



**Getuba & another v Kibagendi & 2 others (Election Petition
E002 of 2022) [2022] KEHC 16575 (KLR) (16 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 16575 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
ELECTION PETITION E002 OF 2022
M THANDE, J
DECEMBER 16, 2022**

BETWEEN

GEOFFREY OMWENGA GETUBA 1ST PETITIONER

NATHAN ONKUNDI MOSIOMA 2ND PETITIONER

AND

HON. ANTONEY KIBAGENDI 1ST RESPONDENT

**RETURNING OFFICER, KITUTU CHACHE SOUTH CONSTITUENCY DAVID
KIPKEMOI CHEROP 2ND RESPONDENT**

**THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 3RD
RESPONDENT**

An election court would be in error for declining to grant an order for scrutiny for reason only that the same was not pleaded

The application sought the scrutiny and recount of votes casts in several polling stations in Kitutu Chache South Constituency. The court noted that no form had been prescribed for making an application for scrutiny and recount. The court further noted that the Elections (Parliamentary and County) Petition Rules did not state that such application must be supported by an affidavit and be in writing. Indeed, a party needed not even plead the same in the petition. The court found that all that was required was that the court be satisfied that there was sufficient reason to order scrutiny and recount. The court also highlighted requirements to be met for an application of scrutiny of votes to be allowed.

Reported by Kakai Toili

Electoral Law – election petitions – scrutiny and recount of votes - requirements to be met for an application of scrutiny of votes to be allowed - whether it was mandatory for an application for scrutiny and recount of votes to be in writing and accompanied by an affidavit - Elections Act, Cap 7, section 82(1); Elections (Parliamentary and County) Petition Rules, 2017, rules 28 and rule 29(1).



Brief facts

The application sought the scrutiny and recount of votes cast in several polling stations in Kitutu Chache South Constituency and for the court to the secure digital memory cards (SD cards) for each of the KIEMS kits used for the polling stations. The petitioners claimed that the election of the 1st respondent as Member of Parliament for Kitutu Chache South Constituency in the August 2022 general elections was characterised by widespread illegalities and irregularities. They further claimed that the malpractices could easily be deduced from various alterations of forms 35A in the listed polling stations. Further, that there were instances of ballots stuffing that was well documented through video evidence.

The respondents on the other hand stated that the application was an omnibus application containing generalized complaints and lacked sufficient basis for the orders for scrutiny and recount of votes in the named polling stations that had not been specified precisely and that the same was tantamount to a fishing expedition for new evidence.

Issues

- i. Whether it was mandatory for an application for scrutiny and recount of votes to be in writing and accompanied by an affidavit.
- ii. What were the requirements to be met for an application of scrutiny of votes to be allowed?

Held

1. Although the petitioners sought an order for the securing of the SD cards for each of the KIEMS kits used for the listed polling stations, no submissions were made in that regard. Accordingly, the prayer was deemed to have been abandoned.
2. Section 82(1) of the Elections Act provided that 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. That was echoed in rule 29(1) of the Elections (Parliamentary and County) Petition Rules, 2017, which provided that the parties to the proceedings may apply for scrutiny of the votes for purposes of establishing the validity of the votes cast. Rule 28 of the Rules provided for recount of votes or examination of tallying.
3. No form had been prescribed for making an application for scrutiny and recount. The Elections (Parliamentary and County) Petition Rules did not state that such application must be supported by affidavit. The Rules did not even state that such application must be in writing. Indeed, a party needed not even plead the same in the petition. A reading of the cited provisions of the law showed that all that was required was that the court be satisfied that there was sufficient reason to order scrutiny and recount.
4. An election court would be in error for declining to grant an order for scrutiny for reason only that the same was not pleaded. In the absence of a mandatory requirement for an affidavit in support of an application for scrutiny and recount, failure by the petitioners to file an affidavit in support of their application for scrutiny and recount did not render the application incompetent.
5. The legal foundation for scrutiny was section 82 of the Elections Act and rules 28 and 29 of the Elections (Parliamentary and County) Petition Rules. The right to scrutiny did not lie as a matter of course. The order for scrutiny was discretionary and in order to succeed in application for scrutiny, a party must lay sufficient evidence to satisfy the court that the orders were warranted. Additionally, the application must not be a fishing expedition and must be concise and specify the exact polling stations in respect of which scrutiny was sought.
6. The petitioners should not expect the court to make an order for scrutiny simply because they had sought such order. They were required to set out their case with sufficient clarity and particularity and adduce sufficient evidence to demonstrate to the satisfaction of the court that the nature of the irregularities complained of completely compromised the electoral process and affected the results thereof. Further, the petitioners had not told the court that the number of disputed votes would affect



the margin of the votes garnered by the 1st respondent and the runners up. Accordingly, the court cannot grant an order for scrutiny if such order would not have an effect on the winner of the elections.

Application dismissed; costs to be in the cause.

Citations

Cases

1. Adam , Nathif Jama v Abdikhaim Osman Mohamed & 3 others (Petition 13 of 2014; [2014] eKLR) — Explained
2. Ahmed , Rashid Hamid v IEBC & others (Election Petition 1 of 2017; [2018] KEHC 8495 (KLR)) — Explained
3. Joho v Nyange & another (No 2) (Admiralty Claim 1 of 2005; [2006] KEHC 22 (KLR)) — Followed
4. Kamanda , William Maina v Margaret Wanjiru Karanja & 2 others (Election Petition 5 of 2008; [2008] KEHC 3305 (KLR)) — Explained
5. Kombo , Musikari Nazi v Moses Masika Wetangula & 2 others (Election Petition 3 of 2013; [2013] KEHC 1022 (KLR)) — Explained
6. Munya v Kithinji & 2 others (Petition 2B of 2014; [2014] e KLR; [2014] 1 KLR 58) — Explained
7. Odinga & another v Independent Electoral and Boundaries Commission & 2 others (Presidential Election Petition 1 of 2017; [2017] KESC 39 (KLR)) — Explained
8. Wambora , Martin Nyaga v Lenny Maxwell Kivuti & 3 others (Election Appeal 6 of 2018; [2018] KECA 365 (KLR)) — Followed
9. Wambua, Gideon Mwangangi & Another v Independent Electoral and Boundaries Commission & 2 others (Election Petition 4 of 2013; [2013] KEHC 3287 (KLR)) — Explained
10. Wasike, Philip Mukwe v James Lusweti Mukwe & 2 others (Petition 5 of 2013; [2013] KEHC 3165 (KLR)) — Explained

Statutes

1. Constitution of Kenya, 2010 — article 81, 86 — Cited
2. Election (Parliamentary and County) Petition Rules, 2013 (cap 7, Sub Leg) — rule 33(2); 33(4) — Interpreted
3. Elections Act (cap 7) — section 82, 82(1) — Cited
4. Elections (Parliamentary and County) Petition Rules, 2017 (cap 7, Sub Leg) — rule 21, 28, 29, 29(1); 33(1) — Cited

Advocates

None mentioned

RULING

1. The petitioners herein filed a petition dated 6.9.22 challenging the election of the 1st respondent as the Member of Parliament for Kitutu Chache South constituency in the general elections held on 9.8.22. The subject of this ruling is an application dated 6.9.22 brought pursuant to article 81 and 86 of the Constitution, section 82 of the Elections Act No 24 of 2011 (the Act), rule 28 and 29 of the Elections (Parliamentary and County) Petition Rules 2017 (the Rules), in which the petitioners seek the following orders:
 1. That this honourable court be and is hereby pleased to make an order of scrutiny and recount of votes casts in the polling stations listed below and the secure Digital Memory Cards (SD Cards) for each of the KIEMS kits used for the said polling stations and a report be forthwith filed before this court by the Deputy Registrar of the court.



- i. Kanyimbo Polling Station
 - ii. Daraja Mbili Primary School Polling Station
 - iii. Daraja Mbili Market Polling Station
 - iv. Daraja Mbili Secondary Polling Station
 - v. Nyankongo Polling Station
 - vi. Raganga DOK Primary School Polling Station
 - vii. Boekabu Primary School Polling Station
 - viii. Nyamatuta DEB Primary School Polling Station
 - ix. Rera DOK Primary School Polling Station
 - x. Ong'icha DOK Primary School Polling Station
 - xi. Nyamondo Primary School Polling Station
 - xii. Ititi Primary School Polling Station
 - xiii. Nyanguru DOK Primary School Polling Station
 - xiv. Riotero SDA Primary School Polling Station
 - xv. Botori Polling Station
2. That costs be in the cause
 3. Any other relief that this honourable court will be pleased to issue in the circumstances.
2. The application is premised on the grounds on the face of it and on the supporting affidavits by Geoffrey Omwenga Getuba and Nathan Onkundi Mosioma filed in support of the petition sworn on even date. The grounds are that the election of the 1st respondent was characterised by widespread illegalities and irregularities. The malpractices can easily be deduced from various alterations of Forms 35A in the listed polling stations. The petitioners further claim that there were instances of ballots stuffing that is well documented through video evidence captured on the 10.8.22 a day after the election and before the declaration of the 1st respondent as the MP Elect. Further, that the figures in Forms 35 A of various polling stations are mathematically inaccurate with a deliberate increase of votes. The affected polling stations Riotero SDA Primary School Polling Station 2 of 2 Code -045269134202002; Nyamagoma FCS Polling Station 1 of 1 Code – 045269134101201; Nyankongo DOK Primary School 7 of 7 Code- 045269134404207; Bototo Primary School Polling Station 1 of 1 Code-045269134100201; Gesarara DEB Primary School Polling Station 2 of 2 Code -045269134505302; Nyankongo Primary School Polling Station 1 of 7-045269134404201. The petitioners further contend that the voter turnout in the constituency on election day as documented on Form 35B was 40,602 out of 66,908 registered voters while the total votes cast was 41,230 votes which is a material departure from the voter turnout. The Petitioners further alleged that there are also numerous unstamped copies of Forms 35A that are not signed by any of the candidates' agents, which raise suspicion as to their authenticity and/ or the genuineness of the votes cast in the various polling stations, like St Anne's Keore Primary school Polling Station 1 of 2.



3. The petitioner urged that the purpose of the application is for the court to establish the factual truth of the total votes cast for each individual candidate in the election in the said constituency. According to the petitioners, none of the parties herein will be prejudiced if the instant application is allowed.
4. The 1st respondent filed grounds of opposition dated 24.11.22. The grounds are that the prayer for scrutiny and recount is a blanket prayer covering about 40 polling stations couched as 15 polling stations and there is no specificity as to which polling station the prayer for scrutiny and recount of votes cast is sought, thus contravening the provisions of sections 82 of the act and rule 29 of the rules and cannot be granted as prayed; that the prayer that the court secure Digital Memory Cards (SD Cards) for each of the KEMS Kit used in the polling stations is not specific to a particular polling station and cannot be granted as prayed; that the application is a fishing expedition for evidence and a calculated move to create an avenue for the 1st petitioner to expand his case; that the application is riddled with generalised allegations not backed by any evidence and no basis has been laid for grant of the orders sought and the instant application ought to be dismissed with costs to the 3rd respondent; that the alleged illegalities and irregularities are too generalized and not confined to any specific polling stations in respect of which scrutiny and recount of votes cast is sought.
5. In his replying affidavit sworn on even date, the 1st respondent reiterated the contents of the grounds of opposition. in sum, the 1st respondent deposed that the application is an omnibus application containing generalized complaints and lacks sufficient basis for the orders for scrutiny and recount of votes in the named polling stations that have not been specified precisely and the same is tantamount to a fishing expedition for new evidence.
6. The 3rd & 2nd respondents opposed the application vide grounds of opposition dated 25.10.22 and a replying affidavit sworn on even date by the 2nd respondent. The grounds are that the application for scrutiny contravenes the provisions of section 82 of the Act and rule 29 of the Rules; that the listed polling stations had more than one polling station and there is no specificity as to which polling station the prayer for scrutiny and recount of votes cast is sought; that there is no polling station known as called Kanyimbo Polling Station; that Daraja Mbili Primary School Polling Station has 3 three different polling stations namely, 1 of 3, 2 of 3 and 3 of 3; that Daraja Mbili Market Polling Station had 4 different polling stations namely, 1 of 4, 2 of 4, 3 of 4 and 4 of 4; that Daraja Mbili Secondary School Polling Station had 4 different polling stations namely 1 of 4, 2 of 4, 3 of 4 and 4 of 4; that there was no polling station known as Nyankongo Polling Station; that Raganga DOK Primary School Polling Station had 2 different polling stations namely, 1 of 2 and 2 of 2; that Bokeabu Primary School Polling Station had 2 different polling stations namely, 1 of 2 and 2 of 2; that Nyamatuta DEB Primary School Polling Station had 2 two different polling stations namely, 1 of 2 and 2 of 2; that Rera DOK Primary School Polling Station, the petitioners have not laid a basis for the order of scrutiny and recount of the votes in their application. Regarding the allegation that there were alterations of form 35A on the votes garnered, the votes cast for Bwonger Pius Abuki reflect the correct number of votes that were garnered by him and the same is applicable for Maubi Andrew Mokaya, Mochoge Justus Onsongo, Nyaberi Eric Elkana and Nyangami Justin Omwenga; that Ong'icha DOK Primary School Polling Station had 3 had different polling stations namely, 1 of 3, 2 of 3 and 3 of 3; that in Nyamondo Primary School Polling Station, the petitioners have not laid a basis for the order of scrutiny and recount of votes in their application.
7. Regarding alteration of the votes garnered by Omwando Samwel Kenani, the form 35A was properly signed by the presiding officer and his deputy together with the political party agents who were present during the voting, close of voting, counting and tallying of the results at the polling stations.



8. Ititi Primary School Polling Station had 2 different polling stations namely, 1 of 2 and 2 of 2; that Nyanguru DOK Primary School Polling Station had 2 different polling stations namely, 1 of 2 and 2 of 2; that the petitioners have not laid basis for the order of scrutiny and recount of votes cast in both the application and the petition in respect of Riotero SDA Primary School Polling Station. As regards, Botori Polling Station, there was no such polling station in the constituency. There was however a polling station known as Botori Junction Polling Station which had three polling stations, namely 1 of 3, 2 of 3 and 3 of 3.
9. The 2nd and 3rd respondents contend that the petitioners have not laid sufficient basis and reasons for the order of scrutiny and recount of votes cast in the aforesaid polling stations. Further, the alleged illegalities and irregularities are too generalized and the petitioners have not confined them to any specific polling stations in respect of which they seek orders for scrutiny and recount of votes cast.
10. In the replying affidavit the 2nd respondent reiterated the contents of the grounds of opposition and added that an application for scrutiny and recount is not automatically granted by court. The contended that the parameters for the grant of such orders are that sufficient reason for scrutiny and recount must be established. Further, scrutiny is to be confined to the polling stations which the results are disputed and scrutiny is not made to be a fishing expedition for new or expanded evidence. The 2nd respondent reiterated that the petitioners have not named with specificity the polling stations in respect of which the orders are sought, nor have they laid any basis and reasons for the grant of such orders in the aforesaid polling stations. Moreover, the alleged illegalities and irregularities are too generalized to justify an order for scrutiny and recount.
11. In response to allegation of ballot stuffing, the same is said to have occurred on 10.8.22 a day after the completion of the voting exercise. Vote counting and tallying was done at the polling station and presiding officers delivered the results in Forms 35A, ballot boxes which contained the votes cast, rejected votes, unused and used ballot papers and their counterfoils. By the time the same were received at the constituency tallying centre, vote counting and tallying at the polling stations had concluded. As such any purported stuffing of ballot boxes could not change the results from a polling station. Notably, at paragraph 36 of the petition, it is alleged that ballot stuffing was in respect to Mosoch Market Polling Station 3 but the same is not among the polling stations in respect of which the Petitioners seek the orders herein.
12. On the allegation that Forms 35A for Riotero SDA Primary School polling station; Nyamagoina FCS Polling Station 1 of 1; Nyankongo DOK Primary School Polling Station 7 of 7; Bototo Primary School Polling Station 1 of 1; Gesarara DEB Primary School Polling Station 2 of 2; and Nyankongo Primary School Polling Station 1 of 7 have been exaggerated as figures in the form indicating the total votes cast are mathematically inaccurate with a deliberate increase of votes, the 2nd respondent contended that this cannot be a basis for scrutiny and recount, the same having not been specified in the prayers for scrutiny in both the application and the petition. Further the presiding officers of the said polling stations added rejected ballots to the valid votes cast in the result forms 35A but this did not confer any advantage or add any votes to any candidate.
13. In sum, the 2nd respondent deposed that the application for scrutiny and recount of votes cast contravenes the provisions of section 82 of the Act and rule 29 of the Rules. It is an omnibus application containing generalized complaints lacking sufficient basis for the orders sought and is tantamount to a fishing expedition for new evidence.
14. I have carefully considered the parties' pleadings and submissions together with the cited authorities and having done so, the following issues arise for determination:



- i. Whether the application is incompetent for want of a supporting affidavit.
 - ii. Whether the petitioners have met the threshold for grant of scrutiny and recount orders.
15. It is to be noted that although the petitioners sought an order for the securing of the Digital Memory Cards (SD Cards) for each of the KIEMS kits used for the said polling stations, no submissions were made in this regard. Accordingly, the prayer is hereby deemed to have been abandoned.

Whether the application is incompetent for want of a supporting affidavit.

16. The 1st respondent challenged the application ground that the same is not supported by affidavit and that despite the petitioners informing the court that the application is supported by the 1st petitioner's affidavit in support of the petition, paragraph 36 of the said affidavit makes no reference to the application. In support of this submissions, the 1st respondent cited the case of *Rashid Hamid Ahmed v IEBC & others* (2018) eKLR where the court made eference to the observations in para 45 of the ruling in *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR where the court stated that the basis for scrutiny and recount of votes is established by way of pleadings and affidavits. To the 1st respondent therefore, without a supporting affidavit the petitioners have failed to plead and prove the specific irregularities alleged to warrant scrutiny and recount of votes.
17. I have looked at the supporting affidavits by both petitioners and I agree that no reference is made in any of them, to the application for scrutiny and recount.
18. Section 82(1) of the *Act* provides that 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. This is echoed in rule 29(1) of the *Rules* which provides that the parties to the proceedings may apply for scrutiny of the votes for purposes of establishing the validity of the votes cast. Rule 28 provides for recount of votes or examination of tallying.
19. Notably, no form has been prescribed for making an application for scrutiny and recount. The rules do not state that such application must be supported by affidavit. The rules do not even state that such application must be in writing. Indeed, a party need not even plead the same in the petition. A reading of the cited provisions of the law show that all that is required is that the court be satisfied that there is sufficient reason to order scrutiny and recount.
20. An election court would be in error for declining to grant an order for scrutiny for reason only that the same is not pleaded. This was the holding in the case of *Natbif Jama Adam v Abdikhaim Osman Mobamed & 3 others* [2014] eKLR where the Supreme Court stated:
- (75) 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.
 - (76) We agree with the Court of Appeal, that the learned trial Judge was in error in holding that an order for scrutiny cannot be granted where it is not pleaded. But it is crucial that the polling stations which are the subject of a possible scrutiny, would have been already signalled 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.

21. In the case of *Gatirau Peter Munya v Dickson Mwenda Kitinji & 2 others* [2014] eKLR the Supreme Court proposed guiding principles, on the right to scrutiny and recount of votes in an election petition. Of relevance to the issue now under consideration is the following guideline:
 - 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.
22. From the foregoing, one can readily see that the basis for scrutiny may be established by pleadings and affidavits or through evidence adduced at the hearing of the petition. In the present case, the petitioners did adduce evidence at the hearing of the petition, to support their prayer for recount and scrutiny.
23. In view of the foregoing, I find that in the absence of a mandatory requirement for an affidavit in support of an application for scrutiny and recount, failure by the petitioners to file an affidavit in support of their application for scrutiny and recount does not render the application incompetent.

Whether the petitioners have met the threshold for grant of orders for scrutiny and recount

24. The legal foundation for scrutiny is section 82 of the *Act* and rules 28 and 29 of the *Rules*. The aim or purpose of scrutiny has been the subject of consideration in our courts.
25. In the case of *Philip Mukwe Wasike v James Lusweti Mukwe & 2 others* [2013] eKLR, Omondi, J (as she then was) stated:

The purpose of scrutiny is:-

- (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.
26. And in *Gideon Mwangangi Wambua & another v Independent Electoral and Boundaries Commission & 2 others* [2013] eKLR, Odunga, J (as he then was), dealing with the issue of scrutiny, stated:

As indicated above the aim of conducting scrutiny and recount is not to enable the court unearth new evidence on the basis of which the petition could be sustained. Its aim is to assist the court to verify the allegations made by the parties to the petition which allegations themselves must be hinged on pleadings. In other words a party should not expect the court to make an order for scrutiny simply because he has sought such an order in the petition. The petition ought to set out his case with sufficient clarity and particularity and adduce sufficient evidence in support thereof in order to justify the court to feel that there is a need to verify not only the facts pleaded but the evidence adduced by the petitioner in support of his pleaded facts. Where a party does not sufficiently plead his facts with the necessary particulars but hinges his case merely on the documents filed pursuant to rule 21 of the *Rules*, the court would be justified in forming the view that the petitioner is engaging in a fishing expedition or seeking to expand his petition outside the four corners of the petition.



27. The guidelines for scrutiny were laid by the Supreme Court in the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji* (*supra*), as follows:

(153) From the foregoing review of the emerging jurisprudence in our courts, on the right to scrutiny and recount of votes in an election petition, we would propose certain guiding principles, as follows:

- a. The right to scrutiny and recount of votes in an election petition is anchored in section 82(1) of the *Elections Act* and rule 33 of the *Elections (Parliamentary and County Elections) Petition Rules, 2013*. Consequently, any party to an election petition is entitled to make a request for a recount and/or scrutiny of votes, at any stage after the filing of petition, and before the determination of the petition.
- b. The trial court is vested with discretion under section 82(1) of the *Elections Act* to make an order on its own motion for a recount or scrutiny of votes as it may specify, if it considers that such scrutiny or recount is necessary to enable it to arrive at a just and fair determination of the petition. In exercising this discretion, the court is to have sufficient reasons in the context of the pleadings or the evidence or both. It is appropriate that the court should record the reasons for the order for scrutiny or recount.
- c. The right to scrutiny and recount does not lie as a matter of course. The party seeking a recount or scrutiny of votes in an election petition is to establish the basis for such a request, to the satisfaction of the trial judge or magistrate. Such a basis may be established by way of pleadings and affidavits, or by way of evidence adduced during the hearing of the petition.
- d. Where a party makes a request for scrutiny or recount of votes, such scrutiny or recount if granted, is to be conducted in specific polling stations in respect of which the results are disputed, or where the validity of the vote is called into question in the terms of rule 33(4) of the Election (Parliamentary and County Elections) Petition Rules.

28. It is evident from the above cited provisions of the law and the jurisprudence that has emerged from our courts, that the right to scrutiny does not lie as a matter of course. The order for scrutiny is discretionary and in order to succeed in application for scrutiny, a party must lay sufficient evidence to satisfy the court that the orders are warranted. Additionally, the application must not be a fishing expedition and must be concise and specify the exact polling stations in respect of which scrutiny is sought.

29. The petitioners contend that they have laid a basis for the grant of the order of scrutiny by narrowing down the results they challenge to specific polling stations listed in the application. They contend that the specifically pleaded and proved discrepancies in the voter turnout between Forms 35A and 35B, illegible or blank and unexplained alterations and overwriting of and unsigned and unstamped Forms 35A, failure to secure electoral material such as counterfoils from Kanyimbo Polling Station and Mosoch Market, and inflation of votes in favour of the 1st respondent.

30. The petitioners further submitted that they seek scrutiny in the following specific streams:

1. Kanunda Primary School Polling Station 2 of 3;
2. Kanyimbo DOK Primary School Polling Station 2 of 2;
3. Mosoch Market Polling Station 3 of 3;



4. Ititi Primary School Polling Station 2 of 2;
 5. St Marys Mosochi Primary Boarding School Polling Station 1 of 2;
 6. St Marys Mosochi Primary Boarding School Polling Station 2 of 2;
 7. Raganga DOK Primary School Polling Station 1 of 2;
 8. Bokeabu Primary School Polling Station 2 of 2;
 9. Rera DOK Primary School Polling Station 1 of 1;
 10. Nyamatuta DEB Primary School Polling Station 1 of 2;
 11. Ong'icha DOK Primary School Polling Station 1 of 3;
 12. Nyamondo Primary School Polling Station 1 of 1;
 13. Riotero SDA Primary School Polling Station 1 of 2;
 14. Nyanguru DOK Primary School Polling Station 1 of 2;
 15. Daraja Mbili Primary School Polling Station 2 of 3;
 16. Daraja Mbili Primary School Polling Station 3 of 3;
 17. Daraja Mbili Secondary School Polling Station 1 of 4;
 18. Kanunda Primary School Polling Station 1 of 3;
 19. Nyankongo DOK Primary School 7 of 7.
31. According to the petitioners, evidence was led on these specific polling stations. The dispute on the results in the above streams were supported by the unexplained alterations on the Forms 35A, illegible forms and unsecured counterfoils secured.
32. The Petitioners relied on the case of *William Maina Kamanda v Margaret Wanjiru Karanja & 2 others* [2008] eKLR and argued that the alterations of forms point to tampering of election materials in the custody of 2nd and 3rd respondents. This was further evidenced at the hearing, when the 2nd respondent attempted to produce a different form 35B from the one filed in court. The ground of result manipulation was specifically pleaded in various polling stations where the 2nd respondent and the presiding officer conceded what they called errors due to fatigue. Additionally, the petitioners argued that the 2nd respondent failed to explain where he obtained the results for Kanunda Primary School Polling Station 2 of 3 that he used in the form 35B despite admitting that the results were ineligible and that the forms he obtained was rained on.
33. In his submissions, the 1st respondent contended that although the petitioners have pointed out over writings, absence of signatures and IEBC stamps on forms 35A such as St. Marys Mosochi Primary School Polling Station 2 of 2, such errors are basic administrative and human errors. In this regard, he cited the case of *Martin Nyaga Wambora v Lenny Maxwell Kivuti & 3 others* 2018. The 1st respondent further submitted that there was no evidence to convince the court that there was systematic alteration of Forms 35A to the advantage of the 1st respondent or to the disadvantage of any other contestant; that the said allegation has been discounted by the affidavits of the 12 presiding officers which the Petitioners did not oppose or question.



34. The 1st respondent further submitted that the petitioners were unable to demonstrate the margin or advantage gained by the 1st respondent or disadvantage to their candidates due to the alleged alterations and cancellations. In this regard, the case of *William Kamanda v Margaret Wanjiru* [2008] eKLR and *Jobo v Nyange* [2006] was relied upon. It was his case that all the general allegations relating to Forms 35A have been debunked unopposed and thus the issue of irregularities committed by the presiding officers in filing the primary data falls. The second issue relating to the margin cannot be ascertained as the petitioners have not pleaded it anywhere in their petition. Moreover, neither the Petitioners nor their witnesses backed their allegations of wrongs or illegalities committed against their candidates with facts. That in fact the 1st petitioner admitted not witnessing any of the irregularities. Further that none of the witnesses presented before court the number of votes lost by Andrew Maubi. The witnesses were also not able to show any sort of dalliance between the 1st respondent on the one hand and the 2nd and 3rd respondents on the other hand, despite raising the issue in the petition.
35. It was further submitted that the petitioners did not establish a *prima facie* case or demonstrate to this court discrepancies between Form 35As and 35B. They cannot therefore be allowed to fish for evidence as they have not stated the particular irregularities in particular polling stations stated so as to obtain evidence not within their knowledge at the time of lodging the petition and application.
36. Relying on the *Musikari Nazi Kombo v Moses Masika Wetangula & 2 others* (2013) eKLR it was submitted that the petitioners have failed to lay a basis and meet the threshold of orders of scrutiny and recount of votes. They have failed to plead the irregularities by way of affidavit and are tagging on administrative errors that cannot form a basis of scrutiny and recount of votes or even a nullify an election as such errors affect all the candidates in the election. Additionally, it was submitted that the issue of 2 stations not appearing on the Form 35B was addressed in the affidavit of DW1 the returning officer. In any event, the primary form here is Form 35A whose data was fed into form 35B. Further, Form 35A from the 2 polling stations in dispute have not featured as appoint of concern before the Petitioners' eyes. He urged that the application be dismissed with costs.
37. The issue of procedural administrative irregularities and human and other errors, addressed by the Court of Appeal in case of *Martin Nyaga Wambora case (supra)*. The court citing the case of *Gatirau Peter Munya v. Dickson Mwenda Githinji and 2 others* (2014) eKLR stated:

In that same case, the court underscored the fact that:

“...procedural or administrative irregularities and other errors occasioned by human imperfection, are not enough, by and of themselves, to vitiate an election.”

The court went on to say:

The other baffling question arising from the learned judge's penultimate determination reproduced above is this; by exonerating the 2nd and 3rd respondent from blame for the non-compliance and irregularities identified by the Judge and in attributing them to fatigue or incompetence on the part of the staff of the 3rd respondent, how could he find that such administrative errors as enumerated in the four (4) grounds affected the outcome of the election in the absence of allegation of any fraud, corruption or illegal practices? It is accepted that in any election, it is inevitable that procedural and administrative mistakes will be made and that if elections can easily be annulled on the basis of administrative errors, public confidence in the finality and legitimacy of election results will be eroded.

38. Gikonyo, J. had occasion to consider an application for scrutiny in the case of *Musikari Nazi Kombo v Moses Masika Wetangula & 2 others* [2013] eKLR. The learned Judge stated:



- (32) As I stated earlier, the legal dimension for granting the relief of scrutiny is contained in rule 33(2) of the *Election Petition Rules*, 2013; that the court must be satisfied that there are sufficient reasons to order scrutiny or recount of the votes. Scrutiny, however, according to rule 33 (4) shall be confined to the polling stations in which the results are disputed. There must be enough material placed before the court which will impel the court to order scrutiny or recount of votes. Sufficiency of the materials before the court will depend on the nature of the claims being put forward by the petitioner in support of scrutiny and the court's evaluation of the evidence in support of those claims. The weight the court will attach to the pieces of evidence provided will also depend on the grave effect the matters complained of would have on the integrity of the electoral process and the results that were announced. In one sense, the court should be able to conclude that the irregularities complained of are of a nature that would completely compromise the electoral process such that the results coming out of such process cannot be said to be free and fair. In another sense, the irregularities or malpractices cited should also be capable of affecting the results. That is the satisfaction the court should look for in an application for scrutiny or recount.
39. The court notes that in the application, the petitioners sought scrutiny and recount in what they called polling stations listed therein. These are however polling centres. The key reason for seeking scrutiny and recount as stated by the petitioners is the unexplained alterations on the Forms 35A, illegible forms and unsecured counterfoils secured. In their affidavits, the presiding officers proffered an explanation regarding the said alterations including the issue of 2 stations not appearing on the form 35B. At the hearing, the parties admitted by consent, the affidavits of the presiding officers without calling the deponents. While their contention is that there were alterations in Forms 35As, it is not clear why the Petitioners opted not to test the explanation of the presiding officers by way of cross examination.
40. After the hearing and guidance of the court the petitioners singled out 19 polling stations in their submissions. In respect of these polling stations, the petitioners submitted as follows:
- We submit that scrutiny of the 19 polling stations, which were specifically pleaded and evidence led on the disputed results in the said polling stations. The dispute on the results in the above streams were supported by the unexplained alterations on forms 35As, ineligible forms and in the polling stations where the counterfoils were not secured.
41. The petitioners have generalised the polling stations and have not stated with any specificity the alterations in each polling station and how they affected the result. Indeed, the petitioners did not demonstrate that there was a systematic alteration of Forms 35A to the advantage or disadvantage of any contestant, to warrant an order for scrutiny and recount. Moreover, they have not rebutted the contention by the respondents that the irregularities were caused by human error due to fatigue. The petitioners should not expect the court to make an order for scrutiny simply because they have sought such order. They were required to set out their case with sufficient clarity and particularity and adduce sufficient evidence to demonstrate to the satisfaction of the court that the nature of the irregularities complained of completely compromised the electoral process and affected the results thereof. Further, the petitioners have not told the court that the number of disputed votes would affect the margin of the votes garnered by the 1st respondent and the runner up. Accordingly, the court cannot grant an order for scrutiny if such order will not have an effect on the winner of the elections.
42. In a nutshell, the petitioners have not made a case to warrant the grant of the orders for scrutiny and, recount as sought in their application. The upshot is that the application herein lacks merit and the same is hereby dismissed. Costs in the cause.



DATED AND DELIVERED IN NAIROBI THIS 16TH DAY OF DECEMBER 2022

M. THANDE

JUDGE

In the presence of: -

.....for the Petitioners

.....for the 1st Respondent

.....for the 2nd & 3rd Respondents

.....Court Assistant

