



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
ELECTION PETITION NO. 6 OF 2013
THE ELECTIONS ACT, 2011

JUSTUS GESITO MUGALI M'MBAYA.....PETITIONER

VERSUS

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION.....1ST
RESPONDENT

DANIEL LENARUM, RETURNING OFFICER, SHINYALU CONSTITUENCY.....2ND
RESPONDENT

ANAMI SILVERSE LISAMULA.....3RD
RESPONDENT

RULING

1. The Petitioner filed an application dated 17th May 2013, pursuant to leave granted by this Court on 14th May 2013, seeking orders that:

1. Paragraphs 23, 24, 25, 26 and 27 of the witness affidavits of the 3rd Respondent be struck out.
2. The Honorable Court be pleased to order a recount and/or scrutiny of the votes in respect of the General elections as conducted on the 4th of March 2013 and more particularly in respect of the office of the Member of the National Assembly, Shinyalu Constituency and to make further orders as it may deem fit and just to issue.
3. The Honorable Court be pleased to issue any further directions as it may deem fit and just in the circumstances.
4. Costs of the application.

2. The application is premised on the grounds set out in the application and supported by an affidavit sworn by the Petitioner dated 17th May 2013. The Petitioner contends that paragraphs 23, 24, 25, 26 and 27 of the 3rd Respondent's affidavit raises issues that are unnecessary, scandalous, frivolous, vexatious and irrelevant and immaterial to the matters in issue in this petition. It is considered further that the said paragraphs are tending to prejudice and ultimately

embarrass the petitioner, his family, friends and constituents. As regards scrutiny and recount, the Petitioner contends that from his pleadings, there were massive discrepancies and vote manipulation by the Respondents during the tallying, which is manifested by the inconsistencies reflected on Forms 35 and 36. The Petitioner in the supporting affidavit deposed that the orders sought in relation to the scrutiny of the votes will not prejudice any party at all since the process is intended to determine the proper and lawful results.

3. The application was opposed by the 1st and 2nd Respondents who filed a joint Replying Affidavit sworn by Moses Kipkoge on 4th June 2013. The deponent stated that paragraphs 23, 24, 25, 26 and 27 of the 3rd Respondent's application did raise issues which are relevant and material to the matters in issue in this petition and as such are properly before the Court. It was his disposition that the Petitioner is bound by his pleadings and could not introduce new issues to the petition by way of affidavit and, therefore, the present application was bad in law, without legal basis for raising matters not pleaded in the petition. He deposed that the Petitioner had failed to particularize disputed results to warrant an order of scrutiny of votes contrary to the provisions of Rule 33(4) of the Election Rules. It is further contended that the Petitioner had not demonstrated any material errors or breaches of law by the Respondents hence, the Petitioner failed to lay a basis for the scrutiny of votes as required by law.
4. The deponent stated that the Petitioner had failed to demonstrate any material errors or breaches of the law which would impugn the credibility and integrity of the elections of the Member of the National Assembly for Shinyalu Constituency. He also deposed that the results of the elections for the Member of the National Assembly for Shinyalu Constituency as declared by the 1st and 2nd Respondents was a true reflection of the will of the people of the said Constituency. The 1st and 2nd Respondents prayed that the application be struck out or be dismissed for being bad in law, misconceived and without legal basis.
5. The application was also opposed by the 3rd Respondent who filed Grounds of Opposition dated 25th May 2013. The 3rd Respondent averred that parties are bound by their pleadings and, therefore, an order for scrutiny may not be legally made through an application in an election petition which does not in its body specifically pray for such an order. The 3rd Respondent stated that an order for scrutiny and/or recount was not available to the Petitioner as no sufficient reasons have been given or basis has been laid down or established to justify the grant of the same. The 3rd Respondent contended that the application is at best a fishing expedition which does not satisfy the conditions of Rule 33 of the Election Rules because it fails to identify the particularity of the polling stations in which the results are disputed.
6. The 3rd Respondent also averred that an order for recount of votes cast is not available to the Petitioner in the absence of a pleading in the petition supported by evidence that the Petitioner exercised his right under Rule 80 of the Election Rules, to require the presiding officers to have the votes rechecked and recounted at the Polling Stations and that the presiding officers rejected or declined such request. The 3rd Respondent contends that the Petitioner is estopped by his conduct from seeking an order for recount of votes as a matter of first instance.

Submissions

7. This application was canvassed by way of written submissions. The Petitioner filed his submissions dated 11th June 2013 and he reiterated the contents of his application that the paragraphs contained in the 3rd Respondent's affidavit sworn on 2nd May 2013 only sought to cause unnecessary embarrassment to the Petitioner and prejudice to fair hearing of the petition.

The Petitioner reiterated that the said paragraphs were scandalous, frivolous and vexatious for they are not capable of sustaining a reasonable argument in court and thus, should be struck out. The Petitioner submitted that the offending paragraphs were an abuse of the court process and, in that regard this Court should not be misused for oppression or in bad faith. In support of his urgings the Petitioner cited the cases of **Dawkins v Prince Edward of Save Weimber (1976) 1 QBD 499**; **Rueben N. Ndolo v Dickson Wathika & Others (2008) eKLR** and **J.O.O & 2 Others v Praxedes P Mandu Okutoyi & 2 Others Civil Case No. 25 of 2008**

8. In the case for scrutiny and recount, the Petitioner submitted that an election petition is not an action at common law or in equity. He submitted that an election petition is a statutory proceeding to which, neither the common law nor the principles of equity apply, and that rules made by statute apply for reasons that it is a special jurisdiction. He submitted that the election laws and rules form a complete legal regime with elaborate procedures of the process therein. Hence, the Civil Procedure Act and Rules do not apply to an election petition save where it is expressly incorporated. The Petitioner quoted the case of **Roshad Hamid Ahmed v Fatum Yasin Twah & Others EP No. 4/2003** in which the Court held that election law is a special regime to which neither the Civil Procedure Rules nor the Civil Procedure Act applies. The Petitioner also relied on the cases of **David Wakairu Murathe v Samuel Kamau Macharia Civil Appeal No. 171 of 1998** and **Mwai Kibaki v Daniel Arap Moi Civil Appeal No. 172 of 1999**
9. The Petitioner referred the Court to Section 82(1) of the Elections Act and Rule 33 of the Election Rules which provisions are to the effect that an election court on its own motion and/or any party to the proceedings may apply to the Court at any stage of the proceedings for scrutiny of the votes. It was his submission that scrutiny would either be done *suo motto* by the Court or through an application by any party and therefore the 3rd Respondent, in view of Rule 33 could not preempt the Court. It was the Petitioner's submission that the whole election for the Member of National Assembly for Shinyalu Constituency was riddled with irregularities and scrutiny and recount will not only crystalize the issues but will also hasten the hearing of the petition. The Petitioner submitted further that there are innumerable glaring irregularities from the documents submitted by the 1st Respondent and those obtained immediately after election making recount and scrutiny imperative. The Petitioner maintained that he had laid a basis for an order of scrutiny and recount, being the glaring irregularities in polling stations and the narrow margin in the results between the Petitioner and the 3rd Respondent.
10. The Petitioner quoted Ugandan cases of **Kiiza Besigye v Electoral Commission & Yoweri Kaguta Museveni Presidential Election No. 1/2006** and **Mwiru v Nabeta & 2 others EP No. 3/2011** where the Courts' observation was that Courts ought to disregard irregularities for no election can be impeccable and totally free of any mistakes. However, the gravity and extensiveness of the mistakes would determine the substantiality of the non-compliance complained of, and inform the decision on whether or not an election should be nullified. The Petitioner submitted that the Court was duty bound to dispense justice to the parties without undue regard to procedural technicalities, pursuant to Article 159 (2) (d) of the Constitution. It was his submission that failure to specifically pray for an order is a technical defect capable of being cured under the said provision and that there would be no prejudice occasioned to the 3rd Respondent. He submitted further that the overriding objective enunciated in Article 159 (2) (d) has now been imported into the Election Rules by dint of Rule 4 and 5. To this end the Petitioner cited the cases of **Walter Enock Nyambati v Justus Omiti & 2 others (2011) eKLR** and **R v Chairman Matungu Land Disputes Tribunal (2012) eKLR**. The Petitioner contended that he should be given a just opportunity to ventilate his case as Rule 17(i) of the Election Rules clearly contemplates a situation where the Court can allow parties to file further affidavits and introduce

further evidence if a basis is laid. The Petitioner distinguished the Supreme Court decision in the case of **Raila Odinga v IEBC EP No. 5/2013** stating that the circumstances, and particularly on the issue of timelines, at the Supreme Court is different from the petition herein.

11. The Petitioner submitted that Courts have been slow to strike out documents filed in court proceedings and cited the case of **Microsoft Corporation v Mitsumi Compute Garage Ltd (2011) KLR**. It was his submissions that Courts have held that election petitions are not ordinary private disputes between the parties since elections are an exercise in facilitation of the democratic rights of the people to choose persons of their choice to represent them. Thus, the Petitioner submitted, in making its decision in an election petition, the Court has to bear in mind the effects that the decision will have on the exercise of the democratic right of the people.
12. The 3rd Respondent filed submissions dated 14th June 2013. He reiterated that the contents of paragraphs 23, 24, 25, 26 and 27 of his witness affidavit sworn on 2nd May 2013 are true, wholly relevant to the petition and therefore admissible. It was the 3rd Respondent's submission that the aforementioned paragraphs are relevant to show the Petitioner's conduct during the said elections as well as his character. The 3rd Respondent contended that paragraph 24 therein demonstrated that the Petitioner is not a suitable person to be a Member of the National Assembly and that it confirms one of the possible reasons for his rejection by the people of Shinyalu Constituency.
13. The 3rd Respondent submitted that the rule under which this application is brought, Rule 17 of the Election Rules, does not clothe the Court with jurisdiction to strike out paragraphs of an affidavit. He also submitted that Rule 17 does not clothe the Court with jurisdiction to grant an order of scrutiny or recount of votes cast during an election. To that extent, he submitted, this application is misconceived and without legal merit. The 3rd Respondent submitted that the Petitioner was uncertain on whether he sought to invoke Rule 32 of the Election Rules that provides for recount and/or tallying of votes, or Rule 33 thereto which provides for scrutiny of votes. He submitted that what was clear was that the Petitioner did not cite these rules. It was the 3rd Respondent's submission that this application would fail not only on technicality but also on substantive justice because Courts exercise different jurisdictions depending on the manner or the law under which it is moved.
14. The 3rd Respondent referred the Court to Regulation 80 of the Election Regulations which avails any candidate or his agent a right to recheck or recount of votes cast in a Polling Station. He submitted that the Petitioner was estopped from applying for recount of votes unless he pleads and provides substantial evidence to show that he had requested for the votes cast at a polling station to be rechecked and recounted but that such a request was declined. The 3rd Respondent submitted that an order for scrutiny is not automatic and will not be granted as a matter of course but is granted only in the Court's discretion when a good reason and basis is established for the same. He cited the case of **Masinde v Bwire & Anor (2008) 1 KLR (EP) 547; Joho & Other v Nyange & Anor (No.3) (2008) 3 KLR (EP) 388**; and **Philip Osore Ogutu v Micheal Onyura Aringo EP No. 1/ 2013 (Busia)**. The 3rd Respondent reiterated that the Petitioner ought to have specifically prayed for an order for scrutiny in his petition.
15. The 3rd Respondent submitted that Rule 33(4) of the Election Rules is to the effect that scrutiny is only for the polling stations whose results are in dispute, and therefore it is not available for all polling stations in a Constituency. The 3rd Respondent further stated that the polling stations that have disputed results are those that the Petitioner requested for rechecking or recount pursuant to Regulation 80 but such request was denied. It was the 3rd Respondent's submission that

scrutiny as provided under Rule 33 of the Election Rules was intended to establish the validity of votes cast. Therefore the same should not be used as a fishing expedition from which the Petitioner may benefit from discovery of a matter that did not form part of his complaint. The 3rd Respondent cited the case of Justus **Mungumbu Aoamiti v Walter Enock Nyambati Osebe & Others (EP) No. 1 of 2008 (Kisii)**. The 3rd Respondent concluded by stating that the Court must guard against the process of scrutiny and recount of votes cast from being abused by a petitioner who on sensing defeat chooses to apply for scrutiny and recount as a means to fish for tools to panel beat his dented case.

16. The 1st and 2nd Respondents filed submissions dated 17th June 2013 and reiterated the contents of their Replying Affidavit and echoed the submissions of the 3rd Respondent.

Determination

17. I have carefully considered the contents of the application, responses thereto and submissions for and against this application. In my view, the following are issues to be determined by this Court:
- i. Whether by bringing this application under Rule 17 of the Election Rules the same is misconceived and without legal merit.
 - ii. The relevance or otherwise of Paragraphs 23, 24, 25, 26, and 27 of the 3rd Respondent's affidavit sworn on 2nd May 2013
 - iii. Whether the Court should grant an order for recount and/or scrutiny of votes, as prayed by the Petitioner.

Whether the application is misconceived

18. The 3rd Respondent submitted that this application has been brought under Rule 17 of the Election Rules as opposed to either Rule 32 or 33 of the Election Rules. Therefore, the 3rd Respondent stated, having invoked a different jurisdiction of this Court, as opposed to citing the relevant rules, the application is misconceived and without legal merit. This submission, in my view, is fallacious. Pursuant to the mandate given to this Court to hear and determine election disputes in respect to Parliamentary and County elections, the jurisdiction of this Court is not curtailed merely by citing wrong rules of the electoral laws, rules and regulations. I find that the orders sought by the Petitioner are clearly expressed in the application and therefore failure to state that the application is brought under Rules 32 and/or 33 of the Election Rules does not render an application misconceived and without legal merit, as submitted by the 3rd Respondent. There is no miscarriage of justice occasioned for failing to quote the relevant rules at the heading of an application. I am guided by the provision of Article 159 (2) (d) of the Constitution which mandates me to administer justice without undue regard to technicalities. This principle is also provided for under Section 80 (1) (d) of the Elections Act.

Relevance of Paragraphs 23, 24, 25, 26, and 27 of the 3rd Respondent's Witness Affidavit sworn on 2nd May 2013

19. The Petitioner prayed that paragraphs 23, 24, 25, 26 and 27 of the 3rd Respondent's witness affidavit sworn on 2nd May 2013 be struck out for being scandalous, and doing nothing but to cause embarrassment to the Petitioner, his family, friends and constituents. The Respondents' view is that the contents of the said paragraphs are relevant to the issues herein and show the Petitioner's conduct during the said elections as well as his character. The 3rd Respondent

contended that paragraph 24 therein demonstrated that the Petitioner is not a suitable person to be the Member of National Assembly and that it confirms one of the possible reasons for his rejection by the people of Shinyalu Constituency.

20. The contents of paragraphs 23 and 24, in my view, are scandalous as they have no relevance at all to the petition filed herein. Black's Law Dictionary 9th (ed.) defines a scandalous matter as;

"A matter that is both grossly disgraceful (or defamatory) and irrelevant to the action or defence".

It matters not to this Court that there are pending criminal cases against the Petitioner particularly because those cases are not in relation to the election dispute the subject matter of this petition. The reasons as to why the constituents of Shinyalu Constituency did or did not vote for a candidate in the Parliamentary election is not subject of determination by this Court. I find that the contents of those paragraphs are irrelevant to the action herein. Consequently, paragraphs 23 and 24 of the said witness affidavit are hereby expunged.

21. However, the contents of paragraphs 25, 26 and 27, in my view, amount to election offences within the purview Part VI of the Elections Act. As an election Court, I am directed by S. 87 of the Elections Act, to make and send a report in writing to the Director of Public Prosecution, Commission and the relevant speaker indicating whether an election offence has been committed by any person in connection with the election. This report is done at the conclusion of the hearing of a petition after it has been proved that such person is guilty of an election offence. In effect, such determination can only be done upon trial and after the 3rd Respondent has proved the allegations contained in the said paragraphs. In that regard, I decline to expunge paragraphs 25, 26 and 27 of the witness affidavit.

Scrutiny and/ or Recount votes

22. The Petitioner prayed for an order of recount and/or scrutiny of the votes cast in the Parliamentary election in Shinyalu Constituency. The Respondents in their responses to this application averred that the order sought had not been specifically prayed for in the Petition and, therefore, could not be introduced through an application. The Respondents contended that an order for recount and/or scrutiny must be specifically prayed for in the petition and, secondly, a basis must be laid to justify the grant of such order. The Petitioner, on his part, submitted that failing to specifically pray for scrutiny or recount in the petition was a procedural technicality which is curable by employing Article 159 (2) (d) of the Constitution.

23. I have noted from perusing the petition that the Petitioner did not specifically pray for an order either for recount or scrutiny of the votes cast. However, this application was filed pursuant to leave granted on 14th May 2013. Further, Rule 32(1) of the Election Rules avails any party an opportunity to make an application for scrutiny at any stage in the proceedings. I therefore find that a Petitioner cannot be completely locked out from applying for scrutiny in the event that he did not specifically pray for the same in the Petition. Imperatively, however, such Petitioner will have to lay a basis, sufficient enough to the satisfaction of the Court to warrant the grant of an order for scrutiny of votes cast.

24. The issue which arises now is whether the Petitioner can ask for recount and scrutiny in the same prayer" Part VI of the Election Rule provides for scrutiny and recount of votes. Rule 32 of the Election Rules provides:

"(1) Where the only issue in the election petition is the count or the tallying of votes received by the

candidates, the petitioner may apply to the Court for an order to recount the votes or examine the tallying.

(2) The Petitioner shall specify in the election petition that he does not require any other determination except a recount of the votes or the examination of the tallies.”

Rule 33 of the Election Rules provides:

(1) 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.

(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.

(3) The scrutiny of the ballots shall be carried out under the direct supervision of the Registrar and shall be subject to directions as the Court may give.

(4) Scrutiny shall be confined to the polling stations in which the results are disputed and shall be limited to the examination of –”

25. From the foregoing provisions of the Election rules, it is discernible that there is a distinction between recount of votes and scrutiny of votes. The difference lies in the outcome from conducting the processes. A recount, in my view, determines the number of votes a candidate received in an election. Rule 32 is to the effect that if the issue in the petition is purely on numbers, that is, the counting or tallying process was erroneous, then a recount of the votes or examination of the tallying process will resolve the dispute. In such a case, the Petitioner is required to categorically state as such in his/her petition. The effect of electing Rule 32 is that there shall be no determination of allegations, if any, of election misconduct. Scrutiny of votes, on the other hand determines the validity of the votes cast in an election. Rule 33(2) requires that a Petitioner must lay sufficient basis for scrutiny. Herein, allegations of election misconduct will be considered by the Court in determining whether a Petitioner has given sufficient reason to warrant a scrutiny.

26. Thus, can a Petitioner ask this Court for an order of recount and/or scrutiny of votes at the same time" I think not. As stated above the outcomes of these two processes are different and in my view, it would be illogical to conduct these two processes in one petition. One cannot have it both ways. It is either an issue of miscounted numbers or validity of votes. Moreover, a Petitioner cannot on the one hand loathe an election process for being flawed and perform a recount or tally of the same process with the aim of being declared the winner if he/she emerges victorious pursuant to Section 80(4) (a) of the Elections Act.

27. In praying for an order of scrutiny, Rule 33 (2) of the Election Rules sets a condition to be met before such order can be granted. The provision of sub-rule 2 is such that the Court has to be satisfied that there is sufficient reason to warrant an order for scrutiny. It is noteworthy that the Court, on its own motion, can order a scrutiny exercise to be conducted. Section 82(1) of the Elections Act gives discretionary powers to the Court to direct such an exercise. The important point to note is that there has to be sufficient reasons advanced to the satisfaction of the Court to issue such order. The argument put forth by the 3rd Respondent that the Petitioner has to demonstrate that he requested for a recheck or recount of the votes at the polling station, as provided under Regulation 80 of the Election Regulation, and such request was denied in order

for such petitioner to successfully ask for scrutiny is, in my view, incorrect.

28. From perusing the petition, affidavits in support to the petition and further affidavits, the Petitioner has alleged that the entire electoral process was manipulated. In this application, the Petitioner alleges that there were massive discrepancies and vote manipulation by the Respondents during the tallying, which is manifested by the inconsistencies reflected on Forms 35 and 36. In the Petitioner's view the scrutiny process was intended to give the proper and lawful results. From the foregoing, few questions arise:

- a. Are the reasons advanced by the Petitioner sufficient enough to warrant the grant of an order for scrutiny"
- b. Can the Court make a determination as to whether the reasons advanced by the Petitioner in seeking an order for scrutiny of votes is sufficient without hearing evidence in the petition at least in part"
- c. Can the Court grant an order for scrutiny where there is no particularization of the polling stations in which results are disputed"

29. To answer the above questions, Kimaru J. in the case of **Rishad H. A. Amana v IEBC & 2 Others Malindi EP No. 6/2013** put it very well,

".....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 the votes before the commencement of the trial. The Petitioner may do so after his or her witnesses 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 the 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".

30. It is only after hearing the evidence of the parties that the Court can make a proper determination that the Petitioner has made a case for scrutiny. In respect to particularization of the polling stations, Rule 33(4) of the Election Rules provides that the scrutiny shall be confined to the polling stations in which the results are disputed. The effect of Rule 33(4) of the Election Rules, in my view, is that it allows for partial scrutiny in only the polling stations in which the results are in dispute. This is a development of the law from the repealed Election Petition Rules wherein the Court had no option but to carry out scrutiny of votes for all the polling stations in an electoral area, that is the subject of the electoral dispute.

31. In essence therefore, I hold prayer 2 of this application in abeyance to afford the petitioner a chance to elect either a recount process or the process for scrutiny of votes. If the Petitioner shall elect the process of scrutiny, then I will revisit this aspect of the application and deliver my ruling after all or some of the witnesses shall have testified in order to found a basis for the process, if any, and also identify the relevant polling stations for the scrutiny exercise.

32. The orders made in this ruling are as follows:

1. Paragraphs 23 and 24 of the 3rd Respondent's Witness Affidavit sworn on 2nd May 2013 are hereby expunged.
2. Pursuant to paragraph 31 above, prayer 2 of the application will be revisited, if need be, on notice.

3. Costs of this application shall be in the cause.

Dated, Signed and Delivered at Nairobi this 21st day of June 2013

E.K.O. OGOLLA

JUDGE

In the Presence of:-

Dr. Khaminwa & Mr. Wachira for the Petitioner

Mr. Mukele Moni for the 1st and 2nd Respondents

Ms. Ngeresa for the 3rd Respondents

Teresia - Court Clerk

Legal Researcher: Jackie Kibogy



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