



**REPUBLIC OF KENYA**  
**IN THE CHIEF MAGISTRATE'S COURT**  
**AT MALINDI**  
**ELECTION PETITION NO. 3 OF 2017**  
**IN THE MATTER OF THE CONSTITUTION OF KENYA**  
**AND**  
**IN THE MATTER OF THE ELECTION ACT. NO. 11 OF 2011**  
**AND**  
**IN THE MATTER OF THE ELECTIONS**  
**BETWEEN**  
**KIPONDA JOSEPH JOSEPPE NGUMBAO .....1<sup>ST</sup> PETITIONER**  
**KATANA REUBEN MWAMURE.....2<sup>ND</sup> PETITIONER**  
**AND**  
**INDEPENDENT ELECTORAL**  
**AND BOUNDARIES COMMISSION .....1<sup>ST</sup> RESPONDENT**  
**MASHA SUDI .....2<sup>ND</sup> RESPONDENT**  
**MOHAMED ABDUL OMAR.....3<sup>RD</sup> RESPONDENT**

**RULING**

Before this Court are four applications:

1) Application (Notice of Motion) filed by the Petitioner dated the 17<sup>th</sup> day of October 2017 seeking orders for scrutiny and recount of votes in all polling Stations in Ganda ward or polling Stations namely Takae Primary School (polling Station number 3), Mere Primary School (polling Station number 1 & 2) at Gandeni polling Station and further that the scrutiny to include examination of;

- a) Written statements made by the returning Officer
- b) The examination of written statements made by the Presiding Officer in the polling station

diaries.

- c) Both electronic and hand copy of the Register of voters as contained in the Biometric data and Alpha numerical details of the voters entitled to vote at the stated polling stations.
- d) The Kenya integrated Electronic machine System (KIEMS) and the information stored in it.
- e) The declaration of results form 36 AS' stored in the ballot boxes of all the named polling stations.
- f) The packets of spoilt boxes
- g) The marked copy registers
- h) The packets of counter foils of used ballot papers
- i) The packets of rejected ballot papers

The applicant also seeks costs of this application.

2) Application (Notice of Motion) dated 16 /10/2017 filed by the 3<sup>rd</sup> respondent seeking extension of time to file response to petition and witness affidavits and for leave to file further replying affidavit and additional witness affidavits within 14 days or such other time as it may deem fit.

3) Application dated (Notice of Motion) dated 27 /10/2017 filed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents seeking extensions of time for filing response to petitions and witness affidavits and an order that the said documents be deemed duly filed.

4) Application (Notice of Motion) dated 30 /10/ 2017 filed by the petitioner seeking summary Judgment against the Respondents in the ground that the certificate of election issued to the 3<sup>rd</sup> respondent on 10/8/2017 in form 36C was null and void as it was issued without being preceded by a declaration of results by and without form 36 B, the declaration of results having been made on 14 /8/2017.

On the 9<sup>th</sup> day of November 2017, all parties to this petition by consent agreed to allow the applications dated 16/10/2017 and the one dated 27/10/2017

In effect, the following orders are hereby granted;

a. An application dated 16/10/17,

1) The time for filling and service of the response to petition and witness affidavit to election petition number 3 of 2017 is hereby extended by two (2) days from the date of delivery of this ruling.

2) The 3<sup>rd</sup> respondent is hereby granted leave to file further Replying affidavit and additional witness affidavits within the next two (2) days from the date of this Ruling.

3) Costs of the application be in the cause.

b) On application dated 27/10/2017: a) The time for filling and service of the first and second Respondents joint response to the Petition and the affidavits of evidence in reply to the first and second Respondents and their witnesses is hereby extended and consequently;

b) The first and second Respondents joint response to the petition dated 12/10/2017 and filed herein on 13<sup>th</sup> October, 2017 together with the witnesses affidavits filed on 13/10/2017 is hereby

deemed duly filed within time.

c) Costs of the application in the cause.

### **Contested applications**

#### **(I) Application dated 17/10/2017.**

##### Applicant's case:

1. That by virtue of the Regulation 72 (6) of the elections (General) Regulations 2012, the polling station diary has the record of the presiding Officer of the voters who requested to be assisted and the reason for the assistance. That this will ascertain how many voters required assistance.
2. That the polling station Diary, by virtue of regulation 73 (2) of the Elections (General) Regulation 2012, contains the written statements of the presiding officer on
  - i. The number of ballot papers issued to the presiding officer
  - ii. The number of ballot papers issued to voters, other than the spoilt ballot papers.
  - iii. The number of spoilt ballot papers.
  - iv. The number of ballot papers that remained unused.

Hence is necessity of the polling station Diary to establish the votes cast, spoilt votes, rejected votes, valid votes, invalid votes cast (including staffed votes or vote casted twice by a voter or vote by unregistered voter)

3. That the returning officer by virtue of Regulation 61(4) (a) of the Elections (General) Regulation 2012, is obliged to provide each polling station with both electronic and hard copy of the register of voters or such part of it that contains the biometric data and alpha numerical details of the voters entitled to vote at the polling station.
4. That the 1<sup>st</sup> respondent is under a statutory duty, by virtue of section 44 A of the Elections Act 2011, to put in place a complementary for Mechanism identification of voters and the register of voters.
5. That KIEMS (Kenya Integrated Electronic Machine System) shows the names of the number of voters who voted, the declaration of results Form 36 A transmitted from the polling station to the Constituency and County tallying centre and the time and day when this was made. That this is important ascertain the actual valid votes cast at every polling station.
6. The recount and scrutiny will determine whether the Respondence conducted the election of the 3<sup>rd</sup> respondent independently transparently, impartially, efficiently and in accountable manner.
7. That there was no declaration of results made in Form 36B as required by law.
8. That the declaration of results from Takae Primary School polling station number 1 and 2 and Ganda Primary School polling station were declared without Form36A hence illegal, null and void.
9. That declaration of results at Milimani Primary School was made without Form 36A being signed by presiding officer hence the results are null and void
10. The declaration of result on Form 36A from Kijiwe Tanga Primary School polling station number 1, 2, and 3, and Miwani Nursary School were not stamped as is required by law hence null and void.

11. That while the aggregate votes of the polling station, without lawful results, are 1854, the margin of votes between the declared winner and the candidate who was number 3 is 717.

12. That the votes at Mshambe Polling station number 1 and Takae Primary School polling station number 1, 2 and 3 were cast in the absence of the Petitioner's agents.

13. That there was no declaration of result made under the prescribed Form 36B as required by law hence result null and void.

14. Hence a need for scrutiny and recount of all the votes cast.

This Court has also had an opportunity to look at the affidavit in support of the application and the applicant submissions (written) dated 6/11/2017 and duly considered the same in this ruling herein.

### **The 1<sup>st</sup> and 2<sup>nd</sup> Respondents Case**

By Grounds of opposition dated the 30<sup>th</sup> day of October, 2017 and filed on the 31/10/2017, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have opposed the Petitioners application dated 17/10/2017 as follows:

- 1) That the application is misconceived in law and is in a fishing expedition without any proper basis or foundation.
- 2) That the application lacks material particulars as to the polling station in which results are disputed and further that the application is premature
- 3) That the Petitioner cannot seek relief in the form of votes scrutiny and recount as the two processes are materially different.
- 4) That the Court has no Jurisdiction to order that the materials be availed to it for purposes of .....”assisting the Court hearing and determination of the application for scrutiny and recount of votes .....
- 5) That the difference in votes between the contestants is large that it will not be of use to order for recount and scrutiny.
- 6) That in the absence of prayers for recount and scrutiny in the petition itself, then this Court has no Jurisdiction for to grant the reliefs sought in the application itself.
- 7) That the application is premised on speculation.

### **3<sup>rd</sup> Respondent Case**

The 3<sup>rd</sup> respondent is opposing the petitioners application dated 17/10/2017 has put his case as follows:

- 1) That the application dated 17/10/2017 has been overtaken by events and seeks orders that would be impossible to comply with.
- 2) That no basis or foundation has been laid down to justify grant of the orders sought.
- 3) That relief sought in the application is an attempt to amend the petition unprocedurally.
- 4) It is in the interest of Justice that the application be disallowed.

### **Issue**

The only issue for determination in the application dated 17/10/2017 is whether the application meets the threshold standard for recount and scrutiny as provided by law.

The petitioners in this case avers that no determination of result made under form 36B for the election of Member of County Assembly for Ganda Ward was made as required by law. The petitioner further avers that the determination of result from Takae Primary School polling station number 3, Mere Primary School polling station number 1 and 2 and Ganda Primary School polling station were declared without Form 36A.

The Petitioners also complains that declaration of results at Milimani Primary School was made without Form 36A being signed by the presiding officer and further that declaration of results on form 36A from Kijiwe Tanga Primary School polling station number 1, 2, 3, and Milimani Nursary School were not signed as required by law.

That the aggregate votes of the polling stations without lawful results is 1854 while the margin of votes between the declared winner and the candidate who was number 2 is 449 and that of the candidate who was number 3 is 717.

That there was no declaration of results made under the prescribed form 36 B as required by law.

The petitioners also complained that the votes cast at Mashamba polling station number 1 and Takae Primary School polling station number 1, 2 and 3 were cast in the absence of the petitioners, agents as the agents of the petitioners were kept outside the station for 2 hours before being allowed in at 8.00am.

Having looked at the entire Court records the following having caught my attention;

- 1) Form 36B in respect of Ganda Ward has not been filed and as provided by the Respondent. It is trite law that it forms part of election materials.
- 2) Form 36A from Gandani polling stations have equally not been provided by the Respondent yet it forms part of election materials .
- 3) Form 36 A for Kijiwe Tanga polling station number 1, 2 and 3 of the petitioners copies appears not to have been stamped, but the same copies are missing from the Court records provided to this court by the Respondent.
- 4) Form 36A For Milimani polling station number 1 appears to have been signed by the presiding officer but not the returning officer though for Milimani polling station number 2 have been signed by both the presiding officer and the returning officer.
- 5) Both the electronic and hard copy of voters that contains the Biometric data and Alpha Numerical details of the voters entitled to vote at the polling stations, and which ordinarily are in custody of the Respondent (1<sup>st</sup> and 2<sup>nd</sup> Respondent) have not been availed to this Court as part of Court record.
- 6) No information (voting information in Ganda ward) contained in the KIEMS (Kenya Intergrated Electronic Machine System) has been placed before this Court by the Respondents.
- 7) Form 36A for Gandeni polling station have equally not been availed to this Court.
- 8) By paragraph 14 of the supporting affidavit to this application it is the assertion and averment of the Petitioners that the aggregate votes of the polling station without lawful results is 1854 while the margin of votes between the declared winner and the candidate who was number 2 is 499, and that of the candidate who was number 3 is 717. This argument has not been responded to by the Respondent in response to the application dated 17/10/2017.

To me such an issue as avered by the petitioners can only be confirmed by Form 36 B touching on all the polling station or of the Constituency tallying centre is availed to this Court by the Respondents.

Under Article 86 of the Constitution, 2010 the 1<sup>st</sup> respondent is required in the conduct of elections, to ensure that:

- a) Whatever voting method is / was used the system has to be simple, accurate, verifiable, secure, accountable, and transparent.
- b) The votes cast counted, tabulated and the results announced properly by the presiding officer in each polling station.
- c) The results for the polling station were openly and accurately collated and promptly announced by the returning officer and

In the case of Phillip Wasike versus James Lusweti Mukwe and 2 others (2013) KLR,

Justice Omondi J stated as follows:

*“if we are to hold the principle of fairness, transparency, accountability and verifiability then it is a bondantly clear that the Court needs to look at some irregularities raised which appears to dent the credibility of the electoral process in Kabuchai Constituency....”*

Under Article 38(2) of the Constitution of Kenya 2010 “Every citizen has the right to free, fair and regular elections based on universal ..... and the free expression of the will of the electors for as any elective public body or office established under this Constitution or (b) Any office of any political party of which the citizen is a member.

Article 81(e) (v) of the Constitution provides that the electoral systems shall comply with free, fair elections which are “administered in an impartial, neutral efficient, accurate and accountable manner”

In the case of /decision of Queens Bench of Manitos In the case of

Dorothy E. Browton –vs- Jean Hart Kangas suit #CI 98-01-10265 consolidated with John Mecarron –vs- The Returning Officer of the city of Winnipeg and another suit –#CI 98-01-10373 and Jean Hart- Kanyas –vs- The Returning Officer of the City of Winniepeg and another suit HCI 98-01-10221, CanLII 14866 (MBQ.B), The Judge, quoting Barry J in Harris -vs- Ryan (1997)44 M.PLR (2d) 194 (Nfld.S.C) held (Judge Glowacki J) as follows:

“ In Harris –vs- Ryan (1997) 44M.P.L.R (2d) 194 (Nfld.S.C), Barry J recognized the public interest in interpreting Legislation dealing with elections in purposive fashion and encouraged public access and stated as follows at page 201, “when interpreting Legislation relating to elections, one may reasonably conclude the primary policy to ensure we have free, open and properly conducted democratic elections. If there have been irregularities these should be exposed to the view of the general public through the returning officer and through the candidates and their agents involved in the recount.....”

In Richard N.Kalembe Ndile –vs- Patrick Musimba Mweunand 2 others, Machakos High Court election petition number 1 of 2013 as consolidated with number 7 of 2013,Majanja J said as follows:

“There is no dispute that election Court has Jurisdiction to order scrutiny of votes under section 82(1) of the election Act 2011 (“the Act”) gives Court wide Jurisdiction in this respect. It states that an election Court may on its own motion or on application by any party to the petition, during the hearing of an election petition, order scrutiny of votes to be carried out in such a manner as the election Court may determine”

In Dickson Daniel Karabe -vs – Hon Nhate Kariuki and Nairobi Election petition number 1 of 2008

(vureported), Warsame J held that “the purpose of the exercise (scrutiny) was to ascertain whether there exists any material discrepancies between the results captured in Form 16A which necessitates the determination of the vote cast and obtained by each aspirant. It is only after this exercise that the Court can form an opinion whether the results in Form 17 Aare correct”

I have again looked at the petitioner’s application dated 17/10/2017. It appears that the petitioners are seeking both scrutiny and recount of votes.

In deed the law on scrutiny and recount of votes is set out in section 80(4)(a) and 82 of the Elections Act 2011 read with Rules 28 and 29 of the Elections (Parliamentary and County Elections) petitions Rules 2017 and although the two terms are often used together and interchangeably the two remedies are conceptually different.

A recount is limited for establishing number of votes (see Justus Gesito Mugali Mmbaya – vs – Independent Election and Boundaries Commission & 2 others in Election petition (Kakamega) number 6 of 2013. Scrutiny on the other hand goes beyond the simple question of the number of votes gunned by the candidates and extends to the question of the validity of such votes. (Kakamega petition no. 6 of 2013)

I have also looked at the prayers in the petition dated 6/9/2017 by the petitioners herein and observed that one of the prayers sought by the petitioners /applicants in the said petition is an order for scrutiny and recount in polling station in Ganda Ward.

Having said all that, it is the finding of this Court that the Petitioner has laid a basis for an order for scrutiny as already elaborately pointed out herein and consequently this Court hereby gives an order for scrutiny of the following items and or material (electoral items and / or materials) only in respect of the following polling stations or in Ganda Ward namely:

- i. Takae Primary School polling station number 3
- ii. Mere Primary School polling station number 1 and 2
- iii. Gandeni PrimarySchool pooling station
- iv. Milimani Primary School polling station number 1 and 2
- v.Kijiwe Tanga Pr imary School polling station number 1, 2 and 3
- vi.Mashamba polling station number 1 and 3

The materials to be provided by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent for scrutiny in particular shall be

- a) Soft copy of KIEMS for Ganda Ward
- b) Form 36 B for Ganda Ward
- c) Form 36 A for the polling station already mentioned herein above
- d) Polling station Diaries for or in respect of the polling stations mentioned herein above (as specified)
- e) Soft copy and hard copy of register of voters for Ganda Ward.
- f) The written statements made by the Returning Officers in respect of the polling station already specified as above

- g) Written statements made by presiding officer in the polling station diaries in respect of the polling station afore specified.
- h) The marked copy register of the polling station mentioned (specified) herein, for purpose of scrutiny.
- i) Packets of counterfoil of used ballot papers
- j) The packets of spoiled ballots for Ganda Ward
- k) The packets of rejected ballots papers

As I make these orders for scrutiny, it's the finding of these Court that the Respondents shall not suffer any prejudice that cannot be compensated by way if costs of the prayer for scrutiny is allowed as I have herein this ruling. The aforesaid material shall be availed to court by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents for purposes of scrutiny.

Costs of this application shall be in the cause which of course will be determined by law governing election petitions.

I am also alive to the fact and law that election petitions have to be determined within the statutory timelines provided by the law and consequently I hereby order that the scrutiny exercise shall be conducted after all or same (as the case may be) of the witnesses to this petition shall have testified.

These are the orders of this Honorable Court.

**HON. C.O NYAWIRI – SRM**

**29/11/2017**

Dated, delivered and signed in open Court at Malindi this 29<sup>th</sup> day of November 2017.

**HON. C.O NYAWIRI – SRM**

**29/11/17**

Petitioners /Advocate - Mr. Karita for Abubakar

1<sup>st</sup> Respondent /Advocate - Mr. Mwadilo holding brief for Mr. Ondego

2<sup>nd</sup> Respondent/Advocate - Mr. Mwadilo holding brief for Mr. Ondego

3<sup>rd</sup> Respondent /Advocate - Mr. Mwadilo

**HON. C.O NYAWIRI – SMR**

**29/11/2017**

## **II. Application dated 30<sup>th</sup> October, 2017**

Before me is an Application (Notice of Motion) dated 30<sup>th</sup> day of October, brought under Article 86 and 87 of the Constitution 2010, section 39, 78 (4), 79(5), 80(1) (d) and (3) and 85 of the Elections Act, 2011 and Rule 4 and 5 of the Elections Parliamentary and County Elections) petition Rule 2017 and all the enabling provisions of the law.

The applicant, who is the Petitioner, seeks order that:-

1. This court certifies this (the) application as urgent.
2. That the Honourable court do declare that there was no declaration of results by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent in respect of its Election of its Member of County Assembly for Ganda Ward in Kilifi County held on the 8<sup>th</sup> day of August, 2017.
3. That Alternatively, this court do declare that the declaration of results made by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in respect of the Election for the Member of County Assembly for Ganda ward, Malindi Constituency in Kilifi County conducted on August 2017 was illegal, null and void.
4. That upon this Honourable court granting prayer (1) and (2) above, it should proceed to allow the petition herein and grant the prayers as sought herein summarily without calling of witnesses.
5. That cost of the application be paid by the Respondents.

### **The Applicants case**

1. That the Respondents in conducting Elections are bound by Article 86 (i) - (iv) and 87 of the Constitution of Kenya, 2010 section 39 (i) and (ii) of the Elections Act, 2011 Regulation , and 83 of the Election (general) Regulation, 2012 as amended in 2017, form 35B and 36B of the Elections Act, 2011.

That in form 35B and 36B the Returning Officer shall declare, as the case may be, the

- a) Name of the respective electoral areas.
- b) Total number of registered voters.
- c) Votes cast for each candidate or referendum side of each polling station.
- d) Number of registered voters in each polling station.
- e) Aggregate number of registered voters.
- f) Aggregate number of voters cast in the respective electoral area and further that the returning officer then signs and dates relevant form and publicly declares the results of the position of member of County Assembly and Member of National Assembly and issuing a certificates to persons elected in the County Assembly and National Assembly Elections in form 36 C and 35C respectively.

That the 1<sup>st</sup> and 2<sup>nd</sup> Respondent instead completed form 35B and declared;

- a. The name of the electoral area as Ganda ward.
- b. The total number of registered voters as 36,623
- c. That the votes cast for each candidate are declared by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents is as:

1. Alfred Kalama Nzaro	-	327
2.Chango Johnson Thelie	-	94
3. Dzombo George Ngomba	-	161

4. Katana Reuben Mwamure	-	2512
5. Kiponda Joseph Joseppe Ngumbao	-	2245
6. Mitsange David Ihah	-	945
7. Mlande Stephen Bahati	-	721
8. Mohamed Abdul Omar	-	2961
9. Mwangandi stamslavs Ngala	-	736
10. Mwanyale peter Ngumbao	-	358
11. Vuko Noel Kalama	-	50

d. That the Respondents did not give the number of registered voters.

e. That the aggregate number of votes cast was given as 11,122.

f. That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents then signed the said form and dated it on 14<sup>th</sup> day of August, 2017 and then stamped it.

Its further the Applicants case that there is no declaration of results form 36 B annexed to the replying affidavit of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents or the 3<sup>rd</sup> Respondents and therefore the 1<sup>st</sup> and 2<sup>nd</sup> Respondents failed to declare the said results by use of the prescribed form 36 B as is required by law and hence no declaration of results was made as required by law.

Its further the applicants case that whereas the purported declaration was made on 14<sup>th</sup> day of August 2017 the certificate to the 3<sup>rd</sup> Respondents was issued to him (3<sup>rd</sup> Respondents) on 10<sup>th</sup> August, 2017 (i.e four days before the declaration of results and therefore the said certificate was illegally issued hence null and void.

It's also the applicant's averments that the certificate issued to the 3<sup>rd</sup> Respondents is illegal null and void since it was issued in form 36 C before declaration of the results by form 36B.

The applicant also averred that votes cast in a number of polling stations exceeded the number of voters that turned out to vote and therefore by regulation 83 (1) (c) of it election (general ) regulation 2012 as amended in 2017, the 2<sup>nd</sup> Respondents was required to disregard the said results. That this happened in the polling stations following

NAME OF POLLING STATION	NO. OF VOTERS THAT TURNED OUT	NO. OF VALID VOTES CAST
Kwa upanga primary school number 1	219	392
Takaya primary school number 1	409	485
Mere primary school number 1	293	295

Msabaha football grounds polling station number 3	366	424
Takaye primary school. No. 2	436	471
Takaye primary school. No. 3	290	456
Kwa upanga primary school no. 2	262	399
Mere primary school no. 2	283	302
Mere primary school no. 3	275	309
Gaheleni primary school no. 3	36	313
Kijiwetanga primary school no.3	257	403
<b>Total</b>		<b>4,249</b>

The applicant's application is supported by supporting affidavit sworn on 30/10/17.

In a nutshell, all that the applicant is saying in summary is that there was no declaration of results in from 36B before the certificate issued to the 3<sup>rd</sup> Respondents in form 36C was made and that the votes cast in the aforementioned stations exceeded the number of voters that turned out to vote in those stations and that consequently, put in one prayer all together, the applicant is seeking for summary Judgment against the Respondents as the consequence of the 3<sup>rd</sup> Respondents action is that there was no results by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

To the applicant, his prayers in the petition number 3 of 2017 which is the subject of this application should be allowed summarily.

### **1<sup>st</sup> and 2<sup>nd</sup> Respondent case.**

By a replying affidavit deposited on (undated) and filed in court on the 8<sup>th</sup> day of November 2017 and submissions dated the 8<sup>th</sup> day of November, 2017 the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have opposed the application dated 30/10/2017 and this is their case.

1. That the election in Ganda ward in Malindi constituency was conducted in a free, fair, simple, transparent and verifiable manner and in compliance with the constitution 2010, the election Act 2011 and all other laws governing elections in Kenya.

That after receiving results of election from all the polling stations in Ganda ward, Malindi constituency of Kilifi County, form 36 B was completed. In support of this response, the respondent has annexed annexure S-1A & B.

That since the printer had jammed, in an agreement by all, they opted to print

Form 36B on another printer which could only print on A4 size paper. The Respondents says they have attached exhibit SM – 1A (court notes that the exhibit referred to is in an A3 paper not A4)

The Respondents goes ahead and avers that this was done for purposes of announcement and declaration of the results to which everyone agreed to.

The Respondent further avers that it was further agreed that once the first Respondents photocopy machine was repaired and able to function, that he would prepare and transfer the results to paper size A3 and call on all agents to sign form 36B, and to this, the Respondents says he has annexed exhibit SM-1B, which he says was prepared on 14<sup>th</sup> day of August, 2017 and that is in A3 size copy paper (court notes that there is no documents in the supporting affidavit by the Respondents annexed as SM – 1B). The only annexures seen by this court are annexures marked ‘SM 1A &B’ and another marked as ‘SM 1A’

The Respondent further avers that pursuant to the request to use for A4, then form A3 letter as averred to above, the only agent who signed form 36B on 14<sup>th</sup> day of August, 2017 was agent for the 3<sup>rd</sup> Respondent and that the rest of the agents refused and/or boycotted despite being called upon as earlier mutually agreed. That form 36 B printed on 10<sup>th</sup> day of August, 2017 (SM -1A) is the same as that in the schedule in the Elections (general) (Amendments Regulation 2017 hence valid as the one of the 14<sup>th</sup> day of August 2017.

That when he (Respondent) declared the results on the 10<sup>th</sup> day of August, 2017 for position of Member of county Assembly for Ganda ward, there was no protest from agents present in the tallying centre who were all satisfied with the process and that it is only on the 14<sup>th</sup> day of August, 2017 that the Petitioners party agents blatantly refused to sign A3 form 36 B without a plausible reason.

The 1<sup>st</sup> and 2<sup>nd</sup> Respondent asked this court to dismiss the application with costs.

### **The 3<sup>rd</sup> Respondents case**

In opposition to the application dated 30/10/2017, the 3<sup>rd</sup> Respondent filed grounds of opposition dated 31/10/2017 and filed on the 31<sup>st</sup> day of October, 2017 and his case is as follows.

1. That the application is bad in law is incompetent and lacks basis in law and in fact.
2. That the application intended to delay, embarrass and prejudice the fair and just hearing of the petition.
3. That the application seeks to determine the petition on procedural technicalities rather than on substantive justice.
4. That the application is an academic exercise and irreconcilably is a departure of the Petitioners own pleadings.
5. That it is in the interest of justice that application be dismissed.

In his replying affidavit to the application dated 7/11/2017 the 3<sup>rd</sup> Respondent alluded that form 36B was duly filled and that circumstances under which it was filled can only be explained to the court at the full trial of the petition and not by way of interlocutory Application. The 3<sup>rd</sup> Respondent consequently annexed annexure MOA I in support of his assertion.

It is important to note that all parties to the application dated 30/10/17 filed their respective written submissions which have duly been considered by this court.

The only issue before court is whether the Respondents responses are so hopeless to an extent that they do not raise any triable issue in response to the applicant’s petition to the extent that summary Judgment/decision of the petition should be allowed.

Ordinarily in civil suits the principles and conditions applicable to grant summary judgments are similar to those of applications for striking out pleadings (see O.2 R15 CPR)

It is my humble position that this principles as shall be put forth shortly herein applies to election petitions.

Madan J (as he was then) in the case of DT Dobie & company (Kenya ) ltd. -vs- Muchina (1982) KLR, adopting the findings of Sellers L.J in Wenlock -vs-Moloney (1965) 1 WLR 1238, where the learned Judge had this to say ; while setting principles to be considered by a court in striking out a pleadings;

“This summary jurisdiction of the court was never intended to be exercised by a minute and a protracted examination of documents and to the facts of the case in order to see whether the plaintiff really has a cause of action. To do that is to usurp the position of the trial Judge and to produce a trial of the case in chambers, an affidavit only, without discovery and without oral evidence tested by cross examination in the ordinary way. This seems to me to be an abuse of the inherent powers of the court and not a proper exercise of the power”.

In the case of DT Dobie (mentioned above) madan (as he then was) held as follows:-

“No suit ought to be summarily dismissed unless it appears so hopeless that it is plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of cause of action, provided it can be injected with real life by amendments, it ought to be allowed to go forward, for a court of justice ought not to act in darkness without the full facts of the case before it”

The court of Appeal in the cases of *Job Kilach – vs- Nation Media Group ltd, salaba agencies ltd. & Michael Rono ( Civil Appeal no. 94 of 2006(2015) ECLR observed that;*

“ Summary Judgment, has far reaching consequences. It must therefore be granted only in the clearest cases, as was stated by this court in *Lajit/a Vakkep building contractors – vs- casousel ltd (1989) eklr. 386*, in which the predecessors of this court held that

“Summary judgments is a draconian measure and should be given only in its clearest cases. A trial must be ordered if a triable issue is found as one which is fairly arguable is found to exist”

In the same case Nyarangi, Platt JJA and Kwach Ag JA held; “... A trial must be ordered if a triable issue is found or one which is fairly arguable is found to exist.

This to me means that a triable issue is one which is arguable, not necessarily a case where a party has to succeed. This means that it does not need to be an issue that would succeed, but just one that warrant further intervention by the court.

It is therefore clear that before a court grants summary Judgment, the court must satisfy itself that there are no triable issue raised by the Defendant, either in his statement of defence or affidavit in opposition to the application for summary judgment or in any other manner. (see NBI/HC (Milimani).

*CC No. 304 of 2014 Transcend Media Group Ltd – vs- Independent Electoral & Boundaries Commission ( IEBC), R. E ABURULI J.*

In the case before me it's the Respondents case that form 36B (declaration of results by form 36B) was made before the certificate was issued to the 3<sup>rd</sup> Respondent in form 36C and further that election at Ganda ward were conducted in free, fair, simple, credible, transparent and verifiable manner and in compliance with the constitution 2010, the provisions of the Election Act, 2011 and all other laws governing the conduct of elections in Kenya. To this extent to me, it's clear that the responses by the respondents do raise triable issues which can only be settled on merit by hearing the petition. Consequently the application dated 30/10/2017 is disallowed with costs to the Respondents. Costs in the

cause

**Signed**

**HON. C.O NYAWIRI – SRM**

**29/11/17**

Ruling delivered at Malindi this 29<sup>th</sup> day of November, 2017

**Signed**

**HON. C.O NYAWIRI – SRM**

**29/11/17**

Petitioner/ Advocate – Mr. Karita holding brief Mr. Abubakar - present

1<sup>st</sup> Respondent / Advocate – Mr. Mwadilo holding brief Mr. Ondego - present

2<sup>nd</sup> Respondent / Advocate – Mr. Mwadilo holding brief Mr. Ondego – present

3<sup>rd</sup> Respondent / Advocate – Mr. Mwadilo – present

**Signed**

**HON. C.O NYAWIRI – SRM**

**29/11/17**