



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**THE ELECTIONS ACT, 2011**  
**ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS) PETITION RULES 2017)**  
**ELECTION PETITION NO. 19 OF 2017**

**BETWEEN**

**JANE MURINGI WANGUI .....PETITIONER**

**VERSUS**

**INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**RETURNING OFFICER EMBAKASI**

**NORTH CONSTITUENCY ..... 2<sup>ND</sup> RESPONDENT**

**JAMES MWANGI GAKUYA ..... 3<sup>RD</sup> RESPONDENT**

**BEFORE: R. NGETICH**

**DIRECTIONS/RULING**

The Petitioner listed four witnesses and filed their Affidavits. During the Pre-trial Conference, Counsel for the Petitioner indicated to the Court that the Petitioner was to avail the four witnesses who had filed Affidavits. All parties indicated that no other interlocutory applications were to be made after commencement of the trial. The suit was set down for hearing.

Before the Pre-trial Conference parties had argued an application dated 6<sup>th</sup> September 2017 which was filed together with the petition. Ruling was delivered prior to the Pre-trial Conference.

In the said application, the Petitioner had sought scrutiny of forms 35A and form 35B and access to the forms and KIEMS kits. It was brought out clearly in the application that the Petitioner wanted access to the information in the SD cards. The Court allowed information in the SD cards to be shared among parties before the Deputy Registrar and in the presence of Judiciary ICT Officer.

At the commencement of the hearing, the forms had not been supplied and information in the SD cards shared. The hearing was adjourned and first Respondents directed to comply to supply the forms and share the data by 3pm.

Report filed by the Deputy Registrar confirmed that forms 35A and 35B were certified and supplied to the Petitioner and certified copy also filed in Court as the copy in the Court file was not legible.

I believe the information in the SD cards was meant to assist the Petitioner in prosecuting her case. At the time the hearing commenced, all the parties had information in the SD cards.

At the close of Petitioner's case, Counsel for the Petitioner sought to avail IT expert to adduce evidence on SD cards. My initial orders were very clear. I allowed access to information in the SD cards. I did not allow scrutiny of the SD card and that is why I did not direct any party to avail any expert. My order was limited to sharing of information in the SD cards. The exercise was conducted as directed before the deputy registrar and in the presence of ICT officer of the Judiciary. If I had ordered scrutiny, the Deputy Registrar with the assistance of an ICT Officer would have been required to a report and file in Court.

Section 82 (1) of the Elections Act (No. 24 of 2011) provide that a party can make an application for scrutiny or a Court on its own motion may order scrutiny if basis has been laid. I had however indicated in my earlier ruling that the allegations made by the Petitioner had been denied by the Respondents. I have not heard the Respondents' evidence. The Petitioner may file formal application for scrutiny after close of 1<sup>st</sup> and 2<sup>nd</sup> Respondent's case to be considered while proceeding with 3<sup>rd</sup> Respondent's case.

There is no rule or provision of law which says scrutiny must be done at the close of the Petitioner's case. Counsel for Petitioner has indicated that other Courts have ordered scrutiny after Petitioner's case; Practice in other Courts cannot bind this Court on the stage at which it should make a finding on whether scrutiny should be done unless the Election Act or Elections Rules provide so. The Court has to be satisfied that a basis has been laid for scrutiny and scrutiny in respect to which polling station.. An expert's analysis or report would arise from scrutiny which I have not ordered. I therefore reject the Petitioner's application to avail an additional witness and direct the Petitioner to close her case and hearing to proceed as scheduled.

**Dated and Delivered at Nairobi this 15<sup>th</sup> day of November 2017**

.....

**RACHEL NGETICH**

**JUDGE**

**IN THE PRESENCE OF**

..... COURT ASSISTANT

.....COUNSEL FOR PETITIONER

.....COUNSEL 1<sup>ST</sup> AND 2<sup>ND</sup> RESPONDENTS

.....COUNSEL FOR 3<sup>RD</sup> RESPONDENTS