



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
ELECTION PETITION NO. 3 OF 2013

PETER GICHUKI KING'ARA.....PETITIONER

VERSUS

INDEPENDENT ELECTROL

AND BOUNDARIES COMMISSION.....1ST RESPONDENT

JAMES MBAI.....2ND RESPONDENT

MARY WAMBUI MUNENE.....3RD RESPONDENT

RULING

In the course of cross-examining the 2nd Respondent this morning, the petitioners counsel, Mr. Marete applied for production, by the 1st and 2nd Respondents, of the following documents.

- (a) The list of polling stations and presiding officers issued with polling day diaries by the 1st and 2nd Respondents for use in the general elections of 4th March 2013 in Othaya constituency.
- (b) A list of polling stations and presiding officers issued with the training polling day diaries
- (c) Polling day diaries and training polling day diaries, apparently used in Othaya Constituency on 4th March 2013 elections.

Counsel for the petitioner says that the two categories of diaries constitute the events and the proceedings at all gazetted polling stations in Othaya constituency on 4/3/2013.

The petitioner counsel's submits that these diaries shall vindicate the petitioner on the questions raised in his petition more particularly grounds (f) (g) (l) and (m) thereof. The Counsel cited Rule 4 of the Elections (Parliamentary & County Assembly) Petition Rules 2013, Rule 20 thereof and Article 159 of the Constitution in support of the application.

Counsel for the respondents have opposed the application. Mr. Miller says that the petitioner has closed his case and it is a bit late in the day to make such an application. The 2nd Respondent, according to counsel, much as he is the returning officer he may not be in a position to answer questions in the poll day diaries because he is not the maker thereof.

According to counsel, introducing new evidence at this stage of the trial will deviate the petition from its course and it may as well amount to amendment of the petition to the prejudice of the respondents.

Counsel submits that no credible basis has been laid for the documents asked for; the petitioner is seeking poll diaries used in the entire Othaya constituency. In the Counsel's estimation this is a fishing expedition. Production of these documents will mean delay in the hearing and determination of this matter.

According to the counsel, the issue of production of documents can and could only be determined during the pretrial conference. The documents sought were not among the documents petitioner sought for during that conference.

Finally counsel says that if the documents are produced, such production will fly in the face of Rules 12 (1) (c), Rule 17(1) (e) and Rule 17 (1) of the Election Petition Rules.

Mr. Munge for the 1st Respondent has associated himself with the submissions of Mr. Miller and insisted that since the petitioner had notice of this poll diaries from the very beginning he should have applied for their production at the pre-trial stage. Counsel submitted that there is no provision for application for production of documents at the trial stage.

Mr. Munge has submitted that this is an administrative document and has no relevance in challenging an election.

Mr. Mbai, the witness in the dock according to Mr. Munge has no role in filling of the diary and further none of the grounds in the petitioner's petition particularly grounds (f) (g) (l) and (m) thereof have any connection with the issue of poll diaries.

Having closed his case, so Mr. Munge argues, the petitioner cannot purport to introduce new documents. Introduction of these documents will certainly delay the determination of this case.

In rebuttal Mr. Marete reminded the court that it is IEBC which had undertaken to produce the polling day diaries in court and even confirmed to have 62 diaries in court and these diaries were to be produced by consent of the parties and he is surprised that Mr. Munge has now changed his mind.

Mr. Marete said that Mr. Mbai is best placed to produce the documents because he was charged with the conduct of the elections in the constituency in issue.

Mr. Marete says that the polling day diaries are not issues for determination and they are simply documents which speak for themselves. They are the only documents which form the record of what transpired at the polling station. Mr. Marete wants these documents produced because they would help the court reach a just determination in this matter.

I have considered the application by counsel for the petitioner and the submissions by the counsel for the respective parties.

It is apparent from the records that on 19/06/2013 Mr. Munge applied for adjournment on the ground that he had only one original poll diary in court. He sought for time to bring the rest of the diaries from Othaya the following day so that they could be availed in court. Counsel for the petitioner did not object to the application.

The understanding between the parties was that these documents, once availed in court would be produced by consent. However, only three diaries out of the 62 diaries that Mr. Munge brought were produced by the witnesses he called.

This morning the counsel for the petitioner applied to have the diaries admitted in evidence apparently because parties could not agree on their admission.

I must start by stating that if the parties had followed their representations through and allowed these documents to be admitted in evidence by consent, the court would have had no problem in endorsing such

consent.

However, since the anticipated consent did not materialise, the court has to consider the application based on the law.

As early as 2nd May 2013 the petitioner made an application for production of several documents which in his view were necessary for determination of the petition herein.

A ruling on that application was delivered on 24 May 2013. In the application that was made no reference was made whatsoever to the polling day diaries.

I have not heard from the petitioner's counsel, in his application today why the petitioner did not demand for production of the poll diaries in that application.

In my view, that is the proper application in which these documents ought to have been demanded for, under the provisions for the law which that application was brought.

I am of the view that seeking productions of documents now after the trial has commenced and more particularly after the petitioner has closed his case may open unexpected front for battle in this petition that will only succeed in delaying the determination of the petition within the statutory timelines.

The court would have had no problem in granting the application if it was timeously made mainly because the documents sought may or may not have answered some of the questions raised in the petition. However, in the 1st and 2nd respondent's wisdom, they have chosen to produce only three diaries out of the sixty two available at this stage. It could be that in the respondent's view the questions raised in the petition have been answered or will be answered by evidence other than the polling day diaries. Whether they are right or wrong is for the court to determine taking into account the inferences that may be drawn on production or non-production of documents in in possession of any one particular party.

For the foregoing reasons the application for production of documents listed by the petitioner is refused. That is my order.

NGAAH JAIRUS

JUDGE

27/06/2013

Ruling delivered in open court at 4.25 p.m.in the presence of

Mr. Marete for the petitioner

Mr. Munge for the 1st and 2nd Respondent

Mr Miller and Mr. Wena for the 3rd Respondent