



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
ELECTION PETITION NO. 1 OF 2013

DR. THUO MATHENGEPETITIONER

VERSUS

NDERITU GACHAGUA1ST RESPONDENT

RETURNING OFFICER NYERI COUNTY..... 2ND RESPONDENT

INDEPENDENT ELECTORAL

BOUNDARIES COMMISSION3RD RESPONDENT

CONSOLIDATED WITH

ELECTION PETITION NO.2 OF 2013

MICHAEL MWANGI KIBICHO.....PETITIONER

VERSUS

NDERITU JAMES GACHAGUA.....1ST RESPONDENT

RETURNING OFFICER NYERI COUNTY.....2ND RESPONDENT

INDEPENDENT ELECTORAL

BOUNDARIES COMMISSION3RD RESPONDENT

JUDGMENT

BACKGROUND

1. These two petitions have been consolidated and for the purposes of this judgment. The Petitioner in petition No. 1 of 2013 MR. THUO MATHENGE shall be referred to as the 1st Petitioner and the Petitioner in petition No. 2 of 2013 MR. MICHAEL MWANGI KIBICHO shall be referred to as the 2nd Petitioner.
2. The first Petitioner was a candidate in the Nyeri Gubernatorial elections of 4th March 2013 while the 2nd Petitioner was his supporter and proposer. The 1st Respondent was the duly elected Governor at the said elections while the 2nd Respondent was the Returning Officer for Nyeri and the 3rd Respondent the Constitutional and Statutory body mandated to conduct the said elections.
3. Following the outcome of the said elections wherein the 1st Respondent was duly declared

elected as the 1st Governor of Nyeri County, the 1st Petitioner being aggrieved by the said outcome on 8th March 2013 filed petition No. 1 of 2013 Nyeri and in his said petition stated as follows:

i. The 3rd Respondent gazetted a stranger as a running mate to the Petitioner instead of gazetting bona fide mate one Dr. Geoffrey Kamau Kibui.

ii. The third Respondent failed to gazette the name of the correct running mate to the Petitioner despite request and notices from the Petitioner.

iii. The Petitioner was discriminated upon by the 3rd Respondent as his running mate in the ballot paper was indicate as Geoffrey Gitonga Ndegwa instead of Geoffrey Kamau Kibui.

iv. The Petitioner was prejudiced as voters accused him of misleading them during the campaign period thus voted against him in protest.

v. The Petitioner may have lost the position of Nyeri Governor through the fault of the 3rd Respondent.

4. The 1st Petitioner therefore prayed that

a. The said Nderitu Gachagua was not duly elected.

b. The election was void and a nullity.

c. The position of Nyeri Governor be declared vacant and fresh elections held.

d. Cost be borne by the 2nd and 3rd Respondents.

5. Simultaneous with the said petition the 1st Petitioner took out a chamber summons on 18th March 2013 under a certificate of urgency wherein he sought an order of injunction against the 3rd Respondent from gazetting the 1st Respondent as duly elected Governor of Nyeri County which application was certified urgent and ordered served upon the Respondents to which the 3rd Respondent took out a preliminary objection on the courts jurisdiction to which the court ruled on 26th March 2013.

6. In the meantime on 2nd April 2013 the 2nd Petitioner filed petition No. 2 of 2013 Nyeri on the following grounds:

i. The 3rd Respondent gazetted a stranger as a running mate to Thuo Mathenge instead of gazetting the bona fide mate one Dr. Geoffrey kamau Kibui.

ii. The 3rd Respondent failed to gazette the name of the correct running mate to Dr. Thuo Mathenge a fact that disturbed voters and influenced them to vote against the said Thuo Mathenge, who was the Petitioners candidate of choice.

iii. Cognisant of the adverse impact of a misprinted ballot paper on an election the 3rd Respondent has from time to time and mostly recently in the just concluded General Elections, postponed scheduled elections in various electoral areas in the Republic of Kenya.

iv. The Petitioner was discriminated upon by the 3rd Respondent.

v. The running mate to the Petitioner's candidate of choice in the ballot paper was indicated as Geoffrey Gitonga Ndegwa instead of Dr. Geoffrey Kamau Kibui.

vi. All other candidates had their correct names and the names of their running mates correctly

printed on the ballot papers.

- vii. *The Petitioner was prejudiced as he had to face the wrath of voters who accused him of supporting a deceitful candidate.*
- viii. *The Petitioner was prejudiced for having invested a lot of time and other resources in campaigning for Thuo Mathenge, yet his efforts were not rewarded as voters did not approve of the person indicated in the ballot papers as the Deputy Governor.*
- ix. *The voters were making a choice based on a combined and overall package of the Governor and a Deputy Governor.*
 - x. *The Petitioner's candidate of choice lost the election of Nyeri Governor through the fault of the 3rd Respondent.*

1. The 2nd Petitioner sought the following reliefs:

- a. *That the 1st Respondent namely Gachagua James Nderitu was not validly elected as the Governor for Nyeri County.*
- b. *That the gubernatorial election was void and a nullity due to the erroneous printing of the ballot papers*
- c. *A fresh gubernatorial election be held in Nyeri County.*
- d. *Cost by the 2nd and 3rd Respondents*

1. Both petitions were supported by the affidavits and annexures thereto some of which I will refer to in this judgment.

2. The 1st Respondent in response to the said petitions stated as follows:

- a. *The 1st Petitioner slept on his rights in respect of the anomaly on the name of his running mate.*
- b. *The Petition is premature and therefore incurably defective for want of compliance with mandatory provisions of Article 87(2) of the Constitution and Section 77 of the Election Act 2011.*
- c. *There was no election for the Deputy Governor.*
- d. *The people of Nyeri elected him as the Governor after campaigning and that the election complied in every material respect and were conducted in accordance with the principles stated in the constitution.*

1. As regards the 2nd petition the 1st Respondent in reply stated that:

- a) *Having had knowledge of the gazettelement of an alleged stranger the Petitioner ought to have sought remedy expeditiously but instead clearly opted to turn a blind eye to the issue and thereafter file the petition rendering it ill motivated and suspect.*
- b) *Claim of discrimination are completely baseless as he was not the candidate in the subject election and has not demonstrated how he suffered suit discrimination.*
- c. *The Petitioner was at liberty in exercise of his democratic rights to support any candidate and it is therefore preposterous to claim that he could be subjected to the wrath of voters simply because of his democratic choice.*

d. *The Petitioners assertion as to why his candidate of choice lost the election is speculative and without merit and that it is not the province of this honourable court to interrogate the democratic choice of the voters or to seek to explain or question the same.*

e) *The electoral process is a democratic process which involves the democratic will of the people and is not a contest in resource mobilization but rather a dynamic and vibrant exercise in which the 1st Respondent and indeed voters of Nyeri County participated.*

f) *Elective post was only of County Governor and that there was no election to the office of Deputy Governor.*

h) *That he has good reasons to believe that the candidate known as Dr. Thuo Mathenge is not eligible to hold the office of County Governor for reasons inter alia that his educational credentials are fictitious and hence he does not meet the minimal criteria for election to the office of County Governor.*

1. The 1st Respondent therefore prayed that it be determined that:

a) *The said GACHAGUA JAMES NDERITU was duly elected as County Governor of Nyeri and the election was valid.*

b) *THUO MATHENGE committed election offence.*

c. *THUO MATHENGE was and is ineligible to run for election as County Governor.*

d. *The cost of the petition be borne by the Petitioner.*

1. The Responses by the 1st Respondent was also supported by affidavits the content whereof I will refer to in the course of this judgment.

2. The 2nd and 3rd Respondents in response to the petition stated as follows:

a) *The elections were conducted as provided for by the Constitution of Kenya and the relevant statute without any breach and were therefore conducted freely and fairly.*

b) *Deputy Governor was not an elective position.*

c. *Only the names of the actual candidates for Gubernatorial elections were carried in the official document form 24.*

d. *Immediately after the announcement of the 1st Respondent as the Governor elect the 1st Petitioner and his agents raised verbal complaints of a typographical error on the ballot that misspelt the Petitioner's running mates name which was to blame for his loss.*

e) *The Petitioner is guilty of laches and acquiescences for failing to raise the issue of misspelt name and that the 1st Petitioner was never discriminated upon.*

f) *The court must consider the public interest test, the proportionately and harm test in deciding the petition.*

g) *The Petition is speculative and raises hypothetical questions on whether the 2nd and 3rd Respondents were responsible for the petition coming a distance third.*

PRETRIAL

1. At the pretrial herein the two petitions as in law required were consolidated for trial and

determination and the following issues were agreed upon by the parties and endorsed by the court:

1. *Whether Michael Mwangi Kibicho the 2nd Petitioner was aggrieved and whether he has any cause of action.*
2. *Was there an error in the ballot paper as far as the name of the running mate of Thuo Mathenge a candidate for Governor seat is concerned.*
3. *If the answer to number 2 above is in the affirmative did the error render election of the Governor of Nyeri County invalid.*
4. *Did Thuo Mathenge notify the 2nd and 3rd Respondents of error and within time.*
5. *Whether Nderitu Gachagua was duly elected as the Governor of Nyeri.*
6. *Whether the court has jurisdiction to determine the issue of eligibility of elective candidate.*
7. *If the answer to number 6 above is in the affirmative was Thuo Mathenge eligible to run for the office of the Governor.*
8. *Was the position of Deputy Governor elective at the election of 4th March 2013*
8. *Who bears the cost of the petitions.*

PRELIMINARY OBJECTION

1. In the meantime the 2nd and 3rd Respondents took out a preliminary objection on points of law to wit that the 1st petition was filed prematurely before the results were gazetted which objection was supported by the 1st Respondent and resisted by the 1st Petitioner the ruling thereof delivered by the court on 10th June 2013 which became the subject of Civil Appeal No. 14 of 2013 COURT OF APPEAL AT NYERI the ruling thereof delivered on 20th August 2013.

HEARING

2. At the hearing hereof the Petitioners called ten witnesses from amongst several who filed affidavits in support of the petition. The tenor of their evidence was that due to the misprint of and or substitution of the names of the 1st Petitioner's running mate, P.W3 JOSEPH MATHAI NDIANGUI D.W.4 SAMUEL MAINGI MUGENDA, P.W. 5 ANNE WANJUGU KAGWAMBA, PW6 BENSON GICHOHI NGURE, P.W.9 PURITY GATHONI GATHOGO NGUNJIRI did not vote for the 1st Petitioner and that they voted against him in protest. Neither did P.W.7 THUO MATHENGE the 1st Petitioner vote for himself. It was only P.W.1 MICHAEL MWANGI KIBICHO who voted for the 1st Petitioner inspite of the error on the ballot.

I will comment on the nature of their evidence as I answer the issues raised herein.

3. The 1st Respondent in opposition called a total of 13 witnesses from amongst several who filed affidavits evidence in opposition to the petition of with 1RW1 JOHN MWENJE MURAGE, 1RW 2 WILSON KARUKI MUNENE AND 1RW 12 BENEDICT MUTUKU MUSEMBI supported the contention that the 1st Petitioner was not eligible to contest the seat of Governor since he did not possess the requisite academic qualification.
4. All the other witnesses on behalf of the 1st Respondent testified that they had made up their mind whom to vote for during the campaigns and that the running mate did not have any effect on the decision made and that the election of the 1st Respondent was free and fair reflecting the will of the people of Nyeri. I will comment on each evidence as I answer the issue the said evidence

- supported.
5. The 2nd and 3rd Respondents called only one witness the 2nd Respondent Mr. Peter Wanjohi whose evidence was that the election was free and fair and I will comment on his evidence as I analyse and answer the agreed issues herein.

UNCONTESTED FACTS

6. The following facts are uncontested in this petitions:-

a) The following were the candidates who contested on the gubernatorial election and got the votes reflected herein.

<i>Gachagua James Nderitu</i>	-	<i>136,985 votes</i>
<i>Gakuru Patrick Wahome</i>	-	<i>126449 votes</i>
<i>Thuo Mathenge</i>	-	<i>48,667 votes</i>
<i>Mutahi Mwangi Njururi</i>	-	<i>9,212 votes</i>
<i>Wang'onde John Githinji</i>	-	<i>2,836 votes</i>
<i>Rejected votes</i>	-	<i>3,902 votes</i>

b) The 1st Petitioner had nominated one Dr. Geoffrey Kamau Kibui as his running mate.

c) The 3rd Respondent gazetted and subsequently printed the name of Geoffrey Gitonga Ndegwa as the 1st Petitioners running mate.

d) The said Geoffrey Gitonga Ndegwa contested for a county ward representative of Mugunda ward on a Sabasaba Asili party ticket as that of the 1st Petitioner.

e) The 1st Petitioner's running mate of choice Dr. Geoffrey Kamau Kibui and the 1st Respondent Nderitu Gachagua comes from the same constituency : Mathira Constituency.

d) Save for the misprint of the running mate of the 1st Petitioner there is no other allegations of election malpractice in respect of the Nyeri Gubernatorial election of March 4th 2013.

DETERMINATION OF ISSUES.

1. (a) **Whether Michael Mwangi Kibicho was aggrieved and whether he has any cause of action?**

It has been submitted by the Petitioner that Michael Mwangi Kibicho was aggrieved by the outcome of the election and therefore lodged a petition challenging the validity of the election of the 1st Respondent and that every person is entitled under the Constitution and the Election Act to challenge the validity of elections which are not conducted in accordance with the constitution and the Elections Act. The regulation made there under, the Elections (Parliamentary and County Elections) Petition rules 2013 and any other written law and that there is no fatter as to who can raise the question of validity of the election of County Governor.

2. It was submitted that rule 2 of Elections (Parliamentary and County Elections) Petitions Rules 2013 defines a Petitioner as follows:

“A Petitioner” means a person who files an election petition to the court under the Constitution or under the Act in accordance with these rules”

3. It was further submitted that the repealed Constitution had restricted the right to challenge validity of an election to a person who were entitled to vote and that the current constitution and the entire electoral law have no restriction whatsoever on who can institute proceedings to challenge the validity of an election and in support therefore the court was referred to section 44 of the repealed Constitution and the cases of KIBAKI vs MOI [2001] EA 115, SARAH MWANGUDZA KIA v MUSTAFA 1DD SALIM & AND OTHERS (2013) ie KLR where the High Court had this to say.

55. the argument that only candidates in elections have the right to file election petition and that the Petitioner being a voter has no capacity to file a petition right out of the window for the simple reason that there is no known provision under the constitution or other electoral laws that prohibits a vote from filing a petition.

The petition rules at section 2 defines a petition as this definition does not say that only candidates in elections or political parties are qualified to be Petitioners. In my view this definition leave no doubt in my mind that any person including a voter who is aggrieved by the conduct of and outcome of elections can file an election petition for redress. Emphasis added.

4. On behalf of the 1st Respondent it is submitted that whereas it is true that voters in an election petition would be entitled to file an election petition. It is equally true that the particular voter must demonstrate the manner in which he is particularly and personally aggrieved and to the extent that the 2nd Petitioner is not aggrieved in as any way he therefore has no cause of action.
5. It is submitted that any grievances arising out of the alleged mis-print of the name of Thuo Mathange's running mate can only be personal to Thuo Mathenge the actual running mate and Geoffrey Gitonga Ndegwa whose name apparently appeared on both the gubernatorial ballot paper and the ward representative ballot for Mugunda ward and in support thereof referred to election petition NO. 8 OF 2013 MALINDI SARAH MWANGUDZA KIA supra that elections petitions are not ordinary suit where a party is enforcing a right that accrues to him as a person.
6. That since the Petitioner admitted that he constitutionally exercised his rights in voting for his preferred candidate of choice but his preferred candidate lost the election following the choice of the voters and it is therefore a demonstration of the rights of electors to exercise their democratic right to support and vote for any candidate of their choice.
7. On behalf of the 2nd and 3rd Respondent it was submitted that the simplest definition of the word aggrieved is a party who is unjustly injured through an infringement of his legal rights and that volume 4 of the Blacks Law dictionary defines the phrase “***cause of action***” as the right which a party has to institute a judicial proceedings.
8. It was submitted that the 2nd Petitioner's legal rights were not infringed on in any way or form since he was not prevented from voting for his preferred candidate and that while the law provides for a voter to file an election petition it is must that the Petitioner must demonstrate how he is personally aggrieved and how that grievance can be remedied by the courts through the prayers he is seeking. The court was therefore asked to find in the negative.

FINDING

9. From the clear reading of the provisions of the Election Act and the authority submitted in support thereof by the Petitioners I find that the 2nd Petitioner has a cause of action and was aggrieved by the outcome of the election herein. The Constitution and the Election rules does not put any fetter upon any person to institute an election petition the cause of action being the validity of the election.
10. I take the view that election petitions are by their nature an inquiry into the said election and therefore there is no requirement for a petitioner to show that he is personally aggrieved he only needs to show that he has a problem with the outcome of the said election and to tender in evidence to prove his claim and would therefore associate myself with the finding of GITHUA J

IN MALINDI ELECTION PETITION NO. 8 OF 2013 “*That there is no known provision under the constitution or other laws that prohibits a voter from filing a petition*”

Was there an error in the ballot paper as far as the name of the running mate of Thuo Mathenge, a candidate for the Governor seat is concerned?

11. It has been submitted by the Petitioners that the actual ballot paper had the name of the Deputy governor as Geoffrey Gitonga Ndegwa. It is further submitted that the uncontroverted evidence of Mr. Peter Wanjohi, the County Returning Officer was that the Deputy Governor designated by the 1st Petitioner was Geoffrey Kamau Kibui and there was therefore a manifest and grave error in the ballot paper.
12. On behalf of the 1st Respondent it was submitted that the burden of proof was on the 1st Petitioner to prove that the name of his running mate which eventually appeared on the ballot paper was different from the correct and actual names of the person he had nominated as his running mate and in support thereof the case of RAILA ODINGA & OTHERS vs IEBC & OTHERS is used.
13. It is submitted that neither in his pleadings nor in any evidence adduced at the hearing did Thuo Mathenge produce any documentary evidence whatsoever as to the actual names of the person that he had actually nominated as running mate and that the person he had allegedly presented to the 3rd Respondent on 31st January 2013 goes by general names to wit (i) Dr. Jeff Kamau (ii) Dr. Geoffrey Kamau (iii) Dr. Geoffrey Kamau Kibui and (iv) Jeff Njoroge.
14. It is therefore submitted that one could not reasonably and objectively state that there was any error on the ballot paper as far as the name of Thuo Mathenge's running mate was concerned.
15. On behalf of the 2nd and 3rd Respondents it was submitted that a perusal of the sample of gubernatorial ballot papers provided by the 3rd Respondent indicated that Thuo Mathenge's running mate was depicted as Geoffrey Gitonga Ndegwa but that neither of the two petitioners adduced concrete proof of what the alleged correct names ought to have been.
16. In answer to this question I have looked at the evidence tendered and in particular the evidence of the 2nd Respondent Mr. Peter Wanjohi. Under cross examination by Mr. Regeru the witness said that “*Thuo Mathenge had nominated Dr. Geoffrey Kamau according to the document which we had*” and under cross examination by Mr. Kilukumi the witness said that Dr. Mathenge at the nomination came with his running mate Dr. Geoffrey Kamau Kibui who also presented his original ID card, photocopy thereof together with degree certificate.
17. The witness further testified that they had one folder for the Governor candidate and his Deputy since it was one ticket and that at the close of the day IEBC head office had the names of Dr. Mathenge and Dr. Geoffrey Kamau Kibui as his running mate and that the electronic report he presented included the name of Dr. Geoffrey Kamau Kibui as the running mate of the 1st Petitioner which he later verified and proof read at the national nomination secretariat in Nairobi.
18. This evidence confirms the evidence the 1st and 2nd Petitioners in respect of the nomination of the said Dr. Geoffrey Kamau Kibui as the 1st Petitioner's running mate and in view of the submission by Mr. Gachugi for the 2nd and 3rd Respondents that the 3rd Respondent in the pleadings admitted the typographical error it cannot therefore be disputed at this stage that there was an error in the matter of the name of the running mate of the 1st Petitioner on the ballot paper and therefore the find of the court on this issue is that there was an error in the ballot paper as regards the 1st Petitioner's running mate.
19. For purposes of this judgment I will deal with issue number 4 as agreed by the parties herein first combine issue number 2 and 5, combine issue number 6 and 7 and deal with them after issue No. 4 and conclude the judgment with issues number 3 and 5 as to my mind they will have the effect of determining the outcome of this petition.

Did Thuo Mathenge notify the 2nd and 3rd Respondents of the error and within time?

20. It is not disputed that the 3rd Respondent gazetted the names of the candidate nominated and their running mates in the official Kenya gazette on 15th February 2013.
21. It has been submitted by the petitioner that the 1st Petitioner did not see any ballot papers before 4th March 2013 and therefore he was not in a position to notify the 2nd and 3rd Respondents of an

- error in the ballot papers before then but that he telephoned Mr. Wanjohi the 2nd Respondent on the 4th March 2013 and drew his attention to the error in the ballot papers. The only question on this issue is as to what time did he notify the 2nd Respondent of the said error?
22. On the error on the Gazette Notice No. 2221/2013 it was submitted that the same was published pursuant to regulation 51(5) of the Election (General) Regulation 2012 but that the Gazette Notice did not invite the public at large, candidate or their supporters to take any action regarding the published names and that there was no indication whatsoever that the names appearing in the Gazette Notice will, unless earlier rectified appear on the ballot paper.
 23. It was submitted that the attention of the 1st Petitioner was drawn to the Gazette Notice by P.W.9 Purity Gathoni Gathogo Ngunjiri on or about 17th February 2013 who then called the 2nd Respondent about four times and drew his attention to the error and that he thereafter caused the secretary of his political party to deliver the letter to the 2nd Respondent which letter was received by a lady known as Ruth and that the Petitioner subsequently sought the assistance of Lucy Mwai, Advocate who wrote letters and transmitted by e-mail to the 3rd Respondent.
 24. On behalf of the 1st Respondent it is submitted that the 1st Petitioner simply failed to notify the 2nd and 3rd Respondents of the misprint of his running mate's name and that Thuo Mathenge dealt with the matter in a casual manner and that the emails from Miss Lucy Mwai went to the wrong place.
 25. The 2nd and 3rd Respondents submitted that it was not disputed that the 3rd Respondent discharged its statutory duty by gazetting the list of all the nominated candidates and their running mates on 15th February 2013 and that the 1st petitioner was alerted of the misprint in the Kenya Gazette on 17th February 2013 and that he delegated the duties of following up the rectification of the misprint to his campaign manager.
 26. In answer to this issue I have looked at the evidence on record and find as a fact that the two letters written by Lucy Mwai Advocate and emailed to the 3rd Respondent did not reach the same as it is not disputed that the email address used did not belong to the 3rd Respondent. At the time when the said letters were written the 1st Petitioner had in his possession a letter written to him by the 2nd Respondent dated 20th February 2013 and produced by the 1st Petitioner in his further affidavit dated 18th June 2013 and filed in court on 19th June 2013 as TM1 wherein the correct email address of the 3rd Respondent is given. The 1st Petitioner also had in his possession the civic education materials with the said email address. I therefore hold that those letters did not reach the 3rd Respondent.
 27. As regards the letter written on 18th February 2013 by one Angela Wangare it is not clear from the evidence tendered under what capacity she wrote the letter, did she write it in her capacity as the Branch Secretary for Sabasaba Asili? Thuo Mathenge's private secretary or campaign secretary? This letter was allegedly received by Ruth as the secretary of the 3rd Respondent but it was not stamped with the official stamp of the 3rd Respondent unlike the letter addressed to the 3rd Respondent and produced by 1st Respondent witness No. 2 WILSON KARIUKI MUNENE.
 28. It was the evidence of P.W.2 Mr. Kimani Mbugua that the said letter was delivered on 18th February 2013 and that Mr. Wanjohi told them that he was in Meru with the official stamp and instructed them to leave the letter, which they did with a lady named Ruth whom he testified on oath he could not pick out since the contact was brief.
 29. Under cross-examination by Mr. Regeru the said witness confirmed that whereas the ID numbers of Wangare and Geoffrey Kamau Kibui are given on the said letter they did not get the ID card of the said Ruth on the letter to confirm the actual person who received it. He further stated that the said letter was not for the purposes of the petition. He further stated that Mr. Wanjohi informed him that he was in Meru.
 30. In his evidence in chief Mr. Wanjohi testified that there was a lady in the IEBC office called Ruth Wamuyu a casual employee who cleans the office and prepare refreshments and that he had no secretary seconded to him. He stated that they shared the office with Regional ICT Officer and that there is a stamp for receiving documents. He further testified that he had not seen the said letter outside these proceedings. He further confirmed that the two handwritings on the letter were both remarkably similar and that when he is not in office his deputy receives the letters.
 31. It is further clear from the proceedings that on the date the letter was delivered to the IEBC offices the 2nd Respondent and the 1st Petitioner were at a security meeting the subject of the letter dated 20th February 2013 aforesaid and that the 1st petitioner did not raise the issue of the

- running mate's name with the 2nd Respondent who also stated to the court that he did not get to see the said Gazette Notice and therefore was not aware that the wrong names of the 1st Petitioner's running mate had been gazetted. I must say that I found the 2nd Respondent an honest witness.
32. The other witness in respect of the gazettement of the wrong name of the running mate of the 1st Petitioner was P.W.9 PURITY GATHONI GATHOGO NGUNJIRI and her evidence was that Kimani Mbugua told her that he had gone to IEBC about the running mate and that they were exchanging information. She further stated that Kimani Mbugua told her that they were communicating with Nairobi which seems to contradict the evidence of Mr. Kimani Mbugua as at this time he had not communicated with Nairobi as per his evidence in chief. She further testified that she went to the IEBC office but did not find the in-charge and that later she was told by the said Kimani Mbugua that they were still communicating but there was no communication from IEBC.
33. In answer to this question I find that the 1st Petitioner has not proved that the said letter was actually delivered to the 3rd Respondent having taken the inconsistency between the evidence of P.W.2, P.W.7 and P.W.9 as to when they communicated with Nairobi and since P.W.2 confirmed in his evidence in chief and under cross examination that he did not get to meet with the 2nd Respondent. Further there is no evidence tendered by the Petitioners to confirm that they communicated with the 2nd Respondent verbally on the same as it is the 2nd Respondent's evidence which stands uncontroverted that he himself did not get to see the said gazette notice and was therefore not aware of any mistake thereon. It was the evidence of Thuo Mathenge that he communicated with the 2nd Respondent on the same about four times and that he stopped communicating with him when he received the letter of 20th February. The question then is when did he communicate with the 2nd Respondent four times? I am unable to believe the evidence of the 1st Petitioner on this issue and find that the Petitioners has failed to prove that they notified the 2nd and 3rd Respondent of the mistake on the gazette notice.
34. The final issue on this regards notification of the error on the ballot paper. It was the 1st Petitioner testimony that after the 20th February 2013 when he received a letter of warning from the 2nd Respondent he stopped communicating with the same. He further testified that he went to the polling station at 7.30 am but before that he had been called by many people on phone from almost all the stations in the County and that when he confirmed that it was true he did not even vote for himself and that he thereafter went away. He did not notify any officials of the 3rd Respondent at the station of the misprint as early as at 7.30 am.
35. It is only his campaign manager who called Mr. Letangule on 4th March 2013 and sent him a telephone text message between 10-11 am on the same date when he was allegedly assured that it was too late and that they had the option of filing a petition which the latter will concede to. The other witness who allegedly notified the IEBC official of the misprint was P.W.8 GEOFFREY GITONGA NDEGWA who complained that his name was appearing twice but was advised that he was not the only Geoffrey Gitonga Ndegwa. Even PURITY GATHONI P.W.9 the most diligent supporter of the Petitioner did not notify the election officials.
36. It was the evidence of P.W.9 that she went to the polling station at 6.00 am and found people discussing the name of the 1st Petitioner's running mate having been altered and instead of entering the polling station went to the home of the 1st Petitioner whom she found confused. I therefore find as a fact that the only time the 3rd Respondent was notified of the error was on 4th March 2013 through a text message sent to commissioner Letangule and thereafter at the time when the 2nd Respondent announced the results of the election when according to his evidence which stands uncontested the 1st Petitioner and his supporters raised the issue verbally and attributed their loss to the same.
37. I however must point out at this stage that the duty of receiving the correct names of the nominated candidates and printing the correct names of the said candidates is/was that of the third respondent which duty to it does not constitutionally and statutorily share with any body as per the provisions of Article 88(4) of the Constitution of Kenya 2010 and Rules 67(3) and (4) of the Elections (General) Regulations 2012.
38. Failure of the petitioner to notify the 3rd Respondent of the wrong entry in the gazette notice can therefore not be held against him and in this I find support in the decision of the Election Court in DR. FREDRICK MASINDE V HENREY BWIRE & ANOTHER EP NO. 9 OF 1993 where it

was stated that failure to object can not be held against the Petitioner as there can be no estoppel against a clear provision of statute.

Whether the court has jurisdiction to determine the issue of the eligibility of the Election candidate.

39. This issue has been answered by the Court of Appeal in Nyeri Civil Appeal No. 14 of 2013 arising from a decision of this court in this matter wherein it was held that this court has original and unlimited jurisdiction under Article 165 (3)(a) of the Constitution and the only court with the original jurisdiction to deal with election Petitions other than presidential and that Article 88(4) of the Constitution prohibits the 3rd Respondent from dealing with election petitions which can only be heard by the High Court while section 75(1) of the Election Act provides that a question as to the validity of a county election shall be determined by the High Court and therefore only the High Court has jurisdiction to deal with election disputes presented before the court. That both the High Court and the 3rd Respondent enjoy *concurrent* jurisdiction over disputes prior to the declaration of the results and the High Court enjoys *exclusive* jurisdiction *after* the declaration of results.
40. I am in full agreement with the holding of the Court of Appeal and state without contradiction that this court has jurisdiction to determine the eligibility of the 1st Petitioner to stand for election and or to be nominated as a candidate in the first place.
41. I would add for avoidance of doubt that the High Court is vested with jurisdiction to inquire into and declare all doubts and disputes arising out of or in connection with the election petition and that once an election has been held any doubt/dispute concerning its validity is material only as a ground for setting aside the election and this would apply whether the candidate won or whether he was eligible to stand for the election in the first place.

Was Thuo Mathenge eligible to run for the office of the Governor and if not whether the same committed an election offence?

42. The issue of the eligibility of the 1st Petitioner to run for the post of the Governor was raised by the 1st Respondent in his response to the petition and at the hearing herein the following evidence was tendered:-

DR. THUO MATHENGE P.W.7 in his evidence under cross examination by Mr. Regeru confined that his award of Bachelor of Social Work and Social Administration degree was being honoured for his social contribution more than anything academic and that there was a proposal to start Fairland University Campus in Nyeri and that he was to avail land.

43. In respect to his education at Fairland University he testified that he enrolled in September 2009 and was living in Kenya but used to study Friday, Saturday and Sunday for home work and would thereafter come back to Kenya. He stated that he studied from September 2009 to 2012 and that the first semester was from September to May with a break of one week with second semester running from June to September and that they were five students who were taking the same course.
44. When asked what Gpa was the 1st Petitioner answered that they were grades and that he applied and got admission. He further stated that he sat for his K.C.S.E. In 1980 and obtained division three with 38 points. The witnesses confirmed that to run for Governor you needed a degree from a recognized university. He further stated that he had a diploma in Business Management and Administration which he obtained through Tutorials and qualified. He was unable to confirm whether the said diploma was academic or professional.
45. When asked why his certificate was different from those issued on the same day the witness stated that those other certificates were for people from Kisii County and his belief is that Mr. Murage 1RW2 collided with them. He further stated that he did not know whether Fairland had a campus in Kisii County and that when his certificate was challenged Mr. Solomon Wokabi the Vice Chancellor of Fairland University took a fight and went to the Commission for University Education and after looking at the certificates attached to Mr. Murage's affidavit confirmed that they were a forgery.

46. On the mode of his transport to Uganda the witness stated that he used to travel to Uganda either through private means and or through public transport coach buses from Nairobi to Jinja starting his trip at 4.00 pm entering Uganda through Busia but during the period of time did not have his passport stamped. He further stated that he was a fee paying student paying Ksh. 60,000/= per semester. When asked by the court his dissertation topic the witness answered that it was about social economic uplifting and poverty eradication with prof. Gandhi as his superior, but did not have a copy of the same.
47. IRW1 MR. JOHN MWENJE MURAGE on behalf of the 1st Respondent testified that he is a Senior Assistant Commission Secretary and head of the department of information services at the Commission for University Education formerly Commission for Higher Education and that he has worked there for the last 24 years. He stated that the Commission is in charge of recognizing university education and that part of their duty is to authenticate foreign degrees for which they are guided by standards and guidelines.
48. He confirmed that they received a request from the first Petitioner to confirm whether Fairland University was a university recognized in Kenya which they did but with a disclaimer that the recognition did not authenticate the degree certificate.
49. It was his evidence that the foreign degrees are equated by their Kenyan equivalent and that having looked at the 'O' level certificate of Thuo Mathenge he was not qualified to be admitted to a Kenyan university and therefore his degree certificate could not be equated to a Kenyan degree. Having looked at the certificate he formed an opinion that it was different from other certificates issued by the same university and that the Commission in fulfillment of its duty to the public put out a paid newspaper advertisement on the status of Fairland University. It was his evidence that the said degree certificate was not valid.
50. IRW2 WILSON KARIMI MUNENE testifies that he wrote to the Law Society of Kenya and also to the IEBC questioning the validity of Mr. Thuo Mathenge's claim to be a graduate and did not receive reply to the said letters. Under the cross-examination by Mr. Kilukumi the witness stated that he went to the same school with the 1st Petitioner and that he used to speak with the same frequently and that if Dr. Thuo Mathenge had graduated his certificate must be fraudulent and that he eventually had the story on Thuo Mathenge's claim to have graduated reported in the STAR NEWSPAPER which was produced in court.
51. IRW12 BENEDICT MUTUKU MUSEMBI was commissioned by the 1st Respondent to conduct investigations on the validity of the degree certificate issued by Fairland University to Thuo Mathenge and that he confirmed from the Uganda Commission for Higher Education that there was no information available at the said institution in respect of the graduates of Fairland University and further that he was unable to receive any information on the same from Fairland university. He further stated under cross examination by Mr. Gachugi that the Terminus of Kampla coach was at the junction of River Road and Nduruma road in Nairobi and not at Machakos Bus Station as stated by the 1st Petitioner.
52. Under Cross examination by Mr. Kilukumi the witness confirmed that between 18th March 2005 and 10th March 2013 Fairland was authorised to issue degrees but that Fairland never made returns to the Commission for Higher Education. He further stated that the degree of the said university were available in the streets for sale though he did not buy any and that he did not get any information whether Dr. Mathenge attended Fairland University or not.
53. Based upon the evidence Mr. Regeu on behalf of the 1st Respondent submitted that under Article 180(2) of the Constitution for one to be eligible for election as County Governor he/she must be eligible for election as a member of the County Assembly and that Article 193(1) of the Constitution sets out the requirements as follows:

a) A registered voter.

b) Satisfies any educational/moral and ethical requirements prescribed by the Constitution or an Act of Parliament and

c. Is either

i. nominated by a political party or

ii. an independent candidate.

1. It was submitted that Election Act echoes the constitutional requirement and states educational requirement as follows:

1. Section 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 under the Constitution and this Act.

b) hold a certificate, diploma or other school qualification acquired after a period of three months study recognized by the relevant ministry and in such manner as maybe prescribed by the commission under this Act.

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

It was therefore submitted that the issue of recognition of a university cannot be divorced or separated from the issue of recognition of the candidate degree and in support of this Mr. Regeru relied upon the case of CHARTER HOUSE BANK LTD V CENTRAL BANK OF KENYA & 2 OTHERS [2006] eKLR at pages 136-137.

2. On behalf of the 2nd and 3rd Respondents it was submitted that on the nomination day Mr. Wanjohi the 2nd Respondent had no reason to doubt the authenticity of the degree certificate and he cleared Thuo Mathenge but if it subsequently turned out that the degree certificate was not valid IEBC would revoke such nomination and that Thuo Mathenge was not truthful about his studies and therefore based on evidence on record Thuo Mathenge was not eligible to run for the office of Governor.
3. On behalf of the Petitioners it was submitted that the 1st Petitioner was eminently qualified to vie for the gubernatorial seat and that as per section 22(2) of The Election Act all that a Governor candidate requires is a degree from a university recognized in Kenya and that as per Regulation 47(2) of the Election (General) Regulation 2012 which provides that

“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 Examinations Council in case of form four or the Commission of Higher Education in case of University degree.”

and therefore the only responsibility of the Commission for Higher Education in electoral matter is to authenticate the body that issued the university degree if it is not based in Kenya.

4. It was therefore submitted that since Election Act, the regulations made there under and the petition Rules constitute a complete electoral code or regime as per the decision of JYOTI BASU & OTHERS V DEBI GHOSAL & OTHERS AIR 983 1982 SCR (3) 31 & KIBAKI V MOI (2008)2 KLR EA 351, MURATHE V MACHARIA (2008)2 KLR 244 and CHELAITE V NJUKI & 2 OTHERS (2008) 2 KLR 109 The provision of the University Act No. 42 of 2012, equation of qualification or recognition of degree from foreign university here as application to the complete electoral code which only requires a degree from a university recognized in Kenya.
5. The issue therefore for this court to determine is as to what constitute a degree from a university recognised in Kenya to meet the constitutional and statutory requirement and whether it is only the institutions which ought to be recognized and not the degree issued therefrom as submitted by Mr. Kilukumi for the Petitioners.
6. In answering this question one needs to look at the intention and purpose of having educational requirement both in the Constitution and Election Act. I take the view that the said provisions was aimed at improving standard of representation and an attempt at good governance because the

business of a County requires certain level of competence as is required in other profession since education centrally broadens the vision, adds to knowledge, brings about maturity and enlightenment which is necessary in administration of the County.

7. The issue of educational qualification of a candidate is therefore very crucial as its determination will go along way to carve out the path on which the politics and leadership of the counties has to be run and I therefore take the view that the degree which is required for one to run for the office of Governor must be a valid degree issued by a university recognised in Kenya and that the Commission for University Education (formerly Higher Education) must validate the said degree and authenticate the institution which awarded the degree under Regulation 47(2) of the Election (General) Regulations 2012 otherwise the constitutional and statutory requirement of a degree will be defeated.
8. This therefore leads to the question as to whether Thuo Mathenge presented a valid degree from a university recognised in Kenya and to help answer this question it is necessary to define a degree certificate. According to Arkansas Department of Higher Education a degree certificate is defined thus:

“An award or title conferred upon an individual for completion of a program or course of study” and bachelor degree is defined “ a degree granted upon completion of a program that requires four to five years of full time college work”

Free on line Dictionary defines a degree as

“An award conferred by a college or university signifying that the recipient has satisfactorily completed a course of study.”

9. The issue therefore for determination is whether the degree certificate presented by Thuo Mathenge was valid degree from a university recognised in Kenya to enable him run for the office of Governor?
10. From the evidence of Thuo Mathenge he was a full time student who attended classes three days in a week at the Fairland University Jinja campus through Busia boarder post but was unable to confirm whether his passport was ever stamped at the boarder post during the period of study. His evidence on the bus which he used to travel to Uganda while not using private motor vehicle was controverted in material particular by 1RW12 BENEDICT MUTUKU MUSEMBI. MR. MURAGE 1RW1 testified that the degree certificate produced by Thuo Mathenge was not valid as it was different from those awarded to the other students of the same university who graduated on the same day and Mr. Mathenge did not even know that his university of choice has a study center in Nyamira in Kisii County where he claims those students whose certificates Mr. Murage had produced came from as confirmed on page 3 of TM 4(a) affidavit of Thuo Mathenge filed on 2nd July 2013.
11. Mr. Mathenge the student did not even understand the meaning of the grading system of his university of choice and therefore when asked what Gpa means his only answer was that it means grades. It is also worth noting that the relationship between Thuo and the university and in particular its Vice Chancellor Prof. Solomon Wokabi is more than a student/teacher relationship and therefore the said degree certificates if issued by Fairland University was issued for other considerations rather than academic.
12. I have also noted from TM 4(a) supra that one of the officers of the university that is its Patron is Pastor Iduda Isabinya Rtd Executive Secretary Uganda Union of SDA Church and therefore take judicial notice that if the university is associated with the SDA faith (which faith I share) then ordinarily classes would not be conducted on Saturdays and therefore there was no way Thuo Mathenge would have attended classes on Saturday as stated in his evidence.
13. It is also clear that Thuo Mathenge might not have qualified for admission to the said Fairland university as per TM 7C since it was not his evidence that he entered the university through a mature age entry examination neither did he undergo the one year pre-degree certificate since he did not have 'A' level. From the citation in his award of Honorary Doctoral award produced as TM 5(b) it is clear that the information availed to Fairland University by Thuo Mathenge is that he had an award from a Cambridge university UK whereas the documentary evidence show that it

- was a diploma from Cambridge Tutorial college.
14. From the evidence tendered before the court I find that the 1st Petitioner did not attend classes at Fairland University and therefore the degree certificate purportedly awarded to him was not validly awarded and since it is the evidence of Mr. Murage that even if it was valid the same could not be equated with the Kenyan degree and that the said degree would therefore not be recognized in Kenya it follows that Mr. Thuo Mathenge was not eligible to run for the office of Governor.
 15. In view of the above finding and taking into account the letter from Prof. Solomon Wokabi the Vice Chancellor of Fairland University in respect to the question of the validity of the degree certificate awarded to Thuo Mathenge I hereby direct the Director of Public Prosecution to order an investigation on the circumstances under which Thuo Mathenge purportedly obtained a degree certificate and if any criminal offence was committed in respect thereof either by Thuo Mathenge or any other person including Prof. Solomon Wokabi to institute appropriate legal prosecution against the same.
 16. In view of the order herein above and in the interest of the rules of natural justice I decline to make a finding at this stage whether Thuo Mathenge committed any election offence.
 17. For avoidance of doubt in respect of educational requirement and taking into account that they may be many cases where politicians have presented fake or invalid degree certificates I would recommend to the Hon. Attorney General to introduce an amendment to the Election Act to section 22(1) by inserting the words holder of a “valid” degree and in Regulation 47(2) by adding a “candidate” shall be required to seek authentication of the certificate issued by that body at least three (3) months before the date of nomination.

Whether the error on the ballot rendered the election invalid and whether the 1st Respondent was validly elected

18. It was submitted by the Petitioners that the ballot paper is the instrument or document that conveys the will of the voters and that the accuracy of the ballot paper is so critical that the constitutional principles governing the electoral system in Article 81(e)(v) demands that free and fair election must be administered in an efficient and accurate manner and that gross inaccuracies in the ballot paper irredeemably compromised the freeness and fairness of the election and in support thereof relied upon the case of OMAR & ANOTHER v MBUZI & ANOTHER COURT OF APPEAL AT MOMBASA CIVIL APPEAL NO. 50 OF 2006 reported in (2008)e KLR (EP)269 where the Court of Appeal came to a conclusion that a ballot paper is an integral part of the election and a default on a ballot paper that misleads voters is an important defect which could not be cured by Section 28 of the National Assembly and Presidential Election Act repealed and now section 83 of the Election Act.
19. It was therefore submitted that the invalidity of the election of the Governor of Nyeri County cannot be salvaged by section 83 of the Election Act based on the OMAR case supra, Election was not conducted in accordance with the principles laid down in Article 81(e) of the Constitution, Regulation 68(1)(c) of the Regulations made under the Election Act which requires that the ballot paper for use at the election for Governor shall be in form 29 set out in the schedule. The Election did not comply with section 118 of the Election Act which provide that a County Governor candidate or a political party shall not at any time change the person nominated as deputy County Governor after nomination of that person has been received by the Commission.
20. It was submitted that nomination of Geoffrey Kamau Kibui was received electronically on 31st January 2013 and none of the exception provided for under the Law for change of Deputy County Governor did not arise. It was therefore submitted that since the election was not conducted in accordance with the principles laid down in the Constitution and in written law the issue of whether or not the non-compliance affected the result does not arise.
21. It was further submitted that the non-compliance affected the result of the election in that voters who intended to vote for the 1st Petitioner personally or had strong attraction to his running mate and therefore his candidature did not vote for him due to the defect in the ballot paper. In support thereof the Petitioner relied upon the case of NTWIGA V MUSYOKA & 3 OTHERS (2008)2 KLR EP 276 where failure to print the candidate title in the ballot paper taken together with other grounds lead to nullification of the election and Tanzanian case of Re K.A THABITI [1967] EA 772 where the printed ballot paper reversed the symbol of the candidates.

22. On behalf of 1st Respondent it was submitted that the error could not possibly invalidate the election since the evidence tendered showed that most voters settled on their choice during the campaigns and that by the time they got to the polling booth all they do is to locate their particular choice for the respective office and mark accordingly and that the alleged error was not in respect of the Governor candidate but his running mate and that there were many other materials of identifying the candidate including the party symbol and the photo of the candidate and that the Petition is related to the office of the Governor and not the running mate.
23. It was submitted that there was the theory advanced by the Petitioners that the 1st Petitioner lost because of the protest votes does not make sense at all and that Thuo Mathenge should have benefited from sympathy votes as most witnesses blamed the 3rd Respondent for the misprint and that 2nd Petitioner confirmed on oath that despite the misprint he voted for Thuo Mathenge. It was therefore submitted that should the court not believe the witnesses for the Petitioners then the entire substratum of the petition collapses and in support thereof the case of WESLEY KIPTANUI KIPKEMOI v SIMIYU WATUNDU [2005]2 KLR was relied upon.
24. It was further submitted that there was no evidence tendered to support the alleged conspiracy theory, substitution of names theory and the spoiler theory and that the elections were conducted according to the evidence of 2nd Respondent in a free fair and transparent manner as per Article 81(2) of the Constitution and that the election results reflected the will of the people with 85% voting against the 1st Petitioner and that Thuo Mathenge and his witness admitted that they could not ascertain the number of votes he would have garnered had the correct name of his running mate been put in place and therefore his contention is speculative.
25. It was submitted that the burden of proof is with the Petitioner as per the decision of RAILA ODINGA V THE IEBC OTHERS and that the Petitioners have failed to discharge that burden and that what happened during the trial is that the Petitioner's case kept on changing and mutating and that the theory advanced were outside the Petitioner's pleadings and that parties are bound by their pleadings as per the decision of CHUMO ARAP SONGOK v DAVID KIBIEGON ROTICH [2006]eKLR.
26. It was submitted that election is a process and the whole process must be viewed in totality and therefore it cannot be said that the entire process was so irredeemably tainted and that the same must therefore be invalidated merely because of misprint of the name and that the court ought to use the proportionality test and in support thereof relied upon the cases of REPUBLIC V JUDICIAL COMMISSION OF INQUIRY INTO THE GOLDEN BERG AFFAIRS & 2 OTHERS EXPARTE GEORGE SAITOTI (2006)eKLR and KENYA PIPELINE COMPANY LTD v STANLEY MURAGE GITHUNGURI 2011 eKLR
27. The 1st Respondent proceeded to distinguish OMAR CASE NTWIGA CASE as being in respect of the candidate himself and that in Re K.A THABITI there was a mixed up of the party symbols in respect of various candidates.
28. It was submitted that on the authority of BENARD SHINALI MASAKO v BONI KHALWELE and 2 OTHERS [2011]eKLR courts will strive to pressure an election as being in accordance with the law provided that the results were not effected by those breaches. It was further submitted that section 83 of the Election Act only demands substantial compliance as per the decision of the Supreme Court in RAILA ODINGA's CASE supra and the decision of Karanja J in KITALE ELECTION PETITION NO. 11 OF 2013 CHARLES MAYWA CHEDOTUM & ANOTHER V IEBC AND 2 OTHERS.
29. On behalf of the 2nd and 3rd Respondents it was submitted that the evidence tendered showed that most witnesses were guided by the (i) Photo of the candidate (ii) Party Symbol (iii) Name of the candidate and that most of the witnesses did not know the name of the running mate of their candidate of choice and that they had made up their mind before going to the polling booth.
30. It was submitted that most of the witnesses were unequivocal that the elections were free and fair and would still believe so even if their candidate of choice lost and on authority of RAILA ODINGA where the Supreme Court said (304) ***Did the Petitioner clearly and decisively show that the conduct of the election to have been so devoid of merit and so distorted as not to reflect the expression of the peoples electoral intent? It is this broad test that should guide us in this kind of case in deciding whether we should disturb the outcome of the Presidential election.*** and urged the court to adopt the principle of proportionately.
31. Reliance was also made on KITALE EP NO. 11 OF 2013 supra where Karanja J dismissed

- election petition on similar facts.
32. Before answering this question I need to state the commonly accepted jurisprudence in respect of election petitions. It generally agreed that the burden of proof is upon the Petitioner and that the standard of proof is beyond balance of probability as in civil cases but below beyond reasonable doubt as in criminal cases but where allegation of commission of election offences is made the standard of proof is much higher.
33. It is also accepted that the word election include the entire process of election which consists of several steps some of which may have an important bearing on the process of dismissing a candidate and that in an election petition the court out to look at the entire process so as to come to the conclusion whether it was free and fair see the case of COL DR. BESIGYE KIIZA v MUSEVENI YOWERI KAGUTA ELECTION PETITION No. 1 OF 2001 UGANDA
34. It is also accepted that the success of a candidate should not be lightly interfered with and that any person seeking such interference must strictly conform to the requirement of law. That the purity of election has to be safe guarded and the court should be vigilant since the setting aside of election involves serious consequences not only to the returned candidate but to the public at large see JEET MOHINDER SINGH v HARMINDER SINGH JESSI supreme court of India AIR 2000 SC 256, JT 1999(8) SC 432.
35. The above principles have been stated in section 83 of the Election Act which states that no election *shall* be declared 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 in that written law *or* that the non-compliance did not affect the result.
36. This principle has been judicially captured in the classic case of MORGAN v SIMPSON [1974]3ALLER 722. Whereas most Judges quote Lord Denning I am of the considered view that Lord Stephenson captures the best interpretation of this section of the law at page 730 thus:

“It is not every action or omission” in breach of the election rules which voids an election, the elections stands;

If it appears to the tribunal having cognizance of the question that the election was so conducted substantially in accordance with the law as to election and that the act or omission did not effect the result”...

an election which is conducted in violation of the principles of an election by ballot is no real election and should be declared void even though it may not or could not have effected the result...

If substantial breaches of the law are as I think enough to invalidate an election though they do not affect the result, it follows that trivial breaches which effect the results must also be enough.

I cannot hold that both substantial breach and an effect on the result must be found in conjunction before the court can declare an election void”.* *Emphasis added.

37. I therefore take the view that an election will be invalid if there is *substantial* non-compliance with the principles laid down in the Constitution and the law as to election whether or not it effects the result or independently where non-compliance whether trivial or substantial has a substantial effect on the result.
38. In this petition it is agreed that the entire election was substantially conducted in compliance with the principles laid down in the Constitution and the law as regards elections which includes the rule and regulations established thereunder save for the misprint of the name of the running mate of the 1st Petitioner which it is their case might have cost him to not to win.
39. I therefore need to look the issue whether the misprint of the name was in breach of the regulation as regards the ballot paper and whether it was substantive or had effect on the election so as to void this election.
40. It must be stated herein that from the evidence presented before the court the error complained of herein was on the gazette notice and not the ballot paper as the same reflected what was published

in the gazette in compliance with regulation 51(5) which provides as follows:

“Upon receipt of a certificate under sub regulation (1) or (2) the Commission shall publish a notice in the gazette”

41. It is the gazette notice published by the 3rd Respondent on 15th February 2013 which had the error as regards the name of the 1st Petitioner's running mate and therefore the ballot paper printed under Regulation 68(3) which states as follows:

“The person validly nominated under these Regulation shall have their names included in the ballot paper for an election in the same order as they appeared in a notice published in accordance with Regulation 51(5)”

was to my mind in compliance with the regulation as it contained the names as they appeared in the gazette.

42. It has been submitted by Mr. Kilukumi that the ballot paper did not comply with Regulation 68(1) (c) which requires that the ballot paper for the elections of Governor shall be in form 29 in the schedule but it should be noted that the sample ballot papers which were produced in court during the hearing were in compliance with Regulation 68(1)(c) as regards the form the pattern or the outline provided for in form 29 and not the content thereof which is provided for under Regulation 68(3). In this holding I find support in the decision of the Supreme Court of India in MAHADEO vs BABU UDAI PRATAP SINGH & OTHERS 1966 AIR 824 1966 SCR(2) 564 wherein it was held that the design to which their rule 56(2)(g) refers to is to form the pattern or the outline of the ballot paper and not its content.

43. As regards the content of the ballot paper Regulation 68(3) requires the 3rd Respondent to have the names printed as per the Gazette Notice under Regulation 51(5) which uses the certificate issued under Regulation 51(2) as set out in form 21 of the schedule and a copy of the nomination certificate in respect of the 1st Petitioner was produced as annexure TM 2(a) to the affidavit in support of petition No. 1 of 2013 filed on 8th March 2013.

44. Regulation 68(4) provides as follows:

4 Every ballot paper for use at an election shall

a) Contain the names and party symbol of the person validly nominated.

b) Contain a photograph of the candidate where applicable.

c) Be capable of being folded up.

d) Have a serial number in combination of letter and number printed on the front and

e) Have attached a counterfoil with the same number or combination printed thereof.

45. It therefore follows that the ballot paper herein though had an error on the content substantially complied with regulation as regards the same as it is clear that it was only the Governor candidate who was duly nominated and issued with a certificate by the 2nd Respondent. This would therefore distinguish the Authorities of OMAR Re K.A THABITI AND NTWIGA V MUSYOKA cited by Mr. Kikukumi in his submission

46. Having looked the law as regards election did the minor error on the ballot effect the outcome of the election so as to enable the court void the same? It was upon the Petitioners to prove that the non-compliance with Regulation 51 of the Election Act had effect on the election and in support thereof the Petitioners tendered in evidence to the effect that most of those who would have voted for him voted against him in protest when they found out that the name of his running mate was

- not whom he had nominated and therefore materially prejudiced the prospects of the 1st Petitioner to win the election. I have looked at evidence of the following witnesses:
- 47.P.W.3. JOSEPH MATHAI NDIANGUI stated under cross-examination that he did not belong to the same party as Thuo Mathenge and his running mate but that Thuo Mathenge was his candidate of choice for the Governor seat and that he had attended the ceremony where when the two were presenting their nomination papers and that he voted in protest against Thuo Mathenge and that he knew of the error at the booth having taken more than five minutes to vote and that he wanted to punish Thuo Mathenge by voting against him.
- 48.P.W. 4 SAMUEL MAINGI MAGENDA stated that he had expected Dr. Geoffrey Kamau Kibui whom they had proposed to be the running mate of Dr. Mathenge since he was a vet Doctor and would have assisted them when he became the Deputy Governor and stated that he was going to vote for both the candidate and the running mate but stated that he did not know the said running mate even during the elections but that he was supposed to be a spoiler. He further stated that he did not vote for Thuo Mathenge neither did he vote for anybody else and that he put the ballot in the box but without marking it.
- 49.P.W.5 ANNE WANJUGU KAGWANJA a registered voter from Mathira constituency voted at 6.20 am but did not vote as she expected since the name of the running mate of the 1st Petitioner had been omitted. She stated under cross examination that she had another candidate in mind so she voted for the same. She stated that she was going to vote for Thuo Mathenge on the strength of his running mate. She testified that when she asked the presiding officer about the missing name she was told that the owner will go for petition and that she blamed both Thuo Mathenge and the IEBC so she voted in protest. It was her evidence that she was going to vote for Thuo Mathenge because of his running mate but at this time nobody knew of what the outcome will be so the issue of petition can not be believed.
- 50.P.W.6 BERNARD GICHOHI NGURE had been a councilor for ten years and that he had decided to vote for Thuo Mathenge and would have been happy if he won the election and that since everybody knew that he was a supporter of Thuo Mathenge they asked him about the change in the name of his running mate. It was his evidence under cross examination that he did not know the running mate of Thuo but had known the running mate of the second runner upon whom he called "Pato" whose ticket he ended up voting for .

P.W. 9 PURITY GATHONI GITHONGO NGUNJIRI also testified and was cross examined in details and stated that she was going to vote for Thuo Mathenge whom she was supporting and that at any time did she separate the two Thuo Mathenge and his running mate and that she knew that who ever was elected Governor would assume office with his running mate and that any mistake on the ballot paper was caused by IEBC and it is only IEBC which would have corrected it and therefore Thuo Mathenge was a victim of the inefficiency of IEBC and at the same stated that she had assumed that Thuo Mathenge had cheated her and therefore did not cast her vote in his favour.

- 51.It is therefore clear to my mind that the reasons all the witnesses for the Petitioners gave for not voting for Thuo Mathenge can not be reasonably believed and further to believe that they were voting for Thuo Mathenge's running mate would have against the express constitutional provision. This claim to my mind can not stand against express constitutional provision in Article 180(6) that

“The Independent Electoral and Boundaries Commission shall not conduct a separate election for the Deputy Governor but shall declare the candidate nominated by the person who is elected County Governor to have been elected as the Deputy Governor”

- 52.It is clear from the evidence tendered before the court that almost all the witnesses knew that Mr. Thuo Mathenge had appointed Dr. Geoffrey Kamau Kibui as his running mate and since the party symbol and the picture of Thuo Mathenge were correctly printed on the ballot paper therefore it would not be unreasonable to take into account the fact that a large majority of voters concentrated on the symbol of the party and the pictures of the candidate rather than the name taking into account the fact that the people were voting for six (6) positions in five minutes.
- 53.In this I find support in the decision of Karanja J in KITALE ELECTION PETITION No. 11 OF 2013 CHARLES MAYWA CHEDOTUM supra wherein the judge had this to say at page 26

“In any event, the mix-up would not have prevented the voters or the Petitioners exercising their constitutional rights. This was because, the name of the candidate was not the only means of identification in a ballot paper. There were other means which included the candidate's political party's name, symbol and colour.... it cannot be true that voters at certain polling station refrained from voting or voted for wrong candidate... it cannot also be true that both Petitioners did not vote for themselves due to the mix-up in their names.

54. It is also clear from the Constitution, Election Act Rules and Regulation thereunder that the political parties Act thus save for independent candidates voters are supposed to vote for political parties and or a collision of political parties and that is why almost all the witnesses for the Petitioners and the 1st Respondent testified that they were voting for a package, a ticket or combination.
55. It is clear from the evidence tendered by Petitioner No. 2 that despite the error he voted for the candidate of his choice and as many as 48,000 voters voted for the 1st Petitioner so his case loses some of its significance.
56. Was therefore the 1st Respondent validly elected? It was initially the case of the Petitioners that the misprint of the names of the 1st Petitioner was a collusion between the 1st Respondent and the 2nd Respondent however this was rebutted by the evidence of the 2nd Respondent who stated to court the steps which were put in place in respect of the nomination papers and that by the time when he left Nairobi he had confirmed that the same was correct. The case of conspiracy was also displaced since the same error in name of the running mate was duly published in the Kenya Gazette for every one who cared to check to confirm.
57. There was further no evidence tendered that the misprinting of the names of the running mate of the 1st Petitioner was deliberately and intentionally done to mislead the voters and or to assist any candidate. There is further no evidence tendered to show that the 1st Respondent benefited from the so called protest voters as I take the view that those voters who would have voted for the 1st Petitioner because of his running mate would not have voted for the 1st Respondent taking into account that they were from the same constituency of Mathira. This was confirmed by the evidence of P.W.6 BENSON GICHOHI NGURE AND P.W.10 MARY ROSALIA WAMBUI KENYI who stated under cross-examination by Mr. Regevu that she did not vote for Thuo Mathenge and abstained from voting.
58. It is also clear that elections in Kenya are mainly won or lost because of the popularity of the political party in a given area save for some few exceptions and there is evidence tendered before me by the following witnesses: 2nd Petitioner MICHAEL MWANGI KIBICHO, P.W.8 GEOFFREY GITONGA NDEGWA and P.W.10 Ms MARY ROSALIA WAMBUI KANYI that they all contested county ward representative seats on Sabasaba Asili party ticket and that they all lost and that in the entire Nyeri County only one candidate won a county representative seat on a Sabasaba Asili party ticket under which the 1st Petitioner also contested.
59. Since elections are by secret ballot any inquiry as to how the voters voted or would have voted would be in violation of the express permission of the Election Act and the Constitution.
60. I therefore find that the error on the ballot was not substantial and neither did it affect the outcome of the election and that the 1st Respondent was validly elected in a free and fair election and taking into account the fact that in a democratic form of Government voters are of utmost importance and therefore this election reflected their will and will quote Sir Winston Churchill who states thus:

“At the bottom of all tributes paid to democracy is the little man (woman) walking into a little booth with a little pencil making a little cross on a little bit of paper no amount of the rhetoric or voluminous discussion can possibly diminish the overwhelming importance of the point.

Was the position of Deputy Governor elective?

61. The answer to this issue depends on the interpretation of Article 180 of the Constitution and in particular Article 180(b) quoted herein above. It has been submitted by the Petitioners that

- Deputy Governor cannot be elected separately but must be jointly elected.
62. It was submitted that whereas the Governor is *directly* elected the Deputy Governor is *indirectly* elected and that is why the provision of Regulation 68(1)(c) of the Election Regulations designed the Governor candidate ballot papers to include the names of the Deputy Governor candidate.
63. On behalf of the 1st Respondent it is submitted that there were six (6) election posts and Deputy Governor is not one of them and that whereas per Article 180(5) every candidate is obliged to nominate a running mate Article 180(1) provides that the County Governor shall be directly elected by the voters registered in the County.
64. The 2nd and 3rd Respondents also took the position that the position of Deputy Governor was not an elective post.
65. To help me answer this question I have looked at the definition of County Election provided for under the Election Act and note that County Elections are defined as the election of a County Governor or a member of a County Assembly and section 18A of the Act provides that a County Governor candidate shall or political party shall not at anytime change the person nominated as a Deputy Governor *candidate* after the nomination of that person has been received by the Commission and candidate is defined to mean a person contesting for *elective* post.
66. Though there is no direct election of the Deputy Governor as stated in Article 180 of the Constitution in that you can not vote for a Deputy Governor and since we have adopted the American System where candidates for President and Governor runs together with a candidate for Deputy President and Deputy Governor on a 'ticket' voters select one ticket to vote for they cannot choose a President candidate from one ticket and a vice Presidential candidate or a Governor candidate and a deputy Governor candidate from another ticket.
67. To my mind Regulation 68(1)(b) of the Election Regulation is supposed to safeguard section 18 of the Act taking into account the historical misuse of the office of the vice President in the past where it was used as a bite to enable the Presidential candidate get more votes by offering the position to many tribal gate keepers and it therefore follows that by virtue of Article 180(6) the position of the Deputy Governor was not directly elective since his/her election was dependant on the election of Governor candidate who nominated the same.

DETERMINATION

68. Having found that the error on the Gazette Notice and the ballot paper as to the content thereof was not so substantive nor was it capable of affecting the outcome and that the election of Nyeri Governor was free and fair and in compliance with the principles set out in the Constitution and Law as regard the election it therefore follows that the petitions herein as consolidated lack merit and are therefore dismissed.

Who bears the cost of this petition?

69. I must state for record and accountability purposes that at the commencement of the hearing of this petition and upon hearing the Petitioners witnesses I made the following remarks off the record to Mr. Kibicho:

“Whatever the outcome of this petition your client must be prepared to pay cost of the same”

and after hearing 1RW No. 2 To Mr. Gachugi I stated off the record thus

“Mr. Gachugi, I had told Mr. Kibicho that whatever the outcome of this petition your client must be prepared to meet the cost of the same.

70. As stated herein this remarks were prompted by the witness who testified allegedly on the conduct of the 2nd Respondent and Mr. Legangule a Commissioner of the 3rd Respondent in particular the following witnesses P.W.2 MR. KIMANI MBUGUA, P.W.7 THUO MATHENGE and P.W.9 PURITY GATHONI GATHOGO and on behalf of the 1st Respondent 1RW No. 2 MR. WILSON KARIUKI MUNENE in respect of the conduct of the 3rd Respondent generally.

71. Having heard the 2nd Respondent in court and having come to the conclusion that he was an honest and truthful witness ready to assist the court my comments stated herein out of record still stands against the 3rd Respondent in as much as an alive to the fact that the Election Act states that cost follows the event.

SUBMISSIONS

72. On behalf of the Petitioners it has been submitted that the proceedings before the court were provoked by the changes and or substitution of the name of the running mate of the 1st Petitioner on the ballot paper and that the 2nd Respondent Mr. Wanjohi's evidence makes it clear that he transmitted electronically and physically the correct and accurate names and that the 3rd Respondent opted not to offer any evidence or acceptable explanation as to what occasioned these serious defects or error in the ballot paper and therefore the only reasonable inference that can be drawn is that it was not an innocent excusable mistake but a deliberate scheme designed to improperly influence the outcome of the election.

73. It was submitted that the 3rd Respondent was under a constitutional obligation to administer the election in an impartial, recital efficient accurate and accountability manner and that if the court preserves the election as I have done the 3rd Respondent out to be condemned to pay cost.

74. On behalf of the 1st Respondent it is submitted that section 84 of the Election Act states that cost shall follow the cause so if a party does not succeed he should pay cost and that the Petitioners were triggered by the alleged misprint of the names of Thuo Mathenge's running mate and court finds there was such misprint the 3rd Respondent could not possibly resist cost being accorded against it.

75. On behalf of 2nd and 3rd Respondents Mr. Gachugi took issues with the off the record remarks stated herein and submitted that it would be a travesty of justice for any party to be condemned to pay cost mid hearing without being heard and regardless of the merits of the petition filed against it and he submitted this *would indeed taint any proceedings with arbitrariness and intolerance* Emphasis added

76. It was submitted that 3rd Respondent may have been responsible for the printing of the ballot papers but it is not disputed that prior to the printing of the ballot papers it discharged its statutory obligation by publishing the final list of nominated candidates and the running mates in the Kenya Gazette for the whole land to see and raise any issue that may require rectification. He submitted that section 84 of the Election Act as well as Articles 27(1), 40, 50, 159 of the Constitution should provide a guide on costs.

77. From the submissions herein and being alive to section 84 of the Election Act I am of the considered view that the 3rd Respondent must pay cost of these petitions on the following grounds.

i) The Petitioners have succeeded to establish that there was an error on the Gazette Notice published by the 3rd Respondent and subsequent error on the ballot paper.

ii) There is evidence tendered by the Petitioners witnesses that this petition was filed on an alleged express or implied prompting by Commissioner Thomas Letangule a Commissioner of the 3rd Respondent who allegedly informed Mr. Kimani Mbugua that there is nothing they can do at that stage but that they should file a petition and the 3rd Respondent will concede to the same.

iii) Though Mr. Letangule filed an affidavit in response to those allegations the same saw it fit not to attend to be cross examined on those allegations noting that the allegations were of a very serious nature and Mr. Letangule as an officer of this court should have known better the consequences of not attending.

iv) Having listened to the evidence of the 2nd Respondent on the steps taken in transmitting the nomination list to the 3rd Respondent it was the duty of the 3rd Respondent to provide some evidence to assist the court in arriving at the conclusion as to whether the error was honest mistake, technological failure or negligence or

deliberate attempt on the part of the 3rd Respondent officers to interfere with the election process and therefore the 3rd Respondent failed in assisting the court by discharging the burden on pleadings to meet the overriding objectives as stipulated in Rule 4(3) of the Election (Parliamentary and County elections) Petition rules 2013 and therefore the court is justified in exercising powers conferred upon it by virtue of Rule 5(2) as to order for payment of costs.

v) There is evidence tendered by the 1st Respondent witness that the issue of eligibility of Thuo Mathenge to contest was brought to the attention of the 3rd Respondent and no action was taken therein by the same.

vi) Although the petition failed on the basis that the breach was not substantial to warrant nullification of election the court is of the view that the Petitioners having succeeded in proving that there was an error and the 3rd Respondent having conceded to the same but without offering an explanation for the said error the court is of the opinion that the petition was necessary and the inquiry called for.

vii. Being a constitutional and statutory body the 3rd Respondent is accountable to the public and where it is negligent in the performance of its duties the court will not find it unreasonable to award cost to the Petitioners even if they do not succeed in having the election nullified and it is high time parliament provides secondary remedies where elections are preserved even though breaches as established including compensation to the offended party.

1. I therefore order the 3rd Respondent to pay cost of these petitions to the 2nd Petitioner, 1st Respondent and half of the taxed cost awarded to the 2nd Petitioner the 1st Petitioner which costs shall be taxed and the total aggregate thereof shall not exceed a sum of Ksh. 2.5 million.
2. In view of my two recommendations in this judgment I direct that a copy of the same be supplied to the Director of Public Prosecution and the Hon. Attorney General for their action and the requisite certificate to be issued.
3. Finally as I have done before I would like to thank the parties in these proceedings and their supporters in the manner they conducted themselves during the proceedings and to their Advocates for the thoroughness great passion, zeal and diligence in the conduct of this proceeding their input can not be taken for granted and for subjecting the interlocutory decisions of the court to appeal thereby

assisting the court to be more learned for now I know that there is a difference between “original” and “inherent” jurisdiction and “concurrent” jurisdiction of this court and the 3rd Respondent.

4. To the parties and their supporters and the people of Nyeri County at large I will leave you with the words of the wise man found in ECCLESIASTES 3: 1-8 NIV

“There is a time for everything and a season for every activity under the heaven.

A time to be born and a time to die

a time to plant and a time to harvest

a time to kill and a time to heal

a time to tear down and a time to build

a time to mourn and a time to dance

a time to scatter stones and a time to refrain

a time to search and a time to give up

a time to keep and a time to throw away

a time to be silent and a time to speak

a time to love and a time to hate

a time for war and a time for peace”.

Dated and delivered at Nyeri this 9th day of September 2013.

J. WAKIAGA

JUDGE

In presence of:

Wanjohi - Court Clerk

Mr. Kilukumi, Miss Mwai & Mr. Mwangi For Petitioners

Miss Karani For 1st Respondent

Mr. Kibicho for 2nd and 3rd Respondent.

J. WAKIAGA

JUDGE