



REPUBLIC OF KENYA



KENYA LAW
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**Abiri v Nyanchama & 3 others (Election Petition 3 of 2013)
[2013] KEMC 103 (KLR) (23 August 2013) (Ruling)**

Isaac Oerri Abiri v Samwel Nyangau Nyanchama & 3 Others [2013] eKLR

Neutral citation: [2013] KEMC 103 (KLR)

**REPUBLIC OF KENYA
IN THE NYAMIRA LAW COURTS
ELECTION PETITION 3 OF 2013
JN NJAGI, PM
AUGUST 23, 2013**

BETWEEN

ISAAC OERRI ABIRI PETITIONER

AND

SAMWEL NYANGAU NYANCHAMA 1ST DEFENDANT

JUSTUS NELIAKHO 2ND DEFENDANT

**THE RETURNING OFFICER NORTH MUGIRANGO CONSTITUENCY 3RD
DEFENDANT**

THE IEBC 4TH DEFENDANT

RULING

1. This is a Notice of Motion that has been filed by the Counsel for the applicant, Mr. Orina advocate. Mr. Orina advocate is acting for the Petitioner, Mr. Isaac Oeri Abiri, the application has been brought against the Respondents 1, Samwel Nyangau Nyanchama, Justus Naliakho, The Returning Officer North Mugirango Constituency, and the independent Electoral and Boundaries Commission, the 2nd, 3rd and 4th Respondents respectively. The Respondents 1st, 2nd, 3rd and 4th, are represented by Mr. G.M. Masese advocate and Mr. Odhiambo Advocate respectively.
2. The application has been brought under Article 38(1), and 87(1), 88(4) (e) and Section 159(1) of the Constitution of Kenya, 2010, Section 82(I) of the Elections Act, No.24 of 2011, Rule 4(1), 32(i) and 33(1) of the Elections Parliamentary and County Elections) Petition rules, 2013.
3. The Application seeks for the orders:-



1. That this Honourable Court be pleased to order for a recount and or scrutiny of all the votes cast in all polling stations comprising Itibo Ward in respect of Member of County assembly Elections held on the 4th day of March 2013.
 - (b) That the costs be provided for.
4. The applicant/petitioner has filed grounds in support of the application they are on the Page 1 and page 2 of the application. They are marked as ground (i) to (vii).
5. The application is further supported by the supporting Affidavit sworn by the petitioner Isaac Oeri Abiri, dated the 8/8/2013. It is a length affidavit containing 17 paragraphs.
6. The applicant alleges irregularities and discrepancies in the way the elections were conducted by the 2nd and 3rd and 4th Respondents. The application seeks for the Recount and scrutiny of all the votes cast in all the votes cast in all polling stations within Itibo Ward.
7. In opposition to the application, the counsel for the 1st Respondent, one Mr. George Masese Advocate, has filed the 1st Respondent's replying affidavit sworn on the 19/8/2013 by the 1st Respondent, Samwel Nyangau Nyanchama. It is also a detailed affidavit in reply to the supporting affidavit. The 1st Respondent is objecting to the application and seeks for the dismissal of the same.
8. The 2nd and 3rd Respondent have also filed a Replying affidavit in opposition to the application brought by the applicant/Petitioner. The 2nd and 3rd Respondent have a replying affidavit that has 24 paragraphs, and the 2nd and 3rd Respondent have averred that the application should be dismissed.
9. The court has also heard the submissions by the counsels for both the Petitioner and the Respondents' at the time of the hearing of this application.
10. The court is of the humble view that on the 28/5/2013, the advocates before this court appeared before me for taking the directions on how the case was to proceed. It is clear in my mind and from the court record that the counsel for the Applicant/Petitioner on this date did inform the court that the only dispute he had was over the votes that were cast at Nyasio primary School, polling station, code 006. This is what the Petitioner/Applicant was disputing then. He was asking the court to establish how many votes the Petitioner had obtained at Nyasio primary School.
11. In regard to all other polling stations, the Petitioner told the court that he was not disputing votes from those polling stations.
12. It is on the basis of this, the court took the earliest opportunity to have the orders that the Recount of the ballot boxes at Nyasio primary School, be carried out at the time of the hearing.
13. on the same day, the Petitioners and Respondent's Counsels, all agreed by consent that Petitioner, shall called as the only witness on his part, and shall be cross-examined and be re-examined, by the Respondents' advocate and the petitioners Counsel.
14. It was also agreed that the Plaintiff had to lay a basis of his claim for a recount. It was further agreed that the Respondents would call their witnesses, and their witnesses were agreed to be two (2).
15. It was further agreed that the Petition was to be heard for two (2) days, starting from the 3rd day of July 2013 to 4th day of July, 2013. The hearing was to be held at Nyamira Law Court; on these days.
61. The matter was adjourned to the 3/7/2013. On 3/7/2013, the court was ready for hearing. All the counsels were present and it is at this point the counsel now brought the application which was oral



- in nature, and was seeking for the Recount/Scrutiny of all the votes cast in the whole of Itibo Ward. It was an oral application, but it is not in any way different from the one filed in court on the 8/8/2013.
17. The court heard the arguments by the counsels on record as to whether the application had any merit, and after carefully hearing both counsels for Petitioner and the Respondents, I was left to write a ruling. This ruling was clear that the issue of the recount/scrutiny had already been settled on the 28/5/2013, when we agreed at the Pre-trial Conference that all the votes from the other polling stations were not in dispute. We therefore had no need to recount and or scrutinize them. The Petitioner may have been prayed for a scrutiny or recount of all the votes cast in the entire Itibo Ward, but he did not do that on the 28/5/2013. He only disputed the votes cast at Itibo Ward, and this is what the court ordered should be counted.
 18. The Ruling of the court dated the 4/7/2013, still stands and is still an order of this court. It clearly stated that the Recount/scrutiny shall only be done for Nyasio Primary School, polling station and not any other polling station. I also stated that if after the hearing and after careful analysis of the evidence, I shall find sufficient grounds and or reasons to warrant me to order for a recount/scrutiny of the voted cast in other polling stations, I shall on my own motion (suo moto), order for that. However, I heard the evidence by the Petitioner and the Respondent, and I did not find any sufficient reasons to make me order for the Recount.
 19. In any case, it, must be pointed out that the document, form No.35, “10A2”, that the petitioner is relying on has been subjected to scrutiny and has subjected the Petitioner to serious cross-examination by both the counsels for Respondents.
 20. The doubts have been raised about the genuineness of this document. It has only the logo of Independent Electoral & Boundaries Commission. The results therein have been done by the 2nd Respondent, the Returning Officer, Justus Naliakho. Indeed, the 2nd Respondent has denied that the document is not from his office and it does not have official stamp-stamp of IEBC, and does not have his signature. Therefore, the Petitioner’s document annexure “10A2” that is claimed to be the basis of his Petition is a Questionable document. I note that the document, “10A2”, Form No. 35, does not even have the information that is on a genuine Form 35 from the Independent Electoral and Boundaries Commissions, annexure “SNJ2”. The information this document “10A2”, is not complete when compared with the authentic (genuine) form 35, from the IEBC The basis of ordering a scrutiny for the other polling station has not been laid by the Petitioner at all.
 21. I have his evidence, and it is important to point out that from his evidence, he was not able to tell the court what the presiding officers did at the polling station that can be said to be irregular and or against the conduct. He was not at the polling station. He said after he cast his vote, he went to a few polling stations, and according to him the voting was going on well. The Petitioner was not at the Tallying Centre, at Kebabe Girls Secondary School, the Constituency tallying centre. He cannot tell what was happening there. He was just being told by other people, his agents, that the 1st Respondent had won the County assembly seat for Itibo Ward. He did not witness the Returning officer, 2nd Respondent, announce the results. I find it difficult to understand the irregularities that the Petitioner is talking about on the part of the Respondents.
 22. The petitioner garnered a total of 3,045, and he maintains that he should have been declared the winner. These results are what the Independent Electoral & Boundaries Commission, has in their form 35 and 36, which even the Petitioner has annexed to his Petition. The 1st Respondent garnered a total of 3130, and was declared the winner. The Petitioner is not claiming the 3130 votes of the 1st Respondent, but still insists that his votes were irregularly given to the 1st Respondent. However, it is not clear in our minds as to how those votes were given to the 1st Respondent.



23. These may be different calculations giving different figure as stated by the Petitioner in Paragraph 8 of the supporting affidavit, but is important for him to show how these figures affect his final tallied figures, and the results of the other candidates.
24. In this Petition, the recount is not the only prayer that the Petitioner is praying for. There are other prayers that are being sought in the Petition.
25. There are various allegations that the Petitioner has made in the Petition, but there is lack of concrete evidence to support those allegations, and the court cannot grant the order of recount/scrutiny on just allegations.
26. The court notes that the counsel for the Petitioner, has alleged that the court is the one that ordered that there be a Recount of Nyasio Primary School polling station only, but I must point out that the parties were all involved in this. It was not from the court. It is the Petitioner's Counsel, who submitted that the only dispute was over the polls at Nyasio Primary School polling station, and not with other polling station. These were not the court's words but his own words and instructions given by his client. It is therefore, just misleading to say that the court ordered that only Nyasio primary School votes should be counted. I do not find this application to have been brought in good faith by the counsel. He is aware that we finalised with the hearing of the matter on the 12/7/2013. We all agreed to come to court for fixing a judgment date on the 16/8/2013. But, on the 8/8/2013, he filed this application before the court. It was urgent, but it was not brought to the court attention until the 14/8/2013. There was no advocate for the Petitioner on this day in court. I was asked by the Registry Clerk, one Patrick, to look at the application. I did peruse through the entire application I certified it as urgent, and ordered for the same to be served. It was the other counsels submissions that they were served late. On the 16/8/2013, the date given for interpartes hearing. The application could not proceed, as other counsels had not put in their Replying affidavits. The matter had to be adjourned to the 21/8/2013. There is a total delay in finalising this Petition. I must point out that if the Petitioner was acting in good faith, then the application should have been filed soon after the 12/7/2013, and not to wait for 27 days to decide as to whether to file the application for scrutiny or not.
27. Infact the issue of the recount and or scrutiny has already been determined by this court, on 4/7/2013. It rejected the recount/scrutiny of all the votes from Itibo ward, save for Nyasio Primary School Polling Station. This is a matter if the Petitioner was aggrieved by my orders of the 4/7/2013, should have filed an appeal. He did not, and as a result of this, the court orders of 4/7/2013. The application is an abuse of the court process, and it should not at all have been entertained. Indeed, it lacks merit. I note that the orders of 28/5/2013, were a consent by the parties as to how they wanted the court to proceed.
28. The court adopted the views of the counsels and not it is views. If the Petitioner is of the view that these views were erroneous or were taken by mistake, or the court granted orders that did not emanate from them, then, all he should have done is to have the orders Reviewed and set aside, or going on appeal but he did not at all. The orders of the 28/5/2013 are still binding to all the parties. They stand until the time they are set aside. It is my humble finding that on careful perusal of the evidence on record, affidavit in support of this application by the applicant/Petitioner, and the Responses by the Respondents in their respective replying affidavits and even the authorities placed before the court by the Petitioners Counsel in his submissions, and the submissions by the Respondents counsels, am of the Humble view that is totally incompetent, frivolous, vexatious and an abuse of the court process. It has no legal merits.
29. This court shall accordingly order that the same be dismissed. The costs shall be awarded to the Respondents in any event.



30. I must also point out that the court on the 16/8/2013, was to receive the submissions from all the Counsel and fix a date for judgment. This was not done in view of the application by the applicant/ Petitioner. In this Petition we are behind the schedule due to the delays that could not be avoided in the interest of justice. I am satisfied that the submissions from all parties are properly before the court., under the High Court practice Rules, once submissions are file, the court is only supposed to give the parties a date for judgement.
31. In the instant case, this court shall move expeditiously, and give the parties the judgment date, on 6/9/2013, at midday at Nyamira law Courts.

COURT: RULING OF THE COURT READ TODAY THE 23/8/2013, IN PRESENCE OF;-

Mr. Orina Advocate for Petitioner-Present

Mr. Masese Advocate for 1st Respondent –present

Mr. Masese Advocate hold brief for Mr. Odhiambo advocate for 2nd and 3rd 4th Respondents –present

Petitioner - present

Respondent 1

Respondent 2 absent

Respondent 3 & 4

C/C George Opande

N. NJAGI

PRINCIPAL MAGISTRATE

23/8/2013

Right of Appeal Explained.

N. NJAGI

PRINCIPAL MAGISTRATE

23/8/2013

