



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**ELECTION PETITION NO. 8 OF 2017**

**HABIL NANJENDO BUSHURU .....PETITIONER**

**VERSUS**

**THE IEBC.....1<sup>ST</sup> RESPONDENT**

**BEDI IYADI NANCY.....2<sup>ND</sup> RESPONDENT**

**(THE CONSTITUENCY RETURNING OFFICER BUTERE CONSTITUENCY)**

**MWALE NICHOLAS SCOTT TINDI.....3<sup>RD</sup> RESPONDENT**

**ANDREW TOBOSO.....4<sup>TH</sup> RESPONDENT**

**IN THE MATTER OF:- THE CHALLENGE OF THE VALIDITY OF THE ELECTION OF  
MEMBER OF NATIONAL ASSEMBLY FOR BUTERE CONSTITUENCY IN KAKAMEGA  
COUNTY**

**AND**

**IN THE MATTER OF: ARTICLE 1,2,4,10,23,38,47,81,86,88,101 AND 105 OF THE  
CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: SECTION 75 & 80 OF THE ELECTIONS ACT 2011**

**AND**

**IN THE MATTER OF: THE ELECTIONS ACT NO. 24 OF 2011 AS AMENDED**

**AND**

**IN THE MATTER OF: THE ELECTION (GENERAL) REGULATIONS, 2012**

**AND**

**IN THE MATTER OF: ELECTION (PARLIAMENTARY AND COUNTY ELECTION)  
PETITIONS REGULATIONS, 2017**

AND

**IN THE MATTER OF: ELECTION (TECHNOLOGY) REGULATIONS 2017 ELECTION FOR  
THE MEMBER OF NATIONAL ASSEMBLY, BUTERE CONSTITUENCY**

**RULING NO.4**

**The Application**

1. The application coming up is the Notice of Motion dated 6<sup>th</sup> December, 2017 and filed in Court on 7<sup>th</sup> December, 2017. The application is filed under Certificate of Urgency dated 6<sup>th</sup> December, 2017 and is brought under Rule 4 of the Elections (Parliamentary and County Elections) Petition Rules, 2017, Order 45 Rule 1, Order 51 rule 1 of the Civil Procedure Rules, 2010 and Sections 63( e), 80, 1A, 1B and 3A of the Civil Procedure Act and all other enabling provisions of the law. The applicants, who are the 1<sup>st</sup> and 2<sup>nd</sup> Respondents seek ORDERS THAT:

*(1) This application be certified urgent, heard ex parte and service thereof be dispensed with in the first instance*

*(2) This court be pleased to review, discharge and or set aside its orders of 5th December, 2017 and direct that the scrutiny exercise conducted under the supervision of the Deputy Registrar was in compliance with the ruling and subsequent Court order of 23<sup>rd</sup> November, 2017*

*(3) The scrutiny report prepared by the Deputy Registrar and submitted to Court on 5<sup>th</sup> December, 2017 be adopted in its entirety subject to agreement by parties on contested issues and the supplementary scrutiny scheduled to begin on 13.12.2017*

*(4) Any further orders as this court may deem fit and just to grant.*

2. The application is premised on twelve grounds set out on the face of the same and is supported by the affidavit sworn by Ronoh Mike K.C on the 6<sup>th</sup> December, 2017. Both the grounds on the face of the application and the affidavit in support are to the effect that the Honourable Court, having been misled by counsel for the Petitioner and the 4<sup>th</sup> Respondent, and there being sufficient cause to review and/or set aside the orders of 5<sup>th</sup> December, 2017, this court has power and the authority to set aside, review and/or vary its orders of 5<sup>th</sup> December, 2017. It is the applicant's case that since counsel for all the parties to this petition were present during the scrutiny exercise which took place from 27<sup>th</sup> to 30<sup>th</sup> November, 2017, both dates inclusive, there is no reason whatsoever for the court to order a supplementary scrutiny. The deponent avers that the Petitioner and the 4<sup>th</sup> Respondent's counsel are being out rightly dishonest, mischievous and that it is improper for them to turn around and mislead the court as to what happened during the scrutiny exercise. The deponent therefore asks this court to discourage counsels' conduct of approbating and reprobating in the same breath. Though affidavits are not meant to contain evidence, Mr. Ronoh cited two authorities at paragraph 20 of his affidavit namely **Evans – Vs – Bartlam [1937]2 All ER 649 at page 652** where Lord Russel of Killowen had this to say on the doctrine of approbation and reprobation:-

*“The doctrine of approbation and reprobation requires for its foundation inconsistency of conduct, as where a man, having accepted a benefit given to him by a judgment cannot allege the invalidity of the judgment which conferred the benefit.”*

3. Again the deponent cited the case of **Banque de Moscou- vs – Kindersley[1950]2 All ER 549** where Sir Evershed stated that:-

*“This is an attitude of which I cannot approve, nor do I think in law the defendants are entitled to adopt it. They are, as the Scottish lawyers (frame it) approbating and reprobating, or in the more*

*homely English phrase blowing hot and cold.”*

4. The deponent finally asked this court to note that the Petitioner also misled the court with regard to the particulars of the difference in votes between his tally and the winners tally which was 3547 votes and not 1493 votes as pleaded by the petitioner. Regarding this particular issue the Court notes that this is not an issue that has arisen from the report of the Deputy Registrar which gave rise to the instant application.

5. The application is also supported by the affidavit of Mwale Nicholas Scott Tindi, the 3<sup>rd</sup> Respondent herein. The affidavit is dated and filed on 8<sup>th</sup> December, 2017. The 3<sup>rd</sup> Respondent alleges at paragraph 4 of his affidavit that contrary to this court's orders issued on 23<sup>rd</sup> November, 2017, counsel for the Petitioner and for the 4<sup>th</sup> Respondent “actively took part in the whole exercise directing on what was to be done.” The 3<sup>rd</sup> Respondent also avers that both the petitioner and the 4<sup>th</sup> Respondent were outrightly dishonest when they misled the court into granting the orders of 5<sup>th</sup> December, 2017, which orders seem to contradict the earlier orders of 23<sup>rd</sup> November, 2017. The 3<sup>rd</sup> Respondent prays that the application be allowed.

### **Response to the application**

6. The Petitioner and the 4<sup>th</sup> Respondent opposed the applications vide the affidavit sworn by Zachariah Momanyi on 8<sup>th</sup> December, 2017 and filed in court on the same day. Though the affidavit is entitled “Affidavit in support” it is an affidavit in opposition to the application. The deponent alleges that the scrutiny was done selectively, that any objections raised by the agents of the petitioner and the 4<sup>th</sup> Respondent were overruled by the Deputy Registrar, that one Truphena Omukanda, the Deputy Returning Officer Butere Constituency interfered in, the process by siding with the Deputy Registrar in overruling the objections raised, and that the report produced in court on 5<sup>th</sup> December, 2017 by the Deputy Registrar did not have any observations touching on Form 35B during the scrutiny exercise.

7. The deponent also alleges that he and other agents were denied an opportunity to compare form 35B contained in the IEBC file with the form 35B that was availed and filed in Court by IEBC though there were many glaring differences in the entries made in the two forms. Finally the deponent asks this court not to fall prey to the applicants' attempt to have it sit on appeal on its own ruling of 5<sup>th</sup> December, 2017. He prays that the application be dismissed so that the supplementary scrutiny ordered by the court on 5<sup>th</sup> December, 2017 is carried out.

### **Submissions**

8. The application was canvassed orally before me on 8<sup>th</sup> December, 2017. All counsel made their submission in line with their respective affidavits. Counsel for the applicants submitted that if the application is not allowed, the petitioner and the 4<sup>th</sup> Respondent would have been aided to accomplish their mission of going on a fishing expedition for evidence in support of an otherwise ailing petition. Regarding the petitioner's and 4<sup>th</sup> Respondent's contention that it is fatal for counsel to swear an affidavit on contentious issues arising in a case in which he appears, Mr. Ronoh submitted that because there were no other IEBC officials to act as agents, he doubled up as counsel and as agent for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and for that reason, his clients ought not be punished for his having sworn the affidavit on their behalf.

9. Mr. Busiega supported the application and associated himself with the submissions made by Mr. Ronoh on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. Mr. Busiega added that since counsel in this matter were unlikely to agree on anything, this court should find it fitting to review and/or set aside order number 3 of 5<sup>th</sup> December, 2017. He also urged the court not to allow the petitioner and the 4<sup>th</sup> Respondent to continue with their fishing expedition for evidence. Mr. Busiega referred to this court's orders of 23<sup>rd</sup> November, 2017 and 5<sup>th</sup> December, 2017 respectively as an extravagant exercise of discretion by the court.

10. Mr. Amasakha for the 4<sup>th</sup> Respondent dwelt at length on the contents of the affidavit sworn by Mr. Momanyi and submitted that scrutiny of election materials is not a simplistic matter as counsel for 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents would want the court to believe. He submitted that scrutiny was a serious exercise intended to enable the court verify the validity of the voting process of an election. Counsel further submitted that there should be no doubt as to what the election material to be scrutinized are since these are clearly, set out in Rule 29 (4) of the Elections Petition Rules, 2017. He urged the court not to allow the application because to do otherwise would deny the court the opportunity to make a fair decision.

11. In reply, Mr. Ronoh conceded that the scrutiny report submitted by the Deputy Registrar on 5<sup>th</sup> December, 2017 does not contain any remarks on Form 35B and that in that regard he would be amenable to having the scrutiny of the said form done.

### **Background**

12. The genesis of the instant application can be traced to this court's order of 5<sup>th</sup> December, 2017 directing the Deputy Registrar to carry out a supplementary scrutiny of all the election materials other than the form 35A and the polling station diaries. The said orders were made after counsel for the Petitioner and the 4<sup>th</sup> Respondent raised some concerns regarding the just concluded scrutiny as ordered by this court on 23<sup>rd</sup> November, 2017 touching on the manner in which the scrutiny was done and some of the findings thereof, including a complaint that forms 35B and 35C were not scrutinized.

13. Mr. Kubebea who held brief for both Mr. Ronoh and Mr. Busiega on behalf of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents respectively submitted thus:-

*“For 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, the agents agree with the report as filed and have no problem if the report is adopted by the court for its records.”*

14. Before the court issued the impugned order, it said the following:-

*“The court has looked at the report vis-a-vis the submissions by counsel for the petitioner and the 4<sup>th</sup> Respondents. The court has also revisited the order of this court made on 23.11.2017, and it is clear that the second limb of that order has not been fully complied with. Accordingly.....”*

### **Analysis and Determination**

15. Having stated the above, and after a careful examination of all the relevant provisions of the law, and considering the rival submissions in this matter, including the concession by Mr. Ronoh on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, the following points are pertinent:-

*(a) This court has power to make such interlocutory orders as may appear to the court to be just and convenient and to give effect to the overriding objective as set out in section 1A of the Civil Procedure Act, (the CPA) Cap 21 Laws of Kenya which is to the effect that courts shall facilitate the just expeditious, proportionate and affordable resolution of all civil disputes brought before them.*

*(b) This court has power to make orders of review in any matter from which an appeal is allowed by the CPA, but from which no appeal has been preferred or from which no appeal is allowed by the Act.*

*(c) An erroneous view of evidence or of law is no ground for a review though it may be a good ground for an appeal (see **Nyamogo and Nyamogo Advocates – vs- Kigo** ([2001]EA 170)*

*(d) An application for review must be based on the discovery of new and important evidence which*

*was not within the applicant's knowledge or could not be produced by him at the time when the decree was passed or made or on account of some mistake or error apparent on the face of the record or for any other sufficient reason. The applicant for review must strictly prove the grounds for review except on the ground of mistake or error apparent on the record, failing which the application will not be granted. (see Kithoi – vs – Kioko[1982] KLR 177)*

16. Having stated the above, it is my finding that the applicant's application does not have any merit. The applicants have not proved the grounds for review and as rightly conceded by counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, the report submitted to the court by the Deputy Registrar on 5<sup>th</sup> December, 2017 does not make any findings on form 35B which is a critical document in confirming therein is in tandem with the information contained in the form 35As. Form 35B is one of the election materials to be subjected to scrutiny. Without such information, this court would be hard put in verifying the validity of the electoral process that led to the results declared by the 2<sup>nd</sup> Respondent for the election of the Member of the National Assembly for Butere Constituency.

17. I must also add that the supplementary scrutiny would in no way afford the petitioner and the 4<sup>th</sup> Respondent the opportunity to go on a fishing expedition for evidence to support an otherwise "ailing petition" to use the words of counsel for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. The court made this position very clear in its ruling of 23<sup>rd</sup> November, 2017. What the Court seeks to have as a result of the scrutiny exercise is evidence to assist it in verifying the validity of the process leading to the declaration of the 3<sup>rd</sup> Respondent as the duly elected Member of the National Assembly for Butere Constituency, period. In any event, any issues/concerns arising from the scrutiny report can be addressed during the final submissions.

18. Finally, I want to point out that most of the allegations made by counsel in the affidavits both for and against the instant application could not be substantiated. No efforts were made by counsel during the scrutiny exercise to bring to the attention of the court the allegations that have been made against the Deputy Registrar. I would therefore dismiss those allegations as lacking in merit.

19. Regarding paragraph 3 of my order of 5<sup>th</sup> December, 2017, and in view of paragraph 1 thereof the said paragraph 3 be and is hereby set aside.

### **Conclusion**

20. For the reasons given above, I now make the following orders on the application dated 6<sup>th</sup> December, 2017

- 1. Paragraph 3 of the order dated 5<sup>th</sup> December, 2017 be and is hereby set aside.*
- 2. Apart from (1) above, the applicant's notice of motion dated 6<sup>th</sup> December, 2017 be and is hereby dismissed*
- 3. Each party shall bear its own costs.*

Orders accordingly

Ruling delivered dated and signed in open court at Kakamega this 11<sup>th</sup> day of December, 2017

**RUTH N. SITATI**

**JUDGE**

In the presence of;-

M/S Kadenyi for Akusala.....for petitioner

Mr. Kubebea for Ronoh.....1<sup>st</sup> and 2<sup>nd</sup> Respondents

Mr. Kubebea for Busiega.....for 3<sup>rd</sup> Respondents

M/S Kadenyi.....for 4<sup>th</sup> Respondent

Polycap.....Court Assistant