



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**ELECTION PETITION NO. 14 OF 2017**

**IN THE MATTER OF THE GUBERNATORIAL ELECTIONS FOR WAJIR COUNTY**

**BETWEEN**

**AHMED ABDULLAHI MOHAMAD.....1<sup>ST</sup> PETITIONER**

**AHMED MUHUMUD ABDI.....<sup>ND</sup> PETITIONER**

**AND**

**HON. MOHAMED ABDI MOHAMED.....1<sup>ST</sup> RESPONDENT**

**GICHOHI GATUMA PATRICK.....2<sup>ND</sup> RESPONDENT**

**INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. On 10<sup>th</sup> November, 2017, this court made an order for partial scrutiny and recount in several polling stations in Wajir County. On 16<sup>th</sup> November, 2017, the 2<sup>nd</sup> and 3<sup>rd</sup> respondent filed a Motion on Notice seeking the review of the said order. The application was brought under the provisions of **Articles 259(1) and 159(2) (d) of the Constitution, Rules 4(1) and 16 of the Election Petition Rules, Section 80 of the Civil Procedure Act and Orders 45 and 51 of the Civil Procedure Rules.**

2. The Motion sought two substantive orders, to wit, that the scrutiny ordered be undertaken within Wajir County instead of Nairobi and that the election materials for the polling stations in Tarbaj Constituency, the subject of the scrutiny order be availed once the existing orders relating to the warehouse housing the materials is lifted.

3. The grounds for the application were set out both in the body of the Motion and the supporting affidavit of Patrick Gichohi Gatuma sworn on 16<sup>th</sup> November, 2017. These were that; the order for scrutiny affected five Constituencies within Wajir County; that the election materials for the Tarbaj Constituency cannot be accessed for reason of another Court Order barring the 3<sup>rd</sup> respondent from accessing them; that while the 2<sup>nd</sup> and 3<sup>rd</sup> respondent have been able to bring all the election materials to Wajir town; they have been unable to transport them to Nairobi due to bad weather. In the circumstances, the said respondents sought that the scrutiny be undertaken at Wajir town and that the materials for Tarbaj Constituency be availed once the orders affecting them in another petition has been lifted.

5. The deponent of the supporting affidavit swore that immediately the order for scrutiny was made, he requested the 3<sup>rd</sup> respondent to avail the original Form 37A's and the subject SD cards which have already been availed; that he had received at Wajir town, all the election materials sought save for those from Tarbaj Constituency in respect of which an order had been made in **Election Petition No. 6 of 2017 Idris Abdi Abdullahi v. Ahmed Bashane & 2 Others** for additional padlocks to be placed on the warehouse wherein the materials are kept.

6. It was further contended that effort to transport the materials to Nairobi had been hampered by ongoing rains making roads in Wajir unpassable; that during the fresh Presidential elections vehicles transporting election materials and security had overturned; that any attempt to transport the materials to Nairobi as ordered might lead to the ballot boxes being damaged including the seals being broken.

7. Ms. Okimaru, Learned Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> respondent submitted that despite there being no express provision in the Election Laws on whether an Election Court has power to review its orders, this Court still retains inherent power to do so. Counsel cited the decisions in **Godfrey Masaba v. IEBC & 2 Others [2013]** and **Nuh Nassir Abdi v. Ali Wario & 2 Others** in support of that proposition. Counsel urged that, in considering the application, the court should be guided by the overriding objective set out in the **Elections (Parliamentary and County Elections) Petition Rules, 2017** (hereinafter "**Election Petition Rules**") as was held in the case of **Ferdinand Ndungu Waititu v. Independent Electoral and Boundaries Commission and Others [2013] Eklr.** Counsel therefore urged that the court be guided by the provisions of Order 45 in determining the application.

8. It was Ms. Okimaru's submission that the applicants were not aware of the orders of Muigai J in **EP. No. 6 of 2017** at the time the order was made; that due to the poor road network in Wajir coupled with the poor weather conditions, it was risky and insecure to transport the election materials to Nairobi from Wajir. Counsel relied on **Rule 4(1) of the Election Petition Rules** and the decision in **Richard Ncharpi Leiyagu v. IEBC & 2 Others [2013]** for the proposition that the resolution of election petitions should be affordable and that it would be expensive for the applicants to ferry the materials to Nairobi.

9. The application was opposed by the Petitioners and the 1<sup>st</sup> respondent. The petitioner's relied on the replying affidavit of Ahmed Muhumed Abdi sworn on 20<sup>th</sup> November, 2017. It was contended that the **Election Petition Rules** clearly specified the place and time for the hearing of this petition; that the weather conditions in Wajir was excellent; that while the applicants had asked for 14 days to avail the materials at the time of the order, the court had given 10 days. The deponent took issue with the photographs exhibited by the applicants in their affidavit in support.

10. The deponent further swore that the buses whose photographs were produced by the applicants ceased operating three months before the application was made; that the weather patterns for Wajir was excellent according to the report by the Meteorological Department; that flights and normal bus services to Wajir were uninterrupted.

11. As regards the order in **Election Petition No. 6 of 2017**, it was contended that the same was in respect of the Parliamentary election and not gubernatorial. The deponent expressed the fear that if the scrutiny is conducted in Wajir, the neutrality of the exercise and safety of the concerned may not be assured. He alleged that the application was an attempt to give the respondents a chance to interfere with the petition and perpetuate the complained of irregularities.

12. Mr. Omwanza, Learned Counsel for the Petitioners submitted that the place gazetted for the hearing of the petition was Nairobi; that no new matters had been raised to warrant an order for review; Counsel relied on the decisions in **Njeru v. Muturi & 2 Others [2008] 2 KLR 504** and **Kipkorir v. Langat & Another [2008] 2 KLR 586** for the propositions that there being no specific provision for review, the Election Court has no jurisdiction to review its decision and that where it is not demonstrated that there is new and important matter, no review can be ordered.

13. The 3<sup>rd</sup> respondent opposed the application vide his replying affidavit sworn on 20<sup>th</sup> November, 2017.

He contended that no good reason had been advanced to warrant an order for review; that there is an international airport at Wajir from where the materials can be airlifted if the roads were impassable. That scrutiny orders had similarly been issued for Tarbaj and Wajir East Constituencies in other petitions yet the 3<sup>rd</sup> respondent had not opposed their being conducted in Nairobi.

14. Mr. Macharia, Learned Counsel for the 3<sup>rd</sup> respondent associated himself with the submissions of Mr. Omwanza on the lack of jurisdiction for this court to grant the orders sought and reiterated his client's opposition to the application. Counsel however, took issue with the insinuation by the petitioners that the application was an attempt by his client together with the 2<sup>nd</sup> and 3<sup>rd</sup> respondent to perpetuate the irregularities complained of in the petition.

15. I have carefully considered the affidavits on record and submissions of Learned Counsel. This is an application for the review of this court's order made on 10<sup>th</sup> November, 2017 for scrutiny. The applicants seek extension of time within which to comply with the order in respect of delivery of election materials for Tarbaj Constituency and for relocation of the scrutiny from Nairobi to Wajir.

16. Since an issue of jurisdiction was raised, I need to deal with it first. It was contended that since there was no specific provision in either the ***Elections Act*** or the ***Election Petition Rules*** for review, this court lacks jurisdiction to entertain the application.

17. The Supreme Court of Kenya has put this matter very clearly in the case of ***Samuel Macharia & Another v. Kenya Commercial Bank & 2 Others [2012] Eklr*** as follows: -

***“A court’s jurisdiction flows from either the Constitution or legislation or both. Thus a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law. Where the Constitution exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation”.***

18. It is clear from the foregoing that a court cannot arrogate to itself jurisdiction which it does not have. Not even through ingenious interpretation of the law. The power must emanate from either the Constitution or statute.

19. In the present case, neither the ***Elections Act (No. 24 of 2011)*** nor the ***Election Petition Rules*** have any express provision for review of orders made by an Election Court. There is also no specific importation of the application of the ***Civil Procedure Act and Rules*** made thereunder to petitions. The question however, is whether such absence of express provision bars this court from reviewing its order if there is good reason to do so.

20. Under ***section 80(1) (d) of the Election Act***, the Election Court is obligated in the exercise of its jurisdiction, to ***“decide all matters that come before it without undue regard to technicalities”***. In this regard, I agree with Ms. Okimaru that, although the Election Court is a special court that is gazetted for a special purpose, it does not lose its inherent power in the exercise of that special jurisdiction. If that were to be so, the Election Court will lose its character of a court of justice.

21. The inherent jurisdiction which is innate in a court confers the court or preserves the court's special character of being a custodian of justice. For that reason, a court cannot lose and/or surrender that inherent power just because it is exercising a special jurisdiction. It is a power to be exercised for the ends of justice.

22. In this regard, I agree with the decisions relied on by Ms. Okimaru of ***Godfrey Masaba v. IEBC (supra)*** and ***Mohamed Ali Mursal v. Saadia Mohamed & 2 Others (supra)*** that in appropriate circumstances, an Election Court has the power to alter, review or set aside its own order. In doing so, the Election Court will not act capriciously. It should be guided by the principles set out in ***Order 45 of the***

**Civil Procedure Rules** since such principles are well known and are predictable.

23. Accordingly, I reject the contention by the petitioners and the 1<sup>st</sup> respondent that this court lacks jurisdiction to entertain the present application.

24. Before I consider the merit of the application, there was one matter that was raised by the petitioners in their replying affidavit that was strenuously opposed by Mr. Macharia that I need to address. In paragraph 34 of the replying affidavit, the petitioners alleged that the application was meant to give the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondent an opportunity to perpetuate the illegalities complained of in the petition. There was a suggestion that the respondents were in cahoot with each other in this application to defeat justice.

25. This court is unable to accept that insinuation. Ordinarily, respondents in an Election Petition are said or are expected to be on the same side, that is, they defend the election. That does not seem to be the case with the present application. While the 1<sup>st</sup> respondent is defending his victory as he is entitled to, he is opposed to the application by the 2<sup>nd</sup> and 3<sup>rd</sup> respondent. Further, there is no evidence to suggest that the 2<sup>nd</sup> and 3<sup>rd</sup> respondent made the present application in connivance with the 1<sup>st</sup> respondent. In my view, the application seem to have been made bona fide by the 2<sup>nd</sup> and 3<sup>rd</sup> respondent for the reasons set out in the Motion and supporting affidavit. In this regard, I think that the attack by the petitioners was unwarranted and unfortunate in the circumstances.

26. The first issue for determination is the inability to comply with the order in respect of the election materials for Tarbaj Constituency. I have seen the order made on 6<sup>th</sup> October, 2017 in **EP. No. 6 of 2017 Idris Abdi Abdullahi v. Ahmed Bashane & 2 Others.** Ms. Okimaru may have been correct to state that in view of the terms of that order, though made by consent, it would have been difficult for her clients to comply with the order of this court of 10<sup>th</sup> November, 2017 as regards election materials from Tarbaj Constituency.

27. While this ruling was pending and the hearing of the main petition continuing, Ms. Okimaru informed the court on 23<sup>rd</sup> November, 2017, that an order had subsequently been made in that petition which would enable the 2<sup>nd</sup> and 3<sup>rd</sup> respondent gain access to the election materials from Tarbaj Constituency. That that however, was dependent on compliance with the terms of the order made by Muigai J. In this regard, prayer number 3(b) is spent.

28. That leaves the prayer regarding the locus of the scrutiny for consideration. The applicants contended that there was bad weather in Wajir County which was compounded by bad roads. That ferrying the materials to Nairobi might lead to the spoiling of the election materials. The applicants produced photographs which allegedly showed the state of the roads in Wajir County.

29. I have seen the photographs produced to support the contention of bad weather and poor roads. The photographs do not bear the date when they were taken. They also do not show the actual location where they were taken. It was not shown that the road where either the bus was photographed or the security vehicle overturned was the Wajir – Nairobi road.

30. Even though this is an election matter which is a special jurisdiction, the usual rules of evidence apply. The general rule set out in **section 107 of the Evidence Act** is to the effect that, he who alleges must prove. The burden was on the 2<sup>nd</sup> and 3<sup>rd</sup> respondent to show that, the weather as at the date they were or are required to comply with the order was or will be too bad to be able to comply with the order without delay. Further, they never proved that the alleged bad roads were the ones to be used in ferrying the election materials required.

31. One other thing, if the roads within Wajir County are that bad, how was then the 2<sup>nd</sup> and 3<sup>rd</sup> respondent able to ferry the election materials from all over the County within a record time up to Wajir town then suddenly, the main Wajir – Nairobi road become impassable? There seem to be no answer or

explanation on record.

32. In any event, when faced with the application and the contentions of bad weather and impassable roads, the petitioners produced Weather Forecast Report for Wajir from the Meteorological Department, which showed that the weather conditions for the period between 30<sup>th</sup> October, 2017 and 2<sup>nd</sup> December, 2017 was favourable. They also produced an Aircraft Movement Report from the Kenya Airports Authority for Wajir International Airport showing that the said airport is still operational. Finally, there was a confirmation letter from one of the bus companies, Sabrin Bus Services, that it was still operating its services between Nairobi and Wajir.

33. The net effect of the evidence produced by the petitioners was to shift the evidentiary burden of proof back to the 2<sup>nd</sup> and 3<sup>rd</sup> respondent. The 2<sup>nd</sup> and 3<sup>rd</sup> respondent did not respond to the said evidence and the burden of proof therefore remained with them to prove their allegations which they failed to discharge.

34. From the foregoing, have the 2<sup>nd</sup> and 3<sup>rd</sup> respondent brought their application within the parameters of **Order 45 of the Civil Procedure Rules**? It was not alleged that there had been anything new and material that had been discovered between 10<sup>th</sup> and 16<sup>th</sup> November, 2017 that could not have been discovered with due diligence before 10<sup>th</sup> November, 2017. The only alleged discovery, was the order in **EP. No. 6 of 2017** whose prayer as I have already stated has been resolved.

35. Further, it was not alleged that there was any error in making the order of 10<sup>th</sup> November, 2017. As regards any sufficient reason, I have already analysed the reasons advanced for the review sought and they have not been proved to be sufficient reasons.

36. One other issue, the place for trial that was gazetted was Nairobi. This Court cannot purport to vary and set aside the subject gazette notice without falling foul with the law.

37. Ms. Okimaru invited the court to consider and apply the overriding objectives of the **Election Petition Rules** as the Court of Appeal had in the case of **Ferdinand Ndungu Waititu v. Independent Electoral and Boundaries Commission (supra)**. **Rule 4 of the Election Petition Rules** provides, *inter alia*, that:-

***“4(1) The overriding objective of these rules is to facilitate the just, expeditious proportionate and affordable resolution of the election Petitions under the Constitution and the Act.***

***(2) The Court shall, in the exercise of its powers under the Constitution and the Act or in interpretation of any of the provisions in these rules, seek to give effect to the overriding objectives specified in sub-rule (1).***

.....”

38. It was Ms. Okimaru’s submission that it will be costly to ferry the election materials from Wajir to Nairobi and that in the event the court insisted that the scrutiny be in Nairobi, the cost should be shared by all the parties. I agree with the submission that this court should be guided by the overriding objectives set out in **Rule 4 of the Election Petition Rules**. That is the law and this court is not at liberty to depart therefrom.

39. However, a closer look at the ruling sought to be reviewed will show that this court took into consideration the provisions of **Article 86 (d) of the Constitution** as well as the issue of costs before making its determination. That Article provides: -

***“86. At every election, the Independent Electoral and Boundaries Commission shall ensure that-***

.....

**(d) appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safe keeping of election materials”.**

The safekeeping of the electoral material therefore is not a matter of choice; it is a constitutional requirement. That being the case, the 3<sup>rd</sup> respondent cannot seek to share that responsibility with any of the parties in this petition.

40. As regards cost, the court was alive of this fact when it stated at paragraph 36:-

***“One issue which was raised by Ms. Okimaru, Learned Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> respondent is the logistics involved in availing the materials for scrutiny. This court is alive to the vastness of Wajir County, that it is situated over 600 kilometres from Nairobi and the balkness of the materials. The question that arises is whether that should prejudice a petitioner who has proved that he is entitled to an order of court. I do not think so. Democracy is an expensive affair. Once the law allowed a particular process to be undertaken, parliament is presumed to have contemplated all matters pertaining to such a procedure”.***

41. In the premises, I see nothing new on record to make the court change that position. In any event, there is a remedy of being refunded those costs at the end of the petition when an order for costs is made.

42. Accordingly, the application is without merit. Let the scrutiny be undertaken at Nairobi on the same terms as ordered on 10<sup>th</sup> November, 2017. The scrutiny is to commence by 5<sup>th</sup> December, 2017 and to continue on a day to day basis until completion.

It is so ordered.

**DATED and DELIVERED** at Nairobi this 24<sup>th</sup> of November, 2017.

**A. MABEYA**

**JUDGE**