



IN THE HIGH COURT AT KISUMU

ELECTION PETITION NO. 3 OF 2017

IN THE MATTER OF ELECTION FOR GOVERNOR FOR

KISUMU COUNTY

BETWEEN

JACKTON NYANUNGO RANGUMA.....PETITIONER

AND

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

THE COUNTY RETURNING OFFICER, THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION, KISUMU COUNTY.....2ND RESPONDENT

H.E. PETER ANYANG' NYONG'O.....3RD RESPONDENT

RULING NO. 2

Introduction

1. This petition filed by Jackton Nyanungo Ranguma contests the return of Peter Anyang' Nyong'o as the Governor of Kisumu County following the general elections held on 8th August 2017. The issue for consideration in this ruling is whether I should order scrutiny and recount of the vote in terms of prayer (e) and (f) of the Notice of Motion dated 6th September 2017 which states:

(e) Pending the hearing and determination of this petition, the court orders for the audit and scrutiny of all the election materials used and unused that were issued by/to the Independent Electoral and Boundaries Commission (IEBC) in the election of the Governor of Kisumu County in the elections held on 8th August 2017 and for a recount and re-tallying of all the votes cast in the gubernatorial elections for the Kisumu County upon which a report be filed in court on the audit, scrutiny and re-tallying.

(f) Upon receipt of the report on audit, scrutiny, recount and re-tallying, the court makes further order on the pending part of the petition.

2. The application is supported by the petitioner's affidavit and the grounds set out on the face of the application. The 1st and 2nd respondents opposed the application through the 2nd respondent's affidavit

sworn on 8th October 2017. At the initial pre-trial conference, I suggested to the parties and the parties agreed that the application for scrutiny should be dealt with at the close of the petitioner's case. In due course, I heard the petitioner and 11 witnesses and after the close of his case, I invited the parties to make oral submissions on whether I should grant the application for scrutiny and recount of the vote.

Submissions

3. Mr Onsongo, counsel for the petitioner, submitted that at this stage the question for the court is whether the petitioner has made out a *prima facie* case for an order for scrutiny and recount. Counsel pointed out that respondents' response to the petitioner's allegations was to question the credibility of witnesses and not challenge the substance of evidence. He recalled that the petitioner and his witnesses produced evidence of alteration of figures at the polling stations and tallying centres in order to favour the 3rd respondent. That there was evidence that some ballot boxes were found elsewhere other than where they ought to have been. He noted that violence was inflicted on the petitioner's agents and that there was rampant breaking of seals on ballot boxes. Counsel submitted that the evidence also established that the results were not collated and pronounced openly and accurately and that election materials were not kept properly.

4. The petitioner's case is that the 1st and 2nd respondents did not comply with **Article 86** of the Constitution in so far as the system of voting used on 8th August 2017 was not simple, accurate, secure, accountable and transparent. Counsel submitted that the only way to determine whether the 1st and 2nd respondents complied with their constitutional obligations was to verify this fact by taking a look at the election material in the ballot boxes. Counsel therefore urged the court to allow the application.

5. Mr Mukele, counsel for the 1st and 2nd respondents, opposed the application on the ground that the Forms 37A from all the polling stations were not disputed. Counsel cited ***Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others NRB Civil Appeal No. 105 of 2017 [2017]eKLR*** where the Court of Appeal held that the will of the people is expressed and recorded at the polling stations and reflected in the Forms 37A which record the votes in the County Governor election. He submitted that since the petitioner did not dispute the Forms 37A, the application for scrutiny and recount ought to be dismissed. Counsel further submitted that the petitioner has not met the threshold for scrutiny set out in **Rule 29(2)** of the ***Elections (Parliamentary and County Elections) Petitions Rules, 2017*** ("the **Rules**") which requires the petitioner to establish "*sufficient reason*" before the court can order scrutiny and recount of the vote. Counsel contended that all the evidence presented by the petitioner and his witnesses cannot support the application for scrutiny.

6. Mr Mukele also submitted that all the results were transmitted in accordance with **section 39(1A)** of the ***Elections Act, 2011*** ("the **Act**") which requires that results from the Polling Station, contained in Form 34A, be ferried to the Constituency Tallying Centre where the results from all the Polling Stations are collated, tallied and recorded in Form 34C which is then taken to the County Tallying Centre. Counsel maintained that election in issue in this petition is the gubernatorial election and not the Presidential election where electronic transmission is required by **section 39(1C)** of the **Act**. Mr Mukele submitted the application should be dismissed taking into account the evidence and the fact that the margin of votes between the petitioner and 3rd respondent was too large to overcome.

7. Counsel for the 3rd respondent, Hon. Orengo, opposed the application by pointing out that the petitioner was shy in stating the results of the election in the petition, affidavits and application as he knew the results could not be surmounted by the allegations and evidence. He noted that the petitioner did not cite any polling stations whose results were disputed as required by the **Rules**. Counsel further submitted that all the allegations in relation to election offences were not pleaded and could not form part of the case or support a case for scrutiny. Hon. Orengo attacked the documents generated by Levi Otieno Oduor (PW 4) who testified that he had access to the 1st respondent's servers and was able to obtain certain results which differed from the declared results. He contended the documents could not be relied upon as they were not authenticated. Counsel stated that the petitioner's evidence was weak and the totality of that evidence could not shift the evidential burden to the respondents. Hon. Orengo submitted

that the petitioner's application amounted to a fishing expedition, was a wild goose chase and ought to be dismissed.

Determination

8. The law on scrutiny, recount and re-tallying of the vote is now well settled. The election court has jurisdiction to order scrutiny of votes. **Section 82(1)** of the **Act** gives the court wide jurisdiction in this respect and it states 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 scrutiny of votes to be carried out in such a manner as the election court may determine.*”

9. **Rule 29** of the **Rules** sets out the mechanics and directions for scrutiny of the vote. It provides, in part, as follows:

29(1) The parties to the proceedings may, at any stage, apply for scrutiny of the votes for purposes of establishing the validity of the votes cast.

(2) Upon an application under sub-rule (1), an election court may, if it is satisfied that there is sufficient reason, order for a scrutiny or recount of the votes.

(3) The scrutiny or recount of ballots shall be carried out under the direct supervision of the Registrar or Magistrate shall be subject to the directions the election court gives.

(4) Scrutiny shall be confined to the polling stations in which the results are disputed and shall be limited to the examination of.....

10. An authoritative statement by the Supreme Court of the principles applicable before the court can grant an order for scrutiny is set out in ***Gatirau Peter Munya v Dickson Mwendu Kithinji & 2 others, Supreme Court Petition No. 2b of 2014 [2014]eKLR*** as follows:

(a) The right to 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 the 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 requests 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 vote is called into question in the terms of Rule 33(4) of the Election (Parliamentary and County Election) Petition Rules.

11. The above principles were affirmed more recently by the Supreme Court in a ruling on an application for scrutiny in ***Raila Amolo Odinga and Another v Independent Electoral and Boundaries Commission and Others Presidential Petition No. 1 of 2017[2017]eKLR*** where, after reviewing the authorities and

evidence, it observed that:

[62] Having addressed our minds to the above issues, it is our view that first, we note that as correctly argued by Counsel for the 3rd Respondent, a party must be bound by its pleadings and secondly, any scrutiny of either the Forms or the technology must be made for a sufficient reason. Any prayer in the application that would seem to be an expansion of the case for the Petitioners or which would in effect be a fishing exercise to procure fresh evidence not already contained in the Petition would and must be rejected.

12. I have considered petitioner's case in light of the pleadings, affidavits and witness testimony. I am aware that at this stage I am not required to make a definitive determination or finding on the petitioner's case as the respondents are yet to make their case. But having considered it, I find that the petitioner's petition and application for scrutiny suffers from a congenital birth defect as the petition or affidavit do not set out which polling stations require further examination. This defect is aggravated by the fact that the petitioner has applied for, "a recount and re-tallying of all the votes cast in the gubernatorial elections for the Kisumu County."

13. The necessity to identify specific polling stations was emphasized in the **Gatirau Peter Munya Case (Supra)** where the Supreme Court held;

[J]udicial opinion distinctly favours a view that commends itself to us: that, an application for scrutiny and recount, must be couched in specific terms, and clothed with particularity, as to which polling stations within a constituency are to attract such scrutiny. If a party lays a clear basis for scrutiny in each and all the polling stations within a constituency, then the order ought to be granted. Otherwise, a prayer pointing to a constituency but lacking in specificity is not to be entertained.

14. The requirement to set out the polling stations whose results are impugned is further highlighted by the decision in **Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others (Supra)** which was affirmed by the Supreme Court in **Raila Amolo Odinga and Another v Independent Electoral and Boundaries Commission and Others (Supra at para. 264)**. In that case, the Court of Appeal underpinned the finality of results recorded at the polling station as follows:

It is clear beyond peradventure that the polling station is the true locus for the free exercise of the voters' will. The counting of the votes as elaborately set out in the Act and the Regulations, with its open, transparent and participatory character using the ballot as the primary material, means, as it must, that the count there is clothed with a finality not to be exposed to any risk of variation or subversion. It sounds ill that a contrary argument that is so anathema and antithetical to integrity and accuracy should fall from the appellant's mouth.

15. The petitioner's case was also premised on the inconsistency of results recorded in the forms and those transmitted and downloaded by PW 4 from the 1st respondent's server and those recorded by other witnesses from its public portal. Several witnesses also spoke of results being announced which differed at the polling stations. The answer to this issue is to be found in an understanding of **section 39** of the **Act** which provides as follows:

39(1) The Commission shall determine, declare and publish the results of an election immediately after the close of polling.

(1A) The Commission shall appoint constituency returning officers to be responsible for-

(i) tallying, announcement and declaration, in the prescribed form, of the final results from each polling station in a constituency for the election of a member of the National Assembly and members of the county assembly;

(ii) collating and announcing the results from each polling station in the constituency for the

election of the President, county Governor, Senator and county women representative to the National Assembly and

(iii) submitting, in the prescribed form, the collated results for the election of the President to the national tallying centre and the collated results for the election of the county Governor, Senator and county women representative to the National Assembly to the respective county returning officer.

(1B) The Commission shall appoint county returning officers to be responsible for tallying, announcement and declaration, in the prescribed form, of final results from constituencies in the county for purposes of the election of the county Governor, Senator and county women representative to the National Assembly.

(1C) For purposes of a presidential election the Commission shall —

(a) electronically transmit, in the prescribed form, the tabulated results of an election for the President from a polling station to the constituency tallying centre and to the national tallying centre;

(b) tally and verify the results received at the national tallying centre; and

(c) publish the polling result forms on an online public portal maintained by the Commission.

16. It is clear that from **section 39(1C)** of the **Act** that electronic transmission and publication of polling result in a public portal is only a statutory requirement for the Presidential election. In all other cases, including the county Governor election, the transmission of results contemplated by **section 39(1A)** and **(1B)** of the **Act** is that the votes at the Polling Station are counted and recorded in Form 34A which is forwarded to the Constituency Tallying Centre. The Constituency Returning officer tallies all the results from all the polling stations and records them in Form 34B. Forms 34B from all the Constituency Tallying Centres are forwarded to the County Tallying Centre where the County Returning Officer tallies all the results from the Forms 34B and announces the election results based on Form 34C.

17. Even assuming accepting the errors, omissions and inconsistencies highlighted by PW 4 and the other witnesses, the legal position remains that the votes as recorded in Form 34A are final. Unless Forms 34A are disputed, any errors in electronic transmission of results or publication in the 1st respondent's public portal cannot, of themselves and without more, invalidate Forms 34A. Where the results from the polling station are electronically transmitted from the polling station to any other portal as the 1st respondent may direct, such results can only be termed as provisional thus underlining the primacy and finality of Form 34A. **Regulation 82** of the **Elections (General) Regulations, 2012** suggests that these results are provisional. It provides that;

82(1) The presiding officer shall, before ferrying the actual results of the election to the returning officer at the tallying venue, submit to the returning officer the results in electronic form, in such a manner as the Commission may direct.

(2) The results submitted under sub-regulation (1) shall be provisional and subject to confirmation after the procedure described in regulation 76.

18. For the reasons I have set out above, I find and hold that the allegations made by the petitioner and his witnesses are broad and vague and cannot form the basis of an order for scrutiny. I am not convinced that at this stage it would be appropriate to make the orders sought. Perhaps the examination and cross-examination of the respondent's witnesses and more particularly the Returning Officers, may convince me to act *suo moto* but at this stage, the only order I can give is to dismiss the application.

Disposition

19. I dismiss the Notice of Motion dated 6th September 2017 in so far as it relates to scrutiny and recount of the vote as prayed. The costs of the application shall be in the petition.

DATED and DELIVERED at KISUMU this 16th day of November 2017.

D. S. MAJANJA

JUDGE

Mr Onsongo instructed by Onsongo & Company Advocates for the petitioner.

Mr Mukele with him Mr Kubebea and Mr Juma instructed by Mukele Moni & Company Advocates for the 1st and 2nd respondents.

Hon. Orengo, Hon. Oluoch, Ms Aulo and Mr Obondi instructed by Rasheed, Rage & Nassir Advocates for the 3rd respondent.