



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

ELECTION PETITION NO. 3 OF 2013

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010

AND

**IN THE MATTER OF: THE ELECTIONS ACT, 2011: SECTIONS 75; 76(1) (a), (2),
(3);77;79;80;82;86 AND 87**

AND

**IN THE MATTER OF: THE ELECTIONS (PARLIAMENTARY AND COUNTY
ELECTIONS)PETITION RULES, 2013; RULES 3(b); 4;5;6(1)(a);8;9;10;11;12;13;21;22;33 &
38**

AND

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

AND

**IN THE MATTER OF: THE ELECTION FOR NAROK COUNTY GOVERNOR HELD ON
4TH DAY OF MARCH, 2013**

BETWEEN

**LEDAMA OLE KINA.....
.....PETITIONER**

VERSUS

SAMUEL KUNTAI TUNAI

**ARUASA EVALYN
CHEPKIRUI**

**THE INDEPENDENT ELECTORAL AND BOUNDARIES
COMMISSION (I.E.B.C.)**

**DR. MICHAEL K. CHERUIYOT (COUNTY RETURNING
OFFICER, NAROK COUNTY)**

SAMUEL CHACHA (RETURNING OFFICER, EMURUA
DIKIRR CONSTITUENCY)

JOSHUA TULWO (RETURNING OFFICER, KILGORIS
CONSTITUENCY)

JACKTON OKUBASU (RETURNING OFFICER, NAROK
WEST CONSTITUENCY)

MARTIN MALONZA (RETURNING OFFICER, NAROK
SOUTH CONSTITUENCY)

MOHAMMED RAKA (RETURNING OFFICER, NAROK
NORTH CONSTITUENCY)

ISAAC RUTO (RETURNING OFFICER, NAROK EAST
CONSTITUENCY)

**THE TRANSITIONAL
AUTHORITY.....RESPONDENTS**

RULING

On 26/6/2013, this court determined the application dated 20/5/2013 seeking orders of scrutiny. The court allowed scrutiny in Kilgoris and Narok West Constituencies and directed that the applicant was at liberty to bring another application for scrutiny during or after the hearing. The applicant had thus moved this court by the Notice of Motion dated 16/7/2013, the petitioner Ledama Ole Kina seeks the following orders:-

- 1. That the Honourable court be pleased to order an examination of tallying and scrutiny of all Forms 35 from Narok South Constituency vis a vis the relevant Form 36 for Narok South Constituency and County Form 36 (PEx.2);**
- 2. That the examination of tallying and scrutiny with respect to Narok South Constituency as well as that of Narok West and Kilgoris already ordered by the court (on 26/6/2013) be carried out using the original Form 35 contained in the respective ballot boxes and the official Form 36 for the Constituencies;**
- 3. That the 3rd respondent (IEBC) do deliver the ballot boxes in respect of Narok West, Kilgoris and Narok South prior to the scrutiny and examination of the scrutiny exercise;**
- 4. Costs of the application be provided for.**

The application is premised on the affidavit of the petitioner, Ledama Ole Kina and grounds found in the body of the application. The application was opposed. The 1st respondent filed a replying affidavit dated 16/7/2013, together with a list of authorities. The 2nd respondent also swore an affidavit dated 16/7/2013 and a list of authorities. The 3rd to 10th respondents only filed grounds of opposition.

At the hearing of the application, Mr. Saitabau, counsel for the petitioner reiterated the contents of the petitioner's affidavit and grounds relied upon which are inter alia:-

- iii. The Petition itself (Para.18(ii)) and the Petitioner's own sworn statement (Para.10(vii)) state that the voter turnout in Narok South Constituency was over 100%;**
- iv. The only reliable document produced relating to Narok South Constituency was the Form**

35 for Iladoru Primary School annexed as Exhibit “MMM 1” to the affidavit of Malonza M. Mule (the then Returning Officer, Narok South) which when read together with the County Form 36 (Exhibit 2) confirms that the tallying exercise with respect to this polling station resulted in a 153% voter turnout solely to the benefit of the 1st respondent who was given 300 votes more than he actually garnered;

- v. The only other document containing results from Narok South before this court is the County Form 36 (Exhibit 2) which by all accounts is and on the face of it inaccurate, incomplete, unverifiable and unreliable;**
- vi. Despite various requests, follow-ups and even a court order requiring the 3rd respondent (IEBC) to supply all Forms 35 and Forms 36, the said 3rd respondent has failed, refused and/or neglected to supply the Petitioner with the Forms 35 and Form 36 for Narok South Constituency in what can only be a cover-up;**
- vii. The Petition questions the credibility, integrity and accuracy of the election data and by extension the entire results of the disputed election;**
- viii. The results as contained in the various Forms 36 and Forms 35 inexplicably contain different, conflicting and contradictory figures and totals and it is not possible to tell with any degree of certainty which results are accurate unless an examination of tallying and scrutiny is conducted.**

Mr. Saitabau also added that Narok South is of particular interest to the petitioner and the complaint was duly raised in the petition at paragraph 18(ii) and paragraph 10(vii) of the Petitioner’s supporting affidavit where it is alleged that there was over 100% voter turnout; that only one reliable document was produced relating to Narok South i.e. Form 35 for Iladoru Primary School polling station (MM1) by the Returning Officer, Mr. Malonza; that the said form compared with the County Form 36 (PEX.2) reveals that there was 153% voter turnout where the 1st respondent was given 300 more votes than what he garnered; that the Returning Officer, Mr. Malonza failed to produce the Form 36, a document he generated nor did he produce the Forms 35 from his constituency which he relied upon in generating Form 36; that the applicant exhibited a letter dated 13/3/2013 (No.1) addressed to the 3rd respondent requesting to be supplied with all Forms 35 from the whole of Narok County but the same were never supplied. A Constitutional Petition 167/2013, was filed by the firm of Omwanza Advocate to compel the release of the said Forms 35 and 36. A consent was entered in which the 3rd respondent was required to supply to the applicant the said Forms 35 and 36 in Narok County; that the some forms were supplied and 36 but not for Narok South Constituencies. It was counsel’s submissions that the 3rd respondent’s conduct is indicative of the fact that there is something to hide. He added the only document with results of Narok South is PEX.2, County Form 36 exhibited by the petitioner which is incomplete and not verifiable. Counsel urged that the only way to verify the results is by looking at the primary documents vis a vis the secondary documents.

The 1st respondent opposed the application on grounds that the court’s jurisdiction has not been properly invoked under the **Elections Act** and Rules made under the Act; that the application is an abuse of the court process, and the applicant has not made out a case for the grant of the order sought. In addition Mr. Kemboy, counsel for the 1st respondent, urged that no basis was laid in the petition for the grant of the order of scrutiny because the petitioner mentioned in general terms at paragraph 18(ii) that there was 100% turnout in the constituency; that the 8th respondent, Mr. Malonza, filed an affidavit dated 8/4/13 explaining the error which specifically relates to Iladoru Primary School polling station and produced Form 35, (MM1) was cross examined on it whereby he explained that it was a human error which happened during the posting of the results. Counsel urged that being an error during posting, scrutiny would not reveal anything and the error cannot be a basis for an omnibus scrutiny for the whole constituency.

It was also the submission of Mr. Kemboy that the application lacks any basis and the intention of the

applicant is to have a look at the Forms 35 and 36 which he alleges that he was not given; that in Constitutional Petition 167/2013, the applicant sought to be supplied with all forms 35 and 36 for all constituencies in Narok and a consent was recorded and the petitioner has never gone to court to enforce the order if indeed the forms were not supplied. Mr. Kemboy submitted that either the petitioner did not go to get the documents from the 3rd respondent or failed to pay for photocopying as directed and that cannot be blamed on the 3rd respondent.

In the 1st respondent's affidavit at paragraph 9 and 10, he has undertaken his own analysis of the Forms 35 and 36, Narok south and that all the votes wrongly credited to any candidate were subtracted.

It was also the 1st respondent's case that scrutiny is not necessary because the margin of votes is very big being about 84,000 votes and that this application is meant to ride on the court's order of 26/6/2013 that there be scrutiny of Forms 35 and 36 in Kilgoris and Narok West Constituencies; that in any event the County Returning Officer has explained in his testimony that he used Constituency forms 36 to declare the results. Counsel urged the court to review its order on scrutiny of Kilgoris and Narok West. Counsel relied on the following decisions:-

1. **Masinde v Bwire & Another (2009)1 KLR 547; where the court held that there had to be a good reason before a court could order scrutiny;**
2. **Hassan Ali Joho v Nyange & Another (2008) 3 KLR 188, where Maraga J, held that where there was a large margin, there is no need for scrutiny;**
3. **Peter Gichuki King'ara v IEBC EP 3/2003 (Nyeri) – where the court emphasized at the fact that a basis had to be laid before an order of scrutiny was made;**
4. **Philip Osore Ogutu v Michael Onyura Aringo EP 1/2013 (Busia). The court reiterated the issue of the margin of votes;**
5. **Wavinya Ndeti v IEBC EP 4/2013, where the court observed that before a scrutiny can be ordered the petitioner should have asked for recount and recheck of votes at the polling station and therefore the court should not be transformed into an agent;**
6. **Kithinji Kirago v Martin Nyaga Wabore EP 1/2013 (Embu), the court adopted the ruling in Philip Osore that scrutiny should not be used as a lottery.**

The 2nd respondent's opposition is based on grounds that the forms 35 and 36 from Narok South Constituency was given to the applicant following a consent order in petition 16/7/2013; that the issue of scrutiny of the forms was not part of the complainant's evidence nor was it ever raised in the earlier Notice of Motion dated 20/5/2013 and that the application is therefore an afterthought.

Mr. Havi further submitted that under **Section 75** of the **Elections Act**, there are three kinds of remedies that can be sought; that the petitioner seeks nullification of the elections under **Section 75(3)(b)**; that a court constitutes itself as a Returning Officer and the court cannot act as such; that the application is brought pursuant to **Section 82** whose marginal votes is 'scrutiny' but nowhere in the election petition is scrutiny of votes sought; that the request for ballot boxes being delivered to court cannot be granted because this court is not acting as a Returning Officer; that the hearing has been concluded without ballot boxes and the applicant did not insist on them being delivered to court under **Rule 21 1(a)**; that there is no provision for tallying under **Rule 33** and that in any event the prayer for scrutiny was never made in the petition and there is no basis for it.

Counsel also urged that since the petitioner testified that he has no idea how many votes he got, there is no basis for re-tallying.

Mr. Havi also submitted that the court had in Petition 167/2013, ordered that the petitioner be given all

Forms 35 and 36 for Narok County; that the 4th respondent testified and he never questioned on non-compliance with the consent order. He urged that the applicant is trying to introduce whole new case altogether and it will be prejudicial to the respondents. He relied on **Raila Odinga v IEBC** in which the court held that a petitioner should bring his case to court at once and avoid surprises and ambush.

Mr. Kibet, counsel for the 3rd respondent relied on the grounds filed; that the prayer for scrutiny is not specific but were speculation, no basis has been laid for the grant of the order and urged the court to dismiss the application.

Section 82 of the Elections Act and Rule 33 Election (Parliamentary and County Elections) Petition Rules 2013 grants the mandate to order for scrutiny. It stipulates:-

“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 and be carried out in such manner as the court may determine.”

The above provision means that the court can on its own motion order for scrutiny where it deems it fit to do so. On the other hand a party can also apply to the court to make an order of scrutiny.

Rule 33 provides as follows:-

“(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.”

The above rule provides in detail what an application for scrutiny will entail and how it will be

undertaken. Scrutiny is supposed to establish the validity of the votes.

Accordingly **Rule 33(1)** clearly states that a scrutiny cannot be undertaken as a matter of course. A basis has to be laid by the party seeking scrutiny – see **Khaoya v Lubeki (2008) 1 KLR 590, Raila Odinga v Uhuru Kenyatta & Others Petition 5/2013 (NRB)** and **William Maina Kamande v Margaret Wanjiru & Others NRB EP 5/08** and **Masinde Bwire & Another** (supra).

In the instant application, the applicant claims to have laid a basis for scrutiny at paragraphs 18(ii) of the petition and 10(vi) of the his affidavit in support of the petition and dated 21/3/2013. At paragraph 18(ii) of the petition, the applicant pleaded that some Constituencies and polling stations strangely recorded 100% turnout of voters and gave an example of Narok South Constituency which had 45,072 registered voters but that the turnout was 46,048 (102%). At paragraph 10(vi) of his affidavit, the applicant singled out Iladoru polling station where registered voters are 511 but that PEx.2, the Narok County Form 36, showed that 786 votes were cast making it 153% turnout. Paragraph 18(ii) of the petition sets out a general allegation of 100% voter turn out in Narok South. It does not specify in which polling stations there was 100% turnout. In his affidavit, the applicant mentions only one polling station, i.e. Iladoru where there was 100% voter turn out. The question is whether that is sufficient reason to order a scrutiny for the whole of Narok South Constituency, that is, if sufficient cause is established. **Rule 33(4)** is specific, that scrutiny shall be confined to the polling stations in which the results are disputed and it then sets out further instructions as relates to what documents are to be examined. The courts have held that an application for scrutiny must be specific as to the specific polling stations or documents sought to be scrutinized. In **Osore Ogutu** (supra) the applicant was specific on the various stations he wanted a scrutiny to take place. In **Gichuki Kingara's** case (supra), the applicant was also specific on the documents the applicant required to scrutinize. An application for scrutiny of all of Narok South Constituency lacks specificity, is a blanket prayer that, in my view, cannot be granted. The applicant needed to be specific on which polling stations he wanted a scrutiny done. If he wanted scrutiny in all the polling stations, then a basis should have been laid for each polling station. The rationale is clear, the process of scrutiny is labourious, time consuming and the applicants can not be let at liberty to seek ambiguous prayers and waste precious court's time and incur unnecessary costs. They must be specific. For the above reason, the court cannot give a blanket order for scrutiny of Narok South Constituency because such order will be prejudicial to the respondent now that the evidence of witnesses has already been taken. The respondent would not have an opportunity to respond to any new issues that may be unraveled during scrutiny.

As mentioned above, specific reference was only made to Iladoru polling station where, Mr. Malonza Mule, (DW2) the Returning Officer of Narok South admitted that there was an error in posting results from Form 35 to Form 36. The Returning Officer exhibited Form 35 (MM1) for Iladoru Primary School which shows the voter turn out to have been 484. This is contrary to County Form 36 (PEx.2) which shows the voter turnout to have been 786. In the said County Form 36 (PEx.2) the 1st respondent was credited with 300 votes more than what he garnered as per Form 35 (MM1). DW2 did not exhibit Form 36 that he generated from Form 35. DW2 said that it was exhibited by the County Returning Officer, Mr. Cheruiyot (DW6) but DW6 did not adduce any evidence as relates to Iladoru nor did he exhibit the Form 36 generated by Mr. Malonza. Though DW6 testified before this court, Mr. Saitabao, counsel for the applicant did not question him about Form 36 which DW2 alleged to have passed over to him and how the figures in Form 36 which he generated changed thus giving the 1st respondent more votes than what he had garnered according to Form 35(MM1) and therefore increasing the voter turnout in Iladoru Polling Station.

In **Raila v Uhuru** (supra), the court explained the need for scrutiny. The court said **“The purpose of the scrutiny was to understand the vital details of the electoral process, and to gain impressions on the integrity thereof.”**

In **Joho v Nyange** (supra) Maraga J, quoting **15 Halbury's Laws of England 4th Ed. Para. 846** said that an order of scrutiny is made where there is reason to believe there are irregularities in the election process or there are mistakes on the part of the Returning Officer. In this case it is apparent and it is admitted by DW2, that there is an error in the results at Iladoru polling station. All documents relating to Iladoru

Polling Station are not before the court and yet under Rule 21 they should have been before the court and thus need for the court to interrogate and examine the document for the court to understand how the error arose.

The petitioner complains generally about the manner in which the elections were conducted in Narok County and wants them nullified for not being fair, free and transparent as required by the Constitution. It was the respondent's submissions that an order for scrutiny should not be allowed because on the fact that the margins in the votes between the applicant and 1st respondent are very big, about 84,000 votes. In **Joho's** case, Maraga J, observed that if the margin between the votes was too high, an order of scrutiny and recount could only be made after a basis was laid. In the instant case, indeed there is a big margin between the applicant and the 1st respondent's votes but sufficient ground has been laid to allow for a scrutiny in Iladoru polling station.

The applicant was seeking that there be tallying and scrutiny of all Forms 35 from Narok South Constituency vis a vis Forms 36 from the Narok Constituency and county Form 36. The reason given for that prayer is that in Pet.167/2013, filed by Njogu, Mwanza Advocates on behalf of the petitioner, against IEBC the petitioner sought orders to direct the 3rd respondent to supply him with the said Forms to the applicant. A consent was later signed between the parties that the 3rd respondent would supply the said forms. The applicant says that some of the forms were supplied but not for Narok South. The respondents objected to the prayer being made at this stage. I do agree with the respondent that the applicant has not demonstrated that he ever tried to enforce the said consent order if indeed he did not receive the forms. He never raised the issue during pre-trial. DW6, the County Returning Officer testified and so did DW2, the Returning Officer for the constituency and they were never challenged as to why they did not provide the said forms. All the witnesses have already been heard and in my view, the applicant is trying to open up areas where new issues may arise and which the respondent may not be in a position to respond. The applicant cannot be allowed to prosecute his case piecemeal but should bring his case at once. (see **Raila v Uhuru** (supra) would not grant the prayer to call for all the Forms 35 for Narok Constituency as prayed save for Iladoru Polling Station.

I have considered Mr. Havi's submissions to the effect that the prayers sought in the application do not lie under **Section 75(3)** of the **Elections Act**. Under that provision, the three remedies are not the only ones that the court can grant. The provision reads:-

“In any proceeding brought under this section, a court may grant appropriate relief including – (a), (b) (c).”

The use of the word “including’ means there are other possible reliefs. In the case of scrutiny, though the court may make an order for scrutiny the scrutiny is done by the Deputy Registrar and other staff under him. It is at the end of the scrutiny and after a full hearing that the court will decide whether the petitioner has convinced the court that he is entitled to the prayers sought in the petition.

Mr. Havi also raised issue with the prayer that ballot boxes be brought to this court for purposes of scrutiny. After the court heard the application on scrutiny dated 20/5/2013, and after hearing counsel on whether or not to comply with Rule 21 of the Election Petitions Rules, the court reserved its ruling till after the ruling on 26/6/2013. In the ruling, the court directed that it would give further directions on scrutiny at a later stage of the proceedings. It is the court that deferred the calling for the ballot boxes and it cannot be blamed on the applicant or his counsel. The reason why the court deferred the direction and delivery of ballot boxes to the court was so that in the event another application for scrutiny was brought the court can make one order regarding the ballot boxes at once if it was found necessary.

Mr. Kemboy invited the court to reconsider its order of 26/6/2013 allowing for scrutiny of votes in Kilgoris and Narok West Constituencies. Although the County Returning Officer testified that the results were entered on the wrong forms, the same were not shown to the court. The Returning Officer used PEx.2 to declare the winner. I do find the same document is still incomplete and unverifiable, as it does not reflect what the results of the Constituencies were. The said results still need an examination and interrogation through scrutiny.

In the end, I decline to grant the application for a scrutiny of Forms 35 and 36 of Narok South Constituency. However, I do grant an order of scrutiny for Iladoru polling station in Narok South Constituency to establish how the 'error' arose and whether the 300 votes added to the 1st respondent's votes were considered in the final tally.

I direct that scrutiny do proceed as follows:-

1. As respects Iladoru Polling Station, there be a full scrutiny and recount of all the valid votes to show what each candidate got;
2. In respect of Kilgoris and Narok West, there be a re-tallying of Forms 35 (in the ballot boxes) with both Forms 36 (a recount based on the forms to be done to establish what each candidate got);
3. The ballot boxes for Iladoru polling station in Narok South Constituency, Kilgoris Constituency and Narok West Constituency be delivered to this Court 48 hours before 29/7/2013 so that the process of scrutiny can commence on 29/7/2013 at 9.00 a.m.

Costs to be in the cause.

DATED and DELIVERED this 23rd day of July, 2013.

R.P.V. WENDOH

JUDGE

PRESENT:

Mr. Saitabao for the petitioners

Me. Kemboy and Mr. Ole Ntutu for the 1st respondent

Mr. Havi for the 2nd respondent

Mr. Kibet for the 3rd to 10th respondents

Lydia Okiya – Court Clerk