



REPUBLIC OF KENYA

High Court at Machakos

Petition 2 of 2013

THOMAS MALINDA MUSAU.....1ST PETITIONER

STEPHEN NDAMBUKI MULI.....2ND PETITIONER

JOHN NTHULI MAKENZI.3RD PETITIONER

VERSUS

THE INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION.....1ST RESPONDENT

LEONARD OKEMWA (RETURNING OFFICER)2ND RESPONDENT

STEPHEN MUTINDA MULE.....3RD RESPONDENT

RULING

1. Pursuant to the ruling of this court dated 15th May, 2013 whereby it was ordered that the scrutiny of votes and recount ballot papers be done in respect of all polling stations to establish the validity of votes cast; under the supervision of the Deputy Registrar, the exercise commenced on the 22nd May, 2013. Scrutiny of the ballot papers proceeded well till the 24th of May, 2013 when parties disagreed over the polling day diary that was being used at the polling centre by the Presiding Officer.

2. **Mr. Leichana** for the Petitioners sought to be furnished with the polling day diary on the ground that it was the document the agents signed at the tallying centre in respect of seals put on ballot boxes. It was his argument that the document could not be viewed as an administrative document.

3. The Petitioner's counsel argued further that it was one of the documents the 1st and 2nd Respondents' counsel agreed to avail to him. The document was used on the first day votes were being scrutinized but was withdrawn by the 1st and 2nd Respondents. He called upon the court to do justice by directing that the document be supplied to the court.

4. **Mr. Mungai**, counsel for the 1st and 2nd Respondents opposed the application on the grounds that no legal basis had been laid for requesting that particular document. He alluded to Rule 33 of the Election (*Parliamentary and County*) Petitions Rules, 2013 (*hereinafter "Petition Rules"*) which stipulates what documents are to be scrutinised.

5. He further argued that the Respondent was entitled to keep records per the provisions of the Elections (*General*) Regulations, 2012, just like the petitioner. In the premises, the Petitioner should use their own records since the law does not require Electoral Independent Boundaries Commission (*IEBC*) to

maintain a polling day diary. The polling day diary in his view was simply an administrative tool used by the presiding officer.

6. **Mr. Kiugu**, counsel for the 3rd Respondent similarly objected to use of the polling day diary which was being used in scrutiny of votes because it was not procedural. He alluded to Rule 21 of the Petitions Rules, 2013 which obligates production of specific documents by the commission namely; ballot boxes within forty-eight hours before the hearing date and the results of the election within 14 days of being served with the petition.

7. His argument was also based on the fact that the document had not been sealed in the ballot box hence was subject to abuse.

8. It was the directive of this court that scrutiny of votes be done in accordance with Rule 33(4) of the Petition Rules, 2013 which provides as follows:-

“Scrutiny shall be confined to the polling stations in which the results are disputed and shall be limited to the examination of:-

(a) *The written statements made by the Presiding Officers under the provisions of the Act;*

(b) -----

(c) -----

(d) -----

(e) -----

(f) -----

(g) -----

(h) -----

(i) -----

(j) -----

9. The polling day diary is said to be an administrative document used by the presiding officer to record events on daily basis. This is a Presiding Officers personal document.

10. It is argued by the Petitioner’s counsel that it contains records of seals on ballot boxes and counterfoils used at the election.

The issue to be determined is whether the document falls within the ambit of statements made by the presiding officer?

11. In order for scrutiny of votes to be carried out, seals on ballot boxes must be broken. All items to be examined are found inside the ballot boxes.

12. Upon completion of a count (*re-count included*), the Presiding Officer is required to demonstrate to candidates or their agents that the ballot box to be used to carry the election results is empty. Then he is required to put statements made pursuant to regulations 78 and 79 therein. (*See Regulations 81(1) (2) of the Elections (General) Regulations, 2012 (hereinafter “Regulations, 2012”*).

13. It is after the Presiding Officer complies with the procedure in Regulation 81(2) of the

Regulations, 2012 that he seals the ballot boxes with the seal of the Independent Electoral and Boundaries Commission (IEBC).

14. The candidates/agents are allowed to affix their respective seals on the box if they so wish (*see Regulations 81(3) of the Regulations, 2012*). He then delivers the box to the Returning officer.

15. Statements made pursuant to Regulation 78 are in regard to rejected ballot papers. The presiding officer must indicate clearly the rejected ballot papers. In case of any objection arising, it must be indicated in writing. All candidates/agents have a duty of signing the declarations in respect of the elections. This is what is reduced into form 35.

16. Petition Rule 33(4) (a) stipulate as follows:-

“The written statement made by the presiding officer under the Provision of the Act”.

(emphasis mine).

It is not any statement made by any party that is scrutinized. The statement must be a legal one made under the provision of the law.

17. It has been submitted that the polling day diary is not a statutory document. It is a document that was in custody of the Presiding Officer and by extension the 1st and 2nd Respondents herein. This court cannot tell whether or not it has been interfered with.

18. An issue was raised about the application dated 19th April, 2013 that was compromised. In the application, the Petitioner sought to be provided with certified copies of forms 33, 35, and 36. Petitioners were furnished with the said documents.

19. His counsel however, argued that they had a gentlemen’s agreement through mutual etiquette with the 1st and 2nd Respondent’s counsel whereby they were to furnish them with any other document used in the polling exercise. The consent recorded in court states:-

“Petitioners’ application dated 19th March, 2013 be marked as compromised”

Parties did not divulge what exactly they had agreed on. Justice would require the court to confine itself to issues before it. Descending in an arena that did not form part of the court record would be unjust.

20. It has been argued that the document (*polling day diary*) was used at the beginning of the exercise (*Scrutiny of votes*). This was done contrary to the directive given by the court.

21. Having considered the issue raised, I find that the document was used in contravention of the court’s directive. This court cannot regularise an illegality just because all parties ventured into it.

22. In the premises, the Respondents are prohibited from using any document that cannot be accessed by the other party and which does not fall within the ambit of the Rule 33(4) of the Petition Rules, 2013.

23. It is so ordered.

RULING DATED, SIGNED and DELIVERED in open court at **MACHAKOS** this **27TH** day of **MAY, 2013**.

L.N. MUTENDE
JUDGE

IN THE PRESENCE OF:

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CC- Collins

Ms Gichuki h/b for Mr. Laichena for the Petitioner

Ms Kioko & Mr. Kiugu for the 3rd Respondent

Mr. Kiugu h/b for Mr. Mungai for the 1st and 2nd

Respondent.

L.N. MUTENDE
JUDGE