



REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATE'S COURT AT NAIROBI
MILIMANI COMMERCIAL COURTS
ELECTION PETITION NO. 10 OF 2017

LANGAT DONNIE KIPTOO ARAP.....PETITIONER/ APPLICANT

-VS-

1. SIKUKU MARTIN SIMOTWO, CONSTITUENCY RETURNING

OFFICER, LANGATA CONSTITUENCY.....1ST RESPONDENT

2. THE INDEPENDENT ELECTORAL

& BOUNDARIES COMMISSION.....2ND RESPONDENT

3. ABDI OSMAN KHALIF.....3RD RESPONDENT

RULING

1. On 6th October 2017 the Petitioner filed two applications dated 5th October 2017. The first application is the Notice of Motion application dated 5th October 2017 which is brought under Article 38(2) , (a),50,81 (e) (iii) (iv) and (v) 86(a) (b) (c) and (d), 159 (2) (d) and (e) and 259(1) of the Constitution of Kenya , 2010 and Section 39,80(1) (d) and 63 and 82 of the Election Act 2011, Rule 29 of the Elections (Parliamentary and County Elections) Petitions Rules , 2017 and all enabling provisions of the Law. The prayers sought are :

a) Spent

b) That this Honourable Court do order a scrutiny and recount of votes in all polling stations in South C Ward, Langata Constituency within Nairobi County held in 8th August 2017.

c) That this Honourable Court upon granting of prayer 2 to direct that a scrutiny do include an examination of the following :-

- the written statements made by the Returning Officers**
- the examination of the written statements made by the Presiding Officers in the Polling Station Diaries**
- both the electronic and hard copy register of voters as contains the biometric data and alpha numerical details of the voters entitled to vote at the stated polling stations**
- the Kenya Integrated Electronic Machine System (KIEMS) and the information stored by it**
- the Declaration of results Forms 36As as stored in the ballot boxes of all Polling Stations**

- *Declaration of results Form 36B*
- *the packets of spoilt ballots*
- *the marked copy of register*
- *the packets of counterfoils used ballot papers*
- *the packets of counted ballot papers*
- *the packets of rejected ballot papers.*

d) THAT the Honourable Court do order costs of this Application to be paid by the Respondents.

2. This application is premised on the grounds set out on the face of the application and the Supporting Affidavit of the Petitioner, LANGAT DONNIE KIPTOO ARAP, sworn on 4th October 2017.

3. The Applicant contends that there was no declaration of results Forms 36A in all Polling Stations in South C Ward and therefore the results were either non-existent and/ or were illegally, wrongly and or fraudulently made after the event ; that the express admission by the Respondent clearly demonstrates this fact with regard to the elections for Member of County Assembly South C Ward Langata Constituency; and that in view of evidence of widespread electoral malpractices and irregularities in the elections held on 8th August 2017, it will be in the interest of justice to grant the orders for scrutiny of the election materials and recount of votes. The Applicant further contends that this will assist in verifying the aforementioned irregularities and / or malpractices. In the Supporting Affidavit, the Applicant states that the elections for MCA South C Ward Langata Constituency, in which he contested and lost as a Jubilee Party Candidate, was marred with Constitutional and Electoral Laws breaches in the tallying and transmission of the results. As such he depones that the credibility and legitimacy of the process was compromised and does not represent the will of the people. He cites the following incidents and posits that the elections were not free , fair ,transparent , accountable , credible and verifiable:

- Gross discrepancies on the number of voters who voted for the MCA as compared to the total voter turnout for other elective positions in various polling stations. It is alleged that **Forms 36B** indicates the total number of voters as 26,760 in that ward while **Form 34B** shows the ward had 26,960 voters .
- A candidate named GESORA JOSPHAT OMWOYO garnered a total of 116 votes yet it was intentionally recorded as 176 votes in the **Form 36B**.
- The valid votes at KONGONI PRIMARY SCHOOL STATION-1 were recorded as 419 and not 415 in the **Forms 36A** .
- The valid votes at KONGONI PRIMARY SCHOOL STATION 4 were allegedly recorded as 413 instead of 417 in the **Forms 36A**.
- The results in **Forms 36A** from KEWI –SOUTH C POLLING STATIONS 1, 6 and 8 were allegedly totally different from the results recorded on **Forms 36As**.
- The results in **Forms 36B** from KEWI –SOUTH C POLLING STATIONS 5 and 6 are identical yet they are distinct polling stations with different number of registered voters.
- The results in **Forms 36A** from KPA STAFF QUARTERS POLLING STATION are totally different from the results in the **Form 36B**.
- The **Forms 36A** showing results of seven polling stations , namely, MOW 2,5,7,and 10; KIRDI 3 and 4 ; KALSA 2 ; were allegedly not signed by the party agents and no reasons and explanation was tendered.
- The **Forms 36A** showing results for MOW -9 and KIRDI -1 were allegedly not signed by the respective presiding officers and or deputy presiding officers.
- The **IEBC online portal** was showing 97.56% results transmission rate as at 31st August 2017 yet the results for eight (8) polling stations are missing, that is, results for KONGONI 1,2,5,and 7; KEWI – 5 ; MOW-1 and KALSA 3.
- The Presiding Officer at KIRDI 04 Polling Station, one MARY JACINTA ADHIAMBO OSIR was allegedly discovered at MMU Centre on Wednesday 9th August 2017 with unsealed ballot boxes , ballot papers and assorted IEBC materials and unfilled forms 36As and 36Bs , 24 hours after voting closed.

- According to the Daily Nation newspaper article by one Maureen Kaka, on Friday 11th August 2017 at page 12, the Returning Officer (1st Respondent herein) allegedly confirmed that a female Presiding Officer was found with unsealed ballot boxes and another one was found in a classroom filling in Forms 34As away from her work station. It is alleged that the two officers were arrested and later released pending investigations .

4. According to the Applicant, the Respondents have expressly admitted in their pleadings that these irregularities and inconsistencies occurred in various polling stations and that the Affidavits of LANGAT DONNIE KIPTOO ARAP , KEVIN BASIYE , EDWARD MWAKIMA and JACQUELINE BASIYE further goes to show the Constitutional and legal violations which render the application herein justified.

5. In response to this application the 1st and 2nd Respondents rely on the Replying Affidavit sworn by SUKUKU MARTIN SIMOTWO, the Returning Officer, Langata Constituency and the 1st Respondent herein. According to the 1st and 2nd Respondents, the application is not only premature but an abuse of the Court process. The 1st and 2nd Respondents contend that the Applicant specified the nature and extent of scrutiny and recount and no proper basis for granting the orders sought has been established. In their view, the Applicant / Petitioner is on a fishing expedition and does not deserve the Court's discretion. The 1st and 2nd Respondent further state that the failure to specify which polling stations that scrutiny or recount should be ordered opens the door for abuse of the court process as the Applicant will be on a fishing expedition and may attempt to amend the Petition through the back door outside the limitation period set by the law. The 1st and 2nd Respondents however undertake to avail the Form 36 As in Court at the main hearing of this Petition.

6. The 3rd Respondent also opposes this application. In the Replying Affidavit of ABDI OSMAN KHALE sworn on 18th October 2017 and filed on 19th October 2017, he states that the ground that there was a failure to declare results was never pleaded in the Petition and amounts to a new cause of action which should be struck out in so far as it amounts to amending the Petition out of time. It is also submitted that no sufficient basis has been laid down to warrant the orders sought. The 3rd Respondent further submits that the Court can only permit an application for scrutiny of election materials and recount of votes when the Applicant has laid a basis for such orders in the pleadings , affidavits or at the hearing and specified the polling stations in which the results are disputed. He states that the allegations made in the Petition and the present application have no evidential backing and shows that the Applicant was seeking an election conducted with mathematical precision. The 3rd Respondent contends that the nullification of the Presidential election Results should not be the point of reference here as the alleged discrepancies in the present Petition do not warrant scrutiny. In rebuttal , it is stated that :

- In KEWI POLLING STATION 3 the results for the different positions as per Forms 34A, 35A, 36A, 37A, 38A and 39A tally with only a difference of 1 vote .
- In KEWI POLLING STATION 4 there were discrepancies in the number of votes for the position of MCA and other positions . However, all the positions tally with only a difference of 2 votes save for the position of Senator.
- In KIRDI POLLING STATION 4 there were also discrepancies in the number of votes for the position of MCA and other positions. However, apart from the position of Women representative, all the other positions tally with a difference of 6 votes for the position of Senator.
- Further, in MOW POLLING STATION 9 despite the discrepancies , all the other positions tally with only a difference of 3 votes for the position of the Senator.
- In MOW POLLING STATION 10 , save for the position of Member of Parliament, all the other positions tally with differences of 4 votes except the position of the Senator.
- On the claim that there were different sets of results for MOW POLLING STATION 2, the 3rd Respondent states that he obtained from his agent the FORM 36 A issued to the agents after the declaration of results which shows that the Applicant's agent signed the Tallying sheet hence the application has no basis.

The 3rd Respondent avers that the Petitioner is raising new grounds which were never pleaded in the

Petition but introduced in the Supplementary Affidavit sworn on 4th October 2017. The Court is urged to dismiss this application and the Petition with costs.

The 2nd Application dated 5th October 2017 hinges on the first application for scrutiny and recount. The Applicant seeks orders that the 1st and 2nd Respondents be ordered to avail to this Court the election materials stated on the face of the application and information in their custody for purposes of assisting the Court in hearing and determination of the Application for scrutiny and recount of votes filed herein. The Applicant cites various provisions of the law and states that the election materials requested will assist the Court in correctly and accurately carry out proper scrutiny of votes and recount exercise and thereby determine whether the election of the 3rd Respondent was conducted in a credible, transparent and fair manner. It will also assist the court to verify whether the irregularities and or malpractices highlighted above were indeed committed. This application is supported by the Applicant / Petitioner's Affidavit in Support sworn on on the 4th October 2017.

This Application is also opposed by the 1st and 2nd Respondent who rely on the Replying Affidavit sworn by the 1st Respondent on 23rd October 2017 and filed on 23rd October 2017. The 1st and 2nd Respondent state that whereas they can avail the Register of Voters as prayed, the same would serve no useful purpose since voters were identified biometrically through the KIEMS system and not through the hard copy register. The siad KIEMS kits were allegedly re-configured in preparation for the repeat Presidential elections hence not available. In short, it is contended that the application is couched in general terms and no basis has been established for the information required . According to the 1st and 2nd Respondents, this application amounts to a fishing expedition and the court is being engaged in a wild goose chase which should not be entertained. The 1st and 2nd Respondents are also of the view that this application is anticipatory of the application for scrutiny and recount above hence to allow it would be in vain if the orders of scrutiny and recount are not granted.

7. Court's Analysis

Having considered these two applications and the sentiments of all the parties, it is clear that the 2nd Application really depends on whether the 1st application for scrutiny and recount of votes is allowed. I will therefore proceed to consider the 1st application for scrutiny and recount. All parties were granted an opportunity to file written submissions with respect to all the applications before me. I note that only the Respondents filed written submissions . The Written submissions dated 23rd October 2017 were filed by 1st and 2nd Respondents, while the one dated 19th October 2017 were filed on behalf of the 3rd Respondent . I have considered the application as well as the opposing views and the legal position.

Section 80 (4) (a) and 82 of the Elections Act , 2011, as read with Rules 28 and 29 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 lays down the legal position with regard to scrutiny and recount of votes. A recount entails establishing the number of votes garnered by each candidate and then tallying those votes. It involves opening the ballot boxes for the disputed polling stations and physically recounting the votes cast. Scrutiny should be distinguished from the exercise of recounting of votes. Scrutiny involves not just recount but extends to determining the validity of such votes. (see **JUSTUS GESITO MUGALI M'MBAYA –VS- IBBC & 2 OTHERS ELECTION PETITION NO. 6 OF 2013 KAKAMEGA**). This Court is also alive to the fact that not every allegation of discrepancies or malpractice warrants scrutiny. To err is human. Elections involve laborious human activity and documentation and genuine mistakes are bound to occur. In the case of **WAVINYA NDETI VS I.E.B.C. & 4 OTHERS MACHAKOS ELECTION PETITION No. 4 of 2013** Hon. Majanja J held:

“An election is a human endeavour and is not carried out by programmed machines. Perfection is an aspiration but allowance must be made for human error.”

Another important consideration is margin of victory or loss. It has been held that the narrower the margin of victory or loss the higher the chances that the Court will order scrutiny or recount even

without the Applicant demonstrating a basis for the orders.(see **CHARLES ONG'ONDO WERE –VS- JOSEPH OYUGI MAGWANGA & 3 OTHERS HOMA BAY ELECTION PETITION NO. 1 OF 2013**) .

The Election Court should also guard against applications for scrutiny or recount where the sole purpose is to assist the Petitioner to build their case and engage the Court in its fishing expedition. As was held in the case of **PETER GICHUKI KINGARA –VS- IEBC & 2 OTHERS NYERI ELECTION PETITION NO. 3 OF 2013**, if the Petition is premised on alleged electoral malpractice or irregularity then such malpractice or irregularity must be pleaded and the evidence of malpractice established to the satisfaction of the Court before the order for scrutiny or recount is allowed. The question is therefore whether the Applicant has demonstrated sufficient grounds to warrant orders for either scrutiny or recount of the votes. In the Election Petition case of **RISHAD H. A. AMANA V IEBC & 2 OTHERS MALINDI ELECTION PETITION NO. 6 OF 2013** the High Court had this to say on applications for scrutiny and the duty of the Petitioner to demonstrate sufficient basis for the orders and the appropriate time to order scrutiny , if at all:

“.....the recent trend is that scrutiny can only be ordered where a Petitioner lays sufficient basis. Such basis can only be laid after the Petitioner has adduced evidence during the actual hearing of the petition. The Petitioner cannot therefore demand that there be scrutiny and recount of the votes before the commencement of the trial. The Petitioner may do so after his or her witnesses have testified. The ideal situation, however, is that such an application for scrutiny should be considered by the Court after all the witnesses of the Petitioner and the Respondents have testified. At that stage of the proceedings, the Court will be in a position to properly assess the veracity of the allegations made by the Petitioner that there is need for scrutiny”.

8. I have considered the legal precedents which are binding on this Court and the guiding principles on an application for scrutiny and recount as was set out by the Supreme Court in **GATIRAU PETER MUNYA –VS- DICKSON MWENDA KITHINJI & 2 OTHERS**. The Court held *inter alia* that an application for scrutiny and recount ought to be couched in specific terms clearly stating the polling stations where scrutiny is to be done. Otherwise the Court should not entertain such an application. The Court's discretion to order scrutiny or recount is not automatic or a matter of right . It should be exercised logically and judiciously based on the evidence placed before it.

In the case before me, the Petitioner prays for scrutiny and recount of votes in all polling stations in South C Ward , Langata Constituency within Nairobi. He does not specify which particular polling stations should attract scrutiny or recount on the face of the application. However, in the Supporting Affidavit, he mentions alleged irregularities in several polling stations. These claims have been disputed by the Respondents and thus there will be need for evidence to establish the credibility of the Petitioner's claims. I have also looked at the Declaration of Member of County Assembly Election Results at the Constituency Tallying Centre exhibited by the 3rd Respondent in the Replying Affidavit in Response to the Petition (annexure AOK-5). This document is not disputed. It shows that the 3rd Respondent garnered 7065 votes while the Petitioner garnered 6820 votes of the total votes cast. The difference is 245 votes as between the two. There were other candidates who also participated in this election where 17827 voters participated. There were 41 Polling stations. The Petitioner refers to a electoral malpractices in the Polling stations aforementioned but has failed to specifically show existence of such malpractices if any, in all 41 polling stations or in the few polling stations above. To allow the application as couched would be tantamount to engaging on a fishing expedition and which this court frowns upon .I am not satisfied that the Petitioner has established sufficient grounds to warrant either scrutiny or recount at this stage. Having found so , there is no basis for considering the 2nd Application dated 5th October 2017. In any event the 1st and 2nd Respondents have undertaken to avail relevant documents pertaining to this Petition at the main hearing of the Petition. The Petitioner is at liberty to re-visit the application at a later stage in the Petition.

Reasons Wherefore, I hereby dismiss both the Petitioner's Notice of Motion applications dated 5th

October 2017.

Costs shall be in the cause.

Orders accordingly.

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Before Hon. A.M. Obura (Mrs), SPM

Court Assistant:.....

Parties:.....for Petitioner / Applicant

.....for 1st and 2nd Respondents

.....for 3rd Respondent

Ruling delivered in open court this **31st** Day of **October 2017.**

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