



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

ELECTION PETITION NO. 4 OF 2017

IN THE MATTER OF: THE ELECTIONS ACT, NO. 24 OF 2011

IN THE MATTER OF: THE ELECTIONS (PARLIAMENTARY & COUNTY ELECTIONS) PETITION
RULES, 2017

MWAHIMA MWALIMU MASUDI.....PETITIONER

AND

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

LUCIANA SANZUA, THE RETURNING OFFICER

OF LIKONI CONSTITUENCY OF THE INDEPENDENT

ELECTORAL AND BOUNDARIES COMMISSION..... 2ND RESPONDENT

THE PRESIDING OFFICERS OF MAJENGO MAPYA

MUZDALIFA POLLING STATIONS, LIKONI

CONSTITUENCY OF THE INDEPENDENT

ELECTORAL AND BOUNDARIES COMMISSION.....3RD RESPONDENT

MBOKO MISHI JUMA KHAMIS.....4TH RESPONDENT

RULING

The Application

1. By way of a Notice of Motion dated 4th October, 2017 brought under Rules 15, 16, 15(2) and 29 of the Elections (Parliamentary and County Elections) Petition Rules, 2017, Article 159 (2) (d) of the Constitution of Kenya and Regulation 86 of the Elections (General) Regulations, 2012, the Applicant/ Petitioner seeks the following orders:

a) An Order for scrutiny of the ballot material namely ballot papers, ballot boxes, ballot seals and the KIEMS kits be made before commencement of the hearing of the Petition.

b) An order be made directed at the 1st Respondent to store in safe custody the election material in (a) above and an order for extra locks to be added and keys deposited with court for safe custody.

c) Costs of the Application to abide the outcome.

The application is supported by the affidavit of **MWAHIMA MWALIMU MASUDI** sworn on 4th October, 2017.

2. The Applicant alleges that the scrutiny is aimed at establishing whether the election was conducted above board and in conformity with the law. The Applicant further contends that upon examination of the responses filed by the Respondents, the Applicant has established various irregularities in the ballot materials thus necessitating an order of scrutiny.

3. With regard to prayer (b), the Applicant alleges that there is need to secure the ballot materials due to the irregularities that the applicant established.

4. The 1st-3rd Respondents responded to the application by way of a Replying Affidavit sworn by **LUCIANA SANZUA** on 11th October, 2017. The deponent states that the Supreme Court on 1st September, 2017, annulled the Presidential Election and directed that a fresh presidential election be conducted within 60 days from that date. The deponent states that the 1st Respondent has deployed all its resources towards the fresh Presidential Elections including the KIEMS kits hence the same cannot be availed to these proceedings.

5. The deponent added that the scrutiny of electoral materials is not an automatic exercise and the Applicant ought to establish a basis for the scrutiny which in this instant the applicant has not done.

6. In relation to storage of electoral materials, the deponent states that it is the obligation of the 1st Respondent to store the materials safely and the Applicant has not demonstrated any security risk to the materials to warrant the court issuing prayer (b) in the application.

7. The 4th Respondent did not respond to the application

Hearing and Submissions

8. The Application came up for hearing on 18th October, 2017. Mr. Mongeri and Ms. Mayabi appeared for the Applicant, Mr. Wafula appeared for the 1st- 3rd Respondents, while Mr. Paul Buti appeared for the 4th Respondent.

9. Mr. Mongeri for the applicant submitted that the Petition was based on irregularities and illegalities such as statutory forms not being stamped and Petitioner's agents not signing the forms. Counsel argued that these irregularities and illegalities can only be evident if the original election materials are brought to court.

10. Mr. Mongeri stated that they require the original forms specifically Forms 35As and Form 35B in order to compare with the copies of the forms that were given to the Petitioner. Counsel also contended that the Petitioner will also require Form 32As which were used to identify voters who voted manually

because their fingerprints could not be captured electronically.

11. Mr. Mongeri urged the court to rely on the case of **Raila Amolo Odinga vs. Independent Electoral and Boundaries Commission & 2 Others [2017] eKLR** in which the Supreme Court allowed scrutiny on similar submissions as in this instant application. Counsel also referred the court to the case of **Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others [2014] eKLR** where Counsel submitted that the Court held that an application for scrutiny can be made at any time after filling the petition and before determination.

12. Mr. Mongeri submitted that the Petitioner was not seeking a recount of votes but rather scrutiny of votes in 55 polling streams or 13 polling centers.

13. Mr. Wafula for the 1st-3rd Respondents submitted that the 1st Respondent was not opposed to supplying any election materials required by any party. However, Counsel submitted that the applicant must lay a basis for the scrutiny exercise and state the polling stations where scrutiny is required.

14. Mr. Wafula argued that this application was amorphous and non-specific as it does not identify the specific stations where scrutiny is required. In support of his assertions, Mr. Wafula pointed out that Rule 29 (2) of the Election Petition Rules provides that an election court may order scrutiny if it finds that there is need for it.

15. As for putting additional locks to the election materials, Mr. Wafula submitted that the Applicant had not demonstrated that the election materials had been exposed or will be exposed to any security risk.

16. Mr. Buti for the 4th Respondent in opposition to the application reiterated Mr. Wafula's arguments that a basis must be laid for an order of scrutiny. Further, Counsel referred to Rule 29(4) of the Election Petition Rules which he said required that scrutiny should be confined to polling stations where results are disputed. Counsel submitted that the applicant had not identified any such polling station as per the Rule. Counsel cited the case of **Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others [2014] eKLR** where the court held:

“where a party makes a request for scrutiny or recount of votes, such scrutiny or recount 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...”

17. Mr. Buti submitted that the applicant has given two reasons for the scrutiny. Firstly, that the Petitioner's agents did not sign some of the statutory forms. On this issue, Counsel stated that Regulation 79 of the Elections (General) Regulations provides that failure of agents to sign the form does not invalidate an election. Secondly, the forms were not stamped, and on this issue Counsel argued that Regulation 83(d) of the Elections (General) Regulations only requires a Returning Officer to sign and date the form and there is no requirement for stamping of the forms.

18. Mr. Buti also submitted that section 82(2) of the Election Act provides that the purpose of scrutiny is to show what votes would be struck off. For example, a person whose name was not in the register. Counsel argued that the Applicant had not disclosed the results of the election and in the absence of this, an order of scrutiny would be futile.

19. Mr. Buti contended that an order of scrutiny cannot be issued for all polling stations in a constituency but rather for specific polling stations where it alleged that there were illegalities and/or irregularities. Counsel again cited the case of **Gatirau Peter Munya vs. Dickson Mwenda Kithinji (supra)** where the

Supreme Court at paragraph 159 stated:

“We are unable to agree with the view of the learned Judges of Appeal. The view that scrutiny and recount in a constituency “means scrutiny and recount in all Polling Stations in the constituency”, is not borne out by emerging jurisprudence from the most relevant fora of adjudication, namely, the election Courts. On the contrary, judicial opinion distinctly favours a view that commends itself to us: that, an application for scrutiny and recount, must be couched in specific terms, and clothed with particularity, as to which polling stations within a constituency are to attract such scrutiny. If a party lays a clear basis for scrutiny in each and all the polling stations within a constituency, then the order ought to be granted. Otherwise, a prayer pointing to a constituency but lacking in specificity is not to be entertained”.

20. Mr. Buti submitted that the Applicant in the application states that he wants to establish whether the election was above board and in conformity with the law. Counsel argued that this cannot be a ground for scrutiny as it would amount to a fishing expedition in which the Applicant will be seeking for evidence to support his petition.

21. In rebuttal, Ms. Mayabi for the Applicant submitted that the Petitioner had at paragraph 16 of the Petition outlined a list of all the polling stations including those in which the Petitioner was seeking scrutiny. Ms. Mayabi also urged this court to look at paragraphs 20, 21 and 28 of the Petition as the polling stations where scrutiny is required are listed.

Analysis and Determination

22. Having considered the submissions by the parties, only two issues arise for determination by this court:

- a) Whether an Order for scrutiny should be issued.
- b) Whether extra locks should be added and keys deposited with the court to ensure safe custody of the election materials.

Whether an Order for scrutiny should be issued

23. The basis of scrutiny of votes is founded on Section 82 of the Elections Act, 2011 which states as follows:

(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.

(2) Where the votes at the trial of an election petition are scrutinized, only the following votes shall be struck off—

(a) 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 authorised 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 committed or procured the commission of personation at the election;

(d) the vote of a person proved to have voted in more than one constituency;

(e) the vote of a person, who by reason of conviction for an election offence 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.

(3) The vote of a voter shall not, except in the case specified in subsection (1)(e), be struck off under subsection (1) by reason only of the voter not having been or not being qualified to have the voter's name entered on the register of voters.

As per section 82(1) above an order of scrutiny may be by a court on its own motion or upon an application by any party. In this instant, the Petitioner has applied for the order of scrutiny.

24. Further provisions to govern scrutiny are provided by Rule 29 of the Election (Parliamentary and County Elections) Petition Rules, 2017. Rule 29 states as follows:

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

(3) The scrutiny or recount of votes ordered under sub-rule (2) shall be carried out under the direct supervision of the Registrar or Magistrate and shall be subject to the directions the election court gives.

(4) The scrutiny or recount of votes in accordance with sub-rule (2) shall be confined to the polling stations in which the results are disputed and may include the examination of-

(a) The written statements made by the returning officers under the Act;

(b) The printed copy of the Register of voters used during the elections sealed in a tamper proof envelope;

(c) The copies of the results of each polling station in which the results of the election are in dispute;

(d) The written complaints of the candidates and their representatives;

(e) The packets of spoilt ballots;

(f) The marked copy register;

(g) The packets of counterfoils of used ballot papers;

- (h) The packets of counted ballot papers;
- (i) The packets of rejected ballot papers;
- (j) The polling day diary; and
- (k) The statements showing the number of rejected ballot papers.

25. Rule 29 of the Election Petition Rules 2017, requires the court to be satisfied that there is sufficient reason to grant an order for scrutiny. The Applicant/ Petitioner herein bases his application on grounds stated in his application at paragraphs 1, 2 and 3 as follows:

1. **The Petitioner has prayed for scrutiny of the election material herein to establish whether the election was conducted above board and in conformity with the law and therefore whether the election of the 4th Respondent was valid.**
2. **It has transpired from the 1st Respondent's reply that there is need to secure the material as there are obvious glaring disparities from the documents filed by the 1st Respondent and the results announced.**
3. **The need to secure the material has become necessary to preserve the evidence to assist the court do justice to parties.**

These are the same grounds that are reiterated in the affidavit in support of the application sworn by **MWAHIMA MWALIMU MASUDI** on 4th October, 2017.

26. During the hearing, Mr. Mongeri added other grounds being that the Petition was based on illegalities and irregularities including failure to stamp statutory forms and petitioner's agents not signing forms and that these illegalities and irregularities can only be established if the election materials are brought to court.

27. Rule 29 sub-rule 4 further requires scrutiny to be confined to polling stations in which results are disputed. The Applicant in his application did not disclose any particular polling stations within Likoni Constituency that the scrutiny should be confined to. However, during the hearing of the application Mr. Mongeri argued that the scrutiny would be restricted to 55 polling streams or 13 polling centers. Interestingly, Counsel did not mention the names of these 55 polling stations or 13 polling centers.

28. When an application is made before the proper hearing of the election petition commences, as is in this case, it becomes prudent for the court to also consider evidence set out by the applicant in the Petition and the affidavits accompanying the petition. In the case of **Jacob Mwirigi Muthuri vs. John Mbaabu Murithi & 2 others [2013]eKLR**, Justice Lessit at paragraph 29 stated:

“[29] 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 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.” (emphasis added)

29. It should also be noted that an order of scrutiny is not issued as a matter of course. The party making the application should establish a basis for the scrutiny. This has been the position in numerous decisions. In the case of **Philip Osoore Ogutu vs. Michael Aringo & 2 other, Busia High Court Election Petition No. 1 of 2013** the court held:

“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 the purpose of chancing on new evidence.”

In the case of **Richard Kalembe Ndile vs. Patrick Musimba Mweu, Election Petition No. 7 of 2013**, Majanja J held:

“...all that is necessary is for the petitioner to establish sufficient basis for the court to be satisfied that it must engage time and resources to ascertain the validity of the vote through scrutiny. The scrutiny exercise is part of the forensic process available for the court to do justice in the case.”

30. The importance of establishing a basis for scrutiny, I would think, is to ensure that an applicant does not abuse this exercise and utilize it as a fact finding mission to solidify his or her case. An applicant is expected to have already gathered some evidence to support his Petition and should not count on a scrutiny exercise to enable him or her gather new evidence. If an applicant utilizes scrutiny as a fishing expedition then such a vital exercise misses its intended purpose. Further, scrutiny is a tedious exercise that involves a lot of time and resources. A court should be hesitant to order scrutiny when the applicant has not laid sufficient basis.

31. The Supreme Court in **Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others [2014] eKLR**, proposed certain guiding principles for scrutiny and recount of votes in an election petition. These are:

a. The right to scrutiny and recount of votes in an election petition is anchored in Section 82(1) of the Elections Act 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 recount and/or scrutiny of votes, at any stage after the filing of petition, and before the determination of the petition.

b. The trial Court is vested with discretion under Section 82(1) of the Elections Act to make an order on its own motion for a recount or scrutiny of votes as it may specify, if it considers that such scrutiny or recount 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 recount.

c. The right to scrutiny and recount does not lie as a matter of course. The party seeking a recount or scrutiny of votes in an election petition is to establish the basis for 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 a party makes a request for scrutiny or recount of votes, such scrutiny or recount 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 the terms of Rule 33(4) of the Election (Parliamentary and County Elections) Petition Rules.

These are guiding principles which I have taken note of in this ruling.

32. In her submissions, M/s Mayabi contended that the Petitioner has laid adequate basis for scrutiny. Counsel referred the court to paragraphs 16, 20, 21 and 28 of the Petition. I have carefully read through the Petition. I have also carefully considered paragraphs 16, 20, 21 and 28 of the Petition, which read as follows:

16. The Petitioner avers that many of his agents were denied access to the polling stations either entirely or others were only able to gain entry much later in the day after commencement of the election exercise with no reasonable explanation from the 1st, 2nd and/or 3rd Respondents. This was notwithstanding the fact that all agents had the necessary credentials as provided for under the law. In fact, the Chief Constituency Agent of the Petitioner one MWALIMU MASOUD MNONO, was completely unable to gain access to the polling stations in order to supervise the process. The polling centres where agents were denied access include but not limited to:

(i) Ushindi Baptist Primary School;

(ii) Consolata Nursery School;

(iii) St. Joseph's Nursery School;

(iv) Daru Ulum Madrasa;

(v) Likoni Muslim Primary School;

(vi) Mrima Primary School;

(vii) Vision Senior School;

(viii) Mtongwe Primary School;

(ix) Vijiweni Primary School;

(x) Peleleza Primary School;

(xi) Jamvi la Wageni;

(xii) Mweza Primary School; and

(xiii) Longo Primary School

20. The Petitioner avers that the 4th Respondent in collusion with other officials of the 1st Respondent and party agents of the ODM Party facilitated and indeed conducted the electoral

process with colossal impropriety and impunity when they opened ballot boxes that had already been sealed after the counting and verification exercise had been completed. This opening of ballot boxes was not done in the presence of other party agents and stakeholders that had been present during the counting exercise. During this incident, the perpetrators removed some ballots that had been cast during the voting exercise and introduced others that had not been marked or cast during the voting exercise at MAJENGO MAPYA/MUZDALIFA POLLING STATIONS in LIKONI CONSITUTENCY.

21. The tampering of the ballot boxes was evident when some of ballot boxes of the said MAJENGO MAPYA/MUZDALIFA POLLING STATIONS arrived at the Tallying Centre when they had not been properly sealed as they had been at the polling station at the first instance as they were supposed to.

28. The 1st Respondent provided the Petitioner with a copy of Form 35B after multiple requests and visits to their offices. The said form however seems incomplete on a cursory glance as at least 49 polling stations within the Likoni Constituency have not been included therein. The said polling stations are:

- (i) Ushindi Baptist Primary School which had 12 polling stations/streams;
- (ii) Likoni Muslim Primary School which had 10 polling stations/streams;
- (iii) Mrima Primary School which had 12 polling stations/streams;
- (iv) Likoni Social Hall which had 5 polling stations/streams;
- (v) Likoni Vision Senior School which had 5 polling stations/streams;
- (vi) Majengo Mapya/Muzdalifa which had 12 polling stations/streams but only 7 have been indicated in the Form 35B supplied;

The supporting affidavit makes almost similar allegations as are made in the Petition.

33. Bearing in mind the provisions of Rule 29 sub-rule (4), that scrutiny should be confined to polling stations in which the results of the election are disputed, I find that the applicant has not particularized his request for scrutiny. The grounds in both the petition and the application are in general terms. In the case of **Philip Munge Ndolo vs. Omar Mwinyi Shimbwa & 2 Others Mombasa Election Petition Number 1 of 2013**, Odero J. held:

“In any case where a request is made for scrutiny and/or recount the application therefor must be clear, concise and more importantly specific. An application couched in general terms ought not to be permitted as this is tantamount to requiring of the court to go through the whole exercise of tallying once again. Rule 33(4) of the Election Rules however obliges a party to name the polling stations in which the results are disputed. As general principle in law, a party is bound by its pleadings. As such, any evidence which goes outside of the pleadings on record must be disregarded.

“It is not each and every claim of a malpractice that will merit a recount or scrutiny. It must be shown that such malpractices were so widespread, so pervasive as to affect the final tally of votes.”

34. The applicant seeks scrutiny in 13 polling centers or 55 polling stations. It should be noted that according to Gazette Notice No. 6397 published on 30th June, 2017, Likoni Constituency had 26 polling centers and 140 polling stations. The figure of 55 polling stations is quite high. Further the applicant has not concisely named these polling stations.

35. What is before this court (in the petition) is a list of 13 polling centers, half the number of polling centers in Likoni Constituency. The applicant seems to be implying that scrutiny should be done in all the 13 polling centers. That, I would think, would be almost equivalent to carrying out scrutiny in the entire constituency. In the case of **Ledama ole Kina vs. Samuel Kuntai Tunai & 10 Others, Nakuru High Court, Election Petition No. 3 of 2013**, Wendo J held:

“An application for scrutiny of all of Narok South Constituency lacks specificity, is a blanket prayer that, in my view, cannot be granted. The applicant needed to be specific on which polling stations he wanted a scrutiny done [in]. If he wanted scrutiny in all the polling stations, then a basis should have been laid for each polling station. The rationale is clear, the process of scrutiny is laborious, time-consuming, and the applicants cannot be let at liberty to seek ambiguous prayers and waste precious court’s time and incur unnecessary costs. They must be specific. For the above reason, the court cannot give a blanket order for scrutiny of Narok South Constituency...”

36. Out of the 13 Polling Centers mentioned by the Petitioner/applicant at paragraph 16 of the Petition, the applicant seems to have narrowed down on MAJENGO MAPYA/MUDZALIFA polling center. This is evident as the 3rd Respondent in the petition is the presiding officer of MAJENGO MAPYA/MUDZALIFA polling stations. Specific allegations have even been made in the Petition in relation to this polling center. The applicant has therefore laid a basis for scrutiny with regard to polling stations at this polling center.

37. To issue an order of scrutiny in relation to the remaining 12 polling centers would tantamount to issuing a blanket order. If issued at this stage, the applicant would be setting out on a fishing expedition, scouting for any new evidence to support his petition. The upshot is that the applicant should have couched his application in specific terms, indicating the precise polling stations where scrutiny should be carried and the reasons why scrutiny should be done in those stations.

Whether extra locks should be added and keys deposited with the court to ensure safe custody of the election materials

38. On the second issue above, no valid reason has been offered by the applicant as to why extra locks should be added. In the application at paragraphs 2 and 3, the applicant simply puts it:

2. It has transpired from the 1st Respondent’s reply that there is need to secure the material as there are obvious glaring disparities from the documents filed by the 1st Respondent and the results announced.

3. The need to secure the material has become necessary to preserve the evidence to assist the court do justice to parties.

While in the affidavit in support of the application the deponent, **MWAHIMA MWALIMU MASUDI** at paragraphs 3 and 4 states:

1. THAT my Advocates M/S AMBWERE T.S ESQ has advised me which advise I believe to be true to seek an order for safe custody of the election materials.

2. THAT I consequently seek for an order that extra locks be placed on the doors in the Go-down/warehouse where the election materials is stored and the keys deposited with court for safe –keeping.

39. As correctly put by Mr. Wafula for the 1st - 3rd Respondents, the applicant has not shown that the election materials have been or will be exposed to any security risk.

40. I would have expected the applicant to demonstrate to the court that the election materials as stored presently by the 1st Respondent have been exposed to various security risks or that during the pendency of this petition the election materials may be unsafe. The applicant has done neither. This court therefore has no reason to grant prayer (b) of the application. However, the issue of security of election materials remains live throughout the petition, and can be brought up at any time for consideration whenever necessary.

43. For the above reasons, the application dated 4th October, 2017 succeeds partially. As per the aforementioned Gazette Notice No. 6397 published on 30th June, 2017, **MAJENGO MAPYA/ MUZDALIFA** polling center has 10 polling stations. Orders are issued as follows:

a) An order of scrutiny be and is hereby issued for the ballot materials namely ballot papers, ballot boxes, ballot seals and the KIEMS kits used in all the 10 polling stations within **MAJENGO MAPYA/ MUZDALIFA** polling center.

b) Costs be in the cause.

Dated, Signed and Delivered in Mombasa this 8th day of November, 2017.

E. K. O. OGOLA

JUDGE

In the Presence of:

Mr. Mongeri & Ms. Mayabi for Petitioner

Mr. Wafula for 1st to 3rd Respondents

Mr. Buti for 4th Respondent

Mr. Kaunda Court Assistant



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