



REPUBLIC OF KENYA
High Court at Bungoma
Petition 5 of 2013

PHILIP MUKWE WASIKE PETITIONER
AND

JAMES LUSWETI MUKWE 1ST RESPONDENT

IEBC 2ND RESPONDENT

SILAS ROTICH 3RD RESPONDENT

RULING

By a notice of motion dated 22/05/2013, brought pursuant to the provisions of Rule 33 of the Elections Regulations (Parliamentary and County Elections) Petition Rules, 2013, the petitioner prays that this court orders for (1) scrutiny of:

- a) Copies of registers used during the elections.
- b) The packets of spoilt papers
- c) The marked copy of registers
- d) The packets of counterfoils of used and un-used ballot papers.
- e) The packets of counted ballot papers
- f) The statements showing the number of rejected ballot papers
- g) Polling day diaries
- h) Field note books

in respect of the Parliamentary elections of Kabuchai Constituency

- (2) A recount of ALL ballots in respect of the Parliamentary elections in Kabuchai Constituency.
- (3) The scrutiny and recount be in respect of **all** the polling stations that are in the said Constituency.

The application is premised on grounds that:-

- (a) In order that the real issues in controversy in this matter are determined fully, it is imperative that scrutiny and recount be carried out.

(b) The petitioner and his witnesses have on their affidavits and testimonies in court, laid a proper basis that justifies the orders sought.

(c) The contents of the rival affidavits, looked at keenly could be a compelling reason to grant the orders sought, so that a just decision is reached.

In the supporting affidavit sworn by PHILIP MUKUI WASIKE (the petitioner), he deposes that there is evidence of:

(i) Multiple erasures of figures, lack of the Presiding Officer's signatures and statutory comments and lack of signatures by agents on a number of Form 35.

(ii) Disputed produced Form 36 (I am not certain what this phrase means).

(iii) Double registration and double voting

(iv) Ballot stuffing

He points out that the manner in which the results were recorded in the Form 35 lacked signatures or names of Presiding Officers and their comments at Busakala Primary School, and Kiboochi Primary School, Kabuchai Primary School, Chwele Youth Polytechnic, Khadwanje Primary School, Pongola SA Primary School, Nalondo Primary School, Chebukala Primary School, Lukhome Primary School, (where the form for Chwele Primary School was used), Kuywa Primary school. His complaint is that the Presiding Officer did not make the required statutory comments to explain the absence of agents or their reasons for not signing the forms.

He also contends that in a number of polling stations, his agents were inappropriately listed or advertently omitted. He lists such polling stations as:

- (1) Nakitumba Primary School
- (2) Sikusi Primary School
- (3) Namilama Primary School
- (4) Sawali Primary School
- (5) Temoi Water Spring
- (6) Muyayi Dam
- (7) Mikayu Primary School
- (8) Kiboochi Primary School
- (9) Luahya Primary School
- (10) Chekulo Primary School
- (11) Nangil RC Primary School
- (12) Bwake Primary School
- (13) Chekulo Baptist Primary School
- (14) Ngalasia Primary School

- (15) Kakosi Market
- (16) Sikulu Primary School
- (17) Chenyeni FYM Primary School
- (18) Hon. Wetangula Primary School
- (19) Sichei Primary School
- (20) Lukhana Primary School
- (21) Nelima Market

The petitioner has listed the thirty four agents as those who signed the Form 35, but their names were omitted from the list of agents submitted on the said forms.

The petitioner also deposes that there were a number of polling stations which had discrepancies between what was reported by the agents and those recorded in Form 35 and tallied in Form 36 resulting in petitioner suffering 541 deflated votes, these are listed as:

No.	PS Code	Name of polling Station	Valid votes cast	Notes
1	002-2	Chwele Youth Polytechnic	456	160 reported;83 tallied (-78)
2	005-1	Nakitumba Primary School	212	48 reported;23 tallied (-25)
3	008-8	Wabukhoyi Primary School	334	204 reported;205 tallied (+1)
4	012-1	Namakhele Primary School	547	18 reported;17 tallied (-1)
5	024-1	Kisiwa Primary School	510	*
6	028-1	Chemwa Primary School	457	94 reported;37 tallied (-57)
7	034-1	Pongola Primary School	368	44 reported;20 tallied (-24)
8	050-1	Mikayu Primary School	349	76 reported;61 tallied (-15)
9	065-1	Namaondo Primary School	455	*
10	007-1	Chebunyinyi ACK	191	13 reported;11 tallied (-2)
11	013-1	Matibo Friends	325	149 reported;141 tallied (-8)
12	033-1	Sirare Primary School	520	12 reported;3 tallied (-9)
13	080-1	Sichei FYM Primary School	654	251 reported;213 tallied (-38)
14	089-1	Mpakani Market	125	79 reported;74 tallied (-5)

The petitioner further contends that in the following polling stations, there were multiple alterations and/or fraudulent entries, which raises issues of the veracity and authenticity of the votes cast i.e.

- (1) Nalondo DEB Primary School
- (2) Kabuchai SA Primary School
- (3) Nangwe Primary School
- (4) Khachonge Primary School
- (5) Namaondo Primary School
- (6) Lukhome Market
- (7) Mukuyuni Cattle Dip

In these stations, the petitioner argues that some votes were inflated by over-writing to read 347 for votes cast and 345 for valid votes cast instead of 247 and 245 respectively.

The other complaint is that there were multiple alterations or erasures of figures yet the Presiding Officer did not countersign. Worse still, one erasure was made using white-out, which is not listed among the materials in use for polling.

A further ground as to why there should be scrutiny of the documents is that in a number of polling stations the number of valid votes cast was not entered in words and figures and in

a) Namulama Primary School, altering the number of votes cast was 456, the words entered read four hundred and fifty.

b) Khatiri Primary School – votes cast recorded in figures as 328, but the words read three twenty nine

c) Khachonge Primary School – votes cast recorded in figures as 369 yet in words it reads three hundred and sixty five.

George Sitati Wekesa swore a supporting affidavit saying he knew a number of voters who had double registered AND voted, so it would be fair that there be an order for scrutiny and recount of the ballots.

His basis for saying that there was double registration of voters is informed by the fact that one CHRISTINE NEKESA WESWA holder of National Identity Card No.30530496 registered at CHEBUKAKA polling station and also registered at MATIBO FRIENDS polling station. These details also entered in the Provisional Principal Register of voters.

ANNA NEKESA WANYAMA holder of National Identity Card No.11452144 is also said to have registered at CHENJENI and TEREMI polling stations.

1st Respondent's Response

The 1st respondent in opposing the application relies on the replying affidavit sworn by JAMES LUSWETI MUKWE who deposes that this is an interlocutory application which ought to have been heard and determined before the commencement of the hearing of the petition. He is of the view that the time allocated for hearing the petitioner's case having been set for 27 – 31st May, 2013, then the application is misplaced as time for hearing has run out.

The other reason for opposing the application is that the petitioner is seeking for a re-count of all ballots in respect of Parliamentary Elections in Kabuchai Constituency, yet Rule 33 (4) of the Election (Parliamentary and County Elections) Petition rules 2013 provide that "Scrutiny shall be confined to the polling stations in which the results are disputed. In any event, it is contended that Rule 33 of the Election

Petition Rules does not provide for a recount of ballots.

The petitioner's application is termed as a fishing expedition made in an attempt to cure the loop holes and gaps that were made manifest during the hearing of this case. The 1st respondent also deposes that the petition has (I suspect he intended to say has not) through his petition, evidence and testimony, established a prima facie case to warrant an order for scrutiny and recount of ballot papers in the entire 89 polling stations of Kabuchai Constituency.

2nd and 3rd Respondent's Response

The 2nd and 3rd respondent in opposing the application state that:

- 1) That an order of scrutiny or recount of the votes received by the candidates does not lie in the circumstances of this case as no sufficient reason or basis has been made out to justify that order particularly since the Applicant has not identified in the application the particular polling stations in which the results are disputed; the application is therefore a mere fishing expedition.
- 2) An order of the recount of votes cast in the polling stations in Kabuchai Constituency is not available to the petitioner without evidence to the effect that the petitioner exercised his right under Rule 80 of the Elections (General) Regulations 2012 to require the Presiding Officers in identified polling stations to have votes recounted at the respective polling stations and that the said Presiding Officers rejected such request.
- 3) That the Order for recount of votes of votes cast may only be entertained where there is evidence establishing that such a request for a recount was first made to the Presiding Officers and denied, otherwise the petitioner is stopped from seeking such Order from the Election Court as a matter of first instance.
- 4) That the application lacks legal merit is misconceived and bad in law.
- 5) That the Grounds upon which the application is made are justifiable, sustainable or meritorious.

Arguments by counsel

Mr, Wanyonyi, counsel for the petitioner reiterated the contention by the petitioner that an order for scrutiny was the only sure way of clearing the doubt cast on the authenticity of the results announced by the 2nd respondent through its employees or agents. Counsel pointed out that forms 35 which were used to compile the results declared by the 3rd respondent, had multiple alterations, erasures and omissions which made it difficult to verify the results contained therein. He submitted that the form 35's being primary source document need to speak for themselves before they can be acted upon. Further that various form 35s had alterations that were not properly accounted for and that the explanation offered by the 3rd respondent cannot clear the doubt on the authenticity of such important document as he was not the maker of the documents. He also submitted that the 3rd respondent had nothing to show that he indeed received the documents (the form 35s).

Regarding double and multiple registration counsel submitted that the evidence given by George Wekesa Sitati sufficed to prove that there was a scheme to recruit and double register voters who would engage in multiple voting. It is argued that such a scheme grievously affected the credibility of the both the principal register and the marked register as its motive was to enable multiple voting. Counsel submitted that by looking at the contents of that form 35, one could not tell whether or not there was over-voting yet a statutory document should be able to speak for itself.

Counsel further submitted that scrutiny and recount, under rule 33 of the Election Rules is meant to erase doubts cast on the conduct of elections and that in the light of the glaring irregularities, omissions and malpractices, one cannot say with certainty that there was transparency and accountability. Counsel contended, that as the winning margin between the petitioner and the 1st respondent is small (1161 votes),

the question as to whether or not the irregularities affected the results can only be cured by scrutiny and recount. Counsel referred the Court to the decision in **Wafula Wabuge V. Limo & another** (2008) 1 KLR pg 417 where it was held inter alia that the mistakes revealed by scrutiny affected the election results thus rendering them void.

On behalf of 2nd and 3rd respondents, counsel, Mr. Lubulellah, submitted that the concept of justice on which the application is premised ought to be justice to all parties; that whereas the court has discretion to grant the orders sought that discretion ought to be exercised judiciously. His contention is that the court ought to be satisfied that a basis has been laid for granting of the orders sought. Further, that the basis of the court's satisfaction has to be the petition, the responses filed in respect thereof and the evidence adduced by the respective parties. Counsel submitted that the court needs to ask itself what exactly the petitioner is complaining about. He contends that whereas the petitioner is complaining about diverse breaches of law, irregularities, and/or malpractices he has not specified what the breaches of law are, who committed the breaches, where the breaches and irregularities were committed and what effect, if any, they had on the scores garnered by each of the candidates. He also submitted that the allegations were neither substantiated nor was evidence led to prove that the alleged breaches, if any, did occur and/or that they substantially affected the elections and the results declared by the 3rd respondent.

Counsel submitted that the evidence led by the petitioner and his witnesses was insufficient to warrant granting of the orders sought. He reiterated that the legal burden of proof cannot shift as he who alleges bears the burden to prove. He maintained that the petitioner has failed to discharge that burden. He argued that the petitioner has failed, for instance, to lead evidence to:-

- i. prove that agents were denied access to statutory forms, or denied a chance to fully participate in the electoral process;
- ii. prove multiple registration and voting;
- iii. prove use of pre-marked ballot papers and/or ballot stuffing;
- iv. prove commission of electoral offences by IEBC officials or any connivance between IEBC officials and the 1st respondent;
- v. prove inflation and deflation of the votes garnered by the candidates;
- vi. prove that alleged bribery or acts of witchcraft affected the results of the election;
- vii. prove that the minor arithmetical errors affected the final result; and
- viii. Prove that the alleged alterations, erasures and omissions in form 35's rendered the results unverifiable.

Counsel maintained that owing to the generalized manner of the application and the petition, the petitioner was seeking the aid of the court to panel beat his petition which is bad in law for want of particulars and specificity.

Mr. Makhoka, counsel for the 1st respondent, submitted that an order for scrutiny and recount is not automatic or granted as a matter of right because a party has to lay a basis for granting of the orders and the basis must stem from the petition.

Counsel submitted that the petitioner only mentioned about five polling stations in which he doubted the results reported yet in the application for scrutiny he seeks scrutiny in all polling stations. Counsel took issue with introduction of so many complaints not raised in the petition and submitted that the application tends to amend the petition as filed.

Counsel further submitted that scrutiny cannot be ordered for the entire constituency but only in disputed

stations which are not as indicated in the application but in the petition. It is on account of this that he argues, the petitioner cannot be allowed to amend his petition through the application for scrutiny or the evidence adduced in support of the petition. He submits that the court as a neutral arbiter cannot enter the arena to assist any party to panel beat his case; that the case being urged against the respondents must be particular and specific for it to be defensible, and the petition herein is not such.

Counsel also submitted that the application introduces persons who neither swore affidavits in support of the petition nor came to testify and that their evidence is not on oath. He submits that such evidence is offensive and of no probative value and as such should be struck off the record of the court.

Counsel maintained that the petitioner is just on a fishing expedition otherwise he would have tendered specific complaints in his petition. It was submitted that under Rule 33(4)(d) scrutiny shall be confined to polling stations in which results have been **disputed**; that the allegations in the application are just but a mere afterthought; and that the application as presented is prejudicial to the respondents since it introduces new evidence or issues which the respondents did not get an opportunity to call witnesses to controvert.

The following authorities were cited in support of the respondents' case:-

- a) **Jitendra Bahandri Singh V. Krishna Bahari (1970) AIR 276;**
- b) **Hassan Ali Joho V Jotham Nyange & Another (2006) eKLR**
- c) **Wabuge V. Limo (2008)1 KLR pg 417**
- d) **Masinde Muliro v. Bwire; and**
- e) **Jenkins V. Brecken (Queen's County, P.E.I elections case), 7 S.C.R 347.**
- f) **Nganga & Another V Owiti (2008) 1KLR pg 749**

In respect of the affidavit sworn by George Sitati Wekesa, counsel submitted that the contents were contrary to the evidence he gave in court. As such, the contents of the affidavit are of no probative value.

Finally he submitted that the totality of the evidence was incapable of supporting the petitioner's application. He urged the court to dismiss the application with costs.

In reply, Mr. Wanyonyi, submitted that once the court is seized of the application and responses, it should look at the issues raised and make a determination. He argues that all what the petitioner is required to do is to establish a prima facie case for granting of the orders sought, which he believes the petitioner has done. Further, that upon proving a *prima facie* case the evidential burden of proof shifted to the respondents to prove that the errors and irregularities complained of did not affect the results.

Counsel submitted that it was the duty of the 2nd respondent to supply form 35's whose contents were verifiable and that the 2nd respondent had failed to discharge that legal duty in a number of the polling stations.

He submitted that the contents of paragraphs 27 and 28 of the petition sufficed to order for scrutiny and recount; that once the court is seized with the petition, what it should consider is whether or not the case is justiciable based on the pleadings filed before it. Further that even though scrutiny may lead to nullification of elections, its aim is to establish the truth, saying that the holding in **Wabuge V. Limo case** supports the petitioners case.

Purpose of scrutiny

The legal basis for scrutiny is found under provision of Section 83(1) of the Elections Act which

provides:

1) **“An election court may, on its own motion or on an 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 allow.”**

The other provision is Rule 33 of the Election Petition Rules which provides that:-

“33 (1) the parties to the proceedings may at any stage of the proceeding apply for scrutiny of the votes for purposes of establishing the validity of the votes cast.”

Subrule 2 of the same provision makes it clear that the court must be satisfied that there are sufficient reasons to order scrutiny or recount of the votes.

Rule 33 (4) provides that scrutiny shall be **confined** to the polling stations in which the results are **disputed**.

The purpose of scrutiny is:-

- (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.

It must never be lost to anyone that what is at stake in this matter, is whether the aspirations and values of the people of Kabuchai Constituency in Bungoma County, were respected, and/or upheld by the results declared following the 4th March 2013 General elections.

To paraphrase what was observed by Warsame J (as he then was) in the Election Petition No. 1 of 2008, **DICKSON DANIEL KARABA V HON. JOHN NGATA KARIUKI & 2 OTHERS**, where the court stated regarding scrutiny that:-

..... the purpose of the exercise was to ascertain whether there exists any material discrepancies between the results captured in Form 35 which

necessitates the determination of the number of votes cast and obtained by each aspirant. It is only after this exercise that the court can form an opinion whether the results contained in the Form 35 are correct.

The gist of the petitioner’s application is that there were discrepancies, errors, alterations and miscalculations committed as demonstrated by the fact that several alterations in figures in the Form 35 were not countersigned. Furthermore, that many of the Form 35 were not signed by political party agents, and in some instances even by the Presiding Officers. What is more, that the Presiding Officers made no comments as to why there was none compliance by the agents who failed to sign the forms.

What I understand the petitioner to be saying is that if all the results were taken into consideration and properly included in the final tallying, he would have beaten the 1st respondent by at least 541 Votes, which would then have entitled him to be declared the winner and duly elected Member of Parliament for Kabuchai Constituency.

Certainly the petitioner must lay a satisfactory basis for the court to order a recount or scrutiny – is an inaccurate number of votes being attributed to the 1st respondent, thereby erroneously making him the

winner? The request for scrutiny is bolstered by the fact that IEBC (2nd respondent) had admitted that there were arithmetical errors, although its contention is that the same were minimal and would not specifically affect the outcome of the results.

In the case of **HARRIS V RYAN (1997) 44 MPLR (29) 194 (Nfld.SD)** it was stated that:-

“When interpreting legislation relating to elections, one may reasonably conclude that the primary policy is to ensure that we have free, open and properly conducted democratic elections. If there have been irregularities, these should be exposed to the view of the general public through the returning officer; and through the candidates, and their agents involved in the recounts.

In promoting this policy, the court must not ignore the desirability of avoiding undue delay in seeing the completion of recounts, scrutinize and awarding unnecessary expenses for the tax payer The courts should give an interpretation which favours encouraging openness regarding information on how the elections has been conducted.”

What is apparent is that the petitioner in this case has picked out various polling stations where there was none compliance with, or contravention of electoral laws, which affected results in the election in a substantial manner. In so doing he has introduced certain polling stations which were never mentioned in the rather generalized petition. He takes issue both with the quality of the process and numbers/figures recorded in the statutory form

I am inclined to use the approach adopted by Warsame J, in the **Karaba decision** earlier referred to, that the court should apply quantitative or qualitative tests or both depending on the circumstances and facts of each case. The quantitative is relevant where the numbers or figures are in issue, while the QUALITATIVE test is relevant where the quality or standard of election is in issue.

This is what the court said:-

“The process, quality, standard and transparency of an election can be gauged from the first step by the electoral body to the last step resulting in the conclusion of the election. The whole process has to be considered in a wholesome and conclusive manner. The process from the start to the end has to be fair, free, transparent and an expression of the will of the people, so as to say, proper election process had been conducted and concluded in a particular Constituency.”

If we are to uphold the principle of fairness, transparency, accountability and verifiability, then it is abundantly clear that the court needs to look at some of the irregularities raised, which appear to dent the credibility of the electoral process in Kabuchai Constituency. This is especially with regard to polling stations in which there were cancellations, alterations and erasures which were not endorsed. However the court must be cautious not to allow the petitioner to panel beat his case. See **Nganga V Owiti (2008) 1KLR pg 749 holding No.3.**

ISSUES FOR DETERMINATION

From the pleadings filed in this application and the submissions made by the respective parties, the issues for determination are:-

- a) Whether the application introduces issues or evidence not contained in the petition; if so
- b) Whether the court should nevertheless consider the new issues and evidence and make a determination thereon;
- c) Whether the petitioner has made up a case for granting the orders sought; if so;
- d) In respect of what documents or polling stations should the order be made?

e) What is the order as to costs?

a) **Whether the application introduces new issues or evidence?**

As pointed out earlier, counsel for the 1st respondent took issue with introduction of so many complaints in the application when the complaints had neither been raised in the petition nor supported by the affidavits and witness statements filed in support of the petition. Respondent's counsel submitted that admission of such evidence when the respondents had not got an opportunity to challenge it would greatly prejudice the respondents as its effect is to amend the petition.

The alleged new issues or evidence is contained in paragraph 6 and 6A of the Petitioner/applicant's supporting affidavit. In these paragraphs the petitioner has enumerated the various incidences of breaches of law, irregularities, malpractices and omissions complained of and particulars thereof.

The bone of contention is that whereas the petitioner had specified only about 5 polling stations where the alleged breaches of law, irregularities, malpractices and omissions were committed, he has listed more polling stations in which the malpractices and irregularities were allegedly committed. It is also alleged that the petitioner has introduced issues not contained in the affidavit and sought to support the issues on evidence not given on oath and which the respondents never got an opportunity to controvert or even cross-examine witnesses on.

Even though counsel did not single out the particular portion of the evidence he was unhappy with, from the contents of paragraph 6A (e), I presume that the evidence contained therein was the source of his complaint. In this subsection, the petitioner has listed 23 polling stations in which his polling agents were inappropriately listed or overtly omitted. From the explanatory notes given in the subsection the petitioner claims that the witnesses had averred that they had signed form 35 in their respective polling stations yet their names are not indicated in form 35's submitted by the 2nd respondent.

Counsel for the petitioner while not denying that the application raises issues not raised in the petition submitted that the petitioner had by implication referred to the said issues and urged the court to make a determination thereon as the complaints form part of the record of the court.

Generally parties must confine their arguments to the issues raised in their pleadings and that issues not pleaded cannot be introduced by way of evidence or submissions, See **Ng'ang'a & another V. Owiti & Another** (2008) 1KLR (EP) 749.

In any election petition the main pleadings are the petition and the responses. The witness statements and the affidavits are just the evidence upon which the petition and responses are premised.

I have taken liberty to ascertain the issues raised in the petitioner's petition. As far as an order for scrutiny and recount is concerned, the relevant paragraphs of the petition are paragraph 14, 17, 19 and 21, 22 and 25. The complaints in those paragraphs relate to:-

Paragraph 14-allegations of numerous instances of huge discrepancies in the total number of votes declared by the 2nd and 3rd respondent, their officers and/or employees. Allegations of ballot stuffing, multiple voting, gerrymandering or inflation of votes;

Paragraph 17-allegations of use of pre-marked ballot papers and ballot stuffing particularly in Lukhome, Kasosi, Sichei Friends, Sikata and Chebukwa polling stations;

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

Paragraph 21 & 22 - Allegations that IEBC officials knowingly and deliberately denied the petitioner's agents access to statutory forms and information during voting, counting, tallying and

declaration of results particularly in Lukhome market, Sichei R.C, Namaondo, Sanadiki and at the tallying centre (Musese Market);

Paragraph 25 - allegation that IEBC officials failed and/ or refused to reconcile and sanitize results from the various polling stations to the extent that it was not possible to tell which results were the correct and true reflection of the results obtained from the voting exercise.

My findings as regards matters not pleaded are as follows:-

(1) Although the petitioner did not specifically plead all the stations he now points to in this application, the issue was implicitly canvassed at the hearing of the petition.

(2) I identify totally with the view expressed by the court in the case of **JUSTUS MUNGUMBU OMITI V WALTER ENOCK NYAMBATI OSEBE & 2 OTHERS (EP No.1 of 2008)** Kisii that:-

“All issues raised in the petition and those which crop up during the hearing, whether pleaded or not, and which had the potential to affect adversely the final result, and the will of the voters in a Constituency must come under spotlight, scrutiny and interrogation. They have to be interrogated and determination made thereon. In this case all illegalities and irregularities which impugn the credibility of the outcome of the elections have to be considered. It will be a sad day indeed if such evidence which comes through the petitioner, his witnesses, the respondents and their witnesses, as well, to be discarded and rendered irrelevant, or inadmissible merely on grounds that the same was not the subject of any pleading At the end of the day what is of prime concern to this court, is whether the elections were conducted in a fair, free and transparent manner, and that they reflect the will of the voters and more importantly whether the Respondent was validly elected. Such determination cannot be made, if relevant evidence is locked out on technical grounds that the issues addressed by such evidence were not pleaded.”

From the foregoing survey of the petitioner's petition there is no doubt that it fairly captures the issues raised in the application, albeit without any specifics or particulars. However, as regards the allegation that the petitioner's agents signed form 35's yet their names were not reflected in the form 35's supplied by the 2nd respondent, I find no averment in the petition which supports that claim, whether by implication or explicitly. I also find no strain of evidence in the affidavits sworn in support of the petition to support such allegation.

To allow such unsubstantiated evidence to form part of the record would, in my view greatly prejudice the respondents. This is so because they never got an opportunity to respond to those allegations and/or to cross-examine the deponent on their content. Be that as it may, Regulation 79 (1) of The Elections (General) Regulations 2012 provides that the Presiding Officer, the candidates or agents Shall sign the declaration in respect of the elections. In this instance it is Form 35.

Of greater significance is Regulation 79 (6) which provides as follows:-

“The refusal or failure of a candidate or agent to sign a declaration form or to record the reasons for their refusal to sign as required . . . shall not by itself invalidate the results announced. . . .”

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.

The upshot of the foregoing is that paragraph 6A(e) of the petitioner's supporting affidavit has no

proper leg on which to stand. However, the contents of paragraphs 6 and 6A (a) (b) (c) and (d) are deemed to stem from the allegations in the petition.

This in effect means that the court will not consider the issues and evidence contained in paragraph 6A(e) in determination of the issues raised in the application.

c) **whether the petitioner has made up a case for granting the orders sought?**

Whereas counsel for the respondents maintained that the petitioner has not made up a case for granting of the orders sought; counsel for the petitioner insisted that the evidence led by the petitioner, sufficed to shift the evidential burden of proof from the petitioner to the 2nd respondent. Counsel for the petitioner submitted that whereas statutory documents (in particular form 35's) should speak for themselves, various form 35's that were supplied by the 2nd respondent had multiple alterations, erasures and omissions which rendered the contents therein unverifiable. He took the court through the polling stations in which owing to the irregularities and/or omissions in form 35 the results were not verifiable.

Although counsel for respondents took issue with reference to polling stations that the petitioner had not specifically referred to in the petition, the 2nd respondent, through the 3rd respondent had an opportunity to explain and in fact did give his views on the contents of the forms.

In his testimony, the 3rd respondent, who testified on behalf of the 2nd respondent, its officials and on his own behalf, maintained that despite the minor irregularities and the three errors he unearthed when reconciling the results, the results he announced and those announced by presiding officers in the polling stations, reflect the will of the voters in Kabuchai constituency and are verifiable.

With regard to the impugned form 35's he maintained that the irregularities contained therein are minor and did not affect the scores obtained by the candidates.

Owing to these rival arguments I took liberty to audit all form 35's in the 98 polling stations to verify whether the irregularities complained of rendered the contents therein unverifiable. The result of my audit is as provided below:-

a) In a majority of the polling stations there were no alterations whatsoever and the Form 35's were signed both by IEBC officials and the party agents.

b) In some polling stations there were irregularities and omissions but which do not affect the substance of the results as they do not relate to distribution of the votes between the candidates. In most of these stations IEBC officials countersigned the alterations, statutory comments are provided, agents signed the forms and the results add up (are verifiable). These are:

(1) Sanandiki Primary School (003) where the

alterations were countersigned, IEBC officials and some agents present signed the forms.

(2) Kibichori Primary School – overwriting, Nakitumba

Primary School (005), Sikusi Primary School (006)
IEBC officials and agents present signed.

Although the alterations/overwriting were not countersigned, their effect needs no explanation and one is able to verify from the record by looking at the unaltered figures.

(3) Namilama (009) – Figure in words differs from figures

in number, rectified record is verifiable by considering other entries.

(4) Sikusi Market (019) – overwriting, IEBC officials and agents signed, verifiable from records.

(5) Kabuchai Primary School (023) – Over-writing not signed, agents signed, results verifiable.

(6) NAMOSI ACK Primary School (025) – overwriting. IEBC officials and agents signed. Results verifiable.

(7) Khalaba Primary School (027) – overwriting signed by IEBC officials and agents, results verifiable.

(8) Musokho Primary School (026) – overwriting, signed by IEBC officials and agents. Results verifiable.

(9) Nangwe Primary School (030) alteration countersigned and IEBC official and party agents signed, results verifiable.

(10) Kabuchai (049) figures and words differ 369, 365 but results are verifiable from the record.

(11) Chekulo Baptist Primary School (055) – alteration not countersigned – IEBC official and party agents signed – Results verifiable.

(12) Chekulo Market (063) – overwriting but from perusal of record entries the results are verifiable.

(13) Chebukaka Boys Primary School Steam 2 (066) – no agents signed Form 35 – Redeemed by Regulation 79 (6) of the Elections (General) Regulations 2012.

(14) Machisi Primary School (026) – several alterations in the distribution of votes,, not countersigned but results add up and are verifiable.

15) Cheyeni FYM Primary School (078) – Alterations and

overwriting not countersigned, IEBC officials and

agents signed. Results add up and are verifiable.

c) In a few of the polling stations no statutory comments, countersigning or explanations were provided for the alterations effected thereon or the absence of agents. In these polling stations, it is difficult for the court or any other person looking at the statutory forms provided to verify the results.

Even though the 3rd respondent tried to offer an explanation as to what might have happened in those polling stations, I found his evidence to be speculative and incapable of clearing the doubts raised over the results in those polling stations as only the makers of the impugned documents could have vouched for the irregularities therein. Unfortunately, no maker of the documents was called to testify and clear the doubt on who effected the alterations and what informed the alteration and omissions.

Whereas the petitioner wants the court to order for scrutiny and recount in all the 98 polling stations, counsel for 1st respondent maintained that under Rule 33(4) (d) an order for scrutiny should be limited to the polling stations in respect of which there are complaints. The Rule provides:-

Scrutiny shall be confined to the polling stations in which the results are disputed and limited to the examination of the following:

- a) The written statements made by the presiding officer 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.**

The court has the discretion to direct which documents among these shall be scrutinized and they need not all be scrutinized – certainly the record of receipt of Form 35 by the Returning Officer sought by petitioner’s counsel is not one of these documents. Further, the court may order for partial scrutiny where sufficient grounds are established.

Use of white-out

The petitioner is aggrieved by the use of white-out on Form 35 with regard to the alteration of results entered in respect of Namaondo Primary School (065) saying white-out is not one of the materials provided by IEBC. Indeed the Returning Officer Mr. Silas Rotich confirmed in his evidence that the same was not provided by IEBC.

Regulation 61 of the Election (General) Regulations 2012 refers to election material at polling stations

which are necessary for carrying out of elections.

Regulation 61 (4) further gives details as to the nature of the materials which are essential for carrying out an election and 61 (4) (g) states:

“Such other material for the better carrying out of polling.”

The white-out was definitely not supplied by the Returning Officer, it is not clear who gave it out, and although the alterations were countersigned, I think the use of this material raises justified suspicions.

The conduct of elections in each of the 98 polling stations was separate and distinct. The petitioner cannot be heard to say just because the results for a given polling station were unverifiable, that is a good reason for opening ballot boxes in polling stations where no irregularities or malpractices were either complained about or unearthed. To order scrutiny and recount in all the 98 polling stations would, in my view, be a fishing expedition which isn't the business of an election court and indeed any other court of law. In making its determinations the court must pay regard to the pleadings and the evidence adduced. The petitioner must demonstrate that the irregularities result is making the electoral process opaque and not verifiable or credible.

In this application and the petition no evidence has been led to warrant the opening of the ballot boxes in all the 98 polling stations, but certainly some polling stations have the numbers altered in the form as to result in lack of transparency or credibility.

Scrutiny of other election materials

Owing to allegations of multiple registration and multiple voting the petitioner maintains that the only way of knowing whether the allegedly multiple registered voters in fact registered and voted more than once is to audit the principal register and the marked register.

This position is strenuously opposed by counsel for 2nd and 3rd respondent who maintains that no evidence whatsoever was led to prove double registration of voters or multiple voting. Counsel submitted that a mere allegation does not establish a fact. He further submitted that even if the persons who allegedly double registered voted, which is not the case, then there would only be two votes unaccounted for and to this end the petitioner has failed to prove double registration of voters and multiple voting to warrant the granting of the orders sought.

I have considered the evidence adduced in support of the allegations that there was a scheme to double register voters, that there were persons who registered more than once and in particular the evidence of George Wekesa Sitati who allegedly was part of the scheme. Indeed the said evidence is insufficient to prove multiple registration of voters or multiple voting. None of the persons who allegedly voted recorded a statement to that effect or was called to testify. Double registration is not proof of multiple voting and Sitati confirmed in his evidence that the 2 people he named as being part of the scheme, were not randomly picked but were selected through strategic interaction by himself.

When an order of scrutiny and recount may be made?

In **Hassan Ali Joho v. Jotham Nyange & Another** (2006) e KLR it was held:-

“An order for scrutiny can be made when it is prayed for in the petition itself and when reason for it exists....It is made when there is ground for believing that there are irregularities in the election process or if there was a mistake on the part of Returning Officer or other election official.”

In **William Maina Kamanda V. Margaret Wanjiru Kariuki & 2 others** (2008) eKLR it was observed:-

“Where statutory forms are not signed as prescribed in law, it would be difficult to determine

whether the results shown in the forms represent a true and accurate account of the ballots. In such circumstances an order of scrutiny is necessary in order to:-

i.investigate the truthfulness or otherwise of the allegations made

ii.assist the court to investigate if the allegations of the irregularities and breaches of law complained of are valid;

iii.to assist the court to determine the valid votes cast in favour of each candidate; and

iv.to assist the court assess whether there would be just cause to limit time within which parties should complete their case.” (holding paraphrased) (This must be read alongside the provisions of Regulation 79 of IEBC Regulations).

Winning Margin

It was submitted on behalf of the respondents that the court should not order scrutiny and recount because the margin of votes between the 1st respondent and the petitioner is not small (1161) and to this end the court was referred to the decision in **Hassan Ali Joho v. Jotham Nyange & Another** (supra) where it was observed:-

“...with a margin of 1061 votes in this petition I am not persuaded that an order of scrutiny and recount should be made before a foundation is laid.”

The key word here is **“before a foundation has been laid”** so that if a foundation has been laid, notwithstanding the wide margin an order for scrutiny and recount would, nevertheless, be made. There is no magic in the figure 1000, my own view is that a margin of 1000 could well be a narrow one, depending on the total number of votes cast.

I have considered the submissions by the respective counsels together with the authorities cited in support thereof. I have also considered the decisions in other persuasive authorities cited by counsel for 1st respondent. I am aware of the favoured global refrain that the narrower the margin the more likely that results were affected substantially – see **Kiiza Besigye V Electoral Commission and Y.K. Museveni Presidential Petition No.1 of 2006 (Uganda)**

In my view, despite the winning margin between the 1st 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 upshot of the foregoing is that petitioner’s application is allowed to the extent contemplated in this ruling that is to say there shall be partial scrutiny and recount in the following polling stations:-

1.Makhonge Primary School (067) where the results in respect of the 1st respondent were altered from 067 to 167.

2.Busakala Primary School Stream 1 (polling station No.001 – Presiding Officer did not sign.

3.Busakala Primary School Stream 2 (001), alteration in entries, not endorsed by countersigning.

4.Chwele Youth Polytechnic (002) – alterations in figures relating to total number of votes cast from 534 to 468 and total number of valid votes cast in first column reads in words (five hundred and forty), then in next column in figures 540 which is cancelled and replaced with 456, and the words four hundred and fifty six recorded.

5.**Kisiwa Primary School** (024) – changes effected not countersigned.

6.**Khachonge Primary School** (polling station No.049) – The total number of registered voters is not indicated. It is difficult to establish whether the number of votes cast exceeded the number of registered voters.

7.**Khachonge Primary School** (049) stream 2, alteration involving over writing in figures and words yet no explanation nor are these alterations countersigned.

8. **Namaondo Primary School** (065) alterations using white out.

The number of spoilt votes is not easily discernable.

9.**Lukhome Market** (072) – alterations in number of rejected votes, not countersigned.

10.**Lukhome Primary School** (073) stream 1, duly filled and signed form missing and the form used is contested. The maker of that form did not swear an affidavit to explain the position and it is not clear whether the results entered here were for Lukhome Primary School or Chemwa (which was cancelled).

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

- 1)**Copy of the Principal register used during the elections.**
- 2)**Copies of result 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 costs will abide the outcome of the petition.

Delivered and dated this 6th day of June, 2013 at Bungoma.

H.A. OMONDI
J