



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**ELECTION PETITION NO. 5 OF 2013**

**IN THE MATTER OF THE ELECTIONS ACT 2011 AND THE ELECTIONS  
(PARLIAMENTARY AND COUNTY ELECTIONS) PETITION RULES, 2013**

**AND**

**IN THE MATTER OF THE GOVERNORS ELECTIONS FOR KAKAMEGA COUNTY**

**BETWEEN**

**MABLE MURULI ..... PETITIONER/APPLICANT**

**V E R S U S**

**HON. WYCLIFFE AMBETSA OPARANYA..... 1<sup>ST</sup> RESPONDENT**

**PHILIP MUSEVE KUTIMA ..... 2<sup>ND</sup> RESPONDENT**

**NICHOLAS SUMBA ..... 3<sup>RD</sup> RESPONDENT**

**INDEPENDENT ELECTORAL & BOUNDARIES**

**COMMISSION (IEBC) ..... 4<sup>TH</sup> RESPONDENT**

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

**Introduction**

The petitioner herein had intended to vie for the position of Governor of Kakamega County. She presented her nomination papers on the 1.2.2013 to the 3<sup>rd</sup> respondent who was the returning officer for Kakamega County but her nomination papers were rejected. She appealed to the IEBC Tribunal but her appeal was also dismissed. The petitioner filed petition No. 93 of 2013 before the High Court in Nairobi seeking orders to be included in the ballot paper and in its ruling delivered on 13.2.2013 the court did order that the petitioner was qualified to vie for the post of Governor and she was to be included in the ballot paper. That never happened and the petitioner did not participate in the elections as a candidate. Upon the completion of the elections, the petitioner preferred the current election petition.

**The Petition**

The petition is dated 8.4.2013 and it is brought in pursuant to Articles 38 and 82 of the Constitution of Kenya 2010, Section 75 of the Elections Act No. 24 of 2012 and Election Petition Rules 2013. The

petitioner was a registered voter at Ileho Primary School polling station in Isukha East County Assembly Ward, Shinyalu Constituency, Kakamega County. The petitioner's nomination documents for the position of Governor Kakamega County were unlawfully declined. The 4<sup>th</sup> respondent conducted the elections without including the petitioner as a candidate despite a court order. The 4<sup>th</sup> respondent initially announced that the 1<sup>st</sup> respondent had obtained 229,000 votes but the figure was later changed and the results were announced as follows:-

No.	Names	Votes
1.	Peter Soita Shitanda	133,718
2.	Wycliffe Ambetsa Oparanya	259,071
3.	Mwilitsa Albert Stanslous	7535
4.	Ndombi Lawrence Simbauni	16,592
5.	Olando Paul Polland	41,765
6.	Wangia Jared Waudu	3,556
	<b>Total</b>	<b>462,237</b>

The petitioner contends that the election of the 1<sup>st</sup> and 2<sup>nd</sup> respondent is vitiated, compromised and an illegality as it did not meet or comply with the standards and principles of free and fair elections. There was a conspiracy to block the petitioner and her supporters from participating in the Kakamega County gubernatorial race. The 1<sup>st</sup> respondent engaged in bribery of voters. There is a discrepancy between the total number of voters for the position of the Governor and that of the Senator. There were many spoilt votes and it was reported that most of the voters were being frustrated by the malicious manner in which the petitioner, as their candidate, was excluded from the ballot paper and they decided to spoil the ballot papers by marking all the boxes and wrote the petitioner's name. The petitioner was the only female candidate for the Governor's race and the election was flawed as it failed to promote gender balance. The petitioner was not cleared yet in other arrears candidates who presented transcripts were cleared. The IEBC failed to postpone the elections and include her name yet it postponed elections in Kuria and other arrears. The petition seeks the following prayers:-

- a. ***A declaration that the Petitioner's fundamental rights and freedom as enshrined in the Constitution were fundamentally violated and willfully compromised by the 3<sup>rd</sup> and 4<sup>th</sup> Respondents.***
- b. ***That the election of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents as a County governor and deputy County governor Kakamega County be determined and declared null and void and a certificate to that effect be issued.***
- c. ***The first Governor and Deputy Governor Election held on the 4<sup>th</sup> March 2013 in Kakamega County be determined and declared null and void and a fresh election for the positions of Governor and Deputy governor be ordered and held in Kakamega County to afford the Petitioner and her supporters to participate in a free, fair and transparent election.***
- d. ***A determination be made that 1<sup>st</sup> and 2<sup>nd</sup> Respondents have not been validly and impartially elected as the County Governor and Deputy County Governor on account of failure by the 3<sup>rd</sup> and 4<sup>th</sup> Respondents to hold free, fair and credible Nominations on 31<sup>st</sup> January, 2013 and 1<sup>st</sup> February, 2013 and Elections on 4<sup>th</sup> March, 2013.***
- e. ***In any event the 3<sup>rd</sup> and 4<sup>th</sup> Respondents be condemned to pay the costs of this petition and***

- other incidentals costs thereto.*
- f. *Such other reliefs and consequential orders as this Honourable Court may deem just fit and grant.*

### **Petitioner's Evidence**

The petitioner called six (6) witnesses including herself. **PW1 VINCENT SHAMWAMA SHIVACHI** was the Deputy Administrator in charge of the petitioner's campaign. On the 1.2.2013 he accompanied the petitioner to present her nomination papers to the returning officer at Kakamega High School. The returning officer indicated on the nomination papers that the documents were invalid and the petitioner was told to produce more documents. The petitioner presented more documents to the returning officer including a letter dated 31.1.2013 from the Council of Higher education, hereinafter referred to as (CHE), but still the returning officer refused to clear the petitioner. The 3<sup>rd</sup> respondent who was the returning officer advised the petitioner to drop her ambition of contesting the position of a Governor but instead contest for the position of Senator.

According to PW1 the 3<sup>rd</sup> respondent arrogantly explained to the petitioner that she was not a degree holder and that her transcripts were not the actual degree certificate required by the law. The returning officer indicated that he was under strict instructions not to clear the petitioner and that he could not allow a woman at all costs to contest as a Governor. The petitioner and her supporters went to the Independent Electoral & Boundaries Commission (IEBC) offices and met one George Oyugi who was senior to the returning officer. George Oyugi tried to intervene but still the 3<sup>rd</sup> respondent declined to clear the petitioner. The petitioner and her supporters left the IEBC offices at about 8.00 p.m. after serving the IEBC officers with a protest letter.

**PW2 FRED SHIJENJE (KASISI)** swore an affidavit on the 13.5.2013. His evidence is that he prepared a list of the petitioner's supporters and presented it to the IEBC. He was present on the 1.2.2013 when the petitioner presented her nomination papers and the returning officer asked the petitioner to present a certificate and not transcripts. The returning officer insisted that the petitioner did not have a degree certificate from a recognized university. On the 2.2.2013 he travelled with the petitioner to Nairobi together with other supporters. The High Court later allowed the petitioner to present her papers but still the petitioner was not allowed to contest. He applied to the OCS Kakamega Police Station to be allowed to hold a peaceful procession in Kakamega and a permit was issued on the 18.2.2013. The procession took place on 18.2.2013 between 8.00 a.m. and 12.00 noon. During the procession he delivered a memorandum to the IEBC offices citing the displeasure in the manner and style in which the petitioner's nomination had been handled.

**PW3 STANSLAUS ANAMI** swore his affidavit on the 8.4.2013. His evidence is that on the 24.2.2013 he attended a church service at the Anglican Church of Kenya in Mumias East Constituency. While at the church the 1<sup>st</sup> respondent entered together with one Professor Shianyisa and other supporters. The 1<sup>st</sup> respondent calmly sat in the church as the service was still on going and when it came to the time for offertory the congregation gave their offerings and the service came to an end. The 1<sup>st</sup> respondent was introduced to the congregation and he also introduced some of the guests that were in his company. They were given a chance to talk to the congregation and they requested for votes. Soon after the closing prayers the 1<sup>st</sup> respondent gave an envelope to one **MUTOBERA(DW2)** who was contesting for the Member of Parliament for Mumias East Constituency on an Orange Democratic Party (ODM) ticket. Mutobera then gave the envelope to the church leader and asked the worshippers to share the contents. PW3 was recording the events that were happening in the church using a spy watch. According to PW3 the 1<sup>st</sup> respondent did not mention money at the church service and one could not see what was in the envelope. He later gave his spy watch gadget to **BEFREY ANAWA (PW5)** for production.

**VICTOR SHIVEGA** testified as **PW4**. He is an Advocate by profession having been admitted to the role of Advocates on the 17.4.2013. He swore an affidavit on the 8.4.2013. He was the chief administrator to the petitioner's campaign team. On the 1.2.2013 he accompanied the petitioner to the nomination centre at Kakamega High School. The petitioner presented her nomination papers but the

returning officer declined to receive her documents and wrote on her academic transcripts “**nomination invalid the candidate to present a degree certificate**”. The 3<sup>rd</sup> respondent asked the petitioner to drop her ambition of contesting as a Governor but to contest for the Senator’s position but the petitioner declined that offer. The petitioner and her supporters left the clearance desk but remained in the nomination clearance hall. At about 6.00 p.m. the petitioner approached the 3<sup>rd</sup> respondent requesting him to clear her but the 3<sup>rd</sup> respondent became harsh. They later went to the IEBC offices and met one George Oyugi who tried to intervene but the 3<sup>rd</sup> respondent declined to clear the petitioner.

On the 28.2.2013 PW4 was at Murhanda market at about 2.00 p.m. He saw a fleet of motor vehicles some having mounted loudspeakers. He saw the 1<sup>st</sup> respondent in the company of Professor Khasiani who was vying for the post of Senator, one Bonface who was contesting for the Murhanda Ward County Representative, one Lisamula who was vying for Shinyalu Parliamentary seat and Rachel Amolo who was vying for Women Representative. The group addressed the gathering and the 1<sup>st</sup> respondent told the crowd that he was going to leave “**some milk**” for them and that he was to leave the milk with Bonface. After the 1<sup>st</sup> respondent and his group had left, the crowd demanded from the said Bonface to be given some money. Bonface confirmed that he had been given KShs.20,000/=. People arranged themselves into two lines, one for men and one for women and they shared the money. PW4 was recording all the events in his spy watch. It is PW4’s evidence that he did not see the 1<sup>st</sup> respondent giving out money to the gathering. He reported the matter to IEBC as well as to the police but he didn’t have the occurrence book number.

**PW5 BEFREY AMAWA** testified that she deals in computers. She was given the spy watches by both PW3 and PW4 and produced CDs. She went through the information that was contained on the gadgets and transferred it to the CDs. PW5 then prepared a certificate.

The petitioner **MABLE MURULI** testified as **PW6**. She swore two affidavits on the 8.4.2013 and a third one on the 10.5.2013. Her evidence is that on the 1.2.2013 she presented her nomination papers for the position of Governor of Kakamega County to the 3<sup>rd</sup> respondent. She gave the 3<sup>rd</sup> respondent her transcripts from the City of London College which showed that she had completed her extended diploma course, a print out from British Education Certification Council, hereinafter referred to as (BTEC), a letter from Council of Legal Education (CHE) which recognized the City of London College and a letter from her university dated 28.1.2013 confirming that she had completed her studies and was waiting graduation. The 3<sup>rd</sup> respondent was not able to interpret her academic qualifications and declined to clear her. The 3<sup>rd</sup> respondent flatly refused her nomination documents and exhibited total lack of appreciation and arrogance. She wrote a protest letter and left it with the IEBC officers. She later filed an appeal number 9 of 2013 before the IEBC Disputes Resolution Tribunal. The appeal was heard on the 6.2.2013 and a decision was made 7.2.2013. The proceedings took only four minutes and Professor Nzibo who was one of the IEBC officers who heard the appeal promised to have her cleared but the appeal was dismissed.

The petitioner moved to the High Court and filed petition number 93 of 2013. The court granted her prayers on the 13.2.2013 and she was allowed to contest. Despite the court order the IEBC declined to include her name on the ballot paper. The petitioner then filed an application dated 15.2.2013 seeking leave to have the IEBC Chairman committed to civil jail for contempt of court. On 19.2.2013 the IEBC filed an application for review of the court judgment. The petitioner withdrew her application that had sought to have the IEBC Chairman cited for contempt and the parties recorded a consent. The petitioner retained her right to file a post-election petition. It is the petitioner’s evidence that she decided to drop the application for contempt as she did not want to hold the country at ransom by having the IEBC Chairman and Chief Executive Officer put in the cells due to disobedience of the court order.

It is the petitioner’s further evidence that the election of the 1<sup>st</sup> and 2<sup>nd</sup> respondent was not free and fair as the two respondents engaged in election malpractices including bribing of voters. The 1<sup>st</sup> respondent was declared the winner. The results that were initially televised gave the 1<sup>st</sup> respondent 229,000 votes but the gazetted results indicated 259,071 votes. PW6 was shown the videos which

indicate that the 1<sup>st</sup> respondent bribed voters. The petitioner later obtained a letter from CHE dated 4.2.2013 indicating that her extended diploma was equivalent to a degree. This was extra information which was not a requirement for the nomination. It is the petitioner's evidence that what the election regulations require is for authentication of the Institution that issues a certificate but not authentication of the certificate itself. The petitioner further testified that the nomination deadline was not 1.2.2013 as there was room for appeal and there are some candidates who appealed, were cleared on the 8.2.2013 and their names appeared on the ballot papers. When they recorded the consent before the court, the IEBC promised the petitioner that she was not going to pay deposit for this petition and on the 11.4.2013 she wrote through her lawyer to the IEBC asking them to honour their promise but there was no response.

The petitioner went on to testify that she rolled out a well-resourced campaign and was optimistic that she was going to be elected as the Governor for Kakamega County. She was unlawfully barred from participating in the elections and the results do not reflect the will of the voters. Her Constitutional rights were violated and the 4<sup>th</sup> respondent also failed to obey the court order.

### **Response by 1<sup>st</sup> and 2<sup>nd</sup> Respondents**

The 1<sup>st</sup> and 2<sup>nd</sup> respondents filed separate responses but the same are similar. The respondents contend that they campaigned in the entire Kakamega County which had 568,813 registered voters out of a population of 1,660,651. The campaigns involved a lot of financial resources. 462,237 voters turned up during the voting day. The 1<sup>st</sup> respondent was declared the winner and is the current Governor for Kakamega County while the 2<sup>nd</sup> respondent is the Deputy Governor and was the running mate. The respondents denied any engagement in electoral malpractices. The 1<sup>st</sup> respondent denied that he gave a white envelope to Mr. Mutobera or that he gave money to voters at Murhanda. The respondents would like to have the petition dismissed with costs of the petition awarded to them.

### **Evidence of the 1<sup>st</sup> and 2<sup>nd</sup> respondents**

Seven witnesses testified for the two respondents including their own respective testimonies. **DW1 JOSHUA AURA LUTOMIA** swore an affidavit on the 23.4.2013. His evidence is that he is a member of the Anglican Church of Kenya and comes from Mumias East Constituency. On the 24.2.2013 he attended church and the 1<sup>st</sup> respondent also attended the service at about 1.00 p.m. and sat at the front. Mr. Mutobera who was a Parliamentary candidate also attended the service. The 1<sup>st</sup> respondent gave his offering while inside the church. The offerings are normally put in a box. The 1<sup>st</sup> respondent also dropped his offering in the box. On that date it had been dedicated for prayers countrywide and after the service the 1<sup>st</sup> respondent was escorted out of the church after singing the National Anthem. He heard members of the congregation asking for money but he did not see him giving out any money. The 1<sup>st</sup> respondent informed those who were jostling outside the church for money that the Constitution did not allow him to give out money. It is the evidence of DW1 that he does not know **STANSLAUS ANAMI (PW3)**.

**JUSTIN MAKARI MUTOBERA** testified as DW2. He swore an affidavit on 23.4.2013. His evidence is that he was a Parliamentary candidate for Mumias East Constituency on an Orange Democratic Party ticket. On the 24.2.2013 he was scheduled to host the 1<sup>st</sup> respondent for rallies in his constituency. On that day DW2 went to the Anglican Church of Kenya in Makunga area at about 11.30 a.m. The 1<sup>st</sup> respondent joined him at about 1.30 p.m. The two gave their offerings which was dropped at a central kitty. Other church members gave their offertories. He denied that he was given a white envelope to put in the offertories. When they came out of the church a group of people was waiting for them and they asked for money but they did not give them.

**DW3** is **JAMES ATSENGA ASHIHUNDU**. He too swore an affidavit on the 23.4.2013. He testified that he was employed by the 1<sup>st</sup> respondent as an intelligent officer. His duty was to go round the county using a motorbike and find out whether the voters would vote for the 1<sup>st</sup> respondent. He was

initially a police reservist. On the 28.2.2013 he visited several places where the 1<sup>st</sup> respondent had passed. He went to Murhanda market at about 4.00 p.m. and found that the 1<sup>st</sup> respondent had already passed. At Murhanda market he was told that the 1<sup>st</sup> respondent had not left any money and he did not see people distributing money.

**WILLIS STANLEY WONGOMA** was the campaign manager for the 1<sup>st</sup> respondent and testified as **DW4**. He was in the campaign trail and on the 28.2.2013 they made a stopover at Murhanda market. The 1<sup>st</sup> respondent addressed a crowd of people while on top of his vehicle as it was just a stopover and not a planned campaign venue. The 1<sup>st</sup> respondent did not give any money to the people. He talked of milk which was a programme in his manifesto whereby he promised to give free milk for six months to women who would deliver in the county. According to him the reference to milk was not a reference to money.

**DW5** is **PROFESSOR PHILIP MUSEVE KUTIMA**, the 2<sup>nd</sup> respondent. His evidence is that together with the 1<sup>st</sup> respondent they ran a spirited campaign and won. The election of the Governor was done without blemish. The petitioner did not have agents in any of the polling stations or at the tallying hall. On the 28.2.2013 he was present at Murhanda market when they made a stopover. The 1<sup>st</sup> respondent talked about milk which was part of their manifesto. He talked about the children of Oparanya meaning those who would be in maternity would be given KShs.2,000/= in the first six months to buy milk. It is his position that the petitioner as an individual cannot override the position of 1.6 million residents of Kakamega County. After the elections none of the other candidates or their agents complained.

**DW6**, is one **KELLY KELI NDIKUID**. He swore his affidavit on the 16.5.2013 while in South Africa. His evidence is that he is an expert in video editing, audio and photograph. The witness made a presentation on how electronic information can be manipulated. He viewed the CDs produced by the petitioner and could not tell whether the voices on the CDs had been manipulated. He could also not tell whether the CD had been manipulated. **DW7, RONALD CHIKURO MBAJI** is a pilot by profession. He swore his affidavit on the 15.5.2013. His evidence is that on the 1.3.2013 he flew the 1<sup>st</sup> respondent to various places while on campaign trail.

The 1<sup>st</sup> respondent **WYCLIFFE AMBETSA OPARANYA** testified as **DW8**. He swore two affidavits on 22.4.2013 and 16.5.2013 respectively. His evidence is that he participated in the elections for the gubernatorial position which attracted six candidates and he was declared the winner having garnered 259,071 votes. The election was conducted peacefully and freely. The results reflect a true expression of the will of the people of Kakamega County. He has nothing to do with the fate of the petitioner. He had only met the petitioner once when she was introduced to him by Mr. Soita Shitanda while in London. DW8's further evidence is that he was a player in the contest while the referee was IEBC. DW8 denied that he bribed voters. He attended a church function but did not give money for distribution. At Murhanda market he talked about milk which was contained in his manifesto. According to DW8 the milk he talked about was for the children between one and six months.

It is 1<sup>st</sup> respondent's evidence that he does not know of the potato mentioned in the CD. He does not know the person by the name Bonface. The petitioner was not a threat to him. For those who were cleared to run, there was a level playing field. There was a check list for the candidates before the nomination and each candidate was free to meet the returning officer in advance. One required a degree qualification for the post of Governor. He had not heard of the issue of bribery before the petition was filed and has never been summoned by IEBC or the police on the issue. There was no discrimination against women as there was a female candidate for the position of Senator. The petition does not disclose any cause of action against him and the 2<sup>nd</sup> respondent.

### **Response by the 3<sup>rd</sup> and 4<sup>th</sup> Respondents**

It is the position of the two respondents that the law empowered the 4<sup>th</sup> respondent to conduct the general

elections in the entire country. Section 17(2) of the Elections Act gave the 4<sup>th</sup> respondent the power to conduct nomination for candidates for the position of Governor at least 21 days before the election date. Section 22 of the Elections Act states that a person is qualified to be nominated for election as Governor or deputy only if the person is a holder of a degree from a university recognized in Kenya. The petitioner presented extended diploma transcripts from City of London College to the returning officer as evidence of a degree certificate. There was no letter from CHE authenticating that the extended diploma was equivalent to a degree as on 1.2.2013 when the petitioner went for her nomination. The petitioner only obtained authentication of her extended diploma from CHE on the 4.2.2013 which was after the expiry of the nomination deadline. It is the position of the two respondents that the petitioner failed to present the requisite documents to the IEBC within the stipulated time lines. The petitioner filed an appeal with the IEBC Disputes Resolution Committee which was dismissed. The petitioner later filed petition number 93 of 2013 before the High Court and judgment was delivered on the 13.2.2013.

It is further stated by the 3<sup>rd</sup> and 4<sup>th</sup> respondents that upon the delivery of the judgment, the IEBC conducted the printing of the ballot papers by the name **SMITH & OUZMAN** but the response was that the printing of all ballot papers was already complete and it was difficult to reprint the ballot papers. The petitioner and IEBC recorded a consent marking the matter as settled and therefore the current petition is re-judicata. The elections were conducted fairly and it should not be disturbed. The votes were tallied from all the polling centres and the winner was declared. The person declared as the winner by the IEBC is a true representation of the will of the people of Kakamega County.

### **Evidence by the 3<sup>rd</sup> and 4<sup>th</sup> respondents**

The 3<sup>rd</sup> respondent, **NICHOLAS SUMBA**, testified as **DW9** for both respondents. He swore an affidavit on the 23.4.2013. His evidence is that he was the returning officer for the Kakamega County. On the 1.2.2013 the petitioner presented her nomination documents for the position of Governor. He had given out a check list and the position for Governor required one to have a degree. Nominations were slated for the 31.1.2013 and 1.2.2013. The petitioner provided all the documents but her main problem was the degree requirement. He could not verify and confirm the petitioner's qualifications without her providing a degree certificate. The petitioner presented to him transcripts that were leading to an extended diploma. He made some remarks on the documents "**nomination invalid the candidate to present a degree certificate**". According to the witness he had no business to countercheck the petitioner's documents including the BTEC equivalence document. All what he wanted from the petitioner was a degree certificate. The petitioner presented to him a letter from CHE dated 31.1.2013 giving accreditation of the City of London College but not the petitioner's certificate.

It is DW9's evidence that had the letter dated 4.2.2013 from CHE equating the petitioner's level 7 extended diploma qualifications to a degree been presented to him on 1.2.2013, he would have cleared the petitioner after taking into account the other requirements. The witness denied that he was under instructions not to clear the petitioner. He advised the petitioner to seek clearance for the position of Senator as it did not require degree qualification. No amount of persuasion could have made him change his mind on his decision not to clear the petitioner for lack of degree qualification. It is the candidates to prove that the documents being presented are equivalent to a degree. DW9 is aware that Mr. Hassan Joho who vied for the position of Governor for Mombasa County was cleared during nomination but he presented transcripts that were leading to the award of a degree. He did not discriminate against women as he cleared Professor Khasiani, a woman, who was vying for the position of a Senator.

### **Submissions by the Petitioner**

Counsels for the petitioner submitted that the petition raises four issues namely:-

1. Whether the petition is re judicata.
2. Whether the 1<sup>st</sup> and 2<sup>nd</sup> Respondent engaged in acts of bribery.
3. Whether the petitioner was wrongly excluded in the election.
4. Who should have the costs of the petition.

The petitioner contends that this petition is not res judicata. Under Section 7 of the Civil Procedure Act, a suit can only be held to be res judicata if the issues raised in a previous suit are similar to the subsequent suit and the parties have to be the same. Counsels submitted that in Nairobi petition number 93 of 2013 the prayers being sought included among other issues a prayer that the petitioner's name be included on the ballot paper while the current petition seeks for remedy for violation of fundamental rights and freedoms as well as nullification of the election of the 1<sup>st</sup> and 2<sup>nd</sup> respondent among other prayers. The Nairobi petition had only two parties while the current one has four. It is further submitted that this court is not sitting on appeal in relation to petition number 93 of 2013 which was before the High Court. The orders in that petition can only be enforced through the filing of this current petition. The two petitions are clearly distinct and the reliefs being sought are not the same.

On the second issue of unlawful exclusion of the petitioner from the election, counsels submitted that **Section 22 (2)** of the Election Act gives a requirement of degree qualification for the position of a Governor. For purposes of ascertainment of education qualifications the petitioner was required to get authentication of her qualification from CHE. It is submitted that it was not the degree that was to be authenticated but the body. CHE wrote a letter dated 31.1.2013 which authenticated the educational institution where the petitioner attended. The 3<sup>rd</sup> respondent interpreted Rule 47 of the General Election Rules to fit his own whims. The 3<sup>rd</sup> respondent insisted on a physical degree certificate and declined the transcripts that were issued to him by the petitioner. The petitioner was denied nomination because she did not carry with her, a degree certificate to the nomination centre. It is further submitted that Hassan Joho was cleared by the IEBC after producing transcripts. The 3<sup>rd</sup> respondent insisted that all what he wanted from the petitioner was her degree certificate.

The petitioner further submits that although her appeal to the IEBC Tribunal was dismissed, the court gave an order that she participate in the elections. The 3<sup>rd</sup> and 4<sup>th</sup> respondents ought to have complied with the court order. Although the nominations were meant for the 31<sup>st</sup> of January 2013 and 1<sup>st</sup> of February 2013, that was not the deadline as there was room for appeal. Since the court granted the petitioner's prayers, the contention that the petitioner could not have been included on the ballot paper as the papers had already been printed cannot stand. The 4<sup>th</sup> respondent ought to have suspended the elections as it did in other arrears.

Counsel is relying, among other authorities, on the case of **ABUBAKAR & OTHERS V YAR'ADUA & ANOTHER 36 NSCOR pt I 231**. In that case the court held that where a petitioner is complaining of unlawful exclusion in an election he or she has to prove the following factors:-

- i. That the Petitioner was validly nominated.
- ii. The election was conducted and concluded.
- iii. That the winner was declared.
- iv. That the name of the Petitioner was not included in the list of contestants.

The petitioner contends that an election was conducted and a winner was declared. The court had ordered that her name be included on the ballot paper and it was not included. The election ought to be nullified because the petitioner was unlawfully excluded. The Constitution gives the petitioner the right to vie for an elective post. Articles 81 and 88 of the Constitution of Kenya 2010 requires the 4<sup>th</sup> respondent to ensure that elections are held in a way that upholds freedom of the citizens to exercise their political rights under Article 38 either as candidates or voters and to conduct free and fair elections which would entail independence, transparency, impartiality, neutrality, efficiency, accuracy and accountability. The respondents failed in that respect.

Counsels also rely on the case of **MORGAN & OTHERS V SIMPSON & ANOTHER [1974] 3 W.L.R. 517 (1975) Q.B. 151** where the court held as follows:-

***“For an election to be conducted substantially in accordance with that law there must be a real election by ballot and no such substantial departure from the procedure laid down by parliament as to make the ordinary man condemn the election as a sham a***

*travesty of an election by ballot. Instances of such a substantial departure would be allowing voters to vote for a person who was not in fact a candidate or refusing to accept a qualified candidate on some illegal ground or disenfranchising a substantial proportion of qualified voters...”*

Counsels for the petitioner submit that refusal to accept a qualified candidate is a substantial departure that renders the entire election process unreliable. Counsels rely on the case of **YINUSA KAZEEM AYANDONYE & ANOTHER V AFEEZ ADELOWO JIMOH & 3 OTHERS** Petition No. OY/NA/5/2011. In that case a candidate who was nominated by his political party to vie for an electoral post was excluded from the election. The court nullified the election and stated as follows:-

*“.....we have come to the irresistible conclusion that having undergone all the stages of nomination stipulated under the Election Act 2010 (as amended), the 1<sup>st</sup> Petitioner was validly nominated by the 2<sup>nd</sup> Petitioner to contest the Irepo/Oorelope/Olorunsogo Federal Constituency seat of House of Representatives at the 9/4/2011 election. His status went beyond a person having a mere aspiration, as the 1<sup>st</sup> respondent described him..... We hold that the 1<sup>st</sup> Petitioner was unlawfully excluded from the election into Irepo/Oorelope/Olorunsogo Federal Constituency seat of the House of Representatives by reason of the exclusion of the name of his Political Party and its logo from the ballot papers of the election (amongst other reasons)..... We hold that this petition succeeds and it is allowed. And for the avoidance of doubts, it is hereby declared, that the exclusion of the Petitioner from the election into Irepo/Oorelope/Olorunsogo Federal Constituency seat of Oyo State conducted on 9/4/2011 after he (1<sup>st</sup> Petitioner) was validly nominated by the 2<sup>nd</sup> Petitioner is unlawful and wrongful.”*

Similarly, counsels for the petitioner rely on the case of **IBRAHIM IDRIS & ANPP&AUDU V INEC & 50 OTHERS (Ca/A/EP/309/07)**. In that case elections to the office of Governors of States in Nigeria were set to be held on 14.4.2007. In Kogi State the All Nigeria Peoples Party (ANPP) nominated Abubakar Audu as a candidate for governorship while their opponent, the Peoples Democratic Party (PDP) nominated Ibrahim Idris as their candidate. The two names were submitted to the electoral body. Audu became aware that the electoral body had intentions of excluding him from contesting the elections. He filed an application for injunction before the High Court and obtained restraining orders against the electoral body which barred the electoral body from excluding him from the elections. On the eve of the election the electoral body distributed a circular to its officers indicating that Audu should not participate in the election and deleted his name and party symbol from the electoral papers. Idris was declared the winner. Audu appealed to the election tribunal which held that the electoral body had acted ultra vires in deciding to disqualify Audu and the disqualification was held to be unlawful. On appeal to the Court of Appeal the court stated as follows:-

*“The grouse of the political party is that its validly nominated candidate was unlawfully excluded. This gives the 1<sup>st</sup> petitioner a locus standi, because the right of the ANPP to participate in the election and protect its right and interest has been infringed and breached by INEC whose decision excluded its candidate the 2<sup>nd</sup> petitioner.....When therefore, a political party has articulated its interests which it believed and nominated a candidate for an election, the right of that political party is assaulted and abused when its nominated candidate is prevented from contesting the projected election. The party has a right to sue.”*

The petitioner contends that even without the issue of unlawful exclusion the election could be nullified due to some irregularities. Counsels rely on the case of **WILLIAM KABOGO GITAU V GEORGE THUO & OTHERS (2010) eKLR** where an election was nullified due to several irregularities and noncompliance with the law. Counsels also contend that the issue as to whether elections involve public funds and are costly does not arise. The petitioner obtained a court order that was not set aside or appealed against and therefore the subsequent elections which excluded the petitioner were unlawful. Counsels rely on the Nigerian case of **IDRIS v ANPP (supra)** where the court stated as

follows:-

***“An order made by a court remains valid and in force for all intents and purposes until it is vacated or set aside on appeal. In the instant case, the tribunal was right when it held that the order of injunction made by the High Court of Kogi State restraining INEC from barring the 1<sup>st</sup> respondent and the 2<sup>nd</sup> petitioner from contesting the election held on 14/4/07 was binding on INEC until vacated, or set aside on appeal.”***

The petitioner’s counsels are also relying on the case of **CONGRESS FOR PROGRESSIVE CHANGE V INDEPENDENT NATIONAL ELECTORAL COMMISSION (INEC) & 2 OTHERS. (Suit No. FHC/ABJ/CS/629/2012)**. In that case a candidate was nominated by the plaintiff but was not allowed to participate in the election organized by the 1<sup>st</sup> defendant. The court nullified the election on the ground that the exclusion of the plaintiff’s candidate was unprocedural.

Finally, the petitioner submits that the election of the 1<sup>st</sup> and 2<sup>nd</sup> respondent was characterized by acts of bribery and election malpractices. A video record that was interpreted does indicate that the 1<sup>st</sup> respondent gave out money to people as inducement to vote for him contrary to the provisions of Section 64 of the Elections Act 2011. Under the said section the offence of bribery does not need to have been committed by the 1<sup>st</sup> and 2<sup>nd</sup> respondent personally but it can be committed on their behalf. The video shows that the 1<sup>st</sup> respondent gave out money disguised as milk at Murhanda market while he campaigned in a church at Mumias contrary to the Electoral Code of Conduct. Regulation 6(d) of the Code of Conduct prohibits campaigns in places of worship or during burial ceremonies. The Code of Conduct is provided for under Article 84 of the Constitution and therefore the election of the 1<sup>st</sup> and 2<sup>nd</sup> respondent did not comply with the Constitution. The court admitted the video evidence and therefore the respondents cannot challenge the admissibility of that evidence at this stage. PW4, Victor Shivega and PW3 Stanslaus Anami recorded the videos which prove that the 1<sup>st</sup> and 2<sup>nd</sup> respondent did influence the voters.

### **Submissions by 1<sup>st</sup> and 2<sup>nd</sup> Respondents**

Mr. Nyaundi, counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents submitted that the petition raises six issues namely:-

1. Burden of proof in elections matters.
2. Bribery.
3. Wrongful exclusion from the ballot.
4. Res-judicata.
5. Legal implication of IEBC Tribunal proceedings.
6. Standard of proof required to prove malpractice or election offence.

Counsel submitted that the burden of proof was on the petitioner to prove all her allegations. The petitioner contends that the 1<sup>st</sup> respondent in the cause of his campaigns committed acts of bribery and that the petitioner was wrongly excluded from participating in the elections. Counsel submits that all allegations of bribery have not been proved. Counsel cited the case of **MUNYAO V MUNUVE & 4 OTHERS. Election Petition No. 29 of 1974** where the court held that the petitioner must put forward cogent evidence which convinces the court that the alleged events amounting to election malpractices indeed took place. Similarly counsel relies on the case of **WILLIAM MAINA KAMANDA V MARGARET WANJIRU KARIUKI & 2 OTHERS** where the court stated as follows:-

***“The petitioner has made numerous allegations of irregularities in the election process touching on nomination, polling, election offences as well as counting... The burden of proof that such irregularities occurred falls squarely on the petitioner and he must also establish that such irregularities were of such magnitude that they substantially and***

***material affected the outcome of the electoral process.”***

Mr. Nyaundi further contends that the CDs showing the alleged incidents of bribery were irregularly processed and no certificate as required by the Evidence Act was produced by those who did the recording. Counsel contends that in the case of **R V BARISAR WAYU MATUGUDA (CRIMINAL CASE NO.6 OF 2008, HC MOMBASA**, the court rejected attempts to admit in evidence a CD made out of a CCTV footage where the said CCTV was not available for scrutiny by the court and no certificate was tendered. Counsel also relies on the case of **JOHN KIARIE WAWERU V BETH WAMBUI MUGO & 2 OTHERS (2008) eKLR** where the court stated the following:-

***“PW2 and PW4 were unable to give the names of the persons who allegedly bribed them at Shalom house at Dagoretti Corner. It was therefore difficult for this court to reach conclusion with certainty that the persons who were dishing out money to potential voters at Shalom house were doing so at the behest of the 1<sup>st</sup> respondent. Even if this court were to find that PW2 and PW4 were indeed bribed by the 1<sup>st</sup> respondent, the fact that the two witnesses were bribed does not disclose bribery of such pervasive magnitude to enable this court may reach a determination that indeed voters were bribed to the extent that they were unduly influenced to vote in favour of the 1<sup>st</sup> respondent. The petitioner failed to discharge the burden of proof placed on him to establish the electoral offence of bribery as against the 1<sup>st</sup> respondent.”***

On the issue of wrongful exclusion, counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondent submits that the authorities relied upon by the petitioner deals with wrongful exclusion of a candidate. This petition deals with the issue that the petitioner was rightfully excluded. Section 22 of the Election Act and Regulations 31 requires a candidate for the position of Governor to have a university degree qualification recognized in Kenya. The candidate must provide documents proving his or her qualifications on the nomination day. The petitioner herein did not provide documents to prove that she was a degree holder on the nomination day. The petitioner ought to have provided documents which authenticated her qualifications. The letter dated 31.1.2013 from CHE does not equate the petitioner’s qualifications to a degree. The equation was made on 4.2.2013 which was past the nomination deadline. Counsel relies on the case of **OJAAMONG V SHIGOLI & ANOTHER [2008] 1KLR (EP) 550**. In that case the petitioner presented his nomination papers and before he was cleared a supporter from the rival camp snatched his documents. The petitioner had to go back home and get fresh documents. By the time he returned to the nomination centre, the returning officer was closing the centre at about 1.00 p.m. and the court held that the petitioner did not present his documents on time and the returning officer had no powers to extend the time. Counsel also relies on the case of **WANYOIKE V ELECTORAL COMMISSION & ANOTHER (NO.2) [2008] 2KLR (EP) 35**.

Mr. Nyaundi contends that the rights of the petitioner to participate as a candidate in an election can be restricted. Article 38(3) of the Constitution gives rights to citizens but restrictions can be made which are not unreasonable. Reasonable restrictions to candidature are legal and legitimate. Section 31 of the Election General Regulations requires an independent candidate for County Governor to deliver to the returning officer on the day fixed for nomination of candidates certain documents as per form 17. Counsel maintains that the law requires that the documents be submitted on the day fixed for the nomination of candidates. Regulation 47 requires that a candidate’s university degree which has been obtained outside Kenya must be authenticated by CHE. The petitioner failed to provide documentation to prove her contention that she was a degree holder on the nomination day. All her spirited argument cannot change that fact. Therefore the petitioner was not ready for nomination on the day fixed by the commission. The petitioner was under an obligation to present to the returning officer a letter from CHE equating her documents to a degree.

Counsel submits that the petitioner’s suit is res judicata. The orders granted by Justice Ogola cannot be the basis of this petition. The orders were compromised by the withdrawal of the contempt of court application. It is true that this court is not sitting on appeal in relation to Nairobi Petition No.93 of

2013 but it is not also not sitting to enforce the orders granted in that petition. By withdrawing her application, the petitioner agreed to suffer the consequences of the disobedience of the court order to include her name.

Counsel submits that the petitioner has failed to meet the standard of proof required in election petitions. Counsel relies on the case of **JOHO V NYANGE [2008] 3 KLR(EP) 500** where the court held that election petitions are disputes in rem and involve great public importance. Generalized allegations cannot prove election petitions. The petitioner has failed to discharge herself of the requirement of the standard of proof. It is not general elections misconduct on the part of IEBC or malpractice by its officers that will call for annulment of an election. Cogent evidence must be provided.

Counsel urged the court to exercise judicial restraint as election deals with public issues. Counsel cited the case of **AROKO & ANOTHER V KWACH & 5 OTHERS Nairobi Civil Case No. 784 of 2007** where the court stated as follows:-

***“Courts should not be used to bring such drastic results instead of voters themselves doing it through the ballot box. In other words courts should not be willing to be used to stifle democracy” (Khamoni J.)***

Counsel submits that although the petitioner complained of exclusion from the ballot paper, she did not present a single witness to state that he or she did not participate in the election because the petitioner’s name was missing from the ballot. To the contrary there was 82% voter turnout and that represents the will of the people of Kakamega County. The election was free and fair and the voters exercised their right to vote under Article 38 of the Constitution. Counsel contends that Section 83 of the Election Act deals with the petitioner’s complaint that she was excluded from participating in the elections. Counsel relies on the case of **JOHN FITCH V TOM STEPHENSON & 3 OTHERS [2008] EWHC 501** where the court stated the following:-

***“...the court 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.”***

### **Submissions by the 3<sup>rd</sup> and 4<sup>th</sup> Respondents**

Miss Thanji, counsel for the 3<sup>rd</sup> and 4<sup>th</sup> respondents submitted that the petition raises the following issues:-

- i. Whether the Petitioner presented her documents for nomination to the Commission within the stipulated timelines.
- ii. Whether the Petition is res judicata.
- iii. Whether the Petitioner has met the standard of proof in election petitions.
- iv. Was the conduct of the elections by the Commission free and fair.
- v. Whether this Honourable Court should grant the Orders sought in the Petition.

Counsel submits that Section 22 of the Elections Act requires a candidate for the position of Governor or Deputy County Governor to be a holder of a degree from a university recognized in Kenya. Section 33 of the Elections Act requires a candidate to submit to the IEBC on the nomination day a dully filled nomination paper as may be prescribed by the commission. Regulation 47 requires a person seeking nomination to submit to the commission his or her certificates indicating the educational qualifications. The petitioner herein presented to the returning officer a document entitled “*BTEC Explained/Equivalences*”. The returning officer requested the petitioner to obtain a letter from CHE confirming that her qualification for extended diploma in strategic management and leadership is indeed equivalent to a degree. By the close of the nomination day on 1.2.2013 the petitioner had not presented any letter from CHE confirming that she held a university degree. It was incumbent upon the petitioner to have ensured that her documents were in order on or before the last nomination day.

Counsel submitted that the IEBC was mandated by the Constitution as stated in Section 9 of the 6<sup>th</sup> Schedule to conduct the election within 60 days after the dissolution of the National Assembly. The commission was bound by the Constitution to conduct the elections and could therefore not have postponed the election. Only in a few constituencies elections in some wards were postponed. Postponement of the election of Governor for Kakamega County would have resulted in a breach of the Constitution.

It is further submitted that the petition is res judicata. In petition number 93 of 2013 parties recorded a consent and the petitioner agreed to withdraw the application for leave to commence contempt of court proceedings against the IEBC Chairman and Chief Executive Officer. On its part the IEBC agreed to withdraw the application seeking a review of the judgment delivered by the court on 13.2.2013. Therefore the consent marked the matter as fully and finally settled. The issues in both petitions are similar as they relate to the petitioner's qualifications to be nominated to vie for the position of Governor in the general election held on 4.3.2013. The petitioner's redress does not lie in filing a new petition raising the same issues and seeking similar orders.

Miss Thanji further contends that the petitioner has not met the standard of proof in election petitions. Counsel cited the case of **RAILA ODINGA V IEBC & OTHERS. Supreme Court Petition No.5 of 2013** in which the court held that a petitioner must prove that there was noncompliance with the law and that the noncompliance did affect the validity of the election. The petitioner herein failed to discharge the burden and therefore the petition ought to be dismissed. The election conducted by the 3<sup>rd</sup> and 4<sup>th</sup> respondents was free and fair. No sufficient evidence was adduced to prove the petitioner's allegations of voter bribery and voter manipulation.

Counsel for the 3<sup>rd</sup> and 4<sup>th</sup> respondents submits that the orders being sought ought not to be granted. Article 1 of the Constitution states that all sovereign power belongs to the people of Kenya who may exercise it through their democratically elected representatives. The rights of the people of Kakamega County overrides the private rights of the petitioner who failed to meet the statutory requirement for nomination for the post of Governor. Election petitions involve great public interest. Counsel cited the case of **MILKAH NANHYOKIA MASUNGO V ROBERT WEKESA MWEMBE & 2 OTHERS [2013] eKLR** where the court stated that *"....electoral issues should not be determined only as between the parties in the proceedings, but with reference to the wider interest of the residents of the concerned electoral area (Misikhu Ward) to challenge the validity of the election of a member to the county assembly as their representative: a right that is guaranteed under the Constitution."*

On the issue of public interest vis a vis private interest, Miss Thanji relies on the cases of **DENNIS MOGAMBI MONG'ARE V ATTORNEY GENERAL & 3 OTHERS [2012] eKLR** and that of **R. V IEBC & 2 OTHERS exparte IBRAHIM HUSSEIN WASHENGA [2013] eKLR**. Counsel further relies on the case of **STEPHEN KARIUKI V GEORGE MIKE WANJOHI & 2 OTHERS [2013]eKLR** where Justice G. K. Kimondo stated as follows:-

*"The court should endeavour to ensure that the democratic rights and choices of the voter are given full effect or as much as is practicable. Elections are not perfect and not all malpractices will lead to nullification of the result."*

### **Issues for determination**

The issues raised by all the parties are quite similar. I do find that the issues for determination in this petition can be summarized as follows:-

1. Whether the petitioner presented her nomination documents to the IEBC within the stipulated timelines.
2. Whether the deadline for submission of nomination documents was 31.1.2013 and 1.2.2013 and no more.
3. Whether the petitioner was wrongly excluded from participating in the elections.
4. Whether the court can nullify an election on the basis of issues relating to nomination of

- candidates.
5. Whether this petition is res judicata.
  6. Whether the 1<sup>st</sup> and 2<sup>nd</sup> respondents engaged in electoral malpractices and acts of bribery of voters.
  7. Whether the petitioner has proved her case up to the required standard.
  8. Was the election free and fair.
  9. Who should bear the costs.

1. **Whether the petitioner presented her documents for nomination to the IEBC within the stipulated timelines.**

It is the evidence of all the parties that nomination for the position of Governor for Kakamega County was slated for 31.1.2013 and 1.2.2013. The 3<sup>rd</sup> respondent who was the returning officer had issued a document containing the checklist to the candidates. There was a two weeks window whereby any of the candidates could have engaged the returning officer with a view to clarify on any issue. The candidates were given the option to decide on when they preferred to present their nomination documents. The petitioner opted for the 1.2.2013. On that date the petitioner did present her documents to the 3<sup>rd</sup> respondent at Kakamega High School which was the nomination centre.

Counsel for the 3<sup>rd</sup> and 4<sup>th</sup> respondents did submit that the petitioner did not present all the required nomination documents within the timelines. On her part the petitioner maintains that she presented all the required documents on the 1.2.2013 to the 3<sup>rd</sup> respondent who failed to interpret her documents properly and insisted on a physical degree certificate yet her qualifications were equivalent to post graduate status. The evidence on record as per the returning officer is that the petitioner presented all the required documents except a degree certificate. Section 22 of the Elections Act No. 24 of 2011 states as follows:-

***“22 (1) A person may be nominated as a candidate for an election under this Act only if that person.***

- a. ***is qualified to be elected to that office under the Constitution and this Act; and***
- b. ***holds a post-secondary school qualification recognized in Kenya.***

***(2) Notwithstanding subsection (1)(b), a person may be nominated as a candidate for election as President, Deputy President, county governor or deputy county governor only if the person is a holder of a degree from a university recognized in Kenya.”***

Regulation 47 of the Election (General regulations) 2012 states as follows:-

***“47. (1) For purposes of ascertaining the educational qualification of persons for an elective post, a person seeking nomination shall submit to the Commission copies of certificates of the educational qualifications.***

***(2) where the body that issued the certificate is not based in Kenya, a candidate shall be required to seek authentication of that body with the Kenya National Examination Council, in the case of form four certificates, or the Commission for Higher Education, in the case of university degrees”. (emphasis added)***

The petitioner’s evidence is that she presented transcripts from the City of London College indicating that she had completed her extended diploma in Business Administration and Leadership. It is her evidence that the diploma is equivalent to a Master’s Degree. The law requires a degree certificate. The petitioner provided a letter from CHE authenticating the City of London College. It is the petitioner’s contention that what was required was authentication of the institution and not the qualification. On the other hand the respondents maintained that the authentication was for the certificate and not the institution.

From my reading of Section 22 of the Elections Act it is clear that a candidate for the position of a County Governor or deputy County Governor must be a holder of a degree from a university recognized in Kenya. The provision of Regulation 47(2) is to the effect that there is need for authentication of the body that issued a certificate by CHE if the body is not based in Kenya. That regulation has to be read jointly with Section 22 (2) of the Election Act which requires that the candidates under that section should be holders of a degree from a university recognized in Kenya. The law did not cater for holders of diplomas to vie for the position of President, Governor and Deputy Governor. However, in some situations, like that of the petitioner, a diploma qualification can be equivalent to a degree. In such situations the equation of the diploma qualification cannot be done by the returning officer. Although the petitioner maintains that authentication is only needed for the institution and not the qualification, the main question is, how will the returning officer confirm that the diploma being presented to him is equivalent to a degree if only the institution issuing it has been authenticated? Authentication of an institution simply means that the quality of the certificates, diplomas and degrees issued by that institution are recognized in Kenya. By authenticating the City of London College, CHE simply recognized the fact that the qualifications issued by that institution are recognized in Kenya. Therefore, a student from the City of London College who is in possession of diploma qualifications must get those qualifications equated to degree qualifications by CHE so that the user of those qualifications can confirm that indeed the diploma being presented is equivalent to a degree.

In certain jurisdiction the terms diploma and degree are used interchangeably. In the Ugandan case of **PAUL MWIRU V IGEME NATHAN SAMSON NABEETA, ELECTORAL COMMISSION (UGANDA) & NATIONAL COUNCIL FOR HIGHER EDUCATION, Election Petition No. 3 of 2011. High Court of Uganda at Jinja** objection was raised to the qualifications of the 1<sup>st</sup> respondent who had won the elections. The 1<sup>st</sup> respondent was a holder of a degree from the Oklahoma State University in the United States and his degree certificate read as follows:

***“Oklahoma State University***

***have admitted***

***Nathan Samson Igeme***

***to the degree of***

***Bachelor of Science in Business Administration***

***International Business***

***and all the honours, privileges and obligations belonging thereto, and in witness thereof have authorized the issuance of this Diploma duly signed and sealed.....”***

The petitioner was of the view that the 1<sup>st</sup> respondent’s qualification was a diploma and not a degree. Evidence was adduced by an officer from the Uganda National Council for Higher Education to the effect that it was usual for the term diploma to be included in the description of a degree. The qualification was found to be that of a degree. In the current case the petitioner did not have the actual diploma certificate. She had transcripts which led to the award of a diploma. There was need for those transcripts to be equated to a degree by CHE as opposed to only authenticating the institution of learning (City of London College).

The letter dated 31.1.2013 from CHE indeed recognized the City College of London. The letter reads as follows:-

***“Recognition and Equation of Qualifications***

Mable Skith Muruli

P.O. BOX 71

KAKAMEGA

**RE: INSTITUTIONAL ACCREDITATION STATUS:**

Thank you for your letter dated 31<sup>st</sup> January 2013, regarding the above subject.

We confirm that The City of London College is a recognized institution in the United Kingdom (UK). The degrees awarded by the said institution are recognized in the UK and by convention in Kenya.

Do note nonetheless, that in addition, you may be called upon to meet other requirements set by Kenya professional organizations.

**DANIEL O. OGUTU**

**For: COMMISSION SECRETARY/CHIEF EXECUTIVE OFFICER**

The Commission is not accountable for the authenticity of any certificate attached or presented in relation to this recognition letter nor the identity of the said certificate holder should the same arise.

Regulation 47 gives CHE the power to authenticate university degrees issued by learning institutions which are not based in Kenya. The word used in both Section 22 and Regulation 47 is “degree”. It is therefore incumbent upon any candidate for the position of a Governor to present a degree certificate to the returning officer. The checklist provided by the 3<sup>rd</sup> respondent for independent candidates called for all the required documents in advance and it stated as follows:-

**CHECKLIST**

Governor Elections candidates vying as independent candidates

Five days to the nomination day set out in the notice of general election, candidates vying for Governor Election as INDEPENDENT CANDIDATES must submit the following:-

1. Candidate's name
2. Physical address of candidate
3. Letter to IEBC on intent to vie for Governor position
4. Certificate of Clearance from the Registrar of Political Parties indicating that the candidate has not been a member of any political party 3 months to the election date (i.e. before 4<sup>th</sup> December 2012 as per section 33(a) of the Elections Act 2011)
5. Degree certificate obtained and institution the candidate studied
6. Candidate's National Identification document number used to register as a voter
7. Candidate voter registration number
8. A list of at least 500 supporters from the constituency/county in a standard serialized A4 sheets of paper and in CD detailing their names, signatures, ID/Passport Nos. who are;
  - a. certified by IEBC as registered voters
  - b. certified by Registrar of Political Parties as not registered member of any registered political party

What to submit on the nomination day

1. Originals and Photocopies of national identification document used to register as a voter (National Identity Card or Passport)
2. Original and certified copy of Degree certificate obtained certified by a recognized institution the candidate studied.
3. Certificate of Clearance from the Registrar of Political Parties indicating that the candidate has not been a member of any political party 3 months to the election date (i.e. before 4<sup>th</sup> December 2012 as per section 33(a) of the Election Act 2011
4. Duly filled and signed Nomination papers for Governor Elections (FORM 17)
5. Colored Passport Size Photographs (Write name and ID/Passport number at the back)
6. – to 13.....”.

The essence of creating qualifications for elective positions is to ensure that whoever is elected to those posts is capable of undertaking the duties and responsibilities which go with the positions. The requirement for specific qualifications is part of the law and has to be complied with. It is not up to the returning officer to evaluate a candidate's qualifications and equate them to the requirements of the law. In the case of **ALI V GETHINJI [1984] KLR 511** the winner of an election was alleged not to have sat for proficiency test in English and Kiswahili languages as required by Article 34 of the old constitution. Although the respondent had obtained a certificate to prove that he had gone through the proficiency language interview and passed, the court nullified the election as it was found that someone else had done the interview and not the respondent. The court stated as follows:-

***“In addition, Section 34 (d) of the Constitution provides for nomination machinery to be enacted. Inasmuch as all qualification of a candidate must be considered at nomination, the power to legislate about the nomination process can include the test whereby the candidates may prove their qualifications in order to be nominated.....the returning officer will scrutinize both the nomination paper and the statutory declaration (see Reg 18(1) & (2)) before deciding that the candidate tendering them to returning officer has been validly elected.....qualification for election is a condition precedent for election and section 28 of the National Assembly and Presidential Act (Cap 7) is inapplicable.”***

The petitioner maintains that the 3<sup>rd</sup> respondent ought to have known that an extended diploma was equivalent to a degree. She provided a BTEC document which gave the equivalence of her qualification to a degree. From the evidence on record I am satisfied that the petitioner did not present a degree certificate to the 3<sup>rd</sup> respondent on the 1.2.2013 as required by the law. The petitioner could have had the qualification but she did not present a degree certificate which is the requirement. The document from BTEC giving the equivalences of the United Kingdom education standard could not help as it was not upon the 3<sup>rd</sup> respondent to rely on a foreign document as proof of degree equivalence. That proof had to be provided by CHE. It was upon the petitioner to have produced a letter from CHE indicating that the extended diploma from the City of London College was equivalent to a degree. That authentication was done on the 4.2.2013 which was after the nomination deadline. The transcripts that were provided by the petitioner were leading to the award of a diploma and not a degree. This is different from the Hassan Joho case where the transcripts were leading to the award of a degree. The 3<sup>rd</sup> respondent was therefore right to insist on a degree certificate. It was not up to the 3<sup>rd</sup> respondent to interpret the extended diploma and equate it to a degree. Indeed the checklist provided by the 3<sup>rd</sup> respondent indicated that independent candidates were to provide their documents five days to the nomination day. In the end I do find that the petitioner did not provide a degree certificate or proof that her qualifications were equivalent to a degree status to the 3<sup>rd</sup> respondent on the 1.2.2013.

2. **Whether the deadline for submission of nomination documents was 31.1.2013 and 1.2.2013 and no more.**

The petitioner maintains that although the deadline for nomination of candidates was given as

1.2.2013, that was not the final deadline as there was room for appeal to the IEBC Tribunal as well as to the High Court. On the other hand the respondents maintain that the deadline was 1.2.2013 and the petitioner did not meet the deadline. According to the respondents, the IEBC Tribunal was only meant to rectify mistakes done by returning officers but it was not meant to open the deadline for nomination. Parties are in agreement that a candidate who had issues with the nomination process had a way to appeal to the IEBC Tribunal. The petitioner filed her appeal on the 6.2.2013 vide IEBC/DRC/09/2013 and the decision was made the following day 7.2.2013. It is not also disputed that some of the successful appellants had their names included in the ballot papers. Similarly a candidate who successfully petitioned the High Court could have had his or her name on the ballot paper in compliance with the court order.

Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondent has cited the case of **OJAAMONG** and that of **WANYOIKE** whereby the court was of the view that the returning officers do not have the powers to extend the nomination deadline. My view for both decisions is that the candidates were treated unfairly. For the case of **OJAAMONG** it was clear that he went back to the nomination centre before the closing time for nomination and he had good reasons as to why he could not have presented his nomination papers before that time as the same had been snatched early that morning before he presented his papers. Substantive justice would have required that Mr. Ojaamong out to have been cleared. The same applies to Mr. Wanyoike who had to cross the road between Nyeri and Nakuru courts and yet he had been nominated by his party.

The fact that candidates who were not satisfied with the decisions of the returning officers had the right to pursue appeals shows that the deadline for nomination of candidates was not the 1.2.2013. A successful candidate before the IEBC Tribunal or the court could have still participated in the elections despite rejection of his or her documents by a returning officer. The petitioner herein pursued the matter further and I do agree with her that the nomination deadline went beyond 1.2.2013. Nomination is a process of clearing candidates who are to participate in the elections. The appeals to the IEBC Disputes Resolution Tribunal is part of the nomination process and until when it is exhausted nomination still runs. This does not mean that a candidate can go ahead and present his or her nomination papers after the nomination deadline has ended. However, a candidate whose complaint or appeal against the decision of the returning officer to clear his or her nomination is successful before the IEBC Tribunal or the High Court is deemed to have been validly nominated as the other candidates despite the clearance being given after the nomination deadline. The appeal process is not intended to only correct a few errors by returning officers but to clear those candidates who could have been unfairly treated and allow them to participate in the elections. Therefore despite the deadline of 1.2.2013, the nomination process ended when all the complaints had been dealt with by both the IEBC Tribunal and the court.

### **3. Whether the petitioner was wrongly excluded from participating in the elections.**

This issue is tied up with the first and 2<sup>nd</sup> issues. Although the petitioner did not present her degree certificate on the 1.2.2013, she managed to get a letter from CHE dated 4.2.2013 equating her extended diploma to degree qualification. The letter dated 4.2.2013 read as follows:-

#### ***“Recognition and Equation of Qualifications***

*CHE/10/9/1/Vol.1/146*

*04/02/2013*

*Mable Skith Muruli*

*P.O. Box 71*

***SHINYALU***

**RE: RECOGNITION OF QUALIFICATIONS**

**MABLE SKITH MURULI**

Thank you for your application dated 4<sup>th</sup> February 2013 requesting for the recognition of the Extended Diploma in Strategic Management and Leadership awarded by City of London College in United Kingdom (U.K.).

We confirm that City of London College is a recognized institution in U.K. the Extended Diploma in Strategic Management Leadership (equivalent to a Bachelors degree) awarded by the said institution is recognized in U.K. and by convention in Kenya.

Do note nonetheless, that in addition, you may be called upon to meet other requirements set by Kenyan professional organizations.

**DANIEL O. OGUTU**

**For; COMMISSION SECRETARY/CHIEF EXECUTIVE OFFICER**

DOO/em

N/B: The Commission is not accountable for the authenticity of the certificate or the identity of the certificate holder presented for recognition or equation.

Similarly upon dismissal of her petition by the IEBC Tribunal the petitioner filed Petition No. 93 of 2013 before the High Court in Nairobi and the court held in her favour. The decree that was issued by the court states as follows:-

**DECREE**

***“THIS PETITION COMING UP for hearing on 11<sup>th</sup> February 2013 and for judgment on 13<sup>th</sup> February 2013 before the Honourable Mr. Justice Ogola AND UPON HEARING the Counsel for the Petitioner, Counsel for the Respondent and Counsel for Commission of Higher Education;***

**IT IS HEREBY ORDERED:**

1. ***THAT*** a declaration be and is hereby made that the petitioner is a degree holder within the meaning of section 22 (2) of the Election Act 2012 Cap 24 and is entitled to vie for the position of County governor, Kakamega County upon meeting other requirements as set by the Commission/Statute.
2. ***THAT***a mandatory injunction do issue compelling the Commission to accept the petitioner’s nomination papers and issue a clearance certificate to her for her to contest the seat of County Governor Kakamega County.
3. ***THAT***a mandatory injunction do issue compelling the Commission to accept and incorporate the Petitioner’s name in the list of candidates and ballot papers as an independent candidate for the County Governors Seat Kakamega County.
4. ***THAT*** costs of this application be borne by the Commission.

GIVEN under my hand and the seal of this Court this 13<sup>th</sup> day of February 2013.

ISSUED at Nairobi this .....14<sup>th</sup> .....day of.....February....2013.

**DEPUTY REGISTRAR**

**HIGH COURT OF KENYA, NAIROBI”**

Armed with the court decree the petitioner expected to have been issued with a nomination certificate but that never happened. Sensing that she was going to be excluded from the elections the petitioner filed a

notice of motion dated 15.2.2013 seeking leave to have the Chairman and Chief executive Officer of IEBC to be committed to civil jail for knowingly, deliberately and willfully violating and disregarding the orders issued by the court on the 13.2.2013. Prayers 3(a) and (b) of the application sought the following orders:-

- a. ***An order compelling the Respondent to accept the Petitioner's nomination papers and issue a clearance certificate to her for her to contest the seat of County Governor, Kakamega County slated for 4<sup>th</sup> March 2013.***
- b. ***An order compelling the Respondent to accept and incorporate the Petitioner's name in the list of candidates and ballot papers as an independent candidate for the County Governor's seat, Kakamega County.***

Counsel for the 3<sup>rd</sup> and 4<sup>th</sup> respondents submitted that the petitioner was not wrongfully excluded from the elections. She withdrew her contempt of court application and also the IEBC decided to withdraw its application for the review of the orders issued on 13.2.2013. On his part, Mr. Nyaundi submits that the petitioner's right to participate in an election is a political right provided for under Article 38 of the Constitution. Such rights can be reasonably limited. It is not a right such as those rights which cannot be limited, such as torture and inhuman treatment. Further, counsel for the 3<sup>rd</sup> and 4<sup>th</sup> respondents contend that the IEBC tried to comply with the court orders and wrote to the printers of the ballot papers but by then the papers had already been printed. In the affidavit by BEATRICE SUNGURA NYABUTO sworn on the 19.2.2013 for purposes of the application that sought to review the orders issued in Petition No.93 of 2013, it is indicated in paragraph 16 that the commission had authorized the printers to print the ballot papers on 14.2.2013. That was a day after the issuance of the court orders on 13.2.2013. The petitioner maintains that counsel for the IEBC was in court when the orders were issued and that it is not true that the IEBC could not have complied with the court order.

Although counsel for the 3<sup>rd</sup> and 4<sup>th</sup> respondents maintains that the correspondence between the IEBC and the printers of the ballot paper is top secret, I do find that there is nothing confidential about that correspondence. In the current Constitutional dispensation Article 35 of the Constitution empowers Kenyans to access information held by the State. I have gone through the emails sent by IEBC officials to M/S Smith & Ouzman of the United Kingdom (The printers) and do confirm that indeed the IEBC communicated the High Court decision to the printers. The emails were sent on the 18.2.2013 and the response was made on the same day. The main component of the letter from Smith and Ouzman is that the printing of the ballot papers had been finalized. The art work and data was completed on the 13.2.2013 and it was not possible to make any further changes. The exercise for collating, stitching and packing of the ballot papers was to be completed by Saturday 23.2.2013 and dispatch of the ballot papers was to commence on Sunday 24.2.2013.

The evidence shows that as of 13.2.2013 the court had directed that the petitioner's name be included on the ballot paper. The decree was to the effect that the petitioner was to be issued with a clearance certificate to enable her contest for the seat of Governor for Kakamega County. On the 19.2.2013 when the application for leave to pursue contempt of court proceedings was fixed for hearing, parties appeared before Justice Ogola and the matter was adjourned to 2.30 p.m. On that date parties informed the court that they were to record a consent and the matter was fixed for mention the following day 20.2.2013. The proceedings for the 20.2.2013 reads as follows:-

20.02.2013

*Coram – Ogola, J.*

*Teresa – court clerk*

*Nyaberi for the Petitioner*

*Munyi for the Respondent*

Nyaberi:

*We have a consent*

*“By consent the*

1. *Petition be marked as settled. However.*
2. *The Petitioner reserve her right under Section 75 of Election Act.*
3. *The Respondent to pay the Petitioner costs.*
4. *The application for contempt dated 15<sup>th</sup>February, 2013 is herewith spent.*
5. *The application dated 18<sup>th</sup> of February, 2013 by the respondent seeking to stay the Judgment herein is also spent.*

OGOLA

JUDGE

20.02.2013

Munyi:

*That is correct.*

OGOLA

JUDGE

20.02.2013

The main question which follows is what was the effect of the above consent. The consent seems to have marked the application for contempt by the petitioner and the one for the review of the orders of 13.2.2013 by the IEBC as **spent**. Similarly the consent marked the entire petition number 93 of 2013 as **settled**. My understanding of the above consent is that the petitioner was no longer going to pursue her interest in having the IEBC include her name on the ballot paper for the position of Governor for the elections of 4.3.2013. The petitioner was also not going to pursue the prayers contained in her application seeking to commit to civil jail the two IEBC officers. It appears that parties deliberated on the issue as to whether it could have been practicable to include the petitioner's name on the ballot paper given the contentions by the IEBC that the ballot papers had already been printed and parties agreed that it was not practicable.

The petitioner was presented by an advocate and a consent was recorded whose effect was to allow the election to continue the absence of the petitioner's name notwithstanding. It is therefore clear that the petitioner gave the elections her blessings and was resigned to the fact that her name could not have appeared on the ballot paper. This is strengthened by the petitioner's evidence in court to the effect that she did not want to hold the entire country in ransom by having the IEBC Chairman and Chief Executive Officer locked up in prison yet Kenyans were expecting elections to be conducted. On the same vein the petitioner informed this court that although it was not put in writing, the IEBC promised that she was not going to pay security for the current petition. This promise was followed by a letter dated 11.3.2013 from her advocate. Although the petitioner might have different thoughts, I do find that even if her name was to be included in the ballot paper, she was not going to have enough time for any serious and meaningful campaigns. Before she could have been certain that she was going to participate in the election, the petitioner could not have staged any serious campaigns. The consent was recorded on 20.2.2013 and the election was conducted on the 4.3.2013. That gave the petitioner less than two weeks to campaign. I believe the decision to let it go was a sound one.

Although I do find that the petitioner gave her blessings to the election to continue without her

participation, I do find that the 4<sup>th</sup> respondent is also to blame. The 4<sup>th</sup> respondent knew that the decision of its Dispute Resolution Tribunal had been overturned by the court and the petitioner had been allowed to participate as a candidate. It was only fair and reasonable for the 4<sup>th</sup> respondent to have suspended the printing of the ballot papers for all those areas where there were court cases. I do associate myself with the views expressed by the court in the case of **IDRIS V ANPP (supra)**, in which one of the candidates was disqualified from participating in an election while his appeal was pending before the court. The court stated as follows:-

*“.....The 1<sup>st</sup> respondent was aware at that time and the appellant was in court pursuing his legal rights. A body that has respect for rule of law which INEC ought to be, would have waited for the outcome of the court proceedings particularly when it was aware of it....yet it went ahead to disqualify the 1<sup>st</sup> respondent and the 2<sup>nd</sup> petitioner.”*

In the end I do find that the petitioner forfeited her right to participate in the elections. She was therefore not wrongly excluded from participating in the elections. She gave the elections her blessings and the fact that the consent reserved her right to petition the court under Section 75 of the Elections Act does not lead me to conclude that her exclusion from the elections was wrongful. The exclusion was sanctioned by the court via the consent. I further do find that there was no violation of the petitioner's fundamental rights. The petitioner's rights were compromised by the consent.

#### **4. Whether the court can nullify an election on the basis of issues relating to nomination of candidates**

The respondents maintain that issues relating to nomination of candidates cannot be the basis of election disputes where an election has already been conducted. Counsels rely on the provisions of Section 74 of the Elections Act which provides as follows:

*74. (1) Pursuant to Article 88 (4) (e) of the Constitution, the Commission shall be responsible for the settlement of electoral disputes, including disputes relating or arising from nominations but excluding election petition and disputes subsequent to the declaration of election results.*

*(1A) A question as to the validity of the election of a member of a county assembly shall be heard and determined by the Resident Magistrate's Court designated by the Chief Justice.*

*(2) An electoral dispute under subsection (1) shall be determined within seven days of the lodging of the disputes with the Commission.*

*(3) Notwithstanding subsection (2), where a dispute under subsection (1) relates to a prospective nomination on election, the dispute shall be determined before the date of the nomination or election, whichever is applicable.*

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

*(a) filed within thirty 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.*

Counsels for the respondents further contend that Section 76 of the Elections Act which supports the filing of petitions deals with issues relating to the validity of an election and not nomination. The petitioner's claim is based on nomination and it should therefore be dismissed.

On the other hand the petitioner maintains that her exclusion was unlawful and was contrary to the provisions of Article 85 of the Constitution. The voters were not given the opportunity to nominate another candidate of their choice. It is agreed that election is a process and it starts way before nomination of candidates is conducted. The body in charge of conducting election has to make early preparations for the process. Political parties also have to come up with their own ways of electing or nominating their candidates for all the respective positions available for election. Where the nomination process is affected it appears that the election will also be affected. Where the court is satisfied that the exclusion of a candidate was mainly done so that his or her competitor could be declared the winner, the court will have to intervene and nullify the election as it happened in the case of **IDRIS V ANPP & OTHERS**. (supra).

There are several authorities which show that the nomination process can lead to election petitions. The Kenyan case of **MURGOR V INGONGA & ANOTHER [2008] 1 KLR (EP) 91** dealt with a petition filed by a party who had lost to secure a nomination to contest a parliamentary seat. The petition challenged the nomination exercise as well as the election. In the case of **RAPHAEL SAMSON KITHIKA MBONDO V LUKA DAUDI GALGALO & PAUL JOSEPH NGEI, [2008] 1 KLR (EP) 142** it was alleged that Mr. Ngei and his supporters had physically prevented Mr. Mbondo from presenting his nomination papers. The petitioner was forced to withdraw his candidature. Mr. Mbondo waited until the election results were published and filed an election petition. The election of Mr. Ngei was nullified and Mr. Ngei was found guilty of an election offence. The court noted the following:-

*“Whatever may have been the relative position of Mr. Mbondo and Mr. Ngei and whatever the likelihood of the former’s success or otherwise at the polls against so famous a politician, Mr. Mbondo was clearly entitled to contest the seat as would any other person duly qualified, however popular the announcement of his withdrawal may have been.”*

Similarly in the case of **KIMANI WANYOIKE V ELECTORAL COMMISSION OF KENYA & ANOTHER [2008] 2KLR (EP) 35** the court held that the complainant could always file a petition after the election had been concluded. In that case the petitioner had presented his nomination papers but he was late for nominations. In the case of **AROKO & ANOTHER V KWACH & 5 OTHERS** the court dismissed a suit filed by people who had lost during nominations for the Kasipul Kabondo constituency held on 16.11.2007 on the grounds that it had not been gazetted as an election court. This meant that the claimants could file an election petition after the election was concluded.

In the Indian case of **GOPAL RAMJI DHENGE VS THE RETURNING OFFICER, LAKHANI [1964] 66 BOMLR 542** the returning officer disqualified a candidate for the election of councilor from Lakhani Electoral Division for the reason that his proposer was disqualified because the proposer had subscribed as proposer to four nomination papers filed by the same candidate. One of the candidates who had been proposed by the name **PITRAM** was therefore disqualified. Eleven other candidates were cleared. Seven of the candidates later withdrew leaving four to contest the elections. The 3<sup>rd</sup> respondent was declared the winner having garnered 3,479 votes. The petitioner who was a voter filed the petition and challenged the results of the election on the grounds that the rejection of the nomination paper of **Pitram** was wrong and illegal. The court upheld the petition and had this to say:-

*“It is then contended that the decision to the effect that the nomination was wrongly rejected is not enough to show that the result of the election is affected and that in that sense, the petitioner has failed to prove that the election itself is liable to be set aside.*

*In our opinion, so far as the effect of rejection of nomination paper of a candidate who is eligible to contest is concerned, it is now well-settled that it is not predictable as to what the result would have been if the candidate whose nomination paper is wrongly rejected were in the arena of contest. In Surenda Nath v S. Dalip Singh their Lordships observed as follows (p.245):*

*..It appears that though the words of the section are in general terms with equal*

*application to the case of improper acceptance, as also of improper rejection of a nomination paper, case law has made a distinction between the two classes of cases. So far as the later class of cases is concerned, it may be pointed out that almost all the Election Tribunals in the county have consistently taken the view that there is a presumption in the case of improper rejection of a nomination paper that it has materially affected the result of the election. Apart from the practical difficulty, almost the impossibility, of demonstrating that the electors would have cast their votes in a particular way, that is to say, that a substantial number of them would have cast their votes in favour of the rejected candidate, the fact that one of several candidates for an election had been kept out of the arena is by itself a very material consideration. Cases can easily be imagined where the most desirable candidate from the point of view of electors and the most formidable candidate from the point of view of the other candidates may have been wrongly kept out from seeking election. By keeping out such a desirable candidate, the officer rejecting the nomination paper may have prevented the electors from voting for the best candidate available. On the other hand, in the case of an improper acceptance of a nomination paper, proof may easily be forthcoming to demonstrate that the coming into the arena of an additional candidate has not had any effect on the election of the best candidate in the field.....*

*We have, therefore, come to the conclusion that the petitioner has a right to challenge the improper rejection of a nomination paper of a candidate at the election, that the rejection of the nomination of respondent No. 9 was improper and unauthorized and that it has materially affected the result of the election. (emphasis added)*

The court concluded as follows:-

*We have directed that the order of the Returning Officer dated May 8, 1962, rejecting the nomination paper of respondent No.9 be and is hereby quashed. As a consequence of that decision, the election of respondent No.3 has also to be and is declared invalid. There shall be a fresh election on the basis of the nomination papers including that of respondent No.9”*

The Nigerian authorities presented by the petitioner do establish that an election can be nullified on the ground that the nomination process was not properly conducted. However, in those cases it is clear that the exclusion of the candidates by the electoral body was meant to enable the other candidates to win the elections. Further, those authorities can be distinguished by the fact that the candidates who were excluded from the elections did not enter into a consent that had the effect of allowing the elections to proceed. It is clear from the above that issues relating to nominations can be entertained by an election court. In this petition I do find that the exclusion of the petitioner was not unlawful as the same was as a result of a consent order. Had the petitioner proved that her exclusion was either unlawful, or was meant to assist any of the candidates or that it was facilitated through the assistance and machinations of the other candidates, the court could have looked at the petition differently. The voters ought to vote for a candidate of their choices and where possible each of the candidates should be allowed to participate in the elections. The petitioner herein willingly excluded herself from the ballot paper.

#### **5. Whether this petition is res judicata**

The 1<sup>st</sup> and 2<sup>nd</sup> respondents maintain that this petition is res judicata. The issues being raised in this suit are similar to the ones raised in petition number 93 of 2013, **Mable Muruli v The Independent Electoral & Boundaries Commission**. The orders that were being sought in that petition involve the inclusion of the petitioner in the ballot paper which is the same order being sought in the current petition whereby the petitioner would like to have the election of the 1<sup>st</sup> and 2<sup>nd</sup> respondents nullified on the reasons that she was not included on the ballot paper. According to counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondent the petitioner's remedy in the disobedience of the orders issued in Petition No. 93 of 2013 lay in the contempt of court application which she freely withdrew. That forbearance gave up the petitioner's right to insist on compliance with the mandatory injunction. The petitioner cannot seek to renew the contempt

proceedings through an election petition. By the act of withdrawal of the application for contempt and settlement of the entire suit, all rights arising out of Petition 93 of 2013 were spent.

On her part, Miss Thanji submitted that the petition herein is res judicata as the issues are similar to those raised in Petition No. 93 of 2013. The consent recorded in that petition marked the matter fully and finally settled. According to her, the petitioner's redress for the grievances raised in Petition No. 93 of 2013 lies in filing an appeal or through the pursuit of other mechanism but does not lie in the filing of an entirely new petition while raising the same issues and seeking the same orders.

The petitioner contends that this petition is not res judicata. The parties in Petition No. 93 of 2013 were two while the current petition has five parties. She maintains that the orders being sought in that petition are different from the current prayers. Further, the consent recorded by the parties expressly reserved the petitioner's right to seek legal redress after the elections.

Section 7 of the Civil Procedure Act, Chapter 21, states as follows:-

***“7. No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard finally decided by such court.”***

In Petition No. 93 of 2013 the petitioner sought the following reliefs-

**Relief Sought**

- a. *A declaration that the Petitioner is a degree holder within the meaning of section 22 (2) of the Election Act 2012 No. 24 and is entitled to contest for the position of County governor, Kakamega County upon meeting other requirements as set by the Commission/Statute.*
- b. *A mandatory injunction compelling the Commission to accept the Petitioner's nomination papers and issue a clearance certificate to her for her to contest the seat of county Governor, Kakamega County in the general elections slated for 4<sup>th</sup> March 2013.*
- c. *A mandatory injunction compelling the Commission to accept and incorporate the Petitioner's name in the list of candidates and ballot papers as an independent candidate for the County Governor's seat, Kakamega County.*
- d. *Costs of this petition are borne by the Commission.”*

The current petition seeks the following prayers:-

- a. *A declaration that the Petitioner's fundamental rights and freedom as enshrined in the Constitution were fundamentally violated and willfully compromised by the 3<sup>rd</sup> and 4<sup>th</sup> Respondents.*
- b. *That the election of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents as a County governor and deputy County governor Kakamega County be determined and declared null and void and a certificate to that effect be issued.*
- c. *The first Governor and Deputy Governor Election held on the 4<sup>th</sup> March 2013 in Kakamega County be determined and declared null and void and a fresh election for the positions of Governor and Deputy governor be ordered and held in Kakamega County to afford the Petitioner and her supporters to participate in a free, fair and transparent election.*
- d. *A determination be made that 1<sup>st</sup> and 2<sup>nd</sup> Respondents have not been validly and impartially elected as the County Governor and Deputy County Governor on account of failure by the 3<sup>rd</sup> and 4<sup>th</sup> Respondents to hold free, fair and credible Nominations on 31<sup>st</sup> January, 2013 and 1<sup>st</sup> February, 2013 and Elections on 4<sup>th</sup> March, 2013.*
- e. *In any event the 3<sup>rd</sup> and 4<sup>th</sup> Respondents be condemned to pay the costs of this petition and other incidentals costs thereto.*

f. *Such other reliefs and consequential orders as this Honourable Court may deem just fit and grant.*

The essence of the doctrine of res judicata is that same parties should not be allowed to litigate over the same issues over and over again. There should be an end to litigation. The main points for consideration by the court are whether the matter before it was fully and finally determined by a court or Tribunal of competent jurisdiction and whether the parties are the same. In the case of **BULHAN & ANOTHER V EASTERN & SOUTHERN AFRICAN TRADE DEVELOPMENT BANK (2004) 1 KLR 147** Justice Ibrahim held that for the principles of res judicata to apply the issues alleged to be similar must have been raised in the earlier suit, the suit must have been heard and finally determined or decided by the court. Whenever the doctrine of res judicata is raised, the court is at liberty to consider as to whether the parties who had not been enjoined ought to have been enjoined in the earlier suit. In the current situation the petitioner could not have enjoined the 1<sup>st</sup> and 2<sup>nd</sup> respondents as by that time the winner of the election had not been declared. Thus the two respondents were not parties to Petition No. 93 of 2013.

Are the issues and orders being sought similar in both petitions. The first prayer in Petition No. 93 of 2013 was for the petitioner to have been declared as possessing degree qualification within the meaning of **Section 22 (2)** of the Elections Act 2012. That prayer was granted. The petitioner was also seeking two mandatory orders of injunction against the 4<sup>th</sup> respondent so that she could be issued with a clearance certificate as well as be included in the list of candidates on the ballot papers for the election for County Governor seat for Kakamega County. Currently the petitioner is seeking an order that her fundamental rights and freedom as enshrined in the Constitution were fundamentally violated and willfully compromised by the 3<sup>rd</sup> and 4<sup>th</sup> respondents and therefore would like the election of the 1<sup>st</sup> and 2<sup>nd</sup> respondents as Governor and Deputy be declared null and void and a certificate issued to that effect. Further in prayer **(C)** of the petition the petitioner maintains that the election held on the 4<sup>th</sup> of March 2013 for the position of Governor and Deputy should be nullified so as to afford the petitioner and her supporters to participate in a free, fair and transparent election. The petitioner in her prayer **(D)** contends that the 3<sup>rd</sup> and 4<sup>th</sup> respondents failed to hold free, fair and credible nominations on the 31.1.2013 and 1.2.2013 as well the elections of 4.3.2013.

The body of the petition indicates that the 1<sup>st</sup> and 2<sup>nd</sup> respondents were not fairly elected. The votes announced by the 3<sup>rd</sup> respondent were initially found to be 229,000 but were later changed to 259,071 (paragraph 19 of the petition). The petitioner also contends that the votes cast for the position of Governor and that of Senator for Kakamega County did not tally. No evidence was adduced in relation to those allegations. It is clear to me that the petition is based on two grounds namely that the petitioner was wrongfully excluded from participating in the election for the position of Governor and secondly that the 1<sup>st</sup> and 2<sup>nd</sup> respondents were not elected fairly as they engaged in acts of bribing voters. As I have found hereinabove, the exclusion of the petitioner from participating in the elections got the petitioner's own blessings. The petitioner entered into a consent signifying that the elections could proceed and she cannot bring the same issue and allege that her exclusion vitiated the elections. Section 120 of the Evidence Act states as follows:-

***“120. when one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.”***

The consent recorded in court did indicate that the petitioner reserved her right to file a post-election petition in line with **Section 75** of the Election Act. **Section 75** of the said Act states as follows:-

***75. (1) A question as to validity of a county election shall be determined by High Court within the county or nearest to the county.***

***(2) A question under subsection (1) shall be heard and determined within six months of the date of lodging the petition.***

**(3) In any proceedings brought under this section, a court may grant relief, including-**

**(a) a determination of whether or not the candidate whose election is questioned was validly elected;**

**(b) a declaration of which candidate was validly elected; or**

**(c) an order as to whether a fresh election will be held or not.**

According to the provisions of **Section 75** the election court is supposed to evaluate whether the candidate whose election is being questioned was validly elected and whether a fresh election should be ordered. The petitioner is questioning the validity of the election of the 1<sup>st</sup> and 2<sup>nd</sup> respondents on two grounds as herein above stated. With regard to the ground that the election was not free and fair on the reason that the petitioner and her supporters were excluded from participating in the elections and that the nomination process was not free, fair and credible, I do find that that issue is similar to what was deliberated before the court in Petition No. 93 of 2013. The petitioner cannot re-open the same issue before this court. The petitioner could not have forfeited her right to participate in the elections only to thereafter file a petition that has the effect of affecting the rights of those who participated and won the elections. The petitioner is estopped from raising the same issue as she made the 4<sup>th</sup> respondent believe that the elections ought to have proceeded without the petitioner being one of the candidates.

The petitioner permitted the 4<sup>th</sup> respondent to continue with the elections and cannot allege that the elections were not free and fair because she was not included on the ballot paper. The mere fact that the 1<sup>st</sup> and 2<sup>nd</sup> respondents were not parties to Petition No. 93 of 2013 cannot reopen the same issue as to whether the petitioner was unlawfully barred from participating in the elections since that issue had already been settled by consent. To enforce the prayer in petition No. 93 of 2013 that the petitioner's name be on the ballot papers is equivalent to nullifying the election and ordering a repeat of the process. The orders that were granted in the previous petition cannot be enforced by this court as those orders are spent and the matter is fully settled. The reservation by the petitioner to file an election petition as per the consent cannot lead to the re-opening of the issues that were dealt with in petition No. 93 of 2013.

Res judicata can apply to a specific issue in a dispute and it does not mean that in all cases where the doctrine of res judicata is raised then the entire suit collapses. Where a specific issue has been dealt with by the court either through a full hearing or by way of a consent order then any of the parties to the dispute is estopped by res judicata from raising the same issue in a subsequent suit. The principle of estoppel by res judicata was dealt with in the English case of **ZURICH INSURANCE COMPANY PLC V COLIN RICHARD HAYWARD [2011] EWCA Civ 641**. In that case the respondent was involved in an industrial accident and filed a suit for damages. The appellant had insured the respondent's employer. A consent judgment was entered into whereby the respondent was paid about 135,000 Sterling pounds as damages. Subsequently the appellant got evidence from the respondent's neighbours that the respondent had exaggerated the extent of his injuries and formed the opinion that the damages that had been paid to the respondent ought to have been reduced. The appellant filed a fresh suit against the respondent claiming that the respondent obtained the damages through fraudulent means. The respondent contended that the suit was res judicata. The court stated as follows:-

***“Estopped by res judicata, or estoppel by record, is a manifestation of the principle that judicial decisions once made must be accepted as final and are not open to challenge. Ultimately, it rests on a rule of policy that it is in the public interest for there to be finality in litigation, but it also sustains an important principle that decisions of competent tribunals must be accepted as providing a stable basis for future conduct. The Latin word “res judicata” mean simply “a thing judicially determined.” They may apply to the claim as a whole (usually referred to as “cause of action estoppel”), or may refer to one or more specific issues which the court was required to decide in the course of reaching its decision on the matter before it (what is generally referred to as “issue estoppel”.... The fact that an order is made by consent does not in my view prevent it from giving rise to an estoppel by record, provided that the nature of the order is such***

*that it would otherwise have that effect.*

In the case of **HENDERSON V HENDERSON [1843] 3Hare 100**(cited in the Zurich Insurance Company case) the court explained the doctrine of res judicata in the following terms-

***“...the court requires that parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res-judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.” (emphasis added)***

With regard to the right to file an election petition based on Section 75 of the Elections Act, the petitioner was at liberty to file an election petition based on other reasons such as irregularities, non-compliance with the law and bribery. Since the petitioner has raised some issues which are not related to nomination matters, I do find that the petition in its entirety is not res judicata. However, issues relating to nomination were dealt with in Petition No. 93 of 2013 and fully settled. The petitioner’s contention that her fundamental rights were breached does not lead to nullification of the election on that basis. Her remedy does not lie in challenging the election due to the violation of her rights but the appropriate remedy would be for her to seek damages and this court is not the right forum to award damages. I am aware that the petitioner had legitimate expectation to participate in the elections but she blew off that opportunity willingly by entering into the consent on 20.2.2013.

The petitioner reserved her right to file this petition. The main question is, what did it mean to have the petition marked as settled, and what were the terms of the settlement. Could it be taken that the petitioner was simply suspending her petition No. 93 of 2013 and promising to re-open it through this election petition. Was the cost paid to the petitioner the consideration for the settlement? Although there are no details of the settlement, it can be concluded by the court that the petitioner cannot go back to that file and seek enforcement of the orders that were granted. Since the prayers sought intended to have the petitioner included as a candidate and those orders were spent, the petitioner cannot seek to have the election vitiated on the ground that her name was excluded from the ballot paper. Prayers (a), (b) and (c) of the petition, in as much as they concern the issue of nomination are res judicata. Even if the petitioner were to approach the court in petition No. 93 of 2013 and seek to enforce some of the orders like punishment of the IEBC officers, the answer would be that those issues are already settled. In the end I do find that the petitioner is estopped by res judicata from seeking nullification of the election on the basis of her exclusion from being one of the candidates but is free to seek nullification of the election on other grounds.

#### **6. Whether the 1<sup>st</sup> and 2<sup>nd</sup> respondents engaged in electoral malpractices and acts of bribery of voters.**

The petitioner maintains that the 1<sup>st</sup> and 2<sup>nd</sup> respondents engaged in acts of bribery. Further, that the 1<sup>st</sup> respondent breached the electoral code of conduct by campaigning in a church as well as bribed voters in the church. The petitioner relies on the evidence of PW3 and PW4 who were at a church in Mumias and at Murhanda market respectively where the alleged acts of bribery took place. Counsels for the petitioner further contend that the interpretation of the CDs show that the 1<sup>st</sup> respondent promised to leave money to the crowd at Murhanda market and he disguised the money to be milk. Immediately the 1<sup>st</sup> respondent left, the crowd made two lines and shared the money. Counsels rely on the provisions of Section 64 of the Elections Act which provides for the offence of bribery. Counsels also rely on the case of **FIRMINO LUSAKA V HOHN CHEELO [1979] Z.R.99 (H.C.)** at pg.107 where the court held as follows:-

***“ It will be seen therefore, that for the purposes of the regulations, that is, of constituting the offence of bribery, the respondent was, in fact, a candidate for the final election at the time of the payment of money, in this case and the word candidate in regulation 74 (1)(c) then applied to him.”***

The 1<sup>st</sup> respondent has denied the allegations of bribery. Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents contends that the burden of proof was upon the petitioner and she failed to discharge it. The CDs produced in court were processed un-procedurally and contrary to the provisions of Section 106 of the Evidence Act. The 3<sup>rd</sup> and 4<sup>th</sup> respondents submit that no acts of bribery were reported to them and that there were no irregularities in the conduct of the elections to warrant an intervention by the court.

The evidence relating to bribery is that of PW3 and PW4. PW3 was in a church in Mumias where the 1<sup>st</sup> respondent also attended. It is on record that the witness did not see the 1<sup>st</sup> respondent hand over money to the worshippers. It is alleged that a white envelope was passed on to Mutobera (DW2) and that the envelope contained money. The court watched the video record but never saw any money exchanging hands inside the church. Indeed it is the evidence of the 1<sup>st</sup> respondent as well as that of DW1 and DW2 that the 1<sup>st</sup> respondent dropped his offering inside the box usually placed for offerings. There is nothing wrong in someone who attends church to give his offering. It is also in evidence that the 24.2.2013 had been set aside as a date for prayers country wide. The 1<sup>st</sup> respondent was invited to talk to the congregation and I do find that he did not breach the electoral code of conduct. It is not unusual for a politician to be invited to talk in a religious congregation. The mere presence in a church of a candidate for any elective post during election period can be interpreted to mean that the candidate is campaigning in the church contrary to the provisions of Election Code of Conduct. Candidates participating in elections are not barred from entering places of worship during the election period and talk to members of the congregation.

With regard to the incident at Murhanda market it is the petitioner's evidence that the 1<sup>st</sup> respondent left some KShs.20,000/=. The amount was distributed immediately the 1<sup>st</sup> respondent left the venue. The main issue is whether the evidence on record does prove the offence of bribery. Counsel for the petitioner submitted that the court should widen the scope of bribery and should not rely only on direct evidence as the respondents contended that the names of those who were bribed were not given. In the case of **MAHMUD SIRAT V ALI HASSAN ABDIRAHMAN & 2 OTHERS [2010] eKLR** the court stated as follows:-

***“The petitioner and his witnesses did not adduce any evidence to connect the persons who were allegedly bribing voters with the 1<sup>st</sup> respondent. The credibility of the petitioner's case on the allegation of bribery would have been boosted if the petitioner procured a voter or voters to testify in support of his case in regard to the allegations of bribery. Having evaluated the evidence adduced in this regard, this court is of the considered view that the allegation of bribery of voters by the 1<sup>st</sup> respondent was not proved”.***

The allegations of bribery borders on criminal culpability. Once the court makes a finding that a candidate was involved in bribery of voters, such a candidate suffers the consequences of being barred from participating in future elections. The standard of proof is therefore high whenever the court is called upon to make a finding that a candidate bribed voters. In some instances courts have held that the petitioner has to prove a claim of bribery beyond reasonable doubt just like a criminal charge while in some cases courts have held that the claim has to be proved beyond the standard of proof in civil cases, that is, on a balance of probabilities.

In the case of **KARURI V MBOGO & ANOTHER [2008] 1KLR (EP)** allegations of bribery were made against the respondent. The court summarized the allegations as follows:-

***Paragraph 2: This dealt with allegations of bribery by the 2<sup>nd</sup> respondent and his***

*agents. On this ground we heard the evidence of the petitioner that he saw 2<sup>nd</sup> respondent throw money in the air so that people could vote for him. The petitioner testified that he saw the 2<sup>nd</sup> respondent throw a bundle of shs.10,000/= in the air and people scrambled for it. We heard the evidence of one Kailanya (PW13) and Kamencho (PW15). All this was, of course denied by the respondent and his witnesses. We have carefully examined the evidence in respect of this ground and we are of the view that this being a serious allegation connecting those involved with election offences a court would require a high standard of proof. We also find it odd that the 2<sup>nd</sup> respondent would throw a bundle of shs.10,000/= in the air for people to scramble for it. We are not satisfied that there is enough evidence to support this ground.*

According to Halsbury's Laws of England, Vol.14 3<sup>rd</sup> Edition paragraph 384, it is stated as follows:

*384. **Proof of bribery.** Due proof of a single act of bribery by or with the knowledge and consent of the candidate or by his agents, however insignificant that act may be, is sufficient to invalidate the election, the judges are not at liberty to weigh its importance, nor can they allow any excuse, whatever the circumstances may be such, such as they can allow in certain conditions in cases of treating or undue influence by agents. For this reason clear and unequivocal proof is required before a case of bribery will be held to have been established. Suspicion is not sufficient, and the confession of the person alleged to have been bribed is not conclusive. Bribery, however, may be implied from the circumstances of the case, and the court is not bound by the strict practice applicable to criminal cases, but may act on the uncorroborated testimony of an accomplice. The court strips the proceedings in each case of every colour, every dress, and every shape to discover its real and true nature. The court has always refused to give any exhaustive definition on the subject, and has always looked to the exact facts of each case to discover the character of the transaction.*

*A corrupt motive must in all cases be strictly prove. A corrupt motive in the mind of the person bribed is not enough. The question is as to the intention of the person bribes him.*

*Where the evidence as to bribery consists merely of offers or proposals to bribe, stronger evidence will be required than in the case of a successful standing. A general conversation as to a candidate's wealth and liberality is not evidence of an offer to bribe. General evidence may, however, be given to show that what the character of particular acts has presumably been.*

The CDs for the church in Mumias and the campaigns at Murhanda were translated by Mr. Musa M'Mbwana Nandwa Advocate. The relevant excerpts read as follows:-

*Oparanya*

- When you deliver from 1<sup>st</sup> (...not clear...)*
- If you deliver do you hear?*
- If you deliver a girl or a boy (...not clear....) is the same thing.*
- Those are Oparanya's children.*
- When you deliver for six months (pointing) How many months?*

*Crowd*

- Six*

*Oparanya*

- You will get two thousand shillings per month to take care of that child*

- *Do you hear?*

*“ Oparanya: “To govern is to have. Even financial he has. I will leave with your son Bonface. If he has not properly supply milk that Oparanya is leaving for you it’s his own problem.”*

*Crowd: “His problem.”*

*Oparanya: “Because you know I am prohibited. I as the governor (..not clear). Is that true?”*

*Crowd: “Yes”.*

*Oparanya: “But milk I leave with who?”*

*Crowd: “Bonface.”*

*Oparanya “I have left with who?”*

*Crowd: “Bonface”.*

*AFTER DEPARTURE OF OPARANYA*

*Voices*

- *Are you alert?*
- *We are alert.*

*Music*

- *“Today is- he who talks about tomorrow is a liar”*

*Voices*

- *Boni – Will you give us our potato?*
- *They said you distribute properly*
- *Queue*
- *We are queuing*
- *Oparanya said you give us our potato it is here.*
- *Oparanya said our potato is here*
- *There is a potato*
- *What are you doing?*
- *Que*
- *You, you what?*
- *Elders are here.*
- *There is the queue*
- *Queue*
- *Queue gentlemen*
- *The reason I say you queue. If you don’t queue you will not be given money.*
- *It’s in the envelope*
- *We want people to line up*
- *What’s wrong?*
- *That’s the queue now distribute the money*
- *What are you waiting for?*
- *Boni is here*
- *Ladies we want to demand for our money*

- *How much money is said to be here?*
- *People have lined up. They have waited and are tired.*
- *Twenty Thousand is this*
- *That's what they gave me? (Holding the money in hand).*
- *Groups! Groups!*
- *Just count. Youths certain amount*
- *Elders, ladies certain amount*
- *How do we share this money?*
- *You see Bon.*
- *Bon. Come I walk with you.*
- *Tell Opranya this is a joke*
- *How can he give Twenty Thousand Shillings to such a crowd!*
- *Twenty Thousand to all these people?*

The CD shows that the 1<sup>st</sup> respondent talked about milk. It is also established that the 1<sup>st</sup> respondent talked of taking care of babies born in Kakamega County for six months after birth. It is also clear that he talked of leaving milk with Bonface. From the translation it is established that some parts could not be interpreted as they were not clear. It cannot be established with finality that the 1<sup>st</sup> respondent left money for the crowd to share. Some of the words on the CD cannot be attributed to the 1<sup>st</sup> respondent as the translation indicates that some parts were not clear. Also some of the words by the crowd were not clear. The translation in some parts use the words *“they said you distribute properly, that is what they gave me.”* It is therefore not clear as to whether it was the 1<sup>st</sup> respondent or the other candidates for other positions who purportedly gave money to the crowd. Can it also be said that there was bribery of voters by the candidates who campaigned at Murhanda on that date. I do not find that there was any bribery of the voters by the 1<sup>st</sup> respondent. The evidence is purely circumstantial and cannot sustain the allegations of bribery. It is possible that the alleged Bonface used his own money to give to the crowd as he was a candidate for County Representative. It is possible that it is the other candidates who gave out the money. It could also be possible that the sharing of the money was not part of the campaign trail of the 1<sup>st</sup> respondent. It is not clear how long it took after the 1<sup>st</sup> respondent left for the alleged money to have been distributed.

It is clear that a petitioner who is alleging that there was bribery in the elections has to prove his allegation to the satisfaction of the court. The test to apply would be whether the evidence as adduced by the petitioner or claimant would sustain a conviction if the party alleged to have committed the offence were to be charged in court. There is also the problem where the alleged acts of bribery were conducted by the respondent on his behalf by other people who are not specifically mentioned. It would be difficult for the court to find such a respondent guilty of a crime that was committed on his behalf by unknown people.

In the Ugandan case of **PAUL MWIRU V IGEME NATHAN SAMSON NABEETA & 2 OTHERS (ELECTION NO. 03 OF 2011)** serious allegations of bribery were made against the 1<sup>st</sup> respondent. The court captured some of the allegations as follows, **“UShs.3,000,000 was given by the 1<sup>st</sup> respondent to the women of Napier market to boost their income through sacco, Jomba Farouk and Muganda Abubakar Baker attested to shs.5,000 transport fare to voters to go and vote, other witnesses attested to the installation of electricity by the 1<sup>st</sup> respondent, evidence was given that 700,000 was given out by the 1<sup>st</sup> respondent to the Chairperson of Kirinya Road Development Agency and shs.2,000 was given as a bribe to everyone on Kirinya road at that time, 2,000,000 was given by the 1<sup>st</sup> respondent as his contribution to a church in exchange for votes.”** The list of allegations went on and on. The court declined all those allegations and found that there was no offence of bribery committed. The court cited the case of **KIIZA BESIGYE V YOWERI MUSEVENI KAGUTA & ANOTHER. Election Petition No. 1 of 2001 (Uganda)** where the court stated as follows:-

***“an election petition is a highly political dispute, arising out of a highly politicized contest. In such a dispute, details of incidents in question tend to be lost or distorted as***

***the disputing parties trade accusations, each one exaggerating the others' wrongs, while downplaying his or her own. This is because most witnesses are the very people who actively participate in the election contest.***

In the case of **SIMMONDS V KHAN [2008] EWHC B4 (QB)** the court applied the standard of proof of beyond reasonable doubt in relation to a claim of election malpractices and stated as follows:-

*“Thus the court will apply-*

- a. *the criminal standard of proof to the charges that Mr. Eshaq Khan and/or his agents have been guilty of corrupt or illegal practices;*
- b. *the criminal standard of proof to the question of whether there has been general corruption.”*

In the case of **ALI V GETHINJI [1984] KLR 511** allegations of bribery were made. Paragraph 18 of the petition in that case stated as follows:-

*“that the Second Respondent is guilty of the offence of bribery in that he promised to procure the offices of chief, sub-chief, nominated councilor for several electors in order to induce such electors to give their vote to him.”*

In the **ALI V GETHINJI** case two witnesses testified in support of the bribery allegations. One witness testified to the effect that he was a candidate in the Civic elections and was asked by the winning candidate not to stand and support him as he was going to nominate him as a councillor or a sub-chief. The second witness testified to the effect that he was to be appointed as a sub-chief of Sangailu sub-location. The court was still not satisfied with that evidence and dismissed the bribery allegations.

According to PW3 he did not see the 1<sup>st</sup> respondent giving out money to the worshipers while in the church. On his part PW4 did not also see the 1<sup>st</sup> respondent hand over money to the crowd. The petitioner contends that the 1<sup>st</sup> respondent bribed voters on 28.2.2013 at Murhanda and 24.2.2013 at a church in Mumias. There is no direct evidence showing that indeed the 1<sup>st</sup> respondent bribed the voters. The CDs that were produced were recorded by the two witnesses who were part and parcel of the petitioner's campaign team. It is not clear whether it is the 1<sup>st</sup> respondent who left the money that was distributed to some people. It is also not clear whether those who were sharing the money were indeed registered voters. It is also doubtful as to whether the money was the milk talked of by the petitioner or the potato talked of by the crowd. Indeed the translation of the CD taken at Murhanda does indicate that the 1<sup>st</sup> respondent talked of milk to mothers of Kakamega County for six months.

The court is not satisfied that there were acts of bribery conducted by the 1<sup>st</sup> respondent. It is the evidence of DW1 and DW2 that when the 1<sup>st</sup> respondent came out of the church at Mumias there was a crowd outside and the people were asking for money. No money was given out, and if it was, then PW3 could have captured that incident. Even if the envelope allegedly handed over by the 1<sup>st</sup> respondent inside the church had money, there is no evidence that it was a bribe. The court cannot conclude that an offertory made to a church during a church service is meant to bribe the congregation so that the members of the church can vote for the person giving out the offertory during oncoming elections. In the end no offence of bribery, election malpractice or breach of electoral code of conduct was proved.

## **7. Whether the petitioner has proved her case up to the required standard.**

Apart from the grounds that the petitioner was unlawfully excluded from participating in the elections and allegation that the 1<sup>st</sup> and 2<sup>nd</sup> respondents engaged in acts of bribery, there are other allegations contained in the petition. The petitioner contends that she was excluded because she was a woman, that initially the 3<sup>rd</sup> respondent announced the results for the 1<sup>st</sup> respondent as 229,000 votes but was later changed to 259,071 votes. Under paragraph 19 of the petition it is alleged that the petitioner does not accept the counting of the votes cast to be accurate nor the tallying of votes from the polling

centres as demands of some agents for candidates who participated in the election to have the results confirmed and verified for each polling station were ignored by the 3<sup>rd</sup> respondent. It is also contended that the total voter turnout ratio for the Governor's position to the Senator's position in Kakamega County was 82.1984%: 81.9868%. Further, that there were many spoilt votes and it was reported that most of the voters were frustrated by the malicious manner in which the petitioner who was their preferred candidate was excluded from the ballot paper. Some voters wrote the petitioner's name on the ballot paper instead of voting properly to express their grievances. No evidence was adduced to show that the results that were announced for Kakamega County were not true. No agent for any of the candidates came to testify and complain that there was a request for a recount or verification and the same was decline.

With regard to the votes of the position of Governor vis a vis those of the Senator not being in tandem, that cannot be an issue as it is upon the voters to decide whether they intended to vote for both positions or only one. The 3<sup>rd</sup> respondent annexed form 36 which shows the results that were declared for Kakamega County. The form shows that there were 7,975 rejected votes. The 1<sup>st</sup> respondent got 259,071 votes while the second candidate SHITANDA SOITA PETER got 133,718 votes. The allegation of many spoilt or rejected votes cannot hold any water. Indeed spoilt votes are replaced and do not count. The rejected votes of 7,975 cannot make any difference. According to the form 36, the voter turnout for Kakamega County was 82.1984%. Out of 569,532 registered voters, 468,146 voters turned up and did cast their votes. None of the candidates who participated in the elections for the position of a Governor either complained about the elections and its results or came to court to testify in support of the petition. No witness testified that he wrote the petitioner's name on the ballot paper instead of the names of the candidates as alleged. I do find that the petitioner's allegations in relation to the conduct of the elections and the announcement of the results were not supported by any evidence and the same fails. Although the petitioner and her witnesses testified to the effect that the 3<sup>rd</sup> respondent seemed to have been under instructions not to clear the petitioner, there is no proof to the effect that the 3<sup>rd</sup> respondent was under instruction from the 1<sup>st</sup> and 2<sup>nd</sup> respondents or any of the other candidates.

The petitioner herein maintains that her qualification is similar to a Master's degree. That is to say her level 7 extended diploma is equivalent to a Master's degree. According to the equivalences of BTEC qualifications level 6 is equivalent to a degree. The petitioner therefore had the qualifications of level 6 which is a degree qualification. The evidence shows that the City College of London wrote to the petitioner on the 28.1.2013 indicating her student status. On the 31.1.2013 the petitioner wrote to CHE requesting for institutional accreditation and on the same date CHE accredited the City of London College. The petitioner seemed to have been running out of time to get her qualification accredited yet she had level 6 qualifications which she could have utilized and get cleared for nomination. The correspondences for the level 7 qualifications were done just a few days before the end of the nomination period. Indeed the letter from CHE dated 4.2.2013 equates the level 7 extended diploma in strategic management and leadership to a Bachelors degree and not to a post graduate degree.

The checklist that was provided by the 3<sup>rd</sup> respondent called upon independent candidates to provide their nomination documents five days to the nomination day. The nomination was fixed for 31.1.2013 and 1.2.2013. On 31.1.2013 the petitioner was in Nairobi seeking accreditation of her college. It is not clear why the petitioner could not have sought the accreditation within the five days before the nomination date as advised. The petitioner presented transcripts to the 3<sup>rd</sup> respondent which could have been given to the 3<sup>rd</sup> respondents five days before the nomination date. Further, the evidence shows that the 3<sup>rd</sup> respondent was available to interact with the candidates two weeks before the nomination. The petitioner cannot contend that her fundamental rights to participate in the elections were violated yet she contributed to her exclusion from the ballot paper. She could have used her level 6 qualifications if she was satisfied that it was equivalent to a degree and I believe she must have obtained the level 6 qualifications before May 2012 when she registered for level 7. She could have also gone to CHE early enough to have her qualifications equated to a degree so as to avoid last minute preparation. As at 1.2.2013 the petitioner's qualification could not have been said to be equivalent to a degree. The 3<sup>rd</sup> respondent was therefore right to have insisted on a degree certificate. Since the provisions of Section 22 and Regulation 47 of the Elections Act do not provide for a diploma, any candidate who has a diploma

which is equivalent to a degree must have had those qualifications equated by CHE early enough so that the returning officer could have approved the nomination documents.

As noted herein the petitioner wrote a letter on 31.1.2013 seeking authentication of the City of London College. CHE responded the same day authenticating the college. Similarly on 4.2.2013 the petitioner sought equation of her extended diploma by CHE and a response equating the diploma to a bachelors degree was made on the same day. Although the action by CHE can be viewed as extreme competency, my view is that it is the wrong approach. It is expected that before CHE authenticate a college it would have a list of all the recognized foreign educational institutions and if what is being sought is in the list then authentication is immediately done. However, for CHE to equate a certificate, it is expected that the commission should write to the specific college and confirm whether the student did undergo that course, the grades obtained, the number of hours a student attended and whether the student completed his or her studies. CHE has been replaced by the Council for University Education through the Universities Act No. 42 of 2012 Section 4 (3) thereof. Section 5 (g) gives one of the functions of the new Commission for University Education the duty to –

***(g) recognize and equate degrees, diplomas and certificates conferred or awarded by foreign universities and institutions in accordance with the standards and guidelines set by the Commission from time to time;***

My view is that the authentication, recognition and equation of foreign educational institutions is a serious function. It should not be left to the whims of one officer who responds immediately a request is made. Ideally there should be a committee of the Commission which would specifically look at the institution and the qualifications, compare it to the Kenyan standards and make a decision. That is a process and not a one day affair. Since CHE has always been clearing candidates for elective positions it was expected of the Commission to have had certain guidelines for such a process. What seems to be happening is that it is a walk in walk out process. A good example is a letter dated 22.1.2013 (Ref. No. CHE/10/9/1/Vol.143) meant for the recognition of the qualifications of Mr. Peter Soita Shitanda. The letter is signed by Professor David K. Some, the Commission Secretary and Chief Executive. That letter indicated that Mr. Soita Shitanda's degree of Bachelor of Business Administration (BBA) is not recognized by the Commission. The letter is in response to Mr. Shitanda's application dated 21.1.2013. However, according to DW9, the returning officer, Mr. Shitanda presented a different letter which recognized his qualifications and he was cleared to contest the position of Governor for Kakamega County. What is the effect of the letter signed by Professor David Some? Was it replaced by another letter? That is why I do state that there is need for structured process of equating and authenticating of foreign qualifications. My view is that such a process should be done at least two weeks before the nomination date. The process of authenticating and equating foreign institutions and qualifications ought to be minuted and should not be transacted through mere letters.

There is also the IEBC Dispute Resolution Tribunal that is meant to deal with nomination disputes. The manner in which those disputes were settled leaves a lot to be desired. There were over 30 complaints. All of them were heard in one day and decisions were made the following day. No wonder the petitioner herein was only given four minutes to present her complaint. Such a process cannot assist the IEBC in solving complaints arising from the nomination process. The IEBC should ensure that it gives the Tribunal ample time to deliberate on the complaints so that the complainants can adequately explain their cases and the Tribunal consider those complaints adequately. Section 74 of the Election Act gives the IEBC 7 days to settle nomination disputes. That calls for proper planning by the IEBC so that prospective candidates are not unfairly excluded from the elections. The IEBC should open its doors and listen to the prospective candidates. The petitioner herein had her qualification equated to a degree on the 4.2.2013. The High Court had the benefit of seeing the letter equating the petitioner's qualifications and did overturn the decision of the IEBC Tribunal. Had the process been started earlier, the contention that the ballot papers had already been printed could not have arisen.

### **8. Was the election free and fair.**

In the case of **BESIGYE V MUSEVENI** the court emphasized on the need for free and fair elections and

sumarised it as follows:-

*“To ensure elections are free and fair there should be sufficient time given for all stages of the elections, nominations, campaigns, voting and counting of votes. Candidates should not be deprived of their right to stand for elections, and the citizens to vote for candidates of their choice through unfair manipulation of the process by electoral officials. There must be a leveling of the ground so that the incumbents or government ministers and officials do not have an unfair advantage. The entire election process should have an atmosphere free of intimidation, bribery, violence, coercion or anything intended to subvert the will of the people. The election procedures should guarantee the secrecy of the ballot, the accuracy of counting and the announcement of results in a timely manner. Election Law and guidelines for those participating in elections should be made and published in good time. Fairness and transparency must be adhered to in all stages of the electoral process. Those who commit electoral offences or otherwise subvert the electoral process should be subjected to severe sanctions. The Electoral Commission must consider and determine election disputes speedily and fairly.”*

There were six candidates who vied for the position of Governor. The petitioner was the only independent candidate but she never participated in the elections. None of the candidates filed a petition against the winner. The petitioner had no agents in all the polling stations and at the tallying centre and therefore cannot fault the election exercise and its results. There are no complaints that were filed with the police or the IEBC relating to the manner in which the elections were conducted. It is clear that since the petitioner was not one of the candidates she had no agents in any polling station or at the tallying centre. I do find that there being no complaints from those who participated in the election, the election was free and fair and no election malpractices were reported to the police. PW4 who is a lawyer by profession could not give the court the Occurrence Book Number for his complaint on the allegations of bribery.

The voters in Kakamega expressed their will and there is no evidence that some of them were barred from voting. The voter turnout of 82.198% does prove that the election was properly conducted and the voters did cast their votes freely. The 1<sup>st</sup> respondent garnered 45% of the total number of registered voters and 56% of the total number of valid votes cast. The results show what the majority of voters in Kakamega County wanted. It expresses their combined will and the court should not interfere with the exercise of sovereign power by the Kakamega voters.

### **Final determination**

The upshot is that the petitioner has not provided enough evidence to warrant the nullification of the election. The petitioner did not participate in the election and her right to participate in the election cannot override the rights of the 468, 146 voters. The huge voter turnout does reflect the Will of the people. The petitioner has not proved that there were election malpractices committed by the 1<sup>st</sup> respondent. No report was made to the police. The petition was premeditated and was bound to be filed. Evidence was planned in advance whereby the petitioner's campaigners were given spy watches to spy on the candidates. None of the campaigners turned spies managed to capture any of the candidates giving out money to voters. The election was free and fair and it should not be nullified. The petition is hereby dismissed.

### **9. Who should bear the costs.**

This petition was bound to be filed. It did not matter who won the elections. The petition was given blessings by the 4<sup>th</sup> respondent on the 20.2.2013 when the consent was signed in court. The 4<sup>th</sup> respondent gave its permission to the petitioner to file an election petition after the conclusion of the election. I am certain that had Mr. Soita Shitanda won the election the petitioner would have raised the issue of his qualifications. I am not sure whether the spy watches were directed at the other candidates as they were to the 1<sup>st</sup> respondent. The petition has also brought in the 1<sup>st</sup> and 2<sup>nd</sup> respondent who had nothing to do with the consent. The two respondents have had to incur legal expenses as a result of that

consent. I do find that the 4<sup>th</sup> respondent should bear the costs of the petition. The cost is assessed at a maximum of KShs.5 million to be shared equally between the petitioner on the one hand and the 1<sup>st</sup> and 2<sup>nd</sup> respondents on the other hand. I do further order that the security deposit be released to the petitioner less KShs.50,000/= to be paid to Musa M'Mbwana Nandwa Advocate being his costs for interpreting the two CDs.

I wish to acknowledge the dedication and industry of counsels for all the parties herein. To them I do thank you for your decorum and utmost competence.

**Delivered, dated and signed at Kakamega this 13<sup>th</sup> day of September 2013**

**SAID J. CHITEMBWE**

**J U D G E**