



THE CHIEF MAGISTRATE'S COURT AT KISII

ELECTION PETITION NO. 2 OF 2013

IN THE MATTER OF ARTICLE 87 OF THE CONSTITUTION, 2010

AND

IN THE MATTER OF ELECTION ACT NO.24 OF 2011

AND

**IN THE MATTER OF ELECTION OF THE COUNTY ASSEMBLY REPRESENTATIVE FOR
BOBARACHO COUNTY ASSEMBLY WARD**

AND

IN THE MATTER;- OF THE PETITION OF LUKAS ONGAKI

BETWEEN

LUKAS ONGAKIPETITIONER

VERSUS

SAMWEL KENNY NYANGENYA1ST RESPONDENT

NG'ENY ROBERT.....2ND RESPONDENT

THE INDEPENDENT ELECTORAL

& BOUNDARIES COMMISSION.....3RD RESPONDENT

RULING

The notice of motion application dated 26th April 2013, expressed to be brought under order L1 rules 1 & 2 of the civil rules 2010, section 1A,B,3A, & 63(e) of the Civil Procedure Act, section 82 of the election Act, 2011 and regulation 17 &13 of the elections (Parliamentary and County elections) petitions rules 2013, Articles 81 & 86 of the constitution and all other enabling provisions of the law seeks inter alia for the following reliefs:-

- I. THAT the Honourable court be pleased to grant and order for scrutiny, recount and re-tallying for all the votes cast and /or in favour of all the candidates who contested for Bobaracho county assembly ward, during the general elections held on the 4th day of March 2013.
- II. THAT consequent to prayer (2) herein before being granted the results for the scrutiny, re-count

and re-tallying be pronounced and / or announced prior to (sic) the substantive hearing of the petition and in any event the results of the exercise be taken into account by the Honourable court.

III. THAT the Honourable court be pleased to make further and / or suitable orders towards the expeditious hearing and disposal of the instant application.

The application was grounded on the grounds set out and enumerated on the face of the record from a to q and the supporting affidavit of the Applicant/petitioner Lukas Ongaki; sworn on the 26th April 2013.

The 1st Respondent in response to the application filed his replying affidavit sworn and dated 15th May 2013, filed in court on the 16th May 2013. The 2nd and 3rd Respondents on the other hand in their response, filed a replying affidavit through the 2nd respondents. Ng'eny K. Robert, on the 13th May 2013, sworn and dated on the even date.

All the parties to the petition thereafter and immediately prior to the hearing of the application filed herein respective written submissions in the raised issues to the presented application for court's determination with the 2nd and 3rd Respondents filing theirs herein on the 22nd May 2013 and the petitioner/applicant and the 1st Respondent filed on the 24th May instant.

The applicant/ Petitioner's counsel in arguing the application adopted the filed written submission and highlighted the following four (4) issues:-

(a) That necessity for scrutiny is provided for under rule 33 (2) of the election (parliamentary and county election) petition rules 2013, while under rule 33(2) of the regulation, an applicant is obligated to establish sufficient reasons or basis for scrutiny and that on the other hand and on the same breath, under section 92 of the elections Act. Which is the parent Act, an applicant is not obliged to satisfy or establish any sufficient reason for an order for scrutiny, which orders in any event can be decreed by the court on its own motion for the court to have a glance of the documents kept and contained in the ballot boxes and to ascertain whether the ballot boxes were tamper proof and sealed, whether the documents contained therein corresponds with the documents kept by the 3rd respondent, examine the details of all the voters who casted the votes and thereafter apply the remedies under section 82 of the elections Act. He, under this limb submitted that scrutiny ought to be ordered as a matter of course and that the applicant/Petitioner has established formidable reason for the court to order scrutiny, given the numerous anomalies discrepancies, contradiction and variations noted in the authentic statutory documents supplied to the applicant /Petitioner filed herein by the 3rd Respondent, which statutory documents I.e form 35s sharply contrasts with the 3rd Respondents documents filed herein and cited an instance obtaining at Bobaracho polling station code 006. he singled out, in this respect the sworn affidavit of one Denden Mosiria Mikuro, the presiding officer at the, Bobaracho primary school on the noted glancing discrepancies and contradictions as a case in point.

The applicants/Petitioner counsel in buttressing his considered opinion and position on the need and necessity for an order for scrutiny in the instance petition referred court to the decision and holding of JUSTICE DANIEL MUSINGA, as he then was in KISII HCC ELECTION PETITION NO.2 OF 2008 (UNREPORTED) at pages 4 and 5 thereof SIMON NYAUNDI OGARI & ANOTHER -versus- HON. JOEL OMAGWA ONYANCHA & 2 OTHERS, and the provisions of Articles 21 (1) , 35 (1) and 86 of the constitution 2010.

ii) RE-COUNT :-

He submitted that the petition herein is anchored on mis-entry of the actual votes garnered by the petitioner on the statutory forms where the total votes garnered were not posted but, instead posted to a third party. He cited a case in point which he submitted obtained at Bobaracho secondary school polling station No.15 and Bobaracho Primary school and Jogoo Primary school stream No.1 code 005. He submitted that the only way the court would be able to verify the lost votes as alleged by the applicant/Petitioner is by recounting of the raw votes cast.

iii) He, submitted that the court is seized with jurisdiction to order for scrutiny, re-count and re-tallying simultaneously in adherence and compliance with the overriding principles and objectives of the election regulations and rules 17, 32, 33(2) of the election regulations thereto and section 82 of the election Act,

He, on this score submitted that, the process of re-counting may generate results different from what was generated by the 3rd Respondent, which difference from the various polling station would then be collated to have a grand total and the end result of the process would in fact be scrutiny and re-counting which position finds favour with the decision of the Supreme Court in its holding in the presidential election Petition.

He, further submitted that the regulation governing an election petition are express and explicit which regulations however should not be read and applied in a narrow and in a restrictive manner and that the provisions of Article 159 (1) (d) requires of the court to administer justice without undue regard to procedural technicalities.

iv. That the 1st Respondent's opposition to the presented application was contrary to the 1st Respondents initial position as can be seen under paragraph (14) of his replying affidavit in response to the petition, where he stated that the 2nd and 3rd Respondents . "shall have an occasion to present this election materials to show that the elections were done according to the election Act and the constitution of Kenya (2010)

He , reiterated that the 1st, 2nd and 3rd respondents have failed to show the prejudice to be suffered by them , in any event and that the 2nd and 3rd Respondent opposition to the present application reeks on some concealment of material facts to the filed petition, contrary to the spirit and letter of Article 10(1) of the constitution of Kenya 2010.

The 1st Respondent's counsel in opposing the application submitted that the law on scrutiny and re-count as provided under section 32 (1) (2) of the election (Parliamentary and county elections) petition rules 2013 are clear and explicit which states."

" where the only issue in election petition is the re-count or the tallying of the votes received by the candidates, the petitioner may apply to the court for an order to re-count the votes or examine the tallying section 32 (2) ."

" The petitioner shall specify in the election petition that he does not require any other determination except a re-count of the votes on the examination of the tallies."

He submitted that the instant application as brought by the Applicant/Petitioner offends the afore stated provisions of the law as he is seeking for both recounting and scrutiny and for failing to show and to demonstrate that the orders being sought herein are the only prayers sought in the filed petition as envisaged .under section 32 (1) (2) of the election regulations aforesaid and the application is hence incurably defective

He , further submitted that, as a matter of right the law provides for one to seek for scrutiny and a party has to show and establish sufficient reasons for such an scrutiny . He, stated that all the filed pleadings, affidavits and documents in the instant petition are all but mere allegations, which have to be tested in evidence for necessity for a scrutiny to arise and would be appropriate for parties to be given their day in court so as to be tested in evidence on their respective cases. He, stressed that the petitioner/applicant by merely stating that there were discrepancies in form 35s cannot suffice and cannot be the basis for scrutiny as evidence as a matter of fact has to be led for scrutiny to arise. He, in resting, his arguments submitted that scrutiny if at all , should be confined to a particular disputed polling station but not the entire county ward in this instance Bobaracho county assembly ward in which exercise would not be achievable under the law and that the hearing of the election petition on its merits would be sufficient in determining how the county elections in issue were carried out.

The 2nd and 3rd Respondent's counsel on his part, wholly relied on the replying affidavit and the filed written submission by the 2nd and 3rd respondents and submitted that the orders sought by the applicant /Petitioner for scrutiny, re-count and re-tallying are not available under the section 33(2) of the election regulations and election Act and that the orders sought by the applicants/Petitioner are alien and a kin to amending the law, which is the preserve of parliament. He maintained that the provisions of section 33(2) of the election regulations rules and section 82 of the election Act do not envisage a situation for scrutiny, re-count and re-tallying of votes simultaneously and concurred with his counterpart for the 1st Respondent that the court lacks the requisite jurisdiction to issue the three prayers sought by the Applicant/Petitioner. He hastened to add that the applicants/Petitioners application herein is a replica or mirror /image of the prayers sought in the filed petition and which prayer are only determinable by the court. Upon hearing all the parties on their respective evidence to be adduced during the trial of the petition.

I would like to observe that the application before hand, for determination has been brought timelessly and in strict compliance of section 17 (1) (2) of the elections (Parliamentary and county elections) Petition rules 2013 and is therefore properly before court and the only issue for determination in my view is whether the prayers being sought herein are obtainable and can issue at such an interlocutory stage of the proceedings. The court in making or arriving at a determination in such a presented application has to take regard and cognizance of the applicable law and overriding objectives of the elections regulations envisaged under section 4 (1) and 5 (1) of the rules therefore, which are to facilitate the just expeditious, proportionate and affordable resolution of election petitions under the constitution and the Act and to ensure the efficient and expeditious disposal of an election petition within the time-lines provided in the constitution and the Act. It is with these background in mind that I know proceed to evaluate and to interrogate the merits and/ or demerits of the instant capitulation.

All the parties to this petition, through their filed sworn affidavits for and against the present application and in their written filed submissions and arguments made in court, through their respective counsels on record, placed reliance on the provisions of the constitution (2010), the elections Act 2011 and the elections petition regulations (rules) 2013 and in particular regulation 33(2) of the elections (parliamentary and county elections) Petition rules 2013, Articles 10 (c) 20(2), 21 (1), 24(1) 35, and 86 of the constitution 2010 and section 80 (1) (d) and 82 of the elections Act, 2011.

The applicable law under which scrutiny or recount of votes in an election petition, maybe ordered is found under section 32 (1) (2) and section 33 (2) (2) (3) and (4) of the election (Parliamentary and county elections) petition rules 2013 as read with the parent Act the elections Act No.24 of 2011, which provisions are express and explicit and for purposes of this application wish to quote verbatim. "section 82(1) of the election Act 2011 states:-

" An election county may on its own motion or an application by any party to the petition during the hearing of an election petition order for a scrutiny on votes to be carried out in such manner as the election court may determine."

Section 32(1) states 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. Section 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. Section 33(1) states:-

" 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.

Section (2) upon an application under sub rule (1) the court may if it is satisfied that there is sufficient reasons, order or scrutiny or recount of the votes. Section (4) scrutiny shall be confined to the polling stations in which results are disputed" And although the court is enjoined and may order a scrutiny or tallying of the votes in dispute between parties to a petition of section 82(1) of the election Act 2011, it behoves and it is imperative and incumbent for a party on application seeking such orders, to satisfy

the provisions of section 32(1) (2) and 33(1) (2) and (4) of the election regulations which in my considered view are covered in mandatory terms.

I in this regard find for a fact and in concurrence with the respondents counsels. Arguments and submissions that the prayers sought by the applicant/petitioner in the instant application are not the only issue or issues in the filed elections petition, otherwise, he ought to have stated as much as required under section 32(2) of the election regulations.

Secondly, I do find that a party seeking scrutiny or re-count to be ordered by the court has to establish and demonstrate sufficient reasons to the satisfaction of the court, which scenario, is my respectful holding can only be achievable during the hearing of the petition when all parties to the election petition would be tested and examined in their respective evidence to be adduced; and it is only then that the court would be able to determine the number of polling stations disputed for an order of scrutiny to arise.

If cannot be gainsaid, in this regard, that the court in exercise of its unfettered discretion and jurisdiction vested under section 80(1) of the election Act 2011 and in the letter and spirit of the provisions of Article 159 of the constitution 2010, would summon and compel the attendance of any person as a witness who appears to the court to have been concerned in the election for examination and/or cross examination at any stage of the trial of the petition as held by JUSTICE DANIEL MUSINGA as he then was in the cited case of KISII HIGH COURT ELECTION PETITION NO. 2 OF 2008. SIMON NYAUNDI OGARI & ANOTHER VERSUS HON, JOEL OMAGWA ONYANCHA & TWO OTHERS.

In the upshot and for the foregoing observations I find the presented notice of motion dated 26th April 2013, lacking merit for the following reasons;-

- I. The application having being brought in non-compliance of the express provisions of section 32 (1) (2) of the elections (parliamentary and county election) petition rules 2013
- II. The applicant/Petitioner having failed to establish sufficient reasons to warrant scrutiny and re-tallying of the disputed votes cast as such an interlocutory stage of the proceedings.

I hereby proceed to reject the application with costs to be in the cause.

It is so ordered.

K.SAMBU PM

27/5/13