



REPUBLIC OF KENYA



**Abdisalan v Abdi & 2 others (Election Petition E007 of 2022)  
[2023] KEHC 17 (KLR) (10 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 17 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARISSA  
ELECTION PETITION E007 OF 2022  
RN NYAKUNDI, J  
JANUARY 10, 2023**

**BETWEEN**

**IBRAHIM AHMED ABDISALAN ..... PETITIONER**

**AND**

**HON. SANEY IBRAHIM ABDI ..... 1<sup>ST</sup> RESPONDENT**

**THE RETURNING OFFICER, WAJIR NORTH CONSTITUENCY .... 2<sup>ND</sup>  
RESPONDENT**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION .... 3<sup>RD</sup>  
RESPONDENT**

**RULING**

1 By a Notice of Motion Application dated October 4, 2022, the Petitioner/Applicant, Ibrahim Ahmed Abisalan, seeks the following orders: -

1. That this Application be certified as urgent, canvassed and determined before the hearing of the Petition-in view of the narrow margin of the gazetted results between the Petitioner and 1st Respondent, being 65 votes.
2. That all the election materials, including ballot boxes used in the Wajir North Constituency National Assembly elections in Korondille Primary School Station I of 1, Tuluroba Polling Station 1 of 1, Malkagufu Dispensary 2 of 2, Buna Sub-county Hospital I of I, Chirate Mobile, Batalu Primary School, Karaduse Dam, Ajawa Primary school 2 of 2, Sirey Primary School I of I, Golbo ECD Polling Station and Nyata Primary School I of /be immediately delivered to the Court for their safe custody;



3. That the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents be compelled to supply the Court and the Petitioner /other parties in the Petition, for their scrutiny, the Returning Officer's Polling Day Diary for Wajir North Constituency elections held on the August 9, 2022.
4. That the 3<sup>rd</sup> Respondent be compelled to supply the Court and the Petitioner/other parties in the petition, for their scrutiny, the following inFormation in their exclusive possession;
  - I. Wajir North Constituency National Assembly Result Declaration Forms
    - a. Certified copies of the original Forms 35A filled in at:
 

Korondille Primary School Station I of 1, Tuluroba Polling Station 1 of I, Malkagufu Dispensary 2 of 2, Buna Sub-county Hospital 1 of 1, Chirate Mobile, Batalu Primary School, Karaduse Dam, Ajawa Primary school 2 of 2, Sirey Primary School 1 of 1, Hote Primary School 2of 2, Beramu Primary School Golbo ECD Polling Station and Nyata Primary School / 1 of 1.
    - b. Certified copy of Form 35B with respect to Wajir North Constituency;
 

Certified copies of the Tally Sheets as filled for Korondille Primary School Station 1 of 1, Tuluroba Polling Station 1 of I, Malkagufu Dispensary 2 of 2, Buna Sub-county Hospital 1 of I, Chirate Mobile. Batalu Primary School. Karaduse Dam, Ajawa Primary school 2 of 2, Sirey Primary School 1 of 1, Hole Primary School 2of 2, Beramu Primary School Golbo ECD Polling Station and Nyata Primary School 1 of 1.
5. That the 3<sup>rd</sup> Respondent be compelled to supply the Court and the Petitioner/other parties, for their scrutiny, the inventory of the Wajir North Constituency National Assembly Result Declaration Forms (with serialization) as distributed to the presiding officers at the polling stations set out at para 3 (I) (a) above.
6. That the 3<sup>rd</sup> Respondent be compelled to supply the Court and the Petitioner/other parties, for their scrutiny, the (KIEMS LOGS) as regards the polling stations at para 3 (I) (a) above;
7. That the 3<sup>rd</sup> Respondent be compelled to supply the Court and the Petitioner/other parties, for their scrutiny, Polling Station Diaries with respect to all the polling stations listed at para 3 (1) (a) above;
8. That the 3<sup>rd</sup> Respondent be compelled to supply the Court and the Petitioner/other parties, for their scrutiny the inventory of ballot boxes' serial numbers and ballot box seals' serial numbers used Korondille Primary School Station 1 of 1, Tuluroba Polling Station I of I, Malkagufu Dispensary 2 of 2. Buna Sub-county Hospital I of I, Chirate Mobile, Batalu Primary School, Karaduse Dam, Ajawa Primary school 2 of 2, Sirey Primary School 1 of I. Hole Primary School 2of 2, Beramu Primary School Golbo ECD Polling Station and Nyata Primary School I of I.
9. That the 3<sup>rd</sup> Respondent be compelled to supply the Court and the Petitioner/other parties, for their scrutiny, packets of rejected ballot papers and statements made thereto at the stations listed at para 3 (1) (a) above;
10. That the 3<sup>rd</sup> Respondent be compelled to supply the Court and the Petitioner/other parties, for their scrutiny, packets of spoilt ballot papers with respect to Wajir North Constituency National Assembly and county assembly elections at the stations listed at para 3 (I) (a) above;



11. That the 3<sup>rd</sup> Respondent be compelled to supply the Court and the Petitioner/other parties, for their scrutiny packets of counterfoils of used ballot papers with respect to Wajir North Constituency National Assembly at the stations listed at para 3 (I) (a) above;
12. That the 3<sup>rd</sup> Respondent be compelled to grant the Court and Petitioner/other parties access to the KIEMS devices' results transmission logs (and transmission error logs- if any) with respect to the Wajir North Constituency National Assembly elections and loss detailing the identification of voters at the polling stations listed at paragraph 4(1) (a) above;
13. That the 3<sup>rd</sup> Respondent be compelled to grant the Court and Petitioner/other parties' access to written statements made by the Returning Officer in relation to the Elections of Wajir North Constituency elections held on the August 9, 2022.
14. That the 3<sup>rd</sup> Respondent be compelled to grant the Court and Petitioner/other parties the packets of counted ballot papers of the polling stations listed at paragraph 4 (I) (a) above
15. That the 3<sup>rd</sup> Respondent be compelled to supply the Court with comprehensive documentation of all the incidences (if any) when as a result of identification failure by the KIEMS gadgets. Alphanumerical identification had to be done at the polling stations listed at paragraph 4 (I) (a) above;
16. That the 3<sup>rd</sup> Respondent be compelled to supply the Court with all the Forms 32A Declaration Forms or assisted voters in the polling stations set out below;

NO. POLLING STATION

1. Malkagufu Dispensary 2 of 2
  2. Buna Sub-county Hospital 1 of 1
  3. Chirate Mobile
  4. Batalu Primary School
  5. Karaduse Dam
17. That this Court grants leave to the Petitioner and any other party to file a supplementary affidavit as necessarily arising from the access to the inFormation that would emerge from the scrutiny above,
  18. That the Respondents bear the Costs of this Application;
  19. That this Court grants any other reliefs that are in the circumstances, just and fair.
- 2 The Application is premised on the grounds set out in the Application and the contents of the affidavit sworn in support of the application.

**The Applicant's Case**

- 3 Learned Counsel for the Applicant, Mr. Omwanza Ombati, filed submissions dated December 16, 2022. In his submissions he stated that there are polling stations disputed by the Petitioner, and the same has been pleaded in the petition and the Applicant's motion.
- 4 Counsel submitted that Petitioner raised serious issues on the safekeeping, safeguarding and/or protection of electoral materials in preservation of the integrity of the election by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. This was evident when he demonstrated to the court that he was able to pick an Original pre-filled Form 35A for Korondille Primary School 1 of 1 at the Tallying Centre at Bute during the



- violence, which some rogue Presiding Officers were handing to the 1<sup>st</sup> Respondent's agents to fill. Counsel maintains that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents as the Constitutionally mandated custodians of the Statutory Forms failed in all fours to test run the security features of the said original pre-filled Form 35A for Korondille Primary School 1 of 1 to prove otherwise, for example, would it have been easy for them to run the barcode on the Form to ascertain its authenticity.
- 5 Counsel further submitted that the Petitioner identified Tuluroba Polling Station 1 of 1 as having recorded excess number of votes cast on Form 35A as being 266 valid votes cast whereas only 225 voters had been identified by the KIEMS kit. Counsel maintains that the Petitioner was able to demonstrate to this Honourable Court that the votes cast in Tuluroba Polling Station 1 of 1 were excess by 41 votes and that the said number could not be accounted for.
  - 6 According to Counsel, the Presiding Officer for Tuluroba Polling Station, Mr Vincent Omambia appearing as one of the Witnesses for the Petitioner herein testified on irregularities at his polling station and wrote a report that the elections as held at his polling station would not be termed as free and fair and therefore recommended that the said elections be nullified. He contended that the Polling Station Diary attached to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' Response to the Petition was a confirmation that indeed Mr. Omambia had given a true picture and account of what took place in Tuluroba Polling Station 1 of 1 on the following limbs as captured in the Petition; The number of valid votes cast stood at 266 in both the Polling Station Diary and the Form 35A. The total number of voters authenticated by the KIEMS Kit stood at 225 including the ones authorized by the Presiding Officer. There were 41 voters who cast their vote in excess of the voters identified by the KIEMS KIT at the Polling Station. There was fighting/violence in the Polling Station.
  - 7 In addition, Counsel submitted that **Ms.** Madina Abdi Ibrahim, who was the Deputy Presiding Officer highlighted various acts of violence that resulted in the disruption of polling and eventual unrestricted access to ballot materials by unauthorized persons that must have contributed to the difference between the number of people identified by the KIEMS KIT at 270 whereas the valid votes cast were 286 as indicated on Form 37A for Sirey Primary School. Counsel further argued that during cross-examination, the 2<sup>nd</sup> Respondent admitted that there was disruption at Sirey Polling Station having been called severally by the Presiding Officer to inform him about the occurrences. Counsel maintains that only way the court can reach a conclusion as to whether there was an interference with the election is through the scrutiny as requested.
  - 8 Counsel further submitted that there was a large number of people who were being illegally assisted to vote in the disputed polling stations. Counsel argued that despite the fact that the 2<sup>nd</sup> Respondent gave a sworn testimony in this court that around 80% of the voters in Wajir North Constituency did not know how to read and write, and therefore were assisted to vote; the 2<sup>nd</sup> Respondent neither provided the relevant statutory Forms used in assisting voters in all the stated polling stations nor line up Presiding Officers to testify from the four (4) particular polling stations adversely mentioned by the Petitioner for their notoriety in contravention of the law. Counsel, further maintains that there was no attempt made by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to produce and/or provide any documents in rebuttal. For example, no Forms 32A were produced to prove that the assisted voting which they admitted to at Paragraphs 56-58 Page 9 of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' Response to the Petition was done in strict conformity with the law.
  - 9 Counsel further submitted that at Paragraphs 47, in Page 13 of the Petition; the Petitioner sampled some polling stations where the total number of valid votes cast exceeded the number of votes garnered by each candidate in the same polling station pointing to inflation, doctoring and/or variation of total votes cast to achieve rigging spread across Wajir North Constituency.



<b>Polling Station</b>	<b>Registered Voters</b>	<b>Total Valid Votes Cast As Indicated In Form 35A</b>	<b>Actual No. Of Votes Cast On Physical Addition</b>	<b>Ghost /Padded Votes Detected</b>
Ajawa Primary 2 of 2	394	159	149	10
Sirey Primary School 2 of 2	542	286	270	16
Korondille Boys Secondary School 1 of 1	459	266	267	1
Nyata Primary school 1 of 1	93	86	84	2
Total No of Ghost voters	29			

- 10 Counsel contended that the 2<sup>nd</sup> Respondent failed to explain to this Honourable Court why there were different figures of the totals for the results of the aforementioned Polling Stations. Further, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents did not avail the Presiding Officers of the affected Polling Stations to come and testify on the same.
- 11 Counsel urged that Polling Station Diaries are important documents that are used to record all activities that take place in the Polling Station. The diaries are in the possession and custody of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and are the actual correct entries of the Presiding Officers on the conduct of elections in a Polling Station at the time of polling.
- 12 Counsel relied on the Supreme Court decision in *Gatirau Peter Munya vs Dickson Mwenda* [2014] eKLR, where the Supreme Court of Kenya discussed on how there is public confidence in the electoral agency if the two tests of openness in the management of the entire electoral process and the test of competence are met.
- 13 Counsel further submitted that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents admitted that by the time violence and eventually disruption of tallying occurred at the Bute Arid Zone Tallying Centre, the gazetted Constituency Tallying Centre for Wajir North Constituency, results from 5 Polling Stations had



neither been tallied nor read aloud as mandated by article 86 (2)(d) of the Constitution in the polling stations set out below;

NO. POLLING STATION

1. Tuluroba Polling Station 1 of 1
2. Malkagufu Dispensary Polling Station 2 of 2
3. Cherate Mobile 1 of 1
4. Buna Sub-County Hospital 1 of 1
5. Ajawa Primary School 2 of 2

- 14 Counsel maintained that there is a huge doubt on when indeed the tallying occurred; as demonstrated below:
- 15 The 2<sup>nd</sup> Respondent prepared 2 sets of Form 35 B both dated the August 13, 2022. However, the one he used to declare the 1<sup>st</sup> Respondent must have been prepared earlier and he noted the anomaly after presentation of his Response. The only inference is that the Returning officer prepared belatedly the second Form 35B. Both Forms were not witnessed by any candidate or agents.
- 16 The Form 35C is dated on the August 16, 2022, three (3) days after the purported tally was concluded. The 2<sup>nd</sup> Respondent allegedly called the 1<sup>st</sup> Respondent on 16<sup>th</sup> of August and later on the August 20, 2022 to inform him to pick his certificate- Form 35C. He never bothered to call any other candidate.
- 17 In his Response at paragraph 80, he claimed that he concluded the tallying on August 12, 2022.
- 18 Counsel maintained that the 2<sup>nd</sup> Respondent was unable to conclude this important constitutional exercise until he consulted “his bosses” and sought legal advice from the headquarters as he called it. In addition, Counsel submitted that it was the 2<sup>nd</sup> Respondent’s testimony that wherever he did the verification, tallying and collation of the 5 remaining polling stations he neither informed the candidates, nor their agents to witness the process, and only reached out to the Chief Agent of the 1<sup>st</sup> Respondent; on August 16, 2022 and personally called the 1<sup>st</sup> Respondent later on 16<sup>th</sup> and August 20, 2022, so that he could “pick” his Form 35C certificate. The constitutional exercise was left as a one man’s show with the support cast of the 1<sup>st</sup> Respondent.
- 19 Further, Counsel submitted that the 2<sup>nd</sup> Respondent was at pains to explain why he had received the results of Tuluroba Polling Station 1 of 1 at around 9.00 a.m. in the morning of August 10, 2022 as confirmed by both the Presiding Officer and his Deputy and choose not to collate, tally, announce and declare the same results for 17 hours until violence broke out on the August 11, 2022 at around 3.00 pm. That did not comply with the constitutional command for promptness. By the 2<sup>nd</sup> Respondent’s own evidence, he resorted to calling the Chief Agent of the 1<sup>st</sup> Respondent one Mr.Ahmed Adan Hefow.
- 20 Counsel further contended that the 1<sup>st</sup> Respondent, in a video clip shown to the court admitted that there were malpractices in the wards mentioned by the Applicant.



## 1st Respondent's Case

- 21 Learned Counsel for the 1<sup>st</sup> Respondent, Mr. Issa Mansur, filed submissions on December 13, 2022. Counsel submitted that a reading of the final prayers as pleaded in the Petition demonstrates that the Petitioner pleaded only one prayer as regards scrutiny. At prayer (e) the Petitioner pleads as follows:
- “An order to enable the Petitioner herein, his advocates, servants, agents, proxies, and/ or information experts to audit the system of the Kenya Integrated Elections Management System and their servers that were relied upon by the 3rd Respondent in the identification of voters and the transmission of results in the Member of National Assembly Wajir North Constituency.”
- 22 Counsel contended that the prayers for scrutiny sought by Petitioner/Applicant herein circumvent the law, by expanding and amending his Petition outside the period permitted by law. Counsel maintains that Petitioner only sought scrutiny of the KIEMS system in identification and transmission of results of the election of Member of National Assembly and therefore any order that seeks to scrutinise, ballot boxes, ballot papers, rejected ballot papers, counter foils of used ballot papers, Polling Station Diaries should be declined ab initio as it is not founded on the Petition.
- 23 Counsel further submitted that that parties are bound by their pleadings and having only pleaded scrutiny of the KIEMS electronic transmission result, this Honourable Court should decline to grant prayers, (2), (5), (6), (7), (8), (9), (10), (11), (13), (14), (15) (16) of the Notice of Motion application dated October 4, 2022 as they related to ballot boxes, inventory of ballot boxes, ballot papers, rejected ballot papers. Polling Station Diaries, Form 32 A as the prayers have no legal or factual foundation on the Petition or the witness Affidavits filed by the Petitioner/Applicant. He referred the court to the decision by the Court of Appeal in IEBC Another vs. Stephen Mutinda Mule & 3 Others 2, where the court held that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or which is at variance with the averments of the pleadings goes to no issue and must be disregarded. This position was re-affirmed by the Supreme Court in Raila Amollo Odinga & Another vs. Independent Electoral & Boundaries Commission & 2 Others 3.
- 24 Counsel contended that Petitioner/Applicant has not satisfied the conditions precedent to warrant an order for scrutiny as the submissions will show. Notwithstanding, the fact that the prayers in the application for scrutiny were not pleaded in the Petition dated September 8, 2022, the Petitioner/Applicant has not demonstrated sufficient reason for grant of an order of scrutiny in any event.
- 25 The court in the case of Hasson Molt anted Hassan Another vs. IEBC & 2 Others, Petition 6 of 2013 in dismissing an application for scrutiny, held that the court must be satisfied generally that there are sufficient grounds to order scrutiny and that such scrutiny should be in the interest of justice and fairness.
- 26 In addition, Counsel submitted that during the trial, the Petitioner did not adduce any evidence to support the order for scrutiny of the election materials in Malkagufu Dispensary 2 of 2, Buna sub-county Hospital 1 of 1, Cherate Mobile, Karaduse Dam, Ajawa Primary School 2 of 2, Hote Primary School 2 of 2, Beramu Primary School, Golbo ECD Polling Station and Nyata Primary School 1 of 1. No witnesses were called to substantiate the allegations of irregularities regarding the voting and declaration of results in the polling stations that would warrant an order for scrutiny.
- 27 Counsel further submitted that the Petitioner has not contested/disputed any results in the specified polling stations in which he seeks scrutiny of election materials. Counsel relied on the decision by



the Supreme Court in the case of Nathif Jama Adam v.v. Abdikhaim Osman Mohamed & 3 Others Petition No. 13 of 2014.

- 28 Counsel maintained that there being no dispute as to the results of votes garnered in each of the polling stations, no basis can lie for an order of scrutiny. Further, allegations alone are not sufficient. The averments in the Petition must be supported by credible evidence to sustain a claim by the Petitioner.
- 29 Counsel further submitted that Petitioner produced a Form 35A Korondille Primary School station 1 of 1 which was marked as annexure “AAI - 5A” which he alleged was the genuine pre-filled Form 35 A issued at the Bute Tallying Centre. However, the Petitioner did not call his polling station agent as a witness in this Petition to challenge the results declared at the polling station. Further, the evidence on record by the Petitioner was that he collected this document on the floor at the Tallying Centre. No agent of the 1<sup>st</sup> Respondent was mentioned as having been in possession of this document.
- 30 Counsel further submitted that by the Presiding Officer, Mr. Vincent Omambia admitting that he did not make any comment regarding any alleged irregularities in the voting and declaration of results at the said polling station, he negated the Petitioner’s allegations and affirmed the credibility and accuracy of the results announced and declared at the polling station.
- 31 Counsel maintained that the 1<sup>st</sup> Respondent and his Chief agent, Mr. Ahmed Hefow, testified that the number of ballots cast in Form 35 A did not exceed the voters and identified in the KIEMS Kit for the election of Member of National Assembly. This position was confirmed by the Presidential elections results contained in the Form 34A that the ballots cast at Tuluroba Polling Station 1 of 2 was 267 and which was identical to the ballots cast in the election of Member of National Assembly.
- 32 Counsel contended that from the evidence on record and witness testimony, no credible basis has been laid to warrant the order sought for scrutiny as regards Tuluroba Primary School Polling Station 1 of 1. As the agent signed the Result Declaration Form in the presence of the Presiding Officer and Deputy Presiding Officer, the attempt to discredit the results is an afterthought. The attempt by the Presiding Officer who was tasked with the duty of presiding over a free and fair election at the polling station, to take a partisan position is to be deprecated.
- 33 In Sirey primary school polling station, Counsel submitted that the Petitioner alleged that the number of valid votes cast exceeded the number of votes garnered by each candidate. This allegation was not supported by any evidence. In her testimony, Ms. Madina Abdi Ibrahim the Officer for Sirey Polling Station, one Mr. Yusuf Abdinoor Abdi and the Agents at Sirey Polling Station duly signed Form 35A for Sirey Polling Station without any protest, confirming the accuracy of the results therein. Further, the Deputy’ Presiding Officer who had sworn on oath to be impartial and who had taken a partisan position in this Petition nevertheless, confirmed that the results garnered by each candidate were correct and they were the results declared at the Tallying Centre. The error in adding or summing up the totals is excusable and would not warrant an order for scrutiny.
- 34 With regard to Batalu polling station, Counsel submitted that during the trial, the Petitioner’s agent and witness could not confirm the said number of voters who used the KIEMS Kit as he apparently recorded all information in his head and claimed that he was an eyewitness. There was no credible evidence to support this allegation. Mr. Abdihakim Abdirashid testified that the cross checked the recordings of the Form 35A with the KIEMS kit.
- 35 Counsel further submitted that vote padding, inflation could only arise if the total votes attributed to all candidates exceeds the total ballots cast. In the four polling stations Ajawa Primary School polling station 2 of 2, Sirey Primary School 1 of 1, Korondille Boys Secondary School 1 of 1 and Nyata Primary School 1 of 1, the total votes cast for all candidates does not exceed the ballots cast, therefore the



- allegation that the votes attributed to the candidates were inflated or doctored is false. The discrepancy was as a result of arithmetic mistakes by the Presiding Officers. The Constituency Returning Officer, Mr. Matthew Thiga, testified and confirmed that the summary of arithmetic errors was corrected in the Form 35B.
- 36 Counsel argued that the statutory requirement for electronic transmission of election results for under section 39 of the *Elections Act* only relates to the presidential result, there is no requirement for electronic transmission of the results for Member of National Assembly. The Petitioners' prayer to have access to the KIEMS devices transmission longs is therefore misconceived and unfounded in law.
- 37 Counsel maintained that this instant application is an attempt by the Petitioner to expand the scope his Petition and unearth new evidence. Which attempt must be rejected by this Honourable Court. To buttress his submissions, the 1<sup>st</sup> Respondent Counsel relied on the decisions in the following cases; Martin Nyasa Wambora VS. Lenny Maxwell Kivuti & 3 Others; Silverse Lisamula Anami & another vs. Independent Electoral and Boundaries Commission & 2 Other; and Kalla Jackson Musvoka vs. Independent Electoral & Boundaries Commission (I.E.B.C) and another.
- 38 With regard to the issue of voters being assisted during the Wajir North Constituency elections, Counsel submitted that where voters were assisted to vote, the same was done in accordance with Regulation 72 of the Election (General) Regulations. 2012. The Petitioner seems to have confused Form 32 used in assisted voting with Form 32A used in the complimentary voter identification and therefore there is no basis for scrutiny of Form 32A as there is no evidence tendered that any Forms 32 A were used in voter identification. The procedural law for assistance of voters in the polling station is found under Regulation 72 of the Elections (General) Regulations, 2012.
- 39 Counsel argued that the Petitioner has not provided any evidence by agents or voters that were assisted in any manner other than that prescribed in the regulations. There is no basis for the court to grant any orders for the production and scrutiny of Form 32As.
- 40 With regard to prayer 3 seeking to compel the Respondents to supply the court with the returning officers' polling day diary, the Respondent submitted that it is trite law that the Polling Station Diary is issued to a Presiding Officer to be filled at the Polling Station and returned to the Constituency Returning Officer as provided for under Section 81 (2) of the Elections (General) Regulations. 2012. Counsel submitted that the Returning Officer does not have a Polling Day Diary and therefore this order is unenforceable and should be declined, ab initio.
- 41 Lastly, Counsel submitted that the applicant had failed to lay the basis for the orders sought and that the application be dismissed with costs.

## **2nd And 3rd Respondents' Case**

- 42 The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents challenged the propriety of the application on the grounds that the Petitioner has only pleaded one prayer for scrutiny in regard to the scrutiny of the Kenya Integrated Elections Management System (KIEMS). The Petitioner has not specifically pleaded in the Petition any other prayers in regard to scrutiny and no other specific prayer for Scrutiny is contained in the Petition in regard to the Scrutiny that is urged in the Notice of Motion dated October 4, 2022. The instant motion offends the rules on scrutiny for failure to stick within the specific allegations and prayers pleaded in the Petition.
- 43 The Respondents cited rules 16(4), 29 and 29(4) of the Election (Parliamentary and County Elections) Petition Rules. 2017 and the case of Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others



[2014] eKLR on the principles governing scrutiny. They also relied on the case of Nathif Jama Adam v Abdikhaim Osman Mohamed & 3 others [2014] eKLR.

- 44 Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, Mr. Moses Owuor, submitted that in determining the application the following questions should guide the ruling; Has the Petitioner signalled the polling stations where he contests results? Does the Petitioner’s Pleading “make out the terrain of his electoral contest?” Has the ‘state of affairs’ been pleaded in the Petition? Has sufficient basis been laid for a grant of Scrutiny? Has the Petitioner marshalled enough evidence in support of his application? He submitted that the answers to all the above questions is ‘no’.
- 45 Counsel further submitted that the Petitioner has not presented any evidence in regard to the following polling stations where scrutiny has been requested: Malkagufu Dispensary 2 of 2, Buna Sub-County Hospital 1 of 1, Cherate Mobile, Karaduse Dam, Ajawa Primary School 2 of 2, Note Primary School 2 of 2, Beramu Primary School, Golbo BCD Polling Station and Nyata Primary School 1 of 1. Counsel maintains that any request for scrutiny in regard to these polling stations should be dismissed in limine. A request for scrutiny without leading any specific evidence is tantamount to a fishing expedition and the same should not be entertained.
- 46 Counsel further submitted that despite of making sweeping allegations of irregular, unprocedural and unlawful assisted voting specifically in regard to Malkagufu Dispensary 2 of 2, Buna Sub-County Hospital 1 of 1, Cherate Mobile, Batalu Primary School and Karaduse Primary School, the Petitioner did not present any witness to speak to the said allegations. The witnesses presented by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, specifically, Mr. Abdinoor Ibrahim Hassan, who was the Presiding Officer at Batalu Primary School testified that all the procedures for assisted voting were duly followed and this was done openly before all the agents present. Counsel maintained that indeed, none of the agents in the polling stations alleged not to have followed the procedures raised any objections which would have been captured in the Form 35As.
- 47 Counsel also submitted that election Courts have affirmed the position that scrutiny cannot be used to unearth new evidence or unpleaded matters upon which an election could be nullified. (See Peter Gichuki King’ara v Independent Electoral and Boundaries Commission & 2 Others, Election Petition (Nyeri) No. 3 of 2013).
- 48 In addition, Counsel submitted that the Supreme Court has in the case of Nathif Jama Adam vs. Abdikhaim Osman Mohamed & 3 Others (Petition No. 13 of 2013), emphasized that the import of scrutiny should be to address instances where disputes or contestations as to the declared results have been specifically pleaded and hence a case made out for scrutiny. It is noteworthy that the Petition does not signal any contestation in regard to the results from the polling stations where scrutiny has been sought.
- 49 Counsel further submitted that a reading of the Notice of Motion and its Supporting Affidavit does not reveal the basis upon which the Scrutiny is sought on this aspect. But for generalized averments and allegations, the Petitioner has not adduced any clear and cogent evidence to rise to the required standard for grant of scrutiny. Further the Petition and the Notice of Motion herein contain allegations that there were Form 35As that were allegedly pre-filled and issued at the Constituency tallying centre. The Petitioner presented before Court a document which he alleged to be an original Form 35B for Korondille Primary School Station 1 of 1 from the tallying centre (marked “AAI-5A”) which the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have rebutted this allegation and demonstrated to the Court why the alleged Form 35A is not a genuine document. Specifically, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent have demonstrated that:



- a. No Forms 35A are filled at the tallying centre. Specifically, the 2<sup>nd</sup> Respondent testified that these Forms are filled and signed by the Presiding Officers and agents at the Polling Stations after finishing the counting process. Further, the 2<sup>nd</sup> Respondent testified on the procedure at the tallying centre on how Presiding Officers from the polling stations present Form 35As for tallying and verification;
- b. Results in Form 35A from the polling stations are final and cannot be changed at the tallying centre;
- c. The results contained in Form 35A from Korondille Primary School Station 1 of 1 had been tallied and verified and the same had not been contested;
- d. The original Form 35A from Korondille Primary School Station 1 of 1 presented for tallying and verification was not the one purported to be the original by the Petitioner;
- e. The 2<sup>nd</sup> Respondent testified that all the Form 35As from the 101 polling stations had been accounted for;
- f. The alleged original pre-filled Form 35A supposedly from Korondille Primary School Station 1 of 1 lacks security features that would be present in an original Form 35A. The 2<sup>nd</sup> Respondent specifically testified that these features would include “non-copying” features which mean that only the original would show “1 of 1” and a copy would not contain this information. The 2<sup>nd</sup> Respondent confirmed that the Form before Court marked “IAA-5A” did not contain this security feature and in no way would it be an original Form 35A as alleged by the Petitioner. These features, which in technical terms may be referred to as Image Survivable Features, are used by the 3<sup>rd</sup> Respondent to ensure that election materials cannot easily be copied, altered, or forged.

50 The above notwithstanding, Counsel contended that the Petitioner led no evidence from any polling station to back up the claim that results in some or any polling station presented at the tallying centre for tallying and verification are not the results declared at the polling station. That in regard to the orders of scrutiny sought for the election materials and ballot boxes at Tuluroba Polling Station 1 of 2 on the basis of alleged issuance of excess ballot papers, the trial revealed that the alleged issuance of excess ballot papers was an isolated incident in regard to Member of County Assembly (MCA) ballot papers that happened.

51 Counsel maintained that from Mr. Vincent Omambia’s testimony the incident was handled by himself and it was the only incident which related to MCA ballot papers. Mr. Omambia confirmed to the Court that there was no incident of issuance of excess ballot papers in regard to the election for Member of the National Assembly. Mr. Omambia was the Presiding Officer at the polling station and also the Petitioner’s witness. Counsel maintained that the Petitioner has, not demonstrated how an isolated incident in regard to a different election is relevant to his application for scrutiny for another election. The request in this regard should fail without further consideration.

52 In response to the allegation of the number of votes cast exceeded those identified by KIEMS, Counsel submitted that the number of voters identified by KIEMS in Tuluroba Polling Station 1 of 2 is 266 and not 225 as alleged by the Petitioner. The 2<sup>nd</sup> Respondent testified and confirmed to the Court that this is the same number of voters identified for all the six elections conducted that day, to wit; Presidential. Gubernatorial, Senatorial, Woman Representative to the National Assembly, Member of the National Assembly, and Member of the County Assembly. This information is captured in the Polling Station Diary for Tuluroba Polling Station 1 of 2 (under section 3.2) which has been presented in evidence



- and annexed as “MKT 2” in the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents’ Affidavit in Support of Response to Petition dated September 19, 2022.
- 53 Counsel further submitted that the Respondents disputed the authenticity of the alleged screenshot of the KIEMS kit from Tuluroba Polling Station 1 of 2. Counsel submitted that as testified by the 2<sup>nd</sup> Respondent, at the close of polling, the KIEMS kit is switched to another mode of results transmission. In the case of Tuluroba Polling Station 1 of 2 where polling closed at 6:35pm, it would not be possible to take a screenshot of the KIEMS kit displaying voting data at 7:41pm.
- 54 Further, the 2<sup>nd</sup> Respondent testified that the alleged screenshot lacks the 15-digit code that would identify the particular polling station that it belongs to. In a case where one cannot ascertain if the screenshot belongs to Tuluroba Polling Station 1 of 2 or 2 of 2, even if it was to be taken as authentic, the evidence is of no value to support a motion for scrutiny. Counsel pointed out that it should be noted that, as testified before Court that the total registered voters for the two polling station was 444, the number displayed on the alleged screenshot.
- 55 Counsel also disputed the authenticity of the alleged screenshot as it does not comply with rules of electronic evidence. Counsel further maintained that even though the piece of evidence is presented by the Petitioner who signed an electronic evidence certificate, he does not state from whom he received the alleged screenshot. It is trite that the person who is the originator of the electronic evidence ought to have signed an electronic evidence certificate to speak to how the alleged screenshot was taken, the equipment used and how it was reproduced. Court further emphasizes that these rules are there for good measure to protect the authenticity of electronic evidence which is more likely to be tampered with than physical evidence.
- 56 Counsel maintained that during hearing the Petitioner’s key witness, one Mr. Vincent Omambia, who served as the Presiding Officer at Tuluroba Polling Station 1 of 2 denied allegations with regard to allowing voters who were not biometrically identified by KIEMS to vote. Further the Deputy Presiding Officer, Mr. Samon Abdullahi Abdirahman, also testified and confirmed that all voters were identified biometrically and the total number of voters were 266.
- 57 With regard to Batalu Polling Station 1 of 1, Counsel submitted that the Petitioner relied on the testimony of his agent, one Mr. Abdihakim Abdirashid, who testified that only 284 people had been identified biometrically rather than the 320 who had cast their ballots. Counsel maintains that it is worth noting that the said Mr. Abdihakim Abdirashid purported to have signed Form 35A under duress when he testified before this Court, a fact that he omitted to state in his affidavit. It is clear that the agent signed Form 35A out of his own free will and did not contest the result or process of voting and counting. No other evidence was presented by the Petitioner on this allegation.
- 58 Counsel further submitted that Petitioner has asked this Court to grant access to KIEMS transmission logs from Wajir North Constituency. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are opposed to this request on two limbs: the request is not legally grounded; and, secondly, the Petitioner has not established any factual basis for grant of such a request, even if it were possible to grant such a request. The Respondents explained that firstly, the KIEMS kits do not transmit results for the election of Member of the National Assembly. Under Section 39 of the [Elections Act](#), the 3<sup>rd</sup> Respondent is only required to transmit, electronically, results of the presidential election. Prayer (e) of the Notice of Motion should therefore, on this ground alone, be dismissed in limine.
- 59 Regarding the allegation of voter padding learned Counsel argued that in Sirey Primary School Polling Station 1 of 1, Ms. Madina Abdi Ibrahim, the Deputy Presiding Officer from the said polling station confirmed to Court that each candidate obtained the votes as captured in Form 35A. this is not an issue



that has been contested by the Petitioner. Furthermore, what the Petitioner alleges to be voter inflation are arithmetic errors on the face of Form 35A on the total votes obtained by all candidates. These errors did not affect the votes obtained by individual candidates. Secondly, the 2<sup>nd</sup> Respondent, Mr. Mathew Thiga, testified before Court and clarified that any errors in addition of the total votes cast is corrected in Form 35B and this does not affect the votes obtained by each candidate. This allegation is therefore unsupported and, in any case, does not establish any basis for a request for scrutiny.

### **Analysis & Determination**

60 Having appreciated the pleadings of the respective Petitioners, the responses thereto, the submissions and decisions referred to, the only issue for determination is: -

#### **a. Whether the Applicant has met the threshold for an order of scrutiny.**

61 The gist of the Applicant's application is mainly on the issue of scrutiny. Scrutiny is one of the reliefs that the *elections act* provides to parties that are discontented with an election. It originates from the provisions of section 82 of the *Elections Act* as read with rule 29 of the Elections (Parliamentary and County Elections) Petitions Rules 2017.

Section 82 of the *Elections Act* states;

1. An election court may, on its own motion or on application by any party to the petition, during the hearing of an election petition, order for a scrutiny of votes to be carried out in such manner as the election court may determine.
2. Where the votes at the trial of an election petition are scrutinized, only the following votes shall be struck off—
  - a. the vote of a person whose name was not on the register or list of voters assigned to the polling station at which the vote was recorded or who had not been authorised to vote at that station;
  - b. the vote of a person whose vote was procured by bribery, treating or undue influence;
  - c. the vote of a person who committed or procured the commission of personation at the election;
  - d. the vote of a person proved to have voted in more than one constituency;
  - e. the vote of a person, who by reason of conviction for an election offence or by reason of the report of the election court, was disqualified from voting at the election; or
  - f. the vote cast for a disqualified candidate by a voter knowing that the candidate was disqualified or the facts causing the disqualification, or after sufficient public notice of the disqualification or when the facts causing it were notorious.
3. The vote of a voter shall not, except in the case specified in subsection (1)(e), be struck off under subsection (1) by reason only of the voter not having been or not being qualified to have the voter's name entered on the register of voters.

62 Rule 29 of the Elections (Parliamentary and County Elections) Petitions Rules 2017 states;

- (1) The parties to the proceedings may apply for scrutiny of the votes for purposes of establishing the validity of the votes cast.



- (2) On an application under sub-rule (1), an election court may, if it is satisfied that there is sufficient reason, order for scrutiny or recount of the votes.
- (3) The scrutiny or recount of votes ordered under sub-rule (2) shall be carried out under the direct supervision of the Registrar or Magistrate and shall be subject to the directions the election court gives.
- (4) The scrutiny or recount of votes in accordance with sub-rule (2) shall be confined to the polling stations in which the results are disputed and may include the examination of-
  - (a) the written statements made by the returning officers under the Act;
  - (b) the printed copy of the Register of voters used during the elections sealed in a tamper proof envelope;
  - (c) the copies of the results of each polling station in which the results of the election are in dispute;
  - (d) the written complaints of the candidates and their representatives;
  - (e) the packets of spoilt ballots;
  - (f) the marked copy register;
  - (g) the packets of counterfoils of used ballot papers;
  - (h) the packets of counted ballot papers;
  - (i) the packets of rejected ballot papers;
  - (j) the polling day diary; and
  - (k) the statements showing the number of rejected ballot papers.
- (5) For purposes of sub-rule (4) (b), every returning officer shall upon declaration of the results, seal the printed copy of the Register of Voters used at that election in a tamper proof envelop and such envelop shall be stored by the Commission subject to the elections court directions under rule 16.

63 The law on scrutiny is now settled. The principles that guide the Court in the determination of an application for scrutiny were set out by the Supreme Court of Kenya in the case of Peter Gatirau Munya vs Dickson Mwenda Kithinji and 2 others (2014) eKLR where the court expressed itself as follows;

- a. The right to scrutiny and recount of votes in an election petition is anchored in Section 82(1) of the *Elections Act* and Rule 33 of the Elections (Parliamentary and County Elections) Petition Rules, 2013. Consequently, any party to an election petition is entitled to make a request for a recount and/or scrutiny of votes, at any stage after the filing of petition, and before the determination of the petition.
- b. The trial Court is vested with discretion under Section 82(1) of the *Elections Act* to make an order on its own motion for a recount or scrutiny of votes as it may specify if it considers that such scrutiny or recount is necessary to enable it to arrive at a just and fair determination of the Petition. In exercising this discretion, the Court is to have sufficient reasons in the context of the pleadings or the evidence or both. It is appropriate that the Court should record the reasons for the order for scrutiny or recount.



- c. The right to scrutiny and recount does not lie as a matter of course. The party seeking a recount or scrutiny of votes in an election petition is to establish the basis for such a request, to the satisfaction of the trial Judge or Magistrate. Such a basis may be established by way of pleadings and affidavits, or by way of evidence adduced during the hearing of the Petition.
- d. Where a party makes a request for scrutiny or recount of votes, such scrutiny or recount if granted, is to be conducted in specific polling stations in respect of which the results are disputed, or where the validity of the vote is called into question in the terms of Rule 33(4) of the Election (Parliamentary and County Elections) Petition Rules.
- 64 Similarly, In *Raila Amolo Odinga & Another –v- IEBC & 2 Others* [2017] eKLR, the Supreme Court cited with approval the Supreme Court of India decision in *Arikala Narasa Reddy –v- Ventaka Ram Neddy Reddygari & Another*, Civil Appeals Nos. 5710 -5711 of 2012 in which the court observed as follows:
- “In the absence of pleadings, evidence, if any produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material preposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings. The court cannot exercise discretion of ordering recounting of ballot just to enable the election petitioner to indulge in a roving inquiry with a view to fish material for dealing the election to be void. The order of recounting can be passed only if the petitioner sets out his case with precision supported by averments of material facts.”
- 65 In addition, the Court of Appeal in *IEBC –v- Maina Kiai & 5 Others* [2017] eKLR while discussing the issue of scrutiny held as follow;
- “It is clear beyond peradventure that the polling station is the true locus for the exercise of the voter’s will. The counting of the votes as elaborately set out in the Act and the Regulations, with its open, transparent and participatory character using the ballot as the primary material, means as it must, that the count there is clothed with a finality not to be exposed to any risk of variation or subversion.”
- 66 Notably, these are requirements for an order of scrutiny upon application as opposed to a situation where a court orders scrutiny suo moto. The court, can make its own observations Form the evidence and testimony before it and give orders for scrutiny without regard to an Applicant’s Application.
- 67 A party applying for scrutiny must establish a prima facie case that the exercise will yield results that will assist the court in resolving an issue or issues raised in the petition. In the case of *Rishad A. A Amama Vs. IEBC sand 2 others*, Petition number 6 of 2013; [2013] eKLR the High court at Malindi observed that, “.....the recent trend is that scrutiny can only be ordered where a petitioner lays sufficient basis.”
- 68 In *Mashif Jama Adama Vs. Abdikhaim Osman Mohamed and 3 others* Petition number 13 of 2014; [2014] e KLR, the court held that: -
- “It emerges that, the primary considerations in determining whether to grant scrutiny, are whether there are polling stations with a dispute as to the election results; whether such a



state of affairs has been pleaded in the petition; and whether sufficient basis has been laid - to warrant the grant to the application for scrutiny."

69 It is trite that scrutiny must be limited to the specific polling stations.

70 In the case of *Ledama Ole Kina v- Samwel Kuntai Tunai & 10 Others* [2013] eKLR, the High Court was dealing with an application for scrutiny for the whole of Narok South Constituency. The Judge held as follows: -

"An application for scrutiny of all of Narok South Constituency lacks specificity, is a blanket prayer that in my view, cannot be granted. The applicant needed to be specific on which polling stations he wanted a scrutiny done in. If he wanted scrutiny in all the polling stations, then a basis should have been laid for each polling station....."

71 The Petitioner herein wants orders for scrutiny to issue with regard to the polling stations listed herein under which he maintains were never tallied in election for the Member of National Assembly Wanjir North Constituency:

Korondille Primary School Station 1 of 1, Tuluroba Polling Station 1 of 1, Malkagufu Dispensary 2 of 2, Buna Sub-county Hospital 1 of 1, Chirate Mobile, Batalu Primary School, Karaduse Dam, Ajawa Primary school 2 of 2, Sirey Primary School 1 of 1, Hote Primary School 2 of 2, Beramu Primary School Golbo ECD Polling Station and Nyata Primary School 1 of 1.

72 The Respondents on the other hand have vehemently opposed the said application stating that the Petitioner has not tendered any evidence to warrant the issuance of the orders sought.

73 In the present case, the Applicant produced a Form that he claimed to have picked at the tallying centre. The same was marked as IAA-5C and produced in court as an exhibit. It was his evidence as to the plan to rig the election and deny him his victory.

74 Further the Petitioner contends that Turubola polling station 1 of 1 recorded an excess number of votes cast on Form 35A as being 266 whereas only 255 voters were identified by the KIEMS kit.

75 The Petitioner's case is mainly dependent the evidence by one Mr. Vincent Mogire Omambia who was a Presiding officer for Tuluroba Polling Station during the said elections. According to the Petitioner the said Mr. Mogire was able to demonstrate to Court that there was a mismatch between the people identified by the KIEMS kit and the valid votes cast on Form 35A meaning that there were an extra 41 votes not accounted for.

76 In addition, the Petitioner argued that one Ms. Abdi Ibrahim, a Deputy Presiding Officer during the said elections highlighted various acts of violence that ensued which resulted in the disruption of the polling process.

77 In rejoinder, the Respondents opposed the production of said Form stating that it was not a genuine Form 35A. The Respondents further submitted that the alleged Form was to the Form was not authentic as it lacked security features which included image survivable features. Further, the Respondents contended that the Form could not have been an original Form 35A as they are filled at the polling stations before being delivered to the tallying centre. Regulation 79 of the Election (General) Regulations states that the presiding officer is to seal the ballot boxes after placing the original Form 35A, among other election materials, after tallying is completed and announced.



- 78 In rebuttal to the allegations by the Petitioner regarding the issue of issuance of excess ballot papers. The Respondents submitted that this was an isolated incident with regard to the election for Member of County Assembly (MCA) ballot papers. The Respondents further contend that it was the Mr. Mogire's own testimony that the incident of issuance of excess ballot papers was an isolated situation relating to the MCA election and not the election for the Member of National Assembly.
- 79 In response to the allegations that the number of votes casts exceeded those identified by the KIEMS kit, the Respondents submitted the number of voters identified by the KIEMS kit in Tuluroba polling station 1 of 2 is 266 and 255 as alleged by the Petitioner. The Respondents further dispute the authenticity of the alleged screenshot of the KIEMS kit.
- 80 The Respondents further contend that the Petitioner's own agent, Mr. Adan Abdullahi Omar duly signed the Form 35 A for Tuluroba Polling Station 1 of 2 accepting and confirming the validity of the results announced and recorded on August 10, 2022. Further the Respondents contend that in his witness affidavit sworn on September 8, 2022, there was no allegation that the ballots cast exceeded the voters identified by KIEMS KIT. He did not disown the said Form and there was no evidence tabled to prove that he was not the one who signed the Form.
- 81 Regulation 83(1) of the Elections (General regulations) 2013 provides as follows;
1. Immediately after the results of the poll from all the polling stations in a constituency have been received by the returning officer, the returning officer shall, in the presence if candidates or agents and observers, if present-
    - a. Tally the final results from each polling station in a constituency for the election of a member of the National Assembly and members of the county assembly.
    - b. Disregard the results of the count of a polling station where the total votes exceeds the number of registered voters in that polling station.
    - c. Disregard the results of the count of a polling station where the total votes exceeds the total numbers of voters who turned out to vote in that polling station.
    - d. Collate and publicly announce to the persons present the results from each polling station in the constituency for the election of the President, County Governor, Senator and County Women Representative to the National Assembly.
    - e. Complete the relevant Form 35B and 36B for the respective elective position set out in the schedule in which the returning officer shall declare, as the case may be, the –
      - i. Name of the respective electoral area;
      - ii. Total number of registered voters;
      - iii. Votes cast for each candidate or referendum side in each polling station;
      - iv. Number of rejected votes in each polling station;
      - v. Aggregate number of votes cast in the respective electoral area; and
      - vi. Aggregate number of rejected votes;
    - f. Sign and date the relevant Forms and publicly declare the results for the position of
      - i. Member of County Assembly;



- ii. Member of National Assembly; and
- g. Issue certificates to persons elected in the County Assembly and National Assembly elections in Forms 36C and 35C respectively set out in the schedule;
- h. Deliver to the county returning officer the collated results for the election of the county Governor, Senator and County Women Representative to the National Assembly; and
- i. Deliver to the chairperson of the Commission the collated results for the election of the president to the national tallying centre.

82 In the instant case, the 2<sup>nd</sup> Respondent admitted that he did not announce the results for the five remaining polling stations. His argument was that the circumstances surrounding the election which even required that he be vacated to the national tallying centre at Bomas of Kenya for safety reasons could not allow him to finish the announcement.

83 The 2<sup>nd</sup> Respondent admitted that he called the winner's agent and did not engage the other candidates' agents. Announcement of results is not a mere formality. The election does not belong to the warring parties nor the IEBC it belongs to the people who are electing their representatives. All the stakeholders in an election deserve to hear the results of all the polling centres. This also ensures that there is public confidence in the electoral process, in the absence of which, as we have unfortunately witnessed in the past, there is often unrest is coupled with violence and clashes.

84 The Kriegler report addressed and analysed this issue at pages 137 – 136 of the Report of the Independent Review Commission on the General Elections held in Kenya on December 27, 2007. It recommended that there be integration of the various descriptions of the entire counting and tallying procedure into one document which would then be the principal description and must be adhered to. This is the reason the election regulations were developed, to set down guidelines that guide the process and ensure that the integrity of the process is maintained in accordance to the constitutional provisions and requirements.

85 Article 86 of the Constitution provides;

At every election, the Independent Electoral and Boundaries Commission shall ensure that

—

- a. whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent;
- b. the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station;
- c. the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and
- d. appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials.

86 The failure to announce the results from the five polling stations was an act of non-compliance on the part of the returning officer. The returning officer in his rejoinder has claimed that there were compelling reasons that that ensued during the said exercise that forced him to announce the results at the National tallying Centre at Bomas. However, what puzzles the court is the fact that he did not present evidence that he alerted all the candidates that he would be doing the tallying at another centre. He also failed to inform the candidates when the tallying was complete, save for the candidate who won.



- 87 Whereas the Applicant contends that the tallying and collation of results in the absence of agents was a violation of the regulations, a reading of regulation 86 reveals that the same is to be done (if) the agents are present. That does not excuse the Respondents' failure to reach out to the agents or the candidates, especially in this digital age.
- 88 This therefore calls into question whether the results for the five polling stations were ever tallied in the first place. Given that the agents for the candidates never had an opportunity to verify the Form 35B, coupled with the manner in which the 2<sup>nd</sup> respondent conducted himself. It is without a doubt that a picture is painted of a process that was never concluded in accordance with the provisions of election laws.
- 89 It therefore follows that there was non-compliance in terms of the announcement of the tallied results, denying the applicant the opportunity to follow up on the results and bringing into question the aspect of verification of the final result.
- 90 Given the threshold required for scrutiny, the averments by the Petitioner and the rejoinder by the Respondents, the scales of justice does tilt towards the Petitioner's case. I am therefore persuaded to grant limited scrutiny so as to meet the ends of justice in this case.
- 91 The court therefore orders as follows: -
1. The Notice of Motion dated October 4, 2022 succeeds partly.
  2. There shall be a scrutiny of the Form 35As Form 35B and Form 35C used in the Wajir North Member of National Assembly Election held on August 9, 2022 limited to the following polling stations;
    - i. Tuluroba Polling Station 1 of 2
    - ii. Malkagufu Dispensary Polling Station 2 of 2
    - iii. Cherate Mobile 1 of 1
    - iv. Buna Sub County Hospital 1 of 1
    - v. Ajawa Primary School 2 of 2
  3. The Deputy registrar shall preside over the opening of the ballot boxes used in the Wajir North Member of National Assembly Election held on 9<sup>th</sup> August 2022.
  4. The Deputy Registrar shall carry out the scrutiny as follows;
    - a. Confirm if the entries in the original Form 35As for the polling stations in 2 above are similar to the entries in the original Form 35B supplied by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.
    - b. Tally the number of votes garnered by each candidate in Form 35B, including the tallies from the stations in 2 above
  5. Each party may avail not more than two Counsels, the parties themselves and not more than three other representatives to attend the opening of the ballot boxes, the retrieval of Forms 35A and the actual scrutiny exercise.
  6. The Deputy registrar shall then prepare and file a report on the exercise in any event on or before January 19, 2022.



7. In compliance with the above orders, the court do hereby direct that a pre-scrutiny meeting be convened by the Deputy Registrar and in attendance shall be two advocates of the high court from each party and one nominee for the petitioner and 1<sup>st</sup> respondent. The pre-scrutiny meeting is intended to iron out any outstanding administrative/logistical frame which might affect the time-bound exercise as ordered by the court in this ruling.

82 Costs of the application shall abide the outcome of the petition.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 10th DAY OF JANUARY, 2023.**

.....

**R. NYAKUNDI**

**JUDGE**

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