

## EN BANC

[ G.R. Nos. 153991-92, October 16, 2003 ]

**ANWAR BERUA BALINDONG, PETITIONER, VS. COMMISSION ON ELECTIONS, MUNICIPAL BOARD OF CANVASSERS OF THE MUNICIPALITY OF MALABANG AND AKLIMA JAAFAR BALINDONG, RESPONDENTS.**

### D E C I S I O N

**TINGA, J.:**

Before us is a petition where the petitioner, Anwar Balindong ("Anwar"), a candidate for Mayor of Malabang, Lanao del Sur, seeks to set aside the *Resolution*<sup>[1]</sup> dated July 4, 2002 of the Commission on Elections (COMELEC) *en banc*<sup>[2]</sup> ordering the Municipal Board of Canvassers (MBC) to immediately reconvene, totally exclude from canvass the election return for a certain precinct and count eighty-eight (88) votes in the election return for another precinct, not in favor of Anwar but another mayoralty candidate by the name of Amir-Oden Balindong.

Petitioner, private respondent Aklima Jaafar Balindong ("Aklima"), and Amir-Oden Balindong are half brothers.<sup>[3]</sup> They were three (3) of the nine (9) candidates for the position of Mayor of the Municipality of Malabang in the May 14, 2001 elections.<sup>[4]</sup>

On May 17, 2001, the MBC convened "with all parties represented by their lawyers and/or authorized representative," so it stated.<sup>[5]</sup> Before the start of the canvassing, the lawyers of the candidates and political parties who were present agreed that all election returns<sup>[6]</sup> should be opened and appreciated immediately so that they could determine the genuineness and authenticity thereof. They stressed that they had to complete the canvass at the soonest possible time because they had to attend the canvassing in the other municipalities of Lanao del Sur, there being a shortage of lawyers in the province.<sup>[7]</sup>

During the canvassing on the same day, Aklima, through his representative, Bassit Balindong ("Bassit"), filed an objection<sup>[8]</sup> to the inclusion of the election return for Precinct 127A/128A due to "fraud and irregularity in the conduct of election, being voted upon by those who are not registered thereof (*sic*)" and "violence, threat and intimidation against watchers of our (their) party and the registered voters thereof." Bassit also objected to the inclusion of the election return for Precinct 18A "for being voted upon by non-registered person (*sic*)" and "non existent Barangay, all the registered voters are non-existent."<sup>[9]</sup> Also on the same day, Aklima filed a *Petition*<sup>[10]</sup> to disqualify the chairman of the MBC, Parok P. Asira, for alleged bias and partiality, but the same was denied for lack of merit in the *Order/Ruling* of the MBC of even date. <sup>[11]</sup>

When the MBC reconvened on May 18, 2001, Atty. Badelles Macaan, acting as counsel for Aklima, filed an objection to the inclusion<sup>[12]</sup> of all the election returns, invoking as grounds the "illegal proceedings of the Board of Canvassers" and violation of Section 25(l) of COMELEC Resolution No. 3848.<sup>[13]</sup> The MBC denied the objection, noting that Aklima as petitioner therein was estopped from questioning the proceedings of the MBC since he expressly agreed to and voluntarily participated in the proceedings and that he did not assail the genuineness and accuracy of the election returns and the votes reflected therein.<sup>[14]</sup>

On the same day, Aklima filed before the MBC his *Offer and Admission of Evidence*,<sup>[15]</sup> attaching thereto the minutes of the MBC proceedings on May 17, 2001 to prove the illegality thereof, and a *Notice of Appeal*.<sup>[16]</sup> Nevertheless, the MBC proceeded with the canvassing of returns. Apparently, this prompted Aklima to file before the COMELEC on May 21, 2001 an *Appeal*,<sup>[17]</sup> urging that the proceedings of the MBC be declared illegal and a new board of canvassers constituted to canvass the election returns for the "various" precincts of Malabang. This was docketed as SPC No. 01-063.

On May 24, 2001, the MBC proclaimed the winning municipal candidates,<sup>[18]</sup> with Anwar winning as Mayor by a margin of fifty-two (52) votes over Aklima.<sup>[19]</sup>

Aklima filed another *Petition*<sup>[20]</sup> on May 28, 2001, praying that the MBC be ordered to reconvene and re-canvass, this time, the election returns in 38 precincts only, without stating, however, their specific precinct numbers; the proceedings of the MBC declared illegal; the municipal canvass transferred to a "safer venue"; and, the proclamation of any municipal candidate suspended or annulled. The petition was docketed as SPC No. 01-175.

In a bid to amend his petition in SPC No. 01-175, Aklima filed the corresponding motion for leave.<sup>[21]</sup> In his *Amended Petition*,<sup>[22]</sup> Aklima further whittled down the number of contested election returns, this time seeking the annulment of the election results in five (5) precincts only, namely: Precincts 18A, **80A**, 127A/128A, 133A/134A and **47A/48A**. According to him, the election returns in the five (5) precincts were "products of fraud, forgery, terrorism and other forms of irregularities." He likewise sought the annulment of the proclamation of Anwar.

At the hearing on June 29, 2001, the COMELEC ordered the consolidation of SPC No. 01-063 and 01-175.

Stressing that the petitions questioned the regularity of the canvassing and the genuineness of the election returns for Precincts 80A and 47A/48A, the COMELEC per the *Order*<sup>[23]</sup> of October 15, 2001 concluded that the petitions presented pre-proclamation controversies. Accordingly, the poll body ordered that the cases be heard and directed the appearance of the chairmen of the boards of election inspectors (BEIs) of the two precincts and the presentation of the ballot box containing the copies of the election returns used by the MBC. The COMELEC also ordered Aklima to amend his petition in SPC No. 01-175 to include the other proclaimed election winners as respondents.

At the scheduled hearing on December 13, 2001 before the COMELEC, Anwar argued that since Aklima failed to object to the inclusion of the returns for Precincts 80A and 47A/48A at the MBC, much less appeal the MBC ruling to the COMELEC, which failure was fatal according to him, the COMELEC could no longer exclude the returns.<sup>[24]</sup> After the oral arguments, the COMELEC examined the canvassing copies of the election returns for Precincts 80A and 47A/48A which were used by the MBC.<sup>[25]</sup> Thereafter, it declared the cases submitted for resolution. <sup>[26]</sup>

Nonetheless, Anwar filed an *Opposition and Memorandum*<sup>[27]</sup> where he posited that the COMELEC *en banc* had no jurisdiction over the petitions which both involved pre-proclamation controversies in view of the provision<sup>[28]</sup> of the Constitution on the matter. He also reiterated his position that the inclusion for canvass of the returns for Precincts 80A and 47A/48A could no longer be assailed.

On July 4, 2002, the COMELEC promulgated the challenged *Resolution*,<sup>[29]</sup> totally excluding the election return for Precinct 80A with Serial No. 68210015 and awarding to candidate Amir-Oden Balindong all the 88 votes in the election return for Precinct 47A/48A with Serial No. 6821008, which were earlier credited by the MBC to Anwar. The *Resolution* is anchored on the following findings:

"An examination of the Election Return with Serial No. 68210008 from Precinct No. 47A/48A reveals that it contains erasures with respect to the votes of private respondent mayoralty candidate Amir-Oden S. Balindong ('Amir-Oden'). The number of votes for him in *taras* and in figures and words was crossed-out while the zero (0) vote for private respondent Anwar Balindong was superimposed and changed to eighty-eight (88) in words and figures. Also, on the first column adjacent to the name of Anwar Balindong, it is apparent that the figure zero (0) was superimposed by five (5) bars. The members of the Board of Election Inspectors (BEI) should have countersigned these alterations, assuming they were made for the purpose of correction.

On the other hand, a perusal of the election return for Precinct No. 80A with Serial No. 68210015 gives the impression that the votes obtained by private respondent Amir-Oden Balindong as well as the signature of the member of the BEI reflected in the columns were erased by a white substance. The same holds true even with respect to the votes garnered by vice-mayoralty candidates Kamar Mauyag and Maongca Paramata."<sup>[30]</sup>

Thus, the COMELEC ordered the MBC to reconvene, take into account its directives with respect to the two (2) returns and thereafter proclaim the winning mayoralty candidate.<sup>[31]</sup>

Not satisfied with the COMELEC *Resolution*, Anwar filed the present petition. He faults the COMELEC for having acted with grave abuse of discretion amounting to lack or excess of jurisdiction, firstly, in taking cognizance of the consolidated cases in the first instance without referring them to either one of its divisions, in violation of the Constitution; and secondly, in taking action on the returns for Precincts 80A and 47A/48A although Aklima did not object to their inclusion for canvass at the MBC level, thereby violating Republic Act No. 7166 (R.A. No. 7166), aggravated at

that by its selective or disparate treatment of the two (2) returns. He adds that even assuming that the COMELEC could take cognizance of the returns despite Aklima's failure to object thereto at the MBC level, the proper course of action was to order the BEIs to recount the votes in consonance with Section 235 of the Omnibus Election Code (OEC).<sup>[32]</sup>

In his *Comment*<sup>[33]</sup> dated August 19, 2002, Aklima insists that the COMELEC *en banc* had jurisdiction to hear and decide the consolidated cases by virtue of COMELEC Resolution No. 0046<sup>[34]</sup> dated January 19, 2000. Asserting that the COMELEC *en banc* did not commit grave abuse of discretion for not ordering a recount of the ballots in Precincts 80A and 47A/48A, he posits that it is beyond the authority of the COMELEC to order *motu proprio* a recount of the ballots since under the law it is incumbent upon the board of canvassers or any affected candidate to initiate the ballot recount.

Subsequent to the filing of the present petition before this Court, on August 21, 2002, the COMELEC issued an *Order*<sup>[35]</sup> constituting a new MBC. Anwar filed a motion<sup>[36]</sup> to hold the implementation of the *Order* in abeyance, which the COMELEC granted in its *Order*<sup>[37]</sup> dated September 18, 2002.

The issues in this case are the following:

- 1) Whether the COMELEC *en banc* had jurisdiction over pre-proclamation controversies at the first instance;
- 2) Whether the COMELEC had authority to pass upon the validity of the two (2) election returns which were not objected to before the canvassing board; and
- 3) Whether the COMELEC in this instance acted properly in declaring the two (2) returns tampered and thereafter totally excluding the first return, on one hand, and ordering the votes in the second return credited from Anwar to another candidate, on the other, without examining the other copies of the returns or ordering a recount of the ballots by the BEIs concerned.

The first issue is both constitutional and jurisdictional.

The 1987 Constitution, in Section 3, Article IX-C thereof, has established the two-tiered organizational and functional structure of the COMELEC. The provision requires that election cases, including pre-proclamation controversies, should be heard and decided first at the division level. It reads, thus:

"SEC. 3. The Commission on Elections may sit *en banc* or in two divisions, and shall promulgate its rules of procedure in order to expedite disposition of *election cases, including pre-proclamation controversies. All such election cases shall be heard and decided in division, provided that motions for reconsideration of decisions shall be decided by the Commission en banc.*" [Emphasis supplied]

This Court has consistently ruled that the requirement mandating the hearing and decision of election cases, including pre-proclamation controversies, at the first instance by a division of the COMELEC, and not by the poll body as a whole, is

mandatory and jurisdictional. Indeed, as the above-quoted Constitutional provision is couched in simple language and yields to no other interpretation than what its plain meaning presents, it is imperative for this Court to enforce its indelible import and spirit to the fullest, any decision, resolution or proceeding of the COMELEC which runs counter to it notwithstanding.

In the definitive case of *Sarmiento v. COMELEC*,<sup>[38]</sup> this Court explicitly held that the COMELEC *en banc* does not have the requisite authority to hear and decide pre-proclamation controversies at the first instance. The Court declared:

"It is clear from the abovequoted provision of the 1987 Constitution that election cases include pre-proclamation controversies, and all such cases must first be heard and decided by a Division of the Commission. The Commission sitting *en banc*, does not have the authority to hear and decide the same at the first instance.

...

Indisputably then, the COMELEC *en banc* acted without jurisdiction, or with grave abuse of discretion, when it resolved the appeals of petitioners in the abovementioned Special Cases without first referring them to any of its Divisions. Said resolutions are, therefore, null and void and must be set aside. Consequently, the appeals are deemed pending before the Commission for proper referral to a Division."<sup>[39]</sup>

The *Sarmiento* ruling has been reiterated in several cases.<sup>[40]</sup> For instance, in *Abad v. COMELEC*,<sup>[41]</sup> the Court ruled that COMELEC Resolution No. 2824, which allows direct recourse to the COMELEC *en banc* from decisions of Metropolitan Trial Courts, Municipal Trial Courts and Municipal Circuit Trial Courts, is not in accord but in conflict with Section 3, Article IX-C of the 1987 Constitution. Hence, the Court set aside the Resolution of the COMELEC *en banc* and ordered the Commission to assign the case to one of its divisions. Likewise, in *Soller v. COMELEC*,<sup>[42]</sup> this Court held that the power to hear and decide election cases, including pre-proclamation controversies, at the first instance pertains to the divisions of the Commission and any decision by the Commission *en banc* as regards election cases, including pre-proclamation controversies, and incidents thereof decided or resolved by it at the first instance is null and void.

Simply put, the Commission *en banc* does not have jurisdiction in the first instance, whether original or appellate, over election cases, pre-proclamation controversies and incidents thereof. When such disputes are filed before or elevated to the Commission, they have to be heard and adjudicated first at the division level.

Doubtless, SPC No. 01-063 and 01-175 are pre-proclamation controversies, involving as they do the alleged illegality of the canvassing proceedings and the purported tampering of certain election returns. This is clear from the OEC.<sup>[43]</sup>

The COMELEC itself characterized the consolidated cases as pre-proclamation controversies in its *Order*<sup>[44]</sup> of October 15, 2001 and in the assailed *Resolution*.<sup>[45]</sup>

Apparently, in assuming jurisdiction over the consolidated cases, the COMELEC