



THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITUI
ELECTION PETITION NO 1 OF 2017.

MILLITONIC MWENDWA KIMANZI KITUTE.....PETITIONER

VERSUS

1. INDEPENDENT ELECTORAL AND

**BOUNDARIES COMMISSION.....1ST
RESPONDENT**

2. THE KITUI EAST CONSTITUENCY

RETURNING OFFICER.....2ND RESPONDENT

3. NIMROD MBITHUKA MBAI.....3RD RESPONDENT

RULING

Introduction

The hearing of the Petitioner's petition challenging the election of the 3rd Respondent as Member of Parliament for Kitui East Constituency in the general elections held by the 1st Respondent on 8th August 2017 commenced on 6th November 2017.

On that date and in the course of cross-examination of the Petitioner, the Petitioner's Counsel, Mr. D. Maanzo, made an application that the information in the Kenya Integrated Election Management System (KIEMS) is brought to the Court by the Deputy Registrar of the Court. The main ground for the application was that it was coming to light that there were more registered voters in some polling stations than those allowed by law. Reliance was also placed on Article 159(d) of the Constitution, Article 47 of the Constitution on fair administrative action, and section 82 of the Elections Act which provides that before a witness is stood down, the Court can ask that information from polling stations alluded to therein be provided.

Mr. Nyamu for the 3rd Respondent opposed the application, and submitted that the application ought to have been made at the time of the pre-trial conferences which was never done, and that this Court has already directed that if there is need for scrutiny during trial it would do so. In addition that in light of the evidence so far produced by the Petitioner, there is no need for scrutiny or for further materials.

Ms Mwinzi for the 1st and 2nd Respondents associated herself with the sentiments by Mr. Nyamu, and

submitted that under Rule 28 of the Elections (Parliamentary and County Elections) Petitions Rules of 2017 it is clear when the Court can hear an application for scrutiny, and that Rule 20 of the said rules provides that once a hearing has started, it cannot be interrupted save for exceptional circumstances. In addition, that the application can only have a basis if there is proof of errors in the Forms 35A and Forms 35B produced by the 1st and 2nd Respondents, and the Petitioner has not identified any such errors since he was issued with the said forms. Lastly, that such an application should not be entertained if the purpose is to unearth new evidence.

I have considered the arguments made by the counsels for the Petitioner and Respondents on the application before the Court. The issue before the Court is whether the information in the KIEMS should be availed by the Deputy Registrar of this Court.

Two pre-trial conferences were held on 5th and 13th October 2017 for parties to make any interlocutory applications that needed to be made. The Petitioner did not make any such application until 24th October 2017, when final directions were being made herein as to the hearing of the Petition, when he sought to apply for scrutiny. The Court declined to allow the application as the application was being made late in the day, and the hearing of the Petition needed to proceed. The Court however ruled that if it finds there is need for scrutiny, it would make appropriate directions and orders during the trial.

Rule 15(2) of the the Elections (Parliamentary and County Elections) Petitions Rules of 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. I am of the view that the reasons advanced by the Petitioner as to the information of more voters registered in polling stations was one which was pleaded in paragraph 53 of his Petition dated 4th September 2017 and filed in Court on 5th September 2017, and they ought to have made any applications as regards further information in this regard during the pretrial conferences.

Section 82 of the Elections Act does however empower this court to order for scrutiny during the hearing of an election petition *suo moto* or upon application. Rule 29 of the Elections (Parliamentary and County Elections) Petitions Rules of 2017 in addition provides for the procedures for scrutiny as follows:

“(1) the parties to the proceedings may apply for scrutiny of the votes for purposes of establishing the validity of the votes cast.

(2) On an application under sub-rule (1), an election court may, if it is satisfied that there is sufficient reason, order for scrutiny or recount of the votes.

(3) The scrutiny or recount of votes ordered under sub-rule (2) shall be carried out under the direct supervision of the Registrar or Magistrate and shall be subject to the directions the election court gives.

(4) The scrutiny or recount of votes in accordance with sub-rule (2) shall be confined to the polling stations in which the results are disputed and may include the examination of-

(a) The written statements made by the returning officers under the Act;

(b) The printed copy of the Register of voters used during the elections sealed in a tamper proof envelope;

(c) The copies of the results of each polling station in which the results of the election are in dispute;

(d) The written complaints of the candidates and their representatives

(e) The packets of spoilt ballots;

(f) The marked copy register;

(g) The packets of counterfoils of used ballot papers;

(h) The packets of counted ballot papers;

(i) The packets of rejected ballot papers;

(j) The polling day diary; and

(k) The statements showing the number of rejected ballot papers.

(5) For purposes of sub-rule (4) (b), every returning officer shall upon declaration of the results, seal the printed copy of the Register of Voters used at that election in a tamper proof envelop and such envelop shall be stored by the Commission subject to the elections court directions under rule 16.”

The ruling of this Court made on 24th October 2017 applies to the present application, as the said application is essentially seeking a scrutiny of the data in the KIEMS as regards the registration of voters. In addition, the Petitioner in his application did not specify which polling stations in which the registration of voters is disputed, in what manner in which the dispute has arisen, and the basis of their arguments.

No sufficient cause has therefore been shown in the present application for scrutiny to be ordered by the Court at this time, and there is thus the risk that allowing the said application may result in the Petitioner procuring evidence for its case to the prejudice of the Respondents, quite apart from the said application also being *res-judicata*. It needs to be emphasized in this regard that the Court will only act on evidence presented before it by the parties in any orders or directions it may give as to scrutiny.

The said application is accordingly denied for the foregoing reasons, and the Petitioner shall meet the costs of the application.

Orders accordingly.

DATED, SIGNED, AND DELIVERED AT KITUI THIS 7TH DAY OF NOVEMBER 2017

P. NYAMWEYA

JUDGE



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