



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

ELECTION PETITION NO.3 OF 2017

IN THE MATTER OF THE ELECTION ACT, 2011

ELECTION FOR MEMBER OF NATIONAL ASSEMBLY FOR WEBUYE WEST CONSTITUENCY

SITATI PETER JUMA.....PETITIONER

VERSUS

SITATI DANIEL WANYAMA.....1<sup>ST</sup> RESPONDENT

CYRIL ESUMAIT ETYANG.....2<sup>ND</sup> RESPONDENT

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION.....3<sup>RD</sup> RESPONDENT

RULING

BACKGROUND

1. **Sitati Peter Wanyama** (Petitioner) filed a Petition on the 5<sup>th</sup> of September 2017 against **Sitati Daniel Wanyama** (1<sup>st</sup> Respondents, **Cyril Esumait Etyang** (2<sup>nd</sup> Respondent) and the **Independent Electoral & Boundaries Commission** (3<sup>rd</sup> Respondent) alleging various irregularities, malpractices, illegalities, anomalies and breach of the law.

2. The hearing of this Election Petition concluded on the 23<sup>rd</sup> of November 2017 at which juncture counsel for the Petitioner Mr. Makokha sought to make an application for scrutiny and recount which application was filed on the 27<sup>th</sup> of November 2017.

3. In the Petitioner, the applicant sought for *inter alia*

i. An order for elaborate scrutiny of the principle voter register of Webuye West Constituency and all documents related including the Polling Day Diaries, field note books, a scrutiny on the used and unused ballot papers, BVR records for the polling day, and KEIMS (Kenya Integrated Election Management System) records for the polling day and recount of all Ballot papers cast during the Election held on 8<sup>th</sup> August 2017

ii. An order for verification of all statutory forms 35A and 35B

## **APPLICATION**

4. The Motion subject matter was brought pursuant to Rules 28 and 29 of the Election (Parliamentary and County Elections) Petitions Rule 2017 & Section 82 of the Elections Act No. 24 of 2011 seeking for the following orders:

**i. That this honourable court be pleased to order for scrutiny of:**

**a. The packets of spoilt ballot papers**

**b. The packets of counter foils of used and unused ballot papers**

**c. The packets of counted ballot papers**

**d. The packets of rejected ballot papers**

**e. The statements showing the number of rejected ballot papers**

**f. Polling station diaries for all 96 polling stations that were in the Webuye West Constituency**

**g. Scrutiny of all for 35A in respect to all polling stations that were in the Webuye West Constituency**

**h. Forms 32A – KIEMS Supervision validation forms**

**i. Form 32 declaration of Secrecy for persons assisting voters**

**j. QR Code for all polling stations within Webuye West Constituency**

**k. Extracted data captured by KEIMS kit during voter identification and result transmission and all their logs in all polling stations in Webuye West Constituency**

**l. Field note books**

**m. All other election materials used in Member of National Assembly for Webuye West Constituency, Bungoma County**

**ii. That this honourable court be pleased to order for a recount of all ballot papers in respect of all 96 polling stations Webuye West Constituency of Bungoma County.**

**iii. That the scrutiny and re-count be in respect of all 96 polling stations that were in Webuye West Constituency of Bungoma County.**

**iv. That cases of the application be provided for.**

5. The said application was based on the grounds that;

i. If the real issues in controversy are to be determined fully and in the interest of justice scrutiny and recount ought to be done

- ii. That the Petitioner and his witnesses have in their affidavits and testimonies laid a proper basis that can be used as justification for the orders sought
  - iii. The contents of the rival affidavits filed by the parties herein looked at keenly could be a compelling reason to grant the orders sought in order that a just declaration is arrived at
  - iv. That the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents failed to submit before this court results (forms 35A's) for 11 polling stations
  - v. Documents filed by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents before portray irregularities, illegalities, and anomalies that require recount and scrutiny be done.
  - vi. The application is made in good faith and in the interest of justice
  - vii. The orders sought will not prejudice the respondents in any manner
6. The application was further supported by the Petitioner's affidavit whose content may be set out briefly as follows; -
- i. 11 form 35A's were missing
  - ii. Some forms
    - a. Lacked Stationary comments by the Presiding officers
    - b. Had erasures and were not countersigned
    - c. Had no IEBC rubber stamp
    - d. Had different serial numbers
    - e. Had different figures reported in some forms 35A and 35B
  - iii. Agents of Ford-K did not sign forms 35A in 41 Polling Stations
  - iv. Results for some Polling Stations were not clear
  - v. Name and signature of some Presiding Officers were missing
  - vi. Similarity of names caused confusion
  - vii. Form 35B gave the number of those who turned up to vote as 273 and the percentage as 0.541%

## **RESPONSES**

7. The first Respondent did not file a replying affidavit.
8. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed a replying affidavit in objection. It may be summarised as follows:
  - i. That all forms 35A were made available

- ii. Although Ford Kenya agents had no badges as all had been released to NASA, coalition of parties, where Ford-K is a member, the anomaly was rectified by all Ford-K agents being allowed access in polling centres and further no agent came forth to claim he was denied access
- iii. In majority of stations, Ford Kenya was represented
- iv. Lack of statutory comments is not an illegality
- v. Erasures did not affect the results
- vi. Difference in serial numbers is not an irregularity. The forms were so designed
- vii. Some issues were neither raised in the pleadings nor brought out in evidence
- viii. Failure to stamp the forms was not an irregularity
- ix. Tallying of results was proper and errors if any did not affect the final results
- x. The error in percentage in form 35B results did not affect the outcome of the results.

## **SUBMISSIONS**

### **Petitioner's Submissions**

9. In his submission, Mr. Makokha, counsel for the Petitioner urged that based on the Petition, affidavits of witnesses and evidence, sufficient basis had been laid out for an order of scrutiny to be made, as the Petitioner had shown that the process had anomalies, irregularities, some Form 35A's were not signed, nor rubberstamped and therefore results were not authenticated.

10. It was further urged that the similarity of names between the Petitioner and the 1<sup>st</sup> Respondent had brought about a confusion; when the votes were being counted as the agents of the Petitioner, who were not given badges were not present to verify.

11. It was contended therefore that the exercise of scrutiny will assist the court to verify results; and ensure that the will of the people of Webuye West Constituency is reflected in the final results.

12. Further this the request is not a fishing exercise neither an abuse of the Court process but meant to ensure that the outcome of this Petition is just & fair.

### **1<sup>st</sup> Respondent's Submissions**

13. Though the 1<sup>st</sup> Respondent did not file a response in opposition. He filed submissions in opposition. Mr. Masinde, his counsel submitted that no basis had been laid down for the application being sought.

14. He urged that an order for scrutiny ought to be on specific polling stations where the results are in dispute and yet the Petitioner has not specifically mentioned any polling station where he disputed results or where his results were attributed to another candidate.

15. Counsel further contended that the alleged anomaly of unsigned and an unstamped forms 35A was no basis for scrutiny as the Petitioner must prove that the anomalies complained of affected the number

of votes, and the tallying of the said results.

16. Further, there is no legal requirement that forms 35A ought to be rubber stamped or comments made. The requirement is that forms ought to be signed in order to authenticate the results.

17. As for the names, the issue was explained through evidence. Counting of the votes cast is done openly in public and in the presence of all agents, apart from names the symbol of the party is considered and there is no likelihood of any such confusion arising.

18. Irregularities complained of out in 3 polling stations were so minor and were explained.

19. Scrutiny of the entire Constituency being sought for was not pleaded or brought out in evidence. The Petitioner is out on a fishing expedition, in any event he has not met the required threshold.

20. Further, the difference in margin is huge. 6,000 votes and even of the minor irregularities are considered they are unlikely to alter the victory margin.

### **2<sup>nd</sup> & 3<sup>rd</sup> Respondent's Submission**

21. Counsel Mr. Odhiambo for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents objected to the exercise of scrutiny arguing that the same is an attempt to expand the scope of the Petition.

22. That a number of Polling Stations that did not feature in the Pleadings and evidence have been included in this application Scrutiny can only be founded on the Petition and supporting affidavits, and to this extent this application ought to be rejected.

23. He singled out items 1(a) - (m) of Paragraph 7 the applicant's affidavit as raising issues not having been part of the Petition, except St. Anthony school for the Deaf, where there was a complaint of a failed KIEMS kit. Complaints of form 35A were not raised, if they had been raised the 2<sup>nd</sup> & 3<sup>rd</sup> respondent would have responded and indeed in the Petitioner had not been concerned with numbers and inclusion of this issue amounts to introduction of new evidence.

24. As regards names, none of the witnesses confirmed the allegation of confusion of names.

25. He was of the opinion that the application is lacking as no proper foundation was laid.

### **Issues for determination**

26. Having considered the application, the responses and submissions by Counsel on record, I am of the view that the issues for determination are as follow; -

**i. Whether or not based on the pleadings and evidence on record the court can grant an order directing scrutiny of electoral materials and recount of votes in the entire Webuye West Constituency**

**ii. Costs.**

### **Applicable statute and Case law**

27. Scrutiny is anchored on Sections 82(1) of the Election Act 2011 & Rules 28 and 29 of the Elections

(Parliamentary and County Elections) Petitions Rules 2017. Section 82(1) of the Election Act states;

**Section 82(1)** provides;

**“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.”**

**Rule 28** provides that;

**“A petitioner may apply to an election court for a order to**

**i. Recount the votes, or**

**ii. Examine the tallying up if the only issue for determination in the petition is the count or tallying of votes received by the candidates**

**Rule 29** provides

**(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 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.

28. In **Gatirau Peter Munya -v - Dickson Mwenda Kithinji & 2 Others Petition no 2B of 2014 (2014) EKLR** the Supreme Court set out guiding principles in respect to scrutiny and recount of votes in election petitions. It pronounced itself in the following terms:

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.

29. Similarly, in **Arikala Narasa Reddy –vs- Venkata Ram Reddy Reddygari & Another (Civil Appeal Nos 5710-5711 of 2012)**, the Supreme court of India set out the following conditions before a recount is permitted namely:

- the court must be satisfied that a *prima facie* is established
- The material facts and full particulars have been pleaded stating the irregularities in counting votes
- A roving and fishing inquiry should not be directed by way of an order to re-count the votes
- An opportunity should be given to file objection
- Secrecy of the ballot should be guarded

30. In **Philip Ogutu Vs Michael Aringo & 2 others 2013 eKLR**, the court said:

“It is not sufficient for a petitioner to aver in the petition that he desires scrutiny and recount in respect of all Polling Stations in the electoral area that is the subject in dispute. The petitioner must plead in sufficient details why he requires the courts intervention to order scrutiny..... the

**petitioner is required to state all the specific polling stations that he alleges there were irregularities and therefore should be scrutinised”**

31. **In Ladema Ole Kina -v- Samuel Kuntai Tunai & 10 others (2013) eKLR**, in respect to the subject of scrutiny, Wendo j stated:

**“An application for scrutiny of all 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 ..... 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 courts time and incur unnecessary costs. They must be specific...”**

32. **In Philip Osoe Ogutu vs Michael & 2 Others, Busia County Petition No. 1 of 2013**, Tuiyot J on his part stated:

**“... 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.**

**... 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.”**

33. From the citation above of the law and cases, standards and requirements for ordering for scrutiny and recount are very clear. An election court ought not to be a ground where scrutiny and recount are sought as a way of unearthing new evidence, or an pleaded matters for purposes of covering loopholes in a party’s pleadings and evidence in a bid to nullify an election. A basis or foundation must be laid and the court must be satisfied that there is sufficient reason to order for scrutiny.

34. The petitioner has not by way of pleadings and evidence, laid sufficient basis for the court to order a scrutiny of the electoral materials and/or recount of votes in the entire Webuye West Constituency. The prayer and indeed the pleadings and evidence lacked in specificity, and details of the complaints and disputes if any of each of the polling stations in the entire constituency. The application is general, expecting a blanket order.

Further several new matters/ complaints have been introduced in the application making this a fishing expedition which must be frowned upon at all times.

35. The petitioner was rather casual in his bid as he set out to seek for scrutiny and recount in his pleadings, affidavits in support and in evidence. The feeling the court got was that the petitioner was

waiting for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents' evidence in order to lay a basis for such exercise. This did not work for the Petitioner and could not have helped as a party in any case ought to be sure and clear of the facts and lay a foundation to back the same.

36. As regarding the alleged irregularities, illegalities and anomalies set out:

1. Lack of comments by presiding officers in forms 35A
2. Erasures in about 5 forms
- 3 Lack of rubber stamps
4. Lack of signatures by party agents
5. Different serial numbers for forms 35 A and its duplicates
6. Errors in summing up

The question to ask is whether adequate evidence was laid to form a basis for the orders sought.

Clearly rubber stamping of form 35A against the presiding officer's signature is not a requirement of the law and may simply be termed as an extra caution taken by the IEBC and this cannot be an illegality. See **Independent Electoral and Boundaries Commission & Another -v-Stephen Mutinda Mule & 3 others Civil Appeal No. 219 of 2013.**

The allegations were not on all the 96 polling stations.

37. Having stated the above, the prayer for scrutiny of the electoral materials and recount of votes for the entire Webuye West Constituency cannot succeed. To allow the same in the circumstances would be a laborious exercise that must not be entertained. A party must know his case and be sure of the facts from the onset. The court cannot certainly allow scrutiny of 96 polling stations without sufficient basis or reason as to do so would be allowing fishing for evidence, expensive, uncalled for and certainly unfair. Consequently, the application must fail.

38. Costs of the application to the Respondents.

**Dated and Delivered in Bungoma** this 23<sup>rd</sup> day of January 2018

**ALI-ARONI**

**JUDGE**



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