



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MALINDI**  
**GARSEN ELECTION PETITION NO. 1 OF 2017**  
**IN THE MATTER OF THE ELECTION ACT, NO. 24 OF 2011 LAWS OF KENYA**  
**AND THE ELECTIONS (GENERAL) REGULATIONS, 2012 AND ELECTIONS**  
**(PARLIAMENTARY AND COUNTY ELECTION) PETITION RULES, 2017**  
**AND**  
**IN THE MATTERS OF THE GUBERNATORIAL ELECTIONS TANA RIVER**  
**COUNTY, COUNTY NO 4, HELD ON 8 AUGUST, 2017)**  
**BETWEEN**  
**MOHAMED DADO HATU.....PETITIONER**  
**VERSUS**  
**DHADHO GADDAE GODHANA.....1<sup>ST</sup> RESPONDENT**  
**THE RETURNING OFFICER, TANARIVER COUNTY.....2<sup>ND</sup> RESPONDENT**  
**THE INDEPENDENT ELECTORAL**  
**AND BOUNDARIES COMMISSION.....3<sup>RD</sup> RESPONDENT**  
**AND**  
**COMMISSION FOR UNIVERSITY EDUCATION.....INTERESTED PARTY**

**JUDGEMENT**

1. The petitioner in this case, MOHAMED DADO HATU (hereafter referred to as the Petitioner) presented this election petition against the three Respondents and the Interested party under the constitution of Kenya 2010 and the Election Act No. 24 of 2011.

2. The petitioner is a registered voter in Bura constituency within Tana River County.

3. The 1<sup>st</sup> Respondent, DHADHO GADDAE GODHANA (hereafter referred to as the 1<sup>st</sup> Respondent) was one of the candidates for Governor seat who was declared winner by the 2<sup>nd</sup> respondent in the general election held on 8/8/2017 and he is currently serving as Governor of Tana River County.

4. The 2<sup>nd</sup> Respondent) MOHAMMED GONJOBE RAKA, (hereafter referred to as the 3<sup>rd</sup> Respondent), was the Returning Officer dully appointed by the 3<sup>rd</sup> Respondent to conduct the general elections in Tana River County.

5. The 3<sup>rd</sup> Respondent, THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (IEBC), (hereafter referred to as the 3<sup>rd</sup> Respondent) is a commission dully established under Article 88(1) of the constitution of Kenya with powers to conduct the elections as prescribed by Article 88(4) and other written laws and Regulations.

6. The petitioner enjoined the interested party, COMMISSION FOR UNIVERSITY EDUCATION (CUE), (hereafter referred to as the interested party) a government entity responsible for verifying and equating university qualifications in Kenya.

7. The grounds upon which the petition was brought were as follows;

**(i) THAT the election of the governor of Tana River County was not conducted and carried out in accordance with the previsions of the constitution of Kenya, the Elections Act or regulations made thereunder.**

**(ii) THAT the 1<sup>st</sup> Respondent does not meet the educational requirements set out under the a foresaid law and was not therefore validly elected as governor.**

**(iii) THAT the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents did not conduct the said elections in accordance with a foresaid by accepting inadequate academic credentials of the 1<sup>st</sup> Respondent and approving the 1<sup>st</sup> Respondent to vie for the position of governor.**

**(iv) THAT the integrity and outcome of the elections upon which the 1<sup>st</sup> Respondent was declared by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents as the Governor of Tana River County was compromised and therefore the elections were not fair and lawful.**

8. The petitioner seeks the following orders in this petition;

**(i) A declaration that the 1<sup>st</sup> Respondent was not validly elected as Governor of Tana River County on the elections held on 8/8/2017.**

**(ii) An order that the 3<sup>rd</sup> Respondent be ordered to conduct a fresh gubernatorial elections.**

**(iii) That the Respondent be condemned to pay the petitioner's costs and incidentals to this petition; and**

**(iv) Such further, other and consequential orders as this court, may lawfully make.**

9. The petitioner who testified as PW1 asked the court to adopt his verifying Affidavit as his evidence in chief. He has deposed in part as follows in the Affidavit sworn on 4/9/2017;

**(i) THAT I am aware that prior to the elections held on the 8<sup>th</sup> August, 2017, the 1<sup>st</sup> Respondent offered himself for nomination and was nominated by the Orange Democratic Party of Kenya as their candidate for Governor, Tana River County.**

(ii) THAT subsequently, the 1<sup>st</sup> Respondent presented his nomination papers to the 2<sup>nd</sup> Respondent to be cleared to contest for the Governor's seat Tana River County.

(iii) THAT the 3<sup>rd</sup> Respondent cleared the 1<sup>st</sup> Respondent to run for office as Governor, Tana River County notwithstanding the fact that the 1<sup>st</sup> Respondent had not satisfied the educational requirements as required under the Elections Act.

(iv) THAT in particular, the 1<sup>st</sup> Respondent holds a Bachelor of Arts in Development Studies from Kimmage Development Studies Centre, an institution in Ireland. ( He *annexed a copy of the degree certificate dated 15<sup>th</sup> October, 2015 and marked it MDH1*)

(v) THAT the Commission for University Education has confirmed through its letter dated 25<sup>th</sup> April, 2017 that such qualification is not an equivalent of a degree from a University recognized in Kenya, as contemplated under section 22 of the Elections Act, 2011 and Regulation 47 of Elections (General) Regulations, 2012. *He has annexed a copy of the letter dated 25<sup>th</sup> April 2017 marked MDH 2).*

(vi) THAT I am aware that the 3<sup>rd</sup> Respondent nevertheless allowed the 1<sup>st</sup> Respondent to vie and was subsequently elected as the Governor Tana River County on the elections held on 8<sup>th</sup> August, 2017( He has *annexed a copy of the gazette notice dated 18<sup>th</sup> August, 2017. and marked it MDH 3).*

(vii) THAT it is apparent that the election for the Governor was not conducted and carried out in accordance with the provisions of the Constitution, the Act or the Regulations nor in accordance with principles laid down therein or in any Law relating to such election.

(viii) THAT the grounds upon which I bring this petition are therefore the following:-

a) The election of the governor, Tana River County was not conducted and carried out in accordance with the provisions of the Constitution, the Elections Act or the regulations made thereunder;

b) The 1<sup>st</sup> respondent does not meet the educational requirements set out under the aforesaid law and was not therefore validly elected the governor;

c) The 2<sup>nd</sup> and 3<sup>rd</sup> respondents did not conduct the said elections in accordance with the law aforesaid by accepting inadequate academic credentials of the 1<sup>st</sup> respondent and approving the 1<sup>st</sup> to vie for the position of a governor;

d) The integrity and outcome of the elections upon which the 1<sup>st</sup> respondent was declared by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents as the winner was compromised and therefore the elections were not fair and lawful.

(ix) THAT I am advised by my advocates, advise I verily believe to be true that the 1<sup>st</sup> Respondent fails to meet the educational requirements as outlined in section 22 of the Elections Act and ought not to have been cleared to run as a candidate in the Tana River County, Gubernatorial Elections.

(x) THAT by reason of the foregoing, the 1<sup>st</sup> Respondent was therefore not validly elected as Governor. This has grossly affected the integrity and outcome of the Tana River County, Gubernatorial elections held on 8<sup>th</sup> August, 2017.

**(xi) THAT it is illegal, unjust and improper for the 1<sup>st</sup> Respondent to be allowed to wear a prize on whose behalf the contest has not been fairly won considering that the 1<sup>st</sup> Respondent participated in an election that he was not duly qualified to run.**

**(xii) THAT I am advised by my advocates on record, advise I verily believe to be true that there was non-compliance of the law relating to the said election which has substantially affected the outcome and results of the said election.**

10. In cross-examination, the petitioner said he is asking the court to nullify the Gubernatorial election of Tana River County on the grounds that the current Governor is not academically qualified to hold the seat.

11. The petitioner also said he attached the degree certificate of the 1<sup>st</sup> Respondent but the same is not genuine. The petitioner said he has never gone to school but he knows that the certificate which the 1<sup>st</sup> Respondent holds is not equivalent to a degree obtained in Kenya.

12. The petitioner said he received a letter from the interested party which states the degree obtained from Kimmage Institute in Ireland is not recognized in Kenya. He said that the letter stated that the hours of study were not enough and the reason he filled this shit is that he is not satisfied with what the interested party said in the letter.

13. The petitioner also said that he is a human right activist although he does not have formal education. He said he educated himself at home. He said he knows Gubernatorial Elections in Tana River County were not conducted in accordance with the constitution of Kenya and the Election Act. He said he was involved in the primaries in his party only and he does not know what happened at the 1<sup>st</sup> Respondent's party.

14. The petitioner denied that he had filed other suits at Milimani High Court in Nairobi on the same issue. He said there is no court order saying that the degree held by the 1<sup>st</sup> Respondent is a recognized degree in Kenya.

15. When the petitioner was cross-examined by the interested party, he said he has a problem with the hours of study which the interested party has said in their letter that they are not enough. He said the school is recognized but the degree is not equivalent to a Kenyan degree and therefore the 1<sup>st</sup> Respondent is not qualified to be elected as the Governor of Tana River County.

16. The 1<sup>st</sup> Respondent who testified as DW1 also adopted his Affidavit sworn on 15<sup>th</sup> September 2017 in which it is deposed in part as follows;

**(i) THAT I was duly elected as the Governor Tana River County in the gubernatorial elections held on the 8<sup>th</sup> August, 2017 and a declaration as the winner was duly gazette vide Gazette Notice No. 7845 made on the 18<sup>th</sup> August, "2017.**

**(ii) THAT I am aware that prior to the General Elections of 8<sup>th</sup> August, 2017, the 3<sup>rd</sup> Respondent intimated to the political parties to conduct their party primaries and indeed my party Orange Democratic Party (ODM) did conduct their primaries/nominations and I was duly nominated as the candidate to vie for the gubernatorial position in Tana River County on behalf of my party, Orange Democratic Party (ODM).**

**(iii) THAT subsequently thereafter I proceeded to present my nomination papers to the 3<sup>rd</sup> Respondent and the same was received by the 2<sup>nd</sup> Respondent and upon confirmation that I had met all the requirements as stipulated on Section 22 of the Elections Act, 2011 and regulations thereto I was cleared by the 3<sup>rd</sup> Respondent to vie for the position of Governor, Tana River County.**

(iv) THAT during submission of my nomination papers to the 2<sup>nd</sup> Respondent I also presented a letter dated the 23<sup>rd</sup> September, 2016 from the Commission for University Education, (the Interested Party herein), my letter dated the 24<sup>th</sup> May, 2017 to the Commission for University Education and their response dated the 24<sup>th</sup> May, 2017.

(v) THAT I have read the purported Election Petition filed by the Petitioner and note that the complaint as stated in paragraph 7 of the Verifying Affidavit is that the Commission -or University Education vide their letter dated the 25<sup>th</sup> April, 2017 indicated that the qualification of the 1<sup>st</sup> Respondent is not an equivalent of a degree from a diversity recognized in Kenya and thus the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents breached provisions of the Constitution and the Elections Act and the regulations thereto when it cleared the 1<sup>st</sup> Respondent to run for the office of the Governor, Tana River County.

(vi) THAT as regards the above allegation I do state that I "was awarded a Bachelor of Arts (in Development Studies) degree from Kimmage Development Studies Centre on the 15<sup>th</sup> October, 2015 and it is therefore false and baseless for the Petitioner to indicate that I did not meet the criteria set out in Section 22 of the Elections Act, 2011 thus should not have been cleared to vie for the gubernatorial elections.

(vii) THAT I do state that prior to my vying for the gubernatorial position I do state as follows: -

a) On the 22<sup>nd</sup> September, 2016 I duly requested the Commission for University Education to ascertain the accreditation status of Kimmage Development Studies Centre and whether the degree offered by the Centre is recognized in Kenya.

b) On the 23<sup>rd</sup> September, 2016 the Commission for University Education responded and indicated that qualifications awarded by Kimmage Development Studies Centre are recognized in Ireland and by convention in Kenya. Annexed hereto and marked as EXHIBIT 1 are copies of the letter dated the 22<sup>nd</sup> September, 2016 from me to Commission for University Education and a response thereto dated the 23<sup>rd</sup> September, 2016.

(viii) THAT subsequently thereafter this year, 2017 I was interested in running for the gubernatorial position and before my participation in the primaries/nominations, my party, The Orange Democratic Party ( ODM) required that I provide authentication from Commission for University Education on the recognition of my qualifications from the Kimmage Development Studies Centre and on the 24<sup>th</sup> May, 2017 I duly applied to commission for University Education for recognition of my Degree Certificate and recognition of the institution and the Commission for University Education responded vide their letter dated the 24 May, 2017.

(ix) THAT I know in their letter dated the 24<sup>th</sup> May, 2017 the Commission for University Education reiterated that the qualification awarded by Kimmage Development Studies Centre are recognized in Ireland and by convention in Kenya and therefore the degree awarded to me was proper and recognized in Kenya. "Annexed hereto and marked as EXHIBIT 2 is a copy of the letter dated the 24<sup>th</sup> May, 2017 from mc to the Commission for University Education and a response thereto dated 24<sup>th</sup> May, 2017.

(x) THAT indeed during submission of my nomination papers to the 2<sup>nd</sup> Respondent I duly presented my Degree Certificate, the letter dated the 23<sup>rd</sup> September, 2016 from the Commission for University Education, my letter dated the 24<sup>th</sup> May, 2017 to the Commission for University Education and the response dated the 24<sup>th</sup> May, 2017 and I was duly cleared to

view for the Governorship position having met all the qualification stipulated in section 22 of the Elections Act.

(xi) THAT I am aware that the current Petitioner has engaged me in numerous suits involving issues relating to degree certificate awarded by Kimmage Development Studies Centre so as to embarrass and frustrate me, I verily believe the Petitioner has no reasonable cause of action in filing this Election Petition for reasons that:-

a) On 11 April, 2017 the Petitioner filed Petition No. 152 of 2017 Mohamed Dado Hatu —vs- Dhadho Gaddae Godana and 2 Others wherein Justice Chacha Mwita found that the issue relating to my academic qualification was the duty of the 3<sup>rd</sup> Respondent and the my party. I know the Petitioner did not file a complaint with either the party or the 3<sup>rd</sup> Respondent.

b) On the 8<sup>th</sup> May, 2017, one Adam Barisa Dhidha, an associate and co -petitioner of the Petitioner in Petition No. 345 of 2017 filed Petition No. 188 of 2017 Adam Barisa Dhidha -vs- Dhadho Gaddae Godana and 2 Others challenging the nomination of the 1<sup>st</sup> Respondent by his party and on 9<sup>th</sup> May, 2017 Justice Mativo dismissed the Petition indicating that the issues of 1<sup>st</sup> Respondents qualification is upon the Interested Party, the 1<sup>st</sup> Respondents political party and the 3<sup>rd</sup> Respondent to determine.

c) On the 13 July, 2017 the Petitioner acting in concert with Adam Barissa Dhidha again filed Petition No 345 of 2017 of Adam Barisa Dhidha Mohamed Dado Hatu -vs- Dhadho Gaddae Godana and 3 Others seeking orders for the gazettelement of my candidature to be revoked citing my academic qualification. And I am aware the petition was struck out with costs for being *res —judicata* on ground that the issue of my academic qualification had been determined in two previous court decisions. Annexed hereto and marked as EXHIBIT 3 are copies pleadings proceedings in Petition No. 152 of 2017 Mohamed Dado Hatu —vs- Dhadho Gaddae Godana and 2 Others, Petition No. 188 of 2017 Adam Barisa Dhidha —vs- Dhadho Gaddae Godana and 2 Others and Petition No 345 of 2017 of Adam Barisa Dhidha Mohamed Dado Hatu -vs- Dhadho Gaddae Godana and 3 Others contents which speak for themselves.

d) I am aware that he Petitioner did not file an appeal against the decisions hereinabove and the Election Petition as filed is malicious and a classic case for abuse of the court process calculated to embarrass and frustrate me.

(xii) THAT I verily believe that in view of the above this court lacks jurisdiction to determine the prayers sought in this Election Petition and pray that the Election Petition be dismissed for reasons that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were not in breach of and did not contravene the provisions of the Constitution of Kenya, the Elections Act. 2011 or any other statute and the gubernatorial election was conducted in accordance with the constitution and the Elections Act and all other relevant statutes and a valid declaration of the outcome of the gubernatorial election made and the 1<sup>st</sup> Respondent was validly elected as the Governor of Tana River County.

(xiii) THAT I swear this affidavit in opposition to the Petition dated the 4<sup>th</sup> of September, 2017 and pray that the same be dismissed with costs to the 1<sup>st</sup> Respondent.

17. In cross- examination, the 1<sup>st</sup> Respondent said he attested Mau Mau Secondary school where he finished form IV in 1996 and attained a division two. After that he joined the military where he also attended several courses.

18. The 1<sup>st</sup> Respondent said he attained his degree at Kimmage Development Centre where he was

awarded a Bachelor of Arts degree. He said he presented his degree certification to the interested party on 22/9/2016 and requested the interested party to ascertain the accreditation status of Kimmage Development Centre and to state whether the degree is recognized in Kenya.

19. On 23/9/2016, interested party responded by letter dated 22/9/2016 and stated that the qualification are recognized in Ireland and by convention in Kenya. The 1<sup>st</sup> Respondent said the constituent college he attended is in Tanzania. He said he finished classes in 2014 and graduated in 2015.

20. The 1<sup>st</sup> Respondent said the letter is divided into 3 three sections – RECOGNATION, EQUATION AND CONCLUSION. He maintained that the degree he obtained at Kimmage Development Studies is recognized in Kenya according to the letter dated 25<sup>th</sup> April 2017 from the interested party.

21. The 1<sup>st</sup> Respondent also said the reason he obtained the letter dated 25/04/2017 from the interested party was that there was a rumors that he was not qualified to vie for the gubernatorial seat. He said three suits were filed at Milimani High Court on the said issue were dismissed.

22. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents called one witness (DW2) MOHAMMED GONJOBE RAKA who was the Returning officer appointed by the 3<sup>rd</sup> Respondent in Gubernatorial Elections for Tana River county on 8/8/2017.

23. The witness (DW2) swore an Affidavit on 14/9/2017 in opposition to this petition which he asked the court to adopt as his evidence in chief which he deposed in part as follows;

**(i) THAT I have read the entire Petition filed herewith together with the Affidavit in support thereof and have had the same explained to me by my Counsels on record and wish to respond as herein below.**

**(ii) THAT I am well conversant with the facts giving rise to the instant Petition and as such I am duly competent to swear and depone to this Affidavit which I hereby do and I wish to state as follows;**

**(iii) THAT the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents deny each and every allegation in the Petition of the Petitioners as if the same were set out herein below verbatim and traversed seriatim and the Petitioner is hereby put to strict proof thereof.**

**(iv) THAT the Petition together with the Affidavit as filed herein are incompetent and fatally, defective for being an abuse of the court process given the fact that the Petitioner in his Petition has failed to prove by cogent and credible evidence all the allegations, if any, of irregularities, malpractices or breaches of the law cited in the Petition on the basis of which the election of the winning candidate/1<sup>st</sup> Respondent herein is sought to be nullified.**

**(v) THAT the Petition is ill-conceived, lacks in merit and is bad in law given the fact that, the Petitioner has not only failed to prove that there has been non-compliance with the law but that such failure of compliance did affect the validity of the gubernatorial elections for Tana River County.**

**(vi) THAT the Petition herein is incompetent, misconceived and legally untenable given the fact that from the totality of the evidence adduced, the Petitioner has not only relied on hearsay evidence but the averments, depositions and prayers as couched amount to a fishing expedition contrary to rules of evidence on ."production and admissibility of documents.**

**(vii) THAT the foregoing notwithstanding, I wish to respond to the Petition as hereunder;**

**(viii) THAT in response to paragraph 1 of the Petition, I wish to state that the Petitioner does not have the locus to institute the present proceedings and has not adduced any evidence**

and/or demonstrated the nature of his interest and/or the prejudice he has suffered as a result of the just concluded Gubernatorial elections held in Tana River County.

(ix) **THAT** Paragraphs 2, 3, 4, 5 and 6 of the Petition are admitted in as far as they are merely descriptive of the Parties herein.

(x) **THAT** in response to Paragraph 7 of the Petition, the Petitioner has failed and/or omitted to adduce the results of the Gubernatorial elections he is challenging and the figures quoted therein are mere figures without any evidence in support of the same and neither does the Petitioner adduce the Statutory instrument used to declare the results. I am advised by my Counsels on record which advise I verily believe to be true that the Petition herein is therefore defective, bad in law as the Petitioner has failed to adduce the results of the election he is seeking to challenge.

(xi) **THAT** Paragraph 8 of the Petition is admitted in as far as the same is not in dispute in the present Petition.

(xii) **THAT** in response to paragraph 9 of the Petition I wish to state that the 1<sup>st</sup> Respondent duly presented his academic credentials and upon checking and verifying the same, I cleared him as per the law to vie for the Gubernatorial position for Tana River County. As such, the Petitioner's averments are misplaced, baseless and unfounded.

(xiii) **THAT** further to the above, I duly exercised my diligence as a Returning Officer and assessed the documents presented to me in line with Section 22 of the Elections Act which I am advised by my Counsel on record which advise I verily believe to be true that the aforesaid Section is to the effect that a person must hold a degree from a University recognized in Kenya. In that regard therefore, the University in question is thus duly recognized by convention in Kenya and as such the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents duly complied with Section 22 of the Elections Act.

(xiv) **THAT** I am advised by my Counsel on record which advise I verily believe to be true that the 1<sup>st</sup> Respondent had a degree which is duly recognized in Kenya, which in any event has not been recalled and/or annulled and hence the Petitioner's are merely attempting to fault the merits of the 1<sup>st</sup> Respondent's degree.

(xv) **THAT** in response to paragraph 10 of the Petition I wish to state that the Petitioner's allegations of invalidity of the election process and non-compliance with the Constitution, Elections Act and other electoral laws are couched in generalities and are misconceived and the impugned elections herein were conducted in accordance with the provisions of the Constitution, the Elections Act and the Elections (General) Regulations as read with the international principles on elections.

(xvi) **THAT** in addition to the foregoing, I wish to state further that the Gubernatorial election process for Tana River was backed by an elaborate electoral management system supported by various electoral laws, which included several layers of safeguards to ensure an open, transparent, participatory and accountable system to guarantee free and fair elections pursuant to Article 81 as read together with Article 86 of the Constitution.

(xvii) **THAT** in response to paragraph 11 of the Petition, I wish to state that the 1<sup>st</sup> Respondent duly presented his credentials confirming that he holds a bachelor's degree as required under Section 22 of the Elections Act.

(xviii) **THAT** in response to paragraph 12 of the Petition, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents aver that they are strangers to the averments therein and the Petitioner is put to strict proof.

(xix) **THAT** in response to paragraph 13 and 14 of the Petition I wish to state that the 1<sup>st</sup> Respondent duly complied with the law and more specifically Section 22 of the Elections Act and it was upon that basis that he was duly and in accordance with the law cleared to vie for the Gubernatorial position for Tana River County

(xx) **THAT** in further response to paragraph 14 of the Petition, it is my contention that the Petitioner never at any time challenged and/or raised any issues in regard to the qualifications of the 1<sup>st</sup> Respondent with me.

(xxi) **THAT** in response to paragraph 15 of the Petition, I wish to categorically state further and reiterate that the election was conducted and carried out in accordance with the provisions of the Constitution, the Elections Act and the Elections (General) Regulations and which subsequently led to the 1<sup>st</sup> Respondent being declared the Governor of Tana River County. *Annexed herewith and marked MGR-1 is a copy of the Form 37C used to declare the final results of the Gubernatorial elections.*

(xxii) **THAT** furthermore, the 1<sup>st</sup> Respondent meets the educational requirements set out in Section 22 of the Elections Act and hence he was validly elected as the Governor of Tana River County.

(xxiii) **THAT** I deny the averments contained in paragraph 15 and further state that the integrity and outcome of the elections upon which the V<sup>x</sup> Respondent was declared by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents as the winner was never at any time compromised and the decision and final outcome was free, fair, transparent and reflected the will of the people of Tana River.

(xxiv) **THAT** further to the foregoing, I am advised by my Counsel on record which advise I verily believe to be true that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in examining the 1<sup>st</sup> Respondent's documents and credentials, it exercised its statutory and constitutional mandate as an independent institution and as such, the Petitioner cannot purport to fault the actions by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.

(xxv) **THAT** I am advised by my Counsel on record which advise I verily believe to be true that as a constitutional body, the 1<sup>st</sup> Respondent enjoys independence and is only subject to the Constitution and not any other body or person and as such, the Petitioner cannot purport to direct the 1<sup>st</sup> Respondent on how to undertake its duties.

(xxvi) **THAT** in response to paragraph 16 and 17 of the Petition I wish to reiterate my earlier depositions herein and to affirm that no irregularities and/or breaches of the law were committed at any time and the whole process was in accordance with the Constitution and the various electoral laws.

(xxvii) **THAT** I wish to state further that no anomalies, and or irregularities have been raised in the present Petition to subvert the will of the people of Tana River to warrant the grant of the orders sought in the Petition herein.

(xxviii) **THAT** no evidence has been placed before this Court and neither has the Petitioner made any contentions to impugn the process of the just concluded Gubernatorial Elections.

(xxix) **THAT** I am advised by my Counsels on record which advise I verily believe to be true that the issues being raised in the instant Petition are pre-election disputes and cannot constitute the basis of an election petition and/or constitute grounds to nullity election.

(xxx) **THAT** I am advised by my Counsels on record which advise I verily believe to be that without any prejudice to the foregoing, that it is not up to me as a Returning officer to

evaluate a candidate's qualifications and equate them to the requirements of the law.

(xxxix) **THAT** the standard of proof required to prove electoral offences and/or malpractices is proof beyond reasonable doubt and the Petitioner in this case has miserably failed to discharge that burden.

(xxxix) **THAT** the claims expressed in the Petitioner's Petition and the prayers set out therein are misconceived, wishful and an attempt to arm twist' the hands of justice by the Petitioner.

(xxxix) **THAT** I am advised by my Counsels on record which advise I verily believe to be true that the Petitioner is misconceived and aimed at subverting the will of the people of Tana River County and further denying them an opportunity to be served by their chosen representative.

(xxxix) **THAT** I am advised by my Counsels on record which advise I verily believe to be true that the Petition herein seeks to subvert the will of the people of Tana River County and to deny them the benefit of exercising their political rights as guaranteed under Article 38 of the Constitution as read with Articles 81 and 86 thereof.

(xxxix) **THAT** I urge this Honourable Court to decline the invitation by the Petitioner to illegally and through the back-door subvert the will of the people of Tana River County and deny them their rightfully chosen representatives.

(xxxix) **THAT** I swear this Affidavit in opposition to the Petition and urge the Honourable Court to dismiss the same and let the will of the people of Tana River County as confirmed by choosing the 1<sup>st</sup> Respondent prevail.

24. In cross – examination DW2 said the 1<sup>st</sup> Respondent presented to him a degree certificate from Kimmage Development Centre and a letter from the interested party confirming the said degree was recognized in Kenya.

25. DW2 said the process of verification belongs to the interested party. He said he was satisfied that the 1<sup>st</sup> Respondent was qualified to vie for Gubernatorial seat upon receiving the degree certificate and clearance letter from the interested party.

26. DW2 also said the 1<sup>st</sup> Respondent went through the party primaries and he was cleared by his party. He said the 1<sup>st</sup> Respondent had a nomination certificate from Orange Democratic Movement (ODM) and a list from the Registrar political party showing the names of those who were cleared.

27. The interested party called one witness (IPW1) PROFESSOR MWENDA NTARANGWI who is the current CEO of the interested party. The witness asked the court to adopt his Affidavit sworn on 19/9/2017 as his evidence in chief. In the said Affidavit, the witness has deposed in part as follows;

**(i) THAT I am the Commission Secretary/ Chief Executive Office of the Interested Party with full knowledge of the facts attending to this matter and duly authorized to swear this Affidavit on behalf of the Interested Party and hence competent to do so.**

**(ii) THAT I have read and understood the contents and purport of the Petition together with the Affidavit all dated 4<sup>th</sup> September 2014 and where necessary consulted the Interested Party's Advocates on record Messer's Muhoro and Gitonga Advocates and wish to respond as hereunder.**

**(iii) THAT on the 23<sup>rd</sup> of September 2016, the 1<sup>st</sup> Respondent wrote to the Interested Party seeking recognition and equation of qualifications obtained from Kimmage Development Studies Centre in Ireland. In his application, he attached a copy of the degree certificate**

together with a degree supplement providing additional information on the qualification obtained. Annexed herewith and marked "MN1" is a true copy of the Application for Recognition and Equation of Qualifications dated the 23<sup>rd</sup> of September 2016.

(iv) **THAT** on the 23<sup>rd</sup> of September 2016, the Interested Party confirmed that Kimmage Development Studies Centre is a recognised institution in Ireland and the qualification awarded by the institution recognised in Ireland and by convention recognised in Kenya as well. Annexed herewith and marked "MN2" is a true copy of the Letter from the Commission for University Education dated the 23<sup>rd</sup> of September 2016.

(v) **THAT** on the 24<sup>th</sup> April 2017, pursuant to an Order by the High Court of Kenya at Nairobi Milimani, Constitutional and Human Rights Division Petition Number 15 of 2017, the Interested Party wrote to the Petitioner through his Advocates, Messer's Muthomi Waweru & Company Advocates and stated that as per the Universities Standards and Guidelines of 2014, the qualifications though valid, were not equivalent to a similar degree offered in Kenya as the minimum admission requirements and instructional hours were not met. Annexed herewith and marked "MN3" is a true copy of the Letter from the Commission for University Education dated the 24<sup>th</sup> April 2017.

(vi) **THAT** on the 24<sup>th</sup> of May 2017, the 1<sup>st</sup> Respondent wrote to the Interested Party seeking clarity on the letter written to the Petitioner on the 25<sup>th</sup> April 2017. Annexed herewith and marked "MN4" is a true copy of the Letter from the Dhadho Gaddae Godhana dated the 24<sup>th</sup> of May 2017.

(vii) **THAT** on 24<sup>th</sup> of May 2017, the Interested Party through its then Commission Secretary/ Chief Executive Officer clarified the position by stating that equation of qualifications is usually conducted for purposes of pursuing further studies and its outcome does not negate the recognition status of the qualification of the 1<sup>st</sup> Respondents degree. Annexed herewith and marked "MN5" is a true copy of the Letter from the Commission for University Education dated the 24<sup>th</sup> of May 2017.

(viii) **THAT** the Petitioner ought to differentiate between recognition and equation of qualifications. Recognized qualification means qualification obtained from a recognized institution while equation means a degree that is equal to a similar degree in Kenya.

(ix) **THAT** the effect of the final letter by the Interested Party was that although the 1<sup>st</sup> Respondents qualification was not equal to a similar degree in Kenya as per the standards set by the Universities Standards and Guidelines of 2014; the qualification was still recognised as a degree in Ireland and thus duly recognised in Kenya by convention as envisaged in Article 2(6) of the Constitution of Kenya”.

28. I PW1 said the letter dated 25/4/2017 emanated from the interested party. He said it was in response to a letter requiring clarification as to whether the degree held by the 1<sup>st</sup> Respondent was recognized in Kenya.

29. I PW1 said Kimmage Development Studies Centre is one of the institutes which is recognized in Ireland and by convention in Kenya.

30. The witness said although the degree under question did not match the Kenyan expectation with respect with the instructional hours, the said degree is recognized in the country of origin and in Kenya by convention.

31. I PW1 said if the holder of such a degree wanted to pursue a masters degree, he would not be admitted. He said the degree is not similar to the one offered in Kenya. However, the said degree is

recognized in the country of origin and by convention, it is recognized in Kenya.

32. I have considered the evidence adduced in this petition together with the submissions filed by all the parties. I have also perused the authorities relied on by the parties. My findings are as follows;

(i) The petitioner in this petition, MOHAMED DADO HATU, a voter in Tana River county filed this petition seeking the nullification of the election of the 1<sup>st</sup> Respondent DHADHO GADDAE GODHANA (the 1<sup>st</sup> Respondent) who is the current Governor of Tana River County following the Gubernatorial elections held on 8/8/2017 on the grounds that the 1<sup>st</sup> Respondent is not qualified academically to be elected under section 22 of the Election Act.

(ii) I find that the issues for determination in this petition are as follows;

(a) Whether the 1<sup>st</sup> Respondent is qualified under section 22 of the Election Act and Regulation 47 of the Election (General) Regulation 2012 to be elected Governor of Tana River County.

(b) Whether 2<sup>nd</sup> and 3<sup>rd</sup> Respondents complied with the afore stated law when they conducted the Tana River Gubernatorial elections during the General Elections held on 8/8/2017.

(c) Whether the 3<sup>rd</sup> Respondent should be ordered to conduct a fresh Gubernatorial Elections in Tana River County.

(d) Who pays the costs of this election petition?

(iii) **Section 22 of the Election Act and Regulation 47 of the Election (General) Regulations 2012** state as follows:

Section 22 qualification for nomination of candidates

**“notwithstanding subsection 1(b) a person may be nominated as a candidate for election as president, deputy president, county governor, or county deputy governor only if the persons is a holder of a degree from a university recognized in Kenya”**(emphasis mine)

(iv) **Regulation 47 of the Election (General) Regulations, 2012** provides as follows;

**(1) “For purposes of ascertaining the education qualifications of persons for an elective post, a person seeking nomination shall submit to the commission copies of certificates of the educational qualification.**

**(2) Where the body that issued the certificate is not based in Kenya, a candidate shall be required to seek authentication of that body with the Kenya National Examination Council, in the case of form four certificates, or the commission for higher Education, in the case if university degree.”**

(v) I find that there is undisputed evidence that the 1<sup>st</sup> Respondent holds a Bachelor of Arts degree from KIMMAGE DEVELOPMENT STUDIES CENTRE. The said degree document has been annexed by all the parties.

(vi) The petitioner in his verifying Affidavit and his evidence in court during the hearing of this petition disputed the said degree certificate and said the interested party has stated in a letter dated 25/4/2017 that the said degree is not equivalent to a degree offered in Kenya.

(vii) The letter dated 25/4/2017 which has given rise to this petition states as follows in part;

## 1. "RECOGNITION

- (a) Kimmage Development Studies Centre (KDSC) is a recognized degree awarding institution in Ireland and by convention in Kenya.
- (b) The Bachelor of Arts (in development studies) qualification awarded by the said institution to Dhadho Gaddae Godana (ID No. 8266432) on 15<sup>th</sup> October, 2015 is also recognized in Ireland and by convention in Kenya.
- (c) The qualification is graded 55% (pass with merit 2). This is equivalent to a "pass degree" according to the Universities Standards and Guidelines, 2014.

## 2. EQUATION

The Universities Standards and Guidelines, 2014, places degrees like the one in question under the "Art and Humanities" cluster whose admission and instructional hours requirements are exemplified below.

### a. Admission Requirement

- (i) A Kenya certificate of secondary education (KCSE) with a mean grade of C+ and above or its equivalent, OR
- (ii) A Diploma from a Recognized Institution with a minimum of a credit, OR
- (iii) KCSE mean grade of Grade C (plain) or equivalent with a post – secondary certificate and Diploma from a recognized institution, OR
- (iv) A Kenya Certificate of Education (KCE), An East African Certificate of Education (EACE)"Ordinary Level" Division II or its equivalent , plus a post-secondary certificate and a Diploma from a recognized institution, OR
- (v) A Kenya Advanced certificate of Education (KACE)"Advanced Level" with two principal passes and a subsidiary.

### b. Instructional Hours

- (i) The minimum instructional hours into degree programmes in this cluster are one thousand, six hundred and eighty (1680).
- (ii) The total credits for the qualification under investigation are one hundred and ninety eight (198).
- (iii) Each Credit under this cluster is equivalent to three (3) instructional hours.
- (iv) The qualification in question was, therefore, obtained within five hundred and ninety four (594) instructional hours.
- (v) Hence, the qualification falls short of the minimum allowed hours by one thousand and eighty six (1086) instructional hours.

## 3. CONCLUSION

Granted the foregoing, the said qualification is recognized in Kenya by convention since it is legally offered in Ireland and the latter subscribes to the same international education conventions as the former. The qualification is however, not equivalent to a

**similar degree programme offered in Kenya since it falls below the minimum admission requirements and instructional hours stipulated in The Universities Standards and Guidelines, 2014”**

(viii) I find that the interested party herein is the body mandated to recognize degrees which are issued outside the country.

(ix) There is evidence that three petitions were filed at Milimani High Court challenging the academic qualifications of the 1<sup>st</sup> Respondent prior to the general Election on 8/8/2017. The High Court dismissed the three petitions on the basis that they were filed in the wrong forum.

(x) The last petition was dismissed with costs on 4/8/2017, a few days to the General Election held on 8/8/2017 where the 1<sup>st</sup> Respondent was declared winner of the Gubernatorial Election for Tana River County.

(xi) An Application by the 1<sup>st</sup> Respondent seeking to strike out this petition on the basis that the same is *res judicata* was dismissed for reasons that the three petitions filed at Milimani High Court did not make a determination on the issue of the academic qualifications of the 1<sup>st</sup> Respondent as the three Judges said the same thing-that the suit was filed in the wrong forum.

(xii) This court also made a determination that after the general elections, the dispute escalated into an election petition and hence this court is properly seized of the jurisdiction to determine whether the 1<sup>st</sup> Respondent is academically qualified to be elected as Governor under section 22 of the Election Act and Regulation 47 of the Regulation (General) Election Regulation 2012.

(xiii) I find that it is the mandate of the interested party to determine the issue of the academic qualifications of the Governor.

The degree certificate from Kimmage Development Studies Centre was presented to the interested party and interested party said in the letter dated 25/4/2017 that Kimmage Development Studies Centre is a recognized institution in Ireland and by convention in Kenya.

(xiv) I accordingly find that the 1<sup>st</sup> Respondent being the holder of the said degree from a university recognized in Kenya is qualified to vie for the Gubernatorial seat in Tana River.

(xv) I find that the dispute arose due to a statement in the letter that the degree held by the 1<sup>st</sup> Respondent is not equivalent to the one offered in Kenya. The last paragraph of the letter dated 25<sup>th</sup> April 2017 states on the said issue as follows;

**“The qualification is however, not equivalent to a similar degree programme offered in Kenya since it falls below the minimum admission requirements and instructional hours stipulated in The Universities Standards and Guidelines, 2014”**

(xvi) I find that the witness for the interested party (IPW1) PROFESSOR MWENDA NTARANGWI said the purpose of the degree is for undertaking further studies and he confirmed in his evidence before this Court and in his affidavit filed in this petition that the said degree is nonetheless recognized in its country of origin and in Kenya by convention. He stated as follows in the 2<sup>nd</sup> last paragraph of his Affidavit;

**“although the 1<sup>st</sup> Respondent's qualification was not equal to a similar degree in Kenya as per the standards set by the Universities Standards and Guidelines of 2014; the qualification was still recognised as a degree in Ireland and thus duly recognised in Kenya by convention as envisaged in Article 2(6) of the Constitution of Kenya.”**

(xvii) I find that in the circumstances, the petitioner has no basis for disputing the academic qualifications of the 1<sup>st</sup> Respondent when the 1<sup>st</sup> Respondent has a degree certificate which he has presented to the interested party and the same has been authenticated by the interested party as one recognized in its country of origin and by convention in Kenya.

(xviii) The petitioner in his evidence and submissions said that the 1<sup>st</sup> Respondent's qualification falls short of a degree under the universities Act and cannot be a degree envisaged under section 22 of the Election Act. However, the interested party is the body mandated by law to carry out the duty of recognizing and equating qualifications and the CEO of the interested party clearly stated that although the said degree is not equivalent to a degree in Kenya, the same is recognized in Kenya and that the purpose of equation is for further studies.

(xix) I find that this petition initially emerged as a pre-election dispute and escalated into an election petition after the 1<sup>st</sup> Respondent was declared winner of the Tana River gubernatorial seat. After the general election the horse had already bolted and the only place the petitioner could take the dispute is to this election court.

The petitioner, a voter in Tana River had a chance to canvas his concerns about the academic qualifications of the 1<sup>st</sup> Respondent and the 1<sup>st</sup> Respondent also had the opportunity to display his academic qualifications and to dispel the rumors that he is not qualified to vie as governor under the afore stated laws. I find that the interested party has clarified that **“although the 1<sup>st</sup> Respondents qualification was not equal to a similar degree in Kenya as per the standards set by the Universities Standards and Guidelines of 2014; the qualification was still recognised as a degree in Ireland and thus duly recognised in Kenya by convention as envisaged in Article 2(6) of the Constitution of Kenya.”**

(xx) I accordingly find that the 1<sup>st</sup> Respondent is qualified to vie for Gubernatorial elections in Tana River.

(xxi) On the issue as to whether the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents conducted the gubernatorial Elections in accordance with the law with respect to the said qualifications, I find that the answer is in the affirmative.

(xxii) There is evidence that the 1<sup>st</sup> Respondent presented to the 2<sup>nd</sup> Respondent as the Returning officer of the 3<sup>rd</sup> Respondent his degree certificate, clearance from the interested party and certificate of nomination from his party prior to the general elections. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents complied with the law and they are not at fault in accepting the party nomination of the 1<sup>st</sup> Respondent.

(xxiii) Finally, I find that there is no basis for seeking to have the 3<sup>rd</sup> Respondent conduct a fresh gubernatorial elections in Tana River County with respect to the issue of the academic qualifications of the 1<sup>st</sup> Respondent as the interested party has confirmed that the 1<sup>st</sup> Respondent is qualified to vie.

(xxiv) This petition is accordingly dismissed and on the issue of costs, it is trite law that costs follow the event. The costs of this petition are accordingly granted to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and also to the interested party. The same are however capped at Ksh. 2 million only.

Orders to issue accordingly.

**Dated, signed and delivered at Malindi this 5<sup>th</sup> day of January, 2018.**

**ASENATH ONGERI**

**JUDGE.**