



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**PETITION NO.6 OF 2013**

**IN THE MATTER OF THE CONSTITUTION OF KENYA, THE ELECTIONS ACT (2011) AND  
THE REGULATIONS MADE THEREUNDER AND PUBLIC OFFICER AND ETHICS ACT**

**AND**

**IN THE MATTER OF ELECTION FOR GOVERNOR AND DEPUTY GOVERNOR OF  
KAJIADO COUNTY**

**AND**

**IN THE MATTER OF THE PETITION OF JOSIAH TARAIYA KIPELION OLE KORES**

**BETWEEN**

**JOSIAH TARAIYA KIPELIAN OLE KORES.....PETITIONER**

**VERSUS**

**DR.DAVID OLE NKEDIENYE.....1<sup>ST</sup>RESPONDENT**

**PAUL NTIATI.....2<sup>ND</sup> RESPONDENT**

**TOM MBOYA .....3<sup>RD</sup> RESPONDENT**

**INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION.....4<sup>TH</sup> RESPONDENT**

**J U D G M E N T**

1. On 4<sup>th</sup> March 2013, the residents of Kajiado County went to the polls to elect their political leaders as the rest of the Kenyans did. One of the positions on offer was that of Governor and his Deputy. The Petitioner was initially one of the candidates nominated to vie for the position of Governor by The National Alliance Party (TNA). Subsequently, the record reflects that his

- nomination was quashed by the 4<sup>th</sup> Respondent, a decision that was later on appealed to the High Court. His name was also excluded from the ballot papers for those elections. After the conclusion of the elections, the 3<sup>rd</sup> Respondent, the Returning Officer of the County, declared the 1<sup>st</sup> and 2<sup>nd</sup> Respondent to have been elected as the Governor and Deputy Governor for Kajiado County, respectively. The 3<sup>rd</sup> Respondent declared the 1<sup>st</sup> Respondent to have won the seat of Governor by garnering 125,563 votes out of the total 260,481 votes cast in that election.
2. After the declaration of the results, the Petitioner challenged the declaration of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent as Governor and Deputy Governor for Kajiado County. In the Petition lodged on 8<sup>th</sup> April 2013, the Petitioner contended that the 2<sup>nd</sup> Respondent was allowed to contest for the position of Deputy Governor even though he was ineligible to contest for the same. The Petitioner contended that the 2<sup>nd</sup> Respondent did not possess a Degree from a University recognized by the Commission of Higher Education (“CHE”). That a letter dated 26<sup>th</sup> March, 2013 by the CHE had confirmed that the masters degree held by the 2<sup>nd</sup> Defendant was not recognized in Kenya.
  3. That further, the 2<sup>nd</sup> Respondent, prior to vying for the position of Deputy Governor was a public officer and had failed to resign from public office by the date of nomination of the 1<sup>st</sup> Respondent as a contestant for the Gubernatorial seat. On those grounds, the Petitioner was of the opinion that the 2<sup>nd</sup> Respondent’s ineligibility invalidated the Kajiado gubernatorial election as the Governor elect effectively lacked a running mate.
  4. The Petitioner also complained that the elections in Kajiado County were not free and fair. He pointed out that the residents of that county were disenfranchised as they were subjected by the 3<sup>rd</sup> and 4<sup>th</sup> Respondent to vote for candidates who were ineligible to contest for the post of Governor. According to the Petitioner, the 4<sup>th</sup> Respondent did not remove the name of Nina Daniel Mpute from the ballot papers or even communicate to the voters that the said candidate had been disqualified from vying for the position of Governor vide by the decision of 4<sup>th</sup> Respondent’s Dispute Resolution Committee ( “DRC”) dated 2<sup>nd</sup> March, 2013. The said candidate came in second garnering 95,526 votes.
  5. The Petitioner further contended that another candidate from the Party of Action, Dr. Obadiah Njoroge Kimani, was also not eligible to contest the position for Governor as he lacked a running mate. In particular, the Petitioner complained that Dr. Obadiah Kimani’s running mate, one Daniel Koilel Tinaayai had resigned from his position as running mate but his name was still retained in the ballot papers. Consequently, it was the Petitioner’s contention that by failing to remove Mr. Tinaayai’s name from the Ballot paper, the 4<sup>th</sup> Respondent violated Section 82 (2) (f) of the Elections Act. To the Petitioner therefore, the votes which Dr. Obadiah received in that election were a waste.
  6. Another allegation by the Petitioner was that several voters were denied their constitutional right to vote by Presiding Officers in various polling stations without proper justification. In totality, the Petitioner averred that the 3<sup>rd</sup> and 4<sup>th</sup> Respondent failed to comply with the provisions of the law and did not carry out the gubernatorial election for Kajiado County to the required standard.
  7. As a result of the matters outlined in his Petition, the Petitioner requested the court to declare that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent were not validly elected. He also sought orders that the 4<sup>th</sup> Respondent be compelled to conduct fresh elections in respect of the position of Governor and Deputy Governor for the Kajiado County. The Petitioner also prayed to be awarded costs of the Petition.
  8. Pursuant to **Rule 14(1) of The Elections (Parliamentary and County Elections) Petition Rules, 2013 (hereinafter “the Election Petition Rules”)**, the Respondents filed their responses to the Petition. In their response filed on 17<sup>th</sup> May, 2013 the 1<sup>st</sup> and 2<sup>nd</sup> Respondent denied the allegations made in the Petition. In respect to the allegation that the 2<sup>nd</sup> Respondent did not meet the requisite academic qualifications for the post of the Deputy Governor, the 1<sup>st</sup> Respondent contended that the 2<sup>nd</sup> Respondent was duly qualified and that he possessed a Master’s Degree from a recognized University. That the issue of the 2<sup>nd</sup> Respondent’s academic qualifications and his status as a Public Officer had been dealt with by the DRC in **Dispute no. 27 of 2013 Jackson Tatao Pashile –vs- Nina Daniel Mpute & 2 Others** wherein the DRC held that there was no evidence to show that the 2<sup>nd</sup> Defendant was not qualified to vie as a Deputy Governor. That the

- DRC also found that there was no evidence that the 2<sup>nd</sup> Respondent was a public servant as at the date of his nomination as was alleged by the complainant. To this end, the 1<sup>st</sup> and 2<sup>nd</sup> Respondent averred that given the fact that no appeal challenging the DRC's decision had been lodged, the Election Court could not sit as an appellate court on disputes already determined. In the opinion of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent, the Court did not have the jurisdiction to determine the 2<sup>nd</sup> Respondent's suitability as Deputy Governor or his academic qualifications.
9. It was further contended by the 2<sup>nd</sup> Respondent that since the Petitioner had lodged an Appeal in the Court of Appeal in respect to the decision rendered by the High Court in **Petition No. 65 of 2013 Josiah Tarayia Kipelian Ole Kores Vs Tom Mboya & 3 others** seeking to overturn the quashing of his nomination which had not been determined, the Petition had not therefore disclosed any reasonable cause of action and was an abuse of the court process.
  10. Through their response, the 3<sup>rd</sup> and 4<sup>th</sup> Respondent on their part contended that the gubernatorial election for Kajiado was conducted substantially in compliance with the Constitution and the applicable law. They averred that the declaration of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent as the elected Governor and Deputy Governor for Kajiado County was valid and credible and that the Petitioner had presented no grounds before the court to persuade the court to nullify the said results. They also contended that the post of Deputy Governor was not an elective position and that the responsibility of vetting such a candidate was the responsibility of a prospective Governor.
  11. As regards the 2<sup>nd</sup> Respondent's academic qualification, the 3<sup>rd</sup> and 4<sup>th</sup> Respondent contended that the letter dated 26<sup>th</sup> March, 2013 by the CHE to the Petitioner's advocate was inconclusive. That the CHE had indicated that the degrees awarded by the University of Reading were recognized in Kenya. The 3<sup>rd</sup> Respondent also confirmed that in his opinion the 2<sup>nd</sup> Respondent was academically qualified to be Deputy Governor and was not a Public servant at the time of the 1<sup>st</sup> Respondent's nomination. Moreover, it was contended that the 4<sup>th</sup> Respondent's DRC had effectively dealt with the issues raised by the Petitioner on the 2<sup>nd</sup> Respondent's qualifications and status as a public officer and had found no merit with regard to those allegations.
  12. On the issue of Nina Daniel Mpute being disqualified from contesting the election, the 3<sup>rd</sup> and 4<sup>th</sup> Respondent pointed out that the DRC only discovered the non-qualification of the said candidate on 2<sup>nd</sup> March, 2013. That because of the timing of that decision, the 3<sup>rd</sup> and 4<sup>th</sup> Respondent could not make the necessary changes to the ballot papers given that at that time all the electoral materials had been distributed to the respective stations in Kajiado County. As regards the complaint of the non-qualification of Dr. Obadiah Kimani for lack of a running mate, the 3<sup>rd</sup> and 4<sup>th</sup> Respondent admitted that although they had received a complaint from Daniel Koilel Tinaayia on 22<sup>nd</sup> February, 2013, his name had already been gazetted and as such, the 4<sup>th</sup> Respondent could not degazette the same without a court order.
  13. The 4<sup>th</sup> Respondent denied that any Presiding Officer from the various polling stations in Kajiado had turned away voters during the election date as alleged by the Petitioner. In the premises, the 3<sup>rd</sup> and 4<sup>th</sup> Respondents urged the court to find that the election of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent as Governor and Deputy Governor for Kajiado County reflected the will of the people of the said County. They urged the court to dismiss the Petition with costs.

### **Burden and standard of proof**

14. Before I proceed to consider the evidence presented by the parties for and against the Petition, I will briefly address the question of the burden and standard of proof required in election petitions. All the parties alluded to this matter in their written and oral submissions. In election petitions, the burden of proving the allegations made in the Petition lies with the Petitioner. This was firmly decided in **Raila Odinga –Vs- IEBC & 3 Others, Election Petition No.5 of 2013** wherein the Supreme Court of Kenya held thus:-

***“Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections. It is on that basis that the respondents bear the***

***burden of proving the contrary. This emerges for a long standing common law approach in respect of alleged irregularity in the acts of public bodies. Omnia praesumuntur rite et solemniter esse acta: all acts are presumed to be done rightly and regularly. So, the petitioner must set out by raising firm and credible evidence of the public authority's departures from the prescriptions of the law."***

15. Further in the case of **Rashid Hamid Amana v IEBC and Others Malindi EP no. 6 of 2013** **Kimaru J** held that:-

***"It is not enough for the Petitioner to point out irregularities that took place during the elections. The Petitioner must establish that the irregularities were of such nature that it affected the exercise by the voters of the particular electoral area of their will to choose a candidate of their choice."***

I fully agree with the above holdings. It is therefore clear that in an election petition such as the present one, the Petitioner must lay cogent evidence before the court in support of any allegation made with regard to any purported breaches of law by the Respondents. Such electoral malpractices and irregularities when proved, must however have been of such a magnitude that they substantially and materially affected the results of the election. The primary consideration in an election contest therefore is whether the will of the electorate has been affected by the irregularities complained of. Put in another way, whether the results returned do genuinely reflect the will of the electorate.

26. As regards the standard of proof, the Petitioner is required to prove the allegations of electoral malpractices to the standard that is higher than that of a balance of probabilities that is applicable in civil cases but lower than that applicable in criminal cases i.e. that of proof beyond any reasonable doubt. See the cases of **Bernard Shinali Masaka –Vs- Bonny Khalwale & 2 Others [2011] eKLR** and **Raila Odinga –Vs- IEBC & 3 Others (supra)**. However, if the irregularities or malpractice complained of amount to election offences the same must be proved beyond reasonable doubt. The court will therefore not interfere with results of an election unless it is established to the required standard of proof that the irregularities and electoral malpractices complained of render the said election invalid.

16. The principles I have outlined above provide the background for consideration of the issues framed for determination.

### **Issues for determination**

17. During the Pre-Trial Conference held on 24<sup>th</sup> May, 2013, the parties to this Petition agreed on the following issues:

- a. Whether this Court, sitting as an elections dispute resolution court has jurisdiction to adjudicate over issues relating to pre-election, such as the nomination and qualifications of the candidates who contested the seat of Governor and Deputy Governor of Kajiado County in the last General Election in view of the provisions of Article 88 (4) (e) of the Constitution, Section 74(2) of the Elections Act and Regulation 99(2) of the Elections (General) Regulations, 2012.
- b. Whether the post of Deputy Governor is an elective post and therefore subject of an election petition.
- c. Whether the 2nd Respondent was qualified to be nominated for the seat of Deputy Governor in Kajiado County.
- d. If the answer to (c) above is in the negative, whether the 1st Respondent was eligible to contest the seat of Governor of Kajiado County.
- e. Whether or not Daniel Nina Mpute and Dr. Obadiah Kimani Njoroge were eligible to contest as Governor in the 4<sup>th</sup> March, 2013 elections. If not, of what effect was their participation on that election?
- f. Was the election for Kajiado County carried out in accordance with the law by 4<sup>th</sup> Respondent?
- g. What order as to costs?

18. I shall now address these issues bearing in mind the evidence that was presented to the court during the hearing of the Petition.

a. **Whether the Court has jurisdiction to adjudicate over issues relating to pre-election issues.**

19. With regard to this issue, the Respondents argued that save for the issues touching on whether voters were denied their right to vote and the impact of not removing the name of Obadiah Njoroge Kimani from the ballot paper, all other issues in the Petition were in regard to the propriety of the nomination process which is outside the Court's jurisdiction. According to the 3<sup>rd</sup> and 4<sup>th</sup> Respondents, this Court does not have the jurisdiction to deliberate on matters that touch on the 2<sup>nd</sup> Respondent's qualifications and Mr. Nina Daniel Mpute's eligibility to contest. Accordingly, the 3<sup>rd</sup> and 4<sup>th</sup> Respondent through their learned Counsel, Mr. Imende, contended that the issues relating to the 2<sup>nd</sup> Respondent's qualifications as well as those of Nina Daniel Mpute, had been decided upon by a quasi-judicial tribunal set up to do so under Article 88 (4) (e) of the Constitution, Section 74 (2) of the Election Act, 2011 and regulation 99 (2) of the Elections (General) Regulations 2012 (hereinafter "the Regulations"). As such, it was argued that re-hearing the aforesaid issues would be contrary to the principle of res judicata. Mr. Imende however conceded that the Court could interrogate the impact of both Mr. Nina Daniel Mpute's and Dr. Obadiah Njoroge's participation as candidates in the election. Mr. Ndubi, learned Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondent, supported Mr. Imende's submissions on this issue.

20. Opposed to the above position, the Petitioner's counsels led by Mr. Mwangi, submitted that the **Elections Act, 2011** under Section 75(1) establishes an Election Court to determine amongst other things, the validity of a County election. He submitted that in the foregoing, an election court is a High Court exercising its unlimited and original jurisdiction in civil matters as per **Article 165(1) (3) (a)** of the **Constitution 2010**. As such, it was submitted that the test for determining the jurisdiction of an election court is whether the matters complained of formed part of the election process and affected the outcome of the election. Along these lines, Mr. Mwangi submitted that the instant Petition raised questions of the qualifications of candidates who contested the elections, a fact that when confirmed, impacts on the validity of the office holder of the post of both Governor and Deputy Governor of Kajiado County. As such, the Petitioner contended that this Court had the jurisdiction to hear and determine all the issues raised in the Petition. He relied on the case of **Peters and Another Vs Attorney General and Another (2002) LRC 32** in support of this position.

21. In a rejoinder, Mr. Imende argued that the Constitution of Kenya 2010 and the Elections Act 2011 created various levels of dispute resolution mechanisms in the electoral process, including pre-election contestations. According to him, in applying the principle of harmonization, all levels of electoral dispute resolution must be given room for implementation. He submitted that the DRC was established to settle, inter alia, disputes relating to or arising from nominations or pre-election contestations. Further, he observed that the Election Court was established to handle disputes subsequent to the declaration of election results including disputes arising from the conduct of elections other than pre-election contestations. He further submitted that the jurisdictional demarcation was meant to reduce the probability of nullifying elections to a minimum. As such it was contended that section 74(3) of the Elections Act contemplated a situation where the hearing and determination of disputes relating to prospective nominations or election should be determined before the date of the nomination or election. He therefore urged the Court to find that the issues that were raised by the Petitioner in his Petition with regard to the qualifications of the 2<sup>nd</sup> Respondent and Mr. Nina Daniel Mpute were not within the jurisdiction of the Election Court. The Court was also urged not to exercise its jurisdiction in favour of the Petitioner, given that he had failed to follow the laid down procedure in challenging the nomination of the 2<sup>nd</sup> Respondent as Deputy Governor. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents therefore concluded that the Court should in this Petition limit its inquiry to the events that transpired on the polling day and after the declaration of results.

22. Having considered the rival arguments by the parties, the following is my take on the matter. Where the jurisdiction of the court has been made an issue in any proceedings, it is incumbent upon the court to dispose of the issue before delving into anything else. In the Supreme Court's

advisory opinion In The Matter of the Interim Independent Electoral Commission [2011] eKLR, the Supreme Court delivered itself in paragraphs 29 and 30 thus:-

*“[29] Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in Owners of Motor Vessel ‘Lillian S’ v. Caltex Oil (Kenya) Limited [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):*

*“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step.”*

*[30] The Lillian ‘S’ case establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the Constitution.” (Emphasis mine)*

23. That is the law. The jurisdiction of a Court emanates from express terms of the law and in the case of the High Court, it emanates from the Constitution under Article 165 (3). In the case of DIANA KETHI KILONZO & another v INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION (IEBC) & 10 others [2013] eKLR the Court stated that:-

*“We note that the Constitution allocated certain powers and functions to various bodies and tribunals. It is important that these bodies and tribunals should be given leeway to discharge the mandate bestowed upon them by the Constitution so long as they comply with the Constitution and national legislation. These bodies and institutions should be allowed to grow. The people of Kenya, in passing the Constitution, found it fit that the powers of decision-making be shared by different bodies. The decision of Kenyans must be respected, guarded and enforced. The courts should not cross over to areas which Kenyans specifically reserved for other authorities. As was stated in International Centre for Policy and Conflict and 5 others -vs- The Hon. Attorney-General & 4 others [2013]eKLR:-*

*“109. An important tenet of the concept of the rule of law is that this court before exercising its jurisdiction under Article 165 of the Constitution in general, must exercise restraint. It must first give an opportunity to the relevant constitutional bodies or State organs to deal with the dispute under the relevant provision of the parent statute. If the court were to act in haste, it would be presuming bad faith or inability by that body to act. For instance, in the case of IEBC, the court would end up usurping IEBC’s powers. This would be contrary to the institutional independence of IEBC guaranteed by Article 249 of the Constitution. .....*

*110. Where there exists sufficient and adequate mechanisms to deal with a specific issue or dispute by other designated constitutional organs, the jurisdiction of the court should not be invoked until such mechanisms have been exhausted...”*

*(Emphasis mine)*

24. This Court identifies itself with the above holdings. Though the Court has been given original and unlimited jurisdiction, the Court must be careful not to extend its tentacles to other dispute

resolution avenues unless it does so under its supervisory role.  
25. Article 88 of the Constitution of Kenya establishes the IEBC. Article 88 (4) (e) provides:-

**“4. The commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for –**

**(e) The settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of elections.” (Emphasis mine)**

The exercise of this mandate by IEBC is cemented by Section 74 of the Elections Act, 2011 and Regulation 99 of the Regulations. Further, Section 109 (x) of the Elections Act empowers the IEBC to make regulations to provide for complaints resolution mechanisms and for the manner of settlement of election disputes. Pursuant to that provision, the IEBC published vide Legal Notice No. 139 of 3<sup>rd</sup> December, 2012 rules relating to the procedure for settlement of electoral disputes by a committee under Regulation 99. Rule 9 of the said Rules provides:-

**“9 (1) any person objecting to the nomination of a candidate may file a complaint with the Commission on any of the following grounds:-**

- a. **That the candidate is not qualified to be elected under any law;**
- b. **That the candidate does not have all the qualifications required under any law;**
- c. **That the candidate was convicted of an election offence at any time material to the nomination;**
- d. **That conduct of the nomination process was invalid;**
- e. **That the candidate did not accept his nomination according to the rules promulgated by the Commission;**
- f. **Any other ground that the Commission deems sufficient provided such ground shall not be frivolous, vexatious or scandalous.”**

26. Rule 11 of the said Rules also gives the Returning Officer authority to decide any dispute arising from the nomination of a candidate within his electoral area. Rule 12 provides that a Returning Officer shall issue a reasoned written decision within seven days after the application or objection is made. Rule 13 provides that a person aggrieved by the decision of a returning officer may appeal such decision to the IEBC.

27. In the case before me, it is not in dispute that some of the aforementioned procedures set out in the Regulations and Rules had been undertaken with regard to the qualifications and eligibility of the 2<sup>nd</sup> Respondent and Nina Daniel Mpute. I have also seen the Ruling of the DRC of the 4<sup>th</sup> Respondent in **Dispute No. 27 of 2013 Jackson Tatao Pashile Vs Nina Mpute & 4 Others**. The DRC dismissed the complaints against the nomination of the 2<sup>nd</sup> Respondent. In the same vein, the issue of Nina Daniel Mpute’s academic qualifications was heard and determined. According to the record, there is no appeal against the said decision and if there was, the outcome thereof was not disclosed to the court. Can one therefore conclude that the issue of the qualifications or eligibility of the 2<sup>nd</sup> Respondent and Nina Daniel Mpute are res judicata as alleged by the Respondents?

28. Mr. Okworo who teamed up with Mr. Mwangi for the Petitioner differed with the Respondents line of reasoning. According to him, the issues with regard to the qualifications of both the 2<sup>nd</sup> Respondent and Nina Daniel Mpute are not res judicata as the parties in **Dispute No. 27 of 2013 (supra)** were different, although the issues may have been the same. I am inclined to agree with Mr. Okworo. The essence of the doctrine of res judicata is that a party should not be vexed twice over the same cause and to bring an end to litigation. Under **Section 7 of the Civil Procedure Act** for res judicata to apply, the issue in the subject suit must have been decided by a competent court. Secondly, the matter in dispute in the former suit between the parties must be directly or substantially be in dispute between the parties in the suit where the doctrine is pleaded as a bar.

Thirdly, the parties in the former suit should be the same parties, or parties under whom they or any of them claim, are litigating under the same title - See the case of **Karia and Another Vs the Attorney General and Others (2005) 1EA 83**. Applying these principles to the present case, I agree with the Petitioner that the issue of eligibility is not res judicata because the parties in **Dispute No. 27 of 2013 (supra)** were different from the present suit. The issue was determined by the DRC a tribunal and not a court. The same could be res judicata if this court was a tribunal as the DRC was. As such the first and third criterion for determining whether a matter is res judicata has not been satisfied.

29. Having said that however, has the jurisdiction of this court been properly invoked in relation to the issue of nomination and eligibility of the 2<sup>nd</sup> Respondent and Nina Mpute? I have already set out above in detail the prescribed procedure for determining issues relating to nomination and eligibility of candidates, which as the 3<sup>rd</sup> and 4<sup>th</sup> Respondents pointed out, amount to pre-election contestations. Any party disputing nomination of a candidate has a duty to follow the dictates of the Constitution as set out in **Article 88(4)(e), Section 74(2) of the Elections Act, 2011 and Regulations 99 (2) of the Elections (General) Regulations, 2012**. These provisions are clear in their tenure in giving the 4<sup>th</sup> Respondent jurisdiction to hear matters that touch on or disputes arising from nominations. Nomination has been defined in Section 2 of the Elections Act as ***“the submission to the commission of the name of a candidate in accordance with the Constitution and the Act.”*** Under Rule 2 of the Rules made under Regulation 99 a dispute has been defined as:-

***“..... a complaint, challenge, claim or contest relating to any stage of the electoral process and includes an objection to the acceptance of the nomination papers of a candidate by the Returning officer.”***

30. My view is that, the law did not provide the detailed procedure for pre-election dispute resolution mechanisms for no reason. It was intended that the procedure be strictly followed. There is ample authority, including **Diana Kethi Kilonzo’s case** cited above, **Kituo cha Sheria Vs John Ndirangu Kariuki (2013) e KLR, ICPC & 5 others Vs AG & 4 others (2013) eKILR, Re Francis Gitau Parsimei & others Vs National Alliance Party & others Pet. No. 356 of 2012 (UR)** to the effect that once a procedure on dispute resolution has been provided for, the court has no business extending its tentacles thereto. It should be noted that the provisions I have cited above are clear that a decision on those disputes must be rendered before the subject election. A dissatisfied party to such a dispute can only appeal to the High Court in its normal jurisdiction against such a decision not an Election Court. In **Kituo Cha Sheria Vs John Ndirangu & Anor (2013) eKLR** Kimondo J was of the view that only in instances of outright negligence by the IEBC in the nomination process that infringe on the Constitution that the election court can re-open the issues relating to nomination. I agree with that holding.

31. A reading of Section 75 of the Elections Act shows what issues an Election court can delve into. The Election Court enquires into the validity of an election. This to my mind does not extend to pre-election disputes whose procedure is well set out in Article 88(4) (e) of the Constitution and Section 74 of the Elections Act.

32. In this regard, I find that the Petitioner failed to use the prescribed procedure as provided by law to question the eligibility of the 2<sup>nd</sup> Respondent and the other 2 candidates. Having failed to do so, I find that this Court cannot usurp the jurisdiction assigned to another body. He should have pursued the appellate process but he did not. Neither has he faulted the process undertaken by the DRC. In the foregoing, I am of the view that this Court will not be acting properly if it extended its jurisdiction to determine matters relating to the qualifications and eligibility of the 2<sup>nd</sup> Respondent and Nina Daniel Mpute which were properly dealt with but not challenged by him on appeal. The same however, does not apply to the issue raised by the Petitioner on the eligibility of Dr. Obadiah Kimani Njoroge to run for Governor of Kajiado County.

33. In the event that I am found to be wrong on that score, I find that it would be appropriate to determine the issues raised during the hearing of this Petition as regards the 2<sup>nd</sup> Respondent’s eligibility and qualifications as Deputy Governor. Further, I will also interrogate the impact of Nina Daniel Mpute’s and Dr. Obadiah Kimani Njoroge’s participation in the subject elections. This I will do under issue Nos. (c) and (d) hereunder.

b. **Whether the post of Deputy Governor is an elective post and therefore subject of an election petition.**

34. On this issue, it was the Petitioner's contention that the post of Deputy Governor was an elective position and therefore subject to all laws relating to the election of a governor. The Petitioner cited Article 180 (6) of the Constitution in support of this contention. In a rejoinder, the 3<sup>rd</sup> and 4<sup>th</sup> Respondent contended that there were only six (6) elective posts in the 4<sup>th</sup> March, 2013 election and that none of these included the post of Deputies. It was therefore their submission that if a candidate for Governor was successful, then his running mate would be automatically be declared as the Deputy Governor by virtue of the Governor's success.

35. In view of this position, the 3<sup>rd</sup> Respondent testified that the post of Deputy Governor was not an elective post as alluded to by the Petitioner. He further told the Court, that it was not the responsibility of the Returning Officer to vet the Deputy Governor's qualifications but that such a responsibility lay on a prospective Governor.

36. I have considered the arguments by the opposing parties including the evidence provided. Article 180 (6) of the Constitution states that:-

***"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."*** (Emphasis mine)

In my view, the above constitutional provision is self-explanatory and only requires a literal interpretation. The 4<sup>th</sup> Respondent is barred by law from conducting separate elections for the post of deputy governor. It may therefore seem that the position of Deputy Governor is not an elective post per se. A candidate for Deputy Governor only assumes such a position by being a nominee of the successful candidate of County Governor. Under **Regulation 51** of the **Elections (General) Regulations 2012** the Returning Officer is required to issue a nomination certificate to a candidate who is validly nominated to contest for the County Governor position. No such certificate is given to a running mate. It would seem that the law only contemplates one elective post in the gubernatorial election and that is the post of County Governor. That notwithstanding, however, the Constitution directs the IEBC to declare a Deputy Governor nominated by a person subsequently elected to have been elected Deputy Governor. To my mind, this means that the election of Governor and his Deputy is one ticket. When electing the Governor, the voters likewise elect the Governor's Deputy. The nomination of the Deputy Governor is prior to and not after election. Although it is not a direct election, it remains an elective post since the name of the Deputy Governor must be in the Ballot paper. A purposive interpretation of the Constitution in my view will lead to no other conclusion than that the Deputy Governor's position is elective. This is because of the requirement that the deputy's qualification must be akin to those of the Governor and once a vacancy in the Governors position arises no by election is to be held but automatic assumption of office of Governor by the Deputy. To my mind therefore the election of Governor cannot be separated from that of his deputy. I therefore hold that the post of Deputy Governor is elective and therefore susceptible to an election petition as is a Governor's seat.

c) **Whether the 2<sup>nd</sup> Respondent was qualified to be nominated for the seat of Deputy Governor in Kajiado County.**

37. In his Petition, the Petitioner averred that he was aware that when the 1<sup>st</sup> and 2<sup>nd</sup> Respondent submitted the requisite documents for clearance to the 3<sup>rd</sup> Respondent, they did not submit the degree certificate for the 2<sup>nd</sup> Respondent or a letter from the CHE to show recognition of the 2<sup>nd</sup> Respondent's foreign degree certificate.

38. The Petitioner contended that though the 2<sup>nd</sup> Respondent had a Masters Degree from the University of Reading (UK) in Rural and Social Development, the same was not recognized in Kenya given that the 2<sup>nd</sup> Respondent had not undertaken a Bachelor's degree as is the requirement in Kenya. The Petitioner argued that the 2<sup>nd</sup> Respondent only possessed a Diploma in Range

- Management from Egerton College and that it was uncommon practice in Kenya for one to acquire a Postgraduate Degree without undertaking a Bachelors Degree. The Petitioner relied on a letter by the CHE dated 26<sup>th</sup> March, 2013 which purportedly supported his position that the Masters Degree held by the 2<sup>nd</sup> Respondent was not duly recognized in Kenya. The Petitioner therefore concluded that the 2<sup>nd</sup> Respondent did not meet the required qualifications as outlined in Section 22 (2) of the Elections Act 2011. The Petitioner therefore pleaded that the 3<sup>rd</sup> and 4<sup>th</sup> Respondent were in breach of Regulation 47 of the Regulations in allowing the 2<sup>nd</sup> Respondent to contest for the position of Deputy Governor.
39. Although all these allegations were in the Petitioner's Affidavit, he neither testified nor called any witness to support them. I shall revert to this aspect later on in this judgment.
40. To rebut the Petitioner's claims, the 2<sup>nd</sup> Respondent testified on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent. Mr. Ntiati told the Court that he had a Master's Degree from the University of Reading in the United Kingdom, though he did not have a Bachelor's Degree. He was firm that his Master's Degree from Reading University was recognized in Kenya by the CHE as evidenced by a letter dated 29<sup>th</sup> January, 2013. On cross examination, he stated that the letter dated 26<sup>th</sup> March, 2013 by CHE was with regard to the verification and equation of his Masters Degree and not recognition. That he was awarded a masters degree at Reading University because that institution regarded his Higher Diploma from Egerton College to be sufficient for under-graduate studies. He was therefore of the opinion that he had the necessary academic qualifications to be Deputy Governor for Kajiado County contrary to the allegations of the Petitioner. He indicated that he had presented his documentation to the 3<sup>rd</sup> Respondent as the 1<sup>st</sup> Respondent's running mate and that the same had been accepted without question. He finally pointed out that the issue with regard to his academic qualifications had been conclusively dealt with by the IEBC Dispute Resolution Committee in **Dispute No. 27 of 2013 (Supra)** and therefore believed that the Court did not have the jurisdiction to deal with matters of his qualification as the aforesaid decision had not been appealed against.
41. When the 3<sup>rd</sup> Respondent testified, he admitted that he was responsible for clearing the candidates that contested for the post of Governor in Kajiado County. He told the court that he had received the requisite documentation from the 1<sup>st</sup> Respondent on 31<sup>st</sup> January, 2013 and he proceeded to clear him as a Candidate for the Governor of Kajiado County. That the responsibility to vet the Deputy Governor's qualifications was that of the prospective Governor. In his view, the Governor was only supposed to undertake to the IEBC that his running mate had the necessary qualifications. He however testified that on his part, he required to see all the requisite documentation of the nominees for Deputy Governor to confirm their qualifications before he could clear the candidates for Governor. He confirmed that the 1<sup>st</sup> Respondent had informed him that the 2<sup>nd</sup> Respondent was his running mate and that he had a Master's Degree from the University of Reading, an institution recognized by the CHE. That he had received the 2<sup>nd</sup> Respondent's documentation which included his academic certificates and a letter from the CHE with regard to the recognition of his Masters degree. To him no proof had been presented to show that the 2<sup>nd</sup> Respondent lacked the requisite academic qualifications. As such, he had properly cleared the 1<sup>st</sup> Respondent to contest for the Position of Governor together with his running mate, the 2<sup>nd</sup> Respondent.
42. With regard to the letter by the CHE dated 26<sup>th</sup> March, 2013, the 3<sup>rd</sup> Respondent on cross examination emphasized that the same was prepared after the election and that it was a private communication between the CHE and the Petitioner's lawyers. He was of the opinion that the same was inconclusive with regard to whether the 2<sup>nd</sup> Respondent's Master's Degree was recognized in Kenya.
43. This court has carefully considered the evidence tendered in respect of this issue. Section 22(2) of the Elections Act 2011 provides thus:-

***“Notwithstanding subsection (1) (b), a person may be nominated as a candidate for election as President, Deputy President, County Governor, Deputy County Governor only if the person is a holder of a degree from the University recognized in Kenya.”***

44. The relevant provisions of the Act require recognition of a university degree that is held by a nominee of the said positions. To my mind therefore **Regulation 47** of the **Regulations**, and **Section 5** of the **Universities Act, 2012** must be read subject to the Elections Act. The said provisions provide that the CHE is the body mandated to recognize and equate degrees awarded by foreign universities and institutions in accordance to the guidelines set from time to time.
45. It is not in contest that the Deputy Governor needs to have the same academic qualification as that of Governor. The rationale behind this requirement is the provisions of Article 182 (2) of the Constitution which provide that:-

***“If a vacancy occurs in the office of county governor, the deputy county governor shall assume office as county governor for the remainder of the term of the county governor.”***

46. This essentially means that the post of Deputy Governor is important in the succession plan of a County Government. The provision seeks to protect the tax payer from the extra expense of a by-election in case of a vacancy in the office of Governor. A Deputy Governor is a Governor in waiting and must be academically qualified to assume and discharge the functions of Office of Governor.
47. In the case at hand, it is not in dispute that the 2<sup>nd</sup> Respondent holds a Masters Degree from the University of Reading (UK). It is also not in contest that the 2<sup>nd</sup> Respondent does not have a Bachelors or first degree as is customary in Kenya when one wants to pursue a Postgraduate Degree. The question that arises is whether the Masters Degree held by the 2<sup>nd</sup> Respondent is a recognized degree in Kenya given these facts. The only body mandated to do so is the CHE. Two letters from the very same CHE were produced by the opposing parties with regard to this issue.
48. The first letter dated 29<sup>th</sup> January 2013 and marked as “**PMN6**” indicates that the University of Reading is duly accredited in the United Kingdom and as such degrees awarded by this institution are recognized in the UK and by convention in Kenya. In his testimony, the 3<sup>rd</sup> Respondent confirmed that the 2<sup>nd</sup> Respondent’s original and copy of his Master’s degree were presented to him together with that letter. Based on these documents, the 3<sup>rd</sup> Respondent was satisfied that the 2<sup>nd</sup> Respondent satisfied the requirements of the law as to academic qualifications. This evidence was not challenged or rebutted. I therefore find the Petitioner’s allegation that the 2<sup>nd</sup> Respondent failed to provide the necessary documentation for clearance by the County Returning Officer as having no basis.
49. Regarding the letter of 26<sup>th</sup> March, 2013 from the CHE to the Petitioner’s lawyers, the same was in response to a letter by the Petitioner’s Advocate dated 22<sup>nd</sup> March, 2013. Both letters were prepared way after the nomination and election exercise had been completed. That letter was never presented to the County Returning Officer or the DRC at the appropriate time. The Returning Officer made his decision based on a letter presented to him before the nomination exercise was completed. The letter presented to him indicated that the degree held by the 2<sup>nd</sup> Respondent was recognized in Kenya. By producing the letter dated 26<sup>th</sup> March, 2013 at this stage, the Petitioner in my view wants the Court to rely on information that was never provided to the Returning Officer at the time of clearing the 1<sup>st</sup> and 2<sup>nd</sup> Respondent and raise issues touching on pre-election disputes at this late stage. That letter should have been better utilized during the IEBC DRC proceedings before the elections had been conducted.
50. I agree with both the Respondents’ submissions that the said letter is inconclusive as to whether the Masters Degree held by the 2<sup>nd</sup> Respondent is recognized in Kenya. In the letter, the CHE indicated that it needed additional information in order to make a determination. Such information included letters of admission to verify the conditions of admission of the 2<sup>nd</sup> Respondent and transcripts that properly indicated the courses undertaken in order to determine whether the qualification is similar to that in Kenya. No proof was provided by the Petitioner that this was indeed provided to the CHE in order to discredit the 2<sup>nd</sup> Respondent’s Masters Degree. In any event, the letter of 26<sup>th</sup> March, 2013 is of little, if any probative value as no evidence was called to confirm its veracity. Neither the Petitioner himself nor anyone from CHE testified on it. To my mind, it was mere suppliance. I therefore find that the 2<sup>nd</sup> Respondent was indeed academically

qualified to be nominated to the post of Deputy Governor.

51. The next issue is whether the 2<sup>nd</sup> Respondent was a public officer who had failed to resign from public office by the date of nomination of the 1<sup>st</sup> Respondent as a contestant for the Gubernatorial seat for Kajiado County. The Petitioner alleged that, the 2<sup>nd</sup> Respondent held a public office as a board member of the NGO Co-ordination Board and that both he and the 1<sup>st</sup> Respondent had failed to disclose this fact to the 3<sup>rd</sup> and the 4<sup>th</sup> Respondent when submitting the requisite documents for clearance to contest the position of Governor and Deputy Governor, respectively. The Petitioner further complained that the 2<sup>nd</sup> Respondent had failed to adhere to a directive by the Head of Public Service to the effect that public officers seeking elective positions should resign their posts by 4<sup>th</sup> September, 2012. In support of his contention, the Petitioner produced board minutes of the NGO Co-ordination Board dated 18<sup>th</sup> October, 2012 that indicated that the 2<sup>nd</sup> Respondent had attended and taken part in a Board Meeting at the aforementioned date. It was the contention of the Petitioner that this proved that the 2<sup>nd</sup> Respondent was thus not eligible to contest the seat of Deputy Governor.
52. In response to these allegations, the 2<sup>nd</sup> Respondent confirmed that he had been a Board member of the NGO Co-ordination Board but had resigned vide a letter dated 29<sup>th</sup> August, 2012. He asserted that his letter of resignation was received by the NGO Co-ordination Board. On cross examination, he told the Court that he had attended Board meetings of the aforesaid organization on 17<sup>th</sup> and 18<sup>th</sup> October, 2012 on the invitation of the Chief Executive Officer. He told the court that the purpose of his attendance was to handover as a Board Member and not to participate in the meeting, though the same was not specified in the Board Minutes. He concluded that he had resigned as a Board Member before joining politics and he was therefore not a public officer at the time of his nomination as alleged by the Petitioner.
53. The 3<sup>rd</sup> and the 4<sup>th</sup> Respondent's also opposed the Petitioner's contentions and submitted that the 2<sup>nd</sup> Respondent had resigned from the aforesaid organization as stipulated by the law. It was contended that the resignation letter dated 29<sup>th</sup> August, 2012 by the 2<sup>nd</sup> Respondent had been marked as received on 3<sup>rd</sup> September, 2012 and that the 2<sup>nd</sup> Respondent had effectively resigned by the stipulated deadline of 4<sup>th</sup> September, 2012.
54. I have considered the evidence of the opposing parties. Section 43(5) of the Elections Act provides that a public officer who intends to contest an election should resign from public office at least six months before the date of election. In the submission of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent, the 2<sup>nd</sup> Respondent was not a public officer and even if he was, he had effectively resigned before the appointed date. Mr. Ndumbi urged that the 2<sup>nd</sup> Respondent could not have been deemed to be a public officer within the meaning of Article 260 as he never received any allowance from the consolidated fund or through Parliament as prescribed by law. According to him, the sources of funding for the NGO Co-ordination Board are from registration and subscriptions from Non-Governmental Organizations.
55. I have seen Article 260 of the Constitution. The same does not define who or what a public officer is. However, it does define a public office to mean:-

**“..... an office in the national government, a county government or the public service, if the remuneration and benefits of the office are payable directly from the Consolidated Fund or directly out of money provided by Parliament” (Emphasis mine)**

Further, the Public Officers Ethics Act gives a more elaborate meaning to the term public officer. Section 2 thereof provide that:-

***"Public officer" means any officer, employee or member, including an unpaid, part-time or temporary officer, employee or member, of any of the following -***

**(a)** .....

**(b)** .....

(c) .....

***(d) any corporation, council, board, committee or other body which has power to act under and for the purposes of any written law relating to local government, public health or undertakings of public utility or otherwise to administer funds belonging to or granted by the Government or money raised by rates, taxes or charges in pursuance of any such law”***

56. Under **Section 7 of the Non-Governmental Organizations Co-ordination Act, 1990**, the NGO Co-ordination Board was established to carry out a public function, which is primarily to regulate the Non- Governmental Organizations sector in Kenya. This function is conferred by an Act of Parliament. Though the law stipulates that the sources of funding for the NGO Co-ordination Board are from subscription and registration fees of NGOs, the said funds are essentially public funds. Further, the then parent ministry of the Board was the Ministry of Heritage. The NGO Co-ordination Act requires that the accounting books and financial estimates to do with the organization are to be done as described by the Act and audited by a government body. To this end, I agree with the Petitioner that board members of the NGO Co-ordination Board are Public Officers by virtue of their appointment as board members through the Minister of Culture and Heritage. To this end, the 2<sup>nd</sup> Respondent was a public officer under the law.

57. Having so stated, did the 2<sup>nd</sup> Respondent resign within the stipulated timeframe? The 2<sup>nd</sup> Respondent relied on the letter of resignation dated 29<sup>th</sup> August, 2013. The same was addressed to the Minister for Culture and Heritage though it was marked as received on 3<sup>rd</sup> September, 2012 by the NGO Co-ordination Board. The 2<sup>nd</sup> Respondent explained that when he took the letter to the Minister for Culture and Heritage he was instructed to deliver the same to the Board. Counsel for the Petitioner submitted that the letter accepting the resignation was not equivocal and that therefore the resignation was not effective. The case of **Mugenyi –vs- Siryori (2008) 2 C.A 235 SCU** was relied on. In the **Mugenyi case**, the Supreme Court of Uganda held that resignation was not effective because there were disciplinary proceedings pending against the subject officer. In the case before me the letter dated 29<sup>th</sup> August, 2012 is not contested. It was received on 3<sup>rd</sup> September, 2012 by the appointing authority (the Board) as directed by the Minister. The case of **Mugenyi Vs Siryori (Supra)** is therefore inapplicable in the circumstances. To my mind, there was effective resignation by 3<sup>rd</sup> September, 2012 though the acceptance of such resignation by the Board came on 21<sup>st</sup> September, 2012.

58. As to the attendance of the 2<sup>nd</sup> Respondent at the Board Meetings of the NGO Co-ordination Board of 17<sup>th</sup> and 18<sup>th</sup> October, 2012, I find that the 2<sup>nd</sup> Respondent properly explained his intention for such attendance. He indicated that his attendance was at the invitation of the Chief Executive Officer. The said Chief Executive Officer had responded to the 2<sup>nd</sup> Respondent’s letter of resignation. He must have known that as at the time of such invitation, the 2<sup>nd</sup> Respondent had already resigned. I have no reason to doubt the 2<sup>nd</sup> Respondent’s testimony that he attended the said meetings for purposes of handing over. Though the minutes of the said meetings did not capture this contention, I find that the 2<sup>nd</sup> Respondent was not the author of the same and it would be unfair to expect him give an explanation for the omission. As such I find that though the 2<sup>nd</sup> Respondent was indeed a Public Officer, he had resigned within the time frame provided for by law of six months before election.

59. From the totality of the determination herein, I find that the 2<sup>nd</sup> Respondent was eligible to run for seat of Deputy Governor. The provision of Article 180 (2) and (5) of the Constitution was complied with by both the 3<sup>rd</sup> and 4<sup>th</sup> Respondent. As such, the 1<sup>st</sup> Respondent was also eligible to run for the post of Governor together with his running mate and I reject the Petitioner’s contention to the contrary.

d. **Whether or not Nina Daniel Mpute and Dr. Obadiah Kimani Njoroge were eligible to contest as Governor in the 4th March, 2013 elections. If not, of what effect was their participation on that election?**

60. The Petitioner complained that the name of Nina Daniel Mpute was included in the ballot papers for the Kajiado Gubernatorial Election although he had been disqualified by the 4<sup>th</sup> Respondent in **Dispute No. 27 of 2013 (Supra)**. In light of this, the Petitioner contended that the 3<sup>rd</sup> and 4<sup>th</sup> Respondent were in breach of **Section 82 (2) (f)** of the **Elections Act** which provides that votes cast for a candidate who is not eligible to contest an election are invalid. In response, the 3<sup>rd</sup> Respondent admitted that Nina Daniel Mpute was unqualified to vie having been declared so by the DRC. He testified that the said candidate had presented a forged degree certificate from the Catholic University of East Africa a fact that was detected on 2<sup>nd</sup> March, 2013. He explained that by that time it was too late to expunge Nina Mpute's name from the ballot paper as electoral materials had already been prepared and distributed to the various stations. He further admitted on cross examination that he did not inform the voters of Kajiado County that the said candidate had been disqualified. He confirmed that the said candidate received 95,526 votes.
61. With regard to Dr. Obadiah Njoroge Kimani, the Petitioner contended that the said candidate contested the elections without a running mate. He alleged that Daniel Tinaayai was gazetted as the running mate of Dr. Obadiah Kimani fraudulently without his consent or knowledge. The said Daniel Tinaayai Koilel did not attend the hearing to tender his evidence in support of these allegations although he had sworn an Affidavit on 28<sup>th</sup> May 2013. He was said to have travelled to the Mara on the day he was supposed to appear in court. There was therefore no opportunity to test his averments.
62. In response, the 3<sup>rd</sup> Respondent admitted that towards the end of the nomination process, Dr. Obadiah Kimani had informed him that he intended to change his running mate, but that he had failed to do so within the stipulated time frame. He further admitted having received a letter from the said Daniel Koilel Tinaayai on 13<sup>th</sup> February, 2013 resigning as the running mate of Dr. Kimani Obadiah. He explained that the said letter of resignation came after Daniel Tinaayai had been gazetted as Dr. Kimani Obadiah's running mate on 12<sup>th</sup> February, 2013. As such, the 3<sup>rd</sup> Respondent testified that it was only through a Court Order that the name of Daniel Koilel Tinaayai could be removed from the ballot papers. He told the Court that he did not receive such an Order and that the name of the aforementioned candidate was therefore retained in the ballot paper. He confirmed that Dr. Obadiah Njoroge Kimani received 25,350 votes.
63. Given the testimony with regard to the ineligibility of both Nina Daniel Mpute and Dr. Obadiah Kimani, it was submitted for the Petitioner that the retention of the two unqualified candidates in the ballot paper meant that the election exercise for Kajiado County was not free, fair or transparent as the electorate was subjected to vote for ineligible candidates. It was further submitted that this was unfair given that the Petitioner had been barred from contesting the elections for his purported lack of qualification. According to Mr. Mwangi, the best cause of action for the 3<sup>rd</sup> and 4<sup>th</sup> Respondent would have been to suspend the elections under Section 73 of the Elections Act. That when added together, the votes received by the two candidates (Dr. Obadiah Njoroge and Nina Mpute) would amount to 120,876 votes. This according to the Petitioner was a significant number of votes that could have altered the outcome of the Kajiado Gubernatorial election in a substantial manner, a fact that the 3<sup>rd</sup> Respondent had admitted.
64. Mr. Mwangi further submitted that given the fact that Nina Daniel Mpute (United Republican Party), Dr. Obadiah Kimani (Party of Action) and Moses Parantai (Democratic Party) were all members of the Jubilee Coalition, there was a high possibility that all the votes garnered by both Nina Mpute and Dr. Obadiah Kimani, would have been cast in favour of Moses Parantai. The Petitioner therefore contended that when all the 120,876 votes are added to those of Moses Parantai, the said candidate would have garnered 134,918 votes against the 125,563 votes garnered by the 1<sup>st</sup> Respondent. This Mr. Mwangi submitted would have altered the results of the election.
65. The Respondents disagreed with the Petitioner's opinion. It was submitted on their behalf that the presence and participation of Nina Daniel Mpute and Dr. Obadiah Njoroge in the ballot paper did not substantially affect the outcome of the results of the election. According to Mr. Ndubi, postponement of an election should only be done under Section 73 of the Elections Act when there is a multiplicity of election offences, breach of peace, national disasters or emergencies. He submitted that since none of these situations existed on 4<sup>th</sup> March, 2013, there was no basis for

postponement of the election in Kajiado County. He concluded that the Petitioner erred in presupposing that if Nina Daniel Mpute and Dr. Obadidah Kimani were barred from contesting, then all the voters would have voted for Moses Parantai.

66. I have considered the evidence and the various submissions of Counsel. It is not in dispute that Nina Daniel Mpute had been disqualified from contesting in the elections. The decision from the DRC was rendered on Saturday the 2<sup>nd</sup> March, 2013, two days before the 4<sup>th</sup> March, 2013 general elections. According to the 3<sup>rd</sup> Respondent, by the time that decision was made, election materials had already been distributed to the various polling stations in Kajiado County. I note that the DRC did in fact grapple with this issue when it noted in its decision as follows:-

***“We find that the document presented was invalid for purposes of clearing the candidate to vie for office, but we are unable to remove his name from the ballot papers, as the same were already distributed to the counties. The issue could be taken up as a post poll dispute”***

Further to the above, I note that the DRC did not order that Nina Daniel Mpute’s name be removed from the ballot paper. This may have been precipitated by the fact that it was already too late to take such action. The Petitioner contended that the 3<sup>rd</sup> and 4<sup>th</sup> Respondent should have postponed the elections from the 4<sup>th</sup> March, 2013 to another day. My reading of Section 73 of the Act does not provide such a scenario as one of the instances warranting a postponement of an election. With less than 48 hours to the election and with five (5) other elections on the card, my view is that to postpone the election would have caused much confusion and even disenfranchise the Kajiado electorate. Such a confusion could probably have affected the other five (5) elections that were not affected by Nina Daniel Mpute’s ineligibility. In the foregoing, I find that the 3<sup>rd</sup> and the 4<sup>th</sup> Respondent were not to blame for the participation of Nina Daniel Mpute in the elections. The circumstances were such that nothing could be done at that stage. In any event, I am of the view that the votes cast in favour of Nina Daniel Mpute could not possibly have substantially affected the outcome of the results to render the election void. I shall later on in this judgment give reasons for this finding.

67. As regards the issue of Daniel Tinaayai, it is quite clear that the said person had intimated his intention of resigning from contesting the position of Deputy Governor as the running mate of Dr. Obadiah Kimani. The question that arises is whether his resignation was effective. The 3<sup>rd</sup> Respondent led evidence to the effect that he advised both Mr. Tinaayai and Dr. Obadiah Kimani on the process of withdrawing a nominated candidate. According to Section 18 of the Elections Act, a County Governor or a Political Party is not allowed to change a person nominated as a Deputy Governor after such nomination has been received by the IEBC. That section however provides that in the event of death or resignation of a person nominated for deputy governor, the political party may substitute its candidate before the date of the presentation of the nomination papers to the 4<sup>th</sup> Respondent.

68. From the evidence adduced by the Petitioner, Mr. Tinaayai wrote to the 4<sup>th</sup> Respondent on 13<sup>th</sup> February, 2013 purporting to resign from the Party of National Unity. According to the 3<sup>rd</sup> Respondent, this was well after the 48 hour window period allowed by the IEBC for the change of candidates nominated. Further, the letter produced was not addressed to the 4<sup>th</sup> Respondent but to the Registrar of Political Parties. To my mind, the proper procedure should have been for Mr. Tinaayai to have written to his political party, that is the Party of Action (POA), indicating that he wished to resign as the running mate of the POA gubernatorial candidate. The Political Party would then have made the necessary arrangements for his replacement. However, all this should have been done within the stipulated timeframe before the close of nominations as stipulated by Section 18 of the Elections Act.

69. Further, the letter dated 21<sup>st</sup> February, 2013 by Mr. Tinaayai to the 4<sup>th</sup> Respondent is of no assistance. The contents of the said letter were to the effect that Mr. Tinaayai wanted his name degazetted and removed from the ballot papers as Dr. Obadiah’s running mate. I agree with the 3<sup>rd</sup> Respondent that it was only through a Court Order that Mr. Tinaayai could have had his name degazetted and expunged from the ballot papers. In my view therefore, the failure by Mr. Tinaayai to follow the proper procedure in resigning as the running mate of Dr. Obadiah Kimani cannot be

- blamed or visited upon the 3<sup>rd</sup> and 4<sup>th</sup> Respondent. To my mind therefore Dr. Obadiah Kimani was an eligible candidate for the gubernatorial seat.
70. On the contention that the votes cast in favour of Nina Daniel Mpute and Dr. Obadiah Kimani would have been cast in favour of Moses Parantai, I find that no evidence was produced by the Petitioner to support that submission. The hypothesis as presented by Mr. Mwangi was not supported by any evidence and appears to be mere speculation. In any case, there is no evidence to show that the majority or a substantial number of the 120,876 voters that voted for both of these candidates might not have as well voted for the 1<sup>st</sup> Respondent. Further, the Petitioner did not lead any evidence to show that the 120,876 voters that voted for both Nina Daniel Mpute and Dr. Obadiah Kimani were disenfranchised.
71. In my analysis, when the total votes of Nina Daniel Mpute and Dr. Obadiah Kimani are aggregated the same would amount to 120,876 votes. With this figure in mind, it is clear that the 1<sup>st</sup> Respondent would still have emerged as the winner with 125,563 votes. As such this Court must give effect to the intent of the voters of Kajiado County. The intent of voters is established by the number of votes cast in favour of the winning candidate in an election that is conducted in compliance with the principles set out in Article 81 of the Constitution. It is determined by reference to the person who garners the most votes. It matters not that he or she won by one or two votes as long as the result reflect the will of the electorate. The duty of the court is to strive to preserve the election held in accordance with the Constitution and the law.
72. I am guided by the holding in the case of **John Fitch v Tom Stephenson and 3 Others [2008] EWHC 501(OB)** where the court observed that:-

***“ ... 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 results of the election was unaffected by those breaches. ----- This is because where possible, the courts seek to give effect to the will of the electorate...”***

As such, I find that though Nina Daniel Mpute was not eligible to vie, the votes cast in his favour would not have affected the results of the election substantially. The 1<sup>st</sup> Respondent would still emerge the winner with more than 20,000 votes. Since I have held that the name of Dr. Obadiah Kimani was properly retained in the Ballot papers, his votes of 25, 350 cannot be said to have been invalid. Those votes cannot be lumped together with those of Nina Daniel Mpute when weighing the effect of the latter's participation in the election vis a vis the ultimate results of the Gubernatorial election in Kajiado County. Accordingly, I find that the participation of both Nina Daniel Mpute and Dr. Obadiah Kimani did not substantially affect the election results for Kajiado County.

**e. Whether the elections for Kajiado County were carried out according to law**

73. This issue focused on the responsibility of the 4<sup>th</sup> Respondent to carry out a free and fair election. The basis of this contention relates to the manner in which various voters were allegedly denied the right to vote by Presiding Officers in various polling stations. Two witnesses testified with regard to these allegations. These were PW1, Thomas Kiviti Ngwava and PW2, Kisanoi Ene Nentuala.
74. PW1 testified that he was a registered voter at Namanga Primary School and that he had verified the registration during the voter registration verification exercise. He told the court that on 4<sup>th</sup> March, 2013, he had proceeded to Namanga Primary school to vote, but was not allowed to do so as his name was missing from the register. He contended that his complaint to the Presiding Officer was not acted upon. To him, his vote would have affected the gubernatorial race given that his preferred candidate was not in the ballot paper.
75. PW2 on her part testified that she was a resident of Kajiado County. In her affidavit sworn on 8<sup>th</sup> April, 2013, she stated that she was a registered voter at Kiluani Secondary School and had gone to vote on 4<sup>th</sup> March, 2013 at the aforesaid polling station. She was however unable to vote as her particulars were not found in the voters register. She also told the Court that she complained to the Presiding Officer who however did not heed to her complaint. On cross examination, she told the Court that she registered as a voter at Engaboli Primary School and that she did not register

- elsewhere. She was firm that when she went to Kiluani Secondary School to vote, she was turned away even though her voter's card clearly indicated that her polling station was Kiluani Newlife Secondary School.
76. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents called one witness to answer the Petitioner's allegations. This was R3W1, Peter Waweru Kimani. R3W1 testified that he was the Presiding Officer at Kiluani Newlife Secondary School Polling Station. He denied the allegations of PW2 that he had denied her the right to vote. He indicated that PW2 was guilty of double registration and she could therefore not be allowed to vote.
77. This court has considered the evidence in regard to this issue. The right to vote is a Constitutional right provided under **Article 38** of the Constitution. There was no evidence to show that other than PW1 and PW2, there were any other voters who were turned away from Namanga Primary Polling Centre and Kiluani Secondary polling station. The Petitioner has not presented enough evidence that would show that the irregularity of voters being sent away without voting was widespread in Kajiado County. PW1 and PW2 testified on their own behalf. It was not indicated that what happened at Namanga Primary Polling Station and Kiluani Newlife Polling Station happened elsewhere in the county. As such, my view is that the irregularity was not of such a magnitude that this court can reach a finding that it was so material as to affect the outcome of the results. In conclusion, I find that the Petitioner has not tendered sufficient evidence to raise doubt in the mind of the court that the elections for the gubernatorial seat for Kajiado County were not conducted in a free and fair manner.
78. I now turn to the issue of the Petitioner failing to testify. I find fault with the Petitioner's argument that there is no rule in law or evidence that requires verbal evidence for an affidavit to be deemed credible. In my opinion, an election petition is no ordinary suit and the facts deposed therein must be interrogated. Such interrogation can only be done by testing the evidence through cross examination of the deponent. Failure to attend court for the testing of such allegations in such a deposition makes the Affidavit to be just that, mere allegations. It is evidence without any probative value. In my view therefore, it was imperative for the Petitioner to have testified during the hearing of this Petition given that he was responsible for its institution and had made adverse claims against the Respondents. On the day he was supposed to testify, he sought and found comfort in a trip to South Africa and sought to have his Affidavit admitted without cross examination. That won't do. The allegations remained just that, bare allegations not proved.
79. As stated earlier in this judgment, the Petitioner bears the burden of proving the allegations in the Petition to the standard required. The Petitioner's failure to appear for cross examination can only be construed to mean that the allegations in the Petition and the Petitioner's affidavits were to a large extent untested. During the hearing, there was evidence tabled by the Respondents that conflicted with the allegations of the Petitioner, the evidential burden therefore shifted to the Petitioner. I therefore agree with the submissions of Mr. Imende that in the absence of the deposition being subjected to cross examination, the Petitioner's allegations that were rebutted by the Respondents must be found not to have met the required evidentiary threshold.
80. In conclusion, the right of Kenyans to exercise their political rights is upheld under **Article 81** as read with **Article 38 of the Constitution**. The voters of Kajiado County elected the 1<sup>st</sup> and 2<sup>nd</sup> Respondent in an election which in my opinion was free and fair. The results reflected the will of the electorate of Kajiado County. In my view, there was nothing that was produced to this Court to warrant this court's interference with the decision arrived at by the voters of Kajiado County. The Petition to that extent is without merit and is dismissed with costs to the Respondents.
81. As regards costs, pursuant to **Rule 34 (1) (a) of the Election Petition Rules**, this Court caps the total costs payable to the Respondents at Kshs.2.5Million. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents shall be paid a maximum of Kshs.1.5Million whilst the 3<sup>rd</sup> and 4<sup>th</sup> Respondent shall be paid a maximum of Kshs.1Million. Accordingly, the sum deposited in court shall remain so deposited until the costs are taxed.

**DATED and DELIVERED** at Nairobi this 29<sup>th</sup> day of **August, 2013**.

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**A. MABEYA**

**JUDGE**

**In the presence of:-**

Court clerk Hassan

Mr. Okworo & Maina & Mwangi for Petitioner

Agina for 1<sup>st</sup> and 2<sup>nd</sup> respondents

Mr. Imende for 3<sup>rd</sup> and 4<sup>th</sup> respondents