



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ELECTION PETITION NO. 5 OF 2017

IN THE MATTER OF THE ELECTION ACT NO. 24 OF 2011 LAWS OF KENYA

**AND THE ELECTIONS (GENERAL REGULATIONS, 2012 AND ELECTIONS
(PARLIAMENTARY AND COUNTY) PETITIONS RULES, 2017**

AND

IN THE MATTER OF PARLIAMENTARY ELECTIONS FOR

**SOUTH MUGIRANGO CONSTITUENCY, CONSTITUENCY NO. 262, HELD ON 8TH
AUGUST 2017**

BETWEEN

HON. DENNIS MAGARE MAKORI.....1ST PETITIONER

HON. SAMSON BICHANGA 2ND PETITIONER

AND

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

WILSON KIMUTAI KIPCHUMBA 2ND RESPONDENT

SILVANUS OSORO ONYIEGO 3RD RESPONDENT

JACOB MBICHA MOGERE 4TH RESPONDENT

RULING

1. Dennis Magare Makori and Samson Bichanga (hereinafter the Petitioners) have moved this Court vide a notice of motion dated 8/12/2017 for orders that:

1. **THAT** the Court orders for the audit and scrutiny of the votes cast, the results declared, statutory Forms 35A in accordance with Rule 29 (4) of the Election (Parliamentary and County Elections) Petition Rules, 2017 concerning the elections of Member of National Assembly South Mugirango Constituency held on August 8, 2017 regarding the following polling stations:

(i) Gesonso Primary School Code 045262130602802;

- (ii) Engeti Primary School Code 045262131010301;
- (iii) Riosanta Primary School Code 045262130805901;
- (iv) Manywanda 'B' Primary School Code 045262130602401;
- (v) Manywanda 'A' Primary School Code 045262130602402;
- (vi) Nyabigege DOK Primary School Code 045262130500501
- (vii) Tabaka D.E.B. Primary School Code 045262130500103;
- (viii) Nyangweta Primary School Code 063-002;
- (ix) Mariwa Primary School Code 045262130908901;
- (x) Bosaga Primary School Code 04526213010701;
- (xi) Bosaga Primary School Code 04526213010702;
- (xii) Nyakorere Primary School Code 04526213060260;
- (xiii) Makara Primary School Code 045262130806201;
- (xiv) Nyambine Jua Kali Tea Buying Polling Station Code 045262130807601;
- (xv) Nyabikondo Primary School 045262130807701; and
- (xvi) Rangeti Primary School 045262130807501.

2. **THAT** the Court orders for the scrutiny and recount of the votes cast in accordance with Rule 29 (4) of the Election (Parliamentary and County Elections) Petition Rules, 2017 concerning the elections for Member of National Assembly South Mugirango Constituency held on August 8, 2017 regarding the following polling stations:

- (i) Makara Primary School Code 045262130806201;
- (ii) Gesonso Primary School Code 045202130602802;
- (iii) Engeti Primary School Code 045262131010301;
- (iv) Riosanta Primary School Code 045262130805901;
- (v) Orwaki DEB Primary School Code 45262130500902;
- (vi) Manywanda 'B' Primary School Code 045262130602401
- (vii) Manywanda 'A' Primary School Code 045262130602402;
- (viii) Nyambine Jua Kali Tea Buying Polling Station Code 045262130807601;
- (ix) Nyakorere Primary School Code 045262130602601.

3. **THAT** the Court orders for the audit and scrutiny of the seals used at opening, close of polls and after counting of votes and as detailed in the Polling Station Diaries in accordance with Rule 29 (4) of the Election (Parliamentary and County Elections) Petition Rules, 2017 concerning the elections

for Member of National Assembly South Mugirango Constituency held on August 8, 2017 regarding the following polling stations:

(i) Bosaga Primary School code 04526213010701; and

(ii) Bosaga Primary School code 04526213010702

4. **THAT** the Court orders the 1st Respondent to avail, for scrutiny, all the original Forms 35A, polling day diaries, packets of rejected ballot papers and statements made thereto, packets of counterfoils of used ballot papers, the inventory of results declaration forms, (with serialization) as distributed to the presiding officers for the polling stations set out in paragraphs 1, 2 and 3 above.

5. **THAT** the Court orders the 1st Respondent to avail, for scrutiny and recount, the ballot boxes for the polling stations mentioned in paragraph 2 above.

6. **THAT** the Court directs that the High Court Registrar compiles a report on the outcome of the scrutiny of the forms and that the report be treated as duly filed.

7. **THAT** the Court grants leave to all the parties to comment on the outcome of the scrutiny.

8. **THAT** the Respondents bear the Costs of this Application.

9. **THAT** the Court grants any other relief that are in the circumstances, just and fair.

2. The application is premised on grounds:

(a) That on 8th August 2017, the parliamentary elections were held in South Mugirango Constituency in Kisii County and on 10th August 2017, the 2nd Respondent announced and declared the 3rd Respondent as the Member of Parliament-elect of South Mugirango Constituency.

(b) That the Petitioners, being aggrieved by the results, sought to challenge the said election.

(c) The Petitioners raised serious constitutional questions concerning the manner in which the elections were conducted and results tallied.

(d) That one of the grounds raised is inaccurate tallying of results.

(e) That under Article 86 of the Constitution the system or method of voting and elections ought to be simple, accurate, verifiable, secure, accountable and transparent.

(f) The voter cast, counted and declared for all the candidates should be correctly entered in Form 35A and the total votes case accurately tabulated.

(g) The 1st and 2nd Respondents did not comply with the constitutional requirement of accurate tallying and tabulation of results.

(h) Specifically, the incorrect tallying occurred in the following polling stations: Gesonso Primary School Code 045262130602802, Engeti Primary School Code 045262131010301; and Riosanta Primary School 045262130805901.

(i) In Gesonso Primary School, the total votes cast declared in Form 35A is 310 yet the accurate figure is 280.

(j) In Engeti Primary School, the total votes cast declared in Form 35A is 366 yet the accurate figure is 286.

- (k) In Riosanta Primary School, the total votes case declared in Form 35A is 212 yet the accurate figure is 204.
- (l) The Respondents did not offer an adequate explanation for the anomaly. They blamed everything on clerical error.
- (m) By appending their signatures on the statutory forms, the Presiding Officers of the 1st Respondent took an oath and declared the figures to be accurate.
- (n) The court need to examine the forms to establish the malpractice.
- (o) The second ground of the petition is announcement of invalid results.
- (p) Under this head, the Petitioner's case is that the 1st and 2nd Respondent announced and declared results contained in forms that were not signed by the Presiding Officer, Deputy Presiding Officer or even the agents.
- (q) There ought to be reasons captured in the forms for refusal to sign.
- (r) The Petitioners testified that failure by the Presiding Officer, Deputy Presiding Officer or even the agents to sign the statutory forms renders the results declared therein inauthentic.
- (s) In their response, the 1st and 2nd Respondents produced yet more forms that were not signed by any of the actors.
- (t) Moreover, in their response, the 1st and 2nd Respondents produced a form for Mariwa Primary School which lacked watermarks.
- (u) All the forms were printed by the same printer and were as such supposed to be uniform and bearing same security features.
- (v) The Respondents could not explain the anomaly during hearing.
- (w) Further, while the Petitioners had forms 35A that were not signed, the 1st and 2nd Respondent produced signed copies.
- (x) It is important that the Court examined the forms to establish the truth.
- (y) Another issue that emerged was failure by the Presiding Officer to seal ballot boxes for Bosaga Primary School code 04526213010701 and Bosaga Primary School code 04526213010702.
- (z) The ballot boxes were opened and sealed at the Tallying Centre.
- (aa) The Respondent did not offer an adequate explanation for this lapse.
- (bb) It is crucial that the Court examined the seals used in these two polling stations.
- (cc) Equally disturbing was the malpractice witnessed at Makara Primary School Polling Station.
- (dd) The Presiding Officer, Makara Primary School Polling Station, submitted two different forms showing different results.
- (ee) For this electoral offence, the Presiding Officer was arrested and charged.
- (ff) Both forms were signed by the Presiding Officer though he denounced one of them.

(gg) It is difficult to tell what the actual results were.

(hh) The evidence adduced in Court points to alteration of results.

(ii) It is therefore important that scrutiny and recount is done.

(jj) The scrutiny sought will establish propriety of the exercise while recount will confirm the true count.

(kk) At Nyambine Jua Kali Tea Buying Polling Station code 045262130807601 it emerged that the form 35A affixed on the ballot box was for election of Member of County Assembly.

(ll) The Respondent did not tell the Court how this happened.

(mm) The malpractice and non-compliance with the law that requires affixing of the right form outside the ballot box was for election of Member of County Assembly.

(nn) It is therefore important that scrutiny and recount is done.

(oo) All these malpractices emerged during the hearing.

(pp) That the basis for the scrutiny sought had already been laid by the 1st Petitioner during his dock testimony.

(qq) That any party to an election petition is entitled to make a request for a recount and/or scrutiny, at any stage after the filing of petition, and before the determination of the petition.

(rr) The scrutiny sought is for specific statutory forms and targeting specific information and polling stations which have been singled out.

(ss) The scrutiny will help save the Court's time as the issues and the problem shall have been duly crystalized.

(tt) That it is in the interests of truth, fairness, justice, accountability and the sovereign will of the people of South Mugirango that the orders sought be granted.

(uu) That none of the parties will be prejudiced by the granting of the Orders sought.

(vv) That the Reliefs sought are merited and Orders thereto will aid this Court in the expedient and just determination of the present Petition.

3. It is supported by the affidavit of Denis Magare Makori sworn on the 8/12/2017.

4. The application is opposed. Wilson Kimutai Kipchumba has sworn a replying affidavit on his own behalf and on behalf of the 1st and 4th Respondent in which he lays grounds for opposing the application.

5. The 3rd Respondent has sworn and filed a replying affidavit in opposition to the application.

6. Directions were given that the application be disposed off by way of written submissions and all parties duly complied.

7. For the Petitioner, it is submitted that a strong basis for scrutiny has been laid and an explanation given why the exercise would be important to the process, there is the question of the authenticity of the forms. Reliance is placed on the decision in **Petition No. 1 at the Supreme Court of Kenya, Raila Odinga and another vs IEBC and 2 others.**

8. Anomalies in tabulation of votes are cited in the forms 35A for Gesonso Primary School, Engeti Primary School and Riosanta Primary School.

9. It is urged that the Petition has specified the polling stations and statutory forms that are sought to be scrutinized, the particular reasons for which the scrutiny is wanted and the information the scrutiny is to target.

10. For the 1st and 2nd Respondents it is submitted, that whereas recount and re-tallying of votes is espoused in **Rule 28** of the **Election Rules**, under **Rule 28 (b)** an order for recount and/or retallying of votes cast can only be granted when the singular issue for determination in the election petition dispute is the count or tallying of votes received by candidates. As such, the order will dispense with the election dispute by determining the number of votes each candidate garnered.

11. It is urged that an order for recount and/or retally is conceptually different from an order for scrutiny and the 2 cannot be granted in the same prayer. Reliance is placed on the case of **Justus Gesito Mugali M'mbaya vs IEBC & 2 others**.

12. It is submitted that sufficient reason has not been satisfactorily adduced to warrant an order for either scrutiny or recount. I am referred to the case of **Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 others**, where the Supreme Court held that the right to scrutiny does not lie as a matter of course.

13. It is urged that the Petitioner has called for scrutiny and recount in polling stations that had not been pleaded anywhere in the petition.

14. On the prayer for production for scrutiny of all the original forms 35A, polling day diaries, packet of rejected ballot papers and statements made thereto, packets of counterfoils of used ballot papers, the inventory of results declaration forms (with serialization) as distributed to the presiding officers for the polling stations set out in the 1st, 2nd and 3rd prayers, it is submitted that, the Applicant seeks information held by IEBC and the Petitioner ought to have pursued the same through **Section 8** of the **Access to Information Act** which provides a mechanism for such a request.

15. Learned Counsel for the 3rd Respondent has submitted, *inter alia*, that, the Applicant through his pleadings filed in this Court and his witnesses and even in the entire proceedings has miserably failed to lay a proper basis for scrutiny of election materials as sought in this application. No basis is laid. Reliance is placed on the **case of Gatirau Munya** above cited.

16. It is urged that the prayer for scrutiny and recount is a discretionary one and in granting such a prayer, the Court ought to be satisfied through sufficient reasons in pleadings or evidence adduced. It is urged that in the pleadings and evidence herein no basis has been laid to warrant the order sought. The applicant is accused of aiming to expand the case.

17. I have applied my mind to the application, supporting affidavit, replying affidavit, the pleadings, the evidence adduced and learned submissions by Counsel.

18. 1. The issues for determination are whether a basis has been laid through sufficient reason for an order of;

i) Audit and scrutiny of votes and forms 35A in polling stations particularized in prayer 1 of the application.

ii) Scrutiny and recount of votes in polling stations particularized in prayer 2 of the application.

iii) Audit and scrutiny of the seals used regarding polling stations particularized under prayer 3.

2. Whether the 1st Respondent should avail for scrutiny, all the original forms 35A, polling day diaries, packets of rejected ballot papers, statements made thereto, packets of counterfoils of used ballot papers and the inventory of results declaration forms as distributed to presiding officers as set out in prayers 1, 2 and 3.

19. The law on scrutiny and recount is now well settled:

Rule 28 of the Elections (Parliamentary and County Elections) Petition Rules provides;

“Rule 28: A Petitioner may apply to an election Court for an order to;

a) recount of votes

b) examine the tallying, if the only issue for determination in the petition is the count or tallying of the votes received by the candidates.”

Rule 29 provides;

“Rule 29 (1): The parties to the proceedings may apply for scrutiny of the votes for purposes of establishing the validity of the votes cast.

(2) On an application under Sub rule (1) an election Court may, if it is satisfied that there is sufficient reason, order for scrutiny or recount of the votes.”

20. The Supreme Court in Gatirau Peter Munya vs Dickson Mwenda Kithinji and 2 others [2014] eKLR laid down the guiding principles of the operation of the right to scrutiny and recount. The Court at paragraph 153 stated;

“[153] from the foregoing review of the emerging jurisprudence in our Court, on the right to scrutiny and recount of votes in an election petition, we would propose certain guiding principles, 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 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 elections petition is to establish the basis for such a request, 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 Elections) Petition Rules.”

21. In my view when considering an application for scrutiny and recount care must be taken not to expand the scope of the petition by introducing new matters that are not pleaded. Parties are bound by their pleadings. Any evidence adduced including evidence introduced through any means such as an order for scrutiny and recount must be evidence that supports the pleading as drawn.

22. An order for recount and scrutiny is not a highway for fishing for new evidence. I quote with approval *Tuiyot J* in **Philip Osore Ogutu vs Michael Aringo [2013] eKLR** where the Court stated;

“There would be several reasons why scrutiny should not be ordered as a usual course. First, there is need to guard against an abuse of the process. I would agree with Mr. K'opot that a party must not be allowed to use scrutiny as a fishing expedition to discover new or fresh evidence. It would be expected that a party filing an Election Petition is, from the outset, seized of the grounds, facts and evidence for questioning the validity of an election. And where the evidence is unclear then a party can, on application to court, seek and obtain better particulars of that evidence from its adversary. But it would be an abuse of process to allow a party to use scrutiny for purposes of chancing on new evidence. Scrutiny should not be looked upon as a lottery.”

23. I am advantaged in having this application coming at the advanced stage at which this petition is. The pleadings and the evidence whose veracity has been tested on cross examination and re-examination are on record.

24. I must add at the outset, that a prayer for scrutiny and recount must be clearly distinguished from a prayer for better particulars from an adversary in a proceedings. Where what is needed is better particulars or evidence in the hands of the opposite party, the law provides adequate mechanisms to achieve that end.

25. Equally important in an application like the one before Court and especially where it relates to recount, is the relevance of **Regulation 80(1)** of the **Elections (General Regulations) 2012**. That regulation provides:

“80(1): A candidate or agent 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 shall not take place more than thrice.

(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.”

26. It follows then that a party who fails to exercise the right under Regulation 80, in my considered view, diminishes the chances of success of his application for recount.

27. As held by *Onyancha J* in **Hassan Mohamed Hassan and Another vs IEBC and 2 Others [2013] eKLR**, the decision to grant scrutiny and or recount is a discretionary one. However, it is not only discretionary but judicious.

28. Armed with this background, what situation obtains in our instant suit? The Court has taken into account the Petitioner's pleadings and the evidence adduced. I have had due regard to the application at hand and affidavit evidence for and against the application. I have considered in great detail the submissions by Counsels and the authorities cited and I am greatly indebted for their industry in the exposition of the law and facts.

29. It will be appreciated that the Court is not at this stage doing its final judgment in the matter. It is a delicate balancing act for the Court in evaluating the sufficiency for reasons advanced for scrutiny and recount without necessarily appearing to give a final verdict on the matter.

30. This is so because, while some of the complaints and evidence adduced thereto may not necessarily be a basis for a recount, they are relevant and material aspects for consideration by the Court in its final judgment.

The fact that a piece of evidence does not support scrutiny and recount does not necessarily render it irrelevant and not of use in the final findings.

31. It is therefore necessary for now to limit the evaluation of the evidence to the specifics about the scope of scrutiny and recount noting the need for brevity and marking boundaries so as not to prematurely encroach onto the arena of the final judgment in this matter.

32. The complaints as pleaded in the petition, as seen at pages 4, 5, 6, 7, 8 and 10 of the petition relate to incorrect tallying, announcements of invalid results, making of false entries, an alleged election offence and failure to seal ballot boxes. Where there is no specific complaint in the pleadings there can be no basis for scrutiny and recount.

33. Having painstakingly gone through the evidence on record in support of the complaints and specifically the evidence of Dennis Magare Makori (PW1) found at page 9 of the proceedings, Mururi Mogoia (PW2) found at page 28, Tom Nyamwayo (PW4) found at page 44, Abraham Okari (PW5) found and page 50, Peter Mokuia (PW7) found at page 59, Jacob Mogere (DW1) at page 67 and Wilson Kimutai Chepsuba (DW2) found at page 71, it is manifestly clear that weighty evidence is on record for consideration by this Court in the final determination of this petition.

34. But whereas the said evidence alluded to above is weighty and raises a myriad of issues and is a fertile ground and resource for the Court in the final findings my evaluation of the said evidence leads me to the unhesitating conclusion that in regard to scrutiny and recount none of the witnesses has laid sufficient reasons for the grant of an order for scrutiny and/or recount.

35. Evidence by the agents called as witnesses miserably fails to lay any basis for a scrutiny or recount.

36. The very serious issues arising about Bosaga Polling Station and Makara Polling station are ones not for a scrutiny and recount, but prove of either of the allegations would lead to a different finding or remedy and not necessarily an order for scrutiny or recount. For instance, what would be achieved by doing a recount in respect of ballot boxes purportedly found open at the constituency tallying centre.

37. It is my considered view that acceding to the prayer for scrutiny and recount would widen the scope of the petition and open a door for possible fishing of evidence. The Court may end up unwittingly participating or facilitating a game of chance or a lottery.

38. Notably there is no evidence at all that the Petitioners exercised the right to seek recount under Regulation 80 of the Elections (General Regulations) 2012 at the respective polling stations.

39. Again my considered finding is that the issues raised fail to lay a basis for a recount and scrutiny but are certainly issues to be canvassed in the final submissions for consideration at judgment stage.

40. In addition, the application has sought to include polling stations that were not pleaded in the petition. These are;

1. Nyangweta Primary School code 063 – 002
2. Nyambine Jua Kali Tea Buying Centre polling station
3. Nyabikondo Primary School
4. Rangeti Primary School

42. As regards whether the 1st Respondent should avail for scrutiny all the original forms 35A, polling diaries, packets of rejected ballot papers and statements made thereto, packets of counterfoils of used ballot papers, the inventory of results declaration forms as distributed to the presiding officers for polling stations set out in paragraphs 1, 2 and 3 above, that prayer is dependent on whether prayers 1, 2 and 3 are allowed.

43. With the result that I find the application before Court without merit. I proceed to dismiss the same, Costs shall abide the outcome of the Petition.

Dated, Signed and Delivered in Kisii this 21st day of December, 2017.

A. K. NDUNG'U

JUDGE