



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 362 OF 2017**

**BETWEEN**

**MOHAMUD IBRAHIM ALIO.....1<sup>ST</sup> PETITIONER**

**YUSSUF ABDI HAJI.....2<sup>ND</sup> PETITIONER**

**SALIMA ALIO HASSAN.....3<sup>RD</sup> PETITIONER**

**AND**

**INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. Independent Electoral and Boundaries Commission is a Constitutional commission established under Article 88 of the constitution. Among its mandates, is preparation and holding elections and referenda. Article 38 of the Constitution gives citizens the right to exercise their political rights and participate in elections. Article 81 requires that the electoral system should have elections that are by secret ballot, free fair accurate and transparent. The elections should also be free from violence, intimidation, improper influence or corruption, and should be administered in an impartial, neutral, efficient and accountable manner.

**The petition**

2. The petitioners are citizens of Kenya and the residents of Mandera North Constituency in Mandera County. They have brought a petition dated 24<sup>th</sup> July 2017, on their own behalf and on behalf of other residents of Mandera North Constituency. They have exercised the right pursuant to Articles 22 and 258 of the Constitution to bring this petition. They have moved this Court to challenge the decision of the respondent to gazette Mandera North Sub-County Commissioner's Office Block as the tallying centre to that Constituency.

3. The petitioners state that the tallying centre has always been Rhamu Arid Primary School. They contend that the sudden change of the tallying centre from a public school to the Sub-County Commissioner's Office was done abruptly, without consultation and or justification.

4. They also contend that the office block is not a suitable place for tallying votes which is supposed to be done in an open and transparent and accountable manner. They have therefore sought the following orders;

*1. A declaration that the decision by the respondent to change the Mander North Constituency tallying centre from RHAMU ARID ZONE PRIMARY SCHOOL to SUB-COUNTY COMMISSIONER'S OFFICE BLOCK without proper consultation and public participation was illegal and unprocedural and unconstitutional.*

*2. An order of certiorari removing into this court for purposes of quashing the decision of the respondent to publish in Gazette Notice No 6396 CXIX No 86 of 30<sup>th</sup> June 2017 the Sub County Commissioner's Office Block appearing as code 041 in the third column of the Third Schedule as the tallying centre for Mander North Constituency for the 8<sup>th</sup> August 2017 general elections.*

*3. An order of Mandamus compelling the respondent to gazette Rhamu Arid Zone Primary School as the recognised tallying centre for the Mander North Constituency for the 8<sup>th</sup> August 2017 general elections.*

4. They also prayed for costs.

### **Response to the petition**

5. The petition is opposed. The respondent filed grounds of opposition dated and filed in court on 25<sup>th</sup> July 2017. The respondent contended that it exercised its powers under Article 88(4) and (5) of the Constitution as well as Regulations 84 and 85 of the **Elections (General) Regulations, 2012**, that the Court should take Judicial Notice that there are areas that have been identified as hotspots which necessitated moving some tallying centres in volatile regions to safer areas to allow people to cast votes in a safer environment.

6. It was contended that Mander North Constituency tallying Centre is not the only tallying centre that has been moved. The respondent stated that 26 other tallying centres were affected in various constituencies and that the petitioners have not shown that there is mischief.

### **Submissions**

7. At the hearing of the petition, **Mr Ayieko**, counsel for the petitioners, submitted that the respondent had not shown why the tallying centre which is bigger and has better and sufficient facilities was moved to an office block which has no facilities comparable to those at the Primary School. Counsel submitted that the change was done arbitrarily, without consultation and public participation. It was counsel's view that the sudden change from a known centre to an office block was suspicious and that the office block was not suitable as a tallying centre where votes are supposed to be openly and accurately collated, and promptly announced. He prayed that the petition be allowed and the orders sought granted.

8. **Mr Saende**, learned counsel for the respondent submitted in opposition to the petition, that the respondent exercised its mandate under the Constitution and the law in gazetting the tallying centre. He contended that Mander North Constituency is prone to violence which largely informed the decision to change the tallying centre to a more secure place. According to counsel, the Sub-County Commissioner's Office Block is a government facility and therefore more secure for purposes of tallying votes. He prayed that the petition be dismissed contending that the petitioners had not shown that there was violation of the law.

### **Analysis and determination**

9. I have considered pleadings herein and submissions by counsel for both parties. As an independent Commission, the respondent is charged with the sole responsibility of conducting elections in this

country. In doing so, the respondent has mandate to designate places that act as polling stations and tallying centres during elections. Article 88 of the Constitution establishes the respondent and apart from the functions contained in Article 88 and other principles in Articles 81 and 86 of the Constitution for undertaking its mandate, Section 26 of the IEBC Act, No 9 of 2011, provides that,

***“Except as provided for in the constitution, the commission shall, in performing its functions, not be subject to the direction or control of any person or authority but shall observe the principle of public participation and the requirement for consultation with stakeholders”***(emphasis)

10. The respondent is responsible for designating places to be used as tallying. Regulation 84 of the Elections (General) Regulations, 2012 provides,

***1. A final tallying of results for the respective election posts shall be at a venue gazetted by the commission for that purpose.***

***2. A tallying centre shall be selected subject to the following requirements-***

a. ....

b. ....

***c. The constituency tallying centre shall be located at constituency or district headquarters.***

***d. All tallying centres shall be located at public buildings.***

11. The petitioners have contended that Rhamu Arid Zone Primary School which has been the tallying centre for over 30 years, was changed without consultation. They have also contended in the supporting affidavit that –

***7. “The newly gazetted tallying centre at the sub-county commissioners office block is at an enclosed and squeezed compound with no proper facilities and security to guarantee the safety of electoral materials.***

8.....

***9. “That Rhamu Arid Zone Primary School, is more spacious and with better facilities to guarantee the safety and security of the election material and public at large.”***

11. The respondent did not file a replying affidavit. The petitioners’ averments above have therefore not controverted. The reasons offered by the respondent for changing the tallying centre were said to be based on security. However, it was not demonstrated by evidence what has made the previous tallying more insecure now than in the previous elections. The issue of insecurity has only been raised in the grounds of opposition which was short on facts.

12. The respondent asked the Court to take judicial notice that some places have been designated as hotspots. However, the respondent did not show which places, when and who designated them as hotspots. It has not adduced evidence that Rhamu Arid Zone Primary School is in such an insecure place that it cannot be used as a tallying centre.

13. The petitioners have also contended that the Primary School which is a public place, has bigger and better facilities than the Office Block which is a government Building. Regulation 84 is clear that a tallying centre should be at a public place. The respondent has not shown that the Sub County Commissioner’s Office Block is a public place as contemplated in regulation 84 (d).

14. A constituency tallying centre is a place where votes for the entire constituency are tallied. All

election results from polling stations across the constituency are tallied at that centre. Election results for MCA's, MPs, Woman Rep, Senator Governor and President in that constituency are tallied at the centre. This means there are many people who assemble at the centre for purposes of tallying and witnessing tallying of the various election results.

15. Section 30 of the Elections Act, 2011 and regulation 85 give a glimpse of some of the people who are to be found at the tallying centre. Section 30 provides that political parties and candidates may appoint agents who may be at polling stations. Regulation 85 provides that agents, candidates or their agents, presiding officers and other election officials, police officers, accredited election observers and accredited media persons may be allowed into the tallying centre.

16. Depending on the number of candidates in each election, there may be very many people in the tallying centre during that period. Taking for example the 8 Presidential candidates in this year's election, it means there will be 8 agents for the 8 presidential candidates. The other elections will also have agents depending on the number of candidates for each election. This obviously means a tallying centre should be big enough to accommodate all authorized persons to witness the collation and announcement of results.

17. According to the petitioners, the Sub-County Commissioner's Office Block cannot accommodate the large number of people expected to attend to witness the tallying and announcement of election results.

18. The Constitution places an obligation on the respondent to conduct free and fair elections that are free from violence, intimidation, improper influence or corruption; Elections are to be conducted in an independent, transparent, impartial, neutral, efficient, accurate and accountable manner. Article 86 is important in that respect and provides;

***“At every election the Independent Electoral and Boundaries Commission shall ensure that-***

***a. Whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent***

***b. The votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station***

***c. The results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and***

***d. Appropriate structures and mechanisms to eliminate electoral malpractice and put in place, including the safe keeping of election materials.***(emphasis)

19. The respondent has a constitutional obligation to conduct free fair and credible elections, and in doing so, must take steps and put in place mechanisms for eliminating electoral malpractice. That is why the respondent has the mandate designating places to act as tallying centres. Results from polling centres are to be openly collated and announced by the returning officer who is in charge of the tallying centre.

20. The significance of tallying centres is no longer in doubt as held in the case of ***Maina Kiai & others v Independent Electoral and Boundaries Commission and others [2017] eKLR*** and affirmed by the Court of Appeal in ***Independent Electoral and Boundaries Commission & others v Maina Kiai & others [2017] eKLR***, election results declared by the returning officer at the constituency are final.

21. The respondent gazetted Mandera North constituency's tallying centre to be the Sub-County's Commissioner's Office Block. The petitioners have argued that the respondent neither consulted the residents nor did it give reasons why the change was necessary this time round yet tallying in the previous elections was done at Rhamu Arid Zone Primary School without any problem.

22. The respondent's counsel submitted that security was the reason why the tallying centre was changed.

No evidence of the nature of insecurity was given to show that the change was indeed necessary. In any case, it is the duty of the government to provide security and ensure that voting and tallying take place in a conducive and peaceful atmosphere. In justifying this, the respondent's counsel submitted that the changes affected many areas. He did not however, give examples of the other affected areas and the changes effected.

23. I have perused the Gazette Notice of 30<sup>TH</sup> June, 2017 and the 290 tallying centres. There is no any other tallying centre that has been placed at the Sub County Commissioner's Office Block except that of Mandera North Constituency. Tallying centres in counties such as Garissa, Wajir, Lamu and Tana River, areas known to be insecure and a curfew has even been declared in such areas as Lamu and Tana River, none of these counties have tallying centres at sub-county's Commissioner's Office Blocks. It has not been shown that Mandera North constituency is more insecure than Lamu and Tana River counties to necessitate a change of the tallying centre from a Public Primary School to a government office Block.

24. Moreover it has also not been shown that the office Block is more suitable as a tallying centre than the primary school or that there is no any other Public Primary or secondary in the constituency where tallying can take place, making a Government office Block the only suitable place for tallying and announcing election results.

25. The constitutional requirement that results from polling stations be openly and accurately collated and promptly announced by the returning officer means that those results should be collated and announced in the presence of candidates, their agents, party agents, observers, election officials and all those present to witness the exercise. This means collation and announcement of results must be done in public. That is why even regulation 84 requires that tallying centres be in public places which would make them accessible by the public.

26. Article 249 of the constitution places obligations on Commissions and Independent Offices to ensure protection and observance of the Constitution. It provides-

***1. The objects of the Commissions and Independent Offices are to;***

***a. Protect the sovereignty of the people***

***b. Secure the observance of all state organs of democratic values and principles and***

***c. Promote constitutionalism***

***2. The commissions and the holder of Independent Offices;-***

***a. Are subject only to this constitution and the law; and***

***b. Are independent and not subject to direction or control by any person or authority.***

27. The respondent is bound by the principles of the constitution and must act to promote national values and principles of governance in Article 10(2) of the Constitution including; the rule of law, democracy and participation of the people, human rights, equity, social justice, inclusiveness, equality, non-discrimination, good governance, integrity, transparency and accountability.

28. The constitutional requirement that results be openly and accurately collated and promptly announced is for purposes of promoting integrity, transparency and accountability of the electoral process. The respondent is accountable to the people of Kenya and must only act in accordance with the constitution and the law.

29. In gazetting the tallying centres, the respondent was undertaking an administrative action which is subject to scrutiny by this court. The respondent was required to comply with the requirement of the constitution regarding the openness of the electoral process. The law is also clear on the considerations to

be taken into account in choosing a place to act as a tallying centre. The Court can, when called upon, inquire whether the respondent acted within the law in this regard.

30. The petitioners have invoked judicial review, a special jurisdiction of this Court by which it supervises administrative decisions and actions of bodies or tribunals. This jurisdiction is aimed at ensuring that there is fairness and lawfulness in the decision making process. In the case of **Republic v Principal Secretary Ministry of Mining Exparte Airbus Helicopters Southern Africa (PTY) Ltd [2017]eKLR** the Court stated thus;

***“Judicial Review is a special supervisory jurisdiction which is different from both (1) ordinary (adversarial) litigation between private parties and (2) an appeal (rehearing) on the merits. The question is not whether the judge disagrees with what the public body has done, but whether there is some recognisable public law wrong that has been committed. Whereas private law proceedings involve the claimant asserting rights, judicial review represents the claimant invoking supervisory jurisdiction of the Court through proceedings brought nominally by the Republic”.***

31. In the **Municipal Council of Mombasa v Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001**, it was also held;

***“Judicial Review is concerned with the decision making process, not with the merits of the decision itself; the court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made, and whether, in making the decision, the decision maker took into account relevant matters or did take in to account irrelevant matters...the court should not act as a court of appeal over the decider which would involve going into the merits of the decision itself. such as, whether there was or there was not sufficient evidence to support the decision.”*** (emphasis)

32. In the present petition, the petitioners have stated that the tallying centre was changed from where it has been without consultation or explanation. The tallying centre has been at Rhamu Arid Primary School for many years but was abruptly government offices. This was done in violation of the legal requirement that a tallying centre be at a public place. The petitioners have come to court on their own behalf and that of other residents of Mandera North Constituency because the impugned decision aggrieved voters in that constituency.

33. In the words of **Lord Denning** MR, in **Liverpool Corporation Exparte Liverpool Taxi Operation Association [1972] 2 ALLER 589** ;

***“...the writs of prohibition and certiorari lie on behalf of any person who is a “person aggrieved” and that includes any person whose interests may be prejudicially affected by what is taking place. It does not include a mere busybody who is interfering in things which do not concern him but it does include any person who has a genuine grievance because something has been done or may be done which affects him.”***(emphasis).

34. The petitioners have contended that the respondent’s action which affects them as voters is illegal and tainted with irregularly. What amounts to illegality ,unreasonableness, procedural impropriety were defined in the case of **Pastoli v Kabale District Local Government Council and others [2008] 2 EA 300**, citing **Council of Civil Unions v Minister for the Civil Service [1985] AC 2** thus;

***“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety ..Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would***

***have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.***

35. Taking the above principles into account and the circumstances of this case, I am satisfied that the respondent's action is tainted with procedural impropriety, illegality and unreasonableness. The respondent did not consult the residents on the change of the tallying centre. This was against the principle of public participation enshrined in the Constitution. This principle is reiterated in Section 26 of IEBC Act which provides that in the performance of its functions it shall observe the principle of public participation.

36. Consultation was required if indeed the shift was necessary. The residents would readily understand if the issue of insecurity was real.

37. Furthermore, it was unreasonable to put a vote tallying centre in an Office Block belonging to the government. This would give a wrong impression that the government was controlling the process when that may not be the case. The making of such a decision called for public engagement in the decision making process because the decision affected their right to witness tallying and announcement of election results.

38. Having considered this petition the evidence placed before court, I am satisfied that the petitioners have proved their case against the respondent. Consequently, the petition dated 24<sup>th</sup> July 2017 is allowed and I make the following orders;

***1. A declaration is hereby issued declaring the decision by the respondent to change the Mandera North Constituency tallying centre from RHAMU ARID ZONE PRIMARY SCHOOL to SUB-COUNTY COMMISSIONER'S OFFICE BLOCK without proper consultation and public participation was illegal and unprocedural and unconstitutional.***

***2. An order of Certiorari is hereby issued removing into this Court for purposes of quashing the decision of the respondent to publish in Gazette Notice No 6396 CXIX No 86 of 30<sup>th</sup> June 2017 the Sub County Commissioner's Office Block appearing as code 041 in the third column of the Third Schedule as the tallying centre for Mandera North Constituency for the 8<sup>th</sup> August 2017 general elections.***

***3. An order of Mandamus is hereby issued compelling the respondent to gazette Rhamu Arid Zone Primary School as the recognised tallying centre for the Mandera North Constituency for the 8<sup>th</sup> August 2017 general elections.***

***4. Each party do bear their own costs.***

**Dated Signed and Delivered at Nairobi this 31<sup>st</sup> Day of July 2017**

**E C MWITA**

**JUDGE**