



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ELECTION PETITION NO. 6 OF 2017
IN THE MATTER OF PARLIAMENTARY ELECTION FOR TARBAJ CONSTITUENCY
(WAJIR COUNTY)

BETWEEN

IDRIS ABDI ABDULLAHI.....PETITIONER

VERSUS

AHMED BASHANE.....1ST RESPONDENT

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION

(IEBC).....2ND RESPONDENT

SIYAT MAHAT SABUL.....3RD RESPONDENT

RULING

The Petitioner/Applicant filed petition on 5th September 2017 brought under Article 105 COK 2010 challenging the election for Member of Parliament for Tarbaj Constituency held on 8th August 2017.

The Petitioner sought among other prayers that a recount of all votes in Kajaja II, Berjini Dam, Haragal Primary School, Leheley Centre and Gunana Primary School polling stations be conducted and scrutiny of the votes cast and recorded, the rejected and spoilt votes, the Kiems register and counterfoils of all ballot papers issued at the polling stations to be conducted.

The Petitioner through Counsel alleged that after the counting and tallying of the votes cast in the election on the 10th August 2017 at Tarbaj Tallying Centre, the 3rd Respondent declared the 1st Respondent had won the election by 6,836 votes against the Petitioner's 6812 votes with a margin of 24 votes.

The Petitioner contests the declaration by the 2nd & 3rd Respondents based on the following grounds;

1). Kajaja II Primary School Polling Station; it was alleged that the Presiding Officer announced in the presence of the public as follows;

Idris Abdi -287 votes

Ahmed Bashane Gaal -146 votes

The Presiding Officer filled Form 35A in the said Polling Station and declared as follows;

Idris Abdi -230 votes

Ahmed Bashane Gaal- 186

It was alleged that there was interference with ballot seals. The petitioner's agent was denied access at the Tallying Centre and the vote tallying and vote results were in direct contrast with Regulation 79 of the Election (General) Regulations 2012.

2) Berjini Dam Polling Station; it was alleged that the Presiding Officer transported the ballot boxes to Tarbaj Tallying Centre and in the process made a detour upon request by the 1st Respondent and he allegedly requested for recount.

It was alleged that ballot boxes were transported from Berjini Dam polling station to Tarbaj and it was alleged that in the process there was interference as the movement was not in consultation or consent of adverse party. A recount was conducted but the Petitioner claims that he was not involved and his agent was not present.

3) Haragal Primary School polling station; the Petitioner's agent was turned away from polling station and for the better part of the voting process until his return the following day. He was unable to verify the validity of votes cast. It was alleged that forms in Haragal Primary School were not signed by the Petitioner's agent.

It was alleged that there were forms that were not signed by agents, countersigned where there were alterations and not stamped. There were various Forms 35A that were not signed by Presiding Officer. The Petitioner also contested the Kiems kits used especially in Berjini Dam Polling Station and cast doubt between actual votes cast and number of people identified.

The Petitioner sought that recount if held early on would confirm the outcome, serve substantial justice, save on time and cost.

The Respondents objected to recount and scrutiny and stated that the fact of pleading and request for the same is not automatic but must be based on sufficient reasons provided to the Court.

The forms in relation to the 5 polling stations were duly signed by parties and agents. There was no complaint advanced to the Presiding Officer and Returning Officer which would have been recorded. The only complaint made and recorded in the Polling Station diary is with regard to violence that erupted at Berjini Dam polling station and the ballot boxes were transported to Tarbaj Tallying centre where the Returning Officer confirmed the incident and advised counting of votes be done in Tarbaj.

The Respondents also objected on the basis that the recount and/or scrutiny would be considered once the Court heard evidence and then the Court will exercise discretion on the way forward.

RECOUNT & SCRUTINY

Recount and Scrutiny are provided for under **Section 80 4 (a) & 82 of Elections Act as read with Rules 28 & 29 of Elections (Parliamentary & County Elections) Petition Rules, 2017**. Recount simply means to count something again. Scrutiny includes the careful and detailed examination of something in order to get information about it and critical observation or examination.

Richard Kalembe Ndile & Another Vs Patrick Musimba Mweu & 2 Others, Election Petition No. 1 of 2013, (Machakos);

It was held that the Scrutiny exercise is part of the forensic process available for the court to do justice.

Gatirau Peter Munya vs DicksonMwenda Githinji & 2 others the Supreme Court gave guidelines for scrutiny as follows;

- a) In exercising discretion, the Court is to give sufficient reason and record the reason(s) based on pleadings or evidence or both.**
- b) The party seeking recount and/or scrutiny of votes should establish basis for such a request to the satisfaction of the Trial Court.**
- c) The request for scrutiny or recount of votes if granted it is to be conducted in specific polling stations in respect of which the results are disputed.**

Gideon Mwangangi Wambua & Another Vs. I E B C & 2 Others,

Mombasa Election Petition No. 4 of 2013.

“The aim of conducting scrutiny and recount is not to enable the Court to 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 light of the above authorities that speak to the conduct of scrutiny and recount, this Court has considered the evidential materials filed by parties herein and the oral submissions made on the subject and finds as follows;

That there is need to conduct recount and /or scrutiny in order to assist this Court to investigate if the allegations of irregularities complained are valid, to help this Court gain impressions on integrity of electoral process and assist the Court in determining the valid votes cast in favor of each candidate.

Therefore with regard to the instant case; the Court finds as follows;

- 1. Kajaja II Primary School Polling Station; where it is alleged different results were announced at the polling station from what was entered in Form 35 and read at the Tallying Centre, a scrutiny shall be conducted.**
- 2. Berjini Dam Polling Station where allegations that the counting of votes was marred by violence and the ballot boxes were ferried to the Constituency Tallying Centre and it is not clear the actual number of valid votes of each candidate as the process was halted midway and/or that there was any activity that interfered with the ballot boxes during transportation from polling station to Tallying Centre. A recount was conducted that is contested. Therefore Scrutiny shall be conducted.**
- 3. Haragal Primary School Polling station; except for the agent and/or representative of the Petitioner being absent no aspersions were cast. The agent's absence by and of itself cannot render the results invalid. The same will await the testimony of Presiding Officer and the said agent first before further order on this Court on whether recount/scrutiny or none of both shall apply.**
- 4. Leheley Centre and Gunana Primary School polling stations; nothing was attributed to the station in terms of any irregularity in the Petition. Therefore this Court shall not order any recount or scrutiny unless the need arises during Trial.**
- 5. In the supporting affidavit by the Petitioner, he attributes to the fact that AIA- 7 copy of Form 35 A was not signed by Presiding Officer at Gunana Primary School. This is a matter of evidence; the Presiding Officer shall testify and in cross examination answer if and why that happened.**

6. In the supporting affidavit by the Petitioner, he attributes to the fact that AIA- 9 copy of Form 35 A at Leheley centre did not bear the authentic stamp of the 2nd Respondent. This is also a matter of evidence; the Presiding Officer shall testify and in cross examination answer if and why that happened.

In sum therefore the Court grants scrutiny in 2 of the 5 polling stations;

Kajaja II Primary School Polling Station; Berjini Dam Polling Station

The Court may proceed with the Pre Conference and any Interlocutory applications.

The Court will also confirm exchange and close of pleadings and exchange of exhibits.

It is hereby ordered.

DELIVERED SIGNED DATED IN OPEN COURT IN NAIROBI ON 31ST OCTOBER, 2017.

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF;

MR GITONGA FOR PETITIONER

MR NGACHA FOR 1ST RESPONDENT

MR. P. CHELOTI FOR 2ND & 3RD RESPONDENT