



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
ELECTION PETITION NO.3 OF 2013

MUSIKARI NAZI KOMBO.....PETITIONER

Versus

MOSES MASIKA WETANGULA.....1ST RESPONDENT

I.E.B.C.....2ND RESPONDENT

MADAHANA MBAYAH.....3RD RESPONDENT

RULING

Application for scrutiny and re-count of votes

[1] This court delivered a ruling on 13/6/2013 on an application for scrutiny and re-count of votes that was made by the Petitioner on 12/6/2013. That ruling essentially gave directions of the court on the application. It was not a substantive disposal of the merits of the application. The court rendered itself thus:

“It makes sense to state that, the new Constitutional Order and the growing awareness that election disputes are public election disputes should lead courts....to develop new norms and standards to deal with the type of application before the court.”

And the court stated further that:

“Guided by that awareness, and the circumstances of this case, I have come to the conclusion that I should not determine the merit of the application at this juncture. It is most appropriate if all parties tender their evidence before the application is determined. This will provide occasion for all parties and the court to consider all the circumstances of the case in making a decision on whether or not a basis has been laid. I, therefore, direct that the ruling that was to be delivered today [13/6/2013] will remain arrested, until the respondents have tendered their evidence. The parties will then be allowed to make further submissions on the application based on their overall impression of the entire case.”

[2] Those directions are the basis for this ruling. True to the said directions of the court, counsels for the parties were invited to make further submissions on the issue at hand, but they informed the court that they had none; the earlier submissions were sufficient. To avoid a dull repetition, the election in dispute in this petition is the senatorial election for Bungoma County held on 4th of March, 2013.

Submissions by Mr. Ndambiri for Petitioner

[3] Mr. Ndambiri, counsel for the Petitioner submitted on 12/6/2013, that, his client prays for scrutiny of votes cast for the senatorial election in all the polling stations in Bungoma County. He also prayed for scrutiny of; all spoilt and rejected votes; and the marked register. A recount of all the votes cast in respect of the senatorial election for Bungoma County was also sought.

[4] The basis for the Petitioner's application is in the evidence adduced before court (oral and documentary), which supports a case for scrutiny and recount of votes cast in the disputed election.

[5] Counsel submitted further that Article 35 of the Constitution grants the Petitioner the right to information. He urged that, evidence by the Petitioner has revealed incorrectness and alterations of the elections and results. It is only fair, therefore, that a scrutiny is ordered to ascertain the correctness or otherwise of the information he has adduced in court.

[6] Counsel continued to argue that, the application is based on section 82 (1) of the Elections Act (hereafter the Act) and rule 33 of the Elections (Parliamentary and County Elections) Petition Rules, 2013 (hereafter Election Petition Rules, 2013). Section 82 (1) of the Act provides for scrutiny to be ordered by the court during the hearing of the petition either on its own motion or upon application of a party. Looking at Rule 33 of the Election Petition Rules, 2013, the court does not only have the power but also the jurisdiction to order for scrutiny of votes cast.

[7] According to the Petitioner, scrutiny can only be undertaken during the hearing of the Petition as long as a proper basis has been laid for it in this case. The Petitioner has established there were massive irregularities for which no explanation has been given. For instance results in Form 36 at page 31 of the Petition show clear, obvious and glaring mistakes for which no explanation or reason has been given. The data entered and the information posted therein in all the nine (9) Constituencies is wrong. The mistakes in the said Form 36 speak volumes about the integrity of the electoral process.

[8] The Form 35 in the ballot boxes is the one which should provide answers to the irregularities that show the elections were massively flawed. The exercise of scrutiny will also confirm the multiplicity of the Forms 35 and Form 36 that were issued by IEBC officers. In addition, Form 35 presented before the court were full of inconsistencies on the information and data in those forms which could only mean that these were different Form 35's issued by IEBC.

[9] Mr. Ndambiri continued to submit that the affidavit evidence presented by the Petitioner and his witnesses revealed irregularities in over 522 polling stations. It is only fair that the evidence be tested through scrutiny. The scrutiny will prove the contentions in the Petition that the elections were not conducted in accordance with the constitutional principles on elections.

[10] The Petitioner has also established that there were double registration of voters and cases where people voted twice. Mr. Ndambiri referred to the evidence of PW2 – George Sitati Wekesa. On that evidence the court has already ordered for those people alleged to have registered and voted twice to appear before it. Marked registers on the affected areas need be scrutinized in order to test the integrity of the election. That, according to him, is a vital ground for scrutiny of the votes cast.

[11] Counsel contended that the Petitioner also gave evidence that dead people voted and this is another sufficient ground for scrutiny.

[12] The expert witness Barasa Nyukuri adduced evidence on the analysis he carried out on the elections in dispute. The analysis revealed massive irregularities, errors, mistakes, which can only be verified through scrutiny of CDs, registers, poll diaries, reports by IEBC officers on the Senate elections. Form 33 which is a crucial document should be scrutinized. This is a statutory document on the candidate's tally sheet on all the votes each candidate received. That data in Form 33 is what is transferred to Form 35.

[13] In the perception of counsel for the Petitioner, most of the information the Petitioner and his

witnesses have testified on is to be found only in the ballot boxes. And unless the boxes are opened it will be difficult to verify the allegations. It should be noted that, the result of scrutiny will provide more proof of the Petitioner's allegation filed before court. The Respondents in their respective replies to the Petition did not oppose prayers a-d in the Petition. Counsel, therefore, believed the application for scrutiny is not opposed. In any event, nobody will suffer prejudice if a scrutiny is allowed. If 1st Respondent believes he won fairly, and the 2nd and 3rd Respondent truly believes the elections were regularly and correctly conducted, a scrutiny should not be in contention.

[14] He submitted further that Article 81 of the Constitution lays down the principles;

- a. That there shall be a free expression and exercise of right under article 38 of the Constitution;
- b. That election shall be free and fair i.e. be by secret ballot, free from violence, intimidation, improper influence or corruption, be conducted by an independent body, be transparent and administered in an impartial, neutral, efficient, accurate and accountable manner.

For the reasons adduce, he prayed for scrutiny of all votes cast on 4/3/2013 election to be ordered.

[15] Upon being propped by the court, Counsel confirmed that he did not make a formal application for scrutiny but he had raised these issues during the pre-trial conference.

Ochieng Oduol opposed the application

[16] Ochieng Oduol, counsel for the 1st Respondent submitted that this case was adjourned for a specific reason, that is, to allow the Petitioner to call more witnesses. Secondly, he told the court that there was no formal application before the court. The application is based on submission by counsel alleging serious issues which counsel cannot vouch for. The application flouts Article 50 on fair hearing as the court has only heard 12 out of possible 40 witnesses. Applications of this nature can only be made after the Respondents have been heard. The application is asking the court to predetermine contested issues. That would be prejudicial. The application is pre-mature. In the alternative, the evidence adduced so far does not establish any basis for the exercise of discretion of court under Section 80(1) of the Constitution. There should be uncontroverted facts by the court on the issues raised. The big words of massive, widespread irregularities have been used. But no evidence has been tabled in support thereof. Indeed some paragraphs on those allegations were struck out by the court.

[17] Ochieng Oduol pressed further and stated that the Respondents have not been heard and so counsel cannot claim they have not given any explanation to the allegations in the petition. Respondents have filed affidavits in rebuttal, denying all those allegations. The question the court should ask itself is what role the 1st Respondent or other respondents had in acts of bribery claimed. The Petitioner is on a fishing expedition in the hope that a shot in the dark would yield favorable results. The evidence of the expert witness was challenged in material respects and he conceded that he used a provisional register. He was not able to show any contrary figures that were entered in the Form 35.

[18] On double voting and double registration claim, counsel posited those are issues yet to be determined. The claim that dead voters voted has also been refuted. The mere fact that the Petitioner thought that there was perceived irregularities is not an avenue for scrutiny. All counsel should assist the court in is to attain an expeditious disposal of the Petition. Without a basis scrutiny cannot be allowed. In light of the fact that the petition should proceed for hearing, the application is a misadventure and should be dismissed with costs.

Eric Gumbo opposed application

[19] Eric Gumbo, counsel for the 2nd and 3rd Respondents made his submissions on the application for scrutiny and recount. He urged that the Application is pre-mature. The law requires sufficient basis to be laid for the application. Evidence tendered so far is not sufficient as Respondents have controverted all the allegations by the Petitioner. The court cannot make definitive decision that a sufficient basis has been

laid. The evidence of the expert was tested in cross-examination and he confirmed that he relied on a provisional register for his analysis. The actual register used by IEBC was available but he did not seek for it. He, therefore, submitted that the Petitioner is in the course of fishing for evidence.

[20] The court cannot make any finding on dead voters in the absence of certificate of death, and prove that such dead voters participated in the voting. Rules require that parties must concisely state the evidence upon which the application is grounded. In taking that perspective he was guided by the following two principles:

1. Burden of proof is on the Petitioner but the application before the court was placing the burden of proof on the court.
2. Standard of proof must be met by the Petitioner which is very high and above the ordinary civil proceedings. He referred the court to the Supreme Court decision in Pet.5/13.

[21] Section 82 of Elections Act sets out the parameters for an order for scrutiny e.g. cases where there are allegations of bribery and other criminal offences that may have been committed. He termed the application as exceptionally pre-mature. Issues of multiplicity of Form 35 are premised on ill information on electoral processes. Such misconception cannot warrant an order for scrutiny and recount. The actual nature of the relief sought should be based on the evidence provided. He held the view that all issues that were raised are around the statutory Forms which have been presented to the court.

[22] Counsel further argued that the difference between scrutiny, recount and re-tallying is apt. In this case, the issues raised can be dealt with by looking at the Forms given. That has not been sought. Re-tallying should also not be confused with recount. An application for recount must be supported by sufficient evidence. The application is ill advised. He referred the court to the decision of court in Pet No.4/13. Pet Kerymuti V Reagan where a similar application was dealt with. He also referred to the decision by Tuiyot J in Busia HC PET No. 1 of 2013 – Philip Oswe V Michael Arego. These decisions are elaborate on the issue. They are relevant and should persuade the court to decline the orders sought in the application. The difference of votes is important. In the present case the difference of votes between the Petitioner and the 1st Respondent is so huge that a scrutiny or recount will not affect the results. The application should be dismissed.

Ndambiri replied

[23] The decision of the Supreme Court in Pet No 5 of 2013 on burden of proof is clear. Double registration and voting is under inquiry by the court. It is a strong ground to have the 40 people subjected to the criminal process. Fraud, wrong entry in statutory documents, multiplicity of Form 35 and 36, are issues which have been proved. Form 36 bears obvious errors. That is a sufficient ground for scrutiny. Scrutiny is not limited to the number of votes garnered by each candidate. That is only one of the grounds on which scrutiny should be ordered. The remedy of scrutiny is directed to the entire electoral process and its integrity. It should be ordered in this case.

COURT'S RENDITION

Issues

[25] Contrary to the submissions by counsel for the Petitioner, the allegations in the Petition as well as the prayers sought have been opposed and there is joinder of issues thereto. The single issue I should determine is whether sufficient reason has been established to the satisfaction of the court to order for scrutiny or re-count of votes cast in the election in dispute. The other issues that were raised by counsels in their submissions will also be determined although most of them have been overtaken by events upon delivery of the ruling of 13th June, 2013.

Scrutiny and re-count prayed for in the petition

[26] Scrutiny and recount of votes has been prayed for in the petition. The following are relevant

prayers:

- a) There be a scrutiny of votes recorded as having been cast in the aforesaid Senate Elections for Bungoma County from all polling stations in the election held on 4th March 2013.
- b) There be a scrutiny of the rejected, void and spoilt ballot papers from all polling stations relating to Bungoma County.
- c) There be a scrutiny of the actual voter's Registers used at all polling stations within Bungoma County during the said Senate Elections.
- d) There be a recount of all valid ballot papers cast at the said Senate Elections.

The legal basis for scrutiny as a remedy

[27] Scrutiny is a legal remedy. It is provided for in Section 82(1) of the Elections Act which provides:

82(1)-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 a scrutiny of votes to be carried out in such manner as the election court may allow.”

[28] Rule 33 of the Election Petition Rules, 2013 provides further that:-

33 (1) the parties to the proceedings may at any stage of the proceeding apply for scrutiny of the votes for purposes of establishing the validity of the votes cast.

[29] The legal dimension for granting the relief of scrutiny is contained in Rule 33(2) of the Election Petition Rules, 2013; that the court must be satisfied that there are sufficient reasons to order scrutiny or recount of the votes. But, according to Rule 33 (4) scrutiny shall be *confined* to the polling stations in which the results are *disputed*.

Purpose of scrutiny

[30] The decision of Justice H. A. Omondi captured the purpose of scrutiny in the case of **BGM HC EP NO 5 OF 2013 PHILIP MUKWE WASIKE v JAMES LUSWETI MUKWE AND TWO OTHERS** as follows:-

1. **To assist the court to investigate if the allegations of irregularities and breaches of the law complained of are valid.**
2. **Assist the court in determining the valid votes cast in favour of each candidate.**
3. **Assist the court to better understand the vital details of the electoral process and gain impressions on the integrity of the electoral process.**

[31] See also the observations by Warsame J (as he then was) in the Election Petition No.1 of 2008, **DICKSON DANIEL KARABA V HON. JOHN NGATA KARIUKI & 2 OTHERS**, that:-

...the purpose of the exercise...was to ascertain whether there exists any material discrepancies (sic) between the results captured in Form 35 which necessitates the determination of the number of votes cast and obtained by each aspirant. It is only after this exercise that the court can form an opinion whether the results contained in the Form 35 are correct.

When an order of scrutiny and recount may be made

[32] As I stated earlier, the legal dimension for granting the relief of scrutiny is contained in Rule 33(2) of the Election Petition Rules, 2013; that the court must be satisfied that there are sufficient reasons to order scrutiny or recount of the votes. Scrutiny, however, according to Rule 33 (4) shall be

confined to the polling stations in which the results are *disputed*. There must be enough material placed before the court which will impel the court to order scrutiny or re-count of votes. Sufficiency of the materials before the court will depend on the nature of the claims being put forward by the Petitioner in support of scrutiny and the court's evaluation of the evidence in support of those claims. The weight the court will attach to the pieces of evidence provided will also depend on the grave effect the matters complained of would have on the integrity of the electoral process and the results that were announced. In one sense, the court should be able to conclude that the irregularities complained of are of a nature that would completely compromise the electoral process such that the results coming out of such process cannot be said to be free and fair. In another sense, the irregularities or malpractices cited should also be capable of affecting the results. That is the satisfaction the court should look for in an application for scrutiny or recount. I find support of this stand I have taken in numerous judicial decisions, say, **Hassan Ali Joho v. Jotham Nyange & Another** (2006) e KLR where the court held:-

An order for scrutiny can be made when it is prayed for in the petition itself and when reason for it exists....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 Returning Officer or other election official.

And also the case of **William Maina Kamanda V. Margaret Wanjiru Kariuki & 2 others** (2008) eKLR where the court observed:-

Where statutory forms are not signed as prescribed in law, it would be difficult to determine whether the results shown in the forms represent a true and accurate account of the ballots.

The Petitioner's gravamen

[33] I stated quite clearly in **BGM HC EP NO 4 OF 2013 [2013] e KLR** that;

.....I should mention from the onset that it is most desirable and convenient that a party seeking for documents should apply formally in court. An oral application is quite restrictive. It denies the applicant an opportunity to clearly set out and aptly present the plausible grounds on which he is applying. Likewise, an oral application does not afford the opposing parties ample chance to put forth their considered replies. And, finally, the method leaves the court to prop in the dark in search of the specific references or grounding in the pleadings. It is tedious. It is also a mean approach for applying for such important documents. It should be discouraged.

[34] The court is yet again left to grope in the dark in search of specific references in the pleading on the request for scrutiny and re-count of votes cast in the election in dispute. Although there is no strict requirement that a formal application for scrutiny should be made, it is most appropriate way to bring out the specific instances in the pleading which support the application. That procedure also allows the parties to make detailed and proper submissions which serve the court appropriately. But, this is yet another instance where no formal application was made. That notwithstanding, I shall consider all the submissions made as well as the entire evidence before court in order to determine the issues in controversy.

[35] The Petitioner's gravamen is that there were massive irregularities, widespread discrepancies, obvious errors, alterations and miscalculations committed as demonstrated by the several alterations in the entries in Form 35 which were not countersigned. Form 36 for the Senatorial results is characterized by miscalculations and omission of huge number of votes, for instance, the total votes indicated in favour of the Petitioner were less by over 13, 000 votes. Other grievances by the Petitioner include; that a good number of the Form 35 were not signed by political party agents, and in some instances even by the Presiding Officers; the Presiding Officers made no statutory comments as required by law; many Form 35 provided by IEBC to the court and to the candidates/agents were different in material respects; there was none compliance with requirements of the law on the statutory forms.

Has the legal test for scrutiny and re-count been met?

[36] There was no evidence before the court that all polling stations were affected by the irregularities and malpractices complained of by the Petitioner. It will not, therefore, be supported in law to make a general order for scrutiny or re-count of all the votes cast in the election for Senator for the County of Bungoma. That kind of extravagant exercise of discretion will also be an affront to the constitutional policy that election petitions must be determined expeditiously, not later than six months from the date of filing. It will also have unnecessary cost on the public. See the case of **HARRIS V RYAN (1997) 44 MPLR (29) 194 (Nfld.SD)** where it was stated that:-

.....In promoting this policy, the court must not ignore the desirability of avoiding undue delay in seeing the completion of recounts, scrutinize and awarding unnecessary expenses for the tax payer...

[37] For those reasons, I will not order scrutiny and re-count of all votes cast in the elections for Member of Senate for Bungoma County held on 4th March, 2013.

WHAT ABOUT PARTIAL SCRUTINY OR RECOUNT?

[38] My decision on this matter is guided by the Elections Act and particularly rule 33(4) of the Election Petition Rules, 2013 that scrutiny shall be *confined* to the polling stations in which the results are *disputed*. It is further reinforced by the fact that courts must adhere to the primary policy of ensuring that we have free, open and properly conducted elections. As such, courts should not foreclose the right of citizens of Kenya and specifically the residents of the County of Bungoma to information on how the elections were conducted. See the case of **HARRIS V RYAN (1997) 44 MPLR (29) 194 (Nfld.SD)** where it was stated that:-

When interpreting legislation relating to elections, one may reasonably conclude that the primary policy is to ensure that we have free, open and properly conducted democratic elections. If there have been irregularities, these should be exposed to the view of the general public through the returning officer; and through the candidates, and their agents involved in the recounts.

In promoting this policy, the court must not ignore the desirability of avoiding undue delay in seeing the completion of recounts, scrutinize and awarding unnecessary expenses for the tax payer The courts should give an interpretation which favours encouraging openness regarding information on how the elections has been conducted.

Specific polling stations in dispute

[39] The Petitioner listed a number of polling stations in the Petition, the Supporting Affidavit as well as in his Further Affidavit where he alleges there were disputes. He also identified certain anomalies which tend to dent the election as shown below. But, after due consideration of the application before me, for purposes of scrutiny and re-count of votes, the following polling stations are considered;

A) IN WEBUYE EAST CONSTITUENCY

I. Alterations and/or falsifications made on forms 35 at Misimo Primary School (015), Wabukhonyi Primary School (024), Misemwa Primary School (025), Sinoko Polytechnic (034) and Khamoto Primary School (050) were not countersigned by the Presiding Officer or any other officer.

B) IN WEBUYE WEST CONSTITUENCY

I. Form 35 for Misikhu Mixed Primary School (011) was not signed by the Presiding Officer, the Deputy Presiding Officer or any of the candidate's agents yet the results were included in the final tally.

C) KABUCHAI CONSTITUENCY

I. There are two different copies of form 35 for Chwele Youth Polytechnic with different entries and

- statutory comments by the Presiding Officer
- II. There are two different copies of form 35 for Sikata Primary School (029) with different entries and statutory comments (See annexure marked MNK – 2b)
 - III. There are two different copies of form 35 for Kiboochi Primary School (051) with different entries, candidates' entries, candidates' agents' names and signatures and statutory comments
 - IV. There are two different sets of form 35 for Luuya Primary School (053) with different entries, candidates' agents' names and statutory comments
 - V. There are two sets of form 35 for Bwake Primary School (057) with different entries, different candidates' names and different statutory comments
 - VI. Two sets of form 35 for Ngalasia Primary School (062) with different entries in relation to number of valid votes cast, names of candidates or candidates' agents Deputy Presiding Officers signature and statutory comments
 - VII. Two sets of form 35 for Chebukaka Boys Primary School (066) with different entries on total number of votes cast, dates, candidates agents' names and statutory comments
 - VIII. Two sets of form 35 for Milembe Primary School (071) with different entries on total number of votes cast, names of candidates agents and statutory comments.
 - IX. Two sets of form 35 for Lukhome Market (072) with different entries on number of votes rejected, names of candidates agents and presiding officer's statutory comments
 - X. Two sets of form 35 for Kuywa Primary School (085) with different entries on number of rejected votes, dates, names of candidates agents and presiding officer's statutory comments
 - XI. Two sets of form 35 for Baraki Polytechnic (086) with different entries on total number of votes cast and presiding officer's statutory comments.
 - XII. The rejected votes at Mfupi Market (065) were not deducted from the votes cast.
 - XIII. Spoilt ballot papers for Kibisi FYM Primary School (009), Miyuke SA Primary School (015), Kibisi Cattle Dip (016), Mukomari Primary School (017), Namboko RC Primary School (060) and Luuya DEB Primary School (061) were not deducted from the votes cast as required under the election regulations.
 - XIV. Mitoto Cattle Dip (004) has two form 35s with different entries on total number of votes cast (see annexure marked MNK-3a)
 - XV. There are two different forms 35 for Karima RC Primary School (007) with different entries, different Presiding Officer's signatures and different Presiding Officer's statutory comments.
 - XVI. There are two different copies of form 35 for Makunga SA Primary School (008) each with different entries.
 - XVII. There are different forms 35 for Lusokho Primary School (020) with different entries.
 - XVIII. Two different forms 35 for Mitua Education Centre (029) that are signed by different candidates or their agents.
 - XIX. Two different forms 35 for Lungai Primary School (032) with different entries on votes cast.
 - XX. Two different forms 35 for Milele FYM Primary School (086) with different entries on the candidates or candidate agents.
 - XXI. Two different forms 35 for Naitiri RC Primary School (111) with different entries on number of registered voters and number of valid votes cast.
 - XXII. Two different forms 35 for Brigadia Makutano Dispensary (119) with different dates and Presiding Officer's comments.

D) KIMILILI CONSTITUENCY

I. Alterations/falsifications made in several stations including Kimilili Bus Park (025), Buko RC Primary School (031), Kamusinde FYM Primary School (035), maeni Primary School (040), Kamukuywa Central Academy (042), Sibakala RC Primary School (047), Lukhome Baptist Primary School (049) and Musembe primary School (059) were not countersigned by the Presiding Officer or any other official.

E) MT. ELGON CONSTITUENCY

I. Corrections/amendments on forms 35 for Kipsis Primary School (004), cheptais SA Primary School (005), Walanga FYM Primary School (011), Nalondo SA Primary School (018), Chebich Primary School (061), Kipteka Primary School (069), chebin Primary School (075) and Chepkoya Primary School (082)

were not countersigned by the Presiding Officers or any of the candidates' agents.

F) KANDUYI CONSTITUENCY

I) Alterations/corrections on form 35 for Sibembe ECDE Primary School (058) were not countersigned by the Presiding Officer or any other officer.

[40] From the pleadings and the affidavits filed in court, the evidence on record by all the parties, it is apparent that the quality of the process as well as the figures allocated to candidates in the polling stations above has been heavily contested in this petition. In line with the policy on the electoral laws, this court will need to ascertain the qualitative and the quantitative aspects of the elections. That approach has been applied in the past as a way of testing the integrity of the process and bringing forth information on how the elections were conducted. Justice Helen Omondi in BGM HC EP NO 5 OF 2013 aptly stated the scope of these strategies as follows:

The quantitative is relevant where the numbers or figures are in issue, while the QUALITATIVE test is relevant where the quality or standard of election is in issue.

[41] I should refer to the decision by Warsame J, in the **Karaba case (supra)** which has been quoted with approval by courts that:-

The process, quality, standard and transparency of an election can be gauged from the first step by the electoral body to the last step resulting in the conclusion of the election. The whole process has to be considered in a wholesome and conclusive manner. The process from the start to the end has to be fair, free, transparent and an expression of the will of the people, so as to say, proper election process had been conducted and concluded in a particular Constituency.

Accordingly, fairness, transparency, accountability and verifiability of an election encapsulates the need for the court to examine, at least some of the irregularities raised, which appear to taint the credibility of the electoral process applied in the senatorial elections for Bungoma County held on 4th March, 2013. I take complete notice of cancellations, alterations and erasures in some Form 35 but which were not endorsed or in any manner verified through known and acceptable procedures. Others were not signed by an officer of IEBC. The said forms are part of the record having been filled by parties herein, and more so, most of them were filled by IEBC pursuant to statutory provisions under the Election Petition Rules, 2013. Other issues emerged during cross-examination of witnesses which the court is obliged to consider in this application. On these, I am guided by the case of **JUSTUS MUNGUMBU OMITI V WALTER ENOCK NYAMBATI OSEBE & 2 OTHERS (KISII HC EP No.1 of 2008)** that:-

“All issues raised in the petition and those which crop up during the hearing, whether pleaded or not, and which had the potential to affect adversely the final result, and the will of the voters in a Constituency must come under spotlight, scrutiny and interrogation. They have to be interrogated and determination made thereon. In this case all illegalities and irregularities which impugn the credibility of the outcome of the elections have to be considered. It will be a sad day indeed if such evidence which comes through the petitioner, his witnesses, the respondents and their witnesses, as well, to be discarded and rendered irrelevant, or inadmissible merely on grounds that the same was not the subject of any pleading At the end of the day what is of prime concern to this court, is whether the elections were conducted in a fair, free and transparent manner, and that they reflect the will of the voters and more importantly whether the Respondent was validly elected. Such determination cannot be made, if relevant evidence is locked out on technical grounds that the issues addressed by such evidence were not pleaded.”

[42] The erasures, cancellations or alterations on the Form 35 provided by IEBC in so far as they have not been properly endorsed will entitle the court to enquire into the veracity of those results. Further, the apparent differences among some forms provided to court by IEBC and those filled by the Petitioner and the 1st Respondent will need proper verification by the court if a complete and effectual determination of issues is to be attained.

IEBC admitted some errors

[43] IEBC admitted that there were arithmetical errors, although they contended that those errors did not affect the outcome of the results. The County Returning officer Mr Madahana Mbayah admitted that there were errors in the statutory forms including form 36 which he used to announce the results. Mr Madahana and other Returning Officers who were called as witnesses tried to explain the discrepancies in the statutory forms but there is absolute absence of the evidence of the makers particularly of Form 35. The totality of these things is that the court should order a scrutiny and recount of votes cast in the polling stations in dispute.

[44] From the foregoing, I find that sufficient reason has been given to the satisfaction of the court and hereby order scrutiny and counting of votes in the following polling stations:

IN WEBUYE EAST CONSTITUENCY

1. Misimo Primary School (015), Wabukhonyi Primary School (024), Misemwa Primary School (025), Sinoko Polytechnic (034) and Khamoto Primary School (050).

IN WEBUYE WEST CONSTITUENCY

1. Misikhu Mixed Primary School (011)

IN KABUCHAI CONSTITUENCY

1. Chwele Youth Polytechnic
2. Sikata Primary School (029)
3. Kiboochi Primary School (051)
4. Luuya Primary School (053)
5. Bwake Primary School (057)
6. Ngalasia Primary School (062)
7. Chebukaka Boys Primary School (066)
8. Milembe Primary School (071)
9. Lukhome Market (072)
10. Kuywa Primary School (085)
11. Baraki Polytechnic (086)
12. Mfupi Market (065)
13. Kibisi FYM Primary School (009),
14. Miyuke SA Primary School (015),
15. Kibisi Cattle Dip (016),
16. Mukomari Primary School (017),
17. Namboko RC Primary School (060)
18. Luuya DEB Primary School (061)
19. Mitoto Cattle Dip (004)
20. Karima RC Primary School (007)
21. Makunga SA Primary School (008)
22. Lusokho Primary School (020)
23. Mitua Education Centre (029)
24. Lungai Primary School (032)
25. Milele FYM Primary School (086)
26. Naitiri RC Primary School (111)
27. Brigadia Makutano Dispensary (119)

IN KIMILILI CONSTITUENCY

1. Kimilili Bus Park (025),
2. Buko RC Primary School (031),

3. Kamusinde FYM Primary School (035),
4. Maeni Primary School (040),
5. Kamukuywa Central Academy (042),
6. Sibakala RC Primary School (047),
7. Lukhome Baptist Primary School (049)
8. Musembe primary School (059)

IN MT. ELGON CONSTITUENCY

1. Kipsis Primary School (004),
2. Cheptais SA Primary School (005),
3. Walanga FYM Primary School (011),
4. Nalondo SA Primary School (018),
5. Chebich Primary School (061),
6. Kipteka Primary School (069),
7. Chebin Primary School (075)
8. Chepkoya Primary School (082)

KANDUYI CONSTITUENCY

- I) Sibembe ECDE Primary School (058)

[45] Under rule 33(4) of the Elections Petitions Rules, 2013 the court has discretion to specify the documents to be examined. The court in the current electoral legal regime could order a partial scrutiny where sufficient reason has been shown. Accordingly, the following documents shall be scrutinized in respect of the polling stations in dispute and listed in paragraph above:

- a. **The copy of the register used during the elections;**
- b. **The copies of the results of each polling station in which the results of the election are in dispute [Form 35];**
- c. **The packets of spoilt papers;**
- d. **The marked copy register;**
- e. **The packets of counterfoils of used ballot papers;**
- f. **The packets of counted ballot papers;**
- g. **The packets of rejected ballot papers; and**
- h. **The statements showing the number of rejected ballot papers.**

[46] The Deputy Registrar shall record the results of the examination particularly answering to the queries raised as per paragraph 39 above. He will also record any other information that is contained in the documents examined. Parties will be represented by a person who shall be deputized in writing by counsels for the parties and they shall all be sworn in accordance with the law. The exercise should be completed within the next seven days.

Other issues

[47] There were other issues which arose and are important to resolve. The inquiry ordered by the court on the 40 people who were alleged to have registered and voted more than one time will continue and the report to be submitted to the court together with the report for scrutiny and re-count herein.

[48] The Petitioner was not in a fishing expedition in so far as the polling stations in question are concerned. Whether or not the application as made by the Petitioner was premature, was decided in my earlier ruling of 13th June, 2013. It was not premature as such application could be made any time during the hearing. Except I wish to add that rule 33(1) of the Election Petition rules, 2013 is not in conflict with section 82(1). The source of that misconception is in the words used in the rule, i.e. *at any stage*, whereas the Act talks of *during the hearing*. The words in the rule should be read with the Act and should bear the meaning *at any stage during the hearing*. Those words emphasizes *at any time during the*

hearing without necessarily having to wait until the end of production of evidence although the applicant should always be minded of rules of fair hearing to all parties as a determinant as to what point such application should be made. An applicant who applies when there are clear materials before court to order scrutiny is not the poorer. Nonetheless, the hearing in this case is still on and parties are yet to conclude by making submissions.

[49] Should the marked register for the polling stations in dispute be in a presidential ballot box, the same be opened and retrieve therefrom the marked register for the exercise ordered by the court. See the case of **BGM HC ELECTION REVISION NO 1 OF 2013**.

[50] Costs will abide the main cause.

Dated, signed and read in open court at Bungoma this 15th day of July 2013

F. GIKONYO

JUDGE

In the presence of:

Khisa: CA

PETITIONERS: Ndambiri and Wanyama for Petitioner

RESPONDENTS: Ochieng Oduol, Makokha and M/s Wakoli for 1st Respondent.

Makokha holding brief for Gumbo for 2nd and 3rd Respondents

COURT: Ruling read in open court.

OCHIENG ODUOL: I apply for copies of ruling.

COURT: Copies of ruling to be furnished to all counsels on payment of requisite fee. Parties to apply for extension of time where necessary in order to complete the exercise. Mention on 29/7/2013.

F. GIKONYO

JUDGE