



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NANYUKI**

**THE ELECTIONS ACT, 2011**

**ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS)**

**PETITION RULES, 2017**

**ELECTION PETITION NO. 2 OF 2017**

**SAMMY NDUNGU WAITY.....PETITIONER**

*Versus*

**INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION.....1<sup>ST</sup> RESPONDENT**

**NDIRITU MURIITHI.....2<sup>ND</sup> RESPONDENT**

**JOHN MWANIKI.....3<sup>RD</sup> RESPONDENT**

**COUNTRY RETURNING OFFICER,**

**LAIKIPIA COUNTY.....4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. During the general election that took place on **8<sup>th</sup> August 2017** Ndiritu Muriithi (Muriithi) and John Mwaniki (Mwaniki) were declared as the elected governor and deputy governor respectively of Laikipia County. That declaration is challenged in this petition. This court was gazetted, to hear this petition, as the election court by the Chief Justice by Gazette Notice No. 9060.

**BACKGROUND**

2. The petition was initially filed by the petitioners **Sammy Ndungu Waity (Waity)** as the 1<sup>st</sup> petitioner, and **Dennis Kimngaror Leman (Leman)** as the 2<sup>nd</sup> petitioner, against the **Independent Electoral and Boundaries Commission (IEBC)** as the 1<sup>st</sup> respondent, **Muriithi** the 2<sup>nd</sup> respondent, **Mwaniki** the 3<sup>rd</sup> respondent, and the **County Returning Officer of Laikipia County (County Returning Officer)** as the 4<sup>th</sup> respondent.

3. By an application dated 18<sup>th</sup> September 2017 Leman sought leave of the court to withdraw himself from this petition. This court by its Ruling dated 9<sup>th</sup> November 2017 granted Leman leave to withdraw from this petition and with that withdrawal his affidavit sworn on 8<sup>th</sup> September 2017 and the attached affidavits of five other persons were withdrawn.

4. Following the withdrawal of Leman the petition proceeded only with Waity as the sole petitioner.

**PLEADINGS**

**PETITION**

5. By his petition Waity pleaded that the election of Muriithi and Mwaniki violated the constitutional provisions in Articles 1, 10, 38, 39, and 40 and that it was therefore unlawful, invalid, null and void. That it was unlawful because from 1<sup>st</sup> to 8<sup>th</sup> August 2017 government agents,

who included Kenya Defence Force Officers, General Service Unit Officers, Police officers and Kenya Police Reserve Officers, forcefully unlawfully and violently moved members of the Pokot community by burning their houses, killing their animals and thereby prevented members of Pokot community from voting. That they moved in heavily armed contingent from one polling station to the other using armored vehicles; and that thereby, they prevented Pokot community from accessing the polling stations by beating them, threatening them, burning their houses and confiscating their national identity cards. The polling stations affected by those acts of violence, set out in the petition were:-

- i. OIMutunyi Primary school polling centre;**
- ii. Mbombo Primary School polling centre;**
- iii. Merigwit Primary School polling centre;**
- iv. Survey Primary School polling centre**
- v. Mutarakwa Primary School polling centre**
- vi. Luoniek Primary School polling centre**
- vii. Ndonyoriwo Primary School polling centre**
- viii. Magadi Primary School polling centre**
- ix. Ndunyu Primary School polling centre**
- x. Kahuho Primary School polling centre**
- xi. Minjore Primary School polling centre**
- xii. Githima Primary School polling centre**
- xiii. Mithuri Primary School polling centre**
- xiv. Posta A.P. polling centre**
- xv. Lentile farm polling centre**

6. Waity by his petition stated that **Joshua Irungu**, who was the only other contender for the position of governor of Laikipia, enjoyed an overwhelming support amongst the Pokot community, living at Sosian Ward, who were disenfranchised by the systematic violence and intimidation of the government. That as a consequence of that violence the breach of peace, by government security forces, and intimidation, 5,000 people residing in Sosian Ward were denied their right to vote.

7. Waity also pleaded that the results of election of the governor were not a true reflection of the will of people since the elections were marred with irregularities, malpractices, lack of transparency and accountability. That there was suspicion that the results of Sosian ward were inflated.

8. He further pleaded that Joshua Irungu's agents at some polling station received hostility from the presiding officers; and that those agents were denied a recount of votes.

9. Further that in Laikipia County there were discrepancies at all polling stations between the total votes casts for president, senator, member of national assembly, and women representative as compared with the votes for governor. That, that variation meant that there was inflation of the votes for Muriithi.

10. It was also pleaded in the petition that a significant number of polling stations failed to count, tabulate, accurately collate or transmit the votes and as a consequence the results announced by returning officer were not verifiable and accurate.

11. Waity also by his pleadings pleaded that Muriithi was time barred from vying for governor's position by virtue of Section 33 of the Election Act. That Muriithi who was independent candidate also campaigned unfairly by using photographs of the presidential candidate for Jubilee party in his poster and bill boards.

12. Waity pleaded that the irregularities and improprieties set out in his petition greatly affected the results of the election and finally prayed for orders:-

**(i) That Muriithi was not qualified to run as independent candidate in gubernatorial election and therefore his election is null and void;**

**(ii) A declaration that the campaign of Muriithi was unlawful and thus rendered the result of the election invalid;**

- (iii) A declaration that IEBC failed by proceeding with the election at Sosian ward rather than postponing the same;
- (iv) An order that gubernatorial election be conducted afresh at Sosian Ward.
- (v) A declaration that the election of governor at Laikipia County was not conducted in accordance with the constitution and the applicable law rendering the results invalid, null and void;
- (vi) A declaration that Muriithi was not validly declared the winner;
- (vii) An order for fresh election for position of governor of Laikipia.

**1<sup>ST</sup> AND 4<sup>TH</sup> RESPONDENT'S RESPONSE TO THE PETITION**

13. IEBC and the county returning officer pleaded that adequate measures were put in place, during the general election that ensured free, fair and transparent elections, as required under Articles 81 and 86 of the constitution, and the Election Act and the Regulation thereunder. That the gubernatorial elections of Laikipia County resulted in the two candidates, namely Muriithi, garnering 100,356 and Joshua Irungu, garnering 98,349. That following the tallying process Muriithi who garnered the highest votes was declared the winner.

14. That the county returning officer began receiving results from the respective constituency returning officers from Laikipia West, Laikipia east and Laikipia North on the 10<sup>th</sup> August 2017 in Forms 37A and 37 B and the said county returning officer commenced the process of making entries in Form 37 C. That after collating, verifying and tallying the Form 37A, and 37B from the constituencies on 11<sup>th</sup> August 2017 the county returning officer declared Muriithi the winner of gubernatorial election of the Laikipia County.

15. IEBC and the country returning officer denied the allegation made by Waity regarding the conduct of the election on the ground that those allegations were not supported by evidence and pleaded that:-

- (a) **The voting, counting, tallying, transmissions and declaration of election results was efficient, accurate, accountable, verifiable, lawful and true representation of the will of the people of Laikipia County based on universal suffrage;**
- (b) **That the declaration of the winner was made only after the 4<sup>th</sup> respondent (the county returning officer) had received all the Forms 37 A and Forms 37 B from the respective constituency returning officers; and**
- (c) **That the accredited agents were allowed to access the polling station and the tallying centres to witness the voting process and the tallying of the votes.**

16. It was further pleaded that the government provided adequate security, which ensured an enabling environment for conducting peaceful, free, and fair election and that there was no incident of violence, which was reported, or which interfered with the elections. That consequently every eligible voter was allowed to vote without discrimination.

17. That contrary to the pleadings of Waity voting took place in the polling stations set out in the petition as follows:-

| No. | Polling Station           | Number of Registered Voters | Valid Votes<br>Cast | Rejected Votes | Percentage<br>Turnout |
|-----|---------------------------|-----------------------------|---------------------|----------------|-----------------------|
| 1.  | Olmutunyi Primary School  | 389                         | 157                 | 0              | 40.36%                |
| 2.  | Mbombo Primary School     | 379                         | 198                 | 1              | 52.51%                |
| 3.  | Merigwit Primary School   | 363                         | 257                 | 0              | 70.80%                |
| 4.  | Survey Primary School     | 392                         | 237                 | 0              | 60.46%                |
| 5.  | Mutarakwa Primary School  | 76                          | 59                  | 0              | 77.63%                |
| 6.  | Luoniek Primary School    | 439                         | 264                 | 0              | 60.14%                |
| 7.  | Ndonyoriwo Primary School | 294                         | 196                 | 0              | 66.67%                |
| 8.  | Magadi Primary School     | 610                         | 343                 | 0              | 56.23%                |
| 9.  | Ndunyu Primary School     | 386                         | 308                 | 2              | 80.31%                |

|     |                        |     |     |   |        |
|-----|------------------------|-----|-----|---|--------|
| 10. | Kahuho Primary School  | 280 | 221 | 1 | 79.29% |
| 11. | Minjore Primary School | 507 | 400 | 3 | 79.49% |
| 12. | Githima Primary School | 487 | 392 | 1 | 80.70% |
| 13. | Mithuri Primary School | 493 | 416 | 2 | 84.79% |
| 14. | Posta A. P.            | 607 | 410 | 0 | 67.55% |
| 15. | Lentile Farm           | 43  | 19  | 0 | 44.19% |

18. That there being no law requiring a certain threshold to be achieved for an election to be declared valid, that indeed election did take place contrary to the pleadings by Waity.

19. Further, contrary to the pleadings in the petition, that Muriithi had complied with the law before participating in the gubernatorial election at Laikipia County.

20. IEBC and the county returning officer denied that agents were denied access at the counting area but rather, that they were involved in the counting and verifying of the votes which was undertaken in the open and in transparent manner.

21. In their final prayer IEBC and the county returning officer sought the dismissal with costs of the petition.

#### **THE 2<sup>ND</sup> RESPONDENT'S (MURIITHI'S) STATEMENT OF RESPONSE TO THE PETITION**

22. Muriithi by his response pleaded in denial of all the allegations contained in the petition then pleaded as follow:-

**a) The allegation of forceful eviction, intimidation and prevention of members of the Pokot Community from accessing particular polling centres or otherwise exercising their right to vote are untrue.**

**b) The allegation of actions by security agencies evidently exhibit criminal offences. The veracity of these allegations is in question to the extent that there is no evidence that any criminal complaint was made to the police.**

**c) Security agencies are specifically mandated under the constitution and through their respective statutory instruments to maintain law and order. These national security organs, at all material times of the general election in Laikipia County, carried out their duties in compliance with the law and with theutmost respect for the rule of law as required by the constitution.**

**d) At the time of the general election certain Administration locations/wards of Laikipia County had been declared under Legal Notice No. 21 of 2017 as Disturbed and Dangerous areas. The Legal Notice did not provide for forceful eviction or intimidation of members of any community but was geared towards maintaining security, law and order in the designated areas.**

**e) In a subsequent Gazette Notice No. 2496 dated 15<sup>th</sup> March 2017 the Inspector General of the National Police Service prohibited all inhabitants of certain locations/areas from possessing any arms.**

23. By his response Muriithi proceeded to further deny that Joshua Irungu had an overwhelming support of the Pokot Community; that the security operation within Laikipia County did afford him (Muriithi) advantage; that there was systematic violence or intimidation against Pokot Community; that the voter turnout in all the three constituencies in Laikipia County was 100%; that there was evidence that 5,000 people were prevented from voting in Laikipia county; and that there were particular irregularities, malpractices, lack of transparency or accountability which could be attributed to him.

24. On the alleged discrepancies of votes casts for the different positions Muriithi attributed this to possibly the voters failing to cast their votes for all the six electoral positions; and to the likelihood of voters making mistakes when voting.

25. Muriithi further pleaded that he was qualified to run as an independent candidate during the general election which fact was recognized in a judgment by Justice Muchelule when the said learned judge was determining his appeal from the Political Parties Tribunal.

26. In regard to the allegation that he did not comply with the decision of IEBC's Electoral Conduct Enforcement Committee, which required him to remove posters and banners bearing the image of President Uhuru Kenyatta, Presidential candidate for the Jubilee party, Muriithi denied that allegation and stated he complied.

27. In his final prayers he sought, the dismissal of the petition, for a determination that he was duly elected as governor of Laikipia County and that the election was valid.

28. The court having discussed the parties pleading as above, and did not deliberately discuss the pleadings of Mwaniki because they were not supported by oral evidence, it is time to consider who bears the burden of proof and what is the standard of proof. I will begin by considering the latter one first.

### **STANDARD OF PROOF**

29. The Supreme Court in the case **RAILA AMOLO ODINGA and ANOTHER -v- INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION AND 6 OTHERS Presidential Petition No. 1 of 2017** (herein after referred to as Raila 2017) discussed the peculiar nature of election petitions and referred to the case of Tanzania High court **MADUNDO -v- MWESHENI & AG Mwanza HCMC No. 10 of 1970** and quoted from that case thus:-

*“An election petition is a more serious matter and has wider implication than an ordinary civil suit. What is involved is not merely the right of the petitioner to a fair election but the right of the voters to non-interference with their already cast votes i.e. their decision without satisfactory reason.”*

30. The supreme court in Rail 2017 while considering the standard of proof required in an election petition stated:-

*“In many other jurisdictions including ours, where no allegations of criminal or quasi-criminal nature are made in an election petition, an intermediate standard of proof, one beyond the ordinary civil litigation standard of proof on a ‘balance of probability’, but below the criminal standard of ‘beyond reasonable doubt,’ is applied. In such cases this court stated in the 2013 Raila Odinga case that [t]he threshold of proof should, in principle, be above the balance of probability though not as high as beyond reasonable – doubt .....*”

31. The Supreme Court in Raila 2017 in further discussion of the standard of proof in election petitions stated that the intermediary standard was now applied in all election petition in this country and further, that where there are allegations of criminal or quasi-criminal nature the standard of proof is one beyond reasonable doubt.

32. The above therefore is the standard that Waity has to meet in proving the allegation in his petition.

### **BURDEN OF PROOF**

33. Having discussed the standard of proof the next thing to consider is who bears the burden of proof.

34. Justice Kimaru in the election petition of **JOHN KIARIE WAWERU -v- BETH WAMBUI MUGO & 2 OTHERS [2008]eKLR** in regard to burden of proof stated:-

*“The burden of establishing all the allegations regarding the conduct of the said election and results announced thereafter is on the petitioner .....*”

35. The Supreme Court in Raila 2017 in response to a question the learned judges poses: that is, who has the burden of proof, stated thus:-

*“The law places the common law principle of *onus probandi* on the person who asserts a fact to prove it. Section 107 of the Evidence Act, Cap 80 of the Laws of Kenya, legislates this principle in the words:-*

*“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. In election disputes, as was stated by the Canadian Supreme Court in the case *Opitz -v- Wrzesnewskyji* an applicant who seeks to annul an election bears the legal burden of proof throughout.”*

36. The Supreme Court proceeded to state that the evidential burden could shift depending on how effective a petitioner discharges that burden.

37. In the Supreme Court in the case **RAILA ODINGA & 5 OTHERS -v- INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 3 OTHERS [2013] eKLR** (hereinafter referred to as Raila 2013) while discussing shifting burden of proof had this to say:-

*“While it is conceivable that the law of election can be infringed, especially through incompetence, malpractices or fraud attributable to the responsible agency, it behooves the person who thus alleges, to produce the necessary evidence in the first place – and thereafter, the evidential burden shifts, and keeps shifting.”*

### **THE CONSTITUTIONAL PROVISIONS GOVERNING ELECTION PROCESS AND RELEVANT TO THIS PETITION**

38. **Article 38** of the constitution is probably a good place to start. Article 38 (2) provides that every citizen has the right to free, fair and regular election based on universal suffrage and the free expression of the will of the electorate.

39. Under **Article 88 (5)** IEBC is required to conduct elections in accordance with the constitution.

40. **Article 81(e)** recognizes that in order for the citizenry to realize their rights under Article 38 the electoral system should operate, inter alia, within the principles of free and fair, which are by secret ballot; free from violence, intimidation, improper influence and corruption; conducted by an independent body; transparent; and administered in an impartial, neutral, efficient accurate and accountable manner.

41. **Article 86** requires IEBC to ensure that every election method is simple, accurate, verifiable, secure, accountable and transparent. It also required that votes are tabulated and results announced promptly at each polling station. That the results from the polling stations are openly and accurately collated and promptly announced by the returning officer.

42. Article 10 provides that the national values and Principles of governance enumerated therein, that is patriotism, national unity, sharing and devolution of power, the rule of law, democracy, human dignity, equity, non-discrimination, integrity and transparency, amongst others bind state organs, state officers public officers and all persons.

43. Having considered those constitutional provisions it is now necessary to consider the recent determination by the Supreme Court of section 83 of the Elections Act, (hereinafter referred as section 83). It ought to be mentioned that section 83 of the Elections Act was amended by Election Laws (Amendments) Act, number 34 of 2017. That amendment occurred after this petition was filed and as per the holding in Raila 2017 – where the court applied the practice that legislation should be effected prospectively and not retrospectively, that amendment will not be considered in this petition.

44. Section 83 prior to its amendment was in the following terms:-

***“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 written law or that the non-compliance did not affect the result of the election”. (Underlining mine).***

45. The Supreme Court in Raila 2017 authoritatively stated the two limbs of section 83 should be applied disjunctively. The court went on to state regarding that section 83:-

***“In the circumstances, a petitioner who is able to satisfactorily prove either of the two limbs of the section can void an election. In other words, a petitioner who is able to prove that the conduct of the election in question substantially violated the principles laid down in our constitution as well as other written law on elections, will on that ground alone, void an election. He will also be able to void an election if he is able to prove that although the election was conducted substantially in accordance with the principles laid down in our constitution as well as other written law on elections, it was fraught with irregularities or illegalities that effect the result of the election.”***

46. That interpretation of section 83, as I understand it, requires the election court to inquire whether there was non-compliance with the law and the constitution and if there was non-compliance the election court would be at liberty to void the election. By the use of word ‘or’ in section 83; the election court can, if it determines that there was compliance with the law and the constitution, proceed to examine if the irregularities and malpractices of an election would lead to it being declared void. That as I understand it is the disjunctive interpretation of section 83.

47. Having discussed provisions of the law that will guide my determination of this petition, I must now begin to consider the issues raised by the pleadings, applying them to the evidence tendered and the law.

#### **ISSUES FOR DETERMINATION**

48. On 2<sup>nd</sup> October 2017 when the petition came up for pretrial conference, because parties had interlocutory applications pending for determination, the court prepared partial/preliminary issues. When the petition came up for full hearing, on 22<sup>nd</sup> November 2017, after all the interlocutory applications had been concluded and determined the court provided the issues for determination which issues largely incorporated the previous issues and added others. Those issue, formulated on 22<sup>nd</sup> November 2017, will be the issue to guide this court. They are:-

- 1. Was the election of Governor for Laikipia County done lawfully transparently and in accordance with the constitution?**
- 2. Were the results announced by County Returning Officer verifiable and accurate?**
- 3. Did the 1<sup>st</sup> respondent put into place adequate measures to ensure free, fair and transparent elections?**
- 4. Were the Pokot community disenfranchised?**
- 5. Were votes in Sosian ward inflated?**
- 6. Were agents of Jubilee party in Laikipia County denied entry to polling stations and denied the exact result at the tallying centre and were they shown hostility?**
- 7. Were votes of the 2<sup>nd</sup> respondent inflated?**
- 8. Was the process of nomination campaigns, voting and counting of votes, tallying and declaration of the winner of**

**gubernatorial election done lawfully in accordance with the constitution and Election Act and other electoral laws?**

**9. Was the 2<sup>nd</sup> respondent qualified to run for the position of the Governor of Laikipia County?**

**10. Did the issues raised in the petition affect the result of the position of Governor of Laikipia County.**

49. Following the withdraw of Leman in this petition, and the withdraw of his affidavits and also the withdraw of the annexed affidavits of 5 other persons, the only witness who testifies before court was Waity. Waity had sworn an affidavit, as required under Rule 12(1) of The Elections (Parliamentary and County Elections) Petitions rules 2017 (hereinafter referred as the Rules), which in accordance with this court's directions was the basis of his evidence in chief. Waity by that affidavit had annexed other affidavits of Peter Ngugi Ndonyo, Bildad Namawa Urando and Me Jooli Frankline Lenana. Because those affidavits were attached, as exhibits, to Waity's affidavit, and not 'stand alone' affidavits, the court ruled that those three persons were not qualified to testify having not sworn affidavits as per Rule 12(3) of the Rules.

50. The issues identified above overlap and it is therefore convenient to consider of them together.

51. I shall begin to consider issues 1, 2, 3, 5, 6 and 8 together. These are issues that touch on the unlawfulness or otherwise of the counting and tallying of votes in respect to the election of governor of Laikipia County; on whether the results of that election were verifiable and accurate; and whether the IEBC put in place adequate measures to ensure free, fair and transparent election. These issues also require interrogation of the nomination process and campaign by Muriithi.

52. Waity by his evidence in chief stated that he was a chief agent of the Jubilee party for Laikipia East Constituency. Waity further by his affidavit evidence, which represented his evidence in chief, stated that he noted while counting of ballot was proceeding that the ballot papers were not stamped. When however he was testifying before court Waity sought to amend that affidavit evidence by saying that what he meant was that Form 37 A were not stamped, and not ballot papers as stated in his affidavit.

53. That attempt to amend that evidence runs into obvious problems. Firstly is whether Waity can amend his affidavit evidence which evidence was tendered under oath. To allow Waity to amend his affidavit would offend the substance of the oath he took to support his deposition in that affidavit: See the case of **SWALEH GHEITHAN SAANU –V- COMMISSIONER OF LANDS & 5 OTHERS [2002] eKLR**. In the same vein the court in the case **REPUBLIC –v- RESIDENT MAGISTRATE COURT MKS & STEPHEN MAUNDU MUIA [2004] eKLR** stated:-

***“Counsel for the respondent relied on the case EASTERN & SOUTHERN DEVT BANK –v- AFRICAN GREENFIELD LTD HCC 1189/00 where the judge ruled that an affidavit cannot be amended ..... I agree with the ruling above cited case that counsel cannot amend his affidavit.”***

54. The second problem facing Waity is that he sought to amend after the expiry of 28 days provided under section 76(4) of the Elections Act. That section provides:

***“A petition filed in time may, for the purpose of questioning a return or an election upon an allegation of an election offence, be amended with the leave of the election court within the time which the petition questioning the return or the election upon that ground may be presented.”***

55. Section 76(1) provides the period within which a petition questioning the validity of an election should be filed to be 28 days after the date the declaration of results. So it is within those 28 days that Waity could have sought to amend, if at all, his affidavit. An affidavit sworn in support of a petition, such as the one Waity sought to amend, from the reading of Rule 8(b) and 12 of the Rules is part of the petition. It follows that, that affidavit cannot be amended without the leave of the court in addition to what is stated above: that, truth cannot be amended.

56. From the above discussion it becomes clear that Waity cannot amend the truth he deposed in his affidavit. It follows that Waity's evidence in chief remains that he noticed that ballot papers were unstamped and that although he raised his concern over that matter, at the polling station, it was not acted upon.

57. The above deposition goes contrary to Waity's testimony before court where he stated that as a chief agent of the Jubilee party he was stationed at the tallying centre and not at the polling station.

58. Further by his evidence in chief Waity deposed that candidates names were not read out to the agents; some agents declined to sign Form 37A but the same was not noted by the presiding officer in the Form; and no agent was issued with form 37A and neither were those results pinned at the door.

59. On being cross examined Waity reiterated that he was the chief agent in Laikipia East and if any of the anomalies he spoke of in his evidence in chief occurred in Laikipia West it was required to be acted upon by the chief agent of Laikipia West. Waity in this regard confirmed that there was no affidavit filed by any other chief agent of Jubilee party apart from him. It was clear from his testimony that Waity did not personally witness the anomalies listed in the petition, which allegedly occurred at the polling stations.

60. **Agnes Kamene Mutisya** the county returning officer (RW 1) in her evidence confirmed that the voting, counting, tallying transmission and declaration of gubernatorial election of Laikipia County was efficient, accurate, accountable, verifiable, lawful and a true representation of the will of the people of Laikipia. She stated that she declared the winner of that election after she had received all the Forms 37A and Forms 37B from the respective constituency returning officers and verified the results therein. She denied Waity's allegations.

61. On being cross-examined RW 1 denied knowledge of any polling station that was opened before 6 a.m. or closed before 5 p.m. but added that if there was time lost in the opening of a polling station such time would have been compensated.

62. She confirmed that only three Kenya Integrated Electoral Management Systems (Kiems) kits failed and were replaced and that thereafter all, the Kiems kits operated 100%. She added that if there were any errors they did not affect the final figure of the votes.

63. Muriithi in his evidence denied that agents were denied entry into the polling station; or that the vote tallying for governor was inflated in his favour.

#### **COURT'S ANALYSIS AND DETERMINATION**

64. Although far-reaching and very serious allegations of irregularities and illegalities were alleged in the petition, those allegations remained just that, allegations. Waity did not support those allegations, that there was failure to carry out election according to the constitution and the law; allegation of inflation of votes; or allegation that agents of jubilee party were intimidated or that they were denied re-count.

65. Indeed no agent testified of the alleged irregularities. Even though Waity relied on annexed affidavit of Me Jooli Frankline Lenana, that evidence cannot be considered by this court because Jooli was not called to testify before the court and therefore his evidence was not tested by cross examination by the respondents. In my view it would be highly prejudicial, to the respondents, for Waity to rely on that affidavit evidence when the respondents were not afforded an opportunity to test it.

66. It follows that Waity failed to meet the higher burden of proof, discussed earlier in this judgment, and therefore failed to prove the allegations on irregularities.

67. The Supreme Court in Raila 2017 had this to say with regard to irregularities in election petition.

***“At the outset, we must re-emphasize the fact that not every irregularity, not every infraction of the law is enough to nullify an election. Were it to be so there would hardly be any election in this country, if not the world, that would withstand judicial scrutiny. The correct approach therefore, is for a court of law to not only determine whether, the election was characterized by irregularities but whether, those irregularities were such nature, or such magnitude, as to have either affected the result of the election, or to have so negatively impacted the integrity of the election, that no reasonable tribunal would uphold it.”***

68. In my view considering that holding there is no irregularity or infraction, which was proved by Waity on the required standard of proof that I can say impacted the integrity of the gubernatorial election.

69. That finding holds true to the allegation that the Forms 37A and or 37B had anomalies. It ought to however be noted that those allegations of anomalies of Forms was not specifically, or with particulars, pleaded in the petition. Waity in his evidence in Chief did not lead evidence on those Forms that were before the court, and in his possession, as far back as 18<sup>th</sup> September 2017. Not one question was put to him in chief on the allegations of those Forms. The learned counsels for Waity waited to cross examine the respondents but did not ask Waity any questions in regard to those Forms. It follows that Waity did not lead any evidence on the alleged anomalies of those Forms.

70. That as it may be, my perusal of those Forms does not lead me to find that the anomalies are of such magnitude to lead this court to oust the will of the people of Laikipia County. That finding gets support from the decision of **ABDIKAM OSMAN MOHAMED & ANOTHER –V- INDEPENDENT ELECTORAL BOUNDARIES COMMISSION & 2 OTHER [2013] eKLR** where the learned judge confronted with Form 35 which were not signed stated:-

***“Where there is failure to do so, the Election Court should resolve the issue in favour of preserving the voter’s inalienable right to vote particularly when there is no proof that failure of presiding officer to sign or stamp the Form 35 was willful or affected the election results in any manner.”***

71. The learned judge in that case **ABDIKAM OSMAN MOHAMED**(supra) referred with approval to the case **NANA ADDO DANKWA & 2 OTHERS V JOHN DRAMANI MAHAMA & 2 OTHERS [2013](unreported)** where it was stated:-

***“.....I would in the absence of explicit statutory language that specifies the election is avoided because of the failure of the signature of a presiding officer; conclude that the votes on the unsigned sheets are invalid. Failure of the presiding officers to sign declaration Forms did not affect the results of the elections at the respective polling station. The presiding officers who did not sign the declaration Forms are liable to be sanctioned.”***

72. My above holding generally on all the issues raised on the Forms 37A and Forms 37B, hold even in respect to Form 37A of Nyadarua Boarding Primary School polling station, where RW1 stated that due to the alterations thereon she relied on the results transmitted through the Kiems kit. The result of that polling station from the Kiems kit reflected Joshua Irungu as having garnered 277 votes as opposed to Muriithi who garnered 178 votes. My holding also applies to the various Forms that were not signed by the returning officer; by the agent or where there was no handing over. All these failures to sign or to hand over, I find, they cannot amount to substantial error or irregularities that can lead to voiding the election.

73. Another matter to be resolved under issue number 8 is whether Muriithi contravened **section 33** of the Election Act. That section requires one who wishes to be nominated as an independent candidate to ensure:-

***a) Not being a member of a political party for at least three months preceding the date of election;***

**b) To have submitted at least 60 days before the general election, a duly filled nomination paper; and**

**c) Have at least ninety days before the date of general election or at least twenty one days before the date appointed by the commission, submit to the commission the name the person intends to use during the general election.**

74. It was pleaded by Waity that Muriithi did not meet those time lines and was therefore not qualified to participate in the election.

75. A little back ground to that allegation is necessary. Muriithi was member of the Jubilee party and so also was Joshua Irungu his sole competitor in the governor's election. Muriithi lost to Joshua Irungu in the Jubilee parties primaries held on 25<sup>th</sup> April 2017. Muriithi contested that outcome before the Jubilee Party National Appeals Tribunal. That Tribunal found in favour of Muriithi. Joshua Irungu being aggrieved filed an appeal before the Political Parties Dispute Tribunal. That Political Parties Dispute Tribunal found in favour of Joshua Irungu. Muriithi also being aggrieved filed an appeal before the High Court, at Nairobi, being Election Petition Appeal No. 10 of 2017. That appeal was dismissed but it is what the learned judge stated in his judgment that this court will rely on this issue. The judge held:-

**“..... when considered that the letter dated 8<sup>th</sup> May 2017 was addressed to the 2<sup>nd</sup> appellant (Muriithi), provided sufficient factual basis for this court to find that the 2<sup>nd</sup> appellant was no longer a member of the Jubilee party, and that he had been cleared by the Registrar of Political Parties to contest the governor's position in Laikipia County as an independent candidate.”**

76. Indeed it was on the basis of the finding of that court, that Muriithi had been cleared by the Registrar of Political Parties to contest as an independent candidate for the Laikipia County governor position, that the learned judge by his judgment of 10<sup>th</sup> May 2017 dismissed Muriithi's appeal. There was no evidence adduced by Waity to the contrary that Muriithi had not been cleared as an independent candidate. Further there was not evidence, in this matter to show that there was an appeal against the judge's finding, that Muriithi was cleared to contest the election as an independent candidate.

77. Similarly Waity's allegation in his petition, that Muriithi was disqualified to vie as a governor, because he was found by IEBC Electoral Code of Conduct Enforcement Committee to have placed in his posters and banners the photographs of the Jubilee presidential candidate, and his running mate contrary to the election code of conduct, was not proved to the required standard.

78. No only did Waity fail to meet the burden or standard of proof to prove the same but erred to suggest that the burden shifted to Muriithi to prove otherwise.

79. Section 112 of the Evidence Act shifts the burden of proof on the party with special knowledge of the fact. Waity's learned counsel invoked that section in arguing that the burden shifted to Muriithi.

80. In my view for the burden to shift to the other party the party alleging it must first lead evidence of the existence of such allegation. In this case Waity did not prove that following the decision of IEBC enforcement committee Muriithi, in disregard of that decision, continued to use the photograph of the Jubilee presidential candidate and his running mate in his posters. It ought to be noted that Muriithi was fined by that enforcement committee a fine of Kshs.500,000 which fine Muriithi proved to this court he paid. There is also the fact that up to 1<sup>st</sup> August 2017 Muriithi had a court order, staying the order of the enforcement committee, which stay order was issued in the Judicial Review Application No. 133 of 2017. Most importantly RW 1 testified, that although she was not required to, she went around Nanyuki Town and confirmed that Muriithi's posters bearing the image of Jubilee presidential candidate had been removed.

81. It follows that the issue whether Muriithi was qualified to vie as governor of Laikipia County is in the positive. Muriithi was qualified to vie. That determination therefore responds to issue number 9.

82. The issue whether the votes of Pokot community were affected by the security operations of KDF and the police in Laikipia North did not at all received any evidence from Waity. Waity admitted in evidence that he had no information about security operations there. He was also unable to give direct evidence that 5,000 people of Laikipia North were prevented from voting. He confirmed that the evidence he had of security operation was that which was reported to him. That evidence therefore being hearsay is inadmissible.

83. Bearing in mind the burden and standard of proof discussed above this court find that Pokot community were not affected by any alleged security operation. And in making that finding I add that had there been such interference with the right to vote of the Pokot community such a matter was an election offence under section 10 of the Election Offences Act. No evidence was led that any complaint was ever filed in regard to that alleged interference. If indeed there was any such interference with people's right to vote IEBC could have, under section 55B of the Election Act, postponed the election in Laikipia North. Strangely however the County Returning officer had no knowledge of such security threats and the only thing she was aware of was that security was given to the election's official and materials.

84. In the final analysis I find that the election of gubernatorial position of Laikipia County of 8<sup>th</sup> August 2017 complied with the written law relating to elections and with the provisions of the constitution. And more importantly, despite the very grave allegations made by the petitioner in his petition, I find that only very minor failures occurred in the Forms 37A and Form 37B which failures had no substantial effect on that election or its results and to echo the Supreme Court's finding in *Raila 2017* “No election is perfect. Even the law recognizes this reality.”

85. I am satisfied that the election of governor of Laikipia county was conducted substantially in accordance with the constitution and electoral law, and that as a result Ndiritu Muriithi was validly elected as the governor of Laikipia County. That election was free and fair. I **hereby dismiss the petition with costs.** The petitioner Sammy Ndungu Waity shall pay costs to the 1<sup>st</sup> and 4<sup>th</sup> respondent which are capped at total sum of Kshs.4,000,000 (Four Million) and shall also pay the 2<sup>nd</sup> and 3<sup>rd</sup> respondents costs (each) capped at total Kshs.4,000,000(Four Million). The costs awarded in this judgment are over and above those costs awarded by this court on 9<sup>th</sup> November 2017 for the

interlocutory application dated 18<sup>th</sup> September 2017, of **Dennis Kimngaror Leman**.

**DATED and DELIVERED at NANYUKI this 31<sup>st</sup> day of JANUARY 2018**

**MARY KASANGO**

**JUDGE**

**CORAM**

Before Justice Mary Kasango

Court Assistant: Njue / Mariastella

For 1<sup>st</sup> Petitioner: .....

For 1<sup>st</sup> and 4<sup>th</sup> Respondent: .....

For 2<sup>nd</sup> Respondent: .....

For 3<sup>rd</sup> Respondent: .....

**COURT**

Judgment read in open court.

**MARY KASANGO**

**JUDGE**