



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**  
**ELECTION PETITION NO. 5 OF 2017**

**MUGAMBI IMANYARA.....PETITIONER**

**VERSUS**

**I.E.B.C.....1<sup>ST</sup> RESPONDENT**

**MERU COUNTY RETURNING OFFICER.....2<sup>ND</sup> RESPONDENT**

**FRANKLIN MITHIKA LINTURI.....3<sup>RD</sup> RESPONDENT**

**RULING**

Application dated 13<sup>th</sup> October 2017, was brought by Petitioner herein under the provision of Rules 15(1) (d) (e) and (h) of the Elections (Parliamentary and County Elections) Petition Rules 2017 and all other enabling provisions of the law seeking that the 1<sup>st</sup> and/ or 2<sup>nd</sup> Respondents be and are hereby directed to furnish the Petitioner with the full Self Declaration Form and nomination papers submitted by the 3<sup>rd</sup> Respondent as required by lawyer in respect of the elections held on 8<sup>th</sup> August 2017;

1. That the 1<sup>st</sup> and/or 2<sup>nd</sup> Respondent be and are hereby directed to furnish the Petitioners with Certified copies of Certificates of the educational qualification submitted by the 3<sup>rd</sup> Respondents to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents for purposes of ascertaining his educational qualification in respect of the elections held on 8<sup>th</sup> August 2017;
2. That the 1<sup>st</sup> Respondent be and is hereby directed and furnish the Petitioner with Certified copies of certificates of the educational qualifications submitted by the 3<sup>rd</sup> Respondents to the 1<sup>st</sup> Respondent and 2<sup>nd</sup> Respondents for purposes of ascertaining his educational qualification in respect of the elections held on 8<sup>th</sup> August 2017;
3. That the 1<sup>st</sup> Respondent be and is hereby directed and furnish the Petitioner with Certified copies of Certificates of the educational qualifications submitted by the 3<sup>rd</sup> Respondents to the 1<sup>st</sup> Respondent for purposes of ascertaining his educational qualification in respect of the 2013 general elections.
4. That the 1<sup>st</sup> Respondent be and is hereby directed to furnish the Petitioner with the Self Declaration Form and Nomination papers submitted by the 3<sup>rd</sup> Respondent as required by law in respect of the 2013 general elections.
5. An order be and is hereby issued for summons to issue to John Mbaabu of National ID No.

8858619, Ruth Muchai of ID No. 22010674, Caroline Gacheri ID No. 22391139 and Miriko Ntubiri ID No. 16094063 directing them to appear as witnesses in this Election Petitions.

That the honourable court be pleased to grant any other reliefs that it may deem just and fit to grant in the interest of justice.

The application is supported by the affidavit of Hon. Milton Mugambi Imanyara and grounds on the face of the application which are to the effect

a) Rule 15(1) (d) of Election (Parliamentary and County Elections) Petition Rules 2017 provides inter alia that at the pre-trial stage this honourable court shall confirm the numbers of witnesses the parties intend to call.

b) Rule 15(1) (e) of Election (Parliamentary and County Elections) Petitions Rules 2017 provides inter alia that at pre-trial stage this Honourable court shall give an order, where necessary for furnishing further particulars and in (c) directions for filing and serving of any further affidavits or the giving of additional evidence.

c) At paragraph 85 of the Petition the Applicant has pleaded the names of John Mbaabu, Ruth Muchai, Caroline Gacheri, Miriko Ntubiri among others are public officers by virtue of being teachers and who were also agents of the Jubilee Party and/or the 3<sup>rd</sup> Respondent in the impugned elections contrary to Section 15 of The Election Offences Act.

d) The polling stations where the said teachers acted as agents of the Jubilee party and/or the 3<sup>rd</sup> Respondent are listed in the said paragraph 85 of the Petitions and the forms 38 A where they appended their respective signatures and details as agents have been produced in the Petitioners annexures.

e) The Respondents have denied that the said persons were indeed teachers or that they acted as agents of the Jubilee Part and/or the 3<sup>rd</sup> Respondent. It is therefore necessary and in the interest of justice that the said persons be summoned to appear before this Honourable court for purposes of ascertaining whether they are indeed the agents who signed the said respective forms 38 A for the stated polling stations and further whether they are indeed teachers.

f) That the Petitioner has expressly pleaded that the 3<sup>rd</sup> Respondent did not satisfy the constitutional and statutory moral, ethical and educational requirements necessary to qualify to be nominated to be nominated for elections as senator by virtue of inter alia making a false statutory declaration that he possesses a degree which in fact does not both in respect of the 2013 General Elections and the present impugned election.

g) In particular the Petitioner has pleaded that the 3<sup>rd</sup> Respondent in his Self Declaration form submitted to the 1<sup>st</sup> Respondent in respect of the 2013 General Elections where he vied for the position of member of National Assembly or the question of his educational qualifications he expressly stated therein that he possesses a Bachelor of Commerce Degree from the University of Nairobi in 2001 a fact that has since turned out to be false.

h) In respect of the present impugned elections, the 3<sup>rd</sup> Respondent falsely stated that the holds a degree.

i) That the 3<sup>rd</sup> Respondent has not produced in court the degree certificate he claims to hold. That at paragraph 72 of the 3<sup>rd</sup> Respondents affidavit he merely claims the allegations to be false and further that he was not the author of the alleged 2013 Self Declaration form.

j) That it is incumbent upon the 3<sup>rd</sup> Respondent in his response to state the facts upon which he

relies to prove that he was eligible to contest the said elections.

k) That at paragraph 16 to 20 of 2<sup>nd</sup> Respondent supporting Affidavit sworn on 20<sup>th</sup> September 2017 the 1<sup>st</sup> and 2<sup>nd</sup> Respondent state in detail the purported steps that were taken to ascertain the 3<sup>rd</sup> Respondents met the requisite education moral and ethical requirements necessary to qualify for nomination as a member of parliament.

l) That at paragraph 17 of 2<sup>nd</sup> Respondents affidavit sworn on 20<sup>th</sup> September 2017, it is confirmed that pursuant to the law a candidate is mandated to obtain and submit a Self Declaration form.

m) At Paragraph 18 (a) the 1<sup>st</sup> and 2<sup>nd</sup> Respondents confirm that for purposes of ascertaining the educational qualifications of persons for an elective post, a person seeking nomination shall submit to the 1<sup>st</sup> Respondent Certified copies of certificates of the educational qualification and where the body that issued the certificate is not based in Kenya, such candidate is required to seek authentication of that body with the Commission for University Education in the case of University Degrees.

n) That the 2<sup>nd</sup> Respondent only annexed the 1<sup>st</sup> page of the 3<sup>rd</sup> Respondents Self Declaration Form and the rest of the pages are missing.

o) That in view of the Self Declaration by the 3<sup>rd</sup> Respondent that he holds a degree it is expected that he must have submitted to the 1<sup>st</sup> Respondent Certified copies of the Degree for purposes of ascertaining the educational qualifications.

p) That there is prima facie evidence the 3<sup>rd</sup> Respondent made false declaration as the University of Nairobi has confirmed in writing that the 3<sup>rd</sup> Respondent was never its student.

In response, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed a Replying Affidavit sworn by Gichihi Macharia Samuel in which he averred he is the county Returning officer for Meru County in accordance with Article 88 (4) (d) and (h) of the constitution of Kenya 2010 and Section 11 of the IEBC Act 2011 Sections 39 (1 A) and (1 B) of the elections Act 2011 and Regulations (4), 4(1), (2) (3) and (4) of the Elections (General) Regulations 2012.

In Gichihi averred that the Petitioner has not met the threshold for the orders sought either as prayed or at all and the application in its entirety is an abuse of court process;

1. He averred that in regard to the issue of educational qualification of the 3<sup>rd</sup> Responding, the grounds in support as raised reiterate the contents of the petition as pleaded and do not establish the need for additional particulars.

2. That paragraphs 9(e), 9(i) (h) (n), (s) (t) (u) and (v) all contain contested issues of fact which Petitioners requires to prove at the hearing of the Petition.

3. That the purpose of particulars is to enable a party properly defend or prosecute its claim and not intended to require the productions of evidence before the hearing of the Petition in the manner sought by the petitioner.

4. That a request for particulars under Rule 15(1) (e) of the Elections (Parliamentary and County) Petitions 2017 is not intended to be an avenue for a party to challenge the legality of the evidence presented by the other party without the court having the benefit of hearing the complaints raised thereof.

5. The legal burden of proof in elections petition rests with the Petitioner; for he is the party desiring the court to take actions on the allegations in the petition. A Petitioner should be under

obligation to discharge the initial burden of proof before the Respondent s are invited to bear the evidential burden. This application seeks to shift the evidentiary burden of proof of the allegations presented by the Petitioner to the Respondent before the hearing and is therefore an abuse of court process;

6. Prayers / and I seek Certified copies of degrees and entire set of nomination papers submitted by the 3<sup>rd</sup> Respondent outside the scope of the initial grounds land in the petition and is intended to expand the scope of the grounds relied upon in the petition to the prejudice of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent.

7. That the Petitioner sought that in this summons be issued to several persons on the basis that the said person are teachers who participated in the elections as agents;

8. That he is advised by the commissions counsel

a) That the applicants is foraging in an unconstitutional manner, for evidence which should otherwise have been sought prior to the filing of the petition.

b) The applicant has not established that indeed the said persons were Agents to warrant the witness summons sought as infact this is a fact which is to be tried and tested at the hearing of the petition.

c) Additionally the fact of the employment of the said persons as teachers is contested.

d) Rule (1) (d) of the Elections (Parliamentary and County) Petitions Rules 2017 does not contemplate the inclusion of additional evidence in the manner sought by the Petitioner which contradicts Rule, 1, 2, 3 and 4 of Election Petition Rules 2017.

e) Prayer 5 of the application is without basis and ought to be dismissed.

f) That without prejudicial to the foregoing paragraphs on educational qualifications, the deponent was aware that under S.22 (1A) of the Elections Act which provides for qualifications for nominations of candidates clearly states that the requirements for a degree shall come into force in the General Elections to be held after the 2017 Elections.

g) That without prejudice to the issues raised supra (above) in the regard to ethical and moral requirements

1. He said he is aware that under S.24 (3) of the Elections Act a person is not disqualified as being elected as a member of parliament unless all possibility of appeal and/or review of the relevant sentence or decision has been exhausted.

2. The Omission by the commission to avail the entire Self Declaration form is inadvertent.

The Returning Officer Meru County urged the court to dismiss the application as it lacks merit and that orders of cost be made to 1<sup>st</sup> and 2<sup>nd</sup> Respondents. The 3<sup>rd</sup> Respondent filed grounds of opposition to the applications dated 13<sup>th</sup> October 2017.

Thus,

1. That this Honourable court lacks jurisdiction to hear and/or determine the suit? Application as presented as it is subjudice owing to the fact that similar questions are being handed in **constitutional Petition No. 394 of 2017 Ethics and Anti corruption Commission vs Franklin Mithika Linturi & Others.**

2. That this court lacks jurisdiction to hear and determine this dispute as a criminal court of 1<sup>st</sup> instance as the court is being called upon to determine the criminal culpability of the 3<sup>rd</sup> Respondent in so far as allegations of forgery and falsification of documents are concerned.

3. The Petitioner is seeking to shift the burden of proof to the Respondents contrary to the legal principles in election petitions that the Petitioner bears the initial burden of proof as was held in **Election Petition. No. 6 of 2013 – Hassan Mohammed Hassan & Another vs IEBC & 2 others [2013]eKLR** and **EP No. 1 of 2017 – Raila Amolo Odinga & Another vs IEBC and 12 others.**

4. The cited individuals John Mbaabu, Ruth Muchai, Caroline Gacheri and Miriko Nturibi have not sworn affidavits as contemplated under Rule 12 of the Election Petition Rules 2017 and are therefore incapable of testifying as witnesses before the Honourable court.

5. The applicant filed submissions on 14.11.2017 in which it was submitted that this court has special jurisdiction derived from Elections Act and the constitution as was held in **Gideon Mwangangi Wambua & Another vs IEBC & 2 others Supreme EP No. 5 of 2014.**

The Supreme court of India Authority in **Tyota Basu & Another vs Debi Ghosal & Others** was all relied in part by Petitioner/Applicant. If I understand submission No. 8 it appears that Petitioner concedes that it would be sub judice this court to hear and determine the question of 3<sup>rd</sup> Respondents eligibility for elections by virtue of the proceedings in constitutional petition **No. 394 of 2017.**

**Petitioner also relied in Justice Ougos holding in Lydia Mathia vs Naisula Lesuuda & Another [2013]eKLR** on issue of subjudice and jurisdiction was also relied upon by the Petitioner as well as **Justice Emukules** decision in **Karanja Kabonge vs Joseph Kuina Kariambegu Ng'ang'a & 2 others [2013]eKLR.**

The Petitioner submitted in regard to application dated 13.10.2017 that as an election is a process and not an event it follows that the court has the requisite jurisdiction to inquire into and determine issues arising from the entire election process right from the voter registration nomination of candidates campaigns voting, counting and declaration of results. The question of a candidates eligibility for election in an impugned of election is a fundamental part of the said election process for which the court possess requisite jurisdiction to inquire into and make a determination.

It was submitted that being 2<sup>nd</sup> Respondent confirmed having received the 3<sup>rd</sup> Respondent Self Declaration Forms for 2013 and 2017 General Elections as well as certified copies of Academic qualification the court should order the 1<sup>st</sup> and 2<sup>nd</sup> Respondent to produce and supply them to the Petitioner.

It is further submitted by the Petitioner that there is a distinction between the grounds for eligibility for election under S.99 (1) of the constitution and the grounds for qualification under Article 99(2) of the constitution and the provisions under Act 99(3) are not applicable to grounds of eligibility under Act 99 (1) of the constitution.

That similarly there is a clear distinction between the grounds for a candidate to be eligible for elections under Section 24 (1) of the Elections Act and the grounds for disqualification under Section 24(2) of the Elections Act.

That provision requiring all avenues of appeal to be exhausted before a person is disqualified as provided under S.24(3) of Election Act relates to the grounds of disqualification listed under section 24(2) and not grounds for eligibility under section 24(1) of the said Act.

It was submitted that the 3<sup>rd</sup> Respondent was not eligible for election as a member of parliament having failed to satisfy the requisite moral and ethical requirements prescribed by the constitution and an Act of Parliament.

In relying in the authority of **Thuo Mathenge & Another vs Nderitu Gachagua & 2 others [2013]eKLR** where **Justice Wakiaga** cited with approval the **Court of Appeal authority in Nyeri Court Appeal No. 14 of 2013**, he held that the High Court had jurisdiction to determining the eligibility of the 1<sup>st</sup> Petitioner to stand for election and/or to be nominated as a candidate in the 1<sup>st</sup> place.

It was submitted that the Petitioner having established that the court had jurisdiction to determine whether or not the 3<sup>rd</sup> Respondent was eligible to contest as member of parliament, the 1<sup>st</sup> Respondent had a duty to furnish the Self Declaration Forms and any other information submitted there with to enable the court make a determination on the issue of eligibility.

It was submitted that pursuant to Section 80(1) of the Election Act, the court had jurisdiction to compel any person to appear as a witness in an election petition even though the said witness had not filed an affidavit as required by the rules.

That the Petition Rules are subsidiary legislation and contest the jurisdiction and powers of the High court granted by substantive Legislation in the Election Act.

It was urged that the court should exercise the requisite powers to compel the teachers that acted as agents of the 3<sup>rd</sup> Respondent in the impugned elections in contravention of Section 51 of the election Offences Act to appear as witnesses before the court.

The 3<sup>rd</sup> Respondents submission was that this court lacks jurisdiction to hear and determine the question of 3<sup>rd</sup> Respondents academic qualification as the issue is directly and substantially before another court in **Constitutional Petition No. 394 of 2017 – Ethics and Anti-Corruption Commission vs Franklin Mithika Linturi & others**.

That by raising the issue substantively for the purposes of the election Petitions, the Petitioner is violating the principle proscribing sub judice.

That this court does not have jurisdiction to issue any order in furtherance of the issue of 3<sup>rd</sup> Respondents academic qualification.

It was also further submitted that the Petition is asking the court determine that 3<sup>rd</sup> Respondents is criminally liable for allegedly fabricating academic certificates and giving false information. It was submitted that this court does not have jurisdiction to investigate and determine alleged criminal liability.

That alleged forgery of academic transcripts cannot be heard and determined by an election court as the allegations therein does not constitute election offences.

The authority of **Jacob Juma vs Evans Kidero – Petition No. 331 of 2015** was relied upon. The holding in **Petition No. 44 of 2013 – Silas Make Okuke vs AG & 3 others [2014]eKLR** to take up the necessary action as permitted by law.

The 3<sup>rd</sup> Respondents counsel submitted that where there are land down processes on how to handle a matter such processes ought t be adhered to. It was further submitted that the EACC had denied the conclusiveness of the integrity verification report that the Petitioner is purporting to rely on. It was argued that the role of investigation of public officer over Ethics and Morality solely belongs to the EACC. That if the court grants these orders then it will be sanctioning the usurpation of the role if EACC in so far as Public Officers are concerned.

- **It was also submitted while relying on the authorities of Karanja Kabenge vs Joseph Kuina Kariambegu Nganga.**
- **Raila Odinga & Others vs IEBC & Others – Petition No. 5 of 2013**
- **Hassan Mohammed Hassan & Another vs IEBC & others [2013]eKLR**
- **John Kiarie Waweru vs Beth Wambui Mugo**

***That the burden of proving the alleged falsification of documents rests solely with the Petitioner.***

On the issue of summoning witnesses the 3<sup>rd</sup> Respondent has submitted that the discretion under S. 80 of the Elections Act 2011 is exercised solely in the interests of justice and not in furtherance of the Petitioner's case. In the **Election Petition No. 1 of 2013 Peter Leo Agweli Onalo vs Eliakim Lindeki and 2 others [200]eKLR** which appears to me to be more relevant in the matters of summoning witnesses on behalf of the Petitioner it was held:-

**“.....it is the duty of the Petitioner and burden to adduce evidence to substantiate allegations if he is to succeed in getting the 2<sup>nd</sup> Respondents election as a member of parliament for Budalangi nullified in seeking to discharge that burden. The court cannot allow him to go on a fishing expedition by calling as witnesses persons who are likely to be called to give evidence by the Respondent. The 3<sup>rd</sup> Respondents Counsel urged that the application be dismissed because it is made in furtherance of the Petitioner's case to salvage it but not in the interests of justice”.**

It was further argued that the alleged witnesses cannot be summoned as they have not sworn any affidavits before court pursuant to Rule 12(6) of the Elections (Parliamentary & county) Petitions Rules 2017 and pursuant to Rule 12(8) no sufficient cause has been shown why they should testify without swearing affidavits.

Upon consideration of the application and the grounds and affidavit upon which it is based and upon consideration of the grounds of opposition by the 3<sup>rd</sup> Respondent and the Replying affidavit by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent; and upon consideration of the submissions by the Petitioner and the 3<sup>rd</sup> Respondent as well as the authorities relied upon by the Petitioner and the 3<sup>rd</sup> Respondent this court is to determine:

1. Whether the Petitioner has shown sufficient cause why the 1<sup>st</sup> and 2<sup>nd</sup> Respondent should supply the 3<sup>rd</sup> Respondents Self Declarations forms submitted for the impugned election for 2013 and 2017.
2. Whether the Petitioner has shown sufficient cause why the 1<sup>st</sup> and 2<sup>nd</sup> Respondent should supply the 3<sup>rd</sup> Respondent's certified copies of academic qualifications allegedly submitted for the impugned elections for 2013 and 2017.
3. Whether the Petitioner has shown sufficient cause why the alleged witnesses should be summoned.
4. Whether the court has jurisdiction to order for the Self Declaration forms and the certified copies of the 3<sup>rd</sup> Respondents academic certificates in custody of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

The Jurisdiction of the High Court in regard to Election Petitions is provided for Under Article 165(3) (a) to (e) (d) (6) and 7 of the constitution of Kenya 2010. This court was gazetted to preside over the impugned senatorial election for 2017. So outrightly I would say that asking the court to order the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to furnish the Self Declaration forms and the certified copies of the academic qualifications of the 3<sup>rd</sup> Respondents submitted in 2013 is obviously beyond the mandate of this court.

The observation by the Supreme Court in the Election Petition between Moses Masika Wetangula vs Musikari Nazi Kombo and 2 others clearly shows the extent to which the jurisdiction of an election court can go:

**“An election Petition is a suit instituted for the purpose of contesting the validity of an election or disputing the return of a candidate, or claiming that the return of a candidate was initiated on the grounds of lack of qualification, corrupt practices irregularity or other factor. Such petitions rest on private political or other motivations, coalescing with broad**

**public and local interests thereafter in their regulatory framework from the civil to the criminal mechanisms and they cut across a plurality of dispute settlement typologies.**

The Petitioner contends in his petition that the 3<sup>rd</sup> Respondent was not eligible and did not qualify to vie for the position of Senator for Meru County on account of his academic qualifications.

The 1<sup>st</sup> and 2<sup>nd</sup> Respondents confirm that they cleared the 3<sup>rd</sup> Respondent to vie for the position of Senator for Meru based among others on his qualifications. They do not deny they have 3<sup>rd</sup> Respondents Self Declaration forms for 2017 Elections; They do not deny that they have 3<sup>rd</sup> Respondents certified copies of academic certificates submitted to qualify the 3<sup>rd</sup> Respondent to vie for the position of Senator for Meru County. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents actually confirm that it was due to inadvertence that these documents were not furnished to the Petitioner. It is the finding of this court that the Petitioner has shown that it is necessary for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to furnish the particulars sought for pursuant to Rule 15(1) (e) of the Elections (Parliamentary and County Elections) Petitions Rules 2017, I do find that the submissions that the application offends the Principle of Sub Judice in relation to constitutional Petition No. 394 of 2017 is misconceived.

Whether the petitioner wants to use the Self Declaration forms and the certified copies of the academic certificates to prove criminal liability is a matter that should be dealt with during the hearing of the Petition. It will be pre-emptive to decide that the Petitioner will be seeking this court to take over the investigation and prosecution of 3<sup>rd</sup> Respondent without interrogating the Petitioner during his testimonies in court.

As regards the summoning of witnesses S.80 (1) of Act provides.

An elections court may in the exercise of its jurisdiction:-

1. Summons and swear in witnesses in the same manner or, as nearly as circumstances admit, as in a trial by a court in the exercise of its civil jurisdiction and impose the same penalties for the giving of false evidence;
2. Compel the attendance of any person as a witness who appears to the court to have been concerned in the election or in the circumstances of the vacancy or alleged vacancy.
3. Examine a witness who is compelled to attend or any other person who has not been called as a witness in court and examined by a party of the petition and after examination the witness may be cross examined by or on behalf of the Petitioner and Respondent or either of them; and
4. Decide all matters that come before it without undue regard to technicalities.

Together with Rule 15(1) (h) of Election Petition Rules 2017 – the substantive law and procedure/Rule are both discretionary in nature and the court must therefore be satisfied that there is sufficient cause for such witnesses to be summoned.

The Petitioner in the application is not certain the alleged witnesses were agents for the 3<sup>rd</sup> Respondent and/or Jubilee Party. Jubilee Party is not a party in this Petition and if it turns out the alleged witnesses were appointed by Jubilee then it will be prejudicial to the Jubilee party who will not have an opportunity to respond to accusations by the Petitioner.

The Petitioner already has material in their custody and I suppose obtained from the 1<sup>st</sup> and 2<sup>nd</sup> Respondents which in my view should enable them further their cause if any.

The sufficient cause this court would be interested in establishing is whether the alleged witnesses participation as agents in the impugned senatorial elections affected the results of the elections; Are these

witnesses holding evidence pertaining relevant facts in issue? Do these alleged witnesses have personal knowledge of the matter in respect in which they will be called to testify? This is a burden which the Petitioner must discharge to the satisfaction of the court and which I think has not been done. As held by **Justice Kihara Kariuki in Peter Leo Agwei Onali vs Eliakim Ludeki**, it would be in bad taste to compel the alleged witnesses to attend court on behalf of the Petitioner if it is not confirmed they are willing to do so.

The alleged witnesses are supposed to be summoned to come and tell the court that they are teachers and therefore public officers who participated in the impugned elections on 8<sup>th</sup> August 2017 as agents for either the 3<sup>rd</sup> Respondent or Jubilee Party an admission which if allowed will contravene Article 50(4) of the Constitution of Kenya 2010 in regard to fair hearing. Further Article 50 (2) (i) provides that every accused person has the right to a fair trial which includes the right to remain silent, and not to testify during the proceedings and Article 50 (2) (l) to refuse to give self-incriminating evidence. It would be unconstitutional to grant orders sought by the petitioner to compel the alleged witnesses to attend court and testify.

Rules 15(1) (d) (e) and (h) under which the application dated 13.10.2017 was brought 15(1) (d) is a requirement that during pre-trial conference the court shall confirm the number of witnesses for the parties intend to call

15(1) (e) the election court shall give an order, where necessary for furnishing further particulars

15(1) (h) the Election Court shall give directions as to the filing and serving of any further affidavits on the giving of additional evidence. None of the rules provide for compelling of witnesses on behalf of a party to an election petition.

Article 50 (4) of the constitution of Kenya 2010 provides that

**“Evidence obtained in a manner that violates any rights or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair or would otherwise be detrimental to the administration of justice”.**

In conclusion, the Application by the Petitioner to summon persons specified in the Petitioners affidavit is disallowed. Costs in respect to that portion of the application will go to the Respondents. In regard to the application for furnishing of the Self Declaration forms and academic certificates for the 3<sup>rd</sup> Respondents respecting the 2013 elections is dismissed and costs in that respect will go to the Respondents. The application for furnishing of the 3<sup>rd</sup> Respondents Self Declaration form and certified copies of the academic qualification by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents is allowed. Costs in that respect is awarded to the Petitioner.

**HON. A.ONG'INJO**

**JUDGE**

**Ruling Signed Delivered and Dated this 22<sup>nd</sup> Day of**

**November 2017.**

In the presence of:-

Petitioner:- Mr Ochieng Oduor and Mr Gitonga Advocates for Petitioner.

1<sup>st</sup> Respondent: MS Kinara Advocate

2<sup>nd</sup> Respondent:

3<sup>rd</sup> Respondent: Professor Ojienda and MS Awuor Advocate for 3<sup>rd</sup> Respondent.

**HON. A.ONG'INJO**

**JUDGE**