IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, MUSINGA & GATEMBU, JJ.A.)

CIVIL APPEAL NO. 276 OF 2013

BETWEEN

HARUN MEITAMEI LEMPAKA …… APPELLANT

VERSUS

HON. LEMANKEN ARAMAT …… 1ST RESPONDENT

ISAAC RUTTO …… 2ND RESPONDENT

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION (IEBC)...3RD RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Nakuru (Emukule, J.) dated 5th September, 2013

in

H.C. Election Petition No. 2 of 2013)

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JUDGMENT OF MUSINGA, J.A.

1. The appellant was one of the contestants for the seat of member of the National Assembly for Narok East Constituency, hereinafter referred to as **"the constituency".** The 2nd respondent, who was the returning officer, declared the 1st respondent as the winner of the said election, having garnered **5,615** votes while the petitioner was said to have got **5,174** votes, the margin between them being **441** votes.

2. The appellant was dissatisfied with the declared results and filed a petition in the High Court of Kenya at Nakuru. In his petition, he averred, *inter alia*, that the 2nd and 3rd respondents, the presiding officers and the polling clerks working under them wilfully neglected or otherwise failed to discharge their duties as required under **Article 86** of the **Constitution of Kenya, 2010,** hereinafter referred to as **"the Constitution",** the **Elections Act, 2011** and the **Regulations and Rules** made thereunder. The appellant alleged that the 1st respondent in apparent collusion with the 2nd respondent and specific presiding officers declared results which neither reflected the actual votes garnered by each of the

candidates nor reflected an accurate record and manifestation of the will of the people of the constituency.

3. The appellant also averred that the tallying exercise was conducted in an opaque, high handed and unaccountable manner and cited, for illustrative purposes, results from nine polling stations in which, according to him, the votes as declared by the 2nd respondent were 249 less than the actual votes as recorded by the petitioner's agents. The appellant contended that according to his agents, he received **5740** votes whereas the 1st respondent garnered **4900** votes.

4. Pursuant to **Sections 80 (4) and 82** of the **Elections Act** and **rule 32** of the **Elections (Parliamentary and County Elections) Petition Rules, 2013,** hereinafter referred to as "**the Elections Petition Rules",** the appellant sought the following orders and declarations:

"(a) That the Honourable court be pleased to issue an order for scrutiny and recount of the votes cast in all the 69 polling stations in Narok East Constituency.

(b) That the Honoruable court be pleased to issue an order for examination of the tallying of votes in relation to the 69 polling stations in Narok East Constituency.

(c) That the Honourable Court be pleased to order the 3rd respondent to issue a certificate of election to the petitioner if the recount of the ballots cast shows that he received most votes in the election of member of the National Assembly for Narok East Constituency held on 4th March, 2013.

(d) That the petitioner's cost be borne by the 3rd respondent in any event.

(e) That any other relief and redress that this Honourable court may deem expedient in the cause of determination of this petition."

5. The 1st respondent filed a replying affidavit and denied the appellant's averments. He contended that the said election was conducted within the law and the results as declared reflected the will of the people in the constituency.

6. The 2nd and 3rd respondents also denied the appellant's averments and stated that the election was free and fair in accordance with the electoral laws. They also defended the declared results, saying that they were true and accurate and reflected the will of the voters in the said constituency. They urged the court to dismiss the petition.

7. Before the hearing of the petition commenced, on 28th May, 2013 the appellant filed an application under **Section 82** of the **Elections Act** and **rule 33** of the **Elections Petition Rules** seeking the following orders: ***"1. That this Honourable court does order for the scrutiny of all votes cast in all the polling stations in Narok East Constituency during the 4th March, 2013 National Assembly elections.***

2. That this Honourable court be pleased to order for a recount of all the valid votes cast in respect of the Narok East Constituency National Assembly elections."

The application was opposed by the respondents.

8. In a considered ruling delivered on 28th June, 2013, the election court held that no case for

granting the orders sought had been made out at that stage and proceeded to dismiss the application with costs to the respondents. At the commencement of the hearing on 2nd July, 2013, the appellant's counsel informed the court that from the ruling delivered on 28th June, 2013 he understood the court to have held that the appellant was required to lay a basis to justify the grant of an order of scrutiny and recount of the votes cast. He indicated that the appellant (the petitioner) would call his witnesses but before he testified and closed his case he would make a fresh application for recount for the votes. Counsel further informed the court that the appellant had abandoned the prayer for scrutiny and all that he would be pursuing is an order for a recount of the votes. The appellant then proceeded to call a total of ten witnesses and also commenced his testimony but was stood down on 3rd July, 2013 and his counsel, **Mr. Kibe Mungai**, renewed the application for recount of the votes. The application was opposed by the respondents. They indicated, *inter alia*, that a recount was not an automatic right and the appellant was still duty bound to show by way of firm and credible evidence that there was a departure from a fair election process and such departure affected the final results. In their view, the appellant had failed to do that.

9. The election court identified the issues for determination in the renewed application to be:

"Whether the order of recount should be granted as a matter of right under Article 35 (1) of the Constitution and if not whether a proper basis has been made by the petitioner to warrant grant of the orders sought."

10. The learned Judge held that a recount could only be ordered upon justification being made. He found that a proper basis had not been laid by the appellant. He concluded that:

"It is still premature for the court to make orders for recount of the votes at this juncture taking into account the nature of the evidence that the respondents have indicated they intend to adduce."

The learned Judge then proceeded to dismiss the application and directed that the hearing of the petition proceeds to its conclusion.

11. The hearing of the petition proceeded and the appellant completed his testimony. Thereafter the 1st and 2nd respondents testified as well as all the respondents' witnesses. At the close of the respondents' case the court directed as follows:

"***Submissions on 31.07.2013 on whether or not there will be a recount. Mr. Kibe 45 minutes, Mr. Ngunjiri 20 minutes, Mr. Karanja 25 minutes, at 11 a.m."***

Come 31st July, 2013 Mr. Kibe made yet another oral application for recount of the votes and went on to make submissions as to why the order sought was merited. Mr. Ngunjiri for the 1st respondent and Mr. Karanja for the 2nd and 3rd respondents also made their submissions on the issue. At the close of all the submissions the learned Judge stated as follows:

"Ruling/Judgment on 5th September, 2013."

In their submissions, both **Mr. Ngunjiri** and **Mr. Karanja** urged the court to reject the prayer for recount and proceed to dismiss the petition in its entirety. Mr. Karanja, in urging the court to deliver a judgment, also made an alternative argument that if the prayer for recount were to be granted, then the recount ought to be limited to five out of the nine polling stations where the appellant had adduced evidence to show that there were discrepancies between the actual votes cast and the votes announced by the

returning officer. The appellant had failed to adduce any evidence regarding the other stations, he added.

12. The election court delivered its judgment on 5th September, 2013. It held, *inter alia*, that there was no evidence to show that the 1st respondent was added any votes as alleged by the appellant. It further stated that all the appellant's witnesses confirmed that the results as announced by the presiding officers after the counting of votes were correct and the minor non-compliance with the law by presiding officers did not affect or invalidate the results.

13. The court further noted that the appellant was able to demonstrate only one instance where he was denied ten votes erroneously and which were given to another candidate (not the 1st respondent). That error had been readily admitted by the 2nd respondent and even if the ten votes were to be credited to the appellant the 1st respondent would still be the winner with a margin of 431 votes. The court found no merit in the petition and proceeded to dismiss the same with costs to the respondents. It also directed that the ballot boxes that had been delivered to the court be released to the 3rd respondent.

14. Being dissatisfied with the said judgment, the appellant preferred this appeal and raised thirty (30) grounds in his memorandum of appeal. I will not reproduce all the grounds of appeal but will only summarize the main arguments that arise out of the same. The appellant contended that:

- *The judgment was fundamentally flawed and irregular as it was based on an incomplete trial because on 31st July, 2013 the appellant's counsel had presented an oral application for recount of votes and the submissions that were made related to that issue only. Consequently, the appellant had been denied an opportunity to submit on the evidence, facts and the applicable law.*
- *The learned Judge erred in law by failing to distinguish between the right of recount founded on* ***Section 80 (4)*** *of the* ***Elections Act, 2011*** *read together with* ***rule 32*** *of the* ***Elections Petition Rules*** *vis-a-vis the power of the court to order scrutiny of votes under* ***Section 82*** *of the* ***Elections Act*** *as read with* ***rule 33*** *of the* ***Elections Petition Rules, 2013.***
- *That the learned Judge erred in law by holding that the appellant had not established any basis for recount of the votes and in arriving at that conclusion the learned Judge applied the wrong standard of proof.*
- *By denying the appellant's plea for recount of the votes, the learned Judge effectively shielded the respondents from being called upon to prove that the irregularities and non-compliance with the electoral law did affect the results of the election.*
- *The learned Judge erred in law by failing to cap the costs to be paid by the appellant as required by rule* ***36 (1) (a)*** *of the* ***Elections Petition Rules.***

15. All the parties filed their respective submissions and made brief oral highlights of the same. Regarding the final decision of the court delivered on 5th September, 2013, Mr. Kibe submitted that the learned Judge erred in delivering a judgment instead of a ruling because what had been argued on 31st July, 2013 was an oral application seeking a recount of votes. The submissions that he made were therefore limited to that issue only, he added.

16. In response, Mr. Karanja submitted that since the only remedy sought in the petition was an order for recount of the votes and all parties made full submissions on the issue, the learned Judge was perfectly entitled to render a judgment if he disallowed the prayer for a recount. Mr. Ngunjiri supported that submission.

17. As earlier pointed out, the record of appeal clearly shows that on 26th July, 2013 the court directed

that submissions be made on 31st July, 2013. The submissions were to focus on whether there would be a recount or not. That was the main relief that was sought in the petition since the prayer for scrutiny had been abandoned. The record further shows that in making their respective submissions, counsel addressed the court on issues of facts and law and cited various authorities. We do not therefore think that there were any further weighty submissions that would have been necessary before the court delivered its final determination, one way or the other.

18. The **Elections Act, 2011** was enacted pursuant to the provisions of **Article 87 (1)** of the **Constitution** which mandated parliament to enact legislation to establish mechanisms for timely settling of electoral disputes. Under **Article 105 (2)** of the **Constitution**, the petition had to be heard and determined within six months from the date of its filing. The trial court was duty bound to ensure compliance with the above timeline and in that regard manage the proceedings before it in such a way that it finalizes the petition and renders its decision timeously.

19. Whereas the appellant's counsel had urged the court to make a ruling on the oral application for recount, the respondents' advocates urged the court to dismiss the application and proceed to make a final judgment. The record does not show that the appellant's advocate had told the court that he had any further submissions to make.

20. Having heard all the parties and their witnesses and taken submissions from all the advocates, if the Judge was satisfied that a recount was not warranted, he was perfectly entitled to deliver a judgment (not a ruling) because he had made a final determination of the petition. In the circumstances, I do not agree that the judgment was fundamentally flawed as alleged in ground one of the appeal.

21. Regarding the issue of recount of votes, Mr. Kibe submitted that the appellant's petition was filed pursuant to **Section 80 (4)** of the **Elections Act, 2011** and **rule 32** of the **Elections Petition Rules** which, in his view, allows a party to an election petition who simply seeks to have the winner of the election determined by the court to apply for an order for recount of the votes cast or examination of the tallying thereof. Such a petition must be premised on the fact that the petitioner accepts the validity of the election except on the issue of whether the votes were correctly counted and/or tallied. **Section 80 (4)** reads as follows:

"An election court may by order direct the Commission to issue a certificate of election to a President, a member of Parliament or a member of a county assembly if –

a. ***upon recount of the ballots cast, the winner is apparent; and***
b. ***that winner is found not to have committed an election offence."***

22. **Rule 32** of the **Elections Petition Rules** states as follows:

"32 (1) Where the only issue in an 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."

23. In support of that line of submission, counsel cited the case of **RICHARD KALEMBE NDILE & ANOTHER vs. DR. PATRICK MUSIMBA MWEU, Machakos High Court Election Petition No. 1 of 2013**, where the court held as follows:

"The power granted to the court under Section 80 (4) is a new provision introduced by the Elections Act, 2012 (sic). Its foundation is that the court should be able to, in an appropriate case, declare the intent of the voters which is established once the ballots are counted as it is the duty of the election court to give effect to the will of the electorate."

24. Counsel further submitted that the jurisdiction of the election court under **Section 80 (4)** of the **Act** is a special one, to efficiently bring to an end any dispute that can be resolved as to who actually won an election by simply recounting the votes and examination of the tallying. In the petition the appellant contended that he was the one who garnered the most votes and the only determination that he sought from the court was an order for recount and scrutiny to verify that. He had withdrawn the plea for scrutiny after delivery of the first ruling on 28th June, 2013. Mr. Kibe further submitted that in the impugned judgment, the learned judge failed to distinguish the mode and nature of recount under **Section 80 (4)** of the **Elections Act** as read together with **rule 32** of the **Elections Petition Rules** from the recount envisaged under **Section 82** of the said **Act** as read together with **rule 33** of the said **Rules**. Counsel added that the consequence of failure to appreciate the difference was that the trial judge ended up applying the wrong principles and standard of proof. In his view, **Section 80 (4)** contemplates a virtually automatic right of recount of votes and at worst, a standard lower than "**sufficient cause"** which is prescribed in **rule 33 (2).**

25. In response, both Mr. Ngunjiri and Mr. Karanja submitted that **Section 80 (4)** of the **Elections Act** and **rule 32** does not give a petitioner an automatic right to a recount of votes. The petitioner has to lay a basis that would satisfy the court that there is sufficient reason for ordering a recount, they submitted, and supported the trial judge's finding to that effect.

26. In his judgment, the learned Judge held that a party seeking an order for recount pursuant to the provisions of the law cited by the appellant **"must establish and show by evidence such massive irregularities that the only way of ascertaining the extent or otherwise of the proper conduct of elections is by going to the primary source of the results of the election, that is by opening the ballot boxes."**

27. The learned Judge further held:

"An order for recount is not an automatic right because if it were so there would be no need for a hearing. The assertion that an order of recount should be granted as a matter of right not only runs against the grain of known and accepted norms of constitutional and statutory interpretation as well as precedent that the spirit of the Constitution is expressed in the words used in each of its provisions, and not merely a spirit of the new dispensation. If indeed the new dispensation was equated to all positive and negative rights, then obviously, the right to a recount would have been expressed in the same way for instance as the right of every child to free and basic education in Article 53 of the Constitution of Kenya, 2010 is expressed."

28. In holding that sufficient evidence had to be adduced by the petitioner to demonstrate to the election court that an order for recount was necessary, the learned Judge cited various cases that included **HASSAN ALI JOHO vs. JOTHAM NYANGE & ANOTHER, [2006] eKLR, BURUNDI NABWERA v SILVESTER KAMARU (Election Petition No. 4 of 1983)** and **WILLIAM MAINA KAMANDA vs. MARGARET WANJIRU & 2 OTHERS [2008] eKLR**. All these cases were decided before enactment of the **Elections Act, 2011** which repealed the **National Assembly and Presidential Elections Act (Cap 7).**

29. Under the repealed Act, there was no specific provision as to how the Court was supposed to deal

with a case where a petitioner's sole complaint was the count of the votes cast without having to conduct a full trial.

30. The learned Judge's view was largely informed by the High Court decision in **HASSAN ALI JOHO v JOTHAM NYANGE & ANOTHER (supra),** where the court stated as follows:

"I concur with the holding in ONAMU vs. MAITSI (Election Petition No. 2 of 1983) that where the margin is very narrow justice will be done and seen to be done if scrutiny and recount is done from the word go. However, where the margins are high, I am unable to agree that scrutiny should be ordered without laying a foundation simply to dispose of petitions and save time which would otherwise go to the full hearing. For my part I will not agree that expediency should be the sole or main factor in ordering scrutiny. Courts should hear cases including election petitions and should not resort to short cuts for their own expediency."

31. Was Emukule, J. right in that holding that evidence of massive irregularities must be established to warrant a recount" As rightly observed by Majanja, J. in **RICHARD KALEMBE NDILE & ANOTHER vs. DR. PATRICK MUSIMBA MWEU, (supra), Section 80 (4)** of the **Elections Act** is a new provision in our electoral law, it was introduced in 2011. That section must be read in conjunction with **rule 32.** In my view, its objective is clear and that is, where a candidate in an election to the office of President, member of Parliament or a county assembly is neither questioning the integrity and validity of the election nor seeking scrutiny of any electoral material and the only complaint is that the counting or tallying of the votes cast was not proper, and believes that he/she was the winner but someone else who garnered less votes was declared the winner, the petitioner, having filed a petition, is afforded an opportunity to have that dispute resolved fairly quickly. That can be done by asking the election court to order a recount or examination of the tallying with a view to ascertaining the candidate that got the highest number of votes.

32. I must emphasize that under the above cited section and rule, no scrutiny of the electoral materials like forms 35 or 36, registers and counterfoils is permissible, only retally or recount of the votes can be sought. Whoever is found to have garnered the highest number of votes, as long as he/she had not committed an election offence, is deemed by the court to have been the duly elected person to the appropriate office. The election court will then proceed to direct the IEBC to issue a certificate of election to that person.

33. I think a petition brought under **Section 80 (4)** of the **Elections Act** and **rule 32** of the **Elections Petition Rules** only, can be disposed of summarily. In my view, the petitioner has to state in the petition and the affidavit(s) in support thereof as well as the affidavit in support of the application for recount, the basis of his/her belief that they got the highest number of votes and did not commit an election offence. Once that is done and the petition and the application are competent in all aspects of the law, we agree with Mr. Kibe that the petitioner/applicant would have a right to grant of an order for recount or tallying, as the case may be. The election court would then make the appropriate orders, one way or the other, depending on the outcome of the exercise.

34. To require parties to such an election petition to conduct a full-blown trial process as required where the validity of an election and the outcome thereof are in question would render the said provisions of the law otiose and inefficacious. Timely resolution of electoral disputes is a constitutional requirement. The Constitution does not declare each and every right of a voter or a candidate and how such rights are to be actualized. Parliament was empowered by **Article 87 (1)** of the **Constitution** to enact the enabling legislation and consequently, the **Elections Act** as well as the **Rules and Regulations** made thereunder came into being. They must be construed appropriately if timely

resolution of electoral disputes is to be realized. That can be done without sacrificing rights of voters and candidates in an election at the altar of expediency.

35. On the other hand, where a party is questioning the validity of an election and makes adverse allegations regarding the electoral process including the tallying or counting of the votes cast and as a result files an application under **Section 82** of the **Elections Act** and **rules 32 and 33** of the **Elections Petition Rules**, before the election court can order scrutiny and/or recount, the applicant must satisfy the court that there is sufficient reason to warrant scrutiny or recount. But where the petitioner is seeking for recount only, **rule 32** does not require that sufficient reason be established. **Rule 33** states as follows:

"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 examination of –

(a) the written statements 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 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 statements showing the number of rejected ballot papers."

36. Although **rule 33 (2)** permits the court to order for a **"scrutiny or recount of the votes",** meaning either of the two, I do not see why the court cannot order, in appropriate cases, both scrutiny and recount of the votes. More often than not, scrutiny goes hand in hand with recount and in our view, where a party is questioning the validity of an election and has raised multiple issues including the final count or tally of the votes, it would be illogical for a court to order a scrutiny only, excluding a recount, or to tell the parties to recount the votes only without scrutinizing the ballots cast to determine that validity. In many instances, parties apply for general scrutiny of all forms 35 and 36, the registers as well as the ballots cast. The situation is different if the validity of the electoral process or of the votes is not in question and a petitioner is merely asking the court to verify the count of the votes.

37. Having brought out the differences between applications brought under **Section 80 (4)** of the **Elections Act** and **rule 32** of the **Elections Petition Rules** on the one hand and those presented under **Section 82** of the **Act** and **rule 33** on the other, I note that the appellant's application dated 27th May, 2013 was filed pursuant to **Section 82** and **rule 33** aforesaid. The appellant sought an order for **"scrutiny of all votes cast in all the polling stations in Narok East Constituency"** as well as an order for a **"recount of all the valid votes cast"** in the constituency. Whereas in the petition the appellant had referred to just about nine polling stations where he disputed the results, in the application, he wanted scrutiny and recount of the votes to cover all the 69 polling stations. The trial Judge rightly held that no basis for the orders sought had been established and dismissed the application.

38. After calling eleven of his witnesses and tendering part of his testimony, the appellant abandoned the prayer for scrutiny and sought a recount of the votes. He believed that the evidence tendered would satisfy the election court that there was sufficient reason to order a recount but the court was unmoved. He repeated the same prayer after close of his case as well as the respondents' case but again the court declined to grant the orders sought, saying that the appellant had not established any basis for recount.

39. With great respect to the learned Judge, I think he misinterpreted the provisions of **rule 32**, which he misconstrued as requiring sufficient reason to be advanced by an applicant as the appellant had abandoned the prayer for scrutiny of votes and was urging a recount only. That being the only determination sought, to hold the appellant had to prove existence of **"massive irregularities"** before a recount could be ordered was putting an onerous obligation on him which, in any event, **rule 32** did not require him to bear.

40. I am persuaded that in an election petition where the only issue is the count or tallying of the votes and the petitioner accepts the validity of the election, including the validity of the votes cast, except for contention that the counting or tallying of the votes was not proper and as a result a candidate who had not garnered the highest votes had been declared the winner, unless there are very good reasons for rejecting the application, for example, where it is found to be grossly incompetent, and order for a recount ought to be made. To deny such a petitioner the right of recount is to negate the jurisprudential gain brought about by **Section 80 (4)** of the **Elections Act.** Such a petition, being premised on the petitioner's acknowledgement that the election was otherwise lawfully conducted, requires summary disposal. In the event that the recount reveals that the petitioner was not the winner, that would be the end of the petition.

41. Turning to the issue of costs, **Section 84** of the **Elections Act** requires the election court to award costs of and incidental to a petition. **Rule 36 (1) (a)** stipulates that the court shall, at the conclusion of an election petition specify, *inter alia,* the total amount of costs payable. The appellant complained that the trial Judge failed to cap the costs payable. That is a new requirement in our electoral law and there is good reason for it. Being a mandatory requirement, we agree that the learned Judge was obliged to comply with the same but failed to do so.

42. I believe I have said enough to demonstrate that this appeal is for allowing and consequently propose the following orders:

(a) The judgment and decree dated 5th September, 2013 are hereby set aside and substituted with an order for recount of all the votes cast in all the 69 polling stations in Narok East Constituency for election of the area member of Parliament.

(b) The recount shall be carried out in the High Court of Kenya at Nakuru where the petition had

been filed. The exercise shall be supervised by the Court's Deputy Registrar and the results thereof shall be forwarded to any judge in that station, except Emukule, J. for declaration in terms of **Section 80 (4)** of the **Elections Act.**

(c) To facilitate the recount as ordered hereinabove, the third respondent (IEBC) is hereby ordered to deliver all the ballot boxes for election of member of Parliament for Narok East Constituency in the 2013 general elections to the High Court of Kenya at Nakuru within ten (10) days from the date hereof.

(d) Subject to determination of the winner following the recount of votes as ordered, as between the appellant and the 1st respondent, the costs of the election petition in the High Court, which shall not exceed Kshs.1,500,000/=, shall be paid by the loser to the winner and to the 1st and 2nd respondents jointly.

(e) The costs of this appeal are capped at Kshs.300,000/= and shall be paid to the appellant by the respondents.

Dated and Delivered at Nairobi this 28th day of March, 2014.

D.K. MUSINGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR

JUDGMENT OF GATEMBU KAIRU J.A.

I agree with the judgment prepared by D.K. Musinga JA.

When considering an application for an order to recount votes or to examine the tallying under rule 32 of the Elections (Parliamentary and County Elections) Petition Rules, 2013 the election court must be satisfied, that a basis has been laid for seeking those orders. It is not enough for an applicant to say to the election court "I am asking for a recount under rule 32. For that reason alone, I am entitled to it. Give it to me." In other words, it is not automatic. The applicant must go beyond that. An application for recount of votes or examination of tallying is premised on a "dispute" regarding results. It means the person seeking a recount or examination of the tallying is questioning the results as announced or declared. Grounds for questioning must be established so as to warrant or justify an order for recount of votes or examination of the tallying under rule 32 of the Elections (Parliamentary and County Elections) Petition Rules, 2013.

I concur in the orders proposed.

Dated and delivered at Nairobi this 28th day of March, 2014.

S. GATEMBU KAIRU

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JUDGE OF APPEAL

JUDGMENT OF WAKI, J.A

I have had the advantage of reading in draft the judgment of Hon. Musinga, JA. I agree with the reasoning therein relating to the special nature of the jurisdiction conferred on the election court under ***Section 80 (4)*** of the Elections Act. I also agree with the reasoning that a clear distinction ought to be made between petitions filed and applications made pursuant to ***Rule 32*** and ***Rule 33*** of the Elections Petition Rules. In both Rules the discretion of the court is required, and as usual it has to be exercised judicially. The distinction, I think, is in the language in which the two Rules are couched. While ***Rule 33*** requires that the court shall be "**satisfied**" that there is "**sufficient reason**", there are no such requirements under ***Rule 32***. The intention of the Rule makers must therefore have been to provide for a summary procedure in the disposal of an election dispute which concedes the regularity and propriety of all aspects of the election process save for the number of votes cast in favour of each candidate in the election. I finally agree with the orders proposed by Musinga, JA in the appeal. As Gatembu, JA also agrees, the final orders, in this appeal shall be as proposed by Musinga, JA.

Dated and delivered at Nairobi this 28th day of March, 2014.

P.N. WAKI

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JUDGE OF APPEAL