



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CONSTITUTIONAL PETITION NO. 1 OF 2017

IN THE MATTER OF THE VIOLATION AND CONTRAVENTION OF SECTIONS 75(1), (3), 5(3), 6, 32 AND 12(1) OF THE ELECTIONS ACT, 2011

AND

IN THE MATTER OF THE VIOLATION AND CONTRAVENTION OF SECTIONS 8(1), (3), 12, 28 AND 29 OF THE ELECTIONS (PALIAMENTARY AND COUNTY ELECTIONS) PETITION RULES, 2017

AND

IN THE MATTER OF ARTICLES 10, 35, 47, 159 165 AND 259 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ARTICLES 1, 3, 38, 61, 86 AND 71 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE GENERAL ELECTIONS HELD ON 8TH AUGUST 2017

AND

IN THE MATTER OF THE ELECTION FOR THE OFFICE OF GOVERNOR OF EMBU COUNTY AND

IN THE MATTER OF BREACH OF FUNDAMENTAL RIGHTS AND FREEDOMS

AND

IN THE MATTER OF

LENNY MAXWELL KIVUTI.....PETITIONER

AND

INDEPENDENT AND ELECTRAL BOUNDARIES

COMMISSION.....1ST RESPONDENT

COUNTY RETURNING OFFICER EMBU COUNTY.....2ND RESPONDENT

INSPECTOR GENERAL OF POLICE.....3RD RESPONDENT

AND

MARTIN NYAGA WAMBORA.....INTERESTED PARTY

R U L I N G

1. In his notice of motion dated 14/08/2017, the petitioner presents several prayers. On the interim, he prays for several conservatory orders seeking to restrain the 1st respondent from submitting for gazetting and swearing the interested party as the governor of Embu County in the 2017 general elections; an order for the 1st respondent to supply the applicant with forms 37A and 37B for all the tallying centres for Embu County and an order that the 1st respondent do deliver all the electoral materials to the custody of the court.

2. It is deposed in the supporting affidavit that the applicant was a gubernatorial candidate for Embu County in the just concluded general election 2017. He states that he was aggrieved by the declaration of the interested party as the governor elect in the race that has six candidates. He names Manyatta and Runyenjes as the constituencies marred with irregularities, fraud, and illegal manouvering which was discovered during the voting, tallying and delivery process. These included:-

(a) Submitting of inflated results of the interested party in particular polling stations hence reflecting high results for the said party.

(b) Reporting and submitting fraudulent and doctored results that are not a true and fair reflection of the counted ballots at the polling stations.

(c) Amending forms 37As at the tallying centre to reflect fraudulent and fictitious figures in favour of the interested party.

(d) Intimidation of agents of the applicants by the presiding officers among others.

(e) Use of forms 37As at the tallying centre not signed by agents.

(f) The results declared and announced exceeded the number of registered voters in Runyenjes and Manyatta constituencies.

3. The petitioner sampled 5 of the 710 polling stations claiming that serious discrepancies in the forms 37A and 37B resulted in a number of votes having been left out in the tally. These were Embu County Primary School, Kithunguriri Tea Factory, Kwa Douglas Bus Stage, New Site Market polling station and Gategi Primary School.

4. Twenty six polling stations were sampled showing total votes of the petitioner and the interested party with some discrepancies. The petitioner's announced results was 96,775 while the interested party had 97,760. This tally differed with the sampled results of 97,048 for the petitioner and 96,561 for the interested party.

5. Based on the samplings, the petitioner argues that the results declared were doctored in favour of the interested party thus denying him victory over the interested party.

6. It is further deposed that the 1st respondent Independent Electoral Boundaries Commission (IEBC) may be in the process of destroying or altering some electoral material which will place the applicant at a disadvantage in gathering evidence for his election petition which he is preparing to lodge.

7. The petitioner states that he raised the issues with the presiding officers and the returning officers during the tallying but his grievances were not addressed.
8. The team of legal counsels led by Prof. Tom Ojienda argued that the prayers for conservatory orders were intended to secure the electoral materials which may not be available at the time of hearing the intended petition.
9. It was explained that the results of the election have not been gazetted for the time to start running for filing an election petition thus making it necessary to petition this court through a constitutional petition.
10. It was also submitted that due to the sampled discrepancies and the petitioners apprehension of the interference with the electoral materials, it was important to protect his rights of evidence in this petition and in the intended petition. Further that it is the petitioner's right to be supplied with Forms 37As and 37Bs which right was denied.
11. The assisting counsels Mr. Nyamu, Mr. Kamunda and Mr. Guantai also submitted on the foregoing issues as well as on other issues on the high probability of interference with the materials, on the right to administrative action and on the fact that the total results announced exceeded the number of registered voters.
12. The petitioner has annexed a number of forms 37As which he says he managed to get.
13. The first sampling is of five forms 37As and 37Bs for the results of the petitioner and the interested party. Some discrepancies could be noted giving different figures for the two forms and showing some additional votes for the petitioner which were not included in the final tally. This does not in any way pre-empt the inter parties hearing of this application or of the intended election petition.
14. If this court was to entertain the argument that the election being marred with irregularities, it would be an attempt to deal with an election dispute in a constitutional petition. The Constitution, the Elections Act and the Election Rules provide for a comprehensive electoral code to deal with election disputes.
15. The law requires that courts entertain electoral disputes only after the elections are gazetted by the 1st respondent.
16. The applicants seeks for orders that the ballot boxes and all electoral materials be kept in court for safe custody. The law confers on the IEBC the role of the custodian of electoral materials. The courts have in the past stored materials required in cases of recount and scrutiny where relevant orders have been made by election courts.
17. I am not convinced that this court should take over legal mandate of the IEBC to order that the material be kept in court. After all the IEBC is yet to respond to these allegations for the court to determine the issue.
18. The applicant urges the court to restrain the 1st respondent from gazetting the interested party as the duly elected governor of Embu County and swearing him in that capacity until this application and petition is heard and determined. The grounds relied on are that the results declaring the interested party as duly elected were based on an election which was not free and fair. In other words, it was contended that the election was marred with irregularities which are serious issues that ought to be addressed before an election court and not in a constitutional court.
19. It is my considered opinion that the applicant has not established a *prima facie* case to justify issue of the orders in this application on interim basis.
20. I hereby make the following orders

(i) *That the application is hereby certified urgent.*

(ii) That the application be heard inter parties on 18th August, 2017.

(iii) That the respondent and the interested party be served with this application and petition and to file their responses within three (3) days.

21. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 15TH DAY OF AUGUST, 2017.

F. MUCHEMI

JUDGE

In the presence of:-

Mr. Nyamu, Mr. Kamunda and Mr. Guantai for the applicant