



REPUBLIC OF KENYA

IN THE PRINCIPAL MAGISTRATE’S COURT AT OGEMBO

ELECTION PETITION NO.2 OF 2017

DANIEL MARK ORUTA.....PETITIONER

VERSUS

ANDREW KENGERE KIMONGE.....1ST RESPONDENT

WILSON KIMUTAI KIPCHUMBA.....2ND RESPONDENT

INDEPENDENT ELECTORAL & BOUNDARY

COMMISSION.....3RD RESPONDENT

J U D G E M E N T

The people of Chitago Borabu ward within South Mugirango Constituency within Kisii county woke up at dawn to vote on the 8th August 2017 in exercise of their democratic right under Article 38(3) of the Constitution, which states as follows;

Every adult citizen has the right, without unreasonable restrictions-

- a) To be registered as voter.
- b) To vote by secret ballot in any election or referendum; and
- c) To be a candidate for public office, or office within a political party of which the citizen is a member and, if elected to hold office.

The petitioner herein Daniel Mark Oruta in exercise of his political rights under Article 38(3)(c) of the Constitution vied for the post of Member of County Assembly for Chitago Borabu ward within South Mugirango Constituency in Kisii County. The petitioner had the following competitors who had been cleared by the Independent Electoral & Boundary Commission to vie for the position of Member of County Assembly representing Chitago Borabu Ward.

NO.	CANDIDATE
1	FRANCIS OBUTU ASUGU
2.	SAMWEL ANDREW NYABWOGI

3	DANIEL MARK ORUTA
4.	DAVID MAIRURA ONDARI
5	OINO MOINDE ALBERT
6	SAMWEL O.NYAKANGI
7.	DENNIS MAKARIO ONKOBA
8	PETER MOGOI OKEROSI
9.	CHARLES ORENGE
10	GECHEMBA JAMES OMWOYO
11	KENYENYA JOB OKEMWA
12	MARWA LAMECK ONGIGE
13	MIRUKA JAMES AYIEGA
14	MOKUA JULIUS ATUTI
15	NYACHAE SAMWEL NYABUTO
16	NYAKANGI SAMWEL O.
17	NYAMBUKA PETER MANONO
18	NYAMOKERI FRED KENYATTA
19	0BORE BENSON OYUGI
20	OINDE ANDREW
21	OKENYURI JOHN OYUMA
22	OKEROSI PETER MOGOI
23	OKINDO BENSON BARONGO
23	0MWAMBA SHEM ONDIEKI
24.	OMWENGA SIMION SIKWEYA
25	0NAMI DENNIS MOKUA
26	ONDABU GEOFREY ONYIEGO

27	ONDARI PAMINUS ROSANA
28	ONDIENG'A FREDRICK JUMA
29	ONDUMA OMWOYO PAUL
30	OGANGA SIMON SINGORI
31	ORUTO KENNEDY ANYANGO
32.	RAGURA BENARD ONDIEKI
33	TIMONY NAFTALI BOKARI

On the 10th day of August 2017 after voting, counting and tallying of votes had been done the 2nd Respondent declared the following results.

No.	CANDIDATE	VOTES
1	ALBERT OINO MOINDE	634
2	ASUGO FRANCIS OBUTU	1068
3	GECHEMBA JAMES OMWOYO	272
4	KENYANYA JOB OKEMWA	66
5	KIMONGE ANDREW KENGERE	1352
6	MARWA LAMECK ONGIGE	88
7	MIRUKA JAMES AYIEGA	27
8	MOKUA JAMES ATUTI	410
9	NYABWOGI SAMWEL ANDREW	994
10	NYACHAE SAMWEL NYABUTO	312
11	NYAKANGI SAMWEL O.	571
12	NYAMBUKA PETER MANONO	306
13	NYAMOKERI FRED KENYATTA	434
14	OBORE BENSON OYUGI	36
15	OINDE ANDREW	75
16	OKENYURI JOHN OYUMA	28

17	OKEROSI PETER MOGOI	156
18	OKINDO BENSON BARONGO	428
20	OMWAMBA SHEM ONDIEKI	59
21	OMWENGA SIMION SIKWEYA	21
22	ONANI DENNIS MOKUA	162
23	ONDABU GEOFFREY ONYIEGO	170
24	ONDARI DAVID MAIRURA	739
25	ONDARI PAMINUS ROSANA	27
26	ONDIENG'A FREDRICK JUMA	399
27	ONDUMA OMWOYO PAUL	274
28	ONGAGA SIMON SINGORI	161
29	ONKOBA DENNIS MAKARIO	474
30	ORENGE CHARLES	152
31	ORUCHO KENNEDY ANYANGO	332
32	ORUTA DANIEL MARK	1052
33	RAGIRA BENARD ONDIEKI	403
34	TIMONI NAFTALI BOKARI	22

He subsequently declared the 1st Respondent (Kimonge Andrew Kengere) as the winner with 1352 votes. The petitioner herein came third with 1015 votes.

The petitioner being aggrieved with the voting exercise and subsequent declaration of results filed this petition on the 5th day of September 2017. The petition is premised on the following grounds:-

That the in the General elections held on the 8th day of August 2017, for the office for Member of County Assembly representing Chitago Borabu ward the 2nd & 3rd Respondents and officers working under their directions blatantly breached the principles set in the Constitution under Article 86 of the Constitution of Kenya intended to guarantee a free, fair, accountable, credible and transparent elections in the following particular respect.

- a) i. Failing to accurately collate results of candidates at polling stations and promptly announce the results and declare the winner thereof,
- ii. Failing to allow and/or require agents of candidates to sign the Statutory form 36A and/or indicate reasons for failure and/or refusal to sign the said forms by agents thereby breaching mandatory regulations governing the conduct of the said elections.

iii. Failing to stamp the statutory forms 36A containing results of the candidates from each polling station in breach of the peremptory requirements of the laws and regulations governing the said elections.

b) The 2nd & 3rd Respondents have failed to supply the petitioner with the statutory forms used in returning the 1st Respondent as the duly elected member of the County Assembly for Chitago Borabu ward.

c) That there exists two sets of results in respect of the election to the office of Member of County Assembly for Chitago Borabu ward which situation is not contemplated under the law and the governing regulations.

d) The petitioner avers that he will be seeking a scrutiny of ballot materials e.g KIEMS kits, unused ballot papers, used ballot papers, counter foils and polling day diaries from the following stations:-

a) Ibencho Primary School

b) Monianku primary school

c) Nyabikondo primary school

d) St.Michaels primary school

e) Bogichoncho primary school

f) Karungu primary school

g) Mogenda Tea buying centre

h) Nyabine Jua kali

i) Kiagware primary school

j) That the singular and general irregularities affected the declared results.

Consequently the petitioner prayed for the following orders:-

(a) There be scrutiny and recount of ballot, KIEMS Kits, un-used ballots and polling day diary in the election held on the 8th day August 2017 for the office of Member of County Assembly representing Chitago Borabu ward in Kisii county Assembly.

(b) There be a scrutiny of the rejected, void, objected, to spoilt ballot papers and on conduct of all the ballot papers issued to all polling stations in respect of the elections of the office of Member of County Assembly Chitago Borabu ward held on 8th August 2017.

(c) The elections held on the 8th day of August 2017 for the office of Member of County Assembly for Chitago Borabu ward was not conducted in accordance with written law and the Election regulations governing the said process hence the said elections be and is hereby declared null and void.

(d) It be and is hereby determined that the 1st Respondent has not been validly elected to the office of Member of County Assembly for Chitago Borabu ward in the Kisii County Assembly and the Certificate of Elections issued to the 1st Respondent as duly elected Member of County Assembly for Chitago Borabu ward be and is hereby recalled and cancelled forthwith.

(e) The 3rd Respondent be and is hereby directed to conduct a fresh election for the seat of Member of County Assembly Chitago Borabu ward in strict compliance with the written law and election(general) Regulations governing the said elections.

(f) Costs of the petition be awarded to the petitioner.

The petition was supported by the petitioner's own affidavit and one other.

The petition is opposed by the Respondents. The 1st Respondent filed a response to the petition which was supported by four affidavits, including his own affidavit. He denied the allegations contained in the petition. He stated in his response that he was duly elected Member of County Assembly for Chitago Borabu ward and that the elections conducted by the 3rd Respondent confirmed in all material respects with Article 86 of the Constitution.

The 2nd & 3rd Respondents also filed their response in opposition to the petition. The response was supported by the Affidavit that was sworn by the 2nd Respondent. They averred that the petition has failed to demonstrate that there were serious or any irregularities that affected the results as to subvert the will of the people of Chitago Borabu ward. As such they prayed that the petition be dismissed with costs to them.

Before I proceed any further, I wish to sincerely thank the counsels for the parties herein for the professional manner in which they conducted themselves during the hearing of this election petition and for observing the strict timelines despite their busy schedules. The well researched submissions and the Authorities that were supplied to this Court are evidence of Advocates thorough research and devotion to these proceedings and they enriched my mind. I wish to extend my gratitude to the parties, witnesses and their supporters for their patience. Last but not least I want to thank the Ogembo Law Courts family for the support that they gave me when I was handling the election petitions.

I now wish to revert to the issue at hand. At the pre-trial stage the parties herein filed their list of issues. I went through them, and condensed them in to the following issues:-

(a) Whether the 2nd and 3rd Respondents committed irregularities and errors in the counting and tallying of votes on the election held on 8th August 2017 for Member of County Assembly in Chitago Borabu ward.

(b) Whether the elections held on the 8th day of August 2017 in respect to Member of County Assembly Chitago Borabu ward was conducted in strict compliance with the principles of the Constitution and the written law governing the conduct of such an election.

(c) Whether the 1st Respondent was validly elected as the Member of County Assembly for Chitago Borabu ward.

(d) Who is to pay costs for this petition.

(e) What relief/orders should this Honourable court grant.

I will address the first issue.

PW1 testified on cross examination that the Presiding Officer at Bogichoncho polling station did not append a stamp on form 36A. He alleged that form 36B appended to his petition is not the prescribed original form 36B. The Returning officer testified before Court that he had the original prescribed form 36B in Court and that the one produced by the petitioner in Court did not bear the IEBC logo. This issue came up while the petitioner was giving his evidence in Court, but it did not arise from his pleadings.

In the case of **Bwana Mohammed Bwana – vs – Silvano Binko Bonaya and 2 others 2013 EKLR**

where the Court held as follows;-

“Before analysis of the evidence I wish to state that in the submissions, the petitioner introduced new issues and new stations which were not pleaded in the petition. It is established law that parties must confine themselves to their pleadings. A Court of law will be seen to deviate from disputed issues if it engages in matters that are not specifically pleaded in the plaint. The Court is therefore not bound to render any opinion on any new issues raised in the submissions”.

A party is bound by its own pleadings. In light of the foregoing, I did not delve into that issue.

PW1(Daniel Mark Oruta) testified in Court that his agents did not sign form 36A's in some of the polling stations, but the same forms had been signed by the Presiding officers and the Deputy Presiding officers. That as the case may be, the 1st Respondent testified that he did not influence the absence of the petitioner's agents from the polling stations.

The petitioner alleged that his agents were compromised but he was unable to demonstrate who compromised them and how they did it.

Regulation 79- Requires that the Presiding Officer signs the statutory form. Once signed by the Presiding officer the statutory form is valid. I noted that nearly all the form 36A's that were produced as exhibits before Court were signed by both the Presiding and the Deputy Presiding or one of them.

In Chikati – vs- Returning Officer Tongareni Constituency. It was held that under Regulation 79, the Presiding officer is required to sign the statutory form. It was further held that the statutory form is valid once it has been signed by the Presiding Officer or the Deputy Presiding Officer or both.

Regulation 79 (6) and (7) reads as follows;

(6) The refusal or failure of a candidate or agent to sign a declaration form or to record the reasons for their refusal to sign as required under this Regulation SHALL not by itself invalidate the results announced.

(7) The absence of a candidate or an agent at the signing of a declaration form or the announcement of results SHALL not in itself invalidate the results announced.

Flowing from above, lack of the official rubber stamp does not invalidate the forms or the results therein. Failure by the candidates agents to sign form 36A and failure to record the reasons for the failure does not in itself invalidate the results announced.

The petitioner and his witness alleged that there were voters who could not identified by the KIEMS kits at Monianku polling station. The Returning officer testified that he was informed of the problem. The ICT officers were called and the problem was rectified. He confirmed before Court that the voting period was extended for 3 hours.

I find that the petitioner has failed to prove the various irregularities and malpractices set out in his petition.

(b) Whether the elections held on 8th August 2017 in respect to Member of County Assembly Chitago Borabu Ward was conducted in strict compliance with the Principle of the Constitution.

Article 86 of the Constitution reads as follows:-

86. At every election, the Independent Electoral and Boundaries Commission shall ensure that :-

a. Whatever voting method is used the system is simple, accurate, verifiable, secure, accountable and transparent.

- b. The votes cast are counted, tabulated and the results announced promptly by the Presiding Officer at each polling station.
- c. The results from the polling stations are openly and accurately collated and promptly announced by the Returning Officer and
- d. Appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safe keeping of election materials.

Both PW1(Daniel Mark Oruta) and PW2 (Francis Ogutu Osugu) testified before Court that they were electronically identified and they were allowed to vote. PW2 further confirmed that his agents were not intimidated and more importantly he confirmed that his agents who had allegedly been initially barred from accessing Monianku primary school polling station and Nyangweta polling stations were allowed to participate in the elections.

The form 36A's from all the polling stations were signed by the Presiding officers or Deputing Presiding officers. The results were transposed onto form 36B which was used to declare the results.

I was satisfied that the election was conducted in accordance with the Constitution and the Electoral laws.

(c) Whether the 1st Respondent was validly elected as the Member of County Assembly of Chitato Borabu Ward.

In an Election Petition, the presumption is that elections were properly conducted, unless, the contrary is proven. The burden of proof therefore lies with the petitioner as he is the person who seeks to nullify the election. **In Raila Odinga – vs- Independent Election and Boundary Commission 2013**, the Supreme Court held that in an election petition, the standard of proof is more than a mere balance of probabilities but less than beyond reasonable doubt.

In Joho – vs- Nyange Maraga (J) as he then was held, that a petition is required to adduce cogent, credible and consistent evidence to prove an election petition.

From my analysis of the evidence on record, it is clear that the Petitioner has failed to discharge the legal burden placed on him. He has failed to prove his case to the require standards. I hereby declare that the 1st Respondent Andrew Kengere Kimonge was validly elected as the Member of County Assembly for Chitago Borabu Ward.

(e) Who is to pay Costs.

It is trite law that costs follow the event. Rule 30 of the Election(Parliamentary and County Elections) Petitions Parties 2017 and Section 84 of the Elections Act empowers Election Court to make orders on:-

- i. Costs payable
- ii. Person who pays the cost.
- iii. Person to whom the costs are payable.

This petition was not so complex. This was reflected by the number of witnesses and the nature of evidence adduced. I have taken into account the processing of the entire case by the parties to include research, attendances and time spent in the matter during mentions and hearings. I am of the view that the Respondents will be adequately compensated by Kshs.Three hundred thousand (Kshs.300,000/=) only.

(f) What relief/orders should this Honourable Court grant.

- a) The petition is hereby dismissed.

b) The Petitioner shall bear the costs of the petition which costs are hereby capped at Kshs.three hundred thousand(Kshs.300,000/=)

(c) A certificate in accordance with Section 86(1) of the Election Act shall issue.

(d) The sum of Kshs.one hundred thousand (Kshs.100, 000/=) deposited by the petitioner as security shall be held by the Court pending determination of the costs payable either by agreement or taxation.

DATED AND DELIVERED THIS 28TH DAY OF FEBRUARY 2018.

By M.M.NAFULA

SENIOR RESIDENT MAGISTRATE

Judgement delivered in open court in the presence of

Court Assistant Gladys

Mr.Okemwa I h/b for Mr.Beki for the petitioner. I also h/b for Mr.Nyamweya Mamboleo for the 2nd & 3rd Respondent.

N/A for Mr.Nyamurongi for the 1st Respondent.

Petitioner absent

1st Respondent present