



REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATE’S COURT AT KAKAMEGA
ELECTION PETITION NO 5 OF 2017
CONSOLIDATED WITH
ELECTION PETITION NO 3 OF 2017

SHIYENJI SILAS MUYEYIA.....1ST PETITIONER

JOYCE MUGASIA KHADOHI.....2ND PETITIONER

VERSUS

BENSON MANUNI MULINYA.....1ST RESPONDENT

THE RETURNING OFFICER,

IKOLOMANI CONSTITUENCY).....2ND RESPONDENT

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION.....3RD RESPONDENT

RULING

Herein are two petitions by Shiyenji Silas Muyeyia and Joyce Mugasia Khadohi challenging the election of Benson Manuni Mulinya as Member of County Assembly for Idakho East Ward. These two petitions were consolidated for ease of hearing. The hearing has been completed. At the conclusion of the hearing, the 1st Petitioner moved the court for consideration of an application dated 6/12/2017. It had earlier been directed that the said application be canvassed by way of written submissions. On the appointed date for confirmation of filing and service of the application, responses and submissions counsel for the 2nd and 3rd Respondents alleged non-service. Counsel urged that for that reason the application be dismissed. The court recorded the objection and reserved its ruling which was to be delivered after the hearing of the substantive petitions.

At the conclusion of the hearing of the petitions, the 2nd and 3rd Respondents filed Grounds of Opposition to the said 1st Petitioner’s application dated 6/12/2017. Following this development I allowed parties to highlight orally their submissions regarding the said application. This was done and therefrom flows the ruling hereunder.

1st Petitioner’s Submissions

The 1st Petitioner has made the following prayers:

1. That this honourable court be pleased to order for recount of the votes cast for the position of Member of the County Assembly Kakamega County for Idakho East Ward in the elections held on 8/8/2017 and in particular with respect to the following polling stations:
 - a. Kasavayi Primary School Polling Station
 - b. Ivole Primary School Polling Station
 - c. Shitoli Primary School Polling Station
 - d. Lwenya Primary School Polling Station
2. That this honourable court be pleased to order the 2nd and 3rd Respondents to avail to this court the election materials relating to the polling stations on the face of the application and all information in their custody for purposes of assisting the court in the event that prayer 1 is granted, the materials hereof being all polling day diaries and ballot boxes.
3. That this honourable court be pleased to grant any other further orders that the honourable court may deem just in the circumstances
4. That the costs of this application be provided for

The 1st Petitioner outlined five principal grounds in support of his application. The said grounds are as follows;

1. That at Kasavayi Primary School Polling Station, the 1st Petitioner's agent heard it announced by the Presiding Officer that the 1st Petitioner had got 47 votes yet Form 36A later indicated that the 1st Petitioner had scored 46 votes
2. That Ivole Primary School Polling Station the 1st Petitioner's agent was denied entry into the voting and counting halls thereby rendering the 1st Petitioner's interest unprotected.
3. That at Shitoli Primary School Polling Station there was a disputed presidential vote which the Presiding Office (sic) gave to one Lisehbu who was not a candidate as Member of County Assembly
4. That at Lwenya Primary School Polling Station the 1st Petitioner's agent was issued with Form 36A by the Presiding Officer indicating that one of the candidates for MCA had scored no vote at all. However, the same Presiding Officer issued yet another Form 36A that showed that the same candidate had got 24 votes
5. That given the small margin error of the votes garnered between the 1st Petitioner and the 1st Respondent and in view of the anomalies and irregularities cited both in the 1st Petitioner's Petition, the affidavit in support, the 1st Petitioner's witness affidavits together with all the annexures, it would be fair and just that a recount be conducted in the specific polling stations cited.

The application is further supported by an affidavit sworn by the 1st Petitioner. The 1st Petitioner's filed written submissions and cited the following cases;

1. Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others [2014] eKLR

This is a Supreme Court decision which sets out the principles to be applied before making an order

for scrutiny and recount

2. William Maina Kamanda v Margaret Wanjiru & 2 Others [2008] eKLR

3. Joho v Nyange & Anor [2008] 3KLR (EP) 500

The latter two allegedly support the submission that a recount should be ordered where there a very slim margin of victory.

2nd Petitioner's Submissions

The 2nd Petitioner did not file a response but at the hearing counsel submitted that the 2nd Petitioner did not oppose the application.

1st Respondent's Submissions

The 1st Respondent swore a replying affidavit in response to the application. He reiterated his deposition vide the affidavit sworn in response to the election petition. What is coming up from this replying affidavit is that the application is a fishing expedition and that a clear basis has not been laid to support granting an order for recount. In submission, Mr. Abok counsel for the 1st Respondent urged that none of the agents of the 1st Petitioner requested for recount at the counting station. He urged that the application be dismissed. 2nd and 3rd **Respondents' Submissions**

Counsel for the 2nd and 3rd Respondents filed grounds of opposition and in his oral submissions urged that the court lacks jurisdiction to order for recount as Section 82 of the Elections Act under which the application is said to be based relates only to scrutiny and recount. Similarly, counsel urged that rule 29 of the Elections (Parliamentary and County Elections) Rules, 2017 has nothing to do with recount and on this basis the application is fatal and ought to be dismissed *in limine*.

In the alternative counsel urged that if the application were to be considered on merit then the court should interrogate the effect of agents signing or not signing the statutory forms. Secondly the court should interrogate the impact of non-signing of the statutory forms.

Determination

The law on recount of votes is set out in section 80(4) of the Elections Act, 2011 as read with Rules 28 and 29 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017. I have been careful to only mention recount as that is the subject of the application herein otherwise the above cited laws deal with scrutiny and recount. It should also not be lost that scrutiny and recount are conceptually different. A recount is limited to establishing the number of votes garnered by the candidates and the tallying of such votes. (See **Justus Gesito Mugali M'maya v Independent Electoral & Boundaries Commission & 2 Others [2013] eKLR**)

In **Gedion Mwangangi Wambua & Another v Independent Electoral & Boundaries Commission & 2 Others [2013] eKLR**, the court held 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 the 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.

In **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others [2014] eKLR** the Supreme Court set out the following guiding principles with respect 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 Elections Act and Rule 33 of the Elections (Parliamentary and County Elections) Petitions Rules 2013. Consequently, any party to an election petition is entitled to make a request for a recount and/or scrutiny of votes at any stage after the filing of petition and before the determination of the petition.*
- *The trial court is vested with discretion under section 82(1) of the Elections Act to make an order on its own motion for a recount or scrutiny of votes as it may specify, if it considers that such scrutiny or recount is necessary to enable it to arrive at a just and fair determination of the petition in exercising this discretion the court is to have sufficient reasons in the context of the pleadings or the evidence or both. It is appropriate that the court should record the reasons for the order of 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 to be conducted in specific polling stations in respect of which the results are disputed or where the validity of the vote is called into question in the terms of Rule 33(4) of the Elections (Parliamentary and County Elections) Petition Rules*

Guided by the above principles let me now make a determination on the application. I have had the advantage of hearing the evidence and therefore my task will not be as arduous.

Before embarking on that, I was invited by Mr. Mutubwa, Advocate to dismiss the application *in limine*. I am required to consider this invite as it would have the effect of disposing of the entire application at this point. He advances a two-fold argument. First, that there is no provision of the law which allows for recount. He urges that section 82 of the Elections Act under which the application is anchored only allows for scrutiny and not recount. We are not to re-invent the wheel, applications for recount have been placed before superior courts. I have gone through a plethora of decisions on this subject and the holding is the same, that an election court is clothed with jurisdiction to entertain applications both for recount and scrutiny.

Second, counsel urges that a wrong rule in form of Rule 29 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 has been cited as being in support of the application. To him the correct provision should be Rule 32. I have looked at the two rules and I find the former to be the relevant one.

The application is thus properly predicated on the provisions of the law cited and I shall proceed to consider the same on merit. I shall proceed under the following heads:

Discrepancy in the announcement of results at Kasavayi Primary School Polling Station

One Charles Itivinali Shivonje was the 1st Petitioner's agent at Kasavayi. In paragraph 20 of his affidavit which was adopted as his evidence in chief, he deposes that the 1st Petitioner got 47 votes but when Form 36A was filled the 1st Petitioner's votes were indicated to be 46. The witness signed the said Form 36A but under protest. The witness was shown the Form 36A which he signed and he readily admitted that the same bore his name and signature. So how what is the effect of this assertion? I have had a look at Form 36A. The same contains a declaration in the following terms;

We, the undersigned, being present when the results of the count were announced do hereby

declare that the results shown above are true and accurate count of the ballots_____Polling Station_____Constituency.

The declaration is made by the Presiding Officer, his deputy and the agents present. There is also a provision for reasons to sign.

A person who has voluntarily appended his signature immediately below the above declaration should not be allowed turn back and say he/she did not know what he was signing. This is particularly so if an agent has sworn an affidavit deposing that he underwent training for agents and therefore expected to carry out his duties as required and/or expected. Unless it is shown that the signature was obtained by deceit or any other form of undue influence, his signature vouches for the results announced.

I therefore find that no sufficient reason has been established to order a recount at Kasavayi Primary School Polling Station.

Denial of entry into Ivole Primary School Polling Station

Oliver Lichalo Matasio testified on behalf of the 1st Petitioner. He stated that he was denied entry into Ivole Primary School Polling Station and was never given the reason why. However, in re-examination, the witness stated that he was not admitted into the polling station for the reason that another agent was already present. The 1st Petitioner was duly informed and he advised the witness ‘to go and stay at my home which is just near to the polling station as I waited for his intervention.’ The witness went further to state that his principal, the 1st Petitioner did not come until 4:00PM. On cross-examination, it emerged that one Wycliffe Masheti had signed as an agent for ODM under which the 1st Petitioner was a candidate.

Section 30 of the Elections Act provides as follows;

- 1) A political party may appoint one agent for its candidates at each polling station*
- 2) Where a political party does not nominate an agent under subsection (1), a candidate nominated by a political party may appoint an agent of the candidate’s choice.*

Regulation 62 of the Elections (General) Regulations, 2012 provides;

- 1) The Presiding Officer shall regulate the number of voters to be admitted to the polling station at the same time, and may exclude all other persons except;*
 - a) ...*
 - b) ...*
 - c) authorized agents*
 - d) ...*
 - e) ...*
 - f) ...*
 - g) ...*
- 2) Notwithstanding sub-regulation (1), the presiding officer shall admit to the polling station not more than one agent for each candidate or political party.*

With the above provisions in mind and the fact that ODM was duly represented by Wycliffe Mateshi as an agent, it is logical to infer that the interests of ODM and its candidate being the 1st Petitioner at Ivole Primary School Polling Station were duly protected. This inference crystallizes considering that the said agent signed Form 36A without reservation. See the case of **Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 Others** [2013] eKLR.

The impact of a stray presidential vote

The 1st Petitioner alleges that at Shitoli Primary School Polling Station there was a disputed presidential vote which the presiding officer gave to one Lisehbu who was not a candidate as Member of County Assembly. The 1st Petitioner's agent at Shitoli, Josphat Lugonzo Shitsama, swore an affidavit to that effect. In cross-examination, the witness stated that *'the voting was conducted well. No one was denied to vote. At the time of counting I was alert. The 1st Petitioner got 77 votes.'* I have looked at Form 36A for the said polling station and see that the votes garnered by the 1st Petitioner are 77. I do not have jurisdiction to interrogate a presidential vote and even if I were to do that a stray vote would not count to the benefit of any of the MCA candidates.

A witness has clearly stated that he was satisfied with the general conduct of elections at Shitoli save for the stray presidential vote. With this evidence, I do not find a sufficient reason to order for recount at Shitoli Primary School Polling Station.

Discrepancy in Form 36A at Lwenya Primary School Polling Station

I am considering this application after hearing the evidence of all parties. The person deposing to the goings-on at Lwenya Primary School Polling Station was not availed as a witness. His deposition has not been tested on cross-examination. It would therefore go against the rules of evidence for me to consider the availed affidavit.

I appreciate that the 1st Petitioner has deposed to what information he got from his agent at Lwenya Primary School Polling Station. Such evidence is hearsay and thus lacks probative value.

Margin between the winner and first runner-up

The 1st Respondent won the elections with 2,155 votes whereas the 1st Petitioner who was the first runners up got 2,153 votes. The question to ask is whether a small margin *per se* calls for recount. In the **Munya Case** (supra) the Supreme Court remarked that 'a narrow margin between the declared winner and the runner-up beckons as a red flag where the results are contested on allegations of counting and tallying errors at specified polling stations.' The allegations herein were not of counting and tallying errors but of 'anomalies and irregularities' which we have nevertheless looked at and found that they neither give sufficient reason nor establish a basis to warrant an order of recount.

The application dated 6/12/2017 is therefore dismissed in its entirety. Costs shall abide the outcome of the main petition.

Dated and signed this 12th day of January 2018

E. MALESI

S.R.M

Ruling read in open court this 12th day of January 2018

in the presence of

Mr Abok for the 1st Respondent and h/b for the 2nd & 3rd Respondents

No representation for the 2nd Petitioner

Ms Wambani present h/b for Mukavale for 1st Petitioner.

E. MALESI

S.R.M