

RULING

Petition No. 5 was filed by the Petitioner, Raila Odinga on the 16th March 2013.

The Respondents in the Petition are:

1. Independent Electoral and Boundaries Commission;
2. Ahmed Isaack Hassan;
3. Uhuru Kenyatta; and
4. William Samoei Ruto.

Upon service of the Petition on them, the Respondents filed their respective replying affidavits. The Petitioner on the 23rd March, 2013 filed what he referred to as “Petitioner’s Affidavit in Reply” and is sworn on the 22nd March, 2013. The Petitioner served the Respondents in Petition No. 5. The only parties in respect of the other Petitions who complained of lack of service were the Petitioners in Petition No. 3, through their Counsel Mr. Regeru.

As indicated earlier, the said Affidavit in Reply was filed on 23rd March, 2013 which was last Saturday. At the Pre-Trial Conference on 25th March 2013, several counsel for various parties in the now consolidated Petitions, took issue with the filing of the said affidavit and raised objections, while others had no objections and even supported the reasons for filing of the said affidavit of the Petitioner.

Mr. Ngatia for the Third Respondent, Mr. Uhuru Kenyatta, stated that:

- The said affidavit was inordinately lengthy, running to 900 pages.
- The new affidavit contained a schedule of alleged inflated votes in 58 new constituencies.
- The affidavit introduced 122 new electoral areas with specific complaints. Mr. Ngatia wondered whether the Court would allow complaints amplified by new complaints out of time.
- It was a scientific impossibility for the Respondents to respond within a day, before the hearing, or even by the end of the week.

- There was a right of fair trial for both the Petitioner and the Respondents.
- The filing of the affidavit was prejudicial to the respondents, as it would occasion delay in the trial.
- It was impossible to provide the material sought within time.
- Parties must be held to their bargain as represented in their pleadings.
- The Petitioner filed the affidavit without the leave of the Court, and as such there was no courtesy or decorum on the Petitioner's part.

Mr. Ngatia asked the Court to disallow the affidavit.

Mr. Ahmed Nassir Abdullahi for the Second Respondent, Mr. Ahmed Isaack Hassan, questioned the filing of the affidavit by the Petitioner. He asked whether the case will stop “mutating” so that parties can proceed with the hearing. He referred to Article 140 of the Constitution and the Supreme Court (Presidential Election Petition) Rules 2013 which provides the framework for responses. He added that:

- There was no provision to respond to the Respondent's response before the Pre-Trial Conference.
- There was a laid down procedure for the filing of responses.
- The affidavit amounted to a flooding of evidence and was a flagrant abuse of the rules.
- The Petition has now changed significantly by the introduction of 152 new areas.
- He inquired whether amendment of the Petition can be done through an affidavit.
- Finally, he concluded that the “original” Petition can be prosecuted without the new affidavit.

The Independent Electoral and Boundaries Commission, through one of its Counsels, Mr. Mohamed Nyaoga, also opposed the filing of the Petitioner's Affidavit in Reply. He said that:

- There was no dispute that the Petitioner and all parties had been served with Forms 34 and 36.
- The affidavit is filed at the eleventh hour, raising fresh issues through the back-door. This, he argued forms a different cause of action.

Mr. Kigen for the Fourth Respondent, Mr. William Ruto, submitted that:

- The Petitioner had filed the affidavit without leave of the Court.
- There is no law which allows the Petitioner to file the further Affidavit.
- The Petitioner had manipulated the timelines. They now have more than 7 days yet they had been allowed enough time.
- If the Court allows the affidavit, it will be re-writing the governing law.
- The Petitioner has not given reasons for the filing of the affidavit.
- The Petitioner is presenting the petition in instalments.

Mr. Regeru for the Petitioner in Petition No.3 stated that:

- The first requirement had not been fulfilled, as he had not been served with the affidavit.
- The Rules do not allow the further affidavit to be filed.
- The Petitioner did not seek leave of the Supreme Court, as a matter of courtesy.
- The time-table was being scuttled, and the Court ought not to countenance this.
- There was a brand new Petition, in the shape of the affidavit.
- There must be fairness to all the parties.

Mr. Deya, on behalf of the Fourth Petitioner, accused the Independent Electoral and Boundaries Commission for the manner in which it had gone about discharging its duties by virtue of Articles 86 and 156 of the Constitution. In effect, he blamed the Independent Electoral and Boundaries Commission for delays that must have necessitated the Petitioner filing the affidavit.

Mr. Oraro, for the Petitioner, stated and argued as follows:

- The Petitioner had to go to Court to obtain Orders for production of various documents.
- Under Rule 10 (f), there was the expectation of filing and serving any further affidavit, or the giving of additional evidence.
- The Petitioner chose the approach contemplated, i.e. to file the further affidavit and apply for leave subsequently.
- There was no new pleading where data in Form 34 had been supplied before.
- They did not ask for particulars earlier, as the Independent Electoral and Boundaries Commission had in its response said that the manual tallying was accurate.
- The affidavit is in respect of the application for disclosure of facts by one Mr. Nesbitt.
- The evidence is not additional.
- The Petition shows in one instance, that 11,000 votes had been deducted from the total.

Mr. Ngatia and Mr. Nyaoga made brief replies.

We have considered the objections raised by the Respondents, in the now consolidated Petition, and supported by the Petitioner in Petition No. 3, who is now Petitioner No. 2.

We have also considered the submissions in response. The net effect is that the Respondents are asking the Court to expunge the Petitioner's affidavit sworn on 22nd March, 2013 and filed on 23rd March, 2013.

We have carefully looked at the record and found that, in fact, there are still further affidavits placed on the record by the Petitioner through the "Affidavit in Reply".

We found the following further Affidavits:

1. Affidavit in Reply sworn by Raila Odinga on 22nd March, 2013 and filed on 23rd March, 2013;
2. Replying Affidavit sworn by Oduor Ong'wen on 22nd March 2013. It is not formally filed, but annexed as Exhibit "RO – 1" in the Affidavit in Reply by the Petitioner;
3. Further Affidavit sworn by Janet Ongera on 22nd March, 2013. It is not formally filed, but annexed as Exhibit "RO – 2".
4. Replying Affidavit sworn by Prof. Lawrence Gumbe on 22nd March, 2013. It is not formally filed, but annexed as Exhibit "RO -3"
5. Replying Affidavit of Andrew Mwambogo Mwarua sworn on 22nd March 2013. It is not formally, but annexed as Exhibit – "RO- 4.".
6. Affidavit of John Walubengo sworn on 22nd March, 2013. It is not formally filed, but annexed as "Exhibit - RO5".
7. Affidavit of Raj Pal Senna sworn on 22nd March, 2013. It is not formally filed, but annexed as Exhibit – "RO- 6".

The true position, therefore, is that there is not one "Petitioner's Affidavit in Reply", but 7 affidavits in total. This aspect was not addressed by any of the parties.

This is an unusual way of availing Affidavits as "annexures" or "evidence"; they are not independent affidavits filed to stand on their own, as evidence in the particular proceedings. We would understand if an affidavit is sworn in other proceedings in the past, is annexed as evidence of that affidavit. However, to have several affidavits sworn for the purpose of current proceedings and annexed as evidence is most unusual, if not strange, in our view.

Firstly, such affidavits evade payment of the filing fees and, secondly, their probative value come into question. Be that as it may, as the matter was never raised by the parties, we will say no more in respect of this anomaly.

It follows that the attacks on the Affidavit in Reply by the Respondents are to be deemed to apply to each of the affidavits, distinctly and separately.

We now wish to turn to the relevant law regarding further affidavits and additional evidence, as provided in the Supreme Court Act and Supreme Court (Presidential Election Petition) Rules, 2013. Section 31 of the Act provides inter alia that:

“without limiting the generality of Article 163 (8) of the Constitution, the rules made by the Supreme Court under that Article may make provisions for (d) prescribing the time within which any requirement of the rules shall be complied with...”

We note that the operative term in Section 31 (d) is the word “shall”. This suggests that it shall be mandatory to comply with any requirement within the prescribed time. The Supreme Court Act provides for the manner in which the Petition challenging the election of the President-elect shall be filed and prosecuted.

Section 6 provides for the filing of the Election Petition-Section 7 for the service of the Petition; and Section 8 deals with the *Response*. There is no dispute that the Petitioner and Respondents complied with these provisions, and there is no need to dwell on them for the purposes of the objections herein.

Upon careful perusal of the Supreme Court Act, there is no provision therein relating to any further or other Response. We emphasize the foregoing because it is our view that the principal pleadings in a Presidential Election under the Act are the Petition and the Response/s (just like a *Plaint* and *Defence* are the main pleadings in civil litigation or action). The next clear stage after pleadings close in a Presidential Election Petition is the Pre– trial

Conference. The Pre-Trial Conference under Rule 9 (1) shall be held 9 days after the filing of the Petition.

It should be noted that it is not mandatory for the Petitioner to annex an affidavit to his/her Petition. However, a Respondent is required to annex a Replying Affidavit to the Response. At the Pre– trial Conference, the Court, under the provisions of Rule 10 (f), may:

“give directions in regard to the filing and service of any further affidavits or the giving of additional evidence;”

Upon careful consideration of the said Rule and submissions by Counsel, we are of the view that the Court can only exercise its powers and/or discretion to allow further affidavits or additional evidence if it is specifically applied for, and may allow or refuse such an application. It is not a matter of right. As stated earlier, there is no provision for further affidavits in the Supreme Court Act, whatsoever.

The Supreme Court is a creature of the Constitution of Kenya, the Supreme law of the land. The Supreme Court Act was enacted by Parliament on the basis of the provisions of the Constitution. The Supreme Court is given the powers to make the Supreme Court (Presidential Election Petition) Rules by the Act. So, everything flows from the Constitution. It may be argued that the Supreme Court ought to apply the principle of substantial justice, rather than technicalities, particularly in a petition relating to Presidential election, which is a matter of great national interest and public importance. However, each case must be considered within the context of its peculiar circumstances. Also, the exercise of such discretion must be made sparingly, as the law and Rules relating to the Constitution, implemented by the Supreme Court, must be taken with seriousness and the appropriate solemnity. The Rules and time – lines established are made with special and unique considerations.

The period for the filing, prosecution and determination of a Presidential Election is only 14 days from the time the results are declared. This is a very tight, short and limited period. The background to the setting of the strict time – lines must be known to most Kenyans. There was a purpose to this and the intention of the People of Kenya and of Parliament must be respected.

The parties have a duty to ensure they comply with their respective time – lines, and the Court must adhere to its own. There must be a fair and level playing field so that no party or the Court loses the time that he/she/it is entitled to, and no extra burden should be imposed on any party, or the Court, as a result of omissions, or inadvertences which were foreseeable or could have been avoided.

The other issue the Court must consider when exercising its discretion to allow a further affidavit is the nature, context and extent of the new material intended to be produced and relied upon. If it is small or limited so that the other party is able to respond to it, then the Court ought to be considerate, taking into account all aspects of the matter. However, if the new material is so substantial involving not only a further affidavit but massive additional evidence, so as to make it difficult or impossible for the other party to respond effectively, the Court must act with abundant caution and care in the exercise of its discretion to grant leave for the filing of further affidavits and/or admission of additional evidence.

In the present case, the affected Respondents have submitted that they are unable to respond within next remaining period (which is only today), before the hearing starts.

We have gone through the affidavits and exhibits and find that the bundle contains 839 pages all inclusive. We find that the further statements, and in particular the intended additional evidence (exhibits), are so detailed that the

remaining time before the trial is not reasonably adequate for the Respondents to file any reasonable answer.

Secondly, from what has been deponed by Mr. Ong'wen and Mrs. Ongera in their respective affidavits, the additional facts and evidence, in our view, tend to introduce such new matters as would change the character and nature of the Petition. This may lead to amendment/s of the Petition thereby possibly giving rise to significant new facts and/or allegations leading to a serious departure from the original case.

We hold that if we allow the 7 affidavits to remain on record, the same will be prejudicial to the Respondents. This will amount to a miscarriage of justice, and we cannot allow it in the circumstances.

As indicated earlier, under Rule 31 (h), the Petitioner could have applied for leave to be allowed to file further affidavits and/or additional evidence at the Pre – trial Conference. Of course it would be prudent for one to file such an application before the date of the Pre – trial Conference, so that it is before the Court, in time. However, in this case, the Petitioner proceeded to file an affidavit in reply bearing on its back six substantial affidavits, without any application for leave to do so!

Senior Counsel, Mr. Oraro submitted, to our understanding, that it was the intention to ask for such leave at the Pre – Trial Conference. We understand that he would have made such request orally. The request for leave was made at the tail-end of the Petitioner's submissions in response to the objection. It was almost reluctantly made, if we may say so. We however give the benefit of the doubt to counsel on the allegations or suggestions of lack of courtesy or decorum. From what we know of the Senior Counsel, he is the last one to show disrespect to any Court of whatever level. We only deem that it was a judgment or decision which was not founded on foresight, or was taken due to pressures emanating from the kind of Petition that was before the Court, and the time

constraints. But the Respondents and the Court should not shoulder the burden of the consequences of such omissions or inadvertences.

As a result of the forgoing, we hereby expunge from the Court records the Petitioner's Affidavit sworn on 22nd March, 2013 together with all its annexures, which include the other affidavits. The Petitioner shall bear the costs of the objection proceedings relating to the Affidavits in Reply.

Orders accordingly.

DATED and DELIVERED at NAIROBI this 26th March 2013

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W.M. MUTUNGA
CHIEF JUSTICE & PRESIDENT
OF THE SUPREME COURT

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P.K. TUNOI
JUSTICE OF THE SUPREME COURT

.....
M.K. IBRAHIM
JUSTICE OF THE SUPREME COURT

.....
J.B. OJWANG
JUSTICE OF THE SUPREME COURT

.....
S.C. WANJALA
JUSTICE OF THE SUPREME COURT

.....
N.S. NDUNGU
JUSTICE OF THE SUPREME COURT

I certify this is a true copy of the original

REGISTRAR
SUPREME COURT OF KENYA

REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA AT NAIROBI
(CORAM: MUTUNGA CJ, TUNOI, IBRAHIM, OJWANG, WANJALA, NJOKI SCJ)

PETITION NO. 5 OF 2013

RAILA ODINGA1ST PETITIONER
MOSES KIARIE KURIA)
DENIS NJUE ITUMBI)2ND PETITIONER
FLORENCE JEMATIAH SERGON)

GLADWELL WATHONI OTIENO)
ZAHID RAJAN)3RD PETITIONER

AND

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION1ST RESPONDENT
AHMED ISSACK HASSAN2ND RESPONDENT
UHURU KENYATTA3RD RESPONDENT
WILLIAM SAMOEI RUTO4TH RESPONDENT

AS CONSOLIDATED WITH PETITION NO. 3 OF 2013

MOSES KIARIE KURIA1ST PETITIONER
DENIS NJUE ITUMBI2ND PETITIONER
FLORENCE JEMATIAH SERGON3RD PETITIONER

VERSUS

AHMED ISSACK HASSAN2ND RESPONDENT
INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION1ST RESPONDENT

AND

CONSOLIDATED WITH PETITION NO.4 OF 2013

GLADWELL WATHONI OTIENO1ST PETITIONER
ZAHID RAJAN2ND PETITIONER

VERSUS

AHMED ISSACK HASSAN2ND RESPONDENT
UHURU KENYATTA3RD RESPONDENT

ORDER

As a result of an accidental slip or error in our Ruling dated 26th March, 2013, we said at page 9 that:-

“ . . . The period for filing of a Presidential Election is only 14 days from the time the results are declared.

In exercise of our inherent jurisdiction, we hereby order the amendment of the said Ruling by substituting the aforesaid underlined words with the following words:-

*“ . . . of filing of the Petition.”**

Orders accordingly

DATED and SIGNED at NAIROBI this 3rd April 2013

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W.M. MUTUNGA
CHIEF JUSTICE & PRESIDENT
OF THE SUPREME COURT

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P.K. TUNOI
JUSTICE OF THE SUPREME COURT

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M.K. IBRAHIM
JUSTICE OF THE SUPREME COURT

.....
J.B. OJWANG
JUSTICE OF THE SUPREME COURT

.....
S.C. WANJALA
JUSTICE OF THE SUPREME COURT

.....
N.S. NDUNGU
JUSTICE OF THE SUPREME COURT

I certify this is a true copy of the original

REGISTRAR
SUPREME COURT OF KENYA