



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ELECTION PETITION NO. 8 OF 2017
IN THE MATTER OF THE ELECTION FOR THE MEMBER OF NATIONAL
ASSEMBLY OF EMBAKASI EAST CONSTITUENCY BETWEEN
FRANCIS WAMBUGU MUREITHI.....PETITIONER

VERSUS

OWINO PAUL ONGILI BABU.....1ST RESPONDENT
NICHOLAS K. BUTTUK.....2ND RESPONDENT

INDEPENDENT ELECTORAL AND
BOUNDARIES COMMISSION.....3RD RESPONDENT

RULING

1. Francis Wambugu Mureithi, the petitioner herein, took out the motion dated 2nd January 2018 whereof he sought for the following orders:

1. This application be certified as urgent and be canvassed and determined before the conclusion of the hearing of the petition.

2. The application be heard and determined expeditiously and in priority to the petition.

3. The 3rd respondent be compelled to grant access to and supply to the court, the petitioner, and the 1st respondent certified photocopies of all the original of Forms 35A prepared at and obtained from the polling station and presiding officers. In particular certified copies of the original forms 35A prepared at:

i. Mihango primary school polling station number 1

ii. Immaculate primary school polling station number 8

iii. Immaculate primary school polling station number 9

iv. Maua primary school polling station number 1

- v. *Maua primary school polling station number 4*
- vi. *Maua primary school polling station number 5*
- vii. *Maua primary school polling station number 6*
- viii. *Maua primary school polling station number 7*
- ix. *East African school of aviation polling station number 1*
- x. *East African school of aviation polling station number 3*
- xi. *East African school of aviation polling station number 10*
- xii. *East African school of aviation polling station number 16*
- xiii. *Utawala academy polling station number 5*
- xiv. *Utawala academy polling station number 10*
- xv. *Utawala academy polling station number 11*
- xvi. *Tassia catholic primary school polling station number 1*
- xvii. *Tassia catholic primary school polling station number 3*
- xviii. *Tassia catholic primary school polling station number 7*
- xix. *Tassia catholic primary school polling station number 22*
- xx. *Tassia catholic primary school polling station number 28*
- xxi. *Tassia catholic primary school polling station number 29*
- xxii. *Embakasi social hall polling station number 5*
- xxiii. *Embakasi social hall polling station number 14*
- xxiv. *Embakasi social hall polling station number 17*
- xxv. *Soweto social hall polling station number 3*
- xxvi. *Soweto social hall polling station number 4*
- xxvii. *Soweto social hall polling station number 5*
- xxviii. *Soweto social hall polling station number 6*
- xxix. *Soweto social hall polling station number 12*
- xxx. *Soweto social hall polling station number 17*
- xxxi. *Soweto social hall polling station number 24*
- xxxii. *Soweto social hall polling station number 25*

- xxxiii. Soweto social hall polling station number 26*
- xxxiv. Edelvale primary school polling station number 1*
- xxxv. Edelvale primary school polling station number 5*
- xxxvi. Edelvale primary school polling station number 12*
- xxxvii. Doonholm primary school polling station number 5*
- xxxviii. Doonholm primary school polling station number 7*
- xxxix. Doonholm primary school polling station number 9*
- xl. Doonholm primary school polling station number 11*
- xli. Doonholm primary school polling station number 12*
- xlii. Doonholm primary school polling station number 15*
- xliii. Doonholm primary school polling station number 19*
- xliv. Doonholm primary school polling station number 20*
- xlv. Doonholm primary school polling station number 23*
- xlvi. Doonholm primary school polling station number 25*
- xlvii. Doonholm primary school polling station number 26*
- xlviii. Edelvale primary school polling station number 4*
- xliv. Mihango primary school polling station number 8*
- l. Greenspan mall grounds polling station number 5*
- li. Doonholm primary school polling station number 20*
- lii. Doonholm primary school polling station number 15*
- liii. Doonholm primary school polling station number*
- liv. Greenspan mall grounds polling station number 5*
- lv. Greenspan mall grounds polling station number 7*
- lvi. Greenspan mall grounds polling station number 8*
- lvii. Greenspan mall grounds polling station number 12*
- lviii. Edelvale primary school polling station number 8*
- lix. Embakasi social hall polling station number 6*
- lx. Embakasi social hall polling station number 9*

- lxi. Tassia catholic primary school polling station number 3*
- lxii. Tassia catholic primary school polling station number 4*
- lxiii. Tassia catholic primary school polling station number 29*
- lxiv. Tassia catholic primary school polling station number 18*
- lxv. Utawala academy polling station number 7*
- lxvi. Mihango primary school polling station number 9*
- lxvii. Mihango primary polling station number 10*
- lxviii. Embakasi primary school polling centre*

4. The 3rd respondent be compelled to supply the court, the petitioner and the 1st respondent, for their scrutiny, certified copies of all the original forms 35A for Embakasi Primary School polling station, Doonholm Primary School polling station number 15, Tassia Catholic Primary School polling station number 18, Embakasi Social Hall polling station number 17, Immaculate Primary School polling station number 9, and Mihango Primary School polling station number 9.

5. The 3rd respondent be compelled to supply the court, the petitioner and the 1st respondent, for their scrutiny, a certified copy of the original marked copy of the voters register for Edelvale Polling stations number 4-5 Soweto Social Hall polling station number 1-28 and Utawala Academy polling station number 11.

6. The 3rd respondent be compelled to supply the court, the petitioner and the 1st respondent, for their scrutiny, access to the KIEMS devices logs detailing the identification of voters at the polling station for Edelvale polling stations numbers 4-5 Soweto Social Hall polling station number 1 – 28, and Utawala Academy polling station number 11.

7. The 3rd respondent be compelled to supply the court, the petitioner and the 1st respondent, for their scrutiny, with comprehensive documentation of all the incidences (if any) when as a result of identification failure by the KIEMS gadgets, manual identification had to be done at Edelvale polling stations number 4-5 and Soweto Social Hall polling station number 1-28.

8. The 3rd respondent be compelled to supply the court, the petitioner and the 1st respondent, for their scrutiny, with forms 32A and KIEMS supervisor validation forms for Edelvale polling stations number 4-5 and Soweto Social Hall polling station number 1-28.

9. The 3rd respondent be compelled to supply the court, the petitioner and the 1st respondent, for their scrutiny, the KIEMS devices logs detailing the identification of voters and certified copies of the original marked voters' register for all the polling stations in Embakasi East constituency.

10. The 3rd respondent be compelled to supply the court, the petitioner and the 1st respondent for their scrutiny polling day diaries with respect to Soweto Social Hall polling stations number 1-28, Greenspan polling stations number 1-12, and Embakasi Social Hall polling station number 6.

11. The 3rd respondent be compelled to supply the court, the petitioner and the 1st respondent for their scrutiny, certified copies of the original form 35B.

12. The 3rd respondent be compelled to supply the court with the sealed ballot boxes for the member of parliament for Embakasi East Constituency for the unsealing of the ballot boxes and the recount of

the ballot papers to be conducted by the court in the presence of the petitioner and the 1st respondent.

13. The petitioner prays that this court grants leave to the petitioner and any other party to file a supplementary affidavit as is necessary arising from the access to the information above.

14. The 2nd respondent bear the costs of this application and

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

2. The motion is supported by the affidavit of the petitioner. When the motion was served, Owino Paul Ongili Babu, the 1st respondent, filed a replying affidavit he swore to oppose the application. On the other hand, Nicholas Buttuk and Independent Electoral and Boundaries Commission, the 2nd and 3rd respondents respectively filed the affidavit of Eroo Mele Joseph to resist the motion.

3. When the motion came up for interpartes hearing, learned counsels appearing in the petition made oral submissions. I have considered the grounds set out on the face of the motion plus the facts deponed in the affidavits filed in support and against the motion. I have also considered the rival submissions made by learned counsels appearing in this petition. It is the submission of Messrs Kimani and Lagat, learned counsels for the petitioner that the votes cast in favour of the 1st respondent were inflated at specific polling stations in Embakasi East Constituency as set out in paragraphs 16(i), 18(ii) and 22 of the petition, paragraphs 12(a), 12(b), 17(a) and 17(b) of the petitioner's supporting affidavit. The petitioner further avers that, his votes were deflated and in some cases he was unlawfully awarded zero votes. It is also alleged that in some polling station in Embakasi East Constituency, that forms 35As lacked either the official IEBC stamp and or the signature of the presiding officer.

4. The petitioner also pointed out that there were multiple forms 35 As showing different results for a single polling station namely: Soweto Social Hall polling station no. 28. It is further argued that the number of votes cast at Utawala Academy polling station exceeded the number of registered voters. The petitioner also complained that alterations were done on several of the forms 35As without being countersigned by the presiding officer. The other complaint the petitioner raised is that the results announced and declared by the 3rd respondent differ from those recorded in form 35B which ought to be the basis of the announcement and declaration of results. It is also submitted that the officials of the 3rd respondent failed to identify voters using the Electronic Voter Identification Device or manually in specific polling stations.

5. The petitioner further alleged that the 1st respondent and his supporters caused violence at Soweto Social Hall and Greenspan polling stations leading to the disruption of the voting exercise in those stations.

6. I have already stated that the 1st respondent filed a replying affidavit he swore to oppose the petitioner's motion. It is the submission of Mr. Awele, learned advocate for the 1st respondent, that the petitioner has in his pleadings and or testimony during the hearing of the petition failed to lay sufficient basis for the grant of any of the orders prayed for. The 1st respondent further argued that the petitioner is using the motion on a fishing expedition venture and to raise new facts and issues not pleaded in the petition. The 1st respondent urged this court to strictly apply the principle of specificity and proceed to dismiss the motion. Mr. Awele pointed out that all the prayers in the motion are without merit and have no basis in the petition. The learned advocate further argued that even for those that have a basis in the petition they are few and minor, hence they could not affect the outcome of the election. It is his submission that an election cannot be free from administrative errors. He pointed out that it is no longer a mandatory requirement that statutory forms must be stamped. This court was beseeched not to grant prayer 4 of the motion, in which the petitioner had sought for the scrutiny of all forms 35As of Embakasi Primary School polling centre since the prayer is general and superfluous. It is said that the polling station complained of is not specified. The 1st respondent argued that the petitioner did not present any witness from Embakasi Primary School to prove the issues that were raised in that polling centre. As

regards Tassia Catholic Primary School, the 1st respondent pointed out that no orders should issue since there is no complaint which was pleaded in the petition. The 1st respondent further pointed out that the averments in paragraph 11 of the petitioner's supporting affidavit are not supported in the petition. It is said that the petitioner did not ask for scrutiny and recount of the votes. The learned advocate pointed out that the 1st respondent demonstrated at the hearing that the failure to sign the statutory form did not affect the results. He also argued that there is no dispute as to the results of that particular polling station.

7. The 1st respondent has argued that the petitioner failed to present evidence to show that KIEMS gadgets failed as alleged during the voting day. It was pointed out that the KIEMS kit did not malfunction but the same merely failed to scan but voters were identified and allowed to vote. This court was beseeched to find that the final result was that contained in form 35A and so long as it had the signature of the presiding officer and the agents. The 1st respondent also argued that there was no evidence tendered in support of the contention that voters did not vote in Soweto Social Hall polling centre, therefore there is no justification for the application for scrutiny of the voter's register. The 1st respondent also pointed out that there was no evidence that violence erupted in Soweto Social hall and Greenspan polling stations.

8. In response to the allegation that the votes cast exceeded the registered voters in Utawala Academy polling station, the 1st respondent stated that the constituency returning officer owned up the mistake and explained that the error occurred when the I.E.B.C officials applied a wrong formula. It was pointed out that the mistake only affected one candidate namely Mr. Wekesa Francis Masinde and not the petitioner. It is argued that the error did not affect the outcome of the entire election of Embakasi East Constituency. The 1st respondent further argued that the result of Utawala Academy is not challenged in the petition thereof the prayer lacks a basis in law.

9. The 1st respondent urged this court to decline the invitation to issue orders sought since some of the petitioner's agents admitted being asleep at the time of counting votes and that some witnesses blatantly lied while testifying before this court. It was also argued that there was no massive non-stamping of the statutory forms, therefore, this court cannot make any inference that there was interference of the electoral process. It is the submission of the 1st respondent that the prayer by the petitioner to be supplied with form 35B was without any basis in law.

10. It is the argument of the 1st respondent that the County Returning Officer gave a detailed explanation when he testified before this court as why more than one form 35A were used in Tassia Catholic Primary School polling station and in Soweto Social Hall polling station.

11. Mr. Odhiambo, learned advocate for the 2nd and 3rd respondents appeared and made submissions against the petitioner's motion. The learned advocate urged this court to dismiss the motion because the same is based on general allegations instead of laying out specific allegations. Mr. Odhiambo pointed out that about 80 out of the 207 polling stations had no issues therefore there is no basis for the order for recount and scrutiny. The 2nd and 3rd respondents are of the same view that the petitioner is on a fishing expedition. Mr. Odhiambo argued that the petitioner has talked of polling centres without specifying the polling station which he had issues with in his petition. Mr. Odhiambo also regurgitated and adopted the submissions of Mr. Awele, learned advocate for the 1st respondent in opposing the motion. He argued that the KIEMS gadgets did not malfunction but merely failed to scan since the I.E.B.C official was unable to operate the same and therefore there is no basis for the application. The learned advocate submitted that the errors raised by the petitioner do not in any way affect the outcome of the entire election in Embakasi East Constituency.

12. The matter that this court is dealing with is an application for scrutiny and recount. Under **Section 82 of the Elections Act, 2011**, the election court may on its own motion or on application during the hearing of the petition order for scrutiny or recount of votes to be carried out in such a manner as the court may determine if it is satisfied that there is sufficient reason. In **Rule 29(i) of the Elections (Parliamentary and County Elections) Petition Rules**, parties to the proceedings may apply for scrutiny of the votes for

purposes of establishing the validity of the votes cast and the court may issue the order for scrutiny or recount if sufficient reason is given to the satisfaction of the court. **Under Rule 29(4) of the aforesaid petition Rules**, the scrutiny and recount of votes shall be confined to the polling station in which the results are disputed. The main consideration in determining an application for scrutiny or recount is that there must exist sufficient reason and must relate to specific polling stations where the results are disputed. In the case of **Gatirau Peter Munya =vs= Dickson Mwendu Kithinji & 2 others (2014) eKLR**, the Supreme Court of Kenya laid down the guiding principles to be applied in an application for scrutiny and recount in paragraph 153 *inter alia* as follows:

“From the foregoing review of the emerging jurisprudence in our court, on the right to scrutiny and recount of votes in an election petition, we propose certain guiding principles as follows:

a., 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 the petition and before the determination of the petition.

b. The trial court is vested with the discretion to make an order on its own motion for a recount or scrutiny of votes 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 evidence or the evidence or both. It is appropriate that the court should record the reasons for the order for scrutiny and 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 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 in which the results are disputed, or where the validity of the vote is called into question.....”

13. Having outlined the principles applicable in an application for scrutiny and recount, let me now apply the aforesaid principles to the petitioner’s application. The substantive matter before this court is the petition against the member of National Assembly of Embakasi East Constituency. In a parliamentary election, the votes are counted at the polling stations and the results are recorded in form 35A and thereafter the results are taken to the Constituency tallying centre where the results from polling stations are tallied and recorded in form 35B. I have already set out in detail the polling centres and polling stations the petitioner seeks to have the votes scrutinised and recounted. I have further considered the arguments plus the authorities presented and relied upon by both sides.

14. The respondents have raised an issue which in my view appears to be a preliminary point of law. They have argued that the petitioner has in prayer 1 of the petition sought for scrutiny and recount of all the votes in Embakasi East Constituency. According to the respondents, the prayer is very general and goes against the principle of specificity. It is for this reason that the respondents think that the petitioner is on a fishing expedition to obtain evidence to support a hopeless petition. The petitioner is of the view that the respondents have misconstrued the doctrine of specificity and misapprehended its application. It is the argument of the petitioner that he has put forward sufficient grounds at the tail end of the petition. This court was urged to rely on the evidence tendered by both sides to determine the preliminary issue. It is not in dispute that the petitioner applied for scrutiny and recount in prayer (i) of his petition as follows:

“It be ordered that there be a scrutiny and recount of all the votes recorded as having been cast in the parliamentary elections in Embakasi East Constituency,”

15. It is apparent from the above quoted prayer that the petitioner applied for a blanket and general order without specifying the polling stations. The question to be determined is whether or not that is fatal. The

petitioner made the application at the end of the trial. Both sides have invited this court to consider the evidence tendered and the rival submissions made in support and against the petition in determining the application for scrutiny and recount.

16. In the case of **Gatirau Peter Munya =vs= Dickson Mwendu Kithini & 2 others (2014) eKLR** the Supreme Court cited with approval the case of **Hassan Mohammed Hassan & Another =vs= I.E.B.C & 2 others Election Petition no. 6 of 2013** in which the court identified three stages at which an application for scrutiny and recount can be sought by the petitioner namely:

i. Before the petition trial, where the petitioner would seek to persuade the court to grant the orders sought by relying on affidavit evidence

ii. During the trial, where the petitioner adduces sufficient evidence to support scrutiny while the trial proceeds

iii. At the end of trial, where the petitioner adduces all the evidence and calls for scrutiny or recount.

17. It is important from the above cited authority that since the application was filed at the tail end of the trial, that the applicant is not bound to rely on his pleadings alone but can also rely on the evidence adduced during the trial. In **Gatirau Peter Munya case (Supra)**, the Supreme Court seem to suggest that the request for general or blanket orders do not violate the specificity requirement provided they are themselves justified by the pleadings and the evidence on record, when it held inter alia:

“We have noted that in those cases where the trial judges had allowed a blanket scrutiny of the votes in constituencies, a sufficient basis had been established in the interest of justice, and it was considered fair and proper to all the parties, in the circumstances.”

18. Having considered material placed before this court plus the authorities cited, I have come to the conclusion that in the circumstances of this case that it was not fatal for the petitioner to seek for general and or blanket orders in the petition. It is also noted that in the motion the petitioner has attempted to comply with the doctrine of specificity to a large extent. The preliminary objection is therefore overruled.

19. The second preliminary point was raised and argued by the petitioner against the replying affidavit of Eroo Mele Joseph filed by the 3rd respondent to oppose the petitioner’s motion. It is the submission of Mr. Ham Lagat that the affidavit should be struck out because it is sworn by someone who is not a witness in this petition. The petitioner suggested that the most appropriate person to swear the affidavit should have been the 2nd respondent who in any case testified in this petition. Mr. Odhiambo, learned advocate for the 3rd respondent opposed the petitioner’s objection arguing that the averments contained in the replying affidavit are in respect of evidence already tendered. I have considered the rival arguments put forward. In my humble view, the petitioner’s objection cannot stand for three reasons. **First**, the deponent of the replying affidavit, is an officer of the 3rd respondent who had authority to make the averments and in any case he deponed on facts within his knowledge. The 3rd respondent being a corporate body can only plead and testify through its officials and advocates. **Secondly**, that most of the facts deponed in the replying affidavit were presented as evidence at the trial hence the deponent is not introducing new issues. **Thirdly**, that it is not a must that a party should only file affidavits deponed by witnesses in the case. The petitioner failed to show the prejudice he would suffer if the replying affidavit was left to stand. In my understanding, the objection raised by the petitioner appear to be more of a technicality which substantive justice abhors. In the end I find the petitioner’s preliminary objection to be without merit.

20. Having determined the two preliminary objections, let me now determine the motion on its merits. In prayer 3 of the motion dated 2nd January 2018, the petitioner has sought for an order to compel I.E.B.C, the 3rd respondent herein, to grant access to and to supply to this court, the petitioner and the 1st respondent certified copies of all the originals of forms 35As prepared and obtained from the polling

station and presiding officers for the 44 named polling stations. The petitioner avers that he has given sufficient grounds to justify the prayer. It is alleged that the aforesaid forms lack the official I.E.B.C stamp hence they are questionable. The 1st respondent aver that he has viewed all the 44 forms 35As and found that there were no alterations of the results of any candidate. It is also said that the forms have been signed either by the Presiding Officer or the Deputy Presiding Officer or the by both and by the agents who were present. It is also stated that no adverse comments were made. The 1st respondent further stated that the form 35A relating to Tassia Catholic Primary School polling stations 1 and 3 were stamped. It is also argued that except for Soweto Social Hall polling stations 5 and 6 there is not a single allegation in the petition or witness affidavits disputing the results of the elections in the 44 listed polling stations. It is clear in my mind that save for a few polling stations that the parties are not disputing the assertion that most of the forms 35A from the aforementioned 44 polling stations were not affixed with the I.E.B.C official stamp. The petitioner has clearly stated that he is questioning the authenticity of the aforesaid forms. It is apparent that the petitioner is challenging the validity of the results for want of the I.E.B.C stamp. The main contention by the respondents is that the petitioner has not challenged the results. In the circumstances of this case can it be said that the petitioner has failed to lay a basis for the request? The Supreme Court in the case of **Gatirau Peter Munya (Supra)** was categorical that a party is entitled to make a request for scrutiny and recount in specific polling stations where the results are either **disputed** or **the validity of the vote is called into question**. I have already noted that the petitioner is questioning the validity of the vote, therefore I am satisfied that he has established a basis for the request. Apart from the averment that the forms lack the I.E.B.C. stamp, there is also an allegation that four of the forms 35As lack the signature of the presiding officer or that of his assistant. It is further argued that there were alterations which were not countersigned and that some forms are illegible. I am consequently satisfied that in the interest of justice and fairness, that it is necessary to have the forms 35A requested to be supplied for purposes of being scrutinised to establish if there are any additional errors which may affect the validity of the vote in Embakasi East Constituency.

21. In prayer 4, the petitioner has sought for an order to compel the 3rd respondent to supply this court, the petitioner and the 1st respondent for their scrutiny, certified copies of the original

forms 35A for Embakasi Primary School polling center,

Doonholm Primary School polling centre no. 15.

Tassia Catholic Primary School polling station no. 18,

Embakasi Social Hall polling station no. 17,

Immaculate Primary School polling station no. 9 and

Mihago Primary School polling station no. 9

22. The petitioner has argued that though the 2nd respondent has deponed that he has provided all forms 35A in respect of Embakasi Primary School polling centre, none was attached to the supporting affidavit. In response to this assertion the 3rd respondent stated that the petitioner did not in his pleadings raise issues touching on Embakasi Primary School polling centre except for polling station no. 6. The 3rd respondent further stated that it did not deem it fit to supply forms 35A in respect of the above polling centre because no issue was raised touching on the results. The 3rd respondent did not respond to the prayers touching on the other polling stations.

23. A careful perusal of paragraph 12(a) of the affidavit of Francis Wambugu Mureithi sworn and filed in support of the petition will reveal that the petitioner had alleged that the results of candidates had been switched as the counting process was ongoing at Embakasi Primary School, Embakasi Social Hall, Soweto Social Hall, Immaculate Social hall and Tassia Catholic polling station. It is therefore not true that no issues were raised touching on the aforementioned polling stations. I am satisfied that the 3rd respondent completely had no justification not to supply to this court all the forms 35A in respect of the

abovementioned polling stations. The petitioner has established to the required standards in election disputes that he is entitled to the order sought in prayer 4.

24. In prayer 5, the petitioner sought for an order to compel the 3rd respondent to supply to the court, the petitioner and the 1st respondent for their scrutiny, a certified copy of the original marked copy of the voters register for Edelvale polling stations no. 4 and 5, Soweto Social Hall polling stations 1 – 28 and Utawala Academy polling station no. 11. It is the submission of the petitioner that in Edelvale polling stations no. 4 and 5 that the KIEMS gadgets malfunctioned and that in Soweto Social hall polling stations no. 1-28, there were incidents where voters were not identified either manually or electronically. It is also the submission of the petitioner that in Utawala Academy polling station no. 11, the number of votes cast exceeded the number of registered voters. The 1st respondent opposed this prayer and relied on the evidence of the returning officer who stated that none of the KIEMS gadgets malfunctioned. The 1st respondent further argued that there was no evidence showing that some voters were turned away from Soweto Social Hall polling centre. The 3rd respondent adopted the arguments put forward by the 1st respondent to oppose the motion. The petitioner in response to the respondents' arguments pointed out that the 1st respondent did not respond to the allegations that he voted in a polling station where he was not a registered voter. After a careful consideration of the rival arguments, I am convinced that the petitioner has given sufficient reasons to enable this court grant him the order sought in prayer 5.

25. In prayers 6, 7 and 9, the petitioner has argued that the KIEMS gadget malfunctioned in Edelvale polling stations 4 and 5 while in Soweto Social Hall polling centre voters were not identified either manually or electronically. It is also alleged that in Utawala Academy polling station no. 11 the number of votes cast exceeded the number of registered voters. The 1st respondent was of the view that there was no evidence led to prove that the KIEMS gadgets malfunctioned. The 1st respondent relied on the evidence of the returning officer which indicated that the KIEMS gadget did not malfunction but that the I.E.B.C officer who operated it was unable to use it to scan. The 1st respondent further argued that there was not a single alteration which was not countersigned by the presiding officer. The 1st respondent further argued that there was no iota of evidence nor pleading alleging and or showing that some voters did not cast their vote at Soweto Social Hall polling station. For the above reasons this court was beseeched to reject prayers 6, 7 and 9. The 3rd respondent on the other hand is of the submission that no KIEMS Kit failed in any station within Embakasi East Constituency. It was argued that the presiding officer only failed to scan the QR code for the gadget in respect of Edelvale school polling centre. The 3rd respondent further argued that the KIEMS Kit functioned but only the statistics of voter turn out could not be obtained. The 3rd respondent heavily relied on the fact that the agents of the various parties confirmed the results by appending their signatures on form 35As. Having considered the rival submissions over the prayers 6, 7 and 9 of the motion, it is clear to me that one fact is admitted that the KIEMS gadget for Edelvale polling stations nos. 4 and 5 did not scan the QR code for the kit to generate statistics on the voter turn out. It is also not in dispute that there was no evidence tendered to show that some voters were unable to be identified electronically or manually. In my humble view, I think the petitioner has failed to the satisfaction of this court to lay a basis for the grant of the orders sought in prayers 6, 7 and 9. It would appear to me that the information being sought in the aforesaid prayers can easily be obtained if prayer 10 of the motion is granted. For the above reasons I decline to grant the orders sought in prayers 6, 7, and 9.

26. In prayer 8, the petitioner has applied for an order to have the 3rd respondent compelled to supply to the court, the petitioner and the 1st respondent for their scrutiny with forms 32A and KIEMS supervisor validation forms for Edelvale polling stations no. 4-5 and Soweto Social Hall polling stations no. 1- 28. I have already stated the arguments put forward by the parties in support and against this prayer. The petitioner argued that in aforesaid polling station the KIEMS kit malfunction and that in some stations voters were allowed to vote without being identified. The respondents denied the allegations. I find the reasons advanced by the petitioner in support of prayer 8 to be plausible. Consequently I grant prayer 8 of the motion.

27. In prayer 10 of the motion, the petitioner has beseeched this court to issue an order directing the 3rd

respondent to supply this court, the petitioner and the 1st respondent for their scrutiny, polling day diaries in respect of Soweto Social Hall polling stations nos. 1 – 28, Greenspan polling stations no. 1 – 12 and Embakasi Social Hall polling station no. 6. It is argued by the petitioner that there were incidents of violence in Soweto Social Hall and in Greenspan. It is also submitted that there was an objection to a recount of votes by the petitioner's agent in Embakasi Social Hall polling station no. 6. The petitioner is of the view that the above incidents ought to have been recorded in the polling dairies as the notable events. The 1st respondent's response to the arguments over prayer 10 is that the petitioner's allegations in respect of Embakasi Primary polling station 6 have not been made out to the required standards in electoral disputes. The 3rd respondent argued that the petitioner is merely in a fishing expedition hoping to get more evidence to boost his petition. The 3rd respondent further lamented that most of the issues are for determination in the main petition hence it should have been filed at the beginning of the petition. Having considered the competing submissions, I am satisfied that the petitioner has convinced me that if the order sought is granted the mystery about what happened after the petitioner's agent left in protest in Embakasi Social Hall polling no.6 may be resolved. The question as to whether or not there was violence is an issue which cannot be discussed at this stage. That issue is to be determined when considering the evidence tendered by both sides in support and against the petition.

28. The petitioner has beseeched this court in prayer 11 to issue an order to compel the 3rd respondent to supply this court the petitioner and 1st respondent for their scrutiny, certified copies of the original form 35B. It is the petitioner's argument that the final results in form 35B do not tally with those announced and declared by the 2nd respondent for Haji Abdeo, Faith Wangui, Stephen Waruinge and Francis Wekesa and that there is a difference of 4874 votes. The 1st respondent has strenuously opposed the prayer arguing that the petitioner has laid no basis in support of the prayer. The 3rd respondent has argued that the petitioner's agents signed forms 35A for the polling stations and those results were keyed into form 35B. It is further argued by the 3rd respondent that the petitioner and his witnesses were taken through the results and they confirmed that they did not have issues with the results as entered in form 35B, therefore there is no basis to issue the order sought. I have carefully considered the rival submissions together with the evidence tendered in support and against the petition. The 2nd respondent while testifying admitted that there were errors in form 35B, which form ought to be the basis of the declaration of the result. The 2nd respondent admitted having been pressurised by the 1st respondent to announce the results before carrying out any verification. In the circumstances of this case, I am satisfied that the petitioner has given sufficient reason in support of prayer 11 of this motion.

29. The final major prayer sought by the petitioner is for an order to compel the 3rd respondent to supply the court with the sealed boxes for the member of parliament for Embakasi East Constituency for the unsealing of the ballot boxes and for the recount of the ballot papers to be conducted by the court in the presence of the petitioner and the 1st respondent. I have already taken into account the arguments of the parties to this election dispute. It is the submission of the petitioner that there is need for issuance of an order for recount of votes in the entire constituency since the accuracy of form 35B is in doubt. The petitioner pointed out that the constituency returning officer, the 2nd respondent herein admitted that there were errors in form 35B. The petitioner further pointed out that the 2nd respondent further admitted while testifying in court that the results he announced and declared do not correspond with the totals on form 35B which ought to be the basis of the declaration. The 1st respondent is of the submission that the order for recount should not be given because the 2nd respondent properly explained the errors which emerged in the process of tallying the results. He also pointed out that the difference in the number of votes garnered between the petitioner and the 1st respondent is wide and incontrovertible hence the petitioner's allegations cannot affect the result. The 1st respondent urged this court to reject the application for recount for lacking in merit. The 3rd respondent was of the view that the 2nd respondent gave a clear explanation for some discrepancies which arose in the results. It was also argued that the petitioner has not shown why a recount is warranted if the error does not affect his or the 1st respondent's results. After a careful consideration of the rival submissions, it is clear that all the parties agree that there were some errors and discrepancies which occurred while the results were being tallied. The constituency returning officer testified before this court where he stated that he declared the results under immense pressure and

before fully verifying the results. In my humble view, I think this is a case where an order for recount should be made. I am satisfied that the petitioner has given sufficient reason to justify being granted the order sought in prayer 12 of the motion.

30. In the end prayers 3, 4, 5, 8, 10, 11 and 12 of the motion dated 2/1/2018 are allowed while prayers 6, 7, and 9 are refused. Costs of the motion to abide the outcome of the petition. In order to implement the orders issued hereinabove this court gives the following directions:

i. The 3rd respondent is directed to supply the items specified in prayers 3, 4, 5, 8, 10 and 11 of the motion to the Deputy Registrar of this court within 2 days from the date hereof. The Deputy Registrar is directed to carry out the scrutiny in the presence of the petitioner, the 1st, 2nd and 3rd respondents and three agents each for the petitioner and the 1st respondent.

ii. The 3rd respondent to supply to the Deputy Registrar of this court the items specified in prayer 12 of the motion within 2 days from the date hereof. The Deputy Registrar is hereby directed to carry out the recount of the ballot papers in the presence of the petitioner, the 1st respondent plus three agents each for the petitioner and the 1st respondent. The Deputy Registrar to file her report in this court within a period of 2 days from the date of completion of the exercise.

iii. The materials specified in prayer 12 to be provided by the 3rd respondent in a place convenient to all the parties to be confirmed by the Deputy Registrar.

iv. Parties to appear before the Deputy Registrar on 14.02.2018 at 9.00am for further necessary directions.

v. Any dispute in the course of the exercise which may require the intervention of the trial judge shall be placed before the judge as soon as practicable.

vi. The Deputy Registrar shall deal with the administrative arrangements necessary in liaison with the 3rd respondent and the parties herein.

vii. The petition to be mentioned before the trial judge on 26.2.2018 at 3.00pm for submissions.

Dated, Signed and Delivered in open court this 12th day of February, 2018.

J. K. SERGON

JUDGE

In the presence of:

..... for the Petitioner

..... for the 1st Respondent

..... for the 2nd Respondent

..... for the 3rd Respondent