



REPUBLIC OF KENYA
IN THE SENIOR RESIDENT MAGISTRATE'S COURT AT BUTALI
ELECTION PETITION NO. 1 OF 2017
(FORMERLY KAKAMEGA CME PETITION NO. 11 OF 2017)

WALTER SHIUNDU MURUNGAPETITIONER

VERSUS

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION..... 1ST RESPONDENT

ENOCK OTARA (RETURNING OFFICER) 2ND RESPONDENT

SITANDA KENNEDY KILWAKI 3RD RESPONDENT

RULING

The Petitioner brought this application under a certificate of urgency. The same is dated 6th September 2017 and filed on the same date.

The same is brought under (Articles 19, 20, 22, 23 (3), 35, 81, 86, 140, 159 and 258 of the Constitution of Kenya 2010, Section 39 and 44 of the Elections Act No. 24 of 2011. Section 27 of the Independent Electoral and Boundaries Commission Act No. 9 of 2011 Revised 2016, Access to information, Act the Elections (Technology) Regulations, 2017 [Legal Notice No. 68]; the Elections (general) Regulations – 2012 and all other enabling Provisions of the Law.

In this application the Petitioner prays two major orders of this court. That is prayer 2 and prayer 3 of his application.

In prayer two (2) he prays the 1st Respondent be compelled to provide and/or supply to the court and to the parties the following Data that is in the exclusive possession of the 1st Respondent:-

- a) In relation to the Kenya Integrated Elections Management System (KIEMS) kits;
 - i) Polling station allocation for each KIEMS kit used in the ten polling stations in Sango Ward.
 - ii) Count of Identified voters by each KIEMS kit
 - iii) Soft copy of ID's captured in each KIEMS kit

iv) Audit log of transmission of scanned forms 36A from each of the KIEMS kit.

b) The hard and certified original copies of forms 36A's prepared at and obtained from all the ten polling stations and presiding officers in Sango Ward.

c) The polling stations diary for the 10 polling stations in Sango Ward.

d) The used and/or filled forms 32A for all the ten polling stations in Sango Ward.

e) Statements made under and/or in compliance with Regulations 78 and 79 of the Elections (General) Regulations, 2012.

3. That the 1st and 2nd Respondents be ordered and/or directed to avail before this court all the ballot boxes used in Sango Ward for purposes of a recount.

The application was supported by the affidavit of Walter Shiundu Murunga who is the Petitioner. The Petitioner is represented by Mr. Mogaka who put in written submissions and did oral highlights in support of the Notice of Motion dated 6th September 2017. The 1st and 2nd Respondents were represented by Miss Wakoli who also put in her grounds of opposition to the said application through submissions and oral highlights of the same. The 3rd Respondent was represented by Mr. Wangila who also put in his grounds of opposition and written submissions supported by oral highlights in open court and parties put in supporting affidavits to the opposition to the said Notice of Motion by the Petitioner. I have had time to go through all the submissions by each party in support of or in opposition to the said Notice of Motion. I will give a summary of each party's case starting with the applicant's.

In summary of his case in paragraph 3 the Petitioner argues that he has adduced evidence that point to indicators of interference with the KIEMS system, in fraud in filling forms 36 A, 36B and 36C and the manipulation of the elections votes in respect of the position of the County Assembly for Sango Ward.

In paragraph 18 of the submissions the Petitioner contents that through his affidavit paragraph 8, the 2nd Respondent deliberately and willfully made erroneous entries on form 34B that he used to declare the results. In paragraph 20 of the submissions he submits that the 1st and 2nd Respondents have only supplied photo copies of forms 36A and 36B and they have not disputed the supplied the Petitioners form 34B. that the two separate forms 34B have separate and contradictory entries and that it will be good fair if the court orders the 1st and 2nd Respondents to avail all the requested materials by the Petitioner through the application.

The other paragraphs are mainly analysis of legal provisions on orders of Recount, Scrutiny access to information and supporting authorities thereof. Mr. Mogaka during the Highlighting added that Elections are a public interest exercise and therefore they ought to meet the expectations of the public and the electorate that participated in. That there is a practical value of the questions raised in the Petition to be adequately answered by the 1st and 2nd Respondents as they are the ones mandated to manage the process legally. He stressed the mandate of the 1st Respondent under Regulation 17 and the article 35(1) of the Constitution which grants all citizens rights to access information in custody of any public body. He submitted that this application is solely based on form 36B which was used in declaring the Member of County Assembly of Sango Ward and yet the person who had most votes as per that form was one Songa Mulanda with 2547 votes and he said the 3rd Respondent did not bother to respond to it and its on the basis of this that this Petition was invited and other reasons. And so to cure the mischief herein he prays that the court orders the 1st Respondent to supply the Electoral materials requested by the Petitioner in this application to verify and determine the correctness of the Elections for held on 8th August 2017 for Member of County Assembly of Sango Ward.

The 1st and 2nd Respondents submissions were filed in court on 20th September, 2017 and Miss Wakoli highlighted the same orally in response to Mr. Mogaka. Wakoli's submissions are detailed in that they

analyse the entire petition visa-vis this application. I will therefore limit myself to the opposition of the orders sought in this particular application and the summary of her opposition is that issues being asked for in this application were not pleaded in the main petition and parties are bound by their pleadings. And so the Petitioner is bound by contents of his petition. What he is seeking in this petition does not support the averments in the Petition and she relied on the case of the court of Appeal in ***Dakianga Distributors Limited Vs. Kenya Seed Company Ltd (2015)eKLR***. She stressed this position through her oral submissions and the supporting affidavit of one Enock Gichaba filed in the opposition and they filed an elaborate lists of Authorities to support this position which I have looked at too

Mr. Wangila for the 3rd Respondent also filed his submissions and put in an oral response to the Petitioner's application seeking orders as enumerated earlier in the Petition. Mr. Wangila argued that there is no basis upon which the Petitioner can be granted the orders he is seeking in this application. In the Petitioner's petition he has not pleaded for a recount or scrutiny and therefore he cannot purport to do the same by way of this application and therefore the same lacks merit and should be dismissed with costs. He too annexed various authorities in support of the response and the court has had the occasion to look at all of them.

I have carefully analyzed these submissions and authorities in support thereof. The applicant does not only seek orders of scrutiny and recount but order of access to all Electronic Data and information that relates to the Election of 8th August for electing Member of County Assembly Sango Ward that saw the 3rd Respondent declared the winner by the 2nd Respondent.

SCRUTINY AND RECOUNT

Section 80(a) and Section 82 of the Elections Act, 2011 as read with rules 28 and 29 of the Elections (Parliamentary and County Elections) Petitions Rules 2017.

The purpose of Scrutiny and Recount is mainly:-

- a) Establish the accuracy or otherwise of the total tallies of a given election in this case form 36B's.
- b) Establish the number of Registered voters, the number of valid votes cast and the number of rejected votes as indicated on each form.
- c) Compare the number of Registered voters per station, number of the votes cast and any other relevant comparison on the prescribed forms.

The principles guiding scrutiny and recount were set out in ***Gatisrau Peter Munya Vs. Dickson Mwenda Kithinji & 2 others*** an authority which all parties herein have relied upon. I will not quote the whole authority but in relation to the matter before me that authority establishes that:-

“ Where a party makes a request for scrutiny and 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 vote is called into question in the terms of Rule 33(4) of the Elections (Parliamentary and County Elections) Petitions Rules 29(4) 2017”.

The above Principle is emphasized in the India's supreme court in the case of ***Arikala Narasa Reddy Vs. Venkata Ram Reddy Reddygari & Another Civil appeals No. 5710 – 5711 of 2012***. Where the court stated that the court cannot order a recount and scrutiny in exercise of its discretion just to enable the Petitioner to indulge into fishing of material just to invalidate an election. This order can only be granted if the Petitioner sets out his case with utmost precision supported by averments of material facts.

The Indian court further set out conditions that must be fulfilled before such an order is granted.

- i) The court must be satisfied that a prima-facie case is established.

- ii) The material facts and full particulars have been pleaded stating the irregularities in counting of the votes.
- iii) A roving and fishing inquiry should not be directed by way of an order to re-count the votes.
- iv) An opportunity should be given to file objections.
- v) Secrecy of the ballot should be guarded.

However, a recount can be ordered even if the Petitioner has not established a basis in situations where the Margin of victory or loss is narrow. This was so in the matter of **Charles Ongondo Were Vs. Joseph Oyugi Election Petition No. 1 of 2013 (HOMA BAY)** or where there are several errors, alterations and/or omissions on the relevant forms in our case forms 36A's and 36B's. (**Richard Kalembe Ndile & Another Vs. Patrick Musimba Mweu & 2 others Election Petition No. 1 and 7 of 2013 (Machakos)**).

The Petitioner herein did not annex the Kenya Gazette that declared the 3rd Respondent as the winner.

I have also looked at the Petition itself visa vis the application herein it has no prayer for recount which would have formed part of the basis of the applications of the orders sought herein. This application should have drawn its life from the Petition but clearly there is no connection of averments in the Petition itself and the orders sought herein.

I deally this application ought to have been made after the witnesses have testified to lay a good basis for the same. This is also emphasized in the case of Rishad H.A Amara Vs. I.E.B.C & 2 others Malindi Election Petition No. 6 of 2013 where Justice Kimani observed that:-

“ That the ideal situation, however is that such application for scrutiny should be considered by the court after the witnesses of the Petitioner and the Respondents have testified. This would enable the court to properly assess the veracity of the allegations made by the Petitioner that there is need for scrutiny”.

In this particular application there is no identified polling stations that are identified in the application. The affidavit in support of the Notice of motion has no annexed evidence to support the case of recount and scrutiny. This was also established in the case of Hassan Mohamed Hassan Vs. I.E.B.C & 2 others. Where Justice Onyanya observed that:-

“If the request for scrutiny is made before the trial starts and therefore before relevant evidence upon which such decision is adduced then clearly such relevant evidence must be based on the affidavits if any supporting the application”.

Also refer to paragraph 3(a) the Ruling of the Supreme court Petition No. 1 of 2017 where it was stated that:-

“ There would be several reasons why scrutiny should not be ordered as a usual court. First, there is a need to guard against an abuse of the process. I would agree with Mr. Kupot that a party must not be allowed to use scrutiny as a fishing expedition on to discover a new or fresh evidence. It would be expected that a party suing an election petitions from the outset seized of the grounds, facts and evidence for questioning the validity of an election. And where the evidence is unclear then a party can, on application to court seek and obtain better particulars of that evidence from his adversary. But it would be an abuse of court process to allow a party to use scrutiny for purposes of chance on new evidence. Scrutiny should not be looked up as a lottery”.

REQUEST FOR KIEMS KITS

The applicant also sought the 1st Respondent to avail the KIEMS Kit and other relevant Electoral

Materials including ballot boxes, in my view these too cannot be granted as the same were not pleaded for in the main petition, and there is no basis established in the application itself. It's a prayer in general and not specific to any polling stations, reasons have not been given why the same are needed. Without belaboring the point, I find the application lacking in merit and I agree with counsel's for the 1st, 2nd and 3rd Respondents that there is totally no basis upon which such an order can be granted.

In my view this application was meant to amend the petition through the "back door" and its not in sync with prayers in their main petition. I therefore dismiss it in entirety with costs to the 1st, 2nd and 3rd Respondents.

Evans W. Muleka SRM

OCTOBER 23, 2017.