



**REPUBLIC OF KENYA**

**IN THE CHIEF MAGISTRATE'S COURT**

**AT MALINDI**

**ELECTION PETITION NO. 1 OF 2013**

**IN THE MATTER OF THE ELECTION ACT, 2011 LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE ELECTION FOR THE GANDA COUNTY ASSEMBLY  
REPRESENTATIVE FOR GANDA WARD WITHIN MALINDI CONSTITUENCY OF KILIFI  
COUNTY**

**BETWEEN**

**JOSEPH KIPONDA.....PETITIONER**

**AND**

**THE INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION.....1ST RESPONDENT**

**STEPHEN BAHATI MLANDA.....2ND RESPONDENT**

**RULING**

The petitioner herein filed an application by way of Notice of Motion dated 26/3/13 simultaneously with the petition. The main issue for determination is contained in prayer 2 of the application which reads as follows:

**“THAT pending the hearing and determination of the petition herein, an order be issued restraining the 2nd respondent from assuming office, undertaking any functions as the Ganda ward County Assembly Representative and or in any other manner acting as such.”**

The application is opposed by the respondents. The parties agreed to dispose of the application by way of written submissions which were duly filed.

I have considered the application and given due regard to the parties' submissions. The evidence on record indicates that at the time of filing the petition and the application, the 2nd respondent had already taken oath of office. As such, the prayer for restraining the 2nd respondent from assuming office has and had already been overtaken by events at the time of filing the application. The same cannot be granted.

The 2nd limb of the prayer urges the court to restrain the 2nd respondent from undertaking any functions as the Ganda ward County Assembly Representative and or in any other manner acting as such. The petitioner contends that the court has jurisdiction to issue an injunction barring the 2nd respondent from undertaking any functions as the Ganda Ward County Assembly Representative and or in any other manner acting as such pending the hearing and determination of the petition.

The respondents contend that the 2nd respondent is already carrying out the functions as Ganda ward County Assembly Representative and as such, the orders being sought by the petitioner cannot be granted.

It is obvious that once a person takes oath of office, he immediately undertakes or carries out the functions of such office. What the petitioner is now asking the court is to restrain the 2nd respondent from continuing in office as the Ganda Ward County Assembly representative. In other words, the petitioner is seeking a prohibitory injunction against the 2nd respondent.

Injunctions are equitable remedies that are granted at the discretion of the court. The principles for granting such injunctions were laid down in the celebrated case of **GIELLA VS CASSMAN BROWN AND COMPANY LTD (1973) EA 358** where the court held at page 360 as follows:-

**“First, an applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience (E.A. INDUSTRIES -VS- TRUFOODS (1972) EA 420.”**

I am alive to the fact that I am not required to determine the petition at this stage. In an Election petition the presumption is that the elections were properly conducted unless the contrary is proven. It is my considered view therefore that an election petition is no ordinary civil suit and that the petitioner has a heavier burden than that of the plaintiff in a civil suit. It is also my opinion that in an Election Petition, it is not just about the rights and duties of the parties to the dispute but the will or interest of the electorate must be considered.

Therefore, apart from the principles laid down in Giella's case (Supra), other factors must be considered by the court before deciding whether or not to grant an injunction such as the one being sought by the petitioner herein.

Having considered the application and the entire petition together with the responses by the respondents and the parties submissions, I find that the petitioner has shown a *prima facie* case with a probability of success. However, I find that the petitioner has not demonstrated at all that he has and continues to suffer irreparable loss or damage owing to the 2nd respondent's continued stay in office. As already stated, the presumption in an Election Petition is that the elections were properly conducted and it is only by evidence that the presumption can be rebutted. Such evidence cannot be adduced at an interlocutory stage but upon full hearing of the petition. Therefore, allowing the application would be tantamount to a premature determination of the petition, and a violation of the legal presumption.

Furthermore, as rightly submitted by the 1st respondent, the interest of the citizens of Ganda ward must be taken into consideration. If the application is allowed, the result will be that the citizens of Ganda ward will have no representation in the County Assembly until after the determination of the petition or for a longer period depending on the results of such determination. If I were to consider the balance of convenience the same would tilt in favour of maintaining the *status quo* so that the citizens of Ganda ward are not deprived of their constitutional rights as we await the outcome of the petition. No prejudice will be occasioned to the petitioner.

In view of the foregoing, it is my finding that the application dated 26/3/13 lacks merit. The same is hereby dismissed. Costs of the application shall be in the cause.

Dated at Malindi this 31st day of May 2013.

**Y.A. SHIKANDA**

**Ag. SENIOR RESIDENT MAGISTRATE**

Delivered in open court in the presence of:

Ms Mwanja holding brief for Ndegwa for 1st respondent

Mr Matata holding brief for Oduor for 2nd respondent

No appearance for the petitioner

Maro – Court clerk

**Y.A. SHIKANDA**

**Ag. SENIOR RESIDENT MAGISTRATE**

**31/5/2013**