



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ELECTION PETITION NO. 23 OF 2017

JAPTHET MUROKO.....1ST PETITIONER

ZACHEUS OKOTH OLIECH.....2ND PETITIONER

VERSUS

INDEPENDENT ELECTORAL AND BOUNDARIES

COMMISSION ('IEBC).....1ST RESPONDENT

JOSEPH MELE EROO, RETURNING OFFICER

NAIROBI COUNTY.....2ND RESPONDENT

KIOKO MIKE SONKO MBUVI GIDEON.....3RD RESPONDENT

RULING

1. The petitioners' application dated 15th September 2017 was filed on 19th September 2017 under a Certificate of Urgency. The application was brought under Articles 19, 20, 22, 23(3), 35, 81, 86, 159 and 258 of the Constitution; Sections 39 and 44 of the Elections Act; Section 27 of the IEBC Act; Section 4 of Access to Information Act and Rules 12(9) and 29 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017. The petitioners seek:

(a)(spent)

(b) *the full and unfettered physical and remote access to each biometric electronic appliance used at each voting/polling station location used to verify voters' identification against the list of registered voters and for the appliances to be forensically imaged to capture, inter alia, metadata such as data filed, creation times and dates, devices IDs MC addresses IP.*

(c) *access to electronic devices(s) used to capture Forms 37A and Forms 37Bs onto the KIEMS system and transmitted to the Constituency Tallying Centres and the County tallying Centre for Nairobi County.*

(d) *full and unfettered access to any form of scanning device which saved the images onto access local server(s) for onward transmission to the Constituency and County Tallying Centre.*

(e) access to all the parties, for purposes of scrutiny and supply to the court and to the parties original Forms 37A, Forms 37Bs and Form 37C prepared at and obtained from the polling stations by Presiding Officers and used to generate the final tally of the Nairobi gubernatorial elections, and pursuant to such production, leave be granted for the use of an aid or reading device to assist in distinguishing the fake forms from the genuine ones.

(f) the KIEMS kit as used in the Nairobi gubernatorial elections on 8th August 2017 be preserved and the same not be used in the impending elections to be conducted on 17th October 2017.

(g) leave to put in further Affidavits sworn by Ole Kina and Japhet Muroko and/or any further Affidavits to or in reply to any responses filed by the Respondents and in the alternative the affidavit of Ole Kina and Japhet Muroko and the petitioners annexure Volume 3 and 4 be deemed to have been properly filed.

(h) any other reliefs that it may deem just and fit to grant in the interest of justice

(i) Costs

2. The petitioners had also made an application for scrutiny dated 5th October 2017 which they sought to withdraw on the basis that it would be raised at an appropriate time during the hearing. All the respondents herein had nevertheless filed their respective replies and written submissions addressing the petitioners' applications. At the hearing of the subject application on 14th December 2017, the court allowed the petitioners to withdraw the application for scrutiny, with leave reserved to file the application at the appropriate stage should the need arise.

3. Having abandoned the application for scrutiny, the petitioners confined themselves to the prayers for access to electoral materials and leave to file further affidavits. The application is supported by the Affidavit of the 1st petitioner sworn on 15th September 2017. It is premised on the grounds that there were extensive anomalies in the forms that were used to declare the gubernatorial results for Nairobi County which go to the root of the integrity, accountability and verifiability of the elections. It is the petitioners' case that their rights under **Article 38** of the Constitution would be prejudiced if the orders sought are not granted. Furthermore, the applicants received additional evidence which was not in their knowledge or custody at the time of filing the petition and which ought to be admitted to enable the court determine the petition. The petitioners state that hearing the petition in absence of such crucial information would disadvantage voters' right to free, fair and credible elections.

4. The 1st and 2nd respondents opposed the application, through the Replying Affidavit of Joseph Mele Oroo sworn on 11th October 2017. The 1st and 2nd respondents submitted that allowing admission of further affidavits would be tantamount to amending the petition, adding that no reasonable explanation was given for the failure to file the affidavits at the time of filing the petition. The 2nd respondent stated that the petitioners' dispute concerns 742 forms in respect of 225 polling stations. Furthermore, no extension of time was sought and the court lacks jurisdiction to grant such extension. It is also the respondents' view that the further affidavits are essentially a reaction to the respondents' response to the petition and allowing the application would therefore be against the statutory timelines.

5. On the KIEMS kits, the respondents state that the kits were already submitted for reconfiguration for use in the repeat elections of 26th October 2017. The 1st and 2nd respondents submitted that the petitioners had made generalized allegations on the use of technology during the elections and had not tendered any evidence in support of the prayer for an audit of the system technology used nor was an allegation made of failure of the kits. It was further submitted that since the results in the Forms 37As had not been disputed, the audit sought would be of no use. Therefore, no basis has been laid to justify the prayer.

6. The 3rd respondent also opposed the application, relying on the Affidavit of the 3rd respondent sworn on 9th October 2017. According to the 3rd respondent, the application seeks omnibus prayers that are

incapable of being granted, lacks merit and seeks to enlarge the petition outside the statutory timelines. Responding to the prayers for information on technology system, the 3rd respondent states that the petitioners did not make a written request to the IEBC in accordance with the Elections (Technology) Regulations. Furthermore, the petitioners request for KIEMS kits could not be granted as it would interfere with the IEBC's mandate of conducting the repeat presidential elections. The 3rd respondent also observed that the petitioner had not complied with **Section 27** of the IEBC Act and **Regulation 16** of the Technology Regulations, 2017.

7. On the prayer to admit further affidavits, the 3rd respondent stated that the prayer was worded in generalized terms, adding that the power to admit additional evidence was discretionary and ought to be exercised sparingly given the implications on time, and prejudice on the respondents who have already filed their responses. He stated that the petitioners seek to close gaps in the petition under the guise of new evidence which the 3rd respondent had cited in response to the petition. Allowing the application would therefore amount to allowing the petitioners to expand the petition outside the statutory timelines and yet no explanation was afforded as to why the evidence could not be filed on time. He urged the court not to allow the petitioners to expand the case through Affidavits outside the pleadings by which they are bound.

8. Upon consideration of the applications, submissions and authorities cited by the parties, there are two issues for consideration:

- a) Whether the petitioners should be granted access to the technology systems and statutory forms as prayed
- b) Whether the court should allow the admission of further affidavits

9. On the issue of access to the technology system, the petitioners grounded their application on **Article 35** of the Constitution, **Section 4** of the Access to Information Act and **Section 27** of the IEBC Act as well as **Section 44** of the Elections Act. It was submitted that the 1st and 2nd respondents failed to comply with Article 81 of the Constitution and that the results of the impugned elections did not comply with the law since Forms 37A were not properly filled as to form a proper basis for Forms 37B and Form 37C. The petitioners cited the various anomalies in the forms as set out in the petition to justify that, in line with the petition, access to the required information was critical to demonstrate that the elections were not free and fair. It was also submitted that there was a risk the forms may be manipulated if not availed and that the 1st and 2nd respondents were under an obligation to ensure safe custody of the data relating to an election. Counsel maintained that the petitioners had demonstrated that technology had not been properly applied during the elections. The petitioners had thus established sufficient reasons to warrant grant of access to the KIEMS kits, and the forms used. In any case, no prejudice would be occasioned to any of the parties.

10. **Article 35(1)** of the Constitution grants every citizen the right to access information held by the state or another person required for exercise of a right or fundamental freedom. This right is elaborated under **Section 4** of the Access to Information Act.

11. One of the materials sought by the petitioners is access to the KIEMS kits as couched in prayers (b), (c), and (d). It was submitted on behalf of the 1st and 2nd respondents that the KIEMS kits could not be availed for the reasons that the same were needed for reconfiguration for use in the repeat presidential elections that were eventually held on 26th October 2017. Therefore, prayer (e) that sought preservation of KIEMS kits to ensure they were not used in the repeat presidential election was spent and incapable of being granted. Counsel for the petitioner, in her oral submissions indicated that the petitioners were interested in the SD cards that contained the information from the respective KIEMS kits. The issue therefore, is whether the court should order access as sought in respect of SD cards for all KIEMS kits used in the elections and the production of all original statutory forms used in the disputed elections. This prayer was opposed on the ground that the petition is limited in terms of the disputed polling stations therefore, allowing access in respect of all polling stations would amount to giving the petitioners room to

engage in a fishing expedition outside what is pleaded in the petition.

12. This court has powers to give directions regarding election materials concerning a particular election petition in particular under **Rule 16** of the Election Petition Rules, 2017 which provides that:

(1) On conclusion of the pre-trial conference under rule 15, the election court may give directions on-

- a) the storage of the election materials including ballot boxes and documents relating to the petition;***
- b) the handling and safety of the election materials; or***
- c) the time for furnishing the election materials to the election court.***

(2) In giving directions under sub-rule (1), the election court shall-

- a) consider the prudent, efficient and economic use of storage and transport facilities;***
- b) consider the maintenance of the integrity of the election materials; and***
- c) ensure that the election materials are not interfered with.***

(3) An election court may direct that the Commission maintains the custody of all election materials in relation to a petition.

(4) Only the material relating to a particular petition may be furnished to an election court.

(5) The election court may order that additional seals be placed on the ballot boxes related to the election for which a petition has been lodged.'

15. Counsel for the petitioners expressed apprehension that unless the forms are availed, they may be manipulated. However, no evidence was laid to demonstrate these fears. Furthermore, it is the duty of the 1st respondent under the law to ensure safe custody of all electoral materials in particular under **Regulation 86** of the General Regulations, 2012 and **Regulation 17** of the Technology Regulations, 2017 in respect to electronic data; and there is no evidence that has been adduced to show that the 1st respondent has ignored or breached that duty.

14. It is true as submitted by counsel for the respondents, that the petitioners have made a generalized request in respect of prayers for access. At this point, the court has not had the benefit of considering on merit the scope of evidence set to be relied on by the parties. Counsel for the petitioners urged that access being sought should be differentiated from the scrutiny process. While it is true that access and scrutiny are different processes, nevertheless, request for access should also be in line with the prayers sought and allegations made in the petition.

15. An examination of the petition shows that some allegations were made in respect of interference in the use of the KIEMS kits at a few cited polling stations; while other allegations are couched in general terms. With this in mind, it is important that a party be specific as to the nature and scope of prayers being sought. The prayers being sought have their founding context in the petition, which defines their scope. While at this stage the court cannot delve into the merits or otherwise of the grounds in the petition, the court is alive to the scope of the dispute defined in the pleadings. The petitioners failed to lay a basis in this regard.

16. The petitioners have cited irregularities in the forms that were used in the elections. However, I find no justification for granting prayer (e) as prayed. The prayer seeks not only production of the original statutory forms but also leave for use of a reading device for purposes of distinguishing the forms. This is

a generalized prayer in terms of scope and also seeks to extend a process of auditing the forms to distinguish the genuine from non-genuine ones. While it is not a matter of scrutiny as strictly known, it would also involve some investigation process, and therefore, not purely access as submitted on behalf of the petitioners. For this prayer to succeed, therefore, a basis must similarly be laid, and at this stage, such a prayer is premature. In my view, the prayer as sought cannot succeed.

17. On the filing of further affidavits, the petitioners submitted that, not being candidates, they did not have the benefit of having agents in various polling stations. They submitted that the 1st petitioner acted diligently in attempting to get the various forms from the IEBC through a letter dated 7th September, 2017. The petitioners alleged that they were only granted forms in respect of six constituencies on the basis of which the petition was filed and subsequently managed to get other forms, though not from the IEBC, and filed them in court through the affidavits being sought to be admitted on record. The court was urged to consider that the Affidavits and additional evidence were filed within 10 days after filing the petition and that the Affidavits merely seek to expound on the grounds already contained in the petition. Thus allowing the application does not amount to amending the petition since the affidavits introduce the statutory forms in line with various allegations in the petition. Furthermore, **Rules 15(h)** and **12(9)**, as read with **Rules 19** and **4** of the Election Petition Rules allow for filing of further affidavits, inclusion of additional evidence and expansion of time in regard to filing any such pleadings.

18. The Affidavits in question are the Affidavit of Japhet Muroko the 1st petitioner sworn on 18th September 2017 and Koitamet Ole Kina sworn on 15th September 2017. The admission of these affidavits was opposed on the ground that it was an attempt to introduce new evidence outside the statutory timelines.

19. The question of whether or not to allow filing of additional evidence is a discretionary power. **Rule 12(1)** of the Election Petition Rules requires that a petition shall at the time of filing be supported by an affidavit of the petitioner. **Rule 12(4)** also requires that, affidavits sworn by persons intended to be witnesses to be filed as well at the time of filing a petition.

20. The Elections Act and Regulations anticipate instances when additional evidence may be allowed. Under **Rule 15 (1)(h)** of the Election Petition Rules, 2017 an election court may at the pretrial conference ***give directions as to the filing and serving of any further affidavits or the giving of additional evidence.*** This is a discretionary power of the court. **Rule 12(9)** of the Rules further recognize that:

‘The election court may on its own motion or on the application by any party to the petition, direct a party or witness to file a supplementary affidavit.’

21. Filing of further affidavits or additional evidence is therefore not prohibited at all. As the court stated in ***Wavinya Ndeti v IEBC & 4 Others Machakos High Court Petition No. 4 of 2013*** ;

‘Rules 12 and 17(1)(i) by reference to the words “grant leave” and “give directions” respectively, in my view, give room for filing of any further affidavits or additional evidence. This evidence may be in addition to existing evidence or it may be entirely new evidence. Whatever the situation, these provisions enable the court to admit additional or new evidence in so far as it assists in the just disposal of the matter.’

22. However, even when so allowed, such further or additional evidence ought not to raise new issues as to change the character of the petition. The rationale for this restriction is that a party ought not be allowed to go outside what has been pleaded in the pleadings, since doing so would amount to expanding the cause of action. The parameters for admission of additional evidence were laid out by the Supreme Court in ***Raila Odinga v Independent Electoral and Boundaries Commission & 3 Others, Supreme Court Petition No. 5 of 2013*** where it stated that *further affidavits ought not introduce evidence which in effect would change the nature of the petition or affect the respondent’s ability to respond to the evidence.*

23. With regard to the 1st petitioner's Further Affidavit, it is notable that some of the grounds in the petition have been reiterated, and in some respects new allegations have been introduced such as; tampering with many ballot boxes; failure by the IEBC to secure elections with citation of criminal proceedings commenced against some election officials and additional allegations of irregularities of vote rigging, illegal maneuvering in voting, tallying and delivery of results in various polling stations and county tallying centre, non-issuance of identification badges to agents despite accreditation and failure by presiding officers to display results in prominent public places. In other instances, the 1st petitioner has alluded to similar allegations already raised in the petition, but introduced new details in terms of particulars of polling stations. For instance, at paragraph 21, the 1st petitioner specifies polling stations where he alleged agents were denied access. At paragraph 25, the 1st petitioner avers that agents were not supplied with forms 37A in over 2,000 polling stations, expanding the stations cited in the petition on a similar allegation.

24. In the petition, the 1st petitioner raises complaints in respect of various forms having irregularities, which in the exhibits to the 1st petitioner's supporting affidavit are 348 forms with anomalies, out of 857 forms that were sampled. In his further affidavit, he cites anomalies in 798 forms out of the 1,300 forms that were sampled.

25. The further Affidavit of Koitamet Ole Kina relates to additional evidence, according to his deposition, as a result of analysis of 1,300 forms that were received from agents from the various polling stations. This is in addition to the 857 forms that had formed the basis of his initial analysis as contained in his affidavit filed in support of the petition. As a result, that later analysis of the forms attached to his further affidavit introduced new undisputed forms in respect of polling stations.

26. The petitioners state that failure to provide the evidence now being sought to be introduced was occasioned by failure by the IEBC to supply them with copies of all the statutory forms when so requested. This allegation was reiterated in court by counsel for the petitioners citing the letter dated 7th September 2017. This request was also referred to by Koitamet Ole Kina in his Affidavit sworn in support of the petition. It is notable however, that this complaint was not pleaded by the 1st petitioner in both his Affidavit in support of the petition and the further affidavit sought to be admitted.

27. Affidavits are required to be confined to such facts as the deponent is able of his own knowledge to prove. However, where they contain statements of information and belief, the sources and grounds must be disclosed. This requirement is intended to avoid any matters based on hearsay which may not have any evidential value. Rule 12 (14) of the Elections Petition Rules provides for the application of the Oaths and Statutory Declarations Act (Cap 15) Laws of Kenya and Order 19 of the Civil Procedure Rules, 2010. This is intended to enhance credibility of the evidence contained in any affidavit to be used in evidence. The affidavits sought to be introduced are in general form, based on information not in the actual knowledge of the deponents, thereby relegating them to the realm of hearsay evidence.

28. It is true that the IEBC as a public body has a duty to provide information in its custody. I take into account that the petition herein was filed on 8th September 2017. The request for the forms was made on 7th September 2017, a day before the petition was filed, that the forms be supplied on the same day. The petitioners were therefore, operating on the presumption that the information needed would be available immediately on demand. It has not therefore been demonstrated that due diligence was exercised to access the necessary information before the filing of the petition. Besides, the petitioners also introduced new information concerning charges against certain election officials. Again, there was no demonstration that this information could not have been obtained earlier.

29. Consequent to the filing of the petition, the 1st and 2nd respondents filed their response on 19th September 2017 while the 3rd respondent filed his response to the petition on 20th September 2017. The application in question was filed on 19th September 2017, when the parties had prepared their responses. The effect of the new evidence sought to be admitted would require further responses by the respondents. This is not tenable outside the 28 days allowed under **Section 76** of the Elections Act on amendment of a

petition, a power which the court cannot invoke under **Rule 19** of the Election Petition Rules to extend the time for admission of such evidence. To admit the further affidavits would go against the duty of an election court which is enjoined under **Rule 4** to *facilitate the just, expeditious, proportionate and affordable resolution of elections petitions*.

30. In the end, the application must fail and is hereby dismissed. The costs shall be in the cause.

Dated and Delivered at Nairobi this 18th Day of December, 2017

A. MBOGHOLI MSAGHA

JUDGE

Delivered in the presence of:

1. for the 1st Petitioner }- Ms. Maumo & Mr. Oginga h/b for Mr. Olouch
2. for the 2nd Petitioner }
3. for the 1st and 2nd Respondents } – Mr. Nani Mungai & Ms. Muthee
4. for the 3rd Respondent – Mr. Kinyanjui

Court Assistant- Kavata