



**Farah v Independent Electoral and Boundaries Commission (IEBC) & 2 others
(Election Petition E001 of 2022) [2023] KEHC 14 (KLR) (5 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 14 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
ELECTION PETITION E001 OF 2022**

LW GITARI, J

JANUARY 5, 2023

**IN THE MATTER OF SECTIONS 39, 44, 44A, 75, 76,
80 & 82 OF THE ELECTIONS ACT, NO. 24 OF 2011**

-AND-

**IN THE MATTER OF RULES 8, 9, 12 & 15 OF THE ELECTIONS
(PARLIAMENTARY AND COUNTY ELECTIONS) PETITION**

RULES, 2017

-AND-

**IN THE MATTER OF THE ELECTION OF MEMBER OF
PARLIAMENT FOR MANDERA NORTH CONSTITUENCY**

BETWEEN

BARDAD MOHAMED FARAH PETITIONER

AND

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION
(IEBC) 1ST RESPONDENT**

**RETURNING OFFICER, MANDERA NORTH CONSTITUENCY 2ND
RESPONDENT**

ABDULLAIH BASHIR SHEIKH 3RD RESPONDENT

RULING

Introduction

1. The application which is pending determination before this Court is the one dated 2nd September 2022 which was filed by the Petitioner at the time of filing the Petition. The Petitioner is challenging the



elections results for Mandera Constituency in the General Elections which were held on 9th August 2022. The Petitioner seeks the following orders in the Petition:

- i. Spent.
 - ii. That there be an order directing the 1st Respondent and 2nd Respondent to present (sic) to avail to Court within 48 hours of service of the Petition and the instant Application, all the original copies of the following elections materials with respect to Mandera North Constituency Parliamentary Elections: -
 - a. All Forms 35A from all the polling stations.
 - b. All Forms 32A from all the polling stations.
 - c. Form 35B.
 - d. All Polling Stations Diaries (PSD) from all the polling stations.
 - e. All KIEMS Kits assigned to all the polling stations.
 - f. All the manual Registers for all the polling stations.
 - g. All the Logs from the said KIEMS Kits.
 - h. All sealed Ballot boxes with all the Ballot Papers from all the polling stations.
 - i. All the Counterfoils of ballot papers from all the polling stations.
 - j. The Final Report on the Number of voters who voted in the Mandera North Constituency Parliamentary Election.
 - iii. That there be an order directing the scrutiny of all the above election materials used specifically for the Mandera North Constituency Parliamentary Election and a Report of the said exercise be prepared by the Deputy Registrar of the Court.
 - iv. That there be an order directing the opening of all the ballot boxes, scrutiny, recount and re-tally of all ballot papers and all election materials and specifically all the 25 original Forms 32A, 35A, 35B, KIEMS Kit logs used for the Mandera North Constituency Parliamentary Elections.
 - v. That the Court directs that such exercise be supervised by the Deputy Registrar of the High Court of Kenya at Garissa and such place for the conducting of the exercise.
 - vi. That costs for this Application be provided for.
2. The application was strenuously opposed by the Respondents.

Background

3. The application is based on the grounds on the face of it. The application is further supported by the affidavit of Bardad Mohamed Farah, the Petitioner/Applicant herein. In summary, the Applicant deposed that five (5) persons were candidates in the Mandera North Constituency Parliamentary Election that was held on 9th August, 2022 and that the 2nd Respondent returned the results below (hereinafter 'the result' or 'final outcome' or 'outcome') on 11th August, 2022, which are contested in this Petition:

Name of Candidate - Valid Votes Cast

Abdullahi Bashir Sheikh 9,214



Ali Abdi Mohamed 4,425

Bardad Mohamed Farah 6,999

Dahir Bashir Ahmed 339

Herin Hussein Abshiro 2,618

Total Valid Votes 23,595

Total Rejected Votes 98

4. It was the Applicant's averment that there was massive, systemic, systematic and deliberate non-compliance with the Constitution and the Election Laws that went to the very core and heart of holding elections as the key to the expression of the sovereign will and power of the people of Mandera North Constituency. He explained the contended irregularities as follows;
- i. Various Presiding Officers (P.Os), in violation of section 17 of the Election Offence Act, deliberately removed SD Cards from KIEMS Kits and thereafter would declare them as non-functional. The various P.Os would then immediately resort to the use of manual registers without following the laid down procedure under the law.
 - ii. The use of the KIEMS kit is obligatory pursuant to section 44 of the Elections Act for purposes of voter identification, and should the KIEMS kit fail, then there is a mandatory procedure that must be followed before resorting to the use of the manual register as provided under Regulations 26 (2) Elections (Technology) Regulations, 2017 and Regulations 69 (1) (e) of the Elections (General) Regulations, 2012 as amended by the Elections (General) (Amendment) Regulations, 2017.
 - iii. At all the polling stations in Mandera North Constituency where the 1st and 2nd Respondents reverted to the complementary mechanism of using the manual register as opposed to the KIEMS Kits, the 1st and 2nd Respondent deliberately violated section 44A of the Elections Act, Regulation 26(2) of Election (Technology) Regulations, 2017, Regulations 69 (1) (e) of the Elections (General) Regulations, 2012 as amended by the Elections (General) (Amendment) Regulations, 2017 as well as the 1st Respondent's guidelines to Presiding Officers and the wording on Form 32A.
 - iv. The failure to use KIEMS Kit was intended to facilitate double voting and ballot stuffing. The complementary system was deployed to facilitate fraud, exaggerate voter turnout and ballot stuffing in favour of the 3rd respondent in majority of the polling stations. He gave the following examples:
 - a. At Lanqura Primary School (0090401020202401)
 - b. At Jikow Primary School (009041020206401)
 - c. Olla Primary School Polling Stations, 009041020201201 and 009041020201202.
 - v. In violation of Regulations 7 (3) and 64 of the Elections (General) Regulations, 2012 as amended by the Elections (General) (Amendment) Regulations, 2017, the 1st and 2nd Respondents unilaterally altered certain polling stations and moved all elections material to other polling stations. To this end, he gave examples of the counting of ballots with respect to the following stations:
 - a. Ashabito Primary School Polling Station



- b. Shir Shir Primary Polling stations
 - c. Yaqila Farms Polling Stations
 - d. Qordobo Nursery School.
- vi. The 1st and 2nd Respondents allowed unauthorized access to the elections materials to the 3rd Respondent and/or his agents at Libin Girls Primary School (009041020505401) and with respect to Alhidaya Primary School (009041020403902).
 - vii. In all the polling stations of Mandera North Constituency there was voter bribery and undue influence instigated by the 3rd Respondent and aided by the various Presiding Officers, the 1st and 2nd Respondents.
 - viii. Agents of the 3rd Respondent would approach voters on the queue or within the polling station. The voter would then be issued with a Card bearing the image of the 3rd Respondent and the party symbol for the UDM Party- a He-goat. As most of the voters are illiterate they required to be assisted to vote. In this sense, upon being issued with the Ballot papers, a voter would walk up to the P.O who upon asking them which candidate they wished to vote for, they would hand over the said Card and shout “Korbes”, the Borana/Gare name of a He-goat. The P.O would then take the Ballot papers and mark them in favour of all UDM Party Candidates for all elective positions.
 - ix. Conversely, voters who stood their ground and intimated they required assistance to vote for other candidates in other parties, were not accorded a similar smooth treatment, instead the individual P.O would now harshly require that they specifically state the full names of whoever they wished to vote for.
 - x. At no point was there a recording in the Polling Station Diary (PSD) by the 1st and 2nd Respondents of each and every person who was assisted by the various P.Os in the manner described above.
 - xi. A sinister scheme that was perpetrated at the various polling stations in RhamuDimtu Ward, where one Hussein Jelle, the 3rd Respondent’s Agent in this Ward would go around telling voters that unless they voted “Korbes” in all the elective positions save for the presidential race, their sub-clan candidate for the MCA position who vied on a UDM candidate would lose the elections: That,
 - a. It so happens that the Abdi- Ali sub-clan, a further sub-clan of JB-O had also fronted a candidate for MCA for Rhamu-Dimtu Ward but on a UDM Party ticket with the consensus that they would still support the Petitioner for the MP position.
 - b. However, owing to Hussein Jelle’s antics on elections day, he exerted pressure and mislead a sizable number of people from the Abdi Ali sub-clan that by not voting for only UDM candidates on the ballot for all the elective positions their pick for MCA would lose. As such, even where ordinarily Rhamu-Dimtu is meant to be the Petitioner’s stronghold as his clan is the majority, the 3rd Respondent ended up getting a sizable chunk of votes in this Ward on account of Hussein Jelle’s deceit.
 - xii. In violation to sections 11 and 12 of the Elections Offences Act, the 1st and 2nd Respondents in cahoots with the 3rd Respondent as well as officers of the Kenya Police, Kenya Police Reserve, Mandera County Security Apparatus meted force and violence on agents and candidates whenever objections to the election process were raised. Instances of violence were particularly



prevalent at Shir Shir Primary School, Jikow Primary School, Lanqura Primary School, Olla Primary School, Awara Primary School, Alhidaya Primary School, Yabicho A Nursery School, Dara Farms, Bambo West, Rhamu-Dimtu Primary School as well as the Constituency Tallying Centre at the DCC Social Hall.

- xiii. In most of the 3rd Defendant's strong-holder, there was an active operation of ferrying voter to and from the various polling stations. This operation was well calculated in that the said voters would be picked up from various town centres by buses hired by the 3rd Respondent, given cash as well as the Korbes Cards and taken to their respective registered polling stations. After voting, the said voters would approach the said buses and were required to show that they still held onto the said Korbes Cards. If one was not in possession he would be turned away. However, with the said Card, you would be allowed to board and ferried back from whence you had been picked.
5. In the Further Affidavit sworn on 21st October, 2022, the Applicant relies on the Supreme Court of Kenya decision in *Gatirau Peter Munya v Dickson Mwende Kithinji & 2 others*, SCK Petition No. 2B of 2014 [2014] eKLR where the Court held that right to scrutiny and re-count is anchored in Section 82(1) of the *Elections Act* and Rules 28 & 29 of the *Election (Parliamentary and County) Rules* and a party to an Election Petition is entitled to make a request for a re-count or scrutiny of votes at any stage after filing of the Petition and before determination. That a party seeking an order for scrutiny in an election petition must establish the basis of that request by way of pleadings and affidavits or by way of evidence adduced during the hearing of the Petition. Further, that where an application for scrutiny is made, it is to be conducted in specific polling stations. That such an application is couched in specific terms and clothed with particularity as to which polling stations within a constituency are to attract scrutiny and where basis are laid, for each and every polling station within a constituency, then the order ought to be granted. The Applicant contends that he has provided sufficient evidence to show why the present application ought to be granted. This is at paragraph 8 of the Further Affidavit where the Applicant has listed the various grounds at the specific polling stations.
6. The Applicant, citing these various grounds raised in the present application, urged this Court to make an order for the delivery, into the custody of the Court, all the election materials including electronic documents, all Forms 32A and 35A, all Polling Station Diaries (PSD), devices, equipment, KIEMS Kits, all ballot boxes and papers for purposes not only limited to inspection scrutiny of all the ballot materials but also to enable recount, re-tally and verification of the count of all the polling stations with respect to Mandera North Constituency Parliamentary Election.

The 1st and 2nd Respondents' Response

7. The 1st and 2nd Respondents filed their response vide a Replying Affidavit sworn on 11th October 2022 by Hashim Ahmed Ismail who was the returning officer of Mandera North Constituency. It was their case that the Petitioner has not disputed results in any single polling station by presenting a set of results other than what was declared and announced by the 1st and 2nd Respondents both at the Polling Stations and the Constituency Tallying Centre. It was further the Respondents' case that the orders sought are wide in scope and not within the ambit of the Petition as initially pleaded. The 1st and 2nd Respondents thus urged this Court to dismiss the present application with costs.

The 3rd Respondent's Response

8. The 3rd Respondent, on the other hand, filed their response vide the Replying Affidavit sworn on 12th October 2022 by Abdullaih Bashir Sheikh. It was their case that the Petitioner has not laid a sufficient basis to warrant the orders sought.



9. The 3rd Respondent submits that the Applicant has not disputed the votes garnered by various candidates for the Member of National Assembly for the Constituency as announced by the 2nd Respondent. He further avers that pursuant to Section 29(4)(2) of the *Election (Parliamentary and County Elections) Petition Rules* 2017, scrutiny should be confined to polling stations in which the results are disputed. That the Petitioner has not contested the results announced in any of the polling stations in the Constituency. The 3rd Respondent further avers that the Applicant is not specific as to the particular polling stations and the prayer can therefore not be granted. That the application contains allegations that are merely speculative and remain unsupported by any credible evidence, and that the Applicant is endeavouring to enlarge the frontiers of his Petition, which cannot be allowed by the Court. He further deposes that an application for scrutiny and recount is not a fishing expedition and parties are bound by their pleadings. He prays that the application be dismissed.

The Submissions

i. The Petitioner's Submissions

10. The Petitioner raises three issues for determination which are as follows:
- i. At what stage should an application for scrutiny or recount be made to the Court.
 - ii. Whether a Petitioner who does not seek recount at the Polling Station is estopped from seeking a recount through Court.
 - iii. Has the Petitioner laid down a basis for scrutiny, re-count or retallying.
11. The Applicant submits that the principles are well settled that an Election Court has jurisdiction to order scrutiny of votes. That Section 82(1) of the *Elections Act* 2011 gives this court wide jurisdiction to order scrutiny and recount. The Applicant also refers this Court to Rules 30 and 31 of the *Elections (Parliamentary and County Elections) Petition Rules* 2017 sets out the mechanics and directions for scrutiny of votes for the purposes of establishing the validity of the votes cast. The Applicant relies on the Supreme Court of Kenya decision in *Gatirau Peter Munya v Dickson Mwende Kithinji & 2 others* (*supra*).
12. The Applicant has also relied on the case of *Raila Amollo Odinga & Another v. Independent Electoral Boundaries Commission* No. 1 of 2017 [2017] eKLR where the Supreme Court of Kenya held that a party is bound by its pleadings and any scrutiny of either form of technology must be made for a sufficient reason. Further that any prayer in the application that would seem to be an expansion of the case for the Petitioner which would in effect be a fishing exercise to procure fresh evidence not already contained in the Petition must be rejected.
13. The Applicant further submits that there is distinction between scrutiny and recount which flows from Section 82(2) and (3) of the *Act*. He relies on *Mohammed M. Kuno v Abdikadir Omar Aden & 2 others* [2013] eKLR and *Justus Gesito Mugali M'mbaya v IEBC & 2 Others* [2013] eKLR.
14. The Applicant submits that an application for scrutiny or recount can be made at any time before the final judgment is delivered.
15. On the second issue, the Petitioner referred the court to paragraph 12 to 14 of their written submissions. It was their submission that under Regulation 81 of the *Election General Regulations*, a candidate has a right if he so wishes to have the presiding officer recheck and recount the votes at the polling station before a final declaration is made. In their view, the said Regulation does not estop a Petitioner under Section 82 from bringing an application for recount. It was their submission that by



virtue of a petitioner not having asked for a recount at the polling station does not prevent him from making that application before court.

16. On the third issue, the Petitioner referred the court to paragraph 15 to 18 of their written submissions. The Petitioner also referred to paragraph 15 of their petition and stated that the same provides a table as against each allegation they have raised to the affected polling stations. By demonstration, the Petitioner identified Qordobo Nursery School, Lanqura Primary School, Jikow Primary School, and Sukela Tinfu polling station, where he alleges that there was a manipulation of the KIEMS kits. The Petitioner also highlighted Wargadud Dam Polling Station where he alleged there was ballot stuffing and manipulation. It was thus their submission that they have indeed laid a basis for an application for scrutiny and recount.

a. The 1st and 2nd Respondents Submissions

17. For the 1st and 2nd Respondents, they relied on the submissions dated 27th October 2022. The 1st and 2nd Respondents also relied on Section 82(2) of the *Elections Act* and submitted that the question that the court has to determine is “what is the objective?” What is the purpose of scrutiny and what would be the outcome. Counsel for the 1st and 2nd Respondents submitted that where votes at a trial of an election petition are scrutinized, a certain category of votes shall be struck off. That these are votes listed under Section 82(2)(a) to (j), the example is the vote of a person whose name was not on the register or list of voters assigned at the polling station. He submits that if no evidence has been led in the petition to demonstrate that there was a vote of a person whose name was not on the register, but was allowed to vote, then there is no reason why the court should allow scrutiny. That others are the vote of a person who committed personation at the election; votes secured through bribery and evidence must be led in support of the allegations. It is further submitted that under Rules 28 and 29, scrutiny and re-count shall be confined to the polling station where results are disputed. He further submits that the Petitioner is presenting a wide range of prayers covering all polling stations whereas he has not pleaded all the polling stations as forming the basis of the allegations which he presents before Court. That the application lacks in specificity. They thus pray that the application be dismissed with costs.

d. The 3rd Respondents’ Submissions

18. It was the 3rd Respondent’s submission that the Petitioner has failed to meet the threshold of “sufficient reason” to warrant this court to grant the orders of scrutiny sought. According to the 3rd Respondent, the Petitioner has not established that the alleged illegalities and irregularities during the election of the Mandera North member of national assembly had the effect of materially and substantially affecting the outcome of the said elections. He has urged the court to be persuaded by the decisions in *Ledama ole Kina v. Samuel Kuntai Tunai & 10 Others* [2015] eKLR, and *Mohamed Hassan v. IEBC & 2 Others*. It is submitted that the Petitioner is seeking to be assisted by Court to engage in a fishing expedition and to look for evidence.

Issue for determination

19. I have considered the application, the affidavits, and all the submissions. The main issue for determination herein is whether the Applicant has laid a basis for this Court to order a scrutiny and recount of votes cast in respect the Mandera North Constituency Parliamentary Election on 9th August 2022.



Analysis

20. What is scrutiny and recount? The law on scrutiny and recount is set out in Sections 80 (4)(a) and 82 of the *Elections Act*, 2011 as read with Rules 28 and 29 of the *Elections (Parliamentary and County Elections) Petition Rules*, 2017. Scrutiny and recount are conceptually different. Recount is concerned with establishing the number of votes garnered. A recount determines the number of votes a candidate garnered in an election and in an electoral dispute, if a Petitioner is challenging the numbers, a recount and tallying will resolve the dispute. A prayer for recount has to be pleaded and where it be the only prayer, it is ordered at the earliest stage of hearing even before taking other evidence. On the other hand, scrutiny seeks to determine the validity of such votes. [See: *Justus Gesito Mugali M'baya v IEBC & 2 Others* (*supra*)] and the definition of scrutiny in *Halsbury's Laws of England* which defines scrutiny as court supervised forensic investigations into the validity of votes cast in an election [See: Bench Book on Electoral Disputes at page 120]. Scrutiny is therefore a more detailed exercise where the election materials are examined (in-depth) to determine the validity of the votes. The objective is to determine the validity of the votes and an election may be impugned, based on irregularities, malpractices, misconduct and non-compliance with the law. It is only the valid votes that give a candidate a win in the elections and hence the need to establish the validity of the votes. This is stated to be the quantitative aspect and qualitative aspect. [See: *Robinson Simiyu Mwaya v. Alpha Kitazi & Other* [2017] eKLR by Mrima, J.]

The Legal Basis of Recount and Scrutiny of votes

21. Section 80(4)(a) and 82 of the *Elections Act* as read with Rules 28 and 29 of the Elections (Parliamentary) and County Elections Rules 2017, lays down the law on scrutiny and re-count.
22. Section 80(4)(a) of the *Elections Act* provides that:
- “An election court may by order direct the Commission to issue a certificate of election to a President, a member of Parliament or a member of a county assembly if—
- (a) upon recount of the ballots cast, the winner is apparent;”
23. Section 82 of the *Elections Act*, on the other hand, states that:
- “(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."

24. Rule 28 of the *Elections (Parliamentary and County Elections) Petition Rules*, 2017, a party can apply for an order of recount of votes where the only issue in the petition is recount or tallying of votes. The said Rule provides:

"A Petitioner may apply to an election Court for an order to;

- a) recount of votes
- b) examine the tallying, if the only issue for determination in the petition is the count or tallying of the votes received by the candidates."

25. On the other hand, Rule 29 of the *Elections (Parliamentary and County Elections) Petition Rules*, 2017 provides that:

"Scrutiny of votes.

- (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 spoiled 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.”

26. Section 82 (2) of the *Elections Act*, 2011 presupposes that the scrutiny will unearth instances of voting by unregistered voters, bribery, treating, cheating, undue influence, impersonation, double voting, voters by those disqualified from voting and votes cast for disqualified candidate etc, the winning candidate has not obtained the votes he is entitled to in law and a basis for this has been laid out in the Petition and the Affidavit evidence.

27. What is apparent from these provisions is that for scrutiny, a court may of its own motion or on application by a party, order the scrutiny of votes. However, an election court will not of its own motion order a re-count of votes. In both cases, that is scrutiny, recount or tallying, the court will not allow the application as a matter of course, a party applying for an order of scrutiny and recount must demonstrate to the Court that there are sufficient reasons for the grant of the order. The Court then gives direction on how the scrutiny and recount shall be done.

28. The Courts have in various decisions laid down the guiding principles upon which the Court may order scrutiny and recount. These principles were elaborately laid down in the case of *Gatirau Peter Munya v. Dickson Mwendu Kithinji & 2 others* (*supra*) where the Court held that:

“It is our position that an order for a recount or scrutiny of the vote may be made at any stage after filing of an election petition or during the hearing of an election petition and before the determination of the said petition. There is no inconsistency between Rule 33(2) of the Petition Rules and Section 82 (1) of the *Elections Act*, as regards the exercise of discretion as to whether to order for scrutiny and recount or not. Contrary to dicta in some of the High Court decisions, the discretion vested in an election court by Section 82(1) of the Act, is not unfettered. Such discretion must be exercised reasonably, so as not to defeat the objectives of Article 87 (1) of the *Constitution* and the *Elections Act*.”

29. The Court further stated:- “From the foregoing review of the emerging jurisprudence in our Courts on the right to scrutiny and recount of votes in an election Petition, we would purpose to issue certain guiding principles as follows:

- i. 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) Petitions



Rules 2013. Consequently, any party to an election is entitled to make a request for a recount and or scrutiny of votes at any stage after the filing of Petition and determination of Petition.

- ii. The trial Court is vested with discretion 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 arrive at a just and fair determination of the Petition. In exercise of 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 of scrutiny or recount.
 - iii. The right of scrutiny and recount does not 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.
 - iv. Where a party makes a request for security 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 terms of Rule 33(4) of the *Elections (Parliamentary and County Elections) Petitions Rules*.
30. The Supreme Court went further to give a guideline as to whether scrutiny or recount, can be ordered in all polling stations in a disputed election. The Court stated:

“We are unable to agree with the view of the learned Judges of Appeal. The view that scrutiny and recount in a constituency “means scrutiny and recount in all polling stations in the constituency”, is not borne out by emerging jurisprudence from the most relevant fora of adjudication, namely, the election Courts. On the contrary, judicial opinion distinctly favours a view that commends itself to us: that, an application for scrutiny and recount, must be couched in specific terms, and clothed with particularity, as to which polling stations within a constituency are to attract such scrutiny. If a party lays a clear basis for scrutiny in each and all the polling stations within a constituency, then the order ought to be granted.”

See also: *Raila Amolo Odinga & Another v. I.E.B.C. & 2 Others* [2017] eKLR where these principle were reiterated.

31. Bearing in mind these principles, I will proceed to determine the issue before me. The main issue for determination is whether the Applicant has satisfied this Court that an order of scrutiny and recount should be granted.
32. The Supreme Court has settled the issue as to what stage an application for scrutiny and recount can be made. The position is that the application can be made at any stage after filing the Petition and before determination of the Petition. The Petitioner filed the application together with the Petition. The Court heard the application and deferred the ruling so as to give a determination based on the evidence. The Supreme Court in *Gatirau Peter Munya v. Dickson Mwende Kithinji & 2 others* (*supra*) and *Raila Amolo Odinga & Another v. IEBC* (*supra*) stated that the Applicant must lay a basis for a request for scrutiny or recount that such basis must be established by way of pleadings and affidavits or by way of evidence adduced during the hearing of the Petition.



33. In *Nathif Jama Adama -versus- Abdi Khaim Osman Mohamed & 3 Others*, Petition No. 13 of 2014; [2014] eKLR the Supreme Court held:-

“It emerges that, the primary consideration 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 a sufficient basis has been laid to warrant the grant of the Application for Scrutiny.”

34. The Petitioner has listed various grounds in the Petition. I have considered the averments in the Petition and the affidavits sworn by the Applicant. The Petitioner/Applicant herein alleged at paragraph 33 of the Petition that there was a deliberate manipulation of KIEMS kit at all the polling stations in Mandera North Constituency where the 1st and 2nd Respondents allegedly reverted to the complementary mechanism of using the manual register as opposed to the KIEMS Kits. According to the Petitioner/Applicant, the failure to use KIEMS Kit was intended to facilitate double voting and ballot stuffing in majority of the polling stations in favour of the 3rd Respondent. He identified some of the polling stations where he avers that there was failure of KIEMS kits and whose alleged failure he contends was deliberate and intend to commit fraud. These polling stations include: Lanqura Primary School (0090401020202401); Jikow Primary School (009041020206401); and Olla Primary School Polling Stations, 009041020201201 and 009041020201202.

35. Among the reliefs sought in this Petition are those couched as follows:

- i. Immediately upon the filing of the Petition, the 1st and 2nd Respondents do avail to the custody of the Court of all the election material including electronic documents, all Forms 32A and 35A, all Polling Station Diaries (PSD), devices, equipment, all ballot boxes and papers for the Mandera North Constituency Parliamentary Election within 48 hours.
- ii. Immediately upon the filing of this Petition, the 1st and 2nd Respondents do produce, avail and allow access for purposes of inspection and scrutiny all the ballot materials, all Forms 32A and 35A, all the Polling Station Diaries (PSD) as well as KIEMS Kits with respect to the Mandera North Constituency Parliamentary Election.

36. The Petitioner's application dated 2nd September 2022 also sought for the following orders, inter alia:

- i. That there be an order directing the scrutiny of all the above election materials used specifically for the Mandera North Constituency Parliamentary Election and a Report of the said exercise be prepared by the Deputy Registrar of the Court.
- ii. That there be an order directing the opening of all the ballot boxes, scrutiny, recount and re-tally of all ballot papers and all election materials and specifically all the original Forms 32A, 35A, 35B, KIEMS Kit logs used for the Mandera North Constituency Parliamentary Elections.

37. The Petitioner has at Paragraph 8 of his further affidavit listed the polling stations that the illegalities and irregularities were committed by the Respondent. They are as follows:



Issue	Polling Stations Affected	Effect on the results of the Election	Issues arising from the Respondents Responses
Deliberate manipulation of KIEMS Kits and reverting to irregular use of manual register	Lanqura Primary School (0090401020202401), Jikow Primary School (009041020206401), Olla Primary School Polling Stations, 009041020201201 and 009041020201202, Sarman Primary School, Rhamu Dimtu Primary School	Failure to use KIEMS Kit was intended to facilitate double voting and ballot stuffing. The complementary system was deployed to facilitate fraud, exaggerate voter turnout and ballot stuffing in favour of the 3rd respondent in majority of the polling stations.	All Respondents have admitted the failure of KIEMS Kits in various polling stations but insist that where such failure occurred, authorization was sought and granted before reverting to use of manual register. It is therefore important that the 1st and 2nd Respondent provides data and information of all the polling stations where the KIEMS kit failed, the manner and proof that authorization was sought for reverting to the complementary system as well as the record of how many voters were identified using the complementary system vis-à-vis the record in the PSDs. It is worth noting that the 1st and 2nd Respondent has already made reference in their various Replying Affidavits to PSDs which they intend to rely on. However, copies of the same have not been provided.



<p>Unilateral alteration of Polling Centres</p>	<p>Shir Shir Primary Polling stations, Yaqila Farms Polling Station, Qordobo Nursery School</p>	<p>The alteration of the polling stations denied voters the right to vote. However, as is seen from Form 35C, the 1st and 2nd Respondent announced results for this polling station. It is therefore useful to ascertain data from the KIEMS Kit to ascertain their location on the said day and how it was used. The voting materials for these polling stations should also be made available in order to scrutinize and confirm whether voting actually took place and if not reasons why voting was not allowed.</p>	<p>The Respondents aver that elections were conducted in every gazette polling station. If that position is indeed true, nothing would be easier than to provide all the elections material with respect to Shir Shir Primary Polling stations, Yaqila Farms Polling Station, Qordobo Nursery School specifically with respect to the election for member of Parliament in which the Petitioner has categorically brought evidence to show that no voting took place in those polling stations. It is thus important that with respect to the KIEMS Kit, the Court orders that the following be provided: (i) Static IP addresses of each KIEMS kit used during the Mandera North Constituency Parliamentary election held on August 9, 2022, (ii) specific GPS location of each KIEMS Kits and GPS location for each polling station used during the Mandera North Constituency Parliamentary election for each period (iii) certified</p>
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list of all KIEMS Kits unique device identifiers including but not limited to MAC address, IMEI numbers, Sim Card numbers procured used, unused and or deployed during the elections; (iv) polling station allocation for each KIEMS Kits used during the Mandera North Constituency Parliamentary election including the six back up kits per ward; (v) Electronic voter identification (EVID) logs of each KIEMS Kits used during the Mandera North Constituency Parliamentary election on 9th August 2022 transmitted from polling stations to the constituency tallying Centre and from i) IEBC Result Transmission Data Base Application protocol interphase (API) logs showing user access rights, time of transmissions from KIEMS Kits to the IEBC Result Transmission Data Base, (vi) count of identified voters by each KIEMS Kit by biometric identification to alphanumeric search, manual identification through physical



			register and overall count including found and not found; logs for EVI application logs to include log in details of the user, opening and closing time, voters IDs, device MAC address, mode of identification, time stamp, polling station Code and GPS location.
Unauthorized and illegal access elections materials by the 3rd Respondent and/or his agents.	Libin Girls Primary School (009041020505401), Alhidaya Primary School (009041020403902), Shir Shir Primary Polling stations	Unlawful access was designed and deliberate in order to give the 3rd Respondent undue advantage and influence over the same to such an extent that the 3rd Respondent together with his agents and/or representatives tampered with the electoral process and thus the result	The Respondents have offered blanket denials that the 3rd Respondent and/or his agents did not have irregular access to elections materials. To the contrary, the Petitioner has offered first hand witness accounts of this fact. What then is important is that as a result of the evidence provided, the integrity of the ballots with respect to the three (3) polling stations affected comes to question. It would thus be prudent for the Court to order for scrutiny to ascertain in the declared result in Form 35C is in tandem with the ballots in the box as well as the information contained in the KIEMS Kit to confirm voter turnout



			vis-à-vis the declared results.
Voter Bribery and undue influence	<p>In all the polling stations of Mandera North Constituency. First hand witness testimony has been provided of voter bribery by the Petitioner's witnesses in the following polling stations: Lanqura Polling Stations, Sukela Tinfa Primary School, Wargadud Dam Polling Stations, Bambo West Polling Stations, Dara Farma Polling Stations, Awara Primary School, Alhidaya Primary School, Ladeni Primary School, Towfiq Primary School, Dau River Day Secondary School, Qodi, Balanqa Shallow Wells, Qorahey Primary School.</p> <p>The Petitioner has also laid a basis for a sister scheme to influence voters to vote in a certain manner with respect to all the polling Stations in RhamuDimtu Ward as outlined at paragraph 44 of the Petition and supported by the Affidavit of the Petitioner and</p>	<p>Voters were coerced and influenced through bribes to vote in favour of the 3rd Respondent. The fact that 70% of the voters in Mandera North Constituency are illiterate and were thus assisted, it is important to ascertain from the Polling Station Dairy how each and every assisted voter voted. Suffice it to say, as this scheme was aided by the various P.Os the entire result of all polling Stations in Mandera North Constituency comes to question.</p>	<p>The Respondents have offered blanket denials on this issue. However, as is evidenced in the various Supporting Affidavits in support of the Petition, there is a clear conspiracy that was hatched in which the Respondents colluded to subvert the will of the people of Mandera North Constituency. For instance, in his Affidavit, Hasim Ahmed Ismail does not deny the various instances that various of the Petitioners witnesses reported to him concerning various irregularities by the various returning officers, he does not even address the issue raised at paragraph 16 of the Affidavit of Issa Yussuf Mohamed concerning one of the P.Os, Mohamed Nur Maalim Yusuf who declared his open support for the 3rd Respondent. The said Mohamed Nur Maalim Yusuf has sworn an Affidavit dated 26th September, 2022 and confirmed that the contexts of paragraph 16 of the Affidavit of Issa Yussuf Mohamed are</p>



	by Omar Jibril Mohamed		indeed true. It is also instructive to note that the 1st and 2nd Respondent through the various P.Os who have sworn Affidavits have admitted to assisting voters who needed help in voting. They said P.Os have readily posited that they followed Regulation 72 of the Elections (General Regulations, 2012. In this sense then, it would be easy for the 1st and 2nd Respondent to provide the information concerning how many assisted voters participated in the election for Mandera North Constituency visà-vis the corresponding entries to the PSD as required under the said Regulation 72 (6) of the Elections (General Regulations, 2012
Alteration of form 35A	Yabicho A Nursery School, at the Constituency Tallying Centre	Alteration was for the benefit of the 3rd Respondent. See paragraph 10 and 12 of the Affidavit of Omar Jibril Mohamed	None of the Respondents have made any comment or responded to this issue.
Irregular Ballot marking and stuffing	Wagadud Dam Polling Station 1, Lanqura Polling Station 1, Libin Girls Primary School, Bambo West	This irregular marking and stuffing was only for the benefit of the 3rd Respondent. See the Affidavit of Feysal	It is admitted that there were ballot papers that were marked beyond the margins. In fact the 1st and 2nd



		<p>Jelle Ali in support of the Petitioner and the admission in the Affidavit of Adan Ahmed Koriyo for the 1st and 2nd Respondents</p>	<p>Respondents through the Affidavit of Adan Ahmed Koriyo have provided four (4) samples of such a ballot paper. Thus, scrutiny of the ballot papers of this polling station will determine how many of such ballot papers exist even as the Court makes a determination of whether the said ballot papers were marked properly or not and thus whether they were valid. Save for the Affidavit of Haasan Adan Samon dated 24th September, 2022 filed by the 3rd Respondent, no other persons named by the Petitioner's witnesses as having participated in Ballot marking and stuffing have sworn any Affidavit to dispute the account by the Petitioner</p>
<p>Use of Force or violence perpetrated and carried out by security organs</p>	<p>Shir Shir Primary School, Jikow Primary School, Lanqura Primary School, Olla Primary School, Awara Primary School, Alhidaya Primary School, Yabicho A Nursery School, Dara Farms, Bambo West, Rhamu-Dimtu Primary School as well as the Constituency</p>	<p>In violation to sections 11 and 12 of the Elections Offences Act, the 1st and 2nd Respondents in cahoots with the 3rd Respondent as well as officers of the Kenya Police, Kenya Police Reserve, Mandera County Security Apparatus meted force and violence on agents and candidates whenever</p>	<p>The Respondents have offered blanket denials on this issue. The theme in the responses was that no formal reports were made to the police, nobody was charged for the violence and that the Petitioner has not produced medical records to show that anyone was injured. However, as is evidence from</p>



Tallying Centre at the
DCC Social Hall

objections to the election process were raised. As force was metted out, all other agents save for the 3rd Respondent's agents were allowed access to verify the Count. Thus, the Petitioner and/or his agents could not even legitimately exercise their right under regulation 80 of the Elections (General) Regulations, 2012.

the various Affidavits by the Petitioner and his witnesses there are various accounts of violence at the said polling stations as well as at the DCCC Office. These accounts have been corroborated. The Upshot is that violence was meted against anyone who objected to the various irregularities and even where arrests were made, the Respondents colluded with the Police to ensure that no formal report was recorded at the police station. In the end, once the other agents save for UDM agents were chased away from various polling station and further at the Constituency Tallying Centre, the Petitioner, his agents and other candidates were unable to verify the results that were eventually announced. Thus, there is a need for a process of scrutiny to be undertaken so as to ascertain that all the voting records, i.e Ballot papers vis-à-vis the data in the KIEMs Kits as well as Manual Register tally with one another for that is the only way to ascertain the accuracy



			of the results of the elections.
Transportation of voters	In most of the 3rd Defendant's stronghold, Particular witness testimony has been provided with respect of Libin Girls and Rhamu-Dimtu	In most of the 3rd Defendant's stronghold, there was an active operation of ferrying voter to and from the various polling stations. This operation was well calculated in that the said voters would be picked up from various town centres by buses hired by the 3rd Respondent, given cash as well as the Korbes Cards and taken to their respective registered polling stations. After voting, the said voters would approach the said buses and were required to show that they still held onto the said Korbes Cards. If one was not in possession he would be turned away. However, with the said Card, you would be allowed to board and ferried back from whence you had been picked.	The Respondents have offered blanket denials on this issue. However, as is evidenced in the various Supporting Affidavits in support of the Petition, there is a clear conspiracy that was hatched in which the Respondents colluded to subvert the will of the people of Mandera North Constituency.

38. It is trite that parties are bound by their pleadings. The prayers in the Petition and those in the present application are relevant in particular prayer (i) and (ii) of the Petition which I have quoted above and prayer (i) and (ii) in the Application form a nexus between the Petition and the Application. It is therefore clear that the Application has its basis in the Petition.
39. The second consideration is whether the Applicant has laid a basis for an order of scrutiny and recount. The Petitioner has pleaded various grounds in the Petition and further affidavit. These include manipulation of KIEMS kits, alteration of polling stations, unauthorized access to election material, voter bribery, alterations of Forms 35A, irregular ballot marking and stuffing, use of violence, and transportation of voters.



40. The principle to guide the Court is that an application for scrutiny must be couched in specific terms and clothed in particularity. The polling stations must be specified and lay the foundation for the grant of scrutiny. The Petitioner seeks recount and scrutiny in all the polling stations in Constituency. This is a generalized prayer, specific polling stations must be stated. The Petitioner listed a number of polling stations. In *Gatirau Peter Munya v. Dickson Mwendu Kithinji & 2 others* (supra) it was held that a fully scale recount and scrutiny of all polling stations cannot be entertained unless the party lays clear basis for scrutiny in each polling station. The Petitioner submits that he has laid sufficient reasons why the orders in the instant application ought to be granted. The Petitioner has stated that he seeks scrutiny, recount, and retallying of all the votes. The Petitioner has demonstrated that there were irregularities and illegalities. The Petitioner is therefore within his right to apply for scrutiny under Section 82(2) of the *Elections Act*. Scrutiny is expected to determine the valid votes and unearth other instances of malpractice as stated earlier.
41. Rule 29(4) of the *Election (Parliamentary and County Elections) Petition Rules* lays down the election materials that may be examined during scrutiny. It is well settled that scrutiny and recount of votes may be ordered based on pleadings and from the evidence presented in Court. The pleadings are the basis upon which the case is built. The evidence adduced must be in support of what is pleaded. A party is bound by his pleadings. Any prayer in the application that would seem to be an expansion of the Petitioner's case which would then amount to a fishing expedition would be rejected.
42. The irregularities and illegalities were pleaded in the Petition and therefore an application for scrutiny and recount does not amount to expanding the scope of Petition. The Petitioner has listed the polling stations where there were irregularities. Furthermore, it also emerged in evidence that there were other irregularities and in the polling stations listed. In one of the polling stations, the polling station diary was not availed. There were also allegations of violence in one of the polling stations and the polling station diary casts doubt as to whether voting took place.
43. There were several irregularities like ballot stuffing, none compliance with the law when KIEMS kits failed and on the assisted voters. The purpose of scrutiny where there are such illegalities and irregularities is to assist the Court to investigate as to whether these allegations are valid and assist the Court in determining the valid votes cast in favour of each candidate. The process also assists the Court to understand and determine the integrity of the votes. The Court has discretion to order scrutiny and recount where it is satisfied that sufficient reasons have been given. [See: *Philip Mukwe Wasike v. James Lusweti Muke & 2 Others* [2013] eKLR] Based on the allegations by the Petitioner in the Petition and the supporting and further affidavits, the Applicant has laid a basis for scrutiny and recount in the polling stations listed. He has not laid a basis for scrutiny, recount, and retallying in all polling stations in the entire Constituency.

In conclusion

44. The Notice of Motion dated 2nd September 2022 partly succeeds. There shall be a scrutiny of all Forms 35A, 32A, 35B, Polling Station Diaries, all KIEMS kits, all manual registers, all logs from KIEMS kits, all ballot papers from the following polling stations:
 - i. Libin Girls Polling Station where it is alleged there was transportation voters, irregular ballot marking and stuffing, and unauthorized and illegal access to election materials by the 3rd Respondent and/or his agents (Polling Station Number 009041020505401).
 - ii. Rhamu Dimtu Primary School where it is alleged that there was transportation of voters, use of force or violence, and deliberate manipulation of the KIEMS kit in the two polling stations.



- iii. Shir Shir Primary Polling Stations where it is alleged there was use of force or violence, unauthorized and illegal access to election materials by the 3rd Respondent and/or his agents, and alteration of the polling centres unilaterally.
 - iv. Jikow Primary School where it is alleged that there was use of force or violence and deliberate manipulation of the KIEMS kit (Polling Station Number 0090410206401).
 - v. Lanqura Primary School where it is alleged that there was use of force or violence, irregular ballot marking and stuffing, voter bribery, and deliberate manipulation of the KIEMS kit (Polling Station Number 0090401020202401).
 - vi. Olla Primary School where it is alleged that there was use of force or violence, and deliberate manipulation of the KIEMS kit (Polling Stations Numbers 009041020201201 and 009041020201201).
 - vii. Awara Primary School where it is alleged that there was use of force or violence, voter bribery, and unauthorized and illegal access to election materials.
 - viii. Alhidaya Primary School where it is alleged that there was unauthorized and illegal access to election materials (Polling Station Number 009041020403902), use of force or violence and voter bribery.
 - ix. Yabicho A Nursery School where it is alleged that there use of force or violence and alteration of 35A.
 - x. Dara Farms Polling Stations where it is alleged that there was use of force or violence and voter bribery.
 - xi. Bambo West Polling Stations where it is alleged that there was use of force or violence, irregular ballot marking and stuffing, and voter bribery.
 - xii. Wargadud Dam Polling Stations where it is alleged that there was irregular ballot marking and stuffing in Polling Station Number 1 as well as voter bribery.
 - xiii. Sukela Tinfa Primary School, Ladeni Primary School, Towqif Primary School, Dau River Day Secondary School, Qodi Balanqa Shallow Wells, and Qorahey Primary School in which it is alleged that there was voter bribery in each of the said polling stations. At Sukela Tinfa Polling Station, the Petitioner alleges that only seven voters were registered using the KIEMS kit and the kit was working properly.
 - xiv. Yaqilla Farms Polling Station and Qordobo Nursery School in which it is alleged that there a unilateral alteration of the said polling stations. It was the Petitioner's case in Polling Station Number 1 of 2 at Qordobo Nursery School, the KIEMS kit was working properly yet no single voter was identified electronically.
 - xv. Sarman Primary School in which it is alleged that there was a deliberate manipulation of the KIEMS kits.
45. For purposes of enabling scrutiny, the 1st and 2nd Respondent shall avail to the Deputy Registrar all the original or duly certified copies of the Forms 32A, 35A, and 35B, all manual registers, all logs from KIEMS kits, and the ballot papers and ballot boxes from the listed polling stations. The Deputy Registrar shall:



- i. Confirm whether the Forms 32A, 35A, and 35B have similar entries to those retrieved from the ballot boxes.
 - ii. Recount and tally the number of votes garnered by each candidate.
 - iii. Confirm whether KIEMS kit failed or manual register was used.
 - iv. The Deputy Registrar to file a report within 14 days.
46. Each party to avail at least two counsels, the parties themselves and three other representatives to attend the exercise of scrutiny. All parties be under the direction of the Deputy Registrar.
47. The matter be mentioned on 24th January 2023 to confirm compliance.
48. Costs to the Applicant.

DATED, SIGNED AND DELIVERED AT MILIMANI THIS 6TH DAY OF JANUARY, 2023.

L.W. GITARI

JUDGE

