REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELECTION PETITION APPEAL NO. 2 OF 2013

WILLIAMKINYANYI ONYANGO……..……..……APPELLANT

VERSUS

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION…..... ….1ST RESPONDENT

RETURNING OFFICER KARIOBANGI SOUTH UHURU WARD….....2ND RESPONDENT

ROBERT MBATIA……..3RD RESPONDENT

(*Being an appeal from the ruling and order of Timothy O. Okello, Senior Principal Magistrate made on 31st May 2013 in the Chief magistrate's Court, Nairobi, Milimani Law Courts in*)

ELECTION PETITION NO. 1 OF 2013

WILLIAM KINYANYI ONYANGO……...…… PETITIONER

VERSUS

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....….. ….1ST RESPONDENT

RETURNING OFFICER KARIOBANGI SOUTH UHURU WARD….....2ND RESPONDENT

ROBERT MBATIA……..3RD RESPONDENT

JUDGMENT

1. The appellant is William Kinyanyi Onyango. He was a candidate in the general elections held on 4th March 2013. He vied for the seat of county representative for Kariobangi South Ward (1429), Nairobi County. The elections were conducted by the 1st and 2nd respondents. He lost to Robert Mbatia, the 3rd respondent. He was aggrieved by the declaration of results by the Independent Electoral and Boundaries Commission (hereafter *the IEBC*). He lodged an election petition in the lower court on 14th March 2013 challenging the election of the 3rd respondent. He cited a number of irregularities in the conduct of the election: that some of his supporters were not allowed to

vote; that the results were announced on the basis of incomplete or doctored tallies; that voters from the 3rd respondent's *gikuyu* community got priority on the queues or had special queues; that some ballot boxes were transported by unauthorized persons; and, that the 3rd respondent had, prior to the poll, committed election offences by issuing land allotment letters with the intention of bribing potential voters.

2. Timothy O. Okello, the learned Senior Principal Magistrate was gazetted to hear the petition. On 20th May 2013, the 3rd respondent presented a motion to strike out the petition on two primary grounds: that the petitioner had not complied with rule 10(1) (c) of the Elections (Parliamentary and County Elections) Petition Rules 2013 (hereafter *the Petition Rules 2013*) by failing to state the results of the election; and, that the petition did not disclose a cause of action.
3. In a ruling delivered on 31st May 2013, the learned Magistrate found that "*the petition [was] incurably defective and fatally incompetent for want of legal format and or legal content"*. In particular, he found that the appellant had failed to particularize the results of the election which was mandatory under rule 10(1)(c) of the Petition Rules. The learned Magistrate delivered himself as follows:

> *"Rule 10 (1) (c) is also a mandatory requirement, it is possible to challenge the process but without the result ideally there is nothing to challenge. The process is to be challenged because it would have affected the result, the results therefore in my considered view are is the crux of any election petition. This reasoning is buttressed in John Michael Njenga Mututho vs Jane Njeri Kihara & 2 others…..…"*

4. The learned Magistrate, while admitting that the petitioner had alluded to corruption, stated as follows;

> *"The allegation of bribery cannot cure the non-compliance with the mandatory procedure and or format. The same shall be investigated by the relevant arm of the government and appropriate action taken."*

5. The entire petition was thus struck out with costs to the respondents. The appellant takes up cudgels on the whole decision. In the memorandum of appeal filed in this Court on 19th June 2013, he has framed 7 grounds:

i. *The learned Magistrate erred in law and fact in holding that the issue of corruption was only raised in the petitioner's affidavit and not in the body of the petition*
ii. *The learned Magistrate erred in law and fact in holding that the petition did not comply with Rule 10 (1) (a) and (c) of the Elections (Parliamentary and County Elections) Petition Rules 2013.*
iii. *The learned Magistrate erred in law and fact in holding that the issue of corruption shall be investigated by the relevant arm of the government and appropriate action taken contrary to the provisions of section 76 of the Elections Act.*
iv. *The learned Magistrate erred in law and fact by holding that the evidence to be adduced by the petitioner is intended to show that certain irregularities affected the results of election and therefore failed to address other issues in the petition.*
v. *The learned Magistrate erred in law and fact by failing to appreciate that an election petition filed on the grounds of election offences and/or malpractices goes beyond mere election irregularities which are serious matters to be handled on merit.*
vi. *The learned Magistrate erred in law and fact in restricting the Petitioner to 14 days' right of appeal contrary to the provisions of section 75 of the Elections Act.*
vii. *The learned Magistrate erred in law and fact by delivering an undated ruling to the parties.*

6. The appeal is contested by all the respondents. The record of appeal was filed on 12th July 2013. The original record of the lower court has also been availed to the Court. On 19th July 2013, the parties agreed to have the appeal determined by way of written submissions. The appellant's submissions were filed on 23rd July 2013. The 1st and 2nd respondents' submissions were filed on

23rd August 2013 while those of the 3rd respondent were filed on 21st August 2013. There is also filed a further reply to those submissions by the appellant on 3rd September 2013. On 4th September 2013, the Court invited all the learned counsel to make brief oral submissions. I have considered the memorandum of appeal, the record of appeal, the pleadings, depositions and the erudite submissions by the learned counsel. I am of the following considered opinion. Grounds 1, 3, 4 and 5 speak to the same subject. I will thus combine them as appropriate. I will address grounds 2, 6 and 7 separately.

7. This appeal is *limited* to points of law. The appeal was filed well within the prescribed time. I find that it is properly before the Court. Section 75(4) of the Elections Act 2011 (as amended by Act number 47 of 2012) provides as follows:

> *"An appeal under subsection (1A) shall lie to the High Court on matters of law only and shall be-*

a. *filed within 30 days of the decision of the Magistrate's Court; and*
b. *heard and determined within six months from the date of filing of the appeal"*

8. My observations in the preceding paragraph go to the root of ground 6 of the appeal. The learned Magistrate had in his ruling stated that "*the parties have a right of appeal of 14 days"*. I agree with the appellant that the Magistrate erred on that score. I think he was misled by rule 34 of the Elections (Parliamentary and County Elections) Petition Rules 2013 under legal notice No 54 of 2013. That rule provides that an appeal should be presented within 14 days. The rule is clearly *ultra vires* section 75 (4) (a) of the Act (as amended) which provides for 30 days' right of appeal. The rules are subsidiary legislation made under section 96 of the Elections Act 2011. They remain subservient to the statute. The impugned decision was rendered on 31st May 2013. The appeal was presented to the High Court on 19th June 2013 well within the statutory window. The respondents' counsel freely conceded to that fact when they appeared for directions on 19th July 2013. I thus find that ground 6 of the appeal has merit and succeeds.
9. I will deal next with ground 7 of the appeal. All the parties conceded that the impugned ruling was delivered in open court at Nairobi on 31st May 2013. Did the learned Magistrate *date* his ruling? The record of appeal at pages 493 to 506 contains the *certified true* copy of the original ruling of the lower court. The ruling is signed but *not* dated. The respondents' counsel conceded that that is the version of ruling that was delivered in open court on 31st May 2013 and supplied to the parties. I have then looked at the original court record of the lower court. The *original* typed ruling is similar save that the learned magistrate has *added* by hand the following text at the bottom and reverse of his ruling: "*ruling delivered (sic) dated and signed on this 31/5/13 in the presence of all counsel for all (sic) parties"*. The appellant's case is that that handwritten text was added by the magistrate long after delivery of the ruling and after filing of this appeal. The respondents' counsel submitted that since the ruling was delivered in open court, and there is no doubt that it was on 31stMay 2013, it does not really matter. It was further submitted that that was a technical slip incapable of impeaching the decision.
10. Dating a judgment or ruling is a *requirement* of law. It is a matter of substance and not a *technicality*. It engenders certainty of the decree or order. Order 21 rule 3 (1) of the Civil Procedure Rules 2010 for example provides that "*a judgment pronounced by the judge who made it shall be dated and signed by him in open court at the time of pronouncing it"*. The language there is *mandatory*. The date of judgment impacts on the rights of parties: the time to lodge an appeal starts to run for example.
11. I disagree with the respondents' submissions that merely because the ruling was read in open court on a certain date, it matters little that it was not *dated*. I have said that all counsel in the appeal concededfreely that the ruling delivered was *not* dated on 31st May 2013. The typed ruling had no pre-printed date or provision for insertion of a date in court. That may explain the odd insertions by hand that spill over to the reverse of the ruling. The conduct by the learned Magistrate of *adding* a date later to the ruling and purporting it to have been done on the date of its pronouncement was highly irregular. It is not the kind of slip that is envisaged, for instance, by sections 99 or 100 of the Civil Procedure Act. I draw support here from *Halsbury's Laws of*

England 4th edition paragraphs 545 and 546. It is stated at paragraph 546 as follows;

> "*The date of the judgment or order is important in that the judgment or order generally takes effect from that date. Interest on the judgment debt runs from the date of entry of the judgment, although interest on costs runs from the date of the taxing master's certificate.*
>
> *Garnishee proceedings may be begun before judgment is actually entered; but, when it is necessary to enter judgment, execution may not issue until the entry, and the time for service of notice of appeal runs from the time the judgment or order is signed, entered or otherwise perfected. Again, an order generally takes effect from the day it was made (which is its date) without its being drawn up or served, unless it is otherwise expressed.……"*

See also *Kola Chacha vs Kenya Commercial Bank and another* Kisumu, Court of appeal, civil appeal 342 of 2001 [2006] eKLR. I have reached the conclusion that failure to date the impugned ruling vitiated it. The lapse was incurable by the purported conduct of dating it retroactively. Accordingly, ground 7 of the appeal has merit and succeeds.

12. The appellant contended that the learned Magistrate misinterpreted rule 10(1)(a) and (c) of the Elections (Parliamentary and County Elections) Petition Rules 2013. The rules are contained in legal notice number 54 of 2013. The relevant parts of the rule provide as follows:

> *"10. (1) An election petition filed under rule 8 shall state–*
>
> *(a) the name and address of the petitioner;*
>
> *(b)……..*
>
> *(c) the results of the election, if any, and the manner in which it has been declared;*
>
> *(d)……..*
>
> *(e) the grounds on which the petition is presented; and*
>
> *(f)……..*"

13. Striking out a pleading is a draconian measure to be employed sparingly. It should be the exception. The rule of thumb is that cases should be determined on evidence and merit. See *Dyson Vs. Attorney General* [1911] 1 KB 410 at 418,*D T Dobie & Company (Kenya) Limited Vs Muchina* [1982] KLR 1,*Steven Kariuki vs George Mike Wanjohi and 2 others* Nairobi, High Court petition 2 of 2013 [2013] eKLR. At paragraph 3of this judgment, I captured verbatim the opinion of the learned Magistrate on application of rule 10(1) (c). In a synopsis, he held that the petitioner failed to particularize the declared *results* of the election or *aggregate results* of the candidates. He found that failure to do so was *fatal in* view of the use of the word *shall* in rule 10 (1) (c).
14. The learned Magistrate drew strength from the Court of Appeal decision in *Mututho vs Kihara* [1993-2009] 1 EAGR 270. That decision was based largely on the text of rule 4 of the Presidential and Parliamentary Elections Regulations (now repealed). Rule 4 (1) then provided as follows:-

> *"An election petition shall:*

i. *State whether the petitioner is entitled to petition under section 44 of the Constitution, and*
ii. *State when the election was held and result of the election, and shall state briefly the facts and grounds relied on in support of the petition"*

15. The Court of Appeal in *Mututho vs Kihara* (supra) was emphatic that election petitions envisage a

challenge of *results* in an election. Accordingly, the requirement to particularize the results was mandatory. The Court stated as follows:

> "*It is clear from rule 4 (1) (b), above that the issue in any election is the result of the election. It should be noted that other than a statement on capacity to bring the petition and the date of the elections, the only other important factor to be included in an election petition is the result. The marginal note of that rule makes the position abundantly clear. It talks about the contents and form of an election petition. The result does not go to form but to the content of the petition; and in our view rule 4 (1), above is specifically concerned with content. Rule 4 (2), (3) and (4) are concerned with form"*
>
> *……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 the rule otiose"*

16. The Court emphasized the unique nature of election dispute settlement, the form of pleadings in a petition and the need for strict application of rules of procedure: failure to plead certain matters with precision would be fatal to the petition. The court stated:

> *"Election petitions are special proceedings. They have a detailed procedure and by law they must be determined expeditiously. The legality of a person's election as a people's representative is in issue. Each minute counts. Particulars furnished count if the petition itself is competent, not otherwise. Particulars are furnished to clarify issues not to regularize an otherwise defective pleading. Consequently if a petition does not contain all the essentials of a petition, furnishing of particulars will not validate it"*

17. A similar approach was taken in <u>*Nyamweya vs Oluoch and others*</u> [1993-2009]1 EAGR 377. A lot of water has passed under that bridge. We now have a fresh set of laws under the Constitution of Kenya 2010, the Elections Act 2011 and the Petition Rules 2013. That is the context within which to interpret the rule. See <u>*Steven Kariuki vs George Mike Wanjohi and 2 others*</u> Nairobi, High Court petition 2 of 2013 (unreported). In view of the new rule 21 requiring the IEBC to file the results in Court, I hold the opinion that failure to particularize the results is no longer fatal to a petition.

18. Some genre of election petitions may, quite apart from results, challenge other aspects of elections. A good example is the petition in <u>*Kituo cha Sheria vs John Ndirangu Kariuki and another*</u> Nairobi, High Court election petition 8 of 2013 [2013] eKLR. That petition was filed after the general elections of 4th March 2013. It was *not* filed by any candidate or a voter. There was *no* complaint of electoral malpractices. It challenged the election of the 1st respondent as member of the National Assembly *not* on the *results* but his *qualifications* for nomination as a candidate on grounds of *integrity*. As the petition did not go to the root of the aggregate results, even the returning officer was not made a party. Rule 10 (1) (c) must thus be given a *liberal* and *purposive* interpretation that gives effect to the overriding objective of the Court to do justice to all parties.

19. The context and history of the rule was succinctly captured by Majanja J in <u>*Caroline Mwelu Mwandiku vs. Patrick Mweu Musimba & 2 others*</u> High Court, Machakos Election petition 7 of 2013 [2013] e KLR. I agree with the learned judge and see no need to reinvent the wheel. I will thus cite him *in extenso*:

> *"The applicant has relied on the case of <u>Mututho Vs Kihara</u> to support the proposition that the petition is fatally defective for want of particulars. In that case, the Court of Appeal stated in part as follows,……In my view, rule 21 as read with rule 10 (1) (c) of the Rules which now permit the petitioner to plead 'the results, if any, however declared' was intended to deal with the mischief identified in <u>Mututho Vs</u>*

Kihara. The purpose of pleadings is to aid a fair trial. Rules of procedure are not mere formulae to be observed as rituals and elevated to a fetish. Beneath the words of a provision of law, lies a juristic principle. In this case the principle is that the rule is intended to enable the court fairly adjudicate the dispute between the parties.

The guiding principle in consideration of this matter is the overriding objective of the Rules which is stipulated under rule 4 (1) of the Rules as

> *'to facilitate the just, expeditious, proportionate and affordable resolution of election petitions under the Constitution and the Act'.*

This objective is best realized by the election court having regard to the purpose and mischief that the rule seeks to cure and the prejudice that would be occasioned by insistence on the strict compliance with form. Rule 5 further obliges this court and the parties to conduct proceedings before it to achieve the following aims,

> *'(a) the just determination of the election petition; and (b) the efficient and expeditious disposal of an election petition within the timelines provided in the Constitution and the Act'.*

Rules 4 and 5 are therefore a testament of the provisions of Article 159 (2) (d) of the Constitution which obliges every court to dispense justice without undue regard to technicalities."

20. I concur entirely with that view. That opinion is also shared by Githua J in *Sarah Mwangudza Kai vs Mustafa Idd Salim and others* High Court, Malindi, election petition 8 of 2013 [2013] eKLR, by Majanja J, in a different setting, in *Richard Kalembe Ndile vs Patrick Musimba Mweu and others* High Court, Machakos election petition 1 of 2013 [2013]eKLR, by Achode J in *Hosea Mundui Kiplagat vs Sammy Komen Mwaita and others* High Court election petition 11 of 2013 [2013] eKLR, and lastly by Ngaah J in *Wilson Nginga Kimotho vs Independent Electoral & Boundaries Commission & 2 others* Nyeri, High Court election petition 5 of 2013 [2013] eKLR.

21. Opinion is however *divided* in the High Court. The key proposition by dissenting judges is that rule 10 and other rules are not mere technical rules: that the strict procedural and substantive rules of election petitions have to be upheld. I am alive, for example, to the decision of Onyancha J in *Amina Ahmed vs Returning Officer Mandera County and others* Nairobi, High Court petition 4 of 2013 [2013]eKLR. The learned Judge relied on *Mututho vs Kihara* (supra) as well as the Indian decision in *Jyoti Basu and others vs Debi Ghosal and others* [1982] AIR SC 983. Onyancha J delivered himself very strongly as follows:

> *"Put differently, the provisions of Rule 10 and others aforestated, are not mere technical requirements. If they are technical in so far as they are procedural and spell out the form and content of intended petitions, they nevertheless, at the same time, are substantive and go to the root and substance of issues and matters prescribed upon. A further reason why the provisions of the Elections Act and/or Rules must be complied with fully, is because the Act, and therefore the Rules, are a special legislation. They are a legislation for the purpose, as already stated above, of efficiently prescribing the proper, efficient, expeditious and just conduct of election petitions. Every provision in them therefore, is intended to achieve a required result and any deficient compliance is likely to lead to delay and injustice and would likely be frowned upon by the court."*

22. There is a similar view held by Makau J in *Ismail Suleman and others vs Returning Officer Isiolo County and others* High court, Meru, election petition 3 of 2013 [2013] eKLR. It is however instructive that in the matters before the latter two judges, there were additional grounds for striking out the petitions. The petition before Makau J, for instance, had a myriad of weaknesses: the petition was poorly drafted; the supporting affidavits were defective; there was misdescription

of the electoral area; and, some mandatory or necessary parties were not impleaded.

23. In my considered opinion, the Petition Rules 2013 were meant to be handmaidens, not mistresses of justice. Fundamentally, they remain subservient to the Elections Act 2011 and the Constitution. Section 80 (1) (d) of the Elections Act 2011 enjoins the Court to determine all matters without *undue regard* to technicalities. Rules 4 and 5 of the Petition Rules 2013 have in turn imported the philosophy of the overriding objective of the court to do substantial justice. Certainly, article 159 of the Constitution would frown upon a narrow and strict interpretation of the rule that may occasion serious injustice. This is not to say that procedural rules will not apply in all cases: only that the Court must guard against them trumping substantive justice. See *Raila Odinga vs IEBC and 3 others* Nairobi, Supreme Court, election petition 5 of 2013 [2013] eKLR, *Steven Kariuki vs George Mike Wanjohi and 2 others* Nairobi, High Court petition 2 of 2013 [2013] eKLR.
24. I find the*liberal* and*purposive*interpretation of the rule by Majanja, Githua, Achode and Ngaah JJ, in the decisions I cited earlier, to be much more in tandem with our new laws. Furthermore, that approach cures the old *mischief* in *Mututho vs Kihara* (supra) under the repealed rules. That was clearly the intention of the new rule 21. What possible prejudice would be suffered by the respondents? None in my view. The 3rd respondent had been declared the winner. The petitioner was challenging that election on numerous grounds. True, he did not specify the aggregate votes of candidates. The results were available. He could have specified them by being a little more diligent. But the IEBC had custody of the results and was mandated by rule 21 to file them in court. The petitioner had annexed some results in forms 35 to his supporting affidavit. He deposed that he did not access all the forms 35. It is not a very sound argument. It means the aggregate results were available. But I have also seen on the record of the lower court the *full* results including forms 35 and 36. They are contained in a further affidavit of Marjorie Owino, the returning officer, sworn and filedin the lower court on 20th May 2013. That was at the hearing of the motion for striking out the action. At the time the learned Magistrate was dealing with the matter, the aggregate results for all candidates were right before him. It cannot then fall from the lips of the respondents, and the IEBC in particular, that they did not know the case they were to meet at the trial.
25. There was a curious finding by the learned Magistrate at paragraph 21 of his ruling that the petitioner didnot comply with rule 10(1) (a). The rule requires the petition to state "*the name and address of the petitioner"*. I have perused the petition in the lower court. The name of the petitioner is pleaded. The petitioner however provided *his advocate's address*. Unless one wants to split hairs, the address of the petitioner was provided. The true purpose of an address is for ease of service of process. The petition states that the petitioner's address is *care of his* advocate. To then say that the petitioner had not provided *his* address is to raise a technicality into a fetish.
26. In a nutshell, the respondents had not met the threshold for striking out the action on those grounds in the lower court. I have reached the firm conclusion that the learned Magistrate erred in interpreting rules 10 (1) (a) and (c) of the Petition Rules 2013 in striking out the petition. The principal error was in his strict and literal application of subsidiary legislation in contravention of the Elections Act 2011, as well as the letter and spirit of the Constitution of Kenya 2010.The further misdirection was failing to juxtapose rule 10 (1) (c) against rule 21 of the Petition Rules 2013 and to apply the tenets of proportionality of justice. By applying the wrong principles, he caused a serious miscarriage of justice. Ground 2 of the appeal thus succeeds.

27. My findings on grounds 2, 6 and 7 are sufficient to dispose of this appeal. I propose to remit this matter back to the election court for determination. I am thus minded to say very little on the remainder of the grounds. Ground 1 for example faults the learned Magistrate for holding that the issue of corruption was *only* raised in the petitioner's affidavit and *not* the body of the petition. A petition largely succeeds or fails on its pleadings and the evidence. Those are then matters best left to the election court. I have already held that the learned Magistrate erred in striking out the petition under rules 10 (1) (c) and (a) of the Petition Rules 2013. It would thus be inappropriate to express an opinion on the veracity of pleadings and depositions at this stage.
28. The learned Magistrate was alive to the wider allegations of undue influence or bribery. He stated:

> *"The allegation of bribery cannot cure the non-compliance with the mandatory procedure and or format. The same shall be investigated by the relevant arm of the*

government and appropriate action taken".

29. From the above excerpt, the learned Magistrate held the view that those alleged offences should be investigated and action taken by other government agencies. Ground 3 of this appeal faults him on that finding. As I have stated, it would be inappropriate to render an opinion that will embarrass the election court. The same can be said of grounds numbers 4 and 5. The election court has wide and unfettered powerunder the Elections Act 2011 to deal with all allegations in the petition including election offences. It would also be wrong to dictate to the election court the manner in which to interpret the pleadings before it,how to conduct the trial or of possible reliefs. Granted those premises, I decline the invitation to address the merits of grounds 1, 3, 4 and 5 of the appeal.
30. In the result, the appeal succeeds on grounds 2, 6 and 7. The appeal is allowed. The *undated* ruling of Timothy O. Okello, Senior Principal Magistrate, delivered on 31st May 2013 at Nairobi is hereby *set aside* in its entirety. I order that the appellant's petition dated 11th March 2013 and filed on 14th March 2013 be and is hereby *reinstated* for hearing. The petition shall be heard by any Resident Magistrate gazetted for that purpose *other than* Timothy O. Okello.
31. Costs follow the event and are at the discretion of the Court. I grant the appellant costs of the appeal to be paid by the respondents jointly and severally. Under Rule 36 (1) (a),I cap those costs at Kshs 200,000. The appellant will present a bill to be taxed by the taxing master of this court.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this 27th day of September 2013.

G.K. KIMONDO

JUDGE

Judgment read in open court in the presence of:

- Mr. J. Were with him Mr. J. Omolo instructed by Odera Were, Advocate for the appellant.
- Mr. J. Wanjohi for the 1st respondent instructed by J. W. Wanjohi & Company advocates.
- Mr. E. Mukele for the 2nd & 3rdrespondents instructed by Mukele Moni & Company Advocates.
- Mr. C. Odhiambo, Court Clerk.