



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 MUTAL.....2ND RESPONDENT

ZAKARIA OKOTH OBADO.....3RD RESPONDENT

RULING NO. 1

1. By their application dated 15/11/2017 the 1st and 2nd Respondents herein after referred to 'IEBC' pray for the following orders.

(1) That leave be granted to the applicants herein to file a further affidavit to be sworn by the 2nd Respondent in response to the petition.

(2) That this honourable court do extent and/or enlarge the time within which to file the further affidavit as sought in prayer (1) above.

(3) That upon such leave being granted and the time of filing the further affidavit being extended/enlarged, the further affidavit duly filed by the 2nd Respondent/Applicant be deemed as properly filed and be admitted into the court record out of time.

(4) That upon grant of prayer (1) (2) and (3) above the applicants be granted leave to serve the said further affidavit upon the petitioner and the 3rd Respondent out of time.

(5) Costs in the course.

2. The application is supported by the affidavit of the 2nd Respondent sworn on 16/11/2017.

3. The substance of the said application is that earlier in their response to the petition, the IEBC had alleged that forms 32 and 32As which were supposed to have been filled at the 826 polling stations were not after filled during the 8th August 2017 Gubernatorial Elections at Migori County. However they have discovered that the same were available as they were inadvertently ferried to the 1st respondents warehouses as opposed to being taken to the offices, thus they could not be traced.

4. That the Respondent handled bulk materials and thus the same could not have been availed to them in time and that they took a very long time to be traced. IEBC argued that the said forms were statutory in nature and no party on record would suffer any prejudice if they are produced and that in any case they shall help in ventilating out the issues in contention.

The 3rd Respondent did not oppose the application.

5. On his part the petitioner/Respondent strenuously opposed the same both in the replying affidavit, written submissions as well as oral submissions. He argued that it was too late in the day. Already 26 of his witnesses have testified.

6. All of them in one way or the other came from various polling stations. Introducing Forms 32 and 32A at this juncture shall prejudice his case and shall require recalling of the 26 witnesses.

7. Further, that if the application is allowed, then it means that the substantive petition must be amended which is impossible. He argued that the reasons given by IEBC were too pedestrian to say the least. How could they deny in all their averments that Form 32 and 32A were not used yet this were statutory instruments available in all the polling stations? They argue that all the witnesses statement on record including that of the 2nd respondent have denied the existence of the forms. He concluded that there was every possibility that as things stand now he no longer trusted the integrity of the said forms. In any case each party is bound by its pleadings.

Analysis and Determination

8. I have carefully read the application together with the attendant oral and written submissions. I have equally perused the authorities supplied by the parties.

9. In my view, the basic question in dispute is whether allowing the application would change the trajectory and character of this petition. Secondly, whether the reasons adduced for failure to include the said forms are too flimsy.

10. It is agreed that form 32 and 32A are statutory forms and are held under the care and custody of the IEBC. It is also clear that these forms are not placed in the ballot boxes but they are kept in envelopes and delivered to their offices and not the warehouses.

11. If this is so, and if indeed they were used or even not used at the 826 polling stations, why did the 2nd respondent the Returning officer and all those Presiding officers who wrote their witnesses statements deny the existence of such forms? Is it that none of their 826 presiding officers failed to appreciate their existence?

12. More importantly by the time pleadings closed or even by the time the hearing started is it possible that none of them was conscious that they had the said forms?

Isn't it true that among the other forms (-physical forms) which the presiding officers have at their disposal during the election, forms 32 and 32A are part and parcel of them?

13. I am not persuaded at all that this was inadvertent mistake. As clearly submitted by the Petitioner/Respondent if the application is allowed at this juncture then he stands to suffer great prejudice.

14. Having listen to the witnesses and the only witness remaining is the Petitioner it shall be onerous to recall all the witnesses taking into account the tight time frame this court is working under. Had this application come during pre-trial stage then this court perhaps would have considered.

15. Rule 15(1) (h) of the Election (Parliamentary and County Elections) Petition Rules 2017 state that;

(15) (1) within seven days after the receipt of the last response to a petition, an election court shall schedule a pre-trial conference with the parties in which the election court shall:-

(b) Given directions as to the filing and serving of any further affidavits or the giving of additional evidence,

15(2) an election court shall not allow any interlocutory application to be made on conclusion of the pre-trial conference, if the interlocutory application could have, by its nature, been brought before commencement of the hearing of the petitioner.”

16. Finally a party is bound by its pleadings. It was generally denied by the applicants that Form 32 and 32A did not exist or were not used. As stated above these were not ordinary forms. They were statutory. They either existed or not.

17. The importance of pleadings are clearly explained in ***Bullen and Leake and Jacobs Precedents of pleadings, 12th Edition, Godon, Sweet and Maxwell (The common Law Library No. 5*** where the learned authors underscored the same as follows;-

“ the system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases upon which the court will be called upon to adjudicate between them. It serves the two fold purposes of informing each party what is the case of the opposite party which he will have to meet before and at the trial and at the same time informing the court, what are the issues between the parties which will govern the interlocutory proceeding before the trial and which the court will have to determine at the trial.”

18. I do not think I need to explain more or even dwell or analyse the other authorities cited by the parties. I am conscious that this application is equally premised on the discretion of this court which must however be exercised judiciously and taking into consideration the circumstances obtaining in each case.

19. For now permitting this application will change the character and or the landscape of this case. It shall mean permitting amendment of the petition as well as the Respondent's response which in my humble view is too late in the day.

20. IEBC must live with this realities. The application is otherwise dismissed. The costs shall abide the outcome of the petition.

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

H.K. CHEMITEI

JUDGE

In the presence:

Odhiambo and Nyasimi for the Petitioner

Ondiek and sagana for the 3rd Respondent

Midenga for Ochwa for the 1st and 2nd Respondent

Court clerk: Nyauke

Ruling delivered in open court.