



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI.**

**CORAM: R. MWONGO, P.J.**

**ELECTION PETITION NUMBER 5 OF 2017**

**IN THE MATTER OF: ARTICLES 2, 10, 38(2), 50(1), 88(4) OF THE CONSTITUTION OF KENYA.**

**IN THE MATTER OF: INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION ACT NO.9 OF 2011**

**IN THE MATTER OF: THE ELECTIONS ACT NO.24 OF 2011**

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

**IN THE MATTER OF: THE ELECTION FOR THE MEMBER OF NATIONAL ASSEMBLY FOR RUARAKA CONSTITUENCY (NO.281)**

**IN THE MATTER OF: THE ELECTIONS (GENERAL) REGULATIONS LEGAL NOTICE NUMBER 72 OF 2017.**

**IN THE MATTER OF: INTERNATIONAL CONVENTIONS AND/OR GOOD PRACTICE.**

**-BETWEEN-**

**ELIZABETH ONGOROAMOLLO.....PETITIONER**

**-VERSUS-**

**FRANCIS KAJWANG TOM JOSEPH.....1<sup>ST</sup> RESPONDENT**

**KAREN WACHERA MWANGI.....2<sup>ND</sup> RESPONDENT**

**INDEPENDENT ELECTORAL**

**& BOUNDARIES COMMISSION.....3<sup>RD</sup> RESPONDENT**

**RULING ON APPLICATION NO 5**

1. This application filed on 12<sup>th</sup> October, 2017 by the Applicant/Petitioner seeks the preservation and production before the court of various election materials.

2. The application is premised on various provisions of law. First, on **Articles 3 and 35** of the **Constitution** (the obligation of every person to uphold the constitution and on the right to access information), only the latter of which is directly relevant. Second, on **Section 4(1)** of the **Access to Information Act**, which provision is relevant. Third, on **Section 27** of the **IEBC Act** (the obligation of the IEBC to publish and publicise all important information relating to its mandate), which is peripherally relevant. Fourth on **Sections 80(4) and 82** of the **Elections Act** (on issuance of certificate of election to a president member of parliament or of a county assembly, and on the court's power to order scrutiny of votes) which are both irrelevant. Fifth, on **Rules 28 and 29** of the **Elections (Parliamentary and County Elections) Petition Rules, 2017** (on recount of votes and scrutiny of votes) which are not relevant.

3. There are three planks to the Petitioner's application for election materials. In her first plank, she seeks that: *"all KIEMS kit, Voter Registers, Polling Station Diaries, as well as lists of all the Presiding Officers and Clerks for Ruaraka Constituency and in respect of the Ruaraka Constituency Member of Parliament be produced and availed"* before the court.

4. Secondly, the applicant seeks that the court does issue *"necessary and proper directions for the storage of the said KIEMS kit devices"* and grant *"access thereto to the parties"*.

5. Thirdly, the applicant seeks that the court: *"direct the audit of all KIEMS kits used in the Ruaraka Parliamentary election in the presence of technical experts for all the parties and the Deputy Registrar"* of the High Court and that a report of findings be filed before the court.

6. The grounds upon which the applicant seeks the election materials, summarised from the application, are stated to be as follows: that **Rule 18(sic)** of **The Elections (Parliamentary and County Elections) Petitions Rules** gives the court discretion to issue such directions; that it is in the interests of justice that KIEMS kits be preserved; that although the respondents have produced forms 35As there is need for them to produce the register of voters to which the applicant should have access pursuant to **Article 35** of the **Constitution**; that it is necessary for the court to compel the production of the polling station diaries and list of all polling clerks to enable the court to ascertain which of the petitioner's agents were logged in at the beginning of the process and which eventually signed off on the Form 35As, and will show the number of persons allied to the 1<sup>st</sup> Respondent who were thereby nevertheless appointed; and that the audit of the KIEMS kit devices and list of voters will enable the court to capture how many people were captured as having voted using the KIEMS devices vis-a-vis those who were assisted manually to vote.

### **Parties' submissions**

7. Pursuant to the court's directions at the pre-trial conference, the parties filed skeletal written submissions in respect of their positions on this application. The applicant argued that the court cannot make a substantive determination without having the benefit of reviewing evidence on record. The applicant stated that she had made specific allegations in her petition that require review of specific electoral materials that are in the 2<sup>nd</sup> and 3<sup>rd</sup> respondents' possession.

8. The specific allegations alleged by the applicant include: That at page 9 paragraph vi the petitioner had asserted that there were inconsistencies and inaccuracies which affect and account for at least 15,000 voters; that at page 10 paragraph iii, the petitioner had asserted that presiding officers, their deputies and polling clerks and agents had manipulated, connived and engineered and /or distorted the votes cast in favour of the 1<sup>st</sup> respondent; and that at page 12 first paragraph it was evident from the table that the 2<sup>nd</sup> respondent had failed to account for 1,369 voters.

9. On voter registers, polling station diaries and lists of presiding officers and clerks, the applicant cited **Zebedeo John Oporo v IEBC [2017] eKLR** where the court, in a constitutional petition and invoking the Right of Access to Information Act, granted the applicant the access to Forms 32 A (Voter Identification and Verification Forms), Polling Station Diaries, and the number of voters identified by the electronic voter identification devices at every polling station in Bonchari Constituency.

10. The applicant also relied on the Supreme Court case of **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others [2014] eKLR** on the need for the IEBC as the public entity vested with authority to conduct elections, to demonstrate instant readiness to respond to public concerns, and to maintain a public-accountability posture at all times for public confidence to be realised. The court held, in that regard, that two tests must be met: the test of openness in the management of the entire electoral process, and secondly, the test of competence.

11. On the KIEMS kit devices the applicant submitted that what they require is ascertainment of the number of voters who were identified through the devices and voted in the elections compared to the number of voters declared to have vote per polling station through Form 35As. The applicant argued that, if the kit were produced, the audit exercise would take a mere two hours, and would not interfere with any configuration exercise of the kit for the presidential election. The applicant further clarified that in this petition she was not seeking a recount of the votes, but only the audit of the one function of voter identification, and to that effect that the SD memory card of the KIEMS kit would suffice. For this purpose, the applicant argued that an ICT expert grounded in software issues and familiar with KIEMS technology would suffice.

12. The 1<sup>st</sup> Respondent opposes the application. Through counsel, he submitted that the Article 38 right to information is exercised with a functional specified objective in mind and not to achieve a feel good effect. Counsel pointed out that the basis which the applicant alleged she had set for the application does not merit the grant of the orders sought.

13. Counsel isolated each of the paragraphs in the petition which the applicant asserted underlay the basis of her application. In respect of page 9 paragraph vii of the petition where the inconsistencies were alleged to affect 15,000 voters, the 1<sup>st</sup> respondent pointed out that the petition clearly stated at paragraph xvi page 10, that the alleged inconsistencies were clerical as between Forms 35A and 35B. Thus, the KIEMS kit would not resolve that alleged inconsistency. In any event the said Forms 35A & 35B had been filed by the 2<sup>nd</sup> & 3<sup>rd</sup> respondent and could be examined for inconsistencies without need for the KIEMS kit. Further, counsel said, the allegation does not relate to a grievance concerning identification of voters, and thus cannot justify an order for audit of the KIEMS kit.

14. In respect of polling station diaries, page 12 of the petition was relied on by the applicant, but the 1<sup>st</sup> respondent submitted that a plain reading of the paragraph did not attract any query on polling station diaries.

15. In respect of the list of presiding officers demanded by the applicant, the 1<sup>st</sup> respondent pointed out that since they admitted that Forms 35A had been filed, those forms each indicated on their face the name of the presiding officer who filled each form. As such, a typed list containing the names of the same officers indicated in Form 35A could not possibly show that the presiding officers had conflict of interest or favoured the 1st Respondent, as alleged by the applicant. The order should therefore not be granted on that ground.

16. Finally, counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents also opposed the application. He adopted 1<sup>st</sup> respondent's submissions. Counsel pointed out that the with regard to polling station diaries, the

applicant had indicated they were needed for twelve polling centres which represented over 100 polling stations. The stations where voters were disputed had not been indicated. That would make it difficult for evidence to be given on the polling station diaries, since only the presiding officer could produce the same and give evidence thereon.

17. On the issue of bias of presiding officers, counsel submitted that this could not be ascertained by a list. If, however, specific named officers were identified, they could be called to give evidence concerning their alleged bias. On page 38 paragraph ii and iii, the petitioner had cited specific presiding officers alleged to be biased, and in respect of these ones, the 2<sup>nd</sup> and 3<sup>rd</sup> respondent had provided an affidavit of Jack Ogodo, and had no objection to the production of his polling station diary.

### **Analysis and Determination**

18. The issue for determination is whether the applicant has provided a satisfactory basis for the grant of orders sought for production of the various election materials.

19. Election material is defined in **Section 2** of the **Elections Act** as follows:

**“election material” means ballot boxes, ballot papers, counterfoils, envelopes, packets statements and other documents used in connection with voting in an election and includes information technology equipment for voting, the voting compartments, instruments, seals and other materials and things required for the purpose of conducting an election”**

20. The law on applications for preservation and production of election materials and on the court's discretion to so direct is contained in **Rule 16** of **The Elections (Parliamentary and County Elections) Petitions Rules**. That Rule enjoins an Election Court after a Pre-Trial Conference to give directions on storage of ballot papers and other materials, handling thereof, and production before the court. **Rule 16** provides:

**“(1) On conclusion of the pre-trial conference under rule 15, the election Court may give directions on –**

**(a) The storage of the election materials including ballot boxes and documents relating to the petition;**

**(b) The handling and safety on the election materials; or**

**(c) The time for furnishing the election materials to the election court.**

**(2) In giving directions under Sub-rule(1), the Election Court shall-**

**(a) consider the prudent, efficient and economic use of storage and transport facilities;**

**(b) consider the maintenance of the integrity of the election materials; and**

**(c) ensure that the election materials are not interfered with.**

**(3) An election Court may direct that the Commission maintains the custody of all election materials in relation to a petition.**

**(4) Only the material relating to a particular petition may be furnished to an election Court.**

**(5) The election Court may order that additional seals be placed on the ballot boxes related to the election for which a petition has been lodged.**” (emphasis supplied)

21. An applicant seeking orders for storage or preservation by the court and access to the applicant, of such election materials at or after the pre-trial conference must demonstrate that there is a real connection between the order sought and the basis and grounding in the pleadings or evidence availed for seeking the said order. In other words, before the court can exercise its discretion to compel the production and availing before the court of election materials or the scrutiny or audit thereof, the court must be satisfied that there is a sure foundation in the pleadings or evidence for the grant of the order.

22. Such an order will readily be granted where, for example, the pleadings allege that the election material has been or is at risk of destruction, or that the election material or electronic information failed upon use or was interfered with at a certain polling station or place, or that its integrity was otherwise affected. Once such a basis is laid, the court will take the next step which is to consider **sub-rule 2 of Rule 16, of The Elections (Parliamentary and County Elections) Petition Rules** and determine the most prudent, efficient and economic transport mode and storage facility for the materials, and modes for the maintenance of the integrity, safety and non-interference with such election materials.

23. The court is always cognisant of the fact that the primary statutory and regulatory obligation to preserve and keep in safe custody all elections materials, is vested upon the IEBC, and that only in clear circumstances will that primary obligation be removed from IEBC and placed on either the courts or another party. There are ample provisions that relate to this obligation of IEBC, as shown hereunder.

24. The IEBC is constitutionally obliged to put in place appropriate structures and mechanisms to ensure, inter alia, the safekeeping of Election materials. To this end, **Article 86 of the Constitution** provides as follows:

**“At every election, the Independent Electoral and Boundaries Commission shall ensure that—**

**(a) whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent;**

**(b) the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station;**

**(c) the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and**

**(d) appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials”..** (emphasis supplied).

25. At the statutory level, this provision of the Constitution is given effect by **Regulation 86 of The Election (General) Regulations, 2012** which provides for the structure and mechanism for the safe keeping of election material in the following terms:

**“(1) After the final tallying and announcement of results, the returning officer shall keep in safe custody the following documents—**

**(a) copies of all election result declaration forms;**

**(b) copies of the register of voters sealed and labelled; and**

**(c) the Electronic Voter Identification Device.**

**(2) The returning officer shall—**

**(a) put the polling station diaries in a separate ballot box, seal and label the box; and**

**(b) keep the sealed ballot boxes and all material relating to the election in safe custody for such period as may be required under these Regulations and the Act.”**

26. As regards election materials which are in the form of documents, they are deemed to be public documents. **Regulation 93** of the **Election (General) Regulations** makes provision for their retention and inspection in the following terms:

**“(1) All documents relating to an election shall be retained in safe custody by the returning officer for a period of three years after the results of the elections have been declared and shall then, unless the Commission or the court otherwise directs, be disposed of in accordance with procedures prescribed by the Commission subject to the Public Archives and Documentation Service Act (Cap. 19).**

**(2) Any person may apply to the High Court with notice to all candidates in the election concerned for authority to inspect documents retained under these Regulations, other than ballot papers and their counterfoils.**

**(3) For the purpose of an inspection under sub-regulation (2), the returning officer shall unseal the documents concerned in the presence of candidates or agents and the returning officer and candidates or their agents shall keep the documents under their scrutiny until they are resealed by the returning officer after the inspection is completed.**

**(4) The provisions of this Regulation shall not apply to documents that concern a pending election petition unless there is a court order granting such authority”.**

27. A similar provision in respect of electronic data, and requiring safe custody thereof by the IEBC, is found in **The Elections (Technology) Regulations, 2017**, at **Rule 17** which provides as follows:

**“All electronic data relating to an election shall be retained in safe custody by the Commission for a period of three years after the results of the elections have been declared, and shall, unless the Commission or the court otherwise directs, be archived in accordance with procedures prescribed by the Commission subject to the Public Archives and Documentation Service Act (Cap. 19) and the Kenya Information and Communications Act, 1998”.**

28. So that, essentially, the safe custody of documents that are part of election materials is statutorily assured in the hands of the IEBC, but access may be granted to any member of the public upon an appropriate application.

29. It is apposite that I deal with the aspect of access to information under **Article 35 of the Constitution** and the Access to Information Act which were invoked in this application. The applicant relied on the

case of **ZebedeoOpore** (supra) where Mativo J stated:

***“15. Offering citizens access to state-held information is one of the most effective ways of upholding the constitutional values of transparency, openness, participation and accountability”***

30. To put the matter in proper context, however, Mativo J also pointed out in **ZebedeoOpore’s** case that there are parameters within which Access to Information Act proceedings are brought. He stated:

***“36. What must be emphasised, however, is that proceedings under the Access to Information Act differ from ordinary proceedings in certain key respects. First these disputes involve a constitutional right of access to information. Second, access to information disputes are not purely private disputes – requests of information often act in the public interest and the outcome of these disputes therefore impacts the general health of our democratic polity”***

31. This point was also well discussed by Tuiyott J in **Election Petition Appeal No. 6 of 2017 Hassan Aden Osman v The Independent Electoral and Boundaries Commission (I.E.B.C)**. There he analysed Access to Information requests as dealt with by Mativo J in the following words:

***“33. I accept the validity of the following statement by Mativo J. in Mercy Nyawade vs. Banking Fraud Investigations Department & 2 others (Petition No. 143 of 2017):-***

***“Offering citizens access to state-held information is “one of the most effective ways of upholding the constitutional values of transparency, openness, participation and accountability” Currie and De Waal suggest that accountability is unattainable if the government has a monopoly on the information that informs its actions and decisions. Access to information is not only fundamental to a properly-functioning participatory democracy: it also increases public confidence in government and enhances its legitimacy”.***

32. In **Hassan Aden Osman** Tuiyott, J went on to say:

***“34. But given the wording in Article 35(1) of the Constitution which is replicated in Section 4(1) of The Access to Information Act, there is a threshold to be reached before an Applicant can avail himself of this right. The threshold is that:-***

***(i). The Requester must state what right or fundamental freedom he/she wishes to exercise or protect with the information requested.***

***(ii). The information required.***

***(iii). How the information would assist him/her in exercising or protecting the right.***

***(See the decision of Lenaola J (as then was) in Timothy Nyoja vs. Attorney Gerald & another [2014] eKLR for a detailed discussion of these requirements)”.***

33. In the present case, I am satisfied that the application does not specifically fit into the mould of an Access to Information Act application. It is appreciated that this is an election petition, and what the applicant seeks is information to bolster her chances of succeeding in rem to dethrone the respondent from office. This is therefore not a public interest application. Further, although the applicant seeks to access her political rights, this alone cannot entitle her to the information sought unless she can demonstrate specifically how accessing that information will assist her in protecting or exercising that

right.

34. In addition, under the Elections Act and Election Petition Rules, it is for the applicant in a petition to provide all the information and facts which s/he believes are requisite to prove his/her case at the time of filing the petition. This explains why, unlike in any other civil proceedings, a petitioner is required as a condition to be heard to deposit security for costs within ten days of presenting a petition. In other words a petitioner is expected to have concrete grounds and information to support his case and an application for access to information will therefore not be readily allowed except within the confines of election law and rules. ( see generally Section 78 Elections Act, and Rules 8(e), 12(1)(a) &(e) of the Elections (Parliamentary and County ) Petitions Rules).

35. I now deal with each category of the items of electoral material sought by the applicant.

***KIEMS Kit, Voters Register, Biometric Voter identification Information***

36. **Section 44** of the **Elections Act**, establishes an integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results. That electoral system is what has been referred to as the Kenya Integrated Electoral Management System (KIEMS)

37. It is common knowledge that the KIEMS is one part of the larger elections management system which includes the servers, software, databases and the network infrastructure. The KIEMS kit itself comprises of many parts, including the important gadget – called a tablet – which reads that part of the information contained in the integrated electronic information relating to the overall elections system established, as already noted, by IEBC pursuant to the Elections Act.

38. The court takes judicial notice of the Supreme Court decision of 1<sup>st</sup> September, 2017 in the Presidential election petition of **Raila Odinga v Uhuru Kenyatta & IEBC [2017] eKLR** pursuant to which a fresh election of the President of Kenya is to be conducted. On the basis of that decision, it is a given undisputable fact that the KIEMS kit, in particular the KIEMS tablet, will be required for the fresh presidential election scheduled by the IEBC for 26<sup>th</sup> October, 2017. Accordingly, as argued by the IEBC, the KIEMS kit cannot be availed before this court pending the conduct of the fresh presidential election.

39. It is in the public domain that the electronic information on the electoral system is managed and read using, inter alia, the San Disc Card (SD Card) inserted into the KIEMS tablet, and such information is stored and contained in the SD card. It is that information (as far as the elections of August, 2017 are concerned) which the IEBC is constitutionally and statutorily required to preserve in safe custody as earlier noted. The court is conscious that the SD Card can be availed to the Court as and when the court requires.

40. In light of the foregoing, I am not satisfied at this point in time, that the applicant is certain exactly what they need the KIEMS kit or the KIEMS information for, in relation to the assertions they have made in the petition.

41. The court is, however, prepared to order that the SD cards for the Ruaraka Constituency be collated, marked per polling station and securely sealed in the presence of the parties and stored by IEBC ready for handover to the Deputy Registrar of the Court when directed by the Court. From my perusal of the Forms 35A the SD Cards for the various polling centres are as follows:

No.	Centre	Polling Station Code	No of SD Cards
1.	Baba Dogo Primary School	101 – 113	13
2.	M. M. Chandaria Primary School	203 – 209	9
3.	Sacred Heart Catholic School	301 – 315	15
4.	ACRES Centre	401 – 404	4
5.	HaidemarieMathare 4A Primary School	501 – 517	17
6.	Stima Members Club	601 – 612	12
7.	Drive In Primary School	701 – 710	10
8.	St. Stephen Nursery School	801 – 810	10
9.	Mathare North Primary School	901 – 909	9
10.	St. Christopher Wholistic School	1001 -1009	9
11.	Mathare North Social Hall	1101 – 1113	13
12.	Chief's Compound Lucky Summer	1201 – 1204	4
13.	Lucky Summer Open Ground	1301 – 1313	13
14.	Tuba Junior Academy	1401 – 1410	10
15.	Ngumyumu Primary School	1501 – 1511	11
16.	Kariobangi Baptist Youth Centre	1601 – 1602	2
17.	Korogocho Community Centre	1701 – 1705	5
18.	Kasarani Youth Resource Centre	1801 – 1804	4
19.	Daniel Comboni Primary Scholl	1901 – 1905	5

42. The said SD Cards shall be availed to the Registrar upon order of the court when evidence is adduced in court, respectively in relation to any specific polling station necessitating the reading, audit or access to the SD Card(s) thereof for purposes of obtaining information on the Register of Voters; the Biometric voter registration; electronic voter identification; polling station information that is contained in the SD Cards and for such other purpose that the court may specify during the proceedings.

#### **Presiding Officers, Polling Station Clerks**

43. The applicant sought to be given lists of the presiding officers and clerks for each polling station. The stated reason in the motion was ostensibly to enable the applicant *“to show the number of persons allied to the 1<sup>st</sup> respondent and who were nevertheless appointed to their roles for one reason or the other as stated in the petition”*

44. Another of the arguments postulated by the applicant in requesting the provision of the lists of IEBC officers was that there were returns forms which were not properly signed.

45. As correctly pointed out by the 1<sup>st</sup> respondent's counsel, there is no basis on which to accept the applicant's assertion that by providing them with a list of presiding officers and polling clerks for the constituency that alone will enable the applicant to show the numbers of biased officers. Further, I accept the position of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents that, with the Forms 34As and 34Bs having been produced, the names of the officers who signed them are available to the applicant. This negates any need for the compilation of a further list to replicate the information already availed in the forms.

46. With regard to the improperly signed forms, since all relevant Forms have been produced, it is open to the applicant to demonstrate and identify any irregularities in signing or otherwise from those forms.

47. Accordingly, I would decline to order the provision of the lists of the presiding officers and clerks. The applicant will not be hindered in any way in their case because they can identify any of the officers from

the Forms available should they need to do so.

**Disposition**

48. In summary, the orders of the court are as follows:

a. With regard to the request for KIEMS kit, SD Cards shall be availed to the Registrar within 24 hours upon an order of the court when evidence is adduced in court, respectively in relation to any specific polling station necessitating the reading, audit or access to the SD Card(s) thereof for purposes of obtaining information on the Register of Voters; the Biometric voter registration; electronic voter identification; polling station information that is contained in the SD Cards and for such other purpose that the court may specify during the proceedings. The SD cards shall be collated in the manner stated in paragraph 41 hereof.

b. Consequently, the prayers concerning access and audit of KIEMS kit will only kick in upon provision by the petitioner of evidence necessitating the access or audit thereof. The court was also not given names of any technical experts who may be required for the said exercise, and this court is not prepared to expose the Deputy Registrar to conduct a technical exercise of auditing the KIEMS system, an area in respect of which he or she is unlikely to have anyexperience or expertise.

c. With regard to provision of lists of presiding officers and clerks, the prayer is declined.

49. The costs of the application will be in the cause.

50. Orders accordingly.

**Dated and Delivered at Nairobi this 30<sup>th</sup> Day of October, 2017**

\_\_\_\_\_

**RICHARD MWONGO**

**PRINCIPAL JUDGE**

Delivered in the presence of:

1. ....  
.....for the Petitioner

2. ....  
.....for the 1<sup>st</sup> Respondent

3. ....  
.....for the 2<sup>nd</sup> & 3<sup>rd</sup> Respondent

Court Clerk.....



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