



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ELECTION PETITION NUMBER 7 OF 2013
IN THE MATTER OF THE ELECTIONS ACT NO 24 OF 2011 AND THE REGULATIONS
MADE THEREUNDER

AND

IN THE MATTER OF THE ELECTION FOR THE MEMBER OF THE NATIONAL
ASSEMBLY FOR BALAMBALA PARLIAMENTARY CONSTITUTENCY

AND

IN THE MATTER OF AN ELECTION PETITION

BETWEEN

MOHAMMED MAHAT KUNO.....PETITIONER/APPLICANT

VERSUS

ABDIKADIR OMAR ADEN.....1ST RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....2ND RESPONDENT

TITUS MUTEMI.....3RD RESPONDENT

RULING

1. The Petitioner's/Applicant's Notice of Motion is dated and filed on 9th July 2013. His affidavit in support of the said application is sworn on the same date. The Application seeks the following orders:
 - i. **THAT, there be a scrutiny of the written statements made by the Presiding Officers in the following polling stations in Balambala Constituency in the General Elections held on 4th March 2013 where voting extended beyond the stipulated polling hours of between 6.00 a.m. to 5.00 p.m. ;**
 - a. **Modika primary school**
 - b. **Sankuri Primary School**
 - c. **Saka Primary School**

- d. **Atheyley Primary School**
 - e. **Shabaha Primary School**
 - f. **Raya Primary School**
 - g. **Dogob ECD Center**
 - h. **Dololo Weyn Primary School**
 - i. **Dalolo Midi ECD**
 - j. **Balich Primary School**
 - k. **Kasha Primary School**
 - l. **Danyere Primary School**
- ii. **THAT, there be a scrutiny of copies of the registers used in all forty (40) polling stations of Balambala Constituency in the General Elections held on 4th March 2013.**
 - iii. **THAT, there be a scrutiny of the marked copies registers used in all forty (40) polling stations of Balambala Constituency in the General Elections held on 4th March 2013.**
 - iv. **THAT, there be a scrutiny of the Polling Station Diaries kept by the Presiding officers in all the polling stations in Balambala Constituency in the General Elections held on 4th March 2013 except Mathahlibah ECD Centre.**
 - v. **THAT, the costs of this application be in the Petition.**
2. The Petitioner relied on the provisions of the Elections (General) Regulations, 2012 (hereinafter referred to as “The Regulations”) and those of Article 86 of the Constitution as grounds in support of his application. The requirements under the said Article 86 of the Constitution were that the 2nd Respondent was required to ensure that:-
 - a. **Whatever voting method was used, the system had to be simple, accurate, verifiable, secure, accountable and transparent;**
 - b. **The votes cast were counted, tabulated and the results announced promptly by the presiding officer in each Polling Station;**
 - c. **The results from the Polling Stations were openly and accurately collated and promptly announced by the Returning Officer; and**
 - d. **Appropriate structures and mechanisms to eliminate electoral malpractice were put in place, including the safekeeping of election materials.**
 3. The Petitioner set out *extenso* the said grounds in his Supporting Affidavit. He averred that in view of the evidence of the witnesses and that of the Returning Officer, it was necessary to scrutinize the Polling Day Diaries. He added that the scrutiny was also necessary as the results declared by the 3rd Respondent on 6th March 2013 confirmed that the number of total votes cast for the Presidential, Gubernatorial, Senatorial, Parliamentary and Women County Representative differed within the Constituency which fact, he stated, was not controverted by the Respondents.
 4. His written submissions were dated and filed on 19th July 2013. It was his submission that Article 1 of the Constitution of Kenya, 2010 provided that elections were an expression of the sovereign will of the people to be governed by the Constitution of Kenya, 2010. He submitted that every Kenyan citizen was entitled to the right to make political choices in accordance with Article 38 (2) of the Constitution of Kenya, 2010 which provides that: **“(2) Every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for— (a) any elective public body or office established under this Constitution; or (b) any office of any political party of which the citizen is a member.”**
 5. It was his argument that Election Petitions were not normal trials. The difference in the two trials was evident as the standards and tests to be met in Election Petitions could be found in Article 86 of the Constitution. This required the 2nd Respondent to ensure that whatever voting method was used during the elections, the system had to be simple, accurate, verifiable, secure, accountable and transparent. Further, the 2nd Respondent was required to ensure that there were in place, appropriate structures and mechanisms to eliminate electoral malpractice.
 6. It was the Applicant's averment that the question as to when an order for scrutiny could be granted was expressly answered in the case of **William Maina Kamanda v Margaret Wanjiru Kariuki Nairobi E.P. No 5 of 2008 [2008] eKLR** where Kihara Kariuki J (as he then 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... there is ground for believing that there were irregularities in the election process or if there was a mistake or mistakes on the part of the Returning Officer or other election officials."

7. The Petitioner contended that the evidence tendered during the hearing and especially that of the 3rd Respondent justified the need for enquiry. It was the Petitioner's submissions that the evidence of all the witness and in particular the evidence of the Returning Officer during cross-examination justified the need for an inquiry. This is because of the disparity in votes which was not denied by the Respondents. In addition, an inspection of the Form 35s supplied to the court by the 2nd Respondent showed cancellations and alterations.
8. The Petitioner submitted that the Form 35s annexed to the 3rd Respondent's Replying Affidavit confirmed that there were multiple cancellations and alterations of figures and results which were not countersigned either by the Presiding Officer or agents. He gave an instance of Danyere Primary School – Stream 1 where there was cancellation and alteration of total number of votes cast and the same was not countersigned. He said that the total number of valid votes cast in respect of each candidate was wrongly stated to be 449 whereas the figures only added up to 339 votes.
9. The Petitioner averred that cancellations and alterations of the total number of votes, total number of votes cast for all candidates and in one particular case the total number of votes cast for **IBRAHIM MOHAMED SALAT**, number of spoilt ballot papers, total number of rejected votes, total number of registered voters and total number of valid votes cast were evident when one looked at the individual and respective Form 35s of Danyere Primary School Stream 1, Saka Primary School Streams 1 and 2, Sankuri Primary School Streams 1 and 2, Raya Primary School Stream 2, Atheyley Primary School Stream 2, Shabaha Primary School, Dololo Weyn Primary School, Dololo Midi ECD Centre and Modika Primary School Stream 3.
10. To support his argument that there was need to scrutinize Form 35s, he relied on the case of **William Kabogo Gitau vs. George Thuo & 2 others [2010] eKLR where Kimaru J said as follows:- "... it was clear to the court that where there are cancellations and alterations, common sense dictates that...., the same should be countersigned..."**
11. It was also the Petitioner's position that the Presiding Officer did not also make any statutory comments on the declaration forms explaining the instances where agents did not sign the forms or refused to sign the same. The Petitioner submitted that in Danyere Primary School Stream 1, Balich Primary School, Kasha Primary School, Saka Primary School Stream 2, fewer than three (3) agents for the Parliamentary candidates signed the respective Form 35s but no reasons were written in the part for Statutory Comments indicating refusal of the other agents to sign.
12. It was also the Petitioner's argument that in Danyere Primary School Stream 2, Dogob ECD Centre Stream 1, Saka Primary School Stream 1, Sankuri Primary School Streams 1 and 2, Raya Primary School Streams 1 and 2 and Dolo Weyn Primary School, the Form 35s were signed by more than three agents yet there were only three (3) candidates running for the Parliamentary seat.
13. The Applicant averred that as part of the mechanisms to eliminate electoral malpractices, **Regulation 79** of the **Regulations** stipulated that immediately after announcing the results in their polling station, the Presiding Officer was required to request each candidate or agent present to append his or her signature on **Form 35**, the declaration in respect of the elections and that further, in the event any candidate or agent refused to sign the **Form 35** or was absent, the Presiding Officer was required to record the fact of their refusal to sign or absence in the declaration form.
14. It was also the Petitioner's argument that the Presiding Officer did not record in the Statutory Comments in Form 35 the fact that voting in Danyere Primary School was extended until 5th March 2013 and he did not in fact sign the said Form. According to the Petitioner's submissions, the polling hours were extended in Modika Primary School, Dogob ECD Centre, Libahlo Primary School, Sankuri Primary School, Raya Primary School, Shabaha Primary School, Saka Junction, Atheyley Primary School, Silkey among other polling stations.
15. While the Petitioner did not dispute that the Presiding Officers had a discretion to extend the polling where extension was warranted and justifiable in accordance with Regulation 64 (3) of the Regulations, his contention was that the same had to be recorded in accordance with Regulation 64 (4) of the said Regulations where it is provided as follows:-

(4) Where hours of polling have been extended as contemplated under sub-regulation (3), the presiding officer shall give a detailed report on the clear facts justifying such extension of hours.

16. Another complaint by the Petitioner was that the respective Presiding Officers did not sign or date Form 35s in Danyere Primary School Streams 1 and 2, Saka Primary School Stream 1 and Sankuri Primary School Stream 2. In Shabaha Primary School, the Presiding Officer and the Deputy Presiding Officer signed the Form 35s on two different dates, the Presiding Officer on 4th March 2013 and the Deputy Presiding Officer on 5th March 2013.
17. In respect of Modika Primary School, the Petitioner said that the names of the candidates recorded on the declaration were incomplete and instead of the official names of the candidates as they appeared on the ballot boxes, their nicknames were recorded for example, instead of recording the 1st Respondent's name in full, it was recorded as 'ABDI K while that of OMAR SHARIF MOHAMED was recorded as OMAR M. SHARIF in Streams 1 and 2 respectively.
18. It came out during the hearing of the Petition that ninety (90%) per cent of the voters were assisted. The evidence of the 3rd Respondent was that they marked the registers "AV" but did not give the reasons. It was the Petitioner's case that if that was the case, then it was in contravention of Regulation 72 (6) of Regulations which provides as follows: - **"Where a presiding officer grants the request of a voter under this regulation, the presiding officer shall record in the polling station register against the name of the voter the fact that the voter was assisted and the reason for the assistance."**
19. It was the Petitioner's submission that the 3rd Respondent could only attempt to proffer an explanation as to what exactly transpired as none of the Presiding Officers of the different Polling Stations were called to testify. It was his case that the statutory comments were written in the Polling Day Diaries and not in Form 35s as required by the Elections law thus making it difficult to verify the results.
20. He averred that the Polling Day Diaries which are not provided for in the Elections Act (hereinafter referred to as "The Act") but in Article 86 of the Constitution mandated the Returning Officers to explain extension of time in the various polling stations. It was his submission that it was necessary to scrutinize the Polling Day Diaries to confirm if the detailed reports were written by the presiding officers as was required under Regulation 64 (4) of the Regulations as the 2nd Respondent used the polling day diary to record these events. He argued that the said Diaries should be scrutinized and a report made to the court to confirm whatever was recorded in the Polling Day Diaries to verify the complaints made and therefore confirm if the election was verifiable, accurate and transparent.
21. The Petitioner also pointed out that the Biometric Voter Identification kits refused to function as a result of which the Presiding Officers resorted to the manual registers. It was his contention that many voters were disenfranchised as their names were missing from the registers. It is on that basis that he sought to have the Registers used during the elections of Balambala Parliamentary seat scrutinized.
22. He further sought the scrutiny of the ballot papers on the basis that the total votes cast for the Presidential, Gubernatorial, Senatorial, Parliamentary, Women County Representative and County Representative in Balambala Constituency deferred. It was his contention that this variance was a clear manipulation of the election process through irregular issuing of ballot papers to influence the outcome of the election.
23. He cited Regulation 69 (2) of the Regulations which provided that a voter issued with ballot papers was required to place all ballots in the ballot box. He pointed out that sub-regulation (3) makes it an electoral offence for a voter who fails to place in the ballot box a ballot paper that is not spoiled.
24. The Petitioner averred that immediately after closing of polling at his or her station, the Presiding Officer was required under Regulation 73(2) of the Regulations to make in the Polling Station Diary a written statement of:
 - a. **the number of ballot papers issued to him or her under regulation 61;**
 - b. **the number of ballot papers, other than spoiled ballot papers,**

issued to voters;

(c) The number of spoiled ballot papers; and

(d) The number of ballot papers remaining unused.

25. He stated that it was necessary that the court make a determination as to whether the said declarations in the Form 35s were reflective of the votes cast and to verify whether or not the 2nd and 3rd Respondents had complied of the Regulations. He was clear that the 2nd Respondent's contentions that the elections in Balambala Constituency were free, fair, transparent, verifiable and credible could only be made through a scrutiny. He did in fact submit that the purpose of the scrutiny was that he was seeking to establish to what extent the 2nd Respondent complied with the regulations.

26. In this regard, the Petitioner relied on the case of **Philip Mukwe Wasike Vs James Lusweti Mukwe & 2 Others [2013] eKLR** where Omondi J stated as follows:—"If we are to uphold the principle of fairness, transparency, accountability and verifiability, then it is abundantly clear that the court needs to look at some of the irregularities raised, which appears to dent the credibility of the electoral process in Kabuchai Constituency."

27. The Petitioner cited the case of **DTA Vs Prime Minister & Others [1996] 3 LRC** where the Learned Judge, Hannah J, stated as follows: "...It is obviously in the interests of justice that an election application, and for that matter any litigation, should be conducted in an open manner and that no party should be denied access to documents in custody of another party which might be useful to him in the conduct of his action or application."

28. The Petitioner also referred this court to the decision of the **Court of Queen's Bench of Manitoba** in the case of **Dorothy E. Browton Vs Jean Hart-Kangas Suit #CI 98-01-10265** consolidated with; **John McCarron Vs The Returning Officer of the City of Winnipeg & another Suit #CI 98-01-10373** and **Jean Hart-Kangas Vs. The Returning Officer of the City of Winnipeg & another, Suit #CI 98-01-10221 1999 CanLII 14066 (MB Q.B.)** where in quoting Barry J. in **Harris Vs. Ryan (1997) 44 M.P.L.R. (2d) 194 (Nfld.S.C.)** the learned judge, Glowacki, J. held as follows:—"In **Harris Vs. Ryan (1997) 44 M.P.L.R. (2d) 194 (Nfld.S.C.)**, Barry J. recognized the public interest in interpreting legislation dealing with elections in a purposive fashion to encourage public access and stated as follows at p. 201: "When interpreting legislation relating to elections, one may reasonably conclude 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 courts must not ignore the desirability of avoiding undue delay in seeing the completion of recounts or scrutiny and avoiding unnecessary expense for the taxpayer. Where, as here, there is nothing to indicate the greater access to election documents is going to unduly delay or increase the cost of a recount or scrutiny, the courts should give an interpretation to the ambiguous language which favours encouraging openness regarding information on how the election has been conducted."

29. Most importantly, it was the Petitioner's submissions that he was entitled to information as enshrined in Article 35 of the Constitution of Kenya which expressly states that:—**35. (1) Every citizen has the right of access to—**

(a) Information held by the State; and

(b) Information held by another person and required for the exercise or protection of any right or fundamental freedom

30. The Petitioner argued that no party would be prejudiced by the scrutiny, if ordered by the court. However, if it was granted, it would vindicate the 2nd Respondent or confirm the said irregularities. He therefore asked that this court exercises its discretion and allow the application.

31. The Petitioner submitted that he was entitled to an order for scrutiny as he had laid sufficient basis why the same should be granted by this court. He relied on the case of **Justus Mongumbu Omiti**

- vs. Walter Enock Nyambati Osebe & 2 others [2011] eKLR Asike Makhandia J (as he then was) observed as follows: - “I take the view that an election petition is an inquiry. This I have constantly stated. As such 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 indeed the will of the voters in a constituency must come under spotlight, scrutiny and interrogation... In any event I am required to determine this petition without undue regard to technicalities.”**
32. It was the Petitioner’s further submission that this Honourable Court, even if a party had not laid sufficient basis, still has discretion to order for scrutiny *suo moto*, without necessitating such a party to lay basis for such an order. In the case of **Said Hemed Said Vs. Emmanuel Karisa Maitha & Another Election Petition No. 1 of 1998 [Unreported]** Hayanga J (as he then was) had this to say: **“... Thirdly Mr. Gikandi submitted that in the case where the Petition Courts have allowed scrutiny without foundation being laid it has been because the vote margin has been small. I agree with Mr. Gikandi partly on this reasoning but it is pertinent to note that it is not a rule so far either of law or of practice...I think I would use my discretion without accepting or rejecting the allegations of the Petitioner and without requiring him to lay a foundation to order a scrutiny...”**
33. The Petitioner also referred this court to several cases detailing what the purpose of scrutiny was. He cited the case of **William Maina Kamanda vs. Margaret Wanjiru Kariuki Nairobi EP No 5 of 2008 [2008] eKLR** where Kihara Kariuki J (as he then was) said as follows:-**“... the court is under a duty to investigate the truthfulness or otherwise of these allegations and scrutiny of the ballots would assist in this regard... purpose of the scrutiny is to assist the court to investigate if the allegations of irregularities and breaches complained of by the Petitioner are valid...to assist the court in determining the valid votes cast...”**
34. He also relied on the case of **Joho & 2 others vs. Nyange & another (No. 3) (2008) 3 KLR (E.P.) 388** where Maraga J (as he then was) held in that:-**“...Scrutiny is ordered 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.”**
35. Similarly in **Philip Mukwe Wasike Vs James Lusweti Mukwe & 2 Others** (Supra) relied upon by the Petitioner where Omondi J observed as follows:-

“The purpose of scrutiny is:-

- 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.”**
36. The 1st Respondent swore a Replying Affidavit on 17th July 2013 and the same was filed on the same date. He set out the provisions of Rule 33 of the Elections (Parliamentary and County) Elections Rules, 2013 (hereinafter referred to as “the Rules”) and the Act that governed the process of scrutiny of votes. It was his contention that the Petitioner had not laid any basis for the court to grant an order for scrutiny as had been prayed in the present application.
37. In his written submissions dated and filed on 23rd July 2013, the 1st Respondent submitted that the primary issue for determination is whether the application had met the legal test of the legal/guiding principles for the grant of an order of scrutiny. He pointed out that if an application meets the legal test, then it will be granted *ex debito justitiae* subject to the court’s power of limitation of the scope of the scrutiny. However, should it fail the test, then it should be declined.
38. The 1st Respondent submitted that Section 82(1) of the Act and Rule 33 of the Rules had to be read together. An applying party had to meet the criteria in both the Act and the Rules.
39. Section 82 (1) of the Elections Act 2011 provides as follows:-

“ (1) 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 scrutiny of votes to be carried out in such a manner as the election court may determine.

(2) Where the votes at the trial of an election petition are scrutinized, only the following votes shall be struck off:-

- a. **the vote of a person whose name was not on the register or list of voters assigned to the polling station at which the vote was recorded or who had not been authorized to vote at that station;**
 - b. **the vote of a person whose vote was procured by bribery, treating or undue influence;**
 - c. **the vote of a person who committed or procured the commission of impersonation at the election;**
 - d. **the vote of a person proved to have voted in more than one constituency;**
 - e. **the vote of a person proved, who by reason of conviction of an election offence or by reason of the report of the election court, was disqualified from voting at the election;**
 - f. **the vote cast for a disqualified candidate by a voter knowing that the candidate was disqualified or the facts causing the disqualification, or after sufficient public notice of the disqualification or when the facts causing it were notorious;**
3. **The vote of a voter shall not, except in the case specified in subsection (1) (e) be struck off under subsection (1) by reason only of the voter not having been or not being qualified to have the voter's name entered on the register of voters.**

40. Rule 33 of the Rules stipulates as follows:-

1. **The parties to the proceedings may, at any stage, apply for the scrutiny of votes for purposes of establishing the validity of the votes cast.**
2. **Upon 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.**

41. The 1st Respondent relied on the case of **Richard N Kalembe Ndile vs. Dr Patrick Musimba**

- Mweu and 2 Others, Machakos High Court Election Petition Number 1 of 2013 as consolidated with 7 of 2013** where Majanja J said as follows: - **“There is no dispute that election court has jurisdiction to order scrutiny of the votes. Section 82(1) of the Elections Act, 2011 (“the Act”) gives the court wide jurisdiction in this respect. It states that, “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 scrutiny of votes to be carried out in such a manner as the election court may determine.”**
42. He also relied on the case of **William Maina Kamanda vs. Margaret Wanjiru Kariuki (Supra)** to guide the court on the principles that it should adopt while considering an application for scrutiny. Warsame J also considered this rationale in the case of **Dickson Daniel Karaba v Hon. Ngata Kariuki and Nairobi EP No. 1 of 2008 (Unreported)** where he held that: - **“the purpose of the exercise was to ascertain whether there exist any material discrepancies between the result captured in Form 16A which necessitates the determination of the vote cast and obtained by each aspirant. It is only after this exercise that the court can form an opinion whether the results in the Form 17A are correct.”**
43. The 1st Respondent also relied on the holding by the Hon. Justice Tuiyott in **Philip Ogutu vs. Michael Aringo and 2 Others Busia EP No.1 of 2013 (Unreported)** after setting out the law regarding scrutiny stated that:- **“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 (see for instance the Court of Appeal decision in Masinde vs. Bwire and Another (2008) 1KLR (EP) 547.”**
44. Ngaah J in **Peter King’ara v IEBC and Others Nyeri EP No.3 of 2013 (Unreported)** also came to a similar conclusion.
45. The 1st Respondent also cited the case of **Rashid Hamid Ahmed Amana v IEBC and Others Malindi EP No. 6 of 2013 (Unreported)** where Kimaru J stated that: - **“[34] [T]he recent trend is that scrutiny can only be ordered where a Petitioner lays sufficient basis....Scrutiny and recount therefore can be used by the court as a basis of declaring a petitioner as having been duly elected in the position that is the subject of the election petition.”**
46. Further in the **Phillip Ogutu vs. Michael Aringo Busia EP No 1 of 2013 (Unreported)**, Tuiyott J stated thus:-**“There would be several reasons why scrutiny should not be ordered as a usual course. First, there is a need to guard against an abuse of the process. I would agree with Mr. K’opot that a party must not be allowed to use scrutiny as a fishing expedition to discover new or fresh evidence. .. Scrutiny should not be looked upon as a lottery. Secondly, an exercise of scrutiny is often arduous and laborious.” See paragraph 40.**

“A Court making an order for scrutiny will define its scope. Whatever that scope, it is invariably a painstaking exercise. This is not a route to be taken without good cause. So this Court, I would repeat, will have to be satisfied that scrutiny is necessary for the just resolution of this Petition. In considering whether or not a justification has been made, I must keep in mind that as an Election Court one of my primary duties is to examine whether an election has been conducted in a free, fair, impartial, neutral, efficient, accurate and accountable manner. Article 81 of the Constitution highlights those as some of the principles that must be complied with in an electoral system.”

47. It was the 1st Respondent's submission that the Applicant had failed the test of meeting the legal principles that form a basis for scrutiny. He added that an examination of “polling station diaries kept by the Presiding Officers” does not relate to a request for scrutiny of votes within the meaning of section 82 of the Act and Rule 33 of the Rules and it is not one of the documents within the limited scope of documents to be examined under Rule 33 of the Rules. It was also his submission that there was no grievance in the Petition and or any of the pleadings relating to filling of polling station diaries.
48. The 1st Respondent contended that the Petitioner did not allude to any piece of evidence demonstrating non-compliance with any requirement required to be entered in the diary as a basis for an order of scrutiny. To the contrary, the Petitioner wanted to scrutinize the Polling Day

Diaries to satisfy himself as to whether or not there was compliance. This clearly befitted the dictum of Justice Tuiyott above that **“it would be an abuse of process to allow a party to use scrutiny for purposes of chancing on new evidence. Scrutiny should not be looked upon as a lottery.”**

49. The 1st Respondent took issue with Prayers 2 and 3 in the Application which sought a scrutiny of copies of the registers and marked copies of registers in all forty (40) polling stations of Balambala Constituency. He urged the court to disallow the same because the order was not and did not relate to a request for scrutiny of votes within the meaning of section 82 of the Act and Rule 33 of the Rules. The order was a blanket prayer for scrutiny as it was not “confined to the polling stations in which the results are disputed” within the meaning of Rule 33 of the Rules.
50. The 1st Respondent invited this court to be guided by the dictum in **Joash Wamang’oli Vs The Independent And Boundaries Commission & 2 Others, Bungoma High Court Election Petition Number 6 Of 2013** where it was observed thus: - **“However in the same breath, it will be overtly indulgent for the court to pay regard to each polling station the petitioner whimpers about, even if it did not feature in the pleadings or in evidence.”**
51. The 1st Respondent contended that the prayers sought by the Applicant were not based on any specific allegations in the petition or contradictory evidence that required to be clarified through an order of scrutiny and in any event, the request was based on totally new evidentiary material introduced through the Petitioner’s Affidavit in support of the application herein.
52. It was the 1st Respondent’s submission that scrutiny of the written statements made by the Presiding Officers in the listed polling stations was also not and did not relate to a request for scrutiny of votes within the meaning of section 82 of the Act and Rule 33 of the Rules. He argued that the same was vague and ambiguous and it was incumbent upon the Petitioner to specify the exact written statements that he was referring to. This is because Regulations 73, 78 and 79 of the Election Regulations expounded on various statements that may be made by the Presiding officers.
53. The 1st Respondent submitted that the Petitioner had failed the test prerequisite to the grant of an order for scrutiny within the meaning of the law and that the only order that commended itself for granting was an order for dismissal of the Petitioner’s application with costs.
54. The Replying Affidavit for the 2nd and 3rd Respondents was sworn on 16th July 2013 and filed on the same date. It was sworn by the 3rd Respondent on his own behalf and that of the 2nd Respondent. The said Replying Affidavit contended that the scrutiny that the Petitioner had sought was based on allegations that were neither in the Petition or the Petitioner’s Affidavits of Witnesses but rather out arose out of evidence that was adduced during cross-examination. In addition, the 3rd Respondent contended that the statutory comments in Form 35s were not mandatory and there being no anomalies in the said Forms and the Voter Register, no purpose would be served by the scrutiny.
55. The 2nd and 3rd Respondents’ written submission were dated 22nd July 2013 and filed on 23rd July 2013. The 2nd and 3rd Respondents associated themselves with the submissions of the 1st Respondent. They stated that the Petitioner’s Application contravened the provisions of the Rules and that the same should be dismissed principally for the following reasons:-
 - a. **No sufficient basis had been set out to warrant an order for scrutiny. The basis for scrutiny must be set out in the Petition and supporting affidavit and during the hearing of the Petition.**
 - b. **The application had sought scrutiny in respect of polling stations that were not in dispute in the Petition. Under Rule 33(4) of the Rules, scrutiny was to be confined only to the polling stations in issue in the Petition and no more.**
 - c. **The Petitioner had not in his Petition challenged the validity of the votes cast in any of the polling stations to warrant the issuance of an order for scrutiny. There was no complaint on any figures (votes cast) as entered in the Forms 35 in any polling station.**
 - d. **There was no nexus established between the complaints raised by the Petitioner and the intended result of the scrutiny and as such, this Honourable Court was being required to engage in an academic exercise and a mere fishing expedition. Scrutiny had to be aimed at establishing a specific outcome as oppose to groping in the ocean/dark.**
 - e. **The Application sought scrutiny of polling station diaries which documents were not**

envisaged or provided for under Rule 33(4) of the Rules.

- f. **The Application sought scrutiny of copies of the registers and marked copies of registers used in all forty (40) polling stations in Balambala Constituency notwithstanding the fact that the Petitioner had in his pleadings not challenged the authenticity of any of the registers used. This request had no connection with the Petition filed.**
- g. **Other than copies of the marked register, the Petitioner had not (sic) in its Petition sought for scrutiny of:-**
 - i. **Written Statements by Presiding Officers.**
 - ii. **Copies of the Registers for all forty (40) polling stations.**
 - iii. **Polling Station Diaries.**

They submitted that the request for these documents did not lie and were not available having never been sought for in the Petition.

56. They also reiterated the 1st Respondent's submissions regarding Section 82(1) of the Act and Rule 33 of the Rules. They emphasized that the court had to be satisfied that there was sufficient reason to order for scrutiny or recount of the votes and further that the scrutiny was to be confined to the polling stations in which the results had been disputed.

57. It was the submission of the 2nd and 3rd Respondents that the Petitioner's application for scrutiny in respect of all the polling stations in the Constituency was misplaced as he had failed to particularize the results of the polling stations which were in dispute. They referred the court to Rules 10 (1)(e) and 10(3)(b), 12(2) and (3) of the Rules which provide as follows:-

- a. **Rule 10(1)(e) - An election petition filed under rule 8 shall state.....the grounds on which the petition is presented;**
- b. **Rule 10(3) (b) - An election petitions shall be supported by an affidavit made by the Petitioner containing the grounds on which relief and setting out facts relied on by the Petitioner.**
- c. **Rule 12(2) - The Affidavits by witnesses shall-(a) State the substance of the evidence and (c) Form part of the record of the trial and a deponent may be cross examined by the Respondents and re-examined in accordance with this rule.**
- d. **Rule 12(3) - Subject to sub rule (4) a witness shall not give evidence in behalf of the Petitioner unless an affidavit is filed in accordance with this rule.**

58. It was also their submission that the Petitioner could not rely on any facts unless they had been set out in the Petition and his Witness Statement which had to be subjected to cross examination and re-examination.

59. The 2nd and 3rd Respondents further argued that no evidence was led during the hearing of the petition in respect of the 32 stations set out in paragraph 4 of the Replying Affidavit of the 3rd Respondent and as such, the results from the polling stations were not disputed in any manner even in the course of the hearing.

60. There was no single averment, whether in the Petition or in the Affidavits, where the Applicant and his witnesses alleged that the results as reflected in the Form 35s did not reflect the actual count of votes of any candidate as announced at any polling station. The 2nd and 3rd Respondent reminded the court that it was the evidence of the Petitioner and his witnesses that they were not disputing the results as reflected in Form 35s in any of the polling stations.

61. The 2nd and 3rd Respondents relied on **Halsbury's Laws of England Volume 15 (4th edition)** at paragraph 840 it is stated:-**"Where a petitioner claims the seat for an unsuccessful candidate, alleging that he had a majority of lawful votes, the court has no jurisdiction to order any particulars except those specified."...A party to scrutiny is bound by his particulars".**

62. They also relied on the case of **Phillip Osore Ogutu v Michael Onyura Aringo & 2 Others (Supra)** where the court considered an application for scrutiny in respect of 15 polling stations, which included stations which were not disputed in the Petition. The court ruled in paragraphs 23

- and 25 of the ruling as follows: - **“The petition and the Affidavit in support should disclose the Petitioner’s cause of action and a cursory look at the two should reveal the petitioner’s case. For the Petitioner to deserve an order for scrutiny then, as a starting point, the Petition and the Affidavit in support must contain concise statements of material facts upon which the claim of impropriety or illegality of the casting or counting ballots is made. It is now opportune to say this. There can be no quarrel with the principle that any evidence that goes beyond pleadings must either be rejected outright or disregarded. I say this because in the Affidavit in support of the Application, the Petitioner has introduced new evidence and evidence that is extraneous to the Petition. This Court is not obliged to look at that evidence.”**
63. In the case of **Meru Election Petition No. 4 of 2013 - N’Nkiria Petkay Shen Miriti v Rangwa Samuel Mbae & Others** also relied upon by the 2nd and 3rd Respondents, Lesiit J was faced with a similar application for scrutiny in which the Applicant sought for a blanket order for scrutiny and had not particularized the results of the polling stations disputed. The Court stated as follows at pages 22 and 26 of the decision:- **“Rule 33(4) makes it clear that where a Petitioner seeks scrutiny, he must make it clear the polling stations whose results are disputed as these are the ones in relation to which scrutiny will be done. The court should not grant a blanket order for scrutiny in all polling stations unless they were all pleaded as disputed results in the petition....For the Petitioner to deserve an order for scrutiny then, as a starting point, the Petition and the Affidavit in support must contain concise statements of material facts upon which the claim of impropriety or illegality of the casting or counting of ballots is made...”**”**The Petitioner must state clearly and concisely what it is he is alleging was done irregularly and upon what evidence and facts he basis his claim.”**
64. It was the 2nd and 3rd Respondents further submission that the Petitioner’s application was an abuse of the court process because it was fishing in nature. According to the 2nd and 3rd Respondents, it was apparent that the Petitioner was, through the scrutiny exercise expecting to stumble upon new evidence which would bolster the Petition as all the issues raised in the Petition had been sufficiently addressed by the Respondents.
65. They contended that the Petitioner’s assertions regarding purported multiple cancellation and/or alteration of Form 35s, validity of the results declared, failure by the Presiding Officers to make statutory comments on the Forms 35, errors in computation of votes received by the respective candidates and improper marking of registers in respect of said assisted votes were new issues that had been introduced in the determination of the application herein. In any event, they argued, it was not a mandatory requirement to make statutory comments in Form 35s.
66. The 2nd and 3rd Respondents averred that the Petitioner’s spirited attempts to introduce new disputes in respect of new polling stations which were not disputed in the Petition were a brazen attempt to introduce an amendment to the Petition through the back door. They submitted that this was contrary to Section 76(4) of the Act.
67. Section 76(4) of the Act states as follows: - **A Petition filed in time may, for purposes of questioning a return or an election upon an allegation of an election offence, be amended with leave of the election court within the time within which the petition questioning the return or the election upon that ground may be presented.**
68. In reference to paragraph 14 of his submissions, it was the 2nd and 3rd Respondents' position that the Petitioner had sought to find refuge in Article 35 of the Constitution which deals with access to information. It was their argument that the said Article could not come into play in an application for scrutiny where it was not alleged that documents were sought from the 2nd Respondent but not given. This is because the Petitioner did not file an application for supply of information and documents pursuant to the said Article, as happened in other Election disputes including the Presidential Election petition at the Supreme Court.
69. The 2nd and 3rd Respondents relied on the holding in **Garissa Election Petition No. 6 of 2013 Hassan Mohammed Hassan & Anor v Independent Electoral & Boundaries Commission & 2 Others** where in addressing an application for scrutiny, Onyancha J stated at page 4 of his decision said:- **“I have also carefully examined the Petitioner’s prayer for scrutiny and recount in the Petition. It is too wide since it seeks for scrutiny in respect of all the votes cast in all polling stations in the Wajir West Constituency. The likelihood of the alleged election**

misconduct taking place in every polling station in that constituency is possible but very unlikely. The Petitioners' wide and unlimited prayers for scrutiny in respect of all polling stations suggest a fishing expedition where amorphous intentions of the Petitioner are intended to be narrowed down and made logical or meaningful by the possible favourable findings of a scrutiny exercise. This Court cannot allow such misuse of its judicial discretion by a party"

70. It was their submission that for a proper basis to be laid for an application for scrutiny after hearing the parties, an applicant had first to demonstrate that there was a genuine dispute regarding the accuracy of the results as captured in Form 35s, which could not be resolved on the basis of the evidence adduced during the hearing and that an order for scrutiny was necessary for the effectual and conclusive determination of the said questions.
71. They further argued that the Petitioner's application for scrutiny was an after-thought. He did not seek a recount of the votes at the conclusion of the counting exercise as permitted under Regulation 80 of the Regulations.
72. Regulation 80(1) specifically states as follows:- **" A candidate or agent, if present when counting is completed, may require the presiding officer to have votes rechecked and recounted or the presiding officer may on his own initiative, have the votes recounted. Provided that the recount shall not take place more than twice."**
73. The 2nd and 3rd Respondents acknowledged that specific complaints were made with respect to Sankuri Primary School, Saka Primary School, Atheyley Primary School, Danyere Primary School, Kasha Primary School, Modika Primary School and Shabaha Primary School polling stations in the Petition and they set out below the complaints made and their relationship to the order for scrutiny together with our analysis as follows:-
 - a. **Violence – This complaint could not be deciphered during scrutiny;**
 - b. **Intimidation of URP supporters – No evidence was tendered. There was no relationship of this allegation to an order of scrutiny;**
 - c. **Late opening of polling stations- This was admitted during the hearing. Nothing further was expected to come out during scrutiny;**
 - d. **Late closing of polling stations- This was admitted during the hearing. The reasons for this were explained. Similarly, nothing further was expected to come out during scrutiny;**
 - e. **Results of various polling stations were not signed or authenticated by agents - No lawful agent came before the court, whether in person or by affidavit and demonstrated that they were present at the polling stations and were denied an opportunity to participate. There was no allegation that the results as indicated in Form 35 were not the results announced at the polling station following the counting of votes. In the absence of such a complaint, the scrutiny orders sought could only have been an afterthought, an attempt at a fishing expedition for new or fresh evidence and an abuse of the court process. In any event, Regulations 79(6) and (7) and Regulation 97 of the Elections (General) Regulations, 2012 were clear that non-attendance or refusal to sign of the declaration forms by the candidates or agents did not invalidate the results announced. Rule 62(3) of the Rules was relevant in this regard;**
 - f. **Failure to indicate Statutory Comments- This was not raised and/or pleaded either in the Petition and/or the Affidavits of Witnesses. Statutory comments are not among the mandatory requirements to be indicated in the Form 35 as stipulated by Regulation 83(1) (c) of the Elections (General) Regulations 2012;**
 - g. **Cancellation/corrections without countersigning – It was not sufficient to order scrutiny on this basis alone. The Petitioner had not demonstrated that the corrections were not justified and/or that the same did not reflect the votes cast and counted in respective polling stations. They urged the court not to order for scrutiny blindly;**
 - h. **Assisted Voters – The Petitioner did not produce evidence to demonstrate any irregularity with regard to voting by assisted voters. In any event, all candidates were affected since a big percentage of the population in the Constituency is illiterate and needed assistance as testified by all parties. No purposes would be served by a scrutiny;**
 - i. **Complaints by Agents – Only one formal complaint was demonstrated. The authenticity of that particular document could not be vouched for including a challenged signature of the**

- 3rd Respondent and a challenged stamp of the 2nd Respondent. The document itself contained obvious errors that fatally tainted its credibility;
- j. **Voters' missing in register – No evidence was tendered to confirm this allegation. The allegations remain as such. Even the alleged Mr. Mathobe of Danyere Polling Station was not called to testify;**

74. It was also their submission that witnesses agreed that taking into account the illiteracy levels, terrain and other logistical difficulties in the Constituency, the difference in the margin of votes between the 1st Respondent and Omar Shariff Mohammed which was 860 votes was not a narrow margin by all means to warrant scrutiny on its face alone.

75. They referred the court to the case of **Nyeri Election Petition No. 3 of 2013 Peter Gichuki King'ara v Independent Electoral & Boundaries Commission**, where the court considered instances when an order for scrutiny could be made. Ngaah J stated as follows:- **"However, I will not hesitate to invoke the provisions of Section 82(1) of the Elections Act No. 24 of 2011 and order for scrutiny if in the course of the proceedings such scrutiny becomes necessary for the effectual and conclusive determination of the questions before the court.....One further remark in that decision warrants consideration in this ruling; the margin of victory or loss, as the case may be, may influence the decision to opt for scrutiny or recount-the narrower the margin, the more likely the court will order for a recount....If the court found 1061 votes to be too wide a margin for a scrutiny and recount without laying a basis, I will not find any less, at least at this stage of the proceedings in a petition where the margin is in excess of 2000 votes."**

76. The 2nd and 3rd Respondents contended that the Petitioner's Application had no merit and prayed that the same be dismissed with costs to the Respondents.

77. In an article titled 'Challenging Elections' in the Scottish Legal Action Group Journal, 2007, Dr Heather Lardy had the following to say:- **"Electoral systems and technology have changed, voter and candidate qualifications have altered, human rights law has entered the regulation of the political process, but the law on petitions remains staunchly rooted in Victorian quasi-democratic precepts...Our democracy requires fundamental redesign of the processes for securing judicial scrutiny of the electoral process..."**

78. It was against the background of re-engineering the electoral laws that the promulgation of the Constitution in August, 2010 ushered in the re-birth of the new electoral system and processes which saw the enactment of the Act and subsidiary legislation. In interpreting this Constitution, the test is that the same must resonate with the standards set in Article 259 of the Constitution which provides that: **259. (1) This Constitution shall be interpreted in a manner that—**

(a) promotes its purposes, values and principles;

(b) advances the rule of law, and the human rights and fundamental

Freedom in the Bill of Rights;

(c) Permits the development of the law; and

(d) Contributes to good governance.

79. It is expected that disputes will arise even when there is good legislation to regulate the elections. As was aptly put by Denis Petit (OSCE / ODIHR) in Resolving Election Disputes, 2000:- **"Election disputes are inherent to elections. Challenging an election, its conduct or its results, should however not be perceived as a reflection of weakness ... but proof of the strength, vitality and openness of the political system...the right to vote would be merely abstract if the right to sue to enforce it was not guaranteed in law."**

80. The right to vote is expressed in the free political will of the sovereignty of citizens of Kenya. It is enshrined in **Article 38 (1)** of the Constitution and it provides that: - **(1) Every citizen is free to make political choices...**

81. The freedom entrenched in Article 38 of the Constitution was affirmed in the case of **Dr Calvin**

- Kadongo and Others v Transition Authority and Others Nairobi Petition No. 174 of 2013 (Unreported)** where Majanja, J held that:-“...The fundamental rights and freedoms guaranteed under the Bill of Rights are also given effect and realised within the framework of governance. [13] Chapter Seven and Eight of the Constitution titled “Representation of the People” and “The Legislature” respectively give effect to the principle of sovereignty of the people articulated in the Preamble and Article 1. These provisions are underpinned by various fundamental rights and freedoms, which include political rights guaranteed under Article 38, which are given effect by provisions dealing with elections.”
82. The same Constitution that gives every a citizen a right to exercise his free political has also enshrined in it his right to sue and enforce that right. It is for that reason that the court has no hesitation in finding that the Petitioner was entitled to lodge the Petition and the application herein. While it cannot be gainsaid that scrutiny is a monumental exercise that is costly and can cause delay in the determination of election disputes, the court also recognizes that the danger of delay and cost implications should not muzzle the right of an applicant to exercise his sovereign power either directly or democratically elected leaders as envisaged in Article 1 (2) of the Constitution.
83. In this regard, the court associates itself with the observations of Carnwath LJ in **R (England) v LB Tower Hamlets [2006] EWCA Civ 1742 20th December 2006** and the report of Sir Maurice Kay **Litigating the Public Interest (July 2006)** where it was stated thus:-“**In our judgment, public law principles for the award of costs are an appropriate guideline in the case of a legitimate and serious challenge to a ballot paper that was decisive of the outcome of an election. There is an important public interest in clarifying the legitimacy of the ballot and the vote on which the disputed paper depends. It would be contrary to the public interest to deter such scrutiny because of the disproportionate consequences in costs for any unsuccessful petitioner. There is some analogy with the court's concerns to limit the costs consequences of public interest challenges in environmental litigation or on other important [law] public law claims:**”
84. It is undisputable that the scope of scrutiny has been really widened since the last Election Petitions of the year 2007. To avoid unnecessary delays and parties incurring unwarranted costs, the court must draw itself to specificity if it is to rule on whether scrutiny should be ordered, whether *suo moto* or on application by one of the parties. There must therefore be sufficient reason before the court can allow an application for scrutiny by a party or before it can decide to order such scrutiny on its own motion.
85. The Petitioner’s application for scrutiny is underpinned in Section 82(1) of the Act and Rule 33 of the Rules which provide that parties to an election petition may apply for a scrutiny of votes. There may be a difference in opinion as to when such an application can be brought as Section 82 (1) of the Act provides that such an application should be brought during the hearing while Rule 33 of the Regulations stipulates that it can be brought at stage of the proceedings. Luckily, there was no contention as to the time the Petitioner filed the same but suffice it to state that this court is of the view that an application for such scrutiny can best be brought after hearing the evidence of the witnesses.
86. In **Rashid Hamid Ahmed Amana v IEBC and Others Malindi EP No. 6 of 2013 (Unreported)** Kimaru J held the same view when he stated that:- “[34] **The recent trend is that scrutiny can only be ordered where a Petitioner lays sufficient basis. Such basis can only be laid after the Petitioner has adduced evidence during the actual hearing of the petition. The Petitioner cannot therefore demand that there be scrutiny and recount of the votes before the commencement of the trial. The Petitioner may do so after his or her witnesses have testified. The ideal situation, however, is that such an application for scrutiny should be considered by the court after all the witnesses of the Petitioner and the Respondents have testified. At that stage of the proceedings, the court will be in a position to properly assess the veracity of the allegations made by the Petitioner that there is need for scrutiny.**”
87. In the Black's Law Dictionary, scrutiny is "**to ascertain the truth; a criterion or a gauge, standard or norm; an inquiry or examination.** It therefore follows that such an inquiry, inspection or examination must be specific, measurable, achievable, realistic and timely (hereinafter referred to as the “SMART criteria”).
88. The question of the specificity of the scrutiny was considered by Odero J in **Mombasa Election**

Petition Number 1 of 2013 when she said as follows:- "In any case where a request is made for scrutiny and/or recount the application therefore must be clear, concise and more importantly specific. An application couched in general terms ought not to be permitted as this is tantamount to requiring of the court to go through the whole exercise of tallying once again. Rule 33(4) of the Election Rules however obliges a party to name the polling stations in which the results are disputed. As general principle in law, a party is bound by its pleadings. As such, any evidence which goes outside of the pleadings on record must be disregarded."

89. The SMART criterion to be applied in a scrutiny of votes is anchored on the guidelines set out in Section 82 (1) of the Act and Rule 33 of the Rules. These are that:-

- a. **Any party to the proceedings can bring the application for scrutiny;**
- b. **The application can be applied for at any stage of the proceedings;**
- c. **The application must be for scrutiny of the votes;**
- d. **The purposes of the scrutiny must be view to establishing the validity of the votes cast.**
- e. **The court may order for such scrutiny if it is satisfied that there is sufficient reason, order for a scrutiny or recount of the votes.**
- f. **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.**
- g. **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**

90. In Prayer 1 of the application, the Petitioner sought for scrutiny of the written statements made by the Presiding Officers the respective Polling Stations in Balambala Constituency in the General Elections held on 4th March 2013 where voting extended beyond the stipulated polling hours of between 6.00 a.m. to 5.00 p.m.;

91. Regulations 78 (3) of the Regulation provides that:- **"After the counting of votes is concluded, the presiding officer shall draw up a statement showing the number of rejected ballot papers under such of the following heads of rejection as may be applicable—**

(a) **Want of security feature;**

(b) **Voting for more than one candidate;**

(c) Writing or mark by which the voter might be identified; or

(d) Unmarked or void for uncertainty, and any candidate, counting

Agent or observer shall, if he or she so desires, be allowed to copy that statement.

92.Regulation 81 (2) of the Regulations further provides that:- **“The presiding officer shall, after demonstrating to as the case may be, that the ballot box to be used to results is empty, put into that box—**

(a) The packets specified in sub-regulation (1); and

(b) The statements made under regulations 78 and 79.

93.Regulation 86 of the Regulations stipulates that:-

(1) After the final tallying and announcement of results, the returning officer shall seal up in separate tamper proof envelopes—

(a) The counted ballot papers which are not disputed;

(b) The validated disputed ballot papers; and

(c) The rejected disputed ballot papers, together with the statements related thereto and shall put the sealed packets in the used ballot box in the presence of candidates or agents as are present and seal the ballot box with a seal of the Commission.

94.In his submissions, the 1st Respondent contended that it was not clear what written statements the Petitioner wished to scrutinize. The Rules and Regulations refer to written statements in the context of scrutinizing votes to establish their validity or otherwise. The court finds itself in agreement with the 1st Respondent’s submissions that the said prayer is ambiguous. In addition, as was rightly stated by the 2nd and 3rd Respondents, this prayer comes out as one where the applicant seeks more evidence not pleaded in the Petition but rather as a fishing expedition.

95.Rule 33 of the Rules which specifies the scope of documents that may be examined under scope specifically states that the written statements made by the presiding officers under the provisions of the Act. Allowing a scrutiny as sought in the first ground of the application herein would be tantamount to re-amending the Petition when the parties have closed their respective cases to the detriment of the Respondents who would not have an opportunity to re-amend their respective Answers to the Petition. The first prayer therefore fails in meeting the specificity criteria.

96.In the second and third prayers of the application, the Petitioner sought for a scrutiny of copies of the registers and the marked copies of the registers used in all forty (40) polling stations of Balambala Constituency in the General Elections held on 4th March 2013.

97.In his Petition, the Petitioner complained that the results in Balambala Constituency showed that there was a dramatic difference in terms of the total votes cast and the voter turnout which could only be answered by scrutinizing the marked principal registers used in the Polling Stations and the Constituency.

98.As has been seen in Rule 33 (4) of the Rules, the scope for scrutiny can only

arise in polling stations where the results were disputed. From the oral and documentary evidence before this court, it does appear abundantly clear that the Petitioner did not demonstrate how the number of votes cast for the Presidential, Gubernatorial, Senatorial, Parliamentary and Women National Assembly Representative differed within the Constituency as a result of which one could infer massive manipulation of the voting exercise in Balambala Constituency. The court did not also have the privilege of comparing

the results of the different seats as no documentation was provided. In addition, no single witness led evidence in this regard.

99. The court did not find any facts placed before it that pointed at disputed results either from the averments in the Petition or the evidence adduced during the hearing. Save for Danyere Primary School Stream 1 where the Petitioner stated that Form 35 showed that the votes had been indicated as 449 instead of 339 votes, the Petitioner did not specify in which other polling station this happened or that indeed the said results were disputed. There may have been alterations and lack of counter-signing in some Form 35s but the Petitioner did not specifically state or lead evidence to show that the figures indicated therein were disputed or that they did not represent the correct position on the ground.
100. The court finds that if it was to grant an order for scrutiny under this ground, this would be a complete veer from the objective of scrutiny. It would be unrealistic to order for a scrutiny for all the forty (40) Polling Stations when none of the results were disputed.
101. This prayer appears to be a request which is founded on new evidentiary material introduced by the Petitioner in his affidavit in support of the application herein. In addition, the proportionality test would not permit scrutiny to be undertaken where it was only one (1) polling station that the Petitioner complained about. Indeed, as has been seen above the difference between the 1st Respondent and Omar Shariff Mohamed was 860 votes whereas the difference in the votes at the said polling station was 100 votes. In the fourth prayer of the application herein, the Petitioner sought a scrutiny of the Polling Station Diaries kept by the Presiding officers in all the polling stations in Balambala Constituency in the General Elections held on **4th March 2013** except Mathahlibah ECD Centre.
102. It is on that basis that the court has no hesitation in wholly concurring with the submissions by the 2nd and 3rd Respondents that the Petitioner did not provide proof to show in which polling station, if at all the results were disputed. The court is also in total agreement with the submissions by the 1st Respondent that the Petitioner's prayers were not based on any specific allegations in the Petition that required to be clarified through an order for scrutiny.
103. As can be discerned from the Petition herein, the Petitioner complained that:-
- a. Despite having declared that the elections were marred by numerous irregularities which disenfranchised voters in Mathahlibah, ECD Centre, Saka Primary School, Sankuri Primary School and Modika Primary School Polling Stations, the Returning Officer of Balambala Constituency nonetheless declared the number of valid votes cast as follows:-

i. Abdikadir Omar Aden	5396
ii. Ibrahim Mohammed Salat	3932
iii. Omar Shariff Mohammed	4536
 - b. The Returning Officer of Balambala Constituency announced the results of the winner on 6th March 2013 at 2.00 am in the absence of the other two (2) candidates and before tallying of votes of all polling stations was completed. On 4th March 2013, after a meeting with the District Commissioner and all parliamentary candidates, it was agreed that the results of Saka Primary School Polling Station would not be announced until the same was verified by the Electoral Dispute Tribunal or the courts.
 - c. Several Polling Stations and in particular to Modika Primary School Polling Station were understaffed forcing some clerks to take up roles of other clerks.
 - d. One (1) of the clerks at Modika Primary School Polling Station was seen influencing voters on who to vote for and turned away voters who were perceived to be the 1st Respondent's supporters.
 - e. An agent of the 1st Respondent and Orange Democratic Movement (ODM) was seen collecting Identity Cards from voters at Modika Primary School Polling Station and was arrested with then (10) Identity Cards but was released immediately violence started. Although a complaint was made by agents of the other two (2) candidates, the clerk was not apprehended and neither were the security officers notified.
 - f. The assisted voters were not being allowed to vote for candidates of their choice. The 1st

- Respondent's agents were seen handing slips to the Presiding Officers with the name of the 1st Respondent which was a case of manipulation of the electoral process.
- g. In several occasions in Sankuri Polling Station, the Presiding Officer marked ballot papers in favour of the 1st Respondent and when this was pointed out by an agent of the United Republican Party (URP), the Presiding Officer crossed it rendering the ballot as spoilt.
 - h. The Presiding Officers in the various Polling Stations failed to ensure free and secret balloting as the illiterate voters who comprised 90% of the voters had to state openly in extremely crowded Polling Stations who their preferred candidates were.
 - i. The Presiding Officers used nick names such as "Abdikay" for the 1st Respondent and "Duqow" for Ibrahim Mohammed Salat to establish who the preferred candidates of the illiterate voters were.
 - j. In various Polling Stations including Sankuri, Saka, Atheyley, Shabaha, Modika and Raya, the Presiding Officer permitted several ODM agents in the Polling Rooms some who did not identify themselves and they participated in the aforementioned serious irregularities.
 - k. Presiding Officers and Polling Clerks for several Polling Stations were changed less than twenty four (24) hours before the elections and did not take oath of secrecy as required by the law.
 - l. The late opening of all Polling Stations some such as Dogob Polling Station and the violence in several Polling Stations disenfranchised many voters and prejudicially affected the results of the Parliamentary results.
 - m. The candidates' agents were not supplied with the serial numbers of ballot papers and boxes.
 - n. Number of votes was changed by Presiding Officers but the Statutory Documents and Forms were not countersigned by the said Presiding Officers and the agents for the candidates.
 - o. A Presiding Officer was arrested and charged with offences relating to failure to discharge his statutory duties after he was caught with broken ballot boxes and carrying polythene ballots in polythene bags.
 - p. In breach of their official duty, the 2nd and 3rd Respondents negligently misplaced ballot papers whereupon ballots papers from various Polling Stations got into the hands of people who were not election officers.
 - q. The Presiding Officers extended the voting hours at Saka Primary School, allowed voters who had not voted on 4th March 2013 to vote on 5th March 2013 and re-sealed boxes after counting in one of the Polling Streams had started.
 - r. The Presiding Officers did not use the Biometric Voter Register and the official Biometric Register Printout as a result of which many people were turned away and did not vote.
 - s. The Presiding Officers did not allow agents of URP to sign the declaration forms set out inform 35 nor were they offered an opportunity to sign and record reasons for refusal to sign the said forms.
 - t. The URP was attacked on several occasions before and on the eve of the elections and that violence was directed at URP supporters leading to some voters suffering injuries.
 - u. The Petitioner's assertions that the election to elect a representative to the National Assembly which was gazetted to be held on 4th March 2013 and extended it to 5th March 2013 was in violation of the Constitution. The same could not be satisfied without scrutinizing the Polling Day Diaries.

105. The Petitioner, his witnesses and the Respondents' witnesses were in agreement that elections in all Polling Stations did not start at 6.00 am or end at 5.00 pm as envisaged by the Rules. They also concurred that the Presiding Officers could extend the number of voting hours where there was a delay in the opening of the said Polling Stations. It would add no value whatsoever to order a scrutiny in a case that was clear cut and in this regard the court agrees with the submissions by the 2nd and 3rd Respondent.

106. The court finds that Polling Day Diaries would fall under the written statements which can be scrutinized if an application for scrutiny for votes is allowed. They cannot be scrutinized in isolation. It is evident that none of the other complaints by the Petitioner can be established by scrutinizing the Polling Day Diaries or the marked voter registers.

107. If the scrutiny was to be allowed, the court finds that neither it nor the parties would know what to expect after the scrutiny because it would be open ended. In the absence of any certainty of what issues are being investigated, the parties and the court will find difficulties in framing the

- issues to be answered by a scrutiny. Unlike a normal scrutiny of votes where one could find votes envisaged in Section 82 (2) of the Act that could alter the count of results or affect the validity of the votes cast, it is unclear what scrutiny as prayed by the Petitioner hopes to achieve. It is not possible for the Petitioner, the Respondents or the court to know what will be the outcome. It would be a wild goose chase hoping to chance or stumble on some irregularity.
108. It would not be realistic to order for a scrutiny of the Polling Day Diaries in all the forty (40) Polling Stations in Balambala Constituency for the reason that no results had been disputed. In this regard, the court agrees entirely with the 2nd and 3rd Respondent when they correctly submitted that the said diaries were not disputed and introduction of the same at this stage was intended to fish for information. The court thereby rejects a scrutiny on this ground.
109. A question that this court considered pertinent was whether or not the court had jurisdiction to order for a scrutiny and examination to establish and determine the exact number of voters who cast their votes. One of the prayers in the Petition was for: - **An Order directing the 2nd Respondent to produce all the marked copies of the Voters Registers used in all the polling stations in Balambala Constituency in the General Elections held on 4th March, 2013 for scrutiny and examination to establish and determine the exact number of voters who cast their votes.**
110. The issue that arises is what remedy the Petitioner would be expecting to obtain once it was established the exact number of voters who cast their votes. The scrutiny of votes that is envisaged in the Act and in the Rules is geared to achieving a certain end result.
111. The Petitioner did not seek a recount or re-tally of the said votes. It would be outside the jurisdiction of this court to nullify the elections, order for a by-election or declare Omar Shariff Mohamed as the winner without ordering a re-tallying of votes because the prayer had not been sought by the Petitioner. He must be bound by his own pleadings.
112. The objective of a scrutiny of votes is anchored on the premise that if votes are struck out as envisaged in Section 82 (2) of the Act, it would have the effect of varying the total number of votes cast for each candidate. In the absence of any evidence that a voter voted in the wrong station, a vote was procured by bribery or treating, a voter had committed or had been prosecuted of impersonation, a voter had voted in more than one (1) constituency, a voter had been disqualified from voting or a vote had been cast for a disqualified candidate the court finds that it would serve no useful purpose in undertaking scrutiny.
113. It is evident that the Act and Rules provide for scrutiny of votes with a view to determining their validity and have an objective of some action being taken. The Act, Regulations or Rules do not provide for a scrutiny of the number of votes cast as had been sought by the Petitioner as no further action is envisaged after establishing the number of votes cast.
114. The court has not found any justification to order for a scrutiny on its own motion as the Petitioner has not laid any basis why it should do so. If the court were to do so, it would amount to prosecuting the case on the Petitioner's behalf to the detriment of the Respondents when the court was expected to be the neutral arbiter in the election dispute herein. Being a draconian step, a court must only order scrutiny of votes with extreme caution and only when it is so certain that an applicant has laid a legal basis through the oral or documentary evidence tendered in court. The court cannot operate in a vacuum and go on a fishing expedition on behalf of the Petitioner. That would not only be unjust but it would be unfair to the Respondents.
115. The Petitioner relied on Article 35 (1) (a) & (b) which has enshrined a citizen's right to freedom to access to information as a basis for his application for scrutiny. It was his contention that the sole purpose of seeking a scrutiny was that its outcome would either vindicate the 2nd Respondent or confirm the irregularities he had complained about against the 2nd and 3rd Respondent. Article 35 of the Constitution provides as follows: - 35. (1) Every citizen has the right of access to—
- (a) Information held by the State; and
- (b) Information held by another person and required for the exercise or protection of any right or fundamental freedom.**

115. This right to access to public information has also been recognized in international conventions.

Article 19 of Universal Declaration of Human Rights (UDHR), Article 19(2) of the International Covenant on Civil and Political Rights (ICCPR) and Article 9 of the African Charter on Human and Peoples Rights. These international conventions form part of Kenyan law by virtue of article 2(6) of the Constitution of Kenya, 2010. This was a view that was also expressed by Mumbi J in **Petition Number 278 of 2011 Nairobi Law Monthly Company Limited v. Kenya Electricity Generating Company & 6 others.**

116. It has been well established that he who alleges a threat on his fundamental rights and freedoms must demonstrate with particularity, the circumstances under which the said right was under threat and the prejudice suffered due to the threat of the said right. This was restated in the case of **Matiba vs. The Attorney –General Misc. Application No. 666 of 1990**, where the Court stated as follows: - **“An applicant in an application under Section 84(1) of the Constitution is obliged to state his complaint, the provisions of the Constitution he considers has been infringed in relation to him and the manner in which he believes they have been infringed. Those allegations are the ones which if pleaded with particularity invoke the jurisdiction of the court under the section. It is not enough to allege infringement without particularizing the details and manner of infringement.”**
117. The court notes that the Petitioner did not provide any evidence to show that the 2nd and 3rd Respondents had refused, declined and/or ignored to give him any information that he had sought for. The inquiry would be properly dealt with by the Constitutional and Judicial Review Division. This court finds that the reliance by the Petitioner of Article 35 of the Constitution to justify that he was entitled to a scrutiny is misplaced.
118. The court finds that the delays and cost implications in undertaking a scrutiny just to satisfy the Petitioner’s curiosity as to whether the 2nd and 3rd Respondents conducted the election of the Parliamentary seat in Balambala Constituency in a free, fair, transparent, verifiable or accountable manner far outweighs the guiding principles of ensuring efficient, expeditious and affordable resolution of the election dispute herein.
119. The court is clear that the forum for carrying out a forensic audit of the election of the Parliamentary candidate in Balambala Constituency does not fall under the jurisdiction or ambit of an Election Court.
120. There are quite a number of issues that were raised by raised in the 3rd Respondent’s Replying Affidavit relating to the merits of the Petition. It is the view of this court that the burden of proving how the allegations complained about by the Petitioner affected the results so as to warrant the interference, by the court, of the results declared on 5th March 2013 are best dealt with during the final submissions by the parties herein. The issues cannot be addressed in the present application because at this juncture, the court is only interested in establishing whether or not the Petitioner has laid a basis for an order for scrutiny to be granted to him.
121. The court wishes to express its gratitude to all counsel for the excellent research. The case law relied upon by all counsel was useful to the court in assisting it to establish whether or not the Petitioner was entitled to a scrutiny as he had sought. The only distinguishing aspect is that the Petitioner had sought for a scrutiny of written statements which are clearly not envisaged in the Act, Regulations or the Rules relating to Election Petitions, which issue had not specifically been addressed in those cases.
122. The above notwithstanding, the court has carefully considered all the parties’ submissions, case law and the oral and documentary evidence adduced in court but it is not persuaded that the Petitioner provided the court with any sufficient reason for it to exercise its discretion to order a scrutiny as he had sought.
123. For the reasons foregoing, the court finds itself entirely in agreement with the Respondents that the Petitioner’s application for scrutiny is not merited. In the circumstances, the same is hereby dismissed with costs to the Respondents.
124. It is so ordered.

DATED and DELIVERED at NAIROBI this 12th day of August 2013

J. KAMAU

JUDGE