



Case Number:	Election Petition 2 of 2017
Date Delivered:	27 Feb 2018
Case Class:	Civil
Court:	Election Petition in Magistrate Courts
Case Action:	Judgment
Judge:	Hon. Dr. Julie Oseko
Citation:	Dickson Karani Yaa v Independent Electoral and Boundaries Commission & 2 others [2018] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Kilifi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Petition dismissed
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
<p>The information contained in the above segment is not part of the judicial opinion delivered by the Court. The metadata has been prepared by Kenya Law as a guide in understanding the subject of the judicial opinion. Kenya Law makes no warranties as to the comprehensiveness or accuracy of the information.</p>	

**REPUBLIC OF KENYA**

**IN THE CHIEF MAGISTRATES COURT**

**AT KILIFI**

**ELECTION PETITION NO.2 OF 2017**

**IN THE MATTER OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE ELECTIONS ACT NO.11 OF 2011**

**AND**

**IN THE MATTER OF THE ELECTIONS**

**(PARLIAMENTARY AND COUNTY ELECTIONS) PETITION RULES,2017**

**BETWEEN**

**DICKSON KARANI YAA..... PETITIONER**

**AND**

**INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION.....1<sup>ST</sup> RESPONDENT**

**ABDIWAHID HUSSEIN- RETURNING OFFICER**

**KILIFI NORTH CONSTITUENCY.....2<sup>ND</sup> RESPONDENT**

**EMMANUEL CHANGAWA KOMBE..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

**DICKSON KARANI YAA** (hereinafter referred to as ‘the Petitioner’) filed this petition on the 4<sup>th</sup> September 2017. This Petition arises from the conduct of the general elections held on the 8<sup>th</sup> August 2017 which results were announced on the 11<sup>th</sup> August 2017. It relates to the Member of County Assembly position and in particular the Dabaso Ward in the Kilifi North Constituency situate in Malindi Sub-County of Kilifi County, The Petition is brought pursuant to the Constitution of Kenya 2010, the Elections Act No. 11 of 2011 and the Parliamentary and the County Elections Petition Rules, 2017.

**ABDIWAHID HUSSEIN**, the 1<sup>st</sup> Respondent was the duly appointed and gazetted as the Returning Officer for Kilifi North Constituency, an employee/agent of the **INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (IEBC)**, the 2<sup>nd</sup> Respondent which is the body charged with the mandate and responsibility to conduct and/or supervise referenda and elections to any elective body or office and any elections under Kenyan electoral laws. **EMMANUEL CHANGAWA KOMBE** (hereinafter referred to

as the 3<sup>rd</sup> Respondent was one of the candidates who contested the Dabaso Ward seat and was declared the winner by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. He is the current sitting Member of the County Assembly Dabaso Ward in the Kilifi County Assembly.

The Petitioner being dissatisfied with the with the election results as declared by the 2<sup>nd</sup> Respondent and further confirmed by the 3<sup>rd</sup> Respondent has sought *inter alia* the following reliefs from this court:

### **Reliefs Sought**

- a. Immediately upon filling of this petition, the 1<sup>st</sup> Respondent do produce, avail and allow access for purpose of this petition by the court and the parties all election material in respect of Dabaso ward county election within seven(7) days.
- b. A specific order for scrutiny and re-count of all the votes cast in the Dabaso Ward member of county Assembly elections held on 8<sup>th</sup> August 2017 and thereafter re-tallying of all valid votes cast for each candidate in Dabaso ward.
- c. A declaration that the 3<sup>rd</sup> Respondent was not duly elected and that the election was void.
- d. A declaration of which candidate was validly elected.
- e. An order as to whether a fresh election should be held in Dabaso ward.
- f. Costs of the petition.

### **Grounds of the Petition**

The reliefs sought as outlined above were grounded upon the following issues;

1. That the petitioner was leading by 378 votes and was called by the returning officer to the Pwani university tallying centre to collect his winners' certificate only to be shocked when the certificate was given to the 3<sup>rd</sup> Respondent.
2. That the results declared by the 2<sup>nd</sup> Respondent in form 36B shows that the 3<sup>rd</sup> Respondent had 1901 votes and the petitioner had 1802 votes a difference of 99 votes.
3. That the Petitioner on perusing form 36B in respect of Dabaso Ward noted that votes in his favour in respect of Dabaso primary school polling centre with five polling stations and Dongo Kundu primary school polling centre with two stations as entered in form 36B by the 2<sup>nd</sup> Respondent differed with the votes announced at the said polling stations.
4. That the tallying of the votes from Dabaso primary school and Dongo Kundu primary school polling centers as indicated in form 36B were erroneous as the Petitioner had been informed by his agents that at these two polling centres he had more votes than what is indicated in form 36B.
5. That due to the wrong tallying of the votes from the five polling stations of Dabaso primary school and the two polling stations in Dongo Kundu primary school he was denied victory and the 3<sup>rd</sup> Respondent was erroneously declared the winner.
6. That if the votes from the said seven polling stations are re-counted and re-tallied, by this court, the

Petitioner will emerge the winner of the election.

As a result of the above outlined grounds, the Petitioner is convinced that the county election was so badly conducted, administered and managed by the 1<sup>st</sup> Respondent that it failed to comply with the attendant laws and the constitution. To support the issues raised in the petition, the petitioner filed an affidavit so did he witness in his affidavit. All the 3 Respondents upon being served with the Petition responded to the petition. Upon completion of pleadings directions as to the manner this petition was to proceed were taken pursuant to which it was ordered by consent of all parties that:

1. Ballot papers and other election materials and documents be sealed by the court on 21<sup>st</sup> November 2017. Specifically they were:-

Form 36A – 22 pieces

Form 36B – 1 piece

Form 36C- 1 piece

The same was due on 21/11/2017. The petition was then set down for hearing.

This court having considered the petition, replies to the petition, affidavits filed, annexures, evidence tendered by all parties, issues raised in cross examination, submissions filed and authorities cited, finds the following issues are in dispute and us subject to the determination by this court:

- Whether the court should order for scrutiny of the specified forms and also order for a recount of all votes at Dabaso ward.
- Whether the election of the 3<sup>rd</sup> Respondents should be nullified and fresh elections held.

### **SCRUTINY AND RECOUNT OF VOTES**

This court will commence to determine the request for scrutiny and recount of votes. The basis for the same was to be laid out in the evidence tendered viva voce at the hearing of the petition. Should the petitioner satisfy the court that scrutiny and recount should be done then that exercise will proceed and the final judgment will be delivered after recount and scrutiny. Should the court find that no basis has been laid to justify scrutiny and recount of votes then the court will proceed and determine the remaining issues in the Petition. Thus, the issue for consideration under this head is whether this court should order scrutiny and recount of the vote in terms of prayer (b) of the petition and (e) and (f) of the Notice of Motion dated 10<sup>th</sup> October 2017 which states;

***a specific order for scrutiny and recount of all votes cast in Dabaso Ward Member of County Assembly elections held on 8<sup>th</sup> August, 2017 and thereafter re-tallying of all valid votes cast for each candidate in Dabaso Ward.***

The law on scrutiny and recount is well settled.

Section 82(1) of the Elections Act 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 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 provides that:

**“A petitioner may apply to an elections court for an order to-**

**(a) recount the votes; or**

**(b) examine the tallying, if the only issue for determination in the petition is the count or tallying of votes received by the candidates.”**

The relevant part of Rule 29 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 provides that:

**“(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.”**

The law is very clear, the court has discretionary power to order for scrutiny. It is also clear from **Section 82(1)** of the Elections Act that the court may *suo moto* make an order for scrutiny. See **Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR** on the rulling dated 28th Day of August, 2017 . Any of the parties are of course at liberty to apply for the scrutiny and or recount.

***At what stage is an application for scrutiny made"***

It may be done at any stage in the proceedings see the Supreme Court decision in **Nicholas Kiptoo Arap Salat v Independent Electoral and Boundaries Commission & 7 Others [2015] eKLR**

***What is the purpose of scrutiny or recount"***

Scrutiny and recount serve different purposes. The purpose of scrutiny as per **Rule 29** of Elections (Parliamentary and County Elections) Petitions Rules, 2017 is to determine the validity of votes cast. In **Idris Abdi Abdullahi v Ahmed Bashane & 2 others [2017] eKLR** the High Court held that

*“Recount simply means to count something again. Scrutiny includes the careful and detailed examination of something in order to get information about it and critical observation or examination.”*

The High Court held in **Phillip Mukwe Wasike v James Lusweti Mukwe & 2 Others [2013] eKLR** that :

*“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”*

The purpose is not intended for a fishing expedition - see the Court of Appeal decision in **Peter Gichuki King'ara v Independent Electoral and Boundaries Commission & 2 Others eKLR**

It is against the backdrop of the law as succinctly set above that this court will now proceed to consider the pleadings and evidence tendered before it in order to determine whether the petitioner has made out a case to warrant scrutiny and recount of votes cast in Dabaso Ward.

### **Petitioner's Submissions**

The Petitioner, in his pleadings and evidence in court has requested for scrutiny and recount of votes in seven polling stations namely: Dabaso primary school polling stations 1,2,3,4, and 5 and Dongo Kundu primary school polling stations 1 and 2.

The evidence of the petitioner is that he garnered more votes in the said seven polling stations than the votes declared in form 36A from the said seven polling stations. The petitioner further pointed out that the votes from the 21 form 36As filed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent in answer to his petition, shows that the petitioner leads the 3<sup>rd</sup> Respondent by **5 votes**. The petitioner further stated that it is only the result from the one station that is missing from form 36As filed by IEBC in court that tilted the election results in favour of the 3<sup>rd</sup> Respondent.

That one polling station he insists, is Dabaso primary school polling station 1 of 5 whose form 36A is filed by the 3<sup>rd</sup> Respondent in his replying affidavit. The form 36A for Dabaso primary school polling station 1 to his mind reveals that:

- i) There are nine cancellations
- ii) The form is not stamped with IEBC stamp.
- iii) From the cancellations the 3<sup>rd</sup> Respondent's votes were changed from 45 votes before cancellations to 114 votes after cancellations.

The petitioner urged the court to agree with him that this is the polling station that tilted the results in favour of the 3<sup>rd</sup> Respondent. Dabaso Primary School polling Station 1 is one of the seven polling stations wherein the petitioner is demanding for a re-count and scrutiny of votes. The above anomalies, petitioner submitted establishes a *prima facie* case to warrant the court to permit the recounting of the votes in the seven polling stations.

### **The 1<sup>st</sup> and 2<sup>nd</sup> Respondents Submissions**

The 1<sup>st</sup> and 2<sup>nd</sup> Respondents on the other hand submitted that the prayer for scrutiny and recount of votes is general and ambiguous. The petitioner has not particularized the polling stations in which he would require scrutiny and/or recount of votes in his petition and application. He has also not identified the number of votes in dispute at the seven polling stations mentioned in his application.

They cited the Supreme Court in the case of **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR**, laid down the principles that should guide the court before making an order of scrutiny and the conditions that must be satisfied in the following terms:

**“From the foregoing review of the emerging jurisprudence in our Courts, on the right to scrutiny and recount of 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.”

The court in their view cannot grant a blanket order of scrutiny in all polling stations unless the same was pleaded as disputed results in the petition. They argued that according to section 33 (4) of the Election (Parliamentary and County Election) Petition Rules, 2013, scrutiny shall only be confined to the polling stations in which results are disputed.

They referred the court to the case of Gideon Mwangangi Wambua & another v Independent Electoral & Boundaries Commission & 2 others [2013] eKLR, wherein the petitioners sought scrutiny and recount of votes in all the polling stations in the said constituency. In finding that there was insufficient pleading, and a lack of particularity of facts upon which an order for scrutiny could be granted, the court held that an order for scrutiny cannot be ordered where the petitioner has not specifically pleaded for it in the petition. They also cited Justice Kimaru in Rashad Hamid Amed Amana V. IEBC – Election Petition No. 6 of 2013 - Malindi wherein the learned judge held that scrutiny must be specifically pleaded in the petition. The petitioner has to state the specific polling stations that he alleges there were irregularities and should therefore be scrutinized. They submitted that a recount of votes can only be ordered where a party seeking it has established a prima facie case. That the petitioner has failed to provide the Court with proof that there were any irregularities experienced during the voting exercise, tallying and announcing of results.

Finally, they submitted that from the evidence adduced during the hearing of the petition, it is safe to say that the petition is riddled with generalities that are insufficient in assisting the Court to make an order for scrutiny and recount of votes at Dabaso Ward. The effect of failing to particularize the polling stations and the number of votes in dispute is that the petitioner has not laid any basis on why the specific order of scrutiny and recount of votes should be granted. They urged the court to dismiss the request for recount and scrutiny.

### **The 3<sup>rd</sup> Respondents Submissions**

The 3<sup>rd</sup> Respondents submitted that the power to so order is discretionary on the part of the court. But discretion is residual power which the court only uses to advance justice and in any case, judiciously. The court would have to believe that the allegations are well founded in truth which can only come from evidence and yet that the test has not been met. He submitted that for the court to order a recount, the petitioner must establish by evidence that he has reasonable grounds to question the veracity of the counting and tallying. A recount should not be ordered merely because the petitioner sees the possibility of a path to victory or on the basis of entertained hope that if a recount is ordered, he might come out in the lead.

He argued that no basis has been laid in the evidence before court to justify interference with the declared result. Indeed the court ordered the resealing of the ballot boxes for Dabaso ward. This is the reason why the notice of motion for a recount was synchronized with the substantive hearing of the petition so as to give the court an opportunity to have a well-informed background on the conduct of the election precisely so that the evidence in support of the prayer for a recount can be weighed. Hence the threshold for ordering a recount has not been met by the petitioner and the prayer should therefore not be granted. The petitioner, he states should not be encouraged to go on a fishing expedition intending in the process to come across some infraction on the part of the which he can then rely on to invite interfere with the exercise of the free will of the people of Dabaso to elect their representative to the county assembly.

### **Analysis of Evidence and Determination**

In this case the Petitioner grounds his petition on the basis of 99 votes difference between himself and the 3<sup>rd</sup> Respondent. He is particular that it is the form 36As relate to the 7 polling Stations namely Dabaso Polling Station which has five Polling Stations and Dongo Kundu Primary School which has two Polling Stations are the ones he wishes that this court scrutinizes. With regard to the recount the petitioner is desirous that all votes cast in Dabaso Ward should be recounted.

The basis of his pleadings and his testimony in court is that the votes that were announced at the polling stations were different from the votes recorded in Form 36As. That this is why he believed that he got more votes than the 3<sup>rd</sup> Respondent. How he came to this knowledge that the announcements were flawed or incorrect was because his agents who were present at the respective polling stations at the times of announcements told him so after the announcements were made.

These agents are the ones who told him that they, the agents, heard numbers being announced which numbers were incompatible with the form 36As. For example in Dabaso Primary School polling station Number 1, he was told that he got 108 votes but only 15 were recorded. In Dongo Kundu Primary School Polling Station he got 22 votes but only 7 were recorded etc. This assertion is reiterated by his Chief Agent (PW2) one Kitsao Ngowa who was in charge of all the agents and whose duty was to supervise the activities of the agents. That is the main basis upon which the Petitioner justifies his perceived win and seeks a recount of all votes.

These agents were not called as witnesses in the petition. The Petitioner and his witness admit in the evidence in chief and in cross examination that they were not present at the respective polling stations in dispute when the said incorrect announcements were made. They do not know the names of the specific agents who reported these incorrect announcements to them. They do not know their signatures. They therefore confirm positively whether they were there or not. The Petitioner's witness too could not produce evidence that he was an accredited agent for the Petitioner. The basis upon which the Petitioner



wishes the court to believe that the announcements made were irregular is therefore hearsay and the truth of it cannot be ascertained. It inexorably follows that the basis upon which the petitioner also counts his perceived votes that puts him ahead of the 3<sup>rd</sup> respondent is also based on hearsay evidence. That omission offends the law as relates to admissibility of evidence and seriously compromises the basis of the Petitioner's case. The question which begs for an answer at this point is whether a sufficient basis has been laid to justify a scrutiny of some Form 34As or a recount of all votes cast in Dabaso Ward.

But even if the court was to overlook the omission to call the witness and *suo motto* (see the case of **Jacob Mwirigi Muthuri V John Mbaabu Muriithi and 2 Others** 2013 eKLR) and look into the substance of the Petitioner's pleadings, it would the court still allow a recount" This is considering with regard to Dabaso Primary School Polling Station Number 1, where the petitioner alleges that he got five votes more than the 3<sup>rd</sup> respondent. After being cross examined by the counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondent on all the Forms 36A which had been attached to the Reply to the Petition regarding the disputed stations, he responds thus "...I have issues with Dabaso Primary School Polling Station Number 1. The rest are okay". Tentatively he abandons the claim to recount on the other six polling stations he initially alleged that he was told he won. That is how he comes up with five votes ahead of the 3<sup>rd</sup> Respondent. But even if the court was to accept that he is five votes ahead what will be clear is that those five votes will not grant him a win considering the 99 vote difference between them. The Petitioner is not certain as a fact of how many votes he was leading with and is asking the court to go with him on a fishing expedition to ascertain whether he won or not. That does not in my view change fact that the basis of his demand for recount is based on hearsay.

The Petitioner is also relying on the documents filed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to prove his claim to recount. In the Petition he only complains of the polling stations in Dabaso Primary school and Dongo Kundu Primary School. In his evidence in court the petitioner spills over beyond the polling stations he has complained about in his petition. He and begins to complain about other polling stations like Children of the Rising Sun, Msabaha, Mpenda Gali, Mida and Mzima Primary School. He states that the Form 36As are missing. He then calculates the votes as per the annexures of then puts himself 5 votes above the respondent. These other polling stations are not mentioned in the petition the Respondents were not put on notice that they would be relying on this evidence in order to enable them to reply or call evidence in rebuttal or clarification. This issue also is also not part of the prayers sought in the petitioner's case. In **Raila Odinga & Others v IEBC 7 others** SC Petition No. 5 of 2013 the learned judges stated that

"...a Petitioner should be under obligation to discharge the initial burden of proof before the respondents are invited to bear the evidentiary burden." The Petitioner herein is asking this court to the Court unearth new evidence on the basis of which the Petition could be sustained or a recount allowed. It must be noted that the 1<sup>st</sup> and 2<sup>nd</sup> respondents did attach all the forms 34A's and that in the course of submissions and hearing of the petition the same have been actually subjected to a thorough scrutiny by all parties. He now wishes to scrutinize the evidence of the respondents without himself first discharging his evidentiary burden.

The purposes of a recount as clearly stated by the superior courts in cases cited above is clear. In particular, this courts in its determination on the request for scrutiny and recount is guided *mutatis mitandis* by the case of **Gideon Mwangangi Wambua & another v Independent Electoral & Boundaries Commission & 2 others [2013] eKLR** wherein the learned judge clearly set out the issues to be considered in allowing or disallowing a recount. His lordship stated that;

***"The aim of conducting scrutiny and recount is not to enable the Court [to] 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 petition 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.”***

In this case some of the allegations are not in the pleadings, but those which are captured therein are wrought with hearsay, and not supported by cogent verifiable evidence. Indeed it turned nebulous when its veracity was tested. This court finds that no reasonable basis has been laid by the Petitioner to justify the orders sought. I agree with the arguments advanced by the Respondents in their submissions and dismiss the arguments made by the Petitioner as to grant the orders will be tantamount to the court allowing itself to be led in a fishing expedition. The issues of cancellation, stamping of the election Forms and other alleged anomalies will be considered as issues relating to the main petition as they cut across other allegations of irregularity. They will be dealt with below in the main petition. Under this heading the burden was on the Petitioner/Applicant to lay the basis for the orders sought and that is what the court has considered.

The upshot of the determination is that the prayer for scrutiny and/or recount of all votes in Dabaso Ward as prayed both in the application and also in the petition is disallowed. Orders accordingly.

**DETERMINATION ON WHETHER THE ELECTION OF THE 3<sup>RD</sup> RESPONDENT SHOULD BE DECLARED VOID AND BE NULLIFIED.**

On the question of where the election of the 3<sup>rd</sup> Respondent should be declared null and void, the Petitioner submitted that the elections were so badly conducted and that there were violations on the constitution and electoral laws sufficient to affect the results of the elections. The contentions of the Petitioner was that elections for Dabaso Ward as conducted on the 8/10/2017 fundamentally violated the law.

In his evidence the Petitioner adopted his affidavit in support of the application. The petition stated that when the results were announced and he was called upon to make comments he recorded on form 36B that he was not satisfied with the results. He raised the following issues.

- **Allegation of Unstamped Forms.**
- ***Allegations of Cancellation of Form 36A from Dabaso polling station 1.***
- **Allegation of Differences in the Certificate of Elected Member of County Assembly (Form 36 C).**
- **Allegation of an Agent being forced to sign Form 36A.**
- **Allegation of the Petitioner being denied entry into the County Tallying Center.**

The court will deal with each issue as identified. On the;

#### **Allegation of 22 Unstamped Forms 36A**

The Petitioner alleges that 22 (twenty two) forms 36A were not stamped with an official stamp. These forms were annexed to the petition of the 2<sup>nd</sup> Respondent. This issue has been partly dealt with on the

issue of scrutiny of votes where4in the Petitioner in cross examination at the hearing of the petition states that he has no problem with them save that of Dabaso primary school polling station number one which he cited cancellations. I see no need to delve into matters already settled as a non-issue as at the date of hearing. To this extent the petitioner has no complaints with the rest of the form 36A which he cited in his petition.

Be that as it may, even if the court takes up the issue as requested in the Petition, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents however went ahead to explain that the failure to physically stamp the forms do no effect the results. The 1<sup>st</sup> Respondent explained that on the material date there were so many others forms that may have failed to be stamped due to oversight. They also explained that the said forms bear the signature and names of officers and that of other agents and all in original form. I have considered this issue. I find that failure to stamp form 34 A without any other allegation of irregularity does not make it invalid. The forms have no features of the 2<sup>nd</sup> Respondents. The forms bear the signatures of the persons entitled to append the signatures on them. The same bear the signatories of the agents not only of the Petitioner but also that of the other candidates. The Petitioner does not appear to have a problem with the figures in terms of votes cast indicated in the form 36A's. *In cross examination, the petitioner confirmed that the Forms that have no Independent Electoral and Boundaries Commission stamps on had been signed by the accredited agents. He also accepted that the said forms had the IEBC logo.*

All that he is telling the court is that there is no stamp and further that the figures indicated therein are not the figures which were announced. The **innuendo** is that he was denied votes at point of announcement and not at the point of entry of data in the respective forms. In his arguments was that the figures indicated are not tallying with the votes cast in his favour then this court could have gone deeper to verify the same.

The Petitioner has not given the names of his agents. He therefore also cannot pin point his agents as against the signatures appended but if his agent did not append his signature but also did not dispute the contents of the forms then he cannot tell with certainty why this is not so.

The only person who can sufficiently allude to the failure and reasons for not stamping the forms was the agent. That agent is not known he did not testify. In the case of **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others** (2014) eKLR it was held that

If party agents are required to be present, sign statutory forms, undertake any other legitimate duty that is imposed upon them as part of the political process in an election, then they are under obligation to do it. To fail to do so is not only to fail one's party, but also to fail our democracy. The courts must frown upon any such inaction, reluctance or delay....a candidate or her agent cannot abscond duty from a polling station, and then ask the court to overturn the election because of her failure to sign a statutory form. Every party in an election needs to pull their own weight to ensure that the ideals in Article 86 are achieved..."

In this case the agents failed the petitioner by not being present to sign the forms or testify to rebut the explanation given by the 1<sup>st</sup> and 2<sup>nd</sup> respondents. The petitioner failed to identify his agents. The court thus had no basis to reject the explanations of the respondent. Consequently, I find in this case the explanations given by the 2<sup>nd</sup> Respondents are valid and sufficiently explain the absence of the stamps. I also find that this omission does not affect the integrity of the elections as there are several other identifying features of the forms as outlined above.

***Allegations of Cancellation of Form 36A Dabaso Primary School Polling Station No. 1.***

With regard to the cancellations on form 36A of Dabaso Primary School Polling Station No. 1, the petitioner stated he was short charged by 45 votes. That the votes he got were reduced by 45 votes. The 1<sup>st</sup> Respondent explained that the same affected all the other candidates and it was on normal cancellations that occur after the votes are counted and tallied. The agents for the other contestants have signed.

But again as in the other alleged irregularities. The petitioner did not identify his agent who was stationed at this polling station. He was not called those other agents of the other contestants who actually witnessed the cancellations to state that they too were shortchanged. I find the explanation by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents plausible considering the fact that it is expected at the time when the votes are being tallied, that there will be mistakes that are corrected at the tallying centre. That is why it is called a tallying centre. This more so because *in cross examination, the petitioner confirmed that he had an agent in Dabaso polling station 1. The said agent alleged that the petitioner had garnered 108 votes instead of the 10 votes recorded on the form 36A. He confirmed that the agent was not a witness in the case. The said agent signed the form accepting the results tallied. The form 36A has been signed by other agents from various parties agreeing with the results recorded in the form as correct. If these cancellations were so manifestly erroneous at least all the other agents whose figures were re-tallied would not have signed.* I find no evidence of malpractice irregularity and illegality in the said alterations.

**Allegation of Differences in the Certificate of Elected Member of County Assembly (Form 36 C). Breach of Regulation 83(1) (Form 36C).**

Under this head the petitioner states that the form 36C issued to the 3<sup>rd</sup> Respondent bears different dates. One that form 36C attained by the 2<sup>nd</sup> Respondent bears a date of 8/8/2017 while the one attached by the 3<sup>rd</sup> Respondent bear the date of 11/8/2017. His submissions is that these are 2 different forms.

The 2<sup>nd</sup> Respondent in his evidence stated that there is no error. He states that the document he annexed was an internal administrative file documents that was supposed to be forwarded to the 2<sup>nd</sup> Respondent as evidence that a certificate had been issued. He further states that the writing of the date as 8<sup>th</sup> August 2017 could have been a mistake on the part of maker of the document. However he states the stamp indicates 11/8/2018 which ameliorates that error. He told the court that no mischief was intended or done but a mishap in printing firm which printed different form 36C format.

Having considered the issue. I find that it is not in dispute that the candidate who was announced as the winner was the 3<sup>rd</sup> Respondent in both the 2 annexures the 2 annexures bears the name and signature of the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent states that he wrote out the certificate. This court would have been more convinced if one certificate bore the name of the Petitioner and the other certificate the name of the 3<sup>rd</sup> Respondent or if two similar certificates with different serial numbers were issued. In this case only one certificate was issued which bore serial number **CA0030110054-1**. I am satisfied with the explanation given by the 1<sup>st</sup> Respondent that the document they attached was for internal purposes only.

In cross examination it was revealed that the 1<sup>st</sup> respondent's Deputy is the one who made the announcement. The 1<sup>st</sup> Respondent explained that after he filled all the forms he suddenly fell sick and had to seek medical attention thus leaving his deputy to make the announcement. The Petitioner has not demonstrated how this action affected the outcome of the result of the election. He has not demonstrated that there was mischief or ill intention or irregularity. Instances where one becomes indisposed can occur and the deputy can take over. The question is whether where such an act occurs so suddenly than an election should be nullified. My considered view is that it is not and the doctrine of necessity set in to ensure that the peoples will is upheld.

Again it must be noted that all through the pleadings and evidence in chief this issue of Form 36C never arose in the petition. Neither did the issue of who made the announcement arise nor was it the basis of the Petitioner's claim and he cannot be allowed to benefit from it.

### **Allegation of the Petitioner being denied entry into the County Tallying Center.**

The Petitioner has also alleged that he was denied entry into the County Tallying Centre. He also alleges that his agents too were at one polling stations denied access to the polling stations. Agents like in the other instances cited above the Petitioner does not have corroboration of his allegations. The specific polling stations that his agents were denied entry are not disclosed. He also does not explain how his failure to access the returning officer affected the elections. He does not identify the specific officer who denied him entry and also the person who announced him as the winner and when he went forward gave the certificate to the petitioner. The County Tallying Centre was situated at Pwani University in Kiliffi. I believe that very many people were present during that time and the Petitioner would have not much difficulty in finding a witness to corroborate his story. He did not.

### **Allegation that the IEBC portal indicated that he was the winner**

The Petitioner alleged that he saw from the IEBC portal display that he was leading the race while the final announcement showed that he lost. The Petitioner did not call for the KIEMS Kit to be produced in evidence of the fact that he was in the lead. He who pleads must prove. This was restated in ***Raila Odinga 2013*** that "It behooves the person thus alleges, to produce the necessary evidence in the first place – and thereafter, the evidential burden shifts, and keeps shifting". He has not proved.

It is also worth noting in the analysis of this evidence that there are several issues raised by the Petitioner during the trial that are not pleaded in this petition. The issue of the two form 36C's which has been analysed above.

There is also the allegations of the agent being forced to sign form 36A at Dabaso Primary School Polling Station Number 4. The petitioner testified that his agents were forced to sign form 36A. He claimed that Alfred Kazungu who was assigned to Dabaso polling station 3 was forced by the presiding officer to sign Form 36A. In cross examination, the petitioner admitted that he did not lodge any complaint with the relevant authorities of the incident. He also named the agent who signed the form at Dabaso polling station 3 as Alfán Chuchu. He was not called as a witness to corroborate the allegation. He stated that the petitioner's agents and 10 others signed Form 36A agreeing with the results of the Dabaso Polling station 4. No person witnessed the agent being forced to sign the form. These are blanket allegations that are based on no cogent evidence. He surprises the respondents with facts that they are unable to respond to having been locked out by the strict timelines such evidence can only be considered to the benefit of the respondents and the Petitioner cannot be allowed to use the weakness of the Respondents case to advance his cause.

With regard to the 3<sup>rd</sup> Respondent the Petitioner has not filed any complaint of any transgressions on his part. For this reason the 3<sup>rd</sup> Respondent was left to play the role of defending his will for the sake of it. He had no single allegations leveled against him. He was not allowed of any malpractices or violation of the law since that he accepted the results as declared by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. In his evidence he did not appear to even object to a recount. He appeared to be saying that he had nothing to hide and he won the elections fair and square.

The only issue that arose was his name as indicated in his identity card and also on the electoral materials when he ably explained there was no allegation by the Petitioner that he was not the correct

candidate or that he had impersonated another candidate.

Kenyan law and jurisprudence is replete with circumstances under which an election can be nullified, indeed each case is to be determined as to its own merits. A few examples will suffice.

Section 83 of the Elections Act clearly provides that:

No election shall be declared void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles of the Constitution and written law or that the non-compliance did not affect the election

In ***Peter Munya*** case (supra) the court stated that

If it is shown that an election was conducted substantially in accordance with the principles of the constitution and the Election act then such election is not to be invalidated only on the grounds of irregularities. When however, it is shown that the irregularities were of such magnitude that they affected the election results, then such an election stand to be invalidated. Otherwise, procedural or administrative irregularities and other errors occasioned by human imperfection are not enough by themselves to vitiate an election.

On standard of proof the case of ***John Kiarie Waweru v Beth Wambui Mugo & 2 Others***, Election Petition No. 13 of 2008 at page 6 is categorical that: “...**there is consensus by electoral courts that generally the standard of proof is higher than that applicable in ordinary civil cases i.e proof on a balance of probabilities but lower than the standard of proof beyond reasonable doubt required in establishing criminal cases...**”

Finally after the above consideration of the facts and applicable law after considering the authorities cited. I am satisfied that the Petitioner has not satisfied this court that the elections in Dabaso ward was so badly conducted and was in violation of the electoral laws as outlined in the petition.

I do find that indeed there were some irregularities however guided by case law above. I find that the same are adequately explained and not so massive as to affect the integrity and/or the outcome of the elections in Dabaso Ward. I do note that the petitioner not only failed the test of specificity but also based his allegations on hearsay. His case was thus greatly weakened and could not meet the threshold of overturning the results of that election.

The upshot of the analysis above is that I decline to grant the orders sought in the petition and the petition has got no merit and is dismissed accordingly with costs to the Respondents.

The same are capped at Kshs. 3 million shillings. I also in addition make the following further orders:

1. The sealed ballot boxes be unsealed and the 1st and 2<sup>nd</sup> Respondents be at liberty to deal with them in the normal manner
2. Certificate of this determination in accordance with section 86 of the Elections Act shall issue to the I.E.B.C and speaker of the National Assembly.
3. The Petitioner has a right of appeal within 14 days

Dated this 19<sup>th</sup> day of February 2018.

**HON. DR. JULIE OSEKO**

**CHIEF MAGISTRATE**

Delivered in open court in the presence of:-

1. Mr. Kinaro for the Petitioner
2. Ms. Marube holding brief for Mrs. Wambua for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents
3. Mr. Angima for the 3<sup>rd</sup> Respondent

**Mr. Kinaro** : I thank you for the Judgment. I apply for certified copies of proceedings and judgment for purpose of lodging an appeal.

**Mr. Angima**

We have no objection.

**M/s Marube**- no objection

**Court** – certified copies of proceedings and judgment to be availed to the parties upon payment of requisite amount.

**HON. DR. JULIE OSEKO – CM**

19/2/2018



While the design, structure and metadata of the Case Search database are licensed by [Kenya Law](#) under a [Creative Commons Attribution-ShareAlike 4.0 International](#), the texts of the judicial opinions contained in it are in the [public domain](#) and are free from any copyright restrictions. Read our [Privacy Policy](#) | [Disclaimer](#)