



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

ELECTION PETITION NO. 4 OF 2013

LESIT, J.

THE ELECTION ACT, 2011 THE ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS) PETITION RULES, 2013

IN THE MATTER OF THE ELECTION FOR THE COUNTY GOVERNOR FOR THARAKA NITHI COUNTY

THE PETITION OF

M'NKIRIA PETKAY SHEN MIRITIPETITIONER

V E R S U S

RAGWA SAMUEL MBAE.....1ST RESPONDENT

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION.....2ND RESPONDENT

SAMUEL MUCHERU.....3RD RESPONDENT

RULING

1. This ruling is in respect of an application filed by the Respondents in this Petition seeking to strike out the Petition herein.
2. The Application dated the 21st of May 2013 and filed on the 24th of May 2013 is a Notice of Motion by the 1st Respondent brought under the Constitution, the Elections Act of 2011, the Elections (Parliamentary and County Elections) Petition Rules, 2013 (hereinafter referred to as the Petition Rules) the Elections (General) Regulations, the Civil Procedure Act and all the enabling provisions of the law.
3. The application seeks the following orders:
 - a. **That this honourable court be pleased to strike out the Petition dated the 8th of April and filed on the 10th of April 2013.**
 - b. **That in the alternative, this honourable court be pleased to strike out the various affidavits filed together with the Petition for being bad in law.**

- c. **That the Petitioner be ordered to pay the costs of the application and the entire Petition and any interest accrued thereof.**
4. Some of the grounds set out in support of the application are that the Petition is fatally defective for being filed out of time, that the results were declared on the 6th of March and that the Petition was therefore filed 7 days outside the time allowed, that the affidavits are bad in law for being false, that the Petition does not disclose any prima facie evidence, and that the Petition is not worth going for a full trial, and that failure to enjoin the 1st Respondent's running mate is fatal and renders the Petition a nullity.
 5. The Application is supported by the affidavit sworn by the 1st Respondent Ragwa Samuel Mbae of even date. The gist of the affidavit is that the Tharaka-Nithi County has three constituencies, Maara, Tharaka and Chuka Igambangome with a total of 568 Polling Stations. It is the 1st Respondent's argument that the Returning Officer from each Constituency announced the votes garnered by the respective candidates and then forwarded them to the County Returning officer who made a public announcement, filled Form 38 and then made a public declaration of the results as he handed over the certificate of results of Governor Elections. He deposes that the duty of declaring the gubernatorial elections results rested with the County Returning Officer and that the subsequent gazette of those results in Gazette Notice No 3155 of 13th March 2013 did not amount to declarations of results but was merely to give notice to the public of the person or persons who have been duly elected for the various seats. The 1st Respondent deposes that since the instant Petition was filed on 10th April 2013, and given that the results of the election contested herein were declared on 6th March, 2013, the Petition was filed in contravention of Article 87(2) of the Constitution.
 6. The 1st Respondent deposes that the affidavits sworn by Njeru Nkoroi Kimura, Justin Gitonga Mbaka, Caston Kamara, Julius Mugambi and Japhet Muchem iMuchiri in support of the Petition have all rented them, and that in the circumstances ought to be struck out.
 7. The 1st Respondent attacks the evidence adduced by the Petition of being full of hearsay scattered all over the Petitioner's pleadings. He has listed some of the evidence alleged to be hearsay at paragraphs 56, 57 and gives particulars of the affidavits alleged to have the hearsay statements as those sworn by M'Nkoria Petkay Shen Miriti (Petitioner) Amram Muthee Njoka, Mutegi Francis Kyoli, Ishmael Mirani Kaimenyi, Elias Mwenda Nthiri, Prof. Lawrence Mbae M'Mbijiwe, Mwathi Franklin Kirimi, Julius Gitonga Mbaka, Njeru Nkoroi Kimura, Muriithi Bore, James Muriithi Nanua, Humphrey Gitonga Murungi, Oswald Nyaga Raini Dereba Njeru Peter, Grace Wangeci, Lillian Karimi Nyaga, Caston Kamaru, and Julius Mugambe Mugambi. He deposes that the offending paragraphs of the affidavit or the entire affidavits so affected ought to be expunged. That once that is done, the Petition should also be struck out as the same will be left disclosing no triable issues.
 8. The 1st Respondent deposes that his running mate in the gubernatorial seat was one Eliud Mate Murithi who was declared the Deputy Governor. The 1st Respondent deposes that the Deputy Governor ought to have been enjoined in this Petition as a Respondent to enable him defend his position and that the failure to enjoin him renders the Petition totally defective as the orders sought if granted would adversely affect him thus condemning him unheard.
 9. The second application is by the 2nd and 3rd Respondents dated 14th May, 2013 and filed on the 15th May, 2013 a Notice of Motion brought under Article 87(2) of the Constitution 2010, section 80(3) of the Elections Act No. 24 of 2011, Rule 17 of the Petition Rules, the inherent jurisdiction of the Court and all other enabling powers and provisions of the Law.
 10. The application seeks the following orders:
 - a. **That this honourable court be pleased to strike out the Petition dated the 8th of April and filed on the 10th of April 2013.**
 - b. **That the Petitioner be ordered to pay the costs of the application and the entire cause.**
 11. Among grounds cited in support of the application is that the declaration of the election results in respect to elections in issue herein is Form 36 which, in this case, was executed upon declaration on 6th March, 2013; and, the conflicting provision of the Election Act is thus inconsistent with the provisions of Article 87(2) of the Constitution, 2010.

12. The Application is supported by the affidavit sworn by Moses Kipkogei a legal officer with the 2nd Respondent of even date. The gist of the affidavit is that the Petition was filed on 16th April 2013. He deposes that since in paragraph 22, 23 and 24 of the Supporting Affidavit it is pleaded and admitted that the 1st Respondent was declared elected Governor of Tharaka- Nithi County on 6th March, 2013, the Petition was filed out of time in in contravention of the mandatory provisions of Article 87(2) of the Constitution.
13. The Petitioner has opposed both applications, the Petitioner filed a replying affidavit dated 6th June, 2013 and filed the next day. The gist of the Affidavit is that as Article 86 (1) of the Constitution provided results from Polling Stations are announced by the Returning Officer not declared. Further that Article 82 of the Constitution empowered Paul to legislate laws to govern election processes and that in compliance thereof it legislated the Elections Act No. 24 of 2011. The Petitioner avers that as provided under Section 76(1) (a) of the Elections Act. Election Petitions challenging elections were to be filed within 28 days after the date of publication of the results of the Elections in the Gazette and that since the publication was vide Gazette Notices of 13th March 2013 the instant Petition was filed within time. The Petitioner avers that in complete compliance with section 76 of the Election Act the title of the Gazette Notice read in part “the IEBC declares that the persons elected as Governors and Deputy Governors in the elections held on the 4th March, 2013, and complied with the provisions of the Election Act, 2011 and of the Constitution are listed in the schedule in this nature.
14. Regarding affidavits filed in support of the Petition, the Petitioner avers that the affidavits are regularly filed and are in compliant with all the laws. He continues to state that what the 1st Respondent is raising with the affidavits is premature and based on opinions that are not binding on the court and ought to be taken up when the witnesses testify in court. He concludes by stating that striking out of a Petition is a drastic order which ought only to issue in cases with no merit, and that the Petition has merit.
15. Mr. Mithega for the 1st Respondent submitted that Petition was filed out of time because the election results were declared on 6th March, 2013 and that the Petitioner should have filed the Petition within 28 days of 6th March. Mr. Mithega urged that the court ought not to consider the Gazetee Notice No. 3155 of 13th March, 2013 as the date of the declaration counsel urged that Election Results are defined in the Elections Act as the declared outcome of the casting of votes by voters at an Election. He urged that Election results must be inform of Form No. 36 which is provided under schedules under the Election Act; and which is clearly titled “**Declaration of Election Results**” counsel urged that the Country Returning Officers are empowered to declare election results by the IEBC.
16. Mr. Mithega urged that the Election Court had power to strike out Election Petition which does not comply strictly with the law. For that preposition counsel relied on several cases Sri **Ramu vs Sunil Vallapure & others ILR 205 KAR 2823, 2005(5) karLJ143; Supreme Court of India Ramsukh vs Dinesh Aggarwal Civil Appeal No. 6128 of 2008; Amina Hassan Ahmed vs Returning Officer Mandera County, Petition No. 4 of 2013** at Garissa, **Clement Kungu Waibara & Another vs Francis Kigo Njenga & Others Petition No. 15 of 2013** at Nairobi.
17. Regarding Election Results Mr. Mithega submitted that Article 86 of the Constitution provides that the IEBC shall ensure that votes case are counted, tabulated and the results announced promptly by the presiding officer at each policing station, and that the results from the polling station, and that the results from the policing stations are openly and accurately collated and promptly announced by the Returning Officer. Counsel urged that the Constitution did not provide for publication (gazettment and that the same were the creation of the Election Act, 2011. Counsel relied on the definition of the words determine, declare and publish as prescribed by Odunga J in **Gideon Mwangangi Wambua vs IEBC and others Election Petition No. 4 of 2013 consolidated with Petition No. 9 of 2013** at Mombasa.
18. Counsel urged that in the case of County Elections under Rule 4 of the Election (General) Regulations 2012, it was the duty of the County Returning Officer to declare and announce results and that all the IEBC does is to publish them. He urged that the County Returning Officer was required under Regulations 83(1)(c) to declare the results in form 36 as in format provided under the Schedule of the Regulations.
19. Mr. Mithega urged that the word declaration is synonymous with announcement and not

- gazettement. He urged that Article 87(2) of the Constitution had avoided gazettement all together due to the apparent principle of timeliness in matters of elections.
- 20.Regarding the contents and form of an election Mr. Mithega urged that the instant petition did not comply with mandatory terms provided under Rule 10 of the Election (Parliament and County Elections) petition Rules 2013 in that it did not state the results of the elections and the manner in which it was declared and the date of the declaration of the results of the election. Counsel urged that the grounds on which the petition is presented are not pleaded in the Petition as required.
 - 21.Regarding the affidavits Mr. Mithega urged that several affidavits filed in support of the Petition had been recounted while others contained hearsay and ought to be struck out or the offensive paragraphs expunged.
 - 22.Mr. Mithega urged that section 18 of the Elections Act provides that a County Governor candidate or a political party cannot change the person nominated as a Deputy County Governor after the nomination has been received by the commission. He urged that the Deputy Governor ought to have been made a party in this Petition as he is bound to be affected by the results of the Petition, and because a person shall not be condemned unheard. He drew as an illustration the naming of the Deputy President as a Respondent in the **Presidential Petition No. 5 of 2013, Raila Odinga v. Uhuru Kenyatta**.
 - 23.Mr. Kibet for the 2nd and 3rd Respondents associated himself with the submissions of counsel for the 1st Respondent and his written submissions which I have considered.
 - 24.Mr. Agwara for the Petitioner/Respondent opposed the applications and urged that they were frivolous and lacked in merit. Counsel urged that the Petition was not raising any issues with the election of the Deputy Governor. He urged that the Deputy Governor was at liberty to apply to be enjoined in the Petition if he felt he would be affected by it and that that was the reason the Election Petitions were gazetted.
 - 25.Regarding the Petition having been filed out of time Mr. Agwara urged that ten Election Petition Courts in the country have so far determined that issue and have come to the conclusion that 28 days required under the Constitution begun running from the date of the Gazette Notice of 13th March 2013 when declarations of the results were made. He urged that the inconsistencies alleged between Article 87(1) of the Constitution and section 76(1) of the Elections Act cannot be addressed through the court in such an applicationxxxxxxxxxx
 - 26.The remedy that is sought by the parties is striking out not just of the affidavits but of the entire Petition. Before I can order that the Petition and the affidavits in support of the same be struck out, the court must be satisfied that the same are incurably defective. I find that the following are the issues that the court is called upon to determine:
 - a. **Whether the Petition was filed within the time allowed by law.**
 - b. **Whether the affidavits filed in support of the Petition are valid**
 - c. **Whether the Petition should be dismissed summarily for not disclosing a reasonable cause of action.**
 - d. **Whether the failure to join the 1st Respondent's running mate is fatal and renders the Petition a nullity.**
 - 27.The court has on several occasions ruled on the procedure of striking out pleadings. Justice Warsame in the case of **Dickson Karaba v. John Ngata Kariuki & Another 2010 eKLR** stated as follows:

...striking out is a very serious matter, it is draconian and it should be resorted to as an avenue when the cause filed is hopeless or it is meant or intended to abuse the process of the court...The court cannot also exercise its inherent jurisdiction, when the exercise will lead to an injustice. In my view the inherent jurisdiction of the court enables it, to exercise control over process by regulating its proceedings by preventing the abuse of the process. Inherent power is a residual power which may be used upon unnecessary event and when it is just and equitable to do so in a particular case to ensure the observance of the due process of the law or to prevent vexation or oppression or to do justice between parties and to secure a fair trial between them. It is not intended to displace a party of his matured right which is likely to result in an injustice. I think, striking out of a Petition is outside the inherent jurisdiction of the High Court and it cannot be exercised to aid a party who has not suffered any prejudice or injustice due to

the acts or omission of another party.

28. In the case of **Electoral Commission of Kenya and Another vs Mwakesi [2009] KLR 511** the Returning Officer was removed as a party to the proceedings for want of personal service in accordance with the Rules. An application was made to strike out the Petition on the ground that an important and absolute party to the Petition had been removed from it. It was also argued that to allow the Petition to continue would be prejudicial to the Electoral Commission (ECK) in that it would be tantamount to asking the court to adjudicate upon the Petition against the ECK on the basis of unproved wrongs or mistakes allegedly committed by a party not before it. The ECK sought to have the Petition struck out on similar grounds. The court declined to strike out the Petition, which decision was upheld by the Court of Appeal. The Court of Appeal restated the dicta of Fletcher Moulton L. J. in **Dyson v. Attorney General** (1911) KB 418

But from this to the summary dismissal of actions because the Judge in chambers does not think they will be successful in the end lies a wide region, and the courts have properly considered that this power of arresting an action and deciding it without trial is one to be very sparingly used and rarely, if ever, excepting in causes where the action is an abuse of legal procedure... To my mind, it is evident that our judicial system would never permit a plaintiff to be “driven from the judgment seat” in this way without any court having considered his right to be heard, excepting in cases where the cause of action was obviously and almost incontestably bad.

29. I will start by considering whether this Petition was filed within the time that is stipulated in the law. This requires a determination on the meaning of the word ‘declaration’ as used in Article 87 (2) of the Constitution. Article 87 of the Constitution provides as follows:

87. (1) Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes.

(2) Petitions concerning an election, other than a presidential election, shall be filed within twenty-eight days after the declaration of the election results by the Independent Electoral and Boundaries Commission.

30. It is contended that the word declaration as used in this provision has the meaning the issuance of a certificate of election in accordance with the Elections (General) Regulations. The applicant contends that he was declared to have been elected on the 6th of March, the date on which the Returning Officer handed him the Certificate of Results of Governor Election (Form 38) in respect of Tharaka-Nithi County. Moreover, he contends that the publication of his name in the Gazette Notice on the 13th of March was merely a notification of the results that had been declared on the 6th of March.

31. The electoral laws in Kenya are contained in several instruments including the Constitution, the Elections Act, the Elections (Parliamentary and County Elections) Petition Rules and the Elections (General) Regulations. Article 87 (2) of the Constitution cannot therefore be read in isolation. The Elections Act was enacted pursuant to this provision of the Constitution. It is the Act that gives effect to the provisions of the Constitution on elections and gives the procedures for the resolution of disputes in relation to elections. This was also noted by the court in **Ferdinand Waititu v. IEBC & Others** Nairobi Election Petition No. 1 of 2013 where Mumbi J. stated at page 11:

In my view, however, and I agree with the 4th Respondent on this, the provisions of the Elections Act and the Elections Rules, which are made pursuant to Article 87 (2) of the Constitution, constitute the Constitutionally underpinned Code of Laws for dealing with election Petitions. The jurisdiction to hear and determine election Petitions is a special jurisdiction that is conferred by the Constitution itself, and the manner in which it is to be exercised is ordained by the Constitution when it donates power to Parliament to enact the requisite laws and Regulations for its exercise.

32. The Constitution itself does not set out the meaning of declaration of election results, neither does it set out the manner in which this is to be done. It is silent on this issue, leaving it instead to statute. The Elections Act, steps in at section 76 (1) (a) to provide that the manner in which the declaration is to be done is by publication in the Kenya Gazette.
33. It is clear that the Elections Act and the Rules made pursuant to the Act are intended to ‘give full effect’ to the provisions of the Constitution on elections. This is exactly what section 76 (1) (a) purports to do; give effect to the Constitution. It is therefore my humble view that where section 76 (1) (a) provides that Petitions shall be filed within 28 days of publication of the results in the Kenya Gazette, the Act is simply giving full effect to the provisions of the Constitution on the manner in which the declaration of the results is to be done.
34. The applicant has asked the court to find that declaration has the meaning attached to it under Regulation 87.
35. Mabeya J. in **Nairobi Election Petition 6 of 2013, Josiah Ole Kores v. Dr. David Nkediye & Others**, observed that the declaration that is referred to in the Elections (General) Regulations is in respect of particular polling stations and tallying centres. What this means is that if ‘declaration’ were to be taken to mean the issuance of the Forms, it would have the effect of creating several declaration dates, which would result in an absurdity. It could not have been the intention of the drafters of the Constitution that it be interpreted in a manner that would result in an absurdity. Indeed this is contrary to the purposive approach that is required to be adopted in relation to Constitutional interpretation. Indeed the publication of the results in the Kenya Gazette provides a uniform reference point for assessing when the jurisdiction of the IEBC ends and that of the High Court begins as provided for in the Constitution.

In the words of Odunga J.:

In the absence of a clear picture emerging from both the Constitution and the Act with respect what constitutes “declaration” the law is that the purpose of legislation must be looked at to see whether or not it is unConstitutional. In my view the insertion of gazettment in section 76(1) (a) of the Act was meant to give certainty to reckoning of time. That being the position and pursuant to my finding that one of the intention of the framers of the Constitution was to give certainty to electoral dispute resolution mechanisms I am unable to find that by merely requiring that the results be gazetted section 76(1)(a) is unConstitutional on that score.

36. Going with the argument that the declaration referred to in Regulation 87 is the one that forms the declaration envisaged in Article 87 (2) poses yet another challenge. Unlike under the previous regime of electoral law where one had to prove that they were entitled to vote in a particular election in order to challenge the outcome of the same, there is now no provision in the Constitution or elsewhere that imposes such a requirement. This leads to the conclusion that any person, can challenge the outcome of an election wherever it was conducted. Since the law creates such a leeway, it cannot have intended to limit this right to seek legal action by denying persons entitled to challenge the election knowledge of the declaration of persons elected. The only publication in Kenya that is deemed to serve as notice to the whole world is the Kenya Gazette. Indeed as Mabeya J. noted at page 13 of his ruling:

It is well known that a declaration contained in the Gazette is to the whole world and has a force of law, whilst the announcement by a County Returning Officer of an election result and the publication thereof in Form 35 is but inFormation to the persons in the tallying hall and declaration of the results of a polling station to the IEBC by its officer. This is so because Forms 35 are supposed to be transmitted to IEBC while a Gazette Notice is to the General Public. Election results are therefore declared on publication in the Gazette.

In line with the principles of transparency and accountability under Article 10 of the Constitution, the

Kenya Gazette, being the official mode of communication by government and state organs to the public, it follows that declaration of results must necessarily be carried in the Kenya Gazette. I therefore find no inconsistency between Article 87 (2) and section 76 of the Act.

37. Furthermore, the requirement under the Constitution is that the declaration be done by the Commission, not by any other person. The declaration that is referred to under Regulations 79 and 83 is made by Presiding Officers and Returning Officers respectively. The definition of 'Commission' in the interpretative part of the Rules is "*the Independent Electoral and Boundaries Commission established under Article 88 of the Constitution.*" A "Returning Officer" under the Act and the **General Regulations** means "*a person appointed by the Commission for the purpose of conducting an election or referendum under the Act.*" As was found by Majanja J. in **Machakos Election Petition 7 of 2013 Caroline Mwelu Ndiku v. Patrick Mwelu Musimba & Others**, these two terms cannot be used interchangeably. The role of declaration of results is that of the Commission and I so find.

38. As to the manner in which the declaration is to be done, the same has been the subject of adjudication in the case of **John Michael Mututho v. Jayne Njeri Kihara (Civil Appeal 102 of 2008) 2008 eKLR** where the court dealt with the failure by the Petitioner to particularize election results in an Election Petition. Looking at **Regulation 40** of the **Presidential and Parliamentary Elections Regulations** (similar to the present Regulation 83) the Court of Appeal held at page 3 that:

A careful reading of that Regulation clearly suggests that the results is not confined to just declaring who won. The detailed result is what is envisaged. The Regulation deals with votes cast, votes spoilt and those garnered by each candidate.

39. Mr. Mithega urged the court to find that election results required by the law must include not just the names of winners of the election but the votes cast, rejected votes, spoilt votes etc. I agree. There was an obligation on the part of the IEBC to set out clearly not just the names of the elected persons as it did on the 13th of March 2013, but also to particularize the votes cast, spoilt and garnered by each candidate. This was not done in Gazette Notice No. 3155 which declared the persons elected as the County Governors and Deputy Governors. This default was however on the part of the IEBC and should not be visited on the Petitioners who placed reliance on it in computing the time for the filing of their Petition.

40. In view of the finding that 'declaration' as set out in Article 87 (2) means 'publication in the gazette', it follows that the Gazette Notice must be deemed to be the declaration. I therefore find that the Petition, having been filed within 28 days of publication of Gazette Volume No. 3155 of 2013, is properly within the Constitutional timelines set out in Article 87 (2).

41. I am aware of the decision of the court in **Suleiman Said Shabhal v. IEBC & Others Mombasa Petition 8 of 2013** where there was a contrary finding. The decision of that court is however merely persuasive, and therefore not binding on this court. I refuse to be persuaded by it.

42. In relation to the allegations that the affidavits are bad in law for being false, I take the view that as section 109 of the Evidence Act provides, the burden of proof of particular facts lies on the person who alleges those facts. The applicant contends that he did not commit the election offences cited by the Petitioner in his affidavits and that the testimony that has been set out by the Petitioner's witnesses is not to be believed. He contends that these witnesses have since recanted their evidence and attaches affidavits in this regard. There is therefore on the record of the court two conflicting sets of facts. The veracity of the contents of affidavits can only be tested when the witnesses of either side take the stand. This makes the issue unsuitable for determination at the preliminary stage as the court has not had an opportunity to hear the witness evidence. The Applicants are therefore asking the court to make a decision on the basis of untested evidence which this court cannot do. As was noted by Kimondo J in **Nairobi Election Petition 2 of 2013 Steven Kariuki v. George Mike Wanjohi & Others** at page 16:

Ideally, cases should be determined on tested evidence at a full hearing.

It was also pointed out by Ngaah J. in **Peter Gichuki King'ara v. IEBC & Others Nyeri Election Petition 3 of 2013**:

It must be noted that witness affidavits in an election Petition constitute evidence-in-chief which is subject to cross-examination and re-examination by virtue of Rule 12(2) (c). To admit it as self-sufficient on the matters deposed upon without cross-examination will not only prejudice the Respondents against whom the adverse comments have been made in that affidavit but will also be contrary to Rule 12(2) (c) of the Rules which guarantees the Respondents the right and the option to cross-examine witnesses on their affidavits.

43. Do the allegations in the affidavits of the Petitioner and his witnesses rise to the level of scandalous? This court has the power to strike out what it considers a scandalous pleading. This is a power that is available to the court at any stage of the proceedings. The court has on several occasions expressed itself on what amounts to a scandalous pleading. In the words of Kimondo J. in **Steven Kariuki v. George Mike Wanjohi (supra)**:

A pleading must disclose sufficient facts to enable the opposing party respond to it. What then is a scandalous pleading? In Brite Print (K) Ltd Vs Attorney General Nairobi, High Court case 1096 of 2000 (unreported) Justice A. Visram, as he then was, citing with approval of Fischer Vs Owen (1878) 8 C.D 645 that a matter can only be said to be scandalous if it is irrelevant. Cotton L.J. in the Fischer case at page 653 said "nothing can be scandalous which is relevant". In Black's Law Dictionary 9th edition, West Minnesota, the word scandal means: "disgraceful, shameful or degrading acts or conduct. Defamatory reports or rumours, especially slander".

In **BULLEN and LEAKE and JACOB'S PRECEDENTS OF PLEADINGS 12th Ed.** by IJ JACOB at page 144-145 scandalous pleadings are defined as follows:

"For this purpose, allegations in a pleading are scandalous if they state matters which are indecent or offensive or are made for the mere purpose of abusing or prejudicing the opposite party. Moreover, any "unnecessary" or "immaterial" allegations will be struck out as being scandalous if they contain any imputation on the opposite party or make any charge of misconduct or bad faith against him or anyone else. Again, if degrading charges are made which are irrelevant, or if, though the charge be relevant, unnecessary details are given, the pleading becomes scandalous. One of the two defendants may apply to strike out scandalous passages from the defence served on him by the other."

In the case of **WEN LOCK V. MALONEY AND OTHERS [1965] WLR 1238**, Sellers L.J. said at page 1242:

"This summary jurisdiction of the court was never intended to be exercised by a minute and a protracted examination of documents and the facts of the case in order to see whether the Plaintiff really had a cause of action. To do that is to usurp the position of the trial Judge and to produce a trial of the case in chambers, on affidavits only without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power."

44. The issue for the court to consider in this regard is what the effect of the allegations is and whether they are relevant to the issue at hand. What the Petitioner alleges is the commission of election offences within the meaning of the Elections Act. Election offences, if proved, would have the effect of showing that the election that is challenged was not free and fair. This would be contrary to Article 81 of the Constitution which sets out the principles. The allegation of commission of election offences by the applicant might be embarrassing in the English sense of

the word but cannot be said to be irrelevant to the matter at hand and therefore fall short of the legal threshold of scandalous.

45. The various affidavits sworn in support of this Petition are not self-reliant but are subject to cross examination and re-examination by virtue of Rule 12(2) (c) of the Rules. The allegations of commission of election offences are neither irrelevant nor scandalous. The veracity of each of them will be tested during the trial.

46.

47. The Applicants also contend that the Petition should be struck out for not disclosing a reasonable cause of action. The Court of Appeal has had occasion to deal with what amounts to a reasonable cause of action in relation to an election Petition. In the case of **Gakunga & Another v. Maina & Another (2008) 1KLR (EP) 520**, the court, cited Chitty J. in the case of **Peru v. Peruvian Guano Company [1887] 36 Ch. D 489 at 495**:

“in point of law, and consequently in the view of a Court of justice, every cause of action is a reasonable cause of action and should as such be seriously considered”.

The court went on to state:

As also stated by the learned judge at page 496, if notwithstanding defects in pleadings, which would have been fatal on a document, the Court sees that a substantial case is presented, then the court should decline to strike out the pleadings. If however the pleading discloses a cause which will not succeed, then it could strike out the pleading.

48. If the allegations contained in the Petition and the supporting affidavits were to be taken as a whole, would it show that the election was not free and fair? If the answer to this question is in the affirmative, then the Petition and the affidavits in support of the same cannot be said not to disclose a reasonable cause of action. For a court to strike out a Petition on this ground, it has to be proved that the pleading is incontestably bad.

49. The last issue deals with the non-joinder of the running mate of the 1st Respondent and what effect that has on the Petition. Provisions on the election of a Governor and Deputy Governor are contained in Article 180 of the Constitution. This provision states at paragraphs 5 and 6:

(5) Each candidate for election as County Governor shall nominate a person who is qualified for nomination for election as County Governor as a candidate for Deputy Governor.

(6) The Independent Electoral and Boundaries Commission shall not conduct a separate election for the Deputy Governor but shall declare the candidate nominated by the person who is elected County Governor to have been elected as the Deputy Governor.

50. From a reading of the provision, it is clear that the Deputy Governor, upon the election of the Governor, is treated as elected, as if he had vied in an election. Upon his declaration, he becomes, by virtue of the Constitution, an elected person.

51. The non-inclusion of the running mate to the 1st Respondent brings to the fore the question of fair hearing as enunciated in Article 50 of the Constitution. Article 25 (c) of the Constitution makes it clear that the right to a fair hearing is one of the rights that cannot be derogated from. The question that then falls for determination is whether or not they are a necessary party in this election Petition.

52. I note from the application that the election offences alleged by the Petitioner are alleged to have been committed by the 1st Respondent. Should the court find that an offence was committed by a person not made a party to the Petition, section 87 (2) of the Elections Act provides that the court shall give the person an opportunity to be heard and call evidence on why he should not be reported. The section states:

(2) Before a person, not being a party to an election Petition or a candidate on whose behalf the seat is claimed by an election Petition, is reported by an election court, the elections court shall

give that person an opportunity to be heard and to give and call evidence to show why he should not be reported.

53. The effect of being found to have committed an offence, aside from the general penalty imposed at section 106 (1) of the Elections Act is disqualification from eligibility for an election for 5 years from the date of the conviction. Section 106 (3) states:

A person who is convicted of an offence under this Act shall not be eligible for election or nomination in an election under this Act for a period of five years following the date of conviction.

54. This means that should a person who has been elected as Governor is found to have committed an offence, he would cease to be eligible to hold the office in accordance with the Constitution. In the event that no wrongdoing is imputed to the Deputy Governor, he would then assume the office of Governor in accordance with the Article 182(2). Should both of them be found to be ineligible or should a vacancy occur in both offices for one reason or another, the Constitution at Article 182 (4) & (5) provides that the Speaker of the County Assembly would then act as the County Governor until an election can be (i.e.) within 60 days of assumption of office. The provisions of section 17 of the Elections Act with regard to the notice of county election would then kick in.

55. Should this court nullify the Tharaka-Nithi county election, a notice would be issued by the Speaker of the County Assembly to all necessary parties, including the Deputy Governor and the Speaker of the Tharaka-Nithi County Assembly. He would thus not be prejudiced by such an adverse finding should this court decide to invalidate the election of the 1st Respondent. The point I am making is if every person who would be affected by the decision of the Election Court were to be required to be a party, the Speaker of the County Assembly just as the Deputy Governor should have been a party as well in light of Article 182 (4).

56. The court also has power to compel the attendance of any person to the proceedings before it where it considers this necessary for the proper determination of the matters in controversy. Section 80 (1) (b) of the Act provides:

80. (1) An election court may, in the exercise of its jurisdiction—

a. ...

(b) 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;

57. Prima facie, the non-inclusion of the running mate to the 1st Respondent is not fatal to the Petition as the court has the power under section 80(1) (b) to 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. Whether the failure to include the Deputy Governor in this Petition was fatal will be considered fully at a later stage in this Petition.

58. Having carefully considered the two applications by the Respondents to this Petition I have come to the conclusion:

- 1. There was an obligation on the part of the IEBC to set out clearly not just the names of the elected persons as it did on the 13th of March 2013, but also to particularize the votes cast, spoilt and garnered by each candidate. This default was however on the part of the IEBC and should not be visited on the Petitioners who placed reliance on it in computing the time for the filing of their Petition. In view of the finding that ‘declaration’ as set out in Article 87 (2) means ‘publication in the gazette’, it follows that the Gazette Notice must be deemed to be the declaration. I therefore find that the Petition, having been filed within 28 days of publication of Gazette Volume No. 3155 of 2013, is properly within the Constitutional timelines set out in Article 87 (2).**
- 2. The veracity of the contents of affidavits can only be tested when the witnesses of either side**

take the stand. This makes the application to strike out affidavits named, whether in part or the whole; unsuitable for determination at the preliminary stage as the court has not had an opportunity to hear the witness evidence. The various affidavits sworn in support of this Petition are not self-reliant but are subject to cross examination and re-examination by virtue of Rule 12(2) (c) of the Rules. The allegations of commission of election offences are neither irrelevant nor scandalous. That prayer is therefore premature.

- 3. Prima facie, the non-inclusion of the running mate to the 1st Respondent is not fatal to the Petition as the court has the power under section 80(1) (b) of the Elections Act to 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. Whether the failure to include the Deputy Governor in this Petition was fatal will be considered fully at a later stage in this Petition.**
- 4. The Respondents applications are dismissed with costs, subject to observations made in this ruling.**

DELIVERED IN OPEN COURT AT MERU THIS 24TH DAY OF JUNE 2013.

LESIIT, J

JUDGE.