



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

THE CONSTITUTION OF KENYA

**THE ELECTIONS ACT, 2011 ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS
PETITION RULES 2017**

ELECTION PETITION CASE NO. 2 OF 2017

SAMMY NDUNG’U WAITY.....1st PETITIONER

DENNIS KIMANGOROR LEMAN2ND PETITIONER

versus

INDEPENDENT ELECTORAL

BOUNDARIES COMMISSION.....1st RESPONDENT

NDERITU MURIITHI2nd RESPONDENT

JOHN MWANIKI 3rd RESPONDENT

COUNTY RETURNING OFFICER

LAIKIPIA COUNTY 4th RESPONDENT

RULING

1. **SAMMY NDUNGU WAITY** (the Petitioner) by this petition has challenged the election of **NDIRITU MUREITHI** (the 2nd Respondent) as the governor of the Laikipia County.

2. This is a ruling on three applications which were argued simultaneously. Those applications are:

(i) Notice of Motion dated 2nd October 2017 filed by the petitioner;

(ii) Notice of Motion undated but filed on 13th October 2017; and

(iii) Chamber summons dated 19th October 2017 filed by the 2nd Respondent.

NOTICE OF MOTION DATED 2ND OCTOBER 2017

3. The petitioner’s aforesaid application seeks for the production of various electoral materials held by the Independent Electoral Boundaries Commission (IEBC or the 1st Respondent). A summary of the prayers

in that application are that:-

- (i) The IEBC do secure and preserve all election materials which include electronic data, devices, Forms 37 and polling day diaries used on 8th August 2017 in Laikipia County;**
- (ii) Provide the petitioner with all materials which include electronic data on all devices used in forms 37 A, B, and C and polling day diaries for Laikipia County;**
- (iii) Provide electronic data on device which shall include date on all Kiems kits as regards static IP address, specific GPS Location;**
- (iv) Audit log of what each Kiems Kits used during the Laikipia gubernatorial election; and**
- (v) Electronic results and data for gubernatorial election that were scanned and transmitted from all the polling stations.**
- (vi) That the 1st Respondent do provide all date of the final tally at Laikipia County of all elective posts, that is Presidential, Governor, Senator, member of National Assembly and women representative.**

4. That application is supported by an affidavit of the petitioner. He deponed in that affidavit that his petition makes it clear that the results of the Laikipia County of the Presidential Candidate, members of the National Assembly, Women Representative and Senator as compared the gubernatorial election did not match or tally. That it is impossible to correctly establish the number of total votes cast when those resulted are compared with each other.

5. The 1st and 4th Respondents opposed the application on the ground that the petitioner was essentially seeking scrutiny of votes and yet had failed to lay a basis for the production of the material he seeks. The said respondent also submitted that the court in considering the application must be guided by the pleadings.

6. The 2nd Respondent submitted that the petitioner had conceded that he was the chief agent of one of the candidates at Laikipia East. That being so it was submitted that the petitioner could only seek electoral materials which were designated for Laikipia East. Further that the petitioner had failed to demonstrate any anomaly but rather made generalized comments with no evidence supporting them. That accordingly the materials being sought by the petitioner do not relate to the petition before court.

7. The 3rd Respondent in response submitted that the petitioner, by his application, was seeking scrutiny and yet failed to show sufficient cause.

8. I have considered the affidavit evidence and the submissions. I have also considered the parties authorities cited.

9. The petitioner grounded his application on the Provisions of **Article 35** of the constitution which article gives every citizen the right to access information held by the state and held by another person which would be required for the exercise or protection of any right or fundamental freedom.

10. The petitioner submitted that he is entitled to the electoral material held by the 1st Respondent by virtue of that Article of the Constitution.

11. **Section 27** of the Independent Electoral and Boundaries Commission Act provides the procedure to be followed by a citizen who requires information from IEBC. Some of those procedures are that a request be made by a citizen and be addressed to the secretary of IEBC, who on payment of reasonable fee by the citizen, may provide the information. That same section however provides that IEBC may, subject to Article 35 of the Constitution, decline to accede to the request for information where the

request is unreasonable, where the information is at deliberative stage, where the citizen fails to pay the fee and where the citizen fails to satisfy confidentiality requirements by IEBC.

12. Learned Counsel Mr. Bush Wanjala was correct, therefore, to submit that the petitioner could have applied for that information as provided under the above stated statute.

13. That as it may be, and having considered the petitioner's application and the replying affidavit and the submissions I am of the view that the petitioner's prayers, as couched in that application are too wide and will not facilitate the just and expeditious, proportionate and affordable resolution of the petition: *See Rule 4(1) of The Election (Parliamentary and County Elections) Petition Rules 2017.*

14. The orders that are just in the circumstances are that the petitioner be permitted by IEBC, at his costs to place additional seals on all ballot boxes of the election of the Governor at Laikipia County. Secondly IEBC shall supply to the Petitioner, in this matter, SD cards only of Sosian Ward. IEBC having supplied to the parties and to this court Forms 37 A, B and C no other electoral material shall be required to be supplied.

NOTICE OF MOTION FILED IN COURT ON 13TH OCTOBER 2017.

15. The aforesaid application was filed by the petitioner. His prayer in that application is for an order of leave for the Petitioner to file affidavits of further witnesses out of time.

16. The petitioner annexed two affidavits which affidavits he seeks leave of the court to file out of time. By one such affidavit the deponent Joseph Kipoipoi Nanyoi deposed that he was an agent for the Jubilee Political Party in the Mathenge Farm Stream in Laikipia County. That he was denied entry into that polling station when he arrived there at 6.30 a.m. He also alleged that the 2nd Respondent went to the said polling station and demanded the presiding officer to count spoilt and rejected votes.

17. The other additional affidavit is of Peter Collins Keshine. He deposed that he was an agent at Doldol Boys High School for Joshua Irungu, the other contender of the gubernatorial election in Laikipia County. That at the tallying centre he saw, what he termed as, numerous agents of the 2nd Respondent who were allowed to enter the tallying center. That at one time he was denied access into the tallying centre by a police officer with the connivance of the official of IEBC.

18. The above is the new evidence that the petitioner wishes to introduce.

19. I have considered the rivalry submissions of learned counsels and the authorities cited. My take is that the petitioner has approached this court too later in the day to seek to introduce new evidence by these two affidavits. This court convened a pre-trial conference on 2nd October 2017. At that pre-trial leave was granted to the petitioner to file a further affidavit in answer to the further and better particulars formulated by the court. The petitioner did not on that occasion inform the court that he intended to file further affidavits to introduce new evidence. At that pre-trial, with the consent of all the parties, this petition was fixed for hearing on 22nd November 2017 which is two days from today. To allow the petitioner introduce new evidence would of necessity lead to an order being granted to the Respondent's to file further affidavits in response. In view of the fact that a hearing date has been fixed for this petition the interest of justice would not be served by allowing the petitioner to file those further affidavits. Accordingly that application is declined.

CHAMBER SUMMONS DATED 19TH OCTOBER 2017

20. This application was filed by the 2nd Respondent. The second Respondent prays for certain paragraphs of the petitioner's affidavit, in support of the petition, to be struck out for being scandalous, oppressive irrelevant and having no probative value.

21. The petitioner by those paragraphs of his affidavit alludes to some ballot papers at Laikipia

constituency not being stamped; that at the counting of governor's votes there was lack of transparency; and that the nomination process, campaigns, voting, counting of votes tallying and declaration of the winner was not transparent. The deponent further disposed to facts given to him by Peter Ngugi Ndonyo on alleged irregularities he saw during the elections of Governor of Laikipia.

22. The 2nd Respondent submitted that the depositions of the Petitioner contain extraneous, scandalous and oppressive assertion.

23. I have considered the rival submissions of the learned counsels and I have also considered the depositions of the petitioner which are sought to be struck out.

24. In the case **THE CO-OPERATIVE MERCHANT BANK LTD V GEORGE FREDRICK WEKESA Civil Appeal No. 54 of 1999** the Court of Appeal states that the power of the court to strike out pleading is discretionary.

25. In the case of **YAYA TOWERS LIMITED –V- TRADE BANK LIMITED (in liquidation) Civil Appeal No. 35 of 2000** the Court of Appeal held:-

“A plaintiff is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant can demonstrate shortly and conclusively that the plaintiff's claim is bound to fall or is otherwise objectionable as an abuse of the process of the court is must be allowed to proceed to trial It cannot be doubted that the court has inherent jurisdiction to dismiss that which is an abuse of the process of the court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases.”

26. The learned author Mulla in the book **‘The Code of Civil Procedure 16th Edition** at Page 1814 to 1815 wrote:-

“It seems to me, said Brown LJ, in Knowles –V- Roberts that the rule that the court is not to dictated to parties how the they should frame their case, is one that ought always to be preserved sacred. But that rule is, of course, subject to this modification and limitation, that the parties must not offend against the rules of pleading which have been laid down by the law; and if a party introduces a pleading which is unnecessary and it tend to prejudice, embarrass and delay the trial of the action, it then become a pleading which is beyond his right.”

27. The above authorities set out the parameter within which the present application should be considered. My perusal of the impugned paragraphs of the petitioner's affidavit is that they fall short of being an abuse of process, and they are not scandalous, oppressive or irrelevant. The 2nd Respondent will be given opportunity, at the hearing of the petitioner, to cross examine the petitioner on the depositions of the petitioner on the truth and otherwise of his depositions.

28. Consequently therefore the 2nd Respondents chamber summons dated 19th October 2017 is declined.

29. Before concluding this Ruling and in the interest of justice I wish to revisit the Ruling of this court in this matter delivered on 9th November 2017. By that ruling it is necessary for clarity to be made with regard to the striking out of the supporting affidavit of Dennis Kimngaror Leman, the former 2nd Petitioner. For the avoidance of doubt the affidavit of the former 2nd Petitioner which was struck out was from pages 117 to 124 and not from page 117 to 157 as prayed by the 2nd Petitioner.

30. In the end the following the order of the court:-

(a) The 1st Respondent shall permit the Petitioner, at his costs to place additional seals on all ballot boxes of the election of governor at Laikipia County.

(b) The 1st Respondent shall supply to the petitioner SD cards of Sosian Ward.

(c) The costs of the Notice of Motion dated 2nd October 2017 shall abide with the outcome of the petition.

(d) The petitioner's Notice of Motion filed in court on 13th October 2017 seeking leave to file further affidavit evidence is dismissed and the costs shall abide with outcome of the petition.

(e) The 2nd Respondent's chamber summons dated 19th October 2017 is dismissed and costs thereof to abide with the outcome of the petition.

(f) For the avoidance of doubt the affidavits of Danson Apaol Ngimor, Dawin Rionomuto Pombo, Maira Kang'aror Musa, Makal Tulu and Mamukong Simau all sworn on 8th September 2017 are still on record and were not struck out in this court's Ruling delivered on 9th November 2017.

DATED and DELIVERED at NANYUKI this 20th day of NOVEMBER 2017

MARY KASANGO

JUDGE

CORAM

Before Justice Mary Kasango

Court Assistant: Njue / Mariastella

For 1st Petitioner:

For 2nd Petitioner:

For 1st and 4th Respondent:

For 2nd Respondent:

For 3rd Respondent:

COURT

Ruling read in open court.

MARY KASANGO

JUDGE