



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT GARISSA
HIGH COURT ELECTION PETITION NO. 5 OF 2017
SHUKRA HUSSEIN GURE.....PETITIONER
VERSUS
INDEPENDENT ELECTORAL AND
BOUNDARIES COMMISSION.....1ST RESPONDENT
THE COUNTRY RETURNING OFFICER
OF INDEPENDENT ELECTORAL AND
BOUNDARIES COMMISSION.....2ND RESPONDENT
ANAB GURE MOHAMED.....3RD RESPONDENT

RULING/DIRECTIONS

1. Three interlocutory applications were filed herein prior to the pre-trial conference as follows:

(a) The application dated 19th October, 2017 and filed in court the same day seeking orders that the petition be dismissed under Section 78 of the Elections Act which provides for deposit of security for costs;

(b) The application dated 5th September, 2017 and filed in court on 13th November, 2017 brought under Articles 35, 86 & 87(3) of the Constitution and Section 82 & 84 of the Elections Act and Regulations 14 & 15 of the Elections (Technology) Regulations 2017 and Section 27 of the Independent Electoral and Boundaries Commission Act. Principally, the application seeks orders for scrutiny and access to polling station diaries, information on KIEM's machines, inventories and details of seals;

(c) Application dated 21st November, 2017 and filed in court on the same day brought under Rules 8(1) & 15 of the Elections (Parliamentary and County Elections) Petition Rules (hereinafter Rules) as read with Section 76 (4) of the Elections Act which provide for *inter alia* the contents of a petition.

2. When this petition first came up for directions on 16th October, 2017, this court directed that the 1st and

2nd Respondent who were not present be served for directions on 24th October, 2017. The response to the petition by the 3rd Respondent was filed on 19th September 2017. The 3rd Respondent requested for a hearing date for the application dated 19th October, 2017 seeking orders that the petition be struck out for none payment of the deposit for security. The Petitioner's counsel undertook to avail to the court the deposit receipt as there was no copy of the same in the court file.

3. Service had been effected on the 1st and 2nd Respondent who had filed their responses to the petition but were allowed more time to file further affidavits. When this case come up for directions on 31st October, 2017, the receipt for the deposit of security had not yet been availed. The Petitioner's side expressed their intention to file an application for scrutiny. The Petitioner was given timelines within which to file the application and the Respondents given time to respond to the same. The Petitioner was also given more time to avail the receipt for the deposit of security.

4. When this petition came up for directions on 14th November, 2017, the Petitioner's application dated 5th September, 2017 had been filed. The 1st and 2nd Respondents had complied and filed their further affidavits albeit late and outside the timelines given by the court. The further affidavit of Antony Njoroge Douglas filed by the 1st and 2nd Respondents had some annexures that were not clear. The court directed the 1st and 2nd Respondents to substitute the unclear annexures and gave the Respondents a chance to respond to the application filed by the Petitioner. The Petitioner and the 3rd Respondent were given time to respond to the further affidavit filed by the 1st and 2nd Respondent. All parties were directed to file and serve their lists of contested and non contested issues. The Deputy Registrar, Garissa was directed to avail a certified copy of the receipt and forward the same to this court.

5. By the time this petition came up for further directions on 17th November, 2017, the Deputy Registrar Garissa High Court had forwarded to the court the certified copies of the duplicate receipt for the deposit of security. The Petitioner's counsel had also forwarded the triplicate receipt to the court. The 3rd Respondent requested for a hearing date for their application dated 19th October, 2017. The said application dated 19th October, 2017 was responded to by the Petitioner and proceeded for hearing on 21st November, 2017. The application was not objected to by the 1st and 2nd Respondent.

6. On 21st November, 2017 the court was informed by the 1st and 2nd Respondent that the aforesaid unclear annexures had been substituted but requested for more time to file further affidavits in response to the petition and was allowed. The 3rd Respondent requested that the replying affidavit in respect of the application dated 19th October, 2017 which had been filed outside the timelines given by the court be deemed as duly filed and the court deemed the said affidavit as duly filed. All parties were warned against none adherence to the timelines given by the court and put on notice that the court will not entertain any further late filing of documents.

7. The application dated 21st November, 2017 was filed and the court gave the other parties time to respond to the same. The court directed that the applications dated 19th October, 2017 and 21st November, 2017 do proceed simultaneously first as they were capable, if successful, of bringing the petition to an end. The two applications were subsequently heard and determined on 4th December, 2017. However, the 3rd Respondent applied to put in a further affidavit in response to the further affidavits sworn by the Presiding Officers on 23rd November, 2017. The application was objected to. The court again granted leave to the 3rd Respondent to file the said further affidavit. Parties put on notice once again that we do not have the luxury of time. The pre-trial conference to be held on 6th December, 2017.

8. During the pre-trial conference on 6th December, 2017 the counsel for the 1st and 2nd Respondent came to the court with a prepared supplementary affidavit which he said had forms 39B & 39C attached and sought leave to file the same. The Petitioner's counsel was objected to the filing of the same and raised concerns regarding the security of the election materials and pointed out he had been denied access to the same by the 1st and 2nd Respondent yet the 3rd Respondent had now filed a further affidavit while

attaching copies of the same forms and objected to the filing of the supplementary affidavit and also objected to the attachment of the said forms the further affidavits by the 3rd Respondent on the grounds that the same were introducing new matters. Issues were raised concerning who was the maker of the said forms.

9. The counsel for the 3rd Respondent stated that they did not have access to the original form 39B & form 39C and attached copies of the same to their further affidavit as the court had not yet been furnished with the same as the timelines given by the court had to be complied with. It was further stated that the affidavit in support of the petition had not attached the national identity card copies of the deponents as stated in the said affidavits and that the affidavit of Yussuf Ahmed Muhumed had been executed by one Abdiaziz Yussuf Osman. The court was urged to expunge the said affidavit from the record and to summon the Commissioner for oaths who had witnessed the same, one Ian M Mbuthia to court to explain the matter. The court was also urged to expunge the contents of paragraph 9 of the Petitioner's further affidavit as it refers to a report by the Director of CID and the Petitioner was not the maker of the same and cannot be cross-examined on the contents thereof. It was also stated that the certificate of electronic evidence filed herein has not attached the video referred to therein.

10. This court on 22nd November, 2017 put all the parties on notice against the late filing of documents and the delay being occasioned to this petition. It was observed that the forms sought to be introduced by the 1st and 2nd Respondent have been in their custody all along. There is no explanation given why there has been delay in the filing of the same. Consequently, I direct the 1st and 2nd Respondent to file and serve a formal application on or before 12.00 p.m. on 11th December, 2017. Any responses to the same to be filed and served on 13th December, 2017 by 8.30 a.m. The said application and the application dated 5th September, 2017 and filed on 13th November, 2017 will be heard at an appropriate stage in the course of the hearing of the petition.

11. On the issue of the attaching of the forms 39B and 39C to the affidavit of the 3rd Respondent, it is noted that the same are said to be copies of the same documents that the makers, the 1st and 2nd Respondent wish to introduce vide their intended supplementary affidavit. The deponent of the said further affidavit is not the maker of the same and cannot be cross examined on the contents therein. The contents of the said further affidavit are not a response to the further affidavits sworn by the Presiding Officers which made no comments on the details of the contents of the said forms. Paragraph No. 3 of the said further affidavit which refers to the said forms 39B and 39C and attached the same is hereby struck out.

12. The deponent of the Petitioner's further affidavit which in paragraph 9 thereof attaches an expert report by the CID has also been objected to. The said deponent is not the maker of the said report and cannot be cross-examined on the contents thereof. Consequently, the maker of the said report to be availed in court during the hearing of the petition for purposes of giving evidence on the same.

13. The national identity card copies referred to in the affidavits of the Petitioner's exhibits have not been attached. All witnesses have to identify themselves by use of their national identity card's before they can testify.

14. The affidavit of Yussuf Ahmed Muhumed which is on the face of it executed by one Abdiaziz Yussuf Osman was witnessed by one Ian M Mbuthia, described as a commissioner for Oaths. The said Yussuf Ahmed Muhumed to explain the said discrepancy to the court before giving his evidence. The aforesaid Commissioner for Oaths to file an affidavit in court and explain what transpired and may be summoned to court to be cross examined on the contents of the said affidavit.

15. Independent Electoral Boundaries Commission (IEBC) is the custodian of the election materials as provided by the law. Now that the Petitioner has raised concerns over the security of the same, IEBC to make arrangements for the placement of the additional seals and/or padlocks by the Petitioner to secure the same.

16. The electronic evidence will be dealt with in accordance with the Evidence Act Cap 80 of Laws of Kenya and the Electronic Evidence Regulations.

17. It is noted that the parties are ready for hearing and have filed lists of contested issues. There are no lists of agreed issues filed. The Petitioner has given the number of witnesses to be called as 7 and will take 5 days. The 1st and 2nd Respondent will call 5 witnesses and take 4 days. The 3rd Respondent will call 2 witnesses and take 3 days. The witnesses to be on standby and will be given a minimum of one day's notice to attend court taking into account the long distance from Garissa to Nairobi.

18. Hearing of the petition to commence on 13th December, 2017 and thereafter on a day to day basis. This marks the conclusion of the pre-trial conference. The directions given herein must be complied with and can only be varied by the court on the invitation of the parties or on its own motion only for sufficient cause.

Date, signed and delivered at Nairobi this 8th day of Dec., 2017

B. THURANIRAJADEN

JUDGE