



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUSIA**

**PETITION NO.1 OF 2013**

**PHILLIP OSORE OGUTU .....PETITIONER**

VERSUS

MICHAEL ONYURA ARINGO.....1<sup>ST</sup> RESPONDENT

INDEPENDENT ELECTORIAL & BOUNDARIES

COMMISISON (IEBC).....2<sup>nd</sup> RESPONDENT

RETURNING OFFICER.....3<sup>RD</sup> RESPONDENT

RULING (NO. 2)

1. These proceedings are at the tail-end as the Court has now heard the witnesses for both the Petitioner and Respondents. At the close of the Respondents case, the Petitioner's Counsel rose to make two requests:-
  - a. That as it was the position of the Petitioner that the scrutiny conducted by the Deputy Registrar on 29th May 2013 was not conclusive, the Petitioner was desirous that the Polling Book Diary and Voter Register in respect to Bujumba Primary School Polling Station (**code 002**) be availed by the 2<sup>nd</sup> and 3<sup>th</sup> Respondents for inspection by the Deputy Registrar.,
  - b. That the Court be pleased to order for a recount of votes cast in respect to all 79 Polling Stations in Butula Constituency.

This decision is in respect to those requests.

2. SCRUTINY OF VOTES AT BUJUMBA

Following a formal application by the Petitioner, this Court on 23<sup>rd</sup> May 2013 ordered the Scrutiny of Votes cast at Bujumba Primary School Polling Station (**Code 002**). And subsequently gave directions on the Scrutiny. Those directions which were issued on 29<sup>th</sup> May 2013 defined both the object and scope of the exercise to be undertaken by the Deputy Registrar. The relevant position is reproduced below:-

1. **Object of Scrutiny**

1. **To establish the numbers, nature, state, integrity or otherwise of the votes cast at the said Polling Station.**
1. **To establish Ballot Papers used at the Polling Station**

2) **Scope of scrutiny and recount**

2.1 **The following shall be examined,**

- a. **any written statement /s made by the presiding officer under the provisions of The Election Act ( Act No 24 OF 2011);**
- b. **the copy of the register used during the Election;**
- c. **the results of the Polling Station;**
- d. **any written complains of the candidates and their representatives;**
- e. **the packets of the spoilt papers;**
- f. **the marked copy register;**
- g. **the packets of counterfoils of issued ballot papers;**
- h. **the packets of counted ballot papers;**
- i. **the packet of rejected ballot papers; and**
- j. **the statements showing the number of rejected ballot papers;**

3. The Deputy Registrar carried out the scrutiny and recount and filed her Report on 31<sup>st</sup> May 2013. Copies of the Report were availed to Counsels representing the parties therein.
4. Issues have now arisen in respect to that Scrutiny. The Petitioners Counsel thinks it is inconclusive because the Polling Day Diary and the Register to the Polling Station were not availed to the Deputy Registrar at the time of Scrutiny. The argument being that these documents are vital for purposes of determining the questions raised on the irregularity of casting of votes at that Station.
5. The Respondents do not agree. They are of the view that nothing new will turn on the documents. In respect to the Diary, the Court was asked to note that it is not one of those documents which are the subject of examination under Rules 33(4) of The Election (Parliamentary and County Petition) Rules, 2013 (Hereinafter “**The Rules**”). For the Register, an explanation was made from the Bar that it was placed inside the Ballot Box in respect of the Presidential Election and could not be retrieved without opening of that box. This Court, I was told, would not have jurisdiction to order the opening of a Ballot Box used in a Presidential election.
6. Having heard the rival arguments, the Court is keenly aware that it will have to make findings on the outcome of the Scrutiny in its final decision. The Court must therefore relent from making any pre-judgment on that. But this Court can still make some tentative observations.
7. The controversy surrounding transferred Ballot papers to Bujumba Primary School Polling Station (**Code 002**) is set up in paragraph **14(a)** of the Petition and reinforced in paragraph 14 of the Petitioner’s Supporting Affidavit. This need to be reproduced.

14 ...

**(a) Allowing unauthorized persons and non-employees of the 2<sup>rd</sup> Respondent to collect ballot papers from one polling station to another polling station without consent and authority of approved party agents of various candidates**

**14 ...The 2<sup>nd</sup> Respondent employed some presiding officers and clerks to serve in their own homes, making it impossible to be impartial in their homes 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**

At the hearing, it came up in the evidence of **Stephen Maero Ngamuringa (PW4)**. He said as follows:-

**...The Presiding officer at Burinda Polling School was Simon Wewa. At 3.00pm. On 4th March 2013 Mr. Wewa informed us that he was releasing voters Ballot Book to Bujumba Primary School Polling Station 1. I recorded the book number PA00006101-PA00006150. The book carried 50 ballot papers. The book was to be released to Bujumba Primary School. The presiding Officer did not make us sign anywhere one as agents**

The 3<sup>rd</sup> Respondent has made an explanation as to how the Ballot Book moved from Burinda Primary School Polling Station (**Code003**) to Bujumba Primary School Polling Station (**Code 002**). This Court must in its final judgment decide whether or not to believe the 2<sup>rd</sup> Respondent’s explanation.

8. I have highlighted these evidence only for purposes of understanding the nature of controversy surrounding the transferred Ballot Papers . And these must be read in conjunction with the pleadings. The issues could be :-
  - a. Is there legal provision allowing for transfer of the Ballots?
  - b. If so, was the transfer done within the confines of the law?
  - c. Has the 2<sup>nd</sup> & 3<sup>rd</sup> Respondent properly accounted for the Ballots?

Now the question; will a Scrutiny, without an inspection of the Diary, help the Court resolve these issues?

9. The Polling Day Diary is not one of those documents to be inspected in a Scrutiny under The Rules. The Polling Day Diaries to the two streams at the Station were availed to the Deputy Registrar on 29<sup>th</sup> May 2013, a day after the Scrutiny. The Deputy Registrar made no comments about the Diaries. And she could not have done so as they were not part of the documents to be scrutinized.
10. Yet both Polling Day Diaries are documents in the custody of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. They chose not to produce them as exhibits at the hearing. On the other hand these would be the sort of documents that the Petitioner would be entitled to call for inspection and production at the Pre-Trial Conference. The Petitioner let that opportunity pass. That said, if issues surrounding the transferred Ballots cannot be conclusively determined without the production of the Diaries then it is the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents who will be disadvantaged. In my view, the provisions of section 112 of the Evidence Act (*although specifically intended for Civil Proceedings*) would apply. That section reads;

**“In Civil Proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disapproving that fact is upon him.”**

The facts in the Polling Day Diaries are within the knowledge of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. The burden of proving the facts in those Diaries lies with them. They are dicing by not producing them. But it is not for this Court to force them to avail the Diaries for Scrutiny when they are not part of the documents to be examined under the Rules. So much for the Diaries.

11) It is true that the copy of the Register used during the elections is one of the documents which can be the subject of scrutiny (Rule 33 (4) (b) of The Rules) and was indeed one of the documents which was to be examined in the exercise concluded by the Deputy Registrar. The Register used in Bujumba Primary School Polling Station was not availed to the Deputy Registrar for inspection. This Court is now told, from the Bar, and without any evidence that the used Register was placed in the Presidential Ballot Box. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents explained that this was the practice adopted by them in the just concluded Polls. While this Court will not doubt that explanation, it agrees with Mr. Kasamani, appearing for the Petitioners, that there is no evidence on record to prove that the Used Register for the Polling station was as a matter of fact placed in the Presidential Ballot Box.

12) And if one was to look at the Regulations that govern the handling of electoral material at the close of Polling, the conclusion to be drawn is that the practice adopted by the IEBC may have been born out of convenience rather than adherence with a Regulatory requirement. The Court has in mind Regulations 73(3) and 73(4) of The Elections (General) Regulations, 2012 which provides that,

**“(3) Immediately after the completion of the statement under subregulation (2), the presiding officer, in the presence of the candidates or agents shall seal in separate tamper proof envelopes-**

**(a) .....**

**(b) the marked copy register, where necessary:**

**(c) .....**

**(d) .....**

**(4) After complying with the provisions of this regulation, the presiding officer shall, as soon as practicable, deliver the ballot boxes, and the tamper proof sealed envelopes to**

**the returning officer who shall take charge thereof.**” (my emphasis)

The Court was unable to find any regulation that requires the Returning Officer to place the tamper proof envelope (which contains the Used Register) in a particular Ballot Box or any Ballot Box at all.

13) There being no certainty that the Used Register will be found in the Presidential Ballot Box then, is the Court to make an order that could turn out to be a wild goose chase? My understanding of the Petitioner’s grievance in respect to the transferred Ballots to Bujumba is that they were transferred illegally, irregularly and without probity for **“purposes of mysterious use”** (Petitioners own words). There was no allegation that (in that Polling station) there was:

- a. Double voting
- b. Voting by unregistered persons
- c. Voting in the name of dead voters of
- d. The votes cast overshoot the number of registered voters.

Whilst an examination of the Used Register would provide a more complete impression of the Polling at Bujumba, this Court takes the view that the Used Register is not absolutely essential in understanding the Bujumba incident in the context of issues raised by the Petitioner. For that reason the Court will not make an order that that may turn out to be futile.

**Re-count**

14) There is an argument by Counsel for the 3<sup>rd</sup> Respondent that needs to be dealt with at once. Citing the decision on **Ochieng –vs- Machani & Another (2008) 1 KLR EP512** Counsel argued that Petitioner being a voter cannot ask for a recount of votes. This Court has read that decision which was in respect to a Petition challenging an election conducted under the provisions of the now Repealed National Assembly and Presidential Elections Act (Cap 7). That Court simply observed that a voter could not insist on a recount of votes at the time of counting of votes. That was the preserve of the candidate or his agents. That decision was not in respect to recount of votes pursuant to an order of an Election count. A Petitioner, whether or not a candidate, has a right to ask for recount as long as he/she satisfies the Court that a recount is deserving. Let me now examine whether a case for recount has been made.

15) The Rules envisage recount of votes in two situations. Under Rule 32 a Petitioner may request for recount or Examination of tallying as the only issue in a Petition. Rule 32 (2) requires such a Petitioner to specify unequivocally that there is no other determination required except a recount of votes or the examination of tallies.

16) Then there is the recount that is part of the scrutiny of votes under Rule 33(1). The request by the Petitioner herein is under this Rule. Rules 33(1) and 33(2) provides as follows:-

**“33(1) The parties to the proceedings may, at any state, apply for 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.”** (my emphasis)

17) A survey of past and recent decisions on Scrutiny shows that the law in this area is all but settled. There is amity that Scrutiny can only be ordered by Court where sufficient basis is laid. And that starts with the pleadings. Earlier in this Petition, this Court, held **“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 Petitioners 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 on the material facts upon which the claim of impropriety or illegality of the casting or counting of Ballots is made.”**

Endorsing this view, Kimaru J in Rishad Hamid Ahmed Amana & 2 others Malindi Election Petition No.6 of 2013 recently held **“it will not do for the Petitioner to aver in the Petition that he desires scrutiny and recount to be undertaken in respect of all the Polling Stations in the electoral area that is the subject of the dispute. The Petitioner must plead in sufficient detail why he requires the Court’s intervention to order scrutiny. In that regard, the Petitioner is required to state the specific Polling Stations that he alleges there were irregularities and therefore should be scrutinized.”**

Once sufficiently impleaded, then evidence must be lead to persuade the Court that there is good reason to order for Scrutiny.

18) In this Petition, the Petitioner specifically requests for an order for recount and Scrutiny of votes cast in the following 14 Polling Stations:-

- a. CODE 002.....BUJUMBA PRIMARY SCHOOL
- b. CODE 049 .....EMAFUBU HEALTH CENTER
- c. CODE 052 .....TINGOLO PRIMARY SCHOOL
- d. CODE 078 .....BUKHUMA TRADING CENTER
- e. CODE 072.....BUKHUMA PRIMARY SCHOOL
- f. CODE 074 .....MUNGAMBWA PRIMARY SCHOOL
- g. CODE 057 .....MADOLA PRIMARY SCHOOL
- h. CODE 077 .....ELUGULU TRADING CENTER
- i. CODE 032 .....NELA PRIMARY SCHOOL
- j. CODE 033 .....BUMUTURI R.C PRIMARY SCHOOL
- k. CODE 039 .....MAUKO PRIMARY SCHOOL
- l. CODE 042 .....BUDUMA PRIMARY SCHOOL
- m. CODE 003 .....BURINDA PRIMARY SCHOOL
- n. CODE 014 .....BUMALA MARKET TRADING CENTER

19) In the application before Court, the Petitioner has substantially expanded that request and seeks recount in respect to **all 79** Polling Stations. Clearly the application goes beyond the pleadings. This Court readily accepts the argument by Mr. Akide for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent that the application seeks not only to amend the Petition but also to expand its scope. A party is bound by his/her pleadings. That is the straitjacket that a cause must take. On the basis pleadings, therefore, this Court can only examine whether a sufficient case has been made for me to order scrutiny in the 14 Polling Stations referred to in paragraph 18 above.

20) The Petitioner premised the need for scrutiny on the erasures, alterations, overwriting and cancellations proved in various Forms 35 in respect to some of those Polling stations. The Petitioner makes reference to a report by S.M. Mweu, a Document Examiner. That report was admitted by Court as Petitioners Exhibit No.12. Of the 14 Polling Station, Forms 35 to 6 Polling Stations were subjected to Document examination. The Document examiner returned a report as follows:-

<b>POLLIN G STATION</b>	<b>STRE AM</b>	<b>COMMENT</b>
BUJUMBA PRIMARY SCHOOL (002)	A	Nil
MAUKO PRIMARY SCHOOL (O39)		Shows evidence of alteration. In entry No.4, the number of rejected votes

figures 02 the last digit was figure 3 which was altered to read figure “2”.

ELUGULU TRADING CENTRE (007)	B		Shows evidence of alteration. Figure 467 of the total number of valid votes cast shows evidence of alteration, the last digit of figures 467 was figure “9” which was altered to read figure “7”
MUNG’AMBWA PRIMARY SCHOOL (074)	OF 1	1	Shows evidence of overwriting and alteration
BUKHUMA DISPENSARY (078)	OF 1	1	Shows evidence of overwriting in the column of No. of valid votes cast
TINGOLO PRIMARY SCHOOL (052)	01		Shows evidence of alterations. The last digit of figures “541” was figure “2” which was altered to read figure “1”. In entry No.4, No. of rejected votes figure ‘8’ was altered to red figure ‘9’. Figures 533 of total number of valid votes cast the second and last digits were figures ‘2’ which were altered to read figures ‘3’. The column of number of valid votes cast shows evidence of overwriting and cancellations.

Save for the Form 35 to Bujumba, the other Forms 35 have suffered erasures, overwritings and cancellations.

21) The response by the Respondent was that the erasures, alterations, overwritings and cancellations were sufficiently explained away by the 3<sup>rd</sup> Respondent. That these were caused by human error owing to fatigue of the Poll officials. It was further explained that what should be of concern is alteration or change in the figures of the number of valid votes cast in favour of the candidates because the rest of the figures appearing on the forms was simply a transposition of figures. These in their view could be verified by examining the tallying of the figures on Forms 35 itself without need for a recount.

22) It was also the view of the Respondents that there can be no basis for securing a recount if the Petitioner or his representatives did not lodge complaint/s about the count at or soon after the counting closed.

23) This Court has considered the Response. At this stage the Petitioner need not prove his case to the standard required by law. All the Petitioner needs to do is to persuade the Court that there is sufficient cause to warrant a recount. In my view the various erasures, overwritings, alterations and cancellations on the Forms 35 in respect with the 5 Polling Stations calls for a revisit of the count in the affected Polling stations. This is one way in which the Court can interrogate the integrity of the count of votes in those disputed Polling Stations. The result of the recount will be considered alongside the explanations tendered by the Respondents and a final decision made one way or the other.

### **Re-Tallying**

24) At the close of arguments the Court indicated that it proposed to make a *suo moto* Order for an examination of tallying on Form 36. Counsels were invited to give their view of the Courts proposal. All parties were agreeable. This Court is obliged to give its reasons for proposing a re-tally. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents told Court that the final results of the elections of Butula National Assembly elections were announced on the basis of the handwritten tallying sheet (Form 36) (P Exhibit 12). It was apparent that there were numerous erasures, overwritings, cancellations and alterations on that Form. This was confirmed by the Document Examiner in his report. Form 36 is an important document in so far as it captures the final tally of the votes garnered by each candidate to a National Assembly Election (Regulation 83 of The Elections (General) Regulations 2012). If the Form is replete with erasures, cancellations and alterations then an examination appears necessary to establish with it faithfully captures the will of the voters from various Polling Stations.

**ORDERS**

25) A) There shall be a recount of votes cast in the following 5 Polling Stations – Mauko Primary School (039), Elugulu Trading Centre (007), Mung’ambwa Primary School (074), Bukhuma Dispensary (078) and Tingolo Primary School (052).

The purpose of the recount is to ascertain the number of votes that each candidate obtained in each of the above Polling Stations.

B) There shall be a re-tallying of votes on Form 36 to ascertain the total number of votes garnered by each candidate.

C) The recount and re-tallying shall be presided over by the Deputy Registrar of this Court assisted by such other officials as the Deputy Registrar in her discretion deems sufficient for the task.

D) The parties to the Petition shall each be represented at the recount and re-tallying by 2 nominees for the entire exercise.

E) The exercise shall commence on 27<sup>th</sup> June 2013 at 10.00a.m. and shall proceed on a day to day basis until conclusion of the exercise.

F) This matter shall be mentioned before this Court on 5<sup>th</sup> July 2013 for further orders.

F) Costs of this Application shall abide the result of the Petition.

**DATED, DELIVERED AND SIGNED AT BUSIA THIS 26<sup>TH</sup> DAY OF JUNE 2013.**

**IN THE PRESENCE OF .....**

**KADENYI .....FOR PETITIONER**

**.....FOR 1<sup>ST</sup> & 2<sup>ND</sup> RESPONDENTS**

**.....FOR 3<sup>RD</sup> RESPONDENT**

**F. TUIYOTT**

**J U D G E**