



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**ELECTION PETITION NO. 6 OF 2017**

**HASSAN ADEN OSMAN.....PETITIONER**

**VS.**

**THE INDEPENDENT ELECTORAL**

**AND BOUNDARIES COMMISSION (I.E.B.C) .....1<sup>ST</sup> RESPONDENT**

**THE MANDERA COUNTY RETURNING**

**OFFICER (DAVID MARO ADE).....2<sup>ND</sup> RESPONDENT**

**MOHAMED MAALIM MAHAMUD.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. The taking of testimony of witnesses in this Petition has come to a close and the Petitioner now seeks the determination of the Application dated 1<sup>st</sup> December 2017 for the following orders:-

**2. THAT the Honourable Court do order that there be an inspection of the ballot boxes, scrutiny an recount of the votes cast and recorded as having been cast in the Senatorial Election in Mandera North Constituency.**

**3. THAT this Honourable Court order examination, verification and scrutiny of the Secure Digital Memory Cards (SD Cards) for each of the KIEMS Kit use in the Senatorial Election in Mandera North Constituency.**

2. The Polling Stations targeted by the application are:-

**Ado Saden Polling Station 1; Ashabito Primary School 1; Ashabito Primary School 2; Awara Primary School Balanqa Polling Station 1; Bambo West Polling Station; Barwaqo Primary School 1; Barwaqo Primary School 2; Bire Centre Polling Station; Bur John Polling Station 1; Dara Farma Polling Station 1; Dara Farma Polling Station 2; Darab Athathi; Garsey Polling Station 1; Garsey Primary School Polling Station 2; Gofa Primary Polling Station 1; Guticha Primary Polling Station1; Kajaja Polling Station 1; Kalicha Primary Polling Station 1; Kalicha Primary School Polling Station 2; Kalmalab Polling station 1; Koban Daka Polling Station 1; Koban Daka Polling Station 2; Korma Adow Polling Station 1; Kubi Primary School Polling Station 1; Ladeni Primary School Polling Station 1; Ladeni Primary School**

**Polling Station 2; Lanqura Primary School Polling Station 1; Lanqura Primary School Polling Station 2; Libi Bul Primary Polling Station; Libin Girls Polling Station 1; Libin Girls Polling Station 2; Mado Wells Polling Station 2; Morothile Primary Polling Station 1; Morothile Primary Polling Station 3; Morothile Primary Polling Station 2; Olla Primary Polling Station 1; Olla Primary Polling Station 2; Olla Primary Polling Station 3; Qorahey Primary Polling Station 1; Olla Primary Polling Station 2; Olla Primary Polling Station 3; Qorahey Primary Polling Station 1; Qordobo Nursery Polling Station; Rhamu Dimtu Primary School Polling Station 1; Rhamu Dimtu Primary School Polling Station 2; Saqira Village Polling Station; Sarman Primary School Polling Station; Shanqala Primary School Polling Station; Shir Shir Primary Polling Station 1; Sigare Hills Polling Station; Tossi Primary Polling Station 1; Tossi Primary School Pooling Station 2; Towfiq Primary; Usubey Center Polling Station 1; Usubey Center Polling Station 2; Yabich Primary Polling Station 2; Yabicho Primary Polling Station 1 and Yaqila Farms Polling Station 1.**

3.. The Motion is an Application for Scrutiny and Recount. The statutory foundation for scrutiny of votes is Section 82(1) of The Election Act which provides:-

**82(1) “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”.**

Part VI of the Election’s **(Parliamentary and County Elections)** Petitions Rules **(herein petition Rules)** 2017, populates the substantive and procedural law in respect to Scrutiny and Recount.

4. Whilst the word Recount does not feature in Section 82(1) of The Elections Act, Rule 28 of The Petitions Rules provides as follows in respect to a Recount of votes or examination of tallying:-

**“A Petitioner may apply for to an Elections Court for an order to:-**

**(a) Recount the votes; or**

**(b) Examine the tallying**, if the only issued for determination in the Petition is the count or tallying of votes received by the candidates”.

5. In loose parlance the word ‘recount’ and ‘scrutiny’ are often interchanged as though they refer to one and the same thing. They are of course different. A recount of votes is a simple exercise enumerating, one by one vote and summing them up so as to establish the number of votes garnered by a candidate. A scrutiny will involve the examination of Election material and may include a recount of votes or examination of the tally. Counsel Mutubwa appearing for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents proposed that a scrutiny is qualitative, whilst a recount is quantitative. This Court generally agrees with this proposition but adds that whilst scrutiny is primarily a qualitative exercise it may, where it extends to a recount or re-tally, be quantitative as well.

6. An application for Scrutiny and Recount may be brought at any stage of proceedings and on this occasion has been brought after the taking of testimony by all witnesses. The principles applicable to an application of this nature are well settled and will soon be old hat. For purposes of determining the application at hand, a few of those may be restated.

7. A request for Scrutiny or Recount can only be for polling stations in respect to which results are disputed and are pleaded (**see Gatirau Peter Munya vs. Dickson Mwenda Kithinju & 2 others**). A request for Scrutiny or Recount cannot be used to expand a Petition beyond what is pleaded. Neither can it be used to chance or fish for new evidence.

8. Whether or not to order a Scrutiny or Recount is generally a discretion of the Court. However there must be a judicial basis for the order and where it is on an application of a party the onus of laying the basis is on the applying party. And although discretionary, an order for recount or scrutiny is desirable

where the margin of victory is narrow. The number of total votes cast and the number of candidates in an election may be factors in determining whether the margin is narrow.

9. As correctly pointed out by Mr. Mutubwa for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, one purpose of scrutiny is for the Court to have an extra view of the integrity of the election by taking an Audit of the vote and polling process. This is in line with the holding of the Court in **Philip Mukwe Wasike vs. Janes Luswel Mukwe & 2 others** cited to this Court by Mr. Jamal Hassan appearing for Petitioner. There Hon. Gikonyo J. held:-

**“The purpose of Scrutiny is:-**

**(1) To assist the Court to investigate if the allegations of irregularities and breaches of the law complained of are valid.**

**(2) Assist the Court in determining the valid votes cast in favour of each candidate.**

**(3) Assist the Court to better understanding the vital details of the electoral process and gain impressions on the integrity of the electoral process”.**

10. A Court may not get any greater insight of certain allegations set out in a Petition by ordering a Scrutiny or Recount. Put differently, not all allegations or grounds can be resolved by Scrutiny. For instance it may not help a Court to better understand or verify an alleged incident of violence by scrutinizing the Ballots in respect to the polling stations where the violence is said to have happened. The exercise must be one that will yield a better insight as to the truthfulness or merit of a grievance set out in a Petition. An Applicant therefore bears the responsibility of establishing a nexus between the grounds and what the Scrutiny will achieve.

11. In assessing whether or not the Petitioner has laid a basis for an order of Scrutiny or Recount at this stage, the task of this Court is made easier because all the witnesses for both sides have testified. It was submitted by Mr. Mutubwa that the Court should evaluate that evidence with a view to determining whether the grounds in the Petition which would warrant a Scrutiny have been established on a prima facie basis. That the Court should then weigh this against the evidence in response and determine whether an order for Scrutiny and Recount will wipe away any doubt that the Court may have.

12. Mr. Kilukumi for the 3<sup>rd</sup> Respondent took a different view. He thought that the timing of the Application was critical and as this has come after the close of the case for all parties the application was not interlocutory in nature. It was then asserted that the Court should weigh the competing evidence and is entitled to determine which one to believe.

13. What is interlocutory? In Black Law Dictionary (9<sup>th</sup> Edition) “interlocutory” means;-

**(of an order, judgement, appeal etc) interim or temporary; not constituting a final resolution of the whole controversy”.**

While an interlocutory application means:-

**“a motion for equitable or legal relief sought before a final decision”.**

14. The Application before Court seeks a relief that will resolve at least one prayer of the Petition. Prayer 4 of the Petition seeks an inspection of the ballot boxes, scrutiny, recount and re-tallying of the votes cast and recorded as having been cast in the named polling Stations. Prayer 2 of the Motion is word for word that prayer save that it does not seek re-tally. A determination of the Motion will therefore be a final resolution of some aspects of controversy set out in the Petition. In that sense, the Application may not be a typical interlocutory application.

15. Crucial, in my view as to the test to apply is that the Motion may not resolve the entire controversy

with finality and even if an order for scrutiny were to be granted, then it may not be an end to itself. It may help the Court gain a better understanding of the grievances raised and assist it in resolving the entire dispute. For that reason I take a view that the Court should not make definitive pronouncements on aspects of the evidence before it which may shackle or embarrass it when called upon to make its final decision. All the Court should be interested in, at this stage, is whether the Applicant has laid down a basis to warrant a Scrutiny or Recount of votes, and the threshold should be the establishment of a prima facie case.

16. I turn to consider the reasons why Scrutiny or Recount is sought and whether it is deserved.

### **Signing of Forms 38A's by the Presiding Officers**

17. Under Regulation 79(1) of The Elections (**General**) Regulations, 2012 (**hereinafter The Regulations**), The Presiding Officer is required to sign the Declaration in respect of the Elections. The requirement is mandatory. This flows not only from the wording of the Regulation but also the nature and importance of the obligation. Regulation 79(1) reads:-

**“The Presiding Officer, the candidates or agents shall sign the declaration in respect for the elections”.**

18. Unlike, the Candidate or Agent whose failure to sign is not fatal (see Regulation 79(5)), the failure by the Presiding Officer to sign a declaration may vitiate the Declaration.

19. The Declaration to be signed in respect to an election for Senator is Form 38A (see Regulation 79(2) (b)). The contention by the Petitioner is that Presiding Officers (**P.O**) in respect to 11 Polling Stations did not sign the Declaration. These are:-

- (i) Bur John Primary School (1)
- (ii) Guticha Primary School(1)
- (iii) Shirshir Primary School(1)
- (iv) Awara Primary School(1)
- (v) Tossi Primary School (2)
- (vi) Yabicho Primary School (1)
- (vii) Ashabito Primary School(1)
- (viii) Bambo West Polling station(1)
- (ix) Ado Saden (I)
- (x) Lanquara (I)
- (xi) Usubey (2)

20. Looking at the evidence, this apparent misadventure can be categorized into three groups. The first is where the Forms 38A were signed by the Presiding officers only. These are forms in respect to the following Polling stations:-

- (i) Bur John Primary School (1)
- (ii) Guticha Primary School(1)

(iii) Shirshir Primary School(1)

(iv) Awara Primary School(1)

(v) Tossi Primary School (2)

There are Forms which were signed by the Deputy Presiding Officer (**D.P.O**) but not the Presiding Officer. These are for the following polling stations:-

(i) Yabicho Primary School (1)

(ii) Ashabito Primary School(1)

(iii) Bambo West Polling station(1)

21. The third category is where neither the Presiding Officer nor the Deputy Presiding signed. These would be:-

(i) Ado Saden (I)

(ii) Lanquara (I)

As for Usubey (2), the Form is signed by both the P.O and the D.P.O but it is pleaded that the handwriting of the P.O and the D.P.O are the same. The Petitioner may not have sufficiently pressed this issue as no handwriting expert was called to support this allegation. A basis has not been laid to justify a Scrutiny or Recount on this ground.

22. The Petitioner made three arguments. That it is obligatory that both the P.O and D.P.O must sign the Declaration Form hence the two (2) spaces provided in the Form. Secondly nowhere in the Regulations is the D.P.O permitted to sign the Declaration Form on behalf of the P.O. Lastly and perhaps connected, Regulation 79(1) mentions the Presiding Officer as the Person to sign the Form.

23. Sub-regulation 1A of Regulation 5 sets out the functions of the P.O as being:-

**(a) Presiding over elections at an assigned polling station;**

**(b) Tallying, counting and announcement of results at the Polling station;**

**(c) Submitting polling station results to the Constituency returning officer; and**

**(d) Electronically transmitting** presidential results to the constituency, counties and national tallying centers.

24. Then sub-regulation (4) has this game-changer:-

**“A Deputy Presiding Officer may perform any act, including the asking of any question, which a Presiding Officer is required or authorized to perform by these Regulations”**

Simply put, what the P.O can or should do, the D.PO can do! So no capital can be gained in criticizing the D.P.O only for signing the Declaration Forms. In addition, Regulation 79 which is fairly elaborate on the signing of the Declaration does not require that both the P.O and D.P.O to sign. That said it may be good practice that both sign. The legitimacy of the Declaration is strengthened when both Polling Officials sign the Declaration in endorsement. However as for the law, it is not regulatory that both sign. There is nothing to be achieved by revisiting the Ballots in respect to Declarations duly signed by either the P.O or D.P.O.

25. However, it cannot be said that there is a proper Declaration when a Form 38A is neither signed by the P.O and the D.P.O. To enable Court have an insight of the Will of the Voters at **Ado Saden (I) and Lanquara (I)**, this Court shall order a scrutiny in that respect.

#### **Where results were nullified or not declared**

26. It is common ground that results in respect to **Al-Hidaya Primary School (4) and Olla Primary School (3)** were nullified. The Constituency Returning Officer (RW2) explained that in respect to the two stations the votes declared as cast exceeded the number of registered voters. The C.R.O would be doing this on the strength of Regulation 83(1)(b) which requires that results of a Polling station where the total votes exceeds the number of registered voters to be disregarded. What IEBC, the body mandated with conducting and managing the election, did not do was to show Court the Declaration of these results. So as to verify whether the decision to nullify the results was done within the parameters of the law, a Scrutiny of the votes at these two stations is inevitable.

27. Although the Petitioner had placed Kubi Primary school Polling station in this category, nothing can turn on it. It was explained that the result of the polling station at Kubi were fully declared and tallied into the Constituency tally (Form 38B). It may serve no purpose to insist on a Scrutiny of a result that was duly declared and included in the final tally.

#### **Forms 38A not signed by any Agent.**

28. Forms 38A for Sigare Hills (I), Bambo West (I), Kalmalab (I) and Koban Daka (2) were not signed by any agent at all. It was argued by the Petitioner that Section 89(1) requires Agents to sign Form 38As. Yet there is Regulation 89(3) which reads,

**“Where any candidate or agent refuses or otherwise fails to sign the declaration form, the candidate or agents shall be required to record the reasons for the refusal or failure to sign”**

29. In respect to these 4 stations, evidence was adduced only for Sigare Hills (I). In his evidence in chief, Isaac Ali Adan (PW6) who was the Economic Freedom Party (**E.F.P**) Agent assigned to that station states,

**“I refused to sign the result declaration forms due to the malpractices exhibited during the entire elections process in the polling station”.**

In his evidence in Court he stated that his complaint was that he was not permitted to see the P.O assist the Voters who required assistance. He also complained of Ballot stuffing.

30. Although he had stated in his affidavit that he was not allowed to witness the vote counting, in cross-examination by Mr. Oonge he stated,

**“I was in the room when counting was taking place. The room is half this Court room. Votes were counted. I do not know how many votes my candidate got”.**

31. So although he alleges malpractices, the witness confirms that he was present at counting. As to why he did not sign the Declaration Form, he says that he refused to sign due to malpractices. Surely, how then can it be proposed that the Ballot Box be reopened only because the Agent did not sign when we know that the Agent has explained to the Court why he refused to sign?

32. In respect to the other three stations no evidence or explanation was put forward as to why the Forms were not signed.

33. In this category I see no reason to order a Scrutiny or Recount.

#### **Where Agents were chased or assaulted.**

34. The Petitioner pointed out four stations:-

- Kubi Primary
- Tossi Primary (2)
- Sigare hills (1)
- Olla primary (2)

35. There was evidence by Abdi Ibrahim Mohamed (PW4) that he was assaulted and ejected from Kubi primary school polling station and did not witness the count. He was the Petitioner's Agent in that station. An in-depth evaluation of his evidence is left for another day. I make the following observation for purposes of this Interlocutory Motion. I have looked at Form 38A in respect to the polling station and do not find a record by the P.O of the absence of the Petitioner or his Agent at counting. The P.O had infringed on Regulation 79(5);-

**“where any candidate or agent of a candidate is absent, the Presiding Officer shall record the fact of their absence.”**

36. While this lapse may not invalidate the result, it takes some significance in the face of the allegations by PW4 that his absence was forced against his will. The Scrutiny of the votes may help this Court verify the assertion by the Petitioner.

37. The evidence of Suleiman Mohamed Fila (P.W.5) does not support the assertion by the Petition that he was chased away from the Tossi Polling station (2). He gave evidence of malpractices he allegedly saw at the Polling station. He also says he was present at counting. He then testified,

**“The votes counted were:**

**Mohamud Maalim – 380**

**Khalif – perhaps – 4**

**Isman Hassan Aden – 17”.**

These votes are substantially the same as those declared in form 38A which are :-

Khalif Abdinasir Mohamed – 2

Mahamad Mohamed Maalim – 380

Osman Hassan Aden – 17

This Agent was present during voting and when the results were declared. There can be no reason to ask for scrutiny of the votes only because it is alleged that the agent was chased away from the station at one point in time.

38. There is then Olla Primary (2). Bashir Adan Issak (PW8) says he was the Agent for EFP at this station. His complaint is that he was not as well accommodated as the other Agents. That he was made to stand at the door of the Polling room. He says he was chased away at about 5.00pm and did not participate in the counting. Form 38A in respect to this station is found on page 440 of the IEBC response. Neither the Petitioner nor his Agent signed on Form 38A. Their absence has not been recorded by the P.O as required by Regulation 79(5). Could there be some truth about the allegations by the Petitioner that the alleged forceful absence of his Agents may have been used to achieve some mischief? A scrutiny may assist this Court verify this allegation.

39. As to Sigare Hills, this Court has already given reasons why it will not order a scrutiny.

40. Under this category I order a Scrutiny in respect to Kubi and Olla Primary (2).

### **Alterations of Forms 38A**

41. In the Petition, the Petitioner pleads that Forms 38A in respect to the following 13 Polling stations were altered without countersignatures:-

- (i) Sigare Hills (1)
- (ii) Yabicho primary School (2)
- (iii) Garsay primary school (1)
- (iv) Kaliche primary school (2)
- (v) Bur John Primary school (1)
- (vi) Ado Saden (1)
- (vii) Awara polling station (1)
- (viii) Kajaja (1)
- (ix) Morothile primary school (3)
- (x) Sarman primary school (1)
- (xi) Korma Adow polling station
- (xii) Morothile primary school (1)
- (xiii) Gofa primary school (1)

42. Abdinashir Alinoor (RW2) was the Constituency Returning Officer for Mandera North. In his testimony he conceded there was alterations or overwriting in certain Forms 38A. He however attributed this to human error. He also told Court that the polling officials worked from 7<sup>th</sup> August 2017 to 10<sup>th</sup> August, 2017 without a break and fatigue could have contributed to the errors.

43. Whilst it is true, as submitted by Counsel for the Respondents, that there is no statutory or Regulatory requirement that altered or overwritten results be countersigned, it is nevertheless good practice for a Presiding Officer or Deputy Presiding Officer making an alteration or overwriting to countersign the changes. Countersigning authenticates the alteration or overwriting and enhances the credibility and integrity of a Declaration. It is a mark of ownership of the change by the person countersigning. So as to verify the legitimacy of an altered result that is not countersigned a scrutiny of the vote may be necessary. However, not all alterations or overwriting requires verification through Scrutiny as a matter of course. The alterations or overwriting must be material to the results. A material alteration or overwriting is one that is likely to affect the outcome of the Declaration. Hon. Mabeya J. was also of this view **Abdinasir Yasin Ahmed & 2 others vs. Ahmed Mohamed Abass & 2 others** [2013] eKLR.

44. This Court has patiently looked at the Declarations in respect to the pleaded 13 polling stations and makes these observations. Declarations from the following polling stations had alterations or overwriting in respect to votes allegedly garnered by the candidates.

- (1) Garsey primary school (I)

- (2) Ado Saden (I)
- (3) Morothile Primary school (I)
- (4) Kalicha primary school (I)
- (5) Korma Adow Polling station
- (6) Sarman primary school (1)

The alterations or overwriting are material.

45. The alterations in the following stations are not material as they are not in respect to votes attributed to the candidates.

- (1) Yabicho primary school(2)
- (2) Kajaja (I)
- (3) Bur John primary School(I)
- (4) Sigare Hills (I)

In respect to Awara polling station (1), the alterations were not material and in any event the Petitioner's Agent signed the Form.

46. The Court did not see any alterations or overwriting in the Declarations for the following stations:-

- (1) Gofa primary school (I)
- (2) Morothile Primary school(3)

47. Under this set there shall be scrutiny of the votes in the 6 polling stations set out in paragraph (44) of this decision.

**Stations said to have been illegally moved.**

48. Regulation 7(1)(c) of The Elections (General) Regulations, 2012 provides as follows in respect to Election Areas and polling stations:-

1. The commission shall;-

**“c. publish in the Gazette and publicise through electronic and print media of nation circulation and other easily accessible medium, a notice specifying-**

**(i) The polling stations established for each constituency, which may be the same as the registration centres which they respectively comprise;**

**(ii) The distinguishing number or letter, or combination thereof, assigned to each polling station, and**

**(iii) The place or places appointed or the vehicle or vehicles, vessel or vessels designated for the establishment of a polling station or stations for each electoral area”.**

49. Jelle Abdi Mohamed (RW4), was an IEBC official during the August 2017 Elections. He was the Presiding Officer for Korman Adow polling station (I). While under cross-examination by Prof. Ojienda,

he gave an insight as to how the Court can verify whether polling took place at a gazetted location or place. He stated,

**“It is not true that the polling station for Karma Adow was moved to Olla primary school. The KIEMS KIT would confirm this. It has logs and coordinates”.**

50. Although it had been submitted for the 3<sup>rd</sup> Respondent that, the Petitioner ought to have asked an Information Technology expert to explain how the KIEMS KIT works, this Court thinks that, for purposes of verifying the positions of polling stations, the evidence offered by the 1<sup>st</sup> Respondent that reading of the Logs and Coordinates from the KIEMS KIT can help resolve the issue is good enough.

51. It was pleaded by the Petitioner that the following polling stations were illegally moved from their Gazetted locations:-

- (1) Gofa primary school Polling station
- (2) Yaqila Farms
- (3) Qordobo Nursery school
- (4) Korma Adow
- (5) Balanqa Shallow wells
- (6) Shanqala primary school
- (7) Dara Farma polling station
- (8) Libi bul primary school
- (9) Sigare Hills polling station
- (10) Sagira Village polling station

The Petitioner is pleading a breach of this Regulation.

52. In respect to Yaqila Farms Mohamed Aliow Mohamed (PW9) signed the Declaration Form for Yaqila Farms (page 454 of IEBC response). He did not protest that the station had been moved. A scrutiny in respect to this station is unnecessary.

53. Hassan Isaac Maalim (PW2) was the EFP Agent assigned to Korma Adow. His testimony was that the polling station was illegally moved to Olla. This was one of the stations the Petitioner visited on the Election Day. His evidence was that the Korma Adow station had been illegally moved. This Court has already held that a Scrutiny for this polling station is necessary to verify the alteration of the Declaration. The exercise of Scrutiny shall extend to an Investigation as to where voting took place.

54. In respect to Sigare Hills polling station, Isaac Ali Aden (PW6) was the EFP agent assigned to the polling station. Curiously, in his testimony he makes no mention of the supposed movement of the polling station.

55. As to the other 6 polling stations no direct evidence was offered by the Petitioner or his witnesses. It would be needless to seek to understand or verify the complaints in respect to these stations by way of scrutiny when the Petitioner has failed to offer any basis at all. As emphasized time and time again, Scrutiny is not a lottery. It should not be used to chance at evidence. As no direct evidence was offered in respect to the 6 polling stations, Scrutiny could only aid to happenstance on evidence.

## **Form 38B**

56. Immediately after the results of the Poll from all polling stations in a Constituency have been received by the Constituency Returning Officer, Regulation 83(1) requires the Constituency Returning Officer to collate and publicly announce to the persons present the results from each polling station in the Constituency for the election of Senator. The Constituency Returning Officer thereafter completes Form 38B and delivers it to the Returning Officer (Regulation 87(5)(a)).

57. In the Petition, the Petitioner asserts that the Senatorial results for Mandera North Constituency was declared on the basis of an incomplete Form 38B which also lacked the security features of IEBC.

58. This Court understands the process of tallying and announcement of results of a Senatorial Election at the Constituency Tallying Centre to be as follows. The Constituency Returning Officer (CRO) receives results of the Poll from polling stations. Immediately after receiving all results, the CRO, in the presence of Candidates or Agents and Observers, if present, collates and publicly announce to the person present the results from each polling station in the Constituency for that election. Collate means:-

- (i) Collect and combine (texts or information)
- (ii) Compare and analyze (two or more sources of information)
- (iii) Verify the number and order of (the sheets of a book).

*(Concise Oxford English Dictionary 12<sup>th</sup> Edition)*

59. It would seem that all that the CRO does is to verify the results (without changing them) and simply transpose them onto Form 38B. The only results that the CRO can disregard are where total valid votes exceeds the number of registered Voters in that Polling Station (Regulation 83(1)(b)) or where the total valid votes exceeds the total number of Voters who turned out to vote in that Polling Station (Regulation 83(1)(c)). The CRO is then required by Regulation 87(1)(a) to deliver the collated results to the County Returning officer.

60. In respect to the collation the Petitioner complaints are threefold:-

- (i) There were no results in respect to three polling stations.
- (ii) The results of one polling station did not indicate the total registered number of voters.
- (iii) The results of 36 polling stations did not indicate the rejected votes.

61. Regarding the polling stations with no results, this Court has already considered the issue and proposed scrutiny in respect of two of the stations to resolve the issue. What is important to note here is that the Presiding Officers and not the CRO nullified the results and so the task of the CRO was to faithfully reflect that in Form 38B. It has not been demonstrated that the CRO did not do so accurately.

62. In respect to the non-indication of total registered number of voters or rejected votes, no effort was made to demonstrate that what was in Form 38B was not a faithful transposition of the results from Forms 38A. As a whole, it was not demonstrated that there is any inconsistency between the results from the polling stations and the collated results on Form 38B. What is to be gained from scrutinizing the Form 38B? I do not see any greater insight to be gained of the tallying and announcement of that result at the Constituency level by subjecting Form 38B to a detailed examination. An order for Scrutiny is not made as a matter of course. It must serve a purpose!

## **The Orders of Court**

63.1 The Scrutiny in respect to the Polling Stations set out hereunder shall involve a scrutiny and/or

Recount of votes which shall include but not limited to the examination of:-

- a) The written Statements made by P.O.s under the Act.
- b) Copies of results.
- c) Written complaints of the Candidates or Agents if any.
- d) Packets of spoiled Ballots
- e) Packets of Counterfoils of used Ballot Papers
- f) Packets of counted Ballot Papers
- g) Packets of rejected Ballot Papers
- h) The Polling day diary
- i) The SD Card to the KIEMS Kit used or any other Register of Voters that may have been used to establish the total number of Voters who turned out to vote.

63.2 The Polling Stations in respect to the order in 63.1 are:

- Ado Saden (1)
- Lanquara (1)
- Al-Hidaya Primary School(4)
- Olla Primary School(3)
- Kubi Primary School
- Olla Primary School (2)
- Garsey Primary School(1)
- Morothile Primary School (1)
- Kalicha Primary School (1)
- Korma Adow Polling Station
- Sarman Primary School(1)

64. The Examination in respect to Korma Adow Polling Station shall extend to the reading of the Logs and Coordinates of the KIEMS KIT to establish whether voting took place at the Gazetted location. ICT Officers of IEBC shall assist in this exercise under the direction of Deputy Registrar.

65.1 The exercise of Scrutiny and/or Recount shall be conducted by the Learned Deputy Registrar of the Commercial and Tax Division of the High Court at Milimani Court.

65.2 Each of the parties shall be at liberty to appoint a maximum of 3 Agents at any one time in the course of the exercise.

65.3 Any issues that cannot be resolved mutually by the parties shall be referred back to Court for determination.

66. The Deputy Registrar shall file her Report in Court on or before 15<sup>th</sup> January 2018.

67. The costs of the application to abide the outcome of the Petition.

**Dated, Signed and Delivered in Court at Nairobi this 15<sup>th</sup> Day of December, 2017.**

**F. TUIYOTT**

**JUDGE**

**PRESENT;**

Jamal for Petitioner

Lubullellah for 1<sup>st</sup> and 2<sup>nd</sup> Respondent

Kilukumi for 3<sup>rd</sup> Respondent

Alex - Court Clerk