



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

ELECTION PETITION NO. 3 OF 2017

(CORAM: J.A. MAKAU – J.)

IN THE MATTER OF THE ELECTION ACT NO. 24 OF 2011 LAWS OF KENYA

IN THE ELECTIONS (GENERAL) REGULATIONS, 2012

AND

**IN THE MATTER OF ELECTIONS (PARLIAMENTARY AND COUNTY) PETITION RULES,
2017**

AND

**IN THE MATTER OF THE ELECTIONS FOR MEMBER OF NATIONAL ASSEMBLY
KITUTU MASABA CONSTITUENCY, HELD ON 8TH AUGUST 2017**

BETWEEN

JUSTUS MONGUMBU OMITI.....PETITIONER

AND

THE INDEPENDENT ELECTORIAL AND BOUNDARIES

COMMISSION (I.E.B.C.).....1ST RESPONDENT

HON. MOSE SHADRACK JOHN.....2ND RESPONDENT

RULING

1. The Petitioner/Applicant **Justus Mong'umbu Omiti** through a Notice of Motion dated 5th October, 2017 pursuant to Articles 19, 20, 22, 23(3), 35, 81,86, 140, 159 and 258 of the Constitution of Kenya 2010, Regulation 15 of the Elections (Technology) Regulations, 2017 (Legal Notice No. 68), Regulation 15, 16 and 19 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017, Regulations 93 of the Elections (General) Regulations sought several orders namely:-

a) The Honourable Court be pleased to issue an order:

i) direction the 1st Respondent to identify and declare the whereabouts of ballot boxes and all election materials as defined by section 2 of the Elections Act used in the parliamentary

elections for Kitutu Masaba Constituency;

ii) securing the said ballot boxes and all election materials;

iii) the 1st Respondent to give actual or constructive custody of the said ballot boxes and all election materials to the court and the parties herein; and

iv) the parties herein be allowed to put additional seals and/or security to the said ballot boxes and election materials.

(b) The 1st Respondent be compelled to give access to the court and the parties the following information in its exclusive possession for the period between 1st and 15th August 2017.

i) The full list of all IMEI numbers of the KIEMS kits used in the above polling stations.

ii) The GPRS locations of KIEMS kits used in Kitutu Masaba Constituency on 8th August 2017.

iii) The SD Cards used in the KIEMS kits employed in the Kitutu Masaba Constituency which SD cards must be extracted from the KIEMS kits under supervision of the parties.

iv) This Honourable Court be pleased to issue an order directing the 1st Respondents and/or its agents to provide the IP addresses of the KIEMS kits used in the Kitutu Masaba elections.

v) Biometric register of all voters in Kitutu Masaba Constituency.

v) Server logs (read access only) with the right to copy generated in the course of the 2017 elections.

c) That the 1st Respondent be compelled to provide and/or give access to the court and the parties to the following information in its exclusive possession;

i) The full list of all the Polling stations in Kitutu Masaba Constituency.

ii) Certified copies of Form 35A prepared at and obtained from polling stations in Kitutu Masaba Constituency and used to generate the final tally of the result for Member of National Assembly, Kitutu Masaba Constituency.

iii) Certified copies of Form 35B used to tally results from polling stations in Kitutu Masaba Constituency.

d) This Honourable Court be pleased to grant leave to the Applicant and any and all other parties to the petition to file a supplementary affidavit/report from the scrutiny exercise.

c) This Honourable Court be pleased to grant leave to the Petitioner to file the annexed further affidavit of Dr. Noah Akala Aduwo and the same be deemed as properly filed in support of the petition.

2. The Prayers sought are based on the grounds on the face of the application and affidavit of Dr. Noah Akala Oduwo dated 5th October 2017.

3. The 1st Respondent filed a Replying affidavit dated 8th October 2017 opposing the Applicant's application, whereas the 2nd Respondent filed its Replying Affidavit dated 8th October 2017 on 9th

October 2017. All parties in this matter filed their respective list of authorities.

4. At the hearing Mr. Awele, Learned Advocate, appeared for the Petitioner/Applicant, whereas Mr. Paul Lilan, Learned Advocate, appeared for the 1st Respondent and lastly Mr. William Mogaka, Learned Advocate, jointly with Mr. Mobongi and Mr. Omoke, Learned Advocates, represented the 2nd Respondent.

5. Mr. Awele, Learned Advocate, for the Petitioner relied on the bundle of authorities filed on 10th October 2017 and sought prayer Nos. 3, 4, 5, 6 and 7 to be granted. He urged as he sought prayer number 4, that the Petitioner/Applicant is entitled to free and fair election, basing that on **Articles 38, 81 and 86 of the Constitution of Kenya 2010**.

Article 86 (a) to (d) of the Constitution provides:-

“(86.) At every election, the Independent Electoral and Boundaries Commission shall ensure that—

(a) whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent;

(b) the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station;

(c) the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and

(d) appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping materials”

6. Mr. Awele, Learned Advocate, urged the Petitioner has raised a number of issues and questions on the credibility of the election and results thereof, referring specifically to the contents of the Petition which he pointed out, has raised fundamental illegalities and irregularities to the election results, which the Applicant, he stated, believes warrants further investigation and which he urged under the law and the Constitution creates basis for scrutiny under **Section 82 of the Elections Act**.

Section 82 (1) of the Elections Act No. 24 of 2011 provides:-

“(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.”

Mr. Awele, Learned Advocate, urged therefore as per **Elections (General) Regulations, 2012**, under **Regulations 86 and 93**, court can order scrutiny of votes. He urged that they are disputing the results of all the polling stations. That under **Regulations 15 of Elections (Technology) Regulation, 2017**, IEBC is mandated to store Electronic Data and grant access.

Regulation 15 of the Elections (Technology) Regulations, 2017 provides:

“(1) The Commission shall store and classify data in accordance with the principles set out in the Access to Information Act, 2016 (No. 31 of 2016).

(1) An Application to access information shall be in writing in English or Kiswahili and shall be made in the Form set out in the Second Schedule providing details and sufficient particulars for the public officer or any other official to understand what information is being requested.

(2) Where an applicant is unable to make a written request for access to information in accordance with sub-regulation (2), because of illiteracy or disability, the information officer shall take the necessary steps to ensure that the applicant makes a request in the manner that meets their needs.

(3) The information officer shall reduce to writing, the request made under sub-regulation (3) in the Form set out in the Second Schedule and the information officer shall then furnish the applicant with a copy of the written request.”

The Learned Advocate, urged further that **Regulations 16 and 17 of the Elections (Technology) Regulations, 2017**, dealing with request for information from the commission and Data retention and archive of all electronic data relating to the election is relevant in this application.

7. In support of the application for scrutiny he relied on **H.E. Raila Amolo Odinga and another V. IEBC and 2 others Supreme Court Presidential Election No. 1 of 2017**, urging that for orders of scrutiny to be granted to the Petitioner/Applicant, he has to establish he has set out in the petition the grounds for scrutiny. He referred to paragraph 10 and 11 of the petition urging it sets out the logs which the petitioner obtained and results transmitted from polling station to the Tallying Centre urging the results were not verifiable. He urged the IEBC should be ordered to provide the information as per **Article 35 of the Constitution of Kenya 2010**.

Article 35 (1) (2) and (3) of the Constitution of Kenya 2010 provides:-

“35. (1) Every citizen has the right of access to—

(a) information held by the State; and

(b) information held by another person and required for the exercise or protection of any right or fundamental freedom.

(2) Every person has the right to the correction or deletion of Untrue or misleading information that affects the person.

(3) The State shall publish and publicise any important information affecting the nation.”

The Petitioner/Applicant’s Counsel, urged if orders for scrutiny are made no party shall be prejudiced in this petition as the scrutiny sought is limited. He further contended that IEBC has that information as per their Replying Affidavit and are able to supply the same.

8. Mr. Paul Lilan, Learned Advocate, for the 1st Respondent in opposing the application relied on the Replying Affidavit dated 8.10.2017. He urged the Petitioner was not a candidate for the Parliamentary Election but filed the petition in his capacity as a voter urging the Petitioner does not say someone else won the election other than the 2nd Respondent and was unlawfully denied the win, urging had he said so, IEBC would have presented evidence to prove that the 2nd Respondent won the election. He urged the Petitioner is asking the court to run through the technical processes hinged on technology deployed in the election. He submitted it has not been demonstrated that what was announced in any of the polling station (**187**) was different from what was captured in Form 35B used to declare the results in the Tallying Centre.

9. On the basis of interrogation of the process of Election transmission Mr. Lilan, Learned Advocate, urged the petition has not shown that the interrogation of the transmission process would change the outcome of the election. That the deponent of the affidavit. Dr. Noah Akala Oduwo, he urged is not a voter in the Constituency and has no connection to actual polling day activities himself, urging court to take his academic presentation with a pinch of salt, urging that his affidavit is an attempt to transmit what transpired at Supreme Court to be basis of assessment of Parliamentary Election, pointing out that Presidential Petition presented to Supreme Court was not Parliamentary election petition.

Under **Section 39(1) (c) of the Election Act No. 24 of 2011**, he urged, it talks of transmission of Presidential Election results electronically yet there is no equivalent provision for other elections. He urged if that was the wish of the parliament nothing would have been hard to stop it from stating so. The said Section provides:-

“(1) The Commission shall determine, declare and publish the results of an election immediately after close of polling (1c) For purposes of a presidential election the Commission shall:-

(a) Electronically transmit, in the prescribed form, the tabulated results of an election for the President from a polling station to the constituency tallying centre and to the national tallying centre.

(b) Tally and verify the results received at the national tallying centre; and

(c) Publish the polling results form on an online public portal maintained by the Commission.”

10. On prayer for scrutiny he urged the law is found under **Section 82 of the Election Act No. 24 of 2011 and Rule 33 of the Elections (Parliamentary and County Elections), Petitions Rules, 2017. Section 82 (1) of the Elections Act No. 24 of 2011** provides:

“(82) (1) An election court may on its own motion or on application by any party to the petition, during the hearing of an election petition, order for a scrutiny of votes to be carried out in such manner as the election”

11. Mr. Lilan, Learned Advocate, urged the provisions of **Section 82 of the Elections Act No. 24 of 2011** and now **Rule 29 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017** has to be satisfied before scrutiny is ordered and the court in doing so must be satisfied there is sufficient basis laid down, based on specific polling stations, where the results are disputed. That the request for scrutiny should not be used as a fishing expedition nor should it be used as an opportunity for a party to seek all manner of information that a party may fancy. Mr. Lilan, Learned Advocate, referred to the case of **Nicholas Kiptoo Arap Korir Salat V IEBC & 7 others (2015) eKLR**, where Supreme Court stated:

“45.In that case, the Court thus remarked (paragraph 159):

On the contrary, judicial opinion distinctly favours a view that commends itself to us: that, an application for scrutiny and recount, must be couched in specific terms, and clothed with particularity, as to which polling stations within a constituency are to attract such scrutiny. If a party lays a clear basis for scrutiny in each and all the polling stations within a constituency, then the order ought to be granted. Otherwise, as prayer pointing to a constituency but lacking in specificity is not to be entertained” [emphasis supplied].”

“57. The determination of sufficiency is a task reserved to the discretion of the election Court. Muchelule J. in a Ruling delivered on 10th July, 2013, remarked that the purpose of scrutiny was not to identify votes cast by persons who were eligible or ineligible to vote, but to identify votes that were void, on account of being not properly marked, unmarked, or bearing a wrong serial number. Such an impression was drawn from a reading of Section 82(2) of the Elections Act, 2011, which indicates the votes to be excluded when scrutiny is done. The learned Judge, quite aptly, thus held:

“Pursuant to Rule 33(4) the Petitioner should specify the polling stations in respect of which he seeks scrutiny, and the materials and documents that he wishes the Court to scrutinize. Reasons have to be given why the stations should be subject to scrutiny. Similarly, reasons should be given why the materials and documents in question should be scrutinized.”

12. Mr. William Mogaka, Learned Advocate, for the 2nd Respondent relied in opposition of the application on the Replying affidavit dated 8.10.2017. He urged by an order of 3.10.2017 the

Petitioner/Applicant was to file and serve the application within 2 days from 3.10.2017, which the Applicant failed to comply with, as the application was served out of time and no reason was given for the failure to comply with, the court's order, hence the application being in violation of the Court's order, he urged the same is invalid and is for striking out. He urged further the application is not made by the petitioner but by a stranger as it is made by Dr. Noah Akala Oduwo, who is different from the Petitioner. That the deponent of the affidavit he urged, is Dr. Noah Akala Oduwo, who he submitted has not been authorized by the Petitioner to swear the affidavit as he has not stated he had been authorized to do so, on behalf of the Petitioner. He urged at paragraph 20, Dr. Noah Akala Oduwo, stated:-

“I swear this Affidavit in support of the Election Petition prescribed herein and humbly urge the Honourable Court to grant the prayers sought.”

13. It was therefore submitted on behalf of the 2nd Respondent, the affidavit is in support of the petition and not the application and that being an affidavit in support of the petition, it is filed outside the parameter of the **Constitutional** timelines and the **Election Act**, which stipulates affidavits be filed within 28 days, from the time of declaration of the Election Results. Mr. Mogaka, further urged a witness cannot seek to introduce addition evidence to the petition, in which he is not a Petitioner and urged that can only be done by the Petitioner who should apply, which is not the case in this Petition. He urged the affidavit is seeking to expand the petition outside what is pleaded by introducing issues related to ungazetted polling stations, contrary to the pleadings. It is further urged through the affidavit in support of the application, the Application is trying to introduce new evidence and change the nature of the Petition, that if the court allows the further affidavit the Respondents' case will be prejudiced, as this would amount to ratification of an illegality and taking away the defence filed and served. It is further urged the original affidavit of Dr. Noah Akala Oduwo, had only one annexure yet he deponed he was always involved in the presidential petition on behalf of ODM candidate, yet he stated, he had come across some materials which affected the Election in Kitutu Masaba on 6.9.2017, then if that is so, the Counsel for the 2nd Respondent questioned why the same were not produced within the timelines, urging no reason or excuse was offered.

14. On scrutiny Mr. Mogaka urged the parameters for granting scrutiny are well set out in the **Election Act No. 24 of 2011** and the **Election Rules**. He relied on the case of **Nicholas Kiptoo Arap Korir Salat V IEBC & 7 Others [2014] eKLR**. He urged the Presidential Petition is peculiar on its own circumstances, in that it is determined on affidavits only, without the markers of the affidavits being examined or cross-examined. He further urged the decision of the Supreme Court has no effect on all Election petitions referring to the case of **Martha Wangari Karua & Another V. IEBC & 3 Others [2017] eKLR** where Hon. Lady Justice L.W. Gitari held:

“It should be appreciated that there were six indivisible elections held on 8th August, 2017 as already stated earlier. What the petitioner is saying is that the result in Election Petition No. 1 of 2017 Raila Amolo Odinga and Another -V- Independent Electoral and Boundaries Commission and 2 others must determine all other petitions as Courts below are bound by the decision. This is already a wrong interpretation or understanding of the provision. A similar determination was made in the Presidential Election in 2013. It did not follow that all the petitions were dismissed. The same is the case in this Petition No. 1 of 2017. All the petitions should not be dismissed. In applying the decision of the Supreme Court in Petition No. 1 of 2017 the Petitioner must lay a factual foundation. Once that is established then the Court has to apply the principle of ‘stare decisis’ under Article 163 (7) of the Constitution.”

15. On preservation of the election materials Mr. Mogaka, Learned Advocate, submitted the law is very clear that **IEBC** must preserve the Election materials for 3 years. He urged there was no letter to show the materials were applied for and the Petitioner denied the same.

16. In response to the submissions by the Respondents, Mr. Awele, Learned Advocate, submitted that the law is now settled, that litigation in election matters is in public interest. He urged the person making the application is not the Petitioner and that the Petitioner was not a candidate. He urged once an election petition is filed the **IEBC** is supposed to bring forth the evidence to prove or disapprove the petition. He

urged the **IEBC** has failed to produce any materials urging the results declared were different from Form **35B** and **35C**. He urged **Section 83** of the **Election Act No. 24 of 2011** is clear and it must be read disjunctively urging they have demonstrated there were irregularities. On Affidavit by Dr. Noah Akala Aduwo, he urged the same could not be challenged from the bar. On scrutiny he relied on **Section 82 of the Election Act No. 24 of 2011**, averring that the areas in question has been pointed out, and submitted Election Results must be verifiable. The Counsel referred to **Raila Amolo Odinga and Another V. IEBC & 2 Others Supreme Court the P. E. No. 1 of 2017** at paragraph 288 where the Supreme Court in the majority decision held:-

“The verification process at all these levels is elaborately provided for in the Elections Act and the Regulations thereunder. The simultaneous electronic transmission of the results from the polling station to be Constituency and National Tallying Centre, is not only intended to facilitate this verification process, but also acts as an insurance against, potential electoral fraud by eliminating human intervention/intermeddling in the results tallying chain. This, the system does, by ensuring that there is no variance between, the declared results and the transmitted ones.”

The Learned Advocate, urged the Petitioner has established variance between the transmitted Results and the declared results and as such has established basis for scrutiny.

17. Responding to submissions by Mr. Mogaka, Learned Advocate, Mr. Awele, Learned Advocate, submitted that the application was filed by the advocates on record and the deponing of the supportive affidavit by Dr. Noah Akala Oduwo, does not mean he is the Applicant, adding that **Regulation 12(3) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017** allows appendixing other affidavits. He urged that Dr. Noah Akala Oduwo, is not a stranger. He also urged the point raised is merely technical and barred by **Article 159 (2) (d) of the Constitution of Kenya 2010**, which provides:-

“159. (1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(d) justice shall be administered without undue regard to procedural technicalities; and”

Responding on filing and service of the application he urged that they complied with the court’s order. On **Forms 37A**, he urged the petitioner’s affidavit is similar to that of Dr. Noah Akala Oduwo, thus it talks of Form 35A, urging they shall be making necessary application for amendment.

18. The Applicant under prayer No. 3 of the Notice of Motion, is seeking orders for preservation of the election materials and to be allowed to put additional seals and/or security to the ballot boxes and election materials. Under prayer No. 4 the applicant is seeking the 1st Respondent to be compelled to give access to the court and the party, the information in its exclusive possession for the period between 1st and 15th August 2017, in respect of items listed under 4 (a) – (g) and further under Prayer No. 5, the Petitioner seeks access to the information in exclusive possession of the IEBC as listed under 5 (a) – (c) of the Prayer.

19. Under **Regulation 93 of the Elections (General) Regulations 2012**, relating to Retention and inspection of documents, it is provided as follows:

“(93) (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.”

20. Under **Rule 16 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017**, on storage of ballot boxes and other materials it is provided as follows:-

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

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

(b) the handling and safety of the election materials; or

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

21. The Applicant/Petitioner did not urge prayers numbers 3, 4 and 5 at the time of the hearing of the application, however as the law clearly spells out where the election materials should be retained in safe custody by the Returning Officer for a period of three years after the results of the election have been declared, and as during the pre-trial conference the Court was not moved to give directions on the storage of the election materials including ballot boxes and documents relating to the petition, the handling and the safety of the election materials, I direct the ballot boxes and other election materials continue to be retained in safe custody by the Returning Officer for the period provided by law in the **IEBC** storage warehouse. I further order that the parties in this petition be at liberty to put additional seals and/or security to the said ballot boxes under the direction/supervision of the Deputy Registrar of this Court.

22. On access to information in exclusive possession of the **IEBC** between 1st and 15th August 2017 in regard to the Parliamentary Election of Kitutu Masaba constituency, the petitioner seeks access of information of the items listed under prayer No. 4 (a) – (g) and prayer 5 (a) – (c).

23. **Article 35 (1) (a) (b) of the Constitution of Kenya 2010** provides:-

“35. (1) Every citizen has the right of access to—

(a) information held by the State; and

(b) information held by another person and required for the exercise or protection of any right or fundamental freedom.”

24. **Section 4 (1) (2) and (3) of Access to information Act No. 31 of 2016** provides:-

“(1) Subject to this Act and any other written law, every citizen has the right of access to information held by:-

(a) The State; and

(b) Another person and where that information is required for the exercise or protection of any right or fundamental freedom.

(2) Subject to this Act, every citizen’s right to access Information is not affected by:-

(a) Any reason the person gives for seeking access; or

(b) The public entity’s belief as to what are the person’s reasons for seeking access.

(3) Access to information held by a public entity or a private body shall be provided expeditiously at a reasonable cost.”

25. In view of the constitutional provisions and the **Access to information Act**, and the material referred to in the petitioner’s prayers, being election materials and in view of the contents of the petition, I find the prayers meritorious and accordingly allow the petitioner to access information stored in KIEMs Kits by directing the IEBC to present printouts to the Deputy Registrar of this Court before hearing of this petition commences. The IEBC to supply the petitioner with certified copies of Form 35 A and 35 B before hearing commences.

26. I now turn to the issue of scrutiny. The Petitioner is seeking orders of scrutiny at this stage, which is strenuously opposed by the Respondents.

27. **Section 82(i) of the Election Act No. 24 of 2011** provides:

“82 (1) An election court may, on its own motion or on application by any party to the petition, during the hearing of an election petition, order for a scrutiny of votes to be carried out in such manner as the election court may determine.....”

28. Similarly **Rule 29 (1) (2) (3) (4) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017** Provides:-

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

(2) On an application under sub-rule (1), an election court may, if it is satisfied that there is sufficient reason, order for scrutiny or recount of the votes.

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

(4) The scrutiny or recount of votes in accordance with sub-rule (2) shall be confined to the polling stations in which the results are disputed and may include the examination of—

(a) the written statements made by the returning officers under the Act;

(b) the printed copy of the Register of voters used during the elections sealed in a tamper proof envelope;

(c) the copies of the results of each polling station in which the results of the election are in dispute;

(d) the written complaints of the candidates and their representatives;

(e) the packets of spoilt ballots;

(f) the marked copy register;

(g) the packets of counterfoils of used ballot papers;

(h) the packets of counted ballot papers;

(i) the packets of rejected ballot papers;

(j) the polling day diary; and

29. In **Nicholas Kiptoo Arap Korir Salat v. IEBC and 7 Others** [2015]eKLR Court of Appeal held as follows:-

*“14. Learned counsel submitted that the appellant’s case provided an opportunity to expand the principles of scrutiny and recount already laid out by this Court in **Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others** S.C. Petition No. 2B of [2014] eKLR. He asked this Court to expound on the import of Section 82(1) of the Elections Act, and Rule 33 of the Election Petition Rules in view of the High Court’s determination on scrutiny and recount, thus:*

“It follows that the purpose of scrutiny is to identify votes by people who were ineligible to vote, and those who were eligible to vote and voted but their votes are void because they were not properly marked, were unmarked or had a different serial number. This is my understanding of Section 83(2) of the Act and Rule 77(1) [sic] of the General Rules. A petitioner seeking scrutiny must, therefore, bring himself within section 82(2) or Rule 77[sic] or both. He should in the application, identify, for purpose of exclusion, votes by people who were not eligible to vote or votes which were included in the count but which the presiding officer should have rejected.”

.....

*“51. The Supreme Court’s approach to Orders of scrutiny in election dispute-resolution, thus, is by no means precipitate: It follows a clear pattern that is rational, familiar, and judicious. Testimony to this effect is found in our earlier decision in the **Munga** case, in which we cited with approval the decision of Odunga, J in **Gideon Mwangangi Wambua & Another v. IEBC & 2 Others** (Paragraph 26)*

“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 other words a party should not expect the Court to make an order for scrutiny simply because he has sought such an order in the petition. The petitioner ought to set out his case with sufficient clarity and particularity and adduce sufficient evidence in support thereof in order to justify the court to feel that there is a need to verify not only the facts pleaded but the evidence adduced by the petitioner in support of his pleaded facts. Where a party does not sufficiently plead his facts with the necessary particulars but hinges his case merely on the documents filed pursuant to Rule 21 of the Rules, the Court would be justified in forming the view that the petitioner is engaging in a fishing expedition or seeking to expand his petition outside the four corners of the petition” [emphasis supplied]”

*“57. The determination of sufficiency is a task reserved to the discretion of the election Court. **Muchelule J.** in a Ruling delivered on 10th July, 2013, remarked that the purpose of scrutiny was not to identify votes cast by persons who were eligible or ineligible to vote, but to identify votes that were void, on account of being not properly marked, unmarked, or bearing a wrong serial number. Such an impression was drawn from a reading of Section 82(2) of the Elections Act, 2011, which indicates the votes to be excluded when scrutiny is done. The learned Judge, quite aptly, thus held:*

“Pursuant to Rule 33(4) the Petitioner should specify the polling stations in respect of which he seeks scrutiny, and the materials and documents that he wishes the Court to scrutinize. Reasons have to be given why the stations should be subject to scrutiny. Similarly, reasons should be given why the materials and documents in question should be scrutinized.”

30. In **Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others** Supreme Court Petition No. (2014)eKLR the Supreme Court stated:

“158. It appears to us that the learned Judges of Appeal did not avail themselves of the number of weighty decisions of the High Court, such as the ones we have reviewed hereinabove. From the eminent rational of these decisions, it is clear to us that an order for a recount or scrutiny

must be grounded on sufficient reasons. The words of Wedo J, in *Ledama Ole Kina v. Samuel Kuntai Tunai & 10 Others* (cited above) are, in this respect, instructive:

“An application for scrutiny of all of Narok South Constituency lacks specificity, and is a blanket prayer that, in my view, cannot be granted. The applicant needed to be specific on which polling stations he wanted a scrutiny done in. If he wanted scrutiny in all the polling stations, then a basis should have been laid for each polling station. The rationale is clear: the process of scrutiny is laborious, time-consuming, and the applicants cannot be left at liberty to seek ambiguous prayers and waste previous Court time and incur unnecessary costs. They must be specific. For the above reason, the Court cannot give a blanket order for scrutiny in Narok South Constituency, because such order will be prejudicial to the respondent, now that the evidence of witnesses has already been taken. The respondent would not have an opportunity to respond to any new issues that may be unraveled during scrutiny.”

31. In a document on “scrutiny” in Electoral Disputes, A Kenyan Judicial perspective by Justice (D.K. Maraga, now the Chief Justice and President of the Supreme Court of Kenya,) on page 260 - 262 under 5.3, it is stated as follows:-“5.3. pleadings for scrutiny:-

Before examining the manner of conducting court supervised scrutiny upon application by a party to a petition, it is important to consider the pleadings required for an order of scrutiny and the criteria for the grant of such an order.

Neither the Elections Act nor the Election Petition Rules specifically require a plea for scrutiny to be made in the petition. They both talk of an “application.” The Courts have, however, interpreted the provisions for Scrutiny in Section 82 of the Elections Act and Rule 33 of the Election Petition Rules as requiring a specific plea in the petition as a basis for the grant of an order for scrutiny arguing that to allow an application for scrutiny not grounded on any prayer to that effect in the petition would be tantamount to amending and thus changing the character and scope of the petition.

In the author’s view this is a correct interpretation of these provisions for scrutiny. Rule 10 (1) (e) of the Election Petition Rules requires the grounds upon which the petition is based to be pleaded in the petition and the facts in support thereof to be deposed in the affidavit in support of the petition. It therefore follows that the irregularities or malpractices that may warrant scrutiny should be concisely pleaded in the petition and in the affidavit in support. This requirement is also in other jurisdictions and was even in the old Kenyan regime.

The courts’ requirement for specific pleas for scrutiny is also sound on the general principle as of pleadings. Pleadings are of crucial importance in adversarial litigation. They not only ensure “procedural fairness” by “acquainting the court and the parties with the facts in dispute.” But also, for expeditious disposal of suits, particulars of pleadings “enable the parties to know” in advance the type of evidence they will require to adduce at the hearing.

There is no reason why these sound principles of pleadings should not apply with equal force to pleadings in election petitions. Besides complying with this legal requirement in election petitions, pleas for scrutiny also serve the purpose of putting both the respondent and the court on notice to expect an application to that effect. This enables the court, during the pre-trial conferencing for time management, to set aside time for the scrutiny exercise. Like in ordinary cases, parties to election petitions should also be bound by their pleadings. As such, they cannot be allowed to adduce evidence “outside” the ambit of their pleadings in the petition.

Having shown that scrutiny must be specifically pleaded in the petition, the courts have also held that pleas for scrutiny must be precise. Scrutiny is not to be granted on ambiguous pleadings intended to enable a petitioner to engage in a fishing expedition and perhaps enlarge his case beyond the scope of his pleadings or on pleadings couched in general terms Courts have held that it “would be an abuse of process to look upon scrutiny “as a lottery” and “to allow a party to

use (it) ... for purposes of changing on new evidence.”

Scrutiny can also never be granted on a blanket prayer. As is deducible from Rule 33(4) of the Election Petition Rules, specificity is crucial. The prayer for scrutiny must specify the polling station(s) in which the results are disputed and the documents which should be scrutinized. The party seeking scrutiny must therefore ensure that its petition and affidavit in support “contain concise statements of materials facts” upon which the prayers is grounded.

The only limited exception to the general rule on pleadings that should be had in election petitions is with respect to unanticipated irregularities that come to the fore during scrutiny of election materials. Given that the election materials are accountable documents kept by the IEBC and the public has no access to them, it is impossible for any petitioner to have knowledge of their contents. Before scrutiny, no petitioner will know, for instance, of the presiding officers’ doctoring of the records, allowing people whose names were not on the voters’ register to vote; or failing to account for some of ballot papers used in the election. In the circumstances, it is submitted that any irregularities revealed by scrutiny of election materials pursuant to a court order, whether pleaded or not should be taken into account in the final determination of as petition. To ignore any such irregularities or malpractices will be condoning illegalities, an act that will undermine public confidence in court determinations. The parties should, however, be accorded an opportunity of commenting on any such irregularities before they are taken into consideration.

Although Section 82(1) of the Election Petition Rules do not require a formal application for scrutiny, from the wording of the former and the court’s view in Hassan Mohamed Hassan & another v IEBC & 2 Others it appears that one is advisable. To enable the court to properly manage its time for the trial of the petition as stated, such an application should be filed along with the petition or soon thereafter. (Underlining is mine)”

32. In the instant application, for security, the Applicant relies on an affidavit filed by Dr. Noah Akala Oduwo, that though he is not a Petitioner, his affidavit in support is proper, for there is no requirement that an application in support of a motion be filed by the Applicant always. It can be filed by his Advocate or any other person who is possessed of the formation in support. I therefore do not agree with the submissions that the affidavit is deponed upon by a strange, however, what, I find to be of great interest, is that under paragraph 20, of the supportive affidavit the same is not in support of the application but the petition. The affidavit is therefore intended to add new evidence to the petition, which was not initially pleaded and as such, that would amount to changing the nature of the petition to the detriment of the of the Respondents, who will not be able to file any response. Secondly under **Rule 12(1) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017** an affidavit in support of the Petition is only required to be sworn personally by the petitioner and not by any other party. This is a mandatory requirement.

33. Section 76 1(a) of the Elections Act No. 24 of 2011 provides:-

“(1) A petition—

(a) to question the validity of an election shall be filed within twenty eight days after the date of declaration of the results of the election and served within fifteen days of presentation;”

34. Article 87 (2) of the Constitution of Kenya 2010 provides:-

“87 (2) Petition concerning an election, other than a presidential election, shall be filed within twenty-eight days after the declaration of the election results by the Independent Electoral and Boundaries Commission.”

35. Under Rule 12 (1) (a) (b) (3) and (4) of the Elections (Parliamentary and County Elections)

Petitions Rules, 2017 it is Provided:-

“12 (1) A petition shall be supported by an affidavit which shall—

(a) set out facts and grounds relied on in the petition; and

(b) be sworn personally by the petitioner or by at least one of the petitioners, if there is more than one petitioner.

(1) Each person who the petitioner intends to call as a witness at the hearing, shall swear an affidavit.

(2) A petitioner shall, at the time of filing the petition, file the affidavit sworn under subrule”

36. It is from the above, a **constitutional** requirement that a petition and all affidavits of the persons intended to be called as witnesses be filed at the time of the filing of the Petition. The Election dispute timelines prescribed under the **constitution** and **Election Act No. 24 of 2011**, especially related to filing documents set out, cannot be extended after expiry of the 28 days from the time of declaration of the results. An Election Court has no power to extend time for filing such documents. **Rule 19 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017**, empowers election court to extend the time prescribed in these Rules or its own timelines but election court has no jurisdiction to extend timelines set in the **Constitution or the Election Act No. 24 of 2011**.

37. In view of the above, I find that this court has powers to extend the period within which the present application was filed and served. I accordingly extend the period of service and declare the application properly on record. I, however, decline to extend the time to file supplementary affidavit/report and/or to file further affidavit of Dr. Noah Akala Oduwo, for the reasons that it is an attempt to file further evidence or introduce new evidence to the Petition, after time allowed for filing witnesses statements has since lapsed, as the petition was filed on 7.9.2017 challenging declaration made on 10th August, 2017. The last date for filing the petition could have in this case, have been on 7.9.2017. That after 7th September 2017, no valid documents or amendment of the petition could be entertained. I find that the attempt to introduce new evidence through the affidavit of Dr. Noah Akala Oduwo untenable. Further affidavit in support of the petition is only required to be sworn by the Petitioner and within time.

38. I now turn back to the prayer for scrutiny. The Petitioner in this application has not met the requirements for the granting of Orders of scrutiny. The Petitioner similarly in his petition has not stated which polling stations he would wish scrutiny to be carried out, what would justify scrutiny to be carried out, nor has he disclosed what would justify scrutiny to be ordered. He is seeking scrutiny for the whole constituency of Kitutu Masaba constituency without laying any basis. The application for scrutiny of Kitutu Masaba Constituency is general and wide, it should be specific as to what polling stations scrutiny should be limited to, a general or blanket prayer cannot be granted without the Applicant having laid basis for scrutiny, as scrutiny is laborious and time consuming exercise and may interfere with the timelines for hearing and determination of the petition. It appears the Petitioner is out on a fishing expedition, as in his application he sought leave to file supplementary affidavit/report from scrutiny exercise. He should also have ensured in seeking scrutiny that he specified the polling stations in respect of which he seeks scrutiny and the materials and documents that he wishes the court to scrutinize, and give reasons why the polling stations should be subjected to scrutiny and why the materials and documents in question should be scrutinized. He should also have ensured his petition and affidavit in support contain concise statements of materials facts upon which the prayer is based on scrutiny and as such should also have been one of the prayers in the petition. In the instant case, there is no prayer for scrutiny and such an order cannot be granted where scrutiny has not been specifically pleaded in the petition as a party cannot be granted what he has not sought through the pleadings.

39. Having come to the conclusion that I have, I make the following orders:-

(a) The IEBC to continue retaining in safe custody, all documents and materials relating to Parliamentary election for Kitutu Masaba constituency as per provision of the law at the IEBC warehouse.

(b) The Petitioner and the 1st Respondent are at liberty to put their seals to the ballot boxes under the supervision/directions of the Deputy Registrar of this Court within 2 days from today.

(c) The Petitioner to have access to information stored in KIEMS kits before commencement of the hearing of the Petition. IEBC to present printouts and SD cards to the Deputy Registrar of this Court before commencement of the hearing of this case.

(d) Applicant be granted access to the certified copies of Form 35A prepared at and obtained from stations in Kitutu Masaba constituency and used to generate the final tally of the result for member of National Assembly, Kitutu Masaba Constituency and certified copies of Form 35B used to tally results from polling Stations in Kitutu Masaba Constituency within 24 hours from today. Form 35A and 35B to be availed to the Registrar of this court before commencement of the hearing of the Petition.

(e) Application for leave to the Applicant and any other party to the petition to file a supplementary affidavit/report from scrutiny exercise is refused.

(f) Application for leave to the Petitioner to file an amended further affidavit of Dr. Noah Akala Oduwo in support of the petition is rejected.

(g) Costs in the cause.

DATED AND SIGNED AT NYAMIRATHIS 31ST DAY OF OCTOBER, 2017.

J. A. MAKAU

JUDGE

DELIVERED IN THE OPEN COURT

IN THE PRESENCE OF:

C.A. 1. Karlbean Mobisa

2. Nancy Moga

Mr. Ligunya for the Petitioner/Applicant

Mr. Paul Lilan for: the 1st Respondent

Mr. William Mogaka

Jointly with

Mr. Mobagi and Mr. Omoke for: the 2nd Respondent.

J. A. MAKAU

JUDGE