



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Election Petition 11 of 2008**

**REUBEN NYANGINJA NDOLO.....PETITIONER  
AND**

**DICKSON WATHIKA MWANGI.....1<sup>ST</sup> RESPONDENT  
JERUSHA CHEPSAP.....2<sup>ND</sup> RESPONDENT  
THE ELECTORAL COMMISSION OF KENYA.....3<sup>RD</sup> RESPONDENT**

**RULING**

After the close of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent's case, Mr. Kilukumi, the learned counsel for the 1<sup>st</sup> Respondent, made oral application for orders of recount and scrutiny of all the ballot papers cast in Makadara Constituency for parliamentary election of 2007 and examination of electoral registers used in the election on hand.

It was submitted that the said application is brought under Sec. 60 of the Constitution which confers unlimited original jurisdiction to the High Court.

He based the application on three grounds, namely:-

- (1) *From the evidence from the Respondents, it has been demonstrated that there have been arithmetical errors in calculation of the votes cast.*
- (2) *On 9<sup>th</sup> May, 2008, all the ballot boxes containing all the ballot papers were delivered under Rule 19 of the National Assembly Election (Election Petition) Rules (referred hereinafter as the 'Election Rules'). He stressed that the spirit behind enacting the said Rule 19 was to arrive at a just outcome of the election by the Court.*
- (3) *Lastly, reliance was placed on paragraph 25 of the election petition dated 17<sup>th</sup> January, 2008 which contends that there be scrutiny and recount of the votes recorded as having been cast and careful examination of the marked copies of the election's registers used during the polling day and it was further contended that consequently, the Petitioner has prayed that there be orders for scrutiny and recount of all the votes cast and examination of elector's registers used in the polling stations in Makadara Constituency to determine the exact number of electors who cast their votes.*

In conclusion, Mr. Kilukumi submitted that as the Petitioner has prayed for such orders, the application should be allowed.

Mr. Lubulellah, the learned counsel for 2<sup>nd</sup> and 3<sup>rd</sup> Respondents could not hide his surprise at the application. He opposed the application strenuously.

Admitting that Sec. 60 of the constitution gives unlimited jurisdiction to the High Court, it was contended that as provided in the said section, the National Assembly and Presidential Elections Act (Cap 7) was enacted to enumerate special powers of the court and the Election Rules provided for the procedure of the Petition.

According to him, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have laid evidence before the court to show who was the winner of the election and that evidence confirms the stand taken by the Electoral Commission in

announcing the 1<sup>st</sup> Respondent as a winner.

He also stressed that on 21<sup>st</sup> January, 2010, the scrutiny of some of the ballot boxes were allowed and the process was undertaken and, that should have been the opportune time to ask for the prayers which are now being made. Moreover, he stressed that only because Rule 19 of the Election Rules is complied by producing the electoral materials before the court, there is no obligation on any party or the court to scrutinize all the materials before the court. The 1<sup>st</sup> Respondent, in his view, has no business to seek the prayers made because the petitioner has sought those prayers in his petition.

Mr. Ongoya, the learned counsel for the Petitioner, echoed the above sentiments, and added that Sec. 60 of the Constitution gives unlimited original jurisdiction to this court in civil and criminal matters and also confers “*such other jurisdiction and powers as may be conferred on it by this constitution or any other law*”. He submitted that Sec. 44 of the Constitution and the Act (Cap 7) do confer the jurisdiction to hear and determine election petitions which are neither in the regime of Criminal matter nor a civil matter *per se*.

It is a specific jurisdiction and thus this court cannot entertain the application solely based on Sec. 60 of the Constitution.

Mr. Ongoya pondered that this application is a first one of its kind where the Respondent is prosecuting the case on behalf of the Petitioner.

The Petitioner, as per the contentions made in the petition, asked for a partial scrutiny of some of the ballot boxes of different categories and the matter came to rest after such scrutiny allowed and undertaken. The Petitioner asked for the said partial scrutiny to avoid delay which factor is the primal requirement under the Act and the Constitution.

He also clarified that the submissions from the 1<sup>st</sup> Respondent to the effect that the ballot boxes delivered contained all the ballot papers fall flat on its face, because of the evidence that one of the ballot boxes scrutinized contained nothing else but the civic election materials. The court cannot in this circumstances arrive at a just determination of who won the election based on the said evidence. These materials cannot be taken into account while undertaking exercise of counting the votes cast.

The court was asked to shun any action which is foreseen to be a futile one and waste of court’s time.

Both the counsel thus asked the court to dismiss the oral application.

I have observed the submissions from all the three counsel and except from stating that I have considered them very carefully, I do not intend to reiterate the same.

I do, however entirely agree, and I have found in earlier matter namely *Election Petition 1 of 2003 Peter Agweli Onalo vs. Ekiakim Ludeki & 2 Others EUR*, that the standard of proof in the election petition are different to the standards in civil and criminal matters and that election petitions are of a quasi-criminal nature.

I also note that Court of Appeal and the High Court in Kenya have with one voice, declared that the electoral laws are the complete code and/or regime of election laws.

Evidently, it is the Petitioner, who has asked for orders of scrutiny of votes as well as careful examination of election register in his petition. Any litigant has options either to seek all the prayers, or parts thereof or withdraw the matter. The opposing litigant cannot take a free ride on those averments made and prayers sought by the claimant, and seek the same orders. That is unheard of in our advertial system of justice or, in my view, in any system of litigation.

The Petitioner, as submitted, has exhausted the claim for scrutiny by asking the scrutiny of some ballot boxes and that exercise is now closed even for the Petitioner.

Moreover, I did not discern the rationale of the 1<sup>st</sup> Respondent seeking the orders as made. He has not shown what result he intends to achieve thereby on what injustice he intends to address. If it is only to delay the determination of the petition, this Court is not going to fall prey of such attempt.

In short, I am not satisfied that the application made by the 1<sup>st</sup> Respondent is bona fide and the court finds that the same is unmeritorious. Thus the oral application so made is dismissed with costs to the Petitioner and 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.

Dated, Signed and delivered at Nairobi this 11<sup>th</sup> day of March, 2010.

**K. H. RAWAL**  
**JUDGE**  
**11.03.2010**

