



**REPUBLIC OF KENYA**

**IN THE SENIOR PRINCIPAL MAGISTRATE’S COURT AT LODWAR**

**PETITION NO. 1 OF 2017**

**PETER AKONO ..... PETITIONER**

**VERSUS**

**1. ABEI JAMES ESINYEN ..... 1<sup>ST</sup> RESPONDENT**

**2. JOSEPH AKUTA LOTUKOL ..... 2<sup>ND</sup> RESPONDENT**

**3. INDEPENDENT ELECTORAL &**

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

**RULING**

The application before me is the Notice of Motion dated 8/12/2017. It is brought under Rule 18 of the Election petitions Rules, 2017 and all other enabling provisions of the law. It seeks for orders that;

- 1. An order directing the scrutiny of all the original form 36 A’s returned from the 8/8/2017 Katilu ward election.**
- 2. Costs of the application be in the petition.**

It is supported by grounds on the body of the application and the affidavit of Peter Akono sworn on 11/12/2017.

The application is opposed by all the Respondents. The 1<sup>st</sup> Respondent did not file a replying affidavit but filed only written submissions and annexed authorities opposing the application. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents opposed the application and relied on the Replying affidavit of Joseph Akutaa Lotukoi sworn on 13/1/2018.

In his submissions, the petitioner urged me to allow the application on the basis that it was pleaded in prayer (ii) of the petition, that the elections Act allows a party to make the application at any stage of the trial, that the order sought was a discretionary order, that sufficient basis has been laid in the pleading and that it was in the interest of justice to allow the application given that even the few forms annexed to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents witnesses affidavits, some were not clear and Yet others were illegible and again, all the forms 36A’s were never annexed. It was his further contention that the Margin of votes between the pro-claimed winner and the Petitioner was so small i.e 6% of the total votes that a recount would be necessary. He further contended that he only singled out on the 29 forms which would be necessary in determining whether or not there were irregularities and inconsistencies sufficient to tilt the declaration made by the 3<sup>rd</sup> Respondent.

The 1<sup>st</sup> respondent argued that there was no basis laid to warrant scrutiny of the forms. That scrutiny of the forms would only avail the petitioner grounds to fish for more evidence and expand the scope of the petition. That through the evidence lead by the Petitioner, no basis for scrutiny was laid. That the application seeks a blanket order of scrutiny in all the polling stations, that the petitioners had agents in all polling stations who signed the forms and that the application was frivolous as inaccuracy was never pleaded.

The 2<sup>nd</sup> and 3<sup>rd</sup> Respondent argued that no basis had been laid down to warrant scrutiny of forms 36A's. That no specific forms were cited but instead the Petitioner wanted all the 29 forms from all the polling centers. That during the trial the question of scrutiny never arose. That all the alleged forms were clear and were annexed to the supporting affidavit of the Respondents in support of the Responses.

In the celebrated case of **Gatirau Peter Munya – vs – Dickson Mwenda Kithinji ( 2014) eEKL** the supreme court observed that scrutiny was anchored in the law and any party could apply for scrutiny at any stage after the filing of a petition and before the determination of the petition. The court further observed that an order for scrutiny is discretionary. My one which can be made by the court even acting Suo Moto, if the court considers the scrutiny or recount necessary to enable it to arrive at a just and fair determination. In exercising that discretion, the Supreme Court stated the following:

**“In exercising this discretion, the court is to have sufficient reason in the context of the pleading or the evidence or both. It is appropriate that the court should record the reasons for the order for scrutiny or recount”.**

It is instructive to note that the court further observed the following;

**“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 votes is called into question in the terms of Rule 33 (4) of the elections parliamentary and county elections) petition rules”.**

It is therefore clear from the foregoing that although the order is discretionary, the discretion is fettered in the sense that the applicant must establish sufficient reason to warrant the grant of such an order and that such an order should be specific to a particular polling station where results are disputed and should not to my mind be granted generally.

**In Lodwar Election Petition Number 1 of 2017 ( John Munyes Kiyonga – vs – Josephat Koli Nanok & 2 others Riechi Judge** said the following on the subject.

**“ in an application as this the applicant need not only specify the polling stations, he must also give specific reasons for seeking and justifying scrutiny in the named polling station.....”**

In page 28 of the above ruling the judge further observed as follows;

**“ though the law provides that the application can be made at any stage in the proceedings given the timelines in election petitions, it is advisable that where such an application may be made, the court is made aware of the likelihood of the application being made at the pre-trial stage. This will enable the court to direct that all election materials for the polling station be presented and kept under the custody of the court ..... this early preparation will ensure that the materials are not tampered with during the hearing of the petition ..... In my view this should be done, before all parties close their case”.**

In the instant case, the petitioner contents that forms 36A's annexed to the replying affidavits of the respondents are not clear and that some were left out. I have had the advantage of perusing the record. The affidavit of Joseph Akutaa Lotukoi sworn on 17/9/2017 annexes all the 29 forms which I have also perused and found to be legible.

No specific polling station has been singled out by the petitioner or his witnesses disputing the correctness of the form or the tally of the votes in issue.

In the case before me, such an issue was not raised nor was any particular polling station cited where a specific grievance was raised. Considering all these observations therefore, I find no merit in the application. I dismiss it with costs.

Read in open court

C/clerk –Lolim

Petitioner – Muga Apondi/Manduku

1<sup>st</sup> Respondent – absent

2<sup>nd</sup> and 3<sup>rd</sup> Respondents – Pukah holding brief for Wanyama

**M K MWANGI SPM**

**15/2/2018**

**Apondi** – I pray for 21/2/2018 to file submissions

**Pukah** – I agree

**Order** – parties to file and exchange written submissions on 21/2/2018, submissions shall be legalized on 22/2/2018. Notice to issue to the 1<sup>st</sup> Respondent.

**M K MWANGI SPM**

**10/2/2018**