



**REPUBLIC OF KENYA**  
**HIGH COURT OF KENYA AT MACHAKOS**  
**ELECTION PETITION NO. 4 OF 2013**  
**AND IN THE MATTER OF THE**  
**COUNTY GOVERNOR ELECTION FOR**  
**MACHAKOS COUNTY**

**BETWEEN**

**WAVINYA NDETI.....**  
**PETITIONER**

**AND**

**THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (IEBC) .....1<sup>ST</sup>**  
**RESPONDENT**

**ISAAC HASSAN (RETURNING OFFICER OF THE NATIONAL TALLYING CENTR.....2<sup>ND</sup>**  
**RESPONDENT**

**THE MACHAKOS COUNTY RETURNING OFFICER .....3<sup>RD</sup>**  
**RESPONDENT**

**ALFRED NGANGA MUTUA .....4<sup>TH</sup>**  
**RESPONDENT**

**MUTUA KATIKU .....5<sup>TH</sup>**  
**RESPONDENT**

**RULING NO. 3**

**Introduction**

1. The petitioner was a candidate for the position of Governor of Machakos County in the 4<sup>th</sup> March 2013 General Election. She has filed the petition dated 26<sup>th</sup> March 2013 in order to challenge the validity of the election of the 4<sup>th</sup> respondent as the duly elected Governor of Machakos County. According to the declared results, which the petitioner contests, the candidates received the following votes;

<b>Alfred Nganga Mutua</b>	<b>257,607</b>
Anthony Mwau Wambua	5,355
Mumina Fidel Jimmi	1,837
Thomas Nzioki Kibua	4,801
Titus John Ndundu	2,951
<b>Wavinya Ndeti</b>	<b>92,644</b>
<b>Votes Cast</b>	<b>356,381</b>
Rejected Votes	4,922
<b>Valid Votes Case</b>	<b>351,500</b>

### **The application**

2. Together with the petition, the petitioner filed a Notice of Motion dated 26<sup>th</sup> March 2013 which sought, *inter alia*, orders as follows;
  - a. A mandatory injunction seeking the following documents concerning the Governor's election in respect of the eight constituencies comprising Machakos County; Masinga, Yatta, Kangundo, Matungulu, Kathiani, Mavoko, Machakos Town and Mwala;
    - i. Packets of all spoilt ballot boxes.
    - ii. Copies of results of each polling station.
    - iii. Written complaints of the candidates and representatives in respect of the election.
    - iv. Copy of the election register.
    - v. The marked register.
    - vi. The packets of counterfoils of used ballot papers.
    - vii. The packet of counted valid ballot papers.
    - viii. The packets of rejected ballot papers.
    - ix. The statement showing the number of rejected ballot papers.
    - x. The original Form 36 Declaration of election results for Machakos County Tallying Centre for Machakos County.
    - xi. A certified copy list specifying the exact number of ballot books issued to each polling clerk and the number of ballot books returned unused to the IEBC for the County Governor's poll.
  - b. An order for scrutiny and recount of the votes for the Machakos County Governor's election for all the eight constituencies in Machakos County.
3. The application was supported by the petitioner's affidavit sworn on 26<sup>th</sup> March 2013. She set out several broad grounds in support of the application. She contended that there were non-existent or ghost voters who cast votes in favour of the 4<sup>th</sup> respondent. That the cast votes in some polling stations were far in excess of the registered votes for example at Munundani Primary School (090), in Masinga Constituency, Kithauni Primary School (062), Matungulu Constituency, Nguluni Primary School (064), Matungulu Constituency and others. She alleged that for example Masinga Constituency has 44,694 registered votes yet there were 45,645 total votes cast. The petitioner averred that the number of registered voters in Machakos Constituency could not be ascertained. On the whole she contends that the 4<sup>th</sup> respondent was the beneficiary of the inflated figures.

4. The petitioner also contends that Form 36 purporting to declare the final results of Machakos County Governor's total votes cast is null and void and illegal as the legal instrument declaring Dr Mutua duly elected. Her case is that results were declared on 8<sup>th</sup> March 2013 without availing the petitioner or her agent a copy. The petitioner further avers that the Form 36 lacks the statutory data as it does not enumerate the authentic total number of registered voters nor does it set out the true voter turnout percentage. The essence of the petitioner's argument is that no results could issue from an invalid Form 36 and therefore the 4<sup>th</sup> respondent's election was invalid.
5. The petitioner also seeks to scrutiny of votes because there were votes illegally cast in favour of the 4<sup>th</sup> respondent as evidenced by the alterations on the Form 35 and glaring errors in the Form 36 evidencing the tallies of the constituencies. The petitioner argued that these errors had the impact of invalidating the Form 36 which was the basis upon which the 4<sup>th</sup> respondent was declared the winner. The petitioner also alleged that fictitious voters' lists were used in many polling stations favouring the 4<sup>th</sup> respondent and inflating the number of votes to his credit.
6. The petitioner also accused the 4<sup>th</sup> respondent of treating, bribery, voter intimidation, violence, undue influence and breach of the ***Electoral Code of Conduct***.
7. I also note that a substantial part of the application was disposed of by reason of compliance by the Independent Electoral and Boundaries Commission ("IEBC") with **rule 21(b)** of the ***Elections (Parliamentary and County Elections) Petition Rules, 2013 ("the Rules")*** which provides that, "*the Commission shall deliver to the Registrar the results of the relevant election within fourteen days of being served with the petition.*" The IEBC filed in court Form 35 for all the polling stations in this County, Form 36 for each Constituency and the Form 36 in respect of the Machakos County governor election.
8. The other documents sought by petitioner are subject of **rule 33(4)** of ***the Rules*** which I have set out below and whether they are available to the petitioner would depend on whether or not a case for scrutiny is made out by the petitioner.
9. On 10<sup>th</sup> June 2013, I directed that any issues of recount and scrutiny will be dealt with by way of submissions upon conclusion of the hearing. After the hearing, the parties filed written submissions and made oral arguments.

### **Legal Principles**

10. The principles upon which the court will order scrutiny are not in doubt and I will, for the record, outline the same. The election court has jurisdiction to order scrutiny of votes. **Section 82(1)** of the ***Elections Act, 2011 ("the Act")*** gives the court wide jurisdiction in this respect. It states that, "*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 scrutiny of votes to be carried out in such a manner as the election court may determine.*"
11. The broad authority in **Section 82** of ***the Act*** is given effect by the ***Elections (Parliamentary and County Elections) Petition Rules, 2013 ("the Rules")***. **Rule 32** and **33** of ***the Rules*** make provision for a recount or examination of tallying in the following terms;
  32. (1) *Where the only issue in the election petition is the count or the 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.*

**Rule 33** provides thus:

1. *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.*
  2. *Upon an application under sub-rule (1), the court may, if it is satisfied that there is sufficient reason, order for a scrutiny or recount of the votes.*
  3. *The scrutiny or recount of ballots shall be carried out under the direct supervision of the Registrar and shall be subject to directions as the court may give.*
  4. *Scrutiny shall be confined to the polling stations in which the results are disputed and shall be limited to the examination of*
    - a. *the written statements made by the presiding officers 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.*
12. The principles upon which the court acts in granting a prayer for scrutiny or recount have been considered and elucidated in several decided cases. In ***Dickson Daniel Karaba v Hon. Ngata Kariuki and Others Nairobi EP No. 1 of 2008 (Unreported)*** where Justice Warsame stated that, “*the purpose of the exercise .... was to ascertain whether there exists any material discrepancies between the result captured in Form 35 which necessitates the determination of the vote cast and obtained by each aspirant. It is only after this exercise that the court can form an opinion whether the results in the Form 35 are correct.*” (See also ***William Maina Kamanda v Margaret Wanjiru Kariuki Nairobi EP No. 5 of 2008 [2008] eKLR***)
13. Hon. Justice Maraga reviewed several decisions where scrutiny was in issue ***Joho v Nyange [No.2] (2008) 3 KLR (EP) 188***. He distilled the principles as follows, “*I have read the authorities cited by counsel for both the parties on this point. The common thread that runs through all of them is that there is no rule that the Petitioner must first call evidence and lay a basis before scrutiny is ordered. Nor is there one that scrutiny will always be ordered whether or not a basis has been made. However, where the votes margin are narrow like in *Onamu v Maitsi Election Petition No.2 of 1983* where the margin was only 30, *Kirwa v Muliro Election Petition No.13 of 1988* where the margin was only 7 and *Hemed Said v Ibrahim Mwaruwa Petition No.1 of 1983* where the margin was only 62, scrutiny was ordered without laying any foundation. Scrutiny has also been ordered without laying foundation even where the margins are wide on the ground that a recount may lead to an expeditious disposal of the petition.*”
14. In the case of ***William Maina Kamanda v Margaret Wanjiru Kariuki (Supra)***, the learned Judge observed that, “[14] *It is now well established that an order of scrutiny can be made at any stage of the hearing before final judgment whether on the court’s own motion or if a basis laid requires so. It can be made if it is prayed in the petition itself – as is the case in this petition – or when there is ground for believing that there were irregularities in the election process or if there was a mistake on the part of the Returning Officer or other election officials.*”
15. More recently, Hon. Justice Tuiyott in ***Philip Ogutu v Michael Aringo and 2 Others Busia EP No.1 of 2013 (Unreported)*** after setting out the law regarding scrutiny stated that, “*An order for scrutiny will not be made as a matter of course. In the words of Rule 33(2) of the Election Petition Rules, the court must be satisfied that there is sufficient reason to require an examination of the ballots. This rule codifies a long held Judicial opinion that scrutiny may only be ordered where a foundation or basis has been laid (see for instance the Court of Appeal decision in *Masinde v Bwire and Another (2008) 1KLR (EP) 547.*” (See also ***Peter King’ara v IEBC and Others Nyeri EP No. 3 of 2013 (Unreported)*** per Ngaah J., ***Kakuta Hamisi v Peris Tobiko and Others***)*

**Nairobi EP No. 5 of 2013 (Unreported)** per Kimondo J., , *M'inkiria Petkay Shen Miriti vs. Rangwa Mbae and 2 Others* **Meru EP No. 4 of 2013 (Unreported)** per Lesiit J.,, *Joseph Tiampati ole Musuni & 2 others v Samuel Kuntai Tunai & 10 others*, **Nakuru EP No. 3 of 2013 (Unreported)** per Wendoh J, *Harun Meitamei Lempaka v Hon. Lemanken Aramat and 2 others*, **Nakuru EP No. 2 of 2013** per Emukule J. and *Rashid Hamid Ahmed Amana v IEBC and Others* **Malindi EP No. 6 of 2013 (Unreported)** per Kimaru J.).

16. What the cases establish is that although scrutiny is within the court's discretion, the applicant must establish sufficient basis for the court to order scrutiny. Further, the petitioner must not be permitted to launch a fishing expedition under the guise of an application for scrutiny in order to discover new evidence upon which to foist his or her case to invalidate an election.

17. It is with these principles in mind that I turn to consider whether I should order scrutiny of the vote for the Governor's election for Machakos County.

### **Determination**

18. Mr Kinyanjui, learned counsel for the petitioner, submitted that the entire election result is tainted with such a degree of uncertainty that renders the entire County result susceptible to scrutiny. Mr Kinyanjui admits in his submissions that at the time the petitioner filed the petition she did not have access to the many Form 35 and 36 across Machakos County and which were submitted by the IEBC. Counsel emphasized that some of the Returning officers have admitted errors in the results and in view of these admissions it is in order for the court to investigate the results further to confirm the veracity of the results. Counsel submitted that it was not necessary to order scrutiny of all the votes but the court should focus on specific polling stations set out in the petitioner's petition which call for scrutiny.

19. The respondents contend that no basis, legal or evidential, has been made out to enable the court order a recount. The position of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondent, through their learned counsel, Mr Muhoro, is that from the evidence adduced, it is clear that the errors in the Forms 35 and 36 were minor clerical errors which cut across the board and were not calculated to favour one candidate over another. Counsel pointed to the fact that each Returning Officer has explained the errors alleged in the petition and that the errors were rectified when the final tally was done by the County Returning Officer. The respondents' position is that the Form 36 accurately reflects the results of the election and there is therefore no basis for the court to order scrutiny.

20. Mr Kilonzo Junior, learned counsel for the 4<sup>th</sup> and 5<sup>th</sup> respondents, also contended that no basis had been laid for ordering scrutiny. In his view, there was no evidence to support the allegations made in the petition. For example, he pointed out that the allegation about the lack of a register lacked any basis as the register of votes was available for inspection by the public and the request for the marked register is not supported by any evidence. Counsel noted that there was no evidence established to show that there were voters who were not allowed to vote, or who had been treated, bribed or unduly influenced or that there were fictitious voting lists and double voting. In the circumstances and in the absence of evidence, scrutiny will not serve any useful purpose as the court is required to exclude votes cast as a result of such malpractice during the scrutiny.

21. Apart from the allegations of bribery, undue influence, treating, illegal campaigning, the petitioner focused her case on the errors, alterations contained in the statutory forms. The Returning Officers from the eight constituencies in Machakos County who testified admitted that there were indeed errors in recording or entering the results, calculation and tallying which they attributed to human error. One of the principles governing the electoral process under **Article 82** of the Constitution is that the election must be transparent and administered in an accurate manner. An election is a human endeavor and is not carried out by programmed machines. Perfection is an aspiration but allowance must be made for human error. Indeed the evidence is clear that the counting and tallying was being done at night and in less than ideal conditions hence errors, which were

admitted, were bound to occur particularly in the tallying of the results. What is paramount is that even in the face of such errors, whether advertent or otherwise is that the ultimate will of the electorate is ascertained and upheld at all costs. (See *Raila Odinga and others v Independent Electoral and Boundaries Commission and 3 others* SCK Petition No. 5 of 2013 [2013]eKLR, *Dr. Kiiza Besigye v Electoral Commission and Y.K. Museveni* SCU Election Petition No.1 of 2006).

22. The petitioner had the opportunity to cross-examine the Returning Officers who gave reasonable explanation of the errors, cancellations, alterations and overwriting which are evident in the Form 35's which formed the basis of the provisional results from each Constituency. The County Returning Officer confirmed that the tallying process at both the constituency and county level involved verification of results from the Forms 35 that had been submitted and some of the errors were indeed corrected. I have taken all this evidence into account and found no evidence of tampering, deliberate interference with the results, ballot stuffing or any such malpractice that would persuade me to proceed further with investigation by way of ordering scrutiny.
23. When the petitioner filed the petition she alleged that she did not have certain documents, which according to her counsel, necessitated the filing of the Notice of Motion under consideration. If any evidence were required of trawling of evidence on the high seas, it is this application. First, the evidence of the Form 36 is telling. The petitioner's case, at (c) (vi) of the petition, is that "*No statutory Form 36 originating from the 3<sup>rd</sup> respondent as by law required ..... was signed by the 3<sup>rd</sup> respondent and delivered to the Petitioner, in spite of the Petitioner seeking to be availed and furnished with such a copy.*" This is at variance with evidence available that the petitioner herself instructed her agent, Katuku, not to sign the Form 36. The Form 36, whatever its nature, was in my view, always available to the petitioner or her agent as were the other statutory forms, if the petitioner and her agents had exercised due diligence.
24. The reason for filing the Motion under consideration becomes clearer when one considers that in her petition, at paragraph 33, the petitioner cites a total of 21 polling stations which has figures with alleged discrepancies. At paragraph 34 of the petition, the petitioner pleads that, "*The total votes cast allegedly in favour of the 4<sup>th</sup> respondent in many polling stations in Machakos County far exceeded the registered votes and in some peculiar cases, in the specific polling stations, the 4<sup>th</sup> Respondent, was awarded votes to his credit that were not all recorded as having been cast in the total votes cast in such polling stations...*" The petitioner set out particulars of 9 polling stations. Further allegations of discrepancies were brought out while the case was litigated on the basis of the results delivered to court by the IEBC. To my mind an order for scrutiny will only broaden the scope of the dispute beyond that defined by the pleadings and contemplated by the parties. The results announced and declared by the IEBC enjoy of a presumption of constitutionality and legality and a petitioner has 28 days from the date of the declaration to seek the evidence he or she requires to mount an election petition. To proceed on a course outside the confines of the petition is not warranted in the circumstances of this case.
25. In simple terms Form 35 is a record of the votes cast at the polling station. After the votes were counted and recorded, the petitioner's or her agents could have sought a recount. There is no evidence that a recount was sought by any of the petitioner's agents at any of the polling stations where it is alleged there were irregularities. Mr Kilonzo Junior, referred to **regulation 80** of the *Elections (General) Regulations 2012* which provides as follows;

*80(1) A candidate or agent, if present when the counting is completed, may require the presiding officer to have the votes rechecked and recounted or the presiding officer may on his own initiative, have votes recounted: provided that the recount of votes shall not take place more than twice.*

*(2) No steps shall be taken on the completion of a count or recount of votes until the candidates and agents present at the completion of the counting have been given a reasonable opportunity to exercise the right given by this regulation.*

26. In the considering **regulation 80 within the context of an application for a recount**, Hon. Justice Kimondo in ***Kakuta Hamisi v Peris Tobiko and Others (Supra)***, observed that, “[25] *The point to be made is that Courts are ill-equipped to carry out a recount. It is a laborious and time consuming exercise. The polling stations provide a better forum, soon after close of polls, and in the presence of agents or candidates. In that scenario a fairly smaller number of votes would be recounted.*” I agree with these sentiments though I would add that the Court may, in an appropriate case, order a full scrutiny of all the votes. Furthermore, the fact that a recount was not sought at the polling station should not disqualify the petitioner from seeking an order of scrutiny in court but failure do so is evidence of the seriousness with which the petitioner considers alleged irregularities particularly where the claim is that the irregularities were widespread and egregious. These sentiments also demonstrate the fact that the petitioner bears responsibility in ensuring that her agents carry out their responsibilities. The candidates’ agents are the responsibility of the candidate and their failures cannot be imposed on the IEBC or any other party absent evidence to the contrary.

27. I am not satisfied that a case has been made out for scrutiny and in coming to this conclusion I am also influenced by the fact that the margin of votes between the Wavinya and Mutua is 164,963 which, in the scheme of things, is quite large.

### **Disposition**

28. I decline to grant the orders sought in the Notice of Motion dated 26<sup>th</sup> March 2013. It is hereby dismissed with costs to the respondents.

**DATED and DELIVERED at MACHAKOS this 2<sup>nd</sup> day of July 2013**

**D.S. MAJANJA**

**JUDGE**

**Mr Kinyanjui instructed by J. Harrison Kinyanjui and Company Advocates for the petitioner.**

**Mr Muhoro instructed by Kimani Muhoro and Company Advocates for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents.**

**Mr Mutula Kilonzo Junior instructed by Kilonzo and Company Advocates for the 4<sup>th</sup> and 5<sup>th</sup> respondents.**