



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT SIAYA**

**ELECTION PETITION NO. 2 OF 2017**

**IN THE MATTER OF: THE ELECTION FOR MEMBER OF NATIONAL ASSEMBLY GEM**  
**CONSTITUENCY**

**BETWEEN**

**HON. WASHINGTON JAKOYO MIDIWO.....PETITIONER**

**VERSUS**

**THE INDEPENDENT ELECTORAL**

**AND BOUNDARIES COMMISSION.....1<sup>ST</sup> RESPONDENT**

**THE RETURNING OFFICER**

**GEM CONSTITUENCY.....2<sup>ND</sup> RESPONDENT**

**HON. ELISHA ODHIAMBO.....3<sup>RD</sup> RESPONDENT**

**RULING NO. 2**

This ruling pertains to the Petitioner's Notice of Motion dated 6<sup>th</sup> October 2017 seeking orders -

1. "(Spent)
2. (Spent)
3. (Spent)
4. **This Honourable Court do order that the 1<sup>st</sup> Respondent furnishes this Court with certified copies of all the electors registers, transmission logs, scanned results retrieved from each KIEMS device and printouts of certified GPRS co-ordinates from which the results for all polling stations in Gem Constituency were; all with respect to the elections for Member of National Assembly, Gem Constituency conducted on 8<sup>th</sup> August 2017.**
5. **Costs of this application be provided for."**

The application is premised on the ground that the copies of the election materials sought shall assist this Honourable Court make a just decision for and on behalf of the people of Gem Constituency.

The above ground is reiterated in the affidavit of the Petitioner sworn on 6<sup>th</sup> October 2017 in support of the application. At paragraph 7 the Petitioner deposes that he has received credible information from members of the public that the election material may/are being interfered with at the National Cereals and Produce Board (NCPB) warehouse in Yala, where they are kept by the 1<sup>st</sup> Respondent and it would be important that the same be kept under safe custody of this court. At paragraph 8 the Petitioner/Applicant deposes that it is in the interest of justice that this application be allowed and that should the application be denied the petition will be compromised as the court shall not have the opportunity to examine crucial aspects relating to this petition.

The 1<sup>st</sup> and 2<sup>nd</sup> Respondents' response to this prayer is found in the replying affidavit of Martin Ngoya Omolo dated 12<sup>th</sup> October 2017. At paragraph 32, 33, 34, 35 and 36 he deposes that the production of the electors register, transmission logs, scanned results and printout of certified GPRS co-ordinates do not help this court to determine the issues in this matter; that the electronic transmission of result forms to a server related to the Presidential election only and that the results for Member of National Assembly were declared solely on the basis of Forms 35A which is where the actual results are to be ascertained. He further deposes that the election materials are secure and there is no interference at all and the Petitioner's allegations are baseless. At paragraph 36 he deposes that this application is intended to delay the determination of the dispute and urges this court to disallow it.

At the hearing Mr Sala submitted that this application is premised on Article 35 of the Constitution, Section 27 of the Independent Electoral and Boundaries Commission Act, Regulations 15 and 16 of the Elections Technology Regulations 2017, Section 87 of the Elections (General) Regulations and Rule 15(e) of the Election Petition Rules 2017. Mr Sala submitted that the election materials sought in prayer 4 are crucial to the just determination of this petition and that this court has a duty under Rule 16(1) and sub-rule 2(b) to give directions on the preservation of election materials. He invited this court to note that the Petitioner has at paragraph 7 and 8 of the supporting affidavit expressed fear that the election materials are being interfered with. Mr Sala also pointed out that the Petitioner requests for the election materials because he has in the petition averred that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent failed to comply with the law in tallying and transmission of results. He contended that if the prayer is allowed the work of this court will be made lighter. Mr Sala submitted that the Petitioner is particularly concerned with the GPRS from where the results were sent as well as the scanned copies from the KIEMS devices. While appreciating that the KIEMS devices may have been taken to Nairobi for purposes of the repeat Presidential election Mr Sala submitted that all the 1<sup>st</sup> Respondent is required to do is to extract the information therein and supply it to the court. He urged this court to allow the application.

The application was vehemently opposed. Mr Wesonga for the 1<sup>st</sup> and 2<sup>nd</sup> Respondent submitted that from its wording prayer 4 is seeking scrutiny of the information in the KIEMS kit and that the same should be put together with the prayer for scrutiny of the votes cast and put in abeyance. Mr Wesonga also argued that under Section 39(1)(c) of the Elections Act transmission of results only applies to the Presidential election and that therefore the submission that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent did not comply with the law does not apply. He contended that in this election the results are verified from Forms 35A and 35B. He further contended that in this election there was no resort to electronic results and that prayer 4 can therefore be of no use to the Petitioner. Referring to the grounds for the petition he stated that the same cannot be substantiated in the KIEMS kit and as such this application is merely intended to prejudice the 1<sup>st</sup> Respondent who is currently preparing for the repeat Presidential election. Mr Wesonga described the application as a fishing expedition which he invited this court to abhor. He further urged that "safe keeping of election materials" was not pleaded and cannot be imported at the submissions stage more especially at this time when the 1<sup>st</sup> Respondent is preparing for the repeat Presidential election. Mr Wesonga contended that the allegation that the election materials are being interfered with is a new ground. He urged this court either to treat this application as one for scrutiny and hold it in abeyance or dismiss it for want of merit.

Mr Willis for the 3<sup>rd</sup> Respondent left the issue of the election to the court and the two other parties.

In response to Mr Wesonga's submission Mr Sala submitted that prayer 4 is clear in its wording and that whereas Section 39(1)(c) deals specifically with transmission of Presidential results Regulation 82 of the Elections (General) Regulations is clear on electronic transmission of all results. Mr Sala drew the attention of this court to paragraph 28 of the affidavits of the 2<sup>nd</sup> Respondent sworn on 17<sup>th</sup> September 2017 and on 13<sup>th</sup> October 2017. On the 2<sup>nd</sup> Respondent's deposition that the election materials are safe he urges that the same is for this court to determine. Mr Sala also clarified that all they require is the information as stored in the KIEMS and that it will not interfere with the repeat Presidential election. He contended that in any event the 1<sup>st</sup> and 2<sup>nd</sup> Respondents do not allege that they shall suffer any prejudice should this application be allowed.

I have carefully considered the application and the rival submissions of the Learned Advocates for the parties. Mr Sala submitted that the application is premised on Article 35 of the Constitution, Section 27 of the Independent Electoral and Boundaries Commission and Regulations 15 and 16 of the Elections (Technology) Regulations, 2017 Article 35 of the Constitution guarantees the right to information. Flowing from this Section 27 of the Independent Electoral and Boundaries Commission stipulates the procedure requests for information in the public interest by citizens. Such requests are addressed to the Secretary or such other person as the Commission may designate. Section 27(3) of the Act leaves it in the discretion of the Commission to give or to decline to give such information. It is however trite that the discretion must be exercised in a reasonable manner.

Regulation 15(1) of the Elections (Technology) Regulations 2017 obligates the commission to store and classify data in accordance with the principles set out in the Access to Information Act. Sub-rule 2 provides for the manner in which applications to access to such information are made and there is provided a form in the second schedule for that purpose. Regulation 16 recognizes that such a request for information may be made from the commission under Section 27 of the Independent Electoral and Boundaries Commission Act. It would seem therefore that ordinarily one does not require the intervention of this court to obtain the information that the petitioner craves; this is information that the petitioner would be entitled to under the Independent Electoral and Boundaries Commission Act and the Elections (Technology) Rules 2017 and which the electoral body has a responsibility to provide. It is instructive whereas that this court has power to give an order for furnishing of further particulars under Rule 15(1)(e) of the Election Petition Rules 2017 this is not an application for furnishing of further particulars and neither is there before this court any other application in that regard. Further Rule 16 of the Election Petition Rules empowers this court to give directions on the storage, handling and safety of election materials or the time for furnishing the materials to the court and in so doing the court must take into consideration the maintenance of the integrity of the election materials and ensure that the election materials are not interfered with. I do however find and agree with the submission by the Learned Advocate for the 1<sup>st</sup> and 2<sup>nd</sup> Respondent that this is not an application for preservation of election materials. It is as submitted by Mr Sala, himself, an application to access to information. This argument and my finding are fortified by the fact that on 21<sup>st</sup> September 2017 the Petitioner filed in this court a Notice of Motion dated 20<sup>th</sup> September which sought orders that –

**“a) That the Honourable court does take into safe keeping of all the ballot boxes and other materials used in the election for Member of the National Assembly Gem Constituency held on 8<sup>th</sup> August 2017 or the said materials to be kept in a party (sic) appointed by the court for safe keeping pending the hearing and determination of the petition.**

**b) That the 1<sup>st</sup> Respondent produces all the forms 35A and 35B used in the election for Member of the National Assembly Gem Constituency held on 8<sup>th</sup> August 2017.**

**c) That the cost of this application be awarded to the Petitioner.”**

That application was not prosecuted the Petitioner instead preferring to file the present application. Nowhere does prayer 4 of the present application mention safe keeping of the election materials. Be that as it may, the guiding principle and consideration of this application ought to be the overriding objective of the election petition rules which is to facilitate the just, expeditious, proportionate and affordable

resolution of election petitions under the Constitution and the Elections Act. Mr Sala, learned counsel of the petitioner/ Applicant has simplified it all by stating that all they require is the information contained in the KIEMS kits used in this election. This as I have found is information which the petitioner would ordinarily be entitled to. Moreover this court is not convinced that supplying this information to the Petitioner shall prejudice the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents have not themselves demonstrated that they stand to suffer any prejudice. Accordingly, it is hereby ordered that the 1<sup>st</sup> Respondent shall download and print the information in the KIEMS kits in the manner provided under Section 27 of the Independent Elections and Boundaries Commission Act and Regulations 15 and 16 of the Elections (Technology) Regulations 2017 and supply the same to the Petitioner/ Applicant, the 3<sup>rd</sup> Respondent and this court within three (3) days of this ruling.

The costs of this application be in the cause.

Orders accordingly.

**Signed, dated and delivered at Siaya this 30<sup>th</sup> day of October 2017**

**E.N. MAINA**

**JUDGE**

**In the presence of:**

Mr Sala & Mr Awino for the Petitioner/Applicant

Mr Orwenjo & Mr Okanda for the 3<sup>rd</sup> Respondent

No appearance for the 1<sup>st</sup> & 2<sup>nd</sup> Respondents

Odhiambo Court Assistant