



REPUBLIC OF KENYA

High Court at Nyeri

Election Petition 3 of 2013

PETER GICHUKI

KING'ARA.....PETITIONER

AND

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

**JAMES MBAI.....2ND
RESPONDENT**

**MARY WAMBUI MUNENE.....3RD
RESPONDENT**

RULING

By a Notice of Motion dated 2nd May 2013 and stated to have been brought under **Articles 86 and 159 of the Constitution of Kenya and Part VI of the Elections (Parliamentary and County Elections) Petition Rules 2013**, the Petitioner has sought from the Court the following orders:

“1. This Honourable Court does take into its custody for safekeeping the Seals referred to at Paragraph 4:54 of the Petition, Paragraph 33 of the Supporting Affidavit of the Petitioner sworn on 26th March 2013 and produced in the affidavit of Francis Mwangi Thuita thereof.

2. An order that the 1st Respondent do produce the following documents:

a) All the Form 33s, 34s and 35s used in the Election for Member of the National Assembly for Othaya Constituency in the Election held on 4th March 2013 and all complaints received in relation to the said forms.

b) All the Voter Registers in respect of Othaya Constituency in respect of the Election held on 4th March 2013.

c) The reports filed by the 2nd Respondent in respect of the Election for the Member of the National Assembly for Othaya Constituency in the Election held on 4th march 2013.

3. An order for the Scrutiny and Recount of the ballots cast in the election for Member of the National Assembly for Othaya Constituency in the Election held on 4th March 2013 pending the hearing and determination of the Petition.

4. An Order that the costs of this Application be awarded to the Petitioner.”

The Motion is supported by an affidavit sworn by the Petitioner himself on 2nd May 2013.

The 1st Respondent is a body established under **Article 88(1)** of the Constitution responsible for, among other things, conducting or supervising elections to any elective body established by the Constitution including the National Assembly. The 2nd Respondent is the 1st Respondent's agent appointed under **Regulation 3(1) of the Elections (General) Regulations, 2012** to conduct the electoral process at the constituency level, in this case, the Constituency of Othaya. The 3rd Respondent is the person declared as elected in the National Assembly for Othaya Constituency in the 4th March, 2013 General Elections.

When the Petition came up for mention on 3rd May, 2013, counsel for the 3rd Respondent objected to the Motion for the reason that it is improperly on record. Although the court did not consider the merits of the objection at that stage, the 3rd Respondent and the rest of the Respondents were directed to formally reply to the Motion and raise whatever reservations or objections to the Motion in their respective responses; in the court's view it was only after such responses that the court would be in a better position to consider the propriety or lack thereof of the Petitioner's Motion and deliver a more informed decision.

Following the court's directions, the Respondents agreed to file their responses to the Motion with the Petitioner having corresponding leave to file a further affidavit on any new issues of fact in the anticipated Respondents' replying affidavits. The parties also agreed to dispose of the Motion by way of written submissions. On 10th May, 2013, when the matter came up in court as earlier directed, parties confirmed that they had complied with the court's directions and their agreements in respect of the Motion and by their collective consent, they agreed to highlight their filed submissions on 15th May, 2013.

Although the 3rd Respondent's counsel had intimated at the earliest opportunity of his reservations about the Motion being on record in the first place, the response filed on behalf of his client points to the conclusion that he did not pursue this issue any further but instead chose to address the substance of the Petitioner's Motion. Counsel must have probably considered **Section 82 (1) of the Elections Act, No.24 of 2011** and **Rules 17(1) (d), 17(2) and 33(1) of the Elections (Parliamentary and County Elections) Petition Rules, 2013** which contemplate applications of the nature of the Petitioner's Motion; that being the case, the issue whether the Motion is properly on record or not is *fait accompli* and the court need not dwell on it any further.

It is apparent from the Petition and the Motion that the Petitioner was an unsuccessful contestant for the position of Member of National Assembly for Othaya Constituency in the general elections held on 4th March, 2013. Being dissatisfied with the manner the 1st Respondent conducted the National Assembly elections in Othaya Constituency the Petitioner lodged the Petition herein challenging the outcome of these elections and more particularly the election of the 3rd Respondent as the Member of the National Assembly for Othaya Constituency. Amongst the grounds upon which the Petition is propped include, *inter alia*, that the declared winner, the 3rd Respondent herein was not eligible to offer herself for an elective office owing to allegations of criminal nature previously made against her; use of public resources by the Petitioner's competitors during the campaigning period; irregularities in the counting, tallying of votes and filling of forms 35 and 36; interference with ballot boxes and ballot seals; failure to submit results in electronic form; rampant voter bribery; discrepancies in the statutory vote tallying documents leading to declaration of manifestly wrong results; failure to investigate publication of negative propaganda and circulation of defamatory leaflets against the Petitioner and; generally contravention of regulations governing voting.

If at the conclusion of the hearing of the petition the Court is satisfied with and persuaded by the Petitioner's case then the Petitioner would want this Court to first, order a recount of the votes cast in the election of the Member of National Assembly for Othaya Constituency in the elections held on 4th March, 2013; second, declare the Petitioner as the duly elected Member of the National Assembly for Othaya Constituency and; third, certify the Petitioner as the duly elected Member of the National Assembly for Othaya Constituency and notify the Speaker of the National Assembly accordingly. The Petitioner has also sought in his Petition prayers in the alternative but for purposes of determination of this Motion reference to those prayers at this stage is unnecessary.

All the three Respondents have opposed the Petitioner's Motion. The 1st Respondent filed a Replying Affidavit sworn on its behalf and also on behalf of the 2nd Respondent by Mahamud Mohamed Jabane on 8th May, 2013. It is apparent from the 1st and 2nd Respondent's affidavit that they are not only averse to the Petitioner's quest to put into the court's custody ballot box seals allegedly recovered by the Petitioner's agents almost two days after the poll but they have also taken issue with the Petitioner's possession of election materials in the first place; according to the Respondents it is an election offence for any unauthorised person to possess election material.

As for the production of form 33 Mr Jabane has sworn that the form is a tallying sheet utilized at the point of counting votes and that it is normally retained in the ballot box. It is a form in which the presiding officer in a polling station records the count of the votes cast for each contestant in any particular polling station pursuant to **Regulation 76 (3) of the Elections (General) Regulations, 2012**. Mr Jabane has stated in his affidavit that at the moment the 1st Respondent has no access to any material inside the ballot boxes, including form 33 and accordingly cannot comply with any order for production of that form.

The prayer for production of form 34 is also according to the 1st Respondent, far-fetched; it is far-fetched because that form is only used during general elections for declaration of the presidential election results and has no role in the election of a member of the National Assembly, the subject of the Petition herein. In any event, so the 1st Respondent argues, all forms 34 are available on its website and therefore within the public domain.

While the 1st Respondent has contested the prayer for production of the voters' register it has nevertheless annexed to Mahamud Jabane's affidavit the principal register contained in a flash disk marked on that affidavit as "MJ-1".

The 1st Respondent is contesting the production of reports in prayer 2 (c) of the Motion on the ground that the prayer is ambiguous. According to the Respondent it is not clear which reports the Petitioner is talking about; it is also not clear when such reports were made, who their authors were and when and where those reports are purported to have been filed.

On the whole both the 1st and 2nd Respondents do not see any reason for scrutiny or recount of the votes cast for election of Member of National Assembly for Othaya Constituency. The 1st Respondent argues that any question sought to be answered by the scrutiny or recount of the votes can validly and sufficiently be addressed by forms 35 and 36 which have been availed.

Crucially, the 1st and 2nd Respondents have admitted that there were some errors in the electoral process but in their view those errors were elementary, limited only to typographical and transposition errors which have not only been adequately explained but which could not, under any circumstances, affect the overall will of the electorate as reflected in the election results for election of the Member of National Assembly for Othaya Constituency.

The 3rd Respondent has supported the position taken by the 1st and 2nd Respondents more particularly on the question of the recovery and custody of ballot box seals save to add that the alleged recovery of seals could not have affected the final results for the election of the Member of National Assembly; in this Respondent's view, the results were filled in form 35 and announced at the polling stations and since each of the candidate's respective agents was supplied with form 35, interference with the ballot boxes, if at all, could not affect the announced and recorded results. The Respondent has gone further to deny any irregularity in the electoral process in Othaya Constituency and argued that merely because the margin of difference between what she obtained and what the Petitioner garnered was only 2,067 votes that in itself does not necessarily warrant scrutiny or recount of the votes or ballots cast.

I have given due regard to the parties' pleadings, their submissions, both written and oral, and the court decisions they have cited in support of the positions they have taken in this Motion; I acknowledge their intellect and industry in this respect.

The Petitioner's Motion can bring out two main issues—the issue of custody of the ballot box seals and the issue of scrutiny of the ballots or votes cast for the election of the Member of National Assembly for Othaya Constituency. The demand for production of forms 33, 34, 35, the voter register and the reports filed by the 2nd Respondent is an issue that is closely linked to scrutiny of votes or ballots cast; scrutiny may as a matter of course involve not only examination of the votes cast but will also involve the interrogation of appurtenant records, including these forms and reports, in which data or information relating to this count was entered. For this reason, the Petitioner's quest for production of the forms bearing the vote count data and the reports thereof and his pursuit for scrutiny of votes are issues that can of necessity and conveniently be determined together. I will proceed accordingly.

In any event, in its response to the Motion, the 1st Respondent has provided forms 35 and the voter register for Othaya Constituency, albeit, in soft copy version. Except for cancellations or alterations which the Petitioner pointed out to court no issue was ever raised as to whether all the forms 35 had been provided. The only documents that remain in issue, which I will address together with the question of scrutiny, would therefore be forms 33 and 34 and the reports filed by the 2nd Respondent.

1. Custody of the ballot box seals

Before delving into the issue of scrutiny, however, it would be appropriate at this juncture to do first, the Petitioner's prayer for custody of the ballot box seals allegedly found abandoned or discarded at a polling station within Othaya Constituency. The Petitioner is elaborate in his Motion, as he is in the Petition, on the circumstances under which these seals were recovered. According to him, on 6th March, 2013, approximately two days after the polling day, his agents recovered an assortment of used and unused seals at Kagere Primary School polling station. The Petitioner has given the particulars of the seals in paragraph 4.54 of his Petition and from the identity given for each of the twenty three (23) seals it would appear that their rightful proprietor is the 1st Respondent; accordingly, they would constitute election material as defined in **Section 2 of the Elections Act, 2011**.

Mr Francis Mwangi Thuita, the Petitioner's Chief Poll Agent in Mahiga Ward, which is one of the wards in Othaya Constituency, is the person who recovered the seals in question; his depositions in an affidavit sworn on 26th March, 2013 and filed in court on 8th April, 2013 in support of the Petition relevant to this subject read as follows:

“51. That I later passed by Kenyatta High School (Mahiga) and ended up at Kagere Primary School Polling Station.

52. That at Kagere Primary School, I went in and found many I.E.B.C papers on a table in one of the classrooms that was being used as a Polling hall during the elections.

53. That I also found under the table many seals, similar to those used to seal ballot boxes, some were in a polythene bag clearly labelled Kenyatta High School Mahiga Polling Station 003, Mahiga ward 0483 and others were spread on the floor. The seals were green in colour and still had their respective serial numbers.

54. That most seals were broken and others were still intact. I collected all of them and placed them in a polythene bag and headed back to Othaya.

55. That I met up the agents who were in Mahiga Ward Polling stations, whose help I enlisted to cross-check the serial numbers on the seals with the records they had from their respective stations.

56. That after cross checking our records we discovered that the said seals were from Kenyatta High School (Mahiga) Polling Station. I would like to produce the said seals as evidence in this Petition which seals are produced herein at first instance for courts safe custody and marked “F.M.T 1 (1-23).

57. *That I thereafter presented the seals to the petitioner for further action.”*

Although the deponent stated in his affidavit that the seals “**had been produced and marked**” they remained in the custody of the Petitioner even after his affidavit had been filed in court. The Petitioner now wants the court to assume responsibility of custody of the seals at this stage of the proceedings for security reasons.

The Respondents have opposed the grant of this prayer; they are all united against the Petitioner's bid for this prayer on the ground that if the seals are election material as defined under **Section 2 of the Elections Act, 2011** then they ought not to be in the custody of the Petitioner but instead they should have been surrendered to the 1st Respondent or to the Police. To the extent that the seals constitute election material, so the Respondents argue, the Petitioner has committed an election offence as prescribed in **Section 58 of the Elections Act**. If that is the case, the Respondents have argued that the court would be abetting a crime if it took custody of the seals. They have asked the court not only to dismiss the application for this prayer but have also find that under **Section 58 of the Elections Act**, the Petitioner has committed an election offence.

The 1st Respondent has not unequivocally denied that the seals are its property and perhaps it is for this reason that it has asked the court, as the rest of the Respondents agree, to find the Petitioner to have committed an election offence. It is important to note that though the 1st Respondent and indeed the rest of the Respondents made most of the Petitioner's possession of the seals, none of them applied to expunge from the Petitioner's or his witness' affidavit paragraphs which could be described as offending paragraphs to the extent that they refer to and introduce material which in the Respondents' view should not be part of the court record.

As noted the Petitioner and his witness are fairly elaborate on how they landed the ballot box seals. My understanding of their explanations is that, unless a contrary intention is proved, the Petitioner is presumed not to have been an ordinary voter who would be excused for ignoring any discarded, disused or abandoned election material in Othaya Constituency particularly after the poll; the Petitioner was, in the context of the Petition herein, a contestant whose interest in the 1st Respondent's handling of election material and generally conducting a flawless or a near flawless election is presumed to have been greater. It may or may not be the Petitioner's stake and interest in the 1st Respondent's conduct at the material time that drove him to keep the seals for purposes of presenting them in a forum such as this court. Whether the Petitioner's find demonstrates recklessness, carelessness or sheer negligence on the part of the 1st Respondent in handling election material or was a move in a series of transactions orchestrated to disadvantage the Petitioner in the elections as alleged in the Petition remains to be seen. It also remains to be seen whether the Petitioner's find and the ramifications thereof would impact the outcome of the elections of the Member of National Assembly in Othaya Constituency in any material way. In these circumstances, it would be too early in the day to hold that, by retaining possession of the ballot box seals, an election offence was thereby committed.

Ordinarily, under **Rule 9 of the Oaths and Statutory Declaration Rules** made under **Section 6 of the Oaths and Statutory Declarations Act, Chapter 15 Laws of Kenya**, all exhibits to affidavits must be securely sealed to the affidavit under the seal of the Commissioner for Oaths and marked with serial letters for identification. Exhibits so sealed and annexed become part of the affidavit and if that affidavit is filed in proceedings such as in the Petition herein those exhibits become part of the record as much as the affidavit on which they are annexed. As with all court property, the court records including the affidavit and the exhibits thereto are presumed to be secure and it would, in my view, be superfluous to ask the court to take into custody any of the exhibits referred to in any affidavit merely for security reasons. It follows that under **Rule 9 of the Oaths and Statutory Rules**, it would be unusual to refer to an exhibit in an affidavit and seek to have it included in the court records through a separate, subsequent application on any ground including, as the Petitioner seems to suggest, security reasons. Accordingly, I do find that to the extent that the seals have been referred to and marked as exhibits in the affidavit of Francis Mwangi Thuita, they are part of the court record and evidence on which he will be examined as one of the witnesses lined up by the Petitioner. The court will thus retain the custody of the seals not

necessarily for reasons of security but as part of the exhibits on an affidavit filed by a witness under **Rule 12 (1) of the Elections (Parliamentary and County Elections) Petition Rules** and on which he may be cross-examined by the Respondents and re-examined by the Petitioner under **Rule 12 (1)** of the same Rules.

2. **Scrutiny of ballots, votes, forms 33, 34 and 35, Reports by the 2nd Respondent.**

The prayer for scrutiny and recount of the votes or ballots cast for election of Member of National Assembly for Othaya Constituency stands out prominently in the Petitioner's Motion; although there were other prayers in the Motion, both the Petitioner and the Respondents spent a substantial part of their time and efforts submitting on this particular prayer. Indeed almost all the authorities cited by the parties in support of and in opposition to the Motion related to the issue of scrutiny and recount of votes.

Perhaps owing to its centrality in the Petition herein, scrutiny and recount of the ballots or votes cast for election of the Member of the National Assembly for Othaya Constituency necessarily emerges as the common feature between the Petitioner's Notice of Motion and the Petition. In support of this prayer for scrutiny and recount, the Petitioner is categorical that his Motion is not only based on grounds and matters set out in the Petition but also sought leave to rely on the affidavits filed in support of the Petition to prosecute his Motion. In a nutshell, the Motion and the Petition are, to a reasonable extent, intertwined. In the midst of this overlap there always existed a real danger of arguing and submitting on the main Petition in the name of prosecuting and opposing the Motion. While parties in the Petition may have crossed the red line on this issue, the court will be careful not to fall into the same trap and I will be cautious to refer to the Petition only as far as it may be relevant to arriving at a just decision in this Motion; in this regard, being minded that the contestants have lined up witnesses to testify during the hearing of the Petition, I will be cautious not to make what may appear to be conclusive remarks or findings on the merits of the Petition or any issue thereof.

As noted, the primary question being asked upon consideration of the counsel's submissions is whether the court should order a scrutiny and/or recount of the votes or ballots cast in election of the Member of the National Assembly for Othaya Constituency. If the answer to this primary question is in the affirmative then the next question, which in my view would be secondary is when such recount should be ordered; should the exercise be undertaken prior to the hearing of the Petition as the Petitioner prays for in his Motion? Should it be undertaken during the hearing of the Petition or should it be done after hearing of the witnesses or rather after their evidence has been taken?

To find answers to these questions one needs go no further than the express provisions of the law the most authoritative of which is **Section 82 (1) of the Elections Act, No. 24 of 2011** and **Rule 33 of the Elections (Parliamentary and County Elections) Petition Rules, 2013**.

Section 82(1) of the Act states;

“An election court may, on its motion or on an 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 court may determine.”

This provision is plain enough that scrutiny of votes may be ordered *during the hearing* of the petition; regardless of whether it is ordered at the instance of a party to the petition or upon the court's own motion, the trial must have commenced before votes can be scrutinized. Section 82(2) makes it clearer that;

“Where the votes at the trial of an election petition are scrutinised...” which phrase goes to show that votes can only be scrutinised in the trial. (Underlining mine).

From the perspective of **Section 82(1)** of the Act, the answer to the primary question posed earlier is that indeed votes can be scrutinised by the court either *suo moto* or on application by a party to the Petition. In my opinion, the only reason why a party would be required to make an application before scrutiny is

ordered is to lay a basis for such scrutiny. Ordinarily an application would not be made without a basis and the basis for an application for scrutiny of votes would logically be the basis for such a scrutiny. Whether or not the basis laid is sufficient enough to warrant an order for scrutiny is for the court to determine based on the evidence available. As to when scrutiny can be ordered, **Section 82(1)** as read with **Section 82(2)** helps us understand that it is during the trial, at any time during the hearing of the Petition but before the final judgment has been delivered. The inevitable conclusion in the premises is that as far as the issue of scrutiny of votes is concerned it would be erroneous in law to order for scrutiny at the pre-trial stage unless the only issue in the Petition is the count and tallying of votes under **Rule 32(1) of the Elections (Parliamentary and County) Petition Rules, 2013**.

A further reason why in the circumstances of the Motion herein, it would be plausible to order for a recount during the trial rather than at the pre-trial stage, should need arise, is that the affidavits that the Petitioner is relying upon in this Motion are sworn by persons who have been listed as the Petitioner's witnesses. If they are presented as such, and indeed the Petitioner's counsel has confirmed they will, they would certainly be examined on their evidence at various levels - at cross examination and re-examination, where necessary. This process, rooted in our adversarial system of adjudication, is undoubtedly calculated to test their evidence and by extension the strength of the Petitioner's case. The Court notes that the Respondents have, by way of affidavits in response to the Petition and the Motion, denied the allegations levelled against them. As expected, the deponents are also listed as the Respondent's witnesses. In this scenario, where we have conflicting affidavits on the same issues, it would be proper and prudent for the deponents to be examined on oath before the court can make out with any certainty the veracity of their depositions and the weight to be attached to their evidence before coming to any definitive decision on the issue in dispute. If that be the case, it would be too early in my view, to order a recount or scrutiny of ballots at this stage on the basis of untested affidavit evidence.

I must reiterate that, subject to the provisions of **Section 82(1) and (2)** of the Act and **Rule 33** of the **Elections (Parliamentary and County Elections) Petitions Rules, 2013**, the door to scrutiny or recount of ballots or votes is always open at any stage of the election petition proceedings as long as a basis has been laid; in the present circumstances such basis cannot be said to have been laid when the evidence thereof is subject to examination and more importantly, when the bid for scrutiny runs contra to **Section 82 (1) and (2)** of the Act and the Rules made thereunder.

It must also be reiterated that under **Rule 32 of the Elections (Parliamentary and County Elections) Petitions Rules, 2013** there is a possibility of ordering for a recount of the votes at the preliminary stage of the hearing of an election Petition where the only issue in the Petition is the count or the tallying of the votes received by the candidates. I would suppose such is the case where the case for scrutiny or recount is so glaring on the face of it, for example, in circumstances where the evidence for such scrutiny or recount is uncontroverted; each case will of course depend on its peculiar facts and circumstances but certainly the present case does not appear to fall under this category in view of the fact that recount or scrutiny of the votes is not the only issue in the Petition.

For the foregoing reasons I will not grant prayer three of the Petitioner's Notice of Motion. However, I will not hesitate to invoke **Section 82(1) of the Elections Act, No. 24 of 2011** and order for the scrutiny if in the course of the proceedings such scrutiny becomes necessary for effectual and conclusive determination of the questions before the court. By the same token any party to the Petition, including the Petitioner may move the court for orders of scrutiny at any stage of the hearing of this Petition before the delivery of the judgment.

The authorities cited by the Petitioner himself point to the direction I have taken. In **Hassan Ali Joho versus Hotham Nyange & Another (2006) eKLR**, while acknowledging that owing, in my humble view, to peculiar circumstances that obtain in an election in any particular electoral area, there is no rule that a petitioner must first call evidence and lay a basis before a scrutiny is ordered nor that a scrutiny will always be ordered regardless of whether a basis has been laid or not, the court (Maraga J as he then was), rejected an application for scrutiny and directed the Applicant to renew his application after adducing evidence and laying a foundation. (See page 7 of the ruling and page 23 on the record of the list of authorities filed by the Petitioner). One further remark in that decision warrants consideration in this

ruling; the margin of victory or loss, as the case may be, may influence the decision to opt for scrutiny or recount - the narrower the margin the more likely the court will order a recount. The court found that such a recount had been ordered in **Onamu versus M'Maiti, Election Petition No. 2 of 1983** where the margin was 30 votes; in **Kirwa versus Muliro, Election Petition No. 13 of 1988** where the margin was only 7 votes and; in **Hemed Said versus Ibrahim Mwaruwa, Election Petition No.1 of 1983** where the margin was only 62 votes. Against this standard, the court found that a margin of 1061 votes in issue in the Petition before the court was too wide for the court to order a scrutiny and recount without laying a basis. If the court found 1061 votes to too wide a margin for a scrutiny and recount without laying a basis I will not find any less, at least at this stage of the proceedings, in a Petition where the margin is in excess of 2000 votes.

In **Mombasa Election Petition No. 1 of 1998, Said Hemed versus Emmanuel Karisa Maitha Hayanga J**, as he then was, considered the same decisions that were considered in **Ali Hassan Joho versus Jotham Nyange & Another (ibid)** but exercised his discretion in ordering for scrutiny and recount at the beginning of the trial. The learned judge however noted, at page 2 of his ruling that, ***“I think as to the time when scrutiny is done may depend on what impresses the Petition Court but it has to use its discretion correctly usually the contending periods are only two; either for the start of the trial, and or at the end of the case when witnesses have given evidence.”*** In our own times **Section 82 (1)** of the **Elections Act (ibid)** and **Rules 32 and 33** of the **Rules** made thereunder set the boundaries within which that discretion can be exercised; those provisions of the law are express on how and when the scrutiny or recount can be done.

After taking the evidence of five witnesses for the Petitioner in **Nairobi Election Petition No. 5 of 2008, William Maina Kamanda versus Margaret Wanjiru & Others**, and upon the application by the Petitioner for scrutiny of the votes, the Court (Kihara Kariuki, J as he then was) ruled at page 11 (page 43 of the record of authorities), ***“for the reasons I have given, I am persuaded that the Petitioner has laid a basis for an order of scrutiny and that it would therefore be in the interests of justice that I allow this application.”*** Amongst the reasons that led the court to this conclusion was that the Electoral Commission had not only not accounted for what was approximately 37% of the form 16As but had also maintained ***“a deafening tomb-like silence”*** on what the learned judge had established as a fact, the tampering with the ballot boxes during and after the electoral process. More importantly, the court noted that the difference in votes between the Petitioner and the declared winner was only 895 votes and accordingly the incidence of the missing forms 16As on the final results of the election as declared was bound to be significant. No doubt there were massive irregularities for which no explanation at all was given.

In the judgment of Warsame, J (as he then was) in the **Nairobi Election Petition No. 3 of 2008 Dickson Daniel Karaba versus John Ngata Kariuki & Two Others**, the judge ordered a scrutiny and re-tallying of forms 16As and 17As, apparently after the trial had commenced, in circumstances that may be said to peculiar to that case. The learned judge took into account the report by Independent Review Commission on 2007 General Elections popularly known as the **Krieglar Report** in which the Returning Officer had confessed having declared a loser in the elections for Member of Parliament for Kirinyanga Central Constituency as the winner at the expense of the petitioner. Election materials including ballot boxes had been destroyed after the elections in mysterious circumstances and against this background the judge resorted to re-tallying of the figures contained in copies of forms 16A and 17A obtained from the African Union Office of African Eminent Personalities. That case is clearly distinguishable from the Petition before court.

The conclusion from these decisions is that, more often than not, scrutiny is not always the first item on the agenda in the determination of an election petition.

I had indicated at the beginning of this ruling that scrutiny of votes or ballots would necessarily include examination of forms and reports attendant to these votes; my findings on the issue of scrutiny would apply in equal measure to prayers seeking production of particular forms and reports. Accordingly, if scrutiny will become necessary at any stage of the proceedings, that would also entail interrogating those

forms and reports which the 1st Respondent has not so far produced but which would ordinarily be kept together with the ballots in the ballot boxes. For avoidance of doubt, those forms would only constitute forms 33 in which the presiding officers are deemed to have recorded the vote count in various polling stations pursuant to **Regulation 76 (3) of the Elections (General) Regulations, 2012.**

Forms 34 will be unnecessary for purposes of determining this Petition; those forms are relevant for declaration of the presidential vote tally which is not and cannot be an issue in this Petition. In any event, the 1st Respondent has stated that all forms 34 are available on its website and therefore within the public domain. If there is any information in those forms or in any of them which the Petitioner deems relevant to this Petition, it is open to him to bring it to the fore. Forms 35 have, as noted, already been provided and therefore an order for production of the same forms would be unwarranted.

In the premises and for reasons I have given I determine the Petitioner's Notice of Motion dated 2nd day of May 2013 as follows:

1. Prayer 1 is allowed and the seals will be admitted as exhibits only to the extent that they have been referred to and marked as exhibits in the affidavit of Francis Mwangi Thuita sworn on 26th March, 2013.
2. The prayer for scrutiny and recount of votes for election of the Member of National Assembly for Othaya Constituency in the General Elections held on 4th March, 2013 is rejected.
3. The prayer for production of Forms 33 and reports which would ordinarily be in the ballot boxes is rejected.
4. The prayer for production of Form 34 is rejected.
5. The prayer for production of Forms 35 and the voter register is spent and/or has been overtaken by events.
6. The costs of the Motion will abide the outcome of the Petition.

It is so ordered.

DATED, SIGNED and DELIVERED in open court at Nyeri this 24th day of May, 2013

NGAAH JAIRUS
JUDGE

In the Presence of

Court Clerk: Mr. Ndung'u

Counsel for the Petitioner: Mr Marete and Mr Kimere

Counsel for the 1st Respondent: Mr Kibet holding brief for Mr Munge

Counsel for the 2nd Respondent: Mr Kibet holding brief for Mr Munge

Counsel for the 3rd Respondent: Mr Miller, Mr Wena and Mrs Makasila

PETER GICHUKI KINGARA.....PETITIONER

VERSUS

1. I.E.B.C.

2. JAMES MBAI

3. MARY WAMBUI MUNENE.....RESPONDENTS

24/5/13

Coram:

Before Justice J. Ngaah

Court clerk - Ndungu

Marete and Kimere for the Petitioner

Mr. Kibet holding brief for Mr. Munga for 1st and 2nd respondent

Miller, Mrs. Makasila and Mr. Wena for the 3rd respondent.

Court: Typed ruling read and delivered in the open court.

NGAAH JAIRUS

JUDGE

24/05/2013

RULING

As part of the pretrial process directions on the hearing of the petition herein were taken on 10/05/2013. On that date all the parties agreed by consent to have petition heard from 4th June 2013 to 7th June 2013.

By the time of taking directions on 10/05/2013, the petitioner had not only filed affidavits pursuant to Rule 12(1) of the Elections (Parliamentary and County Elections) Petition Rules, 2013 but had also sought and obtained leave to file affidavits in response to the respondents response to the petition. Subsequently the petitioner filed two further affidavits sworn and filed in court on 8th May 2013.

More importantly, parties agreed on issues based on evidence on record. A statement of issues was accordingly filed in court on 10th May 2013.

As of today, the only issue that was standing in the way of hearing the petition was the petitioner's motion dated 2/05/2013. The motion has been heard and a ruling duly delivered. As it were, it is now all systems go as far as the hearing of the petition is concerned.

The petitioner now wants to file a further affidavit or affidavits, as he has argued, in view of the ruling that the court has delivered this morning.

The ruling that has been delivered is not an affidavit that parties can respond to by way of filing affidavits. The ruling was to determine an application which was pending on record.

Counsel has argued that he may want to review his application for scrutiny during the hearing. That is agreed, but such application will depend on the evidence on record. It is assumed that there is no reason why the petitioner could have held back some evidence when filing his petition and he ought, as he should, to have placed everything on the table so that the respondents are aware of the case they are meeting.

I am not satisfied that the possibility of applying for scrutiny of votes in future is a reason enough to file a further affidavit. The application to file a further affidavit is therefore rejected and the petition shall proceed for hearing on 4th-7th June 2013 as earlier scheduled during the pretrial conference. It is so ordered.

NGAAH JAIRUS

JUDGE

24/05/2013

Read and delivered in the presence of

Mr. Marete for the petitioners Mr. Kibet for the 1st and 2nd Respondent.

Mr. Wena and Mr. Miller for the 3rd respondent.