



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

ELECTION PETITION NO. 1 OF 2017

JOSEPH OBIERO NDIEGE PETITIONER

VERSUS

INDEPENDENT ELECTORAL & BOUNDARIES

COMMISSION (IEBC)..... 1st RESPONDENT

JULIUS MWITA..... 2nd RESPONDENT

PETER FRANCIS MASARA 3rd RESPONDENT

RULING

1. This is a ruling based on the application dated 19/12/2017 by the Petitioner seeking scrutiny and audit of the polling station diaries, and notes by the various presiding officers in several named respective polling stations; the court to be given access to the technology applied, namely IMEI and KIEMs Kits used in all the 88 polling stations; scrutiny of forms 32A, 35A, the related booklets thereof; scrutiny of ballot boxes as well as the seals used and that the Deputy registrar do make an appropriate report to this court.
2. The Notice of Motion is supported by the Petitioner's affidavit sworn on the even date.
3. The substance of the application is that pursuant to the hearing and conclusion of the petition, it has now emerged that there is need to order scrutiny of the election materials used during the said parliamentary elections for Suna West Constituency. He stated that there are fundamental errors and flaws discovered during the trial which goes directly to the root of the petition.
4. The petitioner has singled out close to 15 polling stations in paragraph 8 of the supporting affidavit in which the Forms 35A in his possession had alterations, were not signed by the presiding officers or such other differences which when compared to those with the Respondents had marked contrasting differences.
5. He further stated that at some polling stations, his agents were given Forms 35A which figures were altered and or altered without any countersignature. In some instances the forms 35A in his possessions were not signed by the agents while those in the custody of the Respondents were duly filled and signed.
6. He argued inter alia that some of the forms 35A had different handwriting when compared with those of the Respondents even from a naked eye perspective. That some did not have stamps from IEBC and the serialisation of the same were suspect. He singled out 27 polling stations which Forms 35A did not have similar serial numbers.

7. He argued that according to the finding by the Deputy Registrar, there were tampering of various ballot boxes as well as their seals. These were discovered during the resealing of the same as per the order of this court on 13/10/2017.

8. The subtotal of the application is therefore that there was need to order scrutiny of the ballot materials used. More significantly a search light ought to be directed at the technology used in particular the KIEMs Kits.

9. Counsel for the applicant relied on the affidavit as well as written submissions and attendant authorities in arguing the said application. I have perused the same extensively.

10. The 1st and 2nd Respondents filed a replying affidavit dated 10/1/2018 as well as written submissions. The said Respondents contended that there were no prayers in the Petition to access the KIEMs kits used in all the 88 polling stations nor SD Cards used as well as the biometric register of all the voters in Suna West Constituency.

11. Mr Mwita deponed that there were no complaints raised in most polling stations which should warrant scrutiny. That there were no prayers in the petition or even complain during the hearing of this matter regarding ballot boxes and serial numbers enumerated by the Applicant/Petitioner. In respect to the polling station diaries mentioned, he argued that the same is nowhere in the petition and neither did it arose during trial.

12. In essence the respondent argued that the application ought to be dismissed as the petitioner was in a fishing expedition. Infact, he went on to state, that the prayers for access to the KIEMs Kits was untenable as the applicant could not substantiate the alleged findings in paragraph 36 of the supporting affidavit to the petition.

13. The 3rd Respondent through his replying affidavit filed on 11/1/2018 as well as the written submissions dated the same date reiterated what the 1st and 2nd respondent stated. He argued that the application was res judicata as this court's ruling of 18/10/2017 had dealt with the same issues.

14. He went on to state that the application does not met the threshold for ordering a scrutiny as laid down in various authorities and in particular *Nathif Jama Adame vs Abdi Karim Osman Mohamed and 3 others (2014) eKLR* by the Supreme Court.

15. He deponed that the entire application was purely a fishing expedition as the issues raised were nowhere in the petition. The court should therefore confined itself to the issues raised in the petition and nothing else. He submitted that nowhere in the petition does the Petitioner/Applicant prays for scrutiny of the polling stations diaries in 13 polling stations, access to KIEMs Kits, SD Cards or Biometric Register used. Nor does the Petition seeks scrutiny and audit of ballot boxes in 16 polling stations.

16. In summary the Respondents urged this court to find that this far, there was no reason to order any such scrutiny as the evidence already on record does not satisfy the elements for granting the prayers. The Petitioner according to them was sensing defeat and is simply in a lottery scheme to gather evidence to buttress what he failed to prove. They prayed for the dismissal of the application.

Analysis and determination

17. Section 82 of the Election Act anchors this issue of scrutiny. **Section 82(1)** states as follows;

“An election court may, on its own motion or an 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.”

18. Rule 29 of the Elections (Parliamentary and County Elections) Petition Rules 2017 provides the road map for undertaking the exercise.

19. The Supreme Court case of *Gatirau Peter Munya Vs Dickson Mwendu Kithinji & 2 others (2014) eKLR* laid down the guiding principles to be applied in respect to prayers for scrutiny. Thus;

“(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) 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 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 reconsider the reasons for the order for scrutiny or recount.

(c) the right to scrutiny and recount does not lie as a matter of course. The Party seeking a recount or scrutiny of votes in an election petition is to establish the basis for such a request, to the satisfaction of the trial Judge or Magistrate. Such a basis may be established by way of pleadings and affidavits or by way of evidence adduced during the hearing of the petition.

(d) Where a party makes a request for scrutiny or recount of votes, such scrutiny or recount if granted is to be conducted in specific polling stations in respect of which the results are disputed or where the validity of the vote is called into question in the terms of Rules 33(4) of the Election (parliamentary and County Elections) petition Rules.”

20. Having cited the above legal positions, the issue at hand is whether the petitioner has laid down a basis for an order of scrutiny in terms of the prayers sought. I have perused the pleadings, the supporting affidavits, the written as well as the oral submissions by the respective counsels representing the parties.

21. I think the preliminary issue which needs to be determined is whether the application is *res judicata* as claimed by Mr Kisera counsel for the 3rd respondent. He argued that this court in the ruling of 18/10/2017 had made such determination.

22. Whereas in the said ruling of 18/10/2017 I touched on some aspects of this application I however opined that any party has the liberty of seeking an appropriate remedy for scrutiny of the votes. I do not therefore respectfully think that the same was dealt with and even if it was, it was not exhaustive. In any case this court could still order scrutiny *suo moto*.

23. The significant point however is whether the prayers sought by the applicant are in tandem with those in the pleadings.

24. I have perused the petition as well as the supplementary affidavit dated 10/10/2017 filed pursuant to the leave of this court granted on 5/10/2017. Save that the same mention the issue of technology in particular the use of KIEMs Kits, I do not find anything sufficient to enable this court to order an access to the same. The evidence by the petitioner as well as his witnesses did not lay any emphasis to the question of the use of the KIEMs kits that fundamentally affected the results thus far. Infact during cross-examination the Petitioner stated that the tabulation he had presented to court in his affidavit were unilateral and that he never involved any expert.

25. Consequently, should the court allow this prayer then the character of the petition may greatly change as it may mean an amendment to the petition which is too late in the day.

26. Casual reading of the petition does not indicate that there were fundamental errors detected in the technology used by IEBC during the elections which the petitioner pinpointed. In my view the issues raised regarding use of technology were full of generalities and if I allow the same to be introduced at this

junction then I shall be permitting fresh evidence in the petition.

27. The same goes to the issue of polling station Diaries and notes by the presiding officers. I do not find any prima facie case raised by the petitioner against the said statutory instruments. This in equal measure apply to Forms 32A. Infact the same only arose during evidence but not an issue strongly pleaded.

28. On the same breath I find the prayer for scrutiny of the ballot papers and ballot boxes ought to fail. Although the same was simply mentioned in the petition, no such evidence was led to suggest that I should order for scrutiny. Infact no evidence was led to show that there were issues or election malpractices regarding the ballot boxes and in particular that there were tampering of the seals.

29. Having stated so, I find that there are weighty issues raised by the petitioner regarding Forms 35A in respect to this election. It is admitted and infact came clearly during trial that the Petitioner was in custody of only Forms 35A from 44 polling stations. Some of those forms were either legible, blank or having various anomalies. The petitioner did not produce the rest of the 44 form 35A from the other stations.

30. The Respondents however produced all the Forms 35A from the 88 polling stations. Theirs were legible and clear. When compared however with the 44 produced by the Petitioner most of them never marched.

31. Some of the discrepancies included;

a) tallying of votes – there were some with material numerical differences

b) alteration of results by hand and no countersigning

c) some were not signed by the presiding officers or the agents. Even where the agents signed, some of them did not sign on the forms produced by the Petitioner.

d) there were different handwritings as one can deduce from naked eye.

(e) there were differences in respect to serialisation.

32. These are some of the issues that appear to surround the differences of Forms 35A held by the Petitioner as well as the Respondents. Its appreciated that the custody of the original forms is IEBC. As raised during cross-examination it was incumbent upon the Petitioner to procure all Forms 35A either through his agents or vide IEBC.

33. In view of the above observations I do not think that it would be too onerous to order scrutiny of the said Forms 35A. None of the parties stand to suffer any prejudice. More importantly for this court it would be in the interest of justice to arrive at a conclusion without any lingering doubt. The said forms are integral part of the elections results. The court has seen both Forms 35A produced by rival parties. Clearly the petitioners are not only from half of the polling stations but more importantly some of them are unreliable.

34. Where a margin of victory or loss as in this case is so close I find it necessary to order a scrutiny of the said forms. This position was held in *Charles Ongondo Were Vs Joseph Oyugi Magwanga & 3 others*.

Election Petition (Homa Bay) No. 1 of 2013.

35. Further, in view of some of the errors and discrepancies as well as the alterations on Forms 35A presented to this court I find that this is the proper forum to order scrutiny of the same. See also the case of *Richard Kalembe Ndile and Another Vs Patrick Musimba Mweu & 2 others Election petition No 1 of 2013 (Machakos)*.

36. I am also conscious of the fact that scrutiny ought to be ordered in specific polling stations. See Rule 29(4) of the Election (Parliamentary and County Elections) Petitions Rules 2017.

37. My view however is that there seemed to be anomalies pinpointed by the petitioner in regard to various polling stations. However this court finds it fit to order scrutiny of all the 88 polling stations. This will remove any doubt and ambiguity that the rest of the polling stations had no issues. This court is aware that the Petitioner did not plead for scrutiny in all the 88 polling stations but taking into consideration the discretion vested in the court it is safe and proper to scrutinise all the Forms 35A from all the polling stations.

38. I further order that upon carrying out the scrutiny it shall be right and appropriate to tally the figures found in those original forms 35A. This will remove any question of the alterations made in the forms as contented by the petitioner/applicant. Again I do not see any prejudice suffered by the Respondents. On the contrary the court shall ultimately arrive at a fair conclusion.

Conclusion

39. The application dated 19/12/2017 is therefore allowed as follows;

a) A scrutiny be and is hereby undertaken on all original Forms 35A in all the 88 polling stations in Suna West Constituency pursuant to the Parliamentary elections held on 8/8/2017.

(b) The 1st and 2nd Respondents to avail all the original Forms 35A for all the 88 polling stations.

c) Contemporaneously with scrutiny of the said Forms 35A a tallying be undertaken so as to get all the total votes cast.

d) the above exercise be undertaken by the Deputy Registrar of this court and a report to be filed within 7 days from the date of this ruling.

e) the respective parties be at liberty to nominate at least two representatives each during the said exercise.

f) the Deputy Registrar be at liberty to engage the services of security officers during the exercise.

g) the Parties shall thereafter submit in respect to the Deputy Registrar's report in their overall final submissions.

h) the costs of this application to abide the outcome of the petition.

Delivered, signed and dated at Migori this 18th day of January 2018.

H.K. CHEMITEI

JUDGE

18/01/18

In the presence of;

Midenga for the Petitioner

Kisera for the 3rd Respondent

Kisera holding brief for Oduor for the 2nd Respondent

Nyauke – Court clerk

Ruling delivered in open court.