



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA
ELECTION PETITION NUMBER 7 OF 2013

HEARD BEFORE THE HIGH COURT OF KENYA AT NAIROBI

**IN THE MATTER OF THE ELECTIONS ACT, ACT NO. 24 OF 2011 AND THE
SUBSIDIARY LEGISLATION THERETO, THE ELECTIONS (PARLIAMENTARY AND
COUNTY ELECTIONS) PETITION RULES, 2013**

AND

**IN THE MATTER OF ELECTIONS FOR THE NATIONAL ASSEMBLY SEAT OF MANDERA
NORTH CONSTITUTENCY**

AND

IN THE MATTER OF THE PETITION BY BASHIR HAJI ABDULLAH

BETWEEN

BASHIR HAJI ABDULLAHI. PETITIONER

VERSUS

ADAN MOHAMMED NOORU. 1ST RESPONDENT

BILLOW ADAN KEROW. 2ND RESPONDENT

EKONIT KOMOL JOHN

(The returning Officer Mandera North Constituency)..... 3RD RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION. .. 4TH RESPONDENT

RULING ON SCRUTINY

This application is a Notice of Motion by the Petitioner herein dated 4th May, 2013. It seeks two main orders: -

- 1. That the court grants an order for scrutiny of all votes cast in all 55 polling stations in respect of the national Assembly seat in Mandera North Constituency during the 4th March 2013 elections; and in particular in respect to 21 polling stations named on the face of the**

application.

- 2. That the court grants an order for a recount of all valid votes cast in respect of the 55 polling stations in Mandera North Constituency in respect of the National Assembly elections of 4th March, 2013.**

The application was based on the following grounds: -

- a. That the petition pleadings included prayers for scrutiny and recount.**
- b. That the 3rd and 4th Respondents who conducted the said elections, committed serious irregularities and election malpractices which so negatively affected and distorted the election results that the court needs to order for scrutiny and/or recount in order to appreciate the extent they affected its integrity.**
- c. That the scrutiny and recount will aid in expeditious disposal of this petition.**
- d. That scrutiny and recount of votes cast in all 55 polling stations aforesated will not prejudice any party in this petition but will clarify the will of the votes in the Mandera North Constituency.**
- e. That it is fair, just and equitable to grant the order for scrutiny and recount.**

The application was based on a supporting affidavit sworn by the Petitioner, Bashir Haji Abdullahi and the court was also urged to take into account all the evidence that had been adduced by all the witnesses who testified in support of this Petition.

Submitting on the issue of absence of petitioners agents from the relevant polling stations and their failure to sign the forms 33, 34 and 35's, the Petitioner stated: -

That his agents were forcefully evicted by supports of the first Respondent in Wargadud Dam, Quramathow, Sukela Tifna, Arda Agarsu Centre, Shantoley Primary School and Kubi Hills Polling Stations. That although the 3rd and 4th Respondents had the responsibilities to prevent such eviction of the Petitioner's agents, he failed or was unable to do so and in fact appeared to be expressly or tacitly supporting the evictions. The Petitioner accordingly further argued that the 3rd and 4th Respondents had colluded with the 1st Respondent to create a climate in which voting would be influenced or twisted in favour of the 1st Respondent. That to worsen the situation, the Petitioner's witness who had been evicted early during the voting process, could not, therefore, verify and or confirm the integrity of the voting process as well as the accuracy of the votes cast for the petitioner and other candidates in the said polling stations.

That in addition, the agents were not accorded their rightful opportunity to verify the correctness of the votes entered in Forms 33's and 35's, and could not sign the said forms as required by the law. Hence the Petitioner argued, it is necessary, for the sake of fairness and transparence, to have the scrutiny and the recount sought, particularly in respect of the six polling stations above named. That the scrutiny will verify and confirm whether or not the ballot papers were properly utilized, votes properly case, registers properly marked thereby verifying that those who voted were only the registered voters and that there was no doubt registration.

The Petitioner's second argument was that at Quramathow and Shantoley Primary Polling stations, respectively, the Presiding Officer and Deputy Presiding Officer were during or at one stage of the voting process prevented from carrying their duty by the Returning Officer or by the Presiding Officer. That Mohamed Jelle appointed to preside the Quramathow was prevented from carrying out his duties wither by the voters or by the Returning Officer of the Constituency. For these reasons the Petitioner submitted that elections were conducted by a stranger whose performance raised serious suspicion as to integrity of the votes cast as well as proper utility of the voting materials. That accordingly the accuracy of votes cast

or the utility of voting material can only be ascertained through scrutiny.

Petitioner's third point is that the Presidential votes in the whole Constituency were 29,986 while those of the 1st Respondent were 33,212. He argued that voting in most polling stations were marked and cast by Presiding or Deputy Presiding Officer on behalf of assisted voters who had no reason not to vote the same way especially since they did not even consult the voters to get their personal wishes. Petitioner submitted further that the over 300 votes over and above the Presidential votes, must have been illegally acquired by the 1st Respondent, an irregularity which can be explained only through scrutiny and recounting, especially in this case where the difference of votes between the winner and the runner-up is 4900 votes.

The fourth ground for scrutiny and/or recount raised by the Petitioner, was that there were several other serious irregularities and witnessed election offences committed by the 3rd and 4th Respondents or their servants or agents. These included the following: -

- i. ***That there was pre-election violence in Rhamu Ward which led to registered voters fleeing the area and failing to vote on 4th March, 2013, and yet Rhamu recorded one of the highest voter-turnout in the country – i.e. Registered voters were 16,201 and votes cast in the election was 14,574 – 90%. The Petitioner then raised the question – Who are the people who voted for the displaced voters? He, therefore, seeks a scrutiny and recount to establish the answer.***
- ii. ***That there was a massive scale of impersonation, treating and bribery of a group of voters who visited in turns, three specific polling stations i.e. Quramathow, Wargadud Dam and Kubi Hills Polling stations. That the ground had or must have had express or tacit authorization from the 1st and 2nd Respondents. That as a result of bribery or treating, voters surrendered their voting cards to other persons who they obtained ballot papers which they marked and cast into the ballot boxes without marking the register. That a scrutiny of the registers and ballot papers will confirm this.***

The final ground raised by the Petitioner was that failure to use Electronic Voter Identification Machines enabled voters to vote more than once and helped in the manipulation of results as many loose ends had been created.

For the above reasons the Petitioner submitted that a basis for scrutiny and recount had been laid in respect of all the 55 polling stations. He stated that the Respondents admitted the devastating violence in Mandera North before, during and even after the elections. That they did not deny displacement of Mandera North Population to Ethiopia during the relevant period. That they neither denied the fact that Mohammed Jelle was originally appointed the Presiding Officer of Quramathow Polling station and that if there was swopping the same was done without the proper consultation and a little too late to change things. That the Respondents did not further deny the ousting of Petitioner's election agents in Quramathow, Sukela Tifna, Arda Agarsu, Shantoley, Kubi Hills and Wargadud Dam. They stressed that the six polling stations alone commanded a total of 11,585 which were 30% of all votes cast in the National Assembly elections.

The Respondents did not take the arguments lying down. Having admitted that they had not replied to this application for scrutiny and/or recount with any replying affidavit or grounds of opposition since they considered it unnecessary, they nevertheless, sought leave to show that the existing law and legal authorities, may not allow scrutiny or recount in the circumstances of this case, so far. Mrs. Karanu, who also had Mr. Kilukumi's instructions to submit for all the Respondents, submitted on the law applicable to scrutiny and recount.

Mrs. Karanu argued that scrutiny or recount depended on sufficient justification being shown by the Petitioner. That it was not a matter of course. That the application before the court, apart from reproducing issues or facts alleged in the petition, produced no proof thereof. She said that the petitioner had produced no tangible evidence. That the margin of votes between the winner and runner-up was

about 4,900, too large to beckon a recount or scrutiny, especially in a legal field where other cases have ruled that a margin of 1,061 is too large to invite a scrutiny and recount.

Mrs. Karanu appeared to signal that while the petitioner sought scrutiny and recount in 35 polling stations although he put more stress on only 21 of them, much of the contestation before the court was only on six of them.

I have carefully considered the application with the arguments for and against. I have also perused the legal authorities cited by both sides.

I will start with a comment on the approach the Respondents chose to take in this matter. They conceded having been properly served with this application sometimes in early June, 2013. They however chose not to file any replying affidavit or grounds of opposition or any other written opposition to the application.

Mr. Kilukumi thought that responding in writing as stated above would be going the civil procedure way, and as he put it, such is not appropriate under the Elections Act which is a special statute. If I understood him sufficiently, he was saying that under the Relevant Act, applications need not be responded to in writing but only orally in court as he attempted to do and probably in any other manner the Respondent would choose to do so. The court did not agree with him however, and Mr. Kilukumi for the 1st and 2nd Respondent, decided to leave the matter to the court.

The position the court takes however, is that a party in a dispute has the right to be properly served with the claimant's pleadings and be given sufficient time to file his response. Such response will show the Respondent's case and defence which balances the process in the dispute and places either party in an equal position or opportunity to best litigate a party's case, either way. This should remain the position whether the dispute in a civil dispute or an election dispute. So, if on being so served with a dispute's pleadings a party chooses not to respond in return by filing and serving back his reply or defence, then the rules of procedure if in existence, will be brought into force. In this case Mr. Kilukumi asserted that the Respondents were not required to file and serve such response under the Elections Act. If that is so, how would the Respondent make known their defence to the Petitioner in good time for the Petitioner not to be caught unprepared? The Petitioner like any other party, was as well entitled to know the Respondent's stand to the application in good time. In my view and finding, failure by the Respondents not to file and serve a defence took away from them their right to later introduce new facts in answer to the application. Otherwise new fact, if introduced by them of the hearing stage the application would early embarrass the petitioner. That is why the court allowed the Respondents to respond only in matters of law applicable to the situation and not on any points of fact.

The above state of things in my view, produced an interesting status i.e. the Petitioner's application can be said to be unopposed in or far as the facts upon which the application is based were not formally controverted by the Respondents by a replying affidavit. That is the stand Mr. Muchiri for the Petitioner took and I would agree with him. However, the situation in this case is a little different. This is because the same facts deposed in the Petitioner's supporting affidavits were same or similar to those sworn in support of the Petition by all the Petitioner's witnesses and were cross-examined on and impressions made upon the court and parties.

That is so say, any impressions made during cross-examination will be considered by the court accordingly. This means in this particular case that the facts upon which the application is made cannot be said to be intact and cannot be said to be totally unopposed on the basis merely that no replying affidavits were filed to contravert them.

Turning now to the issue before the court, the main question is whether the Petitioner had demonstrated a sufficient basis upon which scrutiny may be ordered. The Petitioner did not explain why all the 55 polling stations should be subjected to scrutiny or recount. He gave no evidence of any election malpractices in respect of all the 55 polling stations in the constituency. His evidence was generally limited to only six polling stations – that is to say : - Wargadud Dam, Quramathow, Sukela Tifna, Arda

Agarsu Centre, Shantoley Primary School and Kubi Hills.

The Petitioner's application for some reasons categorized the polling stations into three: -

- i. ***The 55 polling stations of the whole constituency of which he really said little except the generalized fact and arguments that the President garnered less votes than the 1st Respondent and that there was a heavy voter turn-out.***
- ii. ***the 21 polling stations which he tabulated but said nothing about them to support as scrutiny for them.***
- iii. ***and, the six polling stations upon which the petitioner's evidence for scrutiny was heavily directed.***

Having perused the file record and considered the facts and the submissions therein I have the following to say: -

First, there is no doubt that the votes garnered by the President in Mandera North Constituency as compared by those garnered by the 1st Respondent were 3226. The Petitioner seized this difference and argued that there should be no such difference since the voters were being given six voting or ballot papers, one for each of the six seats. That they voted accordingly and the total votes in the ballot boxes for the President should be equal in number to those of the Member of the National Assembly. He sought scrutiny to find out why there was such difference.

I have considered the ground. In my view there might be legitimate reasons for the difference. First, a voter may for lack of knowledge or deliberately or without intending to do so, drop more than one ballot paper in any one ballot box. He may on the other hand decide to vote for the President and not for Member of the National Assembly or vice versa as each voter had freedom to vote as he/she wished. Secondly, the court observed that this phenomenon was not limited to Mandera North. Indeed it was wide spread across the country. Finally, scrutiny if ordered in this respect will not really bring out the cause for and explanation of the difference in votes.

The next ground for calling for scrutiny by the Petitioner was the high voter turn-out. He argued that the Constituency is composed of pastoral nomadic people who are constantly moving and could not possibly be available to vote in big numbers as they did in all the 55 polling stations, or even in the 21 which he tabulated.

The court however notes that a high turn-out of voters was a trend that occurred across the country. It was once again, not limited to Mandera North alone. It was, therefore not a particularly strange phenomenon which would be genuinely questionable in Mandera North. Indeed other similar nomadic pastoralists heavily turned up to vote.

The third ground to consider was the fact that Petitioner's polling agents were evicted from various polling stations. It is said to have occurred particularly in Six Polling stations of Wargadud Dam, Quramathow, Sukela Tifua Primary School, Arda Agarsu Centre, Shantoley Primary School and Kubi Hills.

The above polling stations had 11585 registered voters who accordingly formed almost 30% of all the voters in the Mandera North. The Petitioner testified that its agents were actually evicted by voters of the clan from which the 1st Respondent comes in the presence and full awareness of the 3rd and 4th Respondents who did nothing to protect the agents. He accordingly alleged tacit approval of the illegal act by the Respondents. The result was that there was no agent, not only to protect the election interest of the petitioner, but that the agents could not be present at the end of voting to verify the votes obtained by every candidate and sign the Forms 33, 34 and 25's.

In response the 3rd and 4th Respondents did not specifically deny the eviction and/or absence of Petitioner's agents as asserted by the Petitioner. Their stand however, was that the mere absence of agents of a particular candidates did not invalidate an otherwise lawfully conducted election. They also submitted that it was the agent's absence that disabled them from signing the relevant election forms.

I have considered this issue. I am satisfied that the absence of a candidate's agents from a polling station cannot alone invalidate an otherwise properly conducted elections. In this case the agents were forcibly evicted and were absent unlawfully. The 3rd and 4th Respondents do not state that they did anything to rectify the situation. They appear to have ignored the situation. While the absence of agents from the polling station alone do not prove any electoral irregularity, it nevertheless raises strong suspicion as to what really happened at those stations. More so, when the said polling stations are accused of ethnical influences on the voting pattern. The 1st Respondent is shown to have garnered high majorities which raised serious suspicion of vote stuffing or double voting.

Furthermore, there was prima facie evidence that most of the voters were or chose to be assisted voters who could have had little control over the marking of the ballot papers. In such a situation, the presence of a candidate's agent was of paramount importance. Agents would prevent or at least protest wrong or deviated marking of the ballot papers. While this evidence is yet to be answered by the Respondents evidence, it appears to the court that the Petitioner's request to allow scrutiny has good reasons.

In Quramathow, the Presiding officer, originally posted there was displaced or replaced as the case may turn out to be. He was Mr. Mohammed Jelle. Not only did he find a hostile climate at the Polling Station, but found himself replaced by another person who apparently hailed from the locality. The 3rd Respondent admitted originally appointing Mr. Mohammed Jelle as the presiding Officer but stated that he only over saw a swopping exercise.

Once again, the mere fact of replacement may not amount to much. However, where there are other allegations or irregularities like voting being done without cancelling the name of a voter who voted as he did so, then calling for scrutiny to check the register and other related material may be justified where the Presiding Officer appears to have been deliberately planted although this is yet to be controverted by any evidence which may come from the Respondents. The appointment of the Presiding Officer of Quramathow who was Mohammed Jelle, is yet to be disproved.

In Shantoley, the Deputy Presiding Officer, one M/s Sahara, was removed by the Presiding Officer. It is not clear in evidence whether she was reinstated or not. The Petitioner's evidence is that she was removed by the Returning Officer when she protested clear electoral malpractices being committed in the presence and with the express licence of the presiding officer. The 3rd and 4th Respondents did not deny the allegation. They only stated that the Returning officer had power to remove any junior officer on commission of any irregularity at the polling station. The court's view is that there is sufficient reason to scrutinize the electoral documents of Shantoley to confirm the irregularities which the M/s Sahara protested about.

It was the Petitioner's case that in Quramathow, Wargadud Dam and Kubi Hills there was massive personation, treating and bribery. Some evidence was led on these practices. The Respondents have yet to testify evidence to controvert the petitioner's evidence. it was even alleged that there was acquiring of voter's cards and identity cards before elections so that during the voting on 4th March, 2013 only names of voters were being called and similar number of ballot papers were being pulled out and marked without asking for voting choices and without marking the register in conformity. This at this stage raises a strong ground for scrutinizing the register and the voting material.

Before I conclude the analysis of evidence upon which the Petitioner seeks the orders of scrutiny and recount, I note that he had included such prayers in his petition. I am convinced at this stage that certain aspects of Petitioner's and his witnesses' evidence came up again and again. Such touched on what can be termed as irregularities but which at this stage have not formed conclusive impressions and must be left to the end of the trial after the case of the Respondents is also presented.

In the case of **William Maina Kamanda Vs Margaret Wanjiru Kariuki & 2 others [2008]eKLR** the at page 7 stated thus: -

“... this court is under a duty to investigate the truthfulness or otherwise of these allegations, and scrutiny of the ballot would assist in this regard. 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. A further purpose would be to assist the court in determining the valid votes cast in favour of each of the seventeen candidates that contested the parliamentary election. And finally, scrutiny would also assist the court to 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 Rules.”

In this case the Petitioner produced evidence which revealed that the conduct of casting votes was not properly done as earlier stated. In other aspects documentary evidence, like forms 35's confirmed that in some polling stations voting was not smooth nor transparent. Some figures of votes garnered were shown as altered without authentication. These require to be confirmed or cleared out of the way as the court proceeds to the case's conclusion.

I have however, considered whether the scrutiny to be allowed should cover the whole number of 55 polling stations or the 21 tabulated ones. I have come to the conclusion that allowing scrutiny of the 55 or 21 polling stations will be allowing the Petitioner a fishing expedition. In my view, sufficient basis for scrutiny was laid only in respect of the following six polling stations i.e. : **-Qoramathow, Wargadud Dam, Sukela Tifna Primary School, Kubi Hills, Arda Agarsu Centre and Shantoley Primary School.**

The court hereby directs that scrutiny and recount shall in respect of the six polling stations be carried out in accordance with Rule 33 Sub Rules 3 and 4 (a-j). It is so ordered subject to the orders of court as to the time and place.

Dated and delivered this 5th day of August, 2013.

.....

D A ONYANCHA

JUDGE