



REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE COURT AT NAIROBI

MILIMANI COMMERCIAL COURTS

ELECTION PETITION NO. 8 OF 2013

**IN THE MATTER OF THE ELECTIONS ACT 2011, (LAWS OF KENYA) AND THE REGULATIONS
MADE THEREUNDER**

AND

**IN THE MATTER OF LOWER SAVANNAH WARD COUNTY REPRESENTATIVE – EMBAKASI EAST
CONSTITUENCY**

AND

IN THE MATTER OF THE PETITION OF DUNCAN CHEGE GATHOGO

BETWEEN

DUNCAN CHEGE GATHOGO..... PETITIONER

V E R S U S

ALFRED AMBANI MUHINDI.....1ST RESPONDENT

SYLVIA MARITIM2ND RESPONDENT

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION..... 3RD
RESPONDENT**

J U D G M E N T

The Petitioner **Duncan Chege Gathogo** filed petition dated 8th April, 2013 on 10th April, 2013. He is seeking the following prayers:-

(a) *There be a declaration that the 1st Respondent was not duly elected as county representative for the ward and so the election was void*

(b) *There be a declaration of which candidate was validly elected.*

(c) *There be an order as to whether a fresh election should be held or not.*

(d) *There be a declaration of whether the process was fair, credible and reliable.*

(e) *It be ordered that there be an examination of the elector's registers used in all the polling stations in Lower Savannah Ward in Embakasi Constituency in the General Elections held on 4th March, 2013 to determine the exact number of electors who cast their votes.*

(f) *It be determined and ordered that the election of the 1st Respondent as Member of the County Assembly for Lower Savannah ward in Embassy Constituency was in any event null and void and he was, therefore, not duly elected.*

(g) *It be ordered that the Respondents be condemned to pay the costs of this Petition.*

(h) *Such further or other relief or orders be made as may be just.*

The 1st Respondent has denied the allegations leveled by the Petitioner and stated:-

(a) *The official results as released by the 2nd and 3rd Respondents confirmed that the 1st Respondent garnered the highest votes and was hence returned by the 2nd Respondent as the duly elected member of the Lower Savannah County Assembly Ward and duly gazetted as such.*

The outcome of the aforesaid elections is as follows:-

<u>NAME OF CANDIDATES</u>	<u>RESULTS AS PER</u>
	<u>FORM 36</u>
1. Abel Mabera Ayaga.....	862 votes
2. Alfred Ambani Muhindi	5,965 “
3. Duncan Chege Gathogo	5, 160 “
4. Francis Lukungu Rapando	1,799 “
5. Francis Olindo Chegome	281 “
6. Jared Odhiambo Adenyo.....	319 “
7. Pithon Mutitu Kamau	207 “

He further states:-

(b) *That the elections of Lower Savannah County Assembly Ward were conducted in a free and fair manner and that the final results reflected the will of the people. If at all there was any incident of electoral malpractice, which is denied, then the same was an isolated case which is regrettable but in any event does not materially affect the result of the election in which the 1st Respondent won with a margin of 805 votes. As such, there is no ground whatsoever to warrant nullification of the elections of*

the 1st Respondent as the Lower Savannah Ward County Representative.

He seeks dismissal of the petition with costs.

The 2nd and 3rd Respondents deny the allegations of fact and law set out in the petition and state that:-

(a) They conducted an election on the 4th March, 2013 for the election position of member of the county assembly of Lower Savannah County Assembly Ward.

The outcome of the election is as follows:-

<u>NAME OF CANDIDATES</u>	<u>RESULTS AS PER FORM 36</u>
1. Abel Maberera Ayaga.....	862 votes
2. Alfred Ambani Muhindi	5,965 “
3. Duncan Chege Gathogo	5, 160 “
4. Francis Lukungu Rapando	1,799 “
5. Francis Olindo Chegome	281 “
6. Jared Odhiambo Adenyo.....	319 “
7. Pithon Mutitu Kamau	207 “

(b). The tallying process confirmed that Alfred Ambani Muhindi 1st Respondent, garnered the large number of votes and was therefore returned by the 2nd Respondent as the duly elected member of the Lower Savannah County Assembly Ward and duly gazetted.

The petition therefore lacks merit and should be dismissed with costs.

In support of his case, the **Petitioner** testified and called 6 other witnesses. In his testimony and supporting affidavit PW1, the Petitioner deponed that he received numerous calls from many Agents all around the ward, raising concerns about many aspects of the process indicating there was a lot of irregularities but on calling Returning officer, 2nd respondent she turned a deaf ear.

At around 4.00 p.m of the same day of Election an IEBC Clerk and a voter were arrested after the clerk was found to have given the voter two ballot papers. The two sets of ballot papers were recovered and stamped “**spoilt**”. Both the clerk and the voter were subsequently arrested and charged. The voter pleaded guilty and was sentenced. PW1 also cited other malpractices;

- *transporting ballot boxes to the tallying centre without being escorted by Agents and security officer;*
- *allowing agents to take part in the counting of the ballot papers;*
- *Failing to give Form 34 to his agents and refusing them to give their reasons for refusing to sign.*

P.W.2 **Stephen Kagoiyo Mwangi** - in support of the petitioner deponed that he was an agent in Lower Savannah Ward, Embakasi East Constituency. He suspected foul play of double voting as voters were coughing at the clerk's desk and hid the ballot papers when going to the filling booth. The clerks would pluck the ballot papers earlier in bundles of 10 and stamp them before the voters came.

At 3.30 P.M they spotted one voter with the same demeanor they had noted in other voters. They went to verify and noticed the vote had two sets of ballot for county representative and Governor which were already marked. Presiding Officer marked them "**spoilt**" and both the voter and clerk were arrested. The witnesses further stated that when counting started the presiding officer and clerk started dozing off leaving the agents to do the counting. Clerks also stamped twice on the back of the ballot paper.

P.W.3 – **Mercy Nyarua** was also an agent in Lower Savannah Ward. She was stationed at Edelvale polling Station. After counting had finished she noticed there were numerous errors on the forms. She complained and the same were corrected.

Presiding Officer asked her to fill the requisite form for him which she did. She believed it was not proper for agents to help in the counting and recording exercise. She filled all the forms she was asked to.

P.W.4 **Ann Muthoni Nyaga** in her witness affidavit deponed that she was an Agent in Lower Savannah Ward and was monitoring the process on the Election Day at Soweto Social hall.

Her complaint was that there were 2 stamps of IEBC and that during the voting the presiding officer went out to send presidential results and took too long.

While **PW5 – Eunice Gathigia** was an Agent at Soweto Social hall **stream 4**. She deponed that during the counting the presiding officer and clerks fell asleep. Some Agents also slept. She demanded recount which was done and some anomalies were found and corrected. She was involved in counting the votes which she did not believe was right. After counting, they awoke the presiding officer to fill and sign form 35.

P.W.6 – **James Kinuthia Ndung'u** deponed that on 3/3/2013 he was called by Jane to go to her house for food and meeting. He reached the house and found about 60 people. Jane told them that she was Omondi's and Ambani's Agent. The latter is the 1st Respondent.

At 11.00 a.m. Omondi came accompanied by some men. He told them that he had organised for them to vote twice in stream **M & O**. He instructed them on how they would vote.

Omondi gave Kshs.50,000/= cash to Jane to give them. James, PW6 received Kshs.1500/= and left the house at 2 p.m. When he went to vote, he heard of arrest of one person who was in their meeting the day before and he was afraid.

P.W.7 – **Samuel Ngomali Mwema** deponed in his affidavit that he was registered at Soweto social hall. He stated that one month to the General election his mother had weird movements as they always had people come to see her and gave them money which she mysteriously all of a sudden had in plenty.

On 3/3/2013 she asked him whether he wanted to make quick money. He agreed. He was directed to the house of Ann Mbula and told to go at 9. p.m. to get free drinks. He proceeded to the said

house where he found 50 people and the number kept on increasing while at that meeting Mbula told them that she was Omondi and Ambani's Agent. They were given free illicit alcohol (Chang'aa) which was bought from mama Akinyi. They were also given food. At around 1 a.m the following day Ann Mbula told them they were to vote twice for which they would receive Kshs.1500/= to support Omondi and Ambani.

They were given Kshs.200/= and the balance Kshs.1300 was to be paid after the voting. Ann Mbula further told them that Omondi had clerks at IEBC and he had organised with them to facilitate them to vote twice. They could vote twice up to 11 a.m and thereafter those who would not have voted would be given double ballots. In the event that the small finger was placed in ink, they could wash it out with cocacola. They were given food and drinks the whole night and he was given Kshs.1000. He went to vote at 3 p.m. He was given 2 sets of ballot papers. He went straight to the booth filled the ballot papers and started casting the same. Before he could cast for the Governor and county representative he was arrested after the Agents complained. The ballot papers were marked **spoilt**. He was later charged and convicted on own plea. Petitioner rested his case at that point.

In response to the petitioner's evidence, 1st respondent in his replying affidavit and evidence in court denied the petitioner's claim. He depones that petitioner's allegation of election malpractice are baseless and of no substance as the elections were transparent, credible; free and fair. He denied having bought food and drinks for people to vote for him. On 3/3/2013 he went to church at 9 a.m, left after 2 p.m and went back home. He left his house again on 4/3/13 to go and vote at 9 a.m.

He denied that Ann Mbula gave out chang'aa on his behalf and further denied knowing Jane Kagai. He denied having sent money via M-pesa for the purpose of bribing voters and supplied his M-pesa statement as proof thereof. He knew John Omondi Ogutu as he was vying as an M.P for Embakasi East Constituency but he never gave him money for dishing out to the voters.

He denied he was involved in bribery of voters and stated that the election were concluded in open and transparent manner and any malpractice was dealt with promptly. Petitioner also did not provide evidence that voters whose names began with letter K, D, P, R & J were kept waiting for longer than others. He also has no evidence that such voters were likely to vote for him. Only one incident was reported (**attempted double voting**) and appropriate action was taken. The petitioners also provided no evidence that Agents were allowed to do the counting. No names were mentioned in that respect. He denied all the allegations of the petitioner and deponed that he was elected in an open, transparent impartial manner as the election were free and fair and reflected the will of the people of Lower Savannah Ward.

The 2nd and 3rd Respondents in their response called one witness in support of their case - **Silvia Maritim**. She was the 3rd respondent's Returning officer in charge of Embakasi East Constituency. She deponed that during the tallying exercise at the Constituency tallying centre, there was a lot of heat and pressure from the Agents to finalise the tallying exercise expeditiously and announce the results. Coupled with exhaustion of 3rd Respondent's officers at the tallying centre transcription errors occurred in recording Form 36 hence the initial results announced at the tallying centre.

Subsequently she decided to conduct an audit of the results to confirm the accuracy of the figures in Form 36. She noted that there were inaccuracies in the figures and therefore re-tallied Form 35's and produced a new schedule which tallies with the results as indicated in Form 35. The correct results formed the basis of the final results which were published. Thus the final results announced by 3rd Respondent conform with the results obtained from the polling stations as set out in Form 35's.

She further depones, that she dealt with all complaints she received appropriately including having the person who had double ballot arrested and subsequently charged. Contrary to the petitioner's allegations all ballot boxes were sealed and escorted by security personnel. The agents were at no time allowed to do the counting of ballot papers and the two who alleged the same never indicated their complaint in Form 35's, which they signed. The allegations of bribery and instruction to vote twice were never reported to the 2nd respondent.

Therefore the elections were properly conducted and mechanisms for fair and free election were put in place and the 1st Respondent was validly elected as per the will of the people of Lower Savannah.

Issues for determination by the court:-

- 1. Whether there were electoral malpractices and irregularities in the conduct of the Lower Savannah Ward County Assembly Representative on 4/3/2013 thereby affecting the outcome of the election.**
- 2. Whether the official results returned by 2nd & 3rd Respondents confirming 1st Respondent the winner were credible, free and fair as set out in the Election Act.**
- 3. Whether the 1st Respondent was validly elected member of the Lower Savannah County Ward.**
- 4. Who should bear the costs.**

The burden of proof in the election petition lies with the petitioner.

In the case of **RAILA ODINGA -VS- THE INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION & 3 OTHERS, - SUPREME COURT CASE NO. 5 OF 2013**, the Judges of Supreme Court held that:

“a petitioner should be under obligation to discharge the initial burden of proof before the respondents are invited to bear the evidential burden. The threshold of proof should in principle, be above the balance of probability, though not as high as beyond reasonable doubt.....”

The first grievance raised by the Petitioner is that the 1st, 2nd and 3rd Respondents colluded to deprive him victory which was evidenced by malpractice and irregularity hence the election was not free and fair.

P.W.6 **James Kinuthia testified** that on 3/5/2013 he was called by Jane Kagori to discuss politics. When he went, he found about 60 people. There was a person called Omondi. He told them that he would help them vote twice. Omondi gave them Kshs.50,000/= for tea. He was vying for the seat of Member of Parliament. P.W.6 was given Kshs.1500. Omondi gave them money so that they could vote for him.

On cross-examination he told the court that he did not do as advised by Omondi. He was aware that to vote twice would be to break the law. Petitioner has alleged bribery affected the results. He got this information from P.W. 6 - James Kinuthia. From the evidence of this witness, the person who gave the alleged bribe was one Omondi vying for another seat and conducting his own campaign. There is no evidence whatsoever that any money distributed was from the 1st respondent. Neither is there any proof

that money given by a third person who was Not under the instruction of 1st Respondent influenced the way voters cast their ballot.

P.W. 6 was categorical that, he did not take the advice of Omondi because that would mean breaking the law. It is therefore safe to conclude that he voted according to his convictions. The Petitioner himself did not witness the bribery and he relied on what P.W.6 told him.

P.W.7 **Samuel Ngomali Mwema** testified that during the campaign period his mother had a lot of money which she was dishing out to people. On the 3/3/2013 she advised P.W.7 to go to Ann Mbula's house to get free drinks. The said Ann told him and 50 other people that she was an Agent of Omondi and Ambani. They were advised how they would vote twice. They were given food and alcohol the whole night and received Kshs.1000/=. He was arrested on 4/3/2013 as he attempted to cast double ballots for Governor and County Representative.

In cross-examination P.W. 7 stated that he only received Kshs.200 and he did not know where the money came from. Therefore, if indeed this witness was influenced by the money given by Ann Mbula, there is no evidence that the same had been given by the 1st Respondent and indeed P.W.7 confirmed that he did not see the 1st respondent.

Apart from the evidence of P.W.6 and P.W.7, the Petitioner had no other evidence in support of bribery. He relied on what he was told. The Respondent has denied any interaction with Jane Kagai and Ann Mbula. There is no evidence that they were his Agent and that they received money from him to bribe voters. There is also no evidence that the two received money through M-pesa to distribute to voters. The other allegation is that the 1st Respondent dished Kshs.50,000/= through Omondi for distribution. Mr. Omondi was himself doing his campaign when it is alleged that he gave out money. The 1st Respondent was not a party to those meetings and there is no proof that the money Omondi had came from him.

The allegation of bribery has therefore not been proved against the 1st respondent to the required standard.

On the issue of suppression of voters, the Petitioner stated that a stream in Edelvale polling station was not provided until four hours later. D.W. 2 testified that there was a complaint in Edelvale of a missing stream. She went there personally. When she reached there all the streams were there. She stopped the voting for 30 minutes to sort out the issue and later extended voting for 30 minutes.

Secondly it was alleged that voters whose names started with letters **K, D, P, R, & J** had to wait for an hour before voting and that they were likely to vote for the Petitioner. There is no evidence that people with names starting with those letters would have voted for the petitioner. During his testimony, Petitioner could not give a single name of the likely voter in that category. None came forward to testify that he was declined such a chance. No one came forward to complain that he was unable to vote because of those inconveniences. In any case, Petitioner would not be in a position to tell if people in category of such letters would have voted for the Respondent.

In the absence of any evidence by way of affidavit of any voter who is duly registered to vote at Edelvale who presented themselves to vote and were frustrated from doing so, the allegation is not proved.

Petitioner has also alleged that the 1st respondent directly and through his Agents unduly influenced election officials to favour him and be accomplices to the double voting scheme. Now only

one incident of double voting was reported. That of P.W.7. He was promptly arrested, charged and sentenced. This clearly demonstrates that the 2nd and 3rd Respondents dealt with any malpractice that arose. The IEBC clerk, was also charged. This was a criminal offence and there is no evidence to link the respondents to this witness's conduct. His vote did not benefit the 1st respondent in any way. There is no evidence that other voters cast more than one vote and no other incident was reported. Consequently I find no evidence of collusion or scheme between 1st respondent and 2nd and 3rd respondent to favour 1st respondent through double voting.

Failure of electronic voter identification device; Section 44 of the **Elections Act** provides that the Commission may use such technology as it considers appropriate in the election process. While **Regulation 69** provided for identification through the manual register and electronic register. The failure of election devices did not invalidate the voting system since the manual register was used.

The petitioner has not demonstrated the manner in which the election was compromised and the loss that he sustained over and above all other candidates as a result of the failure of the electronic voter identification device.

The issue of the failure of electronic voter identification devices in the election of March 4th 2013 was dealt with by the *Supreme Court of Kenya in the Petition No. 5 of 2013 - RAILA ODINGA -VS- THE INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION & 4 OTHERS.*

The court stated:-

“An objective reading of the Regulations cited, does not reveal a contemplation of elections conducted solely by electronic means. The elections of 4th March, 2013, were not envisaged to be conducted on a purely electronic basis. Regulation 60 of the Elections (General) Regulations, 2012 illustrates that if the elections are to be facilitated by electronic means only, the relevant guidelines shall be availed to the public. Regulation 59 provides that voting is done by marking the ballot paper, or electronically. Thus, the voting system envisioned in Kenya appears to be manual. Regulation 82, and Section 39 of the Elections Act, which deal with electronic transmission, operate on the basis that electronically transmitted results are only provisional. Can there, therefore, be an invalidation of final results, because of the non-transmission of provisional results”

That issue was therefore settled by the highest court in the land.

Though petitioner's witnesses testified that the political party agents with the election clerks were involved in the counting, this was not indicated in Form 35's. The Petitioner's Agents told the court that they had not been trained and therefore might not have known what to do. All in all if this did happen the Agents were satisfied with the results and where they were not, they sought recount and the same was done. Such incidents therefore could not have altered the outcome of the results.

Arising from the above this court find that the Petitioner has not proved that there were malpractices and irregularities affecting the result of the ward elections. Allegations of bribery by the 1st Respondent were not proved and issue of double voting was only proved against one voter who was in any event arrested together with the clerk and charged in a court of law.

The burden of establishing allegation of irregularities and malpractices regarding the conduct of the election and the results announced thereafter is on the petitioner. He did not establish to the required standard of proof that there were irregularities and malpractices that rendered the said elections

null and void and therefore subject to nullification. In the case of John *Kiarie Waweru -vs- Beth Wambui Mugo & 20 Others [2008] eKLR page 4, the judge stated:-*

“.....It will not be sufficient for the petitioner to establish that irregularities or electoral malpractices did occur; he must establish that the said electoral malpractices were of such a magnitude that it substantially and materially affected the outcome of the electoral process in regard to the elections.....”

In a similar situation High Court sitting in Mombasa in the case of *Joho -vs- Nyange & Another (No.4) 2008 3 KLR J Maraga*, (as he then was) held:-

“The burden of proof in election petition lies with the petitioner as he is the person who seeks to nullify an election...”

On the issue of whether the official results returned by 2nd and 3rd respondents confirming 1st Respondent the winner were credible, free and fair as set out in the Election Act, the petitioner submitted that there were 2 sets of results of the member of the County Assembly therefore the 2nd respondent did not know which results were authentic, accurate and true results. Petitioner further submitted that the counting process was conducted by both clerks and agents of political parties and therefore the results are not credible. The second respondent announced the results as follows:=

Alfred Ambani Muhindi 5518 votes

Duncan Chege Gathogo 4442 votes

The 3rd respondent gave the official results as follows:-

Alfred Ambani Muhindi 5965 votes

Duncan Chege Gathogo 5160 votes

D.W.1, the second respondent in her evidence told the court that she announced the first results at the tallying centre.

After announcing the results, she allowed the officers to go home and sleep due to extreme exhaustion and fatigue since they had not slept from 3rd March, 2013. The initial announcement was prompted by candidates and Agents who were pushing for the results to be announced as quickly as possible.

After resting the officers reported back and they went through the forms again to verify and confirm accuracy. When they finished verification there was a difference in the final figure but in terms of the winner there was no difference. **Form 35's** were the primary data entry records and any discrepancies noted in Form 36's arose out of human error made in good faith during the transcription of figures from **Form 35's** to **Form 36's**. D.W.1 further told the court that the errors were noted timeously and corrected before announcement of final results.

The results announced at the tallying centre **Form 36** was annexed as “**SM-2**”. This was picked from Form 35's drawn from all the polling stations in the ward. After verification annexure “**SM3**” was filed.

I have perused the **Form 35's** from the polling stations. The few corrections that were done were counter signed. There is no major change in the figures. In "SM2' the difference between the Petitioner and first respondent was **1,176** votes. In "**SM3**" the difference was **805 votes**. In both instances the 1st Respondent was leading. From what was presented in court, **SM1, SM2, SM3** the verification corrected arithmetic errors in the provisional results. In the final results both candidates had more votes after the correction but the 1st respondent maintained the lead.

P.W.5 testified that when she complained about the results in one stream, a recount was done and results corrected. She was satisfied while **P.W.2** told the court that he was satisfied with the results and that the petitioner got what he was entitled to. He verified by counting while **P.W.3** testified that when they were not satisfied they asked for recount. During the counting the Agents of Petitioner were present. They raised issues of concern and the same were addressed. There is no evidence that they requested to sign the forms and were refused.

From the foregoing, I am satisfied that the results returned were credible and generally reflected the will of the people of Lower Savannah.

On the issue of whether the 1st respondent was validly elected member of Lower Savannah county Ward, the court has considered all the allegations raised by petitioner. As held in the case of *RAILA ODINGA -VS- THE INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION & 4 OTHERS*, I agree that the conduct of election cannot be said to have been perfect but by and large reflected the people's electoral intent.

There are no any profound irregularities disclosed. The minor issues that arose and were matters of concern were addressed; the voter who attempted to double vote was arrested, where recount was requested the same was done, issues of bribery were not proved against the 1st respondent but were attributed to a person vying for another office who was doing his own campaign. Where there was delay in opening a certain stream by 30 minutes, voting time was extended by 30 minutes. Delay in opening a certain stream would affect all the contestants.

I adopt the position held by Judge **Isaac Lenaola** in the case of *Bernard Shinali Masaka -vs- Boni Khalwale & 2 Others – Election Petition No. 2 of 2008 [2011] eKLR*. On the issue of errors and regularities, he stated that, the law on the subject was well set out in *JOHN FITCH -VS- TOM STEPHENSON & 3 OTHERS QBD* [2008] where it was held as follows:-

The decided cases, including those which Lord Denning considered in MORGAN -vs- SIMPSON established that the courts wills strive to pursue an election as being in accordance with the law, even where there have been significant breaches of official duties and election rule, providing the results of the election was unaffected by those breaches.

.....

This is because where possible, the court seeks to give effect to the will of the electorate.

Having also considered all other authorities cited by the 3 counsels, I am satisfied that the respondent was validly elected by the people of Lower Savannah Ward. The Court will therefore not interfere with the overwhelming will of the people.

The petition is dismissed.

Costs

This should follow events. I have not been persuaded otherwise. I award the Respondents costs against the petitioner. All circumstances of this case considered, the costs awarded is Kshs.1,000,000.00 as follows;

1st Respondent awarded Kshs.420,000/=

2nd and 3rd Respondents jointly awarded Kshs.580,000/=.

Dated and delivered at Milimani Commercial Courts this 17th day of September, 2013.

Before: Mr. Okatch for Petitioner

Mr. Wasonga for 1st Respondent'S

Mr. Nyaburi for 2nd and 3rd Respondent

M. Murage (Mrs)

Chief Magistrate



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