



**REPUBLIC OF KENYA**

**IN THE CHIEF MAGISTRATE’S COURT AT NAIROBI**

**MILIMANI COMMERCIAL COURT**

**ELECTION PETITION NO. 6A OF 2017**

**IN THE MATTER OF THE CHALLENGE OF THE VALIDITY OF THE KWA**

**NJENGA WARD MEMBER OF COUNTY ASSEMBLY ELECTION, 2017**

**AND**

**IN THE MATTER OF SECTION 75 (1A), 76(1) 80 & 82 OF THE ELECTION ACT, 2011**

**AND**

**IN THE MATTER OF SECTION 6 (1) (B), 8,12,28,29 OF THE ELECTIONS**

**(PARLIAMENTARY AND COUNTY ELECTIONS) PETITION RULES, 2017**

**AND**

**IN THE MATTER OF ELECTION PETITION FOR THE ELECTION**

**OF MEMBER OF COUNTY ASSEMBLY, KWA NJENGA WARD.**

**BETWEEN**

**AZIZ KASSIM IBRAHIM.....PETITIONER**

**- VERSUS -**

**THE INDEPENDENT ELECTORAL**

**AND BOUNDARIES COMMISSION (IEBC)....1<sup>ST</sup> RESPONDENT**

**THE RETURNING OFFICER**

**(EMBAKASI SOUTH CONSTITUENCY).....2<sup>ND</sup> RESPONDENT**

**THE DEPUTY RETURNING OFFICER**

**(EMBAKASI SOUTH CONSITUENCY).....3<sup>RD</sup> RESPONDENT**

**ESTHER MWANGI.....4<sup>TH</sup> RESPONDENT**

**MULYUNGI JOHN KYALO.....5<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. On 8<sup>th</sup> August 2017 Kenyans exercised their franchise for the second time under the Constitution promulgated on 27<sup>th</sup> August 2010 by participating in the General Elections conducted by the Independent Elections and Boundaries Commission (herein after IEBC). The petitioner herein Aziz Kassim Ibrahim was a contestant for the elective post of member of County Assembly of Kwa Njenga Ward. The fifth Respondent one Mulyungi John Kyalo was also a contestant in the said election and was declared duly elected on the 9<sup>th</sup> August 2017 by the 1<sup>st</sup> Respondent IEBC. The results were published in the weekly Issue of Kenya Gazette Vol. CXIX Number 118 under Gazette Notice number 7845.

2. Upon declaration of the fifth Respondent as the winner of Kwa Njenga Ward election, the petitioner contends that he has been deprived off his Constitutional Right under Article 38 (3) to be validly elected as Member of County Assembly of Kwa Njenga Ward. He has consequently filed the present petition dated 5<sup>th</sup> September 2017 and seeks ten declaration and orders namely:-

(a) There be a re-tally of the votes cast in Kwa Njenga Primary School polling station Room Number 1-21 and in Cheminade Training Centre Polling Station Room 1-14.

(b) There be a scrutiny and recount of the ballot paper cast at the said election in all Polling stream in Kwa Njenga Primary School and Cheminade Training Centre Polling Station within Kwa Njenga Ward.

(c) An order that summon do and hereby issue on one Esther Nyambura Mwangi the 4<sup>th</sup> Respondent herein to appear before this court to testify on her official note on both Wiper Democratic Party and at IEBC in the just concluded General Elections.

(d) A declaration that the non-compliance, irregularities and improprieties in the member of County Assembly Kwa Njenga Ward were substantial and significant that they affected the result thereof.

(e) A declaration do issue that Mulyungi John Kyalo the 5<sup>th</sup> Respondent herein – whose election is questioned was not validly elected on the 8<sup>th</sup> August 2017 for the seat of member of County Assembly of Kwa Njenga within Embakasi South Constituency.

(f) That the said election of the 5<sup>th</sup> Respondent as the member of County Assembly of Kwa Njenga Ward be determined and declared null and void.

(g) A declaration do issue that Kassim Aziz Ibrahim the petitioner herein was validly elected as the member of County Assembly of Kwa Njenga Ward.

(h) The Respondents be condemned to pay the petitioners' costs of and incidental to this petition.

(i) An order do issue for the release of Deposit of security of cost deposited by the petitioner in court in furtherance of Section 78(5) of the Election Act.

(j) Any other relief and redress that this court may deem expedient in the course of its determination of this petition.

3. It is important to state at the outset that the petition herein was filed alongside an application under Certificate of Urgency where the Petitioner sought ten prayers set out on the face of it. The same was canvassed by way of written submissions and a ruling was rendered by this court on 16<sup>th</sup> November

2017. The same was determined and orders granted to the effect that all the Kenya Integrated Electoral Systems Kits (KIEMS) used for all the polling and tallying Centres with respect of Member of County Assembly Election of Kwa Njenga Ward held on 8<sup>th</sup> August 2017 be preserved and kept safely. That all election materials be preserved and be kept safely, that all election material be delivered into the custody and safekeeping of this court, that the 1<sup>st</sup> respondent to provide access to the petitioner all the voter registers, counter foils and last serial number of all ballot papers of all the polling station and tallying Centres.

On 29<sup>th</sup> November 2017 this petition came up for further directions. Parties agreed to have this court move to the warehouse where the election material, were stored on 5<sup>th</sup> December 2017 for the purpose of taking charge and sealing the ballot boxes. Parties also agreed that they were relying on the affidavits filed herein and would not be calling any witnesses and further that they were to canvass the petition by way of written submissions but would be allowed a chance to highlight the same orally if any party so wished. The highlighting of submissions was fixed for 22<sup>nd</sup> December 2017.

It is my considered view that the decision by the petitioner to rely on the affidavits filed herein and file written submissions to canvass the petition he in essence abandoned prayers (a), (b) and (c) of the petition set out herein above. I say so as this would have been the next process to be undertaken after this court took charge of the election material but on application by the petitioner.

Parties did file written submissions as directed and this matter came up for highlighting. The respondents informed this court through their respective Counsel that they were not going to make any oral presentations. The petitioner's Counsel indicated that they were going to highlight the same orally and were granted an opportunity to do so.

4. Ms. Awour appearing alongside Mr. Arende for the petitioner made lengthy submissions in writing. The petitioner has listed eleven issues for determination and when Counsel made oral submissions she stated that the fifth Respondent was a beneficiary of inflation of votes particularly in Kwa Njenga Polling Station number 8 and 13. Counsel submitted that according to form 36A annexed at page 96 the fifth respondent had 105 votes but according to form 36 'B' it is indicated that he got 133 votes going by annexure 110. Counsel also submitted that in Polling Station 13 according to form 36 'A' the fifth respondent had 25 votes but form 36 'B' indicated that he had 94 votes. That on the other hand the petitioner's votes were lowered. She gave examples that in polling station number 7 Kwa Njenga Polling Station where form 36 'A' indicates that the petitioner got 95 votes but according to form 36 'B' he had 78 votes. Counsel gave various incidents and urged that there was an outright alteration of the forms.

Counsel referred to the affidavit sworn by one Aron Ashiba who was the petitioner's chief agent in paragraph 7 that he witnessed the doctoring of the forms at the tallying Centre. That during preservation of the electoral material the boxes had broken seals and others lacked stamps. Counsel also argued that the petitioner's agents were chased away at the time when the alterations were being made. In the end Counsel prayed that the petition herein be allowed and a fresh election be ordered. Counsel relied on the decision on SCPP Number 1 of 2017 *Raila Amolo Odinga and Another Versus IEBC and Others*.

5. The first, second, third and fourth respondents in their joint submissions stated that in election petition the burden of proof rest with the party making the allegations challenging the outcome. That the standard of proof in election cases is higher than the proof on a balance of probability but lower than the stand of proof beyond reasonable doubt. Counsel also submitted that by amending Section 83 in the Election Act 2011, Parliament intended to ensure that elections are not simply voided by proving that there were irregularities in the process, but that the same materially and/or substantially affected the election results. The court should subject each and every allegations of malpractice or irregularity raised to a "**materiality test**" as set out in the now amended Section 83 of the Election Act 2011.

6. It is first, second, third and fourth Respondents' contention that the election for member of County Assembly for Kwa Njenga Ward, Embakasi South Constituency was conducted in a free, fair, credible and transparent manner that met the Constitutional threshold. That there were isolated cases of

discrepancies and/or inconsistencies between the results contained in forms 36 'A' and forms 36 'B' which arose from inadvertent human error during the process of tallying and verification but the same cannot from the basis to impeach the election results. Counsel relied on the decision ***John Kiarie Waweru Vs Beth Wambui Mugo & 2 others [2008] eKLR.***

7. Counsel also submitted that the petitioner's agent one Patrick Otieno was present when the results were announced and even signed off form 36 'B'. Court relied on the decision in ***Mercy Kirito Mutegi Vrs Beatrice Nkatha Nyaga & 2 others [2013] eKLR.***

That the court is supposed to construe the provisions of law liberally and broadly so as to give effect to the democratic will of the electorate. That the arrest of the Deputy Returning Officer that occurred on the 18<sup>th</sup> August 2017 was in relation to the presidential election and had no connections with the results of Member of County Assembly for Kwa Njenga Ward contrary to the submissions by the Petitioner's Counsel.

8. Counsel further submitted that the seals on the ballot boxes are made of plastic and are easy to break. That they were transported manually from the polling station after the elections results were announced and stored in the 1<sup>st</sup> Respondent's warehouse. That they were prone to the normal wear and tear especially when they transported and stored in bulk. Counsel relied in the decision in High Court Election Appeal No. 3 OF 2013 ***Charles Nyaga Njeru Vs Independent Electoral and Boundaries Commission & Another***

9. The fifth respondent on his part also filed written submissions, which are by and large similar to those of the other respondents in its content. Counsel submitted that the petitioner in his averment admits that he is relying on unofficial documents sourced from sources which are not verifiable and have no probative value and ought not be relied on. Counsel relied on the decision in ***Mercy Kirito Mutegi Vs Beatrice Nkatha Nyaga and 2 others [2013].*** In the end the respondent prayed that the petition herein be dismissed with costs.

10. I have carefully considered the petition filed herein replies made and submissions by parties. As I have mentioned elsewhere in this judgment the petitioner when taking directions on how to proceed with this petition opted to rely on the affidavits filed herein. ***Rule 12 of the Election (Parliamentary and County Elections) Petition Rules 2017*** provides that member of County elections are tried by way of affidavit evidence

***"12 (3) each person who the petitioner intends to call as a witness at the hearing shall swear an affidavit.***

***(6) Each person who the respondent intends to call as a witness at the hearing shall swear an affidavit.***

***(12) An affidavit shall form part of the record of the hearing and maybe deemed to be the deponent's evidence for the purpose of an examination in chief.***

***(13) Every deponent shall subject to the election court's direction be examined in chief and cross examined.***

***Provided that the parties may by consent accept not to cross examine the deponent but shall hand the deponents evidence admitted as presented in the affidavits."***

11. From the proceedings herein it is clear that the deponents in the petitioners' case were never called to be examined in chief and cross examined. The veracity of the said evidence has not been tested.

In the case of ***Moses Wanjala Lukoye Vs Bernard Wekesa Sambu & 3 Others Bungoma*** ..... 2/13 Gikonyo (J) held:-

***“The only safeguard design of the law is either the Court does not consider such evidence at all or exercises its discretion under Section 80 (1) and (2) of the Elections Act and summon the witnesses. It must be appreciated that Rule 12 of the election rules was deliberately tailored that the affidavits filed in an election petition are by persons whom the petitioner intends to call as witness. As an election petition is not an interlocutory application, but a substantive cause, affidavit evidence should be tested in cross-examination unless the parties consent to the admission of the evidence without calling the maker. If, therefore, it bears repeating, the petitioner does not call the deponents to testify; their evidence should not be considered ... The court will not consider the evidence of witnesses who were not called to testify.”***

In the case of *Noah Makhalang’ang’a Wekesa Vs Albert Adome & 3 others Kitale HCEP 6/13* the court held:-

***“In as much as the rest of the petitioner’s witnesses who deponed supporting affidavits were not availed in court for cross examination for purposes of testing the veracity of their averment, their evidence though forming part of the petitioner’s case may be treated as being inconsequential and devoid of probative value ....”(Emphasis added)***

Most recently in the case of *Ahmed Abdulahi Mohammed & Another Vrs Don Mohammed Abdi Mohammed HCEP 14/2017 at paragraph 89 A Mabeya (J)* held that :-

***(39) “The net effect of the foregoing is that, an affidavit under Rule 12 of the Election Petition Rule forms part of the evidence of the part in support of whose case it is sworn. However, the deponent of such affidavit is to be examined in chief and cross-examined. That is mandatory by virtue of the use of the terms shall in sub- rule 13 of Rule 12 of the Election Petition Rules. It is therefore expected that once a party has filed affidavits in support of his case in an election petition, he shall offer the deponents thereof for cross-examination. Those affidavits being part of record, they are not to be struck out or expunged. Since the veracity of the witness’ testimony is confirmed though cross-examination, failure to test such evidence only waters down the probative value of such affidavits. It is in cross-examination that the truth or otherwise of an allegation or the veracity thereof is gauged. Denying a party the right to cross-examine a witness who has made allegations in an affidavit is to deny such a party a right to a fair trial”***

12. It is clear from the foregoing that the affidavit sworn by the petitioner and others by Aron Asiibe, Duncan Ochieng, Daniel Owino and Mohammud Kassim Ibrahim have not been tested on examination in chief and cross-examination. I hold that the omission herein makes the contents in the affidavits mere allegations and is without any probative value.

The Supreme Court of India in the case of *Jyoti Basu & Others Versus V. Debi Bhosal & Others* reported in AIR 1982 SC, 983. Had this to say about Election Petitions:-

***“An election petition is not an action at common law, or in equity. It is a statutory proceeding to which neither the common law nor the principals of equity apply but only those rules which the statute makes and applied it is a special jurisdiction, and a special jurisdiction has always to be exercised in accordance with the statute creating it. Concepts familiar to common law and equity must remain strangers to the election law unless statutorily embodied. A court has no right to resort to them on considerations of alleged policy in such matters, as those, relating to the trial election dispute, is what the statute lays down. In the trial of election disputes, the court is put in a strait jacket.... ”***

The petitioner’s situation is further compounded by his failure to seize the opportunity granted to him at the interlocutory stage to seek that there be a scrutiny or recount of the ballots. This was after this court took charge of all the electoral material pursuant to its ruling on 16<sup>th</sup> November 2017.

When this court moved to the 1<sup>st</sup> Respondents’ warehouse and took charge of the election materials for member of County Assembly for Kwa Njenga Ward there was a report that was prepared on how the

exercise was conducted and the state in which they were in. The same was going to be part of the interrogation that was to be done had scrutiny and/or recount been conducted. No basis has been laid for the submissions as regards the state of the election material and a decline to accept the same.

In the case of *Gatirau Peter Munya Vrs Dickson Mwenda Kithinji and 2 others* the Supreme Court held:-

**..... ‘The right to scrutiny and recount does not lie as a matter of course. The party seeking a recount or scrutiny of votes in an election petition is to establish the basis of such a request to the satisfaction of the trial Judge or Magistrate, such a basis maybe established by way of pleading and affidavits or by way of evidence adduced during the hearing of the petition.’**

It is clear an order for scrutiny or recount is not automatic. In this case this right was granted but the petitioner extinguished it when counsel decided to proceed and canvas the petition same by way of written submissions without calling any witness.

In the submissions made by the petitioner’s Counsel she urges that I make an order directing the 1<sup>st</sup> respondent to organize and conduct a fresh election for member of County Assembly, Kwa Njenga Ward in strict conformity with the Constitution and the Election Act. It is however clear that this was not pleaded in the Petition. The Petitioner only sought for an order that the 5<sup>th</sup> Respondent’s election as a Member of County Assembly in Kwa Njenga Ward be declared null and void and further that a declaration do issue that the petitioner herein was validly elected as the member of County Assembly of Kwa Njenga Ward. In the case of *Mohammed Muhamed Sirat Vrs Ali Hassan Abdirahman & 2 others Nairobi HCEP Number 15/2008* the court held:-

**“From the outset this court wishes to state that the petitioner adduced evidence and even made submissions in respect of matter that he was not specifically pleaded in his petition. It is trite law that the decision rendered by a 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 which he adduced evidence but which were not based on the pleadings that he had filed in court, and in particular, the petition.”**

In the case of *Raila Odinga & another Vs IEBC and 2 others SCK petition number 1 of 2017 the Supreme Court* held that:-

**[323] “the rule of the thumb has always been that parties must be bound by their pleadings and especially in a case such as this where the petitioner is asking the court to address its mind to the possible unconstitutionality of a legal provision.”**

It is my humble view that the evidence tendered herein is of low evidentiary value and this court is not convinced that it should grant the orders sought. This court is guided by the provisions of Article 82 of the Constitution to uphold the right of citizen to elect leaders of their choice. There is admission by all parties herein that the process went on smoothly and there were no incidences reported which would compel this court to nullify the elections of the 5<sup>th</sup> Respondent as Member of County Assembly for Kwa Njenga Ward. This petition therefore lacks merit and is hereby dismissed with costs to the respondents.

### **Costs**

Costs follow the event. The law empowers this Court to specify the amount of costs payable. I note that Counsel representing parties are based in Nairobi. This matter came up on several occasions where parties recorded consents and the court gave directions. I hold that costs shall be payable by the petitioner to the 1<sup>st</sup> and 5<sup>th</sup> respondents and shall not exceed 250,000/= for each of them.

A certificate of this court as to the validity of the election of Kwa Njenga Member of County Assembly shall forthwith issue and be served upon the Independent Electoral and Boundaries Commission for the purpose of notifying the Speaker of the County Assembly in accordance with Section 86 (1) of the Elections Act.

The security deposited in court shall remain so deposited pending the taxation of costs in accordance with Rule 31 (3) of the Election Rules and shall be applied accordingly.

Dated, signed and delivered in open court this 24<sup>th</sup> day of January, 2018

**Hon. P. Ngare Gesora (Mr.)**

**CHIEF MAGISTRATE**

Court Assistant – Ms. Lucy Kendeli

**APPEARANCES**

1. Petitioner represented by Mr. Arende

Instructed by Prof. Tom Ojienda & Associates Advocates

2. 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents represented by Mr. Tanui

Instructed by Kipkoech Tanui & Co. Advocates.

3. 5<sup>th</sup> Respondent represented by Mr. Tanui holding brief for Mr. Gachie.

Instructed by Wanjohi Gachie & Co. Advocates.

Mr. Tanui – We are obliged.

Mr. Arende –I appreciate and pray for a copy of judgment.

**Court**

Copies of the judgment herein to be supplied to all parties.

**Hon. P. Ngare Gesora (Mr.)**

**CHIEF MAGISTRATE**

**24/1/18**