



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA
ELECTION PETITION NO. 2 OF 2017

HON. MARTHA WANGARI KARUA.....1ST PETITIONER

HON. JOSEPH GACHOKI GITARI.....2ND PETITIONER

-VERSUS-

THE INDEPENDENT ELECTORAL

& BOUNDARIES COMMISSION.....1ST RESPONDENT

MR. SEKI LEMPAKA.....2ND RESPONDENT

HON. ANN WAIGURU.....3RD RESPONDENT

HON. PETER NDAMBIRI.....4TH RESPONDENT

RULING

1. The Petitioners, **Hon. Martha Wangari Karua** and **Hon. Joseph Gachoki Gitari** have filed an application dated 14th September, 2017 in which they are seeking the following orders:

(i) The Honourable Court be pleased to order the 1st respondent to give Access to the Court and the petitioners the following:

(a) Direct, unfettered access to relevant persons and systems at Safran.

(b) Full and unfettered physical and remote access to each biometric electronic appliance used in voting/polling station in Kirinyaga County.

(c) Addresses, geographic and local communications mast information.

(d) Full and unfettered physical and remote access to any local server(s) connected to electronic device(s) used to verify voters' identification.

(e) Electronic device(s) used to capture Form 37 A's and 37 B's onto the KIEMS system and transmitted to the CTNs and NTC.

(f) Full and unfettered access to any form of scanning device used which saved images onto an access local server(s).

(g) Access to any scanning device would serve to establish whether the Form 37A was captured, stored and forwarded within the set time frames.

(h) Full and unfettered physical and remote access to any server(s) at the CTNs.

(i) Full and unfettered physical and remote access to any servers at the County tallying centre.

(j) Addresses, source and destination IP addresses, server details and user details.

(k) Full and unfettered access to all source codes including all programming codes.

(ii) The Honourable Court be pleased to order the 1st respondent to give access to this Court and all parties the following:

(a) The IEBC Election Technology system Network Architecture for period of 30 days before the elections.

(b) The IEBC Election Technology system Security Policy.

(c) The IEBC Election Technology System Redundancy Plan.

(d) Certified copies of certificates of Penetration tests conducted on the IEBC Election Technology system.

(e) Import testing certification in relation to KIEMS kits, static IP addresses of each KIEMS kit used, specific GPRS location of each KIEMS kit used.

(f) Technology Partnership Agreement(s) for the IEBC Election Technology system.

(g) Log in for the period of 30 days before the elections to the date of the order of this Court.

(h) Administrative access log into the IEBC public portal between 5th to 10th August 2017.

(iii) The 1st respondent be compelled to give access to an supply to the Court and petitioners certified copies of the original Forms 37 A's and 37 B's and pursuant to such production, leave be granted for use of an aid or reading device to assist in distinguishing the fake forms from the genuine ones.

(iv) The 1st respondent be compelled to give the petitioners access to original Forms 37 A's and 37 B's from all polling stations in Kirinyaga County.

(v) The Honourable Court be pleased to grant leave to the petitioner to:

(a) Rely on and/or file further affidavits in support of petition and/or the affidavits of already filed affidavits.

(b) File such other affidavits in response to or reply to any responses filed by the respondents.

2. The application was supported by the grounds on its face as well as the 1st Petitioner's supporting affidavit dated 14th September, 2017.

3. The 1st respondent filed replying affidavit on 3rd October, 2017 in which he deponed that voters were

identified using the voter identification systems in the KIEMS kit either using bio-metrics or if they could not be identified using bio-metrics, through their identification details stored in the KIEMS kit. That the system was not compromised nor was the results in any way manipulated as is alleged. That the safeguards and security features eliminated and continue to protect against any possibility of intrusion by unauthorized third party and all allegation of compromise or intrusion are without basis. Furthermore the allegation of intrusion, which is hereby denied, would not affect the gubernatorial election results as the requirements were physical delivery of the statutory forms to the respective tallying centres. The commission used complementary systems for electronic voter identification and transmission of results for presidential elections. That the Commission conducted the election in accordance with the Constitution and the application is a desperate attempt by the petitioner to fish for additional evidence in order to sustain a petition that discloses no reasonable cause of action.

4. The 1st and 2nd respondents filed grounds of opposition opposing the application on the ground that the petitioner is seeking for orders against SAFRAN who is not a party to the petition. That all KIEMS equipments countrywide have been recalled for preparation and reconfiguring for purposes of fresh presidential election to be held on 26th October, 2017. The petitioner has in her main prayers prayed for an order compelling the 1st respondent to provide and avail the electronic information. That the petitioner cannot be heard to seek to be allowed to introduce new evidence in support of her petition at this juncture.

5. The 3rd and 4th respondents filed grounds of opposition opposing the application on the ground that the orders sought are untenable as they are fishing expedition to procure additional evidence not already in the petition. The orders sought are not grounded in the petition. The orders sought are at variance with the Constitution, the Elections Act, Regulations made under the Elections Act and binding interpretations of the Constitution and the law. The application is filed prematurely based on Rule 15. The application proceeded by way of oral submissions and summarized as hereunder:-

Petitioner's Case

The petitioners advocate submitted that the votes the returning officer returned was unlawful and increased by 48,000 votes. That the Elections Act defines electronic election system to include biometric registration, identification and electronic submission of results and the petitioner impeaches the election on all the three grounds which are called KIEMS.

6. That there is allegation of registration of voters taking place on the polling station and the petitioner's agents were denied access therefore there is need for confirmation. This information is in possession of the 1st respondent and petitioner is entitled as part of her right. **Rule 18** of the **Elections (Technology) Rules 2017** allows parties to access to election technology materials. Rule 17 of the **Elections (Technology) Rules** obligates the 1st respondent to store materials for 3 years.

7. I have considered the application, the supporting affidavit, the respective grounds of opposition by the respondents and the replying affidavit. This application was filed in the interim. Rule 15 of Elections (Parliamentary and County Elections) Petitions Rules, 2017 provides for pre-trial conferencing and interlocutory applications. At rule -c- it is at the pre-trial stage that the Court is required to determine the interlocutory application. This is to ensure that the applications are filed and determined before the trial commences so as to ensure the expeditious disposal of electoral disputes. They must be filed before the commencement of the trial. It is by such application that the petitioner will seek from the 1st respondent like the petitioner is doing in this application, materials in their possession they seek to rely on and anchored in the prayers in the petition.

8. This application does not arise from matters raised in the pretrial or directions. It was brought under certificate of urgency mainly to obtain conservatory orders in view of the impending presidential election then scheduled for 17th October, 2017 at which the 1st respondent was likely to use all the KIEMS kits nationally. It must be concluded that the petitioner was basing the application on the prayers in the petition.

9. This application was not heard under certificate of urgency mainly because as provided under the rules such applications are supposed to be determined at the pretrial stage. I should state that the 1st respondent has a constitutional duty to preserve the election materials. **Article 86 (d)** of the **Constitution** provides:-

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

Appropriate structures and mechanisms to eliminate electoral malpractices are put in place, including the safe keeping of election materials.”

Further **Rule 16 (1) of Elections (Parliamentary and County Elections) Petitions Rules 2017**. (To be referred to as Election Rules) provides:-

“On conclusion of the pre-trial conference under rule 15, the election court may give directions on:-

- the storage of the election materials including ballot boxes and documents relating to the petition.

- The handling and safety of the election materials.

- The time for furnishing the election materials to the election court.

10. The stage to move to the Court is at the pretrial stage. It provides opportunity for parties to request access to specific and relevant materials for the case. The duty of IEBC to preserve the material is for a period of three years. Rule 17 Elections (Technology) Rules which obligates the I.E.B.C. to store the materials for three years. It is important to point this out as the application was filed even before the responses were filed and before the pre-trial conference. The Constitution has made provision for safe custody of election materials and there would be no urgency to order preservation of materials by I.E.B.C. or any other entity as it is their constitutional duty. I will address this issue later in the ruling.

11. The Petitioner raised issues in her submissions.

1) That election was marred by irregularities particulars being that the votes returned were unlawfully increased by 48,000 votes.

2) Allegation that there was registration of voters taking place on the polling day.

3) Tallying and that petitioners' agents were denied access.

12. For the 1st and 2nd respondent it was submitted that the petitioner was seeking to file further affidavits and introduce new evidence. That the KIEMS kits are not available.

13. The 3rd and 4th respondent submits that the issues are the applicability of the **Raila Odinga -V- IEBC & Others Petition No. 1 of 2017** whether agents of the petitioner were kept out of the polling station, whether there was voter bribery or other malpractices. What was the effect on the election of the governor. Based on these arguments I have collapsed the issues for determination into the following:

(1) Has the petitioner made up a case for access to relevant person and systems at Safran.

(2) Whether the petitioner should have access to information relating to the hardware and software used in the conduct of the gubernatorial Election for Kirinyaga County.

(3) Whether the Petitioner should have access to and supply of certified copies of Forms 37A and 37B.

(4) The issue of leave to file further affidavits.

(1) Access to relevant person and systems at Safran.

The petitioner prays that she be granted direct unfettered access to relevant persons and systems at Safran in order for the forensic information technology experts to fully understand the KIEMS system. In the replying affidavit sworn by James Muhati, it is deponed with regard to this issue, paragraph 27, that the Commission engaged highly qualified team and eventually partnered with internationally recognised and accredited institutions to provide top of the range government-grade information security system. He goes on to depose on security verifiability of KIEMS and that the system was not compromised paragraphs 28-33, 35 and 39. The 1st respondent submits that Safran is not a party in these proceedings and the court cannot issue orders against them.

14. It was also submitted by the Counsel for the 3rd and 4th respondents that Safran is an entity outside the jurisdiction of this Court. That the prayer was declined at the Supreme Court.

15. In response counsel for the Petitioner stated that the allegation that Safran is not a party is to miss the point as they have applied for the agreement between IEBC and other parties. Thus the request for information has a basis.

16. The Petitioners submit that they deliberately chose proceedings in the Supreme Court because they were favourable to them and sought to rely on the case of **Raila Amolo Odinga and another -V- Independent Electoral and Boundaries Commission and 4 others & Attorney General and Another Petition No. 1 of 2017.** In the case the Petitioner had in prayer No. 3 (a) applied to have access to the persons and systems at Safran. In dealing with the issue the Supreme Court stated:

“Regarding prayer No. 3 the same is impractical and difficult to grant because Safran Identity and security, it was submitted by counsel for the 1st and 3rd respondents is a software company based in France and not being part to these proceedings, to demand that ‘persons and systems’ related to it should be accessed by the petitioners is impractical and may unnecessarily delay the hearing and determination of the petition.”

This prayer must fail as Safran is not a party in these proceedings. No orders can be made against them as it would be impracticable to enforce it. She makes further prayers without prejudice.

17. On prayer 2 b, c, d, it is trite law that parties are bound by their pleadings. The petitioner prays for an order that the decision of the Supreme Court in Petition No. 1 is binding on this Court. The facts and background of the petition are that elections were not free, fair and credible or verifiable since there was cheating, intimidation voter bribery, exclusion of petitioner’s agents, use of unauthorized persons to man polling stations, tampering with ballot boxes, forgery of ballot papers and breach of mandatory and statutory and constitutional requirements in voting, counting, tallying and transmission of votes across the county. She further states that her agents were disallowed and kept out of polling station. She further states there was canvassing and voter bribery and electoral offences malpractices.

18. The Petitioner at Paragraph 13 of the supporting affidavit depones that:

“I am advised by my advocates that and information technology experts that reports filed in the Supreme Court and believe the same to be true that the relevance and purpose of the information and data sought is to show and prove the following among other things:-

(a) The 1st respondent did not comply with the law in relation to the elections of governor of Kirinyaga County.

(b) Computer and system logs are permanent and leave a permanent audit trail that are relevant to answering fundamental questions in the petition.

(c) The 1st respondent deliberately tampered with results.

(d) The inaccuracies between forms 37A and 37B and the IEBC Portal was not random accidental or inadvertent but rather widespread deliberate and purposely set to predetermine the results in favour of the 3rd respondent.

(e) Through the logs the petitioners will prove to this Court that there was deliberate failure to transmit the results as required by the law and that during that intervention the 1st respondent manipulated the results to subvert the will of the people of Kirinyaga.

(f) By law the petitioner is entitled to this information.”

At paragraph 15 the petitioner depones that:-

“I am advised by my information technology expert, the electronic transmission system was not properly secured as to deliver a free, faire, credible, transparent accurate, accountable and verifiable election in compliance with Article 81 and 86 of the Constitution”.

These are the averments on prayers in the application. Article 82 (4) of the Constitution makes provision for legislation on elections. **Section 44** of the **Elections Act** deals with use of technology, it provides:

“(1) Subject to this Section there is established an integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results.

(2) The Commission shall for the purpose of sub section (1) develop a policy on the progressive use of technology in the electoral process.

(3) The Commission shall ensure that technology in use under sub-section (1) is simple, accurate verifiable, secure, accountable and transparent etc.

.....

(7)The technology used for the purpose of the first general elections upon the commencement of this Section shall:-

(a) be restricted to the process of voter registration, identification of voters and results transmissions.

The replying affidavit by James Muhati extensively dealt with the implementation of ICT. At paragraph 23 he depones that voters were identified using voter identification system in the KIEMS kit or using biometrics through identification details stored in the KIEMS kits. This he states was as required by **The Elections (Technology) Regulations 2017**.

19. I find that having looked at the Petition and the prayers, the matters raised at Paragraph 13 of the Supporting Affidavit by the Petitioner are new matters not pleaded in the petition. The Petitioner is on a fishing expedition. The use of technology is an important tool for reducing risk of malpractice and increase efficiency. The use of technology in the gubernatorial elections in Kirinyaga County was for biometric voter registration and identification but there were no mandatory legal requirement for transmission of results which only expressly provided for in the transmission of Presidential Elections. **Section 39 Elections Act** deals with declaration of results, at **Section 39 (1c)** it provides:

“(a) electronically transmit in the prescribed form, the tabulated results of an election for the president from a polling station to the Constituency tallying centre and the national tallying centre.”

There is no provision for electronic transmission of results from the polling Station to Constituency tallying centre in respect of gubernatorial elections. The voting was both manual and electronic. For the gubernatorial elections the technology was used in voter registration and identification. There are no pleadings in the petition with regard to use of technology. In the case of **National Super Alliance (Nasa) -V- IEBC High Court Petition No. 328 of 2017** where the Court was urged to declare that the general election on 8th August, 2017 be exclusively electronic in respect of voter registration and transmission of results, The court held:

“To our mind what was required of the respondent was to put in place a mechanism that is set out in Section 44 of the Act. The particulars of the mechanism, whether electronic, manual or any other mode was not expressly provided in Section 44 A. If that were the intention of parliament, nothing would have been easier than to specify.”

The Petitioner prayer (b) of the petition seeks an order that the 1st respondent be compelled to provide and avail the electronic information of the Kirinyaga County gubernatorial elections which she also seeks in this application but in the grounds of the petition has not pleaded grounds based on use of technology. Paragraph 9 of the Petition states that the upshot is that the process from voting, counting tally and declaration of results was not free, fair or verifiable and violated mandatory statutory and constitutional requirements.

20. The Supreme Court in the case of **Raila Amolo Odinga & Another -V- IEBC & Others Petition No. 1 of 2017 (Supra)** it was stated:

“Having addressed our minds to the above issues, it is our view that first, we note that as correctly argued by counsel for the 3rd respondent, a party must be bound by its own pleadings and secondly, any scrutiny of either the forms or the technology must be made for a sufficient reason. Any prayer in the application that would seem to be an extension of the case for the petitioners or which would in effect a fishing exercise to procure fresh evidence not already contained in the petition would and must be rejected.”

I did not find grounds in the petition which would persuade me to grant prayers 1a, b, c, d, f, h, I, j, k, 2(a) (b) (c) (d) (e) (f) (g) (h). Indeed in the Supreme Court decision in **Raila Amolo Odinga & Others -V- I.E.B.C. and Others (Supra)** the Court stated with regard to similar prayers:

“Some of the actions for which access is sought have the potential of compromising the integrity and security of the respondent’s electoral technological system and of individual persons which if granted it is likely that the future use may be compromised and therefore it is important to ensure there is absolute confidentiality of passwords and usernames, location of servers identity of password holders, IP addresses and software running interalia.”

21. In view of the foregoing I decline to grant the sections of prayers 1 and 2 which I have stated above.

22. **(2) Access to information relating to the hardware and software used in the conduct of the Gubernatorial Election for Kirinyaga County**

In considering this issue, first and foremost is the fact that electronic transmission of results is only provided for in Presidential Elections, **Section 39 (1c) Elections Act (Supra)** refers. The declaration of results for Gubernatorial Elections is at County level through Form 37C. **Section 39(1B) Elections Act** provides:

“The Commission shall appoint County Returning officers to be responsible for tallying, announcement and declaration in the prescribed forms, or final results from constituencies in the County for purposes of the election of the County Governor, Senator and County Women Representative to the National Assembly.”

The Supreme Court in the case of **Ali Hassan Joho & Another -V- Suleiman Shahbal & 2 Others**

(2014) eKLR:-

“.....the ultimate election outcome for gubernatorial office which is in question here, is the one declared at the County level by the County returning officer who issues the presumptive winner with a certificate in form 38.”

The Petitioner is contending that the electronic transmission of results from the polling station to the County tallying centre was not secured as to deliver a free and fair election hence prayer (e) for the electronic devices used to capture Form 37A and 37B onto the KIEMS system and transmitted to the CTNs (sic) and NTC (SIC). The issue is tallying, transmission and capture of Form 37 and 37B. She supports the prayer with averments at Paragraph 14 of the Supporting Affidavit. The KIEMS which were used for voter registration, voter identification and results transmission are in the custody of the 1st respondent. Section 2 Elections Act defines “Integrated Electronic Electoral System” to refer to system that includes biometric voter registration and electronic result transmission system. I stated earlier that the 1st respondent has a constitutional duty to ensure safe keeping of election materials. The 1st respondent is also required to preserve the election materials for a period of three years. As such the 1st respondent cannot be heard to say that the KIEMS have been configured for use in the Presidential results. They should be able to provide the electronic data stored in the Kiems kits on request by a party as there is no other way that a party can have access to the data other than from the custodian. The 1st respondent, though he depones that the kits were configured for use in Presidential Elections, was required to ensure the safe keeping of the data with regard to Gubernatorial Election of Kirinyaga as provided under **Article 86 (d)** of the **Constitution**. The 1st respondent in the replying affidavit did depone that indeed the KIEMS kits were used for voter identification and transmission for Presidential Elections. He further depones to the fact that the ‘conceptualizing of the information transmission and security systems the commission engaged a highly qualified team and eventually partnered with internationally recognized and accredited institutions to provide top of the range information security system.’ With the averred security of the system, I do not understand how the 1st respondent can say he is unable to provide the data in the KIEMS. It has been held in a persuasive decision in **Abdirahman Hussein Wenyatau Mohamed & Another -V- IEBC & 2 Others Nairobi High Court Election Petition No. 3 of 2017** where the Court stated with regard to KIEMS kits:

“Faced with a similar issue in the case of Mohamed Ibrahim Abdi –V- Independent Electoral and Boundaries Commission & 2 Others Election Petition No. 7 of 2017 (unreported) the Court stated: “.....preservation of the constitutional material which includes the KIEMS kits and the ballot boxes is for the interest of all parties involved in this matter for the purpose of enabling this Court arrive at just determination of this matter. I therefore allow in the interim.....”

All the same material will be preserved by the 1st respondent with the participation of the parties with their agents if need be.....”

What the 1st petitioner is requesting for is his right under the law and provision must be made for him in the interest of justice. I therefore allow the petitioner to read only access to data extracted to KIEMS kits in relation to Mandela East parliamentary elections held on 8th August, 2017 in the polling stations listed in paragraph 19 of the Petitioners supporting affidavit to the petition sworn on 4th September, 2017. The 1st respondent to make arrangements for such access and reading which should be made in the presence of all the parties and/or their agents. Compliance be within 10 days.”

23. In the submission by the Counsel for the Petitioner he stated that the votes the returning officer returned were increased by 48,000 votes. That cumulatively the Petitioner would like to assist the Court and parties to verify and scrutinize by way of allowing this application by seeking access to the election infrastructure and the Forms 34A and 34B. There was use of the KIEMS kits and in compliment with manual aspects. The petition is seeking for access for access to the KIEMS kits in relation to Kirinyaga

Gubernatorial elections held on 8th August, 2017. The petitioner has a right to access the KIEMS kits – Electronic Device(s) used to capture Forms 37A and 37B and transmitted to County tallying centre. This will be a read only of the Data preserved in the KIEMS or memory cards whatever the case may be in view of the submission that the KIEMS have been configured. Since it is only a few days to the repeat Presidential Elections, the 1st respondent is ordered to preserve the data extracted from the KIEMS kits and the petitioner to have the read only access after the presidential elections. The access be in the presence of all the parties. This be done within seven days after completion of the Presidential Election. This be done between 3 and 10 November, 2017.

24. The 3rd issue is Access to and supply of certified copies of Form 37A and 37B

I have already stated the constitutional duty of the respondent to ensure the safety of election materials. In **Raila Amolo Odinga & Another -V- IEBC in Petition No. 1 of 2017**, the Supreme Court stated:

“Having so held the final orders we make are that the petitioners as well as the 3rd respondent shall be granted a read only access which includes copying (if necessary) to (a) certified photo copies of the original forms 34As, 34Bs and 34Cs prepared at and obtained at the polling stations by presiding officers and used to generate the final tally of the Presidential Elections and pursuant to such production leave be granted for use of an aid or reading device to assist in distinguishing the fake forms from the genuine ones. The registrars of this Court assisted by a number of judicial officers and staff as she may determine shall supervise access to the certified copies of original Forms 34A and 34B by the petitioner and Respondents at such a venue as she shall determine in consultation with the parties. A report on the exercise and related issues shall be filed by Tuesday 29th August, 2017 at 5.00 p.m. and parties are at liberty to submit on it at the end of the hearing.”

The petitioner pleaded that forms used were forged. Scrutiny is provided under **Section 82 of Elections Act** and **Rule 29 of the Election Petitions Rules**. There is no prayer for scrutiny of votes in the prayer as (b) is for Electronic Information. The petitioner has challenged the election of the 3rd respondent. It is fair and just that the petitioner be allowed access to the certified copies of original Forms 37A and 37B in relation to Kirinyaga Gubernatorial elections held on 8th August, 2017. There is no prejudice as the 2nd respondent attached a copy of Form 37C which is generated from A and B. In any case the 1st respondent submits that the forms were supplied at the polling station which means they have the forms and should be able to supply them.

(3) The last issue is leave to file Further Affidavits.

Rule 15 (1) (h) Election Petition Rules 2017 provides for pre-trial conference. It states:-

“Within seven days of 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 –

Give directions as to the filing and serving of any further affidavits or the giving of additional evidence.”

A petition challenging the elections of a Governor must be filed within 28 days of the declaration of results. This is provided under **Article 87 (2) of the Constitution** and **Section 76 (1) of the Elections Act**.

The Petition was filed in time and the respondents have filed their responses. The respondents are saying that the petitioner has in her affidavit introduced new issues which are not in the petition and is seeking to expand the petition outside the constitutional provision. The petitioner has raised new issues which were not pleaded in the petition. Indeed a careful perusal of the petition, there is no allegation that voters were registered on the following day. I had also looked at paragraph 13 of the petitioners supporting affidavit and found that it had raised issues not pleaded in the petition. For the petitioner to seek to introduce

affidavits would amount to amending the petitions. No amendment can be allowed after the 28 days of filing the petition. Furthermore such an amendment will prejudice the 3rd respondent. The petitioner is on a fishing expedition. Her major prayer in the petition was to rely on the decision of **Raila Amolo Odinga & another -V- IEBC & Others Petition No. 1 of 2017** to determine the petition. The Court will not allow a party to go on a fishing expedition after presenting a petition in Court. The ruling of the Supreme Court in the case of Raila Amolo Odinga & Another -V- IEBC & Others, No. 1 of 2017, stated:

“Having addressed our minds to the above issues it is our view that first we note as correctly argued by the counsel for the 3rd respondent a party must be bound by its pleadings and secondly any scrutiny of either forms or the technology must be made for sufficient reason. Any prayer in the application that would seem to be an expansion of the case for the petitioners or which would in effect be a fishing exercise to procure fresh evidence not already contained in the petition would and must be rejected.”

The Supreme Court had further in the case of **Nicholas Kiptoo Arap Korir -V- IEBC Petition No. 23 of 2014** had stated:-

“As existing authority so it will be in this case: We are disinclined to countenance a scrutiny process that becomes open season for petitioners who would turn it in to a forum of gathering all such information as they would fancy.”

So the petitioner must not be allowed to look for evidence by scrutiny and introduce it as ground through the back door with affidavits which were not filed with the petition. The petitioner ought to have introduced such affidavits within the time provided for challenging relevant results i.e. within 28 days of the declaration of the results. Such affidavits if admitted would occasion prejudice to the other parties in the case. In **Raila Odinga -V- Independent Electoral and Boundaries & 3 Others, S. C Petition No. 5 of 2013** the Court gave the following guidelines for determining applications for the filing of further affidavits and admission of new or additional evidence:

- ***The admission of additional evidence is not an automatic right. Instead, the election court has a discretion on whether or not to admit the evidence.***
- ***Further affidavits must not seek to introduce massive evidence which would in effect, change the nature of the petition or affect the respondent’s ability to respond to the said evidence.***
- ***Admission of new evidence must not unfairly disadvantage the other parties to an election petition.***
- ***Parties to an election petition should strive to adhere to strict time lines set out in EDR laws.***
- ***Finally further affidavits may not be filed without leave of the Court or after hearing has closed irrespective of their relevance.***

It has been submitted that the 3rd and 4th respondents would be greatly prejudiced. The discretion of the Court must be exercised judicially. Where one party is prejudiced by expanding the scope of the petition in exercise of Court’s discretion, it would not be doing so judicially. It would amount to a miscarriage of justice. The 3rd and 4th respondents would be exposed to new grounds, causes and evidence in form of affidavits. I am of the view that filing of further affidavits will prejudice the respondents while at the same time amount to amendment of petition through the back door after gathering material not pleaded in the petition. The Petitioner if indeed she had the evidence, filed the affidavit with the petition and apply for the evidence and access but she cannot look for evidence while the petition is in Court. In giving directions on the filing of further affidavits or giving evidence an election Court may consider the significance and effect of that additional evidence. As we stand, the Petitioner has not indicated the contents of the further affidavit and/or the additional evidence, therefore this Court is not able to determine whether it is small, or involving substantial material. It would clearly be prejudicial to allow such affidavits. I decline to allow the prayer for filing of further affidavits. I will however, grant leave to the Petitioner to reply to the affidavits filed by the respondents within seven days from today.

25. In conclusion I make the following orders:

(1) I allow prayers (2) e of the application and order that the 1st respondent to allow a read only access of the data in the KIEMS kits with regard to the Gubernatorial Elections of Kirinyaga County. The access be between 3rd and 10th November, 2017 in the presence of the petitioner and the other parties or their representatives.

(2) I decline other prayers in prayer 2.

(3) The 1st respondent is ordered to supply the Petitioner certified photocopies of Forms 37A, and 37B as prayed in prayer No. 4 and the Petitioner access to original Forms 37A and 37B.

(4) Leave to file further affidavits in support of the Petition is declined. However, the Petitioner is granted leave to reply to the affidavits filed by the respondents. The petitioner will identify the affidavits and the reply be filed and served within seven (7) days from today.

Costs be in the cause.

Dated and delivered at Kerugoya this 23rd day of October, 2017.

L. W. GITARI

JUDGE

Read out in open Court, Mr. Imanyara, 1st Petitioner, M/S Anne Thungu holding brief for Mr. Kathungu for 1st and 2nd Respondent, Mr. Nyamandi, Kamotho and Mr. Mwichigi for 3rd and 4th Respondents.

L. W. GITARI

JUDGE

23.10.2017