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Court:	High Court at Migori
Case Action:	Judgment
Judge:	Hilary Kiplagat Chemitei
Citation:	Joseph Obiero Ndiege v Independent & Electoral Boundaries Commission & 2 others [2018] eKLR
Advocates:	Midenga for the Petitioner Kisera/Mboya for 3rd Respondent Kisera holding brief for Odour for the 1st Respondent
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Migori
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Case Outcome:	Petition Dismissed.
History County:	-
Representation By Advocates:	One party or some parties represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MIGORI**

**ELECTION PETITION NO. 1 OF 2017**

**JOSEPH OBIERO NDIEGE.....PETITIONER**

**VERSUS**

**INDEPENDENT & ELECTORAL**

**BOUNDARIES COMMISSION.....1ST RESPONDENT**

**JULIUS MWITA.....2ND RESPONDENT**

**PETER FRANCIS MASARA.....3RD RESPONDENT**

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

1. In the General Elections held on 8/8/2017, the people of Suna West Constituency elected **Peter Francis Masara**, the 3<sup>rd</sup> Respondent as their member of parliament. He garnered 19,341 votes while the Petitioner **Ndiege Joseph Obiero** came second by garnering 18,316. The other contestants were **Kajimba Philip Alube** who garnered 138 votes, **Obwande Michael Odhiambo** garnered 156 votes and **Ogutu Michael Otieno** garnered 635 votes. The total valid votes cast were 38,582.

2. The Winner, 3<sup>rd</sup> Respondent contested as an Independent candidate while the Petitioner stood on Orange Democratic Movement ticket.

3. The Petitioner was dissatisfied with the said results and he filed this petition seeking the following prayers.

**(a) the 1<sup>st</sup> Respondent do avail for the purposes of determining this petition all the materials including electronic documents, devices and equipment for National Assembly, Suna West Constituency elections that were held on 8<sup>th</sup> August 2017.**

**(b) The 1<sup>st</sup> Respondent do produce, avail, and allow access for purposes of inspection all the logs of any and all servers hosted by and/or on behalf of the 1<sup>st</sup> Respondent in National Assembly, Suna West Constituency elections that it conducted on 8/8/2017.**

**(c) An order for scrutiny and audit of all the returns of the Forms 32A, Forms 35A, Forms 35B and any other form relevant hereto and used by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in respect of National Assembly, Suna West Constituency elections that were held on 8/8/2017.**

**(d) An order for scrutiny and audit of the system and technology used by the 1<sup>st</sup> Respondent in conducting National Assembly, Suna West Constituency elections that were held on 8<sup>th</sup> August 2017 but not limited to Kiems Kits, the server(s); Website/Portal.**

**(e) A declaration that non-compliance, irregularities and improprieties in the elections were substantial and sufficient that they affected the results thereof.**

**(f) A declaration that the elections of the National Assembly, Suna West Constituency elections that were held on 8<sup>th</sup> August 2017 were not conducted in accordance with the Constitution and the applicable law rendering the declared results invalid, null and void.**

**(g) A declaration that the 3<sup>rd</sup> Respondent was not validly declared as Member of Parliament Suna West Constituency and that the impugned declaration is invalid, null and void.**

**(h) A declaration that the acts of the 1<sup>st</sup> Respondent declaring the 3<sup>rd</sup> respondent as the validly elected Member of Parliament, Suna West Constituency without complying with the Election Act Cap 7, the regulations thereunder, the Constitution and other relevant laws pertaining to elections as complained of herein is null and void unconstitutional arbitrary and unreasonable, oppressive and discriminatory against the petitioner and the exercise of his Political rights.**

**(i) An order declaring the petitioner as the validly elected Member of Parliament for Suna West Constituency.**

**(j) Alternative to (i) above, the Honourable Court be pleased to order for fresh elections for Member of Parliament, Suna West Constituency.**

**(k) Any further order or other orders permissible under Article 23 of the Constitution or any other law in the best interest of the Petitioner and justice in the circumstances as the Honourable Court may deem fair, reasonable and just.**

**(l) Costs of this petition be awarded to the petitioner.**

4. The Respondents herein each filed their Respective affidavits in response and attached their list of witnesses and other relevant evidence. The matter proceeded to full trial where each ventilated their case. Subsequently each proceeded to file separate written submissions as well as attendant authorities. The parties were equally allowed to submit orally in court.

5. Before determining this matter, its worthwhile to summarise the positions taken by each of the respective parties. Its appreciated that they all reached consensus on at least issues to be litigated upon although they were filed separately.

The issues can be thus summarised as follows:-

**(1) Whether the said impugned election was held in accordance with the tenets of the Constitution and the relevant Electoral Laws.**

**(2) Whether there were irregularities and illegalities committed during the said election.**

**(3) What was the impact of the said irregularities if any, to the impugned election.**

**(4) Whether the declared results ought to be declared null and void.**

**(5) Whether the Honourable court ought to declare the petitioner as the validly elected Member of Parliament for Suna West Constituency.**

**(6) Whether the Honourable court ought to order for fresh elections for Member of Parliament, Suna West Constituency.**

**(7) Who should bear the costs of the petition"**

#### **Petitioner's case**

6. The Petitioner called 11 witnesses to support his case. The said witnesses dealt with various specific heads as raised in the

petition. One of the issues raised by the Petitioner was to do with the recruitment of the IEBC staff.

7. According to the Petitioner the staff of IEBC who included the polling clerks were recruited in a manner that demonstrated nepotism. He singled out the family of Jackson Obuya Odhiambo (DW2) whom he said that three members of his family worked at various polling stations, namely Dorris Obuya (his wife) who was a clerk at Magongo primary school. Joy Jackson Obuya her daughter as well as Jane Jackson his daughter also worked at the same polling station as clerks.

8. DW6 equally - Sebastian M. Nyamonge worked with his daughter Gloria Kemunto at Nyamome polling station.

He also singled out Erick Ongondo who was a clerk at Oruba mixed polling station as being aligned to the 3<sup>rd</sup> Respondent.

9. He further argued that the 2<sup>nd</sup> Respondent recruited people who were unqualified who included Calvin Omondi Odinga a Presiding Officer at Ida primary school, Charles Mino a Deputy Presiding Officer at Oruba mixed Secondary School among several others. According to him these personnel did not qualify as they did not have sufficient professional certificates such as degrees and diplomas. This according to the Petitioner runs contrary to the IEBC guidelines.

10. The petitioner equally contested that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents used ungazetted polling stations in particular Bridge International School and Happy Oloo Pamba Kids Academy.

According to the Petitioner this caused great confusion to the electorates as the changes were made on the eve of the elections.

11. Essentially what was referred to as cattle Dip polling station turned out to be Bridge International Academy whereas Got Kwer Nursery School Polling station turned out to be Happy Oloo Pamba Kids Academy.

12. The other issue raised by the Petitioner was the voting by underage children (3) of them Spenzia, Hellen and Ann and some other youths who were not registered and not identified by the Kiems Kits. This completely goes contrary to the election rules and procedures.

13. He further alleged that there were bribery by the 3<sup>rd</sup> Respondent and his witnesses. PW9 Donellah Dolly Ochieng alleged that one Jacko Temba was among those bribing voters at Nyarombo Sayuni polling station.

14. He equally told the court that there were threats, intimidation and violence at the polling stations where some agents signed Form 35A under duress.

15. The other issue the Petitioner had with this election is the manipulation of form 35A. The Petitioner produced 44 Form 35A's which according to him were supplied by his agents. According to his evidence most of the said forms did not have IEBC official stamps, there were alteration of figures and overwritings as well as incorrect writings. There were also difference in serial numbers and others did not have statutory comments by the presiding officers as well as the agents. Some of the forms were signed by more agents than was required.

16. The Petitioner went ahead to fault or support the report of the Deputy registrar of this court who had been ordered to conduct scrutiny of the Forms 35A.

### **1<sup>st</sup> and 2<sup>nd</sup> Respondents case**

17. The 1<sup>st</sup> Respondent did file a response vide his replying affidavit of 19th September 2017 denying the entire allegations by the Respondent. He proceeded to file copies of Form 35A as well as form 35B used to declare the results. He contended that the entire election was free and fair and done within the parameters of the law.

18. He further contended that there was no voter bribery, violence or undue influence and that in any case the Petitioner's agents duly signed form 35A whenever they were available.

19. He contested the 44 forms of form 35A produced by the petitioner as some of them were illegible or outrightly blank. He argued that none of the agents who supplied him with the said forms testified on their veracity.

20. On the question of the ungazetted polling station's he said that Oruba Cattle Dip polling station was actually nonexistence as the place is now a dispensary. The nearest facility was Bridge International Academy which was approximately 300 metres from Oruba Cattle Dip. During the day of voting, there was according to IEBC features showing where the voting was taking place. None of the voters testified to the fact that they were unable to vote as they missed the polling station.

21. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent equally had the same argument regarding Got Kwer nursery polling station. The witness stated that the facility which was a church (Shirikisho Church) was too small for the 2 streams expected. The Happy Kids Oloo Pamba Academy was just about 100 metres away and the voters were directed to vote there. Again no voter came out protesting that they failed to vote as a result of change of venue.

22. On the question of dead voters voting the respondent argued that no evidence was brought to the court for example certificate of death to buttress this claim.

23. On the issue of Form 35A supplied by the Petitioner the 1<sup>st</sup> and 2<sup>nd</sup> Respondents contested the same as being photocopies and that apart from being illegible the Petitioner did not attempt to bring the carbon copies he had used.

They further argued that the forms 35A were signed either by the Presiding Officer or their Deputies as per law required.

### **3<sup>rd</sup> Respondent's case**

24. The 3<sup>rd</sup> Respondent in most of the aspects were in all fours with the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. On the question of bribery, they argue that nobody came out to state that Jacko Temba bribed him or her.

25. On the issue raised by the Petitioner in regard to the use of ODM Party symbols by the 3<sup>rd</sup> Respondent, he counteracted this by arguing that the photos which were annexed to the Petition were not even produced and that he (Petitioner) did not know where they were taken from or at worst who took them.

### **Analysis and Determination**

26. It is now accepted that the general principles governing elections are clearly set out under Article 38 of our Constitution. The same provides that;

*“ 38 (1) Every citizen is free to make political choices, which includes the right –*

*a) to form, or participate in forming, a political party*

*(b) to participate in the activities of, or recruit members for, a political party; or*

*( c) to campaign for a political party or cause*

*(2) Every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the elections for*

*(a) any elective public body or office established under this Constitution; or*

*( b ) any office of any political party of which the citizen is a member*

(3) *Every adult citizen has the right, without **unreasonable restrictions-***

*a) to be registered as a voter*

*b) to vote by secret ballot in any elections or **referendum; and***

*c) to be a candidate for public officer, or office **within a political party of which the citizen is a member and if elected, to hold office.***"

27. **Article 86 of the Constitution** demands that the 2<sup>nd</sup> Respondent carries out its obligation of conducting free and fair elections.

The same provides that:

*"86 At every election, the Independent Electoral and Boundaries Commission shall ensure that –*

*a) Whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent.*

*b) the votes cast are counted, tabulated and the results announced promptly by the Presiding Officers at each polling station;*

*c) the results from the polling stations are openly and accurately collated and promptly announced by the Returning Officer; and*

*d) appropriate structure and mechanisms to eliminate electoral malpractices are put in place, including the safe keeping of electoral materials."*

28. It is now well settled principle of Law that he who alleges must proof. The said burden of proof must be done within the parameters of the pleadings as presented in court and nothing else.

29. In *Mahamud Muhammed Sirat vs Ali Hassan Abdirahman & 2 others Nairobi EP No. 15 of 2008 (2010) eKLR Kimaru - J* stated as follows;

*"from the outset, this court wishes to state that the Petitioner adduced evidence, and even made submissions in respect of matters that he had not specifically pleaded in his Petition. It is trite law that a decision rendered by a court of law shall only be on the basis of the pleadings that have been filed by the party moving the court for appropriate relief. In the present petition, this court declined the invitation offered by the Petitioner that required of it to make decision in respect of matters that were not specifically pleaded. This court will therefore not render any opinion in respect of aspects of the Petitioner's case which he adduced evidence but which were not based on the pleadings that he had filed in court and in particular, the Petition."*

30. In *Gatirau Peter Munya Vs Dickson Mwendu Kithinji & 2 others SCOK Petition No. 2B OF 2014 (2014) eKLR*, the court articulated itself as follows;-

*"(216) It is clear to us that an election should be conducted substantially in accordance with the principles of the Constitution, as set out in Article 81(e). Voting is to be conducted in accordance with the Principles set out in Article 86. The Elections Act, and the regulations thereunder, constitute the substantive and procedural law of the conduct of elections.*

*(217) If it should be shown that an election was conducted substantially in accordance with the Principles of the Constitution and the Election Act, then such election is not to be invalidated only on ground of irregularities.*

*(218) where however, it is shown that the irregularities were of such magnitude that they affected the election results, then such an election stands to be invalidated. Otherwise procedural or administrative irregularities and other errors occasioned by human imperfection, are not enough, by and of themselves to vitiate an election ---*

*(219) By way of example, if there would be counting or tallying errors which after scrutiny and recount do not change the result of an election, then a trial court would not be justified, merely an account of such shortfalls, to nullify such an election. However, a scrutiny and recount that reverses an election result against the candidate who had been declared a winner, would occasion the annulment of an election. Examples of irregularities of a magnitude such as to affect the result of an election, are not however closed.*

*(220) where an election is conducted in such a manner as demonstrably violates the principles of the Constitution and the law, such election stands to be invalidated.”*

31. Having cited the above legal authorities, can it be said that the election of Member of Parliament, Suna West met the set out criteria" Can the irregularities cited by the Petitioner be deemed so serious to violate the Constitution and the relevant electoral laws"

32. I have perused extensively the submissions by the parties herein as well as the attendant cited authorities. What is clear is that the parties generally agree on the areas of concern which include bribery, violence, qualification of the Presiding Officer, discrepancies in forms 35A among others.

33. Starting with the issue of bribery of voters, it is apparent that PW9 Donellah Dolly Ochieng is the Star witness in this respect. She stated that one Jack Temba was bribing voters at Nyarobo Sayun polling station. This being a serious criminal offences as well as an election offences, the same ought to be proved beyond any shadow of doubt and not just mere generalities and suppositions.

When she was cross-examined she stated as follows;

**“There was one Jacko Temba bribing people. I did not mention anybody who was bribed. There were many people, young and old. I did not share with the Petitioner’s agent at the room. I went to the window and could not talk to the agent. I did not report to any police station, even about my mum. I want the court to believe because I am saying what I saw. I informed the Petitioner.”**

34. No person who was bribed testified. No amount of money or other favours of bribery involved was indicated and no report was made to the Petitioner’s agents, the polling officers or even the police who were present at the station. Finally no report was made to the police at all.

35. The said witness equally raised the issue of violence at the said polling station. She said that her grandmother one Kerina Auma was injured and she took her to hospital. She confirmed that she was old but still alive. She nevertheless did not swear any affidavit neither was she called to testify.

36. The other issue raised by the Petitioner was the nepotism perpetuated by IEBC during the recruitment of its election staff. He singled out the family of Obuya and Sebastian M. Nyamonge who benefited from the same. He said that they all worked in the same polling station – that is mother and her children. The consequences therefore was that they aided the winning of the 3<sup>rd</sup> Respondent.

37. First of all it was common knowledge that recruitment of the temporary IEBC officials was advertised in the media. Infact when cross-examined they stated that they applied just like everybody else and they were shortlisted and interviewed and they succeeded. I have strained to see how the said family members aided the 3<sup>rd</sup> Respondent. There is no evidence to suggest that they colluded in anyway. In any case the Petitioner had agents everywhere in all the suspected polling stations.

38. Evidence was led to show that the names of the successful polling clerks were placed strategically at public places and were shared even with the contestants. There is nothing to show that the petitioner protested these names or at all.

39. The next issue closely related to this is the qualification of poll officers. The petitioner has argued that Calvine Omondi Odege Charles Mino, John Collins Oduor and Kenneth Yai were not qualified. He relied on the cross-examination of DW5 Julius Mwita Chacha. He further stated that the said DW5 did not have any experience to conduct the election for the reason that he was recruited in July 2017 and took over from one Kosgei. This was hardly one month before the elections.

40. The trouble I have with this line of argument is that no notice was given to the 1<sup>st</sup> and 2<sup>nd</sup> respondents to produce the qualifications of the people allegedly not qualified. More importantly even DW5 who is 1<sup>st</sup> respondent herein did not say that he was not competent to conduct the election. Infact the petitioner all along dealt with the said witness as he was the Constituency returning Officer. Why then did't he raise it with the County returning Officer or at least IEBC headquarters"

41. Further, I have not been shown any evidence to suggest that the said "unqualified" staff failed to conduct the election as per the standards expected of them.

42. As stated above the best thing was for the Petitioner to demand their qualification either prior to the election or at least before the commencement of this petition.

43. The allegation of dead voters and juveniles voting was equally raised by the petitioner. DW9 Donellah Dolly Ochieng was categorical on this. She said that the following children; Spenzia, Hellen and Ann voted. At the same time 5 of them, namely Steve, Ochieng Adongo and Ochieng Okumu voted yet they were not registered. 2 others did not have identity cards.

44. Apart from the same being allegations, she did not adduce any documentary evidence. No birth certificates were produced and neither copies of the identity cards.

45. I have perused the Form 35A for Nyarombo Nursery school polling station and notice that one John Abich Nyarube agent for ODM and I suppose the Petitioner signed the said form on 8/8/2017. The other 2 agents equally signed and the comments by the presiding officer were

"No disputed votes."

46. Clearly and as she admitted she was not the Petitioner's agent at the said station. Further John Abich Nyarube the petitioner's agent did not dispute the results as well as the process. How then did she satisfy herself that indeed the said juveniles voted"

47. The other substantive issue raised by the Petitioner is use of ungazetted polling stations. These were Oruba Cattle Dip as well as Got Kwer Nursery school.

48. At Oruba Cattle Dip the court made a visit together with the entire parties herein and it was established that what exist on site is a Public dispensary. There was a structure on the ground which used to serve as a cattle dip. The parties concede that the same was removed in late 1980's or thereabouts.

49. About 200-300 metres from the said cattle dip or dispensary was Bridge International School. The court observed that although it was not very visible from the dispensary, it was however beside the same road used along the dispensary. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents stated that the previous night that is 7th August 2017 they erected signs which directed persons who were interested to vote or go there to the site.

50. None of the witnesses testified that they were unable to vote because of the change of the venue. It was in my view clear that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were complying with Regulation 64 of the Elections (General) Regulation 2017 which state that:

***“ 64 (1) Notwithstanding the terms of any notice issued under the Act or these Regulations, a Presiding Officer may, after consultation with the returning officer, adjourn the proceedings at his or her polling station where they are interrupted by riot, violence, natural disaster or other occurrence, shortage of equipment or other materials, but where the Presiding Officer shall restart the proceedings at the earliest practicable moment.***

***(2) The discretionary powers of Presiding Officer under sub regulation (1) shall include a power in the circumstances therein mentioned to transfer the proceedings to another polling station public facility in the same constituency, and where Presiding Officer does so-***

***(a) the Presiding Officer shall advertise the fact in such manner as is sufficient to bring it to the notice of voters; and***

***(b) the electoral area for the polling station from which the proceedings are transferred shall, for all the purposes of these Regulations, be deemed to be part of the electoral area of the polling station to which the proceedings are transferred.***

51. Having visited the scene I find that it was not practicable to conduct the elections at the dispensary as there was every possibility that the same was used on that day.

52. In any event I do not find any prejudice suffered by either the Petitioner or the 3<sup>rd</sup> Respondent. I also note that the turnout was over 80% which according to the IEBC was a good one.

53. The same situation obtained at Got Kwer Nursery school polling station. The court and the parties visited the scene and found that actually there was no Nursery school but instead there was a Church called "Shirikisho". Next to the church was Happy Kids Oloo Pamba nursery school which was less than 100 metres from the church. One could clearly see both the school and the church.

54. IEBC contended that they changed the venue as there were now 2 streams and both could not use the church.

Again signs were erected which gave the parties direction to the venue.

53. No witness was called to testify that they were disadvantaged in anyway. Looking at forms 35A the agents for the parties signed without any complaint. The turnout at Got Kwer was equally impressive.

55. The other big issue raised by the Petitioner is to do with Form 35A. As stated earlier this court ordered for the scrutiny of the same under the supervision of the Deputy Registrar.

56. Having perused the said forms in the originals as well as carbon copies I find that all of them were signed by the presiding officers or their deputies.

57. The ones which were carbon copies (5 of them) were legible and clear. The report by the Deputy registrar dated 28/1/2018 essentially captures what I have seen in the forms.

All the said forms were signed by the agents of the Petitioner and none of them was called to deny the same. I have even gone ahead to compare the entries in form 35B and I do not find any fundamental differences.

58. Significantly though, evidence was led by the Petitioner showing that he was supplied with 44 copies of forms 35A. Most of them as clearly submitted by the Respondents were either blank or illegible and those which were clear seemed to have some alterations. The same were used by the Petitioner to tally the results as they appear in the Petition although he said that he was a lay person.

59. What I am unable to appreciate is where did he get the 44 forms" Was he supplied to by his agents as he claims" If so where are the other 44 forms" It appears that the agents failed to supply him the rest of the forms. None of the agents even those who supplied him with the 44 came to testify. Neither did any of the agents testify that he was denied the forms by IEBC.

60. Consequently, to argue that those supplied by IEBC are faulty does not hold much water. The petitioner in any event has not supplied to this court any other credible results. What he attempted to supply in the 44 forms 35A felt short of what was expected.

61. Hot on the heels of this comes the question of the non-stamping of some of the forms 35A. The Deputy Registrar report 14 out of the 88 forms 35A were not stamped but signed by the Presiding Officers. According to the Petitioner this was fatal.

62. This in my view appears an administrative function. What is relevant however is the signatures of the Presiding Officers together with his deputy or either of them.

63. The Court of Appeal in Nairobi Appeal *No. 219/2013 IEBC and Leonard Okemwa Vs Stephen Mutinda Mule* stated that;

***“There is no stamping requirement in form 35. All that is required to form 35 as provided for under Rule 79 is the signature of the presiding officer and the agents of the candidate. If such forms were stamped it was gratuitous and superfluous, discretionary or administrative act incapable of creating a statutory obligation, less still the invalidation of the forms that did not contain the stamp.”***

64. A space was created for the Presiding Officer, the deputy and the agents to sign. I think there would not be any difficulty for the drafters to have created such space for the stamp in the forms. Infact the fact that the agents endorsed the said 14 forms buttresses the assertion that the stamping was not very consequential.

65. What of failure to sign the forms by the agents" It appears that at Abwao polling station 1 of 2, Chambare polling station 1 of 2, Masara polling station 1 of 3, Magoto polling station 2 of 2, Nyamome polling station 1 and 2 respectively, Oruba polling station 3 of 5 and Ore primary school Polling station 1 of 1 were not signed by the Petitioner’s agents. The Presiding Officers did not give any reasons why they failed to sign.

66. What does the law say about this" **Rule 79(6) and (7) of the Election (General regulations 2012) states that;**

***79(6) “ The refusal or failure of a candidate or an agent to sign a declaration form under sub regulation (4) or to record the reasons for their refusal to sign as required under this regulation shall not by itself invalidate the results announced 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.”***

67. It must be noted that agents are servants of the principals. It is upon them to decide whether to sign the declaration or not. None of them is forced to sign. Nevertheless its expected that in the event that they refused to sign they ought to communicate to the Presiding Officer the reasons. In other words they ought to register their displeasure. As found elsewhere herein none of the agents was called to testify on this account. The presumption is that at that particular station the petitioner did or did not have agents.

68. This position that there is need for agents and other interested parties to aid in ensuring that election exercise is flawless was well captured in the **Munya case (Supra) at paragraph 247** where the court stated that;

***“Constitutional provisions are by themselves not enough. The duty bearers be they individual voters, political parties agents, the media, IEBC, the Registrar of Political parties, the Constitutional Commissions, the arms of the state, must all invest in emancipating and protecting the vote. Once the Constitution gives citizens the right to vote, the freedom to choose, and conditions are created for the realization of that right, it is not the business of the court to aid the intolerant. If party agents are required to be present, sign statutory forms, and undertake any other legitimate duty that is imposed upon them as part of the political process in an election, then they are under obligation to do it. To fail to do so is not only to fail ones party, but also to fail our democracy. The courts must frown upon any such inaction, reluctance or delay.”***

***“249----- A candidate or her agent, cannot abscond duty from a polling station, and then ask the court to overturn the election because of her failure to sign a statutory form. Every party in an election needs to pull their own weight to ensure that the ideals in Article 86 are achieved: that we shall once and for all have simple, accurate, verifiable, secure, accountable, transparent elections. The election belongs to everybody’s collective interest, and in everybody collective and solemn duty, to safeguard it.”***

69. The counsel for the Petitioner in his submissions has argued that once the Petitioner discharged the burden of proving that forms 35A had numerous irregularities and entries, the burden then shifts to the Respondent in particular the 1<sup>st</sup> and 2<sup>nd</sup> to prove otherwise. According to him, the report by the deputy registrar after scrutinizing the said original forms shows grave illegalities. Consequently it was incumbent upon the said Respondent to explain the said irregularities as they had the custody of the said forms.

70. As stated earlier I have perused all the 88 form 35A. I have compared them with those produced by the Petitioner, in particular the legible ones. I have equally compared them with the photocopies relied on by the Respondents. Respectfully, I do not see much irregularities as explained by the Petitioner. As a matter of fact the retalling was done by the Deputy Registrar and found to be exactly as found by the Returning Officer.

71. Further even those found to be carbon copy, I do not find the entries therein different from those entered in form 35B. The small overwriting in my view does not make them irregular or at all. As earlier stated his agents confirmed the results by appending their signatures.

72. As regards the use or misuse of the Kiems Kit, I do not find any substantive evidence to back up this. It is true it was alleged by DW5 that 150 forms 32A were filled by the Presiding Officers. This came from the proceedings during trial and nothing more. There was no follow up by the Petitioner as such to demand production of the said Form 32A.

73. The evidence by PW2 Philip Ochieng Okumu in respect to the proceedings at Masara primary school polling station 3 concerning booklets was not very clear. Perusing Form 35A, of the said polling station, one Lucas Olago of ID No 8572489 for ODM signed the same on behalf I suppose of the Petitioner. There were no comments made by the said agent. If indeed there was dispute with any booklets then surely, he had the liberty of stating so. In any case the said agent did not testify on behalf of the Petitioner in respect to this station.

74. On this breath of technology and contrary to the averments in the Petition I did not find any sufficient evidence by the Petitioner that there were any significant problems in use of the Kiems kits. Nothing was shown to suggest that there was material difference between what was recorded in form 35A at individual polling station and those found in Forms 35B.

75. I note that form 35B was not signed by the Petitioner nor his agent. The Petitioner stated that he was home when the results were being announced. His constituency agent apparently offered no explanation why he failed to append his signature in the said form. Needless to say, the same falls within the finding above, that failure to sign the forms does not invalidate the results.

76. The tabulation of results by the Petitioner as contained in paragraph 36 of his supporting affidavit of the Petition allegedly sourced from Kiems kit was not only spurious, but full of errors and contradictions. The Petitioner readily admitted that he was a layman in such matters of statistics and thus one can easily conclude that they were not of any probative value.

## **CONCLUSION**

77. Having stated so, can one conclude that there was free, fair and credible election in Suna West parliamentary general election" Can one conclude that the wishes of the people of Suna West in choosing their member of parliament were clearly achieved" This court is conscious that the margin difference was less than 2000 votes and thus there could be every possibility that there were significant irregularities which caused the same.

78. The Court in *Nathan Obwana –Vs- Robert Bisakaya Wayera & 2 others (2014) eKLR* rendered itself as follows:-

*“An election represents the will of the people. Courts are only called upon to intervene when the electoral process has been flawed to the extent that the winner cannot clearly be established given the irregularities in the electoral process. Other instances include corruption, violence and intimidation of voters. Where the paper trail can enable the court to understand the intention of the voters then the courts should not interfere.”*

79. This authority should be read together with **Section 83 of the Elections Act 2011** which states:-

*“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.”*

80. In my humble view, I find that the impugned election was conducted in accordance with the law. The grounds laid out in the petition as well as in the supporting affidavit be it bribery, schewed employment of poll officials, use of non-gazetted polling stations, violence and intimidation, lack of proper application of technology, use of ODM party symbols, unqualified personnel, voting by minors and deceased voters as well as unregistered voters inter alia did not meet the muster.

81. I have perused the Deputy registrar’s report on scrutiny of forms 35A and noted the errors pointed out by him. The said report

was criticized rightfully by the parties herein especially the respondents on the grounds that it had some non-factual mistakes.

82. I have taken the trouble personally of scrutinizing the originals of all the 88 forms 35As. Save that there were few errors as pointed out by the parties, the same cannot be termed major to oust the results. In any case, what was transferred to forms 35B clearly tallied with those from form 35A.

83. Before making my final orders, the parties submitted on the issue of costs. As expected each party expressed the trouble they have gone through in prosecuting this case. The same was truly complex as is expected in all election petitions.

84. Both the Respondents Counsel asked for a sum of Kshs 5 million as instructions fees, whereas the Petitioner asked for Kshs 2.5 Million from each of the Respondents.

85. Ordinarily, suits should not be opportunities for parties to enrich themselves. They are in their nature public interest litigation save that ordinarily the candidates and their families as well as some of their supporters benefit directly or indirectly. Nevertheless, this being adversarial system the winner takes it all. In the premises I shall grant the parties herein their wish and order that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents shall get instruction fees of Kshs 1,500,000/= and the 3<sup>rd</sup> Respondent Kshs 1,500,000/= million each as instruction fees.

86. In the premises I think I have said enough to indicate that this petition must fail and the election of 3<sup>rd</sup> Respondent as the Member of Parliament for Suna West Constituency was lawfully and within the legal parameters.

#### **DISPOSITION**

87. The final orders are as follows:-

**(a) The Petition be and is hereby dismissed.**

**(b) The Respondents are awarded costs as hereunder.**

**(i) Instruction fees for 1<sup>st</sup> and 2<sup>nd</sup> Respondents is hereby capped at Kshs 1,500,000/=.**

**(ii) Instruction fees for the 3<sup>rd</sup> Respondent is hereby capped at Kshs 1,500,000/=.**

**(iii) Total costs to be taxed and certified by the Deputy Registrar of this Court.**

**(iv) The certified costs awarded shall paid out of the security deposit on a prorate basis.**

**(v) A certificate of this determination in accordance with Section 86(1) of the Election Act 2011 shall issue to the Independent Boundaries and Electoral Commission and the Speaker of the National Assembly.**

Orders accordingly.

**Delivered, signed and dated at Migori this 27<sup>th</sup> day of February 2018.**

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**H.K. CHEMITEI**

**JUDGE**

27/2/18

**In the presence of:-**

**Midenga for the Petitioner**

**Kisera/Mboya for 3<sup>rd</sup> Respondent**

**Kisera holding brief for Odour for the 1<sup>st</sup> Respondent**

**Court clerk - Nyauke**

**Judgment read in open court.**



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