



REPUBLIC OF KENYA

IN THE SENIOR PRINCIPAL MAGISTRATE'S COURT AT KANGUNDO

ELECTION PETITION NO. 1 OF 2017

**IN THE MATTER OF THE CHALLENGE OF THE VALIDITY OF THE TALA TOWNSHIP
ELECTION, 2017**

AND

**IN THE MATTER OF ARTICLE (1), (2); 2(2); 3(1); 4(2); 10; 21(1); 23; 38(3); 47(2); 48; 81(A) &
(E); 82(2) (B); 84; 86; 87(2) & (3); 88(5); 165(3) (A) AND €; & 180(1) OF THE CONSTITUTION
OF KENYA**

AND

IN THE MATTER OF SECTION 75, 80, 83 OF THE ELECTIONS ACT, 2011

AND

IN THE ELECTIONS ACT, 2011 (1CT NO.24 OF 2011) AS AMENDED

AND

**IN THE MATTER OF LEGAL NOTICE NO.128 OF 2012, THE ELECTIONS (GENERAL)
REGULATIONS, 2012**

AND

**IN THE MATTER OF LEGAL NOTICE NO. 126 OF 2012 (THE ELECTIONS (REGISTRATION
OF VOTES) REGULATIONS, 2012**

AND

**IN THE MATTER OF PARLIAMENTARY AND COUNTRY ELECTIONS PETITION RULES,
2017**

AND

IN THE MATTER OF THE ELECTIONS (GENERAL) AMENDMENT REGULATIONS, 2017

AND

IN THE MATTER OF A PETITION BY

BONIFACE MUISYO NGULI.....PETITIONER

-VERSUS-

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

RETURNING OFFICER, TALA TOWNSHIP.....2ND RESPONDENT

KAMITU ALEX.....3RD RESPONDENT

JUDGMENT

This election petition dated 4th day of September 2017 was filed by the Petitioner **Boniface Muisyo Nguli** through his Advocates Ms. Maanzo and Company Advocates on the 5th September 2017.

The file record shows that the petition was accompanied by a supporting affidavit of the petitioner sworn at Nairobi but not dated. It was also accompanied by several affidavits of evidence sworn by those intended to be called by the Petitioner to testify as witnesses during the trial of the petition.

After the service of the petition upon the Respondents, the latter entered appearances in the petition through their various advocates who also filed their several notices of appointments.

On the 15th September 2017, the 3rd Respondent Kamitu Alex who was declared and gazetted winner of the Member of County Assembly Tala ward, filed his answer to the petition dated 15/9/17. A quick perusal of the Respondents answers to the petition shows that the Respondent specifically and generally denied all the allegations in the Petitioner's pleadings.

On the 18/9/17 the 1st and 2nd Respondents being the Returning Officer for Tala Township and Independent Electoral and Boundaries Commission respectively also filed their joint answers to the petition. They also specifically and generally denied each and every allegation. All the answers from the Respondents were properly and timely served upon the Petitioner.

Among the documents served by the Respondents on the Petitioner together with joint answers to the petition was the form 36's showing the election results for the Member of County Assembly for Tala ward seat for each of the polling stations.

There was also annexed the form 36A which is a single document holding all the results contained in all the form 36Bs, aforesaid. Thereafter on 27/10/17, Petitioner applied for leave to file a further affidavit which leave was granted with express condition that no new evidence was to be introduced.

The Petitioner filed his said further affidavit on the 29/9/17. The advocates for the Respondent later on the 24/10/17 raised an objection urging this Honourable court to strike out the said further affidavit on the ground that it had introduced new evidence contrary to the earlier agreement. This court upon listening to the argument by all the counsels on record delivered its ruling on the 6/12/2017 agreeing with advocates for the Respondents that the said further affidavit filed herein had actually introduced new evidence. The said further affidavit was therefore strike out from the record. The Petitioner being unsatisfied with the ruling of this honourable court moved to the High court and filed appeal against this court's ruling which appeal was dismissed on the 6/12/17.

The prayers sought by the Petitioner in the petition are as follows; that:-

- (a) The said county election held on 8th August 2017 in the said ward was not conducted in accordance with the constitutional and the applicable law be determined and declared null and void.
- (b) A declaration that non-compliance, irregularities in the Tala Township Constituency were

substantially and significant that they affected the results.

(c) It be declared that the 3rd Respondent has not been validly elected as the Member of County Assembly for Tala Township Constituency.

(d) An order do issue directing the 1st Respondent to organize and conduct a fresh election for Tala Township Constituency in strict conformity with the constitution and applicable election laws.

(e) A declaration that each and all the Respondents jointly and severally committed election irregularities.

(f) The Respondents be condemned to pay petitioners costs and incidentals to this petition.

(g) Such further or other consequential orders as this Honourable court may lawfully make.

At the pre-trial conference held on the 27/9/17 the parties agreed on the conduct of the outstanding proceedings, the hearing of the trial was scheduled for 24/10/17. The hearing commenced as scheduled on the 24/10/2017. The petitioner was represented by Mr. Airo advocate, 1st and 2nd Respondents were represented by Ms. Maitai, and 3rd Respondent was represented by Mr. Nyamu Advocates appearing with Priscillah Kioko Advocate.

Mr. Airo learned counsel for the Petitioner indicated that they would be calling 3 witnesses. The Respondents stated that they would be calling a total of 5 witnesses. All the witnesses had filed their respective affidavits.

The hearing of the petition concluded with the filing of written submissions on the 13/12/17 as agreed by consent of the parties.

THE ISSUES FOR DETERMINATION

As agreed at the status conference counsel for the parties on the 24/10/17 forwarded their issues which the court had to consolidate as follows:-

a) Whether the results of Tala polling station stream 2 would have changed the overall winner for member of the County Assembly for Tala ward.

b) Whether there was any voter intimidation or bribery during the voting, if in the affirmative what was the effect.

c) Whether the election was carried out in accordance with the provisions of constitution, election act and the regulation therein.

d) Whether indeed election was done in an open, transparent, participatory and accountable manner pursuant to Article 81 (a) as read with Article 86 of the constitution.

e) Whether the 3rd Respondent was validly elected as a member of county assembly of Tala ward

The evidence of the Petitioner Boniface Muisyo Nguli PW1 was contained in his undated affidavit sworn at Nairobi. He said that he was duly nominated by the Wiper Democratic Movement Tala ward to contest the general elections on the 8th August 2017 for the position of a Member of County Assembly.

The Petitioner alleges that the election was riddled with grave breaches of the constitution of Kenya 2010 and applicable electoral laws before the 8th of August 2017 and during tallying of results which affected the legitimacy and/or credibility of the process and the final outcome as declared by the 2nd Respondent. He avers that the credibility of the outcome of the county assembly election has been gravely

compromised and is on available evidence not representative of will of the people of Tala Township.

The Petitioner also contended that the collation, tallying and verification of County Assembly election results was riddled with major procedural flaws, illegalities and/or irregularities of the nature and extent that compromised the credibility of the outcome and/or final results declared on the 8th August 2017.

That the results declared by the 1st Respondent were otherwise substantially at variance with the actual results tallied and declared at the gazetted polling stations as to fundamentally affect the finality of the result declared by the 1st Respondent.

The Petitioner alleged that in spite of the said clear and mandatory provisions, the 1st Respondent either deliberately or negligently failed to tally the votes together with the prescribed forms and thereby exposed the collation and tallying process to manipulation actions that were grossly incompatible with the constitutional electoral principles of accountability, verifiability, security and credibility of the electoral process.

The Petitioner also alleged that the transmission of the results was done without his agents and without the prescribed forms hence in his view, it had no basis in law. That having reviewed form 36B supplied to them by the 1st Respondent, the number of the voter turnout was 10,917 while the total number of votes was indicated as 10993 creating a numerical discrepancy that fundamentally affected the final results to his disadvantage.

That secondly in the said form 36B his numbers of votes in numbers differ from the number in words reading 3181 and three thousand five hundred and eight respectively.

And thirdly his results as declared by the 2nd Respondent was 3318 votes as opposed to the earlier mentioned 3181 votes.

In addition the Petitioner alleged that there was voter intimidation, undue influence, bribery and/or flagrant commission of electoral offences by the 3rd Respondent and presiding officers. That one of the hallmark of free and fair election is the right of a potential voter to make an independent and objective choice of leaders without undue influence, bribery, inducement or manipulative interference of any kind.

That the 3rd Respondent is guilty of unduly influencing voters in lead up to the 8th August 2017 general election without punishment and/or as much as a warning from the 1st Respondent.

Finally the Petitioner alleged that there were blatant violation of clear provisions of electoral laws to his disadvantage. Furthermore to the extent that the 1st Respondent turned a blind eye to the said violations, the discriminatorily, partially, unlawfully and/or unfairly to the advantage of the 3rd Respondent.

In cross examination by Ms. Maitai counsel for 1st and 2nd Respondents the Petitioner said that all the votes including those from Tala Township stream 2 were taken to the tallying centre. That he was not personally present at the centre, but was informed by his agents. That he was simply complaining of the number and that he had no evidence that his votes were given to the opponent. That though there was an allegation of bribery, he himself did not see the money exchanging hands. He also told court that no report was made to police against anybody during and even after the election.

In cross examination by Mr. Nyamu counsel for the 3rd Respondent, the Petitioner admitted that there were many errors in the petition referring Tala ward as a constituency. He told court that there is no constituency called Tala Township. The Petitioner also admitted an error in his affidavit which was not dated though he is aware of the requirement that petition must be filed alongside with an affidavit which must indicate name, address and the date the election was held. All these were missing from his affidavit attached to the petition.

He further stated that the petition must show the result of the election which is also missing from his current pleadings nor the date when the result was declared was indicated hence did not comply with the particulars to the petition. That all these were an oversight and court should ignore them. Asked about allegation about the bribery, the Petitioner stated that he did not know how much was paid nor did he see anybody paying the money. The petitioner further stated that he was not sure whether he won the election or not but was only raising issue with two stations. He also stated that though he complained of some voters being prevented from voting, he did not mention the stations from which the incident occurred and by who. He also admitted that none of the voters he alleged to have been thrown out reported the matter to any authority or called as witnesses to confirm the incident.

The Petitioner's witness Mr. Ben Rogers Munuvi swore affidavit in support of the petition. He states that he was an agent of the Petitioner in Tala Township stream 2 in general elections conducted on the 8th August 2017. That on the said date the presiding officer counted the votes for the candidates, he then asked for a break to enable him locate some missing forms which the results were to be entered. The witness averred that the results were not tabulated and form 36A was not availed in contravention to the provisions of the constitution. That the Presiding Officer did not avail the said form as promised and later he informed agents that the results would be availed at a later date. The witness further stated that when the results were being taken to the constituency tallying centre he was denied entry in the motor vehicle which was transporting the votes.

Mr. Daniel Sila Maingi was the Petitioner's 2nd Witness in the petition. He also swore affidavit in support of the petition. In his said undated affidavit he stated that he was the petitioner's agent at Katine HGM primary school in Tala Township in the general election conducted on the 8th August 2017. He averred that on the material date voting went on smoothly but only for one incident which occurred at about 10.00am. That there came assisted voter who sought assistance from the Presiding Officer. That the said assisted voter choice was as follows, Presidential candidate Raila Odinga, MP Mule, women representative Joyce Kamene, but Presiding Officer marked Agnes Kavindu, Gubernatorial seat she chose Wavinya Ndeti but Presiding Officer marked Alfred Mutua and Member of County Assembly she chose Alex Kamitu. He further averred that he interjected and as a result was thrown out by the presiding officer who accused him of misconduct.

The Petitioner's final witness was Mr. John Kyalo Muli who also swore an affidavit which is also undated in support of the petition. He states that he was the chief agent of Wiper Democratic movement party in Matungulu Constituency within Tala Township. He was appointed by a letter dated 8th August 2017. Mr. John Kyalo Muli stated that on the 8/8/17 he received a call from one Ben Rodgers Munuvi an agent at Tala Township stream 2 informing him that there was a delay in counting of the member of county assembly votes due to missing forms on which the results were to be entered.

The 1st, 2nd and 3rd Respondents denied all the allegations in the petition through their response filed on the 15th September 2017 by their respective advocates. They denied any electoral malpractices as alleged by the petitioner in his petition.

They explained to court that the election (parliamentary and county elections) petition rules 2017 provide at **Rule 8 (c)** that an election petition shall state the results of the election. **Rule 12 (2) (c)** further states that the petition shall be supported by an affidavit which shall state the results of the election.

That on perusal of petition and affidavit in support of the petition will confirm that the petition has not stated the results of the election being challenged in any of the two documents. The issue that remains to be determined therefore is whether this failure by the Petitioner is fatal in the petition.

The court is referred to the case of DAVID WAMUTUSI OMUSOTSI VS. RETURNING OFFICER MUMIAS EAST CONSTITUENCY AND 2 OTHERS (2017) eKLR in which the court stated:

In M'NKIVIA PETKAY SHEN MIRITI VS RAGWA SAMUEL MBAE AND TWO OTHERS (2013) eKLR, Lesiit Judge held that the provisions of Rule 8 are not mere technical requirements but are

substantive and go to the root of the issues in an election petition. She said:

“Rule (10) (now rule 8) are not mere technical requirements laying down procedural form and content of intended election petition but are substantive as they go to the root and substance of the issues and matters prescribed upon. Since the rules like the Election Act are special legislation created to give effect to the overriding objective mentioned in rule 4, which is to facilitate the just, expeditious, proportionate resolution of election petitions under the constitution and the Act. Every rule is intended to achieve a required result geared towards interlia, expedition in the resolution of petitions.”

In JOHN MICHAEL NJENGA MUTUTHO VS JANE NJERI WANJIKU KIHARA AND 2 OTHERS CIVIL APPEAL NO. 102 OF 2008 AT PAGE 8, the court of appeal stated:

“Election petitions are special proceedings. They have detailed procedures and by law they must be determined expeditiously. The law has set out what a petition should contain and if any of the matters supposed to be included is omitted, then the petition would be incurably defective.”

The rules are mandatory. A petition that does not comply with these provisions is incurably defective and cannot stand. It is the respondents’ contention that this petition does not comply with the above mandatory provisions hence defective and should be dismissed.

On the issue of undated affidavits by the petitioner and his witnesses, the 1st and 2nd Respondents stated that every commissioner for oaths before whom any oath or affidavit taken or made under this Act shall state truly in attestation on what place and on what date the oath or affidavit is taken or made.

The section therefore states in mandatory terms that the jurat in an affidavit must be dated. **Rule 12 (14)** of election (parliamentary and county elections) petition Rules, 2017 provides that:

“The oath and statutory declaration Act and Order 19 of Civil Procedure Rules 2010 shall apply to affidavits under these rules”

It is therefore the position of the Respondents that failure to abide by this mandatory rule is fatal to the petition.

On the issue of the Petitioner referring Tala ward as a constituency and terms it as a mere typographic errors.

The petitioner at paragraph 2 of the petition indicates that he ran for member of County assembly Tala Township Constituency which is nonexistent seat when in actual fact the same should indicate Tala ward. Paragraph 5 of the petition indicates that 3rd Respondent was declared as the successful candidate for Tala Township Constituency. This is repeated all over the petition and there is no mention of Tala Ward in the petition or at all. It is further worth noting that the prayers in the petition indicates as much. To this, the Respondents submits that the parties are bound by their pleadings and as such the prayers cannot be granted rendering the petition fatally defective.

The court is referred to the case of ISMAEL SULEIMAN AND 9 OTHERS VS RETURNING OFFICER ISIOLO COUNTY, INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION AND 3 OTHERS (2013) eKLR in which the court stated thus:

“The petition itself is clearly against the Senatorial election and has nothing to do with Gubernatorial election. It is otherwise an abuse of court process and a petition or futility. The petitioner during the hearing disowned the petition, this court finds that the so called petition has no legs to stand on, Parties are bound by their pleading and raised issues in this petition having nothing to do with Gubernatorial election. The petition is bound to fail.”

The issues as to whether the election in Tala Township polling station stream 2 were conducted in

accordance with the provisions of the constitution, Election Act and Regulations therein, whether indeed the election was done in an open, transparent participatory and accountable manner pursuant to **Article 81** as read with **Article 86** of the constitution.

Article 81 of the constitution provides for free and fair election which are:

- i) By secret ballot
- ii) Free from violence, intimidation, improper influence or corruption
- iii) Conducted by an Independent body
- iv) Transparent and
- v) Administered in an impartial, neutral, efficient, accurate and accountable manner.

The Respondents submits that the answer to the above issues are in the affirmative. It is their case that the petitioner has not laid out any proof of any law having been violated in the election conducted on the 8/8/2017 contested herein.

The Petitioner raised only one issue with regard to the form 36A that was found missing. Despite the missing form, the whole process was transparent, accountable, efficient, neutral and impartial. The Respondents states that the missing form did not disenfranchise the voters of the said polling station as the Returning officer considered the votes as rightfully cast and found that the same would not affect the overall winner.

On the issue as to whether there was any voter intimidation or bribery during the voting, the Petitioner simply made a general allegation in its petition and affidavit on this issue. No evidence was adduced before the court on this and further no evidence was adduced on the issue.

On the issue as to whether the results of Tala polling station stream 2 would change the overall winner for Member of County Assembly Tala ward.

At the hearing of the petition, it was clear that the lost form 36A had been scanned and inputted into the KIEMS kit. The Returning officer confirmed the detail, the Presiding and deputy presiding officers attest to this. The court is hence urged to find the answer negative.

Finally the Respondents states that the 3rd Respondent was therefore validly elected as a Member of County Assembly for Tala ward.

GENERAL PRINCIPLES FOR DETERMINATION OF ELECTION PETITIONS

The 1st principal is the sovereignty of the will of the people. This emanates from the **Article 1** of the constitution under which all powers resides in the people. They may exercise it through their democratically elected representatives. **Article 38** and other constitutional provisions safeguard the people's political rights of self-expression. This was well put by Judge Majanja in RICHARD KALEMBE NDILE AND ANOTHER VS PATRICK MUSIMBA MUSAU AND OTHERS, MACHAKOS HIGH COURT ELECTION PETITION NO. 1 (consolidated with petition no. 7 of 2013) 2013 eKLR where he said:

“Under our democratic form of government, an expression of sovereignty of the people and the electoral system is designed to ascertain and implement the will of the people. The bedrock principle of election dispute resolution is to ascertain the intent of the voters and to give it effect whenever possible”.

Thus the question that will always be at the forefront of the court's mind is whether the will of the people

found expression in the results which are impugned.

As in this particular case before me, the grievances to the intent that the outcome of the election is not an expression of the will of the people. The court has to keep in mind that the result declared in the election should only in exceptional circumstances be interfered with. The constitution and electoral laws presents the yardstick for such determination.

The 2nd principle is that election petitions are not ordinary civil suits governed by the civil procedure Act and Rules. The laws that govern settling of election disputes are enacted in accordance with Article 87 (1) of the constitution of Kenya 2010. In recognizing this notion, the court of appeal in the case of BENJAMIN OGUNYO ANDAMA VS BENJAMIN ANDOLA ANDAYI, CIVIL APPLICATION NO. 24 OF 2013 CUR 11/13 observed. Thus:

“In our view, as has been said time and again, election petitions form their own category and are neither controlled by civil procedure Act and Rules made thereunder, nor are they controlled by the criminal procedure Rules. They are neither criminal nor civil in nature. We may say there is an element of public law in them but in even that, is not all correct. They are a class of their own”.

The 3rd principle is that as in all litigations, a petitioner is bound by his pleadings. It is common that a petitioner will file a petition and will in the course of the proceedings veer away from the initial track. This puts an opponent into a different position in knowing what the real case they must answer is and what it is the court must determine. This point was well put by Justice Kimaru in MAHAMUD MUHUMED SIRAT VS HASSAN ABDIRAHMAN AND 2 OTHERS, NAIROBI PETITION NO. 15 OF 2008 (2010) eKLR where he stated that:

“From the outset, this court wishes to state that the petitioner adduced evidence and even made submissions in respect of matters that he had not specifically pleaded in this petition. It is trite law that a decision rendered by a court of law shall only be on the basis of the pleading 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 Petitioner 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 in court and in particular the petition.

The 4th principle is that irregularities and non-compliance with the electoral law committed without any correct motive by the Returning officer or his subordinates in the conduct of the election where the court is satisfied that the election was notwithstanding transgressions. An election really and in substance conducted under the existing election law was not and could not have been affected by those transgressions. If on the other hand the transgressions of the law by the officials being admitted, the court sees that the effect of the transgressions was such that the election was not really conducted under the existing election laws, or it is open to reasonable doubt whether these transgressions may not have affected the result and it is uncertain whether the candidate who has been returned has really been elected by the majority of persons voting in accordance with the laws in force relating to elections. The court is then bound to declare the election void. It appears to us that this is the view of the law which has generally been recognized and acted upon by the tribunal which have dealt with election matters.

The principal is captured in **section 83 of our elections Act, 2011** which provides:

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

The 5th principle is the common legal precept that he who alleges must prove. This last principle relates to the burden and standard of proof. The burden of proof in an election petition/disputes has been a subject well elucidated. In the widely cited Tanzania case of MBOWE VS ELIUFOO (1967) EA 240, the court held that:

“There has been much argument at the meaning of the term proved to the satisfaction of the court. In my view it is clear that the burden of proof must be on the Petitioner rather than the Respondents because it is he who seeks to have this election declared void.”

As regards to the standard of proof the court in MBOWE case above further stated that:

“And the standard of proof is one which involves proof to the satisfaction of the court. In my view these words in fact mean the same thing as satisfying the court. There have been some authorities on this matter and in particular there is the case of BATER RVS BATER. That the case dealt not with the election petition but with divorce, but the statutory provision are similar i.e. the court had to be satisfied that one or more of the grounds set out in section 99(2) has been established. “

In JOHO VS NYANGE AND ANOTHER (2008) eKLR (EP) 500 Maraga Judge (as he then was) said:

“The burden of proof in election petition lies with the petitioner as he is the person who seeks to nullify an election. While the proof has to be done to the satisfaction of the court, it cannot be said that the standard of proof required in election petition is proof beyond reasonable doubt. Like in fraud cases, the standard of proof is higher than on a balance of probabilities and where there are allegations of election offences a very high degree is required.”

DETERMINATION

I now turn to a determination of the substantive allegation which underlies the issues in dispute in this matter.

- 1) Whether the results of Tala polling station stream no. 2 would have changed the overall winner for Member of County Assembly Tala Ward.
- 2) Whether there was any voter intimidation or bribery during the voting. If the answer in the affirmative what was the effect.
- 3) Whether the election was carried out in accordance with the provisions of the constitution election Act and Regulations therein.
- 4) Whether indeed election was done in an open transparent participatory and accountable manner pursuant to Article 81 as read with Article 86 of the constitution.
- 5) Whether the 3rd Respondent was validly elected as a Member of County Assembly of Tala Ward.

ANALYSIS

In regard to the 1st issue

At the hearing of the petition, it became abundantly clear that the lost form 36A had been scanned and inputted into KIEMS kit. The Returning officer, Presiding officer and his deputy all confirmed the same and that the figures as were indicated in form 36A as presented by the 1st and 2nd Respondents at paragraph 32 of the bundle documents. The only one person who offered a different opinion was Ben Rodgers Munuvi the Petitioners agent and it was made abundantly clear during the hearing that all the

figures he had were similar save for his candidate the petitioner herein.

A careful perusal of the figures for the said polling station in form 36A will reveal that even if the figures were to be added to the final figure tally, it would have not changed the overall winner for the Member of County Assembly Tala ward.

I therefore find that the answer to issue no. 1 is in the negative.

In regard to issue no. 2 as to whether there was any voter intimidation or bribery during the voting, if in the affirmative what was the effect?

When testifying before this honourable court, the Petitioner made a very general allegation. In his petition and the supporting affidavit he equally alleges that there was bribery and intimidation of voters. However no evidence was adduced during the hearing of the petition to confirm this.

As the law requires, one who alleges a fact must prove it. This was not done and hence I find that it is not proven as required.

The 3rd issue as to whether the election was carried out in accordance with the provisions of the constitution, election Act and the regulation therein.

Article 81 of the constitution provides for free and fair election which are:

- i) By secret ballot
- ii) Free from violence, intimidation, improper influence or corruption
- iii) Conducted by an independent body
- iv) Transparent and
- v) Administered in an impartial neutral, efficient, accurate and accountable manner.

Though the petitioner alleges corruption, on cross examination he told this court that he did not see money exchanging hands or how much was paid and to who. Neither did he call any witness to testify saying whether he saw money being paid or he himself was bribed to vote against his wish. He himself was not at the polling station but relied on reports given to him by the agents. It is also worth noting that even the said agents who testified in support of this petition did not tell court that they saw voters being bribed or intimidated and by who. There was also a general allegation without any basis at all.

The petitioner and all his witnesses told this court that there was no incident of intimidation, undue influence, corruption or improper influence was reported to the police or to any authority by them or their agents during the election or even after.

Ben Rodgers Munuvi an agent for the petitioner himself told this court that the entire processes proceeded on smoothly. No evidence was made otherwise.

The 4th issue as to whether indeed election was done in an open transparent, participatory and in accountable manner pursuant to Article 81 as read with Article 86 of the constitution.

Here the Petitioner and his witness did not adduce any evidence to show that the exercise was not open, was not transparent was not participatory or accountable as required by law.

Finally, the issue as to whether the 3rd Respondent was validly elected as a Member of County Assembly of Tala ward

From the above evidence, it is logical to conclude that the 3rd respondent was duly elected and declared as the winner to County assembly Tala ward. No evidence was adduced by the petitioner and his witnesses to the contrary. All the allegations level against the respondents none was proved to the satisfaction of this honourable court.

In light of the determination I have made, I hereby dismiss the petition with costs and decline to grant all the prayers sought by the petitioner in the petition.

Pursuant to **Section 75 (3)** of the election Act, I hereby declare that Kamitu Alex whose election was questioned herein was validly elected as Member of County Assembly Tala ward of Machakos County.

COSTS

Section 84 of the Election Act 2011 requires the court to award the costs of an incidental to a petition. It provides that costs shall follow the cause. They are always at the discretion of the court. **Rule 36 (1)** of the election provides as follows:

“36 (1) the court shall at the conclusion of an election petition make an order specifying:

- a) The total amount of costs payable and
- b) The person by and to whom the costs shall be paid.

The 1st - 3rd Respondents are entitled to costs and I so grant them. Those costs shall be paid by the Petitioner.

I will also set a ceiling on costs. In accordance to **Rule 36 (1)** (I hereby cap the costs payable to all not to exceed 2,000,000/= (two million). The 1st and 2nd Respondents to get share 50% of the 2,000,000/= (two million) and the 50% be paid to the 3rd Respondent.

CERTIFICATE AS TO VALIDITY OF ELECTION

Under **Section 87 (c)** of the Elections Act, the court is required to make a report indicating whether an election offence has been committed by any person in connection with the election. During the proceedings, no such offence was found to have been committed in this election.

I conclude by thanking all the learned counsels appearing for the parties for their courtesy and the able manner in which they presented their client’s case.

Orders accordingly.

Dated and delivered at Kangundo this 9th day of January 2018.

D.A. ORIMBA

SENIOR PRINCIPAL MAGISTRATE

9th January 2018

Before Hon. D. Orimba SPM

Court assistant Makena

For Petitioner Absent

For 1st Defendant – Mrs. Kioko holding brief for Ms. Maitai for 1st Respondent

For 2nd Respondent – Ms. Kioko holding brief for Ms. Maitai

For 3rd Respondent – Ms. Kioko holding brief for Mr. Nyamu advocates

COURT

The matter was conclude on the 5/12/2017. By consent all parties were to file their written submissions by 13/12/2017. The judgment was to be delivered on notice to all the parties through their respective contacts in the file.

Through our executive officer/secretary all the parties were notified that the judgment was to be delivered on the 9th January 2018.

At 9.00 am all parties were present except the petitioner and his advocates. The court took a break to wait for them. At 10.34am the advocate was called but texted back “Am in petition no. 12 of 2017 hearing”.

The petitioner was called but said that he was on his way to court and would there be in the next 30 minutes.

The court waited up to 12.00 noon. The petitioner was called again but did not pick the phone.

The court having satisfied itself that all parties were duly notified proceeded to deliver the judgment in the absence of the petitioner and his advocates, noting that the court had timeline to finalize the matter.

D. ORIMBA

SENIOR PRINCIPAL MAGISTRATE

9/1/2018