



Musimba v Independent Electoral & Boundaries Commission & 2 others (Election Petition E001 of 2022) [2022] KEHC 16664 (KLR) (21 December 2022) (Ruling)

Neutral citation: [2022] KEHC 16664 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
ELECTION PETITION E001 OF 2022
JN ONYIEGO, J
DECEMBER 21, 2022**

BETWEEN

PATRICK MWEU MUSIMBA PETITIONER

AND

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

COUNTY RETURNING OFFICER MAKUENI COUNTY. 2ND RESPONDENT

MUTULA KILONZO JUNIOR 3RD RESPONDENT

RULING

Factual Background

1. The petition herein dated September 8, 2022 relates to the Makueni Gubernatorial election exercise that was held on the August 9, 2022. Among the candidates who offered themselves for election for that position were; Mutula Kilonzo Junior (hereafter the 3rd respondent); Patrick Mweu Musimba (hereafter the petitioner); David Masika; Emmanuel Mutisya and Anderson Kaloki. On August 13, 2022, after tallying and counting the votes cast, the County Returning Officer (hereafter the 2nd respondent) declared Mr Mutula Kilonzo Junior (3rd respondent) as the winner and therefore announced as the duly elected Governor Makueni County having garnered 214, 088 votes against the petitioner who came in second position with 63, 252 votes.
2. Dissatisfied with the outcome of the election results, the petitioner lodged a petition dated September 8, 2022 and filed on September 12, 2022. In the petition, he sought various orders which if allowed would lead to the nullification of the Makueni Gubernatorial Elections.
3. Simultaneously filed with the petition under certificate of urgency, is a notice of motion application dated September 8, 2022 brought pursuant to the [Elections \(Parliamentary and County Elections\)](#)



Petition Rules, 2017. The application which is the subject of this Ruling is seeking the following orders:

- i. Spent
- ii. That pending hearing and determination of this application, and subsequent the petition this honourable court be pleased to direct the 1st respondent do avail all the election material including electronic documents, devices and equipment used for the gubernatorial election.
- iii. That pending hearing and determination of this application, and subsequent the petition this honourable court be pleased to direct the 1st respondent IEBC to grant the petitioner and or his agents and or authorised representatives full remote access to electronic devices which were used to transmit results to constituency tallying centres.
- iv. That pending hearing and determination of this application, and subsequent the petition this honourable court be pleased to direct the 1st respondent to provide details of smartphones that were used by all returning officers and access to their respective logs used at each constituency tallying centre.
- v. That pending hearing and determination of this application, and subsequent the petition this honourable court be pleased to direct the 1st respondent to provide the petitioner certified copies of raw images of forms prepared at and obtained from all the polling stations.
- vi. That pending hearing and determination of this application, and subsequent the petition this honourable court be pleased to direct the 1st respondent to provide the IP address of each Kenya Integrated Election Management System (KIEMS) kit used at each of the polling stations.
- vii. That pending hearing and determination of this application, and subsequent the petition this honourable court be pleased to direct the 1st respondent to provide specific GPS locations of each KIEMS Kit and those of each polling station used between August 7, 2022 and August 13, 2022.
- viii. That pending hearing and determination of this application, and subsequent the petition this honourable court be pleased to direct the 1st respondent to provide a certified list of all KIEMS Kits' unique device identifiers, including the Media Access Control (MAC) address, International Mobile Equipment Identity (IMEI) numbers, SIM cards and their numbers as they were procured (used, unused and/or deployed during the election).
- ix. That pending hearing and determination of this application, and subsequent the petition this honourable court be pleased to direct the 1st respondent to provide the count of voters identified by KIEMS Kits at all polling stations by biometric data, alphanumeric search, manual register, and the overall count that includes voters found and those not found.
- x. That pending hearing and determination of this application, and subsequent the petition this honourable court be pleased to direct the 1st respondent to provide KIEMS Kit logs, including login details of the users, test report opening and closing time, voters' identification numbers, the device MAC addresses, the mode of identification, timestamp, and codes of polling station.
- xi. That pending hearing and determination of this application, and subsequent the petition this honourable court be pleased to direct the 1st respondent to provide all form 32A relating to voter identification and verification, all forms 37A, all polling station diaries and all forms 41 in respect to reports pertaining to assisted voting.



- xii. That pending hearing and determination of this application, and subsequent the petition this honourable court be pleased to allow for the scrutiny of the rejected stray and spoilt ballot papers recount of all votes in respect to all 1,130 polling stations.
 - xiii. That pending hearing and determination of this application, and subsequent the petition this honourable court be pleased to issue an order for the scrutiny and forensic audit of all equipment, system and technology and complimentary manual register used by the 1st respondent in the gubernatorial election.
 - xiv. That any other orders that meets the ends of justice be issued.
 - xv. That costs of this application be provided for.
4. The application is premised on the grounds stated on the face of it and further amplified by the content contained in the supporting affidavit as well as further supporting affidavit of Patrick Mweu Musimba, the petitioner herein, sworn on the September 8, 2022 and October 24, 2022 respectively.
 5. The basis of the application herein therefore, is that on the June 12, 2022, the chairperson of the 1st respondent published on the IEBC website portal a press release that was in response to concerns on voter registration that had been raised by the Azimio la Umoja One Kenya Coalition Party on the use of a manual register to identify voters. in the press release the 1st respondent stated that: -

“The commission made a decision not to use the printed register of voters based on the findings of the Post-Election Evaluation Report for the 2017 General Election and Fresh Presidential Elections. It was established that the use of the printed Register of voters provided an avenue for misuse during the voting process.”

In an attempt to ensure that such misuse does not occur and to enhance the credibility of the voting process, the commission decided to bar the use of printed register to ensure that all voters are strictly identified electronically using their captured biometric data and to eliminate the possibility of identification of voters using the printed register.”
 6. The petitioner averred that he was aware that the above statement was subject of a court case being *Kenya Human Rights Commission & 6 others v Independent Electoral and Boundaries Commission & 2 others; Communication Authority of Kenya & 3 others (Interested Party)* (Petition E306 of 2022) [2022] KEHC 10579 (KLR) (Constitutional and Judicial Review) (4 August 2022) wherein the court made an order barring the use of manual registers to identify voters during the general elections that were then to be held on the August 9, 2022.
 7. He further averred that the High Court’s decision was appealed at the Court of Appeal in the case of *United Democratic Alliance Party v Kenya Human Rights Commission & 8 others* (civil application E288 of 2022) [2022] KECA 813 (KLR) (8 August 2022) (Ruling) wherein the court held: -
 - a. “Presiding officers must ensure that voters are identified by biometrics upon production of an identification document used during registration. biometric verification is a primary mode of identifying voters.”
 - b. “Where a voter cannot be identified using biometrics, then the presiding officer shall use a complementary mechanism of alphanumeric search in the presence of the agents and the voter shall fill form 32A before being issued with the six ballot papers.”



- c. “The presiding officer will resort to the use of the printed register of voters after approval from the commission upon confirmation that the KIEMS Kit has completely failed and that there is no possibility of repair or replacement.”
 - d. “The contents of the said memo dated July 27, 2017 shall be adhered to by all concerned persons in application of regulations 69 and 83 of the Elections (General) Regulations, 2012.”
8. That before the decision of the Court of Appeal was read, on the August 6, 2022, the candidates herein were briefed by the 1st & 2nd respondent at a technical training institute that all elections systems were tested and said to be functional and ready for the elections. According to the petitioner, around 140 KIEMS Kits were not in operation in Makueni county as at the time the polls opened. He attributed this failure of the KIEMS Kits to lack of proper testing or intentional manipulation to defeat the purpose of the elections.
 9. He further alleged that the 1st respondent failed to meet its obligation to provide a functional KIEMS Kit system of elections to ensure that there were credible, free, fair and transparent elections for the gubernatorial elections, as per their mandate enshrined under article 86 of the *Constitution*.
 10. The petitioner also indicated that he was aware that a returning officer was mandated to ensure that each polling station had a polling diary and a complementary manual register of voters for purposes of identification in the unlikely event that the electronic KIEMS Kit failed.
 11. Lastly, the petitioner prayed that his application be allowed and an order of scrutiny be granted so that he can be able to scrutinise the election system adopted by the 1st respondent. He further indicated that scrutiny will assist the court to hear and determine the petition herein.

The 1st & 2nd Respondents’ Response

12. In response to the application, the 1st and 2nd respondent filed two affidavits both of which were sworn on the September 20, 2022 by Godfrey Nderitu Ngunyi, the 1st respondent’s ICT Officer for Makueni County.
13. It was the deponent’s averment that an application for scrutiny and recount will not be granted when it is generalized and a clear fishing expedition with no mention of specific polling stations and where no basis exists. It is the 1st and 2nd respondents’ case that the petitioner’s application falls in the aforementioned category.
14. It was further deposed that the application herein is founded on a misunderstanding of the role of technology in gubernatorial elections. According to the deponent, the technology deployed by the 1st respondent was only to be used for voter identification and not transmission of election results for Governor, Senator, Women Representative, Member of National Assembly and Member of County Assembly elective posts. That forms 37As in the governor elections were not transmitted electronically but rather transmission was done physically by delivery of the relevant form to the Constituency Tallying Centres hence nothing to scrutinize.
15. On the question of provision of smartphone details and logs used at each constituency, the 1st and 2nd respondent stated that smartphones were neither used in relation to gubernatorial elections nor was any provided by the 1st respondent. It was further averred that this prayer cannot be granted as the use of smartphones was only approved for the presidential election for the purposes of taking images of form 34As for transmission to the National Tallying Centre.



16. That the prayers for production of IP address and SIM cards, raw images of forms prepared and obtained from all polling stations cannot be issued as no images of form 37As were taken by an electronic device. He asserted that it was only forms 34As for the presidential election that were scanned using KIEMS Kit and therefore they are the only forms retained therein, which cannot assist the petitioner's case. It was also averred that the specific GPS locations of polling stations used cannot be granted as it is information that can only be produced by Mobile Network Operators who are not parties to suit herein.
17. Concerning submission of a certified list of KIEMS Kit unique identifier, which includes Media Access Control (MAC) address, International Mobile Equipment Identity (IMEI) it was deposed that they cannot be granted as it has not been shown how the said information will assist the court in the determination of the issues raised in the petition as no contention has been raised alluding to the use of stray gadgets to identify the voters. Further, that the said prayer cannot be issued as it will compromise the security of the ICT infrastructure of the commission and render them useless for future elections.
18. As to an order to produce all forms 32A used to identify voters manually, 37A, all polling station diaries and form 41 filled with respect to assisted voters, it was averred that it is not tenable as the petitioner does not specify the polling stations affected with any irregularity nor has he shown how their scrutiny will assist in the determination of his petition.
19. Touching on production of all forms 32A with respect to Makueni County, the deponent stated that they cannot be produced as they have not been returned from the Supreme Court where they were taken for the scrutiny exercise in the Supreme Court Case petition E005 of 2022 as consolidated with petitions E001, E002, E003, E004, E007 & E008 of 2022.
20. To the 1st and 2nd respondents, it is their case that all the KIEMS Kits meant to be used in Makueni County for the purposes of the August 9, 2022 general elections, were tested and confirmed to be fully functional and those found to be faulty were replaced by kits that had been set aside for contingency purposes. It was indicated that technology has its unforeseen challenges and that on the day of the election it was reported that KIEMS Kits in 84 polling stations in Kibwezi West Constituency reported a "data validation error" and not 140 polling stations as claimed by the petitioner. That the said error was reported to the Constituency ICT Clerk and ICT Directorate at the Headquarters, incidental report made and a memo sent to the effect that the said Kits were not functional. That the 1st respondent tried to resolve the issue of KIEMS Kits to no avail, and it was at only these 84 polling stations that the 1st respondent authorised the use of manual register.
21. It was also stated that the 1st and 2nd respondent did comply with the set out procedures and that all voters not identified biometrically in the 84 polling stations were successfully identified in the manual register and forms 32A filled.
22. Regarding the prayer for scrutiny and recount of all rejected, stray and spoiled ballot papers with respect to 1,130 polling stations, the 1st and 2nd respondent were categorical that it should be rejected for being baseless as no polling stations have been identified for this exercise to be carried out. Similar sentiments were expressed in respect to the request of scrutiny and forensic audit of all equipment, systems, technology and complementary manual register.
23. It is worth noting that the 1st and 2nd respondents' main contention is that all the prayers in the application herein were too broad, vague and lacked any basis and therefore urged this court not to issue the orders sought.



The 3rd Respondent's Response

24. The 3rd respondent in response to the application herein, filed a replying affidavit sworn on September 20, 2022 by Mutula Kilonzo Junior (3rd respondent), who basically averred that there are no sufficient reasons that have been proffered to justify the prayers for scrutiny and recount.
25. He averred that the application for scrutiny should not be allowed as it is vague, it's a fishing expedition and lacks specificity with regard to the polling stations whose results the petitioner is disputing. That no basis has been laid to require the examination of all ballot boxes and counterfoils for the Gubernatorial Election for Makueni County.
26. According to the 3rd respondent, the petitioner has not shown to the court any irregularities that occurred with respect to regulations 76, 77, 78, and 79 of the [Elections \(General\) Regulations, 2012](#) on the counting of votes, rejection of ballots, signing of the declaration of results hence no order should be granted. That further, there is no proof that the petitioner being dissatisfied with the counting of the votes asked for a recount as provided for under regulation 80 of the [Elections \(General\) Regulations, 2012](#).
27. He further stated that the petitioner has not shown to the satisfaction of this court any reason as to why he should be granted prayers 6, 7, 8, 9 and 10.
28. In addition, it was deposed that no basis had been laid for the provision of forms 32A, 37A, polling station diary, form 41, scrutiny of rejected and stray ballots papers. He went further to state that he garnered 214,088 valid votes and there is therefore a big margin of 150,836 votes between him and the Petitioner who garnered 63,252 votes, and for this reason the application for scrutiny and recount must fail. In summary, the 3rd respondent urged the court that the application before court is untenable and frivolous hence should be dismissed as it has been filed without basis.

Directions of the Court

29. Directions as to the hearing of this application were taken during the pre-trial conference that was held on the October 13, 2022. It was agreed that the application herein would be disposed of by way of written submissions which were to be filed after taking and hearing evidence in respect of the main petition.
30. To this application, the petitioner filed submissions dated November 21, 2022 while the 1st, 2nd and 3rd respondents variously filed their submissions dated November 22, 2022. The submissions herein were highlighted on the November 23, 2022 wherein parties reiterated their respective positions in their written submissions.

The Petitioner's submissions

31. The petitioner through the firm of Andrew & Steve and company advocates represented by Mr kimathi submitted that the power of the court to order for a scrutiny and recount is provided for under section 80 (3), (4) and 82 of the [Elections Act](#) as read with rules 30 and 31 of the [Elections \(Parliamentary and County Elections\) Petitions Rules, 2017](#).
32. To the petitioner, scrutiny and recount is a prudent exercise that is set to assist the court to arrive at a just determination of the issues raised in the petition. That the exercise is aimed at ascertaining whether there exist any material malpractices that are detrimental to the election process and occasion an injustice to the parties. To buttress this position, the petitioner referred the court to the case of petition 5 of 2013 [Philip Mukwe Wasike v James Lusweti Mukwe & 2 others](#) [2013] e KLR (Ruling



delivered on June 6, 2013) where, Lady Justice H. Omondi, J (as she then was) held that the purpose of scrutiny is to: -

- (1) To assist the court to investigate if the allegations of irregularities and breaches of the law complained of are valid.
- (2) Assist the court in determining the valid votes cast in favour of each candidate.
- (3) Assist the court to better understand the vital details of the electoral process and gain impressions on the integrity of the electoral process.

33. Mr Kimathi submitted that before ordering for scrutiny and recount of votes, the court must be satisfied that there are sufficient reasons to do so. That an order for scrutiny or recount may be made without a basis where the margin between the winner and loser is narrow. In that regard, the court was referred to the holding in election petition No 3 of 2013 *Musikari Nazi Kombo v Moses Masika Wetangula & 2 others* [2013] eKLR (Ruling delivered on September 30, 2013) and election petition No 1 of 2017 *Lenny Maxwell Kivuti v Independent Electoral and Boundaries Commission (IEBC) & 3 others* [2018] eKLR (ruling delivered on January 18, 2018).
34. Learned counsel submitted that the Petitioner was not on a fishing expedition. That there exists no record of approval of the use of the manual register and further there is no clear report of the individuals who were assisted to vote.
35. According to Mr Kimathi, the respondents' witnesses, RW1, RW2 and RW3 confirmed that the 1st respondent's staff were neither properly trained and nor ready to conduct the elections held on the August 9, 2022. The petitioner also submitted that the 1st and 2nd respondents' witnesses had confirmed that the KIEMS Kit indeed failed and that there was no proper reboot system. Counsel contended that, there is confirmation that SD cards were changed thus occasioning KIEMS Kit failure which could only indicate intentional sabotage.
36. Mr Kimathi contended that RW2 and RW3 had confirmed that forms 32A were printed in mass and distributed to all polling stations that used the manual register yet there were more polling stations outside the 84 stations that used the manual register inter alia; Kasyelia, Kaseuni, Kithiinani, Komboyo, Ngaaka, Kathulimbi and Muvuti Primary School. In counsel's view, the admission that some stations outside the 84 stations used a manual register confirms that almost 140 polling stations used manual registers which cannot be accounted for.
37. Counsel further submitted that the petitioner having been identified manually using the manual register he was not asked to fill form 32A thus assumed that that was the case for all voters identified manually.
38. Counsel contended that despite the clear directions made by the court of appeal in respect to voting using manual register, the 1st respondent did not follow that mandatory procedure as no voter signed form 32A hence a flawed electoral process prone to abuse. That the failure to conduct a proper deployment of end to end user testing of technology by the 1st respondent was deliberate hence failure to guarantee fair, verifiable, transparent and accountable results.
39. According to Mr Kimathi, the validation error in the KIEMS kit was an identifiable error which could be resolved through its manual and that no effort was made to resolve it besides rebooting the gadget. Further, that the direction to use manual register was general and not specific to the affected polling stations. The court was then referred to the testimony of RW1 who confirmed in his testimony that the only effort made to resolve the error was through rebooting.



40. Regarding cases where some polling stations had excess votes cast than registered voters, the court was referred to Kasyelia and Kaseuni Mbooniconstituency and Kithianiand Komboyo Kibweziwest constituency hence sufficient evidence of vote manipulation thus an aspect that can be resolved through scrutiny. That owing to the contradiction between the 1st and the 2nd respondent as to whether kiems kits failed in 84 or 83 polling stations, it was necessary to conduct an audit in the 1,130 polling stations to ascertain the truth.
41. In re-emphasizing the significance of technology in voting process, counsel contended that the delay in making a decision as to which method to use in voting in Kibwezi West constituency did contribute to voter suppression as most voters left their polling stations without voting. Regarding the use of form 41 in voter assisted cases, counsel opined that such forms were not filled hence the need for scrutiny.
42. The court was urged to grant the orders sought in order to be able to make a determination on whether the elections were conducted in a credible, verifiable, accountable, transparent and fair manner as required under the *Constitution* of Kenya.

The 1st and 2nd Respondents' Submissions

43. The 1st and 2nd respondents represented by the firm of Maema and company advocates through Mr Nyaburi as the lead counsel and Mr Thuo and M/s Musyoka as the assisting counsel basically reiterated the content contained in the 1st & 2nd respondent's replying affidavit. Learned counsel took the court through relevant provisions governing application for scrutiny which he asserted had not been satisfied.
44. Counsel contended that there was no basis for the scrutiny application to be allowed as there is glaring lack of specificity and proof with regard to the manner or nature of irregularities and illegalities that are being complained of and how they affected the outcome of the gubernatorial elections in Makueni County.
45. The court was referred to the holding in the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* (2014) e KLR where the court held that an order for scrutiny is a discretionary one; it does not lie as a matter of course; a basis has to be laid before such order can issue and; where such scrutiny is ordered, it should be specific as to the exact polling station/s affected. Further reference was made to the case of *Hassan Omar Hassan & another v Independent Electoral & Boundaries Commission & others* (2017) e KLR where the court echoed the position espoused in *Gatirau Peter Munya case* (supra).
46. Learned counsel further submitted that the petitioner in his testimony was unable to identify with specificity any election offences, irregularities and/or illegalities committed and the perpetrators involved before the orders sought can issue. That the petitioner has no proof of the allegations made and therefore a fishing expedition intended to unearth evidence to nullify the results hence abuse of the court process. In that regard, the court was referred to the case of *Nicholas Kiptoo Arap Korir Salat v IEBC and 7 others* (2015) e KLR and *Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 others* (2014) e KLR where the court stated that it is not for the court to unearth new evidence to justify nullification of an election result.
47. The court was further cautioned that the petitioner had attempted to introduce new issues which were not pleaded for among them failure of the KIEMS Kit in the following polling stations: Kasyelia, Kaseuni, Kithiinani, Komboyo, Ngaaka, Kathulimbi and Muvuti Primary School.
48. That the mention of these polling stations is a new issue that was never raised in the Petition/application herein and should be disregarded. That parties are bound by their pleadings in compliance with the holding by the Court of Appeal in the case of *Election Petition Appeal No. 6 of 2018 Martin Nyaga Wambora v Lenny Maxwell Kivuti & 3 others* [2018] eKLR and *Kitale High Court Election*



Petition No. 1 of 2017 Robinson Simiyu Mwangi & another v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR.

49. Regarding failure to fill form 32A, it was submitted that no evidence had been adduced from agents nor voters confirming that the said form was not filled. It was further contended that the Petitioner has not provided proof that he was a voter who was identified manually but was denied the opportunity to fill form 32A.
50. It was further submitted that the question of forms 32A that were filled in Kibwezi West Constituency was conclusively determined by the Supreme Court in the case of Raila Odinga & 16 others v Ruto & 10 others; Law Society of Kenya & 4 others (Amicus Curiae) (Presidential Election Petition E005, E001, E002, E003, E004, E007 & E008 of 2022 (Consolidated) [2022] KESC 54 (KLR) (Election Petitions) (5 September 2022) wherein the court confirmed that the said forms had been duly filled.

The 3rd Respondent's Submissions

51. The 3rd respondent through the firm of Kyalo and Associates represented by Mr Mbobu as lead counsel assisted by M/s Ndolo, M/s Kilonzo and M/s Magotsi reiterated the content contained in the 3rd respondent's replying affidavit to the application. Similar sentiments just like the 1st and 2nd respondent were raised thus expressing the position that no basis had been established to warrant issuance of the orders sought. The 3rd respondent submitted that no complaints about the elections were raised by any other party other than the petitioner.
52. To express the point that an application for scrutiny must lay a basis, be specific and not a mere fishing expedition, the court was also referred to the *Gatirau Peter Munyi* case above quoted and *Ledema Ole Kina v Samuel Kuntai Tunai & 10 others* (2013) e KLR where the court stated that an application for scrutiny which lacks specificity or particularity ought not to be granted.
53. That the application herein amounts to a fishing expedition as the petitioner does not challenge the declaration of results in forms 37A, 37B and 37C from any tallying centres.
54. According to the 3rd respondent's submission, scrutiny of the forms 32A cannot be based solely on the fact that it was only the petitioner who did not sign. Counsel submitted that the petitioner has not shown that there was any illegal use of the manual register. It was Mr Mbobu's contention that no agents nor voters have appeared or brought any evidence before this court show that there was misuse of the complementary mechanism for identification of voters.
55. The court was referred to section 44A of the *Elections Act* as read with regulation 69(e) of the Elections (General) Regulations, 2012 that mandates the 1st respondent to use a manual register where the electronic voter identification device fails. The court was referred to the Supreme Court case of *Odinga & 16 others v Ruto & 10 others; Law Society of Kenya & 4 others (Amicus Curiae)* (Presidential Election Petition E005, E001, E002, E003, E004, E007 & E008 of 2022 (Consolidated)) [supra] to explain the point that the petitioner had not fulfilled the evidentiary burden for the application herein to be allowed.
56. According to learned counsel, the petitioner only had two agents for the election process and therefore he cannot ascertain whether the form 32A was filled as required.
57. Concerning the failure of KIEMS Kits and use of manual register, counsel contended that the 1st respondent did follow due process and that the error was unforeseeable. It was opined that the failure of the KIEMS kits did not affect the outcome of election results. That the quantity of votes by a margin of over Kshs150,000 has neither been challenged nor proved to have been flawed.



Analysis And Determination

58. I have considered the application herein, responses thereof, and rival submissions by both counsel. The only issue that emerges for consideration is whether the petitioner/applicant has met the threshold for an order of scrutiny to issue. The law governing scrutiny in an election exercise is clearly set out under section 82 of the *Elections Act* 2011 which provides that;

Scrutiny of votes

- (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.
- (2) Where the votes at the trial of an election petition are scrutinized, only the following votes shall be struck off—
 - (a) the vote of a person whose name was not on the register or list of voters assigned to the polling station at which the vote was recorded or who had not been authorised to vote at that station;
 - (b) the vote of a person whose vote was procured by bribery, treating or undue influence;
 - (c) the vote of a person who committed or procured the commission of personation at the election;
 - (d) the vote of a person proved to have voted in more than one Constituency;
 - (e) the vote of a person, who by reason of conviction for an election offence or by reason of the report of the election court, was disqualified from voting at the election; or
 - (f) the vote cast for a disqualified candidate by a voter knowing that the candidate was disqualified or the facts causing the disqualification, or after sufficient public notice of the disqualification or when the facts causing it were notorious.
- (3) The vote of a voter shall not, except in the case specified in subsection (1)(e), be struck off under subsection (1) by reason only of the voter not having been or not being qualified to have the voter's name entered on the register of voters”.

59. Pursuant to rule 29 of the *Elections (Parliamentary and County) Petitions Rules 2017*, this court is empowered to order for scrutiny of votes upon being satisfied that the conditions set out have been established by the party seeking such scrutiny. For easier understanding and reflection, I wish to reproduce the said provision as hereunder;

Scrutiny of votes-

- “(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.
- (3) 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.



- (4) 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.
- (5) For purposes of sub-rule (4) (b), every returning officer shall upon declaration of the results, seal the printed copy of the register of voters used at that election in a tamper proof envelop and such envelop shall be stored by the commission subject to the elections court directions under rule 16”.

60. From the above provisions, there is no doubt that a party seeking scrutiny of votes bears the highest responsibility and or burden to convince the court that indeed there are sufficient grounds to warrant issuance of an order for scrutiny. A scrutiny exercise is not a ritual nor a matter of course that automatically follows filing of a petition. It is not meant to fish for or unearth evidence that could otherwise not be availed at the point of filing the petition for nullification of an election result. In other words, an application for scrutiny must lay a firm foundation or ground upon which it can be anchored and not merely a fishing expedition as most courts have held in numerous case law decisions.

61. In the often quoted case of *Gatirau Peter Munyi v Dickson Kithinji & 2 others* Supreme Court of Kenya petition No 2B of 2014(supra) the court held that a party seeking for scrutiny must lay a basis and that an order for scrutiny is not granted as a matter of course. Similar position was held in *Ledama Olekina v Samuel Kuntai Tunai & 10 others* (supra) where the court held that an application seeking for scrutiny must be precise and specific as to the irregularities or malpractices complained of. Equally, in the case of *Peter Gichuki King’ra v IEBC & another* high court of Kenya at Nyeri petition number 3 of 2013(2013) e KLR the court emphasized that an application for scrutiny should not be a roving expedition in search of new evidence.

62. In yet another recent decision in the case of *Ayiera v Kimwomi & others* (election petition E002 of 2022(2022) KEHC 15660(KLR)(25th November 2022)(ruling), Kimondo J held that an application for scrutiny must be confined to polling stations in which results are disputed and not



merely a roving expedition. The court went further to state that scrutiny is meant to measure the integrity of an election by interrogating further any Malfeasance, irregularities and breaches of any electoral law.

63. In the instant case, the petitioner's petition is focused on questioning both the qualitative and quantitative aspects of the entire electioneering process in Makueni Gubernatorial Elections. The petitioner has listed 15 prayers for consideration and eventual determination. For clarity or convenience purposes, I shall endeavour to address each prayer independently. Prayer one is already spent.
64. In respect to prayer number two, the petitioner/ applicant is seeking an order directing the 1st respondent to avail all election materials including electronic documents, devices and equipment used for the gubernatorial election. This prayer is quite broad and general as it does not with sufficient particularity or specificity address or state any specific problem with those devices or equipment in each of the 1,130 polling stations in Makueni County.
65. Indeed, a court cannot make an order for scrutiny in all stations in the entire county without basis. To do so will amount to a fishing expedition. See *Ledama Ole kina v Samuel Kuntai Tunai & 10 others* (supra) where the court held that;
- “An application for scrutiny of all of Narok South Constituency lacks specificity, is a blanket prayer that, in my view, cannot be granted. The applicant needed to be specific on which polling stations he wanted a scrutiny done. If he wanted scrutiny in all the polling stations, then a basis should have been laid for each polling station. The rationale is clear, the process of scrutiny is labourious, time consuming and the applicants cannot be let at liberty to seek ambiguous prayers and waste precious court's time and incur unnecessary costs. They must be specific. For the above reason, the court cannot give a blanket order for scrutiny of Narok South Constituency because such order will be prejudicial to the respondent now that the evidence of witnesses has already been taken. The respondent would not have an opportunity to respond to any new issues that may be unraveled during scrutiny”
66. In view of the above holding that prayer cannot issue.
67. In prayer three, the applicant sought an order directing the 1st respondent to grant him and his agents or authorized representatives remote access to electronic devices which were used to transmit results to the constituency tallying centre. During the hearing, the 1st respondent through the testimony of both the county and constituency returning officers told the court that only presidential results are by law transmitted electronically by the presiding officers using their private phones and not any other result. The applicant admitted in evidence that he only had one agent in the entire county.
68. It is trite that there is no law requiring electronic transmission of results touching on the governor's election results. See the *Independent Electoral & Boundaries commission v Maina Kiai & 5 others* Court of Appeal civil appeal No 105 of 2017(2017) e KLR where the court held that electronic transmission of results was limited to presidential results only.
69. In view of the above holding, there is no requirement that the governor's results from polling centres be transmitted electronically to the tallying centres. In any event, there is no proof that there were smartphones supplied by the 1st respondent for transmission of governor's results. Therefore, it is my finding that a court cannot issue an order in vain as there is nothing to be scrutinized.
70. In my view, this is a general and broad prayer which is lacking in objectivity hence not tenable. My finding in this prayer shall befall prayer four which is seeking an order for the 1st respondent to supply details of smart phones used by returning officers and access to their respective logs. The petitioner is



not specific in what he wants to achieve from such access and worse still from private phones. To that extent that that prayer is disallowed.

71. Touching on prayer five seeking an order to be supplied with copies of raw images of forms prepared and obtained from all polling stations, that prayer is too general and lacks particularity. According to the testimony of the constituency returning officer, only presidential results have raw images and not any other elective position. It would appear like the petitioner is not sure of what he is looking for in this prayer and how he stands to lose if not supplied and the overall effect on the declared results. He cannot use the court as an agent for collection of forms which would have been the work of agents. That prayer cannot issue as it lacks objectivity.
72. Concerning prayer six for the supply of IP address for each of the Kiems kits at each of the polling stations, the petitioner has not specified with sufficient evidence why the court should interrogate all kiems kits in the entire county in search of unspecified or unknown wrongs, errors or malpractices. As stated in the *Raila Amolo Odinga & another v Independent Electoral boundaries Commission and 2 others* (2017)e KLR access to electronic or technological system is sensitive and has the potential of interfering with the security system of the commission by preserving pass words, usernames IP addresses and software running applications. Although a court can order interrogation of kiems kit where necessary, in this case there is no basis laid to warrant access to all kiems kits in the entire county for scrutiny.
73. As to prayer seven seeking an order directing the 1st respondent to provide specific GPS location for each KIEMS kit and those of each station used between 7th and August 13, 2022, the same does not state the purpose or intended objective and malpractice to be disclosed after carrying out such scrutiny. To me, this prayer is lacking in merit and therefore lacks basis.
74. Touching on prayer eight seeking a certified list of all KIEMS kits unique identifiers including the media access control address, IMEI numbers, SIM cards and their numbers as they were procured used or unused, the petitioner is once again not telling the court as to what went wrong with these gadgets in the entire county so as to affect the final results hence the audit. Again, this is a fishing expedition.
75. With regard to prayer nine requiring an order that the 1st respondent does provide the count of voters identified by Kiems kits at all polling stations by biometric data, alpha numeric, manual register including those found and those not found, the applicant is not specific as to what malpractice took place in each specific station. To apply a general condemnation of results in the entire 1,130 polling stations in the county without pointing out the exact wrong committed in each specific station is an exercise in futility. In any event, in his evidence, the petitioner clarified that he was not interested in scrutiny in the entire county but rather in 84 stations where manual register was used.
76. In *Philip Mungu Ndolo v Omar Mwinyi Shimbwa & 2others* Mombasa Electionpetition number 1 of 2013 Odero J, had the following to say with regard to generalized application for scrutiny:

“In any case where a request is made for scrutiny and/or recount the application therefor must be clear, concise and more importantly specific. An application couched in general terms ought not to be permitted as this is tantamount to requiring of the court to go through the whole exercise of tallying once again. Rule 33(4) of the Election Rules however obliges a party to name the polling stations in which the results are disputed. As general principle in law, a party is bound by its pleadings. As such, any evidence which goes outside of the pleadings on record must be disregarded”.

I am therefore not convinced that this prayer has any specific agenda intended to be proved or achieved hence not awardable.



77. In respect to prayer ten seeking provision of KIEMS kits logs, including log in details of the users, test reports, opening and closing time, voters identification number device MAC addresses, mode of identification, time stamp and codes of polling station, the applicant was not categorical on how those materials were involved or used to manipulate or misused or not being used to the detriment of a fair, credible, verifiable, transparent or accountable results hence the need for scrutiny to confirm. This prayer is therefore not precise nor specific hence not tenable.
78. In prayer eleven, the applicant is seeking an order directing the 1st respondent to provide all forms 32A in respect to voter identification and verification, all polling station diaries, forms 41 in relation to assisted voters. The genesis of this prayer is the alleged failure of Kiems kits in about 84 polling centres in Kibwezi West constituency resulting to delayed voting which commenced at about noon after approval for use of physical manual register.
79. There was a claim that in 84 polling stations in Kibwezi West constituency, the KIEMS kits failed to identify voters through biometric voter identification and Alpha numeric thus necessitating approval from the IEBC headquarters to resort to manual voting in compliance with the court of appeal decision in the case of *United Democratic Alliance Party v Kenya Human Rights Commission & 12 others* civil application number E288 of 2022(supra) where the court allowed use of manual register as a last option in case of failure of Biometric identification and alphanumeric.
80. Rule 69 of the [Elections \(General\) Regulations of 2012](#) as amended by LN No 72 of 2017 provides that;
Voting procedure
- (1) Before issuing a ballot paper to a voter, an election official shall—
 - (a) require the voter to produce an identification document which shall be the same document used at the time of registration as a voter;
 - (b) ascertain that the voter has not voted in that election;
 - (c) call out the number and name of the voter as stated in the polling station register;
 - (d) require the voter to place his or her fingers on the fingerprint scanner and cross out the name of the voter from the printed copy register once the image has been retrieved;
 - (e) in case the electronic voter identification device fails to identify a voter the presiding officer shall—
 - (i) invite the agents and candidates in the station to witness that the voter cannot be identified using the device;
 - (ii) complete verification form 32A in the presence of agents and candidates;
 - (iii) identify the voter using the printed Register of voters; and
 - (iv) once identified proceed to issue the voter with the ballot paper to vote;
 - (f) deleted by LN 72/2017, r 31(c);
 - (g) deleted by LN 72/2017, r 31(c).
81. The applicant claimed that voters who voted using manual register did not fill form 32A nor did the aided voters fill form 41. He gave himself as an example of a person who never filled nor signed form 32A yet he was allowed to vote. According to the 1st and 2nd respondent, form 32A was filled and signed by every voter who voted through manual register identification. The 1st respondent relied



on the holding in the supreme court's holding in the *Raila Odinga & 16 others; law society of kenya & 4 others (Amicus Curiae)* (presidential Election Petition E005, E001, E002, E003, E004, E007 & E008 of 2022 (consolidated) (2022) KESC 56 (KLR) (election petitions) (26th September 2022) (Judgment) Neutral citation (2022) KESC 56 (KLR) where the court confirmed that it had ordered for the scrutiny of votes in Kibwezi West constituency together with other places and was satisfied that forms 32A were filled where manual voting was applied.

82. For avoidance of doubt, the Supreme Court at pages 13 of its final judgment delivered on September 26, 2022 held as follows;

“whereas, it is not in dispute that the KIEMS kits failed in 235 polling stations in Kibwezi West constituency and parts of Kakamega county, 86,889 voters were granted the right to vote manually and the requisite forms 32A duly filled. As such, the failure of the KIEMS kits in the identified polling stations cannot be taken as a yardstick of the performance of KIEMS kits in the whole country. In any case, all affected voters who could have complained were not disenfranchised as they were able to exercise their democratic right to vote manually”

83. In view of the Supreme Court finding and the testimony by the 1st and 2nd respondent I do not have any basis upon which to order another scrutiny. For those reasons, that prayer is disallowed.

84. In respect to the 12th prayer seeking scrutiny touching on all rejected, stray and spoilt votes in all 1,130 polling stations, the same is too broad. There is no specific complaint raised in respect to any specific station. To engage in a recount exercise in the entire county is too much to bite with the limited resources at hand. It is not the duty of the court to play the role of IEBC post-election.

85. In the case of *Mohammed Tubi Bidu v Independent Electoral & Boundaries Commission & 2 others* (2018) e KLR the court had this to say;

“In addition, scrutiny is also scope-specific to the particular polling stations where the results are disputed, and which must be so stated. The rationale for insisting on specificity is not only because it is a strict requirement under rule 33(4) of the Election Petition Rules, but because the process of scrutiny is laborious exercise which consumes precious Court time and brings about unnecessary costs. Accordingly, as it has been said before, scrutiny is not a fishing expedition or a game of lottery which is best described in the words of Ringeria J (as he then was) in *Pyaralal Mhand Bheru Rajput v Barclays Bank and others* civil case No 38 of 2004;-

...a wide net cast over a large body of water, and out of all the lake or sea, creatures caught in it, there will be one or two edible crabs or fish”.

86. Regarding prayer thirteen for scrutiny and audit of all equipment, system and technology and complimentary manual register used by the 1st respondent in the gubernatorial election, it is not specifically addressing any of the grounds or parameters set out under rule 29 of the *Elections (Parliamentary & County) Petitions 2017* with any specific station hence not awardable.

87. In a nutshell, the petitioner has not met the necessary threshold to warrant an order for scrutiny. The rest of the issues in detail will be addressed in the main judgment in respect to the substantive petition. Accordingly, the application dated 8th September is hereby dismissed. Costs shall be in the cause.

Dated, signed and delivered virtually at Mombasa this 21st day of December 2022

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J.N.ONYIEGO
JUDGE

