



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

WILSON WAWERU WAMBUGU.....PETITIONER

-VERSUS-

IEBC.....1ST RESPONDENT

DENNIS OMARE.....2ND RESPONDENT

KABENGI N. K. RICHARD.....3RD RESPONDENT

JAMLICK KARIUKI KIURA.....4TH RESPONDENT

RULING

The Petitioner Wilson Waweru Wambugu had filed his petition dated 8/4/2013 on 8/4/2013.

The petitioner had made 4 prayers in his petition and relevant to this ruling is prayer number 2 as follows;-

“That a scrutiny and recount be ordered in respect of all votes cast in respect of Njukiini ward for the election of the member of the County Assembly representing Njukiini ward.”

2 witnesses had testified on oath on behalf of the Petitioner's case while 5 witnesses had testified on oath for the respondents' case.

After the trial closed on 17/6/2013 the counsel for the respective parties filed their written submissions. The counsel for the parties had sought leave to highlight their respective written submissions.

After the Petitioner's counsel had filed his written submissions he had filed a Notice of Motion 5/8/2013 which had made the following prayers, namely ;-

1. That an order do issue for scrutiny and recount of votes in Kanjuu Primary School Polling Station and Ngiriambu Primary School Polling Stations.
2. Costs be provided for.

The 1st and 3rd respondents had filed their joint response dated 12/8/2013 to the Notice of Motion while

the 2nd respondent had on 12/8/2013 deponed his Affidavit in opposition to the abovesaid Notice of Motion while the 4th respondent had filed his response dated “8th day of 2013” in opposition to the abovesaid Notice of Motion.

It is clear that the 4th respondent’s response was not properly dated.

On 13/8/2013 the counsel for the different parties had highlighted their written submissions filed after conclusion of trial and simultaneously the petitioner’s counsel had prosecuted his abovesaid Notice of Motion which was opposed by the counsel representing the various respondents.

I have carefully considered the entire court record namely;

- a. The evidence on record.
- b. The Notice of Motion dated 5/8/2013 and responses in opposition made thereto.
- c. The written submissions filed after conclusion of trial.
- d. The entire batch of Judicial decisions filed by the counsel for the parties.
- e. The exhibits and documentary exhibits that form part of the record.

For determination in this ruling is whether this court should grant the prayers sought in the Notice of Motion dated 5/8/2013.

At the pre- trial stage it was agreed by consent that the issue of scrutiny and recount be considered by the court in respect of Ngiriambu Primary school and Kanjuu Primary School Polling stations.

1. Submissions

The Petitioner posited that irregularities were committed in the abovesaid 2 Polling Station. With regard to Kanjuu Polling Station it was stated as follows;-

- a. That the petitioner’s agent was ejected from the polling station by the presiding officer acting on instructions from a telephone call made by the 4th respondent.
- b. That upon ejection of the petitioner’s agent he was replaced by a rival agent.
- c. That the petitioner agent’s signature was forged.
- d. That different entries were made in different form 35s.
- e. That the Presiding Officer during the counting of M.C.A. votes refused to allow party agents to witness the process of counting.

With regard to Ngiriambu Polling Stations, petitioner stated that the following irregularities had taken place, namely;-

- a. That form 35s as filled was erroneous.
- b. That form 36 at time of announcing the winner was erroneous.
- c. That 2 forms 36 were prepared.
- d. That there were different entries in form 35 and 36.

The respondents had denied that there were any irregularities and,inter alia, stated as follows;-

- a. That the 3rd respondent the Presiding Officer in stream 1 of Kanjuu Polling Station had stated that he had presided over the voting exercise and vote counting process in a transparent manner.
- b. That the allegations of irregularities raised by the petitioner were baseless.
- c. That though there were some errors in forms 35 and 36, those errors did not affect the petitioner as the errors had prejudiced the 4th respondent and in any case the 4th respondent remained victorious in the Member County Assembly election.
- d. That the 3rd respondent was justified in ejecting the petitioner’s agent for attempting to influence the voters.

- e. That the ejected petitioner's agent was present at the commencement of vote counting and so the petitioner was not prejudiced when vote counting was taking places.

The above is an abridged version of the competing submissions made before the court with respect to scrutiny of votes.

2. Jurisdiction of this court to hear the Petition.

Section 2 of the Election Act defines an Election Court to mean “**a Supreme Court in exercise of the Jurisdiction confirmed upon it by Article 163(3) (a) or the High Court in exercise of the jurisdiction conferred upon it by Article 165(a) of the constitution and the Resident Magistrate's Court designated by the Chief Justice in accordance with Section 75 of the Act.**”

Section 75(1A) of the Elections Act states that “**A question as to the validity of the election of a Member of a County Assembly shall be heard and determined by the Resident Magistrate's court designated by the chief Justice.**”

The Elections (Parliamentary and County Elections) Petition Rules, 2013 hereinafter referred to as the Rules.

Rule 6 (1) states that “**a court shall be properly constituted, for purposes of the hearing-**

(a).....

“(b) an election petition in respect of an election to a County Assembly if it is composed of a Resident Magistrate designated by the Chief Justice under Section 75 of the Act.”

Rule 6 (2) states that “the Chief Justice may –

- a. **In consultation with the Principal Judge of the High Court designate such judges and**
- b. **designate such Magistrate (as are necessary for expeditious disposal of election petition).**

This court as currently constituted was gazette by the Chief Justice for the purposes of disposal of this election petition.

It is clear that under **Sections 2 and 75(1A) of the Elections Act as read with Rule 6** as above quoted vests this court with the jurisdiction to hear and determined this election petition.

3. Purpose for the scrutiny and/or recount of votes.

The object of a scrutiny is to;-

- a. Ascertain by striking off votes or adding votes a **(See the case of Kisumu Election Petition Number 1 of 2013 – Jared Odoyo Okello – vs- I.E.B.C. and Other.**
- b. (i) Assist the court to investigate if the allegation of irregularities and breaches of law complained of are valid.

(ii) Assist the court in determining valid votes in favour of each candidate.

(iii) Assist the court to better understand the vital details of the election process and gain impressions on the integrity of the election process.

(See the Case of Nairobi E.P. NO. 5 OF 2008- William Maina Kamanda – Vs- Margaret Wanjiru Kariuki).

- c. Ascertain whether there exists any material discrepancies between results captured in form 35 so as to ascertain votes cast and obtained by aspirant (**See Ngata Kariuki Case**).

To my mind the abovesaid stated objectives of a recount and/or scrutiny of votes are merely illustrative and not exhaustive. I state so because each case for trial must turn on its facts and it is up to the Election court to decide what purpose or object will be served by a scrutiny and/or recount of votes if it decides on the basis of sufficient reasons that there be such scrutiny and/or recount of votes.

4. Law applicable with regard to “scrutiny of votes”

Section 82 (1) of the Elections Act states that “an election court 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 manner as the election court may determine”.

Rule 33 (1) of the Rules states that “the parties to the proceedings may, at any stage, apply for scrutiny of the votes for purposes of establishing the validity of votes cast.”

Rule 33 (2) of the Rules states that “upon an application under Sub Rule 1, the court may if it is satisfied that there is sufficient reason order a scrutiny or recount of votes.

The common thread that runs through the judicial decisions that have been filed in the court record is that there must exist sufficient reasons before a court permits a scrutiny of votes.

5. When a court can order for a recount of votes.

A court can order for a scrutiny of votes if the facts before the court have created any of the following circumstances, namely;-

- a. Where the margin of votes is narrow in which case, scrutiny may be ordered without laying any foundation.
- b. Where the margins are wide on the ground that a recount may lead to an expeditious disposal of the petition.
- c. When there is ground for believing that there were irregularities in the election process or if there was a mistake on the part of the returning officer or other election officials.
- d. Where sufficient reasons have been put form.

(See the case of Machakos H.C.E.P. No. 1&7 of 2013 – Richard Kalembe Ndile and Anor. – vs- Dr. Patrick Musimba Mweu).

6.Can a court permit a scrutiny and/or recount of votes when the prayer for scrutiny made in the Petition was, wide, but, which prayer has been limited to only 2 Polling Station in a Notice of Motion?

In his petition the petitioner had prayed for an order of scrutiny and recount of all votes cast in Njukiini ward. In my view the abovesaid prayer as made in the petition did not preclude the court from allowing a partial scrutiny limited to a few polling stations, if sufficient reasons for such partial scrutiny was successfully put forth. **It is my view that if a partial scrutiny would facilitate the just, expeditious, proportionate and affordable resolution of election petitions under the Constitution and the Act as provided for under Rule 4 of the Rules, nothing world prevent the court from permitting such partial scrutiny notwithstanding that a petitioner had prayed for a scrutiny of votes of all the polling stations in the ward.**

Besides, it had been agreed at the pre-trial stage by consent that the issue of scrutiny be limited to Ngiriambu and Kanjuu Polling Stations.

In any case narrowing down the issue of scrutiny to 2 polling stations does not prejudice the respondents

in any way.

Further in his Notice of Motion the petitioner had applied for a scrutiny of votes of only the abovesaid 2 Polling Station. It's on this premise that I find that the Notice of Motion was well founded.

It is my finding that this court can permit for scrutiny and/or recount of votes even when the prayer for scrutiny made in the petition was wide but had in an application been limited to only 2 polling stations.

7.Can an applications for scrutiny and /or recount of votes be supported by evidence that had not been pleaded by the petitioner in his pleadings?

Section 82 of the Elections Act states that an order for scrutiny of votes is to be carried out in such a manner as the elections court may determine.

The 1st, 2nd. And 3rd respondent in their principal submissions made after the conclusion of trial had quoted a passage from the speech of Tuiyot J (**in the case of Busia H.C.E.P. NO. 1/2013 – Philip Osore Ogutu – vs – Michael Ongaro Aringo and 2 others**) that “ it is now opportune to say this there can be no quarrel with the principle that any evidence that goes beyond pleadings must either be rejected outright or disregarded.....this court is not obliged to look at the evidence”.

It is clear that the evidence with regard to material facts with respect to Ngiriambu Primary School Polling Station had not been pleaded by the petitioner at the time of filing the petition.

The petitioner's reliance in his Notice of Motion on the purported anomalies in Ngiriambu Primary School Polling Station to justify his prayer for a scrutiny of votes in that polling station is what Tuiyot J refers to as “.....evidence that goes beyond pleadings and which evidence the court is not obliged to look at”.

This is what Majanja J. said in the **Machakos Elections Petition 1 and 7 of 2013 – Richard N. Kalembe Ndile Case (Ibid)** with regard to the introduction of new evidence “**At the end of the day what is of prime concern to this court is whether the elections were conducted in a free, fair and transparent manner, and that they reflect the will of the voters and more importantly..... Whether the respondent was validly elected. Such determination cannot be made if, relevant evidence is locked out on technical grounds that the issues addressed by such evidence were not pleaded**”.

I would agree with Majanja J. the more because Section 82 of the Elections Act gives wide discretionary powers to the court to order for scrutiny of votes but such discretionary powers I believe must be exercised judiciously.

Introduction of new evidence in making the instant applicant, under the circumstance, is tenable because **Section 80 (1) (d) of the Election Act mandates “an election court in exercise of its jurisdiction to decide all matters that come before it without undue regard to technicalities”.**

It is therefore my finding that under circumstances of this case it was proper for the instant Notice of Motion to have been partially supported by introduction of evidence that had not been previously captured in the pleadings of the petitioner.

8.It was stated that PW2, one, Symon Wachira Mbungu who was an agent for the petitioner in stream No. 1 of Kanjuu Primary School Polling station hereinafter referred to his Kanjuu stream 1 was ejected from Kanjuu stream 1 by the 3rd respondent who had received a telephone call from the 4th respondent with a request or instruction to eject PW2 one, Simon Wachira Mbungu. It is not disputed that the 3rd respondent was the presiding officer of the Kanjuu stream1.

It is not in disputed that PW2 was ejected from the Kanjuu stream No. 1.

DW3 one, Ngairi Gitonyi stated that he was an agent for the 4th respondent in the Kanjuu Primary Polling Station stream No.2 hereinafter referred to as Kanjuu stream 2. He also said that the 3rd respondent had during the voting day informed him (DW3) that an agent in Kanjuu stream 1 was causing problems. DW3 further stated that he was called into stream 1 by the 3rd respondent to replace the ejected problematic agent. DW3 further stated that he had gone back to stream 2. Let me state that in deciding the instant application I am not required and I will not evaluate and analyse the evidence on merit. This ruling is not a judgment. **(See the Kalembe Ndile Case (Supra)).**

I find that the evidence by DW3 that he had been called from Kanjuu stream 2 into Kanjuu stream 1 by the 3rd respondent in a purported attempt to replace the ejected PW2, when considered together with the evidence by PW2 that the 3rd respondent had ejected PW2 from Kanjuu stream 1 at the request of the 4th respondent lays a foundation or sufficient reason for the scrutiny of votes cast in Kanjuu Polling Station. Besides a protest letter was written to the 1st respondent in respect of events of the voting day.

DW3 had stated that though he was the 4th respondent's agent in Kanjuu stream 2, he could not recall the name of the Presiding Officer in that stream, though, interestingly I noted that DW3 knew the name of the 3rd respondent as the person who was the presiding Officer in Kanjuu stream. 1. This court would want to establish whether the voting process was fair in Kanjuu stream 2 as well.

An order for scrutiny is not only founded on complaints raised regarding the manner of counting of votes but also from complaints regarding the voting process on the voting day.

9. The returning officer in his evidence stated that there were some errors in forms 35 and 36.

It is clear that form 35 with respect to the Ngirambu Primary School Polling Station stream 2 herein after referred to as Ngirambu stream 2 shows that the 4th respondent garnered 70 votes while in the form 36 which was initially filed in response to the petition, showed that the 4th respondent had only 7 votes. With respect to Ngirambu Primary School Polling Station stream 1 hereinafter referred to as Ngirambu stream 1, the form 35 shows that Timothy Kariuki Kathuri another aspirant had garnered 255 votes while form 36 with respect to the same candidate in the stream of the polling station showed that the same candidate had garnered 235.

With respect to the abovesaid anomalies the form 36 had robbed the 4th respondent of 63 votes while form 36 had robbed Timothy Kariuki Kathuri of 20 votes.

It is clear that there were miscalculations and errors with regard to form 35 of Ngirambu Polling Station as read with the relevant entries in form 36.

It does not matter that the errors in forms 35 and 36 could not have altered the outcome of the election result or that the errors were accidental because what is clear as I had stated earlier in my ruling is that a scrutiny of votes can be ordered if there were mistakes or irregularities committed by election officials. I find therefore that a foundation was laid for scrutiny of votes of Ngirambu Primary School Polling Station.

It is clear that forms 35 and 36 were prepared by election officials. In the course of trial, in his evidence the 2nd respondent admitted that a second form 36 was prepared.

At this stage the court is not required to decide in the probative value of the second form 36 given the manner in which it was admitted as part of the court record. That is an issue that can only be decided in the body of the judgment.

What was clear though is that it was stated that the second form 36 had been amended to reflect the valid votes cast.

It is clear that both form 36s were not generated in a similar identical process as each was prepared separately in a different process. The two documents have the following differences;-

(a).Whereas the original form 36 shows that the 4th respondent garnered 7 votes at Ngiriambu stream 2, the second form 36 showed that he has garnered 70 votes.

(b).Whereas the original form 36 shows that the total valid votes cast were 10,111 the second form 36 shows that the total valid votes were 10,101.

In the **Case of Malindi H.C.E.P. NO.6/2013 - Richard Hamid Ahmed Amana –vs- IEBC and 2 Other** it was hold that “ Regulation 83 of the Election (general) Regulation 2012 do not provide for a situation where there can be generated 2 forms 36, one being a draft or provisional and the other being a final copy. For this reason, this court is of the opinion that the petitioner established a case for this court to recount and scrutinise the votes cast in 2 polling stations.....this will enable the court ascertain the integrity of the results that were entered in form 36 by the 2nd respondent”.

I cannot agree more. I further add that the 2 forms 36 that were generated by the 2nd respondent are not identical as they have some entries which are totally different from each other. Besides, unlike the 1st form 36 which is signed by party agents/ candidates, the second form 36 is not signed by the candidate/agents . Therefore, in agreement with the **Richard Hamid Ahmed AmaNa Case (Ibid)**, this court has a duty to order for a scrutiny of votes in the requested 2 polling stations so as to **ascertain the integrity of the results that were entered in form 36 by the 2nd respondent.**

10.Does the margin of vote between the petitioner and 4th respondent lay a foundation for a scrutiny of votes?

According to the original/first form 36 filed by the 1st respondent which was the actual form 36 that was intended to be relied upon in the course of trial, the 4th respondent had garnered 2,823 while petitioner had garnered 2,806. This was a margin oof 17 votes.

The Richard Hamid Ahmed Amana Case (Ibid cited with approval the John –vs- Nyange (2006) ekIR Maraga J that a scrutiny can be held where the margin was narrow.

It is clear that a little over 10,000 votes had been valally cast for the 6 spirants who had vied for the elective post of member of Member of County Assembly for Njukiini ward.

I found that the margin between the petitioner and the 4th respondent was narrow therefore calling for a scrutiny of votes as applied for.

11. Section 83 of the Election Act state that no election shall be declared to be void for non compliance of any written law relating to the election provided that;

(a).That election was conducted in accordance with the principles laid down in the constitution and in that written law.

Or

(b) That the non compliance did not affect the result of the election. Article 81 of the constitution lays down the general principles of an electoral process.

According to me, Section 83 of the Elections Act is a saving clause available to the respondent to maintain the status quo on grounds that even if there was a breach of law, there may not have been any effect in the election result.

In my view, Section 83 cannot be considered at this interlocutory stage. I find that Section 83 is relevant

when deciding the petition on its merit in the judgment.

12. The Election Court has a mandate to establish whether the election was free, fair and transparent and whether the 4th respondent was validly elected. (See the Case of Richard Kalembe Ndile Case (Ibid)).

At this stage it is not necessary for the petitioner to prove his application beyond a balance of probabilities but below the standard of reasonable doubt.

To succeed on the application, the petitioner need not establish his proof beyond a balance of probabilities.

It should be realized that a scrutiny is part of forensic exercise available to court to do justice **(See the Richard Kalembe Ndile Case (Ibid)).**

13. The petitioner has laid sufficient basis for scrutiny of votes in 2 polling stations. With regard to Ngiriambu Polling station, the petitioner case is founded on errors and miscalculations in forms 35 and 36 while in Kanjuu polling station the petitioner's case is founded on allegations of irregularities in that PW2 was unjustifiably ejected from the voting room and that the counting of votes for Member of County Assembly was done in a less than transparent manner.

It is not disputed that a complainant was made to the 1st respondent with regard to the events complained of in respect of Kanjuu Polling Station.

Whether the abovesaid complainant to the 1st respondent was merited or not is not an issue for my determination at this stage.

I find that the petitioner has laid a foundation for a scrutiny of votes as requested for.

It is ordered as follows;-

- a. That there shall be scrutiny and recount to ascertain the number of votes each candidate obtained on Kanjuu Primary School Polling Station and Ngiriambu Primary School Polling Station.
- b. That the scrutiny and recount shall be undertaken under the supervision of the Registrar of this Election Court.
- c. For ease of the exercise, the petitioner and the respondents shall each be allowed to have 2 agents present during the exercise.
- d. The scrutiny exercise shall commence on 19th August, 2013 at 9.00am and shall proceed on a day to day basis until conclusion of the exercise.
- e. This case will be mentioned before this court on 22/8/2013 at 9.00am for further directions.
- f. Costs should abide the outcome of the petition.

Delivered at Gichugu this 16th August, 2013.

T.M. MWANGI (PM)

Others Present

Petitioner _ Wilson Wambugu

4th Respondent _ Jamlick Kariuki Kiura

Maina Kagio advocate for the petitioner

Ndegwa advocate for the 4th respondent and also hold brief for Mwangi for 1st to 3rd respondent.

COURT: R/A 30 days explained.

T.M. MWANGI (PM)

16/8/2013.