



REPUBLIC OF KENYA

High Court at Busia

Petition 1 of 2013

PHILLIP OSORE OGUTU.....PETITIONER

VERSUS

1. MICHAEL ONYURA ARINGO.....1ST RESPONDENT

2. INDEPENDENT ELECTORIAL & BOUNDARY COMMISSIONS

(IEBC).....2ND RESPONDENT

3. RETURNING OFFICER.....3RD RESPONDENT

R U L I N G

Background and the Application

1) A Pre-trial Conference as required by The Elections (Parliamentary and County Elections) Petition Rules 2013(hereinafter **The Election Petition Rules**) was held in this cause on 2nd May 2013. At that Conference the Petitioner informed Court that he would be seeking a scrutiny of votes cast in some 15(fifteen) Polling Stations. The Court directed that the Petitioner files a formal application for its consideration as an interlocutory issue.

2) That formal application by the Petitioner is dated 8th May 2013 and seeks an order for scrutiny of votes cast in the following Polling Stations:-

- a) CODE 002.....BUJUMBA PRIMARY SCHOOL
- b) CODE 049EMAFUBU HEALTH CENTER
- c) CODE 052TINGOLO PRIMARY SCHOOL
- d) CODE 078BUKHUMA TRADING CENTER
- e) CODE 072.....BUKHUMA PRIMARY SCHOOL
- f) CODE 074MUNGAMBWA PRIMARY SCHOOL
- g) CODE 057MADOLA PRIMARY SCHOOL
- h) CODE 077ELUGULU TRADING CENTER

- i) CODE 032NELA PRIMARY SCHOOL
- j) CODE 033BUMUTURI R.C PRIMARY SCHOOL
- k) CODE 039MAUKO PRIMARY SCHOOL
- l) CODE 042BUDUMA PRIMARY SCHOOL
- m)CODE 003BURINDA PRIMARY SCHOOL
- n) CODE 014BUMALA MARKET TRADING CENTER
- o) CODE 026BUKHALALIRE PRIMARY SCHOOL

3) The Application was resisted by all the Respondents. The 1st Respondent filed grounds of opposition on 14th May 2013, while the 2nd and 3rd Respondents answer was contained in a Replying Affidavit of Joseph Sigei filed on 13th May 2013.

Arguments by the Petitioner

4) Mr. Kasamani appearing for the Petitioner would argue that the manner in which the elections was conducted in the cited Polling Stations was flawed and irregular. It was the Petitioner’s contention that in various Polling Stations the cast votes were more than the ballots issued. He gave the following examples:

Polling Station	Ballots Cast	Ballots issued	Excess
Murumba Market	644	600	44
Butula Market	285	100	185
Bumutiru Primary School	400	300	108
Isongo Primary School	631	600	31
Kigandole Primary school	721	300	417
Elugulu Primary School	308	600	8

The veracity of the above figures elicited some debate.

5) There was then the question of transfer of ballot papers from Burinda Primary School Polling Station to Bujumba Primary School Polling Station. The Petitioner thought that the transfer lacked any legal basis and that if they truly had been a shortage of ballots for the Parliamentary Election then that shortage would be replicated in the other levels of elections. In addition, it was argued, that the 3rd Respondent who had admitted that there was such a transfer had failed to give a satisfactory explanation as to how those ballot papers were utilized or disposed of.

6) The Petitioner further asserted that there was a variance between what was formally announced at the tallying center as the final result with what was subsequently published in the Kenya Gazette. It was alleged that the announcement gave a figure of 33,210 while that published was 36,332 giving a variance of 3,122.

7) It was also pointed out that the number of Polling Stations used in the elections at Butula Constituency exceeded those that had been Gazetted. This Court was told that the Gazetted Stations were 55 while those used in the election of 4th March 2013 were 79. The Respondents were challenged to avail evidence that the extra Stations were either Gazetted or Publicized. The Petitioner was of the view that only a scrutiny could reveal the probity of elections in those extra Stations.

8) The Court was asked to bear in mind that in all the 6 Electoral levels in Butula Constituency, the Orange Democratic Movement (ODM) Party showed an overwhelming dominance. That it was therefore curious that the outcome at the Parliamentary level broke this trend. This, in addition to the irregularities cited, called for a full inquiry by way of examination of the ballots in the 15 Polling Stations.

9) Finally, the Petitioner thought that the margin between the winner and the second candidate of 1,389 votes was small enough to justify a scrutiny. Counsel cited the decision in **Hassan Ali Joho –vs. Hothman Nyange & Anania Mwasambu Mwaboza** (2008) 3 KLR EP 188 for the proposition that where the margin is narrow, scrutiny should be ordered even without the laying of a foundation.

The Response

10) Mr. K’opot, Counsel for the 1st Respondent emphasized that the overriding principle in the law of scrutiny is particularity of allegations. Counsel was of the view that the wording of Rule 33 of The Election Petition Rules readily lent itself to this principle. It was argued that a party requesting for scrutiny needed to be specific and particular about the following:-

a) The Polling Stations to be scrutinized.

b) The documents to be scrutinized.

c) The reasons for scrutiny.

11) Counsel then proposed a formula for laying out a foundation for scrutiny. Counsel thought that there could be no basis for scrutiny if the documents listed in Rule 33(4) (a) – (d) of The Election Petition Rules failed to reveal the existence of irregularities or illegalities. Those documents are:

a) The written statements made by the presiding officers under the provisions of the Act;

b) The copy of the register used during the elections;

c) The copies of the results of each polling station in which the results of the election are in dispute;

d) The written complaints of the candidates and their representatives;”

Joining the 1st Respondent, Mr. Akide for the 2nd and 3rd Respondent, thought that it was imperative that the Petitioner provided evidence of complaints raised by him prior or during the election. It was argued that the Petitioner should have, for example, cited instances where complaints had been raised in Forms 35.

12) It seemed to the Respondents that what the Applicant sought was an explanation of a certain set of facts which could not be addressed by a scrutiny. For example, the question of additional Polling Stations was better addressed by evidence from the witness stand and a scrutiny was meaningless because the Petitioner had failed to show prejudice that it suffered from the use of the additional Polling Stations.

13) On the question of excess ballots, it was the Respondents view that the Petitioner’s allegations were without a proper basis and was based on sources that were extraneous to the electoral process. That the sources were neither the Electoral Body nor the Agents at the Polling Stations but from the internet. The Respondent posed the question, what was difficult about getting this information from the Agents? It was a further view of the Respondents that the Applicants had not proved that each ballot book contained 50

ballots. That on this the 2nd and 3rd Respondents, who are the Managers of the elections, should be believed. The Respondents argued that the Petitioner's contention that the ballot book contained 50 ballots was self-defeating because some of the Petitioner's argument on excess votes was premised on the ballot books containing 100 ballots.

14) The Respondents criticized the Applicant's effort to call in aid the evidence of Mary Obwogo and Joseph Madiago. It was pointed out that the 2 were not witnesses in the Petition and that their evidence touched on Murumba Polling Station and Lugulu Polling Station which were not the subject of the Application for scrutiny.

15) Turning to the margin, the Respondents submitted that it is in instances when the margin is extremely small that an automatic scrutiny would be warranted. It was suggested that the margin should be less than 100 votes.

The Legislative Framework for scrutiny and Principles applicable

16) The Statutory underpinning for scrutiny is found in Section 82(1) of the Elections Act (Act No.24 of 2011) (hereinafter **the Act**). It provides that:-

“82.(1) An election court may, on its own motion or on 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 election court may determine.”

17) Part VI of the Election Petition Rules makes provision for scrutiny and re-count of votes. For purposes of this application I would cite Rules 33(1) and 33(2) which provides as follows:-

“33. (1) The parties to the proceedings may, at any stage, apply scrutiny of the votes for purposes of establishing the validity of the votes cast.

(2) Upon an application under sub-rule (1), the court may, if it is satisfied that there is sufficient reason, order for a scrutiny or recount of the votes.”

18) Reading the provisions of the Act and the Petition Rules together, a Court may order for a scrutiny *suo moto* or on an application by any party to the proceedings. Secondly the order or application may be made at any stage of the proceedings. On the timing of the application, it would be upon a party seeking scrutiny to choose when to approach the Court. It all depends, I think, on the ability of the Applicant to marshal sufficient evidence to persuade the Court that scrutiny is deserved. And there is no reason why this cannot be made prior to the hearing given that the Election Petition Rules require that the substance of the evidence to be relied on by the parties be set out in the Affidavits accompanying the Petition or the responses.

19) An order for scrutiny will not be granted as a matter of course. In the words of Rule 33(2) of The Election Petition Rules, the Court must be satisfied that there is sufficient reason to require an examination of the ballots. This Rule codifies a long held Judicial opinion that scrutiny will only be ordered when a foundation or a basis has been laid (See for instance the Court of Appeal decision in **Masinde vs Bwire and another (2008)1 KLR (EP)547.**)

20) There would be several reasons why scrutiny should not be ordered as a usual course. First, there is a need to guard against an abuse of the process. I would agree with Mr. K'opot that a party must not be allowed to use scrutiny as a fishing expedition to discover new or fresh evidence. It would be expected that a party filing an Election Petition is, from the outset, seized of the grounds, facts and evidence for questioning the validity of an election. And where the evidence is unclear then a party can, on application to Court, seek and obtain better particulars of that evidence from its adversary. But it would be an abuse of process to allow a party to use scrutiny for purposes of chancing on new evidence. Scrutiny should not be looked upon as a lottery.

21) Secondly, an exercise of scrutiny is often arduous and laborious. Rule 33(4) of The Election Petition Rules outlines the possible scope of that task. Under the Rule, Scrutiny is an examination of any or all of the following;

“(4)-

- a) **The written statements made by the presiding officers under the provisions of the Act;**
- b) **The copy of the register used during the elections;**
- c) **The copies of the results of each polling station in which the results of the election are in dispute;**
- d) **The written complaints of the candidates and their representatives;**
- e) **The packets of spoilt papers;**
- f) **The marked copy register;**
- g) **The packets of counterfoils of used ballot papers;**
- h) **The packets of counted ballot papers;**
- i) **The packets of rejected ballot papers; and**
- j) **The statements showing the number of rejected ballot papers.**

A Court making an order for scrutiny will define its scope. Whatever that scope, it is invariably a painstaking exercise. This is not a route to be taken without good cause.

22) So this Court, I would repeat, will have to be satisfied that scrutiny is necessary for the just resolution of this Petition. In considering whether or not a justification has been made, I must keep in mind that as an Election Court one of my primary duties is to examine whether an election has been conducted in a free, fair, impartial, neutral, efficient, accurate and accountable manner. Article 81 of the Constitution highlights those as some of the principles that must be complied with in an electoral system. An Election Court should be at the forefront in interrogating whether an election conforms to those Constitutional principles. This duty can only be carried out meaningfully if the Court leans towards freely receiving information about the conduct of an election. And scrutiny can give useful insight as to how an election has been conducted. This was recently appreciated by The Supreme Court of Kenya. That Court made *suo moto* orders for scrutiny in Supreme Court of Kenya Petition No.5 of 2013 **Raila Odinga –vs- Uhuru Kenyatta & 3 others** and explained itself as follows:-

“The purpose of the scrutiny was to understand the vital details of the electoral process, and to gain impressions on the integrity thereof.” (my emphasis).-

23) The grounds upon which an election is challenged ought to be contained in the Petition (Rule 10(e) of the Election Petition Rules) and the facts to be relied on by the Petitioner set out in the Affidavit in support of the Petition (Rule 10(3)(b) of the Election Petition Rules). The Petition and the Affidavit in support should disclose the Petitioner’s cause of action and a cursory look at the two should reveal the Petitioner’s case. For the Petitioner to deserve an order for scrutiny then, as a starting point, the Petition and the Affidavit in support must contain concise statements of the material facts upon which the claim of impropriety or illegality of the casting or counting of ballots is made.

24) The Election Petition Rules require that Affidavits of witnesses be filed alongside the Petition or the Response. The Affidavits set out the substance of the evidence. If Scrutiny is sought then the evidence must corroborate that argument. For purposes of determining this Application, the Court will appraise the relevant evidence in the witness affidavits filed for and on behalf of the petitioner. As at the time of

writing this ruling, the Court has heard the testimony of 7 witnesses in support of the Petition. Anything they said that is relevant to this application will be considered. In addition, the Court will not hesitate to take into account any evidence contained in the Affidavits of the Respondent's witnesses that will assist it resolve the application. In a word, the Court will take a broad perspective of all the evidence on record.

The determination of the Court

25) It is now opportune to say this. There can be no quarrel with the principle that any evidence that goes beyond pleadings must either be rejected outright or disregarded. I say this because in the Affidavit in support of the application, the Petitioner has introduced new evidence and evidence that is extraneous to the Petition. This Court is not obliged to look at that evidence.

26) In paragraph 14 of The Petition, the Petitioner raises some questions on the probity of the elections. These are ,slightly paraphrased, that;

a) The 3rd Respondent allowed unauthorized persons and non-employees to collect ballot papers from one Polling Station to another without the consent and authority of approved party Agents.

b) The 3rd Respondent failed to secure ballot boxes at the close of Voting and while on transit to the tallying center.

c) The 3rd Respondent allowed unmarked ballot papers to be cast in favour of the 1st Respondent.

d) The 3rd Respondent counted or allowed counting of ballot papers in favour of the 1st Respondent.

e) The 3rd Respondent stuffed or allowed to be stuffed invalid ballot papers into ballot boxes so as to favour the 1st Respondent.

These are the allegations that specifically attack the integrity of casting and counting of Votes.

27) The facts and evidence in support of those allegations are contained in the Affidavit of the Petitioner himself sworn on 27th of March 2013. It will do well to reproduce the relevant portions of that Affidavit.

“11. THAT I know of my own knowledge that the 1st respondent during the period preceding the elections of 4.3.2013, engaged in electoral malpractices outlawed by Elections Act no.24 of 2011 some of them being voter bribery, engaging civil servants KRA employees whom he employed while working with KRA, campaigning out of time with motorcades distribution of lessos and cash.

a)

b).....

c)

d).....

e)

f) Employing the services of the agents, servants and or employees of 2nd Respondent to allow spoil votes counted in his favor, Bar-ober, Benga Technical Buduma Primary.

g)Employing and or engaging the servants employees and or agents of the 2nd Respondent to use unsealed ballot boxes which were prone to manipulation and indeed were manipulated to reflect results favorable to the 1st Respondent in may polling stations by not sealing the aperture covers, denying candidates agents space to accompany the ballot boxes knowing well that they were not sealed. Taking more than three hours on the way alone with ballot boxes without agents carried in

personal cars of campaign managers of the 1st respondent Mr. Fred Walufu driving a car model Feilder KBK 186S, was ferrying ballot boxes from Makwara, Siribo, Esiribo Market and Emauko against regulation by failure to disclose interest hence conflict of interest as a transporter.

h)Employing his poll agents to vote one than once in his favor for membership of national assembly among other malpractices as in case of a few polling stations where parliamentary votes are more than the rest candidates.station....(sic)

14. THAT I verify that the alleged malpractices on the part of the respondents singularly and or jointly puts into question the validity of election of the 1st respondent, who upon close examination of the modalities employed by 1st, 2nd and 3rd Respondent jointly and or singularly does not reflect the universal and free expression of the will of the people of Butula, myself included and hence prejudiced. The 2nd Respondent employed some presiding officers and clerks to serve in their own homes, making it impossible to be impartial in their home areas as the case of Bujumba polling station where Mr. Michael Sikali illegally, irregularly and without probity decided to collect ballot papers from Burinda polling station to his Bujumba polling station without official delivery procedure of ballot papers as prescribed by the election act for mysterious use.”

28) There is then the evidence of Mr. Stephen Maero Nyamuringa who has already testified in support of the petition. He told Court that he was an ODM Agent at Burinda Primary School Polling Station. He recalls that at about 3.00p.m on the voting day, the Presiding officer at Burinda Primary School informed the agents that he was releasing a Ballot Book to Bujumba Primary school Polling Station. He testified that the Ballot Book contained 50 ballot papers. In an Affidavit filed in response to this application, the 3rd Respondent conceded to this and confirmed that the Presiding Office at Bujumba Primary School Polling Station stream 8 indeed received 50 Ballot Papers from Burinda Primary School Polling Station.

29) Let us examine those allegations and the evidence a little more closely. It is said that the 2nd Respondent allowed spoilt votes to be counted in favour of the 1st Respondent at Bar-ober Polling Station, Benga Technical Polling Station and Buduma Primary School Polling Station. Curiously, the Petitioner only seeks the scrutiny of ballots cast at Buduma Primary School Polling Station. The Petitioner was under an obligation to explain to this Court why he would pick out only one Polling Station out of the three. Or is this a case of cherry picking? This Court is unable to accede to the request to examine the votes at only one Polling Station without any explanation whatsoever as to why it should be treated differently from the other two.

30) Then there is the allegation that after the close of voting, Ballot Boxes were ferried from Makware, Siribo, Esiribo and Emauko to the tallying center without compliance of the regulations. It is said that the ballot boxes were carried in the personal vehicles of the campaign Manager of the 1st Respondent and in the absence of party agents. The Respondents have so far not responded directly to this claim. But I cannot help but notice that this complaint is not in respect of any of the Polling Stations that are the subject of the request for scrutiny. Let me also add that a scrutiny may not achieve much because the counting of votes is done at the Polling Stations. Tampering of the Ballot papers on transit from the Polling Station to the Tallying Station does not change how casting and counting of the votes was conducted at the Polling Station.

31) It is common cause that some ballot papers were transferred from Burinda Polling Station for use at Bujumba Polling Station. The 3rd Respondent has stated that those ballot papers were not utilized and this fact recorded in the Poll Book Diary in the presence of accredited political party Agents. But that explanation by Mr. Sigei is hearsay because the Presiding officer of Bujumba Polling Station Mr. Michael Sikally did not swear an Affidavit to this effect. I find that the query raised by the Petitioner in respect to the utilization of the ballot papers has not been satisfactorily explained. The query is not a trifle and invites further investigation. I would think that an examination of the votes cast at Bujumba Polling Station could shed some light.

32) The above allegations and evidence is all that this Court was obliged to consider. This is because, as

earlier stated, the Court ought to disregard any evidence that is extraneous to the Petition or which has been introduced into the proceedings without leave of Court. Nevertheless, for completeness this Court will examine the additional evidence contained in the supporting Affidavit of the Petitioner sworn on the 8th of May 2013.

33) In paragraphs 14 – 19 of that Affidavit, the Petitioner alleges that in the following 6 Polling Stations; Elugulu Ward, Murumba Market Polling Station, Butula Market Polling Station, Bumutiru Primary School Polling Station, Isongo Primary School Polling Station and Kingandole Primary school Polling Station, the total number of votes cast exceeded the number of registered voters. The 3rd Respondent discounted this claim by showing to this Court the Forms 35 of each of those Polling Stations. This Court has had some difficulty following the argument of the Petitioner. The Petitioner gives an analysis of the Ballot Books issued to each of the Polling Stations and the votes cast. It is from this analysis that he deduces the excess votes. His analysis says nothing about the number of registered voters in each of those Polling Stations. This is contrasted with the evidence of the 3rd Respondent which specifically states the number of registered voters for each of the Polling Stations. As is clear, the allegation by the Petitioner that there was an excess of cast votes is based not, on the registered number of voters for each Polling Station, but on the supposed number of ballot papers issued for voting. The trouble with the Petitioner's approach is that his own evidence does not support this allegation. For instance, for Murumba Market Polling Station, the Petitioner alleges that there were 12 ballot books issued. But from his own evidence, the ballot books issued were 6 (see paragraph 1.15 of the check list of Mary Obwogo annexed to the Petitioner's Affidavit). And looking at the serial numbers of Ballot Book it would seem that each book contained 100 ballot papers. It is therefore unclear from this evidence whether the ballot papers issued for that Polling Station were 1,200 or 600. In respect to the other 5 Polling Stations, the Petitioner has not laid any evidence in support of his allegations as to the number of Ballot Papers issued. The Court notes that the Petitioner is yet to close his case and there is still opportunity for him to prove these allegations. But as things stand, that unproven analysis is insufficient to sway this Court towards an order for a scrutiny in respect to the 6 Polling Stations.

34) There was then the allegation about some additional Polling Stations. It seems conceded that there were 79 Polling Stations in Butula Constituency. The Petitioner has shown this Court an extract from the internet headed "**Mars Group Kenya**" listing the Polling Stations in Butula Constituency as 55. To the Petitioner these are the Gazzetted Stations. But the issue of additional Polling Stations is not one of the grounds listed in the Petition for challenging the outcome of the election. And neither is it taken up in the Affidavit in support of the Petition. That may turn out to be an issue for another day. However, for purposes of the request for scrutiny, the Petitioner is unable to persuade this Court that it is necessary for addressing his Complaint of additional Polling Stations. Regulation 7 of the Elections (General) Regulations 2013 requires, *inter alia*, that the 2nd Respondent publishes the establishment of Polling Stations or their alteration in the Gazette. Whether this was complied with is a matter that can be resolved from the evidence at the hearing. Examination of ballots may not help.

35) I now turn to consider whether the margin of votes between the winner and the runner up justifies an order for scrutiny. That difference is 1,389 votes. Whether or not this is a narrow margin will depend on the total number of votes cast. The total number of votes cast in the Butula Constituency parliamentary election as published by the 3rd Respondent is 36,332. In the **Hassan Ali Joho case** (*supra*) that was cited to this Court Maraga J (as he then was) gave examples of past decisions where the margins were so narrow that scrutiny was ordered without much ado. These include, **Onamu –vs- Maitsi Election Petition No.2 of 1983** where the margin was 30 votes, **Kirwa –vs- Muliro Election Petition No.13 of 1998** where the margin was 7 votes and **Hamed Said -vs- Ibrahim Mwarua Election Petition No.1 of 1983** where the margin was 62 votes. The Learned Judge agreed with the holding in **Onamu –vs- Maitsi** that where the margin is very low justice will be done and seen to be done if scrutiny and re-count is ordered from the beginning. I too would agree. In those instances a scrutiny and re-count could unearth errors (inadvertent or deliberate) that may wipe out the small margin. In the **Hassan Ali Joho case**, (*supra*) The learned Judge concluded as follows:-

“With a margin of 1061 votes in this petition I am not persuaded that an order of scrutiny and

recount should be made before a foundation is laid.”

I take a cue from that decision. It does not seem to me that a margin of 1,389 votes against a total of 36,332 is so narrow as to warrant an order for scrutiny without further justification.

36) On my assessment of the material before me I am satisfied that there is sufficient reason for an examination to be carried out of the votes cast in only 1(one) Polling Station, that is, Bujumba Primary School Polling Station. That said, the Die is not cast on this issue as an order for further scrutiny can still be made at a later stage of these proceedings. The question can be revisited later in the proceedings. Sufficient reason may arise to justify that course. For now, this Court makes an order that there shall be scrutiny carried out in respect to the votes cast at Bujumba Primary School Polling Station (Code 002). This Court shall issue directions of the procedure to be followed in that scrutiny.

37) Each party to bear its own costs.

DATED, DELIVERED AND SIGNED AT BUSIA THIS 23RD DAY OF MAY, 2013.

IN THE PRESENCE OF:

**KADENYI.....COURT CLERK
.....FOR PETITIONER**

.....FOR 1ST RESPONDENT

.....FOR 2ND & 3RD RESPONDENTS

**F. TUIYOTT
J U D G E**