

REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
PRESIDENTIAL ELECTION PETITION NO. 1 OF 2017

RAILA ODINGA.....1ST
PETITIONER

STEPHEN KALONZO MUSYOKA.....2ND
PETITIONER

AND

THE INDEPENDENT ELECTORAL
AND BOUNDARIES COMMISSION.....1ST RESPONDENT

THE CHAIRPERSON OF INDEPENDENT
ELECTORAL AND BOUNDARIES COMMISSION.....2ND RESPONDENT

H.E UHURU MUGAI KENYATTA.....3RD RESPONDENT

3RD RESPONDENT'S SUBMISSIONS ON PETITIONERS' APPLICATION DATED
24TH AUGUST 2017

1. The 3rd Respondent relies on the affidavit of Brian Omwenga sworn in opposition to the Petitioners' application.
2. The Petitioner's application seeks orders, *inter alia*, for access to systems, data and information for purposes of audit and scrutiny. The systems, information, and data that the Petitioners seek this access to is a long list that runs, on the Petitioners own application, to almost 4 typed pages. The Petitioners also seek access to certified copies of the original Forms 34A and 34B prepared at and obtained from the Constituency Tallying Centres.
3. The entire application is based on unfounded and unpleaded allegations. The Petitioners, having made allegations in their petition filed in court without any evidence in support thereof, are now asking the party against which the allegations have been made, that is the 1st Respondent, to provide evidence of the alleged hacking and the other baseless allegations made by them.
4. The Petitioners have not provided any evidence to support their allegations in the petition dated 18th August 2017, the application dated 25th August 2017 and the affidavits filed in support of the application. They are now on a wild goose chase trying to find evidence for their allegations. In effect, having made baseless allegations, they are now saying "Give us the evidence to make our case." There is no basis at all for this in law. The Court

should not countenance the Petitioners' attempts to use its processes on what can only be termed a fishing expedition.

5. Courts do act in vain. It took the 1st Respondent 4 days to do the verification of their own forms. It is clear that what the Petitioners ask for is very involving and would take a considerable period of time. The timelines for the hearing of a petition are already tight. This petition is time constrained by the Constitution. The orders sought are not efficacious and ought not to be granted.
6. If the application succeeded would what the Petitioners ask for be achievable? No.
7. In addition, the applications are in fact an attempt by the Petitioners to introduce further evidence. The deadline for filing a petition challenging the election of the 3rd Respondent, and any evidence in support of such petition, was 18th August 2017. The Petitioners, having filed their petition and affidavits on 18th August 2017, are now making attempts one week later to introduce affidavit evidence in support of their petition. It is instructive that the affidavits filed by the Petitioners read that they are made in support of both the petition and the application. This is an abuse of the process of court.
8. To understand the futility of the exercise that the Petitioners seek the orders of the Court to undertake, the Court is invited to consider paragraph 47 of the affidavit of Brian Omwenga in opposition to the Petitioner's application. In summary:
 - i) Even if, for the sake of argument, the Petitioners were to be given the information and equipment which they have requested for, a credible audit of the 1st Respondent's technology that was used to manage the elections on 8th August 2017, including the results transmission system, would require at least 14 days.
 - ii) The computer logs sought by the Petitioners would run into tens of thousands, possibly even approximately 100,000 pages.
 - iii) It would be prejudicial to all candidates who participated in the election to give access to the systems of the 1st respondent to one party who, without any basis, insists that his election, based on a paper ballot and paper based audit trail, was hacked. By definition, a paper based election cannot be electronically hacked.
 - iv) The Petitioners' allegations are predicated on hearsay information they have received from other individuals who share their confirmation bias.
 - v) It is thus clear that the Petitioners have filed the Notice of Motion as a fishing expedition to help them engage in an ultimately futile wild goose chase for information to further affirm their confirmation bias and conspiracy theories.

- vi) Numerous IT experts, including one of the Country's foremost IT forensic auditors, Mr George Njoroge of East Africa Data Handlers have interviewed at length on the Petitioners hacking claims and have indicated that some of the information the 1st Petitioner has put forward to back his hacking claims appears to be evidence that those providing him with the information within the NASA campaign team are themselves the source of unsuccessful hacking attempts. The said interviews are available at the following links: <https://youtu.be/RPiGLvFEOaQ> and <https://youtu.be/-LghSV0i9Bw> .
 - vii) If that be the case, and to quote the Court of Appeal's sentiments in **Abu Chiaba Mohamed v Mohamed Bwana Bakari & 2 others [2005] eKLR**, even though the law has often been said to be an ass, the law cannot be such an ass that it would forget its other well-known principle, namely that no man can be allowed to rely on his own wrong to defeat the otherwise valid claim of another man.
9. The 3rd Respondent further relies on paragraphs 119 to 132 of his submissions in opposition to the petition. This portion of the submissions deals with the scrutiny of votes.
 10. The 3rd Respondent strongly opposes the Petitioners' application for scrutiny of votes as contained in the application.
 11. An order for scrutiny for votes is not one granted as a matter of course. It is must be pleaded, and cogent reasons advanced justifying why a party makes that request. Further, scrutiny of votes must be specific and must target a specific polling station, constituency or a defined category of vote within a specific locality. It is neither general nor a blanket order.
 12. The Courts have further established through case law, that scrutiny of votes should not be used as fishing expedition, or as an exercise to expand the scope of the petition or to help the petitioner prove his case.
 13. The 3rd Respondent relies on the following decisions of this Court with regard to scrutiny of votes:
 - i) Nathif Jama Adam v Abdikhaim Osman Mohamed & 3 others [2014] eKLR;
 - ii) Gatirau Peter Munya vs. Dickson Mwenda Kinthinji & 2 Others [2014] eKLR; and
 - iii) Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 Others, [2014] eKLR.
 14. In the Peter Munya case, this Court set out the following guiding principles on scrutiny of votes:

"The right to scrutiny and recount of votes in an election is anchored in Section 82(1) of the Elections Act and Rule 33 of the Elections (Parliamentary and Country 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 determination of the petition.

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.

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.

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.”

15. This Court further stated in the Peter Munya case that:

“It will not do for the petitioner to aver in the petition that he desires scrutiny and recount to be undertaken in respect of all polling stations in the electoral area that is subject to the dispute. The petitioner must plead in sufficient detail why he requires the Court’s intervention to order scrutiny. In that regard, the petitioner is required to state the specific polling stations [in which] he alleges there were irregularities and, therefore, should be scrutinized”.

16. The Petitioners’ application is expressed in such general terms and seeks the scrutiny of all Forms 34A and 34B in addition to all aspects of the system used by the 1st Respondent in conducting the elections. There is no specificity in what exactly the Petitioners seek to be scrutinized.

17. For the foregoing reasons, the 3rd Respondent prays that the Petitioners’ application be dismissed with costs to the Respondents.

DATED at Nairobi this 25th day of August 2017.

**OGETTO OTACHI & COMPANY
ADVOCATES FOR THE 3RD RESPONDENT**

DRAWN AND FILED BY:

OGETTO, OTACHI & COMPANY ADVOCATES
SIFA TOWERS, 7TH FLOOR,
LENANA/RING ROAD KILIMANI JUNCTION
P.O. BOX. 79438-00200
NAIROBI
CELL:-020-02309060

TO BE SERVED UPON:

1. MURUMBA & AWELE ADVOCATES
MIRAGE PLAZA, MEZZANINE 1,
UNIT 7 WESTLANDS, CHIROMO ROAD
P.O. BOX 222505-00200
NAIROBI
Cell- 020-2004420
Email: legal@maadvocates.co.ke
2. V.A NYAMODI & CO. ADVOCATES
LOWERHILL DUPLEX, APT HSE 7
LOWERHILL ROAD
P.O. BOX 51432,00200
NAIROBI
3. ISEME, KAMAU & MAEMA ADVOCATES
IKM PLACE
5TH FLOOR, TOWER A
5TH NGONG AVENUE
NAIROBI