



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**ELECTION PETITION NO. 7 OF 2017**

**IN THE MATTER OF: ARTICLES 1, 2, 3, 10, 19, 20, 22, 23, 47 AND 73 OF THE CONSTITUTION OF KENYA**

**IN THE MATTER OF: CHAPTER SEVEN AS READ TOGETHER WITH CHAPTER SIX OF THE CONSTITUTION OF KENYA, 2010 (REPRESENTATION OF THE PEOPLE)**

**AND**

**IN THE MATTER OF: CONTRAVENTION OF ARTICLES 1, 2, 10, 81, 83 AND 86 OF THE CONSTITUTION BY THE RESPONDENTS**

**AND**

**IN THE MATTER OF: THE ELECTIONS ACT CAP 7, ELECTIONS (TECHNOLOGY) REGULATIONS, 2017 AND THE ELECTION OFFENCES ACT NO. 37 OF 2016**

**AND**

**IN THE MATTER OF: THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION ACT, 2012**

**AND**

**IN THE MATTER OF: THE LEADERSHIP AND INTEGRITY ACT, 2012**

**BETWEEN**

**MOHAMED MAHAMUD ALI.....PETITIONER**

**VERSUS**

**INDEPENDENT ELECTORAL AND**

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

**AISHA ABUBAKAR, CHANGAMWE CONSTITUENCY**

**RETURNING OFFICER ..... 2<sup>ND</sup> RESPONDENT**

RULING NO. 2

1. Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents as well as that for the 3<sup>rd</sup> respondent have objected to PW7, Yusuf Adan Isaak adducing evidence relating to paragraphs 8, 9 and 10 of his affidavit sworn on 5th September, 2017, as he has deposed to the fact that voters who were being assisted to cast their ballots were misled to vote for one candidate when their intention was different. Counsel submitted that this is intended to amend the petition as the issues in the alleged offending paragraphs are not raised in the petition. Mr. Balala made reference to paragraph 20(J)(a) of the petition which addresses the issue of voters requiring assistance being helped by strangers assigned to them by electoral officials.

2. Mr. Munyithya submitted that the rules that set out how a petition should be framed are very clear in that no new ground should be introduced into a petition outside the statutory 28 days allowed for filing a petition of this nature. They prayed for paragraphs 8, 9 and 10 of PW7's affidavit to be struck out.

3. Mr. Gikandi in urging the court not to uphold the objection submitted that paragraph 20(J)(a) of the Petition should be read as a whole. He submitted that paragraphs 8, 9 and 10 of PW7's affidavit refer to voters that required assistance who were not allowed to vote in the presence of all the party agents, whereby the voter identifies the candidate he/she would like to vote for.

**ANALYSIS AND DETERMINATION**

4. Paragraphs 8, 9 and 10 of PW7's evidence which are said not to be in tandem with paragraph 20(J)(a) of the grounds raised in the petition state as follows:-

***“8. That while I was at the line, I did notice some weird activities going on in the polling station, this happened largely to the un- educated Somali voters who needed assistance from the agents, but since I was sent out I could not assist them, whenever they needed assistance, the presiding officer would jump in to assist and they were wrongly misled to vote for a person who they did not wish to vote for.”***

***9. That indeed, after they had voted I asked them what the presiding officer had instructed them to do and they told me that the said PO had told them to cross “X” in the box of Omar Mwinyi if they did not want to vote for him, as a sign of voting him out.***

***10. That as an agent, I confronted the presiding officer for misleading the public into voting a person against their wishes but she told me that she was very busy and had no time for arguments. I was blocked from further accessing her by the police.”***

5. The foregoing depositions must be read alongside the averment contained in paragraph 20(J)(a) of the petition that states as follows:-

***“The election across Changamwe Constituency such as Chaani Primary School polling station, Bomu Primary polling station, Cape Town grounds polling station and Mwidani Social Hall polling station were severely compromised by the blatant non-observance of the law regarding assisted voters as those illiterate voters allowed to vote did with assistance of strangers handpicked by the electoral officials or at times had their ballots marked for them by such agents without the presence of party agents or even the presiding officers.”***

6. The issue raised by Counsel for the respondents as I understand it is that paragraphs 8, 9 and 10 of PW7's affidavit are a complete departure from paragraph 20(J)(a) of the petition which it seeks to support. PW7's depositions are in regard to what he observed at Cape Town polling station No. 6 on 8th August, 2007 as he queued to vote. It is clear that he was keen on what was going on at the polling station as he had been appointed an agent of Abdi Daib, one of the parliamentary candidates for Changamwe Constituency. His deposition is that the presiding officer “jumped in” to assist the said uneducated

Somali voters who were wrongly misled to vote for a person they did not wish to vote for. Paragraph 20(J)(a) makes reference to Chaani Primary School polling station, Bomu Primary school polling station, **Cape Town grounds polling station** and Mwidani Social Hall polling station which according to the petitioner, the relevant legal provisions regarding assisted voters were not adhered to. PW7's affidavit relates to what he observed at **Cape Town Polling station No. 6**. Juxtaposition of the foregoing with the depositions in the impugned paragraphs 8, 9 and 10 of PW7's affidavit shows that they are inter-related.

7. The relevant provisions as to the issue of assisted voters is regulation 72 of the Elections (General) Regulations, 2012 which state as follows:-

***“On the application of a voter who is by reason of disability or being unable to read or write, and therefore unable to vote in the manner prescribed in these regulations, the presiding officer shall permit the voter to be assisted or supported by a person of the voter’s own free choice, and who shall not be a candidate or an agent;***

***2. Where the person who applies to be assisted is not accompanied by a person who is qualified to assist him or her, the presiding officer shall assist such a voter, in the presence of the agents;***

***3. The presiding officer may make such necessary and respectful inquiry in order to establish that the voter and the person the voter has chosen to assist him or her satisfies the provision of this regulation.***

***4. The person chosen by the voter is not required to be qualified to vote but is required to have attained the age of eighteen years.***

***5. The following shall apply with respect to a person who assists a voter under this regulation-***

***(a) the person shall, before assisting or supporting the voter, make a declaration of secrecy before the presiding officer in form 32 set out in the schedule;***

***(b) a person who breaches his or her declaration commits an offence under the Act;***

***(c) The person shall assist or support only one voter at that election and have a mark as proof of assisting or supporting a voter.***

***6. Where a presiding officer grants the request of a voter under this regulation, the presiding officer shall record in the polling station register against the name of the voter the fact that the voter was assisted and the reason for the assistance.***

***7. No person other than a person acting under this regulation shall be present in a compartment of a polling station while a voter in the compartment for the purpose of marking his or her ballot paper and any person who contravenes this subregulation commits an offence.***

8. In **Reuben Nyang'inja Ndolo vs Dickson Wathika Mwangi & 2 Others**, the court stated as follows:-

***“The participation of the candidates or their agents is not incidental or cosmetic to the process but an important component of the electoral process and that is the reason why the elections regulations provide that at each stage of the electoral process the candidates or their agents participate in the process. The presiding officers are required to ensure that at each stage of the electoral process the candidates and their agents participate and in the event that a candidate or his agent refuses to participate in the electoral process, a mechanism has been put in place for the presiding officer to give reasons for failure or refusal by the candidate to participate in the electoral process.”***

9. The issues being raised by PW7 fall squarely under the ambit of regulation 72 of the Elections (General) regulations, 2012. I note that paragraphs 8, 9 and 10 of PW7's affidavit are not a complete

replica of the contents of paragraph 20(J)(a) of the petition, I am however of the considered view that the said depositions fall in the context of paragraph 20(J)(a) of the petition herein. The calling of the evidence of PW7 in this court's view is not aimed at amending the petition but is for the purpose of advancing the petitioner's averments contained in paragraph 20(J)(a) of the petition.

11. The Counsel for the respondents will have an opportunity to cross - examine PW7 to test the veracity of his evidence. For the reasons so given, the objection is overruled.

**DELIVERED, DATED and SIGNED at MOMBASA on this 24th day of October, 2017.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

Mr. Gikandi for the petitioner

Mr. Munyithya for the 1<sup>st</sup> and 2<sup>nd</sup> respondents

Mr. Mohamed for the 3<sup>rd</sup> respondent

Mr. Oliver Musundi - Court Assistant