



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

ELECTION PETITION NO. 2 OF 2013

IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA, 2010

AND

IN THE MATTER OF THE ELECTIONS ACT, 2011

AND

**IN THE MATTER OF INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION
ACT, 2011**

AND

**IN THE MATTER OF THE ELECTIONS (REGISTRATION OF VOTERS) REGULATIONS,
2012**

AND

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

AND

IN THE MATTER OF THE ELECTION FOR GOVERNOR OF SIAYA COUNTY

WILLIAM ODHIAMBO ODUOL.....PETITIONER

VERUS

**THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....1ST
RESPONDENT**

BENSON MUGATSIA.....2ND RESPONDENT

CORNEL RASANGA AMOTH.....3RD RESPONDENT

R U L I N G

This petition followed the declaration of the 3rd respondent as the governor of Siaya County following the general elections held on 4-3-2013. The election was conducted by the 1st and 2nd respondents who declared that the 3rd respondent had got 142,901 and the petitioner was the runner-up

with 133,900 votes. The difference was 9,001 votes.

After the preliminaries, hearing begun on 21-5-2013 with the petitioner and his witnesses testifying. The respondents and their witnesses subsequently testified. The last witness gave evidence on 27-6-2013. Each side has closed its case. I have asked counsel to prepare, file and exchange written submissions. The case will be mentioned on 29-7-2013 for a date to be given for the highlighting of such submissions. What will follow is the judgment of the petition

In the meantime, following the petitioner's application, there was an order given on 3-7-2013 for the recount of votes in respect of all polling stations in Bondo, Gem and Rarieda constituencies, Awelo primary school polling station in Alego Usonga constituency, and Nyasanda primary school polling station in Ugunja constituency. The purpose was to ascertain the votes garnered by each of the six candidates, including the 3rd respondent and the petitioner, for the gubernatorial election for Siaya County held on 4-3-2012.

The recount was undertaken by the Deputy Registrar M/S P.L. Shinyada who returned her results on 17-7-2013. The results for Gem and Rarieda constituencies were materially at variance with those declared by the 1st and 2nd respondents following the election. The recount showed that in Gem Constituency the 3rd respondent had 19,757 votes and the petitioner had 23,248 votes, compared to the declared results which showed the 3rd respondent had 25,047 votes and the petitioner had 23,301 votes. In Rarieda constituency, the recount showed that the 3rd respondent had 23,314 votes and the petitioner had 19,316 votes. The declared results showed the 3rd respondent had 26,191 votes and the petitioner had 19,295 votes. For Bondo constituency the result showed that the 3rd respondent had 37,183 votes and the petitioner had 16,287 votes. The declared results were that the 3rd respondent got 37,120 votes and the petitioner 16,593 votes. Awelo primary school had three streams. The recount showed the 3rd respondent had a total of 483 votes and the petitioner had 1,059 votes. The declared results showed the 3rd respondent had 486 votes and the petitioner had 1,152 votes. For Nyasanda primary school which had two streams, the recount result was 411 votes for the 3rd respondent and 353 votes for the petitioner. The declared results showed 415 votes for the 3rd respondent and the petitioner had 355 votes. In total, the 3rd respondent garnered 79,254 votes according to the recount for Bondo, Gem and Rarieda constituencies, compared to 88,358 votes according to the declared results. The difference was 9,104 votes.

Following the recount the parties filed the present applications. The 1st and 2nd respondents filed a motion dated 16-7-2013 which had nine (9) prayers. The substantial prayer was for the scrutiny and examination of election materials for 13 polling stations in Rarieda constituency and 10 polling stations in Gem constituency. The 13 stations were Mabinju primary school, Siradidi primary school, Wera primary school, Bio primary school, St. Lazarus primary school, Aduoyo primary school, Rarieda primary school, Ulwanga primary school, Rambugu primary school, Lwak Mixed primary school, Gagra primary school and Kamariga Beach Banda. The 10 stations in Gem constituency were Lundha Primary school, Maliera primary school, Nyasidhi primary school, Nango primary school, Yala Township primary school, Sagam primary school, Malele primary school, Akala Resource centre, Onyinyore primary school and Akala market. The other prayers were that:

- a. there be stay of adoption, use and implementation of the results of the recount in respect of these polling stations pending the results of scrutiny;
- b. the court orders the opening and removal of the presidential ballot boxes in respect of these polling stations to get from therein the election materials subject of the scrutiny;
- c. an order be given to the 1st and 2nd respondents to avail the parliamentary ballot boxes in respect of the polling stations to be opened to get the election materials and results therein for comparison with those in the polling stations at hand;
- d. an order be given for an immediate and indepth investigations into possible post-election malpractices, including the tampering with the election materials and results, in respect of the polling stations;
- e. the court summons for examination of any person responsible for the handling of the gubernatorial results in Siaya County, and especially for the polling stations;
- f. the court makes a finding that the contents of the ballot boxes in the polling stations were

- tampered with; and
- g. an order for costs be made.

Looking at the grounds and the affidavits sworn by Hilda Imbo, returning officer for Rarieda

constituency, and Juma Mugwanga, returning officer for Gem constituency, the 1st and 2nd respondents' case was that the results from the recount did not reflect the results that they declared following the election. They stated that following the announcement of results at the respective polling stations, the presiding officers, in the presence of agents and in the open, sealed the ballot boxes. The seals numbers were recorded in the poll day diaries. The ballot boxes were handed to the returning officers while intact. Juma stated that the boxes were kept at IEBC warehouse in Siaya whereas Hilda stated that she

“handed the ballot boxes for storage in the National Cereals Board warehouse. It should be noted that the two constituencies of Rarieda and Gem did not have warehouse facilities”.

Whatever is the case, the two witnesses ceased to have physical custody of the boxes but swore that they were intact when they were warehoused. This is where they were removed from and handed over to the Deputy Registrar (in accordance with rule 21 (a) of the Elections (Parliamentary and County Elections) Petition Rules, 2013). During the recount, the returning officers noted the following anomalies, among others:-

- a. some of the boxes had broken seals;
- b. some had seals which were different in serialisation from those used to seal the boxes and which seals had been recorded in the poll day diaries;
- c. a significant number of ballot papers did not have corresponding counterfoils for the ballot used during the election, yet all the counterfoils had been sealed in the boxes by the respective presiding officers; and
- d. a significant number of the ballot boxes had counterfoils of the ballot papers used in the election that did not correspond in number with the ballot papers.

The effect of these anomalies was summarised in paragraph 9 of Hilda's affidavit and in paragraph 4 of Juma's affidavit. They stated that these were illegal post-election activities which had produced the recount results that were substantially different from the results announced and declared in respect of the candidates. The recount results had drastically reduced the 3rd respondent's votes, and materially benefited the petitioner. The recount results had drastically reduced the voter turnout in the constituencies from an average of over 70% to as low as about 40%.

The 1st and 2nd respondents' case was that the information regarding the results as declared, and the number of registered voters and those who voted, can be found in the various documents which should, if scrutinised, will show that the recount results cannot be relied upon because the ballot boxes were broken into and tampered with. The documents include the

- a. written statements made by the presiding officers;
- b. copy of the register used during the elections;
- c. the copies of the results of each of the polling stations in question;
- d. packets of spoilt papers;
- e. marked copy of register in respect of the polling stations;
- f. packets of counterfoils of used ballot papers;
- g. packets of used ballot papers; and
- h. statements showing the number of rejected ballot papers for the stations.

The application by the 3rd respondent was dated 14-7-2013 and sought the scrutiny of the votes cast in the gubernatorial election in 13 polling stations in Rarieda constituency and 15 polling stations in Gem constituency. The 13 stations were the same ones in respect of which the 1st and 2nd respondent sought scrutiny. To the 10 stations in Gem constituency asked by the respondents, the 3rd respondent added Mutumbu, Kagilo, Nyawara, Bar Kalore and Aluor Girls primary schools. The documents to be

scrutinised were copy of register for each of the polling stations; marked copy of register; packets of counterfoils of used ballot papers; copies of results as shown in Forms 33 and 35; poll day diaries prepared by the presiding officers; and statements specifying the serial numbers of the seals used at different stages of the movement of the ballot boxes from the polling stations until they were opened for the recount.

The other prayers in the motion included the following

- a. the presiding officers of the polling stations, the returning officers for Rarieda and Gem constituencies and the Regional Coordinator responsible for Siaya County be summoned to give evidence in relation to the documents and materials that are required for scrutiny and to also give evidence on the outcome of the elections of 4-3-2013; and
- b. the County Elections Coordinator and the security officers who were responsible for the security of the ballot boxes from the day they were handed to them by the presiding officers to the day they were opened for recount be summoned to give evidence.

The reasons given for the request for scrutiny are the same ones given by the 1st and 2nd respondents in their application. The 3rd respondent stated that, as a result of the recount, he had lost more than three times the number of votes he was declared to have garnered in the constituencies; that the loss of the votes reduced the voter turnout in each of the polling stations in question to less than 50% in most cases, a situation that did not obtain in any of the polling stations in Siaya County; that the number of used and unused counterfoil books found in the ballot boxes did not correspond with either the number of the registered voters or with the votes cast, revealing a poor attempt to conceal the anomalies; that several seals of the ballot boxes from the said polling stations were found broken, missing, not fastened, or different at the time they were being handed over to the Deputy Registrar and at the start of the recount; and that an opening was found at the storage facility when the ballot boxes for Rarieda constituency were kept indicating that the security of the ballot boxes was obviously compromised. The 3rd respondent swore an affidavit to support the application.

It should be pointed out that in paragraph 21 of Hilda's affidavit she stated the following about the alleged breaking into the warehouse in which the ballot boxes for Rarieda and Gem constituencies were:

“21. On the day of verification of the ballot boxes and before their handover to the custody of the Honourable Court, the warehouse Assistant, Lillian, brought to my attention the fact that there was an opening caused by a missing iron sheet on the side of the warehouse which fact we have since reported to the police for investigations.”

Lastly, the petitioner filed his application dated 16-7-2013 in which sought the scrutiny of all votes cast in all polling stations in Bondo constituency for the gubernatorial election, and the recount of all the votes in all the polling stations in Alego Usonga, Ugunja and Ugenya constituencies for the gubernatorial election held on 4-3-2013. The prayer for scrutiny was abandoned leaving that for recount. It should be noted that Siaya County has six constituencies: Bondo, Ugenya, Ugunja, Alego Usonga, Gem and Rarieda. The recount had been ordered for Bondo, Gem and Rarieda. This is why the petitioner sought that this be extended to Alego Usonga, Ugunja and Ugenya.

The grounds on which the application was based, together with the supporting affidavits sworn by the petitioner and his agent Mathews Omondi Oluoch, alleged the following:

- a. that results of the recount had revealed massive fraud in sorting out and counting of votes;
- b. that votes cast in favour of the petitioner had been allocated to and counted in favour of the 3rd respondent;
- c. that in stream 1 at Rarieda primary school where Form 35 showed he had got 178 votes, when the ballot box was opened he had no vote assigned to him;
- d. that according to his tally, following the recount, he was ahead of the 3rd respondent by 1811 votes (when all the 6 constituencies are taken into account);
- e. that the recount had shown that the entries in Form 35 showing the votes cast in favour of the 3rd

- respondent had been fraudulently falsified to show him to have won the election; and
- f. that the recount of the remaining constituencies would be in the interest of justice as it would ascertain who had the highest number of votes in the gubernatorial election for Siaya County.

Mr. Gumbo argued the application for the 1st and 2nd respondents, Mr. Kopot and Mr. Ochieng argued the one for the 3rd respondent and Mr. Kwach and Mr. Wakla the one for the petitioner. This was after it was agreed that the applications be heard together. The advocates basically reiterated the contents in the grounds and the averments in the respective affidavits. Over and above that, however, counsel for the respondents took the position that the application for recount by the petitioner was *res judicata* under section 7 of the Civil Procedure Act (Cap 21). This was because the petitioner was had in the application that led to recount unsuccessfully sought the recount of votes for Alego Usonga, Ugunja and Ugenya. The response by counsel for the petitioner that, first, *res judicata* refers to a suit and not an application, and secondly, that the present application was based on the results of the recount and not on the grounds on which the earlier application was based.

The decision of this court will not turn on whether or not the petitioner's application is *res judicata*, but I would like to say the following about the issue. First, *res judicata* applies to applications just as it applies to suits (**Abok James Odera -VS- John Patrick Machira, Civil Application No. Nai 49 of 2001**). Secondly, where an applicant shows that his application is based on new facts which were not known to him at the time of the first application, the respondent cannot successfully plead *res judicata* (**Uhuru Highway Development Ltd -VS- Central Bank of Kenya and Others, Civil Appeal No. 36 of 1996**). The new facts should be such that were not brought before the court after the exercise of due diligence. Thirdly, under rule 33 of the Elections (Parliamentary and County Elections) Petition Rules, 2013 an application for scrutiny can be brought at any stage of the hearing, by any party to the proceedings, provided that such party has sufficient reasons. This means that a party may bring such an application, for instance, at the close of the petitioner's case and, if he fails, that does not stop him from bringing the same application at the close of the respondent's case. He may not be able to demonstrate sufficient reasons at the close of the petitioner's case but be able to demonstrate such reasons at the close of the respondent's case. In the instant case, the petitioner is saying that his application has become necessary owing to the results of the recount, the results he did not have, or contemplate, at the time of his first application.

Lastly, in order to rely on *res judicata* under section 7 of the Civil Procedure Act, there must be a previous suit or application in which the matter was in issue; the parties were the same or litigating under the same title; a competent court heard and determined the matter in issue; and the issue had been raised once again in a fresh suit or application. If that is the case, and if the petitioner's application is *res judicata*, then the respondents would also not successfully urge their applications. This is because they were parties to the earlier application in which they opposed the request for scrutiny and recount and a decision was made. They have to show that a new matter which they could not reasonably foresee has arisen. They would, if they want to succeed, be relying on the results of the recount as the new matter.

An applicant seeking scrutiny must bring himself within section 82 (2) of the Elections Act 2011 or rule 77 (1) of the Elections (General) Regulations, 2012. This is because, under rule 33 (1) of the Elections (Parliamentary and County Elections) Petition Rules, 2013 what such applicant is doing is to challenge

“the validity of the votes cast.”

(Harun Meitamei Lempaka -VS- Hon. Lemanken Aramat & Others, Election Petition No. 2 of 2013 at Nakuru and Nicholas Kiptoo Arap Korir Salat -VS- IEBC & Others, Election Petition No. 107 of 2013 at Kericho).

The respondents are basically alleging that an unknown thief broke into the warehouse where the ballot boxes for Rarieda and Gem constituencies were stored, broke into the boxes and tampered with the contents therein by taking away the ballot papers of votes which had been cast for the 3rd respondent. They are saying that, as a result, the contents of the ballot boxes cannot be relied upon to determine the

votes by which the 3rd respondent was elected; that for the court to determine the results it should look to the Forms 33 and 35, the voters register, the marked voters register, poll day diaries, etc. On the other hand, the petitioner is saying that these documents have been fraudulently falsified by the respondents to give the 3rd respondent the win; that it is only in the boxes that one can find the truth about his votes, and which votes show that he won the election.

It should be remembered that, when the 1st and 2nd respondents handed over to court the ballot boxes and the results for the Siaya gubernatorial election they were saying that the results as declared would be found in these materials.

The other reason why I cannot allow the applications of the respondents is this. They seek, among other things, that I summon presiding officers for the 28 polling stations, the two returning officers and cause them to give evidence regarding the results in the documents which are the subject of the scrutiny. Further, that I should summon the County Elections Coordinator and security officers who were guarding the ballot boxes to be able to know who broke into them and took the ballot papers. To start with, there is no admissible evidence before court that the warehouse that kept the ballot boxes was broken into and the ballot boxes interfered with. Hilda swore that she was informed by one Lillian that she had noted that an iron sheet was missing on the side of the warehouse. Hilda did not go to check the warehouse. Lillian did not swear an affidavit to say what she saw. Can this be the basis for summoning all the people indicated? In any case, can the court be asked at this time of the petition to identify the people who broke into the warehouse?

Further, what is the practical implication of the venture the respondents are inviting the court to go into? Under the Election Rules, each of the mentioned witnesses has to swear an affidavit regarding the alleged results and offences. Such affidavits would have to be served on the petitioner to allow for a response. Examination and cross examination would then be based on such affidavit evidence. The question that one would ask is this: are the respondents treating some of their witnesses as suspects to the alleged offences? What would be the legal implication of such suspicion? In short, the court declines the invitation to travel on this suggested route.

On the other hand, the petitioner's argument is that now that the results of the recount disadvantage the 3rd respondent and favour him, the court should proceed to recount the votes in the three named constituencies: Alego Usonga, Ugenya and Ugunja. That, if the results for Gem and Rarieda have problems then those of Alego Usonga, Ugenya and Ugunja also have? That is an attractive argument, but is without any legal basis. The court asked for the recount of the votes for Gem and Rarieda because a sufficient basis had been laid. It declined to order recount in Alego

Usonga, Ugenya and Ugunja because no basis had been shown. The recount results have nothing to do with Alego Usonga, Ugenya and Ugunja. No fresh material has been provided in the application that would form the basis for the recount of the votes for the three constituencies.

In conclusion, all the three applications have no merit and are hereby dismissed. Costs will abide the outcome of the petition.

Dated, signed and delivered at Kisumu this 22nd day of July, 2013.

**A.O
JUDGE**

MUCHELULE