



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 4 OF 2013

ESTHER WAITHIRA CHEGE.....APPELLANT

VERSUS

MANOAH KAREGA MBOKU.....1ST RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION....2ND RESPONDENT

PETER K. MUIGAI.....3RD RESPONDENT

(Being an Appeal from the Judgment and Decree of the Honourable Mr. Andayi W. F., Senior Principal Magistrate, delivered on 2nd day of August, 2013 in Election Petition No.EP7 of 2013 at the Nairobi Chief Magistrate's Court, Milimani Commercial Courts)

JUDGMENT

The Appellant was a candidate for the County Assembly Representative seat of Nairobi South Ward in Nairobi County in the general elections held on 4th March 2003. The Appellant's sponsoring political party was Narc Kenya. When the results were announced by the 2nd Respondent, the 1st Respondent Manoh Karega Mboku was declared the winner of the seat. The 1st Respondent had offered his candidature under the Orange Democratic Party (ODM) political party. The 3rd Respondent was the Returning Officer of the Electoral area. According to the results which were announced by the 2nd Respondent immediately after the conclusion of the counting and the tallying exercise, the 1st Respondent obtained 6,971 votes while the Appellant 6,447 votes. The Appellant was the runner-up in the elections. They were eight (8) other candidates who participated in the election. All the said eight (8) candidates received lesser votes than the 1st Respondent and the Appellant. Upon the declaration of the results, the Appellant being aggrieved in the manner in which the elections were conducted, lodged a petition before the Chief Magistrate's Court Nairobi seeking various orders from the court. In particular, the Appellant sought an order of the court that there be a scrutiny, recount and examination of the tallies of the votes cast in the election for the following polling centres in Nairobi South Ward: Plainsview Primary School Stream 8, Highway Secondary School Stream 1, Nairobi South Primary School Stream 5 and Lady of Mercy Primary School Stream 1. The Appellant further prayed that it be determined that the 1st Respondent had been not been validly elected or declared as the County Representative for Nairobi South Ward. She prayed that his election and gazette be declared unconstitutional, illegal, null and void *ab initio* and be quashed. She further prayed that it be determined that the Appellant was validly elected as the County Representative of Nairobi South Ward and further that the 2nd and 3rd Respondent be directed to issue a certificate (Form 36) to the Appellant and thereafter gazette her as the County Representative of

Nairobi South Ward. The Appellant, in the alternative prayed that the elections held on 4th March 2013 in respect of County Representative seat of Nairobi South Ward be declared null and void and fresh elections be held. The Appellant prayed to be awarded costs of the petition.

The Respondents filed their papers opposing the petition. They averred that the elections were conducted in a free and fair manner and therefore the outcome thereof could not be impeached. They prayed that the petition be dismissed with costs. After hearing the petition, the court (Andayi W.F.) dismissed the petition. He held that the Appellant had failed to establish her case to entitle the court to nullify the election of the 1st Respondent. He ordered the 2nd Respondent to pay the costs of the 1st Respondent which he capped at Kshs.1.5 million. He did not condemn the Appellant to pay any costs because he was of the view that the complaint raised by the Appellant in the petition had been occasioned by lack of diligence on the part of the officers of the 2nd Respondent.

The Appellant was aggrieved by this decision and filed the present appeal challenging the decision of the trial court. In her petition of appeal, the Appellant raised several grounds of appeal which may be summarized as thus: the Appellant was aggrieved that the trial court had upheld the results of the election yet the scrutiny of the ballots had disclosed discrepancies and irregularities in both the actual votes cast and in the entries made in the Form 35s of the disputed polling stations. The Appellant faulted the trial court for upholding the results yet the Form 36 filled by the Returning Officer was not signed and dated as required by **Regulation 83(d)** of the **Elections (General) Regulations 2012**. The Appellant took issue with the fact that many of the Form 35s were not signed by the candidates' agents as required by the law thereby invalidating the said results. The Appellant was aggrieved that the trial court had failed to find that there was falsification of the entries made in Form 35s and 36 by the Presiding Officers and the Returning Officer despite clear evidence that was established during the scrutiny and recount of the ballot. The Appellant was aggrieved that the trial court failed to take into consideration clear evidence which established that the officers of the 2nd Respondent had failed to conduct the elections in an impartial, neutral, efficient, accurate and accountable manner as provided for under **Article 81(e)(v)** of the **Constitution**. The Appellant faulted the trial court for misinterpreting, misconstruing and disregarding the Appellant's submission which had clearly set out the applicable law regarding the matters in dispute. The Appellant was aggrieved that the trial court had failed to award her cost despite the fact that it found that the petition had been necessitated by failures on the part of the 2nd and 3rd Respondents in the conduct of the elections. In the premises therefore, the Appellant urged the court to allow the appeal, set aside the decision of the trial court and substitute it with a decision of this court declaring that the County Assembly Representative election for Nairobi South Ward were not free and fair and therefore ought to be nullified and fresh elections be held. The Appellant further urged the court to direct that she be paid costs of the suit in any event.

When the Respondents were served, the 1st Respondent filed grounds of affirmation of the decision of the trial court. In essence, it was the 1st Respondent's case that the finding of the trial court was not challengeable because it was properly evaluated and the decision reached was correct. On their part, the 2nd and 3rd Respondents filed a cross-petition of appeal. They were aggrieved that the trial court had properly failed to consider the totality of the evidence adduced and thereby reached the mistaken finding that the failings in the conduct of the election was due largely to the 2nd and 3rd Respondents. They faulted the trial magistrate for failing to appreciate the fact that no elections can be conducted in a perfect manner and therefore a few errors are bound to occur in circumstance where it is clear that the winner can be identified. The 2nd and 3rd Respondents were aggrieved that they had been condemned to pay costs yet there was nothing in the petition that warranted such condemnation. In the premises therefore, the 2nd and 3rd Respondents urged the court to allow the cross-appeal and set aside the judgment of the trial court in so far as it condemned them to pay the costs of the petition.

Prior to the hearing of the appeal, the respective counsels for the parties to this appeal filed written submission in support of their respective opposing positions. During the hearing of the appeal, this court heard oral submission made by Miss Ngania for the Appellant and Mr. Oriaro for the 1st Respondent. Mr. Nyamodi for the 2nd and 3rd Respondents requested the court to excuse him from the proceedings because

he said he had another matter before the Supreme Court. He did not disclose which case he was appearing before the Supreme Court. This court did excuse him. However, it will refer to the written submission filed by 1st and 2nd Respondents. Miss Ngania for the Appellant submitted that results from the five (5) polling stations were not a representation of the entire election and ought not to have been the basis for declaring the 1st Respondent as the winner given that the scrutiny and recount revealed that there were errors in the results. To support this assertion, Learned Counsel for the Appellant relied on the case of **William Odhiambo Oduol Vs. IEBC & 2 Others (2013) eKLR** where the election was annulled upon the results of the scrutiny and recount which revealed that the election was not free and fair. On the issue of the Form 36 not being dated and signed by the candidates or their agents, Miss Ngania submitted that the issue of Form 35s being material had been settled in the case of **William Kabogo Gitau Vs. George Thuo & 2 Others (2010) eKLR**. It was her submission therefore that the trial court ignored the provisions of **Regulation 79** of the **Elections Regulations**.

Still on the same issue, Counsel for the Appellant submitted that the trial court found that there were two (2) different Forms 36 from the election contrary to **Regulation 83(1)(d)** of the **Election Regulations** which contemplates only a look alike copy. It was Miss Ngania's submission that the trial magistrate did not deem it important that the Form 36 should be signed by the candidates or their agents contrary to **Article 81** of the **Constitution**. Counsel for the Appellant contended that the signing of the Form 36 by the candidates or their agents is a mandatory requirement since it was intended to promote transparency and accountability. In support of this assertion Miss Ngania relied on the case of **James Omingo Magara Vs. Manson Onyongo Nyamweya & 2 Others (2010) eKLR**.

Counsel for the Appellant contended that the irregularities revealed upon the outcome of the scrutiny and recount of the votes in the five (5) polling stations indeed invalidated the results of the election given that what mattered are the votes. She further contended that the trial magistrate was wrong in holding that the appellant only proceeded with one part of the reliefs sought in the petition. According to Miss Ngania, the Appellant sought the main prayers in the Petition and that it was incumbent upon the trial magistrate to decide on whether to grant the main prayers or the alternative prayers. On the issue of falsification of the Forms 35 and 36 by the 2nd and 3rd Respondents, Counsel for the Appellant submitted that the results of the scrutiny revealed that that the Appellant was deprived of votes. Miss Ngania also maintained that the forms were altered. The trial court was therefore wrong in holding that there were no alterations on the forms. According to Miss Ngania, such irregularities could not be wished away in an election meant to promote accountability.

Counsel for the Appellant further submitted that the trial court misinterpreted and disregarded the Appellant's submissions leading to its erroneous decision. On the issue of costs, Miss Ngania submitted that the trial court found that the Appellant was prompted to file the petition by the actions of the 2nd and 3rd Respondents. According to her, costs have been previously awarded against the electoral commission even in instances where the petition was dismissed as was held in the case of **Thomas Malinda Musau & 2 Others (2010) eKLR** and **William Kabogo Gitau Vs. George Thuo & 2 Others (2013) eKLR**. Miss Ngania therefore submitted that the trial court should have annulled the entire election and not adjust the results of the scrutiny to declare the winner. In the circumstances, she urged the court to allow the appeal.

In his response, Mr. Oriaro for the 1st Respondent opposed the appeal. According to Counsel for the 1st Respondent, the **Elections Act** empowers the court to declare a winner of an election. It was his submission that the trial court took into consideration the results of all the thirty nine (39) polling stations in declaring the 1st Respondent as the winner. In this regard, he relied on the case of **John Oroo Oyioka & another vs. IEBC & 2 Others (2013) eKLR** where the winner emerged with a margin of four (4) votes. On the issue of **Section 80(4)** of the **Elections Act**, it was Mr. Oriaro's submission that the Appellant had misinterpreted that provision of the law. According to him, one prayer for recount had been rejected by the court since the Appellant's agent at the station had confirmed the result. At Plainsview Primary School, the results of the recount tallied with the results in the Form 35 that was filled. Mr. Oriaro contended that the Appellant's claim of ballot stuffing was not proved. According to Counsel for the 1st Respondent, there were a total of 65 polling stations but the Appellant disputed only the results

from 49 polling stations. He submitted that in the **William Odhiambo Oduol** case, the vote margin before the recount was 9011 but after the recount it reduced to 897. Counsel for the Appellant contended that in this case, the court observed that there were other electoral offences which had been committed which compromised the right of the voters to elect a leader of their choice.

It was Mr. Oriaro's submission that the issue of the Appellant's agents being locked out of the polling stations was not considered by the court. According to him, the Appellant did not also adduce any evidence to show that the Respondents colluded to rig the results of the election. On the issue of the Form 36, it was Mr. Oriaro's submission that the trial court was being condemned unfairly since the 1st Respondent had filed a Form 36 which had been dated and signed by the Returning Officer. According to him, the Returning Officer explained that after signing the forms, he gave out all copies and was left with no copy of the result. This explanation according to Mr. Oriaro was excusable. Counsel for the 1st Respondent submitted that under **Section 83** of the **Elections Act**, the non-filing of the Form 36 did not materially affect the outcome of the election. It could only have affected the outcome of the election if it had been established that the forms did not contain the proper results which was not the case in the instant appeal. According to Mr. Oriaro, **Section 79** of the **Election Regulations** guided the court in instances where the forms had not been signed by the agents. It was Mr. Oriaro's submission that unlike the **William Kabogo Gitau**, **James Omigo Magara** and **John Oroo Oyioka** cases, where there were glaring irregularities, there were no other irregularities in the instant election. It was therefore his submission that the court should consider the circumstances of each case in determining the question whether the results of the election should be invalidated.

Counsel for the 1st Respondent submitted that the court held that the results did indeed establish that the appellant had not won the election. According to him, the Appellant had now changed goal posts and was now alleging that there were other irregularities which invalidated the election. In addressing the issue of alleged falsification of the results forms, Counsel for the 1st Respondent drew the court's attention to the affidavit of Julius Gichine which clarified that the same was an arithmetical mistake as the figure put was 461 instead of 661. This mistake required rectification. Nonetheless, it was Mr. Oriaro's submission that the error did not materially affect the results of the election. It was the 1st Respondent's further submission that the Appellant had failed to demonstrate the manner in which the 2nd and 3rd Respondents had failed to comply with electoral laws. According to him, the Appellant had failed to establish how the alteration, if at all, affected the outcome of the elections. It was submitted by the 1st Respondent that **Regulation 83(1)(d) (1)** of the **Election Regulations** requires the signing and dating of the Form 35s. However, according to Mr. Oriaro, there was no such requirement in regard to Form 36. In conclusion, it was Mr. Oriaro's submission that the appeal lacked merit and therefore ought to be dismissed.

In a rejoinder, Miss Ngania for the Appellant reiterated that **Regulation 83(1)(d)** of the **Election Regulations** was not silent on whether or not Form 36 ought to be signed and dated. She submitted that the fact that there were two Form 35s with different results was sufficient proof that there was mischief on the part of the Presiding Officer. This irregularity cannot in the circumstances be ignored. It was her submission that the Form 35 is the primary document on which the result of a particular polling station is published. She submitted that the official Form 36 from which the results of the elections were announced was not produced in court. In conclusion, Counsel for the Appellant submitted that the will of the people was compromised by the misconduct of the election by the 2nd and 3rd Respondents hence the appeal should be allowed.

On their part, the 2nd and 3rd Respondents relied on their written submissions filed in court. The 2nd and 3rd Respondents first addressed the court of their cross appeal on costs. It was their submission that all the Form 35s and 36 were submitted at the close of the election. They submitted that the results in the said forms were correct save for results from Highway Secondary School stream 1, Nairobi South Primary stream 5, Our Lady of Mercy Primary Stream 1 and Plainsview Primary School Stream 8. In light of this, it was the 1st and 2nd Respondents' submission that they had performed their functions in accordance with the law thus they ought not to have been condemned to pay the 1st Respondent's costs of the suit. According to the 2nd and 3rd Respondents, there was bound to be human error in the election as revealed

in the scrutiny and recount that was ordered by the court. It was their submission that the fact that the Form 35s and 36 were signed by the party agents clearly indicated that the errors were not deliberate and in the end they did not materially affect the outcome of the election. In this regard, the 1st and 2nd Respondents drew the court's attention to the case of **Lewanika & Others Vs. Fredrick Jacob Titus Chiluba S.C.Z (1998) ZMSC 11.**

Still on the issue of the costs, it was the 2nd and 3rd Respondent's case that costs follows the event as provided under **Section 84** of the **Elections Act, 2011**. In support of this contention, the 2nd and 3rd Respondents relied on the case of **Sarah Mwangudza Kai Versus Mustafa Idd Salim & 2 Others (2013) eKLR** in which the court affirmed this principle. It was therefore the 2nd and 3rd Respondents submission that since the petition was dismissed, the Appellant ought to have borne the costs of the petition.

In response to the Appellant's appeal, the 2nd and 3rd Respondents submitted that the Appellant had only disputed results from Our Lady of Mercy Primary School stream 1, Highway Secondary School stream 1, Nairobi South Ward Stream 5 and Plainsview Primary School stream 8. According to the 2nd and 3rd Respondents, the court made the finding that the Appellant had laid sufficient basis for the order of scrutiny of the polling stations complained of save for Our Lady of Mercy Primary School stream 1. It was the 2nd and 3rd Respondents' submission that the trial court made the right decision in adjusting the candidate's results on the basis of the outcome of the recount of votes from the disputed polling stations. The court was further correct to declare the 1st Respondent as the winner since it had been established that the Appellant was satisfied with the results of the other polling stations.

The 2nd and 3rd Respondents submitted that the fact that Form 35 from Plainsview Primary School stream 8 had not been signed by the Presiding Officer as required under **Regulation 79 (1)** of the **Elections Regulations** was not fatal to the entire election in the circumstances envisioned under **Section 83** of the **Elections Act** and the **Constitution**. Further, 2nd and 3rd Respondent contended that the fact that the recount of votes from the polling station did not disclose any other irregularities upheld the integrity of the election. To support this submission the 2nd and 3rd Respondents relied on the case of **Philip Osore Ogutu Vs. Michael Onyura Aringo & 2 Others (2013) eKLR** and **Kakuta Maimai Hamisi Vs. Peris Pesi Tobiko & 2 Others HC EP (2013) eKLR**. With regard to the Form 36s, the 2nd and 3rd Respondents submitted that the Returning Officer explained that the reason why his copy was not signed was because he had mistakenly issued all the signed copies to the candidates only to later realize that he did not have his own signed copy. The 2nd and 3rd Respondents however argued that the duly signed copy was filed in court by the 1st Respondent. This was the same Form 36 which the Appellant is relying on to allege that the 3rd Respondent did not record the reasons for the failure by his agents to sign the form. It was therefore the 2nd and 3rd Respondents submission that there was a proper Form 36 filed in court.

It was the 2nd and 3rd Respondents further submission that the Appellant failed to establish how the alleged irregularities affected the overall result of the election as was observed in the case of **Raila Odinga Vs. I.E.B.C & Others, Election Petition No. 5 of 2013** and that of **Rashid Hamid Ahmed Amana Vs. I.E.B.C & 2 Others Malindi HC Election Petition No. 6 of 2013**. According to the 2nd and 3rd Respondents, **Regulation 79** did not require Presiding Officers to give reasons for their failure to sign the Form 35. In addressing the issue of alteration on the Form 35 from Highway Secondary School, it was the 2nd and 3rd Respondents case that evidence had been adduced to establish that there was been an arithmetical error which was discovered upon audit by the verification team thereby necessitating the correction. According to the 2nd and 3rd Respondents, this correction was made in the presence of the tallying agents of the candidates.

In conclusion, the 2nd and 3rd Respondents submitted that the burden placed upon the Appellant to prove that the election was not conducted in accordance with the law is to a standard higher than proof on a balance of probability but slightly lower than that of proof beyond reasonable doubt as was observed in

the case of **John Kiarie Waweru Vs. Beth Wambui Mugo & 2 Others (2008) eKLR**. According to the 2nd and 3rd Respondents, the trial court correctly interpreted the law in declaring the 1st Respondent as the winner following the outcome of the recount. It was also their submission that the trial court properly directed himself in holding that the Appellant had failed to prove that the alleged irregularities materially affected the results of the election.

This court has carefully considered the written and oral submission presented to the court by the parties to this appeal. This is a first appeal. The principles to be considered by this court in determining this appeal are no longer subject of debate. In **Selle & Anor –Vs- Associated Motor Boat Co. Ltd. & Others [1968] EA 123** at pg.126 Sir Clement De Lestang, V-P. held thus:

“An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge’s findings or facts if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally...”

The present appeal is an appeal from the decision of the trial court which was a specially established court to hear petitions emanating from the elections that were held on 4th March 2013 in respect of County Assembly Representative of Nairobi South Ward. Before evaluating the grounds of appeal, the cross petition of appeal, the submissions made on this appeal and the evidence and the decision of the trial court, this court will first address the burden and standard of proof that the Appellant was required to establish during the hearing of her petition. It is now accepted that in Election Petition the burden of proving the allegations made in the petitions lies with the Petitioner. In **Raila Odinga –Vs- IEBC & 3 Others, Election Petition No.5 of 2013**, the Supreme Court held thus:

“Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections. It is on that basis that the respondents bear the burden of proving the contrary. This emerges for a long standing common law approach in respect of alleged irregularity in the acts of public bodies. Omnia praesumuntur rite et solemniter esse acta: all acts are presumed to be done rightly and regularly. So, the petitioner must set out by raising firm and credible evidence of the public authority’s departures from the prescriptions of the law.”

This court shall deal with the grounds of appeal put forward by the Appellant. The said grounds of appeal can be summarized in five (5) broad areas. The Appellant was aggrieved that the trial court had failed to reach a finding that the election had been improperly conducted and was therefore not free and fair even after the recount and scrutiny of the ballots of the five polling stations established that there were indeed irregularities which in her opinion impeached the outcome of the entire election. It was common ground that during the hearing of the election petition by the trial court, the Appellant did on 23rd May 2013 make an application before that court for the scrutiny, recount and examination of the tallies of the votes cast in the following polling centres: Plainsview Primary School, Stream 8, Highway Secondary School, Stream 1, Nairobi South Primary School, Stream 5 and Our Lady of Mercy Primary School, Stream 1. The trial court allowed the application for scrutiny in respect of three (3) of the polling centres save for Our Lady of Mercy Primary School, Stream 1 where the court established that no sufficient basis had been laid. The trial court did after considering the evidence adduced expand the scrutiny to include two (2) other polling centres, that is, Mariakani primary School, Stream 4 and Highway Secondary School, Stream 5. The scrutiny established that indeed there was discrepancy in the entry of results from the said polling centres in the Form 35s. The results of the scrutiny established that the Appellant had been deprived of 389 votes while the 1st Respondent was added 100 votes and deprived of 329 votes. In total, the 1st Respondent was deprived of 229 votes. After the scrutiny, it was established that the Appellant had

obtained 6,836 votes while the 1st Respondent had obtained 7,200 votes. The trial court was of the view that although the scrutiny of the ballots had established discrepancies, the final tally of the results still establish that the 1st Respondent was the winner by 364 votes.

The Appellant took issue with this finding. It is the Appellant's appeal that after the scrutiny had established that indeed there were irregularities in the entry of results in Form 35s, the trial court should have proceeded and found that the petitioner had established her case that there was substantial non-compliance with the law which rendered the said election not free and fair and therefore null and void. In response to this submission, the Respondents took the following view: the 1st Respondent submitted that even though the scrutiny showed that there was a difference in the entries that were made in Form 35s, the final tally established that he had indeed been lawfully declared to have won the election. On their part, the 2nd and 3rd Respondents argued that the mistakes that became apparent after the scrutiny were mistakes that are normally expected in an election. It was their case that no conduct of an election can be perfect. In that regard, the 2nd and 3rd Respondents relied on **Section 83** of the **Elections Act**.

This court's re-evaluation of the facts and the law applicable in regard to this ground of appeal is that once the Appellant successfully applied before the court for scrutiny and recount of the votes to be done, the Appellant could not turn around and claim that the findings made by the court in regard to the results of the scrutiny had no basis in law. The Appellant must have been aware that once she made an application for scrutiny, she would be bound by the findings established in that scrutiny. As was held by Tuiyot J in **Philip Ogutu –Vs- Michael Aringo & 2 Others Busia HC. Election Petition No.1 of 2013**, the court can only order scrutiny where there is sufficient reason to require examination of the ballots and also where a foundation or basis has been laid. In the present appeal, the results of the scrutiny revealed that both the Appellant and the 1st Respondent had been deprived of votes. The Appellant was deprived of 389 votes while the 1st Respondent was deprived of 329 votes. 100 votes were added to the tally of the 1st Respondent. Upon deducting the 100 votes, the 1st Respondent was deprived of 229 votes. Even after this adjustment of the tally, the 1st Respondent still had more votes than the Appellant.

It is the Appellants appeal that the trial court ought to have proceeded to nullify the election on account of the finding reached after the scrutiny. In that regard, the Appellant relied on the case of **William Odhiambo Oduol –Vs- IEBC & 2 Others [2003] eKLR** where the court nullified the election after a partial scrutiny of the votes establish that there was material discrepancy in the tally of the votes that was obtained by each candidate. In particular, the court observed that there was a discrepancy of over 9,000 votes in respect of the results that were announced by the Electoral Management Body. This court agrees with the Respondents that the difference in votes that was revealed by the scrutiny in that case was such that the court had no option but to nullify the elections. In the present appeal, the scrutiny revealed that there were minor irregularities which did not materially affect the outcome of the results. This court agrees with the 2nd and 3rd Respondents that the mistake in the entry of the results in the Form 35s was most probably occasioned by honest arithmetical mistake on the part of the election officials. It was not a deliberate effort by the said election officials to deprive the Appellant of victory in the said elections. If that were the case, then, the 1st Respondent would not also have been a victim of deprivation of votes.

It was apparent from the proceedings before the trial court that after the scrutiny established that the 1st Respondent was still the winner, the Appellant changed tact and instead of arguing, as pleaded in the petition, that the scrutiny would reveal who the actual winner was, the Appellant claimed that the scrutiny had revealed irregularities which impeached the entire election. It was the Appellant's case that after the scrutiny had revealed the irregularities, the trial court should have proceeded and ordered the scrutiny of the ballots cast in all the polling centres in the entire ward. With due respect to the Appellant, this was not a course of action that was open to the trial court. The trial court could only hear the petition according to the pleadings filed by the parties. The Appellant was bound by her pleadings. As was held in **Mahamud Muhumed Sirat –Vs- Ali Hassan Abdirahman & 2 Others [2010] eKLR**:

“It is trite law that a decision rendered by a court of law shall only be on the basis of the pleadings that have been filed by the party moving the court for appropriate relief. In the present petition, this court

declined the invitation offered by the petition that required of it to make decisions in respect of matters that were not specifically pleaded. This court will therefore not render any opinion in respect of aspects of the petitioner's case which he adduced evidence but which were not based on the pleadings that he had filed".

The Appellant was bound by her pleadings. She could not, in the course of proceedings, change tact and demand from the court reliefs that she had not pleaded in her petition. This court therefore finds no fault with the decision reached by the trial court in that regard.

The Appellant was aggrieved that despite the trial court finding that there were discrepancies in the manner in which entries were made in the Form 35s and 36, the trial court proceeded to reach a finding that those discrepancies did not affect the outcome of the results. In that regard, the Appellant relied on this court's decision in the case of **William Kabogo Gitau –Vs- George Thuo & 2 Others [2010] eKLR**. The trial court after considering the evidence adduced held that any discrepancies noted in the entries made in the Form 35s were resolved when the court ordered scrutiny in the disputed polling centres. In other cases where there were discrepancies in the entries made in Form 35s, the trial court accepted the explanation given by the election officials. In particular, the trial court observed that the Appellant had not lodged any complaint to the presiding officers after the close of the counting exercise. After considering the rival submission made in that regard, and after re-evaluating the evidence adduced before the trial court, this court took the view that the discrepancies noted in the Form 35s were either resolved by the scrutiny or by the explanation given by the 2nd and 3rd Respondents which satisfied the trial court.

This court wishes to distinguish the decision made in **William Kabogo Gitau** case (supra). In that case, the court was unable to ascertain the veracity of the entries made in the primary documents that the results were entered because it could not order scrutiny. Scrutiny of ballots became impossible to perform because a substantial number of ballot boxes had been tampered with and therefore any scrutiny would have been an exercise in futility. In the present appeal, scrutiny was ordered to determine the veracity of the entries made in the Form 35s. The scrutiny revealed minor discrepancies which did not materially affect the outcome of the results. That too applies to the complaint by the Appellant that the Form 36 was not properly filled in that the Returning Officer did not sign or date that form. The trial court accepted the explanation given by the Presiding Officer that in the process of releasing the results, he gave out all copies of the Form 36s that was signed by the agents and by himself. He discovered after the close of the exercise that he did not have any signed copy that he would have retained as the official copy. This court too accepts that explanation. There was no doubt that the Appellant was aware of the results after they were announced by the Returning Officer. The duly signed copy of the Form 36 was annexed to the affidavit sworn by the 1st Respondent in his response to the petition. Nothing turns on that complaint. That ground of appeal too fails.

Another ground of appeal that the Appellant argued was in regard to the manner in which the Form 35s were filled. The Appellant submitted that the evidence adduced before the trial court had established that some of the Form 35s had alterations of the votes garnered by each candidate. It was the Appellant's case that some of the Form 35s were not signed by the agents of the candidates or by the Presiding Officers. In that regard the Appellant relied on **Regulation 79(1)** of the **Elections (General) Regulations 2012** which provides thus:

"The Presiding Officer, the candidates or agents shall sign the declaration in respect of the elections."

The Appellant argued that the fact that there was failure by the Presiding Officers to require the candidates or the agents to sign the Form 35s invalidated the said results because it was proof that the election lacked transparency and accountability. In response to this submission, the Respondents argued that other than the polling centres where the court ordered scrutiny, all the other results as contained in the Form 35s were correct and in fact the majority of the said forms were signed by the agents of the Appellant. Where there was a discrepancy, the Respondents submitted that the 2nd and 3rd Respondents gave explanation which was accepted by the trial court. They urged this court to accept the same explanation.

This court has considered the rival argument made in that regard. The requirement that the Presiding Officer, the candidates and the agents signed the declaration of results (i.e. Form 35) is a requirement that is intended to promote accountability and transparency in the conduct of elections. However, there are certain instances where it may be impossible for the candidates and their agents to sign the Form 35s. The reason may range from some candidates losing hope and leaving the counting centre before the completion of the counting exercise, to candidates not appointing enough or diligent agents to man every polling station. Whereas this requirement is couched in mandatory terms, Regulation 79(6) of the Election Regulations recognizes the fact that there can be circumstances that may affect compliance with this requirement. That Regulation provides thus:

“The refusal or failure of a candidate or an agent to sign a declaration form under subregulation (4) or to record the reasons for their refusal to sign as required under this regulation shall not by itself invalidate the results announced under subregulation (2)(a).”

In the present appeal, it was clear that the discrepancies highlighted by the Appellant in respect to the manner in which the Form 35s were filled was considered and evaluated by the trial court. Upon evaluation of the said evidence and the finding reached by the court, this court holds that the explanation given by the 2nd and 3rd Respondents in regard to the non-compliance of the law in filling the said Form 35s is excusable and is not so material as to invalidate the said results of the election. The errors and mistakes occasioned in the filling the said Form 35s were human and therefore excusable. They were not deliberate or meant to cheat the Appellant from victory in the said elections. That ground of appeal fails.

The Appellant complained that taken into totality, the mistakes that became apparent during the hearing of the petition were such that the entire election was impeached and could not be said to have been held in a free and fair manner as anticipated in **Article 81(e)** of the **Constitution** that requires the elections to be conducted in a free and fair manner and further that such election be administered in an impartial, neutral, efficient, accurate and accountable manner by the Electoral Management Body. The Respondents countered this argument by stating that not all mistakes or irregularities evident in an election can result in the nullification of the election. The Respondents placed particular reliance to **Section 83** of the **Election Act** which provides thus:

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

This court is aware that it should not interfere with the exercise by the people of their democratic right to elect a leader of their choice. The exercise of that right is sacred and can only be interfered with by the court if it is established that the irregularities and the non-compliance with the law were so massive that it was inimical to the exercise by the people of their constitutional right to elect a leader of their choice. In the present appeal, it was clear that the election of the subject ward was a close one. A losing runner-up was bound to be disappointed especially if as evident in the present case, the Appellant lost by 364 votes. It was conceded by the 2nd and 3rd Respondents that there were mistakes that became apparent during the making of the entries of the results in Form 35s and in Form 36. Upon scrutiny, these mistakes were noted. After adjustments, the outcome of the results still remained the same: the 1st Respondent was still the winner, albeit with a reduced vote tally. This court is of the opinion that the scrutiny and recount established the will of the people of Nairobi South Ward. The mistakes and minor irregularities falls in the category of mistakes and irregularities envisaged under **Section 83** of the **Election Act**. Those mistakes and minor irregularities cannot lead to the nullification of the elections. That ground of appeal too fails.

The last ground of appeal which was also the subject of the cross-petition of appeal was in regard to who was entitled to costs in the circumstances of the case. The trial court condemned the 2nd and 3rd Respondents to pay the costs of the 1st Respondent on the grounds that the petition was substantially occasioned by the officers of the 2nd Respondent who failed to make the proper entries in the Form 35s.

The Appellant was however denied costs. On their part, the 2nd and 3rd Respondents are aggrieved that despite being successful in the petition, they were condemned to pay costs. They urged the court to invoke the provision of **Section 84** of the **Elections Act** and rule that costs follows the event. This court has considered the argument put forward by the parties in that regard. This court cannot fault the trial court for the decision it reached on the issue of costs. However, the Appellant was entitled also to be paid costs because the court made a finding of fact that the Appellant was justified in petitioning the court as a result of the lack of diligence on the part of the officials of the 2nd Respondent in the conduct of the said elections. This court finds no favour with the cross-petition of appeal filed by the 2nd and 3rd Respondents. It is within the discretion of every court to award costs to a party in the suit depending on the justice and the circumstances of each case. In the present appeal, the trial court was justified in condemning the 2nd and 3rd Respondents to pay costs of the suit. The only adjustment that court shall make is that the 2nd and 3rd Respondents shall pay the costs of the 1st Respondent and the Appellant in the lower court. Those costs are capped at Kshs.2,000,000/- for both the 1st Respondent and the Appellant. As usual, they shall be required to file their bill of costs for taxation.

The upshot of the above reasons is that the appeal filed by the Appellant is hereby dismissed save for the issue of costs that has been partially allowed. The cross-petition of appeal is dismissed. On the issue of costs on this appeal, the order that commends itself to this court is that each party shall bear its own costs. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF MARCH 2014

L. KIMARU

JUDGE