



REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATE'S COURT AT MERU
ELECTION PETITION NO. 1 OF 2013

JOHN MBAABU MURITHI.....PETITIONER

VERSUS

JACOB MWIRIGI MUTHURI.....1ST RESPONDENT

LUCY MBITHI, R/O BUURI CONSTITUENCY.....2ND RESPONDENT

THE INDEPENDENCE ELECTORAL

AND BOUNDARIES COMMISSION.....3RD RESPONDENT

RULING

This matter has now been heard and all parties have filed written submissions. On the 30.8.2013 as earlier agreed between the parties' advocates, there was an appearance before me for purposes of highlighting submissions. The advocates indeed appeared and highlighted the submissions. I have perused the submissions. In his submissions the petitioner appeared to have revisited the issue of recount and scrutiny. He prays that the court orders for scrutiny and recount though he has not specified whether that should be limited to particular polling station or not. Both the advocates for 1st respondent and one for 2nd and 3rd respondents have in their submissions responded to the issue of scrutiny and recount. The 1st respondent maintains that the petitioner has failed to lay a basis for scrutiny and recount.

The advocate for the 2nd and 3rd respondent has urged that other than failing to lay a basis for scrutiny and recount the petitioner has waived his right to file a fresh application for scrutiny and recount. That it is now too late in the proceedings to order for scrutiny and recount.

The brief background of this matter is that before the commencement of the hearing (at the pre-trial stage) the petitioner filed an application dated 20.5.2013 for scrutiny and recount of all ballot papers- In respect of Kibirichia ward. This court allowed the application but the order was eventually overturned by the High court in HC E.P. No. 2 of 2013 on appeal.

In the judgment of the high court it was pointed out to the petitioner that if he so wished he would re apply to this court for recount and scrutiny. He never did so and instead has raised the issue in his submissions. The issue of scrutiny and recount can only be dealt with before setting a judgment date. Under section 82 (1) of the Elections Act, it is provided

82(1) "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 scrutiny of votes to be carried out in such manner as the election court may determine". (Underline mine)

I have now heard the evidence by all the parties. I am under a duty to investigate the truthfulness or otherwise of the allegations made by the petitioner. I have particularly considered the evidence of PW2. He testified that he was at the tallying centre and witnessed forms 35 for Marurui Primary school being altered in favour of the 1st respondent. The allegations may be unfounded. I however have found it fit to investigate the truthfulness or otherwise of the said allegations. It is for that reason that I have found it necessary to order partial scrutiny and recount limited to Marurui Primary School. I am guided in this finding by the holding of justice P. K. Kariuki in the case of **William Maina Kamanda -vs- Margaret Wanjiku Kariuki & 2 others. NRB E. P. No. 5 of 2008.** where he held in part:

“It is now well established that an order of scrutiny can be made at any stage of the hearing before final judgment whether on the court's own motion or if a basis laid requires so. It can be made if it is prayed in the petition itself...or when there is ground for believing that there were irregularities in the election process or if there was a mistake and mistakes on the part of the returning officer or other election officials”

The scrutiny and recount shall be limited to determining the number of votes garnered by each of the candidates at Marurui primary school and to determine if the results tally with what is recorded in form 35 for that polling station. I hereby direct that all documents and materials in respect to polling station No. 087 (Marurui Primary School) be delivered to court by the 3rd respondent. Pursuant to Rules 21 of the Election Parliamentary and County Election), Petition Rules 2013.

Dated and delivered this 4th day of September 2013.

D.O.Onyango

Ag SENIOR PRINCIPAL MAGISTRATE

MERU LAW COURTS

