



REPUBLIC OF KENYA

IN THE ELECTION COURT

AT MALINDI

ELECTION PETITION CAUSE NO. 13 OF 2017

ERNEST HINZAO.....PETITIONER

VERSUS

1. I.E.B.C.1ST RESPONDENT

2. WAFULA CHEBUKATI.....2ND RESPONDENT

3. THE GANZE MALINDI SUB-COUNTY

RETURNING OFFICER.....3RD RESPONDENT

4. AISHA JUMWA.....4TH RESPONDENT

RULING

Outline and introduction of facts.

1. On 2/10/2017, Petitioner herein filed two applications dated the same day. By directions of the Court given on 28/9/2017 such applications being interlocutory were directed to be heard on the 11/10/2017.

2. Come the 11/10/2017, the matter did not proceed as scheduled because there had occurred some three developments which hampered its being heard. The first development was that the petitioner had for the second time changed advocates and engaged Mr. Aboubakar who said he had just, that morning, been served with Response to the application by the 4th Respondent and was yet to be served by the 1st -3rd Respondent with papers filed that morning. The second development was that the 4th Respondent had equally filed a Notice of Motion and a Notice of Preliminary Objection seeking among other orders the striking out of the petition. The third development which overshadowed all else was a Notice of Change of Advocates and an application filed by Ms Odiya & Associates Advocates seeking to withdraw the petition which were all in the file but had not been served.

3. In accordance with the directions of 28/9/2017, the application by the 4th Respondent were clearly out of time as much as the response by the 1st – 3rd Respondents were.

4. Due to the application intimating withdrawal the petition filed by an advocate who did not attend court and with petitioner in court disowning the application, the court made an order that the senior most

partner in the firm of Odiya & Associates Advocates would attend court on the 12/10/2017 so that a decision would be made whether or not there was a petition to pursue. The scheduled Case Conference and hearing of the interlocutory applications were then rescheduled for the 16/10/2017.

5. It came to pass that one Ms Odiya attended court as scheduled accompanied by Mr. Owour who had facilitated the filing of the application. The two advocates rendered an explanation on how they came to file the application and in the presence of the petitioner sought to withdraw the application which stood disowned by the petitioner who gave his disowning story to court under oath.

6. The explanation was accepted by the court, the application wherefore the Notice of Change by Odiya & Associates together with the Notice of withdrawal and the Notice of motion giving grounds for withdrawal were all ordered expunged from the court record and an order given that the petitioner and one individual identified by Ms Odiya, to have given her instructions, as Mr. Kombo Karabu Kaniki attend before the County Director of Criminal Investigations, Kilifi, for purposes of recording statements to enable the said officer determine if any crime had been committed in the manner the papers in that application had been filed.

7. That determination paved way for the interlocutory application to proceed and the parties after conferencing with the court agreed on the following as the way forward:-

(i) The application for scrutiny would be kept in abeyance pending hearing or further orders of the court.

8. That left two applications one by the petitioner seeking information and another by the 4th Respondent also seeking information for court and striking out of the petition upon the information being availed. The two applications were dealt with in an incremental and truncated manner in that:-

(i) Mr. Gicharu for the petitioner abandoned his prayer 2(ii) for KIEMS kit as prayer 2(iv) on the basis that the same documents had been availed in the Response by the 1st and 2nd Respondents.

9. Therefore only prayer 2(i) and (ii) remain outstanding for determination after argument by the parties.

(ii) For the 4th Respondent's application dated 10/10/2017, parties agreed on a compromise on the following terms:-

(a) The application be allowed in terms of prayer 2 and 3 and the court to furnish to the parties the requested information and documents within 5 days.

(b) The petitioner granted leave to file a Response to the application within 5 days and limited to the prayer 4 only.

(c) The 4th Respondent granted corresponding leave to file and serve a supplementary affidavit within 3 days after service if need shall arise.

(d) The application dated 10/10/2017 be heard on the 30/10/2017 followed by a pretrial conference.

10. This ruling is therefore limited to the prayer 2(i) and (ii) in the petitioner's application dated 2/10/2017. In it the petitioner seeks that:-

"2: This Honourable Court do order the 1st Respondent to avail to this court the following materials, items or information in its custody for purposes of assisting this court in hearing and determination of the

application for scrutiny, and recount of votes filed herein and the petition herein.

(i) *Polling Station Diaries for all Polling Stations in Malindi Constituency.*

(ii) *Both Electronic and Hard Copy of the Register of voters as contained in the Biometric and Alpha numerical details of the voters entitled to vote at all the Polling Station in Malindi Constituency.*

11. The application is grounded on the provisions of Articles 35, 50, 159(2) as well as 259(1) of the Constitution as well as the various provisions of the Elections Act and the Independent Electoral and Boundaries Commission Act and the Regulations under the Elections Act.

12. The need for the information materials and items sought is that it shall be necessary to ascertain from the polling day diary how many voters required assistance and were so assisted as well as number of ballot papers used and unused.

13. For the electronic and hard copy registers it is contended that it would assist the court to ascertain how many voters cast their votes in comparison with the results declared in form 35A.

14. On the basis of those needs the petitioner urged that the 1st Respondent as the manager of elections and custodian of the materials, information and items would be doing its public duty by availing the same to court.

15. The application was supported by the affidavit of the petitioner, EARNEST INZANO who depones to the fact that due to the facts disclosed in the affidavit of William Kahidi Mganga and other witnesses, it is contended that the elections were manipulated and that the items intercepted were also intended for such manipulation.

16. The petitioner then proceeds to reiterate the accusations against the 1st Respondent and its officers on the conduct of the elections and contend that only by availing the items information and documents will the court be at a position to justly determine the petition. Several stations having been cited to have experienced different problems, which compromised the credibility and verifiability of the outcome of the results and it is therefore contended that the documents, items and information requested will help to understand what problems, if any, occurred and their effect on the outcome of the elections.

17. The application is also supported by the affidavit of one William Kahindi Mganga which largely echoes the complaint about a canter lorry intercepted at the County Tallying Centre while carrying IEBC stamps, seals, declaration forms and ballot boxes containing marked ballot papers which he believes were being ferried to a secret location for purposes of compromising the election outcome.

18. The deponent also raised the fact that election officials were caught committing malpractices and were then charged in court with election offences of failure to validate voters using the KIEMS.

19. The 3rd affidavit in support of the application was sworn by Philip Kitsao Charo whose main complaint was that the results declared on the 10/8/2017 were so declared without particulars hence, to him, the same were not only null but also void for reasons that the 1st Respondent failed to comply with the dictates of the Constitution, Elections Act and the Regulations made thereunder.

20. The application was opposed by the Respondents who each filed a Replying Affidavit and Grounds of Opposition respectively. For the 1st – 3rd Respondent, one WASHA SUDI MWAKUTONDA swore the Replying Affidavit and opposed the application on the grounds that all forms 35A and 53B have been

exhibited in the Response to the petition and on the fact that the electronic register cannot be availed because it is in the KIEMS Kit which would be deployed in the repeat Presidential Elections and that recount and scrutiny have not been prayed for in the petition hence to allow the application would be to allow the amendment of the petition.

21. The replying affidavit then delves into and denies all the complaints by the petitioner and avers that the elections were conducted pursuant to strict compliance with the law and that the named stations where malpractices are alleged, the agents for the candidates actually signed the reforms to confirm compliance with the law. In effect the 1st and 2nd Respondent contend that there is no pleading raising issues with counting, tallying and tabulation of votes hence no purpose would be served with the grant of the prayers sought.

22. For the 3rd Respondent the grounds of opposition contend that there being no prayer for recount in the petition, there exist no foundation to grant the request for requested items, information and documents.

23. At hearing, Mr. Gicharu appeared for the Petition/Applicant while Mr. Mwadilo appeared for the 1st Respondent as Ms Aoko appeared for the 3rd Respondent.

Submissions by the Petition/Applicant

24. The thrust of Mr. Gicharu's submissions was that the documents, items and information sought were not without the possession of the 1st Respondent and that the right to information was crucial to the parties and the court toward the just determination of the petition. To the counsel there were grave allegations of irregularities for which the documents sought would go a long way to support their case. He underscored the fact that three persons have been charged with failure to electronically validate a number of voters with the effect that the voters who were not electronically identified need to be verified using the manual register.

Submissions by the 1st and 2nd Respondent

25. Mr. Mwadilo wholly relied on the Replying Affidavit filed and stressed the fact that all the forms 35As and Bs have been exhibited in the Responses filed.

26. On the physical registered Mr. Mwadilo admitted that the same are available and can be availed but not for the electronic register because the same is domiciled in the KIEMS Kit which has since been reconfigured. In conclusion the advocate said that the mere fact that some people have been charged with electoral offences is not a conclusive evidence that any offences have been committed. Such accused person remain rarely suspects.

27. For the 3rd Respondent, Ms Auko opposed the application on the basis that there had not been isolated particular paragraphs of the petitioner sought to be proved by the information, items and documents sought. She reiterated that to allow the application would be to allow the amendment of the petition or just allow evidence to be led outside the pleaded facts a matter that would permit the petitioner to deviate from his pleadings contrary to the law.

Reply by the Petitioner/Applicant

28. In his final submission, Mr. Gicharu admitted that the petitioner is by law bound by own pleadings and pointed out that paragraph 28 of the petition allege and plead impropriety as against the 1st and 2nd

Respondents. He also conceded that the burden of proof rested with the petitioner but added that the court in an election petition has inquisitional powers.

Analysis and determination

29. The matter before court for determination although brought as an application for information is indeed an application purposely intended for scrutiny and recount. Indeed it is difficult to understand why the petitioner sought to file two applications separately for information and production of items, information and documents on one hand and yet another for scrutiny and recount on the other hand.

30. I consider the application for information and production of items and documents to be an appendage of that for scrutiny and recount because in its own words the application seeks, at the relevant portion of prayer (2), that:-

“.....the 1st Respondent avails to this court the following materials, items and information in its custody for purposes of assisting this court in hearing and determination of the application for scrutiny and recount of votes filed herein and the petition herein” (Emphasis added).

31. It would have been tidier and more efficient in the employment of judicial time as a resource to have the applications together. I say it would be so desirable because the information sought will only be relevant in the event the court shall have decided on whether or not to order scrutiny and recount.

32. To dispose of the application at this time would be to create the prospects of considering that for scrutiny and recount in anticipation and in advance before parties address the court on it.

33. Additionally one may wonder would value addition shall have been achieved if, for example, this application is allowed, even in bits as conceded by the 1st and 2nd Respondent then after the evidence is led the court considers it unnecessary to order scrutiny and recount. The court shall in that event have acted in vain. That is most undesirable.

34. The foregoing leads me to the conclusion that this application ought to have been deemed part of the application for scrutiny and recount. Since the parties have agreed that the application for scrutiny and recount shall await production of evidence, this application should, for the purposes of orderliness be kept in abeyance to await evidence in the petition.

35. For the foregoing reasons, I consider the presentation and argument offered on the application for injunction to have been premature. I decline at this movement to decide the application and shall reserve my final determination of the need to provide information or otherwise after evidence shall have been led and as and when the court would consider the application for scrutiny and recount opportune.

These shall be the court's direction for now.

This matter stands scheduled for the 13/11/2017 for the hearing of the 3rd Respondent's application dated the 10/10/2017.

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

Patrick .J. O. Otieno

JUDGE



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