



REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATE'S COURT AT KISII
PETITION NUMBER 1 OF 2013

DAVID NYABUTO OMBATI-----
PETITIONER

AND

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION----- **1ST**
RESP

**SEREM (SUED AS THE RETURNING
OFFICER**

BOMACHOGE BORABU CONSTITUENCY) ----- **2ND**
RESP

GEORGE MORARA BIBAO ----- **3RD**
RESP

RULING

By a Notice of Motion dated 30th May 2013 and filed in court on 3rd day of June 2013, the petitioner herein David Nyabuto Ombui seeks orders

THAT: -

1. The honourable court be pleased to order that production of ballot papers (I suppose this was meant to be ballot boxes) of the seven (7) polling stations within Bokimonge ward in Bomachoge Constituency for purposes of scrutiny and recount thereof to make a finding that the confusion occasioned by the missing photo and the mix up was the result of the confusion in tallying the final results in these centres;
 - i. Kenyonya Primary School Centre code 032
 - ii. Etono Primary School Centre code 035
 - iii. Kenyoro Primary School Centre code 036
 - iv. Tongeri Primary School Centre code 037
 - v. Motemwamu Primary School Centre code 038
 - vi. Kerongori Primary School Centre code 041
 - vii. Senta Primary School Centre code 044

2. That the court do order an audit of Tongeri Primary School to establish that the final tally exceeded the number of votes cast wherein the final tally was 341 as opposed to the cast votes

- numbering 229 votes giving a difference of 112 votes.
3. Costs of suit to be provided for.

The petitioner's application was based on the ground on face of application and on supporting affidavit deposed to by the petitioner himself dated 30th May 2013.

The petitioner relied on authorities of:-

1. Khaoya versus Lubeki and another (2008) IKLR (Election Petition) 590
2. Hassan Ali Joho versus Hotham Nyange and another (2005) eKLR
3. The Constitution of Kenya 2010
4. The Judicature Act Chapter 8 Laws of Kenya
5. The Elections Act 2011
6. The Elections Act (General) Regulations 2012
7. The Elections (parliamentary and county) Petition Rules 2013.
8. The Civil Procedure Act (Cap 21)

This application was opposed by the 1st and 2nd respondents who filed grounds of opposition dated 7th June 2013 in which it was agreed that the application is entirely without the law; that the court lacks jurisdiction to make the orders sought and that application is frivolous, vexatious and an abuse of the process of court.

The 1st and 2nd respondents advocate also filed written submissions which were highlighted during the hearing of the application.

The 3rd respondent also opposed the application in terms of the replying affidavit sworn by the 3rd respondent George Morara Bibao on the 10th June 2013.

The affidavit in support of the application has attempted to explain the reason why scrutiny will be necessary to establish that the elections for Bokimonge ward was not free and fair and hence the dispute herein.

The petitioner's explanation was that because his photograph was missing on the ballot papers in seven polling stations listed, his supporters either voted for a candidate whose names were closer to his or walked away in protest due to confusion that arose from the missing photograph.

In response to these submissions Mr Odhiambo advocate for the 1st and 2nd respondents argued that application for scrutiny cannot be made simultaneously as recount, one can only apply for one or the other. It was also contested that an order for audit can be made as it is not provided for by the elections regime or even the constitution and cannot issue.

Mr Odhiambo advocate also argued that application for scrutiny was premature as section 82 of the Elections Act which is the primary law governing scrutiny of votes and it was his view that application for scrutiny was premature and if carried out there will be nothing left for the court to do as application is a replica of the prayers in the main petition.

It was further argued that in the authorities of Joho vs. Lubeki and another, the parties were given an opportunity to tender evidence before an order of scrutiny was made.

It was argued that the authority of Mutothori vs. Kibe and another was irrelevant as there was no application to strike out petition but rather the respondents' argument is that evidence should be adduced to prove need for scrutiny.

Mr Bosire advocate for the 3rd respondent in opposition relied on submissions by 1st and 2nd respondents' advocate and urged the court to hear the petition in full before it can be decided that an order of scrutiny

can be made.

Mr Bosire said that the order sought for scrutiny of Etono Primary School is not clear because the petitioner gathered no votes and the 3rd respondent also gathered no votes.

Mr Ondieki for petitioner in final response said the court had inherent jurisdiction to make orders even where none was applied for. It was argued that Regulation 68(4) (b) of Elections (General) Regulations gave mandatory provision about affixing photographs in ballot papers to ensure clear identification of candidates/contestants to an election.

It was argued that petitioner didn't gather any votes at Etono Primary School polling station as votes were de-enfranchised.

From the submissions of advocates for the parties herein and from the grounds of opposition filed on behalf of 1st and 2nd respondent as well as replying affidavit deponed to and filed by the 3rd respondent and the grounds on face of petitioner's application and the supporting affidavit the issues for this court's determination in the petitioner's application are as follows: -

1. Whether the petitioner/applicant has laid sufficient cause and/or basis to warrant orders sought
2. Whether an order for scrutiny can be made simultaneously with an order for recount
3. Whether the election regime provides for any remedy in the nature of an audit
4. Whether it is proper and prudent to order for scrutiny or recount before viva voce evidence is tendered to lay a basis for such recount or scrutiny.

From the outset I do want to concur with the 1st and 2nd respondents' advocates submissions that a party is backed by their pleadings and new matters cannot be sneaked into a matter through the back door vide applications or in any other manner without leave of the court. The prayers in petitioner's petition are an order that there be a scrutiny of the ballot papers used in the Bokimonge County assembly election in seven specific polling stations listed.

A declaration that the 1st and 2nd respondents presided over a flawed and irregular election exercise at Bokimonge ward on 4th of March 2013 and therefore it was null and void.

A declaration that the petitioner's right as guaranteed under the constitution and the applicable law where violated by the apparent confusion in their names, placing of passport size photograph in the wrong ballot and substitution of passport size photograph.

A declaration that the election of Bokimonge ward assembly seat was marred with illegalities, irregularities and procedural flaws so as to render the entire election of the 4th March 2013 at Bokimonge ward null and void.

A declaration that the 3rd respondent was not validly elected as a member of the county assembly for Bokimonge Ward.

An order compelling the 1st respondent to conduct a repeat but proper, free and fair elections in Bokimonge ward county assembly that shall be presided over by impartial and competent officials devoid of the incurable defects subject to the petition.

An order that costs for this petition shall be borne by the 1st and 2nd respondents jointly and severally and any other relief that the court may deem fit, just and appropriate to grant.

Claim for recount and audit of ballot papers in prayer 1 and 2 of the notice of motion was never made in the main petition and cannot be entertained through this application without the leave of the court to amend the petition. This position has been expounded severally in several authorities including the High Court of Nairobi C. Number 659 of 1996 where Honourable Justice Bosire as he then was held that unless

pleadings are amended or parties agree on the unpleaded issue to be the subject matter of a decision by a court the parties are bound by and must be confined to their pleadings.

I do therefore find that the prayer for recount and audit cannot be allowed in this application. Secondly, the 1st and 2nd respondents' advocate also argued that an order for scrutiny and recount are provided for under different rules and can't be applied simultaneously. Section 82(1) of the elections Act provides for scrutiny of votes and says: -

“An election count 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.”

Section 82 (2) also provides for votes that shall be struck out upon scrutiny.

On the other hand, part (VI) of the Elections (Parliamentary and County Elections) Petition Rules 2013 provide for scrutiny and recount in Rules 32(1) and (2) and 33(1), (2), (3) and (4) (a) to (j) respectively.

I have noted that although the rules provide specifically for recount as if, and indeed being different from scrutiny, the parent statute, the Elections Act of 2011 only provides for scrutiny and recount in its interpretation of section 2 of the act despite the fact that these are two (2) very common and pertinent words as far as election disputes are concerned.

So, whether scrutiny includes recount is not clear from the law and the rules don't provide for scrutiny and/or recount but the rules don't preclude a party from applying for both. My decision therefore to decline to grant an order for recount would basically be for reasons that same was not pleaded *ab initio* in the prayers in main petition and not that the prayer cannot be granted together with scrutiny.

As far as issue of scrutiny is concerned, both the Elections Act 2011 Section 82(1) and the Elections (Parliamentary and County Elections) Petition Rules 2013, provide that the parties may apply for scrutiny and the court may also on its own motion order for scrutiny of votes for purposes of establishing the validity of the votes cast.

Under Rule 33(2) it is provided that the court, if it is satisfied that there is sufficient reason may order for scrutiny of the votes. The issue here is whether petitioner has laid satisfactory grounds to warrant an order of scrutiny. What has been presented to court is submissions from the bar and allegations in the supporting affidavit of the petitioner as well as affidavits of the petitioner's witnesses filed in court record, which allegations/evidence has not been tested by way of cross examination. In following the law and precedents and particularly the authority of Simon Nyaundi Ogari and Another versus Honourable Joel Omagwa Onyancha and 2 others Kisii High Court Election Petition Number 2 of 2005 and the on-going Election Petition number 9 of 2013 at Kisii High Court Charles Oigara Mogere and 2 others, I do find that at this stage, ground for believing that there was irregularities in the election process has not been laid satisfactorily to warrant an order for scrutiny at this point in time. I do decline to make order for scrutiny but hasten to say that in the event that it turns out in the course of the hearing either at instance of the parties or the court in its own motion that it is necessary for such scrutiny to be done the court will not hesitate to make such an order. Costs of this application to follow outcome of the main petition.

A.C.A Ong'injo C.M. 19/6/2013