



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

ELECTION PETITION NO. 13 OF 2017

ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS)

BETWEEN

DR. GEORGE MBOGO OCHILLO AYAKO.....PETITIONER

VERSUS

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

CHARLES KIPROTICH M.....2ND RESPONDENT

ZAKARIA OKOTH OBADO.....3RD RESPONDENT

RULING NO. 3

1. By the Notice of Motion dated 29/11/2017 the petitioner prays for the following orders;

(1) The petitioner be granted leave to file by way of supplementary affidavits the reports on “SD Cards” and on “sealing” of ballot boxes.

2. The same is supported by the petitioner’s affidavit sworn on the same date. The said application is premised on the ruling of this court dated 9/11/2017 which interalia allowed all parties access to the content of ‘SD Cards’ of the Gubernatorial Election of Migori County as held on 8/8/2017.

3. The substance of the said application is to permit the applicant “avail observations on the sealing of ballots and SD Cards” which the court had directed that the parties be supplied with.

4. The applicant avers that the analysis are objective information extracted from the SD Cards and that no party shall suffer any prejudice.

5. The Respondents have strenuously opposed the same vide their rival affidavits and grounds of opposition. The parties have equally submitted orally and in writing. The Respondents averred jointly and severally that the orders of 9/11/2017 did not suppose that the parties were to file any report after being supplied with the S.D. Cards and sealing of the ballot boxes. That in any case if there was to be any further requirements then it would have involved all the parties under the supervision of this courts Deputy Registrar.

6. According to the Respondents the analysis by the applicant was a kin to seeking scrutiny of the 826 polling stations something which this court did not authorise. They argue the court to dismiss the application as allowing the same could be introducing new evidence which is too late in the day.

Analysis and Determination

7. I have carefully perused the application, the responses, the written submissions as well as the oral submissions made by the respective counsels. The issue to be determined is whether the prayer if allowed would be ordering scrutiny through the back door and whether any prejudice shall be suffered by the rest of the parties.

8. It is true that by the ruling of this court dated 9/11/2017 all the parties were allowed to have SD Cards as well as the sealing of the ballot boxes. This court disallowed the prayer for scrutiny as it deemed it premature at that time. Infact, I went ahead to state that although the prayer for scrutiny was disallowed nothing precludes this court from ordering it unilateral if it deemed necessary or through an application by the parties. As it stands now neither of the two avenues have been applied.

9. What then was the purpose of the applicant analysing the SD Cards? In my view the same was for his own consumption. This court did not order that an analysis be done over the same. Neither did the court deny any party to do so.

10. Having perused the analysis provided by the applicants, its abundantly clear that they are reproduction of the electronic version of the entire KIEMS Kit. Infact they have done scrutiny literally of the polling stations.

11. Mr Nyasimi counsel for the applicant concluded that Section 82 of the Election Act permits this court to order scrutiny. As stated earlier the same has not been allowed.

12. Further and as clearly submitted by the Respondents the analysis were unlawfully done. Nobody can vouch for its integrity. More fundamentally no. 1T expert report or statement has accompanied the 8 volumes. Even if it was to accompany, the same would have been done unilaterally.

13. More fundamentally, should this permit the application then the same would change the character of the petition. The rest of the parties would be required to file their witnesses statements and further ask for leave to analyse their SD Cards in their possession.

14. I find that the electronic version which the applicant seeks to introduce after hearing 26 witnesses has come too late in the day. If I am not wrong its only the petitioner remaining to testify. The rest of the parties herein shall suffer great prejudice.

15. Without prejudice to the outcome of this matters its evidently clear that Section 39 of the Election Act pre supposes that except in the Presidential Elections all other 5 elections shall be dealt with manually. This section provide as follows;

“39(1) The commission shall determine, declare and publish the results of an election immediately after close of polling.

(1A) The commission shall appoint constituency Returning Officer to be responsible for

(1) Tallying, announcement and declaration, in the prescribed form, of the filed results from each polling station in a constituency from the election of a member of the National Assembly and Member of the County assembly;

(ii) Collating and announcing the results from each polling station in the Constituency for the election of the President County Governor, Senator and County Women representative to the National Assembly; and

(III) Submitting in the prescribed form, the collated results for the election of the President to the National tallying Centre and the collected results from the election of the County Governor, Senator and County Women representative to the National Assembly to the respective County returning officer.

(1B) The commission shall appoint County returning officers to be responsible for tallying, announcement and declaration in the prescribed form, of final results from constituencies in the County for purposes of the election of the county Women representative to the National Assembly.

(1c) For purposes of a presidential election the commission shall-

(a) Electronically transmit, in the prescribed from, the tabulated results of an election for the president from a polling station to the Constituency tallying Centre and to the national tallying Centre;

(b) Tallying and verifying the results received at the national tallying centre, and

(c) Publish the polling result forms on an online public portal maintained by the commission.”

16. It appears then that the Presidential results ought to be transmitted electronically. The rest does not require such electronic transmission.

In my humble view therefore the parties and more specifically the applicant shall suffer no prejudice as all the hard copies of the forms are already in their custody. Infact they have relied on todote. Allowing introduction of the details of the SD Cards shall change the landscape of this petition completely and waste much judicial time.

17. In the premises and in disallowing this application I am conscious of the fact that this matter is way past the requirement of Rule 15(1)(h) of the Elections (Parliamentary and County Election) Petition Rules 2017.

18. The application is therefore disallowed. The cost shall abide the outcome of the petitioner.

Delivered, signed and dated at Migori this 12th day of January, 2018.

H.K. CHEMITEI

JUDGE

In the presence of:

Odhambo & Nyasimi for the petitioner

Ondiek & Sagana for the 3rd Respondent

Midenga for Ochwa for the 1st and 2nd Respondents

Court clerk: Nyauke

Ruling delivered in open court.