



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELECTION PETITION NO. 7 OF 2017

**IN THE MATTER OF: THE CHALLENGE OF THE VALIDITY OF THE MANDERA NORTH
CONSTITUENCY ELECTION, 2017**

AND

**IN THE MATTER OF ARTICLE 1 (1); 2(2); 3(1); 4(2); 10; 21(1); 22(1); 23; 38(3)(C); 47(2); 48; 81(1) &
(e); 82(2)(B); 84; 86; 87(2) & (3); 88(5); 165(3)(A) & (e); 94; 95; 97; 99 & 101 OF THE CONSTITUTION
OF KENYA**

AND

IN THE MATTER OF: SECTIONS 75, 76, 80, AND 82 OF THE ELECTIONS ACT NO. 24 OF 2011

AND

IN THE MATTER OF THE POLITICAL PARTIES ACT NO. 11 OF 2011

AND

**IN THE MATTER OF: LEGAL NOTICE NO. 128 OF 2012, THE ELECTIONS (GENERAL)
REGULATIONS, 2012**

AND

**IN THE MATTER OF: THE ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS) PETITIONS
RULES, 2017**

AND

**IN THE MATTER OF: LEGAL NOTICE NO. 126 OF 2012 (THE ELECTIONS REGISTRATION OF
VOTERS) REGULATIONS, 2012**

AND

HUSSEIN ABSHIRO HERIN.....1ST PETITIONER/APPLICANT

ISMAIL MOHAMUD IBRAHIM.....2ND PETITIONER/APPLICANT

ISSACK SHEIKH AHMED.....3rd PETITIONER/APPLICANT
ABDI ADAN.....4th PETITIONER/APPLICANT
ADAN MATHOBE BOSHE.....6th PETITIONER/APPLICANT
HASSAN ISSACK MAALIM.....8th PETITIONER/APPLICANT
MOHAMED ALIOW MOHAMED.....9th PETITIONER/APPLICANT
MOHAMEDNOOR OSMAN MOHAMUD...10th PETITIONER/APPLICANT
ADOW MOLU KIKE.....11th PETITIONER/APPLICANT
ABDI IBRAHIM MOHAMED.....12th PETITIONER/APPLICANT
IBRAHIM MOHAMED NUNOW.....13th PETITIONER/APPLICANT
SULEIMAN MOHAMUD FILA.....14th PETITIONER/APPLICANT
MOHAMUD IBRAHIM ALIOW.....16th PETITIONER/APPLICANT
HASSAN ALI BALAYA.....18th PETITIONER/APPLICANT
KALLA ISSAK ALIOW.....19th PETITIONER/APPLICANT
ALI ABDI ADAN.....20th PETITIONER/APPLICANT
ISSACK ABDIRAHMAN.....21st PETITIONER/APPLICANT
MOHAMED ABDOW ALI.....22nd PETITIONER/APPLICANT
HASSAN IBRAHIM ALI.....23rd PETITIONER/APPLICANT

VERSUS

THE INDEPENDENT ELECTORAL AND
BOUNDARIES COMMISSION (I.E.B.C).....1ST RESPONDENT
THE MANDERA NORTH CONSTITUENCY
RETURNING OFFICER
(ABDIBASHIR ALINOOR ALI).....2nd RESPONDENT
BASHIR SHEIKH ABDULLAH.....3rd RESPONDENT

RULING

1. The petitioners/applicants through a Notice of Motion dated 11th January, 2018 pursuant to Articles 2(4), 3(1), 35, 81, 86, 159, 248(2) (c), 249 (2) (b) and 260 of the Constitution; Section 4 of the Access to Information Act, 2016; Section 82 of the Elections Act 2011; Rules 28 and 29 of the Elections (Parliamentary & County Elections) Petition Rules, 2017; Section 27 of the Independent Electoral and Boundaries Commission Act; and all other enabling provisions of the law sought the following orders;

1. *THAT this Application be heard and determined expeditiously and on priority basis.*

2. *THAT the Honourable Court do order that there be an inspection of the ballot boxes, scrutiny and recount of the votes cast and recorded as having been cast in the Election conducted in Mandera North Constituency for the position of Member of the National Assembly, specifically:- Ado Saden Polling Station 1; Al-Hidaya Primary School Polling Station 04; Ashabito Primary School 1; Ashabito Primary School 2; Awara Primary School; Balanqa Polling Station 1; Bambo West Polling Station; Barwaqo Primary School 1; Barwaqo Primary School 2; Bire Centre Polling Station 1 ; Bur John Polling Station 1; Dara Farma Polling Station 1; Dara Farma Polling Station 2; Darab Athathi; Garsey Polling Station 1; Garsey Primary School Polling Station 2; Gofa Primary Polling Station 1; Guticha Primary Polling Station 1; Kajaja Polling Station 1; Kalicha Primary Polling Station 1; Kalicha Primary School Polling Station 2; Kalmalab Polling Station 1; Koban Daka Polling Station 1; Koban Daka Polling Station 2; Korma Adow polling station 1; Kubi Primary School Polling Station 1; Ladeni Primary School Polling Station 1; Ladeni Primary School Polling Station 2; Lanqura Primary School Polling Station 1; Lanqura Primary School Polling Station 2; Libi Bul Primary Polling Station; Libin Girls Polling Station 1; Libin Girls Polling Station 2; Mado Wells Polling Station 1; Mado Wells Polling Station 2; Morothile Primary Polling Station 1; Morothile Primary Polling Station 3; Morothile Primary Polling Station 2; Olla Primary Polling Station 1; Olla Primary Polling Station 2; Olla Primary Polling Station 3; Qorahey Primary Polling Station 1; Qordobo Nursery Polling Station; Rhamu Dimtu Primary School Polling Station 1; Rhamu Dimtu Primary School Polling Station 2; Saqira Village Polling Station; Sarman Primary School Polling Station ; Shanqala Primary School Polling Station; Shir Shir Primary Polling Station 1; Sigare Hills Polling Station; Tossi Primary Polling Station 1; Tossi Primary School Polling Station 2; Towfiq Primary; Usubey Center Polling Station 1; Usubey Center Polling Station 2; Yabich Primary Polling Station 2; Yabicho Primary Polling Station 1 and Yaqila Farms Polling Station 1*

3. *THAT this Honourable Court order examination, verification and scrutiny of the Secure Digital Memory Cards (SD Cards) for each of the KIEMS kit used in the Senatorial Election in Mandera North Constituency specifically: Ado Saden Polling Station 1; Al-Hidaya Primary School Polling Station 04; Ashabito Primary School 1; Ashabito Primary School 2; Awara Primary School; Balanqa Polling Station 1; Bambo West Polling Station; Barwaqo Primary School 1; Barwaqo Primary School 2; Bire Centre Polling Station 1 ; Bur John Polling Station 1; Dara Farma Polling Station 1; Dara Farma Polling Station 2; Darab Athathi; Garsey Polling Station 1; Garsey Primary School Polling Station 2; Gofa Primary Polling Station 1; Guticha Primary Polling Station 1; Kajaja Polling Station 1; Kalicha Primary Polling Station 1; Kalicha Primary School Polling Station 2; Kalmalab Polling Station 1; Koban Daka Polling Station 1; Koban Daka Polling Station 2; Korma Adow polling station 1; Kubi Primary School Polling Station 1; Ladeni Primary School Polling Station 1; Ladeni Primary School Polling Station 2; Lanqura Primary School Polling Station 1; Lanqura Primary School Polling Station 2; Libi Bul Primary Polling Station; Libin Girls Polling Station 1; Libin Girls Polling Station 2; Mado Wells Polling Station 1; Mado Wells Polling Station 2; Morothile Primary Polling Station 1; Morothile Primary Polling Station 3; Morothile Primary Polling Station 2; Olla Primary Polling Station 1; Olla Primary Polling Station 2; Olla Primary Polling Station 3; Qorahey Primary Polling Station 1; Qordobo Nursery Polling Station; Rhamu Dimtu Primary School Polling Station 1; Rhamu Dimtu Primary School Polling Station 2; Saqira Village Polling Station; Sarman Primary School Polling Station ; Shanqala Primary School Polling Station; Shir Shir Primary Polling Station 1; Sigare Hills Polling Station; Tossi Primary Polling Station 1; Tossi Primary*

School Polling Station 2; Towfiq Primary; Usubey Center Polling Station 1; Usubey Center Polling Station 2; Yabich Primary Polling Station 2; Yabicho Primary Polling Station 1 and Yaqila Farms Polling Station 1

4. THAT this Honourable Court upon granting of prayer 2 do direct that a scrutiny do include an examination of the following :-

- a. the written statements made by the Returning Officer*
- b. the examination of the written statements made by the Presiding Officers in the Polling Station Diaries*
- c. both the electronic and hard copy register of voters as contains the biometric data and alpha numerical details of the voters entitled to vote at the stated polling stations*
- d. the Kenya Integrated Electronic Machine System (KIEMS) and the information stored by it*
- e. the Declaration of results Forms 35As as stored in the ballot boxes of all Polling Stations*
- f. Declaration of results Form 35B*
- g. the packets of spoilt ballots*
- h. the marked copy of register*
- i. the packets of counterfoils used ballot papers*
- j. the packets of counted ballot papers*
- k. the packets of rejected ballot papers.*

5. THAT this Honourable Court upon granting of prayer 3 do direct that a scrutiny do include an examination of the following :-

- a. Opening and closing of the Polling Stations as recorded in the logs.*
- b. The Total Number of voters who were identified biometrically and/ or alpha numerically and document search.*
- c. Log containing geographical location and co-ordinates of polling stations to establish the exact location where voting took place.*

6. THAT the parties be at liberty to appoint 4 agents each who may include (an) IT expert(s) to assist in the scrutiny exercise.

7. THAT the Deputy Registrar or other Court appointed person to prepare and present a Report of the Scrutiny exercise to Court.

8. THAT this Honourable Court be pleased to make/give any further or other orders or directions as may be expeditious, just or suitable.

9. THAT the costs of this Application be in the cause.

This application was filed soon after the close of the case by the 1st and 2nd respondents and was heard after the close of the entire petition.

It is worth noting that at the close of the petitioners case the following petitioners had pulled out of the petition and had their names struck out;

- (i) Noor Hassan Edo - 5th petitioner
- (ii) Hassan Ibrahim Aliow - 7th petitioner
- (iii) Bashir Adan Issack - 15th petitioner
- (iv) Hussein Billow Abdi - 17th Petitioner

3. Counsel for all the parties agreed to orally submit on the application since the court had heard the entire case. Mr. Hassan in his submissions relied on the grounds enumerated in the application. Their main prayer is scrutiny and recount of the votes cast. The exercise would involve inspection of ballot boxes; scrutiny and recount of votes cast and recorded as having been cast; scrutiny and exam of SD cards of Kiems used in the election complained of.

4. On the law on scrutiny, he referred to the case of **Philip Mukwe Wasike –vs- James Lusweti Mukwe & 2 Others 2013 eKLR**. On alteration of documents, he referred to the case of **Ahmed Yasin Ahmed –vs- Ahmed Ibrahim Abass 2013 eKLR**

5. On what needs to be considered in an application for scrutiny, he relied on the case of (i) **Raila Amolo Ondinga –vs- Independent Electoral and Boundaries Commission & 2 Others 2017 eKLR** in particular paragraph 49 of the said decision. (ii) **Jacob Mwirigi –vs- John Mbaabu Murithi 2013 eKLR**.

6. Counsel submitted that the petitioners were not on a fishing expedition and solely relied on the grounds raised.

7. **Mr. Odhiambo** for the 1st and 2nd respondents opposed the application, relying on the following authorities;

(i) Jackton Nymungo Ranguma –vs- Independent Electoral and Boundaries Commission & 2 Others EP No. 3 of 2017 (Kisumu)

(ii) Apungu Arthur Kibira –vs- Independent Electoral and Boundaries Commission & 2 Others EP No. 06 of 2017 (Kakamega)

(iii) Albeity Hassan Abdalla –vs- Independent Electoral and Boundaries Commission & 3 Others EP No. 8 of 2017 (Malindi)

8. He submitted that the petitioners had failed to lay a basis for the orders sought. That they were on a mere fishing expedition. He pointed out that in their prayer No. 2, the petitioners have sought for scrutiny of 62 polling stations while those in the grounds amounted to 29 only. Further, that they seek to verify what happened in the Senator's election and not the parliamentary election in Mandera North.

9. It was his submission that the people's will is expressed at the polling station where voting and counting is done and the court would not be quick to interfere with that will of the people.

10. He submitted that the 2nd respondent in his wisdom cancelled the results of Alihidaya and Olla Primary School polling stations and he had given an explanation for that. The said votes he said, were not added to any candidate's votes.

11. On the forms not signed by the presiding officers and deputy presiding officers he said the same were not invalid as they had been verified by the agents and there was evidence to that effect.

12. He submitted that there was no purpose for the scrutiny as no evidence had been led on any misdeeds by the 1st and 2nd respondents and the Forms 35A had not been challenged.

13. Mr. Havi for the 3rd respondent opposed the application, submitting that the evidence militated against the issuance of the orders for scrutiny and recount. He submitted that the petition has a raft of prayers but there was none for declaration of anyone as having won the election. That on 11th September, 2017, the petitioners were issued with an order for access with permission to copy and there is nothing to show what happened to the said orders.

14. He referred to Rules 28 and 29 of the Parliamentary and County Election Petition Rules 2017 for the different purposes for recount and scrutiny. On this, he submitted that there would be no reason for determination of what each candidate got since the original petitioner exited. Secondly, the 1st petitioner only managed 9 votes and told the court that it was the original petitioner who won the election.

15. On the validity of votes, it was his submission that the petitioners had failed to meet the two conditions set out in the cases of:

(i) Justus Gesito Mugaki M'Mbaya –vs- Independent Electoral and Boundaries Commission [2013] eKLR

(ii) Harun Neitamei Lempaka –vs- Lemanken Aramat & 2 Others [2013]eKLR

Counsel submitted that the 1st petitioner did not have agents in most of the polling stations and only raised trivialities in respect to figures and letters in some Forms 35A. That among the 15 witnesses who claimed to have been chased only 11 of them had voted whereas the 3rd respondent's agents voted before going to guard his votes and sign the Forms 35A and B.

16. On movement of polling stations, he submitted that evidence had been adduced to show that voting had actually taken place in those stations e.g. at Korm Adow which was said to be in a forest.

Further on movement of the tallying centre, it was confirmed that the Court of Appeal had stayed the High Court order.

17. Referring to the cases of;

(i) Mohammed Mahat Kuno –vs- Abdi Kadir Omar Aden & 2 Others 2013 eKLR

(ii) Apungu Arthur Kibira –vs- Independent Electoral and Boundaries Commission & 2 Others [2017] eKLR

Counsel submitted that it was the duty of the petitioners to convince the court as to why the lids of the ballot boxes should be opened. This duty he said had not been discharged.

18. In a rejoinder Mr. Hassan submitted that in the petition, they were seeking for nullification of the election without any substitution. That the orders granted on 2nd October, 2017 were not effected as they had difficulties in executing them. He further stated that though they have sought for scrutiny in 57 polling stations, they had only particularized 29 polling stations. He therefore asked the court to order for scrutiny *suo moto* in the remaining 31 stations. He referred to the case of **Raila Amollo Odinga (supra)** to support this preposition, saying the orders would not prejudice any party.

19. On a point of correction, he said in prayer No. 3 they had erroneously referred to the senatorial election instead of the parliamentary one.

ANALYSIS AND DETERMINATION

20. I have carefully considered the application, the supporting grounds, affidavit and submissions by counsel. I have also had due regard to the petition and the responses made thereto plus the evidence adduced before this court. The issue for determination is whether this court should allow recount and scrutiny of votes cast as prayed for by the petitioner in the Notice of Motion dated 11th January, 2018.

The Law

21. Section 82 (1) of the Elections Act provides;

S. 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.***

(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.

22. Rules 28 of the Election (Parliamentary and County Elections) Petitions Rules 2017 provides;

R. 28 A petitioner may apply to an election 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.

Rule 29 of the same 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.

(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 spoiled 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.

(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.

Section 80 (4) of the Election Act provides;

(4) An election court may by order direct the Commission to issue a certificate of election to a President, a member of Parliament or a member of a county assembly if—

(a) upon recount of the ballots cast, the winner is apparent; and

(b) that winner is found not to have committed an election offence.

23. The Supreme Court of Kenya in the case of **Gatiru Peter Munya –vs- Dickson Mwenda Kithinji & 2 Others (supra)** outlines guiding principles on the right to scrutiny and recount which are as follows;

153. From the foregoing review of the emerging jurisprudence in our court, on the right to scrutiny and recount votes in an election petition, we would propose certain guiding principles as follows;

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.

It follows that no party to an election petition can claim an automatic right to an order for scrutiny or for recount. The party seeking such an order must establish sufficient reason to the satisfaction of the election court that such an order is merited (see Rule 29 (2) of the Election (Parliamentary and County Elections) Petition Rules 2017.

24. It must be shown by the party applying for scrutiny and recount through the pleadings, affidavits and

like in this case, evidence, that indeed there is need for the court to verify certain facts.

What then is the purpose of scrutiny" In the case of **Philip Mukuru Wasike –vs- James Lusweti Mukwe & 2 Others Bungoma Election Petition No. 5 of 2013 [2013] eKLR Omondi J.** Observed:

“The purpose of scrutiny is:-

(1) To assist the court to investigate if the allegations of irregularities and breaches of the law complained of are valid.

(2) Assist the court in determining the valid votes cast in favour of each candidate.

(3) Assist the court to better understand the vital details of the electoral process and gain impressions on the integrity of the electoral process.”

25. The court should not therefore allow scrutiny and recount to be used as a means of searching for fresh or new evidence. Scrutiny should not be used to give the petition a new face and/or character that was never there in the beginning.

26. In the case of **Gideon Mwangangi Wambua & Another –vs- Independent Electoral and Boundaries Commission & 2 Others Mombasa EP No. 4 of 2013 (consolidated with EP No. 3 of 2013), Odunga J.** found that there was insufficient pleading and a lack of particularity of facts upon which an order for scrutiny could be granted in both petitions. He observed thus;

“26. The aim of conducting scrutiny and recount is not to enable the court (t0) unearth new evidence on the basis of which the petition could be sustained. Its aim is to assist the court to verify the allegations made by the parties to the petition which allegations themselves must be hinged on pleadings. In other words, a party should not expect the court to make an order for scrutiny simply because he has sought such an order in the petition. The petitioner ought to set out his case with sufficient clarity and particularity and adduce sufficient evidence in support thereof in order to justify the court to feel that there is a need to verify not only the facts pleaded but the evidence adduced by the petitioner in support of his pleaded facts. Where a party does not sufficiently plead his facts with the necessary particulars but hinges his case merely on the documents filed pursuant to Rule 21 of the Rules, the court would be justified in forming the view that the petitioner is engaging in a fishing expedition or seeking to expand his petition outside the four corners of the petition.” (Emphasis is mine)

27. Having stated what the law on scrutiny and recount is, I now wish to consider the application before this court.

The petitioners' application is grounded on prayer No. A in the petition which seeks an inspection of the ballot boxes, scrutiny and recount and re-tallying of the votes cast and recorded as having been cast in the said election in Mander North Constituency specifically in some 57 polling stations pleaded. These are the same polling stations mentioned in prayer No. 2 and 3 of the present application.

28. The petitioners have set out the issues to be addressed in the form of grounds and I will deal with them in that order;

A. Missing Results

29. **That results in Al-thdaya Primary School 04 and Olla Primary School 03 were nullified.** They want recount and scrutiny done to verify whether the decision to nullify the results was done within the parameters of the law.

30. The Returning Officer who is the 2nd respondent testified here as RW6. He explained that the Forms 35A for these two polling stations revealed untallying figures. That in the place of valid votes, it was indicated the rejected votes. These results could therefore not be collated and had to be nullified.

31. RW6 confirmed that the Forms 35A in respect of these two polling stations were available. The said forms are not in the bundle of the certified Forms 35A produced in court by the 1st respondent. It is prudent that the said information which is lacking be verified to determine whether RW6 made the correct decision in nullifying the results.

32. I therefore direct that the SD cards for the two polling stations be accessed and examined and the information copied.

B. Forms 35A not Signed by Presiding Officer or Deputy Presiding Officer

33. This is in respect of the following polling stations;

- Yabicho Primary School No. 01
- Yabicho Primary School No. 02
- Olla Primary School No. 03
- Sukela Tinfa Primary School No. 01
- Morothile Primary School No. 1
- Awara Primary School No. 01

34. I have examined all the Forms 35A in respect of the said polling stations including Girissa Primary School No. 04 and Al Fowzan Primary School No. 4.

35. My finding is that all the Forms in respect of these polling stations were signed by either the Presiding Officer or Deputy Presiding Officer. They were also signed by an agent or agents. I therefore find no need for scrutiny and/or recount.

C. Alteration of Form 35A without Countersigning

36. The 1st petitioner argued that it was good practice for any cancellation or amended result in Form 35A to be countersigned. The respondents' argument was that such counter signing was not mandatory.

37. My view is that Form 35A is a very important document in a parliamentary election. Accountability for anything entered on it is not only good practice but forms an integral part of the process.

38. I have examined the said Forms and confirmed that it is only Forms 35A in respect of Ladeni Primary School No. 02 and Kubi Primary School No. 01 polling stations where the Presiding Officers

countersigned cancellations.

39. The polling stations complained of by the petitioners are:

Kubi Primary School - No. 01

Kajaja - No. 01

Qorahey Primary School - No. 01

Dara Farm - No. 02

Barwaqo - No. 01

Barwaqo – No. 02

Bambo West – No.

Ladeni - No. 02

40. I have examined all the respective forms 35A and find that there is no cancellation in Bambo West polling station while Kubi and Ladeni polling stations have actually been countersigned.

41. The remaining five (5) polling stations i.e.

Kajaja - No. 01

Qorahey Primary School – No. 01

Dara Farm – No. 02

Barwaqo – No. 01

Barwaqo – No. 2

will be scrutinized through the SD cards of their Kiems kits for purposes of verification.

D. Form 35A's not Signed by any Agent

42. It is the petitioner's case that Forms 35A that were not signed by any agents are not valid.

43. Regulation 79 of the Elections (General) Regulations 2012 provides as follows;

R. 79 (1) The presiding officer, the candidates or agents shall sign the declaration in respect of the elections.

(2) For purposes of sub regulation (1), the declaration for-

(a) presidential election results shall be in Form 34 set out in the Schedule;

(b) National Assembly, county women representatives, Senator, county governor and county assembly elections shall be in Form 35 set out in the Schedule.

(2) The presiding officer shall -

(a) immediately announce the results of the voting at that polling station before communicating the results to the returning officer;

(b) request each of the candidates or agent then present to append his or her signature;

(c) provide each political party, candidate, or their agent with a copy of the declaration of the results; and

(d) affix a copy of the declaration of the results at the public entrance to the polling station or at any other place convenient and accessible to the public at the polling station.

(3) Where any candidate or agent refuses or otherwise fails to sign the declaration form, the candidate or agents shall be required to record the reasons for the refusal or failure to sign.

(4) Where a candidate or any agent refuses or fails to record the reasons for refusal or failure to sign the declaration form, the presiding officer shall record the fact of their refusal or failure to sign the declaration form.

(5) Where any candidate or agent of a candidate is absent, the presiding officer shall record the fact of their absence.

(6) The refusal or failure of a candidate or an agent to sign a declaration form under subregulation (4) or to record the reasons for their refusal to sign as required under this regulation shall not by itself invalidate the results announced under subregulation (2(a)).

44. It is therefore the responsibility of the candidate or agent to ensure that the declaration form is signed or the reason for refusal or failure is recorded. It is obvious that where a candidate or agent is absent, no one can record the reason for them.

45. The fact of the absence is clearly noted by the vacant space where they are supposed to sign. Regulation 79 (7) provides that the failure to sign per se is not sufficient ground for invalidating the results.

46. The Forms 35A for Kalmalab polling station 01 was signed by two agents while the one for Bambo West No. 01 has a clear crossing by the Presiding Officer which to me shows that the agents were absent.

47. I therefore find this ground not proved to warrant any scrutiny and/or recount of votes cast.

E. Illegal Alteration of Gazetted Polling Stations

48. The petitioners claim that there were certain polling stations which were moved from their gazetted and designated geographical locations to other places.

(i) Korm Adow was allegedly moved to Olla Primary School.

49. **PW5 Hassan Issack Maalim** was an EFP agent at Korm Adow village. He confirmed that the station was moved from Korm Adowa and so no voting took place at the said station, instead it took place at Olla Primary School. The Presiding Officer who testified as **RW5 Jelle Abdi Mohammed** contradicted what PW5 had stated.

50. I therefore find this to be a merited case for the court to determine exactly where the polling took place.

51. It is common knowledge that the original Kiems kits were reconfigured for purposes of the repeat presidential elections and the GPRS cannot be picked from the Kiems kit.

52. The SD card in respect of the said polling station will therefore be examined and all the information on it be retrieved and copied.

(ii) Balanga Shallow Wells allegedly moved to Rhamu Dimtu Secondary School

53. No witness testified on this alleged movement.

(iii) Shanqala Primary School allegedly moved to Towfiq Primary School

54. No witness testified on this alleged movement.

(iv) Dara Farm and Libibul Primary School allegedly moved to Ashabito Primary School.

55. No witness testified on this alleged movement

(v) Sigare Hills allegedly moved to Ashabito town.

56. **PW3 Isaack Abdirahman** was an agent at Sigare Hills polling station. He confirmed that polling took place there though not to his satisfaction. He did not mention anything about the polling station being moved to Ashabito town.

(vi) Saqira village polling station allegedly moved to Guticha Primary School.

57. No one from Saqira village testified as to the happenings there.

(vii) Gofa Primary School and Qurdoko Nursery School were allegedly moved to Shirchir.

58. No voter from any of these two polling stations testified on this alleged movement. **PW4 Mohammed Aliow Mohamed** only passed by Gofa Primary School on his way to Yagila Farms. He said nothing about the two polling stations having been moved.

PW18 Ali Abdi Adan an agent at Shirshir Primary School did not make mention of any polling stations having been moved there.

59. I am therefore not satisfied that any basis has been laid on this limb for the orders sought to be issued.

F. Eviction/Chasing Away From Polling Stations and Assault of Some Political Party Agents

60. The petitioners' complaints on this are in respect to polling stations in Ashabito, Guticha, Morothile and Rhamu Dimtu Wards.

61. I will address each complaint on its own.

(a) Where particulars of EFP agents were captured in PSD but failed to sign Forms 35A and no reason was given. This has been dealt with in respect of Forms 35A which were not signed by agents.

62. It is a different issue where agents allege not to have signed the forms because of being chased away or having been assaulted. I will address that in the polling stations as presented in the application.

(i) Ashabito Primary School

63. **PW2 – Kalla Isaack Allow** testified that he was an agent at Ashabito Primary School. He stated that he was kicked out of the station to give the officials an opportunity to conduct their own process. He denied having caused chaos as is shown in the Form 35A.

64. He claimed to have reported the incident to the police but there is no evidence to that effect. It is therefore his word against that of the Presiding Officer in respect to the reason for his failure to sign the Form 35A. Other agents and the Presiding Officer and his deputy signed the Form.

(ii) Bire Centre

65. The complainant here was **PW10 Hassan Ali Balaya**. He served as an EFP agent at Bire centre. He allegedly left the station because the process was flawed and the Presiding Officer and others were hostile to him. He adds that the residents of Ashabito threw things at him because of the good work he was doing.

66. He has not explained why he blames the respondents when it is the Ashabito residents who threw things at him.

(iii) Korm Adow

67. The complainant here is **PW5 Hassan Issack Maalim**. He is a trained agent who reported at about 7.15 am to the polling station. He says he was made to sit at a certain corner and was just observing the on goings and appeared satisfied with that.

68. He left at 4.30 pm before counting began. He only informed his Chief Agent of the happenings and not the police for the reason that he had not been assaulted. To him, it was only an assault which could have amounted to an election offence.

(iv) Darab Athathi

69. The complainant **PW7 Adow Molu Kike** was EFP agent at Darab Athathi. He was allegedly assaulted by the Presiding Officer and Deputy Presiding Officer so he did not wait for the vote counting. He reported the incident at Rhamu Police Station on 14th August, 2017.

70. He gave the reason for the beating as his having raised issues when the Presiding Officer was adding six (6) ballot papers in every ballot box. There was no concrete evidence of such a report having been made.

(v) Kubi Primary School

71. The witness is **PW6 Abdi Ibrahim Mohammed**. He stated that voting started at 6 am and ended at 5.30 pm. He witnessed the sealing of the ballot boxes and was present up to the end of the process at this polling station.

72. He however, protested when the Presiding Officer called villagers to come and vote a second time. It was at that point that he was beaten on his buttocks and was thrown out at 9 pm. He only made his report to the police on 14th August, 2017 yet this was meant to be a serious occurrence.

(vi) Usubey

73. No witness testified on this.

(vii) Shirshir Primary School

74. The witness here was **PW18 Ali Abdi Adan** an EFP agent at Shirshir polling station. He was at the station at 5.00 am. He and others were later informed that the Kiems kit had issues but he did not believe the officers on this.

75. He denied being the agent shown on Form 35A as Ali Abdi Adan ID No. 11550463 of EFP though these are similar to his details.

76. He stated that he had been strangled by an MCA aspirant when he raised an issue of double voting. He however, spent the night at the polling station in spite of what had happened. He did not mention having reported this incident to the police.

77. The respondents witnesses who were Presiding Officers and testified in respect of Ashabito (RW1), Shirshir (RW4) and Korm Adow (RW5) were not asked any questions on these incidents narrated by the petitioners' witnesses through cross examination.

78. I have evaluated all the complaints in this ground and, do not find them to form a basis for scrutiny and/or recount of the votes cast.

79. Mr. Hassan requested this court to consider issuing orders of scrutiny and recount *suo moto* for polling stations not specifically enumerated in the grounds set out in the application. My view is that once an application for scrutiny and/or recount has been made, the onus is on the party applying to satisfy the court of the need for the orders sought.

80. The court cannot step in to fill any gaps for the party applying as that would amount to the court descending into the arena. I will therefore not consider what was not covered in the grounds and moreso what has not been covered by the evidence adduced to warrant the orders sought.

81. In conclusion, I decline to grant the prayer on recount of any votes cast as no basis for it has been laid. The petitioner who had made the prayer to be declared winner exited.

82. Scrutiny is allowed and limited to only reading of the SD cards in respect of the following polling stations;

(i) Ali-Hidaya Primary School – No. 04

(ii) Olla Primary School – No. 03

(iii) Kajaja - No. 01

(iv) Qorahey Primary School – No. 01

(v) Dara Farm – No. 02

(vi) Barwaqo – No. 01

(vii) Barwaqo – No. 02

(viii) Korm Adow

83. This exercise will be undertaken by the Deputy Registrar (DR) of the Anti-Corruption and Economic Crimes Division of the High Court at the Milimani Law Courts. All counsel to meet with the DR and agree on the date and suitable time for the exercise.

84. Each party will be entitled to a Maximum of two (agents) when the exercise is going on.

85. The exercise should be held within the next two (2) days from today.

86. The DR to file and serve her report on all parties by 19th January, 2018 at 4pm.

87. Counsel at liberty to submit on the report in their final submissions.

88. The 1st and 2nd respondents to file and serve certified copies of Forms 35A in respect of Ali-Hidaya Primary School No. 4 and Olla primary School No. 3 by 18th January, 2018, 9 am.

89. Costs of the application to abide the outcome of the petition.

Orders accordingly.

Delivered, signed and dated this 16th day of January, 2018 in open court at Nairobi.

HEDWIG ONG'UDI

HIGH COURT JUDGE



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