Case Number:	Election Petition 1 of 2017
Date Delivered:	02 Nov 2017
Case Class:	Civil
Court:	High Court at Kiambu
Case Action:	Ruling
Judge:	Joel Mwaura Ngugi
Citation:	Clement Kungu Waibara v Annie Wanjiku Kibeh & another [2017] eKLR
Advocates:	Mr. Ondieki for the Petitioner Mr. Oduor for the 1st Respondent Mr. Muchemi for the 2nd Respondent
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Kiambu
Docket Number:	-
History Docket Number:	-
Case Outcome:	Request declined
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

ELECTION PETITION NO. 1 OF 2017

IN THE MATTER OF THE ELECTIONS ACT NO. 24 F 2011 LAWS

OF KENYA AND THE ELECTIONS (GENERAL) REGUATIONS, 2012 AND ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS) PETITIONS RULES 2017

AND

IN THE MATTER OF THE PARLIAMENTARY (NATIONAL ASSEMBLY) ELECTIONS CONDUCTED ON 8TH AUGUST 2017 IN GATUNDU NORTH CONSTITUENCY

BETWEEN

HON. CLEMENT KUNGU WAIBARA…….. PETITIONER

VERSUS

HON. ANNIE WANJIKU KIBEH……1ST RESPONDENT

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION……2ND RESPONDENT

RULING

- In the course of re-examining the Petitioner during the hearing of this Petition, Counsel for the Petitioner made an oral application urging the Court to invoke its powers under Section 80 of the Elections Act to compel the attendance of three witnesses. Counsel argued that the attendance of the three witnesses would be necessary to enable the Court to come to a just and fair determination of the election Petition.

- The three witnesses the Petitioner urges the Court to summon are:
    - The DCIO, Kamwangi Police Station;
    - Mr. Kennedy Mwaura; and
    - Mr. John Kamau Muthoni.

1. Counsel argued that the three persons will assist the Court to disentangle some of the issues

for adjudication in the case. He insisted that the three were necessary witnesses and that they come within the contemplation of the drafters of section 80 of the Elections Act.

- In making his Application, Counsel argued that if granted, the request will not cause the Respondents any prejudice since they will have an opportunity to cross-examine the witnesses. Counsel also argued that a decision to call these witnesses need not slow down the trial since the law provides that these witnesses can be called at any time. Thus, the trial can continue as scheduled and the witnesses summoned at any other time – even after the Respondents' witnesses have testified. As such, Counsel argued, the timelines set by the Court will not need be affected.

- The Application is opposed by both Respondents. Counsel for the 2nd Respondent pointed out that the Court had alreadyruled in its ruling dated 30/10/2017, that the DCIO should not be called. As such the Court cannot go back on its own ruling.

- Respecting the other two witnesses, Mr. Muchemi, who appears for the 2nd Respondent, argued that section 80 did not contemplate these kinds of witnesses. Rather, the section anticipated that the Court may call an expert witness to clarify certain matters that have come up during the election petition. Mr. Muchemi insisted that the Petitioner had not demonstrated how the two witnesses will be able to assist the Court to come to a just determination on the Petition.

- Finally, Mr. Muchemi argued that Rule 12 contemplates that any person who wishes to testify must file an affidavit at the time the Petition or Response is filed. Here, the Petitioner had not shown why they did not file these affidavits earlier.

- Mr. Oduor, Counsel for the 1st Respondent, was of similar views as Mr. Muchemi. He added that the Respondents would suffer great prejudice if the Application is allowed since it would entail the Respondents having to take fresh instructions from their clients and re-opening the pleadings which have been closed. He also argued that granting the Application will likely interfere with the timelines for conclusion of the case which might affect the constitutional timelines.

- Finally, Mr. Oduor argued that allowing the Application would allow the Petitioner to expand the Petition beyond the initialscope of his Petition which would greatly prejudice the Respondents and offend the Elections Petitions Rules.

- As a general rule and practice, interlocutory applications relating to an election petition must be filed before the commencement of the trial of the election petition. Indeed rule 15 (2) of the Elections (Parliamentary and County Elections Petitions) Rules 2017 provides that:

An election court shall not allow any interlocutory application to be made on conclusion of the pre-trial conference, if the interlocutory application could have, by its nature, been brought before the

commencement of the hearing of the petition.

- However, by its terms, the Rule allows parties to approach the Court for certain reliefs if they could not have come up during pre-trial stage.

- In this case, the Petitioner argues that at the time of the Pre-trial stage the need for this application had not arisen.

Counsel for the Petitioner called it “an emerging issue” in the trial. I have taken the provisional view that it might be so.

- I should, at the outset, deal with the application to summon the DCIO, Kiamwangi. As the Respondents point out, I dealt with this matter in my ruling of 30/10/2017. I declined a similar application by the Petitioner to compel the DCIO, Kiamwangi to produce certain documents related to the incident the Petitioner now wants the Court to summon him to come testify on.

- This is what I said in my ruling about the request:

After due analysis, both of these requests must fail. This is because, if granted, the effect of both requests would be to expand the scope of the Petition beyond that originally filed by the Petitioner. The effect would be to travel outside the 28-day period during which the Petitioner must present his Petition as well as all the evidence he wishes to rely on in urging his case. This is a constitutional timeline that the Court must jealously protect.

In considering the requests for the kind of orders sought by the Petitioner in these two specific orders, the Court must be careful not to allow a party to expand his Petition beyond that which was presented within the constitutionally provided timeline of 28 days. The general rule is that the petitioner must file all the evidence he seeks to rely on within 28 days. The Courts would be very reluctant to grant orders for a Petitioner to adduce further evidence beyond the original 28 days provided by the Constitution especially where it can be demonstrated that the Petitioner is either on a fishing expedition or that the adduction of such further evidence would prejudice the Respondents.

In this case, the Petitioner has not given any reasons at all why he was unable to get the evidence he seeks to be produced by a third party and file it as part of his Petition. He has not alleged that it would have been impossible to get the information from the third parties before the expiry of the 28 days. Neither has he indicated that he approached the Court before the expiry of the 28 days in an attempt to get the information. Indeed, by his very own Petition, the Petitioner was aware of the issue respecting the 1st Respondent’s employment even before the elections. It is, therefore, quite prejudicial to permit the introduction of this new evidence at this late stage.

- In this Ruling, I made a judicial finding that the Petitioner ought to have filed the documents respecting the incident over the ballot papers which was ostensibly reported to the DCIO within

the 28-day period provided in the law and that failure to do so made the evidence inadmissible in the specific circumstances of this case.

- The request to summon the DCIO at this stage will have the exact result that the Respondents had earlier resisted and which I had upheld. For this reason, that request must be denied.

- What about the other two witnesses" Mr. Ondieki has vehemently argued that the power of the Court to summon any witnesses it considers necessary for the just determination of the case is untrammeled. He is right. That power is stated in Section 80(1)(b) in the following terms:

- *An election court may, in the exercise of its jurisdiction-*

(b) Compel the attendance of any person as a witness who appears to the court to have been concerned in the election or in the circumstances of the vacancy or the alleged vacancy.

- It is important to note that this power is reserved for the Court – and not the parties. Hence, the Court must be satisfied that the witness it is about to call is a necessary one for the just determination of the Petition. Additionally, the Court must be alive to at least three other primary considerations:

- The great possibility that summoning such a witness could greatly prejudice some parties to the election Petition;

- The effect that such a decision would have on the expeditious and efficient disposal of the election Petition and the undermining of the constitutional timelines for the resolution of electoral disputes; and

- Transcendental considerations of justice and fairness and particular, to avoid the abuse of the court process by the parties.

- In the present case, the Petitioner urges the Court to summon two witnesses who have information about alleged election materials found outside Polling Centres. It is important to recall that this particular Application has been necessitated – not by the discovery of new facts unknown to the Petitioner at the time of filing the Petition – but by the fact that the

Petitioner’s witness affidavits were struck out by this Court for, among other reasons, failure to serve them on the Respondents. In arriving at its decision in striking out those affidavits, this Court observed that the Petitioner had not acted fairly on the Respondents in failing to serve the Affidavits until the day the hearing was to commence. Indeed, the Court described the strategy used by the Petitioner as trial by stealth. Additionally, the Court was apprehensive about the effect the admission of those affidavits would have on the scheduling order made by the Court on the hearing of the Petition and the constitutional timelines.

- All these factors are looming largely and ominously in the present Application. There is no escaping the conclusion that the provenance of the present Application is the striking out of the witness affidavits by the Court. If so, there is similarly no escaping that admitting the same evidence through the alternative route of invoking Section 80(1)(b) would be a cynical way to undermine the Court's own appraisal of the state of the law and evidence.
- Section 80(1)(b) must be used very sparingly by the Courts because of its potential to undermine the constitutional principle of expeditious disposal of electoral disputes as well as the overriding value of ensuring that the Court plays its role as a facilitator of justice without disadvantaging particular players in the dispute. In the circumstances of this case, I have come to the conclusion that invoking section 80(1)(b) to call these witnesses would be inimical to the overriding objectives of an election Court. I will therefore decline the request.

Delivered at Kiambu this 2nd day of November, 2017.

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JOEL NGUGI

JUDGE