



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Election Petition 13 of 2008

JOHN KIARIE WAWERU.....PETITIONER

VERSUS

BETH WAMBUI MUGO.....1ST RESPONDENT

S. K. NJUGUNA.....2ND RESPONDENT

ELECTORAL COMMISSION OF KENYA.....3RD RESPONDENT

JUDGMENT

Election Petition-nullification of election-petition challenging the declaration of the 1st respondent as the duly elected member for Dagoretti constituency-where the petitioner raised various allegations against the respondent-petitioner claiming that the respondents had committed various electoral offences, malpractices and breaches of regulations that ultimately affected the final outcome of the parliamentary elections- petitioner claiming that the 1st respondent had made false statement of fact concerning the character of the petitioner and whose effect defamed the petitioner's character-proof of-burden of establishing allegations regarding the conduct of the election and the results announced thereafter is on the petitioner-court duty to consider and determine the evidence adduced by the parties to this election petition-duty of petitioner to establish that the said electoral malpractices were of such a magnitude that they substantially and materially affected the outcome of the electoral process-whether the petitioner established to the required standard of proof, that the election of the 1st respondent as the duly elected Member of Parliament was voided by electoral malpractices-whether the petitioner established any basis for the court to order the scrutiny of the ballots in respect of the parliamentary elections

Advocates: Mr. Ng'aru counsel for the petitioner; Professor Githu Muigai and Mr. Muthomi counsel for the 1st respondent; Mr. Kyalo and Miss Kamende counsel for the 2nd and 3rd respondents

The Electoral Commission of Kenya (*the 3rd respondent*) is a body established by the Constitution of Kenya. Section 42A of the Constitution mandates the Electoral Commission to, *inter alia*, direct and supervise the Presidential, National Assembly and local government elections. In conducting the said elections, the electoral Commission is required to promote the principle of free and fair elections. Upon the expiry of its term, the 9th parliament was dissolved. All the parliamentary seats constituting the National Assembly were declared vacant by the Speaker in accordance with the law. Among the seats that were declared vacant was Dagoretti Constituency (*hereinafter referred to as "the Constituency"*) parliamentary seat. The 3rd respondent, in discharge of its constitutional mandate, appointed the 27th

December 2007 as the date which the general elections to fill the vacant parliamentary seats would take place. The 3rd respondent duly appointed Sammy Kimemia Njuguna (*the 2nd respondent*) as the Returning Officer of Dagoretti constituency. Seventeen (17) aspirants, among them Beth Wambui Mugo (*the 1st respondent*) and John Waweru Kiarie (*the Petitioner*), were duly nominated by their respective political parties as candidates for the said vacant seat of Dagoretti constituency. The 1st respondent was nominated by the Party of National Unity Political Party (PNU) while the petitioner was nominated by the Orange Democratic Movement Political Party (ODM). The two political parties were the main political parties that contested the said seat.

After the elections were conducted on 27th December 2007, the 1st respondent was declared by the 3rd respondent as the duly elected Member of Parliament for Dagoretti constituency. According to the results which were announced by 2nd respondent and which was published by the 3rd respondent in its Website, (*and which results were produced as 2nd respondent exhibit No.4*), the 1st respondent garnered 27,271 votes whilst the petitioner obtained 21,762 votes. Other candidates obtained varying votes ranging from 2524 votes for the third highest candidate to 20 votes for the 17th and last contestant. The 2nd respondent produced the statutory Form 17A which gave different figures from that officially displayed in the website of the 3rd respondent. Although the results contained in the 2nd respondent's exhibit No.4 are referred to as provisional results, for the purposes of these proceedings, the said results shall be referred to as the official results. As to the results contained in Form 17A which was produced as 2nd respondent's exhibit No.5, this court shall comment on the said results at a later part of this judgment.

Upon the 1st respondent being declared by the 3rd respondent as the duly elected Member of Parliament for Dagoretti constituency, and the petitioner, being aggrieved by the said declaration, filed the present petition challenging the declaration of the 1st respondent as the duly elected member for Dagoretti constituency. In his petition, the petitioner raised various complaints relating to the conduct of the election, which in his view were not conducted in accordance with the electoral laws and the regulations made thereunder. The petitioner stated that the respondents had committed various electoral offences, malpractices and breaches of regulations that ultimately affected the final outcome of the parliamentary elections of Dagoretti constituency. The petitioner complained that the 2nd respondent failed, neglected or refused to address the grievances relating to the goings on in certain polling stations, either during the voting process itself, the counting of the votes, the tallying of the results and the announcement of the valid votes cast that it rendered the final outcome untenable. The petitioner alleged that the 2nd respondent had counted disputed and invalid votes in favour of the 1st respondent. He further alleged that during the campaign period, the 1st respondent had committed an electoral offence by allowing the printing, publication and distribution of campaign posters and other campaign materials which did not disclose, on its face, the name and addresses of its printers or publishers.

The petitioner further complained that the 1st respondent had made false statement of fact concerning the character of the petitioner and whose effect defamed the petitioner's character. In particular, the petitioner testified that the 1st respondent referred to him during the campaign period as a comedian and a joker who could not possibly aspire to position of leadership as Member of Parliament for Dagoretti constituency. The petitioner alleged that the 1st respondent had condoned the commission of electoral offences and corrupt practices by aiding and abetting the publication of campaign posters, advertisements, handbills and placards that did not bear on their faces the names and addresses of the printers and publishers. The petitioner further complained that the 1st respondent had during the campaign used State or public resources including government motor vehicles, and particularly No. GK A696C Toyota Prado, thereby abusing her then position as the Assistant Minister for Education.

The petitioner alleged that the 1st respondent had committed acts of undue influence through voter bribery. He further alleged that the 1st respondent agents wore badges with PNU party symbols during the election, which according to him, was contrary to election regulations. He complained that the 1st respondent had engaged and promoted acts of electoral violence during the tallying of votes at the tallying

centre i.e. at Kenya Teachers Science College. The petitioner further alleged that the 1st respondent's agents were involved in electoral malpractices when they altered and filled in new Form 16As at the tallying centre contrary to electoral regulations. The petitioner complained that the 1st respondent agents colluded with the presiding officers of Gatina and HGM polling centres to deny the petitioner's agents opportunity to witness the voting and the counting process. The petitioner alleged that his agents were physically ejected from the said polling centres.

As regard the 2nd and 3rd respondents, the petitioner complained that the said respondents had committed electoral offences by allowing election officials working under them to breach the code of conduct and their oath of office which required them to serve as impartial and independent electoral officials. The petitioner complained that the 2nd and 3rd respondents had allowed their officers to abdicate their responsibility to be independent electoral officials by performing their duties under the influence of the 1st respondent and her political party. In particular, the petitioner alleged that the 2nd and 3rd respondents had declared results which they knew or had reasonable cause to believe to be false or incorrect. He further accused the 2nd and 3rd respondents of succumbing to the 1st respondent's political party in declaring results that were false and incorrect.

In particular, the petitioner complained about the conduct of the 2nd and 3rd respondents' officials who presided over the elections at Ndururu, Uthiru, Ruthimitu, Joseph Kang'ethe, Gatina, and HGM polling centres. At Ndururu, the petitioner was aggrieved that the presiding officer had allowed voting to proceed beyond the voting hours contrary to electoral regulations. At Ndururu, Uthiru and Joseph Kang'ethe polling centres, the petitioner alleged that disputed votes were counted in favour of the 1st respondent. At Ruthimitu and Uthiru, the petitioner complained that the ballot boxes were transported from the said polling centres to the tallying centre without the escort of the agents of the candidates. He alleged that when the said ballot boxes arrived at the tallying centre at Kenya Science Teachers College (KSTC), the same were not sealed contrary to electoral regulations. The sum total of the complaints made by the petitioner against respondents was that, in his view, the election was not conducted in accordance with the law and thus did not reflect the expression of the will of the voters of Dagoretti constituency. The petitioner sought an order of the court for the scrutiny and recount of the votes cast in the constituency. He further sought an order of the court for the electors' registers used in all polling stations in the constituency to be examined to determine the exact number of electors who cast their votes. He finally sought an order of the court that the election of the 1st respondent as the Member of Parliament for Dagoretti constituency be nullified and the 1st respondent be declared as not duly elected.

The burden of establishing all these allegations regarding the conduct of the said election and the results announced thereafter is on the petitioner. This court is aware of its duty to consider and determine the evidence adduced by the parties to this election petition after putting in mind the fact that the election that is sought to be nullified is in respect of an exercise of the right by the voters of Dagoretti constituency to elect a representative of their choice. This court will not therefore interfere with the democratic choice of the voters of Dagoretti constituency unless it is established to the required standard of proof that there were irregularities and electoral malpractices that rendered the said elections null and void and therefore subject to nullification. It will not be sufficient for the petitioner to establish that irregularities or electoral malpractices did occur: he must establish that the said electoral malpractices were of such a magnitude that it substantially and materially affected the outcome of the electoral process in regard to the elections held on 27th December 2007.

I agree with the holding of Maranga J in Joho vs. Nyange & Another [2008] 3KLR (EP) 500 where at page 507 he stated as follows:

*“Election petitions are no ordinary suits. Though they are disputes **in rem** fought between certain parties, election petition are nonetheless disputes of great public importance – Kibaki –vs- Moi, Civil Appeal No.172 of 1999. This is because when elections are successfully challenged by-elections ensue which not only cost the country colossal sums of money to stage but also disrupt the constituents' social and economic activities. It is for these reasons that I concur with the election court's decision on*

Wanguhu Ng'ang'a & Another –vs- George Owiti & Another, Election Petition No. 41 of 1993 that election petitions should not be taken lightly. Generalized allegations as the ones made in this petition are therefore not the kind of evidence required to prove election petitions. As I have said, they should be proved by cogent, credible and consistent evidence.”

As regard the standard of proof which ought to be discharged by the petitioner in establishing allegations of electoral malpractices, there is consensus by electoral courts that generally the standard of proof in election petition cases is higher than that applicable in ordinary civil cases i.e. that of proof on a balance of probabilities. The standard is higher than proof on a balance of probabilities but lower than the standard of proof beyond reasonable doubt required in establishing criminal cases. Allegations of electoral malpractices, like for instance bribery, require a higher proof. This legal position was accepted in the cases of Muliro vs. Musonye & Another [2008] 2 KLR (EP) 52 at page 64, Wanguhu Ng'ang'a & Another –vs. Owiti & Another (No. 2) [2008] 1 KLR (EP) 799 at page 806 and Joho vs. Nyange & Another [2008] 3KLR (EP) 500 at page 508.

The complaints raised by the petitioner in his petition can generally be classified into three broad areas; the petitioner challenged the election of the 1st respondent on the basis of her conduct during the election campaigns; He made complaints regarding the manner in which the elections were conducted on the polling day by presiding officers appointed by the 3rd respondent; and finally, the conduct of the 1st and 2nd respondents during the tallying of the results at the tallying centre at the Kenya Science Teachers College.

This court will proceed to consider and determine the complaints raised by the petitioner on those three broad areas. As regard the conduct of the 1st respondent during the campaign period prior to the holding of the elections, the petitioner testified that the 1st respondent was involved in acts of electoral violence in that she disrupted the petitioner's campaign rallies. The petitioner recalled that about six days before the elections were held, as he was campaigning at Waithaka shopping centre in the constituency, the 1st respondent with her supporters violently disrupted a campaign meeting he was holding at the time. The said disruption was captured on tape. A DVD of the incident was produced by the petitioner in evidence. The DVD was prepared for Al-Jazeera Television and was aired by the said television station. In the said DVD, it was evident that the 1st respondent and her supporters drove into the meeting that was at the time being addressed by the petitioner. The 1st respondent in her testimony before court denied that she had disrupted the petitioner's campaign meeting. She insisted that it was actually the petitioner who disrupted her campaign meeting. On this point, the 1st respondent's evidence was corroborated by her witness, DWI Hezron Kamau Waithaka, her chief campaign strategist and agent.

I carefully evaluated the evidence adduced by the petitioner and the 1st respondent in this regard. I also carefully analysed the DVD that was produced by the petitioner. It was clear that the campaign itineraries of the petitioner and the 1st respondent were not harmonized. The two political opponents were therefore bound to meet in the constituency in the course of their campaign rallies. It was clear from the DVD that the petitioner and the 1st respondent conducted themselves with maturity deserving of persons aspiring to political leadership of this country. Both the petitioner and the 1st respondent treated each other cordially and with courtesy. This respect for each other persuaded their supporters not to be violent. It was my assessment that the petitioner failed to establish that the 1st respondent disrupted his campaign meetings, particularly the campaign meeting that was held at Waithaka shopping centre.

On her part, the 1st respondent testified that it was the petitioner who conducted violent campaigns. She gave an instance when her campaign convoy was attacked at Gatina. She recalled that youths, whom she suspected to be the supporters of the petitioner, stoned her convoy resulting in injury to several of her supporters. She produced medical reports of several of her supporters whom she claimed were treated at her expense. I carefully analysed the said evidence adduced by the 1st respondent regarding the violence at Gatina. It was clear to this court that the 1st respondent was unable to establish with certainty that the youths who stoned her campaign convoy were supporters of the petitioner. She further failed to establish

that the said youths were in fact under the control of the petitioner. I therefore hold that, although the 1st respondent established that violence was perpetrated against her supporters at Gatina, the said violence could not conclusively be attributed to the petitioner.

Another complaint made by the petitioner regarding the conduct of the 1st respondent during the campaign period was the allegation that the 1st respondent made disparaging comments concerning the petitioner's profession. The petitioner testified that the 1st respondent addressed several campaign rallies in which she stated that "*hiyo ni ridiculous tupu, those are jokers they should be in the streets cracking jokes.*" PW4, Nathan Onchwe Khamoni testified that in the month of December 2007, he heard the 1st respondent state that "*hakuna haja mpigie mwanasarakasi kura... mtu ambaye hajakomaa kisiasa – Dagoretti ina wenyewe*" meaning that there was no need to vote for a performing artist who was not politically mature – Dagoretti had its owners. The petitioner particularly took offence to the fact that the 1st respondent was defaming him by referring to him as a comedian who should not be taken seriously in his desire to be elected as member of parliament. During his testimony in court, the petitioner insisted that he was a performing artist and not a comedian and should be referred to as such. On her part, the 1st respondent testified that the petitioner similarly disparaged her by referring her as "*cucu*" meaning grandmother. The 1st respondent was offended by the reference of her as a grandmother in the context of the election. She testified that she did not mind to be called by the name "*mathe*" which is the *Sheng* language equivalent of the term mother.

It appeared to this court that both the petitioner and the 1st respondent made a big issue out of words which in their ordinary meaning and in normal circumstances would refer, in respect of the petitioner, to his profession, and in respect of the 1st respondent, to her age and respect accorded to her as a senior citizen in the society. However, in the muck and ruck that is politics, it is expected that the petitioner and the 1st respondent would have thick skins to withstand adverse comments made on their respective characters and personal traits. Some of the comments made may be unfair but competitive politics being what it is, such comments are part and parcel of the political terrain. I think when one aspires to a public leadership position, especially in competitive politics, such a person should be prepared to have statements which may not be necessarily flattering be made about them. In the circumstances of this petition, were the comments made by the 1st respondent concerning the petitioner's profession of such a disparaging nature that it exerted undue and negative influence on the electorate that the petitioner was entitled to raise it as a substantial issue in this petition? I do not think so. The fact that the petitioner's profession is considered comedy or performing art does not in any way increase or lessen the petitioner's personal attribute as a qualified Kenyan worthy of aspiration for political leadership generally and as member of parliament for Dagoretti constituency in particular. If the petitioner felt sufficiently aggrieved by statements by the 1st respondent which he considered defamatory, he was entitled to seek appropriate remedy before the civil courts and not an election court. That complaint by the petitioner is not a proper ground in which an election of a duly elected member of parliament can be nullified.

The petitioner further made an allegation that the 1st respondent had bribed voters and therefore unduly influenced them to vote for her. The petitioner called two witnesses, namely PW2 James Ochieng Ouma and PW4 Nathan Onchwe Khamoni. They testified that on diverse dates in the months of September, October and November 2007, the 1st respondent bribed voters with a view to influencing them to vote for her during the general election. PW2 testified that he witnessed a lady whom she referred as Nancy Gichira and the Kawangware Senior Chief Charles Nyambisa distribute money to women who had attended the PNU campaign rally which was held at Nyayo Stadium. He testified that although the said Nancy Gichira did not personally give him money, he was given KShs.200/= by a lady referred to as Mama Kaptan. He further testified that he was given a sum of KShs.400/= by the 1st respondent at Shalom house in Dagoretti Corner.

On his part, PW4 testified that he was given KShs.300/= at Shalom house by the 1st respondent's agents who requested him to vote for the 1st respondent. PW2 and PW4 testified that they were given the bribe at Shalom house after the 1st respondent had addressed a campaign meeting within the vicinity of

the said house. On her part, the 1st respondent denied that she had bribed voters. PW2 and PW4 however conceded in their testimony that the 1st respondent was not present when they were given the money at Shalom house. As regard PW2, he testified that he was not sure if Nancy Gichira and Senior Chief Charles Nyambisa gave them money at Nyayo Stadium at the behest of the 1st respondent. PW2 and PW4 testified that although they took the money that was offered to them at the time, when it came to casting their votes, they voted according to their conscience. PW4 testified that he heeded the advice of the petitioner by accepting the money which was offered to him as inducement by voting according to his conscience. In Muliro vs. Musonye & Another [2008] 2 KLR (EP) 52 at page 64, the election court held as follows:

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

In the present petition, it was evident that the petitioner failed to establish to the required standard of proof that the 1st respondent indeed bribed voters and that the said bribery was so pervasive that it influenced the voters to vote in favour of the 1st respondent. Although there was no doubt that PW2 and PW4 were given money by persons who purported to be agents of the 1st respondent, the petitioner offered no evidence to establish to the required standard the nexus between the said persons giving the money and the 1st respondent. PW2 and PW4 conceded that when they were given money at Shalom house in Dagoretti Corner, the 1st respondent had left the scene. Indeed, the 1st respondent confirmed that she had campaigned at Dagoretti Corner during the particular period. She however denied that she had bribed any voter.

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

As regard whether the 1st respondent used State resources during the electioneering period, the petitioner testified that the 1st respondent used public resources particularly motor vehicle registration No. GK A696C Toyota Prado in her campaign. He produced a DVD which showed a government motor vehicle in the campaign convoy of the 1st respondent. The 1st respondent denied that such a motor vehicle was allocated to her as then Assistant Minister for Education. She produced a letter from the Permanent Secretary Ministry for Education that established that such motor vehicle was indeed not assigned to her at the particular period. The 1st respondent's witness Hezron Kamau Waithaka testified that the 1st respondent was assigned a Mitsubishi Pajero motor vehicle and a Mercedes Benz. The 1st respondent conceded that she could have used a government motor vehicle during a presidential function which was held at the constituency during the particular period. I think the 1st respondent was entitled to use a government motor vehicle during the presidential function as she did not cease to be an Assistant Minister on account of the Dagoretti parliamentary seat being declared vacant after the expiry of the term of the 9th parliament. The petitioner was unable to establish that motor vehicle registration No. GK A 696C was in fact used by the 1st respondent during her campaigns. I hold that the petitioner failed to establish that indeed the 1st respondent used public resources during her campaigns and therefore committed an electoral offence.

The petitioner complained that the 1st respondent caused to be printed and published election posters

which were distributed and which election posters did not bear upon its face the names and addresses of its printers and publishers contrary to Section 11 (1) (b) of the Election Offences Act. The petitioner produced as an exhibit a copy of the 1st respondent's campaign posters which on its face did not in fact bear the names and addresses of the printers and publishers. While conceding that the said poster produced in evidence indeed did not bear the name and address of the printer and publisher, the 1st respondent produced a campaign poster of the petitioner in evidence which did not also contain the name and address of its printer and publisher. The petitioner explained that he did not personally authorize the printing of the particular campaign poster produced in evidence by the 1st respondent. He speculated that the particular campaign poster could have been printed by his supporters.

I have considered the evidence adduced in this regard. It was clear that both the petitioner and the 1st respondent breached the provisions of Section 11 (1) (b) of the Election Offences Act by publishing posters which did not bear the names and addresses of its printers and publishers. Section 11 (3) of the Election Offences Act provides that before anyone can be prosecuted for committing the offence stated in Section 11 (1) (b) of the said Act, the sanction of the Attorney General must be sought. In my view, Section 11 of the Election Offences Act can only be invoked before the elections are conducted. That section cannot be used as ground in support of an election petition unless such publication of election posters prejudiced the petitioner. In the present petition, the petitioner has not established or shown how he was prejudiced or affected by the 1st respondent's failure to have the name and address of the printer and publisher of her election posters on the face of such posters. Even if this court were to find that indeed the 1st respondent was culpable, the only remedy available under the Election Offences Act is the prosecution of the 1st respondent. Such indiscretion by the 1st respondent cannot form a basis for an election court to nullify the election of a member of parliament, in the absence of any other cogent grounds. That ground in the petition similarly fails.

As regard the petitioner's complaint that the 1st respondent's agents had worn badges which had the 1st respondent's political parties symbols inscribed on them, Regulation 10 (5) of the Presidential and Parliamentary Elections Regulations provides as follows:

“Every agent appointed by a candidate for the purposes of these Regulations shall at all times during the performance of the duties authorized by the candidate wear the official badge or insignia of the political party sponsoring the candidature of the candidate at the election.”

It was therefore evident that the petitioner's claim that the 1st respondent had committed an electoral offence by allowing her agents to wear badges with party insignia was without foundation. Whereas it is acknowledged that for there to be peace and order at the polling stations voters must in so far as possible not disclose to the other voters at the polling stations their preferred candidate by either wearing clothes which signify their preference, it is important that the agents of the candidate be properly identified at the said polling stations.

As regard the second broad complaint made by the petitioner i.e. the conduct of the election by the 2nd and 3rd respondents, it was the petitioner's case that the 3rd respondent's officials were engaged in electoral malpractice during the voting process. In particular, the petitioner testified that the presiding officer in charge of Ndururua polling centre allowed voting to proceed beyond the stipulated time. According to the petitioner's witness, PW3 Collins Ndisio Ignatius and PW5 Councillor Paul Simba Arati, voting was concluded at the said Ndururua polling centre at 6.30 p.m. PW5 testified that at about 7.00 p.m., the 1st respondent stormed into the polling centre with a group of approximately 500 people and demanded that the said people be allowed to vote. The presiding officer of Ndururua polling centre was called by the 2nd and 3rd respondents as a witness. She was DW1. She was Margaret Wangui Wanjau. She denied the allegations made by the petitioner's witnesses. She testified that the gates of the polling centre were closed at 5.00 p.m. as required by regulations. She however recalled that all the voters who were still in the queue within the compound of the polling centre were allowed to vote. She testified that she consulted the 2nd respondent, Sammy Kimemia Njuguna, who authorized her to continue with the voting exercise provided that only the persons who were in the queue at 5.00 p.m. were allowed

to vote. The 2nd respondent confirmed in his testimony that he had indeed authorized DW1 to continue with the voting exercise beyond 5.00p.m., the official closing time.

Whereas the petitioner alleged that it was the 1st respondent who instigated the extension of time for persons who had not voted by 5.00p.m. at the said Ndururu polling centre, the 1st respondent on her part testified that it was the petitioner and his supporters who had sought to prevent voters who were still at the queue at 5.00 p.m. from casting their votes. DW1 testified that the petitioner attempted to disrupt the election process when he stormed into the polling centre some minutes after 7.00 p.m. by demanding that voters who had not yet voted at the time be barred from exercising their right to vote. The 1st respondent and her witness DW2, Hezron Kamau Waithaka corroborated the testimony of the presiding officer regarding the time when the polling centre was closed. Whereas the petitioner insisted that the voting continued at the polling centre up to 11.00 p.m., the presiding officer testified that the voting process ended a few minutes before 8.00 p.m. The petitioner's witnesses and the respondents' witnesses were in agreement that the persons who were allowed to vote after 5.00 p.m. voted at polling stations No. 9 and 10 at the said polling centre.

I have carefully considered the evidence adduced in regard to the events that took place at Ndururu polling centre on the evening of the 27th December 2007. In the first instance, Regulation 25 (3) of the Presidential and Parliamentary Election Regulations provides that:

“A presiding officer may extend the hours of polling at his polling station where polling has been interrupted under this regulation or for other good cause, and shall, where polling in that polling station has started late, extend the hours of polling by the amount of time which was lost in so starting late.”

The presiding officer at the said polling centre therefore had legal authority to extend time to allow voters who were at the queue to exercise their democratic right to vote. The reason given by the presiding officer for extending time was a “good cause” within the meaning of the said Regulation 25(3). I was persuaded that the presiding officer exercised her discretion properly when she extended time. I did not find any substance to the allegation made by the petitioner that it was the 1st respondent who instigated the extension of time at the said Ndururu polling centre.

In any event, having perused the Form 16A in respect of polling station No.9 and No.10 at Ndururu polling centre, it was clear that the number of persons who voted at the said polling centre were not of a greater number than the other polling stations within Ndururu polling centre. According to the Form 16A of polling station No.9, 389 persons voted. At polling station number 10, 520 persons voted. The petitioner did not make any claim that unauthorized voters were allowed to vote at the said polling stations. It was clear that, the petitioner, being aware that the said polling centre was a stronghold of the 1st respondent, attempted to prevent people from voting, ostensibly by the reason that the time had expired and therefore voters who were still at the queue at the particular time ought to be barred from casting their votes. I find no merit with the petitioner's complaint that the voting time was unlawfully extended beyond hours at Ndururu polling centre.

The petitioner complained that his agents were barred from witnessing the commencement of the voting exercise and further from witnessing the entire voting exercise, including the counting of ballots. The petitioner specifically complained that his agents were barred from Ruthimitu, Uthiru, Joseph Kang'ethe, Gatina and HGM polling centres. He testified that his polling agents, apart from being barred from the said polling centres, were ejected from Ndururu, Gatina, Joseph Kang'ethe and HGM polling centres. PW3 Collins Ndisio Ignatius testified that the petitioner's agents were locked out of the polling centres at Toi primary school, Uthiru, Mbagathi primary school and Muslim primary school. He however testified that upon his intervention, the ODM party agents were allowed to observe the elections. At Toi primary school, PW3 testified that voters whose surnames started with the letter “O” were frustrated since their queue was very long. He testified that no effort was made by the presiding officers at the said station to properly organize the queue. It was only after his intervention, and after the voting exercise had nearly ended, that the presiding officers agreed to split up the said queues.

Similarly at Ndururu, PW5 complained that there was no proper queue management. On this point, PW5's evidence was corroborated by DW2 Hezron Kamau Waithaka who testified that the queue at Ndururu polling centre had extended for about a kilometre before his intervention which resulted in the queues being properly managed at the said polling centre. It was apparent that any complaint that the petitioner had regarding the locking out of his agents during the voting exercise was resolved upon the intervention of PW3, the Chief agent of the petitioner. The 2nd respondent testified that all the teething problems that were reported to him during the voting exercise were resolved to the satisfaction of all concerned. Although PW3's testimony appeared to suggest a systematic policy by electoral officials to frustrate the agents of ODM and the petitioner, it was clear from the evidence adduced that no such policy was in place. If that was the position, then the presiding officers would not have allowed the petitioner's agents into the polling stations upon intervention by PW3. My assessment of the evidence adduced by the parties to this election petition is that the voting exercise went on smoothly in all the 28 polling centres in Dagoretti constituency save for a few hitches which were satisfactorily resolved by the presiding officers, and where necessary, by the 2nd respondent.

It was apparent that a concern relating to whether party agents should be allowed into the polling stations was an issue that caused anxiety to the presiding officers due to the sheer numbers of parliamentary and civic candidates in the constituency. It was evident that in polling stations where the polling rooms were small, not all agents could be accommodated. According to the 2nd and 3rd respondents witnesses i.e. DW1 Margaret Wangui Wanjau, DW2 Assumpta Ndunge Munyasia, DW3 Phoebe Akinyi Olum and DW5 Bernard Mbugua Wainaina, who were the presiding officers of Ndururu, Ruthimitu, Gatina and Joseph Kang'ethe polling centres respectively, the number of accredited agents was so large that they were forced in some instances to request the agents to observe the voting process in shifts so that the said agents could not impede the voters from casting their votes. I am of the view that the petitioner was not prejudiced by the hitches experienced during the voting exercise. In any event, no evidence was adduced by the petitioner which established that he was singled out for special treatment by the presiding officers to an extent that such treatment amounted to an electoral malpractice. In my assessment of the evidence adduced in this regard, if there was any prejudice at all, then all the candidates were equally prejudiced by the hitches that were experienced prior and during the voting exercise.

The petitioner complained that the 3rd respondent had allowed a bar known as Gachuri Original bar to be used as a polling centre contrary to regulations. The owner of the bar DW4 Richard Muhindi Gachuri indeed confirmed in evidence that the space behind his bar at Uthiru shopping centre was used as a polling centre during the last general elections. He testified that the said space behind his bar has been so used as a temporary polling centre since 1997. PW3 Collins Ndisio Ignatius testified that during the voting exercise people accessed the polling centre set-up behind the bar through an entrance next to the bar and also via an entrance through the bar. DW4 denied that the bar and the butchery next to the polling centre were in operation during the voting process. He testified that he was required to lock up his bar and butchery business during the entire period that the 3rd respondent leased his premises.

The 2nd respondent explained that the 3rd respondent was constrained to use the space behind Gachuri Original bar as a polling centre due to the fact that there was no public school or public hall within Uthiru shopping centre that could be used as a polling centre. Upon evaluation of the evidence adduced in this regard, it was clear that the 3rd respondent put up all the necessary facilities and safeguards that enabled the temporary polling centre set up behind Gachuri Original bar to function as a proper polling centre. I was convinced by the explanation given by the 3rd respondent that it had no option but to site the polling centre at the space behind the said bar since there was no other public venue where election could be conducted within the Uthiru shopping centre. In any event, no evidence was placed before the court by the petitioner to suggest that by the mere siting of the polling centre within the proximity of a bar, the elections conducted at the said polling centre somehow rendered the results that were announced by the 3rd respondent subject to be impeached.

The petitioner and his witnesses made adverse allegations regarding the manner in which the ballots were counted after the voting exercise. The petitioner stated that disputed and invalid votes were counted in favour of the 1st respondent. In particular, the petitioner complained that there was electoral

malpractice evident in the manner in which votes were counted at Joseph Kang'ethe polling centre. DW5 Bernard Mbugua Wainaina, the presiding officer of Joseph Kang'ethe polling centre recalled that at about 9.30 p.m. on the 27th December 2007, the petitioner accompanied by an ODM civic candidate called Abraham Njehia Mwangi attempted to disrupt the counting process. He recalled that the petitioner unnecessarily disputed ballot papers on the grounds that they were improperly marked. He recalled that even after he had addressed the objections by the petitioner, the civic candidate, with his supporters who appeared drunk, made attempts to forestall the conclusion of the counting process by insisting, without any justification, for a recount of the ballots.

PW3 Collins Ndisio Ignatius testified that he witnessed ballot boxes being loaded onto an unidentified Toyota Corolla station wagon outside Mbagathi polling centre. He recalled that he arrived at the said polling centre at about 10.00 p.m. He testified that he inquired from the driver of the motor vehicle whether he was assigned by the 3rd respondent duties of ferrying the ballot boxes to the tallying centre. The driver gave him an answer that he had been instructed by the presiding officer to load the ballot boxes in the motor vehicle. PW3 then instructed the driver to offload the said ballot boxes and return them to the polling station. PW3 was suspicious that the ballot boxes in the said motor vehicle were being introduced into the polling centre. Once inside the polling station, he insisted that the ballot boxes be opened so that he could verify the contents therein.

As the deputy presiding officer was in the process of opening the ballot boxes, the presiding officer arrived and sought to know the identity of PW3. Upon PW3 identifying himself as the chief agent of the petitioner and ODM, the PNU agents who were inside the polling station became hostile. PW3 recalled that he was assaulted by the said agents that he had to be rescued by police officers who were manning the polling centre. The then Kilimani OCPD Mr. Herbert Khaemba arrived at the scene and escorted PW3 to Kilimani police station from where PW3 was released. Herbert Khaemba confirmed in his testimony that he had indeed rescued PW3 from Mbagathi polling centre from a hostile crowd that was baying for his blood. He insisted that since PW3 had committed no offence, he had no reason to detain him at the police station.

The petitioner further complained about irregularity in the manner in which the vote counting process took place at various polling stations, particularly at Uthiru, Ndururu, Joseph Kang'ethe and Ruthimitu polling centres. The petitioner testified that his agents were barred from witnessing the vote counting process at the said polling centres. However, for some strange reasons, other than the evidence by PW3 Collins Ndisio Ignatius and PW5 Paul Simba Arati, the petitioner chose not to call any of his agents whom he claimed were evicted or ejected from the said polling centres during the counting process. This court was therefore unable to find substance in the allegation made by the petitioner to the effect that his agents had been locked out of the polling centres.

PW3 testified that he was on the move throughout the night to ensure that everything was in order in the various polling centres. PW3 could not therefore corroborate the assertion by the petitioner that disputed and invalid ballots were counted in favour of the 1st respondent. Under **Regulation 35 A (3)** of the **Presidential and Parliamentary Elections Regulations**, a candidate or his agents has a right to dispute the inclusion in the count of a ballot paper or object to the rejection of any ballot paper. Where such course of action is taken by the candidate or his agent, the presiding officer is required to either uphold or reject the complaint made. In the event that the presiding officer shall count a disputed ballot paper, he shall mark the said ballot paper as disputed. The petitioner did not adduce evidence to support his assertion that such disputed or rejected ballot papers were counted in favour of the 1st respondent. The petitioner did not adduce any evidence regarding the counting of the ballots papers at any polling station.

Whereas the petitioner insisted that he was leading in 17 out of the 28 polling centres, and in fact gave this information to the press, in his evidence before court, the petitioner was unable to produce any evidence, documentary or otherwise to support his contention that he was in such a lead at the specific time he gave the information to the press. The petitioner did not even name the polling centres that he was allegedly in the lead. I accept the explanation given by the 1st respondent that any diligent candidate

was expected to have tallied the results from the various polling stations before the results were finally officially announced by the 2nd respondent, as a returning officer, at the tallying centre. The petitioner could not give a single figure of the votes that he secured in any of the 28 polling centres. It was therefore incomprehensible that the petitioner could expect the court to arrive at a decision in his favour on this aspect regarding whether disputed or rejected votes were counted in favour of the 1st respondent without the petitioner offering proof of such rejected or disputed ballots that were counted in favour of the 1st respondent. I therefore hold that the petitioner failed to establish to the required standard of proof that indeed disputed or rejected ballots were counted in favour of the 1st respondent by the officials of the 3rd respondent to his detriment.

As regard the allegation by the petitioner's witness PW3 Collins Ndisio Ignatius that illegal ballot boxes were introduced at Mbagathi polling centre, it was strange that after his release from police custody, PW3 failed to pursue the issue of the illegal ballot boxes with the 2nd respondent once he reached the tallying centre. The least PW3 could have done was to note the numbers on the said ballot boxes so that in the event his complaint was not addressed by the returning officer, he could seek the court intervention to establish the contents of the said ballot boxes once the petitioner presented his petition to court. In any event, as admitted by PW3, his demand for the deputy presiding officer to break the seals and open the said ballot boxes at Mbagathi polling centre, was unlawful as it was contrary to Regulation 39 of the Presidential and Parliamentary Elections Regulations that require ballot boxes to be sealed upon the conclusion of the vote counting exercise.

PW3 was in effect asking the deputy presiding officer of the said polling centre to do an illegal act. The petitioner cannot therefore seek the intervention of this court to declare the elections in respect of the said polling centre as not duly conducted, yet it was the petitioner's own chief agent who was breaking the law. I hold that the petitioner failed to establish the allegation that illegal ballot boxes were introduced at Mbagathi polling centre. In any event, since the particulars of the said ballot boxes were not provided to the court, it will be nigh impossible for this court to reach a determination that the ballot papers in the said ballot boxes were either unlawfully introduced or were counted in favour of the 1st respondent.

As regard the events that took place at the tallying centre at Kenya Science Teachers College, it was the petitioner's evidence that the 2nd respondent failed to address his grievance regarding the ballot boxes from Ruthimitu and Uthuru that were delivered to the tallying centre without being escorted by the agents of the candidates and further his complaint that the said ballot boxes were not properly sealed. The petitioner testified that the 2nd respondent failed to address his grievance relating to the number of valid votes cast in favour of each candidate from certain polling stations. The petitioner testified that he was aggrieved that the 2nd respondent failed to address his complaints regarding the disputed votes that he alleged were counted in favour of the 1st respondent. The petitioner confirmed that while at the tallying centre, he agitated for the proper tallying of the votes and in fact prevented the 2nd respondent from announcing the results, which in his opinion were false and fictitious.

On his part, the 2nd respondent together with DW6 Ruth Kwamboka Nchogu, the Assistant Returning Officer testified that the petitioner and his supporters were so rowdy that they prevented them from performing their duties as required by the law. The 2nd respondent conceded that he did not announce any results at the tallying centre even though he had received the first results from the polling centres as early as at 10.00 p.m. on the night of 27th December 2007. According to Regulation 40 of the Presidential and Parliamentary Elections Regulations, the 2nd respondent was required to "*immediately after the results for all the polling stations in the constituency*" had been received to tally the results in the presence of candidates or their agents and publicly announce the results to those present at the tallying centre. The 2nd respondent was required to examine the ballot papers marked "*rejection objected to*" and "*disputed*" and confirm or vary the decision of the presiding officers with regard to the validity of these ballot papers. (see *Regulation 40(1) (b)*). The 2nd respondent took no such action. It was clear that due to the contested nature of the elections at Dagoretti constituency, and in view of the close presidential

elections, the 2nd respondent's failure to announce the tallied results from each polling centre immediately the said results were handed over to him at the tallying centre largely contributed to the anxiety and tension at the tallying centre. It contributed to the events that later unfolded at the tallying centre for two days following the election day.

From the evidence adduced, it was clear that the petitioner and his supporters contributed to a considerable extent to the chaos that took place at the tallying centre. The 1st respondent's supporters also participated in the mayhem. As the returning officer, the 2nd respondent was responsible for keeping order at the tallying centre. The returning officer's duty to keep order at the tallying centre, including requiring the removal of persons who appear to him may prevent the orderly tallying of results, is similar to the power given to a presiding officer under Regulation 24 of the Presidential and Parliamentary Elections Regulations. The police officers at the tallying centre were under the authority of the returning officer. The 2nd respondent did, during the hearing of this election petition, attempt to blame the OCPD Kilimani police station for the disorder at the tallying centre. This court did summon the then OCPD of Kilimani police station, Herbert Khaemba to give evidence regarding the events that took place at the tallying centre at the material period. Although the 2nd respondent insisted that he severally requested the OCPD to remove the rowdy people at the tallying centre (*which request according to the 2nd respondent Mr. Khaemba declined to accede to*), it was clear from the evidence of Mr. Khaemba that the 2nd respondent made no such request which was not given effect to. I assessed the demeanour of Mr. Khaemba when he testified in court. I formed the opinion that he was a truthful witness. He testified that whenever the 2nd respondent made request to him for additional security to be provided, he acceded to the request and sent more police officers to the tallying centre. It however appeared that the 2nd respondent had not briefed the OCPD regarding who was to be incharge of the tallying centre. While the 2nd respondent understood that he was incharge of all the officers at the tallying centre, the OCPD testified that he was answerable to the Provincial Police Officer, Nairobi. Although it was apparent that the two officers acted at cross purpose, the ultimate responsibility of the chaos that took place at the tallying centre must be borne by the 2nd respondent.

Is the petitioner justified to complain that since no tallying or announcement of the results took place at the tallying centre, then this court should nullify the election of the 1st respondent as the duly elected member of Dagoretti constituency? The petitioner has not placed sufficient evidence before this court to enable it take such a course of action. As stated earlier in this judgment under Regulation 35 and 35A of the Presidential and Parliamentary Elections Regulations, the counting of the votes can only take place at the polling station under the supervision of the presiding officer of such a polling station. It was therefore evident that if the petitioner was a diligent candidate, he would already be in possession of the results from each polling station. Indeed, the petitioner or his agents would have availed a copy of the declaration results as set out in Form 16A as provided by Regulation 35A (5) of the Presidential and Parliamentary Elections Regulations. The only issue that remained to be determined regarding the ballot papers by the returning officer at the tallying centre, is the determination of whether rejected or disputed ballots ought to be counted in favour of the candidate who has filed the complaint. (See Regulation 40 (1) (b)). The returning officer does not have any authority under the election regulations to open ballot boxes and recount valid votes cast in favour of each candidate. If a candidate is dissatisfied with the count of the votes, he can only make a request for a recount at the polling station and not at the tallying centre. (See Regulation 37 (1)).

The petitioner's demand for the determination of the valid votes cast at the tallying centre was therefore either misinformed or mischievous. The fact that some ballot boxes from Uthiru and Ruthimitu were not properly sealed was not sufficient reason for the petitioner to robustly protest that the results of the other polling centres ought not to be tallied pending the determination of the fate of the votes that were cast at Uthiru and Ruthimitu. On my assessment of the evidence adduced, including the Form 16As that were produced in respect of Uthiru and Ruthimitu polling centres, even if the votes cast in favour of the 1st respondent in the two polling centres were excluded, the 1st respondent would still have obtained more votes than the petitioner. On the other hand, the 2nd respondent's offer for the recount of votes from the said questioned ballot boxes from Uthiru and Ruthimitu, apart from being unlawful, was unconscionable.

Further, the 2nd respondent action in filling in new Form 16As and the Form 17A after he had certified the results that were officially announced by the 3rd respondent as the true and correct results, was evidence of the 2nd respondent's incompetence in presiding over elections of such importance and magnitude. Although the 2nd respondent touted his experience in presiding over elections since 1974 to 1983 in the single party political era, it was clear that the 2nd respondent was out of his depth when it came to presiding over a hotly contested election in this era of multiparty politics. It was apparent that the 2nd respondent had not familiarized himself with the regulations governing the tallying and the announcement of results once he received them from various polling centres. There was no justification for the 2nd respondent's failure to tally and announce the results immediately he received them from the various polling centres. It is the view of this court that if the 2nd respondent had abided by the requirements of the law, and particularly Regulation 40 of the Presidential and Parliamentary Elections Regulations, may be the mayhem that was witnessed at the tallying centre would not have occurred.

The 2nd respondent had no reason or excuse to withhold the results once he received them at tallying centre from the various polling stations. The 2nd respondent had no excuse in law to tally the results from the various polling stations in the privacy of his office at the tallying centre yet the law required him to tally the results in the presence of the candidates or their agents and immediately announce the tallied results after resolving any issue relating to the inclusion of a rejected ballot paper or exclusion of a disputed ballot paper counted in favour of any of the candidates. The 2nd respondent therefore totally failed in his duty as a returning officer when the time came for him to tally the results from the polling station and publicly announce them to the members of the public.

I wish to reiterate that on the whole, the elections at the polling centres were conducted under the principle of free and fair election. This included the counting of the votes at the various polling stations. Problem only arose at the tallying when the 2nd respondent failed in his duty. I have no doubt that the results that were tallied and officially announced at the press centre at Kenyatta International Conference Centre were the official results of Dagoretti constituency. I carefully considered the evidence adduced by DW6, Ruth Kwamboka Nchogu, the assistant returning officer regarding the tallying of results from various polling stations. I believed her testimony when she testified that she had properly and correctly tallied the results that were eventually announced at the Kenyatta International Conference Centre.

The petitioner further sought the nullification of the election of the 1st respondent as the duly elected member of Dagoretti constituency on the grounds that the results were not officially announced at the tallying centre. It was conceded by all the witnesses who testified in this election petition, and who were present at the tallying centre during the entire material period, that the 2nd respondent failed actually to announce the results at the tallying centre. There was evidence which supported the 2nd respondent's assertion that he was prevented from announcing the results when the crowd in the tallying centre became rowdy. The petitioner took issue with the fact that the results were announced at a different venue other than the duly gazetted venue at the tallying centre at Kenya Science Teachers College.

I think taking into consideration the events that took place on the material period, the 2nd respondent's decision to announce the results at the 3rd respondent's press centre at the Kenyatta International Conference Centre was not unreasonable in the circumstances. The 2nd respondent was required in law to announce the results of the elections of Dagoretti constituency. In the circumstances therefore, the petitioner could not have been prejudiced by the venue of the announcement of the said results.

The petitioner raised several issues concerning the validity or otherwise of the Form 16As that were produced in evidence by the 2nd respondent. It was evident from his petition that the petitioner did not consider the manner in which the Form 16As were filled to be of such an importance as to merit consideration by this court. The petitioner did not plead failure by the 2nd respondent to properly fill the Parliamentary Form 16As. It is trite law that a party is bound by his pleadings. The petitioner cannot be allowed to introduce new grounds in the course of adducing evidence in support of his petition. This court will not therefore address the issues raised by the petitioner regarding the validity of the

Parliamentary Form 16As.

I will however comment on one issue that appears to have caught and vexed the imagination of the petitioner regarding the said Form 16As. The petitioner appears to take issue with the fact that most of the Form 16As that were produced in evidence by the 2nd respondent were not duly signed by agents of the candidates. The failure by a candidate or his agent to sign the Form 16As cannot invalidate the results contained in the said Form 16As (See Regulation 35A (6) and (7) of the Presidential and Parliamentary Regulations). The fact that the said Form 16As were not signed by the agents does not render any of the results from the various polling centres invalid.

In conclusion, I wish to state that taking into totality the evidence adduced by the petitioner in support of his petition seeking the nullification of the election of the 1st respondent as the Member of Parliament of Dagoretti constituency, I hold that the petitioner failed to discharge the burden placed on him to establish the allegation made in his petition to the required standard of proof. As was held by Rawal J in Onalo vs. Ludeki & 2 others (No.3) [2008] 3 KLR (EP) 614, the burden of proving that a person is guilty of an election offence is on the petitioner and his witnesses. That burden cannot be shifted to the respondents establish that they did not commit such electoral offences or malpractices. I agree with the holding by the election court in Joseph W. Khaoya vs. Eliakim Ludeki & another EP No.12 of 1993 (unreported) where the court held at page 12 of its judgment as follows:

“Election offences are serious matters with grave penalties. They amount to criminal charges which should be proved. The proof should be to a very high degree for the charges to be sustained before a court of law. We are satisfied that that has not been done here.”

In the present petition, it was clear that the petitioner made generalized allegations against the respondent with the hope that when the said allegations are considered in totality a picture would emerge that the elections were conducted in a manner that was not free and fair. It is conceded that some of the allegations raised by the petitioner established non-compliance with the law in relation to the conduct of the said elections. I however hold that the said non-compliance with the law were of such a minor nature as not to affect the overall results of the elections to determine the member of parliament of Dagoretti constituency. In any event, Section 28 of the National Assembly and Presidential Elections Act bars this court from voiding a result by reason of non-compliance with any written law if such non-compliance did not materially affect the results of the election. I do hold that the petitioner failed to establish to the required standard of proof that the irregularities evident during the conduct of the elections were of such a nature as to render the said elections not to be a true reflection of the expression of the will of the voters of Dagoretti constituency.

Before concluding this Judgment, I wish to express my sincere gratitude to Mr. Ng’aru counsel for the petitioner, Professor Githu Muigai and Mr. Muthomi counsel for the 1st respondent and Mr. Kyalo and Miss Kamende counsel for the 2nd and 3rd respondents for the industry and effort that they applied in the conduct of their respective clients’ cases. I also thank them for the indepth research that they undertook in the preparation of their final submissions. The said submissions have to a large extent aided this court in reaching a just determination. I wish to single out in particular Mr. Ng’aru for commendation. Despite being faced by eminent counsel for the respondents (*two of whom were his professors at the University*), he acquitted himself well. The lack of success on the part of the petitioner’s case is not a reflection on his ability. This court noted that Mr. Ng’aru came into the case after the pleadings had been prepared by another counsel. Despite short notice, he was able to ably represent his client. For any party who may have felt aggrieved by the relentless pace that the court proceeded with the hearing of this election petition, I beg for their forgiveness and understanding. It was always this court’s intention to hear and determine this petition on priority basis as required by the law. The electorate of Dagoretti constituency expected nothing less.

In the premises therefore, it is clear from the foregoing that the petition herein is for dismissal. It is hereby dismissed. The petitioner has failed to establish, to the required standard of proof, that the election of the 1st respondent as the duly elected member of parliament of Dagoretti constituency was

voided by electoral malpractices and therefore amenable to be nullified. The petitioner further failed to establish any basis for this court to order the scrutiny of the ballots in respect of the parliamentary elections of Dagoretti constituency. As regard costs, since it was the 2nd respondent's dereliction of duty at the tallying centre that gave the petitioner justification for impeaching the said elections, I hereby exercise my discretion and decline to award costs to any of the respondents as against the petitioner. The 2nd and 3rd respondents' shall however pay the costs of the 1st respondent.

A certificate shall hereby issue pursuant to Section 30 (1) of the National Assembly and Parliamentary Elections Act certifying that the allegations made in this petition challenging the election of Beth Wambui Mugo as the Member of Parliament of Dagoretti constituency were not proved. Beth Wambui Mugo is thus the duly elected Member of Parliament of Dagoretti constituency.

It is so ordered.

DATED at NAIROBI this 12th day of SEPTEMBER, 2008.

L. KIMARU

JUDGE