REPUBLIC OF KENYA

IN THE HIGH COURT O KENYA AT KAKAMEGA

ELECTION PETITION NO. 8 OF 2013

BENJAMIN OGUNYO ANDAMA………………….....………PETITIONER

V E R S U S

1. BENJAMIN ANDOLA ANDAYI…………....…….. 1ST RESPONDENT

2. SELLY CHESANG, (RETURNING OFFICER)….. 2ND RESPONDENT

3. INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION ………………..…. 3RD RESPONDENT

RULING

Background

1. On 26th June 2013, before the last witness of the 2nd and 3rd respondents tendered her evidence in court, the petitioner's counsel filed an application by way of a Notice of Motion dated the same day.
2. Following this development, the court directed that the said application be heard on 27th June 2013 and allowed the respondents to file responses thereto. In the meantime, the last witness of the 2nd and 3rd respondents testified and concluded her evidence.

The Application and Responses

3. This Notice of Motion has been brought under Article 86 and 159 of the Constitution of Kenya 2010, Section 80 (4) (a) and (b) of the Elections Act and Rules 32 (1) (2) and 33 (1) (2) (3) and (4) of the Elections (Parliamentary and County Elections) Petition Rules 2013(hereinafter referred to as the Election Petition Rules).
4. The application seeks the following six orders –

    1. That this application be certified as urgent;

    2. That service of this application be dispensed with in the first instance;

    3. That the honourable court be pleased to order scrutiny of the Following (items) for the National Assembly vote in Khwisero

Constituency:

a) All written statements made by the Presiding Officers under the

provisions of the Act;

b) Copies of the results on Forms 35 from the following polling

stations – Emwiru Primary School, Elukanji Primary School, Eshimba Primary School, Mundeku Primary School, Elwangale Primary School, Dudi Primary School, Emwaniro Primary School, Mulwanda Primary School, Luanda SDA Primary School, Emako Primary School, Ebukanga Primary School, Eshinutsa Primary School, Elwangale Primary School, Emaene Nursery School, Shirali Primary School, Emalindi Primary School, Mwikalikha Primary School, Emanyatta Tea Buying Centre, Emakuche Primary School, Shirali Primary School and Ibinda Primary School.

c) Packets of all spoilt papers;

d) Packets of all counterfoils of used ballot papers;

e) Packets of all counted ballot papers;

f) Packets of rejected ballot papers;

g) Form 36.

4. That the honourable court be pleased to order a recount of all the

valid votes cast in the following polling stations – Emwiru Primary School, Elukanji Primary School, Eshimba Primary School, Mundeku Primary School, Elwangale Primary School, Dudi Primary School, Emwaniro Primary School, Mulwanda Primary School, Luanda SDA Primary School, Emako Primary School, Ebukanga Primary School, Eshinutsa Primary School, Elwangale Primary School, Emaene Nursery School, Shirali Primary School, Emalindi Primary School, Mwikalikha Primary School, Emanyatta Tea Buying Centre, Emakuche Primary School, Shirali Primary School and Ibinda Primary School.

5. That the honourable court be pleased to order a retally of all the

valid votes after the recount.

6. That costs of this application be provided.

5. The application has grounds on the face of the Notice of Motion. The grounds are that –

1. It is acknowledged in the petition at paragraph 9 that the counting and tallying of the votes cast at the National Assembly for Khwisero was inaccurate.
2. The 2nd and 3rd Respondents have conceded at paragraphs 8 and 9 of the answer to petition that there were indeed errors in Forms 35 and 36 for National Assembly vote for Khwisero Constituency.
3. The 2nd and 3rd Respondents purported to conduct their own scrutiny of the documents without involving the petitioner.
4. The 2nd and 3rd Respondents concede at paragraph 8 of their answer to petition that the Petitioner had contested the results by way of seeking a recount.
5. The only way to remedy the anomalies in the recount and tallying as prayed for at paragraph 10 of

the 2nd and 3rd Respondents Answer to Petition is by way of recount and re-tallying.
6. The many forms 35 filled by the 2nd and 3rd Respondents presiding officers with different entries creates uncertainty as to the source of their numbers.
7. The 3rd Respondent's presiding officer for Shirali Primary School confirmed that they filled many Forms 35 with different serial numbers and different vote counts for the same polling station.
8. There is an acknowledged vote margin of 212 votes between the Petitioner and the 1st Respondent.
9. The scale of irregularities disclosed is such that it can only be cured by way of a scrutiny, recount and re-tallying.
10. Scrutiny, recount and re-tallying will lead to a just and expeditious disposal of this matter.

6. The application was filed with a supporting affidavit sworn by the petitioner on 26th June 2013. The affidavit supports the prayers and grounds of the application. It concludes by stating that the 2nd and 3rd respondents acknowledged that the vote margin between the petitioner and 1st respondent was 212 votes which was different from the declared vote margin of 552 votes; that the scale of irregularities disclosed in the National Assembly election could only be cured by scrutiny; recount and re-tallying; and that such an exercise would lead to a just and expeditious disposal of this matter.
7. In response to the application, the 1st respondent filed a replying affidavit which he swore on 27th June 2013. It was deponed therein inter alia, that prayer 3 (a) of the application was a general prayer; that prayer 3 (b) was an abuse of the court process as in paragraphs 12 (i) and (ii) of the petition only Emakuche Primary School and Mwikalikha Primary School polling stations were subject to complaints; that no specific reasons were given why scrutiny of the form 35 in the polling stations listed in the prayer was necessary; and that prayer 3 (c), (d), (e) (f) and (g) were not backed by any grounds.
8. The 2nd and 3rd respondents on their part filed grounds of opposition to the application, which were as follows –

1. The Notice of Motion dated 26/06/13 is misconceived, self defeating and discloses no grounds and or justification for the arduous task of scrutiny of votes.
2. Scrutiny of votes as provided for under section 82 of the elections Act is not a matter of course but must be based on cogent grounds pleaded in the petition and the evidence in the supporting affidavits in support of the petition.
3. It is an abuse of the court process to use scrutiny for purposes of chancing on new evidence.
4. The Petitioner has failed to demonstrate how the admitted errors create doubt as to the authenticity of the validity of votes.
5. Prayer No. 3 is fatally defective and incapable of being granted as it is beyond the scope of S.82 which is limited to scrutiny of votes.
6. The Notice of Motion is inconsistent with the Petition to the extent that Prayer No. 4 seeks orders which are a departure from the Petition.
7. The disputed areas pleaded in paragraph 3 and 4 of the Notice of Motion are new areas beyond the scope of rule 33 (4) of the Election Petition Rules, 2013.
8. Paragraphs 4, 5, 7, 8, 9, 10, 11, 12 and 13 are merely speculative, extremely broad, magnanimous thus insufficient to form a basis for scrutiny and recount.

Submissions of the Petitioner's counsel.

9. In support of the application, Mr. Simiyu for the petitioner submitted that prayers 1 and 2 of the application had been spent. Counsel submitted that the grounds of the application had demonstrated that the tallying and counting of votes in Khwisero Constituency was marred by irregularities as pleaded in paragraphs 9, 10, 11 and 12 of the petition. Counsel emphasized that the documents presented in court by the 2nd and 3rd respondents at pages 33 and 50 of their answer to petition, clearly showed that there existed two forms 36 contrary to Rule 83 (1) (d) of the Elections General Regulations which required only one form 36.
10. On the veracity of the tallying process, counsel submitted that at paragraph 8 and 9 of the answer to petition, the 2nd and 3rd respondents conceded that there were errors in the entries in forms 35

and 36. Counsel stated that the request in court by the 2nd respondent that the court relies on a reconciliated form 36 cannot be done, as such purported reconciliation was not known in law. In counsel's view, the only remedy available in such a situation was for the 2nd and 3rd respondents to apply to the court for scrutiny, recount and re-tallying to get the proper figures. Counsel relied on the case of **Omingo Magara -vs- Manson Nyamweya & 2 others – Kisumu Civil Appeal 8 of 2010**.

11. With specific reference to recounting, counsel submitted that when tendering evidence the 2nd respondent was shown 9 forms 35 documents that were in the petition and the equivalent forms 35 annexed to her answer to petition. She acknowledged some of the 9 forms 35 in the petition and disputed some. Since the contents of the subject forms had differences, it was necessary in counsel's view to enquire how the data in the parallel forms was obtained. Counsel suggested that the only solution to that riddle was to go to the source of the information, which was the ballot boxes and conduct a recount.
12. Counsel also submitted that the acknowledged margin of votes between the petitioner and the 1st respondent as stated by the 2nd and 3rd respondents was 212 votes which figure was a departure from the announced margin of about 600 votes. Counsel stated that, where there was such a narrow margin courts had held that a recount of votes be done. Counsel relied on a case cited by counsel for the 3rd respondent – **Rishad Amana –vs- IEBC & 2 others – Malindi HC Election Petition 6 of 2013** where the court analyzed various court decisions on this issue.
13. On scrutiny, counsel urged the court to be guided by the decision in **William Kamanda -vs- Margaret Wanjiru – Nairobi E.P. No. 5 of 2008** since there were admitted errors in the present case in capturing the data, and to order scrutiny. Counsel also relied on the case of **Hassan Joho -vs- Hotham Nyange 2007 eKLR** where, in his view because there was a narrow margin, scrutiny was ordered by the court without the petitioner laying any foundation for the same.
14. Counsel also cited the recent decision in **Thomas Malinda Musau & 2 others -vs- IEBC & 2 Others – Machakos HC E.P. 2 of 2013.** Counsel submitted that though in that case, the petitioner sought for a recount for only 8 polling stations, the court ordered a recount for all polling stations. Counsel also cited **Richard Kalembe Ndile & Anor -vs- Patrick Mwau & 2 others Machakos HC E.P. 1 & 7 of 2013** in which counsel submitted that the court ordered scrutiny in the context of a recount. Counsel was of the view that the court found that recount was an element of scrutiny.
15. Counsel submitted further that in the said case, in which the margin was 254 votes, the court felt that a partial recount would be unfair as the errors were random and affected all candidates as in the present case. Therefore in counsel's view the reasoning is applicable herein.
16. On inadequacy of pleadings to justify a recount, counsel submitted that in that case of **Richard Kalembe Ndile** (supra) the petitioner's pleadings appeared to be inadequate, but the court nonetheless involved Article 81 (e) of the Constitution of Kenya 2010 to serve the broader interests of substantive justice. Counsel urged the court to ignore the contention by the respondents that the requests of the petitioner in the present application was a fishing expedition, and urged this court to adopt the court's views above in order to ensure that the elections herein were democratic and fair.
17. Counsel lastly, sought to highlight the conflicting positions of court decisions. Counsel referred to the cases of **Philip Osore Ogutu -vs- Michael Aringo & Others – Busia HC E.P. No. 1 of 2013** and that of **Rishad Amana** (supra). Counsel stated that this court will be faced by two conflicting positions. On the one hand, courts have held that the polling stations complained of have to be pleaded to justify a recount or scrutiny and, on the other hand they have held that the stations do not necessarily need to be pleaded. Counsel stated that in the cases of **Philip Osore Ogutu and Rishad Amana** (supra), **Article 81 (e)** of the Constitution was not an issue. However, in the case of **Kalembe Ndile** (supra) and **Thomas Malinda Musau** (supra), the court made extensive reference to that Article. In counsel's view, had the other courts been brought to the attention of Article 81 (e) of the Constitution, they would have come to the conclusions arrived at by the judges in the latter two cases. Counsel urged the court to be persuaded by the school of thought which holds that a recount can be ordered whether or not the polling stations have been pleaded.

1st Respondent's counsel submissions

18. Mr. Omwanza for the 1st respondent, in response submitted that paragraph 12 of the petition set out the particulars of the election dispute. Counsel stated that the dispute in the petition was only with regard to two polling stations that is Emakuche Primary School where the votes were said not to have been indicated in form 35 and Mwikalikha Primary School where the allegation was that form 35 was not signed by the Presiding Officer. Counsel emphasized that there was no prayer in the petition for a recount, as sought in prayer 4 of the application.
19. Counsel submitted further that under **Rule 32 (1)** of the Election Petition Rules, it was provided that only in situations where the single issue in the petition was the recount or tallying of votes received, could a petitioner apply for a recount or examination of the tally. Counsel contended that the Regulation relied upon by the petitioner's counsel was not part of the Election Petition Rules. In counsel's view, since the petitioner did not state in the petition that the recount and examination of the tally were the only issue, and since infact there were more than 7 prayers, there was no legal basis for the court to order a recount, and prayer 4 should therefore be rejected.
20. With regard to scrutiny, counsel argued that Rule 33 (4) provided that scrutiny should be confined to the polling stations in which the results were disputed. In counsel's view also, prayer 5 for retally should also fail on the same account as well as the fact that the petition does not comply with rule 32 (2) of the Election Petition Rules.
21. With regard to prayer 3, counsel submitted that only Emakuche Primary School and Mwikalikha Primary School were mentioned in the petition. The other polling stations listed in the motion were neither mentioned in the petition or in the evidence. Counsel therefore submitted that the prayer was meant to be a fishing expedition.
22. On the decisions cited, counsel submitted that the **Omingo Magara** case was decided before the current Election Petition Rules were promulgated. In Counsel's view, at the time of that decision, a prayer for scrutiny and recount was one prayer. Secondly, in that particular case, the parties consented to the recount and scrutiny. Thirdly, all the polling stations in the Constituency were pleaded as having disputes. Therefore counsel submitted that the said case is distinguishable from the present case.
23. With regard to the **Kalembe Ndile** case, counsel referred to paragraph 15 of the ruling and the final order of the court and submitted that the order of the court was limited to a recount. With regard to the case of **Thomas Malinda Musau** (supra), counsel submitted that **Article 81** of the Constitution was not cited. In addition, there were numerous alterations on forms 35 and 36 in that case, which was not the situation in the present case.
24. Counsel relied on the case of **Charles Mogere –vs- Christopher Obure & 2 Others – Kisii HC e.p. 9 OF 2013** where the court emphasized that for an order of recount to be granted, the only issue in the petition should be a recount. In counsel's view, the court in that case declined to grant a request for recount. In counsel's view, the **Magara** decision had been overtaken by the change in the law. Counsel submitted that with the present legal regime, where a petitioner pleaded for various prayers as in the present case, all the prayers in the application had to be declined.
25. Counsel also relied on the case of **Philip Osore Ogutu -vs- Aringo** (supra) where the court gave reasons why a court should be careful before granting an order of scrutiny, because such a process is tedious.
26. With respect to the two polling stations in which disputes were pleaded in the petition herein, counsel argued that no sufficient grounds had been given to support those alleged disputes. In counsel's view, the complaint in paragraph 12 (i) of the petition was sufficiently answered under paragraph 10 (a) of the supporting affidavit of the 2nd respondent. The agents of the petitioner for Emakuche Polling Station signed the form and she was not brought to court as a witness. She was not even one of the witnesses who were summoned but failed to come to court.
27. The second dispute in regard to Mwikalikha Primary School was answered in paragraph 10 (e) of the affidavit of the 2nd respondent. The agent of the petitioner who signed the form was also not brought to court to justify the complaint.
28. Counsel submitted that no specific reason had been given as to why the court should scrutinize or count votes in the 21 polling stations. Nothing was raised in the petition or affidavits that would necessitate a recount in those polling stations.
29. Lastly, counsel argued that granting the prayers sought would amount to unfair trial as the 1st respondent would not have a chance to respond.

2nd and 3rd Respondent's counsel submissions

30. In response, Mr. Ouma for the 2nd and 3rd respondents associated himself with the submissions of Mr. Omwanza. Counsel submitted that in the **Thomas Malinda Musau** case, the court found that the mistakes concealed were substantial and secondly, the party who concealed the mistakes was IEBC. Counsel submitted that it had not been demonstrated herein that mistakes concealed by the 2nd and 3rd respondents affected the election results to deny the petitioner a chance to represent his constituents. The actual reasons why the court allowed the application in the **Thomas Malinda Musau** case were given in the decision.
31. On the **Kalembe Ndile** case (supra), Counsel submitted that the discrepancies in question were given therein. Agents were not given a chance to sign the forms. In our present case, agents signed all forms including the altered forms, which was prima facie proof of the results. No agent was called to testify on the forms. The forms without particulars relied upon by the petitioner were not produced by any agent, and were not in original form. In counsel's view, they could not be produced by the petitioner.
32. With regard to the **Omingo Magara** case (supra), counsel argued that in that case all evidence had been produced in court by the time the court considered the application. In the present case, the counsel for the petitioner was seeking to produce evidence in court through this application, which should not be allowed.
33. Counsel cited the case of **Philip Osore Ogutu –vs- Michael O. Aringo & 2 others – Busia HC E.P. 1 of 2013** and submitted that sufficient reasons must be demonstrated to justify an order for scrutiny. Such sufficient reasons should be contained in the petition and affidavit to the petition. Counsel relied on Section 82 (2) of the Elections Act to demonstrate how ordious the request for scrutiny is. In counsel's view, since no witness testified that there was a problem with counting of votes, or that the form 35 contained results which were not announced, there could be no basis for scrutiny. In Counsel's view, what the petitioner was trying to do was to fish for evidence. Counsel also submitted that the application was an attempt to expand the scope of the petition without giving reasons as to why. Counsel cited the case of **Rishad Amana** (supra) in which he submitted the court frowned at introducing new evidence that departs from the petition. Counsel argued that the attempt by the petitioner to list more polling stations in the affidavit, and other stations in the present application amounted to mutation of the petition which should not be allowed as it would cause injustice to the 2nd and 3rd respondents.
34. On the contention of a narrow margin, counsel argued that such was not pleaded in the petition. Counsel felt that the petitioner misled the court by giving a vote margin of 552 votes. Counsel submitted that the 2nd and 3rd respondents did not plead that the margin was 212 votes. In counsel's view, unless the court ordered a retally, an advocate could not submit on the figure of a 212 votes margin in the proposed reconciled figures by the 2nd respondent, because the court might come to a different figure. Counsel submitted that the examples relied upon by the counsel for the petitioner in the case of **Philip Ogutu** (supra) related to vote margins whose highest difference was 62 votes, unlike in the present case.
35. Counsel argued that, in an adversarial situation, a petitioner cannot avoid to prove his case and then say the margin is narrow. It is not a function of the court to prove a petitioner's case. Counsel argued that prayer 3 of the application could not be granted as it contravened section 82 (1) of the Act as the scrutiny envisaged was scrutiny of votes to establish the validity votes cast. The prayer was therefore self defeating.
36. Counsel submitted further that there were no two forms 36 in the present case as alleged. The second form 36 in counsel's view, was a dummy form only meant to indicate the errors.
37. Counsel also submitted that paragraphs 4, 5, 7, 8, 9, 10, 11, 12 & 13 of the supporting affidavit to the application were mere speculations and were not based on any facts. In counsel's view, the same should be stuck out.
38. Counsel lastly, submitted that following the change of the election law and the Regulations, the parameters for ordering a recount had been settled as per the case of **Rishad Amana**. Only in polling stations where there were disputes could scrutiny of votes be ordered.

Petitioner's Counsel Rejoinder.

39. In a short rejoinder – Mr. Simiyu for the petitioner asked the court to peruse rule 3 (1) and (2). Counsel contended that the court could decline one prayer in the application and grant the other .
40. With regard to sub rule (4) which stated that only polling stations under dispute could be subjected to scrutiny, counsel relied on section 32 (1) of the Elections Act which provided a wider option for scrutiny.
41. On the **Kalembe Ndile** case (supra), counsel submitted that paragraph 15 and 19 of the ruling was not the ratio of the decision. Counsel asked the court to peruse paragraph 3 and 4 of that decision.
42. On the **Thomas Malinda** case, counsel conceded that **Article 81 (e)** of the Constitution was not cited but that the court considered the overriding objective.
43. Counsel concluded by stating that he did not mislead the court on two forms 36, as the 2nd respondent stated so in paragraph 30 of her response to the petition.

Court's Decision.

44. Having considered the application, the responses filed, submissions and the authorities cited, this is the court's determination.

Whether Application is Incompetent.

45. Counsel for the respondents have argued that it is incompetent because it does not comply with the law, that is rule 33 (4) of the Election Petition Rules and Section 82 of the Elections Act. That it seeks the grant of orders that do not have any basis in law under the above provisions. That it seeks to expand the petition through the back door.
46. This is an application for scrutiny under prayer 3, for recount under prayer 4, and for retally under prayer 5. This application was filed under section 80 (4) of the Elections Act, which states -

> **80 (4) An election court may by order direct the commission to issue a certificate of election to a president, a member of Parliament and a member of a county assembly if –**

a. **Upon recount of the ballots cast, the winner is apparent; and**
b. **That the winner is found not to have committed an election offence.**

47. In my view, the above section of the Act relied upon by counsel for the petitioner, does not confer on this court power to conduct a recount. It only provides for the power of the court after a recount has been done.
48. Section 82 of the Act which deals with scrutiny of votes was neither pleaded by the petitioner's counsel, nor did he attempt to bring it in during the entire hearing of the application, thought it was extensively referred to by counsel for the respondents with regard to the prayers sought.
49. In my view however, since the petitioner's counsel relied on Rule 32 and 33 of the Election Petition Rules 2013, and applying the overriding objective under Rule 4 and the provisions of Article 159 of the Constitution, I will not strike out the application on that account. Rule 32 relates to recounting or examination of the tallying of votes. Rule 33 relates to scrutiny of votes.
50. Since the petitioner relies on the above two Rules which confers on the court power to order a recount, an examination of tallies and scrutiny of votes, the application is not incompetent. In my view, the fact that the application seeks prayers that might appear to go beyond what is grantable under law, goes to the merits of the application. It is not a ground to declare the application incompetent. In addition, if the grounds or evidence relied upon is outside what is envisaged under the law, that also goes to the merits of the application. It is not a ground for striking out the application for being incompetent. I find and hold that the application is competent. I decline to strike it out.

Whether the Prayers sought should be Granted.

51. I will deal with prayer 3, and then 4 and 5 together. As the petitioner's counsel has rightly already stated, prayers 1 and 2 have been spent.

52. Prayer 3 asks the court to order a scrutiny. Scrutiny of votes is covered under Section 82 of the Elections Act which provides -

> **82 (1) An 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 a 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;**
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> d. **the vote of a person proved to have voted in more than one constituency;**
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> e. **The vote of a person, who by reason of conviction for election offence or by reason of report of the election court, was disqualified from voting at an election; or**
>
> f. **The vote cast for a disqualified candidate knowing that the candidate was disqualified or the facts causing the disqualification, or after sufficient public notice of the disqualification or where 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.**

53. Rule 33 of the Election Petition Rules provides that the parties or the court may at any stage of the proceedings apply for or require a scrutiny of valid votes cast.

54. In my view, it is quite clear from the above provisions of Section 82 (2) of the Act, that one or other of the considerations therein has to arise in the pleadings of the petitioner and the evidence before a scrutiny can be ordered by the court either on its own motion or on application by a party. There is no pleading or evidence in this petition that an unregistered voter has voted; that a particular voter was bribed or unduly influenced, that a voter committed an election offence; that a voter voted more than once; that a disqualified voter voted; or that a vote was cast for a disqualified candidate. The polling stations where the irregularities have occurred also have to be established.

55. Though counsel for the petitioner has submitted that he does not have to lay a basis for vote scrutiny, I am not persuaded by his views. I must state that the case of **Omingo Magara** was determined before the current election laws and rules were made. It is not applicable. In the case of **Thomas Malinda Musau & Another –vs- IEBC & Others** the court saved affidavits by allowing proper fresh affidavits to be filed. However, it was categorical that scrutiny and recount be done only in disputed polling stations. In the **Kalembe Ndile** case (supra), the court found that the errors made by the respondents and admitted were sufficient to possibly affect the result given the margin of votes between the first two. In our present case, the petitioner has not demonstrated such a situation. These two cases are therefore distinguishable.

56. In my view, the findings in the **Philip Osore Ogutu** case (supra) and the **Rishad Amana** case (supra) do apply herein. I find that no basis has been established for scrutiny, and I decline that prayer.

57. I now turn to prayer 4 and 5 for a recount of valid votes cast, and retally. Again, Section 80 of the Elections Act cited by the petitioner does not provide for the courts powers in ordering a recount, or retallying. Rule 32 of the Election Petition Rules which provides for a recount and retallying

states as follows –

> **32 (1) Where the only issue in the election petition is the count or 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.**

58. Again, in my view, the Rule is very clear. Firstly, the words "at any stage of the proceedings" used under rule 33 for scrutiny are omitted from the rule. It is apparent that a recount has to be done at the beginning of proceedings, not after parties have tendered and closed their evidence as in the present case. Secondly, rule 32 (2) provides that the petitioner must 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. The petitioner did not state so in the petition.
59. In my view, the process of recount of votes or the examination of tallies may apply to all polling stations in a Constituency. The court may allow a recount or examination of the tallies in all polling stations whether complained of or not. However, that has to be the only issue for determination in the petition as required in the rules, and the petitioner must state so in the petition. In our present case, the petitioner has failed to comply with the mandatory requirement of stating in the petition that such is the only issue for the courts determination. The prayers in the petition clearly show that that recount and retallying was not the only issue for determination by the court. The evidence given also does not show that that is the only issue.
60. I agree with the reasoning in **Charles Oigira Mogere -vs- Christopher Mogere Obure & 2 Others – Kisii HC E.P. 9 of 2013** wherein the court stated –

> ***"Under the rules, prayers for scrutiny and recount are provided under Rules 32 (1) and 33 (1) respectively, so that a party seeking an order of the court must choose one or the other and not both in the same prayer as in this case. Such an application was sound under the old law. Under the new law, recount is available to the petitioner where the only issue for determination is the count or retallying of votes. On the other hand scrutiny of votes can be done at any stage of the proceedings as long as the court is satisfied that there is sufficient reason to make an order for scrutiny. "***

61. Since rule 32 governs both recount and tallying of votes, I find no basis for granting the request for recount or retallying. I decline to grant both prayers.
62. In the result, I find no merits in the application and dismiss the same. As for costs, they will abide the outcome of the petition.

Dated and delivered at Kakamega this 2nd day of July, 2013

George Dulu

JUDGE