REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

ELECTION PETITION NUMBER 6 OF 2013

NUH NASSIR ABDI.....PETITIONER

VERSUS

1. ALI WARIO.....1ST RESPONDENT

2. FRANCIS RUNYA(RETURNING

OFFICER, BURA CONSTITUENCY.....2ND RESPONDENT

3. THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....3RD RESPONDENT

RULING

1. By his Motion on Notice dated 5th July 2013, the applicant herein, **Ali Wario**, who is the 1st Respondent in this petition substantially seeks an order that the Court sets aside, varies and or reviews the directions and or orders of 24th June 2013, for scrutiny and recount of votes in respect of Bura Constituency so that the said scrutiny and recount abide the conclusion of arguments from all parties on the petitioner's application for the same.
2. The application is principally based on the ground that this court had earlier on, on 30th May 2013 indicated that the said application dated 28th May 2013 would be argued at a later date. However before that application could be heard this Court during the pretrial conference held on 24th June 2013 *suo moto* directed that the scrutiny be carried out before the said application was heard. It is the 1st respondent's case that he had filed his grounds of opposition to the application and that the said orders were made before the parties were heard.
3. In support of the application **Mr Abed** learned counsel for the 1st respondent submitted that the 1st respondent who stand to be mostly affected by the decision was not heard and secondly that taking into account the court's direction that the application for scrutiny would be heard at the hearing, his expectation was that the same would be heard either at the hearing or upon the commencement thereof. While conceding that the Court has discretion to order scrutiny *suo moto*, **Mr Abed's** position was that that discretion is qualified only at the hearing not at any other stage and relied on the wording of section 82 of the ***Elections Act***. In his understanding that jurisdiction can only be exercised at the hearing of the petition and not prior to the hearing. Learned counsel however clarified that the purpose of the present application is not to delay the hearing or obstruct the same but to pin down the petitioner to particular polling stations and not to put the respondent to the

unnecessary trouble of going through all the ballot boxes. In his view, the fact that the difference is 11 votes does not take away the 1st respondent's right to question the petitioner on which polling stations they wish to have the scrutiny conducted.

4. On her part **Ms Kanabar** who was holding brief for Mr Nyamodi for the 2nd and 3rd respondent's supported the application and associated herself with the submissions made by **Mr Abed.**
5. In opposition to the application the petitioner filed the following grounds of opposition:

1. **The Application is frivolous, vexatious and scandalous.**

2. **The Application offends Article 159(2)(d) of the Constitution which states that justice shall be administered without undue regard to procedural technicalities.**

3. **The Honurable Court, pursuant to Section 80(1)(d), is vested with powers to hear and determine all matters that come before it without undue regard to technicalities.**

4. **Rule 4 of the Elections(Parliamentary and County Elections) Petitions Rules, 2013, the overriding objective to be exercised by this Court is to facilitate the just, expeditious, proportionate and affordable resolution of the Election Petitions under the Constitution and the Elections Act.**

5. **Pursuant to Section 82(1) of the Elections Act, 2011, the Honourable Court is vested with powers to order the scrutiny of votes to be carried out in such a manner as the election court may determine and it can make such orders *suo moto* or on the Application of the Petitioner.**

6. **The 1st Respondent's/Applicant's Advocates was not denied their right to a fair hearing as the Honourable Justice Odunga issued directions on 30th May, 2013 that the Respondents file their Grounds of Opposition by 4th June 2013.**

7. **That the 1st Respondent /Applicant filed his Grounds of Opposition dated 3rd June 2013 and filed on 4th June 2013.**

8. **The Application for the scrutiny of votes dated was heard on 18th June 2013 and the parties were accorded a fair hearing.**

9. **That there is no evidence produced by the 1st Respondent/Applicant proving that the Court had issued directions that the Application for Scrutiny filed by the Petitioner will be heard and determined after the trial as alleged or at all.**

10. **The 1st Respondent/Applicant has not placed before this Honourable Court the discovery of new and important matter or evidence that would warrant a review of the Orders issued by this Honourable Court for the scrutiny of the votes.**

11. **That in the case of *Wavinya Ndeti vs The Independent Electoral and Boundaries Commission and 4 Others [EPNO. 12 of 2013]*, the Honourable Justice Majanja applied the principle set out in the case of *William Maina Kamanda vs Margaret Waniru Kariuki Nairobi EP No. 5 of 2008[2008] eKLR* where it was held that:**

> ***"it is now well established that an order of scrutiny can be made at any stage of the hearing before final judgment whether on the Court's own motion or if a basis laid requires so. It can be made if it is prayed in the petition itself... or when there is ground for believing that there were irregularities in the election process or if there was a mistake on the part of the Returning Officer or other election officials".***

12. **That this Application should thus be dismissed and costs awarded to the Petitioner.**

6. In her submissions in opposition to the application **Ms Mtekere** who was holding brief for **Mr Mutula Kilonzo Jnr** reiterated the grounds of opposition hereinabove and submitted that the application is tantamount to an abuse of the process of the court and its intention is to delay the expeditious disposal of the petition. In her view, the orders sought would inevitably lead the Court to act as a Court of Appeal on its own decision. To learned counsel, by filing their grounds of opposition to the application the 1st respondent was afforded an opportunity to be heard and that the Court properly exercised its discretion under section 82(1) of the ***Elections Act*** as read with rule 33 of the ***Elections Rules***. Learned counsel submitted that by appointing agents to attend the scrutiny process without appealing against the order the 1st respondent acquiesced to the process. In her view, based on ***Black's Law Dictionary***, 8th Edn. page 737, a hearing is a judicial session and therefore from the moment the petition came to court it qualified as a judicial session and hence the court exercised its discretion properly and it matters not that evidence had not been adduced as yet. Learned Counsel also relied on the overriding objective which dictates that the dispensation of the matter be done without undue regard to technicalities. She further relied on the decision of **Majanja, J** in ***Wavinya Ndeti vs The Independent Electoral and Boundaries Commission and 4 Others [EPNO. 12 of 2013]*****, the Honourable Justice Majanja** applied the principle set out in the case of ***William Maina Kamanda vs Margaret Waniru Kariuki Nairobi EP No. 5 of 2008[2008] eKLR*** where it was held that:

> ***"it is now well established that an order of scrutiny can be made at any stage of the hearing before final judgment whether on the Court's own motion or if a basis laid requires so. It can be made if it is prayed in the petition itself... or when there is ground for believing that there were irregularities in the election process or if there was a mistake on the part of the Returning Officer or other election officials"***..

7. In her view since the difference in the votes was 11 votes the court rightly exercised its discretion and gave the petition an opportunity of being expeditiously disposed of. To learned counsel as the scrutiny is ongoing, the application is spent and the court ought to dismiss the application and allow the scrutiny to continue.
8. In a rejoinder, **Mr Abed** submitted that the application raises serious issues which do not fall under procedural technicalities but are administrative procedures relating to a right to a hearing hence the provisions of Article 159 of the Constitution and Rule 4 of the Elections Rules do not apply.
9. I have considered the foregoing. Under section 82 of the ***Elections Act*** (hereinafter referred to as the Act):

> ***An election court may, on its own motion or on application by any party to the petition, during the hearing of an election petition, order for a scrutiny of votes to be carried out in such manner as the election court may determine.***

10. Apart from that rule 33(1) and (2) of the ***Elections (Parliamentary and County Elections) Petitions Rules*** (hereinafter referred to as the Rules) provides:

> ***(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.***

11. It is clear from the foregoing provisions that whereas rule 33 of the aforesaid Rules provide that a sufficient reason be shown before the Court can be satisfied that scrutiny or recount ought to be ordered, section 82 of the Act on the other hand donates wide and unfettered discretion on the Court to make such orders in such manner as it may direct. If it were to be argued that section 82 of the Act ought to be interpreted in accordance with rule 33 that would fall foul of section 31(b) of the ***Interpretations and General Provisions Act***, Cap 2 Laws of Kenya which provides that no subsidiary legislation shall be inconsistent with the provisions of an Act.

12. A similar issue arose when the Court was dealing with section 80 of the ***Civil Procedure Ordinance*** [now ***Civil Procedure Act***] vis-à-vis Order 44 rule 1 [now Order 45 rule 1] of the ***Civil Procedure Rules*** in **Sardar Mohamed vs. Charan Singh Nand Singh & Another HCCA No. 51 of 1959 [1959] EA 793** in which **Farrell, J** was of the following view, which view, I respectfully share:

> **"In terms section 80 of the Civil Procedure Ordinance confers an unfettered right to apply for review in the circumstances specified and an unfettered discretion in the court to make such order as it thinks fit. The omission of any qualifying words at the beginning of the section appears to have been deliberate, since the section is obviously based on section 114 of the Indian Code, which is qualified, and similar qualifying words appear in a number of the other sections. Under section 81(1) of the Ordinance the Rules Committee has power to make rules "not inconsistent with the provisions of this Ordinance". If a rule is inconsistent it is to that extent *ultra vires;* and if the Ordinance confers unfettered power, a rule which limits the exercise of the power is *prima facie* inconsistent with the Ordinance and *ultra vires.* If, however, a rule is capable of two constructions, one consistent with the provisions of the Ordinance, and one inconsistent, the court should lean to the construction which is consistent on the principle *"út res magis valeat quam pereat".* If the words "Or for any other sufficient reason" can be given a liberal construction, there is nothing in Order 44, rule 1(1) in any way inconsistent with section 80 of the Ordinance. The paragraph is perhaps unnecessary, but serves to make it clear that at least the two grounds specified are such as would entitle an aggrieved party to apply for review".**

13. It follows that if the effect of rule 33 was to fetter the wide discretion given to the Court by section 82 of the Act I would have no hesitation in declaring that rule *ultra vires* the parent legislation. However, that is not the view I take of the matter. As was stated in the above cited case the rule is perhaps unnecessary, but serves to give guidance to the court on what considerations to take into account when the application for scrutiny and recount is made by a party rather than on the Court's own motion.
14. Apart from that rule 17 of the aforesaid Rules provides:

> ***(1) Within seven days after the receipt of the last response to a petition, the court shall schedule a pre-trial conference with the parties in which it shall—***
>
> ***(a) frame contested and uncontested issues in the petition;***
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> ***(b) analyse methods of resolving contested issues;***
>
> ***(c) consider consolidation of petitions in cases where more than one petition is filed with respect to the same election;***
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> ***(d) deal with all interlocutory applications and decide on their expeditious disposal;***
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> ***(e) confirm the number of witnesses the parties intend to call;***
>
> ***(f) give an order for furnishing further particulars;***
>
> ***(g) give directions for the expeditious disposal of the suit or any outstanding issues;***
>
> ***(h) give directions as to the place and time of hearing the petition;***
>
> ***(i) give directions as to the filing and serving of any further affidavits or the giving of additional evidence;***

(j) limit the volume or number of pages of any copies of documents that may be required to be filed; or

(k) make such other orders as may be necessary to prevent unnecessary expenses and to ensure a fair and effectual trial.

(2) The court shall not allow any interlocutory application made after the hearing of the petition has commenced if the interlocutory application is brought before the commencement of the hearing of the petition.

15.It is therefore clear that under rule 17(1)(d) of the Rules the Court is empowered during the pre-trial conference to deal with all interlocutory applications and decide on their expeditious disposal. In my view one of the applications that the court may deal with at this stage is an application for recount and scrutiny and pursuant to the provisions of section 82 of the Act the Court may allow such an application if to do so would expedite the hearing of the petition. Similarly the Court is empowered under rule 17(g) and (k) to give directions for the expeditious disposal of the suit or any outstanding issues and make such other orders as may be necessary to prevent unnecessary expenses and to ensure a fair and effectual trial. In my view in ordering for a scrutiny and recount the Court need not necessarily deal with a pending application under rule 17(1)(d) but may invoke its powers under section 82 of the Act as read with rule 17(1)(g) and (k) of the Rules and summarily make an order for recount and scrutiny at the time of the pre-trial directions and that may be done even prior to the taking of any evidence since a hearing as rightly submitted by Ms Mtekere based on *Black's Law Dictionary*, 8th Edn. page 737 is:

"A judicial session, usually open to the public held for the purpose of deciding issues of fact or of law sometimes with witnesses testifying".

16.That is exactly what the court did in this matter. Even before the advent of the current rules it was held in Reuben Nyanginja Ndolo vs Dickson Wathika Mwangi & 3 Others [2008] eKLR that:

"Scrutiny of vote is not only for the purposes of striking off votes as contemplated by section 26(1) of the National Assembly and Presidential Elections Act. That is but one of the purposes of scrutiny which, in the absence of any definition in the Act has been defined as a reviewing of the ballot papers following a court order. But another purpose of scrutiny is to assist the court to investigate if the allegations of irregularities and breaches of the law complained of by the petitioner are valid. Other purposes of the scrutiny would be to assist the court assess whether there would be just cause to limit the time within which the petitioner or any of the respondents should complete his case as envisages by rule 20 of the Election Rules. Another list of scope of scrutiny a court can undertake is the scrutiny of materials which do not pertain to the election in question. The order for scrutiny can be made at any stage of the hearing before final judgement, whether on the Court's own motion or if a basis laid requires so."

17.Once such directions are given the pending application becomes superfluous and is nolonger relevant. The power of the Court to make such order are further grounded on the overriding objective stipulated in rule 4 of the Rules which provides:

(1) The overriding objective of these Rules is to facilitate the just, expeditious, proportionate and affordable resolution of election petitions under the Constitution and the Act.

(2) The court shall, in the exercise of its powers under the Constitution and the Act or in the interpretation of any of the provisions in these Rules, seek to give effect to the overriding objective

18. These provisions are further Constitutionally underpinned by Article 159(2) of the Constitution which provides:
In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

> ***(a) justice shall be done to all, irrespective of status;***
>
> ***(b) justice shall not be delayed;***
>
> ***(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);***
>
> ***(d) justice shall be administered without undue regard to procedural technicalities; and***
>
> ***(e) the purpose and principles of this Constitution shall be protected and promoted.***

19. To drive the point home the Court of Appeal while dealing with similar provisions under the Civil Procedure Act and the Appellate Jurisdiction Act held in **John Gakure & 148 Others vs. Dawa Pharmaceutical Co. Ltd & 7 Others Civil Application No. 299 of 2007**:

> **"jurisdiction of the Court has been enhanced and its latitude expanded in order for the court to drive the civil process and to hold firmly the steering wheel of the process in order to attain the overriding objective and its principal aims. In the court's view, dealing with a case justly includes *inter alia*, reducing delay, and costs, expenses at the same time acting expeditiously and fairly. To operationalise or implement the overriding objective calls for a new thinking and innovation and actively managing the cases before the court, including the granting of appropriate interim relief in deserving cases".**

20. Similarly in **Stephen Boro Gitiha vs. Family Finance Building Society & 3 Others Civil Application No. Nai. 263 of 2009,** it was held *inter alia* that:

> **"The overriding objective overshadows all technicalities, precedents, rules and actions which are in conflict with and whatever is in conflict with it must give way. A new dawn has broken forth and we are challenged to reshape the legal landscape to satisfy the needs of our time. The court must warn the litigants and counsel that the courts are now on the driving seat of justice and the courts have a new call to use the overriding objective to remove all the cobwebs hitherto experienced in the civil process and to weed out as far as is practicable the scourge of the civil process starting with unacceptable levels of delay and cost in order to achieve resolution of disputes in a just, fair and expeditious manner. If the often talked of backlog of cases is littered with similar matters, the challenge to the courts is to use the new "broom" of overriding objective to bring cases to finality, by declining to hear unnecessary interlocutory applications and instead to adjudicate on the principal issues in a full hearing if possible".**

21. The purpose for ordering scrutiny and recount was restated in the case of **William Maina Kamanda vs Margaret Wanjiru Kariuki& 2 others (2008) eKLR**, as follows:-

i. **"to investigate the truthfulness of the allegations made;**
ii. **to assist the court to investigate if the allegations of the irregularities and breaches of law complained of are valid;**
iii. **to assist the court to determine the valid votes cast in favour of each candidate that contested the parliamentary election; and**

iv. **to assist the court assess whether there would be just cause to limit the time within which the petitioner or any of the Respondents should complete his case."**

22. In this petition the difference in votes between the petitioner and the 1st respondent was 11 votes. In **Hassan Joho vs. Hotham Nyange & Another Mombasa HCEP No. 1 of 2005 [2008] 3 KLR (EP) 500, Maraga, J** (as he then was) expressed himself as follows:

> **"An order for scrutiny can be made when it is prayed for in the petition itself and when reason for it exists but not as a matter of course…..There is neither a rule that a petitioner must first call evidence and lay a basis before scrutiny is ordered; nor is there one that scrutiny will always be ordered whether or not a basis is laid….However, where the vote margins are narrow scrutiny was ordered without laying any foundation…..Scrutiny has also been ordered without laying foundations even where the margins are wide on the ground that a recount may lead to an expeditious disposal of the petition…..Whereas where margins are very narrow justice will be done and seen to be done if scrutiny and recount is ordered right from the word go, where the margins are high scrutiny should not be done without laying a foundation simply to expeditiously dispose of petitions and save the time which would otherwise have been spent on full hearing as expediency should not be the sole or main factor in ordering scrutiny since courts are there to hear cases including election petitions and should not resort to short cuts for their own expediency."**

23. However, where the vote margin is narrow, courts have been more inclined to order scrutiny even without the petitioner laying a foundation. For instance, scrutiny was ordered in **Onamu vs. Maitsi Election Petition No. 2 of 1983** where the margin was 30 votes; **Kirwa vs Muliro Election Petition No. 13 of 1988** where the margin was 7 votes and **Hemed Said vs. Ibrahim Mwaruwa Election Petition No. 1 of 1983** margin of 62 votes. However what amounts to a narrow margin is a matter of fact based on the circumstances of the case. Where for example only 5 voters cast their votes and the winner gets 3 votes while the loser gets two votes, whereas the margin is only one vote, that may not necessarily mean that the margin is small. Each case must be decided on its peculiar circumstances.
24. Generally and in many jurisdictions, courts have found that the narrower the margin the more likely that results were affected substantially. See **Kiiza Besigye vs Electoral Commission and Y.K. Museveni Presidential Petition No.1 of 2006 (Uganda).**
25. A decision whether or not to vary, set aside or review earlier orders is an exercise of judicial discretion and the Court ought only to exercise such discretion if to do so would serve a useful purpose.
26. Taking into account the foregoing I am not satisfied that if the orders sought in this application are granted there would be any useful purpose served save for the delay in expediting the hearing and determination of the present petition.
27. In the result the order that commends itself to me and which I hereby make is that the Motion dated 5th July 2013 lacks merits and the same is hereby dismissed with costs to the petitioner.

Dated at Mombasa this 11th Day of July 2013

G.V. ODUNGA

JUDGE

Delivered in the presence of

MS Mtekere for Mr. Kilonzo Jnr.....for the Petitioner

Mr. Abed ….....for the 1st Respondent

Mr. Abed for Nyamodi.....for the 2nd and 3rd Respondents