



REPUBLIC OF KENYA

IN THE PRINCIPAL MAGISTRATES COURT AT OGEMBO

ELECTION PETITION NUMBER 4 OF 2017

IN THE MATTER OF THE ELECTION ACT NO 24 OF 2011 LAWS OF KENYA AND IN THE ELECTIONS(GENERAL) REGULATIONS, 2017 AND ELECTIONS (PARLIAMENTARY AND COUNTY) PETITION RULES

AND IN THE MATTER OF THE ELECTIONS FOR MEMBER OF COUNTY ASSEMBLY FOR BOGETENGA WARD CODE NO. 1307 SOUTH MUGIRANGO CONSTITUENCY WITHIN KISII COUNTY HELD ON THE 8TH AUGUST 2017

BETWEEN

SAMUEL MAUTI MAKORI..... PETITIONER

VERSUS

JAMES NGISA GISORE1ST RESPONDENT

WILSON KIMUTAI KIPCHUMBA.. 2ND RESPONDENT

THE INDEPENDENT ELECTORAL AND BOUNDARIES

COMMISSION.....3RD RESPONDENT

JUDGEMENT

Introduction and Background

1. The petition is filed by Samuel Mauti Makori who contests the election of James Ngisa Gisore as the Member of County assembly of Bogetenga Ward within Kisii County.
2. The petition listed the declared results for Member of County assembly of Bogetenge Ward within Kisii county in paragraph 6 of the petition as follows;-

a. Gisore Ngisa James.	2996 votes.
b. Makori Samuel Mauti	2641 votes.
c. Mauti Japhet Obai	331 votes.
d. Moreka Rueben Choi	1825 votes.

- | | |
|---|-------------------|
| e. Nyagiro Richard Kenyanya | 60 votes. |
| f. Nyarigoti Richard Onuko Nyakina | 264 votes. |
| g. Oanda Cyrus Matoke | 887 votes. |
| h. Ogwori Simeon Okeri | 80 votes. |

3. The grounds upon which the petition is brought were listed as from paragraph 10 of the petition in which the petitioner alleged that the 2nd and 3rd respondents and the officers working under them blatantly breached the principles set out in the constitution under Article 86 of the constitution intended to guarantee a free, fair credible and transparent election.

4. The petitioner averred that the 2nd and 3rd respondents failed to accurately collate results for votes cast at each polling station as required under Article 86 of the constitution but named particular polling stations I.e. **Kenyoro Primary school polling station -2, Mosache Primary school polling station -1, Nduru secondary school polling station -1, Nyabigena primary school polling station -1, Nyamarambe coffee factory polling station -1, Nyabigena primary school polling station-2, Nyandiwa Primary school polling station-2, Riosiri primary school polling station-1, Bomonyama primary school polling station-1, Riosiri primary school polling station 2 and Omogwa primary school polling station -1.**

5. The petitioner alleged that in the said particular polling stations the serial numbers in form 36A differed with the ones downloaded from the IEBC public portal and that the said form 36 A's were not signed by the presiding officer or stamped by the official IEBC stamp.

6. That the 2nd respondent compromised the handling of election materials to expose them to fraudulent activities as votes cast in respect to County assembly seat was a total of 9087 votes while those cast for the members of National assembly aggregated to 9240 votes giving a difference of 153 votes.

7. The petitioner further alleged that large numbers of voters were assisted to vote without complying with the elections (general) Regulations 2017.

8. The petitioner thus urged this court that by reason of the alleged irregularities and failure to comply by the written law, the constitution and regulations relating to elections, the outcome of the elections and the results and returns thereof ought to be rendered null and void.

9. The 1st respondent filed a response to the petition on the 20th September 2017 denying each allegation contained in the petition stating that the elections pertaining to the Member of county assembly for Bogetenga ward were carried out in accordance with the provisions of the constitution.

10. That on the issue of variation of serial numbers the same arose from assigning of every carbon copy a separate and distinct serial number with a view of safeguarding the electoral process.

11. That the analogy and /or comparison of votes cast between the office of the member of county assembly, Bogetenga ward and that of the National assembly, South Mugirango constituency, is erroneous and misconceived and that in any event this court is devoid of the jurisdiction to entertain an issue concerning the validity of the votes cast in favor of the member of the National assembly.

12. That in the alternative and without prejudice even if there were any irregularities the same were minor and inconsequential and curable under the provisions of Section 83 of the Election Act, No. 24 of 2011.

13. That the issues highlighted in the petition were generalized with the petition devoid of requisite particulars and was as such fatally deficient and/or defective.

14. That the 1st Respondent was validly elected and lawfully declared as the Member of county assembly-elect, Bogetenga County assembly ward, Kisii county.

The 2nd and 3rd Respondents case

15. The 2nd and 3rd Respondents filed a joint response to the petition on the 19th September 2017 denying all the allegations contained in the petition.

16. That the 2nd respondent accurately tallied and collated results for votes cast at each polling station and that serial numbers on the forms are meant to be different as they are plucked from different booklets with different serial numbers.

17. That the election for Member of County assembly Bogetenga ward were conducted strictly in compliance with the constitution, relevant legislation and regulation and were free, transparent, verifiable and credible.

PARTIES EVIDENCE

18. At the hearing of the case the parties and their witness adopted their affidavits as their evidence in chief and were subject to cross-examination.

19. The petitioner alleged various malpractices in his affidavit. On being cross examined by the 1st respondents counsel, Mr. Oguttu Mboya he stated that there were different set of results from the same polling station. That there was a difference in the serial numbers in the forms downloaded from IEBC portal and the ones obtained from the polling stations named in Paragraph 10(a)-(K) of the petition. That some of the forms were also not signed or stamped.

That in respect of agents, he had agents at Kenyoro polling station 1, Mosache polling station 1, Nduru secondary school polling station 1 and Kiorina primary school polling station.

That he could see that the form 36A was signed by agents said to be from KNC Party (petitioners party) in Nyamarambe coffee factory polling station 1, Nyabigena primary school polling station one, Omogwa primary school polling station 1 and Nyabigena primary school polling station 2. That however his agent was chased away from Nyandiwa primary school polling station 2.

He further stated that his agents did not collate results from Bogetenga Ward and that there were many votes that were unaccounted for with the affected polling stations being the ones pleaded from paragraph 10(a) to 10(k) of the petition. That at the time of filing of the petition he was also aware that his driver had been subjected to violence.

20. On cross examination by Mr. Kibet for the 2nd and 3rd respondents he stated that in his view the elections were not free and fair and that he had a problem with the serial numbers on the various form 36A's. That he knew that serial numbers are numbers in sequence in a booklet and that form 36A are usually contained in a booklet and serialized.

That all the form 36A referred to in the petition at paragraph 10(i) (a) to (k) had all been signed by the presiding officers. He also stated that there were forgeries and irregularities in respect of Omogwa primary school polling station 1 as the total number of votes cast

was indicated as 347 votes cast. Further that at Kiorina primary school polling station 1, 2 votes were deducted from the 1st respondent when transferring results from form 36A to form 36B.

That he was aware there was violence and that one person had been arrested but no polling station was closed because of violence.

21. On re-examination the petitioner's advocate he stated that his complaint was not about the numbers but the process. He stated that he did not agree that that Forms 36A were contained in a serialized booklet.

He also stated that there were differences in the Form 36A downloaded from IEBC portal and the ones obtained from the polling stations.

That there was also a difference in the votes cast for the Member of county assembly and that of the National assembly, the difference being 193 votes and that there was no explanation concerning that by the 3rd respondent.

22. The petitioner further called a total of 6 witnesses in support of his case alleging various malpractices ranging from violence, failure of BVR machines, failure to follow correct procedure in assisting voters that needed help in voting, influencing of voters and irregularities in statutory forms.

The 1st Respondent's case

23. The 1st respondent averred that the elections were carried out in an open, transparent, democratic and credible manner. That there were no irregularities and/or malpractice that were witnessed during the election exercise, including voting, counting of votes and the resultant tallying and announcement of results. He further stated on cross examination that there was no violence, intimidation and campaigns taking place at the polling station and no agent was barred from the polling stations.

On cross examination by the petitioners advocate, Mr. Onyancha he stated that voting ended at 5:30PM and that all assisted voters filled a form before being allowed to vote. He also stated that he did not know any agents by the names of Stephen Orina or Lazarus Ombegi Mose.

The 1st respondent called a further 5 witnesses in support of his case all who testified that the elections were carried out in an open, transparent, democratic and credible manner.

2nd and 3rd respondent's case

24. The 2nd and 3rd respondent's first witness was the returning officer South Mugirango constituency who stated that he did not receive any complaint in regard to the elections in Bogetenga ward.

That on the issue of serial numbers, he explained that they have a booklet in which Form 36A are contained and which has serial numbers and each page bears a different serial number. He further explained that it was international best practice that election booklets must bear different serial numbers and that a first carbon copy and a second carbon copy would each have different serial numbers.

That at Omogwa primary school polling station there was an error in summation of the total votes cast which had been understated by 100 votes but that it did not affect the votes cast for any of the candidates.

That there was also security provided at Nyamarambe town hall and there could be no possibility of violence. Further that he did not receive any complaint in regard to election malpractice.

25. On cross examination by the petitioners advocate, he stated that he did not get affidavits from presiding officers in respect to the polling stations mentioned in paragraph 10 of the petition. He was also referred to the Form 36A in respect to Nyandiwa primary school polling station 2 which showed a difference of results for one of the candidates Nyarigoti Richard Onuko in which it was not clear whether he got zero votes or one vote.

He also stated that the difference between the votes for Member of county assembly and those of member of National assembly was 153 votes but explained that this was partly to the understatement of votes cast at Omogwa primary school polling station by 100 votes which then brought the difference down to 53

votes. That the 53 votes could be attributed to rejected votes and stray votes

26. On re-examination, he stated that election for different positions are done separately and there could be rejected votes in the parliamentary position votes. That there could also be arithmetical errors in the parliamentary position votes.

He also stated that he did not receive any complaints concerning an attack on the petitioner's vehicle or concerning any agent being barred from accessing a polling station.

That presiding officers also have no control over any agent in regard to signing of form 36A and that the election was free, fair peaceful, credible and reflected the will of the people of Bogetenga ward.

The 2nd and 3rd respondent called a further 5 witnesses in support of their case.

Issues for determination

The parties herein filed separate issues for determination. I have looked at the said issues, considered the parties pleadings, the testimony adduced and submissions made by the parties and I find the following issues fall for determination by this court.

- a. Whether the elections were conducted in compliance with the constitution and electoral law.**
- b. Whether there were irregularities and illegalities in the conduct of the said election, and if so, whether they affected the integrity of the election and the declaration made by the 3rd respondent.**
- c. Whether the declaration of the 1st respondent as Member of County assembly elect of Bogetenga ward was Valid.**
- d. What consequential orders, declarations and reliefs should the court grant if any?**

Analysis and Determination

27. I) Whether the Elections were conducted in compliance with the constitution and the electoral Law.

The constitution mandates specific obligations on the 3rd respondent under Article 86 which states;-

86. At every election, the independent Electoral and boundaries commission shall ensure that;-

- a) Whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent.**
- b) The votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station.**
- c) The results from the polling stations are openly and accurately collated and promptly announced by the returning officer and**
- d) Appropriate structures and mechanisms to eliminate electoral malpractices are put in place, including the safekeeping of electoral materials.**

The burden of proving the allegations of non-compliance with the constitution and electoral law

rests with the petitioner.

In election disputes the standard of proof is higher than a balance of probabilities but lower than beyond reasonable doubt.

This was what was stated by the supreme court in **Raila Odinga & others versus Independent Electoral and Boundaries commission & 3 others SCK Petition No. 5 of 2013[2013]eKLR**

“...[203] The threshold of proof should in principle , be above the balance of probability , though not as high as beyond reasonable doubt save that this would not affect the normal standards where criminal charges linked to an election are in question”

In **Jackton Nyanungo Ranguma versus Independent electoral & Boundaries commission & 2 others.Kisumu Election Petition No.3 of 2017** it was further stated by Majanja .J that;-

“Related to the burden of proof is that fact that the petitioner is bound to prove the case it has pleaded. A petitioner is not permitted to make a case outside the pleadings and his affidavits and testimony must be consistent with and support the case pleaded.”

In **Mahumud Muhumed Sirat versus Ali Hassan Abdirahman & 2 others Nairobi EP NO.15 of 2008[2010] eKLR** it was further stated by Kimaru J as follows;-

“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 an opinion in respects of aspects of the petitioners case which he adduced evidence but which were not based on the pleadings that he filed in court and in particular, the petition”

28. Having laid out the standard of proof required and having shown that an election court ought to determine a petition based on what is pleaded. This court will therefore confine itself to matters that were pleaded in the petition by the petitioner.

29. The petitioner at paragraph 10 of his petition accuses the 2nd and 3rd respondents of blatantly breaching the principles set out in the constitution under Article 86 of the constitution intended to guarantee a free, fair, credible and transparent election. The petitioner goes ahead and pleads the following particular polling stations;-

- a. Kenyoro primary school polling station 2.
- b. Mosache primary school polling station 1.
- c. Nduru secondary school polling station 1.
- d. Nyabigena primary school polling station 1.
- e. Nyamarambe coffee factory polling station 1.
- f. Nyabigena primary school polling station 2.
- g. Nyandiwa primary school polling station 2.
- h. Riosiri primary school polling station 1.
- i. Bomonyama primary school polling station 1.
- j. Riosiri primary school polling station 2.

k. Omogwa primary school polling station 1.

30. Section 83 of the Election Laws(amendment Act,2017 prior to its amendment provided as follows;-

“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.”

31. In the polling stations pleaded in the petition that I have mentioned in paragraph 29 of this judgment the common complaint by the petitioner was differing serial numbers on the form 36A's forwarded to IEBC and the ones downloaded from the IEBC public portal.

332. The 2nd respondent in answer to this testified that the form 36A's are contained in serialized booklets. That each page on the booklet contains different serial numbers and that international best practice favors that election booklets must have serial numbers.

On cross examination he stated that the polling day diaries contains serial numbers for ballot papers but that he had not produced the same in court.

The petitioner in his petition had indicated that he would be seeking scrutiny of ballot papers counterfoil and the polling day diary in the polling stations that were pleaded.This prayer was however abandoned by the petitioner.

It must be remembered that the burden of proof lies with the petitioner as he is the person seeking to nullify an election. The reason the petitioner abandoned the prayer for scrutiny of ballot papers although alleging improper serial numbers on the ballot papers is not clear. This would have been a proper way to prove his allegations if at all they were merited.

The petitioner in his testimony indicated that he had no problem with the figures but the serialization of the form 36 A's. The 1st respondent counsel submitted that the petitioner had not shown which law or regulation had been breached in respect to the serialization of the form 36A's.

The 2nd respondent gave an explanation as to the issue of serialization of form 36A's which explanation this court finds it to be satisfactory as it appears to be in line with the IEBC mandate under Article 86(d) of the constitution that requires it to put appropriate structures to eliminate electoral fraud.

The petitioner further did not show how the constitution or any electoral law was breached in respect to serialization of the form 36A's.

On the aspect of serialization of the form 36A's I therefore find the petitioner has not met the standard of proof required.

33. The petitioner also claimed that some of the statutory forms in particular form 36A's had not been signed by the presiding officers or stamped with the official IEBC rubber stamp. He submitted that the election process was therefore not verifiable, accountable or credible and relied on the case of **Raila Amolo Odinga versus Independent Electoral and Boundaries commission & 2 others, Presidential Election petition No. 1 of 2017, Ahmed Abdullahi Mohammed & 2 others versus Hon. Mohammed Abdi Mahamad & 2 others Nairobi Election petition No.14 of 2017 & Oyongo Nyamweya versus James Omingo Magara & 2 others** to buttress this point and which authorities this court had opportunity to extensively digest.

34. The 1st respondent submitted that all statutory forms 36A's contained in the petition in respect to the polling station pleaded had been duly signed by the presiding officers and that the presiding officers had duly complied with Rule 79 of the Election(General) Rules, 2012.

The 2nd and 3rd respondents reiterated the submissions of the 1st respondent in relation to this aspect.

I have perused the form 36A's in respect to the polling stations mentioned by the petitioner in his petition. I note that contrary to the petitioners claims all form 36A have been duly signed by the presiding officers and as such the said allegation is incorrect. The 2nd and 3rd respondent in their response also provided court with the forms that they claim they used to declare the results and all of them bear the signature of presiding officers.

As regards failure to stamp the form 36A's the same even if true is not fatal as it is not a requirement under Regulation 79 of the Election (General) Regulations, 2012. The only requirement is that of signing. This issue was well captured in the authority of **Independent Electoral & Boundaries commission & Another versus Stephen Mutinda Mule & 3 others[2014]eKLR** that was relied upon by the 1st respondent.

In his submissions, the petitioner referred to irregularities in Form 36B and other defects in form 36A. However these were not pleaded to enable the respondents address the same. An election petition must not contain generalized accusations but must be pleaded with specificity.

I therefore find this issue also not to meet the standard of proof required.

35. The petitioner in his testimony and that of his witnesses also claimed that there were instances where his agents were barred from accessing the polling station. In this respect he alleged that his agent was chased away from Nyandiwa primary school polling station 2. That at Kiorina primary school and Kenyoro polling station 2 his agents were also kicked out of the polling station.

As stated these allegations were made during the giving of testimony and also contained in the witness affidavits. None of these issues were pleaded in the petition with specificity. As stated earlier in **Jackton Nyanungo Ranguma versus Independent electoral & Boundaries commission & 2 others. (Supra).**

“A petitioner is not permitted to make a case outside the pleadings and his affidavits and testimony must be consistent with and support the case pleaded.”

The issue of violence and intimidation of voters was also not pleaded and this court cannot travel beyond the four corners of the petition and make findings on issues that have not been pleaded.

36. On the 1st issue for determination, I find that the petitioner has not proven that the elections were not conducted in compliance with the constitution and applicable electoral laws.

II) Whether there were irregularities and illegalities in the conduct of the said election, and if so, whether they affected the integrity of the election and the declaration made by the 3rd respondent.

37. The petitioner claimed that the number of votes cast in respect of the office of the member of county assembly was 9087 votes whereas in the same ward, the votes cast in respect of the office of the members of National assembly was 9240 making a difference of 153 unaccounted for votes.

The 2nd respondent while testifying stated that the 153 votes could be stray votes or rejected votes but stated that at Omogwa primary school polling station the total votes cast was understated by 100 votes and that if the same is taken into account the difference of votes cast between the office of member of county assembly and that of the members of office of National assembly would come down to 53 votes.

He further stated that there could also be arithmetical errors on the votes cast for member of National assembly to warrant a difference of 53 votes.

He admitted however that this information could be found on the polling day diary which he had not attached to his response.

The 1st respondent in his submissions submitted that this court is not seized with the jurisdiction to interrogate contents of Form 35B relating to the office of the Member of National assembly as it was the preserve of the high court.

I have considered this issue, the complaint involves a difference in the votes cast between the office of the member of County assembly and that of the Office of member of National assembly. The 2nd respondent explained that it could be there were arithmetical errors also as regards votes cast for office of National assembly. This fact appears indeed believable but for this court to be certain it would need to interrogate the results of the votes cast in respect to the office of the member of National assembly.

I agree with the 1st respondents submissions that this court is not vested with the jurisdiction to interrogate the results in respect to the office of Member of National assembly. Consequently this complaint cannot suffice.

As regards the understatement of votes at Omogwa primary school polling station, I have perused the form 36A, the total votes cast were indeed understated by 100 votes however this does not affect the individual votes of the candidates and is curable under section 83 of the Election Act.

The results from Kiorina primary school polling station while being transferred from 36A to form 36B also indicated that two votes were deducted from the tally of 1st respondent .However this would also not affect the overall tally or make any difference and such an error is also curable under section 83 of the Election Act.

The other allegations of irregularities are of a general nature and included complaints of large number of voters who voted without the use of the KIEMS Kits, unaccounted votes allegedly apparent in statutory forms 36A and high number of rejected votes in polling stations. There was no specific pointer in the pleadings where these alleged irregularities occurred and were only pointed out in the witnesses' affidavits

As stated in Joho versus Nyange & Another (4) [2007] eKLR:-

“Election petitions are no ordinary suits but disputes in rem of great public importance. They should not be taken lightly and generalized allegations are not the kind of evidence required in such proceedings”.

I cannot therefore make a finding on the generalized allegations.

III) Whether the declaration of the 1st respondent as Member of County Assembly of Bogetenga ward was Valid.

38. After a careful audit of the documentary evidence and analysis of the testimonies for the witnesses for both the petitioner and the respondents, I find that the election was above board. There were no illegalities or irregularities that were proven and most of the allegations were generalized allegations. Although many issues were also raised by the petitioner and his witnesses at the hearing of the case none was pleaded.

It my finding that the election was conducted within the boundaries of the relevant provisions of the constitution and electoral law. The elections were free, fair, credible and verifiable. Election is a game of numbers and it clearly reflected the will of the people of Bogetenga ward. In the premises I find that the declaration of the 1st respondent as Member of County Assembly of Bogetenga ward was Valid.

Conclusion

39. The petitioner failed to prove his case against the respondents. The petition is therefore dismissed with costs to the respondents.

Costs

40. Section 84 of the Elections Act No.24 of 2011 provides that “An election court shall award the costs of and incidental to a petition and such costs shall follow the cause.”

Rule 30(1) of the Elections(Parliamentary and county elections) petition rules,2017 further provides that the election court may, at the conclusion of a petition, make an order specifying-

- a. The total amount of costs payable.
- b. The maximum amount of costs payable.
- c. The person who shall pay the costs under paragraph (a) or (b) and
- d. The person to whom the costs payable under paragraphs (a) and (b) shall be paid.

41. The petitioner and the 1st respondent suggested a figure of Kshs.1, 500,000 as costs while the 2nd and 3rd respondent although submitting that they ought to be awarded costs did not suggest any figure.

42. The petition herein was fairly straight forward as can be seen from the pleadings, testimony and submissions .I have taken into account time spent on preparation of pleadings, witnesses and hearing of the case. I award costs of Kshs.250,000 to the 1st respondent and Kshs.250,000 to the 2nd and 3rd respondents

43. I therefore make final orders as follows;-

- a. The petition be and is hereby dismissed.**
- b. The 1st respondent is awarded costs of Kshs.250,000.**
- c. The 2nd and 3rd respondents are awarded costs of Kshs.250,000.**
- d. The security for costs deposited in court shall form part of the cost payable and shall be paid out on a pro-rata basis.**
- e. Pursuant to section 86 of the Election Act, a certificate of determination of this petition shall issue to the Independent Boundaries and Electoral Commission and the speaker of County Assembly of Kisii.**

DATED and DELIVERED at KISII this 23RD DAY OF FEBRUARY ,2018

S.K ONJORO

SENIOR RESIDENT MAGISTRATE

Delivered in open court in the presence of:-

Court Assistant: Mosima

Mr. Okemwa h/b for Begi for the Petitioner.

Mr. Oguttu Mboya for the 1st Respondent.

Mr. Kibet for the 2nd and 3rd Respondent.