REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

ELECTION PETITION NO. 2 OF 2013

IN THE MATTER OF THE ELECTIONS ACT, 2011 AND THE ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS) PETITION RULES, 2013

AND

IN THE MATTER OF THE NATIONAL ASSEMBLY ELECTIONS FOR NAROK EAST CONSTITUENCY, NAROK COUNTY

BETWEEN

HARUN MEITAMEI LEMPAKA.....PETITIONER

VERSUS

HON. LEMANKEN ARAMAT.....1ST RESPONDENT

ISAAC RUTO.....2ND RESPONDENT

INDEPENDENT ELECTORAL & BOUNDARIESCOMMISSION (IEBC).....3RD RESPONDENT

RULING

Harun Meitamei Lempaka *(the Applicant)* in his Notice of Motion (the Application) dated 27th May 2013 sought the following orders -

1. ***That this Honourable court does order scrutiny of all votes cast in all polling stations in Narok East Constituency during the 4th March 2013, National Assembly Elections.***

2. ***That this Honorable be pleased to order for a recount of all valid votes cast in respect of the Narok East Constituency National Assembly Elections.***

3. ***That the costs of this Application be borne by the Respondents.***

2. The Application was supported by the Affidavit of the Applicant sworn on 27th May 2013,

and the grounds on the face of the Application, namely-

(a) that the Applicant has in his Petition prayed for an order of scrutiny of all votes cast in respect of the Narok East Constituency National Assembly Elections,

(b) that the Applicant, in the Petition, has cited various electioneering irregularities which provide a firm basis upon which the Application for scrutiny and recounting of votes may be founded as detailed in paragraphs 13-19 of the Petition and the Supporting Affidavit sworn by the Petitioner on 10th April, 2013,

(c) that the scrutiny of the votes cast and a recount of all valid votes cast in the polling stations across Narok East constituency in respect of the National Assembly Elections, will end in the expeditious disposition of the instant Petition.

(d) that scrutiny of all votes cast and a recount of all valid votes cast in the Polling Stations across Narok East Constituency in respect of the National Assembly Elections will not prejudice any party to this Petition but will rather make clear the will of the Narok East people.

(e) that it is only fair, just and equitable that this (Applicant's) instant application be granted.

3. The Applicants' Supporting Affidavit reiterated the above grounds and deponed in paragraphs 3, 4 and 5 as follows -

(a) That I clearly believe that the grounds which an order for scrutiny and recounting of votes has been sought in this instant application have been exhaustively laid out in the Petition (para. 3),

(b) that I am informed by Ms Kinoti & Kibe Advocates, information which I verily believe to be true that a scrutiny of all votes cast and a recount of all valid votes cast in the 69 polling stations across Narok East Constituency in respect of the National Assembly elections will aid in the expeditious disposition of this instant Petition, (para. 4),

(c) that I verily believe that it is only fair and just and equitable that this court orders a scrutiny of all the votes cast and a recount of all valid votes cast in the 69 polling stations across Narok East Constituency in respect of the National Assembly Elections. (para. 5).

4. In opposition to the Application, Lemanken Aramat *(the 1st Respondent)* filed a Replying Affidavit sworn on 4th June 2013 in which he depones *inter alia* -

(a) that the application for scrutiny of votes cast is pre-mature and abuse of the court process; (para. 4),

(b) that I am advised by my Advocates on record which advice I verily believe to be sound that the recount of votes cannot be given merely because the Petitioner is having doubts in his mind and/or as a matter of right and/or doctrine (para. 6),

(c) that the Applicant and/or his agents were present on counting, his agents signed Form 35 that they were satisfied and never asked for a recount and it is not proper for the Petitioner to raise contentions and objections after having been defeated after counting (para. 2),

(d) that the Applicant has not alleged and/or substantiated in acceptable measure by means of evidence that a prima facie case of a high degree of probability existed for the recount of votes, (para. 9),

(e) that the Applicant has not established any grounds and/or basis to warrant grant of

orders sought (para. 5).

5. The Application was also opposed by Isaac Ruto *(2nd Respondent)* and the Independent Electoral and Boundaries Commission *(3rd Respondent)* through their grounds of opposition dated and filed on 10th June 2013 to the effect that -

(a) the application is pre-mature;

(b) no basis has been laid for granting the orders sought,

c. ***that the Petitioner is seeking a short-cut to the determination of the Petition.***

6. The Application was heard on 18th June 2013 when counsel for the Applicant and the Respondents made their submissions orally.

7. Mr. Kibe, learned counsel for the Applicant *(Kibe),* asked the court to appreciate two conceptual issues and nature of Petitions envisioned under Article 105 of the Constitution.The two issues, Mr. Kibe submitted are -

1. ***Firstly, where a Petitioner challenges, the validity of an election in the sense that he ultimately seeks entire invalidation of the entire election exercise, and if successful, a by-election follows and in which a Petitioner would be arguing that the election was conducted in such an unlawful manner that the outcome can only be invalid, and***

2. ***Secondly, where the Petitioner says that the election was properly conducted, but that the person declared a winner ought not to have been declared a winner. In this regard the Petitioner says that the only invalid thing about the election is the declaration of the winner or who the winner was. In practical terms the Petitioner would be challenging issues of counting and the tallying of votes.***

8. Counsel Kibe submitted that the Applicant's Petition fell within the second category. Unlike the old Election Rules 1993 made under the National Assembly and Presidential Elections Act *(Cap. 7, Laws of Kenya),* which did not draw the two types of Petitions and the court had no power to declare a successful Petitioner to have been duly elected, the new rules conferred upon the court the jurisdiction to do.The case of **WILLIAM MAINA KAMANDA VS. MARGARET WANJIRU KARIUKI [2008] eKLR** was an example of the old order.Though the Petitioner, Maina Kamanda had, on recounting the vote, won, the court could not declare the Petitioner to have been duly elected until a by-election was held.Under the new rules, a successful Petitioner would be declared the winner, once the court establishes so, upon the recount of votes cast. Thus counsel contended, determination under Section 82 of the Elections Act, 2011 *(No. 24 of 2011),* would be quickened.It is noted for the record that the current Section 82 of the Elections Act, is equivalent to Section 26 of the National and Presidential Elections Act.

9. On the Respondents' contention that the application for scrutiny and recount has been made pre-maturely and should be made during the trial, counsel contended that given the nature of the Petition, the Application has been made at the right time, and that raising the issue and determining it now, the court would be giving effect to the overriding objective that a Petition such as this one should be determined expeditiously, and that Section 82 of the current Act which is equivalent to Section 26 of the repealed Act, the National Assembly and Presidential Elections Act, does not sit well with the current jurisdiction *(which enables the Petition Court to declare the successful Petitioner to have won an election).*

10. Counsel submitted also that where a Petitioner seeks a limited and specific remedy in a Petition, the authorities which suggest that an order for a recount of votes after the Petitioner has given evidence, should be treated with great circumspection because -

1. ***Unlike the old election rules, the new rules require the Petitioner to render his evidence in***

advance by way of Affidavits, and that since the Petition's evidence is already on record, he would not when put on the witness box depart from his sworn evidence;

2. ***In light of the nature of the Petition the Applicant is only interested in one relief – scrutiny and recount.***

11. Relying upon the provisions of Section 79 *(which gives the court the right to summarily reject a Petition)*, counsel submitted that having declined to summarily dismiss the Petition and further having appointed a date for hearing of the Petition the applicant is entitled as a matter of right to the prayers sought. If this were not so, the Applicant's right under Rule 32(2) of the Elections *(Parliamentary and County Elections Petition Rules, 2013 (LN No. 24 of 2011), (which requires a Petitioner to state the only remedy he requires is scrutiny and tallying of votes)*, would be rendered nugatory, and that scrutiny and recount are an integral part of the Applicant's right to a trial of his Petition, and that having declined to dismiss the Petition summarily under Section 79(a) of the Elections Act, the court lost jurisdiction to deny the Applicant an order of scrutiny and recount.

12. In summary the Applicant's counsel gave seven reasons why orders for both scrutiny and recount should be granted -

1. ***that both the Applicant's and the Respondents' Affidavits show a serious dispute as to the votes received by the Applicant and the 1st Respondent;***

2. ***There was failure of the electronic register, and there was thus no safeguard for ensuring the accuracy and transparency in the vote tallying exercise;***

3. ***There was use of an unauthorized clerk called Mark Lempaka and he is incriminated in giving false evidence on behalf of the Respondents;***

4. ***Bias for URP agents as against TNA agents contrary to Section 30 of the Elections Act,***

5. ***Form 34 or some Form 34 used in tallying were not genuine,***

6. ***There was inordinate stoppage of tallying of votes contrary to Regulation 75(3) of the Election Regulations which requires the continuous counting of votes, and not within the spirit of Article 8(3)(i)-(v) and 86 of the Constitution of Kenya 2010,***

7. ***There were malpractices at Eor-Ekule Primary School which were supplied with three (3) ballot boxes but only two (2) were accounted for. It is unknown what happened to the one box as 70 boxes were supplied and only 69 ballot boxes were accounted for.***

13. For these reasons, Counsel for the Applicant urged the court to grant the orders sought.

14. On the authorities, Counsel submitted that if the difference between the winner and loser is large the courts will not order scrutiny or re-count and to the contrary where the differences are insignificant, the court will order scrutiny and re-count – **PHILIP OSORE OGUTU VS. MICHAEL ONYURA ARINGO & 2 OTHERS [2013] eKLR.**

15. If at the pre-trial stage the only issue is the count and tallying of votes, scrutiny would be ordered **(PETER GICHUKI KINGARA VS. INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION & 2 OTHERS [2013] eKLR.**

16. The court must be satisfied that scrutiny is necessary if justice is to be seen to be done – **M'INKIRIA PETKAY SHEN MIRITI VS. RANGWA MBAE & 2 OTHERS** *(Meru H.C. EP. NO. 4 OF 2013).*

17. For these reasons, counsel for the Applicant urged the court to grant the orders sought.

Firstly in addition counsel urged, the Petition would be concluded in the shortest time possible, and **secondly,** for purposes of the Respondents, the recount and scrutiny would, in respect of the 1st Respondent, show that he won fairly, and for the 2nd and 3rd Respondents that their officer tallied the votes without fear or favour.

THE 2ND AND 3RD RESPONDENTS SUBMISSIONS

18. While agreeing with the introductory submissions by Mr. Kibe, learned counsel for the Applicant, Mr. Lawrence Karanja counsel for the 2nd and 3rd Respondents submitted that the second Respondent is a body mandated by the Constitution to conduct elections without any interference from any other quarter. Under the principles of the separation of powers the mandate to conduct elections is donated to IEBC.Courts are given power to determine questions/disputes of election if there is a justiciable cause. No such cause was shown by the Applicant in terms of Article 83 of the Constitution, and no election may be declared void for minor irregularities.

19. Whereas Rule 33 of the Election Petition Rules is clear that a party may at any time apply for an order of scrutiny, the requirements of Section 82(2) of the Act must first be complied with for instance, an allegation of invalidity of votes.There was no basis for scrutiny.The application for scrutiny was premature, it should be made during the hearing of the Petition **(PETER GICHUKI KINGARA VS. I.E.B.C.** *(supra)***).** The hearing of the Petition must commence before an application for scrutiny is made **KAMANDE VS. WANJIRU** *(supra).*

20. The Respondents had in their Replying Affidavits answered all the claims of the Applicant.The second Respondent had admitted the error in Enariboo Polling Station where the Applicant obtained ten (10) votes which were unfortunately credited to his opponent *(not the Respondent).* The second Respondent also admitted an error of seven votes which error affected the aggregate of votes, and not any candidate.

21. In addition the entries in Forms 35 and 36 are tallying unlike the case of **KAMANDE VS. WANJIRU**, where it was clearly demonstrated at the hearing, there was no parallel situation laid out by the Applicant.

22. The failure of technology was no ground for the grant of orders of scrutiny (**RAILA VS. UHURU**, *Supreme Court Election Petition No. 1 of 2013*).

On alleged malpractice of clerk Mark Lempaka counsel submitted that said clerk is not a party to the Petition and the court cannot investigate his conduct.

On Polling Station No. 32, the applicant scored *(One hundred and eighty (180)* votes and that this is clearly shown in Form 36.

23. Parties, and not individual candidates appointed agents in accordance with Section 30 of the Elections Act. The number of agents if appointed by each candidate would have exceeded the number of registered voters in Polling Centres where there were for instance forty (40) registered voters as against forty-one (41) agents for each of the candidates – for Parliamentary, Senator, Governor, Women Representative, County Assembly and Presidential.The accreditation of agents was a matter of the Political Coalitions, TNA/URP and not I.E.B.C. Agents duly appointed by the coalition, signed the Form 34 & 35.The deponents of the various affidavits were not, and need to be cross-examined before scrutiny or recount may be ordered.

24. On serialisation of the Forms, the 2nd Respondent's Replying Affidavit shows that each Presiding Officer was alloted 5 Forms 34 & 35 which after polling were distributed as follows -

1. ***2 original Form 34 were put into the ballot box,***
2. ***2 original Form 34 was to be given to Agents,***
3. ***one original copy was given to the Returning Officer.***

25. Because the forms had distinctive serial numbers hence the reason why the Returning Officer had a different serial number.

26. On the submission of alleged long or protracted interlude between the tallying process, Counsel for the 2nd and 3rd Respondents indeed admitted that there was an interlude during the tallying exercise.It was not as contended by the Applicant for the purpose of manipulating any votes or the votes of the Applicant.The officials were fatigued.

27. Relying on the case of **HASSAN ALI JOHO VS. NATHAN NYANGE, ANANTA MWASAMBU MWABOZA [2006] eKLR**, Counsel submitted that-

> ***"expediency should not be the sole or main factor in ordering scrutiny. Courts are there to hear cases including election petitions and should not resort to short-cuts for their own expediency."***

28. Counsel urged that there was no merit in the application and should be dismissed with costs.

29. Mr. Njenga, learned counsel for the 1st Respondent supported and reiterated the submissions by counsel for the 2nd and 3rd Respondents and maintained that the 1st Respondent was merely a victim of the war between the Applicant and the 2nd and 3rd Respondents.In his submission, neither the remedy of **scrutiny** nor recount was available to the Applicant.

For scrutiny - because -

(a) There are no allegations of the violations of Section 82(2) of the Elections Act -

(i) no persons voted who were not registered,

(ii) no bribery,

(iii) no treating or undue influence, persuasion either in the Petition or witness statements.

And for **"recount"** because -

(a) there is no prayer or dispute of results in all Polling Stations,

(b) there is no request for recount at any polling station – Regulation 80(1) & (2),

(c) there is no basis laid out yet,

(d) no complaint was made immediately before or after the results were announced,

(e) there was no dissatisfaction recorded upon any Form 35,

(f) No agent or candidate refused or gave reasons for not signing Form 35 in terms of Regulation 79(3) of the Election Regulations, on the contrary all agents signed the reverse of Form 35,

(g) Refusal to sign the Form 35 does not invalidate the results – Regulation 79(7),

(h) there is no conflict between Form 35 and 36. If there was a conflict the resolution would be a recount,

(i) there is no allegation against the Respondent.

There is consequently no basis for any of the prayers sought.

30. Mr. Kibe learned counsel for the Applicant made a Reply to these submissions, and I shall consider his responses in my opinion set out in the following paragraphs.

1. **OF WHETHER AN APPLICATION FOR SCRUTINY AND RE-COUNT SHOULD BE GRANTED AS A MATTER OF RIGHT**

(A) The Philosophical and Spirit of the Constitution of Kenya 2010

31. In his response to the submissions by counsel for the 2nd, 3rd and 1st Respondents – Mr. Kibe learned counsel for the Applicant submitted inter alia that were the court to accept the Respondents' arguments against the grant of the application for scrutiny and recount then the *"most important gain by the new Election Petition Rules would be very easily lost and would in practice be lost."*

32. Likewise in his opening submissions, and with which sentiments, the Respondents counsel generally accepted, but with riders, Mr. Kibe submitted that Article 105 of the Constitution establishes two concepts or principles -

33. **Firstly,** where a Petitioner challenges the entire election exercise and argues that the election exercise was conducted in such an unlawful manner that the outcome can only be invalid, and if successful seeks the invalidation of the entire election exercise. And **secondly**, where the Petitioner admits that the election was properly conducted but that the candidate declared winner ought not to have been declared winner. In other words, the Petitioner would be challenging issues of counting and tallying of votes.

34. Mr. Kibe justified this distinction by reference to the old Rules under the Presidential and National Assembly Act *(Cap. 7, Laws of Kenya)*, which did not carefully draw the distinction between the two types of Petitions.Under the old Rules, even if a Petitioner won on a recount of votes, he would still have to face a by-election.That was the situation in the case of **WILLIAM MAINA KAMANDA VS. MARGARET WANJIRU KARIUKI** *(supra),* where though Maina Kamanda won the vote on recount, he had still to face a by-election. Unlike the old Rules, the new Rules donated to the court the jurisdiction to declare the winner a Petitioner who is successful on a recount.

35. To buttress the Applicant's case, counsel also argued that the Election Court has power to summarily dismiss a Petition under Section 79 of the Elections Act, 20 *(No. 24 of 2011).*

Article 105 provides as follows -

"105. (1) The High Court shall hear and determine any question whether -

(a) a person has been validly elected as a Member of Parliament, or

(b) the seat of a member has become vacant.

2. ***a question under clause (1) shall be heard and determined within six months of the date of lodging the Petition.***

3. ***Parliament shall enact legislation to give full effect to this Article.***

36. The Elections Act 2011 *(No. 24 of 2011)* was enacted pursuant to Article 105(3) of the Constitution of Kenya 2010 *(the Constitution)* and for the purposes of this Ruling Sections 79 – 82 are immediately relevant.

Section 79 provides as follows -

"79(1) Upon receipt of a Petition an Election Court shall peruse the Petition and -

(a) if it considers that no sufficient ground for granting the relief claimed is disclosed therein may reject the Petition summarily; or

(b) fix a date for the trial of the Petition.

37. The obligation imposed upon the court by Article 105 of the Constitution and Section 79 of the Elections Act is to hear and determine questions whether a person has been validly elected as a member of Parliament or whether a seat has become vacant. The determination is made after the hearing of the evidence in relation to the questions raised in the Petition.

38. Similarly, the discretion conferred upon an Election Court by Section 79(1) of the Elections Act to dismiss a Petition Summarily is a discretion which must be exercised with the greatest circumspection and in the clearest of cases. Indeed as the late Madan J. A. *(as he then was)* said – obiter – in the case of **D. T. Dobie & Company (Kenya) Ltd vs. Muchina [1982] 1 KLR -**

"The power to strike out should be exercised only after the court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial judge. On an application to strike out pleadings, no opinions should be expressed as this would prejudice fair trial and would restrict the freedom of the trial judge in disposing the case."

39. In my opinion therefore the Election Court would have to establish to a high degree of probability that the Petitions cannot be redeemed in any way before summarily dismissing it.Consequently an Applicant cannot solely rely on the fact that an Election Court has not dismissed the Petition summarily or has fixed the Petition for hearing as a ground for allowing an application for scrutiny or re-count of votes.

B. OF WHETHER THE ORDER FOR SCRUTINY SHOULD ISSUE

40. The jurisdiction to order scrutiny of votes is conferred upon an Election Court by Section 82(1) of the Elections Act and the grounds for ordering a scrutiny are laid down in Section 82(2) -

"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 Elections Court may determine – and,

82(2) says -

82(2) where the votes at the trial of an election petition are scrutinized, only the following votes shall be struck off -

(a) the vote of a person whose name was not on the register or list of votes assigned to the Polling Station at which the vote was recorded or which had not been authorized to vote at that Station,

(b) the vote of a person whose vote was procured by bribery, treating or undue influence,

(c) the vote of a person who committed or procured the commission of personation at the election,

(d) the vote of a person proved to have voted in more than one constituency,

(e) the vote of a person, who by reason of conviction of an election offence or by

reason of the report of the election court, was disqualified from voting at the election, or

(f) the vote cast for a disqualified candidate by a voter knowing the candidate was disqualified or the facts causing the disqualification, or after sufficient public notice of the disqualification or when the facts causing it were notorious.

And Rule 33 of the Elections (Parliamentary and County Elections) Petition Rules 2013 (the Petition Rules) provides -

"33. The parties to the proceedings may at any stage apply for scrutiny of the votes for purposes of establishing the validity of the votes cast.

2. ***Upon 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.***

3. ***Scrutiny or recount to be carried out under the direct supervision of the Registrar and subject to the directions as the court may give.***

4. ***Scrutiny shall be confined to the Polling Stations in which the results are disputed and shall be limited to the examination of -***

(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 counter-foils of used ballot papers,

(h) the packets of counted ballot papers,

(i) the packets of rejected ballot papers, and

(j) the statement showing the number of rejected ballot papers.

41**.** The expression **"scrutiny" i**s not defined either in the Elections Act, or in the Elections (General) Regulations 2013 or Election Petition Rules.However according to Collins Concise Dictionary *(updated Bank of English)* 1999 Edn. **"Scrutiny"** means - *"close or minute examination"*. In the context of Rule 33(4) it means the *"close"* and *"minute"* examination of the matters set out in Rule 33(4) of the Election Petitions Rules.

42. However, again, and within great respect to counsel for the Petitioner, for an order for *"close and minute examination"* of the Election results to be made, the Petitioner must lay a basis founded upon the provisions of Section 82(2) of the Elections Act, and Rule 33(4) of the Elections *(Parliamentary Petition and County Elections)* Petition Rules, for instance – that a vote was cast for a disqualified candidate which facts *(of the the disqualification were public and notorious)*, or that a person whose name did not appear in the register voted, a vote was procured through bribery, treating or undue influence, or persuasion or that the person voted in more than one constituency, or that a person convicted of an

election offence voted.

43. In as much as Rule 33 of the Election Petition Rules grants the court upon application of a party thereto, the discretion to make an order for scrutiny, the court must first be satisfied that there is sufficient reason for scrutiny or recount of votes. In my respectful opinion, for the court to be so satisfied, the Application must itself first satisfy the requirements of Rule 33(4) of the Election Petition Rules – the Application should foremost indicate those stations in which the results are disputed as well as indicate other particulars stated in that sub-rule.

44. This position has also been upheld by the courts. In ***Philip Osore Ogutu v Michael Aringo and 2 Others*** *(supra)* the court held thus on scrutiny-

> ***"An order for scrutiny will not be made 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 may only be ordered where a foundation or basis has been laid***."

45. Similarly in the case of ***William Maina Kamanda v Margaret Wanjiru Kariuki*** *(Supra)*,the learned Judge observed that,

> ***"It is now well established that an order of scrutiny can be made at any stage of the hearing before final judgment whether on the court's own motion or if a basis laid requires so. It can be made if it is prayed in the petition itself – as is the case in this petition – or when there is ground for believing that there were irregularities in the election process or if there was a mistake on the part of the Returning Officer or other election officials."***

And in **Joho –vs- Nyange & another [2008] 3 KLR (EP) 188-195**, the court held-

> ***"an order for scrutiny can be made when it is prayed for in the petition itself and when reason for it exists. It is not made as a matter of course. It is made when there is ground for believing that there are irregularities in the election process or if there was a mistake on the part of the Returning Officer or other election officials."***

46. I have carefully perused the application(the subject of this ruling) and the Affidavit in support thereof. The Applicant has sought for scrutiny of the votes cast in all the 69 polling stations of Narok East Constituency. However, he has not cited specific irregularities in each of the polling stations which would give a basis to this court to give the orders sought. The court cannot rely on the irregularities found in 1 polling station as a basis for invalidating the votes in another polling station as each station is distinct and independent.

47. In addition, I did not find any specific references to the documents to be scrutinized under Rule 33 (4) of the Election Petitions Rules. The Applicant only made reference to some Forms 34 which relate to the Declarations of the Presidential Election Results at the Polling Station and which I find were mentioned in this Application in error as they are in relation to Presidential Elections, Forms 35 for the National Assembly/ County, Women Representatives/ Senate/ County/ Governor/ County Assembly Elections at the Polling Station and Forms 36 which relates to the Declaration of Results at Constituency/County Level. There were no allegations of the matters listed under Section 82 (2) of the Elections Act as to the validity of any of the votes cast.

48. It is thus clear to me that to make an order of scrutiny on the basis of bare *"beliefs"* would amount to *"playing lottery with the process of the Election Court"* as Hon. Ngaah Jarius aptly put it in the Petition between **Peter Gichuhi Kingara vs. Independent Electoral and Boundaries Commission** *(supra).*

49. There is consequently no material upon which this court can at this stage make an order for scrutiny. The prayer for scrutiny is therefore declined.

50. Having declined to grant the prayer for scrutiny I proceed to consider in the next paragraphs, whether there is any foundation for the grant of the prayer for "**recount."**

C. OF THE PRAYER FOR RECOUNT – NOT AUTOMATIC AT PRE-TRIALSTAGE

51. Section 82(2) of the Elections Act concerning *"scrutiny"* appears to make no distinction between *"scrutiny"* and *"recount"*.The question of "recount" is however one of the complaints resolution mechanisms referred to in Section 109(1)(x) to be provided for in the Regulations. Section 109(1)(x) -

> ***(x) to provide for complaints resolution mechanisms and for the manner of settlement of election disputes.***

52. It is pursuant to this and other provisions of Section 109(1) of the Elections Act that Regulation 80, among others of the Elections (General) Regulations was made. The side note to Regulation 80 is entitled **"Recount**" and provides -

> ***"80. (1) A candidate or agent if present when the counting is completed may require the presiding officer to have the votes rechecked and recounted or the presiding officer may on his or her own initiative have the votes recounted.***
>
> *PROVIDED* ***that the recount of votes shall not take place more than twice.***
>
> ***(2) No steps shall be taken on the completion of a count or recount of votes until the candidates and the agents present at the completion of the counting have been given reasonable opportunity to exercise the right given by this regulation.***

And Part VI of the Elections (Parliamentary and County Elections) Petition Rules 2013 is entitled – **"scrutiny and recount"** and comprises Rules 32 *(Petitioner may request for examination of tallying only), and Rule 33 (Scrutiny of Votes).* I have already dealt with the question of "scrutiny" under Rule 33. Rule 32 provides -

> ***"32(1) Where the only issue in the election petition is the count or the tallying of the votes received by the candidates the Petitioner may apply to the court for an order to recount the votes or examine the tallying;***
>
> 2. ***The Petitioner shall specify in the Election Petition that he does not require any other determination except a recount of the votes or the examination of the tallies.***

53. Mr. Kibe learned counsel for the Applicant submitted that this Rule 32 grants the Applicant an automatic right to a recount. It does so at first blush so to speak if read in isolation.Upon further scrutiny along with Rule 33(2) the court has to be satisfied that there is sufficient reason for making such an order.

54. In my humble view again the right to a recount is not automatic, if it were so, the application could as well have been expressed to be made ex parte.An election is usually a contest between several candidates, and not a decision of a body which can be challenged by way of an *ex parte* application.Whereas a recount is an automatic right at the counting and tallying stage, it would be contrary the rules of natural justice if a recount was an automatic right at the pre-trial stage. An Applicant for a recount of votes at the pre-trial stage must *inter alia* show that he or his agents were denied the right to a recount under Regulation 80 of the Elections (General) Regulations. There is no such averment in the Petitioners' Affidavit or in any of the Witness Statements.

D. OF THE MARGIN OF VOTES

55. It was suggested by counsel for the Applicant that the margin of votes between the Applicant and the 1st Respondent was small.

56. The margin is not *per se* a ground for a recount. In considering the question of a *"margin"* of the winning and losing candidate, or as in this case, the Applicant and his opponent, the 1st Respondent, a relevant factor to consider is the number of candidates in the Election contest. If there were just two contestants there would be reason to consider the margin or difference of votes as a ground for considering a recount. Where there are more than two candidates to an electoral seat, it is absolutely essential to consider the margin between all the candidates.It will determine whether the margin between the Applicant and the 1st Respondent was indeed thin so as to allow a recount.

57. In this case there were 27,000 votes cast, and 10 candidates. The margin between the ten candidates *inter se*, and the Applicant and the 1st Respondent, the over 400 votes would well be wide of not only the Applicant and the 1st Respondent, but also of other candidates. It is not in this case a ground for grant of a recount.

E. OF AGENTS

58. The appointment of agents was not a matter of either of the Respondents. It was a matter of the Political Parties, their candidates and independent candidates. Section 30 of the Elections Act donates the power to appoint agents to either a Political Party or individual candidates. The dominant Political Parties in the subject constituency were TNA *(the National Alliance Party)* and URP *(United Republican Party).* The principal Presidential agents of these parties appointed agents for each Political Party, and this denied their candidates the right to appoint their own agents at each polling station. The URP being the dominant Political Party in the Constituency, its agent appears to have outshone the Applicant's TNA Party agent.That clearly cannot be a ground for recount.

F. OF CONTINUOUS COUNTING AND TALLYING

59. Rule 75(4) of the Election (General) Regulations require a presiding officer not commence the counting or recount unless the Presiding Officer is of the opinion that the count or recount, as the case may be, can conveniently be completed without a break.

60. It was the Applicant's counsel's case for a recount that there was a long break in the counting of votes, thus giving room for manipulation of the votes. I find no evidence to support that the break was for the purpose of manipulating any votes or the tallying forms. It is a fact behoving the courts to take judicial notice, that in a constituency bereft of infrastructure, social amenities and other facilities, without mentioning lack of adequate or any feeding at all and where ballot papers and boxes are delivered on the eve of elections, the officers concerned including agents get extremely fatigued, and must I think get opportunity to stretch from doing the long hours of counting votes.It is bad faith to impute improper motive for such breaks to mean manipulation of votes.There was belief, but no evidence in the Application, to support a finding of manipulation.

61. As the question of Forms 35 and 36 will be part of the evidence in the Petition itself, I decline to make any findings in them at this stage.

62. In summary therefore,I find no case for orders of scrutiny or recount at this stage. I am however alive to the fact that this court has powers to order for scrutiny on its own motion during the hearing of the Petition if the evidence adduced leads the court to conclude that such scrutiny would be necessary for purposes of determining the issues raised in the Petition.

63. Both prayers for scrutiny and recount having failed, the Petitioner's Application dated 27th May, 2013 is dismissed with costs to the Respondents.

64. It is so ordered.

Dated, signed and delivered at Nakuru this 28th day of June, 2013

M. J. ANYARA EMUKULE

JUDGE