



**REPUBLIC OF KENYA**

**IN THE SENIOR PRINCIPAL MAGISTRATE’S COURT AT BOMET**

**ELECTION PETITION NO. 1 OF 2013**

**IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010**

**IN THE MATTER OF THE ELECTION ACT, 2011**

**IN THE MATTER OF THE ELECTIONS (PARLIAMENTARY AND COUNTY**

**ELECTIONS) PETITION RULES, 2013**

**AND**

**IN THE MATTER OF A PETITION FOR THE DECLARATION OF WHICH**

**CANDIDATE WAS VALIDLY ELECTED.**

**IN THE MATTER OF THE ELECTION FOR THE MEMBER OF COUNTY**

**ASSEMBLY OF SILIBWET TOWNSHIP WARD.**

**BETWEEN**

**PETER KIPKIRUI LANGAT**

.....PETITIONER

**VERSUS**

**ROBERT KIPKIRUI METET.....1<sup>ST</sup>**  
**RESPONDENT**

**THE BOMET CENTRAL RETURNING OFFICER.....2<sup>ND</sup>**  
**RESPONDENT**

**THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....3<sup>RD</sup>**  
**RESPONDENT**

**RULING**

**Introduction**

The application before this court for determination is the Notice of Motion Application dated 27<sup>th</sup> May, 2013 brought under Article 38 (1) 87 (1), 88 (4) (e) 159 (1) of the Constitution of Kenya, 2010, S. 82 (1) Of the Elections Act No. 24 of 2011, Rule 4 (1) 32 (1) and 33 (1) of the Elections (Parliamentary and County Elections) Petition Rules, 2013, for the following orders:

- a. That the court be pleased to order for a recount and scrutiny of votes of the following polling stations; Njerian Primary School (009), Silibwet Tea buying Centre (012), Emkwen Youth Polytechnic (001) Kapsimotwa Primary School, Kecheiyat Primary School (015) and Silibwet Primary School (013).
- b. Costs to be provided for.

The grounds of the application are on the face of the application and the supporting affidavit of the petitioner Peter Kipkurui Langat sworn on even date based on the following.

- a. That the election held on the 4<sup>th</sup> March 2013 irregularly, unprocedurally and or unlawfully made a return that the 1<sup>st</sup> Respondent was the duly and validly elected member of the county assembly Silibwet Township Ward.
- b. That the changes in the election results was due to electoral malpractices and offences committed by the Respondents whereby the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents allowed their officers to perform their duties under the influence of the 1<sup>st</sup> Respondent and his political party to the extent that it altered the results”
- c. That the 2<sup>nd</sup> Respondent failed ,neglected and or refused to address the grievances relating to the on- going in certain polling stations during and the voting process, tallying of the results and the counting of the votes hence prejudicing the Petitioner.
- d. That there were a lot of irregularities in the entries to Form 35 which irregularities cast doubt on the outcome of the election.

The application was opposed by the 1<sup>st</sup> Respondent who filed his grounds of opposition based on the following

- a. That the petitioner has not laid a basis to justify the scrutiny or recount in the votes.
- b. That the petition contains no prayer for scrutiny or recount of the votes and this application intends to unlawfully amend the petition.
- c. That the petitioner is on a fishing expedition for evidence and the petitioner is using the application to fish for evidence.
- d. That the Petitioner’s application is pre mature at this stage of the proceedings.
- e. That the petitioner’s application is meant to embarrass and delay the hearing of this petition.
- f. That the petitioner’s application is ambiguous, fatally defective, incompetent and an abuse of the court process.

The 2<sup>nd</sup> respondent filed his replying affidavit and on behalf of the 3<sup>rd</sup> Respondent who is his principal. He urged the application be disallowed on the basis the prayers were not sought in the petition.

That the petitioner is on a fishing expedition to support a petition which is doomed to fail.

That the process of counting and scrutiny of votes cast in Silibwet Township Ward was transparently conducted with the full and active participation of the petitioner’s agents in all polling stations and the results entered in form 35 was duly approved by the petitioner’s agent in each of the polling station who signed on the reverse of the said Forms to confirm the accuracy of the said results.

That there was an initial error in the tallying of votes into Form 36 where results from Njerian Primary School polling station in respect of Women Member of National Assembly were irregularly tallied in lieu of the results for Member of county Assembly .

## **Parties Submissions**

The Parties filed their written submissions and highlighted their oral arguments.

**Mr.Orina for the petitioner** submitted that there were a lot of irregularities apparent on the face of the forms which contain the results. That the form 35 in the named stations were blank and it would be prudent for the court to order for scrutiny and recount to satisfy itself that the election was indeed conducted as per the provisions of Art 81 of the Constitution. The Article, presupposes a free and fair elections, conducted by an independent body in a transparent, impartial, neutral and accountable manner.

That the court should go beyond considering the candidate with the most votes and consider whether the entire electoral process was transparent, free and fair. That for the court to satisfy itself that the results as presented reflected the free will of the electorate it must recount and scrutinize the entire electoral process and verify the results as presented.

That in determining election petitions the court has to have in mind the election petitions are not ordinary suit where a party is enforcing a right that accrues to him in person.

The court has to take cognizance of the fact that an election is a signification of the exercise of the democratic rights of the people of their choice to represent them. He relied on the decision of **Maraga J in Joho Vs Nyange & Anor (No.4) (2008) 3KLR 500** and **Section 82(1) of the Election Act N0.24 of 2011**.

He also relied on the authority of **William Kabogo vs George Thuo & 2 ors (2010) e KLR** Quoting the Ugandan case of **Joy Kabatsi Kafura vs Anifa Kawooya & Anor (EP) 25 OF 2005 (unreported)** “An election is a process encompassing several activities from nomination of candidates through to the final declaration of the duly elected candidate. If any one of the activities is flawed through failure to comply with the applicable law, it affects the quality of the electoral process and subject to the gravity of the flaw; it is bound to affect the electoral results. One such activity is the declaration of the results at every polling station. If any declaration is invalid by reason of non-compliance with the applicable law it affects the quality and the result of the electoral process”.

The court ought to carry a legal factual and evidential audit of the entire process in order to satisfy itself as to the entire electoral process .That in the polling stations mentioned in the application there are glaring irregularities and non-compliance with the law and the court may be unable on the face of the result declared which result to attribute to which polling station as some of the form 35 meant to contain the results of the returns are blank.it is for this reason that the court should order for recount and scrutiny.

Article 81 of the Constitution presupposes that the election must be free and fair. It must be conducted by an independent body.

The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are meant though appearing as Respondents are to demonstrate before this Court that they conducted the election independently, neutral, impartial, accurate and accountable manner. How else will the Court make a finding that the election was conducted in a neutral, efficient, impartial manner? It calls for Court to go to an extra mile to check the conduct of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.

There is a unity of purpose between the 1<sup>st</sup> and 3<sup>rd</sup> Respondents which raises doubt. He submitted that there is no reason why the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents should fear scrutiny and recount. By denying the process, it seems that there is an issue being hidden.

He urged the Court to consider the application and find merit in it. However, if the Court finds that the grounds raised are premature, the Court should reserve the ruling until such a time when it will consider the same.

**Mr. Langat for 1<sup>st</sup> Respondent** submitted that the petitioner's application is fatally defective and incompetent and the orders sought in the application cannot be granted by this Court because they are ambiguous. That a casual look at the prayers in the application, it prays for an order of scrutiny and recount. It has listed the polling stations. It does not specify the votes to be scrutinized or recounted.

On 4/3/2013, the voters in all the named polling stations voted for 6 candidates. In that election, there was Presidential, Senator, Member of National Assembly, Women Representative, Governor and member of County Assembly. It does not specify which of the contested above to be scrutinized or recounted.

If the application is allowed the way it is, it cannot be amended and Court cannot grant any prayer because it will be an exercise in futility. He cited the authority of **Steven Kariuki 2013 eKLR pg 8**. *"The court can only grant that which is prayed for in the petition....."* If the prayer is struck out, the application remains with no orders. He urged the court to strike out the same with costs.

For the Court to order for scrutiny and recount of votes, the party must lay a basis for an order of scrutiny and recount. It is not automatic. **Rule 33 (2) of the Election Petition Rules** and the authority of **Masinde VS Bwire (2008) 1KLR**. *"There must be a good reason before this court can order for scrutiny .An order of scrutiny is not automatic. There must be a basis for it"* Emphasis is that the Court must be satisfied to order for scrutiny and recount.

That the petitioner has not given any evidence particularly in Para4 of his supporting Affidavit he only stated **"That the changes in the election results was due to electoral malpractices and offences committed by the Respondents whereby the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents allowed their officers to perform their duties under the influence of the 1<sup>st</sup> Respondent and his political party to the extent that it altered the results"**

That the petitioner's Notice of motion and its supporting affidavit merely make allegations of electoral malpractices and offences committed by the Respondent and a lot of irregularities in the entries of form 35.No evidence has been annexed to support the same. The application contains general allegations. The application has not laid basis for scrutiny and recount.

**R.10(1) (c ) of the Election petition Rules** is couched in mandatory terms. The petition dated 19/3/2013 has not stated any result declared, it at all they were declared. The application does not state the results of the election.

If scrutiny and recount is ordered by Court, on what basis would it compare the declared results and those of scrutiny and recount?

He submitted that the application is seeking to alter the substance of the petition. A petition cannot be amended at this stage by way of application. The provisions of **Section 76 (4) of Election Act** are clear. The petitioner cannot seek to amend the petition at this stage. The prayers in the petition shows that the petitioner is seeking for (4) prayers-

- a. That the petitioner be declared the validly elected candidate for the member of county Assembly Silibwet Township Ward in the election held on the 4<sup>th</sup> March, 2013
- b. That the certificate of results issued to the 1<sup>st</sup> Respondent be declared invalid and void abi nitio.
- c. That the Honourable court do issue such orders and directions and or relief as the court may deem fit and just to grant.
- d. That the cost of the petition be borne by the Respondents

It is not seeking for scrutiny and recount. The petition contains no prayer for recount or scrutiny.

He relied on the authority of **Amina Hassan Ahmed vs R.O Mander county & 2 Ors High Court at Garrissa EP No. 4 of 2013**. Where **Onyancha J** held that *"an election petition can only be amended with the leave of court within 28 days stipulated by the Act for filling an election petition"* He submitted

that the application is so far as is seeking to amend the petition is irregular.

This not the right stage to order for scrutiny and recount. That the petitioner has largely relied on this section **Section 82 of Election Act** . However we are not yet at the hearing stage of the election petition, the section contemplates for scrutiny and recount during the trial and not at the preliminary stage. He relied on the authority of **Masinde VS Bwire (2008) 1KLR** . The application lacks in merit and same to be dismissed with costs.

The petition has made reference to **Article 81 of the Constitution**. That article gives the aspiration of a free and fair election. The aspirations are to be given life by the Election Act and other legislations. They cannot operate on their own. The petitioner has stated that the independence of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents was compromised by the 1<sup>st</sup> Respondent however no evidence has been produced to support the same.

That the petitioner's counsel has alluded that the Court may reserve its ruling to a later stage of the hearing however, the application was filed since the petitioner wanted an order for scrutiny and recount to be an issue for hearing. He submitted the application must be first determined before going for the trial.

**Mr. Chanzu for 2<sup>nd</sup> and 3<sup>rd</sup> Respondents**- submitted that the election held on 4/3/2013 with respect of election for MCA of Silibwet Township Ward was free and fair, transparent, independent and accountable.

At a look at the application, the petitioner is in a fishing expedition. The issues raised in the application are not contained in the substantive pleadings which is the petition.

The petitioner looked at form 35 and decided to file his application. The petitioner is attacking Form 35 and not Form 36 which is the result of that ward. Form 35 is an interim and can only be validated at the issuance of Form 36. He submitted that they have filed Form 36 and the results for the ward are contained therein and stamped by the official stamp of 3<sup>rd</sup> Respondent.

That to order for scrutiny and recount is an exercise in futility and a waste of time. That nothing has been shown in the petition to prove they were acts done by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in conjunction with 1<sup>st</sup> Respondent to warrant an invalidation of the election held in Silibwet.

That the petitioner has referred to the case of **William Kabogo**. (supra), the same states that election petition falls in special jurisdiction and it affects both the petitioner and Respondents. The Election Act No. 24 of 2011 is *sui generis*, it flows from the constitution.

That under section 96 of the Election Act No. 24 of 2011, the Rules committee are mandated to make rules and the rules are in place. **R.33 of the Election Petition Rule** is clear with respect to the issue of scrutiny. He relied on the authorities (**Joho vs Nyange Anor (No.2) (2008)3 KLR(EP)**. And **Masinde vs Bwire & Anor (supra)** The petitioner in the authorities had pleaded in the petition for an order and scrutiny. **Section 82 Election Act** is given effect by Rule 33. It (section 82) cannot operate in isolation. The discretion has to be founded or something. No basis has been laid.

That when you look at the petition, application and supporting affidavit, the petitioner gives general basis particularly **para 4 of the sworn affidavit**.(supra). All form 35 annexed have been signed by agents who included agents of the petitioner. The discretion under **section 82** should be exercised judicially and not in a vacuum.

It has been submitted that the burden is on 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to prove that the election was conducted in transparently and fairly manner. It is the petitioner who has brought the petition. He ought to prove the mal practice.

The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and those under them fulfilled the tenets of **Article 81** of the constitution

vicariously.

It is not the petitioner's business to define unity of purpose. We are in a petition and not an election.

With the issue reserving a ruling, Court cannot do that after hearing the application. The Court ordered the petitioner to file a formal application and the issue therefore has to be determined for the case to move forward.

An election petition is about results. No results has been shown, date of declaration has not been indicated. It is not an issue of form but substance.

The application is seeking to amend the petition through the backdoor. **Section 76 (4) of Election Act**, is couched in mandatory term and further **Rule 80 of Election Regulations** gave the petitioner a recount of up to two times. It is not stated that he was denied that opportunity. Did he pray for that opportunity? We are not told. It is a tedious process founded on nothing. He fully associated himself with the 1<sup>st</sup> Respondent's submission.

### **Law Applicable**

The statutory underpinning for scrutiny is found in section 82 (1) of the Elections Act (No. 24 of 2011) hereinafter The Act).

**Section 82 (1)** of the Act provides that “ *An election court may, on its own motion or the application by any party to the petition, during the hearing of an election petition, order for scrutiny of votes to be carried out in such manner as the election court may determine*”

Part VI of the Election Petition Rules makes provision for scrutiny and recount of votes.

Further **Rule 33 (1)** Of the Rules provides that “*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*”

**Rule 33 (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”

From the above provisions, a court may order for a scrutiny **suo moto** or on the application by any party to the proceedings.it may be made at any stage of the proceedings.

### **The Determination**

I have considered the affidavits, authorities and counsels submissions both oral and written. The issue is whether the court should order a recount or scrutiny of the votes cast in the above mentioned polling stations. Three questions must be factored when deciding on the issue.

1. Can the court order for scrutiny or recount if the same was not prayed for in the petition?
2. Should a basis be laid first before an order for scrutiny and recount is made?
3. Should the court reserve its ruling should it find the request pre mature?

To answer the above one needs to go to the express provisions of section 82 (1) of the Election Act No 24 of 2011 and Rule 33 of the Elections (Parliamentary and County Elections) Petition Rules, 2013.

**Section 82 (1)** of the Act provides that “ *An election court may, on its own motion or the application by any party to the petition, during the hearing of an election petition, order for scrutiny of votes to be carried out in such manner as the election court may provide*”

Further **Rule 33 (1)** Of the Rules provides that “*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*”

This provision are plain enough that scrutiny may be ordered during the hearing of the petition regardless of whether it is ordered at the instance of a party to the petition or upon the court's own motion, the trial must have commenced before votes can be scrutinized (see **Peter Gichuki King'ara and IEBC, James Mbai Mary Wambui Munene Nyeri High Court Petition No. 3 of 2013.**)

The Respondents contended that the Petitioner seeks to amend the petition through the application seeking for scrutiny and recount as the same had not been prayed for in the reliefs sought in the petition. In my view Section 82 (1) of the Act is clear on the issue. The court can *suo moto* order for scrutiny and recount or on the application by a party to the application. In this case the petitioner filed his application at the pretrial for an order of scrutiny and recount pursuant to **section 82 (1) of the Act** .All the court needs to do is to satisfy itself that there is sufficient reason to order for the same by examining the records and evidence adduced.

In my view in the current case it would be premature to order for the same at the pretrial stage when the evidence on record has not been tested on oath.

Once evidence has been adduced the court can *suo moto* or on the application by a party to the petition order for scrutiny where irregularities have been established to have been committed by election officials and where the margin between the winning candidate and the runner up is such that a scrutiny would be best way in which to settle the dispute as to who actually won the election. (**Joho vs Nyange Anor (No.2) (2008)3 KLR(EP).**(supra)

The Respondent in opposing the application contended that the petitioner has failed to lay a basis for such scrutiny. That the Petitioner laid general basis particularly in Para 4 of the supporting affidavit

Para4 **“That the changes in the election results was due to electoral malpractices and offences committed by the Respondents whereby the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents allowed their officers to perform their duties under the influence of the 1<sup>st</sup> Respondent and his political party of the to the extent that it altered the results”**

That no evidence has been laid in support of the allegation and same cannot be said to have been a basis to order for a recount and scrutiny. In **Masinde Bwire and anor** “ *it was held that there had to be a good reason before the court could order for scrutiny .An order for scrutiny was not automatic and there had to basis.*”

In essence a party to the petition needs not pray for scrutiny or recount in his petition for court to order for the same or must he establish a basis for the same. It all varies from case to case and the circumstances surrounding the situation at hand. In **Joho V Nyange (quoted ) Maraga J.** held that “ *There was no rule that a petitioner had to call evidence and lay a basis before scrutiny is ordered nor was there a rule that scrutiny would always be ordered whether or not a basis had been laid.*

*Where there was a large margin there was no need for recount and scrutiny of the votes.*” He declined to grant an order for scrutiny and directed that the petitioner to renew his application after adducing evidence and laying a foundation.

Section 82(2) of the Act is clear it gives the court express power either on its own motion or upon application by any party to order for scrutiny.

Further **Tuiyott J in Philip Ogutu vs Michael Aringo & 2 Others Busia HC Election Petition No. 1 of 2013** held 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 vs Bwire &Anor (2008) 1KLR (EP) 547.*

As submitted by the Respondents scrutiny should not be used by the petitioner as a fishing expedition to

discover new or fresh evidence and to that extent I agree with their submission.

In the cited case of **Peter Gichuki King'ara, Ngaah J** stated that *“Whether or not the basis laid is sufficient to warrant an order for scrutiny is for the court to determine based on the evidence available. As to when scrutiny can be ordered section 82(1) as read with 82(2) is clear during the trial, at any time during the hearing but before the final judgement has been delivered. The inevitable conclusion in the premises is that as far as the issue of scrutiny of votes is concerned it would be erroneous in law to order for scrutiny at the pretrial stage unless the only issue in the petition is the count and tallying of votes under Rule 32(1) of the Elections (Parliamentary and County Petition Rules 2013)”*

In **Rishad Hamid Ahmed Amana - Vs - IEBC & 2 Ors High Court at Malindi (EP) 6 of 2013 Kimaru J** quoting the cited cases of **Philip Ogutu –Vs- Michael Aringo & 2 Others Busia HC Election Petition No. 1 of 2013 and Peter Gichuki King'ara and IEBC, James Mbai Mary Wambui Munene Nyeri High Court Petition No. 3 of 2013.** Stated that *“As is clear from the two decisions, the recent trend is that scrutiny can only be ordered where a petitioner lays sufficient basis. Such basis can only be laid after the petitioner has adduced evidence during the actual hearing of the petition. The petitioner cannot therefore demand that there be scrutiny and recount of votes before the commencement of the trial. The petitioner may do so after his or her witness have testified. The ideal situation, however, is that such an application for scrutiny should be considered by the court after all the witnesses of the petitioner and Respondents have testified. At that stage of the proceedings, the court will be in a position to properly assess the veracity of the allegations made by the petitioner that there is need for scrutiny”*. I fully associate with the Learned Judge remarks.

In our situation the petitioner has sought for scrutiny at the pretrial stage and under **Rule 32 of the Elections petitions Rules 2013** *“where the only issue in the petition is the count or the tallying of the votes received by the candidates, and the petitioner requests the court to order a recount of the votes or the examination of the tallying ,the petitioner shall indicate that fact in the petition and may indicate that he or she does not require any other determination except a recount of the votes or the examination of the tallies, as the case may be.”* The petition herein does not fall within the ambit of **Rule 32** as scrutiny and recount is not the only issue.

The petitioner has requested that the ruling be reserved to a future date if the prayer is not granted. However I decline to grant that request for reasons that the Rules are clear and particularly **Rule 17 (1) Election Petition Rules** *“Within seven days after the receipt of the last response to the petition, the court shall schedule a pretrial conference with the parties in which it shall (e) “deal with all interlocutory applications and decide on their expeditious disposal”*.

The matter ought to be set down for hearing once the application has been heard and determined at the pretrial stage.

The upshot of the above is that the Notice of Motion dated the 27<sup>th</sup> May, 2013 is dismissed with costs in the cause for being premature. The petition is yet to be heard; however I will not hesitate to invoke **Section 82(1) Of the Act** and order for scrutiny in the course of the proceedings when such scrutiny becomes necessary for effectual and conclusive determination of the issues before court. Equally any party may move the court for orders for scrutiny at any stage of the hearing of this petition before the delivery of the judgement.

**Dated, Signed and Delivered** in open court at **Bomet** this **26<sup>th</sup> June, 2013**

**V. Karanja (Ag SRM)**

**In the Presence of**

Court clerk: Alex

Counsel for the Petitioner: Mr. Matwere h/b for Mr. Orina

Counsel for the 1<sup>st</sup> Respondent: Mr.Langat

Counsel for 2<sup>nd</sup> & 3<sup>rd</sup> Respondent: Mr. Langat h/b for Mr. Chanzu