



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ELECTION PETITION NO 8 OF 2017

IN THE MATTER OF THE ELECTION ACT NO 24 OF 2011 LAWS OF KENYA

AND

THE ELECTIONS (GENERAL) REGULATIONS 2012, AND ELECTIONS (PARLIAMENTARY AND COUNTY) PETITIONS RULES 2017

AND

IN THE MATTER OF THE PARLIAMENTARY ELECTIONS FOR BOMACHOGE BORABU CONSTITUENCY, CONSTITUENCY NO 263, HELD ON 8TH AUGUST 2017

BETWEEN

THOMAS MATWETWE NYAMACHE.....PETITIONER

VERSUS

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

RETURNING OFFICER BOMACHOGE BORABU CONSTITUENCY.....2ND RESPONDENT

OGUTU ZADOC ABEL.....3RD RESPONDENT

RULING

1. This petition commenced hearing on 10th October 2017 at Kisii High Court, after the parties had gone through the various pre-trial steps. It is the one petition before me where parties did not have any pre-trial interlocutory applications to make. After 5 witness had testified, counsel for the petitioner made an oral application requesting the court to issue summons to the **Officer Commanding Kenya** police station or the **DCIO Kenya** to attend court and produce certain electoral material which were recovered by **ZABLON OTARA OMUGA (PW4)** in the company of two others, allegedly irregularly deposited by the roadside along **Kenya-Nyagancha** road on 9th September 2017. The electoral materials were ballot papers for the parliamentary in respect of **BOMACHOGE BORABU** constituency.

2. Counsel for the petitioner has cited section 80 of the Elections Act as the basis for the application, saying the he applicant wanted to first lay a basis for the prayer now made. The petitioner's counsel also explained that they did not want to have the police officers swear affidavits and be called as their

witnesses because: a) they were avoiding creating the impression that the petitioner was using security agents to further his petition and b) the police were conducting their own investigations regarding the report and they did not think it would be a tidy image to get the petitioner entangled in the process

3. In opposing the application **MR THEURI** on behalf of the 1st and 2nd respondents has submitted that the prayer seeks to add extra evidence, yet at the pre-trial conference, the court indicated that all the necessary applications were to be disposed of before proceeding with the hearing of the main petition. He argues that the information sought to be introduced was well within the knowledge of the petitioner and the applicants are simply on a fishing expedition where they first want to hear the nature of the evidence presented then sieve through it and shift the character of the evidence adduced. He urges that the application made herein be dismissed.

4. A similar position is adopted by **MR NYAKUNDI** on behalf of the 3rd respondent who argues that the provision sought to be relied on is not available to any of the parties in the petition. He maintains that section 80 (b) is reserved for the court's use were the court to find that the attendance of an individual who has not been listed as a witness is critical in helping to unravel matters.

5. In response **MR BEGI** submitted that the request is not a fishing expedition as the petitioner had long pleaded in paragraphs 33 and 34 of his pleadings that he would at an appropriate time apply for summoning of the police officer.

6. As a general rule and practice, interlocutory applications relating to an election petition must be filed before the commencement of the trial of the election petition. Indeed rule 15 (2) of the Elections (Parliamentary and County Elections Petitions) Rules 2017 provides that:

"An election court shall not allow any interlocutory application to be made on conclusion of the pre-trial conference, if the interlocutory application could have, by its nature, been brought before the commencement of the hearing of the petition"

7. Does this request for summons to issue to the **OCS KENYAYA** police station and/or the **DCIO KENYAYNAYA** amount to making an interlocutory application once the trial has begun, and therefore offending the Elections (Parliamentary and County Elections Petitions) Rules 2017" Is the application akin to introducing new evidence"

8. I have perused paragraph 33 and 34 of the petition...with the greatest of respect to the petitioner's counsel these do not state that at an appropriate time a request will be made to summon the officer who has custody of the recovered materials. I however acknowledge that the issue about the recovery of the same and a report being made to police in that regard is addressed in those paragraphs and also in the affidavit sworn by **ZABLON OTARA OMUGA**. It is therefore not new information, and yes the petitioner was fully aware of this and ought to have made a formal application to that effect.

9. In any event the petitioner's counsel has not cited any legal provision which restricts or bars the petitioner from having a police officer swear an affidavit to confirm what PW4 alluded to or even calling him as a witness. Indeed it would have been a totally different case if for instance the petitioner had requested the relevant police officer to swear an affidavit so as to be his witness and met with negativity- then there would be good reason to make the application mid-stream after the trial has begun. I think to allow the application would be tantamount to allowing the petitioner to patch up his case after realizing that there was an omission to list the said officers as witnesses or request for their statements. The opportunity was lost at the pre-trial and cannot be re-opened for the benefit of the petitioner.

10. Section 80 of the Elections Act which the petitioner relies on, as correctly pointed out by **MR NYAKUNDI**; addresses the powers of an election court in the exercise of its jurisdiction. It states as follows

“80 (1) An election court may, in the exercise of its jurisdiction- (b) compel the attendance of any person as a witness who appears to the court to have been concerned in the election or in the circumstances of the vacancy or the alleged vacancy”

11. It is certainly not open to any party. So should matters end there" In my honest view evidence has been led by PW4 regarding recovery of the ballot papers and that the same were handed over to the **OCS KENYANYA** police station, who then passed them on to the **DCO KENYANYA** and that the police still have the same in their custody. It would be totally myopic of me to ignore this assertion; indeed I find that it appears the police were mentioned as having dealt with a complaint regarding the conduct of the elections and under circumstances which necessitate their attendance to confirm what PW4 claims. It is necessary that the relevant police officer do attend court and confirm whether there were any ballot papers handed over to them and under what circumstances.

12. In so attending, he will not be appearing as a witness for the petitioner, but as one who has been summoned by the court to shed light on some areas of concern by the court. This means it will not be open to the petitioner to lead any evidence in chief-the court will lead the officer on areas it seeks clarification confirm whether there were any ballot papers handed over to them and under what circumstances, and whether any action has been taken with regard to that report. The parties will be limited in their cross examination of the officer(s) to only the areas specified by the court because he is after-all, the court's witness NOT the petitioner's witness.

13. I therefore direct that summons do issue to the **Officer Commanding Kenya** police station and the **DCIO Kenya** (whichever of them has custody of the recovered ballot papers in respect of the parliamentary elections for **Bomachoge Borabu** constituency) to attend this court on 12th October 2017 at 9.00am.

Delivered and dated this 11th day of October 2017 at Kisii

H. A. OMONDI

JUDGE



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