



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

ELECTION PETITION NO. 2 OF 2013

**IN THE MATTER OF THE ELECTIONS ACT, 2011 AND THE ELECTIONS
(PARLIAMENTARY AND COUNTY ELECTIONS) PETITION RULES, 2013**

AND

**IN THE MATTER OF THE NATIONAL ASSEMBLY ELECTIONS FOR NAROK EAST
CONSTITUENCY, NAROK COUNTY**

BETWEEN

HARUN MEITAMEI LEMPAKA.....PETITIONER

VERSUS

HON. LEMANKEN ARAMAT.....1ST RESPONDENT

ISAAC RUTO.....2ND RESPONDENT

INDEPENDENT ELECTORAL & BOUNDARIES

COMMISSION (IEBC).....3RD RESPONDENT

RULING

Before the hearing of the petition commenced, the Counsel for the Applicant sought the directions of the court. He stated that from the Ruling delivered on 28/06/2013, he understood that he was required to lay a basis to justify the order of scrutiny and recount of votes. He stated that the Petitioner would testify last after calling his witnesses. However, before closing the Petitioner's case he would make a fresh application for recount of votes to be carried out and after the same is allowed, and a recount done, then the Petitioner would testify on the results of the recount, interpret them and elaborate on the prayers that he was seeking. He gave two reasons for taking this approach-

(1) that this would enable the petitioner justify the declaration that he was the winner of the election and the evidence for that prayer could only be obtained by recount of the votes; and

(2) that a decision on recount has to be made in support of the Petitioner's case.

2. He called a total of 11 witnesses including the Petitioner who gave evidence but was stood down on 3/07/2013 to enable his Counsel make the application. Mr. Kibe submitted that the Petitioner had abandoned the prayer for scrutiny of votes. At paragraph 21 of the Petition, the only prayer that he

seeks is for recount of votes and a declaration that he was the winner of the election. In the Ruling made on 28/06/2013, the court, in disallowing the application held that the Petitioner needed to lay a basis for the order of recount to be made. He submitted that in addition to the evidence already on record and in the affidavits, the Petitioner had called a total of 10 witnesses and also given a substantial portion of his evidence-in-chief and therefore had established a solid basis for an order of recount to be made by the court. He relied on 6 grounds in support of his application.

3. The first ground was that it was clear from the evidence that on the voting day many of the petitioner's agents had been prevented from accessing the polling stations. From the affidavit of Isaac Ruto, the Returning Officer of Narok East Constituency and in the course of cross examination of the Petitioner's witnesses by Counsel for the 2nd and 3rd Respondents, it appears that the presiding officers adopted a *first-come, first-enter* policy when it came to URP and TNA Agents and on the face of it, it appears that the URP Agents may have been briefed of this and ended up staging the TNA Agents. The explanation as to why the agents were not allowed and why the policy was adopted did not matter. According to him the important point was that they ended up not being there during the election process and as a result there was a contravention of the law in regard to the Petitioner's Agents being denied access.

4. The 2nd ground was that the voting exercise was not carried out in a manner that was accurate, verifiable, accountable and transparent. He argued that the voting exercise was compromised because the Petitioner's Agents were absent during the exercise and therefore there was no one to supervise on behalf of the Petitioner. In addition, none of his Agents was issued with Form 35 as required by Section 79 (2) (c) of the Elections (General) Regulations 2012 and these actions demonstrate there was a clear intention of the Respondents to rig the election.

5. The 3rd ground on which Counsel relied was that there was evidence that indicated that objections were raised regarding the discrepancies between the results declared at the polling stations and those announced at the tallying centre, but they were casually dismissed or completely disregarded, that there is no paper trail to prove that the objections were acted upon and the court is left to guess what really happened. Counsel therefore argued that the only way to establish the truth is by counting the votes.

6. The 4th issue related to Mark Lempaka who was on the material day an electoral official. The Petitioner had objected to his participation in the election process and although Isaac Ruto alleged that he was a mere clerk, there is evidence to show that he was a significant player in the entire election process and particularly at the tallying center. The conduct of the 3rd Respondent according to the witnesses testimony was intended to create a conducive environment for Mark Lempaka to compromise the results.

7. The 5th ground was closely related to the 2nd ground that the Petitioner's Agents were not issued with Forms 35 and out of the 69 polling stations, they were only issued with Forms from 2 polling stations, that he only saw the Forms 35 for the other 67 polling stations in the 2nd Respondent's affidavit and therefore had doubts as to their credibility alleging that they may have been altered.

8. In his 6th ground Counsel stated that at paragraph 16 of the Petition, the Petitioner had shown that in 8 out of the 69 polling stations he had lost a total of 249 votes and at paragraph 17 he had set out more than 20 polling stations where he believes that the results were falsified, and that the declared margin between the winning and the losing candidate was only 441 votes. Consequently if the petitioner could lose 249 votes in just 8 polling stations then it would be reasonable to expect that if a recount was done it would demonstrate that he lost an average of 10 votes in 30 stations, then the 1st Respondents victory would be wiped out. He submitted that due to the narrow margin and the circumstances of the election, there was sufficient basis for a recount to be ordered.

9. On matters of law Counsel submitted that the court has jurisdiction under Article 105(1)(a) of the Constitution to determine any question on the validity of an election. The Petitioner, Counsel submitted, had the right to protection of the law and to a fair hearing under Articles 27 and 50 of the Constitution and in the context of an Election Petition, the right to a fair hearing was hinged on the right to be able to access all the documents and election materials that relate to his grievance. The right was

further buttressed by Article 35 (1) of the Constitution under which the Petitioner is entitled to information held by another person which is required for the exercise or protection of any right or freedom. Thus the duty of the Petitioner to lay a basis should be a mere formality and not a substantive issue, that the right to a fair hearing presupposes at the minimum that the party would be free to tender evidence it considered necessary and in this case the Petitioner had already stated that he needs the evidence in the ballot box to be able to prove his claim that he was properly elected as a member of the National Assembly.

10. Mr. Karanja counsel for the 2nd and 3rd Respondents in opposition to the application submitted that, the Petitioner had in his Petition alleged malpractices in 8 polling stations but only gave evidence regarding 6 and of the 6 Stations, 2 were not disputed by the Respondents. In Enariboo polling station the 2nd and 3rd Respondents had already admitted that 10 votes belonging to the Petitioner were given to the wrong candidate and there is therefore no need for recount. The 2nd station was Kutenoi where the the Returning Officer announced different results from those announced at the Polling Station and that upon the Petitioner's raising an objection, the error was corrected and that the results finally declared were conceded to be correct by all the Petitioner's witnesses. The Petitioner had accepted the explanation offered by the 2nd and 3rd Respondents and abandoned the ground and therefore the 7th, 8th, 9th and 10th witnesses evidence which was based on this anomaly was no longer relevant. Thus the parties contested over results for 4 polling stations.

11. Of the 4 agents who gave evidence on the 4 polling stations, the Respondents disputed the participation of 2 agents who neither signed the polling day diary nor the Form 35. It was further alleged that another witness had lied on oath that he was registered to vote at the Polling Station where he signed in as an agent whereas he was a registered voter at another Station 20 kilometers away.

12. On the question of entry of agents and representation of the Petitioner during the election process, Counsel submitted that the Respondents would demonstrate that a number of Agents were allowed in, that there was an equal right between a Political Party and a candidate to appoint an agent but that under Section 30 (2) the right of the candidate was conditioned upon the failure of the Political Party to appoint one. An agent had thus the duty to represent all the candidates affiliated with that Political Party. A Political Party had discretion to appoint its own agents and where an agent was appointed to represent two or more parties then the IEBC could only follow the instructions in the letter. On the failure of the agents to sign the Forms 35, it was submitted that majority of the witnesses left immediately after the announcement of the results and did not wait to sign the forms. None of them testified that they requested for the forms and were denied and in any event the Forms 35 were being posted on the door of the Polling Station and the results could have been obtained there.

13. On the law, Counsel argued that the right to protection under the law and to fair hearing apply both to the Respondents as well and under Article 50 (2) (k) of the Constitution, they also had the right to adduce and challenge evidence. He submitted that Article 35 (1) (b) of the Constitution which accorded the Petitioner the right to information related to that contained in the Form 35 which was held by the 3rd Respondent and it was this information that was required by the Petitioner to exercise his right to come to court. He added that opening the ballot boxes is a final relief whereas Article 35 only talks of vessels to assist litigants access justice. In view of the above therefore Counsel submitted that the Respondents intended to present evidence to refute the allegations of the Petitioner and would call 7 Presiding Officers. It would therefore be unjust to condemn the Respondents unheard.

14. Mr. Ngunjiri for the 1st Respondent also made submissions in opposition to the Application. He stated that an order for recount was not an automatic right and the Petitioner had a duty to show by way of firm and credible evidence that there was a departure from a fair election process and the departure affected the election results. The absence of the Petitioner's agents at a Polling Station did not affect the validity of the process under Regulation 62(3) of the Regulations made under the Elections Act. In addition, the Petitioner had sought for recount of all the 69 polling stations but had failed to adduce evidence for each and that none of the witnesses had proven the allegations made against the 1st Respondent. For these reasons it was Counsel's submission that the application was pre-mature and the evidence adduced was neither firm nor credible so that it can be said that the Petitioner had established a

prima facie case to warrant recount.

15. I have considered the counsel's respective submissions and I find the issues for determination to be whether the order of recount should be granted as a matter of right under Article 35 (1) of the Constitution and if not, whether a proper basis has been laid by the Petitioner to warrant grant of the orders sought.

16. Mr. Kibe submitted that the Petitioner was only seeking access to the election materials to enable him prove his case, that the Petitioner's political rights under Article 38 of the Constitution had been contravened and in particular the right under Article 38 (2) which provides-

(2) Every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for-

(a) any elective public body or office established under this Constitution; or

(b) any office of any political party of which the citizen is a member.

17. In order to prove his allegations and to be able to have a fair trial Counsel submitted that the Petitioner would need to have access to the ballot papers, that the information contained in those papers was in the custody of the 3rd Respondent and he had a right under Article 35 (1) (b) which provides that a person has the right to information held by another person and required for the exercise or protection of any right or fundamental freedom, to be provided with the same in order for him to enforce his political rights, that the order of recount was only a means to a relief and the Petitioner needed the results to enable him justify his prayer for a declaration that he was the winner of the election.

18. The mandate to conduct and supervise the election process is solely vested upon the IEBC, a body established under Article 88 (1) of the Constitution. An election is a process that begins with registration of voters followed by casting of the ballot papers, announcing of the results and finally declaration of the winner of the Election. The manner and procedure by which this is to be done has been meticulously provided for under the law and in particular under the Constitution, Political Parties Act, the Elections Act and the Regulations made thereunder.

19. Therefore a party challenging the results of an election and the subsequent declaration of another person as the winner, would in essence be alleging that the IEBC failed to conduct or supervise the elections in accordance with the law. I therefore agree with Mr. Ngunjiri's submission that the Petitioner would be required to demonstrate that there was a departure from a fair election and as a result of this departure, the outcome of the election was affected.

20. The court would then in exercise of its jurisdiction under Article 105 (1) (a) of the Constitution proceed to determine any questions on who was validly elected as a member of the National Assembly, and in so doing show there is evidence that the process was neither fair nor transparent so that in determining the question of validity of the election of the candidate, it would have to recount the votes. An order for recount would therefore in essence be for purposes of verifying and confirming the results as declared by the IEBC. Whereas I agree that it is not a final remedy and is a means by which the Petitioner would be declared as the winner, it is nevertheless a relief which is defined in the **Black's Law Dictionary 8th ed.** at page 1317 "***a redress or benefit that a party asks of a court.***" That benefit can only be accorded to the party seeking it upon proper justification being made to the court. The court cannot therefore without just cause purport to count the ballot papers of an election without a proper basis being laid for doing so.

21. Having found as above, it therefore follows that the Forms 35 and 36 in which the IEBC officials record the results after counting the ballot papers are the primary document to be relied on by a party challenging the results. These are statutory forms which are filled by persons authorized by law and the court cannot disregard their contents without basis being laid to lead the court to conclude that the information therein is not true. I therefore disagree with the Petitioner's contention that the evidence in the

ballot papers was the only way it could prove its claim.

22. The 2nd issue for determination is whether the order can be made at this stage of the proceedings. The Petitioner believes that he has laid a basis from the evidence adduced so far and has made a *prima facie* case for the grant of the orders. The court is aware of its Ruling made on 28/06/2013 where it stated that an order for scrutiny and recount of votes may be made during the hearing of the Petition on the court's own motion or on the application of the Petitioner when in its opinion a proper basis has been made by the Petitioner to warrant the making of such orders.

23. The Respondents have opposed the grant of the order of recount by their various affidavits and submissions. They believe that there is no justification to allow the same and have indicated that they will be leading evidence to refute the allegations made. It is only fair and just that they are heard and their evidence on whether there were irregularities and malpractices as alleged or whether the winner of the elections was properly declared considered before the orders sought can be made by this court.

24. I am therefore of the view that the court can only determine whether a proper basis has been laid in this case after it has considered and evaluated the evidence of all the parties in its entirety and it is only then that it can grant the orders sought. In the circumstances I find and hold that it is still pre-mature for the court to make orders for recount of the votes at this juncture taking into account the nature of the evidence that the Respondents have indicated they intend to adduce.

25. I would therefore dismiss the application and direct that the hearing of the petition proceeds to conclusion.

Dated, signed and delivered at Nakuru this 8th day of July, 2013

M. J. ANYARA EMUKULE

JUDGE