REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

ELECTION PETITION NO. 3 OF 2013

PETER GICHUKI KING'ARA.....PETITIONER

AND

INDEPENDENT ELECTORAL AND BOUNDARIES

COMMISSION.....1ST RESPONDENT

JAMES MBAI…….…….....2ND RESPONDENT

MARY WAMBUI MUNENE…….…….3RD RESPONDENT

RULING

On 3rd July, 2013 the Petitioner filed a Notice of Motion in court in which he sought orders for scrutiny and recount of the votes cast in all the polling stations in Othaya Constituency or in the alternative, a scrutiny or recount of the votes cast in 92 of the 112 polling stations in that constituency during the 4th March, 2013 general elections. The Motion was brought under **Articles 86** and **159 of the Constitution, Section 82** of the **Elections Act** and **Rule 33** of the **Elections (Parliamentary and County Elections) Petition Rules 2013** and was supported by the Petitioner's own affidavit sworn on 3rd July, 2013. The Petitioner also relied on two supplementary affidavits which he swore on 18th July, 2013 in response to the replying affidavits by the respondents in response to the Motion.

Besides the Notice of Motion of 3rd July, 2013, the Petitioner also filed another Motion dated 9th July, 2013 in which he sought orders against the 3rd Respondent for production of copies of her O-level and post-secondary school certificates and diploma respectively. This particular Motion was brought under **Articles 99** and **159** of **the Constitution, Section 80 of the Elections Act, Rule 20 of the Elections (Parliamentary and County Elections) Petition Rules 2013, Section 22 of the Civil Procedure Act, Order 16 Rule 14,** and **Order 18 Rules 10 and 11 of the Civil Procedure Rules.** Again the Motion is said to be supported by the affidavit of the Petitioner sworn on 8th April, 2013.

The 1st and 2nd Respondents filed a replying affidavit in opposition to the Motion of 3rd July, 2013 but filed grounds of opposition only in response to the Motion of 9th July, 2013. On her part the 3rd Respondent filed grounds of objection and a replying sworn by herself in response to the application of 3rd July, 2013. She also swore and filed an affidavit in opposition to the Motion of 9th July, 2013.

In the application for scrutiny and recount the Petitioner argues that there is sufficient evidence on record showing that the elections in issue were not conducted in an impartial, neutral, efficient, accurate and accountable manner; he also argues that the respondents have admitted as much in their respective

responses to the Petition.

Against the background of a Ruling delivered by this honourable court on 24th May, 2013 on a similar application, the petitioner argues that he has now laid a basis for scrutiny and recount more particularly because he has demonstrated that;

a. his agents were barred from accessing polling stations until the election was well underway due to failures on the part of the 2nd and 3rd respondents;
b. the votes were not counted in accordance with the electoral laws as pleaded in the petition;
c. there is uncertainty over 4600 of the total votes cast in respect of 92 polling stations out of the total 112 polling stations in Othaya Constituency;
d. announcing results from polling stations where the votes cast were more than the registered voters; and
e. improper recording of the votes as counted in form 35.

The 2nd Respondent is said to have admitted that there were discrepancies in forms 35 and 36 and that some of the ballot boxes which were brought to the tallying centre did not bear forms 35. He is also alleged to have admitted announcing results without verifying their accuracy; that though he admitted that the seals alluded to in the Petition were the 1st Respondent's seals, he could not confirm in which station they were used; that the poll diaries produced in court were not properly and diligently filled; the results were announced without regard to results from a particular polling station and in disregard of a formal complaint from the petitioner and also that certain polling stations were moved from their gazetted area.

In the application in which the Petitioner has sought for production of certain documents, the Petitioner relies wholly on the grounds set out in his Petition and his affidavit which he swore in support of the Petition. In addition to those grounds, the Petitioner claims that while the 3rd Respondent's educational qualifications are pivotal to determine her eligibility to contest for the seat of member of National Assembly, she has avoided placing before the honourable court her certificates and diplomas for interrogation. The petitioner argues that since the certificates and the diplomas are in the custody of the 3rd Respondent's counsel, it should not be a problem to produce them in court.

The 1st and 2nd Respondents have denied all the allegations made by the Petitioner and Mr Mbai swore an affidavit traversing all the allegations raised in the Application of 3rd July, 2013. The Respondents are of the view that scrutiny and recount of the votes may not be an option available to the Petitioner at this stage of the proceedings by virtue of provisions of **Rule 32 of the Elections (Parliamentary and County Elections) Petition Rules, 2013** and **Section 82 of the Elections Act**.

The Respondents have disputed the Petitioners contentions that they have established a case for scrutiny and recount of the votes in the sense that not a single witness for Petitioner has proved or led any evidence to prove any of the allegations pleaded in the Petition. If it is the discrepancies in the 92 polling stations in which the Petitioner has sought scrutiny and recount, the Respondents' position is that the votes garnered by each of the candidates in those polling stations were not affected and the errors were only in relation to narrative parts in forms 35. The Petitioner, the Respondents argue, has not proved how the discrepancies in that part of form 35 could have affected the results garnered by each of the candidates and in particular the Petitioner herein. There is no evidence that either the Petitioner himself or any of his agents disputed the results of any of the 92 polling stations that the Petitioner has raised issues with. The Petitioner's agents are said to have either signed the forms 35 or never registered their reservations, if they had any, on the forms.

On the issue of announcement of results from stations where the number of votes cast is alleged to have been more than that of the registered voters, the Respondents contend that the available evidence is contrary to the Petitioner's allegations; they have tabulated the stations and demonstrated that indeed the votes cast in those stations except one, are less than the registered number of voters. They have also said that there were 11 voters who were not included in the principal register of voters in Othaya Constituency because they were without biometrics.

The respondents have relied on a retallying of votes in all the 112 polling stations by one of the 3rd Respondent's witnesses which confirmed that the 3rd Respondent had garnered the most number of votes. His evidence was not challenged by the Petitioner.

The respondents also contend that failure to affix form 35 on any of the ballot boxes could not have affected the results because the announcement of the results at a polling station is done prior to the affixing of those forms. As far as the allegations concerning change of results in forms 35 is concerned, the Respondents are firm that only one polling station was affected by this problem and in any event the results from that particular polling station were not taken into account in the final results.

On the issue of seals, the Respodents are categorical that no evidence was led to connect those seals with the results of any particular polling station; neither is there any connection between those seals and breach of any laws or regulations. As far as the poll dairies are concerned, it is the Respondents' case that those are administrative documents but even so those that were produced in court are clear that the agents of the contesting political parties duly signed them without raising any objection on any issue that could have arisen during the electoral process. In the Respondents' view, even after the Petitioner called 22 witnesses nothing has come out of their evidence that could be said to be a basis for scrutiny or recount of the votes.

In respect of the application for production of the 3rd Respondent's O-level certificates and post-secondary school diploma, the 1st and 2nd Respondents only filed grounds of opposition in which they contended that the application offends **Rule 17(2) of the Elections(Parliamentary and County Elections) Petition Rules 2013** and **Section 86** of the **Elections Act**. They further argue that the application is based on misapprehension of the Constitution on the educational requirements for qualification to contest for a parliamentary seat. In their view such an issue should have been raised with the 1st Respondent before the elections and not after; no dispute was lodged on the 3rd Respondent's candidacy under **Article 88(4) (e)** of the **Constitution.**

The 3rd Respondent has opposed the application for scrutiny and recount at an interlocutory stage on the grounds that a similar prayer is sought in the main petition and therefore it can only be granted in determination of the petition; the 3rd Respondent also says that the scrutiny and recount are not the only issues for determination in the petition; and finally since the results have not been disputed in all the polling stations, scrutiny and recount cannot be ordered in all of them. In any event, the 3rd Respondent states that the Petitioner has not justified or laid any basis for scrutiny or recount.

In her affidavit in response to this application, the 3rd Respondent has contested the allegation that her witnesses and herself made admissions in respect of the allegations raised in the Petition. In particular, she has denied any admissions in respect of the errors in forms 35 and reiterated that the information in those forms represents a true and accurate reflection of the results in all the 112 polling stations. The respondent contends that no evidence was adduced to show that the petitioner disputed results or requested for a recount in the 92 polling stations to warrant scrutiny and recount at this stage.

Where it is alleged that the Petitioner's agents did not sign forms 35, it is the 3rd Respondent's case that there is no evidence to show that such refusal was on account of disputed results. In any event, so the 3rd Respondent argues, there is evidence to show that the Petitioner's agents indeed signed forms 35 in 74 out of the 92 or 112 of the polling stations in the constituency. According to her, there were no errors in the part of form 35 which showed what each of the candidates garnered and this has been supported by the 3rd Respondent's chief agent's evidence, which was not controverted. Further, the errors made in the entries in form 36, have been proved not to affect the outcome of the results at all. As for the 4600 votes which the Petitioner claims a cloud of uncertainty hangs over them, no evidence was given to show that such cloud of uncertainty exists or that he lost all or any of the alleged votes.

The recovery of discarded seals in a polling station, in the 3rd Respondent's view, cannot be a basis for scrutiny or recount because no evidence was given that those particular seals were meant for ballot boxes for the election of the member of National Assembly and even if they were it was proved during the

hearing that seals could be used and disposed of at various stages during the electoral exercise.

The formal complaint alluded to has also been said to be of little help for a recount of votes because a recount can only be done at the polling station and not at the tallying centre. If the Petitioner's agents were absent from the polling stations, so argues the 3rd Respondent, that in itself cannot be a basis for scrutiny and recount of the votes. In the premises, the 3rd Respondent has urged the court to dismiss the application for scrutiny or recount.

On the application seeking the 3rd Respondent to produce her certificates in court, the 3rd Respondent made a terse response to the effect that it is up to the Petitioner to prove that she does not have the certificates and in any event those certificates may be irrelevant in view of the provisions of **Section 22(2A) of the Elections Act** which suspended the minimum educational requirements for election into the National Assembly in the March, 2013 general elections.

On 9th July, 2013 directions were taken to the effect that the two applications be heard together. I have considered these applications, the responses thereto and counsel's able submissions against the backdrop of agreed issues whose resolution must necessarily determine the petition. I have also evaluated the applications in the light of the stage in the proceedings at which they have been argued noting in particular that they were argued when all the parties had called evidence and closed their respective cases. Ordinarily, the next activity would have been for the court to invite submissions on the Petition in anticipation of the final judgment but for the two applications which the court has had to grapple with before such submissions can be made.

Just as it was in the first application for recount and scrutiny, the two applications brought out issues whose determination at this stage, will effectively substantially determine the Petition itself. For obvious, reasons I will avoid that route and consequently my determination will be as long as is necessary to cover the subject before me but short enough not to venture into determination of the main petition.

The application for recount and scrutiny is being made for the second time after the first one was rejected on 24th May, 2013 in a ruling in which this court questioned the wisdom of seeking for a scrutiny and recount of votes based on the untested affidavit evidence and, in the circumstances of that application, at a pre-trial stage of the proceedings. This would perhaps explain why the present application has been made after both the Petitioner's and the Respondents' witnesses have been cross-examined and re-examined, in some instances, on their affidavits which they swore in support of or in response to the allegations or claims raised in their respective pleadings. This appears to me to be the correct and appropriate procedure in case such as this where scrutiny and recount of the ballots cast was a hotly contested issue, amongst other issues, which the court considered in its ruling of 24th May, 2013. There is no doubt, therefore, that the application is properly before the court and, for all intents and purposes, consistent with **Section 82 (1)** of the **Elections Act** and **Rule 33(1)** of the **Elections (Parliamentary and County) Petition Rules, 2013** which provide for the sort of an application that the Petitioner has made. It would then follow that, if the application is to that extent competent, the issue of dearth of time for undertaking the scrutiny and recount exercise would not arise if only the applicant can surmount the next hurdle of persuading the court that without such scrutiny and recount it will not be possible for it to determine effectually and conclusively each of the agreed issues or any of them and ultimately the petition itself. In other words, time as a factor need not count where scrutiny and recount is necessary for determination of an election petition as long as such determination can be made within the statutory timelines. As far as this petition is concerned, there is no doubt that as of to date, the court has sufficient time for such an exercise if it was found to be indispensable in determination of the petition.

Having said that I am clear in mind that the issues for determination as drawn will not require the court to consider and evaluate any other evidence beyond the evidence on record to determine them. Each of those issues will be resolved, and this court is convinced that it is capable of determining this petition, one way or the other, without scrutiny and recount of the votes cast for the election of member of National Assembly for Othaya. The reasons for this conclusion will be apparent in the court's judgment which, in my view is the appropriate juncture at which the court can evaluate the evidence on record and make

particular findings or conclusions, a feat that would predetermine the outcome of this petition and therefore prejudicial to the parties if it were to be done in a ruling on an application such as the one before court.

The Petitioner's application for production of the 3rd Respondent's certificate and diploma is said to be founded on the Petition itself and the Petitioner's affidavit in support of the Petition; this would imply that it is an application that could possibly have been made at the pre-trial stage of these proceedings since it is apparent that the Petitioner had the relevant information on which such an application could be based. However, it is not lost to court that the 3rd Respondent was also firm during her cross-examination that she holds an Ordinary level secondary school certificate and a post-secondary school diploma in civic education; these documents, she testified are with her lawyers. It would appear that it is this information that may have nudged the Petitioner into action and make the sort of application he has made long after he had closed his case. While this should not be an excuse for making an application which, under **Rule 17(1)(d)** of the **Elections(Parliamentary and County Elections) Petition Rules 2013** could and indeed should have been made at the pre-trial stage of the proceedings, one may be excused for asking why these documents could not be availed by the 3rd Respondent without any prompting howsoever in view of the fact that her level of education had been questioned in the Petition; would it not have been proper, if not for anything else, to discount any doubts on her education credentials, to avail those documents at the earliest opportunity possible without being compelled to do so?

The law that appears to me to be the most relevant to this situation is **Section 119** of the **Evidence Act, Chapter 80 Laws of Kenya**. It provides as follows:-

119. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

This provision in our Evidence Act embodies the doctrine of spoliation or suppression of evidence. Under this doctrine, it is generally the duty of the party to lead the best evidence in his possession, which could throw light on the issue in controversy. Where such material is withheld, the court may draw adverse inference. **(See Woodroffe's Law of Evidence, 9th Edition at Page 811-816).**

In the circumstances of this case and considering the stage at which the Petitioner has applied for production of the documents in issue it would be more plausible, should it be so persuaded, for the court to draw adverse inference against the 3rd Respondent than order her to produce the educational certificates.

I have stated that the court needs to be persuaded before it draws adverse inference because it is not in every case where a party withholds evidence that adverse inference is drawn. Presumption or adverse inference for non-production of evidence is always optional and a relevant factor to be considered amongst other facts in the case. Existence of some other circumstances may justify non-production of such documents on some reasonable grounds. Of relevance to this application and the Petition, the court has to consider whether the document or evidence withheld has any relevance at all to the issue at hand and more importantly, to the ultimate determination of Petition. The Court is cognisant of the fact while the evidential burden may shift between the adversary parties, the Petitioner bears the overall burden of proving his case; in the case at hand, one of the things that the court will consider in determining the Petition is whether the Petitioner has proved to its satisfaction whether the attainment of O-level certificate and post-secondary school qualifications is a mandatory requirement under the applicable electoral laws for one to contest for a parliamentary seat. Counsel for the Petitioner made submissions on this point in prosecution of the Petitioner's application. Those submissions in my humble view go to the very root of the Petition itself because an issue of whether the 3rd Respondent was qualified to contest for the seat of member of National Assembly is an issue for determination in the main petition. The court would, therefore, be pre-empting its judgment on the petition if, on the basis of the submissions made, it was to rule that certain academic qualifications are mandatory and therefore without them, the 3rd Respondent was disqualified from contesting or vice versa. Suffice it to say that it is only in its judgment

that court will evaluate and make appropriate findings on the import of counsel's submissions and those findings will also inform this court's decision on whether to infer adverse inference against the 3rd Respondent under **Section 119** of the **Evidence Act.** At any rate, a final order on an issue that has been agreed as an issue for determination of the main dispute can and should only be made at the conclusion of the matter and not at an interlocutory stage of the proceedings of the dispute itself.

For the foregoing reasons, I find the Petitioner's applications respectively dated 3rd July, 2013 and 9th July, 2013 unsustainable and they are accordingly dismissed. The costs will abide the outcome of the Petition.

It is so ordered.

Signed and **delivered** in open court at Nyeri this 6th day of August, 2013

Ngaah Jairus

JUDGE

In the Presence of:

Court clerk: -…….....

Counsel for the Petitioner: -.....…….....

Counsel for the 1st and 2nd Respondents: -.....….....

Counsel for the 3rd Respondent: -.....…….....