



REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATE'S COURT
AT MOMBASA
THE ELECTIONS ACT, 2011
ELECTION PETITION NUMBER 3 OF 2013

SALIM ALI SHEIKH PETITIONER

V E R S U S

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION

(IEBC) 1ST RESPONDENT

FRANKLINE MWALENGA 2ND RESPONDENT

PATRICK PETER MURIUKI SIMINYU 3RD RESPONDENT

JUDGEMENT

On 4th March 2013 a General Election was held in Kenya. In the said Elections the Petitioner **Salim Ali Sheikh** and the 3rd Respondent **Patrick Peter Muriuki Siminyu** were among the 10 candidates who contested the Tudor Assembly Ward of the Mombasa County Assembly. Tudor Assembly Ward was within Mvita Constituency. After the Elections on 4th March 2013 were held **Franklin Mwalenga** (2nd Respondent) who was the Returning Officer of Mvita Constituency returned the 3rd Respondent as duly elected Member of the Tudor Assembly Ward. The Petitioner was not satisfied that the 3rd Respondent was duly elected and that he had legally won the said Elections. As a result, the Petitioner brought this Election Petition dated 5th April 2013 and filed in Court on the same date. In the Petition, the Petitioner sought for the following orders-

i. *That the 3rd Respondent was not duly*

elected and the said Election was therefore null and void.

ii. *An order for recount of votes for the*

Election of Member of County Assembly for Tudor Assembly Ward held on 4th March, 2013.

iii. *An order for scrutiny of the ballot papers*

cast, Form 33, 34, 35 and 36 from the Constituency Tallying Centres for the Member of Tudor Assembly Ward in Mvita Constituency.

iv. An order for repeat of the Elections held

on 4th March, 2013 for the position of Member of Tudor Assembly Ward Mvita Constituency.

v. In the alternative to prayer 4 above

declare the Petitioner as the winner of the said Elections.

vi. Costs of the Petition.

The Petition was supported by affidavit of the Petitioner and by affidavits of other people, five (5) of who testified in Court in support of the Petition. Alongside the Petition herein the Petitioner brought another application dated 4th March 2013 whereby he was seeking, inter alia, to be supplied with copies of various materials by the 1st and 2nd Respondents and also an order for scrutiny of votes and documents and recount of votes for the Election of Member of Tudor Assembly Ward. In response to the Petition the 1st and 2nd Respondents filed a Replying Affidavit sworn by Frank Nyambu Mwalenga (2nd Respondent) on 7th May 2013 and filed in Court on 29th May, 2013. The said Replying Affidavit had a lot of documents attached to it including five (5) Replying Affidavits sworn by five (5) people who also testified as witnesses for the 1st and 2nd Respondents. The 1st and 2nd Respondents had also filed a response to the Petition on 20th May, 2013 dated 17th May, 2013.

In reply to the Petition, the 3rd Respondent filed a response and also his affidavit sworn on 24th May, 2013 and filed in Court on the same date. The said affidavit was filed alongside another one sworn on the same date by the 3rd Respondents witness. Before the hearing of the Petition commenced, the Court ordered the 1st and 2nd Respondents to supply the Petitioner and the 3rd Respondent with all the relevant documents touching on the Elections of Tudor Assembly Ward which were related to this Petition save for Form 34 which dealt with Presidential Elections exclusively.

Further, before the hearing commenced, on 14th June, 2013 the Counsel appearing for the parties filed a list of the following eight (8) agreed issues which were to be determined by the Court-

- 1. Was the Election for the position of County Ward Representative, Mvita Constituency Mombasa County on the 4th March 2013 carried out in a free, fair and credible manner?**
- 2. Was the Election carried out in compliance or substantial compliance of the principles laid down in the Constitution or other governing written law?**
- 3. If not, did the non-compliance materially affect the results of the Election?**
- 4. Were any Election offences committed by any person in connection with the Election which is the subject of this Petition and if so, by whom?**
- 5. Was the 3rd Respondent validly elected as County Ward Representative for Tudor Ward?**
- 6. Did the Petitioner obtain 116 votes in Burhaniya Polling Station Stream 2?**
- 7. Were the Elections of 4th March, 2013 in relation to Tudor Assembly Ward conducted in a fair and transparent manner?**
- 8. What is the order for costs?**

The Petitioner testified in Court and he called five (5) other witnesses. Six (6) witnesses who included the 2nd Respondent testified for the 1st and 2nd Respondents. The 3rd Respondent did not testify at the trial but he called one (1) witness. In his evidence, the Petitioner who was PW1 said that he contested the Tudor Assembly Ward in the Election held on 4th March, 2013 after he was nominated by Wiper Party. He said that there were a total of ten (10) contestants of the said seat and there were 11 Polling Stations within the said Ward.

The Petitioner further said that he had appointed a total of 22 agents to take care of his interest during the said Elections but that some of those agents were not allowed to represent him at the Polling Centres. He however did not present a formal list of his agents to the IEBC during Elections and further said that his agents were not in the list of agents contained between pages 188-190 of the Replying Affidavit herein. The Petitioner said that his agents told him that there was vote stuffing in ballot boxes in favour of the 3rd Respondent. He further said that he was denied 116 votes at Burhaniya Primary School making him to have a total number of 2222 as his votes whereas the 3rd Respondent who was declared the winner garnered 2403 votes.

The Petitioner complained to the 1st Respondent vide a letter written by his son dated 5th March, 2013 that the said Elections were irregular, unfair and not free. PW2 said that he was an agent for UPK Party at Tudor Village Hall Stream 1. He further said that voting went on well there on 4th March, 2013 save what Nyamawi who was representing the Petitioner was removed from the Polling Hall. PW3 said that he was an agent for Wiper Party forwarded by the Petitioner at St. Augustine Primary School during the Elections on 4th March 2013. He further said that a woman clerk removed him from the Polling Hall where he was allowed to re-enter later.

PW3 who said that he signed Form 35 told the Court that other than being removed from the Polling Hall, he did not see any other problem during the Elections. PW4 said that he was an agent for Wiper Party forwarded by the Petitioner at Tudor Village Hall during Elections held on 4th March 2013. He further said that initially, a Presiding Officer whose name he did not know denied him entry to the Polling Hall but he was allowed to enter later after the Petitioner intervened. He however said that he did not notice any irregularity nor heard any voter complaining about voting.

PW5 was an agent of Tip Tip Party at Burhaniya Primary School during Elections on 4th March 2013. He said that the Petitioner garnered 116 votes and that he got the most votes at that Polling Centre. PW5 however said that he signed another original Form 35 other than the copy on page 17 of the documents brought to Court by the 1st and 2nd Respondents. He further said that only 17 agents were present when the Polling Centre there opened at 6.00am. A total of 22 agents were there during the day and that only 17 agents were present when voting closed at 5.00pm. PW6 was an agent for the Petitioner in Wiper Party at Stream 2 Burhaniya Primary School during Elections held on 4th March, 2013. He said that people voted orderly and that he did not see any problem about voting. He further said that he signed a Form 35 but not the one before Court.

PW6 said that the Petitioner had a total of 116 votes and not 16 votes at Burhaniya Primary School Polling Centre. On 28th May, 2013 before the hearing of the Petition commenced the Court had directed the Petitioner to apply for scrutiny and recounting of votes in Tudor Assembly Ward at the closure of the case by the Petitioner if he so wished. The said application was made on 3rd July 2013 and after the Court heard the response by the Respondents' Counsel, it ordered for the scrutiny and recounting of votes at Stream 1 St. Augustine Primary School, Stream 2 at Burhaniya Primary School and Stream 3 at Tudor Village Hall Polling Centres which was conducted on 11th July 2013 under the supervision of **Hon. L. T. Lewa** (Deputy Registrar) who later filed a report in this matter on 17th July 2013. From the said report, it was clear that after the said exercise of scrutiny and recount of the votes by the Court in presence of the parties representatives, there was no change of votes that had been garnered by either the Petitioner or the 3rd Respondent at both Stream 1 of St. Augustine Primary School and Stream 3 of Tudor Village Hall. However, after the exercise, it was found that the Petitioner who had been given 16 votes on Form 35 at

Burhaniya Primary School had garnered 114 as valid votes whereas the 3rd Respondent who had been given 89 votes on Form 35 had 88 valid votes there. Form 33 there shown that the Petitioner had been given 116 votes whereas the 3rd Respondent had been given 89 votes. DW1 was the Returning Officer for Mvita Constituency during the Elections on 4th march 2013. He said that there was a manual and an electronic register and that a voter was allowed to vote as long as his name appeared on either of the said registers. DW1 further said that the political parties which had nominated candidates and also the Independent candidates had submitted a list of their agents to the 1st Respondent and that page 188 of the Replying Affidavit showed the agents for Wiper Party. DW1 said that he did not notice the anomaly on Form 35 of page 17 while tallying the votes. He further said that the Petitioner called him on the Elections day and asked him to intervene on the agents issue but that when he spoke to the Presiding Officers they told him that everything was okay.

During the Elections herein, DW2 was a Presiding Officer at Stream 1 of St. Augustine Primary School, DW3 was a Presiding Officer at Stream 3 of Tudor Village Hall, DW4 was a Presiding Officer at Stream 2 of Tudor Village Hall. DW5 was a Presiding Officer at Stream 2 Burhaniya Primary School whereas DW6 was a Presiding Officer at Stream 1 of Burhaniya Primary School. DW2, DW3 and DW4 said that they allowed agents who had an original ID card, oath of secrecy and a letter of introduction from the Political Party nominating such agent. DW2 further said that on the Election day, Mkubwa Lugogo who was an agent went to her Stream and then left. He returned later and that he also signed the Form 35 there. DW3 said that he had 7 agents at his Stream and one of them was for Wiper Party and that when Nyamawi went there, he referred him to Stream 2 due to limited space for agents at his Stream. DW4 said that every Political Party was represented by an agent at his Stream and that he did not send Nyamawi or any other agent away during the Elections herein. DW5 said that she worked from 4th March, 2013 upto 1.00am on 5th March 2013 and that she was very tired. She further said that only 3 agents signed Form 35 which showed that the Petitioner had 16 votes. DW5 said that the other agents had already left but that she did not give the statutory comment on Form 35. She admitted that an error could have been made on a figure on Form 35 after she worked for too long. DW6 said that nobody failed to vote for lack of his/her name on either the manual or the electronic register.

DW7 who testified as a witness for the 3rd Respondent said that he was an agent for ODM Party at Tudor Village Hall during the Elections on 4th March 2013. DW1, DW2, DW3, DW4, DW5, D6 and DW7 told the Court that the Elections for the Tudor Assembly Ward held on 4th March 2013 were free, fair and credible. I have carefully considered all the evidence on record herein and the submissions by the parties Counsel. I have also carefully perused the authorities cited by the Counsel herein. While urging the Court to find that the Elections for Tudor Assembly Ward were not free, fair and credible, the Petitioner's Counsel relied on the following authorities-

1. KISII HIGH COURT ELECTION PETITION NO. 2 OF 2008

SIMON NYAUNDI ONGARI & ANO. –VS- JOEL OMAGWA ONYANCHA & 2 OTHERS

2. NAIROBI HIGH COURT ELECTION PETITION NO. 5 OF 2008

WILLIAM MAINA KAMANDA –VS- MARGARET WANJIRU KARIUKI & 2 OTHERS
(2008)eKLR

3. KISUMU CIVIL APPEAL NO. 8 OF 2010

JAMES OMINGO MAGARA –VS- MANSON ONYONGO

NYAMWEYA & 2 OTHERS (2010)eKLR

The 1st and 2nd Respondents urged the Court to dismiss the Petition with costs and relied on the following authorities-

1. **COL (RTD) DR. BESIGYE KIZZA –VS- MUSEVENI YOWERI KAGUTA & ANO. E.P. NO. 1 OF 2001, SUPREME COURT OF UGANDA** and
2. **RAILA ODINGA –VS I.E.B.C & 3 OTHERS; E.P. NO. 5 OF 2013, SUPREME COURT OF KENYA AT NAIROBI.**
3. **RISHAD HAMID AHMED AMANA –VS- I.E.B.C & 2 OTHERS. H.C. E.P. NO. 6 OF 2013, MALINDI.**

The 3rd Respondent urged the Court to find the Elections herein as having been free, fair and credible and hence dismiss the Petition herein. He relied on the authority in the **RAILA ODINGA CASE** (supra). I noted that the Petitioner told the Court that during the Elections the subject matter of this Election Petition there was votes stuffing in the ballot boxes in favour of the 3rd Respondent. It was however the view and finding of this Court that neither the Petitioner nor any of his witnesses in Court established that there was such stuffing of ballot papers during the Elections. On the issue of appointment of agents, I noted that Section 30 of the Elections Act provides that-

“Section 30:

(i) A political party may appoint one agent for its candidates at each Polling Station.

(ii) Where a Political Party does not nominate an agent under Sub-Section

1. a candidate nominated by a

Political Party may appoint an agent of the candidates choice.

(iii) An independent candidate may appoint his own agent.”

The Returning Officer (DW1) said that the Wiper Party which had nominated the Petitioner had an agent at every Polling Station. The Petitioner admitted that Yusuf Ali who was appointed by the Wiper Party and his name forwarded to the 1st Respondent as shown on page 60 of the Petition was an agent for him. The Polling Hall was limited in size for all of the many candidates to have an agent each as PW3 and DW3 told the Court. In any case the Petitioner told the Court that he had not presented any formal list of agents to the 1st Respondent who he could say were disallowed to represent him during the Elections. It was therefore my humble view that so far as the Wiper Party was represented by agents at the said Elections, it would not be proper for the Petitioner to say that his interest at those Elections was not catered for as the Petitioner was not an independent candidate.

I further noted that some Form 35 were not signed by agents for all the Political parties participating in the Elections. Some of the witnesses for the 1st and 2nd Respondents like DW5 said that that happened because some agents left before the voting was closed although she never gave a statutory statement to that effect. However, it was clear from the evidence of PW5 that some of the agents had left the Polling Centre before the voting closed at 5.00pm. I further noted that the Elections (General) Regulations, 2012 at Rule 79 provides that -

“Rule 79(6) The refusal or failure of a candidate or an agent to sign a declaration form

under sub regulation (1) or to record the reasons for their refusal to sign as required under this regulation shall not by itself invalidate the results under Sub-regulation (2) (a).

- 7. The absence of a candidate or an agent at the signing of a declaration form or the announcement of results under sub-regulation (2) shall not by itself invalidate the results announced.”***

The position of the law on the agents failure to sign a Form (**like Form 35 in this case**) or to record the reasons for their refusal is therefore clear to this Court and the Court will adhere to it.

It was also clear that after the scrutiny and recount of votes was conducted at Stream 2 of Burhaniya Primary School, the Petitioner gained 98 more votes whereas the 3rd Respondent lost one (1) vote there. Other than at that particular Stream, the Petitioner did not establish that there was some irregularities at any other Polling Stations which affected either his votes or those of the 3rd Respondent.

In the end, the Petitioner established that he had a total of 2320 votes whereas the 3rd Respondent had a total of 2402 votes. The votes difference was therefore 82 between the Petitioner and the 3rd Respondent and not 181 votes as the 1st and the 2nd Respondents had presented after the Elections herein. The 1st and 2nd Respondent told the Court that the entry of 16 votes for the Petitioner on Form 35 at Burhaniya Primary School was a human error.

The 3rd Respondent did not contribute to the said error of entry on Form 35. As Elections are conducted by human beings, it was clear to this Court that they cannot be 100% perfect and free from errors. Although the 1st and 2nd Respondents clearly denied the Petitioner 98 votes at the votes tallying, I attribute that to a human error. I noted that even after the said 98 votes were added to the Petitioner's votes, the 3rd Respondent remained ahead of him. It was therefore my humble view that the Elections of Tudor Assembly Ward held on 4th March 2013 could not be said to be free of irregularities but the irregularities were not as substantial as the ones found in the 3 cases cited by the Petitioner's Counsel in his submissions herein. Rather I find this case to be more or less similar to the **RISHAD HAMID CASE** (Supra) which was cited by the 1st and 2nd Respondents (where some votes of the Petitioner were left out in the final tallying) and which I accept to be guided by. I therefore find that the Elections for Tudor Assembly Ward conducted on 4th March 2013 were free, fair, transparent and credible and that the same were carried out in substantial compliance of the principles laid down in the Constitution and other governing written laws. It was also my finding that the 3rd Respondent herein was validly elected in those Elections. As to whether any Election offences were committed by any person in connection with the Election subject matter of this Petition, this Court will stand by its ruling and delivered on 2nd July 2013 whereby the Court ordered for the DCIO Mombasa to investigate PW5 and the concerned IEBC official once this Petition has been fully heard and determined and to take the necessary action. The Petitioner in this Petition has therefore failed to establish that there were irregularities of such a nature that negated the expression of the electorate of Tudor Assembly Ward. The Petition therefore lacks merit and is hereby dismissed.

At this point, I wish to thank learned Counsel Mr. Hamza for the Petitioner, Mr. Khagram, Mr. Siminyu and Ms Khalaba learned Counsel for the 1st and 2nd Respondents and Mr. Obura for 3rd Respondent for exhibiting diligence while presenting their respective clients' cases. The Counsel showed courtesy to each other and to the Court during the entire hearing of the Petition. Their conduct is appreciated by this Court.

On the issue of costs, I noted that although the Petitioner was not successful to have the Elections of the 3rd Respondent herein declared null and void by this Court, he was able to establish that there was a major error on the vote tallying of his votes by the 1st and 2nd Respondents.

In view of the above and pursuant to Rule 34(1) of the Elections (Parliamentary and County Elections) Petition Rules 2013, I order that the Petitioner and the 1st and 2nd Respondents will each bear their own costs of the Petition whereas the Petitioner will pay costs of this Petition to the 3rd Respondent assessed at Kshs. 300,000/-.

It is so ordered.

Dated, signed and Delivered at Mombasa on 25th day of September, 2013.

S. K. GACHERU

PRINCIPAL MAGISTRATE

In the presence of:

- 1. Mr. Hamza for the Petitioner**
- 2. Mr. Siminyu and Miss Khalaba for the 1st and 2nd Respondents**
- 3. Mr. Obura for the 3rd Respondent**