



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELECTION PETITION NO. 1 OF 2017

IN THE MATTER OF: THE CHALLENGE OF THE VALIDITY OF THE MANDERA COUNTY

GOVERNOR ELECTION, 2017

AND

IN THE MATTER OF: ARTICLE 1 (1); 2(2); 3(1); 4(2); 10; 21(1); 23; 38(3) (c);

47(2); 48; 81(a); & (e); 82(2) (b); 84; 86; 87(2) & (3); 88(5);

165(3) (a) AND (e); & 180(1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: SECTION 75, 76, 80 AND 82 OF ELECTIONS ACT NO. 2 OF 2011

AND

IN THE MATTER OF: LEGAL NOTICE NO.128 OF 2012, THE ELECTIONS (GENERAL)

REGULATIONS, 2012

AND

IN THE MATTER OF: THE ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS)

PETITION RULES, 2017

AND

IN THE MATTER OF: LEGAL NOTICE NO. 126 OF 2012 (THE ELECTIONS

REGISTRATION OF VOTERS) REGULATIONS, 2012

AND

HASSAN NOOR HASSAN.....PETITIONER/APPLICANT

VERSUS -

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION [I.E.B.C].....1ST RESPONDENT

THE MANDERA COUNTY RETURNING

OFFICER (DAVID MARO ADE).....2ND RESPONDENT

ALI IBRAHIM ROBA.....3RD RESPONDENT

MOHAMED AHMED ARAI.....4TH RESPONDENT

RULING NO. 4

1. The petitioner did lodge an application for Scrutiny and Recount of the votes cast in Mandera North Constituency, which is one of the six constituencies in Mandera County.

2. The plea for scrutiny and recount had also been made in the substantive petition, which challenged the results of the gubernatorial elections for Mandera County.

3. At the pre-trial conference the court did direct that the application would remain alive throughout the trial. The parties were also in agreement with the directions, because everyone appreciated that as and when parties continued leading evidence during trial, the court would be provided with material which would enable it make an informed determination on the question as to whether or not there was a sound basis for ordering for scrutiny or recount of votes, or both.

4. After all the parties had called their respective witnesses, the petitioner was convinced that he had established a basis for an order that scrutiny and recount of votes be conducted.

5. It is common ground that pursuant to Section 82 (1) of the Elections Act;

“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”.

6. It is now well established that no party to an election petition can claim an automatic right to an order for scrutiny or for recount. When a party was seeking scrutiny or recount, he has to establish sufficient reason to satisfy the election court that the order sought was warranted.

7. The petitioner has submitted that;

“... the purpose of scrutiny is to assist the court to investigate whether allegations of irregularities and breaches of the law complained of are valid”.

8. As was stated by Lesiit J. in **JACOB MWIRIGI MUTHURI Vs JOHN MBAABU MURIITHI & 2 OTHERS, ELECTION PETITION APPEAL No. 2 of 2013;**

“The only way the court can test whether an order for scrutiny and recount is deserved and justified is, first, by considering the petition and the Affidavits in support, to find out whether they disclose the petitioner’s cause of action and whether they contain concise statements of material facts relied upon in support of the allegations of impropriety or illegality and, secondly, by calling of evidence and testing of that evidence through cross-examination and re-examination process to test the veracity of the same”.

9. In effect, it is ordinarily not sufficient for the court to look at the pleadings and the supporting affidavit, when the court was called upon to determine whether or not to order for scrutiny or recount of votes.

10. Often, the assertions made by the petitioner will have been controverted by the Respondents. Therefore, if the court did not go beyond the petition and the supporting affidavits, it would imply that the court had failed to take into account the Respondent's case.

11. And if the Respondents had controverted the petition, prudence dictates that the determination by the court should be pegged on much more than the affidavits, as such affidavits would most probably contain inconsistent and contradictory assertions presented by the opposing parties.

12. It was for that reason that the court allowed the parties to lead evidence and to have the evidence tested through cross-examination, so that the determination is now based on matters which have been adequately sieved.

13. The sieve has helped separate the wheat from the chaff. It has enabled the court see the difference between allegations which were unfounded and the allegations which were properly founded.

14. Allegations were unfounded when the petitioner had failed to lead evidence which could sustain them. On the other hand, if the petitioner has led evidence which appeared credible, the court could then order that such evidence be verified through either scrutiny or recount.

15. In election petitions the evidence is tendered, first, through affidavits. Rule 12 of the Elections (*Parliamentary and County Elections*) Petitions Rules, 2017, stipulates that each person who the petitioner and the respondent intend to call as a witness at the hearing, shall swear an affidavit.

16. Any such evidence would only be relevant if it is led in respect to issues arising from the pleadings.

17. I will now handle the application in the order in which the petitioner has addressed the issues in his submissions.

1) FORM 37 C

18. The petitioner submitted that the Form 37 C which was produced by the County Returning Officer did not have results from some polling stations.

19. The 1st and 2nd Respondents pointed out that the petition did not have any assertion concerning polling stations whose results were not taken into account when the overall results for the gubernatorial elections for Mander County were being declared.

20. I have carefully perused the petition and verified that it did not incorporate any assertion concerning the exclusion of results from some polling stations.

21. Therefore, an order which may or may not demonstrate that the results from some polling stations had not been incorporated into the final tally of the valid votes cast, would not advance the petitioner's cause.

2) FORM 37 B

22. The Form 37 B presented by the **I E B C** was, on its face, on a form titled "*Collation of Presidential Election Results at the Constituency Tallying Center*".

23. The Returning Officer explained that although the title was pre-printed upon the Form, she corrected the said title so that it could refer to the Gubernatorial Election.

24. The Returning Officer also explained that all the information entered onto the form were in relation to the elections for the position of Governor for Mander County.

25. The petitioner has not explained to the court how an order for scrutiny or for recount of votes would aid the court to make an objective determination of the matters in issue that aspect of in the petition.

26. However, the Returning Officer conceded that she excluded from the final tally, results from the following 3 polling stations;

a) Al-Hidaya Primary 04;

b) Olla Primary 03; and

c) Sukela Tinfa

27. On the basis of that concession, the petitioner invited this court to order for the scrutiny and recount of ballots cast in 59 polling stations.

28. In my considered view, the petitioner did not demonstrate any reasons to warrant an order for scrutiny or for Recount of votes in the 59 polling stations.

29. As regards the 3 polling stations which the Returning Officer explained that she had excluded because the votes cast exceeded the number of registered voters, the petitioner did not dispute the explanation.

30. Nonetheless, the court holds the view that accountability demands that the information contained in the **KIEMS** kits be used to verify whether or not the decision of the Returning Officer was based on solid ground.

31. Accordingly, I direct that the **SD** Cards for the 3 polling stations, *Al-hidaya Primary School – 04; Olla Primary School – 03; and Sukela Tinfa* be examined to establish the number of Registered voters vis-a-vis the number of voters who cast their votes in the specified polling stations.

3) VOTE SWAPPING

32. On a *prima facie* basis, it does appear that the results in some four (4) polling stations were swapped. By swapping I mean that the results originally ascribed to the petitioner were later shown as being the results for the 3rd Respondent, whilst those which were originally ascribed to the 3rd Respondent were shown to be those for the petitioner.

33. The 4 polling stations were, *Rhamu Dimtu Primary School; Toss Primary School – 02; Shanqala Primary School; and Olla Primary School – 01.*

34. In answer to the petitioner's case, the Returning Officer explained that there was no swapping. Her explanation was that the respective Presiding Officers at the 4 polling Stations had simply corrected errors which had occurred when they were posting results onto the form.

35. In the petition, the complaint was not just about the alleged swapping. It was specifically that there was swapping of results, without counter-signing.

36. In the event that the swapping was meant to record the correct results, the person doing it ought to have appended his or her signature.

37. However, I also noted that at Tossi Primary School – 02, the petitioners agent, Abdikarim Ali signed the Form. By signing the form, the petitioner's agent had verified the authenticity of the results on the said form. Therefore, there would be no further need for the court to have to verify the authenticity of the said results, through either scrutiny or recount.

38. But in the spirit of accountability on the part of **IEBC**, the court holds the view that the results in the polling stations of Rhamu Dimtu, Shanqala Primary School and Olla Primary School – 01, need to be verified.

4) ALTERATION OF FORMS 37 A, WITHOUT COUNTER-SIGNING

39. According to the petitioner, if a result is altered on the Form, such alterations must be counter-signed by the person who made it.

40. The respondents reasoning was that when the Presiding Officer had not counter-signed any alteration or amendment which he or she had made on the results' form, the results would not be affected, especially when the agents representing the candidate or the political parties had signed the form.

41. In my considered opinion any alteration or amendment which is made on a document, ought to be authenticated by the person who effected it. Such authentication ought to take the form of a signature or such other endorsement which would enable other persons to be able to ascertain the identity of the person who did so. Secondly, the person's signature or other endorsement will constitute the fact that he or she was taking responsibility for had been done.

42. In the absence of anything which could enable the court or any other persons to authenticate the alteration or the amendment, there would be a real danger that any person could simply effect changes without being held responsible or accountable for it.

43. The petitioner submitted that the results which had been altered or amended, without being counter-signed, gave rise to differences between the declared results and the results in the forms.

44. In my considered opinion, the only way to verify whether or not the un-authenticated amendments gave rise to differences between the declared results and the results in the form, would be through a perusal of the relevant **SD** cards.

45. Accordingly, the information from the **SD** Cards in relation to the following polling stations will be scrutinized, to verify the alleged differences between the declared results and those in the forms;

1) Ashabito Primary School 02

2) Bambo West Primary School

3) Rhamu Dimtu Primary School 02

4) Garsey Primary School 01

5) Libin Girls Primary School 01

6) Ado Saden Polling Station 01

7) Shanqala Primary School 01

8) Awara Polling Station 01

9) Ladeni Polling Station 01

10) Tossi Primary School 02

11) Kubi Primary School 01

12) Morothile Primary School 03

13) Barwaqo Primary School 02

14) Langura Primary School 01 and

15) Korm Adow Polling Station.

5) FAILURE TO SIGN FORMS 37A BY PRESIDING OFFICERS

46. The petitioner has asked the court to order for the scrutiny of ballots which were cast, so as to enable the people of Mandera County and the court to determine the actual votes cast and in whose favour the said votes were cast.

47. The petitioner listed the following polling stations as affected in that respect. Those are;

- 1) Awara Primary School 01**
- 2) Ado Saden 01**
- 3) Koban Daka 02**
- 4) Morothile Primary School 01**
- 5) Dara Farma Primary School 01**
- 6) Tossi Primary School 02**
- 7) Bur John Primary School 01**
- 8) Shir Shir Primary School 01**
- 9) Shir Shir primary School 02**
- 10) Guticha Priamary School 01**
- 11) Ashabito Primary School 01**
- 12) Bambo West Primary School 01**
- 13) Usubey Centre**
- 14) Darab Athathi Primary School 01**
- 15) Sigare Hills Polling Station.**

48. Out of those polling stations, 8 forms were signed by either the Presiding Officer or his/her Deputy or both of them. Those polling stations were;

- 1) Tossi Primary School 02**
- 2) Bur John 01**
- 3) Usubey Centre 02**
- 4) Shir Shir Primary School 01**
- 5) Shir Shir Primary School 02**
- 6) Ashabito Primary School 01**
- 7) Bambo West 01**
- 8) Sigare Hills Polling Station.**

49. There is therefore need to verify whether or not the results from the remaining 7 polling stations matched, between those that were declared and those in the **KIEMS** kits.

50. Accordingly, the court will carry out that exercise.

6) FORMS 37 A NOT SIGNED BY ANY AGENTS

51. Pursuant to Regulation 79 (1) of the Elections (*General*) Regulations, each of the candidates or agents is supposed to sign the declaration of results, if he or she is present when the Presiding Officer announces the results at the polling station.

52. However, it is the responsibility of the candidate or the agent who either refused or otherwise fails to sign the declaration form, to record the reasons for his refusal or failure.

53. When a candidate or his agent does not give any reason for refusal or failure to sign the declaration form, the Presiding officer is supposed to record the fact of the said refusal or failure.

54. Most significantly, pursuant to Regulation 79 (6) of the Elections (*General*) Regulations;

“The refusal or failure of a candidate or an agent to sign a declaration form under subregulation (4) or to record the reasons for their refusal to sign as required under this regulation shall not by itself invalidate the results announced under subregulation (2) (a)”.

55. In that event the refusal or failure by the petitioner or by his agents, to sign the declaration form cannot be the foundation for an order for either scrutiny or for a recount.

56. Furthermore, pursuant to Regulation 79 (7) of the Election (*General*) Rules, even the absence of a candidate or an agent at the signing of a declaration form or the announcement of results shall not, by itself, invalidate the results announced.

7) ASSAULT AND CHASING AWAY OF THE PETITIONER’S AGENTS

57. The petitioner led evidence in regard to seven polling stations, as being the ones from which his agents were assaulted and forcibly removed.

a) Korm Adow

58. The petitioner’s agent for that polling station testified that polling for persons registered to vote at Korm Adow did not take place there. Instead he said that voting took place at Olla Primary School.

59. If voting took place at Korm Adow, where there was no agent for the petitioner who could have been assaulted and chased away, there is no reason for recount or scrutiny.

b) Usubey Centre

60. In the first instance, the name of the petitioner’s agent was missing from the Polling Station Diary for Usubey Centre.

61. Therefore, on a *prima facie* basis, he was not at that polling station and could not therefore have been chased away from there.

c) Sigare Hills

62. The Polling Station Diary for the Sigare Hills Polling Station was signed by an **E F P** agent.

63. As each party was only permitted one agent at any one polling station, I find, on a *prima facie* basis,

that Isaack Ali Adan (**PW 10**) was not an agent for the petitioner.

d) Olla Primary School – 02

64. The petitioner's agent signed the Polling Station Diary as an agent for the Third Way Alliance. It therefore shows that he was present during the counting of votes and the signing of the declaration of results.

65. The allegation that Bashir Adan Isaack was the petitioner's agent at *Olla Primary School – 02*, and that he was removed involuntarily, is not borne out by the evidence tendered.

e) Kubi Primary School

66. The petitioner's witness, Abdi Ibrahim Mohamed (**P W 13**) gave evidence which was somewhat dramatic. He was assaulted by women and children, who occasioned him severe injuries to his buttocks.

67. Although he was allegedly injured at 6.00 p.m, and even though he was allegedly bleeding profusely, the witness remained at the polling station until 9.00 p.m.

68. The fact that he remained at the polling station for hours after the alleged attack appears to lend credence to the evidence of the Presiding Officer (**R1 – RW 9**) who said that the petitioner's agent was not injured.

69. The court finds the evidence of PW 13 to be unreliable because the witness, who had been allegedly injured severally, did not visit the hospital until on 14th August 2017.

f) Tossi Primary School – 02

70. Suleiman Mohamed Fila testified that he was chased away from the polling station when votes were still being counted. However, he also testified that he was only chased away after he protested the results which were announced. If he was present whilst the votes were announced, so that he lodged a protest, then it follows that he cannot have been chased away during the counting of votes.

71. I find him to be an unreliable witness.

g) Darab Athathi Primary School

72. Adow Molu Kike (**PW 16**) testified that he was removed from Darab Athathi forcibly, before results were announced. He said that he was assaulted, resulting in injuries.

73. However, the P3 Form was not issued to him until 14th August 2017.

74. He said that although only 40 persons voted at Darab Athathi, the results announced by the Presiding Officer showed that 46 persons had voted.

75. He attributed the results to stuffing of the ballot box.

76. In relation to the claim that his agents were chased away, the petitioner's witnesses failed to make available any reliable evidence.

77. Therefore, I find no basis for ordering either scrutiny or recount based on the allegation that the petitioner's agents were chased away from the polling stations where they had been assigned the roles of agents.

h) Irregular Deployment of Presiding Officers

78. The petitioner produced witnesses who testified that they had been hired by the **I E B C** after being trained. However, on the evening preceding the elections, 70 of the trained Presiding Officers and Deputy Presiding Officers were suddenly replaced by other persons.

79. It was the petitioner's case that the persons who replaced the trained personnel, were strangers to the electoral process.

80. Therefore, the petitioner submitted that the **RETURNS** which were signed by the alleged strangers were uncertain, unreliable and unverifiable.

81. In my considered opinion, if the persons who were strangers to the electoral process had performed the role of Presiding Officers or Deputy Presiding Officers, the results flowing from that process would have been a sham.

82. It would be unnecessary to conduct either scrutiny or a recount. The results ought to have been disregarded, once it was verified that the process was conducted by strangers.

83. As the Presiding Officers and their deputies were all gazetted by the **I E B C** prior to the commencement of the process of voting, none of them was a stranger to the electoral process.

i) Failure to take Ballot Boxes to the Tallying Centre

84. The petition does not have a complaint that ballot boxes were not taken to the tallying centre.

85. In any event, Regulation 86 (2) (b) of the Elections (*General*) Regulations does not require Presiding Officers to deliver the ballot boxes to the tallying centre.

86. The Returning Officer is given the responsibility of keeping the sealed ballot boxes in safe custody.

87. The petitioner has not demonstrated that the ballot boxes were not kept in safe custody, by the Returning Officer.

88. Therefore, there is no basis for ordering scrutiny or recount, on the strength of the alleged failure to have the Presiding Officers deliver the ballot boxes to the tallying centre.

89. In conclusion, the court finds and holds that the petitioner is entitled to the specific orders set out above. There shall be conducted the specified processes of scrutiny as laid out. The said scrutiny will largely involve the **KIEMS** kit or other materials as indicated.

90. The exercise will be conducted by the learned Deputy Registrar of the Commercial and Tax Division of the High Court at the Milimani Courts, Nairobi.

91. Each of the parties will be entitled to have a maximum of four (4) agents at any one time when the Deputy Registrar will be conducting the task assigned to her.

92. In the event that the parties have issues which they cannot resolve mutually, the Deputy Registrar will refer such issues back to the court, for determination.

93. The Deputy Registrar will file her report in court within the next 14 days from today.

94. The costs of the application shall abide the outcome of the petition, so that if it is successful, the petitioner shall receive the costs thereof. On the other hand, if the petition were to ultimately fail, the petitioner will pay to the respondents, the costs of the application.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 21st day of November 2017.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Prof. Ojienda for the Petitioner

Miss Kitur for the 1st Respondent

Miss Kitur for the 2nd Respondent

Issa, Busaidy & Mrs Ahomo for the 3rd Respondent

Issa, Busaidy & Mrs Ahomo for the 4th Respondent

Collins Odhiambo – Court clerk.