REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

ELECTION PETITION NO.9 OF 2013

IN THE MATTER OF THE ELECTIONS ACT, 2011

HASSAN ABDALLA ALBEITY……..…..PETITIONER

VERSUS

ABU MOHAMED ABU CHIABA……..……...…....…..1ST RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION….2ND RESPONDENT

RULING

1. On 19th July 2013 when the hearing of the 2nd Respondents case was set to begin, ***Mr.Ndegwa*** counsel for the Petitioner made an oral application seeking that the 2nd Respondent be ordered to produce the original copies of form 35 and 36 and an original copy of the form made by the County Returning Officer. ***Mr.Ndegwa*** did not specify the title of the latter form or what was supposed to be its content but***Mr.Balala*** and ***M/s Muragori*** Counsel for the 1st and 2nd Respondents respectively in their responses to the application appeared to suggest that the form referred to by ***Mr.Ndegwa*** was the hand written copy of form 36 prepared by the Returning Officer at the end of vote counting and tallying.

2. A close look at the submissions made by ***Mr.Ndegwa*** in support of the application reveal that the application is predicated upon three main grounds namely;

- That the 2nd Respondent though having furnished the court with copies of forms 35 and 36 with respect to the senatorial elections in Lamu County was yet to satisfy the requirements of ***Rule 21 (b)*** of the ***Elections (parliamentary and county Elections) Petition Rules 2013 (the Rules).***

- That the copies of Forms 35 and 36 submitted to the court in compliance with ***Rule 21 (b)*** of the Rules amount to secondary evidence which was inadmissible in evidence as no basis had been laid for their admission under ***S68*** of the Evidence Act.

- That the Petitioner was entitled to the provision of the original copies of forms 35 and 36 in the exercise of his right to information guaranteed under Article 35 of the Constitution of Kenya 2010.

3. In support of the application, ***Mr.Ndegwa*** submitted that one of the reasons he had made the application was to ensure that the 2nd Respondent complied with ***Rule 21 (b)*** of **the Rules** which requires the 2nd Respondent to furnish the court with results of the disputed election within 14days of being served with an election petition. The rationale of this rule, counsel argued, was to enable the court have possession of all the materials the Returning Officer had when declaring the results in order to correctly determine whether the candidate announced as the winner (in this case the 1st Respondent)had been validly elected. In addition, ***Mr.Ndegwa*** argued that in its inquisitorial jurisdiction, an Election court also exercises the supervisory jurisdiction donated to the High Court under ***Article 165*** of the Constitution and had power to call for the original copies of documents used to announce election results.

4. With regard to the claim that the copies of forms 35 and 36 submitted to the court by the 2ndRespondent in compliance with ***Rule 21(b)*** of **the Rules** amounted to secondary evidence which was not admissible in evidence, ***Mr.Ndegwa*** submitted that under***S64***, ***65*** and ***67*** of the **Evidence Act ,** only primary evidence was admissible and primary evidence meant the production of the original document itself for inspection by the court. He asserted that the exception to this rule was contained in ***S68*** of the Evidence Act whose requirements had not been satisfied by the 2nd Respondent. In his view therefore, the results furnished to the court failed to satisfy the test of admissibility of evidence hence the need to compel the 2nd Respondent to produce original copies thereof.

5. Lastly, it was argued on behalf of the Petitioner that since it was pleaded at paragraph 13 of the Petition that the Petitioner was not given a copy of form 36 at the tallying centre which he was entitled to under Regulation 83 of **the Rules,**and the 1st and 2nd Respondents have annexed copies of form 36 for Lamu West Constituency in their respective answers to the petition which were different in form and substance and since the court had not been furnished with original copies of the said forms, there was a possibility that the copies of the results furnished to the court were the forms found in the possession of the Deputy Returning Officer for Lamu County when he was arrested on 7thMarch 2013 and could be the subject of criminal proceedings pending against him in a subordinate court. That in any event, the petitioner was entitled to the provision of the original copies of the results in the exercise of his right to information enshrined under Article 35 of the constitution.

6. The application was opposed by both ***M/s Muragori*** and***Mr.Balala*** for the Respondents.

M/s.Muragori started off her submissions by inviting the court to note that ***Rule 21(b)*** of **the Rules** required results to be submitted to the court and not to the parties to an election petition and that therefore ***Mr.Ndegwa***was precluded by this rule from making an application for the petitioner to be provided with the original copies of the results.

According to ***M/s.Muragori***, it is only the court which can move itself suimoto to order production of original copies of the results if it is was dissatisfied with the results submitted to it by the 2nd Respondent. Counsel further stated that there was no statutory provision or Rule which required the 2nd Respondent to furnish the court with the original copies of results or which prohibited it from submitting copies of results whether certified or uncertified. Counsel argued that it was trite law that what was not expressly prohibited was impliedly allowed.

7. It was the 2nd Respondent's further contention that the Petitioner's application is time barred as it ought to have been made at the pre –trial conference and not at this stage of the proceedings. Counsel recalled that at the pre- trial conference, the petitioner was represented by his advocate and that during the pre-trial conference with the consent of all parties, the copies of results filed in court by the 2nd Respondent were admitted as part of the court record.

M/s Muragori contended that in making the application and citing disparities between the copies of form

36's annexed to the answers of the 1st and 2nd Respondents, the petitioner was attempting to amend his petition by introducing allegations of lack of authenticity of the election results which were not pleaded anywhere in the petition.

8. It is the 2nd Respondent's case that parties are bound by their pleadings and in election petitions, S.76 (4) of the Elections Act specifically prohibits the amendment of petitions after 28 days of their being filed.

M/s.Muragori placed reliance on the authority of ***FerdinardWaitituvsIEBC & Another Petition No. 1 of 2013***where ***Mwongo J*** held *interalia* that cross-examination of witnesses on forms 35 and 36 could only be confined to issues or allegations raised in the petition as cross-examination was not supposed to be a fishing expedition for evidence. Counsel also relied on ***PetkayShenMiritivsRangwa Samuel Mbae and 2 others MeruElection Petition No. 4 of 2013*** which in my view is not quite relevant to the instant application as it dealt with the circumstances within which leave of the court could be granted to parties to file additional evidence out of time limited by the law.

M/s Muragori finallyurged the court to find that the petitioner intended to use documents meant for the court to breath life into his petition and that the reasons given in support of the application did not warrant the granting of the orders sought.

9. ***Mr.Balala*** on his part besides concurring with ***M/s Muragori's*** submissions that the petitioner was attempting to amend his petition outside the time prescribed by the law submitted that the 1st Respondent was opposed to the application as it heavily prejudiced his case in that the petitioner had from the bar made submissions which contradicted his petition, his evidence and submissions made in opposition to the 1st Respondent's application dated 24th may 2013 which had sought dismissal of the petition for,*inter alia,* failure todisclose results in the petition which was determined by this court on 18th June 2013.

Counsel referred to paragraph 42 of that Ruling showing that the court had accepted ***Mr.Ndegwa's*** submission that the 1st Respondent's application had been overtaken by events as the 2nd Respondent had already furnished to the court results under ***Rule 21 (b)*** of **the Rules** and that such results had been made part of the court record by consent of the parties.

Mr.Balala advanced the view that if the petitioner's position in that regard had changed or that he was sincere in his claim that the results furnished to the court were not authentic and may be a product of attempted forgery, then it meant that there were no results before the court which in turn led to the conclusion that this court does not have jurisdiction to hear and determine the petition or to entertain the current application.

10. In response to the submissions by the petitioner that the copies of results in form 35 and 36 availed to the court amounted to secondary evidence which was inadmissible underof ***S68****of* the **Evidence Act,*Mr.Balala*** stressed that the conduct of election petitions is *quasi* – inquisitorial in nature to determine the validity or otherwise of election results. And that because of their public nature and the public interest involved, the court cannot be strictly bound by the laws of evidence. That election petitions are founded on the constitution, the Election Act and **the Rules** and that the laws of evidence in the Evidence Act or the Civil Procedure Rules are not applicable to election petitions unless where they are imported into**the Rules**.

He urged the court to be guided by ***S 80(1)*** of the **Elections Act** and conduct these proceedings without undue regard to procedural technicalities.

11. Having carefully considered the application and the arguments advanced by counsel for each of the parties herein, I find that the main issue for determination by this court is whether the court can at this stage in the proceedings order the 2nd Respondent to produce the original copies of forms 35 and 36 for the reasons stated by the petitioner in his application.

12. I wish to begin by considering the first ground made in support of the application found in ***Mr.Ndegwa's*** submission that one of the reasons for making the application was to ensure compliance with the provisions of rule 21(b) of **the Rules** which states as follows :-

"The commission shall deliver to the Registrar:-

(a) ……..

(b) The results of the relevant election within fourteen days of being served with the petition."

The term "***Registrar***" is defined in section 2 of **the Rules** to mean the Registrar of the High court including a Deputy Registrar or an Executive Officer where the petition is filed in a magistrate's court.

I therefore wholly agree with ***M/s.Muragori's***submission that results of an election are by virtue of Rule 21 (b) supposed to be furnished to the court and not to the parties in an election petition. The possible explanation for this is that Candidates or their Agents are expected to have been provided with their own copies of results immediately the results are announced by the Returning Officer at the tallying centre –see ***Regulation 83 (i) (d)*** of the ***Elections (General)Regulations, 2012.***

13. It is important to note that during the pre-trial conference held on 28th may 2013 in which all parties were represented, all Counsel present including ***Mr.Ndegwa*** acknowledged the fact that results of the senatorial elections in Lamu County had been furnished to the court by the 2nd Respondent in compliance with ***Rule 21(b)***of **the Rules** and the copies of forms 35 and 36 so furnished were admitted as part of the court record by consent of the parties. Having participated in the said consent and proceeded to conduct the petitioner's case and cross-examination of the 1stRespondent's witnesses on the basis of those results, ***Mr.Ndegwa*** is now estopped from asserting that the 2nd Respondent had not complied with ***Rule 21(b)*** of **the Rules** and that the Rule can only be complied with if original copies of results were produced.

14. It is instructive to note that ***Rule 21(b)*** does not specify the form in which results should be delivered to the court. The rule is silent on whether it is the original copies or copies thereof that should be delivered to the court. This means that the court has discretion to decide for itself the form of results to accept from the 2nd Respondent in compliance with the Rule. It is my finding that the court has an option of accepting either original copies of forms 35 and 36 or their copies .

In this case, the court accepted the copies of results in forms 35 and 36 delivered to the court by the 2nd Respondent in compliance with Rule ***21 (b)*** of **the Rules** and that is why the court allowed them to be made part of the court record. This is what informed the court's finding in its ruling delivered on 18th June 2013 as submitted by ***Mr.Balala***.The court finds no reason to depart from that finding that the court had been furnished with the results in compliance with **R*ule 21 (b)***.The first ground of the application therefore miserably fails.

15. More importantly however, I think that the most critical factor to consider is whether an application such as the one made by the Petitioner can be allowed when the hearing of an election petition had commenced and was at an advanced stage like the hearing of the petition in this case. As noted earlier, the instant application was made just after the 1st Respondent had closed his case and the 2nd Respondent was about to present its case. This is notwithstanding the fact that the petitioner had ample time and opportunity to make the application before hearing of the petition commenced and even at the pre-trial stage of the proceedings.

16. The court record shows that as early as the 16th April 2013, ***Mr.Ndegwa*** had filed an application

under a certificate of urgency seeking a court order to compel the 2nd Respondent to supply to the petitioner copies of forms 35 and 36 for the Lamu County senatorial contest.

That application was subsequently withdrawn on 22nd May 2013 after the petitioner was supplied with copies of the said forms by the 2nd Respondent. When withdrawing the application, during the pre-trial conference or at any time before the hearing commenced, ***Mr.Ndegwa*** did not inform the court that he will require to be supplied with the original copies of the results when cross-examining the 2nd Respondent's witnesses so that the court could make appropriate orders taking into account the interests of all parties in the proceedings.

17. I agree with M/s Muragori that this an application which ought to have been made at the pre-trial conference since it sought orders requiring provision of documents allegedly needed during the hearing of the petition.

In conducting pre-trial conferences, the court is guided by the provisions of Rule 17 **of the Rules.** A reading of Rule 17 as a whole leaves no doubt that the Rule was designed to create a forum for the court and the parties to agree on the most efficient and practical way of settling all preliminary issues that needed to be resolved before hearing of the petition started so that when hearing commenced, it would proceed smoothly without any disruptions. That is why Rule 17 (2) divests this court of jurisdiction to allow an interlocutory application made after hearing of the petition had commenced if such an application was one which could have been made before the commencement of hearing of the petition.

18. The rationale behind Rule 17 was aptly captured by ***Ogola J***. in ***Arthur KibiraApungu&Another VsIndipendent Electoral and Boundaries Commission & 3 Others Kakamega Petition No 7 of 2013***and I fully agree with the view expressed by the Hon. Judgein the following terms;

> ***''Rule 17 of the Election Rules provides for pre-trial conference and prohibition of delayed interlocutory applications. This rule, in my view, is a measure to safeguard the adjudication process of an election petition from interlocutory applications made after the commencement of the hearing. The rule also ensures that both the court and the parties narrow down to the contested issues and adopt the best and practical way of resolving the disputes.''***

19. It is clear to me that the entire provisions of Rule 17 are geared towards assisting the court achieve the overriding objective of **the Rules** as stated in Rule 4 which is to facilitate the just, expeditious, proportionate and affordable resolution of election disputes in accordance with the law.

> In my view, allowing this application would be an affront to this overriding objective. I say so because allowing the application will no doubt occasion unnecessary delay in the disposal of the petition which can be avoided without occasioning any prejudice on any party. The petitioner did not point out to any prejudice that he is likely to suffer if the application was not allowed.

20. The above finding with regard to delay if the application was allowed is informed by the fact that when ***Mr.Ndegwa*** first raised the issue of production of the original copies of results on 18th July 2013, ***M/s. Muragori*** informed the court that it would take the 2nd Respondent a minimum of seven days to avail the original copies from its Headquarters in Nairobi. This in effect means that allowing the application would necessitate an adjournment of the hearing for about seven days. It is important to note that in order to facilitate expeditious hearing, the Rules only allow adjournment of proceedings for only five days.The court has already lost three days to prepare and to deliver this ruling which would otherwise have been utilized to complete the hearing of the 2nd Respondent's case.

21. The other point to consider is the stage at which the application was made when the petitioner and

the 1st Respondent had closed their respective cases. The application is clearly an afterthought and if it is allowed, the Respondents are likely to suffer prejudice since they will not have opportunity to use the original results to advance their cases in the course of cross-examination with respect to the witnesses who have so far testified. And since the court must protect and safeguard the rights and interests of all parties in the course of a hearing, allowing the application may lead to the re-opening of the entire case which would cause unnecessary delay in the disposal of the petition.

22. These are important facts to consider since any delay in the hearing of election petitions not only goes against the overriding objective of **the Rules** but also because of the strict constitutional timelines within which petitions are supposed to be heard and determined. ***Article 105(2)*** of the Constitution and***S75(2)*** of the Elections Act makes it clear that election petitions challenging a county or parliamentary election must be finalized within six months of their filing.We are now approaching the fourth month since the current petition was filed and only about two and half months of the set constitutional timeline is remaining. It therefore goes without saying that any action that would contribute to the stalling or undue delay of the hearing of the petition must be avoided at all costs if the court was to beat the constitutional deadline in the fair and just determination of this petition.

23. Turning now to the submission that the results furnished to the court amounted to secondary evidence which had failed to satisfy the requirements of admissibility enumerated under ***S68*** of the Evidence Act, it is my view that not much turns on this submission and I do not intend to say much on it. Suffice it to say that the claim is not well founded since in my understanding, the results delivered to the court under ***Rule 21(b)*** do not constitute evidence *perse*as there is no legal requirement that the same be furnished to the court in the form of an affidavit. They are records meant for the use of the court to ascertain for itself the detailed results of the election and to determine whether the candidate declared as winner had been validly elected. However, once they are made part of the court record, they can be used by any party to advance its case within the confines of the party's pleadings.

24. The tacit implication by ***Mr.Ndegwa*** that the results delivered to the court might not be authentic and that this is why he requires to be supplied with original copies of results to cross-examine the 2nd Respondent's witnesses is neither here nor there because in my opinion, the authenticity or otherwise of those results is a question of fact which can only be determined on the basis of evidence tendered in the course of the trial of the petition. The allegations of forgery which are not even expressly pleaded in the petition cannot form the basis of requiring the 2ndRespondent to produce to the court at this stage in the proceedings original copies of form 35 & 36 as prayed by the petitioner.

25. Lastly, l am in agreement with ***Mr. Ndegwa*** that the petitioner has a right to information under Article 35 of the Constitution. A literal and plain reading of Article 35 does not indicate that Kenyan citizens who include the petitioner are entitled to provision of original documents containing the information that they require at any given time. What is clear is that the petitioner has a right to access the information contained in forms 35 and 36. It is common knowledge that the information can be contained in either copies or original versions of documents. The court record shows that the 2ndRespondent provided to the petitioner through his advocate all copies of form 35 and 36 on or before 22nd may 2013 when his application dated 16th April 2013 was withdrawn by consent of the parties. All the information that the petitioner would require to know about the results of the contested election is contained in the copies supplied to the petitioner and in the answers to the petition filed by the Respondents and served on the petitioner. That being the case, I do not see how the petitioners right to information can be said to be at risk of being infringed if he is not provided with original copies of the results as prayed.

26. For all the foregoing reasons, it is my conclusion and finding that the petitioners oral application made on 19th July 2013 lacks merit and it is hereby dismissed with costs to the 1st, 2nd and 3rd Respondents.

27. The court will now proceed with the hearing of the 2nd Respondent's case hopefully without any further disruptions on dates to be fixed today by consent of the parties. Orders accordingly.

Dated, Signed and Delivered at Malindi this 25th day of July 2013

C.GITHUA

JUDGE

In the Presence of:-

Mr.Tole for the petitioner and holding brief for Mr.Balala and M/s.Muragori for the 1st, 2nd & 3rd Respondents respectively.