REPUBLIC OF KENYA

SPM'S COURT AT WEBUYE

ELECTION PETITION NO.1 OF 2013

ERIC SOITA PATROBA----------PETITIONER

VERSES

MARTIN WAFULA WAWIRE----------1ST RESPONDENT

IEBC----------2ND RESPONDENT

ODUOL BERNAND ARWINGS.....3RD RESPONDENT

RULING

The petitioner filed a notice of motion under Article 35 and 38 of the constitution of kenya 2010,section 4 of the Election Act 2011.Rules 4 and 33 of the Elections(parliamentary & county elections) petition rules 2013 and All the enabling provisions of the law and prayed for the following orders;

(a) That I.E.B.C be ordered to produce and deliver to the petitioner certified copies of the principal Register of voters of sitikho ward used,employed, and relied on for and during the 4th march 2013 elections for county Assembly election for sitikho ward.

(b) That I.E.B.C be ordered to produce and deliver to the petitioner the statutory forms 33 and 35 used,employed and dully signed by the the presiding officer during the county Assembly election sitikho ward held on 4th march 2013

(c)That the cost of this application be provided for by this Honourable court .

And the 2nd and 3rd respondent's counsel filed grounds of opposition stating that he has supplied the petitioner with form 35 and the principal register but not form 33 as they are inside the ballot boxes and the petitioner has not laid a basis why he wants the forms 33 and the petitioner filed a supplementary affidavit where he clarified that what he wanted was the marked register used not the provisional register supplied to him by the 2nd and 3rd respondents and also he filed written submissions on the same.

The petitioner in his written submissions submitted that under Article 35(1) of the constitution the petitioner has a right to information necessary for him to purse his right to justice and also under Article 38(2) of the constitution the petitioner has a right to enjoy his political rights of voting and his supporters right to recognize and to ensure that due weight is

given to votes in his favour and he submitted that if the said register is availed it will let the court know if the voters who were registered twice also voted more than unique and if the deceased one dimina's ID was used to vote in the said election and if forms 33 are scrutinize it will prove the petitioner's and his witnesses allegations that sorting and counting was not done in a transparent manner and as a result wrong entries were made in form 33 to the benefit of the 1st respondent's.

The 1st respondent's counsel filed grounds of opposition where he opposed the application of 10/4/13 on the grounds that the application is frivolous and an abuse of the election(parliamentary& county elections) petition rules 2013 and the affidavits in support sworn on 10/4/13 contravenes the mandatory provisions of section 3 of the oaths and statutory declaration Act cap 15 L.O.K.

The counsel for the 2nd and 3rd respondent's opposed the application and relied on their grounds of opposition dated 23/4/13 and submitted that the application before court has no merit as the orders sought have been overtaken by events for the following reasons;

a) The 1st order being sought is the production by the 2nd respondent of the certified copies of the principal Register to which the Respondents in the Affidavit of oduol bernard Arwings filed together with the Response to the petition annexed the same as OBA 2

b) The 2nd order for production of the forms 35 was complied with when the Respondents in the affidavit of odul bernard Arwings annexed the same as OBA 3

c) As for the production of form 33 the grounds of opposition are very clear that the said form 33 is inside the ballot boxes and the Respondents cannot access the same. This is informed by the fact that the 2nd Respondent will be breaking the law in attempting to break the seals to get the same and all these factors were explained to the petitioner during the pretrail conference of 2/5/13 and that he should have considered vacating the application but refused. Election(General regulations 2012 pursuant to the Election Act and in particular regulations 86(1) and regulation 93 do not allow the opening of ballot boxes without an order of the court.

I have carefully considered the submissions before me and perused the documents filed and I find that under Article 35 of the Constitution as read with section 27(3) &(4) of the IEBC Act the petitioner has a right to information in IEBC'S possession and IEBC can only decline to give the petitioner the said information if the request is unreasonable in the circumstance,the information requested for is at a deliberative stage by IEBC ,the petitioner has failed to pay any prescribed fees or the applicant has failed to satisfy any confidentiality requirement by IEBC.

In this case I find the petitioner is entitled to the said information(documents) as IEBC(2nd respondent) never proved any of the 4 conditions that allow them to refuse/decline to give the said information to the petitioner as all that the IEBC'S counsel said was that form 33s are in the ballot boxes which are sealed and the seals can only be removed through a court order as provided by regulation 93 of the Election Regulations . Further I find the petitioners prayer in the supplementary affidavit to be supplied with certified copies of the marked register not the principal register he had applied for in the said application is a new prayer

which was not prayed for in the original application but guided by section 80(1)(d) of the Election Act 2011 which state that I should decide all matters that come before me without undue regard to technicalities I find the petitioner is entitled to be supplied with a copy of the marked register by IEBC.

Having said the above I disallow the application in respect of being supplied with the principal register and form 35 as the same has been overtaken by events as the same had already been supplied to the petitioner by the time the application was being argued and since IEBC(2nd respondent) has stated that the forms 33 are inside the ballot boxes and I have already ordered for a scrutiny of some documents which are inside the ballot boxes the petitioner can make copies of the same once the ballot boxes are opened during the scrutiny and recount which I have ordered for in my earlier ruling. I also order IEBC to supply the petitioner with certified copies of the marked register but if the same is inside the ballot boxes being brought to court for scrutiny and recount the petitioner can make copies of the same when the ballot boxes are brought to court but I make no orders as to costs. Leave to Appeal within 14 days granted.

D ATED and DELIVERED at WEBUYE this -24th- day of may-2013

SN ABUYA

MAGISTRATE

Ruling read in open court in the presence of:The petitioner

absent----------counsel for the petitioner

absent---------- counsel for the 1st Respondent

absent----------counsel for the 2nd and 3rd Respondent