



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

PETITION NO.1 OF 2017

LESRIMA SIMEON SAIMANGA.....PETITIONER

- V E R S U S -

INDEPENDENT AND ELECTORAL

BOUNDARIES COMMISSION.....1ST RESPONDENT

RETURNING OFFICER

SAMBURU COUNTY.....2ND RESPONDENT

LENOLKULAL MOSES KASAINIE.....3RD RESPONDENT

R U L I N G (8)

Mr. Karanja, counsel for the 1st and 2nd respondent has raised an objection to the manner in which counsel for the petitioner Mr. Gilbert is questioning DW2, Returning Officer for Samburu West n alterations in Forms 37A. Counsel contends that the petitioner did not plead the issue of alterations. Similarly, Mr. Mwangi for 3rd respondent objected to the line of cross examination taken by Mr. Gilbert.

Mr. Gilbert on the other hand argues that they have a right to cross examine on the issues raised in evidence in chief and the documents filed by the respondents as to their veracity.

During cross examination of DW2, he replied to Mr. Mwangi's question and stated "**as a Returning Officer, the results in Form 37A are final results and cannot be changed or altered**". Later, he said, "**the results are collated from Form 37A on to Form 37B as they are, without alteration**". That is what my record reads. From my understanding of those answers, the Returning Officer or anybody else cannot alter the results on Form 37A and the Returning Officer must collate the results as received in Form 37A. DW2 did not say that there are no alterations in Form 37A.

Before I consider whether or not to allow the objection, I must point out to counsel for the petitioner that DW2, was a witness for the 1st respondent right from the onset. He had shown an affidavit which is on record in accordance with Rule 12(6) and (7) of the Election Petition Rules. Calling of DW2 is not an ambush on the petitioner and the court has not allowed sneaking in of re-examination as alleged by the petitioner's counsel. Reasons were given why DW2 had not been called but since issues arose regarding Form 37B which is a document that he prepared and it became necessary to call him as a witness.

It is not in dispute and it has been admitted that the petitioner did not plead the issue of alterations and the issue of alterations cannot be introduced in this petition at any stage whether during cross examination or otherwise.

It is Mr. Mwangi who examined DW2 on whether the results on Form 37A can be altered. Mr. Mwangi was not examining DW3 in chief as alleged by Mr. Gilbert. The issue of alterations was not raised in examination in chief and the petitioner cannot therefore dwell on the issue as 1st respondent never raised it. The manner in which the petitioner's counsel is proceeding is obvious. Counsel is examining DW2 on alterations in Forms 37A, an issue that is not pleaded in the petition and the petitioner cannot be allowed to proceed in that manner. This court and the parties to the petition are guided by Election Rules. The Election Rules require that all the parties there to be bound by their pleadings. The objection is therefore upheld.

Dated, Signed and Delivered at NYAHURURU this 17th day of January, 2018.

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R.P.V. Wendoh

JUDGE

Present:

Mr. Mombo & Gilbert for petitioner

Mr. Karanja for 1st & 2nd respondents

Mr. Mwangi & Ms. Peinan for 3rd respondent

Soi – Court Assistant