



Case Number:	Election Petition 2 of 2017
Date Delivered:	07 Dec 2017
Case Class:	Civil
Court:	High Court at Siaya
Case Action:	Ruling
Judge:	Esther Nyambura Maina
Citation:	Washington Jakoyo Midiwo v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Siaya
Docket Number:	-
History Docket Number:	-
Case Outcome:	Application dismissed
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

ELECTION PETITION NO. 2 OF 2017

IN THE MATTER OF: THE ELECTION FOR MEMBER OF

NATIONAL ASSEMBLY GEM CONSTITUENCY

BETWEEN

HON. WASHINGTON JAKOYO MIDIWO.....PETITIONER

VERSUS

THE INDEPENDENT ELECTORAL

AND BOUNDARIES COMMISSION.....1ST RESPONDENT

THE RETURNING OFFICER GEM CONSTITUENCY.....2ND RESPONDENT

HON. ELISHA ODHIAMBO.....3RD RESPONDENT

RULING NO. 3

The Petitioner who was a candidate for the position of Member of the National Assembly for Gem Constituency in the general elections held on 8th August 2017 filed this petition to challenge the declaration of the 3rd Respondent as the winner.

What is for consideration is his Notice of Motion dated 6th October 2017 which seeks orders that:-

1. **“(Spent)**
2. **(Spent)**
3. **This Honourable Court orders a recount, tallying and scrutiny of all ballot papers, ballot boxes, Forms 35 A, forms 35 B and all other election materials used during the elections for Member of National Assembly, Gem Constituency held on 8th August 2017.**
4. **(Spent)**
5. **Costs of this application be provided for.”**

This court directed that the application would be heard upon hearing the Petitioner’s evidence. The allocation was canvassed by way of written submissions.

SUBMISSIONS

Learned Counsel for the Petitioner have submitted that they wish to have the following election materials scrutinized –

1. “Ballot papers cast and counterfoils thereof
2. Forms 35A and counter foils thereof
3. Forms 32A
4. Polling station diary
5. Electors register
6. Ballot boxes
7. Transmission logs
8. Printouts of certified GPRS coordinates of the physical location of KIEMS devices as at the time they sent their respective results
9. All other election materials from the polling stations specified herein below.”

This scrutiny is sought in respect of six categories of polling stations, viz:-

Category 1 – Polling stations where number of votes in Form 35 B far exceeds the number of voters biometrically identified, verified and authenticated

No.	Polling station & Stream	Total voters biometrically identified	Total votes in Form 35 B	Number of excess/inexplicable votes
1.	Wagwer 1	105	425	320
2.	Luri 1	240	359	119
3.	Luri 2	240	353	113
4.	Siala 2	283	313	30
5.	Siala 1	306	313	7
6.	St. Theresa 1	518	569	51
7.	Ndhene 1	517	528	11
8.	Gogo 2	346	359	13
9.	Nyabeda 1	329	358	29
10.	Nyabeda 2	356	375	19
11.	Asayi 1	552	559	7
12.	Kojuok 1	504	Similar	Numbers
13.	Kojuok 2	504	Similar	Numbers
14.	Midiwo Rembe 1	166	173	7
15.	Ulamba 1	353	369	16
16.	Ulamba 2	376	334	(-42)
17.	Komuok 1	163	316	153
18.	Komuok 2	303	301	(-2)
19.	Uriri 1	333	345	12
20.	Uriri 2	336	351	15

21.	Karariw 2	Same result	For all	Candidates
22.	Karariw 3	Same result	For all	Candidates
23.	Nyawaa 2	370	384	14

Category 2 – Polling stations where the 1st respondent failed, refused and/or neglected to provide biometric data despite a court order

No.	Name of Polling Station and stream
1.	Siriwo – 1 of 2
2.	Bar Turo – 1 of 1
3.	Nyamninia – 1 of 1
4.	Sirandu – 1 of 1
5.	Umina ECD – 1 of 1
6.	Maliera – 1 of 3
7.	Maliera – 2 of 3
8.	Bar Sauri – 2 of 2
9.	Bar Sauri – 1 of 2
10.	Yala Town – 2 of 3
11.	Yala Town – 1 of 3
12.	Tatro – 1 of 1
13.	Anyiko Sec. – 2 of 2
14.	Anyiko Sec. – 1 of 2
15.	Nyawara – 1 of 3
16.	Muhanda – 2 of 2
17.	Muhanda – 1 of 2
18.	Uyonga – 1 of 1
19.	Rawalo – 1 of 1
20.	Ulumbi – 2 of 2
21.	Ulumbi – 1 of 2
22.	Karuwa – 1 of 1
23.	St. Teresa G. – 1 of 3
24.	St. Teresa G. – 1 of 3
25.	Nyagondo – 1 of 2
26.	Nyagondo – 2 of 2
27.	Jina – 3 of 3
28.	Jina – 2 of 3
29.	Nyasidhi – 2 of 2
30.	Jina – 1 of 3
31.	Mwadi – 1 of 1
32.	Mutumbu – 3 of 3
33.	Nyapiedo – 1 of 1
34.	Dienya Health – 1 of 1
35.	Ober – 1 of 2
36.	Ober – 2 of 2
37.	Apuoyo – 1 of 1
38.	Orombe River – 1 of 1
39.	Lundha – 2 of 2
40.	Lundha – 1 of 2
41.	Miru – 1 of 1
42.	Ndori – 1 of 1

43.	Mutumbu – 2 of 3
44.	Mutumbu – 1 of 3
45.	Sirodha – 1 of 2
46.	Uhonya – 1 of 1
47.	Ligoma – 1 of 1
48.	Nyangulu – 1 of 1
49.	Uranga – 1 of 2
50.	Uranga – 2 of 2
51.	Lihanda – 1 of 2
52.	Lihanda – 2 of 2
53.	Maliera – 3 of 3
54.	Omino – 1 of 2
55.	Omino – 2 of 2
56.	Bar Kalare – 2 of 2Ndere – 2 of 2
57.	Ndere – 2 of 2
58.	Mlare – 1 of 1
59.	Kanyuto – 1 of 1
60.	Mingawo – 1 of 1
61.	Got Regea – 1 of 1
62.	Got Kokwiri – 1 of 2
63.	Got Kokwiri – 2 of 2
64.	Malanga – 1 of 2
65.	Malanga - 2 of 2
66.	Ndere – 1 of 2
67.	Ndegwe – 1 of 1
68.	Sirembe – 1 of 3
69.	Sirembe – 2 of 3
70.	Sirembe – 3 of 3

Category 3 – Polling stations where either all candidates got exactly the same number of votes; or the petitioner garnered the exact number of votes in different polling centres within the same station/school

1. Karariw streams 2 and 3 – In both polling stations, the number of votes cast for ALL the seven (7) candidates is exactly the same. The total votes cast and number of rejected votes in both polling stations is also exactly the same.

2. Kojuok streams 1 and 2 – The number of persons biometrically identified to vote in both polling stations is exactly the same – 240.

3. Gogo streams 1 and 2 – The number of votes garnered by the petitioner in both polling stations is exactly the same – 144.

4. Maliera streams 1 and 2 – The number of votes garnered by the petitioner in both polling stations is exactly the same – 167.

5. Lihanda streams 1 and 2 – The number of votes garnered by the petitioner in both polling stations is exactly the same – 158.

Category 4 – Polling stations where the petitioner has demonstrated that the results he garnered

according to Form 35 A are evidently different from those finally posted in Form 35 B

1. Migosi Primary School – Petitioner - Form 35 A – 261 votes

- Form 35 B – 201 votes

-3rd Respondent – Form 35 A – 156 votes

- Form 35 B – 196 votes

Comments – Figures altered in favour of Hon. Elisha Odhiambo and to the detriment of Hon. Jakoyo Midiwo

2. Maliera Primary School (3) – 3rd Respondent – Form 35 A – 541 votes

-Form 35 B – 543 votes

Comments – Figures altered in favour of Hon. Elisha Odhiambo

3. Uriri Primary School (2) – Total votes - Form 35 A – 346 votes

-Form 35 B – 342 votes

Comments – Figures illegally and irregularly altered

4. Ulamba Primary School (2) – Petitioner - Form 35 A – 160 votes

-Form 35 B – 106 votes

- Total Tally -Form 35 A – 388 votes

- Form 35B – 334 votes

Comments – Figures altered to the detriment of Hon. Jakoyo Midiwo

5. St. Teresa's Primary School (3) – Petitioner - Form 35A – 163 votes

-Form 35 B – 153 votes

- Total tally -Form 35 A – 564 votes

-Form 35 B – 565 votes

Comments – Figures altered to the detriment of Hon. Jakoyo Midiwo

6. Sagam Primary School (3) – Votes cast - Form 35 A – 492 votes

-Registered voters -Form 35 A – 462 votes

Comments – votes cast far in excess of number of registered voters

7. Malele Primary School (2) – Petitioner

-Form 35 A – 270 votes

Form 35 B – 1 vote

Comments – Practically all votes cast in favour of Hon. Jakoyo Midiwo deleted, to his extreme detriment

8. Aluor Girls Primary School (1) – Total tally - Form 35 A – 477 votes

-Form 35 B – 474 votes

Comments – Total votes cast differ in the two forms

Category 5 – Polling stations where Form 35 As were not stamped as required

	Name of Polling Station & Stream	Form 35 A Supplied to petitioner	Form 35 A Annexed by 2 nd respondent	Comments
1.	Siriwo – 1 of 2	No stamp	Stamped	Stamp forged later
2.	Siriwo – 2 of 2	No stamp	Stamped	Stamp forged later
3.	Kojuok – 1 of 2	No stamp	Stamped	Stamp forged later
4.	Kojuok – 2 of 2	No stamp	Stamped	Stamp forged later
5.	Kagilo – 2 of 3	No stamp	Stamped	Stamp forged later
6.	Kagilo – 3 of 3	No stamp	Stamped	Stamp forged later
7.	Olengo – 1 of 2	No stamp	Stamped	Stamp forged later
8.	Karariw – 2 of 3	No stamp	Stamped	Stamp forged later
9.	Luri – 1 of 2	No stamp	Stamped	Stamp forged later
10.	Luri – 2 of 2	No stamp	Stamped	Stamp forged later
11.	Nyawara – 3 of 3	No stamp	Stamped	Stamp forged later
12.	Uyonga – 1 of 1	No stamp	Stamped	Stamp forged later
13.	Nango – 1 of 1	No stamp	Stamped	Stamp forged later
14.	Uriri – 2 of 2	No stamp	Stamped	Stamp forged later
15.	Komuok – 2 of 2	No stamp	Stamped	Stamp forged later
16.	Nyagondo – 1 of 2	No stamp	Stamped	Stamp forged later
17.	Ulamba – 1 of 2	No stamp	Stamped	Stamp forged later
18.	Ulamba – 2 of 2	No stamp	Stamped	Stamp forged later
19.	Nyasidhi – 1 of 2	No stamp	Stamped	Stamp forged later
20.	Ginga Valley – 1 of 2	No stamp	Stamped	Stamp forged later
21.	Ginga Valley – 2 of 2	No stamp	Stamped	Stamp forged later
22.	Nyapiedo – 1 of 1	No stamp	Stamped	Stamp forged later
23.	Dienya Helath – 1 of 1	No stamp	Stamped	Stamp forged later
24.	Ober – 1 of 2	No stamp	Stamped	Stamp forged later
25.	Ober – 2 of 2	No stamp	Stamped	Stamp forged later
26.	Apuoyo 1 of 2	No stamp	Stamped	Stamp forged later
27.	Orombe – 1 of 1	No stamp	Stamped	Stamp forged later
28.	Uthanya – 1 of 2	No stamp	Stamped	Stamp forged later
29.	Uthanya – 2 of 2	No stamp	Stamped	Stamp forged later
30.	Ojola – 2 of 2	No stamp	Stamped	Stamp forged later

31.	Ojola – 1 of 2	No stamp	Stamped	Stamp forged later
32.	Malele – 2 of 2	No stamp	Stamped	Stamp forged later
33.	Akala resource – 1 of 1	No stamp	Stamped	Stamp forged later
34.	Akala Market – 1 of 3	No stamp	Stamped	Stamp forged later
35.	Akala Market – 3 of 3	No stamp	Stamped	Stamp forged later
36.	Oseno – 1 of 1	No stamp	Stamped	Stamp forged later
37.	Ndori – 1 of 1	No stamp	Stamped	Stamp forged later
38.	Kambare – 2 of 2	No stamp	Stamped	Stamp forged later
39.	Aluor mixed – 1 of 1	No stamp	Stamped	Stamp forged later
40.	Wambusa – 1 of 1	No stamp	Stamped	Stamp forged later
41.	Ndiru – 1 of 1	No stamp	Stamped	Stamp forged later
42.	Kaudha – 2 of 2	No stamp	Stamped	Stamp forged later
43.	Onyinyore – 1 of 1	No stamp	Stamped	Stamp forged later
44.	Siala Nursery – 1 of 1	No stamp	Stamped	Stamp forged later
45.	Kambare Sec – 1 of 1	No stamp	Stamped	Stamp forged later
46.	Aluor Girls – 1 of 1	No stamp	Stamped	Stamp forged later
47.	Kaudha – 1 of 2	No stamp	Stamped	Stamp forged later
48.	Odok Rera – 2 of 2	No stamp	Stamped	Stamp forged later
49.	Ahono – 1 of 2	No stamp	Stamped	Stamp forged later
50.	Ahoro – 2 of 2	No stamp	Stamped	Stamp forged later
51.	Sinaga – 2 of 2	No stamp	Stamped	Stamp forged later
52.	Sinaga – 1 of 2	No stamp	Stamped	Stamp forged later
53.	Onding – 1 of 1	No stamp	Stamped	Stamp forged later
54.	Sagam – 3 of 3	No stamp	Stamped	Stamp forged later
55.	Sagam – 2 of 3	No stamp	Stamped	Stamp forged later
56.	Sagam – 1 of 3	No stamp	Stamped	Stamp forged later
57.	Nyangulu – 1 of 1	No stamp	Stamped	Stamp forged later
58.	Omino – 1 of 2	No stamp	Stamped	Stamp forged later
59.	Bar Kalare – 2 of 2	No stamp	Stamped	Stamp forged later
60.	Kanyuto – 1 of 1	No stamp	Stamped	Stamp forged later
61.	Mundoware – 1 of 1	No stamp	Stamped	Stamp forged later
62.	Got Kowkiri – 2 of 2	No stamp	Stamped	Stamp forged later
63.	Got Kokwiri – 1 of 2	No stamp	Stamped	Stamp forged later
64.	Malanga – 2 of 2	No stamp	Stamped	Stamp forged later
65.	Sirodha – 1 of 1	No stamp	Stamped	Stamp forged later
66.	Sirembe – 1 of 3	No stamp	Stamped	Stamp forged later
67.	Mutumbu – 3 of 3	No stamp	Stamped	Stamp forged later
68.	Mutumbu – 2 of 3	No stamp	Stamped	Stamp forged later
69.	Mwadi – 1 of 1	No stamp	Stamped	Stamp forged later
70.	Gogo – 2 of 2	No stamp	Stamped	Stamp forged later
71.	Sirandu – 1 of 1	No stamp	Stamped	Stamp forged later
72.	Maliera – 2 of 3	No stamp	Stamped	Stamp forged later
73.	Maliera – 3 of 3	No stamp	Stamped	Stamp forged later
74.	Ligoma – 1 of 1	No stamp	Stamped	Stamp forged later
75.	Uhonya – 1 of 1	No stamp	Stamped	Stamp forged later
76.	Miru – 1 of 1	No stamp	Stamped	Stamp forged later
77.	Lundha – 1 of 2	No stamp	Stamped	Stamp forged later
78.	Ndere – 2 of 2	No stamp	Stamped	Stamp forged later
79.	Jina – 1 of 3	No stamp	Stamped	Stamp forged later
80.	Jina – 2 of 3	No stamp	Stamped	Stamp forged later

81.	Jina – 3 of 3	No stamp	Stamped	Stamp forged later
82.	Ulumbi – 1 of 2	No stamp	Stamped	Stamp forged later
83.	Ulumbi – 2 of 2	No stamp	Stamped	Stamp forged later
84.	Muhanda – 1 of 2	No stamp	Stamped	Stamp forged later
85.	Midiwo Rembe – 1 of 1	No stamp	Stamped	Stamp forged later
86.	Anyiko Sec. – 1 of 2	No stamp	Stamped	Stamp forged later
87.	Anyiko P. – 2 of 2	No stamp	Stamped	Stamp forged later
88.	Anyiko P. – 1 of 2	No stamp	Stamped	Stamp forged later
89.	Tatro – 1 of 1	No stamp	Stamped	Stamp forged later
90.	Yala Town – 1 of 3	No stamp	Stamped	Stamp forged later
91.	Yala Town – 2 of 3	No stamp	Stamped	Stamp forged later
92.	Bar Sauri – 2 of 2	No stamp	Stamped	Stamp forged later
93.	Nyamninia – 1 of 1	No stamp	Stamped	Stamp forged later
94.	Uranga – 1 of 2	Stamped “rejected”	Stamped “IEBC Presiding Officer”	Stamp altered later

Category 6 – Polling stations where numbers were illegally inflated

1. Ndori stream 1
2. Ober stream 1
3. Ober stream 2
4. Ligoma stream 1
5. Muhanda stream 1
6. Muhanda stream 2
7. St. Teresa Girls stream 1
8. St. Teresa Girls stream 2
9. Nyamninia stream 1
10. Sagam stream 2

Learned Counsel reminded this court that the Petitioner had abandoned the prayer for recount and submitted that the Petitioner has ably laid the basis for scrutiny of all the named polling stations and urged this court to allow the prayer in order to do justice for the people of Gem. To support his submissions he cited two cases: –

1. Phillip Osore Ogutu V. Michael Onyura Aringo & 2 Others [2013] eKLR

2. Musikari Nazi Kombo V. Moses Masika Wetangula & 2 Others [2013] eKLR

The application is vehemently opposed. Counsel for the 1st and 2nd Respondent submitted that in this application the applicable law is Section 82 of the Elections Act and Rule 29 of the Elections Petition Rules 2017. Counsel stated that the primary consideration in an application for scrutiny was laid by the Supreme Court in **Nathif Jama Adama V. Abdikhaim Osman Mohamed & 3 Others [2014] eKLR** where it was held –

“It emerges that, the primary considerations in determining whether to grant scrutiny, are whether there are polling stations with a dispute as to the election results; whether such a state of affairs has been pleaded in the petition; and whether a sufficient basis has been laid – to warrant the grant of the application for scrutiny.

But it is crucial that the polling stations which are the subject of a possible scrutiny, would have been already signalled in the pleadings, as having contested results. This is the import of the wording of Rule 33(1) of the Elections Petition Rules that an application for scrutiny can be applied for at any stage. A foreshadowing of such an application should have been embodied in the main lines of pleading, which mark out the terrain of any legitimate electoral contest.”

Counsel submitted that the Petitioner has not laid a basis for scrutiny in the petition and the affidavits; that most of the polling stations referred to in the submissions were not pleaded and that none of the polling stations were mentioned in the application itself. Counsel also submitted that the polling stations pleaded in the petition were abandoned and those remaining cannot alter the result of the election given that the margin was over 5000 votes yet what the Petitioner should be added is 387 votes. Counsel further contended that the Petitioner did not dispute the legality of Forms 35 A which are the final and primary documents for declaring results. Counsel submitted that electronically transmitted results are merely provisional and cannot help this court to determine the dispute at hand. Counsel contended that none of the Petitioner’s agents called as witnesses pointed to an irregularity which would justify scrutiny. Counsel urged this court to dismiss the application with costs to the 1st and 2nd Respondents. In support of the submissions Counsel relied on the following other cases –

- **Wavinya Ndeti V. Independent Electoral and Boundaries Commission & 4 Others [2013] eKLR**
- **Odalo Makajwando Abuor V. Dalmas Otieno Anyango & 2 Others [2013] eKLR**
- **Dakianga Distributors (K) Ltd. V. Kenya Seed Company Limited [2015] eKLR**
- **Ksm Election Petition No. 3 of 2017**
- **Jackton Nyanungo Ranguma V. Independent Electoral and Boundaries Commission & 2 Others**
- **Phillip Osore Ogutu V. Michael Onyura Aringo & 2 Others [2013] eKLR**
- **Gideon Mwangangi Wambua & Another V. Independent Electoral and Boundaries Commission & 2 Others [2013] eKLR**
- **Phillip Munge Ndolo V. Omar Mwinyi Shimbua & 2 Others [2013] eKLR**

Counsel for the 3rd Respondent submitted that an application for scrutiny must be clear, concise and specific and an application couched in general terms ought not to be allowed as it would amount to requiring the court to tally the entire election once again. Counsel submitted that Section 33(4) of the Election Petition Rules obliges a party to name polling stations in which results are disputed and that as a general principle scrutiny should be allowed only in polling stations that were pleaded and any prayer which goes outside of the pleadings ought to be rejected. Counsel submitted that out of the 23 polling stations in Category 1 only three to wit, Uiri 2, Ulamba 2, Karariw 2 and Karariw 3 are in the pleadings. He urged this court to disregard those not pleaded.

Counsel further submitted that the standard of proof in an application for scrutiny is prima facie evidence of disparity, irregularity and/or malpractice and pointed out that not a single witness called by the Petitioner succeeded in elaborating the claims made in the petition sufficiently to warrant scrutiny; that the Petitioner himself admitted that out of the Form 35 As he received from his polling station agents he only had a problem with three polling stations to wit Migosi, Malele and Ulamba where he felt he was denied an aggregate of 383 votes. Counsel submitted that for Malele there was an apparent misalignment of votes obtained by each candidate in Form 35A and that the same was a genuine error which however cannot affect the result. Counsel further pointed out that out of the 70 polling stations listed under Category 2 only 3 – Maliera, St. Teresa's and Yala Township were pleaded in the petition and that the Petitioner had abandoned his claim in regard to the same and he cannot now be heard to ask for scrutiny in the 3 polling stations. Counsel contended that whereas the polling stations may be mentioned in the Petitioner's Supplementary affidavit the fact remains that they were not pleaded in the petition and an affidavit ought not to amend a petition.

In regard to Category 3 polling stations Counsel submitted that these too were not pleaded and should be disregarded otherwise it would be an abuse of the court process to allow a party to use scrutiny to obtain new evidence.

For Category 4 polling stations Counsel stated that there was dishonesty in asking for scrutiny in polling stations which had been abandoned. He urged this court to reject the invitation.

Likewise for Category 5 Counsel submitted that none of the 94 polling stations were pleaded in the petition and stated that the 1st Respondent rather than the Petitioner is custodian of election materials and that as the Petitioner had no problem with the results in the Form 35 As given to him by his agents he has no basis to ask for scrutiny. For Category 6 Counsel for the 3rd Respondent submitted that the submissions to support the same are a departure from the pleadings since only St. Teresa's polling station which in any case was abandoned by the Petitioner in his evidence was pleaded in the petition. He termed the prayer for scrutiny a wild goose chase to chance or stumble on some irregularity.

As for the logs, Counsel submitted that even those provided by the 1st and 2nd Respondent could not aid the Petitioner as he did not specifically indicate where he was denied votes from the logs and scrutiny does not therefore lie. Counsel stated that scrutiny of documents will not achieve anything in this case as the same will be geared at confirming how many ballot papers were in each packet and whether the used and unused tally with the votes cast. Counsel urged this court to bear in mind that there will be instances of voters who spoil their ballot papers and are issued with other. Counsel contended that scrutiny of documents would not aid in establishing whether the Petitioner's supporter in Sinanga was indeed assaulted, whether there was bribery, intimidation or undue influence. Counsel also contended that no evidence of ballot stuffing was adduced and that this court cannot help a litigant to look for evidence. On electronic transmission Counsel submitted that the same was mandatory only in the Presidential election and that in this election all results were relayed to the tallying center through the physical Form 35 As which in any event were verified by the Party agents and signed. Counsel urged

this court to find the application has no merit noting that the petition itself does not state the results being challenged. Counsel wondered why the Petitioner filed this petition if indeed he does not know how many votes were garnered by the 3rd Respondent. He contended that whereas the Petitioner claimed he himself did not know how many votes he obtained his votes were became clear when he was taken through his own evidence. Counsel urged this court to find that the Petitioner has not come to court with clean hands, that his evidence was inconsistent and lacked corroboration and to dismiss this application with costs. To support his submissions Counsel for the 3rd Respondent cited the following six decisions.

- 1. Thomas Matwetwe Nyamache V. Independent Electoral and Boundaries Commission (IEBC) & 2 Others [2017] eKLR;**
- 2. Justus Gesito Mugali M'mbaya V. Independent Electoral & Boundaries Commission & 2 Others [2013];**
- 3. Benjamin Ogunyo Andama V. Benjamin Andola Andayi & 2 Others [2013] eKLR;**
- 4. Esther Waithira Chege V. Manoah Karega Mboku & 2 Others [2014] eKLR;**
- 5. Mohammed Mahat Kuno V. Abdikadir Omar Aden & 2 Others [2013] eKLR; and**
- 6. Election Petition No. 3 of 2017 Jack Ranguma Vs. Independent Electoral and Boundaries Commission & 3 Others.**

DETERMINATION

This court's power to order for scrutiny is anchored upon Section 82(1) of the Elections Act and Rule 29 of the Election Petition Rules 2017. These two provisions are categorical that what is scrutinized is the validity of the votes. To this end Section 82(2) lays out the category of votes which must be struck out following scrutiny.

"82 (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 authorized 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."**

Rule 29 (4) on the other hand provides that scrutiny of the votes may include 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.”

In my view the examination of the documents is not an end in itself but is intended to aid in the scrutiny. Rule 29(1) of the Election Petition Rules makes it clear that scrutiny of the votes is for purposes of establishing the validity of the votes cast. Scrutiny is different from recount of votes and examination of tallying which are provided for under Rule 28 and the two should not be confused.

It is now settled that scrutiny shall be ordered only in the polling stations in which results are disputed. Rule 29(4) of the Election Petition Rules provides that the scrutiny or recount ordered shall be confined to the polling stations in which the results are disputed. This was emphasized by the Supreme Court in **Nathif Jama Adama V. Abdikhaim Osman Mohamed & 3 Others [2014] eKLR** where it stated -

“It emerges that, the primary considerations in determining whether to grant scrutiny, are whether there are polling stations with a dispute as to the election results; whether such a state of affairs has been pleaded in the petition; and whether a sufficient basis has been laid – to warrant the grant of the application for scrutiny.”

“But it is crucial that the polling stations which are the subject of a possible scrutiny, would have been already signalled in the pleadings, as having contested results. This is the import of the wording of Rule 33(1) of the Elections Petition Rules that an application for scrutiny can be applied for at any stage. A foreshadowing of such an application should have been embodied in the main lines of pleading, which mark out the terrain of any legitimate electoral contest.” (Underlining mine).

From the above decision of the Supreme Court to succeed the applicant must also have pleaded the polling stations the subject of the application in his petition.

This of course follows the well established principle that parties are bound by their pleadings. (See **Raila Amolo Odinga & Another V. Independent Electoral and Boundaries Commission and Others [2017] eKLR** where the court observed –

“[62] Having addressed our minds to the above issues, it is our view that first, we note that as correctly argued by Counsel for the 3rd Respondent, a party must be bound by its pleadings”

This principle also finds merit in **Mahamud Muhumed Sirat V. Ali Hassan Abdirahman & 2 Others [2010] eKLR** where it was held:-

“It is trite law that a decision rendered by a court of law shall only be on the basis of the pleadings that have been filed by the party moving the court for appropriate relief. In the present petition, this court declined the invitation offered by the petition that required of it to make decisions in respect of matters that were not specifically pleaded”

An applicant must also lay a basis for the application - In **Gatirau Peter Munya V. Dickson Mwenda Kithinji & 2 Others S.C. Petition No. 23 of 2014 [2014] eKLR** the Supreme Court in setting out the guiding principles with respect to scrutiny stated –

“....

(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.”

It is against that backdrop that I must determine the application by the Petitioner. Counsel for the Petitioner placed the polling stations in various categories and I propose to deal with the categories as listed.

1. Categories of Polling Stations where the number of votes in Form 35 B far exceeds the number of voters biometrically identified, verified and authenticated.

Under this category the Petitioner has listed 23 polling stations. In his petition the Petitioner has set out the grounds for the petition under various heads which are in bold and are underlined. None of those grounds raises the issue of Form 35 B having a higher number of votes cast than the number of voters biometrically identified or authenticated. The closest the petition comes to this issue is in paragraphs 18 – 23 and in paragraph 51 – 58 where it is pleaded that the transmission of results completely failed to conform to both the letter and spirit of the Constitution and the Election Act. The Petitioner’s complaint under that head is that transmission of the results electronically failed on a massive scale and that Presiding Officers were forced to scan and send the results at locations other than at the polling stations thereby exposing the process to manipulation and possible rigging. At paragraph 55 of the petition he avers that it is for that reason that he sought an order that the 1st Respondent furnish this court with copies of all the transmission logs, scanned results and certified GPRS Coordinates from where the results were sent. He has not in the entire petition pleaded that there were discrepancies in Form 37 B and in the logs. I agree with Learned Counsel for the 1st and 2nd Respondents and also Counsel for the 3rd Respondent that this category should and must not be allowed not only because the polling stations listed are not pleaded as stations where the votes are contested but also because that is a new issue being raised in the submissions and to allow it would be aiding abuse of the court process.

Category 2 – Polling Stations where the 1st Respondent failed, refused and/or neglected to provide biometric data despite a court order.

The Petitioner in prayer (b) of the petition and Prayer 4 of the Notice of Motion dated 6th October 2017 sought an order that the 1st Respondent furnishes this court with the logs. This court in granting the order and noting that it did not of itself require the said logs modified the order to the supply of the logs to itself the Petitioner and the Respondents. As I have stated a plain reading of the prayer as read together with paragraphs 18-23 and paragraphs 51–55 of the petition give the impression that it was intended to prove the Petitioner’s ground that results were not electronically transmitted and where it was done it was at a location other than that prescribed in the regulations thereby exposing the results to manipulation as they would not be verified by the polling agents as required. Nowhere is the issue of voter turn out in the KIEMS KITS vis a vis Form 35 B raised. The reason this court made the order for supply of the data was because of the overriding objective of the Election Petition Rules given the limited time for hearing of election petitions. It was not so as to aid the Petitioner to fish evidence for issues that were not pleaded in the first place. In **Wavinya Ndeti V. IEBC & 4 Others Machakos Petition 4 of 2013** cited with approval in **Phillip Munge Ndole V. Omar Mwinyi Shimbwa & 2 Others [2013]** eKLR Majanja J held, and I agree with him:-

“The results announced and declared by the IEBC enjoy a presumption of constitutionality and legality and a Petitioner has 28 days from the date of the declaration to seek evidence he or she required to mount an election petition. To proceed on a course outside the confines of the petition is not warranted in the circumstances of this case.”

I do also agree with M. Odero J’s holding in **Phillip Munge Ndolo** (Supra) that a Petitioner will not be allowed to construct his case as he goes along which is exactly what the Petitioner is trying to do by demanding scrutiny of all the 70 polling stations where the KIEMS were not supplied. What are we to expect from such scrutiny” More importantly it is not pleaded that the results in those polling stations where the KIEMS data was not supplied were disputed. Again the application for scrutiny in this category is not only mischievous and misconceived but is also an abuse of the court process.

Category 3 – Polling stations where either all candidates got exactly the same number of votes; or the petitioner garnered the exact number of votes in different polling centres within the same station/school

The impugned polling stations under this head are Karariw streams 2 and 3, Kojuk streams 1 and 2 and Gogo streams 1 and 2 where it is alleged that either the total votes cast for each candidate or the total valid votes cast, rejected votes, the number of persons biometrically identified or the votes garnered by the Petitioner match in both streams. However those were not the issues pleaded in the petition in regard to those polling stations. For instance for Karariw Primary School Polling Station the complaint was that Form 35 A was missing for both polling stations 2 and 3. The issues raised in these stations were not pleaded in the petition and cannot be raised now. The same would also apply if they were raised in the supplementary affidavit, which they were not, as that would amount to amending a petition and a petition once filed cannot be amended whether by an affidavit filed with leave of the court or through evidence. In **Phillip Osoro Ogutu V. Michael Onyura Aringo & 2 Others [2013]** eKLR Tuiyot J refused to look at such evidence and observed –

“..... There can be no quarrel with the principle that any evidence that goes beyond pleadings must either be rejected out right or disregarded”

Likewise this court is not obliged to look at that evidence. In my view the Petitioner having raised these

new issues now wants this court to order scrutiny to confirm his position. This clearly is a fishing expedition which I should not permit. It is also a classic case of a Petitioner constructing his case as he goes along.

Category 4 – Polling stations where the petitioner has demonstrated that the results he garnered according to Form 35 A are evidently different from those finally posted in Form 35 B

All the polling stations listed under this head were pleaded at paragraph 39 of the petition. However during the hearing and more so during cross-examination the Petitioner abandoned most of the polling stations. He abandoned Maliera 3, Yala Township Primary School stream 2, Sagam Polling Station 3 of 3, St. Teresa's Primary School 2 and Aluor Girls Primary School (2). In his testimony he gave varied reasons for dropping those polling stations and it is dishonest of him to ask for scrutiny in those very polling stations.

As for Uriri Primary School polling station 2 his allegation was that the results were altered to his detriment. However during cross-examination he conceded that the 250 votes that he garnered were correctly transpolated to Form 35 B. It would therefore be unnecessary to order scrutiny for that polling station.

For the remaining polling stations –

- Malele Primary School
- Migosi Primary School
- Ulamba Primary School

the 1st Respondent and 2nd Respondent conceded there were errors in the transpolation of results for the Petitioner from Form 35 A to Form 35 B which affected his results by a sum of 387 votes. That is the number of votes that the Petitioner testified he was denied. To quote him **“The total number of votes deducted from me was 387” (see cross-examination by Mr. Were for the 3rd Respondent)**. There is therefore no dispute concerning the votes in those three stations and accordingly there is no requirement for scrutiny.

Category 5 – Polling stations where Form 35 As were not stamped as required

Under this category the Petitioner has listed 94 Form 35 As which he alleges were not stamped as required by the law. He urged this court to order scrutiny of all those Form 35 As and prayed that the exercise involve scrutiny of all Form 35 As that were electronically transmitted through the KIEMS devices. With due respect the Petitioner has in the fourth column himself shown that the forms were stamped. The burden to prove that the stamps on that form were forged later as he alleges is upon him. He cannot use scrutiny to look for evidence. Moreover it is in the law and in the rules, and I have in this ruling through several authorities demonstrated this, scrutiny can only be done in polling stations where the votes were disputed. The Petitioner has not demonstrated that other than the issue of stamping he had a dispute in the votes returned through those forms. Examination of documents is supposed to aid in the scrutiny of the validity of the votes but is not an end in itself.

Catergory 6 – Polling stations where numbers were illegally inflated

The Petitioner has listed ten polling stations where he alleges the 3rd Respondent's votes were inflated.

If I get him right it is his submission that the votes transpolated to Form 35 B are not what the 3rd Respondent obtained in Form 35 A. Of the ten polling stations only 2 polling stations namely St. Teresa's Girls Polling Station 2 and Sagam Primary School Polling Station 2 were pleaded in the petition. It is instructive that the Petitioner's application is being considered upon hearing his evidence that he in fact did his own tally from Form 35 As which were obtained by his agents in the polling stations and that he had no issue with the results in those Form 35 As. What he raises here are errors in the transpolation of the results from Form 35 As to Form 35B. Whereas that may be an issue of evidence it cannot be the basis for scrutiny as it is trite that it is the results in Form 35 A that are final. In his evidence he stated that the variance between his tally and the 1st Respondent's tally in respect to his own votes was -329 whereas the 3rd Respondent's was +100. When he was cross-examined by Mr. Wasuna, Learned Counsel for the 3rd Respondent, he confessed that he was not disputing the votes but the process. He stated – **“It is correct that I am not disputing numbers but the process.”** All in all the Petitioner has not specifically flagged out polling stations where the votes could be struck out, or indeed any polling station with a vote that could lawfully be struck out under Section 82(2) of the Elections Act which is what was expected of him in this application. It would appear that his main intention is to look for evidence upon which this election would be nullified. His application clearly has no merit and is dismissed with costs to the Respondents.

It is so ordered.

Signed, dated and delivered at Siaya this 7th day of December 2017

E. N. MAINA

JUDGE



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