



REPUBLIC OF KENYA

High Court of Kisii

Petition 1 of 2013

**IN THE MATTER OF ARTICLES 20, 21, 22, 23 (3), 27 (1), & 35, 38 & 47 OF THE
CONSTITUTION, 2010**

AND

**IN THE MATTER OF VIOLATION AND/OR INFRINGEMENT ON THE PETITIONER'S
CONSTITUTIONAL RIGHTS**

AND

IN THE MATTER OF ELECTION TO NAROK COUNTY ASSEMBLY

AND

IN THE MATTER OF MOGONDO WARD

AND

IN THE MATTER OF FAILURE TO SUPPLY AND/OR AVAIL STATUTORY DOCUMENTS

AND

IN THE MATTER OF FAIR AND JUST ADMINISTRATIVE DECISIONS

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION &
PROTECTION OF FUNDAMENTAL**

**RIGHTS & FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE AND
PROCEDURE RULES, 2006**

AND

IN THE MATTER OF SECTION 19 (SIXTH SCHEDULE) OF THE CONSTITUTION, 2010

BETWEEN

KIBET RONO UNDERSONPETITIONER

VERSUS

**THE RETURNING OFFICER, EMURUA DIKIRR CONSTITUENCY.....1ST
RESPONDENT**

THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION...2ND RESPONDENT

RULING

1. By a Petition dated 15th March 2013, the Petitioner Kibeti Ronoh Underson, seeks the following orders:-

a) *Declaration that the failure to avail and/or supply the Petitioner with the statutory Forms, in particular, Forms 34, 35 & 36, respectively, for Mogondo Ward, relating to the General Election held on the 4th day of March 2013, constitutes and/or amounts to violation of the Petitioner's Fundamental and Constitutional Rights.*

b) *Declaration that the Petitioner is entitled to the Statutory Forms, that is, Forms 34, 35 & 36, respectively, in line with the provisions of Section 80 of the Law of Evidence Act and Article 35 of the Constitution, 2010.*

c) *An order of Judicial Review, in the nature of Mandamus to issue to compel the Respondents to forthwith issue, avail and supply to the Petitioner certified copies of Forms 34, 35 & 36, respectively, for Mogondo Ward, relating to the General Election held on the **4th day of March 2013**, to facilitate the preparation and lodgment of the Petition challenging (sic) the Election of one Kipsang Mibei, as the duly elected County Assembly Ward Representative for Mogondo Ward.*

d) *Costs of the Petition be borne by the Respondents jointly and/or severally.*

e) *The Honourable Court be pleased to issue such orders and/or writs as the court may deem fit and/or expedient.*

2. The Petition is supported by the affidavit sworn by the Petitioner herein on 15th March 2013. According to the Petitioner, he contested as a County Assembly Representative for Mogondo Ward within Emurua Dikirr Constituency, Trans Mara East District within Narok County during the General Election held on 4th March 2013 on a Progressive Party of Kenya (PPR) ticket. That as a candidate, he appointed a number of agents to oversee the voting process at various polling stations; that the agents took oath and executed a statutory declaration issued by the 2nd Respondent. He avers that the agents carried out their mandate of ensuring that the voting exercise was carried out and/or conducted in accordance with the democratic rights enshrined in the Constitution.

3. The Petitioner also states that subsequent to the polling exercise, his agents were entitled to copies of statutory forms 34, 35 and 36 showing the number of votes garnered by each candidate for Mogondo Ward. That contrary to the law the Petitioner's agents were not issued with or given copies of the above stated forms; that despite the Petitioner's own intervention by letter written on his behalf by his advocates on record, the said statutory forms 34, 35 and 36 respectively have not been availed by the Respondents either to his duly engaged agents or to himself. It is the Petitioner's contention that the Respondents have no excuse for failing and/or refusing to avail the said forms and that such refusal is informed by ulterior motives on the part of the Respondents and amounts to a violation or infringement of the Petitioner's constitutional and fundamental rights as by the constitution provided. For the above reasons, the Petitioner prays that he be granted the prayers sought, since without the said forms 34, 35 and 36 respectively, he will not be able to effectively mount his Election Petition against the winner, Kipsang Mibei who allegedly got 4441 votes against the Petitioner's 4132 votes.

4. The petition is opposed. There is a Replying Affidavit sworn by Mohamud Mohamed Jabane on 20th March 2013. While acknowledging that the Petitioner was a contestant for the Mogondo Ward County Assembly representative, which seat the Petitioner lost to the winner, one Kipsang Mibei, the deponent

denied that the Petitioner or his agents have been denied the stated forms as alleged; that there is no evidence placed before the court by the petitioner to prove that either the petitioner or his agents attended any polling station for purposes of legally obtaining the statutory form 35 as provided under **Regulation 79 (2) (b)**; that the petitioner has failed to prove that he satisfied the requirements of **Regulation 74 (1) (2) and (3)** in respect of the appointment of the purported agents; it is also not shown in evidence and/or otherwise disclosed to this court why the purported agents or petitioner did not sign the declaration under **Regulation 79 (1)**, and that in the circumstances, the Petitioner has failed to provide in sufficient detail the character and manner of violation or breach of his fundamental rights by the respondent herein. The deponent accuses the petitioner of going on a fishing expedition due to the general nature of the petition. Finally, the deponent asserts that the provisions of **Article 35** of the **Constitution** were not meant to act as a panacea for any party not to comply with the law. The respondents therefore pray that the petition be dismissed.

5. I have considered the evidence on record and also considered the submissions by counsel. In their submissions, counsel reiterated the averments in their respective affidavits. After hearing the parties, the main issue that arises for determination is whether the Petitioner herein is entitled to receive the stated forms 34, 35 and 36 respectively. The secondary issue is whether the stated forms are public documents as provided under the **Constitution of Kenya** and the **Evidence Act, Chapter 80 Laws of Kenya**.

6. **Article 35 (1)** of the **Constitution** which is on access to information provides as follows:-

1) *Every citizen has the right of access to:-*

a) *information held by the State; and*

b) *information held by another person and required for the exercise or protection of any rights or fundamental freedom.*

On the other hand, **section 79 (1)** of the **Evidence Act, Chapter 80 Laws of Kenya**, distinguishes between public and private documents and provides as follows:-

“79(1) The following documents are public documents:-

a) *documents forming the acts or records of the acts.*

i) *of the sovereign authority; or*

ii) *of official bodies and tribunals; or*

iii) *of public officers, legislature, judicial or executive whether of Kenya or of any other county.*

b) *Public records kept in Kenya of private documents.”*

7. In the instant case, counsel for the Petitioner submitted that it is conceded on the part of the Respondents that that a candidate who runs for any elective post is entitled to the forms sought by the petitioner in this application. Counsel for the Respondent on the other hand placed heavy reliance on **Rule 62 (1)** of the **Elections (General) Regulations 2012**, also referred to as **Legal Notice No.128/2012** which provides that the presiding officer shall regulate the number of voters to be admitted to the polling station at the same time and may exclude all other persons except –

(a) a candidate;

(b) a person nominated as a deputy to the candidate, where applicable;

(c) authorized agents;

(d) -----

(e) -----

(f) -----

(g) -----

8. In connection with the above provision, counsel for the Respondents submitted that the Presiding Officer is not authorized by law to issue the forms unless it is to a candidate or authorized agent. Counsel contended that the Petitioner's alleged agents have not shown any proof that they were accredited agents of the Petitioner.

9. After a careful scrutiny of the submissions, I find that there is evidence on record showing that the Petitioner himself, through his advocates requested to be supplied with the requisite forms. That letter was dated 12th March 2013, though counsel for the Respondent seems to suggest that no weight should be placed on the said letter since there is no evidence of the letter having been received by the addressee. In my humble view, nothing much turns on the latter contention by counsel. The Respondents were served with the letter together with the petition and by the 21st March 2013 when the petition came up for inter partes hearing, the respondents were fully aware that the petitioner wanted to be supplied with those forms pursuant to **Regulation 62 (1) of Legal Notice No.128/2012**. They did not oblige and have not obliged to date. The Respondents are aware that the documents in question are public documents to which the petitioner is entitled by virtue of **Article 35 (1) of the Constitution**. The Respondents have not given any reasons to this court as to why the petitioner should not be supplied with the documents, except to state that the Returning Officer is not authorized to release the documents. That argument does not in my humble view have any legal basis.

10. In the circumstances, and for the reasons above given, I allow the petition dated 15th March 2013 and make the following declarations/orders:-

1) That the failure to avail and/or supply the Petitioner with the Statutory Forms, in particular, Forms 34, 35 and 36 respectively, for Mogondo Ward, relating to the General Election held on 4th day of March 2013 constitutes and/or amounts to violation of the Petitioner's fundamental and constitutional rights.

*2) That the Petitioner is entitled to the Statutory Forms, that is Forms 34, 35 and 36 respectively in line with the provisions of **Section 80 of the Evidence Act and Article 35 of the Constitution, 2010**.*

3) An order of Judicial Review, in the nature of Mandamus be and is hereby issued to compel the respondents to forthwith and in any event not later than 1.00 p.m. on Tuesday, 2nd April 2013, issue, avail and supply to the Petitioner certified copies of Forms 34, 35 and 36 respectively, for Mogondo Ward, relating to the General Election held on the 4th day of March 2013, to facilitate the preparation and lodgment of the Petition challenging (sic) the Election of one Kipsang Mibei, as the duly elected County Assembly Ward Representative for Mogondo Ward.

4) Costs of this application shall be borne by the Respondents.

11. It is so ordered.

Dated and delivered at Kisii this 28th day of March, 2013

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

Mr. Oguttu-Mboya (present) for Petitioner

Mr. Isaac Odhiambo) for 1st Respondent

Mr. Isaac Odhiambo) for 2nd Respondent

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI

JUDGE.