



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

ELECTION PETITION NO. 1 OF 2017

**IN THE MATTER OF ARTICLES 1 (1), (2), 2, 3, 10, 19, 20, 21 (1), 23, 27, 38, 47, 50 (1), 81, 86, 87
AND 88 OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF THE ELECTIONS ACT, 2011

AND

IN THE MATTER OF THE ELECTIONS (GENERAL) REGULATIONS, 2012

AND

**IN THE MATTER OF THE ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS) PETITION
RULES, 2017**

BETWEEN

RISHAD HAMID AHMED.....PETITIONER

VERSUS

INDEPENDENT ELECTORAL & BOUNDARIES

COMMISSION.....1ST RESPONDENT

ABDALLAH MWARUA CHIKOPHE.....2ND RESPONDENT

STANLEY MUIRURI MUTHAMA.....3RD RESPONDENT

RULING

[THE PETITIONER'S NOTICE OF MOTION DATED 30TH SEPTEMBER, 2017]

1. Rishad Hamid Ahmed the Petitioner is the applicant in respect of the Notice of Motion application dated 30th September, 2017. The Independent Electoral and Boundaries Commission (IEBC), Abdallah

Mwarua Chikophe and Stanley Muiruri Muthama who are the 1st to 3rd respondents in the Petition are also the 1st to 3rd respondents respectively in regard to the application.

2. When the application came up for hearing on 18th October, 2017, the advocates for the parties recorded consent on most of the prayers in that application. Consequently, counsel for the Petitioner indicated to the court that Prayer No. 9 was the only unsettled issue in the application. The advocates then proceeded to submit on the application.

3. The application is brought under various provisions of the law. It is supported by an affidavit sworn by the Petitioner. The undetermined prayer is premised on the constitutional and legal provisions governing access to information.

4. In Prayer No. 9 the Petitioner seek orders as follows:

“9. THAT the Honourable Court be pleased to grant the Applicant read only access with permission to copy: -

a. the specific Global Positioning System [GPS] location of each of the 122 KIEMS kits deployed at the polling stations in Lamu West Constituency and their coordinates for the period between 8th August 2017 and 10th August 2017;

b. the log-in trail of users and equipment into the IEBC servers for Lamu West Constituency;

c. Log-in trail of users and equipment into the KIEMS database management systems for Lamu West Constituency;

d. Audit log of what each KIEMS Kit used during the parliamentary election in Lamu West Constituency, transmitted from Polling Stations to Constituency Tallying Centres and to IEBC National Tallying Centre; and from IEBC Result Transmission Database to Media Houses Application Protocol Interface (API)(logs of media data update). The log must also show:

i. Time of transmission from KIEMS Kit to the IEBC Result Transmission Database; and

ii. Time of transmission form IEBC Result Transmission Database to the Media Houses API;

e. Count of Identified Voters by each KIEMS Kit;

f. Soft copy of National Identification Cards captured in each KIEMS Kit;

g. Audit log of transmission of scanned Forms 35A from each of the KIEMS Kits;

h. Administrative access log into the IEBC public portal between 5th August 2017 to date for Lamu West Constituency, and more particularly for the following polling stations: Wiyoni Primary School, Lamu County Assembly 3, Lamu Fort Hall 1, Kandahari Playground, Mapenya Primary School 1, Mapenya Primary School 2, Uzida Primary School, Majembeni Primary School 1, Majembeni Primary School 2, Muhamarani Dispensary 1, Muhamarani Dispensary 2, Sinambio Primary School 1, Sinambio Primary School 2, Maisha Masha Primary School 1, Maisha Masha Primary School 2, Katsaka Kairu Primary School, Moa Primary School, Chalaluma Primary School, Dide Waride Primary School, Pandanguo Primary School, Witu Primary School 1, Witu Primary School 2, Witu Primary School 3, Witu Primary School 4, Soroko Primary School,

Sendemke Primary School, Witu Mjini Secondary School, Lake Amu Primary School, Bahari Primary School 1, Bahari Primary School 2, Mikinduni Primary School 1, Mikinduni Primary School 2, Lake Kenyatta ATC, Muungano Primary School and Kilimani Primary School polling stations;

5. Counsel for the Petitioner submitted that the application is mainly brought under the provisions of Article 35 of the Constitution and sections 3, 4 and 5 of the Access to Information Act, 2016. He delved into the substance of the application by pointing out that Article 35(1)(b) of the Constitution is clear that every citizen has the right of access to information held by another person if such information is required for the exercise or protection of any right or fundamental freedom. His assertion is that the information sought from the IEBC is necessary for the protection of the Petitioner's political rights under Article 38, his right to access to justice under Article 48 and his right to a fair hearing as set out under Article 50.

6. Counsel submitted that the Petitioner had particularized the malpractices and irregularities that form the basis of his Petition. According to counsel, the information sought would enable the court to determine the issues in the Petition when having all the material before it thus ensuring a just determination of the matter.

7. The Petitioner pointed out that the information sought was solely held by the 1st Respondent and he had no means of obtaining the same without the aid of the court. Further, that the grant of access to the information sought goes hand in hand with the 1st Respondent's duty to be transparent and accountable.

8. Counsel for the 1st and 2nd respondents opposed the application and submitted that the consent they had entered had captured every prayer of the Petitioner's application. He pointed out that the replying affidavit sworn on 11th October, 2017 had dealt with all the aspects of the Petitioner's application.

9. Counsel submitted that the Petitioner had not laid a basis for grant of the orders sought and that no case had been made to show that the KIEMS Kit had been used for any other purpose other than the voting in Lamu West Constituency. His position is that this is a fishing exercise which will not assist the court. He asserted that a prayer for access to information is not granted as a matter of course.

10. Counsel for the 3rd Respondent associated himself with the submissions of counsel for the 1st and 2nd respondents. He asserted that for the orders to be issued the court must be satisfied that the information sought is relevant and necessary to determine the Petition. Additionally, counsel posits that there must be a well grounded basis for seeking the information.

11. Should the orders sought be granted" A similar application was made in the presidential petition before the Supreme Court in **Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR** and the Court granted certain orders. In doing so, the Court in the ruling delivered on 28th August, 2017 observed that access to information is a precursor of scrutiny. According to the Court, **"implicit in scrutiny is also the fact that the information sought is first granted before any scrutiny can be initiated."**

12. The Supreme Court opined that an application for access to information must be founded on the applicant's petition. At paragraph 62 the Court stated that:

"Having addressed our minds to the above issues, it is our view that first, we note that as correctly argued by Counsel for the 3rd Respondent, a party must be bound by its pleadings and secondly, any scrutiny of either the Forms or the technology must be made for a sufficient

reason. Any prayer in the application that would seem to be an expansion of the case for the Petitioners or which would in effect be a fishing exercise to procure fresh evidence not already contained in the Petition would and must be rejected.”

13. Applying the law as outlined in the cited decision, I find that the Petitioner before me has not, in his Petition, raised issue with the location or movement of the electronic devices used in the election he seeks to invalidate. He does not therefore question the electronic aspect of the election save for stating at Paragraph 32 of the Petition dated 2nd September, 2017 that the results transmitted electronically using the KIEMS devices was at variance with the results in Forms 35A that were delivered manually to the Constituency Tallying Centre. He also takes up the issue in the reliefs he seeks.

14. The prayer is therefore one which seeks to expand the territory of the Petitioner’s Petition. As pointed out by counsel for the 1st and 2nd respondents, the Petitioner has already been promised access to the SD cards for the KIEMS Kits used in the election. Using the information available in the SD cards, he will not be hindered from demonstrating that there was variance between the electronically transmitted results and those in the hand-filled forms 35A. He does not need what he already has.

15. Looking at the orders sought in Pray No. 9, I conclude that the Petitioner is out on a fishing expedition. He is trying to take his case out of the boundaries he has himself delineated in his pleadings. The orders sought in the said prayer will not serve any purpose.

16. For the reasons stated, Prayer No. 9 of the Petitioner’s Notice of Motion dated 30th September, 2017 is dismissed. Costs shall abide the outcome of the Petition and shall follow the cause.

Dated, signed and delivered at Malindi this 3rd day of November, 2017.

W. KORIR,

JUDGE OF THE HIGH COURT



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