



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(CORAM: HON. JUSTICE RICHARD MWONGO, PRINCIPAL JUDGE)

ELECTION PETITION NO.1 OF 2013

**IN THE MATTER OF THE CHALLENGE OF THE VALIDITY OF THE NAIROBI COUNTY
GOVERNOR ELECTIONS, 2013**

AND

**IN THE MATTER OF ARTICLE 1 (1), (2); 2(2);3(1); 4(2); 10; 21(1); 22(1); 23; 38;(3)(C); 47 92);
48; 81 (a); & 82 (2) (b); 84;86;87 (2); & (3); 88(5); 165 (3) (a) and (e); & 180 (1)**

OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTION 75 & 80 OF THE ELECTIONS ACT, 2011

AND

IN THE ELECTIONS ACT, 2011 (ACT NO.24 OF 2011) AS AMENDED

AND

**IN THE MATTER OF LEGAL NOTICE NO.128 OF 2012, THE ELECTIONS (GENERAL)
REGULATIONS, 2012**

AND

**IN THE MATTER OF LEGAL NOTICE NO.126 OF 2012(THE ELECTIONS (REGISTARTION
OF VOTERS) REGULATIONS, 2012**

AND

IN THHE MATTER OF LEGAL NOTICE NO.44 OF 2013

AND IN THE PETITION BY

FERDINARD NDUNG’U WAITITU.....PETITIONER

VERSUS

THE INDEPENDENT ELECTORAL & BOUNDARIES

COMMISSION (IEBC).....	1 ST RESPONDENT
ISAAC HASSAN (RETURNING OFFICER OF THE NATIONAL TALLYING CENTRE).....	2 ND RESPONDENT
THE NAIROBI COUNTY RETURNING OFFICER.....	3 RD RESPONDENT
EVANS ODHIAMBO KIDERO.....	4 TH RESPONDENT
JONATHAN MWEKE.....	5 TH RESPONDENT
THE HON. ATTORNEY GENERAL.....	6 TH RESPONDENT
THE DIVISIONAL COMMANDING OFFICER (DCIO) GIGIRI POLICE STATION NAIROBI.....	7 TH RESPONDENT
THE DIVISIONAL COMMANDING OFFICER (DCIO) KAYOLE POLICE DIVISION NAIROBI.....	8 TH RESPONDENT
THE INSPECTOR- GENERAL OF THE NATIONAL POLICE SERVICE.....	9 TH RESPONDENT

JUDGMENT

BACKGROUND

- Nairobi County is listed as County Number 47 under the First Schedule of the Constitution of Kenya, 2010. It registered the highest number of voters amongst all counties in Kenya. With a voter population of 1,778,903 of the 14,337,399 registered voters country-wide, this constituted over twelve percent of the national registered voting population in the 2013 national elections. The county is also home to the capital city of Kenya, which is also the nation's largest city in Kenya, and one of the most important in the eastern, central and southern Africa region.
- All these factors, and the fact that the election of 4th March, 2013, was the first election for the County, formerly administered as an extra-provincial district, made it inevitable that the County election for Nairobi would be extremely hotly contested. In addition to the Petitioner and the 4th Respondent, ten other candidates were in the Governor's race.
- After the elections of 4th March, 2013, the Interim Electoral and Boundaries Commission (IEBC) (the 1st Respondent), returned Evans Odhiambo Kidero (the 4th Respondent) and Jonathan Mweke (the 5th Respondent) as the winners. They were declared as Governor and Deputy Governor-elect, respectively. The recorded result was as follows:

a. Alice Chepkurui Ng'ok	-	3,823 Votes
b. Eric Mokua Arita	-	4,068
c. <i>Evans Odhiambo Kidero</i>	-	692,483
d. <i>Ferdinand Ndung'u Waititu</i>	-	617,839
e. Geoffrey Thuku Kobia	-	5,314

f. Jimnah Mwangi Mbaru	-	52,084
g. Joseph Mwangi Muchunu	-	1,725
h. Philip Mwala Kisia	-	5,162
i. Richard Kavemba Mutinda	-	7,490
j. Wanyiri Kihoro	-	2,539

On 13th March, 2013, the 1st Respondent published **Gazette Notice No. 3155“Declaration of Persons elected as Governors and Deputy Governors”**, containing the outcome.

- Aggrieved by the results, the Petitioner filed the petition herein under the provisions of Article 86, 87(2), 88(5), 165(3)(a) and (e) of the Constitution and Sections 75 and 80 of the Elections Act, No. 24 of 2011. It is against the IEBC as 1st Respondent; Isaac Hassan, the National Returning Officer, the (2nd Respondent); the Nairobi County Returning Officer (3rd Respondent); the elected Governor and his running mate (as 4th and 5th Respondents); the Attorney General (6th Respondent), the Divisional Commanding Officer (DCIO) Gigiri Police Station (7th Respondent), the Divisional Commanding Officer (DCIO) Kayole Police Division (8th Respondent), and the Inspector-General of the National Police Service (9th Respondent).
- The Petition was filed simultaneously with a Notice of Motion application seeking various orders by way of interlocutory relief. At the time of filing suit, Judges of Election Courts had not been duly designated by the Chief Justice under the Elections Act. **Rule 6 (1),(2) and (3) of the Elections (Parliamentary and County Elections) Petition Rules, 2013**, made under the **Elections Act No 24 of 2011**, requires petitions to be heard by such Elections Courts.
- Accordingly, when the matter came up before Lady Justice Mumbi Ngugi of the High Court’s Constitutional Division, objections were raised as to whether the court had jurisdiction, and whether the petition was filed within the requisite timeframe. The learned Judge ruled on 21st March, 2013, that the petition was properly filed within time. However, she ordered that it should be determined in accordance with the Elections Act and the Elections Petition Rules, 2013.

PRELIMINARY MATTERS

- Elections Courts were first gazetted on 19th April, 2013. The matter came before me on 10th May, 2013 for a status conference. Directions were issued for completion of filing of pleadings. In addition, two applications, one by the 2nd and 3rd Respondents to strike out the petition and another by the Petitioner seeking to file seven additional depositions, were set for hearing on 23rd May, 2013. Further, a mention was fixed for 17th May, 2013, to confirm compliance with directions. A Pre-trial conference was fixed for 10th June, 2013.
- By a ruling dated 10th June, 2013, the court allowed the 2nd and 3rd Respondents’ motion to the extent only of striking out prayers A, F and H of the Petition. Paragraphs **17,18,19,20,21,22,23** and 24 of the affidavit of Moses Muratha Kamau in support of the petition were also struck out. Further, the court dismissed the Petitioner’s motion seeking admission of additional evidence in support of the petition through the affidavits of seven proposed witnesses.
- At the Pre-trial conference held on 10th June, 2013, the parties agreed on the conduct of the outstanding proceedings. The hearing of the trial was scheduled for 25th -27th June, 2013. A daily programme was mutually agreed allocating each party a time-bank for presenting their case. A party would be debited any time spent in prosecuting their client’s brief.
- The hearing commenced as scheduled on 25th June, 2013. The Petitioner was represented by Mr. Kinyanjui, who had earlier appeared with M/s Miller, Wena and Njenga Mwangi. Counsel indicated that he would call the following four witnesses whose depositions had been filed: the Petitioner, Dr. Edward Waweru Chege, Moses Muratha and Ibrahim Ahmed. Ultimately, the

Petitioner closed his case after only he and Moses Muratha had testified. The court determined, pursuant to Rule 12(2) (c) of the Election Petition Rules, that the evidence of the uncalled witnesses would remain on record as evidence in chief. However, in absence of cross examination, such evidence would be affected as to its relevance, materiality and weight.

11. The 1st, 2nd and 3rd Respondents were represented by Mr. V. Nyamodi and Mr. J. Okonjo. They indicated they would call the following witnesses whose depositions had been filed: Fiona Nduku Waithaka, Teresia Wanjiru Mwai, Joseph Leboo Masindet, Steve Biko Roy, Pamela Wandeo, Wycliff Odongo Odoni and Josephine Anzemo Kivuti. However, after the re-examination of their first witness, Fiona Waithaka, the 1st -3rd Respondents closed their case. The court determined that, subject to where limited cross-examination was permitted by the court, the untested evidence of the Respondents' uncalled witnesses was to be treated in the same manner as the evidence of the uncalled Petitioner's witnesses.
12. The 4th and 5th Respondents were represented by Prof. Ojienda, who appeared together with M. Okoth, M/s Mugambi, Katiku and Nyamunga. The following witnesses testified on behalf of these Respondents: Abdillahi Hussein, Vincent Mujenyi Omollo, and Dr. Evans Odhiambo Kidero. Twelve other witnesses who were due to give evidence on behalf of the 4th and 5th Respondents were not called. Their evidence was to be treated in the same manner as that of the other uncalled witnesses.
13. Although sued on behalf of the 6th - 9th Respondents, the Attorney General did not participate at all in these proceedings.
14. During the hearing of the Petition, the court dealt with several applications, and issued rulings as follows:
 - a. A ruling dated 10th June 2013, on two applications; first by the 4th and 5th Respondents dated 8th May, 2013 seeking to strike out the petition; and a second application dated 10th May, 2013 by the Petitioner seeking to file additional evidence through the affidavits of seven witnesses. The court disallowed petitioner's motion, with costs. The 4th and 5th Respondents' motion was also dismissed except to the extent set out by the court, and some prayers were expunged from the petition and some paragraphs deposed by Moses Muratha Kamau were also expunged.
 - b. A ruling dated 26th June, 2013 that emanated from an objection during the cross-examination of Fiona Nduku Waithaka, RW1. The 1st-3rd Respondent's Counsel objected to the line of questioning by Counsel for the Petitioner. The court upheld the objection and gave directions.
 - c. A ruling delivered on the 26th June, 2013, emanating from the 4th and 5th Respondents application to have the affidavits of two of the petitioner's witnesses, namely, Dr. Edward Waweru Chege and Ibrahim Ahmed, expunged for failure to avail them for cross-examination. The Court declined to strike out the affidavits of the witnesses.
 - d. A ruling dated 27th June, 2013 on an application by the petitioner to stay proceedings pending an appeal of the court's ruling delivered on the 26th June, 2013 as regards the objection. The court dismissed the application with costs.
 - e. A ruling on 27th June, 2013 on an oral application by the petitioner seeking to determine the sequence of how the Respondents witnesses would testify. The application was dismissed with costs.
 - f. A ruling on 28th June, 2013 on the petitioners' application seeking to cross-examine three of the 1st-3rd Respondents' witnesses. The court issued directions as to the parameters of cross-examination. Further, the court issued orders as to recount and scrutiny.
 - g. On 9th July, 2013, the court delivered a ruling on the petitioner's application as regards the ongoing scrutiny. The application was dismissed with costs.
 - h. On 17th July, 2013, the court issued directions as to further scrutiny and recount.

15. The hearing concluded with highlights of written submissions on **7th August, 2013**, as agreed by consent of the parties.

The prayers sought by the Petitioner in the petition are as follows (prayers A, F and H having been struck out):

A. “.....

B. ***A declaration do issue that EVANS ODHIAMBO KIDERO, the 4th Respondent herein, and JONATHAN MWEKE the 5th Respondent herein, whose election is questioned, were not validly elected on March 4th 2013 Nairobi County Governor general election as the Nairobi County Governor and Deputy Governor respectively.***

C. ***A declaration do issue that EVANS ODHIAMBO KIDERO, the 4th Respondent herein, and JONATHAN MWEKE the 5th Respondent herein, whose election is questioned, was wrongfully returned by the 3rd Respondent as the Nairobi County Governor and Deputy Governor respectively.***

D. ***A declaration do issue that the degree and extent of electoral malpractices perpetrated by, and/or attributable to the agents of the 1st Respondent in the conduct of the Nairobi County Governor election on March 4th 2013 invalidate the said election.***

E. ***A declaration do issue that the degree and extent of electoral malpractices perpetrated by, and/or attributable to the agents of the 1st Respondent in the conduct of the Nairobi County Governor election on March 4th 2103 were in breach of, and violated Article 86 of the Constitution.***

F.

G. ***An order cancelling the certificate of declaration of results of County Governor of Nairobi County election, 2013, Form 38 issued to the 4th Respondent, EVANS ODHIAMBO KIDERO, and the certificate of declaration of results of Deputy County Governor of Nairobi, County election, 2013 Form 38 issued to the 5th Respondent.***

H.

I. ***An Order do issue for the conduct of a fresh election of the Nairobi County Governor within the stipulated period.***

J. ***Costs be awarded to the Petitioner.***

K. ***Alternatively to Prayer J above,***

a. ***An Order be made on the total amount of costs payable in the Petition;***

b. ***An Order specifying the persons by and to whom the costs shall be paid.***

L. ***An Order do issue for the forthwith release of the Deposit of Security for Costs paid into the Court by the Petitioner in furtherance of Section 78(5) of the Elections Act, 2011.***

M. ***Any other relief and redress that this Honourable Court may deem expedient in the course of its determination of this Petition.”***

THE ISSUES FOR DETERMINATION

16. As agreed at the status conference, counsel for the parties on 10th June, 2013, framed the following issues for determination:

1. ***Whether the Nairobi County Governor election was conducted in accordance with the principles laid down in the Constitution and the electoral law;***

2. ***Whether the results of the Nairobi County Governor election were announced through a valid Form 36;***

3. ***Whether the 4th Respondent obtained highly inflated and non-existent votes;***

4. *Whether the Nairobi County Governor election was marred by the alleged electoral malpractices;*
5. *Whether the alleged electoral malpractices invalidated the Nairobi County Governor election;*
6. *Whether the 4th and 5th Respondents were validly elected as the Governor and Deputy Governor respectively; and*
7. *Who is to bear the costs of this Petition and to what proportion.*

THE PETITIONER'S CASE

17. At the hearing of the Petition, Mr. Kinyanjui, for the Petitioner made an opening statement. He said that the Petition touches on the validity of the elections held on 4th March, 2013, and that it implicates the voting that took place via the forms 35 and 36. Further, that the election also implicates the validity, transparency and fairness of the conduct of the election. According to him, he would demonstrate that there was contravention of **Article 86** of the **Constitution**.

18. Counsel also stated that the Petitioner would show that the election was riddled with unverifiable and contradictory data. Profoundly, he said he would demonstrate totally fictitious results in many electoral areas. The Petitioner also sought to invalidate the forms 35 and 36 employed by the 1st - 3rd Respondent. He invited the court to question what is and what is not a valid form 35. Counsel stated that the Petitioner sought to inquire:

- a. *Can a form 35 from a polling station that is undated by the Presiding officer constitute a valid form 35. Petitioner will query; at what date can it be said that the declaration of results in that form were made, if at all. Petitioner will also show that even if dated by Presiding Officer, can the form be valid if given a different date;*
- b. *Can a form 35 that is on the face of it clearly tampered with without any countersignature of the apparent changes on it be a valid form 35;*
- c. *Can a form 35 that has inconsistent data within itself be a valid form 35;*
- d. *Can a form 35 that has no Presiding Officer who is indicated to have signed it be valid;*
- e. *Can a form 35 whose data is contradicted by the data in that areas' form 36 be valid;*
- f. *Can the results emanating from such glaring infractions be valid in declaring results."*

19. The Petitioner sought to prove that all the answers to the above questions were in the negative, thus, that the validity of the Nairobi Governor elections would stand naked as having failed to meet the various legal thresholds.

20. Mr. Kinyanjui stated that the Petitioner also sought to explain that there is a legitimate expectation that stems from **Article 86 of the Constitution, The Elections Act, No. 24 of 2011** and **The Elections (General) Regulations Legal Notice 128 of 2012** (hereinafter the Regulations). It was an expectation that all form 35's emanating from all the polling stations will:

"(a) be free from typographical errors;

(b) have a Presiding Officer who can be held to account for the results from that station;

(c) have a deputy presiding officer who can corroborate the contents of that form 35;

(d) contain data that meets the statutory threshold."

21. Counsel also averred that the legitimate expectation emanates from the form 36. He stated that he would focus on the form 36 of the 17 Constituencies and the specific form 36 for Nairobi County.
22. The evidence of the Petitioner, Ferdinand Waititu, PW1, was contained in his affidavit sworn on **11th March, 2013**. He said he was a Member of Parliament in the immediate past Parliament, and contested this election on a TNA (The National Alliance) Party ticket. His running-mate was Mr. Robin Achoki. He was aware that the party was required to and did appoint a County Chief Agent and Constituency and Ward agents.
23. The Petitioner alleged that there were breaches of law during the elections. He stated that although he was the most popular candidate for the Governor's post, the 3rd Respondent's Returning Officer purportedly returned the 4th Respondent as the duly elected Governor. He said he believed the 4th and 5th Respondents were invalidly declared the winners. Such belief was based on his scrutiny of Form 36 which he annexed as "FW5". That form was neither executed nor dated by the 3rd Respondent. In the circumstances, the Petitioner averred, no valid declaration of results had ever been made.
24. The Petitioner also contended that Mr. Oswago, the Chief Executive Officer of the 1st Respondent, had improperly employed election clerks and polling officers. These included two of his own daughters who aided and favoured the 4th Respondent to win the election.
25. The Petitioner also alleged that there was double voting. The evidence was that a voting clerk known as Susan Kathure was arraigned in the Chief Magistrates court in Nairobi, Criminal Case **No. 324 of 2013**. She had issued two ballot papers for the Governor's election. The second accused in that case, Samuel Ngomali, was charged with possession of two ballot papers and was convicted on his own plea of guilt. The Petitioner annexed the charge sheet as exhibit "FW6". He asserted that these evidenced a contravention of the law, in particular, the one-man-one vote principle. Accordingly, any such illegal votes to the benefit of the 4th Respondent were not legally capable of being tallied. He argued that this happened in multiple polling stations perceived to be the 4th Respondent's political strongholds.
26. In addition, the Petitioner alleged that in Langata Constituency, Karen Ward at St Mary's Primary School, the total number of registered voters was officially indicated as 4,059 voters yet the total votes cast were 4,510. He annexed a copy of the voting returns for Langata Constituency as "FW7". To him, this proved that there was an excess of votes cast against the registered voters.
27. Finally, the Petitioner complained that the 3rd Respondent failed, neglected or was unable to secure the ballots at Westlands Constituency. He said that election materials were scattered and some electors found the same in Kitisuru and Ruai areas of Nairobi. He said he believed that election materials were secretly accorded to agents of the 4th Respondent. This was done through election clerks and officials from one ethnic group associated with the 1st Respondent's CEO, who favoured the 4th Respondent. The Petitioner annexed photographs of elections materials allegedly found in Ruai and Kitisuru as exhibit "FW9". The photographs were allegedly taken by the Petitioner's electors.
28. In cross examination by Prof. Ojienda, the Petitioner said that though he was the most popular candidate, he was surprised by the results, based on his interpretation of what was happening on the ground. He admitted that there was no way to verify either opinion polls or the assertion of his popularity in the County.
29. With regard to exhibit "FW5", Form 36, the Petitioner admitted that his Chief Agent, Dr. Edward Waweru Chege was present when the similar form 36 in Respondent's bundle was signed. Shown the Respondent's Bundle of documents at page 256 marked "EOK 7", he admitted that it was a form 36 duly signed and stamped by the 1st Respondent. The form 36 in his own bundle, marked "FW5" was however an unstamped and unsigned version. He also admitted that the two

forms 36s, the one in his bundle and the other in the 4th Respondent's bundle "look the same", except that his was unsigned.

30. The Petitioner also argued that at the time when his Chief Agent, Edward Waweru, was signing form 36 in the 1st Respondent's bundle, the agent protested in writing. This was through a letter exhibited at page 113 of Petitioner's bundle of documents. That letter is marked "EC3" and is annexed to Dr. Edward Chege Waweru's supporting affidavit. It is referred to in paragraph 31 of his affidavit as follows:

"I immediately did a letter dated March 7th, 2013 to the 1st Respondent to protest the validity of the said results announced by the 3rd Respondent in favour of the 4th Respondent herein, and to date the 1st and 3rd Respondent have not acted to notify the Petitioner of the position in respect of the stated demand, necessitating this Honourable Court's intervention."

31. However, Dr. Edward Chege was not availed by the Petitioner for cross-examination. That would have given clarity on the issues of whether he signed the form 36, and at the same time allegedly protested the results therein in a letter. Further, he could have clarified why he did not indicate his protest in the form itself.

32. The evidence of Moses Muratha Kamau, PW2, was contained in his affidavit in support of the Petition. He was a contestant for the County representative position for Kitisuru Ward under the TNA party ticket. The court, in its ruling of **10th June, 2013**, had struck out paragraphs 17 – 24 of his affidavit. The reason was that they were relevant only to the Kitisuru Ward and not to the Nairobi County Governorship dispute.

33. Moses Kamau stated that he received calls from the party agents complaining that they had been thrown out of the polling stations. The agents of his opponents were, however, allowed to remain inside. He indicated the agents thrown out as: Samuel Mungai, one Daisy, one Ndungu and a Florence Wambua. He said he spoke to a TNA principal agent at Loresho, one Mrs. Ann Wambui, who replaced Ndungu with a Mr. John Gitau.

34. Further, he said that the polling stations affected by the removal of agents were Loresho Primary School, and Lower Kabete Polling stations.

35. Finally, Mr. Kamau stated that he believed that the 4th Respondent could not have won a ***"true contest of voters fairly and without interference from the officers of the first Respondent in Westlands Constituency who I have stated who deliberately and consciously locked out the Petitioner's agents as the voting was going on"***

36. In cross examination by both Prof. Ojienda and Mr. Okonjo, Mr. Kamau said he did not know the telephone number of Rachel Wambui. He also admitted that none of the agents who he had named as having been thrown out of the polling stations, had sworn affidavits alleging such action. Nor had any of the persons Mr. Kamau had allegedly telephoned concerning the events or those he had named as having replaced those allegedly thrown out.

37. The Petitioner's final witness, Ibrahim Ahmed swore an affidavit in support of the petition on **11th March 2013**. He states that he is a member of the Alliance Party of Kenya (APK). He was the running-mate of Jimnah Mbaru, the APK Party of Kenya contestant for the Nairobi County Governor election.

38. Mr. Ibrahim stated that he was a registered voter, and had checked his status on the IEBC website. However, when he went to vote at St. Teresa's Boys Primary School in Kamukunji Constituency, his name was not on the list of voters. That notwithstanding, he cast his vote. He noted that there were other people casting their votes, yet their names were not on the polls register.

39. The witness averred that he did not believe that the 4th Respondent validly won the election. Further, that he noted that the 1st Respondent's daughters Samantha Oswago and Khadija Oswago were employed as Tallying Clerk at the Constituency Tallying Centre and Presiding Officer at New Pumwani Primary School Polling Station, respectively. This had tainted the validity of the elections in the County.
40. However, this witness was not availed by the Petitioner for cross-examination and his evidence remains un-tested.

THE 1ST, 2ND & 3RD RESPONDENT'S CASE

41. The 1st – 3rd Respondents denied all the allegations in the petition through their response filed on **9th May, 2013**. They denied any electoral malpractices, except in the case of a voter Samuel Ngomali Muema. They explained that that voter was found at Soweto Social Hall in possession of two ballot papers for the Governor position. The Respondents asserted that that voter did not cast the two votes. Infact, he was found with them and convicted. They also asserted that the petitioner's agent Edward Chege Waweru, verified and signed form 36 after having agreed with the vote tally, and therefore there were no inflated, fictional or non-existent results.
42. With regard to allegations of unsecured ballot papers, the 1 – 3rd Respondents asserted that some unused ballot papers were found by a nun who notified the police. They were established to be from St. Martins Primary School polling station. The same were taken to Gigiri Police Station for safekeeping. The Respondents also denied any unlawful disclosure of information or irregular assistance to the 4th Respondent by their officer.
43. With regard to the appointments of the daughters of the IEBC Chief Executive Officer, the Respondents asserted that the recruitment responsibility was vested in the Human Resources Officer. They further denied any unfair practices or any wrongful effect on the elections results occasioned by the two daughters of the Chief Executive Officer.
44. The allegations as to the Petitioner's agents, who were allegedly locked out or thrown out of the polling centres, were denied by the Respondents. They averred that no such reports were made to any of the IEBC officials. They admitted to only one case of agents being removed from a polling station. This was at Westlands Primary School polling station. There, the agents of Wiper Democratic Movement (WDM) were denied access because they lacked letters of appointment.
45. At the hearing, three deponents who had filed affidavits in support of the 1st, 2nd and 3rd Respondents were cross-examined and re-examined. These were Fiona Nduku Waithaka (RW1), the County Returning Officer for Nairobi County; Joseph Leboo Masindet (RW2), the Constituency Election Co-ordinator for Kamukunji Constituency; and Pamela Wandeo, (RW3) the Constituency Election Co-ordinator for Westlands Constituency.
46. Fiona Nduku said that there were no or no material irregularities in the conduct of the Nairobi County Governor elections. She said forms 36 for each Constituency emanated from form 35s for each polling station. At the County tallying office she received 17 Constituency Returning Officers. Each had a form 36 which she carefully scrutinised. She then compiled County form 36 by transposing the information from the Constituency forms 36.
47. She said that the Petitioner's allegation that he was the most popular candidate was speculative and un-objective. She discounted the unsigned form 36 (FW5) annexed to the Petitioners affidavit. According to her, the correct form 36 was that which she signed. It was attached to the 4th Respondent's affidavit as "EOK 7". She stood by the declarations made in the said form 36.
48. She asserted that Samantha Oswago and Khadija Oswago, the daughters of IEBC Chief Executive Officer, applied for jobs with the 1st Respondent. Since they were qualified, they went through

interviews and were appointed in the usual manner.

49. In response to the affidavit of Edward Chege Waweru, she said the Governor's results were tallied at the County Tallying Centre. Candidates and their agents were allowed to witness the exercise. The results were tallied in form 36 and verified by all present. Edward Chege was present and agreed with the results and signed form 36. After all agents had signed, she issued form 38 declaring the 4th Respondent the winner.
50. The evidence of Joseph Leboo Masindet, RW2, was brief. It was about the hiring of the two daughters of the IEBC Chief Executive Officer. In his affidavit he had annexed the application forms and certificates of Samantha Ochieng Oswago and Khadija Oswago. He stated that the two had responded to a newspaper advertisement placed on November, 2012. He and his returning officer colleagues scrutinised the applications, amongst those of other applicants. Samantha and Khadija were shortlisted, interviewed, and hired.
51. Joseph Masindet said that Samantha was appointed as Deputy Returning Officer at Our Lady of Mercy Primary School polling station in Kamukunji Constituency. Khadija was appointed as a Returning officer at New Pumwani Primary School Polling Station in Kamukunji.
52. He said he was not aware at the time of their appointment, that the two were the daughters of the Chief Executive Officer of IEBC. Further, he received no complaints at any time about any acts of favouritism.
53. Pamela Wandeo, RW3, gave evidence in relation to Westlands Constituency. This is where the Petitioner claimed there were unsecured ballot boxes. Some were allegedly found scattered in various places. She denied allegations that the petitioner's agents were barred from polling stations in the Constituency. She stated that no complaints reached her about any agents being thrown out of polling stations, except in respect of a Wiper Democratic Party Movement (WDM) agent who had no appointment letters. She asserted that all forms 35 were availed to candidates and agents present, and they signed them. There was no complaint or request for re-tallying.
54. With regard to the alleged unsecured ballot papers, she made an admission in her affidavit. It was that the Presiding Officer at St. Martins Primary School Polling Station had forgotten to keep the unused ballot papers in the ballot boxes after the elections. They should have been placed inside the boxes together with other election materials after completion of the exercise, and then brought to the tallying centre. They were found by a nun who called the police. They went to the scene, collected the unused materials, and kept them at Gigiri Police Station. This, she said, did not mean there was any electoral malpractice.
55. She denied that unused ballots were stuffed or that the results for Westlands Constituency contained votes from unused ballots not cast by voters. She said the ballots found were unmarked, and none were counted. Thus, no candidate was favoured or prejudiced by that eventuality.

THE 4TH & 5TH RESPONDENT'S CASE

56. The first witness for these Respondents was Abdullahi Hussein, RW4. He was the Orange Democratic Movement Chief Party Agent for Kamukunji Constituency. He went round the various stations in Kamukunji. He kept in constant communication with the party agents. Once tallying was completed, he verified and confirmed the results as filled out in form 36 by the Returning Officer. They tallied with what was announced in forms 35. He signed form 36 in concurrence with the final results. He said there were no complaints in Kamukunji.
57. Vincent Mujenyi Omollo, RW5, testified next. He was the ODM Chief Agent for Westlands Constituency. He testified in Kiswahili although his affidavit was in English. His evidence was that the agents in the polling station assured him that the elections proceeded without any hitch. There were agents of other parties present during the entire voting exercise. At the tallying centre,

a gentleman who introduced himself as Moses Muratha Kamau entered accompanied by a gentleman he introduced as his lawyer.

58. According to Vincent Omollo, Moses Muratha attempted to interrupt the tallying process. He demanded an entire recount of votes in the polling stations. The IEBC officers advised him to follow the laid down procedures, but he remained adamant. There was confusion as he shouted loudly. This forced the police to order all persons out of the tallying centre except IEBC officials and Hon. Tim Wanyonyi. Tallying was stopped for a while. He saw police officers form a ring around the ballot boxes. After about ten minutes, calm returned and the security officers allowed everyone back in. The tallying continued, and Moses Muratha and his lawyer left.
59. This evidence was uncontroverted. Mr. Kinyanjui for the Petitioner did not cross-examine Vincent Omollo on the veracity of his evidence. What he elicited in cross-examination was a confirmation from Vincent Omollo that he understood English “*a bit*”, and that there was no certificate of translation of the affidavit. No submissions were made on that point.
60. I have carefully considered the oral and documentary evidence, and the pleadings and submissions of the parties in this case. I have also taken into account the various directions and rulings made during the course of the proceedings. In submissions, Counsel for the parties referred to forty five authorities. My failure to cite them all in this judgment is not out of disregard for counsels’ efforts, but due to their numerousness.
61. I turn to a discussion of the general principles which I think are applicable to the determination of election petitions, such as this one.

GENERAL PRINCIPLES FOR DETERMINATION OF ELECTION PETITIONS

62. The first principle is the sovereignty of the will of the people. This emanates from the **Article 1** of the Constitution, under which all power resides in the people. They may exercise it through their democratically elected representatives. **Article 38** and other constitutional provisions safeguard the peoples’ political rights of self expression.
63. This was well put by Majanja, J in **RICHARD KALEMBE NDILE AND ANOTHER VS PATRICK MUSIMBA MUSAU & OTHERS, MACHAKOS, HIGH COURT ELECTION PETITION 1 (CONSOLIDATED WITH PETITION NUMBER 7 OF 2013) [2013] eKLR** where he said:
- “Under our democratic form of government, an election is the ultimate expression of sovereignty of the people and the electoral system is designed to ascertain and implement the will of the people. The bedrock principle of election dispute resolution is to ascertain the intent of the voters and to give it effect whenever possible.”*
64. Thus, the question that will always be at the forefront of the court’s mind is whether the will of the people found expression in the results which are impugned.
65. As in this case, most petitioners present grievances to the intent that the outcome of the election is not an expression of the will of the people. The court has to keep in mind that the result declared in the election should only in exceptional circumstances be interfered with. The Constitution and electoral laws present the yardstick for such determination. The Supreme Court of India in the case of **JEET MOHINDER SINGH v. HARMINDER SINGH JASSI, AIR 2000 SC 256**, stated that:

“The Success of a candidate who has won at an election should not be lightly interfered with. Any person seeking such interference must strictly conform to the requirements of the law. Though the purity of the election process has to be safeguarded and the court shall be vigilant to see that people do not get elected by flagrant breaches of law or by

committing corrupt practices, the setting aside of an election involves serious consequences not only for the returned candidate and the constituency, but also for the public at large in as much as re-election involves an enormous load on the public funds and administration.”

66. The second principle, in my view, is that elections petitions are not ordinary civil suits governed by the Civil Procedure Act and Rules. The laws that govern settling of electoral disputes are enacted in accordance with **Article 87(1) of the Constitution of Kenya, 2010**. In recognizing this notion, the Court of Appeal in the case of **BENJAMIN OGUNYO ANDAMA vs. BENJAMIN ANDOLA ANDAYI, CIVIL APPLICATION NO. 24 OF 2013 (UR.11/13)** observed thus:

“In our view, as has been said time and again, Election Petitions form their own category and are neither controlled by Civil Procedure Act and Rules made thereunder, nor are they controlled by the Criminal Procedure Rules. They are neither Criminal nor Civil in nature. We may say there is an element of Public law in them but even that is not all correct. They are a class of their own.”

67. A corollary to that principle is that Election petitions are disputes in *rem* of great public importance, and therefore not ordinary suits. They should not be taken lightly and generalized allegations are not the kind of evidence required in such proceedings. Election petitions should be proved by cogent credible and consistent evidence. This was so held by Maraga J, (as he then was) in **JOHO VS. NYANGE & ANOTHER (2008) 3 KLR (EP) 500**.

68. The third principle is that, as in all litigation, a petitioner is bound by his pleadings. It is common that a petitioner will file a petition and will in the course of the proceedings veer away from the initial track. This puts the opponents into a difficult position in knowing what the real case they must answer is, and what it is the court must determine. The point was well put by Justice Kimaru in **MAHAMUD MUHUMED SIRAT V ALI HASSAN ABDIRAHMAN AND 2 OTHERS NAIROBI PETITION NO. 15 OF 2008 [2010] eKLR** where he stated that:

“From the outset, this court wishes to state that the petitioner adduced evidence, and even made submissions in respect of matters that he had not specifically pleaded in his petition. It is trite law that a decision rendered by a court of law shall only be on the basis of the pleadings that have been filed by the party moving the court for appropriate relief. In the present petition, this court declined the invitation offered by the petitioner that required of it to make decisions in respect of matters that were not specifically pleaded. This court will therefore not render any opinion in respect of aspects of the petitioner’s case which he adduced evidence but which were not based on the pleadings that he had filed in court, and in particular, the petition.”

69. The fourth principle is that irregularities and non-compliance with the electoral law will not necessarily lead to invalidity of an election unless they affect the result of the election. This was long ago recognized in the English case of **ISLINGTON WEST DIVISION CASE, MEDHURST V LOUGH AND GASQUET (1901) 5 O’M & H 120, 17 TLR 210, 230** where Kennedy J, held that:

“An election ought not to be held void by reason of transgressions of the law committed without any corrupt motive by the returning officer or his subordinates in the conduct of the election, where the court is satisfied that the election was, notwithstanding those transgressions, an election really and in substance conducted under the existing election law, and that the result of the election, i.e. the success of the one candidate over the other, was not, and could not have been, affected by those transgressions. If, on the other hand, the transgressions of the law by the officials being admitted, the court sees that the effect of the transgressions was such that the election was not really conducted under the existing election laws, or it is open to reasonable doubt whether these transgressions may not have affected the result, and it is uncertain whether the

candidate who has been returned has really been elected by the majority of persons voting in accordance with the laws in force relating to elections, the court is then bound to declare the election void. It appears to us that this is the view of the law which has generally been recognised, and acted upon, by the tribunals which have dealt with election matters.”

70. That principle is captured in **Section 83** of our **Elections Act, 2011**, which provides that:

“No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and that written law or that the non-compliance did not affect the result of the election.”

71. I think that to constitute a void election on account of non-compliance with the law, the evidence of irregularities and discrepancies in the election must be of such nature as to disclose through clear and weighty evidence, any one or more of the following:

- a. *An attempt to establish a winner otherwise than in compliance with the Constitution; and or*
- b. *An attempt to suppress, alter or undermine the will of the voters exercising their rights under Article 38 in such a manner as to affect the overall outcome of an election; and or*
- c. *A failure by or of the electoral system, or in the processes used therein, such as to constitute non-compliance with the general principles of the electoral system under Article 81 of the Constitution; and or*
- d. *Such clear and glaring flaws in the conduct of the elections as substantially render any of the aspirations of Article 86 (a),(b),(c) or (d) to be meaningless; and or*
- e. *That the non-compliance with the electoral law or regulations was substantial enough to, and did in fact, affect the result of the election;*

72. The fifth principle is the common legal precept that he who alleges must prove. This last principle relates to the burden and standard of proof. The burden of proof in election disputes has been a subject well elucidated. In the widely cited Tanzanian case, of **MBOWE vs. ELIUFOO (1967) EA 240**, the court held that:

“There has been much argument at the meaning of the term “proved to the satisfaction of the court. In my view it is clear that the burden of proof must be on the Petitioner rather than the Respondents because it is he who seeks to have this election declared void.”

73. As regards standard of proof, the court in the **MBOWE case (supra)** further stated that:

“And the standard of proof is one which involves proof to the satisfaction of the court. In my view these words in fact mean the same thing as satisfying the court. There have been some authorities on this matter and in particular there is the case of Bater v Bater (supra). That case dealt not with election petitions, but with divorce, but the statutory provisions are similar i.e. the court had to be satisfied that one or more of the grounds set out in S.99 (2) (a) has been established. There Denning, LJ in his judgment took the view that one cannot be satisfied where one is in doubt. Where a reasonable doubt exist then it is impossible to say that one is satisfied and with that view I quite respectfully agree and say that the standard of proof in this case must be such that one has no reasonable doubt that one or more of the grounds set out in S.99 have been established.”

74. In **JOHO vs. NYANGE & ANOTHER (2008) 3 KLR (EP) 500**, Maraga, J. (as he then was) said:

“The burden of proof in election petitions lies with the petitioner as he is the person who

seeks to nullify an election. While the proof has to be done to the satisfaction of the Court, it cannot be said that the standard of proof required in election petitions is proof beyond reasonable doubt. Like in fraud cases, the standard of proof is higher than on a balance of probabilities and where there are allegations of election offences a very high degree is required.” (Emphasis supplied)

75. Does the burden shift, and does it keep shifting? In **BRADY (INSPECTOR OF TAXES) V GROUP LOTUS CAR COMPANIES PLC [1987] 3 All E.R. 1050, 1059** Mustill, L.J, stated as follows:

“It is, however, submitted that the concept of a shifting burden has another meaning, relative to what is called the 'evidentiary burden of proof'. Although this term is widely used, it has often been pointed out that it simply expresses a notion of practical common sense and is not a principle of substantive or procedural law. It means no more than this, that during the trial of an issue of fact there will often arrive one or more occasions when, if the judge were to take stock of the evidence so far adduced, he would conclude that, if there were to be no more evidence, a particular party would win. It would follow that, if the other party wished to escape defeat, he would have to call sufficient evidence to turn the scale. The identity of the party to whom this applies may change and change again during the hearing and it is often convenient to speak of one party or the other as having the evidentiary burden at a given time. This is, however, no more than shorthand, which should not be allowed to disguise the fact that the burden of proof in the strict sense will remain on the same party throughout, which will almost always mean that the party who relies on a particular fact in support of his case must prove it.”

76. The Supreme Court of Kenya, in **RAILA ODINGA & OTHERS vs. THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & OTHERS, (SUPREME COURT ELECTION PETITION NO. 5 OF 2013) [2013] eKLR**, at para 195, held that:

“There is, apparently, a common thread in the foregoing comparative jurisprudence on burden of proof in election cases. Its essence is that an electoral cause is established much in the same way as a civil cause: the legal burden rests on the petitioner, but, depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting. Ultimately, of course, it falls to the Court to determine whether a firm and unanswered case has been made.” (Emphasis supplied)

77. This Petition, as I earlier stated, has the unique character of having been framed and filed as a constitutional petition under certificate of urgency. Given the foregoing and although the parties framed the broad issues for determination, it is essential to discuss them in light of the specific allegations of the Petitioner in the petition.

This is in line with the principle that a party is bound to his pleadings. The specific **allegations in the Petition** are summarised as follows:

1. **Allegation 1: Invalidity of Form 36.** This is highlighted in:

- Paragraph 5 – constituencies in Nairobi were not entirely stated or specified in the purported form 36 of the 1st Respondent
- Paragraph 20 – Failure of purported form 36 to comply with statutory requirements.

2. **Allegation 2 :Voter suppression;** highlighted in:

- Paragraph 7 - Petitioner’s electors’ right of enfranchisement to in a fair and objective election under **Article 38** without undue influence or unfair practices.
- Paragraph 11 – No proper announcement of results of Nairobi County.

3. **Allegation No. 3: Illegal appointment of IEBC officers:** highlighted in:

- Paragraph 13 & 15 - failure to avail a list of returning officers and deputy returning officers for each constituency to petitioner's political party in breach of **Regulations 3 (2)** and **4 (2)** of the Elections General Regulations 2012.
- Paragraph **14 & 16** non transparent procurement of returning officers and deputy returning officers in breach of **Regulations 3 (4)** and **4 (3)** of the Elections (General) Regulations 2012.

4. **Allegation 4: Breach of security of the custody of Ballot Papers, Ballot Boxes, IEBC Ballot Stamp & Ballot Box Seals;** highlighted in:

- Paragraphs 17 & 18 - Breach of **Regulation 59 (3)** the Elections General Regulations in that there was an act of a person casting more than one vote, resulting in invalidity of the election.
- Paragraph 24 Breach of **Regulation 81 (4)** in that 3rd Respondent failed to secure the ballots cast in Westlands Constituency in that elections materials were found discarded in various places.

5. **Allegation 5: Discrepancy in votes cast in Langata Constituency Karen Assembly, Ward St Marys School.** This was highlighted in:

- Paragraph 37 – The votes cast at St Mary's Primary School were 4,510 votes and were in excess of the total number of registered voters of 4,050. This thus invalidated the election result.

6. **Allegation 6: Locking out of duly appointed agents of the Petitioner's party (TNA) from polling stations, by 1st & 4th Respondents agents.** This was highlighted in:

- Paragraph 39 – The locking out was a calculated move by agents of 1st and 4th Respondents to illegally inflate the votes attributable to 4th Respondent whilst suppressing the voters of Petitioner.

78. As earlier stated, the Petitioner made out his case on the evidence of himself and that of Moses Muratha Kamau. He then closed his case. When their turn came, the 1st – 3rd Respondents called on Fiona Nduku Waithaka (RW1). They then closed their case. After the abrupt closure of the 1 – 3rd Respondents' case, the Petitioner applied to cross-examine, Teresia Wanjiru Mwai, Joseph Leboo Masindet and Pamela Wandeo, the 1st -3rd Respondents' uncalled witnesses.

79. The court in its Ruling of **28th June, 2013** allowed cross-examination of Joseph Leboo Masindet on the disputed issue of the appointments of IEBC officials. The cross-examination of Pamela Wandeo was allowed on the disputed issue of breach of security of ballot papers in Westlands constituency.

80. With regard to disputed ballots in relation to St. Mary's Primary School Polling Station in Langata Constituency, the court, *suo moto*, ordered as follows:

“That there shall be a partial scrutiny of votes limited to a recount and ascertainment of the number of votes each candidate obtained in the following polling stations and streams only:

Polling station: St. Mary's Primary School Code 001

Stream 1; Stream 2; Stream 3; Stream 4; Stream 5 and Stream 6.

That there shall be a scrutiny of all forms 36 from the 17 constituencies of the Nairobi County vis-a-vis the Form 36 of the Nairobi County to verify the entries of Constituency Form 36 to the County Form 36.”

All the parties' agents were allowed to observe the scrutiny exercise to be conducted by the

Deputy Registrar of the High Court.

81. Following the above order, the Deputy Registrar issued Scrutiny Report No. 1, on 11th July, 2013.

Table 1, below, drawn from **Scrutiny Report No 1**, shows a summary of the votes cast for the Petitioner and the 4th Respondent at Streams 1 – 6 of St. Mary's Primary School Polling Station.

TABLE 1

St. Mary's Primary School Polling Station Scrutiny Report No. 1: Summary

Stream	Waititu(Votes)	Kidero (Votes)	Total Number of votes cast	Total Registered voters	Valid votes cast
1	234	300	612	676	610
2	226	308	598	677	588
3	244	289	588	677	584
4	255	256	569	677	565
5	224	283	567	677	559
6	223	251	541	677	534
Totals	1,406	1,687	3,475	4,061	3,440

82. This report shows the verified total number of registered voters as 4,061 as against the total number of votes cast of 3,475. The total number of valid votes is 3,440. Scrutiny Report No. 1 also reported on the requested comparison of forms 36 for the 17 constituencies against form 36 for Nairobi County. The scrutiny revealed various discrepancies. The most glaring are as follows.

83. For Embakasi Central and Mathare Constituencies, **all** entries for **all** candidates' votes in Constituency form 36 and County form 36 did not tally. Thus, the Deputy Registrar was unable to verify the accuracy of results tallied for those two constituencies. The court dealt with this by issuing orders for a second scrutiny considering the situation.

84. A fuller summary and key observations from the scrutiny by the Registrar of form 36 for Constituencies and form 36 for the County is as follows:

- a. Constituency forms 36 and County forms 36 had the same particulars in all aspects for the following constituencies: Kibra, Kasarani and Embakasi East.
- b. The figures in Constituency forms 36 for the following Constituencies differed from county forms 36 in that the Constituency form or county form 36 had a blank for total valid votes or total number of votes cast. These were for Dagoretti North, Langata, Ruaraka, Embakasi West, Makadara and Kamukunji. In each case, however, the Registrar was able to verify the accurate figure respectively. Further, it was only in respect of Langata Constituency that the Petitioner had disputed the total registered voters as against total valid votes.
- c. The figures in constituency forms 36 for the following constituencies differed from county forms

<u>Embakasi Central Constituency:</u>								
Thawabu Primary School , Code 004, Stream 1		325	322	-3	Thawabu Primary School, Code 004, Stream 1	389	392	+3
Thawabu Primary School, Code 004, Stream 2		262	262	-	Thawabu Primary School, Code 004 Stream 2	427	426	-1
The Komarock School, Code 007, Stream 9	275	276	+1	The Komarock School, Code 007, Stream 9	307	305	-2	
<u>Mathare Constituency:</u>								
Mathare Youth Polytechnic, Code 002, Stream 1	87	87	-	Mathare Youth Polytechnic, Code 002, Stream 1	459	458	-1	
Daima Primary School, Code 006, Stream 2	180	186	+6	Daima Primary School, Code 006, Stream 2	378	371	-7	
Ndururuno Primary School, Code 011, Stream 2	429	435	+6	Ndururuno Primary School, Code 011, Stream 2	175	183	+8	
<u>Langata Constituency:</u>								

St. Mary's Primary School, Code 001, Stream 1	238	234	-4	St. Mary's Primary School, Code 001, Stream 1	298	300	+2
St. Mary's Primary School, Code 001, Stream 3	244	246	+2	St. Mary's Primary School, Code 001, Stream 3	291	289	-2
St. Mary's Primary School, Code 001, Stream 4	260	255	-5	St. Mary's Primary School, Code 001, Stream 4	252	256	+4
St. Mary's Primary School, Code 001, Stream 5	199	224	+25	St. Mary's Primary School, Code 001, Stream 5	283	283	-
TOTAL	2,499	2,527	+28	TOTAL	3,259	3,263	+4

88.From the outcome, it is clear that in the different streams there were gains and losses for both candidates. The vote amounts were small and well spread out amongst the candidates. This does not disclose a conspiracy or a deliberate effort to cause prejudice to any of the parties. More likely it shows inadvertent errors. The discrepancies do not affect the overall result of the election.

89.Scrutiny Report No. 2 was dated **24th July, 2013**. In the Central Embakasi Constituency, the 4th Respondent won the Petitioner in each stream. The only discrepancy noted was that there was “one vote for Kidero which had two marks” that was placed among the rejected votes.

90.In the Mathare Constituency recount, the following discrepancies were noted. At Mathare Youth Polytechnic Stream 1, one of Waititu’s votes was among Kidero’s votes. Kidero’s votes were reduced from 459 to 458. In Stream 7 of the same polling station Kidero’s votes were 550 and Waititu’s were 154. The Report records the major discrepancy as follows:

“The total number of Registered voters is 726, while the total votes cast are 737. The

votes cast are therefore more than the Registered voters.”

91. I will deal with the consequences of this finding later herein.

92. In Ndururuno Primary School polling station, the recounted ballots went up because there were 18 votes marked “*rejected*”, but which upon scrutiny were found to be valid. The effect was that Kidero’s votes went up by 8 from 175 to 183, and Waititu’s went up by 6 from 429 to 435.

93. For both Mathare and Embakasi Central Constituencies, the Registrar generated form 36s from the Constituency form 35s filed under **Rule 21**. The total valid votes for Embakasi Central Constituency as added up in court were 82,945. Of these, Kidero had 37,949 votes and Waititu had 41,195. All the other candidates’ combined votes were 3,801. The total valid votes for Mathare Constituency as added up in court were 68,547. Of these, Kidero had 36,669 votes and Waititu had 29,200 votes. All the other candidates’ combined votes amounted to 2,678 votes.

94. On the basis of the two scrutiny reports and the evidence so far considered, I am satisfied that there were some irregularities and discrepancies in some of the results and forms used. I will discuss how these are to be treated.

DETERMINATION

95. I turn now to a determination of the substantive allegations which underlie the issues in dispute in this matter.

Invalidity of County Form 36

96. It was admitted by Fiona Waithaka (RW1) that form 36 did not indicate the full names of the Embakasi Constituencies whose code numbers, 282 and 283, respectively, were however indicated. The form which was exhibited as “EOK7” in the 4th Respondents’ bundle was signed and stamped by her. She said the form 36 exhibited by the Petitioner at “FW5” was not the final signed copy.

97. Mr. Kinyanjui, at page 12 of his submissions, impugned those failures and the fact that form 36:

“has no voter percentage data, no total of registered voters for Nairobi County, lacks the actual total of valid votes cast for the election and has no total of rejected and spoilt votes in breach of Regulation 87(3) (a). It is thus invalid to convey accurate results being void ab initio” (Underlining added)

In support of this proposition he cited **BRAYHEAD LTD V. BERKSHIRE CC [1964] 1 ALL ER at 154**. He therefore submits that no valid declaration of results could be made.

98. **Regulation 87 (3) (a)** relied on by Counsel, provides as follows:

“The County returning officer shall upon receipt of the results from the returning officers as contemplated under regulation (1) –

a. ***Tally and announce the results for the presidential elections, elections for the county governor, senator and county women representative to the National Assembly;***” (Underlining added).

99. Clearly, this provision does not relate to the details suggested by Mr. Kinyanjui. **Regulation 87** relates to forms 37 and 38. The provision which relates to the matters Counsel refers to is **Regulation 83 (1) (c)**. Even then, the forms which are the subject of that detailed information are forms 34 and 35. These had not been impugned in the petition.

100. Form 36 is referred to in **Regulation 83 (1) (d)** and set out in the Schedule to the Regulations.

Under that Regulation, completion of form 36 is the responsibility of the *constituency* returning officer, not the county returning officer. The evidence of Fiona Waithaka was that there were 17 Constituency Forms 36 from which she tallied and completed her county form 36. This County form 36 is what is impugned by the Petitioner.

101. There is, however, a curious gap in the law. It is that there is no specific Regulation regarding the completion of form 36 by the *county* returning officer at the county tallying stage. In the result, the Petitioner cannot strictly rely on the law to criticise the manner in which it was filled.

102. With regard to the failure to include the full names of the two Embakasi constituencies, it is clear that each had a code. In addition, the results under each of the constituencies marked “Embakasi”, the codes are distinct and clearly indicated. Fiona Waithaka said code 282 is for Embakasi South and code 283 is for Embakasi North.

103. The failure to include “North” and “South” in form 36 cannot by any stretch of imagination form a basis to invalidate the results for the declarations made in these forms. Accordingly, I am not satisfied that the form 36 used by Fiona Nduku was so irregular as to be invalid for declaring the results.

104. To conclude this discussion on form 36, I adopt the remarks of Kimondo, J in **KAKUTA MAIMAI HAMISI V PERIS TOBIKO AND OTHERS NAIROBI ELECTION PETITION NO. 5 OF 2013 (UR)**, where he lucidly explained form 36 in relation to the *constituency* tallying exercise:

“All that should take place at the tallying centre is transposition of the results into a document which evolves into form 36....Form 36 in this case was a computer spreadsheet. The first column has a list of all the 65 polling centres and the candidates. The rows contain the scores for each candidate. The bottom row has the aggregate totals. It also reflects the total valid votes, rejected votes, total votes cast, total registered voters and percentage of voter turn-out. After the returning officer reads aloud the results from forms 35, the data clerks record them on a tallying sheet. The final tallying sheet becomes form 36. It is thus a manual process of transferring data from forms 35 to form 36.I am satisfied that the process can result in clerical errors due to the speed and flow of information. What is material is whether the final form 36 corresponds in all particulars with entries in part B of all the forms 35. It is not a static form: it is built as more and more entries are filled. That is the primary duty of the returning officer at regulation 83(1) (a) of the Elections (General) Regulations 2012. It is thus not entirely true that there were two forms 36. In reality, there is only one final and valid form 36 for Kajiado East constituency that evolved from forms 35” (Underlining added)

Voter Suppression of Petitioner’s electors

105. The Petitioner’s inclusion of this allegation was difficult to understand. He neither adduced any evidence regarding the allegation, nor did he make any submissions thereon. None of the parties dealt with it at any stage either. On this, therefore, the court cannot make a favourable finding for the Petitioner.

106. The only aspect capable of being considered is that relating to the allegation in paragraph 11 of the petition. It is about lack of a proper or valid announcement of the results. This aspect is dealt with fully in this opinion in relation to form 36.

Illegal Appointment of IEBC Officers and Influence on outcome

107. The Petitioner’s claim here concerned the irregularity of the appointment of Samantha and Khadija Oswago. He claimed they influenced the outcome of the election.

108. Joseph Masindet (RW3) gave detailed evidence concerning how the two ladies were appointed. He exhibited the newspaper advertisement inviting applicants. Their application forms were exhibited, as were their educational certificates. Masindet said he was involved in interviewing them, and that being qualified, they were duly appointed.

109. None of the evidence adduced by the Petitioner or obtained from the cross-examination of Joseph Masindet demonstrated either the illegality of their appointments or how the two ladies were unqualified. Nor did it show how they influenced the election to the Petitioner's prejudice. In his submissions, the Petitioner did not discuss this subject.

110. Based on the foregoing I am unable to make a finding that confirms the Petitioner's allegation.

Breach of Security of the custody of Ballot papers & Breach of Principal of one man one vote

111. This complaint concerned 1st Respondent's failure to secure election materials. This complaint was double pronged. The first prong was with regard to election materials strewn around, in breach of **Regulation 81 (4)** of the Regulations. That regulation provides:

1. ***"The presiding officer shall, as soon as practicable, deliver to the returning officer for the electoral area the ballot box containing the items listed under sub-regulation (2)."***

112. The items referred to under **sub-regulation 81 (2)** of **Regulation 81** include those under **Regulation 81 (1)**, namely:

- a. *Counted ballot papers which are not disputed*
- b. *Rejected ballot papers with the statements relating thereto*
- c. *Disputed ballot papers*
- d. *Rejected objected to ballot papers; and in addition the statements under **Regulation 78 and 79**, namely: a statement showing the number of rejected ballot papers (**Regulation 78**) and a declaration of the results (**Regulation 79**).*

113. The testimony availed by the Petitioner consisted of photographs of alleged marked ballot papers found in Kayole and Westlands Constituency. They are exhibited to his affidavit at "FW9". The person(s) who took the photographs were not called to give evidence, nor was any certificate by the maker produced. **Section 78** of the Evidence Act, **Cap 80** requires the maker to produce such certificate and to give evidence.

114. Pamela Wandeo, RW2 admitted that some unused elections materials were found by a Nun in Westlands Constituency. This was after the elections. The police were called and took the materials for safe custody and investigations. There was no evidence of breach of voter confidentiality. Nor is the court satisfied that any of the materials found included the materials mentioned under **Regulations 78, 79 or 81** of the Elections Regulations.

115. The second prong of this complaint alleged breach of **Regulation 59 (3)** which provides:

"No person shall cast more than one vote at any particular election."

116. The Petitioner's evidence was contained in exhibits "FW6" and "FW7" and in paragraphs 40 – 49 of his affidavit.

117. Exhibit "FW6" is a charge sheet in police case CR135/123/2013. In it, one Susan Kathure Mwabobia – an official of the 1st Respondent – is charged with issuing two ballot papers serial Nos. GV47-01274047 and GV47-0274048 for Governor's election. This was at Soweto Social Hall Embakasi. In Count II, one Samuel Ngomali is charged with being in possession of two ballot papers for Governor's election serial Nos. GV47-01274047 and GV47-1274048.

118. Exhibit “FW7” is a copy of the 1st Respondent’s returns for Langata Constituency. It shows that the total votes cast at St. Mary’s Primary school were 4,510 whilst the registered voters were 4,059. According to the Petitioner this was further evidence of double voting or vote stuffing.

119. Pamela Wandeo (RW2) gave evidence on the Soweto Social Hall incident. She said that Samuel Ngomali did not cast the two votes for Governor. He was arrested with them. In cross-examination by Prof. Ojienda, the Petitioner admitted (page 55 Record) that:

“Ngomali was charged with being in possession of two ballot papers. The votes were not cast. He was jailed. Ngomali did not vote”.

120. Fiona Waitthaka (RW1) gave evidence regarding “FW7”. She said the figure of registered voters was an error. It did not represent the correct position. The court ordered a recount of the votes at St. Mary’s Primary School polling station. The Registrar’s Scrutiny Report showed the total number of registered voters was 4,061; the total votes cast were 3,475; and total valid votes cast were 3,440. That being the verified position, the allegation of double voting at St. Mary’s Primary School was not demonstrated.

121. In light of the foregoing, the allegations by the Petitioner of double voting by Samuel Ngomali, or by voters at St. Mary’s Primary School, are wholly unfounded. I therefore reject them.

122. However, there was an *un-alleged* concern which affected the number of registered voters. During scrutiny, the Registrar found that at Mathare Youth Polytechnic, Stream 7, Ballot Box No. 094175, disclosed 726 registered voters whilst the total number of votes cast was 737. This was reported in Scrutiny Report No. 2 at page 8. It means there were eleven (11) votes cast not attributable to registered voters, or eleven registered voters who voted twice. Kidero obtained 550 votes and Waititu obtained 154 votes in that stream. The other candidates shared 27 votes and 6 were rejected votes.

123. How are these excess votes to be dealt with? **Regulation 83 (1) (a)** provides as follows:

“Immediately after the results of the poll from all polling stations in a constituency have been received by the returning officer, the returning officer shall, in the presence of candidates or agents and observers, if present –

a. ***Tally the results from the polling stations in respect of each candidate, without recounting the ballots that were not in dispute and where the returning office finds the total valid votes in a polling station exceeds the number of registered voters in that polling station, the returning officer shall disregard the results of the count of that polling station in the announcement of the election results and make a statement to that effect.”***

124. The returning officer was entitled to disregard the results for the entire polling station. She appears not to have noticed the excess valid votes cast, as she did not act in accordance with **Regulation 83 (1) (a)**. The power to disregard excess valid votes is vested *only* in the returning officer at the constituency level. Is this error, now discovered, fatal to the election?

125. In these circumstances, the lesson implicit from the law itself is that it recognises and anticipates that such an error may occur in an election. The law’s remedy, where there are more valid votes than registered voters in a polling station, is to disregard the results of that station, not to invalidate the entire election. The remedy lies in the hands of the returning officer.

126. **Section 82** of the Elections Act, which the court invoked on its own motion to conduct the scrutiny, states at **Section 82 (2) (a) – (f)** which votes can be struck off upon scrutiny, These include:

“82 (2) (a) the vote of a person whose name was not on the register or list of voters

assigned to the polling station at which vote was recorded or who had not been authorised to vote at that station.”(Underlining for emphasis)

127. This provision clearly allows, after scrutiny, for the striking out of votes of a person whose name was not on the register or list of voters assigned to Mathare Youth Polytechnic Stream 7. The total valid votes being 731 exceeded the number of registered voters being 726. The excess valid votes are five (5) in number. There is, however, no evidence to show whether these were unregistered voters or registered voters who cast one or more votes each.

128. How is the court to grapple with this situation? I must apply the principle from **section 83** on the effect of non-compliance with the written law. That is, whether the non-compliance did or did not affect the result of the election. It seems to me that whether the excess votes are struck out, or the entire results of Mathare Youth Polytechnic polling station are disregarded, the effect on the outcome of the election is unsubstantial. The exclusion of 550 votes from Kidero and 154 votes from Waititu in the stream has no significant effect on the outcome, since the difference between the two was over 70,000 votes. Similarly, the exclusion of the entire votes of the Mathari Youth polling station – 4,410 from Kidero and 1,030 from Waititu – has no significant result on the outcome of the election.

129. I therefore find and hold that in terms of **section 83**, that this non compliance is insufficient for the election to be declared void as prayed by the Petitioner.

Discrepancy in votes cast in Langata Constituency

130. I have already dealt with this aspect in relation to the issue on the alleged breach of the principle of one man one vote.

Locking out of Agents of the Petitioner from Polling Stations

131. The allegations that agents were locked out were made by both the Petitioner and Moses Muratha Kamau. As earlier noted, none of the agents who were allegedly locked out filed affidavits or gave evidence. None of the persons who had allegedly been telephoned in relation to the alleged crisis, or who had allegedly replaced locked out agents, were called to give evidence.

132. The Respondents having denied the allegations, it was for the Petitioner to adduce adequate evidence. In absence of the same the allegations are stillborn. The court must disregard them.

SUMMARY

133. Having dealt with all the allegations set out in the petition, I am now able to answer the issues drawn up by the parties for determination.

134. Issue No 1: ***Whether the Nairobi County Governor election was conducted in accordance with the principles laid down in the Constitution and the electoral law.*** The answer is in the positive.

135. Issue No 2: ***Whether the results of the Nairobi County Governor election were announced through a valid Form 36.*** It was shown that County form 36 had some irregularities and discrepancies. However, such discrepancies were of insufficient significance to enable me to draw a conclusion that the election results were invalid. I answer in the positive.

136. Issue No 3: ***Whether the 4th Respondent obtained highly inflated and non-existent votes.*** No evidence was availed to demonstrate that the 4th Respondent obtained highly inflated and non-existent votes. The answer is in the negative.

137. Issue No 4: ***Whether the Nairobi County Governor election was marred by the alleged electoral malpractices.*** The malpractices demonstrated do not go to the root of the election results.

Nor do they indicate a consistent intent to alter the will of the people to the prejudice of the petitioner. The answer is in the negative.

138. Issue No 5: ***Whether the alleged electoral malpractices invalidated the Nairobi County Governor election.*** The electoral malpractices shown to have occurred were of a minor nature. They did not rise to the level of proof required to satisfy the court to invoke its power to invalidate the election. The answer is in the negative.

139. ***Whether the 4th and 5th Respondents were validly elected as the Governor and Deputy Governor respectively.*** The answer is, yes.

140. Issue No 7: ***Who is to bear the costs of this Petition and to what proportion.*** These are dealt with in the following paragraphs.

141. My overall impression of the Petition is that it is remarkable in its paucity of

substance. I would sum up the essential character of the petition like this. It is a petition hastily crafted before the dust of the announcement of results had settled. It was signed on 11th March, 2013, before the statutory publication of the results in the Gazette. It was lodged in court on 13th March, 2013, as the ink of publication of the Gazette was drying. It was filed as a constitutional reference. In it, numerous lofty allegations were made of various breaches. Many were bare, generalized allegations, with scant concrete evidence in support. Nowhere was there a claim that X number of votes was lost or manipulated or miscast to the petitioner's prejudice.

142. Seven witnesses, who the Petitioner sought to bring in as additional, were denied participation. The reason was that the evidence they sought to tender would have changed the essence of the petition as originally filed. Of the four witnesses who the petitioner expected to call to give evidence, only the petitioner himself and one other witness appeared.

143. The Petitioner's Chief Agent was not called to give evidence. He had been at the County tallying centre at Nyayo National Stadium. Apart from the Petitioner's affidavit, his forty-four paragraph affidavit with eighteen pages of exhibits was the second most voluminous and direct evidence on the subject-matter of the petition. Having failed to attend the hearing, his evidence remained untested, and consequently affecting the weight attached to it.

144. The petitioner sought to obtain information to support his petition through several applications, and by fishing expeditions in cross-examination. The court saw through this. It put a firm end to such schemes. The court's foremost duty is to quickly get to the root of the dispute, and resolve it. The Respondents read into the weakness of the petitioner's case. They developed a strategy to avoid providing the petitioner with ammunition for his case. They opted not to call most of the witnesses in their lists.

145. In the circumstances, the court summoned two uncalled witnesses of the 1st – 3rd Respondents, but limited cross examination to only disputed issues deposed to. On its own motion, the court ordered partial scrutiny in respect of specific disputed aspects. The intention was to elicit evidence disclosing whether the will of the voters had been upheld. The outcome of the scrutiny disclosed various irregularities and instances of non-compliance with the law. However these had no substantial effect on the outcome of the election. In a sense, the case was not ripe for prosecution.

DISPOSITION

146. In light of the determinations I have made, I hereby dismiss the petition with costs, and decline all the prayers sought by the Petitioner.

147. Pursuant to Section 75 (3) of the Elections Act, I hereby declare that Evans Odhiambo Kidero,

whose election was questioned herein, was validly elected as Governor of Nairobi County, together with Jonathan Mweke as Deputy Governor.

COSTS

148. Section 84 of the Elections Act 2011 requires the court to award the costs of and incidental to a petition. It provides that costs shall follow the cause. They are always at the discretion of the Court. Rule 36 (1) of the Elections Petition Rules, 2013, provides as follows:

“36 (1) The Court shall, at the conclusion of an election petition, make an order specifying –

- a. ***the total amount of costs payable; and***
- b. ***the person by and to whom the costs shall be paid”.***

149. The 1st – 5th Respondents are entitled to costs, and I so grant them. Those costs shall be paid by the petitioner. The 6th – 9th Respondents did not participate in these proceedings. They are entitled to no costs.

150. I have, however, noted that the 4-5th Respondents had a penchant for making voluminous photocopies, in particular of statutes a number of which were repeated, yet are readily available. I will cap their recoverable photocopying costs to 60% of their total photocopying costs.

151. I will also set a ceiling on costs. In accordance to Rule 36 (1)(a), I hereby cap the costs payable to the 1st - 3rd respondent jointly at Kshs 2,500,000, and to both the 4th and 5th respondents jointly at Kshs 2,500,000. Accordingly, the total costs to be paid by the Petitioner to all the respondents *shall not* exceed Kshs 5,000,000. As this court has not made a determination of the actual costs, the Registrar of the Court shall pursuant to Rule 37 tax such costs under separate bills of costs.

152. Finally, pursuant to Rule 37 (3), I direct that part of the costs awarded herein shall be paid to the Respondents, upon the taxation and *pro rata*, from the money deposited by the Petitioner as security in Court.

CERTIFICATE AS TO VALIDITY OF ELECTION

153. Pursuant to Section 86(1) the court is required to certify its determination of

the validity of any question raised in the petition. Accordingly, I hereby direct that a certificate of this determination do issue to the Independent Electoral and Boundaries Commission and the Speaker of the National Assembly.

REPORT OF COURT ON ELECTION OFFENCES

154. Under Section 87(1) of the Elections Act, the court is required to make a

report indicating whether an election offence has been committed by any person in connection with the election. During the proceedings, no such offence was found to have been committed in this election.

I conclude by thanking all counsel for their courtesy and the able manner in which they presented their clients' cases. Equally, I thank Deputy Registrar Mrs. A Onger, who ensured the efficient and expeditious partial recounts and scrutiny. Finally, I thank all the court staff and other officers without whose assistance the determination of this matter would not have proceeded smoothly.

Orders accordingly.

DATED, SIGNED and DELIVERED at NAIROBI this 10th day of September 2013.

R.M.MWONGO

PRINCIPAL JUDGE

Judgment read in open court in the presence of:

1. H. Kinyanjui, for the Petitioner
2. V. Nyamodi and J. Okonjo for the 1st, 2nd and 3rd Respondents
3. Prof. T. Ojienda, M. Okoth, M/s .Mugambi, Katiku and Nyamunga for the 4th and 5th Respondents