



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

JOHN MUGAMBI ANGAINE.....PETITIONER

VERSUS

I.E.B.C.....1ST RESPONDENT

WARIO IBRAHIM ALI R/O BUURI CONSTITUENCY.....2ND RESPONDENT

RINDIKI MUGAMBI MURWITHANIA.....3RD RESPONDENT

RULING

Petitioners application dated 5th September 2017 was brought under Rule 16 of The Elections (Parliamentary and County Elections) Petitions Rules 2017 seeking that the court be pleased to order for additional seals to be placed on the ballot boxes in respect to the elections of Buuri Constituency;

That the Election court be pleased to direct and/or order the 2nd and 3rd Respondents herein to provide the court and the petitioner with the following particulars:

- i. Form 35 A from all polling stations in Buuri Constituency.
- ii. Official and Certified poll results from Buuri Constituency for Member of Parliament.
- iii. Form 35 B from all polling stations in Buuri Constituency.
- iv. Form 35 (c) from polling stations in Buuri Constituency.
- v. Voters Register for Buuri Constituency
- vi. That the court do order that prayer (b) do order that prayer (b) be complied with within a specified time frame at the petitioners cost.
- vii. That cost of this application be in the course.

The application was based on the grounds that 1st and 2nd Respondent had refused, declined and or failed to supply them on request;

That the 3rd Respondent is apprehensive of the safety of the ballot boxes since he shall be seeking for recount.

That the forms or documents are essential in determining this petition.

That the 1st and 2nd respondents are the legal custodians of the forms sought to be produced and have a constitutional mandate to provide the forms or documents for a fair hearing.

The application was also based on the supporting affidavit sworn by John Mugambi Angaine in which he averred that he was dissatisfied with the results and hence the petition;

That his personal attempts to get forms 35 A, 35 B and 35 C and the manual register for Buuri Constituency and official certified Results from 1st and 2nd Respondent have been futile;

He also averred that he was advised that further particulars can be ordered by the court to be furnished;

He averred that the court is bestowed with the power to order what is just and essential for the determination of the petition.

When the application came up for hearing 16th October 2017 the 1st and 2nd Respondents counsel and the Petitioners counsel consented to the application being allowed and that the 1st and Respondents to allow the affixing of additional seals to ballot boxes containing election materials in respect of the election for Buuri Constituency and that the petitioner provides a flash disk in which he will be provided with forms 35 As, 35 (B) and 35 (C) on soft copy.

Mr Muthomi Advocate for the 3rd Respondent on the other hand opposed the application. Mr Muthomi said application is defective on its face and orders granted can't be granted in the form in which it is crafted.

The reasons were that petitioner should be having form 35A. That a good number of forms sought are unknown in law; He said form 35 b series are prepared at the constituency and 35(c) series are issued to winning candidate.

He pointed at the defects on the grounds including ground 2 which states that 3rd Respondent is apprehensive when it should actually be the petitioner;

He said the petition relates to only a few polling stations as per the affidavits supporting the petition and there is no reason for seeking for preservation of all the ballot boxes from all polling stations. He said scope of dispute should not be expanded beyond the few polling stations mentioned in the petition and affidavits. He said the forms the petitioner requires are already attached to 1st Respondents response to the petition and there is no need for further furnishing.

He said application is not well conceived and he is not ready to concede. When process is not merited.

I have considered the 3rd Respondents objection to the consent between the 1st Respondent and Petitioner and find that Mr Muthomi doesn't say what he would want done with application dated 5th September 2017 if the consent is not recorded.

If it is that he would like to be struck out summarily for being defective, then the view of this court is that, that would be drastic to do that when the defect as confirmed by Mr Muthomi is merely that of form and not substance.

It is true there are a few typographical and grammatical errors but for instance when petitioner has written that '3rd Respondent is apprehensive' instead of 'petitioner is apprehensive' that is a mistake that can be cured with an amendment that cannot in anyway prejudice the 3rd Respondent. It may be true that hand copies of forms 35 A, 35 B and 35 C have been annexed to the 1st and 2nd Respondents responses but the 1st Respondent is the one conceding that in the interest of justice they can supply the documents

and/or forms that petitioner applied to be furnished in soft copy.

There are many mistakes made by counsel who drew the petitions

and application but it would be unfair to visit the mistakes on petitioner when the mistakes do not get to the root of the dispute. I will therefore make an order that the petitioner and even 3rd Respondent if he so wishes provide flash disk for storage of the forms applied for by the petitioner from 1st Respondent.

In regard to affixing additional seals on the ballot boxes, this court has not yet heard or taken evidence to establish whether or not scrutiny and/or recount will be ordered for and in respect of which ballot boxes so that it can't order for partial affixing of additional seals and leave others. If and when it is established that it was not necessary to affix additional seals in only a few ballot boxes then appropriate orders will be issued.

The ballot boxes will therefore remain in the IEBC warehouse where there are currently housed. The Petitioner and the 3rd Respondent in presence of 1st and 2nd Respondent and under supervision of the DR are allowed to affix additional seals.

The DR to take an inventory of the serial numbers of the seals affixed by respective parties.

The inventory (s) to be signed by all parties and copies made for each party.

The duly signed inventory to be filed in court.

Hon. A. Ong'injo J

17.10.2017

Ruling Signed Delivered and Dated this 17th Day of

October 2017.

In the presence of:-

Petitioner: - MS Mutuma holding brief for Gitonga.

1st Respondent: - MS Mwilaria Advocate holding brief for

2nd Respondent: - Mwongera for 1st and 2nd Respondent.

3rd Respondent:- MS Mwilaria Advocate Holding brief for

Muthomi for 3rd Respondent

Hon. A. Ong'injo J

17.10.2017

Mr Mutuma Advocate

We pray for a copy of the ruling.

Order

Copies of ruling to be supplied to the parties at their own cost.

Hon. A. Ong'injo J

17.10.2017