



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
ELECTION PETITION NO. 1 OF 2013
consolidated with
ELECTION PETITION NO. 7 OF 2013
AND IN THE MATTER OF THE
NATIONAL ASSEMBLY ELECTION
FOR KIBWEZI WEST CONSTITUENCY

BETWEEN

RICHARD N. KALEMBE NDILE1ST PETITIONER

CAROLINE MWELU MWANDIKU 2ND PETITIONER

AND

DR PATRICK MUSIMBA MWEU1ST RESPONDENT

RETURNING OFFICER

KIBWEZI WEST CONSTITUENCY2ND RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION3RD RESPONDENT

RULING NO. 3

Introduction

1. The two petitions were consolidated at the pre-trial conference as they contest the election of the 1st respondent as the duly elected member of the National Assembly for Kibwezi West Constituency.
2. The 1st petitioner, in his petition dated 19th March 2013 prayed for, *“An order to recount the votes and examination of the tallies in the election for the Member of National Assembly of Kibwezi West Constituency held on the 4th day of March, 2013 do issue.”*

3. The 2nd petitioner, in her petition dated 10th April 2013, prayed that, “*There be a re-count, re-tally and scrutiny of votes cast in Kibwezi West Constituency.*”
4. In view of the prayers sought, I directed at the pre-trial conference that submissions as to whether a recount, scrutiny or retallying of votes should be ordered be taken after the hearing of all the witnesses. I have now heard all the witnesses, considered the oral and written submissions by the counsel and this is my decision on the matter.

Legal Principles

5. There is no dispute that election court has jurisdiction to order scrutiny of the votes. **Section 82(1)** of the **Elections Act, 2011 (“the Act”)** gives the court wide jurisdiction in this respect. It states that, “*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 scrutiny of votes to be carried out in such a manner as the election court may determine.*”
6. **Section 82** of *the Act* is given effect by the **Elections (Parliamentary and County Elections) Petition Rules, 2013 (“the Rules”)**. **Rule 32** and **33** of *the Rules* make provision for a recount or examination of tallying in the following terms;

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.*

Rule 33 provides thus:

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 a scrutiny or recount of the votes.*
3. *The scrutiny or recount of ballots shall be carried out under the direct supervision of the Registrar and shall be subject to 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 counterfoils of used ballot papers;*
 - h. *the packets of counted ballot papers;*
 - i. *the packets of rejected ballot papers; and*
 - j. *the statements showing the number of rejected ballotpapers.*
7. The principles upon which the court acts in granting a prayer for scrutiny or recount have been considered and elucidated in several decided cases. In **William Maina Kamanda v Margaret Wanjiru Kariuki Nairobi EP No. 5 of 2008 [2008] eKLR**, Hon. Justice Kihara Kariuki summarized the importance and purpose of scrutiny as follows;
 1. To assist the court to investigate if the allegations of irregularities and breaches of law complained of are valid.

2. Assist the court in determining valid votes in favour of each candidate.
3. Assist the court to better understand the vital details of the election process and gain impressions on the integrity of the election process.

Hon. Justice Warsame also considered the rationale for scrutiny in **Dickson Daniel Karaba v Hon. Ngata Kariuki and Others Nairobi EP No. 1 of 2008 (Unreported)** where he stated, “the purpose of the exercise was to ascertain whether there exists any material discrepancies between the result captured in Form 35 which necessitates the determination of the vote cast and obtained by each aspirant. It is only after this exercise that the court can form an opinion whether the results in the Form 35 are correct.”

8. Hon. Justice Maraga reviewed several decisions where scrutiny was in issue **Joho v Nyange [No.2] (2008) 3 KLR (EP) 188**. He distilled the principles as follows, “I have read the authorities cited by counsel for both the parties on this point. The common thread that runs through all of them is that there is no rule that the Petitioner must first call evidence and lay a basis before scrutiny is ordered. Nor is there one that scrutiny will always be ordered whether or not a basis has been made. However, where the votes margin are narrow like in **Onamu v Maitsi Election Petition No.2 of 1983** where the margin was only 30, **Kirwa v Muliro Election Petition No.13 of 1988** where the margin was only 7 and **Hemed Said v Ibrahim Mwaruwa Petition No.1 of 1983** where the margin was only 62, scrutiny was ordered without laying any foundation. Scrutiny has also been ordered without laying foundations even where the margins are wide on the ground that a recount may lead to an expeditious disposal of the petition.”
9. In the case of **William Maina Kamanda v Margaret Wanjiru Kariuki (Supra)**, the learned Judge observed that, “[14] 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.”
10. More recently, Hon. Justice Tuiyott in **Philip Ogutu v Michael Aringo and 2 Others Busia EP No.1 of 2013 (Unreported)** after setting out the law regarding scrutiny stated that, “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 (see for instance the Court of Appeal decision in **Masinde v Bwire and Another (2008) 1KLR (EP) 547**.” (See also Hon. Justice Ngaah in **Peter King’ara v IEBC and Others Nyeri EP No.3 of 2013 (Unreported)**).
11. Noting that the High Court now has jurisdiction to declare the winner of an election under **section 80(4) of the Act**, Justice Kimaru in **Rashid Hamid Ahmed Amana v IEBC and Others Malindi EP No. 6 of 2013 (Unreported)** stated that, “[34] [T]he recent trend is that scrutiny can only be ordered where a Petitioner lays sufficient basis. Such basis can only be laid after the Petitioner has adduced evidence during the actual hearing of the petition. The Petitioner cannot therefore demand that there be scrutiny and recount of the votes before the commencement of the trial. The Petitioner may do so after his or her witnesses have testified. The ideal situation, however, is that such an application for scrutiny should be considered by the court after all the witnesses of the Petitioner and the Respondents have testified. At that stage of the proceedings, the court will be in a position to properly assess the veracity of the allegations made by the Petitioner that there is need for scrutiny. [35] The importance of scrutiny in an election petition cannot be gainsaid. This is because under **Rule 8(4)(b) of the Election Petition Rules**, the court now has jurisdiction to declare a petitioner to have been validly elected. This is in situation where the court establishes that it is the petitioner who actually won the election and not the Respondent. I agree with Mr. Buti that the court cannot declare a petitioner as having been duly elected without scrutiny. Scrutiny and recount therefore can be used by the court as a basis of declaring a petitioner as having been duly elected in the position that is the subject of the election petition.”

12. What the cases establish is that although scrutiny is within the court's discretion, the applicant must establish sufficient basis for the court to order scrutiny. It is with these principles in mind that I turn to consider whether I should order scrutiny of the votes for Kibwezi West Constituency.

The Submissions

13. The petitioners' case is that there were discrepancies, errors, alterations and miscalculations demonstrated by the several alterations on some Form 35 which were not countersigned by agents who it is alleged were not given the opportunity to sign the forms. The petitioners also point to some polling stations as having two Form 35's whose contents differ.
14. The petitioners also hinge their case for recount on the two sets of Form 36 both emanating from the Returning officer, one allegedly signed on the 5th March 2013 and the other certified on 8th March 2013 which have different results and which the petitioner contend were used to declare the results. This, they argue, *prima facie* undermines the validity of the results that declared the 1st respondent as duly elected candidate and thus an order for scrutiny would lay bare the truth of the numbers.
15. They further state that there are variations between the results inputted in the Form 36 and those from the Form 35's. Mr. Makundi, learned counsel for the 1st petitioner, submitted that it was clear that this was evidence of doctoring of results as opposed to 'human errors' as claimed by the respondents. Furthermore, that the results posted in form 35s are not themselves plausible as in most polling stations the number of valid votes registered in those forms differed with the total number of votes garnered by the candidates. Counsel was categorical that what the petitioner sought was only a recount of the votes under **rule 32** and not a under **rule 33** of *the Rules*.
16. Mr Musyoki, learned counsel for the 2nd petitioner, stated that the petitioner had laid sufficient basis for an order of recount. Counsel stated that some of the Form 35s which the returning officer accepted as primary documents were incorrect and thus the Form 36 constructed from them was unreliable. Mr Musyoki submitted that the returning officer had admitted to having used the wrong Form 36 to declare the results and that the existence of errors which the returning officer had termed as human errors indicate the need to do a recount. Counsel cited *Maina Kamanda v Margaret Wanjiru (Supra)* where the court allowed scrutiny and recount of votes holding that there were obvious alterations that were not countersigned.
17. On the whole the petitioners contend that if the alterations, miscalculations are taken into account, the overall result would be affected given that the margin between the top two candidates was about 250 votes. Relying on the case of *Joho v Nyange [No.2] (Supra)*, they urged the court to take into account the narrow margins between the top two candidates. They thus submit that a *prima facie* case for scrutiny and recount has been established.
18. The respondents deny the allegations made by the petitioners. They contend that the Form 35 reflect the results that were announced at the polling stations and any errors that that were noted in the first Form 36 were duly corrected and only one Form 36 was issued on 5th March 2013 upon which the results of the election were declared.
19. The respondents took issue with the fact that petitioners' pleadings lack the clarity required to attract the remedy of scrutiny in terms of **rule 33** of *the Rules*. Mr. Mari, counsel for the 1st respondent, submitted that an election court will not order scrutiny as of right and that a basis had to be laid. Regarding the issue of margins, counsel argued that the difference of 200 votes between the winner and the 1st runner up in this case could not be termed as a margin befitting a recount given the examples cited in *Joho v Nyange [No.2] (Supra)*. Counsel further added that Form 35s, which are the primary documents and the basis against which the winner was declared had not been impeached. He argued that the errors found in Form 36 could be cured, not through a recount, but through a reconstruction of Form 36 by reference to the Form 35's which were on

record.

20. Ms Wambua, learned counsel for the 2nd and 3rd respondents, concurred with Mr Mari's submission that the petitioners had failed to lay a basis for a scrutiny and recount of ballots. Counsel stated that the petitioners had not specified the polling stations in which they wished that a recount be carried out but all the 164 polling stations across the constituency. She urged the court to decline the petitioners' entreaty to make a blanket order for a recount. She cited the case of ***M'Nkiria Petkay Shem Miriti v Rangwa Samuel Mbae & 2 others Meru EP No. 4 of 2013 (Unreported)*** in which Hon. Justice., in dismissing the application for scrutiny, stated in part that; *"...the petitioner applying for scrutiny must adduce sufficient reasons to satisfy the court that such an order is necessary. Fourthly, where the court orders scrutiny, it will be confined to polling stations in which the results are disputed and limited to the examination of the document listed under rule 33(4)."*
21. On the issue of the two Form 36s it was counsel's case that the declaration of results was only done once on the 5th March 2013 but that the returning officer had mistakenly certified a draft of the form 36 on the 8th March 2013 which he erroneously issued to the 1st petitioner's agents. Regarding the failure to sign the forms alleged by the petitioners, counsel submitted that whether or not the forms were signed does not invalidate the results. Further that the discrepancies identified by the petitioner had no effect on the final result and as such there was no necessity for a recount.
22. Dr Abuya, counsel for the 2nd and 3rd respondents, added that the margin in this case was not one deserving a recount. He submitted that in the 2nd petitioner's case only four polling stations were cited to be problematic and which the returning officer had conceded that there was a problem in terms of the tallying process and that the recount, if ordered, should be confined to those stations. Counsel cited the case of ***Philip Ogutu v Michael Aringo & 2 Others (Supra)*** for the proposition that a party must not be allowed to use scrutiny as a fishing expedition.
23. On the whole the respondents aver that the Form 35s were not challenged and in so far as they form the basis of tallying and preparation of Form 36, a recount and scrutiny should not be ordered. Their case is that the discrepancies did not affect the overall results.

Determination and Disposition

24. I have had the advantage of hearing all the evidence and the parties have closed their cases. The only issue determinative of this application whether I should order a scrutiny and if so, whether a full or partial scrutiny and the terms thereof. The petitioners have only set out a few polling stations for which they allege irregularities but have requested a full scrutiny of the 164 polling stations. In my view, the court has jurisdiction to define the scope of the scrutiny and the terms under which it is to be conducted. The court is entitled to consider whether to order a full examination of the ballots and related material, whether a recount of the votes should be conducted or whether the scrutiny should be limited to tallying by reference to Form 35. All these are options available to the court depending on the circumstances of the case.
25. The petitioners' case is founded on alterations, errors and miscalculation which are evident from Form 35. A fully scrutiny is unnecessary in my view and I think it is proper to order scrutiny limited to a recount of the vote to confirm the number of votes are consistent with what is stated in the Form 35. As this is not a final judgment, it is not necessary for the petitioners to prove their case to the requisite standard. As the decided cases demonstrate, all that is necessary is for the petitioner to establish sufficient basis for the court to be satisfied that it must engage time and resources to ascertain the validity of the vote through scrutiny. The scrutiny exercise is part of the forensic process available for the court to do justice in the case.

26. I have taken into account the alterations and errors in Form 35 and those reflected in Form 36 and

I am convinced that the interests of justice would be served if a recount is ordered for all the 164 polling stations. I am particularly persuaded that the errors made, whether by mistake or deliberate, and which the respondents have admitted exist, are sufficient to possibly affect the result given that the margin of votes between the first two candidates is less than 250 votes.

27. I have considered the desirability of a partial scrutiny limited to the polling stations identified by the petitioners as the respondents have contended. Such a course, in my view, would be unfair to the 1st respondent as the errors and miscalculations appear to be random and affect all the candidates since no votes can be attributed to any one candidate.

28. Although the petitioners' pleadings are inadequate in certain respects, in coming to this decision, I am guided by the decision in the case of ***Justus Omiti v Walter Enoch Nyambati Osebe and Others Kisii EP No. 1 of 2008 (Unreported)*** and the principles of electoral system articulated in **Article 81(e)** of the Constitution. In that case the court noted that, *"All issues raised in the petition and those which crop up during the hearing, whether pleaded or not, and which had the potential to affect adversely the final result, and the will of the voters in a Constituency must come under spotlight, scrutiny and interrogation. They have to be interrogated and determination made thereon. In this case all illegalities and irregularities which impugn the credibility of the outcome of the elections have to be considered. It will be a sad day indeed if such evidence which comes through the petitioner, his witnesses, the respondents and their witnesses, as well, to be discarded and rendered irrelevant, or inadmissible merely on grounds that the same was not the subject of any pleading At the end of the day what is of prime concern to this court, is whether the elections were conducted in a fair, free and transparent manner, and that they reflect the will of the voters and more importantly whether the Respondent was validly elected. Such determination cannot be made, if relevant evidence is locked out on technical grounds that the issues addressed by such evidence were not pleaded."*

29. I am satisfied that taking all the evidence into account, an order for scrutiny is merited and accordingly I allow the application for scrutiny on terms I have set out below.

Order and Directions

30. The scrutiny shall be carried out on the following terms;

- a. There shall be scrutiny of the votes limited to a recount and ascertainment of the number of votes each candidate obtained in each of the 164 polling stations in Kibwezi West Constituency.
- b. The recount shall be undertaken under the supervision of the Deputy Registrar of this court.
- c. For ease of the exercise, the petitioners and the respondents shall each be allowed to have three (3) agents present during the exercise.
- d. The scrutiny exercise shall commence on 19th June 2013 at 9.00 a.m. and shall proceed on a day to day basis until the conclusion of the exercise.
- e. This matter shall be mentioned before this court on 1st July 2013 at 9.00 a.m. for further directions.
- f. The costs shall abide the outcome of the petition.

DATED and DELIVERED at MACHAKOS this 17th day of June 2013.

D.S. MAJANJA

JUDGE

Mr Makundi and Mr Kituku instructed by Andrew Makundi and Company Advocates with him Mr Kamolo instructed by Kamolo and Associates Advocates for the petitioner.

Mr Musyoki instructed by B. M. Musyoki and Company Advocates

Mr Mari instructed by WachiraNdung'u and Company Advocates for the 1st respondent.

Ms Wambua instructed by Anne M. Kiusya and Company Advocates and Dr Abuya instructed by J. Louis Onguto Advocates for the 2nd and 3rd respondents.