



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
ELECTION PETITION NO.13 OF 2017

JOSEPH AMISI OMUKANDA.....PETITIONER

VERSUS

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION.....1ST RESPONDENT

RETURNING OFFICER,

NAVAKHOLO CONSTITUENCY.....2ND RESPONDENT

EMMANUEL WANGWE.....3RD RESPONDENT

RULING

1. The 3rd respondent has filed an application dated 12th October 2017 seeking for orders that:-

1. The petitioner be ordered to produce and deposit with the registrar of the court the original (or the original carbon copies as the case may be) of the forms 35A's from which the photocopies which have been produced before the court and annexed to the affidavit of the petitioner Joseph Amisi Omukanda in support of the motion dated 9th October 2017 for scrutiny and recount as annexures JAO-1(a) to JAO-1(s) were made.

2. That the said original (or original carbon copies, as the case may be) deposited with the court together with the photocopies produced and annexed to the affidavit of Joseph Amisi Omukanda as annexures JAO-1(a) to JAO-1(s) be handed over to the officer-in-charge Criminal Investigations Kakamega County (CCIO or DCIO as case may be) for a thorough and immediate investigation in order:

(i) To ascertain the authenticity of the stated original Forms 35A's (or original carbon copies as the case may be) as election materials used and produced pursuant to the general elections of 8th August 2017 and particularly in the election of Member of National Assembly for Navakholo Constituency.

(ii) To ascertain whether the photocopies of the purported forms 35A's produced in court as annexures to the affidavit of Joseph Amisi Omukanda sworn on the 9th of October 2017 in support of his motion of similar date for scrutiny and recount are true copies of the stated original (or original carbon copies) ascertained in 2(i) above or are forgeries and falsifications of the stated forms or any other forms.

3. This Honourable court do order the petitioner to disclose the names of the agents who handed to him the said forms 35A's annexed to his affidavit for their being summoned and produced in court as witnesses and to assist in the investigation of the said forms as shall be ordered herein.

4. That the Officer-in-charge Criminal Investigations, Kakamega County (CCIO/DCIO) be ordered to file his independent report with the court within a specified period of time and for the said report to be supplied to the parties advocates herein in advance of the hearing of the petitioner's motion dated 9th October 2017.

5. That the petitioner's further replying affidavit in response to the 1st and 2nd respondents answer to petition equally sworn on the 9th of October 2017 be struck out and/or be expunged from the court record.

2. The application is supported by the sworn affidavit of the 3rd respondent on the grounds that:-

(i) That the motion of 9th October 2017 and further replying affidavit in response to the 1st and 2nd respondents answer to petition by the petitioner amounts to a completely new petition introducing a completely new set of claims which were not part of the petition.

(ii) That the motion and the supporting affidavit of Joseph Amisi Omukanda relies on and produces documents and particularly purported forms 35A which are not owned by any named person or institution.

(iii) The existence of and the source of the purported forms 35A's is not disclosed and it is suspect and clandestine.

(iv) The produced photocopies of the purported forms 35A's are on their face obviously changed, overwritten, photocopied in faint to conceal the writings thereon, rubbed changed and interchanged all in a clear scheme of forgery and falsification to create a record for the court in contradiction to the record of the forms 35A's produced by the 1st and 2nd respondents so as to create an iota of an unverifiable election result and results tabulation.

(v) The documents are clearly made up and produced for purposes of this case and the application filed.

(vi) The verification of the authenticity of the said documents by an independent law enforcement agency, the Kakamega CCIO/DCIO, with capacity to scientifically confirm the validity of the documents and the entries thereon goes to the root of the petitioners application and the petition as a whole.

(vi) It is very important that the court and the parties ascertain the validity of the documents being produced and to be used in this very important proceedings before the court can continue to rely on them especially in the face of such visible and blatant changes to the documents all pointing to premeditated forgery and falsification of the election materials and evidence being brought to court which in themselves amount to criminal and electoral offences.

(vii) It is only fair and just that the orders sought herein be granted on priority.

3. The application was opposed by the petitioner on the grounds that the application raises substantive issues that should be canvassed during the hearing of the application for scrutiny and recount. That the application makes allegations against the petitioner of forgery and falsification of documents which allegations have not been substantiated and /or proved by any cogent evidence on the face of the documents. That the application is pre-emptive as the petitioner is willing to produce the original

duplicates of the documents for the purposes of scrutiny and recount.

4. The advocate for the 3rd respondent **Mr Namanda**, submitted that the 3rd respondent has a right to demand that he be provided with the original documents before commencement of the hearing. That if the documents are to be fished out by witnesses when in the dock it will necessitate them to ask for an adjournment so that they can compare the documents before cross-examination, which act will procrastinate the hearing. But that if the documents are provided to them in advance that will speed up the hearing.

5. Though the 3rd respondent has in the application sought to have the documents forwarded to the relevant authorities for investigation, **Mr. Namanda** seems to have dropped that demand and suggested that the court can order for any such investigations during the hearing if it finds that investigations are necessary.

The 1st and 2nd respondents supported the application by the 3rd respondent.

6. **Miss Khateshi** holding brief for **Mrs Ashioya** for the petitioner submitted that the application is not supported by any evidence but is made up of mere allegations. That paragraph 11 of the supporting affidavit states that the applicant has reliable information that the documents are forged without disclosing the source of the information.

7. The advocate further submitted that the Criminal Investigations Department is not part of the election court. That it is wrong to hand over the documents to them as the documents might be tampered with. That it is during trial that the court can make an order for investigations to be conducted.

The advocate submitted that they will present the documents during the trial and call witnesses. That the 1st respondent should also be ordered to produce the documents in issue.

8. I have considered the grounds in support of and objection to the application together with the submissions by the advocates for the respective parties. A hearing in an election petition is partly conducted through affidavit evidence. Rule 10 of the **Elections (Parliamentary and County) Elections Petitions Rules, 2017** states that an affidavit shall:

(a) ...

(b) ...

(c) **contain a list of exhibits and copies of any documents which the deponent intends to rely on.**

Rule 12 provides that:-

“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 cross-examination.

Rue 13 provides that:-

“Every deponent shall, subject to the election court’s direction, be examined-in-chief and cross-examined.

Provided that the parties may, by consent, accept not to cross-examine the deponents but shall have the deponent’s evidence admitted as presented in the affidavits.”

9. It is then apparent from these provisions that exhibits already deposited with the court can be considered to be evidence that can even be admitted by consent of the parties. It is then a right of the

opposite party to have access to the originals of the documents already deposited with the court so that he can decide whether or not to cross-examine the witness who has deposited the documents with the court.

12. The 3rd respondent herein is requesting that the originals or carbon copies of the documents deposited with the court be availed to them through the court so that they can study them before the hearing. This is meant to stop wasting the court's time by seeking to be given time to study the documents when the hearing gets underway. I do not think that the request is unreasonable. The petitioner has not given a convincing reason why they are unwilling to deposit the documents with the court before the hearing. I concur with the submissions by the advocate for the 3rd petitioner that if the documents are not disclosed before the hearing, the court will waste a lot of time when hearing is underway to give time to the 3rd respondent to study the documents before cross examination. The application is manifestly made in good faith and there is absolutely no reason why the petitioner is hesitant to deposit the documents with the court.

13. **Rule 12(8)** of the **Elections Rules** provides that:-

“Except with the leave of the election court and for sufficient cause, a witness shall not give evidence unless an affidavit sworn by the witness is filed as required by these Rules.”

The 3rd respondent is seeking that the petitioner be ordered to disclose the names of the agents who handed to him the said forms 35As annexed to his affidavit for their being summoned and produced in court as witnesses. The petitioner has not made any application for those people to be called as witnesses. The 3rd respondent is not the one seeking to call the people as witnesses in his case. The 3rd respondent thereby has no good cause seeking to have them summoned to give evidence. Whether the documents obtained from them are admissible is an issue to be canvassed during the hearing.

14. There is no evidence at this stage to suggest that the documents are a forgery. The court cannot thereby make an order for the documents to be forwarded to the DCIO for investigation. The application to that end is thereby pre-mature.

15. **Rule 15** of the **Elections Rules** provides that during pre-trial conference the court shall:-

.....

(e) give an order, where necessary, for furnishing further particulars.

The application by the 3rd respondent is in the nature of furnishing for further particulars. The application is highly merited.

16. I have looked at Form 35As documents in question. The serial numbers in the said documents are different from the serial numbers deposited by the 1st respondent for the relevant polling stations. There is thereby need for the 1st respondent to produce the corresponding Form 35As with the serial numbers deposited by the petitioner so that the two documents can be compared.

17. In the foregoing, prayer 1 of the notice of motion dated 12th October 2017 is allowed as prayed. The petitioner is hereby ordered to deposit the said documents with the registrar of the court within a time to be determined at the delivery of this ruling.

The 1st respondent is also ordered to deposit with the registrar of the court within a time to be determined by the court, the Form 35A documents with the serial numbers in question.

Delivered, dated and signed at Kakamega this 20th day of November, 2017.

JESSE NJAGI

JUDGE

In the presence of:

Mrs. Ashioya for petitioner

Mr. Abok.....for 1st & 2nd Respondents

Namanda/Mwanya 3rd Respondent

George.....court assistant

2nd Respondent.....present

3rd Respondentpresent

Petitionerpresent