



**REPUBLIC OF KENYA**

**IN THE CHIEF MAGISTRATE'S COURT AT CHUKA**

**ELECTION PETITION NO. 1 OF 2013**

**CHARLES NYAGA NJERU .....PETITIONER**

**=VERSUS=**

**THE INDEPENDENT ELECTORAL &**

**BOUNDARIES COMMISSION.....1<sup>ST</sup> RESPONDENT**

**NEVERT NTWIGA.....2<sup>ND</sup> RESPONDENT**

**RULING**

**Background and the application**

1. This Honourable Court held a pre-trial conference on 28/05/2013. All the parties were present. Mr. Kariuki counsel for the petitioner expressed his intention to file an application for re-tally and/or scrutiny. Mr. Nyaburi counsel for the 1<sup>st</sup> respondent as well as Ms. Muthoni counsel for the 2<sup>nd</sup> respondent did not have a problem with that. However they were of the view that if the application is made formally the same can be heard parallel with the petition. The court then directed that the application be filed anytime during the hearing since the same is provided for in the elections (parliamentary and county elections) petition rules. Counsels agreed on the hearing dates.
  2. On 13/06/2013 the petitioner filed a notice of motion application for re-tally and/or fresh scrutiny. When the petition came up for hearing on 24/06/2013, the petitioner's counsel informed the court that he had filed an application for re-tally and/or scrutiny and sought the courts directions. Counsel for the 1<sup>st</sup> respondent informed the court that he was ready to proceed with either the application or hearing of the petition. Counsel for the 2<sup>nd</sup> respondent took the same stance. The court directed that it would be ideal for the application to be heard after the full hearing of the petition. The case proceeded for hearing and parties closed their respective cases on the same date.
  3. The parties immediately thereafter proceeded to argue the application, which is expressed to be brought under section 80(d), 82 of the Election Act 2011 and Rule 32 and 33 of the Election Petition Rules. The applicant has sought the following orders;
- 1. THAT**, this Honourable court be pleased to order a RE-TALLYING and/or FRESH SCRUTINY of TOTAL VOTES CAST, VALID ONES, SPOILT ONES as well as TOTAL VOTES OBTAINED by each candidate particularly the petitioner and the 2<sup>nd</sup> respondent in the entire MITHERU WARD and particularly in the following polling stations where there is now CLEAR, VISIBLE,

UNDISPUTED evidence of ALTERATIONS OF RECORDS that is to say Kiini Primary School, Ikame Primary School, Mugona Primary School ,Kiamuchumbi Tea Buying Centre, Giampapo Primary School, Gaketha Primary Schol, Muthenge Apostolic Church Grounds, Kathangawe Primary School, Igangara Secondary School, Kaganjo Primary School, Muragara Primary School, Ndumbini Primary School, Kagongo Gacheke Primary School, Nkururu Nursery School, Magundu Primary School, Magundu Secondary School, Gituntu Primary School & (Kamachuku Primary School- that has more than one form 35 as well as visibly interfered with ballot box)

2. **THAT** the costs of this application be provided for;
  
4. The application is grounded on the affidavit of CHARLES NYAGA NJERU the petitioner and on the following grounds;
  - i. Evidence is documentary as well as oral
  - ii. All forms 35 in all the 28 polling stations are now part of record in the petition as originated by the 1<sup>st</sup> respondent. The respondents can't deny their own documents which clearly have alterations.
  - iii. Forms No. 35 in the polling stations of Kiamuchumbi Tea Buying Centre, Kamachuku Primary School, Muragara Primary School, Mikuu Primary School & Mikuu Market grounds are different in serial numbers to the ones supplied in court by the 1<sup>st</sup> respondent.
  - iv. With the clearly visible alterations of the record which was the basis of declaring the results it is not possible for anyone to be sure who validly won or what number of ballots are inside each of the 28 polling stations particularly where alterations are visible.
  - v. There should be no reason why the respondent should oppose this application which is prompted by their own records and more so the 2<sup>nd</sup> respondent if confident that he validly won, recount perhaps can as well confirm the declared results.
  - vi. A recount could easily determine this petition and bring to an end any anxiety of all parties as well as save judicial time and resources as it can be done in a day.

Annexed to the application are forms 35s of the polling stations cited and form 36 comprising of entries made in the entire ward.

The 1<sup>st</sup> respondents counsel filed the grounds of opposition on 20/06/2013 whereas the 2<sup>nd</sup> respondent's counsel filed a replying affidavit on 20/06/2013

#### **5. Arguments and submissions by the petitioner's counsel**

Counsel relied on the grounds set on the face of the application and added that the court has powers to order for scrutiny suo moto. He appreciated that scrutiny is not automatic and has to be based on evidence. He submitted that the application met the principles applicable and urged the court to look at form 35s annexed to the application which forms had visible alterations. His contention was that the difference in votes in respect to the petitioner and the 2<sup>nd</sup> respondent was 10 votes and for the sake of the county's prosperity a recount would bring this case to rest expeditiously. He wondered why the 2<sup>nd</sup> respondent would shy from being confirmed a million times the winner. In reply to the contents of the 2<sup>nd</sup> respondents affidavit he reiterated that they had satisfied the principles of recount and infact they had reduced the recount from all the 28 polling stations to only 20 as indicated in prayer 1 of their application.

6. In reply to the authorities supplied to him by the 1<sup>st</sup> respondent's counsel, he argued that all the authorities had one principle that is, why scrutiny can be allowed or disallowed. He referred the court to Election Petition No. 13/2013 Philip Osoke Ogotu vs Michael Onyona Arigo & 2 others at page 6 of 7 where Justice Ngaah sitting at Nyeri High Court had this to say. *"I would suppose such is the case where the case for scrutiny or recount is so glaring on the face of it, for example,*

*in circumstances where the evidence of such scrutiny or recount is uncontroverted; each case will of course depend on its peculiar facts and circumstances, but certainly the present case does not appear to fall under this category in view of the fact that recount or scrutiny of the votes is not the only issue in the petition".* His submissions were, the ratio in the authority is that the application would not be allowed if made too early.

7. Counsel also referred the court to Election Petition No. 6 of 2013 Rishad Hamid Amana vs Independent Electoral and Boundaries Commission & 2 others in which case Justice Kimaru sitting at Malindi High Court highlighted instances when the court can order scrutiny. The court went ahead and singled out certain stations and gave directions on how the recount should be done. The court was once again referred by counsel to paragraph 845 at page 622 of Halsbury's laws of England where it was stated that "A recount is not granted as of right, but on evidence of good grounds for believing that there has been a mistake on the part of the returning officer. If there are more than two candidates for more than one seat and if a petition is presented against one, claiming as against him a re-count and the seat, it is not necessary for the petitioner to claim a general re-count, that is as regards the other candidate or candidates as well, on the recount against the respondent resulting in the petitioner's favour, he becomes entitled to the respondent's seat. He submitted that the implication of those wordings is that so long as a basis is laid recount can be granted. The only caution is it is not of right or automatic. His final submissions were that the rest of the authorities were no longer applicable as evidence had been heard. He urged the court to do justice by doing the recount on the specific polling stations stated in the application

#### **8. Response by 1<sup>st</sup> respondents counsel.**

The 1<sup>st</sup> respondent through his counsel Mr. Nyaburi in opposing the application relied on his grounds of opposition except ground number 2 which had been over taken by events. Counsel's argument was that the petitioner at the time of presenting his petition is required to set out grounds on which he seeks recount as envisaged in rule 10 [1] [e] and rule 10 [3] [b] of the elections [parliamentary and county elections] petition rules 2013. The response expected to be filed there to is specific to the complaints raised before the court. Secondly rule 80 of the elections [general] regulations 2012 provides that once counting of votes is completed at the polling station candidates and the agents are allowed to ask the presiding officer to check and confirm the votes by requesting a recount , so that by the time the petition is presented to court , the two grounds ought to have been covered. His argument was that only rule 32 and 33 of the elections (parliamentary and county elections ) petition rules 2013 indicate the manner in which an application for scrutiny can be filed and what will or ought to be done during the scrutiny.

9. He appreciated that the court has power to order a recount under rule 32 where it is stated in the petition that the only issue is a recount. In the instant suit, he argued there are other issues raised in the application and unless the petitioner is ready to satisfy rule 20 the court must decline to order a recount. He submitted that rule 33 (4) provides that scrutiny can only be confined to areas where results are disputed. The only dispute according to him from the petitioner's pleadings is in respect to Kamachuku polling station and that is the only station the court can order a recount. He submitted that the petitioner confirmed in his testimony that he did not dispute results in the other polling stations and that he had not filed any complaint. Counsel contended that the complaints raised in paragraph 11(a) of the petitioner's supporting affidavit in respect to Mugona, Karimba and Giampapo polling stations in respect of voters being denied to vote cannot be solved through scrutiny. The votes garnered at Mugona are not challenged and therefore scrutiny will be an exercise in futility.

10. Counsel submitted that the petitioner's application is an abuse of the court process as he is only engaging in a fishing expedition with a hope of obtaining new evidence in respect of areas not in

dispute so as to strengthen his case. In respect of grounds 4 combined with 5 of his grounds of opposition he submitted that no sufficient evidence had been laid to warrant scrutiny of any of the polling stations and besides his witness had given reasons of upholding the results she announced. He stated that her client had admitted that the petitioner got 176 votes therefore the petitioner ought not dispute that the 2<sup>nd</sup> respondent got 55 votes from the same polling station. Counsel referred the court to Election Petition No. 9 of 1993 Masinde versus Bwire and another which set out principles that ought to guide the court in granting an order for scrutiny and submitted that in the instant case no basis had been laid. He pointed out that in the case of Ng'ang'a & another vs Owiti & another EP No. 41 of 1993 the principle that a proper basis ought to be made any time before judgement was reiterated.

11. Counsel referred the court to Election Petition No. 3 of 2013 Peter Gichuku King'ara & 2 others and stated that the court was supposed to address the issue upon which an application for scrutiny ought to be made. He also cited Election Petition number 1 of 2013 Philip Ojore Ogutu vs Michael Onyura Amigo & 2 others and said at paragraph 18 on page 3 the court had this to say *"it would be upon a party seeking scrutiny to choose when to approach the court. It all depends, I think, on the ability of the applicant to marshal sufficient evidence to persuade the court that scrutiny is deserved. And there is no reason why this cannot be made prior to the hearing given that the election petition rules require that substance of the evidence to be relied on by the parties be set out in the affidavits accompanying the petition or the responses"*. Counsel pointed out that at paragraph 19 on the same page the court considered application of rule 33 (2) of the election petition rules that the court must be satisfied that there is sufficient reason to require an examination of the ballots and at paragraph 20 where the court said scrutiny is not a matter of course so as to avoid abuse of the court process.
12. Counsel stated that at paragraph 21 on page 4 of the same authorities, the court held that scrutiny is a painstaking exercise and should not be carried without good cause. At paragraphs 23, 24 and 25 where the court said evidence beyond pleadings should not be allowed. He said in the instant application the petitioner had introduced new evidence and the court ought not consider the new areas raised. Counsel further cited Election Petition number 4 of 2013 M'Nkiria Petkay vs Ragwa Samuel Mbae & 2 others in which Justice Lesiit sitting at Meru High Court set out clearly at page 20 what should be considered in granting an application for scrutiny. He also relied on Election Petition number 6 of 2013 Rishad Hamid Ahmed Amana vs Independent Electoral and Boundaries Commission & 2 others paragraphs 32, 40 and 41 where the court indicated that it would frown on an application seeking to fish evidence. At paragraph 40 the court was in agreement with the respondents that the petitioner can only ask for scrutiny and recount in respect of polling stations which he specifically pleaded in his petition. He finally submitted that the law has not changed and that the decisions cited bind the court. He prayed that the application be dismissed.

### **13. Response by 2<sup>nd</sup> respondent's counsel**

Ms. Muthoni counsel for the 2<sup>nd</sup> respondent equally opposed the application and relied on the 2<sup>nd</sup> respondent's affidavit sworn on 19/06/2013. She adopted submissions made by 1<sup>st</sup> respondent's counsel since they are also captured in the said affidavit. She emphasized that the only polling station legible for scrutiny is the one in dispute and that is Kamachuku polling station. She submitted that parties are bound by their pleadings and the petitioner ought to have established a prima facie case to warrant scrutiny which he has failed. She referred the court to Election Petition number 13 of 2008 John Kiarie Waweru vs Beth Wambui Mugo & 2 others at page 23 where Justice Kimaru sitting at High Court Nairobi stated *"The petitioner further failed to establish any basis for this court to order the scrutiny of the ballots in respect of the parliamentary elections of Dagoretti Constituency"*. At page 24 of the same case the court was of the opinion that the petitioner made generalized allegations against the respondent with the hope that when the said allegations are considered in totality a picture would emerge

that the elections were conducted in a manner that was not free and fair. She mentioned that in the instant application no specific prayers have been sought. She relied on Election Petition number 6 of 2013 paragraph 32 already mentioned by the 1<sup>st</sup> respondents counsel Mr. Nyaburi which submissions counsel adopted and there is no point therefore to duplicate the same.

14. Counsel for the 2<sup>nd</sup> respondent mentioned paragraph 845 Halsbury's Laws of England where it was stated that a mistake has to be on the part of the returning officer for a recount to be ordered. She submitted that the mistake did not materially affect the outcome of the elections for Mitheru ward to warrant scrutiny. Counsel argued that rule 32 of the election petition rules provides that for an order for scrutiny to be granted, the petitioner ought to state in his petition that he is only seeking a recount but in the instant case the petitioner has sought for recount among other prayers hence barred from applying rule 32. She finally submitted that the application was an abuse of the court process and urged the court to dismiss it with costs.

In a brief reply Mr. Kariuki counsel for the petitioner pointed out that the application had been argued after all the evidence had been heard and further stated that the custodian of the ballot boxes confessed while giving evidence that they do not know what is in the ballot boxes unless the court ordered a scrutiny. He asked "if there are disputes in form 36 how much do we need to go" He argued that is still within the statutes that courts should pay undue regard to technicalities. The court cannot be barred or directed on what to look at. He argued that Justice Ngaa in deciding Election Petition number 3 of 2013 at Nyeri High Court already mentioned, considered the margin of the votes. In the instant case about 4-5 votes are in dispute if not 10 votes utmost. He rested his submissions by stating that they were no longer on a fishing expedition. The fish had gotten itself out of the water, some had placed itself on the fry and they had infact made a meal. He stated that the respondents will not suffer any prejudice as the petitioner had already made arrangements for their costs in the event he lost the case. He prayed that the application be allowed.

## **15. The law applicable**

### Section 82

1. of the elections act (Act No. 24 of 2011) states as follows "An election court may, on its own motion or on application by any party to the petition, during the hearing of an election petition, order for a scrutiny of votes to be carried out in such manner as the election court may determine".
2. Where the votes at the trial of an election 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 person 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 after sufficient public notice of the disqualification or when the facts causing it were notorious.
3. The vote of a voter shall not, except in the case 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.

16. Rule 32 of the election petition rules provides thus;

“(1) Where the only issue in the election petition is the count or the 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 provides as follows:

“(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 results are disputed and shall be limited to the examination of-

- a. The written statements made by the polling 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 election results are in dispute;
- d. The written complaints of the candidates and their representatives
- e. The packets of spoilt 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;
- j. The statements showing the number of rejected ballot papers;

#### **17. The decision of the court.**

At this point the court has had the advantage of hearing all the witnesses for each party and the parties have closed their respective cases. What is pending before me for determination before a final judgement is delivered is the petitioner's application for a retallying and/or fresh scrutiny of the stations cited in the application. I have considered the entire evidence adduced by the witnesses, pleadings on record, learned counsels rival arguments and submissions and lastly the authorities placed before me for consideration. In my view the issues that arise for determination are;

- i. Whether the petitioner's application introduces issues or evidence not contained in the petition; if so
- ii. Whether the court should nevertheless consider the new issues and evidence and make a determination thereon.

- iii. Whether the petitioner has made up a case for granting the orders sought.
- iv. If the answer to number (iii) is yes, in respect of what documents or polling stations should the order be made"
- v. What is the order as to costs"

18. The court proceeds to decide the above stated issues as follows;

**i. Whether the petitioner's application introduces issues or evidence not contained in the petition.**

The petitioner's application for scrutiny is hinged on what they allege to be evidence of physical interference on top of many ballot boxes particularly for Gaketha Primary School and Kamachuku Primary School. That is averred at paragraph of the applicant's affidavit sworn on 13/06/2013. While giving evidence during the hearing of the petition, the petitioner testified that while the ballot boxes were being delivered at Igamba Ngombe IEBC (Independent Electoral and Boundaries Commission's) offices he noted that forms 35s which were stuck to the boxes were placed upside down an indication according to him that the forms or the ballot boxes had been interfered with. The application is also hinged on what the petitioner alleges to be visible alterations of records in form 35's particularly in respect to the polling stations mentioned at paragraph 7 of his supporting affidavit. Finally the application is appealed on what the petitioner alleges to be evidence of difference serial numbers with respect to forms 35's supplied to the court particularly those for Kiamuchumbi Tea Buying Centre, Kamachuku Primary School, Mikuu Primary School and Mikuu Market Grounds.

19. The petitioner has pleaded at paragraph 6 of his petition that his agent one Rose Ntinyari Karimi (PW2 ) witnessed all the counting and tallying of votes cast at Kamachuku Primary School and whereat he received a total of 176 votes but only 17 votes were recorded thus making him lose 159 votes. At paragraph 8 he has stated if the proper votes for Kamachuku primary School were recorded and tallied he ought to have received a total of 2333 votes and emerge to be declared the winner instead of the 2<sup>nd</sup> respondent who is alleged to have received a total of 2294 votes hence declared the winner when he actually received 2289 votes had proper addition been done. At paragraph 11(a) –(c) of his supporting affidavit sworn on 5/4/2013 he has averred that there were other massive irregularities in the conduct of the elections. He has pointed out Mugona Primary School polling station where 11 votes were not accounted for and annexed a copy of the affidavit of Martin Mwiti Kaburu (PW3) his identification as well as form No. 35 for the said polling station. At paragraph (b) he averred that a voter by the name Japheth Mutegi could not find his name in the register of voters even in the BVR identification thus did not vote at Karimba Primary School. At paragraph (c) he has stated that one Teresia Mukwanjeru M'Imwitha faced a similar situation at Giampapo Primary School.
20. Counsels for both respondent's took issue with introduction of so many complaints in the application which had neither been raised in the petition nor supported by the affidavits and witness statements filed in support of the petition. Counsel for the 1<sup>st</sup> respondent submitted that grounds for seeking recount ought to be set out in the petition as envisaged in rule 10(1) (e) of the election petition rules so that the expected response is specific to the complaint raised. He argued that the petitioner failed to explore rule 80 of the election regulations by seeking a recount by the presiding officer after the counting had been completed. Both the respondents counsels bone of contention was that whereas the petitioner had specified only Kamachuku Polling Station in his petition stating that the correct votes were not announced, in his application he has listed more polling stations in which the malpractices and irregularities were allegedly committed. They also contend that the petitioner had raised the issue of serial numbers being different in respect to some of the polling stations a fact he never pleaded in his petition or supporting affidavit. It

was also not stated in his witnesses affidavits. Counsel for the petitioner however maintained that, at the time of filing the petition, they had not been supplied with form 35s for all the polling stations so as to factor in the issues raised in the application.

21. I do agree with both the respondents learned counsels that according to the petition, the only polling station that had a problem and which the 1<sup>st</sup> respondent has admitted was Kamachuku. In respect to the 11 uncounted for votes stated in the petitioner's supporting affidavit at paragraph 11 (a) I note that the votes were reflected in form 36 as rejected votes however form 35 of the same polling station reflects the number of rejected votes as 0. In my view those votes were not accounted for in form 35 justifying the complaint raised by PW 3 in his affidavit. In respect to paragraphs 11(b) and (c) I am in agreement that scrutiny cannot resolve the issue of the said voters being allegedly denied a chance to vote by virtue of their names not appearing in the voters register of BVR identification. Counsel for the petitioner while not denying that the application raised other issues not raised in the petition submitted that the petitioner had by implication referred to the said issues and urged the court to make a determination there on as all the evidence had now been tabled before it. It is therefore not in doubt from the foregoing that the application introduces issues or evidence not contained in the petition.
22. (ii) Whether the court should nevertheless consider the new issues and evidence and make a determination thereon. Article 159 of the Constitution enjoins the court to do substantial justice to the parties without undue regard to technicalities. That overriding objective has been imported into the Elections (parliamentary and county elections) Petition Rules 2013 by means of Rules 4 and 5. The Rules read:-

“(4) The overriding objective of these rules is to facilitate the just, expeditious, proportionate and affordable resolution of election petitions under the constitution and the Act”.

“(2) The court shall, in the exercise of its powers under the Constitution and the Act or in the interpretation of any of the provisions in these Rules, seek to give effect to the overriding objective specified in sub-rule (1)”.

“5(1) For the purpose of furthering the overriding objective specified in rule 4, the court and all the parties before it shall conduct the proceedings for the purpose of attaining the following aims-

- a. The just determination of the proceedings; and
- b. The efficient and expeditious disposal of the petition and in any case not beyond the timelines provided in the constitution and the Act with respect to election petitions”. Although the petitioner did not specifically plead all the issues he now points to in the instant application, the issue was implicitly canvassed at the hearing of the petition. Besides the 1<sup>st</sup> respondent supplied the court with all the form 35's and form 36 in respect to the election in question. The alterations are purported to be in some of these forms 35s. During the hearing it became apparent from the evidence of DW1 That there were two sets of forms 36 in respect of Mitheru ward and according to the courts observation the forms were not identical in content. The petitioner alleged that he got an original of the originals from the 1<sup>st</sup> respondents. The court had a chance of looking at the form. It had DW1's signature. She did not dispute the signature but gave an explanation that, it was a manual copy and what she relied on to announce the results was a printed copy. The court cannot in the circumstances turn a blind eye on such discrepancies just because the same was not pleaded in the petition.

23. In election petition No. 1/2013 at Bungoma High Court the court observed, “it makes sense to state that the constitutional order and the growing awareness that election disputes are public elections disputes should lead courts to develop new norms and standards to deal with the type

*of application before the court.” In Election Petition No. 1 of 2013 at Busia High court Justice F. Tuiyott stated at paragraph 22 “So this court, I would repeat, will have to be satisfied that scrutiny is necessary for the just resolution of this petition. In considering whether or not justification has been made, I must keep in mind that as an election court one of my primary duties is to examine whether an election has been conducted in a free, fair, impartial, neutral, efficient, accurate and accountable manner. Article 81 of the constitution highlights those as some of the principles that must be complied with in an electoral system. An election court should be at the fore front in interrogating whether an election conforms to those constitutional principles. This duty can only be carried out meaning fully if the court leans towards freely receiving information about the conduct of an election. And scrutiny can give useful insight as to how an election has been conducted. This was recently appreciated by the Supreme Court of Kenya. That court made suo moto orders for scrutiny in Supreme Court of Kenya petition No. 5 of 2013 Raila Odinga vs Uhuru Kenyatta & 3 others and explained itself as follows:*

*‘The purpose of the scrutiny was to understand the vital details of the electoral process, and to gain impressions on the integrity thereof’.*

24. I appreciate both respondents counsels submissions that parties are bound by their pleadings. That is trite and there is no doubt about that. I also appreciate their submissions on rules 10,32 and 33 of the petition rules but as observed in Election Petition No. 1/13 at Bungoma High Court and Election Petition No.1/13 Busia High Court, this court cannot achieve the sentiments expressed there in if it declines to consider the new issues and evidence captured in the application while making it's determination. In stating so I am guided by the case of Justus Mungumbu Omiti vs Walter Enock Nyambati Osebe & 2 others (Election Petition No. 1 of 2008) Kisii (unreported) and the principles of electoral system articulated in Article 81(c)(e) of the constitution. The said decision was cited by Justice Majanja while determining an application for scrutiny in Election Petition No. 7 of 2013 Richard Kalembe Ndile vs Dr. Patrick Musimba Mweu. It was also cited by Justice H.A Omondi while determining a similar application in Election Petition No. 5 of 2013 at Bungoma High court. They both appreciated the principle set out therein.
25. In the said case which I totally identify with the court noted that, “All issues raised in the petition and those which crop up during the hearing, whether pleaded or not, and which had the potential to affect adversely the final result and will of voters in a constituency must come under spotlight, scrutiny and interrogation. They have to be interrogated and determination made thereon.

*In this case all illegalities and irregularities which impugn the credibility of the outcome of the elections.....have to be considered. It will be a sad day indeed if such evidence which comes through the petitioner, his witnesses, the respondents and their witnesses, as well, to be discarded and rendered irrelevant, or inadmissible merely on the grounds that the same was not the subject of any pleading....At the end of the day what is of prime concern to this court, is whether the elections were conducted in a fair, free and transparent manner, and that they reflect the will of the voters and more importantly... Whether the respondent was validly elected. Such determination cannot be made if relevant evidence is looked out on technical grounds that the issues addressed by such evidence were not pleaded’.* Guided by the learned judge's view, I find that it is important in the interest of justice to consider the new issues and evidence raised in the application and make a determination thereon.

26. (iii) **Whether the petitioner had made up a case for granting the order sought.** The respondents counsels both maintained that the petitioner had not laid a basis warranty scrutiny of votes. They argued that he was not disputing the results of any polling station except Kamachuku Polling Station which he had raised in his petition and which in any case the 1<sup>st</sup>

respondent agrees he got a total of 176 votes as claimed in the petition. The 1<sup>st</sup> respondent's witness admitted that the error was rectified on 10/03/13 after the results had been announced. The petitioner contends that had he been given his rightful votes then he could be ahead with 2333 votes and the respondent would follow with 2289 votes according to the votes recorded in form 36 which was supplied to him by the 1<sup>st</sup> respondent. Both counsels for the respondents further argued that the petitioner had not demonstrated how the alterations if any worked to his advantage. They also argued that he had not demonstrated how the non-reflection of the 11 rejected votes at Mugona polling station in form 35 had affected him. They stated in agreement that the petitioner had not proved that the 2<sup>nd</sup> respondent did not actually get 55 votes instead of 5 votes at Kamachuku Polling Station. The 1<sup>st</sup> respondent's witness(DW1) while giving evidence admitted that some of the forms had alterations but the alterations did not affect the outcome of the results. She maintained that she announced the right winner. The reason she gave for the alterations is that the officers were tired after a long exercise and that she did not notice the alterations at the time of announcing the results.

27. The petition asserts that it is the returning officer's mistake in retallying the figures in form 36 that the petitioner is in court. Counsel for the petitioner submitted that the forms 35s and form 36 speak for themselves. He stated that most of them had alterations. He sought to take the court through the polling stations which had alterations during the hearing but the respondents counsel objected to that vehemently saying that the issues had not been pleaded in the petition. The court directed the petitioner's counsel to confine himself to the polling stations in dispute but cross-examine the 1<sup>st</sup> respondent's in regard to the documents. Both the respondents counsels still objected to the same. At that point counsel for the petitioner sought to show DW1 the stations with alterations without mentioning names and asking any questions. He then urged the court to look at the forms before it and make its own determination. While being cross examined about the votes cast at Kamachuku polling station DW1 genuinely stated that she could not tell what is in the ballot box unless the court ordered that the box be opened so as to ascertain what was actually in the box. She reiterated that the boxes had been sealed when the error was noted. According to the petitioner, the rectification did not benefit him as the results had already been announced and the 2<sup>nd</sup> respondent declared the winner.

28. The principles upon which the court acts in granting a prayer for scrutiny or recount have been considered and elucidated in several decided cases. I will just give a few examples. In the case of William Maina Kamanda vs Margaret Wanjiru Kariuki EP NO. 5 of 2008 [2008] eKLR Hon. Justice Kihara Kariuki summarized the importance and purpose of scrutiny as follows;

(1) To assist the court to investigate if the allegations of irregularities and breaches of law complained are valid.

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

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

In talking about the timing of the order for scrutiny, Kariuki J (as he then was) stated at paragraph 14 "*it is now well established that an order of scrutiny can be made at any stage of the hearing before final judgement whether on the courts own motion or if a basis laid requires so. It can be made if it is prayed in the petition itself as is the case in this petition or where there is ground for believing that there were irregularities in the election process or if there was a mistake on the part of the returning officer or other election officials*". The judge went ahead to make an order for scrutiny after hearing the evidence of 5 witnesses on the tampering of ballot boxes to which the electoral commission had not responded and also based on the fact that the commission could not account for approximately 37% of the form 16As in

respect of that election where the margin was 895 votes.

29. In the instant case the petitioner pointed out the mistake committed at Kamachuku polling station by the presiding officer which mistake was transposed to form 36. The returning officer announced the results based on the entries made in the said form. Whereas the 1st respondent's witness conceded while giving evidence that the mistake was committed by the presiding officer, she was quick to say that it did not affect the outcome of the elections. The petitioner maintains that it affected greatly because had the correct votes been announced he would have been ahead with a margin of 44 votes. In my view there is sufficient ground to order scrutiny of the votes cast at Kamachuku polling station. There is also need to scrutinize votes cast at Mugona polling station to ascertain why the 11 rejected votes were not reflected in form 35 yet they reflected in form 36.
30. There is also need to scrutinize the votes cast at Karimba polling station as one form 36 indicates the 2nd respondent got 232 votes whereas the other form indicates he got 237 votes.

In the case of Hamid Ahmed Amara vs IEBC & others Malindi petition no 6 of 2013 Kimaru J referring to the cases of Joho vs Nyange and the Kamanda case stated at paragraph 31:

*“From the above two(2) decisions it is clear that scrutiny can be ordered under (2) circumstances; firstly where irregularities have been established to have been committed by election officials and secondly where the margin between the winning candidate and the runner-up is such that scrutiny would be the best way in which to settle the dispute as to who actually won the election”.* The court went on to adopt the finding of justice Tuiyott in Busia Election Petition 1 of 2013- Philip Ojore Ogotu vs IEBC & others that scrutiny should not be used as a fishing expedition. He stated that an order for scrutiny should not be made where a prayer in this regard has not been made in the petition. He stated that at paragraph 20. The 1st respondent's counsel in his submissions took the court through the said holdings and the holding at paragraphs 33, 34, 40 and 41.

31. The learned judge went further to state correctly in my view *“that scrutiny should not afford a petitioner the opportunity to embark on a fishing expedition to discover new or fresh evidence. In this regard, scrutiny cannot be ordered where the petitioner has not specifically pleaded for scrutiny in his petition. It will not do for the petitioner to aver in the petition that he desires scrutiny and recount to be undertaken in respect of all the polling stations in the electoral area that is the subject of the dispute. The petitioner must plead in sufficient detail why he requires the court's intervention to order scrutiny. The court having looked at the decision by Justice Tuiyott and Justice Ngaa in Nyeri Petition 3 of 2013 Peter Gichuki King'ara vs IEBC & others recent rulings on the issue, also analyzed the recent trend on scrutiny and had this to say at paragraph 34 “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”.*
32. The court also analyzed the power of the court to grant partial scrutiny. He looked at two kinds of scrutiny that are available in our law. One form is the one created by Rule 33(4) where the rule requires that the exercise be limited to the polling stations where complaints have been raised. The other kind was the one carried out by the supreme court in Election Petition 5 of 2013, Raila Odinga & others vs IEBC & others. In that case, the supreme court ordered partial scrutiny to be undertaken in respect of form 34's of all the polling stations in the Republic to determine whether the results contained therein were reflected in the final tally that was announced by IEBC in the presidential poll. Another type of partial scrutiny is where the court only examines form 35s in respect of other elections other than the presidential elections to determine whether the results

transposed in form 36 reflects the correct tally. Rule 33(4) of the Election petition rules therefore gives the court wide discretion to do justice to parties in an electoral dispute in an efficient and expeditious manner (underlining mine)

Justice Kamau went on to say that in this case just like in the petition he was handling, the court had concluded the hearing of the case save for the determination of the petition. In addition there were two form 36s. The court noted that regulation 83 of the election (general) regulations 2012 do not provide for a situation where there can be two forms 36s one being a draft or provisional. This was one of the reasons the court ordered scrutiny.

33. Because of the rival arguments and the persuasive authorities placed before me, I took liberty to audit all form 35s in the 28 polling stations to verify whether the irregularities complained of rendered the contents therein unverifiable. The results of my audit is as provided below ;

(a) In majority of the polling stations there were alterations in respect to the votes cast. There were however very few alterations in respect to the votes cast for each candidate.

(b) Mugona primary school and Kamachuku primary school polling stations had each two forms 35s with different serial numbers.

c. All the alterations except for Ndumbini primary school were not countersigned.

(d) In some of the stations no reasons were given as to why the agents never signed the forms.

(e) In some of the stations the presiding officer did not make any remarks.

(f) The total votes according to my tabulation for the 2nd respondent from the form 36 attached to the petition were 2289 and those of the petitioner were 2174 votes so that if the said numbers were applied the margin would have been 15 votes. The total votes of the 1st respondent reflected in the said form are 2294. If that figure is used then the margin would be 120 votes. The figures of 2294 and 2174 are reflected in the form 36 supplied to the court by the 1st respondent.

(g) The form 36 supplied to the court unlike the one attached to the petition does not have the agents signatures, identification numbers, the dates and the name of the party.

(h) If indeed the petitioner garnered 176 votes at Kamachuku and not 17, then he got 2333 votes in total. Equally if the 2nd respondent got 55 votes in the said station and not 5 votes, then in total he got using the figure of 2289, 2339 votes. The margin would then be 6 votes. If the figure of 2294 is used then the 1st respondent got 2244 votes so that the margin would be (2244-2233) which is equals to 11 votes.

(i) The total votes for the candidate by the name Joshua Jackson Njeru in the entire ward according to the form 36 attached to the petition are 80. In the form 36 supplied to the court by the 1st respondent he got 60 votes in the entire ward.

34. Even though the 1st respondent's witness tried to offer an explanation as to what might have transpired in the said polling stations, I found her evidence to be speculative and incapable of clearing the doubts raised over the results in those polling stations as only the makers of the attached documents could have vouched for the irregularities therein. Unfortunately, no maker of the documents was called to testify and clear the doubts on who effected the alterations and what informed the alterations and omissions. From the foregoing, I am satisfied that the

petitioner has made up a case for granting the orders sought. I say that because the petitioner demonstrated that a mistake was committed by the offices of the 1st respondent in regards to Kamachuku polling station and Mugona polling stations which mistakes the 1st respondent admitted. Secondly the margin of votes between the petitioner and the 2nd respondent is very narrow compared to the total number of votes cast.

35. In petition no 1 of 2013 at Busia High Court, Justice Tuiyott at paragraph 35 had this to say “ I now turn to consider whether the margin of votes between the winner and the runner up justifies an order for scrutiny. That difference is 1389 votes. Whether or not this is a narrow margin will depend on the total number of votes cast. The total number of votes cast in the Butula constituency parliamentary election as published by the 3rd respondent is 36332. In the Hassan Ali Joho case (supra) that was cited to this court Maraga J (as he then was) gave examples of past decisions where the margins were so narrow that scrutiny was ordered without much ado. These include, Onamu vs Maitisi Election Petition No 2 of 1993 where the margin was 30 votes, Kiruja vs Muliro Election Petition No 13 of 1998 where the margin was 7 votes and Hamed Said vs Ibrahim Mwaura Election Petition No 1 of 1983 where the margin was 62 votes. The learned judge agreed with the holding in Onamu vs Mautsi that where the margin is very low justice will be done and seen to be done if scrutiny and recount is ordered from the beginning. I too would agree. In these instances a scrutiny and recount could unearth errors (inadvertent or deliberate) that may wipe out the small margin...”

In reaching my determination I have followed closely the decisions cited by justice Maraga while deciding the Hassan Ali Joho case so that even if the petitioner failed to lay a basis the court would still go ahead and order scrutiny by virtue of the narrow margin. Justice Maraga in the said case stated that “ scrutiny has also been ordered without laying foundations even where the margins are wide on the ground that a recount may tend to be an expeditious disposal of the petition.

36. (iv) **In respect of what documents or polling stations should the order be made.**

The petitioner in his application has asked for retallying and for fresh scrutiny in respect to 18 polling stations if not all the 28 polling stations. Counsels for both respondents strongly argued that if the orders are granted then they should be limited to Kamachuku Primary School polling station which is in dispute and the facts are pleaded in the petition.

In the case of William Maina Kamanda vs Margaret Wanjiru & 2 others (2008) eKLR it was observed :-

“ Where statutory forms are not signed as prescribed in law, it would be difficult to determine whether the results shown in the forms represent a true and accurate account of the ballots. In such circumstances an order of scrutiny is necessary in order to :

- (i) Investigate the truthfulness or otherwise of the allegations made
- (ii) Assist the court to investigate if the allegations of the irregularities and breaches of law complained of are valid
- (iii) To assist the court to determine the valid votes cast in favour of each candidate, and
- (iv) To assist the court assess whether there would be just cause to limit time within which parties should complete their case”. (holding paraphrased) (This must be read alongside the provisions of regulation 79 of IEBC Regulations.

37. While the 1st respondents witness was giving evidence it became apparent that the form 36 she relied on to announce the results and which had been supplied to the court did not have the agents signatures.

Rule 79 (6) provides thus: " 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)". What is interesting in this case is that there are 2 sets of form 36 in respect to Mitheru Ward. One has the signatures of the respective agents whereas the other one does not have, so which among the two forms is valid"

That can only be answered through carrying out a scrutiny and in order to do justice to both parties, the court on its own motion finds it necessary to for a scrutiny to be carried out in all the 28 polling stations.

38. In reaching my finding I have once again taken clue from the decision of justice Omiti vs Walter Enoch Nyambati Ojembe and others Kisii Election Petition No 1 of 2008 (unreported) already cited hereinabove. I am also guided by the decision of justice Majanja in Election Petition No 1 of 2013 at Machakos High Court. The learned judge in determining an application for a re-count, retally and scrutiny of votes cast in Kibwezi constituency had this to say at paragraph 24 "*I have had the advantage of hearing all the evidence and the parties have closed their cases. The only issue for determination of this application is whether I should order a scrutiny and if so whether a full or partial scrutiny and the terms thereof. The petitioners have only set out polling stations for which they allege irregularities but have requested a full scrutiny of the 164 polling stations. In my view , the court has jurisdiction to define the scope of the scrutiny and the terms under which it is to be conducted. The court is entitled to consider whether to order a full examination of the ballots and related material, whether a recount of the votes should be conducted or whether the scrutiny should be limited to tallying by reference to form 35. All these are options available to the court depending on the circumstances of the case*".

39. At paragraph 26, the learned judge stated "*I have taken into account the alterations and errors in form 35 and those reflected in form 36 and I am convinced that the interests of justice would be served if a recount is ordered for all the 164 polling stations. I am particularly persuaded that the errors made , whether by mistake or deliberate, and which the respondents have admitted exist are sufficient to possibly effect the results given that the margin of votes between the first two candidates is less than 250 votes*".

In reaching my determination I have identified totally with the judge's views as expressed. What is at stake in this matter is whether the aspirations and values of the people of Mitheru ward were respected and/or upheld by the results declared following the 4th march 2013 General elections.

40. On my own assessment of the evidence tabled before me, I am of the considered view that an order for scrutiny is merited and accordingly I allow the petitioners application for scrutiny dated 13/06/2013 on the following terms ;

(a) There shall be scrutiny of the votes limited to a recount in all the 28 polling stations in Mitheru ward.

(b) The recount shall be restricted to the ascertainment of number of spoilt ballot papers, total number of votes cast, number of rejected votes, number of disputed votes, number of rejected objected to votes and finally the number of valid votes cast in favour of each candidate, to enable the court ascertain the integrity of the results that were announced on 4/03/2013 by the 1st respondent.

c. The recount shall be under the supervision of this honourable court assisted by the court's

Executive officer.

(d) For ease of the exercise, the petitioner, the 1st respondent and the 2nd respondent shall each be allowed to have two(2) agents present during the scrutiny. The respective counsels are permitted to witness the exercise if they so wish.

(e) The scrutiny exercise shall commence on 3rd day of July 2013 at 9.00 am and shall proceed on a day to day basis until the conclusion of the exercise.

(f) The 1<sup>st</sup> respondent shall deliver all the ballot boxes to the court's executive officer latest by 3rd July 2013 at 8.30a.m.

(g) This matter shall be mentioned before this court immediately the scrutiny is over for further directions

(h) The costs of the application shall abide the outcome of the petition.

Ruling read, signed and dated in open court on 1/07/2013. Ms Muthoni holding brief for Mr. Nyaburi for the 1st respondent. Ms Muthoni present for the 2nd respondent. No appearance on the part of the petitioner's counsel. Court clerk Mutua

Ms. Muthoni: Mr Nyaburi request that scrutiny be carried out after he files his appeal.

**C. K. OBARA – SRM**

**1/7/13**

**Court** – Counsels at liberty to appeal in the meantime the scrutiny exercise to continue as scheduled. Once the court received an order from the High Court, it will comply.

**C. K. OBARA – SRM**

**1/7/13**



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