



**REPUBLIC OF KENYA**

**High Court at Malindi**

**Election Petition 6 of 2013**

**RISHAD HAMID AHMED AMANA.....PETITIONER**

**-VERSUS-**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION....1<sup>ST</sup> RESPONDENT**

**STEPHEN KITSAO KARANI.....2<sup>ND</sup> RESPONDENT**

**JULIUS NDEGWA KARIUKI.....3<sup>RD</sup> RESPONDENT**

**R U L I N G**

1. When the General elections were held on 4<sup>th</sup> March 2013, Rishad Hamid Ahmed Amana, the Petitioner herein, and Julius Ndegwa Kariuki, the 3<sup>rd</sup> Respondent were candidates and therefore contestants for the Member of Lamu West Constituency National Assembly seat.

2. Following the elections undertaken under the supervision of the Independent Electoral and Boundaries Commission, the 1<sup>st</sup> Respondent, the 3<sup>rd</sup> Respondent was returned as the duly elected member of the National Assembly of the said constituency. This declaration was made by the Returning Officer, the 2<sup>nd</sup> Respondent in this petition.

3. The Petitioner was dissatisfied with the conduct of the said election. He filed this petition on 27<sup>th</sup> March 2013. In the said petition, he sought the following reliefs:

***“(a) There be a scrutiny, recount and retallying of votes as averred in Paragraph 18 above, and consequently,***

***(b) A declaration that the 3<sup>rd</sup> Respondent was not elected or validly elected as Member of Parliament for the Lamu West Constituency Seat in the elections of 4<sup>th</sup> March 2013.***

***(c) A declaration that the Certificate issued by the 2<sup>nd</sup> Respondent to the 3<sup>rd</sup> Respondent pursuant to Rule 87(2)(b) of the Elections General Regulations 2012, is invalid, null and void and of no legal effect.***

***(d) A declaration that the Petitioner is the validly elected candidate for the Lamu West National Assembly Parliamentary seat in the elections held on 4<sup>th</sup> March 2013.***

***(e) An order be made, pursuant to the provisions of Section 80(4) of the Elections Act, 2012, directing the 1<sup>st</sup> Respondent to issue a Certificate of Election to the Petitioner as the validly elected***

*Member of Parliament for Lamu West Constituency in the election of 4<sup>th</sup> March 2013.*

*(f) In the alternative and without prejudice to the prayers set out in paragraphs (a), (b), (c) and (d) above, an order be made that a fresh election be held in respect of the National Assembly seat for Lamu West Constituency.*

*(g) The costs of this petition be met and or paid to the Petitioner by the Respondents.*

*(h) Such other further relief that this court may deem just to grant in accordance with The Elections Act, 2012 and The Elections Petition Rules, 2013.”*

4. The Respondents, upon being served with the petition, duly entered appearance and filed a response to the petition. In compliance with the **Election Petition Rules**, they also filed affidavits of the witnesses that they intended to call during the hearing of the petition. No preliminary issues were raised during the pre-trial conference. However, the court directed that the application which had by then been filed by the Petitioner seeking an order of this court for the scrutiny and recount of the votes be held in abeyance until the court concludes the hearing of the petition. The court issued directions to the effect that that application be canvassed after the court had concluded hearing all the witnesses in the petition.

5. This court has now heard all the respective witnesses called by the Petitioner and by the Respondents. The Petitioner called seven (7) witnesses, the 1<sup>st</sup> and 2<sup>nd</sup> Respondent called three (3) witnesses while the 3<sup>rd</sup> Respondent called one (1) witness. After the conclusion of the hearing of the witnesses in the petition, this court directed the Petitioner’s counsel to present his argument as contained in his application dated 20<sup>th</sup> May 2013. In the said application, the Petitioner sought orders from this court for the scrutiny, recount and retallying of the votes.

6. The notice of motion is predicated on **Section 82** of the **Elections Act** and **Rule 33(1)** of the **Election Petition Rules**. Specifically, the Petitioner has prayed that the court orders scrutiny, recount and retallying of votes in favour of the Petitioner in the disputed polling stations set out respectively in paragraph 32 of the Petitioner’s affidavit in support of the petition and in paragraph of 8 of the replying affidavit. The grounds in support of the application are stated on the face of the application. The Petitioner states that the 2<sup>nd</sup> Respondent had admitted in paragraph 23 of his affidavit in response to the petition that there existed errors in computation of the results that the 1<sup>st</sup> Respondent produced in this court pursuant to the mandatory provisions of **Rule 21(b)** of the **Election Petition Rules**. He further stated that the 2<sup>nd</sup> Respondent had provided him with two different sets of Form 36s all relating to the particular election. The Petitioner contends that the difference in votes between the Petitioner and the 3<sup>rd</sup> Respondent as the declared winner was so minimal that a scrutiny, recount and retallying of the votes can be the only means of determining the veracity or otherwise of the manner in which the voting was conducted.

7. The application was opposed. Moses Kipkogei, a legal officer of the 1<sup>st</sup> Respondent swore a replying affidavit in opposition to the application. In essence, he deponed that the Petitioner had not established prima facie proof that there were such substantive and apparent irregularities in the electoral process that it ultimately affected the outcome of the results. He stated that the Petitioner had not established the threshold upon which this court can be persuaded to make an order for scrutiny. It was the 1<sup>st</sup> and the 2<sup>nd</sup> Respondents’ case that any errors that became apparent during the tallying process were rectified by the returning officer: the said returning officer had given satisfactory explanation in his evidence on how he dealt with the errors which became manifest. He swore that the allegation of arithmetical errors which formed the basis of the petition, were disproved by the testimony of the 2<sup>nd</sup> Respondent. He stated that the Petitioner had not adduced any evidence of any irregularity to form a basis of this court to make an order for scrutiny. He finally stated that the application was not made on the basis of the pleadings filed by the Petitioner and therefore should be disallowed.

8. On his part, the 3<sup>rd</sup> Respondent filed grounds of objection to the application. He stated that no

evidence of any election offence committed by the Respondents had been established. He further stated that no reasonable grounds had been offered by the Petitioner to persuade this court to order scrutiny. He was of the view that the application was speculative and without any basis. He stated that the evidence adduced by the Petitioner's witnesses had not established any ground that would enable this court order the retallying, recount or the scrutiny of votes. The 3<sup>rd</sup> Respondent stated that the Petitioner had not met the threshold for this court to order scrutiny.

9. The application came up for hearing on 5<sup>th</sup> June 2013. The Petitioner was represented by Mr. Buti. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents were represented by Miss Muraguri whereas the 3<sup>rd</sup> Respondent was represented by Mr. Kahindi.

### **The Petitioner's Submission**

10. Mr. Buti for the Petitioner submitted that under **Section 82** of the **Elections Act**, this court has discretion to order scrutiny to determine the validity of votes cast. He further stated that under **Rule 33 (1)** of the **Election Petition Rules**, the court is empowered to order scrutiny in specific disputed polling stations if the same is prayed for by the Petitioner in his petition.

11. Counsel for the Petitioner was of the view that where the vote margin between the winner and the runner-up is narrow, scrutiny should be ordered. To buttress his argument, he relied on the case of **Hassan Ali Joho –Vs- Hotham Nyange & Others [2007] eKLR**. In this case, the court held that scrutiny could only be ordered where vote margins were narrow. He submitted that in such circumstances scrutiny may be ordered without the need to lay a foundation. Mr. Buti explained that the vote margin of 621 votes in the present petition is relatively low considering that the total number of votes that were cast. In the circumstances, it was his argument that order for scrutiny ought therefore to be made.

12. According to counsel for the Petitioner, the Petitioner is not required to establish that the outcome of the scrutiny process would be such that the Petitioner overtakes the successful candidate but to show that there were irregularities in the election process. To support his submission, Mr. Buti relied on the case of **William Maina Kamanda –Vs- Margaret Wanjiru Kariuki & Another [2008] eKLR**. In this case, Kihara Kariuki J (as he then was) made the following observations:

***“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 or mistakes on the part of the Returning Officer or other election officials”.***

13. Learned counsel for the Petitioner in closing his submissions submitted that that the Returning Officer in his evidence indeed admitted that there were mistakes in the tallying process. He therefore urged the court to grant the orders sought as prayed.

### **The 1<sup>st</sup> & 2<sup>nd</sup> Respondents' Submission**

14. In opposing the application, Miss Muraguri for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents submitted that the petitioner is bound by his pleadings and cannot be allowed to introduce new evidence at the hearing. She urged the court to consider that in granting an order for scrutiny, the court can only rely on the evidence before it and not other extraneous considerations. She referred to the case of **Philip Ogutu –Vs- Michael Aringo & 2 Others, Busia HC Petition No. 1 of 2013 (unreported)** where the court observed that a party must not be allowed to use scrutiny as a fishing expedition to discover new and fresh evidence. She quoted Tuiyot J as further stating that:

***“It would be expected that a party filing an Election Petition is from the outset, seized of the grounds, facts and evidence questioning the validity of the election. And where the evidence is unclear then a party can, on application to Court, seek and obtain better particulars of that evidence from its***

*adversary. But it would be an abuse of process to allow a party to use scrutiny for purposes of chancing on new evidence. Scrutiny should not be looked upon as a lottery.”*

15. Miss Muraguri further submitted that for the court to issue orders for scrutiny and recount there must be prima facie evidence. The onus to establish the same fell on the Petitioner. It was her submission that the Petitioner had not established a prima facie case as required under **Rule 33(2)** of the **Election Petition Rules**. She relied on the case of Hassan Ali Joho –Vs- Hotham Nyange & Others [2007]eKLR in support of this contention. She further submitted that an order for scrutiny should not be issued as a matter of course. The court must be satisfied that there are sufficient reasons to require an examination of the ballots. She cited the case of Philip Ogutu –Vs- Michael Aringo & 2 Others (Supra).

16. She submitted that the doctrine of separation of powers should be respected. She explained that the Constitution gave mandate to Independent Electoral and Boundaries Commission to conduct elections. She cited **Article 249(2)(b)** of the **Constitution** in support of her argument. The courts should not therefore entertain applications for scrutiny which will infringe on the independence of the Electoral Commission without legal justification. She urged the court not to allow persons dissatisfied with the electoral process from abusing judicial process.

17. Miss Muraguri explained that judicial scrutiny is a retallying process where Forms 35 are scrutinized and a Form 36 is generated as was ordered in the case of Raila Odinga & Others Versus Independent Electoral and Boundaries Commission & 3 Others Election Petition No. 5 of 2013 (Supreme Court) whereas recounting of votes is the actual counting of votes in the ballot boxes.

18. On the issue of the two Form 36s, Miss Muraguri submitted that that the court should be guided by **Article 86(c)** of the **Constitution** which gives the mandate to the commission to ensure that results from the polling stations are openly and accurately collated and promptly announced by the Returning Officer. In order fulfill this mandate, the commission is under **Articles 88(3)** and **(4)** of the **Constitution** mandated to make administrative arrangements to ensure free and fair elections.

19. It was submitted on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents that the tallying process in this case was transparent. The results contained in Form 35s were correctly entered in Form 36 after same had been verified. The returning officer had verified the provisional Form 36 before coming up with the final Form 36. He corrected the transposition error on the provisional Form 36 relating to the entry made for Lamu Boys Polling Station and Mukomani Girls Polling Station. The transposition error of 300 votes in each polling station was corrected. Miss Muraguri submitted that it was the final Form 36 that was used to declare the verified results by the returning officer.

20. According to Miss Muraguri, there was no irregularity in the fact that there were two Form 36s. She explained that it would have been illegal for the results to be declared on the basis of the erroneous Form 36. She stated that the fact that the commission gave the Petitioner the provisional results showed that the commission was being transparent and should not therefore be condemned for taking such a course of action.

21. Miss Muraguri submitted that the Petitioner’s agents were present during the tallying process. She gave an example of Lake Kenyatta Primary school, Bahati Primary School, Hogwe and Amu polling stations in which agents of the Democratic Party were present. She submitted that the commission allowed only one party agent at the polling centre. A list of the party agents was supplied to the commission on 26<sup>th</sup> February 2013 whereas the letter the Petitioner is relying on is dated 12<sup>th</sup> March 2013. The list was supplied several days after the elections had been conducted. Learned counsel for the commission submitted that the Petitioner did not tell the Court whether or not the agents present at the polling centre were his agents. She urged the court to take into consideration that in this particular general election, more than six (6) elections were being carried out at the same time. This necessitated the commission to set a requirement that each party provides one (1) agent per polling station.

22. It was further submitted for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents that **Rule 33(4)** of the **Election Petition**

**Rules** provided that scrutiny shall be confined to the disputed polling stations. In the instant case, the polling stations are the ones highlighted in paragraph 18 of the petition. Miss Muraguri reiterated that a party is bound by his pleadings.

23. Miss Muraguri further submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had indeed admitted that were minor arithmetic and calculation errors. These errors were however rectified and did not ultimately affect the individual results of the candidates. She placed reliance on the cited case of **Hassan Ali Joho –Vs- Hotham Nyange & Others** (supra) where the court observed that indeed mistakes can occur due to fatigue of the election officials.

24. In addressing the issue of the handwritten aggregated results prepared by the Petitioner, she submitted that the 2<sup>nd</sup> Respondent had not confirmed any errors, but had only indicated that he had noted the issues raised by the Petitioner in the said aggregated results. The Returning Officer had stated that he would get directions from the commission on whether retallying could be done. She however explained that once the Returning Officer declared the results, his mandate came to an end. The question of retallying after the results had been announced did not therefore arise.

25. Miss Muraguri conceded that a recount can be ordered where the margin between the winner and the runner up is narrow. However, it was her case that the margin of 621 votes in the present petition was relatively wide. Miss Muraguri again relied on the case of **Philip Ogutu –Vs- Michael Aringo** (supra).

26. In closing, Miss Muraguri submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had addressed all issues raised in the Petition. She reiterated that there were no complaints raised in respect of the Forms 35s. There was no inconsistency with the said results as they were transposed to Forms 36. In that regard, counsel urged the court to dismiss the application with costs.

### **The 3<sup>rd</sup> Respondent’s Submission**

27. Mr. Kahindi, counsel for the 3<sup>rd</sup> Respondent associated himself with the submission made by Miss Muraguri. He also argued that the Petitioner had not sufficiently laid a basis for the grant of the order of scrutiny and recount. According to Mr. Kahindi, an order for scrutiny cannot be made as a matter of course. He explained that the alleged irregularities must first be established before an order for scrutiny can be made. He also submitted that scrutiny can only be ordered where the margin between the winner and the runner-up was small. In this regard, he relied on the case of **Joho –Vs- Nyange** (supra).

### **The Petitioner Rejoinder**

28. In rejoinder, Mr. Buti for the Petitioner reiterated that the Petitioner had established sufficient basis for scrutiny. In applying the test for sufficiency as a basis for recount, counsel submitted that the court should apply the test of a reasonable man. He submitted that the court in ordering scrutiny is not interfering with the independence of the electoral commission. The court had the role of an oversight authority. Under **Article 86(c)** of the **Constitution**, the commission is required to conduct a transparent electoral process. According to Mr. Buti, the presence of two Form 36s was proof that the process may not have been transparent. In any case, the court should confirm that the said corrections were indeed made.

### **The Applicable Law**

29. **Section 82** of the **Elections Act** provides for scrutiny. It states as follows:

***“(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 matter as the election court may determine.***

***(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 who 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 person, who by reason of conviction for 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 that 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.*
- (3) The vote of a voter shall not, except in the case specified in subsection (1)(e), be struck off under subsection (1) by reason only of the voter not having been or not been qualified to have the voter's name entered on the register of votes."*

**Rule 33 of the Election Petition Rules** 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 ballot papers."*

30. Mr. Buti for the Petitioner and Miss Muraguri for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents correctly set out the position of the law in regard to the circumstance under which scrutiny can be ordered by the court. I agree

with the decision of Kihara Kariuki J (as he then was) in **William Kamanda –Vs- Margaret Wanjiru [2008] eKLR** where at paragraph 14 of his Ruling he said this:

*“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.”*

In **Joho –Vs- Nyange [2006] eKLR, Maraga J** (as he then was) stated thus:

*“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 –Vs- Maitsi Election Petition No.2 of 1983 where the margin was only 30, Kirwa –Vs- Muliro Election Petition No.13 of 1988 where the margin was only 7 and Hemed Said –Vs- 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.”*

31. From the above two (2) decisions, it is clear that scrutiny can be ordered under two (2) circumstances; firstly, where irregularities have been established to have been committed by election officials and secondly where the margin between the winning candidate and the runner-up is such that scrutiny would be the best way in which to settle the dispute as to who actually won the election.

32. In a recent decision, Tuiyot J in **Philip Ogutu –Vs- Michael Aringo & 2 Others Busia HC. Election Petition No.1 of 2013** after setting out the law regarding scrutiny stated thus:

*“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 –Vs- Bwire and Another (2008) 1KLR (EP) 547.”*

The Learned Judge went further to state, correctly in my view, that scrutiny should not afford a petitioner the opportunity to embark on a fishing expedition to discover new or fresh evidence. In this regard, scrutiny cannot be ordered where the petitioner has not specifically pleaded for scrutiny in his petition. 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.

33. Another interpretation of **Section 82(1)** of the **Election Act** in respect of circumstances under which scrutiny may be ordered by the court was addressed in the case of **Peter King’ara –Vs- IEBC & 2 Others Nyeri HC. Election Petition No.3 of 2013**. Ngaah J held at page 15 as follows:

*“From the perspective of Section 82(1) of the Act, the answer to the primary question posed earlier is that indeed votes can be scrutinized by the court either suo moto or on application by a party to the petition. In my opinion, the only reason why a party would be required to make an application before scrutiny is ordered is to lay a basis for such scrutiny. Ordinarily an application would not be made without a basis and the basis for an application for scrutiny of votes would logically be the basis for such a scrutiny. Whether or not the basis be sufficient enough to warrant an order for scrutiny is for the court to determine based on the evidence available. As to when scrutiny can be ordered, Section 82(1) as read with Section 82(2) helps us 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 pre-trial stage unless the only issue in the petition is the count and tallying of votes under Rule 32(1) of the Elections (Parliamentary and County) Petition Rules, 2013.”*

34. As is clear from the two (2) decisions above, the 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.

36. As to the types of scrutiny that can be ordered, **Rule 33(4)** of the **Election Petition Rules** gives the court jurisdiction to order partial scrutiny. Under the old **Election Petition Rules** (which have now been repealed), the court had no option but to undertake scrutiny and recount of all the polling stations in the entire electoral area that is the subject of the electoral dispute. This was whether or not complaints had been raised in respect of some of the polling stations. **Rule 33(4)** now grants jurisdiction to the court to limit scrutiny specifically to the polling stations that complaints have been raised. The court can now direct that scrutiny be undertaken in respect of votes cast in a specific polling station. This is one type of partial scrutiny. Another type of partial scrutiny is similar to the one that was recently undertaken by the Supreme Court in **Election Petition No.5 of 2013 Raila Odinga –Vs- Uhuru Kenyatta & 3 Others**. 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.

37. This court does not agree with the submission made Miss Muraguri on behalf of the Petitioner that in ordering scrutiny, this court will be interfering with the independence of the electoral commission in the exercise of its mandate to conduct elections. This court shall look no further than **Article 105** of the **Constitution** that grants this court jurisdiction in determining the question whether a person has been validly elected as a member of parliament. By ordering scrutiny, the court is not interfering with the independence of the commission: It is undertaking a Constitutional mandate to validate the election that is the subject of the election petition.

### **The Court's Determination**

38. The issue for determination in this application is whether the Petitioner established a suitable case for this court to order scrutiny. This court has set out what is the current law guiding the court in deciding whether or not to order scrutiny. In the present application, the court had the advantage of having heard the evidence adduced by all the parties to this petition. In fact, save for this application, the parties have closed their respective cases.

39. There are several issues that this court wishes to address in determining whether or not to order scrutiny. The first issue is in regard to the fact that the 2<sup>nd</sup> Respondent availed to the Petitioner two (2) Form 36s. The two (2) Form 36s contained different results. The results of two (2) polling stations, namely Mkomani Girls Primary School polling station and Lamu Boys Primary School polling station reflected figures which were different. The 2<sup>nd</sup> Respondent explained that the first Form 36 that he gave to the Petitioner was in effect a draft or provisional Form 36 which contained an error which was later rectified and reflected in the final Form 36 which he availed to the Petitioner. Having carefully perused the two Form 36s, it was clear to this court that while the explanation given by the 2<sup>nd</sup> Respondent may appear reasonable, **Regulation 83 of the Election (General) Regulations 2012**, do 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. This will enable the court ascertain the integrity of the results that were entered in Form 36 by the 2<sup>nd</sup> Respondent.

40. The Petitioner requested the court to order scrutiny and recount in the polling stations he referred to as disputed stations in paragraph 32 of his affidavit. In the said affidavit the Petitioner listed twenty three (23) polling stations which he claimed results were declared whose integrity could not be verified. The Respondents objected to this request on the grounds that the Petitioner had not pleaded the same in his petition. This court agrees with the Respondents that the Petitioner can only ask for scrutiny and recount in respect of polling stations which he specifically pleaded in his petition. A party is bound by his pleadings.

41. It was apparent that the Petitioner introduced new polling stations in the affidavit sworn in support of his petition. These new polling stations went beyond the polling stations that the Petitioner had requested scrutiny in his petition. In the circumstances therefore, this court cannot grant the Petitioner's request to scrutinize and recount results from polling stations that he did not specifically plead in his petition. The court shall return to this aspect of the request at a later part of this Ruling.

42. The Petitioner testified that after the declaration of the results, he met with his agents and was able to collate the results from the various polling stations. In the said results, there was a significant difference between the results that were declared by the presiding officers of the various polling stations, and the results that were collated by his agents. The results collated by the agents are annexed to the Petitioner's affidavit at pages 12 -15. These results were admitted into evidence. What is of interest about the said results is that the Petitioner presented the same to the 2<sup>nd</sup> Respondent. The 2<sup>nd</sup> Respondent received the same and wrote the following note:

***“I note issues raised in the above tally and I reiterate that I will confirm with your chief agents and candidates in a meeting to retally the votes in under 7 days.”***

When the 2<sup>nd</sup> Respondent testified before this court, he admitted that he had indeed been availed a copy of the said tally undertaken by the agents of the Petitioner. He could not however give a satisfactory explanation why he gave the undertaking that he would retally the votes even after he had declared the final results.

43. In this court's assessment, it was either that the 2<sup>nd</sup> Respondent did not know the law relating to the tallying and the announcement of the results or had doubts about the integrity of the results that he himself had declared. Upon perusal of the said tally presented by the Petitioner's agents, it was clear to this court that there was a significant difference in the results announced in respect of some of the polling stations. It was in some of these polling stations that the Petitioner claimed that his agents were prevented from accessing the particular polling stations.

44. This court is of the considered view that the Petitioner established a case for this court to order scrutiny and recount in respect of polling stations that had results declared that were different from the tally of the agents of the Petitioner. There shall only be one caveat: The scrutiny and recount shall be

restricted to the following polling stations;

- (I) Witu Primary School polling station
- (II) Majembeni Primary School polling station
- (III) Ziwani Primary School polling station
- (IV) Bahati Primary School polling station
- (V) Uzida Primary School polling station
- (VI) Sese Primary School polling station
- (VII) Lake Kenyatta ATC polling station
- (VIII) Ocean View Primary School polling station
- (IX) Bomani Primary School polling station.

45. The scrutiny and recount in these polling stations in addition to the other two (2) polling stations referred to above shall be restricted to the ascertainment of the number of votes that each candidate obtained as compared with the results that were announced in the Form 35s that were later collated in Form 36 by the 2<sup>nd</sup> Respondent. This exercise will enable the court to ascertain the integrity of the results that were announced by the 2<sup>nd</sup> Respondent.

46. The scrutiny and recount of the above polling stations shall be undertaken under the supervision of the Deputy Registrar of this court. For ease of the exercise, the Petitioner, the 1<sup>st</sup> and 2<sup>nd</sup> Respondent and the 3<sup>rd</sup> Respondent shall each be allowed to have five (5) agents present during the scrutiny. As stated, the scrutiny shall be partial and limited to the polling stations set out above and shall be restricted to the ascertainment of the number of votes each candidate obtained in each polling stations as compared with the results which were announced by the various presiding officers as contained in the various Form 35s.

47. The scrutiny exercise shall commence on 17<sup>th</sup> June 2013 at 9.00 a.m. and shall proceed on a day to day basis until the conclusion of the exercise. This matter shall be mentioned before this court on 24<sup>th</sup> June 2013 at 9.00 a.m. for further directions.

**DATED AT MALINDI THIS 12<sup>TH</sup> DAY OF JUNE 2013**

L. KIMARU  
**JUDGE**