



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA

ELECTION PETITION NO.1 OF 2017
ELECTION FOR MEMBER OF NATIONAL
ASSEMBLY, KABUCHAI CONSTITUENCY

EDWARD TALE NABANGI.....PETITIONER

VERSUS

JAMES LUSWETI MUKWE.....1ST RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDARIES

COMMISSION (IEBC).....2ND RESPONDENT

BENSON ESUSA LUMWAGI.....3RD RESPONDENT

RULING

Background

1. **Edward Tale Nabangi** (Petitioner) filed a Petition on the 5th of September 2017, against **James Lusweti Mukwe** (1st Respondent) who was declared the winner in the 8th of August 2017 General Elections, the **Independent Electoral and Boundaries Commission** (2nd respondent) and the Returning Officer **Benson Esusa Lumwagi** (3rd Respondent).
2. The Petitioner challenged the election on various grounds; breach and violations of the Election Act, the Elections (General) Regulations 2012 and principles of the electoral process as set out in the Constitution.
3. Violations listed included; lack of voter education, denial of voters' rights, massive irregularities and/or electoral malpractices, the elections not having been simple, accurate, verifiable, secure, accountable, transparent, open and prompt.
4. Further the Petitioner also contended that the voting, counting, and tallying of the results were biased, inaccurate, unaccountable and geared towards favouring the 1st respondent.
5. Among the 10 prayers sought for in the Petition, 3 were on scrutiny and recount, in that the Petitioner

sought to have as prayers a), b) & c)

- **There be a scrutiny and audit of the system and technology used by the 2nd Respondent in the Kabuchai Constituency Member of National Assembly election including but not limited to the KIEMS Kit, the server(s) and website/portals.**
- **There be a scrutiny and recount of ballots cast in Kabuchai Constituency election for Member of the National Assembly in the elections held on the 8th of August 2017.**
- **There be a scrutiny and audit of all the returns of Kabuchai Constituency elections for Member of National Assembly in the elections held on 8th August 2017 including but not limited to forms 35A and 35B.**

6. At the close of the case, the court having received the evidence of all parties and their witnesses. the Petitioner informed the Court that he saw no need against the evidence on re ord to pursue his prayers for scrutiny and recount.

7. It is worth noting that before closing the case for the 2nd and 3rd respondents, an application was filed in court on 16th November 2017, by the 2nd and 3rd Respondents, seeking to have the Court order the officer in charge of Nalondo Police Station, deliver for inspection, the Ballot Boxes, form 35A, KIEMs Kit, QR Code and Polling Station diary relating to Bwake Primary Polling Station 2 of 2, for Member of National Assembly as the same were being held by Nalondo Police Station since the 9th of August 2017 following allegations of tampering of the same by the Polling Officer.

8. The said application was prosecuted by the parties and a ruling delivered on 15th of December 2017.

1st Respondent's Application

9. The current application was filed on 18/12/2017 by the 1st respondent, after close of the case and indication by the Petitioner of the fact that he will not pursue his prayers on scrutiny and recount. The same is brought pursuant to Section 82(1) of the Elections Act and Rules 28, 29(1), (3) and (4) of the Election (Parliamentary County Elections) Petitions Rules, 2017.

10. The application seeks for the following orders that;

a). The Honourable Court be pleased to order that there be a scrutiny of the Ballot Boxes, votes cast, copies of the Register of voters, the Results of voters, the Results of the Polling Stations, any written complaints, packets of spoilt votes, counterfoils if any, polling day diary, and all the seals of the ballot Boxes for Bwake Polling Station 1 and 2, in respect of the election of the member of the National Assembly Kabuchai Constituency.

b). The scrutiny Report of the Deputy Registrar High Court be filed into the record of this Petition within such a period as this Court will be pleased to direct for further orders of the Court.

c). Costs be provided for.

11. The application was predicated upon the grounds that the Petitioner had alleged tampering with electoral materials, irregularities, malpractice and statistical inconsistency in the electoral material at Bwake Polling Station, and had pleaded and requested for scrutiny in the Petition as prayers a, b & c and that if carried out the exercise of scrutiny would settle the issue as to who between the 1st respondent and the Petitioner garnered more votes, and confirm or negate the other allegations.

12. In the affidavit in support of the application the 1st respondent contended that in pleadings, affidavits

and testimonies of the Petitioner and his witnesses there were allegations that the results of Bwake Polling Station 2 of 2 were not announced nor entered in form 35B, despite the votes having been cast, counted and ballot box sealed.

13. Further, that it is not in dispute that before reaching the Tallying Centre the said ballot Boxes for Bwake station 2 of 2 were found in possession of the Presiding Officer in circumstances that caused commotion between the candidates, their supporters and the Presiding Officer, which forced the Returning Officer to call the Police from Nalondo, who compounded the voting materials which materials have since remained in their custody to date.

14. Further, that the Petitioner had contended that if the said results had been tallied, he would have won yet the 1st respondent believes that even with the tallying of the said results he would still have won.

Responses

15. The 2nd and 3rd respondents did not respond to the application either in support or opposition nor make any submissions. On the other hand, the Petitioner opposed the application by filing a Replying affidavit on the 20th of December, 2017.

16. The Petitioner, in his objection took the position that the application is scandalous, frivolous, vexatious, an abuse of Court process and an attempt to delay the fair determination of the Petition; for the reason that the 2nd and 3rd respondents had filed a similar application where the 1st respondent participated and which application was determined and therefore the principle of *res judicata* applies, that indeed according to his evidence and that of his witnesses the Presiding Officer for Bwake Polling station had taken the ballot boxes for the elections of 8th August 2017 including those of Member of the National assembly for Kabuchai Constituency to his house to do 'some balancing' and was arrested and the ballot boxes and election materials for Bwake Polling Station 2 & 2 taken by the police, the Petitioner believes that the ballot boxes for the two polling station were interfered with by the applicant's agents, servants and the said Presiding Officer.

17. Further, that seeking to have the said materials obtained from Nalondo Police is to introduce new evidence in this Petition.

Submissions

1st respondent's submissions

18. **Mr. Wasilwa**, Counsel for the 1st respondent submitted that this Court has the discretion to make the orders sought, for purposes of;

- assisting the Court to investigate the allegations of irregularity and other alleged breach of the Law and
- *understanding the voting process and gain insight to the same (in Kabuchai Constituency)*
- *determining the actual votes cast.*
- That Without scrutiny of the materials the court would be denied an evidence in resolving the quantitative and qualitative issue in the Station subject matter
- judging the integrity of the process by scrutinizing several documents, the polling day diary & Form 35A
- getting an opportunity to assign probity and determine the issue with finality as to who among the two garnered the majority votes given the small margin between the two

19. that the Principle of *res judicata* and Section 7 of the Civil Procedure Act are not applicable in Election Petitions.

Petitioner's Submissions

20. Mr. Ndambiri for the Petitioner in objecting to the application contended that;

- after the close of evidence by the parties and their witnesses, the Petitioner formed the opinion that scrutiny was unnecessary and thus did not pursue his earlier intended prayers for the exercise
- That in the earlier application by the 2nd and 3rd respondent seeking for release and examination of the Election material for Bwake Polling Station 2 this Court observed that there was no guarantee that the materials subject matter had not been tempered with since they have not been in the custody of the 2nd respondent
- there is no evidence before Court that the votes for Bwake Polling Station 2 of 2 were counted, nor Form 35A had been signed by the Presiding Officer or agents as the returning Officer confirmed that he did not receive any Election materials from the said Polling Station
- That since the 1st respondent had been heard on a similar issue, arising from the same cause, the principle of *res judicata* is applicable as the principle touches on all matters in a Court of Law
- Application is an abuse of court process in view of the fact that the 1st respondent had participated in the earlier application
- There are no materials to be scrutinized
- Even if an order were to be made, the materials being sought for are not necessarily safe and there is no certainty that they are the actual materials from the election of 8th of August elections

Analysis and determination

21. Having considered the application, the replying affidavit and submissions by Counsel the issues for determination are;

- i) Whether or not the Principle of *Res judicata* is applicable?**
- ii) Whether an order for scrutiny may be made nevertheless**
- iii) If (ii) is positive whether to make such an order**
- iv) costs**

Applicable Statutes and Case law

22. The applicable laws are set out in Section 82(1) of the Election Act 2011 & Rules 28 & 29 of the Elections (Parliamentary and County Elections) Petitions Rules 2017.

Section 82(1) of the Election Act states:

“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.”

Rules 28 provides

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

(i) recount the votes, or

(ii) examine the tallying, if the only issue for determination in the petition is the count or tallying of votes received by the candidates

Rule 29 provides

“(1) The parties to the proceedings may apply for scrutiny of the votes for purposes of establishing the validity of the votes cast.

(2) On application under sub-rule (1), an election court may, if it is satisfied that there is sufficient reason, order for scrutiny or recount of the vote.

(3) The scrutiny or recount of votes ordered under sub-rule (2) shall be carried out under the direct supervision of the Registrar or Magistrate and shall be subject to the directions the election court gives.

(4) The scrutiny or recount of votes in accordance with sub-rule (2) shall be confined to the polling stations in which the results are disputed and may include the examination of —

a) the written statements made by the returning officers under the Act;

b) the printed copy of the Register of voters used during the elections sealed in a tamper proof envelope;

c) the copies of the results of each polling station in which the results of the election are in dispute;

d) the written complaints of the candidates and their representatives;

e) the packets of spoilt ballots;

f) the marked copy register;

g) the packets of counterfoils of used ballot papers;

h) the packets of counted ballot papers;

i) the packets of rejected ballot papers;

j) the polling day diary; and

k) the statements showing the number of rejected ballot papers.”

23. In *Gatirau Peter Munya V Dickson Mwenda Kithinji & 2 Others* Supreme Court Petition No. 2B of 2014 the Supreme Court gave guiding principles on the subject as follows:

***“The trial court is vested with the discretion under Section 82(1) of the Election Act to make an order on its own motion for a recount or scrutiny of voted 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.*”**

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.

24. Similarly the Supreme Court of India in **Arikala Narasa Reddy Vs Venkata Ram Reddy Reddygari & Another**; Civil Appeals Nos. 5710 – 5711 2012 held that the Court’s discretion on recount should not enable the Petitioner to go on a roving inquiry with a view to fish material to invalidate the election. The Party should plead his case with precision.

25. In **Gideon Mwangangi Wambua & Another Vs I.E.B.C. & 2 Others (Mombasa) Election Petition No.4 of 2013** the Court was of the following view;

“The aim of conducting a scrutiny and recount is not to enable the Court unearth new evidence on the basis the Petition could be sustained. Its aim is to assist the Court to verify allegations made by parties to the Petition which allegation 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 for such an order in the Petition. The Petitioner ought to set out his case with sufficient clarity and particularly and adduce sufficient evidence in support...”

26. In **Charles Ong’ondo Were Vs Joseph Oyugi Magwanga & 3 Others (Homa Bay) Petition No. 1 of 2013**, the court was of the view that scrutiny may be ordered even where a basis has not been laid but where the margin of loss is narrow. In **Hassan Ali Joho V Hothan Nyange & Another, (Mombasa) Election Petition No. 1 of 2005** the court ordered for scrutiny in order to facilitate an expeditious disposal of the election Petition.

27. The authorities cited lay down principles to be considered in arriving at a decision whether or not to allow scrutiny. This case however is peculiar and its circumstances are worth considering before arriving at a determination.

28. This court, made a finding in an earlier ruling in this matter; that the integrity of the Election materials in custody of a ‘third’ party (read the Police), in the absence of evidence or assurances cannot be authenticated and may not be of any evidential value. The said ruling remains unchallenged. The earlier application related to the same facts and was canvassed by all parties in this petition. Isn’t the current application then subject to the principle of ***res judicata***?

29. No doubt Election Petitions are governed by the Election Act and the Election (Parliamentary and County Elections) Petition Rules. It is also true that the two do not specifically address the principle of ***res judicata*** and that the said principle is capture by Section 7 of the Civil Procedure Act.

Res judicata is a legal principle applied in Civil & Common Law jurisdictions. It is a principle meant to prevent abuse of court process, multiple decisions on similar issues injustice and unnecessary confusion.

Notable also is that there is no provision in the Election Act or the Rules barring reference to the Civil Procedure Act, where the two are silent.

Indeed, in my view the principle of ***res judicata*** resonates well with the objective of the Election Rules to be found in Rule 4

“The objective of these Rules is to facilitate the just, expeditious, proportionate and affordable resolution of election petitions.

Further, I associate myself with the sentiments of Ougo J in **Lydia Mathia -v- Naisula Lesuuda & Independent Electoral & Boundaries Commission Election (Nairobi) Petition 13 of 2013** that;

“... The Election Act has rules that must be complied with but where it is silent any (High)

Court having Jurisdiction is at liberty to fall back and be guided by the provisions of the Civil Procedure Act and Rules.....”

I therefore agree with the Petitioners counsel Mr. Ndambiri that the principle is applicable herein.

30. Scrutiny is an exercise aimed at assisting the Court interrogate the allegations made such as irregularities, illegalities and malpractice etc. and secondly establishing whether the results as declared were correct.

31. In my considered opinion none of the above can be achieved in the circumstances of this case for the reasons that;

i) The materials sought to be subject of scrutiny are not only alleged to have been tampered with, the same have not been in the safe custody of an agency mandated by law to ensure their safety, security and integrity;

ii) The materials have been in custody of the Police an agency which has no mandate to ensure integrity of the materials, neither is there evidence that the materials were so secured in any event;

iii) No evidence was led to negate the allegations and evidence of tampering.

32. As observed earlier no doubt the results of Bwake Polling Station 2 of 2 is an issue and the victory/loss margin between the parties is very narrow, ordinarily therefore an order for scrutiny would have been most efficacious as seen from authorities quoted above however, in the circumstances of this case and against the background set above, I am of the opinion that there are no materials within the safe custody of the 2nd Respondent. or anywhere else capable of being scrutinized.

Secondly the application must fail as the principle of *res judicata* is applicable and is a bar.

To order for such an exercise will be most unreasonable, an exercise in futility, unjust & unfair, expensive and a total waste of time and resources.

33. As for Bwake station 1 of 2 no evidence was led in regard to this polling station. I find no basis to make an order either for scrutiny or recount of the votes cast or the election materials.

34. The Application must fail with costs to the Petitioner.

DATED and DELIVERED at BUNGOMA this 23rd day of January 2018

ALI-ARONI

JUDGE