



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL APPEAL NO. 128 OF 2013

BETWEEN

ISAAC OERRI ABIRI.....APPELLANT

AND

SAMWEL NYANG'AU NYANCHAMA.....1ST RESPONDENT

JUSTUS NALIAKHO, THE RETURNING

OFFICER NORTH MUGIRANGO CONSTITUENCY.....2ND RESPONDENT

THE INDEPENDENT ELECTORAL

AND BOUNDARIES COMMISSION.....3RD RESPONDENT

(Being an appeal against the judgment and decree delivered on 6th September 2013 in Nyamira Chief

Magistrate's court Election Petition No.3 of 2013 by Hon. N. Njagi, Principal Magistrate)

JUDGMENT

1. This appeal arises from the decision of the Chief Magistrate at Nyamira Law Courts in Election Petition No.3 of 2013 challenging the Election of the County Assembly Ward representative for Itibo ward Nyamira County.
2. The appellant has moved the court by a Memorandum of Appeal dated 27th September 2013 seeking to set aside the decision of the subordinate court dismissing the appellant's petition. The appellant has set forth the following grounds in his Memorandum of Appeal dated 27th September 2013:-
 1. *That the learned trial magistrate erred in law and fact in dismissing the petition against the weight of evidence tendered.*
 2. *That the learned trial magistrate erred in law and fact in failing to appreciate the constitutional and electoral laws governing election petitions.*
 3. *That the learned trial magistrate erred in law and fact in failing to appreciate that the election was not administered in an impartial neutral, efficient, accurate and accountable manner.*
 4. *That the learned trial magistrate erred in law and fact by being openly and out rightly biased and prejudiced to the petitioner.*
 5. *That the learned trial magistrate erred in law and fact in failing to appreciate the glaring irregularities noted in the proceedings.*

6. *That the learned trial magistrate erred in law and in fact by failing to be impartial and objective in the hearing of the petition.*
 7. *That the learned trial magistrate further erred in law and fact in failing to deliver a well reasoned and judicious judgment.*
 8. *That the learned trial magistrate erred in law and in fact in putting too much weight in evidence of the respondent in total disregard of the appellant's evidence.*
 9. *That the learned trial magistrate erred in law and in fact in condemning the petitioner to pay costs in light of the evidence tendered.*
 10. *That the learned trial magistrate erred in law and fact in considering extraneous issues in arriving at the judgment.*
3. The appellant in his Election Petition No.3 of 2013 before Nyamira Chief Magistrate Court sought for an order for a recount, verification and/or scrutiny of all votes cast in the election for member of county assembly Itibo ward. He also sought a declaration that the 1st Respondent was not the validly elected member of the county assembly Itibo ward and that he (appellant) was the duly and validly elected member of the county assembly.
 4. His petition was premised on grounds that the declared results in which he lost to the 1st Respondent were based on irregularities and malpractices brought about by improper tallying as a result of a deliberate and illegal switching of votes. That this led to the votes he garnered being awarded to the 1st Respondent and those of the 1st Respondent being given to him (petitioner/appellant).
 5. That though these irregularities and malpractices were brought to the attention of the 2nd Respondent, the said 2nd respondent declined to take any action to remedy the situation but proceeded to declare a flawed result made up as follows:-
 - Duke Momanyi – 993
 - Joash Biticha - 299
 - Samwel Nyangau - 3043
 - Oerri Isaac - 2958
 - Thomas Mogaka - 173
 6. That the above stated results were irregular and did not reflect the true will of the people of Itibo Ward due to a deliberate exaggeration of the votes in favour of the 1st Respondent by the presiding officers whereby in most instances the results announced were not supported by the results contained in the statutory form 35.
 7. Based on the reasons set out above the petitioner/appellant says in his petition that the election of the member of the county assembly Itibo ward was not validly, freely and fairly conducted by the Respondents and consequently the outcome did not reflect the will of the people, hence the appellant's prayer to have the results nullified.
 8. From the record, it is shown that at the time of the pre-trial conference parties did agree on the number of witnesses to be called. The trial court was of the view that the petitioner should establish his claim by way of viva voce evidence. The 2nd and 3rd Respondents were to call 2 witnesses and that there was to be a recount of votes from Nyasio Primary School polling station as the appellant confirmed to the court that he had no issues with the results from the other 18 polling stations.
 9. PW1 Isaac Oerri Abiri the petitioner now appellant told the trial court that he was a candidate for Member of County Assembly Itibo Ward amongst other candidates. That he voted on 4th March 2013 at Nyamwanchania voting station at 8.30 a.m. then started going round all the polling stations. He testified that he was vying under the National Alliance Party and that he only had one Agent. He told the trial court that he went to all polling stations and confirmed that polling was going well and that he did get the announced results from the agents whom he knew. He did not attend the counting of the votes but only relied on Agents who gave him the results. He was also not present when the final results were announced at Kebabe Secondary School.
 10. He told the trial court that he was discouraged to attend the announcement because there were a lot of malpractices being committed by the Independent Electoral Boundaries Commission

- (IEBC). He mentioned Tombe polling station where he said he found that the votes had not been counted by 3.30 a.m. and that on 5th March 2013 he asked the Returning Officer why he was counting votes without the agents. He also mentioned Nyamuro polling station where he says he found the Chief of the area addressing a crowd of people at the said polling station. He then left Nyamuro polling station and went to his house at 5.30 a.m. He said that he later learnt that the 1st respondent had won Itibo County Assembly seat though he did not know by how many votes.
11. The petitioner stated that he sought and obtained results from the IEBC and noted therefrom that his 571 votes at Nyamwanchania polling station and 554 votes garnered at Kenyoro polling stations were all given to the 1st Respondent while he was shown to have garnered only 89 votes at Nyamwanchania. That at Etagwa polling station the 1st Respondent was given 323 votes while he was given 47 votes. At Etengelei he found that he was given 136 votes and the 1st Respondent was given 305 votes and at Enginda polling station the 1st Respondent had 482 votes while the petitioner had 166.
12. It was his further testimony that in all the polling stations, the 1st Respondent was given his (petitioner's) votes and he was given the 1st respondent's votes. That he found out that the 1st respondent was given his votes totaling 3043 and he was given 2958 votes which were the 1st respondent's. He told the trial court that the Form 36 which he annexed to his pleadings and which was similar to what the 2nd and 3rd respondent had showed the correct number of votes he had garnered during the elections.
13. He also told the court that he did inquire from the agents who swore affidavits herein namely Samson Magonya, Johnson Mosomi Isaac, Richard Ondieki Muoochi, Evans M. Keroti, and Gladys Kerubo Ongira as to the exact number of votes he garnered during the elections. He said that if there had been no switching of votes, he should have been the winner with 3043 votes as against the 1st Respondent's 2958 votes.
14. The petitioner referred to the form 36 marked as **SNJ2** in the replying affidavit of the 2nd and 3rd Respondent and told the court that according to that form the total votes given to him were 3043 while the 1st respondent has been given a total of 3130 votes, 87 votes more than him. He adds that as per the form 36, the votes are correct as per the listing and that the votes obtained by the 1st Respondent as per Form 36 reveals that there is a difference in one polling station which is Nyasio where it shows that he got 191 votes.
15. The Petitioner also testified that whereas the Form 36 which is marked as annexure **"10A2"** he has 19 votes annexure **SNJ2** shows that he has 91 votes. In the form 36 allegedly given to him by the IEBC, it is shown that he had 29 votes while 1st Respondent had 191 votes. He contends that the votes cast at Nyasio polling station were 96 those rejected were 2 and the valid votes were 94. That the votes allocated to all the candidates were as follows:-

- Duke Momanyi - 36 votes
- Joash Biticha - 9 votes
- Isaac Oerri - 29 votes
- Samuel Nyangau - 191 votes
- Thomas Mogaka - 1 votes

16. According to form 36 annexed to the petitioner's petition namely annexure **"IOA2"**, Duke Momanyi got 36 votes, Joash Biticha had 9 votes, Sammy Nyanchama had 29 votes, Isaac Oeri Nyangau had 19 votes and Thomas Mogaka had 1 vote and in total all the votes are 94 votes and the total votes allocated are 94 votes. He told the trial court that the two forms 36 show that the votes allocated differ in that whereas one shows 19 votes for the petitioner the other shows 191 votes. That the form 36 annexed by the 1st Respondent shows that the 1st respondent received 191 votes and in the form given to him it shows valid votes are 94 and cast votes are 96 which tallies with all the votes given.

17. He adds that in the form 36 the following was the vote tally:-

- Duke Momanyi - 993 votes
- Joash Biticha - 299 votes

- Samuel Nyang'au - 3043 votes
- Isaac Oeri - 2958 votes
- Thomas Mogaka - 173 votes

which gives a total of 7,466 votes.

18. That the total votes cast are 7,528, the rejected votes are 58 and the difference between the votes cast and rejected votes is 7470. Valid votes as per the form 36 is 7372 votes which leaves a difference of 98 votes. That the total votes allocated was 7466 less 7372 which gives a difference of 94 votes.
19. He further told the court that according to form 36 annexed to the 1st respondent's affidavit annexure as "SNJ2" the 2nd and 3rd respondents allocated votes for all candidates as follows:-
 - Duke Momanyi - 993 votes
 - Joash Biticha - 299 votes
 - Isaac Oeri - 3043 votes
 - Samuel Nyang'au - 3130 votes
 - Thomas Mogaka - 173 votes
20. That the total votes allocated to the candidates was 7638 votes and valid votes were 7372 leaving a difference of 266 votes. Further that the total votes allocated to each candidate in form 36 was 7528 less votes cast of 7638 leaving a difference of 110 votes; that there was a difference in the votes cast to the tune of 7380.
21. According to the Petitioner, the Form 36 showed a figure of 7372 as the valid votes. The appellant thus contended that the figures were not tallying and that there were a total of 226 votes that were not explained. He also asked the court, as he testified, for a recount of all votes in all polling stations.
22. During cross examination, the appellant was put to task on where he got his Form No.36 being annexure "10A2" which form was different from the form produced in evidence by the IEBC being annexure SNJ2 which was signed by the officials of IEBC and bore the official stamp of IEBC. He was also put to task on the accuracy of annexure "10A2" and "SN2". He told the court that his document "10A2" was not authenticated and that it is his agents who told him that some figures were switched from his side in favour of the 1st Respondent and that the irregularities he was talking about were conveyed to him by the agents.
23. He also told the court on cross examination that he was given the form 35 by the agents since he had applied for the same from the IEBC but to no avail.
24. DW1 the 1st respondent herein also testified and told the trial court that he was one of the candidates who vied for the seat of county assembly member at Itibo Electoral Ward. That he voted at Tombe Primary School and thereafter he went to Omwanchani polling station because he was told his agent could not be allowed in the hall. He also told the court that he went to Kenyoro primary school where his agent apparently had been denied entry but later on he was allowed.
25. DW1 also stated that the elections of 4th March 2013 were peaceful and fair as observed from the three (3) polling stations he visited. He explained to the court that there were 19 polling stations in Itibo ward; that votes were counted and form No.35 filled for each station by the presiding officer and signed by the witnesses; that he attended the counting of votes at Nyamuro polling station together with the petitioner now appellant; though he did not attend any other counting at any other station.
26. DW1 told the court that he went to the tallying centre at Kebabe Girls Secondary School, attended the tallying of votes from all the 19 polling stations before he was declared the winner. He said that he garnered a total of 3130 votes as opposed to the petitioner who garnered 3043 votes.
27. DW1 further stated that the returning officer filled the form 36 annexed as "SNJ2" which is similar to "SNJ2" filled by the 2nd Respondent and 3rd Respondent; he also signed the said form and the agents also signed. He was then given the form 38 certificate of the results being annexure "SNN1" which he acknowledged by signing.
28. In conclusion, DW1 stated that he did not do anything to influence the outcome of the results and

that the said results were an expression of the will of the people of Itibo ward. He relied on the evidence in his affidavit supported by the evidence of the returning officer. He disassociated himself with the form filed by the petitioner and the results it portrayed thereon. He requested the trial court to dismiss the petition with costs.

29. On cross examination, DW1 told the trial court that the results on “SNJ2” were a true reflection of the will of the people. The registered voters were 9121, voter turnout was 83% -7570, and individual results as follows:-

- Duke Momanyi – 993 votes
- Joash Biticha – 299 votes
- Petitioner – 3043 votes
- 1st Respondent – 3130 votes
- Thomas Mayaka – 173 votes

Total – 7638 votes

30. He told the court that the valid votes were 7372 and there was a difference of 266 votes which votes could not be accounted for. He added that the total votes allocated to each candidate were 7638 and the total votes cast were 7528 a difference of 110 votes which he said he could not explain. He added that the results as announced were a true reflection of the will of the people of Itibo.

31. DW2 Justus Neliakho Simali, the election Co-ordinator for North Mugirango told the court that on 4th March 2013 he was based at Kebabe High School as the Returning Officer. On the 5th March 2013 he was at the tallying centre. That it was a peaceful atmosphere as people were waiting for results. He told the court that he used Form 35 to announce the results from every polling station; that form 36 was filled out from the information on form 35. That Form 36 had his stamp and signature and was also signed by 3 agents. He added that he did not see the petitioner at the tallying centre on that day and further that the petitioner did not dispute the results he garnered as shown on the Form 36. That even the 1st respondent did not dispute the said results. He further explained to the trial court that the calculations which had been done showed different figures but the individual results remained as they were on form 36. He told the court that he announced the winner of the polls as Samuel Nyangau after which he issued the form No.38. That no candidate's results were switched at all. He told court that the petitioner garnered 3043 votes as correctly reflected on annexure “SNJ2” and the 1st respondent had 3130 as correctly reflected on form 36. He said he used form 36 to announce the results and not annexure “10A2” which neither had his signature nor official stamp and was also not signed by any agent or dated.

32. On cross examination, DW2 maintained that the form 36 is competent and denied that there was any inflation of votes in favour of any candidate. He also admitted that there was discrepancy in some of the figures, but that the discrepancy did not affect the final result.

33. After both the petitioner and respondents closed their cases, counting of the votes from Nyasio primary school went on and later parties filed their submissions. After carefully considering the evidence and the written submissions as well as the law, the trial court gave its judgment which is the subject of this appeal.

34. The role of this court on this appeal is as provided under **Section 75 (4)** of the **Elections Act** and **Rules 34 (10)** of the **Elections (Parliamentary and County Elections) Petition Rules of 2013** regarding the hearing of appeals from a magistrate's court. **Section 75 (4)** of the **Elections Act** provides that an appeal from a decision of a Resident Magistrate's Court as to the validity of the election of a member of a county assembly shall lie to the High Court on matters of law only. **Rule 34 (10)** of the **Elections (Parliamentary and County Elections) petition Rules of 2013** provides that the High Court may confirm, vary or reverse the decision of the court from which the appeal is preferred and shall have the same powers and perform the same duties as are conferred and imposed on the court exercising the original jurisdiction.

35. The duty of this court as an appellate court is therefore to review the evidence given at the trial court, and determine whether the findings of the trial court on matters of law should stand, and if not to reach its own independent conclusions in accordance with **Rule 34 (10)** of the **Rules**.

36. It is necessary to state at the outset in this regard that the standard of proof required in election

petitions as held by the Supreme Court of Kenya in **Raila Odinga –vs- The Independent Electoral and Boundaries Commission and others, S.C. Petition No.5 of 2013** is higher than a balance of probabilities but not beyond reasonable doubt.

37. This court has carefully gone through the evidence as adduced by the petitioner and the respondents at the trial. It has also carefully considered and weighed the judgment of the trial court. It has also carefully read and considered all the authorities cited by parties.
38. The court also notes that the appeal herein is opposed. The 1st, 2nd and 3rd Respondents filed written submissions to that effect. The appellant also did so as directed by this court.
39. In highlighting the said submissions, Mr. Orina, counsel for the appellant relied on both the submissions dated the 23rd December 2013 and the submissions dated 8th August 2013 which were in support of the petition and the list of authorities. He submitted as follows:-

That the learned trial magistrate erred in holding that there was no evidence in support of the petition when there was oral evidence to cast aspersions on the results of the elections. He further argued that a casual look at the results filed in court – annexure “SNJ2” shows total registered voters as 8921 while the voter turnout was 83% which translates to 7570. If the total allocated votes are taken into account the total was 7635 which is higher than the voter turnout.”

40. Mr. Orina further submitted that votes indicated as total votes cast were 7528 which votes included the rejected votes. That according to the same document valid votes were 7372 which is a world of difference from the votes cast and further that votes allocated being 7628 show a difference of 266 votes which are unaccountable.
41. He urges that these discrepancies were brought to the attention of the 2nd respondent and whose response was **“I admit that there were discrepancies. Votes cast cannot be more than voter turnout. The final figure can be affected by the anomaly. I have no answer for the anomaly”** see page 250 of the Record of Appeal.
42. He further submits that the discrepancy cited was very serious evidence that was never analyzed by the trial magistrate who was under a duty to satisfy himself that the elections were conducted by an impartial and independent body and that the elections were free and fair and that the result was accurate and accountable. He urged the court to look at the evidence and find that the election was not fair nor was it accountable. He further submits that it was unfortunate that the learned trial magistrate went out of his way to make serious allegations against the appellant by alleging that the documents relied upon by appellant were fictitious unauthentic and a forgery thereby demonstrating lack of objectivity and outright bias.
43. He submits further that no investigations were carried out on such allegations nor was any evidence adduced to show the said document annexure **1A02** was a forgery as the annexures were almost similar to annexure **SNJ2** save the lack of signature and issue of the voter turnout.
44. Counsel submits that the lack of signature and details were explained by the appellant, further that the documents notwithstanding the oral evidence sufficiently brought out the anomaly in the results. He urges court to find that the entries do not add up, and to allow this appeal.
45. Counsel submits further that the court on 3rd July 2013 was asked to have the ballot boxes brought to court but in an apparent lack of understanding on how to proceed, the court went ahead to write a ruling which was uncalled for since they had not asked for a recount and scrutiny and the purported consent in the ruling was nonexistent. He adds that the trial court did not appreciate the provisions of **Section 82** of the **Elections Act** and **Rule 33** of the **Petition Rules** and ended up misdirecting itself in reaching a conclusion that if application had not been made at the pre-trial stage then they were barred from raising the application and submits that that was a misdirection on the part of the magistrate.
46. Regarding the respondents’ response, Mr. Orina submits that all of them had relied on the alleged consent that only one polling station was to be recounted and that without that consent trial court was under a duty to award any prayer of the petition so that the marginal votes had to be considered.
47. Counsel contends that though all parties cited adequate authorities and sufficient law, the ruling lacked analysis and was a biased ruling that was in the main a blame game. He urges this court to find that the lower court’s judgment was not a balanced judgment.

48. Lastly, he submits that the trial court ordered a recount of the one polling station and according to evidence valid votes were 94, 2 rejected bringing a total of votes cast to 96. He submits that the court was under a duty to scrutinize votes in order to verify the results. That the court itself exercised recount instead of allowing the Executive Officer to do so.
49. Mr. Masese for the 1st respondent opposed the appeal relying on their written submissions made in the lower court as appearing in the Supplementary Record of Appeal. He also relied on the submissions in this appeal filed on the 8th January 2014 and dated 7th January 2014.
50. He submits that the petition in the lower court was based on a document marked 1A02 being the principal document relied upon by the appellant to prove his claims against the respondents. That before the trial started in the lower court, a pre-trial conference was conducted at which issues were framed and agreed upon, the procedure of the trial was also agreed upon since that was a public proceeding.
51. He submits that the issue at stake was what was to be counted. That on the 3rd July 2013 counsel for the appellant actually reneged on the consent of 28th May 2013 and sought a recount of all the polling stations and that is how the lower court ended up making the ruling which counsel for appellant now says dealt with a purported consent.
52. He submits further that at the trial appellant was cross examined on the document marked "IAO2" and it became very clear that the said document was a fictitious document. Further that in the body of the judgment the court made this finding of fact and went further to state that this was a document manufactured for purposes of bringing the petition. Further that the trial court made a recommendation in the body of the judgment that an investigation be carried out to establish how appellant came into possession of the said document.
53. Mr. Masese also submits that after it occurred to the appellant that the document was fictitious and that his allegations could not stand, appellant set out on a fishing expedition in an attempt to find a thread to hang on to by raising issues on votes cast and voter turnout a matter that was not in the main petition.
54. He adds that once the court reached the conclusion that the principal document relied on by the petitioner was fictitious the whole petition had to fail. Counsel urged this court to make a similar finding and to dismiss the appeal. Counsel also urges this court to find that the appellant did not come to court with clean hands.
55. Mr. Masese concludes his submissions by stating that during his testimony in the lower court, the appellant expressly agreed that the elections were conducted in a fair and free manner, while also admitting he did not attend either the vote count or tallying of results and that the evidence he gave was what he heard from agents who had no figures. That the appellant woke up two (2) weeks later to cook up those figures and to produce the fictitious documents.
56. Mr. Masese submits that the appeal is not merited and should be dismissed.
57. Mr. Odhiambo who appears on behalf of the 2nd and 3rd respondents in opposing the appeal relied on their submissions dated 14th August 2013 filed in the lower court and the submissions dated 14th January 2014.
58. He submits that it has never been in contention how many votes the appellant garnered during the elections; that the votes stood at 3043 and that during the entire trial appellant stood by these votes. He adds that during his testimony appellant herein said that he never went to any polling station during the counting and also during the tallying at the tallying centre and when the final results were announced he did not even hear how many votes he got.
59. Mr. Odhiambo also submits that two (2) weeks after the results were announced, the appellant was informed that his votes were stolen and he produced document "IOA2" which document when compared with the original document "SNJ2" shows clear differences. "SNJ2" had all the ingredients of being the official and final result as announced.
60. He submits further that the source of "IOA2" was an issue during the trial and appellant was at pains to explain how he came by it. Mr. Odhiambo submits that "IAO2" was a fictitious document as rightly pointed out by the trial court. That the appellant also did many calculations during the hearing but still came up with discrepancies. That the appellant however confirmed that no results were affected by the calculations.
61. On the pre-trial conference Mr. Odhiambo submits that this is the conference that creates room for conduct of the hearing of the petition and it is on record from the pre-trial conference that votes

for Nyasio polling station were the only ones in dispute. That there was consent on 28th May 2013 which consent counsel for appellant reneged on by asking for a recount of all polling stations and that is how the ruling by the court came about.

62. Mr. Odhiambo also submits that under **Rule 21** of the **Election Rules**, the 3rd respondent was supposed to avail ballot boxes 48 hours before they were needed and the court said that they did not have space to store the boxes. He also submits that the order the court made was for recount and not for recount and scrutiny and that the recount was done in full view of all the parties and duly conducted by the Executive Officer and not the court itself. In conclusion, Mr. Odhiambo submits that this appeal is not merited and is an abuse of court process and the same should be dismissed with costs to the 2nd and 3rd respondents.

63. Upon examination of the grounds of appeal and the evidence of the parties, submissions and authorities relied on, the issues for determination in this appeal are:-

1. Whether there was overwhelming evidence to be relied on by the trial court.

64. From the submissions and in the proceedings, it is clear that the appellant relied on annexure **"IOA2"** being purported Form 36 bearing results for Itibo ward. The origin and authenticity of the said document was brought to question not only by the trial court but also by the counsel for all respondents. The arguments raised in the submissions were that the said annexure **"IOA2"** did not have all the qualities to show that it contained results that emanated from the 3rd Respondents' Officials during and after the 4th March 2013 General Elections. Apart from bearing a logo the same was not stamped, dated nor signed by the 2nd respondent. The appellant in his testimony also confirmed during cross examination that the purported results being **"IOA2"** were not authenticated.

65. With the appellant's own admission that annexure **"IOA2"** was not authenticated, it cannot therefore be established who prepared the said form and when it was issued. It does not contain the qualities to show that those were the results that emanated from the 3rd Respondents officials. It is not signed, stamped or dated. Further, Appellant was not at the counting and/or tallying centre where candidates or their agents were expected to have been provided with their own copies of results immediately the results are announced by the Returning Officer at the tallying centre. See **Regulation 83 (i) (d) of the Elections (General) Regulations 2012.**

66. On this ground alone this appeal should fail. As stated by the Supreme Court in the **Raila Odinga case**, the standard of proof in an election petition is much higher than the balance of probabilities. I find that this standard and/or threshold has not been fulfilled by the appellant herein. I find that there was no overwhelming evidence upon which the trial court could make a finding in favour of the appellant.

2) Whether the trial court appreciated the constitutional and Electoral laws governing election petitions.

67. On this issue I do find that the trial court did take into consideration all the electoral laws being the Constitution, the Elections Act, 2011 as well as the Election (General) Regulations 2012 and the Elections (Parliamentary and County Assembly) Petition Rules 2013.

68. The trial court conducted a pre-trial conference in accordance with the provisions of **Rule 17** of the **Rules**. A reading of **Rule 17** as a whole leaves no doubt in my mind that the rule was designed to create a forum for the court and the parties to agree on the most efficient and practical way of settling all preliminary issues appertaining to the petition. The rule is couched in mandatory terms and sub-rule (2) thereof provides as follows:-

"(2) The court shall not allow any interlocutory application made after the hearing of the petition has commenced if the interlocutory application could have, by its nature, been brought before the commencement of the hearing of the petition."

69. In the petition, the petitioner sought, under prayer (a) thereof a recount, verification and/or scrutiny of all votes cast in the election for member of County Assembly, Itibo Ward. However,

on 28th May 2013 counsel for the appellant told the court that the votes for Nyasio Primary School polling station No.6 is what the appellant was disputing, and that other votes were not disputed “**save for votes at this polling station**” concerning the number of votes the appellant received thereat. After hearing all parties, the court directed that there would be a recount of the votes at Nyasio Primary School. The issue of recounting votes from the other 18 polling stations did not therefore arise. The trial court thus reached the correct conclusion on the issue as it was not open to the appellant to raise other applications after the pre-trial conference, unless such applications were brought by consent of all parties.

70. The rationale behind rule 17 was aptly captured by Ogola J in **Arthur Kibira Apungu & another -vs- IEBC & 3 others – Kakamega Petition NO.7 of 2013** in which the learned judge correctly stated that **Rule 17** of the **Election Rules** provides for pre-trial conference and prohibition of delayed interlocutory applications and for the safeguard of the adjudication process of an election petition from interlocutory applications made after the commencement of the hearing. The rule also ensures that both the court and the parties narrow down the petition to the contested issues and adopt the best and most practical way of resolving the disputes.
71. In his ruling, the trial magistrate in this case made mention of compliance with **Rule 17 (i) (a)-(i)** of the **Elections (Parliamentary and County) Election Petition Rules**. The trial court also made mention of the power it had under **Rule 80 (1)** of the **Election Act** and the powers conferred upon it by **Section 82 (1)** of the **Elections Act No.24 of 2011**. The court also complied with **Rule 21** of the **Elections (Parliamentary and County Elections) Petition Rules**. I am therefore satisfied that the appeal based on non-compliance of **Rules 17** and **21** of the **Rules** and **Section 82** of the **Election Act, 2011** has no basis and is dismissed.
72. On this ground again this appeal should fail.

3) Whether the elections were administered in an impartial, neutral, efficient, accurate and accountable manner.

73. The appellant herein alleged that there was switching of results by the officials of the 3rd respondent in favour of the 1st respondent. This allegation was not proved by the appellant. He (the appellant) told the trial court that he only visited one or two polling stations and found that everything in those polling stations he visited was going on well. He also conceded that indeed no switching of votes in favour of any candidate ever occurred during the 4th March 2013 elections in Itibo ward. The alleged switching of votes was hearsay evidence with no probative value to the appellant’s case.
74. I therefore do find as the trial court did that the 1st respondent did not participate in committing any illegal activities and malpractices complained of by the appellant. The trial court appreciated the 1st Respondent was just a candidate like the petitioner and that no evidence was placed before the court to prove that 1st respondent was guilty of any election offence. Having brought out the above issues and finding that the appellant has failed to show that the trial court breached any law, I do find that the elections were conducted in an impartial, free, fair, neutral, efficient, accurate and accountable manner, and that the 2nd and 3rd respondents did conform with the law as to elections.
75. Finally, and before I conclude this judgment, I must say something about the competency of this appeal. **Rule 34 (3)** of the **Elections Rules** provides that “**the Memorandum of Appeal shall be filed at the nearest High Court registry within fourteen days from the date of the judgment.**” In the instant case, the judgment of the lower court was delivered on 6th September 2013 which means that the Memorandum of Appeal should have been filed on or before 19th September 2013. The Memorandum of Appeal herein was filed on 27th September 2013, a whole 22 days from the date of judgment. There is no record of any application by the appellant for enlargement of time within which to file the Memorandum of Appeal. Nor is there any record of any order to that effect.
76. Technically speaking therefore, this appeal was incompetent abinitio. However, the Respondents did not raise any issue with the

delay and that is how this appeal went to full hearing.

77. In conclusion I find and hold that the appeal herein is not merited. The same is dismissed with costs to the Respondents.

Dated and delivered at Kisii this 13th day of March, 2014

R.N. SITATI

JUDGE.

In the presence of:

Mr. Oguttu-Mboya for Orina (present) for Appellant

N/A for G.J.M. Masese for 1st Respondent

Mr. Odhiambo (present) for 2nd and 3rd Respondents

Mr. Bibu - Court Clerk