



REPUBLIC OF KENYA

High Court at Homabay

Election Petition 2 of 2013

JAPHET KIRIMI KOBIA.....PETITIONER

VRS

JULIUS KABIRA AMBAU.....1ST DEFENDANT

BERNARD MUSEE.....2ND DEFENDANT

I.E.B.C.....3RD DEFENDANT

RULING.

The application before the court is a Notice of Motion dated 3rd May, 2013 brought under Section 80 of the Elections Act, 201, seeking the following orders:-

2. That the 2nd and 3rd Respondent be ordered to release to the petitioner/applicant copies of form 34 for all polling stations within Athiru Ruujine Ward for his inspection and/or file copies of the same in court and a specific timeline for compliance be given before the petition is heard.
3. That the honourable court be pleased to compel the 2nd and 3rd Respondents to provide the petitioner with copies of all marked registers for the petitioner to inspect and audit the same and/or order for the said copies of registers to be filed in court and a specific timeline for compliance be given before the petition is heard.
4. That the honourable court be pleased to order a recount of all votes from all the polling stations of ATHIRU RUUJINE before the petition is heard on merits.
5. That the honourable court be pleased to order the 2nd and 3rd Respondent to furnish the petitioner with a certified copy of final tabulation table (Form 36) of the results for ATHIRU RUUJINE COUNTY representing results.
6. That the honourable court be pleased to order the 2nd and 3rd Respondent to furnish the petitioner with each polling station results (form 34) for all the other 5 elective posts for all the polling stations within ATHIRU RUUJINE.
7. That the honourable court be pleased to issue any further and/or better orders as will meet the ends of Justice.
8. That costs of this application be provided for.”

The application is grounded on the annexed affidavit of the petitioner and on the ground that the petitioner requires the assistance of the court to procure evidence that is in the custody of the 2nd and 3rd Respondent.

The petitioner/applicant in paragraph 3 of his supporting affidavit he depones that he has brought this interlocutory application because the 2nd and 3rd Respondent are in custody of materials that he believe will bolster his petition. He further depones that the 2nd Respondent has declined to supply him with form 34's and 36 despite his request for the same.

In paragraph 5 of the supporting affidavit the petitioner contends that he seeks to be supplied with form 34's for all the other 5 positions that were being contested so that he may compare and contrast. The figures of registered voter for he is apprehensive that the 2nd and 3rd Respondent officers conspired to either inflate the 1st Respondents tally of votes and/or reduce his tally of votes and such a play with figures will be easy to discern on comparison with others.

In paragraph 6 of his affidavit he depones that he seeks to audit the marked register of voters to ascertain whether some votes he knows did not vote for reasons of being admitted in hospital being dead, being in far off colleges, universities and having been on security duties as police officers. That there are strong rumours that they have been marked as having voted.

The petitioner further depones that a recount would ascertain whether the 2nd and 3rd Respondents, agents did a proper tally of the votes, lastly he depones that there were election observers who documented the shortcomings of the electoral process.

The application was opposed by the Respondent who filed grounds of opposition.

Mr Kerongo and Co Advocates for the 2nd and 3rd Respondents raises the following grounds of opposition.

1. The application has been overtaken by events as the 2nd and 3rd Respondents have already brought before this court the relevant forms 35 and 36 through affidavits.
2. The demand for form 34 is misplaced as the same is only used in declaration of presidential results and it is irrelevant in the present proceedings.
3. The court cannot order a scrutiny of votes and/or a recount unless the petitioner first establishes a basis and/or the petition is severely limited to one and only one prayer of scrutiny and recount.
4. The demand for register of voters is without basis and it is a fishing expedition for evidence in realization that the petition is without merit.
5. This court is only seized of the ward representative petition and not any other petition and it is not viable for the court to deal with document relating to other positions of President, Governor, Member of Parliament or women representative without offending the constitution and the Elections Act.

The 1st Respondent through the firm of Kiautha Arithi and Co Advocates raises the following grounds of oppositions.

1. That the form 34 sought to be released to the petitioner/ applicant relates to the President election and has not relevance to the petition before court.
2. That the prayer for provision to the petitioner of all marked registers is superfluous as the petition herein does not challenge election tallying in all polling stations.
3. That the court cannot order for recount/scrutiny of all votes before the petitioner abandons all other

grounds in the petition.

4. That the application has already been overtaken by events, the 2nd and 3rd respondent having supplied/served the sought documents in their response to petition.

5. That the petition herein relates to election of county representative for Athiru Ruujine ward only and the court has no jurisdiction to grant prayers touching on the Presidential, governors, senators, members of parliament and women representative election.

6. That the applicant seeks orders against persons who are not parties to petition.

7. That the application is speculative and omnibus.

8. That the application is fatally defective and unlawful.

9. That no ends of justice or value will be served by the application.

This application was canvassed before me on 16/5/13. Mr Mbogo for the petitioner/Applicant dropped all the prayers in his application except prayers 3,4,6 and 7. Mr Mbogo for the petitioner submitted that there were errors in the final tabulation of the votes in that the petitioner votes were under recorded. He argued that the 1st Respondent in his supporting affidavit were so in paragraphs 4 and 5 admits there was a problem with the final tabulation of the votes. He also submitted that they need to inspect the marked register to find out whether dead voters or security officers who were away from their polling stations voted. It is the petitioners case that this court will never know the truth unless the said records were scrutinised.

Mr. Atheru for the 1st respondent submitted that the application is brought under the wrong provision of the law and therefore it is misconceived and unknown in law. He further contended that the petition relates to specific polling stations and therefore the petitioner cannot seek a recount in all polling stations. It was contention that the petitioner cannot seek a recount of the votes unless he abandons all other grounds in the petitions such as bribery.

Mr Atheru further argued that although the 1st respondent admits that there were errors in the final tabulations of votes thus were typing errors and did not affect the outcome of the election. He also submitted that the petitioner is engaging in a fishing exercise and that it is not the duty of the court to aid a party to pet evidence. The petitioner ought to have all the evidence before filling the petition.

Finally he submitted that prayer 6 in relation to forms 34 is outside the jurisdiction of this court since this court is only seized of the ward representative petition.

Mr Kerongo for the 2nd and 3rd Respondents submitted that under Rule 32(1) and (2) of the Elections (parliamentary and county Elections) petition Rules, 2013 Limits recount of votes to where the only issue in the petition is the recount or the tallying of the votes which is not the case in the instant petition.

He further submitted that in the supporting affidavit the petitioner has indicated that the reason he brought this application is to boost his petition, therefore the petitioner is engaged in fishing exercise.

Mr Kerongo also argued that the petitioner has not adduced sufficient reasons to warrant scrutiny or recount of the votes as provided for under rule 33 (2). He saw that granting of prayer 6 will not serve any purpose since forms 34 is for Presidential election results.

He relied on the judgement in Election petition No 9 of 1993. **Masinde Vrs Buire and Another** where it was held that:-

“ There had to be a good reason before the court counsel order for scrutiny. An order for scrutiny was not

automatic and there had to be a basis.

He also relied on the judgement in Election petition No 33 of 1993. Ole Lempaka vrs Komen & another where it is was held:-

“The petitioner which alleged breach of law, rule or regulation or which complained of any malpractice must be proved by evidence.”

I have carefully considered the submissions made by the three(3) counsels and the documents filed in this case. The election results as declared by the 2nd and 3rd Respondents shows that the petitioner pulled 2394 votes and the 1st Respondents pulled 3701 votes. The 1st Respondents was declared as having been duly elected. The vote difference between the 1ST Respondent and the petitioner is 1307 votes.

In the petition the petitioner contends that in several polling stations his votes were under recorded whereas those of the 1st Respondent were inflated. In the present application he seeks to have the said votes recounted so that this court can ascertain the truth.

It was argued that this application is premised on the running provisions of the law. However it is the duty of the court to dispense justice without undue regard to technicalities. The orders sought are very clear and no party can claim to have been prejudiced by the wrong citation of the law.

On whether this court should order recount of all the votes the court is alive to the provisions of Rule 33(1) & (2) of the elections petition Rules, 2013 where a party can at any stage, apply for scrutiny of the votes for purposes of establishing the validity of the votes cast. The said party must also satisfy the court that there are sufficient reason to do so. This is the position restated in the case of **Masinde vres Buire and another**.

I do not agree with the submission made by Mr Kerongo and Mr Atheru that scrutiny is only limited to where there are no other grounds in the petition. What is required for an application for scrutiny to succeed is sufficient grounds. In the instant case the petitioner claims that his votes were interfered with. He contends that his votes were under recorded. The 1st Respondent also admits that there was a problem with the tabulation of the votes. In my view this is a sufficient ground for scrutiny. It is accepted by both the petitioner 1st Respondent that there were irregularities. The extent of the said irregularities can only be ascertained through scrutiny.

For the said scrutiny to be meaningful the marked register should be availed by the 2nd and 3rd Respondents.

For these reasons I grant prayers 3 and 4 in the application. However I find that there is no sufficient grounds to support granting of prayer 6. The forms being sought in prayer six(6) relate to presidential results and therefore they would not serve any purpose in this petition. In my view prayer 6 is a fishing exercise by the petitioner.

The upshot is that I allow and grant prayers 3 and 4 in the application.

The cost of this application to be in the cause.

C.M Maundu SPM

31/5/13.

31/5/13.

Before C.M Maundu

C/C:- Doreen

Petitioner:- Present

1st Respondent:- Present

2nd Respondent:- Present

3rd Respondent:- Absent

Mr Mbogo:- Present for the petitioner

Mr Kerongo present for the 2nd and 3rd Respondent.

Mr Atheru present for 1st Respondent.

Court:- Ruling delivered in open court.

C.M MAUNDU SPM

31/5/13.

Court:- I wish to clarify that the scrutiny of the votes will be done simultaneously with the hearing of the petition.

C.M MAUNDU SPM

31/5/13.

Mr Kerongo:- I will be calling only one (1) witness.

Mr Atheru:- We do not think a mention is necessary. The issues can be brought during submissions. We shall be calling 12 witnesses. These are the witnesses who have put in affidavits.

Mr Mbogo:- We have nine(9) witnesses who have put in affidavits. That is the list we are operating on. If there will be any need for further witnesses I would seek courts leave. I have no problem in drawing the issues.

Court:- I feel that it is important that the parties come up with the issues before the commencement of the hearing.

C.M Maundu SPM

31/5/13.

Mr Kerongo:- We shall file issues before the hearing date. I have another petition in Garissa from 11th – 14th June 2013. I suggest we take 18/6/13 for hearing.

Mr Atheru:- I suggest we start on 20/6/13. I have several high court matters on 18th and 19th June 2013. The election materials can be delivered on 17th June 2013.

Mr Mbogo:- Any date is convenient to me. I suggest we start it on 24/6/13. The scrutiny can start on 17/6/13.

Mr Kerongo:- I suggest the scrutiny start on the same date. (24/6/13).

Mr Kerongo:- I will organize with my client to do the delivery by 21/6/13.

Court:- Hearing on 24/6/2013 to 28/6/13. Parties to file issues before the hearing date.

C.M MAUNDU SPM

31/5/2013.