



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ELECTION PETITION NO. 4 OF 2017

**IN THE MATTER OF THE ELECTION ACT NO. 24 OF 2011 LAWS OF KENYA AND THE
ELECTION (GENERAL) REGULATIONS, 2012 AND ELECTIONS (PARLIAMENTARY AND
COUNTY) PETITION RULES 2017**

AND

**IN THE MATTER OF THE ELECTIONS OF WOMEN REPRESENTATIVE FOR KISII
COUNTY, COUNTY NO. 45 HELD ON 8TH AUGUST 2017**

BETWEEN

NAHASHON AKUNGA PETITIONER/RESPONDENT

VERSUS

THE INDEPENDENT ELECTORAL

BOUNDARIES COMMISSION 1ST RESPONDENT

ROBERTY ISAAC SIDNEY NAMULUNGU 2ND RESPONDENT

HON. JANET ONG'ERA 3RD RESPONDENT

RULING

1. By the Notice of Motion dated 18th December, 2017 the Petitioner (Applicant) sought the following orders-

a) That the court orders for the audit and scrutiny of all the declared number of registered voters through examination of Forms 37C, 37B, 39C, 38C, 35B and 34B that were issued by the 1st Respondent in the elections held on 8th August, 2017 in Kisii County for the polling stations listed in Schedule 1 attached hereto;

b) That the court orders for the audit and scrutiny of the total votes cast as declared in the statutory Forms 34B, 35B, 37B, 38B and 39B that were issued by the 1st Respondent in the elections held on 8th August 2017 in Kisii County regarding the following constituencies: Bobasi, Bomachoge, Borabu, Bonchari, Nyaribari Chache, Nyaribari Masaba, South Mugirango, Kitutu Chache North and Kitutu Chache South;

c) That the court orders for scrutiny of the security features of Form 39C used to declare the results of Women Representative Elections in Kisii County;

d) That the court orders the 1st Respondent to avail for scrutiny the original statutory forms mentioned in paragraphs 1, 2 and 3 above;

e) That the court directs the Registrar to compile a report on the outcome of the scrutiny of the forms and recount and that the report be treated as duly filed;

f) That the court grants all the parties leave to comment on the outcome of the scrutiny;

g) That the Respondents bear the costs of this application; and

h) That this court grants any other reliefs that are in the circumstances fair and just.

2. The application is supported by the Affidavit of the petitioner sworn on 18th December, 2017. The applicant moved this court vide the petition dated 4th September, 2017 to challenge the election of the 3rd Respondent as the Kisii County Women Representative in the National Assembly during the elections that were held on 8th August, 2017. There were 11 contestants for this position. Out of the 403, 930 total votes cast the winner of the election, the 3rd Respondent garnered 171,492 votes and the 1st runners up garnered 144, 973 votes.

3. The present application has been made after the conclusion of the trial, but before submissions have been filed. Therefore the applicant is relying on the pleadings and the testimony of the witnesses. It was the applicant's prayer that the findings from the scrutiny exercise if allowed, will be considered in the main judgment.

4. His application is premised on two grounds. The first concerns the lack of a credible voters register. The applicant argued that Regulation 83 (1) (e) of the Elections Regulations Rules, 2012 requires the returning officer, in the presence of candidates or agents and observers, if present, to complete the relevant statutory form for the respective elective position in which the returning officer shall declare, among others, the total number of registered voters. The number of registered voters is static and sacrosanct. However, the total number of registered voters in various polling stations in Kisii County varied significantly in the statutory forms returning the results of the 6 elections. He adds that there was a mutation of the declared number of registered voters in various polling stations and this was an indication that the voters' register was tampered with.

5. The second ground was that there were wide margins in the differences of the votes cast in the six elections with one constituency having as much as 1,000 votes margin. The applicant argued that this margin was so wide that it is unbelievable. It was his argument that all voters were issued with 6 ballots and it is illegal for a voter to leave the polling station with a ballot paper. In addition, the 6 elections were conducted on the same day and accordingly the margins of voters who cast the votes in the different elective posts should not be very wide. Such wide margins are only an indicant that the election were manipulated.

6. The applicant argued that he has already laid a basis for scrutiny in his evidence. Under the law, a party can make an application for scrutiny at any stage of the proceedings but before the petition is determined. It was the applicant's belief that this is the right time to make the application because he already laid a basis in his evidence and the issues have already crystallised.

7. The 1st and 2nd Respondents relied on the replying affidavit sworn by the 2nd respondent on 15th January, 2018. They opposed the application and argued that the petitioner has not laid a basis for the orders sought. It was argued that the prayers in the application cannot be granted as they are too broad. The petitioner has not listed the constituencies that he wishes for the scrutiny be done as the same cannot be conducted on the 1,126 polling stations in Kisii County. In addition, he has sought a scrutiny of each

and every declaration form in all the 6 elective seats that is the forms 34B, 35B and C, 37B and C, 38B and 39B which is not only impracticable but also not possible because these forms are the subject of petitions in other courts.

8. The 2nd respondent argued that the petitioner has not shown any discrepancies, votes manipulation or inconsistencies during the tallying process in any of the declaration forms noting that they have not been annexed to the application. This is a clear indication that the petitioner is on a fishing expedition. A voter has the right to vote for the candidate of their choice or not to vote at all. There was no evidence presented that this is unlawful. The 2nd respondent argued that the prayers for scrutiny and recount have not been pleaded in the petition, and they cannot be sought at this point by the applicant. The prayer to avail the form 39C has already been dispensed with by this court.

9. The 2nd respondent denied the contention that there was no credible voter register. This register was Gazetted sometimes in July, 2017 and it was published in all the polling stations 7 days before the general election. The petitioner did not show any polling station which did not have a credible register. The 2nd respondent's case was that to the best of his knowledge, the results and the voters' register were not manipulated in any way.

10. The 3rd Respondent filed a Replying Affidavit sworn on 21st December, 2017 in opposition to the application. She argued that the petitioner has not laid a basis to warrant the orders of scrutiny. The petition concerns the election of the County Women Representative for Kisii County. Therefore, the audit of Forms 34, 35, 37 and 38 is not necessary as these are not relevant to the election in question as they relate to the National Assembly, Senator, Governor and County Assembly elections. The court lacks jurisdiction to determine the legality of these forms in these proceedings.

11. She contended that although issued with 6 ballot papers, it was within the discretion of the voter to determine for which elective post he wished to cast his ballot. Therefore such a voter could decide to only vote for the Women Representative and leave out the other elective posts. She also argued that the applicant cannot challenge the credibility of the register of voters when the same has not been annexed to his pleadings. There is no reasonable explanation for this default because this register was issued to all the candidates, it was available for download at the IEBC website and a copy of it had been displayed at all the polling stations. It was argued that the question of voting by non-registered voters does not arise in light of the applicant's own evidence that he did not come across an instance where an ineligible person was allowed to vote. He also admitted that he did not witness the voting process and could not say that the counting and tallying process was not credible.

12. The 3rd Respondent accused the applicant of seeking a blanket order of scrutiny of the votes cast in Bobasi, Bomachoge, Borabu, Bonchari, Nyaribari Chache, Nyaribari Masaba, South Mugirango, Kitutu Chache North and Kitutu Chache South Constituencies. She argued that there were no disputes raised at any of the polling stations or at the trial concerning the number of votes she garnered. Rule 29 (4) (d) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 provides that a scrutiny or recount of votes shall be confined to the polling stations in which the results are disputed. As such because the number of votes garnered remains uncontested, there is no basis to order scrutiny.

13. It was the 3rd Respondent's argument that the applicant cannot request for scrutiny of form 39C whereas he did not call any witness to give any evidence on it. In addition, scrutiny only applies to votes and not the forms. There was no complaint raised at the polling station concerning the votes or the statutory forms which were filled in the presence of the candidates or their agents and no agent or candidate alleged otherwise. No candidate or agent was precluded from signing the form 39C and in fact the applicant did sign this form thereby confirming the validity of the results.

14. The 3rd Respondent contended that where the gap between the winner and the first runners up is so wide, as in this case where the 3rd Respondent won with 26,591 votes, the court must be reluctant to order scrutiny. She contended that the applicant has not laid sufficient basis to warrant an order of scrutiny. Regulation 29 (2) provides that such an order will not be granted as a matter of course. The court must be

satisfied that there is sufficient reason before issuing the order.

15. She disagreed with the applicant's argument that an order for scrutiny can be made at any stage of the proceedings. It was her argument that at this stage, she is unable to answer to any new issues that have been raised by the applicant and thereby will be prejudiced.

16. The applicant's submissions are dated 18th December, 2017. Relying on the definition in **Harun Meitamei Lempaka v Lemanken Aramat & 2 Others [2013] eKLR** counsel submitted that scrutiny entails a close examination of the votes cast including the contents of the statutory forms declaring the results as well as the number of registered voters. The objective of scrutiny as per **Philip Mukwe Wasike v James Lusweti Mukwe & 2 Others [2013] eKLR** is to assist the court to investigate if the allegations of irregularities and breaches of the law complained of are valid, to assist the court in determining the valid votes cast in favour of each candidate and to better understand the vital details of the electoral process and gain impressions on the integrity of the electoral process. Counsel further submitted that scrutiny is important because it also enables the court to establish the truth and to save its time.

17. By this application, the applicant was seeking scrutiny for two purposes: to establish the extent of the malpractices and to save the court's time in investigating the complaints. Counsel submitted that the applicant has laid a strong basis for the order of scrutiny. He had demonstrated that the statutory forms have anomalies which call for investigation. The first is on the conflicting declarations of the number of registered voters in the same polling station. The second is that some of the forms contained similar number of votes for all the candidates in two streams of one polling station. Thirdly, the Form 39C only had watermarks in the first two of its ten pages. Fourthly the wide margins of votes across the six elections for which no explanation had been tendered justified a scrutiny of the votes cast.

18. It was counsel's submission that the applicant has complied with the requirements in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others [2014] eKLR** by specifying the polling stations, constituencies and election materials that he wants scrutinized. He argued, citing **Abdirahman Adan Abdikadir & Another v Independent Electoral and Boundaries Commission & 2 Others [2017] eKLR**, that once a party has specified the particular polling stations or election materials that he wants scrutinized, then the order ought to be given.

19. The 1st and 2nd respondents relied on their submissions dated 15th January, 2018. Learned counsel submitted that the application should be dismissed for want of particulars. This case concerned the election for the Kisii County Women Representative yet the petitioner has asked for scrutiny of the returns for the other elections and in addition, has failed to specify which polling stations he desired to have the scrutiny done. Counsel relied on **Gideon Mwangangi Wambua & Another v IEBC & 2 Others [2013] eKLR** and **Nicholas Kiptoo arap Korir v IEBC & 7 Others [2014] eKLR** where the courts held that a petitioner seeking scrutiny must set out his case with sufficient clarity and particularity and adduce sufficient evidence to justify the prayers. The application for scrutiny must be couched on specific terms and clothed with particularity as to which polling stations within the constituency are to be scrutinized.

20. It was counsel for the 1st and 2nd respondents' submission that the evidence sought goes beyond the pleadings which as per **Philip Osore Ogutu v Michael Onyura Aringo & 2 Others [2013] eKLR** must be rejected outright or disregarded. The petitioner in this case was trying to unearth new evidence and introduce unpleaded facts. He had failed to discharge his burden of proof by establishing a prima facie case. He failed to annex the voters' register which he alleges was manipulated and to give the names of the persons who manipulated it. In addition, the court lacks jurisdiction to allow the application because the prayers have not been pleaded in the main petition. Counsel urged the court to dismiss the application with costs.

21. The 3rd Respondent's submissions are dated 22nd December, 2017. It was submitted by learned counsel that the number of registered voters as per the Gazetted voter register tallies with the primary forms 39A and declaration form 39C a fact which the petitioner confirmed in his testimony. Counsel submitted that the form 39A is the primary document in the election and it contains, inter alia, the number

of registered voters, votes cast and votes garnered by each candidate. It is this form that should be used to clarify any discrepancies in the forms 39B and 39C.

22. It was counsel's submission that the applicant's concern over the number of registered voters can only be settled by referring to the voter register and not through a scrutiny of the ballot boxes and/or the forms. However, the applicant did not annex this register to the petition or application. He admitted that he did not have it in his possession at the time of filing these proceedings and did not make reference to it when preparing the tables of the anomalies in the statutory forms. It is therefore unclear how he could fault this register when he has not gone through it and this only goes to show that his claim is vexatious.

23. It was submitted that there was no dispute over the number of votes that each candidate garnered in the polling stations in the constituencies where the applicant had applied for scrutiny, the incomplete tables attached to the petition have no probative value and the applicant did not show any discrepancies in the forms and the voters' register. Counsel's argument was that if the application is allowed, the court would be engaging in a fishing expedition.

24. Counsel reiterated that as the election concerns the position of County Women Representative, then the forms 34, 35, 37 and 38 are irrelevant and do not form part of the petition. If the court were to consider their validity or legality it would be acting outside its jurisdiction.

25. It was submitted that pursuant to Rules 29 (2) and (4) of the Elections (Parliamentary and County) Petition Rules, 2017 an applicant must satisfy the court that there is prima facie case and scrutiny and recount will be confined to the polling stations where the results are disputed. This statutory position was restated by the Supreme Court in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others (supra)**. The applicant is not only seeking a scrutiny of votes of 6 elective seats but also that this scrutiny be done in 8 constituencies. He has not indicated the polling stations where the results have been disputed. In addition, when preparing his tables, the applicant used the derivative forms 39B and 39C instead of the primary form 39A. These tables are incomplete and the applicant admitted in his testimony that this renders a meaningful comparison of figures impossible.

26. Counsel argued citing **Jared Odoyo Okello v Independent Electoral and Boundaries Commission & 3 Others [2013] eKLR** that the margin between the winner and the runners up is a relevant factor when considering an application for scrutiny. She also relied on **Joho v Nyange & Another [2008] 3 KLR (EP) 500**, where the court held that where the margin is too wide then scrutiny ought not to be ordered. Counsel was of the view that the margin of 26,591 between the winner of the elections and the first runners up is too wide and accordingly a scrutiny should not be ordered.

27. It was further submitted that the applicant had failed to plead material facts and to give full particulars of his claim by stating the irregularities in the specific polling stations in the 8 constituencies where he wanted a scrutiny to be done. Counsel submitted that scrutiny is not intended to aid a party unearth new evidence. He relied on **Charles Ongondo Were v Joseph Oyugi Magwanga & 2 Others [2013] eKLR**.

28. Counsel submitted that the prayers sought in the application cannot be granted because the prayers sought fall outside the ambit of the Elections Act and Rules made thereunder. Section 82 of the Elections Act and Rule 29 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 refers to the process of scrutiny of a vote. The law did not contemplate the scrutiny or examination of the statutory forms.

Analysis and determination

29. Section 82 of the Elections Act, No. 24 of 2011 provides-

(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 manner as the election court may determine.

30. Rule 29 of the Election Petitions

(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 an 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 votes.

(3).....

(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 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 of the register;

(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.

31. In **Philip Mukwe Wasike v James Lusweti Mukwe & 2 Others (supra)** the court held that the purpose of scrutiny is-

(i) to assist the court investigate if the allegations of irregularities and breaches of the law complained of are valid;

(ii) to assist the court in determining the valid votes cast in favour of each candidate and

(iii) to assist the court to better understand the vital details of the electoral process and gain impressions on the integrity of the electoral process.

32. The principles on which the order of scrutiny and recount will be granted were summarized by the Supreme Court in **Gatirau Peter Munya v Dickson Mwenda Kithinji (supra)** 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) 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 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 stations in respect of which the results are disputed, or where the validity of the vote is called into question in the terms of Rule 33(4) of the Election (Parliamentary and County Elections) Petition Rules.

33. An application for scrutiny or recount of votes may be made at any stage of the proceedings as long as the party applying for scrutiny has marshalled up sufficient evidence to support the application. An order of scrutiny will not be granted as a matter of course and the requirement under Rule 29 (2) is that a basis is made before the order is issued. The rationale is that the court must guard against abuse of its process. It must not allow a party to use scrutiny as a fishing expedition to discover new or fresh evidence. In **Philip Osore Ogutu v Michael Aringo & 2 Others (supra)** the court stated-

“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 a 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.”

34. Therefore, the court must be satisfied that there is sufficient reason to order scrutiny or recount of votes. The onus is on the party making the application to establish the basis by submitting sufficient evidence to satisfy the court that the order is warranted. (**Gatirau Peter Munya v Dickson Mwenda Kithinji (supra)**). If the prayer for scrutiny is made before the trial starts, then the relevant evidence must be based on the affidavits, if any, supporting the application. If made after the trial has commenced and adequate relevant evidence has been adduced, it is that evidence that will form sufficient reason upon which the court will make its orders. That decision is not only discretionary but is also judicious so that it must be based on good, logical reasons, and the order must be necessary for the purpose of arriving at an expeditious, fair, just, proportionate and affordable resolution of the issues raised in the petition. (See **Hassan Mohammed Hassan & Another v IEBC & 2 Others (2013) eKLR**).

35. As per Rule 29 (4), the party seeking scrutiny must specify the polling stations where the results are disputed (**Ramadhan Seif Kajembe v Returning Officer, Jomvu Constituency & 3 Others [2013] eKLR**), and an order for scrutiny will be limited to those polling stations (**Justus Gesito Mugali M, Mbaya v Independent Electoral & Boundaries Commission [2013] eKLR**).

36. It is in the interest of justice at this stage to limit the evaluation of matters before me to specifics on whether I am satisfied that a proper basis is laid for the prayers for scrutiny without attempting to answer all the questions raised in the pleadings, evidence and final submissions. The latter is best answered at the final resolution of this petition and good sense of judgment commands that the court must guard against encroaching on that territory prematurely. This court was also faced with a similar situation in **Dennis Magare Makori & Another v Independent Electoral and Boundaries Commission and 3 Others Kisii Election Petition No. 5 of 2017** where an application for scrutiny and recount of votes was made when the parties had already testified. It cautioned itself against making final determinations and held that-

“It will be appreciated that the Court is not at this stage doing its final judgment in the matter. It

is a delicate balancing act for the court evaluating the sufficiency of the reasons advanced for scrutiny and recount without necessarily appearing to give a final verdict on the matter. This is so because, while some of the complaints and evidence adduced thereto may not necessarily be a basis for a recount, they are relevant and material aspects for consideration by the court in its final judgment. The fact that a piece of evidence does not support scrutiny and recount does not necessarily render it irrelevant and not of use in the final findings. It is therefore necessary for now to limit the evaluation of the evidence to the specifics about the scope of scrutiny and recount noting the need for brevity and marking boundaries so as not to prematurely encroach onto the arena of the final judgment in this matter.”

37. In that regard therefore, I will endeavor to make specific findings on the prayers sought all the time in line with the need to avoid compromising the final findings of the court. The issues raised in the petition are wide and varied and a final and fair determination can only be achieved through examination of all the material before court in totality. The brevity of this ruling should be understood from that perspective. Where appropriate the reasons for the findings herein will form part of the final judgment.

38. By his application, the applicant has asked for scrutiny of the statutory forms that were used to declare the results of the 8th August 2017 in order to ascertain the number of registered voters and the number of votes cast. He has also sought scrutiny of the security features on form 39C. His grounds are that the credibility of the register of voters is in question because of the material discrepancies in the statutory return forms and because the number voters who voted in the six elections in the same polling station differed and the margin of difference was too wide to be believable.

39. The applicant's primary evidence was a table he generated comparing the numbers in the elections returns in the six elections, and extracting the discrepancies in the number of registered voters and the votes cast. The objections of the 3rd respondent were that the table which the applicant relies on is insufficient to form a basis for scrutiny. He questioned its probative value because in the applicant's own admission, he did not refer to the register of voters or the forms 39A when preparing it. The register created and maintained by the 1st Respondent pursuant to Article 88 (4) (a) of the Constitution should be the source of reference on issues concerning the registered voters and not the returns of the other elections. Similarly, the form 39A which is prepared at the polling station is the primary election return from which the forms 39B and 39C are extracted and should also be the first port for clarification of any issues. In addition, the table was incomplete with some entries not entered which makes it impossible to make a valid comparison. Counsel further argued that the court cannot scrutinize the forms that pertain to other elections which are not being considered by this court because then it would be acting outside its jurisdiction. In any event, scrutiny of these forms will not enable the court unearth the dispute concerning the registered voters without referring to the register of voters.

40. As stated earlier I am minded not to give detailed reasons for my decision to avoid compromising the final findings in the suit. Suffice to say that I have carefully considered the pleadings, the petitioner's evidence, the evidence of DW1 and DW2, the affidavits in support of the application, the replies and the submissions of learned Counsel. On the material before me, it is my finding that the applicant has failed to establish a prima facie case to warrant the orders of scrutiny of the forms 37B, 37C, 39B, 39C, 38B, 38C, 35B and 34B that were issued by the 1st respondent in the elections.

41. The applicant also failed to lay a basis for scrutiny of the security features in the form 39C which was used to declare the results of the Kisii County Women Representative Election. He indicated while testifying that the evidence on this matter would be given by another witness, one Andrew Nyagwoka. This had not been done at the time the application was made.

42. The applicant further raised an issue concerning the coincidences of the votes cast. It was his argument, that in some polling stations, the candidates garnered the exact same number of votes in both polling stations to suggest that this were not the true votes but rather that the votes had been manufactured. It is my finding, however that a basis has not been laid on this issue in light of this court's ruling dated 30th October, 2017 denying the applicant leave to file a supplementary affidavit in which he

sought to introduce the particulars of the polling stations with the alleged anomalies.

43. Before concluding, there was an issue raised by the 3rd Respondent concerning the scope of scrutiny which the court should undertake under section 82 of the Elections Act and the Rule 29 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017. She argued that these provisions of law only allow scrutiny of votes and their application cannot be extended to the statutory forms and to the voters' register. It was the 3rd Respondent's contention that the orders as prayed cannot be granted. However, Rule 29 (4) is clear that the scrutiny by court is not limited to votes but also includes other election material. In this petition, the applicant has sought scrutiny of the elections returns forms as well as the register of voters. This is material which the court is authorized by the said rule at 4 (b) and (c) to examine. Indeed, the Supreme Court in **Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission Chairman (IEBC) & another [2017] eKLR** ordered a scrutiny of the electoral material including the forms 34A and 34B which were the returns for the presidential election.

44. From the foregoing, it is my finding that the applicant has not laid a prima facie case to warrant the scrutiny of the forms. Accordingly, it is my finding that the application dated 18th December, 2017 lacks merit and the same is hereby dismissed. The costs of the application shall be in the cause.

Dated, Signed and Delivered in Kisii this 18th day of January, 2018.

A. K. NDUNG'U

JUDGE