



REPUBLIC OF KENYA

IN THE PRINCIPAL MAGISTRATE’S COURT AT OGEMBO

ELECTION PETITION NO. 1 OF 2017

JAPHETH OMARI OMBEOPETITIONER

VERSUS

1. FRED SAMBU NYACHOTI.....1ST RESPONDENT

2. MOSES DAULA OMONDI.....2ND RESPONDENT

3. THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....3RD RESPONDENT

J U D G M E N T

On the 8th day of August 2017 this Country held its 2nd General Elections under the New Constitution. The elections were different in many aspects such as technology that was being used right from the registration of voters, identification of voters, tallying of votes and subsequent announcement and declaration of results.

The petitioner Japheth Omari Ombeo in exercise of his political rights under Article 38 3(e) of the Constitution which reads:-

“38 (3) – Every adult citizen has the right, without unreasonable restrictions-

- a) To be registered as a voter,
- b) To vote by secret ballot in any election or referendum; and
- c) To be a candidate for public office, or office within a political party of which the citizen is a member and, if elected to hold office.

Vied for the post of county Assembly representative for Bobasi Chache ward (Bobasi Constituency within Kisii county).

The petitioner had the following competitors:-

No.	CANDIDATE
1	Fan Nyambasora M’Maltsi W

2	Samwel Gwaro Isaiah N
3	James George Magange
4	Jared Nyagaka Angwenyi
5	Vincent Kerosi Marita
6	Peter Moenga Nyanusi
7	Thomas Mogaka Ogega
8	Zephaniah Mose Nyangoto
9	Henry Nyambasora Nyabuto
10	Ruth Obure Mongina
11	Nehemiah Omwenga Mc'jahaz
12	Jeremiah Ongechi Nyandumo
13	Joseph Ongeru Ogega
14	Evans Onyando Onsare
15	Andrew Oseko Manyura
16	Wilson Osoro Nyabayu
17	George Samba Vincent
18	Fred Sambu Nyachoti
19	Tom Hezekiah Bosire
20	Maroro Joseph Ondieki
21	Mochama John Momanyi
22	Siocha Robert Nyamache

Following the voting exercise the counting and subsequent tallying of votes the 2nd Respondent declared the following results;-

NO. GARNERED	CANDIDATE	VOTES
1	Fan Nyambasora M'Malasi W	26
2	Samwel Gwaro Isaiah N	388
3	James George Magange	110
4	Jared Nyagaka Angwenyi	36

5	Vincent Kerosi Marita	36
6	Peter Moenga Nyanusi	505
7	Thomas Mogaka Ogega	89
8	Zephaniah Mose Nyangoto	37
9	Henry Nyambasora Nyabuto	394
10	Ruth Obure Mongina	107
11	Nehemiah Omwenga Mc'jahaz	49
12	Jeremiah Ongechi Nyandumo	177
13	Joseph Ongeri Ogega	59
14	Evans Onyando Onsare	54
15	Andrew Oseko Manyura	1127
16	Wilson Osoro Nyabayo	55
17	George Samba Vincent	294
18	Fred Sambu Nyachoti	1354
19	Tom Hezekiah Bosire	102
20	Maroro Joseph Ondieki	58
21 562	Mochama John Momanyi	
22	Siocha Robert Nyamache	974
23	Japheth Ombeo Omari	1291

The (Returning officer) further proceeded to declare the 1st Respondent (Fred Nyachoti) as the duly elected member for Bobasi Chache Ward. The petitioner emerged 2nd in the race. The petitioner being aggrieved with the voting exercise and subsequent declaration of the results filed this petition on the 23rd day of August 2017. The petition is premised on the following grounds:-

a) The 2nd Respondent erred in law in declaring final results of the Election for the office of Member of County Assembly for Bobasi Chache ward Code No.1320 without accurately collating results from all polling stations as required by law and that such declaration affected the declared results of the said elections.

b) That the 3rd Respondent failed in his duty under Article 86(c) and (d) of the Constitution by failing to openly and accurately collate results from all polling stations as announced by the Presiding officers of each polling stations and more particularly failing to openly collate and announce results from Birongo primary school polling station Code 108. Consequently the petitioner prayed for the following reliefs:-

- c) A recount of valid votes cast for all candidates who contested for the office of the member of County Assembly for Bobasi Chache ward Code No.1320 in the General Election held on the 8th day of August 2017.
- d) A declaration that the 1st Respondent was not validly elected to the office of the County Assembly for Bobasi Chache ward Code No.1320 within Kisii County and the certificate of election issued to the 1st Respondent by the 2nd Respondent be and is hereby recalled and cancelled.
- e) A declaration that the petitioner was duly and validly elected to the office of Member of County Assembly for Bobasi Chache Ward Code No.1320 to the Kisii County Assembly and the 3rd Respondent be and is hereby directed to issue a certificate of election to the petitioner forthwith.
- f) The 3rd Respondent be and is hereby directed to notify the Speaker of the County Assembly of Kisii in writing of the valid election of the petitioner to the office of Member of County Assembly for Bobasi Chache Ward Code No.1320 in the election held on the 8th day of August 2017.
- g) Costs of the petition be awarded to him.

The petition was supported by the Petitioner's own affidavit and the affidavit of Kepha Otindo Nyambuka.

The petition is opposed by the Respondents. The 1st Respondent filed a response to the petition which was supported by 3 affidavits. Whereas the 2nd and 3rd Respondents swore a joint affidavit which was sworn by the 2nd Respondent herein (Moses Daula Omondi).

The 1st Respondent denied the allegations contained in the petition and contended that the election process culminating into his declaration as the member of county assembly representative elect in respect to Bobasi Chache ward was transparent, free and fair reflecting the overall freewill and choice of the electorate and should therefore be declared valid for all intents and purposes.

In response to the petition, the 2nd and 3rd Respondents averred as follows:-

- a) There were a total of 23 persons who were duly nominated as candidates for the position of MCA for Bobasi Chache Ward.
- b) The voting process across the ward was conducted smoothly and there are no recorded incidences that would impact on the overall conduct of the process.
- c) The Presiding officers oversaw the counting of the votes at their respective polling stations and duly filed the relevant statutory forms in this case forms 36A.
- d) That in respect to Birongo primary school polling station, there were 2 sets of results from the instant polling station and in view of the two sets of results presented from the same polling station, the 2nd Respondent annulled the results thereof in computing the final tally at Bobasi Chache ward as shown in form 36B.

The 2nd and 3rd respondents prayed that this Honourable court do make a finding based on the evidence presented before it.

Before I proceed any further, I wish to acknowledge with gratitude the efforts made by the counsels of the parties herein. I was humbled by the professional manner in which counsels conducted themselves during the proceedings. I was impressed by the way counsels were able to observe the strict timelines despite their busy schedules. The authorities that were supplied to this Court and the submissions are evidence of

the Advocates indepth, research and devotion to these proceedings. I must say that they enriched my mind. I also wish to extend my gratitude to the Ogembo Law Courts fraternity and in particular Hon.Ateya and Hon.Mutai who supported me all through. Last but not least, I wish to sincerely thank the parties, their witnesses and the people of Bobasi Chache ward at large for their patience and discipline during the pendency of these proceedings. MAY GOD BLESS YOU ALL.

Having said that I wish to revert to the matter at hand.

The parties herein filed their list of issues during the pretrial stage. I condensed them into the following:-

- a) Whether the elections were conducted in accordance with the principles laid down in the Constitution and written laws ?**
- b) Whether the 1st Respondent was validly elected as the MCA of Bobasi Chache ward?**
- c) Who should bear the costs of this petition?**
- d) What consequential orders, declarations and reliefs should this Court grant?**

I want to address the 1st issue.

- a) Whether the elections were conducted in accordance with the principles laid down in the Constitution and written laws**

b) Article 81 of the Constitution reads as follows

General Principles for the electoral system.

81. The Electoral system shall comply with the following principles:-

- a) Freedom of citizen to exercise their political right under Article 38;
- b) Not more than 2/3 of the members of elective public bodies shall be of the same gender;
- c) Fair representation of persons with disabilities.
- d) Universal suffrage base on the aspiration for the fair representation and equality of vote; and
- e) Free and fair elections which are:-
 - i) By secret ballot.
 - ii) Free from violence, intimidation, improper influence of corruption
 - ii) Conducted by an independent body
 - iv) Transparent; and
 - v) Administered in an impartial, neutral, efficient, accurate and accountable manner.

The petitioner called 2 witnesses, who included the petitioner himself though it had been indicated during the pre trial stage that he would call 3 witnesses. The petitioner testified in Court that he did not have a problem with the voting process. But he had a problem with the results of Birongo primary polling station which were announced at the tallying centre.

PW2, Kepha Nyambuka Otindo testified that the results of Birongo primary school polling station were not included in the final tally.

The Returning officer testified as to why he decided to exclude the results of Birongo primary school polling station in the final tally. The reason that he gave was that the presiding officer of Birongo primary school polling station presented to him two sets of results.

In the course of these proceedings, this Court on its own motion under Section 82(1) of the Elections Act ordered for scrutiny and recount of votes in respect to Birongo primary school polling station. The scrutiny and recount was to be limited to the ascertainment of votes cast for each candidate. From what emerged from the evidence of the parties herein was that the results were declared minus the results of Birongo primary school polling station.

The contents of the ballot papers were recorded and also the serial numbers plus the seals used were also recorded.

The scrutiny of the seals and the boxes detected nothing abnormal as per the initial findings. This Court was able to record the results of form 36A, stray ballot papers, rejected ballots, tallying sheets for the candidate, counterfoils of used ballot papers, unused ballot papers, and the ballot papers and the results were as follows:-

- 1) Nyagaka Jared - 2 votes
- 2) Henry Nyabuto -2 votes
- 3) George Maganga -7 votes
- 4) Samwel Gwaro -1 vote
- 5) Ruth Mongina -4 votes
- 6) Wilson Nyabayo -1 vote
- 7) George Samba -1 vote
- 8) Nyachoti Fred Sambu -3 votes
- 9) Robert Nyamache -4 votes
- 10) Nehemiah Omwenga -2 votes
- 11) Peter Nyandusi -4 votes
- 12) John Momanyi -156 votes
- 13) Andrew Mayora -13 votes
- 14) Japheth Omari Ombeo -343 votes

I also went through the polling station diary which showed that as at 5.00pm on 8.8.17, 449 persons had voted and 8 persons were on the queue. That is to mean, that the votes cast at the station did not exceed the number of registered voters.

From the outcome of the scrutiny and recount, it was quite apparent that some irregularities and illegalities were noted. The results of Birongo primary school Polling station were not included in the final tally, because the Presiding officer presented two sets of results to the returning officer (the 2nd

respondent herein). The Presiding Officer was not called as a witness. In any election, the one who gets more is supposed to be declared the winner. The will of the people of Birongo primary school polling station was not included in the final tally. The 343 votes that the petitioner garnered at Birongo primary school polling station could have made a whole difference and that would definitely affect the outcome of the election. It is my considered view, that the elections at Birongo primary school polling station were not conducted in accordance with the Constitution and the applicable electoral laws.

b) Whether the 1st Respondent was validly elected.

The precise circumstances under which an election can be invalidated are stated under Section 83 of the Elections Act. This Section was amended by the Elections laws Amendment Act of 2017, at No.340 of 2017. The said amendment came into force on 2.11.17. This amendment is not applicable to this election in issue, since the election herein was conducted on 8th day of August 2017.

The initial Section 83 of the Act provides:-

“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 that written law or the non compliance did not affect the results of the election”.

The Supreme Court expounded on this Section in:-

Raila Amolo Odinga and another – vrs IEBC and 2 others. Presidential Petition No.1 of 2017.

It elaborated clearly that this Section has 2 limbs:-

- i) Compliance with the Constitution and the laws on elections, and
- ii) Irregularities that may affect the result of the elections.

The Court held

“Guided by these principles, and given the use of the use of the word “or” in Section 83 of the Elections Act as well as sum of our previous decisions. We cannot see how we can conjunctively apply the two limbs of that Section and demand that to succeed. A petitioner must only prove that the conduct of the election violated the principles in our Constitution as well as other written law on elections but that he must also prove that the irregularities or illegalities complained of affected the result of the elections as counsel for the Respondents assert. On our view such an approach would be tantamount to misreading of that provision.

In the celebrated case of Morgan and others – vs- Simpson and another (1974)3ALL ER 772, Lord Denning laid down the following principles.

- 1) If the election was conducted so badly that it was not substantially in accordance with the law as to election then the election is vitiated irrespective of whether the result is affected or not.
- 2) If the election was conducted substantially in accordance with the law it cannot be vitiated by a breach of the rules or mistake at the polls provided that the breach or mistake did not affect the result of the election.
- 3) If the election was conducted substantially in accordance with the law but there is a breach of the rules or a mistake at the polls station which affect the results then the election is vitiated.

From the foregoing, it is my opinion that the primary consideration in an election dispute is;-

- i) Whether the election was conducted in accordance with the law and to what extent.
- ii) Whether the will of the electorate was affected by the irregularities in the conduct of the election.

Having analyzed the evidence on record together with the results of scrutiny and recount in respect to Birongo primary school polling station. It is trite fact that failure to include the results of Birongo primary school polling station in the final tally affected substantially and materially the outcome of this election. I find that the 1st Respondent was not validly elected and returned as the Member of county Assembly of Bobasi Chache ward.

(c) Who should bear the costs of this petition.

It is trite law that costs follow the event.

Rule 30 of the Election(Parliamentary and County Elections) Petition parties, 2017 and Section 84 of the Election Act empowers an Election court to make orders on:-

- i) Costs payable
- ii) Person who pays the costs
- iii) Person to whom the costs are payable.

I find that the 1st, 2nd and 3rd respondents are responsible for the success of this petition and they ought to pay costs to the petitioner.

This petition was straight forward as the issues were not complex. This was clearly reflected by the number of the witnesses who were called and the nature of evidence that was adduced before me. I have taken into account the preparations of the entire case by the parties, attendances and time spent in the matter during mentions, hearings and scrutiny.

In light of the above, I am of the view that an award of Kshs.300, 000(three hundred thousand) to the petitioner is adequate compensation in terms of costs.

(d) What consequential orders, declarations and reliefs should this Court grant

Section 75(3) of the Election Act provides as follows:-

75(3) In any proceedings under this Section a court may grant appropriate reliefs including:-

- a) A declaration of whether or not the candidate whose election is in question was validly elected.
- b) A declaration of which candidate was validly elected.
- c) An order as to whether fresh elections will be held or not.

Owing to the foregoing, I allow the petition herein as follows:-

- a) That the 2nd Respondent was not validly elected and returned as the Member of county Assembly of Bobasi Chache ward.
- b) That there be a fresh election in the entire Bobasi Chache ward.
- c) A certificate of this determination to issue to the IEBC and the Speaker of County Assembly of

Kisii County.

d) The 1st, 2nd and 3rd Respondents to pay costs assessed at Kshs.300, 000(three hundred thousand only) to the petitioner.

e) That the Kshs.100, 000/= deposited herein as security for costs be released to the petitioner.

DATED AND DELIVERED THIS 20TH DAY OF FEBRUARY 2018.

BY M.M.NAFULA

SENIOR RESIDENT MAGISTRATE

Judgment delivered in open court in the presence of

Court Assistant Gladys

Mr.Begi for the Petitioner. I am also hb for Mr.Oduor for the 2nd & 3rd Respondents.

O.M Otieno for 1st Respondent