



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

SAMMY KEMBOI KIPKEU.....PETITIONER

VERSUS

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

MARTIN KITUYI WEKESA, RETURNING OFFICER,

MARAKWET EAST CONSTITUENCY.....2ND RESPONDENT

BOWEN DAVID KANGOGO.....3RD RESPONDENT

RULING

1. The petitioner claims he was a voter in the election for Member of the National Assembly for *Marakwet East Constituency*. The elections were held on 8th August 2017. He avers that he voted at Sambalat Primary School polling station. He contends that the 1st respondent (hereafter *the IEBC*) and its returning officer (hereafter *the 2nd respondent*) did not conduct a free, fair and credible election. He deposes that the *declaration* that Bowen Kangogo (hereafter the 3rd respondent) won the election was *unlawful*; and, that it should be overturned.
2. Those matters are pleaded at length in the petition filed on 6th September 2017. Pending the hearing of the petition, the petitioner has presented a notice of motion praying for *three* reliefs: Firstly, for scrutiny of all election materials. In particular, he craves an order for “*scrutiny, recount, re-tally of valid votes, rejected votes, counterfoils of used and unused ballot papers*”, forms 35A, ballot boxes and seals. Secondly, he prays to be supplied with the original forms 35A and polling day diaries. Thirdly, he prays for “*certificates of penetration to the KIEMS kits and data indicating their geo-locations between the 5th and 10th August 2017*”.
3. The notice of motion is dated 9th October 2017. It is predicated upon a deposition sworn by the petitioner on even date. He avers that the 3rd respondent won by a narrow margin of 967 votes. The petitioner contends that scrutiny will establish whether the 3rd respondent fairly won the contest. Regarding the forms, the petitioner avers that they contained alterations, errors and discrepancies; that a number of them lacked security features; or, they were not signed by the presiding officers or deputy presiding officers; or, they were not executed by agents or genuine agents. He averred that some forms

did not bear the official IEBC stamp impression. He claims that at one polling station, Valley Oasis, the results were duplicated while those from Kamasha Polling Station were omitted.

4. Paragraph 11 of the supporting affidavit contains a table listing 45 polling stations where the forms contained the anomalies mentioned above. The deponent cites the following additional irregularities: That 5 polling stations were not gazetted; that form 35B in the replying affidavit of the 2nd respondent does not correspond with the one supplied at the tallying centre; that forms 35A do not correspond with form 35B; that there are discrepancies in the total valid votes and rejected votes or those displayed in the IEBC portal; that the 2nd respondent authorized voting at Mureto polling station without a KIEMS kit; and, that the presiding officer at Mureto was arrested but released under unclear circumstances. Paragraph 11 (l) of the affidavit in support of the *petition* states that at Sewerwa Trading Centre Polling Station, form 35A shows 117 votes were cast but form 35B records 177 votes.

5. At paragraph 18, the petitioner makes a curious allegation that the results announced did *not* correspond with the ballots “*in the ballot boxes*”. He thus prays that the boxes be opened for a thorough scrutiny. He also avers that the number of voters in the KIEMS kits was exaggerated. The petitioner avers that his arithmetic shows that Linah Jebii Kilimo won the election but the IEBC “*used fictitious figures*” to declare the 3rd respondent as the winner. There is an incomprehensible allegation at paragraph 27 (l) of the affidavit that IEBC “[*allowed*] *active companies on the polling queues in some station*”. The station is unnamed.

6. In a synopsis, the petitioner contends that the elections were systematically manipulated in favour of the 3rd respondent; that the entire election was not free, fair or credible; and, that the IEBC shirked its constitutional duty to conduct an accurate, transparent and verifiable election as decreed by Article 86 of the Constitution.

7. The application is contested by all the respondents. The 1st and 2nd respondents relied on the replying affidavit sworn by Martin Wekesa, the Returning Officer, on 23rd October 2017. The deponent largely denies the allegations by the petitioner. He avers that the election was conducted in accordance with the Constitution, the Elections Act and the Regulations. He contends that the application is *nebulous* and based on *hearsay*. The application is also impugned for seeking *both* scrutiny and recount.

8. The 1st and 2nd respondents aver that all the forms 35B were serialized and had security features. Copies of all the 142 official forms for all the 142 polling stations are attached and marked *MKW1* to *MKW142*.

9. Regarding the question of agents, the deponent avers that all candidates were entitled to change their agents. In answer to paragraphs 12 to 27 of the supporting affidavit, the deponent avers that the alleged anomalies are a figment of the petitioner’s imagination.

10. At paragraph 14, the deponent makes the following admissions: That at polling station number 130, there was no “provision” for returning officer; and; that at polling stations 008, 019, 031, 033, 053, 057, 069, 077, 090, 113, 114, and, 140 the forms did *not* contain the IEBC stamp impression. However, learned counsel for the 1st and 2nd respondents submitted that the stamp is *not* mandatory.

11. Regarding the claim that the ballot boxes were unsealed, the response is as follows: that at polling station number 140, the apertures and three points were sealed save for one box. However, the contents could not be removed or accessed. There is a further admission that at polling station 041, Kumbulul Primary School, the signature of the presiding officer is missing; and, that at polling station 123, there were no agents. There was also some “overwriting”. The deponent could not confirm whether the form for polling station 086, Chesirkoyo Primary school, was signed by the presiding officer; or, whether it was stamped.

12. The 1st and 2nd respondents cited Rule 29 (4) Elections (Parliamentary and County Elections) Petition Rules 2017 (hereafter *the Rules*) for the proposition that scrutiny should *only* be ordered in stations where

the results are disputed. The 1st and 2nd respondents however assert that the petitioner has failed to lay sufficient basis for an order of scrutiny. Reference was also made to Regulation 80 of the Elections (General) Regulations 2012 (hereafter *the Regulations*). The Regulation allows an aggrieved candidate, under certain conditions, to seek a recount at the polling station.

13. In a synopsis, the 1st and 2nd respondents' case is three-pronged: First, that there is no evidential basis for an order of scrutiny or recount; secondly, that the errors highlighted are minor and do not justify the prayers sought; and, thirdly, that the petitioner has embarked on a fishing expedition.

14. I will now turn to the response by the 3rd respondent. He has filed a replying affidavit sworn on 21st October 2017. He has annexed a set of forms 35A, and form 35B marked *BDK1* and *BDK2* respectively. He deposes that the petitioner is fishing for evidence; that the application is incompetent for seeking *both* scrutiny and recount; and, that there is insufficient evidence to warrant scrutiny of election materials. He is of the opinion that the petitioner should have applied for copies of forms 35A and 35B from the commission. The 3rd respondent casts doubt on the source of the forms annexed to the petitioner's affidavit.

15. In response to paragraph 6 of the affidavit, he deposes that one candidate, John Merimol, secured 387 votes as captured in form 35B. At paragraph 13 of the replying affidavit, the deponent has sketched a table of the contested forms in 45 polling stations. He concedes that at polling station 041, the form is not stamped. However, it is signed by the returning officers and some agents. The same is the case with polling stations 008, 019, 031, 033, 053, 057, 069, 077, 086, 114 and 140.

16. Regarding polling station 083, Chebilil Primary School, he concedes there is some overwriting on the form. But he avers that the overwriting relates to the names of the polling station, constituency and the presiding officer but *not* the *results*. At polling stations 113 (Barberi Trading Centre) and 123 (Marion Primary School), there were no agents. However, the presiding officer has made remarks that the agents left early. The 3rd respondent notes that he *lost* to Linah Kilimo in those two stations.

17. The 3rd respondent deposes that there were no anomalies in polling stations numbers 008, 012, 015, 018, 029, 041, 048, 068, 074-1 of 1, 079, 082, 088, 090, 091, 095, 107, 109-1 of 1, 110, 112, 116, 107, 122, 124, 130 and 142. However, he concedes that there was an error at polling station number 093, Tot Catholic Church: the total cast votes were recorded in form 35B as *194*. The true figure should be *142* as captured in form 35A. He was of the opinion that neither candidate disputed the result nor did the votes cast exceed the number of registered voters. In any event, the typographical error has been explained by the returning officer.

18. The 3rd respondent denies the allegations of irregularities at Mureto polling station; or, the allegations at paragraphs 14, 15, 16, 17, 18, 21, 22 and 23 of the supporting affidavit. In particular, he alleges that he and Linah Jebii Kilimo were at the tallying centre; and, that neither of them objected to the entries in the forms. The 3rd respondent also contends that the averments at paragraphs 25, 26 and 27 of the supporting affidavit are confusing and false.

19. The 3rd respondent averred further that the majority of candidates had agents at polling stations; and, that none of the agents or candidates queried forms 35A and 35B. He contends that it is ironical for the petitioner, who was a voter, to front for one of the candidates, Linah Jebii Kilimo.

20. Lastly, the 3rd respondent avers that the elections were conducted in accordance with the Constitution, the Elections Act and the Regulations thereunder. His view is that the application for scrutiny is unmerited and should be dismissed with costs.

21. All the parties have filed written submissions and lists of authorities. The petitioner's submissions and list of authorities were filed on 23rd October 2017. The 1st and 2nd respondents' skeleton submissions were filed on 23rd October 2017. The 3rd respondent filed submissions with a list of authorities on 23rd

October 2017. On 16th October 2017, all learned counsel for the parties addressed me on their submissions. I have considered the notice of motion, depositions, pleadings, materials and rival submissions.

22. 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”.

23. 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”*. That is not the case in the present petition: the petitioner here is praying for wider reliefs that surpass a recount or re-tally of the votes.

24. 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, copies of results for each polling station, polling day diaries, packets of counterfoils of used ballots, rejected ballots and so forth.

25. The notice of motion by the petitioner is an inelegant *omnibus* praying for *“scrutiny, recount, re-tally of valid, rejected votes, counterfoils of used and unused ballot papers”*, forms 35A, ballot boxes and seals. With respect, the terms *scrutiny, recount* and *re-tally* refer to *different* and *distinct* elements of examination of election materials.

26. *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.

27. 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.

28. 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. Furthermore, scrutiny is to be *confined* to polling stations in which the results are *disputed*. See *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.

29. The petitioner has prayed for *“certificates of penetration to the KIEMS kits and data indicating their geo-locations between the 5th and 10th August 2017”*. The petitioner avers that at *Mureto Primary School*, the elections were conducted without KIEMS kits and without the use of form 32A. Form 32A is used under Regulation 69 (1) (e) (ii) in cases where a registered voter *cannot* be identified *electronically*. Two issues emerge. First, the complaint relates to only *one* polling station but the petitioner prays for certificates and data for *all* the polling stations.

30. Secondly, I have also perused form 35A marked *MKW58* in the replying affidavit of the 2nd respondent. It is signed by agents including one *Johnstone Kipkech*, an agent for Linah Jebii Kilimo. The

latter won at the polling station with 185 votes. The comments by the presiding officer were that the “*all agent [sic] present signed*” and that the “*election was successful*”. I say this with great *caution*, and without making a *finding*, because the petition has *not* been heard and the evidence tested.

31. So much so that the petitioner has not, at *this stage*, 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 that prayer. That prayer is disallowed.

32. Like I have stated, the main petition has not been heard. The averments in the rival affidavits have not been tested through cross examination. Two important observations can be made. First, the margin of votes between the 3rd respondent and Linah Kilimo was only 967 votes. Secondly, there are serious allegations in the petition; and, the two affidavits of the petitioner in support of the petition and the notice of motion. Furthermore, there are *admissions* in the replying affidavit of Martin Wekesa of some *anomalies* which I particularized at paragraphs 9, 10 and 11 of this ruling.

33. 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.

34. The deponent, at paragraph 14 of his reply, could not confirm whether the form for polling station 086, Chesirkoyo Primary school, was signed by the deputy presiding officer, or, whether it was stamped. I have looked at the form marked MKW86. It seems to have a signature of the presiding officer. What it lacks is the signature of the deputy presiding officer and the IEBC stamp. I cannot conclusively state at this stage whether the absence of the second signature or stamp was material. But I can say that the forms do *not* have a specific place reserved for the stamp.

35. For all those reasons; and, to remove any doubt about the *authenticity* of the *forms*, I am prepared to order a *partial scrutiny* of all the forms 35A in the disputed polling stations. Logically, the examination must extend to form 35B for Marakwet East Constituency.

36. I will now turn to the prayer for a full scrutiny of all the election materials used in the constituency. 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 v Owiti and another* [2008] 1 KLR (E.P) 749.

37. 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.

38. I am satisfied that in the present case, the petition contains prayers for *scrutiny*. I cannot say the petitioner’s notice of motion has *significantly* meandered beyond the boundaries of the petition. The differences between the forms annexed to the *petition* and those annexed to the *replying affidavit* of the returning officer *may* lie in a simple fact: the petitioner admits at paragraph 9 of the *petition* that he “*received 40 forms 35A from agents*”. The returning officer on the other hand has attached all the 142 *official forms*.

39. That said, any scrutiny must be confined to the impugned polling stations. Unless that is done, the seams of the petition will be expanded. See *Rishad Hamid Amana v IEBC & others* High Court, Malindi, Petition 6 of 2013 [2013] e KLR. The respondents would be left holding the short end of the stick. In a nutshell, if scrutiny is ordered, it can only be to the extent of the matters pleaded in the body of the petition.

40. I am not satisfied that there should be a scrutiny in *all* the polling stations. At paragraph 18 of the supporting affidavit, the petitioner makes an unsubstantiated allegation that the results announced did *not* correspond with the ballots “*in the ballot boxes*”. It is a leading statement to hoodwink the court to make an order to examine the contents of the boxes. He also avers that the number of voters in the KIEMS kits was exaggerated. Again, no cogent evidence is provided in the affidavit. The petitioner avers that his arithmetic shows that Linah Jebii Kilimo won the election but the IEBC “*used fictitious figures*” to declare the 3rd respondent as the winner. The arithmetic is not provided.

41. The petitioner, who is obviously projecting the interests of Linah Kilimo, must shoulder the blame for failing to seek a recount at the polls. The two leading candidates had agents at the polling stations. 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”.

42. But there is a serious allegation that *violence* broke out after results of 140 polling stations had been declared. That fact has not been rebutted. The petitioner raises cudgels on the results of the two remaining stations: Mungwa Dispensary Hall; and, Cheptany Primary School. At that point, Linah Kilimo was leading by 296 votes. The two stations had a total of 489 registered voters. This is material considering the final margin between the two candidates was quite narrow; 967 votes only.

43. As a general rule, scrutiny is appropriate where the margin of votes between candidates 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.

44. In addition to the claims of violence, it is alleged that the ballot box at polling station 140 Mungwa Dispensary Hall was *unsealed*. The 1st and 2nd respondents’ riposte is that the apertures and three points were sealed save for one box. However, the contents could not be removed or accessed. Partial scrutiny would help to erase the doubts.

45. The Court is at liberty to order for full or limited scrutiny. The order is dictated largely by the evidence and circumstances of each case. I think a basis has been laid in this case for a *limited scrutiny* of the votes cast at four polling stations: Mungwa Primary School; Mungwa Dispensary Hall; Kumbulul Primary School; and, Chaptany Primary School.

46. Granted those reasons, the orders that commend themselves to me to grant are as follows:

(a) That there shall be a *partial scrutiny* of votes limited to a *recount* and ascertainment of the number of votes each candidate obtained in the following *four* polling stations and streams only:

(i) Chaptany Primary School Polling Station 121 – 1 of 1.

(ii) Mungwa Primary School Polling Station 119 – 1 of 1.

(iii) Mungwa Dispensary Hall Polling Station 140 – 1 of 1.

(iv) Kumbulul Primary School 041 – 1 of 1.

(b) That there shall be a *partial scrutiny* limited to examination of all the *original forms 35A* at the following *fourteen* polling stations and streams-

- (i) Mkeno Primary School 130 - 1 of 1.
- (ii) Kapchelega Wool Shade 008 – 1 of 1.
- (iii) Chepyomat Outreach Centre 019 – 1 of 1.
- (iv) Muswon Primary School 053 – 1 of 1.
- (v) Sambirir Primary School 057 – 1 of 1.
- (vi) Kimitel Primary School 069 – 1 of 1.
- (vii) Sewerwa Nursery School 074 -1 of 1.
- (viii) Sambalat Primary School 077 – 1 of 1.
- (ix) Chesirkoyo Primary school 086 – 1 of 1.
- (x) Embomir Primary School 090 – 1 of 1.
- (xi) Valley Oasis Primary School 114 -1 of 1.
- (xii) Chesetan Primary School 031 - 1 of 1.
- (xiii) Barberi Trading Centre 113 -1 of 1.
- (xiv) Maron Primary School 123 – 1 of 1.

(c) That there shall be a *partial scrutiny* of form 35B against the forms 35A. The scrutiny shall be *limited* to the polling stations specified in orders (a) and (b) above.

(d) That the partial scrutiny in orders (a) and (b) above shall be undertaken under the direct supervision of the Deputy Registrar of this Court.

(e) That the scrutiny shall commence on Monday, 4th December 2017 at 9.00 a. m. and proceed on a day to day basis until Friday 8th December 2017.

(f) That the 1st Respondent, The Independent Electoral and Boundaries Commission, shall submit all the forms 35A and the ballot boxes for the four polling stations specified above; and, the form 35B for the national assembly elections for Marakwet East Constituency by close of business on Friday 1st December 2017.

(g) That in view of constraints of space at the courthouse; and, the need to secure the materials, the exercise shall be conducted at the nearest premises of the IEBC to Eldoret.

(h) That the Deputy Registrar shall at the end of the exercise make a detailed report of her findings which report shall form part of the proceedings in this petition.

(i) That the petitioner, the 3rd respondent and Linah Jebii Kilimo shall *not* be present at the examination centre. Their lawyers shall also *not* be present at the examination centre. The petitioner and 3rd respondent are however entitled to appoint two (2) agents each during the entire exercise.

(j) That the Independent Electoral and Boundaries Commission shall be entitled to have 2 (two) agents at the venue of the scrutiny.

(k) That the petition shall be mentioned on 14th December 2017 at 9:00 a.m. for further directions.

(l) That the costs shall be in the petition.

It is so ordered.

DATED, SIGNED and DELIVERED at **ELDORET** this 29th day of November 2017.

KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of:

Mr. Magare and Mr. Nyambegera for the petitioner instructed by Magare Musundi & Company Advocates.

Mr. Onyinkwa Snr. for the 1st and 2nd respondents instructed by Onyinkwa & Company Advocates.

Mr. Onyinkwa Snr. Holding brief for the 3rd respondent instructed by Kivuva Omuga & Company Advocates.

Mr. J. Kemboi, Court Clerk.