



**Kidero & another v Independent Electoral and Boundaries Commission & 4 others
(Election Petition E001 of 2022) [2022] KEHC 15827 (KLR) (26 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 15827 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
ELECTION PETITION E001 OF 2022
RE ABURILI, J
NOVEMBER 26, 2022**

BETWEEN

EVANS ODHIAMBO KIDERO 1ST PETITIONER

ELIJAH ODONDI KODOH 2ND PETITIONER

AND

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

**COUNTY RETURNING OFFICER, HOMABAY COUNTY FREDRICK
APOPA 2ND RESPONDENT**

GLADYS ATIENO NYASUNA WANGA 3RD RESPONDENT

JOSEPH OYUGI MAGWANGA 4TH RESPONDENT

ORANGE DEMOCRATIC MOVEMENT PARTY 5TH RESPONDENT

RULING

1. Following this court's ruling on the November 18, 2022 on the petitioners' application dated September 29, 2022 and the meeting held between the Deputy Registrar and the respective parties' representatives pursuant to the court's ruling, the parties herein sought clarifications on the scope of scrutiny and recount which is to be undertaken by the Deputy Registrar.
2. In its ruling of the November 18, 2022, the court alluded to the fact that the petitioners' application for scrutiny and recount dated September 29, 2022 was grounded on the petition as one of the prerequisites for grant of the order for scrutiny and recount.
3. To this end, the court observed that paragraph 16 of the supporting affidavit to the application for scrutiny and recount dated September 29, 2022 by Dr Evans Odhiambo Kidero in which he alleged



glaring inconsistencies of the number of votes being cast being more than those identified by the KIEMS kit mirrored Paragraph 138 of the Petition.

4. Further, paragraph 17 of the supporting affidavit to the application for scrutiny and recount aforementioned that alleged that the KIEMS Kit identified more people than those recorded to have voted mirrored paragraph 139 of the petition and finally paragraph 20 of the supporting affidavit to the application for scrutiny that provided that form 37As were not signed by either agents, presiding officers or their deputies was a mirror of paragraph 174 of the petition.
5. The court then made orders for scrutiny and recount and referred to specific paragraphs before finally concluding that the scrutiny and recount was to be undertaken in the 7 out of 8 constituencies and in the polling stations mentioned in the paragraphs 11,16,17,20,22 and 28 of the affidavit of Dr Evans Odhiambo Kidero sworn on September 27, 2022. In particular, the parties sought clarifications on paragraphs 151 and 186 of the ruling of November 18, 2022.
6. This court notes that there is an error apparent on the face of the record regarding the reconciliation on the number of constituencies and polling stations that scrutiny and recount would take place and the error is that the scrutiny and recount would specifically happen in 7 out of 8 constituencies in Homabay County. This is an error because the specified polling stations as contained in the petition and the supporting affidavits to the petition and application for scrutiny and recount wherein the petitioner asked this court to undertake a scrutiny and recount and which this court in the aforesaid ruling allowed, cuts across the 8 constituencies and not seven. In addition, not all polling stations in the 8 constituencies were alleged to have had issues. The court upon reconciling the number of polling stations complained of, finds only 195 covering 8 constituencies and not seven.
7. The question is whether this court can review its orders made on scrutiny and recount made on November 18, 2022, having found that there is an apparent error on the face of the record in the ruling of November 18, 2022 regarding the application for recount and scrutiny.
8. In the case of *Godfrey Masaba v IEBC & 2 others* [2013] eKLR, where the Election Court was called upon to review its orders on account that it had not considered the replying affidavit and written submissions filed by the applicant H Omondi J (as she then was) stated as follows, extensively, and I concur:

“21. Having read both the Elections Act, 2011 and the Elections (Parliamentary and County Elections) Petition Rules 2013 I can confirm that they make no provision for review of an Election court’s orders.

Secondly, the Election (Parliamentary and County) Petition Rules are complete and the only instances that the Civil Procedure Rules are invoked are as provided under rule 15 (7) of the Election (Parliamentary and County) Rules.

22. The question which arises is whether the failure to expressly provide for review of the courts orders negates the application of this remedy in the appropriate circumstances?

23. Article 35(2) of the Constitution guarantees every person the right to correction or deletion of untrue or misleading information that affects the person. Article 20(3)(a) on the other hand, enjoins a court when applying a provision of the Bill of Rights, to develop the law to the extent that it does not give effect to a right or fundamental freedom.



24. By failing to make provision for the court to review its orders in the appropriate circumstances, especially where there is a mistake or error apparent on the face of its record that needs to be corrected or deleted in order to set the record straight, it would appear that the Elections Act, 2011 and the Rules made thereunder offends the spirit and letter of article 20(3)(a) as read with Article 35(2) of the Constitution.
25. For this reason notwithstanding lack of any express provisions for review in the Election Act and the Rules made thereunder, I hold the view that an election court would, in the appropriate circumstances, review its orders if in so doing, it would give effect to a right or fundamental freedom that the law in question had failed to recognize or give effect to.
26. There are decisions to the effect that an election court has power, in exercise of its inherent power, to review its orders. For instance in *Mohamed Ali Mursal v Saadia Mohamed & 2 others* (2013) e KLR SN Mutuku J, conceded that An Election Court has power to review its orders and invoked Order 45 of the Civil Procedure Rules in resolving the matter before her. Similarly, in *Nuh Nassir Abdi v Ali Wario & 2 others* (2013) e KLR EP No 6 of 2013 GV Odunga J, observed:-

“A decision whether or not to vary, set aside or review earlier orders was an exercise of judicial discretion and the court could only exercise such discretion if so to do would serve useful purpose...”
27. It is apparent that an election court has power to review its order if doing so would serve a useful purpose in the just determination of the issue before it.”

9. Odunga J (as he then was) in the case of *Nuh Nassir Abdi v Ali Wario & 2 others* [2013] eKLR stated that:

“I have considered the foregoing. The order for scrutiny was made pursuant to section 82 of the Elections Act which provides:

“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.)”

Apart from the foregoing section 80(1)(d) and (e) of the said Act empowers the Court to decide all matters that come before it without undue regard to technicalities. Rule 4 of the Elections (Parliamentary and County Elections) Petitions Rules provides:

The overriding objective of these Rules is to facilitate the just, expeditious, proportionate and affordable resolution of election petitions under the Constitution and the Act.

- (2) The court shall, in the exercise of its powers under the Constitution and the Act or in the interpretation of any of the provisions in these Rules, seek to give effect to the overriding objective.

These provisions derive their Constitutional underpinning on Article 159(2) of the Constitution which provides:



"In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

- (a) justice shall be done to all, irrespective of status;
- (b) justice shall not be delayed;
- (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);
- (d) justice shall be administered without undue regard to procedural technicalities; and
- (e) the purpose and principles of this Constitution shall be protected and promoted"

10. From the above provisions of the law and persuasive case law, I find that in the circumstances of this case, this court has jurisdiction to review its orders in election petitions and therefore on the court's own motion or on application by any party to the proceedings may review and clarify its order. I therefore proceed and review the ruling delivered on November 18, 2022 touching on the application dated September 29, 2022 seeking for scrutiny and recount and more specifically clarifying paragraphs 150, 151 and 186 of the ruling delivered on November 18, 2022 as follows:

- a. A scrutiny and recount shall be undertaken as per this court's findings in paragraph 150 of the ruling dated November 18, 2022 for the gubernatorial election carried out on the August 9, 2022 in Homabay County in respect of the following polling stations:



<i>Constituency</i>	<i>Ward</i>	<i>Polling Station</i>
<i>Homa Bay Town</i>	<i>Homa Bay Central</i>	<i>Pap Ndege Primary School</i>
<i>Homa Bay Arujo</i>	<i>Shauri Yako Primary School</i>	
<i>Homa Bay Central</i>	<i>Nduta Primary School</i>	
<i>Homa Bay Arujo</i>	<i>Opande Rarage Primary School</i>	
<i>Homa Bay East</i>	<i>Marindi Primary School</i>	
<i>Homa Bay East</i>	<i>Pala Masogo Primary School</i>	
<i>Homa Bay Central</i>	<i>Rodi Kopany Market</i>	
<i>Homa Bay East</i>	<i>Walambla Primary School</i>	
<i>Homa Bay Central</i>	<i>Asego Nursery School</i>	
<i>Homa Bay Central</i>	<i>Got Rabuor Primary School</i>	
<i>Homa Bay Central</i>	<i>Homa Bay Polytechnic</i>	
<i>Homa Bay Central</i>	<i>Homa Bay Primary School</i>	
<i>Homa Bay Arujo</i>	<i>Gogo Kochungo Primary School</i>	
<i>Kabondo Kasipul</i>	<i>Kabondo East</i>	<i>Kolweny Primary School</i>
<i>Kabondo West</i>	<i>Orera Primary School</i>	
<i>Kabondo East</i>	<i>Nyamwaga Primary School</i>	
<i>Kokwanyo/Kakelo</i>	<i>Dudi Primary School</i>	
<i>Kokwanyo/Kakelo</i>	<i>Ragogo Primary School</i>	
<i>Kokwanyo/Kakelo</i>	<i>Gangre Primary School</i>	
<i>Kabondo West</i>	<i>Ongoro Primary School</i>	
<i>Kabondo East</i>	<i>Wang'apala Primary School</i>	
<i>Kabondo East</i>	<i>Othoro Primary School</i>	
<i>Kojwach</i>	<i>Ringa Primary School</i>	



<i>Karachuonyo</i>	<i>Wangchieng</i>	<i>Apuko D.O.K Primary School</i>
<i>Wangchieng</i>	<i>Seka D.O.K Primary School</i>	
<i>West Karachuonyo</i>	<i>Gogo Primary School</i>	
<i>Central</i>	<i>Ngeta Primary School</i>	
<i>Kanyaluo</i>	<i>Kowuor Primary School</i>	
<i>Wangchieng</i>	<i>Gongo Primary School</i>	
<i>Kanyaluo</i>	<i>Rabware Primary School</i>	
<i>Kibiri</i>	<i>Oriwo Primary School</i>	
<i>Kendu Bay Town</i>	<i>Nyaburi Primary School</i>	
<i>Wangchieng</i>	<i>Kamwala Primary School</i>	
<i>Wangchieng</i>	<i>Karabondi Primary School</i>	
<i>West Karachuonyo</i>	<i>Masogo Primary School</i>	
<i>Kendu Bay Town</i>	<i>Gendia Primary School</i>	
<i>Kanyaluo</i>	<i>Kamolo Primary School</i>	
<i>Central</i>	<i>Kital Primary School</i>	
<i>Central</i>	<i>Paul Mboya Vocational Training</i>	
<i>Kendu Bay Town</i>	<i>Kideswa Primary School</i>	
<i>North Karachuonyo</i>	<i>Ngolo Primary School</i>	
<i>Kibiri</i>	<i>Omolo Agar Primary School</i>	
<i>West Karachuonyo</i>	<i>Jonyo Primary School</i>	
<i>North Karachuonyo</i>	<i>Otaru Primary School</i>	
<i>Central</i>	<i>Simbi Primary School</i>	
<i>North Karachuonyo</i>	<i>Kagai Primary School</i>	
<i>Kanyaluo</i>	<i>Wikondiek Primary School</i>	
<i>Kanyaluo</i>	<i>Omboga Primary School</i>	



<i>Kibiri</i>	<i>Nyaola Primary School</i>	
<i>West Karachuonyo</i>	<i>Lwala Primary School</i>	
<i>Central</i>	<i>Alego Primary School</i>	
<i>Central</i>	<i>Warao Primary School</i>	
<i>Wangchieng</i>	<i>Kajiei Primary School</i>	
<i>Kibiri</i>	<i>Kandiege Primary School</i>	
<i>Wangchieng</i>	<i>Samba Primary School</i>	
<i>North Karachuonyo</i>	<i>Kanyamfwa Primary School</i>	
<i>Central</i>	<i>Pier Got Primary School</i>	
<i>Kibiri</i>	<i>Rabuor Primary School</i>	
<i>Wangchieng</i>	<i>Kamser Primary School</i>	
<i>Wangchieng</i>	<i>Mirembe Primary School</i>	
<i>Wangchieng</i>	<i>Kamwala Primary School</i>	
<i>North Karachuonyo</i>	<i>Migunde Primary School</i>	
<i>Kibiri</i>	<i>Nyabiage Primary School</i>	
<i>Kasipul</i>	<i>Central Kasipul</i>	<i>Kaluoch Primary School</i>
<i>East Kamagek</i>	<i>Sino Kagola Primary School</i>	
<i>West Kamagek</i>	<i>Agoro Sare Primary School</i>	
<i>South Kasipul</i>	<i>Ayoro Primary School</i>	
<i>South Kasipul</i>	<i>Kamuga Primary School</i>	
<i>South Kasipul</i>	<i>Yala Primary School</i>	
<i>South Kasipul</i>	<i>Kotieno Primary School</i>	
<i>South Kasipul</i>	<i>Kasimba Primary School</i>	
<i>West Kasipul</i>	<i>Nyagowa Primary School</i>	
<i>South Kasipul</i>	<i>Buoye Primary School</i>	



<i>Central Kasipul</i>	<i>God Nyango Primary School</i>	
<i>West Kasipul</i>	<i>Nyabola Primary School</i>	
<i>Central Kasipul</i>	<i>Aolo Primary School</i>	
<i>Ndhiwa</i>	<i>Kabuoch South/Pala</i>	<i>Ober Primary School</i>
<i>Kanyadoto</i>	<i>Nyarongi Primary School</i>	
<i>Kanyadoto</i>	<i>Rapedhi Primary School</i>	
<i>Kanyamwa Kosewe</i>	<i>Ndhiwa Primary School</i>	
<i>Kanyikela</i>	<i>Otange Primary School</i>	
<i>Kabuoch North</i>	<i>Ongako Primary School</i>	
<i>Kanyamwa Kosewe</i>	<i>Unga Primary School</i>	
<i>Kanyamwa Kologi</i>	<i>Malela Primary School</i>	
<i>Kanyamwa Kologi</i>	<i>Kombe Primary School</i>	
<i>Kabuoch South/Pala</i>	<i>Kamenya Primary School</i>	
<i>Kanyamwa Kologi</i>	<i>Abuoro Primary School</i>	
<i>Kabuoch North</i>	<i>Rarage Primary School</i>	
<i>Kabuoch North</i>	<i>Adek Primary School</i>	
<i>Kwabwai</i>	<i>Nyoniang Primary School</i>	
<i>Kwabai</i>	<i>Apuoche Primary School</i>	
<i>Kabuoch North</i>	<i>Maranga Primary School</i>	
<i>Kabuoch North</i>	<i>Aluor Primary School</i>	
<i>Kanyamwa Kologi</i>	<i>Goyo Primary School</i>	
<i>Kanyamwa Kologi</i>	<i>Dunga Primary School</i>	
<i>Kwabai</i>	<i>Osani Primary School</i>	
<i>Kanyadoto</i>	<i>Osodo Primary School</i>	
<i>Kabuoch South/Pala</i>	<i>Maroo Primary School</i>	



<i>Kwabwai</i>	<i>Osogo Primary School</i>	
<i>Kwabai</i>	<i>Wayara Primary School</i>	
<i>Kabuoch North</i>	<i>Lwanda Kawnor Primary School</i>	
<i>Kabuoch South/Pala</i>	<i>Ober Primary School</i>	
<i>Kwabai</i>	<i>Ngere Primary School</i>	
<i>Kabuoch South/Pala</i>	<i>Anding'o Pala Primary</i>	
<i>Kanyikela</i>	<i>Thuon Gweno Nur School</i>	
<i>Kwabai</i>	<i>Aorachuodho Primary School</i>	
<i>Rangwe</i>	<i>West Gem</i>	<i>Anding'o Primary School</i>
<i>Kagan</i>	<i>Got Nyalgosi Primary School</i>	
<i>Kagan</i>	<i>Kachar Primary School</i>	
<i>Kochia</i>	<i>Obengele Primary School</i>	
<i>East Gem</i>	<i>Rangwe Primary School</i>	
<i>Kagan</i>	<i>Luora Primary School</i>	
<i>Kochia</i>	<i>Ongoro Primary School</i>	
<i>Kochia</i>	<i>Kawiya Primary School</i>	
<i>Kagan</i>	<i>Aimo Primary School</i>	
<i>West Gem</i>	<i>Randung' Primary School</i>	
<i>East Gem</i>	<i>Wikoteng' Primary School</i>	
<i>Kochia</i>	<i>Nyajanja Primary School</i>	
<i>Kochia</i>	<i>Nyalienga Primary School</i>	
<i>Kochia</i>	<i>Ngegu Primary School</i>	
<i>West Gem</i>	<i>Nyandiwa Primary School</i>	
<i>Kochia</i>	<i>Ang'iro Primary School</i>	
<i>Kagan</i>	<i>Maugo Primary School</i>	



<i>Kochia</i>	<i>Kuoyo Kaura Primary School</i>	
<i>Kochia</i>	<i>Olare Primary School</i>	
<i>West Gem</i>	<i>Oluso Primary School</i>	
<i>West Gem</i>	<i>Sango Gem Primary School</i>	
<i>Kagan</i>	<i>Nyawita Primary School</i>	
<i>Kochia</i>	<i>Ligisa Primary School</i>	
<i>West Gem</i>	<i>Orero Primary School</i>	
<i>West Gem</i>	<i>Nyopuge Primary School</i>	
<i>Kochia</i>	<i>Ongeti Primary School</i>	
<i>East Gem</i>	<i>Nyakwadha Primary School</i>	
<i>East Gem</i>	<i>Nyambare Primary School</i>	
<i>Suba North</i>	<i>Kasungu</i>	<i>Mbita Primary School</i>
<i>Kasungu</i>	<i>Usare Primary School</i>	
<i>Kasungu</i>	<i>Osodo Primary School</i>	
<i>Rusinga Island</i>	<i>Wakondo Primary School</i>	
<i>Kasungu</i>	<i>Ogando Primary School</i>	
<i>Kasungu</i>	<i>Nyamanga Primary School</i>	
<i>Kasungu</i>	<i>Ndiru Primary School</i>	
<i>Kasungu</i>	<i>Mbita Fish Banda</i>	
<i>Kaksingri West</i>	<i>Gingo Beach Fish Banda</i>	
<i>Mfangano Island</i>	<i>Takawiri Primary School</i>	
<i>Kasungu</i>	<i>Nyamasare Primary School</i>	
<i>Kasungu</i>	<i>God Awendo Primary School</i>	
<i>Rusinga Island</i>	<i>Dr. Williams Primary School</i>	
<i>Kasungu</i>	<i>Urianda Primary School</i>	



<i>Kasungu</i>	<i>Lambwe Primary School</i>
<i>Mfangano Island</i>	<i>Rinya Primary School</i>
<i>Rusinga Island</i>	<i>Waregi Primary School</i>
<i>Kasungu</i>	<i>Kamsama Primary School</i>
<i>Kasungu</i>	<i>Lambwe Primary School</i>
<i>Kasungu</i>	<i>Powo Primary School</i>
<i>Kasungu</i>	<i>Nyasanja Primary School</i>
<i>Kasungu</i>	<i>Got Kopolo Primary School</i>
<i>Kasungu</i>	<i>Obalawanda Primary School</i>
<i>Kasungu</i>	<i>Sikri Jerusalem Primary School</i>
<i>Kasungu</i>	<i>Chamakowa Primary School</i>
<i>Kasungu</i>	<i>Sen Kajwang Sec School</i>
<i>Kasungu</i>	<i>Genge Primary School</i>
<i>Kasungu</i>	<i>Gode Ariyo Primary School</i>
<i>Kasungu</i>	<i>God Jope Primary School</i>
<i>Ruma – Kaksingri</i>	<i>Manyalla Primary School</i>
<i>Mfangano Island</i>	<i>Wakiangata Primary School</i>
<i>Rusinga Island</i>	<i>Nyamuga Primary School</i>
<i>Rusinga Island</i>	<i>Kamayoge Primary School</i>
<i>Rusinga Island</i>	<i>Uya Primary School</i>
<i>Rusinga Island</i>	<i>Kiumba Fish Banda</i>
<i>Rusinga Island</i>	<i>Ulugi Fish Banda</i>
<i>Mfangano Island</i>	<i>Konyahero Beach Fish Banda</i>
<i>Rusinga Island</i>	<i>Nyagina Fish Banda</i>
<i>Kasungu</i>	<i>Kisui Fish Banda</i>



<i>Mfangano Island</i>	<i>Sena Primary School</i>	
<i>Rusinga Island</i>	<i>Uya Primary School</i>	
<i>Kasungu</i>	<i>Wanga Primary School</i>	
<i>Kasungu</i>	<i>Nyamaji Primary School</i>	
<i>Kasungu</i>	<i>Kamoto Primary School</i>	
<i>Kasungu</i>	<i>Sulwe Primary School</i>	
<i>Suba South</i>	<i>Gwasi South</i>	<i>Orore Primary School</i>
<i>Gwasi South</i>	<i>Magunga Primary School</i>	
<i>Gwasi South</i>	<i>Nyamdede Primary School</i>	
<i>Gwasi South</i>	<i>Kigoto Primary School</i>	
<i>Gwasi South</i>	<i>Miriya Primary School</i>	
<i>Gwasi South</i>	<i>Kisegi Primary School</i>	
<i>Kaksingri West</i>	<i>Ngeri Primary School</i>	
<i>Gwasi South</i>	<i>Kiabuya Primary School</i>	
<i>Gwasi South</i>	<i>Obanga Primary School</i>	
<i>Gwasi North</i>	<i>Nyagwethe Primary School</i>	
<i>Ruma – Kaksingri</i>	<i>King'Eyo Primary School</i>	
<i>Gwasi North</i>	<i>Kisegi Beach Fish Banda</i>	
<i>Gwasi South</i>	<i>God Bura Primary School</i>	
<i>Gwasi South</i>	<i>Nyaburu Primary School</i>	
<i>Kaksingri</i>	<i>Kianyumba Primary School</i>	
<i>Gwasi South</i>	<i>Kenchororio Primary School</i>	

In addition, there shall be:

- b. A scrutiny of all the form 37As from the polling stations set out in table D1 and D2 of paragraph 20 of the petitioners' affidavit sworn by Dr Evans Odhiambo Kidero in support of the application dated September 29, 2022.



- c. A scrutiny of form 37As from the polling stations set out in table F of paragraph 28 of the petitioners' affidavit sworn by Dr Evans Odhiambo Kidero in support of the application dated September 29, 2022.
- d. The rest of the directions issued for the Deputy Registrar to supervise the scrutiny and recount as per paragraph 186 of the ruling delivered on November 18, 2022 shall remain as they are and the Deputy Registrar shall give directions in conference with the parties on the process and the timelines in accordance with the already established guidelines.

DATED, SIGNED AND DELIVERED AT HOMABAY THIS 26TH DAY OF NOVEMBER, 2022

R.E. ABURILI

JUDGE

