



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**

**ELECTION PETITION NO. 1 OF 2013**

**IN THE MATTER OF: ARTICLES 1, 3, 38, 81, 86 AND 87 OF THE CONSTITUTION OF  
KENYA, 2010**

**AND**

**IN THE MATTER OF: SECTION 75 AND 76 OF THE ELECTIONS ACT, 2011 (ACT NO. 24 OF  
2011)**

**AND**

**IN THE MATTER OF: THE ELECTIONS (GENERAL) REGULATIONS, (LEGAL NOTICE  
NO. 128 OF 2<sup>ND</sup> NOVEMBER, 2012**

**AND**

**IN THE MATTER OF: THE ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS)  
PETITION RULES, 2013 (LEGAL NOTICE NO. 44 OF 22<sup>ND</sup> FEBRUARY, 2013)**

**AND**

**IN THE MATTER OF: THE ELECTION FOR THE GOVERNOR OF MERU COUNTY IN THE  
GENERAL ELECTIONS HELD ON 4<sup>TH</sup> MARCH, 2013**

**BETWEEN**

**DICKSON MWENDA KITHINJI ..... PETITIONER**

**-VERSUS-**

**GATIRAU PETER MUNYA..... 1<sup>ST</sup> RESPONDENT**

**THE INDEPENDENT ELECTORAL**

**AND BOUNDARIES COMMISSION..... 2<sup>ND</sup> RESPONDENT**

**FREDRICK NJERU**

**KAMUNDI/**

**RULING**

The Petitioner by Notice of Motion dated 14<sup>th</sup> June, 2013 brought pursuant to Article 81(e) 86(a),(c) and 159(2) (d) and (e) of the Constitution of Kenya, 2010, Section 80 and 82 of the Elections Act, 2011, Part VI of the Elections(Parliamentary and County Elections) Petition Rules, 2013 and all enabling provisions of the law prays court for scrutiny and recount of the votes cast in Imenti South, Tigania East, Igembe South and Buuri Constituencies during the election for Governor of Meru county held on 4<sup>th</sup> March 2013.

The application is based on the following grounds:

1. *The total valid votes cast in each of 9 polling stations purportedly exceed the total number of registered voters for each of the respective polling stations;*
2. *The votes affected by the irregularity in (1) above (5,339) exceed margin by which the 1<sup>st</sup> Respondent purportedly beat his closest competitor;*
3. *The results for each of 48 polling stations have not been signed or otherwise authenticated by any candidate or agent;*
4. *In each of the polling stations in (3) above, the respective presiding and deputy officers have not written mandatory statutory comments as to absence and/or reasons for agents' and candidates' failure to sign or otherwise authenticate the results;*
5. *The votes affected by the irregularity in (3) above (20,108) exceed margin by which the 1<sup>st</sup> Respondent purportedly beat his closest competitor;*
6. *Returning officers duplicated and/or omitted results for 7 polling stations in the final tally;*
7. *The votes affected by the irregularity in (6) above (6,187) exceed margin by which the 1<sup>st</sup> Respondent purportedly beat his closest competitor;*
8. *The results for 21 polling stations have not been signed or otherwise authenticated by the presiding and deputy presiding officers as required by law;*
9. *The votes affected by the irregularity in (8) above (8,882) exceed margin by which the 1<sup>st</sup> Respondent purportedly beat his closest competitor;*
10. *The votes affected the foregoing irregularities (36,367) exceed margin by which the 1<sup>st</sup> Respondent purportedly beat his closest competitor.*
11. *In view of the foregoing, there are genuine reasons to believe that—*
  - a. *there were multiple serious lapses, breaches of the law, errors and omissions in the conduct of the election;*
  - b. *the lapses, breaches of the law, errors and omissions alluded to in (a) above have affected and/or vitiated the validity, integrity, credibility and result of the election and*
  - c. *The election did not meet the constitutional requirements of freeness, fairness, transparency, accuracy, verifiability.*
12. *in view of the foregoing, an order for scrutiny and recount—*
  - a. *is the most appropriate, reliable, qualitative, objective and scientific means for addressing and putting to rest the serious issues that arise as to the freeness, fairness, transparency, accuracy, verifiability of the election; and*
  - b. *is the most appropriate, reliable, qualitative, objective and scientific means for reassuring the people of Meru as to the freeness, fairness, transparency, accuracy, verifiability of the election.*

In the supporting affidavit of **DICKSON MWENDA KITHINJI**(PETITIONER) sworn on 24<sup>th</sup> June, 2013 he depones that there is evidence:-

*That reviewed the Forms 35 and 36 filed by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents as annexed to the Affidavit of Kennedy Onditi and noted (inter alia) the following:-*

1. *total votes cast at Yururu Polling Station (No. 70) in Imenti South Constituency; Forest Camp (No. 001); Kinoru Primary School (No. 002); Miriga Mieru (021); and Njuri Ncheke Street*

- (No. 014) Polling Stations in Imenti North Constituency; Nceme Primary School (No. 061) in Igembe South Constituency; Matiandui Primary School; (No. 043); and Muumone Primary School Polling Stations in Igembe Central Constituency; Mutuuma Primary School (No. 073) Polling Station in Buuri Constituency purportedly exceed the number of Registered Voters;
2. the votes affected by the irregularity in (a) above (5,339) exceed margin by which the 1<sup>st</sup> Respondent purportedly beat his closest competitor;
  3. the results for the following 7 polling stations were not tallied into Form 36:
    - i. Mwhichiune Primary School (No. 083) in Imenti South Constituency;
    - ii. Nkuene Primary School (No. 032) in Central Imenti Constituency;
    - iii. Karumaru Primary School (081) in Igembe South Constituency; and
    - iv. Kaluli Primary School (No. 007) in Tigania East Constituency.
  4. the votes affected by the irregularity in (c) above (2,499) is very close to the margin by which the 1<sup>st</sup> Respondent purportedly beat his closest competitor;
  5. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents unlawfully deducted and or added votes to various candidates in Luuma Primary School Polling Station (No. 066) within Tigania East Constituency;
  6. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents unlawfully duplicated and/or omitted results for the following 11 polling stations when computing the final tallies:
    - i. Nkabune Primary School (No. 074) in North Imenti Constituency;
    - ii. Nkubu Primary School (No. 138); Igandene Primary School (No. 086); Kathera Tea Buying Centre (No. 123); in Imenti South Constituency; and
    - iii. Gitoro Primary School (006) in North Imenti Constituency.
  7. the votes affected by the irregularity in (f) above (4,982) exceed the margin by which the 1<sup>st</sup> Respondent purportedly beat his closest competitor;
  8. the results for each of the following 48 polling stations have not been signed or otherwise authenticated by any candidate/agent:
    - i. Forest Camp (No. 001); Pig n Whistle Grounds (013); kongoacheke (No. 016) Meru Main Bus Park (032); Mpuri Primary School (No. 034); and Mwithumwiru Primary School (No. 050) in North Imenti Constituency;
    - ii. Sirimon Centre (011); AIPCA Subuiga Primary School (No. 033); Lucern Cattle Dip (No. 034); Kiirua Primary School (No. 048); and Nkunga Primary School (064) in Buuri Constituency;
    - iii. Igane Primary School (No. 003); Kiruiro Primary School (015); Ruiga Primary School (No. 027); Ruiga AIPCA Church (Old, No. 028); Karimonga Primary School (No. 038); Katheri Primary School (No. 057) ; Katheri Coffee Factory (No. 062); Kinjo Cattle Dip (No. 063); Kaathi Tea Buying Centre (No. 064); Marathi Coffee Factory (No. 067); Ruathi Tea Buying Centre (No. 071); and Makandune Primary School (No. 090) in Central Imenti Constituency;
    - iv. Karoe Primary School (019); Igoji Boys Secondary School (No. 027); Kiroone Primary School (No. 043); Kinoro Market Mobile (No. 051); Murembu Primary School (No. 055); St. Alloys Primary School (No. 062); Mikumbune Primary School (No. 111); Baitigitu Primary School ( No. 121); Kianjogu Primary School (No. 130); and Kathanthatu Primary School (No. 134) in Imenti South Constituency;
    - v. Kanikarui Primary School (No. 100); Ntuti Primary School (No. 107); and Kangeta Primary School (No. 113) in Igembe Central Constituency;
    - vi. Ndumuru Nursery School (No. 002); KK Etama Primary School (No. 012); Ntunene Coffee Factory (No. 029); Kariba Primary School (No. 030); Tuanda Nursery School (No. 032); Miriki Primary School (No. 048); Luciuti Social Hall (No. 052); and Nthangarine Primary School (No. 076) In Igembe North Constituency; and
    - vii. Kirumone Evangelism Church (011); Kailune Tea Buying Centre (052); Mweromalia Primary School (060) in Tigania East Constituency;
  1. in each of the polling stations in (h) above, the respective presiding and deputy officers have not written mandatory statutory comments as to absence and/or reasons for agents' and candidates' failure to sign or otherwise authenticate the results;
  10. the votes affected by the irregularity in (h) above (20,108) exceed margin by which the 1<sup>st</sup> Respondent purportedly beat his closest competitor;

11. *The results for Murathi Primary School (031); St. Mary's Immaculate Primary School (No. 035); Kariene Primary School (No. 044); Kinjo Primary School (No. 056); Katheri Coffee Factory (No. 062) in Central Imenti Constituency have not been signed by all the candidates agents;*
12. *Presiding officers have not indicated mandatory statutory comments as to absence and/or failure of some of the agents to sign the results in each of the polling stations in (k) above;*
13. *the results for 21 polling stations have not been signed or otherwise authenticated by the presiding and/or deputy presiding officers as required by law;*
14. *the votes affected by the irregularity in (l) above (8,882) exceed margin by which the 1<sup>st</sup> Respondent purportedly beat his closest competitor; and*
15. *the results for Murathi Primary School (No. 031) Kariene Primary School (No. 044); Kinjo Primary School (No. 056) and Katheri Coffee Factory in Central Imenti Constituency have alterations and cancellations which have not been countersigned by the respective presiding officers;*
16. *the votes affected the foregoing irregularities (36,367) exceed margin by which the 1<sup>st</sup> Respondent purportedly beat his closest competitor."*

He further deponed that he honestly believed there were multiple serious lapses, breaches of the law, errors and omissions in the conduct of the election which he alluded to have affected and/or vitiated the validity, integrity, credibility and results of the election and as such the election he averred did not meet the Constitutional requirements of freeness, fairness, transparency, accuracy and verifiability. He complained that at the time of filing this petition, Form 35 and 36 were in possession, custody and control of 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and that agents were denied an opportunity to fully participate in the electoral process and thereby effectively denied some critical information that would otherwise have been included in the petition.

The 1<sup>st</sup> Respondent in response to the Petitioner's application filed a replying affidavit sworn by **GATIRAU PETER MUNYA** who depones the application is a superfluity and should not be entertained as the Petitioner has not laid any basis whatsoever to warrant the same being granted and that it has not challenged on entries in the primary electoral documents being Forms 35's. further there has not been anybody either in the petition or during proceedings in court that averred that they were denied a right to vote or that there was any manipulation in the voting exercise that permitted, say dead people to vote.

He further contended that the petition dated 20<sup>th</sup> of March, 2013 and Notice of Motion dated 14<sup>th</sup> June, 2013 seek as the first relief "***...the immediate scrutiny and recount of votes in Imenti South, Tigania East, Igembe South and Buuri Constituencies.***"

In this regard alone, he averred that the application is a total abuse of the Court process as the Petitioner seeks for scrutiny and/or recount of votes from an additional Forty Two (42) polling stations hereunder listed that have not been prayed for in the petition or in the application dated 14<sup>th</sup> June 2013 nor in which any evidence has been adduced in court.

#### From **Imenti North**

- i. Forest Camp (001)
- ii. Kinoru Primary School (002)
- iii. Gitoro Primary School (006)
- iv. Pig n Whistle Grounds (013)
- v. Njuri Ncheke Street (014)
- vi. Kongoacheke Coffee Factory (016)
- vii. Miriga Mieru (021)
- viii. Meru Main Bus park (032)
- ix. Mpuri Primary School (034)
- x. Mwithumwiru Primary School (050)
- xi. Nkabune Primary School (074)

xii.

a. Igembe Central

- i. Matiandui Primary School (043)
- ii. Muumone Primary School (072)
- iii. Kanikarui Primary School (100)
- iv. Ntuti Primary School (107)
- v. Kangeta Primary School (113)

b. Central Imenti

- i. Igane Primary School (003)
- ii. Kirwiro Primary School (015)
- iii. Ruiga Primary School (027)
- iv. Ruiga AIPCA Church (OLD) (028)
- v. Murathi Primary School (031)
- vi. Nkuene Primary School (032)
- vii. St. Mary's Immaculate Primary School (035)
- viii. Karimonga Primary School (038)
- ix. Kariene Primary School (044)
- x. Kinjo Primary School (056)
- xi. Katheri Primary School (057)
- xii. Katheri Coffee factory (062)
- xiii. Kinjo cattle Dip (063)
- xiv. Kaathi Tea Buying Centre (064)
- xv. Marathi Coffee Factory (067)
- xvi. Rwathi Tea Buying Centre (071)
- xvii. Makandune Primary School (090)

c. Igembe North

- i. Ndumuru Nursery School (002)
- ii. K.K. Etama Primary School (012)
- iii. Ntunene Coffee Factory (029)
- iv. Kariba Primary School (030)
- v. Tuanda Nursery School (032)
- vi. Miriki Primary School (048)
- vii. Luciuti Social Hall (052)
- viii. Nthangarine Primary School (076)

The 1<sup>st</sup> Respondent contends that the Petitioner's application seeks to adduce new evidence from Sixty Two (62) polling stations in Eight (8) Constituencies within Meru County that were not pleaded in the petition an endeavor which would be a nullity ab initio and highly prejudicial to the Respondent's case especially since the 1<sup>st</sup> Respondent has already closed his case.

The 1<sup>st</sup> Respondent further contends that parties should be bound by their pleadings. He further contends that if the application is allowed, massive additional evidence are so substantial that it would be nearly impossible for the Respondents to respond effectively at this stage of the proceedings.

The 1<sup>st</sup> Respondent further under paragraph 9 of his replying affidavit averred that the following polling stations remained foreign to the petition as they had neither been mentioned in the petition dated 20<sup>th</sup> March 2013 nor were they brought up in issue in court and as such **MUST** remain outside the purview and consideration of the court:

**a. Imenti South**

- i. Karoe Primary School (019)
- ii. Igoji Boys Secondary School (027)
- iii. Kiroone Primary School (043)
- iv. Kinoro Market Mobile (051)
- v. Mikumbune Primary School (111)
- vi. Baitigiti Primary School (121)
- vii. Kianjogu Primary School (130)
- viii. Kathanthatu Primary School (134)

**b. Igembe South**

- i. Nceme Primary School (061)
- ii. Karumaru Primary School (081)

**c. Buuri**

- i. Sirimon Centre (011)
- ii. AIPCA Subuiga Primary School (033)
- iii. Lucern Cattle Dip (034)
- iv. Kiirua Primary School (048)
- v. Nkunga Primary School (064)
- vi. Mutuuma Primary School (073)

**d. Tigania East**

- i. Kaluli Primary School (007)
- ii. Luuma Primary School (066)
- iii. Kirumone Evangelism Church (011)
- iv. Kailune Tea Buying Centre (052)
- v. Mweromalia Primary School (062)

The 1<sup>st</sup> Respondent therefore averred the request for scrutiny for the polling stations in Imenti South, South Igembe, Buuri and Tigania East mentioned in (a), (b), (c) and (d) above is threadbare as neither have the results in the said polling stations been challenged in the petition nor was any evidence led on trial in that regard.

The 1<sup>st</sup> Respondent concedes in his replying affidavit under paragraph 12 that out of all the polling stations mentioned in the application dated 14<sup>th</sup> June 2013, the only polling stations that were pleaded in the petition and that are within the four constituencies alluded to in the Petition and application are:

- a. Yururu polling station (070, Imenti South)**
- b. Mwichune Primary School (083, Imenti South)**
- c. Igandene Primary School (086, Imenti South)**
- d. Kathera Primary School (123, Imenti South)**
- e. Nkubu Primary School (138, Imenti South)**
- f. Murembu Primary School (055, Imenti South)**
- g. St. Alloysius Primary School (062, Imenti South)**

but the 1<sup>st</sup> Respondent goes on to state the application for scrutiny on the foregoing polling stations is vexatious as no evidence was placed before the court from any agent in those polling stations challenging entries in form 35. The Respondents stated indeed, at the trial no evidence was called and tendered by the Petitioner from Imenti South involving any agent or at all. The 1<sup>st</sup> Respondent contends there is no sufficient reason for court to order scrutiny of votes and that no basis has been laid down by the

Petitioner. He further averred that scrutiny can only be requested in instances where there has been impropriety or illegality in relation to the counting of ballot or votes as in accordance with Section 82(2) of the Elections Act (No.24 of 2011).

On Yururu Primary School (070 Imenti South) the allegation is that the total votes cast at the polling station exceeded the number of registered voters. The 1<sup>st</sup> Respondent deponed that Form 35's showed the number of valid votes cast at Yururu Polling Station was 919, whereas the registered voters were 926. On Mwichiune Primary School (083, Imenti South,) the allegation he averred was that the votes were not tallied in Form 36 but that he contested was not so as Form 36 showed that they had been tallied and further Form 35 is signed by six agents.

On allegation that Form 35 for Murembu Primary School (055 Imenti South) and St. Alloysious Primary School (062 Imenti South) had not been signed he, contends is partially true however he contends despite that being so, no irregularity or malpractice had been proved to warrant a scrutiny of the votes in the two centers on account only of agents not signing the Form 35. Further, the accuracy of the entries in the Form 35's have not been challenged in this petition.

On allegation of duplication of results at Igandene Primary School(086 Imenti South) he termed the allegation as false as there was no such duplication as the record before court has shown.

The 1<sup>st</sup> Respondent has however conceded that there has been a duplication of results from *Nkubu Primary School (138, Imenti South)* where results for stream (3) were erroneously duplicated in Form 36 for stream one (1). The effect of the same on the Candidates was: Hezekiah Gichunge +1, Jasto Mati Maore -12, Kilemi Mwiria -78, Peter Munya +66, and Reuben Marambii 3.

That there has also been duplication of results for *Kathera Primary School (123, Imenti South)* where the results of stream one (1) were erroneously duplicated on stream two (2) which affected the candidates in the following way: **Hezekiah Gichunge +3, Jasto Mati Maore +3, Kilemi Mwiria +24, Peter Gatirau Munya +10, and Reuben Marambii -3**

The 1<sup>st</sup> Respondent depones that it is glaringly clear that the results of the above two Polling stations were not manipulated intentionally in favour of any candidate and moreover there is no challenge mounted on the correctness of the Primary counting documents of the stations which is the Form 35's. Further the Meru Gubernatorial elections was won by a margin of 3,336 votes which margin cannot be substantially affected by the results of the above two stations.

The 1<sup>st</sup> Respondent in his affidavit has concluded by stating that he is inclined to aver that from the petition before court and the subsequent proceedings during trial, the Petitioner has neither laid down the appropriate foundation necessary for the application made nor has he proved any impropriety or illegality in the casting or counting of ballots so as to warrant a scrutiny of votes

The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in opposing the application filed a replying affidavit sworn on 24<sup>th</sup> June, 2013 by Dr. FREDRICK NJERU KAMUNDI,(3<sup>rd</sup> Respondent) in which he briefly stated:-

***1. THAT I am advised by my advocates on record, which advice I verily believe to be correct that the Petitioner's Application is in breach of the provisions of Rule 33(4) of the Elections (Parliamentary and County Elections) Petition Rules for the following reasons:***

- a. ***The Application seeks for scrutiny and recount in respect of the entire Imenti South, Tigania East, Igembe South and Buuri Constituencies even though only the result of only a few polling stations in 2 of the above constituencies have been disputed.***
- b. ***The Application seeks for scrutiny in respect of results from polling stations which are not in dispute in the Petition.***

- c. *No sufficient basis has been set out in the Petitioner's Application or in the course of the hearing of the Petition to warrant an order for scrutiny and recount.*
- d. *There was no recount sought by any of the candidates or agents in the whole of Meru County in respect of the results of any polling stations nor was complaint received in respect of the results of any candidate as reflected in Form 35s. As such the Application is an afterthought and an abuse of the court process.*
- e. *There is no nexus established between the complaints raised by the Petitioner and the intended result of the scrutiny and as such, this Honourable Court is being required to engage in an academic exercise, which will be superfluous.*

**2. *THAT I have read the Petition filed by the Petitioner and confirm that the results from the following polling stations have not been disputed therein:***

ITEM NO.	POLLING STATION	POLLING STATION CODE	CONSTITUENCY
1.	Kinoru Primary School	002	Imenti North
2.	Miriga Mieru	021	Imenti North
3.	Njuri Ncheke Street	014	Imenti North
4.	Nceme Primary School	061	Igembe South
5.	Matiandui Pri. School	043	Igembe Central
6.	Muumone Pri. School	072	Igembe Central
7.	Mutuuma Primary School	073	Buuri
8.	Nkuene Primary School	032	Central Imenti
9.	Karumaru Pri. School	081	Igembe South
10.	Nkabune Primary School	074	North Imenti
11.	Gitoro Primary School	006	North Imenti
12.	Pig & Whistle Grounds	013	North Imenti
13.	Meru Main Bus Park	032	North Imenti
14.	Mpuuri Primary School	034	North Imenti
15.	Mwithumwiru Pri. School	050	North Imenti
16.	Sirimon Centre	011	Buuri
17.	AIPCA Subuiga Primary	033	Buuri
18.	Lucern Cattle Dip	034	Buuri

19.	Kiirua Primary School	048	Buuri
20.	Nkunga Primary School	064	Buuri
21.	Igane Primary School	003	Central Imenti
22.	Kiruiro Primary School	015	Central Imenti
23.	Ruiga Primary School	027	Central Imenti
24.	Ruiga AIPCA Church (Old)	028	Central Imenti
25.	Karimonga Pri. School	038	Central Imenti
26.	Katheri Primary School	057	Central Imenti
27.	Katheri Coffee Factory	062	Central Imenti
28.	Kinjo Cattle Dip	063	Central Imenti
29.	Kaathi Tea Buying Centre	064	Central Imenti
30.	Marathi Coffee Factory	067	Central Imenti
31.	Ruathi Tea Buying Centre	071	Central Imenti
32.	Makandune Pri. School	090	Central Imenti
33.	Murathi Primary School	034	Central Imenti
34.	Kariene Primary School	044	Central Imenti
35.	St. Mary's Immaculate Primary School	035	Central Imenti
36.	Kinjo Primary School	056	Central Imenti
37.	Karoe Primary School	019	Imenti South
38.	Igoji Boys Sec. School	027	Imenti South
39.	Kiroone Primary School	043	Imenti South
40.	Kinoro Market Mobile	051	Imenti South
41.	Mikumbune Pri. School	111	Imenti South
42.	Kianjogu Primary School	130	Imenti South
43.	Baitigitu Primary School	121	Imenti South

44.	Kathanthatu Pri. School	134	Imenti South
45.	Kanikarui Pri. School	100	Igembe Central
46.	Ntuti Primary School	107	Igembe Central
47.	Kangeta Primary School	113	Igembe Central
48.	Ndumuru Nursery School	002	Igembe North
49.	KK Etama Pri. School	012	Igembe North
50.	Ntunene Coffee Factory	029	Igembe North
51.	Kariba Primary School	030	Igembe North
52.	Tuanda Nursery School	032	Igembe North
53.	Miriki Primary School	048	Igembe North
54.	Luciuti Social Hall	052	Igembe North
55.	Nthangarine Pri. School	076	Igembe North
56.	Kirumone Evangelism Church	011	Tigania East
57.	Kailune Tea Buying Centre	052	Igembe North
58.	Mweromalia Pri. School	060	Igembe North

- a. ***The total valid votes cast at Yururu Polling Station for both stream 1 and 2 totals up to 919 which is less than 926, the figure of registered voters as indicated in the Petitioner's document annexed to his Supporting Affidavit, christened "IEBC Voter's register for Meru County".***
- b. ***Form 35 for Forest Camp (001) Imenti North (page 1008 of Volume III of the annexures to the Affidavit of Kennedy Onditi) clearly indicates that there were 288 votes cast whereas there were 366 registered voters at the polling station.***
- c. ***It is clear from the evidence of Mr. Kennedy Onditi that the 2<sup>nd</sup> Respondent used the Principal Register, the special register of people without biometrics and the Green Book during the elections held on 4<sup>th</sup> March 2013. I am aware that the registered voters for Forest Camp (001) Imenti North, from the registers used during polling, that is, the biometrics register and the special register totalled 366. The biometrics register had 234 registered voters and the special register had 132 registered voters.***
- d. ***I reiterate that the unmarked document annexed to the Petitioner's Affidavit, titled "IEBC Voter's Register for Meru County", which is not a voter's register and whose origin and use is not clear, was not used during the elections and is inaccurate as it indicates the registered voters to be 234.***

- e. *No complaints were received by any of the candidates from any of the polling stations indicated in the Application for scrutiny.*
- f. *The number indicated of 5,339 as the alleged votes affected by the irregularity is without any basis, and is at best derived from speculation.*
1. ***3. THAT the Petitioner's allegations as set out in paragraph 2(c) of the Supporting Affidavit are baseless for the following reasons:***
  - a. *Form 36 for Imenti South Constituency clearly shows that the results from Form 35 Mwichiune Primary School (083) were accurately captured. They appear on page 4 of the Form 36 annexed to the Affidavit of Kennedy Onditi (Volume 1, page 4 of the said bundle.)*
  - b. *The results for the polling stations set out in paragraph 2(c)(ii), (iii) and (iv) are not disputed in the petition*
  - c. *No complaint has ever been received by the 2nd and 3rd Respondents regarding all the polling stations indicated.*
  - d. *The figure of 2,499 as the votes allegedly affected by the alleged irregularities is without basis and speculative.*
2. ***THAT as regards the Petitioner's complaint in paragraph 2(e), relating to Luuma Primary School, the only complaint noted in the Petition by the Petitioner in respect of the said polling station is the one set out in Paragraph 8(b) of the Petition, at page 8 was that candidates/agents were irregularly required to sign blank Form 35s and 36. The complaint set out in paragraph 2(e) is clearly an afterthought.***
3. ***THAT I have considered the Petitioner's complaint set out in paragraph 2(f) of the Supporting Affidavit and wish to state as follows:***
  - a. *The complaint relating to Nkabune Primary School and Gitoro Primary School in Imenti North Constituency is an afterthought as it is not in the Petition.*
  - b. *There is no duplication of results of omission of any nature regarding Igandene Primary School (086)*
  - c. *There is no complaint regarding the accuracy of the results of the candidates indicated in Form 35s for Nkubu Primary(138) and Kathera Tea Buying Centre in Imenti South Constituency.*
  - d. *The figure of 4,982 as the votes allegedly affected by the alleged irregularities has no basis and is an imagined figure.*
4. ***THAT the Petitioner's complaint as set out in paragraph 2(h), 2(i) and 2(j) of the Supporting Affidavit ought to be disregarded in its entirety for the following reasons:***
  - a. *Save for Forest Camp (001)-Imenti North Constituency, the results from all the other polling stations set out in paragraph 2(h)(i), (ii), (iii), (iv), (v), (vi) and (vii) are not disputed in the Petition and such cannot be considered for scrutiny.*
  - b. *There is no complaint of whatever nature which has been raised regarding the accuracy of the results of the candidates as reflected in Form 35s in any of the polling stations indicated.*
  - c. *There is no proof which has been adduced in the Petition or in the course of the hearing to the effect that any authorized agent who were present in these polling stations was denied an opportunity to sign Form 35;*

- d. *Failure by the Presiding Officers and Deputy Presiding Officers to indicate the reasons for the agents refusing to sign is not a material irregularity. In any event, it cannot be resolved by an order for scrutiny or recount.*
- e. *The figure of 20,108 votes as the alleged votes affected by such alleged irregularity is without a basis whatsoever and is at best, a creation and imagination of the Petitioner.*
5. *THAT in respect of the Petitioner's contentions regarding the polling stations indicated in paragraph 2(k), 2(l), 2(m) and 2(l), I wish to state as follows:*
  - a. *This complaint is a mere afterthought as the results of all the cited polling stations have not been disputed in the Petition.*
  - b. *The accuracy of the results as reflected in Form 35s has not been disputed in any of the cited polling stations.*
  - c. *There is no proof which has been adduced in the Petition or in the course of the hearing that authorized agents who were present in these polling stations were denied an opportunity to sign*
  - d. *Failure by the Presiding Officers and Deputy Presiding Officers to indicate the reasons for the agents refusing to sign is not a material irregularity. In any event, it cannot be resolved by an order for scrutiny or recount.*
  - e. *There is no single Form 35 which is not signed by a Presiding Officer as the recognized authorized officer under the elections regulations.*
  - f. *The figure of 8,882 as the alleged votes affected by such alleged irregularity is without a basis whatsoever and is at best, imagined.*

*8. THAT as regards the Petitioner's complaints set out in paragraph 2(o) and 2(p), I wish to state that:*

- a. *The complaints set out therein are new complaints which are not indicated in the Petition. The Petitioner cannot go outside the complaints in his petition. The results from the said polling stations are therefore not in dispute.*
- b. *No complaint has been received by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents regarding the accuracy of the results from the said polling stations.*
- c. *The results from the said polling stations were verified by the candidates' agents present at the polling stations.*
- d. *The figure of 36,367 as the votes allegedly affected by the said alleged irregularities as no basis whatsoever and is to be ignored.*
6. *THAT there is no absolutely no basis for the allegation that authorized agents were denied the right to fully participate in the electoral process as no evidence was advanced to establish the allegation. I further state that an order for scrutiny will not in any event shed light on this point since all the Form 35s have been produced in court.*
7. *THAT I verily believe that in view of the foregoing, no basis whatsoever has been laid to warrant an order for scrutiny or recount in the areas sought.*
8. *THAT I further believe that the complaints of the Petitioner as set out in the Application and Supporting Affidavit cannot be resolved by way of an order for scrutiny or recount.*
9. *THAT I verily believe that the Petitioner's Application is an abuse of the court process as the*

same is clearly tailored to be a fishing expedition to buttress the Petition which was severely wanting in evidence to support the allegations therein.

10. ***THAT I am advised by my Advocates on record, which advice I verily believe to be correct that the Petitioner's contention that Forms 35 and 36 were in the custody and possession of the 2<sup>nd</sup> and myself at the time of filing the petition as an explanation for attempting to amend the Petition and raise complaints in respect of new areas and introduce new evidence by way of scrutiny in respect of these areas is contrary to Section 76(4) of the Elections Act and Rule 33 of the Elections (Parliamentary and County Elections) Petition Rules, 2013.***
11. ***THAT in response to paragraph 6(a) of the Supporting Affidavit of the Petitioner, I am advised by my Advocates on record, which advice I verily believe to be correct that:***
  - a. ***The practice of allowing for scrutiny on the basis of the margin of votes was before formulation of the Elections (Parliamentary and County Elections) Petition Rules, 2013 which now sets out the standards for consideration in applications for scrutiny or recount.***
  - b. ***The margin of votes between the 1<sup>st</sup> Respondent and his closest competitor, being 3,336 is not a small margin by any means.***
  - c. ***The strictures set out in the electoral law regime are constitutionally and statutorily mandated and must be adhered to as the election results must not be lightly interfered with due to the political, social and economic implications which result therefrom.***
  - d. ***The allegation that election proceedings are inquisitorial is without legal basis and a bare attempt to shift the legal burden placed upon the Petitioner to establish his case to the requisite standard.***
  - e. ***The only matters which can be in dispute are the facts and grounds which are set out by the Petitioner in the Petition as per the requirements of Rule 10(1)(e) and Rule 10(3)(b) of the Elections (Parliamentary and County Elections) Petition Rules, 2013. The annexures can only be evidence in support or to disprove the facts and grounds of dispute, contrary to the Petitioner's allegations.***

The Counsel for the Petitioner and counsel for the Respondents highlighted on their written submissions in respective of their opposing positions and referred this court to several authorities which this court has considered.

### **PETITIONER'S SUBMISSIONS**

Mr. Muthomi T. for the Petitioner submitted that the Petitioner's application is seeking scrutiny and recount for Imenti South, Tigania East, Igembe South and Buuri Constituencies. In support of his application he referred to **BUGOMA P.E. NO. 5 OF 2013 PHILLIP MUKWE WASIKE V JAMES LUSWETI MUKWE & 2 OTHERS** by Hon. Lady Justice H. A. Omondi and submitted the issues raised in that case are similar to the issues raised in this petition. He further submitted that the Petitioner relies on the contents of the application, supporting affidavit, written submissions, the list and bundle of authorities and supplementary authority. He concluded by stating that he did not wish to highlight on the submissions any further. He then turned to the submissions by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and 1<sup>st</sup> Respondent.

He submitted the authorities relied upon by the Respondents are to a large extent from competent court but not binding upon this court. He submitted that the Petitioner relies on cases of **CLEMENT KUNGU WAIBARA V BERNARD CHEGE MBURU & 2 OTHERS Civil Appeal No. 205 of 2011(2011)** eKlr and **ODD JOBS V MUBIA(1970) EA 476**. He further submitted that the Petitioner relied on decisions made by two or three Judges. He submitted that 1. **SAID V MWARURWA & ANOTHER (2008) 1 KLR (EP) 326**, 2. **Ng'ang'a & Another V OWITI AND ANOTHER (NO.2) (2008) 1 KLR (EP) 799** and 3. **ODD JOBS V MUBIA (1970) EA 476** were decided by 3 Judges whereas **KINYANJUI V**

**GOKO & ANOTHER (2008) eKlr (EP) 450** was decided by 5 Judges. He submitted the reference to the said authorities is only to point out their persuasiveness to this court. He further submitted the authorities relied upon by the Respondents are consistent with the granting of the prayers sought by the Petitioner. He submitted that the scope of scrutiny and recount must be determined with reference to the Constitution. He further submitted that if the statute does not limit the exercise of scrutiny then Rule 33(4) of the Petition Rules 2013 cannot purport to do so. He submitted as far as Rule 33(4) of the Petition Rules 2013 amounts to limit the court to polling stations it is contrary to the substantive law and the Constitution. He submitted the position taken by the Respondents that scrutiny should be limited to polling stations not to be correct. He urged that the Petitioner had listed all polling stations in Imenti South, Imenti Central and Igembe South. He urged the Petitioner was cross-examined on annexures “DMK2, “DMK3, and “DMK4” which set out all polling stations and the Respondents had addressed all those issues. He submitted the authorities relied upon by the Respondents showed that the court should consider the contents of the petition and supporting affidavit. He further referred court to Election Regulation NO.12(2)(c) and 15(3) which he submitted clearly indicates that any affidavit filed before court shall form part of the court record, he however stated that weight to be attached on affidavit to which a party has not been called is very little. On issue of cross-examination he stated that the issue has been addressed in the Petitioner’s authority No.9 **CLEMENT KUNGU WAIBARA V BERNARD CHEGE MBURU & 2 OTHERS CIVIL APPEAL NO. 205 OF 2011(2011) eKlr.** He submitted therefore the affidavits and annexures ought to be considered.

Mr. Muthomi T. in his further submissions referred to paragraph 3 to 11 of the petition and paragraph 12(b) of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents’ submissions referring to case of **BUSIA ELECTION NO. 1 OF 2013 PHILIP OSORE OGUTU V MICHAEL ONYURA ARINGO & 2 OTHERS** in which Hon. Mr. Justice F. Tuiyot stated:-

**“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.”**

He urged the court to consider the petition and affidavit in support. He further submitted though the trial is closed the Petitioner relies on the Petitioner’s affidavit and documents on record. He submitted that the Petitioner is seeking recount of 4 constituencies and if possible maximum 9 constituencies.

He submitted that the Petitioner has laid down a basis as to why all stations are being sought to be subjected to a recount. He submitted the basis are to be found in the Petitioner’s petition and affidavit in support. He also submitted the basis are to be found in the evidence of Mr. Kennedy Onditi, who he submitted stated that he was not concerned whether Form 35’s were signed or not.

Mr. Muthomi T, in his submission on the test of deciding whether a basis has been laid or not submitted it is the decision of a reasonable person. He submitted as the Respondents are relying on replying affidavit of Mr. Kennedy Onditi, the Petitioner should be allowed also to rely on the same. On the issue of margin Mr. Muthomi T, submitted the error was vacated by the same Judge. He referred court to the case **JOHO V NYAGA & ANOTHER(NO2) (2008) 3KLR(EP),**

Mr. Muthomi T, also referred to petition **NO. 5 OF 2013 PHILLIP MUKWE WASIKE V JAMES LUSWETI MUKWE & 2 OTHERS** in which Hon. Lady Justice H. A. Omondi stated as follows:

***In my view, despite the winning margin between the 1<sup>st</sup> Respondent and the Petitioner being slightly over 1000, in view of the glaring irregularities and/or omissions in statutory forms in the polling stations listed in category (c) of the court's own audit of the statutory form provided by the 2nd Respondent, an order for scrutiny is necessary to clear the doubt over the results contained in those statutory forms.***

**THE 1<sup>ST</sup> RESPONDENT’S SUBMISSIONS**

In opposing the application Mr. Okongo Omogeni, Snr. Counsel for the 1<sup>st</sup> Respondent submitted that he had 4 broad reasons in opposition of the application. The first ground of opposition he contended was that the Petitioner is purporting to seek scrutiny within constituencies that are not within the Petitioner's ambit prayers and prayer 1(a) of the petition.

He submitted in the instant prayer advanced by the Petitioner would be prejudicial and an abuse of the court process for the Petitioner to go outside what he humbly has sought the court to grant. He prayed that all polling stations outside the Imenti South, Tigania East, Igembe South and Buuri Constituencies be disregarded in the Petitioner's application for scrutiny and recount. He submitted all such stations are set out in 1<sup>st</sup> Respondent's submissions on page 3 and 4 of submissions. On second objection he submitted even for these polling stations falling within the 4 constituencies that are not in contention in the petition should be disregarded. He submitted the polling stations have been set out in the 1<sup>st</sup> Respondent's submissions at page 5 and 6(a) and (d). He further submitted that those polling stations were not subject of testimony taken before the court neither were they mentioned in the petition. He further submitted that during the hearing of the petition and on its onset they objected to the Petitioner's attempt to introduce evidence that was outside the polling stations which are mentioned in the current application. He submitted that there is indeed a court ruling on that point. He submitted it would be contemptuous of the Petitioner to try to introduce the new polling stations through this application for scrutiny. On scrutiny Mr. O. Omogeni referred court to Article 87(1) of the Constitution of Kenya, 2010 which states:-

***“87. (1) Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes.”***

He stated that Parliament is donated with powers to legislate for timely settlement of disputes. He further submitted that parliament has enacted Elections Act.

He referred to Section 82 (1) and (2) of the Elections Act which provides a framework of what court would consider in scrutiny of votes and what votes could be struck off.

Section 82(1) provides:-

***82. (1) A n 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.***

Mr. Omogeni urged the court to dismiss all polling stations that were not mentioned in the petition. He also submitted the basis for granting scrutiny and recount has not been laid or established as laid under Section 82 of the Elections Act.

Mr. Omogeni referred to the Elections(Parliamentary and County Elections) Petition Rule 2013, Rule 33(4) which provides:-

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

He submitted the above-mentioned Rule provides that scrutiny shall be confined to the polling stations in which the results are disputed. He submitted the Petitioner had not complained on the results on the polling stations which the 1<sup>st</sup> Respondent is objecting to. Mr. Omogeni urged the court to take judicial notice of the fact that the words used under Section 82 of the Elections Act and Rule 33 of petition Rules 2013 are “shall” meaning that they are mandatory, which means for a party to benefit must comply thereof.

On supportive authorities Mr. Omogeni referred to **SUPREME COURT OF KENYA AT NAIROBI PETITION NO. 1 OF 2013 RAILA ODINGA & OTHERS V IEBC & OTHERS** on page 7 in which the Supreme Court stated:

***“we note that the operative term in Section 31(d) is the word “shall”. This suggests that it shall be mandatory to comply with any requirements within the presented time”.***

He submitted guided by that interpretation and going by the fact that these polling stations were not in dispute in the petition they should be disregarded in the application. On decision by Lady Justice H. A. Omondi in BUNGOMA EP NO. 5 OF 2013 PHILIP MUKWE WASIKE V JAMES LUWETI MUKWE & 2 OTHERS he submitted the case can be distinguished in that evidence was heard and cross-examination done. On page 8 paragraph 8 from the bottom the court observed:

***Whereas it is true that the petition is lacking in specificity and particularity, I note that the Respondent got an opportunity to respond to the issues raised therein and even to cross-examine witnesses in respect of the same and would suffer no prejudice owing to the alleged lack of specificity and particularity.***

He urged the court to distinguish those circumstances to be different as no witnesses were called nor did the Respondent cross-examine on those polling stations. He further observed the allegations in that petition were different in that the issue was before court as per last paragraph on page 7 of the ruling which stated:

***“Paragraph 19-allegations that IEBC official made false and inaccurate entries in the statutory forms particularly in Chwele Youth Polytechnic, Kisiwa, Chebunyinyi, Wabukhonyi, Matibo, Matibo friends, Chemwa, Pongola, Sirare Youth Polytechnic, Sichei Rc and Mpakani market.”***

He further submitted the case is distinguishable especially in that there are no specific allegations. He further submitted this is a High Court ruling, made by a judge of equal jurisdiction and the authority is not binding on this court. He submitted its effects and weight must be weighed with what is provided in Article 163(7) of the Constitution of Kenya which provides:

***(7) All courts, other than the Supreme Court, are bound by the decisions of the Supreme Court.***

Mr. Omogeni further submitted that there are decisions of High Court in which different view have been taken by Judges.

In Election Petition No. 4 of 2013 WAVINYA NDETI V IEBC & 2 OTHERS Hon. Mr. Justice David Majanja under paragraph 14 stated:

***The question as to whether or not to admit additional evidence must be weighed heavily against other important factors necessary for a just and expeditious trial. This is especially so in where the determination of the election petition is within strict timelines. The court also ought to guard against a party’s attempt to sneak in fresh evidence in the guise of ‘additional evidence’ or ‘further evidence’ where effect is to amend pleadings and set the cause of action on an entirely different path. That is why in the Raila Odinga & 2 Others v Independent Electoral and Boundaries Commission & 3 Others (Supra), the Supreme Court observed in part, “...the additional facts and evidence, in our view, tend to introduce such new matters as would change the character and nature of the Petition. This may lead to amendment/s of the Petition thereby possibly giving rise to significant new facts and/or allegations leading to a serious departure from the original case.”***

In the case of PHILIP OSORO OGUTU V MICHALE ONYURA ARINGO & 2 OTHERS EP. 1 OF 2013 AT BUSIA Hon. F. Tuiyot, J under paragraph 25 stated:-

***“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. “***

Mr. Omogeni further on his second ground why the application cannot succeed submitted that the Petitioner has not laid sufficient ground to warrant the order for recount and scrutiny to be granted. Under Rule 32(1) and (2) of the Petition Rules 2013 he submitted it is provided:-

**32. (1) Where the only issue in the election petition is the count or the tallying of the votes received by the candidates, the Petitioner may apply to the court for an order to recount the votes or examine the tallying.**

**(2) The Petitioner shall specify in the election petition that he does not require any other determination except a recount of the votes or the examination of the tallies.**

He submitted as in this petition the only issue for determination is not recount the applicable Rule is 33(2) of the Petition Rules 2013 which provides:-

**(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.**

He submitted the court can grant recount on being satisfied that there is sufficient reason. He submitted that the Section must be looked together with Section 82 of the Elections Act, which presupposes that the Petitioner must lay a basis before court can order a scrutiny or a recount.

He submitted according to his understanding the court can order one and not both. In the case of **ELECTION PETITION NO. 3 OF 2013 PETER GICHUKI KANG'ARA V IEBC & 2 OTHERS(NYERI)** on page 18 on paragraph 3 Mr. Omogeni submitted that before an order is made the court must be satisfied that sufficient basis has been laid. He further submitted On authorities before court by the Petitioner authority No.6 in the Case of **SAID V MWARUWA & ANOTHER (2008) 1 KLR EP 323** supports 1<sup>st</sup> Respondent's submissions. He submitted in that case it was held that the Petitioner must cite the relevant paragraph in the petition in which an impropriety in the election has been identified and evidence placed before court. He submitted that case compared with the circumstances of the instant case in that no agent nor the Petitioner nor the witnesses called challenged the counting and entry of results of all candidates. He submitted in view of that no basis had been laid before the court to warrant making an order for recount.

In the case of **NG'ANG'A & ANOTHER V OWITI & ANOTHER(NO.2)(2008) 1 KLR EP 799** he submitted on evidence adduced court found no need for ordering scrutiny and recount. He further submitted under holding No.4 the evidence laid in that case was found to be scanty and speculative and did not meet the required standard of proof. He submitted the Petitioner in this petition has made many grave allegations but which he has deliberately chosen not to call evidence on. He further submitted serious allegations have been raised regarding Imenti South yet no single witness from Imenti South was called and that the same applies for Buuri and Igembe South constituencies. He submitted in absence of direct evidence there is no impropriety that had been laid before court.

Mr. Omogeni on polling stations on page 8 of the Petitioner's submission submitted that no impropriety has been laid down before court to warrant issuance of orders sought.

On Yururu polling station(070) where it is alleged the votes cast exceeded registered voters he submitted the issue can be dealt with under the provision of Section 83(1) (a) of the General Regulation. He submitted the total votes cast were 919 while Petitioner's annexure has 926 registered voters. He urged that this can be canvassed at the submission. On Mwichiune Polling Station (083) he submitted the allegation is that the results were not taken in Form 36. He stated there is no complaint on Form 35 nor were the results challenged by the agents. He submitted Form 36 indeed confirmed entries were made. On Igandene Primary School(086) the allegation was of duplication on Form 36 in respect of one stream. He submitted Form 36 confirmed that was not so. He submitted that cannot be a basis for scrutiny and recount. On Murembu primary school (055) and St. Alloysious Primary School (062) he submitted that the allegation is that Form 35 was not signed by the agents. He submitted that there was no evidence from any of the agents there was any impropriety . He submitted the results garnered by each candidate

has not been challenged. He submitted in absence of malpractices that point can be taken on submission. On Nkubu primary school (138) and Kathera primary School he submitted that there is admission by 2<sup>nd</sup> and 3<sup>rd</sup> Respondents that the results in respect of one stream were duplicated and the two left out completely. He submitted in respect of the two polling stations Hon.Dr. Kilemi was deprived 78 votes and Hon. P. Munya added 66 votes. He added that there was no complaint on Form 35 but complaint is on posting on Form 36. He submitted ordering scrutiny or recount will not alter the error which is already admitted.

On recount and scrutiny Mr. Omogeni stated that the two are different and distinct. He referred court to the case of **L. RAJAPAKSE , PETITIONERS AND S. KATHIRGAMANATHAN EP. NO. 41 OF 1965-ELECTION DISTRICT NO. 75(Tissamaharama)** in which it was stated:

***A clear distinction should be drawn between a recount and a scrutiny. A recount is only ordered when there has been no count according to law and a scrutiny is granted when, as a result of bribery, impersonation, etc., a winning candidate has not obtained the votes he is entitled to in law, In a scrutiny the inquiry into each vote is dealt with separately (vide The Law of Elections and Election Petitions by Hugh Fraser (3rd Edition), page 225). On a scrutiny the Court is empowered to strike out the votes which were procured by bribery, cheating, undue influence, impersonation and on other grounds set out in section 85 of the Parliamentary Elections Order in Council. When a scrutiny is asked for by a Petitioner the successful candidate is also entitled to show that votes cast in favour of the Petitioner should be struck off for similar reasons.***

He submitted that a recount can only be ordered when there has been no count according to law. Scrutiny he submitted it can be ordered as a result of bribery, impersonation in which court is invited to strike out such votes as per Section 82 of the Elections Act.

On the issue of votes garnered by the winner and runner-up he submitted the margin was 3336 votes. He submitted according to the first Respondent there is a big margin. He referred to authority submitted by the Petitioner **JOHO V NYANGE & 2 OTHERS(No.2) (2008) 3 KLR 188** on page 189 on holding No.4 where court had stated:-

***4. There was no rule that a Petitioner had to first call evidence and lay a basis before scrutiny is ordered nor was there a rule that scrutiny would always be ordered whether or not a basis had been laid. Where there was a large margin there was no need for recount and scrutiny of the votes.***

On page 194 under No.40 on the margin court held:-

***“The common thread that runs through all of them is that there is no rule that a Petitioner must first call evidence and lay a basis before scrutiny is ordered. Nor is there one that scrutiny will always be ordered whether or not a basis has been laid. However, the vote margins are narrow like in ONAMU V MAITSI ELECTION PETITION NO. 2 OF 1983 where the margin was only 30, Kirwa-vs – Muliro Election Petition No. 13 of 1988 where the margin was only 7 and HEMED SAID VS IBRAHIM MWARARWA ELECTION PETITION No. 1 of 1983 where the margin was only 62, scrutiny was ordered without laying any foundation.”***

In the case of **PETER GICHOKI KING'ARA V IEBC & 2 OTHERS EP NO. 3 OF 201(NYERI)** at page 22 paragraph 1 line 10 he submitted that court stated where a margin is too wide a basis must be laid and found a margin of 2000 to be too wide.

In the case of No.9 by the petition **CLEMENT KUNGU WAIBARA V BERNARD CHEGE MBURU & 2 OTHERS CIVIL APPEAL NO. 205 OF 2011(2011) eKlr** at page 9 he submitted that if the irregularities had no effect or substantial effect on the results, there would be no proper basis for nullifying the appellant's election. He concluded by submitting that the Judiciary is now reformed with Judges who are competitively recruited with independence from the executive and best placed to

adjudicate on petitions even if they sit as a single Judge and that their decisions are as good if not better. He prayed the application be dismissed with costs.

### **THE 2<sup>nd</sup> AND 3<sup>rd</sup> RESPONDENT'S SUBMISSIONS**

Mr. Munyu, Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents associated himself with submissions made by Mr. O. Omogeni. He submitted that according to current law scrutiny under Rule 33(4) of the petition Rules 2013 should be confined to the polling stations in which results are disputed. He therefore submitted in an application for scrutiny and recount one cannot seek scrutiny and recount for entire constituencies without identifying the polling stations. He therefore submitted that application as drafted cannot be granted under Rule 33(4) of the Petition Rules 2013. Mr. Munyu submitted that the Petitioner had not sufficiently laid a basis for the grant of the order of scrutiny and recount. According to Mr. Munyu mere allegations are not enough. He added that all allegations or irregularities must be proved before an order for scrutiny and recount is made.

In support of his proposition he referred to the case of **PHILLIP OSORE OGUTU V MICHAEL ONYURA ARINGO & 2 OTHERS E.P. NO. 1 OF 2013(Busia)** at page 46 under paragraph No. 20 where Hon. Mr. Justice F. Tuiyot stated:

*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. It would be expected that a party filing an Election Petition is, from the outset, seized of the grounds, facts and evidence for questioning the validity of an election. And where the evidence is unclear then a party can, on application to Court, seek and obtain better particulars of that evidence from its adversary. But 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.*

He submitted that in this case there is no evidence showing discrepancy to be answered by looking at the ballot boxes nor are there gaps. He submitted that he is concerned with the purpose of the scrutiny and in regard to 4 Constituencies as out of the 4 Constituencies no single witness was called. In regard to 3 Constituencies namely Imenti South, Igembe South, and Buuri, he submitted the court is being asked to go fishing from the ballot boxes for evidence and termed the application as an abuse of the court process. He further submitted in considering the Petitioner's application the court should restrict itself to the contents of the petition and supporting affidavit made by the Petitioner and that one cannot introduce fresh polling stations through a supportive affidavit to the Notice of Motion for scrutiny and recount. He submitted the polling stations to be considered are the ones set out in the replying affidavit of Dr. Kamundi under paragraph 4. He submitted the 58 polling stations were not pleaded in the petition nor are there irregularities pleaded and as such they should be rejected as the Petitioner is trying to look for evidence through scrutiny. On the remaining polling stations, he submitted that there are no material evidence of impropriety or illegality in voting or casting of votes. He submitted that those are the same polling stations set out under paragraph 13 of Mr. Omogeni's client's supportive affidavit. He further relied on **EP. NO. 4 OF 2013 M'NKIRIA PETKAY SHEM MIRITI V RAGWA SAMWEL MBAE & 2 OTHERS** in which Hon. Lady Justice Lesiit, stated the Petitioner must state what it is that he is alleging was done irregularly and upon what evidence or facts he bases his claim. He submitted that is missing. He then referred to the judgment of Hon. Justice L. Kimaru in **EP. NO. 6 OF 2013 RASHID HAMID AHMED AMANA V IEBC & 2 OTHERS (Malindi)** in which the court emphasized that polling stations must be pleaded. He referred to **EP No. 6 of 2013 HASSAN MOHAMMED HASSAN & ANOTHER V IEBC(Garissa)** in which Hon. Justice D. A. Onyancha stated that prayers for scrutiny and recount in the petition was too wide since it sought scrutiny in respect of all votes cast in the polling stations in Wajir West constituency. Mr. Munyu further referred to the case of **MASINDE V BWIRE AND ANOTHER (2008) 1 KLR EP 9 of 1993** where court considering an application for scrutiny stated that

*“There must be a good reason before this court can order for scrutiny. An order for scrutiny is*

*not automatic. There must be a basis for it”*

## **The Petitioner rejoinder**

In rejoinder, Mr. Muthomi T, for Petitioner reiterated that the law on petition has not changed. He also reiterated the authorities the Petitioner is relying on are equally binding, persuasive and authoritative. In reply to the introduction of new polling stations he submitted the Petitioner has not introduced new polling stations and urged court to look at the petition and affidavits in support. He submitted annexures “DMK2” has all polling stations and should be considered as pleadings. He submitted it was not true that the Petitioner had introduced new polling stations. He also submitted the court was obligated to consider all evidence adduced before it and not that of the Petitioner alone. He reiterated the Petitioner has established basis for granting of the application. He reiterated the errors on forms 35 and 36 would form a basis for doubting the results. He submitted that in Kenya scrutiny includes recount; he however stated the court can grant recount and ignore scrutiny. He submitted that once a Petitioner leads evidence to establish a case for scrutiny the Returning Officer should be the last one to oppose a scrutiny and recount.

### **APPLICABLE LAW:**

Section 82 of the Elections Act provides for Scrutiny. It provides as follows:-

***82. (1) A n 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.***

***(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 personation at the election;***

***(d) the vote of a person proved to have voted in more than one***

***constituency;***

***(e) the vote of a person, who by reason of conviction for an***

***election offence or by reason of the report of the election***

***court, was disqualified from voting at the election; or***

***(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.*

Rule 33 of the Election Petition Rules 2013 provides as follows:-

- 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.*

I have summarized the various submissions by counsel in this petition, quoted the various authorities relied upon and it would be duplication in replicating the said authorities in my decisions herein below but the same shall be considered in my decision.

I would like to state that from various authorities referred to this court and recent trend, scrutiny can be ordered but be confined to polling stations in which results are disputed and where a Petitioner lays sufficient basis. That such basis can only be laid after the Petitioner and his witnesses has adduced evidence during the trial of the petition. The Petitioner can seek scrutiny after his/her witnesses have given evidence or wait and make application after all witnesses in the petition has given evidence and before judgment. This is because the court will be in a position to properly weigh the veracity of the allegations made by the Petitioner that scrutiny be considered.

Under Rule 8(4) (b) and (c) of the Petition Rules 2013, the court has jurisdiction to declare a person to have been validly elected or order a fresh election should be held or not, upon court establishing the Respondent has not been validly elected. The court however cannot declare a Petitioner having been duly

elected without scrutiny. Therefore scrutiny and recount can be used by election court as a basis of declaring a Petitioner as having been duly elected in a petition that is subject of dispute before that court.

Rule 33(4) of the Election Petition Rules 2013 is worded in a mandatory manner and specifically states that scrutiny shall be “**confined**” “(underlining mine)to polling stations in which the results are in dispute. My understanding is that scrutiny can only be limited or restricted to “polling stations” and not otherwise and in which polling stations the results are disputed. I do not agree with the petitioner’s counsel submission that Rule 33(4) of the Petition Rules 2013 is contrary to the substantive law and the Constitution by limiting scrutiny and recount to polling stations in which results are disputed. Its purpose is to safeguard the opposite party from being ambushed by the petitioner who may cunningly attempt to introduce fresh evidence in a petition.

In the **ELECTION PETITION NO. 6 OF 2013 RISHAD HAMID AHMED AMANA V IEBC & 2 OTHERS** Hon. Justice L, Kimaru **KIMARU** under paragraph 36 stated:

*At to the types of scrutiny that can be ordered, Rule 33(4) of the Election Petition Rules gives the court jurisdiction to order partial scrutiny. Under the old Election Petition Rules (which have now been repealed), the court had no option but to undertake scrutiny and recount of all the polling stations in the entire electoral area that is the subject of the electoral dispute. This was whether or not complaints had been raised in respect of some of the polling stations. Rule 33(4) now grants jurisdiction to the court to limit scrutiny specifically to the polling stations that complaints have been raised. The court can now direct that scrutiny be undertaken in respect of votes cast in a specific polling station. This is one type of partial scrutiny. Another type of partial scrutiny is similar to the one that was recently undertaken by the Supreme Court in Election Petition No.5 of 2013 Raila Odinga –Vs- Uhuru Kenyatta & 3 Others. In that case, the Supreme Court ordered partial scrutiny to be undertaken in respect of Form 34s of all the polling stations in the Republic to determine whether the results contained therein were reflected in the final tally that was announced by IEBC in the presidential poll. This was partial scrutiny because the Supreme Court did not make an order that the ballot boxes in respect of the presidential poll be opened to verify the results that were entered in the Form 34s. Another type of partial scrutiny is where the court only examines Form 35s, in respect of other elections other than the presidential elections, to determine whether the results transposed in Form 36 reflects the correct tally. Rule 33(4) of the Election Petition Rules therefore gives the court wide discretion to do justice to parties in an electoral dispute in an efficient and expeditious manner.*

I agree entirely with the learned Judge on the types of scrutiny that can be ordered by court. I agree with the petitioner’s counsel Mr. Muthomi T. that in Kenya, scrutiny can include recount.

### **THE COURT’S DECISION**

The issue for determination in this application is whether the Petitioner has established that he is entitled to prayers for scrutiny and recount. This court has set out the Petitioner’s application, the Respondents responses, and the Counsel submissions both in writing and oral. The court has also set out what is the current law guiding court in deciding whether or not to order scrutiny and recount. In the instant application this court had the advantage of having heard the evidence adduced by the Petitioner and his witnesses as well as evidence by the Respondents and their witnesses. The parties had closed their respective cases when this application was filed.

This court shall in the process of determining this application consider several issues in determining whether to grant or dismiss this application. The first issue is whether the polling stations outside the four(4) constituencies, that is Imenti South, Tigania East, Igembe South and Buuri constituencies being constituencies in which scrutiny and recount is sought should be considered. Secondly whether polling stations falling within the four constituencies that are not in contention in the petition should also be considered. Further whether polling stations which were not subject to testimony taken before this court nor mentioned in the petition should be considered. Other point to consider is whether basis has been laid or established under Section 82 of the Elections Act and as per conditions set out under Rule 33(4) of the

Having carefully perused the petition, the affidavit in support and having considered the evidence adduced by parties in this petition and Counsel submissions the court agrees with the Respondents that the Petitioner is trying to introduce new evidence by introducing polling stations outside the four pleaded constituencies, that is Imenti south, Tigania East, Igembe South and Buuri constituencies in which scrutiny and recount is sought. I further agree with Respondents the polling stations falling within the above mentioned four constituencies that are in the Notice of Motion, that are not in the contention in the petition should not be considered.

In the testimony of the Petitioner and his witnesses no evidence was adduced on the further polling stations which are not mentioned in the petition nor any cross-examination done on polling stations outside the ones mentioned in the petition. I find that the said polling stations should be disregarded. In addition to the above no basis is laid in respect of the polling stations outside the 4 constituencies or the polling stations which were not mentioned in the petition. The Petitioner's attempt to rely on annexure "DMK2" "DMK3" and "DMK4" as part of the pleadings cannot be acceptable to court as the annexures to any affidavit cannot be said to be pleading. In addition to that the annexures are of all polling stations in the 9 constituencies and I find this to be contrary to Rule 33(4) of the Petition Rules 2013 which confines scrutiny to polling stations and not constituencies and in respect of which polling stations results are disputed. The polling station in 4 constituencies are too many to consider and the area too wide. The Petitioner has not laid basis nor disclosed any evidence to warrant scrutiny and recount in the said constituencies. Scrutiny and recount cannot be granted without laying the basis. The Petitioner is using this application for scrutiny and recount to fish for fresh evidence from ballot boxes and the court cannot agree to consider any polling stations outside the pleadings, and especially where no evidence was adduced by the petitioner or his witnesses or cross-examination done on the polling stations outside the pleadings.

In view of the foregoing I find and hold that the Petitioner can only ask for scrutiny and recount in stations which he has specifically pleaded in the petition. He cannot be allowed to go beyond his pleadings nor can court look beyond his pleadings. The polling stations which are not pleaded in the petition as objected by the Respondents are therefore disregarded as a party in any matter is bound by his pleadings. It is too late for the Petitioner to attempt to introduce fresh evidence, and in view of this court's earlier ruling on the same issue if allowed would amount to this court sitting on an appeal on its own ruling and the Respondents would be prejudiced. Allowing fresh evidence I find would offend the provisions of the Election Laws.

The Petitioner has introduced new polling stations in the affidavit sworn in support of his application. The new polling stations are beyond the polling stations that the Petitioner had requested for scrutiny in his petition. The evidence a party intends to rely on should be brought to the attention of the opponents in advance to enable the other party to prepare his defence. Gone are the days when a party will produce evidence at the last minute with a view to catch the other party unawares and win the case. Courts have to ensure level playground for all and that the parties do not shift goal posts as and when they wish and that all will be bound by their pleadings hence ensuring all particulars are contained in the pleadings. In the circumstances this court cannot grant the Petitioner's request to scrutinize and recount results from polling stations that he did not specifically plead in his petition. The stations objected to by the Respondents numbering 62 are disregarded.

The Respondents objected to an order of scrutiny and recount being issued to the remaining seven (7) polling stations being:-

- 1. Yururu Polling Stations (070) Imenti South**
- 2. Mwichiune Primary school (083) Imenti South**
- 3. Igandene primary School (086) Imenti South**

4. ***Kathera Primary School (123) Imenti South***
5. ***Nkubu Primary School (138) Imenti South***
6. ***Murembu Primary School (055) Imenti South***
7. ***St. Alloysious Pry. School (062) Imenti South***

On grounds that no impropriety had been laid down before court to warrant issuance of the orders sought. The Respondents however conceded that the results of two polling stations that is Nkubu primary school and Kathera primary school were not tallied in Form 36. The Petitioner had contended in the above-mentioned polling stations the number of cast votes exceeded the registered voters and the results were not tallied in Form 36. The Petitioner also complained of duplication on Form 36 in respect of one stream in Form 36. These allegations are clearly spelled in the petition and supporting affidavit of the Petitioner.

Having carefully considered the evidence and having carefully perused Form 36 it is clear to this court while explanation given by 2<sup>nd</sup> and 3<sup>rd</sup> Respondents may be reasonable, and may be possible, this court, though in agreement with the Respondents that the margin of 3,336 votes is too wide, it is convinced that the Petitioner has laid sufficient basis and the need for the court to investigate the truthfulness or otherwise of the allegations made by the Petitioner. The court would by granting the orders sought be assisted in investigating if allegation of irregularities and breaches of law complained of are valid.

In view of the reasons hereinabove this court is of the opinion that the Petitioner has established a case for this court to order scrutinizing and recounting the votes cast in the seven (7) polling stations to determine whether or not the results reflected in Form 35 are the ones which were transferred into Form 36. This will enable the court to ascertain the integrity of the results that were entered in Form 36 by the 3<sup>rd</sup> Respondent.

The upshot is that the Petitioner has established a case for this court to order partial scrutiny and recount in respect of the following polling stations.

1. ***Yururu Polling Station(070) Imenti South where it is alleged votes cast exceeded registered voters.***
2. ***Mwichiune Primary school(083) Imenti South where it is alleged results were not tallied.***
3. ***Igandene primary School(086) Imenti south where it is alleged duplicate results were accepted.***
4. ***Kathera Primary School (123) Imenti south where it is alleged duplicate results were accepted and results not entered in Form 36.***
5. ***Nkubu Primary School(138) Imenti South where it is alleged Kilemi Mwiria's results were reduced and not entered in Form 36.***
6. ***Murembu Primary School(055) Imenti South where it is alleged Form 35 were not signed by agents.***
7. ***St. Alloysious primary school(062) Imenti South where it was alleged Form 35's were not signed by agents.***

The scrutiny and recount in these polling stations referred above shall be restricted to the ascertainment of the number of votes that each candidate obtained as compared with the results that were announced in Form 35 that were later collected in Form 36 by the 3<sup>rd</sup> Respondent. The exercise will enable the court to ascertain the integrity of the results that were announced by the 3<sup>rd</sup> Respondent.

The scrutiny and recount of the above stations shall be undertaken under the supervision of the Deputy Registrar of this court. I direct for ease of the exercise, the Petitioner, the 1<sup>st</sup> Respondent, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents will each be allowed to have two (2) agents present during the scrutiny. As regards scrutiny it shall be partial and limited to the polling stations set out above and shall be restricted to the ascertainment of the numbers of votes each candidate obtained in each of the above-mentioned polling station as compared with the results which were announced by the various Presiding Officers as contained

in the various Forms 35's and entered in Form 36 by the 3<sup>rd</sup> Respondent.

The scrutiny exercise shall commence on 6<sup>th</sup> August, 2013 at 9.00 a.m. and shall proceed on a day to day basis until the conclusion of the exercise.

The scrutiny and recount shall be in respect of the following documents:-

1. *Copy of principal register used during the elections.*
2. *Copies of results of each polling station in which the results are disputed.*
3. *The packets of spoilt votes.*
4. *The packets of counterfoils of used ballot papers*
5. *The packets of counted ballot papers*
6. *The packets of rejected ballot papers*
7. *The statement showing the number of rejected ballot papers.*

The matter shall be mentioned before this court on 8<sup>th</sup> August, 2013 at 11.00 a.m. for further directions.

Costs of the application will abide in the outcome of the petition.

DATED, SIGNED AND DELIVERED AT MERU THIS 2<sup>ND</sup> DAY OF AUGUST, 2013.

**J. A. MAKAU**

**JUDGE**

DELIVERED IN OPEN COURT IN THE PRESENCE OF:

1. *MR. Muthomi T. jointly with Mr. M. Kariuki and Mr. V. P. Gituma for the Petitioner*
2. *Mr. Omogeni Snr. Counsel for the 1<sup>st</sup> Respondent with Mr. A. Kiautha*
3. *Mr. Munyu jointly with Mr. Nyaburi for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.*
4. *C/clerk Penina/Kathurima.*

**J. A. MAKAU**

**JUDGE**