



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
ELECTION PETITION NO. 3 OF 2017

MUTISYA ALBANUS PAULPETITIONER

VERSUS

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION1ST RESPONDENT

THE RETURNING OFFICER (MACHAKOS

TOWN CONSTITUENCY).....2ND RESPONDENT

MUNYAKA VICTOR KIOKO3RD RESPONDENT

RULING OF THE COURT

1. This Petition was filed by the Petitioner herein MUTISYA ALBANUS PAUL on the 7th September, 2017 in which he challenged the election of MUNYAKA VICTOR KIOKO (3rd Respondent herein) as the Member of the National Assembly for Machakos Town Constituency in the general election held on the 8th August, 2017. The Petitioner upon lodging this petition later filed the present Application dated 9th October, 2017 seeking eight (8) prayers some of which were determined vide a ruling of this Honourable court dated 15th November, 2017. During the hearing of the said Application, the Petitioner’s learned counsels indicated to the court that they were suspending the request for scrutiny at that stage of the proceedings and would raise it at the close of the hearing of the Petition. The hearing of the Petition thus started in earnest on the 23rd November, 2017 and closed on the 15th December, 2017. The Petitioner has now revisited the issue of scrutiny in his Application dated 9/10/2017 whose prayers at the moment appear as follows:-

(1) *(spent)*

(2) *(spent)*

(3) *THAT the 1st and 2nd Respondents be compelled to supply the court and the Petitioner/Applicant for scrutiny, the following information in their exclusive possession, which information they have refused and/or neglected to avail to the Petitioner/Applicant despite several requests (as pleaded in the Petition and supporting affidavit):*

1. Member of National Assembly Result declaration forms:

(a) Certified copies of the original **Forms 35A** filled in at all the polling stations for Machakos Town Constituency;

(b) A certified copy of the **Form 35B** with respect to Machakos Town Constituency; and

II. Concurrent Elections Results Declaration forms for Machakos Town Constituency (for comparative analysis)

(a) Certified copy of the original **Form 34B**;

(b) Certified copy of original **Form 36B**;

(c) Certified copy of the original **Form 37B**;

(d) Certified copies of the original **Forms 38B**; and

(e) Certified copies of the original **Form 39B's** for Machakos Town Constituency.

(4) THAT the 1st and 2nd Respondents be compelled to supply the Court and the Petitioner/Applicant for scrutiny, all of the following materials distributed to the presiding officers at all the polling stations for Machakos Town Constituency:-

(a) **The inventory of the Member of National Assembly Result Declaration forms (with serialization);**

(b) **The printed copy of the register of voters used during the elections;**

(c) **The marked copy Register;**

(d) **The polling day diaries;**

(e) **The inventory of all the ballot boxes serial' numbers and ballot box seals serials' numbers;**

(f) **All the packets of rejected ballot papers and statements made thereto;**

(g) **All the packets of spoilt ballot papers; and**

(h) **All the packets of counterfoils of used ballot papers (or certified copies thereof) with respect to the Member of National Assembly.**

5. **(Spent)**

6. **(Spent)**

7. **(Spent)**

8. **(Spent)**

2. The Application was supported by the Affidavit of Petitioner sworn on even date and further by a supplementary affidavit dated 27/10/2017. The Application is also supported by the following grounds:-

(1) On the 8th August, 2017, the Member of National Assembly elections were held in Machakos Town Constituency and on 10th August, 2017, the 2nd Respondent announced and declared the 3rd Respondent as the Member of National Assembly Machakos Town Constituency.

(2) The 1st and 2nd Respondents' inaction to provide the information sought as per the letter dated 10/08/2017 by the Petitioner's chief agent Felix Mutua Musau shows the bad faith, mischief and secrecy with which an independent commission which, is supposed to operate with accuracy, verifiability, transparency and accountability, acted and is acting.

(3) One of the grounds in the petitioner/applicant's petition was election results inflation/manipulation at various polling stations.

(4) Another ground by the Petitioner/Applicant linked to that of result manipulation/padding is that of unlawful denial of agents acting on behalf of the Petitioner/applicant in specific polling stations by the 1st and 2nd Respondents the right to enter into the polling stations and the right to confirm and sign declaration **Forms 35A** in respect of the election as mandatorily required by the law.

(5) There is clear result manipulation and the petitioner/applicant has illustrated and particularized voter–turnout disparities across different elective seats with a view to demonstrating that the results of different elections at various polling stations which were conducted simultaneously/concurrently, did not have similar valid vote counts.

(6) That non-production of Forms 35A, 35B and 35C is also part of the cover-up that the Respondents are currently engaged in.

(7) The totality of the forgoing and inevitable conclusion is that the 1st and 2nd Respondents' action and inactions point to a well-planned scheme (between the Respondents) to illegally subvert the will of the Machakos Town Constituency electorate.

(8) The 1st and 2nd Respondents hold public information; which information the Petitioner/applicant as a candidate in an election is entitled to.

(9) The refusal to provide the documentation sought before the filing of the present Petition was a deliberate strategy to frustrate the petitioner/applicant's right to challenge an election process.

(10) The refusal to avail the information sought was a specific plan to cover–up the rampant illegalities and irregularities that were perpetrated by the Respondents.

(11) In order to dispel the foregoing facts or conjecture as the respondents may want to camouflage them a scrutiny of all the election materials including but not limited to, the ballot papers, counterfoils, et cetera, is necessary.

(12) It is in the interests of truth, fairness, justice, accountability and the sovereign will of Machakos Town Constituency electorate that the orders sought be granted.

(13) None of the parties will be prejudiced by the granting of the orders sought which are clearly in public interest.

(14) The reliefs sought are merited and the orders sought will aid this court to expediently determine the present Petition.

3. The 1st and 2nd Respondent swore a replying affidavit dated 16/10/2017 through one Marvin Mungah who was the Returning officer for Machakos Town Constituency in which the claims by the Petitioner were denied in toto and further that no sufficient basis has been laid to warrant an order for scrutiny and recount and that there is no nexus established between the complaints raised by the Petitioner and the intended results for scrutiny since the election had been conducted in a fair and transparent manner without incidents for irregularities or anomalies.

4. The 3rd Respondent swore a replying affidavit dated 12/10/2017 in which he deponed inter alia that he

had been validly elected as the Member of Parliament for Machakos Town Constituency, that scrutiny and recount does not lie as a matter of right and basis must be established from the pleadings and evidence and if required then it should be restricted to specific polling stations where results are disputed, that an order for recount of ballots should be cautiously exercised to prevent the Petitioner from indulging in a roving inquiry with a view to fish materials to invalidate the election.

5. Counsels for the parties filed written submissions. They also relied on the rival affidavits earlier on filed as well as the evidence tendered herein by the parties.

6. It was submitted for the Petitioner that the prayer for scrutiny and recount of ballots cast had been made in the petition and affidavit in support as well as during the presentation of the evidence. It was submitted that the evidence revealed a mismatch and mispostings of votes in some polling stations which discrepancies and irregularities were confirmed by the 2nd Respondent. It was also submitted that several **Forms 35A** were not stamped or signed and it is the wish of the Petitioner that 17 polling stations require scrutiny and are as follows:-

- (1) Machakos Primary – 01
- (2) Kiima Kimwe - 01
- (3) Kyamuthinza - 01
- (4) Machakos Girls rescue centre – 01
- (5) Machakos Girls rescue centre – 02
- (6) Kithaayoni Primary - 01
- (7) Manza Primary – 03
- (8) Katumani – 01
- (9) Ivutini – 01
- (10) Baptist Primary – 01
- (11) Mumbuni Primary – 01
- (12) Katoloni Primary – 01
- (13) Kyangala Primary – 01
- (14) Kasinga Primary – 01
- (15) St Mary's Primary – 01
- (16) Makyau Primary – 01
- (17) Katheka Kai primary – 01

It was further submitted for the Petitioner that the mispostings in seven of the 17 polling stations resulted in one of the polling stations namely Kaseve not being captured in the eventual votes tally and hence there is need for scrutiny. The following authorities were relied upon:-

(1) GATIRAU PETER MUNYA =VS= DICKSON MWENDA KITHINJI & 2 OTHERS [2014] eKLR

(2) JUSTUS MUNGUBU OMITI =VS= WALTER ENOCK NYAMBATI OSEBE & 2 OTHERS – KISII E.P. 1 OF 2008.

(3) ISOE OCHOKI ANDREW MINGATE =VS= IEBC & 2 OTHERS [2017]eKLR

(4) PHILIP MUKWE WASIKE =VS= JAMES LUSWETI MUKWE & 2 OTHERS – BUNGOMA E.P. NO. 5 OF 2013

(5) MERCY ACHIENG MOLA & ANOTHER =VS= RAPHAEL BITTA SAUTI WANJALA & 2 OTHERS [2017] eKLR

7. It was submitted for the 1st and 2nd Respondent that the request for scrutiny has not been properly laid and that even for the admitted mispostings of votes in the seven polling stations have been adequately explained. It was further submitted that as regards the issue of unstamped forms 35A for some polling stations, the same did not prejudice any party since the same was administrative and did not create a statutory obligation. Reliance was placed in the case of **IEBC =VS= STEPHEN MUTINDA MULE & 3 OTHERS - CIVIL APPEAL NO. 219 OF 2013** where it was held that stamping was purely an administrative action incapable of creating a statutory obligation. It was finally submitted for the 1st and 2nd Respondent that the Petitioner seeks to use the exercise of scrutiny to obtain further new evidence and which should be discouraged.

8. It was submitted for the 3rd Respondent that the Petitioner's Application has not passed the specificity test and that mistakes identified would not affect the eventual outcome of the elections and that no sufficient basis has been laid for scrutiny. Reliance was sought in Section 82(1) of the Elections Act and Rules 28 and 29 of the Elections (Parliamentary and County Elections) Petition Rules 2017 as well as cases namely:- **GATIRAU PETER MUNYA =VS= DISKSON MWENDA KITHINJI [2014] eKLR, LEDAMA OLE KINA =VS= SAMUEL KUNTAI TUNAI & 10 OTHERS [2013] eKLR**. It was also submitted that even though the Petitioner had pointed out two polling stations namely Kathome and Kiima Kimwe to have had some problems, the 3rd Respondent conceded the mispostings of results in seven other polling stations whose total votes even given to the Petitioner would not have affected the eventual result since the 3rd Respondent's votes had a wide margin to that of the Petitioner. It was finally submitted for the 3rd Respondent that the application by the Petitioner is intended to indulging in a roving inquiry with a view to fish fresh material which would be prejudicial to the Respondents.

9. I have considered the Petitioner's Application dated 9/10/2017 together with the rival affidavits. I have also considered the submissions of the learned counsels and the authorities cited. I have also considered the evidence adduced herein by the parties. The issue for determination is whether or not the Petitioner has laid sufficient reasons to warrant an order for scrutiny.

10. The issue of scrutiny is provided for under **Section 82 (1)** of the Elections Act No.24 of 2011. The same provides as follows:-

“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 scrutiny of votes to be carried out in such manner as the election court may determine.”

Scrutiny is also provided for under Rule 29 of the Election (Parliamentary and County Elections) Petition Rules 2017 whereby it provides that parties to the election proceedings may apply for scrutiny of the votes for purposes of establishing the validity of the votes cast. Before such an order is granted, the election court has to satisfy itself that there is indeed sufficient reason to grant either scrutiny or recount of votes. The order so allowed should only be confined to the polling stations in which the results are disputed.

The Supreme Court of Kenya in the case of **GATIRAU PETER MUNYA =VS= DISKSON MWENDA KITHINJI [2014] eKLR** laid down the guiding principles for seeking an order for scrutiny and recount:-

(a) *The right to scrutiny and recount of votes in an election 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 is entitled to make a request for a recount and/or scrutiny of vote, at any stage after 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 contest 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 votes is called into question in terms of Rule 33(4) of the Election (Parliamentary and County Elections) Petition Rules.”*

The Supreme Court of Kenya echoed the same sentiments in the case of **NICHOLAS KIPTOO ARAP SALAT =VS= IEBC & 7 OTHERS [2015] eKLR** where it held that a Petitioner must specify the polling stations in respect of which he seeks scrutiny and the materials and documents that he wishes the court to scrutinize and also furnish reasons as to why the said documents should be scrutinized. The court went further to add that the purpose for scrutiny is only for the court to determine the contested issues and not to convert the court into another tallying centre.

It would seem that the rationale for placing stringent conditions for parties seeking orders for scrutiny and/or recount is to ensure that the party seeking such an order is not given a blank cheque to go on a fishing expedition to unearth new evidence in support of his case to the disadvantage and or prejudice of the Respondents.

11. It is noted that the Petitioner herein is seeking for orders in terms of *prayers* 3 and 4 of his Application dated 9/10/2017. As earlier observed, this court did deliver a ruling on the said Application on the 15/11/2017 wherein the said prayers 3 and 4 thereof were duly granted as prayed for by the Petitioner. This court had pointed out that from the manner in which the prayers were couched, the Petitioner appeared to indicate that all the documents sought were needed by him in order to assist him in prosecuting the petition. Indeed the Petitioner had filed the said Application pursuant to the provisions of *Article 35* of the Constitution and *Section 4(1)* of the Access to Information Act No. 31 of 2016 which dealt with the right to access to information. This court did grant the Petitioner the prayers sought and it ordered the 1st and 2nd Respondent to comply forthwith. The 1st and 2nd Respondents duly complied with the court's order and supplied all the documents referred to in *prayers* 3 and 4 of the Application to the Petitioner. The said documents were interrogated at length by the parties herein during the hearing of the petition. It transpired in the evidence herein that other than the two polling stations named by the Petitioner in the petition namely *Kathome* and *Kiima Kimwe*, seven other stations were confirmed by the Respondents to have been affected by the mispostings of votes and these include *Kathome Trading center – station 2*, *Machakos University – 1, 2, and 3*, *Kakinduni Primary School*, *Machakos girls Rescue Center – 1 and 2*, *Kaseve Primary School – 1 and 2* all totaling nine (9) polling stations. All the witnesses were taken thorough in their evidence and cross-examined regarding the irregularities and anomalies on the said polling stations and explanations thereon tendered. Again the witnesses were taken through the statutory **Forms 35A** and **35B** and several answers and views were received from them. The answers as relates to the **Forms 35A** were on *whether the same had been signed by the presiding officers and agents, whether they had been stamped etc.* Since most of the issues regarding the documents in dispute have been raised and tackled during the hearing with some explanations regarding some of them tendered, I do

not now find any reasons for an order for scrutiny at this juncture. What is now remaining is for the parties to sum up their respective cases by way of submissions so that this court could then proceed to determine the petition. During the submissions, the learned counsels for the parties shall then address the court on the validity of the statutory **Forms 35A** and **35B** as well as the regularity or otherwise of the votes cast at the disputed polling stations or the rest within the Machakos Town Constituency. The submissions shall also dwell on whether the elections were conducted in a free, fair and transparent manner and whether it reflected the will of the voters and finally whether the 3rd Respondent was validly elected. Indeed the Petitioner in his evidence stated that he may not be concerned so much on the numbers of the votes but on the electoral process. The materials already presented before this court is sufficient to enable it determine the question as to whether or not the electoral process had been conducted in accordance with the law. Hence I find the Petitioner has not convinced this court that there is need to order for scrutiny.

12. The Petitioner has urged this court to order on its own motion for scrutiny and recount. However, going by the observations above, I find that all the issues in controversy have already been tendered before the court for determination and hence I find there is no need to order for scrutiny. All the documents in dispute have been presented to court and further all the witnesses have given their testimonies which are sufficient for this court to interrogate in the determination of the dispute before it.

13. In the result, it is the finding of this court that the Petitioner's request for an order for scrutiny and recount is not merited. The same is dismissed. Learned Counsels for parties are hereby directed to file their concluding submissions. The costs shall abide the petition.

Orders accordingly.

Dated and delivery at Machakos this 25th day of **January, 2018**.

D. K. KEMEI

JUDGE

In the presence of:

Kituku - for the Petitioner

Kaluu for Anyoka for the 1st and 2nd Respondents

Nyamu - for the 3rd Respondent

Kituva - Court Assistant