



**REPUBLIC OF KENYA**  
**IN THE CHIEF MAGISTRATE'S COURT AT NAIROBI**  
**MILIMANI COMMERCIAL COURT**  
**ELECTION PETITION NO. 9 OF 2013**

**OSCAR MAFUNGA IGAIDA**

..... **PETITIONER**

**VERSUS**

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

**THE RETURNING OFFICER, LANG'ATA CONSTITUENCY**  
..... **2ND RESPONDENT**

**MAURICE GARI OTIENO**  
.....**3RD RESPONDENT**

**J U D G M E N T**

The Petitioner Oscar Mafunga Igaida has sued the Independent Electoral and Boundaries Commission, The Returning Officer Lang'ata Constituency and Maurice Gari Otieno seeking three prayers namely;

- a declaration that the third respondent was not validly elected
- there be fresh elections
- costs of the petition

In his testimony, Mr. Igaida said he was nominated by The National Alliance Party (TNA) to vie for the Nairobi West Ward, Lang'ata County Representative and cleared by the IEBC. On the morning of the general elections – 4.3.2013, he cast his vote at the Nyayo Stadium polling station at 7.00am and went to Mbagathi Way for breakfast. While getting briefs, he was informed that three of his agents had not turned up at Madaraka polling station and suspected they had been compromised since it had been alleged the three had been seen with a close ally of Mr. Gari the third respondent, the previous night.

In the afternoon, Mr. Igaida said a voter called him to say that Mr. Gari Otieno, the third respondent was at the Madaraka Primary School polling station and he called the Lang'ata Constituency Returning Officer, Terry who sent him the name and number of a police officer, Mr. Kariuki who said he was busy

when he called. He sent his agents to check and Terry later called him and said Mr. Gari had been thrown out of the polling station.

After the results were announced, he and other contestants were dissatisfied and held a meeting on 13.3.2013 during which it emerged that ODM supporters had registered more than once and were allowed to vote more than once. He singled out one PEGGY ASAMI who was arrested and charged. He also alleged that during the tallying and counting process, the agents were not shown the ballot papers and ultimately, the total votes cast (4540) and what was announced was different (4685). The dissatisfied candidates wrote a letter which he delivered to the IEBC who however failed to respond prompting him to file this petition.

During cross-examination by the counsel for the first and second respondents, Mr. Wandati, Mr. Igaida said that form 35 for Madaraka stream 2 was only signed by one agent and that his agent had raised the issue and left before the counting. Despite PEGGY being arrested, he said he did not have evidence of voters being issued with more than one ballot paper.

Under cross-examination by Mr. Gichure counsel for the third respondent, Mr. Igaida said that he did not see his agents meeting Mr. Gari's ally, or Mr. Gari soliciting for voters.

PW2 Arthur Atsiayo who testified as a witness for the Petitioner, said that he was an agent of Mr. Igaida at Madaraka Polling Station Stream 4. He however was registered at Nyayo National Stadium where he went to vote. While there, Mr. Igaida called him to check if Mr. Gari was at the polling station. He checked and confirmed so. He was beside the line talking to people. When voting, Mr. Atsiaya said he was asked "Mbili ama moja", meaning "two or one". He did not understand. When he asked other agents he was told that was a unique language for those to be given two ballot papers. When counting started, he was assigned to Stream 2, 4 and 5 since other agents failed to turn up. In Stream 2, they were not shown the ballot papers and he declined to sign form 35.

During Cross-examination by Mr. Wandati, Mr. Atsiaya said that he did not see any voter being given more than one ballot paper and that despite declining to sign form 35, he did not give reasons for his refusal. While being cross-examined by Mr. Gichure, Mr. Atsiaya said he was able to see Mr. Gari and one Victor talking to people on the line though he could not hear what was being said and whether he was asking for votes. He conceded that this issue of the third respondent being at the polling station is not mentioned in the affidavit he presented to court.

For the 1st and 2nd respondents, DWI Teresia Mwai said she is the IEBC Lang'ata Constituency Coordinator and was the Returning officer for Lang'ata Constituency during the general elections on 4.3.2013. On that morning, she received a call from the Petitioner complaining that Mr. Gari was talking to voters at Nyayo Stadium polling station. She called Chief Inspector Kariuki of security who called her back after an hour to say the issue had been solved. She denied having told the Petitioner that the 3rd Respondent had been thrown out from the polling station. In any event, she said candidates were free to visit polling stations to see how voting was being done.

As to the votes cast, she said the number was 4685. There was an error in the rejected votes which read 108 having included 55 from Nyayo Stadium instead of 53 only from Madaraka polling Station and was rectified.

Prior to the announcement of the results, she did not receive any complaints about ballot papers or agents being sent out. It is only thereafter that the Petitioner went to her officer and complained about Mr. Gari and claimed to have video evidence against him. During cross-examination by Mr. Kinga, Teresia said the petitioner's agent did not sign the form 35.

When cross-examined by Mr. Gichure, Teresia said that candidates are not denied access to monitor polling at the stations as long as they are not breaching the Electoral Code and if indeed Mr. Gari was campaigning, he would have been arrested. She also clarified that polling could not stop because no or only one agent was available and if an agent was not satisfied, he should have written his name on form

35, declined to sign and write the reason why.

DW2 – Ephraim Kariuki said he was the presiding officer in Stream 2 at Madaraka and presented his affidavit as evidence. In cross-examination he said the ballot papers were displayed by him to everyone for verification and the agents were more interested in the presidential count and left. It is only one Victor Rotich who was present when the County Representative counting was being done.

When cross-examined by Mr. Gichure, Mr. Ngingi said there was no voter who was given more than one ballot paper and that at the time he signed the form 35, no agent raised any complaint.

The third respondent Mr. Gari, the County Representative said he would rely on his affidavit and stated he was at the polling station where he was registered to vote. At the time he was alleged to be soliciting for votes, he was at home and if indeed he was campaigning, he would have been arrested. During the campaign, he had no motor vehicle or money to bribe voters. He had no hard feelings for the Petitioner who even requested to be included in the CDF Committee.

When cross-examined by Mr. Wandati he said he is not aware that his agents influenced those for the Petitioner and had never met PEGGY who was double registered. While being cross-examined by counsel for the Petitioner, Mr. Gari said he had also raised an issue of the tallying of votes which was rectified.

DW5 Dan Adongo, Chief agent for the 3rd respondent denied the allegation that they stopped the Petitioner's agents from attending. Under cross-examination he said there was no complaint made against Mr. Gari over soliciting of votes, and on being questioned by Mr. Kinga counsel for the Petitioner he said he was present when counting was being done and the presiding officers were showing all the ballot papers.

Counsels therefore filed written submissions which they highlighted. According to Mr. King for the Petitioner, there is evidence that the third respondent was soliciting for votes. Secondly, the ballot papers were not shown to the agents during the counting process and that the third respondent compromised some of the Petitioner's agents not to turn up. Thirdly, there was double registration and multiple voting contrary to the rules and lastly, there was an error in the tallying of votes.

In his submissions Mr. Wandati said that the Petitioner failed to prove the allegations of soliciting for votes, bribery, double voter registration and multiple voting and that the Petitioner's agents were denied access to the ballot papers. He pointed out that if indeed Mr. Atsiaya was present, he should have made his complaint on the form 35. he referred to the case of **Bernard Shinali VS Boni Khalwale** which gives the standard of proof required in an Electoral Petition.

Mr. Gichure, counsel for the third respondent submitted that allegation of soliciting for votes and bribery against the 3rd respondent have not been proved. He also pointed out that if Mr. Atsiaya was not satisfied with the process, he should have indicated his approval in the form 35. it was also submitted that no proof of double voting was given and the errors in the rejected votes did not affect the out come with the result that he asked the court to dismiss the Petition.

During the pre-trial conference, having gone through the three questionnaires and issues, the issues for determination were narrowed down to whether;

- a) the agents were allowed into the polling station
- b) there were irregularities during the voting process
- c) the tallying process was done according to law
- d) irregularities in the voting and tallying process were sufficient to invalidate the election process

- e) the election was free, fair and credible
- f) the 3rd respondent was validly elected and
- g) who should bear the costs

In the case of **Onalo VS Ondeki (2008) 3 KLR (EP) 500**, cited in the case of **Benard Shinali VS Boni Khalwale 2011 eKLR**, in the 1st and 2nd respondents written submissions, Rawal J (as she then was) stated that the burden of proving any allegation made in a petition lies with the petitioner and has to be to the satisfaction of the court on a higher degree than merely on a balance of probabilities.

On the first issue, the 1st and 2nd respondents witness said there were no agents denied access to the polling stations as long as they were duly accredited. DW2 Mr. Kariuki said there were agents present and most left after only the presidential votes had been counted and at the time the County Representative votes were counted only one agent Mr. Victor Rotich had remained.

In the evidence from the Petitioner, what seemed to come up more was the allegation that 3 of his agents failed to turn up after having been allegedly compromised by Mr. Gari. This remained an allegation and hearsay as no direct evidence was availed to show that indeed the 3 agents were seen with Mr. Gari or a representative of Mr. Gari. The allegation that agents were denied access to the polling stations therefore fails.

The second issue is about irregularities during the voting process. In the Petitioner's evidence, this was broken down into three points. Viz-double registration of voters, double voting and the 3rd respondent soliciting for votes at Nyayo Stadium polling station.

The only evidence given in respect to double registration was a newspaper report about the arrest of one PEGGY ASAMI at South C for having registered twice. This was done before she could vote and this did not affect the voting in Nairobi West Ward which covered only Nyayo Stadium and Madaraka polling station. The allegation that particular voters were allowed to vote twice was also not proved.

The third issue was about the tallying process. As the counting was being done, PW2 Mr. Atsiaya said the presiding officer and clerks were not showing the ballot papers to the agents. In his evidence the presiding officer stated otherwise. He said at the time, there was only one agent who had remained and signed the form 35 which was presented in evidence. The said agent, Mr. Rotich did not make any complaint to that effect. If indeed there was an anomaly and Mr. Atsiaya was present, the regulations required that he registers his complaint in the form 35 which he never did. How then can his allegation be taken seriously yet he has not even given any explanation why he failed to sign the form 35. The explanation by the presiding officer that the agents had left by then seems credible. Under regulation 62(3) of the Election (General) Regulations, 2012, it is emphatic that

**“the absence of agents shall not invalidate the proceedings at a polling station”**

A second limb related to the tallying process is that there was a discrepancy in the votes case and what was announced. According to the Petitioner, the total number cast as per form 36 was 4540 and what was announced was 4685. The explanation given by the Returning Officer and Presiding Officer is that the rejected votes at Madaraka polling station had erroneously been indicated initially as 108 instead of 53 and the same was rectified as it had included rejected votes from Nyayo Stadium. The error did not affect the votes cast and the results for each candidate and form 36 should then correct figure of 4685 at Madaraka with the Petitioner getting 2488 and the 3rd respondent getting 2994 in the final tally from the Madaraka and Nyayo Stadium polling station with Mr. Gari being declared the winner. The error did not affect the margin between the winner and the Petitioner and that allegation also fails.

In seeking to answer the question whether there was irregularities in the voting and tallying process to warrant invalidation of the results, it is clear from the preceding analysis that there were no irregularities proved during the voting process and during the tallying and counting of votes.

Was the election free and fair? The Petitioner said several contestants were dissatisfied with the whole process and they made a joint written complaint which they presented to the IEBC office. The same was presented in court as an exhibit and has been seen. There is a letter dated 13.3.2013 addressed to the chairman IEBC headed **“TO WHOM IT MAY CONCERN”** raising complaints in the Election of County Representation in several wards including Nairobi West Ward. During cross-examination, the Petitioner admitted that the letter is not signed and does not give the name of the writer of author. A second letter was also presented to IEBC written by Jacqueline Basiye which the Petitioner also admitted was not dated and did not make reference to any meeting the aspirants had convened.

Other letters had been annexed to a further affidavit which the Petitioner had sought to file and rely on but was rejected on two grounds. The Respondent had initially objected to leave being granted to file a further affidavit but later consented allowing the Petitioner to file the same within 7 days. The Petitioner however presented the same on the 10th day. Secondly, in any event, the respondent did point out that the petitioner was seeking to introduce new grounds and evidence. It is on the two grounds that the further affidavit was rejected. To that extent, the Petitioner has failed to show that the County Representative elections at Nairobi West Ward were not free and fair.

The sixth issue for determination is whether the 3rd respondent was validly elected. The Petitioner's submission is that given the irregularities in the voting and tallying and counting process, the 3rd respondent was not validly elected. The respondents have however submitted otherwise. In the **E.P. NO. 5 of 2013 filed by Hon Raila Odinga and Others VS IEBC and Others**, reference was made to Section 83 of the Elections Act No. 24 of 2011 which provides that:

**“No Election shall be declared void by reason of men. Compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the constitution ..... or that non compliance did not affect the results of that election”.**

In the same E.P. 5/13, the Supreme Court on similar lines referred to the case of **Buhari VS Obasanjo (2005) CLR 7K** from Nigeria in which the court held that;

**“The burden is on the Petitioner to prove that non-compliance has not only taken place, but has also substantially affected the results.....There must be clear evidence of non-compliance and that non-compliance has substantially affected the election”.**

From the foregoing, it is clear that alleging that the election of Mr. Gari was not done in accordance with the law, is not enough. He is required to show what were the irregularities and that they were of such a scale to affect the outcome of the election and the result could not be said to be the wish of the people.

It is not open to the election court to nullify an election based on allegations presented by a Petitioner. In the case of **Morgan & Others VS Simpson & Another 1974 3 ALL ER** it was ruled that;

**“an election court was required to declare an Election invalid (a) if irregularities in the conduct of Elections had been that it could not be said that the election had been conducted as to be substantially in accordance with the law as to the election (b) if the irregularities had affected the results conversely if the elections had been conducted so badly that it was not substantially in accordance with the law it was vitiated”.**

The 4th March 2013 general election in Kenya was unrepresented. It is the first election being done under the new 2010 constitution and for the first time voters had to elect six leaders right from the president down to the county representative. In respect to the Nairobi West Ward elections, the court is satisfied the IEBC carried it out to the best of their ability within the law.

In his testimony, the petitioner took issue with the court's rejection of his further affidavit and the strict timelines imposed by the Elections Act as to the conclusion of Petitions. The Supreme Court in dealing with the presidential petition set the precedent in adhering to the timelines. It may have been unfortunate

on the petitioner but the court is bound by the law and precedent.

Having considered the evidence and submissions, this court is satisfied that the Petition lacks merit for the reasons given above. The 3rd respondent was validly elected as the county representative for Nairobi West Ward and the court so declares. The Petition is hereby dismissed. Under Section 34 of the Election Petition Rules provision is made for the court to award costs to the extent of fixing the total amount payable and specifying the persons by and to whom the costs shall be paid. The court will award costs of the petition to the three respondents to be paid by the Petitioner which amount should not exceed 750,000/=. The security deposit shall remain in the court custody and may be used towards payment of the costs. A certificate shall issue to the speaker of the county assembly accordingly.

Finally, the court does appreciate the effort from the parties and their advocate towards having this petition conducted within the 6 months period.

**C.OBULUTSA (MR.)**

**Ag. CHIEF MAGISTRATE**

**10.9.2013**

Delivered in open court this 10th day of September, 2013

in the presence of

Mr. Kinga for Petitioner,

Mr. Gichure holding brief for 1st respondent for Mr. Wandati

Mr. Gichure holding brief for 2nd respondent for Mr. Wandati

Mr. Gichure for 3rd Respondent

**C.OBULUTSA (MR.)**

**Ag. CHIEF MAGISTRATE**

**10.9.2013**

**Counsel – Mr Kinga:** I request for copies of judgment and proceedings for appeal.

**C.OBULUTSA (MR.)**

**Ag. CHIEF MAGISTRATE**

**10.9.2013**

**Order:** Copies of proceedings and judgment be availed.

**C.OBULUTSA (MR.)**

**Ag. CHIEF MAGISTRATE**

**10.9.2013**