



**REPUBLIC OF KENYA**

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

**ELECTION PETITION NO. 3 OF 2017**

**CONSOLIDATED WITH ELECTION PETITION NO. 9 OF 2017**

**IN THE MATTER OF: ARTICLES 1, 2, 3, 10, 47, 48, 50 (1), 82 (2), 86, 87, 105 159, 160, 258 & 269  
OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE INDEPENDENT ELECTORAL AND BOUNDARIES  
COMMISSION ACT, (NO. 9 OF 2011) LAWS OF KENYA**

**AND**

**IN THE MATTER OF: THE ELECTIONS ACT (NO. 24 OF 2011) LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE ELECTION OFFENCES ACT (NO. 37 OF 2016) LAWS OF KENYA**

**AND**

**IN THE MATTER OF: THE ELECTION OF MEMBER OF THE NATIONAL ASSEMBLY;  
MANDERA EAST CONSTITUTENCY, HELD ON 8<sup>TH</sup> AUGUST, 2017, THE ALLEGED  
DECLARATION ON 10<sup>TH</sup> AUGUST, 2017 AND UNLAWFUL GAZETTEMENT OF THE  
RESULTS, VIDE VOL. CXIX-NO. 121 GAZETTE NOTICE NO. 8239 ON 22<sup>ND</sup> AUGUST, 2017**

**BETWEEN**

**ABDIRAHMAN HUSSEINWEYTAN MOHAMED.....1<sup>ST</sup> PETITIONER**

**ABDIKADIR SHEIKH HASSAN.....2<sup>ND</sup> PETITIONER**

**AND**

**INDEPENDENT ELECTORAL &**

**BOUNDARY COMMISSION (IEBC).....1<sup>ST</sup> RESPONDENT**

**ADAN HARAR NOOR; RETURNING**

OFFICE MANDERA EAST CONSTITUENCY.....2<sup>ND</sup> RESPONDENT

HON. HASSAN OMAR MOHAMMED MAALIM.....3<sup>RD</sup> RESPONDENT

AND

JAMALDIN ADAN AHMED .....INTERESTED PARTY

**RULING**

1. This Election Petition is a consolidation of two election petitions namely Election Petition No. 3 of 2017 and Election Petition No. 9 of 2017. They are challenging the election of the 3<sup>rd</sup> respondent as the Member of Parliament (MP) for Mandera East. The Ruling is in respect of two applications, filed by both petitioners herein under Section 80 and Section 82 of the Election Act and Rules 28 and 29 of the Election (Parliamentary and County Elections) Petition Rules 2017 among others.

2. The 1<sup>st</sup> petitioner (*Abdirahman Husseinweytan Mohammed*) filed the Notice of Motion dated 18<sup>th</sup> December, 2017 seeking the following orders:

***1. This Honourable court be pleased to compel the 1<sup>st</sup> respondent to give access to scrutiny of all packets of spoilt papers, the packets of counterfoils of used ballot papers, the packets of counted ballot papers, the packets of rejected ballot papers, the statement showing the number of rejected ballot papers in the following polling stations. (INCLUDING ALL POLLING STATIONS IN ARABIA WARD THAT HAVE BEEN LEFT OUT).***

***2. This Honourable Court be pleased to compel the 1<sup>st</sup> respondents to give access to scrutiny of all form 32 filed for the Mandera East Parliamentary Election in the polling stations in prayer 1 herein.***

***3. This Honourable Court be pleased to compel the 1<sup>st</sup> respondent to give access to the scrutiny of all form 32 filed for the Mandera East Parliamentary Election and in particular from the following polling stations:-***

***(a) Ledi Centre,***

***(b) Arabia Primary School 2 of 2,***

***(c) Beraywon Farms,***

***(d) Bokolo Duse Polling Station 1 of 2,***

***(e) Khadija Girls Primary School Polling Station 3 of 3,***

***(f) Mandera Village Polytechnic 2 of 5,***

***(g) Mandera Village Polytechnic 5 of 5,***

***(h) Geneva White House 2 of 3,***

***(i) Livestock Market 1 of 3***

***(j) Shafshafey 1 of 4,***

***(k) Gudediye Primary School 1 of 1,***

***(l) Bananey Polling Station 1 of 1***

***(m) Amin Gurey Centre.***

***4. This Honourable Court be pleased to issue a further order that the materials in prayer 1, 2 and 3 herein be deposited in court by the 1<sup>st</sup> and 2<sup>nd</sup> respondents for purposes of scrutiny.***

***5. This Honourable Court be pleased to grant any other reliefs that become just and fit to grant.***

3. The said application is supported by the grounds on its face plus the 1<sup>st</sup> petitioner's supporting affidavit.

4. The 2<sup>nd</sup> application has been filed by the 2<sup>nd</sup> petitioner (***Abdikadir Hassan***). It is dated 18<sup>th</sup> December, 2017 and seeks the following orders:

***1. That the Honourable Court be pleased to Order recount of votes and scrutiny of all the printed copy of the Register of voters during the elections sealed in a tamper proof envelope, copies of Form 35A sealed in the ballot box, the packets of spoilt ballots, the marked copy register, the packets of counterfoils of used ballot papers, the packets of counted ballot papers, the packets of rejected ballot papers, the polling day diary, the total number of ballot boxes for the Mandera East Parliamentary Elections conducted on 8<sup>th</sup> August, 2017 in respect of the following polling stations:***

***(a) Libehia Polling Centre,***

***(b) Gumbiso Polling Centre,***

***(c) Arabia Polling Centre,***

***(d) Shafshafey Polling Centre,***

***(e) Geneva White House Polling Station 3,***

***(f) Korjab Farm Polling Station,***

***(g) Mandera DEB Primary School Polling Station No. 3,***

***(h) Bur Abor Primary School Polling Station No. 1,***

***(i) Livestock Market Polling Station,***

***(j) Bulla Mpya Primary School Polling Centre,***

***(k) Ledi Polling Centre,***

***(l) Omar Jillow Polling Centre,***

***(m) Beraywon Farms Polling Centre,***

***(n) Hegalow Primary School Polling Centre,***

***(o) Kamar Bahawa Polling Centre,***

***(p) Arabia Girls Secondary School Polling Centre,***

- (q) Korjab Farm Polling Centre,*
- (r) Arabia Boys Secondary School Polling Centre,*
- (s) Kamor Buhlow Polling Centre,*
- (t) Jeera Libi Polling Centre,*
- (u) Bella Primary School Polling Centre,*
- (v) Mandera Village Polytechnic Polling Centre,*
- (w) Bur Abor Primary School Polling Centre*
- (x) Khadija Girls Primary School Polling Centre*
- (y) Koromey Primary School Polling Centre*
- (z) Boarder Point Polling Station*
- (aa) Fighu Primary School Polling Station,*
- (bb) Neboi Primary School Polling Station,*
- (cc) Daua Integrated Polling Centre,*
- (dd) Karo Primary School Polling Station,*
- (ee) Arabia Primary School Polling Station*

**2. That the Honourable Court be pleased to orders for scrutiny of the KIEMS KIT with regard to the kit's Ground Positioning System (GPS) of the following Polling Stations:**

- (a) Arabia Polling Centre,*
- (b) Ledi Polling Centre,*
- (c) Omar Jillow Polling Centre,*
- (d) Beraywon Farms Polling Centre,*
- (e) Hegalow Primary School Polling Centre,*
- (f) Kamar Bahawa Polling Centre,*
- (g) Arabia Girls Secondary School Polling Centre,*
- (h) Korjab Farm Polling Centre,*
- (i) Arabia Boys Secondary School Polling Centre,*
- (j) Kamor Buhlow Polling Centre,*
- (k) Libehia Polling Centre,*
- (l) Jeera Libi Polling Centre,*

**(m) Bella Primary School Polling Centre**

It is supported by the grounds on its face plus the supporting affidavit of the 2<sup>nd</sup> petitioner.

5. In response the 1<sup>st</sup> and 2<sup>nd</sup> respondents filed a replying affidavit by the returning officer (2<sup>nd</sup> respondent) **Mr. Adan Harar Noor** sworn on 21<sup>st</sup> December, 2017. The 3<sup>rd</sup> respondent (**Hon. Hassan Omar Mohamed Maalim**) filed two replying affidavits sworn on 21<sup>st</sup> December 2017 in response to the application. All respondents opposed both applications.

**THE 1<sup>ST</sup> PETITIONER/APPLICANT'S CASE**

From the supporting affidavit of the 1<sup>st</sup> petitioner and the grounds on the face of the application, there are two grounds forming the basis of his application.

The 1<sup>st</sup> one is that the presiding officers did not record in the polling station diaries the voter turnout and the number of voters identified using the complimentary method (alphanumeric method). Further that since no forms 32A were availed during access and hearing, this had cast doubt on their existence or authenticity. The 1<sup>st</sup> applicant therefore sought to have scrutiny of various documents in the polling stations enumerated in prayer No. 3 of the application.

6. The second ground is that ballot papers were collected at Arabia School of Arabia Ward and their origin remains unknown. It was therefore his prayer that all the polling stations in Arabia Ward should have their ballot materials scrutinized. That this would assist the court to know the origin of the said recovered ballot papers. The subject polling stations are stated in paragraph 11 of his supporting affidavit.

7. In his submissions, **Mr. Kinaro** for the 1<sup>st</sup> petitioner stated that the recovered ballot papers were found by a watchman who testified and his evidence was supported by that of Abdi Hassan (a witness). That the DCIO Manderla East testified on the same and indicted that investigations were still underway even though the returning officer had denied any knowledge of these ballot papers.

8. He further submitted that there was need for scrutiny in terms of their prayer No. 3 because it would assist in establishing the validity of the votes captured in Forms 35A and B.

He referred to the case of **Isoe Ochoki Andrew Mingate –vs- Independent Electoral Boundaries Commission & 2 Others [2017] eKLR** where **Maureen Odero J.** had outlined the various ways for establishing the need for scrutiny. He submitted that the 1<sup>st</sup> petitioner had laid the basis for scrutiny in the concerned polling stations.

9. On scrutiny of the Forms 32 and 32A he submitted that there was need for such scrutiny because majority of the voters in the constituency were illiterate and Forms 32 should have been filled. Secondly, that the returning officer (2<sup>nd</sup> respondent) had confirmed that it was only one polling station which had filed Form 32A in respect of assisted voters. That scrutiny would assist the court to know how many voters used the alphanumeric method of voting.

10. Finally, he submitted that the 1<sup>st</sup> petitioner's application was not defective since Section 80 and 82 of the Elections Act allowed the filing of this kind of application.

**THE 2<sup>ND</sup> PETITIONER/APPLICANT'S CASE**

11. From the grounds on the face of the application and the 2<sup>nd</sup> petitioner's supporting affidavit, there are three grounds being advanced as a basis for scrutiny and recount in various polling stations.

The first is that Korjab polling centre was moved to Arabia Boys Secondary School which was not a

gazetted as a polling centre. Further that ballot papers which are election materials used in Mandera East Constituency elections were recovered and produced in court as exhibits.

12. The second ground is that the total valid votes cast plus rejected and spoiled ballots exceeds the number of voters who were identified by the Kiems kits. He states that the 2<sup>nd</sup> respondent testified to the fact that the manual register was never applied in the elections in Mandera East Constituency hence the need to do scrutiny and recount.

13. The 3<sup>rd</sup> ground is that despite majority of voters in this constituency being illiterate, there were no Forms 32 produced by the 1<sup>st</sup> and 2<sup>nd</sup> respondent in court. Finally, that there are alterations with regard to the six (6) polling stations enumerated in paragraph 12 of the 2<sup>nd</sup> petitioners supporting affidavit of the petition.

14. In his submissions, Mr. Mwangi for the 2<sup>nd</sup> petitioner stated that there was a ground of by passing of Kiems kits and merging of polling stations yet there was no incident of violence reported. He referred to the evidence of one Abdulahi Mohammed the watchman of Arabia boys who mentioned the recovery and burning of ballot papers. He contrasted this with the testimony of the returning officer who denied knowledge of any stray ballot papers but later recorded a statement to that effect.

15. Mr. Mwangi raised issue with the method used in identifying voters. It was his submission that when the Kiems kit failed, the manual register was resorted to and records at Khadija Primary School Kanor Polling station and Phigo Primary School attested to that. He submitted that the returning officer (2<sup>nd</sup> respondent) and Mohammed Abdi Ali had also stated that there were assisted voters in Mandera East Constituency. In such cases he said, Forms 32 had to be filled and filed yet it was not availed to the court, hence the need for its scrutiny in all polling stations.

16. He further submitted that following incidents of agents being thrown out of the polling stations, and reports of the same (OB No. 21 of 12/8/17 by Abdi Mohammed), it was necessary to have scrutiny of documents in these polling stations. He referred to the case of **Ahmed Abdullahi Mohammed and Another –vs- Hon. Mohammed Abdi Mohammed and 3 Others Nairobi Election Petition No. 14 of 2017** where **Mabeya J.** dealt with the issue of unsigned forms. It was his submission that recovery of ballot papers meant that ballot boxes had been interfered with.

### **THE 1<sup>ST</sup> AND 2<sup>ND</sup> RESPONDENTS' CASE**

17. The 1<sup>st</sup> and 2<sup>nd</sup> respondents relied on the replying affidavit by the returning officer Mr. Adan Harar Noor (2<sup>nd</sup> respondent) and did not make any submissions. Mr. Adan has in his replying affidavit denied any merger of polling stations and confirmed attaching copies of all Forms 35A and 35B to their response which was served on all the parties.

18. He has averred that only 5 ballots marked as “spoilt” as confirmed by the watchman of Arabia Boys Secondary School were recovered. He denied any by passing of the Kiems kits. He further stated that the petitioners had not pleaded nor requested for the supply of Forms 32A.

19. Mr. Adan also averred that the poll station diary is an administrative document that aids the Presiding Officer in carrying out his duty and is not a statutory document in the collation of results. That the Forms 35A were duly signed only by agents who were present. It was his averment that the 1<sup>st</sup> and 2<sup>nd</sup> respondents were in total control of the elections of 8<sup>th</sup> August, 2017.

### **THE 3<sup>RD</sup> RESPONDENTS' CASE**

20. The 3<sup>rd</sup> respondent has in his replying affidavit averred that the requests by the 1<sup>st</sup> petitioner are spent. Further, that his prayer C in the petition is so general without specifics. He averred that the 1<sup>st</sup> petitioner had been granted access to the Kiems kits for 64 polling stations and 84 certified copies of Forms 35A

and the 35B. He deponed that the prayers in the 1<sup>st</sup> petitioner's application have no relationship with the petition which makes no mention of Forms 32A, polling station diary or voter turnout.

21. He averred that the petitioner had never disputed the results right from the polling stations. That no request for recount, tally at the polling stations had ever been made. He also deponed that the 1<sup>st</sup> petitioner had not adduced any evidence to support the request for recount or scrutiny. Finally, he states that 9 out of 13 polling stations in which the petitioner seeks scrutiny have the forms 35A signed by his agents, to show they were satisfied with the results.

22. In reply to the 2<sup>nd</sup> petitioner's application, the 3<sup>rd</sup> respondent avers that the same is speculative and not backed by any evidence. He further states that the application is defective as it was not filed together with the petition and was filed outside the required period.

23. He points out that from the list in prayer A and B it's not clear which are polling centres and which are polling stations. That the number had risen from **20** to **36** centres or stations and a number of them were not pleaded in prayer **B** of the Petition. The 3<sup>rd</sup> respondent has averred that the application has failed to lay a basis for the prayers sought and should be dismissed.

24. Mr. Biriq for the 3<sup>rd</sup> respondent referred to Rule 31 (1) Election (Parliamentary and County Elections) Petition Rules 2017 and submitted that the petitioners had not explained the purpose for which scrutiny was being sought, neither had they raised any issue with any vote or polling station. That under Rule 31 (2) Election (Parliamentary and County Elections) Petition Rules 2017, (Election Petition Rules 2017), no basis for scrutiny had been laid before the court. He further stated that Rule 4 (3) Election Petition Rules 2017 and Section 82 (2) of the Election Act had not been complied with. Mr. Biriq pointed out that what is mentioned in prayer No. 1 of the 2<sup>nd</sup> petitioner's application are not polling stations and he referred the court to the Forms 35A. That there was no evidence of polling stations having been merged.

25. He submitted that the issue of GPS was being introduced for the first time through this application. On the 1<sup>st</sup> petitioner's application, he submitted that his prayer No. 1 had been spent. Further, that the petitioner had in his petition failed to point out any polling stations he had problems with. He referred to the case of **Raila Ondiga & Another –vs- Independent Electoral and Boundaries Commission & 2 Others, Presidential Petition No. 1 of 2017 (2017) eKLR** to support this submission.

26. On the Forms 32A requested, he submitted that this was not one of the documents kept in the ballot box (under the Election General Regulations).

He finally submitted on unpleaded matters saying the petitioners could not through their applications get what they never pleaded in the petition. He referred to the case of **Justus Mongumbu Omiti –vs- Independent Electoral and Boundaries Commission & 2 Others, & Another, Nyamira Election Petition No. 3 of 2017** in support of this submission.

27. **Mr. Ondieki** for 3<sup>rd</sup> respondent further submitted that both applications were defective for having been filed late in the day. He relied on Rule 15 (1) (2) Election Petition Rules.

He stated that the threshold for such an application was set out in the ***Raila Amolo Odinga & Another case (supra)*** at page 20 by the Supreme Court. He referred to portions of his authorities in his bundle and submitted that the grounds to be covered in such an application had not been met.

28. Mr. Ondieki in distinguishing the case cited by counsel for the petitioners and the present case stated that the first one was not opposed when the application for scrutiny was made, while in the 2<sup>nd</sup> one, the court was satisfied that the evidence was clear. It was his submission that the scenario was different in the present case, in that, there is no basis to warrant the grant of the orders.

29. In a rejoinder, Mr. Kago for the 2<sup>nd</sup> petitioner submitted that under Section 80, Section 82 (1) Election

Act Rule 28 and 29 Election Petition Rules 2017, such an application can be brought at any time. He stated that Rule 15 (2) Election Rules falls under case management for matters arising prior to the hearing. On scrutiny, he referred the court to the case of **Ahmed Abdullahi Mohammed & Another –vs- Mohamed Abdi Mohamed & 2 Others [2017] eKLR.**

30. Further on the burden of proof, he submitted that in Election Petition No. 9 of 2017 the 2<sup>nd</sup> petitioner sought scrutiny of all materials including the Kiems Kits. Referring to the case of **Mombasa Election Petition No. 4 of 2013, Gideon Mwangagi Wambu –vs- Independent Electoral and Boundaries Commission & 2 Others,** he asked the court to be mindful of the right of the people of Mandera East. Further, that scrutiny in this case would go a long way to assist the court, that the respondents would not suffer any prejudice.

31. Mr. Kinaro in his rejoinder submitted that in paragraph 19 of EP No. 3 of 2017 the polling stations are enumerated. While relying of the Ahmed **Abdullahi Mohammed Case (supra),** he stated that even where the petitioner has not pleaded scrutiny, the court can still order for it on its own motion. Finally, he submitted that it was important for the court to know how many assisted voters voted on that date since the polls diary was final.

### **ANALYSIS AND DETERMINATION**

32. I have carefully considered the application, the supporting grounds, affidavits, replying affidavits and submissions by learned counsel. I have had due regard to the petitions by the 1<sup>st</sup> and 2<sup>nd</sup> petitioners and the responses made thereto plus the evidence before this court. The issue for determination is whether this court should allow scrutiny as prayed for by the 1<sup>st</sup> petitioner and scrutiny and recount as prayed for by the 2<sup>nd</sup> petitioner.

33. It is acknowledged that pursuant to Section 82 (1) of the Elections Act, there are things an election court can do. It provides thus;

***Section 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.***

***(2) Where the votes at the trial of an election petition are scrutinized, only the following votes shall be struck off —***

***(a) the vote of a person whose name was not on the register or list of voters assigned to the polling station at which the vote was recorded or who had not been authorised to vote at that station;***

***(b) the vote of a person whose vote was procured by bribery, treating or undue influence;***

***(c) the vote of a person who committed or procured the commission of personation at the election;***

***(d) the vote of a person proved to have voted in more than one constituency;***

***(e) the vote of a person, who by reason of conviction for an election offence or by reason of the report of the election court, was disqualified from voting at the election; or***

***(f) the vote cast for a disqualified candidate by a voter knowing that the candidate was disqualified or the facts causing the disqualification, or after sufficient public notice of the disqualification or when the facts causing it were notorious.***

***(3) The vote of a voter shall not, except in the case specified in subsection (1) (e), be struck off***



***under subsection (1) by reason only of the voter not having been or not being qualified to have the voter's name entered on the register of voters.***

34. Rule 28 of the Election (Parliamentary and County Elections) Petitions 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 candidate;***

Rule 29 of the same Rules provides:

***29. (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) The scrutiny or recount of votes ordered under sub-rule (2) shall be carried out under the direct supervision of the Registrar or Magistrate and shall be subject to the directions the election court gives.***

***(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.***

***(5) For purposes of sub-rule (4) (b), every returning officer shall upon declaration of the results, seal the printed copy of the Register of Voters used at that election in a tamper proof envelop and such envelop shall be stored by the Commission subject to the elections court directions under rule 16.***

Section 80 (4) of the Election Act provides;

***(4) An election court may by order direct the Commission to issue a certificate of election to a President, a member of Parliament or a member of a county assembly if—***

***(a) upon recount of the ballots cast, the winner is apparent; and***

***(b) that winner is found not to have committed an election offence.***

35. It is not disputed that the applications before this court were filed after all the parties had called their respective witnesses and closed their cases. It is the 3<sup>rd</sup> respondent's argument that the said applications are defective since they were not filed together with the petition or soon thereafter.

36. The Supreme Court of Kenya in the case of *Gatirau Peter Munya –vs- Dickson Mwenda Kithinji [2014] eKLR* had this to say in respect to the 3<sup>rd</sup> respondent's submission;

***“The right to scrutiny and recount of votes in an election petition is anchored in Section 82 (i) of the Elections Act and Rule 33 of the Elections (Parliamentary and County Elections) Petitions 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 filing of petition and before the determination of the petition” (Emphasis is mine)***

This was also cited by the same court in the case of *Nathif Jama Adan –vs- Abdikhaim Osman Mohamed & 3 Others [2014] eKLR*

37. In the case of *Rishad H.A Amana –vs- Independent Electoral and Boundaries Commission & 2 Others, [2013] eKLR, Kimaru J.* stated;

***“.....the recent trend is that scrutiny can only be laid after the petitioner has adducted evidence during the actual hearing of the petition. The petitioner cannot therefore demand that there be scrutiny and recount of the votes before the commencement of the trial. The petitioner may do so after his or her witnesses have testified. The ideal situation, however, is that such an application for scrutiny should be considered by the court after all witnesses of the petitioner and the respondents have testified. At that stage of the proceedings, the court will be in a position to properly assess the veracity of the allegations made by the petitioner that there is need for scrutiny.”***

I entirely agree with this observation by ***Kimaru J.***

38. From the foregoing, it is clear that an application for recount and scrutiny may be made at any stage of the proceedings, but before the final determination of the election petition. It is nowhere stated that it must be filed together with the petition as alluded to by Mr. Ondieki. We are just moving towards the final determination of this Election Petition. The applications are therefore properly before the court and will be determined on merit.

39. The Supreme Court in the case of *Gatirau Peter Munya –vs- Dickson Mwenda Kithinji & 2 Others (supra)* outlines certain guiding principles on the right to scrutiny which are as follows;

***153. From the foregoing review of the emerging jurisprudence in our court, on the right to scrutiny and recount votes in an election petition, we would propose certain guiding principles 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.*

It follows that no party to an election petition can claim an automatic right to an order for scrutiny or for recount. The party seeking such an order must establish sufficient reason to the satisfaction of the election court that such an order is merited (see Rule 29 (2) of the Election (Parliamentary and County Elections) Petition Rules 2017.

40. It must be shown by the party applying for scrutiny and recount through the pleadings, affidavits and like in this case, evidence, that indeed there is need for the court to verify certain facts.

What then is the purpose of scrutiny? In the case of *Philip Mukuru Wasike –vs- James Lusweti Mukwe & 2 Others Bungoma Election Petition No. 5 of 2013 [2013] eKLR Omondi J.* Observed:

*“The purpose of scrutiny is:-*

- (1) To assist the court to investigate if the allegations of irregularities and breaches of the law complained of are valid.*
- (2) Assist the court in determining the valid votes cast in favour of each candidate.*
- (3) Assist the court to better understand the vital details of the electoral process and gain impressions on the integrity of the electoral process.”*

41. The court should not therefore allow scrutiny and recount to be used as a means of searching for fresh or new evidence. Scrutiny should not be used to give the petition a new face and/or character that was never there in the beginning.

42. In the case of *Gideon Mwangangi Wambua & Another –vs- Independent Electoral and Boundaries Commission & 2 Others Mombasa EP No. 4 of 2013 (consolidated with EP No. 3 of 2013), Odunga J.* found that there was insufficient pleading and a lack of particularity of facts upon which an order for scrutiny could be granted in both petitions. He observed thus;

*“26. The aim of conducting scrutiny and recount is not to enable the court (t0) unearth new evidence on the basis of which the petition could be sustained. Its aim is to assist the court to verify the allegations made by the parties to the petition which allegations themselves must be hinged on pleadings. In other words, a party should not expect the court to make an order for scrutiny simply because he has sought such an order in the petition. The petitioner ought to set out his case with sufficient clarity and particularity and adduce sufficient evidence in support*

***thereof in order to justify the court to feel that there is a need to verify not only the facts pleaded but the evidence adduced by the petitioner in support of his pleaded facts. Where a party does not sufficiently plead his facts with the necessary particulars but hinges his case merely on the documents filed pursuant to Rule 21 of the Rules, the court would be justified in forming the view that the petitioner is engaging in a fishing expedition or seeking to expand his petition outside the four corners of the petition.” (Emphasis is mine)***

43. Having stated what the law on scrutiny and recount is, I now wish to consider the applications before this court, starting with that of the 1<sup>st</sup> petitioner.

Prayer (c) of his petition which relates to scrutiny states as follows;

***“An order specifically directing the access and scrutiny of the casted votes; valid, rejected and spoilt from all the Forms 35As and 35B and the Kiems Kits register for the Election of the Member of National Assembly; Mandera East County.”***

This is a general plea for scrutiny to be conducted in all the 84 polling stations. In the application before this court, the 1<sup>st</sup> petitioner is seeking for scrutiny of all documents in some 13 polling stations. I find no clarity or particularity as to why he is seeking for the said activity in those polling stations from among the 84 polling stations.

44. At paragraph 19 of the supporting affidavit to the petition, he mentions 64 polling stations whose Forms 35A were allegedly invalid and unverifiable. No specifics were pleaded in relation to each station showing the reason for the invalidity. In his prayer No. 1 of the application, he alludes to unidentified polling stations which should include all polling stations in Arabia Ward that have been left out. No polling stations have been mentioned at all. To qualify this, it was submitted that because some five ballot papers were recovered by a watchman at Arabia Boys Secondary School, all polling stations in Arabia Ward should be scrutinized. That this would enable the court determine from which polling station these ballot papers had come from. The 1<sup>st</sup> petitioner did not explain how this result would assist him or the court. The DCIO Mandera East was here as a witness and he explained that he was unable to complete his investigations because the recovered ballot papers were before this court. This court will not therefore carry out investigations on behalf of the police who are already seized of the said investigations. Such action by this court would be tantamount to directing the police on the outcome of its investigations.

45. Prayers No. 2 and 3 are about Forms 32 and 32A. Form 32A is filled when one is identified through the printed register at the polling station, where the electronic identification has failed. Some polling stations diaries show that there were voters who were identified through the printed register. At the same time, the 2<sup>nd</sup> respondent was categorical that the printed register was never used since all the Kiems kits worked successfully. The relevant materials are before the court and this court will get an opportunity to look at them carefully at the appropriate time with or without Forms 32A.

46. Forms 32 are filled by persons who assist illiterate voters to vote. The 1<sup>st</sup> petitioner has set out 13 polling stations whose Forms 32 he wants scrutinized. The evidence on record is that a sizeable number of the voters in Mandera East are illiterate and were assisted to vote. There was no request for the Forms 32 to be availed in court by the 1<sup>st</sup> and 2<sup>nd</sup> respondents. Witnesses were therefore not cross examined on the individual Forms 32. A basis had to be laid to show why the 1<sup>st</sup> petitioner wants the Forms 32 in the 13 polling stations scrutinized. This has not been done.

47. This court has already heard evidence from both parties in this election petition on the issue of voters who were assisted at the polling stations. A determination will be made on it in one way or another without necessarily going for scrutiny of the Forms 32.

48. In prayer No. 1 of the 2<sup>nd</sup> petitioner’s application, he seeks both a recount of votes and scrutiny of various documents including the counting of ballot boxes in polling centres and stations outlined in prayer

No. 1. It is noted that a polling centre is not the same as a polling station. A polling centre comprises of several polling stations. In prayer No. 1 the polling centres and polling stations appear to be referred to interchangeably. The list of polling centres and stations in prayer (b) of the Election Petition No. 9 of 2017 and the list of polling centres and stations in prayer No. 1 of the application are quite different. The former comprises of a list of **20** while the latter comprises of a list of **33**. It's not clear where the **13** have emerged from and there is no justification for the increment.

49. This prayer introduces new issues which are not in the pleadings and which were not canvassed in the proceedings. For example, the issue of the number of ballot boxes in the polling stations, polling centres and constituency was not pleaded nor canvassed. No justification for the increased number of polling stations and polling centres has been given, let alone the introduction of new issues. Scrutiny cannot be used to unearth unpleaded issues.

50. Prayer No. 2 of the 2<sup>nd</sup> petitioner's application relates to Kiems kits in respect of some polling centres and polling stations with regard to the kits Ground Positioning System (GPS).

It is within common knowledge that following the Supreme Court Judgment for repeated Presidential elections, all the Kiems Kits were recalled from the field and reconfigured. The information in the Kiems kits was stored in SD cards. There is therefore no way that the scrutiny of the Kiems kits as requested in prayer No. 2 would be of assistance to the court or the parties herein as that information is not there.

51. Vide an application by the 1<sup>st</sup> petitioner dated 6<sup>th</sup> September, 2017 and after consolidation of the election petitions, it was by consent ordered that;

(i) The 1<sup>st</sup> and 2<sup>nd</sup> respondents file and serve certified copies of Forms 35A, 35B and polling station diaries.

(ii) The election materials be secured in Mandera East. This was duly complied with.

Later after an inter partes hearing, the court granted the petitioners a read only access of the SD cards for Kiems kits in respect of the polling stations requested for by both petitioners which were 64 in total.

52. A detailed report on this exercise has been filed by the DR and it contains the information sought by the 2<sup>nd</sup> petitioner in prayer No. 1 of the application. What then would the scrutiny unearth that is not before this court? During the hearing of this election petition, there has been vigorous cross examination of the witnesses in respect of Forms 35A, 35B and the polling station diaries.

53. All this has been covered in the proceedings. The omissions and commissions if any by the Presiding Officers, Deputy Presiding Officers and agents have been captured from the documents filed in court, the cross examination of the witnesses and the report by the DR. It is for the court to determine whether these omissions and/or commissions were a breach of the law and/or regulations and if they affected the outcome of the election of the representative for the National Assembly for Mandera East. This can be done without necessarily going for scrutiny especially when no satisfactory basis has been laid for the same.

54. Regulation 80(1) of the Elections (General) Regulations, 2012 provides for a recount at the polling station where a candidate or his agent is not satisfied after the completion of the counting. It provides;

***“80 (1) A candidate or agent, if present when the counting is completed, may require the presiding officer to have the votes rechecked and recounted or the presiding officer may on his or her own initiative, have the votes recounted.***

***Provided that the recount of votes shall not take place more than twice.”***

No evidence has been led to show that the petitioners or any of their agents requested for a recount at any

of the polling stations and it was denied. There is no reason that has been advanced before this court to warrant the order for a recount of the votes, in the stated polling centres and polling stations. The certified Forms 35A filed herein clearly show what each candidate garnered.

55. As already stated above, scrutiny and recount is not automatically granted. It must flow from the pleadings, affidavits and the oral evidence.

What the petitioners appear to seek to achieve through the scrutiny and recount has already been addressed through the read only access of the Kiems kits granted to them by this court. I find no merit in both applications which I hereby dismiss.

56. The DR is hereby directed to make and certify photocopies of the 5 ballot papers of Mandera East Constituency plus a letter produced herein by the 1<sup>st</sup> petitioner as Exhibit 1. The original documents produced to be released forthwith to the DCIO Mandera East to enable him complete his investigations. The certified copies will remain as part of this record as Exhibit 1.

Costs to abide the outcome of the petition.

Orders accordingly.

***Delivered, signed and dated*** this 10<sup>th</sup> day of ***January***, 2018 in open court at Nairobi.

**HEDWIG ONG'UDI**

**HIGH COURT JUDGE**