



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**ELECTION PETITION NUMBER 10 OF 2013**

RAMADHAN SEIF KAJEMBE.....PETITIONER

VERSUS

1. THE RETURNING OFFICER,

JOMVU CONSTITUENCY.....1<sup>ST</sup> RESPONDENT

2 .THE SECRETARY, THE INDEPENDENT ELECTORAL AND BOUNDARIES  
COMMISSION.....2<sup>ND</sup> RESPONDENT

3. THE INDEPENDENT ELECTORAL AND BOUNDARIES  
COMMISSION.....3<sup>RD</sup> RESPONDENT

4. BADC TWALIB

BADC.....4<sup>TH</sup> RESPONDENT

**RULING**

**INTRODUCTION**

1. In this petition, the petitioner herein **Seif Ramadhan Seif Kajembe**, seeks the following orders:

I. (a) the said **Badc Twalib Badc** not duly elected Member of Parliament of Jomvu Constituency **And** the election for Member of Parliament of Jomvu Constituency was void and should be annulled forthwith; And

(b) your Petitioner do and is hereby returned as duly elected Member of Parliament of Jomvu Constituency;

II. In the alternative to the above, and without prejudice thereto,

a. There be a scrutiny and recount of all ballots cast in all polling stations within Jomvu Constituency for the election of Jomvu Constituency Member of Parliament under the provisions of Sections 80(4)(a) and 82(1) of the **Elections Act (2011)** and Rule 33(1) of the Rules thereunder; And

There be a scrutiny and recount of the tally of ballots cast in all polling stations within

**Jomvu Constituency for the election of Jomvu Constituency Member of Parliament under the provisions of Rules 32 and 33 of the Elections Act (Parliamentary & Constituency Elections) Petition Rules (2013);**

**III. The costs hereof be paid by the Independent Electoral & Boundaries Commission and by Bady Twalib Bady and by the Jomvu Constituency Returning Officer to your Petitioner.**

**Wherefore your Petitioner prays that it be determined that the said Bady Twalib Bady was not duly elected and the election was void.**

2. After hearing the evidence adduced on behalf of both the petitioner and the respondents herein, I invited Counsel for the parties herein to address me on the issue of scrutiny and recount.
3. The two provisions which provide for scrutiny and recount are to be found in Section 82 of the *Elections Act, 2011* (hereinafter referred to as the Act) and Rule 33 of the *Elections (Parliamentary and County Election Petitions) Rules, 2013* (hereinafter referred to as the Rules). Section 82(1) of the Act provides as follows:

*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.*

4. By Rule 33 of the Rules, on the other hand provides:

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

*(2) Upon an application under sub-rule (1), the court may, if it is satisfied that there is sufficient reason, order for a scrutiny or recount of the votes.*

*(3) The scrutiny or recount of ballots shall be carried out under the direct supervision of the Registrar and shall be subject to directions as the court may give.*

*(4) Scrutiny shall be confined to the polling stations in which the results are disputed and shall be limited to the examination of—*

*(a) the written statements made by the presiding officers under the provisions of the Act;*

*(b) the copy of the register used during the elections;*

*(c) the copies of the results of each polling station in which the results of the election are in dispute;*

*(d) the written complaints of the candidates and their representatives;*

*(e) the packets of spoilt papers;*

*(f) the marked copy register;*

*(g) the packets of counterfoils of used ballot papers;*

*(h) the packets of counted ballot papers;*

*(i) the packets of rejected ballot papers; and*

*(j) the statements showing the number of rejected ballot papers.*

5. 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.
6. 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 “*ut 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”.**

7. 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 that Rule would be *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.
8. In Mombasa High Court Election Petition No. 6 of 2013 between *Nuh Nassir Abdi vs. Ali Wario & 2 Others*, I found based on *Black’s Law Dictionary*, 8<sup>th</sup> Edn. page 737 that hearing refers to “A judicial session, usually open to the public held for the purpose of deciding issues of fact or of law sometimes with witnesses testifying”.
9. Accordingly whereas in the exercise of its powers under Rule 33 of the Rules, the Court must be *satisfied that there is sufficient reason* before making an order for scrutiny or recount where the Court exercises its powers under section 82 aforesaid it is not a requirement that the Court must be satisfied that there is a sufficient reason as long as the Court is of the view that the circumstances of the petition warrant an order for recount.

10. The reasons for an order for recount were restated in *Reuben Nyanginja Ndolo vs Dickson Wathika Mwangi & 3 Others* [2008] eKLR in which it was held *inter alia* as follows:

**“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 envisaged 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."**

11. In this case, however, the application for scrutiny and recount has been made by the petitioner hence the provisions of Rule 33 come into play. In **Wavinya Ndeti vs The Independent Electoral and Boundaries Commission and 4 Others [EP NO. 12 of 2013]**, the Honourable Justice Majanja applied the principle set out in the case of **William Maina Kamanda vs Margaret Wanjiru 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. In my view, the phrase "***if a basis is laid***" means the same thing as being "***satisfied that there is sufficient reason***".

#### **THE APPLICANT'S/PETITIONER'S CASE**

13. In support of the application, **Mr. Kithi** learned counsel for the petitioner submitted based on **Machakos HCEP Number 2 of 2013 Thomas Malinda Musau & 2 Others vs. Independent Electoral & Boundaries Commission & 2 Others [2013] eKLR** that alterations which are not authenticated without comments and signatures of agents amount to mistakes which cannot be dismissed as non-consequential. Learned Counsel submitted that while ideally the testing of form 35s ought to have been done during cross-examination, he was unaware that the court file had the said forms as he had not been served with the same.

14. According to **Mr. Kithi**, they identified 27 Polling Stations the form 35s of which do not bear signatures for the agents of the petitioner and these were St. Mary's Primary School, (Bangladesh) Code 019 Streams 1, 2, 3 and 4; Kwa Shee Primary School Code 017 Streams 1, 2 and 3; Amani Primary School Code 018 Streams 1, 2, 4, 5, 6, and 7; Mikindani Social Hall Code 015 Streams 1, 2, 4, 5, 6 and 7; Mikindani Primary School Code 020 Streams 1, 3 and 5; and Owino Uhuru Nursery School Code 016 Stream 2. According to **Mr. Kithi**, the total number of votes cast in these Polling Stations is 11,735 and if these votes were counted and tallied in absence of Petitioner's agents then elections therein does not conform with Article 86(a) and (b) of the Constitution.

15. Counsel further submitted that the petitioner had found 4 Polling Stations in which there was no entry at all of the names and signatures of the Presiding Officers and these were Miritini World Bank Primary School Code 001 Stream 4 and St. Mary's Bangladesh Primary School Stream one. Apart from that it was submitted that there is a category of polling stations in which there are no names or signatures of agents whatsoever in two Polling Stations and these were Amani Primary School Stream 7 and Alidina Nursery School Stream 2 which stations contain an aggregate number of 1,909 votes cast.

16. It was therefore contended that in view of the apparent gap between the winning candidate and the Petitioner of 4000 votes, half of the votes are not authenticated by agents.

17. The last two complaints related to 39 forms which according to learned Counsel do not contain any statutory comments of any kind and which constitute more than 50% of the total Polling Stations of 74. Further there were 13 Polling Stations where form 35s were witnessed by less than 5 agents.

18. Taking into account the foregoing, it was submitted that the verifiability of the elections in Jomvu and accountability ought to have been centered on a proper verification by IEBC of form 35s and in its absence the elections is rendered unverifiable and unaccountable. Taking into consideration

the allegations by petitioners' agents that they were locked out of the tallying process and that the response to those allegations by IEBC was a response of allegation with a counter allegation, it was the view of **Mr. Kithi** that it behoved upon IEBC to come to court and take the court through a process to show that there was no lockout in light of the documented evidence hence the Court ought to draw adverse inference and order recount of all ballots and tallying of the ballots.

### **THE 1<sup>ST</sup>, 2<sup>ND</sup> AND 3<sup>RD</sup> RESPONDENTS' CASE**

19. On behalf of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents written submissions were filed. According to the said submissions, the prayer for scrutiny contravenes Rule 32(4) of the Rules as it is a general request and does not specify the particular polling stations in which the results are disputed. It is therefore submitted based on **Rashid Hamid Ahmed Amana vs. IEBC & 2 Others Election Petition No. 6 of 2013**, **Hassan Mohamed Hassan & Another vs. IEBC & 2 others [2013] eKLR** and **Charles Ong'ondo Were vs. Joseph Oyugi Magwanga & 3 Others [2013] eKLR** that the Court cannot grant such and order hence the application ought to be dismissed.
20. It is further submitted that the Petitioner has not laid an evidentiary basis for the grant of the orders sought, nor have the respondents been granted an opportunity to respond to any allegations in relation to the affected polling stations, if any. Based on **Peter Gichuki King'ara vs. IEBC & 2 Others [2013] eKLR**, it is submitted that a party seeking an order for scrutiny must lay a basis hence the petitioner has failed to satisfy the conditions evolved over a time for the grant of such orders. Based on **Philip Osore Ogutu vs. Michael Onyura Aringo & 2 Others [2013] KLR** and **Hassan Ali Joho vs. Hotham Ntange & Anania Mwasambu Mwaboza [2008]** it is submitted that where the margin between the petitioner and the respondent is large the petitioner must give strong reasons in his application for scrutiny. Since here the margin is 4000 votes, it is submitted that the petitioner has similarly failed to make out a case for scrutiny.
21. According to the same submissions, the petitioner ought not only to have prayed for the order of scrutiny in his petition but must go further and specify the polling stations in respect of which scrutiny is sought and reasons for seeking the same. In this case it is contended that the petitioner in his Petition, Supporting Affidavit and witness statements did not pray for scrutiny of any specific polling stations or even specific constituencies as submitted in the present application for scrutiny or particularize any allegations or provided any evidence of irregularities to support his application for a general scrutiny of votes in the entire constituency and reliance for this line of submissions is placed on **Hassan Mohamed Hassan & Another vs. IEBC & 2 others [2013] eKLR** (supra).
22. In these respondents' view the application for scrutiny constitutes an amendment of the petitioner's pleading and expansion of the scope of the petition since the petitioner seeks to rely on documents which are by law not evidence but are just part of the evidentiary record under Rules 8(a), 10(1)(e), 10(2)(b) and 12(2)(a) of the Rules which documents are to aid the Court in reaching its finding in the event that an order for scrutiny is made since the same do not form part of the petitioner's evidence. In support of this submission reliance is placed on **Sarah Mwangudza Kai vs. Mustafa Idd Salim & 2 Others [2013] eKLR** in which the decision in the case **Caroline Mwelu Mwandiku vs. Patrick Mweu Musimba** was adopted. To the respondents the petitioner seeks to expand the scope of his petition in a manner offensive of Article 87(2) of the Constitution as regards the timelines for the filing and the hearing of the petitions and further reliance is placed on **Raila Odinga & 5 Others vs. IEBC & 3 Others [2013] eKLR**. To the respondents the application is an attempt to shift the burden of proving the petitioner's case to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents contrary to section 107 of the ***Evidence Act*** and Rules 8(a), 10(1)(f) and 12(2)(a) of the Rules.
23. It is submitted that the present application is intended to fish evidence from the documents that have no evidentiary value which is supported by lack of particularity in the electoral areas in which the scrutiny is sought.
24. According to the respondents the irregularities outlined in the petition and in the supporting affidavits do not materially affect the votes garnered by the petitioner and the 4<sup>th</sup> respondents or any other candidate and to that extent further scrutiny of the said discrepancies does not aid the Court in making a determination of the issues in this petition. Hence further reliance on **Hassan Mohamed Hassan & Another vs. IEBC & 2 others [2013] eKLR** (supra).

## THE 4<sup>TH</sup> RESPONDENT'S CASE

25. On behalf of the 4<sup>th</sup> respondent, **Mr. Mohamed** submitted that the Petitioner is trying to launch sufficient expedition under disguise of scrutiny. In his view, of all the evidence led before the court, all these Polling Stations mentioned are not specifically pleaded and of all the witnesses who came to testify on behalf of the Petitioners only 2 were confirmed to be agents as per NEEMA's affidavit and those were **Juma Swaleh and Ali Nyamae** who duly signed forms 35s hence the instant case is distinguishable from **Machakos HCEP Number 2 of 2013 Thomas Malinda Musau & 2 Others vs. Independent Electoral & Boundaries Commission & 2 Others [2013] eKLR** (supra) in which most agents did not append their signatures. In this case, it is submitted that all the form 35s have been signed by most agents without complaints hence the Petitioner cannot be allowed to shift his burden to other parties contrary to the principle that he who alleges must prove. To learned counsel the said agents did not adduce evidence to show that they were actually agents and were justifiably thrown out.
26. Based on **Wavinya Ndeti vs. Alfred Mutua & 4 Others Machakos High Court Election Petition No. 4 of 2013** it is submitted that no sufficient cause has been laid for order of scrutiny and whereas the petitioner has a right to apply for scrutiny, the court must be satisfied before the said orders can be granted and ought not to grant the same on mere speculation. To him whereas proof in election disputes is below beyond reasonable doubt, it must be above balance of probabilities. Furthermore, in determining whether to order scrutiny, the court must consider the margin based on **Philip Munge Ndolo vs Omar Mwinyi Simbwa & 2 Others Mombasa High Court Election Petition No. 1 of 2013.**
27. In conclusion, learned counsel submitted that this is a fishing expedition since what the petitioner is trying to do is to unearth new evidence despite the rule that a party is bound by its pleadings hence the application ought to be dismissed with costs.

## REJOINDER BY MR KITHI

28. In reply, **Mr Kithi** submitted that the decision the court is being called to render is historic because under Article 86(a) and (b) of Constitution, the evidentiary burden as to whether or not there was a free and fair election rests on IEBC. The Constitution, according to him, gives IEBC a mandatory obligation to ensue elections are accurate, and verifiable and therefore contrary to conventional wisdom, there is an overriding burden on IEBC to live up to dictates of Article 86. Therefore, the principle in *Evidence Act* that he who alleges must prove is inferior to the Constitution and inapplicable to election disputes and it would be contrary to public policy for IEBC to shift the burden which it owes which is both constitutional and fiduciary level. To him the issue of signatures ought to have been dealt with in examination and secondly, IEBC ought to have taken the court through the evidence of free and fair elections and the evidence of lack of badges or letters ought to have been tested though form 35 examination if the same had been laid.

## DETERMINATION

29. I have considered the foregoing. In his submissions **Mr. Kithi** has emphasized the fact that his client was unaware of the fact that form 35s had been filed in this Court by the IEBC hence the failure to test the same. To him the said documents ought to have been served on him. Rule 21 of the Rules provides as follows:

*The Commission shall deliver to the Registrar—*

*(a) the ballot boxes in respect of that election not less than forty eight hours before the date fixed by the court for the trial;*

*and*

*(b) the results of the relevant election within fourteen days of being served with the petition.*

30. Clearly therefore, the law enjoins the Commission to deliver to the Registrar of the Court the results of the election whose results are dispute within 14 days of service of the petition. There is clearly no express requirement that the said documents be likewise served on any of the parties to the petition. What is then the recourse available to a party who requires the same? In my view, such a party may make such an application at the time of the Pre-trial Conference since at that time the Court is empowered to give an order for furnishing further particulars, 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.
31. A party who therefore fails to take advantage of the said provisions cannot therefore be heard to complain that he was unaware that Rule 21(b) aforesaid had been complied with. In fact, a party ought in my view to peruse the Court file to confirm that the said provision has been complied with and in default to take whatever legal recourse available to him. I therefore, do not attach much weight to the petitioner's complaint that he was unaware of the fact that Rule 21(b) of the Rules had been complied with by the 3<sup>rd</sup> respondent.
32. It has, however, been submitted that the documents supplied under the said rule ought not to be relied upon in the determination of the petition since they are not part of the petitioner's evidence. In **Mututho vs. Kihara & Others Civil Appeal No. 102 Of 2008 [2008] KLR 10**, the Court of Appeal overturned the decision of the High Court and ordered the petition struck out on the ground that the results of the elections were not contained in the petition. The requirement in the said Rule 21(b) was as was correctly stated by my learned brother **Justice Majanja** in **Caroline Mwelu Mwandiku vs. Patrick Mweu Musimba** that "Rule 21 as read with Rule 10(1)(c) of the Rules which now permit the petitioner to plead 'the results, if any, however declared' was intend to deal with the mischief in Mututho vs. Kihara." That however does not in my view mean that the documents supplied under rule 21(b) are superfluous and are only important for the purposes of scrutiny. If for example the ballot boxes are supplied in a state in which no meaningful recount can be undertaken I do not see the reason why the Court cannot take into account such state of affairs in reaching its decision. As I held in **Nuh Nassir Abdi vs. Ali Wario & 2 Others**, (supra):

**"To the contrary it may assist the Court in determining the question whether or not the principles under Article 81 of the Constitution were adhered to. However, the petitioner is put on notice that he should avoid the temptation to enlarge his case outside the scope of his pleadings since it is trite that a party is bound by his pleadings despite the evidence.**

**Section 80(1) of the *Elections Act* provides:**

***An election court may, in the exercise of its jurisdiction—***

- a. ***summon and swear in witnesses in the same manner or, as nearly as circumstances admit, as in a trial by a court in the exercise of its civil jurisdiction and impose the same penalties for the giving of false evidence;***
- b. ***compel the attendance of any person as a witness who appears to the court to have been concerned in the election or in the circumstances of the vacancy or alleged vacancy;***
  - (c) ***examine a witness who is compelled to attend or any other person who has not been called as a witness in court, and examined by a party to the petition and after examination the witness may be cross examined by or on behalf of the petitioner and respondent or either of them; and***
  - (d) ***decide all matters that come before it without undue regard to technicalities.***

**Dealing with a similar provision under repealed *Elections Act*, Musinga, J (as he then was) held in **Simon Nyaundi Ogari & Another vs. Hon. Joel Omagwa Onyancha & 2 Others Kisii Election Petition No. 2 of 2008**:**

**"Section 23(1)(d) of the National Assembly and Presidential Elections Act stipulates**

that in the exercise of its jurisdiction, an election court shall decide all matters that come before it without undue regard to technicalities. Section 23(1) also empowers the court to compel the attendance of any person or witness who appears to it to have been concerned in the election...It is regrettable that many election courts have, in deciding several applications and petitions disregarded the spirit and tenor of section 23(1)(d) by allowing parties to resort to undue technicalities. While every effort must be made to follow rules of procedure as stipulated under the Act and the Election Petition Rules, the same should not be interpreted in a narrow and restrictive manner that may give undue advantage to some of the parties in an election petition. An election court should endeavour to do substantial justice without allowing unnecessary clogs and fetters to be placed along the path of justice...Section 34 of the Act gives the Electoral Commission power to make regulations for the better carrying out of its mandate. Some of those regulations provide for the manner in which the ballot boxes are handled before and after conduct of the elections and that includes sealing of the ballot boxes...In its quest for truth and just determination of an election dispute, an election court is not limited to examining only the documents referred to in Rule 19 of the Election Petition Rules but can examine any public document that is shown to be relevant...Section 23(b) of the Act also empowers the Election Court to summon the District Elections Co-ordinator and once summoned the witness has to swear an affidavit and deliver to court sufficient copies thereof as provided for under rule 18(4) of the Election Petition Rules.”

In the present petition as opposed to the afore cited decision of the Supreme Court deponents of the affidavits filed have been cross-examined on amongst others the report of the scrutiny and the recount. In Wildlife Lodges Ltd. vs. Jacaranda Hotel Ltd. Civil Appeal No. 249 of 1999, the Court of Appeal held that nothing is immaterial that helps justice to be done; nothing is extraneous which helps prevent injustice being done. Article 159(2)(d) of the Constitution enjoins the Courts and the Tribunals to be guided by the principle that justice shall be administered without undue regard to procedural technicalities. If I understood the respondents’ objection correctly, the direction taken in cross-examination is not objected to on the ground that the said documents can never be the subject of the cross examination rather that the same are not properly before this Court. In other words the procedural rules relating to election petitions have not been complied with in order for the same to properly form part of the record of this court. No prejudice has been alluded to at all.”

33. Accordingly, whereas the documents supplied to the Court under Rule 21(b) of the Rules are strictly speaking not the petitioner’s evidence since the petitioner’s evidence strictly speaking ought to be in form of affidavit, the Court cannot be prevented from relying on material which is patently on the face of the record in reaching a just decision.
34. **Mr Kithi** has however submitted that in election petitions the burden is upon the Commission to prove that the election was conducted in a process which is verifiable and accountable. In Nelson vs. Attorney General and Another [1999] 2 EA 160, it was held that the burden is heavy on him who assails an election, which has been concluded. In William Maina Kamanda vs. Margaret Wanjiru Kariuki & 2 Others Nairobi HCEP No. 5 of 2008, the Court held that the burden of proof is on the Petitioner and it is sufficient for the Respondent simply to deny the allegations and leave the rest to the Petitioner. In Madundo vs. Mweshemi & AG Mwanza HCMC No. 10 Of 1970, the rationale for placing a heavier burden on the petitioner than in ordinary civil cases was given as follows:

“An election petition is more serious matter and has wider implications than an ordinary civil suit. What is involved is not merely the right of the petitioner to a fair election but the right of the voters to non-interference with their already cast votes i.e. their decision without satisfactory reasons. To require the petitioner to satisfy such standard of proof is not only fair but reasonable in the circumstances. Petitions, as

the Act itself provides, should not be easily allowed by mere production of evidence which might probably prove the allegations and this is why it not enough merely to prove the allegations but also necessary to prove that the allegations affected the results of the election. No doubt a person who seeks to avoid an election results has the duty of leading evidence in support of this allegation and without doing so, his petition would fail, although the trial court is not bound to decide an election petition only on the petitioner's evidence."

35. Accordingly, it would be wrong for the Court to decide as the petitioner herein would like the Court to do that once it files a petition and makes allegations, the burden shifts to the Commission to show that the elections were indeed conducted in accordance with the law. In John Kiarie Waweru vs. Beth Wambui Mugo & 2 Others Nairobi HCEP No. 13 of 2008, Kimaru, J held:

"in conducting the said elections, the electoral Commission is required to promote the principle of free and fair elections.... The burden of establishing the allegations in an election petition regarding the conduct of the said election and the results announced thereafter is on the petitioner. The Court is aware of its duty to consider and determine the evidence adduced by the parties to this election petition after putting in mind the fact that the election that is sought to be nullified is in respect of an exercise of the right by the voters of Dagoretti Constituency to elect a representative of their choice. The court will not interfere with the democratic choice of the voters of Dagoretti Constituency unless it is established to the required standard of proof that there were irregularities and electoral malpractices that rendered the said elections null and void and therefore subject to nullification. It will not be sufficient for the petitioner to establish that irregularities or electoral malpractices did occur: he must establish that the said electoral malpractices were of such a magnitude that it substantially and materially affected the outcome of the electoral process in regard to the elections... Election petitions are no ordinary suits. Though they are disputes *in rem* fought between certain parties, election petitions are nonetheless disputes of great public importance and this is because when elections are successfully challenged by-elections ensue which not only cost the country colossal sums of money to stage but also disrupt the constituents' social and economic activities. It is for these reasons that election petitions should not be taken lightly. Generalised allegations are therefore not the kind of evidence required to prove election petitions but they should be proved by cogent, credible and consistent evidence.... As regards the standard of proof which ought to be discharged by the petitioner in establishing allegations of electoral malpractices, there is consensus by electoral courts that generally the standard of proof in election petition cases is higher than that applicable in ordinary civil cases i.e. that of proof on a balance of probabilities. The Standard is higher than proof on a balance of probabilities but lower than the standard beyond reasonable doubt required in establishing criminal cases. Allegations of electoral malpractices, like for instance bribery, require higher proof... The petitioner cannot be allowed to introduce new grounds in the course of adducing evidence in support of his petition. This court will not therefore address the issues raised by the petitioner regarding the validity of the Parliamentary Form 16As. The failure by a candidate or his agent to sign the Form 16As cannot invalidate the results contained in the said Form 16A and therefore the fact that the said Form 16As were not signed by the agents does not render any of the results from the various polling centres invalid... In the present petition it is clear that the petition made generalised allegations against the respondent with the hope that when the said allegations are considered in totality a picture would emerge that the elections were conducted in a manner that was not free and fair. It is conceded that some of the allegations raised by the petitioner established non-compliance with the law in relation to the conduct of the said elections. It is, however, held that the said non-compliance with the law were of such a minor nature as not to affect the overall results of the elections to determine the Member of Parliament of Dagoretti Constituency. In any event section 28 of the

**National Assembly and Presidential Elections Act bars the court from voiding a result by reason of non-compliance with any written law if such non-compliance did not materially affect the results of the election. It is held that the petitioner failed to establish to the required standard of proof that the irregularities evident during the conduct of the elections were of such a nature as to render the said elections not to be a true reflection of the expression of the will of the voters of Dagoretti Constituency.”**

36. The Petitioner’s case for scrutiny as I understand it is based on the fact that his agents were not allowed in the polling stations. As rightly submitted on behalf of the respondents there was no evidence adduced to show that the people who were allegedly denied entry into the affected polling stations were agents of the petitioners. From the copies of form 35s filed by the Commission it is true that there is no evidence that the said forms for Alidina Nursery School stream 2 in which 413 votes were cast and Amani Primary School Stream 7 in which 510 voters were cast were signed by agents of the parties. However, that number is a far cry from the 4000 which is the margin between the petitioner and the 4<sup>th</sup> respondent herein. Whereas it is correct that in a number of polling stations the number of agents indicated are less than 5, that does not necessarily indicate that the ones whose names are missing are the petitioner’s. It was incumbent upon the petitioner to adduce evidence to show that in those polling stations it was his agents who were locked out therefrom with documentary evidence showing that they were accredited agents for the petitioner. This was evidence which was peculiarly within the knowledge and possession of the petitioner and by not adducing the same the petitioner has deprived the Court of the crucial evidence on the basis of which the Court can make a finding in favour of the petitioner with respect to the scrutiny sought. Whereas the petitioner has submitted that he has identified 27 polling stations in which his agents were absent, that submission is not supported by the evidence on record so far and as I have held elsewhere in this ruling it was incumbent upon the petitioner to peruse the record to see whether based on the documents filed pursuant to Rule 21 of the Rules there was a need to seek the Court’s leave to adduce further affidavit evidence.
37. From the evidence adduced by the petitioner there clearly is no basis upon which it can be said that the Court is satisfied that the scrutiny ought to be ordered in light of the wide margin of 4000 votes between the petitioner and the 4<sup>th</sup> respondent herein.
38. Going by the documents filed by the Commission there is no clear evidence upon which the allegations made by the petitioner that his agents were locked out of the polling stations can be sustained. Whereas such evidence may be deduced from other evidence on record, the same does not explicitly appear from the copies of form 35s filed herein save in respect of the aforesaid two polling stations. For the purposes of the order of scrutiny sought I do not attach much weight to the allegation that in four polling stations the names and signatures of the presiding officers are missing. In any case the number of votes cast in the alleged polling stations do not amount to the said figure of 4000 votes.
39. As I stated at the beginning of this ruling, the basis for ordering recount and scrutiny are to investigate the truthfulness of the allegations made; to assist the court to investigate if the allegations of the irregularities and breaches of law complained of are valid; to assist the court to determine the valid votes cast in favour of each candidate that contested the parliamentary election; and 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.
40. Therefore, scrutiny is meant to enable the Court arrive at a just determination of an election petition. In deciding to do so the Court must look at all the circumstances of an election petition including the margin between the petitioner and the respondent who was declared to have won the election as well as the evidence presented before the Court. The Court however cannot out of the blue without considering the said circumstances make an order for scrutiny. Where therefore there are no circumstances which warrant a scrutiny to be conducted the Court will not make such an order simply because allegations are made in the petition. Where there is no evidence, the petitioner should not expect the Court to order for scrutiny in the hope that in the course of the conduct of such a process some evidence may come to light on the basis of which the petition may succeed. As was stated by **Majanja, J** in **Wavinya Ndeti vs The Independent Electoral and Boundaries Commission and 4 Others** (supra) *“although scrutiny is within the court’s discretion, the applicant must establish sufficient basis for the court to order scrutiny. Further, the*

*petitioner must not be permitted to launch a fishing expedition under the guise of an application for scrutiny in order to discover new evidence upon which to foist his or her case to invalidate an election.....An election is a human endeavor and is not carried out by programmed machines. Perfection is an aspiration but allowance must be made for human error”*. In the said case the learned Judge cited with approval the decision of **Kimondo, J in Kakuta Hamisi vs. Peris Tobiko and Others Nairobi High Court Election Petition No. 5 of 2013** (unreported) in which it was stated that “*Courts are ill-equipped to carry out a recount. It is a laborious and time consuming exercise. The polling stations provide a better forum, soon after close of polls, and in the presence of agents or candidates. In that scenario a fairly smaller number of votes would be recounted.*” The learned judge went ahead to state that “*the petitioner bears the responsibility in ensuring that her agents carry out their responsibilities. The candidates’ agents are the responsibility of the candidate and their failures cannot be imposed on the IEBC or any other party absent evidence to the contrary.*” Whereas where it is proved that the petitioner’s agents were locked from the polling station it would be unreasonable to hold that the agents ought to have requested for a recount, in this case, there is no evidence at all that the deponents of the affidavits in support of the petition herein were accredited agents of the petitioner.

41. As already stated above petitions should not be easily allowed by mere production of evidence which might probably prove the allegations and this is why it not enough merely to prove the allegations but also necessary to prove that the allegations affected the results of the election. The court has a duty to consider and determine the evidence adduced by the parties to the election petition after bearing in mind the fact that the election that is sought to be nullified is in respect of an exercise of the right by the voters to elect a representative of their choice hence the court will not interfere with the democratic choice of the voters unless it is established to the required standard of proof that there were irregularities and electoral malpractices that rendered the said elections null and void and therefore subject to nullification. It will not be sufficient for the petitioner to establish that irregularities or electoral malpractices did occur: he must establish that the said electoral malpractices were of such magnitude that it substantially and materially affected the outcome of the electoral process in regard to the elections.
42. Having considered the totality of the evidence adduced in this petition I am not satisfied that a basis has been laid by the petitioner which would justify this Court in ordering the scrutiny and the recount sought in respect of all the polling stations in Jomvu Constituency as sought by the petitioner. In my view, the mere fact that a petitioner has sought an order for scrutiny and recount of all the votes cast in a constituency does not disentitle the Court from making an order in specific polling stations in which the court is convinced that there is a dispute just as the mere fact that a party seeks recount and scrutiny of specified polling stations does not oblige the Court to conduct recount and scrutiny in all the specified polling stations. However, a party who seeks recount and scrutiny ought to be specific on the disputed polling stations to avoid the impression that he is on a fishing expedition taking into account the fact that the petitioner may have obtained more votes in some polling stations than the declared winner. As was stated in **Phillip Osore vs. Michael Aringo & 2 Others Busia High Court Petition No. 1 of 2013**:

**“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 a 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.”**

43. I must however, make it clear that the sentiments made by the Court herein are limited to the application for scrutiny and recount. Whether or not the petition is merited must necessarily remain to be decided based on all the material placed on record.

## **ORDER**

44. I have said enough to show that I am not satisfied that there is sufficient reason to order scrutiny and recount of all the votes cast in Jomvu Constituency or any of the polling stations therein. Accordingly, the application for scrutiny recount fails and is dismissed with costs to the

respondents.

**Dated at Mombasa this 12<sup>th</sup> Day of August 2013**

**G.V. ODUNGA**

**JUDGE**

**Delivered in the presence of**

.....for the Petitioner

.....for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondent

.....for the 4<sup>th</sup> Respondent