



**REPUBLIC OF KENYA**  
**IN THE PRINCIPAL MAGISTRATE'S COURT**  
**AT KWALE**  
**PETITION NO. 1 OF 2013**

**BETWEEN**

**MOHAMED KHAMIS MWASENGEZA.....PETITIONER**

**AND**

**INDEPENDENT ELECTION & BOUNDARIES**

**COMMISSION (IEBC).....1ST RESPONDENT**

**DAVID MARO.....2ND RESPONDENT**

**JUMA ATHMAN MAONE.....3RD RESPONDENT**

**RULING**

The application for court determination is dated 4<sup>th</sup> April 2013. It is brought by the petitioner herein Mohamed Khan Mwasengeza. Among the prayers it seeks orders for:

- a. Scrutiny of the votes of and other documents related to the election of the member of the county for Kinondo Assembly Ward in Msambweni constituency held on 4<sup>th</sup> March 2013.
- b. Recount of votes for the election of the member of the Kinondo Assembly Ward in Msambweni constituency held on 4<sup>th</sup> March, 2013

The other prayers canvassed in the said application were dealt with during the pretrial conference.

The petitions grounds for scrutiny are that he believes that proper scrutiny of the votes and all relevant documents may settle the petition without hearing the witnesses and that proper scrutiny of votes will reveal the commission of electoral offences by 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondent among other grounds in support of supply of the relevant documents to the petitioner.

The 1<sup>st</sup> and 2<sup>nd</sup> respondents put in a replying affidavit and gave a narrative of the accounts that were undertaken by both on the date of the elections. They alleged that the disputed election were free and fair.

Both parties later put in a joint affidavit supplying the petitions with documents as directed by court during pretrial conferencing.

Parties agreed to put in written submission for court's decision. The 1<sup>st</sup> and 2<sup>nd</sup> respondent in their

submission also raised points of law and alleged that the application was premature and brought contrary to the law. They made reference on Rule 32 and 33 of the Elections (parliamentary and county elections) petition rules. The said respondents also made reference to sec 82 (1) of the elections act of No. 24 of 2011 and submitted that proper scrutiny of votes and all relevant documents can only be ordered when trial has commenced. It was submitted by the 1<sup>st</sup> and 2<sup>nd</sup> respondent that the petition being at its pre hearing stage the court cannot order for scrutiny of votes and documents. It was also submitted that rule 33(4) was offended by the petitioner as it was not disclosed which specific polling station had disputed result. Lastly it was submitted that Rule 33(2) was not satisfied as no sufficient reason was shown for the court to make an order for scrutiny and recount. The 3<sup>rd</sup> Respondent also submitted that the petition had not reached the threshold set by rule 32 of the Elections (parliamentary and county elections) petition rule 2013.

I have considered the submissions put in by the parties and the quoted authorities Sec 82 of the election act of 24 of 2011 gives the court discretion to make an order for scrutiny of votes during the hearing of the petition.

Rule 33(1) of the election (parliamentary and county) gives any party to the proceeding a right to apply for scrutiny at any stage for purposes of establishing the validity of the votes cast. I'm satisfied that the application is properly before me. Under rule 32(22) of the elections (parliamentary and county elections) petition rule 2013 the court has the discretion to allow that application if satisfied that there is sufficient reason to do so.

Having carefully considered the application, replying affidavits thereto and the submission made for and against the application, I'm convinced that the allegations raised are better canvassed at the hearing of the petition. The court will also get a chance to properly determine on whether scrutiny will be necessary. I would therefore find no basis laid for a case for scrutiny as by law required. Given the circumstances herein a hearing would be best forum where basis for scrutiny maybe laid.

Order 32(1) relates to recounting of votes. Under this rule the petitioner may request for recount or examination of tallying where it's the only issue in the election petition. Obviously that issue is placed number two out of the five prayers listed in the petition. The court would decline that prayer on that basis.

The other issues raised in that application having been dealt with in the pretrial conference and the petitioner's counsel having expressed his satisfaction that all the documents that were requested were supplied, the court shall proceed to dismiss the prayers for scrutiny of votes and documents and the prayer for tallying of votes.

The cost shall abide outcome of the petition.

Read, dated and delivered in open court.

Mr. Hamza for petitioner

Mrs. Kariuki holding brief for 1<sup>st</sup> and 2<sup>nd</sup> respondent

Mr. Mwangunya for the 3<sup>rd</sup> respondent

**Mr. Hamza** – we have examined our issues and they are almost the same with little variance and we have agreed to do joint issues for filling now that the application has been determined.

**Mrs. Kariuki** – we are in agreement.

**Court** – mention on 21/06/3013.

Parties to file the joint submission for the court directions

**E.K. Usui Macharia, Ag. SPM**

18/6/13