



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

ELECTION PETITION NO.4 OF 2013

LESIIT J.

THE ELECTION ACT, 2011 THE ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS) PETITION RULES, 2013

IN THE MATTER OF HE ELECTION OF THE COUNTY GOVERNOR OF THARAKA-NITHI COUNTY

THE PETITION OF

M'NKIRIA PETKAY SHEN MIRITI.....PETITIONER

V E R S U S

RANGWA SAMUEL MBAE.....1ST RESPONDENT

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION.....
....2ND RESPONDENT**

SAMUEL MUCHERU.....3RD RESPONDENT

RULING

1. The Petitioner's counsel sought to cross examine the 2nd and 3rd Respondents witness on a Polling Station not mentioned anywhere in the petition, petitioner's affidavit and Petitioner's witnesses' affidavits filed herein. It was clear that the Counsel was introducing a new contest not before pleaded in any of the Petitioner's pleadings. His argument is that he should be allowed to cross examine the witness on the Polling Station (Iriaini), even though it is not specifically named in the Petition and Petitioner's affidavit in support of the Petition. He argues that the IEBC did not supply Forms 35 and 36 to the Petitioner as provided under Rule 21 of the Election (Parliamentary and County Elections) Petition Rules (hereinafter the Rules), as the same were provided late. He urges that by court's leave, direction and intervention, he visited the offices of the 2nd and 3rd Respondents' advocates this past Saturday to examine the original Form 35 and 36, and that upon that perusal discovered inconsistencies between entries in the two Forms. That the only opportunity the Petitioner has to raise issue on how the entries in both Forms were made is only through cross examination of the Returning Officer concerned especially given the scenario that the Petitioner was denied the Forms 35 and 36 until towards the end of the Petitioner's case.
2. Mr. Munge for the 2nd and 3rd Respondents has opposed the attempt by the Petitioner's counsel to

cross examine on Polling Stations not mentioned in the Petitioner's Petition and Affidavits. Mr. Munge urged that to allow that would mean to prejudice the Respondents who had filed their responses on the basis of filed Petition and affidavits in support therein. Counsel urged that the Petitioner was trying to amend his Petition and reckons that even if what he was raising now was discovered on Saturday as Mr. Agwara claimed, he cannot over look the Rules to introduce them at this stage. Mr. Munge urged that Mr. Agwara is bound by the issues as filed and signed by all parties. He urged that the issue of the specified 10 Polling Stations where results were contested did not include Iriaini Polling Station. Counsel relied on two rulings by Ngaa, J in Nyeri **Election Petition No. 3 of 2013**. Both rulings are irrelevant to the issues raised in this ruling as they related to introduction of new evidence and the matter in issue here.

3. Mr. Mithega supported Mr. Munge. Counsel for 1st Respondent reiterated that parties should be bound by their pleadings particularly where there was no room for amendments as in the case of Petitions. Counsel pointed out that the only tabulation given of Polling Stations where results were contested is in paragraph 30 of the Petition and the Polling Station sought to be introduced in cross examination is not among them.
4. Mr. Agwara in response urged that issue No. 2 of signed issues for determination and paragraph 12 of the Petition deal with the manner in which elections were conducted as being irregular and that in some Polling Stations the votes cast exceeded the registered voters. Counsel urged that the only way to prove irregularity was by cross examining the witness on the documents which are before court. Furthermore, Mr. Agwara urged, the Evidence Act, which is applicable, under sections 153 to 155 and 157 shows what can form the basis of cross examination. He urged that the Petitioner should not be barred from testing the veracity of the documents before the court, and to demonstrate irregularity and biases as a result of which the Petitioner was denied victory in the election. Mr. Agwara urged that the 2nd and 3rd Respondents cannot suffer any prejudice if he cross examined the witness using the documents which they themselves prepared and supplied.
5. I will begin with the argument advanced by Mr. Agwara of the basis of cross examination of witnesses as set out under the Evidence Act. Section 153 of the Evidence Act stipulates:

“153. A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him or being proved, but if it is intended to contradict a witness by a previous written statement, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.”

6. It relates to cross examination of a witness on statements made by them in writing and relevant to matters in question. That section does not relate to documents prepared by the witness, whether relevant or not to the matters in question, which relate to formal matters reduced in writing. Such formal matters are the subject of Section 152, part V and VI of the Evidence Act.
7. Section 153 would apply to the affidavit sworn by the witness under cross examination, and would apply to any other affidavit sworn by the witness in relevant or related matters. Section 154 and 155 and 157 are general provisions on cross examination of witnesses generally, dealing especially with the testing of the accuracy, veracity or credibility of the witness.
8. The Evidence Act, even though it is applicable in Election Petition Cases, the scope of its application is confined to extent dictated by the provisions of the Elections Act and subsidiary legislation made there under. The application of the Evidence Act is subject to the provisions of the Election Laws. The Election Rules in particular dictate how the issues for determination of an Election Petition can be arrived at and makes it mandatory that once known, the entire proceedings must be confined to the issues raised in the Petition and affidavits in support thereof and matters agreed upon as the issues for determination. That means, even though under the Evidence Act a Party is at liberty to cross examine a witness on any matter, even if not previously contained in the pleadings, that liberty is clipped by the Election laws, the Election Act and the Rules, which specifically removes the discretion of the court to allow solicitation of issues outside those raised in the pleadings and or issues for determination themselves.
9. A party who wishes to introduce new issues other than those pleaded must be guided by the Rules. Rule 17 which provides in part:

17.(1) Within seven days after the receipt of the last response to a Petition, the court shall schedule a pre-trial conference with the parties in which it shall—

- i. give directions as to the filing and serving of any further affidavits or the giving of additional evidence;...**

We have been through this exercise and even agreed on the applications for additional evidence and other applications and I have made it abundantly clear that additional evidence outside the period provided under the Rules is not allowed, unless application is made and the court is minded to extent the period of introducing same. In the instant case, the Petitioner is not seeking to bring new evidence; however from the direction the cross examination is taking, it is clear that it is new evidence being sought to be introduced.

10. Conversely a party cannot be allowed to introduce, through cross examination contests which were previously not specifically raised in the pleadings. The reason for this is simple. The Election Petitions are limited in time and scope. The Petitioner must present his Petition within 28 days and he/she cannot be allowed to amend same thereafter. The Respondents are given time to respond to the Petition and in their response the law states clearly that they too cannot introduce any issues or contests outside those raised by the Petitioner in his pleadings.

11. The Petitioner cannot have a free hand to add to the Polling Station outside those specified in the Petitioner's pleadings. He cannot argue that some others are implied, given the general language used in the pleadings. What is implied in the pleadings is not specified as required in the Election laws and cannot be considered by the court, as the court has no jurisdiction to do so.

12. The conclusion is that the Petitioner is free to cross examine the witnesses presented but he cannot be allowed to introduce new contests in Polling Stations outside those specified in the pleadings.

Dated signed and delivered this 15th day of July 2013

J. LESIIT

JUDGE.