REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

THE ELECTIONS ACT 2011

ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS

PETITIONS) RULES 2017

ELECTION PETITION NUMBER 1 OF 2017

JEREMIAH NYANGWARA MATOKE.....PETITIONER

VERSUS

1. THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION

2. THE RETURNING OFFICER

3. ALFAH MIRUKA ONDIEKI.....RESPONDENTS

RULING

1. At the close of the hearing of both the petitioner's and respondents' case, Mr. Nyaberi, learned counsel for the petitioner made an oral application for leave to file an application for scrutiny under Rules 28 and 29 of the Elections (Parliamentary and County Elections Petitions) Rules 2017, (hereinafter "the Rules"). He stated that the grounds for seeking of the scrutiny would be explained, in detail, in the application itself.

2. Miss Olando, learned counsel for the 1st and 2nd respondents opposed the said application for leave on the basis that it ought to have been made at the beginning of the proceedings even if it was to be determined at a later stage. Miss Olando distinguished the petitioner's application from an instance when a court can, *suo moto*, order for scrutiny at any stage of the proceedings.

3. Mr. Omogeni,learned Senior Counsel, for the 3rd respondent also reiterated that the application should have been made at an earlier stage and referred to rule 15 (2) of the Rules which stipulates that an election court shall not allow an interlocutory application to be made on conclusion of the pretrial conference if the interlocutory application could have, by its nature been brought before the commencement of the hearing of the petition. Counsel for 3rd respondent further argued that the application for scrutiny should have been made at the pre-trial and further that the prayers in the petition did not include a recount or tally of votes garnered by the candidates.

4. He maintained that the dispute before the court was not about the counting or tallying of votes and that even if the application was to be entertained under rule 29 (4) of the Rules, scrutiny would only be confined to polling stations in which the results are contested yet the entire petition had no contest on the count of votes.

5. In a rejoinder, Mr. Nyaberi for the petitioner stated that the merits of the intended application for scrutiny could only be canvassed in the application itself and not at the application for leave stage.

6. I have considered the petitioner's application for leave to apply for scrutiny and the response by the respondents' advocates. **Section 82 (1) of the Elections act, 2011** stipulates as follows:

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."

7. **Rules 28 and 29 of the Rules** stipulate as follows:

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."

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.

(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 counted ballot papers;

h) The packets of rejected ballot papers;

i) The polling day diary; and

j) The statements showing the number of rejected ballot papers.

5) For purposes of sub-rule (4) (b), every returning officer shall upon declaration of the results, seal the printed copy of the register of voters used at that election in a tamper proof envelop and such envelop shall be stored by the Commission subject to the elections court directions under rule 16."

8. The respondents took issue with the timing of the application for leave to apply for scrutiny and argued that the said application should have been made at the pre-trial conference stage. My finding on the timing of an application for scrutiny is that the same can be made at any time during the proceedings. This was the finding in the case of **Nicholas Kiptoo Arap Salat vs IEBC and 7 Others Supreme Court Petition No. 23 of 2014** wherein the court held that an application for scrutiny and recount may be made before, during or at the end of the trial of an election petition.

9. Similarly, in the of **Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others {2014} eKLR** the Supreme Court held, inter alia, that 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 the petition and before the determination of the petition.

10. From the above cited cases and statutes, there is no requirement that a party desiring to apply for scrutiny seeks the leave of the court before making such an application or that the application be made at the pretrial conference stage. My finding, therefore, is that a party is at liberty to apply for scrutiny at any time in the proceedings before the determination of the petition as long as his application meets the threshold set down for application for scrutiny in which case, I further find that**Rule 15 (2) of the Rules** is not applicable in respect to an application for scrutiny.

11. Turning to the issue of whether or not the intended application for scrutiny is merited, I am of the humble view that this is an issue that can only be canvassed at the hearing of the application itself as it would be pre mature and indeed preemptive, at this stage, to determine its merits. In that regard this court will reserve its views on the intended application until the same is filed and argued.

12. Having found that there is no legal requirement that the court'sleave be sought and obtained before an application for scrutiny is made, I find that the petitioner is at liberty to make the said application should he deem it necessary as long as he remains alive to the fact that such an application must have sufficient reasons or grounds in the context of the pleadings and the evidence that he tendered before the court.

Dated, signed and delivered in open court this 6th day of December, 2017

HON. W. OKWANY

JUDGE

In the presence of:

- Mr. Oonge and Mr. Nyaberi for the Petitioner
- Mr. Miss Olando for the 1st& 2nd Respondents
- Mr. Omogeni S.C. for the 3rd Respondent
- Omwoyo: court clerk

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