



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA

Election Petition No 1 of 2005

Joho & 2 others v Nyange & another (No 3)

(Consolidated with Election Petition Number 2 of 2005 (Pursuant to order of this Honourable Court made on 10' November 2006)

Practice and Procedure ballot papers application for the scrutiny and the recount of ballot papers - where there had been a margin of 1,061 votes effect of- circumstances under which a scrutiny and a recount of the votes is carried out where the Electoral Commission had conceded that some of the election materials had been altered whether the applicant laid a basis on which the votes could be recounted.

The application before the court was one for the scrutiny and recount of ballot papers. The application was opposed by the respondent. The main ground of the application was that some of the election materials had been altered, a matter which was conceded by the Electoral Commission.

Held:

1. Scrutiny is ordered when there is ground for believing that there were irregularities in the election process or if there was a mistake on the part of the returning officer or other election officials.
- 2 The petitioner had laid a basis for a scrutiny and recount of the ballot papers.

Application allowed.

Cases

No cases referred to. Statutes

No statutes referred. Advocates

Mr Khagram & Mr Balala for the Petitioner.

Mr Asige & Mr Mwakireti for the 1st Respondent.

Mr Weloba, Mr Munyithya & Miss Ngugi for the 2nd Respondent.

January 12, 2007, Maraga J delivered the following Ruling of the Court.

Election Petition Number I of 2005 was filed by Hassan Ali Joho challenging the election, in the by-election held in Kisauni Constituency on the 161" December 2004, of Anania Mwasambu Mwaboza. Election Petition Number 2 of 2005 by Said Abdalla Salim and Edward Christopher Oduor challenges the

same election. The two petitions have since been consolidated. For ease of reference I will refer to Hassan Ali Joho as the first petitioner, Said Abdalla Salim as the second petitioner and Edward Christopher Oduor as the third petitioner.

In his application dated 11th April 2005 the first petitioner sought, inter alia, scrutiny and recount of all ballot papers, counterfoils and register of all the votes cast in the by-election. In my ruling of 3rd February 2006 I rejected that application on the ground that with a margin of 1061 the first petitioner first needed to lay a basis for scrutiny before the same could be ordered but directed that he could renew the application after adducing evidence and laying a basis.

After calling five witnesses the Petitioners have now renewed that application. Mr Khagram, teaming up with Mr Balala for the petitioners, have submitted that the copies of the documents supplied to the petitioners by the electoral Commission of Kenya (ECK) pursuant to the order of this court and annexed to the second petitioner's affidavit show that there were innumerable and glaring irregularities in the by-election. That, together with the evidence already on record, he said, has laid a basis for scrutiny and recount. He therefore prays that the same should now be ordered.

Mr Asige teaming up with Mr Mwakireti for Hothan Nyange, the first respondent did not oppose the application. He submitted that his client and indeed the ECK are equally baffled by the material alterations on the election documents. He said that before surrendering the documents to the ECK the first respondent had taken a photocopy of each and those alterations are not on his copies implying that they were made afterwards.

On his part Anania Mwasambu Mwaboza, the second respondent strongly opposed the application. Mr Weloba, leading his team of advocates comprised of Messrs Munyithya, Were and Miss Ngugi, submitted that with the admission of ECK that the election documents were tampered with while in its custody it cannot be ruled out that the ballot papers themselves may also have been tampered with. A scrutiny will therefore not achieve any useful purpose. In his opinion the petition should be heard fully and a determination be made on the basis of the evidence that will have been placed before court.

I have considered the matter. As I said in my said ruling of 3rd February 2006 scrutiny is ordered "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."

In this case the ground for believing that there may have been irregularities in the election process is now not far off to find. Counsel for the first respondent who was the Returning Officer in the by-election whom I believe is also representing the interests of The ECK, readily admitted that the election documents have materially been altered and although that was done when the documents were in its custody the ECK being non-partisan in this matter does not wish to oppose this application. Even a cursory perusal of the documents show that some of them have been altered. It does not require the eye of a document analyst to tell us, for instance that Form 16A on page 24 of the first petitioner's affidavit has materially been altered. Other material alterations appear on Page 92. Several Forms 16A which are declarations of results at each stream in each polling station have figures of votes cast in favour of the first petitioner which are much higher than those appearing on the corresponding Forms 17A. In one instance, a comparison of the figures on both those forms on pages 71 and 92 shows that the second respondent's votes were understated by 204.

Taking all these factors into account I find that a basis has now been established for an order of scrutiny. Without those alterations and discrepancies we do not know what the results of the by-election could have been. The irregularities may very well turn out to be immaterial in which case the second respondent's fears will be unfounded and instead he will be vindicated. Consequently and in the interest of justice and for it to be done and be seen to be done I grant this application. A scrutiny of all the election document including the ballot papers (which shall also be recounted) shall be done on 15th, 16th and 17th January 2007 under the supervision of Hannah N Ndung'u, the Deputy Registrar of this court who shall submit her report to court after the exercise. The parties to agree on the modalities and those they wish to be present.