



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ELECTION PETITION NO. 7 OF 2013

IN THE MATTER OF THE ELECTIONS ACT NO. 24 OF 2011 LAWS OF KENYA AND THE ELECTIONS (GENERAL) REGULATIONS, 2012 AND ELECTIONS (PARLIAMENTARY AND COUNTY) PETITION RULES

AND

IN THE MATTER OF THE PARLIAMENTARY ELECTIONS FOR BOMACHOGE BORABU CONSTITUENCY NO. 263 HELD ON 4TH MARCH, 2013

BETWEEN

ENG. PETER KIMORI MARANGA 1ST PETITIONER

ARCH ALBERT MBAKA 2ND PETITIONER

-VERSUS-

JOEL OMAGWA 1ST RESPONDENT

ALBERT SEREM 2ND RESPONDENT

IEBC 3RD RESPONDENT

JUDGMENT

1. **By their Petition dated 8th April 2013, the petitioners seek the nullification** of the election at Bomachoge Borabu constituency of the General Election of 4th March 2013 at which the 1st respondent was announced by the 2nd respondent official of the 3rd respondent, the member of National Assembly after being declared the winner with 11198 votes while the petitioners garnered 10577 and 9917 respectively, among other candidates who scored lower votes as shown below:

<u>Name</u>	<u>Votes</u>
Adams Seth Onsongo Mabeya	113
Albert Mbaka Nyaundi	9,917

Credius Nyamwange	218
Joel Onyancha Omagwa	11198
Samson Bosire Mbeche	472
Peter Kimori Maranga	10,577
Timothy Nyameto	153
Total	33,368

2. The petitioners contended that the election at the constituency had numerous irregularities making it substantially non-compliant with the Constitution and the Elections Act and rendering the election not to be free and fair. The specific prayers sought in the petition were set out in paragraphs 46 as follows:

***“46. By reason of the contents of all and each of the foregoing paragraphs and by reason of non compliance with the written law, relating to the said election, the National Assembly Election was not conducted and cannot be said to have been substantially conducted in accordance with the law or within the principles laid down in the said written laws and/or within the known tenets of common law and all and each of the foregoing breaches, violations, non-compliance and complaints against the Respondents collectively and each of them, of omission and commission affected the outcome and results of the said Election.*”**

REASON WHEREFORE YOUR PETITIONERS PRAY FOR ORDERS THAT:

- a. ***There be a scrutiny of votes recorded as having been cast in the aforesaid National Assembly Election for Bomachoge Borabu Constituency in the election held on the 4th of March, 2013;***
 - b. ***There be a scrutiny of the rejected, void and spoilt ballot papers from all polling stations in respect of the member of the National Assembly Election for Bomachoge Borabu constituency held on the 4th of March 2013;***
 - c. ***There be a scrutiny of the actual voters registers used at all polling stations within Bomachoge Borabu Constituency during the said National Assembly Elections;***
 - d. ***There be a recount of all valid votes cast at the said Election;***
 - e. ***The said National Assembly Election held on the 4th March 2013 in Bomachoge Borabu Constituency be determined and your 1st Petitioner be declared as the true and valid winner;***
 - f. ***It be determined that the 1st Respondent has not been validly elected to the Member of the National Assembly for Bomachoge Borabu Constituency;***
 - g. ***In the alternative to (e) above, that a fresh election be conducted.***
 - h. ***Such election offences and electoral malpractices on the part of the 1st Respondent and acts of omission and commission by the 2nd Respondent as disclosed and found by this honourable court be reported to the Director of Public Prosecutions for appropriate action;***
 - i. ***The honourable court do find that the 1st respondent has committed serious electoral offences and order him barred from participating in subsequent elections for a period of at least five years or as the court may deem just and expedient;***
 - j. ***The respondents be condemned to pay your petitioners costs and incidentals to this petition; and***
 - k. ***Such further, order and consequential orders as this honourable court may lawfully make.”***
3. The alleged irregularities and breaches of the election law ranged from cancellations, alterations and write-overs on Form 35 which were not countersigned, forms 35 not signed by agents and no reasons given therefor, discrepancies between votes cast in the National assembly election and other election taking place at the same time and ejection of the petitioners agent’s during counting

at specified polling stations, voter importation, violence and intimidation of voters for petitioners' strongholds and bribery of voters . The respondents filed their Responses and Affidavits in support in which they principally admitted minor errors in the Form 35, a few alterations and transposition of votes from the primary Form 35 onto constituency Form 36 but denied that such irregularities had any substantial effect on the result of the election. The other allegations were denied.

4. The petitioners agreed in their submission before the court that they did not seek an order for the declaration of the 1st petitioner as the winner of the election as prayed in the petition. The petitioner also abandoned their claim that dead voters were shown as having voted in the election.
5. The prayers for scrutiny and recount were urged by an application within the petition and disposed of after the taking in of all evidence but before the final submissions were made in the petition. The court declined to allow scrutiny in all the polling station and allowed scrutiny and recount of votes in specified polling stations, in which specific questions had arisen, on the reasoning that:

“I consider that scrutiny at [Senta Polling] station is justified by the fact that although the announcement of the results was according to DW3 done at the polling station, the completion of the form 35 at the Constituency Tallying Centre from the records of 3 agents and the unexplained entry of the 04 rejected votes on Form 36 without a corresponding entry on the Form 35 requires further investigation to confirm the correctness of the Form 35 filled from the recollection of few agents.

The allegation that there was a difference in the totals in votes cast in the National Assembly election against the presidential and women representative elections at Rianyachabera Polling Station stream 1 with a difference of 37 votes according to the Petitioners and 05 according to the 2nd and 3rd Respondents would require further investigation in view of the further discrepancy at the same station between the total votes distributed to the candidates at 477 and the figure shown on the Form 35 for the total votes cast at 447. While the court may not be able to compare the figures in results in Presidential and other elections against the National Assembly results, it will be possible to ascertain the correct figure of total votes cast in the station to support the validity of the vote distributed to the individual candidates.

There was confusion as relates Magena Polling station where although the 1st Respondent was shown garnering 084 and being show on the Form 36 as 184 and the DW3 in his testimony before the Court took a position different from what he had set out in his affidavit that he had used the figure of 184 as shown in the Form 36 declare the results, rectifying his evidence to state that he had used the correct figure of 084. There is difference of 100.

At Keberesi Polling station, there was also the issue whether the 1st Respondent had scored 384 votes on Form 35, it was recorded as 284 on Form 36 and there was disagreement whether there was an alteration on the Form 35 changing the votes from 284 to 384 with a difference of 100.

I consider that there is a likelihood that on account of the small margin of 335 votes between the 1st Respondent and the 1st Petitioner at respectively 11198 and 10683, the 200 votes the subject of the dispute at the two stations – Magena and Keberesi – and the alleged discrepancies between the votes in the National Assembly and presidential election at Rianyanchabera and the correct totals at the Senta Polling station whose figures were entered from the recollection of party agents may affect the result of the election.”

6. The Law applicable:

As I held in **Paul Gitenyi Mochorwa v. Timothy Moseti E. Bosire and 2 Ors** Petition no. 8 of 2013 the law applicable to the election petitions the criteria for validation or invalidation of Election is as follows:

“For a candidate’s election to be validated under Article 105 of the Constitution, it must appear to court that the person was duly qualified for election as a Member of Parliament and that he was elected in a free and fair election consistent with the set constitutional standards. Accordingly, for a petitioner to succeed in a petition challenging the declaration of a person as validly elected, he must demonstrate that the person was not qualified [where applicable], or that the election was not free and fair within the meaning and standards of the Constitution.

In addition to the constitutional provisions on voting requirements under Article 86 set out above, parliament is empowered under Article 82 of the Constitution to enact legislation for the conduct of elections, whereby the Elections Act, 2011 has been enacted. By Article 82 (2) of the Constitution, the legislation required for the conduct of elections is required to ensure that the voting at every election is (a) simple (b) *transparent* and (c) takes into account the special needs of persons with disabilities and others with special needs.

By its section 83, the Elections Act 2011 provides a threshold saving clause that an election shall not be invalidated unless it offends the constitutional standards and election laws, or it fails to comply with the written law in such a manner as to affect the result of the election. In its exact terms section 83 injuncts that:

“83. No election shall be declared to be void by reason of non-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 and in that written law or that the non-compliance did not affect the result of the election.”

When considered together the provisions of the Constitution and the Elections Act on the voting rights and method or process of voting, the injunction in section 83 must mean that a valid election must accord to the ‘*principles laid down in the Constitution and in that written law*’ and deviations from the provisions must not be of a scale, nature or character as to affect the result of the election.”

7. It was common understanding of the parties that the exposition of the law relating to election petition by Lord Denning MR. in the leading case of ***Morgan & Others -VS- Simpson & Another*** [1974] 2 ALL ER 722 at 728, has laid down the principles by which the court will consider a petition seeking to invalidate an election as follows:

“Collating all these cases together, I suggest that the law can be stated in these propositions

(i) 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 the Hackney case, where 2 out of 19 polling stations were closed all day and 5000 voters were unable to vote

(2) If the election was so conducted that it was in accordance with the law as to elections it is not vitiated by a breach of the rules or mistake at the poll provided that it did not affect the result of the elections. That is shown by the Islington case where 14 ballot papers were issued after 8 p.m

(3) But, even if 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 as to polls and it did affect the result, then the election is vitiated”.

8. The object of election law

The court is enjoined as its primary object of the election law to respect and uphold the will of the people expressed through the vote where breaches of the election law does not affect the result. The principles in ***Morgan v. Simpson*** were contextualised in ***John Fitch –vs- Tom Stephenson & 3 Others***, QBD(2008) EWHC 501 where it was held that:

“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 been 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 people...”

9. The issues for determination in the petition are, principally, two:

- a. Whether there were any irregularities, election offences, breaches of the Constitution and Elections Act, rules and regulations revealed in evidence and scrutiny.
- b. Whether any irregularity, offence or breach proved affected the result of the election.

10. There was a question whether persons who were lined up by the parties in their respective cases but who were not called as witnesses for cross-examination. Where the deponents of affidavits in support of the petitioner or the respondents is not called as witness in court for cross-examination as provided in the Rules, the court has a discretion as to whether it may be used. The position in England with respect to cross-examination of deponents of affidavits as set out in paragraph 310 of Volume 17 of the ***Halsbury’s Laws of England***, 4th Edition, emphasizing the discretionary nature of the court’s power as follows:

“Cross examination of deponents

A deponent may be ordered to attend for cross-examination on his affidavit before a judge, master or examiner of the court, and the court may refuse to act on an affidavit where the deponent cannot be cross examined; but an affidavit may be allowed to be used in court where the cross examination is pending. Where the deponent’s good faith or motive is in issue, however, the court should not be asked to act without hearing cross-examination, leave to cross-examine will not be granted until evidence by affidavit is complete. A person, whether a party to the proceedings or not, who has made and filed an affidavit cannot withdraw the affidavit when cross-examination is threatened, and a deponent can be cross-examined even where the affidavit has not been used by the party filing it.

Where, after an order has been made for the attendance of a deponent for cross-examination, he fails to attend, his affidavit will not be admissible except by leave, but the fact that a deponent does not appear before an examiner for the purpose of being cross-examined is no ground for taking his evidence off the file before the hearing.”

However, as to using the affidavit as evidence, the court must take care that the evidence deponed to therein has not been tested by cross-examination. Unless the particular affidavit is an admission, I do not accept that it should be used without the deponent being offered for cross-examination.

11. Cancellations on Form 35s

This was admitted by the 2nd and 3rd respondents as regards 15 polling stations.

12. Transpositional errors from form 35 to Form 36

This was also admitted by the 2nd and 3rd respondents leading to a loss of 286 votes on the Form 36 for the 1st petitioner. The votes for the 1st Respondent and the 2nd Petitioner were not affected.

13. PW2 was able to demonstrate by mathematical accuracy coefficient analysis that there were absolute difference in the sum of 586, which I find to have been the expression of the errors in the transposition of the values from form 35 and form 36. The real votes differences were explained by the 286 vote loss by the 1st petitioner in the transposition and the credit of 300 votes for candidate Mbeche at Igorera stream II where the candidate scored 00 votes. In my ruling on scrutiny herein I found that:

“The issue of the allegedly unaccounted 586 votes was sought to be proved by the PW2, the Mathematics Professor who used the correlation co-efficiency between the figures in the 79 Forms 35 for the polling stations in the Constituency and in its Form 36. As I understood the evidence of the expert witness, his examination of the co-efficiency of correlation identified absolute differences between the entries in the two sets of forms leading him to further investigation into the forms revealing the errors or differences in relation to the Petitioner’s, the 1st Respondent’s and candidate Mbeche’s votes, whose co-efficiency was below full correlation at value 1. In real terms, as a matter of votes, the value of 586 represented the 286 votes lost by the 1st Petitioner in the transposition to Form 36 and vote-swapping with candidate Mbeche and the 300 votes allocated to Mbeche at Igorera polling station stream II where his actual score was 00. In my understanding, the alleged 586 unaccounted votes are not actual votes that could be claimed by the candidates to increase their totals or to reduce the totals of others so as to change the election results.”

I have not heard anything in the final submissions to change that finding.

14. That the 1st respondent is a member of party other than the one on which he was nominated and elected

The Petitioner produced in court a newspaper cutting of 21st April 2012 which suggested that the 1st respondent was a member of URP party and of a letter from the Registrar of Political Parties dated 6/8/2013 but referring only to one Joel Onyancha without the full names and identity card particulars of the 1st Respondent could not outweigh the 1st respondent’s evidence in rebuttal that he was a member of the party which nominated him and on whose ticket he was elected since 23/10/12.

This allegation was not proved by cogent evidence.

15. Failure of agents to sign Form 35

It was established and admitted that agents did not sign forms at 5 polling stations, and no reasons were given. However Regulation 79 (6) and (7) of the General Regulations provide that an election will not be invalidated on the ground only of absence or failure to sign the statutory forms.

16. Pre-marked ballots

The evidence by the petitioners PW1 and PW3 on this issue is as follows:

The first petitioner PW1 on cross examination by counsel for the respondents said:

Paragraph 18 of my affidavit is unmarked ballot papers at Gesabakwa. I have video

footage. I have not annexed any evidence. Form 35 at Gesabakwa is not attached to my affidavit. The name of the TNA agent that I refer to at paragraph 18 of my affidavit is Elijah Migiro Maobe. I was at Gesabakwa at some stage. I was called at around 6-7pm. The voting had finished. They were counting the votes. My agent is not coming as a witness. He is not dead.

[Form 35 for Gesabakwa at p. 42 of the returning officer Gilbert Serem at p. 33]

According to form 35 I got 392 at Gesabakwa, the 1st respondent got 02 votes. Gesabakwa is polling station about 2km from the tallying centre at Magena. It is about 500metres by the tarmac road. The school has a perimeter fence and a gate. The counting hall was one of the classrooms in the school. After voting the voters were asked to go out so that the hall could be used as a counting hall. The voters who had finished voting were locked outside. The left out of the school. The TNA chief agent came at around 6pm and they refused him to get at the polling. Somebody called me. I was at my house. I was informed that there was a problem at Gesabakwa and people were about to fight. I called the OCPD from Ogembo station. He arrived ahead of me. I arrived at about 6.45pm. It was getting dark. I found that the OCS could not manage to control the people. We persuaded them to allow us to go in. We went into the compound with Deputy OCPD, Elijah Migiro the TNA agent and a leader whose name I do not recall.

The Deputy OCPD called the presiding officer, a short man, who told us that the TNA agent was not comfortable with the TNA from the county representative. We resolved that there would be no change of agent. We walked back to the gate about 80metres. We did not go in to the hall. We started interrogating the TNA agent. It is clear in the video. I addressed the people and told them that I did not want violence at my home station. The TNA agent had a probox driven by a person I knew from 1980, I pleaded with the people to let them alone. There was no manipulation at Gesabakwa because we stopped it at the right....

Nyabongo (014) Lameck Ondari presiding officer with pre-marked ballot papers. I saw the pre-marked ballots, most were from national assembly and fewer for the presidential. I do not have the figure of three ballot papers. I do not have a video of the incident. I was in the same compound on the tallying centre. I was in my car. I do not remember now the person who called me. The person is not a witness. The pre-marked ballot papers were taken by one Lameck, officials and the people he was with in the white Probox who said they were taking it to where the other materials were. This was heading to 3.30-4.00pm on 4/3/2013. I am not sure whether the ballot boxes had come in by that time. We did not make a report to the police. I do not have the ballot paper and copies thereof. I do not have a witness for Nyabongo. Form 35 for Nyabongo is not attached to my affidavit.

The second petitioner PW3 said:

Nyabongo primary (014). There was one Moraya Ondari and Reuben Juma as the party agents for my party....Form 35 of Nyabongo (014). I see the name Moranga Zachary. The name I have as my agent Moranga Ondari. At the tallying centre, I went to the car. The presiding officer was filling the papers. I grabbed them. Several were marked for Joel Onyancha others were spoilt. We took the bundle to the returning officer. We did not keep a copy. We were tired. We did not report to the police. In the car he did not have a ballot box. Wherever the boxes were we did not know.

In his response DW3, the returning officer while under re-examination simply denied and said:

“I did not see any pre-marked ballot papers. It is correct that I was told about such incident and no pre-marked ballot papers were given to me. I am not aware whether the

police were told of the incident. I am also not aware of a TNA agent found with pre-marked ballot papers at Gesabakwa.

[Gesabakwa form 35 at p. 33 of witness affidavit]

The 1st respondent got 02 votes at Gesabaka. 1st Petitioner got 392. The 1st Petitioner got the most votes by far. Nyabongo form 35. The 1st respondent got 134 and the 1st petitioner got 188 votes. The 1st petitioner had more votes.”

Bearing in mind that the petitioners have to prove this allegation to the standard of proof below beyond reasonable doubt but higher than the balance of probabilities, although the DW3 admits having been told about the incident at Gesabakwa and only denies having been given the pre-marked ballots confirms the allegations by the respondents, I do not find that it has been proved to the required standard that there was an attempt to use unmarked ballot papers.

17. Pre-rigging strategy meeting

PW1 who made the claim of pre-rigging strategy meetings between the 1st and 2nd respondents at Gekomu, Keberesi on diverse dates did not call the two persons who are supposed to have given him the information and he did not report the matter to the police. I do not find the allegation proved. The second petitioner indicated to court that he had abandoned the issue of dead voters.

18. Voter importation

Only the 2nd petitioner PW3 testified on this issue and said that:

“All the clans were divided in the middle, one clan refused to accept the division. The issue that led to bloodshed. The clan insisted that they should remain as voters in the constituency. At the registration, the clan came and registered. There was bloodshed. The District Commissioner called for a security team including the candidates and IEBC and the issue on voter importation was discussed. The IEBC read the law that any Kenyan is entitled to register anywhere. It was resolved that the voters remain at their home. I refer to AMM3 at p. 72-93 of affidavit of Kenyenyia polling station voters from Sengera/Bosoti ward in Bomachoge Chache. I am the author of the document. The source of the information is IEBC and party registrar of persons. I got the list from Kenyenyia polling station. There are about 450 people for Bosoti.

Registration of voters is done upon presentation at registration centre with a National ID card. The people applied to IEBC, IEBC should consider the law before registration. The 1st respondent did not accompany the voters at registration. The law allows any Kenya to register anywhere. In as far as the law is concerned the registration offends the free and fair elections because of the bloodshed. We stopped the bloodshed.”

The principal register when printed included those persons, the person on the register were entitled to vote for a person of their choice. The persons come from the Sengera/Bosoti. I got the date for the register of persons. At paragraph 18 of my affidavit at p. 64, I asked the court to compel the registrar of persons to clarify this information. I do not have the primary source of the document. I am the author of the document.

Sengero Bosoti is a ward predominantly occupied by the 1st respondent’s clan. My mother comes from the clan. I pray that my primary data be authenticated by the Registrar of Persons. At Kenyenyia the 1st respondent 1000 votes. I believed the people voted for the 1st respondent. The names at pp 72-93 show their registration numbers but it does not show that they appear on the register of voters at Kenyenyia polling station.

Kenyenya is a district headquarters on Bokiange ward. The dominant clans are Bokiange and Bosoti. I do not know which is the bigger clan. Kenyenya is at p. 62 of the returning officer's affidavit.

At p. 62 – The registered voters are 546 stream II 547 and stream II 547. The total is 1640 voters. The total valid votes cast is 450 for stream I, 433 for stream II, 460. The total valid voters polling centre is 1343 votes. I do not have the figure for the Bomachoge ward. I recall it was about 12000 registered voters. The names at pp 72-93 are at paragraph 18 of my affidavit are 425. I do not have the figure from the Bokiange ward. I recall it was about 12000 registered voters. The names at pp 72-93 are at paragraph 18 of my affidavit are 425.

I cannot tell what number of the 425 actually voted in the election. The votes for the 1st respondent in stream I is 327, stream II 329 and stream III 345 making a total of 1001. The 1st respondent is Bosoti. The other clan was Bokiange. The candidate Mbeche was from Bokiange clan. He got 19 votes in total of all the stations. I got 22 stream I, 17 stream II and stream III 18. A total of 57 votes. The winner was the 1st respondent despite having the two clans Bokiange and Bosoti having dominant.

I did not find the complaint as valid bearing in mind the constitutional right of citizens under Article 38 participate in the election at any part of the Republic, and the witnesses own admission that the area complained of was a cosmopolitan town of the newly created constituency. The promotion of national unity and reconciliation requires integration and not disintegration of the various ethnic communities and the court is not able to uphold the claim of voter importation.

19. Voter bribery

PW1 said he did not know anything about voter bribery and PW3 could only vaguely refer to Pre-election rigging strategy in these terms: *“Pre-election rigging strategy – use of violence and massive voter importation. The outcome of the election was affected. The pre-election rigging strategy includes the voter importation. I did not include anything to prove the causing of fear to the voters.”*

I do not find that the allegations of bribery either alone or as part of the rigging strategy is proved.

20. Scrutiny

The scrutiny showed that the Form 35 for **Senta Polling station** and the used ballot counter-foils and the unused ballot papers were not in the ballot box and therefore scrutiny could not be done. At **Rianchabera I** there was 8 unaccounted for ballot papers and Form 35 was not in the box; **Magenta II** votes for the 1st Respondent were confirmed at 85 and not 84 as shown on the Form 35. At **Kiberesi** the 1st Respondent votes were found to be 381 and not 384; and at **Senta** primary school the 1st respondent was found to have scored 493 rather than 496 as shown on form 35, but the form original form 35 and the unused ballot papers and counter foils were not in the box.

21. Missing counter foils and Form 35

The scrutiny showed that the Form 35s for **Rianchabera I** and **Senta Polling station** and the used ballot counterfoils and the unused ballot papers were not in the ballot boxes and therefore scrutiny could not be done. Although there is lack of clarity in the Regulations as to whether the unused ballot papers and counterfoils which are required to be secured into a tamperproof envelope should be deposited into the ballot box, the trend in the other polling station demonstrated that the practice or direction of the Presiding officer may have been to deposit them into the ballot boxes. The 2nd and 3rd respondent did not also seek to produce them after the recount established that they were not in the box, and cannot be taken

to have discharged their evidential burden in rebuttal to Senta case.

22. While the ballot counter-foil for used ballots are important for verification of the number of votes cast in a particular station, there may be instances where the voting process has internal mechanisms for safeguarding the integrity of the ballot and it cannot be said that the lack of counter-foils must necessarily invalidate an election. It must be that the result of the election was affected in that it could not be established by any means other than the missing counter-foils of ballot papers.
23. In employing scrupulous care in examining the question whether the election should be set aside because of lack of counter-foils, the court must consider whether there are other methods of verification of the voting results at Senta Polling station? The Elections Act and its regulations has procedure for the protection of the integrity of the ballots as follows:
- a. Regulation 68 (5) of the Regulations requires agents to verify the ballot before they are cast as follows: -.

(5) The presiding officer shall before polling commences, allow the candidates or agents who are present at the polling station to inspect the ballot papers provided for use at the polling station and to note the serial numbers thereon;

- b. Regulation 77 (1)(d) requires verification at the time of the counting using counterfoils in these terms:-

“77. (1) At the counting of votes at an election, any ballot paper-

- (a) Which does not bear the security features determined by the Commission;*
- (b) On which votes are marked, or appears to be marked against the names of, more than one candidate;*
- (c) On which anything is written or so marked as to be uncertain for whom the vote has been cast;*
- (d) which bears a serial number different from the serial number of the respective polling station and which cannot be verified from the counterfoil of ballot papers used at that polling station;” and*

- c. Ballot papers comparison at scrutiny when the ballots are scrutinised as the used counter-foils which should have been stamped.

24. It was argued for the 1st respondent that even before the ballots are cast, the candidates and or their agents would have verified the validity of the ballots and recorded their numbers for comparison with the cast ballot papers at the counting and scrutineering stages. The agents at Senta would have noted any irregularities as to the ballot papers if they did not belong to the polling station. The ballot papers may all belong to the station but not all validly cast by the voters registered at the station. Or ballots could be stuffed.

25. The Petitioner alleged in the affidavit that agents were sent out of the counting room during counting. Although this was not proved by any agent so ejected, in the absence of the counterfoils, the verification of the ballots found in the ballot box at Scrutiny is impossible. Moreover, the lack of Form 35 record of the results in the ballot box also makes the verification process difficult. In addition, the antecedents relating to the processing the ballot boxes for Senta polling station at the Tallying Centre tend to confirm serious irregularity at the polling station evidenced by the lack of Form 35 and used counter-foils and unused ballot papers.

26. Senta Polling Station

On the evidence the petitioner **PW1, DW2** the 1st Respondent's party (TNA) agent and the Returning Officer **DW3** described the situation on Senta Polling station as follows:

“I had 3 agents at Senta. The registered voters at Senta under form 35 are not indicated. I know the total registered voters for the Constituency. I had the records of registered voters at each polling station but I cannot recall them. At p. 32 from 36 the number of registered voters is given as 640 for Senta. I know there was voting at Senta. My agents informed me even when they started voting. I do not know whether the results were announced as I did not get my results as indicated earlier. I do not have any witness who swore an affidavit.

*I was there when the ballot boxes from Senta. They were brought in a pickup with a body covered in the old matatu type. This was on 5/3/13 at about 1-2pm. I did a letter about Senta and presented to the Returning Officer where he was standing with the commandant of the AP and there were many policemen. There was also a person called Wangamati. I introduced myself and the returning officer pointing to the Wangamati said “this is my boss”. I later learnt that he was the county co-ordinator. I asked the OCPD to ask the returning officer to accept my letter. **The distance between Senta and tallying centre is 5km.** I complained that there was a delay in the delivering the ballot boxes. I delivered the letter. I gave the letter to my chief agent who gave it to the returning officer.*

I do not know the presiding officer for Senta. I have never met the presiding officer for Senta. I cannot recognize him. I cannot remember whether my agents were at the tallying centre when the ballot boxes were delivered.

I do not know where the form 35 was filled. The chief agent for TNA said they filled it at the tallying centre. The results for Senta were not announced in my presence. I had already left. At p. 107 of my affidavit has the form 35 from Senta. On the reason, there are three persons named. The 3rd person is Vincent Mogoi. There is a signature against his name. He was the party agent. At p. 59, there is a signature against the name Vincent Mogoi, the signatures are different. I have stated that it was forgery as they differ materially. See paragraph 41 (h) and (j). I was not there when the forms were being signed. I said they look materially different. The agents have signed at the poll book. When I analyzed the votes, I used form 36 and the votes from Senta were included for all the candidates.”

DW2 on cross-examination by counsel for the petitioners said:

“I was an agent for TNA at Senta polling station. I was at the station for the whole day. After the voting the results were announced. I signed the register when coming into the station and when I left. My colleague signed the other form. The presiding officer finished the exercise at about 2.00p.m.

P.24 of my affidavit at paragraph 16, I did not go to Magena. The vehicle that we had could not take all of us. The ballot boxes were taken to Magena on 5/3/13 between 5-6a.m. the presiding officer had written form 35. I saw him writing. I was trained. I know form 35. The presiding had signed the form but he had not finished completing the form. When the presiding officer was declaring the results he was writing on form 35.

[Paragraph 17 of the witness's affidavit].

The paragraph relates to Magena not Senta. I do not know why there was need to sign other forms. Paragraph 16 states I was not there at Magena. I did not see form 35 at Senta.”

The Returning Officer DW3 gave his account of the incident at Senta as follows:

“I go the information about the disappearance of the presiding officer. I informed my staff to keep it secret and asked my staff to keep it secret and asked the police to held trace the presiding officer and I instructed the presiding officer in charge of waiting room to ensure that the two security officer’s that had escorted the ballot boxes remained guarding the box and that the Deputy presiding officer for the Senta (044) does not leave the tallying centre. Sometimes the presiding officer and the deputy presiding officer part ways to surrender respectively for the presiding officer at the tallying centre the strategic materials namely the ballot boxes and the ballot papers while the deputy presiding officer goes to the store to surrender the non-strategic material in the black ballot boxes. The deputy is thereafter free to leave. That is why I asked that he does not leave.

Before I continued announcing the results I went to the waiting room and I confirmed that the box for Senta was there properly sealed and the security officers were there. I then went back to the tallying hall and continued to announce the results as they trickled in.

I informed the security officers to trace the presiding officer. At some point in the process, I did not get a reply from the security officers but the presiding officer appeared. This was at 5.00pm – 6.00pm. I was informed of his disappearance about 2-3pm. This was on 5/3/2013. The presiding officer upon arriving seemed a bit confused. He told me that while on the queue he felt some headache and went to rest. The presiding officer arrived as among the last twenty. Senta was not the last station to arrive. It was Moteiribe station which arrived at around 5pm.

The presiding officer did not have the results in form 35 and form 34. Having had the poll book diary. At that point I called the deputy presiding officer because I had to find a solution for the same. It was my duty and responsibility to announce the results, and to declare the winner of at least two elections – the county ward representatives and the national assembly. The two elections were tallied at the constituency tallying centre, while the others were tallied at the county tallying centre and the presidential at the national tallying centre. I did not have the luxury to watch events, I had to find a solution to the problem. I treated as any other challenge that one may encounter in the electoral process. After noting that the presiding officer did not have the results. I convened a meeting with two officials presiding officer and the deputy presiding officer and the agents that were in that station. I only managed to get 3 agents. They all agreed that they had the results announced at the polling station and they had the results on their own pieces of paper and they were able to confirm the results. They did not have form 35s. I gave them a table where to sit at the tallying centre and I provided the presiding officer with a soft copy of form 35 and they sat at a table, the presiding officer, the deputy, the three agents and observers and reporters who were there to observe the process. It took them about 5-10 minutes, they gave me the form 35 that had been signed by them. Before I announced the results I addressed the hall asking whether there were any concerns on the process that I adopted. It seemed everybody was in agreement. I further told them that the results that I was about to announce was as they were announced at the polling station. It seemed everybody agreed and I proceeded to announce the results for Senta (044). This was about 6.00pm. I left the tallying centre at about 7.30pm in the evening to drop the results for the other 4 elections as I proceeded to the national tallying centre to deliver the presidential results.

[At p. 125 of witness affidavit]

Poll book diary for Senta (044). There were 21 agents at Senta. I was only able to trace 3 agents under the circumstances.

[At p. 26 of witness affidavit at p. 76-78]

Form 35s for Senta. The data shown on the form is 4/3/13. The document was filed on

5/3/13. I think that this might have been an oversight. Under the circumstances of the stress of the occasion where the people were calling for the results. I was only able to deal with the issue that helped me quickly solve the problem. I confirmed from the form 36 comparing the valid votes cast against the total number of registered voters and I was satisfied the votes were within the range of the registered voters. Items nos 1-7 on the form 35 is not indicated.

[Witness is shown from 36 for Senta]

The total number of registered voters is pre-printed on form 36. The total number of votes cast at 555 in accordance with form 35. Form 36 show the total votes cast as 558. What I read as the valid votes cast in favour of that candidate. The total for candidates is 555 votes. The total number of rejected votes in form 36 is given as 04 votes. I did not announce the figure of rejected votes because it was not shown on form 35. The figure is shown on form 36.

Counting of votes is done at the polling station. The people of Senta are entitled to be present to witness the counting of votes. The figures had been announced by the presiding officer at the polling station. It is only that the form 35 was filled in the tallying centre but the results had been announced at Senta.

When I tried to ask the presiding officer he appeared confused and I was not able to establish why the presiding officer had not filled form 35 at Senta. I felt I could explain because the petition raised issues that arose at the tallying centre. So the presiding officer is not a witness.

27. On cross-examination by the counsel for the 2nd and 3rd respondents, The National Alliance (TNA) party agent DW2 contradicted himself on the issue of Form 35 at Senta saying he did not see Form 35 being signed but he could recall the results as displayed on the wall, said: ***“The results were announced by the presiding officer one Nyambati. The other agents were present. This was about 2.00a.m on 5/3/13. I did not see the form 35 being signed. I saw the one on the wall. The registered voters were 640. There 558 voters. 1st respondent got 496 and the 1st petitioner 41 and the 2nd petitioner 12 and Nyabuto 02 votes. I wrote the votes down on paper. I also wrote on my register. I was there. There was no dispute about the figures. I recall the 2nd petitioner passing around there at 11.00a.m on 4/3/13. Everything is okay.”***
28. The presiding officer left the ballot boxes on the queue only to turn up later without the form 35 recording the results forcing the returning officer to arrange for a Form 35 to be completed at the tallying station from the recollection of the agents for parties in a meeting called for that purpose by the Returning Officer. While it was definitely irresponsible for the presiding officer to leave the ballot boxes unattended on the queue before handing over to the Returning Officer, the Returning Officer in a commendable step to protect the integrity of process called for a meeting of the Presiding Officer, the Deputy Presiding Officer and three agents whom he could secure at short notice to recast the figure garnered by each candidate at the polling station. It might have been a useful device in maintaining calm and peace at the tallying centre because the revelation of the situation relating to Senta would have caused the members of the public at the tallying centre to protest, perhaps violently.
29. However, in determining whether the exercise at Senta is verifiable and valid regard must be had as to whether the exercise met the constitutional and legal thresholds. In the absence of the Form 35 and the unused ballot papers and counter-foils, what remains is the verification by deduction process, that because there was evidence of voting going at the polling station, with no reported incidents of irregularity and because the presiding officer announced the result at the polling station which, according to the 1st respondent’s TNA agent at the station (DW2), are the same results as those recorded in the Form 35 filled with the assistance of three agents at the Tallying

centre, who were not called as witnesses and because the votes found in the ballot box upon scrutiny closely reflect the figures shown in the Form 35 that was filled at the Tallying centre from the recollection of agents, the votes shown in the box must be the correct tally of votes cast for the individual candidates . This process does not rule out the possibility of stuffing of the ballot box which the procedure for serialising the ballot paper and subsequent verification through the counterfoils is designed to prevent.

30. Whether matters arising in the course of hearing may form the basis of judgment.

I was asked by the counsel for the respondent to enforce the principle of pleadings that parties are bound by their pleading and that therefore the judgement of the court could not be based on an issue which is unpleaded. I had earlier during the hearing considered the matter of unpleaded issue in an objection raised by counsel for the 1st respondent against proposed cross-examination, when I said:

“I have considered the objection, and I would agree with the counsel for the Respondents that there is an issue of prejudice if the petitioners are permitted to put the question to the witness without notice through prior pleading or affidavit evidence. **I would have upheld the objection were it not for the serious implication of the information alleged in the letter. If it were true, the question of legality of the 1st Respondent’s nomination and election would arise. Such a question is in my view of such fundamental moment that a court of law cannot ignore to the extent that the court would be seen to have condoned an illegality.** I would therefore allow the question to be put to the witness. As regards, the issue of putting the document into evidence, the court may on the basis of the contents of the letter, and the response to be given by the Respondents, if necessary summon as a court witness the Registrar of Political Parties under section 80 of the Elections Act.

However, the 1st respondent must be granted an opportunity to prepare to respond to the information contained in the letter, by making any necessary inquiries to mount their response and defence.”

31. As held in *Odd Jobs v. Mubia*, (1970) EA 476, CA a court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the court for decision. Again a court may give judgement on an unpleaded issue where an unpleaded cause of action had become an issue in the trial. As Dufus said at p 520, the omission to plead is an irregularity and where such an irregularity clearly did not affect the merits of the case, it would be a failure of justice if the unpleaded issue is rejected. See also *Transworld Safaris (K) Ltd v. Ratemo* (2008) KLR 339, applying *Odd Jobs v Mubia* supra.

32. Moreover, as held by the Court of Appeal in *Mapis Investment (K) Ltd v Kenya Railways Corporation* (2005) 2 KLR 410, no court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and of the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded illegality or whether he has not. If evidence adduced by the plaintiff proves the illegality, the court ought not to assist him.

A fortiori in election petitions where allegations or issues of illegality occur.

33. For my part, I have considered that where there is an alleged issue of illegality, I have allowed the matter to be raised notwithstanding that the issue has not been raised in the petition. I consider that the substantial justice principle of Article 159 of the Constitution allows the consideration of such an issue of alleged illegality notwithstanding non-pleaded status because the rule of law of which legality is a central part is one of the values of the new constitution. There cannot be greater illegality than the contravention of the constitution.

34. In addition, election petitions are about the enforcement of the fundamental constitutional right to vote under Article 38 of the Constitution, and any unconstitutional act should be examined without the strictures of the technicalities of pleading. However, being mindful of the object of pleading to inform the respondent of the claim against him and afford him an opportunity to respond, the court must grant an opportunity to the respondent of the unpleaded issue to respond to the issue before decision is based on it. See *Gandy v. Caspair Air Charters Ltd.* (1956) 23 EACA 139.

35. To be sure, however, the issue of Senta was pleaded in the petition and elaborated in the affidavit of the 1st petitioner at paragraph 41 thus:

“41. THAT I further wish to point out the following anomalies in respect of Senta polling station 044 to demonstrate that no true, correct, accurate and/or democratic election took place. These include:

- a. I am informed by agent my agent at the said polling station the presiding officer one Ben Ondiba Nyambati set the party agents some 200 away from the counting hall for more than 30 minutes after the close of the poll at 7.10pm;*
- b. The presiding officer was arrested in the course of the day on 5th of March 2013 and booked in O/B No. 2 of 5th of March 2013 at Ogembo Police Station for improper conduct and mishandling of the electoral process.*
- c. Form 35 was presented to the IEBC without summary of votes as required by the regulations;*
- d. I understand that the presiding officer signed form 35 on 05/03/2013 under compulsion and or duress after he was arrested by the police at Magena tallying centre and not at the polling station;*
- e. The results of the polling station were presented the following day 05/03/2013 after 4.00pm, when counting and tallying ended the previous day at about 11p.m.*
- f. Parliamentary votes counted were more by 14 votes than the other elections and despite protests from agents, the votes were included in the final tally;*
- g. My party agents were set out of the counting room, sorting and counting was done as they watched from outside (all these concerns were captured by agents on the agent checklist form);*
- h. Party agents were not allowed to sign form 35, instead signatures were forged on the form for presentation to the 3rd respondent; and*
- i. That the form appears to be different from the standard forms used in other polling stations;*
- j. The signatures of the purported agents, Tom Nyaosi Onyanacha, Daniel M. Kinaro and Vincent Omweno Mogoi differ and are materially different whereas they were purportedly signed at the same time;*
- k. In total disregard to the provision aforesaid, form 35 from Senta polling station was not signed by the presiding officer when the results were declared until the following day, 5th of March 2013. I understand that the presiding officer in the said station was arrested on the polling day for election malpractice and in fact signed the forms under compulsion from the police on the 5th of March 2013, a day after the votes were supposedly counted and tallied at this particular polling station. The said form was also submitted without summary of the votes as required by law and with forged signatures of my party agents who were denied to sign. I refer to annexure “PKM-8” being form 35 from the Senta Polling Station referred to in paragraph 40 above.*

I annex herewith O/B No. 2 of 5th of March 2013 and mark it as “PKM-9” and refer to the affidavit of Jacob Nyakundi.”

36. Moreover, the discovery of the lack of used ballot paper counterfoils and unused ballot papers upon scrutiny is not something that the petitioner could have foreseen to require them to plead them specifically. I consider that the pleading of the problem of Senta polling station in general terms is sufficient in the circumstances of this case. From the evidence, it is clear the parties extensively cross-examined the other’s witnesses on the issue of the incident regarding Senta.

37. The lack of Form 35 and used counterfoils and unused ballot papers lends credence to the allegations of irregularities alleged by the petitioners. It raises many questions as follows:

- a. Were the results announced at the Polling station and what were the figures for the candidates?
The only evidence on this was from one of the 1st respondent's agents at the polling station, without independent verification that is necessary in the circumstances where process at the station is disputed. The Presiding Officer of the station in whose knowledge much of the matters raised in the station was not called. See section 112 of the Evidence Act on burden of proof of special knowledge.
- b. Was a Form 35 ever filled at the polling station and if so what became of it?
- c. If none was filled, what led the presiding officer to this breach of the regulations?
- d. Where are the unused ballot papers and used counter-foils?
- e. Where are the 4 rejected votes shown on the Form 35 but not in the ballot box?
- f. DW2 one of the 1st respondent's agents at Senta said the vehicle with Senta ballot boxes left the station for the tallying centre at 5.00am on the 5/3/13; why did it take more than 6 hours to reach the tallying centre at 2-3pm, a distance of only 5km (according to PW1)?
- g. Where was the Presiding Officer when he is said to have disappeared from the queue leaving the ballot boxes unattended from 2.00pm up to 4.00pm when he resurfaced?
- h. Why did the Presiding officer appear confused and the returning Officer could only rely on agents to recollect the figures of votes garnered by the candidates at the station?
- i. In view of the fears or vote stuffing supported by incidents at Gesabakwa polling station reports of which the Returning officer DW3 acknowledges, the irregularities in the Senta station affects the credibility of the election results.

38. Effect on the result

The margin of difference in votes between the petitioner and the 1st respondent is small at 621 by the form 36 declaration. During cross-examination by counsel for the petitioners the Returning officer DW3 said the 1st petitioner's figure after correction of the transpositional errors gave **10863** reducing the margin between the 1st respondent and the 1st petitioner to **335**. However, upon re-examination on the basis of form 36 and taking into account the loss of 286 votes the 1st petitioner was shown to garner **10507** with a margin therefore of **677** votes. The in-exactitude was caused by the 2nd respondent's error in recording of entries in Forms 35 and transposition onto Form 36. Whatever the figure of the margin at **335, 621 or 677**, I consider that the election would likely be affected by invalidation of the results for Senta where the total votes cast was **556** votes, of which the 1st respondent is shown as garnering **493** and the 1st petitioner **42**. There are also the unaccounted ballot papers at Rianchabera stream I which may point to votes which may affect the result.

39. I consider that for an irregularity to be deemed to affect the result, it need not show exact changes in the score by the winning candidate as against those of the other candidates. I so observed in **PAUL GITENYI MOCHORWA v. TIMOTHY MOSETI E. BOSIRE and 2 Ors.** Petition no. 8 of 2013, when citing Georges CJ. in the Tanzanian case of *Mbowe v. Eliufoo* [1967] EA 240 when he considered the meaning of the phrase 'affected the result' in a provision similar to our section 83 of the Elections Act and held:

"In my view in the phrase "affected the result", the word 'result' means not only the result in the sense that a certain candidate won and another candidate lost. The result may be said to be affected if after making adjustments for the effect of proved irregularities the contest seems much closer than it appeared to be when first determined. But when the winning majority is so large that even a substantial reduction still leaves the successful candidate a wide margin, then it cannot be said that the result of the election would be affected by any particular non-compliance of the rules."

I would agree that where, as here, the margin is small a real likelihood of the result being affected is presented by a substantial reduction of the difference between the votes of the candidates.

40. In the present case, I consider that the constitutional requirements under section 86 of the Constitution for a verifiable and accountable system of election was infringed with respect to

Senta Polling station by the lack of verification devices of the unused ballot papers and the counterfoils of used ballot papers in the surrounding circumstances of the failure to fill the Form 35 for the station at the polling station upon announcing the results or failure to have the Form (if any) put in the ballot box and the filling of a Form 35 at the Tallying Centre from the recollection of agents.

41. The electorate of Bomachoge Borabu constituency will understand that for a free and fair election devoid of *violence, intimidation, improper influence or corruption*, their will expressed through the ballot must, to avoid cheating and fraud on themselves and in order to attract public confidence in the electoral system, be capable of verification; and that where such verification is not possible due to lack of accountability documents such as the Form 35 and unused ballot papers and counterfoils for the used ballots, or for other substantial reasons, the election should be nullified to permit a clear establishment of their will.
42. Accordingly, I return a determination under Article 105 of the Constitution that the incumbent Member of the National Assembly for Bomachoge Borabu Constituency, **JOEL OMAGWA ONYANCHA**, was **NOT** validly elected at the General Election of the 4th March 2013. A certificate of the determination pursuant to section 86 of the Elections Act shall issue to the Independent Electoral and Boundaries Commission and the Speaker of the National Assembly forthwith.
43. As the acts and omissions giving rise to the outcome of this petition were committed by the Independent Electoral and Boundaries Commission and its officers, **the party and party** costs of petition will be paid by the 3rd Respondent to the petitioners and the 1st respondent and the costs will be agreed or taxed by the taxing master of the court to a maximum of Kenya Shillings Two Million (Ksh. 2M).
44. In accordance with Rule 38 of the Election (Parliamentary and County Elections) Petition Rules 2013, the security deposit paid into court by the petitioners will be released to the depositor forthwith.
45. The court is grateful to counsel for the parties for their diligence in presenting their respective briefs in the petition and the Deputy Registrar of the Court, Ms. Lucy Kaitany, for her assistance in the scrutiny proceedings.

Dated signed and delivered on the 7th OCTOBER 2013.

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EDWARD M. MURIITHI

JUDGE

In the presence of: -

- | | |
|--------------------------------------|--|
| Mr. Omwanza with Mr. Begi and Kiarie | - for the Petitioners |
| Mr. Minda for Kibe Mungai | - for the 1st Respondent |
| Mr. Kinyanjui Theuri | - for the 2nd and 3rd Respondents |
| Mr. Edwin Mongare | - Court Clerk |