**REPUBLIC OF KENYA**

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

**ELECTION PETITION NO. 2 OF 2013**

**IN THE MATTER OF THE ELECTIONS ACT, 2011 AND THE ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS) PETITION RULES, 2013**

**AND**

**IN THE MATTER OF THE NATIONAL ASSEMBLY ELECTIONS FOR NAROK EAST CONSTITUENCY, NAROK COUNTY**

**BETWEEN**

**HARUN MEITAMEI LEMPAKA.................................................................................................................................PETITIONER**

**VERSUS**

**HON. LEMANKEN ARAMAT.............................................................................................................................1ST RESPONDENT**

**ISAAC RUTO.............................................................................................................................................2ND RESPONDENT**

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

## JUDGMENT

### 1. INTRODUCTION

**1.1** Harun Meitamei Lempaka *(hereinafter referred to as the Petitioner)* was along with nine (9) others a candidate for the National Assembly for Narok East Constituency. His vehicle of choice was the National Alliance Party ("TNA"). One of the other nine candidates was one Lemanken Aramat whose vehicle of choice was, the United Republican Party ("URP").

**1.2** After the closure of the polls and counting of the ballot papers, the results showed that there were 27,262 votes cast and 153 rejected votes. Out of the 27,110 valid votes, Lemanken Aramat garnered 5615 votes, while Harun Meitamei Lempaka became the runner-up with 5,174 votes. Lemanken Aramat was consequently declared the winner of the election and was returned as the Member of the National Assembly (MNA), for Narok East Constituency by Gazette Notice No. 3155 issued on 15th March 2013. He had won the Election by a margin of 441 votes.

**1.3** Being dissatisfied with the declared results, Harun Meitamei Lempaka *(the Petitioner)* filed a Petition dated 6th May 2013. He named Lemanken Aramat as the First Respondent, one Isaac Rutto as the Second Respondent and the Independent Electoral & Boundaries Commission (IEBC) as the Third Respondent. He sought the following orders -

***(1) that the Honourable Court be pleased to issue an order for scrutiny and recount of votes cast in all the 69 polling stations in Narok East Constituency.***

***(2) that the Honourable 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.***

***(3) 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.***

***(4) that the costs of the Petition be borne by the Respondents in any event.***

**1.4** The Petition was supported by the Petitioner's Affidavit sworn on 10th April 2013 and Further Affidavit sworn on 20th May 2013. The Petition was also supported by Witness Affidavits filed pursuant to directions given under Rule 12 of the Election Petition Rules. In addition to the Supporting and Further Affidavit of the Petitioner and the witnesses affidavits the Petitioner himself testified, and also called ten (10) witnesses to support his Petition.

**1.5.** As expected the Petition was opposed by both the First, Second and Third Respondents whose responses will be set out following the Petitioner's case.

## 2. THE PETITIONER'S CASE

**2.1.** The Petitioner's case is that the Election for the Narok East Constituency National Assembly seat was not conducted in accordance with the provisions of the Elections Act 2011 *(No. 24 of 2011) (as revised in 2012)*, the Regulations made thereunder and the principles of electoral justice envisaged and set down under Articles 38, 81 and 82 of the Constitution of Kenya, 2010. The Petitioner contended that the Second and Third Respondents and the Presiding Officers and polling clerks working under them at the various polling stations had willfully neglected or otherwise failed to discharge their duties under Article 86 of the Constitution which requires them *inter alia* to ensure that-

> ***(a) votes cast are counted, tabulated and the results announced promptly by the Presiding officers of each polling station.***

***(b)*** ***the results from polling stations are openly and accurately collated and promptly announced by the Returning Officer.***

c. ***appropriate structures and mechanisms to eliminate electoral malpractices are put in place, including the safekeeping of electoral materials.***

The Petitioner's case may be summarised into four categories.

*2.2.1.***that the Second Respondent and some of the election officials, and in particular one Mark Lempaka were not impartial and politically neutral. It was the Petitioner's belief that Mark Lempaka was involved in the alteration of Form 35 from Kutenoi Polling Station and forging the signature of the Presiding Officer;**

*2.2.2.***the Petitioner also contended that the Second Respondent engaged and acquiesced in acts of commission and omission whose cumulative effect was to prevent the Petitioner's agents from exercising proper and effective participation in the voting process. In particular, the Petitioner alleged that his agents were refused entry at Olenkomei, Ilkiragerien, Ole Sharo and Empaash polling stations.The Petitioner also alleged that his agents wee not issued with Form 35 as required by the law, and that out of the 69 polling stations, he only received Form 35 from 2 polling stations. The Petitioner also alleged that the Presiding Officers rejected requests from the Petitioner's agents for recount of the votes and that the Presiding Officers failed to post the results of the election on the doors of the polling stations contrary to the Election Regulations.**

*2.2.3.***The Petitioner contended that the tallying exercise was conducted in an opaque, high handed,and unaccountable manner, that in several instances there were discrepancies between the results that had been announced at the polling stations and those finally declared by the Returning Officer at the Tallying Centre. It was the Petitioner's belief that the transparency of the process was also diminished by the fact that his agents did not have Forms 35 with which they could confirm the results being declared.**

*2.2.4.***The Petitioner alleged that the integrity of the voters' register used in Narok East Constituency was questionable because the Respondent's website showed that there were 29,935 registered voters whereas Form 34 showed that there were 29,653 voters. The**

***Petitioner therefore concluded that the variance of 282 votes was used to manipulate the results in favour of the First Respondent.***

**2.3** For those reasons the Petitioner sought to be granted the orders first above set out in the Petition.However as indicated the Petition was opposed by both the First, Second and Third Respondents. I set out in the paragraphs following the case of each of the three Respondents.

## 3. THE FIRST RESPONDENT'S CASE

**3.1.** Unfortunately for the First Respondent, the court struck out his Response filed on 5th May 2013 as it had been filed both out of time, and without leave of the court. However, I allowed the First Respondent's Replying Affidavit sworn on 29th April 2013 and filed on 2nd May 2013 and directed it to be treated as the Response in the Petition. The First Respondent relied entirely on his own Replying Affidavit and testimony. He did not call any witness.

**3.2** The First Respondent's case was that the election results reflected the will of the people of Narok East Constituency. He, on the election day, visited about 30 polling stations and did not witness any incident of malpractice. He was present at the Tallying Centre when the complaint in regard to Kutenoi Polling station was raised, and stated the same was addressed immediately by the Second Respondent. He stated that he was at the Tallying Centre throughout the tallying process and that no other complaints were raised by the Petitioner or his agents. This Respondent stated that he was not involved in the appointment of agents, but that to the best of his knowledge none of the URP agents were denied entry into any of the polling stations. He testified further that the results from the various polling stations were relayed to him by the Chief Agent of URP who was based at the Tallying Centre. He confirmed that he too was not issued with Form 35 but he did ask the Second Respondent for them, and that he was satisfied with the results.

**3.3** The First Respondent specifically denied any involvement with one Mark Lempaka as alleged by the Petitioner, or the said Mark Lempaka having interfered with counting at the Tallying Centre. He therefore urged the court to dismiss the Petition as it lacked merit.

## 4. THE SECOND AND THIRD RESPONDENTS' RESPONSE

**4.1** In opposition to the Petition the Second and Third Respondents filed on 10th May 2013 an Amended Response dated the same day. In addition, the Second Respondent also filed a Replying Affidavit sworn on 6th May 2013 and Further Affidavit sworn on 25th May 2013.

**4.2** The sum total of the Second and Third Respondents' Affidavits, and testimony of the Second Respondent, and his witnesses was that the Elections in Narok East Constituency were free and fair and were conducted in accordance with the electoral laws and denied all the allegations that they or any one of their election officials wilfully neglected and/or otherwise failed to discharge their lawful duties or that they colluded with the First Respondent to declare results which neither reflected the actual votes gained by each candidate nor reflected the accurate record and manifestation of the will of the people of Narok East Constituency.

**4.3** In response to the question of alterations in some of the Form 35, the Second Respondent's case was that the alterations were minor and were to correct clerical mistakes and that such alterations did not affect the aggregate results.

**4.4** On the question of alleged denial of access of the Petitioner's agents at various polling stations, the Second and Third Respondents' joint response was that they had no role in the appointment of agents as this was the sole mandate of Political Parties. As purely an administrative measure arising out of the confusion in the number of agents, brought about by appointment by Political Parties and individual candidates, the Second Respondent directed his Presiding Officers to allow one (1) authorized agent appointed by Political Parties into the polling station. This decision was also informed by the fact that there was a total of forty-one (41) candidates for Presidential, Governor, Senatorial, Women Representative, Member of the National Assembly and Member of the County Assembly. It was not in the circumstances possible to allow every candidate to be represented by an election agent.

**4.4.** The Second Respondent specifically denied that there was any manipulation of results at the Tallying Centre. He reiterated that the only complaint raised at the Tallying Centre was in relation to Kutenoi Polling Station and the same was promptly addressed and resolved.

**4.5.** In addition to the testimony of the Second Respondent, the Second and Third Respondents also called four witnesses; Mark Lempaka, Albert Kolsikir Kaleke, Ntoiyik Supeyo and Daniel Nkamasian all of whom testified in terms of their affidavits, and denied all the allegations raised by the Petitioner in his Petition, and evidence.

**4.6.** I will now consider each of the specific allegations and relate the evidence for and against each of those allegations.

## 5. OF THE QUESTION OF RECOUNT

**5.1** The Petitioner relied on four main grounds in support of his prayer for an order of recount. **Firstly,** the Petitioner alleged that Second and Third Respondents were not impartial. **Secondly**, that his agents were denied access to polling stations. **Thirdly,** that the results were manipulated by the Second Respondent and his officials, and **fourthly,** that there was non-compliance with the electoral law during counting and tallying of votes. I will consider each of these grounds in turn.

### 5.2 Of Impartiality of the Respondent in the Election Process

**5.2.1** The Petitioner alleged that some of the election officials in Narok East Constituency were politically biased and not impartial. In his letter dated 29th January 2013

addressed to the IEBC Regional Coordinator the Petitioner expressed concern with regard to two officials, namely, one Mark Lempaka and Setu Kuyoni. According to the Petitioner, Setu Kuyoni was a close supporter of one of the aspirants, while Mark Lempaka had allegedly expressed deep hatred for the Petitioner and his family and that as a result he felt that they would not be impartial in conducting the election.

**5.2.2** Although Setu Kuyoni was transferred as requested by the Petitioner, Mark Lempaka remained an official of IEBC and participated in the organization of the electoral process for Narok East Constituency. The Petitioner consequently believed that the said Mark Lempaka caused the reduction at the Tallying Centre, of the Petitioner's votes from 180 to 140 votes in respect of Kutenoi Polling Station. The Petitioner was therefore apprehensive that the said Mark Lempaka engaged in other malpractices before he was redeployed by the Returning Officer after a request from the Petitioner.

**5.2.3** Mark Lempaka, DW2, testified that he had been appointed a Clerk by IEBC, that his recruitment was based on competitive process. He confirmed that the Petitioner was a distant relative and denied having any grudge against him. He also denied tampering with the election results and was not anywhere near the Coordinated Flow of Activities between the Presiding Officers from the various polling stations, the Receiving and Recording Clerks, to the final end of declaration of results by the Returning Officer. Mark Lempaka confirmed in his evidence, that he was indeed at the Tallying Centre and his role was to act as instructed by the Returning Officer, Second Respondent. He denied knowledge of alteration of any forms and denied having committed any malpractices during the Election.

**5.2.4** Isaac Ruto also testified that after receiving the Petitioner's complaint, the Regional Coordinator consulted him and it was found that as an Office Clerk, Mark Lempaka had no role in the election process, and there was therefore no need to transfer him. The Petitioner's complaint was found to have no basis.

**5.2.5** It is also clear from the evidence that Mark Lempaka was not selected as an official for purposes of Narok East Constituency Elections. He was not sworn as an election official in terms of Regulations (5) & (6) of the Regulations and from the evidence of the three Presiding Officers and the Returning Officer himself, Mark Lempaka had nothing to do with tallying of votes. There was not an iota of evidence that he even touched any Form 35. The proposition by the Petitioner that he aided in the manipulation of votes by deflating the Petitioner's votes and inflating the First Respondent's votes was not borne out by the evidence by the Petitioner or his Chief Agent who was seated a mere 3 metres away from the tallying table.

**5.2.6** I find and hold that the employment of Mark Lempaka, as an election clerk in the Constituency did not prejudice the Petitioner in any way, and does not cast any doubt in my mind that the process was anything but impartial.

**5.3 Of Non-Admission of Polling Agents into Polling Stations**

**5.3.1** It was also the Petitioner's case that the Second Respondent conducted, engaged and acquiesced in acts of commission or omission whose cumulative effect was to deprive the Petitioner's agents from exercising proper and effective participation in the voting

process. The Petitioner complained particularly that out of the 69 polling stations his agents were only allowed into two (2) polling stations. However PW1, PW2, PW4 and PW6 were TNA agents for Ilkiremisho, Olotrot, Oloika and Ongata Naado polling stations. It was their testimony that on the polling day they went into their respective polling stations but were denied entry by the Presiding Officers. PW1 testified that he was informed by the Presiding Officer that there was already a URP agent to represent the Jubilee Coalition and only one agent could be allowed in.

**5.3.2** The four agents produced their letters of appointment which had been signed by the National Chief Election Agents for URP and TNA. The letters instructed the agents to monitor elections on behalf of both parties. The Petitioner however testified that the situation on the ground was different. Whereas the Political Parties forming the Jubilee Coalition supported one Presidential aspirant, each party had its own candidate contesting other seats and were therefore rivals for purposes of the other elective seats. Each party therefore appointed its own agents to represent them in the elections.

**5.3.3** This position was confirmed by DW3, Albert Kaleke, who was the Presiding Officer in charge of Oloototrot Polling Station. He testified that on the morning of the Polling Day, the TNA and URP agents presented three different letters, some showed that the agents appointed were representing either TNA, URP Party or both parties jointly. He therefore sought instructions from the Second Respondent and was directed to allow one agent per Political Party on the basis of first-come, first-enter.

**5.3.4** The Second Respondent confirmed in his evidence being called by the Presiding Officers for directions as confusion had emerged over allowing agents due to the different letters of appointment. The Political Parties had been instructed by IEBC to submit the list of their authorized agents together with their letters of appointment to the Second Respondent. But having failed to do so, the only way the Presiding Officers could identify an authorized agent was by appointment letters which were to be submitted on the morning of the elections. It was the Second Respondent's testimony that he made an administrative decision and instructed the Presiding Officers to allow an agent for each Political Party and not on the basis of the Coalitions, and therefore each party was represented on the polling day.

**5.3.5** Indeed at Ilkerimisho Polling Station where PW1 was denied entry, it was admitted that one Sakau was the TNA Polling Agent and he signed the Polling Day Diary and Form 35.At Olootrot Polling Station where PW2 alleged to have been denied entry, Karkar was the TNA agent present and he signed Form 35 for the results, and in Ongata Naado, Jackson Sankar signed as the TNA agent.

**5.3.6** Regulation 62 of the Elections (General) Regulations prescribes the persons to be allowed into polling stations by Presiding Officers, and they include candidates and authorized agents. Sub-regulation (2) prohibits a Presiding Officer from admitting into the Polling Station more than one agent for each candidate or Political Party. Consequently, the instructions issued by the Second Respondent to admit one agent per Political Party was legally sound.

**5.3.7** However the Petitioner alleged that he did not know any of the agents who allegedly signed the Polling Day Diary and Form 35. His case was that his agents whom he

had appointed were not allowed into the polling station, and that as a result there was no transparency in the process. Section 30 of the Elections Act, 2011 *(No. 24 of 2011)*, envisaged this kind of situation. It gives priority to a Political Party to appoint agents. A candidate who has been nominated by a Political Party can only appoint agents if his Party fails to nominate agents. The said Section provides -

> ***"30(1)A political party may appoint one agent for its candidates at each polling station.***
>
> ***(2) Where a political party does not nominate an agent under sub-section(1) a candidate nominated by a political party may appoint an agent of the candidate's choice.***
>
> ***(3) An independent candidate may appoint his own agent.***

**5.3.8** It is thus clear that the decision to admit the Party's agent, as opposed to the candidate's agent was also in conformity with the law. The Petitioner was not an independent candidate. The appointment of agents is a duty solely vested in the Political Parties and IEBC the *(2nd and 3rd Respondents)*, have no power to direct on how such appointment would be made. If the Petitioner felt dissatisfied with the decision of his Party, he ought to have submitted his complaint to the Party. The allegation or fact that the Petitioner did not know the agents who had been appointed by his Party has absolutely no bearing or impact on the transparency of the election process.

**5.3.9** In addition, I concur entirely with the Second Respondent's evidence that it would have been impossible to allow each candidate's agent into the Polling Station as the crowd would have made it difficult for the Presiding Officers to conduct the elections. Further, out of the three polling stations pleaded by the Petitioner, the evidence shows that a TNA agent was present during the voting and counting process. The Petitioner was, it is emphasized, a candidate on a TNA ticket. I also agree with Mr. Karanja's submission that the Third Respondent has power and duty under the Electoral laws, regulations, and rules to ensure that the elections were conducted in a free, fair and transparent manner. I consequently find and hold that the Second Respondent's decision to allow agents on the basis of appointment by Political Parties, and not on the Coalition was just and fair. I am satisfied that the Petitioner's Party was represented during Polling Day at the Polling Stations.

## 6. OF MANIPULATION OF FORM 35 AND RESULTS OF THE ELECTIONS

**6.1** The Petitioner alleged that the results as announced by the Presiding Officers differed from those finally declared by the Second Respondent at the Tallying Centre. The Petitioner cited at paragraph 16 of his Petition 9 polling stations where he alleged, there were discrepancies. These were the polling stations, the votes allegedly garnered and votes declared

| | POLLING STATION | VOTES ALLEGEDLY GARNERED | VOTES DECLARED |
|---|---|---|---|

| | | | |
|---|---|---|---|
| 1 | Ilkiremisho | 12 | 2 |
| 2 | Komortot | 13 | 1 |
| 3 | Enaribo | 10 | 0 |
| 4 | Ole Sito | 97 | 24 |
| 5 | Olooltrot | 22 | 0 |
| 6 | Oloika | 12 | 2 |
| 7 | Ongata Naado | 34 | 4 |
| 8 | Eor-Ekule | 1045 | 1040 |
| 9 | Ole Sharo | 113 | 36 |

**6.2** The Petitioner also listed other polling stations at paragraph 17 of his Petition where he believed he was denied votes. In total the Petitioner alleged to have lost 249 votes in the 69 polling stations.According to the information he received from his agents, he was the winner of the election in Narok East Constituency, with 5,740 votes. Mr. Joseph Monke Nkadudu of Maendeleo Party was the second with 5,054 votes and First Respondent with third with 4,900 votes.

**6.3** Out of the pleaded polling stations the Petitioner gave evidence on five stations. In Ilkiremisho Polling Station, PW1, who alleged to have been present during the counting and announcing of results at the polling stations testified that the Petitioner received 12 votes and not 2 as indicated in Form 35 for Ilkiremisho and annexed to the second Respondent's Response and Replying Affidavit *(sworn and filed on 6th May 2013)*. However during cross-examination PW1 testified that Sakau was the agent for TNA at the station. This agent signed Form 35 and acknowledged the results therein.

**6.4** In Olooltrot Polling Station, the Petitioner alleged that he had received 22 votes but he was instead declared to have received no votes. His belief was based on the information he received from PW2 who alleged to have been present at the counting and announcing of the results. However DW3 who was the Presiding Officer produced the Polling Day Diary which had been signed by Shinka Karkar as the TNA agent for that Station. DW3 was both certain and emphatic that the Petitioner did not receive any vote as indicated in Form 35 which was as stated, also signed by the TNA agent.

**6.5** PW3 was the TNA agent at Enaribo Polling Station, where the Petitioner alleged to have received 10 votes. His testimony was corroborated by Form 35 at p. 126 of the Second Respondent's Replying Affidavit which showed that the Petitioner had indeed received 10 votes. However the Second Respondent erroneously declared that the Petitioner had garnered zero votes. The ten (10) votes were given to Joseph Nkaadado as indicated in the Form 36 annexed at page 45 of the Petition.The Second Respondent admitted this was an error and acknowledged that the 10 votes were not included in the tabulation of the Petitioner's final results.

**6.6.** PW4 testified that he was the Petitioner's agent for Oloika Polling Station although he came from Ntulele. According to him, the Petitioner had received 12 votes in that station although Form 35 annexed at p. 30 of the Second Respondent's Replying Affidavit showed that he had received 2 votes. The Second Respondent denied that PW4 was the Petitioner's agent, and according to the said Respondent, this agent was not even at that polling station. The Returning Officer testified that in fact PW4 was a registered voter at Ntulele Polling Station and not Oloika as he had testified. This witness not only perjured himself but by his demeanour I found him not to be a genuine or credible witness. His answers in cross-examination were evasive, and he could neither explain the mode in which the results were announced nor could he remember the results of any other candidate yet he claimed to have been at the polling station.

**6.7** - PW5, Stanley Konko was the agent at Kormoto Polling Station. He testified that he went to the Polling Station at 7.00 a.m. and was there throughout the voting and counting process. According to him the Petitioner garnered 13 votes. DW4 Daniel Salash Nkamasin who was the Presing Officer at that station produced Form 35 where it is clearly indicated that the Petitioner received one (1) vote. PW5 signed this Form 35. He also acknowledged the signature therein was his, but strangely maintained that the Petitioner had 13 votes in that station. I think PW5 was a hired tongue, as he could have refused to sign Form 35 and give his reasons as per the format in that - ***"Reasons for Refusal to sign".***

**6.8** According to Form 35 produced by the Returning Officer, the Petitioner garnered 4 votes in Ongata Naado Primary School Polling Station. However according to PW6 who alleged to have been the Petitioner's Polling agent, at that station and present during the counting of the votes and announcing of the results, the Petitioner actually got 34 votes.

**6.9** I did not find this witness credible or his evidence reliable. I have serious doubts as to whether he was even present at that polling station as he alleged. For instance, during cross-examination he acknowledged that Jackson Sankara had signed the Polling Day Diary as a TNA agent but he did not sign Form 35. Further, although he claimed that he was at the polling station as a TNA agent, he testified that he was only interested in the Petitioner's results, and could not therefore tell how many votes the Presidential candidate who was running under the Jubilee Coalition garnered. He also could not tell how many votes the other candidates including the First Respondent, who were contesting the seat for the Member of the National Assembly received. His version that the Petitioner garnered 34 votes as alleged, and his testimony alone without any other evidence was not sufficient to prove the allegation raised in regard to this station *(Ongata Naado).*

**6.10** Jackson Tonou Lempaka, PW7, was the TNA agent at Kutenoi Polling station and testified that he was present throughout the election process. He testified that the Petitioner garnered 180 votes in that station. He produced Form 35 issued to him confirming the said results.His evidence was corroborated by PW8, Robinson Lecau who was the Presiding Officer at the said Polling Station. However at the Tallying Centre the Second Respondent declared that the Petitioner had obtained 140 votes. After a complaint was immediately raised, this erroneous announcement was promptly rectified by the Returning Officer, and Form 35 was countersigned by the Presiding Officer. All the parties agreed on the figure finally declared and those reflected in the Form 36 were correct.

**6.11** In Olesito, Eor-Ekule and Ole Sharo Polling Stations where the Petitioner claimed to have garnered 97, 1045 and 113 votes respectively, there was no evidence that was submitted in support of his claim. The Petitioner's belief was based on hearsay, that is, information given to him by persons who claimed were his agents. The evidence on record however contradicted the Petitioner's claims.

**6.12** In Ole Sito polling station, DW5 who was the Presiding Officer in Stream 2, disputed the Petitioner's claim that he had received 97 votes. DW5 produced the Polling Day Diary signed by a TNA agent Port Maiyo Ole Katamoki on the material day and Form 35 containing the results which had not been signed by the agents. His evidence was that there were 530 registered voters in Olesito Stream 2 and 427 votes were cast and out of which the Petitioner received 24 votes.

**6.13** DW5 explained in his testimony that the agents present did sign the Forms but that it was by oversight that the one handed over to the Returning Officer had not been signed. In Ole Sito Stream 1, Form 35, annexed to the Petition shows that the Petitioner received 43 votes. In Ole Sharo where he claimed to have received 113 votes, Forms 35 produced shows that he had 50 votes in Stream I, and 27 votes in Stream 2, both making a total of 77 votes. Besides Teresia Naipanoi who was the TNA Agent as per the Polling Day Diary signed the Form 35 and in Stream 2 Kurash R. Panyua who had signed in as a TNA agent signed the form.

**6.14** On the allegations of alteration of forms at the Tallying Centre by the Second Respondent and his officials, and in particular Mark Lempaka, the Petitioner relied on the incident on Kutenoi Polling Station. However, during his testimony, PW7, the agent for Kutenoi produced Form 35 that had been issued to him. The form contained the correct votes and had not been altered. PW8 denied having altered the form as alleged by the Returning Officer and also denied the signature appearing thereon was his. He alleged that the signature had been forged by Mark Lempaka.

**6.15** The confusion in the alleged alteration of the forms can however be explained, Presiding Officers were provided with 5 copies of Form 35 each with its own distinct Serial Number which was to be recorded in the Polling Day Diary. Following the counting of ballot papers, the Presiding Officers fill the form, and 2 copies are given to agents, one copy is posted on the door of the polling station, the 4th is put into the ballot box and the final copy is given to the Returning Officer. The probability of there being an extra form that could be filled as alleged is absolutely remote.

**6.16** By way of comparison, the Petitioner also cited several polling stations at paragraph 7 of his Further Affidavit where Form 35 had been altered. The stations were Ongata Naado, *(where the number of rejected votes and votes for Martin Ole Kamwaru, Nturumeti Joseph Nkadado's figures were altered)*, Eor-Ekule Stream I *(alteration of the Petitioner's figures)*, Ole Sharo *(where the alterations were on the total number of votes cast)*, and Nail Ogilog polling stations.

**6.17** For these polling stations the Presiding Officers countersigned against the alterations. In Munanda Polling Station the alteration was on the total number of valid votes cast which was consistent with the total number of registered voters. In Komorto polling station, an alteration was made to the figures for the Petitioner and Joseph Nkadado. During cross-examination DW4 explained that for the Petitioner's figures he had written the figure I before 0 and the alteration was to indicate the correct votes he got. He (DW4) also confirmed to having altered the 47 votes for Nkadado but maintained that it was an error made during recording and the alteration made then was to correct an error. His testimony was that the votes as indicated in the Form 35 were correct and true, even though alterations for both stations had not been countersigned.

*[The question for this court's determination is whether the alterations were significant so as to affect the ultimate results of the entire election. I will answer this question along with the other complaint raised by the Petitioner].*

**6.18** The Petitioner also alleged that the number of registered voters indicated in the IEBC's website differed from the total registered voters as per Form 36. The Petitioner also alleged that the Second Respondent's inventory showed that he returned a total of 70 ballot boxes whereas there were 69 polling stations in Narok East Constituency. His belief was that the extra votes in the Form 36 were added to the First Respondent's votes.

**6.19** The Second Respondent explained that the discrepancy between the number of voters shown in the IEBC's website arose from the original registration in which the Biometric Voter Register *(the BVR)* and the manual register, which became known by the name of the "Green-book". However during the inspection of the register after the close of the registration period, it was found that some people had registered but their biometrics could not be retrieved and were put in the special register. There were other people who were found to have registered more than once, and these were put under the Exception Register. The total number of registered voters in Narok East Constituency were as follows:

| | | |
|---|---|---|
| (a) | Those in the BVR | 29,209 |
| (b) | Those in the Special Register | 413 |
| (c) | Those in the | 30 |

| | | |
|---|---|---|
| | Greenbook but not in the BVR or the Special Register | |
| (d) | Exemption Register | 1 |
| (e) | Total | 29,653 |

**6.20** The Second Respondent however explained that the total number of votes cast was 27,256, the rejected votes were 153 and the number of valid votes was 27,103. He contended that there was an error in the Form 36, as it showed that the total number of votes cast was 29,263. The error he explained was caused by "the Excel Software" used in tallying votes, but did not affect the results. He demonstrated that a tabulation of the total votes cast as indicated in Form 36 would show that 7 votes were not included in the tabulation.

**6.21** I have carefully scrutinized Form 36 and indeed the number of voters in each polling station tally with those in Form 36, I found no evidence that any vote was added to the First Respondent's aggregate final. I also find that the 7 votes were not included in the tabulation of the votes received by any candidate. I accept the explanation by the 2nd Respondent and I find that there was no manipulation of the votes cast and received by the candidates in the Form 36.

**6.22** There was also no evidence that the alleged extra ballot box contained any votes that could have been or were used to manipulate the election process in favour of the First Respondent.

## 7.0 OF NON-COMPLIANCE WITH THE ELECTORAL LAWS

**7.01** The Petitioner alleged that some of the Forms produced by the Returning Officer had not been signed by agents and urged this court not to rely on them as true reflections of the results. The Petitioner also faulted the Second Respondent for failing to give his agents copies of Form 35, and further alleged that in some polling stations, Forms 35 were not published on the door of the polling station. The Petitioner consequently accused the Third Respondent's officials for failing to comply with the requirements of Regulation 79 of the Elections (General) Regulations 2012, which says -

***"79(1) The Presiding Officers, the candidates and the agents shall sign the declaration in respect of elections -***

***(2) The Presiding Officer shall -***

***(a) …***

***(b) request each candidate to append his or her signature.***

***(c) provide each political party, candidate or their agent with a copy of the declaration of the results; and***

***(d) affix a copy of the declaration of the results at the public entrance to the polling station.***

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

**7.02** The Returning Officer's *(Second Respondent),* testimony which was corroborated by the Presiding Officers, was that a Presiding Officer was issued with 5 copies of Form 35, each with its distinct serial numbers. Upon being filled, two copies are issued to the agent, one is put on the door, another is put into the ballot box and the final copy is given to the Returning Officer *(during the tallying of the votes at the Tallying Centre).*

**7.03** It was however in evidence that Form 35 from some of the polling stations were neither signed by any candidate, their agents, nor the Presiding Officer, nor were any reasons recorded as required by Regulation 79(3) & (4) of the Elections (General) Regulations. Some Presiding Officers also failed to record the absence of some of the agents. I therefore find that the law was contravened in this regard. The question therefore is whether such contravention was fatal and would form a basis upon which the court would grant the orders sought.

**7.04** The answer to this specific question is provided for in Regulation 79(6)&(7) of the Elections (General) Regulations which says -

> *"79(1) – (5)*
>
> ***(6) The refusal or failure of a candidate or agent to sign a declaration under sub-regulation(4) or to record the reasons for their refusal shall not by itself invalidate the results announced under sub- regulation(2), and***

Sub-regulation 7 further provides -

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

## 8.0 OF THE QUESTION WHETHER, ALTERATIONS IN FORM 35 AFFECTED THE RESULTS

**8.01** I raised this question at the end of the discussion in paragraph 7 of this Judgment, and I reiterate here, the question, whether alterations in, and failure to sign Form 35, were so significant so as to affect the ultimate results of the entire election for Member of the National Assembly for Narok East Constituency. I have in the foregoing paragraphs answered this question in relation to failure by the candidates, or their agents, or even Presiding Officers to sign the declaration of results in Form 35. I now discuss the other

question generally of failure to comply with other aspects of the electoral law in Narok East Constituency.

**8.02** No process can be perfect and without any errors. Human hands and minds have lapses. This was recognized in **<u>JOHO</u> VS. <u>NYANGE & ANOTHER</u> (No. 4) (2008) 3 KLR (EP)** where the Election Court held thus -

***"Some errors in an election are nothing more than what is always likely (to happen) in the conduct of human activity. If the errors are not fundamental, they should be excused or ignored. But where deliberate irregularities are committed different considerations should be given as to the effect, if any, that those errors have on the election before it is vitiated. This is what is provided for in Section 28 of the National Assembly and Presidential Elections Act (Cap. 7, Laws of Kenya)."***

**8.03** Section 83 of the current Elections Act 2011, is the equivalent of Section 28 of National Assembly and Presidential Elections Act *(now repealed).*

**8.04** An Election Court in determining this question must bear in mind whether the lapses were material and whether they affected the overall results.The court will also consider the nature of the alterations, and the larger question whether such alterations also constituted malpractices as envisaged under Section 82 of the Elections Act, 2012 *(unauthorized or not registered persons voted, bribery, treating or undue influence, personation, double voting, a convict of an election offence* or Section 83 *(non-compliance with the law)* so that the non-compliance affected the results of the election.

**8.05** In the case of **<u>MORGAN</u> VS. <u>SIMPSON & ANOTHER</u> [1973] ALL E.R. 722 at 728** Lord Denning summarized the principles that the court should bear in mind when determining an Election Petition. He stated thus -

***"I suggest that the law can be stated in these propositions -***

***(1) If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated irrespective of whether the result was affected or not. This is shown by Hackney case (1874) 20 M' & H 77, where 2 out of 19 polling stations were closed all day and 5,000 voters were unable to vote.;***

***(2) If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by a breach of the rules or a mistake at the polls – provided that it did not affect the result of the election. That is shown in the <u>Ishington</u> case (1901) ITLR 210, where 14 ballot papers were issued after 8.00 p.m.***

***(3) But, even though the election was conducted substantially in accordance with the law as to elections, nevertheless if there was a breach of the rules or a mistake at the Polls – and did affect the results – then the election is vitiated. That is shown by <u>Gunn vs. Sharpe</u> [1974] 2 ALL E.R. 1058 – where the mistake was in not stamping 102 ballot papers did affect the results."***

**8.06** That decision is in all fours *(in conformity)* with Section 83 of the Elections Act 2012, - which provides -

*"83. No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in the written law or that the non-compliance did not affect the result of the election."*

**8.07** In **Rishad Hamid Ahmed Amana vs. IEBC & 3 others** ***(Malindi EP No. 6 of 2013),*** the Court established the materiality test and said -

> ***"Apart from that, the Petitioner is required to establish that the errors and irregularities were either occasioned by outright or deliberate action on the part of the guilty party. Irregularities which can be attributed to an innocent mistake or an obvious human error cannot constitute a reason for impeaching an election result. This court is mindful of the fact that at the stage where election officials are required to tally the results, some of them, would have stayed awake for more than thirty-six (36) hours and therefore simple arithmetic mistakes are bound to happen. This was the decision of Maraga J. (as he then was) in JOHO VS. NYANGE (2008)3 KLR 1 (EP) 500. What Section 83 of the Elections Act simply provides is that in any election, because it is conducted by human beings, there are bound to be errors which can be explained. There is no election which can be perfectly conducted. However it is only when such errors, which constitute non-compliance with the law, materially affect the outcome of the results that the court will have no option other than to nullify the said results."***

**8.08** The Supreme Court of Uganda, interpreted the phrase **"affected results"** in the case of **BESIGYE VS. MUSEVENI** *(Election Petition No. 1 of 2001)*, and said -

> ***"To my understanding, therefore, the expression "non-compliance affected the result of the election in a substantial manner" as used in S. 58(6)(a), can only mean the votes a candidate obtained would have been different in a substantial manner, if it were for non-compliance substantially. That means that to succeed, the Petitioner does not have to prove that the declared candidate would have lost. It is sufficient to prove that his winning majority would have been reduced. Such reduction however would to be such as would have put victory into doubt. This is how the learned Chief Justice of Tanzania Georges, C.J. stated it differently in MBOWE VS. ELIUD (supra), when he said at p. 242 DE -***
>
> ***"In my view in the phrase "affected the result", the word "result" means "not only the result in the sense that a certain candidate won and another candidate lost. The result may be said to be affected if after making adjustments for the effect of proved irregularities, the contest seems much closer than it appeared to be when first determined. But when the winning majority is so large that even a substantial reduction still leaves the successful candidate a wide margin then it cannot be said that the result of***

***the Election would be affected by any particular non-compliance of the rules."***

**8.09** A similar attempt to define *"result"* was made by the Supreme Court of Uganda, in **RTD. COL. DR. KIZZA BESIGYE VS. ELECTORAL COMMISSION (OF UGANDA), & YOWERI KAGUTA MUSEVENI** (Uganda – Election Petition No. 1 of 2006), - where the court said -

> ***"In Clare Eastern Division Case (1892)4 QM & H 167, at p. 162, Ruffle vs. Rogers [1982]QB 1220, it was held that the "result" means the success of one candidate over another, and not merely an alteration in the number of votes given to each candidate. In other words the result of an election is the outcome of the election in terms of performance by the candidate and the number of votes each obtained. The results of an election are reflected in a return filed by the Electoral Commission."***

**8.10** What emerges from the above decisions is that where an election is marred with such irregularities and malpractices, or was not conducted in conformity by the law, that it was a sham and a nullity, and it cannot therefore to stand and another election ought to be conducted. In such a case the Petitioner would be showing that the elections were not free and fair and do not reflect the will of the electorate. In such a case the election will be vitiated, and a new election conducted. On the other hand, those authorities also show that even if there were irregularities or malpractices, the election will not be vitiated unless it can be said that such irregularities or malpractices were so rampant that they affected the results of the election exercise. The question here is whether such irregularities or malpractices were so rampant that they affected the election exercise. Once again, I go back to review and analyse the evidence, the law of the Constitution, the Statutes and the authorities.

## THE PARTIES SUBMISSIONS

**9.01** After their respective testimonies, Counsel for the Petitioner and the Respondents made oral submissions, relying the Constitution of Kenya 2010, the various electoral laws, including regulations and the Election Petition Rules.

**9.02 The Petitioner's Submissions**

**9.02.1** Mr. Kibe learned counsel for the Petitioner renewed the Petitioner's application for scrutiny of votes although he had earlier indicated that the Petitioner had abandoned that prayer. This change of tact was perfectly in order in terms of Rule 33 of the Election Petition Rules that such an application can be made at any stage of the proceedings, and on the basis of sufficient evidence. In my view, the fact that such an application had been made and dismissed earlier does not preclude a Petitioner from seeking the same prayers after the conclusion of the trial where he is of the view that the evidence submitted establishes sufficient cause for the court to order scrutiny of votes in order to ascertain the validity of the votes cast.

**9.02.2** Mr. Kibe relied on Articles 80, 38 and 35(1)(b) of the Constitution of Kenya 2010 and submitted that Article 86, sets out the standards of a valid election, and this includes an accurate, verifiable, secure, accountable and transparent system. Under Article 38 of the Constitution, the Petitioner has a right to seek an elective office established by the Constitution and under Article 35(1)(b) of the Constitution, counsel submitted, in seeking to secure his right to public office, a Petitioner has a right to information held by another person, and that the Petitioner believes he won the Election for a Member of the National Assembly Narok East Constituency and that the proof thereof is contained in the ballot papers which are in the custody of the Third Respondent.

**9.02.3** Mr. Kibe submitted that the Petitioner had shown that many of of his agents did not participate in the election process regardless of the explanations offered by the Second and Third Respondents, that the arrangements by TNA and URP parties which teamed to form the Jubilee Coalition did not work and that the First Respondent's agents gained an unfair advantage over the Petitioner. Counsel argued that even where the Second Respondent demonstrated that there were TNA agents allowed into the polling station, that was however only sufficient in the eyes of the law, however because those agents were not recognized by the Petitioner and that his agents with appointment letters had been denied entry was sufficient to cast doubt as to the transparency and accountability of the process.

**9.02.4** On the distribution of Form 35, Mr. Kibe submitted that each candidate or his agent was entitled to a copy of Form 35 as per the provisions of Regulation 72(2)(c) of the Elections (General Regulations, 2012). Counsel submitted that the two Form 35 issued to agents and from which they were to make copies were not sufficient bearing in mind that the circumstances of Narok East Constituency *(which does not have adequate photocopying facilities)* and that many of the Petitioner's agents did not receive any of the said Form 35.Copies of the Form 35 were in addition not pinned on the doors of the polling stations, and that there was consequently no way the agents could verify the results announced by the Presiding Officers. The court, counsel submitted, was therefore vested with the duty to ensure compliance with the law and that only the court could do so is by ordering a recount of the votes cast.

**9.03** **<u>The Third Respondents Submissions</u>**

**9.03.1.** Mr. Karanja, learned counsel for the Third Respondent however argued to the contrary, that the burden lay on the Petitioner to prove that there were irregularities and malpractices in the electoral process, and that therefore a judicial inquiry ought to be carried out. That burden must be discharged to a higher degree than the balance of probability but not beyond reasonable doubt.

Counsel submitted that the Petitioner had failed to prove his case to the required standard. On the question of alterations on Form 35, counsel submitted that such alterations were minor and did not vitiate the entire process, and the court's duty was to determine the Petition on the basis of whether such errors affected the results of the elections in Narok East Constituency.

**9.03.2** On the question of recount counsel submitted a recount could either be a means to a remedy or a remedy itself. A recount, counsel submitted, is a means to a remedy

where there are serious allegations of irregularities and the only way to confirm the true position, but it is a remedy where it is the only prayer sought in a Petition and that in such a case a Petitioner seeking a recount bears a heavier burden. Counsel submitted that the Petitioner was not entitled to an order of scrutiny of votes as his application had been filed under Rule 22 of the Election Petition Rules, and he had only specified that he was only seeking an order of recount and tallying of votes.

**9.03.3.** On the Petitioner's evidence and that of his witnesses, counsel submitted that out of the nine polling stations listed at paragraph 16 of the Petition, the Petitioner gave evidence in relation to five and the rest of the evidence was based on hearsay from his agents.Counsel submitted that Section 30 of the Political Parties Act provides for the number of agents each candidate was supposed to have and a party could not seek nullification of an entire process on the basis of acts or omissions of his own Political Party.

**9.03.4** Counsel submitted that the counting of votes was an administrative function of the Third Respondent, and that the court could only interfere with that function if it is satisfied that the process was so irregular that it did not conform to the electoral law and procedure. There was no evidence of such extreme irregularity in the electoral process and urged the court to reject the prayer for recount, and that if the court were to find that the grant of such prayer was necessary, it should be limited to five polling stations for which evidence was given. Counsel submitted that disputes are determined on merit without fear or favour, and on basis of conviction by the court of the evidence submitted of the need to confirm the results as declared by the Third Respondent.

## 10.0 Submissions Of The First Respondents

**10.01.1** Mr. Ngunjiri, learned counsel for the 1st Respondent adopted the submissions made on behalf of the Second and Third Respondents. He however reiterated that for an order of scrutiny and to be made, a basis has to be laid, that is, a prima facie case ought to be established warranting such an order for a recount. The Petitioner had in this case sought a recount in all the 69 polling stations but had neither listed every polling station citing irregularities, malpractices and illegalities in each, nor called evidence to prove all his allegations. Counsel submitted that a recount cannot be granted as a matter of course, and will not be granted to satisfy a a Petitioner or litigant who says that the votes he garnered are not compatible with those he expected.

**10.01.2.** On the Petitioner's and the Petitioner's witnesses evidence, Counsel submitted the Petitioner had failed to prove his allegations of collusion between the First Respondent and the Third Respondent's officers.

**10.01.3.** Counsel also submitted that he found the Petitioner's evidence to be inconsistent because on one hand the Petitioner alleged that his agents were not allowed into polling stations while on the other he alleged that his Petition was based on information received from his agents who were present during counting and announcing of the results at the polling stations. For those reasons counsel submitted that the Petition be dismissed with costs to the 1st

## 11.0 FINAL ANALYSIS OF THE EVIDENCE , ISSUES AND AUTHORITIES

**11.1** I have considered the evidence adduced by the Parties in support of the Petition and the Responses thereto. From the evidence rendered together with the consolidated List of Issues filed along with the Pre-trial Check-List by the Petitioner, I find the issues following for determination -

> ***(1) whether a Petition should lay a basis before an order of recount and scrutiny of votes is made;***
>
> ***(2) whether the tallying of votes was done in accordance with the law; and***
>
> ***(3) whether the First Respondent was validly elected as having won the election for Member of National Assembly for Narok East Constituency.***

**11.2** On the first issue *(whether the prayer to recount should be granted)*, Mr. Kibe counsel for the Petitioner submitted that the court should apply two tests. The first test is where a Petitioner is challenging the validity of the entire election. In such a case, counsel submitted, the general rule applicable under the Election Petition Rules and case law is that the Petitioner should lay a basis as to why an order for scrutiny and recount should be granted or made, and that therefore those orders are a means to an an end. The second test of necessity is applied where a Petition is restricted to a single issue, namely, whether the declared winner obtained the correct number of votes. In such a case, as is the present Petition, where the only prayer sought is one for scrutiny and recount, it is not necessary to lay a basis or hear all the witnesses.

**11.3.** Indeed as Maraga J. *(as he then was, now Judge of Appeal)* said in the case of **HASSAN ALI JOHO VS. HOTHAM NYANGE & ANOTHER [2006] eKLR** - on the questions of an order of scrutiny -

> ***"I have read authorities cited by counsel for both parties, the common thread that runs through them is that there is no rule that a Petitioner must first call evidence and lay a basis before scrutiny is ordered, nor is there one that scrutiny will always be ordered whether or not a basis has been laid."***

**11.4** And in the earlier cases of **BURUDI NABWERA VS. SILVESTER KAMARU** ***(Election Petition No. 4 of 1983)*****,** cited with approval by the Court of Appeal in **SAMBU VS. GENEA & ANOTHER [2008] 1KLR (E.P.) 396,** the Court held *inter alia* -

> ***"a scrutiny would help in crystallising the Petitioner's complaint and might well also reduce the time which the court will have to spend upon hearing the evidence."***

**11.5** This thread of thought was followed in the case of **SAID VS. MWARUWA & ANOTHER [2008]1 KLR (E.P.) 323** where the court in rejecting counsel's argument that a recount cannot be ordered unless it is shown that the Returning Officer had acted contrary to the law held -

> ***"We think that the instant case is eminently proper for the application of the rulings in Onamu's and Nabwera's Petitions, and without accepting or rejecting the allegations of the Petitioner and without (requiring him to lay a***

***foundation or rejecting therefor we order a scrutiny of the votes cast in the exercise of our discretionary powers under Section 23(1)(d) of Chapter 7 (i.e) the National Assembly and (Presidential Elections Act, Cap. 7, Laws of Kenya).”***

**11.6.** Again in **Joho Ali Joho** **vs.** **Hotham Nyange & Another** *(supra)* Maraga J. continued -

> ***“... 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, and this Petition was heard to conclusion.”***

**11.7** In a sharp departure from the above cases, recount cases clearly show that in order for an order for scrutiny or recount to be made there has to be a basis laid before the court. The most recent recount decision in which the above considerations were given expression was the case of **WILLIAM MAINA KAMANDA VS. MARGARET WANJIRU KARIUKI & 2 OTHERS [2008] eKLR** where the court found that a basis was laid and the exercise of scrutiny would aid the court in investigating the allegations made and enable it to make a just and well informed finding. The court stated at p.7 -

> ***“... in light of the Petitioner's allegations – on which he has led evidence – that the 2nd Respondent and/or ECK failed to carry out their duties under the Regulations, this court is under a duty to investigate the truthfulness or otherwise of these allegations, and scrutiny of the ballots would assist in this regard. But another purpose (of scrutiny) would be to assist the court in determining the valid votes cast in favour of each of the seventeen candidates that contested the Parliamentary Election. And finally, scrutiny would also assist the court assess whether there would be just cause to limit the time within which the Petitioner or any of the Respondents should complete his case as envisaged by Rule 20 of the Rules. The Petitioner's allegations may turn out to be red herrings but an order of scrutiny would assist the court in its investigations to determine the truth.”***

**11.8** In **PHILIP OGUTU OSORE VS. MICHAEL ORINGO & 2 OTHERS** ***(Busia High Court Election Petition No. 5 of 2013)*** the court explained the reason as to why a basis has to be laid before an order for scrutiny is made -

> ***“First there is need to guard against an abuse of the court process. I agree with Mr. Ko' Opot that a party should not be allowed to use scrutiny as a fishing expedition to discover new or fresh evidence. It would be expected that a party filing an Election Petition is, from the outset, seized of grounds,***

***facts and evidence for questioning the validity of an election.And where the evidence is unclear then a party can, on application to the court seek and obtain particulars of that evidence from its adversary. But it would be an abuse of the court process to allow a party to use scrutiny for purposes of obtaining new evidence. Scrutiny should not be looked upon a lottery."***

**11.9** I entirely agree with the sentiments expressed by Maraga J (as he then was) -

***"I will not agree that expediency should be 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."***

**11.10** The IEBC, *(the Third Respondent)*, is the sole constitutional body vested with the mandate to conduct, regulate and supervise elections into any public office. This court's power under Article 105(1)(a) of the Constitution is limited to determining the **validity** of an election of Member of Parliament *(which includes, election to be a Member of the National Assembly or Senate)*. In determining that question, the court would in essence be inquiring into the conduct of the elections by the Third Respondent (IEBC). The court would be determining whether the IEBC acted in accordance with the electoral law, that the process was free and fair and the results reflect the will of the people of the particular constituency.

**11.11** In that regard therefore, a Petitioner challenging an election is bound to present to the court, clear, concise and credible evidence that the process was fraught with malpractices and irregularities, that the IEBC failed to discharge its constitutional and statutory mandate and that as a result the election is a nullity. In **<u>RAILA ODINGA</u> VS. <u>IEBC & 3 OTHERS</u> (Election Petition No. 5 of 2013),** the Supreme Court held -

***"where a party alleges non-conformity with the electoral law, the Petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections. It is on that basis that the Respondents bear the burden of proving to the contrary. This emerges from the long standing common law approach, in respect of alleged irregularity in the acts of public bodies <u>Omnia praesumutur rite et solemniter esse acta -</u>(all acts are presumed to be done rightly and regularly). So, the Petitioner must set out by raising firm and credible evidence of the public authority's departures from the prescriptions of the law."***

**11.12** The Romans expressed the same sentiment in the expression – *omnia praesumuntur legitime facta sunt donec probetur in contrarium [All things are presumed to have been legitimately done, until the contrary is proved]"*. This too is part of the Hellenic and Roman civilization we have received as our common law of England. It therefore follows that a Petitioner in an election petition bears a high burden of proof. He has the onus to show that there was non-conformity with the law and that such non-conformity with the law affected the entire electoral process and therefore the results. Where the Petitioner discharges that onus, then and only then, does the burden shift to the Third Respondent to answer the allegations of malpractice or irregularities made by the Petitioner. At p. 53 of its

decision in **RAILA ODINGA VS. IEBC & OTHERS** *(supra),* the Supreme Court rendered itself thus -

> ***"IEBC is a constitutional entity entrusted with the specific obligation to organize, manage and conduct elections designed to give fulfilment to the people's political rights (Article 38 of the Constitution). The execution of such mandate is underpinned by specific constitutional principles and mechanisms, and by detailed provisions of statute law. While it is conceivable that the law of elections can be infringed especially through incompetence, malpractice or fraud attributable to the responsible agency it behoves the person who thus alleges, to produce the necessary evidence in the first place – and thereafter the evidential burden shifts and keeps shifting."***

**11.13** It is thus clear that a party or a Petitioner is not entitled to any orders including that of scrutiny and recount as a matter of right and that a basis has to be laid to warrant the granting of the orders sought. This is so because the remedy of recount is a process by which the court would be verifying the results as declared by the Third Respondent (IEBC). In laying a basis the Petitioner would be showing irregularities in the conduct of Presiding Officers and the Returning Officer, that is, the results filed and declared by them were erroneous or were not filled in accordance with the law. In essence the Petitioner would be establishing that Forms 35 and 36 do not reflect the results of the elections. This is because these are the primary documents for purposes of an election and a party challenging these results would rely on them. Without having a basis or reason not to rely on them the court cannot on its own motion purport to order a recount of the ballot papers. That would indeed as Maraga J. observed, in **Joho Ali Joho vs. Nyanje** *(supra) be resorting to short cuts for convenience.*Therefore a party seeking such an order must establish or 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 election, that is by opening the ballot boxes.

**11.14** An order for recount is not an automatic right because if it were so then 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.

**11.15** Consequently the question of determination under Article 105 of the Constitution, whether a person has been validly elected as a Member of Parliament *(i.e. National Assembly or Senate)*, is a matter of inquiry, and determination by proof on evidence, a proper foundation by evidence must be established before it can be granted. Whereas it is indeed correct that a prayer for a recount would be part of such an inquiry/investigation a

party must still show evidence that there were such patent and flagrant abuses of the electoral law, that such an inquiry would be absolutely necessary. The Petitioner failed to do so.

**11.16** This is equally the case where a Petitioner claims that the margin of votes between him and the winning candidate is narrow. The court has still the duty to assess and ascertain whether the claim of the alleged loss of votes was proved. That is both the jurisdiction and discretion vested in the Election Court.

**11.17** I do not think, with respect to contrary view, that there is much adventure of thought in saying that the First Respondent won by a narrow margin. In every competition, it is the expectation of every competitor to excel against the other competitors. The reality however is the win or the loss. For athletics, the most exciting race of all is the 100 metre race. It is run and won in seconds. The difference between the winner and the runner-up, are equally in seconds. In the most popular game in the world, Football, the matches are won by two or less goals. The difference is not the margin of the time taken to win or lose the race or game, but, the closeness or tightness of the race or game.To disallow the athlete's win, there must be proof of malpractice, irregularity or doping, the use of performance enhancing drugs. In the game of football, faults are punished on the spot. A player is sent off, or penalty awarded. Complaints against referees are investigated and punishment meted out if found in breach of the race or game rules.

**11.18** So in the game of politics, the expectation of every candidate is to defeat his opponent, hands down. The reality however is the win or loss. For the Petitioner to say that he expected to have the most votes at stations where he thought he had the most influence whether by clan or otherwise is to cast a spell on the spirit and freedom of his electorate in those stations. Such expectation kills and renders meaningless the freedom of choice and secrecy of the actual electoral process.

**11.19** Mr. Kibe counsel for the Petitioner argued that the Petition herein was based on an act of faith and belief of the Petitioner, that the Petitioner believed, he won the Election and his evidence was contained in the ballot boxes, that scrutinizing and recounting the votes was the surest way of determining the Petition herein, and that it would also save the court's time by preventing an appeal.

**11.20** An Election Petition like all disputes before court is a process in which the court conducts a hearing as an impartial umpire. The court will only act on sound grounds and principles of the constitution and statutes. The court's decision must be based on facts and evidence, and the court cannot, as suggested by Mr. Kibe, act on the basis of belief and faith of the Petitioner or any other party.

**11.21** Scrutiny entails the process of determining the validity of a vote. The object of scrutiny is to ascertain by striking out votes or adding votes which are found the candidate had garnered. Rule 33(4) of the Election (Parliamentary and County Elections) Rules 2013 provides that scrutiny shall be limited to examination to the polling stations in which the results are disputed and shall be limited to examination of the documentation prescribed. Section 82(1) of the Elections Act 2011, *(No. 24 of 2011)* revised in 2012, provides for the grounds upon which votes allowed or disallowed during an election may be struck out. Votes may be struck off on a scrutiny on the grounds of bribery, treating or undue

influence, and votes may be rejected on the grounds of disqualification from voting, such as unregistered votes. There was no question raised challenging the validity of the votes cast and the evidence adduced did not disclose sufficient basis to warrant a court order for scrutiny of the votes. In any event counsel for the Petitioner indicated that the prayer for scrutiny had been abandoned at the conclusion of the submissions. I therefore find and reiterate my Ruling of 28th June 2013 disallowing, and rejecting the prayer for scrutiny. It has no basis in law or evidence. There is equally no basis for recount.

**11.22** That being the only prayer sought by the Petitioner, and the same having been rejected as having no basis, I must now draw my Judgment to a conclusion -

## 12.0 CONCLUSION

**12.01** In this case I am of the considered view that the results of the Narok East Constituency were free and fair and the results returned by the Independent Boundaries and Electoral Commission *(the Third Respondent)* reflected the will of the people of Narok East Constituency. I find that there was no evidence of substantial non-compliance with the law and therefore no irregularities alleged substantially affected the results. In this regard, I am also persuaded by the finding of the Supreme Court of Uganda in **Rtd. Col. Dr. Kizza Besigye vs. Electoral Commission & Yoweri Museveni** *(supra)* where the Court ruled -

> ***"In determining the effect of the irregularities on the result of the Election, the court should consider whether there has been substantial compliance with the law and principles and the nature, extent, degree and gravity of non-compliance. The court should consider whether the irregularities complained of adversely affected the sanctity of the Election. The court must finally consider whether after taking all these factors into account the remaining majority would have been reduced in such a way as to put the victory of the winning candidate in doubt."***

**12.02** There was no evidence adduced to show that the First Respondent was added any votes. All the Petitioner'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.

**12.03** The Petitioner was able to demonstrate only one instance where he was denied 10 votes erroneously given to another candidate, not the First Respondent. This error was readily admitted by the Second Respondent, and even if the same were credited to the Petitioner, they would only reduce the winning margin to 431 votes and would not affect the outcome of the election. The court cannot infer from the admitted error in regard to Kutenoi Polling Station that the same irregularities were committed in regard to other polling stations in the absence of any evidence to lead the court to such inference.

**12.04** Equally there was no evidence of manipulation of Form 35 or 36 at the Tallying Centre. There is no doubt in my mind that the First Respondent won the election and was validly declared as the Member of the National Assembly for Narok East Constituency.

**12.05** Being therefore of the above mind, I find no merit in the Petition herein and dismiss the same with costs to the Respondents.

**12.06** In terms of Section 86 of the Elections Act, 2011 *(No. 24 of 2011)*, I declare and certify that the First Respondent, Lemanken Aramat was validly elected as a Member of the National Assembly for Narok East Constituency.

**12.07** The Ballot Boxes currently under the court's custody be released forthwith to the Third Respondent.

**12.08** There shall therefore be orders and certificate to the Independent Electoral and Boundaries Commission accordingly.

**Dated, signed and delivered at Nakuru this 5th day of September, 2013**

**M. J. ANYARA EMUKULE**

**JUDGE**

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