



REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATE'S COURT AT BUNGOMA

Election Petition No. 1 Of 2013

IN THE MATTER OF THE ELECTIONS ACT NO. 24 OF 2011 AND ELECTIONS
[PARLIAMENTARY AND COUNTY ELECTIONS] PETITION RULES, 2013

AND

IN THE MATTER OF THE MEMBER OF COUNTY ASSEMBLY FOR LWANDANYI WARD

BETWEEN

ROBERT BISAKAYA WANYERA.....PETITIONER

VERSUS

1. NATHAN OBWANA1ST RESPONDENT

2. CALEB S. GEKONDE2ND RESPONDENT

3. THE INDEPENDENT ELECTORAL BOUNDARIES
COMMISSION.....3RD RESPONDENT

4. LORNA NANJALA KHAEMBA4TH RESPONDENT

RULING

This is a ruling on petitioner's application dated 10th April 2013. It seeks orders for scrutiny, recount and retallying of all votes in all the polling stations in Lwandanyi county Assembly in respect of the seat of county representative.

The petitioner's counsel argued that the 2nd respondent announced at Sirisia tallying centre that the petitioner had garnered one vote at Lwandanyi primary school yet he had garnered 271 votes. She further stated that some candidates were given nil results at the same polling station. She argued that if the petitioner's votes at Lwandanyi primary school were correctly given to him then he would have garnered more votes than the 1st respondent.

Petitioner's Counsel further submitted that 1st respondent had admitted that petitioner garnered one vote in Lwandanyi primary school and has now changed and said he had not seen Form 35 which indicate 271 votes. She argued that the 1st Respondent is not truthful and that what has been brought to Court may not be necessarily what is in the ballot boxes and there is therefore need to scrutinize the votes. She further argues that the tally is not correct mathematically and that the difference between the petitioner's and 1st

respondent's votes is 73.

In reply Ms. Rono for the 1st respondent said that this is a Court of evidence and all allegations must be proved by tendering evidence in Court. She stated after receiving documents filed by the 2nd 3rd and 4th respondent they learnt that in Lwandanyi primary school polling station the petitioner garnered 271 votes. She added that the returning Officer (2nd respondent) declared results as recorded in form 35 and the votes indicated for each candidate is true reflect of votes cast for each and that the petitioner garnered 271 votes. She further submitted that agents of all candidates signed form 35. She argued that the petitioner's contention is on votes for Lwandanyi primary school and has not given substantial evidence of substantial irregularity in the polling station or any other. She prayed that the application be dismissed with costs.

In reply Mr. Akenga for the 2nd, 3rd and 4th respondents argued that the application is vexatious and frivolous. He submitted that the elections in Lwandanyi ward were conducted in accordance with the Constitution Election Act No.24 of 2013 and rules and regulations to the Act. He said that the application is a replica of the petition and if the application is dealt with then it will have dealt with the whole petition. He said there are no one prayers in the application and that the application is based solely on the polling station Lwandanyi primary school. Mr. Akenga argued that the Court has not been told that the counting of votes at Lwandanyi ward was faulty and that petitioner said he got 271 votes which they admit is true and were included in the total tally. He argued that the basis for recount and retallying has not been established. He further submitted it is only Lwandanyi primary school polling station where the applicant feels aggrieved. He concluded that the application herein is a replica of the petition and is aimed at wasting the Court's time. He prayed that the same be dismissed with costs.

In reply Ms. Mumalasi for petitioner submitted that the issues in the petition are many not only re-count. She said they include allegation of bribery of voters. She argued that rule 33(2) talks of sufficient reason not substantive irregularity and that dealing with the application will not have dealt with the whole petition. She added that the respondents will not suffer any prejudice if votes are scrutinized.

I have considered arguments by all Counsels. I have also perused annexures to the application, replying affidavits and the petition. Prayer (a) in the petition is for an order for scrutiny and recount of votes regarded as having been cast for member of County Assembly in Lwandanyi ward. I also note that there are allegations of bribery, rigging and undue influence in the affidavit annexed to the petition. The finding as to whether any election offence or malpractice occurred in the election process can only be reached after evidence has been adduced. The Court is mandated to make such finding.

If evidence adduced prove such election offence and it will go further to make a finding as to whether it affected the outcome of election. The petitioner herein has chosen to make an application for similar prayers as made in prayer (a) of the petition. That can be made which he has rightfully made under see 33(2) of the Election rules. The question/issue that arises is whether the petitioner has demonstrated sufficient reasons to warrant granting the prayers at this stage of the trial. Petitioner's Counsel highlighted entries in form 35 and 36. She also indicated that announcement made at the tallying centre were contrary to pronouncement at the polling station. She has also mentioned mathematical errors. These are issues that would require evidence before the Court can reach a finding as to whether there is sufficient reason of basis for recount and scrutiny. It would be more appropriate to make such a decision after considering evidence adduced by all parties.

At this stage I decline to grant prayers sought in the application dated 10th April 2013. I therefore dismiss it with costs to the respondent.

R. B. NGETICH

Ag. CHIEF MAGISTRATE

15/5/2013

15/5/013

Before Hon. R.B. Ngetich, Ag. CM

CC – Gladys

Ms. Mumalasi for petitioner

Mr. Akenga for 2nd, 3rd and 4th Respondents

COURT: Ruling delivered and signed in open Court.

R. B. NGETICH

Ag. CHIEF MAGISTRATE

15/5/2013