REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

THE ELECTIONS ACT 2011

ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS

PETITIONS) RULES 2017

ELECTION PETITION NUMBER 1OF 2017

JEREMIAH NYANGWARA MATOKE……..…….....…...…PETITIONER

VERSUS

1. THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION

2. THE RETURNING OFFICER

3. ALFAH MIRUKA ONDIEKI …….…....….RESPONDENTS

RULING

1. At the close of the hearing of this petition, the applicant/petitioner herein, **JEREMIAH NYANGWARA MATOKE**, filed a Notice of Motion dated 11th December 2017 pursuant to **Article 35, 38, 48, 81, 82, 86 and 88 of the Constitution of Kenya, 2010** in which he sought the following orders:

1. Spent.

2. That this honourable court be pleased to order for scrutiny of Forms 35A in the ballot boxes and the data, results posted in the 1st Respondent's website/portal for elections held on the 8th August 2017 for Bomachoge Chache Constituency in the following polling stations;

a. Tendere Primary School Polling Station 3 of 3.

b. Nyamonyo Farmers' Cooperative Society Polling Station 1 of 1.

c. Getare Primary Polling Station

d. Kebire Primary School 1 of 1

e. Bomachoge Ogembo Ne Bus Station 1 of 2

f. Riachoga Primary School 1 of 130

g. Nyakenyerere Primary School 1 of 1

h. Nyansara Farmers Primary School 1 of 1

j. Mochorwa Primary School 2 of 2

j. Nyabioto Primary School 2 of 2

k. Kimai Primary school 2 of 2

i. Nyamasege Primary school 2 of 2

m. Moogi Primary School

n. Rianyakwara Primary School 1 of 2

o. Nyansara Primary School 1 of 3

p. Nyagesa Primary School 2 of 3

q. Tunta Primary School 1 of 1

r. Nyamboga Primary School 1 of 1

s. Itabago Primary School 1 of 1

t. Kegege Primary School 2 of 2

u. Egutonto Health Centre 1 of 1

v. Sani Tea Buying Centre 1 of 1

w. Kerongo Tea Buying Centre 1 of 1

x. Nyabiobo Primary School 2 of 2

y. Nyaburumbasi Primary School 2 of 2

z. Riabisimba Tea Buying Centre

a. Kebere Primary School 1 of 1

b. Nyamonye Farmers' Co-operative Society 1 of 1

bc. Nyamacha Primary School 1 of 2

cd. Sengera Girls High School 1 of 2

de. Riteke Primary School 1 of 2

ef. Nyataro Primary School 1 of 1

fg. Gakuro Primary School 1 of 1

gh. Nyamaunde Primary School 2 of 2

hi. Nyamaunde Primary School 2 of 2

ij. Nyansara Primary School 1 of 1

jk. Rianyakwara Primary school 1 of 1

3. That this Honourable court be pleased to order for scrutiny of the election materials under 2 (a) to (kk) above including:

i. Serial numbers of all Form 35A's for those polling stations.

ii. All Forms 35As not signed by agents.

iii. All Forms 35As not stamped with 1st Respondent's official stamps.

iv. All Forms 35As not bearing security water mark features

v. All Form 35A with wrong figures which are not tallying.

vi. All Form 35As with alterations.

vii. All Form 35A that are not signed by any agent.

viii. All Forms 35A that are not signed by Presiding Officials and/or their deputy (ies).

4. That this honourable court be pleased to order for the scrutiny and audit of the results of Forms 35As and data posted in the 1st respondent's website/portal from Parliamentary elections Bomachoge Chache Constituency for the elections held on the 8th August 2017.

5. Upon scrutiny under (2) above, the registrar of this court to submit a report of this Honourable Court with copies to the parties herein.

6. Costs of the application do abide the outcome of the petition.

2. The application is premised on the grounds, *inter alia*, that the applicant had laid a basis for the scrutiny of the materials used in the impugned elections that culminated in the declaration of the 3rd respondent as validly elected Member of Parliament for Bomachoge Chache Constituency.

3. The application was supported by the applicant's affidavit dated 11th December 2017 in which he reiterates the grounds outlined in the body of the application and avers that he had, in his petition, raised several issues regarding the many defects in Forms 35A used in the said election that made the outcome of the said election questionable and that the 1st and 2nd respondents had admitted some of the defects. In this regard the applicant claimed that forms 35A from atleast 24 polling stations that were exhibited in the affidavit of his witness, one **Ben Mayaka,** did not bear the official IEBC rubber stamp even though the 2nd respondent testified that all the forms 35A from all the 89 polling stations bore the official IEBC rubber stamp.

4. He further avers that the forms in his possession bore no security features/marks contrary to the 2nd respondent's claim that all the 89 forms 35A he had produced in court bore the requisite security features. The applicant's case was that it would therefore be necessary and prudent to have access to the forms 35A in the ballot boxes so as to compare the same with the forms produced in court in order to establish which forms are genuine.

5. The applicant further states that despite the respondent's claim that all the forms 35A were signed by the respective presiding officers and their deputies, the said forms in respect to Ntamocha Primary school.

2 of 2 and Nyamiobo Primary School 1 of 1 were not signed by the presiding officers or their deputies and that it was therefore prudent to scrutinize the forms 35A in the ballot boxes to ascertain the actual position.

6. The applicant highlighted Nyakoiba Primary School 1 of 2 polling station as the place where the 1st and 2nd respondents confirmed that seals on the ballot boxes were broken and argued that it was important for the court to ascertain/confirm if the results in the said ballot box were genuine. It was the applicant's case that the discrepancies complained of had the overall effect of undermining the accuracy of the results for Bomachoge Chache Constituency and thus the need for scrutiny.

7. In the applicant's written submissions to the application, he argued that even though the forms 35A attached to his affidavit contained the same information/results as the forms posted in the 1st respondent's website and the 1st and 2nd respondents' replying affidavits, some of the forms in his possession were not stamped, bore no security features and lacked the signatures of the polling officials thereby raising the question of the actual forms that were used in announcing the results for Bomachoge Chache Constituency. It was the applicant's argument that only the material contained in the ballot boxes could give the court the true picture and assist it confirm the validity of the information in the website and the declared results.

8. The applicant further argued that a prayer for scrutiny of the forms posted in the portal/website of the 1st respondent will assist in confirming which materials were used in announcing the results. The applicant cited the provisions of **Article 35 of the Constitution and the Access to Information Act 2016** in support of his argument that he was entitled to access the information contained in the ballot boxes and the 1st respondent's website. He also relied on the decision in the cases of **William Maina Kamanda vs Margaret Wanjiru Kariuki and 2 Others [2008] eKLR** herein it was held:

> ***"It is now well established that an order of scrutiny can be made at any stage of the hearing before final judgment whether on the courts own motion or if a basis laid requires so, it can be made if it is prayed in the petition itself as is the case in this petition or when there is ground for believing that there were irregularities in the election process or if there was a mistake or mistakes on the part of the Returning Officer or other election officials."***

9. He further relied on the Supreme Court's decision in the case of **Nathif Juma Adam vs Abdi Khaim Osman Mohamed and 3 Others [2014] eKLR** wherein the apex court observed:

> ***"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 petitions; and whether a sufficient basis has been laid- to warrant the grant of the application for scrutiny"***
>
> ***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 the possible scrutiny would have been already signaled 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; foreshadowing of such an application should have been embodied in the main lines of pleadings, which mark our terrain of any legitimate electoral contest."***

10. The applicant also cited the Supreme Court's decision in the case of **Gatirau Peter Munya Vs Dickson Mwenda Kithinji & 2 Others [2014] eKLR** wherein the guiding principles for scrutiny in election petitions were outlined:

1st and 2ndRespondents' Response and Submissions

11. The 1st and 2nd respondents opposed the application through the replying affidavit of Amos Nyongesa

Chilai dated 18th December, 2017 who avers that he declared the 3rd respondent the winner of the Bomachoge Chache parliamentary seat in the 8thAugust, 2017 elections after he garnered 19,639 votes against his closest challenger, the applicant herein who garnered 4,279 votes. He further avers that the applicant has not laid any basis for the scrutiny and states that the application is therefore speculative and based on distorted facts as some of the documents that the applicant claims lacked stamps, signatures and security features were actually expunged from the court record. He further confirms that all the forms 35A that he attached to his affidavit in response to the petition were properly authenticated and contained accurate results that had not been objected to or disputed by the applicant or his agents at the respective polling stations.

12. On the applicant's claim that there were discrepancies in the serial numbers on the forms 35A, the 2nd respondent stated that there was no anomaly in the said forms as the presiding officers in each polling station was issued with one booklet of forms 35A and that each booklets had 6 counterparts/leaflets each bearing a different and unique number.

13. The 1st and 2nd respondents' case was that all the forms 35A were duly signed and stamped with the official IEBC rubber stamp and further that stamping of the forms was neither a mandatory requirement nor a basis for a request for scrutiny. They also submitted that the big margin between the votes garnered by the 3rd respondent and the applicant was a critical factor to be considered in the application for scrutiny.

The 3rd respondent's response and Submissions.

14. The 3rd respondent opposed the application through his replying affidavit sworn on 15th December 2017 wherein he avers that the application introduces new grounds that were not covered in the petition in which the results announced through the forms 35A were not disputed. He also avers that some of the forms 35A on which the application for scrutiny was grounded had been expunged from the court record in a ruling delivered on 21st November, 2017.

15. He further states that the 1st and 2nd respondents filed and served all the forms 35A and 35B that were used in the impugned elections and that the applicant could not therefore be seen to be asking for scrutiny of forms that were already in his possession. He also states that the applicant has not specified which forms were unstamped, unsigned, lacked security features or had no serial numbers so as to justify his application for scrutiny. He contends that the applicant is merely engaging the court in a 'fishing expedition' in view of the fact that there was no polling station in which the applicant had disputed the declared results. He reiterates that the court cannot make a blanket order for scrutiny of all election materials where no specific evidence has been adduced to show how the results were affected by the alleged anomalies.

16. The 3rd respondent contends that no agent appointed by the applicant or his political party had sworn any affidavit challenging the results declared at the various polling stations and that in fact, one Joel Nyandoro Oyaro, an agent of the applicant's political party, signed form 35B that collated all the results from all the polling stations. According to the 3rd respondent, the applicant's party agent's signature on form 35B was a clear indication that the results were accepted and endorsed by the applicant's own agent as he did not raise any objections at the time the declaration of the results.

17. In his written submissions, the 3rd respondent highlighted four main grounds for opposing the application as follows:

i. Introduction of new polling stations which did not exist in the petition.

ii. The huge margin of votes between the 3rd Respondent and the petitioner.

iii. The principles for scrutiny have not been satisfied.

iv. The prayer for scrutiny ambiguous and unenforceable.

18. On the issue of introduction of new polling stations, the 3rd respondent stated that the applicant of introduced **Kebire Primary School polling station 1 of 1** under paragraph 2(a) which station did not feature in the petition as one of the polling stations that had contested results. The 3rd respondent also faulted the applicant for sneaking in new evidence by attempting to amend the petition from the backdoor by introducing forms 35A which had been expunged from the court records vide a ruling delivered on 21st Day of November 2017. He listed the affected polling stations as:

i. Tendere primary School 3/3 at page 58.

ii. Nyasara primary school 1/3 at page 61/122

iii. Riteke primary school 1 of 2at page 59

iv. Nyangesa primary school 2 of 3 at page 62/122

v. Sengera Girls' high School 1 of 2 at page 63

vi. Nyamaonde primary school polling station 2 of 2 at page 65

19. He cited the case of **Philip Munge Ndolo v Omar Mwinyi Shimbwa & 2 others [2013] eKLR** wherein it was held:

"The reason for this approach is easily discernible. There is need to guard against a party using the exercise of scrutiny and recount as a 'fishing expedition' so to speak as a means to uncover new or fresh evidence. This is more so given that under the constitution the hearing and disposal of Election Petitions is governed by strict timelines. As such a court ought to confine itself strictly to the substance of the petition and not entertain any 'side shows."

20. On the issue of the margin between the votes garnered by the 3rd respondent and the petitioner, 3rd respondent submitted that scrutiny should not be allowed where the margin is wide. He relied on the decision in the case of **Joho vs Nyange & Another Election Petition No. 5 of 2005** wherein Maraga J. *(as he then was)* stated*:*

"However where margins are high I am unable to agree that scrutiny should be ordered……."

21. He reiterated that in the instant case, the margin of votes between the Petitioner/Applicant and the 3rd Respondent is **Fifteen Thousand, Three Hundred and Sixty Votes (15,360)** which was by all means and in the face of it is not a narrow margin to warrant scrutiny.

22. On the principles to be adhered to in an application for scrutiny, the 3rd respondent submitted that scrutiny is not an automatic right and that the petitioner must advance sufficient reasons to warrant such scrutiny. He relied on the case of **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others (supra)** wherein the Supreme Court set out, in detail, the principles guiding scrutiny and held that scrutiny cannot be used by the petitioner to foist his case and discover new evidence to invalidate an election. He also cited the Supreme Court's decision in the case of **Gideon Mwangangi Wambua & Another v. IEBC & 2 Others, 2013 eKLR** wherein the court held that :-

"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 petitioner 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."

23. The 3rd respondent argued that the application for scrutiny lacked specificity and is couched in vague terms. He relied on the decision in the case of **Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others(supra)**where at paragraph 159 the court observed thus:-

"On the contrary, judicial opinion distinctly favours a view that commends itself to us: that, 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. If a party lays a clear basis for scrutiny in each and all the polling stations within a constituency, then the order ought to be granted. Otherwise, a prayer pointing to a constituency but lacking in specificity is not to be entertained."

24. On the applicant's allegation that his agents were chased from the polling stations the 3rd respondent submitted that the applicant had to lay bare evidence of any agent who was chased from the polling station. The 3rd Respondent asserted that no agent had sworn any affidavit to state that they were chased from any polling station and maintained that the applicant did not discharge the burden of proof in this regard so as to warrant an order for scrutiny. He cited the decision in the case of **Raila Odinga and Others Vs Independent Electoral and Boundaries Commission (supra)** wherein it was held:

*"**Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections. It is on that basis that the respondents bear the burden of proving the contrary. This emerges from a long standing common law approach in respect of alleged irregularity in the acts of public bodies. Omnia praesumuntur rite etsolemniteressaacta: all acts are presumed to be done rightly and regularly. So the petitioner must set out by raising firm and credible evidence of the public authority's departures from the prescriptions of the law".***

25. he 3rd Respondent further submitted that the applicant's prayer for scrutiny, as stated in the petition, was vague, ambiguous and unenforceable as the scrutiny sought was in respect to all the relevant material used in the parliamentary election. He maintained that this court cannot order for the scrutiny of parliamentary election as indicated in prayer 4 of the petition since, under the Constitution of Kenya 2010, the word Parliament refers to both the National Assembly and the Senate. He maintained that the correct legal position was that the General elections held on the 8th August 2017 had voters at each constituency level voting for six elective posts and that it therefore followed that Parliamentary elections included the elections of the Member of National Assembly and the Senate. It was the 3rd respondent's case that it was untenable for the applicant, in an election petition challenging the election of a Member of Parliament, to request that scrutiny be done for both the position of member of National Assembly and the Senate. He relied on the decision in the case of **Charles On'gondo Were Vs Joseph Oyugi Magwanga & 2 Others Election Petition No. 1 of 2013** wherein Maina J. stated:

*"**The first observation I make is that this is a prayer in the alternative which makes it not a very serious prayer. Secondly the prayer is very poorly drafted. It seeks a recount in reference to the Parliamentary elections. Unlike previously where we had only one House in Parliament we now have two – The Senate and the National Assembly so which House is the order sought in respect. The prayer is ambiguous and indeed a similar prayer was struck out in Nairobi Election Petition No. 2 of 2013. Steven Kariuki V. George Mike Wanjohi & 2 others (unreported) …….I fully associate myself with his findings."***

<u>Analysis and Determination.</u>

26. I have carefully considered the application for scrutiny, the respondents' response, the parties' submissions and the authorities that they cited. I note that parties made detailed submissions on the law and principles governing an order for scrutiny and all that this court needs to determine is if the instant application falls within the ambit of the conditions and principles set for the grant of an order for scrutiny. The law on scrutiny and recount of votes is set out in sections **80(4)(a) and82(1) of the Elections Act as read with Rules 28 and 29 of the Elections (Parliamentary and County Elections) Petition Rules, 2017.**

27. The guiding principles for scrutiny in election petitions were succinctly stated by the Supreme Court in its decision in the case of **Gatirau Peter MunyaVs Dickson Mwenda Kithinji & 2 Others (supra)** wherein it was held:

> "***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 of 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 Election 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 station in respect of which the results are disputed, or where the validity of the votes is called into question in the terms of Rule 33 (4) of the Election (Parliamentary and County Elections) Petition Rules."***

28. The main gist of the application is the applicant's claim that the forms 35A in his possession were different from the forms produced in court by the respondents on account of lack of official IEBC stamp, security features, signatures of IEBC officials and anomalies on the serialization of the said forms. The applicant did not however state, with particularity and specificity, the polling stations or forms which were affected by the alleged irregularities. Instead, the application was couched in general words and terms that do not pinpoint which polling station should be under scrutiny and for what fault. In the **Gatirau Peter Munya case (supra)** the court observed that:-

> ***"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."***

29. Before I embark on examining each of the alleged irregularities highlighted by the applicant, I will first analyze the issue of access to information in relation to the source of the forms 35A in the applicant's possession. The applicant aptly submitted on his rights to access the information in the respondent's custody. He did not however claim that he had been denied his right to access information as he alleged, in his testimony before the court, that he obtained the forms 35A from the 2nd respondent who gave him a flash disk containing the said forms after the declaration of the results. It was however noteworthy that

the applicant did not tender the said flash disk in court as an exhibit in support of his said allegation in which case I find that the existence and the source of the alleged flash disk, was not proved to the required standards or at all.

30. On his part, the 2nd respondent testified that the applicant went to the tallying center after the declaration of the results and that while at the said center, the 2nd respondent availed to him all the forms 35A for his perusal after which he returned them to the 2nd respondent and that he (applicant) did not raise any objections to the forms. The 2nd respondent was categorical that he did not give any flash disk containing the impugned forms to the applicant as the correct procedure should have been for the applicant to make a formal written request to the 1st respondent to be supplied with certified copies of the said forms. My finding, therefore, is that the source of the forms 35A that the applicant attached to his affidavit in support of the petition is not known and was not proved in view of the 2nd respondent's denial that he ever issued any flash disk containing the said forms to the applicant.

31. This case presents a scenario in which there are two sets of forms in respect to the same election, one set being the forms in the applicant's possession and the other set in the custody of the 1st respondent. The legal position however is that the 1st respondent is the maker and the custodian of all the election materials used in any election and therefore it would be a misdirection for anyone purporting to have forms that are not authenticated as having been issued to him by the 1st respondent to claim that such forms should be taken into account in determining a sensitive case such as an election petition.

32. I further note that the applicant did not, upon observing that the forms in his possession lacked certain specifications or differed from the forms filed in court by the respondents, as he alleged, take the initiative to exercise his right to access information by requesting the 1st respondent to supply him with certified copies of the forms that were in its custody. One can therefore safely say that the forms in the applicant's possession are not the official forms 35A from the IEBC, but are forms whose exact source is unknown and I therefore find that it is not open for the applicant to secure forms from unofficial sources only to turn up in court to ask the court to order for a scrutiny to enable him confirm if the forms in his possession are the same as the ones held by the 1st respondent in the ballot boxes. I find that, under the above circumstances, allowing scrutiny on the basis that the forms the applicant had were different from the forms held by the 1st respondent can set a dangerous precedent in which parties will take the liberty to obtain forms from all manner of sources only to turn up in court and seek scrutiny to enable them confirm if the forms from their unofficial sources matched the forms in the 1st respondent's custody. In the case of **Philip Osore Ogutu Vs Michael Aringo & 2 Others [2013] eKLR** it was held that

> ***"It is 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 the party can, on 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 new evidence. Scrutiny should not be looked upon as a lottery."***

33. Taking a cue from the above decision, I further find that allowing the use of unauthenticated forms as a basis for scrutiny would be tantamount to engaging the court in guess work and a wild goose chase which goes against the known principles for grant of an order for scrutiny that frown upon the use of scrutiny in the hope of stumbling upon new evidence. I say so because it is apparent that the applicant failed to exercise due diligence by obtaining authenticated or certified forms from the 1st respondent in time or at all and is now seeking orders for scrutiny of the forms held by the 1st respondent in order to fill the gap or confirm documents which he ought to have confirmed before he even filed the petition in court. To my mind, scrutiny is not intended to assist a petitioner fill the gaps in his petition which appears to be the case in this application. The scenario would have been totally different if the forms 35A in the both the applicant's and respondent's possession had defects or discrepancies. In this case, one cannot vouch for the origin of the forms that the applicant attached to his affidavit in support of the petition and if the same could have been tampered with or not.

34. Furthermore, I note that the applicant does not dispute the results contained in the impugned forms which results he concedes were the same as the results contained in the forms filed in court by the 1st respondent in which case this court is at a loss as to what the scrutiny sought is meant to achieve when the results are not disputed. On this point I note that the applicant aptly referred to the case of **Nathif Juma Adams (supra)** in which it was held, *inter alia,* 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 petitions; and whether a sufficient basis has been laid to warrant the grant of the application for scrutiny. In the instant case the applicant did not present any affidavit sworn by any of his agents at the polling stations challenging the declared results. In fact the applicant went on record to state that he did not dispute the results that were declared by the 2nd respondent. I also note that the applicant's own party agent one Mr. Joel Nyandoro Oyaro signed the form 35B that declared the final results of the said election. To my mind, the fact that the applicant's party agent signed the said form is sufficient proof that the election results were not contested by the applicant. I find that the ultimate goal of scrutiny is to confirm the votes garnered by a candidate where the results have been contested and therefore it beats logic for the applicant to state that he has no problem with the number of votes that he garnered in the said election and in the same breath seek a scrutiny of the forms used in the impugned elections.

35. Turning to the applicants claim that the forms 35A in his possession had anomalies such as lack of stamps, signatures, security features, and inconsistencies in the serial numbers, I once again reiterate my findings in this ruling in respect to the source and authenticity of the forms in the applicant's possession. Be that as it may, I also note that, in his affidavit in support of this application, the applicant confirmed that the information contained in the forms in his possession was the same as the information in the forms that the respondents had availed to the court. To my mind, this confirms that the issue in dispute is not the results declared through the said forms, but rather, the alleged lack of stamps, security features and signatures in some of them. The question that arises is what the scrutiny sought is intended to achieve in view of the fact that the information contained in the said forms has not been disputed by the applicant who similarly did not state how his votes were affected by the alleged irregularities. Is the scrutiny intended to be an academic exercise to confirm if the 1st respondent conducted a perfect or flawless election? In the event that the scrutiny, if conducted, reveals that some of the forms 35A contained in the ballot boxes indeed lack the requisite stamps or signatures as alleged, would that discovery be fatal to the results declared by the 1st and 2nd respondents considering that the results, *per se*, have not been disputed? The answer to the above question can be found in the words of Maraga J. *(as he then was)* in the case of **Joho V Nyange case (supra)** wherein he stated:

> ***"it is not every non-compliance or every act or omission in breach of the election regulations or procedure that invalidates an election for being non-compliant with the law……And the result of an election is affected when the cumulative effect of the irregularities reverses it".***

36. In the case of **Peter Gichuki King'ara Vs IEBC & 2 Others, [2014] eKLR** it was noted:-

> ***"It follows that electoral systems and processes all over the world are not perfect, they are susceptible to human errors and other inadvertent mistakes as long as those mistakes do not affect the overall results and the democratic will of the people"***

37. Similarly, in the case of **Wavinya Ndeti vs IEBC & 4 Others. Machakos Election Petition No. 4 of 2013,** Majanja J. held:

> ***"An election is a human endeavor and is not carried out by programmed machines. Perfection is an aspiration but allowances must be made for human error"***

38. On the issue of lack of security features on the said forms 35A, I find that this was also a claim that was not proved by the applicant who had the following to say during cross examination;

> **"I have not seen the contract signed by the printers of forms 35A and B, and the IEBC. I have never seen the contract so as to know what was agreed on in terms of security features. I have**

never read the contract so as to know what a watermark is."

39. I note that the applicant did not state what the alleged security features were or how the alleged lack of security features affected the results that were declared by the 2nd respondent considering that the said results were not contested in any of the polling stations. The applicant did not claim that the alleged irregularities were so widespread or pervasive that they adversely affected the total number of votes he garnered. In the case of **Philip Munge Ndolo v Omar Mwinyi Shimbwa & 2 others (supra) Odero J. observed:**

"Genuine mistakes and errors (especially those which would have negligible effect on the final tally) need not form the basis for scrutiny."

40. On the issue of lack of stamps on some of the forms, I find that this claim was also not proved to the satisfaction of this court for the reasons that I have already stated to in this ruling but even assuming that I am wrong and that some of the forms 35A allegedly supplied to the applicant lacked the official IEBC rubberstamp, would that form a ground for scrutiny? I find that the answer to the above question is to the negative as there is no mandatory requirement that the said forms must be stamped. I am guided by the decision in the case of **Independent Electoral and Boundaries Commission vs Stephen Mule & 3 Others [2014] eKLR** wherein when faced with a similar question the court held:

"There is no stamping requirement in the case of the form 35. All that is required with regard to form 35 as provided for in Regulation 79 is the signature of the presiding officer and the agents of the candidates. We agree with the submissions on behalf of the appellant that it is the signatures of the presiding officers and the agents that authenticate the forms 35. If any such forms were stamped, it was a gratuitous and superfluous discretionary or administrative act incapable of creating a statutory obligation, less still, an invalidation of the forms 35 that did not contain the stamp."

41. The applicant further claimed that the forms 35A in respect to Ntamocha Primary school 2 of 2 and Nyamiobo Primary School 1 of 1 were not signed by the presiding officers, their deputies or party agents and that it was therefore necessary to scrutinize the forms 35A in the respective ballot boxes in order to ascertain the actual position. I find that this allegation is not only not a sufficient ground for scrutiny, but is also not in tandem with the applicant's own testimony during cross examination when he stated:

"On Ntamocha Primary polling station, I have no complaint on the votes I received and no agent has sworn an affidavit over how voting was conducted there. The same position applies to Nyamiobo polling station. I have no complaint and no agent has sworn an affidavit…..I do not have the list of ODM agents who were stopped from signing form 35A. I do not have an affidavit of any agent who was denied the right to sign form 35A."

42. From the applicant's own testimony, it is clear that he did not dispute results that were declared in the said polling stations and that his only complaint was that the forms were not signed by the polling officials and agents. It is noteworthy that this complaint is against the backdrop of the 2nd respondent's position that all the requisite forms were duly signed by the respective presiding officers and their deputies as shown in the forms that they attached to their affidavits in response to the petition. My finding, therefore, is that this claim is made purely for its own sake as the applicant did not show how the alleged lack of signatures affected the integrity of the results or the actual number of votes that he garnered in the two polling stations bearing in mind the fact that the applicant was categorical that he did not dispute the results from the said polling stations.

43. Turning to the applicant's claim that the seals on the ballot box for Nyakoiba Primary School Polling Station 1 of 2 were broken thereby necessitating scrutiny to establish if the results were genuine, I note that this is a matter that was neither pleaded in the petition and nor application that is the subject of this ruling. Instead, the applicant raised the issue of Nyakoiba Primary School in his submissions before the court. I have gone through both the petition and the application with a fine-tooth comb and I note that nowhere in the said pleadings is Nyakoiba Polling Station mentioned. I reiterate my earlier findings in

this ruling that an application for scrutiny must be specific on the polling stations in which the scrutiny is sought.

44. On the applicant's claim that his request for scrutiny was necessitated by the differences in the serial numbers on forms 35A. I note that the 2nd respondent's explained the issue of serialization of the forms in paragraph 12 of his replying affidavit as follows:

> **"THAT I am aware that for each category of forms, including forms 35A, the presiding officers in each polling station were provided with a self-inking booklet which contained a total of 6 leaflets for each type of form. The forms in each booklet would bear different serial numbers although they had the same information. Upon filing, the duplicate forms would be distributed among the agents and candidates and the 1st respondent would be left with a copy."**

45. I am satisfied with the 2nd respondent's explanation on the serialization of the said forms and I find that the applicant did not establish that, contrary to the 2nd respondent's explanation, there was a mandatory requirement that the serial numbers in all the 6 leaflets in the booklet be the same, or that the 3rd respondent benefitted from the difference in the serial numbers so as to justify his request for a scrutiny.

46. I also find that the instant application is vague and ambiguous in the sense that it is not specific on the exact elective office for which the scrutiny is sought and as such, the orders sought, if granted, would be incapable of being enforced. I say so because the application is worded in general and ambiguous terms as follows:

> "**That this Honourable court be pleased to order for scrutiny and audit of the results of Forms 35As and data posted in the 1st Respondent's website/portal for parliamentary elections Chache Bomachoge Constituency for the elections held on the 8th August 2017."**

Article 93 of the Constitution provides that:-

> **1. There is established a Parliament of Kenya, which shall consist of the National Assembly and the Senate.**
>
> **2. The National Assembly and the Senate shall perform their respective functions in accordance with this Constitution.**

47. From the above Article, it is clear that Parliament refers to both the National Assembly and the Senate. In the general elections that are the subject of this petition, voters at each constituency level voted for six elective positions of the President, Governor, Senator, Women Representative, Member of Parliament and Member of County Assembly. It therefore follows that unlike in the past, before the promulgation of the new Constitution in 2010, when reference to parliamentary election meant only the position of the Member of the National Assembly, currently, reference to Parliamentary elections includes the elections of the Member of National Assembly and the Senate. In the context of the foregoing, the applicant's prayer for scrutiny of materials used in the parliamentary elections for Bomachoge Chache Constituency would entail the scrutiny of the materials used in both seats the member of National Assembly and the Senate a scenario which makes the prayer vague, ambiguous and untenable as allowing it would be tantamount to making orders that extend beyond the subject matter of this petition which is the position of the member of the National Assembly. I am guided by the decision in the case of **Steven Kariuki V George Mike Wanjohi& 2 Others [2013] eKLR** where the court struck out a similar prayer couched in the words 'parliamentary elections' on grounds of its ambiguity. The court held as follows:-

> *"But while that may help to sustain elements of the petition, it cannot, unfortunately extend to the prayers at prayers f, g, h and i of the petition.* ***The prayers, in view of the ambiguity of the contested office are couched in such generality that the recount or retallying or inspection of***

documents may extend or apply to any of the elections that took place on 4th of March 2013 in Mathare or what the petitioner calls "Mathare Parliamentary election". *I have stated that the legal framework and procedures of electoral dispute settlement are very strict on the nature of pleadings, reliefs and timelines down to the nitty gritty of the font size of a newspaper advertisement. One only needs to look at article 88 of the constitution, Part VII of the Elections Act 2001 sections 74 to 85 and the Elections (Parliamentary and County Elections) Petition Rules 2013 to appreciate the very elaborate and strict procedures for electoral dispute settlement……..…..…..…..****Prima facie and without more, the prayers are nebulous and opaque and their boundaries permeate and extend beyond the national assembly election in Mathare constituency. Since the prayers in the petition at f), g), h), and i) are vague and ambiguous they would, in a sense, only be granted in vain. I am then persuaded to strike out f), g), h), and i) of the petition in limine. For the reasons outlined earlier, paragraphs 14 a, 14 e, 15 b, 16, 19 b and 21 of the petition are also struck out.*** *The petition contains alternative prayers. Prayer (e) prays as follows; There be a scrutiny of the votes cast and recorded as having been cast in* ***the parliamentary election in "Mathare constituency".*** *The petition itself is instituted* ***In The Matter of the Parliamentary Election for Mathare Constituency'.*** *Like there I have said, there is no such elective office for that constituency. That is clear from Article 93 of the constitution. The court can only grant that which is prayed for in a petition. See Chesire Vs. Ruto and 2 others [2008] 2 KLR (EP) 526.* ***If one lumps up both houses of parliament, then the voters in Mathare on 4th March 2013 were not just voting for their member of National Assembly: but also their senator for Nairobi County. Those two elective offices comprise the parliamentary election in Mathare. This is not a matter of form. It goes to substance. The prayer for scrutiny as couched in e) would then encompass the two elective offices. I have dealt with the inherent danger of that ambiguity. While I was ready to shut my eyes to the ambiguity in the descriptive parts of the petition, and to sustain the petition as much as practicably possible, there are serious patent and latent flaws in the wording of the prayer e). If granted as prayed, it would extend the scrutiny to the entire parliamentary election in Mathare Constituency. It cannot be amended now. That alternative prayer is thus suomoto struck out."***

48. My findings on the above issues would have been sufficient to determine this application but I am still minded to consider the issue of the margin of votes garnered by the 3rd respondent and the applicant in relation to the application for scrutiny. Courts will in most cases grant orders for scrutiny even where no basis has been laid when the margin of votes between the winner and the candidate who comes second is small. In instances where the said margin is wide, however, courts have held that the margin would be critical in determining whether or not to allow an application for scrutiny. In the case of **Peter Gichuki Kingara V Independent Electoral and Boundaries Commission & 2 Others [2013] eKLR** the court stated that:-

"One further remark in that decision warrants consideration in this ruling; the margin of victory or loss, as the case may be, may influence the decision to opt for scrutiny or recount - the narrower the margin the more likely the court will order a recount. The court found that such a recount had been ordered in Onamu versus M'Maitsi, Election Petition No. 2 of 1983 where the margin was 30 votes; in Kirwa versus Muliro, Election Petition No. 13 of 1988 where the margin was only 7 votes and; in Hemed Said versus Ibrahim Mwaruwa, Election Petition No.1 of 1983 where the margin was only 62 votes. Against this standard, the court found that a margin of 1061 votes in issue in the Petition before the court was too wide for the court to order a scrutiny and recount without laying a basis. If the court found 1061 votes to too wide a margin for a scrutiny and recount without laying a basis I will not find any less, at least at this stage of the proceedings, in a Petition where the margin is in excess of 2000 votes."

49. In the case of **Jared Odoyo Okello V Independent Electoral And Boundaries Commission & 3 Others [2013] eKLR** the court observed that the margin between the votes is one the considerations that a court observes and informs itself on whether to grant scrutiny or not. In the said case the court stated:

"What is therefore clear is that the margin between the petitioner and the winner will be one of the considerations in determining whether or not to order scrutiny and recount."

50. A similar holding was also made in the case of **Charles On'gondo Were Vs Joseph Oyugi Magwanga & 2 Others Election Petition No. 1 Of 2013** wherein Maina J. declined to order scrutiny on the basis that the margin of 3000 votes was too high to order for such. In the said case, the judge observed:-

> ***"The powers of the court to order Scrutiny and Recount are provided under S.82 (1) & (2) of the Elections Act and Rule 32 and 33 of the Elections (Parliamentary and County) Petition Rules 2013. However it is not in all cases that the prayers shall be granted. In Hassan Ali Joho V Hothan Nyange & Another (2006) eKLR, for instance the court ordered that a basis had to be laid before the order for scrutiny could be granted. It is also clear from that decision that the margin of victory or loss may influence the decision for the order so that if the margin is narrow the court is more likely to order a recount. This in effect is what Mr. Omondi the Advocate for the 2nd and 3rd Respondents was saying. That in this case the margin was quite wide and a scrutiny ought not to be ordered. Indeed the court in the Hassan Joho case found that the margin of 1061 votes was too wide for a scrutiny and recount without laying a basis. Here the margin is about 3000 votes. The question then is whether in this case a basis has been laid. My finding is that it has not."***

51. Similarly in the cases of **Wavinya Ndeti v Independent Electoral and Boundaries Commission (IEBC) and 4 Others (supra)** and **Gideon Mwangangi Wambua & Another v. IEBC & 2 Others (Supra)** applications for scrutiny were rejected on account of the big vote margins.

52. The common thread that runs through all the above cited cases is that the court will not grant an order for scrutiny where the margin of votes is too wide. In the instant case, I have already found that no proper basis has been laid by the applicant for seeking the orders for scrutiny and therefore this finding, coupled with the huge margin of over 15,000 votes between the applicant and the 3rd respondent make me find that the prayer for scrutiny cannot be granted in the circumstances of this case.

Conclusion

53. Having regard to my above findings and observations together with my assessment of the evidence tendered during the trial, I find that no sufficient cause has been established to warrant an order for the scrutiny sought. In light of the foregoing, I hereby dismiss the notice of motion dated 11th December, 2017 with further order that costs will abide the outcome of the petition.

Dated, signed and delivered in open court this 23rd .day of January, 2018

HON. W. OKWANY

JUDGE

In the presence of:

- Mr. Oonge and Mr. Nyaberi for the Petitioner

- Mr. Miss Olando for the 1st& 2nd Respondents

- Mr. Omogeni for the 3rd Respondent

- Omwoyo: court clerk