



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
ELECTION PETITION NO.1 OF 2013
IN THE MATTER OF THE ELECTIONS ACT, 2011

BETWEEN

JARED ODOYO OKELLOPETITIONER

AND

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION (IEBC).....1ST RESPONDENT

THE RETURNING OFFICER

NYANDO CONSTITUENCY (DAVID MBUI)2ND RESPONDENT

FREDRICK OTIENO OUTA.....3RD RESPONDENT

ODM PARTY.....4TH RESPONDENT

J U D G M E N T

During the general elections held in Kenya on 4/3/13, the electors in Nyando Constituency of Kisumu County voted and at the end of the exercise the 3rd respondent was declared the winner with 24,558 votes. His main challenger was the petitioner who was declared to have received 23,815 votes. The difference was 713 votes. The other contestants were Martin Omulo and Nicholas Awando Otieno who got 56 votes and 74 votes, respectively. The election was conducted by the 1st respondent whose returning officer was the 2nd respondent. On 2/4/13 the petitioner filed this petition to challenge the validity of the election. This was on various grounds, but mainly that the 3rd respondent was not validly nominated to participate in the election; the failure of electronic equipment substantially affected the election; and that the respondents were guilty of election irregularities, malpractices and offences which had substantially compromised the integrity of the election. The respondents filed responses to deny these allegations. They contended that the election was conducted in accordance with the principles in the Constitution and the electoral laws; was free and fair; and its results were accurate and verifiable.

It should be pointed out that the 3rd respondent was elected on Orange Democratic Movement (ODM) ticket and the petitioner ran on Ford Kenya ticket. The petitioner had been a member of the ODM party until 18/1/13 when he defected to Ford Kenya party.

This petition was filed through **Bruce Odeny & Co., Advocates** whose **Mr. Odeny** prosecuted the same. He did this together with **Mr. Pascal Odhiambo** who bolted towards the tail end of the

proceedings when the respondents discovered, and filed an application to say, that he was not a holder of a practising certificate. The 1st and 2nd respondents were represented by **Mr. Mukele**, the 3rd respondent by **Mr. P. J. Otieno** and the 4th respondent by **Mr. Ochieng Opiyo**.

During the pre-trial conference held on 10/5/13, counsel agreed that the petition be determined based on the following issues:

- a. whether or not the petitioner could contest the validity of the nomination process culminating in the election of the 3rd respondent;
 - b. whether there was failure of the Biometric Voter Register (BVR), Electronic Voter Identification Device (EVID) and Electronic Results Transmission System (ERTS), and whether the failure substantially compromised the integrity of said election;
 - c. whether there were election malpractices and offences committed during the election and whether such compromised the integrity of the election;
 - d. whether the 3rd respondent was validly elected in accordance with the Constitution and electoral laws;
- (e) whether the petitioner was the one who validly won the election; and
- (f) who was to bear the costs of the petition?

On the question of nomination, there was no dispute that both the petitioner and the 3rd respondent were members of the ODM party who, along with other candidates, were seeking the party ticket to contest the parliamentary seat. The party nominations were called for 17/1/13. When the day came the candidates and the party members waited for nomination ballot papers which were not brought. The dateline for party nominations was midnight of 17/1/13. When by 18/1/13 at 1 p.m. the nomination exercise had not been carried out the petitioner defected to Ford Kenya party which gave him a ticket. The 3rd respondent testified that when ODM did not carry out nominations he left at about 1 a.m. on 18/1/13 to Nairobi to plead his case following which his party's National Executive Committee gave him a direct nomination. According to him ODM had no party nominations. However, the petitioner's evidence was that ODM conducted party nominations between 19/1/13 and 20/1/13 which was after the 1st respondent's dateline and were therefore null and void. If the 3rd respondent got direct nomination, the petitioner stated, that was irregular as it went against the ODM party's Constitution. Whatever is the case, there is no dispute that on 21/1/13 the petitioner challenged the 3rd respondent's nomination at the 1st respondent's Dispute Resolution Committee. The Committee heard the dispute between 25/1/13 and 27/1/13 and dismissed the challenge. The Committee found no merit in the challenge because the petitioner had by the time moved to a new party. In paragraph 18 of the affidavit in support of the petition, the petitioner deposed as follows:

“18. THAT I know as of personal knowledge that the 1st Respondent breached the law and the Constitution permitting the 3rd Respondent to vie for the Nyando Parliamentary seat and therefore this honourable court should review the decision of the 1st Respondent on my complaint and declare that the election of the 3rd Respondent is null and void *ab initio*.”

The response by the respondents on the point can be summarised by what **Joshua Kawino** of the ODM Party swore in paragraph 12 of his affidavit dated 30/4/13 as follows:

“12. THAT I am advised by the 4th Respondent's advocates on record which advise I verily believe to be the true that Article 88(4)(e) of the Constitution of Kenya 2010 and Section 74(1) of the Elections Act No.24 of 2011 gives the 1st Respondent exclusive jurisdiction to settle election disputes arising from nominations but excluding petitions which are preserve of the Court and hence the Petitioner is stopped from raising issues related to the nomination process as his complaint filed with the IEBC Dispute Committee was dismissed.”

In my view the response provided a sufficient answer to the petitioner's complaint on the validity of the 3rd respondent's nomination to contest the parliamentary seat on 4/3/13. Both Article 88(4)(e) of the

Constitution and section 74(1) of the Elections Act provide that:

“the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results”

are the responsibility of the Commission (1st respondent). In both **REPUBLIC .V. THE NATIONAL ALLIANCE PARTY OF KENYA AND ANOTHER EX-PARTE DR. BILLY ELIAS NYONGE [2012] eKLR** and **DIANA KETHI KILONZO AND ANOTHER .V. IEBC AND OTHERS [2013] eKLR**, the High Court discussed the meaning to be attached to the Article and the section and concluded that it is only the Commission that has exclusive mandate to resolve any dispute in relation to the electoral nomination exercise; that it is only after that IEBC mechanism has been exhausted that a party may go to the High Court to challenge the process; and such challenge would be through invoking the supervisory jurisdiction of the Court under Article 165(6) of the Constitution.

In the instant case, the Commission's Dispute Resolution Committee heard the petitioner's challenge and dismissed it. The Committee was established under section 109 of the Act and the Rules of Procedure of Settlement of Disputes made thereunder and published vide Legal Notice No.139 of 3rd December 2012. The petitioner did not move to the High Court to challenge the determination by the Committee. This court is an election court which is not sitting to supervise the decision of the Committee. It is sitting to determine the validity of the election that was conducted on 4/3/13. The petitioner lost the opportunity to challenge the decision and cannot be heard to raise the issue here. In short, he cannot contest the validity of the nomination in this petition.

The next issue relates to the alleged failure of BVR, EVID and ERTS systems and the effect of such failure. It is not in dispute that whereas BVR was successfully used to register voters, EVID and ERTS failed on the election day and this forced the elections officials to use manual register to identify voters and to use manual system to transmit the results. The failure was countrywide and affected all elections, all electors and all candidates. In the petitioner's affidavit in support of the petition, he alleged that the failure of the electronic equipment led to the following:

- a. inability to properly identify and/or verify the voters who turned up;
- b. it enabled absent and/or dead voters to “vote” and such “votes” were used to stuff ballot boxes to the disadvantage of the petitioner;
- c. it delayed voting and results transmission;
- d. it led to general fraud and manipulation of the votes; and
- e. it led to an election that was not free and fair and which offended both the Constitution and the electoral law.

The response by the 1st and 2nd respondents was that although the electronic systems would have, had they worked, enhanced the efficiency and the transparency of the process, the elections were essentially manual and worked. They stated that they had in place voter registers and each voter was identified through them by producing his identification card. After the voting and counting of votes, the results were entered into Forms 35 and later aggregated into Forms 36. At every stage of the process, each candidate was allowed to have an agent who had the right to complain whenever something went wrong. The agents were required to witness the counting and tallying of results, and to eventually sign Forms 35 and 36. The Forms were subsequently manually taken by the presiding officer and/or returning officer to the constituency tallying centre and/or the national tallying centre. These are the words of the 2nd respondent in paragraph 44 of his affidavit relating to the technologies deployed by the 1st respondent:

“44. THAT in further response I wish to state that the design of the electoral system, the process of voting, counting, transmission, tallying and announcement of election results as contemplated under the Constitution, the Elections Act and attendant regulations is primarily a manual system of voting which was configured with various safeguards to preserve the integrity of the process. The use of the various electronic devices and Information Technology was an additional instrument to make the electoral process efficient and enhance transparency but not a substitution of the legally stipulated manual electoral systems”

Mr. Mukele referred the court to the Supreme Court decision

in Presidential Election Petition of **RAILA ODINGA .V. IEBC AND OTHERS, Petition No.5 of 2013** in which it was acknowledged that there was failure of technology in the general election conducted on 4/3/13. The Court observed that when EVID and the Results Transmission Systems (RTS) stalled and crashed it was within the Commission's discretion to revert to the "normal electoral system" (manual system). It was held that the use of the manual system, in place of the promised technology, did not substantially compromise the integrity of the election.

The general election was actually six election in one. They included the presidential elections in **Raila Odinga's** case and the parliamentary election, which included the election in dispute. It follows that the decision of the Supreme Court on the matter binds this court, unless the petitioner can demonstrate any failure that was peculiar to the election in question, or peculiar to him. He did not demonstrate these. Certainly, the election would have been more efficient, transparent and accountable had the promised information technology been successfully employed. But this is a story for another day.

I will deal with the rest of the issues, but before then let me address the Constitutional and statutory principles that guide the conduct of elections in Kenya. Under Article 1 of the Constitution all sovereign power belongs to the people of Kenya. The people may exercise that sovereign power either directly or through their democratically elected representatives. It follows that, through elections the sovereign will of the people is expressed. Articles 38 and 81 to 87 are designed to enable the people to make political choices in an environment that is free, fair, efficient and transparent. Such environment is intended to be free of violence, intimidation, improper influence or corruption. A free and fair election means that electors have a safe chance to elect a candidate of their choice, that all candidates who want to run have a safe chance to do so and all voters have a real chance to have their votes counted and a real chance that their candidate, if elected, will be allowed to serve (**RTD COL. DR. KIZZA BESIGYE .V. ELECTORAL COMMISSION AND YOWERI KAGUTA MUSEVENI, Presidential Election Petition No.1 of 2006** at Kampala).

The Commission is the independent body that conducts elections and referenda It is insulated from any interference or influence so that it can deliver credible, accurate and verifiable results.

The overriding concern of the court in election dispute resolution is to ascertain the will of electors as expressed in the vote and to give effect to it. The sanctity of the will of the people as expressed in the vote is so important that section 83 of the Elections Act provides as follows:

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

What this means is that, it is not enough for a petitioner in an election dispute to prove that the election had irregularities, malpractices and transgressions. He has to show that such irregularities, malpractices and transgressions were of such magnitude and intensity that they substantially and materially affected the result of the election (**RICHARD KALEMBE NDILE AND ANOTHER .V. DR. PATRICK MUSIMBA MWEU AND OTHERS, Election Petitions Nos.1 and 7 of 2013** at Machakos). He has to show that the election was so perverted that one cannot say that it was conducted in accordance with the principles laid down in the Constitution and the Elections Act. This is what Lord Denning in **MORGAN AND OTHERS .V. SIMPSON AND ANOTHER [1974] 3 All ER 722, 728** stated regarding what the court dealing with an election petition should be looking for:

“(1). If the election was conducted so badly that it was not substantially in accordance with the laws as to elections the election is vitiated, irrespective of whether the result is affected or not.....

(2) If the election is so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by breach of the rules or a mistake at the polls.....

(3) But, even though the election was conducted substantially in accordance with the law as to elections, nonetheless, if there was a breach of the rules or a mistake at the polls and it did affect the result, then the result is vitiated.”

The court will also bear in mind what was said in **JOHN FITCH .V. TOM STEPHENSON AND 3 OTHERS QBD [2008] EWHC 501** as follows:

“The decided cases, including those which Lord Denning considered in MORGAN .VS. SIMPSON, established that the courts will strive to preserve an election as being in accordance with the law, even where there have significant breaches of official duties and election rules, providing the results of the election was unaffected by those breaches.....

.....

This is because where possible, the courts seek to give effect to the will of the electorate.” (BENARD SHINALI MASAKA .V. BONI KHALWALE AND 2 OTHERS [2011] eKLR).

Lastly, whereas in an election numbers are important, the circumstances leading to the numbers are equally important. At the conclusion of the election one must look at the process leading to the win and be able to say that there existed favourable circumstances that gave each candidate a fair chance to campaign, and that the electors were given a fair chance to elect a candidate of their choice. This is what a free and fair election in a democratic society would mean (**MANSON NYAMWEYA .V. JAMES MAGARA AND 2 OTHERS [2009] eKLR**).

There is the usual presumption that every election has been conducted in accordance with the Constitution and the law. Such presumption can only be rebutted by establishing that the election was not so conducted. The burden is placed on a petitioner who is seeking that the election be invalidated. He has to prove every allegation of irregularities, malpractices and transgressions that is pleaded in the petition. He has to demonstrate how such irregularities, malpractices and transgressions materially affected the result.

When dealing with the standard of proof that is required, the court has to bear in mind that an election petition is neither a civil suit nor a criminal case. It is a peculiar kind of litigation. All the time, a court should consider that an election has been held and a result rendered. When such a result is invalidated the electors have to mobilise once again to participate in an exercise that is politically disruptive and financially and socially expensive. This is why it is now accepted that the standard of proof is higher than proof on balance of probabilities but lower than proof beyond all reasonable doubt (**JOHN .V. NYANGE AND ANOTHER [2008] 3 KLR (EP) 500**). Where there is that allegation that an election offence was committed, the standard of proof is higher. The court has to be satisfied that the evidence called to prove the allegation is cogent, certain and compelling (**Halsbury Laws of England, 4th Edition, Volume 15, at page 695**).

Bearing in mind issues (c) and (d) of the issues for determination, I will deal with what allegedly happened during the campaigns before dealing with what happened during voting, counting, tallying and declaration of results.

Regarding what happened during the campaigns, the petitioner had two complaints as follows:

- a. that although FORD KENYA was a member of the CORD Coalition, there was orchestrated campaign to vote “six pieces” in an area where the 4th respondent enjoyed massive following; such campaign meant that all the seats in the election go to ODM; that this kind of campaign disadvantaged the petitioner and his party; and
- b. that the 3rd respondent and his agents used public resources (to wit, Constituency Development Fund (CDF) to campaign and to bribe and unduly influence the electorate to vote for him.

The court was not told what campaign agreement there was among the coalition parties in CORD.

There was no evidence, for instance, that now that both ODM and FORD Kenya had each a candidate in Nyando Constituency parliamentary election a candidate should not campaign for its party candidates in the other five elections. Was the coalition arrangement only meant to get the Presidency?

In paragraph 44 of the petitioner's further affidavit sworn on 24/5/13 it was deposed as follows:

“44. THAT the fact that the former prime minister of this country Honourable Raila Odinga campaigned for the 3rd Respondent in the Nyando Constituency and Kisumu County and given his political stature in Luo Nyanza I know that the prime minister exerted undue and/or improper influence on the voters to vote for the 3rd Respondent”

The issues raised in the paragraph can be easily dealt with as follows. When the petitioner defected from ODM to FORD Kenya he knew he was going to run against a party whose leader had a massive political influence in the constituency. He knew that whoever was going to get the ODM ticket was going to be supported and campaigned for by the party leader who was also the Prime Minister. The party leader was entitled to come to the constituency and urge the electorate to vote only the candidate of his party. That was the “real politik” that the petitioner was going to bear with. Given the numbers at the conclusion of the election, one can say that the petitioner stood his ground very well. He was a worthy competitor given the ODM onslaught. Otherwise, I find no merit in his complaint about the ODM campaign.

The crucial question, therefore, is the alleged use of CDF money to sway the election in favour of the 3rd respondent. There is no dispute that following the 2007 general elections, the 3rd respondent was elected as the member of parliament for Nyando constituency. By virtue of that position he became the patron of CDF. The CDF Committees had Stanley Omega (DW8) as its Chairman. The Committee officials were nominated to serve on the Committee by the 3rd respondent and formally appointed by the CDF National Management Board. Following the dissolution of 2007 parliament on 14/1/13, the Board issued a circular dated 14/1/13 saying, among other things, that immediate former members of parliament would immediately cease to be patrons or officials of CDF Committee. The Committees were, however, to continue to operate during the transitional period and to oversee the management of the Fund at the constituency level. Each committee was required to prepare a handover report before the general elections on 4/3/13. It is not in dispute that between 18/2/13 and 4/3/13 the CDF Committee in Nyando constituency issued and distributed cheques to various institutions in the constituency. According to the petitioner, the cheques were to Ponge primary school (Kshs.400,000/=), Osino primary school (Kshs.300,000/=), Awasi primary school (Kshs.600,000/=), Kochogo youth polytechnic (Kshs.400,000/=), Kaluore primary school (Kshs.300,000/-), Ayweyo Ayier Gweng Dam (Kshs.1,000,000/=), Disi secondary school (Kshs.500,000/=), Sare primary school (Kshs.500,000/=), Yogo primary school (Kshs.500,000/=), Bwanda Girls secondary school (Kshs.600,000/=), Alendu mixed school (Kshs.500,000/=), Wang'ang'a primary school (Kshs.400,000/=), Disi secondary school (Kshs.500,000/=). It was the petitioner's evidence that the officials of CDF were ardent supporters and campaigners of the 3rd respondent and that the cheques were disbursed by the 3rd respondent in campaign rallies that he had called and publicised on air specifically on Radio Lake Victoria (FM 92.1).

The evidence of Gordon Odhiambo Gwanda (PW7), deputy chief agent of Ford Kenya in the election, was that on 17/2/13 at about 7.15 p.m. he was listening to Radio Lake Victoria (FM 92.1) where the 3rd respondent was being interviewed by presenter Sella Aimba. He announced that he was going to disburse CDF cheques in the various areas where polling stations were located. The witness knew that it was not right for the 3rd respondent to participate in the disbursement of cheques now that it was campaign period and he had ceased being an official of the Fund. This is why he followed the 3rd respondent to a campaign rally at Kochogo Youth Polytechnic on 18/2/13 where the CDF officials handed to him a cheque of Kshs.400,000/= which he gave to the officials of the polytechnic; a campaign rally at Disi secondary on the same day where he handed over a cheque of Kshs.500,000/=; and a campaign rally at Kaluore primary school where he handed over a cheque of Kshs.300,000/= on 24/1/13. In short, the witness stated that he attended all the meetings where the 3rd respondent gave out cheques, and that at every occasion he was asking those at the rally to vote for him so as to be able to get more money. The witness stated that he was serving on locational development committee.

Paul Odhiambo Apamo (PW10) testified that he served as secretary of Kochogo Youth Polytechnic and that on 18/1/13 there was an announced campaign rally at the Polytechnic where the 3rd respondent came with officials of CDF and handed over a cheque of Kshs.400,000/= to the Polytechnic. At the rally, DW8 addressed those gathered and asked them to vote for the 3rd respondent. The 3rd respondent spoke last and asked those present to vote for him. PW13 (Festo Ochieng Ondiek) testified that on 28/2/13 there was a political rally by the 3rd respondent who came with CDF officials to Luora Ayweyo primary school where a cheque of Kshs.1,000,000 for Ayweyo Ayier Gwang Dam was presented by the respondent. PW13 was an official of the Dam and also an ODM official in the ward. The 3rd respondent addressed the rally asking the people to vote for him so that they could receive more money. George Onyango Ngore (PW14) testified that on 22/2/13 the 3rd respondent called a political rally at Sare primary school whose committee he (PW14) chairs. The respondent came and addressed the rally and gave them a cheque of Kshs.500,000/= and asked those present to support him.

The response by the 3rd respondent, DW8, DW9, and Amos Osieko was that the CDF cheques were distributed to the projects named, but that was done by the CDF officials and in the absence of the respondent who had ceased to be member of parliament and patron of the Fund. The reason why the cheques were distributed at this time, during campaign time, was so as to try and beat the dateline given by the Fund's Management Board. It was stated that the CDF had received money which had to be disbursed. The other evidence given was that the projects in question had been approved for funding under the relevant Act and Regulations, and therefore that the cheques were not for supporting the 3rd respondent's campaign.

There was the evidence by the petitioner that the 3rd respondent had been to the radio station and announced that he was going to campaign in the constituency and issue CDF cheques. To this, the 3rd respondent stated as follows:

“17. THAT during the campaign period I had the right to use both print, social and visual media to propagate my ideals to the electorate but I also had legal counsels in my teams in areas that breached the law and I never in my campaign used government resources during my campaigns nor did I offend the electoral code of conduct nor did I distribute any cheques as alleged.”

I have considered the evidence that was presented on this issue of use of CDF money to bribe and/or influence the electorate in favour of the 3rd respondent. I consider that the petitioner had in his corner Joshua Onyango (PW2), and advocate of the High Court of Kenya, as his chief agent. He had PW7 as deputy chief agent. PW7, while being cross-examined by Mr. P. J. Otieno, stated as follows:

“I was trained as agent. Even in 2007 I was trained. I have been agent before. I was trained about the complaints procedure. I knew the process. I did not make written complaint about these events.”

It was a serious matter for the 3rd respondent to go on air and announce that he was going to use public resources to campaign and then actually do so. The vigilance with which the petition was prosecuted, and the knowledge that the petitioner and his chief agents had on electoral process, would not have allowed the 3rd respondent to do the alleged things without a formal protest or complaint being lodged against him to the Commission, or to police. I am unable to find that the 3rd respondent used CDF money to campaign.

What was admitted, however, was that DW9 actually participated in the campaign for the 3rd respondent and that of the ODM when at the same time he was the treasurer of CDF in Nyando. This is what he stated in his affidavit sworn on 29/4/13:-

“1. THAT I am an adult of sound mind, an advocate of the High Court of Kenya and in the Kenyan elections held on 4th March, 2013 I was the presidential election chief agent for ODM party for Nyando constituency hence competent to swear this affidavit.

2. THAT I trained and recruited all agents for the presidential agents for ODM party in

Nyando constituency and also attended the briefing by the 3rd respondent in Multi-Purpose Hall where we were told of the legal requirements for our agents for them to be admitted to so participate as agents for any candidate one of the legal requirements being a letter of appointment and oaths of secrecy.

3. **THAT I know of my own knowledge that ODM party trained all its agents as I was the one who was responsible for the training and recruitment for all candidates in Nyando Constituency and all our agents met the requirements to be agents in the elections held on 4.3.13.**

4.

.....

5. **THAT I know that the affidavit of Gordon Odhiambo Gwada is false as I am the treasurer of Nyando Constituency and the CDF Committee is mandated by law to have and continue working even after dissolution of parliament until a new committee is set up and duly gazetted as per the law.”**

When he was cross-examined by Mr. Odeny, he stated as follows:

“I campaigned for Raila and all ODM candidates.

I support Outa. When Outa presented his nomination paper to IEBC on 30/1/13 I was there. I was “supporter” No.1 in his nomination documents.....”

The witness, however, stated that during the cheques presentation the 3rd respondent was not there, nor did he participate.

On the allegation by Jacob Okello Onditi that DW9 dished out Kshs.300,000/= to youths of Kakola to influence voters of Kasuna primary school to vote for the 3rd respondent, and that he also spread propaganda that the petitioner was a mole of the TNA party, this was the response:

“20. THAT I know that much as I had the right to any ODM party being a leader and opinion leader and in my area of Kakola I was within my right during campaign period to give direction when asked upon by the youths whom am their patron on who I felt would be a better leader without any need of giving money as alleged the said petitioner or his supporters.”

During oral testimony, DW9 admitted interacting with the youth and advising them to elect the 3rd respondent but denied giving them money. When Mr. Odeny cross-examined him, the issue of TNA propaganda was not raised. After I heard all the evidence I did not get the impression that the 3rd respondent's campaign, or indeed that of the ODM, was founded on propaganda against the petitioner. I find that the allegations by Jacob Okello Onditi regarding bribery or propaganda not substantiated.

On the question of DW9's responsibility in relation to the partisan campaigns and his position in CDF Committee, the petitioner's contention was that he committed an election offence in which he should be cited. When confronted with this, DW9 responded as follows during cross-examination:

“I was a citizen and was entitled to campaign for a candidate irrespective of my position as CDF treasurer.”

Under section 2 the Public Officer Ethics Act, 2003 DW9 is **“a public officer”** since he was appointed by the Constituency Development Fund Board to administer the Constituency Development Fund for Nyando Constituency. The Fund administers public money belonging to and/or granted by the government after it has been raised from taxes and such administration is under the Constituency Development Fund Act, 2013 or its predecessor the Constituency Development Fund Act, 2003. Under section 16 of the Public Officer Ethics Act a public officer shall not, in or in connection with the performance of his duties as such

- a. act as an agent for, or so as to further the interest of, a political party;
- b. indicate support for or opposition to any political party, or candidate in an election; or
- c. engage in political activity that may compromise or to be seen to compromise the political neutrality of his office.

A public officer who does any of this prohibited conduct offends the general code of conduct and ethics under the Act and can face disciplinary sanction by the Board.

The petitioner wanted DW9 to be reported to the Director of Prosecutions and the Commission under section 87(1) of the Elections Act. That cannot be done. This is because for one to be so reported he has to be found guilty of an election offence. Under section 2 of the Act, an “election offence”

“means an offence under this Act.”

The Elections Act does not provide for the complaint that the petitioner is making about DW9 in relation to his campaigning for the 3rd respondent, and for the ODM party as a whole. Maybe, this is an area that both the Commission and the Director of Public Prosecutions may want to look at as public officers can have, and sometimes actually have, profound influence on the electioneering process.

The next area of consideration relates to the alleged irregularities, malpractices and transgressions during voting, counting, tallying and declaration of results. In dealing with this issue, I wish to recall that there was an application dated 10/5/13 seeking for an order for scrutiny and recount of votes for the purpose of establishing the validity of the votes cast in the polling stations in Nyando constituency. Some of the polling stations had two streams each. The 13 stations were Arombo, Ogenya, Karanda, Odienea, Lela, Kobura, Osaria, Mao, Yogo, Nyamware, Migingo, Alendu and Nyangande. It should be noted that in the prayers for scrutiny and recount in the petition only 11 stations were named. They were Lela, Kobura, Osaria, Mao, Yogo, Arombo, Karanda, Ogenya, Odienea, Nyamware and Migingo. Alendo and Nyangande were not included. During submissions in the application for scrutiny and recount, the petitioner added Katolo, Kasule, Sare, Obungi, Nyandiwa, Ayweyo and Kasuma polling stations and Ahero Multipurpose tallying centre. Needless to say, the application could not seek scrutiny and recount for stations beyond those named in the petition. On this point I wish to reiterate what Justice Kimaru stated in **MAHAMUD MUHUMED SIRAT .V. ALI HASSAN ABDIRAHMAN AND 2 OTHERS [2010] eKLR** as follows:

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

The application for scrutiny and recount was based on the following grounds, among others:

- a. that ballots were stuffed in the ballot boxes by the respondents to favour the 3rd respondent;
- b. that the voters registers were marked to show that even absent and dead voters had voted and this was done to favour the 3rd respondent;
- c. the petitioner's agents were not allowed to do their duties, including the witnessing of vote counting, to be able to sign for them;
- d. that the margin between the petitioner and the 3rd respondent was narrow;
- e. the Biometric Voter Registration System (BVR), Electronic Voter Identification Device (EVID) and the Electronic Results Transmission System (ERTS) had failed to function which meant, among other, things, that there was no independent verification of the votes cast and results declared in the various polling stations.

In the ruling that the court rendered on 14/6/12, the application was dismissed. In the final submissions by Mr. Odeny it was sought that the prayer for scrutiny and recount in the petition be allowed. This was opposed by the respondents on the basis that the court had determined the issue. I wish to say as follows on the matter. The application for scrutiny and recount was prosecuted after the petitioner had closed his case and after only one witness had testified for the respondents. Other witnesses for the respondents were called after the ruling. I found that on the evidence called by the petitioner, and that even before there was full response, he had not shown on a *prima facie* basis that the validity of the delivered results was questionable as to require ascertainment by scrutiny and recount. In other words, no sufficient reasons had been demonstrated to cause the court to order the scrutiny and recount of the votes. The petitioner did not bring any further evidence, and there has been no submission that the evidence that the witnesses of the respondents gave in any way strengthened the case for scrutiny and recount. There would be no reason, or legal basis, for the court to order scrutiny and recount at this stage in this judgment. In any case, this judgment is supposed to finally determine the petition.

What allegations has the petitioner made to support his contention that the election was not free and fair, and therefore that the result should be nullified? The allegations are made in the petition as follows:

- a. presiding officers and polling clerks campaigned for and favored the 3rd respondent;
- b. the election officials and agent of the 3rd and 4th respondents locked out the agents of the petitioner from the polling stations;
- c. the officials, servants and/or agents of the respondents caused the names of absent and dead voters to be crossed from the register to show that they had voted and continued to stuff ballot papers in the ballot boxes in favour of the 3rd respondent;
- d. that the officials of the 1st respondent at the polling stations failed and/or refused to give copies of the results of the poll to the agents of the petitioner and further failed to affix the same at the doors of the polling stations;
- e) that the officials of the 1st respondent denied the agents of the petitioner the opportunity to accompany the ballot boxes from the polling stations to the tallying centre;
- f) that the officials of the 1st respondent and the agents of the 3rd and 4th respondents tampered with the results by breaking open the ballot boxes and interfering with the results therein to favour the 3rd respondent;
- g) that the results declared that the 3rd respondent had got 24,558 votes and the petitioner 23,815 votes did not therefore reflect the truth;
- h) that the 3rd and 4th respondents and their supporters and agents bribed voters and used undue influence all intended to favour the 3rd respondent; and
- i) that the election was not free and fair and neither did the process comply with the Constitution and the electoral laws.

Regarding complaints (c),(d),(f) and (g) the petitioner's case was that some Forms 35 had cancellations, corrections and/or alterations which were unsigned by the makers and therefore such Forms could not be accepted as representing the results of the respective stations. This was because, according to the petitioner, the cancellations, corrections and/or alterations had not been countersigned, dated and stamped. In dealing with these issues, the court will bear in mind that each polling station in Nyando constituency had the petitioner's agents to witness the voting and counting. Except for George Otieno Okumu (PW11) and Nicholas Otieno Nyambura (PW16) who were agents for Arombo and Ogenya polling stations, respectively, no agent was called for the petitioner to come and say that he witnessed any of the claims made by the petitioner and his chief agent (PW2). The agents were not called to come and say that absent or dead people were called to "vote"; that they (agents) were not allowed to witness voting or counting; that there was campaigning or bribery at the polling station; that the results in Forms 35 did not represent the true results of the votes garnered by the respective candidates; that they were not given results; and so on. PW2 admitted that he did file any formal complaint with the Commission about these

claims. No candidate or agent sought to have any of the presiding officers re-check or recount the votes at the time when there was the count and determination of the results at the polling stations. This option was available under regulation 80 of the Elections (General) Regulations, 2012 made under the Elections Act.

PW11 testified that him and one Lucy, were the agents of Ford Kenya at Arombo polling station. He testified that after they voted Lucy was ordered out. He was allowed to remain in the voting hall alone. When he complained he was also kicked out by the presiding officer. He remained out for about one hour. At about 11 a.m. he was now back to the hall when the 3rd respondent came to vote. He remained here for a while. He voted and then told the presiding officer that now that this was home for him all people including those absent should vote. He then left. PW11 remained in the room. At about 3.30 p.m. when the crowd thinned he saw the presiding officer take many ballot papers, tick them and then put them in the ballot boxes. He noticed that the register had names of Leonida Oulo Onyunga and Truphena Okelo Otunga, his mother and grandmother, respectively, who were both sick at home, crossed to show that they had voted. He also saw the name of Joseph Abungo Owino, a dead person, whose name had been crossed to show that he had voted. When the time of counting came, the presiding officer was counting very fast. At some point she declared that there was no need to continue counting as the 3rd respondent had won. She did this before the counting was over. She did not declare the results and she did not give Form 35 to the agents to sign. It is material that the polling station had police officers. PW11 did not report or complain to them. He stated that he reported to PW2. PW2 did not file a formal complaint with the Commission, or the police. When the witness (PW11) was cross-examined by Mr. P. J. Otieno he was referred to his further affidavit in which he had indicated that the presiding officer gave him Form 35 to sign but that he declined to sign it owing to what he had seen at the station. That is materially different from his evidence in chief that counting was not completed, results were not declared and he did not see Form 35. Both versions cannot be true. Form 35 was the results declaration form at the polling station. If it was completed and he was being asked to sign then there were results. Under regulation 79(6) of the Regulations, the refusal or failure of a candidate or an agent to sign a declaration form to record the reasons for their refusal to sign shall not by itself invalidate the results announced.

PW16 was the petitioner's agent at Ogenya primary school. He was with Philip Onyango Ochia. They were in the voting hall up to 4 p.m. when he went out shortly and found Maurice Owuor Okite (PW4) complaining that he had come to the hall and found somebody had voted for one Zedekiah Owuor Madago who was dead. He (PW16) returned to the hall and complained to the presiding officer who did nothing. Secondly, that after the voting the votes were counted but that the presiding officer refused to announce, give the results declaration form or let him sign it. When this witness was cross-examined by Mr. P. J. Otieno and showed Form 35 for the station, he conceded that the Form had been signed by agents including Philip Onyango who was an agent for the petitioner with him. Phillip had acknowledged the results as announced and had not indicated that the station had witnessed any incident.

In short, the evidence of PW11 and PW16 was not believable. But more important, if agents are going to add any value to the electoral process, and be of assistance to their candidate, they have to maintain a written record and account of the happenings at the polling station from the time it is opened up to when the results are declared. An agent who sits in the polling room for the whole day should be able to say how many people came in to vote. His count would be compared with the marked register, the votes and the counterfoils. At the counting he should be able to keep record of all votes cast, valid votes, reject/spoilt votes and the votes garnered by each candidate. All this information would be helpful not only in the request for scrutiny and recount but also in a petition to nullify the results of the election. One cannot say that the petitioner's agents were of substantial use to him in this regard.

The issue of alleged bribery and undue influence by the 3rd respondent using CDF money has been dealt with in the foregoing.

PW4's evidence was that when he gave his identity card to be identified to vote at Ogenya polling station he noticed that the name of Zedekiah Owuor Madago (whom he knew to be deceased) had been crossed to show that he had voted. He also found that his name had been crossed to show he had voted. He complained about these and was given ballot papers and he voted. The station had PW16 and Philip

Onyango as agents. He said he complained to PW16. When he entered the room he found only ODM agents. When asked by Mr. P. J. Otieno whether he found the two agents in the room he stated:

“Room did not have Ford Kenya agents but I had left Ford Kenya agent outside. He was Otieno Nyambura and there was also Onyango. I met Otieno at the gate when going out.”

The evidence of PW16 was that it was only himself who was allowed into the room but that Philip was not. Of course, it is now clear that Philip signed Form 35 and without any complaint. This casts doubt on the allegations by PW4. Further, if PW4 states that when he came into the room he did not find the Ford Kenya agents, then what does that say about the two agents? Is it possible that if there were two agents both of them could leave the room at the same time?

Robert Ouko Owanda (PW15) was a voter at Lela primary school. He stated that he came to vote on this day. He entered the polling room and produced his identity card to a clerk who checked for his name in the register. When the clerk was checking the witness was looking at the register when he noticed the name of his nephew Collins Ochieng Lwande having been crossed to show that he had voted. The witness knew that Lwande was working Wajir and had not travelled home to vote. He also saw the name of Daniel Ondigo also having been crossed. He had been with Ondigo up to 4 p.m. at home where he had left him. Ondigo had told him he would not go to vote. The witness's name was not in the register and therefore he did not vote. It is material that both Luande and Ondigo are alive and were therefore available to testify to say that they were registered voters at this station but that did not vote. They were not made to swear affidavit or to testify, and this was without explanation. The usual presumption is that they held evidence adverse to the petitioner.

PW11 testified that names of two absent (because of sickness) voters Leonida Oulo Onyunga and Truphena Okelo Otunga were crossed in the register showing that they had voted when they had not. He was cross-examined by Mr. P. J. Otieno to say that the two voters are still alive. Again, they were not called to testify, or made to swear affidavit. They would have provided the best evidence in the matter. The witness stated that he saw the name of Joram Agumba Awino crossed to have voted and yet this was his uncle who had died. He produced the deceased's death certificate. On this point of death, what the witness told court and what he swore in his affidavit dated 2/4/13 were different. In the affidavit he stated that:

“15. THAT I learnt that in the process of stuffing the ballot boxes in favour of the ODM candidate, Honourable Fredrick Outa, the Independent Electoral and Boundaries Commission officials and agents of Outa and ODM party marked ballot papers on behalf of Joram Agumba Awino (deceased) annexed hereto and marked “GOO-2” is a copy of the certificate of death.”

Either the witness saw the name of Joram Agumba Awino crossed in the register or he “learnt” that the name had been crossed. Both cannot be true.

PW9 John Owiti testified that he was a voter at Odienya polling station and that when he went to the polling room his name was checked and found to have been crossed to show that he had voted. Yet he had not. He was therefore not allowed to vote. The petition did not complain that some registered voters were not allowed to vote. The witness, however, went on to state that he checked the register and found that the name of a deceased John Gunja Abuto had been crossed to show he had voted. He produced the deceased's burial permit to court. In his affidavit sworn on 2/4/13 he stated that presiding officers, polling clerks and ODM agents had stuffed ballot papers into the ballot boxes

“without caring whether the people they were the absentee were alive or dead.”

He was cross-examined to reveal that the room had two Ford Kenya agents who were Dan Ogwando and Joseph Yogo Ooga. One, the two agents did not testify or made to swear affidavit to say that indeed what the witness was complaining about was true. Secondly, Form 35 for Odienya primary school polling station was produced by the Commission. It shows that the two agents were present and each signed the Form without any complaint. This means that what the witness was testifying about was not true..

PW6 Martin Juma Odindo was a voter at Osaria polling station. In court he stated that he saw by looking at the register in the polling room that the names of two dead people (Joash Okaka Obore and Pamela Adhiambo Ogwang) had been crossed to show that they had voted. In his affidavit sworn on 2/4/13 he stated something else. He stated that he had:

“reason to believe that some of the names crossed in the register belonged to deceased persons who registered but died before 4th March 2013 and as such I found out that Joash Owaga Obore and Pamela Adhiambo Ogwang had registered as voters at Osaria nursery school and were likely to have had their names crossed in the voters register.....”

What the witness told the court was materially at variance with what he stated in the affidavit. Further, Form 35 produced for the polling station shows all the agents present signed it without complaint. PW6 told court that the station had Ford Kenya agent Michael Ongiri. Indeed the Form shows he was present and appended his signature. It is unlikely that PW6 complained to him regarding the claims he is now making.

In short, I have, after due consideration, come to the conclusion that the petitioner's allegations that either dead or absent voters were allowed to “vote” were not credibly substantiated.

Nyando constituency had 97 polling stations. Some stations had two streams each. The petitioner's evidence was that in Forms 35 there were alterations and/or cancellations, which had not been countersigned and dated by the respective presiding officers. This happened in 24 polling stations, which means 24 Forms 35. The witnesses called by the Commission agreed that indeed the Forms had cancellations and/or alterations which had not been countersigned, but went on to state that such cancellations and/or alterations had been done by the presiding officer, in good faith, and in the presence of agents; and that the cancellation and/or alterations had not affected the result in the Forms, or the final results. The witnesses asked the court to appreciate that they were conducting in all 6 elections and were under pressure to complete the exercise and produce the results. There were bound to be arithmetical errors which, when noticed, had to be corrected. I accept that explanation from the Commission, especially now that the petitioner has not shown that the unsigned cancellations and/or alterations had affected the result to his disadvantage; that he had been denied votes, and the 3rd respondent given votes, in the exercise; and that the failure to countersign had materially and substantially affected the final tally. In reaching this decision, I bear in mind that, although the regulations do not explicitly state that every cancellation or alteration to the results declaration form has to be counter-signed, it should always occur to the presiding officer that a form containing results is a sacred document. He has to own the contents therein and to justify them in any litigation. A petition may be won or lost on the basis of such a declaration. The law requires him to complete it and sign it together with his deputy and candidates/agents present. If he has to correct any entry thereon this has to be brought to the attention of the candidates/agents present first for them to appreciate the need for the correction. Such correction has to be countersigned, dated and stamped. Lastly, I consider what was stated by **Lord Denning in MORGAN AND OTHERS .V. SIMPSON AND ANOTHER (supra) that:**

“2. If the election is so conducted that it was substantially in accordance with the law as to elections,

it is not vitiated by breach of the rules or a mistake at the polls.....”

There was the evidence of PW1 and PW2 that numerous broken unused seals were recovered around Ahero Multipurpose Tallying Centre; that officials of the Commission were breaking seals of ballot boxes, stuffing ballots into the boxes and resealing them. These allegations of breaking into ballot boxes, stuffing them with ballots and resealing them, was denied by the witnesses of the Commission. It is not in dispute that the counting of votes was done at the polling stations where the results were being declared in Forms 35. Ideally, therefore, how could ballot stuffing after the count and declaration of result help any candidate? This bit was not substantiated by the petitioner. How did the alleged ballot stuffing at the tallying centre affect the petitioner, or the final result?

In conclusion, I find that the parliamentary election for Nyando constituency was substantially conducted in accordance with the Constitution and the electoral laws and regulations. I confirm the results as declared by the Commission and determine that the 3rd respondent was validly elected. A certificate to this effect under section 86(1) of the Elections Act shall issue to the Commission.

On costs, the petitioner has been unable to prove any of the grounds on which the petition was premised. The petition was defended. Costs follow the event, and therefore the petitioner shall bear them. Under rule 36 of the Elections (Parliamentary and County) Petition Rules, 2013, and considering the facts of this petition, I determine that the costs payable shall be Kshs.2 (two) million. The 3rd respondent and the Commission (which includes the 3rd respondent) shall be entitled to an equal share in Kshs.1.5 million of the costs whereas the 4th respondent shall be paid Kshs.500,000/=.

Dated, signed and delivered this 30th day of September 2013

A. O. MUCHELULE

J U D G E