



**IN THE HIGH COURT AT KISUMU**

**ELECTION PETITION NO. 3 OF 2017**

**IN THE MATTER OF ELECTION FOR GOVERNOR FOR**

**KISUMU COUNTY**

**BETWEEN**

**JACKTON NYANUNGO RANGUMA.....PETITIONER**

**AND**

**THE INDEPENDENT ELECTORAL AND BOUNDARIES**

**COMMISSION.....1<sup>ST</sup> RESPONDENT**

**THE COUNTY RETURNING OFFICER, THE INDEPENDENT ELECTORAL**

**AND BOUNDARIES COMMISSION, KISUMU COUNTY...2<sup>ND</sup> RESPONDENT**

**H.E. PETER ANYANG NYONGO..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. This petition filed by Jackton Nyanungo Ranguma contests the return of Peter Anyang' Nyong'o as the Governor of Kisumu County following the general elections held on 8<sup>th</sup> August 2017.

2. What is at issue in this ruling is whether I should allow the petitioner to access all the information of the SD Cards for all polling stations within Kisumu County. The issue arose out of a consent order recorded at the pretrial session of 19<sup>th</sup> October 2017 as follows;

*ORDER BY CONSENT the 1<sup>st</sup> and 2<sup>nd</sup> respondent shall provide the relevant SD Cards and infrastructure necessary for the petitioner and 3<sup>rd</sup> respondent to access necessary information on or before 01.11.2017. Mention on 02.11.2017.*

3. As this stage, I would also point out that the petitioner in the Notice of Motion dated 6<sup>th</sup> September 2017, sought the following orders that:

*(c) [The] 1<sup>st</sup> respondent Independent Electoral and Boundaries Commission (IEBC) to avail a certified copy of the print out of the logs and data relating to the use of the Kenya Integrated Election Management System (KIEMS) Kits from all the polling stations on the voters who voted in the election for the Governor of the Kisumu County held on 8<sup>th</sup> August 2017.*

(d) [The] 1<sup>st</sup> Respondent Independent Electoral and Boundaries Commission (IEBC) to avail a certified copy of the print out of the logs and data relating to all the entries and postings of all the Forms 37As and 37Bs at its servers in relation to the elections for the Governor of Kisumu County held on 8<sup>th</sup> August 2017.

4. During the pre-trial sessions, I gave the parties an opportunity to agree all issues, including access to information, as much as possible without my intervention hence the consent recorded in respect of the provision of access to information stored in the SD Cards. It is apparent that the parties could not agree on what was necessary hence they referred this matter back to me for determination.

5. When the matter came up for mention on the appointed day, counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents informed the court that they have all the SD cards and means of viewing them available but they would like the petitioner to isolate specific polling stations which they want as the petition did not specify any particular polling stations.

6. In response, counsel for the petitioner drew the court's attention to paragraphs 23 and 24 of the petition to support the request. The paragraphs state as follows;

23. *The 1<sup>st</sup> respondent through its agents, servants, employees and or persons acting under its authority illegally, unlawfully and with ill motives entered, logged into their servers and made several deletions of the entries relating to Forms 37As and the 3<sup>rd</sup> Respondent through his agents, servants, employees and or person claiming his authority illegally, unlawfully and with ill motives entered, logged into their servers and made several deletions of the entries relating to Form 37A in the servers so as to manipulate data in favour of the 3<sup>rd</sup> respondent.*

24. *The data and information recorded in Form 37A at the individual polling stations were not accurately and transparently entered into the KIEMS Kits at the individual polling stations.*

7. The question then is whether the petitioner is entitled to full access of the data without specifying specific polling stations. There is ample authority in respect of the law and practice regarding scrutiny and recount of the vote that the court will not order scrutiny and recount unless the petitioner specifies the polling station and lays a basis for such an order (see ***Gitirau Peter Munya v Dickson Mwenda Kithiui & 2 others SCOK Petition No. 2B of 2014 [2014] eKLR***). The 1<sup>st</sup> and 2<sup>nd</sup> respondents rely on this principle to resist the application.

8. While I agree that paragraphs 23 and 24 of the petition are vague and the law regarding scrutiny and recount limits the scope of access to certain information, particularly to material required by the ***Elections (General) Regulations, 2012*** to be sealed, the issue regarding electronic information does not end there. **Regulation 16** of the ***Elections (Technology) Regulations, 2017*** states as follows;

*A person may request for information from the Information from the Commission, in accordance with section 27 of the Independent Elections and Boundaries Commission Act, 2011 (Act No. 9 of 2011).*

**9. Section 27** of the ***Independent Elections and Boundaries Commission Act, 2011*** anchors into the Commission's processes the right of access to information protected under **Article 35** of the Constitution. Under **section 27**, the Commission may decline to give information to an applicant if the request is unreasonable in the circumstances, the information requested is at a deliberative stage by the Commission, failure to pay the prescribed fee and the applicant fails to satisfy any confidentiality requirements by the Commission.

10. The reason I have referred to the provisions of **Regulation 16** of ***Elections (Technology)***

**Regulations, 2017** is that the petitioner would be entitled to this information on application to the Commission in any case absent intervention of the court. The respondents did not rely on any of the exceptions in **section 27** of the **Independent Electoral and Boundaries Act, 2011** to resist the application. In my view, such information from the KIEMS kit stands in the same position as the copies of the Forms 37A's which have already been supplied to the petitioner.

11. Before I conclude, I would like to deal with an issue raised by counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondent that access to the information stored on the SD Cards would be inconvenient and take a long time to access. I do not think that this would be a consideration in refusing the petitioner's request as the Commission's duty under **Articles 81** and **86** of the Constitution and **section 44** of the **Elections Act** to ensure that the technology used is simple, verifiable, secure, accountable and transparent which must also mean that the information and data stored must be available to any person who seeks to exercise his or her right of access to information in a form that is not only accessible in a simple and readable format but is also accessible timeously.

12. In addition, the 1<sup>st</sup> and 2<sup>nd</sup> respondents had already agreed to provide access to the SD Cards. Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents informed the petitioner's counsel, by the letter dated 1<sup>st</sup> November 2017, that, *"Accordingly and as discussed in the telephone conversations aforesaid you may avail yourselves at our client's officers or at any agreed premises at anytime before the end of the day to access the SD Card."*

13. The 1<sup>st</sup> and 2<sup>nd</sup> respondents shall provide access to all the electronic information related to the Kisumu County Governor Election to the petitioner and 3<sup>rd</sup> respondent. Since no polling stations are cited in the petition, the terms of access shall be read only access and shall be done between 10<sup>th</sup> and 17<sup>th</sup> November 2017.

14. Costs of this application shall be in the petition.

**DATED and DELIVERED at KISUMU this 7<sup>th</sup> day of November 2017.**

**D.S. MAJANJA**

**JUDGE**

Mr Onsongo instructed by Onsongo & Company Advocates for the petitioner.

Mr Juma instructed by Mukele Moni & Company Advocates for the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

Mr Obondi instructed by Rasheed, Rage & Nassir Advocates for the 3<sup>rd</sup> respondent.



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