



REPUBLIC OF KENYA

IN THE PRINCIPAL MAGISTRATES COURT AT KAPENGURIA

THE ELECTION PETITION ACT 2011

THE ELECTION (PARLIAMENTARY AND COUNTY ELECTIONS) PETITION RULES, 2017

ELECTION PETITION NO 1 OF 2017

BETWEEN

JAMES APARENG KARUMET..... PETITIONER

VERSUS

1. INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION (IEBC)..... 1ST RESPONDENT

2. RETURNING OFFICER, KACHELIBA CONSTITUENCY..... 2ND RESPONDENT

3. YERER PETER LOKOR..... 3RD RESPONDENT

RULING

By way of notice of motion dated the 25th September 2017 the Petitioner/ Applicant brought an application pursuant to the provisions of *Articles 19, 20, 22, 23(3), 35, 50, 81, 86, 140, 159, and 258 of the constitution and section 39,44 and 82 of the Election Act, section 27 of the IEBC Act, section 2 and 4 of the Access of Information Act, Elections(Parliamentary and County Elections) Petitions Rules, Election(Technology) Regulations. Section 1A, 1B, and 3A of the Civil Procedure Act, Order 51 rule 1 of the Civil procedure Rules 2010* seeking for Orders **that:-**

1. Spent

2. Spent

3. Waived (Pursuant to the affidavit sworn on the 6th November 2017 and filled on the same dated, the same is deponed **James Apareng Kuramet** see. **Paragraph 4.**)

4. That this Honourable Court be pleased to order the 1st Respondent to give access to the Petitioner/applicant to all Election materials with respect to the Member of County Assembly of Kapchok Ward, Kacheliba Constituency elections held on 8th august 2017 including but not limited to: **Ballot boxes, Kenya Integrated Electoral system kits (KIEMS) log, the presiding officer’s statement on rejected votes, form 33, form 35, form 36A, 36B and 36 C, the polling stations**

diaries, the packet of spoilt votes, packets of used counterfoils of used ballot papers, packet of rejected votes, packets of counted ballot papers, and the hard/manual copy of the voters register(sealed in tamperproof envelopes) used as back up to the electronic voter identification register used in the seven polling stations in which the conduct of the said election is in dispute and more specifically **Ngotut primary school stream 1 nad 2, Konyao Secondary School stream 1 and 2, Lokasur Nursery school, Kopeyon Nursery School and Napatiro Primary School polling Stations.**

5. That the Honourable Court be pleased to grant leave to the applicant/petitioner to:

a. Rely on and file further affidavits in support of the petition and or the affidavits of **James Apareng Karumet, John Loin and Peter Arekai Lokwang** dated 29th of August 2017 and the same be admitted on record and or be deemed to have been properly filed.

b. File such other affidavits in response to or reply to any response filed by the respondents

6. That the Honourable Court be pleased to order the 1st Respondent to give access to and supply to the Court and all the parties for scrutiny all election materials with respect to the Member of county Assembly of Kapchok Ward, Kacheliba Constituency elections held on 8th august 2017 including but not limited to: **Ballot boxes, Kenya Integrated Electoral system kits (KIEMS) log, the presiding officer's statement on rejected votes, form 33, form 35, form 36A, 36B and 36 C, the polling stations diaries, the packet of spoilt votes, packets of used counterfoils of used ballot papers, packet of rejected votes, packets of counted ballot papers, and the hard/manual copy of of the voters register(sealed in tamperproof envelopes) used as back up to the electronic voter identification register** used in the seven polling stations in which the conduct of the said election is in dispute and more specifically **Ngotut primary school stream 1 and 2, Konyao Secondary School stream 1 and 2, Lokasur Nursery school, Kopeyon Nursery School and Napatiro Primary School polling Stations.**

7. That the Honourable Court be pleased to order that the registrar of this honourable Court assisted by a number of judicial officer as he may determine supervise access to the said election materials by the petitioner and the 3rd Respondent on such a date and at such Venue as he may determine in consultation with the parties and make a report on the exercise and the related issues which should be filed in Court and that the parties be at liberty to submit on it before the end of the hearing.

8. That the cost of this application be provided for.

9. Any other or further orders that this Honourable Court may deem fit, just and expedient.

The application was based on the grounds that the petitioner was a candidate for the elective post of the Member of County assembly in Kapchok Ward, Kacheliba Constituency that was conducted by the 1st Respondent on the 8th of August 2017 under the KANU Party and garnered 2591 votes and his competitor the 3rd respondent garnered 2740 votes and was declared the winner on an election that was conducted according to the petitioner, unprocedurally and failed to comply with the governing principles established under Article 1, 2, 38, 81, 82, 86, 88 and 249 of the Constitution which affected the outcome of the County Assembly election for Kapchok Ward. Further that the petition raises several irregularities in the conduct of the election and discrepancies in figures and other information captured on the face of the Kenya integrated Electoral System kits (KIEMS) logs, the presiding officers statement on rejected votes, Form 33, form 35, Form 36A, 36B and 36C, the polling Station Diaries, the packet of spoilt votes, packets of used counterfoil of used ballot boxes, packets of rejected votes, packets of counted ballot papers, and hard/manual copy of the voters register as back up to the electronic Voter Identification Register used in seven polling Stations in which the conduct of the election is in dispute. According to the applicant the information sought is crucial to demonstrate that the 1st and 2nd Respondent did not conduct free, fair, verifiable, accountable and transparent election.

In the further affidavit to the application herein sworn on 13th day of October 2017 pursuant to a consent order on the 10th day of October 2017, he stated that the affidavits proposed to be added restricted to the seven out of the nineteen polling stations and would also include five (5) more deponents these are:-

1. James Apareng Karumet the petitioner
2. Jeremiah Lonapangar KANU's authorized agent, Ngotut Primary School Polling Station stream 2
3. Musa Logwe- KANU's authorized agent, Kepeyon Nursery School polling Station
4. Yusuf Morita Lokisuri- A voter, Konyao Secondary School polling station stream 2
5. Elizabeth Titekete- KANU's authorized agent Konyao secondary school polling station stream 2.

Petitioner/Applicant in his further affidavit in response to 2nd Respondent Replying affidavit sworn on the 6th November 2017 confirmed having received the following from the 2nd Respondent:-

1. Forms 36As
2. Forms 36Bs
3. Forms 36Cs
4. Polling station diaries for Ngotut Primary School Polling Station

In the affidavit the petitioner states that he does not need the physical KIEM kits but the logs relating thereto.

The application was opposed by the respondents.

The 2nd Respondent through a replying affidavit sworn on the 25th October 2017 and the further affidavit sworn on the 3rd November 2017 opposed the application and stated that the Constitution and the Election Act provides that a petition should be filed within 28 days after the declaration of the results and that the Petitioner should at the time of filing the petition file alongside affidavits sworn in support of the petition and that unless with leave of Court and upon sufficient reason is given should the court allow filing of further affidavit or additional evidence. According to him the affidavit lodged in court was done on the 28th September 2017 which is outside the prescribed period of 28 days. That the applicant has failed to demonstrate reasons for the delay as a basis for the prayer. He further stated that if the application is allowed the Respondent will be greatly prejudiced as it will not be possible to secure the relevant documents and then draft and file further affidavits in response to the fresh allegations. And further it would be impossible to interview all the presiding officers of all the polling stations in which the petitioner is seeking to introduce fresh allegations. That the delay in filing further affidavit is inordinate, inexcusable, lacks reasonable explanation and untenable as it seeks to introduce fresh allegations which if admitted will alter the nature, character and scope of the Petition.

In his further affidavit he stated that he had supplied all Statutory Forms 36As, 36Bs, and 36Cs and polling station diaries for all the polling Stations in Kapchok ward and that the Election (Parliamentary and County Elections) Petitions Rules 2017 provides for handling of election materials after the pre-trial stage. And that the petition should particularize his allegations as required under section 82 of the Election Act in respect of Scrutiny. He further stated that the KIEM kits were not available as they were taken to Nairobi for calibration and use for the presidential election on the 26th October 2017, in any case the court had no storage capacity to store all the items requested by the petitioner. Further the letter dated the 17th August 2017 and 9th August 2017 are afterthoughts as the petitioner was supplied with all the relevant statutory documents which he used to file the petition and he should not be allowed and or

permitted by the Court to launch a fishing expedition under the guise of an application for scrutiny in order to discover new evidence upon which to foist his case to invalidate the election. Otherwise he sought the application be dismissed.

The 3rd Respondent also opposed the application through his affidavit sworn on the 9th October 2017 he stated the application is an afterthought made in bad faith with intention to delay the speedy conclusion of the matter and it's a copy paste of the presidential petition 2017 petition and lacks authenticity and originality. He went further to state that the orders sought cannot be obtained for reasons that since the KIEM kits were to be used elsewhere, and that the logs have no basis since there is no allegation of ghost polling stations. He stated that the election conducted was free, fair credible and above all full of transparency and no electronic gadget failed.

On the 31st October 2017, the parties agreed to canvass the application by way of written submissions.

The applicant submitted in respect to prayer 4 of the application and relied on Article 35(1) of the Constitution, section 4 of the Access to information Act 2016, section 27 of the Independent elections and boundaries commission Act 2011, Regulations 15, 16 and 17 of the Elections (Technology) Regulations 2017 and urged the Court that he was entitled to the information that he sought from the 1st and 2nd respondents.

In respect to prayer 5 he relied on Rule 9 of the Elections (Parliamentary and County election) Petition Rules 2017 which he argued that it should be read together with Rules 4, 5, 15(6), 15(7), 17(i), 21 and Section 80 of the elections Act 2011 and Article 159(2) (d) of the Constitution. He urged the Court that while exercising its discretion in granting the prayers sought to have regards to the overriding objective of the rules which is to facilitate the just, expeditious, proportionate and affordable resolution of petitions without undue regard to procedural technicalities. And further that failure to deliver by the petitioner in this regard was occasioned by the Contravention of his constitutional right of access to information.

He further argued that the supporting affidavits were not part of the petition itself, that the petition consisted of the petition itself and the supporting affidavit by the petitioner. This he relied in section 87(2) of the Constitution, Section 76(1) of The Elections Act 2011.

In respect of prayer 6 and 7 the Petitioner relied in section 82 of the Election Act 2011. He also relied in the case of **Gatimu Peter Munya v Dickson Mwenda Kithinji Petition No. 2b of 2014[2014]eKLR** which the supreme court set out the guiding principles with respect to scrutiny and recount of votes in an election petition and that at paragraph 153 of the judgment the court pronounced itself as follows:-

a. The right to scrutiny and recount of votes in an election petition is anchored in section 82(1) of the Election act and rule 33 of the Election (Parliamentary and County Elections) Petition Rules 2013, Consequently any party to an election petition is entitled to make a request for a scrutiny of votes, at any stage after filing of the petition and before the determination of the petition.

b. The court is vested with discretion under section 82(1) of the Election 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 a 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 for scrutiny or recount.

c. The right of scrutiny and recount does not lie as a matter of course. The party seeking a recount or scrutiny of votes in an election petition must establish the basis of such 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.

d. Where a party makes a request for scrutiny or recount of votes, such a scrutiny or recount if granted, is to be conducted in specific polling stations in respect of which the result are disputed,

or where the validity of the vote is called into question in terms of rule 33(4) of the Election (Parliamentary and county Election) Petitions Rules.

He also relied in the case of **Nathif Jama Adama v Abdikhaim Osman Mohammed and 3 others Petition No 3 of 2014, [2014]** the Supreme Court stated;

“It emerges that, the primary consideration in determining whether to grant scrutiny, are whether there are polling stations with a dispute as to the election results; whether such a state of affair has been pleaded in the petition; and whether a sufficient basis has been laid- to warrant the grant of the application for scrutiny.”

Further

“But it is crucial that the polling station which are subject of a possible scrutiny, would have been already signaled in the pleadings, as having contested results. This is the import of the wording of Rule 33(1) of the Election petitions Rules, that an application for scrutiny can be applied for at any stage. A foreshadowing of such an application should have been embodied in the main lines of the pleading, which mark out the terrain of any legitimate electoral process.”

The petitioner also relied in the case of **Raila Odinga and 5 others v IEBC and 3 others petition No 3, 4, and 5 of 2013** and **Raila odinga and anor vs IEBC and 2 others presidential Petition No. 1 of 2017[2017]eKLR**. In the latter the court stated:-

“Applying law and the principles relating to scrutiny as well as and the law on access to information to the present application, there is no doubt that the petitioner have signaled their intention to seek scrutiny and we have in that regard set out the specific parts of the petition in which the issue of scrutiny has been pleaded as well as the kind of information they intend to access. They have also set out the parameters of the intended scrutiny in the petition....”

He finally urged the Court to allow the application.

The 1st and 2nd Respondents submitted too. In respect to order of scrutiny and access to voting materials used in conducting the election that a court must consider the following grounds before granting an the petitioner an order for access and scrutiny of votes:

a) Whether the Petitioner has laid sufficient basis to warrant the Court granting the orders of access and scrutiny. In this he relied in the case of **Hassan Mohammed Hassan and another vs IEBC and 2 others [2013]eKLR** in which Onyancha J dismissing an application for scrutiny, held

“A party is at liberty to apply for scrutiny and recount at any stage of the proceedings for the purpose of establishing the validity of the votes cast. However, the Court has to be satisfied that there is sufficient reason for it to order scrutiny or recount of votes. In my view and understanding, for a party to provide sufficient reason upon which the court can decide to grant the order, the party shall provide sufficient evidence.”

They also relied on the case of **Nicholas Kiptoo Arap Salat vs IEBC and 7 others[2015]Eklr**. And also the case of **Gairau Peter Munya v Dickson Mwenda Kithinji and 2 others[2014]Eklr**. Where the court stated that:-

“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 the 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”

According to the 1st and 2nd Respondent the petition has not laid any basis to warrant the Court to grant such orders.

b) Whether the electoral material sought to be accessed and scrutinized is readily available and in possession of the Respondents at the time the application was lodged.

c) Whether the orders sought promote the expeditious, fair, just, proportionate and affordable resolution of the issues raised in the Petition. In this he also relied in the case of **Hassan Mohammed Hassan and another vs IEBC and 2 others [2013]eKLR** where the court stated:

“The decision to grant scrutiny or recount is clearly, not only discretionary but is also judicious. That is to say that the Court’s reason to grant such order must be good, must be logical and must be necessary for the purpose of arriving at an expeditious, fair, just, proportionate and affordable resolution of the issues raised in the petition.”

They submitted that in order for an order for scrutiny to be ordered by a court all witnesses must have testified. He relied in the case of **Rashid H. A. Amana v IEBC and 2 other [2013] eKLR**. Further, they argued that the same should not be granted merely on the basis of allegations. He relied in the case of **Mwirigi Muthuri v John Mbaabu Murithi and 2 others [2013] eKLR**. The court had this to say:

“Unless an order for scrutiny and recount is the only prayer sought in the petition, it cannot be ordered at the pre-trial stage. This is because the prayer should not be granted on the basis of untested evidence, which would be the case if the prayer is simply granted at the pre-trial stage on the basis of the allegations in the petition and the witness affidavits of the petitioner”

He argued that the court should not assist the petitioner to fish evidence. He also relied in the case of **Philip Osore Ogutu v Michael Aringo and 2 Others Busia High Court Petition No. 1 of 2013**.

On the issue of granting leave to file a further affidavit. They relied in Article 87(2) of the Constitution, section 76(1) of the Election Act, 2011 and Rule 12(4) of the Election Rules. Where they argued that the petition should be filed within 28 days after the declaration of the result and that at the time of filing the petition the petitioner must file the witness affidavits in support of the petition. And that rule 19(1) of the Elections (Parliamentary and County Elections) Petition Rules 2017 provided court with discretion for extension or reduction of time within which an act is to be done within such time as prescribed by the Rules. However, in deciding whether or not to extend time as stipulated by the Rules, the court should address itself on the following issues:

- 1. Whether the document and evidence were available to the petitioner at the time of preparation and filing of the petition and the basis of the introduction of the new material.*
- 2. Whether the evidence sought to be introduced have an effect on the nature and character of the petition*
- 3. Whether the Respondents stands to be prejudiced should the petitioner be granted leave as prayed*
- 4. Whether the petitioner has laid foundation/ basis for extension of time.*
- 5. Whether the extension of time promotes timely settling of electoral disputes under Article 87(1) and Article 159 (2) (b) and (e) of the constitution.*

They argued further that the constitution provided for strict timelines in respect to election petition. In **Hassan Abdalla Albeity v Abu Mohammed vs Abu Chiaba and another [2013] eKLR** stressed the point. Also in the High Court and Court of Appeal decision in **Kitale Election Petition No 1 of 2017 Robinson Simiyu Wanga and Another Vs IEBC and 2 others** while referring to the Court of Appeal decision in **Michael Njenga Mutotho vs Jane Njeri Wanjiku Kihara and 2 others [2008]KLR10** respectively dismissed an application for leave to file further affidavits holding as follows:

“...Election petitions are special pleadings. They have detailed procedure and by law they must

be determined expeditiously. The legality of person's election as a person's representative is in issue. Each minutes counts..."

They further submitted that the petitioner is seeking to add additional evidence which will prejudice other parties. He relied on the decision of **Nicholas Kiptoo Arap Korir Sala v IEBC and 7 others [2015] eKLR petition number 23 of 2014**. And the case of **Republic vs Chief Justice of Kenya and 6 others Ex- parte Moiwo Mataiya Ole Keiuwa Nairobi HCMCA No. 1298 of 2004 [2010] eKLR**.

The 2nd and 3rd Respondent further argued that in **Chris Munga N Bichange Vs Richard Nyagaka Tongi and 2 others [2015]eKLR** while referring to the decision of **Raila Odinga Vs IEBC** pronounced itself as follows:-

"The other issue the Court must consider when exercising its discretion to allow a further affidavit is the nature, context and extent of the new material intended to be introduced and relied upon. If it is small and limited so that the other party is able to respond to it, then the court ought to be considerate, taking into account all aspects of the matter. However if the evidence is such as to make it difficult or impossible for the other party to respond effectively, the Court must act with abundant caution and care in the exercise of its discretion to grant leave for the filing of the further affidavits and /or admission of additional evidence."

They argued that provision of section 159 (2) (d) of the Constitution relied on by the Petitioner as was in the case of **Raila Odinga (Supra)** was not meant to oust obligation of the litigants to comply with procedural imperatives as they seek justice from the Courts of Law. And that Article 159(2) (b) provides that justice shall not be delayed, a principle that is so dear in electoral disputes management as envisioned in Article 87(1) of the Constitution. Furthermore, under Article 159(2) (e) this Court is obliged to promote and protect the purposes and principles of timely settling of electoral disputes.

In conclusion, he submitted that the application be dismissed.

The 3rd Respondent also submitted, in respect to access to election material he submitted that the Court had no lawful powers to adjudicate over claims premised on the bill of rights, and further that access to information was not absolute. He argued that there is a procedure and criteria of obtaining information from the commission which the Petitioner/applicant did not follow and has not demonstrated to this Court.

In respect for leave to file further affidavits in support of the petition he submitted that by allowing the same it will give an opportunity to introduce new issues which were not pleaded in the petition hence seeking to expand the petition outside the Constitutional provision. That having gone through the affidavit in support of the petition sworn by one Jeremiah Lonapangar, it is stated at paragraph 13 that the petitioners agent at Ngotut primary school polling station stream one was ejected from the polling station at the time of closing and did not participate in the vote counting and tallying process. This is an issue that the petitioner had not raised in the petition and seeks to introduce it in the further affidavit in support to the petition.

He went ahead to submit that if allowed it will amount to an amendment of the petition since it seeks to introduce new issues and the petition Respondent will suffer prejudice. He also referred to the case of **Raila Odinga(supra)**.

Further he submitted that in the case of **Martha Wangari Karua and Anor v Independence electoral and boundaries Commission and 3 others [2017] eKLR** the court stated as follows:

"It has been submitted that the 3rd and 4th Respondents would be greatly prejudiced. The discretion of the Court must be exercised judiciously. Where one party is prejudiced by expanding the scope of the petition in exercise of Court's discretion, it would not be doing judiciously. It would amount to miscarriage of justice. The 3rd and 4th respondent would be exposed to new grounds, causes and

evidence in form of affidavits. I am of the view that filing of further affidavits will prejudice the Respondents while at the same time amount to amendment of the petition through the back door after gathering material not pleaded in the petition. The petitioner if indeed she had the evidence, filed the affidavit with the petition and apply for the evidence and access but she cannot look for evidence while the petition is in Court. In giving directions on the filing of further affidavits or giving evidence an election Court may consider the significance and effect of that additional evidence. As we stand, the petitioner has not indicated the contents of the further affidavit and/or the additional evidence. Therefore this Court is not able to determine whether it is small, or involving substantial material. It would clearly be prejudicial to allow such affidavits. I decline to allow the prayer for filling of further affidavits...

Thus he stated that the Petitioner should not be granted leave to file further affidavits in support of the petition.

For prayer 6 and 7 of the application the 3rd Respondent submitted that no case has been made for the scrutiny of form 36A, B or C by the applicants. That the prayers sought fails to meet the very minimum legal threshold one must satisfy before this honourable Court can grant such prayers. And that scrutiny must be specific and must target a specific polling station. He submitted that the Courts have established that scrutiny should not be used as a fishing expedition. He further relied on section 82 of the Election Act, and Rule 29 of the Elections (Parliamentary and County Elections) Petition Rules. He also relied in the case of **Gatimu Peter Munya v Dickson Mwenda Kithinji (Supra) and Hassan Mohammed Hassan and another vs IEBC and 2 others (supra)**

Further in **Phillip Muge Ndolo v Omar Mwinyi Shimbwa & 2 others [2013] eKLR** the court stated that:

“...where a request is made for scrutiny and/or recount the application therefore must be clear, concise and more importantly specific. An application couched in general terms ought not be permitted as this is tantamount to requiring of the court to go through the whole exercise of tallying once again...As a general principle in law, a party is bound by its pleadings. As such any evidence which goes outside of the pleadings on record must be disregarded”

He concluded by urging the court to reject the request for scrutiny.

Looking at the application the same is brought pursuant to the various provisions of the law as hereunder

“Articles 19, 20, 22, 23(3), 35, 50, 81, 86, 140, 159, and 258 of the constitution and section 39,44 and 82 of the Election Act, section 27 of the IEBC Act, section 2 and 4 of the access of information Act, Elections(Parliamentary and County Elections) Petitions Rules, Election(Technology) Regulations Section 1A, 1B, and 3A of the civil procedure Act, Order 51 rule 1 of the Civil procedure Rules 2010”

I will begin with prayer 5 of the application. Thus the petitioner is seeking leave for extension of time for filing petitioner’s further affidavits in support of the petition and or affidavits of :-

1. James Apareng Karumet
2. John Loin
3. Peter Arekai Lokwang

The filing of Election Petitions other than Presidential is provided for under Article 87(2) of the constitution, which provides that:-

“Petitions concerning an election, other than a presidential election, shall be filled within twenty eight days after the declaration of the election results by the independent Electoral and boundaries

Commission”

Further section 76 (1) (a) of the Election Act 2011 reiterates:-

“A petition-

(a) To question the validity of an election shall be filed within twenty eight days after the date of the declaration of the results of the election and served within fifteen days of presentation”

At the time of filing the petition the same should be accompanied with affidavits. Under rules 12 (3) (4) of the Election (Parliamentary and county Election) Petition Rules 2017 provides that:-

“(3) Each person who the petitioner intends to call as a witness at the hearing, shall swear an affidavit.

*(4) A petitioner **shall**, at the time of filing the petition, file the affidavits sworn under sub rule (3). **(Emphasis mine)***

So under the rules it’s a must that at the time of filing the petition the petitioner affidavits for the intended witnesses must be filed together with the petition. The court in **Gitarua Peter Munya (Supra)** was of the view that although affidavits are not usually deemed to be pleadings, the affidavits in support of an election petition and any documents annexed thereto are deemed to be part of the petition and therefore part of the pleadings. This was also the position in **Ferdinand Ndugu Waititu V Independent Electoral and Boundaries Commission and 8 Others (Election Petition Number 1 of 2013)**

However, an Election Court has discretion to allow the filing of further affidavits and admit new of additional evidence. However, an election court will not grant an application for the adduction of new or additional evidence where the grant of such an application will prejudice the other parties to the dispute or undermine the constitutional imperative of timely resolution of electoral disputes. In the Supreme court decision of **Raila Odinga vs Independent Electoral and boundaries Commission and 3 Others Supreme Court Election Petition No. 5 of 2013** the Court stated:

“...The parties have a duty to ensure they comply with their respective timelines, and the Court must adhere to its own. There must be a fair and level playing field so that no party or the Court loses the time that he/she/it is entitled to, and no extra burden should be imposed on any party, or the court, as a result of omissions, or inadvertences which were foreseeable or could have been avoided. The other issue the court must consider when exercising its discretion to allow a further affidavit is the nature, context and extent of the new material intended to be produced and relied upon. If it is small or limited so that the other party is able to respond to it, then the Court ought to be considerate, taking into account all aspects of the matter. However, if the new material is so substantial involving not only a further affidavit but a massive additional evidence, so as to make it difficult or impossible for the other party to respond effectively, the Court must act with abundant caution and care in the exercise of its discretion to grant leave for filing of further affidavits and/or admission of additional evidence....the additional facts and evidence, in our view, tend to introduce such hew matters as would change the character and nature of the petition. This may lead to amendments of the petition thereby possibly giving rise to significant new facts and/ or allegations leading to a serious departure from the original case.”

The court seem to suggest that in nature of election petitions litigation, the court should adhere to the following guidelines for determining application for the filing of further affidavits and admission of new and/or additional evidence:-

- 1. The admission of additional evidence is not an automatic right. Instead, the election Court has a discretion on whether or not to admit the evidence.*
- 2. Further affidavits must not seek to introduce massive evidence which would, in effect, change the*

nature of the petition or affect the Respondent's ability to respond to the evidence

3. *The parties to an election petition should strive to adhere to the strict timelines set out in Election Disputes Resolutions laws*

4. *Admission of new evidence must not unfairly disadvantage the other parties to an election petition.*

The same position is reiterated in the High Court decision in **Wavinya Ndeti vs independent Electoral and Boundaries commission and 4 others** and the decision in **Joel Makori Onsando Kunga and Anor vs independent Electoral and Boundaries commission and 4 others**.

Looking at the application the prayer 5 the applicant is seeking to:

"5. That the Honourable Court be pleased to grant leave to the applicant/petitioner to:

*a. Rely on and file further affidavits in support of the petition and or the affidavits of **James Apareng Karumet, John Loin and Peter Arekai Lokwang** dated 29th of August 2017 and the same be admitted on record and or be deemed to have been properly filed.*

In his further affidavit sworn on the 13th October 2017, the petitioner seeks to add the following:-

"7. The proposed deponents may therefore include:

*i) **James Apareng Karumet** -Applicant/Petitioner*

*ii) **Jeremiah Lonapangar** -KANU's Authorised agent Ngotut Primary School polling Station, stream 2*

*iii) **Musaa Logwee** -KANU's authorized agent Kopoyen Nursery School*

*iv) **Yusuf Morita Lokisuri** -A voter. Konyao Secondary School Polling Station stream 2*

*v) **Elizabeth Titeket**- KANU's authorized agent Konyao secondary School polling Station, stream 2..."*

Apart from the petitioner the rest are new witnesses in this case which the Petitioner intends to introduce at this stage. Looking at the decision of the **High Court in Kitale Election Petition No 1 of 2017 Robinson Simiyu Wanga and anor vs Independent Electoral and boundaries commission and 2 others** the court was faced with a similar scenario as to whether the granting leave to factor further evidence would promote timely resolution of electoral disputes under Article 87(1) and 159 (2) (b) and (e). relying on the Court of appeal decision in **John Michael Njenga Mututho vs Jane Njeri Wanjiku Kihara and 2 others [2008] KLR 10** which the court stated:-

"...Election petitions are special pleadings. They have detailed procedure and by law they must be determined expeditiously. The legality of a person's election as a person's representative is in issue. Each minute counts...."

The High Court in **Robinson Simiyu Wanga and anor (Supra)** stated:-

"...in allowing the application the Respondents will have no option but act within extremely limited timelines as we rush against time. That will not be fair and realistic as the witnesses will have to be identified, sought for and availed for swearing the affidavits. This will no doubt require ample time which time may not be available and as such the Respondents Constitutional right to fair hearing will be curtailed. That, will visit an injustice and prejudice to the Respondents and the provision of Article 159 (2) (d) of the constitution do not come to aid of the applicants."

This Court holds the same view, and in exercising its discretion in respect of the applicant's request for leave to file a further affidavit is declined.

In respect of access to and scrutiny of election materials, the Petitioner has admitted to having been supplied with some of the materials:-

1. Forms 36As
2. Forms 36Bs
3. Forms 36Cs
4. Polling station diaries for Ngotut Primary School Polling Station.

The petitioner in his Petition requested:

“An order for scrutiny of all the logs to all the KIEMS kits used in all the polling stations in the Ward; the Hard copy of the Voter Register used as back up to the KIEMS kits, all forms 33 and forms 35 to all the polling stations, form 36 used to declare the winner, all the spoilt votes in all the polling stations, all the Counter foils to the ballot for the Member of county Assembly for Kapchok Ward and all the polling station Diaries to all the 19 polling stations on or before the date set for the commencement of the hearing of this petition.”

In the present application he is seeking an order that:-

“Court be pleased to order the 1st Respondent to give access to and supply to the Court and all the parties for scrutiny all election materials with respect to the Member of county Assembly of Kapchok Ward, Kacheliba Constituency elections held on 8th August 2017 including but not limited to: Ballot boxes, Kenya Integrated Electoral system kits (KIEMS) log, the presiding officer's statement on rejected votes, form 33, form 35, form 36A, 36B and 36 C, the polling stations diaries, the packet of spoilt votes, packets of used counterfoils of used ballot papers, packet of rejected votes, packets of counted ballot papers, and the hard/manual copy of the voters register (sealed in tamperproof envelopes) used as back up to the electronic voter identification register used in the seven polling stations in which the conduct of the said election is in dispute and more specifically Ngotut primary school stream 1 and 2, Konyao Secondary School stream 1 and 2, Lokasur Nursery school, Kopeyon Nursery School and Napatiro Primary School polling Stations.

From the foregoing it is clear that the goalposts are changing, the former request in the petition was limited to only a few items of the election material but in all the polling stations in the ward. However in the application the items have tremendously been increased despite limiting the number of polling stations. **Phillip Muge Ndolo v Omar Mwinyi Shimbwa & 2 others [2013] eKLR** the court stated that:

“...where a request is made for scrutiny and/or recount the application therefore must be clear, concise and more importantly specific. An application couched in general terms ought not be permitted as this is tantamount to requiring the court to go through the whole exercise of tallying once again....As a general principle in law, a party is bound by its pleadings. As such any evidence which goes outside of the pleadings on record must be disregarded”

In **Peter Gichukii Kinga'ra v Independent Electoral and Boundaries Commission and 2 others Election petition (Nyeri) no 3 of 2013**, the Court held as follows:

“The law on scrutiny and recount that I have addressed suggests that scrutiny and recount in a Petition such as the present one 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 and the irregularity

must be pleaded and evidence of such malpractice must be laid out or established prior to an order for scrutiny and 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 that particular evidence. Asking the Court for scrutiny or recount where there is no evidence or basis for such an evidence would be more or less [like] engaging the court on a mission of searching for 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.”

The allegations pleaded are that in:-

1. Konyao Secondary School polling station Stream 1 and 2 the 1st and 2nd Respondents failed to use the Electronic Voter Identification Machine and or the Manual voter register as from 6; 00am to around 10:00 am as a result of which many people voted without being identified. In Konyao Stream one (1) there was a difference of 9 votes between the total number of votes cast and the total number of voters’ identification details captured in the KIEMS kit. In Stream 2 that there was a difference of 44 votes between the total number of votes cast and the total number of voters’ identification details captured in the KIEMS kit
2. Lokasur Nursery School Polling Station 1st and 2nd Respondents failed to use the Electronic Voter Identification Machine and or the Manual voter register as from 6; 00am to around 10:00 am as a result of which many people voted without being identified. That there was a difference of 20 votes between the total number of votes cast and the total number of voters’ identification details captured in the KIEMS kit
3. Kapoyen Nursery School polling Station 1st and 2nd Respondents failed to use the Electronic Voter Identification Machine and or the Manual voter register as from 6; 00am to around 10:00 am as a result of which many people voted without being identified. And that there was a difference of 6 votes between the total number of votes cast and the total number of voters’ identification details captured in the KIEMS kit for each of the elective posts.
4. Ngotut Primary school Polling Station stream 1 that there was a difference of 68 votes between the total number of votes cast and the total number of voters’ identification details captured in the KIEMS kit.
5. Napitiro Primary School polling station that there was a difference of 28 votes between the total number of votes cast and the total number of voters’ identification details captured in the KIEMS kit.

The Petitioner in his affidavit indicates that in proving the same he rely on the substance of evidence of the above malpractice on the annexed affidavit of:

1. John Loin- Petitioners agent Ngotut Primary school Polling Station stream 1
2. Peter Arekai Lokwanga- A voter at Konyao Secondary School polling station stream 2

Where does that leave us with the remaining allegations? The answer lies in the case of **Mwirigi Muthuri v John Mbaabu Murithi and 2 others [2013] eKLR**. The court had this to say:

“Unless an order for scrutiny and recount is the only prayer sought in the petition, it cannot be ordered at the pre-trial stage. This is because the prayer should not be granted on the basis of untested evidence, which would be the case if the prayer is simply granted at the pre-trial stage on the basis of the allegations in the petition and the witness affidavits of the petitioner”

Having looked at the application and the grounds upon which the application for orders of scrutiny are premised I find that the applicant has not laid any basis at this stage to warrant this Court to grant the

orders sought as explained in the case laws quoted above. The right of scrutiny and recount does not lie as a matter of course. The party seeking a recount or scrutiny of votes in an election petition must establish the basis of such 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. The petition is at this stage still seeking for evidence from the 1st and 2nd Respondent to justify his grounds for grant of the orders.

Consequently, the application by the Petitioner dated the 25th September 2017 fails and is hereby dismissed with Costs, save that the 1st and 2nd Respondents are hereby ordered to file and serve the Petitioner with polling Station Diaries for:

1. Konyao secondary School polling Station Stream 1 and 2
2. Lokasur Nursery School Polling Station
3. Kapoyen Nursery School Polling station
4. Napatiro Primary School Polling station
5. Ngotut Primary School Polling station Stream 1 and 2

Within the next 7 days from the date of delivery of this Ruling. So ordered.

Ruling read in open court on the 24th day of November, 2017 in the presence of:-

1. Ms Opondo holding brief for Mr. Magal for the Petitioner.
2. Ms Chebet holding brief for Mr. Yego for the 1st Respondent.
3. Ms Chebet holding brief for Mr. Yego for the 2nd Respondent.
4. Ms Chebet holding brief for Mr. Akenga for the 3rd Respondent.
5. Mr. Nick and Mr. Job - Court Assistant.

V. O. ADET

SENIOR RESIDENT MAGISTRATE

24.11.2017