



REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATE'S COURT AT KAKAMEGA
ELECTION PETITION NO 5 OF 2017
CONSOLIDATED WITH
ELECTION PETITION NO 3 OF 2017

SHIYENJI SILAS MUYEYIA.....1ST PETITIONER

JOYCE MUGASIA KHADOHI.....2ND PETITIONER

VERSUS

BENSON MANUNI MULINYA.....1ST RESPONDENT

THE RETURNING OFFICER,

IKOLOMANI CONSTITUENCY).....2ND RESPONDENT

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION.....3RD RESPONDENT

RULING

The substantive matter herein is a petition by the petitioners challenging the election of the 1st Respondent as the Member of County Assembly (MCA) for Idakho East Ward. During pre-trial conference held on 29/11/2017 two issues emerged which the court has been called upon to make a determination. The issues are;

- a. Whether the Response by the 1st Petitioner to the Petition of the 2nd Petitioner (hereinafter Response) and the Further Affidavit sworn by the 1st Petitioner on 29/11/2017 (hereinafter Further Affidavit) are properly on record.
- b. Whether the 1st Petitioner can make an application for scrutiny and recount at this stage and/or at the hearing of the petition.

1st Petitioner's Submissions

The 1st Petitioner through counsel, Mr. Amasakha, submits that the Response and the Further Affidavit were filed pursuant to the consolidation of the two petitions. That on scrutiny of the petition by the 2nd Petitioner, the 1st Petitioner found that he was adversely mentioned in the petition by the 2nd Petitioner

and saw it appropriate to answer in rebuttal. Counsel cited the provisions of Rule 12(9) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 (hereinafter Election Petitions Rules, 2017) which gives the court discretion to allow filing of such Further Affidavit.

On the issue of scrutiny and recount, counsel submitted given the slim margin with which the 1st Respondent won the election then scrutiny and recount should be ordered. While citing the provisions of section 82 of the Elections Act, Act No 24 of 2011, counsel submitted that an application for scrutiny and recount could be made anytime during the hearing of the petition. He goes further to urge that Rule 15(2) of the Elections Petitions Rules, 2017 provides a window for interlocutory applications even after pre-trial stage. Counsel proceeds to urge that we are yet to commence the hearing of the substantive petitions and therefore the 1st Petitioner still has the opportunity to make such an application.

The 1st Petitioner supplied the court with two authorities, namely,

1. **Joseph Kiponda v Independent Electoral & Boundaries Commission (IEBC) & Another [2013] eKLR**
2. **Ahmed Abdullahi Mohamad & Another v Mohamed Abdi Mohamed & 2 Others [2017] eKLR**

The first case is of persuasive value and the second is binding on me.

2nd Petitioner's Submissions

Counsel for the 2nd Petitioner, Mr. Khayumbi, submitted that the Response and Further Affidavit ought to be struck out as no leave was sought before filing the same. On the second issue, he submitted that an application for scrutiny and recount may be made but the resultant order should not outrightly declare a party as the winner as this would render nugatory the petition by the 2nd Petitioner.

Respondents' Submissions

Mr. Abok appeared for the 1st Respondent and held brief for Mr. Lubullelah for the 2nd and 3rd Respondents. Mr. Abok took issue with the fact that the 1st Petitioner has not made an application for scrutiny and recount three months after the filing of the petition. Counsel urged that the law does not prescribe the margin with which a candidate should be declared a winner and a slim margin per se should not be the determinant for scrutiny and recount. Counsel also urged that the 1st Petitioner has not complied with section 82 of the Elections Act as read with Rule 29(2) of the Elections Petitions Rules, 2017 since no basis has been laid before the application for scrutiny and recount can be made.

Determination

I have carefully considered the above submissions. Let me begin with the first issue on striking out the Response and Further Affidavit. Rule 12(9) of the Elections Petitions Rule, 2017 is clear on filing of supplementary affidavits. The same must be done with the leave of the court. In the instant case leave was not sought before filing of the Further Affidavit. Counsel for the 1st Petitioner has submitted that the Further Affidavit was necessitated by the adverse allegations made by the 2nd Petitioner against the 1st Petitioner and thus the latter was obligated to rebut the same. The rules of natural justice support such a reaction. However, the law guiding election dispute resolutions has strict constitutional timelines and if we open ourselves to allowing filing of additional pleadings we might as well be opening a floodgate which we will not be able to close. Given the nature of litigants, the rival parties will want to file responses and counter responses with the risk of the process being turned into a circus. The same

reasoning can be applied to the Response.

Again, consolidation did not widen the scope of the petitions. The petitions stand as they were filed. The petitioners have not been made co-petitioners neither have they been made adversaries in these proceedings. Their focus should remain to prove their cases as against the respondents who are common. Each petitioner shall have his/her day in court throughout the entire proceedings.

So would the 1st Petitioner be prejudiced? I have had a glimpse of the issues framed by the 2nd Petitioner and none of the issues can result into an adverse order being made against the 1st Petitioner.

In that regard therefore I find that the Response and Further Affidavit do not properly form part of the record and they are therefore expunged and/or struck off.

On the issue of scrutiny and recount, I would say the following. One of the prayers by the 1st Petitioner is for scrutiny and recount. Commencing from paragraph 29 to 34 of the 1st Petitioner's Petition, the 1st Petitioner has listed the particulars of fraud, electoral malpractice and irregularities committed by 1st, 2nd and 3rd Respondents. I do not want to second guess the case by the 1st Petitioner as I do not know whether these are the grounds which would support the 1st Petitioner's prayer for scrutiny and recount. It is for the 1st Petitioner to put his case across succinctly guided by the pleadings so far filed.

The Supreme Court has clearly pronounced itself and thereby setting the law in the case of **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others [2014] eKLR** on when a request for scrutiny and recount can be made. The Supreme Court stated as follows;

- a. ...any party to an election petitions entitled to make a request for a recount and/or scrutiny of votes, at any stage after the filing of petition and before the determination of the petition.

We are at the stage of pre-trial, hearing is yet to commence. This issue came up during the last pre-trial conference on 29/11/2017. Counsels made their submissions on their feet. I appreciate counsels were later able to file authorities which I must admit were helpful to the court. However, the material placed before me is not sufficient for me to properly pronounce myself on the issue of scrutiny and recount. I could not for example go through the petition by the 1st Petitioner and determine which polling stations would be subjected to scrutiny and recount. It is upon the 1st Petitioner to make a formal application praying for scrutiny and recount. I will consider the same *vis-à-vis* the responses that would have been filed alongside submissions by counsels, if any, and apply the same on the law as is and thereafter make an appropriate determination.

In that regard therefore, I direct the 1st Petitioner to make a formal application for scrutiny and recount to be filed and served on or before 6/12/17. The same should be filed with submissions. The respondents would then file their responses and submissions on or before 11/12/2017.

Costs shall abide the outcome of the petition.

Dated and signed this 01st day of December 2017

E. MALESI

S.R.M