



**REPUBLIC OF KENYA**

**IN THE CHIEF MAGISTRATE'S COURT AT BUSIA**

**ELECTION PETITION NO.2 OF 2013**

EMMANUEL OKORE SANGO.....1<sup>ST</sup>  
PETITIONER

JOSEPH MAKOKHA OUMA.....2<sup>ND</sup>  
PETITIONER

VERSUS

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

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

STEPHEN OMENDA MUKANGA.....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 South 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 1<sup>st</sup> petitioner **Emmanuel Okore Sango** contested the County Representative seat for Bunyala South Ward in the last general elections
2. He told court that he had been nominated by UDF Party whose symbol was a clapped pair of hands
3. That there were other candidates for the said position including the 3rd respondent herein

4. That the 3rd respondent who was one of the candidates, was declared the winner and County Representative for Bunyala South Ward by the 2<sup>nd</sup> Respondent, the Independent Electoral & Boundaries Commission whose responsibility was to conduct the elections.
5. The 1st Petitioner testified that there was an anomaly in the ballot paper in that instead of UDF Party whose symbol was a pair of capped hands; there appeared against his name UDM Party whose symbol is a flag
6. That when the petitioner was informed about the anomaly by his witness Mbagu Tuzinde Gero who was the UDF party chief agent; he informed the Returning Officer the 1st respondent herein who declined to make any rectification
7. In support of the Petition; the 1st Petitioner swore an affidavit on 2nd April 2013 and and filed it on 3rd April 2013
8. The 1st petitioner claimed that his friends informed him that the elections for County Representative for Bunyala South Ward had been postponed but he had no evidence in support thereof
9. The 1<sup>st</sup> petitioner testified that prior to the elections; he had submitted his nomination certificate containing his name, party name and symbol of the party to the 2<sup>nd</sup> respondent

## **2<sup>nd</sup> PETITIONER'S CASE**

1. The 2<sup>nd</sup> petitioner **Joseph Makokha Ouma** contested the County Representative seat for Bunyala South Ward in the last general elections
2. He told court that he was an independent candidate whose symbol was a boat
3. That there were other candidates for the said position including the 3rd respondent herein
4. That the 3rd respondent who was one of the candidates, was declared the winner and County Representative for Bunyala South Ward by the 2<sup>nd</sup> Respondent, the Independent Electoral & Boundaries Commission whose responsibility was to conduct the elections.
5. The 2<sup>nd</sup> Petitioner testified that there was an anomaly in the ballot paper in that his party symbol was missing
6. That when he became aware of the anomaly on 3rd March 2013; he informed the 1st respondent who was the returning officer who promised to make the necessary rectification but which he failed to do.
7. In support of the Petition; the 2nd Petitioner swore an affidavit on 2nd April 2013 and and filed it on 3rd April 2013
8. The 2nd petitioner claimed that election for County Representative for Bunyala South Ward had been postponed and in support thereof produced a newspaper cutting from Nation Media Group
9. The 2<sup>nd</sup> petitioner testified that prior to the elections; he had submitted his nomination certificate containing his name and symbol of the party to the 2<sup>nd</sup> respondent

## **WITNESS AFFIDAVITS**

- This petition is also supported by affidavits sworn on 2nd April 2013 and and filed on 3rd April 2013 by petitioner's witness namely Mbagu Tuzinde Gero; Elvis Juma Okumu; Paul Wanjegero Achoka and Moses Bencrise Mugoya
- The petitioners and their witnesses told court that as a result of the anomalies in the ballot paper, the voters were confused thinking that petitioners' names were not on the ballot paper and consequently they lost the election.

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

1. The 1st and 2nd respondent filed a response to petition on 13th May 2013

2. The 2<sup>nd</sup> respondent conceded that there were anomalies in the ballot paper in that instead of UDF Party whose symbol was a pair of capped hands; there appeared against 1st petitioner's name UDM Party whose symbol is a flag
3. The 2<sup>nd</sup> respondent also conceded that there were anomalies in the ballot paper in that the 2nd petitioner's party symbol was missing
4. He conceded that the anomaly was reported to him on 3rd March 2013
5. He told court that other than the name; candidates and more particularly the complainant could not only be identified by their party symbols and party names but also by their

- a. Photograph
- b. Nickname if any

6. He denied that elections for County Representative for Bunyala South Ward had been postponed
7. He stated that the elections were free, fair, transparent and credible.
8. The answer to the petition is supported by the affidavit of the 1st respondent and returning officer Paul Cheruiyot Kones sworn on 9th May 2013 and filed on 13th May 2013

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

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

I have considered the evidence on record and the issue in question is whether or not the petitioners have proved their 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 petitioners called six (6) 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 petitioner and 1st and 2nd respondents filed their submissions while the 3rd respondent sought to rely on submissions by the 1st and 2nd respondents.

### **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 South Ward was postponed
3. Whether the anomaly in the ballot paper invalidates the election for County Representative for

Bunyala South Ward

4. Whether there is sufficient evidence to invalidate the election of the 3rd Respondent as the member for County Representative for Bunyala South Ward
5. Who pays costs of the petition.

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

It is not disputed that there was an anomaly in the ballot paper in that instead of UDF Party whose symbol was a pair of capped hands; there appeared against 1st petitioner's name UDM Party whose symbol is a flag. It is not disputed that there was an anomaly in the ballot paper in that in that the 2nd petitioner's party symbol was missing. The petitioners did not become aware of the anomalies until 3rd March 2013 and they therefore would not raise their formal protestations before the elections were conducted as submitted by the 3rd respondent. I therefore find that this petition is properly before the court.

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

In support of this issue; 2<sup>nd</sup> petitioner relies produced a newspaper cutting from Nation Media Group of the 5<sup>th</sup> March 2013.

A perusal of the said brief shows that it was authored on behalf of the Nation Media Group 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 petitioners and their witnesses. The 1st respondent 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 voter turnout in the Budalangi Constituency in which Bunyala South Ward falls. Accordingly; I have come to the conclusion that the voter turnout would have been lower had elections for County Representative for Bunyala South 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 South Ward County; 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 South Ward**

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

- a. Photograph
- b. Nickname if any

The petitioners did not have nicknames and they have conceded their names and Photographs were properly printed on the ballot paper.

A perusal of forms 35 shows that 1<sup>st</sup> petitioner received majority of votes in the following two (2) polling

stations

**i. MUSOMA**

**328** votes as against the 3<sup>rd</sup> respondent's **88** votes.

**ii. BINYANGA/BUSUCHA ISLAND**

**20** votes as against the 3<sup>rd</sup> respondent's **18** votes.

A perusal of forms 35 shows that 2<sup>nd</sup> petitioner received majority of votes in the following polling stations

**i. OSIEKO PRIMARY SCHOOL**

251 votes as against the 3<sup>rd</sup> respondent's **232** votes.

**ii. OSIEKO PRIMARY SCHOOL**

198. votes as against the 3<sup>rd</sup> respondent's **189** votes

**iii. BUKHUMA MOBILE ISLAND**

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

**vi.. RUKALA MARKET**

**115** votes as against the 3<sup>rd</sup> respondent's **102** votes.

**V. NAKHAYIRIRA BEACH**

**26** votes as against the 3<sup>rd</sup> respondent's **11** 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 there appeared against 1st petitioner's name UDM Party whose symbol is a flag instead of UDF Party whose symbol was a pair of capped hands and that the 2nd petitioner's party symbol was missing from the ballot paper; 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 petitioners 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 1st petitioner has failed to prove that the inaccuracy of his party name and party symbol on the ballot paper had any material effect on the election that would justify invalidation of the election results. I also find that the 2nd petitioner has failed to prove that the missing party symbol on the ballot paper had any material effect on the election that would justify invalidation of the election results.

I have considered RE K.A.THABITI [1967] E.A 722 cited by the petitioners and 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 South Ward and the petitioners' prayer for a declaration for fresh elections is therefore without merit
2. The petitioners' prayer for general damages is also unmerited
3. The 3rd Respondent was validly elected as the County Representative for Bunyala South Ward in an election that was conducted fairly, transparently and in a credible 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 2nd April 2013 and filed on 3rd April 2013 is considered and dismissed.
5. The respondents' costs of the Petition shall be borne by the Petitioners jointly and severally.

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

**Thripsisa Wanjiku Cherere (Ms.)**

**Chief Magistrate**

In the presence of

CC.....

1st Petitioner.....

2nd Petitioner.....

1st and 2nd respondents.....

3rd respondent.....



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