



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ELECTION PETITION NO. 5 OF 2008

WILLIAM MAINA KAMANDA PETITIONER

VERSUS

MARGARET WANJIRU KARIUKI 1ST RESPONDENT

MANASSEH MUGASIA 2ND RESPONDENT

ELECTORAL COMMISSION OF KENYA 3RD RESPONDENT

RULING

(1) William Maina Kamanda (“**the Petitioner**”) filed this petition on the 14th January 2008, to contest the validity of the election of the Hon. Bishop Margaret Wanjiru Kariuki (“**the first Respondent**”), as the Member of Parliament for Starehe Constituency at the General Elections held on the 27th December 2007. The Petitioner was one of the seventeen candidates in the contest.

(2) On the 3rd July 2008 in the course of the trial while the Petitioner’s fifth witness was giving evidence, the Petitioner took out a Notice of Motion under sections 44 and 60(1) of the Constitution of Kenya; section 23(2) of the National Assembly and Presidential Elections Act [Cap.7] (“**the Act**”); Regulation 40(4) of the Presidential and Parliamentary Elections Regulations (“**the Regulations**”); and the inherent jurisdiction of the court and all other enabling powers and provisions of the law, seeking the following main order:

“(1) This Hon. Court be pleased to order that before closure of the Petitioner’s case, there be a scrutiny and recount of all the votes recorded as having been cast in the Parliamentary elections held on 27th December, 2007 in Starehe Constituency to ascertain the valid votes garnered by each of the Parliamentary candidates.”

(3) The application is based on eleven grounds the principle ones being that the declaration of the Parliamentary results for the Starehe Constituency as contained in Forms 16As and Form 17A has been falsified through obvious unauthorized alterations made without any signed declarations by respective presiding officers vouching for the accuracy and truthfulness of the results; that it is not possible from the available Forms 16As and Form 17A for the court to ascertain the number of valid votes garnered by each candidate; that the difference in votes between the Petitioner and the first Respondent is a very thin margin of some 895 votes; that the official results were announced before completion of tallying results from all polling stations and that Manasseh Mugasia, (“**the second Respondent**”), who was the Returning Officer for the Starehe Constituency, officially and publicly announced results for two

parliamentary candidates only.

The Petitioner reiterates these grounds in his affidavit in support of the application dated the 2nd July 2008.

(4) In her replying affidavit made on the 14th July 2008, the first Respondent opposes the application on the grounds that the Motion is premature and lacks merit inasmuch as the Respondents have not given evidence; that the Petitioner has not pleaded any ground in his Petition dated the 14th January 2008 upon which the court would have jurisdiction to consider a request for scrutiny; that no evidence has been led so far to establish the basis or foundation for granting of the orders sought; that the ballot boxes, having been broken and opened, the fidelity of their contents is questionable and no useful purpose will be rendered by allowing the application; and that no evidence has been provided with respect to the measures taken to ensure that the contents of the ballot boxes were not interfered with, particularly given that the Petitioner was at the material time a Government Minister in charge of the administration and management of Nyayo Stadium where the ballot boxes were at one time stored.

(5) Though the second Respondent did not file any documents in response to the application, Mr. Kihara Muttu, the Vice-Chairman of the Electoral Commission of Kenya (“**the ECK**”), swore and filed his replying affidavit in opposition to the motion on the 15th July 2008 on behalf of the ECK. The ECK, too, contends that the application is premature as the evidence of the second and third Respondents has not been heard; that the report of a handwriting expert has not been submitted to assist the court determine whether the allegations made by the Petitioner of unauthorized alternations to Forms 16As and 17A are true; and that the ballot boxes themselves and the contents therein are an issue as some of them appear to have been tampered with at the time of delivery to court.

(6) Mr. Kioko Kilukumi, learned counsel for the Petitioner, in submission pointed out that Exhibit 1B containing the original Forms 16As and Form 17A delivered to court by the ECK contains only 129 Forms 16As while there were 204 polling stations in the Constituency, leaving 75 forms unaccounted for. He said that from the evidence so far, 17 Forms 16As have obvious alterations which have not been counter-signed by the presiding officers or the agents of the candidates; that the majority of the Forms 16As are photocopies in which figures have been inserted in original handwriting without any verification. Further, he pointed out the irregularities specifically pleaded in paragraphs 15, 20, 25 and 29 of the Petition on which evidence had been led by the Petitioner himself (PW1) as well as by James Phillip Kiilu (PW3) and Martin Baiya Kihui (PW4) (who respectively were Assistant and Deputy Presiding Officers in the Constituency) in support of the several grounds on the basis of which the application is made. Citing several authorities, Mr. Kilukumi urged that the application be allowed as the court cannot otherwise ascertain the number of valid votes garnered by each of the seventeen candidates who contested the Starehe Parliamentary seat.

(7) In his submission, Mr. Chacha Odera, learned counsel for the first Respondent, invited me to make a clear distinction between **scrutiny** and **recount** which, though they may have a convergence in implementation, are separate jurisdictions with separate grounds upon which to move the court. He argued that inasmuch as the Petitioner claims the Starehe seat on allegations that he had a majority of lawful votes but had failed to deliver to the Registrar of the High Court a list of the voters the Petitioner objects to in accordance with rule 7(1) of the National Assembly (Election Petition) Rules, 1993 (“**the Rules**”), the orders sought do not lie. Mr. Odera was of the view that the purpose of scrutiny is only to look at the disputed votes in order that those votes found to fall within the purview of section 26(1) (a) to (f) of the Act be struck off as expressly provided in that section; and because the Petitioner had not only failed to identify the ballots disputed but also not sought recount at any of the polling stations, both remedies were no longer available to him.

Learned counsel also submitted that no useful purpose will be served in ordering scrutiny because in all likelihood, the ballot papers have been interfered with following the destruction and opening of the ballot boxes at the Tallying Centre and, in all probability, subsequently. From the record of the Deputy Registrar who received the ballot boxes when they were delivered to court on the 23rd May 2008, Mr.

Odera suggested that there were 61 broken ballot boxes, 15 opened boxes and 78 boxes which were not properly closed. He was also of the view that the Petitioner obtained copies of Forms 16As (Exhibit 1A) irregularly as the Petitioner did not comply with Regulation 42 of the Regulations which clearly sets out the manner in which election material may be made available for purposes of inspection. On these and other grounds, Mr. Odera urged that the application be dismissed.

(8) On his part, Mr. Dan Kasina, learned counsel for the second and third Respondents, associated himself fully with the sentiments expressed by Mr. Odera with regard to the status of the ballot papers at the time of their delivery to court.

Expounding the grounds in Mr. Muttu's replying affidavit, Mr. Kasina was of the view that the second and third Respondents are entitled to be heard in answer to the various allegations made against them by the Petitioner and an order for scrutiny at this stage in the proceedings would be to condemn them unheard. Further, learned counsel also pointed out that the aspect of expediency and the issue of the margin of votes between the Petitioner and the first Respondent should not influence the court in making an order of scrutiny prematurely as it was in the interest of justice that the Petition be heard fully.

(9) I have listened very carefully to learned counsel, read and considered the authorities cited in support of their respective contentions and submissions in conjunction with the material placed before me in this application, and I will now deal with the issues that arise.

(10) Without either accepting or rejecting the testimony of the Petitioner himself (PW1), that of James Phillip Kiilu (PW2) and that of Mr. Martin Baiya Kihiu (PW3), it is apparent from their evidence that at least 17 of the original Forms 16As and Form 17A (Exhibit 1B) delivered to court by the ECK contain material alterations which have not been countersigned by the presiding officers or the agents of the candidates thereby making it difficult for the court to determine the truthfulness and accuracy of the results declared in such forms. The declaration in Form 16A reads thus –

“We, the undersigned, being present when the results of the count were announced, do hereby declare that the results shown above are true and accurate count of the ballots in Polling station Constituency.”[Emphasis added].

There is provision in the Form for the name and signature of the Presiding Officer as well as for those of the respective agents of the candidates. Space to record the Presiding Officer's statutory comments is also provided. Unless the declaration in Form 16A is signed in the manner prescribed, how is this court to determine that the results shown in the form represent a **true and accurate count** of ballots without a scrutiny and recount of the votes cast?

It is also not disputed that the second and third Respondents have still not fully accounted for all the Forms 16As, including those which Mr. Kihara Muttu in paragraph 5 of his affidavit dated the 15th July 2008 says have been found but are yet to be delivered to court. The second and third Respondents have also failed to explain the circumstances giving rise to their failure to deliver what would appear to be approximately 37% of the Forms 16As. Bearing in mind that the difference in votes between the Petitioner and the first Respondent is 895 votes, the incidence of the missing Forms 16As on the final results of the election as declared may be quite significant.

(11) In paragraph 4 of his said affidavit, Mr. Muttu depones as follows:

“4. That on the disputed elections forms, I am advised by our Advocate on record that the report of handwriting expert has not been submitted for conclusion to be done on the status of the alleged alterations.”

The ECK on whose behalf Mr. Muttu says he makes the affidavit, has not made any application to this court for leave to refer what the deponent describes as **“the disputed election forms”** to a handwriting expert. It would seem to me, therefore, that Mr. Muttu's averment is misplaced. The second and third Respondents have also not made any attempt whatsoever to explain by affidavit the apparent anomalies in

the Forms 16As and 17A nor to controvert the Petitioner's averments that the official results were announced publicly before tallying was completed, and then only as regards the Petitioner and the first Respondent, and that the results were announced before ballot boxes from ten polling stations had been delivered to the Tallying Centre and taken into account.

(12) As regards the sealed status of the ballot boxes as at the 23rd May 2008 when they were delivered to court, all that Mr. Muttu offers by way of explanation is to be found in paragraph 9 of his said affidavit which reads as follows:

“9. That I am advised by our Advocate on record that the ballot boxes themselves and contents there in are an issue as some of them appeared to have been tampered with at the time of delivery to the Registrar of High Court. I annex hereto and mark as “KM2” a copy of the report by the registrar.”

It is common ground that during the tallying of the votes at the Kenya Polytechnic on the 28th December 2008, there was some commotion in the course of which various ballot boxes were broken and opened. Other than what is stated in paragraph 9 aforesaid, there is no mention at all in Mr. Muttu's affidavit either of this commotion which resulted in the temporary suspension of the tallying process or of any interference with the ballot boxes at the Tallying Centre or subsequently or at all. On his part, the second Respondent, whose statutory duty it was to conduct and supervise the elections in the Constituency, has altogether maintained a deafening tomb-like silence which is of no assistance whatsoever to the court. At all material times until the ballot boxes were delivered to court, they were in the custody and full control of the second and the third Respondents. They do not deny this and if there was any interference with the ballot boxes, the second or third Respondents would be the persons to know. It would therefore be incumbent upon them to inform the court even at this stage in the proceedings but they have not done so.

Accordingly, and on the basis of the material before me, there is no evidence to support or even suggest that the Petitioner tampered with the ballot boxes either at the Tallying Centre or subsequently when they were stored at Nyayo Stadium or at any other time.

(13) Mr. Odera argues that in these circumstances, an order of scrutiny cannot lie particularly, and as in any event, the Petitioner has failed to comply with rule 7(1) of the Rules, read in conjunction with section 26(1) of the Act.

With great respect, I am unable to agree with Odera's submission that scrutiny ought and can be ordered **only** for the purpose of striking off votes as contemplated by section 26(1) of the Act. That is but one of the purposes of scrutiny (which in the absence of any definition in the Act the Court of Appeal in **Said v. Maitha and Another** [2000] 2 EA 495 at 509 defined as **“a reviewing of the ballot papers following a court order”**), namely, to enable the court strike off such votes as are ascertained as falling within the ambit of section 26(1) of the Act. In this connection, many of the Forms 16As already on record show that there were disputed votes at various polling stations. In light of the Petitioner's allegations – on which he has led evidence – that the second Respondent and or the ECK failed to carry out their duties under the Regulations, this court is under a duty to investigate the truthfulness or otherwise of these allegations, and scrutiny of the ballots would assist in this regard. But another purpose of scrutiny is to assist the court to investigate if the allegations of irregularities and breaches of the law complained of by the Petitioner are valid. A further purpose would be to assist the court in determining the valid votes cast in favour of each of the seventeen candidates that contested the parliamentary election. And finally, scrutiny would also assist the court assess whether there would be just cause to limit the time within which the Petitioner or any of the Respondents should complete his case as envisaged by rule 20 of the Rules.

(14) It is now well established that an order of scrutiny can be made at any stage of the hearing before final judgment whether on the court's own motion or if a basis laid requires so. It can be made if it is prayed in the petition itself – as is the case in this Petition – or when there is ground for believing that there were irregularities in the election process or if there was a mistake or mistakes on the part of the Returning Officer or other election officials. The Petitioner has made numerous allegations of

irregularities in the election process touching on nomination, polling, election offences as well as counting, as Mr. Kihara Mutu correctly states in his said replying affidavit. The Petitioner alleges that as a result of such irregularities, the first Respondent benefited and was consequently declared winner. The burden of proof that such irregularities occurred falls squarely on the Petitioner and he must also establish that such irregularities were of such magnitude that they substantially and materially affected the outcome of the electoral process. The Petitioner's allegations may well turn out to be red herrings but an order of scrutiny would assist the court in its investigation to determine the truth. In doing so, section 23(d) of the Act empowers the court to decide all matters before it without undue regard to technicalities, so that even if the Petitioner had failed to provide a list of the voters he is objecting to, that would not of itself bar the court from scrutinizing the votes cast, whether on its own motion or on application – and I so hold.

(15) Before I conclude this ruling, there is one final aspect with which I must deal. Learned counsel for the first Respondent argued that the Petitioner breached Regulation 42 of the Regulations in inspecting and procuring copies of Forms 16As from the ECK other than in the manner expressly provided for in the said Regulation. James Phillip Kiilu (PW3) and Martin Baiya Kihiu (PW4) testified that each of the candidates (through their respective agents) were provided with Forms 16A at each of the polling stations and that a copy of each of such Forms was lodged and sealed with the ballot papers in the ballot boxes. This evidence would appear to be consistent with the statutory requirement in Regulation 35A (5)(c) requiring the Presiding Officer to provide each candidate or agent with a copy of the declaration of the results. It is also clear from the conduct of the ECK in delivering to court the original Forms 16As and Form 17A (Exhibit 1B) that it maintains a separate record of such forms independent from those in the sealed ballot boxes. If the Forms 16As and 17A were “**sealed documents**” for the purposes of Regulation 42, then they would be in the sealed ballot boxes together with the other documents delivered to court under rule 19 of the Rules, which documents the court has yet to see. The Petitioner says he obtained the Forms 16As [Exhibit 1A) from the ECK and the ECK has not denied this. In light of the Forms 16As submitted by the ECK itself (Exhibit 1B), and the requirement in Regulation 35A (5)(c), I find and hold that Forms 16As and 17A are not “**sealed documents**” for the purposes of Regulation 42 read in conjunction with Regulations 34, 39 and 40.

(16) For the reasons I have given, I am persuaded that the Petitioner has laid a basis for an order of scrutiny and that it would therefore be in the interests of justice that I allow this application. Consequently, orders in terms of prayer No.1 in the Notice of Motion filed on the 3rd July 2008 be and are hereby granted.

(17) For the avoidance of any doubt, I hereby direct that all and several the documents and materials delivered to the court by the second Respondent pursuant to rule 19 of the Rules shall be scrutinized. The documents to be scrutinized are:

- (a) The written statements made by the Presiding Officers under the provisions of Regulation 34 of the Regulations;
- (b) Written complaints of the candidates and their representatives;
- (c) The packets of spoilt papers;
- (d) The marked copy register;
- (e) The packets of counterfoils of used ballot papers;
- (f) The packets of counted ballot papers;
- (g) The packets of rejected ballot papers;
- (h) The statements showing the number of rejected ballot papers.

In particular, the statements written by the Presiding Officers pursuant to Regulation 34 of the

Regulations shall be scrutinized. They are:

- (a) The number of ballot papers issued to the Presiding Officer under Regulation 22(1);
- (b) The number of ballot papers, other than spoilt ballot papers issued;
- (c) The number of spoilt ballot papers;
- (d) The number of ballot papers remaining

unused.

The court shall also scrutinize the packets prepared under Regulation 34(2), including the seals placed by the officials of the ECK and the seals, if any, placed by the candidates or their agents. This will be in addition to the scrutiny of original Forms 16As and 17A, and any other statutory forms in respect of Starehe Constituency that are in the possession of the second and third Respondents.

The orders hereby made shall be effected under the supervision of the Deputy Registrar of this court on such dates as the court shall direct.

It is so ordered.

Dated and delivered at Nairobi this Twenty-second day of September 2008.

P. Kihara Kariuki

Judge.