



**Abdisalan v Abdi & 2 others (Election Petition E007 of 2022)  
[2022] KEHC 13931 (KLR) (21 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 13931 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARISSA  
ELECTION PETITION E007 OF 2022  
RN NYAKUNDI, J  
OCTOBER 21, 2022  
CORAM: HON. JUSTICE R. NYAKUNDI  
OMWANZA OMBATI, MR ONDERI AND BENJAMIN ONDIGI  
FOR THE PETITIONER  
ISSA MANSOUR, M/S AGWATA KWAMBOKA AND CHELAGAT  
FOR 1ST RESPONDENT  
MR OWOUR, NABIL ORINNA AND REBECCA MOGIRE FOR 2ND  
AND 3RD RESPONDENT**

**BETWEEN**

**IBRAHIM AHMED ABDISALAN ..... APPLICANT**

**AND**

**SANEY IBRAHIM ABDI ..... 1<sup>ST</sup> RESPONDENT**

**RETURNING OFFICER, WAJIR NORTH CONSTITUENCY .... 2<sup>ND</sup>  
RESPONDENT**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION .... 3<sup>RD</sup>  
RESPONDENT**

**RULING**

1. The Petitioner/Applicant approached this court vide a Notice of Motion Application dated October 4, 2022 seeking the following orders;
  1. That this Application be certified as urgent, canvassed and determined before the hearing of the Petition-in view of the narrow margin of the gazetted results between the Petitioner and 1st Respondent, being 65 votes.



2. That all the election materials, including ballot boxes used in the Wajir North Constituency National Assembly elections in Korondille Primary School Station I of 1, Turuloba Polling Station 1 of 1, Malkagufu Dispensary 2 of 2, Buna Sub-county Hospital I of I, Chirate Mobile, Batalu Primary School, Karaduse Dam, Ajawa Primary school 2 of 2, Sirey Primary School I of 1, Golbo ECD Polling Station and Nyata Primary School I of /be immediately delivered to the Court for their safe custody;
3. That the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents be compelled to supply the Court and the Petitioner /other parties in the Petition, for their scrutiny, the Returning Officer's Polling Day Diary for Wajir North Constituency elections held on the August 9, 2022.
4. That the 3<sup>rd</sup> Respondent be compelled to supply the Court and the Petitioner/other parties in the petition, for their scrutiny, the following information in their exclusive possession;
  - I. Wajir North Constituency National Assembly Result Declaration forms
    - a. Certified copies of the original Forms 35A filled in at:  
 Korondille Primary School Station I of 1, Turuloba Polling Station 1 of I, Malkagufu Dispensary 2 of 2, Buna Sub-county Hospital 1 of 1, Chirate Mobile, Batalu Primary School, Karaduse Dam, Ajawa Primary school 2 of 2, Sirey Primary School I of I, Hote Primary School 2of 2, Beramu Primary School Golbo ECD Polling Station and Nyata Primary School / 1 of 1.
    - b. Certified copy of Form 35B with respect to Wajir North Constituency;  
 Certified copies of the Tally Sheets as filled for Korondille Primary School Station 1 of 1, Turuloba Polling Station 1 of I, Malkagufu Dispensary 2 of 2, Buna Sub-county Hospital 1 of I, Chirate Mobile. Batalu Primary School. Karaduse Dam, Ajawa Primary school 2 of 2, Sirey Primary School I of I, Hole Primary School 2of 2, Beramu Primary School Golbo ECD Polling Station and Nyata Primary School 1 of 1.
5. That the 3<sup>rd</sup> Respondent be compelled to supply the Court and the Petitioner/other parties, for their scrutiny, the inventory of the Wajir North Constituency National Assembly Result Declaration Forms (with serialization) as distributed to the presiding officers at the polling stations set out at para 3 (I) (a) above.
6. That the 3<sup>rd</sup> Respondent be compelled to supply the Court and the Petitioner/other parties, for their scrutiny, the (KIEMS LOGS) as regards the polling stations at para 3 (I) (a) above;
7. That the 3<sup>rd</sup> Respondent be compelled to supply the Court and the Petitioner/other parties, for their scrutiny, Polling Station Diaries with respect to all the polling stations listed at para 3 (1) (a) above;
8. That the 3<sup>rd</sup> Respondent be compelled to supply the Court and the Petitioner/other parties, for their scrutiny the inventory of ballot boxes' serial numbers and ballot box seals' serial numbers used Korondille Primary School Station 1 of 1, Turuloba Polling Station I of I, Malkagufu Dispensary 2 of 2. Buna Sub-county Hospital I of I, Chirate Mobile, Batalu Primary School, Karaduse Dam, Ajawa Primary school 2 of 2, Sirey Primary School 1 of I. Hole Primary School 2of 2, Beramu Primary School Golbo ECD Polling Station and Nyata Primary School I of I.
9. That the 3<sup>rd</sup> Respondent be compelled to supply the Court and the Petitioner/other parties, for their scrutiny, packets of rejected ballot papers and statements made thereto at the stations listed at para 3 (1) (a) above;



10. That the 3<sup>rd</sup> Respondent be compelled to supply the Court and the Petitioner/other parties, for their scrutiny, packets of spoilt ballot papers with respect to Wajir North Constituency National Assembly and county assembly elections at the stations listed at para 3 (I) (a) above;
11. That the 3<sup>rd</sup> Respondent be compelled to supply the Court and the Petitioner/other parties, for their scrutiny packets of counterfoils of used ballot papers with respect to Wajir North Constituency National Assembly at the stations listed at para 3 (I) (a) above;
12. That the 3<sup>rd</sup> Respondent be compelled to grant the Court and Petitioner/other parties access to the KIEMS devices ' results transmission logs (and transmission error logs- if any) with respect to the Wajir North Constituency National Assembly elections and loss detailing the identification of voters at the polling stations listed at paragraph 3(1) (a) above;
13. That the 3<sup>rd</sup> Respondent be compelled to grant the Court and Petitioner/other parties' access to written statements made by the Returning Officer in relation to the Elections of Wajir North Constituency elections held on the 9<sup>th</sup> August 2022.
14. That the 3<sup>rd</sup> Respondent be compelled to grant the Court and Petitioner/other parties the packets of counted ballot papers of the polling stations listed at paragraph 3 (I) (a) above
15. That the 3<sup>rd</sup> Respondent be compelled to supply the Court with comprehensive documentation of all the incidences (if any) when as a result of identification failure by the KIEMS gadgets. Alphanumerical identification had to be done at the polling stations listed at paragraph 3 (I) (a) above;
16. That the 3<sup>rd</sup> Respondent be compelled to supply the Court with all the Forms 32A Declaration Forms or assisted voters in the polling stations set out below;

No POLLING STATION

1. Malkagufu Dispensary 2 of 2
  2. Buna Sub-county Hospital 1 of 1
  3. Chirate Mobile
  4. Batalu Primary School
  5. Karaduse Dam
17. That this Court grants leave to the Petitioner and any other party to file a supplementary affidavit as necessarily arising from the access to the information that would emerge from the scrutiny above,
  18. That the Respondents bear the Costs of this Application;
  19. That this Court grants any other reliefs that are in the circumstances, just and fair.

The Application is premised on the grounds set out in the Application and the supporting affidavit.

**APPLICANT'S CASE**

2. The Applicant has based the Application on the grounds that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have failed to produce evidence of an official communique informing the candidates and /or their agents the change of venue of tallying and declaration of results. Further, that the gazettelement of the 1<sup>st</sup> Respondent as the member of parliament elect for Wajir North was unconstitutional and illegal. The



petitioner had raised issues on particular polling stations and the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents admitted at Paragraphs 23-28 of the Response to the Petition that they did not complete tallying and that it was disrupted by violence.

3. The Applicants' contention is that the KIEMS Kit showed that there were 225 voters identified by 19:17 p.m. HRS after the closure of the polling station whereas the Form 35A shows that there were 266 votes cast thus the votes cast exceeded the number of voters identified by the kit. Further, that there was result manipulation through assisted voting in polling stations. The Applicants' deposed that there was non attachment of forms for assisted voting in the response to the petition which points to a cover-up.
4. The petitioner contended that there was refusal to avail information when requested and to produce forms that by ignoring/ neglecting the Petitioner's legitimate concerns amounting to a request for either Forms 35A or Polling Station Diaries (PSDs) for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have acted in bad faith and in a manner that not only contradicts but also contravenes their constitutional mandate and election laws. Further, that the Reliefs sought are merited and Orders thereto will aid this Court in the expedient determination of the present Petition.

### **RESPONDENT'S CASE**

5. The Respondents opposed the Application vide Grounds of Opposition and Replying affidavit dated October 12, 2022.
6. The Application was opposed on the grounds that Scrutiny was not specifically pleaded in the main petition and thus offends the principles on scrutiny and recount laid out in Raila Amollo Odinga & Another VIEBC & 2 Others, Presidential Election Petition No 1 of 2017 and Peter Gitarau Munya v IEBC, Meru County Returning officer 7 Kiraitu Murungi, Meru Election Petition No 6 of 2017. Further, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents contended that the Application has been filed prematurely without the Court having the benefit of cogent and credible evidence to exercise its jurisdiction.
7. The Respondents contended that the Application is a fishing expedition and that the issues raised were addressed adequately in their response to the petition. In their replying affidavit they contended that an Application for Scrutiny cannot be based on the margin of victory of a candidate without more.
8. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents contended that the Prayer for Safe Custody by Court is misguided and unfounded in law, due to the fact that Article 86(d) of the Constitution empowers the Independent Electoral and Boundaries Commission to ensure that appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials. Further, that Rules 15 and 17 of the Elections (Technology) Regulations, 2017 provide for data storage and access to information as well as data retention and archive, Regulation 15(1) of the Elections (Technology) Regulations, 2017 requires the Independent Electoral and Boundaries Commission to store and classify data in accordance with the principles set out in the Access to Information Act and that Regulation 17 of the Elections (Technology) Regulations, 2017 makes it mandatory for Independent Electoral and Boundaries Commission to retain all electronic data relating to an election for a period of three years after the election results have been declared.
9. The Respondents contended that there are adequate legal mechanisms with respect to storage of election materials, which mandate falls squarely on the Independent Electoral and Boundaries Commission as an independent Constitutional Body. Therefore, this Court therefore has neither the mandate nor the capacity to store elections materials.



10. The Respondents contended that due to the violence that occurred at the tallying station, and after consulting with the County Election Manager and the Commission Headquarter, the returning officer was taken by Helicopter to Wajir Town and kept in safety at a local hotel, and thereafter to the County Tallying Centre located in Wajir Town (Red Cross Hall). On Saturday August 13, 2022, I joined Returning Officers from Mandera County in a plane Chartered by the 3<sup>rd</sup> Respondent and was moved to the National Tallying Centre, at the Bomas of Kenya.
11. The Respondents deposed that there were no voters who were assisted to vote unlawfully as alleged at paragraph 14 and references to the Petition are an attempt by the Petitioner to prosecute the Petition prematurely although no clear particulars have been provided with respect to any improperly assisted voter.
12. They contended that the Application was premature and urged the court to disallow the same.

### **ISSUES FOR DETERMINATION**

13. I note that the Application essentially has 19 prayers. The same shall be narrowed down as some of the prayers are related and replicated. The issues to be determined can therefore be narrowed down to the following:
  - a. Whether the election materials should be delivered for safe custody
  - b. Whether orders for scrutiny should issue

### **WHETHER THE ELECTION MATERIALS SHOULD BE DELIVERED FOR SAFE CUSTODY**

14. This issue has already been settled and orders were issued during the mention of October 4, 2022 where the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were ordered to initiate the process of delivery of all the election materials related to the election held on August 9, 2022 for the position of Member of National Assembly for Wajir North Constituency.
15. It is therefore overtaken by events.

### **WHETHER ORDERS FOR SCRUTINY SHOULD ISSUE**

16. The law on scrutiny is stated in section 82 of the *Elections Act* as follows;
  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.
17. Rule 29 of the *Elections (Parliamentary and County Elections) Rules 2017* states;
  1. The parties to the proceedings may apply for scrutiny of the votes for purposes of establishing the validity of the votes cast.
18. The principles regarding orders for scrutiny have been discussed time and again by the courts. The Supreme Court expressed itself in the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* where it set out the following guiding principles with respect to scrutiny and recount of votes in an election petition. At paragraph 153, the Court pronounced itself as follows:
  - a. The right to scrutiny and recount of votes in an election petition is anchored in Section 82(1) of the *Elections Act* 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 recount and/or scrutiny of votes, at any stage after the filing of petition, and before the determination of the petition.

- b. The trial Court is vested with discretion under Section 82(1) of the *Elections Act* to make an order on its own motion for a recount or scrutiny of votes as it may specify, if it considers that such scrutiny or recount 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 recount.
  - c. The right to scrutiny and recount does not lie as a matter of course. The party seeking a recount or scrutiny of votes in an election petition is to establish the basis for 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 recount of votes, such scrutiny or recount 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 the terms of Rule 33(4) of the *Election (Parliamentary and County Elections) Petition Rules*.
19. In *Peter Gichiki Kingara v Independent Electoral and Boundaries Commission*, Nyeri, High Court Election Petition No 3 of 2013 the court held that;
- As to when scrutiny can be ordered, Section 82 (1) as read with Section 82(2) helps us to understand that it is during the trial, at any time during the hearing of the petition but before the final judgment has been delivered. The inevitable conclusion in the premises is that as far as the issue of scrutiny of votes is concerned it would be erroneous in law to order for scrutiny at the pretrial stage unless the only issue in the petition is the count and tallying of votes under Rule 32(1) of the *Elections (Parliamentary and Country Elections) Petition Rules, 2013*.”
20. In *Gideon Mwangangi Wambua & another v Independent Electoral And Boundaries Commission & 2 others [2013] eKLR* the court held as follows;
- “The aim of conducting scrutiny and recount is not to enable the Court unearth new evidence on the basis of which the petition could be sustained. Its aim is to assist the court to verify the allegations made by the parties to the petition which allegations themselves must be hinged on pleadings. In other words a party should not expect the Court to make an order for scrutiny simply because he has sought such an order in the petition. The petition ought to set out his case with sufficient clarity and particularity and adduce sufficient evidence in support thereof in order to justify the court to feel that there is a need to verify not only the facts pleaded but the evidence adduced by the petitioner in support of his pleaded facts. Where a party does not sufficiently plead his facts with the necessary particulars but hinges his case merely on the documents filed pursuant to Rule 21 of the *Rules*, the Court would be justified in forming the view that the petitioner is engaging in a fishing expedition or seeking to expand his petition outside the four corners of the petition.”
21. The upshot of the foregoing is that orders for scrutiny can be granted at any time of the trial before judgment has been delivered. Where a prima facie case has been established the court can grant said orders but caution must be exercised in order to ensure that scrutiny does not turn into a fishing expedition.



22. This court is of the view that scrutiny in the 1<sup>st</sup> instance is not merited. The Applicants have stated their allegations in the Application and affidavit in support of the same with regards to the polling stations and the results of the election. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have opposed the Application by way of a replying affidavit and in order to make a determination on the issue cross examination would be necessary to test the cogence and credibility of the evidence. The court shall await the evidence from the parties to determine the scope of scrutiny and to determine the merits. Therefore, the court defers the order for scrutiny to a later stage insitu the petition, adjudication.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 21<sup>ST</sup> DAY OF OCTOBER, 2022.**

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**R. NYAKUNDI**

**JUDGE**

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