



**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.....1<sup>ST</sup> RESPONDENT**

**INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION.....2<sup>ND</sup> RESPONDENT**

**GOGO ALBERT NGUMA.....3<sup>RD</sup> RESPONDENT**

**DIRECTIONS**

1. The Petitioner filed two applications by way of Notices of Motion dated 4<sup>th</sup> and 10<sup>th</sup> October 2017 respectively. The applications arise from a Petition the Petitioner filed dated 7<sup>th</sup> September 2017, in which he is challenging the election of the 1<sup>st</sup> Respondent as the Governor of Kitui County in the general elections held by the 2<sup>nd</sup> Respondent on 8<sup>th</sup> August 2017. The Petitioner was a candidate in the gubernatorial elections.

2. Some of the prayers in the Notice of Motion dated 4<sup>th</sup> October 2017 were dispensed with by way of consent and directions given in a pre-trial conference held on 5<sup>th</sup> October 2017, and the outstanding prayers in the said Notice of Motion are as follows:

a. This Hon. Court do order the 2nd Respondent to avail to this Court the following materials, items and or information in its custody for purposes of assisting this court in hearing and determination of the application for scrutiny and recount of votes filed herein and or the Petition herein.

i. The Polling station diaries for all polling stations in Kitui County.

ii. Both the electronic and hard copy of the register of voters as contains the biometric and alpha numerical details of the voters entitled to vote at all voting stations in Kitui County.

iii. The Kenya Integrated Electronic Machine System (KIEMS) used in Kitui County for purposes of accessing the information stored therein.

b. That the Court do order the Director of Public Prosecutions to avail all the witness statements with regard to all cases of accused persons charged with election offences in Kitui County.

c. The cause (sic) of this Application be provided for

3. The Petitioner's Notice of Motion dated 10<sup>th</sup> October 2017 seeks the following additional orders:

a. This Hon. Court be pleased to order for the scrutiny of all statutory forms and recounts of votes cast in all Polling Stations in Mwingi North, Mwingi Central, Kitui West, Kitui Central and Kitui South Constituencies relative to the election of the Governor of Kitui County held on 8<sup>th</sup> August, 2017.

b. This Hon. Court upon granting of prayer 1 to direct that the scrutiny do include the examination of the followings:-

- (i) The signatures of Presiding Officers and Deputy Presiding Officers;
- (ii) The affixing of stamps by IEBC on statutory forms;
- (iii) Alteration of forms without countersigning;
- (iv) Transposition errors;
- (v) Statutory forms where there are no signatures of Wiper Agents.
- vi) Similarities in handwritings in the forms;
- (vii) Both the electronic and hard copy of the Register of voters as contains the biometric data and alpha numerical details of the voters entitled to vote at all the stated Polling Stations;
- (viii) The Kenya Integrated Electronic Machine System ("KIEMS") and the information stored by it or the print outs in respect thereof;
- (ix) The Declaration of Results Forms 37C;
- (x) The packets of spoiled ballots;
- (xi) The marked copy register;
- (xii) The packets of Counterfoils of used ballot papers;
- (xiii) The packets of counted ballot papers;
- (xiv) The packets of rejected ballot papers;
- (xv) The information contained in the poll diaries;

4. After reading and mulling over the pleadings and arguments made by the Petitioner and Respondents, I am of the view that while the interests of justice require that the Petitioner's applications be heard and determined with finality, it is not possible to do so before the Petitioner has presented his evidence and the same has been tested by way of examination, for the following reasons:

a. The prayers for supply of information from the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent are made in the context of an interlocutory application in an election petition and after the close of pleadings. The Petitioner therefore requires to show by evidence the issues that require verification from the polling station

diaries, the electronic and manual voter register and the information from KIEMS, and with respect to specific polling stations, so as to avoid the risk of a fishing expedition for evidence.

b. The Petitioner has in his Petition and in the application for scrutiny and recount of votes relied on various grounds, including the denial of access to various named polling stations by his agents; that various Forms 37A and 37B were not signed by his agents and were not duly stamped; and that there were irregularities and falsification of the entries and tallying in various Forms 37A, Forms 37B, Forms 37C and Form 37D. At this stage as no evidence has been adduced on the said grounds and subjected to examination, the same remain mere allegations and cannot constitute the basis of orders for scrutiny and/or recount of votes.

c. The Respondents have claimed that some grounds raised in the applications are not supported by the pleadings filed by the Petitioner.

d. The evidence on some of the grounds for the applications raised by the Petitioner has been disputed by the Respondents.

e. The Respondents in addition claim that some of the grounds raised in the Petition and application are not supported by any evidence.

5. In the premises the ruling on the Petitioner's two applications by way of Notices of Motion dated 4<sup>th</sup> and 10<sup>th</sup> October 2017 respectively is hereby deferred to a date to be set after the close of the Petitioner's case.

**DATED, SIGNED, AND DELIVERED AT KITUI THIS 16<sup>TH</sup> DAY OF NOVEMBER 2017**

**P. NYAMWEYA**

**JUDGE**