



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**ELECTION PETITION APPEAL NO 20 OF 2017**

OSCAR OMOKE OCHOLLA.....1<sup>ST</sup> PETITIONER/APPLICANT

KARIUKI KAVORE.....2<sup>ND</sup> PETITIONER/APPLICANT

ODERA DANIEL TRESVANT.....3<sup>RD</sup> PETITIONER/APPLICANT

HILLARY OKUMU MULILIA.....4<sup>TH</sup> PETITIONER/APPLICANT

KIRAGU MARGERY NDUTA.....5<sup>TH</sup> PETITIONER/APPLICANT

**VERSUS**

**INDEPENDENT ELECTORAL AND BOUNDARIES**

COMMISSION .....1<sup>ST</sup> RESPONDENT

MARTIN SIMOTWO.....2<sup>ND</sup> RESPONDENT

NIXON KIPROTICH GENERALI KORIR.....3<sup>RD</sup> RESPONDENT

**IN THE MATTER OF THE CHALLENGE OF THE VALIDITY OF THE MEMBER OF  
NATIONAL ASSEMBLY LANGATA CONSTITUENCY ELECTION, 2017**

**AND**

**IN THE MATTER OF ARTICLE 1,2,4,10,23,38,47,81,82,86,87,88,101 AND 165 OF THE  
CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF SECTION 75 & 80 OF THE ELECTIONS ACT, 2011**

**AND**

**IN THE ELECTION ACT, 201 (ACT NO. 24 OF 2011) AS AMENDED**

**AND**

**IN THE MATTER OF THE ELECTIONS (GENERAL) REGULATIONS, 2012**

**AND**

**IN THE MATTER OF ELECTION (PARLIAMENTARY AND COUNTY ELECTION)  
PETITIONS REGULATIONS, 2017**

**RULING**

The petitioners herein, filed an Amended Notice of Motion dated the 2<sup>nd</sup> October, 2017 seeking orders which can be summarized as follows;

- 1. THAT** pending the hearing and determination of the petition, this Honourable court be pleased to issue an order for preservation and safe keeping of all Election materials including Integrated Electoral systems kits (KIEMs).
- 2. THAT** pending the hearing and determination of the petition, this Honourable court do issue an order for scrutiny of all original forms 35A.
- 3. THAT** pending the hearing and determination of the petition, this Honourable court do issue an order compelling the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to deliver into the custody and safe keeping of this Honourable court as evidence, the ballot boxes and all polling materials for the 57 polling stations listed therein.
- 4. THAT** upon the applicant complying with order 3 above, an order requiring;
  - I.** A recount of all ballots cast in the listed polling stations as set out therein.
  - II.** A re-tally of all election results for the election of the parliamentary election held on the 8<sup>th</sup> August, 2017 for the member of National Assembly Langata Constituency.
  - III.** Scrutiny for all polling materials as particularized herein.
- 5. THAT** this Honourable court grants the petitioners/Applicants Read Only Access relating to permission to copy information relating to the number of servers Limited to Langata Constituency.
- 6. THAT** this Honourable court grants the petitioners/Applicants Read Only Access;
  - I.** To each biometric electronic appliance used at each voting/polling station location to verify voter's identification against the list of registered voters and for the appliances to be ensically imaged to capture, inter-alia, metadata such as data files, creation such as data files, creation times and dates, devices IDs, MAC addresses IP.
  - II.** Electronic address(s) used to capture forms 35A onto the KIEMSS systems and transmitted.
  - III.** Access to any form of scanning device which saved images onto access local server (s) for onward transmission.
- 7. THAT** the Honourable court be pleased to grant the petitioner leave to file an expert affidavit of Dr. Noah Akala Oduwo.
- 8. THAT** the costs of the application be provided for.
- 9. THAT** any other or further orders that this Honourable court may deem fit, just and expedient.

The application is premised on the grounds set out in the application and supported by an affidavit sworn

by **OSCAR OMOKE OCHOLLA**, the first petitioner. The petitioner contends that the election of the 3<sup>rd</sup> Respondent as member of the National Assembly for Langata Constituency was characterized by irregularities and malpractices; that the election was not administered in an impartial, neutral, efficient, accurate and accountable manner, contrary to Article 81(e) (v) as read together with sections 39,44, and 44A of the Elections Act, the Regulations made there under, Section 25 of the IEBC Act, that the results declared by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents lacked verifiability.

The application is opposed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents who filed a joint replying affidavit sworn by MARTIN SIMOTWO on 6<sup>th</sup> October, 2017. The deponent who was the returning officer, Langata Constituency during the 8<sup>th</sup> August, 2017 General Elections stated that, for the court to grant a request for scrutiny or recount, the petitioners/ Applicants ought to establish sufficient basis in the petition, that it is not permissible for the petitioners/Applicants to introduce new or additional evidence through an affidavit in support of an application, that it is not the purpose of a scrutiny to unearth new or unpleaded evidence or matters upon which an election petition could possibly be sustained, that scrutiny shall be confined to the polling stations in which the results are disputed and that the petitioners/Applicants must demonstrate to the court, with particularity, the extent of invalidity of the votes in dispute as to call for a scrutiny.

In respect to the new or additional evidence, it was deponed that an application for any new or additional evidence must be made within the time prescribed under the law, and with the leave of the court and that such additional evidence should not have the effect of amending the petition.

The application was also opposed by the 3<sup>rd</sup> Respondent who filed grounds of opposition dated the 5<sup>th</sup> day of October, 2017. The 3<sup>rd</sup> Respondent averred that the applicants have not established sufficient reason(s) for the grant of the prayers sought, that the applicants have not advanced any justification for the application for scrutiny, that the application is incompetent for want of material particulars, that the prayers for scrutiny are premised on conjecture, supposition and assumptions and no particular and factual basis has been laid out, that the orders if granted, would be an affront to the established precedent and statutory prerequisites, that the applicants are malicious by seeking to amend the petition by introducing new evidence. It is also deponed that the application is bad in law, lacks merits and that it is an abuse of the court's process.

The application was canvassed by way of oral submissions. In his submissions, Counsel for the applicants submitted that the application is made pursuant to Rule 15 (2) of the Elections (parliamentary and county Elections) petitions Rules, 2017 herein referred to as "the Rules", which requires that the application be made before pre-trial and therefore the same is not pre-mature contrary to the view held by the Respondents.

He contended that the Applicants' have set out the 57 polling stations that they require to have the scrutiny done and have also set out the discrepancies in the forms that were provided by the 2<sup>nd</sup> Respondent for some polling stations to wit; Karen C, stream 3 of 8 in which the total number of votes for the 3<sup>rd</sup> Respondent indicated in forms 35A are different from those in 35B in that between the transfer from A-B the 3<sup>rd</sup> Respondent was added 20 votes. Counsel argued that the difference can only be answered upon a scrutiny and where possible, a recount of votes in that station.

He averred that in some stations, the results were not electronically transmitted which was contrary to the law. He submitted that this can only be answered if the devices are provided in such stations. He stated that some form 35A's are not signed and stamped as required under the law and that the forms that were used to declare the results have glaring mistakes and the scrutiny will help the court to know the correct position. To support this contention, he gave an example of South C polling station in which the 1<sup>st</sup> petitioner is said to have obtained 198 votes but in form 35B he has garnered 119 votes from the same polling station. He argued that the discrepancies that form the foundation of this application have not been expressly controverted by the Respondents.

On the question of preservation and safe custody of materials, he told the court that it is in the interest of

justice that all the materials that were used in the Election, be preserved for fair determination. Counsel for the petitioners referred the court to Rule 16 which allows the petitioners to ask the court for safe custody.

On Access to the Electronic materials, reference was made to section 44 of the Elections Act that integrate the use of technology in Elections. He stated that the applicant is seeking extractable information that was used in Elections in respect of the 57 polling stations and this will help the court to determine the total number of voters who voted and it will also help the court to ascertain the information entered in the KIEMs kit for the 57 polling stations that are in dispute. Counsel argued that the Respondent should not have difficulties in providing the information sought because under the law, the materials should be preserved for a period of 3 years after the Elections.

On leave to include a further expert affidavit, it was averred that the petitioner shall be calling the deponent as a witness and the court was urged to allow the 1<sup>st</sup> petitioner to file the affidavit out of time. He cited rule 12 of the Elections (parliamentary and County Elections) petitions Rules, 2017. He refuted the assertion by the Respondents that the affidavit contains new evidence that will change the contents of the petition but rather, the same explains and summarizes the discrepancies touching on all the polling stations. He contended that the Rules gives the court the discretion to admit such an affidavit. He invited the court to take judicial notice of the declared margin of victory between the first petitioner and the 3<sup>rd</sup> Respondent which is less than 1493 votes going by forms 35A's.

Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents relied on the replying affidavit of Martin Simotwo and the list of authorities, in opposing the application. He submitted that under Rule 16, of the Elections (parliamentary & County Election) petitions Rules, 2017 the court may give directions on handling and preservation of materials and in doing so, it will consider the efficient, prudent and economic use of storage facilities that are available to the court and that the court can only order for preservation of materials that are before it.

Counsel Contended that the prayers sought are in respect of materials for stations that are not disputed. He stated that if the court were to order for preservation, it should limit the orders to the stations in dispute and in any event, under the law, it is the duty of the 1<sup>st</sup> Respondent to keep the Election materials in safe custody for a period of 3 years after Election has taken place. He argued that in absence of proof that the materials have been tampered with, those materials are deemed to be in safe custody. No such proof has been availed before the court.

On the issue of scrutiny, he relied on the case of **Nicholas Kiptoo Korir Salat Vs IEBC & others (2015) eKLR** in which the Supreme Court set out what the court should consider before ordering a scrutiny. He submitted that the petitioners' application does not adhere to all those principles in that the petitioners seek for scrutiny for all the voters cast in Langata constituency for the National Assembly. He stated that there are no particulars of the polling stations for which the materials are sought to be scrutinized. The effect of all this, it was submitted, is that the petitioners have not laid a basis for the scrutiny and/or recount. He relied on the case of **Hassan Ali Joho vs Hotham Nyange & Another (2006) eKLR** where the court held that scrutiny and recount should not be allowed where there is no basis and especially where the margin is high.

On the issue of re-tally, he averred that the applicants have sought a re-tally of all Election results yet it is not in all the polling stations where results are disputed in the petition herein. He relied on the case of **Raila Amollo Odinga & another Vs IEBC & 2 others (2017) eKLR** and that of **Hassan Mohammed Hassan & another Vs IEBC (2013) eKLR**.

While submitting on the issue of "Read Only Access", counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents told the court that the prayer is not specific in that it seeks each and every biometric appliance used at each polling station. The court was told that the appliances used in the election were specific to specific polling stations and that they have components and there was need for the applicants to specify which of those components they are seeking to access. That all those facts should have a basis in the petition itself which is not the case herein and being a general prayer, the petitioners are fishing for evidence.

On the expert evidence sought to be introduced by the petitioners, it was submitted that an expert witness should illustrate the expertise that he seeks to bring to the case, which aspect is missing from the evidence of Dr. Noah Akala. It was further submitted that since it is alleged that the said Dr. Akala participated in the scrutiny that had been ordered by the Supreme court, the petitioners had all that information with them even before the petition herein was filed and no reason has been given to the court why that information was not availed to court when the petition was filed, to justify why it is being availed to court now. It was contended that the information he seeks to bring to the court is nowhere in the petition so that if the same is allowed to be produced, it will definitely amend the petition and the Respondents will not have an opportunity to respond to those allegations because time has already lapsed.

The counsel for the 3<sup>rd</sup> Respondent relied on the grounds of opposition filed on 6<sup>th</sup> October, 2017 and the list of authorities. He submitted that an application for scrutiny and recount should only be brought with respect to the disputed stations. He averred that the 57 polling stations in respect of which the scrutiny and recount is sought are not listed in the petition and that the petition lists only six polling stations which are disputed.

He submitted that though the law on scrutiny gives the court the reasons why it should be allowed, it should not be used to unearth new evidence to sustain the petition. He relied on the case of **Gideon Mwangi Wambura Vs IEBC & Others, Election Petition Number 4/2011**.

He further submitted that the outlining of polling stations is not sufficient reason for a recount. That the court should be satisfied that the recount will substantially change the outcome. He cited the case of **Njoho Vs Nyanga & Another (Supra)** where a margin of 1600 votes was found to be huge to warrant a scrutiny.

On preservation of Election materials, Counsel for the 3<sup>rd</sup> Respondent referred the court to Regulation 93 which gives the 1<sup>st</sup> and 2<sup>nd</sup> Respondents the mandate to preserve the same. He argued that the court has not been told of any risk that the materials are at, or whether they have been in any way tampered with, and in absence of such reasons, the application should not be allowed.

It was submitted that the affidavit sought to be introduced will bring in new evidence and it will amount to amending the petition contrary to section 64 of the Rules.

On the prayer for access, he wholly adopted the submissions made by Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and reiterated that the Applicants have not laid a basis for the sought for access. He stated that the petition herein is governed by a different regime from that of the presidential Election in that the Electronic transmission of results only applied to the presidential petition and therefore the petitioners request to rely on transmission was misguided. He relied on the decision in Martha Karua case.

While responding to the counsels for the Respondents, Counsel for the applicants contended that the Martha Karua petition case is also applicable in this case as there was only one voters register that was used for both presidential and others. He gave an example of the KIEMs kit that was used to identify the voters.

The court was referred to the case of **Gideon Mwangi (Supra)** where the court stated that margin is a consideration that the court has to take into account when considering whether to order a recount or not.

On the affidavit of Dr. Adala, he submitted that it has not annexed new evidence but its just a summary of documents that form part of the case and those documents are on record. He further submitted that what the applicants are seeking is an order for re-tally of the votes in all the polling stations after those for the 57 polling stations are scrutinized and re-tallied.

The court has carefully considered the application, the responses thereto and the submissions by the respective parties. In my view, the following are the issues for determination by this Honourable court;

- 1) Whether the court should issue an order for preservation and safekeeping of all elections materials used in the parliamentary election for the member of National Assembly Langata Constituency held on the 8<sup>th</sup> August, 2017.
- 2) Whether the court should issue an order compelling the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to deliver into the custody and safe keeping of this Honourable court as evidence, all the polling materials.
- 3) Whether the court should grant an order for recount, scrutiny, re-tally of votes, as prayed by the petitioners.
- 4) Whether the Honourable court should grant the petitioners a “Read Only Access” to the information sought in the Application.
- 5) Whether the court should grant leave to the petitioners to file an expert affidavit of Dr. Noah Akala Oduwo.

On Preservation and safekeeping of Election materials, the petitioners/applicants have argued that, it is in the interest of Justice that the materials be preserved for fair determination of the matter at hand. The court has considered the relevant legal provisions in this regard.

Section 86 of the Elections Act no 24 of 2011 provides for safe keeping of Election materials by the returning officers after the final tallying and announcement of results. In the relevant part i.e section 86 (2) (b) it states as follows.

**“The returning officer shall keep the sealed ballot boxes and all materials relating to the election in safe custody for such a period as may be required under those regulations and the Act.”**

Under Rule 16 of the Elections (parliamentary and county Elections) petitions Rules, 2017, the election court may give directions on the storage of election materials including ballot boxes and documents relating to the petition, the handling and safety of election materials and the time for furnishing the election materials to the election court.

In giving directions relating to the storage of such materials, the court is by law enjoined to consider the prudent, efficient and economic use of storage and transparent facilities, the maintenance of the integrity of the materials and to ensure that the materials are not interfered with.

This court has keenly considered the submissions made by the petitioners in support of that prayer. It has not been alleged that the materials have been interfered with in any way or that there is a threat of interference whatsoever, while the same are in the custody of the 1<sup>st</sup> Respondent.

On scrutiny, recount and re-tally of votes, the petitioners gravamen is that there were irregularities and discrepancies in the forms 35As and 35Bs that were provided by the 1<sup>st</sup> and the 2<sup>nd</sup> Respondents and that some 35Bs and some form 35As were not signed and stamped as required under the law. On their part, the Respondents have contended that the petitioner’s request does not adhere to the set down principles, in that scrutiny is sought for all the polling stations in Langata constituency and that no good basis has been laid for it.

The law on scrutiny is set out under section 82 of the Elections Act, 2011 which empowers the Election court acting on its own motion or on application by any party to the petition, during the hearing of an election petition to order for scrutiny of votes to be carried out in such a manner as the election court may determine.

Rule 29 of the Election (parliamentary and County Elections) petitions, 2017 lays down the principles to be applied by the court where a party to the proceedings makes an application for scrutiny. It provides as

follows;

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 direction/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 .....

The Supreme Court, in the case of **Nicholas Kiptoo Arap Korir vs IEBC & 7 others in petition no 23 of 2014** referred to the Munya case where it developed certain cross-cutting principles with regard to the scrutiny and recount of votes in an election petition, which it sets out 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 29 of the Elections (parliamentary and County Elections) Petitions Rules, 2017. 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 filing of the petition, and before the determination of the petition

**(b)** The trial court is vested with discretion under Section 82(1) of the Election 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 the court 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 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 votes is called into question.

In the same case, the Supreme Court thus remarked

**“..... 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 a prayer pointing to a constituency but lacking in specificity is not to be entertained (Emphasis supplied)**

From the foregoing analysis, the question that arises is whether the reasons advanced by the petitioners are sufficient to warrant the grant of an order for scrutiny and whether at this point, the court can make a determination as to whether the reasons advanced are sufficient without hearing the petition at least in part?

Justice Kimaru, J, when dealing with a similar situation in the case of **Rishad H.A Amana Vs IEBC & 2 others Malindi in E.P 6/2013** had this to say:-

**“..... the recent trend is that scrutiny can only be ordered where a petitioner lays sufficient basis. Such basis can only be laid after the petitioner has adduced evidence during the actual hearing of the petition. The petitioner cannot therefore demand that there be a scrutiny and recount of the votes before the commencement of the trial. The petitioner may do so after his or her witnesses have testified. The ideal situation, however, is that such an application for scrutiny should be considered by the court after all the witnesses of the petitioner and the respondents have testified. At that stage of the proceedings, the court will be in a position to properly assess the veracity of the allegations made by the petitioner that there is need for scrutiny.”**

In essence therefore, I hold prayers 2A and 4 of the application in abeyance until after all or some of the witnesses shall have testified.

In respect to prayers 5 and 6, the petitioners stated that they are seeking to extract the information that was used in Elections in the 57 polling stations as this will help the court to determine the total number of voters who voted and it will also help the court to ascertain the information entered in the KIEMS kit. Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents on his part, argued that the appliances used were for specific polling stations and that they have components and therefore, there was need for the applicants to specify which of the components they are seeking access of. My understanding of prayers 5 and 6 of the amended Notice of Motion is that what the petitioners require is information that is stored in those devices. I concur with the counsels for the respondents that there was need for the petitioners to specify the specific polling stations and the components that they are seeking to access for purposes of this petition.

On leave to file an affidavit by an expert, in his submissions, counsel for the petitioners asked the court to allow the affidavit to be filed as he will be calling the deponent as a witness.

On their part, counsels for the respondents have argued that no sufficient cause has been shown to the court why the affidavit was not filed on time and have urged the court to disallow the same.

Rule 12(3) of the Elections (Parliamentary and County Elections) Petitions, 2017, provides:-

**“Every person who the petitioner intends to call as a witness at the hearing shall swear an affidavit.”**

While rule 12(8) provides:\_

**“Except with the leave of the election court and for sufficient cause, a witness shall not give evidence unless an affidavit sworn by the witness is filed as required under these rules.”**

It has been submitted that the evidence Dr. Noah Akala Oduwo only explains and summarizes the discrepancies touching on all the polling stations and that it does not seek to introduce new evidence. A cursory perusal of the said affidavit reveals the following;

- (1) That the deponent is a senior official of Orange Democratic Party to which the 1<sup>st</sup> petitioner is a member.
- (2) That he was part of the team that assisted in the scrutiny of the electronic result transmission system in the Presidential Petition No. 1 of 2017 and he obtained varied data on the results transmission of the General Elections held on 8<sup>th</sup> August, 2017.

From the above revelation it is clear that the deponent was a person well known to the petitioners. Secondly, the information held by the deponent was at all material times within the knowledge and/or available to the petitioners even at the time of filing the petition.

This court notes with concern that the petitioners did not explain why the affidavit that is sought to be

introduced, was not filed on time. In fact, no attempt was made at all, to explain why it was not done. **Rule 12(8)** quoted herein above requires that sufficient cause be shown. I find and hold that no sufficient cause was shown why the affidavit was not filed together with the petition. The petitioners needed to show a sufficient cause to enable this Honourable Court exercise discretion in their favour, it is unfortunate that they failed to do so.

In the premises, the orders made in this ruling are as follows:-

**(a)** Prayer 1 of the application is allowed in the following terms:-

(1) Pending the hearing and determination of the petition herein, an order is hereby issued for preservation and safekeeping of all election materials as particularized in Prayer 1 of the Amended Notice of Motion that were used in the parliamentary election for the Member of National Assembly, Langata Constituency, held on the 8<sup>th</sup> August, 2017. The said materials to be preserved by the first Respondent in their premises by putting additional seals on the ballot boxes.

**(b)** Prayers 2A and 4 of the application to be revisited, if need be, and on notice.

**(c)** That all the necessary information from the servers and the KIEMS kit as captured and stored in the SD (Scan Card) card be preserved by the Deputy Registrar Civil Division to be accessed if need be, under the directions of this Honourable Court.

**(d)** Prayer 7 of the application is hereby disallowed.

**(e)** The cost of the application shall abide the outcome of the petition.

It is so ordered.

Dated, signed and delivered at Nairobi this 23<sup>rd</sup> day of **October, 2017**.

.....

**L. NJUGUNA**

**JUDGE**

*In the presence of*

..... *for the Petitioners.*

..... *For the 1<sup>st</sup> & 2<sup>nd</sup> Respondent.*

..... *For the 3<sup>rd</sup> Respondent.*