



**REPUBLIC OF KENYA**  
**IN THE CHIEF MAGISTRATE'S COURT AT KISUMU**  
**ELECTION PETITION NO. 1 OF 2017**

**JULIUS OCHIENG OMORO.....PETITIONER**

**VERSUS**

**INDEPENDENT ELECTORAL &  
BOUNDARIES COMMISSION.....1ST RESPONDENT**

**RETURNING OFFICER-  
NYANDO CONSTITUENCY.....2ND RESPONDENT**

**OKKY CAROL KANGALA OMOTO.....3RD RESPONDENT**

**JOHN KENNEDY AGENGO.....4TH RESPONDENT**

**R U L I N G**

This is a ruling to the application herein dated 19/9/2017 for orders;

1. That court scrutiny or recount of votes be ordered in respect to votes cast at Luora, Nyakongo, Olasi, Kanyangoro, Kuth Awendo, Sare, Waradho and Kongwedhi Polling Stations.
2. That court orders the 1st, 2nd and 3rd respondents to submit the VR Machines for Luora, Nyakongo, Olasi, Kanyangoro, Kuth Awendo, Sare, Waradho and Kogwedhi Polling Stations to confirm the number of people who voted.

The application is brought under Rules 28 and 29 of the Elections (Parliamentary and County Elections) Petition Rules 2017 and also Section 82 of the Elections Act. It is based on the major grounds;

- i. That there were massive irregularities compounded with alterations of the results of Luora, Nyakongo, Olesi, Kanyangoro, Kuth Awendo, Sare, Warodho and Kogwedhi Polling Stations.
- ii. That the electoral process for the elections were irredeemably compromised and tilted in favour of the 4th respondent.
- iii. That the votes of the petitioner were reduced and those of the respondent increased in the mentioned Polling Stations by the Polling Clerks and Presiding Officers.
- iv. The employees of the 1st and 2nd respondent tempered with the counting and tallying of votes.

v. There is need to establish the validity of voted cast and the results.

vi. The provisions of the Election Act were breached and violated.

vii. The above grounds are also supported by the affidavit of the Julius Ochieng Omoro the petitioner herein sworn on 15th September, 2017.

This application is opposed by all the respondents. The 4th respondents has filed grounds of opposition dated 28/9/2017.

The grounds are;

- (i) The application is frivolous, incompetent, misconceived and fatally defective.
- (ii) It is an after thought meant to derail the hearing and expeditious determination of this petition.
- (iii) The applicant has not made out a case for scrutiny or recount of votes.
- (iv) The orders sought cannot be in the alternative.
- (v) The application is not specific and amounts to a fishing expedition.

The 1st and 2nd respondents have also opposed the application vide a replying affidavit of one – Okky Carol Kangala Omoto sworn on 12/10/2017

The deponents was the Returning Officer of Nyando Constituency in the elections in disputed.

In summary she depones;

- (i) The relies on the documents availed to her to reply to the application in issue.
- (ii) That the elections were conducted in accordance with the Articles 38, 81 and 86 of the Constitution, (Sections 39, 44 and 44A) of the Elections Act 2011, Section 4 and 25 of the Independent Electoral and Boundaries Commissions Act, 2011 and also the Elections (general) Regulations, 2012
- (iii) That there were no irregularities such as bribery, fraud, intimidation and tempering with the counting or tallying of votes in Luore, Nyakoyo, Olesi, Kanyangoro, Kuth Awendo, Sare, Waradho and Kogwedhi Polling Stations
- (iv) That the application herein does not satisfy the threshold envisioned under Section 82 of the Elections Act.
- (v) That the election in Kano East/Wawidhi were largely manual and only electronic to the extent of voter identification and transmission of the results from polling stations to the Constituency Tallying Centre.
- (v) That the results announced at the polling station were final and she could not vary them.
- (vii) The results were announced after tallying from all the twenty polling stations in Kano East/Wawidhi Ward.
- (viii) The results were reflected in both forms 36A and 36B
- (ix) That Rule 80, allows the candidate or agent the right to recheck or recount the votes in a polling station a right that the petitioner did not exercise.

(x) That the two prayers sought for scrutiny and recount are not available to the petitioner/applicant.

The matter came up for hearing of the application on 10/10/2017 and the court directed that it be dispensed by way of written submissions.

All the parties filed their respective submissions. They have each relied on the applicable laws.

I have considered the application, the responses, the submissions and the applicable law and have the following observations to make.

(I) The main prayers of the petition herein are that ballot boxes in the named seven polling stations be produced for scrutiny and counting, BVR Kits for the same stations be presented for verification of the figures and scrutiny to determine the number of dead voters and consequently determine whether or not the 4th respondent was validly elected.

(ii) The votes sought to be recounted and/or scrutinized plus the election material are in possession of the 1st respondent.

(iii) The petitioner has raised various numbers that were either added to the 4th respondent or deducted from his votes.

This aspect can only be noted by a recount and/or scrutiny.

(iv) The Supreme Court in the Case of Gatirau Peter Munya -vs- Dickson Mwendu Kithinji and 2 others, Supreme Courts Petition No. 2B of 2014 gave the following guiding Principles on applications for scrutiny and recounts ; amongst them are;

(a) That any party to an election petition is entitled to make an application/request for a recount and/or scrutiny of votes at any stage after filing of the petition and before its determination.

(b) Under Section 82(1) of the Elections Act the Court on its own motion can order for a recount or scrutiny of votes if it considers such necessary.

(c) The party making or seeking a recount or scrutiny is to establish a basis for it either by way of pleadings and affidavits or evidence adduced at the hearing.

(d) If request is granted, it ought to be conducted in the specific polling stations in respect to which the results are disputed or where validity is called to question.

Reading the above guiding Principles against the application before me, I do find that indeed the applicant has made a case for a recount and/or scrutiny at this stage.

I do know that both the recount and/or scrutiny can be done at the same time. I see no basis for them not being able to proceed simultaneously.

In the process of scrutiny, a recount will be done. It will also just be limited to the polling stations clearly identified by the Petitioner/Applicant.

Indeed in the case of Charles Ong'ondo Were -vs- Joseph Oyugi Magwagwa Homa Bay No. 1 of 2013 the court held that scrutiny and recount would be held so as to facilitate the expeditions disposal of the election petition.

I do find that this will also likely be the benefit here. It would go to just reduce the number of witnesses to be called and ultimately determine some of the issues in contestation.

The uphold of this is that the application herein is allowed as presented.

The scrutiny and/or recount will proceed before the hearing of witnesses. The parties will then be called upon to agree on the logistics of the scrutiny and/or recount exercise.

DATED and DELIVERED at KISUMU this 30<sup>th</sup> day of October, 2017

**J. Ng'arng'ar**

**CM**

**30/10/2017**

Before J. K. Ng'arng'ar CM

Court Assistant – Nyambeta

Nyamu for Petitioner – Present

Kemunto holding brief for Onsongo for 4th respondent – present

Lugano for Ogejo for 1st, 2nd 3rd respondent – present