

IN THE REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA AT NAIROBI
PETITION NO 1 OF 2017



–BETWEEN–

RAILA AMOLO ODINGA.....1ST PETITIONER

STEPHEN KALONZO MUSYOKA.....2ND PETITIONER

AND

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

THE CHAIRPERSON INDEPENDENT ELECTORAL

AND BOUNDARIES COMMISSION.....2ND RESPONDENT

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

Scrutiny Report as filed by the Registrar

A. Introduction

[1] This report is prepared pursuant to a Court order issued on 28th August 2017 following petitioners application for scrutiny and access to information. The details of the order of the Court was *inter alia* as follows:

[72] Having so held, the final Orders we make are that the Petitioners as well as the 3rd Respondent shall be granted a read only access, which includes copying (if necessary) to -

(q) Certified photocopies of the original Forms 34A's 34B's and 34Cs prepared at and obtained from the polling stations by Presiding Officers and used to generate the final tally of the

Presidential election, and pursuant to such production leave be granted for the use of an aid or reading device to assist in distinguishing the fake forms from the genuine ones.

- (r) Forms 34A 34B and 34 C from all 40,800 polling stations.*
- (s) Scanned and transmitted copies of all Forms 34A and 34B.*

[73] Consequent upon the said Orders, we hereby make the following further Orders:

- (i) The Registrar of this court assisted by a number of judicial officers and staff as she may determine shall supervise access to the certified copies of original Forms 34A and Forms 34B by the petitioners and 3rd Respondents at such a venue as she shall determine in consultation with the parties. A report on that exercise and related issues shall be filed by the Registrar by Tuesday, 29th August 2017 at 5.00 p.m. and parties are at liberty to submit on it at the end of the hearing.*

[2] Following this order the Registrar of the Supreme Court convened a meeting at midday (12.00) on 28th August 2017 to deliberate with the parties and agree on the way forward in implementing the orders of the Court. This meeting was attended by the ICT Officers and expert appointed by the Court; Judicial Officers and staff directed by the Registrar; representatives of the petitioners, the respondents' and interested parties.

[3] During this meeting the following transpired:

- a) **Introductions** -Parties introduced themselves. I introduced the ICT officer designated by Court, the Judiciary ICT Director Mr. Stephen Ikileng together

with the experts appointed by Court namely Prof. Omwenga and Dr. Joseph Sivilla

- b) **Understanding of the court order** - Parties deliberated on the nature and effect of the court order in relation to their expectation and it was agreed that the court order envisaged two tasks - access to certain information through the ICT channel and access to original Forms 34A, 34B and Form 34C.

With the above understanding, and in view of the time constraints, I directed, with the agreement of parties and their agents that there be two teams tasked concurrently. The first team relating to the ICT was to be headed and supervised by the Judiciary ICT director while I was to lead and supervise the team relating to the physical access of the forms.

- c) **Venue** - Initially, I had suggested that the processes be undertaken at KICC, a venue to be procured by the court. However, since the KICC venue was not available for use, I made arrangement for the securing of the Ceremonial Hall at Milimani Law Court and communicated the information to the parties through their respective advocates. All the parties agreed to convene at Milimani Law Court ceremonial hall where the IEBC would deliver the documents for the parties to access them under my supervision.

The ICT team, on the other hand and owing to the nature of their exercise, and considering the integrity of the system agreed to meet at IEBC offices.

- d) **Appointment of agents** - It was agreed that as per the court order, each party was entitled to 2 agents in each of the exercise. As such each party nominated 4 agents each, 2 for the ICT process and 2 for the manual process. Parties availed alternate agents in case the processes took long and the agents needed to be relieved.

- e) **Emerging issues** - The following issues emerged

- i. **Whether the interested party Prof. Wainaina should participate in the exercise?**

The Interested Party made an application to join the exercise and had his IT expert on hand following his interpretation of the court order at paragraph Order

7. In response, all the respondents opposed the application on behalf of Prof. Wainaina as the order was very specific to the petitioners and the 3rd Respondent. The Interested party had not participated in the application leading to the order. I made a ruling declining the interested party from participating in the proceedings as it was unclear what role he had to play in the process as the order was very specific. I further pointed out that the interested party was at liberty to apply to the court for redress if aggrieved by my ruling

ii. Whether the advocates would oversee the process?

Parties sought clarification as to whether Advocates for the parties were allowed to participate in the process in addition to the agents nominated. I clarified that the order was specific to the effect that only 2 agents were permitted per exercise per party. Since the access was not another form of litigation or hearing before the Registrar, no advocates would be permitted to appear unless in their capacity as agents.

iii. Whether the Judiciary would provide security of the physical documents availed?

The Registrar guaranteed the parties that Judiciary had liaised with the relevant security agency to ensure that adequate security is provided to guard the documents which were to be stored in a secured place.

iv. What documents were to be delivered by IEBC and in what manner?

IEBC was of the view that the petitioners should use the already submitted certified copies of Forms 34As, 34Bs, and 34C filed in Court to which the Petitioners already had access to. They argued that the forms were similar and there was no point of bringing other certified copies.

On the other hand, the Petitioners view was that IEBC delivers the original forms as the petitioners wished to physically verify the genuineness of the forms using reading devices, a process that was not possible to be undertaken on copies. To the Petitioner, any copying can only be made from the said originals under the supervision of the Registrar.

There was consensus on the issue and it was agreed that IEBC should bring;

- All the originals of Forms 34As, 34Bs, and 34C of all 40,883 polling stations in their possession
- Soft copies of scanned and transmitted copies of all Forms 34A and 34B

Thereafter, the petitioner stated that, for purposes of examining the stated documents they required reading devices namely; a bar code reader, Ultra Violet (UV) reader, photocopier, and scanner

As the court order allowed the petitioners to use any reading aid devices, the Petitioners were at liberty to procure and carry along such devices.

v. Time for delivery of the documents

IEBC stated that they needed a few hours to sort and bring the documents to the agreed location where they would be handed over to the Registrar of the Court. They undertook to deliver the documents by 5.00pm.

vi. Declaration of interest

Prof. Elijah Omwenga the Courts' expert and Brian Omwenga the 3rd respondent agent confirmed that they are not related.

vii. Logistical support

The Petitioners requested that owing to the voluminous number of forms they expected to peruse, they be allowed to be accompanied by their own technical assistance of up to 100 personnel who would work under the supervision and direction of the 2 nominated agents but within the public set up in the presence of the respondent's agents. The Respondents agents opposed the proposal insisting that the court order limited each party to 2 agents and there was therefore no room for any further technical staff and if there was such need then it was only upon the Registrar to deploy such staff from the Judiciary. I clarified that the court order was limited to only two agents and that the petitioners proposal to have their own technical assistance was not permitted.

I also reassured the parties that the Judiciary was ready to provide all logistical support that would be required to facilitate implementation of the court order. Judiciary had made arrangements to ensure availability of suitable number of staff to assist as and when required and availed facilities including photocopying of the original documents which would only be done under my supervision.

Way forward

[6] Following the above deliberations, the parties agreed to adjourn the meeting to 4pm to allow the parties to prepare to undertake the task and for the 2nd respondents to avail the materials. It was also agreed that the ICT team will also meet at the same time with all the agents in order to agree on how to execute the task.

The 4.00pm meeting

[7] The meeting was called to order at 4.20 pm. The aim of the meeting was for the agents to report and break into the respective teams to agree on the process. I noted that neither the petitioners advocates nor their agents were present. I instructed one of my staff to call the agent using the contact that had been availed. I was informed that they had indicated that they were in traffic and would be in the court room in 10 minutes time. All the respondents were present together with their agents.

[8] We waited for approximately 20 minutes and there was no show of the petitioners' advocates or their agents. Aware of the time constraints I then instructed the entire team undertaking scrutiny to move to Milimani Ceremonial room where the activity was to be undertaken leaving behind the ICT team.

B. THE SCRUTINY EXERCISE

[9] I arrived at Milimani Ceremonial Hall at around 5.20 pm together with my team. I found some IEBC officials together with some representatives of the 3rd respondent already waiting at the hall. At around 6.00pm IEBC officials informed me that they had arrived with all the Forms 34As, 34Bs and 34C. I then alerted the security to secure the offloading of the materials from the IEBC vehicle which was at the Milimani front parking.

[10] At around 6.30 pm the petitioners advocate, and their agents arrived. I called upon the entire team to go and inspect the room in which the forms were to be stored. After inspecting there was a consensus that IEBC staff deliver the documents to the secured room.

[11] The forms were submitted in folders arranged per constituency and filed together per county and in volumes. From the outset the parties were in agreement that the handing over process was a process between the IEBC and the Judiciary and that they were only witnesses at that stage. There were a total of 84 box files *See the annexure of the indexing of the volumes*. I had a briefing with my team of Judicial officers and staff to agree on the modalities of physically counting all the forms supplied. A team of upto 50 supervised by the Registrars of the Court of Appeal, High Court and Magistrates Court and about 10 deputy registrars from the High Court carried out the counting.

[12] I needed to ascertain the exact number of forms delivered. This was done by matching the index with the list of all constituencies per county against the forms received per constituencies per county which was used to mark the forms received against each constituency As per our count we received a total number of 41451 forms. *See the annexed copy of list provided.*

[13]. The total number of forms is as indicated below

Form 34C	1
Form 34B	291
Form 34B downloaded from the File Transfer Protocol (FTP)	291
Form 34A	41,451

[14] Upon ascertaining the count, I officially received the documents from the IEBC representatives noting on their receiving register that some of the documents handed over were carbon copies.

Observations

[15] During the verification of documents submitted by the IEBC I noted the following;

- a) Forms 34A for Mandera West were not among the forms submitted. However, upon requesting for them they were availed.
- b) There was one Volume labeled as illegible forms which contained 10 copies of scanned Form 34As that were illegible. IEBC indicated that the originals of those polling stations were locked up in the ballot boxes.
- c) Forms presented for Mvita Constituency presented were for Member of National Assemble however later on IEBC presents the forms 34As for presidency
- d) Certain forms 34As appeared to have been duplicated → original form + scanned form
- e) Certain forms 34As and 34Bs appeared to be carbon copies ✓ come in copies eg 6 carbon to ease for distribution to agents ✓ This is an original document & contains security feature & jama at the same
- f) Certain forms 34As and 34Bs appeared to be photocopies ✓
- g) Some of the forms had no evidence of being stamped or signed

very few the scanned copies

Parameters of the scrutiny exercise

[16] As counting of the Forms was going on prior to handover from IEBC to Judiciary, I convened a meeting with the agents to agree on the parameters and modalities of the scrutiny exercise upon access of the materials from IEBC.

[17] I explained to the agents that my role in the process as per the court order is to supervise the access to the certified copies of the original Forms 34A and B and to report on the exercise and any related issue. Accordingly, once the access was granted under my supervision, it was not within my ambit to direct the parties, unless an issue arose requiring my intervention as a supervisor.

[18] The Petitioners indicated that they were interested in distinguishing the fake forms from the genuine ones as per the court order. This would involve checking the following:

- a) The presence of watermark using the UV reader
- b) Colour of the form
- c) Serialization
- d) Microtext
- e) X10 magnification
- f) Column for comments on the form

- g) Format of the forms;
- h) Anti-copy features

[19] The 3rd respondent's agents did not oppose to the proposal but only added that they be allowed to look at the exact forms checked by the petitioners and make their own comments.

[20] Parties agreed on the following:

- a) to differ in their comments arising from checking the forms and requested me to take note of such comments especially when the parties differ.
- b) not to make submissions but only observations.
- c) Other documents sought will be availed on soft copy directly by 7am
- d) The parties agreed to start by looking at Form 34C followed by Forms 34B and Forms 34As.
- e) I would also be making my own observations during the process for purposes of the report to court.
- f) In view of the timelines and the need for time to prepare and submit my report, the exercise would be concluded on 29th August 2017 at 2pm;

[21] The petitioners provided one UV light reader (*DoCash model*) to be used for the verification exercise. The machine was tested to the satisfaction of the respondents.

[22] The petitioners did not give an indication as to whether they would be looking at specific forms but indicated that it was their discretion on how to proceed. Following this and the conclusion of handing over of the Forms 34As, 34Bs, and 34C the petitioner was allowed to access at 10.37pm. The petitioners proposed that the exercise should commence by examining forms 34Bs together with 34C. this would be followed by scrutinizing Forms 34As.

C. SCRUTINY OF FORM 34C

[23] The petitioner noted that no security features of watermark and serialization were noted and that the form looked like a photocopy.

[24] The 3rd respondent noted that the Form was a copy of the original duly certified by an Advocate of the High Court. They further noted that the form contained declaration of results and signed by the 2nd Respondent and other agents except for ODM where there is a comment that the agent declined to sign.

D. SCRUTINY OF FORMS 34B'S

[25] The Petitioners inspected a total of 291 Form 34B's representing the 290 Constituencies together with the Diaspora. From the list of constituencies provided, there was one additional constituency representing the prisons. IEBC explained that the results from these prisons were captured in the respective Constituency where they are located as such there was no constituency known as prisons.

[26] In carrying out the verification exercise the Petitioners were guided by the parameters enumerated hereinabove, however as the process went on they introduced a new checklist.

[27] The parties also agreed that a UV lighting device would be used to determine the genuineness or otherwise of the form.

[28] From the said 291 Forms as well as the results from the prisons the following were the findings in relation to the said parameters and the additional checklist.

Forms that bore Watermark	236
Forms without watermark	56 *
Forms not signed	5
Forms signed by the Returning Officer	281
Forms signed and Stamped by the Returning Officer	225
Forms that have only been Stamped by the Returning Officer	2
Forms without Serial Numbers	31
Forms with Serial Numbers	261
Forms signed by the agents	260
Forms not signed by the agents	32 -

32 of
not part of scrutiny parameters
only Constituencies with no agent all are 10.
Dispute schedule shows only 10 forms not signed no indication no agent at all.

Forms that the 'Hand Over' section had not been filled	189
Forms that the 'Hand Over' section had been filled	103
Forms that the 'Take Over' section had been filled	5
Forms that the 'Take Over' section had not been filled	287

most of results were saved & sent consequence of electronic transmission.



[29] The detailed consolidated scrutiny report together with summaries is annexed

[30] On the 29th August, 2017 at around 9.30 am the exercise of verifying the Form 34 B's came to an end.

E. SCRUTINY OF FORM 34A

[31] With regard to verification of the Form 34A's the petitioner's wished to change the modus operandi. This included;

1. Randomly choosing the forms to sample and verify.
2. Checking and confirming whether the forms bear the watermarks and the serial numbers.

[32] The 3rd Respondent on its part indicated that they would wish to look at the following

1. whether the forms had been signed and stamped by the Presiding Officers
2. whether there was involvement of the party agents.

[33] The Petitioners suggested that they would wish to procure 10 more UV lighting devices to aid them in the verification process. The Respondents objected and submitted that the Court order was to the effect that the exercise was to be supervised by two agents per party and they would therefore have no manpower to help supervise the

exercise. The parties agreed that the Petitioners would get one more device and divide the teams into two.

The parties then commenced the verification of the form 34A's in Tharaka Constituency. The parties also carried out scrutiny of Forms 34As in the following constituencies Chuka /Igamba Ngombe, Nyaribari Masaba, Mandera West, Mandera South, Kanyi, Bumula, KAbuchai, Sirisa, Mt.Elgon, Bonchari, South Mugirango, Bomachoge Borabu, Bobasi, Bomachoge chache, Nyaribari Nyasaba, Nyaribari Chache, Kitutu chache North, Kitutu Chache South, Lafey, Banissa, Mandera North, Mandera South, Mandera East, Embakasi Central, Makadara, Embakasi West, Roysambu, Embakasi East, Embakasi North and Maara.

[34] A total of 4120 forms were sampled across 5 counties. Some of the issues raised during this process included

- a) Some of the forms were carbon copies, *original & legit*
- b) Original forms 34As which did not bear the IEBC stamp
- c) Some forms were scanned copies which were stamped while others were photocopies *→ extremely small number of this*
- d) Forms not being signed

The raw data captured is available but owing to constraints of time it could not be analysed.

[35] At around 12.15 pm the Petitioners brought in one more UV lighting device and the process of verifying the Form 34 A's was divided into two groups with each party being represented by one agent.

F. DELIVERY OF SCANNED AND TRANSMITTED COPIES OF ALL FORMS 34AS AND 34BS

[35] The scanned copies were handed to the Petitioners in a hard drive; at 11am on Tuesday 29th August 2017. The petitioners raised concern that they had not been presented with the transmission logs indicating which polling stations sent the image

which was supplied. IEBC responded by handing over the time logs at 1.05 pm on Tuesday 29th August 2017

[36] Upon consensus of the parties the scrutiny ended at 3pm for one group and around 4pm to allow the agents and I to prepare reports on the exercise.

PREPARED AND DATED at NAIROBI this 29th Day of August, 2017




Esther Nyaiyaki

REGISTRAR

SUPREME COURT OF KENYA