



No.778

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ELECTION PETITION NO.9 OF 2013

IN THE MATTER OF ARTICLES 81, 86 AND 87 OF THE CONSTITUTION, 2010

AND

IN THE MATTER OF ELECTIONS ACT, NO. 24 OF 2011

AND

IN THE MATTER OF THE ELECTIONS (GENERAL) REGULATIONS, 2012

AND

IN THE MATTER OF ELECTION TO THE SENATE

AND

IN THE MATTER OF KISII COUNTY

AND

IN THE MATTER OF THE PETITION OF CHARLES OIGARA MOGERE

BETWEEN

CHARLES OIGARA MOGERE PETITIONER/APPLICANT

VERSUS

CHRISTOPHER MOGERE OBURE 1ST RESPONDENT

NYANGAU SHEM OBWORO 2ND RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION 3RD RESPONDENT

RULING

The Application and Responses thereto

1. By the Notice of Motion dated 22nd May 2013 and filed in court on the same day, the Petitioner herein, Charles Oigara Mogere seeks orders THAT:-
 1. *The instant application be certified urgent.*
 2. *The Honourable Court be pleased to grant an order for scrutiny and re-count of all the votes cast to and/or in favour of all the candidates who contested for Senatorial Seat, Kisii County during the General*

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Election held on the 4th day of March 2013.

3. *Consequent to prayer (2) hereinabove being granted, the results for the Scrutiny and Re-count be pronounced and/or announced prior to (sic) the substantive hearing of the petition and in any event, the results of the said exercise be taken into account by the honourable court.*
 4. *The Honourable court be pleased to make further and/or suitable orders, towards the expeditious hearing of this instant application.*
 5. *Costs of this application do abide the outcome of the petition.*
 6. *Such further and/or other orders be made as the court may deem fit and expedient.*
2. The application is supported by the petitioner's sworn affidavit dated 22nd May 2013 and on grounds that:-
 - a. *The 3rd Respondent herein convened, held and/or conducted the general election on the 4th day of March 2013.*
 - b. *Besides, the 3rd Respondent constituted and/or engaged the 2nd Respondent to help in the management, conduct and/or supervision of the General Election.*
 - c. *It was incumbent upon the 2nd and 3rd Respondents to ensure that the General Elections were held in accordance to and compliance with the provisions of Articles 81 & 86 of the Constitution, 2010.*
 - d. *For clarity, the methods and systems used and/or employed by the 2nd and 3rd Respondents was obliged to be simple, accurate and verifiable.*
 - e. *Nevertheless, the 2nd and 3rd Respondents employed, adopted and used a system that was opaque, riddled with inconsistencies and devoid of transparency.*
 - f. *In any event, the accounting system, together with the attendant Counting and Tallying was wrought and/or fraught with miscalculations, deletion and errors in calculations.*

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- g. *The errors of miscalculations, deletion and calculation, denied, deprived and/or substantially decreased the petitioner's votes, in a number of Polling Stations.*
- h. *As a result of the errors, arising from and/or attendant to the foregoing, it has become imperative that an independent audit be undertaken in respect of the votes cast on account of Scrutiny and Re-count.*
- i. *In any event, the statutory forms supplied by and/or obtained from the 3rd Respondent, are contradictory and at variance.*
- j. *Arising from the contradictions and/or variations, it is apparent that the 2nd and 3rd Respondents engaged and/or indulged in subsequent alterations and adjustments to camouflage and/or conceal the errors.*
- k. *To ascertain the validity, correctness and verifiability of the votes cast, it is necessary that an Order for Scrutiny and Re-count be undertaken.*
- l. *The exercise of Scrutiny and Re-count will enable the Honourable Court to ascertain the nature, cause, extent and basis of the variance and discrepancies apparent in the Statutory Forms.*

- m. Besides, the Re-count will also enable the Court to ascertain the extent and consequences of the Dual Streams, generated by the 2nd Respondent and his subordinates, contrary to the obtaining situation.
- n. In any event, the Court will also be able to ascertain the efficacy and accuracy of the total votes cast and/or garnered by the various candidates, in particular, the 1st Respondent viz- a- viz, the Peoples Democratic Movement (PDP) candidate.
- o. Unless the exercise of Scrutiny and Re-count, is ordered and undertaken, the apparent differences, discrepancies, alterations and variance in the statutory forms, may go unabated.
- p. It is in the interests of justice and fair play that the exercise of Scrutiny and Re-count, be undertaken.
- q. Neither of the parties in the instant matter will be prejudiced by the

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order for Scrutiny and Re-count.

- r. *It is the interests of justice that the instant Application be granted.*
 - s. *That this is a fit and proper application to be allowed Ex-Debito Justitiae.*
3. The affidavit in support sets out details of voting centres and constituencies where it is alleged that valid votes cast in favour of the Peoples Democratic Party (PDP) candidate were reduced, decreased and/or diminished in favour of the 1st Respondent, Christopher Mogere Obure. The Petitioner also avers that the number of streams on the voting day were multiplied for the benefit of the 1st Respondent, so that some of the declared results as recorded in Form 36 were contrary to and/or in contradiction to the total results allocated to the various Senatorial Candidates, thereby compromising the validity of the results declared, including some polling stations recording more votes than the total number of registered voters. Finally, the petitioner contends that the 2nd Respondent herein, failed and/or refused to verify the entries made and/or posted onto Form 36 with the entries made in the Primary Form emanating and filed by the various presiding Officers, that is Form 35, in direct violation of **Article 86 (c) of the Constitution, 2010**. The sub article requires the 3rd Respondent to ensure that **“the results from the polling stations are openly and accurately collated and promptly announced by the returning officer.”** The petitioner therefore prays that his application be allowed so that scrutiny and recount of the votes is carried out in the named polling stations.
 4. The application is opposed. The 1st Respondent filed Grounds of Opposition dated 24th May 2013 as follows:-

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1. *By virtue of Rule 32 of the Elections (Parliamentary and County Election) Petition Rules 2013, an application for a recount of the votes does not lie in law in view of the nature of the petition, the averments contained in the said petition and the prayers sought therein.*
 2. *An application for recount and scrutiny are by virtue of Rules 32 and 33 (2) of the Elections (Parliamentary and County Election) Petition Rules 2013, mutually exclusive of each other and cannot be sought concurrently.*
 3. *An application for recount and scrutiny are in any event premature as no basis has been laid to entitle the Petitioner to the said prayers.*
 4. *By reason of section 82 of the Elections Act and rule 33 of the Elections (Parliamentary and County Elections) petition Rules, the application is in any event bad in law as it does not specify the polling stations it seeks an order of scrutiny.*
 5. *The application in any event amounts to a fishing expedition and a general enquiry without any legal basis.*
5. The 2nd and 3rd Respondents also filed Grounds of Opposition dated 24th May 2013 stating as follows:-

1. That the application seeks to circumvent the essence of the petition and the cogent answer thereto and the Affidavits filed thereto by the 2nd and 3rd Respondents as it seeks to have similar orders sought in the petition granted through the instant application in actual fact creating a petition within a petition in absolute abuse of the law and the Honourable Court process.
2. That Rule 33 (2) of the Elections (Parliamentary and County Election) Petition Rules, 2013 required that there be sufficient reason for scrutiny or re-count while none is apparent in the subject application.
3. That the court's jurisdiction is strictly limited to making an order for either scrutiny or re-count and not scrutiny and re-count as prayed for

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in prayer 1 of the subject application thus the Honourable Court is lacking in jurisdiction in that respect.

4. That the prayers as constituted in prayer 2 of the instant application are without law and or Rules – Elections (Parliamentary and County Elections) petition Rules, 2013 governing election petitions. The scrutiny contemplated under Rule 33 (4) is in mandatory terms confined to the polling stations in which the results are disputed and does not contemplate the blanket approach adopted by the Petitioner.
5. That Rule 32 of the Elections (Parliamentary and County Elections) Petition Rules, 2013 requires that if a re-count is to be ordered, then it is the only issue that lies for determination. However the instant application falls foul of the law in this respect.
6. That no grounds for scrutiny as contemplated under section 82 (2) of the Elections Act, 2011 have been brought out in the application.
7. That prayer 2 in the instant application is a re-statement of prayer (a) in the Petition and thus there is nothing interlocutory about the instant application.
8. That in any event and without prejudice to the aforesaid and in strenuous opposition to the instant application, the 2nd and 3rd Respondents rely on the Answer to the Petition dated 6th May 2013 and filed on 7th May 2013 and the Affidavits of Shem Obworo Nyangau, Rutto K. Wesley, Peter Resa and Mungai Main a James. This further demonstrates the absurdity of the instant application as a hearing thereof would demand an examination of evidence presented by all parties in the Petition thus in fact constituting a hearing of the Petition.
9. That for reasons aforesaid, the instant application is a legal nullity, gravely incompetent, frivolous, vexatious, and indeed an abuse of the Honourable Court's process deserving instant dismissal.

6. In addition to the Grounds of Opposition set out above, the 2nd and 3rd

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Respondents also rely on the Answer to the Petition dated 6th May 2013 and filed in court on 7th May 2013 together with the affidavits of Shem Obworo Nyangau, the 2nd Respondent herein, and those of Rutto K. Wesley, Peter Resa and Mungai Maina James in opposing the petitioner's notice of motion dated 22nd May 2013. All the 3 Respondents pray that the Petitioner's application be dismissed with costs to them as they view the said application to be incompetent, frivolous, vexatious and indeed an abuse of the due process of the court.

7. Parties filed written submissions and also made oral arguments.

Issues for Determination

8. From an analysis of the pleadings and the submissions, I concur with counsel for the Petitioner, and counsel for the Respondents also made their submissions around the same issues, that the issues for determination are as follows:-

- a. Whether the Petitioner/Applicant is entitled to scrutiny;
- b. Whether the Petitioner/Applicant is entitled to Re-count;
- c. Whether the Honourable Court has jurisdiction to Order scrutiny and Re-count;
- d. Whether sufficient cause and/or basis have been laid to warrant the orders sought.

Whether the Petitioner/Applicant is entitled to Scrutiny

9. The Petitioner alleges that since the results as contained in Forms 35 and 36 appear incomplete, deficient fraudulent and doctored, there is need for an order for scrutiny. He also says that since the 2nd Respondent has admitted vide paragraphs 17, 18, 19 and 20 of his

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Replying Affidavit that various votes cast in favour of the Peoples Democratic Party (PDP) candidate were not factored in and/or reckoned in favour of the said candidate, then it follows that a recount is necessary as such votes must have been applied to the advantage of preferred candidate(s). He argues further that the petitioner is entitled to a recount by dint of **Articles 24 and 35 of the Constitution and Section 82 of the Election Act, and Rule 33 (2) of the Rules.** Counsel also relied on Simon Nyaundi Ogari & Another –vs- Hon. Joel Omagwa Onyancha & 2 others – Kisii HC EP No.2 of 2005 (unreported) and Joho –vs- Nyange & another [2008] 3 KLR (EP) 188-195. In the latter case, the court held at holding No.5:-

“an order for scrutiny can be made when it is prayed for in the petition

itself and when reason for it exists. it is not made as a matter of course. It is made when there is ground for believing that there are irregularities in the election process or if there was a mistake on the part of the Returning Officer or other election officials.”

10. It is noteworthy that the Joho case was decided under the old electoral law. Under the new electoral regime, scrutiny of votes is provided under **Rule 33**. Under **sub rule (1)** thereof 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 and an order for scrutiny or recount can only be made if the court is satisfied that there is sufficient reason for the same. The requirement for sufficiency of reason thus underlies the current electoral regime as it did the old regime. This means that an order for scrutiny cannot be made as a matter of course. Further, and by dint of **Rule 33 (4)** scrutiny shall be confined to the polling station in which the results are disputed and

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declared limited to the matters set out in paragraphs (a) – (i).

11. In opposing the prayer for scrutiny, counsel for the 1st respondent submitted that the petitioner has not satisfied the conditions set out under **section 82 (2) as no particulars have been given by the petitioner in terms of section 82 (2) (a) – (f)**. Counsel submitted that a scrutiny can only be granted in the course of hearing of the petition and only after a basis for the same has been established or laid as was held in Ng’ang’a & another –vs- Owiti & another (No.2) [2008] 1 KLR (EP), where following numerous applications by the Petitioner, for scrutiny, a three judge bench of the High Court found that there was no need or justification to scrutinize and recount the votes as requested. The court also held that a court can order a scrutiny and recount of election materials at any stage of the hearing before final judgment whether on its own motion or if a basis has been laid for the same. That no such basis has been laid in the instant case.
12. Counsel also cited Khaoya –vs- Lubeki & another [2008] 1 KLR (EP) where the petitioner made a formal application for scrutiny and recount of ballot papers after the hearing of 7 witnesses. For the reason that the evidence of 3 of the 7 witnesses pointed to a need for scrutiny and recount, the court found that a basis had been laid by the petitioner and ordered a recount. In

the **Joho ali Joho case** (above), the court declined to grant the order for scrutiny in the absence of a basis for the same being laid.

13. Mr. Rigoro, counsel for the 2nd and 3rd Respondents supported the arguments by Mr. Chacha Odera and urged court not to grant the orders **HC**
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sought.

14. The law is thus clear that where a basis is laid, and either on its own motion or on application by any party to the petition, a court may order scrutiny. In the instant case, no basis has yet been laid by the petitioner as all that the court has been given are allegations that are yet to be tested during the hearing of the petition. In the circumstances, and while noting that the petitioner is entitled to an order for scrutiny in appropriate circumstances, I decline to order for scrutiny at this stage. I hasten to add that if it becomes apparent to the court during the taking of evidence that there are circumstances which warrant scrutiny, I shall proceed to make such an order.

Whether the Petitioner/Applicant is entitled to Recount

15. The Petitioner contends that he has supplied sufficient evidence to show that there was multiplication of streams, culminating into doubling or tripling of votes in favour of certain candidates to the extent that votes allocated to candidates far exceeded and/or surpassed the actual votes cast. Counsel argued that in the circumstances, it would be necessary to consult the source documents, which have not been interfered with so that the truth about the votes cast and for whom such votes were cast can come out. Counsel relied on **Article 86 (c) of the Constitution** (supra) and on **Simon Nyaundi Ogari case** (above) as well as the **Said –vs- Mwaruwa & another [2008] 1 KLR (EP) 323-325** in urging the court to order a recount.
16. In responding to this issue, counsel for the 1st Respondent cited **Arthurton –vs- Fergus [1988] LRC (Constn) 115** in which Redhead J held

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that “a party must have a basis for his challenge of votes and --- that a recount is not granted as of right but on evidence of good grounds for believing that there has been a mistake.” That finding was followed in two Indian cases cited by counsel for the 1st Respondent namely **Vadivelu –vs- Sundaram & others – Appeal (Civil) 6543 of 1999** and **Satyanarain Dudhani –vs- Uday Kumar Singh & others 1993 (Supp) 2 SCC 8** where it was held that “an order for recount cannot be granted as a matter of course. Only when the High Court is satisfied on the basis of material facts pleaded in the petition and supported by the contemporaneous evidence ---- when there was no contemporaneous evidence to show any irregularity or illegality in the counting ordinarily it would not be proper to order a recount on the basis of bare allegations in the Election Petition.”

17. My understanding of the above decisions is that, apart from the allegations, the Petitioner or party calling for recount must substantiate the allegations otherwise he would not be entitled to an order for recount.
18. Counsel for the 1st Respondent also referred to **Rules 33 (4) and 33 of the Rules** and submitted that the petitioner has fallen foul of the said provisions on grounds that the prayer for scrutiny is not confined to the polling stations in which the results are disputed and two that the petition as filed does not raise recount as the only issue for determination by the court, but is seeking a determination on the validity or otherwise of the entire Senatorial election process in Kisii County. Counsel urged court to find that the petitioner is bound by his

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pleadings and to dismiss the application

19. In his response, Mr. Rigoro for 2nd and 3rd Respondents was of the same view as that taken by the 1st Respondent and submitted that the Petitioner in this case was on a fishing expedition in the hope of making a catch the farther he casts his net. Counsel urged the court to dismiss the application.
20. It is not in doubt that the Petitioner's prayer for recount is anchored in the provisions of **Rule 32 (1)** which clearly stipulates that that **"where the only issue in the election petition is the count or 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."** In the present case, the petition speaks for itself. The petitioner has set out 8 prayers. In my considered view therefore, and considering the law and taking into account the authorities cited by all parties, this is not a proper case in which the court can order a recount. I therefore decline to grant the prayer for recount.

Whether the Honourable Court has jurisdiction to order Scrutiny and Recount and whether sufficient cause and/or basis has been laid to warrant the orders sought

21. Issues 3 and 4 were argued together by the petitioner. The reason why I think these issues have arisen is because in the application, the petitioner prays for scrutiny and recount in the same prayer number 2. Mr. Rigoro, counsel for the 2nd and 3rd respondent submitted that the dual order for scrutiny and recount lies outside the jurisdiction of this court by dint of the provisions of **Rule 33**; that no sufficient basis has been laid for the prayer; that the prayer is not confined to any specific

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polling stations where there is a dispute and that because of the nature of the prayers sought in the petition, the court would be acting in vain if such an order were to be granted. Mr. Chacha Odera for the 1st Respondent was also of the same view.

22. Under the rules, prayers for scrutiny and recount are provided for under **Rules 32 (1)** and **33 (1)** respectively, so that a party seeking an order of the court must choose one or the other and not both in the same prayer as is the case in this case. Such an application was sound under the old law. Under the new law, recount is available to a petitioner where the only issue for determination is the count or tallying of votes. On the other hand, scrutiny of votes can be done at any stage of the proceedings as long as the court is satisfied that there is sufficient reason to make an order for scrutiny. In the instant case, there is still need to test the petitioner's allegations when Petitioner and his witnesses give evidence. Until that time comes, the court is not satisfied that any basis has been laid for the orders sought.
23. In the premises, I hereby dismiss the Notice of Motion dated 22nd May 2013. Costs of the application shall abide the outcome of the petition.
24. Orders accordingly.

Dated, signed and delivered at Kisii this 11th day of June, 2013

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

Mr. Oguttu-Mboya (present) for Petitioner/Applicant

Mr. Ochoki for Chacha Odera (present) for 1st Respondent

Mr. Isaac Odhiambo (present) for 2nd and 3rd Respondents

Mr. Bibu - Court Clerk

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