



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**ELECTION PETITION CASE NO. 1 OF 2013**

KITHINJI KIRAGU..... PETITIONER

VERSUS

MARTIN NYAGA WAMBORA.....1<sup>ST</sup> RESPONDENT

DAVID KIAMBI

(COUNTY RETURNING OFFICER).....2<sup>ND</sup> RESPONDENT

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....3<sup>RD</sup> RESPONDENT

**R U L I N G**

The Petitioner filed a Notice of Motion dated 8th July 2013 under Rule 33 of the Elections (Parliamentary and County Elections) Petition Rules, 2013 seeking the following orders:-

1. *That there be a scrutiny of votes from Runyenjes and Manyatta Constituencies excepting Kithiruri Tea Buying Centre (polling station Code 075 Runyenjes); and Kathunguri Primary School (polling station Code 104 Runyenjes).*
2. *Other further directions do issue.*

The said application was based on the following grounds:-

1. *The scrutiny ordered by the Court on its own motion clearly bears out manifest irregularities which raise serious doubts about the veracity of the results declared on 7/3/2013.*
2. *This honourable court is obligated to ensure that the letter and the spirit of Article 86 of the Constitution is realized for purposes of the hearing of this petition.*
3. *The Respondent will not suffer any real prejudice or at all if the orders sought are granted.*

The 1st Respondent's grounds of opposition:-

- i. *the prayers sought should not be granted as the same relate to polling stations not specifically cited in the Petition filed herein.*
- ii. *The Petitioner has therefore not laid any evidential basis for the grant of the orders sought nor have the respondents been granted an opportunity to respond to any allegations in relation to the affected polling stations.*
- iii. *The order for scrutiny and/or recount will not be granted as a matter of course.*

- iv. *This Honourable Court has upon hearing the evidence presented before it made an order for scrutiny and recount and hence the matter is now resjudicata.*
- v. *Its in the interest of justice and fairness that the application be dismissed.*

The 2nd and 3rd respondents grounds of opposition:-

- (i) *The Honourable Court has already made an order for scrutiny based on the evidence before the court. The issue of scrutiny has therefore been determined by this court.*
- (ii) *The petitioner has made a bare request for scrutiny and recount without laying any basis without giving sufficient reason to support the request.*
- (iii) *The Petitioner has made a general request for scrutiny without limiting it to polling stations in which results are disputed and those specifically pleaded in the petition.*
- (iv) *The Petitioner's application is unfounded and an abuse of the court process.*

#### **Submissions by Mr. Njagi for the Petitioner:**

He submitted that under Part VI of the Election Petition Rules the kind of application the Petitioner had made could be made at any stage. He further submitted that the scrutiny and recount ordered by the court had revealed a lot which required the Petitioner's reaction.

He cited Kithimu and Kathunguri Primary Schools polling stations where there were 107 unaccounted for votes. He took the court through all the polling stations in this Court's directions on scrutiny and recount. He showed the Court where the candidates lost or gained votes.

He also submitted that the Form 35s found in the Mbuinjeru ballot box was a consolidated one and not a single one as had been stated in court by a witness. And that Embu Urban Primary School Stream 3 had an unsigned hand written note instead of a Form 35. He further submitted that the votes complained of in the petition had not been accounted for while the origin of 18 votes in Embu Municipal Council (Stadium) was unknown. He therefore prayed for an order for full scrutiny to reveal more information that would assist this Court determine the petition on merit.

#### **Submissions by Mr. Marete for the 1st Respondent:**

He submitted that the issue of scrutiny had already been dealt with by this Court. And the Petitioner was only using a critique of the Deputy Registrar's report to call for scrutiny. To him this was a fishing expedition as referred to in the case of **PHILLIP OSORE OGUTU VS M. ONYURA ARINGO Election Petition No. 1/2013 – Busia High Court**. Citing the case of **WAVINYA NDETI VS IEBC & OTHERS – Election Petition No. 4/2013 Machakos High Court** he indicated that errors were admitted by witnesses but it should be noted that it was human beings and not machines that were doing this work. Also referring to

1. **GICHUKI KINGARA VS IEBC (NYERI)** and
2. **MASINDE VS BWIRE & ANOTHER [2008] 1KLR 547** he submitted that there was no basis for doing a scrutiny on unnamed polling stations. He also raised the issue of the margin between the contenders and referred to the case of **HASSAN JOHO VS NYANGE [2008] 3 KLR 188** where the margin was 1061 votes and the request for scrutiny was not allowed. To him the document from Kianjugu polling station was improvised and it was signed by all and showed the results.

#### **Submissions by Ms. Omuko for 2nd and 3rd Respondents:**

Associating herself with the submissions by Mr. Marete which she adopted, she submitted at length on the issue of new evidence being looked for by the Petitioner. She referred to the cases of:-

1. **JOHN KIARIE WAWERU VS B.W. MUGO [2008] eKLR**
2. **MERCY KERITO MUTEGI VS BEATRICE NKATHA NYAGA - Election Petition No. 5/2013 Meru**
3. **PHILLIP OSORE VS MICHAEL ARUNGO & 2 OTHERS (supra)**

She referred to Rule 33(4) of the Election Petition Rules saying the Petitioner should have indicated the polling stations he had disputes with. These ought to have been borne in the Petition and affidavits in support. The rest of her submission was covered by Mr. Marete.

In reply Mr. Njagi submitted that his application was supported by Article 86 of the Constitution and Rule 33 of the Election Rules. And that the Petitioner was within his Petition while asking for scrutiny of all other polling stations. The application he says is not resjudicata.

### **BASIS FOR SCRUTINY**

1. Section 82(1) of the Elections Act 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.”***

It therefore follows that the Court may on its own motion order for scrutiny where it discerns that there is need for such scrutiny. It is the Court which then gives directions on the manner in which the scrutiny will be carried out.

2. The Election (Parliamentary and county Elections) Petition Rules 2013 also provide for scrutiny.

Rule 33(1) provides:-

***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 or recount of the votes***

***(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 statement made by the presiding officers under the provisions of the Act;***
- b. ***the copy of th 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 ballots papers;***
- i. ***the packets of rejected ballot papers; and***
- j. ***the statements showing the number of rejected ballot papers.***

It is on record that this Court pursuant to the Provisions of Section 82(1) of the Election Act did on its own motion order for scrutiny which was limited to specific polling stations. The application before me has been brought under Rule 33 of the Election Petition Rules. The Respondents have in their grounds of opposition and their submissions indicated that the present application is resjudicata. Their reason is that the Court had already dealt with scrutiny.

For res judicata to arise the following must be established

- i. ***The issue and the parties must be the same***
- ii. ***The issue has been heard and decided on merits.***

If these two factors are not established the plea of res judicata cannot be sustained. It is clear that though scrutiny was dealt with by this Court, it was not at the instance of any of the parties herein. Further no such application has been heard and decided on merit. The application for scrutiny may be made at any stage of the proceedings. I therefore find that the application is not ***res judicata*** and is properly before this Court.

A reading of Rule 33(2) of the Election Petition Rules confirms that the order for scrutiny is not a matter of course. The Court must be satisfied that there is sufficient reason for it to order for scrutiny or recount. It is therefore incumbent upon the Applicant to demonstrate to the Court the reasons which must be sufficient in order for the Court to grant the same. It is therefore the Court to determine if the reasons are sufficient or not.

In the case of ***MASINDE –V- BWIRE & ANOTHER ELECTION PETITION NO.9 OF 1993 AT NAIROBI*** Justices O’Kubasu, Mbitio and Mwera held;

***“There must be a good reason before this Court can order for scrutiny. An order for scrutiny is not automatic. There must be a basis for it”.***

In the case of ***JOHN KIARIE WAWERU –VS- BETH WAMBUI MUGO & 2 OTHERS [2008] eKLR*** Justice Kimaru stated;

***“The Petitioner further failed to establish any basis for this Court to order scrutiny of the ballots in respect of the Parliamentary elections of Dagoretti Constituency”.***

This position has been buttressed by various decisions held by the High Court in recent times during this period of Election Petitions.

In the case of ***PHILLIP OSORE OGUTU (Supra)*** Justice Tuiyot had this to say;

***“An order for scrutiny will not be made as a matter of course. In the words of Rule 33(2) of the Election Petition Rules, the Court must be satisfied that there is sufficient reason to require an examination of the ballots. This rule codifies a long held judicial opinion that scrutiny may only be ordered where a foundation or basis has been laid”.***

Justice Tuiyot further stated;

***“It would be expected that a party filing an election petition is from the outset, seized of the grounds, facts and evidence questioning the validity of the election. And where the evidence is unclear the party can, on application to Court, seek and obtain better particulars of that evidence from its adversary. But it would be an abuse of the Court process to allow a party to use scrutiny for purposes of chancing on new evidence. Scrutiny should not be used as lottery”.***

In ***RISHAD HAMID AHMED AMANA –VS- IEBC & OTHERS – ELECTION PETITION NO.6/2013 MALINDI*** – Justice Kimaru held thus;

***“In this regard, scrutiny cannot be ordered where the Petitioner has not specifically pleaded for scrutiny in his petition. It will not do for the Petitioner to aver in the petition that he desires scrutiny and recount to be undertaken in respect of all the polling stations in the electoral areas that is the subject of the dispute. The Petitioner must plead in sufficient detail why he requires the Courts intervention to order scrutiny. In that regard, the Petitioner has to state the specific polling stations that he alleges there were irregularities and therefore should be scrutinized”.***

Other cases I have considered are;

1. ***RICHARD N. KALEMBE NDILE & ANOTHER –VS- DR. PATRICK MASIMBA MWEU & ANOTHER ELECTION PETITION NO.7 OF 2013 MACHAKOS.***
2. ***FERDINAND NDUNGU WAITITU –VS- IEBC & 8 OTHERS ELECTION PETITION NO. 1 OF 2013 NAIROBI***
3. ***WAVINYA NDETI –VS- IEBC & OTHERS ELECTION PETITION NO.4 OF 2013 MACHAKOS.***

The common thread running through all these authorities is that they clearly espouse the position of the law as it is currently. And the position is that there must be a sufficient basis for there to be scrutiny or recount. It is however note worthy that where the Court acts *suo moto* and orders for scrutiny it does so after taking into account the pleadings, affidavits of both sides and the evidence adduced in Court. Even though the Rules provide that an application may be brought at any time before the delivery of Judgment, most Courts have found it suitable that the same is dealt with after both the Petitioner and Respondent have laid their cases before the Court. Scrutiny should not therefore be used as a tool for discovering new evidence or in Justice Tuiyott's words, "***It should not be used as a fishing expedition***".

It is with the above principles in mind that I now wish to consider whether I should order scrutiny of the vote for the Governor's election in Runyenjes and Manyatta constituencies of Embu County.

### **Determination**

1. I have outlined the submissions by the Counsels for all the parties herein and the positions each has taken on this application. The Petitioner's position is that he has laid a basis for scrutiny while that of the Respondents is that he has not.
2. The Petitioner has based his application on the results of the scrutiny that was ordered by this Court under section 82(1) of the Elections Act. In ordering for that scrutiny the Court considered the polling stations whose results were questioned as per the Petition and the evidence adduced in Court. This Court has to analyze the Deputy Registrar's report *vis avis* the material already before it as it forms part of the proceedings that the Court will consider in determining this petition.
3. Mr. Njagi has however in his submissions taken the Court through the report and he submits that there are massive irregularities warranting this Court to order for scrutiny. It's noted that there are unaccounted for votes, and a few missing Form 35s. He is asking whether there was tampering and where these unaccounted for votes are. He is further asking the Court to order for scrutiny so that more information can be retrieved concerning the contents of the ballot boxes. It was the duty of the Petitioner to lay a basis for all these things he is asking for. There is no evidence which has been adduced to show that the missing Form 35s and unaccounted for votes are in the ballot boxes. And if indeed he knew they were there he would simply have indicated the relevant polling stations and the Court goes for them. Scrutiny and recount is not an easy exercise and the Court would not aimlessly go for it. There must be a target! There must be basis!
4. In the exercise of taking the Court through the Deputy Registrar's report it has come out clearly that all the candidates in this Gubernatorial election in the selected polling stations were either losing or gaining votes. It has not been shown that the Petitioner was the permanent loser while the 1<sup>st</sup> Respondent was the permanent gainer of votes.
5. The ultimate question this Court is asking itself is what is to be achieved by opening all those ballot boxes. Most of the polling stations in Runyenjes and Manyatta are not mentioned anywhere in the petition and affidavits, not even in the evidence. Both the Petitioner and Respondents have been given sufficient time by this Court to build up their cases. The Court allowed more affidavits and responses to be filed and even some matters to be raised which were not in the pleadings. This was after the 3<sup>rd</sup> Respondent delivered to the Court the results of the Governor's elections in compliance with Rule 21(b) of the Election Petition Rules. In the case of ***WAVINYA NDETI*** (supra) this is what Justice Majanja said at page 24 when faced with a situation similar to this;

***“The Petitioner set out particulars of 9 polling stations. Further allegations of discrepancies were brought out while the case was litigated on the basis of the results delivered to Court by the IEBC. To my mind an order for scrutiny will only broaden the scope of the dispute beyond that defined by the pleadings and contemplated by the parties ..... To proceed on a course outside the confines of the petition is not warranted in the circumstances of this case”.***

I entirely agree with my brother Judge that allowing scrutiny without a basis being laid would stretch the dispute beyond the pleadings. This would reduce these proceedings to an all for all arena.

6. I am satisfied that the scrutiny and recount exercise conducted by the Deputy Registrar following the directions of this Court covered what has been raised in the petition as disputed results in limited polling stations.
7. My finding therefore is that the Petitioner has not made out a case for scrutiny in Runyenjes and Manyatta constituencies.
8. I therefore decline to grant the orders sought in the Notice of Motion dated 8<sup>th</sup> July 2013.

Costs shall abide the outcome of the petition.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 12<sup>TH</sup> DAY OF JULY 2013.**

**H.I. ONG'UDI**

**J U D G E**

**In the presence of:-**

**Mr. Njagi for Petitioner**

**Mr. Marete assisted by Ms. Wairimu for 1st Respondent**

**Ms. Omuko for 2nd & 3rd Respondent**

**Petitioners**

**Respondents**

**Njue CC**