REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ELECTION PETITION NO. 12 OF 2017

(CONSOLIDATED WITH ELECTION PETITION NO. 10 OF 2017)

IN THE MATTER OF ELECTIONS ACT, 2011

AND

IN THE MATTER OF THE ELECTIONS (PARLIAMENTARY AND COUNTY ELECTION) PETITION RULES, 2017

AND

IN THE MATTER OF THE ELECTION FOR MEMBER OF NATIONAL ASSEMBLY FOR NYARIBARI CHACHE CONSTITUENCY

BETWEEN

CHRIS MUNGA N. BICHAGE …… 1ST PETITIONER

ZAHEER JHANDA …… 2ND PETITIONER

JAMES F. O KENANI …… 3RD PETITIONER

VERSUS

I.E.B.C …… 1ST RESPONDENT

JULIUS MEJA OKEYO (RETURNING OFFICER) …… 2ND RESPONDENT

RICHARD NYAGAKA TONGI …… 3RD RESPONDENT

R U L I N G

1. This ruling is in respect of the application dated 3rd October 2017 brought by way of Notice of Motion by Zaheer Jhanda and James O. Kenani in which they seeks orders:

1. Spent

2. Spent

3. Compromised vide a consent recorded on 5th October 2017.

4. THAT there be preservation, production, scrutiny, inspection and verification of all the rejected ballot papers cast in the Member of the National Assembly Elections in Nyaribari Chache Constituency.

5. THAT there be a recount of all votes validly cast, rejected and spoilt votes in the Member of the National Assembly Elections in Nyaribari Chache Constituency.

6. THAT there be preservation, production for scrutiny, inspection and verification of all written statements made by the presiding officers including but not limited to polling station diaries for (sic), Forms 32A voters identified by means other than the KIEMS Kit, and oaths of secrecy and records of voters assisted to vote.

7. THAT there be preservation, production, scrutiny, inspection and verification of any printed copies of the register of voters used during the elections for Nyaribari Chache Constituency.

8. THAT there be preservation, production, scrutiny, inspection and verification of all Kenya Integrated Electronic Management System (KIEMS) Kits used by all the presiding officers and that the Returning officer, Nyaribari Chache Constituency.

9. THAT there be production and scrutiny of all Forms 35A and Form 35B for the Member of National Assembly Elections for Nyaribari Chache Constituency.

2. The application is premised on 13 grounds as seen on the face thereof and supported by the Petition and affidavits of Zaheer Jhanda, James O. Kenani, Gilbert Omambia Ogeto, Fred Nyagaka Bonuke, Joseph Onchwati, Job Obongo, Zaphania Otundo, Francis Ogoti, Mercyline Nyakerario, Calvin Ogembo and Richard Ratemo.

3. The evidence in support of the application is found in the sworn affidavit of Zaheer Jhanda (hereinafter 2nd petitioner).

4. She avers that the 1st and 2nd respondents failed to provide the printed register of voters as a complimentary system of voters whose biometrics or alpha numeric data could not be verified from the KIEMS Kit.

5. Voters at Irondi Primary School, Chichiro Primary School, Taracha Primary School, Kenyerere Tea buying centre, Kegati Primary School, Jogoo Primary Station 4, Kigoro Tea Buying Centre and Rianga Primary School were allowed by the 1st and 2nd Respondent to vote not withstanding that their biometrics or alpha numerical data could not be verified.

6. At Irondi and Rikendo Primary School polling centres as well as Riondonga Secondary School polling centre, voters were not marked with ink on their fingers after voting. This resulted in higher numbers of votes cast than the voters allowed to vote.

7. The 1st Petitioner gives a long list of polling stations where rejected ballot papers were incorrectly declared so, handled and recorded in polling station diaries.

8. Widespread discrepancies are cited in respect to issuance and records of ballot papers, records of voter attendance and accounting for voting materials. A list of polling stations is given.

9. It is complained that there were inconsistencies in records of results for candidates as seen in Forms 35As, polling station diaries and Forms 35B. Some were overwritten, erased or otherwise corrected. A list of polling stations is given.

10. There was no form 35A for Nyanchwa Primary School polling station 1 and there were 2 Forms 35A from Nyanchwa polling station. Each form has different results.

1st and 2nd Respondents answer:

11. The application is opposed in a response contained in the affidavit of Julius Meja Okeyo (2nd Respondent).

12. He avers that the Petitioners have not laid a basis for grant of the orders for scrutiny and recount of votes cast.

13. He reiterates the averments in paragraph 17, 18 and 22 of his affidavit in response to the Petition and further states that the printed versions of the registers were available for use in all the 149 polling stations.

14. He confirms that all voters were identified electronically through the KIEMS Kits.

15. He offers that the KIEMS Kits have been taken back to Nairobi for reconfiguration in readiness for use during the forthcoming presidential elections.

16. However the memory (SD) card containing data relating to the elections in Kisii has been secure at the 1st Respondent's head office in Nairobi.

17. Presiding officers for the polling stations mentioned have answered the allegations in the Petition and in the instant application.

Response by the 3rd Respondent;

18. This is found in the replying affidavit of the 3rd Respondent sworn on the 11th October 2017 and filed on the 13th October 2017.

19. It is averred that the Petitioners cannot on the one hand loathe an election process for being flawed and at the same time demand for a recount or tally of the same process with the aim of being declared the winner if either emerges victorious pursuant to Section 80(4) of the **Elections Act**.

20. The application is speculative and there is no evidence offered in support of the allegations. The application is dismissed as a fishing expedition.

21. The complaint on rejected votes is dismissed on grounds that the same are inconsequential and do not belong to any particular candidate.

22. Any errors in Forms 34As (sic) and 35B whose existence is denied are too trivial and are not capable of substantially affecting the results of the election.

23. On discrepancies, the 3rd Respondent falls back on paragraph 40 of his reply to Petition dated 15th February 2017 at pages 20 to 22.

24. It is stated that out of 13,492 valid votes cast by the voters in 37 polling station in Nyaribari Chache Constituency the Petitioners are questioning only 33 votes. These are petty grievances.

25. No discrepancies existed in the listed polling stations and the stations should not be considered for scrutiny and/or recount.

26. It is acknowledged that there were transposition errors at Masango and Nyanchwa Primary School polling stations and the votes garnered by the respective candidates are not being challenged.

27. It is not the duty of the court to assist the Petitioners to prove their case through the tedious process of scrutiny, recounting and/or re-tallying of votes cast when no basis for such an exercise has been established. No sufficient reasons have been given on a basis laid to justify grant of orders ought.

28. The order for recount is not available to the Petitioners as it is not pleaded and there is no evidence that the Petitioners exercised their right to require the presiding officer to recheck and recount at the polling stations mentioned.

Submissions:

29. Directions were given that the application be disposed off by way of written submissions. All the parties complied and I am indebted to counsel for their industry and extensive coverage of the law and legal precedents relevant to the application. I have considered all the material presented, even that which I may not directly make reference to in my analysis.

Analysis and determination;

30. I have carefully considered the application, the supporting grounds and affidavit, the replying affidavits and submissions by learned counsel. I have had due regard to the Petition by the 2nd and 3rd Petitioners and the responses made thereto.

31. Arising therefrom, the issues for determination are:

1. Whether the Petitioners are entitled to an order for scrutiny of all rejected ballot papers cast in the elections for member of the national Assembly for Nyaribari Chache Constituency.

2. Whether the Petitioners are entitled to a recount of all valid votes cast, rejected and spoilt votes in the said election.

3. Whether there should be production and scrutiny, inspection and verification of;

(i) All written statements by presiding officers.

(ii) Printed copies of the register of voters

(iii) All KIEMS Kits

(iv) All forms 35A and 35B filled in respect of the election.

32. Let me begin by restating the relevant provisions of law that relate to scrutiny and recount of votes.

Section 82 of the **Elections Act, 2011** provides:

82. (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.

33. Rule 28 of the Elections (Parliamentary and County Elections) Petition Rules 2017 provides:-

28. A petitioner may apply to an elections court for an order to-

(a) Recount the votes; or

(b) Examine the tallying, if the only issue for determination in the petition is the count or tallying of votes received by the candidates.

34. Rule 29 of the said Rules provides:-

29. (1) The parties to the proceedings may apply for scrutiny of the votes for purposes of establishing the validity of the votes cast.

(2) On an application under sub-rule (1), an election court may, if it is satisfied that there is sufficient reason, order for scrutiny or recount of the votes.

35. Also relevant in my view are Regulations 76 through to 83 of the Elections (General) Regulations 2012 which provide an elaborate mechanism for the counting and tallying of votes including who should be present, the mode of counting and tallying, raising of disputes or objections, requests to a presiding officer for a recount etc.

36. The Supreme Court in the case of **Gatirau Peter Munya –vs- Dickson Mwenda Kithinji and 2 Others [2014] eKLR** summarized the principles applicable as follows:-

a) The right to scrutiny and re-count of votes in an election petition is anchored in Section 82(1) of the Election Act, 2011 and Rule 33 of the Elections (Parliamentary and County Elections) Petition Rules, 2013. Consequently, any party to an Election Petition is entitled to make a request for a re-count and/or scrutiny of votes, at any stage after the filing of the Petition and before the determination of the Petition.

b) The trial court is vested with discretion under section 82(1) of the Elections Act, 2011 to make an order on its own motion for re-count or scrutiny of votes as it may specify, if it considers that such scrutiny or re-count is necessary to enable it to arrive at a just and fair determination of the Petition. In exercising this discretion, the court is to have sufficient reasons in the context of the pleadings or the evidence or both. It is appropriate that the court should record the reasons for the order for scrutiny or re-count.

c) The right to scrutiny does not lie as a matter of course. The party seeking a re-count or scrutiny, of votes in an election petition is to establish the basis of such a request, to the satisfaction of the trial Judge or Magistrate. Such a basis may be established by way of pleadings and affidavits or by way of evidence adduced during the hearing of the petition.

d) Where party makes a request for scrutiny or re-count of votes, such scrutiny or re-count if

granted, is to be conducted in specific polling stations in respect of which the results are disputed or where the validity of the vote is called into question in terms of rule 33 of the Elections (Parliamentary and County Elections) Petition Rules, 2013.

37. It follows, therefore that it is incumbent upon the applicant to state sufficient reasons so that the court could grant an order for scrutiny and/or recount and it is for the court to determine whether the reasons given are sufficient or not. Scrutiny should not be used as a tool for discovering new evidence.

38. Looking at the affidavit in support of the current application and the Petition by the 2nd and 3rd Petitioner, it is clear that there are listed therein allegations of myriad malpractices, commissions, omissions, irregularities and discrepancies. Based on these, it is urged that a scrutiny and recount of the votes be conducted.

39. The evidence on record is the affidavit evidence of the 2nd Petitioner as opposed to the affidavit evidence of the 1st and 2nd Respondents, as found in the affidavit of the 2nd Respondent.

40. Indeed, the affidavit evidence and replying affidavit in the Petition must, too, be factored in.

41. Suffice it to note that the veracity of the evidence has not been put to test. How then can the court be satisfied that there is sufficient reason for an order for scrutiny and recount"

42. It is my considered view that a recount and scrutiny will only be allowed where there is evidence to lay a basis for it and the expected results of such an exercise would aid in the determination of the case.

43. An application for scrutiny and/or recount should not be used for speculative purposes or as a fishing expedition. The timing of such an application is key.

44. In the case of Philip **Osore Ogutu –vs- Michael Aringo & 2 Others, 2013 eKLR** Tuiyot, J. observed:-

"…it all depends, I think, on the ability of the applicant to marshal sufficient evidence to persuade the court that scrutiny is deserved. And there is no reason why this cannot be made prior to the hearing given that the Election Petition Rules require that the substance of the evidence to be relied on by the parties be set out in the affidavits accompanying the petition or the responses."

He went on to state:-

"There would be several reasons why scrutiny should not be ordered as a usual course. First, there is a need to guard against an abuse of the process. I would agree with Mr. K'opot that a party must not be allowed to use scrutiny as a fishing expedition to discover new or fresh evidence. It would be expected that a party filing an Election Petition is, from the outset, seized of the grounds, facts and evidence for questioning the validity of an election. And where the evidence is unclear then a party can, on application to court, seek and obtain better particulars of that evidence from its adversary. But it would be an abuse of process to allow a party to use scrutiny for purposes of chancing on new evidence. Scrutiny should not be looked upon as a lottery."

45. As stated earlier before court is affidavit evidence by the Petitioners as countered by affidavit evidence of the 1st, 2nd and 3rd Respondents. Veracity of this evidence has not been tested. The burden is on the Petitioners to show/prove sufficient reason for an order for scrutiny and/or recount. In light of

the evidence in response by the Respondents prove of sufficient reason is not achieved.

46. In Jacob **Mwingi Muthuri –vs- John Mbaabu Muriithin and 2 Others, [2013] eKLR**, **Justice Lesiit** emphasized the need to test the evidence in order to determine whether an order for scrutiny or recount is deserved. The learned Judge stated:-

"[28] …Unless an order for scrutiny and recount is the only prayer sought in the Petition, it cannot be ordered at the pre-trial stage. This is because the prayer should not be granted on the basis of untested evidence, which would be the case if the prayer is simply granted at the pre-trial stage on the basis of the allegations in the Petition and the witness affidavits of the Petitioner.

[29] It is clear from the foregoing that where an application for scrutiny is made, the court must be satisfied that an order for scrutiny and recount has been justified by the party applying and secondly, that the order is necessary for the just resolution of the election petition. Scrutiny is one of the tools that the court uses to investigate whether an election was conducted in accordance with constitutional principles and to establish that indeed the result as declared was a reflection of the will of the electorate that took part in that election. The only way the court can test whether an order for scrutiny and recount is deserved and justified is first by considering the Petition and the affidavit in support to find out whether they disclose the Petitioner's cause of action and whether they contain concise statements of the material facts relied upon in support of the allegations of impropriety or illegality and secondly by calling of evidence and testing of that evidence through cross examination and re-examination process to test the veracity of the same. There can be no need to call evidence for examination through the trial process if none has been advanced in the petition and the petitioner's pleadings and in particular the affidavits of potential witnesses."

47. From the foregoing, it is manifestly clear that the timing of an application like the one before court becomes a critical consideration and heavily impacts on the outcome of the application.

48. I quote with approval the decision in the case of **Rishad H. A Amana –vs- IEBC & 2 Others, [2013] eKLR** where **Kimaru, J.** stated:-

"…..the recent trend is that scrutiny can only be ordered where a Petitioner lays sufficient basis. Such basis can only be laid after the Petitioner has adduced evidence during the actual hearing of the petition. The Petitioner cannot therefore demand that there be scrutiny and recount of the votes before the commencement of the trial. The Petitioner may do so after his or her witnesses have testified. The ideal situation, however, is that such an application for scrutiny should be considered by the court after all the witnesses of the petitioner and the Respondents have testified. At that stage of the proceedings, the court will be in a position to properly assess the veracity of the allegations made by the Petitioner that there is need for scrutiny."

49. I alluded to Regulation 76 to 83 of the **Elections (General) Regulations 2012** and I now revert to why I consider the regulations relevant and vital in an application like the one before court.

50. The right to a recount is automatic when made to a presiding officer at a polling station under Regulation 80 of the **Elections (General) Regulations, 2012**. The recount can be done not more than twice. The presiding officer is enjoined under Regulation 80(2) to give a reasonable opportunity to a candidate or an agent to exercise the right under Regulation 80.

51. The right to a recount is not automatic at the pretrial stage. A party who offers no evidence of a

request for a rechecking and recount of votes under Regulation 80 diminishes the chances of success of his application for a recount. As stated by **Emukule, J.** in **Harun Lempaka –vs- Aramat [2013] eKLR**:-

"An applicant for a recount of votes at the pre-trial stage must inter alia show he or his agents were denied the right to recount under Regulation 80 of the Elections (General) Regulations, 2012".

In our instant case, there is no such averment in the Petitioners' affidavit.

52. Most importantly, and given the strict timelines set in the law for the hearing and disposal of Election Petitions, an election court does not have the luxury of time. Scrutiny and recount by its very nature is a laborious and time consuming exercise. It must only be allowed where a solid basis is laid and sufficient reasons given.

53. On issue No. 3 on the production, scrutiny and verification of:

(i) All written statements by presiding officers.

(ii) Printed copies of the register of voters.

(iii) All KIEMS Kits

The same analysis as above regarding scrutiny and recount applies.

54. Indeed no basis or sufficient reason is given for the production and scrutiny of these items. The prayers in my view are speculative and a possible attempt to gather evidence. They are couched in such general terms giving the impression of a fishing expedition.

55. To paraphrase Gikonyo J. in **Musikari Kombo –vs- Moses Wetangula, [2013] eKLR**, to make a general order for production for scrutiny, inspection and verification of all written statements by presiding officers, all KIEMS Kits and all Forms 35A and 35B used in Nyaribari Chache Constituency would be an extravagant exercise of discretion, an affront to the Constitutional policy that election petitions must be determined expeditiously and an unnecessary cost on the public.

56. With the result that the application dated 3rd October 2017 is wholly unsuccessful. The same is dismissed. Costs to abide the outcome of the Petition.

Ruling dated, signed and **delivered** at **Kisii** this **6th day** of **November, 2017**.

A. K NDUNGU

JUDGE

In the presence of:

Mr. Ochwangi for the 1st Petitioner

Ms. Makobu for the 2nd and 3rd Petitioners

Mr. Omwega for the 1st and 2nd Respondents

Mr. Gesicho holding brief for Mr. Omogeni for the 3rd Respondent

Mr. Limo court assistant

A. K. NDUNGU

JUDGE