



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

ELECTION PETITION APPEAL NO. 6 OF 2018

ODHIAMBO BEATRICE ADHIAMBO.....APPELLANT

-VERSUS-

1. MICHAEL ONDONG AGUNDA

2. JOASH MWAURA OJUNE

3. WILLIAM ODOYO CHACHA

4. THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION

5. RETURNING OFFICER – SUNA EAST CONSTITUENCY.....RESPONDENTS

-consolidated with-

ELECTION PETITION APPEAL NO. 26 OF 2018

1. THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION

2. RETURNING OFFICER – SUNA EAST CONSTITUENCY.....APPELLANTS

-VERSUS-

1. MICHAEL ONDONG AGUNDA

2. JOASH MWAURA OJUNE

3. WILLIAM ODOYO CHACHA

4. ODHIAMBO BEATRICE ADHIAMBO.....RESPONDENTS

(Being twin appeals from the judgment and decree by Hon. R. Odenyo, Senior Principal Magistrate in Migori Chief Magistrate's Election Petition No. 1 of 2017 delivered on 23/02/2018)

JUDGMENT

Introduction and Background:

1. The twin appeals herein are against the judgment of the trial court which allowed an election petition and nullified the election of **Odhiambo Beatrice Adhiambo** (hereinafter referred to as '**the Appellant**') as the Member of the County Assembly of Migori for Kwa Ward within Suna East Constituency in Migori County and ordered a fresh election to be held.

2. The appellant was declared as the duly elected Member of the County Assembly of Migori for Kwa Ward in the general election held on 08/08/2017. I will henceforth refer to the said election as '**the election**'.

3. Aggrieved by the said declaration, three Petitioners who described themselves as voters within the Kwa Ward namely **Michael Ondong**

Agunda (hereinafter referred to as '**Michael**'), **Joash Mwaura Ojune** (hereinafter referred to as '**Joash**') and **William Odoyo Chacha** (hereinafter referred to as '**William**') filed an election petition dated 24/08/2017 on the 25/08/2017 challenging the election of the Appellant. They sued **The Independent Electoral and Boundaries Commission** (hereinafter referred to as '**IEBC**'), **The Returning Officer – Suna East Constituency** (hereinafter referred to as '**the Returning Officer**') and the Appellant as the Respondents respectively. I will however refer to the said Michael, Joash and William jointly as '**the Petitioners**'.

4. The Petition challenged the election of the Appellant on the grounds that the election was not in compliance with the **Constitution** and the written law and further that it was marred with irregularities. The Petitioners pleaded bribery, violence, double voting, multiple voting, misleading of illiterate voters, non-stamping of votes, non-signing of forms by party agents and variances between the figures in the KIEMS Kits and the transmitted results.

5. On 30/08/2017 the Petitioners filed a Notice of Motion dated 24/08/2017 (hereinafter referred to as '**the Application**') seeking *inter alia* the custody of all the election materials in a secured place, the verification of the information contained in the KIEMS Kits, scrutiny and recount of the votes, a declaration that the Appellant was not validly elected as the Member of the County Assembly of Migori for Kwa Ward, an order for fresh elections, an order stopping the swearing in of the Appellant pending the outcome of the petition, among others.

6. The Respondents vehemently opposed both the Petition and the application. They all filed their respective responses and affidavits upon consensus of the Counsels and approval of the trial court the application was disposed of by way of written submissions. By a ruling rendered on 15/11/2017 the application was disallowed.

7. The Petition then proceeded for hearing where William testified as **PW1** and by an order of the trial court his evidence was adopted as the evidence of Michael and Joash. The Petitioners called three witnesses namely **Mouriss Okeyo Chacha (PW2)**, **Sabianus Okoth Anyumo (PW3)** and **Gordon Okoth Amondo (PW4)**. IEBC called its ICT Officer in-charge of Suna-East Constituency one **Dewart Otieno Alex (DW1)**, the Presiding Officer for Kwa Mixed Secondary School Polling Station one **Linus Opiyo Dondo (DW2)**, the Returning Officer as **DW3**, the Presiding Officer for Radianya Polling Station one **Jack Okwiri as DW4**. The Appellant testified as **DW5** and the Chief Agent in Kwa Ward for ODM Party one **Carol Odongo Ombewa** testified as **DW6**.

8. At the end of the trial the court on its own motion ordered for what it described as '*verification and recount of votes*' in 8 polling stations. Thereafter the parties filed their respective submissions and the court rendered its decision on 23/02/2018 where it allowed the petition and ordered a repeat of the poll.

The Appeals:

9. The Appellant, IEBC and the Returning Officer were aggrieved by the judgment of the trial court. The Appellant filed Appeal No. 6 of 2018 and IEBC and the Returning Officer filed a joint Appeal No. 26 of 2018.

10. In a Memorandum of Appeal dated 27/02/2018 the Appellant herein preferred 6 grounds which were tailored as follows: -

- 1. THAT the learned trial magistrate erred fact and in law in holding that that the Petitioners had failed to prove the alleged irregularities to the required standard and on the same breath holding that the irregularities / impropriety established in only one polling station and may have been implicated in other polling stations.**
- 2. THAT the learned trial magistrate erred in fact and misdirected himself fundamentally in not holding that the elections of Kwa Ward were managed and conducted in accordance with the constitution and the Electoral Law.**
- 3. THAT the learned trial magistrate erred in fact and in law by advancing Petitioners case as none of them plead and/or testified that the purported extra 55 votes were allocated to the Appellant or / any other candidates was allocated fewer or more votes than stated in form 36A.**
- 4. THAT the learned trial magistrate correctly held that the Petitioners had failed to proof that there were any significant breaches of the Regulations of the law governing elections or widespread electoral irregularities or malpractices but went ahead to nullify and upset the elections on the basis of unexplained shortfall of 55 votes in only one polling station in the Kiems Kit.**
- 5. THAT the learned trial magistrate misdirected himself fundamentally in not holding that where the IEBC transgressed if at all, the irregularity was insubstantial and did not compromise or affect the result or outcome of the election.**
- 6. THAT the learned trial magistrate misdirected himself fundamentally in holding that the big margin between the victor and the runner up reflected clearly the will of the people of Kwa Ward.**

11. IEBC and the Returning Officer preferred 7 grounds of appeal vide their Memorandum of Appeal dated 23/03/2018 and filed on 26/03/2018. The grounds were as follows: -

- '1. THAT the learned magistrate erred in allowing the Petition on the basis of matters that were not pleaded and hence could not be responded to.**
- 2. THAT the learned magistrate erred in admitting and relying on evidence of undisclosed sources and on the basis of which he went ahead to make orders and a finding in favour of the Petitioner.**

3. **THAT the learned magistrate erred in allowing the testimony of a witness who had been an employee of the Commission and who failed to disclose that information until he was caught out during cross examination.**

4. **THAT the learned magistrate made blanket and vague orders that neither disclosed issues to be addressed nor gave the Appellant herein a fair chance of responding and /or complying.**

5. **THAT the Court, in spite of several reminders refused and/or failed to avail the Appellants herein information that was required to assist in compliance with its orders and address whatever issues the court was seeking to address.**

6. **THAT the learned magistrate failed to consider the entire testimony and evidence placed before him in arriving at his decision, including the testimony of the Commission's ICT Officer.**

7. **THAT on the whole, the manner in which the proceedings were conducted violated the Commission's right to a fair hearing.**

12. On 14/03/2018 the Appellant filed a Notice of Motion evenly dated seeking to stay the execution of the judgment of the trial court. Interim orders were issued, and the application was canvassed by way of written submissions where all parties duly complied. This Court then allowed the application for stay of execution pending the determination of the appeal and reserved its reasons in this judgment.

13. Directions were taken on 19/04/2018 where upon concurrence of Counsels and the approval of this Court the two appeals were consolidated with Appeal No. 6 of 2018 being the lead appeal. The appeals were then disposed of by way of written submissions and parties duly complied.

14. **Mr. Bosire** Counsel instructed by the firm of Messrs. Bosire Gichana & Company Advocates appeared for the Appellant. **Mr. Oduor** Counsel instructed by the firm of Messrs. Oreo & Odhiambo Advocates appeared for the IEBC and the Returning Officer whereas **Mr. Agure Odera** Counsel instructed by the firm of Messrs. Agure Odera & Company Advocates appeared for the Petitioners. All Counsels filed very detailed and well researched submissions and referred to several judicial decisions in support of various limbs of the submissions. Essentially, **Mr. Bosire** and **Mr. Oduor** urged this Court to allow the appeal and dismiss the petition with costs whereas **Mr. Agure Odera** submitted that the appeal ought to be dismissed with costs such that the rule of law prevails.

Analysis and Determinations:

15. I have keenly read and understood the substance of this appeal. I have perused the Petition and all the responses and their accompanying Affidavits, the proceedings, submissions and the judgment of the trial court as well as the Record of Appeal and the parties' submissions before this Court.

16. As the first appellate Court, this Court derives its jurisdiction from **Section 75(4)** of the **Elections Act No. 24 of 2011**. Its role is to revisit the entire record but to limit itself to only settling matters of law. As this is an appeal from the decision of an election court, what constitutes matters of law in election matters was aptly settled by the Supreme Court in the case of **Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 7 Others Sup. Ct. Petition No. 2B of 2014 (2014) eKLR**.

17. Although the Supreme Court was dealing with an appeal from the Court of Appeal to itself nevertheless the principles enunciated in that judgment apply to this Court which is sitting on an appeal from the Magistracy as an election petition trial court. The Supreme Court expressed itself on what constitutes matters of law as follows: -

'[81] Now with specific reference to Section 85A of the Elections Act, it emerges that the phrase "matters of law only", means a question or an issue involving:

a. the interpretation, or construction of a provision of the Constitution, an Act of Parliament, Subsidiary Legislation, or any legal doctrine, in an election petition in the High Court, concerning membership of the National Assembly, the Senate, or the office of County Governor:

b. the application of a provision of the Constitution, an Act of Parliament, Subsidiary Legislation, or any legal doctrine, to a set of facts or evidence on record, by the trial Judge in an election petition in the High Court concerning membership of the National Assembly, the Senate, or the office of County Governor:

c. the conclusions arrived at by the trial Judge in an election petition in the High Court concerning membership of the National Assembly, the Senate, or the office of County Governor, where the appellant claims that such conclusions were based on "no evidence", or that the conclusions were not supported by the established facts or evidence on record, or that the conclusions were "so perverse", or so illegal, that no reasonable tribunal would arrive at the same; it is not enough for the appellant to contend that the trial Judge would probably have arrived at a different conclusion on the basis of the evidence.

[81A] It is for the appellate Court to determine whether the petition and memorandum of appeal lodged before it by the appellant conform to the foregoing principles, before admitting the same for hearing and determination.

[82] Flowing from these guiding principles, it follows that a petition which requires the appellate Court to re-examine the probative value of the evidence tendered at the trial Court, or invites the Court to calibrate any such evidence, especially calling into question the credibility of witnesses, ought not to be admitted. We believe that these principles strike a balance between the need for an appellate Court to proceed from a position of deference to the trial Judge and the trial record, on the one hand, and the trial Judge's commitment to the highest standards of knowledge, technical competence, and probity in electoral – dispute

adjudication, on the other hand.

18. With the foregone guidance and which is binding on this Court, this Court must therefore be so vigilant and strictly keep within the above confines. The Court should not accept any invitation 'to re-examine the probative value of the evidence tendered at the trial court' orto calibrate any such evidence, especially calling into question the credibility of witnesses...'. Put differently, this Court should resist the temptation of venturing into the realm of evidence, evaluating that evidence and reaching its own conclusions on factual matters. However, this Court reserves the jurisdiction to venture into the said realm of evidence with a clear purpose of determining the applicability or interpretation and/or construction of a provision of the Constitution, an Act of Parliament, subsidiary legislation or any legal doctrine.

19. There is one paramount issue for consideration in the twin appeals. It is whether the trial court erred in determining the petition on the results of the verification and recount exercise. From the record several issues are uncontroverted. For instance, the trial court dismissed all the grounds relied upon by the Petitioners in the petition for want of proof. The court in doing so held as follows: -

'In short all the irregularities complained of were not specifically proved to the required standard. Perhaps they are some of them took place, but I am unable to state either way with certainty...'

20. Another issue which remain uncontroverted is that the trial court carried out a 'verification and recount exercise' in respect of 8 polling stations on its own motion. I take it that it was a scrutiny and recount of the votes in respect of the 8 polling stations. During the exercise the court directed that the KIEMS Kits be availed for scrutiny and upon information that they were not available, the court ordered that the SD Cards be used instead. At the end of the exercise the court had the following to say in the judgment: -

'Granted, the irregularities/impropriety have been established in only one polling station. But what if the same had been replicated in other stations...'

21. This Court has on previous occasions dealt with the issue of the effect of evidence arising from interlocutory applications or from scrutiny and recount exercises. Since I have not changed the position I will reproduce what I stated in **Bungoma High Court Election Petition No. 2 of 2017 Suleiman Kasuti Murunga vs. IEBC & 2 Others (2018) eKLR: -**

(i) The effect of interlocutory applications: -

24. A Petitioner must discharge the legal and evidential burdens of proof in an election petition to the required standard of proof as to succeed. This depends on the allegations and/or grounds in support of the Petition. If the allegations are of criminal or quasi-criminal nature, then the standard of proof is beyond reasonable doubt and in any other case the standard of proof is the intermediate one of above the balance of probabilities but below beyond reasonable doubt.

25. In endeavoring to attain such a legal bar a Petitioner must adduce evidence and may also file an application or applications in accordance with the law. The applications may vary from one matter to the other depending on the circumstances of a case. Regardless of the number and nature of applications which may be filed it must always be remembered that a Petitioner is strictly bound by and limited to the contents of the Petition and the contents of the filed Affidavits accompanying the Petition. The applications are only supposed to aid in proving or disproving the grounds as already tendered in the Petition, but they should not amount to an attempt to change the nature and/or character of a Petition or tend to adduce fresh and further evidence in support of the Petition. It is therefore not open to a Petitioner to use an application as an attempt to introduce new or further evidence or new grounds in support of the Petition. Like a caged animal, a Petitioner is free to move but within the four corners of the Petition.

26. Therefore, any new or further evidence or grounds attained by the aid of an interlocutory application should not be used to determine a Petition. On an equal footing a Petitioner cannot benefit from rummaging through the documents filed by the Respondents for fresh or further evidence to support the Petition. The position remains so even where a Petitioner attempts to introduce such matters during the cross-examination of the Respondents and/or their witnesses. And, the position does not change when a party makes submissions on an issue which was not part of the Petition. Lastly, a Petitioner cannot benefit from the results of any scrutiny or recount exercises or any other exercise undertaken during the hearing of the Petition by the Court if such results do not support what was pleaded in the Petition.

27. That being the position in law, an election Court still has an **inquisitorial jurisdiction** in an election petition. That jurisdiction should however be sparingly invoked. In exercise of such jurisdiction the Court may on its own motion make enquiries into certain issues or even order for a scrutiny of the votes and/or other election materials as provided under **Section 82(1) of the Act**. When a Court opts to exercise that special inquisitorial jurisdiction, it must be for the purposes of assisting the Court to better understand the vital details of the electoral process and gain impressions on the integrity of the electoral process but not to aid any of the parties in the case. Any evidence unveiled through the Court's exercise of its inquisitorial jurisdiction which is not founded in the Petition and the accompanying Affidavits, as said before, must not be used to determine the Petition.

28. There is also a further rationale behind the exercise of the inquisitorial jurisdiction by a Court. The Court's exercise may unearth evidence which may at times aid in making recommendations on the electoral processes possibly resulting in electoral law reform. Adding its voice to the issue the Supreme Court in **the 2017 majority judgment** found and held in **paragraph 374** that '.....it is good judicial practice for the court to still inquire into the potential effect of any irregularities that may have been noted upon an election. This helps to put the agencies charged with the responsibility of conducting elections on notice.....' That finding of the Supreme Court demonstrates the Court's exercise of the inquisitorial jurisdiction.

29. Courts do not operate in a vacuum; they play a very crucial role in the society being the custodians of justice and as such operate under the societal expectation that through them disputes will forever be determined. In appropriate instances, a Court is expected to make recommendations or orders that may lead to timely resolution of disputes generally or forestall or even reduce the

occurrence or frequency of occurrence of disputes or to law reform. A Court must therefore widely open its legal eyes and see past the dispute before it into the society at large. In so doing however, a Court must guard against being carried away by such findings and should remain alive to what it ought to consider in deciding the matter before it.

30. Courts, as well as Legal Scholars, have severally upheld the position that parties are firmly bound by their pleadings. Just to mention a few; the Court of Appeal in Independent Electoral and Boundaries Commission & An. vs. Stephen Mutinda Mule & 3 others (2014) eKLR cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -

“...it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....”

...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

31. The Supreme Court of Kenya in its ruling on inter alia scrutiny in the case of Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR found and held as follows in respect to the essence of pleadings in an election petition: -

“[52] Further, the Court went on and observed that: -

“In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.....”

32. This Court also dealt with this question in Kitale High Court Election Petition No. 1 of 2017 Robinson Simiyu Mwangi & Another vs. IEBC & 2 Others (unreported) in its Ruling No. 4 on scrutiny of votes which ruling was delivered on 07/12/2017. This is what I partly stated: -

“77. But what if the issues although not pleaded came up during the cross-examination of the witnesses and are therefore part of the record? The answer is found in the above decisions of the Supreme Court and the Court of Appeal. Such evidence goes to no issue. That seems to be the position taken by the Scholar Hon. Justice (Prof.) Otieno-Odek in his article aforesaid where he stated that ‘A party cannot be allowed to introduce, through cross-examination contests which were previously not specifically raised in the pleadings...’”

33. It is therefore only what is contained in the Petition and the accompanying Affidavits that shall be considered by this Court in determining whether the required standard of proof was attained in respect to the various allegations in the Petition.

201. I believe to have dealt with this issue substantively under the rubric **‘the effect of interlocutory applications’** wherein I also looked at the exercise of the inquisitorial jurisdiction by an election Court. As a way of emphasis, my position remains clear that any issue which is not specifically pleaded in the Petition and supported by admissible evidence even if it comes up during the hearing of the Petition cannot form the basis of determining a Petition. Likewise, any documents obtained and/or used during in the hearing can only go to the extent of proving the allegations already pleaded in the Petition but cannot be a basis of introducing new or further issues. A party which wishes to rely on any new matters must formally so request by way of an application otherwise such a party will be unfairly riding on an ‘amended Petition’ through the back door. That will be prejudicial to the other parties.

202. In this case the Petitioner sought for and was granted copies of all Forms 35A, 35B, 35C, Polling Station Diaries and Forms 33 vide the ruling of this Court delivered on 23/10/2017. Whereas in making the orders I remarked in paragraph 30 of the said ruling that ‘the second issue is that Form 35B is an aggregate of the contents of all Form 35As. That means for one to authenticate or verify the contents of Form 35B there is need to access all Form 35As as well as Form 33s. The third issue relates to the contents of polling station diaries under Regulation 73 of the Regulations. The contents thereof have a direct bearing on the contents of Form 35As, Form 35B and Form 33s’ it remains that the relevance of any of the said documents goes to whether the issue sought to be proved is already part of the Petition and not otherwise. It must also be understood that the grant of the documents is not in itself an open cheque to use any of their contents at will. The relevant contents are only those which touch on the disputed issues already before Court. A party must always remain alive to the foregone legal confines. As opposed to not granting the order for supply of the documents when made by a party, I take the position that it is fair and just to avail the documents since they can assist in the general preparation of the matter unless it is rationally and reasonably demonstrated otherwise. As also said the documents may assist the Court in its inquisitorial jurisdiction.

203. It seems that the Petitioner did not act with that caution in mind on receipt of the documents. He spent a considerable period in venturing into new ‘revelations in the documents’. Such an exercise, despite its magnitude and revelations, did not aid the Petitioner’s case or at all. That is the reason why this Court only limited itself to the documents which touched on matters which were pleaded in the Petition and deponed to in the affidavits while considering the grounds in support of the Petition. As such the Court concurs with the submission by the Counsel for Didmas.’

22. Based on the foregone, when the trial court made a finding that none of the grounds relied upon by the Petitioners in the petition were proved then that was the end of the matter. The court ought to have determined the petition there and in favour of the Appellant, IEBC and the Returning Officer. The evidence relied upon by the trial court to nullify the election was solely what came out during the exercise ordered by the court on its own motion. That evidence was not tested given that none of the witnesses testified on what, how many and how the SD Cards were used during the election. The Appellant, IEBC and the Returning Officer were hence not given an opportunity to be heard on the alleged issue that the results from Pemo Polling Station as recorded in Form 36A did not tally with what was recorded in the SD Card. They were therefore condemned unheard and their rights to a fair hearing as guaranteed under **Article 50(1)** of the **Constitution** and under the **Fair Administrative Act, 2015** were unjustifiably infringed.

23. But that aside, the difference in the number of the votes in Form 36A and the SD Cards for Pemo Polling Station was 55 votes. Given that the trial court had already found that the said station was the only one with a discrepancy, the court would have gone ahead to consider the effect of the 55 votes (which had no guarantee that they belonged to any particular candidate and could as have been to the credit of the Appellant as well) on the overall valid votes garnered by each candidate. According to Form 36B the Appellant garnered 2,723 votes whereas the first runners up one **Nyamwanga Joshua Odoyo** garnered 2,085 votes. The difference between the Appellant and the first runners up was 638. Even if all the said 55 votes were credited to the first runners up still the tally would be 2,140 votes and the difference between the Appellant and the first runners up would be 583 votes.

34. As said, since the court had already confirmed that there were no other discrepancies in any other polling station then the holding that **“Granted, the irregularities/impropriety have been established in only one polling station. But what if the same ad been replicated in other stations...”** did not have any factual or legal basis at all. Election Petitions cannot be determined on presumptions, but on the clearly settled rules of evidence. An election court cannot take it upon itself to rummage through evidence which is not tested and settle a resultant issue in favour of one of the parties. Such a court runs the risk of portraying itself as assisting a party hence biased on the other party(ies). A court must always remain an independent arbiter. Election courts must always remember that **‘that an election is a matter of public importance not to be lightly set-aside (Singh vs. Mota Singh & Another (2008) 1 KLR 1)** and that **‘the success of a candidate who has won at an election should not be lightly interfered with...Any person seeking such interference must strictly conform to the requirements of the law.....(Jeet Mohinder Singh vs. Harminder Singh Jassi, AIR 2000 SC 258)’**

24. The foregone brings this Court to the finding that the trial court misdirected itself on the law thereby reached a contrary decision. It is clear that the petition was not proved as required in law.

25. As I come to the end of this judgment I must remember to give the reasons why I granted the stay of execution pending the determination of the appeals. One of the main reasons is contained in **Section 85A** of the **Elections Act** which provides as follows: -

‘(1) An appeal from the High Court in an election petition concerning membership of the National Assembly, Senate or the office of county governor shall lie to the Court of Appeal on matters of law only and shall be –

(a) filed within thirty days of the decision of the High Court; and

(b) Heard and determined within six months of the filing of the appeal

(2) An appeal under subsection (1) shall act as a stay of the certificates of the election court certifying the results of an election until the appeal is heard and determined.

26. The law therefore provides for an automatic stay of execution pending the determination of an appeal from the High Court to the Court of Appeal in respect to an election petition concerning membership of the National Assembly, Senate or the office of the County Governor. The very reasons that formed the rationale behind the creation of **Section 85A** of the **Elections Act** must apply to election appeals to the High Court concerning membership of the County Assemblies otherwise **Section 85A** of the **Elections Act** can only be discriminatory hence in contravention of **Article 27** of the **Constitution**.

27. Another reason for allowing the application rested on the possible effect of and the cost of conducting a by-election while the matter is still under litigation. Suppose a by-election was held and the winner whose election was challenged in the election petition (that is the Appellant) loses in that by-election but succeeds in the appeals before this Court on one hand and the election is upheld in this appeal on the other hand, won't that be a recipe for creating unnecessary confusion and wasting colossal public funds? An equally important factor is the public interest involved in election matters.

28. The three are among the very many reasons which made this Court arrive at the decision of granting the stay of execution pending the determination of the appeals.

29. As a consequence of the foregone analysis and considerations the following final orders do hereby issue that: -

(a) Migori High Court Election Appeal No. 6 of 2018 and Migori High Court Election Appeal No. 26 of 2018 be and are hereby allowed.

(b) The judgment of Hon. R. Odenyo delivered on 23/02/2018 be and is hereby set-aside in its entirety and is substituted with an order dismissing the Petition dated 24/08/2017 with costs. For clarity purposes, it is hereby declared that the election of Odhiambo Beatrice Adhiambo as the elected Member of the County Assembly of Migori for Kwa Ward was conducted within the Constitution and the law and that there were no irregularities that affected the result of that election.

(c) The Petitioners shall jointly and severally bear the costs of the Petition as well as the costs of the appeals.

30. Those are the orders of this Court.

DELIVERED, DATED and SIGNED at MIGORI this 19th day of July 2018.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of:

Mr. Bosire Counsel instructed by the firm of Messrs. Bosire Gichana & Company Advocates for **Odhiambo Beatrice Adhiambo**.

Mr. Oduor Counsel instructed by the firm of Messrs. Oreo & Odhiambo Advocates for the IEBC and the Returning Officer.

Mr. Agure Odero Counsel instructed by the firm of Messrs. Agure Odero & Company Advocates for **Michael Ondong Agunda, Joash Mwaura Ojune** and **William Odoyo Chacha**, the Petitioners.

Evelyn Nyauke - Court Assistant