



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
THE ELECTIONS ACT, 2011
ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS) PETITION RULES 2017)
ELECTION PETITION NO. 19 OF 2017

BETWEEN

JANE MURINGI WANGUIPETITIONER

VERSUS

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION 1ST RESPONDENT

RETURNING OFFICER

EMBAKASI NORTH CONSTITUENCY 2ND RESPONDENT

JAMES MWANGI GAKUYA 3RD RESPONDENT

RULING

The Petitioner/Applicant Jane Muringi Wangui filed this petition against the Respondents seeking among other prayers, an order quashing the results of EMBAKASI NORTH CONSTITUENCY Member of National Assembly elections declared by the 2nd Respondent on 9th August 2017 and an order directing the 1st Respondent to conduct fresh elections.

The Petitioner filed application under certificate together with the petition. The application dated 6th September 2017 is brought under Articles 19, 20, 22, 23 (3), 35, 81, 86, 159 and 258 of the Constitution; Section 39 of the Elections Act, Section 27 of the Independent Electoral and Boundaries Commission Act, No. 9 of 2011, Access to Information Act and all enabling provisions of the Law, Section 17 of the Elections (Parliamentary and County Elections) Petition Rules, 2017).It seeks the following orders;

- a) The Application be certified as extremely urgent, heard and orders given before the hearing of the substantive Petition.
- b) The Application be heard and determined expeditiously and in priority to the Petition.
- c) This Court be pleased to order the 1st Respondent to give access to the Applicant/Petitioner to

the following:

- i. Full and unfettered physical and remote access to each biometric electronic appliance used at each voting/polling station location used to verify voters' identification against the list of registered voters and for the appliances to be forensically imaged to capture, inter alia, metadata such as data files, creation times and dates, devices IDs MAC addresses IP.
- ii. Electronic device(s) used to capture Form 35As and Form 35Bs onto the KIEMS system and transmitted to a) the Constituency Tallying Centres and (b) the National Tallying Centre for Member of National Assembly.
- iii. Full and unfettered access to any form of scanning device which saved images onto access local server(s) for onward transmission to the Constituency and National Tallying Centre.
- iv. The Honorable Court be pleased to order the 1st Respondent to give access to all the parties, for purposes of scrutiny, and supply to the Court and to the parties original Form 35As and 35B prepared at and obtained from the Polling Stations by Presiding Officers and used to generate the final tally of the Member of National Assembly elections, and pursuant to such production leave be granted for the use of an aid or reading device to assist in distinguishing the fake Forms from the genuine ones.
- v. The 1st Respondent be compelled to give the Petitioner/Applicant access to the Original Form 35As and 35B.
- vi. The Honorable Court be pleased to grant any other reliefs that it may deem just and fit to grant in the interest of justice.

Grounds on the face of the application are that in the presidential case **Raila Amolo Odinga and Another Vs Independent Electoral and Boundaries Commission and 2 Others(2017)** the Supreme Court found and held that there were irregularities and some the forms used to tally election results had anomalies and inconsistencies and pursuant to the finding the Petitioner herein has noted similar and extensive anomalies in the forms used to declare results in member of parliament for Embakasi North which go to the very root of integrity, accountability and verifiability of the elections conducted in Embakasi North. The application is supported by Affidavits of Jane Muringi Wangui the Petitioner herein, doctor Nyangasi oduwo and Jackline Otieno. Counsels herein proceeded by way of oral submissions.

Ms. Maumo for the Petitioner submitted that the Petitioner seeks access to original forms 35A and 35B, KIEMS and BVR kits. She submitted that the forms the Petitioner has been supplied are 160 whereas the polling stations were 176. She submitted that the forms supplied by the 1st Respondent to the Petitioner and 3rd Respondent do not comply with Regulation 79 of the Election Rules and invited the Court to look at the forms on page 5, 6,7,8,9 in the 1 & 2nd Respondents bundle of documents and page 10 of the supplementary list. She cited the following irregularities in forms 35A and 35B:-

- Forms do not bear the IEBC stamp,
- No anti- copy mark,
- Forms not signed by the presiding officer agents,
- No objections recorded,
- Forms illegible and is signed by presiding officer,
- Disparity in forms in the 1st and 2nd Respondents bundle and forms in the Petitioners bundle.

She argued that the above mentioned irregularities support the averment that the KIEMS kit was not used in some polling stations and that is the reason why the Petitioner is asking for preservation of KIEMS kits to enable her ascertain where excess votes came from. She submitted that the petition has concise

statement of facts confirming illegality and non-compliance with the law and scrutiny will enable the Court determine this petition in totality.

Ms. Maumo submitted that the Petitioner is apprehensive that the same KIEMS kits will be used in the impending election and data may be discarded thus denying the Petitioner a chance to examine the KIEMS kit. She prayed that original forms 35A and 35B and SD card (Secure Digital Card) from the KIEMS kit be availed before Court.

The 1st and 2nd Respondents filed joint response to the petition and Affidavits sworn by Moses Kipkogei on 15th September 2017 in response to the application. Mr. Kitur for the 1st and 2nd Respondent also relied on Affidavit of Frank Boinett. He submitted that the forms filed comply with election regulations and that there is a difference between documents not being signed and documents not being legible. He submitted that the Petitioner in paragraph 13 of her Affidavit, has made wild allegations that some forms bear fake stamps, some are not filled and some bear similar handwriting. He argued that the Petitioner is not a handwriting expert and cannot be in position to tell what constitute a fake stamp by 1st Respondent's officials and that it would be improper to grant orders for scrutiny on the basis of wild and unsubstantiated allegations. He argued that Affidavit by Doctor Oduwo points at anomalies and brings one additional issue that ballot boxes were staffed but there is no particular station where the Petitioner wants scrutiny to be done on allegation of staffing of ballot; he added that the Petitioner also alleges that there were instances where votes cast were in excess of registered voters but this has not also been pointed out. Mr. Kitur submitted that entitlement to scrutiny is anchored in Section 82 of Election Act which is operationalized by Rule 28 and 29 of Elections (Parliamentary and County) Petitions Rules 2017. He added that Regulation 15 of Election Technology Rules 2017 makes provision for data storage and access to information and Regulation 15(2) provide that the request for data has to be in writing and Petitioner never made such a request prior to filing this suit. Counsel further said that Sections 35,44, and 44A of Election Act make provisions for declaration of results, use of technology and complimentary machinery of identifying voters and that Section 39(1)(c) stipulates electronic transmission in respect of Presidential Elections; and in respect of National Assembly and Member of County Assembly announcement by Returning Officer at Constituency level is final. He submitted that any form obtained elsewhere other than from the Returning Officer does not hold the force of law.

Mr. Kitur submitted that Section 76(4) provides for raising objection on counting but there is no indication the Petitioner raised any objection on counting. He cited **Machakos Petition No 4 Of 2013 Wavinya Ndeti Vs.Iebc & 4 Others** where the Court held that the Petitioner has to establish a basis for scrutiny. Counsel argued that prayers sought by Petitioner with respect to biometric appliances and scanning devices is a simple exercise at fishing for evidence. He urged Court to find that the application lacks merit and dismiss it.

Mr. Kibe Mungai for the 3rd Respondent associated himself with the 1st and 2nd Respondent's submissions. He started by pointing out that this application has come before pretrial conference where contested issues are framed. He submitted that the Respondent has answered each and every allegation raised in the application and on reading the Affidavits it raise doubt as to whether at this stage the Court is able to come to conclusion that a basis for scrutiny has been raised. He submitted that from Affidavits by 3rd Respondent, the Petitioner has not been able to demonstrate that there are votes she genuinely lost or there are doubted votes. He said the Petitioner is only talking of forms not being legible or not signed. He submitted that even under regulation not all agents need to sign, they sign if present and they cannot be forced to sign. He submitted that if the Petitioner had claimed that she obtained more votes than the 3rd Respondent that could have been reason for scrutiny to confirm who won but asking for scrutiny in all polling stations amounts to a fishing expedition. He submitted that the petition is mirrored on the Presidential Election Petition but Parliamentary Elections are meant to be simple; simply what forms 35A and 35B say.

He argued that the application before Court is for access to information which has been converted to scrutiny but no sufficient basis has been made for scrutiny.

In response, Ms. Maumu for the Petitioner submitted that the prayers in the application tally with prayers

in the petition and that prayer for scrutiny has been pleaded in prayer (e) and that the application is premised on Section 83 of Election Act and Rule 29 that failure to disclose the correct provisions is not fatal and that can be cured by Article 159 and Section 80(1) invites Court to decide all matters that come before it without undue regard to technicalities.

In respect to the 3rd Respondent's submission that the application is premature having come before pretrial conference, she submitted that the Court has discretion to give directions on how to proceed. She submitted that forms submitted are not legible and that 1st Respondent has not submitted forms for all polling stations. She clarified that the Petitioner want scrutiny not recount. On the issue of no objection being raised by Petitioner or her agents, she submitted that there is no way a party could object if not present. She conclude that what the Petitioner seeks is original forms 35 and Secure Digital (SD)card availed to Court and preserved.

Mr. Kitur for the 1st and 2nd Respondent offered to supply to Court legible copies of forms 35A and B.

I have considered rival submissions by Counsels herein. I wish to consider two issues one is Petitioner's prayer to access original forms 35A and 35B, and KIEMS kit and two whether a basis has been laid for scrutiny of the forms 35A and 35B.

The Petitioners is apprehensive that original forms 35A and 35B may not be availed in Court at the time of hearing and that the KIEMS kits may be also be used during the impending presidential election. The Petitioner has indicated that the forms 35A and 35B that the Petitioner has filed do not tally with the ones filed in Court by the 1st Respondent and are not legible.

I have perused the documents filed in Court and confirm that some forms are not legible. Counsel for the 1st and 2nd Respondent showed Court the original copies which appear legible and offered to supply both the Petitioner and the Court. Having noted that some of the documents are not legible I find it would be in the interest of justice avail certified copies of forms 35A and 35B both to Court and the Petitioner. To address the allegation that the forms supplied to the Petitioner differ from forms filed by 1st Respondent, I find it appropriate to have the forms certified by the Deputy Registrar. Upon certification of documents being done the origins be preserved by the 1st Respondent pending herein and determination of this petition.

As concern access to KIEMS kit, it came out clearly from the Petitioner submissions; the Petitioner requires information in the SD cards that relate to election in Embakasi North. There is no indication that the petition made such request before filing this suit and was denied; but in the interest of justice it would be crucial to preserve the information in the SD cards to assist the Court in arriving at a fair decision.

I now go to the second limb of the application; scrutiny of the forms 35A and 35B. The Respondents herein filed Affidavits in response to the Petitioners applications .Allegations raised by the Petitioner have been denied by the Respondents. The averments in the Affidavits have not been subjected to test by cross examination. The Petitioner has not indicated which polling station had irregularities which warrant scrutiny, the allegations raised have been generalized and scrutiny cannot be carried out in all polling stations, scrutiny if ordered should carried out in specific polling stations. No basis has been laid to warrant scrutiny. In the circumstance the prayer for scrutiny is not allowed.

From the foregoing I do allow the following orders;

1. That the 1st Respondent do supply the Petitioner certified copies of forms 35A and 35B in respect of all the polling stations in Embakasi North Constituency. Forms to be photocopied and certified by the Deputy Registrar.
2. That original forms 35A and 35B in respect of this petition be preserved by the 1st Respondent and be availed in Court during the hearing.

3. That the data in the SD cards in respect to this petition be shared between the parties herein in the presence of the Deputy Registrar and Court ICT officer.

4. That the 1st Respondent do submit to the Deputy Registrar all Secure Digital (SD) cards used on 8th August 2017 elections in respect of election Embakasi North Constituency.

5. Each party to bear own costs.

Dated and Delivered at Nairobi this...18th...day ofOctober.....2017

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF

.....COURT ASSISTANT

.....COUNSEL FOR PETITIONER/APPL.

.....COUNSEL FOR 1st & 2nd RESPONDENT

.....COUNSEL FOR 3rd RESPONDENT