



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
ELECTION PETITION NO. 1 OF 2017

LENNY MAXWELL KIVUTI.....PETITIONER

VERSUS

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION (IEBC).....1ST RESPONDENT

THE EMBU RETURNING OFFICER.....2ND RESPONDENT

MARTIN NYAGA WAMBORA.....3RD RESPONDENT

DAVID KARIUKI.....4TH RESPONDENT

RULING

1. For determination is the Motion by the 3rd respondent dated 19th January 2018, which seeks two alternate orders, and directions with relation to the on-going recount exercise. The principal prayer is that there be a scrutiny limited to the re-tallying of all Forms 37A and 37B in respect of all the polling stations within Embu County used during the subject election. The alternative prayer being that the orders made on 18th January 2018 be reviewed to include a scrutiny of Forms 37B for the four constituencies as against all Forms 37A for the 710 polling stations.

2. The grounds upon which the application is premised are set out on the face of the application, as well as in the affidavit in support sworn on 19th January 2018 by the 3rd respondent. In the affidavit the 3rd respondent deposes that the orders made on 18th January 2018 only cover some polling stations, yet at the main hearing it transpired that there were several errors affecting nearly all the candidates, and the scrutiny should therefore take into account all those errors, some of which affected polling stations other than those listed in the ruling of 18th January 2018. He states that the final tally ought to take those errors into account. He proposes, as a way forward, to cure those anomalies, that there be a partial scrutiny of all Forms 37A and 37B in all the four constituencies with a view to identify the said errors and a re-tally of Forms 37B and 37C to correct those errors.

3. The petitioner opposed the application and filed grounds of opposition. It is averred that the application is bad in law and an abuse of the court process, that it is a veiled appeal against the ruling of 18th January 2018, no sufficient reasons have been advanced to warrant a review limited to examination of Forms 37A and 37B used in the election, among others. The petitioner also filed written submissions and a bundle of authorities.

4. The matter was disposed of by way of oral submissions made on 22nd January 2018, by Prof Ojienda for the petitioner, Mr Kibicho for the 1st and 2nd respondents and Mr Marete for the 3rd respondent and 4th respondent. Counsel addressed me extensively on the matters averred in the affidavits of the parties that they represent and pointed me to the law as stated in the authorities that they cited.

5. I understand the 3rd respondent's concern to be that the orders that the court made on 18th January 2018 allowed a scrutiny and recount in only a few of the polling stations in the county, yet at the trial it had been demonstrated that he had lost votes in polling stations that are not going to be subjected to the recount. Similarly, the petitioner is said to have benefited from extra votes in polling stations that are not going to be subjected to the recount. His fear is that the outcome of the recount would be tallied without taking into account those errors, which would be to his disadvantage. He has listed Kamviu Primary School, Kivangua Coffee Factory, Igumo Catholic Church Grounds, Kathangari Nursery School, Iriamurai Primary School, Marimari Primary School and Ugweri Primary School polling stations as the ones that he has in mind.

6. To a certain extent the 3rd respondent is justified in his fears. At paragraph 17 of his affidavit he lists polling stations where he lost votes, being Kamviu Primary School (code 08 Manyatta), Kivangua Coffee Factory (code 022 Manyatta), Igumo Catholic Church Grounds (code 048 Manyatta), Kathangari Nursery School (code 117 Manyatta), Iriamurai Primary School (code 106 Mbeere South) and Marimari Primary School (code 123 Mbeere South). He also points out in paragraph 18 that the petitioner was erroneously awarded votes at Igumo Catholic Church Grounds and Ugweri Primary School (code 034 Runyenjes). It was also stated from the bar that the 3rd respondent had lost votes at Kamutwanjiru Primary School in Mbeere South.

7. I have gone through the ruling I delivered on 18th January 2018 carefully. I note that I omitted to list the four polling stations in Manyatta Constituency where the 3rd respondent lost votes, that is to say Kamviu Primary School, Kivangua Coffee Factory and Igumo Catholic Church Grounds and Kathangari Nursery School polling stations. All these are listed in the prayers in the petition, but were omitted in the Motion the subject of the ruling. The order for recount ought to have included the four. The order does however cover all the streams at the Ugweri Primary School polling station. Regarding the three polling stations in Mbeere South, that is to say Iriamurai Primary School, Marimari Primary School and Kamutwanjiru Primary School, these are not in the prayers in the petition, and that is the basis for their exclusion. I trust that it is in respect of such cases as these latter three polling stations that the 3rd respondent would like a re-tally of all Forms 37A, 37B and 37C to capture all such errors so that the same are corrected at the point the final count is being done.

8. The issue that I need to determine is whether I should order a re-tally of all the 710 polling stations, or just those that are not the subject of the recount. The ruling of 18th January 2018 ordered a re-tally to cover all those polling stations where a recount was ordered. It would therefore not be necessary to have a tally done twice in respect of those polling stations. It would suffice to have an examination done of the tally only in respect of those polling stations where recount has not been ordered.

9. Would an examination of the tally of the Forms 37A in respect of the polling stations where no recount was ordered amount to expanding the matter beyond the scope of the petition? The answer would appear to be in the negative with respect to polling stations in Manyatta and Runyenjes Constituencies given that the petitioner had sought scrutiny and recount in all the polling stations in the two. However, for the other two constituencies, that is to say Mbeere South and Mbeere North, there could be an element of that, for the prayers in the petition touch on only two polling stations in Mbeere South and none in Mbeere North.

10. The petitioner argues that allowing a tally in respect of the polling stations where no recount is to be done would extend the scope of the petition. The petitioner complains about the count. He says he lost votes in the count and tally, hence he prays for the same in the petition. It has turned out, from the recorded evidence, that there were anomalies in the tallying with respect to polling stations that are not the subject of the prayers in the petition, which errors disadvantage the 3rd respondent. The recount and

tallying exercise currently underway is intended to establish what the candidates garnered, and it would provide a perfect opportunity to rectify errors in tallying in respect of polling stations other than those the subject of the prayers in the petition. To argue otherwise would be to turn a blind eye to material that is glaringly evident before the court, and would be tantamount to wishing away an irregularity that is apparent and for which there is opportunity to correct. I believe the 3rd respondent is entitled to the tally that he has asked for, but limited to only those polling stations that will not be the subject of the recount.

11. The application raises questions about directions. Counsel for the 3rd respondent did not urge me on that, and I shall not make any orders thereon.

12. The Motion before me is therefore disposed of in the following terms: -

(a) That the orders made on 18th January 2018 are reviewed so as to include in the list of polling stations within Manyatta Constituency where a recount is to be conducted the following– Kamviu Primary School (code 08), Kivangua Coffee Factory Stream 2 (code 022), Igumo Catholic Church (code 048) and Kathangari Nursery School (code 117), and in respect of Mbeere South the following – Iriamurai Primary School Streams 1 and 2 (Code 106), Kamutwanjiru Primary School (Code 112) and Marimari Primary School (Code 123); and

(b) That the Deputy Registrar is hereby directed to carry out a partial scrutiny of Forms 37A for all polling stations in Manyatta, Runyenjes, Mbeere South and Mbeere North Constituencies, where recount has not been ordered, limited to tallying the figures in those forms with those in Forms 37B and Form 37C;

(c) That the costs of the application shall be in the cause.

DATED, SIGNED and DELIVERED at NAIROBI this 24TH DAY OF JANUARY, 2018.

W. MUSYOKA

JUDGE