



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
THE ELECTIONS ACT, 2011
ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS)
PETITION RULES, 2017
ELECTION PETITION NUMBER 10 OF 2017

BETWEEN

NDWIGA STEVE MBOGO.....PEITITIONER

AND

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

PHILICE KAYIEMBA (THE RETURNING OFFICER OF

THE INDEPENDENT AND ELECTORAL AND BOUNDARIES

COMMISSION STAREHE CONSTITUENCY.....2ND RESPONDENT

NJAGUA CHARLES KANYI.....3RD RESPONDENT

RULING NO.4

1. On 17th November 2017 the last witness for the 3rd Respondent testified and thereafter the 3rd Respondent closed his case.
2. At that point, the only witness who was yet to conclude her testimony was the Returning Officer, **Ms. PHILICE KAYIEMBA**. The said witness had earlier been stood down, at the behest of the petitioner.
3. After the Returning Officer had taken the witness stand, she was cross-examined by Miss. Maumo, the learned advocate for the petitioner.
4. During the course of the cross-examination, the petitioner asked questions in relation to the Expert Report which had been put together by an expert who had been appointed by the petitioner.
5. Mr. T.T. Tiego, the learned advocate for the **I E B C** and the Returning Officer told the court that he did not know how the Expert Report would be dealt with, considering that the said report was not before

the court.

6. In his view, the report could only be produced in evidence by the person who had made it.

7. In response, the petitioner said that in his understanding, the court had only directed him to have the report shared with the respondents. Therefore, as the petitioner had already shared his report with the respondents, and also because the **I E B C** had also prepared a report through its expert, the petitioner did not see any difficulty in making reference to his expert's report.

8. Miss. Maumo advocate pointed out that the report in issue was simply a readable format of the information contained in the **SD** cards which had been retrieved from the **KIEMS** kit.

9. It was the petitioner's contention that the report did not incorporate any analysis.

10. In the circumstances, the petitioner submitted that the respondents would not be prejudiced, when it was borne in mind that the respondents also had their own expert's report.

11. After giving consideration to the objections put forward by the respondents, the court ruled that if the petitioner continued to cross-examine the Returning Officer on the basis of a report which was not yet before the court, it would thereafter not be open to any of the parties to later produce that report.

12. At that stage, the petitioner sought leave of the court to file an affidavit, to which the expert report would be attached.

13. This Ruling is in relation to the petitioner's application for leave to file the affidavit.

14. The application was said to be based on the provisions of Rule 12 (8) of the Elections (*Parliamentary and County Elections*) Petitions Rules, 2017.

15. The petitioner pointed out that whilst the parties had recorded a consent on 12th October 2017, pursuant to which the expert report should have been presented to the court by 18th October 2017, it had been impossible to comply with the said consent order.

16. The reason why it had been impossible to present the report to court by 18th October 2017 is that the **I E B C** had only made available the **SD** cards on 3rd November 2017.

17. Thereafter, the petitioner's expert was able to extract information from the **SD** cards on 6th November 2017.

18. Presumably, it is because the information from the **SD** cards was extracted after the time when it was supposed to have been presented to the court, that the petitioner now sought leave to now file an affidavit through which the said information could be presented to the court.

19. Mr. T. Tiego advocate opposed the application, submitting that the petitioner had not given any basis to warrant the exercise of the court's discretion.

20. The **I E B C** and the Returning Officer pointed out that the petitioner had already closed his case.

21. As far as those respondents were concerned, the petitioner's decision to close his case was made when he knew that he had not yet presented the expert report, which at the time was only within his knowledge.

22. It was further submitted by Mr. Tiego that if the petitioner wanted to rely on the report, the said report would have to first be produced by a witness.

23. Therefore, as far as the respondents were concerned, the expert's report cannot, by itself, re-open the

petitioner's case.

24. And because the report had been allegedly made by an expert, the court could only determine its admissibility after evaluating the skill and competence of the expert.

25. As the respondents said, this court had, in an earlier Ruling, rejected the intended evidence of Ms. Namulero, on the grounds that such evidence was inadmissible.

26. In the circumstances, the respondents reasoned that the petitioner was now seeking to shield the expert from the court, whilst at the same time asking the court to admit the report of the said expert into evidence.

27. It was the position of the 1st and 2nd Respondents that if the court were to allow the expert report to be produced in evidence at this stage, then they would need to call eleven witnesses to answer to the 11 new issues which were not contained in the petition and its supporting affidavits.

28. If the new evidence was admitted, in respect to new issues, the respondents believe that that would constitute the circumventing of the legal requirement that petitions be filed within 28 days of the declaration of results.

29. On his part, Mr. Okatch, the learned advocate for the 3rd Respondent, associated himself with the submissions of advocate Tiego.

30. As far as the 3rd Respondent was concerned, it had been open to the petitioner to seek an extension of the time within which the expert report was to have been filed.

31. He pointed out that between 6th November 2017, (*when the petitioner's expert had done his work*), and 15th November 2017 (*when the petitioner closed his case*), the case was handled by the court on several occasions. Therefore, the 3rd Respondent submitted that the petitioner could have utilized any of those opportunities to ask the court for an extension of time, to file the expert report.

32. However, Miss. Maumo advocate responded by saying that when the 1st and 2nd Respondents did not provide the **SD** card timeously, it is they that had amended the original consent order which had required the petitioner to file the report by 18th October 2017.

33. Indeed, the petitioner drew the respondents' attention to the fact that he had to obtain the intervention of the court, in order to have the **SD** cards made available.

34. Having delayed in providing the **SD** cards, the 1st and 2nd respondents were said to be operating in bad faith, when they were now objecting to the leave being sought to bring the expert's report to court.

35. When the said respondents raised an objection to the aspersions being cast against them, the petitioner withdrew the said assertion of bad faith.

36. I hold the view that the decision to withdraw the remark was well founded because the petitioner did not allege that he had been earlier misled by the respondents to take a given position on the matter, and that the respondents later changed from what they had earlier said to the petitioner.

37. In my considered view, the delay by the 1st and 2nd Respondents, in providing the **SD** cards has a direct correlation to the failure by the petitioner to file the expert report by 18th October 2017.

38. But it has also become clear that there was no malice on the part of the said Respondents. I say so because it was explained to the court that on the date when the experts were first scheduled to meet, so that they could jointly extract information from the **SD** cards, there was mis-communication between the

parties. Whilst the petitioner's expert arrived at 1100 a.m, the respondents expert was available at 2.00 p.m.

39. That explanation was tendered to the court when the petitioner had sought an order which could have enabled him to access the **SD** cards in the absence of the respondents.

40. Once it became clear that there had just been some mis-communication between them, the parties re-scheduled their meeting and thereafter the petitioner's expert did get access to the **SD** cards.

41. It is common ground that the **SD** cards were accessed on 3rd November 2017, and that by 6th November 2017, the expert had down-loaded the information.

42. It is therefore clear that before the petitioner made the decision to close his case, he already had the expert's report. Therefore, if he was convinced, as he now says, that the report contains crucial information, he had the opportunity of adducing it in evidence before closing his case.

43. Regrettably, the petitioner has not offered any explanation for not having sought to produce the expert report in evidence, prior to closing his case.

44. I also noted that when the petitioner was cross-examining the Returning Officer, in relation to what I presume to be the expert's report, he was suggesting to the witness that the number of valid votes cast, as shown on the **KIEMS** kits, was different from those which were declared by respective Presiding Officers.

45. The Returning Officer answered that that was not possible.

46. In the circumstances, if the Returning Officer were to now be confronted with the expert's report, and if the said report indicates differences between the votes on the **KIEMS** and the votes in the declaration forms, the only persons who could possibly explain such differences would be the Presiding Officers.

47. That would therefore imply that if the 1st and 2nd Respondents were to be given a fair chance to respond to the expert report, it would become necessary to permit them to bring as many witnesses as would be needed to respond to the issues raised in the expert report.

48. The respondents indicated that they may need to call about eleven new witnesses.

49. Considering that the total number of witnesses who testified for all the respondents did not exceed nine in number, I hold the considered view that a situation which may give rise to eleven new witnesses, would be akin to a whole new case.

50. It is certainly not prudent for the court to give directions which could give rise to such a situation, especially considering that the petitioner had closed his case earlier.

51. Furthermore, when Mr. Olouch, the learned advocate for the petitioner, had made comments which suggested that he would be seeking leave to call a further witness, (*in connection with the expert's report*), the 1st and 2nd respondents said that they were opposed to that step.

52. At that stage, Mr. Olouch made it clear that he had no intention of calling any other witness.

53. As the respondents thereafter proceeded with the case on the understanding that the petitioner would not be calling any other witness, I hold the view that it would be prejudicial to the said respondents to now saddle them with another witness for the petitioner.

54. When a petitioner was putting forward his case, it is best that the respondents are made aware of the whole case before the respondents are called upon to put forward their respective cases.

55. It is to be noted that pursuant to Section 86 of the Elections Act, the Returning Officer is under an obligation to keep the election materials in safe custody after the final tallying and announcement of results.

56. By requiring the election materials to be kept in safe custody, the law does not imply that the said materials had already become evidence during election petitions.

57. Indeed, when any party to the petition wishes to have scrutiny or recount or retallying, he has to persuade the election court that the justice of the case requires the orders sought. It is only when the court gives an order for scrutiny, recount or retallying, that the election materials can be accessed for the purposes specified in the court order.

58. Therefore, in my considered view, the fact that the court had adopted the consent order pursuant to which the election materials were to be kept in safe custody, cannot imply that the said materials were already before the court.

59. Indeed, that must be the reason why the petitioner sought the leave of the court to file an affidavit, through which the expert's report could be adduced in evidence.

60. In the final analysis, the petitioner has not satisfied the court that he should be granted leave to file an affidavit to help him introduce the evidence which is in the expert's report.

61. Therefore, I reject the petitioner's application.

DATED, SIGNED and DELIVERED at NAIROBI this 23rd day of November 2017.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Sifuna for the Petitioner

Ogoji for Tiego for the 1st Respondent

Ogoji for Tiego for the 2nd Respondent

No appearance for the 3rd Respondent

Collins Odhiambo – Court clerk.