REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL SUIT NO. 32 OF 2018

CHARLES KIBISU GUNYALI.....1ST PLAINTIFF

ABUNGANA K. KHASIANI.....2ND PLAINTIFF

VERSUS

KTDA MANAGEMENT SERVICES LIMITED.....1ST DEFENDANT

MUDETE TEA FACTORY LIMITED.....2ND DEFENDANT

SETH AGALA MASAYA.....3RD DEFENDANT

JAVAN MWANZI MUKAVALE.....4TH DEFENDANT

RULING

1. The suit herein was commenced by way of a plaint, filed simultaneously with a Motion, dated 20th November 2018, seeking, principally, orders to restrain officials of the 1st and 2nd defendants from doing various things with relation to Agenda 5 of the 2nd defendant's Notice of the Annual General Meeting dated 12th October 2018, pending the hearing and determination of the suit and for a recount of votes taking into account the shares held by each of the voters.

2. The Motion was initially placed before the court on 22nd November 2018, under certificate of urgency, and the court granted interim relief, to restrain any action being taken with respect to Agenda 5. The application was responded to by the 2nd, 3rd and 4th respondents, by way of affidavits sworn by Dr. John Kennedy Omanga, Seth Agala Masaya and Javan Mwanzi Mukavule, on 11th December 2018. The 1st respondent opted to file a preliminary objection, dated 11th December 2018, which was disallowed by the court on 9th July 2018, for want of prosecution. The 2nd respondent filed two further replying affidavits, sworn by Onesmus Mugambi and William Ruto, on 13th December 2018 and 15th December 2018, respectively. Directions were taken, by consent, that the Motion be disposed by way of written submissions, which the parties have filed.

3. The applicants' case was that the 1st and 2nd respondents carried out a flawed tea election for the Sabatia and Shinyalu tea areas from which the 3rd and 4th respondents were declared winners, and were set to be appointed directors of the 2nd respondent. The applicants state that they had contested the results announced, through the internal dispute resolution mechanism of the 2nd respondent as laid down by the 1st respondent. They further contended that the 1st and 2nd respondents had failed to consider their complaints, and that they were set to hold an annual general meeting where the 3rd and 4th respondents would be appointed directors. The reasons advanced for the objections to the results were:

a) That some of the ballots cast in both electoral areas were by persons who were not farmers within the polling areas;

b) The 1st and 2nd defendants refused to avail a copy of the share register as required under the elections manual produced by the 1st defendant;

c) That certain shareholders were denied the right to vote as the register used on the election date read that they held no shares; and

d) That other shareholders were denied the right to vote since special powers of attorney forms had been taken from them by misrepresentation or other acts of fraud exercised by the 3rd and 4th defendants.

4. It was contended that as a result, the election results announced by the 1st and 2nd respondents were erroneous, falsified and not commensurate with the number of shares in the area and the will of the shareholders of the 2nd respondent in the region. It was further contended that despite their protest, the 1st and 2nd respondents failed or refused to respond to their complaints, and where they responded, they treated the same as inconsequential. The applicants argued that they had satisfied the condition precedent for grant of an injunction in line with Order 40 of the Civil Procedure Rules, 2010. The applicants further argued that the actions of the 1st and 2nd respondents reeked of high handedness and open bias towards the applicants and that the court could grant an injunction on the grounds advanced, and further that on the ground that allowing the 1st and 2nd respondent to discuss and record any resolutions on Agenda 5 of the 2nd respondent's notice of annual general meeting, which refers to appointment of the 3rd and 4th respondents, would render the substratum of the Motion void.

5. They further argued that the applicable law with respect to application was the Companies Act, 2015, which, they submitted, lays the responsibility for the operations of the affairs of a company on the management of the company. The applicants contended that the court had power to intervene and order compliance with a company's own internal policies to a just end. It was further submitted that the 1st and 2nd respondents, through their replies, had admitted to errors complained of by the applicants, but, in breach of their election manual, failed or refused to remedy the same and in all but words, ignored the applicants. The applicants added that the directors and the secretaries of the company had a duty to act with care and skill for the benefit of the company as per the provisions of section 145 of the Companies Act, 2015, and that a failure to act with such *bona fides* constituted a fraud to an offended party, such as the applicants. It was further contended by the applicants that substantive justice called for orders by the court compelling the 1st and 2nd respondents to act with *bona fides* and uphold the provisions of their election manual. They concluded by submitting that, having demonstrated that the respondents had acted fraudulently and failed to carry out their duty of care and skill to the applicants, costs should be awarded to them.

6. William Ruto deposed that he was appointed by the 2nd respondent's Company Secretary to act as the Deputy Presiding Officer of the impugned election within Sabatia electoral area, and more so at Kiritu polling station. He confirmed that the election process was smooth, from when the polling station was opened to polling. He stated that during vote counting, one of the 1st applicant's agent picked one of the ballot papers, ran to the window where his candidate's supporters were and handed the same to them. He added that the same agent became unruly and uncontrollable, and that his actions amounted to commission of an election offence. He stated that the said agent was arrested by police officers and taken out of the polling station. He further stated that aside from that incident, the vote counting process was largely seamless and that he announced the 3rd respondent as the winner after garnering 6,261 of the votes. Mr. Ruto stated that he filled the certificate of result, which was signed by the 3rd respondent's agent only, as the 1st applicant's agent had been arrested. He stated that he sealed the ballots in the ballot boxes and had the same transported safely to the 2nd respondent. He contended that no one was restrained or barred from voting within the stipulated voting time, and that there was no malpractice at the Kiritu polling station. He added that no one used a power of attorney at the polling station where he was the presiding officer, and no eligible voter was barred from voting.

7. Seth Agala Masaya, the 3rd respondent, confirmed that he was a candidate for the position of director, Sabatia electoral area, vying against the 1st applicant and that after all votes cast were counted, and he emerged winner with a total of 25,497 votes. He denied any malpractices and irregularities during the elections, save for the 1st applicant's agent being arrested. He denied using a power of attorney given by Aggrey Isuha, saying that the same had been cancelled out as the same had been double-issued to him and the 1st applicant. The 3rd respondent further stated that the total number of votes that he garnered was commensurate with the total number of shares held by the voters who voted for him. The 3rd respondent stated that he genuinely defeated the 1st applicant in the impugned election and that the orders sought by the 1st applicant would take away his overwhelming win, defeat the voice and wish of the voters and expose him to unnecessary anguish, emotion and expense.

8. Similarly, Javan Mwanzi Mukavale, the 4th respondent, confirmed that he had been a candidate for the position of director for the Shinyalu electoral area, vying against the 2nd applicant and that after all votes cast were counted, he emerged winner with a total of 23,458 votes. he denied any malpractices and irregularities during the elections, saying that all the agents, including those of his opponent, the 2nd applicant, signed all the certificates of results, signifying the authenticity and credibility of the election process and the election results. He added that in as much as he obtained powers of attorney from James Lukania Nyenzo, Joseph Shivachi Lwelo and Henry Ambey Liseche, who have since purportedly denied the same, he, nevertheless, did not use the same as they were disputed. The 4th respondent further stated that the total number of votes that he garnered was commensurate with the total number of shares held by the electors who voted for him. The 4th respondent stated that he genuinely defeated the 2nd applicant in the impugned election and that the orders being sought by the 1st applicant would take away his overwhelming win, defeat the voice and wish of the voters and expose him to unnecessary anguish, emotion and expense.

9. Onesmus Mugambi deposed that he was appointed by the 2nd respondent's Company Secretary as the Deputy Presiding Officer for the impugned election within Shinyalu electoral area, and more so at Birhembe polling station. He confirmed that the election process was smooth, from when the polling station was opened to polling or vote-casting and vote counting. Mr. Mugambi stated that all agents of the candidates, including those of the 2nd applicant, were present at all the polling stations to confirm the credibility of the process by confirming the names of the voters from the voter register, confirming the number of shares held by the voters, which were indicated correctly in the ballot paper as read out and the casting of votes by the eligible voters. He deposed that before he could record the result in the certificate of result, the 2nd applicant complained that there were additional votes that had been granted to the 4th respondent and that the total share votes counted exceeded the actual number of shares existing, of which he requested that there be a recount. He stated that, he recounted the votes in the presence of all the candidates' agents, including those for the 2nd applicant, and that the 4th respondent emerged the winner, having garnered 13,417. He stated that he filled the certificate of result, which had been signed by the agents of the 2nd applicant and 4th respondent. He further deposed that he sealed the ballots in the ballot boxes and had the same transported safely to the 2nd respondent, after he had filled the tallying form results. He contended that no one was restrained or barred from voting within the stipulated voting time and that there was no malpractice at the Birhembe polling station. He added that no one used a power of attorney at the polling station where he was presiding officer, and no eligible voter was barred from voting.

10. Dr. John Kennedy Omanga, the Group Company Secretary of the 1st and 2nd respondents, deposed that, as per Article 2 of the 2nd

respondent's Constitution, one of the roles bestowed upon him was overseeing of elections, by, among others, the appointment of returning and presiding officers for the purposes of elections of directors for the 2nd respondent. He stated that to ensure a seamless election, and that the process was not carried out in a vacuum, various processes were undertaken, including the formulation of an election manual, which was availed to all candidates and participants in the election prior to the election day. It included appointment of various officers responsible for the election, including members of the verification committee, presiding officers and their deputies, and returning officers; and appointment of a dispute resolution committee to deal with election disputes such as the instant case. He confirmed that on Election Day, one would either vote personally or through issued powers of attorney and he outlined the process of obtaining one. Dr. Omanga deposed that candidates in the impugned election were allowed to appoint agents and that all those agents, save for the 1st applicant's agent stationed at Kiritu polling station, signed the election result forms in confirmation that the election processes in all polling stations were credible and fair. He added that the 1st applicant's agent at Kiritu polling station had been arrested having committed an election offence, by stealing a ballot paper and unlawfully handing the same over to his candidate's supporters, who were at the polling station. He confirmed that the 3rd and 4th respondents were announced as winners of the elections, being for the Sabatia and Shinyalu electoral areas, respectively. He further confirmed that in as much as the impugned election was held in a credible manner, as attested to by the candidates' agents, the 1st applicant raised a complaint, by a letter dated 7th November 2018, which was addressed to the returning officer and received by the regional manager for Region VII. Dr. Omanga stated that the complaint by the 1st applicant related to a ballot paper that had been stolen by his agent and it was an offence for him to be in possession of the same, and that the returning officer did address the said complaint. He further deposed that the 2nd applicant raised a complaint, through undated letters. He stated that it was not true that the applicants' complaints were never responded to exhaustively. He contended that no voter was restrained from voting and that all eligible voters were allowed to vote for their preferred candidates. He added that the election results were a true reflection of the wishes of the 2nd respondent's growers in the respective electoral areas and that there were no malpractices or irregularities. In sum, he deposed that the applicants had not met the minimum requirements for the grant of an injunction or recounting of votes as sought herein.

11. In their submissions, the respondents stated that election of directors was an internal management process of the company provided by the 2nd respondent's Memorandum and Articles of Association, which is different from parliamentary elections in Kenya, which are regulated by a different legal regime. The respondents added that the appointment and removal of a director was something that can be addressed through a general meeting in an ordinary resolution or special general meeting by a special resolution as per their memorandum and articles of association, and that courts ought not to interfere with the same. The respondents further submitted that an order for scrutiny and recount cannot be ordered where the affidavits being relied upon have not been tested by cross-examination at the main hearing of the suit. They further submitted that an order of scrutiny and recount cannot be sought at the same time in the same petition and that there was no sufficient reason for the same.

12. From the material that I was placed before me, the issues for determination that emerged are:

a) whether the applicants satisfied the conditions precedent for granting an interlocutory injunction, and

b) whether the applicants had satisfied the condition precedent for grant of an order of recount and scrutiny.

13. On the first issue, the applicants relied on Order 40 Rule 2 of the *Civil Procedure Rules, 2010* which provides as follows:

> *"2. Injunction to restrain breach of contract or other injury [Order 40, rule 2.]*
>
> *(1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.*
>
> *(2) The court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit."*

14. The conditions for consideration in grant of an injunction were well settled in *Giella vs. Cassman Brown & Company Limited* (1973) EA 358, which was cited by the respondents, where the court expressed itself on the conditions that a party must satisfy for the court to grant an interlocutory injunction. The court said:

> *"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience."*

15. In the case of *Mrao Ltd vs. First American Bank of Kenya Ltd & 2 others* [2003] eKLR, cited by the respondents, the Court of Appeal held that:

> *"A prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."*

16. The Court of Appeal, in *Naftali Ruthi Kinyua vs. Patrick Thuita Gachure & another* [2015] eKLR**,** stated that:

> *"With reference to the establishment of a prima facie case, Lord Diplock in the case of American Cyanamid vs Ethicon Limited [1975] AC 396 stated thus,*

"If there is no prima facie case on the point essential to entitle the plaintiff to complain of the defendant's proposed activities that is the end of any claim to interlocutory relief.""

17. In *Vivo Energy Kenya Limited vs. Maloba Petrol Station Limited & 3 others* [2015] eKLR, the Court of Appeal, stated that:

"In Habib Bank Ag Zurich vs. Eugene Marion Yakub, CA No. 43 of 1982 this Court considered the role of the court when determining whether or not a prima facie case has been made out. The Court expressed itself thus:

"Probability of success means the court is only to gauge the strength of the Plaintiff's case and not to adjudge the main suit at the stage since proof is only required at the hearing stage."

The same caution was repeated in National Bank of Kenya vs. Duncan Owour Shakali & Another, CA NO. 9 of 1997 when Omolo JA stated:

"The question of finally deciding whether or not there is a contract between the parties and if there is what terms ought to be implied in the contract is not to be determined on affidavits. All a Judge has to decide at the stage of an interlocutory injunction is whether there is a prima facie case with a probability of success. A prima facie case with a probability of success does not, in my view, mean a case, which must eventually succeed."

Yet again in Agip (K) Ltd vs. Vora [2000] 2 EA 285, at page 291, while reversing a grant of an order of injunction by the High Court, this Court stated:

"With reference to ground 19 of the appeal, it is as well to remember that the Commissioner had before him an application, which by law required him to consider whether on all the facts in support or in opposition, a prima facie case with a probability of success had been made out to justify the grant of an injunction. In our view, the Commissioner was not entitled to delve into substantive issues and make finally concluded views of the dispute. He was not at that interlocutory stage of the matter, to condemn one of the parties before hearing oral evidence that party being condemned had in opposition to the claims in the suit." (Emphasis added).

"…More recently in Nguruman Limited vs. Jan Bonde Nielsen & 2 Others Ca No. 77 of 2012 this Court echoed the same sentiments in the following terms:

"We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right, which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right, which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed."

18. I have looked at the pleadings, affidavits, annexures, submissions and authorities filed in court, and the arguments advanced by both parties. I am alive to the position that the court ought not to determine the merits or demerits of the main suit at this stage. The totality of the material placed before the court tilts in favour of the respondents. I am not persuaded that the applicants have established a *prima facie* case with a probability of success. The applicants' case at this stage has been rebutted by evidence from the respondents, which casts doubts as to the weight of the applicants' case. The complaints raised by the applicants to the 2nd respondent, over the victory of the 3rd and 4th respondents, were dealt with by the 2nd respondent's returning officers as can be seen from the annexures of the 2nd respondent, which was in compliance with the election manual, also annexed. The agents for both the applicants signed the tallying forms issued by the 2nd respondent, confirming the results of the impugned election. The respondents have presented evidence to rebut the allegation that the election was marred with irregularities and that the irregularities cited by the applicants were well addressed by the 2nd respondents. In any case, I do not see how the applicants cannot be compensated by way of damages if their case was to succeed after hearing of the main suit. I am in agreement with the respondents that the remuneration and allowances they could have earned as directors are quantifiable and would adequately compensate them. Additionally, it would not be fair, based on the material before me, to hold operations of the 2nd respondent in abeyance, as that would be tantamount to interfering with the internal affairs and operations of the company. At this juncture, it would be fair to presume that the 3rd and 4th respondents were validly elected into office, unless the contrary is proved, which can only be done at the hearing of the main suit. The order of an interlocutory injunction cannot ,therefore, be granted as the applicants have failed establish a *prima facie* case with probability of success, and, in any case, the applicants do not stand to suffer irreparable loss, which cannot be compensated by way of damages should they be successful after the hearing of the main suit, and that the balance of convenience tilts in favour of the respondents to continue with their operations in the meantime with minimum or no interference by the court.

19. On the second issue as to whether the applicants have satisfied the condition precedent for grant of an order of recount and scrutiny, I shall cite the court in *Robinson Simiyu Mwanga & another vs. Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR, where it was stated as follows:

"What is recount and scrutiny?

32. The Constitution, the Act as well as the Regulations have not defined what scrutiny and recount is. The ordinary English

dictionary (The Concise Oxford English Dictionary, (2011) 12th Edition, (OUP) defines 'scrutiny' as 'the close and thorough examination, observation or study.' 'Recount' is simply 'to count something again'. Whereas the term 'recount' is easily understandable on one hand, the term 'scrutiny' on the other hand is a term with complex layers of meaning. That being so, the term 'scrutiny' has been variously defined and/or explained. In this conversation however, I will limit myself to the court-supervised scrutiny and recount. In legal jurisprudence for instance, The Halsbury Laws of England, (1990) 4th Edition, 12; 454 defines 'scrutiny' as 'a court supervised forensic investigation into the validity of the votes cast in an election'.

33. Whereas the two terms are conceptually different, they are often used together and interchangeably. In an attempt to distinguish them, the Judiciary Bench Book on Electoral Disputes Resolution, 2017 at page 78 has the following: -

> *"4.6.5. 1…Although the terms 'scrutiny' and 'recount' are often used together and interchangeably, and petitioners often pray for 'scrutiny and recount' of the votes cast at an election, the two remedies are conceptually different. A recount is limited to establishing number of votes garnered by the candidates and the tallying of such votes (Justus Gesito Mugali v Independent Electoral & Boundaries Commission & 2 Others, Election Petition (Kakamega) No. 6 of 2013). Scrutiny, on the other hand, goes beyond the simple question of the number of votes garnered by the candidates and extends to the question of the validity of such votes (Justus Gesito Mugali v Independent Electoral & Boundaries Commission & 2 Others, Election petition (Kakamega) No. 6 of 2013).There is no room for examination of electoral misconduct in a recount (Justus Gesito Mugali v Independent Electoral & Boundaries Commission & 2 Others, Election petition (Kakamega) No. 6 of 2013). Although scrutiny and recount are conceptually different, the conduct of a scrutiny inevitably entails the conduct of a recount. The converse, however is not true."*

34. From the foregone, whereas a 'recount' only deals with the number of votes garnered and the re-tallying of those votes, 'scrutiny' is a more detailed exercise where votes and the other election materials are carefully and thoroughly observed and examined with a view to ascertain if such votes are valid in the first instance and the process, to an extent, was flawless. Scrutiny is therefore an intensive exercise which gives room for examination of inter alia electoral irregularities, malpractices, misconduct and even a re-examination of the tally. The rationale behind scrutiny is two-fold: that it is only the valid votes that confer an electoral advantage to a candidate in an election hence the need to establish the validity and the number of the valid votes a candidate garnered (the quantitative aspect) and that an election can be impugned based on electoral irregularities, malpractices, misconduct and non-compliance with the law (the qualitative aspect)."

20. The Supreme Court of Kenya, in *Raila Amolo Odinga & another vs. Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR**,** gave a general overview on how the law of scrutiny should be applied, as follows:

> *"[36] In the case of Hassan Mohamed Hassan & Another v. IEBC & 2 Others Petition 6 of 2013; [2013] eKLR, the petitioner had sought scrutiny of votes in 15 polling stations. The Court (Onyancha J) in dismissing the application pronounced itself as follows:*
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> > *"… a party has liberty to apply for scrutiny and recount at any stage of the proceedings for the purposes of establishing the validity of the votes cast. However, the court has to be satisfied that there is sufficient reason for it to order for scrutiny or recount of votes. In my view and understanding, for a party to provide sufficient reason upon which the court can decide to grant the order, the party shall provide sufficient evidence to that end. If the request for scrutiny is made before the trial starts and therefore before the relevant evidence upon which such decision is adduced, then clearly and logically such relevant evidence must be based on the affidavits, if any, supporting the application….*
>
> *On the other hand where an application for scrutiny or recount is made after adequate relevant evidence has been adduced during the trial, it will be such evidence that will provide, if at all, sufficient reason upon which the court will make relevant orders. It is my view however that whether the application for scrutiny or recount is made before, during or at the end of the trial of a petition, the court must be satisfied generally, that there are sufficient grounds to order a scrutiny or recount on the basis that such scrutiny or recount will be in the interest of fairness and justice in settling the issues raised in the petition.*
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> *The decision to grant scrutiny or recount is clearly, not only discretionary but is also judicious. That is to say that the court's reason to grant such order must be good, must be logical and must be necessary for the purpose of arriving at an expeditious, fair, just, proportionate and affordable resolution of the issues raised in the Petition." [emphasis added.]*
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> *[37] Further, in the case of Philip Mukwe Wasike v. James Lusweti Mukwe & 2 Others, Bungoma High Court Petition. No. 5 of 2013; [2013] eKLR, the learned Judge (Omondi J) observed that:*
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> *"The purpose of scrutiny is:-*
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> > *(1) To assist the court to investigate if the allegations of irregularities and breaches of the law complained of are valid.*
> >
> > *(2) Assist the court in determining the valid votes cast in favour of each candidate.*
> >
> > *(3) Assist the court to better understand the vital details of the electoral process and gain impressions on the integrity of the electoral process."*
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> *[38] Further elaboration on the issue of scrutiny was provided in the case of Philip Osore Ogutu v. Michael Aringo & 2 Others, Busia High Court Petition No. 1 of 2013 wherein the Petitioner had sought scrutiny of votes in 15 polling stations during the pre-trial conference. Upon making a formal application, Tuiyott J after setting out the law regarding scrutiny, observed that as*

pertaining to the timing of the application, it would be upon the party seeking scrutiny to choose when to approach the Court. He thus observed [paragraph 18]:

"…It all depends, I think, on the ability of the Applicant to marshal sufficient evidence to persuade the Court that scrutiny is deserved. And there is no reason why this cannot be made prior to the hearing given that the Election Petition Rules require that the substance of the evidence to be relied on by the parties be set out in the Affidavits accompanying the Petition or the responses."

… [40] We also note that in the case of Jacob Mwirigi Muthuri v. John Mbaabu Murithi & 2 Others, High Court at Meru, Petition No. 2 of 2013; [2013] eKLR, the Court (Lesiit J) held that [paragraph 28 & 29]:

"[28]… Unless an order for scrutiny and recount is the only prayer sought in the Petition, it cannot be ordered at the pre-trial stage. This is because the prayer should not be granted on the basis of untested evidence, which would be the case if the prayer is simply granted at the pre-trial stage on the basis of the allegations in the Petition and the witness affidavits of the Petitioner.

[29] It is clear from the foregoing that where an application for scrutiny is made, the court must be satisfied that an order for scrutiny and recount has been justified by the party applying and secondly, that the order is necessary for the just resolution of the election Petition. Scrutiny is one of the tools that the court uses to investigate whether an election was conducted in accordance with constitutional principles and to establish that indeed the result as declared was a reflection of the will of the electorate that took part in that election. The only way the court can test whether an order for scrutiny and recount is deserved and justified is first by considering the Petition and the Affidavit in support to find out whether they disclose the Petitioner's cause of action and whether they contain concise statements of the material facts relied upon in support of the allegations of impropriety or illegality and secondly by calling of evidence and testing of that evidence through cross examination and re-examination process to test the veracity of the same. There can be no need to call evidence for examination through the trial process if none has been advanced in the Petition and the Petitioner's pleadings and in particular the affidavits of potential witnesses."

[41] Similar sentiments as above were expressed by Kimaru J in the case of Rishad H. A. Amana v IEBC & 2 Others, High Court at Malindi Petition No. 6 of 2013; [2013] eKLR where he emphasized that [paragraph 34]:

"…the recent trend is that scrutiny can only be ordered where a Petitioner lays sufficient basis. Such basis can only be laid after the Petitioner has adduced evidence during the actual hearing of the petition. The Petitioner cannot therefore demand that there be scrutiny and recount of the votes before the commencement of the trial. The Petitioner may do so after his or her witnesses have testified. The ideal situation, however, is that such an application for scrutiny should be considered by the court after all the witnesses of the Petitioner and the Respondents have testified. At that stage of the proceedings, the court will be in a position to properly assess the veracity of the allegations made by the Petitioner that there is need for scrutiny."

21. Based on the guidance by the Supreme Court above, it is finding, that an order for scrutiny and recount would be premature at this point without testing the evidence of the applicants during the hearing of the main suit. As it stands, what the applicants have presented are allegations and their veracity can only be tested during the trial of the main suit. It would be at that point that the court can consider whether it would be appropriate to order for a scrutiny or a recount. However, I should point out that the applicants' prayer for a recount is couched in such general terms that it might turn out to be arduous if not reduced to precise and specific areas where a recount is being sought.

22. In the end, it is my conclusion that the Motion dated 20th November 2018 lacks merit and ought to be dismissed in its entirety, with costs to the respondents. I, accordingly, hereby dismiss the said Motion and award costs thereof to the respondents. The orders of the court, made on 20th November 2018, are hereby discharged. It is so ordered. Any party aggrieved by the orders made herein, is at liberty to move the Court of Appeal, appropriately, within twenty-eight days.

DELIVERED DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 14th DAY OF February, 2020

W MUSYOKA

JUDGE