



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT HOMABAY

CONSTITUTION PETITION / JR NO. 10 OF 2017

IN THE MATTER OF; ARTICLE 22, 23 & 47 OF THE CONSTITUTION

AND

IN THE MATTER OF; ARTICLE 89 7(a) & (b), 165(3) (a) & (b) OF THE CONSTITUTION

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION FUNDAMENTAL RIGHTS AND
FREEDOM UNDER ARTICLE 40**

BETWEEN

ODHIAMBO MATILE.....PETITIONER

VERSUS

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

THE KASIPUL KABONDO CONSTITUENCY

IEBC RETURNING OFFICER.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

1. The petitioner (**ODHIAMBO MATILE**) filed this petition emanating from gazette of the electoral constituency tallying centre that was published on 7/July/2017. He is agitated over the removal of the constituency tallying centre at **GOT RATENG MIXED SECONDARY SCHOOL** to **RINGA BOYS HIGH SCHOOL** saying this was done against the wishes of **KABONDO KASIPUL** voters. Further that the stakeholders were not involved by way of public participation with the result that the decision has disadvantaged the people of **EAST KASIPUL**. Consequently the petitioner sought the following orders;

- **Prohibition to issue to the chairman IEBC prohibiting the commission from transferring the KABONDO KASIPUL constituency tallying centre from GOT RATENG MIXED SECONDARY SCHOOL to RINGA BOYS HIGH SCHOOL**

- *Certiorari directed at the chairman Independent Electoral Boundaries Commission quashing the gazettelement of RINGA BOYS HIGH SCHOOL centre made in the Kenya gazette on the 7th day of July 2017.*

2. The respondents opposed the petition stating that the tallying centre was moved because **GOT RATENG SECONDARY SCHOOL** compromised the credibility of elections as it is insecure, difficult to access and the school administration is uncooperative and hostile. All this is captured in **Moses Sarara** (previous returning officer for Kabondo Kasipul) report and it is annexed to the replying affidavit of the respondents' as MS1.

3. The respondents further stated that before identifying a suitable tallying centre the stake holders and representatives were invited to a meeting, they had a discussion and a resolution was reached to have a tallying centre at **RINGA BOYS HIGH SCHOOL** (annexure MS2 list of participants). This is because **RINGA SCHOOL** is strategically located, it has a secure fence, electricity power, and support facilities. In addition, the respondents stated that election is 2 weeks away; this time frame cannot allow the court to grant the orders sought by the petitioner. Moreover, the petitioner concealed a material fact, which is that there was public participation, so he is not entitled to the orders sought. They further stated that the petitioner did not state the prejudiced occasioned to him as a registered voter by changing the tallying centre.

4. At the hearing Mr Osoro submitted on behalf of the applicant that the tallying centre was moved from **GOT RATEN'G to RINGA BOYS SCHOOL** without public participation yet **GOT RATENG** is more centrally placed and acceptable to the people of **KABONDO** constituency. He explained that **Kasipul Kabondo** actually comprises two divisions namely a) **KABONDO** b) **KASIPUL**, and **Kabondo** has more sub-locations than **Kasipul**, so moving the tallying centre to Ringa which is in Kasipul disadvantages the people of Kabondo where Got Rateng is situated. It is further argued that Ringa Boys School is 17 km away from Kabondo and the people of the area should be comfortable in accessing the tallying centre to witness the tallying, so they ought to have been involved in the decision as they are stakeholders.

5. The petitioner listed names of clan elders from Kabondo who signed a petition saying they never participated in the decision which they described as a one man decision by the former Returning Officer.

6. Mr Olendo on behalf of the respondents submitted that the prayers sought about reverting the tallying centre to Got Raten'g were being made orally, and in any event the prayer for prohibitory orders had already been overtaken by events as such an order is issued in contemplation of an event or activity that is about to happen, yet in the present case the gazette notice had already been published.

7. He further pointed out that public participation implies the involvement of the persons affected by a decision, and in this instance the tallying centres would directly be accessible only to the aspirants, the election observers, the aspirant's agents, and is not open to the general public. This would therefore mean that unless one is accredited to access the tallying centre, the access thereto would be limited. Mr Olendo explained that a tallying centre is different from a polling station which is open to the general public and is the place where results are announced by the Returning Officer. This means the petitioner and the residents of Kabondo would be able to know the results affecting their preferred and un-preferred candidates from their respective polling stations. Once the results are announced at the various polling stations they are then transmitted to the tallying centres for the Returning Officer to collate all the results and announce the ultimate winner. In a nut-shell a tallying centre is basically a co-ordination centre for all the polling stations.

8. The respondents were categorical that identifying a tallying centre is the prerogative of the Commission and can be placed anywhere within the constituency that is convenient to the 1st respondent. He explained that the considerations that go into determining a tallying centre to ensure credible elections include:-

- a) Accessibility: That Got Rateng School is located in the interior and the road is not tarmacked

hence it would pose a challenge to access during the rains.

b) Security: It was submitted that Got Rateng did not have a secure fence, and it could be accessed from all angles thus making it difficult to control access. A case in point was the recent Orange Democratic Movement (ODM) nominations where it was impossible to control accessibility. This is because tallying centres work late into the night and must be secure Personnel allowed into the centre must be accredited, so there is need for a fenced place to control who comes into the centre.

c) Environment: That the school principal at Got Rateng had been un-co-operative and hostile to the IEBC officials and during the last general elections he even disconnected power in the tallying hall despite the fact that the rest of the school had power. All electrical fittings that had been done by IEBC in the tallying halls were removed on two past occasions and the Commission had to re-do them

Further, the school does not have a back-up generator and in the event of a blackout, there is no other source of power to be used and without power it becomes difficult to do tallying in the dark- this would compromise the credibility of the elections.

d) Counsel argued that contesting the transfer of the tallying centre only because it is 17km away is not sufficient reason as it serves an area of 249 square kms with about 49000 registered voters and is centrally located in relation to all the other sub-locations the people of Kabondo will not be prejudiced in any manner.

ISSUES FOR DETERMINATION

1. Was public participation conducted
2. Would the voters of East Kasipul suffer prejudice with the movement of the tallying centre 17 km from them?
3. Is the credibility of the election upheld by transfer of tallying centre?
4. Is the selection of a tallying centre a prerogative of the 1st respondent?

WHAT IS TALLYING

9. **Regulation 83 of Election (General) Regulation, 2012** demonstrate what tallying is a collation of the final results from each polling station in a constituency for election of a member of national assembly and MCA.

“83 (1) Immediately after the results of the poll from all polling stations in a constituency have been received by the Returning Officer, the Returning Officer shall, in the presence of candidates or agents and observers, if present –

- a) tally the final results from each polling station in a constituency for the election of a member of the National Assembly and members of the County Assembly;*
- b) disregard the results of the count of a polling station where the total valid votes exceeds the number of registered voters in that polling station;*
- c) disregard the results of the count of a polling station where the total votes exceeds the total number of voters who turned out to vote in that polling station;*
- d) collate and publicly announce to the persons present the results from each polling station in the constituency for the election of the President, county Governor, senator and county women representative to the National Assembly;*

e) complete the relevant Form 35B and 36B for the respective elective position set out in the Schedule in which the returning officer shall declare, as the case may be, the –

- i. name of the respective electoral area;
- ii. total number of registered voters;
- iii. votes cast for each candidate or referendum side in each polling station;
- iv. number of rejected votes in each polling station;
- v. aggregate number of votes cast in the respective electoral area; and
- vi. aggregate number of rejected votes;

f) Sign and date the relevant forms and publicly declare the results for the position of –

- i. member of County assembly;
- ii. member of National assembly; and

g) Issue certificates to persons elected in the county assembly and National Assembly Elections in Forms 36C and 35C respectively set out in the Schedule;

h) Deliver to the county returning officer the collated results for the election of the county Governor, senator and county women representative to the National Assembly; and

i) Deliver to the Chairperson of the Commission the collated results for the election of the president of the national tallying centre.

(4) The Chairperson of the Commission shall tally and verify the results received at the National tallying centre.”

WHAT IS A TALLYING CENTRE AND ISSUES THAT SHOULD BE CONSIDERED WHEN IDENTIFYING A TALLYING CENTRE

10. **Regulation 84 of Election (General) Regulation, 2012** provides that a tallying centre is a venue gazetted by the Commission for the purpose of tallying. In **Regulation 84(2)** requirements for selecting a tallying centre are stated as –

“84(2) A tallying centre shall be selected subject to the following requirements –

- a) The presidential elections tallying centre shall be located in Nairobi;**
- b) The county tallying centre shall be located at the county headquarters;**
- c) The constituency tallying centre shall be located at the constituency or district headquarters;**
- d) All tallying centres shall be located at public buildings.”**

In case of selection in the constituency tallying centre it shall be located in the constituency or district headquarters and that they shall all be located at a public building.

WHAT IS PUBLIC PARTICIPATION

11. Public participation is greatly enshrined in the Constitution of Kenya, from the very beginning,

Article 1, where it is stated that the sovereign power belongs to the people of Kenya and the people may exercise their sovereign power either directly or through their democratically elected representatives. The right to participate in public affairs, voting rights and the right to equal access to public service as contemplated in the International **Covenant on Civil and Political Rights (ICCPR)** is addressed in **UN General Comment No 25** as follows:-

“The effective implementation of the right and the opportunity to stand for elective office ensures that persons entitled to vote have a free choice of candidates. Any restrictions onthe right, must be justifiable on objective and reasonable criteria...”

12. An article by Society for International Development titled ***Improving the Quality of Citizen Engagement in Kenya; Promise, Reality and Prospects*** at page 4 defines public participation as a civic right and responsibility. The article, further states that public participation is key in reconfiguring skewed power relations, restoring power to the communities and promoting transparency, accountability and equity.

13. The 1st respondent explained that as a result of the past challenges experienced when Got Rateng was used as a tallying Centre [gathered from a report by the Returning Officer and also from complaints from other stakeholders, it embarked on a process of identifying a suitable tallying centre and the stakeholders and representatives were invited for a meeting where the issue was discussed and a decision made which considered three possible tallying centres, namely;

- **Bishop Linus Okoko Girls School**
- **Got Rateng Mixed Secondary School**
- **Ringa Boys High School** favoured **Ringa Boys High School** and a decision was made for this one.

14. Apparently the decision to switch to Ringa was supported by all political aspirants and other stakeholders except the current sitting Member of Parliament-so the majority carried the day. It is explained that the incumbent’s motive was simply clan based politics informed by the fact that the dominant **Kabondo** clan feel that relocation elsewhere disadvantages them.

15. What factors weighed in favour of **Ringa Boys High School**? This is explained in the replying affidavit sworn by **MOSES SARARA (the Constituency Election Co-ordinator for Kasipul-Kabondo)** who stated that it is

- *Secure as it has a strong fence which is not easy to breach; as well as a gate. This makes it easy to control access into the centre and ensure that only accredited or authorized persons gain access.*
- *Access: The school is strategically located along the tarmacked Kisumu-Kisii high-way; making it easy to access from all parts of the constituency.*
- *The school is connected to the National Grid and also has a reliable back-up generator which is critical for a tallying centre as operations often go well into the night*
- *Facilities: The school has a large hall, water and adequate sanitary facilities. It is also near a shopping centre which has facilities such as hotels and restaurants*

16. The petitioner has by no means been denied the right to participate in electing his candidate of choice by re-locating a polling station. The centre where there will be tallying of results whether at his doorstep or at **GOT RATENG** would still not give him the right to access the venue. The advantages of the relocation outweigh the lament about the 17km distance when the access thereto will not be open to the public.

WHAT PREJUDICE WILL THE PETITIONER SUFFER

17. **Regulation 85 of the Election (General) Regulation, 2012** provides for the person allowed in the tallying centre as:-

“85 (1) the returning officer shall allow the following persons to be present at the tallying centre –

- a) the presiding officers and other election officials on duty;**
- b) a candidate;**
- c) a person nominated as a deputy to the candidate, where applicable;**
- d) a member of the commission;**
- e) authorized agents;**
- f) a police officer on duty;**
- g) duly accredited election observers; and**
- h) duly accredited medial persons.**

(2) Notwithstanding the provisions of this regulation, the returning officer shall not be obliged to admit more than one agent per candidate or political party to the tallying venue.”

18. It is clear that the tallying centre is not open to all the voters of the constituency but particular persons. The petitioner would only be prejudice in the distance that he would be required to travel from **EAST KASIPUL** to get to the tallying centre if he is one of the accredited persons allowed access into the tallying centre.

19. Citizen participation is vital and is required where the decision affects a group or the individual concerned. In this instance the group concerned would be the election aspirants and their accredited agents whose participation and interests were taken into account at the **Candidates Engagement Forum held on 14th July 2017 at Annexe Hall, Kadongo**. The said stake-holders have not complained about the contested tallying centre and the applicant has failed to establish the prejudice which will be occasioned to voters who will not even be allowed into the tallying centre. The upshot is that the application lacks merit and is dismissed with costs to the respondents

Delivered and dated this 28th day of July 2017 at Homa Bay

H.A.OMONDI

JUDGE