



REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATE'S COURT AT BUNGOMA
ELECTION PETITION NO. 2 OF 2017

DANIEL MAKECHO NDALILA MUYELELEPETITIONER

VERSUS

BARASA TONY KHAOYA 1st RESPONDENT

KENNEDY OCHANYO 2nd RESPONDENT

I.E.B.C 3rd RESPONDENT

RULING

The notice of motion dated 27/11/17 is brought under rules 28 and 29 of the Elections (Parliamentary and County Elections) Petitions Rules 2017, and section 82 of the Elections Act No. 24 of 2011;

It seeks the following orders:

1. Scrutiny of:

- a). The packets of spoilt ballot papers.
- b). The packets of counter foils of used and unused ballot papers.
- c). The packet of counted ballot papers.
- d). The packets of rejected ballot papers.
- e). The statement showing the number of rejected ballot papers.
- f). Polling station diaries for all 42 polling stations that were in the Lwandanyi ward of Sirisia Constituency.
- g). Scrutiny of all forms 36A in respect of all polling stations that were in the Lwandanyi ward of Sirisia constituency.
- h). Forms 32A – KIEMS supervisor validation forms.
- I). Forms 32 – Declaration of secrecy for persons assisting voters.
- j). QR code for all polling stations within Lwandanyi ward of Sirisia constituency.

k). Extracted data captured by KIEMS kit during voter identification and results transmission and all their logs in all the polling stations of Lwandanyi ward of Sirisia constituency.

l). Field note books

m). All other Election materials used in member of county Assembly for Lwandanyi ward of Sirisia constituency, Bungoma County.

2. Re count of all ballot papers in respect of all the 42 polling stations in Lwandanyi ward of Sirisia constituency of Bungoma county.

3. That the scrutiny and recount be in respect of all the 42 polling stations in Lwandanyi ward of Sirisia constituency of Bungoma county.

The application is based on the grounds which are stated on the application and is supported by the affidavit sworn by Daniel Makecho Ndalila Muyebele on 27/11/17.

The following are the grounds upon which the application is based:-

- a). In order that the real issue in controversy in respect of this Petition are determined fully it is imperative and in the interest of justice that scrutiny and recount be done.
- b). That the Petitioner and his witnesses herein their affidavits and testimonies in Court laid a proper basis that can be a justification for the orders sought.
- c). The contents of the rival affidavits filed by the parties herein looked at keenly could be a compelling reason to grant the orders sought in order that a just decision is arrived at.
- d). That the 2nd and 3rd respondents failed to submit before this Court results (Forms 36A's) for 4 polling stations.
- e). Documents filed by the 2nd and 3rd respondents before Court raises glaring irregularities, illegalities and anomalies that require recount and scrutiny.
- f). The application is made in good faith and in the interest of justice.
- g). That the orders sought will not prejudice the respondents in any way.
- h). That the Court has Unfettered powers and jurisdiction to grant the orders sought as provided under section 80(1), (d) of the Elections Act.

The application is opposed by all the respondents. The 1st respondent filed his replying affidavit dated 11/12/17 in Court on 14/12/17. The 2nd and 3rd respondent filed their replying affidavit sworn by Kennedy Ochanyo (2nd respondent) on 11/12/17 through their advocates on record.

The application came up for hearing on 18/12/17. Counsel for the 2nd and 3rd respondents did not turn up in Court on the said date. The application was heard in his absence and the Court directed that he files his submissions by 19/12/17. All counsel on record filed their submissions together with authorities for the Court's consideration.

Scrutiny of votes is provided under section 82(1) of the Elections Act which 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 a manner as the Election Court may determine”**.

Rule 29 of the Elections (Parliamentary and County Elections) Petitions Rules 2017 provides as follows:-

- a). Parties to the proceedings may apply for scrutiny of the votes for purposes of establishing the validity of the votes cast.***
- b). Where the Election Court is satisfied that there is sufficient reason for scrutiny and recount.***
- c). That scrutiny can only be carried out under the direct supervision of the Registrar or Magistrate and shall be subject to the directions of the Elections Court.***
- d). That scrutiny or recount of votes shall be confined to the polling stations in which the results are disputed.***

The Petitioner's counsel submitted that the Petitioner has established a basis for scrutiny and recount through the pleadings on record and the evidence adduced.

In support of his submissions counsel for the Petitioner cited the following decisions:

- Bungoma High Court Election Petition No. 5 of 2013 (2013) e KLR
- Raila Amolo Odinga and Another = vs = Independent Electoral and Boundaries Commission and 2 others (Supreme Court Presidential Petition No. 1 of 2017).
- Philip Osore Ogutu = vs= Michael Aringo and 4 others Busia High Court Petition No. 1 of 2013.
- Jacob Murigi Muthuri = vs = John Mbaabu Murithi and 2 others.

Meru High Court Petition No. 2 of 2013;(2013) e KLR

In the case of Peter Munya = vs = Independent Electoral and Boundaries Commission and 2 others cited by the counsel for the 1st respondent as well as the counsel for the 2nd and 3rd respondents in their submissions which are on record, the Supreme Court of Kenya at Nairobi Petition No. 2b of 2014 gave the following guidelines in regard to scrutiny and recount of votes in an Election Petition.

- The right to Scrutiny and recount of votes in an Election Petition is anchored in section 82(1) of the Election Act and rules 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 the Petition and before the determination of the Petition.
- The Elections court is vested with the 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 and 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.

- 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.
- 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 votes called into question in the terms of Rule 33(4) of the Elections (Parliamentary and County Elections) Petitions Rules 2017.

In Philip Mukwe Wasike = vs = James Lusweti Mukwe Bungoma High court petition No. 5 of 2013, the Petitioner sought scrutiny and recount in all polling stations within Kabuchai constituency. Justice Omondi noted while adopting the decision in William Maina Kamanda = vs = Margaret Wanjiru Kariuki Nairobi Election Petition No. 5 of 2008 that the purpose of scrutiny is to:-

- 1. Assist the Court to investigate if the allegations of irregularities and breaches of the Law complained of are valid.**
- 2. Assist the Court in determining the valid votes cast in favour of each candidate.**
- 3. Assist the Court to better understand the vital details of the electoral process and gain impression on the integrity of the electoral process.**

Rule 33(4) of the Election Rules gives the court discretion to direct which documents can be scrutinized in view of the fact that not all the documents in an Election needs to be scrutinized. The Court may order for partial scrutiny where sufficient grounds have been established.

In Gedion Mwangangi Wambua and another = vs = I.E.B.C & 2 others, Mombasa Election Petition No. 4 of 2013 (Consolidated with Election Petition No. 9 of 2013). The Petitioners sought scrutiny and recount of votes in all the polling stations in the entire constituency of LungaLunga. In finding that there was insufficient pleadings and lack of particularity of facts upon which an order for scrutiny could be granted in both Petitions, Odunga J. observed as follows:-

“The aim of conducting scrutiny and recount is not to enable the Court to unearth new evidence on the basis of which the Petition could be sustained. Its aim is to assist the Court to verify the allegations made by the parties to the Petition which allegations themselves must be hinged on pleadings. In other words a party should not expect the court to make an order for scrutiny simply because he has sought such an order in the Petition. The Petition ought to set out his case with sufficient clarity and particularity and adduce sufficient evidence in support thereof in order to justify the court to feel that there is a need to verify not only the facts pleaded but the evidence adduced by the petitioner in support of his pleaded facts.

Where a party does not sufficiently plead his facts with the necessary particulars but hinges his case merely on the documents filed pursuant to Rule 21 of the Rules, the court would be justified in forming the view that the Petitioner is engaging in a fishing expedition or seeking to expand his Petition outside the four corners of the Petition”.

Rule 8(4) of the Elections (Parliamentary and County Elections Petition Rules 2017) obligates the Petitioner to provide the particulars of the allegations in the Petition and the affidavits. The Petitioner is bound by his pleadings and he cannot be allowed to depart from the same.

Counsel for the 1st respondent and counsel for 2nd and 3rd respondents submitted that the Petitioner did not plead the polling stations mentioned in the application in the Petition. They also submitted that the court cannot order for recount and scrutiny just to aid the Petitioner to indulge in aroving inquiry with a view to fish material to invalidate the Election. In the case of Peter Gichuki Kingara = vs = I.E.B.C and 2 others Nyeri Election Petition No. 3 of 2013, the Court held that:-

The issue of Scrutiny and recount is not a gambling exercise that sets the Court to rummaging through the ballot boxes to see whether any scintilla of evidence of electoral malpractice or irregularity can be found. If the Petition is based on any particular electoral malpractice or irregularity that would warrant scrutiny or recount of votes, the malpractice or irregularity must be pleaded and the evidence of such malpractice must be laid out or established prior to an order for scrutiny or recount; the court must be satisfied that on the basis of the evidence before it, it is necessary to call for a scrutiny and recount if not for anything else,

to confirm the truth of the particular evidence. Asking the Court for a scrutiny or recount where there is no evidence or basis for such an exercise would be more or less (like) engaging the Court on a mission of searching for the evidence where none exists, a practice that would not only be prejudicial to the respondents but would also be deprecatory in a legal system that believes in fair and impartial administration of justice.

In the instant petition there is a prayer for scrutiny of the principal voter register for Lwandanyi ward of Sirisia constituency and all documents related, including the polling day diaries and field notebooks, a security of the used and unused ballot papers, BVR records for the polling day and KIEMS (Kenya) Integrated Election Management system, records for the polling day and a recount of all ballot papers cast during the election held on 8th August 2017.

I have considered the facts pleaded in the Petition the affidavits in support thereof and the evidence adduced in this matter and it is my view that the Petitioner has not met the conditions set out under Rule 8(4) of the Elections (Parliamentary and County Elections) Petition Rules 2017. The Petitioner is bound by his pleadings. The law requires the Petitioner to provide the particulars of the allegations in his Petition and the affidavits as to why he would like the court to order for scrutiny of all the Election materials used in the member of County Assembly for Lwandanyi ward of Sirisia Constituency.

The application before Court seeks to introduce new matters which were never pleaded in the Petition. Prayer No. 1 in the application herein seeks for scrutiny of new matters which were not sought in the Petition. No evidence was tendered in court by the Petitioner to warrant the Court to grant the order. In regard to prayer 2 and 3 of the application, the Petitioner did not explain as to why he needed scrutiny and recount in all the 42 polling stations in Lwandanyi ward of Sirisia Constituency. The pleadings filed by the Petitioner and the evidence adduced do not provide the basis for the said scrutiny and recount.

The Petitioner at Paragraph (d) of the grounds in support of the application stated that the 2nd and 3rd respondents failed to submit before Court forms (36A's) for 4 polling stations. In his supporting affidavit at paragraph 6(a) he listed the polling stations which he claimed forms 36A's were missing. They are:-

- Mufungu Primary school polling station 1 of 1
- Lwandanyi youth polytechnic polling station 1 of 1
- Lurare primary school polling station 1 of 1
- Namwesi market polling station 1 of 1

The above is not the correct position. The Court record shows that forms 36A for the polling stations mentioned at paragraph 6(a) of the Petitioner's supporting affidavit were annexed to the 2nd and 3rd respondents further affidavit dated 18/10/17 and filed in Court on 19/10/17. Further all the forms 36A, 36B and 36C (Originals) were availed to Court during the hearing of this Petition.

The Petitioner in his supporting affidavit at paragraph 6(b) listed various polling stations where he claimed there were irregularities in form 36A and 36B. At paragraph 6(c) of his supporting affidavit, he listed the polling stations where Ford Kenya party agents did not sign forms 36A.

At paragraph 6(d) of his supporting affidavit he spoke of form 36C which was attached to the 2nd respondents affidavit.

At paragraph 6(e) he spoke of form 36B which did not have the total number of registered voters and the voter turn out. The above issues were addressed at length during the hearing of the Petition. The irregularities mentioned in the supporting affidavit of the Petitioner cannot form the basis for scrutiny and or recount. In the case of Nicholas Salat = vs = I.E.B.C Nairobi Court of Appeal No. 228 of 2013, the Court held that ***“scrutiny and recount is not automatic, sufficient reason has to be shown before the***

Court orders scrutiny and recount. There must be enough material placed before the Court, which will warrant the Court to order for scrutiny or recount of votes. Whether that is met or not will depend on the nature of the claims being put forward by the Petitioner and the weight the Court will attach to the evidence in support of the material complained of. The irregularities complained of by the petitioner should be of such a nature that would compromise the electoral process so that it was capable of affecting the results and cannot be said to have been free and fair”.

The pleadings filed by the petitioner herein were couched in general terms. The court cannot allow the petitioner to engage in a fishing expedition to enlarge his case beyond the scope of his pleadings. The Courts have held that it ***“would be an abuse of the process”*** to look upon scrutiny ***“as a lottery”*** and ***“to allow a party to use it for purposes of chancing on new evidence”***.

Rule 33(4) of the Election Petition Rules provides that specificity is crucial. The prayer for scrutiny must specify the polling station(s) in which the results are disputed and the documents which should be scrutinized. The party seeking scrutiny must therefore ensure that its Petition and affidavit in support ***“contain concise statements of material facts”*** upon which the prayer is grounded.

The law demands that a party gives sufficient reasons before its entitled to an order of scrutiny. As long as election is conducted in accordance with the Law section 83 of the election Act provides that any irregularities, which do not affect the result of the election, will not vitiate it.

In Philip Mungu Ndolo = vs = Omar Mirinyi Shimbwa and 2 others Mombasa High Court Petition No. 2 of 2012 the High Court observed that scrutiny ***“is a time consuming laborious and arduous exercise”*** which is also costly. It should not therefore be needlessly undertaken. The Courts will not meet the peremptory time lines set out in the constitution and the Elections Act within which Election Petition should be disposed of if they were to grant every prayer for scrutiny.

In the end it is my finding that the petitioner has failed to lay a foundation for an order of scrutiny and recount.

For all these reasons the application dated 27/11/17 lacks merit and the same is hereby dismissed with costs.

Orders accordingly.

Right of Appeal explained.

S.O. MOGUTE, PM

18/01/18

Certificate

Ruling is signed and delivered in the open court in the presence of Court Assistant: Clare

The Petitioner

The 1st Respondent

M/s Antonina Muyoka for the 1st Respondent

Mr. Makokha for the Petitioner

No Appearance for the 2nd and 3rd Respondents

S.O. MOGUTE, PM

18/01/18

MS ANTONINA MUYOKA: We can have 2nd of February, 2018 for final submissions.

S.O. MOGUTE, PM

18/01/18

MR MAKOKHA: It is ok.

S.O. MOGUTE, PM

18/01/18

COURT: Final submissions on 02/02/18. Counsel for the 2nd and 3rd respondents to be served.

S.O. MOGUTE, PM

18/01/18