



REPUBLIC OF KENYA

SENIOR PRINCIPAL MAGISTRATES COURT AT WEBUYE

ELECTION PETITION NO. 1 OF 2013

ERIC SOITA PATROBA-----PETITIONER

VERSES

MARTIN WAFULA WAWIRE-----1ST RESPONDENT

IEBC-----2ND RESPONDENT

ODUOL BERNARD ARWINGS-----3RD RESPONDENT

RULING

The petitioner's counsel made an oral application for scrutiny and recount when the matter came up for pretrial conference and the issue of exploring methods of resolving contested issues in the petition was being discussed. The 1st respondent's counsel submitted that a basis must be laid first by the petitioner and a scrutiny should be the last result. The 2nd respondent's counsel opposed the application and submitted that the petitioner was supplied all papers so what does he want to scrutinize. The Notice of motion does not ask for scrutiny and recount what the petitioner is asking for (scrutiny and recount) is what is in the petition which comes after all evidence is adduced is when the court can order for the same and he based this argument on section 82(1) and (2) of the Election Act. The court must be led in evidence to know if there is need for scrutiny. There is no need for scrutiny in this case. In reply the petitioner's counsel submitted that the basis of the scrutiny is in the application filed with the petition dated 10/4/13. There is also a basis in the provisional register supplied full of errors. The margin of votes is 60 votes and if there is no scrutiny there is no basis for the petitioner to be in court and he filed a supplementary affidavit which he asked the court to look at before deciding on the issue of scrutiny and recount and he also filed written submissions in favour of scrutiny of ballots cast, form 33, form 36 and ballots by assisted voters where he submitted that the statutory basis for the scrutiny are found in Rule 4 of the Election Act no 24 of 2011 the Elections parliament and county elections petitions Rules 2013 which lays the basis that an election court shall employ means to facilitate the just expeditious, proportional and affordable resolutions of this dispute and Rule 31 and 33 of the same rules which gives the petitioners the right to ask for scrutiny and recount and retallying and there is no exceptions to this right to the petitioners and respondents. The factual basis of the scrutiny and recount is to be able to establish the cause of clear disharmony and discrepancies in forms 35 and 36. The forms 33 to be scrutinized to prove the petitioner and his witnesses allegation that sorting and counting was not done in a transparent manner and as a result wrong entries were made in forms 33 to the benefit of the 1st Respondent. To establish the voting pattern of all assisted voters and compare the same with the

general pattern of all candidates. The precedential basis is the Supreme case no. 5 of 2013 Raila odinga vs IEBC where the said court ordered a scrutiny on its own motion without being prompted to show that scrutiny is important tool before the court to have an appreciation of voting exercise and issues raised and also observe the importance of one vote one person principle espoused in the case of lakshmi charansen and others vrs Akm hassan azzaman and in the circumstance of this case where the margin of votes in favour of the 1st Respondent is so small (90 votes) as against the petitioner an order of scrutiny may help determine this case without even further evidence and he prayed for an order that the petition herein begins by scrutiny of the statutory forms and the ballot papers cast before calling of any other evidence.

The 1st Respondent ,s counsel never filed his written submissions on scrutiny and recount.

The 2nd and 3rd Respondents' counsel in his written submissions submitted that the application dated 10/4/13 does not pray for scrutiny of ballots cast,forms 33 and forms 36 what the application seeks is the production of the principal Register,form 333 and form 35 and where the law allows the respondent has complied.

Under the law scrutiny is not an automatic right as submitted by the petitioner. Section 82(1) of the Election Act provides “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 a scrutiny of votes to be carried out in such manner as the election court may determine.” but there is no application by any party to the petition to invoke the provisions of section 82(1) further the same can only be “during hearing of election petition” as provided for in section 82(1) and not at a preliminary stage.”Thus an application for scrutiny of votes at an interlocutory stage is premature and the same is informed by the fact that a basis must first be adduced before the court during the hearing of the petition so that the contested allegations are subjected to rigorous cross examination and this rational informs the basis of section 82(2) of the Election Act on how a scrutiny is to be carried out. The allegations for scrutiny cannot be based on the supplementary Affidavit of the petitioner dated 6/5/13 wherein the deponent has not been cross examined on the contents of his affidavit. The same is supported by Rule 33(2) of the Election (parliamentary and county Elections) petition Rules,2013 which provides “upon an application under subrule (1) the court may if it is satisfied that there is sufficient reason order a scrutiny or recount of the votes.” The petitioner bases the scrutiny on the right to access information as provided for in Article 35(1) of the Constitution but the same is not an absolute right and the same is subject to limitation under Article 24 and 25 of the Constitution. The only rights and fundamental freedoms which cannot be limited under the constitution and in statutes as provided for under Article 25 of the constitution are;

- a) freedom from torture an cruel, inhuman or degrading treatment or punishment
- b)freedom from slavery and servitude
- c)the right to fair trial
- d)the right to an order of habeas corpus

The respondents further submitted that the supreme court in paragraph 169 in Raila v IEBC &Others petition no.5 of 2013 on its own motion ordered the scrutiny of all forms 34 and forms 36 for the purpose of the better understanding the vital details of electoral process,it did not order a scrutiny of forms 33,ballots cast and ballots by assisted voters as the same were in the ballot boxes. The said scrutiny did not involve cutting of seals in the ballot boxes in order to get the said forms. The forms were supplied voluntary by the 2nd Respondent.

Finally the 2nd and 3rd Respondents counsel submitted that the Notice of motion Application before the court does not pray for scrutiny but for production of various documents of which the Respondents have complied with to the extent permissible by the law. The application does not meet the threshold for grant of orders of scrutiny. The petitioner was given an opportunity to withdraw the application and refused and the same should be dismissed with costs to the Respondents as its an abuse of the court process.

I have carefully considered the oral and written submissions and the supplementary affidavit filed by the petitioner's counsel on the same and the respondents replies and find its not true that the supreme court never ordered a scrutiny of forms 33,ballot cast and ballots by assisted votes because they were in the ballot boxes but because they decided to do a partial scrutiny and under Rule 33(4)(c)(e)(h)(i) of the Elections (parliamentary and county elections) petition Rules 2013 form 33s' and cast ballots' are some of the documents which can be scrutinized but votes by assisted voters cannot be scrutinized as under Rule 33(4)(a) to (j) they are not among the documents which can be scrutinized. Further I find its not true that a party can only apply for a scrutiny during the hearing of the election petition as as per rule 33(1) of the Elections (parliamentary and county election) petition Rules 2013 and I quote "33(1) The parties to the proceedings may **at any time** apply for scrutiny of votes for purposes of establishing the validity of the votes cast ."

I also find the only condition for granting an order for scrutiny and recount is for the court to be satisfied that there is a sufficient reason to do so and I rely on Rule 33(2) of the same rules which state "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 votes". I am satisfied that there is sufficient reason to order for a scrutiny and recount as the margin of the votes between the petitioner and the 1st Respondent as alleged by the petitioner is very small/narrow(90 votes) and the petitioner also alleged that the the principal register supplied to him by the the 2nd respondent(IEBC) is full of errors and there is also disharmony and discrepancies in forms 35s' and 36s' and the respondents never made any attempt to explain the alleged anomalies in forms 35 and 36 and the principal register in their submissions and even though I find the said allegations by the petitioner may well turn out to be false an order of scrutiny and recount would assist the court in its duty of investigating the truthfulness of these allegations . Therefore in the interest of justice and for it to be seen to be done I grant this application and order a scrutiny of all the election documents mentioned (forms 33,35 and 36,the marked copy register, the principal register used at the polling stations and the spoilt ,rejected and valid votes)used in the sitikho county representative elections and also order a recount of all the spoilt votes,rejected votes and valid votes of each candidate which shall be done simultaneously under the supervision of the executive officer webuye law court who shall submit his report to the court after the exercise. The court shall give the parties directions on how the scrutiny and recount shall be conducted by 27/5/13 . I further order the 2nd Respondent(IEBC) to deliver the ballot boxes and the other documents to be scrutinized which are not in the ballot boxes to the court by 31/5/13 and the scrutiny and recount shall commence on 3/6/13 and if by the time the hearing commences on 17/6/13 the scrutiny and recount is not complete the process shall continue simultaneously as the hearing continues for the court to comply with the strict timelines for hearing election petitions. No orders as to costs. parties are granted leave to appeal.

DATED and DELIVERED at WEBUYE this -24-day of -May-2013

SN ABUYA

MAGISTRATE

Ruling read in open court in the presence of:Petitioner

Absent-----for the petitioner

Absent-----for the 1st respondent

Absent-----for the 2nd and 3rd respondent



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