



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
ELECTION PETITION NO. 1 OF 2013

KITHINJI KIRAGU.....PETITIONER

VERSUS

MARTIN NYAGA WAMBORA.....1ST RESPONDENT

DAVID KIAMBI.....2ND RESPONDENT

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION.....3RD RESPONDENT

DIRECTIONS

Upon a reading of the Petition, Responses, all affidavits (in support & against), annexures & Embu Governor's results (filed by IEBC) this Court discerned that there would be need for scrutiny & recount. The counsels and parties were duly informed. The Court made an order to that effect with a rider that it would in due course give directions on which polling stations would be affected. I would also wish to add that the Petitioner in prayer (iv) of his petition made the following prayer;

“That an order do issue for the scrutiny or recount of ballots from Runyenjes & Manyatta constituencies to ascertain and authenticate the votes garnered by the 1st respondent”.

On the first day of the hearing i.e 10th June 2013, Ms. Omuko for the 2nd & 3rd respondents requested to be allowed to submit on the issue of scrutiny at a later date. The request was granted. The Petition has been heard to its conclusion with the Petitioner calling six (6) witnesses plus himself; the 1st respondent called six (6) witnesses plus himself while the 2nd & 3rd respondents called four (4) witnesses plus the 2nd respondent. In total this Court has heard nineteen (19) witnesses. At the close of the hearing the Court inquired from all the counsels if they were still keen on submitting on scrutiny & recount and they all responded in the negative.

Scrutiny, Tallying, and recount are all founded on the following provisions of the law;

i. ***S82(1) of the Elections Act which provides:***

“ 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”.

- ii. *Part vi of the Elections (Parliamentary & County Elections) Petitions Rules 2013 - Rules 32 & 33. Rule 32 provides;*

“Petitioner may request for recount or examination of tallying”

Rule 33(1) provides;

“The parties to the proceedings may at any stage, apply for scrutiny of the votes for purposes of establishing the validity of the votes cast.”

In the present petition R32 &33 do not apply as none of the parties made an application under the said Rules. The Order herein was therefore made under Section 82(1) of the Elections Act. The following would make a Court on its own motion make an Order for scrutiny and/ or recount;

- i. *There having been laid a basis for the same from the pleadings and/ or the evidence adduced.*
ii. *To assist the Court investigate the validity of allegations of irregularities and breaches of the law complained of.*

Ref;

(a) REUBEN NYANGINJA NDOLO VERSUS DICKSON WATHIKA MWANGI. PETITION NO.11 OF 2008.

(b) WILLIAM MAINA KAMANDA VERSUS MARGARET WANJIRU KARIUKI & 2 OTHERS. ELECTION PETITION NO.5 OF 2008

- iii. *To assist the Court in determining the valid votes cast in favour of the candidates. Ref; WILLIAM MAINA KAMANDA’S CASE (supra).*

After hearing all the parties and their witnesses herein I hereby confirm the Order for scrutiny & recount made on 27th May 2013 and proceed to issue the following directions:

1. *There shall be Full Scrutiny and Recount of valid votes in the following polling stations;*

- (i) Code No. 041 – Kithimu Primary School – Manyatta Constituency, and,*
(ii) Code No. 075 – Kithiruri Tea Buying Centre
(iii) Code No. 104 – Kathunguri Primary School of Runyenjes Constituency

2. *There shall be Partial Scrutiny & Recount in the following polling stations;*

MANYATTA CONSTITUENCY

- (i) Code 028 - Kianjugu Tea Buying Centre*
(ii) Code 122 - Embu Urban Primary School
(iii) Code 124 - Embu Municipal Council (stadium)
(iv) Code 130 - Embu Municipal Council (Town hall)
(v) Code 083 Kibugu Tea Buying Centre

RUNYENJES CONSTITUENCY

(i) Code 002 Kianjokoma Primary School

(ii) Code 034 Ugweri Primary School

(iii) Code 045 Gikuuri Primary School

(iv) Code 050 Gitare Primary School

(v) Code 057 Kanja Primary School

(vi) Code 066 Mbuinjeru Primary School

(vii) Code 077 Miandari Tea Buying Centre

3. *The scrutiny & recount in the above polling stations shall be restricted to the ascertainment of the number of valid votes that each candidate obtained as compared with the results that were announced in the Form 35s that were later collated in Form 36s by the constituency returning officers. The Form 35s in respect of these polling stations will be photocopied by the Deputy Registrar for the Court's record.*

4. *There shall be verification & retally of ALL Form 35s & 36s limited to ascertainment of*

(i) Valid Votes,

(ii) cumulative/aggregate votes of the candidates;

(iii) unaccounted for votes in the following polling stations:

MANYATTA CONSTITUENCY

(i) Code 029- Kithunguri Tea Buying Centre

(ii) Code 046- ACK Church Grounds Kithimu market stream 2

(iii) Code 118- Kapingazi Coffee Factory stream 1

(iv) Code 159- Full Gospel Church Grounds– Kivue

(v) Code 045 St. Joseph Allamano

RUNYENJES CONSTITUENCY

i. Code 009 Karue Primary School

ii. Code 015 Machagori Primary School

iii. Code 030 Ndumari Primary School

iv. Code 039 Nthagaiya Primary School

v. Code 046 Ngarare Primary School

vi. Code 048 Kigaa Primary School

vii. Code 061 Ndamunge Tea Buying Centre

viii. Code 063 Kirimiri Tea Buying Centre

ix. Code 067 Mugui Primary School

x. Code 068 Kareretire Tea Buying Centre

xi. Code 070 Karangu Tea Buying Centre

xii. Code 073 Machiara Tea Buying Centre

xiii. Code 079 Kiamuchiri Tea Buying Centre

xiv. Code 080 Kiandong'o Tea Buying Centre

- xv. *Code 087 Njeruri Primary School*
- xvi. *Code 091 Riari Primary School*
- xvii. *Code 098 Gakwegori Primary School*
- xviii. *Code 101 Karungu Primary School*
- xix. *Code 105 Kathunguri Youth Polytechnic*
- xx. *Code 106 Kariru Primary School*
- xxi. *Code 108 Kaveti Primary School*
- xxii. *Code 117 Mikundu Tea Factory*

5. *This scrutiny & recount shall be undertaken under the supervision of the Deputy Registrar of this Court. After the exercise she will file a report which will form part of the proceedings herein.*

For ease of the exercise the Petitioner, the 1st, 2nd & 3rd Respondents shall each be allowed to have four (4) agents present during the exercise.

6. *This exercise shall commence on 3rd July, 2013 8.30am and shall proceed on a day to day basis until it's conclusion.*

Mention on 8th July, 2013.

Dated at Embu this 2nd day of July, 2013.

H.I.ONG'UDI

JUDGE

Mr. Njagi for Petitioner

Mr. Marete assisted by Ms. Wairimu for 1st Respondent

Ms. Omuko for 2nd & 3rd Respondents

Njue CC