



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAPENGURIA**  
**ELECTION PETITION NUMBER 1 OF 2017**

**JOHN LOKITARE LODINYO.....PETITIONER**

**VERSUS**

**IEBC.....1ST RESPONDENT**

**BONVENTURE OKOCHI OBONGOYA.....2ND RESPONDENT**

**MARK LOMUNOKOL.....3RD RESPONDENT**

**RULING**

The Petition dated 5th September 2017, and filed on 6th September 2017 seeks among other orders for orders that:

**A. Immediately upon filing of the petition the 1st and 2nd respondents do avail the original forms 35As form 35Bs, the polling station diaries and the KIEMS kits for scrutiny and audit.**

**B. There be a scrutiny of the votes recorded as having been cast in the parliamentary election in Kacheliba constituency.**

Based on foregoing prayer A and B, the petitioner filed a Notice of Motion dated 27th September 2017 seeking for orders that:-

**1. This Honourable Court be pleased to grant orders allowing the petitioner and the registrar of this Honourable Court to access the logs and the electronic voter identification machines used during the 8.8.2017 elections at Kacheliba Constituency.**

**2. This Honourable Court be pleased to order 1st and 2nd Respondents avail the KIEMS machine and the logs used during the just concluded 8.8.2017 election in Kacheliba constituency before this Honourable court for scrutiny of their security codes and the logs respectively.**

**3. Upon grant of orders (1) and (2) above, the report be made by the registrar of this Honourable Court and the same be submitted to this court and the 1st respondent electronic identification machines, security codes and the logs availed to this Honourable Court do form part of the evidence for determination of this petition.**

**4. Cost of this application be provided for.**

The application is founded on the grounds that there is a petition before this Honourable Court against the

1st, 2nd and the 3rd respondents seeking declaration that the elections held on 8.8.2017 in Kacheliba Constituency was done contrary to the provisions of the law thus illegal and irregular, hence the same should be held null and void. The applicant further avers that the 1st and 2nd respondents used the Kenya Integrated Electronic Management System (KIEMS) kit to identify voters and further verify the eligible persons to vote in various polling stations within Kacheliba Constituency. The said KIEMS machines were as well used by the 1st and 2nd respondent to transmit results from various polling stations within Kacheliba Constituency a process they were statutorily required to observe without fail. The 1st and 2nd Respondent failure to observe the said statutory requirement led to anomalies in the voter identification process where many of the voters in several polling stations were allowed to cast their votes without being electronically identified and as a result some of persons who voted were not eligible to vote.

It's alleged by the applicant that the number of total voters as presented on the form 35 signed by the 2nd respondent is in conflict with what is portrayed on the 1st respondents website portal, a difference which has not been explained satisfactorily by the 1st and 2nd respondents. This is said, by the applicant, to be a clear indication that either the KIEMS machines were not used or the system was tampered with, thus necessitating the sought for orders in order to demonstrate the same. Lastly, all the electronic machines used by the 1st and 2nd respondent are alleged to have had security codes which represented each and every polling station of which makes it necessary for the court to know whether the same was used in accordance with the dictates of the law. The court was urged by the applicant to allow the application in the interest of justice.

The petitioner attached an affidavit in support of the application in which he deponed that the concluded elections held on 8.8.2017 at Kacheliba Constituency, West Pokot County by the 1st and 2nd respondents were in contravention of the electoral laws and the constitution as they failed to effectively use the statutory requirement of the use of electronic management system and if the same was used the same had been interfered with. This was in breach of the mandatory provisions of **section 44 and 39(1)(c) of the Elections Act** and the **Elections Technology Regulations 2017 to the Elections Act, number 24 of 2011**. The transmission platform, is claimed, was not secured and or was so compromised as to deliver free and fair election in compliance with **Article 81 and 86 of the Constitution of Kenya**. Further, he deponed that some of the KIEMS machines were logged in more than 50 metres away from the polling station within which they were supposed to be used. He urges the court to have them availed so as to have a look at them and the logs to verify if they were used within the station as per the law. He as well urges the court to establish the security codes of each machine because each code represents a specific station and he alleges that the same was not done in Kacheliba Constituency hence regularity of the same was affected. This, according to him, means the results were not authentic. If the errors were established they would have an impact on the final tally of votes. The computer and the system logs that the petitioner requests to be availed in court are permanent and leave a perpetual audit trail which is fundamental in answering the fundamental questions in the petition. Under **Article 35(1)(a) of the Constitution** he is entitled to access the information. He avers that he had made efforts to have them availed by the 1st and 2nd respondents but in vain, hence the application.

In his oral submissions, the counsel for the petitioners urged the court to make the orders as the election materials should be preserved for a period of three years after elections are conducted and made available to any party. He submitted that if the respondents claim they are not available it will be because the information will be adverse to their case. He relied on provision of **IEBC Act, Section 57**, which allows the commission to furnish any person with information held in its custody, and that IEBC response that the kits are not available as they are in custody of the 2nd respondent for use in the repeat presidential election, does not address the question of applicant's entitlement to the same.

The three respondents opposed the application. the 1st and 2nd respondents filed a replying affidavit to the application, sworn by the 2nd respondent. He averred in it that the elections held in Kacheliba Constituency of West Pokot county were partial in compliance with the law and the constitution. The allegation that the electronic management system failed to work or were interfered with are untrue. The allegation that the KIEMS kit were logged 50 metres away is unsupported and baseless. He argues that the court does not need to look at electronic machines and logs where there exists sufficient information to establish a free, credible and fair election. The application is alleged, aims at amending the petition

through back door and the court should reject it. The requested for KIEMS kit were said to be unavailable as they were in use in the repeat presidential election. The sought for orders were alleged to introduce new and extraneous matters not carried in the petition. The court was urged to dismiss the application as it cannot be achieved without unnecessary inconvenience and expense. The counsel for the 1st and 2nd respondents submitted that the prayers by the petitioner are part of the petition and can be weighed after evidence is adduced. He further submitted that the right to information is not absolute and should be balanced with the respondents right to fair hearing. They have already identified witnesses based on the pleadings filed and turning around to seek information covering the entire constituency, if allowed, will be costly and a waste of court's time. the basis for the application is not well established as there is no indication why the security codes are needed. They have just made a general claim that transmission was not accurate but have not specifically stated the polling stations.

The 3rd respondent filed grounds of opposition in response to the application as follows:-

- 1) The application is an abuse of court's process.**
- 2) There is no legal basis for allowing the application.**
- 3) The application lacks merit.**
- 4) The application is incompetent and bad in law.**
- 5) The application was filed out of time.**
- 6) The application amounts to an evidence searching exercise.**
- 7) Orders sought cannot be enforced by the court if granted.**
- 8) The application is meant to embarrass the process of the court.**

The counsel in his oral submissions associated himself with the sentiments of 1st and 2nd respondents. In addition, he submitted that for such orders to be granted there have to be obvious anomalies, other than just the way the transmission of the results were done. What is prayed for in the petition is not in line with the orders sought in the application. the application therefore amounts to an amendment of the petition and **section 76(4) of the Election Act** allows a party who makes an application to amend the petition to do so within 28 days after declaration of the results. The application was filed on 27.9.2017 and results were declared on 10.8.2017. It was therefore made out of the stipulated time.

In deciding this application I wish on the onset to observe that an application for scrutiny in an Election petition, that is general in nature, wide and not specific in terms of the polling stations in which its required, materials and gadgets to be scrutinized and more importantly the information to be obtained and how that information is crucial in resolving issues raised in the petition, if granted, may end up as a wild goose chase or a fishing expedition. A party applying for scrutiny must establish a prima facie case that the exercise will yield results that will assist the court in resolving an issue or issues raised in the petition. That is why in ***Rishad A. A Amama versus IEBC sand 2 others, Petition number 6 of 2013; [2013]e KLR*** the High court at Malindi observed that, "**.....the recent trend is that scrutiny can only be ordered where a petitioner lays sufficient basis.**"

In ***Mashif Jama Adama - versus - Abdikhaim Osman Mohamed and 3 others Petition number 13 of 2014; [2014] e KLR***, the court held that:-

***"It emerges that, the primary considerations in determining whether to grant scrutiny, are whether there are polling stations with a dispute as to the election results; whether such a state of affairs has been pleaded in the petition; and whether sufficient basis has been laid - to warrant the grant to the application for scrutiny."***

The courts call for strict establishment of need for scrutiny by the applicant before the application is allowed is a caution against engaging in a tedious, back breaking, time consuming and costly exercise, of which may yield nothing relevant towards resolving the petition, bearing in mind that election petitions are time bound.

The applicant herein, in the petition as shown at the onset of this ruling requested for forms 35As and 35Bs of which have already been supplied by the 1st and the 2nd respondents. He further requests for scrutiny of the votes recorded as having been cast in the parliamentary election in Kacheliba constituency. If prayer B is founded on prayer A, of which I believe is the case, the scrutiny of votes recorded cast, is as recorded in forms 35As and forms 35Bs of which we already have. This is all there is in the petition in relation to the application herein. However, the Notice of Motion dated 27th September 2017 raises new prayers. The first one is a prayer to allow the petitioner and the registrar of this court to access the logs and the electronic voter identification machines used during 8.8.2017. The voter identification machines are the KIEMS kit. Their use was only to electronically identify the registered voters in a given polling station to ensure that only legitimate voters voted. The applicant basis for need to carry the said exercise is to establish his claim that unregistered voters who were not identified by the KIEMS kit were unprocedurally allowed to vote. The issues which arises out of the sought order is what the petitioner and the court registrar, who are not shown to be experts in extracting the relevant information from the sought for logs and KIEMS kit will do with the machines if presented to them. Secondly **Regulation 69 of Elections (General) Regulations 2012** states that:-

***"(e) in case the electronic voter identification devise fails to identify a voter the presiding officer shall:-***

***i. invite the agents and candidates in the station to witness that the voter cannot be identified using the device;***

***ii. complete verification form 32A in the presence of agents and candidates;***

***iii. identify the voter using the printed register of voters; and***

***iv. once identified proceed to issue the voter with the ballot paper to vote."***

It's therefore clear from the foregoing that KIEMS kit may not contain the full record of the voters who voted. One needs form 32As in addition to information in KIEMS kit to have a full record of the identified voters. The printed register of voters can also be of assistance if there was marking of the voters who were identified through it. Forms 32As and the printed registers were not requested for in the application for scrutiny. If the order by the applicant is granted as requested, the information sought if availed will not assist the court in determining the issue raised regarding it in the petition.

The second prayer is for scrutiny of KIEMS kit codes and logs. As earlier on mentioned the parties to be presented with the gadgets are not experts in the field. It's not clear how logs and codes if obtained will assist in resolving the issues in the petition. The two are the main prayers.

Looking at the grounds on which the said application is founded, there is a statement that the KIEMS kit were used to identify and verify the eligible voters. There's a further claim of which is wrong, that they were used to transmit results from various polling stations within Kacheliba Constituency. This is indicated as a process the 1st and 2nd respondents were statutorily required to observe without fail. This is not right and if the prayers in the application are based on the understanding, if granted, cannot yield results expected by the applicant.

The issue of conflict in the total number of voters presented in form 35 and the number portrayed on the 1st respondent website portal, cannot be resolved or explained by presentation of the items sought and obtainance of information sought from them. Probably the simple mechanism which would have resolved that issue, and of which is not sought by the applicant is scrutiny and recount of votes cast in Kacheliba Constituency.

Having observed the foregoing it's clear that the applicant has failed to establish a prima facie case, deserving orders for the sought scrutiny. The application therefore lacks merit and is dismissed with costs to the respondents.

Ruling is read in presence of the parties this 29th day of November, 2017.

**S. M. GITHINJI**

**JUDGE**

**29.11.2017**

Ms. Chebet holding brief for Mr. Muyundo for the 1st and 2nd Respondents, Mr. Nyamu for the 3rd Respondent and Mr. Ingosi for the petitioner

**MR NYAMU**

We can request clarification whether the hearing will be here or in Kitale Court.

**COURT**

Hearing of the petition on 13th, 14th and 15th December, 2017 at Kitale High Court. The necessary Gazette Notice will be issued regarding the said order.

**S. M. GITHINJI**

**JUDGE**

**29.11.2017**