



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYAHURURU
ELECTION 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 (7)

Mr. Karanja, counsel for the 1st and 2nd respondents prays that this court do review its order of 10/1/2018 where the court had ordered the 1st respondent to produce the contract between IEBC and Al Ghurair. That order was made following a notice to produce filed by Mr. Mombo, counsel for the petitioner. Although the respondent's counsel objected to the manner in which the notice had been brought, the court granted the order for reasons that the contract is a public document and Mr. Mombo informed the court that the contract was exhibited at pages 342 – 362 of the petition. Mr. Karanja now contends that what is annexed at pages 342 – 362 of the petition is not the contract between IEBC and Al Ghurair but an Inspection Report for tender documents, a report at pages 365 – 383 by IEBC officers and at page 444 is a scrutiny report by the Supreme Court.

He urged that the counsel grossly misrepresented facts to this court and that he has a certified copy of the contract but the contract cannot be produced in court because it is not pleaded.

Mr. Mwangi, counsel for the 3rd respondent also sought review of the court's order and objected to the production of the contract between IEBC and Al Ghurair because it was not annexed to the petition and he has not had an opportunity to see it or consult his client on it and if produced, it will be prejudicial to his client.

Mr. Ochieng' in reply, urged that the respondents had not filed any affidavits in seeking to review the court's order; that the document they want produced is exhibited at paragraph 342 of the petition, titled, contract between Al Ghurair and IEBC and the court should not review its order.

A notice to produce is a device by which a party to a litigation informs another of his intention to use the information contained in the document sought to be produced and therefore requires the party who has the original of that document as the primary evidence thereof, to produce it otherwise the party giving notice will use secondary evidence.

A notice to produce a document in a petition must be alluded in the petition or affidavit and the notice must directly refer to the document sought to be produced. The purpose of notice to produce is to enable the other party know the case he is to meet at the trial and also speed up the proceedings.

The notice to produce the contract and memo dated 3/7/2017 were argued orally because Mr. Mombo served the notice on the counsel in court after the ruling of 10/1/2018. Due to time constraints, this matter having been set down for hearing today, the court indulged counsel and allowed Mr. Mombo address the court on the matter. It was, therefore, unnecessary for the 1st respondent to file any affidavit seeking to review the court's order of 10/1/2018 because no formality had been followed by Mr. Mombo. When the court made the order that the 1st respondent do produce the contract, it was based on the fact that it is a public document and Mr. Mombo informed the court that the said contract was exhibited in the petition at paragraphs 342 to 362. At that time the respondent's counsel had not had an opportunity to look at the annexures to the petition to verify whether indeed it was the contract. It turns out that Mr. Mombo misrepresented the facts to the court, as to what was annexed at paragraphs 342 – 346 because it was not the contract.

As clearly pointed out by Mr. Mwangi, in an election petition, the pleadings place the litigants in a straight jacket so that they are strictly bound by their pleadings. A look at page 342 – 362 of the petition clearly shows that what is exhibited is not the contract between IEBC and Al Ghurair. The fact that the petitioner has titled it as such, does not make it the contract.

If the court were to allow the contract between Al Ghurair and IEBC which has been shown to this court by Mr. Karanja, to be produced at this stage, the respondents would be greatly prejudiced because it is not pleaded and they have not had an opportunity to see, consider the contract and consult.

Secondly, if the contract were produced, it would serve to delay the hearing of this petition. This court has to observe the strict time lines set in the Constitution and Elections Act.

For the above stated reasons, I do allow a review and set aside my order of 10/1/2018 ordering the 1st respondent to produce the contract between IEBC and Al Ghurair. The 1st respondent is no longer required to produce the contract between IEBC and Al Ghurair.

It is so ordered.

Dated, Signed and Delivered at NYAHURURU this 16th 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