



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUSIA**

**ELECTION PETITION NUMBER 1 OF 2013**

**PHILIP OSORE OGUTU .....PETITIONER**

**V E R S U S**

**1. MICHAEL ONYURA ARINGO.....1<sup>ST</sup> RESPONDENT**

**2. INDEPENDENT ELECTORAL AND BOUNDARY**

**COMMISSIONS (I.E.B.C).....2<sup>ND</sup> RESPONDENT**

**3. RETURNING OFFICER .....3<sup>RD</sup> RESPONDENT**

**JUDGEMENT**

**INTRODUCTION AND PLEADINGS**

1. The Independent Electoral and Boundaries Commission (the 2nd Respondent) has been mandated by the people of Kenya to conduct and supervise elections in respect to membership of The National Assembly. The 2nd Respondent appointed the 3rd Respondent to conduct and manage the election of 4<sup>th</sup> March 2013 for Butula Constituency. The 2nd Respondent declared the 1st Respondent as the validly elected Member of National Assembly for Butula Constituency vide a special Kenya Gazette published on 13<sup>th</sup> March 2013. The 3rd Respondent had announced and returned the following results-

Alfred Bwire Odhiambo	-	8,881
Eric Ambutsi Mudimba	-	97
George Peter Bwire Ogengo	-	107
George Wesonga Ojwang	-	2,429
Ignatius Pancrass Oyula Agola	-	1,238
Joseph Maero Oyula	-	10,936
Michael Aringo Onyura	-	12,325

The Petitioner who was a Registered voter in that constituency is displeased with the return and challenges it in this Petition.

2. In the Petition dated 27th March 2013 and filed on even date, the Petitioner charges the 1st Respondent of using violence against the supporters of his opponents. It was also averred that the 1<sup>st</sup> Respondent bribed and treated voters before and on the polling day. The 1<sup>st</sup> Respondent was accused of breaching Electoral Law by campaigning after the close of the campaign period, using and employing civil servants in his campaigns, and employing unlawful means of dissuasion.

3) The Petitioner was unhappy about the manner in which the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents conducted, managed and supervised the Elections. It was stated that there was irregular and unlawful transfer of ballot papers from polling stations. And that at the close of polling, ballot boxes were not secured properly or at all. There was a claim that the Election was rigged in favour of the 1<sup>st</sup> Respondent. It being alleged that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent counted spoilt and invalid ballots in favour of the 1<sup>st</sup> Respondent. The Petitioner also assails the outcome as the results were announced before all requisite Declaration Forms had been signed by all Party Agents.

4. The Petitioner pleaded that the election of the 1st Respondent was neither free, fair nor credible. That it contravened the law and infringed on the cardinal principles of the electoral process as envisaged by Article 81 of the Constitution, 2010. And in the end it did not reflect the free will of the people of Butula Constituency.

5) The 1st Respondent filed a response “**under protest.**” The protest being that he was never served with the Petition. That was maintained by the 1st Respondent right to the end of the proceedings. And as invited by him, the Court shall have to determine the issue of service as a preliminary matter herein.

6) Anyhow, in the Response, the 1st Respondent denied each and every allegation made against him and defends his declaration as the duly elected member of The National Assembly. He also states that the election was peaceful, free and fair.

7) The 2nd and 3rd Respondents filed a joint response on 25th April 2013. It was their case that they maintained an open door policy and was always ready to receive and deal with complaints during the General Election. They stated that prior to the Election Day they did not receive any written complaint from any of the candidates or their agents in respect to campaign or electoral malpractices.

8) The 2nd and 3rd Respondents denied the allegations of impropriety, prejudice and partiality made against them by the Petitioner and invited the Court to find that the Electoral process was credible, impartial, free and fair and that there was a valid declaration of the 1st Respondent as the Member of the National Assembly for Butula Constituency.

### **Some Pre-Trial Issues**

9) As required by Rule 17 of The Elections (Parliamentary and County Elections) Petition Rules, 2013 (Hereinafter **The Rules**), this Court held a pre-trial conference on 2nd May 2013 in which the parties agreed on a range of procedural and substantive matters. These included the issues for determination, the disposal of interlocutory applications, filing of additional affidavit evidence, the taking and reception of evidence and the time-frame for hearing of the matter and making of submissions.

10. Arising from that agreement and subsequent proceedings this Court heard and determined the Petitioner's application of 8th May 2013 for scrutiny of votes. In the end the Court ordered for scrutiny to be carried on in respect to only one polling station, Bujumba Primary School polling station (Code 002). I will make some comments later in this decision on the findings of that exercise.

11) It was also agreed that the 1st Respondent abandons his application dated 9th May 2013 and that the mainstay of that application be reserved for argument and determination in the final decision of this Court. The question raised was whether or not the 1st Respondent was duly served with the Petition as required by The Elections Act (Act No 24 of 2011) (Hereinafter **The Act**) and the fallout that is incidental if this Court was to find that there was no proper service. That is where I begin.

### **Service of the Petitioner**

12. Service has in past Electoral disputes been a source of much controversy and debate. In the past dispensation Respondents employed all manner of tactics, some ingenious and others embarrassingly crude, to avoid and defeat service. Such was the controversy generated by the antics employed that the people of Kenya thought it important enough to make Constitutional provision on this otherwise mundane matter. And so Article 87(3) of The Constitution provides that-

***“Service of a petition may be direct or by advertisement in a newspaper with National circulation.”***

13. Section 77(2) of The Act echoes and slightly elaborates the constitutional provisions as follows-

***“A Petition may be served personally upon a Respondent or by advertisement in a Newspaper with National circulation.”***

The Statute seemed to equate the “**direct service**” required by Article 87(3) of The Constitution to “**personal service.**” It has not been suggested that there is a contradiction and I see none.

14. Rule 13(1) of The Rules retains the same wording as the Constitutional provisions and makes the following Rule on service of Respondent other than the IEBC-

***“An Election Petition shall be served by the Petitioner on the Respondent by:-***

- a. ***direct service; or***
- b. ***publication on a Newspaper of National circulation.”***

One notices that in respect to service via a Newspaper the Rules talk of publication and not advertisement.

15. And as would be essential of rules providing for procedure of legal proceedings, the Rules detail how service by publication is to be effected. This is what Rule 13(3) provides-

***“(3) Where a Petition is served by publication***

***in a newspaper as provided under Sub-rules 1(b) and 2(c), the advertisement shall be sufficient if it is –***

***(a) In Form EP3 set out in the schedule***

***and contains, as a minimum, the details required in that Form;***

- c. ***Is of at least font size twelve; and***
- d. ***is captured in dimensions of not less***

***than ten by ten centimeters.”***

16. So was the 1st Respondent served as required by the above clear and straightforward provisions? The 1st Respondent denies that he was personally or directly served and says this in paragraphs 2

& 3 of his affidavit in response of 24th April 2013-

**“2) THAT I was never served with the**

**Petition as law and particularly by the Elections Act No. 24 of 2011.**

**3) THAT I learnt of the existence of this**

**Petition from the Court Notice Board and from one Mary Makhokha who also sent me copies which she says were left by unknown people at her office gate.”**

17. In the face of this allegation, a direct response would be expected from the Petitioner. He elected not to call or invite the Process Server to offer written or oral explanation on how and when service was effected. Instead, the Petitioner himself gave some evidence on this matter in the course of cross-examination.

18. This is the Petitioner’s evidence on service-

**“I served Mr. Aringo, Petition was served by a Process Server. The Process Server told me how he served. He looked for him, he went to his home. He served it on his worker. I was not present. He gave the worker a copy of the Petition. It was a lady. The Process Server then went to the office of (REEP) Mary Makokha. He gave a copy to the watchman present. I also served through the Nation Newspaper and Taifa Leo. I do not know when this was done, looking at a copy, it was served on 11th April 2013 (Nation) and in Taifa Leo on 11th April 2013. It was in the classified pages.”**

19. That evidence needs to be compared with what the 1st Respondent and Mary Makokha (RW4) said. The 1st Respondent stated-

**{Shown DMF1 2 – Taifa Leo April 11, 2013} I see a notice. It appears on the bottom right corner of the page. This is the first time I am seeing the advert.**

**{Shown DMF2 (b) copy of Daily Nation April 1, 2013 at page 55 at the top written ‘Classified’. I see a notice regarding this Petition. It is on the top left corner.**

He later said-

**“There is no name of a Petition on both notices. There is no name ascribed to the person serving the notice. The notices are not signed.”**

While on the witness stand, the witness measured the notices using a ruler. He found the notice appearing on Taifa Leo to be 4cm by 10.5cm and that in the Nation to be 4cm by 9.8cm.

20. On the alleged personal service he remarked-

**“Later the same day my younger brother called me and mentioned that some two people on a motor bike wearing helmets came to my home early in the morning and found my caretakers wife at the gate and asked her whether this was Hon. Onyura’s home. They gave them an envelope and said “Hii ni barua yake, nimetoa Easy Coach.” She received the letter, they took a photograph of her and the gate. Many letters come home and my caretaker receives them.”**

In cross examination he stated (of Mary)

**“I did not give her authority to receive Court papers on my behalf. I have a caretaker at home. He has authority to receive any mail or package on my behalf. They received the Petition on 27th March 2013”.**

He went on to say in re-examination-

***“The wife to my caretaker is not my employee.”***

21. On her part, Mary Makokha testified-

***“On a day I cannot remember a copy of the Petition was left in our ground (REEP) it was in an unmarked envelope. It had a Petition inside. I cannot remember when it was left.”***

22. What emerges from this Evidence? It seems that the Petition was, in the first instance, served on the wife of the 1st Respondent’s caretaker. Separately, a copy was left on the Grounds of offices of REEP. Then it was published in Taifa Leo and Nation Newspapers on 11th April 2013.
23. The 1st Respondent stated that the wife of his caretaker is not his employee or agent and had no authority to receive Court process on his behalf. A party who chooses to serve Court process on an agent of an adversary carries the burden of proving that the person served is indeed an agent of the adversary and is authorized to receive Court process. I saw no effort by the Petitioner to discharge this onus.
24. On service on the grounds of REEP, that cannot be said to constitute direct or personal service. Leaving of the Petition on the grounds is not service on a person. Secondly, the Petitioner did not demonstrate that 1st Respondent was connected to REEP in the sense that REEP was duly authorized to receive and accept Court process on his behalf.
25. I find and hold that service of the Petition on the wife of the caretaker and on the grounds of REEP did not amount to direct or personal service as required by Article 87(3) of The Constitution, Section 77(2) of The Act and Rule 13 of The Rules.
26. I turn to examine the service by publication of the Notice in the Nation and Taifa Leo Newspapers of 11th April 2013. It is acknowledged, I think, that both are papers with National circulation and readership. That meets one requirement of the law (Rule 13(1) of The Rules).
27. The Law also requires that service of a Petition be effected within 15 days of its presentation. This is what Section 76(1)(a) of The Act stipulates-

***“A Petition ...***

- a. ***to question the validity of an Election shall be filed within twenty eight days after the date of publication of the results of the Election in the Gazette and served within fifteen days of presentation.” (my emphasis)***

The statute does not formulate the computation of time and so one must fall back to the general rules on reckoning of time. That is found in Section 57(a) of The Interpretation and General Provisions Act (Chapter 2 Laws of Kenya)

***“57. In computing time for the purposes of a written law, unless the contrary intention appears-***

***(a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done.”***

Applying that computation, the date of publication of 11th April 2013 was the 15th day of the presentation of the Petition. I have to find, as I now do, that the publication was within the time stipulated by the law.

28. Rule 13(3) is on the sufficiency of the advertisement where service is effected by way of publication. An advertisement must be-

***a) In Form EP3 set out in the schedule***

***and contains, as a minimum, the details required in that form.***

***b) Is at least font size twelve***

***c) Is captured in dimensions of not less***

***than ten by ten centimetres.***

It was deemed necessary to detail the form and content of the advertisement so that the advertisement is visible. A party who chooses to serve in this way must effect real and visible service. It must not be notional. It must be as visible as to have a real chance of capturing the attention of the person intended to be served.

29. I have looked at the notices published herein. It is common ground that they fall short of the expectations of the law in, at least, the following aspects-

***a) The advertisement was not signed.***

***b) The font was smaller than that required by  
the rules.***

***c) The dimensions of the Notices were less  
than 10 by 10 centimetres***

30. There was further criticism that the Notice was defective as it invited the 1st Respondent to enter appearance and respond within 7 days and not the 14 days stipulated by the rules. A reading of Rule 14(1) of The Rules leads me to agree with this criticism. That Rule is to this effect-

***“Upon being served with an Election Petition under Rule 13, the Respondent may oppose the Petition by filing and serving a response within a period of not more than fourteen days upon service of the Petition.” (my emphasis)***

The minimum period prescribed by the rules is 14 days and a party cannot purport to shorten this period. There can be no justification to constrict the Respondents' right of response.

31. The font and dimensions aside, both notices, in my view, were visible. The Taifa Leo publication was on page 3 of that newspaper, while that in The Daily Nation was in the classified page. I am not told that page 3 of Taifa Leo is not prominent enough. Neither has it been demonstrated that the mere publication of the notice amongst classified adverts in The Daily Nation was an attempt to obscure it. The petitioner, no doubt, was frugal in the manner in which he published the notices. But I am unable to categorically find that the publication was merely a pretended adherence to the law. It is my further view that although the notices were not signed and purported to shorten the period of response, they complied with the Law on some essentials. For all its shortcomings the notices did the following;

- i) It named the target of the notice,
- ii. His attention was drawn to the presentation  
of an election petition,
- iii) The notice gave the cause number of the petition,
- iv) It stated that the home of the Petition was  
the Busia High Court from where copies could

be found.

This Court chooses to overlook the flaws in the notices also because the 1st Respondent came to learn of the Petition in good time, responded promptly and participated robustly in the interlocutory and main hearings. I reach this result only because of the uniqueness of this situation. It is not an attempt to minimize or diminish the importance of service. Parties must on all occasions comply strictly with the rules of service. Non-compliance attracts the worst possible sanction, that of striking out the Petition.

### **The Issues And Overview Of The Applicable Law**

32. I now return to the course of determining the substance of the Petition. At pre-trial the parties agreed that the issues for determination are-

- a. ***Whether there should be scrutiny and recount of the votes in the polling stations listed in paragraph 19 of the Petition.***
- b. ***Whether there should be a declaration that the 1st Respondent was not validly declared as elected Member of the National Assembly for Butula Constituency.***
- c. ***Who should pay for costs.***

33. The Petitioners case consisted of 8 witnesses while the 1st Respondent called 5 and then Mr. Joseph Sigei (the 3rd Respondent) testified on his own behalf and on behalf of the Commission. As required by Rules 12 and 15 of The Rules their testimonies were preceded by their filed affidavits. That evidence will be evaluated and discussed in the setting of some legal principles.

34. The Constitution 2010 has, in Article 81, set out the general principles for the electoral system and process. Clause (e) of that Article is of great significance to conduct and management of an Election. It provides that a free and fair election is

- i) By secret ballot
- ii) Free from violence, intimidation, improper influence or corruption
- iii) Conducted by an independent body
- iv) Transparent, and
- v) Administered in an impartial, neutral, efficient, accurate and accountable manner

The duty of an Election Court is to examine whether, in the context of a Petition, a disputed election complies with these Constitutional minimums.

35. In carrying out that examination the Election Court must give due regard to the provisions of Section 83 of The Act which provides-

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

In construing the provisions of this section Akide appearing for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents suggested the Court takes the approach of Lord Denning in **Morgan Vs Simpson** [1974]3All ER 722. That was indeed the approach of Githinji J.A. in **James Omino Magara – vs- Manson O. Nyamweya & 2 others**.(2010) eKLR to section 28 of the retired The National Assembly and Presidential Elections Act which was worded similarly with the current Section 83. Lord Denning said at page 728,

**“Collating all these cases together, I suggest that the law can be stated in these propositions(1)If the election was conducted so badly that it was not**

substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result is affected, or not...(2)if the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by a breach of the rules or a mistake at the polls-provided that it did not affect the result of the election.(3)But, even though the election was conducted substantially in accordance with the law as to elections, nevertheless if there was a breach of the rules or mistake at the polls- and it did affect the result- then the election is vitiated.”

The Court will adopt that approach.

36.It was long settled that the burden of proof in an Election Petition lies with the Petitioner. And in **Petition No. 5 of 2013 Raila Odinga - Vs- The Independent Electoral and Boundaries Commission and 3 Others** the Supreme Court held-

**“Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance *did affect the validity of the elections*. It is on that basis that the respondent bears the burden of proving the contrary. This emerges from a long-standing common law approach in respect of alleged irregularity in the acts of public bodies. *Omnia praesumuntur rite et solemniter esse acta*: all acts are presumed to have been done rightly and regularly. So, the petitioner must set out by raising firm and credible evidence of the public authority’s departures from the prescriptions of the law.”**

And on the burden of proof, the Court observed.

**“The lesson to be drawn from the several authorities is, in our opinion, that this Court should freely determine its standard of proof, on the basis of the principles of the Constitution, and of its concern to give fulfilment to the safeguarded electoral rights. As the public body responsible for Elections, like other public agencies, is subject to the “national values and principles of governance” declared in the Constitution [Article 10], judicial practice must not make it burdensome to enforce the principles of properly-conducted elections which give fulfilment to the right of franchise. But at the same time, a Petitioner should be under obligation to discharge the initial burden of proof, before the Respondents are invited to bear the evidential burden. The threshold of proof should, in principle, be above the balance of probability, though not as high as beyond-reasonable-doubt – save that this would not affect the normal standards where criminal charges linked to an election, are in question. In the case of data-specific electoral requirements (such as those specified in Article 38(4) of the Constitution, for an outright win in the Presidential Election), the party bearing the legal burden of proof must discharge it beyond any reasonable doubt.”** (underlining mine)

As is clear from that decision, a Petitioner who assails the outcome of an Election bears a heavy burden of proof.

37) There is then the caution that was sounded in the Ugandan case of **Nabukeera Hussein Hanifa –Vs- Kibule Ronald & Another HCT-03-CV-EP-00017-2011** where the Court remarked:

***“In an Election Petition, just like in the election themselves, each party is set out to win. Therefore Court must cautiously and carefully evaluate all the evidence adduced by either party. In the Tanzania case of Nelson -Vs- AG & Anor [1990]2 EA 160 (CAF) Court held that evidence of partisans must be viewed with great care and caution, scrutiny and circumspection.”***

This alert may seem needless because a Court must, whatever the nature of the dispute before it, evaluate the evidence presented to it attentively and critically, but there is no harm in recapping it.

38) The Court now turns to consider the evidence in clusters of the allegations and complaints raised in the Petition.

### **Violence**

39) In paragraph 12(i) of The Petition, the Petitioner alleges that the 1st Respondent used violence against the supporters of his opponents. Those allegations are more pointed in paragraph 11(b) of his affidavit in support of the Petition where he states that the violence was at Murumba Market, Buhuyi Market, Emafubu and Emauko Polling Stations. In his oral testimony the Petitioner gave evidence on only one incident. That would be an incident at Buhuyi Market Polling Station. The Petitioner was however candid that he did not see this happen but told of it by the victim of the violence a Mr. Okello(PW 6).

40) PW6 was agent for Orange Democratic Movement (ODM) Party. That at about 12.00noon he took a lunch break from his assignment. That as he went for lunch, he saw four people bribing voters. One of those giving out the bribes was Dennis Oduori who was a person known to him. He sought to know from them why they were engaging in this malpractice on the very day of Election. That the inquiry elicited a violent reaction.

41) That the four (4) people assaulted him. One hit him on the eye and after he fell they pounced on him. That he was rescued by one Joseph Malala (PW7). He later reported the matter to 2 Administration Police Officers who were present at the Polling Station. He sought medical attention from a dispensary on the following day.

42) On cross-examination, PW6 told Court that Dennis was one of the people who beat him. And that although he attempted to report the matter to the police, he found no officer at Ogalo Police Post as all of them were away on duty.

43) PW7 told Court how he found some people arguing at Buhuyi Polling Station. He then saw Juma (PW6) being slapped. He identified Dennis Oduor as one of the assailants. The people who had assaulted Juma (PW6) dispersed when they saw him. He later, along with PW6, reported the matter to the Administration Police.

44) Use of force or violence during the Election period is an Election offence. Section 65 of The Elections Act provides-

***“65. A person who, directly or indirectly in person or by any other person on his behalf, inflicts or threatens to inflict injury, damage, harm or loss on or against a person—***

***(a) so as to induce or compel that***

***person to support a particular***

***candidate or political party;***

***(b) on account of such person having***

***voted or refrained from voting; or***

***(c) in order to induce or compel that***

***person to vote in a particular way or refrain from voting, commits an offence and is liable on conviction to a fine not exceeding one million shillings or to imprisonment for a term not exceeding five years or to both.”***

Assault is also a Criminal offence under Sections 250 and 251 of The Penal Code.

45) For that reason, the law requires that proof of electoral violence is cogent and firm. That evidence must not only prove that violence occurred but also that it was associated with the Respondents. The 1<sup>st</sup> Respondent denied knowing Dennis Oduor. It was upon the Petitioner to prove that the use of violence was at the instance of the candidate or with his approval or consent or that it was carried out by his agents. The evidence by the Petitioner's witnesses failed to establish this crucial link.

46) And if the allegation against Dennis was that he acted on his own, then he would have been a potential Respondent to these proceedings. That is in contemplation of Rule 2 of The Rules which defines a Respondent as amongst others,

**“Any person whose conduct is complained of in relation to an Election.”**

As Dennis was neither a party or a witness herein, his side of the story is unknown. For this reason, the Court cannot make an adverse finding against him. To do so would be to condemn him unheard.

47) It also needs to be pointed out that had the incident been proved then what would have been proved was assault within the meaning of Penal Law and not the use of force and violence referred to in Section 65 of The Elections Act. I say this because that Section makes reference to use the force or violence-

- a. *So as to induce or compel that person to support a particular candidate or political party;*
- b. *On account of such person having voted or refrained from voting or in order to induce or compel that person to vote in a particular way or refrain from voting.*

There is no evidence that the violence was employed to achieve any of the above purposes. Neither was there evidence that the violence disrupted or prevented voting or created despondence or fear that influenced the process or outcome of the Election. The evidence is that it was an angry reaction to the enquiry made by PW6 as to why the four (4) persons were bribing voters.

48) It is my finding that the allegation of violence has not been proved and there is no evidence that any incident occurred at Buhuyi that disrupted or prevented polling at that Station. The high voter turnout out 88% at Buhuyi not consistent with disordered polling.

### **Bribery**

49) As a general rule proof of bribery, even of a single act, with knowledge and consent or approval of the candidate or by the candidates agent is sufficient to invalidate the Election. The amount or significance of the bribe does not matter. Our Courts (e.g in **Election Petition No. 9 of 1983 Mohamed Jahazi –Vs- Shariff Nassir A. Taib** and in **Election Petition No. 1 of 1998 Eustace Mbuba Nlwiga – Vs- Julius Musyoka & 3 Others**) have approved the following passage from HALSBURYS Laws of England 3rd Edition Vol. 14 page 222 paragraph 384-

***“As a general rule, due proof of a single Act of bribery by with knowledge and consent or approval of the candidate or by the candidates agents, however insignificant the act may be is sufficient to invalidate the Election. A Court is not at liberty to weigh its importance nor can it allow any excuse whatever the circumstances may be.”***

50) Section 64 of The Act elaborately provides for what amounts to bribery. The provisions of that Section are exemplary in detail. Perhaps a demonstration that the legislature did not want any conduct that might amount to be bribery to be left out. Owing to the seriousness in which bribery is viewed and of its Criminal nature, an allegation of bribery must be supported with credible and cogent proof. The evidence must leave no room for doubt that it happened.

51) What is the evidence? First, John Wycliffe Wanga (PW1) said,

***“I did not witness anyone being bribed.”***

He later said-

***“Prove of bribery is difficult. I saw people receiving money but I may not know that it was bribery.”***

That evidence required corroboration.

52) There would be more direct evidence from Esther EnFegu Musundu (PW2). She was a recipient of a “lesso” that was produced in Court. She also claimed to have been given Kshs.100/-. These were given by four (4) men who did not identify themselves but had claimed to be the 1st Respondents “people”. Then on cross examination she said-

***“I cannot say with certainty that the four who came to my home were supporters/agents of Aringo. Nothing on the lessso shows it came from Aringo.”***

On the lessso she remarked-

***“There is no difference between this “lesso” and those available in shops.”***

My view is that even if it were to be believed that there was indeed bribery, this Court does not see any evidence linking it to the 1st Respondent. Nothing proves that the giving of the “lesso” and or the money was done with the knowledge and consent or approval of the 1st Respondent or by his agents.

53) Andrea Sitawa (PW3) told a story about the night of 3rd March 2013. He was the home of a Dennis. At around 10.00pm a Fredrick Okelo came in a white car, addressed the people who had gathered there and gave them “lessos” and money while urging them to vote for the 1st Respondent. It was his testimony that Fredrick Okelo was accompanied by Michael Onchiri and Pamphill Ngote.

54) Pamphill Oduor also known as Pamphill Ngote (RW2)

testified on behalf of the Respondent. It had been alleged by PW3 that he was the one offloading the ‘lessos’ and distributing them. Pamphill denied being present at the home of Dennis and says that he remained in his home from 5.00p.m on 3rd March 2013 and never left. He also denied knowing Fredrick and Michael.

55) On cross-examination, PW3 said as follows about the events of that night-

***“I was not given any ‘lesso’ by Mathew, Pamphill and Fredrick but they promised to give me money. The ‘lesso’ were given to the women. They never gave me the money as promised.”***

56) This Court must deal with the one word of PW3 as against that of RW2. That is all to the evidence of this night incident. On cross examination, both witnesses stuck to their stories. There is no reason for this Court to believe one account and not the other. And in this situation, unfortunately, the Petitioner is unable to prove his allegation even on a balance. None of the many people said to have been at the home of Dennis came forward to corroborate the account of PW3.

57) More decisively the witness was unable to give any proof of a connection between Fredrick, Mathew (or is it Michael?) and Pamphill on the one hand and the 1st Respondent on the other. The proof was important because as conceded by PW3 he never saw the 1st Respondent at that home. I must conclude that the evidence is too tenuous to constitute cogent and satisfactory proof of bribery.

58) The same witness PW3 narrated events of the following day. That on the Election day of 4th March 2013, he was urged by some unknown person to vote for Aringo on the promise that he would be rewarded with a soda and sugar. But as it turned out, PW3 was not able to vote because he lacked identification papers and the said reward was not made good.

59) Then the same witness sought to implicate Mary Makokha (RW4)(**Mary**) in a bribery scheme. It was the testimony of PW3 that Mary requested him to urge voters to vote for the 1st Respondent and she promised to give him Kshs.500/- for this work.

60) Marys' account, unsurprisingly, is different. That in her capacity as Manager of the campaign of the 1st Respondent, she visited all polling stations on the Election date. In one station she found Sitawa (PW3) who approached her with a complaint that although he was the 1st Respondents agent he had not been paid. She promised to take up the matter. She denied asking Sitawa to do anything on her behalf.

61) This evidence again runs into the same problem as the earlier account of bribery as it is not corroborated and is the word of one person against the other. Both accounts were not upset in cross examination and are therefore even. That does not tip the scale in favour of the Petitioner.

62) Allan Barasa Olende (PW5) is a resident of Mauko. That on 3<sup>rd</sup> March 2013 at about 11.00am some people in motor vehicle KBC 494N visited his home. The people introduced themselves as Campaigners for Aringo and gave him two '**lessos**' and Kshs.400/-. One of the lessos had the picture of the 1st Respondent. This he gave to John Wanga (PW1). He kept the other. Both were produced as exhibits.

63) Mary (RW4) who was the campaign Manager for the 1st Respondent was unable to recognize the lesso with the image of the 1st Respondent. She thought that it could have been printed by anyone. On his part, the 1st Respondent was more categorical. He stated-

***“Lessos” were not part of my campaign materials. This was not part of my campaign material. The paste on picture seems to be uplifted from my campaign poster. It is not my work ... It was not done with my authority.”***

64) What is the Court to make of the evidence of PW5 in the face of the express denial by the 1st Respondent and his witness? The evidence of PW5 is the evidence of a single witness who says that he was alone when given the money and the lessos. And he does not know the givers. So he furnished no names to the Court. Then there is this statement made by him in cross-examination-

***“I was not bribed to vote.”***

That evidence dissuades this Court to hold that the witness was indeed bribed or that if he was, then it was on the authority or instance of the 1st Respondent or by his agents.

65) My hesitation is further informed by the demeanor of the witness as he testified. It had been his initial testimony that he was assisted by the 1st Respondents' agent in marking his ballot. He had some difficulty maintaining this line when subjected to cross examination. He was undecided as whether he voted on his own or whether he was assisted to vote. He seemed to contradict himself on this. Much reliance cannot be placed on him.

66) Buhuyi Primary School was a polling station for the

purposes of the Election. It was the evidence of Joseph Juma Okello (PW6) that on the material day at about 12.00 noon he saw four (4) people who were stopping voters going to vote and bribing them with Kshs.200/- each and asking them to vote for Aringo (***the 1st Respondent***). Of the four people, he was able to identify Dennis Oduori. PW7 was also able to see Dennis Oduori at the scene but he did not witness any bribery.

67) Under cross-examination some details emerged. PW6 says that he first saw the four when they were about 100ft away. On reaching there, two women had already been bribed and had left. The witness did not know the names of those women.

68) What the evidence of the witness failed to establish was a link between the four people (one of whom was known to the witness) and the 1st Respondent. It may be possible that the four(4) were urging

voters to vote for the 1st Respondent but that without more does not form an unequivocal link between the 1st Respondent and what is said to have happened at Buhuyi. It cannot, in my view, be sufficient evidence that if there was bribery then it was done with the knowledge and consent or approval of the candidate who expressly denied it.

69) All the evidence on the complaint of bribery is weak and falls far short of the standard set by the law.

### **Employing And Using Public Servants**

70) Section 68(1) of The Act provides-

***“Except as authorized under this Act or any other written law, a candidate, referendum committee or other persons shall not use public resources for the purpose of campaigning during an election or referendum.”***

What amounts to Public Resources is defined in Section 2 of The Act to include-

***Any vehicle, or equipment owned by or in the possession; or***

a. ***Premises owned or occupied by,***

***any government, state organ, statutory corporation or a company in which the Government owns a controlling interest.***

71) The answer as to whether a Public Officer is barred from engaging in Partisan Politics or participating in Partisan Campaigns in an Election covered under The Act lies in the provisions of The Public Officers Ethics Act and The Leadership and Integrity Act.

72) Section 16(1) & (2) of The Public Officer Ethics Act provides that-

***(16)(1) A Public Officer shall not or in connection with the performance of his duties as such-***

***(a) Act as an agent for, or so as to***

***further the interest of, a political***

***party; or***

***(b) indicate support for or opposition to***

***any political party or candidate in***

***an Election.***

***(2) A Public Officer shall not engage in Political activity that may compromise or be seen to compromise the Political neutrality of his office.”***

Then Section 2 of that Act gives this broad definition of who a Public Officer. A ‘**Public Officer**’ means-

***“2. In this Act, unless the context otherwise requires:-***

***"public officer" means any officer, employee or member, including an unpaid, part-time or temporary officer, employee or member, of any of the following -***

***(a) the Government or any department, service or undertaking of the Government;***

**(b) the National Assembly or the Parliamentary Service;**

**(c) a local authority;**

**(d) any corporation, council, board, committee or other body which has power to act under and for the purposes of any written law relating to local government, public health or undertakings of public utility or otherwise to administer funds belonging to or granted by the Government or money raised by rates, taxes or charges in pursuance of any such law;**

**(e) a co-operative society established under the Co-operative Societies Act;**

**Provided that this Act shall apply to an officer of a co-operative society within the meaning of the Act.**

**(f) a public university;**

**(g) any other body prescribed by regulation for the purposes of this.”**

The provisions of the Leadership and Integrity Act on

Political neutrality are similar but are directed only to appointed State Officers (Section 23 of The Act).

73) So the provisions of Section 16 of The Public Officer Ethics Act and Section 23 of The Leadership and Integrity Act limits the participation and engagement of appointed Public and State Officers in Political activity.

74) In paragraph 12(iii) of the Petition the Petitioner charges The 1st Respondent with employing the services of known public Civil Servants for his campaigns. The Civil Servants are said to be KRA employees (see paragraph 11 of The Petitioners Affidavit in support).Sitiwa (PW3) gets more specific when he names the KRA employees as Fredrick Okelo, Michael Ochiri and Pamphill Ngote.

75) ‘**KRA**’ is clearly an acronym but PW3 does not tell the Court which public organization is acronymed ‘KRA’. But let this Court assume, out of public notoriety, that ‘KRA’ refers to Kenya Revenue Authority. That is no doubt a Public Body (See Section 3 of The Kenya Revenue Authority Act (Cap 468 Laws of Kenya)). The difficulty the Petitioners case faces is that there was absolutely no evidence to establish that the three(3) gentlemen were employees of KRA. Further there was no evidence linking the 1st Respondent and the three named individuals, nay, that the 1st Respondent had employed them as his campaigners.

### **Unlawful Campaigns**

76) The campaign period is defined in Section 2 of The Elections Act as the period specified as such in the notice issued by the Commission in relation to an Election. No campaigns are permitted after this period. It is common ground that for the 2013 elections the campaign period closed on 2nd March 2013. The complaint by the Petitioner is that the 1st Respondent engaged in campaigns after this date. What is the evidence?

77) The Petitioner, Philip Osore Ogutu alleged that Post

campaign period campaigns were conducted by the 1st Respondent on 3rd March 2013 through a road show that visited Burinda, Murumba, Bukhuma, Tingolo, Ogalo Market, Emauko to Siribo. But he did not personally witness this road show. This statement by him is instructive-

**“All my evidence about late campaigns, bribery, violence or other misconduct is what I was told by my witnesses.” (underlining mine)**

78) John Wanga's (PW1) testimony was direct evidence. It was his testimony that on 3rd March 2013, at about 11.00am, he was told by a Mr. Moses Osono Onyango (RW1) that electioneering was still ongoing. Responding to that call he visited various Centres. That at Makwara he met a motorcade and people campaigning for the 1st Respondent. That one of the vehicles in the motorcade was a Blue Land Cruiser which belonged to the 1st Respondent. Another was a Pick-up with loud speakers mounted on it and carrying people who were shouting praises for Michael Onyura (1st Respondent).

79) The other aspect of his testimony was more interesting. That on the same day (3rd March 2013) Onyango played over to him a voice recording of a conversation between The District Commissioner Butula and himself (Onyango) That it was a conversation in respect to late campaigning. It was also his evidence that Onyango told him that he had video recording of the campaigns. That the recording was in his handset.

80) That later on 16th April 2013 the video recording was

downloaded into three (3) still pictures. In the course of hearing, the Petitioner failed to produce these three (3) photographs as exhibits and they are therefore not part of the Court record.

81) The evidence of PW1 attracted a reaction from Onyango who, while admitting that he had a recording of a voice conversation with the District Commissioner (D.C) denied that the conversation was about campaigns of the 1st Respondent. That it was a conversation about late campaigns of a Mr. Alex Aguko, a County Representative Contestant.

82) It was the evidence of Onyango that he first met the Petitioner, PW1 and one other person who he did not know on 10th March 2013 at Mayoni. That on that occasion he played over the voice recording to them. It was agreed that he would electronically transfer the conversation to the handset of PW1 but the attempt to transfer failed. The transfer, however, succeeded on 11th March 2013.

83) The further evidence of the witness is that the photographs did not emanate from him. He denies downloading them from his phone He also says that he was not aware that the 1st Respondent campaigned on 3rd March 2013. I shall return to this shortly.

84) PW1's evidence was that he met and saw a motorcade belonging to the 1st Respondent campaigning during the post-campaign period. The 1st Respondent needless to say denied this. The evidence of PW1 is that he saw the motorcade but that he did not see the 1st Respondent in it.

85) In answer to a question posed by Mr. Akide appearing for the 2nd and 3rd Respondent, PW1 stated that he communicated the Election breach to Mr. Francis Omido (the Deputy Presiding Officer) in the afternoon of the very day (3rd March 2013). He was also aware that complaints of Election irregularities and malpractices were to be lodged **in writing** to the Commission. And he says that he had indeed done so and copied the communication to the D.C. For some unknown reason the witness did not deem it necessary to show or produce this letter during his oral testimony. Because of that this Court will never know whether a formal complaint was lodged with the Commission because the Commission denied receiving complaints of that nature.

86) Something else does not favour the evidence of PW1. He portrayed himself, and correctly so, as a man with knowledge of the Election Process. He played a Central role in the Electioneering of one of the Parliamentary Candidates. And in an appointment letter of 12th January 2013 from that candidate (Joseph Oyula) to the Petitioner, the Petitioner was asked to work with PW1 "**to acquaint yourself with IEBC and the Election Act.**" PW1 was known to had knowledge of the election law and regulations. He was also a professional teacher. Yet he failed to capture this substantial and serious malpractice in a way that would give credence to his allegation. This Court is not told why there is no photographic, voice or video recording of this incident or why only one witness (PW1) was available to testify on it. Why was the D.C whom the witness says he spoke to about the late campaigns and who is said to have given an assurance that he would stop further campaigns not called to support this evidence.

87) Back to the evidence of his interaction with Onyango. There was a contest between the two witnesses as to the source of the photographs. There was need for clear evidence on how the photographs were processed and handled. That was not forthcoming. Worse still for the Petitioner, the sting of that story was lost when the photographs which were the substratum of the evidence were not formally produced in Court as exhibits. They are not part of the court record and this Court cannot make any comments or findings on its contents.

### **Dissuading Voters**

88) There was an allegation in paragraph 11(c) of the affidavit of the Petitioner that the 1st Respondent was guilty of-

***“Dissuading voters inclined to vote for his opponents not to vote as in the case of voters at Bujumba, Emfabu, Tingolo, Elagalu, Sibembe, Elukhari and Madula Polling Stations by his campaign agency called REEP a HIV And Aids NGO run by Mary Makokha, which not only compelled but threatened the people living with HIV, both affected and infected who collect ARVs through the NGO that they will be removed from the program which is their life line. This is contrary to the individual Constitutional rights under 2010 Constitution.”***

89) If these allegations were true, then both the 1st Respondent and Mary (RW4) would be guilty of an Electoral offence under Section 63(1)(a) of the Elections. Under that Section-

***“63. (1) A person who, directly or indirectly in person or through another person on his behalf uses or threatens to use any force, violence including sexual violence, restraint, or material, physical or spiritual injury, harmful cultural practices, damage or loss, or any fraudulent device, trick or deception for the purpose of or on account of—***

***(a) inducing or compelling a person to vote or not to vote for a particular candidate or political party at an election; ”***

So what is the evidence?

90) It was the evidence of the Petitioner that PW1 (Wanga) had in a letter of 23rd February 2013 lodged a complaint about Human Rights abuse by Mary (RW4). That letter, which was produced as a Petitioner's Exhibit 10, was addressed to the “Returning Officer Butula IEBC Office”. The gist of it was that Mary and the Petitioner were using persons affected and infected by HIV as political tools. But there was no direct evidence of how Mary was doing this.

91) The Returning Officer (The 3rd Respondent) denied having received that letter. And he says that had he, then he would act on it. This was his testimony-

***“I would have summoned this person and assess the impact the NGO would have on the people and then decide which action to take and after confirming whether the NGO is registered, I would not allow a registered NGO to take part in politics. An NGO is not allowed to participate in political activity.”***

92) Noteworthy is that the letter was dated 23rd February 2013, the very day that the Commission held a meeting of National Assembly Aspirants. The minutes of meeting (P Exhibit 11) does not show that this complaint was amongst the complaints or concerns raised in that meeting. And this is Minute 7/23/2/2013-

***“MIN 7/23/7/2013 Electoral Code of Conduct The chair appreciated the efforts being done by the Candidates in keeping to The Code of Conduct that they signed during nomination. This is manifested in few or no serious incidences of malpractices. It has been observed that there was peace and little conflict during their campaign.”***

93) The person who may have been best placed to give evidence as to when and how this letter was delivered was the author himself (PW1). Curiously he makes no mention of this letter either in his written or oral evidence. It also needs to be said that this is also the person who would have given evidence of how Mary committed the abuses. Again he was silent.

94) Only one witness of the Petitioner gave direct evidence about Mary.Sitawa's (PW3) evidence was that on the voting day Mary asked him to urge the voters to vote for Aringo on the promise that she would reward him with Kshs.500/- (This Court has already dealt with this evidence in the earlier part of this decision). He made no mention of abuse of position by Mary (RW4).

95) Mary (RW4) admitted that she was a Director of an NGO acronymed REEP and that she was the 1st Respondents campaign Manager. She took every opportunity to emphasize that she did this in her personal capacity and when on her annual leave from the organization. Whilst admitting that she would be influential given her position in the NGO, she denied that REEP itself was involved in Politics or that she coerced anyone into voting one way or other. In the face of the weak evidence of the Petitioner's witnesses and Mary's (RW4) express denial, this Court must find that the allegations of undue influence have not been proved at all.

### **Of Irregularities and misconduct by IEBC**

96) A specific charge against the Commission was that it

allowed unauthorized persons and non-employees to collect ballot papers from one polling station to another without the consent and approval of party agents. It was further alleged that some ballot papers were collected from Burinda Polling Station to Bujumba Polling Station without following laid down procedure and for improper use.

97) In support of those allegations, Stephen Maero Nyamuringa (PW4) testified on behalf of the Petitioner. He was an agent for Orange Democratic Movement at Burinda Primary School. The Presiding Officer of Burinda Polling Station released a ballot book (Serial No.PA00006101-PA00006150) for use at Bujumba Primary School. In an affidavit sworn by the 3rd Respondent on 13th May 2013 in response to an application for scrutiny, the Commission admitted the transfer of the ballot papers but stated that they were not utilized.

98) At the prompting of the Petitioner and motivated by the need to find out what became of the transferred ballots the Court ordered for the scrutiny of the votes cast at Bujumba Polling Station. When making the order, the Court said-

***“I find that the query raised by the Petitioner in respect to the utilization of the ballot papers has not been satisfactorily explained. The query is not a trifle and invites further investigation. I would think that an examination of the votes cast at Bujumba Polling Station could shed some light.”***

99) The scrutiny was conducted by the Deputy Registrar who returned her Report on 30th May 2013. Bujumba Primary Polling Station (Code 002) had two streams. The answer to the examination sought by the Court was found in the Ballot Box to stream A. The Deputy Registrar found as follows-

### **“USED BALLOT BOOKS WERE AS FOLLOWS:-**

- 1. PA00001151 to PA00001250 (100 ballot papers)**
- 2. PA00001351 to PA00001450 (100 Ballot papers)**
- 3. PA00000951 to PA00001050 (100 Ballot papers)**
- 4. PA00001251 to PA 00001350 (100 Ballot papers)**
- 5. PA00002080 to PA 00002100 (50 Ballot papers) only half of them were used. These were from PA00002181 to PA00002092**

## **UN-USED BALLOT BOOKS**

**PA 00006101 to PA 00006150 (50 Ballot papers)**

**PA 00002093 to PA 00002100 – were un-used from ballot book (5) above.”**

100) The scrutiny revealed that the questioned ballot papers (PA00006101 to PA00006180) were not used at all. That would put to rest the anxiety by the Petitioner in respect to this Polling Station because as his witness (PW4) put it-

***“Apart from the ballot book issue I do not have any quarrel with the way the Form was prepared.”***

He was referring to Form 35. He later said this in answer to a question put to him by the Court-

***“I never noted any other irregularity in the voting and counting.”***

101) The Petition raised other complaints against the 3rd Respondents conduct of the Election. These are:-

- i) Failing to secure and/or properly secure ballot boxes at the close of the Polling Station and while transporting them to the tallying centre – (paragraph 14(b) of the Petition).***
- ii) Allowing unmarked Ballot papers to be cast in favour of the 1st Respondent (paragraph 14(c))***
- iii) Counting and/or allowing counting of spoilt ballot papers in favour of the 1st Respondent (paragraph 14(d))***
- iv) Stuffing and/or allowing to be stuffed into the ballot boxes invalid ballot papers. (Paragraph 14(g)).***
- v) Declaring results of candidates before the requisition forms were signed by all party agents.***

This Court will turn to examine the evidence tendered

around each of these allegations.

102) The evidence by the Petitioner was that the vehicle of one Fred Walufu was used to ferry ballot boxes from Makwara, Siribo, Esirbo market and Emauko. It was said that Fred was not an employee of the Commission and that he was in fact one of the campaign managers of the 1st Respondent. The Petitioner says this in his evidence in chief-

***“It is true that IEBC did not seal some ballot boxes after the voting. These were collected and transported by a campaigner of Mr. Aringo. They involved Siribo, Emauko Polling Stations. They were transported by Fred Walufu using vehicle KBK 186S. I was told that by John Wanga. Mr. Sigei has not denied this in his affidavit.” (my emphasis)***

103) So what did John Wanga (PW1) say of this? In his entire testimony, both written and oral, PW1 makes no mention whatsoever about the issue of transportation of ballot boxes. And none of the other witnesses for the Petitioner supported the allegation of the Petitioner. As to the question whether Mr. Sigei (the 3rd Respondent) had not controverted the allegation, this Court finds the following statements in Mr. Sigei’s statement of 14th May 2013-

**“14) The sealed ballot boxes and all other**

***Election materials from the various polling stations were then ferried to the Constituency Tallying Centre, where I was based, by the respective Presiding Officers for verification before final announcement of the final results.***

**15. The IEBC relies on hired vehicles to transport its personnel and materials during the Election process since it does not have enough motor vehicles for use throughout the Country.”**

104) No doubt, the 3rd Respondent does not specifically deny that Fred Walufu transported some Electoral materials. On the other hand there is no admission made by him. A party who alleges must prove and even if the Respondents were to be silent on the averments, the Petitioner was not unburdened from proving the allegations that the ballot boxes were manipulated in favour of the 1st Respondent.

105) On the further allegations, the Petitioner states-

***“IEBC allowed unmarked Ballot papers to be marked in favour of the 1st Respondent. But I do not have any report or evidence on this, I was merely suspicious. This is also true about my allegation that spoiled votes were counted in his favour.***

Suspicion alone without proof is never good enough and remains just that, suspicion. And to this category of unproved allegations this Court would add that averment that ballot boxes were stuffed with invalid ballot papers.

106) Blasio Sandas Ngono (RW3) was hired as a clerk by the Commission. He was assigned the duty of a queuing clerk at Emafubu Health Centre Polling Station but his role there would not end without controversy. Andrew Sitawa (PW3) told Court that whilst on duty Ngono directed voters to vote for the 1st Respondent. Sitawa allegedly reported his misconduct to the Administration Police who were present and that he was arrested.

107) Ngono (RW3) gave a version that was favourable to himself. He denied directing or wooing voters to vote for the 1st Respondent. That what precipitated his crisis was his decision to remove Sitawa from the voting queue because Sitawa did not have the documents that would make him eligible to cast his vote. Sitawa, it is said left the polling station in protest. That a complaint was then raised that Ngono was campaigning for Hon. Bwire and the Presiding Officer made a decision to remove him from the polling station. Although he denied being placed under arrest he conceded that he remained in the custody of the police for sometime. He nevertheless was released without being charged and was able to return to the polling station where he joined in the counting exercise.

108) In his written statement, the Returning Officer referred to the incident at Emafubu and states-

***“There was an incident at Emafubu Health Centre Polling Station where a queuing clerk was sacked and ejected from the polling station by the Presiding Officer after he was found talking to voters.”***

In his oral testimony Mr. Sigei says that the clerk was not arrested.

109) In my evaluation of the evidence, I find that Ngono misconducted himself by talking to voters while he organized the queue. This led to his removal from the Station. I also find that he was constructively under arrest for sometime on that day as his liberty had been taken away from him. What this Court is unable to find is that he was campaigning for the 1st Respondent or that he was doing that with the sanction, knowledge and consent or approval of that candidate. The 1st Respondent in fact stated that he came to know Ngono (RW3) after the filing of this Petition. This Court cannot make an adverse finding against the 1st Respondent on the misconduct of (RW3).

110) The focus now shifts to Form 35. Form 35 is a declaration of results in respect to the Elections for the National Assembly, County Women Representatives, Senator, County Governor and County Assembly (Regulation 79 (2) of the Elections (General) Regulations 2012). The Petition criticizes the Commission for declaring results before these forms were signed by all party agents. In the course of the hearing and submissions this Court sensed an attempt by the Petitioner to introduce a new frontier in respect to those forms. It was the Petitioner's new case that many of the Form 35 had suffered changes, alterations, overwriting and erasures and that these anomalies, errors or irregularities affected the results of the Election.

111) The issue of alterations or changes or erasures or over-writings was not pleaded in the Petition. Although the duty of an Election Court is to inquire as to whether an Election was conducted in accordance with the principles laid down in the Constitution and Statute, that inquiry must be carried out within the context of the pleadings. It is not an open-ended inquiry and parties must be bound by their pleadings. I am not alone in this view and I identify with the holding of Kimaru, J in Mahamud Muhumed Sirat -Vs- Ali Hassan Abdirahman and 2 Others Nairobi Petition No. 15 of 2008 [2010]eKLR where he stated that-

***“From the outset, this Court wishes to state that the Petitioner adduced evidence, and even made submissions in respect of matters that he had not specifically pleaded in his petition. It is trite law that a decision rendered by a Court of law shall only be on the basis of the pleadings that have been filed by the party moving the Court for appropriate relief. In the present petition, this Court declined the invitation offered by the Petitioner that required of it to make decisions in respect of matters that were not specifically pleaded. This Court will therefore not render any opinion in respect of aspects of the Petitioner's case which he adduced evidence but which were not based on the pleadings that he had filed in Court, and in particular, the Petition.”***

112) Even if this Court were to accept that the question of erasures and alterations was implicitly pleaded, I would still reach a decision that the Court should not reprehend the results reflected in those Forms. True, there was unequivocal proof by the Document Examiner, S.M.Mweu, that there were some alterations or erasures or overwritings or cancellations in twenty five Forms 35. What the Petitioner failed to do was to lead evidence that these affected the results of the Election or was substantial non-compliance with the Law.

113) In the course of submissions, the Petitioner sought to demonstrate the effect of the erasures, alterations, overwritings and the cancellations. That statistical analysis was at best the impression of the Petitioner. For it to have been a basis for an objective examination by this Court, the analysis ought to have been given in evidence and subjected to cross-examination. It was not demonstrated that the figures transposed to Form 36 and used to give the final tally of the results were inaccurate or incorrect.

113) The erasures, cancellations, alterations and overwritings were attributed to human error and fatigue on the part of the Poll officials. The Court was told that the Commission had to conduct and manage an exceptionally involving election. It has not been shown that the errors were a deliberate work of fraud. For this reason, I would be as sympathetic as Maraga J. (as he then was) Joho -vs- Nyange & Another (No 4) (2008)3 KLR EP 500 where he noted;

**“Error is to Human. Some errors in an election like this conducted under a frenetic schedule are nothing more than what is always likely in the conduct of any human activity. If they are not fundamental they should always be excused and ignored.”**

And more recently Meoli J. in H.CC. Malindi Election Petition No.1 of 2013

Lenno Mwambura Mbaga -vs- IEBC & another held;

**“As irregular as they are there is no evidence that these alterations were fraudulent or deliberate rather, than the result of usual human fallibilities. The mere existence of**

**alterations by itself, if not shown to be deliberate and designed to affect the results will not suffice to impeach results.”**

114) I am somewhat fortified because the results of the recount that this Court ordered in some of the Polling stations complained about showed that the results in the Forms 35 were very substantially accurate and correct notwithstanding the untidiness caused by the alterations, erasures, cancellation and overwritings.

115) Back to what was pleaded. The Petitioner was the Campaign Manager of Joseph Maero Oyula who was a candidate in the Election. He testified that none of the agents for his candidate were given Forms 35 and that not all Forms 35 were signed by all the party agents. He also made the point that the names of those who were present and did not sign were not captured in the Forms.

116) The cross-examination of the Returning Officer elicited some admissions which, in the view of the Petitioner, demonstrated mismanagement of the Election. These are-

- Bulama Township Polling Station (014) two streams filled one Form 35.
- St. Augustine Boys Primary School (038) – Not a single agent signed the Form 35.
- Esongo Primary School, 14 agents signed.
- Sikarira Primary School (059) – although Form 35 was signed by Presiding Officer it was not stamped.

117) In his re-examination the Returning Officer sought to

explain why, what appears to be anomalies, would not change the result. Buluma Township Polling Station had two streams but results were declared using only one Form 35. The Returning Officer conceded that this was not usual as each stream ought to have had separate declarations. Where Polling Stations had more than one stream, each stream was headed by an officer. The reason would be that each stream is a separate polling unit. The officer heading a stream ought to sign the declaration of the results from the stream. In respect to this polling station, the results of two streams were combined. The form 35 declaring the results was signed by a Roselida Magisa Opondo as presiding officer. It unclear whether she was the head of stream 1 or stream 2. In my view the Commission breached the provisions of Regulation 79(1) of The Election Regulations which makes it mandatory for the Presiding Officer to sign the declaration in respect to the election. In addition by combining the results of two streams the commission blurred the true outcome of the individual streams. This is hardly an accountable manner of declaring a result. For these reasons the Court invalidates the entire results declared for that station. But there is a sad twist for Petitioner in that after the invalidation of that result, the margin between the 1<sup>st</sup> Respondent and the runners up would widen. The 1<sup>st</sup> Respondent had garnered 259 votes against Joseph H Maero Oyulas' 467.

118) There was then the unstamped Form 35 for Sikarira Primary School (059). The Form was duly signed by the Presiding Officer but not stamped with the Official mark of the Commission. It was the submission by Counsel for the Petitioner that this omission would invalidate the results declared in that Form. Counsel pointed at Regulation 69(1)(g) of The Elections (General) Regulations 2012. But that Regulation is completely off the mark because it is in respect to stamping of a ballot paper. Regulation 79(1) of The Regulations is more relevant. That Regulation requires the Presiding Officer to sign the declaration. There is no requirement that the official mark of the Commission need to be stamped on it. I am unable to agree with Counsel, and even the Returning Officer, that no-stamping invalidates Form 35. The signature of the Presiding Officer was sufficient compliance with the law.

119) Esongo Primary School Polling Station was amongst eighteen (18) or so other Polling Stations in which more than even (7) agents signed Form 35. Seven is significant because there were seven (7) candidates in the Election and each candidate was expected to be represented with one (1) agent at counting. The Returning Officer stated that agents of other parties who did not participate at the National Assembly but at other levels of Election may have also signed the Forms. This was his explanation for the 'excess' signatures. This Court is unable to accept that explanation because it was speculative and not

founded on any evidence. That said, there was no specific complaint that the results in any of these stations were inaccurate. There would be no reason to doubt or invalidate the results captured in the Forms. There is no basis for finding that the declarations do not reflect the will of the voters merely because of the presence of superfluous signatures.

120) There is another aspect of the Forms 35. Not all forms were signed by agents representing the candidates. In this regard St Augustine Boys Primary School Polling Station stood out as Form was not signed by any agent. The Returning Officer gave several reasons why this could have happened-

- Some candidates may not have had agents in polling station.
- Agents may have left before signing.
- Agents may have refused to sign.

Again these explanations were at the very best hypothetical as the Commission did not avail evidence of the officers who managed the questioned Polling Stations.

121) The issue arising is the legal effect of the refusal or failure of an agent to sign the declaration form or to be present at the signing or announcement of results? This is what Regulations 79(3), 79(4), 79(5), 79(6) and 79(7) of The Regulations tells us-

***“79(3) Where any candidate or agent refuses or otherwise fails to sign the declaration form, the candidate or agents shall be required to record the reasons for the refusal or failure to sign.***

- 4. Where a candidate or an agent refuses or fails to record the reasons for refusal or failure to sign the declaration form, the presiding officer shall record the fact of their refusal or failure to sign the declaration form.***
- 5. Where any candidate or agent of a candidate is absent, the presiding officer shall record the fact of their absence.***
- 6. The refusal or failure of a candidate or an agent to sign a declaration form under subregulation (4) or to record the reasons for their refusal to sign as required under this regulation shall not by itself invalidate the results announced under subregulation (2)(a).***
- 7. The absence of a candidate or an agent at the signing of a declaration form or the announcement of results under subregulation.”(2) shall not by itself invalidate the results announced.***

Surprisingly, the Petitioner did not provide any evidence of the circumstances surrounding the alleged non-signing of the Forms by some agents. A remarkable feature of the Petitioner’s case is that not a single agent testified on his behalf. The reasons why all agents did not sign the Declaration Forms has to be a conjecture. The Petitioner has not laid a basis for this Court to impeach those results.

122) At any rate the words **“shall not by itself invalidate the results announced”** appearing in subregulations (6) and (7) are not idle. For results in the Form 35 to be invalidate it would have to be shown that they do not reflect a true and accurate count of the ballots. It was therefore not enough for the Petitioner to begrudge the non-signing of the forms. It was incumbent upon him to prove to this Court that the forms were untruthful and/or inaccurate. Having failed to do so, this Court is unwilling to oblige to his gesture that the results in the Forms 35 which are not signed by all agents be invalidated.

### **Scrutiny And Recount**

123) One of the reliefs sought in the Petition was an order for recount and scrutiny in the following 14 polling stations-

- |         |     |               |
|---------|-----|---------------|
| a. Code | 002 | Bujumba       |
| b. Code | 014 | Bumala market |
| c. Code | 026 | Bukhalalire   |

d. Code	045	Emafubu
e. Code	052	Tingolo Primary
f. Code	078	Bukhama T.C
g. Code	072	Bukhama primary
h. Code	074	Mungambwa
i. Code	057	Madola Primary
j. Code	077	Elugulu
k. Code	032	Neta primary
l. Code	032	Mauko primary
m. Code	842	Buduma
n. Code	003	Burinda primary.

124) After receiving evidence and hearing two application for scrutiny and recount the Court ordered-

- i. Scrutiny and recount in respect to Bujumba 002.
- ii. Recount in respect to
- iii. Mauko primary school Code 039

- Elugulu Trading Centre Code 077
- Mungambwa Primary school Code 074
- Bulehuma Dispensary Code 078
- Tinglo Primary school Code 052

On its own motion and with the concurrence of the parties herein I made an order for re-tallying of final result on Form 36.

125) The results of the recount and re-tallying carried out by the Deputy Registrar is tabulated below-

### **RECOUNT**

#### Results from the original Form 35 and after recount

CANDIDATES	MAUKO PRIMARY CODE 039		ELUGULU TRADING CENTER CODE 077				MUNG'AMBWA PRIMARY CODE 074		BUKHUMA DISPENSARY CODE 078		TINGOLO PRIMARY CODE 052		BUJUMBA CODE 002	
	Before	After	Before	After	Before	After	Before	After	Before	After	Before	After		
			A	A	B	B							A	A
<b>ALFRED BWIRE ODHIAMBO</b>	*66	<b>66</b>	74	<b>74</b>	84	<b>84</b>	339	<b>339</b>	209	<b>209</b>	150	<b>150</b>	09	<b>09</b>
<b>ERICK AMBUTSI MUNDIMBA</b>	02	<b>02</b>	<u>00</u>	<u>02</u>	02	<b>02</b>	00	<b>00</b>	00	<b>00</b>	02	<b>02</b>	00	<b>00</b>
<b>GEORGE PETER BWIRE</b>	03	<b>03</b>	01	<b>01</b>	02	<b>02</b>	02	<b>02</b>	00	<b>00</b>	00	<b>00</b>	00	<b>00</b>
<b>GEORGE WESONGA OJWANG'</b>	20	<b>20</b>	21	<b>21</b>	22	<b>22</b>	09	<b>09</b>	06	<b>06</b>	28	<b>28</b>	11	<b>11</b>

<b>IGNATIUS PANCRASS OYULA</b>	66	<b>66</b>	14	<b>14</b>	12	<b>12</b>	05	<b>05</b>	02	<b>02</b>	16	<b>16</b>	20	<b>20</b>
<b>JOSEPH MAERO OYULA</b>	165	<b>165</b>	95	<b>95</b>	97	<b>97</b>	43	<b>43</b>	39	<b>39</b>	143	<b>143</b>	137	<b>137</b>
<b>MICHAEL ARINGO ONYURA</b>	263	<b>263</b>	254	<b>254</b>	248	<b>248</b>	48	<b>48</b>	36	<b>36</b>	194	<b>194</b>	311	<b>311</b>

**Note**

\*66 . This figure is from the Form re-tallying and recount sheet signed by the representative of the parties herein.

**Retally of Form 36**

	<b>Total registered voters</b>	<b>Total Votes Cast</b>	<b>Total Rejected Votes</b>	<b>Alfred Bwire Odhiambo</b>	<b>Erick Ambitsi Mudimba</b>	<b>George Peter Bwire</b>	<b>George Wesonga Ojwang</b>	<b>Ignatius Pancrass Oyula</b>	<b>Joseph Maero Oyula</b>	<b>Michael Aringo Onyura</b>
Original Form 36	40,803	36,322	347	8,881	097	107	2,429	1,238	10,936	12,325
After Retally Form 36	40,811	36,330	288	8,881	097	107	2,449	1,228	10,936	12,325

126) The recount showed that from these seven Polling stations, there were only 2 errors which are underlined on the table above. These are in respect to Elugulu Trading Centre and Bujumba primary school. The other results are accurate. And in respect to the 2 errors made, they are insignificant and do not upset the results.

127) For the retally, some mistakes were also noted. In respect to the total registered votes, the original Form 36 tally were 40,803 but upon retally, they were found to be 40,811. Another discrepancy was in the total votes cast. In the original Form 36 they were 36,332, but upon retally they reduced by 2 to 36,330. Rejected votes were after retallying found to be 288 and NOT 347 entered in the original form 36. For the candidate George Wesonga Ojwang, the retally shows that he garnered 2,449 instead of 2,429 reflected in Form 36. As for Ignatius Oyula votes in his favour were 1,228 on retallying and NOT 1,238 captured by the IEBC. Upon examination of the final retally the 1<sup>st</sup> Respondent still emerges victor with an unchanged margin of 1,387 over his runners up. And the other discrepancies did not affect the result.

**The Courts Determination**

128) An evaluation of all the evidence placed before this Court shows that the Election of the 1<sup>st</sup> Respondent was conducted, managed and supervised very substantially in compliance with the principles laid down in the Constitution and Election Law. The evidence also shows that where there was non-compliance, the same was insignificant and did not affect the result of the Election. This Court reaches a decision that the result returned by the 3<sup>rd</sup> Respondent and declared by the 2<sup>nd</sup> Respondent reflected the will of the people of Butula Constituency. That will must prevail.

129) The upshot is that the entire Petition is dismissed with costs. Rule 36 of The Rules empowers this Court to specify the total amount of costs payable at the conclusion of an Election Petition. While the actual costs will be taxed in the usual way, I do hereby cap the total costs payable by the Petitioner to the

Respondents at a sum of Ksh.2,000,000/= That will be shared equally between the 1<sup>st</sup> Respondent on one part and the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent on the other part.

130) It now falls on me to thank all the parties, Counsels, and the people of Butula for the patience they have demonstrated in the course of these proceedings. A special tribute to the Counsels for their conduct throughout these proceedings. It was a true portrait of their noble calling. Lastly, I thank the staff of the Busia Law Courts and in particular Mildred Munyekenye the Deputy Registrar of this Court.

**DATED, DELIVERED AND SIGNED AT BUSIA THIS 9<sup>TH</sup> DAY OF SEPTEMBER 2013.**

**F. TUIYOTT**

**J U D G E**

**IN THE PRESENC E OF:**

**MR. KASAMANI .....FOR THE PETITIONER**

**MR. K'OPOT .....FOR THE 1<sup>ST</sup> RESPONDENT**

**MR. JUMBA holding brief for Mr. Akide for the 2<sup>nd</sup> and 3<sup>rd</sup>  
.....RESPONDENT**

**COURT CLERK .....KADENYI**