



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

ELECTION PETITION NO. 7 OF 2017

IN THE MATTER OF: ARTICLES 1, 2, 3, 10, 19, 20, 22, 23, 47 AND 73 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF: CHAPTER SEVEN AS READ TOGETHER WITH CHAPTER SIX OF THE CONSTITUTION OF KENYA, 2010 (REPRESENTATION OF THE PEOPLE)

AND

IN THE MATTER OF: CONTRAVENTION OF ARTICLES 1, 2, 10, 81, 83 AND 86 OF THE CONSTITUTION BY THE RESPONDENTS

AND

IN THE MATTER OF: THE ELECTIONS ACT CAP 7, ELECTIONS (TECHNOLOGY) REGULATIONS, 2017 AND THE ELECTION OFFENCES ACT NO. 37 OF 2016

AND

IN THE MATTER OF: THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION ACT, 2012

AND

IN THE MATTER OF: THE LEADERSHIP AND INTEGRITY ACT, 2012

BETWEEN

MOHAMED MAHAMUD ALL.....PETITIONER

VERSUS

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

AISHA ABUBAKAR, CHANGAMWE CONSTITUENCY

RETURNING OFFICER.....2ND RESPONDENT

OMAR MWINYI SHIMBWA.....3RD RESPONDENT

RULING NO. 5

1. Through an application dated 7th September, 2017 brought under the provisions of Articles 1, 2, 3, 10, 19, 20, 22, 23, 27, 47 and 159 of the Constitution of Kenya, 2010; the Elections Act Cap 7, the Election Offences Act and all other enabling provisions of the Law and the inherent jurisdiction of the court; the petitioner/applicant seeks the following orders:-

(i) Spent;

(ii) Spent;

(iii) That pending the hearing and determination of this petition, this court be pleased to grant an order for scrutiny of all the votes cast, the polling station diaries made by the presiding officers under the provisions of the Elections Act, 2011, the KIEMS kits, the copies of registers, the copies of all Forms 35A and 35B, the packets of unused Form 35A booklets, counterfoils of used ballot papers, unused, rejected and spoilt ballot papers to establish the validity of the votes cast and determine the votes cast in favour of each candidate in respect to the election of the Member of the National Assembly for Changamwe Constituency held on 8th August, 2017; and

(iv) That costs of the application be provided for.

2. The application is supported by a brief affidavit by the applicant, Mohamed Mohamud Ali sworn on 7th September, 2017. In the said affidavit, the applicant avers that for the sake of brevity, he reiterates the contents of the affidavit sworn in support of the petition. The 1st and 2nd respondents filed a joint replying affidavit on 15th September, 2017 through the Changamwe Constituency Returning Officer, Aisha Abubakar opposing the application herein. Their Counsel also filed a list of authorities. Counsel for the 3rd respondent filed grounds of opposition on 22nd September, 2017 and a list of authorities thereto.

3. The court made it clear from the outset that it would be premature to hear the application herein before the hearing of the petition had begun due to the need for the applicant to lay a firm basis to his application. The said application therefore remained in limbo until after the close of the 1st and 2nd respondents' case. As at this time, the court and Counsel on record had the advantage of hearing the evidence in support of the petitioner's and 1st and 2nd respondents' case. Mr. Gikandi, Learned Counsel for the applicant revisited the said application when the 3rd respondent's case was ongoing.

4. The affidavit which the applicant has adopted to support the application herein was sworn on 5th September, 2017. It lays out the irregularities and illegalities that were allegedly committed by the respondents in the elections conducted on 8th August, 2017, in respect to the Member of Parliament for Changamwe Constituency.

5. The court directed Counsel to file their submissions for consideration. This court has perused the same as well as the authorities relied upon in support of the said submissions. Counsel for the applicant filed his submissions on 22nd December, 2017. He cited the decision in **Gatirau Peter Munya vs Dickson Mwenda Kithinji and 2 Others** [2014] eKLR as affirmed by the Supreme Court in **Raila Amolo Odinga and Another vs Independent Electoral Boundaries Commission and 2 Others** [2017] eKLR, that a party can lay a basis for an order of scrutiny by relying on the *pleadings, affidavits and evidence adduced during the hearing of the petition*. Mr. Gikandi therefore submitted that the court should look at the matter on a preliminary basis as it is not making a final determination on the issues before it at this point in time. He invited the court to look at the report of the materials that were delivered to the safe custody of the court by the 1st and 2nd respondents and captured in the Deputy Registrar's report of 17th November, 2017.

6. He attached to his submissions a table that outlines the discrepancies captured in the said report with regard to serial numbers of some ballot boxes and serial numbers of some seals as against data of the serial numbers of some ballot boxes and serial numbers of some seals as reflected in polling station diaries produced by the 1st and 2nd respondents' witnesses. He stated that the discrepancies that apply to 21 polling stations, raise the suspicion that there has been interference with election materials after the declaration of election results.

7. Counsel for the applicant has in his affidavit also addressed what he terms as apparent anomalies on Forms 35A, in that 32 of them from different polling stations lack official IEBC stamps thus authenticity of the said Forms cannot be ascertained.

8. He asserts that Forms 35A from 16 polling stations have a lot of alterations which were not countersigned. Further, Forms 35A from 27 polling stations were not signed by Jubilee party agents which is compounded by the evidence of the petitioner's witnesses that most of the Jubilee party agents were denied a chance to undertake their duties. It is submitted that Forms 35A from 4 polling stations were affixed with wrong stamps thus the results therein are disputed. It is also contended that Forms 35A from 9 polling stations are missing important signatory details of the Presiding Officers and party agents thus one cannot establish whether they are copies of the original Forms 35A or if they have been doctored.

9. Submissions by Counsel for the applicant were also to the effect that PW35 (sic), Abdi Mohamed Daib gave pictorial evidence of voters being issued with ballot papers stamped spoilt before they cast the said ballots, thus an order of scrutiny will establish the veracity of the said fact.

10. Another issue submitted on, was the disparity of online portal results whereby the total ballot papers cast for the President, Governor, Member of Parliament, Senator, Woman Representative and Member of County Assembly were not in tandem as a disparity of over 5,000 votes was found. Counsel stated that online portal results and results declared in Forms 35B were at variance and that the Returning Officer confirmed the same but maintained that the online portal results were provisional. Counsel for the applicant stated that the results for 2 contestants **Patrick K. Ngugi and Godfrey Imbali Mpapale** were reduced by a margin which can be attributed to the increased votes for the 3rd respondent by an equal margin.

11. It was argued that the Returning Officer talked of having made alterations and/or amendments to Form 35B. In that one was prepared on 10th August, 2017 and the second one on 13th August, 2017. Tied to the foregoing was the issue of the Returning Officer having amended the typed figure of 41,893 votes in Form 37B in respect to the results for the Governor Mombasa County, to 52,804 votes.

12. Mr. Gikandi cited the case of **Joho and 2 Others vs Nyange and Another** [2006] eKLR, where Maraga J (as he then was) held that scrutiny is ordered when there is ground for believing that there were irregularities in the election process or if there was a mistake on the part of the Returning Officer or other election officials.

13. The applicant's Counsel narrowed down his prayer for scrutiny to 80 polling stations outlined in his submissions. He thus did not pursue a recount and scrutiny of all votes cast in Changamwe Constituency.

14. The 1st and 2nd respondents in their written submissions dated 18th December, 2017 opposed the application of 7th September, 2017. Their Learned Counsel, Mr. Muniyithya, addressed the court on the provisions of section 82(1) of the Elections Act, 2011, Rules 28 and 29 of the Elections (Parliamentary and County) Petition Rules, 2017 on the issue of scrutiny and recount of votes. He emphasized that a sufficient reason must be established and that orders for recount and scrutiny cannot be granted as a matter of course, as it would enable a petitioner to engage in a fishing expedition. He made reference to the case of **Gatirau Peter Munya vs Dickson Mwenda Kithinji and 2 Others** (supra) on the need for a proper basis to be laid for grant of an order for scrutiny and recount of votes.

15. It was his submission that although the applicant seeks orders for recount and scrutiny of votes, the supporting affidavit to the petition as adopted by the applicant in his application, and his further affidavit make reference no more than 11 polling stations, where Jubilee party agents were chased away on 8th August, 2017 during the elections in Changamwe Constituency. He also relied on the decision in **Hassan Mohamed Hassan and Another vs IEBC and 2 Others** [2013] eKLR, where Onyancha J laid out the factors to be considered before a court can grant orders of recount and scrutiny of votes, which authority was cited with approval by the Supreme Court in **Raila Amolo Odinga and Another vs Independent Electoral Commission and 2 Others** (supra).

16. Mr. Muniyithya also relied on **Nathif Jama Adama vs Abdikhaim Osman Mohamed and 3 Others** [2014] eKLR and **Arikala Narasa Reddy vs Venkata Ram Reddy Reddygari and Another** [2014] S.C R, a decision of the Supreme Court of India, to propound on the considerations that should be taken into account in an application like the one before this court.

17. It was argued for the 1st and 2nd respondents that the applicant has failed to establish a prima facie case for grant of the orders sought. Counsel outlined the matters complained of in the petition and stated that the petitioner and his witnesses failed to present a list of agents who were chased away from polling stations, voters who were identified as having been registered in specific polling stations and who were denied the right to vote. He stated that there was no demonstration of any disputed election results as appertaining to Forms 35A. Counsel stated that the 1st and 2nd respondents' witnesses established that Jubilee party agents were in all the polling stations and signed the polling station diaries and witnessed the declaration of results in Forms 35A, which fact was corroborated by the witnesses for the 3rd respondent.

18. It was further submitted that the applicant failed to demonstrate the polling station he visited and found some illiterate voters not being assisted appropriately by the Presiding Officers, but relied on information from third parties. He added that the 3rd respondent's witnesses confirmed that illiterate voters were assisted properly by Presiding Officers according to the rules.

19. Counsel for the 1st and 2nd respondents also indicated that the applicant failed to specifically bring out the particulars of massive electoral malpractices and irregularities, such as, some voters being denied the right to vote, some people being allowed to vote without verification by KIEMS kits, lack of proper stamps on Forms 35A, Forms 35A in a polling station having different serial numbers, many assisted voters being turned away, Presiding Officers not managing their polling stations properly, failure by most Presiding Officers to relay and/or transmit the results electronically, and discrepancy in voter turnout in the election for Member of the National Assembly, Changamwe Constituency and other elections. In submitting that the applicant had failed to discharge the burden of proof, Mr. Muniyithya relied on the provisions of sections 107(1) and 109 of the Evidence Act on evidential burden of proof and the case of **Raila Amolo Odinga and Another vs Independent Electoral and Boundaries Commission and 2 Others** [2013] eKLR.

20. It was submitted that the applicant should have given reasons as to why the polling stations in issue should be subject to scrutiny and recount, as per the holding in **Nicholas Kiptoo Salat vs Wilfred Lesan and 7 Others**, Civil Appeal No. 228 of 2013. It was contended that the applicant failed to state the materials and documents he wished to have scrutinized.

21. Counsel for the 1st and 2nd respondents also stated that there was no indication that the margin of victory between Abdi Mohamed Daib the Jubilee party candidate and the 3rd respondent was so small such that there was a likelihood of a mistake in tallying that would have been detrimental to the Jubilee party candidate.

22. In closing his arguments, Counsel urged the court to be persuaded by the decision by Ongeru J in Malindi High Court Election Petition No. 8 of 2017, **Albeity Hassan Abdalla vs IEBC and 2 Others**, Malindi High Court Election Petition No. 8 of 2017 where the court relied on the decision in the 2017 decision in **Raila Amolo Odinga and Another vs IEBC and 2 Others** (supra) and declined to grant orders for scrutiny. He prayed for the application dated 7th September, 2017 to be dismissed with costs.

23. Mr. Mohamed, Learned Counsel for the 3rd respondent filed his submissions on 21st December, 2017. He cited the provisions of Rule 29(2) of the Elections (Parliamentary and County) Elections Rules, 2017 on the issue of scrutiny of votes. He cited the 2017 Supreme Court decision in **Raila Amolo Odinga and Another vs IEBC and 2 Others** (supra). He also cited **Gideon Mwangangi Wambua and Another vs IEBC and 2 Others** [2013] eKLR, **Philip Munge Ndolo vs Omar Mwinyi Shimbwa and 2 Others** [2013] eKLR and **Justus Mongumbu Omiti vs IEBC and Another** [2017] eKLR.

24. In addressing the issues raised by the applicant's witnesses in the petition, Counsel for the 3rd Respondent submitted that voters who had been issued with multiple ballot papers were not allowed to cast the extra ballot papers as they were taken away from them by the Presiding Officers of the respective polling stations. He stated that the allegation of 2 strangers stuffing ballot papers into the ballot boxes was unfounded and the said allegation was controverted by the Returning Officer of Chaani Primary School polling station No. 5, who was the 1st and 2nd respondents' witness No. 9. He testified that he did not see such people at the polling station. Counsel argued that the polling station

diary for the said polling station shows that ballot papers were issued to 400 voters for all the elective seats. Counsel indicated that 396 valid votes were cast for the Member of the National Assembly and the difference with the rest of the elective seats arose as a result of spoiled ballot papers and/or stray ballot papers.

25. With regard to the mix up of the lids of the ballot boxes for Senatorial and the Member of the National Assembly seats at Kipevu Primary School polling station and Umoja Primary School polling station No. 3, it was argued that the said mix up was not a deliberate illegal act meant to confuse voters leading to casting of ballots for parliamentary candidates in the Senatorial ballot box. It was stated that the Presiding Officer of Umoja Primary School polling station No. 3 agreed with the political party agents that the said boxes be labeled correctly and for voters to be directed to cast their ballot papers in the correct ballot boxes. Counsel indicated that 392 valid votes were cast out of the 397 ballot papers issued for Member of the National Assembly and that there were 5 stray ballot papers in the said polling station.

26. The 3rd respondent's Counsel also addressed the issue of the faulty KIEMS kit. This court notes that Counsel for the applicant in his written submissions has indicated that he does not wish to pursue the said issue as the Returning Officer, Changamwe Constituency testified that the KIEMS kits were formatted to pave way for the repeat Presidential elections of 26th October, 2017.

27. On the alleged discrepancy between the online portal results and those declared by the Returning Officer, Changamwe Constituency, Counsel submitted that the online portal results were not final but provisional results as per regulation 82 of the Elections (General) Regulations, 2012 which are subject to confirmation after the procedure in Regulation 76 thereof.

28. It was submitted the alterations made to Forms 35A were countersigned by the Presiding Officers and party agents duly appended their signatures on the said Forms to signify they had no problems with the results. He relied on the case of **Philip Munge Ndolo vs Osman Mwinyi Shimbwa and 2 Others** (supra) and **Wavinya Ndeti vs IEBC and 4 Others**, Machakos Petition No. 4 of 2013, where the court noted that human error cannot be discounted in that electoral Forms are filled by human beings.

29. It was also submitted that political party agents for the Jubilee candidate were not denied entry into the polling stations, which is ascertainable from polling station diaries. Reliance was placed on the provisions of Regulations 62(2) and (3), 79(6) and (7) and 97 of the Elections (General) Regulations. Counsel therefore argued that the absence of political candidates or party agents at polling stations cannot invalidate the results. Mr. Mohamed relied on the case of **John Kiarie Waweru vs Beth Wambui Mugo and 2 Others**, Nairobi High Court Election Petition No. 13 of 2008 to assert the said position.

30. The 3rd respondent's Counsel contended that no witness testified that he was issued with a ballot paper stamped "spoilt" and as such PW27's allegation on the same cannot stand.

31. On the lack of IEBC stamps on the face of Forms 35A or Forms 35A bearing the wrong stamp, Counsel submitted that the said issue was never pleaded but came out in the course of the evidence but Presiding Officers testified that stamping of Forms 35A is not a legal requirement. He relied on the provisions of regulation 76 and 79 of the Elections (General) regulations, 2012 to amplify that point.

32. It was submitted that the applicant has supplied a list of 9 Forms 35A where signatory details are missing but the same was never pleaded and came to the fore during the hearing of the case, thus should be disregarded.

33. Mr. Mohammed wound up his submissions by counteracting the argument by Mr. Gikandi that since the court nullified the Presidential election of 8th August, 2017, all the other elections conducted on the same day were equally flawed. The 3rd respondent's Counsel stated that the 2017 Supreme Court decision in **Raila Amolo Odinga and Another vs IEBC 2 Others** (supra) cannot be applied uniformly to all election petitions as each case must be decided on its own merits. He also relied on the case of **Martha Wangari Karua and Another vs IEBC and 3 Others** [2017] eKLR, where Gitari J held that in applying the decision of the Supreme Court decision in the 2017 **Raila Amolo Odinga case**, the petitioner must lay a factual foundation. Once that is established then the court has to apply the principle of *stare decisis* under Article 163(7) of the Constitution. He prayed for the application for scrutiny and recount of votes to be dismissed with costs.

ANALYSIS AND DETERMINATION

The issues for determination are if the applicant has established a sufficient reason for scrutiny and recount of votes cast on 8th August, 2017 for the Member of Parliament for Changamwe Constituency.

34. The applicable provisions for scrutiny of votes is section 82(1) of the Elections Act, 2011. It provides as follows:-

"An election court may on its own motion or on an application by any party to the petition, during the hearing of an election petition, order for scrutiny of votes to be carried out in such manner as the election court may determine." (emphasis added).

35.35. On recount of votes, Rule 28 of the Elections (Parliamentary and County Elections) Petition Rules, 2017 provides:

"A petitioner may apply to an elections court for an order to:

(a) recount the votes; or

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

36. Rule 29 thereof provides that:-

“(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.” (emphasis added).

37. The application dated 7th September, 2017 was broad but some of the election materials for which scrutiny is sought such as polling station diaries, Forms 35A and Form 35B were supplied by the 1st and 2nd respondents to the applicant's Advocate. KIEMS kits for some polling stations were brought before the court by the 2nd respondent who demonstrated how the said kits are prompted at the beginning of the voting day, how voters are identified, data captured on each voter who is identified, transmission of data and closure of the KIEMS kits at the end of the voting period. Scrutiny of a faulty KIEMS kit allegedly used for the Changamwe parliamentary elections for 8th August, 2017 is no longer a live issue as the Counsel for the applicant discarded the said issue. This court will therefore not dwell on the same and in any event, the KIEMS kit in issue, among others, were formatted to pave way for the Presidential re-election held on 26th October, 2017. The Retuning Officer however assured the court that the SD cards for all the KIEMS kits in the elections of 8th August, 2017 for Changamwe Constituency were in safe custody.

38. The unresolved issues therefore are on scrutiny of copies of registers, Forms 35A and 35B, the packets of unused Forms 35A booklets, counter foils of unused ballot papers, rejected and spoilt ballot papers to establish the validity of the votes cast and determine the votes cast in favour of each candidate in respect of the Assembly for Changamwe Constituency for the elections held on 8th August, 2017 and the disparity in the ballot boxes serial numbers as captured in the polling station diaries and the report by the Deputy Registrar dated 17th November, 2017. As aptly submitted by Counsel for the respondents an application for scrutiny and recount of votes is not meant to lead to a fishing expedition for an applicant to look for additional evidence, this was the holding in **Nicholas Kiptoo Salat vs Wilfred Lesan and 7 Others** (supra). Counsel for the respondents have also cited other authorities to support the argument that sufficient reason must be established before a court can grant orders for scrutiny and recount of votes.

39. The applicant in his detailed affidavit sworn on 5th September, 2017 in support of the petition raises what he perceives to be illegalities and irregularities that occurred in Changamwe Constituency in the elections for the Member of Parliament. The said irregularities and illegalities are well outlined in the said affidavit and in the petition, which contains a prayer for scrutiny and recount of votes.

40. The submissions of the applicant's Counsel contain annexures that illuminate the polling stations for which orders for scrutiny and recount are being sought. Annex 1 contains a list of 32 polling stations where Forms 35A lack the official IEBC stamp. On this ground, Counsel for the respondents were right in submitting that it is not a mandatory requirement for Forms 35A to be stamped with IEBC stamps to authenticate the same. Regulation 79(1) of the Elections (General Regulations) 2012 provides as follows:-

“The presiding officer, the candidates or agents shall sign the declaration in respect to the elections.”

41. It is evident that the above regulation does not contain a provision for stamping of Forms 35A. The Court of Appeal when dealing with a similar issue in the case of the **IEBC vs Stephen Mutinda Mule** [2014] eKLR had the following to say on the stamping of Forms 35A:-

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

42. The above decision clearly buttresses the legal position that it is not a mandatory requirement for Presiding Officers to stamp Forms 35A. I therefore decline to make an order for recount and scrutiny of votes for the polling stations listed in annex 1.

43. Annex II contains a list of polling stations where it is stated that Forms 35A had alterations. In order to give the applicant the opportunity to verify whether the said Forms 35A captured the correct number of votes cast in the said polling stations, or whether the alterations were made for an ulterior motive, I grant the applicant the orders sought for scrutiny and recount of votes in the said polling stations.

44. Annex III contains a list of 27 polling stations in which Forms 35A were not signed by Jubilee party agents. Evidence was adduced that some Jubilee party agents were turned away, rather, chased away from some polling stations. The said party agents who adduced evidence that they were chased away from polling stations or were allowed to enter polling stations late, after voting had commenced, established sufficient reason for this court to grant the orders sought for recount and scrutiny of votes as per the list in Annex III.

45. Annex IV contains a list of 4 polling stations wherein Forms 35A bore the wrong IEBC stamp. The court has already stated that the law does not provide for stamping of Forms 35A and therefore the stamping of the said Forms with the wrong stamp cannot be regarded as having affected the validity of the elections results. I therefore decline to allow scrutiny and recount of votes in the polling stations outlined in Annex IV.

46. Annex V contains a list of polling stations where the details of the signatories are missing. In view of the requirement on Forms 35A for both the Presiding Officer and Deputy Presiding Officer's details to be included in Forms 35A and for them to sign the said Forms, I hereby allow the recount and scrutiny of votes in the 9 polling stations as listed in annex V. This will establish if there was accountability and transparency in the electoral process of 8th August, 2017, in Changamwe Constituency.

47. The applicant supplied to the court a schedule of 21 polling stations wherein the serial numbers of the ballot boxes and also of serial numbers of seals affixed to apertures of ballot boxes, are in variance with serial numbers captured in the polling station diaries and the report filed by the Deputy Registrar as at the time she took custody of the election materials in issue. In order to ascertain the integrity of the

election materials contained in the said ballot boxes, I hereby allow the scrutiny and recount of votes in the 21 polling stations.

48. This court in allowing for the scrutiny and recount of votes pursuant to the report by the Deputy Registrar of 17th November, 2017 in securing election materials takes cognizance of the fact that the 1st and 2nd respondents had custody of the said materials and the applicant was not aware that some of the serial numbers for ballot boxes captured in polling station diaries differed from the actual serial numbers of the ballot boxes containing ballot papers for the impugned polling stations. The same applies to the serial numbers of the seals affixed to the apertures of some ballot boxes. The issue of a party being bound by his pleadings would not arise in such a situation where the applicant did not possess the said information. In the Supreme Court decision of **Justice Kalpana H. Rawal vs Judicial Service Commission and 3 Others** [2016] eKLR, the Court had the following to say:-

“..... the court will not determine or base its decision on unpleaded issues. Where however, evidence is led and it appears from the course followed at the trial that an unpleaded issue has been left for the court to decide, the trial court can validly determine the unpleaded issue. Accordingly, we need not belabour or restate the principles here in detail, save but to mention some decisions, which have crystallized those principles include Captain Harry Gandy vs Caspur Air Charters Ltd. [1970] 23 EACA, 139, Odd jobs Vs Mubea [1970] EA 476, D.E.N vs P.N.N., CA Application No. 226 of 2012, Baber Alibshai Manji vs Sultan Hashim Lalji and Another CA No. 296 of 2001; and Mapis Investment (K) Ltd vs Kenya Railways Corporation [2005] 2 KLR 410.”

49. This court ordered for the 1st and 2nd respondents to hand over the custody of Elections material for the Member of Parliament, Changamwe Constituency to the court and for the Deputy Registrar to file a report of the said handing over process. This was done. The said report forms an integral part of the court record and can therefore not be wished away.

50. Another issue that came up for consideration was the variance between the figures on the IEBC online portal results and the declared results. In considering an application where the issue of the variance in online portal results and declared results was raised before Karanja J, in **Joseph Oyugi Magangwa and Another vs Independent Electoral and Boundaries Commission and 3 Others** [2017] eKLR, the court stated thus:-

“..... an election court would order scrutiny or recount or

re-tallying of votes if this would serve the purpose of establishing the sovereign will of the people and only after it is satisfied that the petition contains adequate statement of material facts on which the petitioner relies on in support of his case. Where there is ground for believing that there were irregularities in the election process or if there is a mistake or mistakes on the part of election officials, an order of scrutiny may issue.”

51. The applicant deposed of the variance in the total number of votes declared as cast in favour of the President of the Republic of Kenya, the Governor, Woman Representative, and the Senator of Mombasa County, the Member of the National Assembly and the Member of County Assembly for Changamwe Constituency, as compared to those posted on the IEBC portal. The applicant as such cannot fathom how such a variance could have come about since each voter was given 6 ballot papers, with the requirement for the voter to cast one ballot paper for each candidate.

52. In order to bring to rest the above issue, as well as the issues of some polling clerks who were caught issuing multiple ballot papers, the mix up of lids of the ballot boxes of the candidates for the Senate and the Member of Parliament, the issue of a voter who was allegedly seen carrying a green paper bag and another who carried a rucksack, which the applicant purports to have contained ballot papers which the said voters stuffed into the ballot box for the Member of the National Assembly for Changamwe Constituency; it is only reasonable and fair to assuage the apprehension on the part of the applicant on if the elections were conducted properly.

53. The last thing the court would like to address is the issue of the margin of votes between the Jubilee candidate Abdi Mohamed Daib and the 3rd respondent, Omar Mwinyi Shimbwa. Counsel for the respondents relied on the decisions in **Gatirau Peter Munya vs Dickson Mwenda Kithinji and 2 Others** (supra) and **Philip Munge Ndolo vs Omar Mwinyi Shimbwa and 2 Others** (supra) where courts held that where the margin of votes is narrow an order for scrutiny and recount should be granted.

54. In the present application the applicant has pinpointed various irregularities and illegalities which he alleges were committed by the respondents. In the said circumstances, the issue of the margin of vote is but one of the considerations among others, that this court has to take into account. I also note that each case turns on its own circumstances.

55. For the avoidance of doubt, I grant orders for scrutiny of copies of registers, copies of Forms 35A and 35B, packets of unused Forms 35A booklets, counterfoils of used ballot papers, unused, rejected and spoiled ballot papers to establish the validity of the votes cast and determine the votes cast in favour of each candidate in respect to the election of the Member of the National Assembly for Changamwe Constituency held on 8th August, 2017. I also issue an order for scrutiny of votes cast in the polling stations where it is alleged that there are variances in the serial numbers of the ballot boxes as well as serial numbers of seals affixed to apertures of ballot boxes, as compared to the serial numbers captured in the polling station diaries and the report filed by the Deputy Registrar as at the time she took custody of the election materials in issue. The order for scrutiny and recount of votes will apply to the polling stations specified by the applicant and listed here below:-

(1) Station No. 02 - Bomu Primary School, (2) Station No. 06 - Bomu Primary School, (3) Station No. 11 - Bomu Primary School, (4) Station No. 04 - Lilongwe Garden, (5) Station No. 02 - Cape Town Ground, (6) Station No. 03 - Cape Town Ground, (7) Station No. 05 - Cape Town Ground,

(8) Station No. 06 - Cape Town Ground, (9) Station No. 02 - Mwidani Social Hall, (10) Station No. 03 - Mwidani Social Hall, (11)

Station No. 05 - Mwidani Social Hall, (12) Station No. 06 - Mwidani Social Hall,

(13) Station No. 08 - Changamwe Social Hall, (14) Station No. 12 - Chaani Social Hall, (15) Station No. 01 - Kipevu Primary School, (16) Station No. 01- Mikadini Primary School, (17) Station No. 03 - Mikadini Primary School, (18) Station No. 04 - Mikadini Primary School, (19) Station No. 06 - Mikadini Primary School (20) Station No. 01 - Chaani Primary School,

(21) Station No. 02 - Chaani Primary School, (22) Station No. 3 - Al-Irshadi Nursery School, (23) Station No.1 - Baptist Church Primary School,

(24) Station No. 3 - Baraka Village, (25) Station No. 1 - Bokole Nursery School, (26) Station No. 3 - Bokole Nursery School (27) Station No. 8 - Chaani Primary School, (28) Station No. 1 - Chaani Social Hall, (29) Station No. 3 - Changamwe Social Hall, (30) Station No. 1 - Kaloleni Ground,

(31) Station No. 3 - Kisumu Ndogo Ground (32) Station No. 5 - Lilongwe Garden, (33) Station No. 3 - Magongo Primary School, (34) Station No. 1 - Al-Irshadi Nursery School (35) Station No. 5 - Baraka Village, (36) Station No. 3 - Bomu Primary School, (37) Station No. 5 - Bomu Primary School, (38) Station No. 12 - Bomu Primary School, (39) Station No. 14 - Bomu Primary School, (40) Station No. 4 - Cape Town Ground, (41) Station No. 5 - Chaani Primary School, (42) Station No. 7 - Chaani Primary School,

(43) Station No. 5 - Chaani Social Hall, (44) Station No. 2. Chaani Social Hall, (45) Station No. 8 - Chaani Social Hall, (46) Station No. 13 - Chaani Social Hall, (47) Station No. 2 - Changamwe Secondary School, (48) Station No. 3 - Lilongwe Garden, (49) Station No. 3 - Umoja Primary School, (50) Station No. 2 - St. Lwanga Primary School, (51) Station No. 4 - Baptist Church Primary School, (52) Station No. 1 - Baraka Village, (53) Station No. 2 - Baraka Village, (54) Station No. 6 - Baraka Village, (55) Station No. 5 - Changamwe Social Hall, (56) Station No. 1 -Gome Primary School, (57) Station No. 3 - Gome Primary School, and (58) Station No. 5 - Lilongwe Garden.

56. The scrutiny and recount will be undertaken for a period of 5 days from 16th to 20th January, 2018. The Deputy Registrar shall file a report of the said exercise by the latest 24th January, 2018.

57. Costs of the application dated 7th September, 2017 are awarded to the petitioner/applicant.

It is so ordered.

DELIVERED, DATED and SIGNED at MOMBASA on this 12th day of January, 2018.

NJOKI MWANGI

JUDGE

In the presence of:-

Ms Murage holding brief for Mr. Gikandi for the petitioner/applicant

Mr. Munyithya for the 1st and 2nd respondents

Mr. Said holding brief for Mr. Mohamed for the 3rd respondent

Mr. Oliver Musundi - Court Assistant