



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

ELECTION PETITION NO 4 OF 2017.

IN THE MATTER OF THE ELECTIONS FOR THE GOVERNOR OF KITUI COUNTY

BETWEEN

DR. JULIUS MAKAU MALOMBE.....PETITIONER

VERSUS

CHARITY KALUKI NGILU.....1ST RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....2ND RESPONDENT

GOGO AL BERT NGUMA.....3RD RESPONDENT

RULING

Introduction

1. The Petitioner filed a Petition dated and filed on 7th September 2017 challenging the election of the 1st Respondent as Governor of Kitui County in the general elections held by the 2nd Respondent on 8th August 2017. The Petitioner was a candidate in the gubernatorial elections. On 1st November 2017 during the giving of pre-trial directions, Mr. Okong'o Omogeni SC, the counsel for the Petitioner, made an oral application pursuant to the provisions of section 80 of the Elections Act for the Court to summon the OCPD (Officer Commanding Police Division) of Kitui to produce the Elections Offences Case No 3 of 2017.

2 The basis for the application was that a polling clerk by the name of Morris Mulei was charged with the offence of supplying extra ballot papers in polling station number 073/112, and that the attendance of the OCPD in Court will be useful for purposes of a full inquiry by the Court on the allegations made in the Petition as to commission of the said election offence, and as the police is the entity concerned with compliance with the Election Offences Act. Further, that no prejudice will be caused to the Respondents as they will be accorded the opportunity to cross-examine the OCPD.

3 Mr. Kioko Kiliukumi, the counsel for the 1st Respondent opposed the application in oral submissions made in Court. The counsel contended that section 80(1) (b) of the Elections Act provides for the summoning a person who appears to have been concerned in the election, and there is no evidence that the OCPD was concerned in the election and he is only in-charge of the police. Further, that he was not the investigating officer, and that in any event the investigating officer and Director of Public

Prosecutions are involved in criminal proceedings and not in election petitions, and this Court cannot intermeddle with criminal proceedings pending in a subordinate court.

4 Ms. Mageto, the counsel for the 2nd and 3rd Respondents, also opposed the application in oral submissions she made in Court. She averred that the Petitioner had pleaded in paragraph 18 of his Petition that election offences were committed by officers of the 2nd Respondent, which meant that he has the relevant evidence through witness statements and affidavits to verify these allegations. Therefore, that the Petitioner was trying to use the Court to build its case.

5 I have considered the arguments made by the counsels for the Petitioner and Respondents on the application before the Court. The issue before the Court is whether summons can issue to the Officer Commanding the Police Division (OCPD) at Kitui to produce Elections Offences Case No 3 of 2017. Section 80 (1) of the Elections Act provides as follows as regards this Court's powers to summon witnesses:

“ (1) An election court may, in the exercise of its jurisdiction—

(a) summon and swear in witnesses in the same manner or, as nearly as circumstances admit, as in a trial by a court in the exercise of its civil jurisdiction and impose the same penalties for the giving of false evidence;

(b) compel the attendance of any person as a witness who appears to the court to have been concerned in the election or in the circumstances of the vacancy or alleged vacancy;

(c) examine a witness who is compelled to attend or any other person who has not been called as a witness in court, and examined by a party to the petition and after examination the witness may be cross examined by or on behalf of the petitioner and respondent or either of them; and

(d) decide all matters that come before it without undue regard to technicalities.”

6 The summons under the section can either issue to witnesses sought to be called by the parties, or to any person who appears to the Court to have been concerned in the elections in question. How is such an impression that a person was concerned in the elections to be established? In my view this can only be by way evidence that is brought before the Court, and a party who wishes to call a person who is not his witness to give evidence in an election petition must first establish a basis by showing their involvement in the elections.

7 In *Thomas Matwetwe Nyamache v Independent Electoral and Boundaries Commission & 2 others*, [2017] eKLR a similar application to the present application was made by the counsel for the Petitioner therein. Omondi J. in allowing the application held as follows in as regards the application of section 80(1)(b) of the Elections Act:

“11...In my honest view evidence has been led by PW4 regarding recovery of the ballot papers and that the same were handed over to the OCS KENYANYA police station, who then passed them on to the DCO KENYANYA and that the police still have the same in their custody. It would be totally myopic of me to ignore this assertion; indeed I find that it appears the police were mentioned as having dealt with a complaint regarding the conduct of the elections and under circumstances which necessitate their attendance to confirm what PW4 claims. It is necessary that the relevant police officer do attend court and confirm whether there were any ballot papers handed over to them and under what circumstances.

12. In so attending, he will not be appearing as a witness for the petitioner, but as one who has been summoned by the court to shed light on some areas of concern by the court. This means it will not be open to the petitioner to lead any evidence in chief-the court will lead the officer on areas it seeks clarification confirm whether there were any ballot papers handed over to

them and under what circumstances, and whether any action has been taken with regard to that report. The parties will be limited in their cross examination of the officer(s) to only the areas specified by the court because he is after-all, the court's witness NOT the petitioner's witness. "

8 In that application, evidence had already been led by PW4 on the need to summon the police. It is also evident from the ruling that in summoning such a person, the Court should not seek the person to give evidence-in-chief for any party, and the person's testimony should be limited to giving information on areas of concern arising from the evidence led by parties in Court.

9 In the present application, the Petitioner has alleged in paragraph 18 of his Petition as follows:

"The 1st and 2nd Respondent and or its officers who had been given the responsibility of conduction a free and fair election by the Constitution unlawfully issued more than one ballot paper to some of the voters in contravention of Section 59 of the Elections Act. This was the case in some places in Kitui East Constituency and one of the polling clerks was charged in Kitui Law Courts on the 10th of August 2017."

The Petitioner is required by Rule 12 (1) and (3) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 to file and serve affidavits that support his Petition and set out facts and grounds relied on in the petition; as well as affidavits by his witnesses.

10 The Petitioner should therefore have pointed this Court to the evidence he has presented on the allegation he makes in his Petition in paragraph 18, for this Court to establish the necessity of summoning the OCPD of Kitui. In the absence of an indication that such evidence exists, his application cannot be granted at this stage.

11 I agree in this regard with the ruling of Majanja J. in *Odera Arthur Papa vs Oku Edward Kaunya & 2 Others*, Busia Election No. 2 of 2017 wherein the learned Judge emphasised that the Petitioner's allegations are proved by primary evidence of witnesses which are set out in the affidavits filed together with the petition. Further, that police investigation reports are secondary evidence of what was reported by other witnesses to the police, and in the absence of primary evidence, such a report is either hearsay or opinion evidence and only proves that an offence was reported.

12 The learned judge also noted that the powers of an election Court in investigating whether an election offence has occurred is now limited by section 87 of the Elections Act, and that an Election Court, while making an inquiry into election malpractices in the nature of criminal offences, in order to determine the validity of the election, must exercise caution and circumspection as a further process is contemplated in order to determine whether a person is guilty of an election offence.

13 It is thus my finding that for the proper and prudent use of the Court's powers under section 80(1) of the Elections Act, the Petitioner should first provide the evidence on the ground pleaded in paragraph 18 of the Petition to the Court, so as to demonstrate the need for the exercise by this Court of the powers to summon a person who is not his witness. To this extent the Petitioner's oral application to summon the OCPD (Officer Commanding Police Division) of Kitui to produce the Elections Offences Case No 3 of 2017 is pre-mature and may also result in granting an opportunity to the Petitioner to present new evidence to the prejudice of the Respondents. The application is accordingly dismissed, and the costs of the application shall abide the outcome of the Petition.

14 The Petitioner is however at liberty to apply once he has laid a basis for the summons.

15 Orders accordingly.

DATED, SIGNED, AND DELIVERED AT KITUI THIS 16TH DAY OF NOVEMBER 2017

P. NYAMWEYA

JUDGE