



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI**  
**MILIMANI LAW COURTS**  
**(CORAM: R. MWONGO, PRINCIPAL JUDGE)**  
**ELECTION PETITION NO. 4 OF 2013**

**BETWEEN**

**GEORGE ALADWA OMWERA**

..... **PETITIONER**

**AND**

**BENSON MUTURA KANG'ARA** .....  
..... **1<sup>ST</sup> RESPONDENT**

**FLORENCE KWAMBOKA MOGAKA** .....  
... **2<sup>ND</sup> RESPONDENT**

**THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION** .....  
..... **3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

**BACKGROUND**

1. In the parliamentary elections held on 4<sup>th</sup> March, 2013, there were eight contestants for the Makadara Constituency Member of National Assembly position. On 6<sup>th</sup> March, 2013 the results were announced by the Independent Electoral and Boundaries Commission (IEBC) as follows:
  - i. Anthony Koinange 1,370 Votes
  - ii. **Benson Mutura Kangara 37, 644**
  - iii. Consolata Wairimu Kivuti 2,484
  - iv. **George Aladwa Omwera 36,079**
  - v. Grace Atieno Omondi 660
  - vi. Lindy Ajiambo Wafula 7,456
  - vii. Patrick Orenge Angasa 1,204
  - viii. Terry Hudson Mwarisha 186

2. The margin between the winner Benson Mutura Kangara, the 1<sup>st</sup> Respondent, and the Petitioner, George Aladwa Omwera, was announced as 1,565 votes. Dissatisfied with the results, the Petitioner filed this petition on 5<sup>th</sup> April, 2013. It is against the election of the 1<sup>st</sup> Respondent that the Petitioner enjoins the Returning Officer, Florence Kwamboka Mogaka as 2<sup>nd</sup> Respondent, and the Interim Electoral and Boundaries Commission (IEBC) as the 3<sup>rd</sup> Respondent.
3. The Petitioner's prayers are as follows:
  - a. ***The 1<sup>st</sup> Respondent was not duly elected as Member of Parliament for Makadara Constituency and that the declaration that he was validly elected is null and void;***
  - b. ***The Petitioner be declared the duly elected Member of Parliament for Makadara Constituency.***

In the alternative, he prays that:

- c. ***The Elections for Member of Parliament for Makadara Constituency held on 4<sup>th</sup> March 2013 be declared null and void and the said elections be repeated.***

In either relief pleaded for by the Petitioner, he also prays for costs against the Respondents and such other consequential orders/ reliefs as the court may deem fit.

4. The Petition is brought under Article 87 of the **Constitution of Kenya**, Sections 76 and 77 of the **Elections Act** and the **Elections (Parliamentary and County Elections) Petitions Rules** ("the Election Petition Rules"). It is supported by the Petitioner's affidavit dated 5<sup>th</sup> April, 2013, and the affidavits of several other deponents.

## **PRELIMINARIES**

5. A status conference was held on 10<sup>th</sup> May, 2013. All parties confirmed the pleadings filed and those outstanding. A Pre-trial conference was scheduled for and held on **17<sup>th</sup> May, 2013**.
6. At the Pre-trial conference a list of issues for determination by the court was agreed. The hearing date was set for **3<sup>rd</sup> June, 2013**. A mention to confirm compliance and agree allocation of time for the hearing was set for **21<sup>st</sup> May, 2013**.
7. The Petitioner was represented by Mr. Miller together with Mr. P. Wena and Mrs. McAsila instructed by M/s Miller & Co Advocates. The 1<sup>st</sup> Respondent was represented by Mr. Kibe and Ms. Minjire duly instructed by M/s Kinoti & Kibet & Co. Advocates. The 2<sup>nd</sup> & 3<sup>rd</sup> Respondents were represented by Mr. Onsando and Mr. Tiego, duly instructed by the firm of Onsando Ogonji & Tiego Advocates.
8. The hearing commenced on **3<sup>rd</sup> June, 2013**. The petitioner gave evidence and called the following witnesses: Daniel Nyakundi, PW1; Felix Siema Atinya PW2; Alex Alumada Kalonye , PW3; James Wahome, PW4; Pamela Adongo Omondi, PW5; Catherine Karendi Mugendi, PW6; Sylvia Mbula Musyoki, PW7; Duncan Audi Okwaro, PW8; Joyce Agola Omondi, PW9; Caroline Obuchere, PW10; Charles Ogutu Ernest, PW11; Beatrice Imbakala Lusiki, PW12; Michael Adongo Aketch, PW13; Richard Justice Ndirangu, PW14; James Opere Omogi, PW15; Silvanice Odhiambo Obade , PW16; Justice Owiti Odhiambo, PW17; Shem Kisanya, PW18; Beatrice Alice Auma, PW19; Agneta Anzabwa, PW20; Esther Auma Opiyo, PW21; Barnabas Inzini, PW22; Patrick Owino Ogutu, PW23; John Ogendo Onyare, PW24 AND Nancy Wanyonyi Mulama, PW25. All these witnesses had deposed affidavits which had been filed with the petition.
9. The 1<sup>st</sup> Respondent, Benson Mutura Kangara also gave evidence. He called the following witnesses in support of his response to the Petition: Geoffrey Gichohi Wahome, RW2; and George Odhiambo Akula, RW3.

10. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondent's evidence was adduced by Florence Kwamboka Mogaka, 2<sup>nd</sup> Respondent as RW4; Paul Onyangare Ondara, RW5; Agnes Aketch Aoko, RW6; Hesbon Odoyo K.'Ogolla, RW7; Kizito Odhiambo Mutula, RW8; Mary Akoth Ochola, RW9; and Geoffrey Kimani Maina, RW10.
11. The parties agreed that in order to save time, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' remaining nineteen (19) witnesses who had deposed affidavits, would not be called for cross-examination. This would avoid repetition as their evidence concerned exhibiting a form 35 for the polling stations which they presided over. Parties however agreed that submissions would be made regarding their evidence as deposed.
12. During the hearing, two applications were disposed of. The first emanated from the Petitioner's application seeking that the 2<sup>nd</sup> Respondent do comply with the provisions of Rule 21 of the Elections Petition Rules before commencement of the hearing. That rule obliges the IEBC to deliver to the Registrar the ballot boxes in respect of an election, not less than forty eight (48) hours before the date fixed for trial. In its ruling of 5<sup>th</sup> June, 2013, the Court dismissed the application with costs to abide the outcome of the petition. The court held that the delivery of ballot boxes shall be upon application by a party.
13. The second application was by the 2 – 3<sup>rd</sup> Respondents' counsel. He sought the arrest and charging of PW1, Daniel Nyakundi. That witness had, in his affidavit and in cross examination and re-examination, admitted that he had voted twice. After the court explained that this was an offence under section 58 of the Elections Act, Nyakundi confirmed that he understood this to be an offence. The court in its ruling on 6<sup>th</sup> June, 2013 directed that the witness be arrested and charged. The polling station officers who gave the witness the two ballot papers were also ordered to record statements and investigations as to complicity be carried out in that regard.

## **ISSUES FOR DETERMINATION**

14. On 17<sup>th</sup> May, 2013 the parties agreed and signed a list of the Issues for determination by the court. They are as follows:

***“1. Whether the elections were conducted in accordance with the law.***

***2. Whether the 1<sup>st</sup> Respondent was validly elected***

***3. Whether the elections for the Member of Parliament, Makadara Constituency should be nullified***

***4. Which party should bear the costs of the petition”***

15. It was agreed that parties would be permitted to particularise the Issues. It was further agreed that the witness depositions would stand as evidence in chief, and the respective witnesses would be called for cross-examination thereon.

## **THE PETITIONER'S CASE**

16. The Petitioner's case is made out in paragraphs 9 – 14 of the petition. In essence, his complaints are as follows:
- a. That the election was not carried out in accordance with the Elections Act 2011 (paragraph 9).
  - b. That the tallying and counting of votes was marred by irregularities and inaccuracies. Thus, the number of votes obtained by each candidate was not conclusively ascertained. Petitioner referred to form 36, and forms 35 from fifteen polling stations (paragraph 10 (a) – (jj)).

- c. That the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents failed to furnish the Petitioner’s polling agents with duly filled, signed and stamped forms 35. In the result the Petitioner was unable to participate in tallying and verifying the results. The outcome was an illegal and invalid result (paragraph 11).
  - d. That the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents denied several voters their right to vote as their names did not appear in the register of voters (paragraph 12).
  - e. That the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents denied the Petitioner’s agents access to various polling stations for purposes of monitoring. As a result the polling and tallying process was questionable (paragraph 13).
  - f. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents’ officers and agents issued some voters with more than one ballot paper for Member of Parliament. In the result some voters cast more than one vote.
17. In his affidavit in support of the petition, the Petitioner said that his Chief Agent was Kennedy Otieno Okaka. The agent had not signed form 36. Instead, someone called Rachel Stanley had signed the form on behalf of his Chief Agent. According to him, she was an agent for the ODM Presidential candidate, and had no authority to sign for him.
18. He annexed exhibits “GAO 2” and “GAO 4” being form 36 bearing different results for each candidate, and different totals. He asserted that both forms were issued by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, which puts the integrity of the election and tallying process into serious question.
19. He identified eight of his polling agents who he alleged were not issued with copies of form 35. These were Florence Amollo, Esther Syombua Kamumbi, Charity Kaluki Muteto, Kennedy Othuon, Obed Newton Nyaberi, Jackline Atieno Otieno, Awuor Rosemary Oyando and Elias Ondiek. However, he did not call these persons to give evidence.
20. The Petitioner asserted that at Dr. Krapf Primary School polling station the results show the total votes cast as 4,651, yet the number of registered voters is indicated as 4,557. Thus, the results should have been automatically cancelled. In that station, the rejected votes were indicated as 32 therefore the total valid votes should have been 4,619. Since the total votes garnered by candidates was 3,966 then there are 653 votes unaccounted for.
21. He averred that “GAO4” shows that the total votes cast were 89,152 and rejected votes were 786. The total valid votes should therefore have been 88,366. However, when you add up the votes garnered by each candidate, the total votes cast amount to 87,316 leaving a total of 748 votes unaccounted for. This is stated at paragraph 21 of the Petitioner’s affidavit.
22. The Petitioner’s case revolved around the concepts of “*unaccounted for votes*” and “*unascertainable votes*”. He identified forms 35 from different polling stations from which he drew these complaints. He exhibited the forms as “GAO5” to “GAO35” in his affidavit. In summary, the complaints concern fifteen polling stations as follows:

**Unaccounted for votes in 15 polling stations**

- a. Bahati Primary School Form 35 Exhibit “GAO5”
  - Stream 2 – valid votes 558; votes garnered 468; Inflated by: 10
- b. Morrison Primary School – Forms 35
  - Stream 4 – does not indicate Petitioner’s votes – Unaccounted
  - Stream 6 Not the form prescribed by law – invalid result

c. Bidii Primary School – Forms 35

Stream 3 – Total valid votes 841, Candidates' votes 837; unaccounted for: 10 votes

Stream 6 – No entry in section A of form 35; form unstamped

d. St. Paul's Primary School – Forms 35

Stream 1 – Total votes cast 642; valid votes 633; Spoilt 0, unaccounted for 9 votes

Stream 2 – Total valid votes 674, candidates' votes 671; unaccounted for 3 votes

Stream 7 – Form has no details in part A – unascertainable results

Stream 8 – Figures for total number of votes cast altered and unsigned

e. Dr. Krapf Primary School – Forms 35

Stream 3 – Total votes cast 664, 14 rejected votes. Total valid votes shown as 644. Thus 7 votes are unaccounted for

Stream 6 – Votes cast 709, total candidates votes (garnered) 704. Thus, unaccounted for votes are 5

f. Joseph Apudo Primary School – Forms 35

Stream 3 – Two different forms 35 were issued leading to double counting

Stream 4 – Total votes cast were 641 with 1 rejected vote; total valid votes indicated as 633; unaccounted for: 7 votes.

g. Harambee Primary School – Form 35

Stream 3 – Form 35 does not indicate total valid votes. Candidates' votes cannot be ascertained

h. Baraka Primary School – Form 35

Stream 5 – Total votes cast is 644: rejected votes are not deducted, and therefore votes distributed to candidates are inaccurate.

Stream 2 – Total votes cast are 638 and 3 rejected votes. Total valid votes are 634 leaving 1 vote unaccounted for

i. Star of Hope Primary School – Forms 35

Stream 4 – Total valid votes are 692 but candidates votes are 686 Therefore there are 6 votes unaccounted for

Stream 7 – Total votes cast are 684 with 7 rejected votes. Total valid votes are 676 leaving 1 vote unaccounted for.

Stream 9 – Votes cast not indicated; valid votes unascertainable

Stream 11 – Total valid votes are 659, and total votes for candidates are 657 – 2 votes are unaccounted for.

j. Makongeni Primary School – Forms 35

Stream 1 – Total votes cast are 640 and total valid votes cast are 636 with ‘nil’ rejected votes. Unaccounted for votes are: 4

Stream 3 – Total votes cast is 628 and 3 rejected votes. Total valid votes cast is 624. Unaccounted for votes: 1

k. St. Michael’s Primary School – Forms 35

Stream 2 – “GAO34” – shows unsigned alterations to valid votes cast

Stream 4 – Total number of votes cast are 622 and ‘Nil’ rejected votes. Total valid votes are 615, leaving 7 unaccounted for votes

Stream 5 – Total number of votes cast are 616, ‘Nil’ rejected votes. Total valid votes is 615 leaving 1 unaccounted for vote

• St. Anne’s Primary School –Form 35

Stream 2 – Total votes cast are 630 with 1 rejected vote. Total valid votes is 628 leaving 1 vote unaccounted for.

m. St. Patrick’s Primary School – Forms 35

Stream 4 – Total number of votes cast or rejected not indicated and impossible to verify votes garnered, unsigned alterations.

Stream 5 – Total votes cast are 641 with ‘Nil’ spoilt votes. Valid votes cast are 639. Unaccounted for votes are 2.

□ Kaloleni Primary School – Form 35

Stream 1 – Total votes cast are 663. No spoilt votes. Total valid votes are 659. Unaccounted for votes are 4

○ St. John’s Primary School – Form 35

Stream 1 – Total votes cast are 613 with 5 rejected votes. Total valid votes is 607 leaving 1 vote unaccounted for.

23. When all these “unaccounted for votes” in the fifteen polling stations are added up they amount to **85** unaccounted for votes (75 unaccounted and 10 inflated). In his evidence, the petitioner said that these votes belong to him.

**Complaints Regarding Form 36**

24. The complaints regarding Form 36 are contained in paragraph 10 of the Petitioner’s affidavit. They may be summarised as follows:

- a. The form was not signed by the 2<sup>nd</sup> Respondent and did not bear the stamp of the 3<sup>rd</sup> Respondent. The results are therefore invalid
- b. The form is signed on behalf of the Petitioners by a person who was not duly appointed by the Petitioner. The results are thus invalid
- c. The total votes for each candidate is different from the total votes indicated by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in the summary of results.

- d. The counting of total votes cast, rejected and valid votes in the summary do not tally, making the entry tallying process invalid
- e. The results for Dr. Krapf Primary School shows that the number of votes cast was 4,651 which is more than the registered voters of 4,557. The results should have been cancelled

25. In respect of Dr. Krapf Primary School polling station, the Petitioner states that Form 36 shows the rejected votes as 32. When these are deducted from the allegedly cast votes of 4,651 the valid votes cast would be 3,966. The difference between cast votes of 4,619, and valid votes of 3,966, leaves 653 unaccounted for votes. This is the essence of paragraph 23 of the Petitioner's affidavit.

26. In summary, from the Petition and Petitioner's affidavit the votes unaccounted for are as follows:

1. From 15 polling stations (paras 10a – jj) petition and petitioners affidavit paras 31-53 – 85 votes
2. From affidavit para 21 form 36 - 748 votes
3. From Affidavit para 23 form 36 - 653 votes

Added together, these total to **1,486** votes.

27. In his submissions, however, the petitioner alleged that **2,215** votes were unaccounted for, or his votes were deflated to that extent. This he calculated as follows:

- a. Difference between Declaration Form 36 and Summary Form 36 in total garnered votes i.e. 87,083 minus 87,617 equals **535** votes; plus
- b. Difference between Summary Form 36 total votes cast of 89,152 and total rejected votes equals **748** votes; plus
- c. Unaccounted for votes at paras 21-55 of petitioners affidavit equals **932** votes

28. In cross-examination by both Mr. Kibe and Mr. Onsando, the Petitioner said that the voting proceeded in an orderly manner on election day. After he completed voting at about 11.00 a.m., he went round to a few stations and went home at about 7.00 p.m. He did not go out until the following day. His chief agent was Ken Otieno Okaka (pg. 9 Record) who gave him a report. Okaka did not, however, go to the Constituency Tallying Centre at Aquinas School.

29. The Petitioner said that he had in fact selected Joel Atieno Aluoch as his Chief Agent (pg. 22 Record). However, his party (ODM) changed the agent to Ken Okaka. At the time he was giving his report, Ken Okaka told the Petitioner he was at Jam Rescue along Jogoo Road (Record pg 10). That was where he had set up his operational base.

30. On Tuesday 5<sup>th</sup> March, 2013, the Petitioner did not go to the tallying centre and had no agent there (Pg. 10 Record), but Ken Okaka was able to get reports from agents and pass them onto him. He had met his 137 agents on Sunday, 3<sup>rd</sup> March, 2013 and he met one Rachel Stanley on 4<sup>th</sup> March, 2013. He was unsure how the party selected his agents. This included Ken Okaka who was selected for him after ODM changed the agent to Ken Okaka instead of Joel Otieno Aluoch.

31. When he was shown page 12 paragraph 17 of his affidavit, he confirmed and stated:

***“... form 36 is purportedly signed on behalf of my party Orange Democratic Movement by one Rachel Stanley but I aver that the said Rachel Stanley was an agent for the Presidential Candidate and therefore had no authority to sign the form on my behalf or on behalf of my Chief Agent.”***

He further admitted that all ODM agents' appointment letters were signed by the Secretary General Prof. Anyang Nyong'o. When shown the exhibit in his witness Shem Kisanga's affidavit, he confirmed that all the appointment letters looked alike.

32. The Petitioner alleged that the 2<sup>nd</sup> & 3<sup>rd</sup> Respondents failed to furnish Forms 35 to his agents, and also denied them access to several polling stations. This led to the tallying process being illegal and invalid with the result that the wrong candidate was declared the winner.
33. In addition, the Petitioner alleged that the 2<sup>nd</sup> & 3<sup>rd</sup> Respondents through their officers, issued some voters with more than one ballot paper for Member of Parliament. In the result, some voters cast more than one vote for the position. He gave the example of Daniel Nyakundi who was allegedly issued with two ballot papers and cast both. Nyakundi was his witness No. 2.
34. Finally, the Petitioner also gave evidence that some registered voters who went to vote were turned away by the 2<sup>nd</sup> & 3<sup>rd</sup> Respondents' officials. He said these included Alex Alumada Kalonye of Kaloleni Primary School, Felix Siema Atenya, registered at Makongeni Primary School; and Fatma Mohamed (registered at Joseph Apudo Primary School).
35. The second witness in support of the Petition was Daniel Nyakundi. Although on the record he is named PW1, it should have read PW2. This has no material effect, however.
36. Nyakundi admitted that he voted twice. He said he was given seven ballot papers, two of which were for the Parliamentary seat. In addition to polling officials there were ten people – other agents and observers – in the centre. He said he marked the two ballots, and they were dropped into the ballot boxes. His evidence remained intact on cross-examination and re-examination. An application for his arrest was subsequently made by counsel for the 2<sup>nd</sup> – 3<sup>rd</sup> Respondent and granted.
37. Felix Siema Atenya gave evidence as PW2. He deponed that he was registered as a voter at Makongeni Primary School, but was denied the right to vote. When he went there, the officers did not find his name in the register.
38. In cross-examination by Mr. Onsando, Felix Atenya was shown page 456 of Florence Kwamboka's affidavit. He was able to identify his name as Number 117 in the IEBC Principal Register for Joseph Apudo Primary School. In re-examination, however, he was adamant that the officer did not find his name though they looked at his registration card.
39. PW3 was Alex Alumada Kalonye. He said he was registered at Kaloleni Primary School. He said he had checked two weeks prior to the election and his name was on the register. On elections day, however, he was told that his name was not in the register.
40. During cross-examination by Mr. Onsando, he was shown page 381 – 482 of Florence Kwamboka's affidavit. It contained the Principal Register of voters for Kaloleni Primary School.
41. In re-examination he re-asserted that he was registered at Kaloleni Primary School as shown in his acknowledgment slip which he had exhibited.
42. The Petitioner's next witness was James Wahome, PW4. He was the Petitioner's polling and tallying agent at Morrison Primary School, Stream 4. He said that after voting he was given a form 35 to sign. He exhibited a copy as "JW2". It did not clearly indicate the number of votes garnered by the Petitioner, because the figure 106 was altered by overwriting but not counter-signed. The form was also stamped "*rejected*" by the IEBC, yet was used in final tallying.
43. In cross-examination by Mr. Onsando he was shown pg. 75 of Florence Kwamboka's affidavit. It was a form 35 for Morrison Primary School Stream 4. He admitted that he signed the form and could see his signature. He then said he signed the form before the IEBC officer had filled it with any information. However, he admitted that he had not sworn in his affidavit, the explanation he was now giving that he signed the form 35 before it was completed with information. He said the form in Kwamboka's affidavit clearly showed that the petitioner garnered 106 votes at Morrison

Primary School Stream 4.

44. PW5 was Pamela Adongo Amondi. She was the Petitioner's polling and tallying agent at Baraka Primary School Stream 5. She exhibited form 35 for that stream as "PAO2". She signed the form, and other agents signed it too. It indicated the number of valid votes as 644 in Part A, but did not account for rejected votes.
45. In cross-examination, PW5 was shown page 203 of Florence Kwamboka's affidavit. It was form 35 for Baraka Primary School Stream 5. He observed that Part A had been amended, signed and stamped. The total number of votes cast was shown as 645. She was also shown paragraph 92 of Kwamboka's affidavit where it is averred that the authentic form 35 shows the votes cast is 645 with one rejected vote.
46. Catherine Karende Mugendi, PW6, was the Petitioner's agent at St. Paul's Primary School Stream 1. She said that the form she signed showed that the total votes were 642 whereas valid votes were 633.
47. During cross-examination she was shown page 221 of Florence Kwamboka's affidavit. In re-examination she admitted having signed the form 35 shown there. She noted that in Part A the figure of 642 cast votes was cancelled and substituted with 633 votes. The total valid votes were shown as 633.
48. PW7 was Sylvia Mbula Musyoka. She said she was the Petitioner's agent at Harambee Primary School. She also asserted that they were forced to sign form 35 before the figures were recorded in it. In cross-examination, she also said:

***"Signing (the form) did not signify that the information was correct... I see the declaration at paragraph 8 of form 35. It says I declare the results are accurate. I didn't know this was the meaning. I knew that I should not sign if I don't agree with the figures ..."* (Record page 53)**

49. Further, the witness said she pointed out the anomaly in the figures in the form 35, but that the officials declined to act.
50. PW8, PW9, PW10, PW11, PW13, PW14, PW15, PW16, PW17, PW18, PW19, PW20, PW21, PW23, PW24, PW25 and PW26 all testified to being agents for the Petitioner. They all alleged that they signed form 35 in their respective centres. In each case it was before the results were indicated in the form.

PW12, Beatrice Imbakala Lusiki testified that she was not given a form 35 and did not sign any.

## **THE 1<sup>st</sup> RESPONDENTS' CASE**

51. The 1<sup>st</sup> Respondent filed a Response to the petition on 30<sup>th</sup> April, 2013. He supported it with his own affidavit, and the affidavits of Geoffrey Gichohi Wahome, (RW2); George Odhiambo Akule, (RW3).
52. He denied the allegations in the petition. He said he was validly elected and issued a Declaration of results. He said he garnered 37,967 votes against the Petitioner's 36,183, a difference of 1,784 votes. He stated that he was aware that the results pleaded by the Petitioner in paragraph 7 of his petition were provisional. He was declared duly elected under the results annexed as "BMK 3" exhibited to his affidavit. It showed the corrected figures of registered voters and total votes cast for Dr. Krapf Primary School as 4,557 and 3,966 respectively.
53. He denied any irregularities that had any bearing on the results. He asserted that if Daniel Nyakundi had voted twice he should be arrested and charged. He stated that even if all the voters

allegedly denied the right to vote, had voted, the results would not change. He also annexed the results for the Presidential, Gubernatorial, Senate, Country and Women Representatives positions.

54. In cross-examination, the 1<sup>st</sup> Respondent admitted that in “FKM 3” at pg. 4 of Florence Kwamboka’s affidavit, there were two columns for registered voters. They showed different totals. He got a similar form from Florence Kwamboka, except that his had corrections. It, was annexed as BKM 3 and has a note indicating “note corrections on total votes cast.” It was stamped “13 March 2013”.
55. Geoffrey Gichohi gave evidence as RW2. He was the Chief Agent for the National Alliance Party (TNA) for Makadara Constituency. He said he was stationed at Aquinas High School tallying centre. From there, he monitored and witnessed the conduct of the entire election. From his observation, the election was conducted in an orderly manner and without any hitches. He visited all polling stations in the Constituency.
56. In cross-examination he said he witnessed the tallying at St. Aquinas School from the night of 4<sup>th</sup> March, up to 7<sup>th</sup> March 2013. His cross-examination was uneventful.
57. George Odhiambo Akula gave evidence as RW3. He said he voted at Kaloleni Primary School. He was issued with one ballot paper for each candidate. According to him the voting exercise was smooth free and fair.

## **THE 2<sup>ND</sup> & 3<sup>RD</sup> RESPONDENTS’ CASE**

58. Florence Kwamboka Mogaka gave evidence as RW4. She was the Constituency Returning Officer for Makadara. She said each polling station was manned by a Presiding Officer, assisted by a Deputy Presiding Officer and polling clerks. She stated that the document annexed as “FKM1” was a declaration of results. She asserted that as results were being read out from form 35s by Presiding Officers, they were keyed into form 36.
59. She added that during the tallying process there was anxiety and restlessness from the people crowded in the room. She therefore read out provisional results as soon as there was a clear winner. Such results, she said, can be used in given circumstances.
60. As regards the changes made to forms 35, she testified that they were only made in Part A. That is the part in respect of which the law allows verification. Changes are allowed because there may be errors in additions during transposition and making summaries. She was assisted in doing that work by Mercy, Eric and Charles who were officers of the 3<sup>rd</sup> Respondent.
61. She testified that she explained to the agents at the tallying centre regarding changes she was making on form 35s. They did not object. Such changes could only be made on Part A of form 35. She was categorical that no changes were made to Part B of any form 35. All IEBC officers were under strict instructions not to touch Part B of form 35, because it contained the number of votes each candidate garnered.
62. Florence Kwamboka said that correction of Forms 35 was done at the tallying centre. They were then to be attached with the ballot boxes from the polling centre. After alterations to the Forms 35 were done, the forms were countersigned in the presence of party tallying agents. At the tallying centre, they would first look at the distribution of votes of the candidates, and where there were votes which could be allocated, they were counted as rejected votes. Thus, verification was done at the tallying centre.
63. According to RW4, it was every agent’s responsibility to be present at the tallying centre. However, some parties’ agents chose to absent themselves for their own reasons. She said that polling agents were not allowed to be in the tallying centre, as tallying agents were stationed there.

64. During cross-examination by Mr. Kibe, She said that at the polling station, there were party agents representing each party/ candidate and that their role was to ensure the smooth process of voting. That included witnessing the opening of the polling stations, the tallying, and further ensuring a fair process. As results were read out and declared, the agents were expected to sign the declaration form 35 to state that the results were as declared.
65. She testified that agents were entitled to register their dissatisfaction at the polling station. If a vote was objected to, then the Presiding Officer would bring it to the attention of the Returning Officer. If the concern is genuine, the Presiding Officer stamps the same as 'objected', then seals the ballot in a tamper proof envelope, and indicates the same in Form 35 where there is the 'objected' vote. At the Tallying centre, this is then brought to the attention of the Returning Officer.
66. According to RW4, with regard to votes received by candidates, they are settled at the polling station. No changes on these can be made at the tallying centre.
67. She further testified that all the votes in Part B of disputed form 35s were similar except in one alleged station. She stated that she had not presented a single Form 35 in which there was alteration in Part B.
68. It was RW4's testimony that the ODM agent at the tallying centre was Rachel Stanley; further that Ken Otieno Okaka was not a recognized tallying agent at the tallying centre. It was her evidence that she did not see any other agent from ODM at the tallying centre.
69. She also testified that the Forms 35 attached to the Petitioners' document were not similar to the ones attached to her Replying affidavit. The Forms 35 were filled in by hand and the process would not likely be done in the same order. In this case the forms were signed in a random manner, in that, as one agent was signing one form, another one would be signing the other. The forms were then handed to the agents who were then supposed to give them to their tallying agent at the tallying centre.
70. At the Tallying centre, the tallying agents were expected to follow the tallying exercise to ensure that there was full conformity. It was RW4's evidence that Rachel Stanley played this role. RW4 stated that she did not see in the tallying centre any other person alluded to by the Petitioner by the names Ken Okaka or Joel Otieno Aluoch. Further, the tallying agents were not supposed to sign or countersign any alterations or verification. Their role was only to take notes.
71. As regards the Form 36, RW4 stated that the agents present at the tallying centre signed it and they were satisfied with the announced results.
72. Paul Onyango Ogara gave evidence as RW5. He was the Polling Clerk at Kaloleni Primary School Stream 5. According to him Daniel Nyakundi had lied about voting twice.
73. Agnes Okatch Aoko, RW6, was also a polling clerk in Kaloleni Primary School Stream 5. She said her work was to give ballot papers for the positions of President and Member of Parliament. She denied giving Daniel Nyakundi two ballot papers.
74. Hesbon Odoyo K'Ogolla gave evidence as RW7. He was the Presiding Officer at Makongeni Primary School, Stream 3. Shown page 46 of the Petitioner's bundle, he confirmed signing form 35 for that stream. He admitted an error in Part A of the form. It was amended as one rejected vote had not been taken into account. He signed the amendment in form 35 shown at page 83 of the Petitioner's bundle.
75. Kizito Mutula Odhiambo, RW8, was the Presiding officer at Morrison Primary School stream 4. Shown the Petitioner's Bundle page 25, he said he signed form 35 for that stream. At the back it was stamped "rejected". Shown page 140 of the Respondent's bundle, a similar form 35 was stamped "rejected" on both sides. He admitted he stamped the forms in error. He called it a "minimal error" which no one realised at the polling centre. The result was used at the tallying centre despite the stamp. He admitted overwriting on the total number of registered voters in Part A of the form. The similar form on page 26 of the Petition was not corrected.
76. Mary AkothOchola, RW9, was the Presiding Officer at St. Patrick's Primary School. She admitted changing Part A of form 35 on page 41 of her affidavit from 641 to read 639 total votes cast. She

countersigned the form. She said the form 35 contained in the Petitioner's Bundle (page 47) had not been verified. She verified her copy at the tallying centre.

77.RW10 was Geoffrey Kimani Maina, the Presiding Officer Makongeni Primary School Stream 1. Shown page 39 of the Petitioner's bundle, he identified it as form 35, which he signed. He said the form had not been verified. He had subsequently verified the form at the tallying centre.

## SUBMISSIONS

78.The parties' counsel filed their submissions and highlighted the same.

79.Mr. Miller submitted that there were three sets of election results: the Declaration, the Summary Form 36 and the 1<sup>st</sup> Respondent's exhibit "BKM3". The Declaration showed total votes as 87,083; the Summary Form 36 showed the total votes as 87,618, a difference of 535 votes which were unexplained. Further, Summary form 36 of the Returning Officer which was used for announcing the results showed the margin between the Petitioner and 1<sup>st</sup>Respondent to be 1,565; yet the summary form 36 presented to 1<sup>st</sup> Respondent showed a margin of 1,784.

80.Counsel summarised the Petitioner's main complaints arising from the petition and the evidence adduced as follows:

- a. There were a number of polling stations which had discrepancies between Form 35s given to his agents, the form 35s produced by the 2<sup>nd</sup>Respondent and results tallied in the summary form 36.
- b. There were multiple alterations and/or fraudulent entries which raises issues of the veracity and authenticity of the votes cast.
- c. The Presiding Officer did not make the required statutory comments to explain the absence of agents or their reasons for not signing the forms in various polling stations.
- d. The Returning Officer did not make the required statutory comments to explain the absence of agents, or their reasons for not signing both the Declaration form 36 and Summary form 36.
- e. Various of the petitioner's agents who signed form 35s at the polling centres were not there after furnished with duly signed form 35s as required.
- f. In some stations the 1<sup>st</sup>Respondent's votes were inflated or were indicated with overwriting that was not countersigned.
- g. IEBC officials committed an electoral offence at Kaloleni Primary School where the said officials connived to the commission of double voting by Mr. Daniel Nyakundi.

81.Counsel further submitted that the results at Dr. Krapf Primary School ought to have been automatically invalidated under **Regulation 83 (1) (a)** Elections Regulations as the total votes cast were 4,651 whereas registered voters were 4,557.

82.On authenticity of forms 35 annexed to the Petitioner's supporting affidavit, counsel pointed out that the evidence showed that not all the Petitioner's agents were furnished with form 35. In addition all forms 35 produced before the court were issued by IEBC.

83.Counsel relied on several authorities. The case of **Justus Mungumbu Omiti v. Walter Enock Nyambati Osebi & 20 Others, EP. 1.2008**, propounded that all issues raised in a petition and those which crop up during the hearing whether pleaded or not, and which adversely affect the final result, and the will of the voters, must come under spotlight, scrutiny and interrogation.

84. With regard to nullification of the elections, he relied on the dicta referred to in **Philip Mukwe Wasike v. James Lusweti Mukwe & 20 Others [2013] eKLR**. It was stated there that where there have been irregularities, these should be exposed to the view of the general public through the returning officer and through the candidates and their agents involved in the recounts.
85. I note however, that the **Philip Mukwe Wasike** (*supra*) citation is a reference to an application for scrutiny which was allowed. In this case no application was made by the Petitioner or initiated by the court.
86. Mr. Kibe for the 1<sup>st</sup> Respondent also filed submissions. Counsel asserted that the declaration of the winner on 6<sup>th</sup> March, 2013 was done before completion of the verification exercise to fill in form 36. After verification the results were altered. The votes of virtually all the candidates increased.
87. Counsel pointed out that the Petitioner did not testify that he got more votes, or less votes, at any of the 23 polling stations amongst those indicated in the verified results. Further, counsel submitted that the 2<sup>nd</sup> Respondent annexed all forms 35 for all 137 polling stations. He submitted that the evidence demonstrated that no alteration of form 35 changed the votes received by any of the eight candidates. Thus, alterations in Part A of form 35 did not affect the outcome of elections, unless Part B was also shown to have been altered.
88. Counsel submitted that there was no proof of fraud or collusion, and that there was no basis for invalidating the election for Makadara Constituency as proved. He referred to ***section 83*** of the Elections Act for the principle that no election can be declared void for non-compliance with the law unless the non-compliance affected the result of the election. In support of this proposition, he cited **Mbogori v. Kangethe & Another [2008] 1 KLR (EP)168**; **Mnene v. Kubo & Another [2008] 1 KLR (EP) 336** and **Joseph & 4 Others v. Ogutu & Another [2008] 1 KLR (EP)73**.
89. Finally, counsel stated what he thought to be the immutable principles in election petitions. These were viz: burden of proof; standard of proof; effect of miniscule infractions; and level of satisfaction for holding an election void. Counsel annexed a list of four authorities and various statutes and subsidiary legislation, which I have considered.
90. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondent submissions also dealt with the burden and standard of proof citing several authorities which I have considered.
91. Counsel engaged in a detailed analysis showing how, according to the evidence, an error of 535 votes was identified and how they were re-distributed among candidates upon verification. Further, he pointed out how the 748 vote difference of alleged “unaccounted for” votes was a result of data entry errors during transposition of figures from form 35s to form 36.

## **ANALYSIS & CONCLUSIONS**

93. I have carefully considered the petition and the responses thereto, the oral and documentary evidence availed and the parties submissions. My findings and conclusions are as hereunder.
94. The general principles which I think must guide the court in determination of election petitions are set out in my judgment in **Ferdinand Ndungu Waititu vs. IEBC & 8 Others, [2013] eKLR**. For the sake of completeness, I will set them out here.
95. *Principle 1*: is on the sovereignty of the will of the people. Under this principle the court seeks to determine whether the election result is a reflection of the intent and will of the voters. See **Richard Kalembe Ndile vs. Patrick Musimba Musau & Others, Petition No. 7/2013 [2013] eKLR**.
96. *Principle 2*: Election Petitions are in their own category of litigation, neither controlled by the

Civil Procedure Act and Rules or the Criminal Procedure Rules. See **Benjamin Ogunyo Andama vs. Benjamin Andola Andaji, Civil Application No. 24 of 2013 (UR)**. As such they must be proved by cogent, credible and consistent evidence (**Joho vs. Nyange & Another (2008) 3 KLR EP. 500**).

97.*Principle 3*: A Petitioner is bound by his pleadings, **Mohammed Mohamed Sirat vs. Ali Hassan Abdirahman & 2 Others, Nairobi Election Petition No. 15. 2008 [2010] eKLR**; see also **T. H. Musthaffa vs. MP Varghese, AIR 2000 SC 153** where the Supreme Court of India held in an election petition that if pleadings did not contain the necessary foundation for raising an appropriate issue, the same cannot go to trial. Thus, any amount of evidence in that regard, however excellent the same may be, will be futile.

98.*Principle 4*: Irregularities and non compliance with the electoral law will not necessarily lead to invalidity of an election unless they affect the result of the election, or constitutional principles were breached. See **section 83** Elections Act. See also **Morgan v. Simpson (1974) 3 ALL ER 722** at 728 where Denning LJ stated:

***“I suggest that the law can be stated in these prepositions:***

***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 was affected or not. That is shown by Hackney case (1874) 2 O’M & H 77, where 2 out of 19 polling stations were closed all day and 5,000 voters were unable to vote.***

***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. That is shown by the Ishington case (1901) 17 TLR 210 where 14 ballot papers were issued after 8.00 pm.***

***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 a mistake at the polls – and it did affect the result – then the election is vitiated. That is shown by Gunn vs. Sharpe (1974) 2 All ER 1058 where the mistake in not stamping 102 ballot papers did affect the result.”***

99.*Principle 5*: The burden of proof lies on the Petitioner (**Mbowe vs. Eliufoo (1967) EA 240**). The standard of proof is higher than a balance of probabilities and where there are allegations of fraud or election offences, a very high degree of proof is required. See **Joho v. Nyange & Another (2008) 3 KLR (EP) 500**; See also **Bernard Shinali Masaka vs. Boni Khalwale & 2 Others [2011] eKLR** where Lenaola, J said:

***“I agree with the proposition grounded on the decision in Mbowe vs Eliufoo [1967] E.A. 240 that any allegations made in an election petition have to be proved to the “satisfaction of the court”. Like Rawal, J. in Onalo, I am certain that the standard of proof, save in matters where electoral offences are alleged, cannot be generally beyond reasonable doubt, but because of the quasi – criminal nature of some election petitions, it is almost certainly on a higher degree than merely on a balance of probabilities, the latter being the standard in civil cases.”***

100. I will now address the Petitioner’s complaints as set out in the petition.

### **Whether tallying and counting of votes was marred by irregularities**

101. It is necessary first to clarify here that none of the evidence by the Petitioner actually impugned the counting of votes. Counting was done at the polling stations. There is no evidence that the

Petitioner’s polling agents raised any issues concerning the actual counting. For instance, there was no evidence of any request for re-counting of votes pursuant to **Regulation 80**, or any complaint thereon. Indeed the Petitioner’s own evidence was that he was not told of any negative reports during Election day, and that the real problem was at tallying. This is reflected in the evidence of the Petitioner on cross examination by Mr. Onsando, where he said:

***“I don’t fully understand what goes on in the tallying centre. There are agents there. My big concern is the differences in Part A” (see Pg 30 Record)***

102.As earlier stated, the Petitioner alleged that at the time of tallying the forms 36 read together with forms 35 had discrepancies. These included what the Petitioner called “unaccounted for” votes which deflated his votes. The evidence of the Petitioner on this allegation was based on two premises: First, that there were differences in the final summaries of form 36 exhibited at “GAO2”, “GAO3”, and “BMK3”. Secondly, that there were numerous alterations to Form 35 which put the validity of the whole electoral exercise into question. Petitioner identified this problem in respect of fifteen stations.

103.It is not disputed that the alterations on Form 35 on which evidence was given were in Part A of those forms. I have carefully scrutinised each of the forms 35. There were indeed many alterations. These alterations relate to addition and arithmetic errors regarding Part A of the form. I say so because Part A of form 35 concerns “totals”. That is: total number of registered voters; total number of spoilt votes; total number of votes cast, total number of rejected votes, total number of disputed votes; total number of rejected objected to votes and total number of valid votes cast for the polling station. These are not primal figures that have any direct bearing on the number of votes garnered by each of the competing candidates. They characterise the context surrounding the primary numbers of votes garnered by the candidates.

104.The evidence on record is that, save for one case, no alteration was made to Part B of any of the form 35s. That part is the sacrosanct part of the form wherein a candidate’s result is recorded. I took the trouble, therefore, to scrutinise the forms 35 complained of in the petition for the various streams. Below is a table (Table 1) containing a comparison of the Petitioner’s Form 35 and the Respondent’s form 35s. I have in particular compared the votes garnered by the Petitioner and the 1<sup>st</sup> Respondent in each of the polling stations complained of.

105.

**TABLE 1**

**COMPARISON OF FORM 35 DISCREPANCIES: PETITIONER’S & 1<sup>ST</sup> RESPONDENT’S VOTES**

NO. STATION	STREAM	PETITIONER’S BUNDLE (VALID VOTES)		RESPONDENT’S BUNDLE (VALID VOTES)		REMARKS
		KANGARA	ALADWA	KANGARA	ALADWA	
1 Dr. Krapf Primary Sch.	3	341	264	-	-	“GAO23” of Petitioner relates to <u>County Assembly</u> Election
	6	308	329	308	329	Part A altered and countersigned
2 St. Patricks Primary	4	392	161	392	161	Alteration in Part A – Petitioner’s document has

	Sch.						alterations in Part B and Part A is incomplete. Part A In Respondent's document is corrected and countersigned.
		5	426	169	426	169	Respondent's document Part A amended and countersigned.
3	St. Michael's Primary Sch.	4	366	209	366	209	No alterations on either form
		5	359	208	359	208	No alterations on either form
4	Bahati Primary Sch.	2	387	038	387	138	Petitioner's document in <b>Part B</b> does not add up to 558 valid votes cast, disfavouing Petitioner.  Respondent's document amended in Part A
5	St. Anne's Girls Primary Sch.	2	286	272	286	272	Respondent's document has alterations in Part A duly countersigned
6	Star of Hope Primary Sch.	4	353	246	<b>Overwritten unclear</b>	246	Alteration is only in Petitioner's document at Part B*
		7	355	212	355	212	Respondent's document Part A overwritten not countersigned
		11	287	265	287	265	Respondent's document Part A altered & countersigned

7	Bidii Primary Sch.	3	354	363	354	363	Respondent's document altered at Part A and countersigned
8.	Baraka Primary Sch.	2	271	263	271	263	Respondent's document altered at Part B* for candidates: Grace Omondi and Patrick Angasa  Alteration unacceptable* but no effect on disputants

		5	297	251	297	251	
9	St. Paul's Primary Sch.	1	171	362	171	362	Alterations in Respondent's document Part A countersigned. In Part B as to Anthony Komange changed from 1 to 2. But no effect on disputants.
		2	185	380	185	380	Respondent's document altered in Part A and countersigned
		7	210	333	210	333	Petitioner's document has no entries in Part A. Respondent's Document complete and unaltered. Part B in both forms tally.
		8	200	332	200	332	Both Petitioner's & Respondent's documents altered in Part A and countersigned
10	Makongeni Primary Sch.	1	113	338	113	338	Respondent's document altered in Part A and countersigned
		3	092	367	092	367	Respondent's document altered in Part A and countersigned
11	Joseph Apudo Primary Sch.	1	84	448	No form	No form	Petitioner did not attach form 35 for this Stream
		3	99	398	99	398	Petitioner has 2 forms 35 none of which is signed or stamped
		4	080	365	080	365	Respondent's form 35 altered in Part A and duly signed
12	St. John's Primary Sch.	1	120	324	120	324	Respondent's form 35 altered in Part A and duly signed. Petitioner's document is altered in Part B
13	Kololeni Primary Sch.	1	124	343	124	343	Respondent's form 35 altered in Part A and duly signed
14	Morrison Primary Sch.	4	510	106	510	106	Respondent's form for total number of registered voters, signed & stamped
		6	-	-	491	109	Petitioner attached a form 35 which had no serial number
15	Harambee Primary Sch.	3	274	241	274	241	Respondent's form 35 altered in Part A and countersigned and stamped

106. From the above summary, I noted that the votes garnered by each candidate were exactly the same in the Petitioner's bundle of forms 35 as compared to the Respondent's bundle. The only difference was this: firstly, in Bahati Primary School Stream 2, the Petitioner's bundle shows he got 38 votes whilst in the Respondent's bundle he got 138 votes. Secondly, at Star of Hope Primary School Stream 4, in the Petitioner's bundle, Part B in form 35 it is overwritten so that the figure of garnered votes for the 1<sup>st</sup> Respondent is not clear. It looks like 353 or 853. On the same sheet party agents have signed the declaration.

107. In my view, these differences or discrepancies have no overall effect on the result of the election. As such in accordance with **section 83** of the Elections Act, I am not satisfied that the

discrepancies are of insufficient significance to invoke a declaration of the election as void.

108. The complaint by the Petitioner was that the form 36 showed 4,651 votes cast, against 4,557 registered voters. I have perused the Principal Register of voters exhibited at pages 277 – 380 of Florence Kwamboka’s affidavit. The registered voters for each stream are indicated as follows: Stream 1 – 759; Stream 2 – 760; Stream 3 – 760; Stream 4 – 760; Stream 5 – 759 and Stream 6 – 759. These add up to 4,557 registered voters.

109. I have also perused Kwamboka’s exhibit at pages 5 – 15. These are forms 35 for all 6 streams at Dr. Krapf Primary School polling station. Streams 1 to 6 indicate 759, 760, 760, 760, 759 and 759 registered voters, respectively. These add up to 4,557 registered voters. The total votes cast for each stream are 684; 631; 649; 640; 660 and 711, respectively. I am therefore satisfied beyond any doubt, with the explanation given by the 2<sup>nd</sup> Respondent that the figure of 4,651 votes cast, indicated in form 36 summary, was entered in error. No tampering was shown in respect of valid votes cast in favour of each candidate, whose votes remained unaffected.

110. If it had been shown that in forms 35 there were votes in excess of the registered voters, that would have been sufficient to invalidate the results of that station. This would also very likely have been noted during counting at the polling station.

111. In light of the above analysis, I reject the Petitioner’s allegation that there were excess votes cast or that there were 653 unaccounted for votes at Dr. Krapf Primary School. There is also no evidence that the Petitioner’s votes were deflated there, or that the 1<sup>st</sup> Respondent’s were inflated.

### **The Role of Rachel Stanley vis a vis that of Ken Okaka**

112. This issue was not directly pleaded in the petition but arose of necessity from the central role played by Form 36 in this dispute. It is in paragraph 17 of the petitioner’s affidavit in support of his petition. There, he depones that Rachel Stanley had no authority to sign form 36 on his behalf or on behalf of his chief agent, Ken Okaka. As such, he says, form 36 which was used by the 2<sup>nd</sup> & 3<sup>rd</sup> Respondents to declare the parliamentary results is not authentic and should not be allowed to stand.

113. **Article 86** of the Constitution obliges the 3<sup>rd</sup> Respondent to conduct elections through a credible system. It should be an accountable and transparent system, in which results are announced promptly after they are openly and accurately collated. **Section 30** of the **Elections Act** then provides for one aspect of such system as follows:

***“2. A candidate nominated by a political party may appoint an agent of the candidate’s choice.”***

**Section 2** of the **Elections Act** defines an agent as a person duly appointed by a political party or independent candidate for an election. It includes a counting and tallying agent.

114. **Regulation 62** of the **Elections Regulations** bars a presiding officer from excluding an agent from the polling station. It provides as follows:

***“1. The presiding officer shall regulate the number of voters to be admitted to the polling station at the same time, and may exclude all other persons except –***

a. ....

b. ....

c. **Authorised agents**

**2. Notwithstanding sub-regulation (1), the presiding officer shall admit to the polling station not**

*more than one agent for each candidate or political party.*

**3.The absence of agents shall not invalidate the proceedings at a polling station”.**  
(underlining added)

115. Agents are the eyes and ears of a candidate at the polling stations and tallying centres. They ensure strict compliance with procedures. However, their absence cannot invalidate activities at such stations or centres. It is for candidates and their agents to ensure their presence at such centres and stations. In **Joho vs. Nyange & Another (2008) 3 eKLR (EP)**, Maraga, J (as he then was) observed:

***“I cannot myself think of a more important role of a candidate’s agent than to be present in the counting hall to ensure that the counting exercise is properly carried out and that all votes cast in favour of his principal are credited to him.”***

This role of an agent presupposes a certain level of confidence, ability to work together, and mutuality of effort and purpose.

116. *Against this background, what happened on the ground?* The Petitioner said he selected as his Chief agent Joel Otieno Aluoch. His party, ODM, on the other hand changed the agent, and appointed Ken Okaka as the Petitioner’s Chief agent. At the time of counting and tallying the results. Ken Okaka was nowhere to be seen. The Petitioner said Okaka was at a place called Jam Rescue, an entertainment spot. Okaka was seen again after the results were announced. He definitely appears not to have played his proper role as agent.

117. Enter Rachel Stanley. The Petitioner only knew this lady as his party’s presidential candidate’s agent. He had been briefly introduced to her before the election. He asserts in his affidavit, however, that she had no authority to sign form 36 on his behalf. Nonetheless, Ken Okaka was not at the tallying centre to do so, and Joel Otieno Aluoch, the Petitioner’s preferred confidant, was not selected as agent at all.

118. The Petitioner did not call either Ken Otieno Okaka or Joel Otieno Aluoch to give evidence. Ken Okaka, in particular, would have shed useful light on the circumstances under which Rachel Stanley signed form 36 at the tallying centre. Nor did the Petitioner call Rachel Stanley, his party colleague in ODM, to deny signing the form or acting on his behalf.

119. It is wholly probable and credible, then, that Rachel Stanley, admitted to be the agent of the Petitioner’s presidential candidate, would take on the role on behalf of the Petitioner. In the circumstances, I am unable to accept either that Rachel Stanley had no authority to sign on behalf of the Petitioner, or that the results in form 36 signed for by her were thereby void.

120. In any event, even the total absence of an agent at the tallying centre would not, in law, invalidate the results.

**Alterations to Part A of Form 35**

121. *What is to be made of the alterations to Part A of form 35?* Form 35 is required to be completed by the Presiding Officer of a polling station. This is done after the counting of votes is concluded, pursuant to **Regulation 78 (3)**. The Presiding Officer, candidates or agents are then required to sign the declaration in respect of the elections (**Regulation 79 (1)**). For National Assembly elections, the declaration is that contained in Form 35. It is at the bottom of the form and is numbered 6 in the form in the schedule to the Regulations, and number 8 in the IEBC form. The Presiding Officer is required to immediately announce the results at the polling station, before communicating them to the returning officer. Each candidate or agent is entitled to a copy of the declaration of the results (**Regulation 79 (2) (c)**).

122. The form once signed, signifies that the persons signing agree with the recorded results. The declaration states as follows:

***“We, the undersigned, being present when the results of the count were announced, do hereby declare that the results shown above are a true and accurate count of the ballots.”***

123. Almost all the Petitioner’s agents who testified said they signed the declaration. However, they also alleged that they signed the forms in blank, before the results were filled in it. I am not inclined to believe that the forms 35s were blank when the Petitioner’s agents signed them.

124. There are two reasons why I am not persuaded. First, the Petitioner’s witnesses all failed to state in their affidavits that very important fact of the blank documents. This makes their allegation appear like an afterthought. Secondly, almost all the Petitioner’s witnesses invariably made the following statement in the same words, in their affidavits:

***“That after the voting and tallying exercise at the polling station on 4<sup>th</sup> March 2013, the presiding officer at the station {named therein} issued me with a form 35 (Declaration of a Member to the National Assembly Election results at a polling station) for me and other candidates to sign. ...That I signed the back of the form which was given to me by the Presiding officer”.***

125. In any event, the law is clear that whether or not the declaration form is signed, the results therein are not invalidated. **Regulation 79 (7)** provides:

***“The absence of a candidate or an agent at the signing of a declaration under sub-regulation (2) shall not in itself invalidate the results announced.”***

Further, **Regulation 97 (1) and (2)** also provide that non attendance of an agent or candidate cannot invalidate proceedings. **Regulation 97 (2)** reads as follows:

***“The mere non-attendance of any candidate or agent at the time and place as contemplated under sub-regulation (1) shall not, if any act is otherwise lawfully done, invalidate the act.”***

126. This does not mean that an agent’s role is unnecessary. It does, however, mean that the transparency and credibility of an election is not dissipated by the non-engagement of candidates and agents where opportunity has been availed for their observation and participation.

127. In this case, I am unable to accept the suggestion that agents were given blank forms 35 in the presence of observers, which they willy-nilly signed, and that figures were subsequently inserted into the form. If the agents actually did sign blank forms, they have only themselves to blame. The law places an obligation on agents and candidates to engage positively in ensuring a credible process. If they fail to play their role, blame cannot be visited on the third Respondent.

### **Failure of 2<sup>nd</sup> Respondent to furnish Petitioners agents with form 35**

128. The Petitioner asserted in paragraph 11 of the petition that his agents were not furnished with forms 35. It is true that a number of the forms 35 which were exhibited by the Petitioner and his witnesses had gaps and were incomplete in one respect or another, particularly as to Part A of the form. As to Part B of the Form, they had similar information.

129. The Respondent’s witnesses who were presiding officers including RW6, 7, 8, 9 and 10 gave evidence that after counting of votes they made entries into form 35 which they signed and required the agents of all parties to sign. That, thereafter, they gave a copy of the signed forms to the agents who wished to obtain copies.

130. The Petitioner attached numerous such forms 35 to his petition. The main difference between them and the forms 35 presented by the Respondents was the alterations that were made to Part A. It was clearly explained by RW4, Florence Kwamboka, that those alterations were permitted at the time of verification. She said that the verification was done at the tallying centre. There was a registration desk where the officer manning it checked the register of voters for each polling station and the compilation of figures in Part A. If a discrepancy was noticed, she was immediately notified and did the computation. If the problem was a real one, she called the Presiding Officer, with whom she discussed the problem in the presence of tallying agents. Once a solution was found, they moved ahead in agreement to make the necessary change in Part A. The Presiding Officer then countersigned and stamped the alteration, and thereafter handed the form to tallying agent to confirm.

131. Florence Kwamboka testified that **Regulations 83 – 87** allow the Returning Officer to make changes to Part A of form 35 during verification. **Regulation 83 (1)** provides for tallying in the presence of candidates, agents and observers. Under **Regulation 83 (1) (a)** the Returning officer is not permitted to recount the ballots that were not in dispute. He is however allowed to:

***“tally the results from the polling stations in respect of each candidate, without recounting the ballots that were not in dispute.”***

The Returning Officer is then required to announce the results and complete form 35.

132. **Regulation 83 (1) (c)** permits the Returning Officer to declare the total number of registered voters, the votes cast for each candidate, the number of rejected votes for each candidate, the aggregate number of votes cast, and aggregate number of rejected votes. It must be remembered that the results submitted to the Returning Officer by the Presiding Officer under **Regulation 82 (2)** are provisional and unconfirmed. **Regulation 82 (2)** provides:

***“The results submitted under sub-sub-regulation (1) shall be provisional and subject to confirmation after the procedure described in Regulation 73.”***

**Regulation 83 (3)** then provides:

***“The decisions of the Returning Officer on the validity or otherwise of a ballot paper or vote under this regulation shall be final except in an election petition.”***

133. My reading of the above provisions is as follows: The Returning Officer has a statutory function pursuant to which he or she can interfere with Form 35, after it is received from the Presiding Officer. I am therefore satisfied that the changes he or she can make on it are those that lead to form 35 being conclusive without recounting the undisputed ballots included in Part B of the form.

134. Accordingly, I can understand the premise under which the Petitioner’s forms 35 may have been altered in Part A, but not in Part B. I can also understand, then, that if a tallying agent does not hand to the Returning Officer the form 35 given to him by the Presiding Officer for conformance, such form will not be amended to reflect the changes in Part A that the Returning Officer has properly made in the circumstances. I am therefore unable to find that the Petitioner’s agents were not supplied with form 35 duly signed. I therefore find that alteration of Form 35 at Part A by the Returning Officer does not amount to an irregularity, unless done in bad faith, or outside the law.

### **Whether the Respondents through their officials denied voters their constitutional right to vote**

135. This complaint was contained in paragraph 12 of the Petition. Alex Alumada Kalonye, PW3, gave evidence that although he was registered at Kaloleni Primary School and had previously confirmed his registration status, he was not allowed to vote. He was told his name was not on the Register. The same fate befell Felix Siema Tenya, PW2, who deponed that he was registered at Makongeni Primary School, but was turned away on election day.

136. In his cross examination, Felix Tenya said he was registered at Joseph Apudo Primary School. He admitted that in his affidavit he declared his registration to be at Makongeni Primary School. However, that he first went to Joseph Apudo where he was turned away, despite the officials looking at his card, which he exhibited as “FSA1”.
137. I have seen the photocopy of the IEBC acknowledgment slip “FSA 1” exhibited. It shows his registration centre as Joseph Apudo Primary School. When he was shown his name in the Principal Register of Voters for Joseph Apudo Primary School at No. 117 on page 486 of Florence Kwamboka’s affidavit, he had no explanation for his prevarication. I do not believe him. His evidence is inconsistent and I am not persuaded that he was denied the right to vote.
138. With regard to Alex Alumada, his exhibited IEBC Acknowledgment slip shows he was registered at Kaloleni Primary School. When cross-examined he maintained his story. When shown pages 381 – 482 of Florence Kwamboka’s affidavit, being the Principal Register of voters for Kaloleni Primary School, his name was found at page 385 No. 169. The identity card numbers match. There is however, nothing to explain his assertion that his name could not be found. Equally, I am not persuaded that he was turned down at the Kaloleni Primary School.
139. In the premises, and on balance, I am unable to find that either PW2 or PW3 were turned down at the polling centres.

### **Issuance by the Respondents of more than one ballot paper to some voters in several polling stations**

140. The claim herein was made in paragraph 14 of the Petition. The evidence adduced by the Petitioner was through PW1, Daniel Nyakundi. This witness admitted in both his affidavit, in cross-examination and re-examination that he voted twice, and was paid two hundred shillings for his trouble. On his own admission, the court ordered that he be charged. This was subsequently done in the magistrate’s court. It was reported through counsel at bar that the arrest was carried out and he has been incarcerated for two years on his own plea of guilt.
141. In his submissions, the Petitioner said that the offence by Nyakundi implicates the 2<sup>nd</sup> Respondent as complicit. That there was an attempt to aid and abet the crime; and that **section 71** of the Elections Act on aiding and abetting was contravened.
142. This issue was partly dealt with in my earlier Ruling of 6<sup>th</sup> June, 2013. There, I held that since the Respondent’s officers who were serving at Kaloleni Primary School Stream 5 had denied the offence, the admission by Mr. Nyakundi was insufficient to prove an offence. Accordingly, I ordered that such officers should record a statement with the police and investigations be carried out with the aim of identifying the culprit officer or officers. I still hold the same position and shall make a report herein under **section 87** of the Elections Act.

### **SUMMARY**

143. All the issues raised in the petition having been addressed herein, I am now unable to answer the issues drawn by the parties for determination by the court.
144. Issue No 1: **Whether the elections were conducted in accordance with the law.** The answer is, yes. The irregularities and discrepancies on which evidence was adduced are minor. They related almost entirely to explicable variances and inconsistencies in form 36 and allowable alterations to forms 35
145. Issue No 2: **Whether the 1<sup>st</sup> Respondent was validly elected.** The answer is, yes. From the evidence, the election of Benson Mutura Kangara reflected the will of the people.
146. Issue No 3: **Whether the elections for the Member of Parliament for Makadara Constituency should be nullified.** The answer is, no. There was no cogent evidence of any fundamental non-compliance necessitating a declaration of the election as void.
147. Issue No 4: **Which party should bear the costs of this Petition?** This is dealt with in the

following paragraphs.

## DISPOSITION

148. In light of the findings and conclusions I have arrived at, I hereby dismiss the petition with costs to the Respondents. The Petitioner's prayers in the petition are hereby declined.

149. I hereby declare, pursuant to **Section 75(3)** of the Elections Act, that Benson Mutura Kangara, whose election was questioned herein, was validly elected as Member of the National Assembly for Makadara Constituency in Nairobi City County.

## COSTS

150. In accordance to **Section 84** of the Elections Act, costs follow the cause. Accordingly, the Petitioner shall pay costs to all the Respondents.

151. Pursuant to **Rule 36(1) (a)** of the Election Petition Rules, I shall cap the costs to be paid by the Petitioner to the Respondents jointly so as not to exceed Kshs.2,700,000. The said costs shall, if not agreed, be taxed by the Registrar of the Court under separate bills pursuant to **Rule 37** of the Rules.

152. I also direct that part of the costs awarded herein shall be paid to the Respondents, *pro rata* upon taxation, from the security deposited in court by the Petitioner.

## CERTIFICATE AS TO VALIDITY OF ELECTION

153. I hereby direct, pursuant to **Section 86(1)** of the Elections Act, that a certificate of this determination do issue to the Independent Electoral and Boundaries Commission and to the Speaker of the National Assembly

## REPORT ON ELECTION OFFENCES

154. Pursuant to **Section 87(1)** of the **Elections Act**, I make the following report as to election offences committed in connection with the election:

- a. The Petitioner's witness PW 2, Daniel Nyakundi, admitted that he committed the offence of voting more than once at Kaloleni Primary School polling centre Stream 5, contrary to **Section 58(m)** of the **Elections Act, 2011**. Upon his said admission, this Court on 6<sup>th</sup> June, 2013, ordered that he be arrested and charged. The Court's orders were effected, and he was charged in the subordinate court.
- b. In addition, this Court directed that all officers of the 3<sup>rd</sup> Respondent who were serving at Kaloleni Primary School polling centre, Streams 2 and 5, be forthwith summoned by the Police, that they should record statements in connection with the aforesaid offence, and that investigations be conducted thereon.
- c. Accordingly, it is hereby ordered that the information herein, and the orders of this Court made on 6<sup>th</sup> and 7<sup>th</sup> June, 2013, be sent to the Director of Public Prosecutions, the Speaker of the National Assembly and the Independent Electoral and Boundaries Commission for further action.

155. In conclusion, I wish to thank all counsel acting in this matter for their able representations; the court staff and my staff for their expeditious and meticulous assistance towards determination of this petition.

**Orders accordingly.**

**DATED, SIGNED and DELIVERED at NAIROBI this 27<sup>th</sup> day of September, 2013**

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**R.M. MWONGO**

**PRINCIPAL JUDGE**

**Judgment read in open court in the presence of:**

**1. Mr. Miller, Mr. Wena and Mrs. McAsila for the Petitioner**

**2. Mr. Kibe Mungai for the 1<sup>st</sup> Respondent**

**3.1 Mr. Tiego for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents**