



**REPUBLIC OF KENYA**

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

**ELECTION PETITION NO. 3 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 THE GUBERNATORIAL ELECTION FOR KISII COUNTY, COUNTY NO. 45 HELD ON 8<sup>TH</sup> AUGUST 2017**

**BETWEEN**

**JOEL MAKORI ONSANDO.....1<sup>ST</sup> PETITIONER**

**FRANCIS MOCHOGE OMAO.....2<sup>ND</sup> PETITIONER**

**VERSUS**

**THE INDEPENDENT ELECTORAL AND**

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

**ROBERT ISAAC SIDNEY NAMULUNGU.....2<sup>ND</sup> RESPONDENT**

**JAMES ELVIS OMARIBA ONGWAE.....3<sup>RD</sup> RESPONDENT**

**JOASH ARTHUR MAANGI GONGERA.....4<sup>TH</sup> RESPONDENT**

**NAFTAL OBWOCHA ORINA.....5<sup>TH</sup> RESPONDENT**

**RULING**

1. The Petitioners’ Notice of Motion Application dated 8<sup>th</sup> December 2017 and supported by the affidavit of **JOEL MAKORI ONSANDO** seeks orders for:

a) Audit and scrutiny of all the declared number of registered voters through examination of Forms 37C, Forms 37B, Form 38C, Forms 35B and Form 34B that were issued by the 1<sup>st</sup> Respondent in the elections held on 8<sup>th</sup> August 2017 in Kisii County as per schedule 1.

b) Audit and scrutiny of the all statutory forms that declared the results in forms 35B, 37C, 38C and 39C that were issued by the 1<sup>st</sup> Respondent in the election held on 8<sup>th</sup> August 2017 in Kisii County in the polling stations as per schedule 2. The court orders for the scrutiny and recount of votes obtained by each of the candidates in the elections held on 8<sup>th</sup> August 2017 in Kisii County for the polling stations as per schedule 3 being:

**KISII COUNTY GUBERNATORIAL ELECTIONS PETITION**

**NO. POLLING STATION NAME POLLING STATION CODE**

**1. BOBASI CONSTITUENCY**



1	GETAI PRIMARY SCHOOL	076-01
2	GETAI PRIMARY SCHOOL	076-02
3	NYANTIRA PRIMARY SCHOOL	078-01
4	NYANTIRA PRIMARY SCHOOL	078-02

## 2. BOMACHOGE BORABU CONSTITUENCY

5	KEMOREKO PRIMARY SCHOOL	03-01
6	KEMOREKO PRIMARY SCHOOL	03-02
7	OROCHE PRIMARY SCHOOL	05-01
8	OROCHE PRIMARY SCHOOL	05-02
9	ENDERETI PRIMARY SCHOOL	029-01
10	ENDERETI PRIMARY SCHOOL	029-02
11	MAGENA PRIMARY SCHOOL	02-02

## 3. BOMACHOGE CHACHE CONSTITUENCY

12	NTAMOCHA PRIMARY SCHOOL	12-01
13	NTAMOCHA PRIMARY SCHOOL	12-02

c) The 1<sup>st</sup> Respondent to avail the ballot boxes for the polling stations referred in paragraph 3 above for the purposes of the scrutiny and recount.

d) Scrutiny and features of Form 37C used to declare the results of gubernatorial elections in Kisii.

e) That the Registrar compiles a report on the outcome of the scrutiny of the forms and recount and the report be treated as duly filed,

f) Leave to all the parties to comment on the outcome of the scrutiny

g) The respondents to bear the costs of the application.

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

2. The applicant was aggrieved by the results of the 8<sup>th</sup> August 2018 Kisii County where the gubernatorial elections where the 3<sup>rd</sup> respondent (**JAMES ELVIS OMARIBA ONGWAE**) was declared the winner saying the 1<sup>st</sup> and 2<sup>nd</sup> respondents raised serious constitutional questions concerning the manner in which the elections were conducted and results tallied. It is his contention that there was lack of a credible Voters Register which was demonstrated by the varying figures declared as total number of registered voters in the forms returning 6 of the election results.

3. Further that under Article 86 of the Constitution the system or method of voting and elections ought to be simple, accurate, verifiable, secure, accountable and transparent. Consequently the voters' register forms the foundation for verifiable elections as only registered voters can participate in the elections and that a person who is not registered as a voter is not entitled to vote. He urges the court to pay heed to Regulation 83 (1) (e) of the Election Regulations Rules, 2012 which 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, *total number of registered voters; which is always constant and static, whichever the elections held.*

4. The applicant's argument is that the total number of declared registered voters in various polling stations in Kisii County varied significantly in the statutory forms returning the results of the six elections. He contends that the mutation of the declared number of registered voters from one election to another demonstrates that the voters' roll was tampered with and the 2<sup>nd</sup> Respondent did not conduct a credible poll whatsoever; and the declared number of registered voters was manipulated with the intention of undermining the integrity of the gubernatorial election in Kisii County.

5. The petitioner points out that 6 elections were conducted on the same day yet there was an unbelievable wide margin in votes cast in the 6 the elections spanning over 100 votes in some polling stations. Since all the voters were being issued with 6 ballot papers he maintains that there was no way in which any voter could walk out of the polling station with a ballot paper and as there was no case of arrest or

prosecution; then the margin in votes cast could not be very wide.

6. The Respondents' explanation of stray ballot is described as flimsy as they have not produced the polling station diaries or the envelopes containing the stray ballots and there is a need to compare the votes cast in the 6 elections for purposes of accountability and verifiability because the figures should be near uniform.

7. The petitioner also laments that there was striking similarity in number of votes obtained by the candidates in two streams of the same polling station.

8. He insists that it is logically and humanly impossible for figures of votes obtained by all the candidates including number of rejected votes to remain consistently similar for two streams of the same polling station; and the coincidences render the results incredible and suggest thoughtless manipulation of figures by the officers of the 1<sup>st</sup> Respondent. It is his contention that the coincidences make it impossible to tell what number of votes was obtained by each of the candidates and what number of votes were rejected in the affected polling stations. This makes the elections in those polling stations opaque and does not meet the principle of accountability and only a recount can disclose the truth.

9. The 1<sup>st</sup> and 2<sup>nd</sup> Petitioners already did a summary of the problems with the register as well as the margins in votes cast in the six elections which summary was filed alongside the petition but wish for a further scrutiny by the court stating that the basis for the scrutiny has already been set out in the 1<sup>st</sup> Petitioner testimony. The applicant maintains that the scrutiny sought is for specific statutory forms and targeting specific information and polling stations which have been singled out and will help save the court's time as the issues and the problem shall have been duly crystallized.

10. The application is opposed, and the 1<sup>st</sup> and 2<sup>nd</sup> respondents in the replying affidavit sworn by **ROBERT SIDNEY NAMULUNGU** reiterates that there was only one standard, uniform, static and legal voter register employed in the 8<sup>th</sup> August, 2017 Gubernatorial election in Kisii County and the Petitioners have failed to show otherwise. Further that the difference in the votes cast in the different seats was occasioned by stray votes and no evidence was led to show that any such discrepancy affected the gubernatorial results.

11. The allegation concerning similarities in the votes garnered by the candidates in different polling stations within the same polling centre is denied and the Petitioners are faulted for not challenging the results of any specific single polling station. The Application is termed as weltering all over, misguided, misdirected and is obviously a fishing expedition made in an attempt to resurrect a dead Petition as no basis for scrutiny and recount was laid by the Petitioner or his witnesses nor does the application flow from evidence adduced during the hearing of the Petition. The court is urged to dismiss the application with costs.

12. The 3<sup>rd</sup> - 5<sup>th</sup> respondents filed grounds of opposition stating that the Application is bad in law, incompetent, misconceived and an abuse of court process as:-

a. The Petitioners have never annexed any official document from IEBC containing the number of voters per polling station for comparison with entries in forms 35B, 36B, 37B, 38B, and 39B (which in any event relate to other elective seats and not for use in the election of Governor). It is contended that in any event, the 'B' series are derivative documents and do not constitute the voters register.

b. The respondents insist that any error in the aforementioned forms should be compared to the corresponding results in the primary forms which are in the 'A' series; and errors in the 'B' and 'C' series must be compared with the entries in the 'A' series. It is pointed out that despite an order by the court dated 10<sup>th</sup> October 2017 directing the IEBC to provide the Petitioners and the respondents with the statutory forms for gubernatorial elections in the A, B and C series, the petitioners never bothered to file the forms 37 A in court, yet they now seek another order that the same forms be made available.

c. As regards the claims that the number of declared voters in form 37B and 37C vary in a major way, the respondents state that this is a speculative theory, and they have provided an official gazette that summarizes the register of voters for Kisii County as annexure JOOI indicating the number of registered voters in all the polling stations in the County. It is their contention that there is no single polling station where the declared number of registered voters is less than the number of people who voted.

d. The court is referred to Annexure JOO 2 attached to affidavit of Elvis Omariba Ongwae contains a comparison of the number of registered voters declared in JOO1 and the equivalent entry in Form 37A –there is no discrepancy at all. Moreover, the number of registered voters is a static figure which never varies or changes and is expected to be constant throughout.

13. It is pointed out that during the hearing of the Petition, IEBC witnesses testified that some of the discrepancies in the figures indicated in form 37 A and B are as a result of transposition errors which did not disadvantage the candidates at all. Further that here is no pattern of illegalities that emerge from these errors at all and the proved transposition errors are from the following 3 polling stations in Bamachoge Borabu Constituency :-

**i) Kemoroko Primary School** where the results for stream 1 were posted in Form 37B twice-replicated in stream 2.

**ii) Oroche Primary School** where the results for stream 3 were posted in stream 1 and 2 in Form 37B.

**iii) Endereti Primary School** where the results of stream 1 and replicated in Form 37B as the results for stream 2.

14. The Petitioners are also faulted for not pleading the polling stations whose results are problematic and not availing a single affidavit from

any of their agents at the polling stations to challenge the declared results. The petitioners' complaint is described as being dominantly based on a qualitative test and not a quantitative one.

15. The Petitioners are accused of engaging in speculation regarding the number of votes cast in the six elections yet they cannot prove with certainty the allegations of the anomaly using the appropriate statutory documents from the election as they should have made reference to Forms 37A (and other primary results declaration forms) for proper guidance.

16. The Petitioners are said to have failed to prove the allegation under the heading 'Striking coincidences and incredible figures' using the correct primary results declaration forms. Therefore, the allegation is speculative and based on subjective statistics as the number of votes obtained by each of the candidates is ascertainable through the use of Form 37As.

17. It is also pointed out that the Petitioners at Schedule 2 –pages 34-36 of the Petition have listed a schedule that contains alleged similarities in votes garnered among candidates per polling stations(part of the schedule contains votes garnered by Presidential candidates and the court has no jurisdiction to interrogate this matter). At the hearing of the Petition, it emerged that the petitioners' conclusion is based on the entries in the secondary /derivative documents (Form 37B). Further that when the issue was interrogated, it became apparent that the alleged discrepancies are in actual fact transposition errors. The primary results declaration forms ( form 37A) contain the correct votes garnered by candidates for Governor in:-

**i. Kemeroko Primary School streams 1 and 2,**

**ii. Oroche Primary School streams 1 and 2,**

**iii. Endereti Primary School stream 1 and 2,**

**iv. Ntamocha Primary School steams 1 and 2,**

**v. Getai Primary School streams 1 and 2**

18. At paragraph 68 and 69 of the Petition the Petitioners state the results for Nyachenge Polling Station were delivered outside the box at the Constituency Tallying Center. It is conceded that on paper, this allegation would have formed an automatic basis for scrutiny and recount. The respondents point out that during the hearing of the Petition, the **County Returning Officer(CRO)** explained that there was an accident involving a motor vehicle transporting the ballot boxes of the said polling station, which was reported to the police and the injured taken to the hospital. The CRO testified that the ballot box for governor was not destroyed at all and the seals and the votes inside the box were not affected remain intact to-date. The Petitioners are accused of taking advantage of the accident to attempt to lay basis for scrutiny and recount.

19. The respondents maintain that petitioners have not disclosed any violations of the Constitution, electoral laws or regulations to justify scrutiny and recount. The scrutiny and recount application is termed as largely an afterthought and the document which has been annexed by both respondents have discharged their burden of proof that there is no justification for scrutiny and recount.

20. Where the nullification of an election is sought on the basis of non-compliance with any written law, then section 83 of the Election Act requires the petitioner to not only demonstrate non-compliance with the written law but also that the non-compliance affected the results of the election. The Petitioners are faulted for having failed to provide evidence to show how any of the allegations they have pleaded affected the results, consequently scrutiny and recount is not available to them at all.

21. Basically the applicant would like the court to closely examine figures declared as the total number of registered voters for the 6 elections in specified polling stations as well as total number of votes cast in all the elections in identified polling stations. Also, the Applicant prays for scrutiny and recount of votes cast in 13 polling stations which had similar results for all the candidates. It is submitted on behalf of the petitioner that scrutiny is important in the sense that it helps the court not only in establishing the truth but also in picking out very vital and finer information that would otherwise require a lot of time to investigate.

The petitioners' reasons for seeking scrutiny are:

- **to establish the extent of the malpractices**
- **to save the court's time in investigating the problems complained of.**

22. Reference is made to the decision in **Harun Meitamei Lempaka v Lemanken Aramat & 2 others [2013] eKLR** where the Court held *inter alia* –

***“A scrutiny would help in crystallizing the Petitioner's complaint and might well also reduce the time which the court will have to spend upon hearing the evidence.”***

#### **Total Number of Registered Voters**

23. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents witnesses admitted that due to inadvertent human error by data entry clerks some of the Form 37Bs did not capture the correct total number of registered voters in isolated polling stations. Counsel submitted that it was however clear and demonstrably so, that the Form 37As correctly captured the total number of registered voters in the polling stations. Counsel urged the court to note that there is no single allegation of more voters than the registered voters voting or a non-registered voter voting.

24. The Petitioners' are faulted for failing to annex any official document from IEBC that contains the number of voters per polling stations for comparison with entries in 35B, 35B, 36C, 37B, 38B and 39B. This document has been annexed by both respondents to disprove the allegation. In any event, Form 34B, 35B, 36C, 38B and 39B are for other elections are not used for position of Governor as such they are irrelevant in the instant Petition. Moreover, this court lacks jurisdiction to determine the validity of entries in the Form 34B, 35B, 36B, 38B and 39B, a position which was affirmed in a ruling dated 10<sup>th</sup> October 2017 on an interlocutory application.

25. Form 34B, 35B, 36C, 38B and 39B are described as derivative documents and not the register of voters at all so that any error in them (if pointed out) should be compared to the corresponding results in the primary forms (Form 35A, 35A, 36A, 38A and 39A). i.e. errors in Form 37B and 37C must be compared with the underlying Form 37A. The respondents submit that the Petitioners prepared their pleadings without examining the register of voters and the primary form 37A and in fact the Petitioner testified that he had not seen any register (genuine or otherwise) before, during or after the election, he therefore had no basis to allege that the register was interfered with.

26. It is argued that an examination of Forms 37Cs, 37Bs, 39C, 38Cs 35Bs and 34Bs will not assist the Court in any way as the total number of registered voters can only be determined by reference to the Gazette Notice filed in Court providing such numbers. Consequently, they are speculating on the nature and scope of the irregularities.

#### Similarity of votes

- Counsel argues that it is neither logically nor humanly possible to have a similarity of votes obtained by the candidates in two streams of the same polling station. The pattern and the coincidences are termed as too fantastic to be credible and no rational mind can believe the figures. A similar scenario is said to have been presented before Mabea (J) in **Ahmed Abdullahi Mohamad & another v Mohamed Abdi Mohamed & 2 others [2017] E KLR**. Where in granting the order for scrutiny, the judge stated:

**“In both the petition, the affidavits and testimonies of witnesses, there were allegations that in 51 specified polling stations, there was striking coincidences and incredibly similar figures for the results of candidates in all the elections. It was contended that the said results was but pure manipulation that was intended to achieve predetermined results. That it was scientifically and mathematically impossible to have such similarity in such a large number of polling stations where all the candidates receive the same number of votes- the manipulation is alleged to have affected a total of 13632 votes. These have been detailed in paragraph 82 of the petition...Due to the alleged similarity and the inadequate response by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, it is imperative that there not only be scrutiny on the declaration Forms 37A's and other statutory Forms from those polling stations but there also be a recount of votes”**

- Counsel also referred to the case of **Abdirahman Adan Abdikadir & another v Independent Electoral & Boundaries Commission & 2 others [2017] eKLR** the court made it clear that once the Applicant has specified the particular polling stations or election materials that he wants scrutinized, then the order ought to be given. Mwongo (J) stated thus:

**“It is clear from the above provisions that the principle requirement for scrutiny, whether of votes or other election material, is that the court must be satisfied that there is sufficient reason to direct it, and that it relates to specified polling stations or items which are, or where, results are disputed”**

27. It is further submitted that the statutory forms in this petition contain glaring anomalies that the court needs to examine such as:-

- conflicting declarations of numbers of registered voters in the same polling station.
- forms contained similar number of votes obtained by all the candidates in two streams of the same polling station.
- Form 37C used to declare the results have watermarks only in the first two of its 10 pages.

28. In relation to this the respondents contention is that there is a striking similarity of votes garnered by candidates, it is submitted that the record attests there is no case of candidates garnering same number of votes in different polling stations within a polling centre. It is pointed out that the Petitioner was taken through Form 37As relating to the alleged polling stations and he confirmed that there were no similarities and in any event he had not seen the Form 37As when he was preparing the Petition. Further that although he was aware he could have requested for the Forms, he did not do so because he was busy analyzing Forms 37B and 37C. Consequently it is shocking and vexing for the Petitioner to base his application for scrutiny and recount on the same allegation.

29. The respondents insist that they have debunked and disproved Petitioners inane speculative theory that the number of declared voters in Form 37B and 37C is different varies in a major way. The respondents refer to the official gazetted document that summarizes the register of voters in all the polling stations for Kisii County (Ex JOO1) annexed to the affidavit of James Elvis Omariba Ongwae sworn on 15<sup>th</sup> September 2017. They point out that there isn't a single polling station where the declared number of registered voters is less than the number of people who voted. Reference is also made to Annexure JOO 2 which contains a comparison of the number of registered voters declared in JOO1 and the equivalent entry in Form 37A to confirm that there is no discrepancy at all.

30. As for the errors noted in the following 3 polling stations in Bamachoge Borabu Constituency :-

- i) Kemoreko Primary School where the results for stream 1 were posted in Form 37B twice-replaced in stream 2.**
- ii) Oroche Primary School where the results for stream 3 were posted in stream 1 and 2 in Form 37B.**

iii) Endereti Primary School where the results of stream 1 and replicated in Form 37B as the results for stream 2.

31. These are described as **proved transposition errors** and not glaring and irreconcilable irregularities or discrepancies nor has the evidence brought out the dispute more clearly and it must be borne in mind that not all irregularities or discrepancies call for scrutiny. An irregularity or discrepancy, whether minor or otherwise, which is sufficiently explained may not call for a further analysis by way of scrutiny. One such instance is as put by *Majanja J* in **Wavinya Ndeti vs. Independent Electoral and Boundaries Commission & 4 Others (2014) e KLR** where the Learned Judge stated that:-

***“An election is a human endeavor and is not carried out by programmed machines. Perfection is an inspiration, but allowance must be made for human error.”***

32. It is important to note that the Petitioner had no problem with results in the Form 37As which are the primary source of the results and which are final.

**Wide margins of votes cast in the 6 elections /Differences in Votes Cast in the 6 Elective Positions**

33. The Applicant’s concern here is that the margin could not be as wide as over 100 votes in some polling stations since all the voters were being issued with 6 ballot papers as required by law. Further that because no voter can walk out of the polling station with a ballot paper, then the wide margin of votes cast in all the elections cannot be believed; and the Respondents failed to give a plausible explanation for the wide gaps.

34. It is further submitted that one of the ways in which accountability and verifiability of elections can be tested is by comparison of turn out and/or votes cast in the 6 elections. This it is argued was done in **William Kabogo Gitau V George Thuo & 2 Others [2010] E KLR** in which the court compared the presidential, parliamentary and civic elections held on the same day. The court held:

***“The difference of over 5,000 votes between the parliamentary vote on the one hand and the presidential and the civic vote on the other, in the circumstances of this petition, is evidence of serious electoral malpractice that was apparent during the conduct of the elections at Juja constituency.”***

- The scrutiny sought will reveal the exact margins between/among the elections held in Kisii County on 8<sup>th</sup> August 2017.

35. In countering these arguments the respondents admit that there was a difference in the number of votes cast in the various elective positions in isolated polling stations. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents in their response explained that the difference was due to stray ballots and there is nothing strikingly strange and/or suspicious about the said differences. Further that the Petitioner and this witnesses failed to show how the said difference advantaged the 3<sup>rd</sup> Respondent and/or affected the gubernatorial results as in any event the Petitioner and his witnesses admitted that they did not know how stray ballots are treated.

36. It is the respondents’ contention that this Court lacks jurisdiction to pronounce itself on the results and or contents as are contained in Forms 35B, 38E and 39C as its jurisdiction limited to the gubernatorial election in this matter. In any event counsel points out that the scrutiny of Forms 35B, 37C, 38C and 39c will not assist the Court in determining the Petition and may only reveal that the votes cast in the different elective seats were varying. It is emphasized that is important to the Court is the effect of varying votes cast in the various elective seat on the gubernatorial results.

37. In advancing their arguments regarding the margin of victory, reference is made to the decision **Richard Kalembe Ndile & Another v Patrick Musimba Mweu & 2 Others**, where the court observed that an order for scrutiny or recount will usually be made where there are several errors, alterations and/or omissions on statutory forms. Further, that it will be more readily made in such cases if, in addition, the margin of votes between the returned candidate and the runners-up is narrow. It is submitted that in the present, the Petitioners have not particularized or proved during the hearing of the Petition any of such errors, alterations or omissions.

38. It is pointed out that the 3<sup>rd</sup> Respondent won the election by a margin of 95,000 votes against the 1<sup>st</sup> runners up, which is extremely wide and there has been no error that has been proven or particularized that can affect this margin. The Court of Appeal in the case of **Hassan Joho vs. Nyange & Another (2008) EKLR EP 500** addressed the issue thus:-

***“Where the margins are narrow, the courts have ordered scrutiny without necessarily seeking that a foundation to be laid. The Judge did not say that where the margin is wide, then no scrutiny will be ordered, it only means that the task of laying sufficient basis is made difficult the wider the margin...”***

39. The Court declined to issue an order of scrutiny where the margin of votes was 1061 votes. Further, in **Phillip Osore Ogutu v Michael Onyura Aringo & 2 others [2013] eKLR**, the Court held that a margin of 1,389 votes against a total of 36,332 was not narrow as to warrant an order for scrutiny without further justification. Further, as held in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR** at paragraph 223, where a court is adjudicating on the effect of an irregularity, the test to be used should not be speculative and cannot be based on extrapolation of limited-scale irregularity to the broad expanse of whole election under contest as can be seen from this case.

**ANALYSIS**

40. In the instant case the Petitioners are faulted for failing to plead the polling stations whose results are problematic (**CHECK PLEADINGS**). In law, such polling stations must be pleaded and a basis of electoral malpractice laid down through evidence and cross-examination of the respondent’s witnesses.

41. Obviously the order for scrutiny does not materialize at the drop of a hat- there must be a satisfactory basis presented to the court. In **Arikala Narasa Reddy v Venkata Ram Reddy Reddygari & Another**, the Supreme Court of India held that the court cannot exercise the discretion of ordering recounting of ballots just to enable the election petitioner to indulge in a roving inquiry with a view to fish material to invalidate the election. The order of recounting can be passed only if the petitioner sets out his or her case with precision supported by averments of material facts. The Supreme Court of India set out the conditions that must be satisfied before a recount is permitted to include *inter alia*:

- a) *A prima facie case is established;*
- b) *The material facts and full particulars have been pleaded stating the irregularities in counting of votes;*
- c) *A roving and fishing inquiry should not be directed by way of an order to re-count the votes;*

42. This was further fortified by Justice Kimaru in **Rishad Hamid Ahmed Amana –V- Independent Electoral and Boundaries Commission & 2 others [2013] eKLR** stated as follows:

*“In this regard, scrutiny cannot be ordered where the Petitioner has not specifically pleaded for scrutiny in his petition. It will not do for the Petitioner to aver in the petition that he desires scrutiny and recount to be undertaken in respect of all the polling stations in the electoral areas that is the subject of the dispute. The Petitioner must plead in sufficient detail why he requires the Courts intervention to order scrutiny. In that regard, the Petitioner has to state the specific polling stations that he alleges there were irregularities and therefore should be scrutinized”.*

43. In the case of **Peter Gichuki King’ara v Independent Electoral and Boundaries Commission & 2 Others, Election Petition (Nyeri) No. 3 of 2013**, where the Court held as follows *scrutiny and recount is not...a gambling exercise that sets the court to rummaging through the ballot boxes to see whether any scintilla of evidence of electoral malpractice or irregularity can be found. If the Petition is based on any particular electoral malpractice or irregularity that would warrant scrutiny or recount of votes, the malpractice or irregularity must be pleaded and the evidence of such malpractice must be laid out or established prior to an order for scrutiny or recount.*

44. It is therefore incorrect to suggest that the position taken by Mwongo (J) in **Abdirahman Adan Abdikadir & another v IEBC & 2 Others [2017] eKLR** is that once an applicant has specified the particular polling stations or election materials that he wants scrutinized, then the order ought to be given. Infact Mwongo(J) was clear that:

*“...the court must be satisfied that there is sufficient reason to direct it...”*

45. The Petitioners’ complaint is that the number of declared voters in Form 37B and 37C is different from the number of indicated in Form 35B, 35B, 36C, 38B and 39B thus indicative of electoral malpractice at the polling stations in Kisii County. The Petitioners have at pages 19-28 of the Petition attached a schedule of the said polling stations where number of declared voters in Form 37B and 37C is different from the number of indicated in Form 35B, 35B, 36C, 38B and 39B.

46. The Petitioners at Schedule 2 –pages 29-33 of the Petition have also listed a schedule that contains alleged discrepancies in votes cast per seat per polling station in Form 34B, 35B, 37B, 37C, 38B, 38C, 38B and 39C. The Petitioners at Schedule 2 –pages 34-36 of the Petition have listed a schedule that contains alleged similarities in votes garnered among candidates per polling stations. They are said to be introducing fresh matters which were not pleaded. That is incorrect, infact a perusal of the schedules and paragraphs in the petition confirm that the petitioners have pleaded the anomalies and defects they allude to.

**Section 82** of the **Elections Act** provides as follows:

**82.(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. What is more, , Rule 29 of the Election (County and Parliamentary Elections) Petition Rules 2017 limits the extent of scrutiny of votes in the following manner:-**

**Rule 29(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 the examination of—**

- (a) the written statements made by the returning officers under the Act;**
- (b) the printed copy of the Register of voters used during the elections sealed in a tamper proof envelope;**
- (c) the copies of the results of each polling station in which the results of the election are in dispute;**
- (d) the written complaints of the candidates and their representatives;**

- (e) the packets of spoilt ballots;
- (f) the marked copy register;
- (g) the packets of counterfoils of used ballot papers;
- (h) the packets of counted ballot papers;
- (i) the packets of rejected ballot papers;
- (j) the polling day diary; and
- (k) the statements showing the number of rejected ballot papers.

47. The petitioners specifies scrutiny of all the statutory forms and ballot boxes

**Differences in votes cast in the six elective posts**

48. What are the glaring anomalies in the statutory forms? The petitioner lists them as:-

- **the conflicting declarations of numbers of registered voters in the same polling station.**
- **the forms contained similar number of votes obtained by all the candidates in two streams of the same polling station.**
- **Form 37C used to declare the results have watermarks only in the first two of its 10 pages. (Meaning a desire to scrutinize ALL the statutory forms used in the gubernatorial election.)**

49. Have these been sufficiently demonstrated as to warrant an order for scrutiny? As regards the statutory forms in relation to the 6 elective posts, this court made orders in ruling dated 10<sup>th</sup> October 2017 that the IEBC provide the Petitioners and the 3<sup>rd</sup>-5<sup>th</sup> Respondents with all the statutory forms limited to the election of Governor ( Form 37A, 37B, and 37C). I adapt verbatim from the submissions by Mr. Omogeni, the Petitioner. Indeed were given the forms but they did not file the Form 37As in court yet now they are now seeking another order that the said forms be availed. As the respondents counsel submitted, they requested for the forms and when the Court made the order they declined to benefit from it. The details concerning the other statutory forms relating to the other 5 elective posts was already addressed in the aforementioned ruling and I will not repeat those findings in this present ruling- suffice it to say, the –petitioners cannot have two bites at the cherry!.

**Total Number of Registered Voters**

50. It is common ground that the total number of registered voters in an election is constant, that the register of voters was availed in each polling station in Kisii County. The respondents counsel pointed out that the total number of registered voters in each polling station was gazetted and was a matter of public knowledge. The 1<sup>st</sup> petitioner had never seen nor inspected the register of voters before, during or after the polls.

51. However, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents witnesses admitted that due to human error by data entry clerks some of the Form 37Bs did not capture the correct total number of registered voters in isolated polling stations. Counsel submitted that it was however clear and demonstrably so, that the Form 37As correctly captured the total number of registered voters in the polling stations. Counsel urged the court to note that there is no single allegation of more voters than the registered voters voting or a non-registered voter voting.

52. Petitioners maintain that the number of declared voters in Form 37B and 37C is different from the number of indicated in Form 35B, 35B, 36C, 38B and 39B has led them to speculate that there was no credible voters register. However, during the hearing of the Petition, evidence was presented confirming that the register contained the names of voters and that the same had been printed and posted at the door of the polling station days before the election for members of the public to verify the details therein. The petitioner confirmed he had never seen nor inspected any register of voters before, during or after the polls.

53. During the hearing of the Petition, IEBC witnesses testified that some of the discrepancies in the numbers indicated in form 37 A and B are as a result of transposition errors. Three specific polling stations have been mentioned in Bamachoge Borabu Constituency namely:-

- **Kemoreko Primary School where the results for stream 1 were posted in Form 37B twice-replaced in stream 2.**
- **Oroche Primary School where the results for stream 3 were posted in stream 1 and 2 in Form 37B.**
- **Endereti Primary School where the results of stream 1 and replicated in Form 37B as the results for stream 2.**

54. Is it correct that these errors did not disadvantage the candidates at all and there is no pattern of illegalities that emerge from them as these were simple transposition errors. The primary results declaration forms (form 37A) contain the votes garnered by candidates for Governor in:-

- i. Kemoreko Primary School streams 1 and 2,**
- ii. Oroche Primary School streams 1 and 2,**

**iii. Endereti Primary School stream 1 and 2,**

**iv. Ntamocha Primary School streams 1 and 2,**

**v. Getai Primary School streams 1 and 2**

55. Indeed in these instances the figures entered in Form 37A differed with what was recorded in form 37B and 37C but the error is attributed to fatigue during the electoral process. The IEBC official stated that the results for governor are processed last in six elective positions at the constituency tallying centers and at the time, the staff processing the results would have stayed for nearly four days without sleep and would inadvertently make transposition errors in the secondary results declaration forms.

56. On cross examination the petitioner confirmed that **Kemoreko primary school** stream 1 reads that there were 551 voters registered and the candidates garnered votes as follows:-

**Babwasi Charles Maranga 7,**

**Mogeni Kefa 5,**

**Nyaberi Justry P.Lumumba 10,**

**Nyamao Samuel Nyachwaya 2,**

**Nyamweya Manson Oyongo 23,**

**Obure Christopher Mogere 103,**

**Omboto Boniface 4,**

**Ongwae James Elvis Omariba 276.**

Total valid votes 430, rejected 5 and the 1<sup>st</sup> Petitioner confirmed that these results were accurately captured.

57. In Kemoreko primary stream 2 the number of registered voters was 552.

**Babwasi Charles Maranga 7,**

**Mogeni Kefa 5,**

**Nyaberi Justry P.Lumumba 10,**

**Nyamao Samuel Nyachwaya 2,**

**Nyamweya Manson Oyongo 23,**

**Obure Christopher Mogere 103,**

**Omboto Boniface 4,**

**Ongwae James Elvis Omariba 276.**

58. These results were not captured in Form 37A and Kemoreko I results were infact posted twice but the petitioner confirmed that the errors did not advantage any of the candidates-so what will scrutiny achieve?.

59. Form 37B Oroche primary school had 3 streams – For Oroche stream 1 in Form 37A registered voters were recorded as 499. The evidence of the petitioner on cross examination was that the candidates garnered votes as follows:-

**Bagwasi 1**

**Mogeni 2**

**Nyamao 13**

**Nyamweya 1**

**Manson 14**

**Obure 145**

**Boniface 2**

**Ongwae 237**

60. The petitioner also confirmed that these results were accurately captured in Form 37B so what will scrutiny reveal that has not been brought out in the evidence presented? Is there need to scrutinize an error which has been admitted and satisfactorily explained? I think not.

61. **Oroche Stream II** – Form 37B Total showed that the registered voters were 499. The total valid votes 388 cast – rejected votes 5. The petitioner confirmed that the results were accurately captured in Form 37A and there was no pattern favouring anyone.

62. With regard to Oroche Primary School III the 1<sup>st</sup> Petitioner insisted that Ongwae's votes at Oroche polling station were inflated – at Oroche Primary School Stream 3, Ongwae got 190 votes as per Form 37A and in 37B he had 183 votes – so he lost 7 votes. In the light of this revelation the 1<sup>st</sup> Petitioner conceded that "...my statement about inflated votes at this polling station is not valid". Scrutiny in this instance will not wave any magical wand!

63. On being referred to the affidavit by Argwings with regard to **Endereti primary I** – Form 37B (page 18 of Argwing's affidavit) the total number of registered voters were 395 and the chief protagonists James Ongwae got 156 votes whilst Chris Obure got 113 votes again the petitioner confirmed that these were accurately captured.

64. It was also apparent that **in respect of Endereti II** in Form 37B – the results of stream I were duplicated in II and differed from what was in Form 37A. The difference is that Ongwae in stream II got 134 yet form gave him 156 – so he gained by over 20 votes. Obure got 113 and in the other form is 113. I am persuaded that in this stream there is need for scrutiny in relation to the number of ballots cast, spoilt and rejected. This scenario is repeated in Getai Primary School stream 1 and 2 as well as Nyantira Primary School Stream 1 and 2 where no detailed explanation was given and the court cannot make assumption that it was transposition error.

#### **Lack of a credible and verifiable register**

65. The petitioner in his evidence stated that the voter's register was manipulated although he confirmed "I have no evidence of the manipulation....The register was not credible although I did not see the register which was used at all the polling station. I never got a complaint that there was a polling station with a defective register"

66. IEBC witnesses testified that the register contained the names of voters (minus their ID numbers-for security reasons) is printed and posted at the door of the polling station days before the election for members of the public to verify the details therein. Moreover, the register of voters at any polling station is also electronically maintained in the KIEMS kit. What then forms the basis of the allegation that there was no credible, accurate and verifiable voters register? No evidence was led to demonstrate that the number of votes cast exceeded the number of registered voters. There was no due diligence on the part of the petitioners and under this head, they are on a curiosity fulfilling mission to see what they never even inspected in the first place-the prayer lacks merit and I decline to indulge the proverbial cat's curiosity.

#### **Striking Similarities in votes garnered**

67. At Schedule 2 –pages 34-36 of the Petition have listed a schedule that contains alleged similarities in votes garnered among candidates per polling stations. (part of the schedule contains votes garnered by Presidential candidates for which this court has no jurisdiction to interrogate). During the hearing of the Petition, it emerged that the petitioners' conclusion is based on the entries in the secondary /derivative documents (Form 37B) and they had not checked corresponding entries in form 37A despite the ruling delivered on 10<sup>th</sup> October 2017 which I have already alluded to.

68. The 1<sup>st</sup> Petitioner testified that the results for **Nyanchege Polling Station** were delivered outside the box at the Constituency Tallying Center. I concur with the submission that this would form an automatic basis for scrutiny and recount. However, during the hearing of the Petition, the County Returning Officer that there was an accident involving a motor vehicle transporting the ballot boxes of the said polling station which was reported to the police and the injured taken to the hospital.

69. The County Returning Officer testified that the ballot box for governor was not destroyed at all and only the sides of the box contained minor damages-further the seals and the votes inside the box were not affected at all and remain intact to-date. If that is the case, then there is no easier way to confirm the state of affairs other than to open the ballot box from **Nyanchege Polling station** relating to the election of governor of Kisii County and also inspect the Polling Day Diary to confirm whether the incident and delivery alluded to was thus recorded. The scrutiny shall be limited to confirming the state of the ballot box, the counted votes in respect of the 3<sup>rd</sup> respondent and the first runners-up namely Christopher Obure, the rejected ballot papers and the spoilt ballots only.

#### **Wide margins of votes cast in the 6 elections**

70. The Applicant's concern here is that the margin could not be as wide as over 100 votes in some polling stations since all the voters were being issued with 6 ballot papers as required by law. Further that because no voter can walk out of the polling station with a ballot paper, then the wide margin of votes cast in all the elections cannot be believed; and the Respondents failed to give a plausible explanation for the wide gaps. In the application the petitioner states that there are 13 polling stations whose results ought to be scrutinized and they are specified. If this court is to go by what has been confirmed in the evidence then it would be the ones with the transposition errors which I have already alluded to in the earlier part of this ruling. What evidence is there to support this assertion that a person who is not registered as a voter voted in the impugned elections? What evidence is there to confirm that every ballot paper issued to a voter was marked? This

position is purely speculative and theoretical, Surely one cannot get away by simply making a blanket statement based on speculation then insist that due to the wide margin then the only way to confirm the integrity of the results is to order for a scrutiny in all the polling stations.

- For purposes of clarity the prayer for scrutiny is allowed and shall be limited to the following polling stations and the ballot boxes relating to the election of governor of Kisii County. The scrutiny shall be limited to the counted votes in respect of the 3<sup>rd</sup> respondent and the first runners-up namely Christopher Obure, the rejected ballot papers and the spoilt ballots only in respect to:-
- **Endereti Primary School Stream II**
- **Gaiti Primary School Stream I and II**
- **Nyantira Primary School stream I and II**
- **Nyanchange Polling station and also includes inspecting the state of the ballot box.**

71. The costs of this application shall be borne by the Petitioners.

**Delivered and dated this 16<sup>th</sup> day of January, 2018 at Kisii**

**H.A.OMONDI**

**JUDGE**