



REPUBLIC OF KENYA

High Court at Bungoma

Petition 5 of 2013

PHILIP MUKWE WASIKE.....PETITIONER

AND

JAMES LUSWETI MUKE.....1ST RESPONDENT

IEBC.....2ND RESPONDENT

SILAS ROTICH.....3RD RESPONDENT

RULING

I have considered submissions

- 1) I think the issue of service was overlooked with regard to the pre-trial information initially intended for 9th May 2013 by virtue of the fact that Mr. Wanyonyi was present in court when the date was given. However that is now water under the bridge as the pre-trial did not proceed thus the court apologies for the omission.
- 2) I think the notice of motion filed is not misplaced, the rules do not restrict what it urges is for parties to find ways of resolving the same.
- 3) With regard to scrutiny, it would be prudent to first hear the evidence and cross-examination before parties apply for the same – this would then allow parties to lay a basis for such order because scrutiny and recount are not automatic – there must be a basis for doing so. I would also urge counsel to refer to the case of **Maina Kamanda V Margaret Wanjiru Election Petition No.5 of 2008** which offers a useful guide on scrutiny.
- 4) The only other instance where scrutiny would take place *ab initio*, is if it is the only issue in the Election Petition and that once done it would conclude the matter. I have perused the application – there seems to be several other issues including bribery and witchcraft and such other related electoral offences – so I direct that the issue of scrutiny and recount be raised at the end of the petitioner’s case preferably on 22nd May 2013.
- 5) I direct that parties explore ways of resolving some of the issues raised in the application for instance:
 - a) Does the applicant seek scrutiny and recount in all polling stations or only some stations? This needs clarification.
 - b) Is there any prejudice likely to be caused if the further evidence sought to be introduced is allowed

without inter-partes hearing. Mr. Makokha says there will be prejudice caused.

c) In the event of parties not agreeing then hearing proceeds on 14/05/2013 at 12.00 p.m. The same be served on 2nd and 3rd respondents.

H.A. OMONDI

JUDGE

13/05/2013

Mr. Wanyonyi

I have seen the issues as framed by the court, we have no problem with them, we are agreeable. We intend to call 10 witnesses. I ask court to give us 15/05/2013. I need to serve 2nd and 3rd respondent.

H.A. OMONDI

JUDGE

13/05/2013