



REPUBLIC OF KENYA



Katatha v Independent Electoral and Boundaries Commission & 2 others (Election Petition E001 of 2022) [2022] KEHC 16092 (KLR) (22 November 2022) (Ruling)

Neutral citation: [2022] KEHC 16092 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
ELECTION PETITION E001 OF 2022**

RK LIMO, J

NOVEMBER 22, 2022

BETWEEN

MAWEU KYENGO KATATHA PETITIONER

AND

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

**LANGO IBRAHIM GUYO, THE RETURNING OFFICER KAGUNDO
CONSTITUENCY 2ND RESPONDENT**

MULI FABIAN KYULE 3RD RESPONDENT

RULING

1. The Petitioner, through this Petition dated 6th September 2022 seeks to invalidate the declaration made on 11th August, 2022 by the 3rd Respondent that the 2nd Respondent was elected the Member of the National Assembly for Kangundo Constituency in the general election held on 9th August, 2022.
2. By his Notice of Motion dated 11th November 2022 premised under sections 1A,3A of the *Civil Procedure Act*, section 80 of the *Elections Act* and rule 29 of the *Elections (Parliamentary and County Election Petition) Rules 2017*, the Petitioner/ Applicant principally seeks an order for scrutiny and recount of votes casts in various polling stations in Kangundo Constituency. The Applicant has particularized the orders sought as follows
 - i. That this Honorable Court to order a scrutiny and recount of votes in the following polling stations in Kangundo Constituency in respect of the elections of the Member of National Assembly held on 9th August, 2022;
 - a. Matetani Polling Station Stream 1
 - b. Matetani Polling Station Stream 2



- c. Kwamilile Primary School Stream 1
 - d. Kawathei S.A Primary School
 - e. Mbusyani Primary School
 - f. Mbusyani Secondary School
 - g. Kathomi Primary School Stream 1
 - h. Kathomi Primary School Stream 2
 - i. Kitwii Boys School Stream 1
- ii. That this Honourable Court upon granting of prayer 1 to direct the scrutiny do include the examination of the following:-
- a. The written statements made by the Returning Officer.
 - b. Polling stations diaries for all polling stations named in prayer 1.
 - c. The examination of the written statements made by the Presiding Officers in the Polling Stations diaries.
 - d. Both the electronic and hard copy of the register of voters as contains the biometric data and alpha numerical details of the voters entitled to vote at all polling stations listed in prayer 1.
 - e. The Kenya Integrated Electronic Machine System (KIEMS) used in the polling stations named in prayer 1 above for the purposes of accessing the information stored therein
 - f. All statutory forms 35 (A) for the polling stations listed in prayer 1 and Form 35B for Kangundo Constituency.
- iii. That the costs of this application be bound to the outcome of the Petition
- iv. That the Honourable Court be pleased to make such further orders in the interest of justice upon examination.
3. The application is premised on the following listed grounds;
- i. That the Petitioner/ Applicant has proved through the Petition and Supporting Affidavit, together with the Affidavit sworn by Jane Kiloko, that Matetani Polling Station Stream 1 and 2 lacked electricity and that against all regulations, the Presiding Officer of the Matetani Polling Station refused to count the votes cast in the presence of the agents
 - ii. That at Matetani Polling Station Stream 1 and 2 as evidenced by the Affidavit Sworn by Jane Kiloko produced in the Supporting Affidavit of the Petitioner, the Presiding Officer allegedly attempted to re-open the ballot box to insert the spoilt votes and the votes allegedly cast for both the Applicant/ Petitioner and the 3rd Respondent which was questionable.
 - iii. That the Petitioner/Applicant has proved through the Petition and Supporting Affidavit, together with the Affidavit sworn by Florence Ndunge Mutisya, the events at Kwamilile Polling Station of bribery and the harassment/ intimidation and assault of agents of the Applicant/ Petitioner led to agents of the Applicant/Petitioner being kicked out of the Kwamilile Polling Station thus no transparency in the voting process



- iv. That the Petitioner/Applicant has proved through the Petition and Supporting Affidavit, together with the Affidavit sworn by Margaret Mwethya Mutua, the Applicant/Petitioner's agent at Kwathei SA Primary School of rampant voter bribery at the said Polling Station
 - v. That the Petitioner/Applicant has proved through the Petition and Supporting Affidavit, together with the Affidavit sworn by Josephine Nduku Nguta, an agent of the Applicant/Petitioner stationed at Mbusyani Primary School and Mbusyani Secondary School that the agents of the Petitioner/Applicant were not allowed to see or verify any of the votes cast.
 - vi. That the Petitioner/Applicant has proved through the Petition and Supporting Affidavit, together with the Affidavit sworn by Eric Mulwa, an agent of the Applicant/Petitioner stationed at Kathomi Primary School Stream 1 and 2, that there were multiple incidences or irregularities including and not limited to stopping of voting process and use of polling clerks who were related to the Constituency Manager of the 3rd Respondent therefore raising issues of their impartiality.
 - vii. That the Petitioner/Applicant has proved through the Petition and Supporting Affidavit sworn by Jacinta Nzisa Mbuvi, an agent of the Applicant/Petitioner stationed at Kitwii Boys School Polling Station that the agents were denied entry into the Polling Station and the refusal by the Presiding Officer for the said agents to verify the results of the votes cast contrary to the election procedures and regulations.
 - viii. That still at Kitwii Boys School Polling Station, several voters voted in the guise that they were illiterate and thus needed assistance only to find out that the same guise was used by the Respondent and his agents to confirm that the said voter had voted for the 3rd Respondent and therefore could be rewarded.
 - ix. That the production of the Polling Station diaries is necessary in the verification of the votes cast, the spoiled votes, the rejected votes, the valid votes and any invalid votes casts which includes votes stuffed or by a voter who voted more than once or by a person who is not a registered voter.
 - x. That the Returning Officer under the Electoral Laws is obliged to provide each polling station with both electronic and hard copy of the Register of Voters and if the same is to be availed before this Honourable Court, it will assist the court in the verification process.
 - xi. That the 1st Respondent has as shown in the Petition and Supporting Affidavit refused to provide the Applicant/Petitioner documentations including the form 35A and form 35B which would ascertain the true votes cast and even verify if the said forms were duly signed and reliable.
 - xii. That the failure of the Respondent to provide the said forms, which are themselves key in determining the dispute before this Honourable Court is a blatant disregard to the rights of the Applicant/Petitioner and the 1st Respondent/s conduct should be examined and reviewed.
 - xiii. That this Application is brought without unreasonable delay
 - xiv. That in view of the foregoing, it is in the interest of justice that the prayers prayed are granted.
4. The Application is supported by the Applicant/ Petitioner's Supporting Affidavit sworn on 11th November 2022 which largely reiterates the grounds upon which the motion is premised on.
 5. The Respondent Case



The 1st and 2nd Respondent have opposed this application through replying affidavit sworn on 14th November, 2022 by one Lango Ibrahim Yusuf the 1st Respondent's Senior Election's Officer in charge of Kangundo Constituency.

6. The 1st and 2nd Respondents have denied each and every allegation of irregularity raised by the Applicant stating that the election was conducted in compliance with the Constitution and the laws governing elections. They have deponed that the application is irredeemably defective and is for striking out for the reason that the Applicant has failed to plead or state the results of the results against which he is seeking scrutiny and recount in his Petition and the present application. The 1st and 2nd Respondents have also accused the Applicant for raising generic, generalized and unmerited alleged electoral irregularities in his Petition and Application. They have averred that the Applicant has failed to produce in evidence written complaints by his representatives or himself, reports lodged with the police or photographs of the incidences he has complained of in his application and that overall, the Applicant has failed to establish a basis for grant of an order for scrutiny. On the question of the specific alleged electoral irregularities, the 1st and 2nd Respondents have responded as follows;
 - a. On the allegation that there was lack of electricity at Matetani Polling Station, the 1st and 2nd Respondents have averred that there were 2 gas cylinders, 2 gas lanterns and 6 gas lamps as well as a solar powered floodlight to supplement the electricity. Concerning the allegation of ballot stuffing, the 1st and 2nd Respondents have averred that the Applicant's agents were present during the counting and verification exercise and confirmed and that they executed form 35 in confirmation of the same.
 - b. On the harassment and intimidation allegations at Kwamilile Polling Station, the 1st and 2nd Respondents have denied the same and averred that there was no report of such incidents at the center concerned.
 - c. On the bribery allegation at Kawathej, they have averred that there was no report of the same at the station
 - d. On the allegation that the Applicant's agents were not allowed to see or verify votes cast at Mbusyani primary and secondary polling stations, they have averred that the same is false and further, that there is no evidence provided to support the claims.
 - e. With regards to the allegation that voting was stopped at Kathome DEB Primary School, the 1st and 2nd Respondents have denied the allegation. The 2nd Respondent has specifically averred that at about 3.50pm on the material day, the Presiding Officer called him and advised him that the presidential ballot papers were less than the number of registered voters in stream and he arrived at the station at 4.20pm on the same day and authorized the use of PR04902147 from stream 2 to ensure that voting remained uninterrupted.
 - f. Concerning irregular 'illiterate voters' assistance at Kitwii Boys Primary School and denial of access of the Applicant's agents at the same station, the 1st and 2nd Respondents have denied the allegations and stated that the Applicant's agents were admitted at the station at 6.07am on the material day and further, there was no record of any voter who was assisted at the station on the election day.
7. The 1st and 2nd Respondents have also accused the Applicant of delaying in filing this application as well introducing unmerited allegations that were not initially pleaded in his Petition. They have sought for its disposal.



8. In their written submissions dated 16th November, 2022, they submit that the order sought does not obtain in law as the Applicant has failed to plead the election result in which he has sought the order for scrutiny and recount against. They also submit that the Applicant has failed to establish a basis/ reason for seeking the recount or scrutiny of votes contrary to the Supreme Court's guidelines encompassed in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* (2014) eKLR
9. They have also submitted that the Application is premised on some grounds that were missing in the Applicant's Petition and cited the case of *Hassan Noor v Independent Electoral and Boundaries Commission (I.E.B.C) & 3 Others* (2017) eKLR where it where the court held that it is mandatory for all witnesses in election petitions to swear affidavits which constitutes their evidence in chief.
10. The Respondents have also cited the case of *Hassan Mohammed Hassan & Anor v Independent Electoral and Boundaries Commission & 2 Others* (2013) eKLR where the court dismissed an application for scrutiny where the applicant had sought scrutiny in all polling stations in Wajir West Constituency. The court held that the evidence presented was scanty and found the application to be a fishing expedition.
11. The 3rd Respondent has also opposed the Application vide his Replying Affidavit sworn on 14th November 2022. He had averred that the application is unsupported by hard evidence and that it is a fishing expedition adding that there is no evidence presented against him by the Applicant as such the court should treat the irregularities complained of as hearsay and dismiss the application.
12. The 3rd Respondents contends that the prayer for scrutiny is unmeritorious and that it has failed to meet the threshold stipulated in the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* (2014) eKLR.
13. He avers that the Applicant has also failed to provide relevant materials to prove his case. The 3rd Respondent has also faulted the applicant for failing to meet the laid own procedure of requesting for information under sections 8 and 9 of the *Access to Information Act*.
14. He submits that the Applicant is not entitled to both scrutiny and recount and that he is attempting to obtain additional evidence to support his petition. He contends that the Petitioner is bound by his pleadings.
15. This court has considered this application and the response made. The applicant appears to have gone to great lengths in seeking the reliefs sought and in the process has kind of invited this court to determine some of the issues in the Petition filed which I find to be premature at this stage. This court will keep within the scope of the substantive prayers and avoid touching on matters that are premature at this stage.
16. The Applicant is principally seeking for an order of scrutiny and recount in his application. Section 82 (1) of *Elections Act*, empowers an election court to order for scrutiny it states;
 "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. The procedural aspect for obtaining the reliefs is stipulated under the *Elections (Parliamentary and County Elections) Petitions Rules, 2017*. On recount rule 28 states as follows:-
 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
18. On scrutiny, rule 29 of the *Elections (Parliamentary and County Elections) Petition Rules, 2017* provides;
- Scrutiny of votes.
- i. The parties to the proceedings may apply for scrutiny of the votes for purposes of establishing the validity of the votes cast.
 - ii. 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.
 - iii. The scrutiny or recount of votes ordered under sub-rule (2) shall be carried out under the direct supervision of the Registrar or Magistrate and shall be subject to the directions the election court gives.
 - iv. The Scrutiny or recount of votes in accordance with sub-rule (2) shall be confined to the polling stations in which the results are disputed and may include the examination of;
 - a. the written statements made by the returning officers under the Act
 - b. the printed copy of the Register of voters used during the elections sealed in a tamper proof envelope
 - c. the copies of the results of each polling station in which the results of the election are in dispute
 - d. the written complaints of the candidates and their representatives
 - e. the packets of spoiled ballots
 - f. the marked copy register
 - g. the packets of counterfoils of used ballot papers
 - h. the packets of counted ballot papers
 - i. the packets of rejected ballot papers
 - j. the polling day diary; and
 - k. the statements showing the number of rejected ballot papers
19. A recount is meant to establish the number of votes garnered by each candidates after tallying. An aggrieved party must therefore show the basis or demonstrate that the tallying process was not transparent or verifiable to warrant a fresh process of recount.
- A party cannot be granted an Order of recount where the only reason for the same is to fish for evidence to fill gaps in his petition.
20. In the case of *Gatirau Peter Munya v Dickson Mwenda Githinji & 2 others* [2014] eKLR, the Supreme Court set out the following guiding principles with respect to scrutiny and recount of votes in an election petition. At paragraph 153;
- 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.(Emphasis added)
21. In Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR, the Supreme Court provided criteria for an application of recount, relying on the decision of the Supreme Court of India in Arikala Narasa Reddy v Venkata Ram Reddy Reddygari & Anr, Civil Appeal Nos. 5710 – 5711 of 2013; [2014]2 S.C.R. as follows;
- Before the Court permits the recounting, the following conditions must be satisfied;
- a. The court must be satisfied that a prima facie case is established
 - b. The material facts and full particulars have been pleaded stating the irregularities in counting of votes
 - c. A roving and fishing inquiry should not be directed by way of an order to re-count the votes
 - d. An opportunity should be given to file objection; and
 - e. Secrecy of the ballot should be guarded
22. Having set out the applicable law and the cited authorities this court will now examine the facts presented by the applicant.
23. The Applicant is seeking scrutiny and recount of votes in a number of polling stations across Kangundo Constituency for various reasons as stated in his application. The reasons per constituency are stated as follows;
- i. Matetani Polling Station Stream 1- No electricity
 - ii. Matetani Polling Station Stream 2-Presiding Officer attempted to re-open the ballot boxes and insert spoilt votes and votes cast in favour of the Applicant and the 3rd Respondent.
 - iii. Kwamilile Primary School Stream 1-bribery and harassment
 - iv. Kawathej S.A Primary School-voter bribery



- v. Mbusyani Primary and Secondary School-applicant's agents not allowed to see or verify any votes cast
- vi. Kathomi Primary School Stream 1 and two-stopping of voting process and use of polling clerks related to constituency manager
- vii. Kitwii Boys School Stream 1-Applicant's agents were denied entry and further that several voters voted in guise of being illiterate and thus needed assistance only for the Applicant to find out that the guise was to ensure that they voted for the 3rd Respondent for purposes of getting a reward.

24. In response to the allegations, the Respondents responded as follows;

- a. On the allegation that there was lack of electricity at Matetani Polling Station, the 1st and 2nd Respondents through the Affidavit of station's Presiding Officer Elizabeth Mwikali, confirmed that there was no electricity at Matetani Polling Station, however that there were 2 gas cylinders, 2 gas lanterns and 6 gas lamps as well as a solar powered floodlight to supplement the electricity. The officer attached the polling station's diary material checklist and material distribution form (inventory) which confirms that the supplement sources of light were at the station.
- b. Concerning the allegation of ballot stuffing, the 1st and 2nd Respondents have averred that the Applicant's agents were present during the counting and verification exercise and confirmed and that they executed form 35 (A) in confirmation of the same. The 1st and 2nd Respondent provided form 35 (A) attached to the Affidavit of Elizabeth Mwikali which was executed by the Applicant's agent Kane Kiloko confirming the results that were announced at the polling station. Notably, the form makes a provision for an agent's refusal to sign with reasons.
- c. On the harassment and intimidation allegations at Kwamilile Polling Station, the 1st and 2nd Respondents provided an Affidavit sworn by the station's Presiding Officer, James Katua where he disputed the allegations and annexed the polling station's diary.
- d. On the bribery allegation at Kawathe, they provided the Affidavit of the station's Presiding Officer, Patricia Mbeke who exhibited form 35 (A) which was executed by the Applicant's agent Margaret Mutua who was among the agents who confirmed the number of votes cast by appending her signature.
- e. On the allegation that the Applicant's agents were not allowed to see or verify votes cast at Mbusyani primary and secondary polling stations, the 3rd Respondent relied on the Affidavit of one of his agent stationed at Mbusyani Primary School Polling Station, Susan Koki averred that all the agents appended their signatures on the station's form 35 (A) without raising any issues and that she did not hear the Applicant's agent complaining.
- f. With regards to the allegation that voting was stopped at Kathome DEB Primary School, the 1st and 2nd Respondents have denied the allegation. The 2nd Respondent has specifically averred that at about 3.50pm on the material day, the Presiding Officer called him and advised him that the presidential ballot papers were less than the number of registered voters in stream and he arrived at the station at 4.20pm on the same day and authorized the use of PR04902147 from stream 2 to ensure that voting remained uninterrupted. The Respondents relied on form 35 (A) in reference to the Polling Centre.
- g. Concerning irregular 'illiterate voters' assistance at Kitwii Boys Primary School and denial of access of the Applicant's agents at the same station, an excerpt of the polling station diary



indicates that the Applicant's agent, Jacinta Nzisa Mbuvi was admitted at 6.07 am and she left at 10.23 PM.

25. The applicant has not clearly shown how the cited irregularities whether real or without basis affected due process and the sovereign will of the voters in so far as votes garnered by each candidate is concerned.

26. In *Joseph Oyugi Magangwa and Another v Independent Electoral and Boundaries Commission and 3 Others* [2017] eKLR;

the court held that;

“In an application for scrutiny, it must be demonstrated that the grant of the order will establish the sovereign will of the people and that there is sufficient factual basis laid in the Petition for the grant of the order. Without the indication of the votes cast, the court would be granting an order of scrutiny without knowing whether it is establishing the will of the people” It held as follows;

“... an election court would order scrutiny or recount or re-tallying of votes if this would serve the purpose of establishing the sovereign will of the people and only after it is satisfied that the petition contains adequate statement of material facts on which the petitioner relies on in support of his case. Where there is ground for believing that there were irregularities in the election process or if there is a mistake or mistakes on the part of election officials, an order of scrutiny may issue.”

27. An Order of scrutiny or recount can be granted or obtained as a matter of right. An applicant is required to establish good basis for contesting the results declared in the respective polling station and must plead with specificity the impugned declared results and the particulars of the Polling Station that the irregularities were prevalent to warrant scrutiny or recount in order to establish the veracity of the allegations.

28. The applicant in this application has fallen short of the threshold required for an order of scrutiny and recount.

In the case of *Nathif Jama Adama v Abdikhair Osman Mohamed & 3 Others* [2014] eKLR, the court held as follows;

“It emerges that, the primary considerations in determining whether to grant scrutiny, are whether there are polling stations with a dispute as to the election results; whether such a state of affairs has been pleaded in the petition; and whether a sufficient basis has been laid to warrant the grant of the application for scrutiny

But it is crucial that the polling stations which are the subject of a possible scrutiny, would have been already signaled in the pleadings, as having contested results. This is the import of the wording of rule 33 (1) of the *Elections Petition Rules*, that an application for scrutiny can be applied for at any stage. A foreshadowing of such an application should have been embodied in the main lines of pleading, which mark out the terrain of any legitimate electoral contest.”



29. The Court of Appeal in *Albeity Hassan Abdalla v Independent Electoral and Boundaries Commission (IEBC), Mohammed Adan Ali, Anuar Loitiptip & Wiper Democratic Movement Party* [2018] eKLR, The Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Gitthinji & 2 others (supra)* held:

“... the right to scrutiny and recount do not lie as a matter of course. The party seeking a recount or scrutiny of votes in an election petition is to establish a basis for such a request, to the satisfaction of the trial judge or magistrate ...”

30. The Applicant has made allegations that can only be interrogated in full trial for this court to determine whether the allegations are valid and if so if the will of voters were adversely affected to an extent that the elections carried did not meet the statutory and Constitutional thresholds.

This court for now finds no merit in this application. If, however at the tail end of the trial, the court is convinced through the evidence tendered that there is need for either scrutiny or recount, it cannot hesitate to make such Orders to ensure that the ends of justice are met but for now this application is disallowed. The cost will follow the event of the main position.

DATED, SIGNED AND DELIVERED AT KITUI THIS 22ND DAY OF NOVEMBER, 2022.

HON. JUSTICE R. K. LIMO

JUDGE

