



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**ELECTION PETITION NO.4 OF 2013**

**JOSEPH AMISI OMUKANDA .....PETITIONER**

**V E R S U S**

**INDEPENDENT ELECTORAL &**

**BOUNDARIES COMMISSION (I.E.B.C.) ..... 1<sup>ST</sup> RESPONDENT**

**WILSON KIMUTAI KIPCHUMBA ..... 2<sup>ND</sup> RESPONDENT**

**(RETURNING OFFICER, NAVAKHOLO CONSTITUENCY**

**EMMANUEL WANGWE ..... 3<sup>RD</sup> RESPONDENT**

**R U L I N G**

In the application dated 24<sup>th</sup> June 2013 the applicant is seeking the following orders:-

1. ....
2. ....
3. *That pending the filing of submissions and the final determination of the petition an order of scrutiny and recount be issued on Navakholo constituency Member of Parliament in those polling centers where errors have been identified both in the petition and the returning officers answer to the petition and errors identified during trial and whose results of the election are disputed by the petitioner.*
4. *That an order of scrutiny be issued to verify the original forms 35 and form 36 held by the 1<sup>st</sup> respondent against the photocopies supplied by the respondents to the petitioner and supplied to the court to compare and verify the completeness and truthfulness of the posted and declared results.*
5. *That an order be granted for a recount and re-tally of the votes cast to come up with one reconciled form 36 in accordance with the law.*
6. *That an order be issued that after the recount the deputy registrar do file the results of that recount in court in this petition.*
7. *That in the event the scrutiny and recount of the disputed polling stations herein listed reveal discrepancies in collating tabulating and tallying of the votes an order do issue for a recount of the entire votes cast in all the polling stations for Navakholo National Assembly and a winner be declared on the basis of that entire recount.*

## Submissions by the Petitioner

The application is supported by the affidavit of the petitioner sworn on the 24.6.2013. The matter was filed under a certificate of urgency and on the 25<sup>th</sup> 6.2013 the court directed that parties file written submissions which direction was complied with. The essence of the application is that there are some polling stations where party agents did not sign the forms 35, that some forms 35 contain erasures without being counter-signed and that in some polling stations the recorded valid results are at variance with the recorded aggregate votes for each candidate. Counsels for the petitioner contend that the petitioner has established a basis for the order of scrutiny and recounting of the votes. It is the petitioner's submission that Section 82 of the Elections Act 2011 gives the court powers to grant the orders being sought. Further Rules 32 and 33 of the Election Rules empowers the court to order scrutiny and recount of votes cast in an election. It is further contended that an order for a recount and scrutiny can be made at any stage of the trial and counsels cited the case of **WILLIAM MAINA KAMANDA VS MARGARET WANJIRU & OTHERS [2008]eKLR**.

The petitioner maintains that after the taking of the evidence, it was established that some anomalies did occur and this calls for the scrutiny and recount of the votes cast. It is the petitioner's position that he has proved up to the required standard that the orders being sought ought to be granted. Although the standard of proof in election petitions is higher than in ordinary civil matters, the petitioner has proved that an order of scrutiny and recount ought to be granted. The scrutiny and recount will assist the court in making a determination as to whether or not it should disturb the election in order to verify the truth. According to the petitioner even the returning officer (2<sup>nd</sup> respondent) admitted that he did not include some of the polling stations when he declared the final results which results were gazetted. The petitioner specifically calls for scrutiny and recount on the following stations on the grounds that the forms 35 have erasures without countersigning. The polling stations are:- *Bushiri stream I, Ematiha stream II, Emakhumbi, Ingotse market, Naluchira, Shikomari stream I, Shing'oto, Eshikoni, Bumamu, Ebushibo, Mushulilie Child Development Centre, Mwikoli, Buhayi, Sisokhe, Kamuli, Bukhubalo, Mungakha, Kaunda, Namakoe, Lusumu Dispensary, Butieri, St. Mary Situkhumi, Sivilie, Namirama, Chekata, Makhima, Muregu, Konyero Nursery, Lutaso, Buchangu, Simuli, Nambacha, Sihanikha, Chebuyusi Primary, Matoi and Goodshepherd Academy.*

The petitioner further contends that in some polling stations there is a variance between the aggregate of the recorded votes for each candidate against the valid votes recorded in forms 35. The affected polling stations are- *Bushiri, Ematiha, Ewemakhumbi, Kharanda Primary, Sikubile Primary, Tanga, Buchangu Primary and Newlife Academy.* It is also contended that some polling stations have variance in the vote tally in forms 35. The affected polling stations are – *Shikomari, Eshikhoni, Ebushibo, Namakoye, Lusumu, Sivilie Primary, Muregu and Naulu Primary.* The petitioner has also given a list of some polling stations where the forms 35 were signed by agents who exceeded the required number accredited to the specific polling stations. The petitioner is relying on the following authorities-**RICHARD N. KALEMBE NDILE & ANOTHER V DR. PATRICK MUSIMBA MWEU & 3 OTHERS – Machakos High Court Election Petition No. 1 of 2013, WILLIAM MAINA KAMANDA V MARGARET WANJIRU KARIUKI & 2 OTHERS – Nairobi High Court Election Petition No. 5 2008 eKLR, HASSAN ALI JOHO V JOTHAM NYANGE & ANOTHER [2006] eKLR, JAMES OMINGO MAGARA V MANSON ONYONGO NYAMWEYA & 2 OTHERS [2010] eKLR, REUBEN NYANGINJA NDOLO V DICKSON WATHIKA MWANGI & 2 OTHERS [2012] eKLR – Nairobi Election Petition No. 11 of 2008, PETER GICHUKI KING'ARA V IEBC & 2 OTHERS – Nairobi Election Petition No. 3 of 2013 eKLR and BENARD SHINALI MASAKA V DR. BONI KHALWALE & 2 OTHERS – Kakamega High Court Election Petition No. 2 of 2008.**

## Submissions of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents

Mr. Lubulellah, counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondent opposed the application. Counsel filed grounds of opposition as well as written submissions. Counsel contends that the application is incompetent as it was filed after all parties had closed their respective cases. An order for scrutiny cannot be made at this juncture unless the proceedings are reopened by an order of the court. Further, that the petitioner has not made out the basis for an order for scrutiny and recount of votes cast in Navakholo Constituency National Assembly elections. The applicant has not identified in the petition the particular polling stations in which the results are being disputed and the application is a fishing expedition intended to panel beat the petitioner's case. The petitioner did not make a request to the presiding officers for the rechecking and recount of the votes cast and is therefore estopped from making such an application at the end of the hearing. Counsel further submits that the purpose for an order of scrutiny is to give a useful insight as to how an election had been conducted and this was expounded in the Supreme Court of Kenya Petition No.5 of 2013 **Raila Odinga versus IEBC and 3 Others**. An order for scrutiny is not intended to investigate the complaints made by the petitioner. The duty of an election court is to make a just and fair determination of the case and evidence provided by the parties but not to investigate the petitioner's complaints. Counsel further cited the case of **PHILIP OSORE OGUTU V MICHAEL ONYURA ARINGO. Busia High Court Election Petition No. 1 of 2013** where the court observed that a petitioner is expected when filing his petition from the outset to be seized with the grounds, facts and evidence for questioning the validity of the election.

It is submitted by counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents that the application is brought under the wrong legal provisions. The applicant ought to have indicated during the pre-trial that he intended to file an interlocutory application. Since that was not done then the application contravenes the provisions of Rule **17(2)** of the Elections (Parliamentary and County) Election Rules 2013. **Section 82(1)** of the Elections Act allows an election court on its own motion or on an application by a party to order for a scrutiny of votes during the hearing of the election petition. In the case of **MURGOR V INGONGA [2008] 1KLR (EP) 191** a three Judge Bench opined that it would be inappropriate for an application for scrutiny to be made at the stage of submissions or where the petition did not include such a prayer. Counsel contends that the law does not allow parties to apply for scrutiny at any stage. It is submitted that in the case of **MASINDE V BWIRE & ANOTHER [2008] 1KLR (EP) 547** the court held that an order for scrutiny will not be granted as a matter of course. According to Mr. Lubulella, Rule 33 is in conflict with Section 82 of the Election Act which provides for such an application to be made during the hearing.

### **Submissions by the 3<sup>rd</sup> Respondent**

Mr. Namada for the 3<sup>rd</sup> respondent filed grounds of opposition and written submissions opposing the application. Counsel submits that the application for scrutiny and recount is nothing but an amendment to the petition after the case has been closed and that it is an abuse of the court process. It is submitted further that an order for scrutiny and recount is not available to the petitioner. Rule **33(4)** of the Election Petition Rules 2011 specifically requires that scrutiny shall be confined to the polling stations in which the results are disputed. The petition did not specifically indicate the polling stations where the votes have been disputed. Counsel further contends that the petitioner ought to have lodged a written complaint to the presiding officer for the specific polling stations where he objects to the results and he cannot make the application at this stage. The petitioner has not shown sufficient reason or cause to be granted the orders being sought. The petitioner's chief agent one **NICANOR ERIC S. WANGWE** did not name any one polling station where the results entered in form 35 were wrong or fraudulent. The errors complained of by the petitioner do not constitute a sufficient cause for an order of scrutiny and recount. Counsel relies on the following authorities – **ELECTION PETITION NO.1/13 HIGH COURT BUSIA – PHILIP OSORE OGUTU V MICHAEL ARINGO ONYURA & 2 OTHERS, ELECTION PETITION NO. 73/93 – HIGH COURT NAIROBI – MUNYAO V MUNUVE & 4 OTHERS, ELECTION PETITION NO.**

## 9/74 – HIGH COURT NAIROBI – MBOGORI V KANGETHE & ANOTHER

### Issues for determination

The essence of the application is that it seeks scrutiny, recount and re-tallying of all the votes cast for members of National Assembly in Navakholo constituency. The main issues for determination are:-

1. *At what stage should an application for scrutiny or recount be made to the court.*
2. *Whether a petitioner who does not seek recount at the pollings station is estopped from seeking a recount through the court.*
3. *Can the court order scrutiny suo motto even where an application for scrutiny has been filed.*
4. *Whether a petitioner is restricted to either apply for scrutiny or in the alternative recount and cannot apply for both.*
5. *Whether an application for scrutiny can be made after parties have gone through the pre-trial conference.*
6. *Whether Rule 33 of the Election Petition Rules is in conflict with Section 82 of the Election Act 2011.*
7. *Has the petitioner laid down a basis for scrutiny, recount or re-tallying of the votes.*
8. *What orders should the court make.*

### At what stage can an application for scrutiny or recount be made.

Counsels for the petitioner contend that such an application can be made at any time before the final judgment is delivered. On the other hand it is the respondents' position that the application has been brought too late and granting it would be tantamount to re-opening the case. The relevant statutory provisions dealing with scrutiny and recount of votes are **sections 82** of the Elections Act No.24 of 2011 and Rules 32 and 33 of the Election Petition Rules 2011. Section 82 of the Act states as follows:-

***“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 a scrutiny or votes to be carried out in such manner as the election court may determine.***

***(2)Where the votes at the trial of an election petition are scrutinized, only the following votes shall be struck off-***

- a. the vote of a person whose name was not on the register or list of voters assigned to the polling station at which the vote was recorded or who had not been authorized to vote at that station.***
- b. the vote of a person whose vote was procured by bribery, treating or undue influence.***
- c. the vote of a person who committed or procured the commission of personation at the election.***
- d. the vote of a person proved to have voted in more than one constituency.***
- e. the vote of a person, who by reason of conviction for an election offence or by reason of the report of the election court, was disqualified from voting at the election: or***
- f. the vote cast for a disqualified candidate by a voter knowing that the candidate was disqualified or the facts causing the disqualification or when the facts causing it were notorious.***

***(3) The vote of a voter shall not, except in the cause specified in subsection (1) (e), be struck off under subsection (1) by reason only of the voter not having been or not being qualified to have***

***the voter's name entered on the register of voters.***

Rule 32 of the Election Petition Rules states as follows:-

***“32.(1)Where the only issue in the election petition is the count or tallying of the 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 Petition Rules further provide the following:-

***“33. (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 or recount of 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-***

- a. the written statement made by the presiding officers under the provisions of the Act.***
- b. the copy of the register used during the elections***
- c. the copies of the results of each polling station in which the results of the election are in dispute.***
- d. the written complaints of the candidates and their representatives.***
- e. the packets of spoiled papers.***
- f. the marked copy register***
- g. the packets of counterfoils of used ballot papers***
- h. the packets of counted ballot papers.***
- i. the packets of rejected ballot papers: and***
- j. the statements showing the number of rejected ballot papers.”***

The suit was fully heard and the petitioner closed his case after calling six (6) witnesses. Similarly the respondents closed their respective cases after calling all their nine (9) witnesses. The petition was listed for final submissions for the 18.7.2013. The current application was filed on the 25.6.2013. There are several authorities as to the point in time when the court can order scrutiny and recount of the votes. In the case of **WILLIAM MAINA KAMANDA V MARGARET WANJIRU & 2 OTHERS** the court held as follows:-

***“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.....”***

In the case of **HASSAN ALI JOHO V HOTTAM NYANGE & ANOTHER** Justice Maraga held that:-***“An order for scrutiny can be made when it is prayed in the petition itself and when reasons for it***

exists". The court in the same case held that scrutiny could be ordered where the vote margins were very narrow. In the case of **NG'ANG'A & ANOTHER V OWITI & ANOTHER (No.2) 2008 1KLR (EP)** a three judge bench had this to say in relation to this issue:-

***"After considering the ground left in the petition and the evidence adduced we find that there is no need or justification to scrutinize and recount the election materials as requested by the petitioners even at this stage. This we can do at any stage of the hearing before final judgment whether that be on our own motion or if a basis laid requires so."***

In Election Petition No.3 of 2013 Nakuru **JOSEPH TIAMPATI OLE MUSUNI & 2 OTHERS V SAMUEL KUNTAI TUNAI & 5 OTHERS** Justice Wendoh deliberated on this issue and her view, which I do agree with, is that the application can be made at any time during the hearing of the petition or at the end of the petition. The court stated as follows:-

***"It is only after part or all of the evidence has been taken that a basis will be laid for either the court to order a scrutiny suo motto or grant the prayers in the application. When a party moves the court by way of application, the court considers the evidence already adduced to determine whether or not scrutiny is deserved. Most of the courts have generally adopted the view that scrutiny be done during the hearing of the petition or at the end of it."***

In Mombasa Election Petition No. 8 of 2013 **SULEIMAN SAID SHAHBAL V HASSAN ALI JOHO & 3 OTHERS** Justice Fred Ochieng was of the view that an application for scrutiny should be made in the course of the proceedings and not after the proceedings are concluded. That calls for interpretation as to at what point in time are the proceedings deemed to have been concluded. The judge noted as follows:-

***"In so far as that is a substantive prayer, at the end of the Petition, I hold the view that it would be too late in the day to grant an order for scrutiny in the judgment. An order for scrutiny should be made in the course of the proceedings, not after the proceedings are concluded."***

From the wording of Rule 33 of the Election Petition Rules, the rule specifically states in relation to scrutiny of votes that an application can be made **at any stage of the proceedings**. With regard to recount and tallying of the votes Rule 32 does not indicate the stage at which such an application can be made. Rule 32 only states that the petitioner **may apply** to the court for such an order. From the authorities provided by all the parties which I have had the advantage of going through, it is established that an order for scrutiny, recount or tallying of the votes can be made at any time before the final judgment is made. From the foregoing I do find that although the application was filed after the taking of all the evidence had been concluded, it is competent and was filed within time as no final judgment had been delivered. Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondent submitted that in the case of **MURGOR V IGONGA & ANOTHER** a three judge bench was of the view that it would be inappropriate for an application for scrutiny to be made at the stage of submissions or where the petition did not include such a prayer. In our situation submissions have not been completed and the petition contains a prayer for scrutiny for recount.

**Whether a petitioner who does not seek recount at the polling station is estopped from seeking a recount through the court.**

Mr. Lubulelah, counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondent submitted that Regulation 80 of the Elections (General) Regulations 2012 gives a candidate the right to ask for a recount at the polling station. The petitioner herein did not exercise that right and is now estopped from making the current application. On

the other hand counsels for the petitioner reiterate that the overriding objective of the Election Petition Rules is to assist the court in arriving at the correct decision. The mere fact that the petitioner did not seek recount at the polling station cannot be used to deny the petitioner that right.

Regulation 80(1) of the Elections (General) Regulations states as follows:-

**“80. (1)A candidate or agent, if present when the counting is completed, may require the presiding officer to have the votes rechecked and recounted or the presiding officer may on his or her own initiative, have the votes recounted.**

***Provided that the recount of votes shall not take place more than twice.”***

An election petition is filed after the results have been declared. The law requires that such petitions be filed within 28 days after the declaration of the results (Article 87 (2) of the Constitution). **Section 82** of the Election Act allows a petitioner to apply to the court during the hearing of the petition for an order of scrutiny of the votes. Similarly Rule 33 states that an application for scrutiny can be made by parties to the proceedings at any stage. From the wording of the above two legal provisions it is clear that it does not matter whether the party had requested for a recount at the polling station or not before the application for scrutiny is made. It could appear that after a petitioner evaluates his own report from his agents after the results have been declared he or she might be of the view that the results of a certain polling station were not properly presented to the tallying center even though such a candidate would not have requested for a recount. My view is that regulation 80 does not bar a party who had not sought a recount at the polling station from making an application in court. It is obvious that when the election is being conducted the candidates cannot be at all polling stations. Whereas a candidate's agent might be satisfied with the vote count at a particular polling station, the candidate himself might on a second thought be of the view that the results of that polling station were not properly given by the presiding officer and therefore seeks scrutiny of the votes through an application in an election petition. Regulation 80 only deals with situations at the polling stations and does not govern election petitions.

**Can the court order scrutiny suo motto even where an application for scrutiny has been filed.**

**Section 82(1)** of the Election Act 2011 as stated hereinabove allows an election court on its own motion during the hearing of an election petition to make an order for scrutiny of the votes. The section is premised on the assumption that after going through the petition or after hearing the evidence on record an election court might be of the view that a scrutiny of all or part of the votes cast is necessary. In **the Supreme Court Election Petition No.5 of 2013 Raila Odinga and Others v IEBC and Others** the court ordered scrutiny of some ballot boxes suo motto. However, where an application is made by any of the parties to an election petition it would be un-procedural for the court to make an order for scrutiny suo motto. The Kenyan judicial system is adversarial in nature and the court in exercising its duty as an impartial umpire should not be seen to be aiding one of the parties in a dispute. The court should restrict itself to the application for scrutiny by any of the parties and make a decision on it. Making an order for scrutiny suo motto would be viewed as being partisan on the part of the court. In the current situation an application has been made by the petitioner and there is no need for the court to make an order for scrutiny suo motto. Further, if none of the parties has sought an order for scrutiny it would be unwise for the court to issue such an order suo motto. My view is that once an application for scrutiny of the votes has been filed, the power of the court to make an order for scrutiny suo motto becomes spent.

**Whether a petitioner is restricted to either apply for scrutiny or in the alternative for recount and cannot apply for both.**

**Section 82** and **Rule 33** of the Election Act 2011 provides for scrutiny of the votes. Under **Section 82** an order for scrutiny is limited to specific votes which are supposed to be struck off. Under **Rule 33 (4)** scrutiny is confined to the polling stations in which the results are being disputed and is also limited to certain documents as stated in the Rule. Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondent contends that one cannot apply for both scrutiny and recount. Counsel relies on the case of –Kakamega Election Petition No. 6 of 2013 **JUSTUS MUGALI M'MBAYA V IEBC & 2 OTHERS** where Justice Ogola held that a petitioner cannot apply for scrutiny and recount at the same time since the outcome for the two processes is different. My view is that a petitioner or any party to an election petition can decide to apply for either scrutiny or recount or for both. Scrutiny leads to recounting but recounting does not involve scrutiny.

According to Halsbury's Laws of England, Fourth Edition Volume 15 paragraph 924, the object of scrutiny in an election petition is to **ascertain by striking off votes or adding votes which candidate had the majority of lawful votes**. It appears from the provisions of Section 82 and Rule 33 that whenever scrutiny is done some votes might be struck off. The question which follows is what happens after those votes are struck off. The only logical result would be that the remaining votes would have to be recounted. It is also established that during scrutiny some of the votes which could have been declared rejected might be found to be valid and therefore fit for inclusion in the tally for valid votes. That would also call for recounting the votes that would have been found to be valid as well as the remaining votes after the striking off of those votes envisaged in Section 82 of the Act. My view is that a party is not restricted to apply for either scrutiny or recount. A party can apply for both. Recount naturally occurs after scrutiny is ordered. A party can apply for pure recount as envisaged under Rule 32 of the Election Rules if that is the only issue in dispute. An order for scrutiny will automatically lead to recounting of the votes while an order for recounting simply calls for fresh counting of the votes. Further, a party can apply for scrutiny specific polling stations and recount for other polling stations depending on the evidence adduced.

#### **Whether an application for scrutiny can be made after parties have gone through the pre-trial conference.**

Mr. Namada, counsel for the 3<sup>rd</sup> respondent submitted that during the pre-trial conference parties were asked if they had any preliminary applications and all parties informed the court that there were none. Counsel submits that the application is an afterthought as the petitioner did not indicate during the pre-trial that he was going to file an interlocutory application. On their part counsels for the petitioner maintain that an application for scrutiny and recount can be made at any time before judgment is delivered. Rule 17 of the Election Petition Rules does provide for a pre-trial conference. The marginal notes for the Rule indicate that it is for “**pre-trial conferencing and prohibition of delayed interlocutory applications**”. Rule **17 (1) (d)** states that during a pre-trial the court shall deal with all interlocutory applications and decide on their expeditious disposal. Further Rule **17(2)** provides that the court shall not allow any interlocutory application made after the hearing of the petition has commenced if the interlocutory application could have, by its nature, been brought before the commencement of the petition.

In his petition dated 2.4.2013 the prayers being sought are as follows:-

- a. **An order for a scrutiny of all ballot papers cast, recount of votes cast for all candidates and examination of the tallying.**
- b. **That upon the recount and re-tallying a declaration that the candidate with the highest number of votes is the one validly elected Member of National Assembly for Navakholo Constituency.**



**c. That the 1<sup>st</sup> and the 2<sup>nd</sup> respondents do meet the costs of this petition.**

It is clear from the petition itself that the petitioner had in mind that the votes ought to be scrutinized and recounted. I therefore find that the application is not an afterthought or a fishing expedition meant to panel beat the petition herein. Indeed the petitioner's prayers are clear that whoever would be found to have garnered the highest number of votes after the recount and re-tallying he should be declared the validly elected member of National Assembly for Navakholo Constituency. There are several authorities whereby the court held that it could not entertain an application for scrutiny or recount before evidence had been adduced (see *Joho v Nyange*).

From the above I do find that a pre-trial conference is meant to give a roadmap as to how the election petition will be conducted. During the hearing of the case certain issues might occur warranting the making of applications. Such applications can be for scrutiny or recount of the votes or for any other issue that would have resulted from the evidence taken. If we are to go by the arguments of Mr. Namada it will mean that after a pre-trial conference the court should not entertain any subsequent applications. Rule 17(2) empowers the court to look at the application and determine whether it ought to have been made before the pre-trial conference or whether the same is necessary under the circumstances. The current application is inbuilt within the petition itself. In some situations some applications are made orally during the hearing and the court cannot shut out such applications if they are meant to assist the court in arriving at its decision. Simply because the pre-trial conference is over.

**Whether Rule 33 of the Election Petition Rules is in conflict with Section 82 of the Election Act.**

Mr. Lubulelah contends that Rule 33 is in conflict with Section 82 of the Act in that whereas the Act specifically requires an application for scrutiny to be made during the hearing of an election petition, Rule 33 allows such an application to be made at any stage. Counsel contends that since the rules are subsidiary legislation they should not override the specific provisions of the Act. This issue was raised in Bungoma Election Petition No.6 of 2013 **JOASH WAMANG'OLI V THE IEBC & 3 OTHERS**. In that case Justice Hellen Omondi extensively analyzed the issue. The contention is that whereas Section 82 of the Elections Act provides that an election court may on its own motion or on an application by any party to the petition **during the hearing** order for a scrutiny of the votes, Rule 33 states that such an application can be made by parties to the proceedings **at any stage**. All the parties herein closed their respective cases and the matter was listed for final submissions. Justice Hellen Omondi in the **Joash Wamang'oli** case noted as follows:-

***".....One school of thought is of the view that the moment the respondent indicates "That is the close of the respondent's case", the hearing has ended. Anything else that comes after that is deemed to be done after the hearing. This would then mean that an application such as the one made here ought to have been made at least before the respondent closed its case. However, another school of thought is that hearing only comes to an end after parties have presented submissions in a matter."***

In Mombasa Election Petition No. 6 of 2013 **NUH NASSIR ABDI V ALI WARIO & 2 OTHERS** Justice Odunga had the opportunity of dealing with the issue and noted as follows:-

***"It is clear from the foregoing provisions that whereas rule 33 of the aforesaid rules provide that a sufficient reason be shown before the Court can be satisfied that scrutiny or recount ought to be ordered, section 82 of the Act on the other hand donates wide and unfettered discretion on the Court to make such orders in such manner as it may direct. If it were to be argued that section 82 of the Act ought to be interpreted in accordance with rule 33 that would fall foul of***

**section 31 (b) of the Interpretations and General Provisions Act, Cap 2 Laws of Kenya which provides that no subsidiary legislation shall be inconsistent with the provisions of an Act.”**

The bone of contention is the word **during the hearing** in section 82 of the Act and **at any stage** in Rule 33. Rule 4 of the Election Petition Rules stipulate that the overriding objective of the rules which are made to facilitate the operation of the Election Act is to facilitate the just, expeditious, proportionate and affordable resolution of election petitions under the Constitution. Whether an application for scrutiny is made in the middle of the hearing or at the end of the proceedings should not be an issue. The overriding objective is to do substantive justice to the parties to the dispute. My view is that before a final judgment is delivered then the last stage of the dispute has not been reached. This, therefore means that the hearing is part of the stages in a dispute and the hearing cannot be separated from the other stages in a dispute. Before a judgment is delivered the hearing stage and other stages of the dispute have not been concluded. At times courts visit scenes & crimes or civil disputes after taking all the evidence. That is another stage of the hearing. Indeed both the Civil Procedure Act and the Criminal Procedure enable a party to arrest the delivery of a final judgment after a case has been concluded, once this is done the case can be re-opened. I do not see any conflict in the two provisions of the law.

**Has the petitioner laid down a basis for scrutiny, recount or re-tallying of the votes.**

The substratum of the application is three fold, namely that the forms 35 were not signed by the political parties' agents, that some of the forms 35 contain erasures and rubbing and that some of the forms 35 do not give the correct aggregate of the votes garnered by the candidates. The petitioner's witnesses testified and they were all in agreement that the election was properly and fairly conducted. The petitioner and his chief agent informed the court that there was no dispute as to the counting and tallying of the votes in all the polling stations. Their main concern is the tallying process at Chebuyusi tallying station. The petitioner's two agents **Charles Ong'ayo**(PW2) and **Dina Ayako Were** (PW4) informed the court that their main concern was that they did not sign the forms 35 for Shikomari polling station stream II and Bushiri Primary polling station stream II respectively. According to **PW5 Nicanor Eric S. Wangwe**, he was receiving the results from the petitioner's agents in all the polling stations. The court went through the list of the petitioner's votes provided by the witness and noted the differences the list had in some polling stations as compared to the results that were declared. For clarity purposes I do hereby reproduce the list as per PW5.

**I.E.B.C. TALLIES Vs. PETITIONER'S TALLIES**

CODE	POLLING STATIONS	FINAL TALLY BY I.E.B.C	PETITIONER'S TALLIES	DIFFERENCE					
001	BUSHILI PRIMARY SCHOOL	615	615	0					
002	PRIMARY	311	311	0					

	SCHOOL								
003	ESHILAK WE PRIMARY SCHOOL	386	386	0					
004	PRIMARY SCHOOL	586	586	0					
005	EMULAM A PRIMARY SCHOOL	405	405	0					
006	EWAMAK HUMBI PRIMARY SCHOOL	457	470	13					
007	EMULAK HA PRIMARY SCHOOL	475	475	0					
008	INGOTSE MARKET	357	357	0					
009	TUMAINI NFE SCHOOL	183	283	100					
010	SHINOYI PRIMARY SCHOOL	699	699	0					
011	NALUCHI RA PRIMARY SCHOOL	235	255	20					
012	SHIKOMA RI PRIMARY SCHOOL	633	653	20					
013	SHING'O TO PRIMARY SCHOOL	324	331	7					
014	ESUMEYI A PRIMARY SCHOOL	399	399	0					
015	EBUTENJ E PRIMARY	436	441	5					

	SCHOOL								
016	ESHIKHO NI PRIMARY SCHOOL	310	320	10					
017	SHIBEMB E S.A.NU RSERY SCHOOL	339	342	3					
018		348	348	0					
	PRIMARY SCHOOL								
019	LIFE SPRING ACADEM Y SCHOOL	264	264	0					
020	EBUSHIB O PRIMARY SCHOOL	169	169	0					
021	MUSHILIL IE CHILD DEVELO PMENT CENTER	168	168	0					
022	ESHIYEN GA PRIMARY SCHOOL	222	222	0					
023	EBUMAN GALE ECD SCHOOL	228	228	0					
024	MWIKOLI PRIMARY SCHOOL	133	133	0					
025	EBUREN GA PRIMARY SCHOOL	273	273	0					
026	BUDONG A PRIMARY SCHOOL	9	9	0					
027	NAMUND ERA	5	15	10					

	PRIMARY SCHOOL								
028	NDEREM A PRIMARY SCHOOL	106	106	0					
029	BUHAYI PRIMARY SCHOOL	18	18	0					
030	SISOKHE PRIMARY SCHOOL	5	15	10					
031	KAMULI PRIMARY SCHOOL	24	24	0					
032	SIDIKHO PRIMARY SCHOOL	0	10	10					
033	PRIMARY SCHOOL	9	9	0					
034	PRIMARY SCHOOL	0	9	9					
035	BUKHUB ALO PRIMARY SCHOOL	12	12	0					
036	NANG'A NDA PRIMARY SCHOOL	1	12	11					
037	LUSUMU PRIMARY SCHOOL	46	46	0					
038	PRIMARY SCHOOL	2	12	10					
039	BURANG ASI PRIMARY	1	10	9					

	SCHOOL								
040	KHARAN DA PRIMARY SCHOOL	4	4	0					
041	MUNGAK HA PRIMARY SCHOOL	40	40	0					
042	KAUNDA MARKET	41	41	0					
043	SIMAKIN A PRIMARY SCHOOL	0	6	6					
044	NAMA KO YE PRIMARY SCHOOL	4	4	0					
045	LUSUMU DISPENS ARY	41	41	0					
046	SIPANGA CATHOLI C NURSE RY SCHOOL	21	21	0					
047	MUYIYI NURSER Y SCHOOL	0	4	4					
048	MAYUKE MUSLIM NURSER Y SCHOOL	0	7	7					
049	BUTIERI FRIENDS NURSER Y SCHOOL	14	14	0					
050	ST. MARY SI TUKHUMI NURSER Y SCHOOL	4	9	5					
051	SIVILIE PRIMARY SCHOOL	5	5	0					
052	MUSAGA	14	14	0					

	PRIMARY SCHOOL								
053	NAMIRA MA PRIMARY SCHOOL	12	12	0					
054	PRIMARY SCHOOL	22	22	0					
055	LUTASO PRIMARY SCHOOL	13	13	0					
056	CHEKAT A PRIMARY SCHOOL	3	8	5					
057	SIKUBAL E PRIMARY SCHOOL	6	6	0					
058	MAKHIM A PRIMARY SCHOOL	5	5	0					
059	WEREMBA A PRIMARY SCHOOL	19	19	0					
060	MUREGU MARKET	6	6	0					
061	BUHERI WATER POINT	3	6	3					
062	KONYER O NURSE RY SCHOOL	2	4	2					
063	TANGA PRIMARY SCHOOL	2	8	6					
064	LUTASO CCANUR SERY SCHOOL	4	4	0					
065	BUCHAN GU PRIMARY	6	6	0					

	SCHOOL								
066	NAULU PRIMARY SCHOOL	15	15	0					
067	NAVAKH OLO PRIMARY SCHOOL	31	31	0					
068	MUKANG U PRIMARY SCHOOL	65	65	0					
069	SIRIGOI PRIMARY SCHOOL	53	53	0					
070	SIMULI PRIMARY SCHOOL	106	106	0					
071	NAMBAC HA PRIMARY SCHOOL	18	18	0					
072	SIHANIK HA PRIMARY SCHOOL	89	89	0					
073	EMUHUN I PRIMARY SCHOOL	11	7	-4					
074	LWAKHU PA PRIMARY SCHOOL	179	179	0					
075	MUSABA LE PRIMARY SCHOOL	14	14	0					
076	CHEBUY USI PRIMARY SCHOOL	1	8	7					
077		9	9	0					
	PRIMARY SCHOOL								
078	MATOI PRIMARY	130	130	0					



	SCHOOL								
079	NEW LIFE ACADEMY SCHOOL	11	11	0					
080	GOOD SHEPHERD ACADEMY PRIMARY SCHOOL	4	4	0					
081	ADC CHURCH ACADEMY PRIMARY SCHOOL	1	11	10					
082	MUKHWEZO ACADEMY PRIMARY SCHOOL	2	8	6					
	<b>TOTAL</b>	<b>10,223</b>	<b>10,527</b>	<b>304</b>					

Similarly the returning officer Wilson Kimutai Kipchumba informed the court that after declaring the results he noted two anomalies. That the results for Kaunda polling station and Emuhuni polling station were not properly included in the final results. According to the returning officer he discovered that Kaunda polling station had been wrongly captured and Emuhuni polling station included only one stream yet the polling station had two streams.

I have analyzed the list of the votes garnered by the petitioner as provided by his chief agent (PW5) and note that his only dispute is for the following polling stations which give different results. The rest of the polling stations give him similar results as per the forms 35.

<b>POLLING STATION</b>	<b>IEBC</b>	<b>PETITIONER</b>	<b>DIFFERENCE</b>
EWAMAKHUMBI PRIMARY SCHOOL	457	470	13
TUMAINI NFE SCHOOL	183	283	100
NALUCHIRA PRIMARY SCHOOL	235	255	20
SHIKOMARI PRIMARY SCHOOL	633	653	20
SHING'OTO PRIMARY SCHOOL	324	331	7
EBUTENJE PRIMARY SCHOOL	436	441	5
ESHIKHONI PRIMARY SCHOOL	310	320	10
SHIBEMBE S.A NURSERY SCHOOL	339	342	3
NAMUNDERA PRIMARY SCHOOL	5	15	10
SISOKHE PRIMARY SCHOOL	5	15	10
SIDIKHO PRIMARY SCHOOL	0	10	10
KOCHWA PRIMARY SCHOOL	0	9	9
NANG'ANDA PRIMARY SCHOOL	1	12	11
MUKAMA PRIMARY SCHOOL	2	12	10

BURANGASI PRIMARY SCHOOL	1	10	9
SIMAKINA PRIMARY SCHOOL	0	6	6
MUYIYI NURSERY SCHOOL	0	4	4
MAYUKE MUSLIM NURSERY SCHOOL	0	7	7
ST. MARY SITUKHUMI NURSERY SCHOOL	4	9	5
CHEKATA PRIMARY SCHOOL	3	8	5
BUHERI WATER POINT	3	6	3
KONYERO NURSERY SCHOOL	2	4	2
TANGA PRIMARY SCHOOL	2	8	6
EMUHUNI PRIMARY SCHOOL	11	7	-4
CHEBUYUSI PRIMARY SCHOOL	1	8	7
ADC CHURCH ACADEMY PRIMARY SCHOOL	1	11	10
MUKHWESO ACADEMY PRIMARY SCHOOL	2	8	6
<b>TOTAL</b>	<b>2960</b>	<b>3264</b>	<b>304</b>

The petitioner contends that some of the forms 35 contain erasures and crossing. I have gone through each and every form and find that the forms for the following polling stations are proper and the erasures or alleged wrong computations by the petitioner are not proved as required. *Ewamakhumbi, Ingotse market, Naluchira, Shing'oto stream I, Bumamu, Ebushibo, Mushullie, Buhayi, Sisokhe, Khamuli, Bukhubalo, Mungakha, Namakoye, Lusumu Dispensary, Namirama, Chekata, Makhima, Muregu, Konyero Nursery, Lutaso, Buchangu, Simuli, Nambacha, Sihanikha, Chebuyusi Primary, Matoyi and Goodshepherd* polling stations do provide result for each of the candidates and the same results were posted correctly on the form 36. Further the cancellations and erasures are only limited to the top parts of the forms 35 which deals with the summary of the total votes cast, total rejected votes and total valid votes. There is no cancellation in the forms 35 involving the specific votes obtained by each candidate. The cancellation or erasure of the upper part can only be attributed to human error whereby the presiding officers wanted to balance their figures. Nobody benefited from those cancellations and there is no vote for any of the candidates that was affected by those cancellations. There is no evidence from any of the agents of the petitioner that the results in those polling stations complained of were not proper or that the petitioner's votes were reduced. I am alive to the decision of Justice Kimaru, Nairobi Election Petition No. 10 of 2008 of **WILLIAM KABOGO GITAU V GEORGE THUO & 2 OTHERS [2010] eKLR** where the court was of the view that cancellations in such important documents ought to be countersigned. However, there is no law which indicate that a cancellation on a document if not countersigning renders the document invalid. The court has to evaluate each document and find out whether the cancellation was meant to perpetuate fraud or help one of the candidates or it was just a normal cancellation done in the ordinary course of the election process. In other words, the court has to find out if any of the candidates benefited from the cancellations.

The evidence of PW5, Nicanor S. Wangwe is to the effect that some of the petitioner's votes were not properly posted on the form 36. The court went through the witnesses' list and noted differences in some polling stations. The differences could have been attributed to the fact that the results were being relayed through a phone call and not via SMS. The witness could have noted down the wrong figures.

The errors complained of by the petitioner relates to forms 35. It is contended that in some polling stations no party agents signed the forms 35 and there are no reasons given for that. Regulation 79 (1)

of the Election (General) Regulations 2012 states as follows:-

**79. (1) The presiding officer, the candidates or agents shall sign the declaration in respect of the elections.**

**(2) The presiding officer shall**

- a. ....
- b. **request each of the candidates or agent then present to append his or her signature:**
- c. ....
- d. **affix a copy of the declaration of the results at the public entrance to the polling station or at any other place**

**79. (3) Where any candidate or agent refuses or otherwise fails to sign the declaration form, the candidate or agents shall be required to record the reasons for the refusal or failure to sign.**

**(4) Where a candidate or an agent refuses or fails to record the reasons for refusal or failure to sign the declaration form, the presiding officer shall record the fact of their refusal or failure to sign the declaration form.**

**(5) .....**

**(6) The refusal or failure of a candidate or an agent to sign a declaration form under sub-regulation (4) or to record the reasons for their refusal to sign as required under this regulation shall not by itself invalidate the results announced under sub-regulation (2)(a).**

**(7) The absence of a candidate or an agent at the signing of a declaration form or the announcement of results under sub-regulation (2) shall not by itself invalidate the results announced.**

Further Regulation 97 (1) & (2) states as follows:

**“97. (1) When in these Regulations expression is used requiring, authorizing, or implying that, any act is to be done in the presence of the candidates or agents, that expression shall be regarded as reference to the presence of such candidates or agents as may be required or authorized to attend.**

**(2) The mere non-attendance of any candidate or agents at the time and place as contemplated under sub-regulation (1) shall not, if any act is otherwise lawfully done, invalidate that act.”**

The polling stations where the petitioner is complaining that the forms 35 were not signed are **Shinoi** stream I where the petitioner got 308 votes, **Shikomari Stream I** where the petitioner got 367 votes, **Ebushibo** where the petitioner got 169 votes, **Kaunda** where he got 41 votes and **Siyenga** where the petitioner got 9 votes. According to the list provided by Mr. Nicanor (PW5) the petitioner got 699 votes at Shinoi. This being 308 votes for stream I and 391 votes for stream II. Mr. Nicanor's list does not give any difference in the number of votes garnered by the petitioner. That means there is no dispute as to what the petitioner got in that polling station. The fact that the form 35 for stream I was not signed does not invalidate the results as even the petitioner's chief agent is in agreement with those results. The 3<sup>rd</sup> respondent got 21 votes in stream I and 16 votes in stream II.

At Shikomari stream I the list provided by Mr. Nicanor indicates that the petitioner got 653 votes instead of 633 votes. The form 35 for the station indicates that Shikomari stream I had 470 registered voters and 464 did cast their votes. The petitioner got 367 votes in stream I and 266 votes in stream II giving a total of 633 votes. The 3<sup>rd</sup> respondent got 22 votes in stream I and 12 votes in stream II. If we are to go by the contentions of Mr. Nicanor and add the extra 20 votes to the total votes cast we shall get a total of 484 votes which is above the total number of registered voters (470) for Shikomari stream I. The petitioner's agent for that polling station was Charles Ong'ayo (PW2). In his affidavit sworn on the 2.4.2013 the witness stated the following:-

**"3. THAT results for the National Assembly Navakholo Constituency for the two streams were announced at SHIKOMARI PRIMARY SCHOOL POLLING STATION in my presence by which the petitioner led with 633 votes."**

It is clear from the above that the analysis by Mr. Nicanor did not give the correct results for Shikomari and cannot be accepted by the court. The agent who was at the station did confirm the votes garnered by the petitioner and it is the same number of votes that were posted to the form 36. Even if no agent signed the form 35 for stream I there is no dispute on the actual votes obtained by each candidate.

For **Ebushibo** polling center it is contended that the form 35 was not signed by any agent. The list provided by PW5 gives similar results as those given by the IEBC. The petitioner got 169 votes and there is no variance. The 3<sup>rd</sup> respondent got 5 votes at the polling station. There is no need to reopen that ballot box as PW5's evidence gives the correct results for the petitioner. With respect to **Kaunda** polling center, it is claimed that no agent signed the form 35. The list given by PW5 shows that the petitioner got 41 votes which is similar to the number of votes indicated in the form 35 for the polling station. The 3<sup>rd</sup> respondent got 263 votes. Since the petitioner's own chief agent is in agreement with the results given by the IEBC there is no need to reopen the ballot box for that station. **Siyenga** polling station, it is contended that no agent signed the form 35. The list by PW5 gives the petitioner 9 votes which is similar to those posted on the form 35. The 3<sup>rd</sup> respondent got 77 votes and there is no dispute for that polling station warranting scrutiny or recount.

The application by the petitioner contends that at some polling stations some forms 35 contain erasures without countersigning. The application gives 37 polling stations as having been affected. I will deal with each polling station. At **Bushiri** streams I and II the forms 35 show that the same were signed by 7 agents for stream I and for stream II, 3 agents signed. According to PW5 the petitioner got 615 votes which is the same number of votes given to him by IEBC. Nobody benefited from the spoilt votes. In any case spoilt votes are not included in the valid votes tally. The presiding officer for that station (DW1) informed the court that he did not have the form 35 for that station and borrowed one from the neighbouring Ematiha station. The results are correct and PW5 did not raise any issue with those results. For **Ematiha** the form 35 was signed by the party agents and the changing at the top of the valid votes and total number of votes was merely meant to balance the figures. Nobody benefited from those changes. The petitioner got 586 votes in stream I and II while the 3<sup>rd</sup> respondent got 77 and 132 votes respectively. The list by PW5 gives the petitioner 586 votes which is similar to the results posted by IEBC. At **Ewamakhumbi** polling station there is a change in words for the total number of valid votes cast. The presiding officer only cancelled one word. The total number of valid votes is 630 which is similar to the actual total votes garnered by all the candidates. The petitioner got 457 votes but Mr. Nicanor posted 470 votes giving a difference of 13 votes. The form 35 is clear and if we are to add the extra 13 votes, it will exceed the total number of valid votes cast of 638 including the 8 rejected votes and therefore PW5 posted the wrong results.

At **Ingotse** market it is alleged that there are changes made on the total votes cast and the valid

votes. The changes do not affect the actual number of votes garnered by all the candidates and the form is signed by 9 party agents. Further PW5 posted 357 votes for the petitioner and the same is similar to those posted by IEBC. The 3<sup>rd</sup> respondent got 28 votes. **Ewamakhumbi** and **Ematiha** stations have already been dealt with herein above. The same applies to **Ingotse** polling station. For **Naluchira** polling station, it is alleged that there is erasure of the total number of votes cast. The form 35 was signed by four party agents and gives a total of 277 votes for all the candidates. The petitioner got 235 votes while the 3<sup>rd</sup> respondent got 7 votes. PW5 posted 255 votes for the petitioner giving a variance of 20 votes. If we were to add the 20 votes difference it will exceed the total number of votes cast of 295 as the total will be 297. The agents signed the form 35 signifying the correctness of the results. **Shing'oto** polling station, it is alleged the votes cast changed and it was not countersigned. The form shows that the actual total votes for all the candidates was 406 and the same number of votes is written in figures and words. There is a slight correction on the total number of votes cast in figures and that does not make any difference. The form was signed by the party agents. The petitioner got 324 votes against 27 votes for the 3<sup>rd</sup> respondent. PW5 posted 331 votes. The total votes cast were 411 and the extra 7 votes by PW5 cannot be true. There were five rejected votes.

Another complaint is for **Eshikhoni** polling station where some erasures were made. I have seen the form 35 and it gives the total number of valid votes as 360. The top part gives the total as 359. The petitioner got 310 votes against 3 votes for the 3<sup>rd</sup> respondent. PW5 posted 320 votes giving a variance of 10 votes. The form was signed by 8 party agents and shows that the results were correct. The difference of one vote only appears when the presiding officer was tallying the total actuals and the anomaly did not benefit anyone. There was no rejected vote and the extra votes by PW5 cannot be true. **Bunamu** polling center, the petitioner got 348 votes which is the same number of votes picked by PW5 against 23 votes for the 3<sup>rd</sup> respondent. The form was signed by 8 party agents and the cancellation at the top of the form 35 in relation to total number of valid votes does not change the results. Indeed it is a mere correction whereby the presiding officer wrote 419 in words and noted that it was 415. He cancelled 19 and replaced it with 15 which is a normal human error and even if it is not countersigned it does not give any candidate any extra votes. At **Ebushibo** polling center there are erasures on the form 35 at the top but the total number of votes for all the candidates is not changed which is 206. The petitioner got 169 votes which is similar to those posted by IEBC against 5 votes for the 3<sup>rd</sup> respondent.

At **Mushulilie** polling station it is contended that the votes cast were changed. The form 35 only shows a minor correction on the total number of votes cast of 220. It is the zero on that figure which was re-written. The station had 5 rejected votes and 215 valid votes. The petitioner got 168 votes against 2 votes for the 3<sup>rd</sup> respondent. The posting by PW5 gives the petitioner 168 votes and it is the same number of votes given to him the IEBC. Although the form 35 was not signed by the agents the presiding officer **Stanley Onyimbo** signed it. There should be no issue for the station. The next one is **Buhayi** polling station where it is alleged that the number of votes cast was changed. Again there is a minor correction in the total number of votes cast of 562 and a cancellation of 549 and replaced with 551 for the total number of valid votes. The petitioner got 18 votes against 332 for the 3<sup>rd</sup> respondent. PW5 gave the petitioner 18 votes and it is the same number of votes given to him by IEBC. The form was signed by the agent. At **Mwikoli** polling station the cancellations were countersigned and it involves the total number of votes cast whereby 217 was cancelled and replaced with 215. The petitioner got 133 votes against the 3<sup>rd</sup> respondent's 11 votes. PW5 posted 133 votes for the petitioner which is the same figure given to him by the IEBC. The form was signed by 10 party agents. There should be no issue with that polling station. The other complaint is **Sisokhe** polling center where it is alleged the spoilt papers and total votes were changed. The form 35 has some cancellations but the form does show that the total number of votes cast was 625. The spoilt votes are normally replaced. The actuals for all the candidates was 625 votes. The 3<sup>rd</sup> respondent got 449 votes against 5 votes for the petitioner. The

form was signed by party agents. PW5 gave the petitioner 15 votes instead of 5 giving a variance of 10 votes. The total number of votes cast was 625 and there were no rejected votes. Therefore the extra 10 votes by PW5 cannot be true. At **Bukhubalo** polling station it is alleged that the spoilt ballot papers were changed. The form 35 shows that there was one spoilt ballot paper and 5 rejected votes. The record had indicated zero spoilt ballot papers but it was changed to one and as indicated herein above a spoilt ballot paper does not affect the results. The petitioner got 12 votes and it is the same number of votes given to him by his chief agent. The form was signed by the party agents. Similarly for **Kamuli** Primary the alleged changes on the total number of votes is so minor to raise any issues.

At **Mungakha** polling center there is a re-writing on the total number of votes cast of 325. This does not affect the actual results for all the candidates. The petitioner got 40 votes and it is the same number of votes given to him by his chief agent. The form was signed by 5 party agents. At **Namakoye** Primary the issue is on spoilt ballot papers having been changed. It is only one spoilt ballot paper and the total actuals for all the candidates was 461 votes. The petitioner got 4 votes and it is the same number of votes posted by PW5. At **Lusumu** dispensary there is a slight change on the figure 271 whereby the figure 1 was re-written in figures but the writing in words is correct. The actual number of all the votes for the candidates was 271. The petitioner got 41 votes and his chief agent also posted the same number of votes. The form was signed by 10 party agents. At **Butieri** polling station it is contended that the rejected votes was changed as well as the valid votes. There was no rejected votes and it is only the figure zero that was overwritten. There is cancellation in words on the figure 9 for 209 votes. The actuals for all the candidates was 209 votes and there was no rejected vote. The form was signed by 9 party agents. The petitioner got 14 votes and it is the same number of votes posted by PW5. At **St. Mary Situkhumi** center there is only a negligible change on the figure 9 in 189 for the total number of valid votes. Indeed the actual total votes for all the candidates was 189 and the change does not affect the results. One party agent signed the form. The petitioner got 4 votes but his agent posted 9 votes. There were 4 rejected votes and the total number of votes cast was 193. The extra 5 votes by PW5 cannot be true as it exceeds the total number of votes cast. The next one is **Sivilie** polling station where there is cancellation in figures for the word 13 and replaced with 12. There was one spoilt ballot paper and 2 rejected votes. The actuals for the candidates is 214 votes. The petitioner got 5 votes and the same figure was captured by PW5. Two agents signed the form 35.

With regard to **Namirama** polling station, it is contended that there is changes on the votes cast for stream II. The presiding officer only rectified the total number of votes cast at the top of the form 35 which was 441. It is the last figure which was corrected. There were 438 valid votes and 3 rejected votes giving a total number of votes cast of 441. The petitioner got 6 votes in stream I and 6 votes in stream II giving a total of 12 votes which was captured by PW5. Moni Wekesa got 245 votes in stream I and 268 votes in stream II and was the winner in those two streams. The two forms for the polling center were signed by 8 party agents for stream I and 10 party agents for stream II. Another contention relates to **Chekata** polling station where the petitioner complains that the total number of votes cast was changed as well as the number of valid votes. There was no rejected votes at the station and there were 14 spoilt ballot papers. The actual number of votes for all the candidates is 440 and each candidate got his proper number of votes. The petitioner got 3 votes but PW5 posted 8 votes. The variance of 5 votes cannot be accounted for as there was no single rejected vote. The form was signed by 7 party agents.

At **Makhima** polling center there are changes on the number of valid votes in words where the word hundred is overwritten. However, that did not change the actual votes for each candidate. The petitioner got 5 votes which were captured by PW5 and the form was signed by 7 party agents. At **Muregu** polling center it is alleged that the number of valid votes cast was changed. The form 35 shows that there were 453 valid votes and 7 rejected votes giving a total of 460 votes cast. The petitioner got 6 votes and PW5 captured the same number of votes. The form was signed by 3 party agents. As for

**Konyero** Nursery polling station there is a slight change on the total number of votes cast in figures. There were 4 spoilt ballot papers and no rejected votes. The actual valid votes for all the candidates was 206. The petitioner got 2 votes but PW5 captured 4 votes. Since there was no rejected vote and the total votes cast was 206 the extra 2 votes by PW5 cannot be added to the tally as that would exceed the total number of votes cast. At **Lutaso** the changes were made on the figure 4 in 314 for the total number of votes cast. There was one rejected vote and 313 valid votes which are the actuals for all the candidates. The petitioner got 4 votes and PW5 captured the same votes. Six party agents signed the form. The same trend occurs for the remaining contested polling stations namely **Buchangu, Simuli, Nambacha stream II, Sihanikha, Chebuyusi Primary, Matoyi** and **Goodshepherd**.

The petitioner raised another issue relating to the aggregate of the votes. Most of the issues raised in page 12 – 14 of the application involve polling stations which I have already dealt with herein above. The complaints are just an expansion of the earlier one involving the aggregate number of votes for each candidate and the recorded valid votes. The purported variance by the petitioner is not true. The only anomaly I have noted is for Ematiha polling center where the total number of valid votes for all the candidates is 1013 but the form 36 posted 980 votes. After perusing the form 35 and form 36 I do note that the votes for the 3<sup>rd</sup> respondent were erroneously posted as 199 yet his total was 209 (77 + 132). The votes for Leonard Mayende were posted as 3 yet he got 6 (3 + 3). Also the votes for Moni Wekesa were posted as 41 instead of 60 (30 + 30). The same applies for Vance Paul Udoto who got 72 votes in stream I and 67 votes in stream II but it was posted as 134 votes. With regard to **Bushiri polling center, Ewamakhumbi, Shikomari, Eshikhoni, Ebushibo, Namakoye, Lusumu, Sivilie** and **Muregu** the issues have just been dealt with herein above and the forms 35 gave results for each candidate which were not altered. The alleged differences or variance by the petitioner are too minor to affect the results. For instance it is claimed that some figures are different in words from those ones in figures. It is the same explanation which I have expounded herein above. The end result is that these alleged variances did not affect the result and no candidate benefited from the alleged variances. For instance at **Kharanda** polling station it is alleged that there is a variance of one vote. The question is, who benefited from that 1 vote when the total number of votes for all the candidates is 487. There were 2 rejected votes and the difference whereby the presiding officer indicated the total number of valid votes as 485 could only have been a human error attributed to the 2 rejected votes. The form was signed by the agents. The petitioner got 4 votes and it is the same number of votes given to him by PW5. What would be the reason to scrutinize or recount those votes. The same applies to **Sikubule, Tanga, Buchangu, Newlife Academy** and **Naulo Primary**. At **Sikubule** the total number of votes for all candidates is 367 but the presiding officer captured 368. The petitioner got 6 votes and the same was captured by PW5. The form was signed by 8 party agents signifying the correctness of the results. At **Tanga** the total number of votes for all the candidates is 240 and there were 2 rejected votes. The presiding officer wrote 246 valid votes and 248 total number of votes cast. The form was signed by 6 party agents and the form 36 give the total number of votes as 240 with 2 rejected votes. The difference was just a human error which did not affect the results. At **Buchangu** the total votes for all the candidates is 579 and there were 6 rejected votes. There were also 2 spoilt ballot papers. The presiding officer captured 585 total number of votes cast which is correct and the alleged variance of 6 votes is not true as there were 6 rejected votes. The form was signed by 11 party agents. The form 36 gives 585 valid votes and 6 rejected votes. The petitioner got 6 votes and PW5 captured the same number of votes. There is no issue with that polling station.

At **Newlife Academy** it is alleged by the petitioner that there is variance of 6 votes. The total number of votes for all the candidates is 333. There were 4 rejected votes and the presiding officer captured 337 total number of votes cast which is correct. The alleged variance is not true as the figure on form 35 for all the candidates is 333 instead of 327 as alleged by the petitioner. I do note that the handwriting is in small print and counsels for the petitioner could have missed the correct figures. The

petitioner got 11 votes which were captured by PW5. The form 36 gives the correct figure of valid votes of 333 and 4 rejected votes. At **Naulo Primary** the total number of votes for all the candidates is 325. The form 35 is very clean and has no corrections. It was signed by 12 party agents. There were 3 rejected votes. The petitioner got 15 votes which were correctly captured by PW5. The alleged variance is not established. Counsels for the petitioner got 322 valid votes instead of 325 and that was a mistake on their part as the correct number is 325 (144 + 3 + 15 + 3 + 121 + 1 + 38).

From the petition itself the petitioner contends that the voting went on very well and there were no incidents that were recorded. Paragraph 6 of his affidavit states as follows –

**“THAT I confirm that on 04<sup>th</sup> March 2013 voting begun and ended generally well at about 6 p.m. in all the 82 polling stations within Navakholo Constituency.”**

The petitioner also contends that the results for Shikomari Primary School were not announced at the tallying center. Paragraph 11 of his supporting affidavit states as follows-

**“THAT at that time National Assembly results from 81 out of 82 polling stations had been announced except results from SHIKOMARI PRIMARY SCHOOL POLLING STATION.”**

From the evidence on record it is established that there is no single polling station where the results were contested. The mere fact that some forms 35 were not signed by some party agents do not make those results invalid. The signing of the forms 35 by many party agents cannot be a ground for scrutiny or recount. There is no evidence that those who signed the forms were legally entitled to do so. No witness testified to the effect that there were some results at a polling station that were altered or erased for any particular candidate. Indeed the alleged erasures and cancellations merely appear on the upper part of the form 35 but all the postings in all the forms 35 for the individual candidates have no corrections, rubbing, alterations or erasures. The petitioner picked some forms 35 which have such erasures and rubbing at the upper part forgetting that the party agents signed some of those forms and also forgetting that the results in some of those forms were the same results captured by PW5. The list provided by PW5 is also erroneous and cannot be relied upon entirely as by the end of his tally it gives him 10,223 instead of 10,527. This shows that the variances are not correct. I have already explained in those stations where PW5 posted the wrong results. At Tumaini NFE School PW5 posted 283 votes for the petitioner instead of 183 votes giving a variance of 100 votes. The total number of registered voters at the station is 309 and 267 votes were cast. Simple logic indicate that if the variance of 100 votes is added to 267 that would exceed the registered number of voters of 309. This also shows why PW5 got 10,223 instead of 10,527 as the final total.

The dispute for Shikomari has already been explained in this ruling. The form 36 gives the petitioner his correct number of votes that is 633 and the allegation that it was not included in the final tally cannot be true. The 2<sup>nd</sup> respondent Wilson Kimutai Kipchumba who was the returning officer testified that after the gazettment of the results he noted that there was a problem for Kaunda polling station and Emuhuni polling station. As for Kaunda polling station the votes were 263 for the 3<sup>rd</sup> respondent but the posting on form 36 was captured as 43. Similarly for Emuhuni Primary School polling station there were two streams but only stream II was posted on the form 36 but stream I was excluded. According to him even after correcting those two polling stations the 3<sup>rd</sup> respondent widened the winning margin. The form 35 for Kaunda polling station shows that there were 697 registered voters and 564 turned to vote. There were 541 valid votes and 23 rejected votes. The 3<sup>rd</sup> respondent got 263 votes while the petitioner got 41 votes. PW5 posted 41 votes for the petitioner. The form 35 was not signed by the party agents although their names are indicated on the form. The form 35 for Emuhuni stream I shows that there were 515 registered voters and 422 turned up to vote. There were 2 rejected votes.



The 3<sup>rd</sup> respondent got 106 votes against 9 votes for the petitioner. In stream II there were 516 registered voters and the petitioner got 2 votes against 127 for the 3<sup>rd</sup> respondent. Both forms 35 were signed by 3 party agents. The petitioner got 11 votes from both streams but his chief agent posted 7 votes giving a negative variance of 4 votes.

The underlying objective of an order for scrutiny or recount is to verify the results of the election which is being challenged. An election involves numbers and when the numbers are being contested it would be incumbent upon the court to decide as to whether justice can be done without visiting the ballot boxes. It does not follow that whenever the winning margin is small then scrutiny and recount would be granted as a matter of course. Since the petitioner has to lay basis for his request it is clear that the evidence has to be taken before the court can grant the order. However, Section 82 of the Act gives the court the power to issue an order for scrutiny suo motto and this can be done even before the first witness testifies in court.

### **Final determination**

There is no claim that none registered voters were allowed to vote or that in any single polling station there were more votes than the number of registered voters. The petitioner himself testified that his main problem was the tallying process at Chebuyusi tallying station. Similarly the petitioner's chief agent did confirm that the election went on fairly well and there was no complaint from their agents as to the voting process. The provisions of Rule 33 (4) of the Election Petition Rules limits an order for scrutiny to certain specific documents. The evidence on record does not question any of the items listed in Rule 33 (4). Although counsels for the petitioner have made some arithmetic computations for some polling stations which question the validity of the rejected votes as well as the aggregate votes, I have gone through each and every allegation made by the counsels and note that some of them are incorrect and others do not change the results. With regard to the allegation that some agents did not sign the forms 35 I do find that this cannot be a ground for scrutiny of those polling stations. The evidence on record shows that no agent was denied the opportunity to sign the forms 35. The presiding officers signed the forms 35 and the results contained in those forms are valid. The claim that more agents than those authorized by the parties signed the forms 35 does not invalidate those forms. Erasures and cancellations on election materials is bound to occur. The most important issue is to determine whether those erasures and cancellations or discrepancies affected the results. In the case of **MUNYAO V MUNUVE & 4 OTHERS [2008] 2KLR (EP)** the court noted that there were some deficiencies in the electoral process and stated that "*whatever little deficiencies that may have occurred in the conduct of the election have not been shown to have affected the outcome of the results thereof*". In Nairobi Election No. 10 of 2008 Justice Kimaru in the case of **WILLIAM KABOGO GITAU V GEORGE THUO & 2 OTHERS [2010] eKLR** was of the view that cancellations and alterations in a statutory form should be countersigned by the concerned official. However the none countersigning of alterations do not automatically invalidate the document. In Kisumu Election Petition No. 1 of 2013 **JARED ODOYO OKELLO V IEBC & 3 OTHERS** the petitioner contended that there were alterations and unsigned corrections in the forms 35 and the returning officer conceded to those allegations. Justice Muchelule stated the following:-

*"there was the issue of the unsigned and/or undated corrections and alterations in the forms 35 which the 2<sup>nd</sup> respondent conceded during his testimony. The witness pointed out that the corrections and alteration did not alter or affect the final result. I have looked at the tallies in these forms. The petitioner will ultimately have to show how the results were materially affected by the alterations to his disadvantage. But there is nothing in them that should cause either scrutiny or recount."*

The results were counted, tabulated and tallied. Article 86 (b) & (c) of the Constitution states the

following:-

86. At every election, the Independent Electoral and Boundaries Commission shall ensure that:-

a) .....

**b) the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station.**

**(c) the results from the polling stations are openly and accurately collated and promptly announced by the returning officer.**

I do find that Article 86 of the Constitution was complied with. A party who applies for scrutiny or recount has to satisfy the court that he is worth the order. His pleadings and evidence should be able to raise doubt in the mind of the court as to the validity of the results. The petitioner herein had his chief agent who picked the correct results as posted by the 1<sup>st</sup> respondent in 55 out of the 82 polling stations. The differences with the other 27 polling stations have been explained in this ruling. As stated in the case of **MASINDE V BWIRE & ANOTHER [2008] 1KLR (EP)** *there must be a good reason before the court can order for scrutiny. An order for scrutiny is not automatic.* Under Rule 33 (2) the court has to be satisfied that there is sufficient reason to grant the application for scrutiny.

In the end I do find that the prayers for scrutiny and recount of all the ballot papers for Navakholo Constituency has not been established. The reasons given by the petitioner do not satisfy the court to warrant re-opening of all the ballot boxes. The petitioner has not laid down a proper basis for recount and scrutiny of all the ballot papers. As for Kaunda market and Emuhuni stream I, I do find that there is need to verify the actual results so that they can be properly tallied with the other results. I have also noted that there were minor anomalies in the posting of the results from forms 35 to 36. This calls for a proper re-tallying of all the votes. The petitioner mainly complains that the tallying at Chebuyusi tallying center was not properly done and would like the votes to be re-tallied. Since there are two polling stations which I find should be recounted, I do grant the prayer for recounting for the two polling stations and for re-tallying of the votes cast for member of National Assembly for Navakholo Constituency. Prayer 5 of the application dated 24.6.2013 partly succeeds to the extent of the prayer for re-tallying of the votes.

I do therefore make the following orders:-

1. The Deputy Registrar Mrs. Caroline Kendagor to recount the votes for Kaunda Market polling station number 42 and Emuhuni Primary School polling station number 73 stream I only.
2. After recounting the votes from the above two polling stations the Deputy Registrar to re-tally all the other votes as per the forms 35 provided by the 1<sup>st</sup> and 2<sup>nd</sup> respondent.
3. The Deputy Registrar to develop a tallying sheet that will capture the votes for all the candidates as well as the rejected votes.
4. The petitioner and the respondent shall be represented by three agents and one counsel during the process.
5. The packets for spoilt votes shall not be opened.
6. The Deputy Registrar to file her report within five (5) days hereof.

Other than the above orders the application dated 24.6.2013 is hereby dismissed with no orders as to costs.

DATED AT KAKAMEGA THIS 26<sup>TH</sup> DAY OF JULY 2013

SAID J. CHITEMBWE

**J U D G E**



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