



**REPUBLIC OF KENYA**  
**IN THE CHIEF MAGISTRATE’S COURT AT BUSIA**  
**ELECTION PETITION NO.1 OF 2013**

TADEYI MUKUDI  
MULIRO.....PETITIONER

VERSUS

PAUL CHERUIYOT KONES.....1<sup>ST</sup>  
RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION .....2<sup>ND</sup>  
RESPONDENT

FRED MUSIRIMBA.....3<sup>RD</sup>  
RESPONDENT

**JUDGMENT**

Following the General Elections held on the 4th day of March 2013, the 3rd respondent was returned as the County Representative for Bunyala North Ward. The elections were presided over by the 2nd Respondent and the 1st respondent was the returning officer.

The Petitioners, being dissatisfied with the manner the elections were conducted, moved to this court vide his petition dated 2nd April 2013 and filed on 3rd April 2013. The petitioners pray for orders that

- a. Results returned by the returning officer be annulled and a declaration for fresh elections be made
- b. General damages
- c. Costs of the petition

**1<sup>st</sup> PETITIONER’S CASE**

1. The petitioner **Tadeyi Mukudi Muliro** contested the County Representative seat for Bunyala North Ward in the last general elections on UDF Party.
2. That there were other candidates for the said position including the 3rd respondent herein
3. That the 3rd respondent who was one of the candidates, was declared the winner and County Representative for Bunyala North Ward by the 2<sup>nd</sup> Respondent, the Independent Electoral & Boundaries Commission whose responsibility was to conduct the elections.
4. The Petitioner testified that there was an anomaly in the ballot paper and his name was inaccurately printed as **MUKDUDI. T . MULIRO** instead of **MUKUDI. T. MULIRO**.
5. That when the petitioner was informed about the anomaly by his witness Mbaga Tuzinde Gero who was the UDF party chief agent; he informed the Returning Officer the 1st respondent herein who declined to make any rectification

6. The Petition is supported by an affidavit sworn by the Petitioner on the 19th March 2013 and filed on even date and a supplementary affidavit sworn on 30th April 2013 and filed on 2nd May 2013
7. The petitioner claimed that the elections for County Representative for Bunyala North Ward had been postponed and in support thereof relies on a computer printout of a press briefing allegedly made by the 2<sup>nd</sup> respondent that is attached to his supplementary affidavit sworn on 30th April 2013.
8. The petition is also supported by affidavits sworn on 19th March 2013 and filed on even date by petitioner's witness namely Mbaga Tuzinde Gero; Agnes Tabu Apinde; Patrick Khamenga Okochi and Francis Muyoti Omondi.
9. The petitioner told court that prior to the election date, he furnished IEBC with a deed poll for purposes of changing his name original and copy of ID to IEBC with his correct names on it
10. The petitioner and his witnesses told court that as a result of the anomaly in the ballot paper, the voters were confused thinking that petitioner's name was not on the ballot papers and consequently he lost the elections.

### **1ST AND 2ND RESPONDENTS' CASE**

1. The 1st and 2nd respondent filed a response to petition on 12th April 2013
2. The 2<sup>nd</sup> respondent conceded that there was an anomaly in the ballot paper and that petitioner's name was inaccurately printed as **MUKDUDI. T. MULIRO** instead of **MUKUDI. T. MULIRO**
3. He conceded that the anomaly was reported to him on 3rd March 2013
4. He told court that other than the name; candidates and more particularly the complainant could not only be identified by their names but also their
  - a. Party symbol
  - b. Party name
  - c. Photograph
  - d. Nickname if any
5. He denied that elections for County Representative for Bunyala North Ward were postponed
6. He stated that the elections were free, fair, transparent and credible.
7. The answer to the petition is supported by the affidavit of the 1st respondent and returning officer Paul Cheruiyot Kones sworn on 11th April 2013 and filed on 12th April 2013.

### **3RD RESPONDENTS' CASE**

1. 3rd respondent averred that he was elected as County Representative for Bunyala North Ward
2. That the elections were fair, transparent and credible.
3. He denied being aware of any anomalies having occurred as alleged by the petitioner.
4. He prayed for a declaration that he was the duly elected County Representative for Bunyala North Ward Assembly and the dismissal of the petition.

I have considered the evidence on record and the issue in question is whether or not the petitioner has proved his case on the balance required in election petition cases which was restated in **Raila Odinga & others versus IEBC and others- Petition No. 5 of 2013** to be higher than a mere balance of probability.

### **EVIDENCE**

Evidence was presented by way of affidavits pursuant to rules 12 and 15 of the elections (parliamentary and county elections) petition rules, 2013 (rules). The petitioner called five (5) witnesses who swore affidavits and were duly cross-examined by the respondents' counsels and re-examined by their advocates. the 1<sup>st</sup> and 2<sup>nd</sup> respondents were represented by the returning officer, Paul Cheruiyot Kones while the 3<sup>rd</sup> respondent was the only witness to his case. .

### **SUBMISSIONS**

The petitioners; 1st and 2nd respondents and the 3rd respondent filed their written submissions

## **ISSUES FOR DETERMINATION**

The issues for determination are as follows:-

1. Whether there was an anomaly in the ballot paper
2. Whether the election for County Representative for Bunyala North Ward County Assembly was postponed
3. Whether the anomaly in the ballot paper invalidates the election for County Representative for Bunyala North Ward County Assembly
4. Whether there is sufficient evidence to invalidate the election of the 3rd Respondent as the member for County Representative for Bunyala North Ward
5. Who pays costs of the petition.

### **1. Was there an anomaly in the ballot paper**

It is not disputed that there was an anomaly in the ballot paper and petitioner's name was inaccurately printed as **MUKDUDI. T. MULIRO** instead of **MUKUDI. T. MULIRO**

### **2. Was the election for County Representative for Bunyala North Ward County was postponed**

In support of this issue; petitioner relies on a computer printout of a press briefing allegedly made by the 2<sup>nd</sup> respondent's chairperson that is attached to his supplementary affidavit sworn on 30th April 2013.

A perusal of the said brief shows that it was authored and posted on the Nation Media Group website by one Isaac Ngwiri. The said Isaac Ngwiri was not called as a witness to verify the authenticity of the said brief.

The respondents denied that the elections had been postponed as alleged by the petitioner and his witnesses and stated that elections can only be postponed by a court order or a notice in the Kenya Gazette. The 1st respondent testified that there was a 91% percent voter turn out in the Budalangi Constituency in which Bunyala North Ward falls. Accordingly; I have come to the conclusion that the voter turnout would have been lower had elections for County Representative for Bunyala North Ward been postponed as alleged by the petitioner.

Having found that there is no evidence that the 2<sup>nd</sup> respondent had postponed the election for County Representative for Bunyala North Ward County Assembly; I also find that the doctrine of **legitimate expectation** espoused by the petitioner does not apply to this case. Even if it did apply; this court would have no jurisdiction to consider the doctrine which according to the petitioner is a review administrative action which falls in the realm of the High Court.

### **3. Is there sufficient evidence to invalidate the election of the 3rd Respondent as the County Representative for Bunyala North Ward**

The 1st respondent testified that other than the name; candidates and more particularly the petitioner could be identified not only by their names but also their

- a. Party symbol
- b. Party name
- c. Photograph
- d. Nickname if any

The petitioner did not have a nickname but he conceded that his Party symbol; Party name and Photograph were properly printed on the ballot paper.

The petitioner came 3<sup>rd</sup> in the elections and received majority of votes in the following five (5) polling stations

i. **NABUCHWI**

285 votes as against the 3<sup>rd</sup> respondent's 27 votes.

ii. **BULAGU NURSERY SCHOOL**

68 votes as against the 3<sup>rd</sup> respondent's 21 votes.

iii. **KENYA GAUZE PRIMARY SCHOOL**

125 votes as against the 3<sup>rd</sup> respondent's 16 votes.

iv. **BUDUBUSI PRIMARY SCHOOL**

99 votes as against the 3<sup>rd</sup> respondent's 39 votes.

v. **ISENYE PRIMARY SCHOOL**

409 votes as against the 3<sup>rd</sup> respondent's 81 votes.

I have considered the provisions of section 83 of the Election Act which states as follows:

***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 result of the election***

Other than that the petitioner's name on the ballot paper was inaccurately printed as **MUKDUDI. T. MULIRO** instead of **MUKUDI. T. MULIRO**; there is no iota of evidence that the election was not conducted in accordance with the principles laid down in the Constitution and other written law. From the fact that petitioner received majority of votes in the above quoted polling stations; I have come to the conclusion that the ballot paper contained sufficient information by which the petitioner could satisfactorily be identified by the voters and the anomaly in the ballot paper did therefore not affect the results of the election.

I have no doubt in my mind that the mischief intended to be cured by the requirement that a candidate's photo, name, party colour and party symbol appear on the ballot paper was to enable voters to identify their preferred candidates not only by name but also by other means such as photos, party colour and party symbol especially in regions where the illiteracy level of voters is high. It came out during the testimony of the 1<sup>st</sup> respondent that the level of illiteracy in Budalang'i is very high i.e. 70% to 80%. It therefore follows that most voters could most likely not tell if their preferred candidate's name had been misspelt or not and that they most likely highly relied on the candidates Party symbol, colour and candidates Photograph.

From the foregoing therefore; I find that the petitioner has failed to prove that the inaccuracy of his name on the ballot paper had any material effect on the election that would justify invalidation of the election results. In arriving at this decision; I am guided by **MAHEO VS BABU UDAI PRATAP SINGH & OTHERS 1966 AIR 824, 1966 SCR(2) 564** cited by the 1st and 2nd respondent.

I have also considered **RE K.A.THABITI [1967] E.A 722** cited by the petitioner but I find that is distinguishable since unlike in the case at hand; the party symbols in the cited case had been exchanged so that the petitioner's party symbol was printed against the name of his rival.

**4. Who pays the costs of this petition**

Costs follow the event. Unless otherwise for sufficient reason ordered, the unsuccessful party/parties pays costs to the successful party/parties..

Consequently; this court finds that:

1. No evidence has been tendered to justify the annulment of the election results for the County Representative for Bunyala North Ward and the petitioner’s prayer for a declaration for fresh elections is therefore without merit
2. The petitioner ‘s prayer for general damages is also unmerited
3. The 3rd Respondent was validly elected as the County Representative for Bunyala North Ward in an election that was conducted fairly, transparently and in a credibe manner and the verdict of the electorate must be respected. A certificate to that effect shall be issued forthwith and shall be served upon the speaker of the Busia County Assembly in accordance with section 86(1) of the election Act.
4. The petition dated 19th March 2013 and filed on even date is considered and dismissed.
5. The respondents’ costs of this Petition shall be borne by the Petitioner

Delivered in open court and Signed on 1st day of August 2013

**Thripsisa Wanjiku Cherere (Ms.)**

**Chief Magistrate**

In the presence of

CC.....

Petitioner.....

1st and 2nd respondents.....

3rd respondent.....