



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
ELECTION PETITION NO. 1 OF 2013

PHILIP MUNGE NDOLOPETITIONER

VERSUS

1. OMAR MWINYI SHIMBWA

2. FLORENCE BIRYA (RETURNING OFFICER I.E.B.C.)

CHANGAMWE CONSTITUENCY

3. INDEPENDENT ELECTORAL & BOUNDARIES

COMMISSIONRESPONDENTS

RULING

The petitioner **PHILLIP MUNGE NDOLO** filed together with the Election Petition dated 3rd April, 2013 this Notice of Motion dated 24th May, 2013 seeking the following orders:

“(a) That an order do issue for scrutiny of all ballots cast, the written statements made by the presiding officers, the copy of registers used in the elections, the copies of the Election Results in Changamwe constituency, the written complaints of the candidates and their representatives, the packets of spoilt papers, the marked copy of the registers, the packets of counterfoils of ballot papers, the packets of counted ballot papers, the statements showing the rejected ballot papers, all ballot boxes and seals and all forms 35’s in respect thereto for Member of National Assembly for Changamwe constituency in the general elections held on 4th March, 2013, and a recount of all valid votes thereof to establish and determine the validity of the votes cast in favour of each candidate during the said elections.

(b) Any other or further order the Honourable court may deem fit to grant in the circumstances.

(c) That the costs of and incidental to this application be provided for.”

The application was based on the thirteen (13) grounds set out therein. The 1st respondent filed their

grounds of opposition to this application dated 28th May, 2013 on 29th May, 2013 in which they listed eight (8) grounds for opposing the motion. Similarly, counsel for the 2nd and 3rd respondents filed their grounds of opposition to the same on 18th July, 2013 setting out four (4) grounds upon which they would be opposing the motion. Following pre-trial directions made by this court on 19th June, 2013, the Notice of Motion in question was scheduled to be heard after the witnesses for the petitioner had appeared for cross-examination. Thus the Notice of Motion was heard by way of oral submissions on 18th July, 2013. Although the Notice of Motion dated 24th May, 2013 sought a variety of orders in its prayer (a), **MR. MUTISYA** counsel of the petitioner concentrated his submissions on the prayer for scrutiny and re-count. No doubt this was because most of the other prayers contained therein had been disposed of by the compliance by the Independent Electoral and Boundaries Commission (the 3rd Respondent) with rule 21(b) of the **Elections (Parliamentary and County Elections) Petition Rules 2013** (hereinafter referred to as '*the Rules*'). Rule 21(b) of the aforementioned rules provides,

“the commission shall deliver to the Registrar the results of the relevant election within fourteen days of being served with the petition.”

The 3rd respondent did in compliance thereto file in court all the Form 35's for all the polling stations in Changamwe constituency, as well as the Form 36, being the Declaration of the Member of National Assembly Results at Changamwe constituency.

SUBMISSIONS OF COUNSEL

Although in the Notice of Motion the prayer made was for a scrutiny and recount of "*all valid votes*", Mr. Mutisya in his oral submissions modified this somewhat and made submissions with respect only to certain polling stations where it was alleged that irregularities, anomalies and/or election offences had occurred. In short his prayer was that the scrutiny and recount be conducted **only** in the polling stations in which there was a dispute. Counsel went on to list ten grounds upon which the petitioner was seeking scrutiny and recount. These included but were not limited to the following:-

- That a request made by the petitioner for a recount in his letter dated 5th March, 2013 to the Returning Officer was not heeded.
- That some of the Form 35's contained figures with unsigned alterations.
- Existence of stray ballots
- The existence of some Form 35's which had not been signed/endorsed by the party agents, as well as other Form 35's which had not been endorsed by the Presiding Officers.
- Allegations of ballots stuffing and double counting of votes cast.
- That the petitioner's agents had been locked out and/or ejected from certain polling stations, thus in those stations the results needed to be verified.
- That the petitioner's votes had been counted for the 1st respondent in certain polling stations.
- That there was manipulation of votes, coercion and threats against voters in certain polling stations.

MR. MOHAMED for the 1st respondent and **MS. OMUKO** for the 2nd and 3rd respondents in opposing the application submitted that no proper basis had been laid for the prayer for scrutiny and re-count. They argued that the application amounted to a mere '**fishing expedition**' by which the petitioner was seeking to uncover more evidence and thus expand the scope of this petition. Counsel for the respondents urged the court to reject the application as an abuse of court process.

THE LAW

The legal position with regard to scrutiny and recount is clear but for purposes of completeness bears repetition here. Section 82(1) of the Elections Act 2011 provides as follows:-

“An election court may on its own motion or on an application by any party to the petition,

during the hearing of an election petition, order for scrutiny of votes to be carried out in such manner as the court may determine.”

This provision makes it clear that a court may make an order for scrutiny either on its own motion (*'suo moto'*) or upon an application made by a party. Secondly, the Election (Parliamentary and County Elections) Rules 2013 provides for scrutiny in Rule 33 which provides:

“33(1) The parties to the proceedings may at any stage apply for the 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 and recount of the votes. [my emphasis]

(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)

There exist general principles governing scrutiny and recount of votes which have guided Election Courts in Kenya in determining whether to make orders of scrutiny and recount in any particular case. Firstly, an order of scrutiny and recount will not be granted as a matter of course. Section 33(2) of the Election Petition Rules clearly provides that a court must be satisfied that there exists *'sufficient reason'* before making such an order. In the case of **MASINDE VS BWIRE & ANOTHER (2008) 1 KLR EP 547** the Court of Appeal held as follows:

“There had to be good reason before the court could order for scrutiny. An order for scrutiny is not automatic and there had to be a basis.”

The reason for this approach is easily discernible. There is need to guard against a party using the exercise of scrutiny and recount as a *'fishing expedition'* so to speak as a means to uncover new or fresh evidence. This is more so given that under the constitution the hearing and disposal of Election Petitions is governed by strict timelines. As such a court ought to confine itself strictly to the substance of the petition and not entertain any *'side shows'*.

Secondly, the exercise of scrutiny and recount is a time consuming, labourious and arduous exercise which requires adequate and committed man-power. A court ought only to go down that route where good cause exists. This is not however to say that courts should be reluctant to grant orders for scrutiny and recount. The underlying mandate of any Election Petition Court is to ensure that justice is done to both sides and that any discrepancies and/or irregularities are closely interrogated in order to reach a just decision in the case.

Finally, in determining whether or not to grant a prayer for scrutiny and recount, a court will be guided by the margin of votes. Courts have previously held that an order for scrutiny and recount would be merited in cases where this margin is narrow. In the case of **HASSAN ALI JOHO VS HOTHMAN NYANGE & ANANIA MWASAMBU MWABOZA (2008) 3 KLR EP 188**, Hon. Maraga J (as he then was) in agreeing with the holding in **ONAMU VS MATSI Election Petition No. 2 of 1983**, held that where the margin of votes was very low, then justice will be done and will be seen to be done if scrutiny and recount are ordered. Such scrutiny may well serve to unearth errors (inadvertent or deliberate) that would wipe out the small margin. Of course the test of what constitutes a narrow margin is subjective and will depend on several factors mainly the number of votes cast vis-à-vis the number of votes garnered by the winning candidate.

ANALYSIS

In the case of **PHILLIP OSORE VS MICHAEL ARINGO & 2 OTHERS (BUSIA HIGH COURT PETITIN NO. 1 OF 2013)**, Hon. Tuiyott J held that:

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

By prayer (a) of this Notice of Motion the petitioner asks for ‘*scrutiny*’ and ‘*recount*’ of all votes cast. There is a distinction between the two exercises. In the case of **HARUN MEITAMEI LEMPAKA VS HON. LEMAKEN ARAMAT & OTHERS Election Petition No. 2 of 2013**, Hon. Justice Emukule held that where a petitioner seeks scrutiny a basis must be founded on the provisions of section 82(2) of the Elections Act and Rule 33(4) of the Election Rules. Section 82(2) of the Elections Act provides:

“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 voters 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 a 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.”**

As such the purpose and aim of scrutiny is to examine all the votes cast and to identify votes by people who were ineligible to vote, and those who were legible to vote and voted but their votes are void because they were not properly marked, were unmarked or had a different serial number [see ruling of Muchelule J in **NICHOLAS KIPTOO ARAPKORIR SALAT VS I.E.B.C. & 7 OTHERS Kericho Petition. 1 of 2013**]. Rules provide that a petitioner must **specify** the polling stations in respect of which he seeks such scrutiny as well as the documents which he seeks to have scrutinized. On the other hand a recount refers to a tally of all the valid votes cast. Thus in a prayer for recount a petitioner is asking the court to open the ballot boxes and conduct a recount of the votes cast in that election.

In any case where a request is made for scrutiny and/or recount the application therefore must be clear, concise and more importantly **specific**. An application couched in general terms ought not be permitted as this is tantamount to requiring of the court to go through the whole exercise of tallying once again. Rule 33(4) of the Election Rules however obliges a party to name the polling stations in which the results are disputed. As general principle in law, a party is bound by its pleadings. As such, any evidence which goes outside of the pleadings on record must be disregarded.

In his petition filed on 3rd April, 2013 the petitioner claims that there was inflation of votes in the following polling stations:

- Chaani Social Hall
- Baraka Village
- Changamwe Secondary School
- Gome Secondary School
- Mikindani Primary School

In the petitioner's affidavit in support of the petition the following polling stations are added to the list:

- Bokole Nursery School
- Mwijabu Primary School
- Baptist Church Primary School
- Bokole Nursery School
- Mwidani Social Hall

These therefore being the polling stations in dispute as per the petitioner's own pleadings he is bound by those pleadings. In the case of **WAVINYA NDETI VS I.E.B.C. & 4 OTHERS Machakos Petition No. 4 of 2013**, Majanja J held:

“The results announced and declared by the I.E.B.C. enjoy a presumption of constitutionality and legality and a petitioner has 28 days from the date of the declaration to seek the evidence he or she requires to mount an election petition. To proceed on a course outside the confines of the petition is not warranted in the circumstances of this case.”

Therefore to attempt as Mr. Mutisya did to add additional polling stations as areas of dispute in the course of submissions cannot be countenanced. As I ruled earlier, the petitioner will not be allowed to construct his case as he goes along. The question arises as to what is the standard of proof required to establish sufficient cause in an application such as the present one – is it the standard used in criminal law of *'beyond a reasonable doubt'* or is it the standard in civil law being *'upon a balance of probability'*. It has been held that the standard of proof required for the main petition falls somewhere in between [see ruling of Muchelule J in **Nicholas Salat Petition** case]. In my own thinking at this application stage the standard of proof required to show sufficient cause would be *'prima facie evidence'* of the disparity, irregularity and/or malpractice being alleged as a basis for the application. The court has already heard the cross-examination of eight (8) of the petitioner's witnesses. Not a single witness was able to elaborate on the claims of inflation of votes. There were vague allegations of double voting and ballot stuffing but again the witnesses were very short on specifics. The evidence tendered in this regard was not entirely persuasive.

Further allegations were made alleging the ejection of the petitioner's agents from the polling stations and the denial of entry to his agents. In addition allegations were made with regard to unsigned alterations on some of the Form 35's. It is not each and every claim of a malpractice that will merit a recount or scrutiny. It must be shown that such malpractices were so widespread, so pervasive as to affect the final tally of votes. It must be remembered that the Forms are completed by human beings and as such human error cannot be discounted. In the case of **WAVINYA NDETI VS I.E.B.C. & 4 OTHERS Machakos Election Petition No. 4 of 2013** Hon. Majanja J held as follows:

“An election is a human endeavour and is not carried out by programmed machines. Perfection is an aspiration but allowance must be made for human error.”

Genuine mistakes and errors (especially those which would have a negligible effect on the final tally) need not form the basis for scrutiny.

Finally, I would take into account the margin of votes. This was an election where the number of votes cast was 37,656. The margin between the declared winner (the 1st respondent) and the petitioner was 4,032. In the **HASSAN ALI JOHO** case (supra) it was held that where the margin of votes is low (as low as 30 votes, 7 votes or 62 votes) then an order for scrutiny would be justified. In that case the court held as follows:

“With a margin of 1,061 votes in this petition I am not persuaded that an order of scrutiny and recount should be made before a foundation is laid.”

In the case of **PHILLIP OSORE OGUTU** my learned brother Hon. Tuiyott J held that a margin of 1,389 votes was not so narrow as to provide a justification for scrutiny. In a case like the present where the

margin is 4,032 there exists less justification to grant the orders sought.

CONCLUSION

Based on my assessment of the evidence before this court I find that no sufficient cause has been established to warrant an order for scrutiny and/or recount as prayed. The petitioner remains at liberty to revisit this issue later on in the proceedings provided that sufficient justification will be made. Based on the foregoing, I do hereby disallow this Notice of Motion dated 24th May, 2013 with costs to the respondents.

Dated and delivered in Mombasa this 24th day of July, 2013.

M. ODERO

JUDGE