



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

ELECTION PETITION NO. 2 OF 2017

HON. MARTHA WANGARIKARUA...1ST PETITIONER

HON. JOSEPH GACHOKIGITARI.....2ND PETITIONER

-VERSUS-

THE INDEPENDENT ELECTORAL & BOUNDARIES

COMMISSION.....1ST RESPONDENT

MR. SEKI LEMPAKA.....2ND RESPONDENT

HON. ANN WAIGURU.....3RD RESPONDENT

HON. PETER NDAMBIRI.....4TH RESPONDENT

RULING

The Petitioners Hon. Martha Wangari Karua and Hon. Joseph Gachoki Gitari filed an application dated 12/04/2018 in which they are seeking orders that the Court varies if necessary the orders of 27/10/17 and/or directions issued subsequent thereto to admit the proceedings/notes of the Deputy Registrar and the reports made by the Deputy Registrar and the parties representatives following the order of 23/10/2017 and 3/1/17 that in addition or the alternative and without prejudice to the above the court to deem the reports and proceedings made by the Deputy Registrar, (to be referred to as the registrar) and each of the parties representatives (or experts) be deemed as this courts proceedings with the respective counsels for the parties having the right to examine in chief and cross-examine their representatives respectively.

That leave be granted to the petitioner to file additional affidavits together with exhibits concerning the proceedings and report made pursuant to the orders of 23/10/2017 and the subsequent directions, orders thereof in terms of hereto annexed supporting affidavit and annexure reports thereof. That the court be pleased to grant further orders and directions as it deems just.

The application is based on the grounds on the face of the application and is supported by the affidavit of the Hon. 1st Petitioner Martha Wangari Karua, and that of Mr. Gitobu Imanyara. She deposes that the court granted her a read only access to the Kiems Kit and that the 1st respondent do supply her with the original forms 37As &Bs as well as access to the originals of the same. That she appeared before the Registrar and the scrutiny was to be done at 1st respondents only. That she attended the exercise supervised by the Registrar and all parties were represented. 1st Respondent failed to grant the order with its IT officer Mr. Ngatia stating that the kits were configured and dispatched for presidential Elections. That since the application for access was filed with the petition the 1st respondent was aware she would need them and the destruction was breach of statutory duty and in contempt of court orders. The 1st respondent availed 594 SC Cards said to have been removed from KIEMS Kit and neglected to avail 57 SD Cards. That the Kiems Kits would have assisted in verification by matching unique identification number on each kit with the station said to have been deployed and using network provider to confirm and verify the geo-physical location of each of the kits and confirm the results sent. That vital information has been denied to this court on adjudicating on the issues in dispute. She deposes further that she was supplied with certified copies of forms 37A & B save where some were copies. That on 10/11/17 before the Registrar the parties consented that each file their respective reports on the observation on the scrutiny of Kiems Kit and the forms by 14/11/17 to enable the Deputy Registrar to file his report. She filled her report on 15th but the respondents neglected or refused to file their reports. That the court has not stated that the report is not part of the proceedings.

That the Registrar filed his report on 17/11/18 MWK-1. That the Registrars notes did not include the consent of 10/11/17 for parties to file reports. That the respondents were aware of the consent and on 15/11/17 counsel Mr. Kathungu had a report which he declined to give her. That the order was not made in vain but was meant to facilitate discovery and verification of the information to assist court in fair determination of the issues. That the court to appreciate the legal basis and allow the prayers. The 2nd respondent filed a replying affidavit

dated 13/4/2018 and deposes that the 1st respondent did comply with the orders. That the court had not ordered filing of any report by the Registrar after the exercise and the petitioners had not applied for such an order.

The 3rd and 4th Respondents filed grounds of opposition dated 16/4/18 and a replying affidavit sworn by the 3rd respondent and depone that the court did not order the Deputy Registrar to prepare and file his report in respect of the scrutiny of the data. That the parties did not record a consent to file a report of their observation.

The application proceeded by way of oral submissions. I have considered the application. The first issue which I have to determine is:-

‘Whether this court should admit the proceedings/reports of the Deputy Registrar and those of the parties and their representatives’.

The petitioner submits that they seek to perfect the court proceedings. That the court gave orders of scrutiny but the court gave a ruling that terminated the proceedings. That the court did not make a decision that the report was not part of the proceedings. That the proceedings recorded by the Registrar should form part of these proceedings. That the Deputy Registrar is an Officer envisaged in the rules that if the court had jurisdiction to order scrutiny it had jurisdiction to supervise. That there were proceeding before the Registrar. That the court has to start from where it stopped and has to ask for the report. He submits that the I.E.B.C must remain independent and neutral and cannot hide behind some rule. That crucial evidence should not be locked out. That it is an issue of discretion and the court must be judicious.

The 1st respondent submits that they complied with the order and that is why there is no application for contempt. That the petitioner did not pray that a report be made either by the Deputy Registrar or any party. That the parties made their observations. That what the petitioner wanted after observation did not come out.

For the 3rd and 4th Respondent it was submitted that the court gave a ruling pursuant to an application by the petitioner. That no consent was entered before the Deputy Registrar. That the petitioner is seeking a variation of the order of the court and the proceedings of the Registrar becomes part of the record. That there is no reason why the court should review its ruling. That what the petitioner purports to be the registrars report is not a report of the registrar. The report annexed to the 1st petitioner’s affidavit MWKI is a petitioner’s report. That the Registrar emailed his report which does not include the petitioner’s report. That what was emailed by the Registrar is not the same as the report the 1st petitioner wants to form part of this court’s record. That counsel has submitted that what they are introducing is evidence. He conceded that the Judge is entitled to a return from the Deputy Registrar on the process ordered and supervised by the Registrar.

The Petitioners had filed an application dated 14/9/2017. In the prayer -2- of the application they were seeking various orders some which were declined. The court granted prayer No. -2- and directed the 1st respondent to allow a read only access of the date in the Kiems Kits with regard to Gubernatorial Elections of Kirinyaga County. The court also ordered the 1st respondent to supply the petitioner certified photocopies of Forms 37A and 37B and the petitioners be given access to original forms 37A and 37B. These order was for scrutiny as envisaged in the Rules made under the Elections Act. Rule 29 of the Elections (Parliamentary and County Elections) Petition Rules 2017 deals with scrutiny.

It provides:

“(1)The parties to the proceedings may apply for scrutiny of the votes for the purpose 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 vote.....

(3) The scrutiny or re-count 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 direction the election court gives.”

This rule spells out the role of the registrar as that of supervision of the exercise and shall be subject to the directions of the election court. This means that the Registrar is exercising the role of supervision must comply with order of the court. The Registrar performs that role on behalf of the election court. The Registrar is bound by the order of the election court. The order of this court issued by this court on 23/10/17 was the direction given to the Registrar of this Court. The court did not need to make further orders as the rule is clear as to what the Registrar is supposed to do. The Registrar did take up his role as he dutifully had the parties appear before him and directions were given as to how the order of the court would be enforced within set time lines. The parties as seen from the proceedings of the Deputy Registrar which have been annexed attend the scrutiny exercise by themselves and/or their representatives. The dispute is as to whether the registrar had to file a report since the order had not directed him to file a report.

The court has to consider why the scrutiny in the first place. The election court when dealing with an election petition which basically a dispute arising from the election, interrogates the election to determine whether it was conducted in accordance with the Constitution, the Elections Act and other related legislation. It is in this regard that the court ordered scrutiny as requested by the Petitioner. In the case of **Phillip Mukwe Wasike –vs- James Lusweti Mukwe and 2 Others** the court held that the purpose of scrutiny is;

- i. To assist the court investigate if allegations of irregularities and breaches of the law complained of are valid.
- ii. To assist the court in determining the valid votes cast in favour of each candidate.
- iii. To assist the court to better understand the vital details of the electoral process and gain impressions on the integrity of the

electoral process.

I am persuaded by the holding as this is what entails the exercise of scrutiny. As such it does not end at the stage where the exercise of scrutiny and supervision by the Registrar. If it were to end there it would not be of any assistance to the election court and would be an exercise in futility. What I am trying to say is that the Registrar has a duty to report back. This was acknowledged by the counsel for the 3rd and 4th respondent who conceded that the Judge is entitled to a return from the Deputy Registrar of this court of the process ordered and supervised by the Registrar. The statement by the Hon. The Chief Justice David Maraga in a passage, **Balancing the scale of Electoral Justice** where he stated;

“At the conclusion of the scrutiny exercise, the Deputy Registrar makes a finding on his report which report will be taken into consideration in the determination of the petition. This however does not seem to have happened in the Raila Odinga Case, The Supreme Court never addressed the objective and result of the scrutiny.”

though not binding as it was not from a decision made in court, it is a good guide to an Election Court and a matter which the court should consider after ordering a scrutiny.

There are various decisions where the Election Courts after ordering scrutiny, have proceed to receive the report of the Registrar and it formed part of the record. The election court proceeded to consider the report in its final determination. In **Lenny Kivuti –v- I. E. B. C & 3 Others 2018 Eklr** it was stated:

“The Deputy Registrar thereafter compiled a report which was subsequently filed in court on 7/2/18. The Deputy Registrar also filed the original forms used in the partial scrutiny duly filled by hand and signed by the agents of all the parties and by Deputy Registrar.”

In Farah Maalim –v- I. E. B. C & 3 Others (2018) eKLR it was stated:

“The exercise was conducted under the supervision of the Deputy Registrar M/s Roselyn Aganyo. She filed a report dated 8/12/17 in respect of the said exercise.”

In Francis Wambugu Muriithi –v- Owino Paul Ongili Babu & 2 Others (2018) eKLR:

The petitioner did not seek that the Deputy Registrar files his report and the same to form part of the courts record. However the court of its own motion held as follows:

“In order to implement the orders issued herein above this court gives the following direction:

The Deputy Registrar to file her report in this court within a period of two days from the date of the exercise.”

These are persuasive decisions. Filing the report will not vary the order or review it. They are all in agreement that the Deputy Registrar should file a report. This court should follow suit. Though the order did not direct the Registrar to file a report it was expected that the Registrar would report back to the court upon completion of the exercise. This is not in dispute as counsel for the 3rd and 4th respondents concede that the Registrar had to report back.

The petitioner stated that parties had reached a consent for each party to file a report. However the respondents denied that such a consent was entered. The record of the proceedings before the Registrar does not show such a consent was reached. The report annexed by the petitioner MWKI has a petitioner’s report and whether headed our observation is as follows which is signed by the Deputy Registrar.

From the above authorities and even the passage by the Hon. Chief Justice David Maraga which I have referred to, the report has to be filed by the Deputy Registrar. There is no room for parties to file reports as it may lead to parties using the exercise of scrutiny as a fishing expedition. I had addressed the issue in the ruling and I have considered the decision cited that **Sitati Peter Juma –v- Sitati Daniel Wanyama& Others E. P. No. 3/2017** where it was stated:

“There would be several reason why scrutiny should not be ordered a usual course. First there is need to guard against an abuse of the process. I would agree with Mr. Kopot that a party must not be allowed to use scrutiny as a fishing expedition to discover new or fresh evidence it would be expected that a party filing an election petition is from the outset seized of the grounds facts and evidence for questioning the validity of an election and where the evidence is unclear then a party can on application to court seek and obtain better particulars of that evidence from its adversary. But it would be an abuse of process to allow a party to use scrutiny for purposes of chancing on new evidence. Scrutiny should not be looked upon as a lottery.”

This was also stated in **Justus Mogumbu Omiti –v- I. E. B. C & another (2017)eKLR**. A party should not use scrutiny as a fishing expedition. By the very fact that the petitioners have stated that they want to bring in new evidence shows that they are using the exercise of scrutiny as a fishing expedition. The common thread in these decisions is that a party will not use scrutiny to bring new evidence which was not in the petition. The use of Judicial precedents is an indispensable foundation upon which to decide what the law is and its application to individual cases in a common law legal system. The rational of the doctrine lies in the need to ensure predictability, certainty, consistency, uniformity and stability in the application of the law. It is to say that what is established should not be upset. Though the court has discretion, there is a well founded agreement by the courts on the issue of scrutiny that it should not be a fishing expedition. The Anton

Pillar rules relied on by the petitioner, a party moves court based on evidence that there is evidence which they will get Where a party has come with pleading stating the claims under after scrutiny seeks to bring a new cause of action. Election Petitions are special proceedings which are governed by rules which guides party to file the pleading.

Having stated all these, I hold that having ordered a scrutiny, the court had to receive a report of the exercise from the Deputy Registrar. The proceeding stopped at the stage where the report was supposed to be filed in court. The proceedings before the Registrar and the Registrar's report should be filed in court. There was no consent by the parties to file their individual reports or reports in response to the Registrar's reports. It is well established in the cases cited that it is only the Registrar's report which should be filed in court. I therefore direct that the proceedings before the Registrar forms part of these proceedings and the report should be filed in court.

The second issue which I have to address is leave to file additional affidavits together with exhibits.

Rule 15(1)(h) of the Elections (Parliamentary and County Election) Petitions Rules provides:

“Within seven days after the receipt of the last response to a petition, the court shall schedule a pre-trial conference with the parties in which the election court shall give directions on as to the filing and serving any further affidavit or the giving of additional evidence.”

In *Raila Odinga, Moses Kiarie Kuria and Others –v- I. E. B. C & Others Pet – 5/2013 S. C.*. These court stated to grant additional facts and evidence may lead to amendment of the petition thereby giving rise to significant new facts and allegations leading to a serious departure from the original case. That it would lead to a miscarriage of justice and the court cannot allow that.

In Gideon Mwangangi Wambua& Another –vs- I.E.B.C Pet No. 4/2013 Justice Odunga;

It was stated:

The aim of conducting scrutiny and re-count is not to enable the court unearth new evidence on the basis of which the petition should be sustained. Its aim is to assist the court to verify the allegations made by the parties to the petition which allegations must themselves be..... on the pleading

The petitioners want to introduce evidence gathered from the scrutiny. This would no doubt lead to a departure from the petition filed. This will be prejudicial to the other parties. In the words of the Supreme Court this would lead to a miscarriage of justice and cannot be allowed. In deciding whether or not to allow additional evidence or file further affidavits the court exercises discretionary powers. The discretion must be exercised judiciously at all times taking into consideration the issue at hand. The court in giving directions on the filing further affidavits or giving additional evidence the court will always consider the significance and effect of that additional evidence. The petitioners have made it clear that the content of the additional evidence in affidavits and exhibits concerns the proceedings and report made with regard to scrutiny. First of all this is what the courts have said in one chorus from Supreme Court down to this court that scrutiny must not be a fishing expedition. Secondly, the petitioner's bring new evidence through the back door and turning around the nature of the petition. This is no doubt prejudicial but would occasion a miscarriage of justice. This court had in an earlier ruling where no appeal was filed refused to allow the filing of additional affidavits. The court cannot go against that ruling and allow filing of affidavits and exhibits. On this issue I hold that it has no merits.

IN CONCLUSION.

1. The record and report of the Deputy Registrar on scrutiny shall be filed and form part of these proceedings.
2. The prayer for filing affidavits and exhibits is declined.
3. Costs in the cause.

L. W. GITARI

JUDGE

Read out in open Court on 20th April 2018.

L. W. GITARI

JUDGE