



**Kafow & another v Independent Electoral and Boundaries Commission & 2 others
(Election Petition E003 of 2022) [2023] KEHC 348 (KLR) (26 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 348 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
ELECTION PETITION E003 OF 2022
TW CHERERE, J
JANUARY 26, 2023**

IN THE MATTER OF: THE ELECTIONS ACT, 2011 OF THE LAWS OF KENYA

AND

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

AND

IN THE MATTER OF: THE ELECTIONS (GENERAL) REGULATIONS, 2012

AND

**IN THE MATTER OF: THE ELECTION OF THE MEMBER OF
NATIONAL ASSEMBLY FOR LAGDERA CONSTITUENCY HELD**

ON 09TH AUGUST, 2022

BETWEEN

ABASS IBRAHIM KAFOW 1ST PETITIONER

MOHAMED IBRAHIM SUGOR 2ND PETITIONER

AND

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 1ST
RESPONDENT**

FARAH IBRAHIM 2ND RESPONDENT

ABDIKADIR HUSSEIN MOHAMED 3RD RESPONDENT



RULING

Introduction: -

1. By an application dated 04th October, 2022, Petitioners seek the following orders:
 1. That the Honourable Court do hereby order scrutiny and recount of votes in the following polling stations in Lagdera Constituency in respect of Election of the Member of National Assembly conducted on 09th August, 2022
 - i. Afweny Centre 1
 - ii. Afweny Centre 2
 - iii. Benane Primary School 1
 - iv. Benane Primary School 2
 - v. Bullo Centre
 - vi. Shanta-Abak Centre 1
 - vii. Shanta-Abak Centre 2
 - viii. Benane Secondary School 1
 - ix. Benane Secondary School 2
 2. That the Honourable Court do upon granting prayer 1 do direct the scrutiny to include the following:
 - a. Written statements made by Returning Officers
 - b. The examination of written statements made by the Presiding Officers in the Polling Station Diaries
 - c. Both the electronic and hardcopy of registers of voters as contains the biometric data and alpha numerical details of the voters entitled to vote at the stated polling stations
 - d. The Kenya Integrated Machine System (KIEMS) and the information stored by it
 - e. The Declaration Results Forms 35A stored in the ballot boxes of all the named Polling Stations
 - f. The packets of spoilt votes
 - g. The marked copy of Register
 - h. The packets of counterfoils of used ballot papers
 - i. The packets of counted ballot papers
 - j. The packets of rejected ballot papers
 3. That the Honourable Court do hereby order and compel the 1st Respondent to avail the following materials for voter scrutiny:
 - i. Polling Station Diaries for all polling stations named in prayer 1 above



- ii. Both the electronic and hardcopy of registers of voters as contains the biometric data and alpha numerical details of the voters entitled to vote at the stated polling stations named in prayer 1 above
 - iii. The Kenya Integrated Machine System (KIEMS) and the information stored by it used in the stated polling stations named in prayer 1 above
 - iv. All the Declaration Results Forms 35A used to declare results in the stated polling stations named in prayer 1 above
 - v. Total number of registered voters in Lagdera Constituency
 - vi. Total number of voters who voted in each polling station
 - vii. Total votes cast per polling station
 - viii. Number of voters who were identified by biometrical and by supervisor mode per polling station
 - ix. Total number of voters unidentified by KIEMS Kit
 - x. The total number of assisted voters per polling station
2. The application is hinged on the twelve grounds appearing on its body and is supported by the Supporting Affidavit sworn by Mohamed Ibrahim Sugor (2nd Petitioner) sworn on 04th October, 2022.
 3. In opposing the application, first and second Respondents filed a Replying Affidavit sworn by Farah Ibrahim (2nd Respondent) on 20th December, 2022. The third Respondent similarly opposed the application vide his affidavit sworn on 22nd December, 2022.
 4. The application was heard by way of written submissions which counsel dutifully filed.

The Petitioners'/Applicants' submissions

5. Petitioners/Applicants relied on their written submissions dated 13th January, 2023, It was submitted for the Petitioners/Applicants that the application was based on the same grounds as Petition which grounds include unlawful ejection of political agents, use of violence to intimidate voters and party agents, irregular, unprocedural and unlawful actions during assisted voting, relocation of gazetted polling stations, discrepancies in tally entre and failure to properly store and secure election materials.
6. It is the Petitioners/Applicants' case that out of their 11 witnesses, 6 who were agents tendered evidence concerning irregularities, malpractices and misconducts at the polling station and violence and intimidation meted against them and their being side-lined to the extent of being herded to the back of the polling station and ejection from the polling stations to intentionally stop them from monitoring the elections. Witnesses also stated that there was irregular voting extension into the night and that some voters were not properly identified by KIEMs kit while others were allowed to vote without any identification whereas assisted voters had their choice changed in favour of the 3rd Respondent.
7. Concerning the extent of the scrutiny and recount, it was submitted that the application was based on violence, ejection and banishment to the back of the polling station of UDA agents at Afweny Centre 1, Afweny Centre 2 and Afweny Primary School, Benane Primary School 1 and Benane Primary School 2, Benane Secondary School 1 and Benane Secondary School 2 and unprocedural tallying at Bullo Centre.



8. It was additionally submitted that the application is competent and meritorious and that the law allowed such an application to be filed at any time before the determination of the petition. Reliance was placed on the Supreme Court decision in the case of *Gatirau Peter Munya vs. Dickson Mwenda Gitbinji & 2 others* (2013) eKLR where the court led that the court may order scrutiny and recount to enable it arrive at a just and fair determination of the Petition. Concerning sufficient basis for scrutiny and recount, Applicants/Petitioners relied on the Supreme Court decisions in *Nathif Jama Adam v Abdikhaim Osman Mohamed & 3 others* [2014] eKLR and *Nicholas Kiptoo arap Korir Salat vs. Independent Electoral and Boundaries Commission & 2 Others* (2015) eKLR submitted that they had specifically identified the polling stations and in the incidents that happened thereto that compromised the elections.

The first and second Respondents' submissions: -

9. Whereas the 1st and 2nd Respondents concede that Applicants/Petitioners have specifically identified the polling stations for which they seek scrutiny and recount, the application is opposed on the ground that it has not satisfied the threshold for the grant of an order for scrutiny, recount or re-tallying of the votes.
10. In support of this proposition, 1st and 2nd Respondent relied on Section 33(2) of the *Election Petition Rules* which requires that the court be satisfied that there exists sufficient reason. Reliance was similarly placed on *Masinde v Bwire & Another Election* (2008) eKLR where the court held that an order for scrutiny is not automatic and that there must be a basis for it and on the *Munya ccase* (*Supra*) where the Supreme Court settled the principles with respect to scrutiny and recount of votes in an election petition which includes the necessity to enable the court arrive at a just and fair determination of the Petition but not to enable a petitioner to indulge in a roving inquiry with a view to fish for material to invalidate the election. (See Indian Supreme Court decision in the case of *Arikala Narasa Reddy -vs- Venkata Ram Reddy Reddygari & Another* (Civil Appeal Nos 5710-5711 of 2012).
11. Concerning the issue of nexus, it was submitted for the 1st and 2nd Respondent that the Petitioners/Applicants had not demonstrated how the alleged violence affected voters and that there being no nexus between the orders sought and the violence, the orders sought ought not to be granted. In support thereof, reliance was place on *Hassan Joho vs. Nyange & Another* (*supra*).
12. It was submitted for the 1st and 2nd Respondent that an order of scrutiny and recount ought only be allowed to aid the court in reaching a fair determination but not to provide an avenue for the applicant to beef up its case. (See *Phillip Osore Ogutu v Michael Onyura Aringo & 2 Others* [2013] eKLR and *William Maina Kamanda v Margaret Wanjiru Kariuki & 2 Others* [2008] eKLR).

The third Respondent's submissions

13. It was submitted for the 3rd Respondent that the prayer for scrutiny and recount was unmerited the same having not been pleaded in the Petition. In support therefore, reliance was placed on supreme court decisions in *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR and *Nathif Jama Adam v Abdikhaim Osman Mohamed & 3 others* (*Supra*).
14. Concerning the basis for orders of scrutiny, it was submitted that the Applicants/Petitioners had failed to demonstrate how alleged violence, ejection of party agents and relocation of polling stations had tilted the results to warrant scrutiny and recount and that the orders sought would not in the interest of fairness and justice assist the court in settling the issues raised in the Petition. (See *Hassan Mohamed Hassan & Another v. IEBC & 2 Others* {2013} eKLR and *Gatirau Peter Munya's case* (*supra*)).



15. Based on the foregoing, the three Respondents urged this court to disallow the application with since no sound basis has been laid.

Analysis and Determination: -

16. I have carefully considered the application alongside the parties' affidavits and elaborate submissions and all the decisions referred to and I have deduced the issue for determination as follows;
- i. Whether the issue of scrutiny and recount was pleaded
 - ii. Whether sufficient reasons for an order for scrutiny and recount of votes have been established.
17. From the submissions by the parties, it is not disputed that there is abundant case law on the issue of scrutiny and recount. Section 82 of the *Elections Act*, 2011 provides:
82. (1) An election court may, on its own motion or on application by any party to the petition, during the hearing of an election petition, order for a scrutiny of votes to be carried out in such manner as the election court may determine.
18. The *Elections (Parliamentary and County Elections) Petition Rules* 2017 provides that: -
28. A petitioner may apply to an elections court for an order to-
- (a) Recount the votes; or
 - (b) Examine the tallying, if the only issue for determination in the petition is the count or tallying of votes received by the candidates.
19. Rule 29 of the said *Rules* provides: -
29. (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.
20. Also relevant in my view are Regulations 76 through to 83 of the *Elections (General) Regulations* 2012 which provide an elaborate mechanism for the counting and tallying of votes including who should be present, the mode of counting and tallying, raising of disputes or objections, requests to a presiding officer for a recount etc.
21. The parties in this matter appreciate that the granting of an order for scrutiny and recount of votes is not a matter of course and as stipulated under Rule 29(2) above, sufficient reason has to be shown to the satisfaction of the court for such an order to issue.
22. Contrary to the Respondents' submissions that Petitioners have not pleaded scrutiny in the Petition, a perusal of the prayers in the Petition demonstrate otherwise. The Petition and the application have indeed singled out Afweny Centre 1, Afweny Centre 2, Afweny Primary, Bullo Centre, Benane Primary School 1, Benane Primary School 2, Benane Secondary School 1 and Benane Secondary School 2 as the polling stations with disputed results.
23. From the foregoing, I am persuaded that the polling stations which are the subject of a possible scrutiny have been specifically identified in the pleadings.



24. The burden to demonstrate a sufficient reason for scrutiny remains throughout with the Applicant/s and it all depends on the ability to marshal sufficient evidence to persuade the court that scrutiny is deserved. (See *Phillip Osore Ogotu v Michael Onyura Aringo & 2 Others* (supra).
25. The question that readily follows is whether sufficient reason has been given for this request. The law on the parameters to be achieved for an order of recount and/or scrutiny to issue is now well settled. The Supreme Court decision in *Gatirau Peter Munya –vs- Dickson Mwenda Kithinji & 2 Others* (supra) held: -
- a) The right to scrutiny and re-count of votes in an election petition is anchored in Section 82(1) of the Election Act, 2011 and Rule 33 of the Elections (Parliamentary and County Elections) Petition Rules, 2013. Consequently, any party to an Election Petition is entitled to make a request for a re-count and/or scrutiny of votes, at any stage after the filing of the Petition and before the determination of the Petition.
 - b) The trial court is vested with discretion under section 82(1) of the *Elections Act*, 2011 to make an order on its own motion for re-count or scrutiny of votes as it may specify, if it considers that such scrutiny or re-count is necessary to enable it to arrive at a just and fair determination of the Petition. In exercising this discretion, the court is to have sufficient reasons in the context of the pleadings or the evidence or both. It is appropriate that the court should record the reasons for the order for scrutiny or re-count.
 - c) The right to scrutiny does not lie as a matter of course. The party seeking a re-count or scrutiny, of votes in an election petition is to establish the basis of such a request, to the satisfaction of the trial Judge or Magistrate. Such a basis may be established by way of pleadings and affidavits or by way of evidence adduced during the hearing of the petition.
 - d) Where a party makes a request for scrutiny or re-count of votes, such scrutiny or re-count if granted, is to be conducted in specific polling stations in respect of which the results are disputed or where the validity of the vote is called into question in terms of rule 33 of the Elections (Parliamentary and County Elections) Petition Rules, 2013.
26. In the recent decision in *Raila Amolo Odinga & Another –vs- IEBC & 2 Others* (supra) the court buttressed the need for establishment of a sufficient reason for an order of scrutiny to issue. The court stated: -
- “Having addressed our minds to the above issues, it is our view that first, we note that as correctly argued by counsel for the 3rd Respondent, a party must be bound by its pleadings and secondly, any scrutiny of either forms or the technology must be made for a sufficient reason. Any prayer that would seem to be an expansion of the case for the Petitioners or which would in effect be a fishing exercise to procure fresh evidence not already contained in the Petition would and must be rejected.”
27. In the instant application, the application for scrutiny and recount is grounded mainly on alleged irregularities, violence and chasing away of UDA agents from the impugned polling stations. It is urged that these incidences affected the votes of the UDA candidate in favour of the 3rd Respondent. These alleged malpractices are summarized in paragraphs 16 through to 40 of the Petition. 1st, 2nd and 3rd Respondents have made specific responses to the allegations in the Petition including a response to paragraphs 16 through to 40 of the Petition. Additionally, 1st, 2nd and 3rd Respondents have also opposed the application along the lines, summarized earlier in this ruling.



28. The *Halsbury Laws of England*, (1990) 4th Edition, 12; 454 defines ‘scrutiny’ as a court supervised forensic investigation into the validity of the votes cast in an election.
29. The applicants have in their application, set out their prayers specifically asking for scrutiny as well as the information they intend to be granted access to. It has not been demonstrated that the order sought is aimed at unearthing new evidence on the basis of which the petition could be sustained. I have no doubt that the exercise will assist the court to verify the allegations made by the parties.
30. Consequently, it is hereby ordered:
 1. That the ballot boxes for the following polling stations be opened for inspection, scrutiny and recount: Afweny Centre 1, Afweny Centre 2, Afweny Primary School, Bullo Centre, Benane Primary School 1, Benane Primary School 2, Benane Secondary School 1 and Benane Secondary School 2
 2. The ballot boxes shall be delivered to the Deputy Registrar, Milimani Constitutional and Human Rights Division Hon. Tessy Marienga not later than 09.00 am on 30th January, 2023
 3. 1st Respondent shall provide certified copies of Forms 35As used in the impugned election for the specific contested polling stations and Forms 35B and 35C for compliance thereof.
 4. The Deputy Registrar shall get in touch with 1st Respondent to coordinate the delivery of the ballot boxes and, with all the parties, for directions concerning the place and time that the exercise will be carried out
 5. Each Party shall be represented by two agents during the exercises above and they shall at all times be under the supervision of the Registrar of the court and her staff.
 6. The Registrar shall file her report and avail copies to all parties by close of business on 01st February, 2023.
 7. Mention on 02nd February, 2023 virtually at 09.00 am to confirm compliance with the foregoing orders and for directions as to filing of submissions on the Petition
 8. There shall be no order as to costs.

DATED AT MERU THIS 26TH DAY OF JANUARY 2023

T. W. CHERERE

JUDGE

Appearances

Court Assistant - Morris Kinoti

For Petitioners - Mr. Salah for Sallah & Co. Advocates

For 1st and 2nd Respondents - Mr. Nura for Garane & Somane Advocates

For 3rd Respondent - Mr. Ndegwa & Mr. Mwangi for Ndegwa & Ndegwa Advocates

FURTHER ORDER:

These orders shall be served on the OCPD Garissa for the purpose of providing security during the collection and movement of ballot boxes identified in this ruling and delivery to the Deputy Registrar, Milimani Constitutional and Human Rights Division Division Hon. Tessy Marienga.

