

5. In his Petition filed on the 6/9/2017 and supported by his affidavit sworn on the 6/9/2017 and a supplementary affidavit filed on the 9/10/2017 the petitioner who garnered 11,304 votes against the 3rd Respondents 15,117 votes stated five (5) grounds thus :-

1. Voter bribery

2. Irregularities, malpractices and systematic negative campaigns ,

3. Ballot stuffing and fraudulent manipulation of the ballot papers .

4. Violence and

5. Flawed tallying .

6. According to the petitioner, the above malpractices against the Respondents had the effect that the Election was not administered by the 1st Respondent in an impartial neutral and accountable manner as required under **Article 81(e) (v) of the constitution** , and that the 1st Respondent declared the results without verification of the results from the polling stations.

7. The Respondents responses in a nutshell are that the petitioner , by his pleadings affidavits and affidavit evidence including oral evidence adduced in court has not laid sufficient basis for either the audit of the systems of technology including the KIEMs Kit , servers and website /portal used by the 1st nor for scrutiny and recount of the ballots cast in all the 99 polling stations as envisaged under Rule 29 of the Elections (parliamentary and County Elections) Petitions Rules 2017 nor have sufficient reasons for the request been sufficiently demonstrated in line with provisions of Section 82(1) of the Election Act 2011 in the context of the pleadings, evidence or both.

8. I heard the parties arguments on the application after closure of both the petitioners and the Respondents cases , thus upon all evidence had been adduced.

Applicable law and judicial precedent.

Section 82(1) of the Election Act 2011 and Rule 29 of the Elections (Parliamentary and county Elections) petition Rules 2017 give an Election court discretion to order scrutiny and/or recount of votes cast but only if the court is satisfied that such scrutiny/recount is necessary to enable the court to arrive at a just and fair determination of the petition .

The guiding principles are now settled in a myriad of Judicial precedents. However, each petition and application ought to be interrogated in accordance with its peculiar circumstances.

9. The Supreme Court in Gatirau Peter Munya Vs Dickson Mwenda Kithiji & 2 others (2014) eKLR, Raila Amolo Odinga & another Vs IEBC & 2 others (2017)eKLR, Gideon Nywanganji Wambua & another Vs IEBC & 2 others (2013) eKLR and Philip Osore Ogutu Vs Micahel Aringo & 2 Others (2013) eKLR (authorities cited by all parties) , among others are relevant to this application.

10. In the Gatirau Peter Munya case (supra) .

1. It is not automatic

2. Sufficient reason for the scrutiny and recount must be established to the satisfaction of the court.

3. Scrutiny shall be confirmed to the polling stations in which the results are disputed.

4. It is not made to be a fishing expedition for new or expanded evidence.

11. In Philip Ogutu Vs Michael Aringo & 2 Others (Supra) the court held that:-

“ It is not sufficient for a petitioner to ever in the petition that he desires scrutiny and recount in respect of all polling station in the electoral area that is the subject of the dispute . The petitioner must plead in sufficient detail why he requires the court intervention to order scrutinythe petitioner is required to state the specific polling stations that he alleges there were irregularities and therefore should be scrutinized.”

12. In Warinya Ndeti Vs IEBC & 4 others (2013) eKLR and Ledama Ole Kina Vs Samuel Kuritai Tunai & 10 others (2013) eKLR, Justice Majanja and Wendo Judge respectfully on the issue of scrutiny in all polling stations in a constituency held that Majanja J

“ the petitioner must not be permitted to launch a fishing expedition under the guise of an application for scrutiny in order to discover new evidence upon which to foist his or her case to invalidate and election “

13. Wendo J rendered that

“ An application for scrutiny of all Narok South Constituency lacks specificity , is a blanket payer that , in my view , cannot be granted.

The applicant needed to be specific on which polling stations he wanted a scrutiny 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 let at liberty to seek ambiguous prayers and waste precious courts time and incur unnecessary costs. They must be specific....”

14. The Supreme Court in the Gatirau Munya case quoted the Musikari Nazi Kombo Vs Moses Masika Wetangula (2014) eKLR, petition no. 26 of 2014.

Where , Gikonyo J rendered that

“ There were no evidence before the court that all polling stations were affected by the irregularities and malpractices complained of by the petitioner.....

It will not be supported in law to make a general order for scrutiny or re- count of all votes cast in the election ... that kind of extravagant exercise of discretion will be an affront to the constitutional policy that election petitions must be determined expeditiously ... it will also have unnecessary cost on the public.”

15. The thread running across the above decisions is that there is a requirement for specificity of polling stations where there are disputes as it is possible , but not likely that there can be disputes in all 99 polling stations.

See Mohammed Mahat Kurio Vs Abdikadir Omar Aden and two others(2013) eKLR.

Against the above legal provisions backed by the authorities cited , a basis for an order for scrutiny and recount , must be sufficiently laid by the applicant for such orders to be granted.

16. **Petitioners pleadings .**

At paragraph 24 and 25 of the petition, the petitioner stated the polling stations where election malpractices were witnessed as Luanda South , Luanda Township , Emabungo , mwiboma , Epanga , Wemilabi , Esirabe , Ebusiralo , Emululu , Emmaloba, Khwiliba.

I have considered the alleged malpractices and irregularities.

- a. The irregularities stated in the above stations in the Petition were voter bribery only.
- b. Irregularities , malpractices and systematic negative campaigns stated in the petition were not attached to any particular polling station, but were generalized .
- c. Ballot stuffing and fraudulent manipulations of ballot papers too is a general complaint across board and not for any particular polling station . No evidence was adduced on this issue.
- d. Violence too was alleged to have been experienced in the petitioners strongholds that are not stated in the Petition or in the supporting affidavits.
- e. On KIEMS Kit , it is stated that in many polling stations the date entered therein was not consistent with the information and data from the respective Form 35As. No polling stations are stated where such inconsistencies were witnessed. It is a general complaint without any specificity.
- f. It is further stated that a significant number of polling stations votes were not counted tabulated and accurately collated . None of these polling stations are stated, among other cited irregularities in unspecified stations in the petition. It is a general complaint.

17. I have noted and confirmed from the petitioners documents and affidavits that Forms 35As from the 99 polling stations in Luanda Constituency were not filed or annexed to the affidavits . The application under interrogation was filed on the 29/9/2017 , while the 1st and 2nd Respondents filed their responses to the petition and their witness affidavits on the 21/9/2017, and their documents among them the 99 copies of the Form 35As for the entire Luanda Constituency.

It is therefore evident that the present application was triggered by perusal of the Respondents responses and documents .

18. In **Philip Ogutu case** (supra) the court rendered that there must be specificity and sufficient detail in the petitioners petition as to why he requires courts intervention in the specified polling stations .The Supreme Court Judges in Raila Omolo Odinga & Others Vs IEBC & 2 others (2017) eKLR held, that lack of specificity in a petition is a cause to disallow an order of scrutiny and recount . The court further proceeded to hold that under Rule 29(4) of the 2017 Elections Rules Scrutiny is to be confirmed to specific polling stations and cannot be ordered in an entire constituency , unless irregularities are disclosed in the pleadings in all the polling stations.

19. The Main reasons advanced by the applicant /petitioner for the order of scrutiny were that some Form 35As had not been stamped by IEBC officials, had alterations that were not countersigned by IEBC officials and in some , no agents signed or the petitioners agents did not sign.

A further complaint was that unauthorized persons were allowed to sign Forms 35A as agents of the various political parties and that some petitioners agents too were not allowed into the polling stations whereas some polling centres allowed more than one agent for the parties including the petitioners agents .

20. A further complaint was that IEBC allowed unauthorized presiding officers to oversee the voting process and in particular singled out one Jairo Ganyanaya (RW2) the presiding officer for Embusakami Primary School stream 3, and termed him a stranger for the , reason that he did not have his appointment letter issued by the IEBC.

21. The respondents in their reply to the application submitted that parties are bound by their pleadings and cannot expand them through evidence.

It was their submissions that it is not open for a party once served with responses by their opponent to try and expand their grounds of the petition without amending the petition , and that the grounds ought to remain as they are stated in the petition.

22. On specific complaints of bribery, unauthorized persons signing documents, denial of agents entry into polling stations , unauthorized presiding officer , presiding over polling stations , voters claims of being given less than six ballot papers , violence upon the petitioner , Election campaign Bill board banner not pulled down by the polling day. The Respondents urged that scrutiny cannot resolve any of the alleged irregularities and are issues that can only be proved or disapproved through evidence.

They cited authorities to reiterate the purpose of scrutiny among them,.

Nicholas Kiptoo Arap Korir Salat Vs IEBC & others (2014) eKLR, Gideon Mwangangi Wambua & another Vs IEBC (2013) eKLR, Philip Osore Ogutu Vs Micharl Aringo & 2 otehers (2013) Eklr

It was their submission that without specificity of the polling stations being pleaded the court cannot issue a blanket order to cover the 99 polling stations . It was further submitted that , the petitioner himself , and none of his witnesses during cross examination and re – examination disputed the results of the election in any station.

23. I have carefully considered the pleadings and the evidence adduced as far as the application is concerned.

It is trite that where a party does not sufficiently plead his case he cannot hinge it on his opponents documents, or evidence.

The Form 35As being the basis for the request for an order of scrutiny were not filed with the petition nor annexed to the supporting affidavit including the supplementary affidavit nor with the applicants witness affidavits. The petitioner listed the 99 polling stations in the entire constituency .

24. The requirement for specificity is stated in numerous court decisions , the latest being the Supreme Court Election Petition No.1 of 2017 – Raila Omollo Odinga (Supra) and Supreme Court Election petition No. 5 of 2013 Raila odinga & others vs IEBC and others (2013) eKLR and all other decisions stated in par 9 of this ruling.

The purpose of scrutiny is well stated . It is not to unearth new evidence of expand the ground stated in the petition . It is not a fishing expedition .

However it found to be necessary , it ought to be granted for specific and identifiable polling stations .

25. I want to associate myself with the holding by Majanja J and Wendo J in Wavinya Ndeti case and Ledama Ole Kina cases supra (see Par 12 above) .

That – (Majanja J)

“ ... the petitioner must not be permitted to launch a fishing expedition under the guise of an application for scrutiny in order to discover new evidence upon which to foist his or her case to invalidate an election “.

And Wendo J that :

“ Am application for scrutiny of all Narok South Constituency lacks specificity , is a blanket prayer , that in my view cannot be granted if he wanted scrutiny in all the polling station then a basis should have been laid for each polling station The applicant cannot be let at liberty to seek ambiguous prayers and waste precious courts time and incur unnecessary costs”

26. The Supreme Court in reiterating the above necessity cited also the petition in Musikari Kombo Vs Moses Masika Wetangula (supra) (par 14 above) where Gikonyo J stated

“ That there were no evidence that all polling stations were affected by the irregularities complained of . It will not be supported by the law to make a general order for scrutiny or recount of all votes cast .

..... that kind of extravagant exercise of discretion is an affront to the constitutional policy that election petitions must be determined expeditiously.....”.

27. In my very considered opinion, the petitioner by his application and pleadings laid bear that he did not have any specific dispute on any polling station complaints that a scrutiny or recount could resolve and therefore stated generalized complaints in all the 99 polling stations , and hoped that by using the respondents would be responses and witness affidavits some irregularities and illegalities would be unearthed to persuade the court to order a scrutiny and /or a recount of the votes cast.

28. The manner the prayers sought are crafted in the application under interrogation, bring out my above findings clearly.

Prayer No. 2 :- In the alternative

“.....to order a recount and or scrutiny of the ballot cast in respect of Luanda Constituency in the polling stations whose errors have been identified in the petition and respondents answers to the petition and errors identified during trial and whose results of the election are disputed by the petitioner”.

There is no gainsaying that the prayer as crafted is but a fishing expedition as the court is being asked to find for itself which polling stations in may identify from both the respondents documents and during hearing.

29. This petition belongs to the petitioner. It is the petitioner who has the duty , before filing his pleadings to identify where his disputes lie and attach them to specific polling stations. A nexus between the pleadings and the disputes must be established and demonstrated by a party seeking the orders for scrutiny/ recount.

30. Neither the petitioner nor any of his witnesses had any dispute as to the results in any of the 99 polling stations. It is therefore my findings that the irregularities and illegalities complained of by the Petitioner, by their very nature , can only be resolved through evidence and not through scrutiny or recount.

For those reasons, the prayers of scrutiny and /or recount of all votes cast for the entire 99 polling stations in Luanda Constituency cannot be granted to the petitioner .

31. The application is therefore dismissed with no orders as to costs.

DATED ,delivered and signed at Kakamega this 21st day of November, 2017

J .N. MULWA

JUDGE

In the presence

M/S Oketch holding brief for Odeny.....or petitioner

Mr. Musyokafor 1st & 2nd Respondents

Mr. Musyoka holding brief for Tollo for 3rd Respondent

Lilian & Susancourt assistant