



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
ELECTION PETITION NO. 5 OF 2017

MILTON MUGAMBI IMANYARA.....PETITIONER

VERSUS

I.E.B.C.....1ST RESPONDENT

MERU COUNTY RETURNING OFFICER.....2ND RESPONDENT

FRANKLIN MITHIKA LINTURI.....3RD RESPONDENT

RULING

The Respondents herein 1st and 2nd Respondent and 3rd Respondent separately filed applications under Certificate of Urgency for review of this courts orders made on 11th January 2018.

The 1st and 2nd Respondents in their application dated 15th January 2018 sought pursuant to Article 159 (2) (d) Sections 2, 80(1) (d) and 80 (3) and (4) 29 of the Elections (Parliamentary and County Elections) Petitions Rules 2017 that the court reviews its order requiring the County Returning Officer and Constituency Returning Officers under the supervision of the Deputy Registrar to establish from which polling station, the partly burnt ballot paper emanated and how it got out of a sealed ballot box from where it ought to have been preserved. IEBC to provide device to establish whether the partly burnt ballot paper is authentic. The 1st and 2nd Respondents application is supported by the grounds on the face of the application and affidavit of Gichichi Macharia Samwel. Among grounds supporting application is that the partly burnt ballot paper was not in custody of the court and therefore cannot form part of election materials to be scrutinized as per the Regulation. That the County Returning Officer and the 9 Constituency Returning Officers of Meru County do not have the capacity to carry out the investigations in the manner directed without the assistance of the Directorate of Criminal Investigations as they are not document examiners or sleuths.

The 3rd Respondent on the other hand in his application dated 15th January 2018 under Certificate of Urgency, pursuant to Article 159(2) (d) of the constitution, section 80(1) (d) of the Elections Act, Rules 4, 28 and 29 of the Elections (Parliamentary and County Elections) Petitions Rules 2017 sought that the court reviews its ruling dated 11th January 2018 and award costs of the application. The 3rd Respondent relied on the **Court of Appeal Authority No. 258 of 2017 – NASA Kenya vs IEBC and 2 others [2017]eKLR** to say that the Printed Voters Register would only be required as complementary to the Biometric Voters Identification Kit if the KIEMS kit fails during the voting process and not that it was mandatory to cross voters names from the Printed Voters Register upon being identified and being issued with ballot papers to vote.

In consideration of the application for review of this courts orders made on 11th January 2018 the applicants are supposed under order 45 Rule 1 (b) to satisfy certain conditions namely:-

- Discovery of new and important matter or evidence which after the exercise of due diligence was not within their knowledge or could not be produced by them at the time when the decree/order was passed/made or on account of some mistake or error apparent on the face of record, or for any other sufficient reason, desires to obtain a review of the decree or order.

The 3rd Respondents ground for seeking review is based on the authority in Civil Appeal No. 258 of 2017 being an appeal from the Judgement and Decree of the High Court of Kenya at Nairobi in Petition No. 328 of 2017.

At page 7 of the authority paragraph 20, the Court of Appeal renders itself as follows:

“What is at the heart of the instant appeal, which we propose to deal with first, is the interpretation of the provisions of section 44 A of the Elections Act and Regulations 69, 82, and 83 of the Elections (General Regulations) 2017 that comprise what the IEBC perceived as complementary mechanism contemplated by the aforesaid Act, which must be read together or juxtaposed with the provisions of Articles 38(2), (3), 81 and 86 of the constitution.” Taking the totality of the aforesaid provisions of the constitution, the Elections Act and Regulations, the plain intention of the Legislature was to ensure that very eligible citizen should not be disenfranchised or denied a right to vote; the elections should be fair, are by secret ballot, free from violence, intimidation, improper influence or corruption..... The elephant in the room was, in the event of failure of technology, how to facilitate the identification of a voter whose biometrics cannot be picked by the KIEMS and also in the event of failure of technology in transmission of Presidential Results.

The court of Appeal at paragraph 22 upheld the decision of the High court in the interpretation of section 44 A.

This authority comes into play in the scenario of Regulation 69 1(e) in case the electronic voter identification devise fails to identify a voter. The High Court was not called upon to interpret, Regulation 69 (1) (d) which precedes a situation where the electronic voter identification fails to identify a voter.

Regulation 69 (1) provides :-

Before issuing a ballot paper to a voter, an election official shall:-

- a) Require the voter to produce an identification document which shall be the same document used at the time of registration as a voter;
- b) Ascertain that the voter has not voted in that election;
- c) Call out the number and name of the voter as stated in the polling station Register.
- d) Require the voter to place his or her fingers on the fingerprint scanner and cross out the name of the voter from the **Printed** copy register once the image has been retrieved.

If Regulation 69(1) (d) if not successful Regulation 69(1) (e) provides (e) In case the electronic voter identification device fails to identify a voter the presiding officer shall :

- i. Invite the Agents and candidates in the station to witness that the voter cannot be identified using the devise.
- ii. Complete verification form 32A in the presence of agents and candidates

iii. Identify the voter using the printed register of voters.

iv. Once identified proceed to issue the voter with the ballot paper to vote.

that the election official shall use the complementary method of identification.

The holding both in High Court Petition No. 328 of 2017 – Nairobi and Civil Appeal No. 258 of 2017 do not in any way affect the voting procedure provided for under Regulation 69 (1) (a) to (d) which are couched in mandatory terms. Having considered the evidence before this court by both the Petitioner and the Respondents this court was very clear in its mind when the order of scrutiny in regard to the printed Registers was made.

This court was not mistaken in making the order and this court finds no sufficient reason made to review that order for scrutiny. The application is therefore dismissed.

In regard to the 1st and 2nd Respondents application, for review this court wishes to say that the partly burnt ballot paper that the court wants to establish its authenticity was an annexure to PW5's affidavit. The Petitioner testified about it, PW5 also testified about it and was cross examined by the Respondents counsels. The 2nd Respondent was served with the copy which was attached to the affidavit; The 2nd Respondent was cross examined on the document now said not to be in court. Based on the evidence by the parties in reference to this document the order in question was made. The exhibit has a serial number and the 2nd Respondent prima facie should be able to tell this court whether the document is one that was printed on the instructions of 1st Respondent or not because there was specifications given to the printer for all the election materials that were being printed for and on behalf of the 1st Respondent. The 1st and 2nd Respondents original forms 38 Bs and form 38 C were produced and left in custody of the court at the end of the proceedings on 15th December 2017 when Petitioner's counsel insisted they should remain. It is therefore not abnormal that the document sought to be examined was not in court custody. The witness who alleged he picked it testified and during his testimony it didn't come out that the copy annexed to his affidavit was not from the original that was shown in court during his testimony. The averment under paragraph 8 of 2nd Respondents affidavit in support of application for review should therefore form part of the proceedings before the DR in the performance of the scrutiny exercise. If the 2nd Respondent is sure that he does not know the criteria that was used in distribution of ballot papers to different polling stations within the county then he should make those presentation to the DR.

The DR will then make a report duly endorsed by all parties for the use of the court in determination of the petition. The applications by the Respondents for review of this courts orders are therefore dismissed with costs to petitioner.

Ruling Signed, Delivered and Dated 17th Day of January 2018.

HON. A.ONG'INJO

JUDGE

In the presence of:

Mr Kiunga Advocate holding brief for Gitonga Advocate for petitioner.

Mrs Kinara Advocate for 1st and 2nd Respondent.

Mr Kiogora Mugambi for 3rd Respondent.

Court

Copies of ruling to be supplied to parties at their own costs.

HON. A.ONG'INJO

JUDGE