



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KABARNET
PETITION NO. 2 OF 2017
THE MATTER OF THE CONSTITUTION OF KENYA 2010
AND
IN THE MATTER OF THE ELECTIONS ACT, 2011
AND
MATTER OF THE ELECTION FOR THE MEMBER OF NATIONAL
ASSEMBLY OF BARINGO NORTH CONSTITUENCY
JOSEPH MAKILAP KIPKOROS.....PETITIONER
AND
INDEPENDENT ELECTORAL &
BOUNDARIES COMMISSION.....1ST RESPONDENT
JOSEPH LEBOO MASINET.....2ND RESPONDENT
WILLIAM CHEPTUMO KIPKIROR.....3RD RESPONDENT

RULING

1. By an Amended Notice of Motion dated 4th October 2017, the Petitioner sought various orders as follows:

1. ***“THAT*** this Motion be certified as urgent owing to its demonstrated extreme urgency, and be heard *ex parte* in the first instance.

2. Pending the hearing and determination of this application Petition, an order mandamus do issue to compel the 1st Respondent and 2nd Respondents through the IEBC’s Chief Executive Officer, EZRA CHILOBA, to within 24 hours of the making of this Order, produce before this Honorable Court and furnish the Petitioner through his Advocates on record with:

a. The copy of the register used during the National Assembly Member of Parliament

Baringo North constituency, Baringo County.

- b. The original and copies of form 33 being the candidate vote tally sheet containing the results of each of the polling stations in the election of National Assembly Member, Baringo North constituency, Baringo County.*
- c. The written complaints of the candidate and their representatives in respect of the National Assembly Member election, Baringo North constituency.*
- d. The packets of all spoilt ballot papers in the specified the National Assembly Member election, Baringo North constituency, Baringo County.*
- e. The marked copy of the registers in respect of the National Assembly Member election, Baringo North constituency, Baringo County.*
- f. The packets of counterfoils of used ballot papers of the election conducted on 8.8.2017, in respect of the National Assembly Member, Baringo North Constituency, Baringo County.*
- g. The packets of counted valid ballot papers in respect of the National Assembly Member, Baringo North Constituency, Baringo County.*
- h. The packets of rejected ballot papers in respect of the National Assembly Member, Baringo North Constituency, Baringo County.*
- i. The original form 41 being statements/Report showing the number of rejected ballot papers in respect of the National Assembly Member, Baringo Constituency, Baringo County.*
- j. The original Forms 35A AND 35B used in the Declaration of Election Results for the National Member, Baringo North constituency, Baringo County.*
- k. A certified copy of the list specifying among others:*
 - i. The exact number of ballot books issued to each polling clerk within the Constituency for the conduct of the National Assembly Member of Parliament Baringo North, Constituency, for purposes of the conduct of the 8th of August 2017 elections.*
 - ii. The number of ballot books returned unused to the IEBC for the National Assembly Member election in Baringo North Constituency Baringo County for purposes of conduct if the 8th of August 2017 elections, and their respective serial numbers;*
 - iii. The total number of IEBC stamps for valid votes, spoilt votes, and rejected votes issued by the IEBC to the 2nd Respondent in respect of National Assembly Member, Baringo North constituency Baringo county for purposes of the conduct t of the 8th of August 2017 elections.*
 - iv. The number of IEBC stamps for valid votes, spoilt votes, and rejected votes issued by the IEBC to its polling clerks in respect of National Assembly Member of Parliament Baringo North Constituency Baringo county for purposes of the conduct of the 8th of August 2017 elections.*
 - v. The total number of IEBC stamps for valid votes, spoilt votes, and rejected votes issued by the IEBC to it polling clerks in constituency Baringo County, for purposes of the conduct of the 8th August 2017 elections AND documented as RWTU8RNEED to the IEBC as at 10th of August 2017.*

vi. Leave to file supplementary affidavits and any relevant documents.

l. The original and copies of form 32A being the voter identification & verification of each of the polling stations in the election of National Assembly Member, Baringo, North constituency, Baringo County.

m. The original and copies of polling station diaries of each of the polling stations in the election of National Assembly Member, Baringo North constituency, Baringo County.

3. Pending the hearing and determination of this Application Petition, a mandatory order of mandamus does issue, compelling the 1st and 2nd Respondent to within 24 hours of the making of this Order to produce before the Court, all the elections materials in respect of National Assembly Member Baringo North constituency Baringo County election on the 8th August 2017 hence the demand to account for all materials used and for storage, safeguarding, safekeeping, accounting and PRESERVATION of all the said election materials within the Honourable court's jurisdiction.

4. More specifically, as a rider to the foregoing paragraph 4 above, pending the hearing and determination of the motion and petition respectively herein, the KIEMS Kits and all the contents whereof as used on the 8th August, 2017 be supplied to the court for access by the petitioner in its their status as at the declaration of the results for Baringo North Member of the National Assembly elections alongside the ballot boxes and all the contents whereof, for safe custody, storage, scrutiny, verification by the through the supervision of the Honourable Court.

5. Pending the hearing and determination of this Motion petition and subject to such directions, the Honourable Court be pleased to issue an order compelling the 1st and 2nd Respondents, to open the ballot boxes for scrutiny and verification of the votes for all the polling stations in Baringo North Constituency for purposes of establishing the validity of the votes cast in the said Constituency.

6. THAT should the order of mandamus compelling the 1st and 2nd Respondents to supply all elections materials issue, the petitioner/ Applicant be at liberty to further amend the motion and the petition whereof accordingly in reflection of the potential adjustments therein.

7. THAT all seals and their numbers as used on the ballot boxes upon the end of the voting exercise and the declaration of the Results for Member of Parliament Baringo North constituency be supplied to the petitioner pending the hearing and determination of the instant motion petition.

8. Pending the hearing and the determination of the petition and subject to directions as the court may grant an order for the opening of the ballot boxes and scrutiny of the votes for all the polling stations do issue for the purposes of establishing the validity of the votes cast in the said constituency.

9. Upon the making of the Order in Prayer 5 and 6 above, an order do issue for the recount of the votes and all ballots cast.

10. An order do issue to the 1st and 2nd Respondents and their agents to keep all electoral materials under lock and key within the Honourable Courts jurisdiction to secure all electoral material pending the hearing of the motion herein.

11. Upon the hearing of this motion and petition with sufficient cause being made, the Certificate of election of the 3rd Respondent HON. WILLIAM CHEPTUMO as the Member of Parliament, Baringo North Constituency be ordered canceled.

12. That upon the hearing of the instant motion and sufficient cause being made, the gazette notice and the consequent swearing of the 3rd Respondent be deemed null and void.

13. The costs of this application be awarded to the Petitioner.”

2. The respondents have objected to the application and filed respective replying affidavits and grounds of opposition. For the 1st and 2nd Respondent were filed a replying affidavit by Joseph Leboo Masindet, the Returning Officer of Baringo North Constituency sworn on 29th September 2017 and another sworn on 11th October 2017 by Festus Kosgei the Returning officer of Polling station no. 016 Muchukwo Primary School.

3. The 3rd respondent filed two sets of grounds of objection respectively dated 28th September 2017 and 16th October 2017.

4. At the hearing of the application, the Counsel for the Petitioner, however, only urged specific prayers. In his submissions, Counsel for the Petitioner said he sought specifically Prayers [2] (b), (i), (m), [apparently in error, counsel referred to prayer 1 but prayer 1 is on certification of urgency only] respectively for supply of Form 33, Form 41 and polling station diaries. As regards the rest of the documents in prayers 3-10, the petitioner sought their preservation and security.

Submissions by the parties

5. The petitioner contended that the case in his petition challenged the legality of all Forms 35As used in all the polling stations across the Baringo North Constituency. Counsel pointed to irregularities on some of the Forms 35As attached to the 1st Respondent's replying affidavits and sought to lay a basis of the scrutiny of the votes. Counsel for the petitioner then sought supply of Form 33 which he described as the primary document on which the votes garnered by the candidates were recorded before transcription onto Forms 35As. Pointing to the small margin of 39 votes between the petitioner and 3rd respondent who was declared winner and some polling stations which recorded high number of rejected ballots, counsel called for Form 41 which records a statement on rejected ballots, and sought to file further affidavits upon supply of the said documents. Counsel asserted that the petitioner sought scrutiny in respect of all the 162 polling stations of the Constituency and that differences on the results shown on the IEBC Portal and in Form 35B could only be explained upon scrutiny.

6. The 1st and 2nd respondents, it was conceded that there had been some error in transposition of results such as at Muchukwo polling station but that these had been rectified and had not affected the results of the election. It was contended that some of the materials sought by the Petitioner were strategic election materials which were contained in the ballot boxes and which in accordance with the law shall be delivered to the Court before the hearing commences. On the prayer for scrutiny, it was contended that the petitioner had not laid as he was required to do a basis for this request and specify the polling stations for which scrutiny was sought, and that the application for scrutiny constitutes an amendment of the petitioner's pleading and expansion of the scope of the Petition, which was not permitted at this stage of the petition. Discrepancy in the results as declared in Form 35B and the IEBC Portal were conceded and explained as error of transposition with regard to Kabartonjo Primary school, which did not affect the result. It was asserted that all the forms used in the election originated from the IEBC and had security features.

7. The 3rd respondent urged that the petitioner was premature as it was filed before the could settled the pre-trial issues under Rules 15 and 16 of the Election (Parliamentary and County Elections) Petition Rules, 2017 (the Election Petition Rules) and the petitioner could not by application seek the outcome of a pre-trial conference. That the application sought omnibus prayers and the prayer for scrutiny was premature as the court was yet to test the evidence before it. That prayer 2 of the amended motion was premature as the documents could only be availed upon scrutiny being granted and that the prayer for scrutiny in the entire constituency amounts to a fishing expedition and it goes beyond the polling stations complained of in the Petition. It was contended that the prayer for leave to file supplementary affidavits and to amend the Petition would prejudice the 3rd respondent in his defence.

8. The issue for determination are primarily:

1. Whether the Court may give pre-trial directions for the hearing of an election petition on formal motion by a party
2. Whether the Court may order scrutiny and recount of votes at the interlocutory stage.
3. Whether the Court would order the supply of various documents requested for by the Petitioner
4. Whether the court would grant leave to the petitioner to file further affidavits.

9. The Court has considered the pleadings and affidavits filed in the matter and the respective submissions of counsel for the parties.

Determination

Preliminary

Pre-trial directions for the hearing of an election petition on formal motion by a party

10. At the outset, the court considers that objections by the respondents that the petitioner seeks to achieve the outcomes of the pre-trial conference by the application the subject of the ruling is without merit. While the Court may make directions at a pre-trial conference without formal application as the case here, there is no prohibition in the rules against the filing of an application seeking the very orders that may be granted at the Pre-trial conference. Indeed, one of the matters that the election court may, under Rule 15(1) (c) of the Election Petition Rules, deal with at pre-trial conference is “(c) *determine interlocutory applications*”.

11. Rule 15 of the Election Petition Rules provides for pre-trial directions as follows:

“15. (1) Within seven days after the receipt of the last response to a petition, an election court shall schedule a pre-trial conference with the parties in which the election court shall-

(a) frame the contested and uncontested issues in the petition;

(b) analyse methods for resolving the contested issues;

(c) determine interlocutory applications;

(d) confirm the number of witnesses the parties intend to call;

(e) give an order, where necessary, for furnishing further particulars;

(f) give directions for the disposal of the suit or any outstanding issues;

(g) give directions as to the place and time of hearing the petition;

(h) give directions as to the filing and serving of any further affidavits or the giving of additional evidence;

(i) give directions on limiting the volume of any copies of documents that may be required to be filed; or

(j) make such orders as may be necessary to prevent unnecessary costs”

12. In KBT Election Petition No. 1 of 2017, the court deferred the full consideration of interlocutory application for scrutiny and recount until after directions for the preservation of the ballot papers, which are specifically regulated by Rule 16 of Election Petition Rules, among other pre-trial directions were

made. An application for amendment of the petition in KBT Petition No. 1 of 2017, supply of documents and other electoral data, and leave to file additional affidavits is pending consideration on 31st October 2017 as part of the pre-trial directions.

13. In the view of this court, the Electoral Court may exercise discretion under Rule 15 of the Election Petition Rules for pre-trial directions before commencement of the hearing of the petitions, with or without formal application being made by the parties.

14. Furthermore, section 80 (1) (d) of the Act requires minimum formality in election court's procedure as follows:

“80. Powers of election court

(1) An election court may, in the exercise of its jurisdiction—

(a) summon and swear in witnesses in the same manner or, as nearly as circumstances admit, as in a trial by a court in the exercise of its civil jurisdiction and impose the same penalties for the giving of false evidence;

(b) compel the attendance of any person as a witness who appears to the court to have been concerned in the election or in the circumstances of the vacancy or alleged vacancy;

(c) examine a witness who is compelled to attend or any other person who has not been called as a witness in court, and examined by a party to the petition and after examination the witness may be cross examined by or on behalf of the petitioner and respondent or either of them; and

(d) decide all matters that come before it without undue regard to technicalities.

(2) A person who refuses to obey an order to attend court commits the offence of contempt of court.

(3) Interlocutory matters in connection with a petition challenging results of presidential, parliamentary or county elections shall be heard and determined by the election court.

(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.

(5) The Commission shall, in writing, notify the relevant Speaker of the decision made under subsection (4).”

Storage of electoral materials

15. The Elections Act contains statutory requirements for safe-keeping of election materials as follows:

“Safe keeping of election materials

86. *(1) After the final tallying and, announcement of results, the returning officer shall keep in safe custody the following documents—*

(a) copies of all election result declaration forms;

(b) copies of the register of voters sealed and labelled; and

(c) the Electronic Voter Identification Device

(2) The returning officer shall—

(a) put the polling station diaries in a separate ballot box, seal and label the box; and

(b) keep the sealed ballot boxes and all materials relating to the election in safe custody for such period as may be required under these Regulations and the Act.”

16. Regulation 93 of the Elections (General) Regulations also requires that the election materials be kept for 3 years after the declaration of the results of the election, as follows:

“93. Retention and Inspection of documents

(1) **All documents relating to an election shall be retained in safe custody by the returning officer for a period of three years after the results of the elections have been declared and shall then, unless the Commission or the court otherwise directs, be disposed of in accordance with procedures prescribed by the Commission subject to the Public Archives and Documentation Service Act, (cap. 19).**

(2) **Any person may apply to the High Court with notice to all candidates in the election concerned for authority to inspect documents retained under these Regulations, other than ballot papers and their counterfoils.**

(3) *For the purpose of an inspection under subregulation (2), the returning officer shall unseal the documents concerned in the presence of the candidates or agents and the returning officer and candidates or their agents shall keep the documents under their scrutiny until they are resealed by the returning officer after the inspection is completed.*

(4) *The provisions of this Regulation shall not apply to documents that concern pending election petition **unless there is a court order granting such authority.**”*

17. In similar terms the Electoral Commission is required to retain electronic data for three years as provided in Regulation 17 of the Elections (Technology) Regulations 2017:

“17. Data retention and archive

All electronic data relating to an election shall be retained in safe custody by the Commission for a period of three years after the result of the elections have been declared, and shall, unless the Commission or the court otherwise directs, be archived in accordance with procedures prescribed by the Commission subject to Public Archives and Documentation Act (cap.19) and the Kenya Information and Communications Act 1998 (NO. 2 of 1998).”

18. Under Regulation 16, the Electoral Court is required to give directions at pre-trial conference for storage and the production in court of the election materials as follows:

“16. Storage of ballot boxes and other materials

(1) *On conclusion of the pre-trial conference under rule 15, the election court may give directions on -*

(a) *the storage of election materials including ballot boxes and documents relating to petitions;*

(b) *the handling and safety of election materials: or*

(c) the time for furnishing the election materials to the election court.

2. In giving directions under sub-rule (1), the election court shall –

(a) consider the prudent, efficient and economic use of storage and transport facilities;

(b) consider the maintenance of the integrity of the election materials; and

(c) ensure that the election materials are not interfered with.

(3) An election court may direct that the Commission maintains the custody of all election materials in relation to a petition.

(4) Only the material relating to a particular petition may be furnished to an election court.

(5) The election court may order that additional seals be placed on the ballot boxes related to the election for which a petition has been lodged.”

18. The Court will therefore make directions pursuant to pre-trial conference procedure under Rule 15 of the Election Petition Rules for the storage of election materials in accordance with the statutory mandate of the IEBC under the Elections Act and the Regulations made thereunder.

Supply of Documents

20. I agree with the 1st and 2nd respondents that the IEBC is required to supply the election materials to court before the hearing commences. In addition, Regulation 93 of the Election (General) Regulations 2012 grants a right to any person to apply for information stored by the IEBC on any election. The petitioner, as candidate in the election the subject of this petition, has a greater interest in the inspection of the election materials for purposes of ascertaining the verifiability of the election result.

21. The Original Forms 33 and 35A are documents containing the data on the results of the election within the meaning of Rule 29 (4) (c) of the Election Petition Rules and are, therefore, the proper subject of a scrutiny application rather than supply of information under Regulation 93 of the Election Regulations. An order for their supply should be made in my view in the course of an order for scrutiny after sufficient basis has been demonstrated. This would guard the proceedings against the prospects of speculative fishing expedition on the part of the petitioner.

22. However, the 1st respondents may properly be directed to supply certified copies of Forms 33 and 35As. The respondent has already filed copies of Forms 35As, and directions may only be given as to Forms 33s. Where the Forms 35As are not clear better copies may be provided.

Rejected ballot papers

23. There is, in my view, no occasion for ***an order*** by the Court for the supply of Form 41 statement on rejected ballot papers because this is a statutory entitlement to all candidates, agents and indeed election observers under Regulation 78 of the Election General Regulations as follows:

“78. Rejected ballot papers

2. Every rejected ballot paper shall be marked with the word “rejected” by the presiding officer, and, if an objection is made by a candidate or an agent to the rejection, the presiding officer shall add the words “rejection objected to” and shall be treated as rejected for the purpose of the declaration of election results at the polling station.

(2) The presiding officer shall mark every ballot paper counted but whose validity has been disputed or questioned by a candidate or an agent with the word “disputed” but such ballot paper shall be treated as valid for the purpose of the declaration of election results at the polling station.

(2A) *The presiding officer shall make a decision on the validity of the disputed ballot paper under sub regulation (2) and award it to a candidate and such decision shall be final.*

(3) *After the counting of votes is concluded, **the presiding officer shall draw up a statement in Form 41 set out in the Schedule showing the number of rejected ballot papers under such of the following heads of rejection as may be applicable—***

(a) want of security feature;

(b) voting for more than one candidate;

(c) writing or mark by which the voter might be identified; or

*(d) unmarked or void for uncertainty, **and any candidate, counting agent or observer shall, if he or she so desires, be allowed to copy that statement.***

24. In accordance with Regulation 81 (1) (b) of the Elections (General) Regulations, rejected ballots in a sealed envelope are stored along with the valid votes and unused ballot papers along with other election materials in the respective Ballot Boxes. To examine these would require opening of the ballot boxes. That is a matter that shall be considered at the hearing on the application for scrutiny.

25. The Petitioner as a candidate is, however, by Regulation 78 (3) (d) entitled to a copy of Form 41s and polling station diaries. The Original will, in accordance with the law, be supplied to the Court at the hearing of the Petition.

26. For purposes of the verification requirements of the election system prescribed under Article 38 of the Constitution, the Court may order for 1st and 2nd respondents to file an affidavit to produce Forms 33 in accordance with Rule 12 (9) of the Election Petition Rules, which provides as follows:

*“(9) **The election court may, on its own motion or on the application by any party to the petition, direct a party or witness to file a supplementary affidavit.**”*

27. The Court will, therefore, direct that the 1st Respondent do supply certified copies of Forms 33 and 41 for the polling stations in Baringo North Constituency by filing a supplementary affidavit for that purpose in accordance with Rule 12(9) of the Election petition Rules.

Amendment of the Petition

28. As I ruled in KBT Pet. 1 of 2017, ***Musa Sirma v. IEBC and 2 Ors.***, the period for the amendment having closed after the 28 days of the declaration of the results by publication in the Gazette, it is not open for the petitioner to amend the Petition for purposes of section 76(4) of the Act, that –

*“(4) **A petition filed in time may, for the purpose of questioning a return or an election upon an allegation of an election offence, be amended with the leave of the election court within the time within which the petition questioning the return or the election upon that ground may be presented.**”*

29. Consequently, the prayer for amendment of the Petition does not arise if it is for purposes of “*the purpose of questioning a return or an election upon an allegation of an election offence”.*

Leave to file additional evidence

30. As this Court has ruled in KBT Petition No. 1 of 2017 an amendment to the Petition cannot be allowed outside the period prescribed under section 76(4) of the Elections Act. For this reason affidavit which seek to introduce new matters expanding the petition or introducing a new cause of action in contravention of section 76 (4) of the Act may not be allowed. However, the Court is not able to

determine whether affidavit to be filed *will* be in contravention of the section. In the interests of expedited disposal of the matter, an applicant seeking to file supplementary affidavit attach a draft of the affidavit or disclose the specific issues to be contained in the affidavit.

31. While that may be desirable, it is not right that a party may be restrained ahead of the filing to file further affidavits in accordance with Rule 15 (1) (h) of the Election Petition Rules. It is only that such an applicant runs a risk of having his affidavit, or paragraphs thereof, struck out pursuant to an objection under Rule 6 of Order 19 of the Civil Procedure Rules which are incorporated by reference into the election petitions regime by Rule 12 (14) of the Election Petition Rules, 2017.

32. In these circumstance, the correct order to make in the matter is to grant leave to the Petitioner to file such affidavits as he deems appropriate to further support his case set out in the Petition, with needless to say liberty to the respondents to seek the striking out of the affidavits or their contents should they attempt to amend the Petition in contravention of section 76(4) of the Elections Act. In the interests of expedition the time for the filing and responses to the further affidavit shall be done within seven days from the date of this order.

Supplementary Affidavits

33. Objection was taken to paragraphs 5, 8, 9, 10, 12, and 14 of the supplementary affidavit of the petitioner filed on with leave of court. I respectfully agree with Dulu, J. in **Benjamin Ongunyo Andama v. Benjamkin Andola Andayi & 2 Ors.** [2013] eKLR that where affidavits are filed that broadly comply with the law-

“As to the relevance of what [the affidavits] contain, that is for the Court to determine at the appropriate time in the process of hearing of the petition. It is no ground for the striking out of the said affidavits filed with the petition merely because a party thinks that the affidavits contain more than they should contain.”

34. Of, course, if the affidavits introduce a new cause of action in contravention of the provisions of section 76 (4) of the Elections Act, the same will be invalid as the time for amendment of the Petition expired 28 days after the publication of the results in the Gazette. See **M’nkiria Petkay Shen Miriti v Rangwa Samuel Mbae & 2 Ors.** [2013] eKLR.

35. I respectfully agree, as urged by the 3rd Respondent, with the Courts in **Miriti v. Ragwa**, supra and **Andama v. Andayi**, supra, that further affidavits are meant to clarify the case in the petition and cannot be used to introduce new evidence which is inconsistent with the Petition. The question is whether in this case the evidence sought to be adduced has the effect of introducing a new case which is not pleaded in the Petition. The Petitioner states that he has challenged the results from all the 162 polling stations, and that, therefore, the evidence he seeks to present is relevant to the cause of action in the petition. As to relevance of the affidavits as in **Andama** case, that is matter for determination at the hearing of the Petition.

36. In this case, the case of the petitioner is already set in the Petition time for amendment being already lapsed, the affidavits that the petitioner may can only substantiate the said cause of action or amplify on the evidence but not create a new claim. However, the true nature of the evidence can only be assessed once the affidavits have been filed and this court will not go as far as requiring that a draft affidavit or the specific nature of the content of the proposed Affidavit be disclosed or a witness statement filed before the leave of court is granted to file additional affidavits. Witness statements are used in regular civil cases to achieve the same purpose of informing the other party of the nature of evidence to be presented at the hearing. A party in an election court should not be required to give a witness statement or draft affidavit before his application for leave to file further affidavit is considered and granted.

37. What the Court must strive to observe is the twin principles of election dispute adjudication of Article 50 fair hearing right for the respondents and the public interest Article 87(1) principle of expeditious disposal of electoral cases. I think that an order allowing further affidavits by the Petitioner to be filed

within seven (7) days and responses by the respondents to be filed with seven (7) of service shall meet the requirements of justice.

Scrutiny of votes

Application for Scrutiny at interlocutory stage?

38. Section 82 provides for scrutiny of votes as follows:

“82. Scrutiny of votes

*(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; 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.”

39. The Supreme Court of Kenya has issued guidelines on scrutiny and recount in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others** [2014] eKLR as follows:

“[152] We have considered the wording of Section 82 (1) of the Elections Act and Rule 33 of the Petition Rules. Taking into account the intention of Parliament (which in this instance is “to provide legislative mechanisms for the timely resolution of electoral disputes”), and the judicial thought-process as expressed by the election Courts, we are of the view that:

i. There is no fundamental inconsistency between Rule 33 (1) of the Petition Rules and Section 82 (1) of the Elections Act. It is our position that an order for a recount or scrutiny of the vote may be made at any stage after filing of an election petition or during the hearing of an election petition and before the determination of the said petition.

*ii. There is no inconsistency between Rule 33(2) of the Petition Rules and Section 82 (1) of the Elections Act, as regards the exercise of discretion as to whether to order for scrutiny and recount or not. Contrary to dicta in some of the High Court decisions, the discretion vested in an election court by Section 82(1) of the Act, is not unfettered. **Such discretion must be exercised reasonably, so as not to defeat the objectives of Article 87 (1) of the Constitution and the Elections Act.***

[153] From the foregoing review of the emerging jurisprudence in our Courts, on the right to scrutiny and recount of 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.

[154] We are guided by the foregoing principles, and by the relevant case law which we have reviewed, as we determine the question whether the learned Judges of Appeal erred, in faulting the learned trial Judge's decision to confine the scrutiny and recount to only seven polling stations, rather than extend it to all polling stations in the four constituencies of Meru County."

40. Accordingly, the Election Court's discretion to order scrutiny is not unfettered: it is exercised for sufficient reason in accordance with section 82 (2) of the Elections Act, 2011 and in conformity with the overall requirement of Article 87(1) of the Constitution whose primary purpose is the "timely settling of electoral disputes." In terms of the Statute and case-law guiding principles laid down by the Supreme Court in **Gatirau Peter Munya**, supra, an applicant for scrutiny is required to lay out sufficient basis for the order. In addition, as the Supreme Court in held-

"[A]n order for a recount or scrutiny of the vote may be made at any stage after filing of an election petition or during the hearing of an election petition and before the determination of the said petition."

It is therefore clear that an application for scrutiny under section 82 may be made any time **during the hearing of an election petition**, and in accordance with Rule 29 of the Election Petition Rules the object of scrutiny is given as follows:

"29. (1) The parties to the proceedings may apply for scrutiny of the votes for purposes of establishing the validity of the votes cast."

41. Rule 29 (4) of Election (Parliamentary and County Elections) Petition Rules, 2017 is in *pari materia* with Rule 33 (2) of the 2013 edition of the Rules, providing as follows:

"(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..."

42. In the Presidential Petition No. 1 of 2017, **Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others**, the Supreme Court held as follows:

[375] In the impugned presidential election, one of the most glaring irregularities that came to the fore was the deployment by the 1st respondent, of prescribed forms that either lacked or had different security features. The 1st respondent had submitted by way of affidavit and in open court that out of abundant caution, it had embedded into the prescribed Forms, such impenetrable security features that it was nigh impossible for anyone to tamper with them. The Court was also reminded that this was done, despite it being not a requirement by the law.

[376] However, the scrutiny ordered and conducted by the Court, brought to the fore, momentous disclosures. What is this Court for example, to make of the fact that of the 290 Forms 34B that were used to declare the final results, 56 of them had no security features? Where had the security features, touted by the 1st respondent, disappeared to? Could these critical documents be still considered genuine? If not, then could they have been forgeries introduced into the vote tabulation process? If so, with what impact to the “numbers”? If they were forgeries, who introduced them into the system? If they were genuine, why were they different from the others? We were disturbed by the fact that after an investment of tax payers money running into billions of shillings for the printing of election materials, the Court would be left to ask itself basic fundamental questions regarding the security of voter tabulation forms.

[377] Form 34C, which was the instrument in which the final result was recorded and declared to the public, was itself not free from doubts of authenticity. This Form, as crucial as it was, bore neither a watermark, nor serial number. It was instead certified as being a true copy of the original. Of the 4,229 Forms 34A that were scrutinized, many were not stamped, yet others, were unsigned by the presiding officers, and still many more were photocopies. 5 of the Forms 34B were not signed by the returning officers. Why would a returning officer, or for that matter a presiding officer, fail or neglect to append his signature to a document whose contents, he/she has generated? Isn't the appending of a signature to a form bearing the tabulated results, the last solemn act of assurance to the voter by such officer, that he stands by the “numbers” on that form?

[378] Where do all these inexplicable irregularities, that go to the very heart of electoral integrity, leave this election? It is true that where the quantitative difference in numbers is negligible, the Court, as we were urged, should not disturb an election. But what if the numbers are themselves a product, not of the expression of the free and sovereign will of the people, but of the many unanswered questions with which we are faced? In such a critical process as the election of the President, isn't quality just as important as quantity? In the face of all these troubling questions, would this Court, even in the absence of a finding of violations of the Constitution and the law, have confidence to lend legitimacy to this election? Would an election observer, having given a clean bill of health to this election on the basis of what he or she saw on the voting day, stand by his or her verdict when confronted with these imponderables? It is to the Kenyan voter, that man or woman who wakes up at 3 a.m on voting day, carrying with him or her the promise of the Constitution, to brave the vicissitudes of nature in order to cast his/her vote, that we must now leave Judgment.”

43. Although an order for scrutiny may in a proper case be made before commencement of hearing, it would appear to be more appropriate as contemplated by the Elections Act, that it should be made in the course of hearing of the Petition, when the Court has had an opportunity to receive the evidence presented by the parties with cross-examination of the witnesses to assess whether sufficient basis has been demonstrated for an order of scrutiny of the votes. This approach is particularly appropriate in this case where the petitioner's claims on the lack of clarity and errors in Form 35As has been responded to and explained by replying affidavits by the 1st and 2nd respondent and the Court to test the veracity of depositions in the respective affidavits before considering an order for scrutiny. Unlike, the case in **Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others, 2017** it cannot be readily said, at this stage, that the irregularities pointed out by the petitioner are inexplicable. In any event, the Court has, under section 82 of the Elections Act, the discretion to order scrutiny for

sufficient reason on its own motion.

Conclusion

44. The Petitioner is entitled to the supply of election materials of Forms 33 and 41 and the polling station diaries in accordance with Regulations 78 and 93 of the Elections (General) Regulations, 2012. The Original Forms 33s and 35As which are in the ballot boxes will be supplied only upon successful application for scrutiny. The Court will, therefore, direct that the 1st respondent supplies the petitioner with copies of Forms 33 for all the polling stations. However, Forms 35As which have been supplied by way of attachments to the 1st respondent's replying affidavit and are faint and unclear should be supplied in clear copies. This is without opening the ballot boxes which may only be opened upon a successful application for scrutiny.

45. Although the petitioner asserts that his claim in the petition is against all polling stations, he has not given particulars of the claims in each polling station. The Court will accordingly order pursuant to Rule 15 a direction that the petitioner shall give further and better particulars of the claims against the results in the polling stations.

46. Under rules 78 and 93 of the Election (General) Regulations, the court will order the 1st and 2nd Respondents to supply the statement on rejected votes as recorded in Form 41 for the polling stations where there were rejected votes or rejected objected votes and the primary record of the votes of each candidate in Form 33 of the polling stations, as well as the polling station diaries.

47. The Court agrees with counsel for the respondents that affidavits must support the case pleaded in a petition and that they should not be used to amend the petition outside the limit for amendment of petitions. However, until the petitioner has filed the affidavits, the court is not able to say that the affidavit is not in support of the support of the petition or that it seeks to introduce a new cause of action to amend the petition outside the time limit allowed for such amendment.

48. I have perused the petition, and at this stage without deciding, I am not able to say that the evidence of the Form 35As pointed out from the 1st and 2nd respondents replying affidavit are irrelevant to the petitioner's case set in the Petition, or that irregularities pointed out therein are inexplicable by the respondents.

49. The application for scrutiny of votes will be deferred to a later stage when the court shall have heard the evidence presented by the parties by affidavits with cross-examination thereon in accordance with Rule 12 (13) of the Election Petition Rules.

Orders

50. Accordingly, for the reasons set out above, the Election Court makes the following orders on the Amended Notice of Motion dated 4th October 2017 in partial directions for pre-trial purposes that:

1. The custody of all the electoral materials for the Baringo North Constituency will remain with the 1st Respondent IEBC to be stored in accordance with Rule 16 (3) of the Election (Parliamentary and County Elections) Petition Rules, 2017.
2. Pursuant to Rule 16 (5) of the Election (Parliamentary and County Elections) Petition Rules 2017 the Deputy Registrar of the Court shall in the presence of the parties, their counsel agents or suitable representatives, place additional seals to the ballot boxes on a date to be agree between the parties within seven (7) days.
3. Petitioner shall within seven (7) days supply further and better particulars with relation to the Petition, without amending directly or in effect the case of the Petitioner therein, and file further affidavits as necessary to amplify his case in the Petition.

4. The respondents are liberty, if necessary, to file affidavits in response to the Petitioner's additional affidavits filed under Order No. 3 above within seven (7) days of service.

5. The 1st and 2nd Respondent shall supply clear copies, where necessary, of Forms 35As for the polling stations in Baringo North Constituency.

6. The 1st and 2nd Respondent shall within three days (3) file further affidavit(s) supplying to the parties Forms 33 and 41 and polling station diaries for the polling stations in Baringo North Constituency.

7. The application with regard to scrutiny and recount of votes is deferred to an appropriate time after the taking of evidence in the Petition and before determination thereof.

51. Further directions on the pretrial to given on a date to be fixed in consultation with counsel or the parties upon the filing of the affidavits aforesaid.

52. Costs in the Cause.

DATED AND DELIVERED THIS 31ST DAY OF OCTOBER 2017.

EDWARD M. MURIITHI

JUDGE

Appearances: -

Mr. Ogolla instructed by M/S Gordon Ogola, Kipkoech & Co. Advocates for the Petitioner

Mr. Tororei, Advocate for the 1st and 2nd Respondent

Mr. Odhiambo Advocate for 3rd Respondent.