



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ELECTION PETITION APPEAL NO. 6 OF 2017**

HASSAN ADEN  
OSMAN.....PETITIONER

VS.

THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (I.E.B.C)....1<sup>ST</sup>  
RESPONDENT

THE MANDERA COUNTY RETURNING OFFICER (DAVID MARO ADE).....2<sup>ND</sup>  
RESPONDENT

MOHAMED MAALIM MAHAMUD.....3<sup>RD</sup>  
RESPONDENT

**RULING**

1. After the General Election held Countrywide on 8<sup>th</sup> August 2017, David Maro Ade (The 2<sup>nd</sup> Respondent or Presiding Officer) declared Mohamed Maalim Mahamud (The 3<sup>rd</sup> Respondent) as the winner of the contest for Senator of Mandera County. Hassan Aden Osman (**The Petitioner**) is aggrieved by that Result and has presented this Petition against the two Respondents and The Independent Electoral and Boundaries Commission ((I.E.B.C) or The 1<sup>st</sup> Respondent).

2. As is evident from the Petition dated 5<sup>th</sup> September 2017, the Petitioner's grievances are very substantially in respect to events and things allegedly done or omitted to be done in, about or in respect to Polling Stations within Mandera North Constituency. These Polling Stations (hereinafter '**the specified Polling Stations**') are:-

Ado Saden Polling Station 1; Ashabito Primary School 1; Ashabito Primary School 2; Awara Primary School Balanqa Polling Station 1; Bambo West Polling Station; Barwaqo Primary School 1; Barwaqo Primary School 2; Bire Centre Polling Station; Bur John Polling Station 1; Dara Farma Polling Station 1; Dara Farma Polling Station 2; Darab Athathi; Garsey Polling Station 1; Garsey Primary School Polling Station 2; Gofa Primary Polling Station 1; Guticha Primary Polling Station 1; Kajaja Polling Station 1; Kalicha Primary Polling Station 1; Kalicha Primary School Polling Station 2; Kalmalab Polling station 1; Koban Daka Polling Station 1; Koban Daka Polling Station 2; Korma Adow Polling Station 1; Kubi Primary School Polling Station 1; Ladeni Primary School Polling Station 1; Ladeni Primary School Polling Station 2; Lanqura Primary School Polling Station 1; Lanqura Primary School Polling Station 2; Libi Bul Primary Polling Station; Libin Girls Polling Station 1; Libin Girls Polling Station 2; Mado Wells Polling Station 2;

Morothile Primary Polling Station 1; Morothile Primary Polling Station 3; Morothile Primary Polling Station 2; Olla Primary Polling Station 1; Olla Primary Polling Station 2; Olla Primary Polling Station 3; Qorahey Primary Polling Station 1; Olla Primary Polling Station 2; Olla Primary Polling Station 3; Qorahey Primary Polling Station 1; Qordobo Nursery Polling Station; Rhamu Dimtu Primary School Polling Station 1; Rhamu Dimtu Primary School Polling Station 2; Saqira Village Polling Station; Sarman Primary School Polling Station; Shanqala Primary School Polling Station; Shir Shir Primary Polling Station 1; Sigare Hills Polling Station; Tossi Primary Polling Station 1; Tossi Primary School Pooling Station 2; Towfiq Primary; Usubey Center Polling Station 1; Usubey Center Polling Station 2; Yabich Primary Polling Station 2; Yabicho Primary Polling Station 1 and Yaqila Farms Polling Station 1.

3. In respect to these specified Polling Stations, the Petitioner has brought a Notice of Motion dated 5<sup>th</sup> September 2017 seeking the following Orders:-

1. *Spent*

2. *Spent.*

3. *Spent*

4. *Spent*

5. THAT pending the hearing and determination of this petition this Honorable Court be pleased to make an order for preservation and safekeeping of all the Kenya Integrated Electoral System Kits (KIEMS) used for the Polling Stations and Tallying Centers with respect to the Senatorial Election for Mandera County held on 8<sup>th</sup> August 2017 within Mandera North Constituency for purposes of preservation of material evidence in this petition.

6. THAT pending the hearing and determination of this Petition this Honourable Court be pleased to make an order for preservation and safekeeping of Election Material by 1<sup>st</sup> and 2<sup>nd</sup> Respondent including but not limited to: the ballot boxes; the written statements made by the presiding officers under provisions of the Elections Act; the printed copy of the register used during the election sealed in a tamper proof envelop; copies of the results of each polling station in which the results of the election are in dispute; the packets of spoilt papers; the marked copy register; packets of the counterfoils of used ballot papers; packets of counted ballot papers; packets of rejected ballot papers; polling day diary and the statements showing the number of rejected ballot papers and all other Election Material used for the Senatorial Election within Mandera North Constituency.

7. THAT pending the hearing and determination of this Petition an order do issue compelling the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to deliver into the custody and safe keeping of this Honourable Court as evidence all the Election Material used in the Mandera County Senatorial Election held on 8<sup>th</sup> August 2017 including but not limited to; the ballot boxes; the written statements made by the Presiding Officers under provisions of the Election Act; the printed copy of the register use during the Elections sealed in a tamper proof envelop; copies of the results or each polling station in which the results of Election ae in dispute; the packets of spoilt papers; the marked copy register; packets of counterfoils of used ballot papers; packets of counted ballot papers; packets of rejected ballot papers; polling day diary and the statements showing the number of rejected ballot papers and all other Election material used for the Senatorial election within Mandera Constituency.

8. THAT this Honourable Court do issue an order compelling the 1<sup>st</sup> Respondent to provide access to the Applicant of all the voter Registers, counterfoils and diaries indicating the first and last serial numbers of all the Polling Stations and Tallying Centers with respect to the Senatorial Election of Mandera County.

9. THAT this Honourable Court grants the Petitioner/applicant a read only access with permission

to copy:

- i. Information relating to the number of servers limited for Mandera North Constituency in the exclusive possession of the 1<sup>st</sup> Respondent.
- ii. Specific GPRS Location of each KIEMS Kit and their coordinates used for the Mandera North Constituency Senatorial for the period between and including 5<sup>th</sup> August 2017 and 11<sup>th</sup> August 2017.
- iii. Log in trails of users and equipments into the KIEMS database management systems for Mandera North Constituency.
- iv. Polling station allocation for each of the KIEMS Kits used in Mandera North Constituency.
- v. Administrative access log into the IEBC public portal between 5<sup>th</sup> August 2017 to date for Mandera North Constituency.

4. The Motion is supported by a lengthy Affidavit but, thankfully, the Petitioner's Counsel has in his written submission capsuled the basis of the Application into four:-

- (a) That there is evidence of tempering with Election materials including the disappearance of a KIEMS KIT machine.
- (b) IEBC is on the process of retrieving and reconfiguring the KIEMS machines in preparation for the upcoming Presidential Elections.
- (c) There are prayers for scrutiny and recount thereby necessitating preservation.
- (d) The materials are currently out of the Court's jurisdiction.

5. The Respondents oppose the Application. Some of the Grounds of Opposition overlap. Together the Respondents assert that:-

- (a) The Orders sought are not sustainable and at any rate before the Election Petition commences.
- (b) The Application is made on the basis of bare allegations and unsubstantiated suspicion.
- (c) The Electoral materials are already preserved for a period of three (3) years after the declaration of Election Results by operation of Article 86 of The Constitution of Kenya, 2010, read together with Regulations 86 and 93 of The Elections (General) Regulations 2012, Rule 16(3) of The Elections (Parliamentary and County Elections) Petition Rules 2017(hereinafter **the Rules**) and Regulation 17 of The Elections (Technology) Regulations 2017.
- (d) The preservatory Orders sought are premature in that such Orders or Directions can only be issued under Rule 16(1) of The Rules on conclusion of the pre-trial conference and with concurrence of the parties.

6. At the hearing, Mr. Ojienda S.C appearing for the Petitioner informed Court that the Petitioner would not be pursuing prayer 5 as the Petitioner felt sufficiently served by an Order made in Mandera Election Petition No. 1 of 2017. In respect to Prayer 8 which touches on Scrutiny and recount, the Petitioner reserved this for a later day in the proceedings after some level of evidence will have been received by Court. The Court is therefore left to determine prayers 6,7 and 9 of the Motion.

7. The Court has read the Petition, the Motion, the Replies to the Petition, the Grounds of Opposition of

the Motion and considered Counsel's written and oral submissions. As a prefatory, this Court must determine whether the bringing of this Application prior to the Pre-trial Conference envisaged by Rule 15 of The Elections Petition Rules renders the Motion premature.

8. For purposes of facilitating the just, expeditious, proportionate and affordable resolution of Elections Petitions (see Rule 4), the Rules that have been published to apply and govern procedure for the hearing of Petitions in respect of Elections of Members of Parliament, County Governors and Members of County Assemblies (Rule 3). The Petition at hand is in respect to a Senatorial position and therefore an Election of a Member of Parliament and The Rules are obviously applicable.

9. By virtue of Rule 15, an Election Court is enjoined to schedule a Pre-Trial Conference within seven days after the receipt of the last response to a Petition. The purpose of the Pre-trial Conference is to settle certain matters set out in Sub-rule (1) and to hear and determine interlocutory applications. There is then Rule 16 which provides:-

“(1) On conclusion of the pre-trial conference under rule 15, the election Court may give directions on –

- (a) The storage of the election materials including ballot boxes and documents relating to the petition;
- (b) The handling and safety on the election materials; or
- (c) The time for furnishing the election materials to the election court.

(2) In giving directions under Sub-rule(1), the Election Court shall-

- (a) consider the prudent, efficient and economic use of storage and transport facilities;
- (b) consider the maintenance of the integrity of the election materials; and
- (c) ensure that the election materials are not interfered with.

(3) An election Court may direct that the Commission maintains the custody of all election materials in relation to a petition.

(4) Only the material relating to a particular petition may be furnished to an election Court.

(5) The election Court may order that additional seals be placed on the ballot boxes related to the election for which a petition has been lodged.

10. Admittedly, the Motion before Court is substantially in respect to storage and preservation of Election Materials. Ideally, and generally, directions as to the storage, handling and safety, and time for furnishing Election materials to the Election Court ought to be given on conclusion of the Pre-trial Conference under Rule 15. The rationale for the timing, I think, is that at the Pre-trial Conference the Election Court will have had a feel of the issues emerging from the Petition and heard any concerns (and settled some) of the Parties and would therefore be in a more informed position to give directions in respect to the Election Materials.

11. That said, the timing contemplated by Rule 16 cannot be cast in stone. There will be instances where the safety or integrity of Elections Materials may be under imminent danger such that a storage or preservatory application cannot await the scheduling or conclusion of a Pre-trial Conference. The attitude of an Election Court towards strict adherence of the Rules is moderated by the Provisions of Rule 5(1) of The Rules which reads:-

“(1) The effect of any failure to comply with these Rules shall be determined at the Court's

discretion in accordance with the provisions of Article 159(2)(d) of the Constitution”.

The edict of Article 159(2)(d) of the Constitution is that justice shall be administered without undue regard to procedural technicalities.

12. However, a suitor seeking preservatory Orders in respect to Election Materials prior to the Pre-trial Conference must demonstrate that there is a real apprehension (as opposed to a notional one) that the safety or integrity of the Election Materials is under threat. There must be good cause why the timetable set out in the subsidiary legislature must be overlooked or disrupted, even if temporarily.

13. It has to be remembered that one of the prayers (now abandoned) in the Motion before Court was for preservation of the information in the KIEMS KIT in respect to the specified Polling Stations. It is a matter of public notoriety that the KIEMS KIT used in the Election of 8<sup>th</sup> August 2017 need to be reconfigured for purposes of the fresh Presidential Election ordered by the Supreme Court. One of the reasons why this Court entertained the current Motion prior to the Pretrial was the sense of urgency this reality portended or created. That prayer having been abandoned it remains to be seen whether the rest of the Application deserved an urgent hearing. For now, this Court does not find the Motion to be premature.

14. Prayer 6 and 7 can be conveniently dealt with together. Prayer 6 calls for an order for preservation and safekeeping of Election Materials by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent. While prayer 7 bespeaks the delivery of the said Materials into the custody and safe keeping of this Honourable Court. There is convergence that under Article 86 of The Constitution, IEBC is required to put in place appropriate structure and mechanisms to ensure, inter alia, the safekeeping of Election materials. Article 86, as a whole reads:-

“At every election, the Independent Electoral and Boundaries Commission shall ensure that—

- (a) whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent;
- (b) the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station;
- (c) the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and
- (d) appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials”..

15. To give effect to this Constitutional Commandment, Regulation 86 of The Election (General) Regulations 2012 provides for the structure and mechanism for the safe keeping of Election Material in the following way:-

“(1) After the final tallying and announcement of results, the returning officer shall keep in safe custody the following documents—

- (a) copies of all election result declaration forms;
- (b) copies of the register of voters sealed and labelled; and
- (c) the Electronic Voter Identification Device.

(2) The returning officer shall—

- (a) put the polling station diaries in a separate ballot box, seal and label the box; and

(b) keep the sealed ballot boxes and all material relating to the election in safe custody for such period as may be required under these Regulations and the Act”.

In respect to retention to Electronic Data, Rule 17 of The Elections (Technology) Regulations, 2017 has the following provisions:-

“All electronic data relating to an election shall be retained in safe custody by the Commission for a period of three years after the results of the elections have been declared, and shall, unless the Commission or the court otherwise directs, be archived in accordance with procedures prescribed by the Commission subject to the Public Archives and Documentation Service Act (Cap. 19) and the Kenya Information and Communications Act, 1998”.

16. Election material is defined in the interpretation Section of the Election Act and means:-

“**election material**” means ballot boxes, ballot papers, counterfoils, envelopes, packets statements and other documents used in connection with voting in an election and includes information technology equipment for voting, the voting compartments, instruments, seals and other materials and things required for the purpose of conducting an election”;

17. As would be evident, part of Election Materials are Documents relating to an Election. These are deemed to be Public Documents and Regulation 93 of the Election (General) Regulations makes provision for their retention and inspection. It reads:-

“(1) All documents relating to an election shall be retained in safe custody by the returning officer for a period of three years after the results of the elections have been declared and shall then, unless the Commission or the court otherwise directs, be disposed of in accordance with procedures prescribed by the Commission subject to the Public Archives and Documentation Service Act (Cap. 19).

(2) Any person may apply to the High Court with notice to all candidates in the election concerned for authority to inspect documents retained under these Regulations, other than ballot papers and their counterfoils.

(3) For the purpose of an inspection under subregulation (2), the returning officer shall unseal the documents concerned in the presence of candidates or agents and the returning officer and candidates or their agents shall keep the documents under their scrutiny until they are resealed by the returning officer after the inspection is completed.

(4) The provisions of this Regulation shall not apply to documents that concern a pending election petition unless there is a court order granting such authority”.

What would amount to “Documents” is a discussion beyond the scope of this decision and must be left for another day.

18. It is because of this comprehensive regime of safekeeping and retention of Election Materials that the Respondents argue and submit that prayer 6 is superfluous and needless. IEBC’s position is that they are well aware of their statutory obligation to safe-keep Election Materials and they need not be supervised or even reminded.

19. Granted that IEBC is already mandated to safekeep Election Materials and to retain Election Documents, the request by the Petitioner is an invitation to this Court to consider and determine the circumstances, if any, when an Election Court should and can intervene to give Directions on the discharge of this mandate in connection with an Election Petition or Dispute.

20. The Respondents submit that the Election Court can only intervene upon the Petitioner Showing good Cause. I understand the Respondents to be arguing that before deserving of such intercession by the

Election Court the Petitioner must Show that, either willfully or by omission, IEBC is failing in its duty of storage and safekeeping of the Election materials. Mr. Lubullelah for the IEBC argued that if the Court fails to identify and delimit the occasion for intervention, then any person can, willy nilly and without just cause, ask for Orders such as these and walk away with them.

21. The Petitioner on the other hand makes the point that IEBC stands accused of mismanaging the Senatorial Election for Mandera and cannot be trusted with the Safety and Integrity of the Election Materials relating to the Election. In addition it is argued that the apprehension of tempering and loss of the Materials is real because, already, one of the KIEMS machines used in Mandera North has disappeared (See pages 1130 -1136 of the Petition).

22. This is my view of the matter. Rule 16 of the Election (Parliamentary and County Elections) Petitions Rules 2017 is on storage of Ballot Boxes and other materials and provides:-

(1) On conclusion of the pre-trial conference under rule 15, the election Court may give directions on –

(d) The storage of the election materials including ballot boxes and documents relating to the petition;

(e) The handling and safety on the election materials; or

(f) The time for furnishing the election materials to the election court.

(2) In giving directions under Sub-rule(1), the Election Court shall-

(a) consider the prudent, efficient and economic use of storage and transport facilities;

(b) consider the maintenance of the integrity of the election materials; and

(c) ensure that the election materials are not interfered with.

(3) An election Court may direct that the Commission maintains the custody of all election materials in relation to a petition.

(4) Only the material relating to a particular petition may be furnished to an election Court.

(5) The election Court may order that additional seals be placed on the ballot boxes related to the election for which a petition has been lodged.

23. This Rule, in my view, acknowledges that an Election Court may in the course of hearing require to scrutinize Election Materials relating to the disputed Election so as to get an insight of how the Election was conducted and managed. That scrutiny can be on the Courts on motion or at the prompting of a Party. Section 82(1) of the Election Act on scrutiny of votes reads:-

“(1) An Election Court may, on its own motion or on application by any party to the Petition, during the hearing of an Election Petition, order for a scrutiny of Votes to be carried out in such manner as the Election Court may determine”

24. In the matter at hand, the Petitioner has expressly signaled that he seeks the scrutiny, recount and re-tally of votes cast in the specified Polling Stations (prayer A of the Petition). Whether or not the Petitioner will succeed in this quest will, of course, be determined by Court if and when asked to do so.

25. When the journey of hearing an Election Petition begins there is no knowing whether or not the Court will require a scrutiny of Votes. So that as to act on the side of caution an Election Court must from the outset be concerned about the integrity, storage and safety of Election Materials. And it may, where

necessary, give directions in this regard (See the Express provisions of Rule 16). That concern is heightened when the Petitioner has from its pleadings made it clear that it shall be seeking an Order for scrutiny. This Court takes the view that because of the dynamics involved in the hearing of an Election Petition which includes the possibility of an Election Court, on its own Motion, requiring a scrutiny of Votes, the threshold to be achieved by a party requesting for directions on the storage and safety of Election Materials is low. That said the Court should be careful not to give directions that are uneconomical, inefficient and onerous. Scrutiny being one of the prayers sought herein, this Court is satisfied that the Petitioner is deserving of some orders of preservation of the Election Materials.

26. Although not expressed in the Petition itself, Counsel for the Petitioner requested that his client be allowed to place additional seals on the Ballot Boxes. This is an Order that an Election Court may give. Rule 16(5) provides:-

“(5) The election Court may order that additional seals be placed on the ballot boxes related to the election for which a petition has been lodged”.

As this Court is not told of any practical difficulties in implementing the placing of additional seals, the Court readily grants it. The 3<sup>rd</sup> Respondent shall also be permitted to place his own seals.

27. The Court is aware that once the Ballot Boxes are secured then, ordinarily, a host of other Election materials are protected. This is because the following are placed in the Ballot Boxes:-

- i) Valid votes
- ii) Rejected Ballots
- iii) Unused Ballot papers
- iv) Counterfeits of used Ballot papers
- v) Copy of election Results declaration form
- vi) Stray ballot papers

(See Regulation 81 of The Elections (General) Regulations 2012). In addition the Polling Stations Diaries are put in a separate Ballot Box (Regulation 86(2)) thereof).

28. Prayer 7 asks IEBC to deliver the Election Materials to the custody of this Court. The Court is told that the Election Materials are currently at Mandera. Is there need for the Materials to be transferred now to Nairobi where the Election Court is sitting?

29. Any Court must be pragmatic about orders it makes. Orders must be sensible and realistic. And in respect to Orders of storage of Election Materials the Election Court will be sensitive to the prudent, efficient and economic use of storage and transport facilities. Sub rule 2 of Rule 16 provides:-

“In giving Directions under sub-rule (1), the Election Court shall:-

- a) Consider the prudent, efficient and economic use of storage and transport facilities.
- b) Consider the maintenance of the integrity of the Election materials; and
- c) Ensure that the Election materials are not interfered with.

The provisions of the Subrule do not brook of any ambiguity. Whatever orders the Court makes, its primary object is that the integrity and safety of the Election materials is maintained.

30. Bearing this in mind I take the view that having made an Order for placing of additional seals in the Ballot Boxes, the Election materials should remain in the custody of IEBC until and when required by Court. There is no need of incurring further costs on transport and storage when there is no knowing if and when an Order for scrutiny shall be made. This decision is also informed by the fact that the Petitioner has not placed any tangible evidence that the safety and integrity of the Election Materials is under peril. Lastly, this Court takes consolation in the provisions of Sub Rule 2 of Rule 16 which allows an Election Court to direct that IEBC maintains the custody of all Election Materials in relation to a Petition. This would be, in addition to IEBCs' Statutory obligation, under the Direction of an Election Court.

31. Prayer 9 is the more controversial. In it the Petitioner seeks a Read Only Access with permission to copy the following( in respect to the specified Polling Stations):-

vi. Information relating to the number of servers limited for Mandera North Constituency in the exclusive possession of the 1<sup>st</sup> Respondent.

vii. Specific GPRS Location of each KIEMS Kit and their coordinates used for the Mandera North Constituency Senatorial for the period between and including 5<sup>th</sup> August 2017 and 11<sup>th</sup> August 2017.

viii. Log in trails of users and equipments into the KIEMS database management systems for Mandera North Constituency.

ix. Polling station allocation for each of the KIEMS Kits used in Mandera North Constituency.

Administrative access log into the IEBC public portal between 5<sup>th</sup> August 2017 to date for Mandera North Constituency.

32. The Petitioner hinges this request on Article 35 of The Constitution, Section 4(1) of The Access to information Act 2016 and Section 27(1) of The IEBC Act of 2011. Article 35 provides:-

“(1) Every citizen has the right of access to—

(a) information held by the State; and

(b) information held by another person and required for the exercise or protection of any right or fundamental freedom.

(2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.

(3) The State shall publish and publicise any important information affecting the nation”.

Section 4(1) of the Access to Information Act 2011 reads:-

“(1) Subject to this Act and any other written law, every citizen has the right of access to information held by—

(a) the State; and

(b) another person and where that information is required for the exercise or protection of any right or fundamental freedom.

Section 27(1) of The IEBC Act of 2011 provides:-

“(1) The Commission shall publish and publicise all important information within its mandate affecting the nation”.

33. I accept the validity of the following statement by Mativo J. in Mercy Nyawade vs. Banking Fraud Investigations Department & 2 others (Petition No. 143 of 2017):-

“Offering citizens access to state-held information is “one of the most effective ways of upholding the constitutional values of transparency, openness, participation and accountability” Currie and De Waal suggest that accountability is unattainable if the government has a monopoly on the information that informs its actions and decisions. Access to information is not only fundamental to a properly-functioning participatory democracy: it also increases public confidence in government and enhances its legitimacy”.

34. But given the wording Article 35(1) of the Constitution which is replicated in Section 4(1) of The Access to Information Act, there is a threshold to be reached before an Applicant can avail himself of this right. The threshold is that:-

(i) The Requester must state what right or fundamental freedom he/she wishes to exercise or protect with the information requested.

(ii) The information required.

(iii) How the information would assist him/her in exercising or protecting the right.

(See the decision of Lenaola J(as then was) in Timothy Nyoja vs. Attorney Gerald & another [2014] eKLR for a detailed discussion of these requirements).

35. Admittedly in bringing this Petition, the Petitioner is assessing his Political Right guaranteed by Article 38 of The Constitution. But that alone cannot entitle him to the information sought because he must also demonstrate how the requested information will assist him in exercising or protecting that right. This is where the Petitioner is rattled.

36. At the heart of the Petitioner’s request is that the information will enable the Court to probe the manner in which:-

a) The KIEMS KIT were deployed and used.

b) The Results of the Election were electronically transmitted

And whether this was done in compliance with the law.

37. As stated earlier, on the issue of information in the KIEMS machines, the Petitioner abandoned his quest because it was happy with the Order of the storage of that information made in Election Petition NO. 1 of 2017.

38. In respect to the transmission of the Results, the Respondents argue forcefully that Electronic Transmission of Results is restricted to Presidential Elections and do not extend to other levels of Elections. These argument is on the basis of the provisions of Section 39(1B) and 39(1C) of The Elections Act which reads:-

“39(1B)The Commission shall appoint county returning officers to be responsible for tallying, announcement and declaration, in the prescribed form, of 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”.

(1C) For purposes of a presidential election the Commission shall —

- (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 to the national tallying centre;
- (b) tally and verify the results received at the national tallying centre; and
- (c) publish the polling result forms on an online public portal maintained by the Commission.

39. At the hearing Ojienda S.C had a difficulty locating any provisions of Statute that required that transmission of Results of a Senatorial Election be electronic. But there is Regulation 82 of The Elections (General) Regulations, 2012 which provides as follows,

“82. The Presiding Officer shall, before ferrying the actual results of the Election to the Returning Office at the Tallying venue, submit to the Returning Officer the Results in electronic form, in such manner as the Commission may direct and The Results submitted under Sub-Regulation (1) shall be provisional and subject to confirmation after the procedure described in Regulation 76”.

Regulation 76 is on counting of votes by Presiding Officers.

40. Upon receipt of results from all the Polling stations, the Constituency Returning Officer collates the Results and delivers them to the County Returning Officer who shall then tally and announce the Results for the Senator. See Regulations 87(1)and 87(2) The Elections (General) Regulations which reads:-

(1) The constituency returning officer shall, as soon as practicable—

(a) deliver to the county returning officer all Forms 37B, 38B and 39B from the respective constituencies and the collated results; and

(b) deliver to the National tallying centre all the Form 34B from the respective polling stations and the summary collation forms.

(2) The county returning officer shall upon receipt the results from the constituency returning officers as contemplated under regulation (1)—

(a) tally and announce the results for the county governor, senator and county woman representative to the National assembly;

(b) complete Forms 37C, 38C and 39C set out in the Schedule in which the county returning officer shall declare, as the case may be, the—

(i) name of the respective electoral area;

(ii) total number of registered voters;

(iii) votes cast for each candidate or referendum side in each polling station;

(iv) number of rejected votes for each constituency;

(v) aggregate number of votes cast in the respective electoral area; and

(vi) aggregate number of rejected votes; and

(c) sign and date the relevant forms publicly and declare the results for the position of—

(i) county Governor;

(ii) Senator; and

(iii) county woman representative to the National Assembly; and

(d) issue certificates to persons elected in the county Governor, Senator, county woman representative to the National Assembly in Forms 37D, 38D and 39D respectively set out in the Schedule.

41. For the purposes of Senatorial Election the requirement to transmit Results electronically appears to be only in respect to provisional results from the Presiding Officer to the Returning Officer at the Tallying Centre(Regulation 82). What needs to be emphasized is that the electronically transmitted results are provision.

42. This Court has carefully studied the Affidavit in support of the Application and was able to find an allegation in respect to transmission of results from Polling Station in paragraph N(V) of the Affidavit. It is alleged that:-

“There was deliberate and unexplained delay in the transmission of Results from various Polling Stations in Morothile, Rhamu Dimtu and Gulicha Wards in Mandera North Constituency. The delays therein were deliberate as they were Results which had been cooked with the sole aim of hiding the huge gap of votes that as between the Petitioner and the Respondent”.

It is not clear whether the transmission complained of is the manual submission of results or the electronic transmission. What is clear is that there is no complaint that the results that may have been transmitted differed from those announced by the Presiding Officer at the Polling Station.

43. I have to reach a conclusion that, as of now and on the material before Court, it is not apparent to me that the Access and information sought in prayer 9 shall assist the Petitioner prosecute the Petition and prove his Claims or would otherwise help him protect or exercise his Political Rights under Article 38.

44. Ultimately, the Motion succeeds only in respect to the following:-

44.1 The Petitioner and 3<sup>rd</sup> Respondent shall be at liberty to place additional seals on the Ballot Boxes for the specified Polling Stations.

44.2 The Petitioner and 3<sup>rd</sup> Respondent shall be entitled to place only one additional seal to each Ballot Box.

44.3 The Petitioner and 3<sup>rd</sup> Respondent shall choose different colours of seals to be used to differentiate their seals.

44.4. The placing of seals shall be done at the same time under the supervision of IEBC who shall, with reasonable Notice inform the Parties of the time and venue for placing of the seals.

44.5 All Ballot Boxes and Election Materials in respect to the Election for Senator of Mandera County shall remain where they are at the time of delivery of this Ruling and under the custody of IEBC until and upon further Orders of this Court.

44.6 As the Motion has partially succeeded but also partially failed, each party shall bear its own costs.

**Dated, Signed and Delivered in Court at Nairobi this 16<sup>th</sup> Day of October, 2017.**

**F. TUIYOTT**

**JUDGE**

**PRESENT;**

Juma h/b Ojienda for Petitioner

Mutubwa for 1<sup>st</sup> and 2<sup>nd</sup> Respondent

Kilikumi for 3<sup>rd</sup> Respondent

Alex - Court Clerk

**Court: By consent:**

a) The seals to be placed by the Petitioner and the 3<sup>rd</sup> Respondent shall be to all apertures on the ballot boxes, where that is possible, but as long as the Petitioner and the 3<sup>rd</sup> Respondent shall be at liberty to place an equal number of seals.

b) The placing of seals shall be arranged and done within 7 days hereof.

F. TUIYOTT

**JUDGE**