



REPUBLIC OF KENYA

High Court at Mombasa

Election Petition 8 of 2013

**IN THE MATTER OF: ARTICLES 22, 23, 35, 38, 80, 81, 86 AND 88 OF THE REPUBLIC OF KENYA, 2010.
AND**

IN THE MATTER OF: SECTIONS 75, 76, 80 AND 86 OF THE ELECTIONS ACT NO. 24 OF 2011 LAWS OF KENYA AND THE RULES MADE THEREUNDER.

AND

IN THE MATTER OF: THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION ACT

ELECTION FOR THE GOVERNOR OF THE COUNTY OF MOMBASA

THE PETION OF SULEIMAN SAID SHAHBAL

BETWEEN

SULEIMAN SAID SHAHBAL PETITIONER

VERSUS

**THE INDEPENDENT ELECTORAL ANDBOUNDARIES COMMISSION (IEBC) 1ST
RESPONDENT**

**MWADIME MWASHIGADI 2ND
RESPONDENT**

**HASSAN ALI JOHO 3RD
RESPONDENT**

**HAZEL EZABEL NYAMOKI OGUNDE 4TH
RESPONDENT**

DIRECTIONS

(1) On 5th June 2013 the trial of the Election Petition commenced. The Petitioner, SULEIMAN SAID SHAHBAL, took the witness stand and was sworn. He then confirmed that he was the deponent of the affidavit sworn on 10th April 2013, in support of the Petition.

(2) Following that confirmation, the affidavit of the Petitioner constituted the evidence-in-chief.

(3) Thereafter, the Petitioner was cross-examined by Mr. Khagram, the learned advocate for the Commission and the Returning Officer.

(4) Mr. Balala, the learned advocate for Mr. Hassan Ali Joho and Hazel Ezabel Nyamoki Ogunde, was next in cross-examining the Petitioner.

(5) In the course of answering questions from Mr. Balala Advocate, the Petitioner said that it was not possible for him to tell who was the winner of the Elections for the position of Governor in the County of Mombasa, unless a scrutiny was conducted in this Petition.

(6) The Petitioner added that if the scrutiny showed that the 3rd Respondent had won the elections, he would not be fully satisfied.

(7) But when the advocate drew his attention to the contents of paragraph 29 of his affidavit, the Petitioner said that if the scrutiny was undertaken, and if the results of such scrutiny showed that the votes cast matched the counter-foils from the booklets from which the votes were obtained, he (the Petitioner) would accept the results.

(8) At that point, the court asked the Petitioner's lawyers to confirm whether or not the whole Petition could then be determined by way of a scrutiny.

(9) At the request of the learned advocate, the court allowed him time to consult with his client.

(10) After obtaining instructions on the issue, Mr. Ndegwa advocate informed the court that the issue of scrutiny, if ordered, would deal with eight of the grounds in the Petition. However, the said scrutiny would not address three (3) other issues, which relate to:

(a) Bribery;

(b) Intimidation; and

(c) Violence.

(11) Therefore, the Petitioner would still wish to lead evidence on those 3 issues, even if a scrutiny was carried out.

(12) In answer to the Petitioner, Mr. Balala advocate accused the Petitioner of wanting a scrutiny which could not resolve the whole Petition. Indeed, the Petitioner was accused of striving to retain a "*life-jacket*", just in case the scrutiny did not result in a win for him.

(13) The 3rd and 4th Respondents said that if the scrutiny cannot result in a win for the Petitioner even if the results thereof were favourable to him, then the whole process of scrutiny would be meaningless.

(14) This court was told by Mr. Balala advocate, that if the scrutiny would determine the whole Petition, then the 3rd and 4th Respondents would accept it.

(15) However, those Respondents also emphasised that there cannot be a scrutiny of the votes cast throughout the whole county. It was the view of the 3rd and 4th Respondents that scrutiny could only be ordered in relation to upto 200 polling stations.

(16) The number of about 200 polling stations was derived from the Petitioner's application for scrutiny.

(17) On his part, Mr. Khagram, the learned advocate for the 1st and 2nd Respondents, submitted that scrutiny could only be ordered if it was the only relief sought by the Petitioner. That was his understanding of rule 32 of Election Petition Rules.

(18) As the question then being addressed by the parties had been raised by the Court, without any prior notice to any of the parties, the Court was of the view that the parties needed more time to give due consideration to it. For that reason, the case was adjourned to the following morning.

(19) When called upon to reply to the Respondents' submissions, Mr. Ndegwa advocate informed the court that the Petitioner was still agreeable to the process of scrutiny. He added that such scrutiny would relate to specified polling stations, which, in his understanding, numbered about 200.

(20) He added that after-scrutiny is ordered, that process would resolve eight of the Grounds in the Petition. Thereafter, there would remain the following four (4) issues:

- (a) Intimidation of voters and agents;
- (b) Violence;
- (c) Bribery and treating of voters; and
- (d) Partiality and favouritism by IEBC.

(21) The Petitioner also pointed out that his application for scrutiny was pursuant to Rule 33, and not under Rule 32, as was suggested by Mr. Khagram.

(22) I was told that the scrutiny was a means to an end, rather than an end in itself. It was for that reason that the Petitioner had filed the interlocutory application for scrutiny.

(23) In those circumstances, the Petitioner believes that the other grounds raised in his Petition cannot either succeed or fail, on the basis of the results of the scrutiny.

(24) However, if a scrutiny was ordered for the whole county, the Petitioner would be ready to accept the results thereof as a basis for concluding the whole Petition. On the other hand, if scrutiny was limited to about 200 polling stations, the Petitioner would wish to prosecute the remaining four (4) grounds of the Petition.

(25) Mr. Khagram expressed the view that the Petitioner cannot be allowed to raise issues in relation to the 500 polling stations that were not the subject matter of his application for scrutiny.

To his mind, the Petitioner was, by his conduct, seeking to hold the court to ransom.

(26) Responding to the question of rule 33, Mr. Khagram advocate submitted that it would come into play if the Petitioner had satisfied the court that a scrutiny was necessary.

(27) For now, the Petition is said to have raised doubts in relation to the following thirteen (13) polling stations:

- (1) Mwijabu
- (2) Frere Town Hall
- (3) Mvita Primary School
- (4) Mrima Primary School
- (5) Ziwa La Ngombe
- (6) Kiembeni

(7) Mainview Primary School

(8) Elim Church

(9) ASK Gate B

(10) St. Kevin Academy

(11) Kwa Bomu Primary School

(12) Methodist Church

(13) Chandaria Tallying Hall.

(28) In the light of those particulars from paragraphs 29 to 39 of the Petition, the 1st and 2nd Respondents emphasised that the Petitioner had not laid any foundation for seeking scrutiny for 200 polling stations.

(29) In any event, the report by the analyst engaged by the Petitioner is said to have only raised suspicions. In the circumstances, the Respondents emphasised that mere suspicion cannot be the basis for an order of scrutiny.

(30) If the Petitioner was ready to accept the results of the scrutiny, said Mr. Khagram, he must do so without the rider that he would proceed with the rest of the Petition thereafter.

The Commission views the scrutiny as an opportunity for the Petitioner to carry out an audit on the electoral process. Therefore, the Commission cannot understand why the Petitioner wants to impose a pre-condition to the process of scrutiny.

(31) As far as Mr. Balala advocate was concerned, the Petitioner was guilty of reprobation and approbation.

That contention flows from the Petitioner's argument that there was such widespread violence that the results of the elections cannot be fair. If that be the position, the process of scrutiny could not yield a valid result from an unfair process of election.

The Petitioner was told that he needs to choose between the position that the elections were so unfair that the results of the exercise were compromised, or, in the alternative, he must admit that the alleged violence, intimidation or bribery was not so bad as to affect the results.

(32) The 3rd and 4th Respondents pointed out that from the affidavits filed by the Petitioner, the polling stations in contention were seventeen (17). Those stations were:

(1) Tononoka Nursery

(2) Majengo Village

(3) Kengeleni Primary School

(4) Kongowea Ward

(5) Ziwa La Ng'ombe

(6) Likoni Primary School

(7) Mrima Primary School

- (8) Chaani
- (9) Bomu Primary School
- (10) Majimbo Primary school
- (11) Kwa Bomu Primary school
- (12) Chagamwe Secondary school
- (13) Mishomoroni Junior Primary
- (14) Snake Valley
- (15) Junda
- (16) Hajam Jamat
- (17) Public Health Centre.

(33) Therefore, the 3rd and 4th Respondents argued that if the Petitioner wished to have scrutiny done for the 200 polling stations, he would have to lay a foundation for that exercise.

(34) In determining the appropriate directions to give in this matter, I first reiterate that the said directions did not emanate from an application by any of the parties in the election Petition herein. Therefore, if the court were to order that scrutiny be conducted, such order would not be on the basis of either Rule 32 or Rule 33 of The Elections (Parliamentary and County Elections) Petition Rules, 2013.

Rule 32 allows a Petitioner to raise, in his Election Petition, the issue of counting or re-tallying of votes, as the only issue.

If that be the only issue being raised by a Petitioner, he will specify that he does not require any other determination except a recount of votes or the examination of the tallies.

In this case, the Petition did not indicate that the only issue for determination was a recount or a re-tallying.

(35) Meanwhile, Rule 33 allows the parties to the proceedings in an Election Petition, to apply for scrutiny of votes, for purposes of establishing the validity of the votes cast.

An application under rule 33 can be made at any stage of the proceedings. However, if it is so made, the court can only order for scrutiny if it satisfied that there was sufficient reason to warrant a scrutiny.

(36) As none of the parties prosecuted any application for scrutiny; and because the question was raised by the court, after the Petitioner had given an answer during the cross-examination, I hold that rule 33 was not applicable to the matter at hand.

(37) In my considered view, the action undertaken by the court herein, is informed by the provisions of Section 82 of the Elections Act. That section provides as follows:

“(1) An election court may, on its own motion or an application by any party to the Petition, during the hearing of an election Petition, order for a scrutiny of votes to be carried out in such manner as the election court may determine.”

(38) Therefore, this court has the requisite legal authority to order scrutiny, even on its own motion.

In this instance, the Petitioner testified that if a scrutiny was conducted, and if the votes tallied with the counterfoils, he would accept the results of the said scrutiny. It therefore occurred to me that a scrutiny may well address the Petitioner's concerns, as raised in paragraph 29 of the Petitioner's affidavit. The said paragraph is in the following words:

“29. THAT my advocates on record advise me, which advise I verily believe to be true, that the net effect of these illegalities is that it is not possible to tell who won the gubernatorial election in Mombasa county in the absence of scrutiny of the votes and a recount to ascertain inter alia:

Ø the legitimate number of votes cast

Ø the total number of votes cast

Ø the total number of valid and rejected votes cast respectively

Ø the correct number of votes to be ascribed to each of the candidates;

And that only after such an exercise of scrutiny, recounting and re-tallying has been undertaken can the true and legitimate winner of the gubernatorial elections in Mombasa County be ascertained.”

(39) In my considered view, the ascertainment of the legitimate winner of the gubernatorial elections in the Mombasa County is the primary function of this court. It would enable the court to declare whether or not Hassan Ali Joho was validly elected, or if the Petitioner or any other candidate was validly elected. However, if the scrutiny does not reveal the person validly elected, pursuant to Section 75 (3) (c) of the Elections Act, the court may order that fresh elections be held.

(40) I have already held that the issue of scrutiny herein does not fall under either Rule 32 or Rule 33 of The Elections (Parliamentary and County Elections) Petition Rules, 2013.

The issue was raised by the court, on its own motion. I find and hold that scrutiny will be very useful in this Petition, as it will determine eight (8) of the Grounds raised in the Petition.

But I also appreciate that the issue of scrutiny would not answer all the grounds in the Petition. In the circumstances, if I were to bar the Petitioner from canvassing the other grounds of his Petition, I would have blocked him from prosecuting a portion of his case.

(41) However, the real difficulty that now presents itself is as to the extent that scrutiny should be undertaken.

In the Petition, there is a prayer for scrutiny of all the ballot boxes, written statements of presiding officers, registers, election results, complaints of candidates and their representatives etc.

(42) In so far as that is a substantive prayer, at the end of the Petition, I hold the view that it would be too late in the day to grant an order for scrutiny in the judgment. An order for scrutiny should be made in the course of the proceedings, not after the proceedings are concluded.

(43) But should the scrutiny be for 13 polling stations or 17 polling stations or 30 polling stations or 200 polling stations or for all the polling stations?

(44) In **PHILIP OSORE OGUTU VS MICHAEL ONYURA ARINGO & 2 OTHERS PETITION NO. 1 OF 2013** (at Busia), my learned brother F. Tuiyott J. delivered a ruling on 23rd May 2013. At page 17 of the said ruling he expressed himself thus:

“the grounds upon which an election is challenged ought to be contained in the Petition (rule 10 (e) of the Election Petition Rules); and the facts to be relied on by the Petitioner set out in the affidavit in support of the Petition (Rule 10 (3) (b) of the election Petition Rules).”

Therefore, the Petitioner's case herein must be contained

within the four (4) corners of his Petition. And the evidence in support of the Petition must be found within the Affidavits that were filed to support the Petition.

(45) Any application by the Petitioner is made within the Petition, and cannot therefore expand the scope of such Petition. The only exception is an application seeking to amend the Petition, with a view to expanding it or altering portions thereof.

In this case, there is no application for the amendment of the Petition.

(46) The Hon. Mr. Justice Tuiyott went on to reason as follows in his Ruling (above-cited):

“The Petition and the Affidavit in support disclose the Petitioner's cause of action, and a cursory look at the two should reveal the Petitioner's case. For the Petitioner to deserve an order for scrutiny, then, as a starting point, the Petition and the Affidavit in support must contain concise statements of the material facts upon which the claim of impropriety or illegality of the casting of counting of ballots is made.”

(47) I am in full agreement with my learned brother. If it was otherwise, and if a Petitioner could expand the scope of his Petition through an interlocutory application or an affidavit in support of such an application, the Petitioner would have gone beyond the confines of his own pleadings.

To the extent that the schedule filed by the Petitioner goes beyond the Petition and the affidavit evidence filed with the Petition, I find that the Court cannot accord any attention to the contents of the said schedule.

(48) In **THOMAS MALINDA MUSAU & 2 OTHERS VS THE IEBC & 2 OTHERS, PETITION NO. 2 OF 2013** (at Machakos), L.N. Mutende J. ordered that scrutiny be conducted in relation to the polling stations at which the Petitioner had specifically pleaded in the Petition, that the results thereof were disputed.

(49) That, in my humble opinion, is the correct position.

I find that the Petition did not give particulars of either 700 or 200 polling stations, as being those whose results required scrutiny.

(50) The total number of polling stations cited in both the Petition and the Affidavits filed by the Petitioner, as requiring scrutiny, do not exceed 200.

(51) Accordingly, I do now direct that scrutiny be undertaken in the 200 named polling stations. The results of the said scrutiny shall be provided to this court, by the learned Deputy Registrar, Mr. S.K. Gicheru, who is hereby mandated to conduct the process of scrutiny.

The results shall be provided to the court within the next three (3) weeks.

(52) The parties shall be entitled to have at most two (2) agents each, at each of the venues where the scrutiny will be undertaken.

For the avoidance of any doubt, the reference to “venues” implies that there might be more than one team of personnel, who will be conducting scrutiny at any one time.

(53) Finally, I direct that whilst the scrutiny is being undertaken, the hearing of the Petition will go ahead. The parties will review the list of witnesses to be cross-examined, so that they are limited to the witnesses in respect to issues other than those that relate to scrutiny.

(54) Costs in relation to these directions and incidental thereto shall be in the cause.

(55) I so direct.

Dated, signed and delivered at Mombasa, this 7th day of

June 2013.

FRED A. OCHIENG

JUDGE