



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

ELECTION PETITION NO. 1 OF 2017

IN THE MATTER OF THE CHALLENGE OF THE VALIDITY OF THE EMBU COUNTY GOVERNOR ELECTION, 2017

LENNY MAXWELL KIVUTI.....PETITIONER

VERSUS

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION (IEBC).....1ST RESPONDENT

THE EMBU RETURNING OFFICER.....2ND RESPONDENT

MARTIN NYAGA WAMBORA..... 3RD RESPONDENT

DAVID KARIUKI.....4TH RESPONDENT

RULING

1. On 27th September 2017 the court recorded orders by consent of the parties, as dictated by Prof. Ojienda for the petitioner, and confirmed by Mr. Kibicho for the 1st and 2nd respondents, Mr. Marete for the 3rd respondent and Mrs. Rugaita for the 4th respondent, in the following terms -:

‘By consent of all parties:

1. That the KIEMS Kits held for the gubernatorial elections for Embu County for Manyatta, Mbeere South, Mbeere North and Runyenjes Constituencies be released to IEBC, the 1st respondent, for the purpose of conducting the repeat presidential election;

2. That the data from the said KIEMS Kits be stored by the 1st respondent as by law obligated for purposes of the hearing of this petition;

3. That the IEBC do access the premises in Mbeere South, Mbeere North, Runyenjes and Manyatta Constituencies for the purpose of securing the KIEMS Kit;

4. That subject to availability of space within Embu law courts, the 1st respondent, in consultation with and in the presence of 2 representatives of the petitioner and 2 representatives for the 3rd and 4th respondents, do secure, transport and store all the election materials within the premises availed at Embu Law Courts, and the said material be preserved in terms of the orders made on

28th August 2017;

5. *That the Deputy Registrar of the High Court do supervise the process of movement and storage of all the materials, and do thereafter file a report in court;*

6. *That the parties shall undertake this process within seven (7) days commencing on 29th September 2017. The matter to be mentioned on 29th September 2017 before the Deputy Registrar, Embu High Court;*

7. *That the 3rd and 4th respondents shall be at liberty to place their seals on the ballot boxes before they are moved to the court;*

8. *That that after movement of the election materials to the court for storage, the premises shall be available to the 1st respondent.'*

2. The matter was mentioned on 29th September 2017 before the Deputy Registrar in compliance with the consent order, when the matter was given a further mention date for 2nd October 2017. There was no mention on 2nd October 2017, the matter was instead mentioned on 4th October 2017, when it was agreed by consent that the orders of 28th September 2017 would be executed on 11th and 12th October 2017.

3. When the matter came up on 11th October 2017, a disagreement arose relating to interpretation of the orders of 27th September 2017. Mr. Nyamu, counsel for the petitioner, took the position that the petitioner was ready for implementation of orders 1, 2 and 3 of the consent order, but was of the view that the rest of the orders were no longer tenable on account of changed circumstances, to wit the unavailability of space at the law courts for storage of the election materials. He argued that the involvement of the Deputy Registrar in the exercise was conditional on the materials being stored at the courthouse. The other parties protested that the petitioner was shifting goal posts and abusing the court process. Mr. Marete submitted that the Deputy Registrar had communicated the challenge of space, and had tasked the IEBC to find space. He mentioned that the Deputy Registrar had been tasked to inspect ballot boxes. He then proposed that the matter be mentioned before the Judge for directions. The Deputy Registrar directed that the matter be mentioned before me on a date earlier than 18th October 2017 for directions.

4. The matter was mentioned before me on 13th October 2017. I heard oral arguments from the parties on their point or points of disagreement so as to assess whether or not there was an issue of interpretation of the orders of 27th September 2017. Prof. Ojienda for the petitioner stated that the said orders fell into two categories. The first category related to the release of the KIEMS Kit, and was comprised in orders 1, 2 and 3 of the consent order; and he submitted that the petitioner had no issue with that. The second category of orders, related to movement of electoral materials from the 1st respondent's warehouses or stores to the courthouse. He submitted that the movement of the materials was subject to availability of space at the courthouse. It was submitted that as the materials were to be removed from the custody of the 1st respondent into the custody of the court, it was imperative that the Deputy Registrar be involved to ensure the integrity of the materials from the time they were to leave the 1st respondent's premises until they were stored in the court's precincts. It was stated that as the court had indicated its inability to store the materials, the second tier of the consent order was no longer capable of implementation as framed, as it was no longer tenable to involve the court's officer in the process. It was submitted that it would violate the provisions of the Elections Act, should the Deputy Registrar be required to handle the election materials when the same were not in the custody of the court.

5. Mr. Kibicho for the 1st and 2nd respondents took a mixed position. He conceded that the court had stated that there was no storage space, and that the 1st respondent was happy to avail space for storage of the materials. He did not see anything wrong, however, with the Deputy Registrar preparing a report on the state of the election materials and of the premises where they were stored after the execution of the orders made by the court on 28th August 2017. He submitted that the execution of the order of 28th

August 2017 was done unilaterally, by one side in the absence of the other parties, contrary to the express terms of the order itself for involvement of the other parties. He concluded by stating that the consent order ought to be varied to accord with the changed circumstances.

6. Mr. Marete on behalf of the 3rd respondent submitted that the consent order was made against a certain background, that the petitioner had obtained *ex parte* orders, which he proceeded to execute *ex parte*. There was concern that there might have been interference with the integrity of the materials during the process, and the report of the Deputy Registrar was intended to address those concerns. He submitted that the fact that the materials were no longer going to be moved to the courthouse did not preclude the Deputy Registrar's involvement. He protested that the petitioner was interpreting the order in a manner designed to kill it.

7. Mrs. Rugaita for the 4th respondent submitted that the orders were largely intact, and that the only thing that had changed was the movement of the materials to the courthouse. She stated that the respondents were still keen on knowing the state and condition of the subject matter of the petition as and when the warehouses or stores are opened for the retrieval of the KIEMS kit. She asserted that if the petitioner had involved the other parties in the execution of the orders made on 28th August 2017 all would have been well with everyone.

8. It is common ground that orders 4, 5, 6, 7 and 8 of the consent order of 27th September 2017 relate to movement of electoral materials from the stores of the 1st respondent to those of the court. It is about the 1st respondent surrendering custody of those materials to the court. My reading of the consent order is that as the 1st respondent is to surrender custody of the electoral materials to the court, the officer of the court responsible for administration of court affairs ought to be at hand to receive the materials and place them in proper custody. The officer responsible for and in charge of the day to day administration at a High Court station is the Deputy Registrar. If electoral materials are to be placed in the hands of the court, it should be the duty of the Deputy Registrar to receive them from their current custodian, in this case the 1st respondent. For every handover there ought to be a status or handover report, addressing the state of the subject matter as at the time it was handed over. Such a status or handover report would be an accounting document. It is critical as questions may arise later touching on the integrity of the subject matter, and the report may shed light as to whether how and when the integrity of the subject matter might have been compromised. It is also now common ground that the court does not have the capacity to store the materials, and therefore it is not in a position to takeover custody relating to them. The circumstances have changed, so that there is no necessity to move the electoral materials to the court for lack of storage.

9. The question that arises is whether there is any continued role for the Deputy Registrar in view of the circumstances. Should he be involved in the movement and storage of the electoral materials, and should he make any report touching on the said movement and storage, and concomitant matters? The answer to these questions are to be found in order 5 of the consent order, the Deputy Registrar's role is limited by that order to supervising the process of the movement of the materials to the court precincts and their storage therein. If there is to be movement of the materials for storage purposes to a place other than the court, then the Deputy Registrar would have no business with the said movement and storage. I was invited to give a broader and purposive interpretation to that order. I have carefully read and reread that order; to my mind it is not capable of any other interpretation. A court officer can only be responsible for materials that are within the custody of the court, he should not be tasked with accounting for materials that are in the custody of other persons and entities.

10. I agree with the petitioner that the circumstances have changed with regard to storage of the materials at the court premises, and therefore the consent order as it relates to orders 4, 5, 6, 7 and 8 can no longer be implemented as currently framed. I agree too with the 1st and 2nd respondents that there is need for variation of the orders so as to bring them into conformity with the changed circumstances. I agree too with the 3rd and 4th respondents that their representatives need to affix their seals on the ballot boxes and assess their state as well as that of the premises where the ballot boxes are currently stored. However, regarding the status report, the Deputy Registrar shall not be available to prepare any, instead each party

shall be at liberty to assess the situation and to prepare such report or reports as it pleases, and such party will be at liberty to present such report as evidence at the full trial. The petitioner has already prepared one such report, through the affidavit of Mr. Kamunda, and it was stated from the bar that Mr. Kamunda would be taking the witness stand with regard to that affidavit. The other parties are at liberty to prepare reports along similar lines.

11. The centrepiece of the proceedings conducted on 13th October 2017 was the movement of the electoral materials; it was agreed that there is now not going to be any movement of materials to the courthouse. However, it was mentioned in passing that the 1st respondent had undertaken to provide premises for storage of the materials. It was also said that parties had arrived at a consent when they appeared before the Deputy Registrar with regard to that. No consent on the matter has been placed before me, and the record before me does not have evidence of any such consent. Similarly, there is no indication as to whether the 1st respondent has identified any premises for storage of the said materials. I shall in the circumstances make no orders with regard to that. Parties shall be at liberty to move the court appropriately for an order to facilitate that once such storage facilities are identified.

12. In the end, I shall vary the order made on 27th September 2017 in the following terms-

a. That the premises of the 1st respondent where the KIEMS Kits for the constituencies of Manyatta, Mbeere South, Mbeere North and Runyenjes are currently being held shall be opened, in the presence of two representatives or agents from each of the parties, but in the absence of the petitioner and the 3rd and 4th respondents and their supporters, on Tuesday 17th October 2017 between 10.00 am and 4.30 pm for the purpose only of retrieval of the KIEMS Kits;

b. That for the purpose of (a) above, the said premises shall not be opened simultaneously, but sequentially, starting with Runyenjes, and followed by Manyatta, Mbeere North and Mbeere South;

c. That the data from the KIEMS Kits shall be stored by the 1st respondent in terms of order 2 of the consent order of 27th September 2017;

d. That the premises referred to in (a) above shall be opened, in the presence of two representatives or agents from each of the parties, but in the absence of the petitioner and the 3rd and 4th respondents and their supporters, on Wednesday 18th October 2017 and Thursday 19th October 2017 between 10.00 am and 4.30 pm, on both dates, for the purpose only of the 3rd and 4th respondents putting their seals on the ballot boxes for the gubernatorial elections in respect of the polling stations specified in the petition herein;

e. That for the purpose of (d) above, the said premises shall not be opened simultaneously, but sequentially, starting with Runyenjes, and followed by Manyatta, Mbeere North and Mbeere South, in that order;

f. That the parties shall be at liberty thereafter to prepare such reports as they may please, relating to what they may observe regarding the state that they may find the premises and the ballot boxes to be in as at the time of the exercises referred to in (a) and (d) above, which reports may be used for such purpose or purposes as the parties shall please, including being presented as evidential material at the full trial of the election petition;

g. That the police officer in charge overall for the Embu County police area is hereby directed to provide security for the exercises to be conducted under (a) and (d) above; and

h. That the 1st respondent shall thereafter take and have full custody, for the time being, of all the electoral materials the subject of these proceedings, and shall make them available to the court as and when required to do so by order.

DATED, SIGNED and DELIVERED at EMBU this 16TH DAY OF OCTOBER, 2017.

W. MUSYOKA

JUDGE

In the presence offor the Petitioner

In the presence offor the 1st Respondent

In the presence offor the 2nd Respondent

In the presence offor the 3rd Respondent

In the presence offor the 4th Respondent