



REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATE'S COURT AT KERICHO
ELECTION PETITION NO.1 OF 2013

IN THE MATTER OF THE ELECTIONS ACT NO. 24 OF 2011

AND

IN THE MATTER OF THE ELECTION OF THE SPEAKER OF BOMET COUNTY ASSEMBLY

AND

IN THE MATTER OF NOMINATION AND ELECTION OF JOHN LANGAT AS THE SPEAKER OF THE BOMET COUNTY ASSEMBLY

BETWEEN

KIPKEMOI TERER - PETITIONER

VERSUS

JOHN LANGAT - 1ST RESPONDENT

RICHARD ONDIEKI - 2ND RESPONDENT

THE INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION - 3RD RESPONDENT

THE TRANSITION AUTHORITY - 4TH RESPONDENT

JUDGEMENT

Following the General Elections held on the 4th day of March 2013, the Bomet County Assembly held its first sitting on the 22nd of March 2013 during which the 1st Respondent was elected the speaker of the assembly. The elections were presided over by the 2nd Respondent.

The Petitioner, being dissatisfied with the manner the elections were conducted, moved to this court vide his petition dated the 22nd day of March 2013 and filed in court on the 23rd day of March 2013.

The grounds for the challenge, as can be discerned from the Petition and the affidavit in support sworn

by the Petitioner on the 22nd day of March 2013 are:

- i. That the 1st Respondent was at the time of his election as speaker on the 22nd day of March 2013 still an employee of the Public Service Commission of Kenya.
- ii. That before the election, the 3rd Respondent had disqualified the 1st Respondent as a candidate but nevertheless the 2nd Respondent accepted his nomination papers and proceeded to allow him to contest the speaker's election.
- iii. That the elections were irregular in that the provisions of Article 193(2)(b) of the Constitution and Section 43(5) of the Elections Act were breached.
- iv. That the 1st Respondent did not furnish the 2nd Respondent with his resignation letter and Curriculum Vitae at least 48 hours to the election.

All the Respondents save for 4th Respondent filed their answers to the Petitioner's Petition.

The 1st and 2nd Respondents filed a joint answer to petition in which they asserted that the election and swearing-in of the 1st Respondent were regular, in that by the time of nomination and election, the 1st Respondent had already resigned from the public service. They also contended that section 43(5) of the Elections Act did not apply to the election of the county assembly speaker.

At the Pre-trial Conference held on the 16/5/2013, the 1st respondent was with the agreement of the rest of the parties, allowed to rely on his replying affidavit sworn on the 8th day of April 2013, which he had sworn in reply to the Petitioner's application dated the 22nd day of March 2013, as his affidavit in answer to the Petition.

In this affidavit, the 1st Respondent reiterates the contents of his answer to Petition and also raises two more issues. These issues are that he was duly cleared by 3rd Respondent who became functus officio after doing so and that the Petitioner lacks the locus standi to file the petition.

The 3rd Respondent filed its answer to petition on the 25th day of April 2013. In this answer, it states that it got information that the 1st Respondent had not resigned from the public service after it had already cleared him and therefore revoked the clearance. It also states that it legally discharged its mandate in relation to the speaker's election and in the event that there were any breaches of the law in the elections, the blame lies elsewhere and not on itself.

It admitted that the law requires state and Public officers intending to contest elections resign at least six(6) months before the elections but contended that the Petitioner's Petition did not disclose any cause of action against it and that the Petition should therefore be dismissed.

The 3rd Respondent also filed a Preliminary Objection dated the 24th day of April 2013 and an affidavit verifying answer to petition sworn by Mr. Kennedy Ochanyo on the 24/4/2013 and filed in court on the 25/4/2013. This affidavit reiterates the contents of the answer to petition.

Among the issues raised in the Preliminary Objection was that this court lacked jurisdiction to deal with the dispute before it. This Preliminary Objection was however abandoned.

The 4th Respondent did not file an answer to the petition as required by rule 14 of the Elections(Parliamentary and County Elections) Petition Rules,2013. It however, filed a replying affidavit by its Chairman Mr. Kinuthia Wa Mwangi, sworn on the 10th day of May 2013.

In this affidavit, the 4th Respondent asserts that its duty in regard to the speaker's election, was to prepare and circulate rules for election and that it did not conduct the elections. That the 2nd Respondent is an employee of the County Assembly Service Board . That it is the 3rd Respondent who is legally and constitutionally mandated to conduct elections and had therefore been wrongly enjoined in this suit. That

its mandate is to facilitate and co-ordinate the transition to the devolved system of government pursuant to the Transition to Devolved Government Act.

The court convened a pre-trial conference on the 16/5/2013. At the conference, the parties were in agreement that the court has jurisdiction to hear the matter and that the 1st Respondent was a public officer prior to the election held on the 22/3/2013.

The following were identified as the contested issues:

- i. Whether the 1st Respondent was eligible to vie as the speaker of Bomet County Assembly
- ii. Who was responsible for the conduct of the Elections of the speaker of the Bomet County Assembly?
- iii. If the answer to the first issue is in the negative, then who was responsible?
- iv. Did the Petitioner have locus standi to file the Petition?
- v. Is the Petition against the 3rd and 4th Respondent competent?
- vi. What orders, consequential reliefs and declarations should the court make?
- vii. Who bears the costs of the Petition?

The Petitioner's application dated the 22/3/2013 was also withdrawn with costs being in the cause. The parties further agreed that the petition would be canvassed by way of written submissions and that they would meet to highlight the submissions on the 6th and 7th day of June 2013.

Subsequently, all the parties filed their elaborate submissions and spent the 6th and 7th day of June 2013 highlighting them.

I have carefully considered the submissions and will deal with the issues raised in the order that I have stated them above.

i. **Whether the 1st Respondent was eligible to vie as the speaker of Bomet County Assembly**

For the Petitioner, Mr. Orina began by pointing out that the position of the speaker is provided for under Article 178 of the Constitution. That the Article provides that the speaker shall be elected from among persons who are qualified to be members of a county assembly but are not such members.

That under Article 178(3) of the constitution, Parliament was to enact legislation providing for the election and removal of the speaker of a county assembly. He pointed out that the timeline for enactment of that legislation under the fifth schedule to the constitution, is one year from the date of promulgation of the constitution.

He submitted that pursuant to the constitution, parliament had enacted the Elections Act No. 24 of 2011 and County Government Act No. 17 of 2012 to provide for the election and removal of the speaker of a county assembly. This was in response to the submission by the 4th Respondent that legislation contemplated under Article 178(3) of the Constitution had not been enacted.

I agree with Counsel that the Elections Act and the County Government Act were meant to address the demands of Article 178(3) of the constitution.

On the issue of who is qualified to be elected speaker of a county assembly, the Counsel for the petitioner referred the court to Article 193 of the Constitution and Section 25(2) of the Elections Act.

Article 193 reads as follows;-

“Unless disqualified under clause (2), a person is eligible for election as a member of the county assembly if the person-

- a. Is a registered voter;
- b. Satisfies any educational, moral and educational requirements prescribed by this constitution or an Act of Parliament; and
- c. Is either
 - i. Nominated by a political party; or
 - ii. An independent candidate supported by at least five hundred registered voters in the ward concerned

(2) A person is disqualified from being elected a member of a county assembly if the person-

- a. Is a state officer or Public Officer other than a member of the County Assembly;
- b. Has at any time within five years immediately before the date of election, held office as a member of the Independent Electoral and Boundaries Commission;
- c. Has not been a citizen of Kenya for at least the ten(10) years immediately preceding the date of election;
- d. Is of unsound mind;
- e. Is an undischarged bankrupt;
- f. Is serving a sentence of imprisonment of at least six(6) months; or
- g. Has been found, in accordance with any law, to have misused or abused a state office or public office or to have contravened Chapter six.

(3) A person is not disqualified under Clause(2) unless all possibility of appeal or review of the relevant sentence or decision has been exhausted.”

Section 25 of the Elections Act is word for word a replica of Article 193 of the Constitution.

It was submitted that if a public officer or State Officer wanted to vie for elections, then he or she had to resign at least six(6) months before the elections to avoid being disqualified by Sections 25 and 43(5) of the Elections Act and Article 193(2) of the Constitution.

It was also contended that there was no evidence that the 1st Respondent, who was a clerk to the County Council of Kipsigis prior to the speaker’s election held on the 22nd day of March 2013, had resigned from the position at the time he was elected speaker of the Bomet County Assembly.

It was also pointed out that the resignation letter by the 1st Respondent dated the 19th day of March 2013(Annexure JL1) annexed to the affidavit sworn on the 8th day of April 2013 had only been received at the offices of the County Council of Kipsigis where the 1st Respondent was the Chief Executive Officer(CEO). That there was no evidence that it had been received by the Permanent Secretary, Ministry of Local Government.

Mr. Orina submitted that even if the court were to assume that the letter had been received by the 1st Respondent’s employer at the time, the Public Service Commission, the same would not be sufficient for the purposes of section 43(5) of the Elections Act which requires the resignation to be at least 6 months to the election.

Mr. Langat for the 1st and 2nd respondent submitted that the 1st Respondent had resigned from the Public service at the time he was elected the speaker of the Bomet County Assembly. He relied on annexure JLI annexed to the 1st Respondent’s affidavit sworn on the 8th day of April 2013, which is a resignation letter dated the 19th day of March 2013, addressed to the permanent secretary, ministry of Local Government.

He submitted that the speaker of the County Assembly only becomes a member of the assembly after he is elected and it is only upon election, that one would be required to resign from the Public Service ,if he or she was such officer before the elections. Therefore, in his view, section 43(5) of the Elections Act

does not apply to the election of the speaker.

Mr. Langat further submitted that the position taken by the petitioner that Section 43(5) of the Elections Act does apply to the election of the speaker, is ipso facto illogical, because unlike the general election where the date of election is determined by the 3rd respondent many days before the election, the date for the election of the speaker is only known after the general elections. He contended that it would therefore be difficult for the candidates for the speaker's position to determine when to resign so as to meet the requirements of section 43(5) of the Elections Act.

According to Counsel for 1st and 2nd Respondent, the mischief that section 43(5) of the Elections Act intended to cure, is a situation where a Public officer with an eye on the elections would exploit his/her public position to gain undue advantage over other candidates. He submitted that this cannot be the case for election of the speaker because the election date is known just a few days to the elections. He also submitted that had Parliament intended that the section would apply to the election of the speaker, nothing would have been easier than to expressly state so in the Act.

In addition to the foregoing, it was contended on behalf of the 1st and 2nd Respondents, that Section 43(5) was meant for elections where the citizens exercise their universal suffrage as opposed to the speaker's election where only county assembly members participate. That the 3rd Respondent having cleared the 1st Respondent had no powers to purport to revoke his clearance.

Counsel equated qualifications required for a candidate for the speaker's position under section 21 of the Elections Act to academic qualifications. He therefore submitted that the 1st Respondent being an advocate of High court of Kenya with more than 15 years experience and also a former clerk to various local authorities was qualified for the position of the speaker.

In reply to the 1st and 2nd Respondent's contention that section 43(5) of the Elections Act did not apply to the election of County assembly speaker, Mr. Orina and Mr. Theuri for Petitioner, submitted that that was a wrong interpretation of the law as the preamble to the Elections Act was quite explicit that the Act applied to election to the office of the County assembly.

Mr. Kahiga for 3rd Respondent supported the position taken by the petitioner's advocates, that the 1st Respondent was ineligible to vie for the position of the speaker. He told the court that that is what informed the decision by the 3rd Respondent to write a letter dated the 20th day of March 2013 to the 2nd Respondent revoking the clearance that it had issued to the 1st Respondent. The letter is marked **KT1** and is annexed to the affidavit of the petitioner sworn on the 22nd day of March 2013 in support of the petition. The letter clearing the 1st Respondent is marked JL 2 and is annexed to the affidavit of the 1st Respondent sworn on the 8th day of April 2013.

It was pointed out that the letter revoking clearance was served on the 2nd Respondent after the 3rd Respondent received information that the 1st Respondent was a public officer. It was submitted that the decision to revoke the clearance was informed by the provisions of section 21 as read with section 43(5) of the Elections Act. That it was a requirement of Section 21 that a candidate for the speaker's position be qualified to vie for the position of a member of a county assembly but who is not such a member.

According to Counsel, there were 2 elements in the section which are membership and qualification. On membership, he submitted that what was required for one to qualify for the speaker's position is that the candidate is not a member of the County assembly.

On qualification, he referred the court to section 25 of the Election Act which sets out the qualifications and disqualifications for the member of County assembly. He emphasized section 25(2) which disqualifies a public officer from being elected a member of a county assembly.

He observed that Section 25(2) of the Elections Act might on the face of it seem unfair to public officers

as it appears to curtail their right to offer themselves as candidates in public elections. He however, pointed out that there was an escape route in section 43(5) of the Elections Act, which requires public officers intending to vie for public offices under the Act to resign at least six(6) months before the election.

Mr. Kahiga submitted that the highlight of the section is the phrase "election under the Act". He also submitted that the election of the speaker of a County assembly is an election under the Act as it is provided under S. 21 of the Act.

Being an election under the Act, he submitted that the provisions of Section 43(5) of the Elections Act applied to the Speaker's position and the 1st Respondent who was a Public officer, having not resigned six(6) months to the General Elections held on the 4th day of March 2013, was disqualified from offering himself for election.

Counsel for the 4th Respondent's position was that Section 43(5) of the Elections Act did not apply to the speaker's election, because in her view, legislation contemplated under Article 178(3) of the Constitution had not been enacted.

Having stated the submissions by the parties, I must now turn to the determination of the issue. According to Section 21 of the Election Act, the qualifications required for the speaker of a county assembly are the same as for those of a member of a county assembly. And the qualifications and disqualifications of a member of a county assembly are set out in Section 25 of the Elections Act and Article 193 of the Constitution.

Nobody has challenged the qualifications of the 1st Respondent who is an advocate of the High Court of Kenya and a former County Clerk of the County Council of Kipsigis. What is in issue is whether he was disqualified under the Elections Act and the Constitution. The determination of that question turns on the construction that this court will put on Section 43(5) of the Elections Act upon which the Petitioner's case is predicated.

How should statutes be interpreted?

In Orengo –versus – Moi & 12 others (No. 3) 2008 1 KLR(EP) the court stated;-

“.....the court's duty is to interpret the law as it is gleaned from the intention of parliament from the words used in the statute being construed. That the plain words of a statute being precise and unambiguous should be given their ordinary and natural meaning. It is also an established Principle of construction of statutes and documents that Judicial Officers do not pronounce their own views as representing the intention of parliament nor do they put their own words in the statutes before them in the name of construing the intention of the law given. It is also known that the courts do not and should not construe the law to bring out what parliament ought to have legislated. The courts should and we are no exception, construe the intention of parliament as clearly expressed in the statute in question. Where a statute is ambiguous for any reason tending to some-not-so-clear a meaning, of course the court will look to the purpose of that statute as a whole and employ such other acceptable aids as are available to give meaning and effect to that law. This is because it is presumed that parliament passes law for the public good and benefit – not mischief.”

In the case of Hon. Chirau Ali Makwere – versus – Robert M. Mabera & 4 others Nairobi HC. Petition No. 6 of 2012(unreported)Justice David Majanja quoted with approval the decision in Lall – versus – Jeypee Investments Limited 1972 EA 512 where the court held that every statute must be interpreted on the basis of its own language since words derive their colour and content from the context and the object of a statute is a paramount consideration.

In the case of Opoya– versus – Uganda 1967 EA at page 754 ,Sir Clement De Lestang Vice President,had this to say about interpretation of statutes;-

“The duty of the court is in a nutshell to put upon the language of the legislature honestly and faithfully its plain and rational meaning according to its express or manifest intention”

The above decisions provide a guide as to how statutes should be interpreted and this court will follow them in interpreting Section 43(5) of the Elections Act.

Section 43(5) of the Elections Act reads ***“A public Officer who intends to contest an election under this Act shall resign from Public office at least six months before the date of the election.”(underlining added).***

The key words in this section are “an election under this Act”. Those words are quite clear and unambiguous. Their ordinary and natural meaning is that any Public Officer who intends to contest an Election governed by the provisions of the Elections Act No. 24 of 2011 must resign at least six(6) months before the election.

Justice Lenaola in **Nairobi HC. Petition No. 2 of 2012 Charles Omunga & Another –versus- Independent electoral & Boundaries Commission & Another** (2012) eKLR observed that the Section was quite clear and required no more than a literal interpretation and was designed to aid Public officers to make up their minds on where they wanted to maximize their energies as they could not have one leg in the Public Service and another in the Political arena.

This takes me to the all-important question of whether the election of the speaker of a county assembly is an election under the Elections Act No. 24 of 2011.

The election of the speaker of a County Assembly is provided under Section 21 of the Elections Act and falls under part of the Act with the heading “County Assembly Elections.” It is therefore an election under the Elections Act No. 24 of 2011.

The court notes that the only other statute that has provisions relating to the speaker of a County assembly is the County Government Act, which from the object and purpose of the Act under Section 3, was meant to provide for the removal from office of the speaker and not his election.

The 1st Respondent having been a Public officer prior to the elections held on the 22nd day of March 2013 was bound by section 43(5) of the elections Act and ought to have resigned at least 6 months to the election. It matters not that the election date was only known a few days to the election.

The intention of parliament as can be gathered from the Act is that all Public officers other than those set out in Section 43(6) were required to resign at least six(6) months before the election to qualify as candidates for all elective posts under the Act. I therefore disagree with Counsel for the 1st, 2nd and 4th Respondents that the Act only applied to General Elections.

Had that been the intention of parliament, nothing would have been easier than to include the speaker of County Assembly aspirants in Section 43(6) which exempts some Public Officers from the provisions of section 43(5) of the Elections Act.

Did the Respondent resign at least six(6) months before the election?

In his affidavit sworn on the 8th day of April 2013, he has annexed a letter of resignation dated 19th day of March 2013(Annexure JL1). Although the same is addressed to the Permanent Secretary, Ministry of Local Government, it was only received at the offices of the County Council of Kipsigis on the 19/3/2013 and has a stamp to that effect. There is however, no evidence that it was received by the Permanent secretary, Ministry of Local Government.

The 1st Respondent ,having been the Clerk of the County Council of Kipsigis, was under Section 109 of the repealed Local Government Act an employee of the Public Service Commission. His resignation

should therefore have been addressed to the Public Service Commission.

There is no evidence before the court that the resignation letter dated the 19/3/2013 was received at either Public Service Commission or the Permanent Secretary ,Ministry of Local Government. I therefore find that the 1st Respondent had not resigned by the time he offered himself for election and was elected as the speaker of the Bomet County Assembly.

Even assuming, for the sake of argument, that the letter dated 19/3/2013 had been received at the Ministry of Local Government, the 1st Respondent would still not have satisfied the requirements of Section 43(5) of the Elections Act as the period between his purported resignation and the elections would be just two(2) days to the election which falls short of the six(6) months required by the law.

I find that despite his high academic qualifications, the 1st Respondent was ineligible for both nomination and election as speaker of the Bomet County Assembly. I also find that his nomination and election were contrary to the provisions of Section 21 and 25 of the Elections Act and Article 193(2) of the Constitution.

ii) Who was responsible for the Conduct the elections of the Speaker of Bomet County Assembly?

Mr. Theuri for the Petitioner took the position that it is the 2nd Respondent who was mandated to conduct the elections. He referred the court to the first schedule of the Elections Act which in Section 3 clearly states that it is the Clerk to the assembly who shall conduct elections of the speaker.

The 1st and 2nd respondents did not make any submissions on this issue while the 3rd and 4th Respondents agreed with the Petitioner's Submissions on the issue.

Section 21(1) of the Elections Act provides that the speaker of the County assembly shall be elected by each County in accordance with standing orders of the County assembly from among persons who are qualified to be elected as members of the County assembly but is not such member. Section 21(2) provides that for the purpose of the election of the speaker of the County assembly after the first election under the Constitution, the procedure set out in the first schedule shall apply.

There is no doubt that the election that took place on the 22nd day of March 2013, where the 1st Respondent was elected the speaker, was an election after the first election under the Constitution. The procedure set out in the first schedule to the Elections Act No. 24 of 2011 therefore applied.

In Section 3 of the first schedule, the clerk to the assembly is the one mandated to preside over the speaker's election. I therefore agree with submissions by Counsels for the petitioner and the 3rd and 4th Respondents and find that it is the 2nd Respondent who was legally mandated to preside over the elections.

iii) Who was responsible for the irregularities that occurred in the election?

In their submissions, Counsel for the Petitioner blamed the 2nd and 4th Respondents for the irregularities. The 1st and 2nd Respondents took the position that there were no irregularities in the election.

The 3rd Respondent told the court that it did its part which was to clear candidates who met the criterion set by the law and that it communicated to 2nd Respondent before the elections that the 1st Respondent was not qualified to vie. It therefore contended that any irregularities that may have occurred in the elections cannot be blamed on it.

For the 4th Respondent, it was contended that its mandate under Section 4 of the Transition to Devolved Government Act ,was only restricted to facilitating and coordinating transition to the devolved system of Government and did not extend to presiding over the elections of speakers of various County assemblies.

That pursuant to that mandate it identified 47 officers among them the 2nd Respondent, from a pool of serving officers and posted them to all counties in the republic of Kenya.

It was contended that once the officers were deployed in the various Counties, they became employees of the County Assembly Service Boards and therefore the 4th Respondent cannot be held liable for their actions.

There is no dispute that the 3rd Respondent played its role which was to clear candidates for the election of the speaker, by communicating to the 2nd Respondent through its letter dated the 20th day of March 2013, that the 1st Respondent was not qualified to be allowed to vie for the speaker's position as he was a public officer. This was done in time before the elections held on the 22nd day of March 2013. The 3rd Respondent cannot therefore bear any responsibility for whatever irregularities that occurred in the election of the 1st Respondent.

There is also no dispute that it is the 2nd Respondent who presided over the election and is to blame for the irregularities in the election. What is in dispute is whether the 4th Respondent should be blamed for his mistakes.

To answer this question, one needs to look at the provisions of the Transition to Devolved Government Act No. 1 of 2012. Section 7 of the Act provides for the functions of the 4th Respondent. One of the functions is to ensure the successful transition to the devolved system of government.

Section 12 of the County Government Act establishes the County Assembly Service Board for each County Assembly. The composition of the Board is as follows:

- a. The speaker of the County Assembly as Chairperson.
- b. The leader of the majority party or a member of the County Assembly deputed by him or her as Vice-Chairperson
- c. The leader of the minority party or a member of the County Assembly deputed by him or her; and
- d. One person resident in the County appointed by the County Assembly from among persons who have knowledge and experience in Public affairs but who is not a member of the County Assembly.

Section 12(4) provides that the County Assembly Clerk shall be the secretary to the County Assembly Service Board. Under section 13(1) of the Act, the Clerk of the assembly shall be appointed by the County Assembly Service Board with approval of the County Assembly.

By the time the elections of the speaker of the Bomet County Assembly were held on the 22nd day of March 2013, there was no County Assembly Service Board as this was the first sitting of the County Assembly and even its Chair, who is the speaker had not been elected. The argument by the 4th Respondent that the 2nd Respondent was an employee of the County Assembly Service Board is therefore clearly untenable.

I find that the election of the speaker was part of the 4th Respondent's mandate in ensuring successful transition to the devolved system of government. It therefore had a legal obligation to ensure that the election held on the 22nd day March 2013 was credible. Consequently, I hold that it is equally to blame for the failures of the 2nd Respondent.

iv) Did the Petitioner have locus standi to file the Petition?

Mr. Langat for 1st and 2nd Respondents submitted that the petitioner was a busybody who had not demonstrated what direct loss he had suffered as a result of the 1st Respondent's election. He contended that the Petitioner's grievances were generalized and that he had not demonstrated that he was entitled to

bring the petition in public interest. He therefore urged the court to find that the Petitioner did not have locus standi to file the petition.

The cases of **Trusted Society of Human Rights Alliance – vs- The Attorney General & 2 others** (2012) eKLR and **Dr. Ondego Charles & 208 others – versus – Kenyatta National Hospital Nairobi HCCC No. 6 of 2000**(unreported) were cited by Mr. Langat to support his submissions.

I have looked at those authorities. They did not relate to election petitions and are therefore not useful in this matter.

Miss Langat for the 4th Respondent supported the Submissions by the 1st and 2nd Respondents. She took issue with the fact that in Paragraph 1 of the petition, the Petitioner describes himself as a resident of Bomet and does not state if he is a registered voter or a candidate in the election that was held on the 22nd day of March 2013. In her view, locus standi required more than just residence in a County.

Mr. Kahiga for 3rd Respondent did not address the court on this issue.

Mr. Theuri for the Petitioner in reply to the 1st, 2nd and 4th Respondents' submissions submitted that Election Petitions are not ordinary suits where a party is enforcing a right that accrues to him as a person and therefore any citizen had the locus standi to petition the election results. He cited the case of **William Kabogo Gitau –versus-George Thuo & 2 others**(2010)eKLR in support of this submission.

The court of appeal in the case of **James Omingo Magara –versus – Manson Oyongo Nyamweya & 2 others** (2010)eKLR at page 9 authoritatively pronounced on the nature of election petitions when it stated as follows :-

**“An election is not a matter solely between the winner and the losers;
all the voters in the constituency have a valid interest in it and that is part
of the reason why if a particular petitioner wants to withdraw an election
Petition, the notice of Intention to Withdraw is publicly announced so that
if any voter is opposed to the withdrawal, the election court can allow him or
her to take over the petition.”**

Guided by the above statement by the court of Appeal whose decisions are binding on this court, I find the Petitioner, just like any other voter in Bomet county, had a valid interest in the election of the speaker and therefore had the locus standi to file the Petition.

v) Is the Petition against the 3rd and 4th Respondents Competent?

This issue was raised by 3rd and 4th Respondents and their Submissions on this point are similar to those they have already made in respect of issue number(iii). That is, that they had no role to play in the elections and there is therefore no cause of action disclosed against them.

In reply, Mr. Theuri for the Petitioner repeated his earlier submissions in issue number (iii) in respect of the 4th respondent's role in the election. He therefore submitted that the Petition against 4th Respondent was competent.

In regard to the 3rd Respondent, his view was that it was properly sued for two(2)reasons: Firstly, that rule 2 and 9 of the Elections(Parliamentary and County Elections) petition Rules, 2013 made it mandatory for 3rd Respondent to be joined as a Respondent in all election petitions. And secondly, that the issue of

clearance of the 1st Respondent to vie for the Speaker's election having been an issue in the petition, the 3rd Respondent had to be made a party.

Rule 9 of the Elections (parliamentary and County Elections) petition Rules, 2013 provide that IEBC shall be a Respondent in an election petition filed under the Elections Act. The Marginal note to the rule reads "**Commission to be Respondent in every Petition**".

Rule 2 defines a Respondent in relation to an election petition to include the Commission among other parties.

From these rules, it is clear that the 3rd Respondent has to be made a party to every Petition. In any case, the issue of clearance of 1st Respondent by the 3rd Respondent would have been difficult to decide without its input.

For the 4th Respondent, I have already found elsewhere in this judgment that it had a role to play in the elections held on the 22nd day of March 2013.

My answer to issue number (V) is in the affirmative.

vi) What orders, Consequential reliefs and declarations the Court should make?

On this issue, Mr. Theuri for the Petitioner submitted that the election of the speaker was void ab initio and the duty of the court was to nullify it. He also asked the court to invoke Section 75(3) of the Elections Act and Rule 10(4) of the Elections (parliamentary and County Elections) Petition Rules, 2013 and declare Mr. Joel Koskei, the runners-up to the Speaker's election held on the 22nd day of March 2013, as the validly elected Speaker.

To justify the request, Mr. Theuri pointed out that the power to declare the candidate who was duly elected did not exist in our statutes prior to enactment of the Elections Act No. 24 of 2011 and that the rationale for its inclusion was to save public funds, time and inconvenience that came with by-elections occasioned by nullification of elections.

Mr. Langat for 1st and 2nd Respondent urged the court to dismiss the Petition as the same lacked merit. He also opposed the suggestion that the runners-up be declared the duly elected speaker. He submitted that this would amount to imposing the runners-up on the people of Bomet County.

Mr. Kahiga for the 3rd Respondent was of the view that the irregularities that had been proved were not sufficient to warrant nullification of the 1st Respondent's election. He cited section 83 of the Elections Act to support of this submission. He also opposed the suggestion that the runners-up be declared the duly elected speaker because in his view, that would be against the will of the majority.

Mr. Kahiga further submitted that an election could only be nullified if it was shown that the Electoral Principles provided in Article 81 of the constitution had not been observed. It was his position that non-compliance with Section 43(5) of the Elections Act did not meet the requirements of Section 83 of the Act.

Miss Langat for the 4th Respondent supported the submissions by the 1st, 2nd and 3rd Respondents and urged the court to dismiss the petition.

Having set out the submissions, I must now turn to the determination of the issue. The issue of situations where elections will be nullified has been considered before by our superior courts.

In the case of **Joho –versus – Nyange & Another**(No 4) 2008 3 KLR (EP) Justice Maraga held that an election will be nullified in two(2) situations, namely:

- i. Where the election is not conducted substantially in accordance with the law as to elections; and
- ii. Where elections although conducted substantially in accordance with law as to elections, there are errors or mistakes in conducting the same which affect the results of the election.

The same Principles were enunciated in the cases of **Wabuge –versus – Limo & Another**(2008) 1 KLR (EP) and **Murgor –versus – Ingonga & another**(2008) 1KLR (EP).

The courts have also rendered decisions interpreting Section 28 of the repealed National Assembly and Presidential Elections Act which was similar to Section 83 of the Elections Act No. 24 of 2011.

In the cases of **James Omingo Magara –versus- Manson Oyongo Nyamweya & 2 others** 2010 eKLR and **Ali Omar & Another –versus- Julius Daraka Mbuji & Another** 2006 eKLR, the Court of Appeal held that the Section was designed to deal with minor breaches of the electoral law such as opening the polling station a few minutes late, but certainly could not be used to cover up non-compliance with a fundamental part of the written law that would and did affect the elections adversely.

In the case of **Ali –versus- Gethinji** (2008)1KLR(EP), where the qualifications of a candidate had been challenged, just like in the case before this court, the High Court of Kenya sitting as an Election Court held that qualification for election is a condition precedent for election and Section 28 of the National Assembly and Presidential Elections Act(cap 7) was inapplicable.

The above decisions are binding on this court and I will be guided by them in deciding the issue at hand.

In this case, as I have already found elsewhere in this judgment ,there is no evidence that there was effective resignation by the 1st Respondent at the time he offered himself as a candidate and was elected as the speaker of Bomet County Assembly. By accepting his nomination papers, including him in the list of candidates and allowing him to vie for the election held on the 22nd day of March 2013 while fully aware that the 1st Respondent was still a Public Officer, the 2nd Respondent contravened Sections 21,25 and 43(5) of the Elections Act in that he was not qualified to be nominated. The election was therefore not conducted in accordance with the Elections Act.

Qualification for nomination being a condition precedent for election as was held in the case of **Ali –versus- Gethinji**, the Provisions of Section 83 of the Elections Act would not cure the defect in the election held on 22nd day of March 2013.

I further find that the election was not in accordance with Article 81(e) of the Constitution which requires free and fair elections administered in an impartial, neutral, efficient, accurate and accountable manner. The reason for this finding is that the 2nd Respondent appears to have been biased in favour of the 1st Respondent when he allowed him to vie for the election even after being informed by 3rd Respondent more than 2 days before the election that he had not met the mandatory requirements of the law for nomination.

In view of the foregoing, I declare the election of the 1st Respondent null and void. I further declare that he was not validly elected as the Speaker of the Bomet County Assembly and a certificate to that effect will issue forthwith and be served upon the Independent Electoral and Boundaries Commission pursuant to Section 86 of the Elections Act No. 24 of 2011.

I decline the request to declare Mr. Joel Kipkurui Koskei, the runners-up to the election held on the 22nd day of March 2013, as the duly elected speaker, for two (2) reasons:

Firstly, he is not a party to this Petition. Secondly, the office of the speaker of a County Assembly is so pivotal in the proper functioning of the devolved system of Government that it requires broad support among members of the County Assembly to be able to discharge its functions.

I am not sure that the said Joel Koskei has the support of majority of the members of the County

Assembly. I therefore order that fresh elections for the speaker of Bomet county assembly be held where all interested candidates will have a chance to try their luck.

No election offence was proved in this case.

The costs of the Petition are awarded to the Petitioner and 3rd Respondent against the 1st, 2nd and 4th Respondents.

Before I conclude, I must commend the advocates for all the parties for their thorough submissions which made it easier for this court to decide the matter. I also thank them for their co-operation which has enabled this court to conclude the matter within the timeline provided by the law.

Dated, signed and delivered at Kericho in Open Court this **5th** day of **July** 2013

WILSON NKUNJA KABERIA

Ag. SENIOR PRINCIPAL MAGISTRATE

Mr. Orina & Mr. theuri for Petitioner - present

Mr. Kahiga for 3rd Respondent - present

Mr. Ngetich holding brief for Mr. Langat for 1st and 2nd Respondents - present

C/c; Josephine