



**REPUBLIC OF KENYA**  
**IN THE CHIEF MAGISTRATES COURT AT KAKAMEGA**

**ELECTION PETITION NO. 1 OF 2013**

**FRANCIS INGOSI KABURU-----PETITIONER**

**VERSUS**

**ROBERT LUBWA LUTATWA**

**I.E.B.C.-----RESPONDENTS**

**JUDGMENT**

1. In the General Election of 4<sup>th</sup> March 2013 Francis Ingosi Kaburu (hereinafter referred to as ‘the Petitioner’) vied for the seat of County Assembly Representative, Isukha North Ward Kakamega County on a Ford Kenya Party ticket.
2. Among the other contestants for the same seat was Robert Lubwa Lutatwa (hereinafter referred to as the ‘1<sup>st</sup> Respondent’) who vied on a UDF Party ticket and who was declared the winner.
3. The elections were conducted by the Independent Election & Boundaries Commission (hereinafter referred to as the “Commission” who declared and gazetted the election results.
4. Dissatisfied with the results the Petitioner filed this petition on 20<sup>th</sup> March 2013 seeking orders as follows:-
  - a. that there be a scrutiny of votes recorded as having been cast in the ISUKHA NORTH COUNTY WARD on 4<sup>th</sup> March 2013.
  - b. That there be a scrutiny of the rejected, void and spoiled ballots papers from all polling stations within ISUKHA NORTH COUNTY WARD.
  - c. That there be a scrutiny of the actual Voters Register used at polling station within ISUKHA NORTH COUNTY WARD.
  - d. That there be a recount of all ballot papers cast at the election of 4<sup>th</sup> March 2013 at ISUKHA NORTH COUNTY WARD
  - e. That the said COUNTY WARD ELECTIONS held on 4<sup>th</sup> March 2013 at ISUKHA NORTH COUNTY WARD be determined and declared null and void.
  - f. That it be determined that the 1<sup>st</sup> Respondent has not been validly elected as the County Representative of ISUKHA NORTH COUNTY WARD of KAKAMEGA COUNTY.
  - g. That it be determined that the 1<sup>st</sup> Respondent as member of the county Assembly of ISUKHA NORTH COUNTY WARD be determined and declared null and void and a certificate to that effect be issued to the County Assembly Speaker.
  - h. That such election offences and electoral malpractices on the part of omission and commission by

the 2<sup>nd</sup> Respondent (Commission) as disclosed and found by this Honourable court be reported to the Honourable Director of Public Prosecutions for appropriate action.

- i. That the Honourable court do find that 1<sup>st</sup> Respondent has committed serious offences and order him barred from participating in subsequent elections for a period of at least five years or as court may deem fit and just.
- j. That both Respondents be condemned to pay the costs of this petition and incidentals thereto.
- k. That the court be pleased to make any such order as the court may deem fit and just.

5. The 1<sup>st</sup> Respondent filed a response to this petition on the 22<sup>nd</sup> April 2013 in which he sought for the court's orders for dismissal of the petition and in the alternative it finds whether if at all there was failure on the part of the Commission whether it negated the entire election, and if so, sufficient and adequate compensation be paid to him in terms of money spent on campaigns and salary, allowances, County Assembly entitlements and benefits for a five year term allowance, County Assembly entitlements and benefits for a five year term. He also prayed for costs of this petition.

6. In its response filed on 17<sup>th</sup> April 2013 the Commissioner asked the court to find that-

- a. The Respondents were not in breach of or in contravention of the provisions of the constitution, the Election Act or any other law relating to the elections.
- b. The electoral process was valid and a valid declaration of the outcome of the County Assembly Elections for Isukha North Ward made.
- c. The commission did not commit, aid and or abet in the commission of any electoral offences.
- d. The 1<sup>st</sup> Respondent was validly elected as the County assembly Member of Isukha North Ward.
- e. The Petitioner should bear the costs of the petition.
- f. The people of Isukha North Ward exercised their sovereign power of the vote and their decision should be respected.

7. At the pretrial conference the parties agreed on the following issues for determination-

- a. Whether the 1<sup>st</sup> Respondent was eligible to vie for the election of the County Representative by virtue of being a member of Shinyalu CDF Committee Shinyalu Constituency.
- b. Whether the 1<sup>st</sup> Respondent was validly elected as the County Representative of Isukha North Ward.
- c. Whether or not there were any election malpractices and if so whether the results of the election were affected by such election malpractices.
- d. Who should pay the costs of the petition.

8. The issue of whether there should be counting and or scrutiny of votes cast for the seat of County Representative Isukha North ward was canvassed by learned counsel by way oral submissions.

9. The court in its ruling on 6<sup>th</sup> June 2013 determined the issue effectively dismissing prayers (a) to (d) of the Petition.

### **The Petitioners case**

10. It was the Petitioner's averment that the elections were not conducted within the provision of the Election Act 2011.

11. That the Commission aided and abetted Commission of Election offences during voting and ignored pretexts from him and his agents

12. He further averred that the commission failed to allow agent participation and allowed its employees to do voter rigging and acts that were not impartial and against their oaths.

13. That the Commission employees barred him entry into polling stations and also failed to allow his

agents accompany ballot papers to the tallying centre.

14. The Commission allowed Civil Servant to campaign for certain candidates thus sabotaging the will of the electorate through coercion.

15. It also allowed the 1<sup>st</sup> Respondent to campaign past the required time.

16. He also averred further that the Commission employers behaved unprofessionally and illegally leading to rejection of some votes.

17. He also accused Commission of employing staff who had an interest in the outcome of the election and also its employees for locking out voters who were on the queue refusing them from voting when the time set for voting ended.

18. Against the 1<sup>st</sup> Respondent the Petitioner averred that he was not eligible to vie for the elective seat since he was an employee of the CDF Committee Shinyalu Constituency at the time, drawing a salary from public coffers and had not resigned.

19. That the 1<sup>st</sup> Respondent continued using his office as CDF member Shinyalu constituency to initiate and open projects within the ward in order to gain unfair advantage over his competitors.

### **The 1<sup>st</sup> Respondent's case**

20. The 1<sup>st</sup> Respondents averred that it was the Commission's constitutional mandate to conduct the election in an impartial, fair, neutral, efficient, accurate and accountable manner.

21. That it was the Commission responsible for registration of candidates for elections and indeed after conducting the general election of 4th March 2013 in respect of Member of County Assembly Isukha North Ward declared him the winner with vote counts as follows:-

a) Robert Lubwa Lutatwa – 1740

b) Hosea Manuni Irungu – 121

c) Francis Ingosi Kaburu – 1525

d) James Kwata Mulanda – 153

e) Florence Masitsa Isaac – 1278

f) Samuel Collins Mushi Guvai – 432

h) Benard Munase – 1432

22. He averred that clearly the election results put his vote ahead of the Petitioner's and contrary to the averments that the petitioner had made his agents clearly participated in the election Process and accepted the results.

23. He denied ever engaging in acts of voter bribery and being a civil servant who should have resigned before the elections. That the Commission had cleared him and issued him a clearance certificate.

24. He maintained that he was an innocent party on allegations raised by the Petitioner and had spent enormous resources, time and energy in the election process and needed to enjoy quiet representation of his constituency.

## **The Commission's case**

25. In response to the petition the Commission averred that it conducted the elections for the Isukha North Ward County Representative in accordance with standards of the constitution, the Elections Act and the attendant regulations in such a way that the electoral management System was simple, accurate, verifiable, secure, accountable and transparent.
26. It denied claims that party agents were blocked from accompanying ballot papers to the Tallying Centre maintaining that they were briefed in that they could accompany the ballot papers so long as they made own transport arrangements. The Commission was not under obligation to transport Party agents and in fact contrary to the Petitioner's allegations the Party agents were present at the Tallying centre.
27. Allegations that Civil Servants were campaigning for some candidates were termed strange by the Commission
28. It averred further that recruitment of staff was done by the Commission Returning Officer and in accordance with the Commission recruitment policy whereby the positions were advertised and the candidates shortlisted under a competitive, transparent exercise.
29. That the list of those short listed was published in the District Commissioner's Public Notice Board, two Divisional District Offices and 23 sub locational offices, the constituency and regional offices of the Commission.
30. It averred that this list was made public for the required period before appointment was done yet the Petitioner did not raise any complaints against it.
31. It denied claims that voters were turned away while on the queue by 5 p.m. during the elections stating that party agents were required to inform the Returning Officer in case any voter was turned away after being on the queue by 5 p.m. There was no such report.
32. The Commission denied claims that there were any reports of voter bribery and campaigning on the elections day.
33. In respect of eligibility of the 1<sup>st</sup> Respondent, it maintained that he was cleared after he submitted a self declaration and statutory form from the Kenya Anti Corruption Commission (KACC) and also a certificate of nomination by his political party just like the petitioner. That despite that the petitioner did not raise any objection with the Commission.
34. That the Commission followed laid down regulations and even put in place adequate measures to ensure free, fair and transparent elections even when faced with challenges in use of technology and therefore the petition was based on unfounded allegations which could not be sustained under the law.

## **EVIDENCE**

35. The evidence was presented by way of affidavits filed pursuant to Rules 12 and 15 of the Election (Parliamentary and County Elections) Petition Rules 2013
36. Parties had agreed at the Pretrial Conference to avail witnesses to identify their affidavits and be subjected to cross examination by counsel on contentious issues.
37. The Petitioner called six (6) witnesses being Francis Ingosi Kaburu, Stephen Khakabo Machinji (PW2) Rose Abunwa Recha (PW3), Hosea Manuni Irungu (PW4) Boaz Nakuku Kutoto (PW5) and Evans Imbwaka Manani (PW6)
38. The 1<sup>st</sup> Respondent called Seven (7) witnesses being;

- Robert Lubwa Lutatwa
- Samwel Collins Kuvai (DW2)
- Jethro Mwanzi Shitukhu (DW3)
- Reuben Shikuku Shachira (DW4)
- Elkana Wanjia (DW5)
- David Marakalu Indeche (DW6) and
- George Lubwa Sotsi (DW7)

40. The Commission called only one witness

- Lenarun Daniel (DW8) as Election Officer and the Returning Officer Shinyalu Constituency during the 4<sup>th</sup> March 2013 General Elections.

41. I have carefully considered all evidence adduced. I have also considered submissions by learned counsel and case law cited.

42. As I embark on determining the issues raised at the Pretrial Conference remaining unresolved I must first consider the points of law raised in submission by Mr. Ojuro for the Commission.

43. Counsel has submitted that the petition as it stands filed does not conform with the requirements of Rule 10(1) of the Elections (Parliamentary and County Election) Petitions Rules 2013 and for that reason alone the Petition is fatally defective and should be struck out.

44. The court was referred to the Ruling made in an application to strike out a petition for a similar reason by Justice Onyancha.

*Garissa High Court Petition No. 4 of 2013. Amina Hssan Ahmed Vs Returning Officer Mandera County and Fatma Mahtub KLR.*

45. Rule 10(1) of the Elections (Parliamentary and County Elections) Petitions Rules 2013 provides and I quote:-

“ 1) an Election Petition filed under Rule 8 shall state

- a. The name and address of the Petitioner
- b. The date when the election is disputed was conducted
- c. The results of the election, if any and how they were declared
- d. The date of declaration of the results of the election
- e. The grounds on which the petition is presented, and
- f. The name and address of the advocate, if any for the Petitioner which shall be the address for service.”

46. Specifically, Counsel quoted the Hon Judge’s decision in one sentence as follows:-

*“In my view and finding based on the facts and reasons herein above the Petition is without doubt fatally defective because it is deficient in form and lacks the vital prescribed conduct”*

47. The Petitioner did not submit on this point of law. This court is nevertheless under duty to evaluate the pleadings especially the Petition and make its findings.

48. Looking at the Petition filed herein I notice that it omitted the state the following

- a. The result of the election
- b. The manner those results were declared
- c. The date those results were declared

49. Clearly these are requirements under Rule 10(1) of the Elections (Parliamentary and County Elections) Petitions Rules 2013.

50. While deciding on this issue Hon. Justice Onyancha in the above cited case discussed at length the importance of these regulations. He had this to say about them:-

*“The provisions of Rule 10 and other aforesaid are not mere technical requirements. If they are technical in so far as they are procedural and spell out the form and content of intended petitions they nevertheless at the same time are substantive and go to the root and substance of issues and matters prescribed upon”*

He went on to strike out the petition.

51. I am persuaded and bound by the position taken by the Honourable Judge in finding that the requirements set out in Rule 10(1) of the Elections(Parliamentary and County Elections) Petitions Rules 2013 are therefor a special purpose and are not just about technicalities but influence the substance of the Petition.

52. The Petitioner herein while being cross examined by both counsel for the 1<sup>st</sup> Respondent and the Commission conceded to existence of these omissions in his petition describing them as errors.

53. They are however an omissions that go to the root of the Petition. It smacks of a haphazardly drawn petition.

54. Such drafting goes against the overriding principle which binds counsels and parties to assist the court in ensuring fast, efficient and just determination of disputes and especially so election petition that have time frames.

55. What election results is the petitioner complaining about if he has not even set them out in his pleadings?

56. I agree that this was a fatal omission which had the effect of stalling this petition even at an earlier stage. I will nonetheless deliberate on the other issues

**Whether the 1<sup>st</sup> Respondent was eligible to vie for the election of the County Representative by virtue of being a member of Shinyalu CDF Committee Shinyalu Constituency**

57. It was the Petitioner’s evidence that the 1<sup>st</sup> Respondent was at the time he was cleared to contest in the elections an employee of the CDF Committee Shinyalu Constituency drawing a salary of Kshs. 7000/-, allegations which both the 1<sup>st</sup> Respondent and the Commission refuted referring to the Self Declaration form by the 1<sup>st</sup> Respondent.

58. Section 25 (2) (a) of the Elections Act states that a person is disqualified if the person is a state officer or a public officer. The question is if the 1<sup>st</sup> Respondent fell within the two categories.

59. The Petitioner relied on a document titled “Shinyalu CDF Committee Member” which have said that he had downloaded from the website.

60. He conceded while being cross examined by the 1<sup>st</sup> Respondents counsel that apart from being uncertified as a true copy of the original, the document was dated 3<sup>rd</sup> September 2013 and therefore unreliable.

61. He could not also avail records of a register he claimed showed the salary that the 1<sup>st</sup> Respondent was drawing.

Still, while being cross examined the Petitioner admitted that sitting on a CDF Committee is voluntary and members only get an allowance.

62. The Petitioner had not objected to the Commission when the 1<sup>st</sup> Respondent presented his self declaration form and Party nomination certificate for clearance.

63. I have no reasons to doubt that the 1<sup>st</sup> Respondent was eligible to contest as he did.

**Whether the 1<sup>st</sup> respondent was validly elected as County Representative for Isukha North Ward**

65. The Petitioner appeared to question the results based on what he claimed were:-

- Acts of late campaigning by the 1<sup>st</sup> Respondent
- Voter bribery
- Assistance of illiterate voters
- Barring his agents from accompanying ballot papers to the tallying centre
- Employment of the 1<sup>st</sup> Respondents relatives to officiate the polls which resulted in voters being issued unstamped ballot papers which ended up as rejected votes.

That the said relatives also assisted or influenced voters to vote for the 1<sup>st</sup> Respondent.

66. It is important to note that while in the petition the Petitioner was questioning the results in all the polling stations within Isukha North Ward, he conceded in evidence that he had no complaint against other polling station like Bukhaywa, Lubao, Shanderema and others where the 1<sup>st</sup> Respondent did not garner most votes.

67. In court he only availed witnesses whose evidence touched on three (3) out of the sixteen (16) polling station being Ivakala Primary school, Bulovi Primary school and Ingolomisio Primary school.

68. It was evidence of the 1<sup>st</sup> Respondent and the Commission that all the party agents signed Form 35 including the Petitioner's agents in all polling stations.

69. The forms were produced before court by the Returning Officer Mr. Lenarum (DW8). The Petitioner's agents who appeared in court admitted signing them. No complaints were recorded from the petitioner's agents at the time of signing these forms or even after.

70. There were allegations of conducting of late campaign by the 1<sup>st</sup> Respondent.

There was no proof of reports being made of such malpractice either to the Commission or even police.

71. The Petitioner while referring to photographs of shads he produced herein, he appeared to be implying that the 1<sup>st</sup> Respondent either constructed them or opened them within the campaign period. With no dates put on such photographs and their connection to the 1<sup>st</sup> Respondent clearly established they cannot on the face of it be relied on as proof of late campaign by the 1<sup>st</sup> Respondent.

72. It was alleged that illiterate voters were being either assisted or influenced to vote for the 1<sup>st</sup> Respondent. None of these voters swore affidavits to confirm this.

The Petitioner's agents were cross examined on this. Stephen Khakabo (PW2) said that he saw Everlyne Isabwa assist up to three voters. When cross-examined he said that Everlyne Isabwa was a campaign for Benard Munasa.

Evans Imbwaka Manai (PW6) said that he saw three voters assisted but could not tell for whom they voted.

73. There were also claims that clerks related to the 1<sup>st</sup> Respondent were issuing unstamped ballot papers which were subsequently rejected other than the Petitioner's allegations there was no evidence of this from agents at the polling stations.

74. Be it as it may the rejected votes were in total 151. Assuming that all these people voted for the Petitioner still his vote count could not have equaled the Petitioners.

75. There was no evidence of any such malpractices reported to the Commission official for action.

**Whether or not there were elections malpractices and if so whether such malpractices affected the results.**

76. Apart from malpractices discussed herein above which could invalidate an otherwise valid election there were allegations of bribery of voters either directly or indirectly by the 1<sup>st</sup> Respondent.

77. The Petitioner himself had alluded to instances including depositing of money at Khakaba Mukhwam's home, Tabitha Ayiya's hotel and even in some polling stations where it was alleged Morris Muchika, Francis Mwavishi, Jesica Khatenje and Nancy Makokha were seen distributing money to voters.

78. It was claimed that at times voters were bribed with changaa

None of such voters swore an affidavit to confirm these allegations. There was no indication of any reports made either to the Commission officials or the police.

None of the agents called by the Petitioner as witnesses could pinpoint any acts of bribery of voters that could be attributed to the 1<sup>st</sup> Respondent.

In fact the Petitioner himself while being cross examined confirmed that in that in some stations like Ivakale Primary where he had alleged that the 1<sup>st</sup> Respondent committed acts of bribery he got 225 votes while the 1<sup>st</sup> Respondent got only 15 votes.

80. Bribery of voters is reason enough to invalidate an election. It is not just enough to make vague allegations. There must be proof of such claims beyond reasonable doubt this being a crime that on top of invalidating an election calls for criminal sanctions.

81. On the question of who should pay the costs of the petition it is clearly set out at section 84 of the Elections act 2011

*“an election court shall award the costs of and incidental to a petition and such costs shall follow the cause”*

In this petition we have discussed irregularities cited by the Petitioner to have occurred during the elections.

This court has noted these were irregularities that have not been proved as no reports whatsoever were made either to the election officials or police as there was no evidence of that.

Under section 83 of the Elections act it is provided and I quote:

*“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 results of the election”*

The court is bound to tread carefully. The people's sovereign right to choose their leader is at stake. It is not enough for mere allegations to be made. There must be proof of the malpractices and election offences which proof is beyond proof on a mere balance of probabilities.

As I conclude, I must commend the parties and counsel in this petition for their able research, cooperation and timely actions that enabled the court conclude the petition quite fast.

I now make orders as follows:-

- a. The election petition herein is fatally defective having failed to comply with the provisions of Rule 10(1) of the Election (Parliamentary & County) Petitions Rules 2013. It is struck out.
- b. the 1<sup>st</sup> Respondent was eligible and validly elected as County Assembly Representative Isukha North Ward, Kakamega County Assembly and I hereby confirm his election.
- c. The petitioner to pay costs of this petition to the 1<sup>st</sup> Respondent and the Commission.

Dated and signed this 15<sup>th</sup> day of August 2013

**S.M. SHITUBI C.M.**

**15.8.2013**