



**REPUBLIC OF KENYA**  
**IN THE CHIEF MAGISTRATE'S COURT AT BUNGOMA**  
**ELECTION PETITION NO.4 OF 2017**

**ELIUD MUSIKONGO TENGE.....PETITIONER**

**VERSUS**

**1. NYONGESA SOSPETER ERASTUS.....1ST RESPONDENT**

**2. I.E.B.C.....2ND RESPONDENT**

**3. NOBERT KIMEI.....3RD RESPONDENT**

**R U L I N G**

By a Notice of Motion dated 25/1/18 brought under S.8(1)(d), 3, 82(1) of the Elections Act No.24 of 2011 and rules 4(b) 2, 28 and 29 of the Elections (Parliamentary and County Election) Petition rules 2017 and Article 159 of the Constitution of Kenya 2010 the petitioner Applicant has moved the court for orders that:

- a) The court issues an order of scrutiny and recount of votes for the election member of county assembly for West Bukusu Ward.
- b) The recount and scrutiny be in respect of the following polling stations.
  - i) Nangeni 2 of 2
  - ii) Kibuke primary
  - iii) Tunya polling station
  - iv) St Jude Nabuyeye
  - v) Mayanja primary polling station 2 of 2
  - vi) Ngoli primary polling station 2 of 2
  - vii) Mayanja 1 of 1
  - viii) Kisoi 1 of 1
  - ix) Machwele 1 of 1
  - x) Machwele 2 of 2

c) Scrutiny in respect of the following:

- a) printed copy of the register of voters used during the elections of 8<sup>th</sup> August 2017 sealed as per the law.
- b) copies of marked register used in each of the polling stations
- c) packet of counted valid, rejected and spoilt ballots.
- d) polling day diaries
- e) statement on the rejected votes
- f) form 33(tallying sheet)

The Application is based on the following grounds.

- i) That there has been put in place sufficient basis for the grant of orders of scrutiny and recount in respect of the aforesaid polling stations.
- ii) That through the scrutiny and recount exercise the court shall be able to measure the integrity of the electoral process that were and ascertain what each candidate got in the cited polling stations.
- iii) That justice and fairness demands that the orders sought be given in view of the contradictory positions and or evidence obtaining on the ground.
- iv) No prejudice shall be suffered by the respondent if the orders sought are granted.

The application is supported by the affidavit of Eliud Musikongo Tenge the petitioner applicant. He deposes that the court did direct that once sufficient basis is laid, it can make orders of scrutiny, that the fountain of sufficient basis can be the testimony of the parties and or their witnesses and the documentary evidence on record, that the recount of votes will aid the court to measure the integrity of the electoral process, to ascertain the number of votes garnered by each candidate and understanding the process, that the cumulative evidence placed before the court forms sufficient basis upon which the orders sought can be granted, that he seeks recount and scrutiny of documents and electronic materials in respect of the stated polling stations. He deposes further that the petition is against both quantitative and qualitative aspect of the electoral process. He avers that the evidence of the returning officer left a lot to be desired which in character would trigger any court of justice to award orders of scrutiny and recount so that the actual number of vote obtained by each candidate is ascertained and the integrity of the process measured. He deposes that the evidence of the 1<sup>st</sup> Respondent, his witnesses, the 2<sup>nd</sup> Respondent witnesses and the 3<sup>rd</sup> Respondent under cross-examination render sufficient basis for the award and orders sought, that the form 36A in respect of the aforementioned stations can be ascertained if there is counterfeits in the ballot boxes are looked at and lastly, that the orders shall so doing may aid in the course of justice and that the Respondent are not prejudiced at all if the orders are granted.

The 1<sup>st</sup> Respondent filed grounds of opposition dated 31/1/18 vehemently opposing the application.

The grounds are:

1. That the application lacks any merit, the same seeking Res judicata to a previous decision dated 13/10/17 and is a mere replica raising no new matters or issues.
2. That the same is baseless as it only says a basis has been laid without disclosing any specific omissions or even instances that go to show that entire votes were not counted, people voted twice, serial numbers were different or even that there was notice that distracted the process.

3. That the applicant simply has no reasons or acts that could require the court to order a recount. He compares the present case with High Court petition no.3 of 2017 **Sitati Peter Juma -vs- Sitati Daniel Wanyama & IEBC** Bungoma where serious issues were raised like missing form 35A, serial numbers were different, lack of signatures of presiding officers and Agents, no results for 11 stations etc yet Judge Hon. A. Aroni declined scrutiny and recount.

4. That the application is ambiguous and a mere waste of court's time as it simply makes blatant allegations that recount is to test integrity of the process which is not even a basis, the basis of scrutiny and recount being to address glaring commissions or acts that could compromise results and not the integrity of the process.

5. That the applicant is now desperately seeking to engage the court in a fishing expedition to expand the scope of a hanging and baseless petition.

6. That the granting of the orders without a single reasons disclose will be a clear waste of judicial time, public resources and strenuously fruitless undertaking.

7. The application has no basis as the anomalies in form 36B has been explained by the returning officer as an error resulting from manual additions which left out Kisioyi.

8. The application should be dismissed in the entirety.

The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed a replying affidavit dated 31<sup>st</sup> January 2018 by Nobert Kimei the 3<sup>rd</sup> Respondent. He avers that the elections at West Bukusu Ward were free and fair, that Mr Nyongea Sospeter Erastus was validly elected and issued with a Declaration Certificate having garnered the highest votes in the West Bukusu Ward MCA contest. He deposes that the said elections were held in accordance with the electoral law including the Constitution of Kenya 2010 and all Electoral laws and regulations therein. In paragraph 7 he deposes that the results reflected in form 36As was a true reflection of the will of the people of West Bukusu Ward that from the evidence adduced by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents it is beyond doubt that the election was free from violence, intimidation, improper influence or corruption and that even from the cross-examination of the 2<sup>nd</sup> Respondent's Agents, the election was proved to be free and fair and administered in an impartial, neutral, efficient, accurate and accountable manner, that Nyongesa Sospeter Erastus won the MCA contest fairly. In paragraph 1, he deposes that the petitioner's application is an abuse of the court process, is hopeless as it plainly and obviously discloses no reasonable and substantiated

ground enough to be granted the orders sought and is res judicata. In paragraph 13, it is deposed that the ruling of 13/12/17 was categorical and clear that the petitioner failed to adduce sufficient reasons to be granted the orders for scrutiny. He states in paragraph 14 that the alleged evidence adduced by the petitioner is nowhere close enough to justify any prayer for scrutiny and is nothing less than a lottery for purpose of chancing on new evidence with an attempt to ave the sinking ship. In paragraph 15 he states that the purpose of scrutiny is to identify and strike out;

- a) Votes of persons who voted though they were not in the votes list assigned to the polling station.
- b) Votes of a person whose vote was procured by bribery, treating or undue influence.
- c) Vote of a person who committed or procured the commission of personation at the election.
- d) Vote of a person proved to have voted in more than one Constituency.
- e) Vote of a person who by means of conviction for an election offence or by reason of the election court was disqualified from voting at the elections or
- f) Vote cast for a disqualified candidate by a voter knowing that the candidate was disqualified.

He states that the petitioner has adduced no evidence to prove the criteria in paragraph 15 and the application is an abuse of court process with the intention to fish for evidence. He deposes that sufficient evidence for scrutiny must entail the criteria above-mentioned and that the applicant has not shown that votes excluded by the criteria were cast in favor of any MCA cancellations in the West Bukusu Ward contest. In paragraph 19, he deposes that the petitioner has not proven the presence of sufficient evidence to order scrutiny and recount and to the contrary witnesses evidence prove the petitioner's petition had no merit and should be dismissed at this juncture and that to allow the application would be to allow the petitioner to go for a fishing expedition to the prejudice of the Respondents and the law at large. In paragraph 21 he deposes that the petitioner is in the business of revising and reviewing his earlier dismissed application dated 13/10/17 and that the present application is *res judicata*. In paragraph 22 he states that applicant has not proved any criteria for recount and scrutiny of any of the stations listed under paragraph 5 of the petitioner's supporting affidavit.

In response to paragraph 6 and 7 of the petitioner's supporting affidavit, he avers that a prayer for qualitative and quantitative analysis of the electoral process must be equally supported by sufficient evidence both qualitatively and quantitatively which the applicant has not done.

In paragraph 25 the 2<sup>nd</sup> Respondent states that the matters pleaded in the notice of motion and supporting affidavit that were never pleaded in the petition amount to a new cause of action and should be struck out so far as it amounts to amending the petition out of time. He pleads that the matters remunerated in paragraph (c) of the notice of motion should be struck off.

In paragraph 26 the 3<sup>rd</sup> Respondent deposes that to facilitate the just, expeditious, proportionate and affordable resolution of the petition, the court should dismiss the application with costs.

The petitioner applicant filed submissions in support of his application. He filed the following authorities;

- 1) Philip Mukwe Wasike -vs- James Lusweti Mukwe & 2 others (2013) eKLR
- 2) Dickson Mwenda Githinji -vs- Gatirau Peter Munya & 2 others (2014)eKLR

The Applicant petitioner also filed a response to the submissions by the Respondents.

The 1<sup>st</sup> Respondent filed grounds of objection and filed one authority ***Sitati Peter Juma -vs- Sitati Daniel Wanyama & 2 others Bungoma HC Election Petition No.3 of 2017*** dated 23/1/18 in which the Hon. Justice A. Aroni declined to issue orders of scrutiny and verification of all statutory forms 35A and 35B. The response by way of grounds of opposition has been attacked by the petitioner who points that it should have been by way of a replying affidavit.

The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed submissions and 3 authorities;

- 1) Gatirau Munya -vs- Dickson Mwenda Kithinji & 2 others (2014)eKLR
- 2) Langat Dominic Kiptoo Arap -vs- Shikuku Martin S, Motwo & 2 others (2017)eKLR
- 3) Noah Makha Langanga Wekesa -vs- Albert Adome & 3 others (2013)eKLR

I have considered the application with the supporting affidavit, the response by the 1<sup>st</sup> Respondent and the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent, the submissions by all parties as well as the response to the submissions.

The present application is well founded in our electoral law. S.82 of the Elections Act 2011 and Rules 29 of the Elections (Parliamentary and County elections) petition rules 2017 lay the foundation of scrutiny S.82 of the elections Act provides as follows:

“An election court may on its own motion or on application by any party to the petition during the

hearing of an elections petition order for a scrutiny of votes to be carried out in such manner as the elections court may determine”.

Rules 29(1) of the election petition rules 2017 made thereunder provides that the parties to the proceedings may apply for scrutiny of votes for purposes of establishing the validity of the votes case and in subrule (2) thereof that an election court may if satisfied there is sufficient reason order for scrutiny or recount of votes and under subrule (4) that scrutiny or recount of votes in accordance with subrule (2) shall be confined to polling stations in which the results are disputed.

With regard to precedents on the question of scrutiny we have a wide jurisprudence. The Supreme Court set out guidelines in respect to scrutiny and recount of votes in election petitions in the celebrated case of **Gatirau Peter Munya -vs- Dickson Mwenda Kithinji & 2 others. Petition no.2B of 2014 (2014) ECLR** as follows:

- a) The right to scrutiny and recount of votes in an election petition is anchored in S.82(1) of the elections Act and rule 33 of the Elections (Parliamentary and County elections) petition rules 2013. recount and/or scrutiny of votes, at any stage after the filing of the petition, and before the determination of the petition.
- b) The trial court is vested with discretion under S.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 reason 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 of such a request to the satisfaction of the trial Judge or Magistrate such basis should 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 terms of rule 33(4) of the Election (Parliamentary and County Elections) petition rules.

From the foregoing I set the following issues for determination:

- 1) Whether or not the application is res judicata.
- 2) Whether or not paragraph C of the application should be struck out as unpleaded and prejudicial to the Respondents.
- 3) Whether it was proper for the 1<sup>st</sup> Respondent to file grounds of opposition.
- 4) Whether or not the applicant has satisfied court that the order for scrutiny and recount should issue.
- 5) Costs of the application.

The Respondents have submitted that the present application is res judicata. They have in mind the petitioner's application which this court determined on 13/12/17. They are wrong. The court did leave a window to the applicant to move the court again for scrutiny and recount which the applicant has done on conclusion of hearing of the petition. It is not unusual for such an application to be brought to court after another one has been dismissed. In **Hassan Ali Johon -vs- Nyange & Another Election Petition (Mombasa) No.1/2005** the court entertained a 2<sup>nd</sup> application. The matter is therefore not res judicata.

The 2<sup>nd</sup> question is whether or not paragraph C of the application should be struck out as unpleaded and prejudicial to the Respondents. I have looked at prayer (a) of the petition herein and not that the petitioner sought

....An order for elaborate scrutiny of the kiems machines, polling day diaries, scrutiny of the used and unused ballot papers and recount of all papers cast.

The present application seeks scrutiny in paragraph C of:

- a) printed copy of the register of voters used during the elections of 8/8/17.
- b) copies of marked register used in each of the polling stations.
- c) packets of counted, valid, rejected and spoilt ballots
- d) pooling (sic) day diaries
- e) statement of rejected votes
- f) form 33 (tallying sheet)

It is quite clear that the applicant is seeking more than he pleaded in the petition. Only C(c) and C(d) of the prayer were pleaded otherwise C(a), C(b), C(e) and C(f) were not. The applicant plaintiff is therefore seeking to scrutinize documents that are not pleaded in the petition. Therefore, I would strike out C(a), C(b), C(e) and C(f) and leave C(c) and C(d) which were included in the pleadings.

On the 3<sup>rd</sup> question, it is clear from the guiding principles set forth by the Supreme Court in the **Gatirau Munya case** above quoted that the way to prove basis is by way of pleadings, affidavits and evidence. It follows therefore a reply to the affidavits should be by replying affidavit. Grounds on opposition would appear to be the wrong approach to answer facts alleged in an affidavit.

The 4<sup>th</sup> issue is whether or not the applicant has satisfied the court that the order for scrutiny and recount should issue. It is submitted by the petitioner that the votes cast for each candidate were understated in form 36B. The petitioner urges the court to disbelieve that Kisioyi polling station results were left out. He is of the impression that Kiems kit was manipulated and there is need to scrutinize the kit and logs from the stated polling station. It is submitted that for Nangeni 2 of 2 the form 36A was not signed by the Agents. For Kibuke primary form 36A was not signed by a single Agent and there is need to compare what is in the ballot boxes with the form 36A not signed by the Agents. For Tunya polling station, it is submitted that the seal of the ballot box was broken given the need to ascertain if there was interference. For St. Jude Nabuyeye it is submitted that it is not very clear what the petitioner obtained and hence the need for recount. Respecting Mayanja primary polling station 2 of 2, Form 36A is allegedly signed on 9/8/17 and the signature of the independent candidate appears to have been imitated by the presiding officer. For Ngoli primary polling station 2 of 2 form 36A is unstamped which is an irregularity and hence the need for scrutiny. With regard to Machwele polling station 2 of 2, there is an alteration on the figure which is not countersigned and scrutiny orders should be given following **Philip Mukwe case**. For Mayanja 1 of 1, the results in that stream attract attention with those in stream 2 as the figures for most candidates alternate or are similar. For Machwele 1 of 1 form 36A is not clear on the votes cast as the figure has been erased and not countersigned.

In response, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents submitted that following the examination in chief of their witnesses it was proven beyond doubt that no single candidate or Agent was dissatisfied with the figures before and after the declaration of the votes case. The results were embraced by the candidates and Agents present and Agents went ahead and signed the respective form 36A. It is submitted further that the votes recorded in form 36A were never successfully challenged in cross-examination. The prayer for recount is not based on any evidence but mere apprehensions of the petitioner and the petitioner's

application is a fishing expedition. He relied on *Langat Dominic case* above quoted where the court remarked thus:

“This court is also alive to the fact that not every allegation of discrepancies or malpractice warrants scrutiny. To err is human...”

The Respondents submit further that the petitioner has the burden to adduce sufficient evidence of either:

- i) votes of persons who voted though they were not in the list of voters assigned to the polling station.
- ii) votes of a person whose vote was procured by bribery, treating or undue influence.
- iii) vote of a person who committed or procured personation of the election.
- iv) voter of a person proved to have voted in more than 1 Constituency.
- v) vote of a person who by reason of conviction of an election offence or by reason of the report of the election court was disqualified or
- vi) vote cast for a disqualified candidate by a voter knowing that the candidate was disqualified.

It is submitted that it is for the petitioner to show that the excluded votes were cast and tabulated.

I have gone through the evidence as pertains the questioned polling stations, I have considered the discrepancies in form 36B, the explanation preferred by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents for the mathematical discrepancies and the submissions made by the parties and find the irregularities to have been so minor and to have been explained away. There is no evidence that excluded voters were cast. Having weighed the evidence on record following a full hearing I am satisfied that the petitioner applicant has not laid a sufficient basis for scrutiny. The applicant appears to be seeking to discover new or fresh evidence. This must be discouraged. In the case of *Philip Osore -vs- Michael & 2 others Busia County Petition No. 1 of 2013* Justice Tuiyot remarked.

“There would be several reason why scrutiny should not be ordered as a matter of course. First, there is need to guard against an abuse of the process..... a party must not be allowed to use scrutiny as a fishing expedition to discover new or fresh evidence. It wold be an abuse of the process to allow a party to use scrutiny for purposes of chancing on new evidence. Scrutiny should not be looked upon as a lottery”.

I make no further comments as there will be a judgment in the petition. I therefore decline to grant the orders sought for scrutiny and recount.

Costs will be in course.

**J.Kingori**  
CM

**Court**

**Read and delivered in open court this 9<sup>th</sup> day of February 2018 in the presence of Mr Sichangi for 1<sup>st</sup> Respondent and holding brief for Mr Baraka for 2<sup>nd</sup> and 3<sup>rd</sup> Respondents , Mr Onkangi for Mr Kebira for petitioner and Ms Barasa court assistant.**

**J.Kingori**  
CM

**Mr Onkangi**

I apply for a certified copy of the ruling and the proceedings.

**J.Kingori**  
**CM**

**Court**

The petitioner to be supplied with a certified copy of the proceedings and ruling on payment of requisite charges.

**J.Kingori**  
**CM**

**Mr Onkangi**

The petitioner can have 5 days for filing submissions.

**Mr Sichangi**

The respondents can have 5 days open service to file our submissions.

**J.Kingori**  
**CM**

**Court**

Mention on 19/2/18 to confirm filing of submissions and giving a date for judgment.

**J.Kingori**  
**CM**

**9/02/18**