



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

NAIROBI ELECTION PETITION NO. 5 OF 2013

KAKUTA HAMISIPETITIONER

VERSUS

PERIS TOBIKO.....1ST RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....2ND RESPONDENT

RETURNING OFFICER KAJIADO EAST CONSTITUENCY3RD RESPONDENT

RULING (NO. 2)

1. On 5th March 2013, the election results for the National Assembly seat for Kajiado East were announced. The 1st respondent was declared the winner with 23,645 votes. The petitioner came second with 22,771 votes. The margin was only 874 votes. It was a narrow divide. The petitioner questions the count. He casts aspersions on the integrity of the tallying process and conduct of election officials. By a notice of motion dated 10th May 2013, the petitioner seeks scrutiny of votes and other election materials in 5 polling centres.
2. The Court stayed the hearing of that prayer until the conclusion of oral evidence. The primary reason was to grant the petitioner opportunity to lay a firm basis for an order of scrutiny. The trial closed on 19th June 2013. The motion for scrutiny was then canvassed on 20th June 2013. Part of the motion praying to strike out the 2nd and 3rd respondents' response and replying affidavits was spent and was the subject of a considered ruling delivered on 24th May 2013.
3. The Notice of Motion is anchored upon sections 80 (3) and 82 of the Elections Act 2011, article 35 of the Constitution and rules 14 and 33 of the Elections (Parliamentary and County Elections) Petition Rules 2013. The applicant prays for scrutiny of votes in the following polling centres:-
 - i. St. Monica polling centre streams 016/1-016/22
 - ii. Noonkopir Secondary School polling centre streams 018/1-018/13
 - iii. GK Athi River Prisons Primary School Polling Centre streams 019/1-019/13
 - iv. Korrompoi Primary School polling centre 007/1-007/3
 - v. Multi-purpose CTR/02
4. The petitioner also craves an order for production and supply of the following documents:
 - i. Statement by the presiding officer under the Elections Act
 - ii. Copy of the register used during the elections
 - iii. Copies of the results of each of the polling centres above

- iv. Written complaints by the petitioner and their representatives
- v. Spoilt papers
- vi. The marked copy of the register
- vii. Used ballot papers counterfoils
- viii. Rejected votes
- ix. Statement showing the number of rejected ballot papers

5. The petitioner's case is that the difference of votes between the petitioner and the 1st Respondent was only 874. Accordingly, this is a good case for an order for scrutiny of votes to establish whether the 1st respondent was the winner of the poll. He also urged this court to make an order for scrutiny because there were alterations on the electoral records. In this regard, he cited several forms 35 where white-out had been used, contrary to the provisions of the Elections (General) Regulations. It is averred that the polling centres cited are in a cosmopolitan section of the constituency. The petitioner thus questions discrepancies between tallies for the parliamentary and presidential elections. He alleges manipulation of votes in favour of the 1st respondent. He states that his agents were refused entry into polling centres or thrown out. The conduct of election officials was also called into question. He alleged that in the course of tallying, votes for other candidates were switched and unlawfully added to the 1st respondent.
6. Counsel for the petitioner relied on the case of Thomas Malinda Musau & Others Vs. IEBC & Others High Court, Machakos, Election Petition No 2 of 2013 [2013] e KLR for the proposition that where the alterations are not authenticated or signed by agents, a scrutiny should be ordered. He submitted that the petitioner was not on a fishing expedition: The petitioner was only seeking a partial scrutiny. Finally, he submitted that the petitioner had laid a firm evidential basis for grant of the orders.
7. The application is opposed by all the respondents. The 1st respondent relied on her replying affidavit sworn and filed on 16th of May 2013 and the list of authorities filed on the 20th of June 2013. It is the 1st respondent's case that the application and the petition are divergent and inconsistent: The petitioner's grievances relate to 3 polling centres being 007/1 Korrompoi Primary School, 019/8 G.K Athi River Prisons Primary School and 018/6 Noonkopir Secondary School. The application on the other hand seeks scrutiny for additional polling stations and streams.
8. Mr. Koin, learned counsel for the 1st Respondent, conceded that in those three centres, the forms 35 had apparent changes. It would thus be fair for the court to conduct a limited scrutiny to confirm the nature of the alterations. He however pointed out that in 2 out of those 3 centres, the petitioner was leading.
9. The 2nd and 3rd respondents relied on the affidavit of Jennifer Mugambi sworn on 14th of May 2013. Mr. Ogonji, learned counsel for the 2nd and 3rd respondents, contended that the application was not supported by evidence. He also submitted that the application had meandered beyond the boundaries of the petition. Mr. Ogonji however conceded to a partial scrutiny in respect of polling stations numbers 007/1, 018/6 and 019/8.
10. I have heard the rival submissions. I have considered the affidavit evidence. I have also had the benefit of sworn evidence from 8 witnesses. I am of the following considered opinion. Section 82 (1) of the Elections Act 2011 provides as follows:

“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”.

11. Rules 32 and 33 of the Elections (Parliamentary and County Elections) Petition Rules 2013 elaborate on the procedures and nature of materials for scrutiny. The scrutiny is generally to be confined to *polling stations in which the results are disputed*. See Richard Kalembe Ndile and another Vs Dr. Patrick Musimba Mweu and others (Ruling No 3) Machakos, High Court Petition 1 of 2013 (as consolidated) [2013] e KLR, Steven Kariuki Vs George Mike Wanjohi and others Nairobi, High Court Petition No 2 of 2013 [2013] e KLR. Scrutiny is meant to assist the Court to interrogate fully any malfeasances, irregularities and breaches of electoral law; in a word to

measure the integrity of the election. It also aids the Court to determine disputed votes or tallies. These principles were well stated by D.S. Majanja J in Kalembe Ndile's petition (supra), by Kihara Kariuki J (as then was) in William Maina Kamanda Vs Margaret Wanjiru Kariuki Nairobi, High Court Petition 5 of 2008 [2008] e KLR and by Warsame J (as he then was) in Dickson Karaba Vs Ngata Kariuki and others Nairobi, High Court Petition 1 of 2008 [2010] e KLR. See also Justus Omiti Vs. Walter Enock Nyambati and 2 others High Court, Kisii, Petition 1 of 2008 [2010] e KLR.

12. There are no fast and hard rules on the timing for an order of scrutiny. In William Kamanda Vs. Margaret Wanjiru [2008] e KLR, Kihara Kariuki J (as he then was) stated as follows:

“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”.

13. My considered view is that the court is better suited to make the order after receiving evidence at the trial. That is the position taken by D.S. Majanja J, and L. Kimaru J respectively in Kalembe Ndile's case (supra) and Rishad Amana Vs IEBC and others, High Court, Malindi, Petition 6 of 2013 [2013] e KLR. See also the recent decision in Phillip Osore Ogotu Vs Michael Aringo and others High Court, Busia Petition 1 of 2013 [2013] e KLR. In the latter decision, Tuiyot J, was emphatic that scrutiny is not a lottery or a fishing expedition and will not be allowed as a matter of course. See also Peter Gichuki Kingara Vs IEBC and others High Court, Nyeri, Petition 3 of 2013 [2013] e KLR. In a synopsis, the applicant must lay a firm basis for scrutiny.
14. As a general rule, scrutiny is appropriate where the margin of votes between candidates is very low. See Hassan Ali Joho Vs Hotham Nyange & Anania Mwasambu Mwaboza (Ruling No 2) (2008) 3 KLR (EP) 188. D. Maraga, J (as he then was) cited with approval the following three decisions: Onamu Vs. Maitisi Election Petition No.2 of 1983; Kirwa Vs Muliro Election Petition No.13 of 1998 where the margin was only 7 votes and Hamed Said Vs Ibrahim Mwarua Election Petition No.1 of 1983 where the margin was 62 votes. These cases are instructive because the margin of votes between the present petitioner and the 1st respondent is about 874 votes. Both candidates had garnered well over 22,000 votes each.
15. The Court is at liberty to order a full or limited scrutiny. The order is dictated largely by the evidence and circumstances of each case. My learned brother Luka Kimaru J, dwelt at length on different types of scrutiny. In Rishad Amana's case (supra) he observed that one form of scrutiny is created by Rule 33 (4) limiting scrutiny to the polling stations where complaints have been raised. The other kind was the type carried out by the Supreme Court in Election Petition 5 of 2013 Raila Odinga & Others Vs. IEBC & Others [2013] e KLR. Justice Kimaru observed as follows:

“In that case, the Supreme Court ordered partial scrutiny to be undertaken in respect of Form 34s of all the polling stations in the Republic to determine whether the results contained therein were reflected in the final tally that was announced by IEBC in the presidential poll. This was partial scrutiny because the Supreme Court did not make an order that the ballot boxes in respect of the presidential poll be opened to verify the results that were entered in the Form 34s. Another type of partial scrutiny is where the court only examines Form 35s, in respect of other elections other than the presidential elections, to determine whether the results transposed in Form 36 reflects the correct tally. Rule 33(4) of the Election Petition Rules therefore gives the court wide discretion to do justice to parties in an electoral dispute in an efficient and expeditious manner”.

16. In the present petition, there are two conflicting editions of forms 36. The 3rd respondent explained that the first was provisional. In Rishad Amana's case (supra) the court ordered for scrutiny where there were two forms 36. In the learned Judge's view, that ran counter to Regulation 83 of the Election (General) Regulations 2012. The court stated:

“Regulation 83 of the Election (General) Regulations 2012, does not provide for a situation where there can be generated two (2) Form 36s one being a draft or provisional and another being a final copy. For this reason, this court is of the opinion that the Petitioner established a case for this court to recount and scrutinize the votes cast in the two (2) polling stations to determine whether or not the results reflected in Form 35 are the ones which were transposed into Form 36”.

17. The motion by the petitioner is fraught with serious procedural difficulties. A petition is a pleading. There are elementary rules of pleadings: for example, a party cannot expand the boundaries of pleadings to seek additional reliefs not prayed for; a party shall not lead evidence inconsistent with the pleading; and fundamentally, a court shall not grant a relief not prayed for. The petition here seeks the following reliefs:

“i) Declaration that the 4/3/2013 election of member of parliament (sic) the 1st respondent is null and void for not being free, fair and transparent and lacking credibility.

ii. Certificate issued and granted to the 1st respondent be and is hereby quashed and nullified.

iii. Fresh election be held”.

18. The petitioner cites, in the body of the petition, irregularities or discrepancies at polling stations 018 Noonkopir Secondary School stream 6, 019/8 G.K. Athi River Prisons Primary School, 016 St. Monica Nursery School, 007 Korrompoi Primary school. He also cites incomplete forms 35 or errors in transposing the results to the eventual form 36. The petitioner also pleaded that there were discrepancies or inconsistencies in the total votes cast in the parliamentary election as compared to the gubernatorial or presidential votes. That grievance is raised for the polling at St. Monica Nursery School 016. The petitioner stated that it is a cosmopolitan polling centre. The gubernatorial election dispute is not before this court. The presidential election is beyond the jurisdiction of this court. The court is thus ill-placed to compare those results by way of scrutiny. There is no prayer in the petition for scrutiny of votes or materials used in the election.

19. Failure to pray for scrutiny is prejudicial to the motion. Courts have held that there must be a prayer for scrutiny. In *Abdikhaim Osman Mohamed and another Vs Independent Electoral and Boundaries Commission and others* Garissa, High Court Petition No 2 of 2013 [2013] e KLR, Mabeya J declined a prayer for scrutiny for want of a prayer in the main petition. See also *Hassan Ali Joho Vs Hotham Nyange & others (Ruling No 2)* (2008) 3 KLR (E.P) 188, [2006] e KLR; *Ng’ang’a and another Vs. Owiti and another* [2008] 1 KLR (E.P) 749. The principle to be distilled is that parties are bound by their pleadings.

20. The next procedural quagmire is that the petitioner’s notice of motion has meandered well beyond the boundaries of the petition. The motion seeks scrutiny of additional polling stations and materials not pleaded in the body of the petition. While the main petition had pleaded discrepancies at 3 polling centres, the motion seeks scrutiny in all the 22 streams at St. Monica Nursery School 016/1 to 016/22, Noonkopir Secondary School streams 1 to 13, G.K. Athi River Prisons Primary School streams 1 to 13, Korrompoi Primary School streams 1 to 3 and multipurpose CTR/02.

21. If the motion were to be allowed as prayed, it would amend the petition and change the character and scope of the petition. See *Rishad Hamid Amana Vs IEBC & others* High Court, Malindi, Petition 6 of 2013 [2013] e KLR. That would prejudice the respondents who only came to court to face the original petition. It would alter the balance of power between the parties and leave the respondents holding the shorter end of the stick. In a nutshell, if scrutiny is ordered, it can only be to the extent of the matters pleaded in the body of the petition. The rationale is self-evident: the petition must succeed or fail on the basis of the complaints or grounds urged in the pleading.

22. Article 159 of the Constitution enjoins the Court to do substantial justice to the parties without undue regard to technicalities. That overriding objective has been imported into the Elections (Parliamentary and County Elections) Petition Rules 2013 by dint of Rules 4 and 5. The complaints of errors and discrepancies in forms 35 and 36 for example pleaded by the petitioner cannot be fully resolved without partial scrutiny of the votes in the impugned polling centres. The

petitioner and his witness have in my view raised sufficient grounds for limited scrutiny. In addition, the Court on its own motion has identified a few centres where limited or partial scrutiny is justified. Most of the matters raised by the parties will be dealt with in the final judgment of the Court. But the following examples will suffice: At Noonkopir Secondary School centre 018/6 (Stream 6) there is a question whether the 1st respondent was added 200 votes; At Korrompoi Primary School, the petitioner alleged that 153 votes belonging to another candidate Margaret Matee were switched in favour of the 1st respondent; The original form 35 for Emamparisuai primary school, centre 001, had alterations.

23. The truth can only emerge from a partial scrutiny or recount of the votes. Form 35 is meant to be a snapshot of the votes cast. Its contents are then transposed into form 36 that captures the constituency total tallies for all the candidates. When form 35 is then impugned, a full inquiry must extend to the ballot box.
24. Having said so, the petitioner must shoulder the blame for failing to seek a recount at the polls. Regulation 80 of the Elections (General) Regulations 2012 provides as follows:-

“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 agents present at the completion of the counting have been given a reasonable opportunity to exercise the right given by this regulation”.

25. The point to be made is that Courts are ill-equipped to carry out a recount. It is a laborious and time consuming exercise. The polling stations provide a better forum, soon after close of polls, and in the presence of agents or candidates. In that scenario a fairly smaller number of votes would be recounted. The petitioner’s learned counsel freely conceded that the petitioner never sought a recount. But I remain alive to the notion that the problem may not be the vote *per se* but its representation on forms 35 and 36. An order for partial scrutiny is thus well merited.

26. Granted those reasons, the orders that commend themselves to me to grant are as follows:

- a. **THAT** there shall be a partial scrutiny of votes limited to a recount and ascertainment of the number of votes each candidate obtained in the following polling stations and streams only:
- i. Polling Centre 018/6 Noonkopir Secondary School, stream 6 only.
 - ii. Polling Centres 019/2 and 019/8 G.K. Athi River Prisons Primary School streams 2 and 8 only.
 - iii. Polling Centre 007/1 Korrompoi Primary School, stream 1 only.
 - iv. Polling Centre 001 Emamparisuai Primary School, single stream.
- b. **THAT** the recount shall be undertaken under the direct supervision of the Deputy Registrar of this Court.
- c. **THAT** the scrutiny shall commence on 27th June 2013 at 9.00 a.m and proceed on a day to day basis until conclusion of the exercise.
- d. **THAT** the scrutiny and recount shall be done within seven (7) days. The Independent Electoral and Boundaries Commission shall resubmit all the forms 35 and ballot boxes for the 4 polling stations and streams specified above and the form 36 for the national assembly elections for Kajiado East Constituency by close of business on Wednesday 26th June 2013.
- e. **THAT** the Deputy Registrar shall at the end of the exercise make a detailed report of her findings which report shall form part of the proceedings in this petition.
- f. **THAT** the petitioner and 1st respondent shall not be present at the examination centre but will be entitled to appoint two (2) agents each during the entire exercise.
- g. **THAT** the Independent Electoral and Boundaries Commission shall be entitled to have 2 (two) agents at the venue of the scrutiny.

- h. **THAT** the petition shall be mentioned on 8th July 2013 at 10:00 a.m for further directions.
- i. **THAT** the costs shall be in the petition.

It is so ordered.

DATED and DELIVERED at NAIROBI this 25th day of June 2013.

G.K. KIMONDO

JUDGE

Ruling read in open court in the presence of:

Mr. F.I. Omino for the Petitioner instructed by Abuodha & Omino Advocates.

Mr. L.P. Koin with Mr. P. Anam for the 1st Respondent instructed by Sichangi & Partners Advocates.

Mr. T.T. Tiego for the 2nd & 3rd Respondents instructed by Onsando, Ogonji & Tiego Advocates.

Mr. C. Odhiambo Court Clerk.