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Scrutiny in Electoral Disputes: A Kenyan Judicial Perspective

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Abstract

Because of the tremendous public interest that elections generate, scrutiny is an integral aspect of any democratic electoral process intended to demonstrate openness in the entire process. It transcends the entire electoral process from the registration of voters; balloting; as well as counting, tallying and collating of votes. In election petitions, scrutiny of the voting materials is one of the methods the courts use to determine the integrity of an election. This chapter discusses scrutiny in the entire electoral process; what it entails; when and on what basis an order for scrutiny is granted; how the exercise of scrutiny is carried out; and the application of the result of the exercise.

1.0 Introduction

One of the main pillars of a functioning democracy is a peaceful transition of office through elections, which the public perceives as transparent, free and fair.¹ The right to free, fair and regular elections based on universal suffrage has been billed as “the fountain source of ... democracy.”² As one of the world democracies, transparency and integrity are hallmarks of Kenya’s

* This chapter expresses the personal views of the author. It is not a reflection of the official position of either the JCE or the Judiciary. The author is grateful to Brian Omwoyo and Priscilla Nyokabi for their research assistance.

1 V Autheman, *The Resolution of Disputes Related to Election Results: A Snapshot of Court Practice in Selected Countries around the World* (2004), IFES Rule of Law Conference Series, available online at, <http://www.aceproject.org>, at 29 December 2015.

2 K M Shradha Devi v. Krishna Chandra Pant & Others, (1980) SCI CA No. 277, [para 16].

electoral system. The Constitution of Kenya, 2010 (the Constitution) requires, in imperative terms, that whatever methods are employed, the conduct of elections shall be “simple, accurate, verifiable, secure, accountable and transparent.”³

Elections the world over, however, are competitive “features.”⁴ Heads of State in many parts of the world, and especially in Africa, wield a lot of power.⁵ “The influence that comes with the office makes it very attractive.”⁶ That influence cascades down through all elective positions. Besides the candidates, the electorate themselves, hoping for an improved standard of living, get equally agitated.⁷ Candidates and political parties often do anything to be elected. Incumbents who are eligible for re-election marshal state power and all means at their disposal to get re-elected.⁸ All these factors make elections at every level extremely “high-pressure events.”⁹

If they are mismanaged or candidates do not respect and adhere to the rules of the game; if the average citizen, political parties and candidates do not perceive them as free and fair, elections can stoke and foment conflict, which can lead to instability of a country with attendant economic breakdown.¹⁰

With such eventualities, the proper management of elections is of crucial importance to both the stability and prosperity of nations, especially on the African continent. To enjoy public confidence as credible and legitimate, the entire electoral process from the registration of voters and the integrity of the voters register; nomination of candidates; campaigns; the conduct of elections; and the counting and tallying of votes, must be transparent, verifiable and accountable and be perceived to be so. The objectivity and impartiality of the electoral dispute resolution mechanism¹¹ (EDR) inspires public confidence

3 The Constitution of Kenya, 2010, Article 86(a).

4 Independent Review Commission Report (IREC) The 2007 General Elections in Kenya ch III, (2008), 32.

5 E O Abuya, ‘Can African States Conduct Free and Fair Elections?’ (2010) 8 *Northwestern Journal of International Human Rights*, 123.

6 E O Abuya, ‘Can African States Conduct Free and Fair Elections?’ (2010) 8 *Northwestern Journal of International Human Rights*, 123.

7 E O Abuya, ‘Consequences of a flawed presidential election’ (2009) *Legal Studies*, 29, 127-158.

8 E O Abuya, ‘Consequences of a flawed presidential election’ (2009) *Legal Studies*, 29, 127-158.

9 Independent Review Commission Report (IREC) The 2007 General Elections in Kenya ch III, (2008), 32.

10 The flawed presidential elections in Kenya in December 2007 led to post-election skirmishes that left about 1,000 people dead, about 700,000 others displaced and drove the country to the brink of precipice not to mention the gargantuan economic crisis that was thereby wrought. A similar situation was witnessed in Cote d’Ivoire following the bungled presidential elections in November 2010. See Communiqué of 252 Meeting of the Peace and Security Council of African Union held on 9 December 2010.

11 V Autheman, Note 1.

and lends credibility and legitimacy to the electoral process in any democratic system.¹²

Electoral disputes are essentially political contestations, which should ideally be left to politicians to resolve.¹³ However, the electoral process from which they arise is also legal in nature and embraces wider and fundamental aspects of the rule of law and governance principles,¹⁴ which call for resolution by an independent and non-partisan body enjoying public confidence. Because of its neutrality and impartiality¹⁵ and more importantly being the vanguard of the rule of law¹⁶ the “final interpreter of the Constitution,”¹⁷ the judiciary, in most common law jurisdictions, is considered the right organ of state to resolve electoral disputes and its jurisdiction to do so is, in most cases, entrenched in the national constitution.¹⁸

In electoral disputes, scrutiny is one of the tools the court employs to determine the integrity and credibility of an electoral process. The term “scrutiny” has not been defined in the Constitution of Kenya, 2010 (the Constitution) or the Elections Act, 2011¹⁹ (the Elections Act). It is a term with complex layers of meaning. The ordinary English dictionary defines it as a close and thorough examination, observation or study.²⁰ In election dispute resolution jurisprudence, courts have defined scrutiny as a technical term, which refers to a court supervised forensic investigation into the validity of the votes cast in an election,²¹ and the subsequent determination of who ought to have been returned as the winning candidate.²²

12 International Foundation for Electoral Systems (IFES), Guidelines for Understanding, Adjudicating, and Resolving Disputes in Elections’ (GUARDE) (2011) 11.

13 *Bush v. Gore*, (200) 531 U.S.; In Germany, Under Article 41 of the German Basic Law, objections challenging the validity of federal elections are heard by the Committee for Scrutiny of Elections, Immunity and Rules of Procedure of the German Bundestag which makes recommendations to the Bundestag for a final plenary decision. In most Latin American countries, electoral tribunals are the entities designated to resolve such disputes while in the United States and some countries in Latin America and Europe, mixed systems of ordinary courts and specialized tribunals are used.

14 G Tardi, ‘Judicial Recount of Election Results: The Saskatchewan Experience in 2000’, MSU-DCL Journal of International Law (2001) 10, 475., <http://www.heinonline.org>, at 23 October 2015.

15 R Hirschl, ‘The New Constitution and the Judicialization of Pure Politics Worldwide’, (2006) 75 Fordham Law Review 721. Available at, <http://www.ir.lawnet.fordham.edu/flr/vol75/iss2/14>.

16 G Tardi, ‘Judicial Recount of Election Results: The Saskatchewan Experience in 2000’, MSU-DCL Journal of International Law (2001) 10, 465., <http://www.heinonline.org>, at 23 October 2015.

17 International Development Law Organization (IDLO) and Judiciary Training Institute (JTI) and Katiba Institute (2015) *Animating Devolution in Kenya, The Role of the Judiciary, A commentary and Analysis of Kenya’s Emerging Devolution Jurisprudence under the New Constitution*, (2015) 150

18 In Kenya, this jurisdiction is set out in Articles 105 and 140 of the Constitution of Kenya, 2010.

19 The Kenyan Elections Act, 2011 (No. 24 of 2011).

20 Oxford University Press, *The Concise Oxford English Dictionary*, (2011) 12th ed.

21 *Halsbury’s Laws of England*, (1990) 4th ed, 12, 454.

22 *Robert Chapman v. Silas Rand* (1885) 11 SCR 312.

This definition by the courts restricts scrutiny to only matters brought before courts. In the electoral process, however, scrutiny is broader. It transcends the entire electoral process. In most cases, electoral disputes raise issues from all stages of the electoral process: the integrity of the voters register; commission of election offences during election campaigns; the conduct of the ballot; and the counting and tallying of votes before the declaration of election results. These are among the areas that generate protracted issues in election petitions.²³ Viewed in that context, scrutiny is “a scrupulous audit,”²⁴ sometimes referred to as an examination²⁵ or inspection,²⁶ carried out in Kenya, and in many other jurisdictions,²⁷ at several stages in the entire electoral landscape. Its primary objective is twofold: determination of the validity of election results as well as the integrity of the electoral process and a demonstration of the transparent nature of electoral dispute adjudication and fair determination of electoral disputes.²⁸

If scrutiny is well facilitated and properly carried out at all stages of the electoral process, disputes such as those relating to the integrity of the voters’ register and nominations of candidates will be resolved before elections and thus substantially minimize the issues raised in election petitions, thus enabling the judiciary to expeditiously dispose of election petitions. This Chapter critically examines the type of scrutiny carried out at every stage of the electoral landscape and how that weaves into electoral dispute adjudication. The primary objective of this broader view of scrutiny is to identify problematic areas that require closer attention for a seamless, expeditious, competent and fair resolution of electoral disputes and ultimate restoration of public confidence in the judiciary.

23 The integrity of the voters register and the tallying and collation of votes were among the issues which were raised in the Presidential petition of Raila Odinga & Others v. The Independent Electoral and Boundaries Commission & Others, [2013] eKLR. (hereinafter referred to as Raila Odinga case). In Moses Masika Wetangula v. Musikari Nazi Kombo & 2 Others, [2015] eKLR, bribery in the campaign period was the major issue.

24 J Harrington and A Manji (2015) ‘Restoring Leviathan? The Kenya Supreme Court, Constitutional transformation, and presidential election of 2013,’ (2015) *Journal of Eastern African Studies*, 9:2, 175-192, DOI: 10.1080/17531055.2015.1029296.

25 The Elections Act, No. 24 of 2011, marginal note to s.101.

26 The Elections Act, No. 24 of 2011, s. 6(1).

27 Countries such as the USA, Canada, Australia, India, and South Africa carry out scrutiny at various stages of their respective electoral processes.

28 With some election petitions taking as long as five years and more to resolve, as the Supreme Court held in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* [2014] eKLR [par.62], the courts have, in the past, justifiably been blamed for tardiness. One of the alleged causes of the 2007/2008 post-election violence was said to be the Kenyan Judiciary’s biased, indolent and incompetent handling of election petitions, particularly the Presidential petitions. That informed the strict timeframe set in the Constitution of Kenya, 2010 and the Elections Act, 2011 for the resolution of election petitions. Scrutiny to demonstrate the courts’ transparent and competent determination of electoral disputes is crucial.

This Chapter is divided into six parts. Part one is the introduction which also defines the term “scrutiny” and what it entails; part two sets out the legal framework for scrutiny; part three examines the pre-election day scrutiny process; part four looks at the scrutiny carried out on the election and subsequent days up to the declaration of election results; part five examines scrutiny pursuant to court orders and the utilization of the result of the exercise; and the last part makes concluding remarks and suggests possible reforms to achieve the intended objectives of a seamless election dispute resolution.

2.0 The Legal Framework for Scrutiny

The pith of the legal framework for scrutiny in the electoral process is discernable from the letter and spirit of the Constitution. Article 38 of the Constitution provides for political rights. Chapter Seven entitled “Representation of the People,” provides for free, fair, transparent, accountable and verifiable elections. All these terms import the element of scrutiny in one way or the other to guarantee the integrity of an electoral process.

The Elections Act and the Election Regulations provide for public scrutiny of the voters register and scrutiny by the election officials of the nomination papers of the candidates seeking elective positions.²⁹ The right to a recount before election results are declared is provided for in Regulation 80 of the Election Regulations, which permits up to two recounts. In EDR, the legal framework for court-supervised scrutiny is anchored in Section 82 of the Elections Act and Rule 33 of the Election Petition Rules. Section 82 of the Elections Act states:

82. (1) An election court may, on its own motion or on application by any party to the petition, during the hearing of an election petition, order for a scrutiny of votes to be carried out in such manner as the election court may determine.

Rule 33 of the Election Petition Rules provides:

(1) The parties to the proceedings may, at any stage, apply for scrutiny of the votes for purposes of establishing the validity of the votes cast.

²⁹ See Elections Act, ss. 6, 13 and Election Regulations, Parts III to X.

3.0 Pre-Election Day Scrutiny

3.1 Inspection of the Voters Register

The right to vote guaranteed by Article 38(3) of the Constitution is exercisable by all adult Kenyans who are registered as voters.³⁰ That renders the right to be registered as a voter and the integrity of the voters roll sacrosanct. Every citizen's right to be registered as a voter³¹ and to demand scrutiny of the voters' register to ensure that his or her name is in it cannot therefore be overemphasized.³²

As is the case in many other jurisdictions such as Australia,³³ Nigeria,³⁴ Pakistan,³⁵ South Africa,³⁶ and Tanzania,³⁷ upon completion of the registration of voters and compilation of the voters register, Section 6 of the Kenyan Elections Act grants the public the right to inspect the register at any time "for purposes of rectifying the particulars therein"³⁸ and confirming that one's name is on the register.³⁹

For the public to exercise their right to vote, a proper and authentic register should be compiled and made public. After finding out that the voters register used in the 2007 general election was bloated with over 1 million deceased persons on it,⁴⁰ the Independent Review Commission (IREC), which was appointed by the Government of Kenya to inquire into the botched 2007 elections and the cause of the 2008 post-election violence and make remedial recommendations, singled out voter registration as "open to serious

.....
30 Elections Act, s 3.

31 In *Kituo Cha Sheria v. IEBC & Another*, [2013] eKLR the High Court held that even prisoners are entitled to register and vote.

32 This is probably why, save for short periods prior to and after elections, Section 5 of the Elections Act provides for continuous the registration of voters.

33 The Australian Commonwealth Electoral Act of 1918, s 90A.

34 The Nigerian Electoral Act No. 6 of 2010, s 19.

35 The Pakistan Electoral Rolls Act, No. XXI of 1974, s 8.

36 The South African Electoral Act No. 73 of 1998, s 16.

37 The Tanzanian National Elections Act, 2010, Cap 343, s 22.

38 Elections Act, 2011, s 6. In the election year sixty days prior to the general election, the inspection of the register is limited to a period of fourteen days or such period as the Independent Electoral and Boundaries Commission, (the IEBC) shall by notice in the Kenya Gazette specify. See Section 24(2) and Regulation 27(2) of The Elections (Registration of Voters) Regulations, 2012. Although it is not expressly stated, the particulars for rectification may include disputes on the names of persons in the register who may not be eligible to vote and removal from the register of deceased persons. See Section 8(2)(b).

39 If one finds one's name missing from the register, under Section 12 one has a right to lodge a claim to the registration officer for the area with a right of appeal, first to the Principal Magistrates Court and then to the High Court, if one's plea is denied by the registration officer.

40 *Independent Review Commission Report (IREC) The 2007 General Elections in Kenya ch III, (2008)*, 32.

criticism.”⁴¹ IREC in particular deprecated the use of the manual register, then known as the ‘Black Book,’ in the 2007 election, on the ground that it created a fertile ground for “electoral malpractice.”⁴² In its stead and to minimize voting malpractices, IREC recommended the compilation, by the biometric voter registration (BVR) system,⁴³ of a single national register for use in subsequent elections.⁴⁴ Following this recommendation, IEBC compiled an electronically based register, which it successfully used on a pilot basis in the 2010 referendum in some parts of the country.

As is common knowledge, in the 2013 general elections, the electronic voter identification device (EVID), based on BVR completely collapsed forcing IEBC to resort to the manual register, known as the Green Book, for identification of voters. This later formed the basis of a serious contestation in *Raila Odinga & Others v. The Independent Electoral and Boundaries Commission & Others*,⁴⁵ on the authenticity of the voter register used in the 2013 general elections which would have been obviated had a secure BVR register been compiled pursuant to the IREC recommendation, and proper scrutiny facilitated and carried out prior to elections.⁴⁶

Given the ethnic and highly factional Kenyan political landscape, IEBC cannot afford to have an oscillating voters register and leave room for allegations of its manipulation. To minimize multiple voter registrations and voting, IEBC should develop a proper BVR register in good time, avail it for public scrutiny, and obtain a secure EVID. Pursuant to IREC’s other recommendation of electronic transmission of results from polling stations as a parallel record against which the manual records of results would be verified and thus authenticated,⁴⁷ IEBC should also obtain functional devices for electronic transmission of election results from the polling stations to its national database.

41 Independent Review Commission Report (IREC) The 2007 General Elections in Kenya ch III, (2008), 32.

42 Independent Review Commission Report (IREC) The 2007 General Elections in Kenya ch III, (2008), 32.

43 A BVR register would electronically capture the voters’ fingerprints and eliminate double voting and personating frauds.

44 J Harrington and A Manji (2015) ‘Restoring Leviathan? The Kenya Supreme Court, Constitutional transformation, and presidential election of 2013,’ (2015) *Journal of Eastern African Studies*, 9:2, 175-192, DOI: 10.1080/17531055.2015.1029296..

45 Raila Odinga case [2013] eKLR.

46 In the Raila Odinga case, the petitioner accused IEBC of maintaining an oscillating voter’s register. It was claimed that at the close of the voter registration process on 18 December 2012 the figure for the total number of registered voters was given as 14,333,339 while the figure later gazetted was 14,352,445. At one stage, the number of the registered voters on the Special Register was given as 31,318 and at another as 36,236.

47 J Harrington and A Manji (2015) ‘Restoring Leviathan? The Kenya Supreme Court, Constitutional transformation, and presidential election of 2013,’ (2015) *Journal of Eastern African Studies*, 9:2, 175-192, DOI: 10.1080/17531055.2015.1029296.

3.2 Scrutiny of Nomination Papers

The next stage of scrutiny in the electoral process is at the nomination of candidates seeking to vie for any election. The objective of this inspection is to confirm the prospective candidates' compliance with the criteria set out in the electoral laws. In Kenya, election officials carry out this type of scrutiny. The Elections Act sets out the criteria for eligibility to vie for any elective position and requires the IEBC to vet the names of applicants forwarded to it by political parties or independent candidates who present themselves for nomination.⁴⁸

Some other jurisdictions, however, go a step further to allow inspection of the prospective candidates' nomination papers by their rivals and the public. In India for instance, after the nomination of candidates is completed, Section 36(1) of the Representation of People Act, 1951 authorizes inspection of candidates' nomination papers by their rivals with a right to challenge their validity.⁴⁹ In South Africa, the inspection is open to the public at large,⁵⁰ while in Uganda it is limited to registered voters only.⁵¹

Kenya, like many other African states, is a patriarchal society.⁵² As such, women, youth and persons with disabilities⁵³ do not have equal chances of success to elective positions and fare poorly even in appointive positions. To achieve some form of balance, the Constitution has provided for affirmative action⁵⁴ for appointive positions and election of women, the youth, persons with disabilities, to Parliament and the County Assemblies on the basis of proportional representation by use of party lists⁵⁵ (nominations). In the aftermath of the 2013 general elections, many petitions were filed in court challenging the composition of party lists. Such disputes can greatly be minimized if Kenya were to adopt the open form of scrutiny of candidates' nomination papers and party lists found in the said jurisdictions.

48 See Elections Act, ss. 22 to 37 and Election Regulations, Parts III to Part X.

49 A B Kafaltiya, *Democracy and Election Laws*, (2003) 140.

50 The South African Elections Act No. 73 of 1998, s. 29.

51 The Ugandan Parliamentary Elections Act, 2005, s. 15.

52 In a literal sense, patriarchy refers to the rule of the father in a male dominated society. See S Walby, *Theorizing Patriarchy*, 1990.

53 In Kenya, the Constitution lists the youth, without specifying the age range, women and persons with disabilities as vulnerable groups in whose favor there should be affirmative action.

54 See Constitution of Kenya, 2010, Article 27(6).

55 See Constitution of Kenya, 2010, Articles 81; 90; 97(1) (c), 98(1) (b), (c) & (d) and 177(1) (b), (c) & (d).

4.0 Scrutiny on Polling Day

4.1 Inspection of Election Materials Prior to Polling

The third stage of scrutiny is at the polling stations. This appears to be a universal practice whose objective is to ensure transparency of the poll. Globally, on the election day, before polling commences, the election officials are required to display, “in full view of the candidates, or their representatives,”⁵⁶ the ballot boxes to be used in the election for them to confirm “that [they are] empty”⁵⁷ and allow candidates or their agents to examine the ballot papers to be used in the election.⁵⁸ As this is done at the outset when all parties are keen to ensure the poll commences on a clean slate, no complaints have been brought to Kenyan courts of ballot boxes being stuffed with votes prior to the commencement of the poll.

4.2 Scrutiny at Polling Stations after the Poll

The fourth and perhaps the most crucial stage of scrutiny is carried out at the polling stations after the poll to determine the validity and accurate number of votes cast for each candidate. This is of course done before the results are announced.⁵⁹

Regulations 75, 76, 77 and 80 of the Elections Regulations set out an elaborate procedure of the mechanism of this scrutiny. Great emphasis is laid on the transparency of this exercise. The presence of the candidates or their agents and there being availed a reasonable opportunity of ascertaining that each ballot paper is actually marked in favor of the candidate to whom it is credited should be guaranteed.⁶⁰ As stated, the purpose of this scrutiny is to determine

56 The Canada Elections Act, 2000, s.140.

57 Section 34 of The Sri Lankan Presidential Elections Act, No. 15 of 1981, s.34. See also The South African Elections Act No. 73 of 1998, s.37 and Halsbury’s Laws of England, (1990) 4th ed., 15, [par. 515] in respect of the UK.

58 Election Regulations, reg. 67(1) and 68(5) require presiding officers to allow the candidates’ election agents to inspect the ballot boxes before they are sealed and to affix their own seals if they so wish.

59 Before this scrutiny is carried out, Regulation 73 requires the presiding officer to make, in the polling station diary, a statement of “(a) the number of ballot papers issued to him or her under Regulation 61; (b) the number of ballot papers, other than spoilt ballot papers, issued to voters; (c) the number of spoilt papers; and the number of ballot papers remaining unused.” After making that record, Regulation 73 requires the presiding officer to seal, with his or her own seal and the seal of the Commission in separate tamper proof envelopes, “the spoilt ballot papers, if any”; “the marked copy register ...;” “the counterfoils of the used ballot papers” and the said statement. Once again, the candidates or their agents have a right to place their own seals to those envelopes. The rationale for this record is accountability. All election materials, especially the ballot papers, which Regulation 68(4) (d) requires to be serially numbered, are accountable documents. It is from this record that the court is able to determine if there is any malpractice (such as over voting) where such allegations are made.

60 The Elections Regulations, 2012, reg. 76(2).

the validity of each ballot paper and ensure that the rejected ballot papers or votes are not taken into account in favor of any candidate; that valid ballots are not rejected and that the votes of every candidate are correctly credited to him or her.

In sorting out the ballot papers used in an election, there are those that are “spoilt” and others that are “rejected.” The distinction between a “spoilt” ballot paper and a “rejected” vote is important. It is manifest from Regulation 71 of the Election Regulations that a spoiled ballot paper is one that is inadvertently wrongly marked and cannot be used for the intended purpose of casting a vote.⁶¹ It is never cast into a ballot box. Instead, it is replaced with another one. A rejected ballot paper or vote, on the other hand, is a ballot paper that is cast into a ballot box, which is, however, declared invalid during the scrutiny at the close of polling. Regulation 77(1) of the Election Regulations sets out the criteria for determination of rejected votes or ballot papers as: lack of the Commission (IEBC) security features on a ballot paper; a ballot paper bearing different serial numbers from those supplied to the polling station concerned; or the ones on which the voter’s choice is indeterminate. Any other ballot papers with more than one mark or those marked outside the required box are to be accepted as long as the voter’s choice is clearly discernable from them.⁶²

After the determination of rejected votes, the valid ones are counted and the results are then announced. The presiding officer then seals up the votes and other voting materials in the ballot boxes and transmits them to the returning officer.⁶³

The determination of the rejected votes in turn may determine the winners and losers of the election concerned. As regards the election of the President, the figures compiled from the polling stations are important in the

61 The Election Regulations, 2012, Regulation 71 provides that “A voter who has inadvertently dealt with his or her ballot paper in such a manner that it cannot be conveniently used as a ballot paper may, on delivering it to the presiding officer and providing to the satisfaction of such officer the fact of the inadvertence, obtain another ballot paper in the place of the ballot paper so delivered and the spoilt ballot paper shall be immediately cancelled and the counterfoil thereof marked accordingly.”

62 Regulation 76(4) of the Election Regulations gives each candidate the right to dispute the inclusion of rejected votes in the computation of votes count or oppose the exclusion of a ballot paper on the ground that it is a rejected vote.

63 At the completion of scrutiny at the polling stations, Regulation 81 of the Election Regulations requires presiding officers to “seal in separate tamper proof envelopes—(a) the counted ballot papers which are not disputed; (b) the rejected ballot papers together with the statements relating thereto; (c) the disputed ballot papers; and (d) the ‘rejected objected to’ ballot papers,” and put them into an empty ballot box and transmit them to the returning officer.

determination, first and foremost, of whether or not the President-elect has garnered the threshold set out in Article 138(4) of the Constitution⁶⁴ of more than 50% of all the votes cast and 25% of the votes cast in at least half of the counties to obviate a run-off.⁶⁵

The interpretation of Article 138(4) of the Constitution took center stage in *Raila Odinga* case. After the 2013 general elections, three presidential petitions were filed. They were *Petition No. 3 of 2013 (Moses Kiarie Kuria and 2 Others v. Ahmed Issack Hassan & Another)*, *Petition No. 4 of 2013 (Gladwell Wathoni Otieno & Another v. Ahmed Issack Hassan & 3 Others)* and *Petition No. 5 of 2013 (Raila Odinga v. the Independent Electoral and Boundaries Commission & Three Others)*. The main contention in Petition No. 3 of 2013 was that contrary to Articles 86(b) and 138(c) of the Constitution, the IEBC had taken into account rejected votes in the final tally, which had the “prejudicial effect” of reducing “the percentage” of the “votes won by Mr. Kenyatta.” Counsel for the petitioners in that petition earnestly urged, what, in their view, was the dichotomous nature of a “ballot paper” and a “vote.” They submitted that the court should make a clear distinction between a “ballot paper” and a “vote.” They contended that a ballot paper is just a tool used “to convey the choice of a voter” while “a vote” is a ballot paper with a “definable and ascertainable” choice of a voter.⁶⁶ Counsel further argued that a ballot paper remains a ballot paper until it is declared as validly cast in favor of a particular candidate. In other words, it is the determination of a ballot paper as valid that transforms it from a ballot paper into a vote. As such, and relying on the decision of Burhan, J. of the Seychellois Constitutional Court in *Popular Democratic Movement v. Electoral Commission*⁶⁷ and Regulation 77(1) of the Kenyan Elections (General) Regulations 2012, counsel for the petitioner in Petition No. 3 of 2013 urged that rejected votes, which, at any rate Regulation 78(2) declares null and void, should not be included in the computation for the determination of whether any presidential candidate had met the threshold set out in Article 138(4).

64 The Kenya Constitution, 2010, Article 138(4) reads: “A candidate shall be declared elected as President if the candidate receives—(a) more than half of all the votes cast in the election; and (b) at least twenty-five per cent of the votes cast in each of more than half of the counties.”

65 The Kenya Constitution, 2010, Article 138(5) provides that if no candidate meets the threshold set in Article 138(4), there shall be a run-off.

66 J Harrington and A Manji (2015) ‘Restoring Leviathan? The Kenya Supreme Court, Constitutional transformation, and presidential election of 2013,’ (2015) *Journal of Eastern African Studies*, 9:2, 175-192, DOI: 10.1080/17531055.2015.1029296.

67 Constitutional Case No. 16 of 2011.

For the respondents in that petition, it was contended that unlike the former constitution, which restricted the computation for the determination of the threshold for the election of the President to “valid votes”, the current Constitution requires “all the votes cast” to be taken into consideration. In their view, “all the votes cast” meant all ballot papers cast into the ballot boxes including those that are subsequently determined as rejected votes. On that contention, they urged that even rejected votes should be taken into consideration in that computation. On a purposive interpretation of Article 138 of the Constitution, the Elections Act and the Election Regulations and relying on the said Seychellois decision, the Supreme Court excluded the rejected votes from the computation and declared Mr. Uhuru Kenyatta as the duly elected President of the Republic of Kenya.

While taking or not taking into consideration the rejected votes was the issue in the *Raila Odinga* case, in the American case of *Bush v. Gore*,⁶⁸ the central issue was the validity of about 9000 votes, cast in some counties in the state of Florida. Because of some voters’ failure to clear hanging chad and chips from the punch card ballots, the counting machines recorded some ballots as having no vote for any presidential candidate (under vote) and some as having a vote for more than one candidate (over vote).⁶⁹ Holding the view that “[t]o invalidate a ballot which clearly reflects the voter’s intent, simply because a machine cannot read it, would subordinate substance to form and promote the means at the expense of the end,”⁷⁰ the Florida Supreme Court ordered a manual recount. The US Supreme Court overturned that decision on the ground that manual recounts “with the use of differing sub-standard for determination the voter intent in different counties,”⁷¹ would foul the equal protection rule in the Fourth Amendment of the American Constitution and lead to unequal treatment of voters.

The scrutiny at polling stations at the close of the poll is an important feature in other jurisdictions as well. At the close of polling, the above procedural steps are more or less followed in other jurisdictions such as Canada,⁷²

68 531 U.S. 98 (2000).

69 Steve Bickerstaff, Counts Recounts, and Election Contests: Lessons from the Florida Presidential Election, 29 Florida State University Law Reviews 425 2001-2002, 437. Also available at, <http://heinonline.org>, at 23 October 2015.

70 Steve Bickerstaff, Counts Recounts, and Election Contests: Lessons from the Florida Presidential Election, 29 Florida State University Law Review 425 2001-2002, 444. Also available at, <http://heinonline.org>, at 23 October 2015.

71 Steve Bickerstaff, Counts Recounts, and Election Contests: Lessons from the Florida Presidential Election, 29 Florida State University Law Review 425 2001-2002, 448. Also available at, <http://heinonline.org>, at 23 October 2015.

72 *Elections Act, 2000, s. 283.*

Australia,⁷³ India,⁷⁴ and South Africa.⁷⁵ In Canada, which has provisions for advance voting, the chief electoral officer engages an auditor with technical and specialized knowledge to perform an audit and report if the election officials have strictly complied with the law in the process of advance voting.

4.3 Recount of Votes at Polling Stations

Scrutiny is not restricted to only the examination of election documents for determining the validity of votes. It includes a recount of votes.⁷⁶ This proposition comes out clearly from Rule 33(3) of the Election Petition Rules, which talks of “scrutiny or recount of ballots.” The Kenya courts appear to equate scrutiny with recounts and use these terms interchangeably. Recounts are the ones that verify⁷⁷ and authenticate not only the accuracy, but also the validity, of the votes cast for each candidate, which in turn determines the winners and losers. Regulation 80 of the Election Regulations makes recounts mandatory when demanded by a candidate or his agent.⁷⁸

Recounts before the results of an election are announced are also an important feature in other jurisdictions. In Australia, after the initial counting of the votes by the Polling Place Manager, a fresh or second scrutiny, returning officers carry out the main objective being essentially quality control, within 48 hours of polling prior to the declaration of the election results.⁷⁹ In Canada, if the margin between the two top candidates is less than 100th of the votes cast, an automatic recount is carried out.⁸⁰ Where the margin is greater than that, “on the affidavit of a credible witness,”⁸¹ one is entitled to a judicial recount. This recount, though presided over by a judge, should be distinguished from the challenge of the election results. This judicial recount, which is conducted before the results are announced, is a tabulation of the votes cast to correct counting errors. Though not expressly authorized by the

73 Commonwealth Electoral Act, 1918, s.265.

74 The Representation of the People Act, 1951, s. 47.

75 Electoral Act No. 73 of 1998, ss.47, 49 and 52.

76 See *Said v. Mwaruwa & Another*, [2008] 1 KLR (EP) 323.

77 G Tardi, ‘Judicial Recount of Election Results: The Saskatchewan Experience in 2000’, *MSU-DCL Journal of International Law* (2001) 10, 465., <http://www.heinonline.org>, at 23 October 2015.

78 The Election Regulations, 2012, reg. 80 authorizes the presiding officer to suo motu carry out a recount and accords candidates or their agents a right to at most, two recounts and states in imperative terms that “[n]o steps shall be taken on the completion of a count or recount of votes until the candidates and the agents present at the completion of the counting have been given reasonable opportunity to exercise the right given by this regulation.”

79 Commonwealth Electoral Act, 1918, s. 265.

80 This recount is carried out under Section 300 of the Canadian Elections Act, 2000 within four days of the poll and before the results are declared by the Returning Officer under the supervision of a judge.

81 The Canadian Elections Act, 2000, s. 301(1).

Canadian Elections Act, a judicial recount is in practice granted on an ex-parte application⁸² and in conducting it, the presiding judge subsumes the role of the returning officers. A contest of election results on the other hand is premised on allegations of irregularities, fraud or corruption and illegal practices⁸³ and is filed after the declaration of election results. It is akin to the Kenyan election petition.

4.4 Scrutiny at the Tallying Centers

The fifth stage of scrutiny is at the tallying centers.⁸⁴ The first phase of tallying is at county headquarters for the senatorial, gubernatorial, and county women representative elections; and at the constituency or district headquarters for Presidential election and that of the members of the national and county assemblies. The scrutiny at this stage is limited to the examination of the forms with the numerical results from polling stations.⁸⁵ After this tallying and collation of votes, the results thereof are transposed to Forms 36 for Presidential election and to Forms 35 for all other elections.

The second phase of tallying and collation of votes is in respect of the Presidential election and is carried out at the national tallying center. This tallying is limited to only the examination of Forms 34, which have the numerical results from polling stations and 36, which have the constituency tallies. Particular emphasis is, once again, placed on the aspect of transparency in the tallying of the votes at that center. One of the major complaints in the *Raila Odinga* case was the ejection of the party agents and observers from the presidential vote tallying room. The parties traded accusations on the cause of that ejection. While the petitioners claimed that, contrary to Regulation 85(1) (e) of the Election Regulations, the IEBC ejected party agents and accredited observers from the National tallying center when they pointed out

82 G Tardi, 'Judicial Recount of Election Results: The Saskatchewan Experience in 2000,' MSU-DCL Journal of International Law (2001) 10, 477., <http://www.heinonline.org>, at 23 October 2015.

83 G Tardi, 'Judicial Recount of Election Results: The Saskatchewan Experience in 2000,' MSU-DCL Journal of International Law (2001) 10, 474, (<http://www.heinonline.org>) at 23 October 2015.

84 The Election Regulations, 2012, reg. 84 provides for three tallying centers, which shall be located in public buildings and gazetted by the Commission. They are in Nairobi, for the presidential election; at county headquarters for the senatorial, gubernatorial, and county women representative elections; and at constituency or district headquarters for the election of the members of the national and county assemblies.

85 These are Forms 34 for presidential elections; Forms 35 for elections of members of the national county assemblies as well as senatorial, gubernatorial and county women representative elections. The results of the tallying and collation of votes at the constituency and county tallying centers are recorded on Forms 36 and duly announced at those centers. The winners of the elections, that is, members of the national and county assemblies as well as the county senatorial, gubernatorial and women representatives are then issued with the certificates of results in Forms 38.

irregularities in results from Constituencies,⁸⁶ the IEBC retorted that party agents had become “rowdy and quarrelsome and [had] engaged Commission staff in paralyzing confrontations,” a claim that the agents and observers subsequently denied.⁸⁷ Consequently, the agents were relocated to another room at the tallying center at the Bomas of Kenya where they were unable to scrutinize the paperwork with details of the tallies. The petitioner termed that a gross illegality. However, the Supreme Court tacitly endorsed the ejection on the ground that IEBC was under obligation to keep order in the tallying center and that, in ejecting the rowdy agents, it acted within its mandate under Article 249 (2)(b) of the Constitution.

As the Supreme Court correctly observed, this was a precedent-setting petition in which it needed to provide the baseline for future petitions and jurisprudence.⁸⁸ Bearing in mind that the disputed Presidential election was the cause of the 2007/2008 post-election violence in the country, this kind of scenario does not augur well for IEBC, the judiciary and the nation at large. Given the security detail at its disposal, in the authors view, IEBC should have controlled the rowdy agents and exercised restraint by allowing them to remain in the tallying hall.

Although they gave the 2013 general elections a clean bill of health, most election observers censured IEBC’s opaque tallying and collating of the Presidential votes with the Commonwealth Observer Group describing the exercise as representing “an untidy end of a critical part of the process.”⁸⁹ Quite a number of scholars have since also made more or less similar observations.⁹⁰ These are the kind of comments IEBC cannot afford to have repeated in future. Every effort should therefore be made to forestall any such eventuality. To accord legitimacy and integrity to the Presidential election and obviate any strife, the national tallying center should not only be accessible to the party and presidential candidates’ agents, but also to the accredited observers and the media representatives and tallying should be open, transparent and verifiable.

86 See *Raila Odinga Case* [par.35].

87 See *Raila Odinga Case* [par. 239].

88 See *Raila Odinga Case* [par. 177].

89 Commonwealth Observer Group (COG), 2013. Some of the other observers were the Election Observer Group (ELOG), the European Union Election Observer Mission (EUEOM) and the Carter Center Election Observer Mission (CCEOM).

90 J Harrington and A Manji (2015) Note 23.

Beside the peace and tranquility for the nation and the good reputation of IEBC, a transparent and credible tallying and collation of presidential election votes will forestall or minimize presidential election petitions. Proper and transparent scrutiny at the national tallying center cannot therefore be overemphasized.

5.0 Judicial Scrutiny

5.1 The Purpose of Judicial Scrutiny

Neither Section 82 of the Elections Act nor Rule 33 of the Election Petition Rules states the objective of scrutiny when it is ordered by the court *suo motu*.⁹¹ However, when scrutiny is predicated on an application by a party to an election petition, these provisions give the purpose of scrutiny as being for the establishment of the “the validity of the votes cast.”⁹² The courts have interpreted these provisions as vesting them with jurisdiction “to investigate” the veracity of the allegations made⁹³ in the petition to determine whether or not the conduct of the impugned election was in accordance with the dictates of the Constitution⁹⁴ and ensure that “justice is done”⁹⁵ and seen to be done to the parties. By examining the election materials enumerated in Rule 33(4) of the Election Petition Rules,⁹⁶ the court is able to sieve and flag the invalid ballot papers⁹⁷ and strike them out as stated in Section 82(4) of the Elections Act and add those that may have been wrongly excluded.⁹⁸

91 The purpose of *suo moto* scrutiny was given in the Raila Odinga case as intended to enable the court “to understand the vital details of the electoral process, and to gain impressions on the integrity thereof.”

92 The Election Petition Rules, Rule 33(1).

93 Ramadhan Seif Kajembe v Returning officer of Jomvu Constituency & 3 others, Mombasa High Court Election Petition No. 10 of 2013.

94 Mercy Kiritu Mutegi v Beatrice Nkatha Nyaga & IEBC Meru High Court, Election Petition No. 5 of 2013. See also Hassan Abdalla Albeity v Abu Mohamed Abu Chiaba & another, Malindi High Court Election Petition 9 of 2013. Besides the principles of complete freedom of choice in the conduct of a free and fair election based on universal suffrage, in scrutiny the courts also ascertain compliance with Articles 27 and 81 which provide for affirmative action to achieve gender equity and fair representation of the youth and persons with disabilities who have in the past been marginalized.

95 Thomas Malinda Musau & Two others v. Independent Electoral Boundaries Commission & 2 Others, Machakos High Court Election Petition No. 2 of 2013. See also Nicholas Salat v IEBC & 7 others, Kericho High Court Election Petition No.1 of 2013.

96 The materials the Rule enumerates for examination are the written statements made by the presiding officers under the provisions of the Elections Act; copies of the registers used during the elections in the relevant polling stations; the written complaints of the candidate or his representative; the packets of spoil papers; the packets of counterfoils of used ballot papers; and the packets of rejected ballot papers.

97 Section 82(2) of the Elections Act sets out the votes, which, though on their face appear valid, should nonetheless be rejected and struck out. These are the votes of people whose names are not on the voters register for the station concerned; who voted more than once; votes procured by corruption; votes of convicts disqualified from voting; and those cast for disqualified candidates.

98 Halsbury’s Laws of England, 15, 4thed, 501.

Since, as stated, election petitions are not limited to alleged balloting improprieties, scrutiny is a demonstration by the election officials to the candidates or their agents and the public at large that the procedural steps set out in the Elections Act and Regulations intended to achieve free and fair elections have all been followed. The principal objective of judicial scrutiny therefore is to determine whether the electoral process was transparent, accountable and verifiable as required by the Constitution.⁹⁹

5.2 Sufficient Cause for an Order of Scrutiny

The sixth and final scrutiny exercise, when necessary, is carried out in court during the hearing of election petitions. This scrutiny, as already stated, is anchored in the provisions of Section 82 of the Elections Act and Rule 33 of the Election Petition Rules.¹⁰⁰ Some courts have viewed these provisions as conflictual. The contentions in some petitions alleged that by requiring an application for scrutiny to be made “at any stage,” Rule 33(1) is in conflict with Section 82(1) of the parent Act that states that an order for scrutiny is to be made “during the hearing.” In *Joash Wamang’oli v. IEBC & 3 others*,¹⁰¹ and *Ramadhan Seif Kajembe v Returning officer of Jomvu Constituency & 3 Others*,¹⁰² Omondi, J. and Odunga, J. respectively held that there is a conflict and called for the harmonization of the provisions. In *Kombo v. Wetangula*,¹⁰³ however, Gikonyo, J. held that there is no conflict, but the provisions created some confusion, which should be cleared.

It is submitted that there is no conflict in these provisions. A court cannot grant an order for scrutiny without first hearing the petition, even partly, or an application in that regard. As Gikonyo, J. suggested in *Kombo v. Wetangula* (supra) the phrase “during the hearing” in the parent Act and “at any stage” in the Rule should be read to mean scrutiny can be ordered “at any stage during the hearing.”

Section 82(1) provides that a court can make an order for scrutiny *suo moto* or on application by any party to a petition. Whereas Rule 33(2) requires the party seeking scrutiny to satisfy the court that there “is sufficient reason” for

99 The Constitution of Kenya, 2010, Article 86(a).

100 In the old regime, scrutiny was provided for in Section 26(1) of the National Assembly and Presidential Elections Act, Cap 7 of the Laws of Kenya.

101 Bungoma High Court Election Petition No. 6 of 2013.

102 Mombasa High Court Election Petition No. 10 of 2013.

103 Bungoma High Court Election Petition No. 3 of 2013.

an order of scrutiny, there is no condition precedent for an order of scrutiny at the court's own motion. It appears that the court is supposed to discern the need for an order for scrutiny from the material placed before it and make the order *suo motu*. In the *Raila Odinga* case, on allegations of, inter alia, manipulation of the election documents, the Supreme Court ordered scrutiny *suo moto*.

5.3 Pleadings of Pleas for Scrutiny

Before examining the manner of conducting court supervised scrutiny upon application by a party to a petition, it is important to consider the pleadings required for an order of scrutiny and the criteria for the grant of such an order.

Neither the Elections Act nor the Election Petition Rules specifically require a plea for scrutiny to be made in the petition. They both talk of an "application."¹⁰⁴ The courts have, however, interpreted the provisions for scrutiny in Section 82 of the Elections Act and Rule 33 of the Election Petition Rules as requiring a specific plea in the petition as a basis for the grant of an order for scrutiny¹⁰⁵ arguing that to allow an application for scrutiny not grounded on any prayer to that effect in the petition would be tantamount to amending and thus changing the character and scope of the petition.¹⁰⁶

In the author's view, this is a correct interpretation of these provisions for scrutiny. Rule 10(1)(e) of the Election Petition Rules requires the grounds upon which the petition is based to be pleaded in the petition and the facts in support thereof to be deposed in the affidavit in support of the petition. It therefore follows that the irregularities or malpractices that may warrant scrutiny should be concisely pleaded in the petition and in the affidavit in support.¹⁰⁷ This requirement is also in other jurisdictions¹⁰⁸ and was even in the old Kenyan regime.¹⁰⁹

104 See the Elections Act, 2011 s. 82(1) and the Election Petition Rules, Rule 33(1) & (2).

105 Abdikam Osman Mohamed & another v IEBC & 2 others, Garissa High Court Election Petition No. 2 of 2013. See also Ndolo v. Mwangi & 2 Others, [2014] 5 KLR (EP) 178, 225.

106 Kakuta Hamisi v Peris Tobiko & 2 others, Nairobi High Court Election Petition No. 5 of 2013.

107 In Philip Osore Ogutu vs Michael Aringo & 2 Others, Busia High Court Election Petition No. 1 of 2013, Tuiyott, J. opined that "[f]or a petitioner to deserve an order for scrutiny," as Rule 10(1)(e) and (3)(b) of the Election Petition Rules requires, "then, as a starting point, [that] the petition and the affidavit in support must contain concise statements of material facts upon which the claim of impropriety or illegality of the casting or counting of ballots is made."

108 The law in most US states requires specificity in the pleadings and prima facie proof of alleged election irregularities. See Steve Bickerstaff, 'Counts, Recounts, and Election Contests: Lessons from the Florida Presidential Election,' Florida State University Law Review, 29, 4252001-2002, <http://heinonline.org> Accessed on 23.10. 2015.

109 Murgor v. Inginga & Another, [2008] 1 KLR (EP) 191.

The courts' requirement for specific pleas for scrutiny is also sound on the general principles of pleadings. Pleadings are of crucial importance in adversarial litigation. They not only ensure "procedural fairness"¹¹⁰ by "acquainting the court and the parties with the facts in dispute"¹¹¹ but also, for expeditious disposal of suits, particulars of pleadings "enable the parties to know" in advance the type of evidence they will require to adduce at the hearing.¹¹²

There is no reason why these sound principles of pleadings should not apply with equal force to pleadings in election petitions. Besides complying with this legal requirement in election petitions, pleas for scrutiny also serve the purpose of putting both the respondent and the court on notice to expect an application to that effect. This enables the court, during the pre-trial conferencing for time management, to set aside time for the scrutiny exercise. Like in ordinary cases, parties to election petitions should also be bound by their pleadings. As such, they cannot be allowed to adduce evidence "outside" the ambit of their pleadings in the petition.¹¹³

Having shown that scrutiny must be specifically pleaded in the petition, the courts have also held that pleas for scrutiny must be precise. Scrutiny is not to be granted on ambiguous pleadings intended to enable a petitioner to engage in a fishing expedition¹¹⁴ and perhaps enlarge his case beyond the scope of his pleadings¹¹⁵ or on pleadings couched in general terms.¹¹⁶ Courts have held that it "would be an abuse of process" to look upon scrutiny "as a lottery" and "to allow a party to use [it] ... for purposes of chancing on new evidence."¹¹⁷

Scrutiny can also never be granted on a blanket prayer.¹¹⁸ As is deducible from Rule 33(4) of the Election Petition Rules, specificity is crucial.¹¹⁹ The prayer for scrutiny must specify the polling station(s) in which the results

110 Banque Commerciale SA, En Liquidation v. Akhil Holdings Ltd, (1990) 169 CLR 279 at 286.

111 Charles E. Clark, 'History, Systems and Functions of Pleading' (1925) Virginia Law Review, 518

112 Bailey v Federal Commissioner of Taxation (1977) 136 CLR 214 at 219.

113 Philip Mungu Ndolo v Omar Mwinyi Shimbwa & 2 others, (Supra) and Kakuta Hamisi v. Peris Tobiko & 2 Others, Nairobi High Court Petition No. 5 of 2013.

114 Philip Mukwe wasike v James Lusweti Mukwe Bungoma High Court Election Petition No. 5 of 2013; see also Ledama ole Kina v Samuel Kuntai Tunai & 10 others, Nakuru High Court, Election Petition No. 3 of 2013.

115 Nuh Nassir Abdi v. Ali Wario & 2 Others, Mombasa High Court Election Petition No. 6 of 2013.

116 Philip Mungu Ndolo v Omar Mwinyi Shimbwa & 2 others, Mombasa High Court Election Petition Number 1 of 2013.

117 In Philip Osore Ogutu v Michael Aringo & 2 Others, Busia High Court Election Petition No. 1 of 2013.

118 Ledama ole Kina v Samuel Kuntai Tunai & 10 others, Nakuru High Court, Election Petition No. 3 of 2013.

119 Philip Mungu Ndolo v Omar Mwinyi Shimbwa & 2 others, Mombasa High Court Election Petition Number 1 of 2013.

are disputed and the documents which should be scrutinized.¹²⁰ The party seeking scrutiny must therefore ensure that its petition and affidavit in support “contain concise statements of material facts” upon which the prayer is grounded.¹²¹

The only limited exception to the general rule on pleadings that should be had in election petitions is with respect to unanticipated irregularities that come to the fore during scrutiny of election materials. Given that the election materials are accountable documents kept by the IEBC and the public has no access to them,¹²² it is impossible for any petitioner to have knowledge of their contents. Before scrutiny, no petitioner will know, for instance, of the presiding officers’ doctoring of the records; allowing people whose names were not on the voters’ register to vote; or failing to account for some of ballot papers used in the election. In the circumstances, it is submitted that any irregularities revealed by scrutiny of election materials pursuant to a court order, whether pleaded or not should be taken into account in the final determination of a petition. To ignore any such irregularities or malpractices will be condoning illegalities, an act that will undermine public confidence in court determinations. The parties should, however, be accorded an opportunity of commenting on any such irregularities before they are taken into consideration.

Although Section 82(1) of the Elections Act and Rule 33(1) of the Election Petition Rules do not require a formal application for scrutiny, from the wording of the former and the court’s view in *Hassan Mohamed Hassan & another v IEBC & 2 others*¹²³ it appears that one is advisable. To enable the court to properly manage its time for the trial of the petition as stated, such an application should be filed along with the petition or soon thereafter.

5.4 The Criteria for and the Stage at which an Order of Scrutiny is Granted

Though provided for in the Elections Act and the Election Rules, scrutiny is not an automatic right to be granted as a matter of course.¹²⁴ The courts

120 Nicholas Salat v IEBC & 7 others, Kericho High Court Election Petition No.1 of 2013.

121 See Philip Osore Ogutu vs Michael Aringo & 2 Others, Busia High Court Election Petition No. 1 of 2013.

122 Save for Forms 34, which contain election results copies of which are required to be supplied to candidates or their agents.

123 Garissa High Court Election Petition 6 of 2013.

124 Nicholas Salat v. IEBC & Others, SC Petition No. 23 of 2014; Philip Mungu Ndolo v. Omar Mwinyi Shimbwa & 2 others (supra); Tuiyott, J. in Philip Osore Ogutu v. Michael Aringo & 2 Others, Busia High Court Petition No. 1 of 2013.

hold the view that not every claim of misconduct in an election or plea in a petition warrants scrutiny. Rule 33(2) of the Election Petition Rules which sets out the broad criteria upon which an order of scrutiny can be granted on a party's application,¹²⁵ makes it clear that granting an order for scrutiny is at the discretion of the court upon being "satisfied that there is sufficient reason" for granting it. The party seeking scrutiny must therefore provide sufficient reasons why materials and documents in the identified stations should be scrutinized.¹²⁶ However, what is the rationale for this requirement?

There are several reasons why the law demands that a party gives sufficient reason(s) before it is entitled to an order of scrutiny. First, as long as the election is conducted in accordance with the law, Section 83 of the Elections Act provides that any irregularities, which do not affect the result of the election, will not vitiate it.¹²⁷ Secondly, as the High Court observed in *Philip Mungu Ndolo v. Omar Mwinyi Shimbwa & 2 others*,¹²⁸ scrutiny "is a time consuming, laborious and arduous exercise" which is also costly.¹²⁹ It should not therefore be needlessly undertaken. Thirdly, the courts will not meet the peremptory timelines set out in the Constitution and the Elections Act within which election petitions should be disposed of,¹³⁰ if they were to grant every prayer for scrutiny. Therefore, apart from the criterion set out in Rule 33(2) of the Election Petition Rules, as stated, the court must be satisfied that granting the order for scrutiny will be in aid of "an expeditious, fair, just, proportionate and affordable resolution of the issues raised in the petition."¹³¹

In terms of Section 82(1) of the Elections Act and Rule 33(1) of the Election Petition Rules which respectively state that the order for scrutiny can be sought "at any stage" "during the hearing of an election petition, "such an application can be heard before the actual hearing commences, in the course of the hearing, or at the end of the trial.¹³² At whatever stage it is heard, the

125 Rule 33(2) states that "Upon an application under sub-rule (1), the court may, if it satisfied that there is sufficient reason, order for a scrutiny or recount of the votes."

126 *Nicholas Salat v IEBC & 7 others*, Kericho High Court Election Petition No.1 of 2013.

127 Section 83 of the Elections Act reads: "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 principle laid down in the Constitution and in the written law or that the non-compliance did not affect the result of the election." In *Morgan v. Simpson*, [1975] 1 QB 151 which has been followed in many cases in Kenya including in the Raila Odinga case, it was held that it is "substantial" failure to carry out an election in accordance with the principles laid down in the constitution and in the written law that will void an election.

128 *Mombasa High Court Election Petition Number 1 of 2013*.

129 See *Ledama ole Kina v Samuel Kuntai Tunai & 10 others*, Nakuru High Court, Election Petition No. 3 of 2013.

130 The Kenya Constitution, 2010, Article 140(2) and the Elections Act, 2012, ss. 75(2) & (4) (b), 85A.

131 *Hassan Mohamed Hassan & another v IEBC & 2 others*, Garissa High Court Election Petition 6 of 2013.

132 *Hassan Mohamed Hassan & another v IEBC & 2 others*, Garissa High Court Election Petition 6 of 2013.

requirement of sufficient cause must still be fulfilled. To be heard before the hearing commences, a cursory glance at the pleadings, especially the affidavit in support of the petition or the application for scrutiny, should clearly and precisely make out the petitioner's case for scrutiny.¹³³ Such an affidavit must be sworn by a credible witness who should depose to the grounds for this belief, for instance, that invalid votes were counted or valid ones were improperly rejected, if that is the allegation in the petition, or any other reason why the conduct of the election in question was believed flawed. Even in cases of narrow margins of victory where applications for scrutiny are normally heard before the hearing commences, it must be clear from the pleadings that the counting was flawed.

In all other cases, the petitioner has to lay a foundation for an order of scrutiny by adducing sufficient and credible evidence to show the need for scrutiny. He has to prove that the irregularities or malpractices complained of were so widespread, or so pervasive that they affected the final tally of the votes¹³⁴ or those they ultimately substantially and materially affected the result of the election.¹³⁵ There are several cases where this threshold was met and scrutiny was granted.

In *Richard Kalembé Ndile v. Patrick Musimba Mweu*,¹³⁶ where sufficient evidence of, inter alia, alterations and errors in Forms 35 and 36 which affected the result of the election was adduced, the court had no difficulty granting the petitioner's application and ordering a scrutiny of the election materials in all the 164 polling stations in Kibwezi West constituency. Similarly, in *Hassan Abdalla Albeity v. Abu Mohamed Abu Chiaba & another*,¹³⁷ in which the authenticity of the forms used was in issue, the court granted a similar order for scrutiny of the entire Lamu County. In *Dickson Daniel Karaba v. John Ngata Kariuki & 2 Others*¹³⁸ where, under cross-examination, the Returning Officer conceded that he had wrongly tallied the votes from various polling stations and as a result declared the respondent, instead of the petitioner, as the winner, the court ordered a scrutiny that confirmed that evidence and voided the election. Further, in *William Maina Kamanda v. Margaret Wanjiru*

133 See Philip Osore Ogutu vs Michael Aringo & 2 Others Busia High Court Election Petition No. 1 of 2013.

134 Philip Mungu Ndolo v Omar Mwinyi Shimbwa & 2 others, Mombasa High Court Election Petition Number 1 of 2013.

135 Hassan Mohamed Hassan & another v IEBC & 2 others, Garissa High Court Election Petition 6 of 2013.

136 Machakos High Court Election Petition No. 7 of 2013.

137 Malindi High Court Election Petition 9 of 2013.

138 [2014] 5 KLR (EP) 388.

Kariuki & 2 Others,¹³⁹ on evidence being adduced that several Forms 16A and 17A had alterations that were not countersigned by the Presiding Officers thus casting aspersions on their authenticity, scrutiny was inevitably ordered.

In other petitions such as *Musikari Nazi Kombo v Moses Masika Wetangula*,¹⁴⁰ *Wavinya Ndeti v. The IEBC & 4 Others*,¹⁴¹ and *Mercy Kirito Mutegi v Beatrice Nkatha Nyaga & IEBC*¹⁴² which had unsubstantiated allegations, the courts dismissed pleas for scrutiny.

The requirement for a basis to be laid as a condition precedent for an order of scrutiny is not new. Though not specifically provided for in the old constitution or the now repealed National Assembly and Presidential Elections Act, Rule 33(2) is a codification of a long held practice in electoral jurisprudence for this requirement, which was hinged on the need for expeditious determination of election petitions.¹⁴³ It is also a requirement in the US¹⁴⁴ and in India.¹⁴⁵

5.5 Recounts Pursuant to Court Orders

The right to a recount pursuant to a court order is provided for in Rule 33(2) of the Election Petition Rules. Though it is part of scrutiny, a recount is a completely distinct process.¹⁴⁶ A recount refers to the tallying and counting, for the second or more times, of the votes cast in a particular election. Scrutiny on the other hand is broader. It is an examination of electoral materials to determine the result and validity of an election and, as stated, it includes a recount.

Recounts pursuant to court orders are particularly important in three main situations: where it is the only plea in the petition; whereupon recount of the ballots cast, the winner is apparent; and, lastly, where the margin of victory is narrow. They not only assist in the expeditious disposal of election petitions but they also enhance transparency and public confidence in the electoral dispute adjudication.

139 Nairobi High Court Election Petition No. 5 of 2008.

140 Bungoma High Court Election Petition No. 3 of 2013.

141 Machakos High Court Election Petition No. 4 of 2013.

142 Meru High Court, Election Petition No. 5 of 2013.

143 See *Masinde v. Bwire and Another* (2008) 1KLR (EP) 547, and *Joho v. Nyange and Another*, (2008) (No. 2) 3 KLR (EP) 188.

144 Steve Bickerstaff, 'Counts, Recounts, and Election Contests: Lessons from the Florida Presidential Election,' *Florida State University Law Review*, 29, 425 2001-2002, <http://heinonline.org> Accessed on 23.10. 2015.

145 *KM Shradha Devi v. Krishna Chandra Pant & Others*, (1980) SCI CA No. 277, [par. 16].

146 *Halsbury's Laws of England*, (1990) 4th ed., 15, 454.

5.6 Where the only Plea in the Petition is for a Recount

Rule 32 of the Election Petition Rules makes provisions for a special type of scrutiny. This is when a recount and tallying of votes is the only issue in an election petition. It reads:

- (1) Where the only issue in the election petition is the count or the tallying of the votes received by the candidates, the petitioner may apply to the court for an order to recount the votes or examine the tallying.
- (2) The Petitioner shall specify in the election petition that he does not require any other determination except a recount of the votes or the examination of the tallies.

To the author's knowledge, no petition was solely based on this provision. Therefore, we do not have the benefit of any court interpretation of this provision.

Several questions spring to mind as one grapples with the correct interpretation of this Rule. What is the scope of the petition based solely under this Rule? What is meant by, "the tallying of the votes" or "the examination of the tallies." Does the recount of votes referred to in this Rule extend to full scrutiny of all votes in the impugned election? Does a petitioner, in a petition based solely on this Rule, require establishing a basis by adduction of evidence before he obtains an order for recount or is the recount automatic? In other words, does a petitioner with such a pointed plea need to satisfy the court that a recount is justified as in other petitions? What type of averments should a petitioner make in his pleadings in such petition? At what stage should the recount be done? These are not by any chance simple and straightforward questions.

It is not difficult to discern the scope of this provision. As the Rule states, a petition premised on this provision must be one limited to only a prayer for recount and/or tallying of the votes of the election in question. In addition, it appears mandatory that the petitioner should specify in the "election petition that he does not require any other determination except a recount of the votes or the examination of the tallies." Since it is premised on Rule 32 of the Election Petition Rules, which does not apply to Presidential petitions, this right is only available to petitioners challenging parliamentary and county elections.

Looked at on face value, the term "recount" appears to pose no problem. There is, however, more to a recount than a mere counting of votes for two or

more times. Is it all the votes cast in an election or only valid votes that are to be counted?

The canons of sound statutory interpretation demand that, when considering a particular provision, the entire statute and its objects should be born in mind.¹⁴⁷ On the basis of this profoundly sound principle, considering that, besides “recount,” Rule 32 of the Election Petition Rules further talks of “the tallying of the votes” and “the examination of the tallies”, it is submitted that as Omollo JA held in in *James Omingo Magara v. Manson Onyongo Nyamweya and 2 Others*,¹⁴⁸ the court is not bound by the returning officer’s determination on the validity or otherwise of the ballot papers. It has to re-examine them and reach its own decision on their validity after which only valid votes are counted. It follows therefore that a petition based solely on Rule 32 of the Election Petition Rules, in which the term “recount” is intrinsically linked to the phrases “the tallying of the votes” as well as “the examination of the tallies, “requires a de novo re-examination of the votes, exclusion of invalid ones from the computation, and tallying of votes for the purpose of determination of the winner of the election in question. Therefore, this is a full scrutiny, which is, however, limited to the examination of the ballot papers and Forms 34 and 35 in respect of the impugned election.

With the settlement of the issues of “recount” and “the tallying of the votes” as well as “the examination of the tallies”, the next issue for determination is whether in such a petition, the petitioner needs to lay a basis for the plea.

We have already cited the provisions of Section 83 of the Elections Act, which in a nutshell provide that not every infraction of the electoral law warrants voiding an election unless such infraction affects the result of the election in question; that scrutiny being a time consuming, laborious, arduous and costly exercise, it should not needlessly be undertaken; and that pleas for scrutiny should not be granted as a matter of course or on ambiguous pleadings intended to enable a petitioner to engage in a fishing expedition.¹⁴⁹ Based on these principles, it is respectfully submitted that that parties should never be allowed to play lottery¹⁵⁰ in matters of great national importance such as

147 See also *Royal Media Services v. AG*, Petition No. 346 of 2012 following *Olum & Another v. AG of Uganda*, [2002] EA 505.

148 [2014] 5KLR(EP) 292.

149 Omondi, J. in *Philip Mukwe Wasike v James Lusweti Mukwe*, Bungoma High Court Election Petition No. 5 of 2013; see *Wendo, J. in Ledama ole Kina v Samuel Kuntai Tunai & 10 others*, Nakuru High Court, Election Petition No. 3 of 2013.

150 *Philip Osore Ogutu vs Michael Aringo & 2 Others*, Busia High Court Election Petition No. 1 of 2013.

challenging elections of people's representatives in the hope that they might by chance succeed. To shut out frivolous petitions, the criterion for adducing sufficient reasons before scrutiny is granted, should therefore apply to even petitions based solely on Rule 32(1) & (2) of the Election Petition Rules. Sufficient reasons should be given in the petition itself, the affidavit in support of the petition or the affidavit in support of an application in that regard. Some cases, such as those with admittedly narrow margins of victory, in the author's view, do not require adduction of any evidence to establish a basis for an order of scrutiny in such petition. Any other case will require evidence.

5.7 Power of Court to Declare the Winner

Section 80(4) of the Elections Act vests the election court in respect of presidential, parliamentary and county election petitions to declare the winner after a recount of votes. It provides that:

(4) An election court may by order direct the Commission to issue a certificate of election to a President, a member of Parliament or a member of a county assembly if—

(a) Upon recount of the ballots cast, the winner is apparent; and

(b) That winner is found not to have committed an election offence.

This is an innovation in the current Elections Act, which was not in the old electoral regime. In the old system, even where the petitioner met the threshold in Section 80(4) of the current Elections Act, there was no provision authorizing the court to declare the winner of the election. Instead, the courts simply nullified elections and directed the conduct of by-elections.¹⁵¹

Though prayers were made under Section 80(4) in most petitions arising from the 2013 general elections, especially where there were narrow margins, none was granted as, in terms of the Court of Appeal's definition of the term "apparent" in *John Oroo Oyioka v. IEBC & Others*,¹⁵² as "visible; manifest; [and] obvious, "no winner was "apparent" in any of them. For instance in *Richard Kalembe Ndile v Patrick Musimba Mweu*¹⁵³ the winner was

151 In the cases *Ambala v. Waitthaka & Another*, Election Petition No. 5 of 1983 (2008)1KLR(EP)296 ; *Anaswa v. Mberia & Another*, Election Petition No. 6 of 1988((2008)1KLR(EP)359; *Wabuge v Limo & Another*, Election Petition No. 7 of 1988(2008) 1 KLR(EP) 417; *Gitau v Thuo & Others* Election Petition No.10 of 2008(2014)5KLR(EP) 254; and *Masaka v Khalwale & 2 Others*, Election Petition No.2 of 2008(2014)5KLR(EP)550, after recounts pursuant to court orders, the petitioners emerged clear winners but were not declared winners. Instead, the election courts directed the conduct of by-elections.

152 [2013] EKLK.

153 *Machakos High Court Election Petition No. 7 of 2013.*

indeterminate because the 409 votes, which went missing, could have tilted the result either way. Even where the criteria in the section are met, a winner cannot be declared if the impugned election was fundamentally flawed. In the said case of *John Oroo Oyioka v. IEBC & Others*,¹⁵⁴ besides other irregularities, the Court of Appeal held that permitting people, whose names were not on the voters' register to vote undermined the integrity of the election, set aside the trial court's declaration of the petitioner as the winner and directed the conduct of a by-election.

5.8 Where the Margin of Victory is Narrow

Where the margins of victory are relatively narrow,¹⁵⁵ courts have generally held that for justice to be done and be seen to be done, recounts should be ordered.¹⁵⁶ In such cases, as a recount might, on its own, determine a petition, the courts have often ordered scrutiny without requiring the petition to lay any basis by adduction of evidence.¹⁵⁷ These principles notwithstanding, it appears that narrow margins of victory do not guarantee an automatic right to a recount. The integrity of the recount itself has to be considered. In *Bush v. Gore*,¹⁵⁸ the US Supreme Court held that the manual recount directed by the Florida Supreme Court was going to foul the equal protection rule in the Fourth Amendment of the American Constitution and lead to unequal treatment of voters.

5.9 Conduct of Scrutiny

While Section 82 of the Elections Act provides in broad terms the right to an order of scrutiny, Rule 33 of the Election Petition Rules sets out the mechanism of conducting the court supervised scrutiny. It states that the scrutiny exercise is to be supervised by the Deputy Registrar¹⁵⁹ and shall be confined to the polling stations in which the results are disputed. Sub-rule

154 [2013] ECLR.

155 In the cases of William Maina Kamanda v. Margaret Wanjiru Kariuki & 2 Other, Nairobi High Court Election Petition No. 5 of 2008 with a margin of 895; Richard Kalembe Ndile v Patrick Musimba Mweu, Machakos High Court Election Petition No. 7 of 2013 with a margin of 200 and John Oroo Oyioka v. IEBC & Others, [2013] ECLR with a margin of only 5 votes, scrutiny was ordered. However, Wavinya Ndeti v. The IEBC & 4 Others, Machakos High Court Election Petition No. 4 of 2013 where the margin was 164,963 votes, scrutiny was declined.

156 *Joho v. Nyange and Another*, (2008) (No. 2) 3 KLR (EP) 188.

157 In *Hemed Said v. Ibrahim Mwaruwa*, Machakos High Court Election Petition No. 4 of 2013; *Onamu v. Maitsi*, High Court Election Petition No. 2 of 1983; *Burundi Nabwera v. Joshua Angatia*, High Court Election Petition No. 4 of 1983; and *Kirwa v. Muliro*, High Court Election Petition No. 13 of 1988 with margins of 62, 30, 534, and 7 respectively, cases decided in the former electoral regime, scrutiny was ordered in each case without laying any basis.

158 531 U.S. 98 (2000).

159 In the case of county petitions tried by the Subordinate Courts, the Executive Officer supervises the exercise.

(3) thereof enumerates the documents that should be scrutinized.¹⁶⁰ At the conclusion of the scrutiny exercise, the Registrar makes a report of his or her findings. As this exercise is usually carried out in the presence of counsel for or representatives of parties to the petition, disputes on the contents of such reports are rare.

5.10 Irregularities Revealed by Scrutiny

Chapter 7 of the Constitution underscores the importance of grounding in due process the integrity of the entire electoral process. Articles 38 and 81 of the Constitution enumerate, *inter alia*, the integrity of the voters' register; complete freedom of choice; absence of violence, intimidation, improper influence, and corruption; as well as the conduct of elections in a transparent, impartial, accurate, accountable, and efficient manner as the overarching principles which underpin a free and fair election.

Other than numerical accuracy of the votes garnered by each candidate, which is a quantitative test, all the other principles in these provisions relate to the qualitative factors of the electoral process that deal with the process employed in arriving at the quantitative results of an election. That renders the qualitative principles the bedrock of any free and fair election. This is why most, if not all, election petitions are premised upon alleged impeachments of qualitative principles.

Section 83 of the Elections Act provides for two disjunctive situations, which will void an election. This is where there is failure to carry out an election "in accordance with the principles laid down in the constitution" and where there is "non-compliance with any written law relating to [an] ... election" that affects "the result of the election." In the famous English case of *Morgan v. Simpson*,¹⁶¹ a decision that has been followed in several cases in this country, it was held that the "non-compliance" referred to in the English equivalent of this provision is "substantial" failure to carry out an election in accordance with the principles laid down in the written law governing the impugned election.

160 These are: (a) the written statements made by the presiding officers under the provisions of the Act; (b) the copy of the register used during the elections; (c) the copy of the register of the results of each polling station in which the results of the election are in dispute; (d) the written complaints of the candidate and their representatives; (e) the packets of spoilt papers; (f) the marked copy register; (g) the packets of counterfoils of used ballot papers; (h) the packets of counted ballot papers; (i) the packets of rejected ballot papers; and (j) the statements showing the number of rejected ballot papers.

161 [1975] 1 QB 151.

The second aspect of this section is the “non-compliance” that will affect the results of the election. That this relates to either the qualitative or the quantitative aspects of an election or both is not in dispute. The vexing issue in this aspect of Section 83 of the Elections Act is what type of non-compliance can affect the result of an election.

It is relatively easy to determine when the quantitative elements have affected an election. For instance, if the counting of votes is flawed, wrong figures will be obtained. In the electoral system of first-past-the-post, even one vote will affect the result of an election. In *William Maina Kamanda v. Margaret Wanjiru Kariuki & 2 other*,¹⁶² the election was voided because the returning officer admittedly altered the numerical results. The position is, however, not as clear-cut when an election is challenged on infractions of the qualitative test. The question then is: when does the infringement of qualitative factors per se affect the result of an election?

There are two aspects of infractions of qualitative factors that should automatically affect the result of an election. The first one is commission by a candidate of the election offences of treating;¹⁶³ undue influence;¹⁶⁴ and bribery.¹⁶⁵ Besides unduly influencing and therefore impairing the voter’s freedom of choice, these offences also impeach the integrity of the candidate committing them. Integrity is one of the cardinal values Article 10 of the Constitution requires of anyone aspiring for leadership. In the author’s view, proof of any of these offences to the requisite standard of beyond reasonable doubt, is a substantial violation of the Constitution and the Elections Act, which should automatically void an election.¹⁶⁶

The second aspect of infraction of qualitative factors that can void an election relates to violation of the principles of due process. Election goes “beyond simple arithmetic.”¹⁶⁷ As stated above, the qualitative test is the major determinant of a free and fair election. The qualitative principles have their grounding in due process. Due process, which is concerned with the quality of the ballot, is the hallmark of any democratic electoral process.

162 Nairobi High Court Election Petition No. 5 of 2008.

163 The Elections Act, 2012, s. 62.

164 The Elections Act, 2012, s. 63.

165 The Elections Act, 2012, s 64.

166 In *Moses Masika Wetangula v. Musikari Nazi Kombo & 2 Others* Supreme Court Petition No.12 of 2014, [2015] eKLR where the offence of bribery was proven beyond reasonable doubt, the election was nullified.

167 *James Omingo Magara v. Manson Onyongo Nyamweya and 2 Other*, [2014] 5KLR (EP) 292.

The result of an election is therefore affected when the violation of qualitative factors fundamentally undermines the integrity of the electoral process. That is to say, apart from the figures, the result of an election is affected when the irregularities and malpractices committed render the legitimacy or reliability on the numerical result and the sanctity of the ballot questionable. The cases of *James Omingo Magara v. Manson Onyongo Nyamweya and 2 Other*;¹⁶⁸ *Richard Kalembe Ndile v. Patrick Musimba Mweu*;¹⁶⁹ *John Oroo Oyioka v. IEBC & Others*;¹⁷⁰ and *Musikari Nazi Kombo v. Moses Masika Wetangula*¹⁷¹ provide good examples of violation of qualitative principles, which undermine the integrity of an election.

In *Magara v. Nyamweya*, scrutiny revealed that the seals of the apertures to most ballot boxes had been broken and were missing; three ballot boxes could not be accounted for; one ballot box, which contained votes of only three out of seventeen candidates had its lid open; the presiding officers did not sign Form 16A, which carried the numerical results of the votes garnered by each candidate in 53 polling stations thus casting doubt on their authenticity; and an attempt had been made to burn down the building where the election materials were stored. To make matters worse, in his testimony to court, the returning officer for that election conceded that he could not vouchsafe the tallies on Form 17A, as he had not verified them against the numerical results on Forms 16A in the South Mugirango Constituency. On those anomalies, despite the fact that in the court supervised recount, the appellant emerged the winner with over 4000 votes, the trial Judge held that the integrity of the poll was seriously dented and he accordingly voided the election. A majority of the Court of Appeal bench of three upheld that decision.

The integrity of the elections in *Kalembe Ndile v. Patrick Musimba and Oroo Oyioka v. IEBC* were similarly undermined. In the former case as, 409 ballots from three polling stations went missing. That rendered the election indeterminate. In the Oroo Oyioka case, as stated, the scrutiny report revealed numerous irregularities: the number of ballot paper counterfoils used in the election did not tally with the votes cast; the counterfoils from 10 polling stations exceeded the number of votes cast; counterfoils from 2 polling stations were missing; the ballot box from one polling station was also

168 [2014] 5KLR (EP) 292.

169 Machakos High Court Election Petition No. 7 of 2013.

170 [2013] ECLR.

171 Supreme Court Petition No. 12 of 2014

missing; people whose names were not on the voters' register were allowed to vote; Forms 35 from 5 polling stations were missing; and there were also alterations on some of Forms 35 which made it impossible to determine how each candidate scored. On those irregularities, the Court of Appeal held that the election was not free and fair.

5.11 Utility of Scrutiny Results

As stated, at the conclusion of the scrutiny exercise, the Registrar makes a report of his or her findings. Such report is taken into consideration in the determination of the petition in question. This, however, does not seem to have happened in the *Raila Odinga* case. Save for the mention of mismatches between the contents of Forms 34 and 36, which it dismissed as coming belatedly in the petitioners' counsel's final submissions,¹⁷² the Supreme Court never addressed the objective and result of court supervised scrutiny.

6.0 Conclusion and Recommendations

This Chapter has discussed the concept of scrutiny in the entire electoral process and how that mirrors the electoral dispute resolution mechanism. It has also argued that elections arise from politico-legal processes that render the intercession of the judiciary, which is a law-applying body inevitable.¹⁷³ That calls for the harmonization of politics and law to “produce election results that are both legitimate and legally valid.”¹⁷⁴ Given the complex nature of Kenya's general elections of filling six elective positions all in one day, errors especially in the counting of votes, are bound to occur from even sheer fatigue of the polling officials. Scrutiny accords the electoral process a golden chance of correcting such errors.

Transparency is the bedrock of scrutiny. The openness with which it is supposed to be carried out is not only a great boost of public confidence in the IEBC, as the election management body, and the judiciary, but also an authentication of the integrity of the electoral process. As argued, if it is well facilitated and properly carried out, scrutiny with its in-built pre-election dispute resolution mechanisms will address a reasonable proportion of the

172 See *Raila Odinga* case[par.246].

173 G Tardi, 'Judicial Recount of Election Results: The Saskatchewan Experience in 2000,' *MSU-DCL Journal of International Law* (2001) 10, 515., <http://www.heinonline.org>, at 23 October 2015.

174 G Tardi, 'Judicial Recount of Election Results: The Saskatchewan Experience in 2000,' *MSU-DCL Journal of International Law* (2001) 10, 515., <http://www.heinonline.org>, at 23 October 2015.

issues raised in election petitions and thus limit election petitions to disputes relating to the conduct of the poll.

The achievement of these noble objectives, however, presupposes co-operation of all the stakeholders in the electoral process. To compile a credible national BVR register and acquire functional electronic voter identification devices, as well as competently conduct the general elections, IEBC requires colossal sums of money. If the Treasury does not avail the required funds in sufficient amounts and in good time, IEBC will be hamstrung and the result is anybody's guess. If the political parties, aspirants for elective positions and the general public do not bother to inspect the voters register, pre-election disputes will continue crowding election petitions. The proper conduct of scrutiny at all stages of the electoral process cannot therefore be overemphasized.

To achieve its desired objective of determining the validity of the votes cast and the result of an election, a few aspects of the electoral process need to be addressed. The first one is the integrity of the voters register. As IREC recommended, there should be one principal register incorporating the special register of persons whose bio data cannot be captured by the BVR devices due to their physical deformities and the BVR register.

Associated with an authentic national voter register is the issue of the use of technology in EVID and electronic transmission of provisional election results. Besides certainty and reliability, the greater the speed with which election results are publicly transmitted, the greater their acceptance by the public.¹⁷⁵ This informed the IREC recommendation for electronic transmission of results as a parallel system upon which the manual results can be counterchecked and verified. As is clear from *Bush v. Gore*, at times technology fails even in advanced countries. In our country, with no reliable electric supply to many schools and public premises, which are used as polling stations, chances are that technology can fail again. A compromise should therefore be made and clearly provided for in statute. Given the vitriolic attack on the Supreme Court decision in the *Raila Odinga* case, the issue of "all the votes cast" in Article 138(4) of the Constitution is far from being settled. A constitutional amendment will be necessary to settle it.

175 G Tardi, 'Judicial Recount of Election Results: The Saskatchewan Experience in 2000,' *MSU-DCL Journal of International Law* (2001) 10, 478, <http://www.heinonline.org>, at 23 October 2015.

A skim through the election petitions judgments reveals the courts' reluctance to readily order scrutiny. This reluctance is partly because of the judiciary's limited capacity to carry out scrutiny on a large scale within the limited timeframe for the disposal of election petitions. The judiciary needs to enhance its capacity and train its Deputy Registrars and Executive officer who carry out scrutiny.

Save for these hiccups, scrutiny is a crucial aspect of the electoral process as it goes a long way in boosting public confidence in the electoral process and the judicial determination of electoral disputes. Barring unreasonable costs and the length of time it takes to carry out, scrutiny should not only be encouraged but also be readily granted.