REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

ELECTION PETITION NO 3 OF 2017

MOHAMMED TUBI BIDU…….……...……..……PETITIONER

Versus

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION……....…1ST RESPONDENT

MAMO ELEMA ADANO…….…….....2ND RESPONDENT

ABDI KORON TEPO…...…….…..……..3RD RESPONDENT

RULING

Access to KIEMS KIT and scrutiny of system

[1] Of application dated 6th November 2017 by the Petitioner, this court stated that:-

> ***A proper basis for scrutiny must be laid before scrutiny is granted. I, however, note that generalized complaints that total valid votes cast exceeded the number of registered voters or those who turned up to vote have been made. Worth of note also is that scrutiny has been requested for as an alternative prayer by the Petitioner without any specific request for examination and access of the KIEMS KIT having been made in the Petition. Nonetheless, so that I do not prevent this application from being made, I shall defer it until such time that the petitioner and his witnesses have testified. I make this decision in order to avoid prejudice to the law or any party in these proceedings which for sure are not purely private suit of the Petitioner. I am also aware that the KIEMS KITS in issue were used in the repeat presidential elections held on 26th November 2017 and if need be, specific directions will be required on how the data or information in those KIEMS KIT should be furnished to court and parties. Meanwhile, the hearing shall continue. It is so ordered.***

[2] In making the above decision, the court was fully aware of the decision of the Supreme Court in the case of **PETER GATIRAU MUNYA 2B OF 2014 [2014] eKLR** that the right to scrutiny does not lie as a matter of course. It is granted upon sufficient cause being shown by the applicant in the context of the pleadings or evidence adduced or both.Now, parties have been heard. They have also filed submissions on this application as was agreed amongst the parties. The application dated 6th November 2017 seeks the following orders:-

> ***1. …….spent***

2. THAT this Honourable be pleased to order the 1st Respondent to give access to the Applicants/Petitioner to the following:

a. Full and unfettered physical and remote access to each KIEMS and or biometric electronic appliance used at each voting/polling station location used to verify voters IP voters' identification against the list of registered voters and for the appliances to be forensically imaged to capture, inter alia, metadata such as data files, creation times and dates, devices IDs MAC addresses IP.

b. Full and unfettered physical and remote access to any local server(s) connected to the electronic device(s) used to verify voters' identification against the list of registered voters at each polling station, from which a forensic image will be taken.

c. Electronic devices used to capture Form 35As and Form 35Bs onto the KIEMS system and transmitted to the Constituency Tallying Center.

d. Full and unfettered access to any form of scanning device which saved images onto access local servers for onward transmission.

e. Access to any scanning device which would serve to establish whether the Form 35A was captured, stored and forwarded in the expected timeframes.

f. Full and unfettered physical and remote access to any server(s) at the Constituency Tallying Centre for storing and transmitting voting information.

g. Addresses, source and destination IP Addresses, server details and user details

h. Full and unfettered access to all source codes, including all programming codes, pursuant to the Election Regulation Technology, 2017.

3. The Honourable Court be pleased to Order the 1st Respondent to give access to the Petitioner the following information and data that is in its exclusive possession:-

I. Specific GPRS location of each KIEMS Kit used during the Election of Member of National Assembly of Isiolo South Constituencyfor the period between 5th August 2017 and 11th August 2017.

II. Polling station allocation for each KIEMS Kit used during the Presidential Election;

II. Audit log of what each KIEMS Kit used during the Election of Member of National Assembly of Isiolo South Constituencytransmitted from stations to Constituency Tallying Centres indicating:-

i. Time of transmission from KIEMS Kit to the IEBC Result Transmission Database; and

ii. Time of transmission from IEBC Result Transmission Database to the Media Houses API;

iii. Count of identified Voter by each KIEMS Kit

iv. Such copy of Ids captured in each KIEMS Kit;

v. Audit log of transmission of scanned Forms 35A from each of the KIEMS Kits.

4. THAT the 1st Respondent be compelled to give and to supply to the court and to the Petitioner for scrutiny, certified photocopies of the original Form 35As, 35Bs and 35C prepared at and obtained from the polling stations by presiding officers and used to generate the final tally of the Election of Member of National Assembly of Isiolo South Constituency.

5. THAT the 1st Respondent avail all the log files from the KIEMS Kits deployed in all the polling stations during the Election of Member of National Assembly of Isiolo South Constituency showing:-

I. Time when voting opened;

II. Time voting ended; and

III. Total number of votes cast using Biometric system.

6. THAT the 1st Respondent avail all Forms 32A filed in instances where the KIEMS Kits failed to identify voters electronically and had to resort to manual voter identification system.

7. THAT the 1st Respondent avail all the reports and entries made by the Presiding officers in the Polling Station Diary (PSD) where they record every details and events happening at the polling station as reports to the Returning Officer of votes cast after every two hours until official closing time of 5pm.

8. THAT this honourable court be pleased to grant leave to the Petitioner/Applicant to file further Affidavits in support of the petition and to file such other affidavits in response to or reply to any responses filed by the Respondents.

9. THAT costs be in the cause.

[3] The application is expressed to be brought under Articles 19, 20, 22, 23(3), 35, 81, 159 and 258 of the Constitution, Section 44 and 80 of the Elections Act, Section 27 of Independent Electoral and Boundaries Act, Access to Information Act and the Elections (Technology) Regulations and all enabling provisions of the law. It is supported by the Affidavit of the Petitioner, grounds set out in the application as well as submissions filed in court.

Petitioner: I have laid basis for access and scrutiny

[4] Is the application merited? The Applicant says his application is meritorious. His reasons for saying so are enunciated in the submissions, the application, affidavit in support and evidence adduced in court. He submitted that his application relates to:

(a) Access to information in the hardware and software used in the conduct of elections in question;

(b) Access to and scrutiny of certified copies of Forms 35A, 35B and 35C; and

(c) Leave to file further affidavits.

[5] The Applicant argued that there is sufficient jurisprudence on Section 82(1) and rule 29 of the Elections (Parliamentary and County Elections) Petition Rules (hereafter Election Rules) on scrutiny and cited a number of cases to that effect. I need not list all of them except to cite the case of **PETER GATIRAU MUNYA(supra).** The core of those decisions is encapsulated in the following:-

(a) The right to scrutiny does not lie as a matter of course. It is a discretionary relief which is granted only upon sufficient cause being shown within the context of the pleadings or evidence adduced or both.

(b) Scrutiny is specific to the particular polling stations where results are in dispute; therefore, those polling stations must be identified.

(c) The purpose of scrutiny is to enable the court determine real issues in controversy.

[6] The Petitioner submitted further that right to information is governed by Article 35 of the Constitution and section 4 of the Access to Information Act. Information is defined in the Access to Information Act to include records held by a public entity or private body, regardless of the form it is stored, its source or date of production. Specifically, section 27 of the IEBC Act requires IEBC to publish and publicize all important information within its mandate, and also provides the procedure for request for information held by IEBC. Technology Rules also provide for storage and retention of data and access to information held by IEBC. On the basis of this right to access to information, the Applicant, in his petition, signalled his intention to seek scrutiny of all form 35A, 35B and 35C.According to the Applicant, it emerged during the hearing that the physical forms produced by the 1st Respondent may not necessarily contain the results that were electronically transmitted during the election in issue. Hence, the request for scrutiny of the system used in the conduct of the elections in dispute as a way of confirming the results declared. He was aware that our electoral system is partly manual and partly electronic and so the role of technology cannot be ignored. He referred the court to paragraph 7 of the Petition. He stated further that, although all the allegations in paragraph 7 of the petition were denied in *toto* by the 1st Respondent, answers to the questions raised therein are readily available in the technology system used in the election. For those reasons, the Applicant beseeched the court to allow his application.

Arguments by the 1st and 2nd Respondents

[6] The 1st and 2nd Respondents urged the court to dismiss the request for access to information and scrutiny of systems made by the Applicant. Their reason is that, according to rule 29(4) of the Election Rules, scrutiny should be limited to only polling stations whose results are being disputed. They also stressed the fact that section 63 of the Evidence Act was contravened as the Applicant's evidence during the trial was oral and did not produce any material to support his request for scrutiny. They also argued that scrutiny should not be a fishing expedition or a lottery for evidence. Therefore, as the particular polling stations where dispute on results is alleged were not specified, a generalized prayer thereto will not do. Only paragraph 13 of the Petition raises complaints about 12 out of 55 polling stations in the Constituency in issue. But those complaints have been sufficiently explained in the Affidavits by the Respondents' witnesses. In the absence of such particularities, the complaints by the Petitioner are mere fishing expedition. To them, there is no basis laid for the scrutiny. To support that proposition, they cited the case of **PHILIP OSORE OGUTU vs. MICHAEL ONYURA ARINGO**by Tuiyo J.

[7] The 1st and 2nd Respondents addressed each and every complaint and concluded that all complaints were sufficiently addressed and that no evidence was adduced to substantiate any of them. Thus, scrutiny is not deserved. They cited the Supreme Court case of **NICHOLAS KIPTOO ARAP KORIR vs. IEBC** which cautioned against turning scrutiny into an open forum for gathering of evidence or al such information as they fancy.

[8] On request to access KIEMS kits, the 1st and 2nd Respondents urged that such request should be made during pre-trial conference under rule 15 of the Election Rules. The request should therefore not be entertained. They relied upon the decision by Nyamweya J in the case of **MILITONIC MWENDWA KIMANZI KITUTE vs. IEBC & 2 OTHERS [2017] eKLR** that access to information in the KIEM Kits ought to have been made during pre-trial conference.

Arguments by the 3rd Respondent

[9] The 3rd Respondent took an early swipe at the application; that it was founded on un-pleaded allegations and he is now on a wild goose chase for evidence. He was dramatic; that the Petitioner is saying, *''Give me the evidence to make my case''*.He substantially reiterated the essential core of the submissions by the 1st and 2nd Respondents on scrutiny. He also cited cases relevant and binding

decisions by the Supreme Court on scrutiny. He concluded by stating that the petitioner expressed his application in general terms without the requisite particularities and specificity as to what they exactly require. And such woolly requests should be declined. So he prayed.

DETERMINATION

A venial error

[10] One venial but embarrassing matter: whereas this application relates to the election of Member of National Assembly for Isiolo South Constituency, in some of the prayers, reference to presidential election has been made. I think it is the mischief that occurs when one cuts and pastes materials from one source to another without doing proper editing.

Law on Scrutiny and access

[11] That notwithstanding, this application relates to access to, provision and scrutiny of all electronic systems and devices, all Forms 35A, 35B and 35C, and Polling diaries used in the election for Member of National Assembly for Isiolo South Constituency on 8th August 2017. Such being an Application for scrutiny. I take this view of the matter. There is no dearth of judicial decisions on the subject of scrutiny. As law has it, scrutiny is not granted as a matter of course. It is granted at the discretion of the court where sufficient basis has been laid through the pleadings or evidence or both. *'Sufficient reason or basis''* may not have been exactly defined or assigned a definite scope as it will all depend on the facts of each case. However, I should think that it entails showing such irregularities or illegalities which are substantial, in the sense that they may affect the results and or the integrity of the election, and of a nature that cannot be reconciled otherwise than resorting to examination of the electoral systems and material used in the election. *Odunga, J in**GIDEON MWANGANGI WAMBUA & ANOTHER V. IEBC & 2 OTHERS**(Paragraph 26)said this same thing in different words as follows;*

> ***"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''. [Underlining mine]***

Therefore, scrutiny will not issue; (1) where the court can make an informed opinion on the alleged malpractices or irregularities on the basis of the material before the court; or (2) where only venial or pardonable errors, or errors which can easily be explained through or reconciled from the material before the court, say, affidavits, documents or oral evidence, have been established. Hence, the school of thought which posit that the particular allegations founding scrutiny must be specifically and clearly stated in the pleadings and evidence in support thereto be readily available from the pleadings or affidavits or evidence adduced. See eminent **scholarly paper by *Maraga JA*** (as he then was), ***Scrutinyin Electoral Disputes, A Kenyan Judicial perspective****that:*

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.

[12] In addition, scrutiny is also scope-specific to the particular polling stations where the results are disputed, and which must be so stated. The rationale for insisting on specificity is not only because it is a strict requirement under rule 33(4) of the Election Petition Rules, but because the process of scrutiny is laborious exercise which consumes precious Court time and brings about unnecessary costs. Accordingly, as it has been said before, scrutiny is not a fishing expedition or a game of lottery which is best described in the words ofRingera J (as he then was) in**PYARALAL MHAND BHERU RAJPUT vs. BARCLAYS BANK AND OTHERS Civil Case No. 38 of 2004**;-

> ***…a wide net cast over a large body of water, and out of all the lake or sea, creatures caught in it, there will be one or two edible crabs or fish.***

[13] The foregoing analysis is drawn from the innumerable judicial authorities as well as eminent literary works on the subject of scrutiny in section 82(1) of the Election Act and Rule 29 of the Elections Rules made thereunder. I do not wish to multiply the authorities except at the risk of monotony and dull repetition, I am content to cite some few. See the case of **GATIRAU PETER MUNYA V DICKSON MWENDA KITHINJI & 2 OTHERS PETITION NO.2B OF 2014; [2014] eKLR**as follows:-

> ***"From the foregoing, review of the emerging jurisprudence in our courts, on the right to scrutiny and recount of votes in an election petition, we would propose certain guiding principles, as follows:-***
>
> > ***a) The right of scrutiny and recount of votes in an election petition is anchored in Section 82(1) of the Elections Act and Rule 33 of the Elections (Parliamentary and County Elections) Petition rules, 2013. Consequently, any party to an election petition is entitled to make a request for a recount and/or scrutiny of votes, at any stage after the filing of petition, and before the determination of the petition.***
> >
> > ***b) The trial Court is vested with discretion under Section 82(1) of the Elections Act to make an order on its own motion for a recount or scrutiny of votes as it may specify, if it considers that such scrutiny or recount is necessary to enable it to arrive at a just and fair determination of the petition. In exercising this discretion, the Court is to have sufficient reasons in the context of the pleadings or the evidence or both. It is appropriate that he 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 terms of Rule 33 (4) of the Election (Parliamentary and County Elections) Petition Rules."***

[14] See also the case of **NICHOLAS KIPTOO ARAP KORIR SALAT vs. IEBC AND 7 OTHERS [2015] eKLRwhere the**Court of Appeal *citedwith approval the decision of Odunga, J in**GIDEON MWANGANGI WAMBUA & ANOTHER V. IEBC & 2 OTHERS**(Paragraph 26)that;*

> ***"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]"***
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> ***"The determination of sufficiency is a talk 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."

[15] In **GATIRAU PETER MUNYA vs. DICKSON MWENDA KITHINJI & 2 OTHERS (supra)** the Supreme Court stated:

"…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 Wendo J, in Ledama Ole Kina v. Samuel KuntaiTunai& 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."

[16] **Eminent scholarly paper by** ***Maraga JA*** (as he then was), **S*crutinyin Electoral Disputes, A Kenyan Judicial perspective*, atpage 260 - 262under para 5.3 on*pleadings for scrutiny;*** *has given such splendid and clear exposition on scrutiny. Of specific importance is this passage:*

…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 chancing 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.

Request for KIEMS

[17] Coming back to the facts of this case, the 1st and 2ndRespondents argued that request to access KIEMS kits should have been made during pre-trial conference. Under rule 15 and 16 of the Election Petitions Rules, the court is empowered to make orders on election materials, their storage, access and furnishing of those materials to court and to the parties. Nyamweya J in the case of **MILITONIC MWENDWA KIMANZI KITUTE vs. IEBC & 2 OTHERS [2017] eKLR** held that access to information in the KIEM Kits should be made during pre-trial conference. The test here is whether the application thereof, by its nature, could have been made during the pre-trial conference. See rule 15(2) of the Election Petition Rules which provides as follows:-

15(2) An election court shall not allow any interlocutory application to be made on conclusion of the pre-trial conference, if the interlocutory application could have, by its nature, been

brought before the commencement of the hearing of the petition.

Pre-trial conference was held on 2nd October 2017 in the presence of counsels for the parties. Mr.Muriuki for the Petitioner informed the court that there was no pending application and that they wish to go to the hearing of the petition straight-away. The hearing of the petition was scheduled for 6th and 7th of November 2017. This application was filed on 6th November, 2017- the day for hearing of the Petition. Accordingly, it came too late in the day and no explanation was given as to why it could not have been made during pre-trial conference. On that score alone the application should fail. But before I conclude, is there sufficient basis for scrutiny?

Prayer for scrutiny

[18] The prayer for scrutiny in the Petition has been couched in very general terms and in the alternative. The Petitioner kept on stating that his work is to allege and then verification of those allegations shall beborne out of the information contained in the KIEMS Kits used in the conduct of the elections in question. For purposes of scrutiny, it is not enough *to* merely make allegations of malpractices. Again, merely stating that answers to allegations in the petition on the election are readily available in the technology or system used in the conduct of elections is not enough to warrant scrutiny or access to the systems or documents used in the election. Equally, merely stating that results were electronically transmitted and so you are entitled to that information is not enough. Essentially, under article 35 of the Constitution access to information should be on the basis that the person needs the information for purposes of exercising his right or fundamental freedom**.**In election petitions the basis for access to information is ascertained from the pleadings. Therefore, what will entitle you to information or scrutiny of the Forms, documents or the systems used in the election in dispute is that you have shownon *prima facie* basis that there are malpractices or illegalities which cannot be verified except by resorting to the electoral systemor documents used in the election and being held by IEBC. Matters which the court can form an opinion of or are easily reconciled or explained from the material before court, cannot found a basis for scrutiny of or access to electoral systems and documents used in the election. The court is aware of the allegations stated in paragraph 7 of the affidavit in support of the petition on un-gazetted polling stations, failure of some KIEMS Kits, extended voting, unusual voter turnout, refusal to provide Form 35A, turning away of voters, incorrect votes tally, alteration of results, votes cast exceeding number of registered voters, failure to indicate number of registered voters and number of votes for the MP being significantly higher than for the otherpositions. But, those matters constitute the core issues in controversy in this petition and evidence has been led upon them. The court shall evaluate the evidence and decide the issues in its final judgment. There is, therefore, no specific need for scrutiny. Accordingly, I do not wish to discuss these issues in detail at this stage. In the upshot, there is no basis laid for scrutiny or access to or supply of information on KIEMS Kits or servers or documents used in the conduct of the election in dispute. Accordingly, the application dated 6th November is dismissed. Costs shall follow the outcome of the petition. It is so ordered.

Dated, signed and delivered in open court at Meru this 30th

day of November, 2017

F. GIKONYO

JUDGE

In the presence of:

M/s. Kiome for 3rd Respondent

M/s. Kiome for Mr. Tolo for 1st and 2nd Respondent

Mr. Kaimba advocate for Mr. Kisaka advocate for Petitioner

F. GIKONYO

JUDGE