



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MALINDI
THE ELECTIONS ACT, 2011
ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS) PETITION RULES, 2017

ELECTION PETITION NO. 3 OF 2017

BETWEEN

TIMAMY ISSA ABDALLA

AND

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

ADAN ALI MOHAMED.....2ND RESPONDENT

FAHIM YASIN TWAHA.....3RD RESPONDENT

ABDULHAKIM ABOUD BWANA.....4TH RESPONDENT

RULING

1. The Petitioner filed a Notice of Motion Application under certificate of urgency dated the 26th September, 2017 which was received in court on the 28th September, 2017 whereby the party sought for a raft of reliefs from court.

The application was set down for hearing before the trial of the petition commenced.

2. The court considered the rival arguments, and in reaching its decision, made the following orders on 30th October, 2017;-

- (a) Prayers numbers 2 and 4 are hereof declined;
- (b) Prayers numbers 5 and 6 (a) to (m) are suspended and may be considered in the course of trial;
- (c) Parties are at liberty to make oral applications during the substantive hearing;
- (d) Each party to bear its own costs.

3. The trial of the main petition commenced on 18th December, 2017 whereby the petitioner presented to court a total of 107 witnesses who testified in support of his case. In rebuttal, the Respondents called a total of 40 witnesses.

The court, by consent of all counsel on record, adopted the affidavits of all these witnesses as their evidence in support of their respective cases and then proceeded to patiently listen to the testimony of each of those witnesses in cross examination and re-examination. The aim of this is to arrive at answers to the rival accusations, counter – accusations and finger pointing.

4. After the 3rd and 4th Respondent's closed their case, the petitioner's counsel sought to have the court consider prayers 5 and 6 which were sought by the petitioner in his application dated 26th September, 2017. The said prayers are as follows;

(i) There be a scrutiny and recount of votes cast in all the 167 polling stations in Lamu County in the election of Governor held on 8th August 2017.

(ii) The recount and scrutiny to include the examination of;

(a) The written statements made by the Presiding and Returning Officer under the Election Act, 2011;

(b) The printed copy of the register of voters used in the election sealed in tamper proof envelope;

(c) The original forms 37 A's in the ballot boxes containing the elections results of all the 167 polling stations;

(d) The written complaints of the candidate and their representatives;

(e) The packets of spoiled ballot papers and stray ballot papers in all the 167 polling stations;

(f) The marked copy of registers;

(g) The packets of counter foils of used ballot papers;

(h) The packets of counted ballot papers in all the 167 polling stations;

(i) The packets of rejected ballot papers in all the 167 polling stations;

(j) The polling day diaries of all the rejected ballot papers;

(k) All the rejected ballot papers;

(l) The system and technology used by the 1st Respondent in the gubernatorial election in Lamu County including access for purposes of inspection to the 1st Respondents KIEMS kits, ICT logs, servers, websites and /or portal.

(m) The scanned and transmitted forms 37 As containing the results from the 167 polling stations scanned and transmitted to constituency tallying as well as county tallying center.

5. The Respondents vehemently objected to the application to the court to consider the prayers in number 5 and 6 of the application dated 26th September, 2017 for scrutiny and recount. On the ground that no sufficient reason had been advanced or come out from the evidence to warrant the order being granted.

6. The court heard evidence of witnesses with regard to a number of polling stations. The petitioner has

summarized the reasons for the prayer for scrutiny and recount at paragraphs (i) to (v) of the highlights in the prayers of the application as follows;

- (a) paragraph (i) to (v) underscore that this will determine the petition fairly since the margin is narrow and that there is a discrepancy of votes cast with other candidates;**
- (b) More votes cast for the petitioner were counted as spoilt;**
- (c) the results were declared on form 36 B instead of form 37B;**
- (d) These is sufficient evidence provided in the petition and written affidavit to support the prayers sought;**
- (e) Most presiding officers did not relay and/or transmit the results electronically and in the respective polling stations immediately after counting the votes, but did so at the constituency tallying center in the absence of party agents. This was either because of the network problem or a problem with KIEMS KITS. Therefore, the results of the election were not openly and transparently collated and announced, and the said results are not verifiable.**

7. In considering the prayer for scrutiny and recount, the court has taken cognizance of the said reasons and the content in the evidence adduced before it. The court has read through the authorities cited by the parties in support of their submissions with regard to the said application.

8. The law on scrutiny and recount is enacted by parliament as authorized by the Constitution of Kenya, 2010.

Article 82 (10) of the Constitution provides as follows;

“Parliament shall enact legislation to provide for;

(a).....

(b).....

(c).....

(d) the conduct of elections and referendum and the regulations and efficient supervision of elections and referendum, including the nomination of candidates for election”.

(e).....

Article 82 (2) of the Constitution further provides as follows;

“Legislation required by clause (1) (d) shall ensure voting at every election is

(a) simple

(b) transparent; and takes into account the special needs of;

(i) persons with disabilities

(ii) other persons or groups with special needs.

9. Parliament has enacted legislation with regard to elections in Kenya and the effective statute as at the 8th August, 2017 General Elections Act, 2010

10. With regard to the dispute before court, the said Act has provided elaborate guidelines to be followed by the Independent Electoral and Boundaries Commission ranging from;

- (a) registration of voters;
- (b) nominations of candidates by political parties including the qualifications of independent candidate;
- (c) conduct of elections on the voting day
- (d) handling and storage of election materials.

11. It goes further to provide for the power of the Election (Petition) court.

Section 80 (1) (d) of the Elections Act, 2011 provides that:

“An election court may in the exercise of its jurisdiction “decide all matters that come before it without undue regard to technicalities’.

This provision is in recognition of the now famous and often quoted Article 159 (2) (d) of the Constitution of Kenya, 2010 which provides as follows;

“In exercising judicial authority, the courts and Tribunals shall be guided by the following principles; -

(a).....

(b).....

(c).....

(d) justice shall be administered without undue regard to procedural technicalities,”

Section 82 (1) of the Elections, Act, 2011 provides for the judicial discretion of an election court to make an order for scrutiny and /or on the application of a party to the election petition. It provides that;

“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”

Section 82 (3) of Elections Act, 2011 further provides that;

“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”.

The law, protects the sanctity of the vote cast by a voter and it is the reason very narrow room has been allowed for the election court to interfere.

12. Having regard to the provisions of Article 86 of the Constitution of Kenya, 2010, which provides for standards to be met, that is to say;

“(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 each polling stations are openly, and accurately collated and promptly announced by the Returning Officer, and

(d) appropriate structures and mechanisms to eliminate electorate malpractices are put in place, including the safe keeping of elections material;”

13. There is also sufficient jurisprudence from our courts and literary works on this issue of scrutiny as provided for under section 82 (1) of the Election Act, 2011 and Rule 29 of the Election Petitions Rules, 2017. Most of the authorities cited by the parties in their submissions have expounded on when and why the application for scrutiny should be sought.

14. The court has considered the submissions of all the parties in support of the application dated 26th September, 2017 before the trial, the evidence of the witnesses during trial together with the evidence tendered from the various polling stations named on the application as urged by all the parties therein at the close of trial and all the authorities relied on by the parties.

15. In compliance with the law and rules with regard to election and jurisprudence, this court proceeds to allow a scrutiny of the votes under Rule 29 (1) and (4) of the Elections (Parliamentary and County Elections) Petition Rules, 2017, which scrutiny will be limited to following matters;

(a) the written statements made by the returning officers (ROs) under the Act;

(b) the register of voters used in the election and sealed in tamper proof envelopes;

(c) the copies of results for the station in dispute;

(d) the written complaints of candidates or their agents;

(e) the packets of spoilt ballot papers (if any)

(f) the marked copy of register;

(g) the packets of rejected ballot papers;

(h) the Polling Day Diary (PDD).

The said scrutiny to apply to the following stations;

(a) Lamu West constituency

(i) Mapenya primary (1) and (2)

(ii) Mpeketoni Youth Polytechnic (1) and (2)

(iii) Lamu Port Hall polling station (4) and (5)

(b) Lamu East constituency

(i) Mbwajumwali Nursery school

(ii) Mbwajumwali Primary school

(iii) Kizingitini primary school

(c) All the forms 37As in Lamu East constituency

16. The parties to submit on the results of the scrutiny in their closing submissions so that the ends of justice are protected to abide the judgment of the court.

17. Accordingly, I direct the Deputy Registrar of this court to commence the exercise with immediate effect and submit the report to this court in the 8th February, 2018 with service to the counsel for the parties by the close of day on 9th February, 2018.

18. Cost of the Application to follow the outcome of the petition.

Ruling dated, delivered and signed this 2nd day of February, 2018.

Hon. Lady Justice D. O. Chepkwony

In the presence of:

Mr. Aboubakar & Mr. Okoth counsels for the Petitioner.

Mr. Kilonzo for the 3rd and 4th Respondent.

Mr. Munyu for the 1st and 2nd Respondent.

C/clerk - Mwanaidi