

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
ELECTION PETITION NO. 3 OF 2017

MUTISYA ALBANUS PAUL.....PETITIONER

VERSUS

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

THE RETURNING OFFICER (MACHAKOS

TOWN CONSTITUENCY).....2ND RESPONDENT

MUNYAKA VICTOR KIOKO.....3RD RESPONDENT

RULING OF THE COURT

1. Mr. Makundi and Mr. Kituku learned Counsels for the Petitioner have sought for adjournment in the hearing of this matter which was to start in earnest today. The reasons for the adjournment are that they have not been supplied with the requisite documents by the 1st and 2nd Respondents pursuant to an order of this court made on the 15/11/2017. They have also submitted that the Petitioner was to be allowed a read only access to the KIEMS data but which has not been complied and as a result the Petitioner is unable to proceed with the hearing of the Petition today. The counsels further sought to have the report by the Deputy Registrar regarding the exercise of placing additional seals on the ballot boxes. Counsels finally urged this court not to rush the hearing without according the Petitioner the benefit of obtaining the needed materials in order to conduct the hearing of his case.

2. Mr. Anyoka for the 1st and 2nd Respondent submitted that the staff of the 1st Respondent has had some logistical challenges in securing the documents required to be forwarded to the Petitioner as ordered on 15/11/2017. He further submitted that already they have managed to obtain soft copies of the documents which are currently being E-mailed to the Advocates herein. They are also reported to be preparing the bound copies which should be ready in the course of the day. Counsel submitted that the other challenge is that some of the documents such as polling diaries are held up and stored in a warehouse for safe keeping as ordered and agreed by parties in **Election Petition Number 1 of 2017** and that to access the same they shall need to have the consent of the parties in that petition as well as an order from the Court in that **Petition Number 1 of 2017**. Counsel therefore urged this court to issue appropriate directions in the matter but that on their part they are ready to facilitate the expeditious disposal of this matter.

3. Mr. Kyalo Mbobu and Nyamu for the 3rd Respondent submitted that the date had been taken by consent and on their part they are ready to proceed with the matter today. They urged this court to take note of the fact that time is of essence on the disposal of this matter and it should ensure that parties strictly adhere to its directions and orders. They finally submitted that should the court be inclined to allow the adjournment, the same be only allowed for the remainder of the day and the case to proceed tomorrow.

4. I have considered the sentiments of the learned counsels for the parties herein. Indeed this matter had been confirmed for hearing today and was to continue until the 23/11/2017. Pursuant to the ruling dated

15/11/2017 and the subsequent pre-trial directions, it had been ordered that the 1st and 2nd Respondents were to supply certain documents to the Petitioner and further to allow a read only access to KIEMS data in possession of the 1st Respondent. The 1st and 2nd Respondents have now indicated that there has been a partial compliance of the order and that all the requisite documents are likely to be forwarded to the Petitioner in the course of the day save only that the materials such as polling day diaries are still held up in a warehouse pursuant to an order in **Machakos Election Petition Number 1 of 2017** for which access could only be had through directions or orders in the **Election Petition Number 1 of 2017** since there will be need to have the parties in that Petition participate in the opening of the warehouse. Indeed the logistical challenges faced by the 1st Respondent are understandable. However upon the issuance of the order of this court on the 15/11/2017 directing the 1st and 2nd Respondent to allow the Petitioner read only access to the KIEMS data, the 1st and 2nd Respondent having knowledge that the documents and materials sought are contained in **Election Petition Number 1 of 2017** should have proceeded to that Election Court and sought for the appropriate orders but not to wait until the hearing of this matter today. In fact the read only access was to take place on the 17/11/2017 whereby the parties herein and others in other Petitions in which the 1st and 2nd Respondents have been sued were to conduct a joint exercise. If that exercise did not proceed for one reason or another then the 1st and 2nd Respondents responsibility to organize for the read only access still has to be fulfilled. All the parties in this matter must bear in mind that a lot of time has been spent and there is little time left before the case is finalized. Since the **Election Petition 1 of 2017** is now ongoing at Machakos High Court, the 1st and 2nd Respondents should move to that court for directions so as to access the warehouse and to thereafter comply with the orders of this court. Having heard the submissions of all learned counsels I proceed to give the following directions:-

(1) The request for adjournment sought by the Petitioner is granted.

(2) The 1st and 2nd Respondents to proceed and seek an order in Election Petition 1 of 2017 for purposes of accessing the warehouse wherein the materials are stored and therefore to comply with the orders of this court made on the 15/11/2017.

(3) The hearing of this Petition shall proceed on the 22/11/2017 at 10.00 a.m.

(4) Copies of the data captured during the placement of additional seals on ballot boxes be made available to all the learned counsels herein.

Dated and delivered at **Machakos** this **21st** day of **November**, 2017.

D.K. KEMEI

JUDGE