



REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATE'S COURT AT BUNGOMA
ELECTION PETITION NO.1 OF 2017

SHITANDI EDITH WERE.....PETITIONER

VERSUS

1. HENRY MAJIMBO OKUMU.....1ST RESPONDENT

2. GREGORY ODHIAMBO OUKO.....2ND RESPONDENT

3. I.E.B.C.....3RD RESPONDENT

RULING

By a notice of motion dated 17th October 2017 and filed on 24.11.17 brought under rule 29 of the Election (parliamentary and county Elections) petition rules 2017, Section 82 of the Elections Act No. 24 of 2011 and all enabling provisions of the law. The applicant petitioner seeks;

1. An order for scrutiny of:

- a). The packets of spoilt papers.
- b). The packets of counter foils of used and unused ballot papers.
- c). The packets of counted ballot papers
- d). The packets of rejected ballot papers
- e). The statements showing the number of rejected ballot papers
- f). Polling station diaries for all polling stations.
- g). Scrutiny of form 36 As in respect to all polling stations that were in Khalaba Ward Kanduyi constituency.
- h). Field note books of the presiding officers
- i). All other election materials noted in the member of county assembly Khalaba Ward Kanduyi constituency, Bungoma County.
- j). Scrutiny of forms 36B Khalaba ward, Bungoma county.

- k). Extracted data from Kiems kit and logs from all the polling stations of Township ward.
2. That the court issues an order for a recount of all ballot papers in respect of Khalaba Ward Kanduyi Constituency Bungoma County.
3. That scrutiny and recount be in respect of all polling stations that were in Khalaba Ward Kanduyi constituency, Bungoma County.
4. Costs of this application be provided for. The application is premised on the following grounds:
- a). In order that the real issues in controversy in this matter be determined fully it shall be imperative that scrutiny and recounting as sought be done.
 - b). That there are a lot of discrepancies and irregularities in forms 36A and form 36B thus warranting a scrutiny in order to reach a just decision.
 - c). Documents filed by the 2nd and 3rd respondents raises glaring anomalies that require recount and scrutiny.
 - d). The application is made in good faith.
 - e). The orders sought will not prejudice the respondents in any manner.
 - f). That the court has unfettered powers and jurisdiction to make the orders sought.

The application is supported by the affidavit of the petitioner who deposes that one of the prayers in her petition is scrutiny and recount. In paragraph 3 she deposes that through her affidavit and testimony in court and the document filed by the 2nd and 3rd respondent, there is sufficient facts to form sufficient basis and reason for the grant of the orders sought. She further deposes that there are glaring errors and omission in forms 36A and form 36B enough to order scrutiny and recount. In paragraph 5, she avers as follows:

- a). That there were multiple erasures of figures without counter signing in forms 36A Kanduyi DEB stream 3 and 4, form 36A Bondeni Mteremko stream, of 2 the figure in rejected ballot papers altered with no counter signature, Kanduyi DEB stream 4 of 4, figures altered and not countersigned.
- b). Lack of presiding officers statutory comments on most forms.
- c). Lack of signatures by petitioners agents on most of form 36As eg. Kanduyi DEB primary 3 of 4, form 36A Wamalwa Kijana stream 2 of 2.
- d). Failure by the presiding officers to close the results by crossing lines both sides of the results to allow or expose main manipulation of results e.g form 36A Pamus Teachers college 3 of 3, 36A Form Perfectors high school 1 of 4, form 36A Kanduyi children's home 3 of 4 which raises doubt if results were changed to the advantage of the 1st respondent and to her disadvantage.
- e). Presiding officers repeatedly rewriting results of the 1st respondent particularly on form 36A Pamus Teachers College Polling stations 3 of 3 form 36A Kanduyi Children's home 3 of 4.
- f). Form 36A Kanduyi children's home 3 of 4 has not indicated the total number of registered voters yet on form 36B the number of registered voters has been indicated and since form 36A generates form 36B the origin and validity of the registered voters indicated on form 36B is questionable.

g). The original form 36A Kanduyi DEB stream 3 of 4 is different from the copy where the figures have been altered and not countersigned.

h). Form 36A Western College stream 2 of 2 number of registered voters has been deleted and countersigned yet no other figure has been indicated.

i). Questionable similarities on total number of registered voters on each polling station eg. Perfectors High School 2,3,4 all have 630 registered voters, West Kenya college 1,2,3 all have 557 registered voters.

j) Form 363 that generated form 36A has failed to show the number of rejected ballot papers.

She further deposes in paragraph 6 and 7 that for the real issues in controversy to be dealt with fully, the orders sought should be granted and that the prayers are imperative for the court to arrive at a fair and just determination. It would appear the applicants affidavit had a paragraph 8 and 9 and I see paragraph 10 but paragraph 8 and 9 are missing in the affidavit filed in court which affidavit contains 2 pages repeating paragraph 4 – 7.

The 1st respondent in opposing the application filed a replying affidavit dated 30.11.17. She deposes that the application is made in bad faith and is an abuse of the due process of the court and meant to delay the expeditious disposal of the matter, that the application could have been filed before directions were taken. In paragraph 8 she deposes that scrutiny has a broader intent than recount and given that the petitioner has not proven any electoral offences or malpractice, there is no single vote that is capable of being excluded from the tally and the petitioner therefore is trying to expand the petition beyond its scope and the petitioner is engaging the court in a mission of searching for evidence which is deprecatory. In paragraph 12 she deposes that the petitioner has not stated and provided sufficient material facts and full particulars of the irregularities in counting of votes and therefore has not established a prima facie basis to warrant the grant of the orders sought. In paragraph 14, she deposes that the application is incompetent and bad in law on the following grounds:

- i. That the application was counter to rules 4, 12, 28 and 29 of the Election petition rules 2017.
- ii. The orders sought are superfluous and incapable of being awarded.
- iii. That the application is inordinate and generally inexcusable.
- iv. That the applicant has not shown sufficient reason deserving the exercise of the court discretion in her favour.
- v. That right to scrutiny and recount does not lie as a matter of course.
- vi. That the applicant was candid before court that she does not dispute the result of the election in question.
- vi. That the application lacks in specificity and hence the court cannot issue the orders sought based on generalities.

In paragraph 15, he deposes that forms 36As and 36B have been availed and there is nothing further to scrutinize. In paragraph 16, he deposes that the issues raised in the applicants affidavit paragraph 5 could not in any way affect the final tally of the result as the pertained has not provided a contrary tally nor disputed any specific result from any polling station. From paragraph 17 the 1st respondent avers that the application and pleadings do not give necessary particulars but brings on documents filed and hence the petitioner is engaged in a fishing expedition and in paragraph 18, that the application is calculated at subjecting the judicial process to difficulties of costs, logistics and time constraints and should be dismissed with costs.

The 2nd respondent opposed the application in a replying affidavit dated 30.11.17 and filed on the same day. He deposes that the application lacks merit and merely an after thought and should be dismissed. He avers that the petitioner stated that she does not dispute the results as declared and cannot turn around and seek scrutiny and recount at this stage. In paragraph 5, she avers that no sufficient reason is given by the petitioner why scrutiny and recount should be granted. In paragraph 6 he states that no specific result from any specific polling station has been disputed to warrant scrutiny and recount of votes. He deposes in paragraph 7 that the petitioner has not provided evidence in support of her allegations in the petition and application and supporting affidavit in paragraph 8, that it was incumbent upon her to provide the evidence. In paragraph 9, he deposes that the petitioner is on a fishing expedition to get evidence from the respondent to support her case which is an attempt to amend the pleadings through the back door. He further states that Kiems kits were reconfigured in preparation for the fresh presidential elections held on 26.10.17, that the original form 36A, 36B and 36C are before court and there is nothing the petitioner is looking for as the forms speak for themselves. In paragraph 14 he avers that the evidence of the 2nd and 3rd respondent on record has explained how and why the results appear as they are. He states further that failure to sign form 36A in 2 polling stations by agents of the petitioner cannot be a ground for scrutiny and recount and the petitioner would be seeking to benefit from her mischief and no agent declined to sign or indicated reasons for decline. In paragraph 16 he deposes that forms 36A and 36B are manually filled by human beings who worked nonstop for over 48 hours and it would be unreasonable not to expect a few errors here and there due to exhaustion and human error.

In paragraph 17, he avers that form 36B is a stationary form meant to show the valid votes garnered by each candidate and not rejected votes which votes are shown in form 36A. He states in paragraph 19 that the total number of rejected votes is 137 way below the votes between the petitioner and the 1st respondent which is 554 that even if all the rejected votes were to be awarded the petitioner, she would still not be the winner.

He deposes that the stations referred to by the petitioner in paragraph 5 of the supporting affidavit are stations where her own agents signed, the statutory declaration on form 36A confirming they were satisfied with the count and that the same was accurate. He states further in paragraph 23 that the application is an afterthought and mischievous and was prepared on 17.10.17 but filed and served on the day the 2nd and 3rd respondents closed their cases which should not be countenanced by court. Lastly he deposes that it would be in vain to order the supply of data extracted from Kiems kits and logs.

The parties filed written submissions and supplied the court with authorities. They also highlighted their submissions. The petitioner submits that there were glaring discrepancies and hence the prayer for recount and since the 1st respondent claims to have won fairly, he has nothing to hide. She relies on **Philip Mukwe Wasike Vs. James Lusweti Mukwe & 2 others Bungoma Election Petition no 5 of 2013** where the purpose of scrutiny was stated to be;

- a). Assist the court to investigate if the allegation of irregularities and breaches of the law complained of by the petitioner are valid.
- b). To assist the court in determining the valid votes cast in favour of each candidate.
- c). Assist the court to have a detailed understanding on the vital details of the electoral process and gain impression on the integrity of the electoral process.

She submits further that scrutiny lays a basis of the validity of the votes garnered and relies on **Justus Gesito Mugali Mbenye vs Independent Electoral & Boundaries Commission & 2 others petition (Kakamega) no. 6/13**. She reiterates the alternations, errors and omissions in forms 36A of various polling stations and the discrepancies between forms 36A and 36B. She submits that though the margin between the petitioner and the 1st respondent is wide quality of the process gives validity of the votes that have been garnered and relies on **Hassan Ali Joho Vs. Holban Ngenge & another Election Petition (Mombasa) no. 1 of 2005** where it was held that where the margin is wide scrutiny and recount

may still be ordered if it would facilitate the expeditious disposal of the election petition. She further submitted that she was entitled to make the application for scrutiny at any stage of the petition and relies on *Gatira Peter Munya vs. Dickson Muenda Kithunyi & 2 others*. That an application can be brought at any stage was echoed in *Hassan Mohamed Hassan & another & Independent Electoral & Boundaries Commission & 2 others petition no. 62013 [2013]e KLR* where the court stated:

“... it is my view however that whether the application for scrutiny and recount is made before, during or at the end of the trial of a petition, the court must be satisfied generally that there are sufficient grounds to order a scrutiny or recount on the basis that such scrutiny or recount will be in the interest of fairness and justice in settling the issues raised in the petition”.

She submits further that *Ayub Juma Vs. Chirau Ali Makwere Mombasa petition no. 1 of 2008* scrutiny was ordered of all ballot papers, counter foils and registers of all votes cast in the election of Matuga Constituency. She also relied on *Joash Wamangoli vs. Independent Electoral & Boundaries Commission Bungoma Petition No. 6 of 2013* where the petitioner did not specify the specific polling station but court ordered for scrutiny and recount in all constituencies. She further submits that the court should order scrutiny of votes and not polling stations and relies on *Dickson Minanda Githinji vs. Gaturian Peter Munya & Independent Electoral & Boundaries Commission CA Mp. 38 of 2013.*

Respecting the claim that Kiems Kit has been reconfigured in preparation for the fresh presidential elections held on 26.10.17, she submits the respondents are not being sincere and have something to hide as regulation 17 of election Technology regulations 2017 dictates that all electronic data relating to an election shall be retained in safe custody by the commission for a period of 3 years after the results of the election are declared.

The 1st respondent submitted that the application was brought in bad faith and it is dated 17.10.17 but filed on 2.11.17.

He submits further that scrutiny is for purposes of establishing the validity of the votes cast which can only come after the petitioner has proved incidents of electoral offences.

He relies on *Nicholas Kiptur Arap Korir Salat Vs. Independent Electoral & Boundaries Commission & 7 others [2015] e KLR* and *Nyeri High court Election Petition no. 3 of 2013 Peter Gichuki Kingara vs. Independent Electoral & Boundaries Commission & 2 others.*

He submits further that the petitioner seeks scrutiny of forms 36A and 36B which forms are already before the court having been supplied by the 2nd respondent. In reference to paragraph K, he submits that the prayer for Kiems Kit cannot be granted as it is in respect to Township Ward yet the 1st respondent was not a candidate of Township Ward. The petitioner he states is bound by his pleadings.

He submits further that failure of the agents to sign is not a ground of scrutiny, that there is no instance where it is alleged, the voters exceeded 700, that the petitioner has not shown how any errors have affected the tally, that the petitioner is on a fishing expedition, that the number of registered voters is not determined by forms 36A but a voter register in the custody of the 2nd respondent.

It was submitted for the 2nd and 3rd respondents that the application is mischievous coming as it does at the close of the trial. On over writings it is submitted that that is not a reason for scrutiny and that it would be abnormal not to have errors in handwritten results. It is submitted further that it was only in 2 stations where agents have not signed and there is no station where they came to sign and were chased away. It is also submitted that failure to close the figures is not necessarily a window for manipulation and in all stations there is no claim of manipulation. On the alteration on rejected number of votes at Bondeni Muteremko it is submitted that the form was signed by the agents and that the 2nd respondent indicated that the contents of the photocopy and the original copy are the same and that carbonated copies were filed in different hands and could not look the same and that several were filled for the

people present.

She submitted that for scrutiny to be granted valid reasons have to be given to court which should be brought not in the petition and in the application, that right to scrutiny does not lie as a matter of course but the petitioner has to lay basis. She relied on Peter Muya case above quoted.

It is submitted for the 2nd and 3rd respondents that the petitioner is not specific and seeks scrutiny of the whole ward which is a fishing expedition.

She relies on *Nathhi Juma Adam Vs. Abdi Khaim Osman Mohamed & 3 others [2014] e KLR, Zacharia Okuth Obado vs. Edward Akosi Oyugi & 2 others* where it was held that scrutiny should be founded on proper grounds. She relied also on *Gideon Mwangangi Wabina & another vs. Independent Electoral & Boundaries Commission & 2 others – Christopher Mogere Obure [2013]e KLR.*

On the margin between the petitioner and the 1st respondent, she submits it is 554 votes and that even if the rejected votes totaling to 137 were to be awarded the petitioner she would still lose to the 1st respondent. It is also submitted that the Kiems Kit was reconfigured by a 3rd party and that the results are not in the Keims kit but in form 36B which shows who the winner is and by what votes which form is annexed and what the petitioner says she has not problems with. It is also submitted that similarities of votes in different streams is no reason for scrutiny and that margin cannot be a ground for scrutiny.

I have considered the application for scrutiny and recount by the petitioner the supporting affidavit, the submissions by counsel for the parties and the authorities to wit *Raila Amolo Odinga vs. Independent Electoral & Boundaries Commission [2017]eKLR, Philip Osore Ogutu vs. Michael Aringo & 20 others Busia High court Petition no. 1 of 2013, Hassan Mohamed Hassan & another vs. Independent Electoral & Boundaries Commission & 2 others [2013]e KLR* among others. 3 issues arise for determination.

1. Is the plaintiff entitled to seek for scrutiny and recount?
2. Has she shown sufficient reason for scrutiny?
3. Who should pay the costs of the application?

Scrutiny is provided for in the Electoral Law. Section 82 of the Elections Act and rules 29 of the Elections (Parliamentary and County elections) petition rules 2017 lays the foundation of scrutiny. Section 82 of the Act provides:

1 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 for a scrutiny of votes to be carried out in such manner as the election court may determine.

Rule 29 (1) of the Election Petitions Rules 2017 provides that the parties to proceedings may apply for scrutiny of votes for purposes of establishing the validity of the votes cast and in sub rule (2) thereof that an elections court may if satisfied there is sufficient reason order for scrutiny or recount of votes and under sub rule (4) that scrutiny or recount of votes in accordance with sub rule (2) shall be confined to polling stations in which the results are disputed. It becomes clear therefore that the petitioner applicant herein is entitled to seek the prayers he seeks, being a party in this petition, the petitioner applicant has moved the court on completion of the hearing which appears to have unsettled the respondents who are of the view that the application is made in bad faith at that point in the petition. The application should not be attacked as an afterthought. Precedents indicate that the application can be made at any time during the hearing. In the case of *Philip Osore Ogutu Vs. Michael Aringo & 2 others* above quoted Justice Tuiyot observed that it was upon the party seeking scrutiny to choose when to approach the court. That was the holding also in *Hassan Mohamed Hassan & another vs. Independent Electoral & Boundaries Commission & 2 others.*

The next issue is whether the applicant petitioner has shown sufficient reason for scrutiny. It is noted that scrutiny is pleaded in the petition and has been sought in the present application. In the case of *Philip Mukwe Wasike Vs. James Lusweti Mukwe & 2 others [2013]e KLR* Justice Omondi allowed scrutiny in some stations where sufficient cause was shown as did Justice Tuiyot in 1 station where sufficient cause was shown in the case of *Philip Osore Ogutu vs. Michael Aringo & 2 others* above quoted. In the present case the petitioner alleged multiple erasures of figures in form 36A Kanduyi DEB stream 3 and 4, forms 36A Bondeni Muteremko stream 1 & 2, alteration of figures in rejected ballot without counter signing, Kanduyi DEB stream 4 & 4 altered without countersigning.

DW2 returning officer explained that forms 36A were carbonated and that eligibility is dependent on the written and only the copies supplied are photocopied and eligibility may be compromised and further that there were possibilities that the agents signed on the carbon copies. I have looked at the copy of 36A Kanduyi DEB Primary polling station 3 of 4. I do not decipher any multiple alterations. The document can only be described as faint but the original form 36A has been provided as part of Dex. 1 showing in clearer terms the same results in the copy document with the same results being posted to form 36B before court with the original being produced as Dex. 2. The allegation of alterations of form 36A for the station named in not true. Respecting Bondeni Muteremko stream 1 of 2, it is alleged, the figure of rejected ballot papers were altered and there is no counter signature. I have looked at this copy form 36A and note that the number of rejected ballot papers read 009. The 2nd 0 appears altered as it does in the original supplied in Dex. 1 but the figure for votes for the various candidates are all clearly indicated on both the copy and the original. There is nothing much to read from this. The applicant has also claimed that Kanduyi DEB stream 4 of 4 is altered without countersigning. I have looked at the copy form 36A and the original Dex. 2. It is correct that figure "2" in "152" the votes cast in favor of Okumu Henry Majimbo is overwritten but the figure is verifiable from the form itself. There is no indication that the results in this polling station were disputed.

The applicant has complained that there was lack of presiding officer statutory comments of most of the forms. I have gone through the form 36A for the 25 polling stations. There are no comments by the presiding officer in 12 out of the 25 stations. There were comments in the other 13 polling stations form 36A 12 against 13 cannot be called most. The applicant has not shown how lack of comment amounts to sufficient cause for scrutiny.

The Petitioner applicant has claimed there is lack of signatures by the petitioners agents on most form 36A eg form 36A Kanduyi DEB primary stream 3 and 4, form 36A Wamalwa Kijana stream 2 of 2 and no reason was given. She claims polling diaries ought to have such records. The petitioner run on a Ford Kenya ticket. I have gone through four 36A forms the 25 polling stations in the wards and find that in 23 of the 25 polling stations the party agents are indicated present and to have signed the form. The allegation is therefore not correct. It is correct that in 2 stations Kanduyi DEB primary streams 3 of 4 the Ford Kenya agent has not signed the form 36A as was the case in Wamalwa Kijana stream 2 of 2. I note that form 36A speaks for itself. The agents or candidates sign the form if present and should they refuse to sign the reasons for such refusal (if any) should be indicated. There was no allegation that the applicants agents were present and refused to sign after counting and announcement of results. Lack of their signatures on the 2 form 36As cannot be a sufficient case for scrutiny.

Another reason by the Applicant for scrutiny is failure by the presiding officers to close the results by closing lines both sides of the results to allow or expose manipulation for instance in form 36A Bondeni, Mteremko stream 1 of 2, form 36A Pamus Teachers College stream 3 of 3, form 36A Perfectors High School stream 1 of 4, Form 36A Kanduyi Childrens Home stream 3 of 4. I have looked at the forms. It is true the forms are not closed but the applicant has not shown that failure/omission allowed any manipulation. That cannot be a sufficient cause for scrutiny.

The applicant alleged that the presiding officers repeatedly rewrote results of the 1st respondent on form 36A Pamus Teachers College poling station 3 of 3, form 36A Kanduyi children's home 3 of 4 raising doubts if the results were changed to the advantage of the 1st respondent and to her disadvantage. I have looked at the forms. It is true the results are overwritten boldening the figures but clearly there are no alterations. These results were not disputed by the party agent who signed both forms. This is not a

sufficient cause for scrutiny.

It is further alleged that form 36A Kanduyi children's home 3 of 4 does not indicate the total number of registered voters yet form 36B has that number. It is correct the form 36A does not indicate the total number of the registered voters but obviously this form does not create or originate the registered votes. There is a register. The origin and validity of the total registered voters in form 36B cannot be questioned therefore. The petitioners agents did not dispute the result in that station. The applicant has not claimed that there was over voting at the polling station. In the circumstances the omission to indicate the total number of registered voters on the part of the presiding officer in one station out of 25 does not constitute a sufficient cause to order scrutiny in the entire 25 polling stations in the ward.

The petitioner has claimed that the original form 36A Kanduyi DEB stream 3 of 4 is different from the copy document whereby the figures has been altered and not countersigned. I have looked at the copy and the original. The 2 forms contain the same results absolutely. There are no alterations whatsoever. The copy of form 36A is however very faint and does not appear to have the signatures of the presiding officers and particulars of the party agents which are present in the original form 36A Dex. 2 presented. That discrepancy was however sufficiently explained away by the returning officer who stated that it was possible that some carbonated copies may have been written in original and then photocopied. That would explain why the copy form 36A in question would not have the signature of the presiding officer and particulars and signature of the agents as they appear in the original. That discrepancy having been sufficiently explained cannot be sufficient basis for scrutiny.

The Petitioner further argues that in form 36A of Western college stream 2 of 2 the number of registered voters has been deleted and countersigned yet no other figure has been indicated. I have looked at the form 36A and the original thereof Dex. 1 of the correct polling station West Kenya College polling station 2 of 3 and not 2 of 2 and find that the total number of registered voters indicated as 557 was crossed out in the process of closing the figure. The closing is countersigned but no fresh figures has been indicated. In the station 407 valid votes were cast and 5 rejected ballots. There results were not disputed. A named Ford Kenya agent signed the form 36A. The omission to indicate the registered voters after closing out the figure is in my view a very minor irregularity that should not occasion scrutiny for the whole ward and even that particular polling station.

The applicant has questioned the similarities on the total number of registered voters in Perfectors High school 2,3, 4 all being 360 registered voters West Kenya 1,2, and 3 all with 557 with utmost respect that cannot be a basis for seeking scrutiny.

Lastly the applicant urges that form 36B which is generated from form 36A failed to show the rejected ballot papers and that the votes cast were tallied without the rejected ballots and a scrutiny would show whether the rejected ballots were manipulated in favour of certain candidates. That argument does not appear to hold any water. A close look at the forms 36As indicates that there results were correctly posted to form 36B and no votes added to any candidate. No reason has been shown for scrutiny on the basis of the number of rejected ballots.

Section 82 (2) of the Act provides specifically which votes on scrutiny are to be struck off.

- a). The vote of a person whose name was not on the register as list of voters assigned to the polling stations at which the vote was recorded or who had not been authorized to vote at that station.
- b). The vote of a person whose vote was procured by bribery, treating or undue influence.
- c). The vote of a person who contested or procured the commission of personation at the elections.
- d). The vote of a person proved to have voted in more than 1 constituency.
- e). The vote of a person who by reason of conviction for an election offense or by reason of the

report of the election court was disqualified from voting at the election or

f). The vote cast for a disqualified candidate by a voter knowing that the candidate was disqualified or the facts causing the disqualification or after sufficient public notice of the disqualification or when the facts causing it were notorious.

The applicant petitioner has not shown that any of these class of votes were cast during the election in the ward for scrutiny to issue.

Rule 29 of the election petition rules however provides for scrutiny of other election materials other than just the counted ballot papers. Under sub rule 4

- (a) Written statements made by returning officers under the Act.
- (b). Printed copy of the register of voters used during the elections.
- (c). Copies of the results of each polling station in which the results are in dispute.
- (d). Written complaints of the candidates and their representatives.
- (e). Packets of spoilt ballots.
- (f). Marked copy of the register
- (g). Packets of counter foils of used ballot papers.
- (h). Packets of rejected ballot papers.
- (i). Polling day diary and
- (k). The statements showing the number of rejected ballot papers.

The petitioner has however not shown why the court should scrutinize the statement of the returning officer, the printed copy of the register of voters, the copies of the results (these have already been provided) that there are in written complaints of candidates or their representatives, why the court should examine the spoilt ballots (they would not affect the results even if they were added the petitioner). Why the court should examine the voters registered when there is no allegations of over voting, she had not shown why the court should examine counter foils of used ballot papers when there is no allegation that there were ballots from outside the polling station, packets of counted ballot papers when the results were not shown to have been disputed, packets of rejected ballot papers when there is no indication that they were disputed. Why the court should examine the polling day diary or the statements showing the number of rejected ballot papers. In **Kalembe Ndile vs. Patrick Musumba** scrutiny in all polling stations was granted but that was a case where there was sufficient evidence of alterations and errors in statutory forms. Such is not the case here. **Philip Mukwe Wasike vs. James Lusweti Mukwe & 2 others** Justice Omondi allowed scrutiny but only in stations where results were altered, where presiding officers did not sign the forms, where there were changes which were not counter signed or where there were over writings. The present case is clearly distinguishable. Justice Tuiyot in **Philip Osire Ogutu** allowed limited scrutiny in one polling station only where sufficient cause had been demonstrated. In the present case no sufficient cause has been shown even for a single polling station.

After considering the application, the arguments and submissions by counsel and after considering the evidence by all witnesses herein I am not satisfied that the applicant has shown sufficient reason for the court to grant the order of scrutiny.

Mr. Musumba raised the issue of the applicant seeking scrutiny in a strange ward. Indeed the applicant

sought scrutiny for Kiems Kit and logs from all polling stations of “Township ward” If the applicant had been successful which is he is not, I would not have allowed scrutiny of any Kiems kits as “Township Ward” is not the subject of this petition. The 3rd respondent had an obligation to retain in safe custody electronic data and cannot be heard to claim that the Kiems Kit has been reconfigured. That would not have done . It is clear the application has no merit. The applicant appears to want to engage in a fishing expedition which is deprecated by the court. It was held in **Philip Osore Ogute vs. Michael Aringo & 2 others** that scrutiny is not a lottery for purposes of chancing on new evidence. The application therefore is declined.

With regard to costs, costs shall be in the cause.

J.K. KINGORI

CM

COURT – read and delivered this 22nd day of December 2017 in open court in the presence of Ms. Mbaka for petitioner, Mr. Musumba for 1st respondent and Ms. Mumalasi and Mr. Tsimonjero for 2nd and 3rd respondent and Ms. Barasa court assistant

J.K. KINGORI

CM