



REPUBLIC OF KENYA

High Court at Garissa

Petition 2 of 2013

ABDIKAM OSMAN MOHAMED1ST PETITIONER

SAHAEL NUNO ABDI2ND PETITIONER

VERSUS

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....1ST RESPONDENT

RETURNING OFFICER, GARISSA COUNTY.....2ND RESPONDENT

NATHIF JAMA ADAN3RD RESPONDENT

R U L I N G

1. After the general election of 4th March, 2013, the 3rd Respondent was declared elected as Governor for Garissa County on 13th March, 2013. Consequently, the Petitioners who are registered as voters within that County lodged a Petition dated 10th April, 2013 challenging the said election and the declaration of the 3rd Respondent as Governor of Garissa County.

2. When the matter came up for Pre-trial directions on 28th May, 2013, the Court gave various directions with regard to the hearing of the Petition and the Petitioners Application by way of Chamber Summons dated 25th March, 2013. Among the directions given by the Court on that summons was that the Application be served upon the Director of Public Prosecutions (D.P.P) for purposes of determining the prayer by the Petitioner for the production of Ballot Boxes in the custody of the Police in relation to **CRIMINAL CASE NO. 251 OF 2013, Republic -V-ABDIKARIM NOOR**. On 4th June, 2013, the said application came up for hearing and was argued by the respective Counsel and this is a ruling inspect thereof.

3. The application was supported by the Affidavit of Abdikhaim Osman Mohamed sworn on 20th March, 2013. The Petitioners contended that the Police had in their custody unsealed ballot boxes and ballot papers in connection with a criminal case instituted against a presiding officer of Saka Ward, Balambala Constituency. It was contended that unless the Court granted the orders sought, there was risk that the unsealed ballot boxes and ballot papers would be tampered with or lost, to the detriment of the Petitioners case. Ms. Millimo, Counsel for the Petitioners submitted that the said unsealed ballot boxes formed part of the Petitioners evidence on the election irregularities for the County. That even though there was no

law in support of such a prayer the Court had wide discretionary powers to aid in the delivery of substantive justice.

4. The application was opposed by Mr. Ngetich representing the D.P.P. Counsel submitted that under Article 156 (4) and 157(6) of the Constitution, the mandate of the D.P.P was to prosecute offences that were of a criminal nature, that what was before Court was an Election Petition that did not fall within the confines of D.P.P's jurisdiction, that for that reason the proper party should have been the Attorney General who is the Principal Legal Advisor of the Government and not the D.P.P. Counsel further submitted that the Accused person and the case number in the Charge Sheet did not agree with the particulars in the application. He observed that the charge sheet indicated that the particulars of offence were in connection with Polling Day Diaries and not unsealed Ballot Boxes as claimed by the Petitioners in the application. He therefore urged that the Application be dismissed.

5. The 1st and 2nd Respondent supported the D.P.P through their Counsel Mr. Muganda. He submitted that the 1st Respondent was an independent body and was thus relieved of its duty when a matter was placed in the hands of the Police for investigation of an alleged electoral offence. That as such, the 1st Respondent had no role to play in the instant application. Learned counsel however submitted that the election results at Mathalibah ECD Polling Station having been cancelled, no party benefited from any irregularities thereon. He therefore urged the Court to dismiss the Application.

6. Mr. Muriithi, learned Counsel for the 3rd Respondent, also supported the D.P.P in opposing the Application. He submitted that the prayer for the production of the unsealed ballot boxes lacked legal or factual foundation. That the sections cited in the application were general provisions of the constitution and do not empower the court to give the orders sought by the Petitioners. He further submitted that the Petition and the grounds of the Application, did not mention **CRIMINAL CASE NO. 251 OF 2013 Republic -V-ABDIKARIM NOOR**. Mr. Muriithi therefore contended that allowing the Application would amount to amending the Petition and the Application through the back door. He concluded that the Petitioners had not laid the basis for the production of the ballot boxes and ballot papers as there was no prayers for scrutiny and re-tallying of the votes in the Petition. He therefore urged the Court to dismiss the Application.

7. In rejoinder, Ms. Millimo submitted that the D.P.P was properly enjoined as the Persons arrested with connection to the election offences, were under the direction of the D.P.P. That as such there was no need to enjoin the Attorney General as a party. She further submitted that the Petition had in paragraph 9 made reference to **CRIMINAL CASE NO. 251 OF 2013 Republic -Vs- ABDIKARIM NOOR**, wherein the Petitioners had referred to the arrest of the Presiding Officer for Mathalibah Polling Station. It was also submitted that the Petition had indicated that some ballot boxes had been tampered with and there was therefore no need to lay any other basis for the production of the ballot boxes.

8. With regard to the issue of the variance of the particulars of the Charge Sheet and the Application in terms of the Criminal cases referred to, Ms. Millimo submitted that though the Petitioners knew of **CRIMINAL CASE NO. 251 OF 2013 Republic -Vs- ABDIKARIM NOOR**, they did not have the details of the same at the time of filing the application. She therefore sought to rely on a letter dated 21st March, 2013 ("the letter") by the Office of the President to the Director of Criminal Investigation Department, Nairobi requiring investigations to the criminal case.

9. Counsels for the Respondents and the D.P.P however opposed the production of the said letter and the court reserved its decision on such reliance to be made in this ruling.

10. I have considered the documents on record and counsels' submissions. The issue for determination is whether the Petitioners have laid a proper basis for the Court to Order for the production of the ballot boxes that are in possession of the Police with regard to this particular Petition. Further, the court has to determine on the admission or otherwise of the letter dated 21st March, 2013. I propose to address the issue of that letter first.

11. The Petitioners sought to rely on the letter dated 21st March, 2013 in support of their Application. The same is in connection with two criminal cases regarding alleged electoral malpractices. Ms Millimo had sought to use the letter to confirm the existence of **Criminal Case No. 251 of 2013 R-V-ABDIKARIM NOOR**.

12. I have seen the contents of the said letter. They relate to two criminal cases one of them being **Criminal Case No. 251 of 2013 R-V-ABDIKARIM NOOR** referred to in the Petitioner's application. I however note that the same was addressed to the Director of Criminal Investigation Department, Nairobi and not the D.P.P as alleged by the Petitioners. The D.P.P did not therefore have notice of the same. Counsel to the Petitioners also admitted that the letter had not been served upon the Respondents. In view thereof, my view is that production of the said letter was a complete ambush not only to the Court but to the parties as well. It is trite that a party is supposed to make full disclosure of the evidence he/she intends to rely on to establish or protect his legal rights against a third party by founding a cause of action or a defence to a claim.

13. In this respect, though the Letter may have had some probative value and would probably have buttressed the Petitioner's Application, in my view, to seek to rely on it at the stage they did, the Petitioners were not only ambushing the respondents but the court itself. I think that is unprocedural and unacceptable. It should be noted that Ms. Millimo sought to rely on that letter while Replying to the Respondent's submissions. Further, since Counsel to the Petitioners is not a witness in this Petition, that letter could only be produced by way of an affidavit by a competent person and not Counsel. In any event, at the pre-trial stage, Mr. Mbugua had categorically withdrawn that letter and the Petitioners cannot now purport to revert to it. I therefore decline to allow reliance on that letter.

14. I now turn to the merit of the application. The Petitioners are seeking the production of certain Ballot Boxes allegedly in the possession of the police. Firstly, I do not agree with Mr. Ngetich that the D.P.P is not the right party. The fact that the Attorney General is the Chief Legal Advisor of the government, that does not make him the right party in this matter. Since the ballot boxes are alleged to be in the possession and custody of the police for purposes of prosecution in a criminal case(s), the department to be affected by any adverse orders is that of prosecution which is under the D.P.P. For that reason, I think that the D.P.P. was properly served with the application.

15. The Respondents opposed the application on the grounds of inter alia, that there was no legal basis for the application, that the legal provisions cited do not allow the making of the order sought. I do not agree with that proposition, I subscribe to Ms. Millimo's submission that notwithstanding that the law does not make specific provision to the making of the orders sought, the court retains inherent power to grant the order sought to meet the ends of justice. If and where a proper basis is established, a court is not precluded from making orders in the nature of the prayer sought by the Petitioners in their application.

16. The other ground of opposition to the application was that there was no evidence of the existence of **Criminal case No. 251/2013 Republic –vs- Abdikarim Noor** and that the evidence produced by way of a charge sheet was at Variance with the prayer sought. I have perused the Petition carefully and I have not seen any allegation made to the effect that certain ballot boxes had been taken into possession of the police and that the Petitioners will rely on those ballot boxes. Paragraph 9 of the Petition which Ms Millimo referred the court to in my view does not disclose that any such fact existed.

17. I have also seen the Charge sheet exhibited to the application. The same does not refer to **Criminal Case No. 251 of 2013 Republic -vs- Abdikarim Noor** but refers to **Criminal case No. 242 of 2013 Republic –vs- Abdi Ahmed Ibrahim**. The Charge sheet does not refer to Ballot Boxes but that the accused had failed to fill in polling day diary. How then do ballot boxes come in? In the circumstances, I find that there has been no connection made between the alleged ballot boxes and the subject criminal case.

18. The other issue is the particulars of the Ballot Boxes sought. The application has sought production of Ballot Boxes in the possession of the police relating to **Criminal case No.251 of 2013 Republic –vs- Abdinarim Noor**. How many ballot boxes are these? How will the police identify those ballot boxes if

the order is made? From which polling station(s) are those ballot boxes? Notwithstanding that we know that each ballot box has its own distinct number this has not been disclosed by the Petitioners. Further, it has not been established that there were such ballot boxes relating to **Criminal Case No. 251 of 2012** in respect of which the police had taken possession.

19. In this regard, I agree with Mr. Muriithi that there being no prayer for scrutiny and recount, the production of those ballot boxes will be of no use. The Petitioner can produce and rely on any acceptable evidence regarding the existence of such ballot boxes and the criminal case without necessarily having to order for the production of those ballot boxes. In this regard, I do not think that a basis has been established for this court to interfere with a criminal process which is ongoing elsewhere.

20. Accordingly, I am satisfied that the application has no merit and the same is dismissed with costs.

DATED and **DELIVERED** at Nairobi this **7th** day of **June**, 2013.

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A. MABEYA

JUDGE