



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NANYUKI
THE ELECTIONS ACT, 2011
ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS)
PETITION RULES, 2017
ELECTION PETITION NO. 2 OF 2017

SAMMY NDUNGU WAITYPETITIONER

versus

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION1ST RESPONDENT

NDIRITU MUREITHI2ND RESPONDENT

JOHN MWANIKI3RD RESPONDENT

COUNTRY RETURNING OFFICER, LAIKIPIA COUNTY4TH RESPONDENT

RULING

1. **SAMMY NDUNGU WAITY (the Petitioner)** by this petition has challenged the successful election of **NDERITU MURIITHI (2nd Respondent)** as Governor of Laikipia County during the general election of 8th August 2017. The petitioner filed the petition as a voter and resident of Nanyuki Town.
2. After concluding the hearing of interlocutory applications in this petition the full hearing of the petition commenced on 22nd November 2017 and was concluded on 29th November 2017. The 2nd respondent was the last witness to testify. In other words on 29th November 2017 all parties closed their respective cases.
3. The petitioner filed on 29th November 2017 a Notice of Motion application dated 27th November herein after referred to as the application. It is that application which is the subject of this Ruling.
4. By that application the petitioner seeks the following prayer:

“That the Honourable court be pleased to conduct a scrutiny of the votes in all polling stations in Sosian ward for gubernatorial election.”

5. It is important to state that this court by its Ruling of 20th November 2017 granted an order that the Independent Electoral and Boundaries Commission (IEBC) should supply to the Petitioner SD card in respect to the Sosian ward in Laikipia County.

6. The application under consideration is supported by the Petitioner's affidavit sworn on 27th November 2017.

7. Because the matters deponed in that affidavit are relevant to the prayer of the petitioner, I shall reproduce some of the depositions herein as follows:-

- ***That the margin between the gubernatorial candidates herein, JOSHUA IRUNGU WAKAHORA and NDIRITU MURIITHI was too narrow, to be specific it was about 1,993.***
- ***That I am certain that there was voter inflation/deflation in Sosian Ward, Laikipia North constituency.***
- ***That on 20th November, 2017 the Honourable Court granted me access to the data pertaining to Sosian Ward.***
- ***That to interpret and understand the data, I engaged the expertise of BILDAD NAMAWA and BRIAN SILAS OCHIENG who are both I.T. experts.***
- ***That further to understand the data is very easy once the process is explained.***
- ***That summary of the data provided it include the voters identified, the logs on the voters identified and what transpired during the voting period.***
- ***That when filing the said petition I did not have the said electronic evidence. But after having a look at the data a lot of information was revealed. That confirmed my averments in the petition.***
- ***That the data confirmed that indeed there was voter inflation/deflation in Sosian Ward.***
- ***That the data in the S.D. Cards shows that;***

a) The number of voters was inflated/deflated in some polling station.

b) That some polling stations opened before the 8th August 2017.

c) That some voters were identified even before stations were opened.

d) That some stations closed late and other earlier than the scheduled gazette time which is 6.00 a.m. to 5.00 p.m.

e) That some polling stations were closed due to insecurity.

- ***That a scrutiny of votes in Sosian Ward would assist the court in arriving at a just decision.***
- ***That as evidence during trial and cross-examination of the Laikipia County Returning Officer there were substantial irregularities and material alterations in the forms 37A, B and C as had been pleaded in the petition;***

a) That some forms missed the required security features. That the forms handed over to court were photocopies and there is dire need to scrutinize the original forms especially the ones from Sosian Ward.

b) That most of the forms do not bear the required stamps.

c) The returning officer indicated that one form 37A that is in court was not the one used to fill form 37C.

d) Many of the forms were not signed by Jubilee Party Agents and no reasons were given.

e) Many of the forms were not signed by the polling stations presiding officer and

deputy presiding officers.

f) Some forms had alterations.

- *That if the court is to analyze the data provided, without a shadow of a doubt, it shall see that the election in Sosian Ward was fraught with material irregularities that adversely affected the outcome of the gubernatorial election.*
- *That the election in Sosian Ward and Laikipia County as a whole did not comply with the Constitution, Election Laws and Regulations.*
- *That being that some voters voted out the gazette time, these votes should be rejected.*

8. The petitioner annexed to his affidavit a CD containing what he stated was information from the SD card.

9. The Petitioner was represented, at the hearing of the application, by two learned counsels namely Mr. Ramadhani Abubakar and Mr. Magee wa Magee.

10. In support of the application they submitted that it was after the court ordered the petitioner to be supplied with the SD card of Sosian Ward that the petitioner confirmed there were electoral malpractices, specifically that there was inflation and deflation of votes. It was also submitted that the petitioner, with the assistance of I.T. experts analyzed the data in the SD card which analysis revealed those anomalies.

11. The Petitioner relied on the case **GATIRAU PETER MUNYA –V- DICKSON MWENDA KITHINJI & 2 OTHERS [2014] eKLR** to show that IEBC has an obligation to Kenyans because they are funded by public funds, and that therefore IEBC should be receptive of scrutiny being sought. Petitioner referred to the following passage in that case:-

“[251] Finally, let me turn to the issue of election–management. Important as it is, the preparations of the parties and the candidates are not enough, by themselves, to achieve satisfactory electoral culture. Of enormous significance is the conduct of the electoral agency. The idea that parties invest in electoral processes in their entirety, including in anticipation of a petition, does not relieve the electoral management agency of its constitutional obligations. Nothing could imperil our democracy more than an electoral agency that is contaminated by bias, infected with incompetence, and afflicted by a virulent virus of minimal public accountability. Arguably, Kenya can do with one or two indolent political parties, but she cannot afford an electoral management agency that exhibits these weaknesses.

[252] The constitutionally – mandated agency for electoral management, the IEBC, must demonstrate competent, impartiality, fairness, and remarkably high sense accountability to the public, and the parties who are its primary customers. It must embrace high disclosure standards, and must avoid conduct such as hoarding of information and data that the public has the right to, both as a matter of course and also as a matter of Article 35 of the Constitution. Materials that are in the possession of the IEBC are not private property; they are public resources. The IEBC is not funded by private money; it draws its money from the public purse. Its subject matter elections and boundaries are extremely public issues, attended with considerable emotions. Its decisions determine the fates, and interests, at both private and public levels.”

12. On margin of votes it was submitted by the petitioner that because the margin in Laikipia County gubernatorial election was 1,993 a scrutiny of Sosian ward can change the outcome of that election. That scrutiny is necessary for the purpose of arriving at a just decision.

13. IEBC and the County Returning Officer, Laikipia County (the 4th Respondent) were represented by learned counsel Mr. Bush Wanjala. IEBC and the 4th Respondent opposed the application and sought for its dismissal.

14. It was submitted on behalf of IEBC and 4th Respondent that what the petitioner was seeking, by the application for scrutiny, was to introduce new evidence after parties had closed their case. That, the petitioner had also failed to show sufficient basis for an order for scrutiny. That, it was clear from the affidavit of the petitioner, in support of the application, that the petitioner was seeking to introduce evidence of the SD card which this court had declined to allow at the hearing of the petition. That such annexures of information in the SD, in this application was against rules of evidence and should be expunged. In this regard there was reliance on the case of **ABDIRAHMAN ADAN ABDIKADIR & ANOTHER –V- INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION ELECTION PETITION NOs.13 & 16 of (2017)** (consolidated) where a petitioner filed an affidavit whose depositions were not in tandem with the pleadings in the petition. The following passage was referred to:-

“However, nowhere is there even a slight mention of the illegality of opening ballot boxes, which in my view is an expansion into a new vista not contemplated in the petition. To this allegation, I think the Respondent will not have an opportunity to respond. This is particularly so given that the hearing of the petition is now on-going on its substantive merits. I am of the view that the affidavit of Abdikadir Abdirahman does not clarify or expound on matters already in contention as pleaded in the petition, but raises new grounds substantially departing from those in the petition.”

15. Learned Counsel submitted that unlike **ABDIRAHMAN ADAN ABDIKADIR** (supra) in this case parties had closed their cases and therefore new issue such as opening or closing of polling station or voter identification which had not been pleaded in the petition, to allow them to be introduced would be expanding the petition.

16. In that regard it was argued that the petitioner is in breach rules in respect of election petitions and that such breach should be frowned upon. Counsel referred to the case **MARTHA KARUA & ANOTHER –V- INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION & 3 OTHERS [2017] eKLR** where the court held that a party would be prejudiced if he was exposed to new grounds, cause or evidence in the form of affidavit which was at variance with what was pleaded in the petition.

17. In response to the petitioner’s submission that IEBC was obligated to provide information because it is funded by public money, learned counsel Mr. Bush Wanjala submitted that IEBC would always protect the process and rules that govern its obligations.

18. Learned counsel further submitted that the Rules required the petitioner to show sufficient basis. The case **NATHIF JAMA ADAMA –V- ABDIKHAIM OSMAN MOHAMED & 3 others Petition No. 13 of (2014) eKLR** and particularly the following passage was referred to.

“It emerges that, the primary considerations in determining whether to grant scrutiny, are whether there are polling stations with a dispute as to the election results; whether such a state of affairs has been pleaded in the petition; and whether a sufficient basis has been laid – to warrant the grant of the application for scrutiny.”

19. To further develop the afore stated argument learned counsel referred to the petition and stated that the petitioner had pleaded therein that members of the Pokot Community had been disfranchised by the security operation which prevented them from voting. Of that pleading learned counsel posed a question of how scrutiny would assist to establish whether Pokot Community were disfranchised.

20. The petitioner, it was submitted was fishing for evidence which ought not to be permitted. The case **APUNGU ARTHUR KIBIRA –V- INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION AND 2 others Election Petition No. 6 of 2017** was referred to where the court referred to other decisions as follows:-

“Wavinya ndeti vs IEBC & 4 others (2013)eKLR, Justice Majanja on the issue of scrutiny in all polling station in a constituency held that:

“..... The petitioner must not be permitted to launch a fishing expedition under the guise of an application for scrutiny in order to discover new evidence upon which to foist his or her case to invalidate an election”

Wendoh J. rendered herself in the case *Ledama Ole Kina vs Samwel Kuritai Tunai & 10 others* (2013) eKLR that:

***“An application for scrutiny of all Narok South Constituency lacks specificity, is a blanket prayer that, in my view, cannot be granted. The applicant needed to be specific on which polling station he wanted a scrutiny. If he wanted scrutiny in all the polling stations, then a basis should have been laid for each polling station. The rationale is clear, the process of scrutiny is laborious, time consuming and the applicants cannot be let at liberty to seek ambiguous prayers and waste precious court’s time and incur unnecessary costs. They must be specific*”**

21. The second Respondent was represented by learned counsels Mr. Kuyo and Miss Mbeneka.

22. They began by reiterating what the other respondents had submitted, that the petitioner has a burden to show there was sufficient basis for scrutiny to be ordered. This they submitted had not been discharged by the petitioner.

23. Learned counsels highlighted that the petitioner had not pleaded in the petition that there were invalid votes. That no evidence had been adduced at the trial to show that the votes were inflated or deflated. Rather that the 4th Respondent had testified of how the results were first reflected in Form 37A. Those results were then transferred to Form 37 B, and finally to form 37C. That if indeed the problem was with those forms there was no need for scrutiny. That the issue the court would have to determine was whether the alleged omission in the forms affected the result and therefore there will not be need for scrutiny. That in any case the cancellations of form 37A of Nyandarua had been explained in evidence of the 4th Respondent.

24. In respect to the margin of votes between the two contenders for governor learned counsels referred to IEBC form 37C, which is before the court, and which reflected that Joshua Irungu Wakahora garnered 98,349 while the 2nd Respondent garnered 100,356. That the margin was therefore 2,007 and not 1,993 as submitted by the petitioner.

25. Counsels referred to the case **HASSAN ALI JOHO –v-HOTHAM NYANGE & Another [2006]eKLR** where the court found a margin of 1,061 was not narrow to attract an order for scrutiny. That the determination of narrow margin in the case of JOHO -v- NYANGE (Supra) was approved in the case **HASSAN MOHAMMED HASSAN & another -v- INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION & 2 Others [2013] eKLR**.

26. In response to submissions by the petitioner, that there were discrepancies between the results reflected in form 37 with those reflected in the public portal, learned counsels submitted that that would not be a basis for scrutiny to be ordered. That the petitioner had also not explained the source of the copy of the public portal attached to the petition and its validity was in question.

27. Learned counsel referred to **section 39(1)(c)** of the Elections Act and submitted that that section only required the presidential result to be posted in public portal. That that section did not obligate IEBC to post other electoral results on the public portal and accordingly those gubernatorial election that were posted were preliminary result because reliance was mainly on the forms 37.

28. **JOHN MWANIKI (the 3rd Respondent)** was represented by learned counsels Mr. J. M. Njengo and Mr. G. M. Wanjohi.

29. They too reiterate that the petitioner had failed to prove sufficient basis why scrutiny should be ordered. The learned counsel also submitted that the Petitioner had failed to show by evidence that there

were irregularities in Sosian ward.

30. The 3rd Respondent referred to paragraph 19 of the petition where it was pleaded: -

“That about 5,000 people did not exercise their right to vote in Sosian ward due to breach of peace.”

In respect to that paragraph the 3rd respondent drew the attention of the court that at the trial no evidence was led by the petitioner on how the figure of 5,000 people was arrived at.

31. Similarly to the averment in the petition that there was suspicion that the result of Sosian ward were inflated the 3rd Respondent posed the question: who was suspicious.

32. 3rd Respondent relied on the supreme court’s decision in the case **RAILA AMOLO ODINGA & ANOTHER –VS- INDEPENDENT ELECTORAL & BOUNDARIES & 2 Others [2017]eKLR** where the said court quoting with approval from a judgment by Justice Tuiyott in the case **PHILIP OSORE OGUTU –V- MICHAEL ARINGO & 2 Others Petition No. 1 of 2013** stated: -

“The learned judge further observed [paragraph 20]:

“There would be several reasons why scrutiny should not be ordered as a usual course. First, there is a 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 fishing expedition to discover new or fresh evidence. It would be expected that 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 chancing on new evidence. Scrutiny should not be looked upon as a lottery.”

33. 3rd Respondent on reliance to that case RAILA AMOLO ODINGA (supra) also submitted that the petitioner should not be permitted to fish for evidence in seeking scrutiny. The supreme in the above had this to say to such an attempt.

“Having addressed our mind 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 sufficient reason. Any prayer in the application that would seem to be 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.”

34. Finally it was submitted on behalf of 3rd respondent that the parties having closed their respective cases the court could not order scrutiny to be undertaken.

BACK-GROUND

35. Before I analyze the matter before me it is important to give some background to this matter because it is relevant to my decision.

36. The Petition was originally filed by two petitioners, namely SAMMY NDUNGU WAITY (the Petitioner) and DENNIS KIMNGAROR LEMAN (Dennis). By an application dated 18th September 2017 Dennis applied to withdraw himself from this petition.

37. This court by its Ruling of 9th November 2017 permitted the said Dennis to withdraw from this petition and also allowed the withdrawal of his affidavit in support of the petition together with the

affidavits of 3 other witnesses which affidavits were annexures to his affidavit.

38. By this court's ruling dated 20th November 2017, amongst other orders, granted the petitioner permission to place seals on all the ballot boxes of gubernatorial election within Laikipia County; and also granted an order for IEBC to supply to the petitioner SD cards for Sosian ward.

39. As stated before, on the day the petitioner presented his application under consideration before court all parties had closed their respective cases.

ANALYSIS AND DETERMINATION

40. I see two broad issues presented by the application. First is whether the petitioner has met the legal threshold of granting an order for scrutiny. The second is whether the petitioner is barred from making the application.

41. As I consider the first issue I stand at a vantage point having received all the evidence parties rely upon in this petition. I reiterate parties have already closed their respective cases.

42. The law, which governs the exercise of scrutiny, is the Elections Act and The Elections (Parliamentary and County Elections Petitions Rules 2017 (hereinafter referred to as the Rules). **Section 82(1)** of the Elections Act provides:-

“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 scrutiny of votes to be carried out in such manner as the election court may determine.”

43. **Rule 29(1)** and **(2)** of the Rules provides:-

“(1) The parties to the proceedings may apply for scrutiny of the votes for purpose 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.”

44. In determining whether the petitioner has met the legal threshold set out in Section 82(1) of the Elections Act and Rule 29(1) and (2) of the Rule I will be guided by the evidence adduced and where that evidence fell short of the pleadings in the petition the evidence will prevail. This is because to allow the converse would be to allow the petitioner to fill the gaps between his pleadings and his evidence.

45. In the course of the hearing of the petition the court ruled that the witnesses whose affidavits were annexed to the petitioner's affidavit could not testify because those witnesses' affidavits were annexures and not affidavit envisaged in the Rules. As a consequence of that Ruling the petitioner was the sole witness to testify in proof of the petition.

46. What the petitioner in summary stated in evidence in chief and in cross-examination was that he was the chief agent of the Jubilee party for Laikipia East constituency. Although he attempted to amend some part of his affidavit, and it is arguable whether a party can amend a sworn statement, what the petitioner did depose in his affidavit was that while ballot papers for governor in Laikipia East were being counted he noted that they were not stamped. That at that polling station there was no transparency. That some agents, presumably of that polling station, refused to sign form 37 A but the same was not noted by the presiding officer.

47. The petitioner further on being re-examined stated that the security operation in Laikipia North, where Pokot community ordinarily reside, under which Sosian ward falls, were supposed to end after 30 days from the date of declaration and gazette of that operation. The 30 days ended in April 2017. He further testified that that security operation caused people not to vote at Sosian Ward. That 5,000 people did not therefore vote. He however reiterated that during the general elections he was based at Laikipia East and confirmed the evidence he tendered relating to Laikipia North, where Sosian ward is, was from information he had received from third parties.

48. The sufficient basis for ordering scrutiny required under Rule 29(2) of the Rules will be determined from that evidence of the petitioner. Pleadings in the petition remain just that, pleading, until they are given life by the evidence adduce. This was the tenor of the holding of Justice R. E. Aburili in the case **SAMUEL NDUNGU MUKUNYA –V- NATION MEDIA GROUP LIMITED & Another [2015] eKLR** where the learned judge considered pleading not proved by evidence and stated:

***“Without the defendants giving evidence to prove their allegation of fair comment, their allegations remain allegations emerging from the thicket, far-fetched and unsupported. Under section 107 of the Evidence Act, Cap 80 Law of Kenya, the burden of proof lies on he who asserts*”**

49. Had the petitioner sought scrutiny before his case was closed I certainly would have been guided by his pleadings in determining whether sufficient basis had been shown.

50. And even then as was stated in the case **PHILIP OGUTO –V- ARINGO (supra)** it is not enough for a party to plead in the petition that scrutiny need to be undertaken. He must plead with sufficient detail why he requires the court’s intervention.

51. The need to meet the threshold of sufficient basis was discussed by Justice Wendoh in the case **LEDAMA OLE KINA –V- SAMUEL KUNTAI TUNAI & 10 others Nakuru Election Petition (supra)** the learned judge in holding that the application for scrutiny lacked specificity had this to say: -

“...the court cannot give a blanket order for scrutiny of Narok South Constituency because such order will be prejudicial to the respondent now that the evidence of witnesses has already been taken. The respondent would not have an opportunity to respond to any new issue that may be unraveled during scrutiny.”

52. Justice Gikonyo in the case **MUSIKARI NAZI KOMBO –V- MOSES MASIKA WETANGULA** also held:-

***“There is no evidence before the court that all polling stations were affected by the irregularities and malpractices complained of by the petitioner. It will not, therefore, be supported in law to make a general order for scrutiny or re-count of all the votes cast in the election for Senator for the County of Bungoma. That kind of extravagant exercise of discretion will also be an affront to the constitutional policy*”**

53. The above cases show that the burden of proving that scrutiny should be ordered lies squarely on the party seeking scrutiny and that party should prove sufficient basis for an order of scrutiny.

54. With the above in mind it is now necessary to examine what the petitioner, by his application sought the scrutiny to include.

55. In his application the petitioner sought that scrutiny of Sosian Ward to include:-

a) The exact turn-out per polling station in Sosian Ward as per electronic data available.

b) The voters identified using the Kiems Kit and the images of their identify cards.

c) The opening and closing time of the polling station in Sosian Ward as per the electronic data available.

d) The electronic result transmitted visavis the respective form 37A of Sosian Ward.

56. Looking at the above areas that the petitioner sought scrutiny to include it becomes clear that it is not supported by the evidence adduced before this court. To reiterate, the Petitioner in his testimony stated that he was the chief /agent at Laikipia East. It has been accepted by all parties that Sosian Ward is in Laikipia North. Therefore the petitioner's evidence about the voting that took place in Sosian was from information of person who did not adduce evidence before court.

57. Rule 29(1) of the Rules sets out why scrutiny of votes would be ordered by the court. That rule provides that such scrutiny would be ordered for the purpose of establishing the validity of cast votes.

58. The petitioner by his affidavit in support of his application deponed that the SD card of Sosian, as interpreted by I.T. experts revealed that a number of votes were inflated and deflated. Bearing in mind the need to be specific when making allegation which a party wished to rely upon for an order of scrutiny, the petitioner is being economical with the truth. Why did he fail to reveal which polling station was either inflated or deflated. Having failed to reveal that information has he met the threshold set in rule 29(2) of the Rules? I would respond in the negative. He has failed to prove to this court that there was any polling station which was inflated or deflated.

59. Similarly the petitioner failed to prove which, if any, polling station opened before 8th August 2017; or which polling station identified voters before the station was opened; or which polling station closed later than the scheduled gazette time; and or that any polling station was closed due to insecurity.

60. The evidence adduced during cross examination of the 4th Respondent that there were some Form 37 that were not stamped or signed by agents cannot be a basis of granting an order of scrutiny. All the Form 37 have been produced before court and any party who wishes can submit on whether or not they had anomalies.

61. Those areas that the petitioner seeks scrutiny to include clearly shows, as submitted by the Respondents, that the petitioner not only was fishing for evidence but was extending the scope of this petition, which cannot be permitted. And it becomes clear that the petitioner does not seek scrutiny to determine valid votes cast. Rather he seeks information that would not assist the court determine the valid votes cast.

62. The Supreme Court in the case RAILA OMOLO ODINGA & Another –v- IEBC (supra) referring to an Indian case stated:-

“It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings /ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court of its consideration.

..... The court cannot exercise discretion of ordering recounting of ballots just to enable the election petitioner to indulge in a roving inquiry with a view to fish material for declaring the election to be void. The order of recounting can only be passed only if the petitioner sets out his case with precision supported by averments of material fact.”

63. The above case speaks to the facts of this case. No foundation was shown by the petitioner for scrutiny to be ordered. This court cannot allow a party to misuse its judicial discretion, at least not at the stage at which this case has reached.

64. The second issue identified above was raised by learned counsels for the 3rd Respondent, that is,

whether the petitioner was barred from filing the application for scrutiny.

65. My first reaction when I heard that submission being made before me was to say; of course the petitioner can make an application for scrutiny at any stage in the proceedings. But on second reflection however I came to a totally different conclusion. That different conclusion was from a closer examination of section 82 of the Elections Act and Rule 29 of the rules.

66. Section 82 provides that an election court may on its own motion or on application, during the hearing order scrutiny. I repeat – during the hearing. The Webs Dictionary by Farlex defines ‘*hearing*’ as:-

“A legal proceeding where an issue of law or fact is tried and evidence is presented to help determine the issue.”

67. Accepting that definition it would follow that the hearing of this petition will be concluded when all parties make their final submission. If however they choose not make submissions then the hearing indeed conclude on 29th November when parties closed their cases. Justice Gikonyo was of the same mind, in the case **JOHN MURUMBA CHIKATI -V- RETURNING OFFICER TONGAREN CONSTITUENCY (2013) eKLR**, where the learned judge stated that submissions was part of hearing of a case.

68. Elections (Parliamentary And County Elections) Rules 2013, particularly Rule 33(1) provided that a party may at any stage apply for scrutiny of votes. Those 2013 Rules, where Rule 33(1) fell, were revoked and now the operative Rules are The Elections (Parliamentary and County Elections) Petition rules 2017. Under 2017 rules scrutiny is provided for under Rule 29. Rule 29 does not state that scrutiny may be applied for at any stage of the proceedings. Those words ‘at any stage’ were not included in Rule 29 of the 2017 Rules. There is therefore a dramatic shift introduced by Rule 29 of 2017 rules and one now needs to bear that in mind when relying on authorities of pre 2017.

69. It is for the above reason that I unable to determine whether the petitioner can be barred from making his present application for scrutiny because unless parties elect not to submit in this matter the hearing is still on going. And if it is going on Section 82 of the Elections Act is satisfied.

70. **Rule 4** of the Rules provides:-

“The objective of these rules is to facilitate the just, expeditious, proportionate and affordable resolution of election petition.”

Further **Rule 5(2)** provides:-

“A party to a petition or an advocate for the party shall assist an election court to further the objective of these Rules and, for that purpose, to participate in the process of the election court and to comply with the directions and orders of the election court.”

71. If the learned counsels for the petitioner had considered the provisions of Rule 4 above and their duty under Rule 5 and had considered that the prayers for scrutiny were not supported by evidence adduced before court they would not have filed the application or scrutiny. The action of filing the application certainly has not contributed to the expeditious and affordable resolution of this petition. The application certainly has held back the conclusion of this petition.

72. Finally I find that the Notice of Motion dated 27th November 2017 is unmerited and is therefore dismissed with costs to all the Respondents.

DATED and DELIVERED at NANYUKI this 13th day of DECEMBER 2017

MARY KASANGO

JUDGE

CORAM

Before Justice Mary Kasango

Court Assistant: Njue / Mariastella

For 1st Petitioner:

For 1st and 4th Respondent:.....

For 2nd Respondent:

For 3rd Respondent:

COURT

Ruling read in open court.

MARY KASANGO

JUDGE