



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

**ELECTION PETITION NO. 1 OF 2013**

**MOHAMED BILLOW MOHAMED.....**  
**.....PETITIONER**

**VERSUS**

**IDRIS ABDI BILAL.....1<sup>ST</sup>**  
**RESPONDENT**

**MUTEMI TITUS, RETURNING OFFICER GARISSA COUNTY.....2<sup>ND</sup>**  
**RESPONDENT**

**THE INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION.....3<sup>RD</sup>**  
**RESPONDENT**

**J U D G E M E N T**

On the **4<sup>th</sup> March 2013** the people of Kenya went to the polls to elect their preferred governance and political leaders at various levels of leaderships in a general election, under the new constitutional and electoral dispensation.

The general election was conducted in line with new constitution of Kenya 2010, the United Nations Declaration of Human Rights Article 21, The U.N International Covenant on civil and Political Rights (1996) Article 25 and Elections Act 2011. The exercise was generally presided over and supervised by the Independent Electoral and Boundaries Commission in line with the I.E.B.C act 2011. The people of Kenya participated in this electoral process as a fulfillment of their, constitutional guaranteed, fundamental Rights.

In Balambala ward of Garissa County, the voters (Citizens) too cast their votes in electing their preferred Ward Representative. In this Ward five contestants vied for the position of Balambala Ward Representative.

These were:

1<sup>st</sup> Idris Abdi Bilal

2<sup>nd</sup> Mohamed Abdi Sahal

3<sup>rd</sup> Mohamed Ahmed Yare

4<sup>th</sup> Mohamed Billow Mohamed

5<sup>th</sup> was Mohamed Harrow Abubakar

After the electioneering and the people of Balambala Ward casting their votes, the Independent Electoral and Boundaries Commission declared Idris Abdi Bilal the victor, the duly elected Balambala Ward Representative, subsequently gazetted him as the Ward Representative.

However Mr. Mohamed Billow, one of the contestants being dissatisfied and aggrieved by the electoral process, filled a petition under the electoral Legal Regime and in line with the Electoral (Parliamentary and County) Petitions Rules 2013, the petition is dated 25/3/13 and it challenges the election process, declaration and gazetting of Mr. Idris Abdi Bilal as the duly elected candidate for Balambala Ward Representative.

Mohamed Billow Mohamed (herein after referred to as the petitioner) is challenging the electoral process, declaration and gazetting of Idris Abdi Bilal (herein after referred to as 1<sup>st</sup> Respondent) as being the Balambala Ward Representative.

He the petitioner also cited Mr. Mutemi Titus, the Returning officer of I.E.B.C Garissa County as the (2<sup>nd</sup> Respondent hereinafter referred to as such) and the Independent Electoral and Boundaries Commission as the (3<sup>rd</sup> Respondent, herein after referred as such)

**The petitioner sought for the following order.**

- A. A declaration that the 1<sup>st</sup> Respondent was not validly elected as the Ward Representative of Balambala Ward and the purported election and gazetting of the 1<sup>st</sup> Respondent vide gazette notice no 3160 of 2013 be nullified and declared void.
- B. An order for scrutiny and recount of votes cast at all polling stations at Balambala Ward, Garissa County.
- C. A declaration that the petitioner was validly elected as the Ward representative of Balambala Ward, Garissa County Assembly.
- D. An order be issued directing the 3<sup>rd</sup> respondent to issue a certificate of election to the petitioner, as Balambala Ward Representative in Garissa County Assembly and to Gazette him as such.
- E. A declaration that the 2<sup>nd</sup> Respondent Committed an electoral offence and he be charged/ or fined.

In a nutshell I have considered all issues raised and canvassed herein. I too, considered all the submissions filled. Briefly it's the petitioners case that on 4<sup>th</sup> March, 2013 at 5.00 p.m the 2<sup>nd</sup> Respondent after the electoral process at 5.00 p.m declared him (Petitioner) the winner having garnered 784 votes as against the 1<sup>st</sup> Respondents 743 votes, then he did not issue the requisite Certificate immediately, but for unknown reasons, to the petitioner, and without any powers contrary to the results to, at 1.00 a.m he now declared the 1<sup>st</sup> Respondent as the winner, subsequently issued a certificate to him despite his loss in the polls.

The petitioner averred that he was aggrieved wrote a letter to the 3<sup>rd</sup> Respondent on 1<sup>st</sup> March, 2013 seeking for official results from all polling stations but he did not receive any response,

And that for this reasons, among others, he seeks for scrutiny and recount of the votes cast and tallies.

The petitioner relied on the affidavits and testimonials of Mr. Gerad Abdi Mohamed, Mr. Abdi, Rashid Mohamed Ibrahim and Ms. Hasan Farah while the 1<sup>st</sup> Respondent denied that results from Buradansa were announced twice, by 2<sup>nd</sup> Respondent as alleged, that if any results were announced they were provisional results, that when results were announced the petitioner garnered zero(0) votes and not 63 votes at Buradansa polling station and he garnered 4 votes and its Mohamed Ahmed Yare who garnered

63 votes but not the petitioner and that

2<sup>nd</sup> Respondent rightly declared him victorious having garnered 743 as against 721 votes for the petitioner, that the presiding officer for Buradansa polling station was the petitioners cousin while the agent was his brother and that after the elections the ballot boxes were left at Balambala Primary School, the tallying Centre for close to two weeks before being transported to the Respondents County Office, for this reason he is apprehensive the ballot boxes may have been tampered with.

That the petitioner is a bad loser, a vexatious litigant who is abusing the due process and this petition ought to be dismissed with cost while the 2<sup>nd</sup> and 3<sup>rd</sup> denied the petitioners averments and stated that they discharged their constitutional and statutory duties by the presiding over the electoral process within the law, contrary to the allegations raised by the petitioner and that the declarations done on the 4<sup>th</sup> March, 2013 after the close of polling, thereafter the respective agents signed forms 35 the 2<sup>nd</sup> Respondents returned the 1<sup>st</sup> Respondent as the duly elected member for Balambala County Assembly Ward after garnering the highest votes as shown below and subsequently gazetted him.

	<b>Name of Candidate</b>	<b>Votes garnered</b>
a)	Idris Abdi Bilal	743
b)	Mohamed Abdi Sahal	618
c)	Mohamed Ahmed Yare	86
d)	Mohamed Billow Mohamed	721
e)	Mohamed Horrow Abubakar	266

That the election was free and fair and in accordance with the principles set out in article 86 of the Constitution and all relevant electoral laws, that the Court should apply the three inter related test when hearing and determining this petition.

Which tests are;

- a. Proportionality test
- b. Public Interest test
- c. The harm test

That the application of this test singularly and collectively, militates against the nullification of this election the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent stated that the threshold of nullification of this election as per section 83 of the elections act 2011 having not been met the Court should find the 1<sup>st</sup> Respondent as duly elected and that the election was valid.

By consent the parties agreed that the issues for determination were as follows;

1. Whether the 1<sup>st</sup> Respondent was validly elected as County Assembly representative for Balambala Ward.
2. How many votes did each candidate garner at Buradansa Primary School polling station?
3. What relief can be granted in the circumstances?
4. Who bears the cost of this petition?

With the leave of Court parties agreed to call the presiding officer and Deputy presiding officer Buradansa polling station as witnesses and at the close hearing Court on its own motion ordered for the scrutiny and recount of the three contested polling stations in order to inform itself.

Briefly it is the petitioner's case that as adduced by PW 1, PW 2, PW3 that initially 2<sup>nd</sup> Respondent declared the petitioner as the winner with 784 votes as against 1<sup>st</sup> Respondent's 721 votes. PW 1 disputed results of only three polling stations. These were Buradansa, Abdigap and Balambala and told court that the form 35 for Buradansa polling station is a forgery. In the real form 35, the presiding officer signed it and he garnered 63 votes yet the unsigned forged form indicates he got zero votes yet he even cast his vote at Buradansa and voted for himself. He deponed the seal numbers for Buradansa polling station as being 3690299, 3690298, 3690297 and 3690296.

**Pw 1:** Testified that his 63 votes from Buradansa were not factored in instead they unfairly gave him zero votes yet he had 63 votes and that this was not free and fair, that he voted himself at this polling station.

**Pw 2:** Gerad Abdi Mohamed who was an agent to the petitioner too testified that the form 35 for Buradansa form 007 is not the form he signed. His signature is forged by someone else that he as the agent witnessed that petitioner had garnered 63 votes but not zero votes. That again the purported form 35 Buradansa 007 is also not signed by the presiding officer and no reasons are given why it's not signed by the P.O but the Deputy Presiding Officer. That he reported this forgery to the police vide O.B. no. 9/2915/2013.

**Pw 3:** Abdirashid Mohamed Ibrahim testified and he heard the 2<sup>nd</sup> respondent declared the petitioner as the winner on 4/3/2/13 at 5.00pm he then left.

**Pw 4:** Sahan Farah the presiding officer for Buradansa told court that he signed form 35 for Buradansa and the petitioner had garnered 63 votes and its one Mohamed Ahmed Yare who is the one who got (0) votes but not the petitioner and that 1<sup>st</sup> Respondent got 4 votes. She disowned the Buradansa form 35, form no 007 which is court where petitioner got zero (0) votes. She told court that the form 35 Burandansa 007 is not the correct form used during the electoral process 1<sup>st</sup> respondent RW 1, Idris Abdi Bilal testified that he was duly elected in a fair and free election.

2<sup>nd</sup> respondent declared him the winner after the tallying on 5<sup>th</sup> March, 2013 at the Constituency tallying centre. That he garnered 743 votes against the petitioner's 721 votes, that the presiding officer is the petitioner's cousin and after the results were declared the petitioner was dissatisfied he almost got physical he had garnered zero votes at Buradansa.

That the returning officer gave them all forms 35 they were all signed and even the 2<sup>nd</sup> respondent wrote a letter to the Deputy Presiding officer to do recount. The letter was shown as exhibit 3.

RW1 Malingi Cosine Musyimi, the Deputy Presiding officer at Buradansa testified that he does not remember how many votes each candidate got at Buradansa polling station though he is the one who signed forms 35 on behalf of the presiding officer, no reason is given why the presiding officer did not sign the form 35 and that the results were not pinned at the public place as required since they had no materials.

RW 3: 2<sup>nd</sup> respondent Titus Mutemi the Returning Officer for Balambala Constituency testified that he returned the 1<sup>st</sup> respondent as the winner after tallying. That when he announced the results the petitioner and his supporters roughed him up removed him from his car. This was a threat to his life that he wrote a letter indicating that he could issue a certificate to the winner after re-count and that he even summoned the Buradansa presiding officer and her deputy and discussed the results. He testified that all form 35 which were in court were authentic I.E.B.C document. That the elections were free and fair and he issued the 1<sup>st</sup> respondent with a certificate at the close of the case At the close of the case pursuant to section 82 (1) of the Elections Act 2011, on my own volition ordered for a scrutiny and recount of the three contested polling stations of Burandansa, Abdigap and Balambala. I have also considered filled

submission too. I now agree with petitioner and indeed all parties too. That this entire petition hinges on the outcome of the results at Buradansa polling station. In fact one of the agreed issues is;

How many votes did each of the candidates garner at Burandosa Primary School polling station? To me this is the question the court ought to answer.

### **SCRUTINY AND RECOUNT**

Before analyzing the evidence though, scrutiny and recount, was the last exercise I shall begin with because it appears all parties nearly came to a consensus on this. As correctly submitted by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents the scrutiny was meant to supplement and not to supplant the sum total of evidence tendered during hearing. The question is did this exercise do that? I find the answers in the parties' submission.

Petitioner's submission "scrutiny of votes at Buradansa Primary School recorded several irregularities and anomalies which borders on fraud by the officers of the 3<sup>rd</sup> respondent and which render the results, not credible mere sham and which confirm that the 1<sup>st</sup> respondent was not validly elected" as demonstrated below;

#### 1<sup>st</sup> Respondent Submits

"On alleged anomalies and irregularities arising from scrutiny, the petitioner has purported to point out the said anomalies and irregularities without demonstrating the 1<sup>st</sup> Respondents' culpability. It is not farfetched to raise the possibility that irregularities were conducted by the petitioner"

While 2<sup>nd</sup> and 3<sup>rd</sup> respondents had this to say on this issue;

"The effect of the outcome of the scrutiny is such that there is no clear-cut finding to assist court reach an out right determination; as such court can only conclusively determine the totality of parties' respective pleadings and evidence adduced in support of the allegation".

The main point I am trying to bring out is that all parties agree that indeed there were anomalies and irregularities upon scrutiny and recount of Buradansa Primary School polling station. I must say the other two stations, Abdigap, Balambala polling stations scrutiny and recount tallied very well. There are no issues. The question and answers raised by the petitioner and 1<sup>st</sup> Respondent are that who caused this anomalies and irregularities and how do this irregularities affect this results or should as opined by 2<sup>nd</sup> and 3<sup>rd</sup> Respondents that, then court should not consider this irregularities and deal with other evidence?

I state this because from the evidence the issue to be interrogated in this case is the electoral process of Burandosa polling station, that is what this entire case hinges on, therefore most of the pleadings and evidence adduced is related to Buradansa. **My conclusion** is court must consider the totality of the entire pleadings, evidence and even the outcome of the scrutiny and recount of Burandosa polling station. These issues are intertwined completely.

Secondly with regards to the evidence adduced by PW 2 Gerard Abdi, the petitioner's agent at Buradansa testimony was credible. He confirmed to court that he was present during the entire voting period and that the petitioner garnered 63 votes that he even signed form 35 and that the form 35 Buradansa 007 purportedly signed by him and other agents purporting that the petitioner got zero votes is a forgery and signature appended, is not his and he reported this to police vide O.B. 9/29/5/2013 also that he learnt of this forgery in April while PW 4 an officer of the 3<sup>rd</sup> Respondent who was the presiding officer for Buradansa completely discredit the Respondent's case. She is a 21 year old university student one Sahan Farah told court that she diligently exercised her duties as P.O. was not negligent. She even signed the form 35 for Buradansa where the petitioner had garnered 63 votes and not zero (0) votes that the form 35 she signed is not before court. She disowned the form 35 Buradansa 007 on which her name and I/D appear as not the genuine form that it's not in her handwriting yet she signed a genuine form 35 in

triplicate and handed it over to the Returning Officer.

To me to suggest in submissions that the testimonies of the petitioner Mohamed Billow Mohamed, the testimony of PW 2 Gerard Abdi Mohamed, the testimony of Abdirashid Mohamed Ibrahim and the testimony of Presiding Officer, PW 4 one m/s Sahar Farah, were discredited and controverted by way of impeachment either through cross examination or the Respondents testimonies is not being candid. To me the question of the 2<sup>nd</sup> Respondent announcing two conflicting results was put to rest indeed exhibit 1 the letter he wrote confirms the **uncertainty in his mind then** unlike when he testified in court, without even considering the scrutiny and recount the issue of form 35 for Buradansa polling station not being genuine i.e. Buradansa form 007 not being genuine was in fact put beyond reasonable doubt in my mind, in fact of concern to court is that the original form 35 Buradansa was missing from the ballot box or inside the box during scrutiny and recount but as for the alleged forgery of the form 35 its obvious and even put above the balance of probability.

The only question is by whom and when was this form forged? I will leave this at that because this is under investigation vide O.B. no 9/29/5/2013.

To me from the evidence, it does not matter who was whoever's relative, it's expected in politics that contestant's agent should either be his relative, confidant or someone he trusts. For PW 4 Sahar Farah whether she was related to the petitioner or not she conducted herself courageously and diligently. I am not inquiring further whether they are related.

As for the Respondent's case, to me it's a weak defense in the sense that PW 4 Sahar Farah Hassan, is one of 3<sup>rd</sup> Respondent's employees' testimony is credible and goes against their defense.

PW 3 the 2<sup>nd</sup> Respondent's testimony was clearly contradictory. He did not come out clearly, his demeanor too left a lot to desire. In fact his testimony was a mere denial and assertion without any backing for instance why was form Buradansa 007 not signed by the Presiding Officer, his lieutenant on the ground he says he was not at Buradansa polling station. This is a hot spot for him yet he doesn't mind if the Deputy Presiding Officer sign the form 35 Buradansa 007 without documenting reasons for failure of either the presiding officer or other agents to sign it.

RW2. The Deputy Presiding Officer came out as either not well grounded or the one used, however he cleared himself during cross examination by stating that he does not know what each candidate garnered at Buradansa polling station despite having signed the form 35 Buradansa 007.

Bottom line the 1<sup>st</sup> Respondents assertion that the petitioner got (0) zero votes or 2 votes as per scrutiny results is not supported by any evidence.

No one for sure except those who knew during the counting of votes at Buradansa polling station can authoritatively say they know how many votes each candidate got at Buradansa polling station.

Clearly from the evidence there are several anomalies and irregularities ranging from the 2<sup>nd</sup> respondents announcing two different sets of results at the different times which is proven to the letter he wrote exhibit 1, which during hearing, he claimed it was written under duress when his life was in danger yet he chose not to report to police or engage the security system.

The irregularity with the unsigned form 35 Buradansa 007, without reasons for the presiding officer remarks why?

The unresolved question of the forged signature of the agent PW 2 on Form 35 Buradansa 007 which matter is still under investigation by the police.

The purported genuine Form 35 for Buradansa polling station, which missing inside the Buradansa ballot box and not pinned on the box and the fact that 3<sup>rd</sup> respondents employee, PW 4 M/s Sahar Farah

discrediting the very exercise she presided over. She testified that the Form 35 Buradansa 007 availed is not genuine. If I return to the scrutiny and recount, the results thereafter was a disaster, it appears even there is a discrepancy between the results contained in the controversial Form 35 Buradansa 007 and the results obtained after scrutiny, for Buradansa polling station.

The scrutiny report indicates over 30 rejected votes. Again as correctly submitted by the petitioner's counsel Mr. Kigen foreign ballot papers without their counterfoils, were found inside Buradansa ballot box while other proper ballot papers were missing. Counsel set this at 55 missing ballot papers. Again the closing seals on the ballot box for Buradansa were tampered with.

Bottom line the scrutiny and recount leaves court in a dilemma. I guess from the submission all parties herein are in a dilemma too. Conclusion Buradansa puzzle is not resolved yet again.

Mr. Melly for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents correcting submits that the burden of proof lies with the petitioner and that the standard of proof ought to be higher than proof on a balance of probability but lower than the standard of proof beyond reasonable doubt as required in establishing a criminal case, to this extent I concur, he cited the case of John Kiarie Waweru Vs. Beth Wambui Mugo and two others (2208) eKLR by Justice Kimaru which the learned Judge stated as follows.....the burden of establishing all these allegations, regarding the conduct of the said election and results announced thereafter is on the petitioner .....this court will therefore not interfere with the democratic choice of the voters..... UNLESS its established to the required standard of proof that there were irregularities and the electoral malpractice that rendered the said elections null and void, and therefore subject to nullification. The petitioner must establish that such malpractice were of such magnitude that it substantially and materially affected the outcome of the electoral process.

To me this case is distinguishable in the above mentioned case the learned Judge noted that petitioner had failed to attain the standard required of nullification of a petition. However in this petition considering the aforementioned (enumerated) anomalies and malpractice noting that the narrow margin which separated the petitioner and 1<sup>st</sup> respondent is 21 votes only. No doubt the petitioner has put his case far way beyond than the proof on a balance of probability.

The petitioner demonstrated that if the electoral process at Buradansa polling station was done freely, fairly and administered in an impartial, neutral, efficient, accurate and accountable manner as enshrined in the Constitution of Kenya 2010, Articles 38, and 81 of the constitution, the Elections Act 2011, the Universal Declarations of Human Rights Article 21 "where the will of the people shall be the basis of the authority of government which shall be expressed through freely chosen representatives and the international covenant on civil and political rights Article 25 which laws set out the GENERAL PRINCIPLES FOR THE ELECTORAL SYSTEM. The free expression of the electors would have been known, at Balambala on the 4<sup>th</sup> March 2013. As correctly submitted by Mr. Kigen for the petitioner, these general principles and in particular the principals with regard to scrutiny and nullification of an election are well settled in the case of HEP No. 6 of 2013 Joash Wamangoli Vs. I.E.B.C. and 3 others 2013 (Eklr) by Justice H. Omondi the learned Judge had this to say "the purpose for scrutiny is to establish the validity of votes cast, where there have been allegations of irregularities and breaches of the law.

Scrutiny also helps the court to better understand the vital details of the electoral process and gain impressions on the integrity of the electoral process. I can do better than draw from the sentiments expressed by Warsame J. M the case of Dickson Daniel Karaba vs. Hon. John Ngata Kariuki and 2 others. Election Petition No. 3 of 2008, to the effect that only after scrutiny that the court can form an opinion whether the results contained in Form 35 are correct.

Certainly an order for scrutiny and recount cannot be based on whimsical suspicion. The court has to be satisfied that such an exercise is necessary for the just resolution of the petition.....and the primary duty of the court is to examine whether elections were conducted in a free, impartial, accurate and accountable manner, it cannot be based on belief that the petitioner was the poll favorite. With regard to scrutiny and recount for Buradansa polling station the results were disastrous. I too draw from the principles and set out above by the two honorable Judges.

I totally disagree with the 1<sup>st</sup> respondent counsel Mr. Kibungei that these irregularities were minor and could have been engineered by the petitioner. I don't believe this but believe the evidence adduced which is to the contrary. I concur with the petitioner's submissions that even a small irregularity in one station, which affects the results in a substantial manner, is enough to have the entire results nullified. It is not lost to court that this was a closely contested election, with a narrow margin of 21 votes separating the victor and the loser.

It is also not lost to court that both PW4 Sahan Farah the presiding officer Buradansa and RW 3 Malingi Cousine Musyimi her Deputy (D.P.O Buradansa) disowned and discredited the Buradansa polling station results, **the very station they were entrusted to supervise and preside over on behalf of the 3<sup>rd</sup> respondent their employer.**

RW3, 2<sup>nd</sup> respondent testimony that he wrote a letter to the effect confirms this to buttress this point. Mr. Kigen for the petitioner cited HEP No. 2 of 2013 by Justice L. N. Mutenda case of Thomas Mutinda Musau & 2 others Vs. the I.E.B.C and 2 others, which case is cited with approval of the case of Morgan & others Vs. Samson and another (1974) 3 A KLR 722 where the Judge had this to say "An election court was required to declare an election invalid

0. If the irregularities in the conduct had been such that it could not be said that the election had been so conducted as to be substantially in accordance with the law as to the election.
0. If the irregularities had affected the results accordingly where breach of the election rules although trivial had affected the results, that by itself was enough to compel court to declare the election void"

To me this breach was not trivial, and they cannot be cured by Section 83 of the Elections Act 2011 as suggested. Section 83 of Election Act 2011 states that 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 that written law or that the non – compliance did not affect the results of the election.

In this situation the principles setout were defied and the non compliance affected the results should anyone think otherwise the obvious answer lies in the narrow margin win of 21 votes vis-à-vis the disastrous results upon scrutiny of the Buradansa polling station results

Mr. Melly cited the case of John Vs. Nyange (No. 4) 2008 3 KLR Cp 500 and reminded court that "Error is to human" and indeed I concur with him. Error is to human and only God and maybe angels do not error, but unlike in that case, in this case there are one too many consistent bad errors, which to me form a certain pattern.

Again counsels cited case of Toolit Simon Akeche Vs. Oulonya Jacob L. Okeri and another EP No. 1 of 2011 U.G. HC 56 (unreported) this case is clearly distinguishable in that case the issue was refusal to sign DR forms (equivalent of our forms 35) by agents.

However in this particular case, the issue is that the agents and presiding officer signed the Form 35 (DR forms) but the said Form 35 is missing.

To me the upshot is that the Balambala ward elections were not in line with the setout principles of a free and fair accurate election.

In hearing this matter I applied the three tests as submitted by Mr. Melly, the proportionality, harm and public interest tests, but I do find that the will of the majority if know is paramount.

In conclusion I shall revert to the agreed issues and state that from the issues canvassed even the court cannot tell with certainty how many votes each candidate garnered at Buradansa polling station, this answers the first agreed issue on the irregularities and how they adversely affected the results.

Clearly the anomalies, malpractices, irregularities or should I refer to it as inefficiency and lack of diligence was caused by the 3<sup>rd</sup> respondent's employees or someone who infiltrated their operations, there is nothing linking the petitioner as submitted by Mr. Kibungei, nor is the 1<sup>st</sup> respondent linked.

As for the purported forgery of the agent signature on form 35 Buradansa 007, the same was reported to police vide O.B. 9/29/5/2013, what I am grappling with is can I report to the Director of Public Prosecution, the commission and the speaker as stipulated under section 87 (1) of the Elections Act that election offence are committed under section 59 (J), (K), (L), (M), I think I would have sat from the evidence.

I am unable to pin point anybody in particular though it's obvious that the returning officer, 2<sup>nd</sup> respondent, the presiding officer, Pw4 and the Deputy returning officer RW 3, for Buradansa each looked at electoral process differently, and without finding the culpable person, I leave this to the 3<sup>rd</sup> respondent (their employer) to do their own inquiries and audits. However due to this 3<sup>rd</sup> respondent shall bear the cost of this petition.

Again as for the forgery of the signature of agent on form 35 Buradansa 007 the same is already reported to police, my opinion is that this matter is under investigations, and I need not comment herein I believe 3<sup>rd</sup> respondent is aware of this. This upshot is that respondent was not validly elected as the ward representative of Balambala ward and I hereby nullify this election and order for fresh elections to enable the will of the people of Balambala ward to prevail.

In line with section 86 (1) (2) of the Election Act 2011, a certificate to issue to the relevant speaker.

In line with section 84 of the Elections Act 2011 and Rule 34 of the Election Rules 2013, for the aforesaid reasons I hereby award the petitioner and 1<sup>st</sup> respondent the cost of this suit, in equal cost, the cost to be borne by 2<sup>nd</sup> and 3<sup>rd</sup> respondents.

Lastly I wish to thank all those who have enabled us reach this far; I thank the J.W.C.E.P for their preparatory work and support, throughout the entire hearing period.

All members of staff and security personnel who came in handy whenever duty called for it, the court clerk Abdi Abdi.

I commend the counsel for making it slightly easier for me to arrive at this verdict. Mr. Kibungei and Mr. Kigen cited over 10 high court authorities so far, and filled over 500 pages each. Mr. Melly wasn't any better citing over 14 precedents with roughly 700 pages, this was in spite of our agreement that we limit on the number of pages. I did my best at least looked at each page, last but not the least, I thank ALL PARTIES herein especially Mr. Mohamed Billow Mohamed and Mr. Idris Abdi Biloli should the two gentlemen choose to be bound by this judgment I wish both of them the best of luck in the fresh elections. This is the judgment of this court.

**B. J. NDEDA SPM**

**30/08/13**

**COURT:** Judgment delivered in presence of Mr. Kibungei for the petitioner.

**Mr. Kigen for the 1<sup>st</sup> respondent**

**In absence of Mr. Melly, Mr. Kibungei holding brief for Mr. Melly for 2<sup>rd</sup> and 3<sup>rd</sup> respondent.**

**Petitioner present**

**1<sup>st</sup> respondent present**

**Court clerk Abdi Mohamed Abdi**

**B. J. NDEDA Ag.SPM**

**30/08/13**