



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE
(CORAM: KANYI KIMONDO J)
ELECTION PETITION NO. 2 OF 2017

HENRY TIOLE NDIEMA.....PETITIONER

VERSUS

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

BILHA KIPTUGEN, THE RETURNING OFFICER,

TRANS NZOIA COUNTY.....2ND RESPONDENT

MICHAEL MALING'A MBITO.....3RD RESPONDENT

RULING

1. There are two *distinct* applications before the court. The first is by the *petitioner*. He was a candidate for senator of Trans Nzoia County in the general elections held on 8th August 2017. He craves an order for *scrutiny* or *access* to election materials, equipment and statutory forms. The notice of motion is dated 9th October 2017.

2. The second application is a notice of motion dated 30th October 2017. It is taken out by the 3rd *respondent*. It is on a three-strand: First, the applicant is pursuing an order to *strike out* the entire petition dated 4th September 2017; secondly, for an order to *strike out* a supplementary affidavit sworn and filed by the petitioner on 16th October 2017. Thirdly, and, in the alternative, he seeks to *strike out* offending paragraphs in the impugned affidavit; and, another affidavit sworn by the same deponent in support of the petition.

3. The court directed that both motions be heard together. I will first deal with the motion by the 3rd *respondent*. The motion is predicated upon a deposition sworn by the applicant on 30th October 2017. The first prayer is for striking out of a supplementary affidavit by the petitioner sworn on 16th October 2017. It was filed on the same date. The 3rd *respondent* contends that the affidavit should be struck out for want of *leave*.

4. The High Court is a court of record. I have carefully studied the record. During the pre-trial conference on 9th October 2017, learned counsel for the petitioner, *Mr. Nyaosi* and *Mr. Oibo* applied for *leave* to file a supplementary affidavit. But *no* leave was granted. Certainly, it was not part of the *thirteen* orders or

directions granted by consent on 9th October 2017. Counsel for the petitioner conceded as much.

5. When learned counsel *Mr. Nyaosi* appeared in court on 22nd November 2017, he said he was under the *wrong impression* that leave was granted. He said he would be “*happy*” if the impugned affidavit is *accepted* by the court. He left the matter to the court.

6. Like I said, all learned counsel for the parties executed the *consent* to the pre-trial directions and orders. I would have expected learned counsel for the petitioner to pray for leave to admit the deposition *retroactively*. He did *not* do so.

7. Rule 12 (9) of the Elections (Parliamentary and County Elections) Petition Rules 2017 (hereafter *the Petition Rules*) provide that “*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*”. Rule 15 (1) (h) on the other hand states that “*the court shall give directions as to the filing and serving of any further affidavits or the giving of additional evidence*”.

8. By its very nature, a supplementary affidavit introduces *fresh evidence*. It may *prejudice* other parties. Hence the requirement for leave by the court; and, the need for *directions as to the filing and serving of any further affidavits*. Furthermore, there is a *constitutional* imperative to conclude election petitions within *six months*. Article 159 of the Constitution; and, Rules 4 and 5 of the Petition Rules accentuate the principles of equality of parties and proportionate justice. See generally *Raila Odinga and others Vs Independent Electoral and Boundaries Commission and 2 others* Nairobi, Supreme Court Petition No. 5 of 2013 [2013]eKLR, *Evans Kidero v Ferdinand Waititu & others* Nairobi, Supreme Court Petition No. 18 of 2014 [2014]eKLR.

9. Allowing the impugned affidavit to stand is highly irregular and undesirable. It will obviously delay the proceedings. The prejudice to the respondents is also self-evident: the supplementary affidavit introduces new evidence; and, it *permeates* the borders of the *original* petition.

10. I accordingly order that the entire supplementary affidavit sworn by the *petitioner* on 16th October 2017 be and is hereby *struck out*. It shall be expunged from the records.

11. I will now turn to the prayer by the 3rd respondent to strike out the *petition*. The genesis of the application is a *consent order* recorded on 9th October 2017 between the petitioner and 3rd respondent. The accord related to a separate notice of motion dated 9th October 2017 praying for *particulars*. The 3rd respondent agreed to furnish the particulars in the annexed *Request for Particulars* of even date. The particulars were to be supplied within *seven days*.

12. The 3rd respondent’s case is that the petitioner defaulted; and, has instead filed an affidavit generally stating that “*the particulars sought are contained in the petition*”. The 3rd respondent contends that failure to obey the court order prejudices him; and, offends the concept of *equality of arms* between parties. He argues that he is now faced with a petition “*that contains generalities and unquantifiable claims*”.

13. The 3rd respondent thus prays that the entire petition be struck out. In the alternative he prays that the following paragraphs in the petition be struck out: 5, 8, 10, 11, 17, 18, 27, 28, 36, 38, 42, and 43. Those are the paragraphs over which further particulars had been sought. He also seeks to strike out corresponding paragraphs in the supporting affidavit sworn on 4th September 2017. They are numbered 10, 11, 12, 15, 17, 18, 19, 20, 21, 23, 24, 25, 27, 30, 31, 33, 36, 38, 39, 40, 41, 42, 43, 44 and 45.

14. The 1st and 2nd respondents *support* the motion. There is a deposition sworn by Bilha Kiptugen, the Returning Officer, on 20th November 2017. Learned counsel for the 1st and 2nd respondents associated himself fully with the submissions by the 3rd respondent.

15. The application is opposed by the petitioner. There is a replying affidavit sworn by the petitioner on 20th November 2017. He deposes that he filed an answer to the Request for Particulars. The answer was in the form of another *affidavit* filed on 16th October 2017. He says it was filed well within the *seven days* as ordered by the court.

16. I have carefully studied the latter affidavit. At paragraph 2, the petitioner's answer to paragraph 1 of the Request for Particulars is that "*it can be found in the petition*" specifically part C; and, "*that the acts or omissions of the commission subverted the will of the people of Trans Nzoia contrary to Article 1 of the Constitution*".

17. Regarding paragraphs 15, 16, 17, 18, 19, 20, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36 and 37 of the supporting affidavit, the petitioner avers that the conduct of the 1st and 2nd respondents violated Articles 2 (2), 10 and 86 of the Constitution; and, the Elections Act. IEBC also usurped the right of voters to free and fair elections. In particular, the 1st and 2nd respondents did not conduct a simple, accurate and verifiable election; or, failed to set up systems to eliminate malpractices.

18. In response to paragraph 2 of the Request for Particulars, the petitioner contends that the answers are at paragraphs 15 to 37 of the petition; and, sufficiently pleaded in the supplementary affidavit that I have just struck out. He attaches a table marked *HN1* analysing the irregularities in some forms 38A.

19. The petitioner states in further answer that he cannot "*ascertain the actual number of votes he [was] denied*" but that the same is the subject of an application for scrutiny of election materials. Regarding criminal activities, the petitioner contends that the details are in the petition. He nevertheless annexes a *charge sheet* marked *HN2*. He states that the burden of identifying the perpetrators lies with the 1st and 2nd respondents.

20. The petitioner's further answers are that the acts of omissions by the presiding Officer at Muungano Primary School are detailed in the petition. He states that the differences between the results in form 38C; and, the 1st respondent's public portal are particularized in the petition. A copy of the results in the portal are annexed marked *HN3*.

21. In response to paragraph 6 of the Request for Particulars, the petitioner has identified four dates on which the Cabinet Secretary for Water campaigned for the 3rd respondent at Mt Elgon Lodge, Endebess; Endebess Centre; and, at Trans Nzoia Primary School. The dates were 1st July 2017 to 8th August 2017.

22. All the parties have filed written submissions. Those by the petitioner were filed on 20th November 2017. The petitioner also filed a list of authorities on 22nd November 2017. The 1st and 2nd respondents' skeleton submissions were filed on 21st November 2017. A separate bundle of authorities was filed on 22nd November 2017. The 3rd respondent filed a list of authorities on 22nd November 2017.

23. On 22nd November 2017, all learned counsel for the parties addressed the court on the two notices of motions. I have considered the rival submissions.

24. The true purpose of an order to *furnish particulars* is to clarify issues to the opposing party. *Mututho v Kihara* [2008] KLR 10, *Tipis v Ntimama & another* [2008] 1 KLR (EP) 347. The court has the residual power to strike out a petition for want of particulars. *Steven Kariuki v George Mike Wanjohi and others* Nairobi, High Court Petition No 2 of 2013 [2013] e KLR.

25. An order to furnish the particulars was issued by *consent* on 9th October 2017. The petitioner filed an answer in form of an affidavit well within the *seven days* specified in the order.

26. So much so that the dispute relates to the *format* or *sufficiency* of the *answers* by the petitioner. For starters, I deprecate the tone by the petitioner; it is full of contempt for the 3rd respondent. That can be

discerned from the riposte *that the answers to the request are in the petition*. I was then at a loss why learned counsel *conceded* to the prayer for particulars in the first place.

27. That said, the particulars sought were in the format of 6 paragraphs seeking specific particulars of the allegations at paragraphs 5, 6, 8, 10, 11, 17, 18, 27, 28, 36, 37, 38, 42 and 43. Learned counsel for the 3rd respondent, *Mr. Murethi*, submitted that the answers should have strictly followed that template.

28. I am *not* persuaded by that submission. For starters, these are not ordinary *civil proceedings*. Rule 15 (e) of the Petition Rules merely states that the court, at the pre-trial conference, may give an order for furnishing of particulars. To insist that the answers must follow the template of the Request for Particulars is unreasonable. It would defeat the overriding objective of the court in Article 159 of the Constitution; and, Rules 4 and 5 of the Petition Rules. It would trump substantive justice at the altar of technicalities. I concur fully with Ringera J (as he then was) in *Microsoft Corporation Vs Mitsumi Computer Garage* [2001] KLR 470 that it would be to elevate technical requirements of form to a fetish.

29. Paragraph 16 of the affidavit in answer to the particulars sets out the dates; and, the four occasions the on which the Cabinet Secretary for Water campaigned for the 3rd respondent. That may not be a full answer; but it sufficiently answers paragraph 6 of the Request for Particulars.

30. Regarding paragraph 1 of the request, I do not see how the petitioner would “*show numerically or by some other quantifiable method, the extent to which noncompliance with the Constitution and the law that was massive and systematic as described in paragraphs 5 and 6*”. The nature of the request at paragraphs 2 and 3 is not any different. It is thus not surprising that the petitioner has glossed over the matter and sought refuge in the original petition.

31. The petitioner has given some details of the election offences. He has annexed some charge sheet. I doubt that it would satisfy the 3rd respondent. But the point is that he has *attempted* an answer. Regarding paragraph 4 of the Request for Particulars, he has annexed a copy of the results in the IEBC public portal. For example, the portal showed the petitioner garnered 164 votes at *Muungano Primary School* Polling station; Form 38C on the other hand indicates 64 votes.

32. The petitioner states that he is unable to tabulate the exact number of votes subtracted from him and added to the petitioner. I think those are matters best left to evidence at the trial. In *Robert Nelson Ng’ethe v Mbogori Njeru & Another* [2005] e KLR Ojwang J (as he then was) held that some of the particulars demanded “*could only be responded to by giving the very evidence which will have to be produced at the hearing stage*”

33. I am not surprised that the petitioner did not provide a satisfactory answer to paragraph 6 of the request. I am unable to comprehend the request. It is worded as follows: “*Give particulars about the law [sic] difference impugned [sic] the election and the specific [sic] of the requirement that the number should be identical*”.

34. Granted those circumstances, I cannot say that the petitioner *completely* failed to answer to the particulars. It is also not lost on me that this is an election petition. It is an action *in rem*. A serious *injustice* would be occasioned by striking out the petition or the impugned paragraphs merely because the answers are insufficient; or, they do not follow the layout suggested by the 3rd respondent.

35. I am also fortified by the decision in *Dickson Karaba v John Ngata Kariuki & Another* Nairobi, High Court Petition 1 of 2008 [2010] eKLR-

“*...striking out is a very serious matter, it is draconian and it should be resorted to as an avenue when the cause filed is hopeless or it is meant or intended to abuse the process of the court...The court cannot also exercise its inherent jurisdiction, when the exercise will lead to an injustice. In my view the inherent jurisdiction of the court enables it, to exercise control over process by regulating its proceedings by preventing the abuse of the process. Inherent power is a residual*

power which may be used upon unnecessary event and when it is just and equitable to do so in a particular case to ensure the observance of the due process of the law or to prevent vexation or oppression or to do justice between parties and to secure a fair trial between them. It is not intended to displace a party of his matured right which is likely to result in an injustice. I think, striking out of a petition is outside the inherent jurisdiction of the High Court and it cannot be exercised to aid a party who has not suffered any prejudice or injustice due to the acts or omission of another party”.

36. For all those reasons prayers 3 and 4 of the 3rd respondent’s notice of motion dated 30th October 2017 are *dismissed*.

37. I will now turn to the *petitioner’s* notice of motion dated 9th October 2017. The petitioner seeks a *read only* access to all the KIEMS kits used in the election; and, to make copies therefrom. There is a further prayer to access the *logs* of the kits “*on uploading of results onto the portal, deletions, corrections of results onto the system and the details of the users*”.

38. The petitioner also seeks the original or certified copies of all forms 38A, 38B, 38C, 37C and 39C. The petitioner prays that upon grant of the preceding prayer, he be allowed “*to file additional affidavits*”. The petitioner craves an order to *preserve* the election materials; and, lastly, for “*scrutiny of all election materials*”.

39. Like I stated, the petitioner was a candidate for Member of the Senate for Trans Nzoia County. The elections were held on 8th August 2017. The pith of the motion is that the election was marred by “*massive irregularities*” which warrant an order for scrutiny. He avers that the KIEMS kits were used by the 1st and 2nd respondents to identify voters and transmit the results. He thus prays for “*limited access...for the sole purposes of making copies of the information which is relevant for the just determination of the petition*”.

40. Those matters are buttressed by the supporting affidavit sworn on 9th October 2017. At paragraph 5, he deposes that the KIEMS kits were in the process of being *reconfigured* for use in the presidential elections slated for 26th October 2017.

41. At paragraph 8, the deponent has drawn a comprehensive table particularizing the discrepancies in the number of cast votes; rejected votes; and, valid votes. He cites differences between the version in the petition and the response to the petition. He avers that the discrepancies can only be cured by *full scrutiny*.

42. At the table I referred to, the deponent has also isolated forms 38A not signed by the Presiding Officers; or, without the officers’ comments; those signed by IEBC clerks instead of polling agents; those with wrong polling stations; those with mathematical errors; those with unauthenticated alterations; those without handing over notes; those signed by strange agents; discrepancies between forms 38A, 38B and 38C; and, the forms with contradictory notes.

43. The deponent avers further that three presiding officers were charged with criminal offences in Endebess Constituency. He also avers that the results displayed in the IEBC public portal were at variance with forms 38A, 38B and 38C.

44. The application is contested by all the respondents. The 1st and 2nd respondents relied on the replying affidavit sworn by Bilha Kiptugen, the Returning Officer, on 23rd October 2017. She largely denies the allegations by the petitioner. She avers that no evidence of the irregularities has been tabled; and, that the application is a fishing expedition. She contends that the petitioner has not given sufficient reasons for his prayer to access the KIEMS kits. She avers further that no basis has been laid for production of forms 38A, 38B, 38C, 37C or 39C for the entire county election.

45. The deponent denies there were any irregularities in forms 38A. She avers that the forms for Kitale

Labour Office polling station 3; and, Kapchelanget Primary School polling station 2, were all signed by the presiding officer. She contends that form 38A for St Joseph's Primary School is accurate. The 2nd respondent denies that there were discrepancies in the votes in forms 38A; or, that there were alterations in the *thirty four* forms identified at *paragraph 8* of the supporting affidavit. She also states that the claims are nebulous.

46. She denies there were alterations in the forms for Saboti Constituency. She deposes further that counting and tallying of results was conducted in the presence of all candidates. Regarding agents, she stated that the only mandatory signatures on the forms are those of the presiding officers or their deputies. She avers that agents are only entitled to sign when *present* at the *end* of the exercise; and, the forms have a provision for *refusal* to sign. Regarding claims of criminal conduct at Endebess Constituency, she avers it related to theft of a KIEMS kit and not the results of the elections.

47. Lastly, she avers that the results displayed in the IEBC public portal were *provisional*; and, that the official and *final* results are the ones contained in forms 38A, 38B and 38C. In her view, there was no double-voting; and, all the votes were accounted for.

48. In a synopsis, the 1st and 2nd respondents' case is three-pronged: First, that there is no sufficient basis for an order of scrutiny or recount; secondly, that the application is imprecise; and, that the petitioner has embarked on a fishing expedition.

49. The 3rd respondent filed grounds of opposition dated 16th November 2017. The pith of the objection is that the application *meanders* beyond the boundaries of the original petition; that the prayers are vague; that the statutory forms are before the court; that it would be unreasonable to scrutinize forms that are not related to specific complaints; and, that the orders of scrutiny will prejudice the 3rd respondent.

50. Section 82 (1) of the Elections Act 2011 (as amended) provides that-

“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”.

51. Rule 28 of the of the Elections (Parliamentary and County Elections) Petition Rules 2017 (hereafter *the Rules*) on the other hand provides that a petitioner may apply for a recount or examination of the tallying *“if the only issue for determination in the petition is the count or tallying of votes received by the candidates”*.

52. Rule 29 entitles a party to apply *“for scrutiny of the votes for purposes of establishing the validity of the votes cast”*. The exercise under that Rule is more elaborate. It extends to the marked register; statements by returning officers and copies of results for each polling station; polling day diaries; packets of counterfoils of used ballots; rejected ballots and so forth.

53. *Scrutiny* is meant to *assist* the election court to interrogate fully any malfeasances, irregularities and breaches of electoral law. Paraphrased, to measure the *integrity* of the election. It also helps the court to deal with *disputed* votes or tallies. See *Raila Odinga & another v IEBC & 2 others*, Supreme Court of Kenya, Presidential Petition 1 of 2017 [2017] eKLR, *Kakuta Hamisi v Peris Tobiko & 2 others* Nairobi High Court Election Petition 5 of 2013 (*Ruling No. 2*) [2013] eKLR, *William Maina Kamanda v Margaret Wanjiru Kariuki* Nairobi, High Court Petition 5 of 2008 [2008] e KLR, *Dickson Karaba v Ngata Kariuki and others* Nairobi, High Court Petition 1 of 2008 [2010] e KLR, *Justus Omiti v Walter Enock Nyambati and 2 others* High Court, Kisii, Petition 1 of 2008 [2010] e KLR.

54. The party seeking scrutiny must lay a *basis*. It is *not* a matter of right. See *Peter Gatirau Munya v Dickson Kithinji & 2 others*, Supreme Court of Kenya Petition 2B of 2014 [2014] eKLR, *Nicholas Salat v IEBC & 7 others*, Supreme Court of Kenya Petition 23 of 2014 [2014] eKLR, *Arikala Narasa Reddy v Venkata Ram Reddygari & another*, Supreme Court of India, Civil Appeals 5710 -5711 of 2012. An

application for scrutiny should not be a *roving or fishing* expedition for new evidence. Peter Gichuki King'ara v IEBC & another, High Court at Nyeri, Petition 3 of 2013 [2013] eKLR.

55. Furthermore, scrutiny is to be confined to polling stations in which the results are *disputed*. See Nathif Jama Adama v Abdikhaim Mohamed & 3 others, Supreme Court Petition 13 of 2014 [2014] eKLR, Kalembe Ndile and another v Dr. Patrick Musimba Mweu and others (Ruling No 3) Machakos, High Court Petition 1 of 2013 (as consolidated) [2013] e KLR, Steven Kariuki v George Mike Wanjohi and others Nairobi, High Court Petition No 2 of 2013 [2013] e KLR.

56. Courts have consistently held that there must be a prayer for scrutiny in the petition. See Abdikhaim Osman Mohamed and another v Independent Electoral and Boundaries Commission and others Garissa, High Court Petition No 2 of 2013 [2013] e KLR, Hassan Ali Joho v Hotham Nyange & others (Ruling No 2) (2008) 3 KLR (E.P) 188, [2006] e KLR; Ng'ang'a and another Vs. Owiti and another [2008] 1 KLR (E.P) 749. I am satisfied that in the present case, the petition contains *express* prayers for scrutiny.

57. There is also the overarching principle that parties are bound by their pleadings. See Raila Odinga & another v IEBC & 2 others, Supreme Court of Kenya, Presidential Petition 1 of 2017 [2017] eKLR.

58. The petitioner seeks a *read only* access to all the KIEMS kits used in the election; and, to make copies. There is a further prayer to access the logs of the kits “*on uploading of results onto the portal, deletions, corrections of results onto the system and the details of the users*”.

59. Rule 17 of the Election (Technology) Regulations 2017 requires the IEBC to *retain* electronic data in safe custody for *three years* after the elections. The KIEMS kits were deployed in the last election for *electronic* registration and identification of voters; and, transmission of results. I have closely studied section 39 of the Elections Act 2011. Unlike the *presidential* election, there is no express requirement to transmit *electronically* the results of the election of Governors, Senators or County Women Representative.

60. Regulation 82 of the Elections (General) Regulations 2012 on the other hand speaks of *electronic transmission* of provisional results. Such results are deemed *provisional* and subject to confirmation after the procedures in Regulation 76.

61. Three other issues emerge. The first is a risk of compromising the integrity or *security* of equipment of the IEBC. In Raila Odinga & another v IEBC & 2 others, Supreme Court of Kenya, Presidential Petition 1 of 2017 [2017] eKLR, the court was well alive to such risks. The learned judges delivered themselves as follows-

“[67] With regard to prayer 3 specifically, some of actions for which access is sought have the potential of compromising the integrity and security of the 1st Respondent’s electoral technological systems and of individual persons which, if granted, it is likely that the future use of the system may be compromised and therefore it is important that there is absolute confidentiality of passwords and usernames, locations of servers, identity of password holders, IP addresses and software running applications *inter alia*”.

62. Secondly, neither the petition nor the motion has raised a specific *complaint* at a *particular* station relating to the use of the KIEMS kits. In the grounds to the motion, the applicant contends that the “*IEBC KIEMS portal do not tally*” with forms 38B and 38C. That statement is *not* in the affidavit in support of the motion. Again in the grounds, it is alleged that there was a *variance* between the votes for senatorial, gubernatorial and county women representative for Trans Nzoia. That statement is *not* found in the supporting affidavit.

63. Thirdly, the affidavit of the petitioner at paragraphs 3, 4, 5 and 6 deposes as follows: That IEBC deployed technology at the elections through the KIEMS kits; that the kits were to be reconfigured for use in the subsequent elections of 26th October 2017 which could interfere with the data of the preceding election; and, that the kits comprise the primary data for the number of voters in the election. He prays for

“limited access...for the sole purposes of making copies of the information which is relevant for the just determination of the petition”.

64. In short, no *evidential basis* has been laid for any access to the KIEMS equipment. It is instructive that the petitioner seeks KIEMS data for *all* the polling stations. Rule 29 (4) of the Petition Rules limits scrutiny to the polling stations that are *disputed*. See Raila Odinga & another v IEBC & 2 others, Supreme Court of Kenya, Presidential Petition 1 of 2017 [2017] eKLR.

65. So much so that the petitioner has not demonstrated *noncompliance* with section 44 and 44A of the Elections Act. Lastly, under section 60 of the Evidence Act, I am entitled to take *judicial notice*, as a matter of local notoriety that the KIEMS kits were to be used for *all* the six elections held on 8th August 2017. Rule 16 (4) provides that *only the material relating to a particular petition may be furnished to an election court*. In the final analysis, there is no sufficient basis laid either in the body of the petition; or, the motion before the court for those prayers. Prayers 3 and 5 of the *petitioner's* notice of motion dated 9th October 2017 are *disallowed*.

66. I will now turn to prayers number 4, 6, 7 and 8 of the motion. The main petition has *not* been heard. The averments in the rival affidavits have not been tested by cross examination. However, it is clear that the *margin* of votes between the petitioner and the 3rd respondent was *narrow*. The petitioner garnered 70,846 votes; the 3rd respondent obtained 71,471 votes. The difference between the two leading candidates was a paltry 625 votes.

67. As a general rule, scrutiny is appropriate where the margin of votes is very low. See Hassan Ali Joho v Hotham Nyange & Anania Mwasambu Mwaboza (Ruling No 2)(2008) 3 KLR (EP) 188. Maraga, J (as he then was) cited with approval the following three decisions: Onamu v Maitsi Election Petition No.2 of 1983; Kirwa v Muliro Election Petition No.13 of 1998 where the margin was only 7 votes and Hamed Said v Ibrahim Mwarua Election Petition No.1 of 1983 where the margin was 62 votes.

68. Article 159 of the Constitution enjoins the Court to do substantial justice to the parties without undue regard to technicalities. That overriding objective has been imported into the Elections (Parliamentary and County Elections) Petition Rules 2017 by dint of Rules 4 and 5.

69. There are *serious* allegations of anomalies in this election. They are contained in the petition; and, the two affidavits of the petitioner sworn in support of the petition and the notice of motion. At this stage, they remain mere allegations. Some are of a criminal nature. Contrary to the deposition by Bilha Kiptugen, the *charge sheets* annexed to the answer to particulars are not *all* about theft of a KIEMS kit. Two presiding officers, *Martin Nyongesa* and *Benson Busi*, are alleged to have failed to properly *handover election materials* to the Returning Officer. That was at Njoro Primary School and Nai Farm Primary School Polling stations.

70. I cannot also shut my eyes completely to the allegations at paragraph 8 of the supporting affidavit. The petitioner avers that the discrepancies between the petition and the response by the 3rd respondent on one hand; and, the anomalies in forms 38A, 38B and 38C on the other hand, can only be cured by *full scrutiny*. He identifies forms 38A not signed by the Presiding Officers or without their comments; those signed by IEBC clerks instead of polling agents; those with wrong polling stations; those with mathematical errors; those with unauthenticated alterations; those without handing over notes or signed by different agents; discrepancies between forms 38A, 38B and 38C; and forms with contradictory notes.

71. I remain alive that those are just allegations at this stage; and, that the 1st and 2nd respondents have made a detailed reply in paragraphs 12 to 16 of the replying affidavit of Bilha Kiptugen that I referred to at length. The evidence requires to be tested through cross examination.

72. I am *not* satisfied that a sound evidential basis has been laid for scrutiny of forms 37C and 39C. Those two forms relate to the election of the *Governor* and *County Women Representative*. Like I stated, Rule 16 (4) of the Petition Rules provides that *only the material relating to a particular petition may be*

furnished to an election court.

73. The petitioner must also shoulder some blame for *not* seeking a recount at the polling station. Regulation 80 of the Elections (General) Regulations 2012 provides as follows:-

“80. (1) A candidate or agent, if present when the counting is completed, may require the presiding officer to have the votes rechecked and recounted or the presiding officer may on his or her own initiative, have the votes recounted: provided that the recount of votes shall not take place more than twice.

“(2). No steps shall be taken on the completion of a count or recount of votes until the candidates and agents present at the completion of the counting have been given a reasonable opportunity to exercise the right given by this regulation”.

74. The point to be made is that Courts are ill-equipped to carry out an extensive recount for a whole county. It is a laborious and time consuming exercise. The polling stations provide a better forum, soon after close of polls, and in the presence of agents or candidates. In that scenario a fairly smaller number of votes would be recounted. See *Kakuta Hamisi v Peris Tobiko & 2 others* Nairobi High Court Election Petition 5 of 2013 (*Ruling No. 2*) [2013] eKLR. It is not clear *at this stage* whether the petitioner or his agents sought a recount.

75. In the end, I find that there will be need for *further* and tested evidence at the *trial* to justify full scrutiny or partial scrutiny of election materials. In *Kakuta Hamisi v Peris Tobiko & 2 others* Nairobi High Court Election Petition 5 of 2013 (*Ruling No. 2*) [2013] eKLR, I had this to say on the subject-

“My considered view is that the court is better suited to make the order after receiving evidence at the trial. That is the position taken by Majanja J, and Kimaru J respectively in Kalembe Ndile’s case (supra) and Rishad Amana v IEBC and others, High Court, Malindi, Petition 6 of 2013 [2013] eKLR. See also the recent decision in Phillip Osore Ogotu v Michael Aringo and others High Court, Busia Petition 1 of 2013 [2013] eKLR.”

76. The upshot is that prayers 4 and 8 in the motion are *adjourned* until the close of testimony in the petition. It is not lost on me that section 82 (1) of the Act gives the *election court* the discretion *on its own motion or on application by any party to the petition, during the hearing of an election petition, to order for a scrutiny of votes to be carried out in such manner as the election court may determine.*

77. It follows as a corollary that prayer 6 in the motion seeking to file *additional* affidavits collapses. That prayer was hinged upon the grant of an order for scrutiny.

78. I will now turn to prayer 7. The petitioner craves an order for *preservation* of all election materials. In view of the adjournment of prayers 4 and 8 of the notice of motion, there is merit in ensuring that the election materials remain intact.

79. Article 86 (d) of the Constitution mandates the IEBC to ensure that *“appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials”*.

80. Regulation 86 of the Elections (General) Regulations 2012 on the other hand requires the IEBC to keep the sealed ballot boxes and all materials relating to the election in *safe custody*. I have already stated that Rule 17 of the Election (Technology) Regulations 2017 requires the IEBC to retain *electronic data* in safe custody for *three years* after the elections. But to assuage the fears by the petitioner, I will grant prayer 7 in the following terms: The IEBC is hereby *ordered to preserve* all the election materials for the seat of the Senator, Trans Nzoia County, in safe custody; or, until the final determination of this petition. In addition, the IEBC shall in the next *seven days* file in court *certified copies* of forms 38A, 38B and 38C for that election.

81. The orders that commend themselves to me to grant are as follows:

- a) That the *entire* supplementary affidavit sworn by the *petitioner* on 16th October 2017 be and is hereby *struck out*. The affidavit shall be expunged from the records.
- b) That prayers 3 and 4 of the 3rd *respondent's* notice of motion dated 30th October 2017 [which sought to strike out the petition or parts of the supporting affidavit to the petition] are *dismissed*.
- c) That prayers 3, 5 and 6 of the *petitioner's* notice of motion dated 9th October 2017 are *disallowed*.
- d) That part of prayer 4 of the *petitioner's* notice of motion dated 9th October 2017 seeking *scrutiny* of forms 37C and 39C in the general elections of 8th August 2017 in Trans Nzoia County is hereby *dismissed*.
- e) That the remainder of prayer 4; and, prayer 8 in the *petitioner's* notice of motion dated 9th October 2017 seeking *full scrutiny* of election materials are *adjourned* until the close of testimony in this petition.
- f) That the 1st *respondent*, IEBC, is hereby *ordered* to *preserve* all the election materials for the seat of the Senator, Trans Nzoia County, in safe custody until the *final determination* of this petition.
- g) That the 1st *respondent*, the IEBC, shall within *seven days* file in court *certified copies* of forms 38A, 38B and 38C for the election of the Senator, Trans Nzoia County.
- h) That the costs shall be in the petition.

It is so ordered.

DATED, SIGNED and DELIVERED at **ELDORET** this 30th day of November 2017.

KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of:

Mr. Nyaosi for the Petitioner instructed by McKay & Company Advocates.

Mr. Munene for the 1st and 2nd Respondents instructed by Akide & Company Advocates.

Mr. Gitonga for the 3rd Respondent instructed by Gitonga Mureithi & Company Advocates.

Mr. J. Kemboi, Court Clerk.