REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ELECTION PETITION NUMBER 12 OF 2017

(Consolidated with No. 10 of 2017)

IN THE MATTER OF PARLIAMENTARY ELECTIONS FOR NYARIBARI CHACHE CONSTITUENCY

CHRIS MUNGA N. BICHAGE.....1ST PETITIONER

ZAHEER JIHANDA.....2ND PETITIONER

JAMES F. O. KENANI.....3RD PETITIONER

VERSUS

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION .....1ST RESPONDENT

JULIUS MEUTA OKEYO .....2ND RESPONDENT

RICHARD NYAGAKA TONGI .....3RD RESPONDENT

RULING

1) This ruling is in respect of an oral application by the 1st Petitioner made in Court today.

2) Counsel for the 1st Petitioner has submitted that they had requested that as the case progresses, they were to be allowed to look at the data from the KIEMS kits used in Nyaribari Chache Constituency. The 1st Petitioner now has the KIEMS kit data. He has made some analysis. It is sought that the 1st Petitioner makes comments on those *(sic)* data so that the information can be part of the record.

3) Counsel would not wish to close his case at this stage.

4) The application is supported by Ms Makobu for the 2nd and 3rd Petitioner who has urged that since it is the 1st Petitioner's case, the 1st Petitioner should be given his day in Court.

5) Mr. Terer for the 1st and 2nd Respondents opposes the application. He states that it is not clear what is sought. A request does not exist in Law. All along there has been complaint that data was not supplied. Counsel is suprised that it is now admitted data was supplied.

6) It is submitted further that this Court is constituted as an Election Court. Before Court is a petition. The Petitioner had 28 days to prepare his case. He filed a petition together with affidavits which became evidence in the case.

7) The 1st and 2nd Respondents answered and replied to the petition and the affidavits vide their response to the petition and the replying affidavits.

8) It is urged that the 1st Petitioner has testified. He has been cross examined. The documents stated are not part of the record. They were not part of the documents presented in affidavit form which were to be responded to.

9) No leave is sought to introduce the documents as part of the evidence in this case.

10) If request is allowed, it will offend the Law. It will amount to expanding the petition.

11) Learned Counsel for the 3rd Respondent opposes the application. The Court is invited to take judicial notice of the fact that it is a total disregard of the rules of evidence.

12) The 1st Petitioner is purporting to introduce evidence at the tail end of re-examination.

13) When hearing commenced, no application was made to place the evidence before the Court so that the witness could be cross examined on it. On that ground alone, the application should be dismissed.

14) It is urged that the Court is exercising some special jurisdiction. There is an attempt to place evidence before Court in terms of a report or something *(sic)*. The Constitution stipulates that the petition must be filed within 28 days after declaration of results.

15) More so, the request is made when the Respondents have closed their cross-examination and the 1st Petitioner has been re-examined. There is no legal basis for the application in the Elections Act and the Rules.

16) The order extracted on the 7/11/2017 was never served.

17) In all fairness, if there was a need to file an application for the Court to consider the evidence, why wait until now? This would be against every tenet of Law.

18) I am urged to reject the application. Article 50 as regards fair hearing shows the 1st Petitioner ought to have brought the information by affidavit. It is an abuse of Court process.

19) In response, Mr. Ochwang'i states that there is a request in the petition and there is no request to expunge the same. That request is still on Court record. The request is not illegal. It is within the Elections Act and the Constitution. His client has not been supplied with a register.

20) The order allowing the data was made after 28 days. The request is not an abuse of the Court process.

21) It is urged that an analysis of the date has been made. This is not the only case where a witness can be recalled. The witness can be recalled and cross examined. The 1st Petitioner wishes to rely on the data.

22) I have had occasion to consider the submissions by counsel, the applicable Law and the record herein.

23) It is common ground that the 1st Petitioner has testified. He has been cross examined and re-examined.

24) It is common ground that the Court granted the 1st Petitioner an order to be supplied with data from KIEMS kit.

25) Of determination is whether it is legally tenable to have the 1st Petitioner recalled to comment (the exact words used by Counsel for the applicant) on the data which he has now analyzed so that the information forms part of the record.

26) From the outset, I need not belabour the fact that election petitions are special proceedings with specific procedures and conditions as seen in the Constitution, the Elections Act and the Rules made thereunder.

27) Rule 8 of the Elections (Parliamentary and County Elections) Petition Rules gives in great detail what constitutes a petition.

28) Rule 12 makes provisions for affidavits giving a clear picture of what form evidence in election petitions should take.

29) Rule 12 (12) provides:

> **"Rule 12: An affidavit shall form part of the record of the hearing and may be deemed to be the deponent's evidence for the purposes of an examination in chief."**

30) In a nutshell all evidence in a petition must be included when a petition is filed.

31) Under Rule 15 (I), the Court has power during the pre-trial conferencing to give directions. Under Rule 15 (1) (h) the Court has power to give directions as to the filing and serving of any further affidavits or the giving of additional evidence.

32) In our instant suit, the 1st Petitioner applied and was granted an order to be supplied with data from the KIEMS kit. There was never an application for additional evidence.

33) In view of the 28 days limit for the filing of a petition from the date of declaration of results, and in view of the fact that the petition should include all the evidence to be relied on, the granting of an order to a party to be supplied with evidence is not tantamount to admission of the material supplied as evidence in Court.

34) In **Supreme Court Presidential Petition Case No. 4 of 2017, Njonjo Mue & Another v The Chairperson of the Independent Electoral and Boundaries Commission & Others**, the Court gave an order for access to material by the Petitioners but the report generated therefrom was not admitted as part of the evidence.

35) A good practice and a more legally appropriate and resourceful approach by a party seeking use of data as in this case would be to apply to the Court sitting as the High Court for orders compelling supply of data within the 28 days window allowed for filing a petition. This would enable incorporation of the information so obtained in the petition.

36) This is as held in **John Opore v IEBC [2017] eKLR** where the Court, in a Constitution Petition and invoking the right of access to forms 32A, polling station diaries and the number of voters identified by the electronic voter identification devices at every polling station in Bonchari Constituency was moved and proceeded to grant access to information sought.

37) Such timeous prayer for and receipt of information would enrich the intended petition and avoid pitfalls that befall the application before me.

38) Suffice is to note, the Court only grants reliefs sought for. What is granted cannot be stretched to include what was not sought for in the first place.

39) Indeed, looking at the application herein, it is not certain what is sought. How will the document be introduced without an affidavit? Who will verify the analysis by the 1st Petitioner? What becomes of the Respondents who are not seized of this analysis? Will there be need to engage an expert? How does an expert who is not included as a witness in the petition legally gain entry into the proceedings? All these questions remain begging and militate against the granting of the orders sought.

40) The prayer sought will be tantamount to expanding the scope of the petition. This would play havoc to, not only the Respondents' cases, but to the Court's schedule and timelines. Any admission of new evidence at this stage would of necessity require further responses.

41) This would fly on the face of **Section 76(1) (a)** of the Elections Act. That Section provides:

> **"Section 76(1) (a): A petition to question the validity of an election shall be filed within twenty eight days after the declaration of the results of the election and served within 15 days of presentation."**

42) It was incumbent upon the 1st Petitioner to file the petition complete with all the evidence intended to be used within 28 days of the declaration of results. Any attempt to introduce evidence in the manner aforesaid at this stage is not legally tenable. The strict discipline set under the Constitution, the Elections Act and the Rules made thereunder must be complied with.

43) In **Raila Odinga v IEBC & Others [2013], eKLR** the Court stated:

> **"The requirement of such a disciplined trial framework fully justifies the unlimited exercise of Court's discretion in making orders that shape the cause of the proceedings..."**

44) It follows that parties must adhere to the strict discipline set under the Constitution, the Elections Act on the Rules made thereunder. The petition must be filed in compliance with all the contents envisaged under the Law. Any prayer for additional evidence must be specifically sought, and, as is already demonstrated in Case law, that discretion is very sparingly exercised.

45) The application before me offends the rules of evidence. We have a witness who has been examined, cross examined and re-examined. The evidence he seeks to introduce is an analysis which would need verification and certification and possible explanation by an expert. Of what value would such evidence be even if it was commented on by the 1st Petitioner noting that it is not included as required in the petition?

46) On the whole, the application before me is not merited. I dismiss the same. No order as to costs.

Dated, Signed and Delivered in Kisii this 30th day of November, 2017.

A. K. NDUNG'U

JUDGE

Ruling read in open Court in presence of:

Ochwangi for the 1st Petitioner

Ms Makobu for the 2nd & 3rd Petitioner

Mr. Terer for 1st & 2nd Respondent

Mr. Omogeni (Sc) for 3rd Respondent

A. K. NDUNG'U

JUDGE