



**REPUBLIC OF KENYA**

**IN THE RESIDENT MAGISTRATE`S COURT AT MALINDI**

**ELECTION PETITION NO. 1 OF 2013**

**IN THE MATTER OF THE ELECTIONS ACT, 2011 LAWS OF KENYA**

**IN THE MATTER OF THE ELECTIONS FOR THE GANDA COUNTY ASSEMBLY  
REPRESENTATIVE FOR GANDA WARD WITHIN MALINDI CONSTITUENCY OF KILIFI  
COUNTY**

**BETWEEN**

**JOSEPH KIPONDA.....PETITIONER**

**AND**

**THE INDEPENDENT ELECTORAL &**

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

**STEPHEN BAHATI MLANDA.....2ND RESPONDENT**

**RULING**

Before me is the application dated 19/8/2013 brought under Article 159 of the Constitution, Rules 4, 5, 33 (1) and 33 (2) of the Elections (Parliamentary and County Elections) Petition Rules, 2013 and section 80(3) of the Elections Act. The application mainly seeks orders that the court be pleased to review its decision dated 6/8/2013 and order for the scrutiny and or recount of all the votes cast in respect of the County Assembly representative seat for Ganda County Assembly ward within Malindi Constituency in Kilifi County touching on all the polling stations. The application is premised on the following grounds.

- (a) **That there is a mistake and or error apparent on the face of the record;**
- (b) **That there is discovery of a new and important matter which could not have been produced by the petitioner/applicant when the order for a recount was made;**
- (c) **That there are sufficient grounds to warrant this Honourable Court to review its orders granted on 6/8/2013.**

**d. That is only fair and just and in the interest of justice that the application herein be allowed.**

The application is supported by the affidavit of Joseph Ngumbao Kiponda, the petitioner herein. The application is opposed by the respondents who filed replying affidavits. Due to time constraints, the court ordered that written submissions be filed at the time of filing the application on the part of the petitioner and at the time of filing the replying affidavits on the part of the respondents. The parties duly complied.

I have carefully considered the application together with the objections thereto. I have also put into consideration the submissions by the parties. The application basically seeks review of this court's orders made on 6/8/2013 vide which the court ordered a scrutiny and recount of 4 polling stations as opposed to all the polling stations as had been prayed by the petitioner. The petitioner is now asking the court to order for scrutiny and recount of the votes in all the remaining polling stations.

To begin with, I wish to consider whether this court has jurisdiction to review its own orders. The Elections(Parliamentary and County Elections) Petition Rules, 2013 do not expressly provide for a procedure for review of orders. However, Article 159(2) (d) of the Constitution of Kenya provides that justice shall be administered without undue regard to procedural technicalities. Section 80 (1) (d) of the Elections Act 2011 provides as thus:-

**“An Election court may, in the exercise of its jurisdiction- decide all matters that come before it without undue regard to technicalities”**

Rule 4 of the Elections(Parliamentary and County Elections) Petition Rules 2013 provides that the overriding objective of the rules is to facilitate the just, expeditious, proportionate and affordable resolution of election petitions under the Constitution and the Act , and that the court shall seek to give effect to the overriding objective.

Having analysed the above provisions of law, I am convinced that the application is properly before court and this court is clothed with the jurisdiction to hear and determine the application on merits. I do not therefore agree with the 2nd respondent, with all due respect, that in the absence of express provisions on review in the governing rules, the application must fail.

The main issue for determination is whether there are sufficient grounds to review the orders made on 6/8/13 and order for scrutiny and recount of votes in all the remaining polling stations. To this end, the application must be considered in two fold. That is to say that the court must consider and determine;

- (a) Whether the petitioner has established the grounds upon which the application is based; and**
- (b) Whether such grounds provide a sufficient basis for the court to order for scrutiny and recount of all the votes in the remaining polling stations.**

The first ground upon which the application is based is that there is a mistake and or error apparent on the face of the record. Apart from indicating the ground on the face of the application, the petitioner has not either in his supporting affidavit or submissions pointed out the alleged mistake or error referred to. The only proper conclusion would be that there is no mistake or error apparent or at all, on the face of the record.

The second ground relied upon by the Petitioner/applicant is that there is discovery of new and important matters which could not have been produced by the petitioner/applicant when the order for a recount was made. According to the petitioner, the recount of votes in the four polling stations as was ordered by the court on 6/8/2013 revealed various anomalies. It is the petitioner`s contention that the anomalies were

new and important matters which could not have been produced by the petitioner when the initial application was lodged in court. The petitioner argues that given the anomalies, it is difficult to rule out discrepancies touching on the remaining polling stations as the revealed anomalies cast doubt on the accuracy of the counting exercise in all the polling stations within Ganda ward.

The respondents submitted that the petitioner had not presented any new evidence relating to the remaining polling stations. The respondents further submitted that the results of the scrutiny and recount of votes as was ordered by the court do not concern the other polling stations and as such, they cannot be termed as new and important evidence so as to lay a basis for scrutiny and recount of the votes in other polling stations. With respect, I agree with the respondents. The petitioner ought to have presented new evidence with respect to the remaining polling stations as each polling station stands on its own and ought to be assessed separately since the elections at the various polling stations were conducted by different people. A mistake of one election official in a polling station cannot be used to impute liability on another election official in a different polling station. It is therefore my finding that no new evidence has been presented with respect to the remaining polling stations.

The petitioner further stated that there were sufficient grounds to warrant the court to review its orders made on 6/8/2013 and that it was only fair, just and in the interest of justice that the application be allowed. Apart from the grounds already analysed hereinabove, the petitioner has not demonstrated to the court that there are other reasons which would warrant the court to review its orders. It is not enough for the petitioner to state that he disputes the results of the elections as declared by the 1st respondent. The petitioner must give reasons as to why he disputes the results. In the initial application for scrutiny and recount dated 13/6/2013, the petitioner relied on the ground, *inter alia*, that there were alterations on the forms 35 for Ganda ward. The issues were canvassed and in a Ruling delivered on 6/8/13, the court was of the opinion that most of the alterations had been sufficiently explained. It is worth noting that neither the petitioner nor his agents faulted the counting exercise in their affidavits and in their evidence in court. Most of the forms 35 were signed by the Petitioner's agents. I agree that a candidate's agents are the responsibility of the candidate and their failures cannot be visited upon IEBC or any other party in the absence of evidence against the other parties. The court has powers to grant orders so as to meet the ends of justice. However, such orders cannot be made in vacuum. There must be a basis for granting such orders and the basis must be laid by the applicant. I find that the petitioner/applicant has failed in this endeavour.

In view of the foregoing, it is my finding that the petitioner/applicant has failed to establish the grounds upon which he relies in the application. It is trite law that an order for scrutiny or recount can only be granted where the petitioner has laid a sufficient basis. In the recent case of **Philip Ogutu-v-Michael Aringa & 2 Others Busia HC Election Petition No. 1 of 2013(unreported)**, the court held as follows;-

**“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.....”**

In the case of **Rishad Hamid Ahmed Amana=v=IEBC and 2 others (2013)eKLR**, the court held that scrutiny should not afford a petitioner the opportunity to embark on a fishing expedition to discover new or fresh evidence. A similar finding was made in the case of **Philip Munge Ndoro=vs=Omar Mwinyi Shimbwa and 2 others Mombasa HC Election Petition NO. 1 of 2013** where the court held as follows;-

**“There is need to guard against a party using the exercise of scrutiny and recount as a “fishing” expedition so to speak as a means to uncover new or fresh evidence”**

The issue of scrutiny and recount of votes in the remaining polling stations was dealt with in the Ruling that was delivered on 6/8/2013. The court found no basis for ordering a scrutiny and recount of all the polling stations. A recount was ordered in 4 polling stations and whether or not there were anomalies that were discovered, the results of the scrutiny and recount cannot form a basis for ordering a scrutiny and recount of the votes in all the remaining polling stations. As rightly submitted by the respondents, the

application is a mere fishing expedition and this court is not prepared to assist the petitioner to fish for more evidence in support of his petition. It should be remembered that the prayers for scrutiny and recount did not form the basis of the petition. The petitioner cannot be allowed to construct his case as he goes along. Hearing of the petition has already been concluded and in my considered view, it would be improper for the court to allow the application without a proper basis. As rightly submitted by the 1st respondent, a prayer for scrutiny and or recount cannot be based on a hunch or on the instincts of the petitioner but must be based on tangible evidence relating to each particular polling station.

The upshot of the above considerations is that the application dated 19/8/2013 lacks merit. The same is hereby dismissed with costs to the respondents.

Dated at Malindi this 27th day of August, 2013

**Y.A.SHIKANDA Ag SRM**

**27/8/13**

**Delivered in open court in the presence of;-**

Mr Otara holding brief for Kabue for Petitioner

Mr Kibet holding brief for Ndegwa for 1st Respondent

Mr Matata holding brief for Oduor for 2nd Respondent

Maro-c/c

**Y.A.SHIKANDA Ag SRM**

**27/8/13**