



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

PETITION NO. 2 OF 2013

IN THE MATTER OF THE ELECTIONS ACT, 2011

AND

**IN THE MATTER OF THE INDEPENDENT ELECTORAL AND BOUNDARIES
COMMISSION ELECTIONS IN GOVERNOR ISIOLO COUNTY**

**IN THE MATTER OF THE IEBC RESULTS OF GOVERNOR ISIOLO COUNTY ELECTIONS
IN THE KENYA GAZETTE OF 13TH MARCH, 2013 SPECIAL ISSUE OF THE GAZETTE
NOTICE NO. 3155**

BETWEEN

ISMAIL SULEMAN

ABDI NUR ISMAIL

ABDRAHAMAN ALI

GODFREY MURIERA

ADAN ABAKULA

HUSSEIN ALI WARSAME

JACKSON NYAMBUTI KENGELE

LAWRENCE AKWIMA KIRIMA

HALIMA NUR ELMI

JALDESA TUKE DABELLO.....

.....PETITIONERS

VERSUS

**RETURNING OFFICER ISIOLO COUNTY INDEPENDENT ELECTORAL AND
BOUNDARIES**

COMMISSION.....1ST

RESPONDENT

I.E.B.C.....2ND

RESPONDENT

GODHANA ADHI DOYO.....3RD

RESPONDENT

DOMINZIANO LAIKURU MAINGI.....1ST

INTERESTED PARTY

J U D G M E N T

The petitioners are residents and registered voters within Isiolo County. The petitioners filed this petition on 10th April, 2013 against the elections of Governor for Isiolo County. The petitioners in their petition did not disclose the names of all the candidates who contested the Gubernatorial seat nor the representatives of various political parties. The 3rd respondent GODANA ADHI DOYO is described as Governor for Isiolo County, whereas 1st interested party DOMINZIANO LAIKURU MAINGI is described as candidate for the seat of Governor for Isiolo County under Alliance Party of Kenya(APK). The petitioners in the petition did not disclose or state the votes scored by the candidates, however from the contents of the petition it can be gathered that the 3rd respondent GODANA ADHI DOYO was declared to have won the election and hence was declared the duly elected Governor of Isiolo County.

The petitioners were aggrieved by the declaration of 3rd respondent as duly elected governor of Isiolo County. Pursuant to Article 87(2) of the Constitution of Kenya, 2010 and Section 76(1) (a) of the Elections Act, the Petitioners on 10th April, 2013 filed this petition challenging the said declaration of the 3rd respondent as duly elected Governor of Isiolo County. The petitioners also sought a declaration that the 1st and 2nd respondents did not carry out credible, free, fair and transparent elections as required by law and as such sought for an order for re-opening of all ballot boxes and recount of all ballot papers cast for SENATORIAL elections for Isiolo County (the underlining is mine).

The petitioners raised several complaints which may be summarized as follows:-

That the election was marred with serious irregularities and, that the 2nd respondent failed either through negligence, omission or commission to conduct credible elections. That the 2nd respondent failed to prepare a credible and verifiable register as contemplated under Section 3 of the Elections Act. That the 2nd respondent failed to use the BVI Election voter identification system giving room to use of the manual register resulting to multiple voting. That the 2nd respondent presided over elections marred with violence and intimidation. That the elections were replete with voter bribery under watchful eye of the IEBC. That the 2nd respondent presided over massive and serious irregularities and tampering with results, counting, recording and tallying evident in some of Form 34, 35 and 36. The petitioners were of the view that the declared results were therefore false, fabricated, fictitious and unlawful.

The 1st and 2nd respondents upon being served with the petition appointed the firm of M/S Sisule Munyi Kilonzo & Advocates to represent them in this petition whereas the 3rd respondent appointed M/S Arthur Ingutya & Co. Advocates.

The 1st and 2nd respondents in response to the petition, filed their response on 2nd May, 2013, being a Replying Affidavit by 2nd respondent dated 26th April, 2013, a supplementary affidavit dated 15th May, 2013, and 26th April, 2013 and a Replying Affidavit by 1st respondent dated 26th April, 2013 and the 2nd respondent's supplementary Affidavit dated 15th May, 2013. The said documents are contained in the 1st

and 2nd respondents' bundle of documents titled and referred to as "the response to the petition and Affidavits". The 1st and 2nd respondents filed 17 witnesses' affidavits by various witnesses as contained in the 1st and 2nd respondents' bundle of documents filed on 2nd May, 2013. The 3rd respondent filed a response to the petition on 3rd May, 2013.

The petition came up for pre-trial conference on 17/5/2013 when Counsel agreed on time frame and the number of witnesses to be called. The Counsel agreed on contested issues as follows:-

- 1. Whether the election of the 3rd respondent as conducted by 1st and 2nd respondents was free and fair and in accordance with the provisions of the Constitution and Election Laws?**
- 2. Whether the election of the 3rd respondent as conducted by 1st and 2nd respondents was of genuine expression of free will of the voters?**
- 3. Whether the election of 3rd respondent as conducted by 1st and 2nd respondents was free from violence, intimidation, unlawful influence or corruption on part of the respondents?**
- 4. Whether the election of 3rd respondent as conducted by 1st and 2nd respondents was transparent?**
- 5. Whether election of 3rd respondent as conducted by 1st and 2nd respondents was administered in an impartial, neutral, efficient, accurate and accountable manner?**

The counsel also agreed on uncontested issues in the petition as follows:-

- 1. ISIOLO GUBERNATORIAL Elections was held on 4th March, 2013 and 3rd respondent was duly declared the winner by 1st respondent after final tally**
- 2. That 3rd respondent was gazetted as having been elected as a Governor of Isiolo County on 13th March, 2013 and subsequently inaugurated as a Governor on 27th March, 2013.**
- 3. The burden of proof of all allegations lies with the Petitioners.**

When the petition came up for hearing, the counsel for the petitioners stated that he was ready with six(6) witnesses and applied for 10th Petitioner Jaldesa Tuke Dabello to be withdrawn as one of the petitioners on the ground that he did not want to be associated with the petition. The request was granted leaving 9 petitioners to proceed with the petition. That out of the nine (9) Petitioners remaining only two (2) gave evidence whereas the other seven (7) did show up nor was any explanation given for their absence. The petitioners who gave evidence are Adan Abakula, the 5th petitioner, and Abdi Nur Ismail, the 2nd petitioner. Petitioners Nos 1, 3, 4, 6, 7, 8 and 9 did not give evidence. A close perusal of the petition shows that only the 1st petitioner Ismail Suleman signed the petition and further that he did not have authority from his co-petitioners to sign the petition on their behalf. The other remaining petitioners Nos, 2, 3, 4, 5, 6, 7, 8 and 9 did not sign the petition. That out of the 9 remaining petitioners one Ismail Suleman the, 1st petitioner swore an affidavit in support of the petition whereas the others did not. The 2nd and 5th petitioners out of the eighteen (18) witnesses called only six (6) witnesses and closed their case.

The 1st and 2nd respondents out of their seventeen (17) witnesses called five (5) witnesses and closed their response whereas the 3rd respondent did not give evidence nor call any witness.

That after close of the petition counsel agreed to put in written submissions. The petition was set down for highlighting on 5th July, 2013.

On 5th July, 2013 the counsel for the petitioners Mr. A. T. Oluoch stated that he had put in his written submissions dated 3rd July, 2013 and to which he had attached authorities. He stated that he did not wish to highlight on the petitioners' submissions. He stated that the petitioners had also forwarded a soft copy.

Mr. N. M. Malonza, counsel for the 1st and 2nd respondents stated that they had filed their submissions dated 4/7/2013 together with a list of authorities. That they had also served a soft copy.

The counsel for the 3rd respondent Mr. A. Ingutya stated that they had filed their written submissions dated 4th July, 2013 together with a list of authorities in support and wished to highlight on his submissions.

The petitioners' Counsel Mr. A. T. Oluoch in his written submission, relied on the evidence of the six (6) petitioners' witnesses contending the witnesses in their evidence raised several issues on malpractices and in particular by the 1st respondent. He submitted that witnesses gave evidence on flagrant breach of election regularities and the Presiding Officer influenced the choice of voters. He further submitted that the petitioners' witnesses corroborated one another. He concluded his submissions by praying for a recount and scrutiny.

The counsel did not highlight on his written submissions. I will deal with witnesses' evidence later in my judgment.

The counsel for 1st and 2nd respondents Mr. N. M. Malonza submitted that the 1st and 2nd respondents carried out a credible, verifiable, free and fair and transparent election in respect of the position of the governor, Isiolo County as required by the Constitution and all electoral laws. He further submitted that the allegations contained in the petition are not proved by the petitioners and/or their witnesses. He contended that there was no evidence that the allegations, if any, affected the outcome of the position of the Governor, Isiolo County. He further submitted the petition before court is incompetent.

Mr. N. M. Malonza in highlighting on his submissions submitted that the petition is incompetent as it is not signed by petitioners as required under Rule 10(3) (a) of the Petition Rules 2013. He referred to the case of **Jahazi V Cherogeny (1984) KLR 814** in which Court of Appeal stated:-

“The requirement that a petition be signed by a petitioner is not a formality. Equity demands that a petitioner assumes responsibility for his petition by signing it. We are satisfied and find that the provisions contained in Rule 4(3) that a petition shall be signed by the petitioner is mandatory and that this petition not having been signed by the petitioners it is not properly before court. The petition is dismissed.

Mr. N. M. Malonza further submitted that the petition is not supported by supportive affidavit of the petitioners as required under Rule 10(3), (b) of the Petition Rules 2013.

He referred court to E.P. No. 3 of 2013 **ISMAIL SULEMAN & 9 OTHERS V IEBC AND 2 OTHERS (Meru)**. This is my ruling in which I stated:-

“The petition before me does not comply with the provisions of Rule 10(3) of the Elections (Parliamentary and County Elections) Petition Rules 2013 as the petition is not supported by an affidavit made by the petitioners or any of the petitioners”.

He further submitted the petition does not disclose the results of the election as required under Order 10(1) (c) of the Petition Rules 2013. He submitted such omission renders an election petition incurably defective. He relied on the case of **JOHN M. N. MUTUTHO V JAYNE NJERI WANJIKU KIHARA & 2 OTHERS(2008)**eklr Civil Appeal No. 102 of 2008 where the Court of Appeal stated as follows:-

What would happen where, as here the results as envisaged by regulation 40, above are not included in the petition”? In our view an essential element would be missing. The petition shall

be incomplete as the basis for any complaint will be absent. Whatever complaints a petitioner may be having about an election may be regarded as having no legal basis. The law has set out what a petition should contain, and if any of the matters supposed to be included is omitted, and then the petition would be incurably defective. For instance, paragraph (a) of rule 4(1) deals with capacity to petition. If a petitioner omits to make an averment in that regard the petition will be incurably defective. Likewise if the date of the election omitted that omission would be fundamental in nature and would of itself without more render a petition incurably defective. We say so advisedly. The provisions of the National Assembly and Presidential Elections Act, have been held, to provide a complete code of the law and rules on elections and election petitions. As rightly pointed out by Mr. Kilonzo for the appellant, that law has no provision for amendment of pleadings after the 28 days stipulated for lodging petitions. In view of the conclusions we have come to on that aspect, it follows that the term “shall” as used in rule 4, must be read as having a mandatory import. Reading it otherwise will render the provisions of that rule otiose.

The Counsel also relied on the case of ISMAIL SULEIMAN & 9 OTHERS IN IEBC & OTHERS EP NO. 3 OF 2013(Meru) in which Court stated:-

“The present position of this petition is similar to Mututho’s case(supra). The petitioner did not include the results in their petition and the manner in which it had been declared; the law set out under Rule 10 of the Petition Rules 2013 what a petition should contain and if any of the matters supposed to be included are omitted, as in this case the petition would be incomplete and incurably defective”

Mr. M. N. Malonza further submitted that the petition does not disclose the person against whose election is complained of. He submitted such omission rendered the petition defective. He relied on the case of ABOUB ALI V IEBC & 2 OTHERS EP 12/2013 MALINDI where Hon. Justice L. Kimaru stated:-

The Constitution, the Election Act and the Election Petition Rules require that the successful candidate be made a party to the petition because such candidate is the primary target of such election petition. He is the one who will be the first person to suffer the consequences of the nullification of the particular election result. Where the Petitioner does not include the successful candidate as a party in the petition such petition lacks legal substratum and is liable to be struck out

He submitted the petitioners included parties who are not proper parties to the petition. He referred to the court’s decision in EP No.3 of 2013 ISMAIL SULEIMAN & 9 OTHERS V IEBC & 2 OTHERS (supra) where the court stated”

“Under Rule 2(d) Of the Elections (Parliamentary and County Elections) Petition Rules 2013, any person whose conduct is complained of in relation to an election may be joined as “interested party” with the leave of the court once the nature of the interest has been considered through an application; otherwise there is no room for an interested party.”

He therefore concluded that the petition is incompetent.

Mr. N. M. Malonza on evidence of witnesses’ affidavits and oral testimony submitted, that most of it amounts to perjury and especially the evidence of PW6, whom he submitted lied on oath. On PW3 he submitted he confirmed that he swore the affidavit at Isiolo and not at Nairobi as indicated in his affidavit. On PW4 he submitted the witness stated that he swore an affidavit before an unnamed lady confirming it was not sworn before the Commissioner for Oaths who stamped the affidavit.

On PW5 he submitted she lied on oath in respect of the date she signed the affidavit. She stated that she signed the affidavit on 7/3/2013 whereas the specific date of the affidavit is 7th April, 2013. On affidavit of PW1, he submitted it made no reference to the petition before court as it does not show parties to the petition. He therefore submitted such an affidavit cannot be deemed to be an affidavit in support of the

petition assuming the petition is competent. He submitted the affidavits of PW6, PW3, PW4 and PW5 should be struck out for perjury. He referred to the case of **LUCY WANJIRU NJUNGE & 2 OTHERS V JOB MWANGI MACHARIA & 9 OTHERS CIVIL SUIT NO. 158 OF 2005** where Hon. D. Musinga, J as he then was stated:-

The first two plaintiffs openly lied under oath and actually committed perjury by stating that they were not parties to the suit HCCC No. 142 of 2005 while indeed they were. An affidavit cannot be amended by counsel's verbal word that a technical omission was made by her and seek to exonerate the deponents from any fault yet they are the ones who swore to the truth of their depositions. I hold that the verifying affidavits are improper and bad in law and must be struck out which I hereby do.

He further submitted that the affidavit of PW1 similarly should be struck out as it is not an affidavit with reference to the petition before court, assuming the petition is competent.

Mr. N. Malonza further submitted assuming that there is a valid affidavit based on the evidence adduced by 1st and 2nd respondents, the respondents conducted a credible, verifiable, free and fair election in respect of the position of Governor Isiolo County as required by law. He prayed that the petition be dismissed.

Mr. A. Ingutya, Counsel for the 3rd respondent relied on his written submissions and associated himself with submissions by Mr. N. M. Malonza, Counsel for the 1st and 2nd respondents. He submitted that the petition is incompetent, highly misconceived and evidence tendered before court was insufficient and of no probative value to warrant any order in favour of the petitioners.

Mr. A. Ingutya orally submitted that on the issue of the petition being signed by only one petitioner and in absence of authority to do so from the other petitioners, the 1st petitioner did so on his own behalf but not for the others. He therefore submitted Rule 10(1) of the Election Petition Rules 2013 was not complied with. In regard of the supporting affidavit required to be filed by the dint of that Rule, he submitted that is mandatory requirement and the petitioners had no choice. He submitted that the other nine (9) petitioners were misjoined and has no locus in this court.

He further submitted the petitioner who signed the petition did not appear before the court to present the petition. He submitted on behalf of the 3rd respondent they could stop there and move the court to dismiss the petition for want of prosecution by the petitioner. He even suggested as the petitioners had not signed the petition and the 10th petitioner applied his name to be withdrawn, it is possible the petitioners might have been joined without their consent. He therefore submitted the petition could only relate to the 1st petitioner. He submitted that principle of pleadings is that a party should disclose his case with sufficient details to enable the opposing party to meet the case. He submitted once a party has pleaded his case unless amended he is bound by his pleadings. He submitted the petitioners pleadings reveal that the petition is largely about the **Senatorial Election** in Isiolo County and not against **Gubernatorial Election**. He therefore submitted any evidence presented before court with objective of upsetting Governor's election would be irrelevant or of no consequences and should be disregarded.

Mr. A. Ingutya submitted that the standard of proof and in an election petition is not on balance of probability nor is it beyond reasonable doubt but it is between the two. That it tends to move towards beyond reasonable doubt and specifically where evidence touches on alleged criminal acts.

He referred to the case of **MULIRO V MUSONY & ANOTHER (2008) eKlr 52** where Court of Appeal stated:-

Looking at all the evidence on this claim again we subjected it to the standard of proof required in establishing an election offence of bribery. Proof should be higher than on a balance of probabilities although not equal to beyond a reasonable doubt in criminal cases. Indeed it is not even necessary that bribery itself be proved. It should suffice if it is shown that with

intention to vote for a given candidate, bribes were given to the voters.

He submitted the petitioners witnesses' evidence should be weighed in light of their contradictions and on their admitting having lied or being inaccurate or relying on hearsay. He submitted weighing on the witnesses evidence the court would find that the standard of proof was not met. He referred to the case of **WILLIAM KABOGO GITARU V GEORGE THUO & 2 OTHERS EP NO. 10/2008**, being petitioners authority, on page 12, on standard of proof. He submitted that the burden of proof is upon the petitioners to prove the principles to election were breached. He further submitted the petitioners should also demonstrate the breach went to the root of the process and affected the results and that if petitioners' case fell below that bar he submitted the petition should be dismissed. He submitted that the petition is so incompetent that it should have failed at the threshold. He prayed the petition to be dismissed with costs.

Mr. A. T. Oluoch, Counsel for the petitioners in response to the submissions by the respondents counsel submitted on issue of costs. He referred to the case of **STEPHEN KARIUKI V GEORGE WANJOHI EP No. 2 of 2013** where Hon.Mr. Kimondo, J, declined to award costs and urged court not to award costs. On Rule 10(1),(a),(b),(c)-(h) of the Petition Rules,2013 he submitted is framed in a mandatory terms.

After hearing the parties and receiving written submissions as well as the counsel oral submissions which the court has analyzed herein above, the petition was set down for judgment on 7th July, 2013.

The issues for determination in this petition as I understand the evidence and submissions by Counsel can be narrowed down to the following:-

1. ***Whether the petitioners' petition is incompetent?***
2. ***Whether the petitioners have proved the allegations in the petition to the required standards?***
3. ***Whether the election of the 3rd respondent as conducted by 1st and 2nd respondents was free and fair and in accordance with the provisions of the Constitution and Election Laws?***
4. ***Whether the election of the 3rd respondent as conducted by 1st and 2nd respondents was of genuine expression of free will of the voters?***
5. ***Whether the election of 3rd respondent as conducted by 1st and 2nd respondents was free from violence, intimidation, unlawful influence or corruption on part of the respondents?***
6. ***Whether the election of 3rd respondent as conducted by 1st and 2nd respondents was transparent?***
7. ***Whether election of 3rd respondent as conducted by 1st and 2nd respondents was administered in an impartial, neutral, efficient, accurate and accountable manner?***

The first issue for consideration is whether the petitioners' petition is incompetent. The petition before the court is signed by 1st petitioner only. He did not demonstrate that he had authority from his co-petitioners through filing of the authorization document. Indeed PW1 the 5th petitioner and PW2 the 2nd petitioner who gave evidence admitted having not given the 1st petitioner authority to sign the petition on their behalf. The other petitioners did not give evidence nor is there any document filed authorizing the 1st petitioner to sign the petition on behalf of the other nine (9) petitioners.

Rule 10(3) (a) and (b) of the Petition rules 2013 provides:-

(3) An election petition shall—

- a. ***be signed by the Petitioner or by a person duly authorized by the Petitioner;***
- b. ***be supported by an affidavit made by the Petitioner containing the grounds on which relief is sought and setting out the facts relied on by the Petitioner; and***

The petition itself is clear that it was signed by the 1st petitioner, Ismail Suleman and no other petitioner.

The 1st petitioner did not appear before court to give evidence nor did the other petitioners save petitioners no's 2 and 5. The 2nd petitioner in his evidence admitted that he did not authorize the 1st petitioner to sign the petition and he stated that he did not know the 1st petitioner. The 5th petitioner stated that he does not know the rest of the petitioners and he did not authorize the 1st petitioner to sign the petition. The petition on record also is not supported by affidavit as required under Rule 10(3) (b) of the Petition Rules 2013. The affidavit in support of the petition sworn by the 1st petitioner, Ismail Suleman does not exhibit any authority from the other petitioners to swear the affidavit on their behalf. The affidavit in support by 5th petitioner (PW1) is of no relevancy nor does it come to the aid of the petitioners as it does not show the petition in respect of which the affidavit is filed. It does not indicate the petition case number and the parties to the petition. It does not name the person, whose election is complained of, as one of the respondents. It is a mandatory requirement to name the respondent in a petition, which is omitted herein. I find the affidavit of ADAN ABAKULA, PW1 to be not relevant to this petition and of no aid to the petitioners.

The requirement that petition be signed by a petitioner in Rule 10 3(1) of the Petition Rules 2013 and be supported by affidavit made by petitioners containing grounds on which relief is sought and setting the facts relied on by the petitioner under Rule 10 3(b) of the Petition Rules 2013 is not a formality. The petitioner is supposed to assume responsibility for his petition by signing it and supporting it with a supporting affidavit. I have noted the provision contained in Rule 10 3(a) and(b) of the Petition Rules 2013, that a petition shall be signed by the petitioner or by a person duly authorized by the petitioner and be supported by an affidavit made by the petitioner is mandatory and the petition before this court having not been signed by 2nd to 10th petitioners or there being no authorization for the 1st petitioner to sign the petition on behalf of all other petitioners and there being no affidavit of support by 2nd to 10th petitioner, the petition by 2nd to 10th petitioners is not properly before the court and the Petition is incompetent.

The Court of Appeal in the case of **JHAZI VERSUS CHEROGENY** stated:-

“The requirement that a petition be signed by a petitioner is not a formality. Equity demands that a petitioner assumes the responsibility for his petition by signing it.”

The petition before this court does not disclose the results of the election of the Governor, Isiolo County and the manner in which the results had been declared.

Rule 10(1) (c) of the Petition Rules 2013 provides:-

10. (1) an election petition filed under rule 8, shall state

(a).....

(b).....

(c) the results of the election, if any, and the manner in which it has been declared;

The above-mentioned provision contained in Rule 10(1),(c) of the Petition Rules 2013 as worded is mandatory as it states election petition shall state the results of the election if any and the manner in which it has been declared.

I have referred to Court of Appeal decision in the case of **JOHN NJENGA MICHAEL N. MUTUTHO V JANE NJERI WANJIKU KIHARA & 2 others(2008) 1KLR 10**, where the Court of Appeal held:-

“Regulation 40 implied that where the results were not included in the petition, it will be incomplete as the basis for any complainant would be absent and whatever complaints a Petitioner had about an election would be regarded as having no legal basis. The law sets out what a petition should contain, and if any of the matters supposed to be included was omitted, the petition would be incurably defective.”

In the instant petition the names of the candidates and what each garnered has not been disclosed. In this petition, results of the elections have not been stated nor the manner in which it had been declared if any, notwithstanding the law had set out under Rule 10(1) (c) of the Petition Rules 2013 what a petition should contain and I find if any of the matters supposed to be included are omitted, as it has happened in this petition, the petition would be incomplete and incurably defective. I therefore find this petition to be incomplete and incurably defective.

The petitioners in their petition have included one DOMINZIANO LAIKURU MAINGI and referred him as an interested party. The said person has been included in this petition without following the due procedure under the petition Rules under Rule 2(b) of the petition Rules 2013. The “respondents” in relation to an election petition, means:-

- a. *The person whose election is complained of,*
- b. *The returning officer*
- c. *The commissioner*
- d. *Any other person whose conduct is complained of in relation to an election.*

The third party in this petition do not fall under any of the above-definitions. Under 2(d) a party may be joined with leave of the court once the nature of his interest has been considered through an application otherwise there is no room for the petitioners to join in any party whose conduct is not complained of in relation to an election petition. Having found that there is no basis for DOMINZIANO LAIKURU MAINGI to having been made a party in this petition his name is struck off from the petition.

The affidavits of the petitioners’ witnesses that is to say affidavit in support of ADAN ABAKULA, PW1 dated 23rd March, 2013 does not disclose the names of the parties to the petition nor does it have petition case number. It has essentially omitted the names of the parties against whom the petition is complained of. The same applies to witnesses affidavits of GEDION KABURUKI KIRERA (PW3) dated 7th April, 2013, DANIEL SEBASTIAN EKAI, (PW4) dated 7th April, 2013, AGNES NKIROTE MUTEA, (PW5) dated 7th April, 2013 and JOYCE KARAMBU (PW6) dated 7th April, 2013. The affidavits of PW3, PW4, PW5 and PW6 omit the name of the 3rd respondent and all do not have the election petition case number. In the case of **ABOUB ALI V INDEPENDENT ELECTION AND BOUNDARIES COMMISSION & 2 OTHERS**, (supra) Hon. Mr. Justice L. Kimaru held that a successful candidate must be made a party to the petition.

I am entirely in agreement with the holding of Hon. Mr. Justice L. Kimaru.

In view of the failure by the petitioners’ witnesses affidavits to include the name of the 3rd respondent and the petition case number I find in allowing the said affidavits to be taken in evidence would amount to this court engaging itself in an exercise in futility because any findings adverse to successful candidate and especially the 3rd respondent would be against the rules of natural justice as the occupant of the Governor’s seat would be condemned unheard on affidavit which do not mention him and further the affidavits by the witnesses are ambiguous and speculative.

The affidavits by PW1, PW3, PW4, PW5 and PW6 are for striking out and are accordingly struck out. The upshot is that the petitioners’ petition before this court is incomplete, and incurably defective.

Notwithstanding that I have found the petition to be defective I would proceed to consider the evidence adduced by the parties in this petition and also consider the other issues which I had already set down in this petition in case I am faulted on my findings, that this petition is incomplete and incurably defective.

The 1st petitioner, ISMAIL SULEMAN, who is the only petitioner and who has signed the petition did not give evidence, nor was any explanation given as to why he was unable to prosecute his petition but that notwithstanding six(6) witnesses gave evidence in support of the petition. PW1, Adan Abakula, who is in the petition named as 5th petitioner relied on his affidavit dated 23rd March, 2013. This is an affidavit which I have stated that it has no names of the parties against whom the petition is complained

against. His main complaint is that the agents were not allowed to witness the process through which illiterate voters were guided in making their choice of candidate by the Presiding Officer. That the agents were not therefore able to verify who the illiterate voters choice were and whether indeed the presiding Officer actually chose the exact choice of the voters and not another. He also complained the Presiding Officer was in assisting voters mentioning the candidate's clans and when the witness complained he was told that was not his business. He also stated that Clerks issued more than one ballot papers per seat. He stated the Clerks engaged in electoral malpractices including even casting more than one vote. That during counting of votes, the Presiding Officer left Clerks doing counting of votes alone as he went to chew miraa.

PW1 also said counting went on in a room with poor lighting. He claimed the Presiding Officer asked the agents to sign blank forms. He further stated Clerk Abdul Mutalib Mohammed confessed to him that he had voted for his father in his absence and that he declared more votes for one of the Governor candidates during counting than was cast for him. He deponed that the same clerk confessed to voting using a dead voter's card. During cross-examination he stated that he does not know what is required to be done when an illiterate voter refuses the presence of agents. He admitted that he signed Form 35 which had figures but not a blank one. He admitted that he did not make any written complaint to IEBC. He also admitted that he did not attach any evidence to show that Jamlick Kula Ole was dead nor did he attach any register to show that person voted. He admitted that he was not trained as an agent and did not know what was expected of an agent. He admitted that there was sufficient light in the hall at the time of counting. He confirmed he had nothing with him to confirm the truth of his complaints. PW1 further admitted that he is one of the petitioners but did not sign the petition nor did he deposit any security in form of money in the petition. He admitted that he does not know the 1st petitioner, Ismail Suleman but the only person he knows is Dominziano Laikuru Maingi. He admitted though the petition is about Governor's seat, in paragraph 10 and 11 of the petition is about election of a Senator. He said page 5 of the petition is against Hon. Mohammed Kutu, who is not party to the petition. He admitted in the petition there was no single complaint against Godana Adhi Doyo the 3rd respondent but his complaint is against Mohammed Kutu. He denied the petition before court as his petition, as it is against Senatorial seat instead of Gubernatorial seat. He told court what he testified on was hearsay.

On being cross-examined by court he admitted he did not have any other petition. He admitted not having given instructions on the contents of the petition but that he became aware of it on 22nd March, 2013 when it was already prepared. He testified that he has no complaint against 3rd respondent but against the Senator.

On re-examination of PW1 by Mr. A. T. Oluoch he testified that he has no complaint against 3rd respondent election but he has complaints against IEBC officials. He testified the illiterates were properly assisted. He also said in cases where they were not witnessing the illiterate voters being assisted it was the illiterate voters who were objecting to their witnessing the assistance but not the Presiding Officer's. He testified that he did not raise the money to file the petition and do not know where the money came from.

PW2 Abdi Nur Ismail relied on his affidavit dated 7th April, 2013. His main complaint was that IEBC officials transferred 6 ballot boxes which were sealed to a private house across the road. That people present raised alarm but the Officials proceeded to take away ballot boxes and marked papers. The ballot papers were then returned after 30 minutes unmanned by Police Officers or witnessed by agents. During cross-examination the witness confirmed that he has no evidence that he was a registered voter at the said polling station, that is Bulla Pesa polling station. He admitted the petition before court was his petition. He stated that he signed the petition. He said the petitioners were all together and agreed to file this petition. He testified that he does not know PW1, the 5th Petitioner. He testified the petitioners never met and agreed to file the petition. On ninth (9th) petitioner he averred that he saw her on 4th March, 2013 and did not see her thereafter. He admitted he did not sign affidavit in support of the petition. He admitted in the petition he has no complaint against the Governor but against Senator Mohammed Kutu. He said the petition is against election of the Senator and that his affidavit is against election of the Senator.

PW3 Gideon Kaburuki Kirera testified that he swore an affidavit dated 7th April, 2013. His main complaint is that he was called by APK agent at Bulla Pesa Water Kiosk Polling Station one Rebecca Kanana on allegations that there was a problem as some people had taken away ballot boxes with papers from polling stations to a private house. He went to the scene and after a scuffle and intervention of police officers ballot boxes were returned to the polling station. He stated it was not clear what the motive was but the Presiding Officer was withdrawn and voting proceeded on smoothly.

PW3 further testified that at Wabera Polling Station numerous cases of voters names could not be found in the voters' register and at the end they were chased away by Police Officers at 8.00 p.m and could not vote. He estimated the number to be around 250. He also averred several ballot boxes at Mardo Alcano polling station were re-opened by the Returning Officer as they did not have Form 35 which declares the number of votes for each candidate. He said the total number of boxes opened were 4 but none of them was in respect of Gubernatorial seat. During cross-examination he testified in his affidavit that he did not complain against the Governor. He admitted that he did not make complaints in writing to the IEBC or police as required. He admitted that in his affidavit he had not put the name of the Governor as one of the respondents. He testified that the Governors ballot boxes were not interfered with and he has no complaint against the Governor. He admitted the contents of his affidavit is hearsay.

He further testified contrary to what is stated in his affidavit he did not swear it at Nairobi but at Isiolo.

PW4 Daniel Sebastian Ekai relied on his affidavit dated 7th April, 2013. His main complaint is that the election of 4th March, 2013 was marred by serious irregularities. That the Presiding Officer at Ngare Mara polling station at 12noon told them there was no need of candidates agents to witness the IEBC officials when assisting illiterate voters to mark the ballot boxes. He averred this began when the Presiding Officer was detected marking one ballot paper improperly in a way that would render it a spoilt vote. That he was also intimidating agents when they complained. During cross-examination he admitted that he did not attend any IEBC training as an agent. He admitted that he signed Form 35 as an agent of APK. He testified that he had no complaint on Form 35. He admitted that he did not complain to the police. He said his complaint is against Governor by the name Dominziano Laikuru Maingi. He said in his affidavit he stated that he is objecting to the election of the Governor. He stated that he signed his affidavit before a lady who then stamped it. He said the signatures of the commissioner for oaths was not signed in his presence. He stated there was no advocate at the material time. He confirmed the place was that of Mr. A. T. Oluoch advocate. He stated that he is giving evidence on behalf of Dominziano Laikuru Maingi in his petition. He said he did not see the name George Akoto, who is said to have commissioned his affidavit. He agreed that he did not take the oath before George Akoto but before a lady. He said the petitioner in his case is Dominziano Laikuru Maingi. He stated that he does not know Ismail Suleman, the 1st petitioner. He stated that he does not know any of the petitioners. He testified that in his affidavit he did not mention the 3rd respondent as one of the respondents in this petition.

PW5 Agnes Nkirote Mutea relied on her affidavit dated 7th April, 2013. Her main complaint is that she was unable to vote and that IEBC disenfranchised her Constitutional right to vote. During cross-examination she stated that her affidavit is against the position of the Governor but his name is not indicated in her affidavit. She testified that she signed the affidavit three (3) days after election. She testified that she does not know any of the petitioners in this petition. She insisted that she signed the affidavit on 7th March, 2013 before Mr. A. T. Oluoch. She confirmed Mr. A. T. Oluoch, Advocate administered the oath to her and signed her affidavit as the person who had commissioned the affidavit.

PW6 Joyce Karambu relied on her affidavit sworn on 7th April, 2013. Her main complaint is that she was not allowed to vote as her name could not be found in the Electronic BVI Machine. That at 8.00 p.m she was chased away by Police Officers from polling station and told she could not vote. During cross-examination she admitted that her name could not be found in the registered voters' register. She admitted that she was not aware of anyone who voted without being a registered voter. She admitted she is not aware of any registered voter who was denied right to vote. She did not make any complaint to IEBC. She admitted that her affidavit do not have Governor's name as one of the respondents. The witness testified that when she approached the advocate she wanted to file her own petition but did not

make any payment to the advocate. She admitted her affidavit was drawn by Mr. A. T. Oluoch Advocate, before whom she signed and he commissioned the same. She admitted that she did not go before George Akoto. She admitted that she lied to the court in her evidence before she effectually admitted that her affidavit was commissioned by Mr. A. T. Oluoch, Advocate.

The 1st and 2nd respondents called five (5) witnesses in opposition to the petition. The 1st and 2nd respondents through their witnesses testified that they conducted a credible, verifiable, free, fair and transparent elections in respect of governor, Isiolo County as required by law. The respondents testified that the petitioners and their witnesses did not establish how the availability and use of various registers at the election compromised and/or affected the credibility of the elections of the position of Governor, Isiolo County nor did they call evidence to demonstrate how the failure and/or malfunction of electronic voter transmission system affected the credibility of the election results at the 2nd respondents tallying centers as they had alleged.

DW1 Eunice Wathoni testified that all Form 35's from all polling stations attached to her affidavit were proper. She testified the use of manual register in identification of voters did not comprise the elections. The same position was maintained by DW2 Ntuala Samuel Gikundi and DW3 Stanley Mwangi Kanyoria in their testimony.

The respondents contented that there is no evidence that was tendered to show multiple voting or voting by proxy. The respondents testified in their evidence that the Presiding Officers completed and submitted Form 35 for Mwangaza, Nagaa and Boji polling stations contrary to the allegations in the petition. DW2 in his testimony testified that in assisting illiterate voters that Presiding Officers are permitted to disallow the agents from witnessing his assistance to illiterate voters if the voters do not accept to have the agents witness the voting. DW4 Nathan Mbaabu denied that he disallowed agents from witnessing his assistance to illiterate voters nor did he intimidate any agents but only cautioned PW4 from campaigning at Ngare Mara polling station on the election day. On removal of ballot boxes DW1 and DW5 deposed and testified on reasons and the necessity of removal of ballot boxes. DW5 testified the room to which the ballot boxes were relocated after scuffle was within the part of Bulla Pesa polling station (code 015) and not a private house or premises as asserted by PW2 and PW3. He testified the ballot boxes were sealed when they were moved for security reasons and that she was accompanied by party agents and no complaint was lodged or registered.

The 1st and 2nd respondents witnesses during cross-examination by Mr. A. T. Oluoch were not broken. They were consistent and impressed the court as telling the truth. They stated there were no malpractices or irregularities at Isiolo County. The witnesses were specific that during voting a voter had to appear in person with documents used at the time of registration and that there was visual identification of the voter. That there was inspection of fingers to ensure no prior voting. That register would be checked to confirm entry of the voters name and upon the name being traced would be called loudly for the voter and everyone in the room to hear. The witnesses denied voting by dead voters or through proxy. The witnesses stated that it is not mandatory for agents to sign Form 35's and the reason for failure to sign Form 35 should be given by the agent who refuses to sign. They further stated if agents are not available the Form 35 will remain unsigned on part of the agents.

The 3rd respondent Godana Adhi Doyo, did not offer evidence nor call any witnesses, but relied on his Counsel's written submissions, which I have reproduced in this judgment.

The petitioners who gave evidence in this petition are the 2nd and 5th petitioners. I had earlier on found their petition to be incompetent and incurably defective as the two did not sign the petition as per mandatory provisions of Rule 10(3) (a) of the Petition Rules 2013 nor had they authorized the 1st petitioner to sign the petition on their behalf. They admitted that they did not sign the petition nor authorize the 1st petitioner to sign on their behalf. I had earlier on found and held that 2nd and 5th petitioners had not complied with the mandatory provisions of Rule 10(3) (b) of Petition Rules 2013 in that their petition is not supported by affidavit. I found the affidavit by PW1, Adan Abakula, and the 5th petitioner to be defective and struck it out. In view of the foregoing the petitioners who gave evidence

have no proper petition before this court, having held that it is incomplete and incurably defective. In addition to the above, the two petitioners who gave evidence disowned the petition and specifically stated that their petition is against Senatorial election against Mohammed Kutu and not Gubernatorial election. They stated they have no complaint against the 3rd respondent. The petition itself is clearly against the senatorial election and has nothing to do with the Gubernatorial election. It is otherwise an abuse of court process and a petition in futility. The petitioners having disowned the petition this court finds that, the so called petition has no legs to stand on. Parties are bound by their pleadings and the matters raised in this petition having nothing to do with Gubernatorial election the petition is bound to fail.

The 1st petitioner did not attend court to give evidence in support of his petition and without evidence in support the petition cannot stand. The witnesses who were called on behalf of the petitioners were PW3 who admitted that he signed his affidavit at Isiolo whereas the commissioning was done at Nairobi, PW4 admitted signing the affidavit before a lady, whose profession was not disclosed and not before the commissioner who is alleged to have commissioned the document. His evidence was against Dominziano Laikuru Maingi and not against the 3rd respondent. PW3's and PW4's evidence did not prove any wrong on part of the respondents. PW5 admitted swearing the affidavits before Mr. A. T. Oluoch, an advocate for the petitioners and not before the Commissioner for oaths stated in the affidavit, whereas, PW6 similarly admitted swearing the affidavit before Mr. A. T. Oluoch and not before the Commissioner whose stamp appears in the affidavit. She admitted lying before this court. PW5 and PW6 evidence fell far short from proving to the required standard any malpractice or any wrong that could be attributed to the respondents. Both failed to prove they were registered voters hence capable of voting. I find they were not registered voters and the Presiding Officers correctly denied them the right to vote as per provisions of the law.

Section 4(1) of the Oaths and Statutory Declaration Act (Cap.15 provides:-

4. (1) A commissioner for oaths may, by virtue of his commission, in any part of Kenya, administer any oath or take any affidavit for the purpose of any court or matter in Kenya, including matters ecclesiastical and matters relating to the registration of any instrument, whether under an Act or otherwise, and take any bail or recognizance in or for the purpose of any civil proceeding in the High Court or any subordinate court:

Provided that a commissioner for oaths shall not exercise any of the powers given by this section in any proceeding or matter in which he is the advocate for any of the parties to the proceeding or concerned in the matter, or clerk to any such advocate, or in which he is interested.

Further Section 5 of the Oaths and Statutory Declaration Act provides:-

5. Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.

In view of the admission of PW3, PW4, PW5 and PW6 that they had not taken oath before George Akoto, the Commissioner for Oaths whose stamp appears in their affidavits but before people who are not authorized to do so by virtue of the provision of Section 5 of the Oaths and Statutory Declaration Act the witnesses affidavit are struck off the record. The petition therefore without witnesses affidavits remains an empty shell and bound to fall.

The court would like to add that it found the petitioners and their witnesses evasive, untruthful, and not worthy believing. None of them seemed to be giving evidence in support of the petition. PW1 and PW2 disowned their petition and stated their petition was against Senatorial election and not Gubernatorial election. PW1 testified he had no evidence to support his allegations. He also stated that he did not know the 1st petitioner in the petition Ismail Suleman and said the only person he knew was Dominziano Laikuru Maingi, the interested party. He admitted his petition was not against the Governor but the Senator, Mohammed Kutu. He admitted there was no single complaint against the said respondent

Godhana Adhi Doyo. He stated the petition before court is not his petition as it is against Gubernatorial election instead of Senatorial election. He admitted most of what he was telling the court in his evidence was hearsay evidence. He admitted that he did not meet his co-petitioners to discuss the filing of the petition.

PW2 the 2nd petitioner admitted that he does not know PW1, Adan Abakula. He admitted in the petition there is no complaint against the Governor but all complaints are against the Senator Mohammed Kutu. He disowned his petition by disowning its contents.

PW3 admitted in his affidavit he omitted the name of the Governor as one of the respondents. He admitted that the ballot boxes of the Governor were not interfered with and that the contents of his affidavit are hearsay. He failed to prove his allegation to the required standard and admitted the petition had no substance.

PW4 stated his evidence is against Governor Dominziano Laikuru Maingi. He averred he was giving evidence for Dominziano Laikuru Maingi and not the petitioners who he did not know. PW4's evidence did not support the petitioners petition and is of no help to the petitioners' petition.

PW5 admitted the name of the Governor is not indicated in her affidavit and that she did not know the petitioners. PW6 admitted that she did not mention the Governor in her affidavit and that she did not know the petitioners. PW5 and PW6 evidence do not connect the respondents with any malpractice nor did PW5 and PW6 prove they were entitled to vote and were denied the right to vote. I find none of them was a registered voter and have failed to prove that the respondents defranchised them.

The 1st petitioner cannot rely on evidence of PW1, PW2, PW3, PW4, PW5 and PW6 in support of the petition when he had not given evidence in support of his petition and when none of the witnesses were called to give evidence on his behalf and further when none of them knew him. In actual fact none of the six witnesses gave evidence in support of the allegations in the petition. The witnesses admitted they never met with 1st petitioner, so who is the 1st petitioner? Do 1st petitioner exist and if so why did he not give evidence or show up or is he a busybody or a ghost? There is doubt as to whether the 1st petitioner genuinely filed this petition but whatever the same may be, the court noted that no sufficient evidence was adduced in support of the allegations in the petition to the required standard of proof.

The 1st petitioner having failed to give evidence and the court having struck out the affidavits of PW3, PW4, PW5 and PW6 and having found that PW1 and PW2 had not complied with mandatory provisions of signing petition and filing supportive affidavit, and further PW1 and PW2 having denied the contents of the petition, I find that the petitioners have not proved the allegations in the petition to the required standard as set by the law. In actual fact, I find no evidence in support of the petition before me as against the respondents and what the petitioners have before the court are mere allegations which remain so. Allegations without being proved to the required standards remains baseless allegations which court has to ignore.

In view of the evidence adduced by the petitioners witnesses and the 1st and the 2nd respondents I find the election of the 3rd respondent Godhana Adhi Doyo, as Governor Isiolo County was free and fair and in accordance with the provisions of the Constitution, election laws and was genuine expression of the will of the voters.

There was no evidence adduced before the court to show that there was violence, intimidation, unlawful influence or corruption on part of the respondents. The petitioners and their witnesses indeed admitted the petition was against Senator Mohammed Kutu, who is not a party and not against the 3rd respondent or Gubernatorial election. I therefore find and hold the election of the 3rd respondent which the petitioners admitted they are not challenging in their petition as conducted by the 1st and the 2nd respondents was free from violence, intimidation, unlawful influence or corruption on part of the respondents.

I further find that the election of the 3rd respondent is not questioned by the petitioners or by their witnesses and all the witnesses and the petitioners stated that they had no complaint on how the 3rd respondent was elected and as such I find the election of 3rd respondent was transparent. The election of the 3rd respondent was therefore as conducted by the 1st and the 2nd respondents, administered in an impartial, neutral, efficient, accurate and accountable manner as no complaint was raised with IEBC or with the police or in the petition before this court.

In view of the foregoing the petitioners' petition dated 6th April, 2013 is dismissed with costs to the respondents against the petitioners number one(1) to nine (9) jointly and severally.

The respondents to file their separate Bill of Costs for taxation before the Deputy Registrar and the total sum to be taxed in respect of all the bills not to exceed Kshs 2Milliion.

DATED, SIGNED AND DELIVERED AT MERU THIS 7TH DAY OF AUGUST, 2013.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT IN PRESENCE OF:

1. Mr. A. T. Oluoch for the petitioners
2. Mr. N. M. Malonza for 1st and 2nd respondents
3. Mr. A. Ingutya for 3rd respondent
4. C/clerk Penina/Kathurima

J. A. MAKAU

JUDGE