



REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATE'S COURT AT NAIROBI
MILIMANI COMMERCIAL COURTS
ELECTION PETITION NO. 10 OF 2017

LANGAT DONNIE KIPTOO ARAP.....PETITIONER/ APPLICANT

-VS-

- 1. SIKUKU MARTIN SIMOTWO, CONSTITUENCY RETURNING
OFFICER, LANGATA CONSTITUENCY.....1ST RESPONDENT**
- 2. THE INDEPENDENT ELECTORAL
& BOUNDARIES COMMISSION.....2ND RESPONDENT**
- 3. ABDI OSMAN KHALIF.....3RD RESPONDENT**

RULING

1. The Petitioner brought the Notice of Motion application dated 5th September 2017 under the provisions of Section 75(1A) , 76(1), 80 & 82 of the Elections Act 2011 and Section 8, 12, 28 of the Elections Parliamentary and County Elections Rules , 2017 , Sections 3 and 3A of the Civil Procedure Act, Cap 21and all enabling provisions of the Law. The prayers sought are :

a) Spent

b) That pending the hearing and determination of this application this Honourable Court be pleased to make an order for the preservation and safekeeping of all the Kenya Integrated Electronic Systems kits (KIEMS) used for all the polling stations and tallying centers with respect to the Member of County Assembly for South C Ward held on the 8th of August 2017 within Langata Constituency for the purpose of preservation of material evidence in this petition.

c) THAT costs of this Application be in the cause.

2. The Petitioner / Applicant is represented by Joshua Kiptoo & Company Advocates. The application is premised on the grounds set out in the Supporting Affidavit of the Petitioner, LANGAT DONNIE KIPTOO ARAP, sworn on 5th September 2017. In a nutshell, the Applicant contends that he was the Jubilee Party candidate for the election of the Member of County Assembly for South “C” Ward, Langata Constituency, Nairobi County, while the 3rd Respondent was the Orange Democratic Candidate . On 8th

August 2017, the 2nd Respondent conducted elections for the Member of County Assembly for South C Ward , Langata Constituency and the 1st Respondent allegedly returned the 3rd Respondent as the winner.

3. Being aggrieved by this decision, the Petitioner / Applicant contends that the elections were marred with Constitutional and Electoral laws breaches during the tallying and transmission of results. It is alleged that these irregularities affected the legitimacy and credibility of the process and thus the final outcome which does not reflect the will of the people. The Applicant highlights the following incidents as a basis for his conclusion that the elections were not free , fair ,transparent , accountable , credible and verifiable:

- Gross discrepancies on the number of voters who voted for the MCA as compared to the total voter turnout for other elective positions in various polling stations. It is alleged that **Forms 36B** indicates the total number of voters as 26,760 in that ward while **Form 34B** shows the ward had 26,960 voters (annexures “ LDAK a”)
- A candidate named GESORA JOSPHAT OMWOYO garnered a total of 116 votes yet it was intentionally recorded as 176 votes in the **Form 36B**

(annexure “ LDAK b”)

- The valid votes at KONGONI PRIMARY SCHOOL STATION-1 were recorded as 419 and not 415 in the **Forms 36A** (annexures “LDAK c”)
- The valid votes at KONGONI PRIMARY SCHOOL STATION 4 were allegedly recorded as 413 instead of 417 in the **Forms 36A** (annexure “LDAK d”)
- The results in **Forms 36A** from KEWI –SOUTH C POLLING STATIONS 1, 6 and 8 were allegedly totally different from the results recorded on **Forms 36As** (annexure “LDAK e”)
- The results in **Forms 36B** from KEWI –SOUTH C POLLING STATIONS 5 and 6 are identical yet they are distinct polling stations with different number of registered voters (annexure “LDAK f”) .
- The results in **Forms 36A** from KPA STAFF QUARTERS POLLING STATION are totally different from the results in the **Form 36B**.
- The **Forms 36A** showing results of seven polling stations , namely, MOW 2,5,7,and 10; KIRDI 3 and 4 ; KALSA 2 ; were allegedly not signed by the party agents and no reasons and explanation was tendered(annexures LDAK h).
- The **Forms 36A** showing results for MOW -9 and KIRDI -1 were allegedly not signed by the respective presiding officers and or deputy presiding officers (annexures “LDAK i).
- The **IEBC online portal** was showing 97.56% results transmission rate as at 31st August 2017 yet the results for eight (8) polling stations are missing, that is, results for KONGONI 1,2,5,and 7; KEWI – 5 ; MOW-1 and KALSA 3.
- The Presiding Officer at KIRDI 04 Polling Station , one MARY JACINTA ADHIAMBO OSIR was allegedly discovered at MMU Centre on Wednesday 9th August 2017 with unsealed ballot boxes , ballot papers and assorted IEBC materials and unfilled forms 36As and 36Bs , 24 hours after voting closed.
- According to the Daily Nation newspaper article by one Maureen Kaka, on Friday 11th August 2017 at page 12, the Returning Officer (1st Respondent herein) allegedly confirmed that a female Presiding Officer was found with unsealed ballot boxes and another one was found in a classroom filling in Forms 34As away from her work station. It is alleged that the two officers were arrested and later released pending investigations (annexture “ LDAK l).
- The number of people who voted is recorded as 17,827 in the **Form 36 B** yet the cumulative total valid votes , disputed votes and stray ballot papers is 17,927. The Applicant contends that this difference of 100 votes cannot be ignored.

4. According to the Applicant, the inconsistencies, data manipulation and election related offences above compromise the integrity of the elections hence the prayers sought. The prayers stated in the Applicant’s supporting affidavit are the same prayers for determination in the Petition.

5. This application is opposed by the 1st and 2nd Respondents. The 1st Respondent swore the Replying

Affidavit on 23rd October 2017. He was the appointed Returning Officer in Langata Constituency. According to SUKUKU MARTIN SIMOTWO, the Applicant has failed to lay a basis for granting the orders sought. It is also contended that the KIEMS Kits have already been re-called to the IEBC's warehouse following the orders of the Supreme Court in Presidential Petition No.1 of 2017 which annulled the Presidential elections and ordered a repeat poll. The 1st Respondent depones that any attempt to detain the said kits would compromise the repeat polls scheduled to take place on 26th October 2017. It is submitted that the prayer for preservation of the KIEMS kit has been overtaken by events and orders granted will be incapable of performance as the data is unavailable. The 1st Respondent further states that the KIEMS kits had to be re-configured to prevent data entered being mixed up with data from the fresh presidential polls. It is also submitted that the Applicant ought to demonstrate why the information needs to be preserved and how failure to preserve the kits and materials would adversely affect the just determination of the Petition. The 1st and 2nd Respondents pray for dismissal of this application with costs.

6. The 3rd Respondent did not participate in this application.

7. Court's Analysis

8. I have carefully considered the application and opposing arguments.

The issue for determination is whether the application for preservation and safekeeping of the KIEMS kits used for all the polling stations and tallying centers with respect to the Member of County Assembly for South C Ward held on the 8th of August 2017 within Langata Constituency should be allowed.

9. **Rule 16 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017**, provides as follows with regard to storage and handling of ballot boxes and election materials:

“ (1) On conclusion of the pre-trial conference under rule 15 , the election court may give directions on –

The storage of the election materials including ballot boxes and documents relating to the petition;

The handling and safety of the election materials; or

The time for furnishing the election materials to the election court .

(2) in giving directions under sub-rule (1) , the election court shall- Consider the prudent , efficient and economic use of storage and transport facilities; Consider the maintenance of the integrity of the election materials ;and ensure that the election materials are not interfered with.

(3) An election court may direct that the Commission maintains the custody of all election materials in relation to a petition.

(4) Only the material relating to a particular petition may be furnished to an election court.

(5) The election court may order that that additional seals be placed on the ballot boxes related to the election for which a petition has been lodged.”

Article 86 (d) of the Constitution of Kenya, 2010 also states that:

“At every election the Independent Electoral and Boundaries Commission shall ensure that:-

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.....
(d) appropriate structures and mechanisms to eliminate electoral malpractices are put in place, including the safe keeping of election materials.” (underlining mine)

10. Further, **Rule 17 Elections (Technology) Regulations, 2017** expressly enjoins the 2nd Respondent herein to retain and safely archive data pertaining to an election for three years. It provides:

“All electronic data relating to an election shall be retained in safe custody by the Commission for a period of three years after the results of the elections have been declared, and shall, unless the Commission or the court otherwise directs, be archived in accordance with procedures prescribed by the Commission subject to the Public Archives and Documentation Service Act and the Kenya Information and Communications Act, 1998”.

11. It is therefore clear that the duty to preserve and safely store data and electoral materials is a Constitutional duty anchored in law and rests with the 2nd Respondent. It is a mandatory requirement. The claim by the 1st and 2nd Respondent that they have configured the KIEMS kits and there is no data to provide cannot therefore be accepted. The KIEMS kits may have been configured but it is expected that the 2nd Respondent extracted the information in the kits and securely stored them in compliance with the law so that parties are able to access and inspect the records.

12. In considering this application, it is pertinent to consider the Petition itself and what the Applicant seeks to be preserved. The Application only refers to preservation of “*..the KIEMS kits for all polling stations and tallying centers with respect to the Member of County Assembly for South C Ward held on the 8th of August 2017 within Langata Constituency for the purpose of preservation of material evidence in this petition*”. It would appear from the wording that the Petitioner only seeks preservation of the KIEMS kits and not the other election materials as defined under **Section 2 of the Elections Act**. The Applicant also seeks preservation of the said kits pending hearing of this application – not the Petition. If the application is considered in that light, then the orders sought cannot be granted at this juncture as they will serve no purpose in the hearing and determination of this Petition.

13. However, this Court is enjoined to consider the application and the grounds upon which it is brought having regard to the need to ensure integrity of election materials relating to this Petition and to safeguard the materials from any interference or tampering. In this case, the Applicant claims, *inter alia*, that there are inconsistencies on the figures in the Forms 36A and 36B from various polling stations mentioned above; that there are discrepancies on the numbers of voters at some polling stations; and that some Forms 36As were not signed as required by law hence the results are not accurate and verifiable.

14. It is therefore in the interest of justice and fairness that the Court gives directions with regard to preservation of data extracted from the KIEMS kits and documents pertaining to this Petition. I have considered the decision of the High Court at Kerugoya on an application for preservation of and access to election materials including KIEMS kits, in **MARTHA WANGARI KARUA & ANOTHER V INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION & 3 OTHERS** [2017] EKLK. The Honourable Court quoted the case of **ABDIRAHMAN HUSSEIN WENYATAU MOHAMED & ANOTHER -V- IEBC & 2 OTHERS NAIROBI HIGH COURT ELECTION PETITION NO. 3 OF 2017** and adopted the same approach by allowing read only access to data extracted from the KIEMS kits. This was to be done within a specified time frame and in the presence of all the parties.

15. I am guided by legal precedence above. Consequently, I hereby allow the application and direct that the 2nd Respondent shall preserve the data extracted from the KIEMS kits with respect to the polling stations mentioned hereinabove. The 2nd Respondent shall allow the Petitioner read only access to this information within two (2) days from this date (from 31st October 2017 to 2nd November 2017). The 2nd Respondent to ensure the exercise is undertaken in the presence of all the parties or their agents.

Costs shall be in the cause.

Orders accordingly.

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Before Hon. A.M. Obura (Mrs), SPM

Court Assistant:.....

Parties:.....for Petitioner / Applicant

.....for 1st and 2nd Respondents

.....for 3rd Respondent

Ruling delivered in open court this **31st** Day of **October 2017**.

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