



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

ELECTION PETITION NO.1 OF 2017

LESRIMA SIMEON SAIMANGA.....PETITIONER

- V E R S U S -

INDEPENDENT AND ELECTORAL BOUNDARIES COMMISSION...1ST RESPONDENT

RETURNING OFFICER SAMBURU COUNTY.....2ND RESPONDENT

LENOLKULAL MOSES KASAINIE.....3RD RESPONDENT

J U D G M E N T

This petition is filed by **Lesrima Simeon Saimanga** who contests the return of **Lenolkulal Moses Kasaine** (*the 3rd respondent*) as the Governor of Samburu County following the elections held on 8th August, 2017. There were three contestants for the Samburu County Gubernatorial seat and the declared results were as follows:

- (1) Lenolkulal Moses Kasaine - 40,467 votes
- (2) Lengoiboni Gabriel Kimoroko - 20,204 votes
- (3) Lesrima Simeon Saimanga - 3,260 votes

The election was conducted by the **Independent Electoral and Boundaries Commission (IEBC)** (*the 1st respondent*) whose County Returning Officer was **Ben Moseti Misati** (*2nd respondent*). The *3rd respondent* is Lenolkulal Moses Kasaine, the Governor of Samburu.

The county is made up of three Constituencies namely: Samburu North, Samburu East and Samburu West. The County had in total, 284 Polling Stations.

Dissatisfied with the conduct and declaration of the results, the petitioner preferred this petition dated 5/9/2017 and filed in court on 6/9/2017.

The petitioner seeks the following reliefs:

- (a) That a declaration be and is hereby granted to the effect that the Gubernatorial election of Samburu County held on 8/8/2017 was invalid and contrary to the Constitution of Kenya, 2010 and the various Election Laws and Regulations and therefore null and void and of no consequence thereof and invalid;***
- (b) That a declaration order be and is hereby issued quashing the results of the Samburu Gubernatorial elections as declared by the 2nd respondent on 10/8/2017;***
- (c) The cost of this petition;***
- (d) Any other or further relief that this court deems appropriate.***

The grounds upon which the petition is premised are found at paragraphs 6 – 20 of the petition and they are replicated at paragraphs 5 – 22, 24 of the petitioner's affidavit. The complaints are as follows:

1. Irregularities in form 37As:

- (a) Unstamping of Form 37As;*
- (b) Unsigning of Form 37As by Orange Democratic Movement Party (hereby referred to as ODM) agents or agents contracted by the ODM chief coordinator;*
- (c) Unsigning of Form 37A's by Kenya African National Union Party agents (KANU);*
- (d) Unsigning of Form 37As by Jubilee Party Agents;*
- (e) Signing of Form 37As by party agents from political parties that did not have candidates vying in the Gubernatorial position;*
- (f) Form 37As that on the face of it, appear to have been signed by one person and/or similar handwriting;*
- (g) Form 37As signed by the Presiding Officer only;*
- (h) Form 37As only signed by the Deputy Presiding Officer;*
- (i) Form 37As bearing no party agents signatures and no reasons indicated;*
- (j) Unstamped and unsigned form 37As with no reasons given;*
- (k) Form 37As signed by Agents from Independent Candidates;*
- (l) Form 37As signed by only a single party;*
- (m) Form 37As signed by 'NASA' agents;*
- (n) Form 37As with blank counts details indicated;*
- (o) Form 37As without the prerequisite security features;*
- (p) Form 37As not signed by any party agents completely and no reasons given;*
- (q) Form 37As signed by DC party Agents;*
- (r) Form 37As where the party agents' political parties have not been indicated;*
- (s) Form 37As signed by Party Agents from 'KANU Fresh' political party among others;*
- (t) Form 37As signed by agents with nonexistent telephone numbers from service providers;*
- (u) Form 37As bearing similar signatures by both the Presiding Officer and the Deputy Presiding Officer and a stamp appended over the signatures;*
- (v) Form 37As whereby no identity card number and contact of KANU Agent is given;*
- (w) Form 37As signed by Jubilee Agents only;*
- (x) Form 37As signed by more than 3 agents from parties with no Gubernatorial candidates;*
- (y) Form 37As with arithmetical inconsistencies.*

2. Irregularities in Form 37Bs:

- (a) That the 1st respondent issued to the petitioner two sets of forms 37As for Samburu East Constituency and both bear anomalies and inaccuracies;*
- (b) That the 1st respondent issued to the petitioner form 37B for Samburu West Constituency which bears grave anomalies i.e. it does not bear HANDING OVER – TAKING OVER SECTION; bears only 2 signatures from persons affiliated with Jubilee party and a purported 'NASA';*
- (c) That the 1st respondent issued to the petitioner form 37B of Samburu North Constituency which has anomalies – i.e. Handing Over – Taking Over is blank and the form only bears two signatures from persons affiliated with Jubilee Party and ODM.*

3. (a) That the 1st respondent's officials denied and/or willfully refused to avail the duly appointed ODM agents and supporters, copies of Form 37As;

(b) That some agents were deliberately locked out of the polling and tallying stations.

The issues that arose from these grounds are:

(1) Whether the petitioner's agents were denied access to the polling stations and tallying centres;

(2) Whether the alleged irregularities and illegalities substantially affected the outcome/results of the election;

(3) Whether the election was conducted in accordance with the law.

The petition was supported by an affidavit sworn by the petitioner. Two other persons who had sworn affidavits in support of the petition had their affidavits (i.e. **Doris Lopatoie** and **Jaheem Logialae**) struck out by this court vide its ruling of 22/11/2017 due to the fact that they had been commissioned by counsel for the petitioner. The 3rd affidavit of **Jackson Lekarsia** was struck out on the same grounds and also because the deponent retracted his affidavit. By the application dated 13/10/2017, the court granted the petitioner leave to file supplementary affidavits outside the stipulated time but none was filed. In another application dated 11/12/2017, the petitioner sought to have other witnesses file affidavits in support of the petition but for reasons, *inter alia*, that the affidavits introduced new unpleaded issues, the court declined to grant the orders. Therefore, this petition only turns on the petitioner's affidavit and he is the only witness who testified in support of the petition. The petitioner adopted his affidavit in evidence where he reiterated the above grounds and was cross examined thereon.

The respondents filed their respective affidavits, denying the allegations leveled against them by the petitioner. The respondents denied that there were irregularities, malpractices or non compliance with the Constitution and other Electoral Laws, but that even if there were any irregularities, they were minor and were not so cumulatively fundamental as to affect results of the elections. The 2nd respondent **Ben Moseti Misati (DW1)** and **Joshua Tulwo (DW2)** the Returning Officer for Samburu West Constituency both testified on behalf of the 1st and 2nd respondents. The 3rd respondent also testified.

The petitioner was represented by three counsel, Mr. Gilbert, Mombo and Ochieng' Oginga; the 1st and 2nd respondents were represented by Mr. Karanja while the 3rd respondent was represented by Mr. Mwangi and Miss Peinan.

At the conclusion of the case, the parties filed submissions which they highlighted in court.

In the petition, it is alleged that the impugned conduct and declaration of the Gubernatorial results was made in breach of the Election Act, especially Section 39 of the Elections Act and Articles 1, 2, 3, 10, 27(1), 38, 81, 86 and 249 of the Constitution.

Before considering the issues raised in the petition, I think it is necessary to consider some of the key principles in the above listed provisions that govern the conduct of elections and resolution of election petitions.

Article 1 of the Constitution recognizes the sovereignty of the people of Kenya and that power is exercised through democratically elected representatives in the election process. **Article 38 of the Constitution** sets out the political rights of the individual and underpins the said sovereignty of the people. It provides as follows:

“Article 38(3) Every adult citizen has the right, without unreasonable restrictions:-

(a) to be registered as a voter:

(b) to vote by secret ballot in any election or referendum: and

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

The rights guaranteed under Article 38 are realized through the electoral process set out under Chapter 7 of the Constitution which is titled **“Representation of the People”**.

Article 81(3) of the Constitution outlines what free and fair elections entail; they must be by free ballot, free from violence, intimidation, improper influence or corruption. The election must be conducted by an independent body, must be transparent, neutral, efficient, accurate and accountable.

Article 88(1) of the Constitution establishes the IEBC whose functions are set out in the IEBC Act (No.9 of 2011).

Article 86 of the Constitution sets out the principles that guide the IEBC in the conduct of the actual voting. It provides as follows:

“At every election, the Independent Electoral and Boundaries Commission shall ensure that:

- (a) whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent;
- (b) the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station;
- (c) the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and
- (d) appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials.”

Article 10 of the Constitution, sets out the National Values and principles of governance which every state officer, public officer is enjoined to observe. They include, “**good governance, integrity, transparency and accountability**” (Article 10 (2)(c).

Article 249 of the Constitution sets out the objects and authority of Commissioners and Independent Officers which includes the protection of the people and promotion of Constitutionalism.

Section 39 of the Elections Act is concerned with determination and declaration of results; tallying, collating and submission of the results in the prescribed forms by the Presiding Officers and Returning Officers.

Burden of proof:

As observed earlier, the will and sovereignty of the people is expressed through the election process. Elections are a serious, tedious and expensive process. Anyone wishing to challenge the said process must come with cogent evidence to prove that it was not the will of the people or that the election was conducted contrary to the Constitution and the law.

Section 107 of the Evidence Act provides:

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law, that the proof of that fact shall lie on any particular person.”

In the case of **Ben Njoroge and another v IEBC & 2 others 2013 KLR**, the court held:

“The burden of proving any allegation of election breach, misconduct and/or irregularity lies squarely upon the petitioner. The legal principle is that ‘he who alleges must prove’. In the case of Gideon Mwangi Wambua v IEBC & 20 others, E.P.4 of 2013, it was held that it is a presumption of law that elections were properly conducted and as such, the burden is always upon the petitioner to prove otherwise. This was further buttressed in the case of Joho v Nyange and another (2008) 3 KLR E.P.)500, where the court in upholding the position that the burden of proof lies with the petitioner, held that “election petitions are no ordinary suits but disputes in rem of great public importance”. They should not be taken lightly and generalized allegations are not the kind of evidence required in such proceedings. Election petitions should be proved by cogent, credible and consistent evidence. “.....the burden of proof in election petitions lies with the petitioner as he seeks the nullifying of an election....”.

The Supreme confirmed the above position in **Petition 5 of 2013 Raila Odinga v The IEBC & 2 others** where it is stated:

“Where a party alleges non-conformity with electoral law, the petitioner must not only prove that there had been non-compliance with the law but that such failure and non-compliance did affect the validity of an election. This emerges from a long standing common law approach in respect of alleged irregularity in the acts of public bodies ominiapraesumuntu rite solemniterresseacta (All acts are presumed to have been done, rightly and regularly). So the petitioner must set out by raising firm and credible evidence of the public authority’s departures from the presumption of the law.”

Section 83 of the Elections Act sets out the circumstances under which an election court can invalidate an election. The said section reads as follows:

“No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law or that the non-compliance did not affect the result of the election.”

The said section was considered in extenso in the case of **Raila v IEBC E.P.1/2017** which in turn considered the case of **Morgan v Simpson (1974) 2 ALL ER** where a similar provision had been considered. In the Morgan case, after considering the case law, Lord Denning M.R. Said as follows:

“(i) If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election was vitiated, irrespective of whether the result was affected, or not...

(ii) If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by a breach of the rules or a mistake at the polls-provided that it did not affect the result of the election...

(iii) But, even though the election was conducted substantially in accordance with the law as to elections, nevertheless if there was a breach of the rules or a mistake at the polls and it did affect the results-then the election is vitiated...

The Supreme Court in *Raila's case 2017 (Supra)* gave the section a wider interpretation when it said:

“(207) Be that as it may, the issue as to how Section 83 of the Elections Act ought to be interpreted by a court of law in determining the validity or otherwise of an election, was later authoritatively settled by this court in Gatirau Munya v Dickson Mwenda Githinji and 2 others (2014) eKLR.

(208) We are surprised that none of the counsel who canvassed this issue, made any reference to this case. This court, was never in any doubt as to the disjunctive character of Section 83. The 7-judge bench was categorical, when stating thus:

“it is clear to us that an election should be conducted substantially in accordance with the principles of the Constitution, as set out in Article 81(e). Voting is to be conducted in accordance with the principles set out in Article 86. The Elections Act, and the Regulations thereunder, constitute the substantive and procedural law for the conduct of elections...if it should be shown that an election was conducted substantially in accordance with the principles of the Constitution and the Election Act, then such election is not to be invalidated only on ground of irregularities. Where however, it is shown that the irregularities were of such magnitude that they affected the election result, then such an election stands to be invalidated. Otherwise, procedural or administrative irregularities and other errors occasioned by human imperfection, are not enough, by and of themselves, to vitiate an election...where an election is conducted in such a manner as demonstrably violates the principles of the Constitution and the law, such an election stands to be invalidated:

As further held in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others (2014) eKLR*, only irregularities that affect the result of the election and thereby undermine the integrity of the electoral process are grounds for overturning an election. The Supreme Court appreciated the fact that human imperfections in the electoral process is expected given the stressful conditions under which the elections are conducted, the fact that it is conducted by human beings who are bound to err.

Standard of proof:

Election petitions are a special litigation not similar to the ordinary civil cases. The standard of proof in an election petition is higher than on a balance of probability but lower than beyond reasonable doubt. In *Raila Odinga and others v IEBC E.P.5/2013 (2013) KLR*, the court said as follows:

“Para 203...the threshold of proof should in principle, be above the balance of probability, though not as high as beyond reasonable doubt – save that this would not affect the normal standards where criminal charges linked to an election are in question.”

Of pleadings:

It is trite that each party is bound by its pleadings. The petitioner is therefore bound to prove the case that is contained in his petition, the affidavits and any documents that were exhibited. The courts have repeatedly asserted the above position, and there is a wealth of authorities on the issue. The court cannot, therefore, adjudicate on issues beyond those pleaded in the petition. This position is supported by the Supreme Court in *Raila's case 2017* where it cited with approval, the Supreme Court of India in *Arikala Narasa Reddy v Ventaka Ram Neddy Reddygari & another Civil Appeals No.5710 – 5711 of 2012 (2014) 2 SCR* where the court said:

“In the absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.”

I also associate myself with the decision of Justice Kimaru in *Mahamud Muhumed Sirat v Ali Hassan Abdurahman and 2 others NRB.E.P.15/2008 (2010) eKLR* where the judge stated:

“From the outset, this court wishes to state that the petitioner adduced evidence and even made submissions in respect of matters that he had not specifically pleaded in his petition.

It is trite law that a decision rendered by a court of law shall only be on the basis of the pleadings that have been filed by the party moving the court for appropriate relief. In the present petition, this court declined the invitation offered by the petitioner that required of it to make decisions in respect of matters that were not specifically pleaded. This court will therefore not render any opinion in respect of aspects of the petitioner's case which he adduced evidence but which were not based on the pleadings that he had filed in court and particularly, the petition.”

See *Jackton Nyanungo Ranguma v IEBC and 2 others E.P.3/2017 (Kisumu) and Wavinya Ndeti, Peter Mathuku v IEBC & 2 others E.P.1/2017 (Machakos)* where the courts reiterated the above position.

Armed with the above principles, it is now time to address the issues raised in the petition bearing in mind that I will limit my judgment to

the pleadings, the testimony of the petitioner and the documents produced in support thereof.

Report on 'Read only Access':

The petitioner filed the application dated 5/9/2017 seeking various orders and on 6/12/2017, the court granted the following orders:

(1) Prayers 3a and 4 are declined.

(2) As regards prayer 3(b) and (c) I allow the petitioner to a read only access to the data extracted from the KIEMS KIT in respect of forms 37A and 37B which is contained in the SD cards.

(3) As regards prayer 5, the 1st respondent to avail the original form 37A, 37B and 37C for access.

(4) The 1st respondent to make arrangements for the read only access to be conducted in the presence of the Deputy Registrar, all parties and/or their agents. Compliance to be within 5 days.

(5) The Deputy Registrar to prepare a report in respect of the access for the court.

(6) The counsel may take notes for use in cross examination or submissions later during the hearing of the petition.

After the exercise, the Deputy Registrar filed his report and the petitioner's counsel was satisfied with the exercise and that fact was recorded by the court. In the petitioner's submissions however, counsel prepared a submission titled, '**Report on Scrutiny of Form 37Bs**'. First of all, this court never ordered for scrutiny and none was done in this case. Secondly, the court's order was very clear that the petitioner would use his findings from the '**read only access**' during cross examination and submissions.

During cross examination of DW1 and DW2, the petitioner never raised any issues arising from the '**read only access**'. In the submissions however, the petitioner alleged that in the exercise, they found that some SD Cards were missing. This had not been raised during cross examination of the witnesses nor was any other issue raised regarding the read only access to the forms 37A, 37B, 37C. Had any issue been raised in cross examination, the respondents would have had an opportunity to respond. The petitioner cannot be allowed to raise these issues in his submissions without having laid a basis in the pleadings or in the cross examination of the respondent's witnesses.

Allowing the petitioner to sneak in issues on the '**read only access**' would amount to the petitioner expanding the scope of his petition and this court would be overstepping its mandate if it were to make any determination on the issue. Of course such a determination would be to the disadvantage of the respondents who had no notice that the issues would be raised at the stage of submission when respondents had no opportunity to reply.

Of Alterations:

Related to the above issue is the question whether this court can make a determination on the issue of alterations that were made to statutory forms. It is the petitioner's submission that the court ought to have granted him an opportunity to cross examine the County Returning Officer, Samburu (DW1) and Presiding Officer Samburu West (DW2) on the altered forms. When the petitioner attempted to cross examine the witnesses on alterations on the forms, the court ruled that the issue of alterations was not pleaded.

The petitioner submitted that the court is bound to consider the alterations as the court should not close its eyes to the illegalities committed by IEBC. Counsel relied on the decision in **Moses Masika Wetangula v Musikari Kombo & 2 others Supreme Court Petition 12/2014** where the court held:

"The court can not appear to condone illegality in election process, and would therefore investigate any alleged breaches of law, even where these were not in the pleadings but rose in the course of the trial."

The respondents opposed this invitation made by the petitioner to the court to accept and consider unpleaded issues and counsel cited several authorities where courts have held that the court cannot make a determination on unpleaded issues;

In **Raila Amollo Odinga – 2017 Supra**, the court quoted with approval the decision in Supreme Court of India in **Arikala Narasa Reddy (Supra)**; the same case was relied upon by J. Manjanja, in **Jackson Nyanungo Ranguma v IEBC & 2 others E.P.3/2017 (Kisumu) (2018) KLR**. I have already considered the case in this judgment.

I must point out that in the **Wetangula case**, the Supreme Court was dealing with breaches of the law (criminal offences) that arose during the proceedings and the court recommended that the same be referred to the Directorate of Public Prosecution for investigations. In the instant case, the alterations which the petitioner wants considered by the court existed at the time this petition was filed and are not of a criminal nature. The petitioner had an opportunity to present his whole case to court but not litigate piece meal. The court will be guided by the decisions cited by respondents and I adopt the recent finding by J. Manjanja on a similar issue in **Ranguma's case (Supra)** when he said '**A petitioner is not permitted to make a case outside the pleadings and his affidavits and testimony must be consistent with and support the case pleaded.**'

In addition to the above findings this court had already ruled that the issue of alterations had not been pleaded and the petitioner's counsel could not cross examine on them. The issue is *res judicata* and the petitioner can only wait to appeal, if it will become necessary.

(A) Whether the petitioner's agents were denied access to polling stations or tallying centres and declaration forms:

1. The petitioner has complained that his agents were denied access or chased away from polling stations/tallying centres, and were denied access to the declaration forms and those acts therefore compromised the integrity of the election process. The question is who is an agent and what is his role? **Section 2 of the Elections Act** defines an agent to mean:

“Agent means a person duly appointed by:

(a) A political party or an independent candidate for the purposes of an election under this Act; or

(b).....and includes a counting agent and a tallying agent.”

Section 30 of the same Act then provides for appointment of agents. Section 30 provides:

“(1) A political party may appoint one agent for its candidates at each polling station;

(2) Where a political party does not nominate an agent under subsection (1), a candidate nominated by a party may appoint an agent of the candidate's choice;

(3) An independent candidate may appoint his own agent;

3A.....”

Once an agent is appointed, Regulation 5 of the Elections (General) Regulations, 2012 requires that he takes an oath of secrecy. The duties/functions of the agents are set out in the Regulations and they include: Inspection of ballot papers; witness voter identification; generally witness the voting process; witness the sealing of the ballot boxes; sign the declaration forms under Reg.79(2A)(b); keep a copy of the declaration and witness the tallying of the results under Regulation 82.

Before one is deemed to be an agent, he must comply with Regulation 74 which provides as follows:

“74(1) No agent shall be deemed to be an agent for the purposes of counting unless at least forty eight hours before the close of the poll in that election, the candidate or political party, as the case may be, has submitted to the Presiding Officer:

(a) The name and address of the agent; and

(b) A letter of the appointment of the agent.

(2) A Presiding Officer shall not allow a person whose name, address and authorization has not been so submitted to attend at a counting of votes notwithstanding that the appointment of that person is otherwise in order.”

The petitioner was sponsored by the ODM party, which is under NASA coalition umbrella. It is ODM which had the duty to appoint agents, failing which the petitioner would appoint his own. The agents' names and addresses were required to be presented to the Presiding Officer 48 hours before the poll.

In his testimony, the petitioner admitted that some agents were appointed by the NASA coalition for ODM party while others were appointed by himself.

However, the petitioner did not produce any documentary evidence by way of a list of the agents belonging to ODM (NASA) or appointed by himself. He could not recall any of the agents he appointed. The petitioner did not call any of his agents as witnesses to give credence to his allegations that his agents were locked out or were turned away from any polling station or tallying centre or were denied access to the declaration forms.

The petitioner was unable to tell whether he had any agents at Simiti Primary School, Soit Pus Primary School, Lmarim Primary School, Samburu Lodge Polling stations, including many other polling stations.

It is trite that he who alleges must prove. The petitioner did not demonstrate that indeed any of his agents were locked out or were denied access to any polling stations or denied a chance and to sign the statutory forms or were ejected from any polling station.

The complaints by the petitioner that his agents were locked out or ejected from polling stations and tallying centres are mere allegations that he never put effort to prove. They remain mere allegations.

(B) Whether alleged irregularities and illegalities on the statutory Form 37As affected the outcome of the elections:

(i) Of unstamping of form 37As:

The petitioner exhibited at pages 36 to 75 (LSS2) of the petition, Form 37As that did not bear the IEBC stamp. It is the petitioner's

contention that stamps authenticate a document and failure to stamp the mentioned form 37As rendered the forms null and void. Counsel relied on the decision in *Shah & another v Investment & Mortgages Bank Ltd & 2 others (2001) KLR 190* where the court held that a name, signature and stamp authenticate a document. He further relied on the case of *Joy Kabetsi Kafura v Anifa Kawooya Bangirana E.P.25/2007* Supreme Court of Uganda. In that case, the court said that an election is a process which encompasses several activities and if anyone activity was flawed, through failure to comply with the law, subject to the gravity of the flaw, it would affect the election results. The petitioner did not tell the court, what effect the non stamping of the 39 forms had on the election results because the forms were otherwise properly authenticated by the Presiding Officers and agents. In *Abdikhaim Osman Mohamed & another v IEBC CA.293/2013* which the petitioner relied on the court found many more serious irregularities including lack of signatures of Presiding Officers in 31 forms, 35 forms were missing e.t.c.

Regulation 79 of the Regulations sets out what the Presiding Officer should do after declaration of the results i.e. sign the declaration but there is no provision for stamping of the form. I am guided by the decision in *IEBC & another v Stephen Mutinda Mule & 3 others* where the Court of Appeal said:

“There is no stamping requirement in the case of Form 35. All that is required with regard to Form 35 as provided in Regulation 79 is the signature of the Presiding officer and the agents of the candidates.”

It is the signature of the Presiding Officers and the agents that authenticate the Form 35. If any such forms were stamped, it was a gratuitous and super flours discretionary or administrative act incapable of creating a statutory obligation, less still, the invalidation of the Forms 35 that did not contain the stamp.”

In *Raila Odinga case (2017)* the court emphasized that it is the signature of the Returning or Presiding Officer on the form that assures a voter of the contents in the form.

Even though the County Returning Officer and Presiding Officers (DW1 & 2) told the court that stamping was a key component of authenticating the results, stamping is not a statutory requirement and may only be administrative in nature and cannot invalidate the results. The petitioner has not demonstrated that stamping of Form 37A is mandatory or that failure to stamp affected the results.

(ii) Of unsigned forms 37A by ODM agents:

The petitioner faulted the results from several polling stations where ODM agents did not sign form 37As. These are at pages 76(a) 121(LSS-3) of the petition i.e. 45 polling stations. I have earlier in this judgment dealt with the allegation that ODM agents were denied access to polling stations. The petitioner failed to produce any documentary or other evidence that he had his agents in all polling stations or who the agents were. This court cannot presume that the petitioner had agents in all polling stations and specifically where they did not sign. It is the petitioner who bears the burden to prove that he had agents. He did not discharge that burden. Besides, Reg.79(7) takes care of a situation where a candidate or agent does not sign the declaration.

The rule reads ***“79(7) the absence of a candidate or an agent at the signing of a declaration form or the announcement of the results under sub regulation (2) shall not by itself invalidate the results announced.”***

It is therefore not mandatory for either the candidate or agent to sign the declaration. I do agree with the suggestion made by respondent’s counsel that the Regulation was meant to cure the mischief whereby a candidate or agents sensing defeat, may decline to sign the declaration thus defeating the whole exercise.

In addition to Regulation 79(7) is Reg.97 which provides:

“Where in these Regulations expression is used requiring authorizing or implying that, any act is to be done in the presence of the candidate or agents, that expression shall be regarded as reference to the presence of such candidates or agents as may be required or authorized to attend;

(2) The mere non-attendance of any candidate or agent at the time and place as contemplated under sub regulation (1) shall not, if any act is otherwise lawfully done, invalidate the act.”

This issue was addressed in *Elizabeth Ongoro’s case (Supra)* when the court said: ***“The law is thus clear that in the absence of proof of an unlawful act, the mere absence or failure by an agent to sign the form without more, cannot invalidate the act or proceedings in an act which the agent was required to participate.”***

The petitioner did not ensure that his agents, if he had any, attended their place of assignment and wants the respondents to bear his burden.

(iii) Of Form 37As not signed by Agents of other parties and no reason given:

It is the petitioner’s case that signing of Form 37A by agents is mandatory: That the statutory forms are in a prescribed form and they specify where each party should sign with a view to authenticating and verifying the results therein, so that if any form is not signed, then it was incomplete and lacks credibility.

In the petition were exhibited the following forms as not having been signed by agents of other parties:

1. Form 37A not signed by KANU Agent

Page 122 – 131 of the Petition;

2. Form 37A not signed by Jubilee Agents

Page 132 – 138;

3. Form 37A with no party Agents and no reasons given at

Pages 159 – 167;

4. Form 37A not signed or stamped with no reasons given at Page 168 of the petition and 214.

Mr. Gilbert submitted that failure to sign the forms contravened Regulations 79(1) (2)(b) (2A)(b) and 3.

Regulations 79(1) to (7) provides as follows:

(1) The presiding officer, the candidates or agents shall sign the declaration in respect of the elections.

(2) For purposes of subregulation (1), the declaration for—

(a)

(b) National Assembly, county women representatives, Senator, county governor and county assembly elections shall be in Form 35 set out in the Schedule.

(2A) The presiding officer shall—

(a) immediately announce the results of the voting at that polling station before communicating the results to the returning officer;

(b) request each of the candidates or agent then present to append his or her signature;

(c) provide each political party, candidate, or their agent with a copy of the declaration of the results; and

(d) affix a copy of the declaration of the results at the public entrance to the polling station or at any other place convenient and accessible to the public at the polling station

(3) Where any candidate or agent refuses or otherwise fails to sign the declaration form, the candidate or agents shall be required to record the reasons for the refusal or failure to sign.

(4) Where a candidate or an agent refuses or fails to record the reasons for refusal or failure to sign the declaration form, the presiding officer shall record the fact of their refusal or failure to sign the declaration form.

(5) Where any candidate or agent of a candidate is absent, the presiding officer shall record the fact of their absence.

(6) The refusal or failure of a candidate or an agent to sign a declaration form under subregulation (4) or to record the reasons for their refusal to sign as required under this regulation shall not by itself invalidate the results announced under subregulation (2)(a).

Regulation 79(7) is already set out earlier in this judgment.

In his testimony, the petitioner did admit that Jubilee agents were not his agents nor could they verify his results. He was not able to confirm if the candidates in KANU, Jubilee had agents in the Polling Stations where the declarations were not signed. DW3 (the 3rd respondent) in his testimony told the court that he was aware that he did not have agents in some Polling Stations due to personal or logistical reasons and denied that the absence of the agents affected the results. In my view, the petitioner has no authority to question why KANU or Jubilee agents did not sign the declaration.

Regulation 79(7) is clear that refusal or failure by a candidate or agent to sign a declaration form does not invalidate the results. The above position was considered in **Thomas Malinda Musau & 2 others v IEBC 2013 eKLR** where the court said:

“Though it was crucial for agents or candidates to sign Form 35, failure to do so does not necessarily nullify the elections.”

For example, in the following polling stations, the candidate did not have agents but they still won: At Consolata Nursery School Polling Station, Naimarlal, Kawap Primary School and Wamba CCM Primary School, KANU did not have an agent yet Longoiboni won. It is apparent, from the above results, that absence of a party’s agent did not necessarily mean that the result was compromised.

It was the duty of the petitioner to demonstrate that by failing to sign the Form 37As by the agents, the results were compromised but that was not done.

Regulation 79(3) provides that a candidate or agent who refuses or fails to sign a declaration of results form, has the duty to record the reasons for the refusal. However, if there were no agents present at the Polling Station, then of course it follows that no reasons would be recorded. The petitioner did not establish whether or not the other parties had agents in the said Polling Stations so that reasons would be given.

On this issue, I am guided by the decision of Abdikam Osman Mohamed & another v IEBC & 2 others 2013 KLR where the court stated:

“The mere failure to sign the Form 35 therefore does not go to the root of the validity of the figures in the form. In this regard, the case of William Kabogo, on the failure of the party agents to sign the statutory form 16 in the 2007 election which is the equivalent of the Form 35 in this election has been negated by Regulation 79(b). To my mind, there has to be more or other accompanying irregularities in addition to such failure, for an election of an unsigned form 35 by agents to be invalidated.”

I have already made reference to Regulation 97(2) which also provides that absence of agents/candidates at the Polling station shall not invalidate the proceedings.

The same position was reiterated in Elizabeth Ongoro’s case (Supra).

The petitioner did not endeavor to demonstrate that an unlawful act had been committed apart from the mere failure to sign, the form, that affected the results of form 37A signed by either the Presiding Officer or Deputy Presiding Officer.

(iv) Of Form 37As signed by either the Presiding Officer or the Deputy Presiding Officer:

The petitioner’s case is that Form 37A had to be signed by both the Presiding and Deputy Presiding Officer and failure by both officers to sign rendered the forms irregular (LSS-8). The said forms are attached at page 155 – 158 of the petition:

1. Nkorika Primary School (Page 155)
2. Ndonyo Warrikon Nursery (Page 156)
3. Landala Nursery School 1 of 1 page 157

The above three form 37As were signed by only the Presiding Officer (LSS-9) while that of Lolua Village Mobile Polling Station 1 of 1, was signed by only the Deputy Presiding Officer.

As noted earlier, Regulation 79(1) provides that the Presiding Officer shall sign the declaration of results i.e. Form 37A and it does not require the Deputy to sign. Regulation 5(4) of the same Regulations provides as follows:

“A Deputy Presiding Officer may perform any act, including the asking of any question, which a Presiding Officer is required or authorized to perform by these regulations.”

The above regulations mean that the Deputy Presiding Officer can discharge any functions that the Presiding Officer is required/authorized to perform and therefore form 37A can be signed by either, the Presiding Officer or the Deputy. The above position was aptly captured in the case of John Murumba Chikati v Returning Officer Tongaren Constituency and 2 others 2013 where the court held:

“The requirement of the law under Regulation 79 of the Elections (General) Regulations, 2012, (hereafter General Regulations) is that the Presiding Officer signs the statutory form. Under Regulation 5 of the General Regulations, Presiding Officer includes the Presiding Officer and Deputy Presiding Officer duly appointed by IEBC. The statutory form is valid once it has been signed by the Presiding Officer, both the Presiding Officer and the Deputy Presiding Officer or by either them.”

The fact that either the Presiding Officer or the Deputy Presiding Officer signed form 37A does not invalidate the declaration.

(v) Of Returns not signed by both the Presiding Officer and Deputy Presiding Officers but was signed by 6 agents:

The declaration for Opiroi Primary School Polling Station 1 of 1 (LSS-11) at page 99 of 1st – 2nd respondents response, was neither signed by the Presiding Officer nor the Deputy. Failure to sign the declaration is irregular and offends Regulation 79(1). However, the question one must ask is whether the irregularity affected the results. At that polling station, registered voters were 488; valid votes cast were 425 with the 3rd respondent garnering 313 votes and the 1st runners up garnering 107. The petitioner managed only 5 votes. Form 37A was then signed by 6 agents. Even if the votes cast i.e. 425 were given to the 1st runners up, the winning margin would be still large, over 19,000 votes. If the 425 votes were given to the petitioner, he would garner a total of 3,685 votes. He would still hold the 3rd position with a margin of 36,882 votes. To this end, the said omission does not affect the election result. This position is buttressed by the decision in Nathif Jama Adan v Abdikhaim Osman Mohamed & 3 others Supreme Court of Kenya Pet.13/2014 where the court stated:

“But there had been an irregularity in the handling of statutory forms from the polling station. There was no explanation of how

that irregularity affected the results of the election. This, clearly, is a censurable condition. But in a dutiful resolution of a legal and electoral dispute, the fundamental question is the constitutional franchise-right of the people inhabiting the electoral area. It is this, to be protected, in circumstances such as those unfolding in this instance – the default in view being, that of election presiding officers failing to have forms duly signed and stamped. In a similar situation, in the Nana case from Ghana, the learned Judges had thus held:

“An election being a process as opposed to it being an event, where all stages have been gone through and therefore the elections could be said to have been substantially held in accordance with the regulations, to nullify the results on this ground per se, would amount to putting in the power of some unscrupulous presiding officer in some polling station to nullify the solemn act of the whole constituency by his single act of omission.

In my view, visiting the sins of some public official on innocent citizens who have expressed their choice freely would run counter to the principle of universal adult suffrage, one of the pillars of our democracy, and perpetuate an injustice”

This court is bound by the decision of the Supreme Court. Besides, out of the 284 forms only one had this irregularity and so far the petitioner has not led any evidence that lack of the signatures on the affected Form 37A affected the outcome of the election.

(vi) Of signing of Form 37A by agents who did not field Gubernatorial candidates:

The petitioner faulted form 37As for having been signed by agents who had no candidates for Governor – LSS-6 – at page 139 to 148 of the petition. At page 139, Lmutaro Primary School Polling Station 1 of 1 – declaration was signed by agents of Jubilee, ANC and DC: At page 140, Maralal DEB Nursery School Polling Station 1 of 1 was signed by agents of Jubilee, Wiper, CCM & MCC. The same is replicated on the other declarations being 10 of them. It is common knowledge that five other elections were ongoing at the same time so that there were more agents representing Presidential, Senatorial, Women Representative, Member of Parliament and Members of County Assembly. The agents present at the Polling Station are people who are accredited to be present at the tallying centres and if they signed the forms, then the credibility of the results should have been enhanced. The onus was on the petitioner to demonstrate that the agents who signed had not been appointed as agents or Regulation 62(1)C and (2) which deals with admission to the polling station had been breached. A similar issue arose in E.P.No.8/2013 (Kisii) Paul Gitenyi Mochorwa v Timothy Bosire where the court said “*if non signing of the forms by the agents cannot invalidate an election, the signing of forms by agents whether in more or less than the number of candidates in the particular election should not invalidate the election. It is an issue of first principles: The object of agents signing the form 35 is to confirm the results contained therein. If it is signed by agents in other election tallying place alongside particular election, there cannot be a valid objection to such an ‘over confirmation’ unless it can be shown to have affected the result adversely in some way.*”

I agree with the position the court took. The petitioner did not endeavor to demonstrate how the signing of the Forms by agents for other parties adversely affected the results.

(vii) Of Form 37As that appear to have been signed by one person and/or similar handwritings:-

Forms 37As which were allegedly signed by one person were exhibited as LSS-7 (page 149 – 154) of the petition. Apart from the handwriting on the names, the identity card and party names, the said forms were signed by different agents. None of the agents were called to denounce the signatures on the forms. Besides, there was no expert evidence to prove that the handwriting or even signatures belonged to one person. The petitioner did concede that he was not a handwriting expert. The allegations cannot be sustained.

(viii) Of Security Features:

At paragraph 15 of the petitioner’s affidavit were annexed Form 37As (LSS16) (page 200 – 213), which were said to have no security features. The petitioner did not avail a sample of the security features expected to be on the forms. He denied being conversant with the security features with regard to the election documents. Despite the fact that the petitioner’s counsel requested to be allowed to demonstrate the security features on the Form 37A, to the court using a special light and permission was granted, that was not done. The issue remains an allegation.

(ix) Whether alleged irregularities in Form 37Bs and 37Cs substantially affected the results:

The petitioner complained that the three form 37Bs were defective and unverifiable due to the anomalies therein as supported by the evidence of DW1 the County Returning Officer and DW2, the Constituency Returning Officer of Samburu West (see paragraphs 16 – 18 of the petition). In respect of **Samburu West**, the petitioner had the following complaints:

(1) That form 37B did not bear the HANDING OVER – TAKING OVER Section;

(2) That form 37B bears two signatures from party agents affiliated to Jubilee and a purported NASA agent.

DW2, the Constituency Returning Officer for Samburu West, told the court that he received form 37As from the Polling Stations, Collated the results using form 37B which he filled and later took it to DW1 for verification and he signed it as he handed over to the County Returning Officer DW1, who signed the Taking Over Section. According to DW2, the results in form 37A are final and cannot be altered. He said that he had 6 copies of forms 37B bearing same serial number. He denied that they were 4 copies as alleged by DW1 and that the results on the copies are the same. He issued copies of Form 37B to the agents, one was posted on the wall at the tallying centre, he kept one while one was sent to the County Returning Officer. Having dealt with the form 37B, he was the best person placed to tell how many copies he handled. DW2 denied having seen the impugned form 37B (LSS-32) exhibited by the petitioner at page 537 of the petition which had anomalies. Instead, the proper form 37B generated by DW2 was exhibited at page 14 – 15 of the 1st and 2nd respondent’s affidavit. It is

signed by DW2, is dated 9/8/2017 and was handed over to DW1 who signed and took over at 16.30 p.m. on 10/8/2017 together with 105 Form 37As.

The forms also bears two signatures of two agents. Simon Lelesit of Jubilee and Jackson Lekarsia of NASA.

As to the allegation that the form was 'purportedly' signed by a NASA agent, DW3, who knows Jackson Lekarsia told the court that he knew Lekarsia to be the chief agent of NASA. The petitioner campaigned on an ODM ticket. ODM is an affiliate party of NASA coalition. In fact Jackson Lekarsia had sworn an affidavit as one of the petitioner's witnesses save that it was struck off for having been commissioned by counsel for the petitioner and also because the said Jackson denied ever swearing the said affidavit.

Additionally, the petitioner admitted in his testimony that ODM and NASA agents were one and same. The petitioner said in part:

“I was an ODM candidate (NASA). I was a party sponsored candidate. There were 2 other contestants - KANU & Jubilee.I was the only candidate for Governor in NASA. Agents of NASA were recruited by me and other candidates on ODM ticket, Senator, Women Representative. Some MCAs had their own agents. We recruited separately sometimes and in some cases jointly and gave the list to IEBC.”

Having admitted to belonging to ODM, an affiliate of NASA and that they appointed some agents as NASA, the petitioner cannot turn round and deny Jackson Lekarsia, his own chief agent, who duly signed the form 37B for Samburu West confirming that the results were authentic.

On Samburu East, the petitioner alleged that he was given two different sets of Form 37Bs and each had anomalies as follows:

- (a) One is in portrait form while the other is in landscape;***
- (b) In both forms no party agent has appended their signatures;***
- (c) In one form the Returning Officer has appended his signature while in the other, Returning Officer has not signed ;***
- (d) In one form the handing over not available while the other is blank;***
- (e) In one, the Returning Officer's details are provided in the handing over section but no details are indicated in the taking over notes;***
- (f) In both forms, the number of forms 37As submitted/received at the Constituency level are not indicated;***
- (g) One of the forms does not bear 1st respondent's logo neither does it bear any serial number and bar code.***

When Form 37B for Samburu East was shown to DW1, he denied that it was prepared by the 1st respondent but was a forgery, and he has no idea where the petitioner obtained it from. DW1 told the court that he received form 37B together with all form 37As (NM1) (para.16-17 of the response to petition).

The Form 37B was duly signed by three agents of Jubilee, Democratic Congress and KANU. The Constituency Returning Officer Timothy Kirui signed it, signed the handing over section while DW1 signed the taking over section and indicated that he received 93 forms at 06.20 hours on 10/8/2017. When DW1 filed his response denying knowledge of the said form, Form 37Bs, no explanation was given by the petitioner as to the source of the form 37Bs in his possession. The petitioner failed to explain where he got the impugned Forms 37Bs in his possession which were materially different from what DW1 had. The Form 37B exhibited by DW1 had no anomalies and it is the basis of the declared result. The petitioner was not able to see any variation between the said Form 37A, Form 37B and 37C.

Form 37B for Samburu North:

The petitioner complained that form 37B exhibited at page 538 of the petition had anomalies as follows:

- (i) Handing Over – Taking Over section was blank;***
- (ii) Had two signatures of persons affiliated to Jubilee party and ODM.***

DW1 explained that at the Constituency Tallying Centre, Form 37B is usually sent to IEBC through the public portal before the Handing Over exercise and that must be what happened in this case because the handing over and taking over takes place at the County Tallying Centre where the County Returning Officer receives the Form 37B from the Constituency Returning Officer. The proper form 37B was exhibited by the respondents at page 13 of the response and it is duly signed by the Returning Officer Samuel, Kirui handed over to DW1 who took over and signed for 90 forms at 16.50p.m. The form was also signed by Jubilee and ODM agents confirming the results declared.

DW1, the County Returning Officer for Samburu prepared Form 37C based on Forms 37Bs received from the Constituency Returning Officer which he also verified using form 37As and that they all tallied. Form 37C was duly signed by agents for Jubilee, ODM and KANU. By the ODM agent signing form 37C, it was a confirmation that the results were correct. DW1 said that the petitioner never complained about the results and even in court, he did not challenge the said form. The petitioner did not see any variation in Forms 37A, B, and C.

(c) Whether the election was conducted within the law:

This court cannot lose sight of the primary objective of electoral law, which is, to respect and uphold the will of the people in Samburu. The case law considered in this case have reiterated that position. So that, if the breaches complained of are not so serious as to affect the result, the court will not invalidate the election. This is what the court held in John Fitch v Tom Stephenson & 3 others QBD 2008 EWHC 501, which reasoning the Kenyan Courts have adopted.

The court Said:

“The courts will strive to preserve an election as being in accordance with the law, even where there have been significant breaches of official duties and election rules, providing the result of the election was unaffected by these breaches. This is because where possible, the courts seek to give effect to the will of the people.”

The petitioner told the court that he was not contesting figures but the process of the election because it was fraught with irregularities so that the outcome cannot be said to be legitimate. He also said that the results were tilted in favour of the 3rd respondent though he did not demonstrate how this was done. In fact he was unable to tell if there was any variation between form 37A, 37B or 37C. No doubt, there were some few irregularities in the form 37As that declared results at the polling stations in Samburu County but the irregularities were not so grave as to affect the declared results. No irregularities were found on Form 37Bs and 37Cs. I subscribe to the decisions of J. Majanja in Wavinya Ndeti v IEBC & 4 others (Machakos) E.P.4/2013 where he said:

“An election is a human endeavor and is not carried out by programmed human machines. Perfection is an aspiration but allowance must be made for human error. Indeed the evidence is clear that the counting and tallying was being done...in less than ideal conditions hence errors, which were admitted, were bound to occur particularly in the tallying of the results. What is paramount is that even in the face of such errors, whether advertent or otherwise is that the ultimate will of the electorate is ascertained and upheld at all costs.”

In this instance, this was a 6 tier election which was conducted within a short period, under a lot of pressure to produce the results in time. DW2 admitted that he did not sleep for four days. The elections would not be expected to be without error. The Supreme Court recognized that fact when it stated in Raila Odinga v IEBC E.P.1/2017.

“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 of such a nature, or such a 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.”

I also adopt the words of the Supreme Court in E.P.5/2013 Raila Odinga v IEBC where the court said that for an election to be nullified, it must be so devoid of merit and so distorted as not to reflect the will of the people. An election will also be voided if it is a sham or a travesty of an election (See Morgan v Simpson).

After a careful consideration of all the evidence adduced in this petition, the submissions by all counsel, I am satisfied that the petition lacks merit. I find that the Samburu County Gubernatorial election was free, fair, credible and transparent. The election met the Constitutional threshold and Electoral Laws of Kenya. They reflect the will of the people of Samburu and **Lenolkulal Moses Kasaine** was validly elected as Governor of Samburu County.

Costs:

Mr. Mwangi, counsel for the 3rd respondent urged the court to award costs of Kshs.10 million against the petitioner. Mr. Mombo on the other hand urged the court to cap the costs at Kshs.2 million to be paid by the 1st respondent to the 2nd, 3rd respondent and the petitioner.

Ordinarily, costs follow the event and the court has the discretion to award the costs having taken into account, inter alia, the complexity of the case, the time spent in preparation and prosecution of the case; and the costs should not be too high or too low as to be punitive. This court is also guided by awards made by other courts. In the case of Jackton Ranguma (Supra) the court capped costs at 5 million; in Ferdinand Ndungu Waititu v IEBC E.P.1/2013, costs were capped at Kshs.5 million. In Wavinya Ndeti's case E.P.1/2017 (Supra) costs were capped at Kshs.10 million. Taking into account all these facts, I will award costs as follows, the petitioner to pay Kshs.4,000,000/= to the 1st and 2nd respondents and Kshs.2,000,000/= to the 3rd respondent, total Kshs.6,000,000/=.

Orders:

- 1. The petition be and is hereby dismissed.**
- 2. The 1st and 2nd respondent are awarded costs of Kshs.4,000,000/= (4 million).**
- 3. The 3rd respondent is awarded costs of Kshs.2,000,000/= (2 million).**
- 4. Under Section 75(3) of the Election Act, a certificate do issue to the IEBC and the Speaker of the Senate following this determination under Section 86 of the Elections Act.**

Dated, Signed and Delivered at NYAHURURU this 23rd day of February, 2018.

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R.P.V. Wendoh

JUDGE

Present:

Mr. Mombo for petitioner

Mr. Karanja for 1st & 2nd respondents

Mr. Mwangi & Ms. Peinan for 3rd respondent

Soi – Court Assistant