



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
ELECTION PETITION NO. 1 OF 2013
consolidated with
ELECTION PETITION NO. 7 OF 2013
AND IN THE MATTER OF THE
NATIONAL ASSEMBLY ELECTION
FOR KIBWEZI WEST CONSTITUENCY

BETWEEN

RICHARD N. KALEMBE NDILE 1ST PETITIONER
CAROLINE MWELU MWANDIKU 2ND PETITIONER

AND

DR PATRICK MUSIMBA MWEU1ST RESPONDENT
RETURNING OFFICER

KIBWEZI WEST CONSTITUENCY 2ND RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION 3RD RESPONDENT

RULING NO. 4

1. In my ruling No. 3 in this matter dated 17th June 2013, I ordered that, “*There shall be scrutiny of the votes limited to a recount and ascertainment of the number of votes each candidate obtained in each of the 164 polling stations in Kibwezi West Constituency.*” The recount proceeded apace and was completed.
2. Upon completion, the 1st respondent filed a Notice of Motion dated 27th June 2013 seeking certain

- orders that the ballot boxes for County Assembly, Women representative, Senator and Governor and unstrategic material for three polling stations; Ngelenge Primary School Polling Station (No. 134), Kiuruni Polling Station (140) and Itiani Polling Station (115) be examined in order to ascertain whether those were votes cast in favour of the 1st respondent.
3. When the matter came up for hearing today, I directed, *suo moto*, that the three Presiding officers of Ngelenge Primary School, Kiuruni Primary School and Itiani Primary School and Itiani Primary School Polling Stations who had sworn affidavits in support of the applicant's case be cross examined.
 4. The 1st petitioner has now opposed the order for cross-examination on the ground that it is a re-opening of the scrutiny process which has been completed. Mr Nyamu contended that scrutiny was ordered on the basis of questionable documents. He submitted that adopting this course amounts to a re-opening of the case when all the parties had given evidence and was not permitted.
 5. The 1st, 2nd and 3rd respondents support the order for cross-examination as it is part of the investigation process. Mr Mari submitted that the application arose out of matters arising out of the process of scrutiny and was therefore proper. He relied on the case of ***Justus Mungumbu Omiti v Walter Enock Nyambati Osebe & 2 Others, Kisii EP No. 1 of 2008 (Unreported)***, for the proposition that the court ought to investigate issues arising from the hearing process in order to determine whether the election was free and fair.
 6. I have considered the objection and find it lacks merit. The 1st respondent is entitled to make the application being one predicated upon issues arising out of the scrutiny. The court likewise, has jurisdiction to order make an order *suo moto*, as I have done or permit cross-examination of deponents, if these witnesses shed light on the process. The issues raised in the application cannot be glossed over on account of a technical basis.
 7. As I stated in my ruling No. 3 in this matter, scrutiny is part of the forensic process and so is this application. This matter shall now proceed as ordered.

DATED and DELIVERED at MACHAKOS this 2nd day of July 2013

D.S. MAJANJA

JUDGE

Mr Makundi and Mr Kituku instructed by Andrew Makundi and Company Advocates with him Mr Kamolo instructed by Kamolo and Associates Advocates for the petitioner.

Mr Musyoki instructed by B. M. Musyoki and Company Advocates

Mr Mari instructed by Wachira Ndung'u and Company Advocates for the 1st respondent.

Ms Wambua instructed by Anne M. Kiusya and Company Advocates and Dr Abuya instructed by J. Louis Onguto Advocates for the 2nd and 3rd respondents.

