REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

ELECTION PETITION NUMBER 6 OF 2013

IN THE MATTER OF: THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: ARTICLES 1(1), 2, 3(1), 10(2); 21, 23, 33(1)(A); 48: 81(a); 82(2): 86: 87(2) & 3; 88(4); 91(1)(d), (e), (f), (g) and (h); 91(2)(b) and (e); 105(a) & (2); 165(3)(a) and (e) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: SECTION 2(1)(A);(B) of the sixth SCHEDULE OF THE CONSTITUTION

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA (PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) PRACTICE AND PROCEDURE RULES, 2006

AND

IN THE MATTER OF: THE ELECTION ACT, 2011 (ACT NO. 24 OF 2011 AS AMENDED

AND

IN THE MATTER OF: LEGAL NOTICE NO. 126 OF 2012, THE ELECTIONS (GENERAL REGULATIONS 2013)

AND

IN THE MATTER OF: A PETITION BY

HASSAN MOHAMED HASSAN. ....1ST PETITIONER

ABDIKARIM NUNOW AMIN. ....2ND PETITIONER

VERSUS

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION..............................1ST RESPONDENT

FESTUS NGEERAH (RETURNING OFFICER). ....2ND RESPONDENT

ABDKAIR ORE AHMED. ....3RD RESPONDENT

<u>R U L I N G</u>

The application before the court is the Notice of Motion dated 28th May, 2013 seeking for orders of scrutiny of votes and material related thereto in fifteen polling stations named on the face of the application. The application was properly supported by a supporting affidavit.

The Respondents filed their Replying affidavit(s) and Grounds of Opposition. Both the Petitioner and the Respondents filed their written submissions as allowed by court and have relied upon their respective pleadings.

I have thoroughly perused the relevant material to the application and have also carefully considered the main issue which is whether the Petitioner's prayer for scrutiny should be granted right away or later during the trial. The list of polling station in respect of which the Petitioner seeks scrutiny are: -

1. Arbajhan Primary School
2. Adan Awale Primary School
3. Garsekoftu Primary School
4. Forest Primary School
5. Hadado North Primary School.
6. Atibobae Primary School.
7. Lolkuto North Primary School.
8. Lagbogol Primary School
9. Hadado Waberi
10. Lagbogol Secondary School
11. Bukumu
12. Elakah Mobile
13. Bahati Primary School
14. Wajir Girls
15. Makaror Primary School

The legal basis for seeking scrutiny is indicated to be found under Section 82 of the Elections Act and

under the Rule 33 of the Elections (County and Parliamentary Elections) Petition Rules, 2013. The Rules were promulgated by the Rules Committee by virtue of authority donated by Section 96 of the Elections Act, 2011. The said Rule 33 provides as follows:

> "***33 1) 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 an application under sub-rule (1), the court may, if it is satisfied that there is sufficient reason, order for scrutiny or recount of the***
>
> ***3)..........***
>
> ***4) Scrutiny shall be confined to the polling stations in which the result 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***
>
> ***j. the statements showing the number of rejected ballot papers."***

It is clear from the reading of above provision that a party has liberty to apply for scrutiny and recount at any stage of the proceedings for the purposes of establishing the validity of the votes cast. However, the court has to be satisfied that there is sufficient reason for it to order for scrutiny or recount of votes. In my view and understanding, for a party to provide sufficient reason upon which the court can decide to grant the order, the party shall provide sufficient evidence to that end. If the request for scrutiny is made before the trial starts and therefore before the relevant evidence upon which such decision is adduced, then clearly and logically such relevant evidence must be based on the affidavits, if any, supporting the application. That is what has happened in this case.

On the other hand where an application for scrutiny or recount is made after adequate relevant evidence has been adduced during the trial, it will be such evidence that will provide, if at all, sufficient reason upon which the court will make relevant orders. It is my view however that whether the application for scrutiny or recount is made before, during or at the end of the trial of a petition, the court must be satisfied generally, that there are sufficient grounds to order a scrutiny or recount on the basis that such scrutiny or recount will be in the interest of fairness and justice in settling the issues raised in the petition.

The decision to grant scrutiny or recount is clearly, not only discretionary but is also judicious. That is to say that the court's reason to grant such order must be good, must be logical and must be necessary for the purpose of arriving at an expeditious, fair, just, proportionate and affordable resolution of the issues raised in the Petition.

Various pronouncements have been made by various courts to define **"Sufficient Reasons"** or **"Sufficient Cause"** for ordering scrutiny or recount.

An order of scrutiny or recount will be granted if there is sufficient reason for the court to believe that during the conduct of the relevant election, there were serious irregularities or mistakes on the part of the presiding or returning officers or election officers which negatively affected a fair election process – **Halsbury's Laws of England, 4th Ed. Para 846.**

The court will be inclined to grant the order for scrutiny and/or recount where the margin of votes between the Respondent/winner and the Petitioner is so small as to raise suspicion that the tallying contained mistakes which can be resolved by scrutiny or recounting and thus establish fairness and justice. To that end Maraga, J, as he then was, stated thus, in **Joho Vs Nyange & Another [2008] 3KRL (EP), 188**:-

> ***"... where the margin is very narrow justice will be done and be seen to be done if a scrutiny should be ordered without laying a foundation simply to expeditiously dispose of petitions and save the time which would otherwise have been spent on full hearing."***

He found that a margin of 1061 votes between the winner and the loser was large enough for refusing a scrutiny and recount.

For the court to order a scrutiny and/or recount, there must be a prayer for the same in the petition to warn or prepare the court and the Respondents to expect an application. That too was held in the **Joho Vs Nyange** case aforecited. The Petitioner must also have specified the polling stations in respect of which and for the reasons given, a scrutiny or recount will be sought.

The court will not grant scrutiny on mere allegation of irregularities in a particular station(s). The request must be backed by probable evidence that persuades the trial court that a scrutiny or recount is necessary. Otherwise the Petitioner may have set up for a fishing expedition and would have attempted to shift the burden of proof that is on him instead of discharging it. In **Masinde Vs Bwire & Another [2008] IKLR (EP) 547,** O'Kubaso, J, Mbito J and Mwera J, as they then were, expressed the point thus: -

> ***"... we agreed that we have discretion to order for scrutiny but this has to be done in order to achieve just and speedy results in an election petition. There must be good reason before this court can order for scrutiny. An order for scrutiny is not automatic. There must be a basis for it ...."***

It is observed also that even where the Petitioner establishes by evidence that there were irregularities or mistakes at a polling or polling stations, the misconduct must be such that, it or they substantially and materially affected the outcome of the election. That is to say, if the mistakes, irregularities or malpractices proved by the Petitioner, did not negatively and substantially affect the electoral process in question, or negatively affect the result of the relevant election the misconduct will not justify to be the basis upon which to grant scrutiny or recount.

Before turning to the facts of this case before me, I find it relevant to consider whether the order for scrutiny and/or recount, where appropriately granted, should be ordered before, during or at the end of trial of a petition.

It is common ground amongst the courts that have given consideration to the issue of scrutiny that scrutiny should be granted only upon sufficient reasons for it being shown by the Petitioner. In theory, therefore, a Petitioner can in an application brought before the a petition trial, persuade the petition court by affidavit evidence that he is entitled to the order of scrutiny or recount at that stage. Another Petitioner will call evidence and when he has adduced evidence sufficient to support a scrutiny, he will then apply for it while the trial still proceeds. Finally, a Petitioner may decide to adduce all his evidence in the Petition and then call for scrutiny or recount based on the evidence on record. The conclusion I make accordingly, is that the court can make an order for scrutiny or recount any time before, during or at the

end of the hearing, depending on circumstances of a given case.

My attention has however, been drawn to the decision of the High Court in **Peter Gichiki Kingara Vs Independent Electoral and Boundaries Commission, Nyeri, High Court Election Petition No. 3 of 2013**. Therein after the analysis of several decisions on the question of scrutiny, the court stated thus: -

> ***".... scrutiny is not always the first item on the agenda in the determination of an election petition. I had indicated at the beginning of this ruling that scrutiny of votes or ballots would necessarily include examination of forms and reports attendant to these votes; my findings on the issue of scrutiny would apply in equal measure to prayers seeking production of particular forms and reports attendant to these votes; my findings on the issue of scrutiny would apply in equal measure to prayers seeking production of particular forms and reports. Accordingly, if scrutiny will become necessary at any stage of the proceedings, that would also entail interrogating those forms and reports which the 1st Respondent has so far not produced but which would ordinarily be kept together with the ballots in the ballot boxes."***

The court thereafter concluded by stating that scrutiny should not be ordered at the pretrial stage. The court said thus: -

> ***"As to when scrutiny can be ordered, Section 82 (1) as read with Section 82(2) helps us to understand that it is during the trial, at any time during the hearing of the petition but before the final judgment has been delivered. The inevitable conclusion in the premises is that as far as the issue of scrutiny of votes is concerned it would be erroneous in law to order for scrutiny at the pretrial stage unless the only issue in the petition is the count and tallying of votes under Rule 32(1) of the Elections (Parliamentary and Country Elections) Petition Rules, 2013." (the stress is mine)***

I have, on my part, already stated that depending on the fact that adequate proof by evidence of reasonable grounds to grant an order for scrutiny, the court has power and discretion to grant the order whether it be before the actual hearing of the petition starts or during the hearing or at the end of the Petitioner's case or even at the end of the full trial. To that end I stated that the evidence to be considered and be accepted by the court to justify the granting of the order for such scrutiny may be affidavit evidence or oral evidence. I have also stated that I would, on my part, be cautious to lay down hard and fast rules as to the time when a court can grant such order since each case may turn on its own peculiar circumstances.

Having stated as above, I find nothing erroneous in law for the court to order for scrutiny of votes and/or related election documents such as the cast, spoilt or rejected ballot papers, at the pre-trial stage even where count and tallying are not the only issues in the petition, if the circumstances of the case so demand. I would leave the issue to the trial court which alone would be satisfied whether a good case for scrutiny has been made out at that stage. This conclusion would also be consonant with Rule 33(1) aforestated, which provides that parties to a petition proceedings may, **at any stage**, apply for scrutiny of the votes for the purposes of establishing the validity of the votes cast.

Reverting to this case before me, it is not denied that the Petitioner was defeated in the relevant elections with a margin of 6,238 by the 1st Respondent who garnered 19,055 votes while Petitioner garnered 14,156 votes. Scrutiny and recount exercise at any stage may likely not lead to a wiping out of such a large margin of votes.

Furthermore the Petitioner in his and his witnesses' supporting affidavits alleges double voting in 15 polling stations. He also alleges contradictions and anomalies between the votes posted in Forms 35's and those posted in Forms 36 without properly specifying which of the 15 stations are affected of the alleged contradictions. These allegations are denied and controverted by the various Respondents, who also purport to explain away the alleged contradictions in the forms. The result is that it is not easy for the court to believe the affidavit evidence versions of either side. This calls for the said evidence to have been first tested in cross-examination before the court can decide which one should be believed.

I have also carefully examined the Petitioners prayer for scrutiny and recount in the petition. It is too wide since it seeks scrutiny in respect of all votes cast in all the polling stations in the Wajir West Constituency. The likelihood of the alleged election misconduct taking place in every polling station in that constituency is possible but very unlikely. The Petitioners wide and unlimited prayers for scrutiny in respect to all polling stations, suggest a fishing expedition where amorphous intentions of the Petitioner are intended to be narrowed down and made logical or meaningful by the possible favourable findings of a scrutiny exercise. This court cannot allow such misuse of its judicial discretion by a party, at least at this stage of the proceedings. Furthermore, the Petitioner's written submissions seeking the said relief dated 3rd June, 2013, confirm the fact that he had difficulty in justifying his prayers. The written submissions which are signed by the Petitioner's Advocates, Kinyua Mwaniki & Wainaina, are clearly shallow, strained and bare of the relevant reasons for granting scrutiny capable of persuading the court.

In the circumstances and for the reasons stated above, the application seeking the order of scrutiny and recount is hereby rejected and dismissed with costs to the Respondent. Orders accordingly.

Dated and delivered at Nairobi this 20th day of June 2013.

...

D A ONYANCHA

JUDGE