



REPUBLIC OF KENYA

IN THE PRINCIPAL MAGISTRATES COURT AT KAPENGURIA

ELECTION PETITION NO 2 OF 2017

**IN THE MATTER OF ELECTION FOR THE MEMBER OF COUNTY ASSEMBLY OF
MASOOL WARD, SIGOR CONSTITUENCY, WEST POKOT COUNTY**

**THE ELECTION ACT NO. 24 OF 2011 AND THE ELECTION (PARLIAMENTARY AND
COUNTY ELECTIONS) PETITION RULES, 2013 THE CONSTITUTION OF KENYA**

BETWEEN

WILSON PKERER CHEKERUK.....
.....PETITIONER

AND

1. LOPORNA PYATICH LONYANGATODO.....1ST
RESPONDENT

2. JUMA AMACH DANIEL (RETURNING OFFICER, SIGOR CONSTITUENCY.....
2ND RESPONDENT

3. INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (IEBC).....
3RD RESPONDENT

RULING NO 2

By way of Notice of motion dated the 29th day of September 2017 the petitioner the applicant herein brought an application pursuant to the provisions of Rules 4 and 5 of the Elections (Parliamentary and County Elections) Petitions Rules and article 159 of the constitution of Kenya seeking orders that:-

1. THAT the 2nd and 3rd Respondents to deliver to the court the Electronic Voting Gadgets (KIEMS KIT) and voters registers on the trial days in respect of the following polling stations.

a) Amolem Primary School Mobile Polling station Code No. 037 in Masool Ward Sigor Constituency, West Pokot County

b) Lokarkar Primary School Mobile Polling station Code No. 040 in Masool Ward Sigor Constituency, West Pokot County

2. That cost of the application be provided.

The application was supported by an affidavit sworn by the petitioner and was based on grounds that

many voters in the mentioned polling stations who were duly registered were not allowed to vote for lack of their biometric data/ details in the 2nd and 3rd Respondents electronic voting gadgets, hence being denying the voters a chance to choose candidates of their choice. That the 2nd and 3rd respondents further refused to use alternative method to allow the voters to vote. Hence delivery of those gadgets to court will show that the witnesses did not vote on the 8/8/2017.

The same was opposed by the 2nd respondent in his replying affidavit sworn on the 23rd day of October 2017, stated that section 82(1) of the Elections Act, 2011 provided that an election court may, on its own motion or on application by any party to the petition, during the hearing of the petition, order for scrutiny of votes to be carried out in such manner as the election Court may determine. And that section 82(2) of the Elections act, 2011 states that it's only the vote of a person whose name was not on the register or list of voters assigned to the polling station at which the vote was recorded or who had not been authorized to vote at that station shall be struck off. That the application is defective for failing to name the person who had been turned off during the voting exercise. He denied claims that the KIEM KITS failed to work at Amolem Primary school Mobile Polling Station and Lokarkar Primary School Mobile polling Station and stated that where voters were not able to be identified using finger prints they would resort to an alternative method of identification called alphanumerical search and that all the voters identified through the KIEM KITS were allowed to vote. According to him the voting exercise and the entire election was free, fair, democratic, transparent and credible. He further stated that the petitioner had not laid any basis to warrant the orders sought.

The petitioner submitted that his application was merited and the orders sought were subject to judicial discretion and in any case the same would not prejudice the Respondents, as the same was filled in time.

All the parties submitted on this application. According to the first respondent no legal basis has been laid down by the Petitioner for grants of the orders sought and the same should not be allowed. He relied on the decision of the High Court in **Kerugoya HC EP No 2 of 2017 Martha Wangari Karua and Anor Vs IEBC and three others.**

The 2nd respondent submitted that the Court must consider the following grounds before granting the orders sought:-

1. Whether the petitioner has laid sufficient basis to warrant the court granting the orders of access and scrutiny
2. Whether the electoral material sought to be accessed and scrutinized is readily available and in possession of the Respondents at the time the application is lodged.
3. Whether the orders sought promote the expeditious, fair, just, proportionate and affordable resolutions of the issues raised in the Petitions.

In respect of the first issue he argued that the affidavit of the Petitioner in support of the application does not lay any basis to warrant the Court granting an order for scrutiny. He relied on the decisions **in Hassan Mohammed Hassan and another vs IEBC and 2 others [2013] eKLR, Nicholas Kiptoo Arap Salat vs IEBC and 7 others and Gitirau Peter Munya Vs Dickson Mwenda Kithinji and 2 others[2014]eKLR.**

In respect of the 2nd issue he argued that the Petitioner has not sought an order of recount or scrutiny and that he is engaging in a fishing expedition in an attempt to secure evidence to invalidate an election and the Court must frown upon his actions and dismiss the application. He relied on the decision on **Jacob Mwirigi Muthuri V John Mbaabu Murithi and 2 others [2013] eKLR, Rishad H. A Amana Vs IEBC and 2 others [2013] eKLR and Phillip Osore Ogutu vs Michael Aringo and 2 others Busia High Court election Petition No 2 of 2013.**

The petitioner is seeking to have the KIEMS KITS and the voters register be delivered to Court on the

trial dates in respect of Amolem Primary school Mobile polling station and Lokarkar Primary School Mobile Polling Station. Indeed the petitioner has the task to establish a basis upon which such orders should be granted. Further the said request should be anchored in the petition otherwise the court would be assisting the petitioner in a fishing expedition. In **Hassan Mohammed Hassan and another vs IEBC and 2 others [2013]eKLR** the Court thus stated that:-

“The decision to grant scrutiny and recount is clearly, not only discretionary but is also judicious. That is to say that the Courts reason to grant such orders 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”

The basis upon which the petitioner is seeking for the KIEMS KITS and the voter register is that some voters who were duly registered were not allowed to vote for lack of their biometric data/ details in the 2nd Respondents electronic voting gadgets and that such voters were denied the chance to vote even by use of alternative method and that availing the gadgets and the register the Court will be in a position to see that they did not vote on the 8/8/17. Indeed paragraph 6 of the Petition states:-

“That many voters were turned away and did not vote as their names were not captured/revealed in the voting electronic gadgets used by the 2nd and 3rd Respondents, for example various voters in Amolem Primary School polling Station were denied a chance to vote”

In respect to Lokarkar Primary School Mobile polling station, the allegations are not contained in the petition. The only allegations as contained in the petition is that the petitioner’s agents were thrown out of the polling station, and not that voters were turned away. Thus no basis has been laid out to warrant such orders. Since this is a judicial discretion and which must be exercise judiciously the application dated 29/9/17 is allowed in the following terms:

a) The 2nd and 3rd Respondents to deliver to court the electronic voting gadgets (KIEMS KIT) and the voters register on the trial days in respect of **Amolem Primary School Mobile Polling Station Code No. 037** in Masool Ward Sigor Constituency, West Pokot County.

b) Cost of the application shall be in the cause.

Ruling read in open court on the **20th** day of **November, 2017** in the presence of:-

V. O. ADET

SENIOR RESIDENT MAGISTRATE

20.11.2017

1. Mr. Changorok holding brief for Mr. Onyancha for the Petitioner
2. Mr. Kiarie for the 1st Respondent.
3. Mr. Kiarie holding brief Mr. Yego for the 2nd Respondent
4. Mr. Kiarie holding brief Mr. Yego for the 3rd Respondent
5. Job/Nicholas - Court Assistant