



Case Number:	Petition 9 of 2013
Date Delivered:	07 Aug 2013
Case Class:	Civil
Court:	High Court at Garissa
Case Action:	Ruling
Judge:	Alfred Mabeya
Citation:	Abdinasir Yasin Ahmed & 2 others v Ahmed Ibrahim Abass & 2 others [2013] eKLR
Advocates:	-
Case Summary:	<p><u>Instances when a prayer for Scrutiny of Votes may be granted</u></p> <p>Abdinasir Yasin Ahmed & 2 others v Ahmed Ibrahim Abass & 2 others</p> <p>Petition No.9 of 2013</p> <p>High Court at Garissa</p> <p>A. Mabeya, J</p> <p>August 7, 2013</p> <p>Reported by Cornelius Lupao and Mercy Ombima</p> <p>Brief Facts</p> <p>The Petitioners filed an election petition to challenge the outcome of the gubernatorial election results for Ijara Constituency. They alleged that the electoral process in thirteen polling stations had been stained by various inconsistencies. There were allegations that some serial numbers of ballot papers had never recorded and that there had been multiple</p>

cancellations and alterations in various electoral forms. The Petitioners thought scrutiny would be the only sure way to clear the doubt as to the authenticity of the election in Ijara Constituency. The Respondents admitted that there had been alterations in some of the documents (Forms 35), but that the alterations were not such as to materially affect the results of the election.

Electoral Law - electoral malpractices - allegations of alterations, cancelations and inconsistencies in data entered in electoral documents - claim that the Petitioners' agents were denied a chance to sign some electoral documents (Forms 35) – where the Petitioners instituted an application for scrutiny of votes at the last stage of the election petition - whether the irregularities had substantially affected the election results – Constitution of Kenya 2010 articles 82; 86; 88, Elections Act, 2011 section 82, Elections (Parliamentary and County Elections) Petition Rules, 2013 rule 33(1), Elections Petition (General) Regulations, 2012 regulations 64(4); 72(6).

Issues

i. Whether it was proper for the petitioners to institute an application for scrutiny of votes during the final stages of election proceedings

ii. Whether a petitioner must lay a basis for an order of scrutiny to issue

iii. Whether material alterations and cancellations of statutory forms of electoral documents could form a basis for scrutiny

Held

1. A reading of section 82 of the Elections Act and rule 33(1) of the Election Petition Rules showed that an application for scrutiny could be made at any stage of the proceedings before judgment. To rule otherwise would be to curtail the wide discretion given to the court by the law. The words “*at any stage*” used in rule 33 presupposed at any time before judgment was pronounced. The Petitioner’s application was therefore properly before court. In any event, when an

application for scrutiny was made at the close of trial, the court was well placed to ascertain whether the allegations in the petition had been qualitatively established to warrant an order for scrutiny.

2. The cumulative effect of articles 82, 86 and 88 of the Constitution of Kenya was to require the Independent Electoral and Boundaries Commission to ensure that the system of voting was simple, verifiable, accountable, secure and transparent. It was to ensure that when queries arose about the electoral process, such queries were settled swiftly without any complications. Additionally, regulations 64(4) and 72(6) of the Election Regulations required a presiding officer to give a detailed report of when polling hours had been extended, as well as record in the register, instances where a voter had been assisted and give reasons therefor.

3. Registers would be required to be scrutinized where there was credible evidence that there was vote stuffing or that the number of votes cast superseded the number of registered voters in a particular polling station. A petitioner who desired an order of scrutiny was required to specifically plead in his petition and lay a basis for such scrutiny. Scrutiny would only issue where there were allegations that were properly backed by evidence. It was then that scrutiny of such documents would be of assistance to the court in gauging the credibility of an election.

5. There had been material and immaterial alterations in the election documents that were the subject of the suit. Material alterations were those that were likely to affect the results of the elections. The Respondent had been able to explain some of the alterations. However, there were unexplained alterations to Forms 35, especially the portion touching on the candidates' votes. The unexplained alterations were therefore material since they touched on the results entered for the candidates and they were likely to affect the results of the elections.

Scrutiny and recount in these seven (7) polling stations to be undertaken under the direct supervision of the Deputy Registrar of the High

Court.

Cases:

East Africa;

1. *Amana, Rishad Hamid Ahmed v IEBC & 2 others* Election Petition No 6 of 2013 – (Explained)
2. *DTA v Prime Minister & others* (1996) 3LRC 83 – (Explained)
3. *Gitau, William Kabogo v George Thuo & 2 others* Election Petition No 10 of 2008 – (Explained)
4. *Hassan, Hassan Mohammed v IEBC & 2 others* Election Petition No 6 of 2013 – (Explained)
5. *Joho & 2 others v Nyange & another (No3)* (2008) 3 KLR (EP) 388 – (Explained)
6. *Joho, Hassan v Hotham Nyange & another* Election Petition No 1 of 2005 – (Explained)
7. *Kamanda, William Maina v Margaret Wanjiru & 2 others* Election Petition No 5 of 2008 – (Explained)
8. *Kiragu, Kithinji v Martin Nyaga Wambora,* Election Petition No 1 of 2013 – (Explained)
9. *Lempaka, Harun Meitamei v Lemanken Aramat* Election Petition No 2 of 2013 – (Explained)
10. *M'Mbaya, Justus Gesito Mugali v IEBC & 2 others* Election Petition No 6 of 2013 – (Explained)
11. *Miriti, M'Nkiria Petkay v Rangwa Samuel Mbae* Election Petition No 4 of 2013 – (Explained)
12. *Mogere, Charles Oigara v Christopher Mogere Obure* Election Petition No 9 of 2013 – (Explained)
13. *Ndeti, Wavinya v IEBC & 4 others* Election Petition No 1 of 2013 – (Explained)
14. *Ndile, Richard Kalembe v Patrick Musimba Mweu* Election Petition No 1 of 2013– (Explained)
15. *Ndolo, Phillip Munge v Omar Mwinyi Shimbwa & 2 others* Election Petition No 1 of 2013– (Explained)
16. *Odinga, Raila v IEBC & 3 others* Election Petition No 5 of 2013 – (Explained)

	<p>17. <i>Omiti v Osebe & 2 others</i> [2010] 1KLR 115 – (Explained)</p> <p>18. <i>Said v Maitha & another</i> [2000] KLR 134 – (Mentioned)</p> <p>19. <i>Tiampati, Joseph & 2 others v Samuel Kuitai Nakuru</i> Election Petition No 3 of 2013 – (Explained)</p> <p>20. <i>Wasike, Phillip Mukwe v James Lusweti</i> Petition No 5 of 2013 – (Explained)</p> <p>21. <i>Were, Charles On'gondo v Joseph Oyugi</i> Magwanga Election Petition No 1 of 2013 – (Explained)</p> <p>Statutes:</p> <p><i>East Africa;</i></p> <ol style="list-style-type: none"> 1. Constitution of Kenya, 2010 article 82, 86, 88 – (Interpreted) 2. Elections Act, 2012 (Act No 24 of 2012) section 82 – (Interpreted) 3. Elections (Parliamentary and County Elections) Petition Rules, 2013 (cap 24 Sub Leg) rule 33(1)(4); 80 – (Interpreted) 4. Elections (General) Regulations, 2012 (cap 24 Sub Leg) regulations 64(4); 72(6); 73(2)(d) – (Interpreted)
Court Division:	Civil
History Magistrates:	-
County:	Garissa
Docket Number:	-
History Docket Number:	-
Case Outcome:	Allowed
History County:	-
Representation By Advocates:	One party or some parties represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

HEARD IN THE HIGH COURT OF KENYA AT NAIROBI

PETITION NO.9 OF 2013

ABDINASIR YASIN AHMED 1ST PETITIONER

UBAH ABDULLAHI SANEI.....2ND PETITIONER

YUSUF SULEIMAN AHMED3RD PETITIONER

VERSUS

AHMED IBRAHIM ABASS.....1ST RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION2ND RESPONDENT

GEORGE CHEGE3RD RESPONDENT

R U L I N G

1. **On 23rd July, 2013, the trial of this Petition was concluded. Having** reserved their right at the pre-trial stage to apply for scrutiny, the Petitioners sought directions on the making of the subject application. The court directed that a formal application be filed. This the Petitioners did on 24th July, 2013 and is the subject of this ruling.

2. The Motion is made under Article 86 of the Constitution of Kenya, Section 82 of the Elections Act and Rule 33 of the Elections (Parliamentary and County Elections) Petition Rules 2013 (hereinafter “the Petition Rules”). The Petitioners sought orders for scrutiny of various documents set out in rule 33 of the Petition Rules. They also sought the scrutiny and recount of votes cast in Parliamentary (sic) Elections for Ijara Constituency. Since there are 11 prayers in total I will deal with each prayer later on in this ruling.

3. The grounds for the motion were set out in detail in the body of the motion as there was no Affidavit sworn in support. This is because the evidence to be relied on is already on record by way of Affidavit and cross examination. The grounds were that Article 86 of the Constitution requires that the voting system used for elections be simple, accurate, verifiable, secure, accountable and transparent, that election materials be safeguarded, that polling hours are fixed by law and any extension thereof must be explained, that 90% of Ijara voters having required assistance, the registers should be scrutinized to ascertain whether such registers were used and any reasons for such assistance recorded therein, that it was necessary to scrutinize the Field Note Books to ascertain if Regulation 73(2) was complied with and that the ballot papers transferred in two polling stations be scrutinized as their serial numbers were never recorded. Other grounds were that Forms 35 were not signed by agents and no reasons for refusal was recorded by the Presiding Officers, that there were multiple cancellations and alterations in Forms 35 in 13 named polling stations, that the number of total votes cast for Presidential, Gubernatorial, Senatorial,

Parliamentary and Women County Representative greatly differed within the constituency. That scrutiny will be the only sure way to clear the doubt as to the authenticity of the election in Ijara Constituency.

4. Mr. Issa Mansur teaming up with Mr. Anzalla and Ms. Kigeria learned Counsels for the Petitioners submitted that it was a constitutional requirement that the system used in elections be simple, verifiable, secure, accountable and transparent, that under Regulation 73(d) of the Elections (General) Regulations, 2012 (hereinafter "the Regulations"), the use of Polling Day Diary was introduced to ensure that elections are verifiable, that scrutiny has been statutorily underpinned under Section 82 of the Elections Act and it need not be in the pleadings, that if evidence established that the acts or omissions of the Independent Electoral and Boundaries Commission ("IEBC") has infringed Article 86 of the Constitution the court should order scrutiny. Counsel submitted that Rule 33 of the Election Rules does not limit the courts power to order scrutiny but provides how wide the same can be undertaken.

5. Learned Counsel further submitted that where a margin of votes is slim, scrutiny should be ordered and relied on the case of **Said –vs- Maitha**. That for the court to determine if the elections were carried out in accordance with the Constitution, evidence of the Returning Officer to the effect that statements were not made in accordance with the requirements of the law was crucial, that the Returning Officer (R₃W₁) was unable to explain the returns in the polling day diaries or the discrepancies in Forms 36. That for the court to confirm whether the returns by R₃W₁ concides with the number of voters who voted in Ijara, it was imperative to scrutinize the register. To counsel, the Petitioners had laid a basis to order scrutiny.

6. Counsels referred to the cases of **William Maina Kamanda –vs- Margaret Wanjiru & 2 others (2008) eKLR** for the proposition that where Forms 35 have not been signed, scrutiny will assist the court to establish whether the candidates votes have been accounted for, **Phillip Wasike –vs- James Lusweti (2013) eKLR** that Rule 33 of the Election Rules is not a fetter to the court's jurisdiction, **Richard Kalembe Ndile –vs- Dr. Patrick Musimba Mweu** that where there are discrepancies and irregularities in Forms 35, the court should exercise its discretion and order scrutiny, **Joho & 2 others –vs- Nyange & Another (2008) 3KLR** that scrutiny should be ordered when there is a 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, **Justus Mongumbu Omiti –vs- Walter Nyambati & 2 others (2011) eKLR** that an election Petition is an inquiry and all such issues raised in the Petition or those which crop up during the hearing whether pleaded or not must come under scrutiny and interrogation. They also relied on **William Kabogo –vs- George Thuo & 2 others (2010) eKLR** that scrutiny is the only sure way to verify results recorded in Forms 35 and finally on the case of **DTA –vs- Prime Minister & Others (1996) 3LRC 83** for the proposition that there should be accountability in elections and therefore for interests of justice the 2nd Respondent should produce all the documents sought by the petitioners for scrutiny. Counsel submitted that the complaints raised in the Petition and the evidence produced at the trial had cast serious doubts on the integrity, transparency, accountability and credibility of the electoral process in the Ijara constituency and the application should therefore be allowed.

7. Both the Respondents opposed the application. The 1st Respondent relied on the Grounds of Opposition dated 25th July, 2013 and written submission dated 26th July, 2013. He contended that the application was mischievous and a fishing expedition seeking to bolster the Petitioners' case, that being brought after close of the case, it would prejudice the 2nd Respondent as he would have no opportunity to tender any evidence in relation to the outcome of the scrutiny, that no credible basis had been laid to warrant the order sought for scrutiny, that no evidence had been led to substantiate the claims in the Petition. That the evidence of changes in the tallies in six (6) polling stations had been concretely contradicted by evidence of IEBC officials, that the changes in the six (6) polling stations only showed a

change of 22 votes which would not affect the final result and that the Petitioners were seeking to amend the Petition by introducing new matters into the case without affording the Respondents any opportunity to meet the new case. To the 1st Respondent, prayer Nos. 1, 2, 4, 5, 6, 7, 8, 9 and 11 of the motion were not founded on the Petition and their inclusion in the motion was an ambush.

8. Relying on his written submissions dated 26th July, 2013, Mr. Kanjama, Learned Counsel for the 1st Respondent submitted that at all times in determining a Petition, the court must be guided by Section 83 of the Election Act, that the Petitioners had failed to lay a basis to show substantial non-compliance with electoral law and that that non-compliance had materially affected the results of the election. That the application being made after close of the case should be looked at with circumspect as the Respondents will have no opportunity to answer the outcome of the scrutiny. That the Petitioners were shifting the burden of proof to the Respondents and the court. That the court should apply the principles laid in the **Raila –vs- IEBC & 3 others Supreme Court Petition No.5 of 2013** and decline scrutiny as the Petitioners had not laid a firm and unanswered case. Referring to the case of **Mbaya –vs- IEBC (2013) eKLR**, Mr. Kanjama urged that there is a difference between recount and scrutiny and a Petitioner who has sought scrutiny in the Petition cannot turn around to seek recount since in recount he is deemed not to challenge the validity of the electoral process. That the Petitioners were not particular as to which polling station they needed scrutiny and the results they intended to achieve from such scrutiny. That the courts discretion must be exercised judiciously, that the Petitioners had not established that the altered Forms 35 were not meant to correct mistakes as contended by the 2nd Respondents Presiding Officers.

9. On the margin of 2.5% between the winner and runner up. Mr. Kanjama was of the opinion that such was a kind of margin that a serious case must be laid before scrutiny can be resorted to. Counsel referred to various authorities for various propositions including **Harun Lempaka –vs- Aramat (2013) eKLR** that scrutiny will not be ordered as a matter of course, **Mogere –vs- Obure (2013) eKLR** that the Petitioner must substantiate the allegations before recount can be ordered, **Hassan Mohammed Hassan –vs- IEBC (2013) eKLR** that the Petitioner must establish by evidence that there were irregularities that substantially and materially affected the results of the elections, **Hassan Joho –vs- Nyange (2006) eKLR** that mistakes in counting cannot be ruled out and **Wavinya Ndeti –vs- IEBC (2013) eKLR** that allowance must be made for human error. Counsel distinguished the cases relied on by the petitioners submitting that in those cases, a basis for scrutiny had been laid by the Petitioners establishing serious irregularities to vote counting and tallying which was not the case here. Mr. Kanjama urged the court to dismiss the application as it tended to increase costs and waste time contrary to the overriding objective of the law.

10. Mr. Moibi teaming up with Ms Keya opposed the application on behalf of the 2nd and 3rd Respondent. Relying on the Grounds of opposition and written submissions of the 2nd and 3rd Respondent, Mr. Moibi submitted that the Petitioner had not laid a basis for scrutiny, that the application fell foul of Rule 33(4) of the Election Petition Rules for failing to name the specific polling stations where scrutiny was sought, there was no allegation that any polling station recorded a higher number of votes than the registered voters to require a scrutiny of registers, that the application sought to introduce a new Petition, that evidence was lacking in respect of the allegations made in respect of the six (6) polling stations where results were contested, that the Petitioners have not exercised their right under Rule 80 of the Regulations by asking for a recount at the polling station, that the Ballot papers transferred from Masalani streams 1 and 2 were for gubernatorial elections and not National Assembly, that there was no dispute as to the assisted voters and the Petitioners had not established that there had been any dispute as to any ballot papers under Regulation 78, that the application was being made at a very late stage of the proceedings.

11. Counsels for the 2nd and 3rd Respondent referred to various cases including **Raila –vs- IEBC** (Supra) for the proposition that the purpose of scrutiny is to understand the details of the electoral process and to ascertain the integrity thereof and **M’Nkiria Petkay Miriti –v- Rangwa Samuel Mbae (2013)** to the effect that the grounds for scrutiny must be in the Petition. Counsels urged that the application should be dismissed.

12. I have carefully considered the submissions of Counsel. I have also reviewed the allegations contained in the Petition and the evidence tendered at the trial. I have also reviewed various case laws on the subject which reveal various principles to be applied in such an application. Some of these are that scrutiny may be ordered by the court suo motto and it is in the discretion of the court **Kithinji Kiragu –vs- Martin Nyaga Wambora, Embu EP No.1 of 2013**, that a Petitioner must lay a basis for an order of scrutiny to issue **Joho –vs- Nyange (Supra)**; a Petition has to cite specific irregularities in polling stations which would give a basis for scrutiny, **Harun Lempaka –vs- Lemanken Aramat (Supra)**; an order for scrutiny can be made at any stage before judgment **William Kamanda –vs- Margret Wanjiru (supra)**; when the margin is so narrow an order for scrutiny is desirable **Said Hemed –vs- Emmanuel Karisa Maitha (Supra)**; material alterations and cancellations to statutory forms may form a basis for scrutiny **William Kabogo –vs- George Thuo (Supra)**; the Petitioner must show that the alterations in Forms 35 that are not countersigned materially affected the results **Jared Odogo Okello –vs- IEBC (Supra)**; scrutiny is not meant to aid the Petitioner to look for evidence, it has to be confined to specific polling stations in which results are in dispute **Charles Ogande Were -vs- Joseph Oyugi (2013) eKLR**; that the court cannot grant the Petitioner’s request to scrutinize and recount results from polling stations that are not specifically pleaded in the Petition **Rashid Amana –vs- IEBC EP NO. 6 of 2013 (Malindi)**; and that a court is seized with the jurisdiction to define the scope of scrutiny and that where scrutiny is sought the evidence adduced by a party must corroborate the argument, the prayers for scrutiny should not be too wide to suggest a fishing expedition and that the courts reason to grant scrutiny must be good, logical and necessary for the purpose of arriving at an expeditious, fair, just, proportionate and affordable resolution of the issues raised in the Petition **Hassan Mohammed Hassan –vs- IEBC Garissa EP No. 6 of 2013**. That is how various courts have expressed themselves on the subject of scrutiny. Do the Petitioners bring themselves within this scope"

13. From the foregoing, the Respondent’s argument that the Petitioner’s application should be rejected for being brought at a late stage of the proceedings cannot lie. In my view, a reading of Section 82 of the Elections Act and Rule 33(1) of the Petition Rules, an application for scrutiny can be made at any stage of the proceedings before judgment. To rule otherwise, as submitted by the Respondents, will be to curtail the wide discretion given to the Court by the law. The words “at any stage” used in Rule 33 presuppose at any time before judgment is pronounced. Accordingly, I reject the Respondent’s contention and hold that the Petitioner’s application is properly before court. In any event, when an application for scrutiny is made at the close of trial, the court is well placed to ascertain whether the allegations in the Petition have been qualitatively established to warrant an order for scrutiny.

14. I agree with Counsels for the Petitioners that the cumulative effect of Articles 82, 86 and 88 of the Constitution of Kenya is to require the IEBC to ensure that the system of voting is simple, verifiable, accountable, secure and transparent. It is to ensure that when queries arise about the electoral process such queries are settled swiftly without any complications. I am also in agreement with the said counsels that Regulations 64(4) and 72(6) of the Regulations, require a Presiding Officer to give a detailed report when polling hours have been extended as well as record in the register instances where a voter has been assisted and give reasons therefor. Such requirement however has its basis.

15. I now turn to the prayers sought in the motion. In prayer Nos. 1, 2 and 3 of the application, the Petitioners sought an order for scrutiny of written statements by presiding officers in Maah, Ege,

Masalani primary, Masalani Baraza Park and Shurie Secondary School polling stations for the reasons that polling commenced later than 6 a.m. and was extended beyond 5 p.m. They also sought an order to scrutinize statements for Sinai and Wardijad (Wardejib) polling stations for the reason that polling closed earlier than 5 p.m. They also sought an order to scrutinize all the registers for the 65 polling stations to ascertain whether the presiding officers recorded the instances of assisted voters and the reasons for such assistance.

16. On the issue of late closure of polling stations, the 3rd Respondent produced R₃Exh 3, 4, 5, 11 and 12 which were the Polling Day Diaries for Sinai, Ege, Wardejib, Shurie Secondary School stream 2 and Maah Village Dam polling stations which showed that those stations were opened and closed on time. At the trial, the entries to those exhibits as to time were not seriously challenged and I see no basis to call for the presiding officers' statements in respect thereof. As regards Shurie Secondary stream 1, Masalani primary streams 1, 2 and 3 and Baraza Park streams 1 and 2 polling stations, the Petitioner's allegation was that the polling stations were opened late and closed late. In the Petition, the Petitioners did not allege that the late closure was for any ill motive on the part of the 2nd and 3rd Respondent. They only alleged that the early or late closure of the alleged stations was contrary to law. In their testimony, the Presiding Officers for some of the affected polling stations told the court that gates to the polling stations were closed at exactly 5 p.m. as required by law but they allowed those voters who were on the polling line to continue voting until the last of them voted. That evidence was not challenged. In any event, what value do the Petitioners hope to add to their Petition by scrutinizing the written statements of the Presiding Officers as to the time of opening and closure of polling stations and the reasons therefor. To my mind, I see none. No basis has been laid both in the Petition as well as in the application for the grant of prayer Nos. 1 and 2 of the Motion and I reject the same.

17. As regards the scrutiny of all the registers, the Petitioners argued that over 90% of the Ijara voters required assistance to vote. For that reason, the Petitioners required to scrutinize the registers to ascertain if the fact of the assisted voters was recorded in those registers and the reasons therefor. In the case of **Hassan Mohammed Hassan & Anor –vs- IEBC (supra)** the court held that, if irregularities alluded to do not negatively and substantially affect the electoral process in question the court will not order scrutiny. In this case, all the parties are agreeable that over 90% of the Ijara voters were voter assisted. The presiding officers who testified indicated that this was one of the reasons why voting took long and that they indicated in the register (V.A) to indicate voter assisted against the voters names. The Petitioners have not given any plausible reason why they require to establish whether the fact of assistance of voters was indicated in the registers and the reasons for such assistance. They have not told the court, how such information will assist the court in ascertaining the credibility of the electoral process in Ijara. My view is, the reasons for the requirement to record the fact of assisting voters in the register are threefold. Firstly, to avoid a situation where the presiding officer or IEBC officials mark the ballot papers for voters without any reason whatsoever, secondly, to make a record showing that even those voters with disability of whatever kind have been assisted and have not been disenfranchised and finally, in the words of the 3rd Respondent, for IEBC's demographic purposes. To my mind, registers would be required to be scrutinized where there is credible evidence that there was vote stuffing or that the number of votes cast superseded the number of registered voters in a particular polling station. None of these exists in this case and I therefore reject prayer No. 3 of the Motion.

18. In prayer Nos. 5, 6, 7, 8 and 9 of the Motion, the Petitioners seek the scrutiny of the packets of spoilt papers, counterfoils, rejected ballot papers and statements showing the number of rejected ballot papers as well as all Field Note Books in all polling stations. The basis for this request is that under Regulation 73(2) of the Regulations, the Presiding Officers are required to account for ballot papers issued to them. The other reason is that the presiding officers who testified on behalf of the 2nd Respondent indicated that the information required under this regulation was recorded in the Field Note

Book. To my mind, this is not good reason. As already stated, a Petitioner who requires scrutiny must specifically plead in his Petition and lay a basis for such scrutiny. An order in the nature of the prayers sought in Prayer Nos. 5, 6, 7, 8 and 9 will issue where there are allegations in the petition, properly backed by evidence, that there was either ballot stuffing or over voting in particular polling stations. It is then that scrutiny of such documents will be of assistance to the court in gauging the credibility of an election. In this case, there is no such evidence leave alone allegation. At best, the Petitioners are in a fishing expedition. I reject those prayers.

19. In prayer No.10, the Petitioners have sought the scrutiny and recount of all votes cast in the entire Ijara constituency. As already observed, Rule 33 of the Petition Rules require scrutiny to be confined to the polling stations in which results are disputed. The courts in **Charles Oigara Mogere –vs- Christopher Obure (2013) eKLR** and **Joseph Tiampati & 2 others –vs- Samuel Kuitai Nakuru EP No. 3 of 2013** were categorical that general prayers for scrutiny without observing Rule 33 of the Petition Rules would be construed to be a fishing expedition and would be rejected. Having carefully examined the Petition and the evidence tendered at the trial, I am not convinced that the Petitioners have made a case for the general scrutiny they crave for under this prayer. In **Phillip Munge Ndolo –vs- Omar Mwinyi & 2 others MSA EP No. 1 of 2013** Odero J in rejecting an application for scrutiny observed that:-

“In any case where, a request is made for scrutiny and/or recount the application therefore must be clear, concise and more importantly specific. An application couched in general terms ought not be permitted as this is tantamount to requiring of the court to go through the whole exercise of tallying once again. Rule 33(4) of the Election Rules however obliges a party to name the polling stations in which the results are disputed. As a general principle in law, a party is bound by its pleadings. As such, any evidence which goes outside of the pleadings on record must be disregarded.

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In my own thinking at this application stage, the standard of proof required to show sufficient cause would be ‘prima facie evidence’ of the disparity, irregularity and/or malpractice being alleged as a basis for the application. The court has already heard the cross-examination of eight (8) of the petitioner’s witnesses. Not a single witness was able to elaborate on the claims of inflation of votes. There were vague allegations of double voting and ballot stuffing but again the witnesses were very short on specifics. The evidence tendered in this regard was not entirely persuasive.” (Emphasis supplied)

I fully agree with the said sentiments and will apply them here.

20. In this case, the court has heard all the evidence of all the witnesses. There was no allegation of inflation of votes or ballot stuffing. If there was any such allegation in the Petition, no evidence of any probative value was tendered to collaborate the same. To my mind therefore, there is no basis laid for Prayer No.10 and I therefore reject the same.

21. In prayer No. 11, the petitioners have sought the scrutiny of the ballot papers that were transferred from Masalani Primary stream 1 and 2 to Shurie Secondary and Maah Village Dam polling stations. The basis for this prayer was that there was admission by the Returning Officer that ballot papers were

transferred from Masalani to Shurie and Maah polling station, respectively. As already stated, for scrutiny to issue evidence must show that the irregularities and mistakes of polling officials that are complained of, materially or substantially, affected the outcome of the election. In the case before court, all witnesses were agreed that the ballot papers transferred from Masalani Stream I and II to Shurie and Maah village Dam polling stations were for the Gubernatorial seat and not the National Assembly. The Petitioners have not established how the transfer of such Gubernatorial ballot papers could have affected the results of the elections for the National Assembly. I also reject that prayer as having no basis.

22. This now leaves prayer 4 for consideration. In that prayer, the Petitioners sought scrutiny of the results of each polling station in which the results of the election are in dispute. The basis for this prayer is that, there were alterations in Forms 35 for 13 polling stations. These as set out in ground No. 14 of the motion were Hulugho Primary School, Ire Garwan Village Dam, Tuntish, Hamora Village Dam, Gababa Primary School, Elkambere Primary School Stream 1, Koranhindi Primary, Muftu Primary School, Sagar Village Dam Stream 1, Hara Primary School, Rahma Primary School Stream 1 and Kotile Early Childhood Centre Stream 1. The Petitioners contended that due to the irregularities in the Forms 35 in those polling stations it was imperative that there be scrutiny to establish the authenticity of the votes cast thereat. The Respondents admitted that, there were alterations in some of the Forms 35 but the alterations were not material and that as such they did not materially affect the results of the election. They also submitted that there was no credible evidence to show that the alterations to those forms was fraudulent and not meant to correct simple mistakes. They also contended that, whilst in the Petition, the polling stations where results were disputed were set out as six (6), the Petitioners were seeking to amend their Petition by now extending the number of polling stations to 13. That the 2nd Respondent was able to rebut the evidence in the six (6) polling stations named in the Petition and therefore that prayer should be dismissed.

23. As already stated, it is clear from case law that a Petitioner will not be allowed to use scrutiny for a fishing expedition, per Tuiyot J in **Philip Osore Ogutu –vs- Michael Onyura Aringo (Supra)**. A Petitioner will be restricted to what he has pleaded in his Petition and the Affidavit in Support, per Kimaru J in **Rishad Amana –vs- IEBC**. In the **Phillip Osore Petition**, the court allowed scrutiny only in one polling station that had been pleaded in the Petition. In the **Rishad Amana case**, the court allowed scrutiny in only ten (10) polling stations pleaded in the Petition. In this regard, I agree with the Respondents that the Petitioners cannot be allowed to go outside what they had pleaded in the Petition.

24. I have looked at the Petition, in Paragraph 36, the Petitioners listed six (6) polling stations where they disputed the results. These were, Hulugho, Mata Arba, Daber Weyne, Gababa primary, Ire Garwan and Ali Tarire polling stations. They gave what they considered to be the results declared at the polling stations and a different figure declared at the tallying centre. However, when the 2nd Respondent filed its response, it supplied Form 36 which clearly showed that in five of the said polling stations, the results declared in the Tallying Centre were as declared in the polling station and as per the figures supplied by the Petitioners in their Petition. Only Daber Weyne polling station whose results for Sophia Abdi Noor were still returned as “Nil” (0). In the present application the Petitioners have prayed for scrutiny in 13 polling stations.

25. The reasons advanced by the Petitioners for seeking scrutiny in the 13 polling stations are that the Forms 35 in those polling stations contain multiple alterations and cancellations in the figures and information contained therein. To my mind, I do not think the Respondents are right in objecting to the 13 polling stations named. In paragraph 31 of the Petition, the Petitioners pleaded:-

“31. Your Petitioners claim that the statutory documents and forms which the presiding officers and the Returning officers are supposed to keep were altered and the number of votes changed without countersigning by any of the presiding officers or the returning officer. It is your Petitioner’s case that the signatures of the agents in several polling stations on Form 35 were forged.”

26. To this end, I do not think the Petitioner’s inclusion of these 13 polling stations is without foundation as contended by the Respondents. The basis stems from the Petition itself and the 13 polling stations are therefore not an amendment to the Petition.

27. That being the case, has a basis been laid for scrutiny in these polling stations” The Petitioners claim that there was a difference in the results supplied in the two (2) Forms 36 produced, that there was failure to make statutory comments on the declaration forms to give reasons why agents had not signed, that there was a difference in the total number of votes for the Presidential, Senatorial and Governor’s elections in the constituency as compared with that of the National Assembly and finally that the alterations in Forms 35 were not explained.

28. On the ground that there was a difference in the number of total votes cast for six (6) elections in the constituency, the Petitioners did not give the specific figures to back their claim. Even if there was, I would echo the words of Onyancha J in **Bashir Haji Abdullahi –vs- Adan Mohammed Nooru Garissa EP No. 7 of 2013** wherein in considering such a ground stated:-

“I have considered the ground. In my view there might be legitimate reasons for the difference. First, a voter may for lack of knowledge or deliberately or without intending to do so, drop more than one ballot paper in any one ballot box. He may on the other hand decide to vote for the President and not for Member of the National Assembly or vice versa as each voter had freedom to vote as he/she wished. Secondly, the court observed that this phenomenon was not limited to Mandera North. Indeed it was wide spread across the country. Finally, scrutiny if ordered in this respect will not really bring out the cause for and explanation of the difference in votes.”

That ground therefore fails.

29. On the difference in the results in Forms 36 produced at the trial, the Form 36 produced by PW1, Sophia Abdi Noor was not signed or stamped. R3W1, the Returning Officer explained that the Form 36 produced by Sophia Noor was a draft Form 36 that was prepared for all the agents and candidates for use in the tallying and verification exercise using Forms 35. He told the court that after the figures in Forms 35 were compared with the entries made by the data clerk in the draft Form 36, the correct final Form 36 was prepared signed and stamped. That Form 36 that contained the correct results returned for Ijara Constituency was the one produced in the Affidavit in Support of the 2nd Respondent’s response. To my mind, that evidence was not credibly challenged and seem to agree with the Forms 35 produced in evidence.

30. As regards cancellation and alterations to Forms 35, the presiding officers who testified for the 2nd Respondent were able to explain some of the alterations. However, in my view where there are unexplained alterations to Forms 35 especially the portion touching on the candidates’ votes, that calls

for scrutiny to verify the authenticity of the results. In this regard, I have examined the Forms 35 for the polling stations concerned and I find that there are those that are material and those that are immaterial. Those that are material are those that are likely to affect the results. After careful examination of the said Forms 35, I find that the alterations in Hulugho Stream 1, Hamora, Gababa primary school, Elkambere, Koranhindi, Sagar, and Kotile polling stations are immaterial. Not only that some are countersigned and stamped, they do not affect the results entered for the respective candidates. However, as regards the alterations for Ire Garwan, Tumtish, Muftu, Masalani Primary Stream 1, Hara and Rahma, I find them to be material. They touch on the results entered for the candidates and therefore likely to affect the results.

31. For the foregoing reasons, I am satisfied that the Petitioners have laid a foundation for scrutiny of votes cast in the following polling stations:-

- a. Tumtish
- b. Muftu
- c. Masalani Primary School Stream 1
- d. Hara
- e. Ire Garwan; and
- f. Rahma

32. As regards Dabel Weyne Village Dam Polling Station, the Petitioners had alleged that Sophia Noor got 40 votes but only zero (0) was returned. It also came out during trial, that the Polling Day Diary for that polling station, R₃Exh13, was not properly filled. To this end, I am satisfied that a basis has been laid for the inclusion of that station among those where scrutiny is to be carried out.

33. I allow prayer No. 4 of the Motion dated 24/07/2013 and direct that the scrutiny and recount in these seven (7) polling stations shall be restricted to the ascertainment of the votes which each candidate obtained in those specific polling stations as compared with the respective forms 35 as collated in Form 36 by the 3rd Respondent. This will enable the court ascertain the integrity of the results announced by the 3rd Respondent.

34. The scrutiny and recount is to be undertaken under the direct supervision of the Deputy Registrar of this court. The Petitioners and each of the Respondents shall be allowed to have four (4) agents present during the scrutiny. As indicated above, the scrutiny shall be partial to the extent of ascertaining what number of votes each candidate obtained in each of the polling stations as compared with the returned results.

35. The scrutiny shall commence on 12th August, 2013 at 9.00 a.m. and shall proceed on a day to day basis until completed. This matter shall be mentioned on 19th August, 2013 at 9.00 a.m. for further directions.

36. Costs in the cause.

DATED and DELIVERED at Nairobi this **07th** day of **August, 2013**.

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A. MABEYA

JUDGE



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