



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**  
**ELECTION PETITION NO. 2 OF 2017**

**JOHN MUGAMBI ANGAINE.....PETITIONER**

**VERSUS**

**I.E.B.C.....1<sup>ST</sup> RESPONDENT**

**WARIO IBRAHIM ALI R/O BUURI CONSTITUENCY.....2<sup>ND</sup> RESPONDENT**

**RINDIKIRI MUGAMBI MURWITHANIA.....3<sup>RD</sup> RESPONDENT**

**RULING ON SCRUTINY**

On 10<sup>th</sup> January 2018, this matter came up for mention to confirm if the petitioners advocate had filed his submissions. Upon confirming that those submissions had been filed Mr Gitonga advocate for the petitioner reminded the court that among the Petitioners prayers in the Petition was an order for scrutiny and that it was his view that the petitioner had laid a basis of scrutiny in his evidence in court. He sought that the court makes a determination on whether or not scrutiny will be conducted. Ms Gloria for 1<sup>st</sup> and 2<sup>nd</sup> Respondent, said that the application for scrutiny should be filed formally so that they can respond. Mr Muthomi for the 3<sup>rd</sup> Respondent argued that the manner in which the request is made is irregular because no formal application had been made. He argued that scrutiny by its very nature is tedious and such request should not be granted on casual grounds. He said that Mr Gitonga had not told the court what basis had been laid to warrant an order for scrutiny. He urged that Mr Gitonga should have the application canvassed properly by all parties.

In response Mr Gitonga argued that the **Supreme Court in Gatirau Peter Munya vs Mwenda Githinji** gave guidelines for scrutiny and that the application need not be formal and can be made at any stage, before, during and after the hearing of the petition.

In response the court ordered as follows:-

**“The prayer for Scrutiny and recount by the Petitioner in the petition will have to be considered based on evidence on record as a finding/Determination has to be made on each materials and every prayer made by the Petitioner. In the event that this court finds that a basis for scrutiny and/or recount has been established by the petitioner then this court will summon the parties and counsels through the DR for directions on scrutiny and/or recount. Date for judgement remains 8.2.2018. In event that it is necessary to change date for judgement parties will be instructed accordingly.”**

The reliefs that the petitioner sought in regard to scrutiny and recount in this petition were:

- a. Recount of all votes from all the polling stations within Buuri Constituency and
- b. An order for scrutiny and audit of all the Returns of the Buuri Parliamentary Election including but not limited to forms 35 As, 35 B and 35 C.
- c. A specific order for scrutiny of rejected votes and spoilt votes.
- d. An order for scrutiny and audit of the system and technology used by the 1<sup>st</sup> Respondent in the Buuri Parliamentary Elections including but not limited to the KIEMS kits, servers, website/portal.

I have perused the pleadings and the evidence of the parties and pursuant to **section 82(1) of the Elections Act**, this court finds that in order to arrive at a fair and just determination of the petition an order for scrutiny and recount has to be made for the following reasons:-

The petitioner questioned the accountability and transparency of the forms used to declare results and complained of superficial forms being used to manipulate results. Inconsideration that the statutory forms were procured by the 1<sup>st</sup> Respondent as specified in the schedule the reasonable expectation that all forms ought to be a standard form and format. This is what Immaculate Kassait a Director of the 1<sup>st</sup> Respondent deponed to in **Raila 2017 case at the Supreme Court** that:

**“All the ballot papers and statutory forms used in the August 2017 elections contained these security features.”**

JMA4 does not seem to be compatible with this averment and is not in the format in schedule provided at page 150 of Elections General Regulations of 2012. The evidence of the 2<sup>nd</sup> Respondent witness Jane Omuruga Mati lends credence to the petitioner claim that forms were superficially changed because she says that the form 35A that she signed and stamped is not the one at page 82 of the 1<sup>st</sup> and 2<sup>nd</sup> respondents bundle of documents. She said she had signed dated and stamped the form 35A that she delivered to the Returning officer but the one in court did not have a stamp.

The 1<sup>st</sup> and 2<sup>nd</sup> Respondents at paragraph 15 of their response to the petition admit there were isolated cases of discrepancies between the results contained in forms 35 A and form 35 B which arose from inadvertent human error during the process of tallying and verification of the results contained in Form 35As. It is stated that the said errors never materially affected the outcome of the elections results.

The 2<sup>nd</sup> Respondent explained the errors and/or discrepancies in his affidavit sworn on 19<sup>th</sup> September 2017 at paragraph 9.

The 2<sup>nd</sup> Respondent explained that when he realised that there were errors in JMA 5 he corrected them in JMA 4 which is shown to have been witnessed by 3 Jubilee Agents and candidates. There is nothing to show that the persons who were affected by the said discrepancies as shown in paragraph 9 of the affidavit were involved in the correction/verification as alluded by the 2<sup>nd</sup> Respondent. I have also looked at JMA 4 and compared it to the prescribed form in the schedule and find that it is not filled completely for example the Returning Officer has not indicated :-

- Voter turn out
- Total Number of Registered voters
- Total number of voters who turned out
- Percentage of voter turnout

**It is not satisfactorily explained how JMA 5 got into the hands of the petitioner from 2<sup>nd</sup> Respondent who was custodian of 1<sup>st</sup> Respondents election materials.**

This section of voter turnout shows the writings are repeated and this raises suspicion as to whether this is

the original form 35 B that the 2<sup>nd</sup> Respondent was supposed to use in declaration of results. The form has only a column for aggregate votes in figures and not in words.

The 2<sup>nd</sup> Respondent didn't explain why he did not fill all the parts of form 35 B which he says he used to declare the results for Member of National Assembly for Buuri Constituency, and Justice Musinga (as he then was) in **Manson Oyongo Nyamweya vs James Omingo Magara** held that:-

**“A declaration that is not fully completed is of no value and cannot be used or authenticate results.”**

The 2<sup>nd</sup> Respondent has appended his signature away from section where it is supposed to be. The section where serial no. is supposed to be indicated at the top of the form is blank and serial number on the form is at the margin of the form. The 2<sup>nd</sup> Respondent at paragraph 11 has averred that all forms 35 As are available through the chair of 1<sup>st</sup> Respondent as the forms were submitted to the 1<sup>st</sup> Respondent in Nairobi after declaration of results.

This court is interested in establishing that JMA 4 contains valid results and that it was not a forgery introduced into the vote tabulation process. At paragraph 377 of **Raila 2017 Petition Supreme Court** held that the form declaring results should not be a certified copy and it should be free from doubt as to authenticity.

**Regulation 83(1) (e)** of Election in (Parliamentary and County Elections) Petition Rules 2017 obligates the County Returning officer in mandatory terms to complete the relevant form 35 B and form 36 B in the presence of candidates or agents and observers if present for the respective elective position set in the schedule in which the Returning officer shall declare as the case maybe,

- i. Name of respective electoral area.
- ii. Total number of registered voters
- iii. Votes cast for each candidate
- iv. Number of rejected votes in each polling station
- v. Aggregate number of votes cast in respective electoral area and
- vi. Aggregate number of rejected votes.

**Regulation 83(1) (h)** requires the Constituency Returning Officer to deliver to the County Returning Officer the collated results of the County Governor, Senator and Women Representative to National Assembly.

**83(1)(i) the Constituency Returning Officer** is obligated to deliver to the Chair person of the Commission the collated results for the elections of the President to National tallying centre. The averment at paragraph 11 of the 2<sup>nd</sup> Respondents affidavit that all forms 35 As are in custody of the chair of the 1<sup>st</sup> Respondent in Nairobi is not anchored in any law or Regulation.

I have looked at the forms 35 A that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent has filed in court and they are all copies that are not certified and the court cannot rely on them to find for or against either the petitioner or the 3<sup>rd</sup> Respondent as they have not been authenticated.

The petitioner witnesses PW2 agent at Ndurumuru polling station, PW3 who was agent at Tutua polling station stream 1, PW8 who was agent at Kiirua primary school polling station stream 3 and PW12 the agent at Mujujune polling station stream 2 appeared to this court to be credible witnesses and PW2, 3 and 12 said they signed the forms 35 A at their respective polling stations but were surprised when they were

shown photocopies of forms 35 As that didn't have their names and signatures. This court found these witnesses to be genuine to the extent that evidence they gave had some probability of truth save for corroboration. Suspicion was raised in the mind of this court as to whether it could be a coincidence that three people can claim they were at a polling station and signed the forms when they did not sign them. The photocopy of forms that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent provided in their response the petition did not make it any better because most of them are ineligible. In that regard the polling station diaries as well as the original forms 35 As will have to be scrutinized to confirm whether or not these witnesses were agents or not.

Concerning an order of scrutiny and audit of the system and technology used by the 1<sup>st</sup> respondent in the Buuri Parliamentary elections including but not limited to the KIEMS kits the servers, website/portal this court finds that no basis was laid for the reason that the primary results for Member of the National Assembly are contained in the original forms 35 A.

In conclusion, this court makes an order in regard to the Petitioners prayers for scrutiny and recount in the following manner:-

1. All original forms 35 As in the impugned election for Member of National Assembly for Buuri Constituency shall be scrutinized and compared to the Results in form 35 B JMA 4 to establish:

- Valid votes for each of the candidates.
- Voter turn out
- Total Number of Registered voters
- Total number of voters who turned out
- Percentage of voter turnout

2. Recount of votes in Tutua stream 1 and Mujujune stream 2 to establish votes garnered by each of the candidates.

3. Scrutiny of rejected and spoilt votes at Mujujune polling station stream 2.

4. Scrutiny of polling station diaries from Ndurumuru polling station, Mujujune polling station stream 2, Tutua polling station stream 1 and Kiirua primary polling station stream 3.

5. The exercise ordered in 1-4 shall be conducted at the premises of the 1<sup>st</sup> Respondent warehouse where the materials have been preserved under the supervision of the Deputy Registrar High court Meru from 9<sup>th</sup> and 10<sup>th</sup> February 2018.

6. The Deputy Registrar in the exercise of supervising of the scrutiny and/recount in 1-4 above shall be assisted by such number of court clerks as shall be necessary to ensure efficiency and expediency.

7. At the conclusion of the exercise, the Deputy Registrar shall file a report on 12<sup>th</sup> February 2018 which shall form part of the proceedings of the court and shall be considered in the determination of this petition on 15<sup>th</sup> February 2018.

8. The petitioner and the 3<sup>rd</sup> Respondent shall appoint two agents each to represent them during the scrutiny exercise.

9. The Petitioner and Respondents counsels may if they wish file brief submissions in respect to the exercise together with the DR's report.

10. Security of the Deputy Registrar, court staff, IEBC staff and the agents shall be provided for by the County Police Commander Meru County.

11. The costs of the application shall await the outcome of the Petition. Orders accordingly.

**HON. A.ONG'INJO**

**JUDGE**

**DATED, SIGNED AND DELIVERED AT MERU THIS 8<sup>TH</sup> DAY  
OF FEBRUARY 2018.**

**HON. A.ONG'INJO**

**JUDGE**

In the presence of:-

Mr Gitonga Advocate for Petitioner.

Mr Mwongela Advocate for 1<sup>st</sup> and 2<sup>nd</sup> Respondents

Mr Muthomi Thiankolu Advocate for 3<sup>rd</sup> Respondent.

**Order**

Copies of ruling to be supplied to the counsels and DR immediately.

**HON. A.ONG'INJO**

**JUDGE**