

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ELECTION PETITION NO. 3 OF 2008
THE NATIONAL ASSEMBLY AND
PRESIDENTIAL ELECTIONS ACT
(CAP 7 OF THE LAWS OF KENYA)
ELECTION PETITION FOR KIRINYAGA CENTRAL
THE PETITION OF DICKSON DANIEL KARABA
BETWEEN

DICKSON DANIEL KARABAPETITIONER

VERSUS

JOHN NGATA KARIUKI1ST RESPONDENT
JAMES KARIUKI GITAHU2ND RESPONDENT
INTERIM INDEPENDENT ELECTORAL COMMISSION OF KENYA
(Successor to Electoral Commission of Kenya)3RD RESPONDENT

RULING

After the petitioner completed his evidence, his advocate Mr. Paul Wamae made application that the result as contained in forms 16, 16As, 17 and 17A which was produce before court by the third respondents be examined in terms of its contents. He submitted that all the figures shown in form 16As be added up and re-tallied to see the result of the election in order to determine who actually worn the election. He stated we must know what is contained and what is revealed since there are no other electoral materials before court. He also contended that the information contained in the forms before court be verified in order to determine whether the evidence given by the petitioner has any basis. On the other hand Mr. Wachira Mari learned counsel for the respondent objected to the application by the petitioner on the following grounds:

1. That the petitioner has not established a case to justify the court to investigate the election materials before court.
2. The petitioner has not developed a case for this court to start a process of investigating the materials
3. Most of the evidence of the petitioner is hearsay evidence which does not meet the threshold for permitting this court to order for the information contained in the forms to be scrutinized and verified.
4. The foundation of this petition is that the 2nd respondent refused to re tally the votes and it is premature to order for the exercise requested by the petitioner, therefore he invited court to reject the application since no basis has been laid by the petitioner Mr. Arusei learned counsel for the 2nd and 3rd respondent supported the position taken by the 1st respondent in that the document can be looked at, when the 2nd respondent is giving evidence. He also contended that the petitioner has laid no ground for investigating the documents. No evidence of asking for re-tallying has been made by the petitioner to the 3rd respondent.

I have considered the application and the submissions by the learned counsel for the parties herein. The starting point is that all the election materials and documents under Rule 19 of the election petition rules were not produced before court because they were destroyed in a fire that consumed the offices of the election coordinator Kirinyaga Central Constituency. The election materials and documents required to be produced before court under rule 19 are unavailable and cannot be traced. As a result of that unfortunate scenario this court directed the 2nd and 3rd respondent to produce forms 16, 16As, 17 and 17A for purposes of ascertaining or determining whether the alleged grievances by the petitioner are valid or baseless. In that regard the 3rd respondent could not produce the originals but secured photocopies from African Union. The photocopies are the only electoral materials available in this petition to the parties.

It is clear, that the gist of the petitioner's cause of action is that the returning officer did not take into consideration all the results from all the polling stations before announcing the winner of the election. It is contended that there exists, discrepancies, mistakes, errors and miscalculations committed by the returning officer. It is alleged that in the announced results the petitioner got 16,264 while the 1st respondent got 17,830 votes. It is also alleged that the 2nd respondent did not announce the total number of votes cast and/or rejected.

It is the position of the petitioner that after the results were announced, he demanded for re-tallying of the votes which was done. The said exercise gave different figures than the results which were announced and which declared the 1st respondent as the winner. It is also contended by the petitioner that the 2nd respondent did not include the results from one polling station namely Kiamutuira polling station resulting in more confusion and discrepancies. The respondents disagree by saying that no legitimate recount or re-tallying was requested and done.

It is the case of the petitioner that if all the results were taken to consideration and properly included into the final tallying, he would have beaten the 1st respondent by 198 votes which would have entitled him to be declared the winner and duly elected member of the parliament. In paragraph 4 of the petition it is averred as follows:

“By reason of the aforesaid counting, omission of the results from one polling station as aforementioned, erroneously tallying and re tallying of results from the polling stations, the petitioner was deprived the benefits of the true results of the election of Kirinyaga Central Constituency which results, he worn in the manner herein before stated in consequence, whereof the collective choice of leadership by the electorate of the said constituency was thereby undermine or denied.”

The main objective of a petition court is to determine and satisfy whether the tenets of democracy which requires the whole of the election process to be free, open and fair in all aspects were met or achieved. In that regard it is the duty of the court to ensure that justice is done to the parties in a manner that meets the requirements of the law and serves the interest of the parties.

Section 23(d) of Cap 7 empowers this court to decide all matters that come before it without undue regard to technicalities in order to achieve justice between the parties.

The purpose of the application by the petitioner is to establish whether the returning officer made any mistakes in adding up the results from all the polling stations. No doubt information in Form 17A is uplifted from Form 16As. The entries made in Form 17A are in respect of each of the polling station in Kirinyaga Central Constituency. The person who made up the entries in Form 17A was the returning officer and regulation 40(1) (f) requires him to complete the form set out and declare the information and the result in a particular manner i.e.

- (1) Name of the Constituency
- (2) Total number of the registered voters
- (3) Votes cast for each candidate in each polling station
- (4) Aggregate number of votes casts in the constituency and
- (5) Aggregate number of rejected votes.

After filling that information the returning officer is required to sign and date the form and give to each candidate or candidate's agent a copy and thereafter deliver to the electoral commission the original of Form 16As together with Form 17A.

Basically the entries made in respect of Form 16As for each polling station has to be reflected in Form 17A and in order for that to be determined, this court has to be in possession of information showing that all the details in Form 16As are the same as in Form 17A. What that means is that Form 17A is a secondary document which has to be a true reflection of information lifted from 16As. In essence Form 17A is a child while Form 16As are the parents of the child. Consequently it is incumbent upon the returning officer to ensure that the child is a true born child of the parents. The only way to ascertain whether the child is a clear and proper reflection of the parents is to scrutinize both the child and the parents. What is questioned is the legitimacy of the child and the parents.

The purpose of the exercise as requested by the petitioner is to ascertain whether there exist any material discrepancies between the results captured in form 16As and 17A. That will necessitate the court to determine the number of votes casted and obtained by each aspirant. It is after verifying and ascertaining that process that the court can form an opinion whether the results contained in the Form 16As and as reflected in Form 17A are correct and complimentary. The allegations by the petitioner may be immaterial, may be unfounded but nevertheless the same raises reasonable grounds to enable this court to investigate and determine the global and pertinent issues raised by the respective parties. In *Harris v Ryan* [1997], 44 M.P.L.R. (2d) 194 (Nfld. S. D.) it was held;

“When interpreting legislation relating to elections, one may reasonably conclude the primary policy is to ensure that we have free, open and properly conducted democratic elections. If there have been irregularities, these should be exposed to the view of the general public through the returning officer and through the candidates and their agents involved in the recounts. In promoting this policy the courts must not ignore the desirability of avoiding undue delay in seeing the completion of recounts or scrutines and avoiding unnecessary expense for the taxpayer. Where, as here, there is nothing to indicate that greater access to election documents is going to unduly delay or increase the cost of a recount or scrutiny, the courts should give an interpretation to the ambiguous language which favours encouraging openness regarding information on how the election has been conducted.”

The question for my determination is whether the petitioner has established sufficient cause or grounds for this court to order an exercise to determine what each candidate got from each of the polling station and whether the information reflected in the Form 16As are a true reflection of the information ultimately uplifted into Form 17A by the returning officer. I think reasonable grounds have been raised to enable this court to allow the application by the petitioner. I reckon that the allegations and grievances by the petitioner have not been proved. Nothing may also turn of the exercise being undertaken at this stage. I therefore think the application is well merited and it is hereby allowed with no orders as to costs.

Dated, signed and delivered at Nairobi this 26th day of July 2010

M. WARSAME
JUDGE