



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**ELECTION PETITION NO 20 OF 2017**

**OSCAR OMOKE OCHOLLA.....1<sup>ST</sup> PETITIONER/APPLICANT**

**KARIUKI KAVORE.....2<sup>ND</sup> PETITIONER/APPLICANT**

**ODERA DANIEL TRESVANT.....3<sup>RD</sup> PETITIONER/APPLICANT**

**HILLARY OKUMU MULILIA.....4<sup>TH</sup> PETITIONER/APPLICANT**

**KIRAGU MARGERY NDUTA.....5<sup>TH</sup> PETITIONER/APPLICANT**

**VERSUS**

**INDEPENDENT ELECTORAL AND BOUNDARIES**

**COMMISSION.....1<sup>ST</sup> RESPONDENT**

**MARTIN SIMOTWO.....2<sup>ND</sup> RESPONDENT**

**NIXON KIPROTICH GENERALI KORIR.....3<sup>RD</sup> RESPONDENT**

**IN THE MATTER OF THE CHALLENGE OF THE VALIDITY OF THE MEMBER OF  
NATIONAL ASSEMBLY LANGATA CONSTITUENCY ELECTION, 2017**

**AND**

**IN THE MATTER OF ARTICLE 1,2,4,10,23,38,47,81,82,86,87,88,101 AND 165 OF THE  
CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF SECTION 75 & 80 OF THE ELECTIONS ACT, 2011**

**AND**

**IN THE ELECTION ACT, 201 (ACT NO. 24 OF 2011) AS AMENDED**

**AND**

**IN THE MATTER OF THE ELECTIONS (GENERAL) REGULATIONS, 2012**

AND

**IN THE MATTER OF ELECTION (PARLIAMENTARY AND COUNTY ELECTION)  
PETITIONS REGULATIONS, 2017**

**RULING**

By an Amended Notice of Motion dated the 2<sup>nd</sup> day of October 2017, the Petitioners have sought the following orders:-

1. **THAT** pending the hearing and determination of the petition, this Honourable Court be pleased to issue an order for preservation and safekeeping of all election materials including Integrated Electoral Systems Kits (KIEMS), KIEMS GPRS coordinates transmission history and records of KIEMS kits, Database logs, Ftp logs, system user logs, Firewall configuration, ICT use policy, password matrix policy, service level agreements with all contracted and IEBC service providers, ballot boxes, ballot papers, Forms 35A, polling diaries, all entries and records made by the Presiding Officers, votes cast, all votes/ballot papers including Ballots cast, spoilt, and rejected, and all documents and materials used in the parliamentary election for the member of National Assembly Langata Constituency held on 8<sup>th</sup> August, 2017.

2. **THAT** pending the hearing and determination of the petition, this Honourable Court do issue an order compelling the 1<sup>st</sup> Respondent to supply the Applicants with all Forms 35A and Forms 32A for all the polling stations with respect to the parliamentary election for the member of National Assembly Langata Constituency held on 8<sup>th</sup> August, 2017.

2A. THAT pending the hearing and determination of the petition, this Honourable court do issue an order for scrutiny of all original Forms 35A.

3. **THAT** pending the hearing and determination of the petition this Honourable Court do issue an order compelling the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to deliver into the custody and safe keeping of this Honourable Court as evidence, the ballot boxes, all polling materials including; the written statements made by the presiding officers under provisions of the Elections Act; the printed/hard copy of the voters register used in the election; spoilt ballot papers; all counterfoils; packets of rejected votes, packets of counted votes, polling day dairies used in the parliamentary election for the member of National Assembly Langata Constituency held on 8<sup>th</sup> August, 2017 for the following polling stations:-

1. NCC Social Hall 01
2. NCC Social Hall 03
3. NCC Social Hall 07
4. Karen C Pri Sch 03
5. St. Mathews Hall. 01
6. St. Mathews Hall 04
7. KMTC College 01
8. KMTC College 02
9. Madaraka Pri. Sch 01

10. Madaraka Pri Sch 02
11. Madaraka Pri Sch 06
12. Madaraka Pri Sch 07
13. Madaraka Pri Sch 08
14. Nyayo National Stadium 03
15. Nyayo National Stadium 05
16. Nyayo National Stadium 08
17. Nyayo National Stadium 09
18. Nyayo National Stadium 11
19. Langata Road Pri 04
20. Langata Road Pri 05
21. Langata Road Pri 06
22. Uhuru Gardens Pri 07
23. Uhuru Gardens Pri 08
24. Langata High Sch 05
25. Langata West Pri 04
26. Kongoni Pri Sch 02
27. Kongoni Pri Sch 03
28. Kongoni Pri Sch 04
29. Kongoni Pri Sch 07
30. KPA Staff Quarters 01
31. KPA Staff Quarters 03
32. KPA Staff Quarters 05
33. KPA Staff Quarters 05
34. KEWI South C 01
35. KEWI South C 03
36. KEWI South C 04
37. KEWI South C 05

38. KEWI South C 06
39. MOW Grounds 03
40. MOW Grounds 04
41. MOW Grounds 05
42. MOW Grounds 06
43. MOW Grounds 08
44. MOW Grounds 09
45. MOW Grounds 10
46. KIRDI South C 02
47. KIRDI South C 03
48. KIRDI South C 04
49. Khalsa Pri Sch 02
50. Nyayo Highrise Parking
51. Udungu Society 03
52. St. Jude Church 02
53. St. Jude 07
54. Soweto Resource Centre 01
55. Soweto Resource Centre 05
56. St. Mary's Primary O4
57. Manyatta Village 02.

4. THAT upon the applicant complying with Order 3 above, an order requiring:-

i. A recount of all ballots cast in the listed polling stations with the involvement of the Petitioners/Applicants' and Respondents' agents and Advocates respectively and/or in Langata Constituency for the Parliamentary election on 8<sup>th</sup> august, 2017 for the member of National Assembly Langata Constituency namely:-

1. NCC Social Hall 01
2. NCC Social Hall 03
3. NCC Social Hall 07
4. Karen C Pri Sch 03
5. St. Mathews Hall. 01

6. St. Mathews Hall 04
7. KMTC College 01
8. KMTC College 02
9. Madaraka Pri. Sch 01
10. Madaraka Pri Sch 02
11. Madaraka Pri Sch 06
12. Madaraka Pri Sch 07
13. Madaraka Pri Sch 08
14. Nyayo National Stadium 03
15. Nyayo National Stadium 05
16. Nyayo National Stadium 08
17. Nyayo National Stadium 09
18. Nyayo National Stadium 11
19. Langata Road Pri 04
20. Langata Road Pri 05
21. Langata Road Pri 06
22. Uhuru Gardens Pri 07
23. Uhuru Gardens Pri 08
24. Langata High Sch 05
25. Langata West Pri 04
26. Kongoni Pri Sch 02
27. Kongoni Pri Sch 03
28. Kongoni Pri Sch 04
29. Kongoni Pri Sch 07
30. KPA Staff Quarters 01
31. KPA Staff Quarters 03
32. KPA Staff Quarters 05
33. KPA Staff Quarters 05

34. KEWI South C 01
35. KEWI South C 03
36. KEWI South C 04
37. KEWI South C 05
38. KEWI South C 06
39. MOW Grounds 03
40. MOW Grounds 04
41. MOW Grounds 05
42. MOW Grounds 06
43. MOW Grounds 08
44. MOW Grounds 09
45. MOW Grounds 10
46. KIRDI South C 02
47. KIRDI South C 03
48. KIRDI South C 04
49. Khalsa Pri Sch 02
50. Nyayo Highrise Parking
51. Udungu Society 03
52. St. Jude Church 02
53. St. Jude 07
54. Soweto Resource Centre 01
55. Soweto Resource Centre 05
56. St. Mary's Primary O4
57. Manyatta Village 02.

ii. A re-tally of all election results for the election of the parliamentary election held on 8<sup>th</sup> August, 2017 for the member of National Assembly Langata Constituency.

iii. Scrutiny of all polling materials including; the written statements made by the presiding officers under provisions of the Elections Act; the printed/hard copy of the voters register used in the election; spoilt ballot papers; all counterfoils, packets of rejected votes, packets of counted votes, polling day diaries used in the parliamentary election for the member of

National Assembly Langata Constituency held on 8<sup>th</sup> August, 2017.

5. THAT the Honourable court grants the Petitioners/Applicants Read Only Access relating to permission to copy information relating to the number of servers limited to Langata Constituency.
6. THAT the Honourable court grants the Petitioners/Applicants Read Only Access
  - i. To each biometric electronic appliance used at each voting/polling location to verify voters' identification against the list of registered voters and for the appliances to be forensically imaged to capture, inter alia, metadata such as data files, creation times and data, devices IDs MAC addresses IP.
  - ii. Electronic device(s) used to capture Forms 35A onto the KIEMS system and transmitted.
  - iii. Access to any form of scanning device which saved images onto access local server(s) for onward transmissions.
7. THAT the Honourable Court be pleased to grant the Petitioners leave to file an expert affidavit of Dr. Noah Akala Oduwo.
8. THAT the costs of this application be provided for
9. THAT any other or further orders that this Honourable court may deem fit, just and expedient.

The application is premised on the grounds set out on the body of the same and it's supported by an Affidavit sworn by the 1<sup>st</sup> Petitioner **OSCAR OMOKE OCHOLLA**.

It is opposed by the 1<sup>st</sup> and the 2<sup>nd</sup> Respondents by way of an affidavit sworn by **MARTIN SIMOTWO**, on the 6<sup>th</sup> day of October, 2017. The 3<sup>rd</sup> Respondent has also opposed the same vide grounds of opposition dated the 5<sup>th</sup> day of October, 2017.

The application proceeded before me on the 10<sup>th</sup> October, 2017 when the respective parties made detailed submissions and in a ruling delivered on the 23<sup>rd</sup> day of October, 2017, the court partly allowed the application in the following terms:-

- a. Prayer (1) of the application was allowed.
- b. Prayers 2A and 4 of the application to be revisited, if need be, and on notice.
- c. That all the necessary information from the servers and the KIEMS kit as captured and stored in the SD Card (scan card) be preserved by the Deputy Registrar, Civil Division, to be accessed if need be, under the directions of this Honourable Court.
- d. Prayer 7 of the application is hereby disallowed.
- e. The cost of the application shall abide the outcome of the petition.

In the said ruling, which the court shall refer to as, **Ruling Number 1** for ease of reference, the court found it necessary to defer certain prayers in the application for the reasons that sufficient basis, where an order for scrutiny, recount and/or re-tally has been sought, can only be laid after the court has heard all, or some of the witnesses.

On the 8<sup>th</sup> day of December, 2017, the Court concluded the taking of evidence in this petition and invited the Learned Counsels for the respective parties, to make further submissions with regard to prayers 2A

and 4 of the Amended Notice of Motion, which they did, on the 19<sup>th</sup> December, 2017.

Counsel for the Petitioners adopted his earlier submissions and in addition, itemized the polling stations that were mentioned during the trial and submitted that a strong basis for scrutiny has been laid and an explanation given why the exercise would be important to undertake. They have raised the question of alterations in Forms 35A, incomplete Forms 35A by not having results of some candidates, use of Forms 35A for different stations to declare results for others, variation of results entered in Forms 35A from those in Form 35B, failure by Returning officers to send the results to the portal on time and some polling stations in particular, Kongoni 3 and 4 had similar results.

It was also submitted that some Forms 35A were not signed by agents and the Presiding Officers, and that the polling station diaries were also not signed as required under the law.

For the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, it was argued that no evidence was produced in respect of all the polling stations that have been listed in the application, and that from the evidence, only 14 polling stations have been mentioned and even in those, there is no basis on which the re-tally or scrutiny can be allowed.

On alterations of Forms 35A, Counsel submitted that the reasons for such alterations, were explained by the Presiding Officers. He relied on the evidence of DW9 and DW12 in support of that contention. He cited the case of **Paul Gitenya Vs Timothy Moseti E. Bosire & 2 others (2013)** where the court stated that there is no legal requirement that Forms 35A be without alterations. He contended that in such cases where there are alterations, the results were verified through other means namely the agents and messages from the Presiding Officers.

With regard to the allegations that agents did not sign Forms 35A, it was contended that they did sign and where the forms are not signed, reasons have been given for the failure and/or refusal to do so. That the allegations of chasing away agents from the polling stations is couched in general terms and much of it was hearsay evidence.

It was submitted that transmission of results to the portal is not mandatory for a Member of Parliament. Counsel relied on the **Martha Karua case**. On scrutiny of Forms 35A, it was contended that the prayer is couched in very general terms and it has not outlined the polling stations as required. Counsel cited the case of **Arap Korir Vs IEBC & 7 others (2015)** where the court held that an application for scrutiny must be in specific terms and must outline the stations.

On improvised Forms 35A where it was alleged that forms for certain stations were used to declare results for other stations, Counsel argued that there is nothing illegal or irregular, unless it can be shown that the forms were used for rigging the elections and in any event, the Returning Officer gave a plausible explanation for improvising the said forms for the affected stations namely Uhuru Gardens 14, Madaraka Primary 6,7 and Nyayo National Stadium 11.

On his part, Counsel for the 3<sup>rd</sup> Respondent substantially adopted the submissions by the Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and reiterated his earlier submissions that he made in October, 2017 when the application was first heard.

In addition, he submitted that the discrepancies in Forms 35A were explained by the Returning Officer and the Presiding Officers who were in charge of the affected polling stations.

It was contended that the Petitioners have called for scrutiny and recount in stations that have not been pleaded yet they did not dispute the results at the specific polling stations. That no sufficient basis has been laid for scrutiny, recount and re-tallying of votes.

On transmission of results to the portal, he averred that the same were provisional results and that actual results were those declared by the Returning Officer. It was submitted that the prayer on scrutiny of

KIEMS kit is generalized and no evidence was adduced to support the same.

In rejoinder and on the issue of particularization of the allegations and the stations that scrutiny and recount are sought, counsel for the Petitioners relied on the case of **David Wamatsi Omusotsi Vs Returning Officer of Mumias East Constituency & 2 others (2017) eKLR** in which the Court of Appeal decision of **John Michael Njenga Mutinda Vs Jane Njeri Kahara** was cited and the court stated that an affidavit in support of the petition and that of a witness are an integral part of a petition. Counsel contended that the anomalies and the list of the polling stations are all listed in the affidavit and that the Petitioners testified on those allegations as well as the list of the polling stations.

With regard to the alterations of the results, the court was told that the results ought to be simple, credible and verifiable and that the court should not take the word of the Presiding Officers as the gospel truth yet the agents did not sign the forms. Counsel urged the court to allow the application.

I have applied my mind to the affidavits, the pleadings, the evidence on record and the submissions by the learned counsels. As I had noted earlier on in this ruling, parties herein had made lengthy submissions in October, 2017 when the court made a determination on the other prayers sought in the application, and it would not serve any useful purpose to rehearse the same here.

Before I proceed to consider prayers 2A and 4 of the application, I need to point out that with regard to prayers 5 and 6, this court had made an order for preservation of all the necessary information from the servers and the KIEMs kits as captured, and stored in the SD cards. As I had noted in the earlier ruling, the two prayers are extremely broad requests. It is not entirely clear what information the Petitioners seek to access in those targets. In his earlier submissions, Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had argued that the appliances used were for specific polling stations and that they have various components and therefore, there was need for the applicants to specify the components that they are seeking access of.

These two prayers relate to audit and inspection of the technology system. The applicant has not indicated the experts who will be required to conduct the exercise and in what fields and areas of expertise. Nor is there indication as to which specific polling stations the said inspection is sought. Parties will recall that the Court dealt with prayer 7 of the Application in which, the petitioners had sought leave to file an expert Affidavit or Dr. Noah Akala. This is among the prayers that the Court disallowed. The Court would imagine that the evidence of this witness, had it been allowed, would have focused on prayers 5 and 6 of the application. That being the case, and coupled with the fact that the Petitioners did not identify the components that they are seeking access of, the two prayers are disallowed.

The only pending prayers for determination are 2A and 4 and looking at those two prayers, the issues for determination are whether a basis has been laid for an order of:

1. A recount of all ballots cast in the polling stations listed in the prayer 4(i) of the application.
2. A re-tally of all election results, for the election of the parliamentary election held on 8<sup>th</sup> August 2017 for member of National assembly Langata Constituency.
3. Scrutiny of all polling materials as particularized under prayer 4(iii).

The law on scrutiny and recount is now well settled.

**Rule 28 of the Elections (Parliamentary and County Elections) Petition Rules** provides that:

**“A petitioner may apply to an election court for an order to:**

**a. Recount the votes**

**b. Examine the tallying, if the only issue for determination in the petition is the count or tallying of the votes received by the candidate.”**

**Rule 29(i)** provides that:

- i. The parties to the proceedings may apply for scrutiny of the votes for purposes of establishing the validity of the votes cast.**
- ii. On an application under sub rule (i), an election court may, if it is satisfied that there is sufficient reason, order for scrutiny or recount of the votes.**

**Section 82 of the Elections Act, 2011** provides as follows on the issue of scrutiny:

- 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 a manner as the election court may determine.**
- 2. On an application under subrule (1), an election court may, if it is satisfied that there is sufficient reason, order for scrutiny or recount of the votes.**

**Rule 29 (4) of the Elections (Parliamentary and County Elections) Petition Rules** provides that the scrutiny and 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 for 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 spoilt votes.
- 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.
- k. The statements showing the number of rejected ballot papers.

It is clear from the above provisions that the principle requirement for scrutiny, whether of votes or other election materials is that, the court must be satisfied that there is sufficient reason to direct it and it must relate to the polling stations where the results are disputed.

The supreme court in the case of **Gatirau Peter Munya vs Dickson Mwenda Kithinji and 2 others (2014) eKLR**, laid down the guiding principles on recount and scrutiny. The court at paragraph 153 stated;

**“(153) From the foregoing review of the emerging jurisprudence in our court, 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) Petitions 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 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 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 terms of Rule 33(4) of the Election (Parliamentary and County Elections) Petition Rules.”**

It is clear that pursuant to **Rule 29(4) of the Elections (Parliamentary and County Elections) Petition Rules 2017**, a petitioner ought to have demonstrated to the election court that he had disputed the results declared at the polling stations in respect of which he is now seeking scrutiny.

In a parliamentary election like the one before me, the votes are counted at the polling stations and the results are recorded in forms 35A after which they are forwarded to the constituency tallying center where the results for all the polling stations are tallied.

If the results on forms 35A were not disputed, the presumption is that they were accurate. If the results declared at the tallying center were accurate, such results can only be challenged by seeking a re-tallying of the results.

**Under section 80 of the Elections Act**, a person who was disputing the results at any polling station should be expected to raise his or her concerns at the said polling station. Such a person has a right to have the votes rechecked and recounted.

In my view, a party seeking recount and scrutiny of votes is required to identify the specific polling stations in respect of which the results are disputed. It should also be noted that when considering an application for scrutiny and recount, care must be taken not to expand the scope of the petition by introducing new matters that are not pleaded. This is in line with the cardinal principle that parties are bound by their pleadings. It therefore follows that, any evidence adduced must be evidence that supports the pleadings as drawn.

An order for recount and scrutiny is not a highway for fishing for new evidence. See the case of **Philip Osore Ogutu vs Michael Aringo(2013) eKIR** where the court stated;

**“There would be several reasons why scrutiny should not be ordered as a usual course. First, there is need to guard against an abuse of the process. I would also agree with Mr. K’Opot that a party must not be allowed to use scrutiny as a fishing expedition to discover new or fresh evidence. It would be expected that a party filing an election petition is, from the outset, seized of the grounds, facts and evidence for questioning the validity of an election. And where the evidence is unclear then a party can, on an application to court, seek and obtain better particulars of that evidence from its adversary. But it would be an abuse of process to**

**allow a party to use scrutiny for purposes of chancing on new evidence. Scrutiny should not be looked upon as a lottery”.**

Arising from the above observation by the court, a request for scrutiny and recount should be distinguished from that for further and better particulars, where the applicable legal principles are different.

The court has looked at the petition and only fifteen (15) polling stations are pleaded which are:

1. Kirdi 4
2. Madaraka 7
3. Mow 9
4. Mow 5
5. Kewi 5
6. Karen C 3
7. Kongoni 2
8. Kongoni 3
9. Kewi 3
10. Mow 10
11. Kongoni 4
12. KPA Staff Quarters 1
13. KPA Staff Quarters 3
14. KPA Staff Quarters 5
15. St Mary's Primary 4

But in the Amended Notice of Motion, a total of 57 polling stations have been listed which therefore, means that, borrowing from the wisdom of the supreme court in the **Peter Munya case**, the court is only bound to consider the 15 polling stations that are pleaded.

On prayer 2A, I note that it seeks for an order for scrutiny of all original forms 35A. There are no particulars of the polling stations for which the forms are sought to be scrutinized. It is just a general prayer for scrutiny that does not target any particular polling station.

In the case of **Nicholas Kiptoo Arap Korir vs IEBC and 7 others, Petition No 23/2014** referred to, in the **Munya case**, the Supreme Court remarked

**“... an application for scrutiny and recount, must be couched in specific terms and clothed with particularity as to which polling stations within a constituency are to attract such scrutiny ..., otherwise a prayer pointing to a constituency but lacking in specificity is not to be entertained(Emphasis supplied) ”.**

In view of the foregoing, I find that prayer 2A does not comply with the above principle and it is hereby

disallowed. The same fate befalls prayers 4(ii) and 4(iii) on account of similar considerations.

With regard to prayer 4(i), the question that arises is whether there is sufficient basis laid for recount in the 15 stations pleaded in the petition. It is important for the court to consider the allegations in those stations:

- a. Kongoni 3 and 4, the presiding officers returned the same number of votes for all the candidates.
- b. Uhuru gardens 14, Nyayo National Stadium 11, Madaraka 6 and 7, forms 35A were not in the prescribed form.
- c. Karen C 3, Kongoni 2, Kongoni 3, Kewi 3, Mow 9 and 10 there were discrepancies in Forms 35A and 35B.
- d. St. Mary's primary school 4 and Kirdi 4, the ballot boxes arrived at the tallying center unsealed.
- e. Kirdi 4, Kewi 3 and KPA, the agents were chased away and counting never proceeded.
- f. Kongoni 2, Kongoni 3, Kewi 3, Mow 9 and 10, votes were understated and entries in forms 35A and 35B are different.

Evidence has been adduced both by the petitioners and the respondents. Having examined the said evidence, the duty of this court is to make a finding whether the petitioners have laid a sufficient basis to warrant the order of recount.

It is noted that the first and second respondents have been able to counter the allegations raised by the petitioners relating to improvised Forms 35A for Uhuru Gardens 14, Nyayo National Stadium 11, Madaraka 6 and 7.

The court has also compared the results in forms 35A and those in 35B in the stations disputed in (c) above and in some of those stations, there are no discrepancies and more particularly Karen C 3, Kongoni 2 and Kewi 3 but some discrepancies have been noted in some of the stations. On the other hand, the court appreciates that in some of the polling stations, like Kongoni 3 and 4 similar results were posted, for the respective candidates in both stations.

Due to the alleged similarities and discrepancies, it is imperative that there be an order for recount of votes cast in the following stations:

1. KPA staff quarters 1
2. KPA staff quarters 2
3. St. Mary's primary school 4
4. Mow 5
5. Kongoni 3
6. Kongoni 4

The recount shall be restricted to the ascertainment of the number of the valid votes cast at each polling station and assigned to each candidate and any unaccounted for votes.

The exercise shall be undertaken under the supervision of the Deputy Registrar of this court. Each party shall be represented by one agent during the exercise.

The Deputy Registrar shall file a report within 5 days of the completion of the exercise which report shall form part of record of proceedings.

The exercise shall commence promptly on the 29<sup>th</sup> January 2018 at 9:00 am by which date the 2<sup>nd</sup> respondent should have availed all the necessary materials to the Deputy Registrar.

The Deputy Registrar shall deal with the administrative arrangements necessary in liaison with the 2<sup>nd</sup> Respondent and the parties herein.

Any dispute arising in the course of the exercise which may require resolution by the trial judge shall be placed before the judge as soon as practicable.

There shall be a mention before the Deputy Registrar on 24/01/2018 at 9:00 am for further necessary directions.

It is so ordered.

**Dated, Signed and Delivered at Nairobi this 22<sup>nd</sup> day of January, 2018.**

.....

**L. NJUGUNA**

**JUDGE**

**In the presence of**

.....For the Petitioners.

.....For the 1<sup>st</sup> and 2<sup>nd</sup> Respondent.

.....For the 3<sup>rd</sup> Respondent.