



**REPUBLIC OF KENYA**  
**IN THE CHIEF MAGISTRATE'S COURT**  
**AT NYAMIRA**  
**ELECTION PETITION NO. 3 OF 2013**

**ISAAC OERRI ABIRI.....PETITIONER**

**-VERSUS-**

- 1. SAMWEL NYANGAU NYANCHAMA**
- 2. JUSTUS NELIAKHO**
- 3. THE RETURNING OFFICER NORTH**

**MUGIRANGO CONSTITUENCY.....DEFENDANTS**

- 4. THE I.E.B.C.**

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

The Petitioner herein, ISAAC OERI ABIRI, has filed the Petition dated the 2/4/2013, and filed in court on 3/4/2013. The Petitioner, ISAAC OERRI ABIRI, has sued the 1<sup>st</sup> Respondent, **SAMWEL NYANGAU NYANCHAMA, JUSTUS NALIAKHO**, The Returning Officer, **NORTH MUGIRANGO CONSTITUENCY, 2<sup>nd</sup> Respondent, INDEPEDENT ELECTORAL AND BOUNDARIES COMMISSION**, and 3<sup>rd</sup> Respondent. The Petitioner is represented by his Counsel, Mr Orina Advocate and Mr George Masese and Mr Odhiambo from the firm of Murugu and Rigoro Advocates appear for 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondent Respectively.

The Petitioner filed the Petition together with the supporting affidavit, sworn by the said Petitioner together with affidavits allegedly sworn by his agents of the T.N.A. (The National Alliance Party). They are the affidavits of Johnson Evans Mosomi Isaaka, Samson Ruoti Magonya, Richard Ondieki Moochi, Evans Mosigisi Keroti, and Gladys Kerubo Ongera, all dated the 2<sup>nd</sup> April 2013 and fled in court on the 3<sup>rd</sup> day of April 2013.

From the Petition the Petitioner seeks the following prayers:-

- (I) That, this Honourable court be pleased to order for a recount, verification and or scrutiny of all votes cast in the election for member of County assembly, Itibo Ward.
- (b) That the Honourable court do declare that the 1<sup>st</sup> Respondent is not the validly elected member of

the County assembly, Itibo Ward.

- (c) That the Honourable court does declare that the Petitioner the duly and validly elected member of the County assembly, Itibo Ward.
- (d) That cost of this Petition be borne by the Respondents.
- (e) That any other relief the court may deem fit and just to grant.

The 1<sup>st</sup> Respondent, SAMWEL NYANGAU NYANCHAMA, did reply to the PETITION, on the 5<sup>th</sup> April, 2013. The Reply to the Petition is dated 5/4/2013, and the same was filed on the 5/4/2013. The 1<sup>st</sup> Respondent, SAMWEL NYANGAU NYANCHAMA has through his reply to the Petition, denied all the allegations averred to by the Petitioner. He seeks for the Petitioner's Petition to be dismissed with costs to him.

The Reply to the petition is supported by the 1<sup>st</sup> Respondent Affidavit in reply, sworn on the 5/4/2013. The affidavit in reply, has the annexures marked as "SNN1", SNN2" and "SNNI",

In his affidavit, he is denying the Petitioners claim against him and seeks the dismissal of the said, Petitioner with costs to 1<sup>st</sup> Respondent.

The 2<sup>nd</sup> and 3<sup>rd</sup> Respondent, have fled their **ANSWER TO THE PETITION**. The answer to the Petition is accompanied by a Replying affidavit filed in court in Response to the PETITION. The same is sworn by the 2<sup>nd</sup> Respondent, **SIMALI NALIAKHO JUSTUS**. It is a detailed affidavit and has denied all the allegations made by the petitioner, and has replied to the affidavits of the agents of the Petitioner.

There are several annexures annexed to the Replying affidavit in answer to the Petition, by **the JUSTUS NALIAKHO (2<sup>nd</sup> Respondent) SIMALI**. They are the annexures "SNJI "and "SNJ2". The 2<sup>nd</sup> Respondent totally denies the Petitioner allegations made against him and 3<sup>rd</sup> Respondent and seeks for the dismissal of the petitioners Petition.

The Petition was set down for hearing on the 15/5/2013. On this day, the court was informed by Mr Rigoro advocate that he has filed the issues for determination for the 2<sup>nd</sup> and 3<sup>rd</sup> defendant.

The issues for determination had been served upon the firm of George Masese Advocate. Mr George Masese admitted that he had been served, and he did associate himself with the issues filed by the 2<sup>nd</sup> and 3<sup>rd</sup> defendant.

Mr Orina advocate had not filed the issues, and he requested for time to file the checklist and the issues for determination. The court was requested to frame up the issues from the petition. The court was asked to check on scrutinizing the results from the polling stations. The counsels did agree that the counsel for Petitioner was to file the checklist on or before the 28/5/2013. It was further agreed that the issues to be canvassed at the hearing be agreed upon at the time of the pre-trial conference, on 28/5/2013.

On the 28/5/2013, all counsels, Mr Orina advocate for Petitioner, Mr George Masese advocate for 1<sup>st</sup> Respondent, and Mr. Odhiambo advocate for 2<sup>nd</sup> and 3<sup>rd</sup> Respondent appeared.

In his submissions, Mr Orina advocate, submitted that the Petitioner be allowed testify and be examined. If the Respondents want to respond then they call their evidence.

The court was told that the only issue before the court was the tallying of the votes, but Mr Odhiambo, did not agree to the contention by Mr. Orina advocate, that the only issue was the tallying of votes.

The court was referred to the **annexture "10A2"**, which the court was told shows that the 1<sup>st</sup> Respondent,

garnered 3043 votes, and the Petitioner garnered 2,958 votes, but in the Response to the petition by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent, the **annextures “SNJ2”**, it is judicator and shown that the Petitioner did gunner a total of 3043. The 1<sup>st</sup> Respondent garnered a total of 3130 votes.

According to the Counsel Mr Orina advocate for the Petitioner, **“SNJ2”** is the corrected version of the results. He alleged that the votes allocated to the 1<sup>st</sup> Respondent, belonged to the Petitioner.

The Counsel further submitted that the Petitioner is disputing the votes cast at Nyasio Primary School, and in particular the votes garnered by the 1<sup>st</sup> Respondent.

It was his contention that the votes at Nyasio polling station be recounted.

It was further his submission that the Petitioner was not disputing the votes cast from the other polling stations.

The recount was sought for votes cast at Nyasio Primary School.

In his submissions Mr George Masese advocate submitted that going by the documents certified by the Respondent 2, there are no erroneous figures given on the official documents.

There is no discrepancy at all on what was declared and the final results given. Mr. George Masese advocate, submitted that is upon the Plaintiff to adduce evidence to support his claim before the court on what he is telling the court was erroneous given to the 1<sup>st</sup> respondent, which was in his favour.

Mr. Odhiambo did submit that he is relying on the pleadings filed. he submitted that Form 35 and 36 corroborate annexure **“102A”** which reveal that votes obtained by the 1<sup>st</sup> Respondent were 191 votes.

It was further submitted; we can count the votes, or go for a full hearing.

It was agreed by the parties involved in this Petition and their counsels that:

(a) The petitioner does establish his claim by way of viva voce evidence.

There is a recount of voted from Nyasio Primary School (polling station).

The 2<sup>nd</sup> and 3<sup>rd</sup> Respondent to bring 2 witnesses at the time of the trial, it was agreed that the 1<sup>st</sup> Respondent, do invite the 2<sup>nd</sup> and 3<sup>rd</sup> respondent, at the time of the hearing.

The ballot boxes from Nyasio Primary School, polling station to be availed to the court on 3/7/2013. The Petition be heard on the 3<sup>rd</sup> and 4<sup>th</sup> July, 2013.

On the 3<sup>rd</sup> of July, 2013 after the directions had already been taken by the parties the matter came for hearing. On 3/7/2013, the Counsel for the Petitioner brought an application for the recount of votes from the entire Itibo ward. The application was oral. It was heard by this court. It was objected to by the Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> defendant.

The court after carefully analysing the application found that it had no merit, and in its Ruling on 4/2/2013, it dismissed the application for the recount of the votes from the Itibo ward, and ordered for the matter to proceed for hearing on its own merits.

On 8/8/2013, another application, similar to what had been placed before the court on the 3/7/2013, was placed before the court, this time it was a Notice of Motion, the court heard the same and found no merit at all and dismissed the same and set down the petition for judgement on the 6/9/2013.

The court heard the Evidence by the Petitioner on the 4/7/2013. In his Evidence, the Petitioner, ISAAC OERI ABIRI, told the court that he is a farmer, from Itibo Ward, Itibo location, Ekerenyo Division, Nyamira District. He told the court that on the 4/3/2013, he was part of the election process that took place in Kenya. He was a candidate, for a member of County assembly, Itibo Ward.

There were other candidates, **SAMWEL NYANGAU NYANCHAMA (1<sup>st</sup> Respondent), Duke Nyaribo, JOASH BITICHA and THOMAS BITICHA.**

It was his evidence that he voted at Nyamwanchania polling station, at 8.30a.m.

It was his evidence that he toured the voting (polling) stations and people were voting and according to him all was going on well. The Petitioner was a candidate on a T.N.A. party ticket. He had one (1) agent, but the T.N.A Party had appointed the poll agents.

The Petitioner did not know the names of the agents appointed by the party.

In his home area, he identified the agents that he knew. They are his witnesses and these are the people who gave to him the results announced by the Returning officer, 2<sup>nd</sup> Respondent. He did not attend to the counting of votes and did not attend to the tallying, and final announcement of the result, and the announcement and declaration of the winner of the Itibo ward, County assembly member. He relied on the results given by the agents.

It was his evidence that he was discouraged from, attending the final tallying and announcement of the results due to malpractices committed by the Independent Electoral and Boundaries Commission.

The Petitioner told court that at Tombe he found that the votes had not been counted by 3.30a.m. It was his evidence that he talked to the Returning officer and asked him why he was counting the votes in the absence of the agents. He (P.W.1.) told him that it was bad. The Returning officer told him to appoint the agents. He could not as he was not the appointing authority.

It was the evidence of the Petitioner that at Nyamauro polling station, he found the chief of the area addressing a crowd of people at the polling station, in the school compound. He (PW1) sat at the door of the counting Hall.

It was his evidence that he heard the 1<sup>st</sup> Respondent, shout from the crowd that Tombe Station had assisted him. The 1<sup>st</sup> Respondents was with the agents, and the P.W.1., Petitioner, was of the view that this was unfair. He heard that the Respondent I, had garnered 361 votes at Tombe and he suspected that these were “doctored” results.

The Petitioner left Nyamauro polling Station, he went Home at 5.30a.m. He later learnt that the final results had been announced in the morning, and the 1<sup>st</sup> Respondent had won.

He decided to file an Election Petition. He went to the I.E.B.C., officer and requested for the Election Results for all polling station. He was asked to go and buy Size A4 duplicating papers. He bought them and gave them to the Returning officer. He waited for the results to be given to him. He was given tallied results for all the elected officials. The results are contained in the **annexture “10A2”** Results for Itibo Ward. He did check the Results. He found at Nyamwanchania Polling station, he obtained 571 votes, but they were given to the 1<sup>st</sup> Respondent.

At Kinyoro polling station, he had 554 votes, but was given to 1<sup>st</sup> Respondent and he was given 89 votes.

At Etakwa the 1<sup>st</sup> Respondent was given 323 votes and he was given 47 votes. He went to Etengelei, and found that he was given 136 votes and the 1<sup>st</sup> Respondent was given 305 votes.

At Enginda Polling Station, the 1<sup>st</sup> Respondent had 482 votes and the Petitioner had 166.

It was his (P.W.1) evidence that made the polling stations, the Respondent I, was given votes that belonged to Petitioner, and the Petitioner was given the votes that belonged to the Respondent 1. It was his evidence that the Respondent was given 3,043, of the Petitioner, and Petitioner given 2958 votes that belonged to the Respondent.

The Petitioner had form 35, showing what he obtained, and he has attached them to his petition as annexures. His form No.35, is similar to what the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent, have attached.

He made the inquiries from the agents. The agents have sworn their affidavits. They are Samson Magonya, Johnson Mosomi, Isaac, Richard Ondieki Muoochi, Evans M. Keroti, and Gladys Kerubo Ongira, who informed him of the votes he garnered. They went ahead and swore their affidavits.

The Petitioner maintained that he was the winner with 3,043 votes, but due to the switching of votes, he was denied victory.

In answer to the petition, the respondents 2 and 3 in their **annexture 'SNJ'** the total votes given 3043. The Respondent 1 has been given a total of 3130. These are more than his (PW1) 87 votes.

It was also confirmed by the petitioner (PW1) that as per the form 36, these votes are all correct as listed. It was his evidence that as per the form NO.36 there is a revelation that there is difference in one polling station at Nyasio polling station, which shows that he gained 191 votes. In form 36 marked as annexture **"IOA2"** the 1<sup>st</sup> Respondent has 19 votes but in the annexture **"SNJ2"** .He has 191 votes. In the annexture **"IOA2"** given to the PW1, the 1<sup>st</sup> Respondent had 29 votes.

In **"SNJ 2"** it reveals that the 1<sup>st</sup> Respondent had 191 and petitioner had 29 votes.

The PW1, maintained that the votes cast at Nyasio primary school polling station there were 96 votes

The votes cast were 94 and two (2) were rejected votes.

In total votes cast at Nyasio primary polling station, and allocated to each candidate, are as follows:-

<b>1 DUKE MOMANYI</b>	<b>- 36 VOTES</b>
<b>2. JOASH BITICHA</b>	<b>-9 VOTES</b>
<b>3. ISAAC OERI</b>	<b>-29 VOTES</b>
<b>4. SAMWEL NYANGAU NYACHAMA</b>	<b>-191 VOTES</b>
<b>5. THOMAS MOGAKA 1</b>	<b>- 1 VOTE</b>
<b>TOTAL VOTES</b>	<b>- 266</b>

Rejected votes 2 as per the **annexture "IOA2"** Form 36 annexed to the petitioner's petition the votes cast are 96 votes.

**Rejected votes 2**

**Valid votes 94**

The allocation of votes for each candidate is as follows:-

- |                                   |                   |
|-----------------------------------|-------------------|
| 1) <b>DUKE MOMANYI</b>            | <b>-36 VOTES</b>  |
| 2) <b>JOSHUA BITICHA</b>          | <b>-9 VOTES</b>   |
| 3) <b>SAMWEL NYANGAU NYACHAMA</b> | <b>- 29 VOTES</b> |
| 4.) <b>ISAAC OERI had</b>         | <b>19 VOTES</b>   |
| 5.) <b>THOMAS MOGAKA had one</b>  | <b>(1) VOTE</b>   |

**In total there 94 VOTES CAST**

The two (2) forms 36, one by the petitioner and other by the Respondents 2 and 3, shows that the votes differ. The form 36, by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent, shows the 1<sup>st</sup> Respondent received 191 votes and the petitioner received 19 votes.

In form 36” annexure” “IOA2” reveals that the total votes allocated to each **candidate are as follows=**

- |                          |                    |
|--------------------------|--------------------|
| 1) <b>DUKE MOMANYI</b>   | <b>993 VOTES</b>   |
| 2) <b>JOSHUA BITICHA</b> | <b>299VOTES</b>    |
| 3) <b>SAMWEL NYANGAU</b> | <b>3043 VOTRES</b> |
| 4) <b>ISAAC OERI</b>     | <b>2,958 VOTES</b> |
| 5) <b>THOMAS MOGAKA</b>  | <b>173 VOTES</b>   |

In total votes allocated is a total of 7466

Total votes cast 7,528

The rejected votes 58

The difference between votes cast and votes rejected is 7,470

The valid votes as per the form 36 are 7,372 votes leaving a difference of 98 votes.

The Court was told by the petitioner that the total votes allocated is 7,466 less 73,72 valid votes cast leaving a balance of 94 votes.

The court was then referred to the annexure **SNJ2**, by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent, and the Petitioner told the court that the votes allocated to each candidate were as follows:-

- |                          |                     |
|--------------------------|---------------------|
| 1) <b>DUKE MOMANYI</b>   | <b>- 993 VOTES</b>  |
| 2) <b>JOASH BITICHA</b>  | <b>-299 VOTES</b>   |
| 3) <b>ISAAC OERI-</b>    | <b>-3043 VOTES</b>  |
| 4) <b>SAMWEL NYANGAU</b> | <b>- 3130 VOTES</b> |
| 5) <b>THOMAS MOGAKA</b>  | <b>-173 VOTES</b>   |

The total votes allocated to the candidate are **7638 votes**. The **valid votes** are **7372**. The allocated votes

and the valid votes leave a total figure of **266 votes**.

The court further told that the total allocated to each candidate in form 36 is 7528 less votes cast 7638 leaving a total of 110 votes.

The difference of total votes cast is 7,380

The valid votes as per the form 36 show a figure of 7,372. The petitioner told the court that from the calculations done, it shows that the figures are not at all tallying. The Petitioner told the Court that the figures are not tallying.

The petitioner told the Court that he has filed the petition. He has a list of witnesses, supporting affidavit, annexures in supporting affidavit, and the annexures in support of the petitioner prays for a recount of all the votes in all the votes in all the polling stations, and this is prayer **(a)** in the petition. It was his evidence that the votes do not tally. It was his prayer that if votes are counted from all the polling stations in Itibo ward shall show as to who won the election.

The petitioner told the court that it is after the recount he shall be satisfied that the elections were free and fair. The petitioner told the court that if the recount is done, then the allocation for each candidate can be known. It was his prayer that if the recount is done and it shows that he won, then he should be declared a winner or a by election be ordered. The petitioner also prayed that the Court do award him costs, and also find in his favour: The petitioner was cross examined by MR. George Masese Advocate for 1<sup>st</sup> Respondent and MR. Odhiambo Advocate for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent, and Re-examined by Mr. Orina Advocate for the petitioner. It is after this the case was closed for the petitioner.

The Respondents 1 and 2 were called to advice their evidence in response to the petitioner's evidence. The 1<sup>st</sup> Respondent, **SAMWEL NYANGAU NYACHAMA (DW1)** told the Court that he is a farmer, and at the moment the elected County ward Representative Itibo ward. He told the Court that on the 4/3/13 he was a candidate seeking to be elected as a county ward Representative. There were other candidates, **ISAAC OERI ABIRI, DUKE MOMANYI NYARIBO, JOASH BITICHA** and **THOMAS MOSOTA**.

It was his evidence that on 4/3/13, at 9.30am, he voted at Tombe polling station. After voting he left for another polling station by the name of Omwanchani polling station he told the Court that. He went to this polling station because his agent could not be allowed into the Hall. He went to Kinyoro primary polling station, as his agent had been denied entry into the hall. The problem was solved. It is after this, he went home.

It was the Respondent's observation that the elections went on peacefully and were conducted in a free and fair manner. He formed this opinion after visiting the three (3) polling stations.

The Court was told that there are 19 polling stations in this ward. The votes were voted were all counted. The form NO. 35 were filled for each station. The Court was told that the presiding Officer and the Agents are the ones who signed the forms No 35 filled by the presiding Officer.

It was the evidence by the Respondent 1 that he and the petitioner, **ISAAC OERI ABIRI** did attend the counting of the voting at NYAMOWIZU polling station. The Court was told that the petitioner was found by the 1<sup>st</sup> Respondent seated in the Hall. The counting was done and the presiding Officer signed.

It was his evidence that he did not at all attend any other counting at any other polling station in the Itibo ward.

It was his evidence that he attended the tallying of all the votes cast from all the 19 polling stations within Itibo ward, at Kebabe Girls secondary school. After the tallying was done, the result from the 19 polling station revealed that the Respondent was the winner of the said election. He had gained Total of 3130

votes against the petitioner's 3043 votes. The Returning Officer, declared him as the winner. The respondent 1 was with **DUKE MOMANYI** at the time of tallying of the votes. It was his evidence that the annexure "SNJ2" Form 36, was signed by the Returning Officer and the polling agents. The Respondent 1, was issued with a certificate of the Results, form NO. 38. The form is the one marked as annexure "SNNI". The Respondent 1 signed for it.

The Respondent 1 told the Court that the voting was done on 4/3/13, the tallying of the votes done on the 5/3/13. The 1<sup>st</sup> Respondent denied that he did anything at all to influence the outcome of the results. The 1<sup>st</sup> Respondent told the Court that the Results, declared were an expression of the will of the people of Itibo ward, who had voted on the 4/3/13.

The 1<sup>st</sup> Respondent told the Court that He relied on the evidence on his affidavit. He also supported the evidence on the affidavit of the Returning Officer.

The 1<sup>st</sup> Respondent disassociates himself with the form filed by the petitioner and the results it portrays.

The 1<sup>st</sup> Respondent is praying for the suit to be dismissed with costs as it has no merits. He was cross examined by the Advocate for the petitioner and the counsel appearing for the 2<sup>nd</sup> Respondent, and re-examined by his Advocate, Mr. Masese Advocate for (1<sup>st</sup> Respondent), Respondent1.

The evidence by **JUSTUS NELIAKHO SIMALI (DW2)** the Elections coordinator North Mugirango told the Court that He has been a coordinator for the last 3 years.

It was his evidence that on the 4/3/13, he was based at Kebabe Girls secondary school, as there was a general election that was on going on this day.

It was his evidence that on the 5/3/13, he was the Returning Officer at the tallying centre. It was his evidence that members of public were waiting for the results and the atmosphere was peaceful. There were no protests. There was no commotion.

It was his evidence that he was using the form NO. 35 to announce the results from every polling station. It was further his evidence that He relied on the information on Form NO. 36.

It was his evidence that Form 36 has his stamp, signature and signed by three (3) agents.

The DW", told the Court that the petitioner was not at the tallying centre because he did not see him at the tallying centre.

The Court was told by the DW2, that the petitioner did not dispute the Results; on the votes he gained as shown on the form No.35 to fill the form No. 36.

The witness was referred to the different calculations that the counsel for the petitioner raised in the petitioner's evidence in chief and in cross examination of the D.W.1 1<sup>st</sup> Respondent, and it was the DW2's evidence that different figures may have been shown, but the individual results remain as they are on Form 36.

It was the evidence by the DE2 that He announced that "Samwel Nyangau Nyachama, had won. He stands by this. He issued the certificate of Results, Form 38.

The witness denied any votes/Results were switched at all. It was his evidence that the petitioner gained a total of 3043 votes. The 1<sup>st</sup> Respondent gained 3130 votes, and these results are reflected on the **annexure "SNJ2"**

The DW2 denied further that He had used the annexure "IOA2", to announce the Results. It was his evidence that annexure "IOA2" is not signed by him. It has no date and has no Official stamp of the

independent Electoral and Boundaries Commission. It is not signed by the agents. One cannot tell as to when it was prepared.

The DW2, was cross examined by the petitioners advocate and the advocate for the Respondent 1 and Re-examined by MR. Odhiambo Advocate for the Respondents 2 and 3.

The counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent closed the case for the Respondents 2 and 3.

The Court was left to do a recount of all the votes that were cast at Nyasio primary school by the voters on the 4/3/13. The Ballot Box was serial NO. 207129. The Court did make the observations on the ballot box in the presence of all the agents of both the petitioner and the Respondents the Court and all the parties to this petition their agent and counsels were all satisfied that the ballot box had its seals all intact.

The same was opened and all the votes were counted. The votes were all counted and the following votes for all the five (5) candidates were found to be as follows:-

- 1) **SAMWEL NYANGAU NYACHAMA of KANU Party had 189 votes**
- 2) **ISAAC OERI ABIRI T.N.A Party had 30 votes**
- 3) **DUKE MOMANYI NYARIBO of the O.D.M Party had 36 votes**
- 4) **JOASH BITICHA NYANGAU of P.D.P Party had 10votes**
- 5) **THOMAS MOGAKA MOSOTA of FORD PEOPLE party had 1vote**

**One spoilt votes 2**

**Rejected votes 2**

The total votes allocated to the candidates are **266 votes** and the rejected votes are 2. Spoilt votes 2

The counting exercise was completed and the ballot box from Nyasio primary school was returned back to the Returning Officer for safe keeping.

The court completed the hearing of the petition and the parties were given upto the 16/8/13, to file their submissions. The submissions were filed by the parties and are on the court file.

The court has voted the submissions that have been filed by the petitioner and the Respondents1, 2,and 3 through their counsels. This Court has also noted that list of authorities that have been attached to the submissions by both the counsel for the petitioner and the Respondents 2 and 3.

The Court has been left with a duty of analysing all the evidence adduced before it by all the parties.

It has a duty of perusing and analysing the authorities placed before it, and has a duty to keenly and diligent peruse the submissions that have been placed before it by the parties.

The court is also guided by the pleadings by the petitioner and the prayers sought.

The Court has keenly evaluated all the evidence before it, and noted that the petitioner has been praying for the Court to order for recount of all the votes cast at all the polling stations. Comprising, Itibo Ward. He prayed for recount, scrutiny and verification in his pleadings and voting of vote the petitioner in his own submission through the Advocate MR. Orina appearing for him, did submit on the 28/5/13, that they were not disputing the results from the other polling stations but were now disputing the Results of the votes cast at Nyasio primary school. The petitioner sought for a recount, and the same was agreed by consent of all that there be a recount of votes from Nyasio primary school.

This was done and the Recount was carried out after the hearing the evidence of all the parties involved in this petition.

After the recount of the votes at Nyasio primary School, the court did find out that the Petitioner had 30 votes: and the Respondent 1 had 189 votes. The recount did reveal that the Respondent 1 had won at this polling station and had beaten the Petitioner.

The court notes that even after the recount of votes from Nyasio Primary School the Petitioner, PW1, who had submitted that he did not dispute the election results from other polling stations within Itibo Ward, except Nyasio Primary School polling station, changed his mind and was pleading with the court to allow him to be granted the orders for recount, scrutiny and or verification.

It is after hearing the applications sought for a recount or scrutiny; I found out that the Petitioner had not laid a firm foundation that the court would rely on to grant the orders sought. The court rejected the applications for a recount through its Rulings dated 4/07/2013, and the 23/07/2013.

The Petitioner alleged that there were irregularities, malpractices committed by the agents of the I.E.B.C., and that is the reasons he doubted the Election results that were released by the 2<sup>nd</sup> Respondent, who was an agent of the I.E.B.C. He did tell the court that at Tombe, there were irregularities. The counting was done late and without any agent of his. He told the court that even the 1<sup>st</sup> Respondent, addressed the members of public where also the chief of the area was presented. He was not happy about this, but it is important to point out that in his affidavit he has not deboned to these facts that are still within his knowledge. At Nyamariro, the 1<sup>st</sup> Respondent is said to have been with the agents, which the petitioner thought was bad. The Petitioner was of the view that votes from Tombe polling station had been doctored.

The Petitioner made all these allegations, but it is important for him to demonstrate by way of evidence the allegations that he has made against the Respondents. It is not just enough for the Petitioner to allege that the Respondents were not working according to the law and in total disregard of the law. It has to be demonstrated by way of tangible evidence that the 1<sup>st</sup> Respondent and the other Respondents were involved in any malpractice and or in any irregularities.

In this Petition, it must be pointed out that the Petitioner has alleged that there were electoral malpractices on the part of the Respondents, but it is unfortunate that the Petitioner has not tabulated the particulars of the malpractices committed by the 1<sup>st</sup> Respondent, 2<sup>nd</sup> and 3<sup>rd</sup> Respondent.

The Petitioner has alleged in his Petition that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent did count the votes at Tombe Polling station without his polling agent, but it has turned out that in his own affidavit in support of the petition, he was not stated who the polling agent of his was.

Indeed, it has come out in evidence that the candidates had no polling agents of their own. It is only the Political party that had sponsored a candidate that had the mandate to appoint a polling agent. In the case of the party, T.N.A., that appointed the Petitioner, one **RICHARD REMBETA**, was the one appointed as poll Agent for the Party.

I do note from the evidence that the witnesses, who have been brought to court by the Petitioner, are being referred to him as his chief agents, but there is no letter of authority from, the National Alliance Party to show that witnesses were even appointed as the agents of the party. The evidence on the affidavits of the witnesses of the Petitioner is highly doubtful and full of half-truths. The affidavits do not at all assist the Petitioner's case. It would have been prudent of the Petitioner to bring evidence before the court to show what each of the Respondents did or did not do to deny the Petitioner the rights he enjoys of free and fair elections. There is no evidence to any of the wild allegations made against the Respondents.

- It is important for the court to point out that the Petitioner garnered a total of 3043 votes and the

1<sup>st</sup> Respondent garnered 3130 votes. There is evidence on record that the Petitioner has admitted that these were his votes. This is exactly what he received at the hearing. He is not telling the court that these were not his votes. He is not saying that they should go up or should come own. In the absence of any claim that his votes should be more than 3043, or less than 3043 then the question that in court mind, is why then seek for a recount/scrutiny of the votes from the entire ward. There is absolutely no basis laid down by the Petitioner to persuade the court order for a Recount or a scrutiny.

The Petitioner is not therefore entitled to the orders of scrutiny/recount without laying a basis for his case. It is my humble finding that the prayers that the Petitioner is seeking from the court have not been proved at all. The evidence that he has placed before me is shaky, lacks independence and does not at all support the pleadings.

In this case, it has been alleged that the 1<sup>st</sup> Respondent participated in committing the Irregularities and Malpractices complained of by the Petitioner. This court is fully aware that the 1<sup>st</sup> Respondent was just a candidate just like the Petitioner. He had no role in the alleged switching of votes. We have not been confronted with evidence to show the votes that were switched from the Petitioner to the 1<sup>st</sup> Respondents' favour, all that the court is being treated to are just mere allegations and innuendos.

This court is of the humble view that the allegations made by the Petitioner on the paragraph 7, 8, 9 and 10 of his Petition have not been proved and the allegations cannot at all be proved by **viva** and or with the documentary evidence that the Petitioner has placed before the court.

The person who committed the malpractices and Irregularities complained of in the aforesaid paragraphs 7, 8, 9 of Petition have not been cited and are not parties to this petition. One is left to wonder as to whom the Petition is blaming for all the malpractices and irregularities talked of.

The court must also point out that the Petitioner's Petition has been grounded on Form 36 which has been annexed as annexure **"10A2"** in his Petition. This is a document that much attention has been drawn to it by the Petitioner and his counsel. However, this document whose source/origin is not known is just a fictitious document. The PW1, Petitioner's, document is alleged to be from the I.E.B.C., but the same has only the logo of the I.E.B.C. It has no date when it was obtained. It does not have the seal of the I.E.B.C, and it does not signed by the authorized officer, the Returning officer.

The document **"10A2"** that has been relied on by the P.W.1, is the document that the P.W.1, has himself manufactured, and the alleged results from this document are the ones that are causing confusion in this Petition.

The form 36, annexure **"10A2"** does not resemble other form 36, annexed to the 1<sup>st</sup> Respondents' affidavit in Reply to the Petition, and same marked as "SNN2" and that Form 36, **annexture "SNJ2"**, annexed in Response by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent. The annexures **"SNN2"** and **"SNJ2"** are the authentic documents that the 2<sup>nd</sup> Respondent prepared after he received the results from polling stations contained in Form 35. He tallied the Results using from 35 and he gave the final results as contained in the genuine Form 36.

It is worth of note that in cross-examination by the counsels for the Respondents, the P.W.1, Petitioner, was put to task to task as to the source of his form. He (P.W.1) was not able to show how he managed to get it from the I.E.B.C He did not even show he bought it. He did not give an explanation as to why it was not signed by the officials of the I.E.B.C. He did not tell the court why it had no date. It cannot be said to have been of any evidential value to the court and to the Petitioner.

It is to be pointed out that the form 36 **annexture "10A2"** when compared with **"SNN2"** and **"SNJ2"** you find that the genuine form 36, has the stamp of the I.E.B.C., it has the names of the candidates' names of the Political parties, name of the political parties and the agents, their identity card numbers and even the signatures of the agents.

There is space for the number of registered voters, voter turnout percentage and a place for the Returning officer to give this name and signatures. It has space for fixing a date.

All these details are all missing from the Petitioners form “**10A2**”.

It is also important for the court to point out in this own admission the petitioner did not visit all the polling stations in Itibo Ward. He cannot therefore tell how the vote counting was being done. He could not even tell the form that the Returning officer was using to tally and announce the results at the tallying centre at Kebabe Girls Secondary School. The Petitioner relied on his agents who are not recognised to tell him what was happening at the polling station. This is nothing but hearsay evidence that is being placed before court. The Petitioner has absolutely no basis at all to claim that the elections were not conducted in accordance with the constitution and Electoral law. He has not shown how the Electoral law was violated by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.

They (**2<sup>nd</sup> and 3<sup>rd</sup> Respondents**) did conform with the law, and in my humble view the elections were conducted peacefully, free and in a fair manner.

It is the court’s humble view that one cannot be allowed to use a fictitious document and at the end of the day be granted the Reliefs he is seeking from the court. It is the requirement of the law that he who comes to the court of Equity must come with clean hands. In this case, the Petitioner has not come to court of Equity with clean hands and the prayers sought should be denied.

This document was manufactured for purposes of filing this petition. The Petitioner should be investigated as how he managed to get this document. In my view he has committed a criminal offence, by forging a document he claims is from the I.E.B.C. One who forges a documents with the intention of pursuing justice is not only a law breaker, but one whose intention is defeat justice. In this case the petition is geared towards defeating the law that the Petitioner should be upholding.

The court cannot allow the Petitioner to benefit from a forged document whose source cannot be known, it would be setting a bad precedent. The court was told that the petitioner came to know about the final results on the 20/3/2013. He did not know as to who had won on the 5/3/2013. He relied on what other people told him.

In the course of the hearing of this petition, we did carry out a recount of the votes from Nyasio Primary School. We carried out the exercise in presence of all the parties and their agents and from the votes cast, the Petitioner garnered 30votes and the 1<sup>st</sup> Respondent garnered 189 votes. It is the court’s humble finding that the 1<sup>st</sup> Respondent led in this station.

There were no anomalies detected at this polling station.

The court was satisfied that the polling was conducted in accordance within the law, and the winner of the election was validly elected as the member for Itibo Ward County representative

The court was taken through various calculations of the votes cast, votes rejected, votes spoilt and the turnout percentages but from all these figures given they did not at change the final tally of votes from each respective candidate.

It is a gain important to point out that the calculations were based on a fictitious document that P.W.1. Relied on

In this Petition, the votes were properly tallied and each of the candidates was allocated his votes and at no time was the vote of any candidate switched to the other candidate. Each candidate was allocated his votes as per votes garnered and recorded in from 35. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondent did not at all switch any votes in any of any candidate.

There is no. There were errors on the figures that came out in examination in chief of the Petitioner by the counsel for Petitioner, but the errors are human errors and do not at invalidate the outcome of the election.

It has not been shown by the Petitioner, as to how the differences of votes, affect the final tally of every candidate. Credible, cogent and consigned evidence offered by the Petitioner in establishing his Petition against the Respondents.

The court notes that the Petitioner did admit in cross-examination that the 1<sup>st</sup> Respondent was declared as the winner of the elections held on 4/3/2013, in respect of the ward representative at County Level for Itibo Ward. The final Results released by the 2<sup>nd</sup> Respondent showed that the 1<sup>st</sup> Respondent had won the Itibo Ward elections with a total of 3130 votes against the Petitioner. The 2<sup>nd</sup> Respondent relied on the accurate results delivered to him through by the presiding officer from the 19 polling stations comprising Itibo Ward. The Tallying done revealed the winner. The 1<sup>st</sup> Respondent was declared as the one validly elected in accordance with the Electoral Law and was issued with a certificate of Result of the County assembly under section 38 of the Elections (General) Regulations, 2012. The 1<sup>st</sup> Respondent was duly gazetted as the duly elected County assembly Representative for Itibo Ward.

The 1<sup>st</sup> Respondent was elected in fair and a free election, as there are no irregularities, discrepancies and malpractices, revealed by the Petitioner.

The votes were properly tallied, and the final tally on the official form 36, which the Petitioner has not challenged at all reveals that the Recount and or scrutiny sought may not be of much help and does not at all change the final tally.

The Petitioner cannot therefore be declared the validly elected county assembly candidate for Itibo ward, as he did not become the winner with the highest number of cast votes on the 4/3/2013. He was beaten at the poll by the 1<sup>st</sup> Respondent, **SAMWEL NYANGAU NYANCHAMA** and therefore 1<sup>st</sup>, Respondent was validly elected and I shall uphold his election as a candidate for the Itibo ward County assembly member. There is ample evidence to support the 1<sup>st</sup> Respondents election as a validly elected member of the County assembly Itibo ward.

It is also my finding that the Petitioner cannot be declared cannot be declared as the duly and validly elected member of the County assembly Itibo Ward, as he has failed to establish his claim against the Respondents 1, 2 and 3 and his evidence is totally incredible and full of Half-truths, and not worth of being believed. The prayers prayed for by the Petitioner in his Petition are not at all supported by the evidence before the court. The court is of the Humble view that the **Annexure "10A2"** that the Petitioner laid great emphasis and significance to is not only unauthenticated but is just but a forgery, and as stated elsewhere in this judgment, the forged document should have been expunged from the court record in the first instance. I would have asked for the investigations to be carried out as to how the Petitioner, acquired this fictitious document for purpose of knowing if he colluded with some other people but for purpose of this Petition, I only point out that this document is of no evidential value, and does not at all assist his case at all.

This court cannot at all be persuaded to find one who is using forged documents to lodge his claim against the Respondents to be a Honest and a credible person. The fictitious (forged) document only reveals how dishonest and untrustworthy the character of the Petitioner is. My humble view is that with this document **"annexture 10A2"**, the Plaintiff is not a credible witness at all.

This court is of the Humble view that the Petitioner's Petition and his evidence has not shown what normal procedure and process in relation to the law, was not followed for the court to find that the elections held on 4/3/2013, were illegal, irregular and or flawed.

I am of the view that there was illegality, irregularity or flaw in these elections. They were conducted in accordance with the constitution and the Electoral Laws. The Petitioners' petition has to fail in totality.

The burden of proof on a balance of probability has not been discharged.

The burden in this petition being higher than in the ordinary Civil Cases. This court shall have the Petition dismissed forthwith. The Petitioner shall be condemned to pay the costs to the Respondents 1, 2 and 3. The costs of this Petition shall be assessed by the Executive officer of this Court.

Orders accordingly, I thank all Counsels for doing their Research well.

Court: judgement read aloud, dated and signed today, the 6<sup>th</sup> September, 2013 in presence of Mr. Orina Advocate for Petitioner

- Mr. Odhiambo Advocate hold brief G.M. Masese Advocate for 1<sup>st</sup> Respondent
- Mr. Odhiambo Advocate for 2<sup>nd</sup> & 3<sup>rd</sup> Respondent present
- Petitioner –absent
- 1<sup>st</sup> Respondent absent
- 2<sup>nd</sup> Respondent –absent
- 3<sup>rd</sup> Respondent –absent
- CC George Opande

N. NJAGI

PRINCIPAL MAGISTRATE

6/9/2013

- Right Appeal explained.

N. NJAGI

PRINCIPAL MAGISTRATE

6/9/2013-