



**REPUBLIC OF KENYA**  
**IN THE CHIEF MAGISTRATE'S COURT AT EMBU**  
**ELECTION PETITION NO. 1 OF 2017**  
**IN THE MATTER OF THE COUNTY ASSEMBLY OF EMBU, MAVURIA WARD**

**A N D**

**PATRICK NGARI NJERU .....**  
**.....PETITIONER**

**VERSUS**

**INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION .....** 1<sup>ST</sup>  
**RESPONDENT**

**THE RETURNING OFFICER,**

**MBEERE**

**SOUTH CONSTITUENCY .....** 2<sup>ND</sup>  
**RESPONDENT**

**JOHN NGARI MBAKA .....** 3<sup>RD</sup>  
**RESPONDENT**

**11.12.2017 AT 2.40 PM**

Before Me. M.N. Gicheru – C.M.

Petitioner – Present

Respondents 2 and 3 (present)

Court Assistant – Grace

Miss Muriuki holding brief for Mr. Gachuba for the petitioner (present)

Miss Mburia holding brief for Mr. Kathungu for the first and second respondent (present)

Mr. Njagi Wanjeru for the third respondent (present)

**R U L I N G**

This ruling is on the Notice of Motion dated 22.11.17 which is by the third respondent John Ngari Mbaka.

The application which is under Rules 4,5,11,12,15 and 19 of the Elections (Parliamentary and County Elections) Petition Rules 2017 has two (2) main prayers namely:-

***1) THAT the pretrial directions dated 14<sup>th</sup> November 2017 be reviewed and/ or set aside and the pretrial conference be rescheduled accordingly and***

***2) THAT this Honourable court do extend the time for the 3<sup>rd</sup> respondent to comply with Rules 12 (5) and (6) of the above cited Petition Rules.***

The application is grounded on several grounds which can be summarized into one namely that he was not competently and faithfully represented by his former counsel Mr. Kurauka advocate with the result that the consent order of 14.11.17 was entered into without his authority or knowledge and that he failed to file witness affidavits to the petition because he was made to believe that he would do so after the petitioner's case was closed.

In support of the application the third respondent has sworn an affidavit dated 22.11.17 with one annexure and a supplementary affidavit dated 30.11.17.

The first affidavit details the woes that he suffered in the hands of his former counsel including being shocked by the consent for outright scrutiny and his reaction in court while the second affidavit is a response to the replying affidavits by the petitioner and counsel for the first and second respondents where he says that they should not purport to know the content of his communication with his former counsel on 14.11.17 within the court precincts among other deposition.

The application is opposed by the petitioner, Patrick Ngari Njeru, whose counsel has filed 13 grounds of opposition dated 24.11.17. The grounds can be summarized briefly as follows:-

A consent order is binding on all parties to it and can only be set aside on grounds of fraud, collusion, being contrary to policy of the court or having been given without sufficient material facts, misapprehension or ignorance of such facts in general or for a reason which would enable the court to set aside an agreement. Secondly it is urged that the third respondent is time barred by virtue of rules 11 (8) 12 (7) and 12 (9) from filing any of the evidence sought to be filed.

The petitioner has also sworn a replying affidavit dated 24.11.17 in which he controverts the averments by the third respondent and further adds that he has not demonstrated the prejudice and hardship he would suffer if scrutiny took place.

The first and second respondents have also opposed the application dated 22.11.17 and have filed five grounds which are to the effect that the time sought to be extended cannot be extended and that the threshold for setting aside a consent order has not be met by the third respondent.

In addition, counsel for first and second respondents has worn a replying affidavit dated 29.11.17 in which he deposes that there was consultation between the third respondent and his then counsel Mr. Kurauka before the consent order was recorded and that there is no proof therefore that Mr. Kurauka acted without instructions.

Counsel for the parties filed three lists of authorities on 1.12.17 and 4.12.17 respectively. On 4.12.17 when the application came up for hearing the court heard the oral submissions by the three counsel on record.

The third respondent's submissions can be summarized as follows. He was let down by his former counsel who misadvised him as to when to file his affidavits. Because of this, the consent on recount and scrutiny will prejudice him since the threshold for scrutiny has not been proved by the petitioner.

If he is given a chance he will file and serve evidence of his witness in opposition to the petition and the court has discretion under rule 19 to extend time in his favour.

On the other hand, the petitioner and the first and second respondents are of the view that the threshold has been met. Counsel for the petitioner cited the narrow margin between the votes for the petitioner and the third respondent. His point is that the third respondent has nothing to fear because the scrutiny will merely confirm that he actually won if this be the case.

Counsel is also of the view that since the court can order scrutiny suo moto, the third respondent should not be heard to say that scrutiny would hurt him especially in a case such as this where his own counsel consented to it.

I have carefully considered the application dated 22.11.17 in its entirety including the affidavits, the annexure, the grounds, the authorities cited and the submissions by the learned counsel for the three parties. I have also considered the entire context of the disputes and the timeliness set by law. I find that the following issues came up for determination.

***1) Has the third respondent established sufficient grounds to set aside the correct order of 14.11.2017 pertaining to scrutiny?***

***2) Can the court extend time for the third respondent to comply with rules 12 (5) and 12(6) of the Petition Rules and should it?***

On the first issue, I find that the third respondent has not established sufficient grounds for setting aside the consent order of 14.11.17. The margin of victory or loss is indeed narrow. According to form 36B filed on 7.9.17, the third respondent garnered 3,192 votes while the petitioner polled 3,092. The margin is only 163 votes.

A sampling of 44 of the 46 polling stations revealed a total of 229 rejected votes. There are allegations made by some witnesses in the affidavits in support of the petition as follows:-

***i. Some ballots cast in favour of the petitioner were rejected only because the voters has signed in the space provided instead of putting a tick (ü) or a cross (x).***

***ii. That since the petitioner and the third respondent have a similar middle name of “Ngari” some presiding officers would say Ngari while announcing the tally without specifying which of the two “Ngari’s” they were referring to.***

***iii. That a Presiding Officer accepted as valid some ballot papers where the voters had written the candidate’s name at the back as opposed to the face of the ballot.***

There are other allegations which I have not enumerated. The best way to resolve the dispute as to those alleged discrepancies is by scrutiny of the ballots.

In the case of ***Charles Ong’ondo Were vs Joseph Oyugi Magwanga and 3 others, Election Petition (Homa Bay) NO. 1/2013***, it was held that an order for scrutiny or recount may be ordered without establishing a basis where the margin of victory or loss is narrow.

Again, in the case of ***Hassan Ali Joho vs Hothan Nyange and Another, Election Petition (Mombasa) No. 1/2005*** it was held that even when the margin of victory is wide, scrutiny and recount may still be ordered if it would facilitate the expeditious disposal of the petition.

As stated earlier, the margin on victory or loss was narrow and the jurisprudence in the case of ***Were vs Magwanya*** (supra) applies squarely in this case.

On the second issue of extension of time, I find that though the court can do so under Rule 19, it would

not be fair, just or reasonable to do so in this case.

The objective of Elections Petitions Rules 2017 is to facilitate the just, expeditious, proportionate and affordable resolution of election petitions (Rule 4 (I)). Under Rule 5 (2) party to a petition or an advocate for the party shall assist an election court to further the objective of these Rules. We are already in the fourth month of this petition. We are past the half way mark because a final decision must be made on or before 5<sup>th</sup> March 2018 which is less than three (3) months away.

The third respondents is asking the court to take the clock back to the pretrial conference and he is not sure who to call. He could file affidavits of 46 witnesses from all the 46 polling stations in Mavuria, yet we all have clear timelines for each and every action and a clear objective of reducing delay and costs. This includes the third respondent.

Only very, very exceptional and special circumstances would make the court exercise its discretion in Rule 19 and none have been shown to exist in this case.

Finally, the third respondent was not able to demonstrate how a scrutiny would prejudice him. He only said the legal threshold had not been met but the court has already ruled otherwise.

In my view, a scrutiny is not for the benefit of the petitioner only but also for the third respondent whose victory would be undoubted, if confirmed by the scrutiny.

For the above stated reasons, the application dated 22.11.17 is dismissed with costs to the petitioner and the first and second respondents.

**M.N. GICHERU**

**C.M. – 11.12.17**

**ORDER**

Scrutiny to be carried out as earlier agreed on 14<sup>th</sup> and 15<sup>th</sup> December 2017 and other later date starting at 9.30 am at the IEBC warehouse at Kiritiri market.

The Executive officer to be in charge of the scrutiny and to take notes and photographs of the following:-

- 1) The condition of each of the 46 ballot boxes including the seal numbers and their details.
- 2) The disputed ballot papers including those alleged to have marks on the back.
- 3) Comply strictly with rule 29.
- 4) To file a report in court at the conclusion of the exercise.
- 5) Counsel to be present
- 6) Parties to be present.
- 7) Further mention and directions on 22.12.17.

**M.N. GICHERU**

**C.M. – 11.12.17.**