



**REPUBLIC OF KENYA**  
**IN THE CHIEF MAGISTRATE COURT AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ELECTION PETITION No. 2 & 6 of 2013(Consolidated)**

**JOEL NYABUTO OMWENGA.....1<sup>ST</sup> PETITIONER**  
**DANIEL MUNYAO NZWILI.....2<sup>ND</sup> PETITIONER**  
**ROSE WAMBUI MUNGAI.....3<sup>RD</sup> PETITIONER**

**VERSUS**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION...1<sup>ST</sup> RESPONDENT**  
**DANIEL MBUGUA MARI.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

This petition is a consolidation of the Election Petition No. 2 of 2013 and Election Petition No. 6 of 2013. It is brought under the *Constitution of Kenya 2010 (the Constitution)*, the *Elections Act No.24 of 2011* and the *Elections (Parliamentary and County Elections) Petition Rules 2013 (The Election Rules)*. Petition No. 2 of 2013 is brought by Joel Nyabuto Omwenga (*1<sup>st</sup> Petitioner*) who was the candidate for Ford People Party for the Ruai County Assembly Ward Representative (*Ruai Ward*) in Kasarani Constituency. A similar petition, Election Petition No. 6 of 2013 was filed by Daniel Munyao Nzwili and Rose Wambui Mungai (*2<sup>nd</sup> and 3<sup>rd</sup> Petitioners*) in their capacity as voters.

The Petition is brought against the 1<sup>st</sup> respondent, the Independent Electoral and Boundaries Commission (*IEBC*) which is a constitutional commission established under *Article 88 of the Constitution*. It is responsible for conducting or supervising referenda and elections to any elective body or office established by the Constitution, and any other elections as prescribed by an Act of Parliament. The 2<sup>nd</sup> Respondent is Daniel Mbugua Mari who was declared the winner of the County Assembly Elections for Ruai Ward in the General Elections (*the elections*) held on 4<sup>th</sup> March, 2013.

**Petitioners' case**

The long and short of the 1<sup>st</sup> Petitioner's case is that on 17<sup>th</sup> January 2013, Ford People Party nominated him to vie for the position of County Assembly Ward Representative in Ruai. The Ford People Party certified his candidature and issued him with a nomination clearance certificate which he presented to the 1<sup>st</sup> Respondent through the Returning Officer at the Kasarani constituency office. He was thereafter issued with a Nomination Certificate for County Assembly Ward Representative elections dated 29<sup>th</sup> January 2013 in his name **Joel Nyabuto Omwenga**.

On 4<sup>th</sup> March 2013 the 1<sup>st</sup> Petitioner was stunned to realize that his name had been unlawfully omitted from the ballot papers and a total stranger by the name **John Nyabuto Omwenga** introduced in his place. This inclusion he says was irregular and unlawful. He reported the matter to the Presiding Officer at Drumvale Secondary School Polling Centre who referred him to the Returning Officer at the IEBC constituency headquarters at Kasarani. He went to the IEBC constituency office and was asked to return on 5<sup>th</sup> March 2013. He went back again on 5<sup>th</sup> March 2013 and got frustrated by the Returning Officer who was delaying the correction of the misnomer or assuring him of a repeat of the elections. It was on this day that the results were declared.

On 7<sup>th</sup> March 2013, he wrote a letter to the 1<sup>st</sup> Respondent raising his concerns and complaints. He asserted that his rights as a voter and as a candidate were grossly violated since the elections conducted by the 1<sup>st</sup> Respondent lacked credibility, were not free and fair and the outcome did not represent the will of the electorate. He said that the process was not democratic because **John Nyabuto Omwenga** did not qualify to contest in the elections as there was no such person registered as a voter, nominated by any Political Party or issued with a Nomination Certificate by the 1<sup>st</sup> Respondent. He contended that he could not have lost in an election where he was denied the chance to contest. He went on to state that the unlawful exclusion of his name from the ballot papers was a material and weighty irregularity since all along he had campaigned as “**Joel**” and that is how the voters could have easily identified him in the ballot papers.

The 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners case is that they were denied a chance to vote for their candidate of choice when his name “**Joel**” was excluded from the ballot paper.

The petitioners therefore pray that:-

1. The election for the County Assembly Ward Representative for Ruai is declared null and void.
2. The Gazette Notice indicating the 2<sup>nd</sup> Respondent as the elected County Assembly Ward Representative for Ruai is nullified.
3. That an order does issue requiring the 1<sup>st</sup> Respondent to conduct a fresh election of the County Assembly Ward Representative in Ruai.
4. That the 1<sup>st</sup> Respondent bears the costs of the petition.

### **Respondents' case**

Mr. Lawrence Kaburu (the Returning Officer), appeared on behalf of the 1<sup>st</sup> Respondent. According to him, the General Elections and specifically the County Assembly Ward Representative elections for Ruai were conducted in accordance with the law. The 1<sup>st</sup> Respondent described in their pleadings the procedure for verification, tallying and announcement of results, the complaints to IEBC against irregularities in the electoral process and the voting, tallying and announcement of results in Ruai Ward.

The Returning Officer said that the 1<sup>st</sup> petitioner was a candidate for the County Assembly Ward Representative for Ruai, nominated by the Ford People Party. During the elections there were 9 other contestants for the position of County Assembly Ward Representative in Ruai and the 1<sup>st</sup> Petitioner obtained 343 votes out of 20,168 votes cast for that seat. The 2<sup>nd</sup> Respondent was declared the winner having garnered 9,044 votes.

The 1<sup>st</sup> Respondent and the Returning Officer averred that the 1<sup>st</sup> Petitioner's name was inadvertently included as “**John**” instead of “**Joel**” and that two of his names “**Nyabuto Omwenga**” were correctly set out in the ballot papers. They averred that the 1<sup>st</sup> Petitioner's photograph, Party name and Party symbol were correctly inserted next to his name and as such no prejudice was occasioned to him or his supporters by virtue of that mistake. The 1<sup>st</sup> Respondent and the Returning Officer contended that no rights of the 1<sup>st</sup> Petitioner to contest for a political seat were violated by the 1<sup>st</sup> Respondent.

They emphasized that the elections went on without any problems and voters who turned up to vote were able to exercise their democratic and constitutional right to vote. It is the 1<sup>st</sup> Respondent's case that the 2<sup>nd</sup> Respondent won the election and was validly conferred with a certificate at the constituency tallying centre in the presence of the 1<sup>st</sup> Petitioner's agents, agents of other candidates, members of the public as well as other staff of the 1<sup>st</sup> Respondent. It is also their assertion that the Petitioners have made unsubstantiated allegations which ought to be dismissed. The 1<sup>st</sup> Respondent therefore prays that it be determined that Daniel Mbugua Mari was duly elected and that the election was valid.

The 2<sup>nd</sup> Respondent filed affidavits dated 3<sup>rd</sup> and 18<sup>th</sup> April 2013 in response to the petition. He asserted that he participated in the elections and was overwhelmingly elected by garnering 9,597 votes against the 1<sup>st</sup> Petitioner's 230 votes. He stated that the Petitioners did not disclose any election irregularities, malpractices, offences, and any valid reason to warrant the nullification of the elections. He contended that the 1<sup>st</sup> Petitioner was well identified by the voters and that they would only have been confused if there were two aspirants using the name "**John Nyabuto Omwenga**" on the ballot papers.

He opined that candidates are mostly identified by their middle name and/or surname and that any error on the first name is immaterial. In any event the name "**John**" and "**Joel**" did not vary at large and the mix up could not have confused any voter. He went on to state that throughout the campaign period and to date most voters refer to him as Mbugua or Mari, and that his first name is not popular. He alleged that the misnomer could not therefore have affected the elections. He wondered how the 1<sup>st</sup> Petitioner managed 235 votes if voters did not identify him or how he voted if at all he did not identify himself. According to the 2<sup>nd</sup> Respondent the election practice was that besides their name, a candidate could be identified through their photograph and party symbol and in this case the 1<sup>st</sup> Petitioner was silent on all the other identification marks. He argued that if the 1<sup>st</sup> Petitioner had a valid ground to object to the elections, he would neither have participated in the voting nor lodged a written complaint on 7<sup>th</sup> March 2013 after the results had been declared. In his view the allegations were an afterthought. The 2<sup>nd</sup> Respondent averred that the 1<sup>st</sup> Petitioner lost heavily and he could not claim otherwise. The 2<sup>nd</sup> Respondent took issue with the evidence of one of the Petitioner's witness Samuel Kahuthu whom he asserted was not a credible witness, since he was an agent of Samuel Githu Mburu. In conclusion the 2<sup>nd</sup> Respondent averred that the petition did not disclose any cause of action against him and the people who conducted the elections.

On 16<sup>th</sup> May 2013, parties filed a joint statement of agreed facts and issues for determination by the court. The agreed facts were set out as follows:-

1. That the 2<sup>nd</sup> Respondent was declared the winner in the said elections.
2. That the name John Nyabuto Omwenga was in the ballot paper.
3. That the name Joel Nyabuto Omwenga did not appear in the ballot paper.
4. That the 1<sup>st</sup> Respondent conducted the Ruai County Assembly Ward Representative Elections on the 4<sup>th</sup> March 2013

The issues to be determined were set out as follows:-

1. Whether the ballot papers used in the Ruai Ward elections on 4<sup>th</sup> March 2013 included the 1<sup>st</sup> Petitioner as one of the contestants.
2. Whether the inclusion of the name **John Nyabuto Omwenga** in the ballot paper who was neither a registered voter in the said ward nor a person nominated to contest the elections, amounted to an irregularity.
3. Whether there were any irregularities in the conduct of the Ruai Ward elections which caused prejudice to the 1<sup>st</sup> Petitioner and/or his supporters including the 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners herein.
4. Whether the Ruai Ward elections were conducted in a free and fair manner in accordance with the electoral rules, doctrines and principles.

5. Whether the election for the Ruai Ward County Representative held on 4<sup>th</sup> March 2013 should be declared null and void.
6. Whether the Gazettement of the 2<sup>nd</sup> Respondent as the elected county representative for Ruai Ward should be nullified.
7. Whether an order should issue requiring the 1<sup>st</sup> Respondent to conduct fresh elections of the County Representative for Ruai Ward
8. Who bears the cost of the petition.

### **Issues for determination**

Having perused the pleadings, heard the testimony of witnesses, scrutinized the exhibits produced for the court's inspection and heard submissions from learned counsels, I am of the considered view that, the issues for determination framed by the parties can be consolidated as follows:

1. Issues 1 and 2 will determine the question of whether the failure by the 1<sup>st</sup> Respondent to cite the correct name of the 1<sup>st</sup> Petitioner in the ballot paper was an irregularity.
2. Issues 3 and 4 will determine whether the elections conducted in Ruai Ward were free and fair and conducted in accordance with the law.
3. Issues 4, 5, 6, and 7 will determine whether the election for the Ruai County Assembly Ward Representative should be nullified and fresh elections conducted.
4. Issue 8 will determine who bears the cost.

### **Burden and Standard of proof in Election Petitions**

It is settled that the burden of proof in election petitions lies with the petitioner. The **Supreme Court of Kenya in Raila Odinga and Others v Independent Electoral and Boundaries Commission and Others Election Petition No. 5 of 2013** held that

*“There is, apparently, a common thread in the foregoing comparative jurisprudence on burden of proof in election cases. Its essence is that an electoral cause is established much in the same way as a civil cause: the legal burden rests on the petitioner, but, depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting. Ultimately, of course, it falls to the Court to determine whether a firm and unanswered case has been made.”*

This was also the finding in the Ugandan case of **Col. Dr. Kizza Besigye v. Museveni Yoweri Kaguta & Electoral Commission**, Election Petition No. 1 of 2001, where the majority on the Supreme Court bench held that:

*“...the burden of proof in election petitions as in other civil cases is settled. It lies on the Petitioner to prove his case to the satisfaction of the Court. The only controversy surrounds the standard of proof required to satisfy the Court.”*

Similarly in the Canadian case, **Opitz v. Wrzesnewskyj** 2012 SCC 55-2012-10-256, it was stated in the majority opinion that:

*“An applicant who seeks to annul an election bears the legal burden of proof throughout.....”*

In **Joy Kabatsi Kafura v Anita Kawooya & Another Election Petition No. 25 of 2005** it was held that with regard to the standard of proof required in election cases, it is higher than a balance of probabilities although not equal to beyond a reasonable doubt.

In **Mbowe v Eliufoo (1967) EA 240**, the standard of proof was said to be proof to the satisfaction of the court and that the court cannot be said to be satisfied when it is in doubt.

I am well guided by the authorities above and will apply the set principles to this case.

## **Analysis of evidence and determination**

### **1. Whether, the failure by 1<sup>st</sup> Respondent to cite the correct name of the 1<sup>st</sup> Petitioner in the ballot paper was an irregularity.**

It is the Petitioners' case that the 1<sup>st</sup> Petitioner's name was not on the ballot papers and that the 1<sup>st</sup> Respondent introduced a stranger in his place who was neither a registered voter nor a candidate. Their argument was that despite being cleared to vie for the position of County Assembly Ward Representative for Ruai, the 1<sup>st</sup> Petitioner was unlawfully and irregularly omitted from the ballot paper whereas he had a legitimate expectation to contest in the election. He was denied the chance to contest and his supporters were denied the chance to elect a candidate of their choice.

The doctrine of legitimate expectation is said to arise out of a promise made by a public body or official which the person relying on anticipates will be fulfilled. It is also said to arise out of the existence of a repeated or regular practice of the public body or official which could reasonably be expected to continue. Essentially, once made, the promise or practice creates an estoppel against the public body or official, so that the person benefitting from the promise or practice would continue to so benefit, and that the promise or practice would not be withdrawn without due process or consultation.

The Supreme Court of India in **J.P. Bansal v State of Rajasthan & Anor, Appeal (Civil) 5982 of 2001** observed as follows regarding the doctrine:

*“The basic principles in this branch relating to ‘legitimate expectation’ were enunciated by Lord Diplock in Council of Civil Service Unions & Others v Minister for the Civil service (1985 AC 374 (408-409)(commonly known as CCSU case). It was observed in that case that for a legitimate expectation to arise, the decisions of the administrative authority must affect the person by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do and until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision maker that they will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn...”*

However, it is not enough that an expectation should exist; it must in addition be legitimate in order for it to be worthy of protection. This was expressed by **HWR Wade C.F. Forsyth in Administrative Law, Tenth Edition (2009) page 449:**

*“It is not enough that an expectation should exist; it must in addition be legitimate. But how is it to be determined whether a particular expectation is worthy of protection? This is a difficult area since an expectation reasonably entertained by a person may not be found to be legitimate because of some countervailing considerations of policy or law.”*

In order to place the 1<sup>st</sup> Petitioner's legitimate expectation in a proper context, this court must examine the circumstances under which such expectations were raised. The 1<sup>st</sup> Petitioner averred that despite being cleared to vie for the position of County Assembly Ward Representative for Ruai, he was unlawfully and irregularly omitted from the ballot paper whereas he had a legitimate expectation to contest in the election and that his supporters were denied the chance to elect a candidate of their choice.

In discussing the legitimate expectation of candidates, the High Court of Kenya in **Diana Kethi Kilonzo & Another v IEBC & 2 others Petition 359 of 2013** held that:

*“...it is essential, in discussing the legitimate expectation of a potential political candidate in regard to an election process, to take into account the competing legitimate expectations of*

*voters and other political parties and interested parties, all of whom have a stake in the elections. Further, there are other bodies such as IEBC who are mandated to conduct the election in strict accordance with the law so as to ensure the proper legitimate conduct of the electoral process. It is amidst these competing interests that the soundness and eventual certification of the electoral process as a free and fair process in terms of Article 81 may be made.”*

In this regard, it is essential to take into account the competing legitimate expectations of the 1<sup>st</sup> Petitioner vis a vis the expectations of the voters and other candidates in Ruai Ward, all of whom had a stake in the elections.

It was established that the 1<sup>st</sup> Petitioner was cleared by the 1<sup>st</sup> Respondent to contest the County Assembly Ward Representative election in Ruai. He had a legitimate expectation to contest in the General Election using his name **Joel Nyabuto Omwenga**. The 1<sup>st</sup> Respondent had a duty to have the 1<sup>st</sup> Petitioner contest in the elections in discharge of its mandate which under **Article 88 of the Constitution of Kenya, 2010** was to conduct the election in strict accordance with the law so as to ensure the proper legitimate conduct of the electoral process. In furtherance of that duty, the 1<sup>st</sup> Respondent published a Gazette Notice on 15<sup>th</sup> February 2013 with a list of the details of all the candidates who had been cleared to contest the General Election. This list was submitted to them by the candidates or their Political Parties.

The Gazette Notice read:

***“NOTICE ON NOMINATED CANDIDATES FOR THE 4TH MARCH, 2013 GENERAL ELECTION***

***IN EXERCISE of the powers conferred by Section 2(1) (a), (b), (c) and 9 of the Sixth Schedule to the Constitution of Kenya, Section 4 (k) of the Independent Electoral and Boundaries Commission Act, 2011, Section 13 (1),(2) and (3) and Section 33 of the Elections Act, 2011 Part III to IX and Regulations 51(1),(2),(3),(4),(5) and (6) of the Elections (General) Regulations, 2012 the Independent Electoral and Boundaries Commission hereby gives NOTICE to the public that the persons listed in the 2nd Column to the First Schedule stand validly nominated for the Presidential Election of the General Elections to be held on 4th March 2013 and the persons listed in the Second Columns to the Second, Third, Fourth, Fifth and Sixth Schedules stand validly nominated for the elective positions listed in each schedule for the electoral units listed in the 4th Column of the Second, Third, Fourth and the 6th Column of the 5th and 6th Schedules respectively”***

The Gazette Notice published by the 1<sup>st</sup> Respondent therefore put the public on notice that the persons listed in the 2nd Column to the First Schedule stood validly nominated for the Presidential Election of the General Elections to be held on 4<sup>th</sup> March 2013 and the persons listed in the Second Columns to the Second, Third, Fourth, Fifth and Sixth Schedules stood validly nominated for the elective positions listed in each schedule for the electoral units in the 4th Column of the Second, Third, Fourth and the 6th Column of the 5th and 6th Schedules of the Gazette Notice.

The 1<sup>st</sup> Respondent had therefore discharged its duty by publishing the details that had been submitted for verification and action where necessary. It was upon the 1<sup>st</sup> Petitioner to exercise due diligence and verify his details in the Gazette Notice where he would have noted the discrepancy and prompted the 1<sup>st</sup> Respondent to rectify the anomaly, thereby renewing the 1<sup>st</sup> Petitioner’s legitimate expectation to contest in the Ruai Ward elections. The 1<sup>st</sup> Petitioner had therefore lost his right of legitimate expectation.

There was great debate on the photograph on the ballot paper intended to depict the 1<sup>st</sup> Petitioner. The 1<sup>st</sup> Petitioner and his witnesses, apart from the 2<sup>nd</sup> Petitioner who did not know how the 1<sup>st</sup> Petitioner looked like before the elections, went back and forth on the quality of the photograph and whether it depicted **Joel Nyabuto Omwenga**. The 1<sup>st</sup> Respondent’s case was that the photographs that were used in the ballot

papers were submitted by the candidates or their Political Parties. It was the 1<sup>st</sup> Petitioner's duty to prove to this court that the photograph used by the 1<sup>st</sup> Respondent in the ballot paper did not originate from him or his Party. The onus was upon him and it did not shift to the Respondents. He did not avail the photograph he and his Political Party submitted to the 1<sup>st</sup> Respondent for the court's consideration to prove this contention. I had occasion to look at the photograph on the ballot paper and compare it to the 1<sup>st</sup> Petitioner as he adduced his evidence and it was not in doubt that the photograph was a true reflection of him. He admitted to this during cross examination and so did his witnesses who alluded to the photograph's poor quality. It is therefore the finding of this court that the photograph in the ballot paper was that of the 1<sup>st</sup> Petitioner which was submitted by him and his party with his knowledge and consent and was sufficient to identify him.

It was the contention of the Petitioners and Respondents that the name "**John**" in place of "**Joel**" was a misnomer and an inadvertent mistake respectively. The 1<sup>st</sup> Respondent's contention was that this inadvertent mistake was not likely to confuse the 1<sup>st</sup> Petitioner or his supporters. The Returning Officer testified that if **John Nyabuto Omwenga** had won the election, the victory would have been his because his other details would have been used to confirm him and the mistake would be of no consequence. He said that a clerk may make a typographical error while registering a voter. Notwithstanding a mistake in his name a voter would still be allowed to vote as long as his other details could be verified. The details are confirmed from the BVR machine and the voter's Identity Card. This is also cross checked with the information provided at the time of registration. In his evidence, the Returning Officer told the court that he discovered the mistake in the 1<sup>st</sup> Petitioner's name during the submission of his Nomination Clearance Certificate and asked him to rectify the discrepancy in the name with the Political Party. He wrote on the 1<sup>st</sup> Petitioner's nomination paper for County Assembly Election (**Form 18**) that:

*"The name appearing on the Political Party nomination certificate is different from the name sent to IEBC by the Political Party. Certificate reads Joel in the list it reads John. Clarify and come later."*

He went on to state that it was the 1<sup>st</sup> Petitioner's Political Party which gave his name as "**John Nyabuto Omwenga**" instead of "**Joel Nyabuto Omwenga**". The 1<sup>st</sup> Petitioner went back to the Returning Officer from his Political Party offices and the Returning Officer noted on the Form 18 "*cleared*". This was shortly before the deadline for submissions of the Nomination Clearance Certificates. He was then issued with a Nomination Certificate. The 1<sup>st</sup> Respondent then published a Gazette Notice on 15<sup>th</sup> February 2013 listing the names of the candidates for the 4<sup>th</sup> March 2013 General Election for confirmation of details by the candidates or Political Parties.

I have perused the Special Issue of the Kenya Gazette Notice No. 2221 of 15<sup>th</sup> February 2013. The 1<sup>st</sup> Petitioner's name at page 1214 is listed as **Omwenga John Nyabuto**

The Gazette Notice states as follows:

Surname:	Omwenga
Other names :	John Nyabuto
County Code:	47
County name:	Nairobi City
Constituency Code :	280
Constituency name :	Kasarani
Ward Code:	1400

Ward Name: Ruai  
Party Code: 024  
Party Name: Ford-People  
Abbreviation: FORD-P  
Party Symbol: Pen

From the above it was clear that there was a mistake in the 1<sup>st</sup> Petitioner's name on the ballot papers. This mistake was detected by the Returning Officer and attributed to the 1<sup>st</sup> Petitioner's Political Party. The 1<sup>st</sup> Petitioner was directed by the Returning Officer to rectify the anomaly with his Political Party to avoid a situation where Nomination Certificates would be issued to two candidates from the same party and for the same position. It was apparent by the Gazette Notice that the mistake had not been rectified and the mistake was carried on to the ballot paper. The Respondents argue that the mistake was a misnomer that could not prejudice the election or the 1<sup>st</sup> Petitioner and his supporters and give undue advantage to the other contestants.

In determining the effect of the mistake in name I am guided by the Indian election petition of **A.Lazar vs M.K.Azhagiri, 2011**, where Justice V. Dhanapalan when dismissing the application to strike out the election petition based on mis-description of the names of the 7<sup>th</sup> and 11<sup>th</sup> respondents, cited the true test for determining whether a misdescription is a mere misnomer or defect of a substantial nature. The learned judge cited **Davies v. Elsby Brothers Ltd. [1960] 3 All E.R 672** as under:

*“...In English Law as a general principle the question is not what the writer of the document intended or meant, but what a reasonable man reading the document would understand it to mean: and that is the test which ought to be applied as a general rule in cases of misnomer..... the test must be: How would a reasonable person receiving the document take it? If, in all the circumstances of the case and looking at the document as a whole, he would say to himself: ofcourse it must mean me, but they got my name wrong. Then, there is a case of mere misnomer. If, on the other hand, he would say, I cannot tell from the document itself whether they mean me or not and I shall have to make inquiries, then, it seems to me that one is getting beyond the realm of misnomer....”*

The above finding was upheld in **Holder v Wiazowski [2011] O.J No. 4152 (S.C.J)** and **Kilembe Mines v Uganda Gold Mines Ltd HCCC 83 of 2009**.

The **Black's Law Dictionary 7<sup>th</sup> Ed by Bryan A. Garner p.1015** defines a misnomer as:

*“...a mistake in naming a person, place or thing especially in a legal instrument. In federal pleading-as well as in most states- misnomer of the party can be corrected by an amendment, which will relate back to the date of the original pleading...”*

The **Oxford Advanced Learner's Dictionary, International Students New 8<sup>th</sup> Edition** defines the noun misnomer to mean a name or a word that is not appropriate or accurate.

Viewed in the above manner, there can be no doubt that the use of the name “**John**” in the place of “**Joel**” in the ballot paper was a mistake which was a misnomer. However, it was not of a substantial character to confuse the 1<sup>st</sup> Petitioner or his supporters, since he could be clearly identified by his two names **Nyabuto Omwenga**, his party name and symbol (*being the only candidate for Ford People Party for the County Assembly seat in Ruai ward*) and through his photograph. This description was the 1<sup>st</sup> Petitioner's and none other. Any reasonable man could identify him as the aspirant for his party. It would not be correct to state that a stranger “**John Nyabuto Omwenga**” was introduced by the 1<sup>st</sup> Respondent

especially where the Ford People Party erroneously gave the 1<sup>st</sup> Petitioner's name as "**John Nyabuto Omwenga**" instead of "**Joel Nyabuto Omwenga**". Furthermore, the duty was upon the 1<sup>st</sup> Petitioner to verify his name and details as listed in the Gazette Notice by the 1<sup>st</sup> Respondent of all the nominees for the 4<sup>th</sup> March 2013 General Election. The 1<sup>st</sup> Petitioner failed to do so.

As the famous maxim of equity states, "***Equity aids the vigilant and not the indolent***"

The petitioner in this case slept on his rights as he had an opportunity to raise the discrepancy in the names with the 1<sup>st</sup> Respondent when the Gazette Notice was published.

The situation would have been different if after the Gazette Notice the 1<sup>st</sup> Petitioner had pointed out the anomaly and the 1<sup>st</sup> Respondent had ignored and refused to correct the mistake. The 1<sup>st</sup> Petitioner needed to exercise due diligence and ensure that his name was accurate in the Gazette Notice of 15<sup>th</sup> February 2013. This duty could not be relegated to the 1<sup>st</sup> Respondent who was for the 1<sup>st</sup> time conducting an election that was grand both in scale and complexity and under a new constitutional dispensation. The 1<sup>st</sup> Petitioner cannot be heard to say that he was stunned not to see his name on the ballot paper whereas he had been asked to rectify the error in his name by the Returning Officer during the submission of the Nomination Clearance Certificate. He had a second bite at the cherry after the Gazette Notice.

According to the issues as framed by the parties, I find that there was no irregularity committed by the 1<sup>st</sup> Respondent who prepared the ballot papers on instruction of the candidates and the person that the Petitioners are calling a stranger is undoubtedly the 1<sup>st</sup> Petitioner.

## **2. Whether the elections conducted in Ruai Ward were free and fair and conducted in accordance with the law.**

Political rights are enshrined under **Article 38 of the Constitution of Kenya, 2010**. Every citizen is free to make political choices, has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors. Every adult citizen has the right without unreasonable restrictions to be registered as a voter, to vote by secret ballot in any election or referendum and to be a candidate for public office, or office within a political party of which a citizen is a member and, if elected, to hold office. **Chapter 7 of the Constitution** talks about representation of the people. Part 1 describes the electoral system and process.

**Article 81** describes the general principles for the electoral system and legitimizes **Article 38 of the Constitution**. **Article 81 (a) (d) and (e)** will guide this court in determining the issue before it. Free and fair elections are described under **Article 81 (e) of the Constitution** as those conducted by secret ballot; free from violence, intimidation, improper influence or corruption; conducted by an independent body; transparent; and administered in an impartial, neutral, efficient, accurate and accountable manner.

The principle in **Article 81 of the Constitution** was espoused in the Ugandan case of **Col (Rtd) Dr. Besigye Kizza v Museveni Yoweri Kaguta in Election Petition No. 1 of 2001**, the Supreme Court of Uganda observed that:

***"...an Election Court is the mechanism whereby the choices of a political culture are known. These choices should be expressed in ways which protect the rights of the individual and ensure that each vote cast is counted and reported properly. That, an electoral process which fails to ensure the fundamental rights of citizens before and after the election is flawed. That, candidates should not be deprived of their right to stand for elections, and the citizens to vote for the candidates of their choice through unfair manipulation of the process by electoral officials. That, the entire election process should have an atmosphere free of intimidation, bribery, violence, coercion or anything intended to subvert the will of the people. That, fairness and transparency must be adhered to in all stages of electoral process."***

The Petitioners' case is that the elections were not free and fair and were marred with irregularities. They contended that the 1<sup>st</sup> Petitioner's name was left out of the ballot paper in contravention of **Article 38(3) (c) of the Constitution** and specifically his right to be a candidate for public office and therefore he was denied a fair chance to contest for the position of the Ruai County Assembly Ward Representative, a position he had been nominated for and cleared by the 1<sup>st</sup> Respondent. The 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners averred that they were denied a chance to vote for a candidate of their choice and express their will when his name was excluded from the ballot paper and that the 1<sup>st</sup> Respondent introduced a stranger to contest the elections. Counsels for the Petitioners contended that the Returning Officer was biased against the 1<sup>st</sup> Petitioner because he considered the 1<sup>st</sup> Petitioner not a serious candidate when he said in cross examination that the 1<sup>st</sup> Petitioner had been called for several meetings but had only attended one, that he had 4 agents out of the 33 polling stations, that he printed black and white posters for his campaigns and that he submitted poor quality photographs to be used in the ballot paper. They contended that the Returning Officer did not act on the complaints raised by the 1<sup>st</sup> Petitioner when he said that they were not in writing yet he had the power to investigate and act on the complaints or inform his superiors. It was also stated that the Returning Officer by saying that even if the 1<sup>st</sup> Petitioner's name was correct, he would not have won the elections, he had already made up his mind that the 1<sup>st</sup> Petitioner would lose by the time he received the call from the 1<sup>st</sup> Petitioner at 6.00 am in the morning on the polling day.

The Respondents denied the allegations and contended that the elections organized by the 1<sup>st</sup> Respondent in Ruai Ward and elsewhere in the Republic of Kenya, were free and fair and were administered in a transparent, impartial, neutral and efficient manner and in accordance with the standards set out by the Constitution and enabling law. They stated that no rights of the 1<sup>st</sup> Petitioner to contest for a political seat were violated by the 1<sup>st</sup> Respondent. They averred that no prejudice was occasioned to the 1<sup>st</sup> Petitioner or his supporters by virtue of the inadvertent mistake since any voter who knew the 1<sup>st</sup> Petitioner, his photograph and his Political Party was able to identify him through the photograph, the party symbol and the 2 correct names that appeared on the ballot paper. The Returning Officer testified that prior to the elections he called for a meeting with all candidates in Ruai Constituency to chat the way forward for a peaceful election. He read out the names of all candidates as would appear in the ballot paper and no one raised an objection.

In the English case of **Morgan and Others v Simpson and Another (1974) 3 ALL ER 722**, it was stated that:

***“An election court was required to find an election invalid (a) if irregularities in the conduct of the elections had been such that it could not be said that the election had been conducted as to be substantially in accordance with the law as to election, or (b) if the irregularities had affected the results. Accordingly, where breaches of the election rules, although trivial, had affected the results, that by itself was enough to compel the court to declare the election void even though it had been conducted substantially in accordance with the law as to elections. Conversely, if the election had been conducted so badly that it was not substantially in accordance with the law, it was vitiated irrespective of whether or not the result of the election had been affected...”***

Similarly in the Nigerian case of **Buhari v Obasanjo (2005) CLR 7K**, the Supreme Court stated that:

***“The burden is on petitioners to prove that non-compliance has not only taken place but also has substantially affected the results...there must be clear evidence of non-compliance, then, that the non-compliance has substantially affected the election.”***

This proposition is strengthened by **Section 83 of the Elections Act No. 24 of 2011** which provides that:

***“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 in that written law or that the non-compliance did***

***not affect the result of that election”***

The **Halsbury’s Laws of England, 3<sup>rd</sup> Edition volume 14 at paragraph 261** states that:

*“An election ought not to be held void by reason of transgression of the law committed without any corrupt motive by the returning officer or his subordinates in the conduct of the elections if the tribunal is satisfied that the election was notwithstanding those transgression, an election really and in substance conducted under the existing law, and the result of the election, was not and could not have been affected by those transgressions.”*

It is the finding of this court that the 1<sup>st</sup> Petitioner had the opportunity to verify his details and have the name rectified at the point when the Gazette Notice was published and remained in the public domain for 15 days before the elections. The purpose of the window period of 15 days after the publication of the Gazette Notice was to put the candidates and members of the public on notice about who was vying for the various positions as submitted by the candidates and Political Parties. Queries and corrections by affected persons would be raised within the 15 days. Therefore, it was incumbent upon the 1<sup>st</sup> Petitioner to verify his details when the Gazette Notice was published and if not satisfied to request for corrigenda for correction of his details. This window period can be likened to the banns in marriage. Members of the public are invited to raise objections to the proposed marriage of the betrothed. After the lapse of the time set in the banns the couple is free to marry and only death can separate them. The 1<sup>st</sup> Petitioner had encountered the anomaly in name at the time of presenting his party nomination forms, he should have been alert and exercise due diligence to ensure that all was well before the race. He did not discharge that duty and therefore waived his right to rely on the misnomer to challenge the election. The doctrine of waiver operates to deny a party his right on the basis that he had accepted to forego the same rights having known of their existence. The 1<sup>st</sup> Petitioner is therefore found to have waived his right when he did not confirm his details from the Gazette Notice and cannot blame the 1<sup>st</sup> Respondent on the misnomer.

The petitioners have not shown that this misnomer could affect or affected the outcome of the results to deprive the electorate of their constitutional right to vote for a person of their choice. The Petitioners also failed to show that the error was actuated by malice on the part of the 1<sup>st</sup> Respondent, was a deliberate act and that it was intended to favour either the 2<sup>nd</sup> Respondent or any other candidate in the election. In any case, the disenfranchisement of the electorate in this regard would have been difficult, if not impossible to prove since voting, in accordance with the Constitution, was by secret ballot.

The Petitioners’ witnesses testified that they were unable to vote for a candidate of their choice because the name “**Joel**” was missing from the ballot paper. The 1<sup>st</sup> Petitioner testified that he cast his vote for the other positions but did not vote for the County Assembly Ward Representative because his name was missing. Mochama Nyabuti who was the 1<sup>st</sup> Petitioner’s proposer at nomination and Samuel Kahuthu Nguru both knew the 1<sup>st</sup> Petitioner, his name and how he looked like and the details of the Party that had nominated him to contest the election. The 2<sup>nd</sup> Petitioner testified that he only knew the 1<sup>st</sup> Petitioner by his name “**Joel**”.

It is the contention of this court that the 1<sup>st</sup> Petitioner knew about the mistake. The name **John Nyabuto Omwenga** was not strange to him because it had been brought to his attention by the Returning Officer. Had he exercised due diligence, he would have established that the mistake had not been rectified. He was the only nominee of the Ford People Party for County Assembly Ward Representative in Ruai and his details apart from the name “**Joel**” were correct. Mochama Nyabuti and Samuel Kahuthu Nguru should have identified the 1<sup>st</sup> Petitioner with more than just the name “**Joel**”. They knew or ought to have known that his Political Party was Ford People whose abbreviation was FORD-P with the symbol of a pen and that he was the only nominee of the Party for the County Assembly Ward Representative in Ruai. They could have easily identified the 1<sup>st</sup> Petitioner’s two names “**Nyabuto Omwenga**” because they knew him and his photograph which they were familiar with.

The 2<sup>nd</sup> Petitioner testified that he attended nominations for Ford People Party. However he did not participate due to the queues. His contention that he could only identify the 1<sup>st</sup> Petitioner from his name “**Joel**” cannot be true because he knew or ought to have known that 1<sup>st</sup> Petitioner was the only Ford People candidate in the County Assembly Ward Representative in Ruai. The will of these voters was not vitiated by the mistake in the name of the 1<sup>st</sup> Petitioner because they did not raise the concern with the Presiding Officer on the polling day. It is the finding of this court that their right to vote for a candidate of their choice was not interfered with.

I will now address the issue raised by the Petitioners of the Returning Officer’s bias and which could be attributed to the way he addressed the complaint by the 1<sup>st</sup> Petitioner on the polling day and before the 7<sup>th</sup> March 2013. I am not convinced that the Returning Officer and by extension the 1<sup>st</sup> Respondent had bias against the 1<sup>st</sup> Petitioner. No evidence was led by the Petitioners to show that the misnomer was a deliberate act of the Returning Officer with a view to aiding the 2<sup>nd</sup> Respondent or any other candidate unfairly.

The finding of the **High Court of Kenya in Charles Maywa Chedotum & Another v IEBC & 2 Others Kitale Election Petition 11 of 2013** is instructive in this regard. In the words of that court:

*“Instead of serving the interests of justice it would appear that the petitioners and their witnesses chose to misrepresent facts hoping that the court would come to their aid by invalidating an election without good cause. In doing so, they have failed to discharge their burden of proof by showing that the alleged irregularities were ill-motivated or that taken as a whole, they would have tilted the balance against the third respondent. There was herein inadequate and credible evidence to show that the two petitioners were deprived of their right to stand for and vote in the election. Neither, were the people of Kapenguria deprived of their right to vote for candidates of their choice through unfair manipulation of the electoral process by electoral officials. Indeed, there was nothing to show that the will of the Kapenguria electorate was subverted by any of the respondents. There was insufficient evidence of non-compliance with the law on the part of the first and second respondent and even if there was sufficient evidence, there was no valid evidence adduced to show how the non-compliance with the law affected the results of each candidate including the petitioners”*

An election court will take the general presumption that elections are free and fair and conducted in accordance with the law unless there is evidence to the contrary. That contrary evidence must show that there was a flaw and it affected the result of the Election. The burden is on the Petitioners to prove that non-compliance has not only taken place but that it has substantially affected the result of the Election. There must be clear evidence of non-compliance, then, that the non-compliance has substantially affected the election.

This was established in **Raila Odinga & Others v Independent Electoral and Boundaries Commission & Others (Supra)** where the supreme court of Kenya held that:

*“...this Court should freely determine its standard of proof, on the basis of the principles of the Constitution, and of its concern to give fulfillment to the safeguarded electoral rights. As the public body responsible for elections, like other public agencies, is subject to the “national values and principles of governance” declared in the Constitution [Article 10], judicial practice must not make it burdensome to enforce the principles of properly-conducted elections which give fulfillment to the right of franchise. But at the same time, a petitioner should be under obligation to discharge the initial burden of proof, before the respondents are invited to bear the evidential burden. The threshold of proof should, in principle, be above the balance of probability, though not as high as beyond-reasonable-doubt – save that this would not affect the normal standards where criminal charges linked to an election, are in question.”*

The Supreme Court went on to find that,

***“Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections. It is on that basis that the respondent bears the burden of proving the contrary. This emerges from a long-standing common law approach in respect of alleged irregularity in the acts of public bodies”.***

There was no evidence led as to incidents of violence, intimidation, improper influence or corruption. Polling started on time and as had been scheduled. People voted by way of secret ballot. No voter was turned away from the polling station. According to the Polling Day Diary there were no incidents or reported complaints. The 1<sup>st</sup> Petitioner’s agents did not raise an issue about the misnomer of names. None of the agents was called to testify. According to the evidence of the Returning officer the first call he received from the 1<sup>st</sup> Petitioner was about agents and it was not until 9.00 a.m. that the 1<sup>st</sup> Petitioner raised the concern about the mistake in his name having cast his vote. The petitioners did not discharge the burden of proof on whether the elections were not conducted in a free and fair manner and that this affected the result of the election. They did not satisfy the court that the name sent to the 1<sup>st</sup> Respondent was the correct name, they did not show what prejudice the Petitioners suffered or the advantage that the other candidates derived from the name **John Nyabuto Omwenga**. This would have gone to show that not only was the conduct of the election not free and fair but that the misnomer affected the results. This error in name did not in my humble view affect the outcome of the result. The voting process was free and fair in that context. This court therefore legitimizes the victory of the 2<sup>nd</sup> Respondent who vied for a public position, won with an overwhelming margin and was declared the winner with 9,044 votes as against the 1<sup>st</sup> Petitioner’s 353 votes. The 2<sup>nd</sup> Respondent is therefore entitled to hold public office having been duly elected.

### **3. Whether the election for the Ruai County Assembly Ward Representative should be nullified and fresh elections conducted.**

This court has been guided by the Constitution, the Elections Act No.24 of 2011 and the Elections (Parliamentary and County Elections) Petition Rules 2013 in determining this petition. **Article 81** of the **Constitution** upholds the right of the citizens to exercise their political rights as set out under **Article 38** to elect leaders of their choice.

Having found that the elections conducted in Ruai for the County Assembly Ward Representative were free and fair and in accordance with the law; and that the misnomer in name is not sufficient to invalidate the election, I rely on the Nigerian case of **Ibrahim v. Shagari & Others (1985) LRC (Const.) 1**, where the Supreme Court held that:

***“..the Court is the sole judge and if it is satisfied that the election has been conducted substantially in accordance with Part II of the Act it will not invalidate it. The wording of Section 123 is such that it presumes that there will be some minor breaches of regulations but the election will only be avoided if the non-compliance so resulting and established in Court by credible evidence is substantial. Further, the Court will take into account the effect if any, which such non-compliance with [the] provisions of Part II of the Electoral Act, 1982 has had on the result of the election.... The duty to satisfy the Court that a particular non-compliance with the provisions of Part II of the Electoral Act....lies on the petitioner.”***

The wording of **Section 83 of the Elections Act No. 24 of 2011** postulates that there will be some minor breaches of regulations but the election will only be avoided if the non-compliance so resulting and established in Court by credible evidence is substantial. The election court has a duty to consider the non-compliance and determine whether it was deliberate or otherwise before making a decision on whether or not to nullify the election.

In **Joho vs Nyange & Another (2008) 3 KLR (EP) 500**: Maraga J (as he then was) stated as follows;

***“In my view the errors made and the irregularities committed in this petition fall in two***

categories. The first one is the errors or mistakes that I would call innocent even though negligent. The second category is those deliberate irregularities or forgeries that were committed.

*In respect of the first category I would like to say this: Error is to human. Some errors in an election like this, conducted under a frenetic schedule, are nothing more than what is always likely in the conduct of any human activity. If they are not fundamental they should always be excused and ignored. But where deliberate irregularities or forgeries are committed, different considerations come into play. In either case, however, serious consideration should be given as to what effect, if any, that those errors, whether innocent or deliberate, have on an election before the same is vitiated. As I have said if they are minor and do not affect the election or its results they should be ignored. This is what I understand section 28 of the National Assembly and Presidential Elections Act to be providing for when it declares that:*

*‘No election shall be declared void by reasons of a 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 that written law, or that the non-compliance did not affect the result of the election.’*

*The law is therefore clear as to when an election can be nullified if it is not conducted substantially in accordance with the law as to elections. It will also be nullified, even though it is conducted substantially in accordance with the law as to elections, if there are errors or mistakes in conducting it which, however trivial, are found to have affected the results of an election.*

*But when is an election said not have been conducted substantially in accordance with the law as to elections which errors or irregularities can affect the results of an election?*

*To start with I do not think that anybody is in doubt as to the law as to the parliamentary elections which we are here concerned with. It is the National Assembly and Presidential Elections Act, Cap 7 of the Laws of Kenya together with the Rules and Regulations made there-under.*

*It is not very (sic) non-compliance or every act or omission in breach of the election regulations or procedure that invalidates an election for being non-compliant with the law. As I have said minor breaches will be ignored. An election is said to be non-complaint with the law as to election when it is conducted in violation of the principles of an election by ballot. This is how Stephenson L.J expressed this point in the case of Morgan –vs- Simpson (1974) 3 All ER 722 at P 731.*

*“For an election to be conducted substantially in accordance with that law there must be a real election by ballot and no such substantial departure from the procedure laid down by parliament as to make the ordinary man condemn the election as a sham or a travesty of an election by ballot. Instances of such substantial departure would be allowing voters to vote for a person who is not in fact a candidate or refusing a qualified candidate on some illegal ground or disenfranchising a substantial proposition of qualified voters.”*

*And the result of an election is affected when the cumulative effect of the irregularities reverse it. For instance when a large proposition of the voters are by some blunder in the conduct of the election, as happened in Harrison Garama Kombe vs Ali Omar & Others, Civil Appeal No. 52 of 2006 (CA), do not turn up to vote, the result is said to be affected.”*

The voters of Ruai Ward elected the 2<sup>nd</sup> Respondent in an election that in the opinion of this court was free, fair, and transparent and whose results reflected the will of the electorate of Ruai Ward in Kasarani Constituency. This court cannot interfere with the right of the voters to elect their County Assembly

Representative, unless it is established that the particular election was marred with irregularities to an extent that a court reviewing the conduct of the said election is unable to reach a finding that the results reflected the will of the electorate. The Petitioners have failed to establish that there were irregularities of such a nature that negated the expression of the will of the electorate of Ruai ward in Kasarani Constituency. They had established that there was a misnomer in the first name of the 1<sup>st</sup> Petitioner but not that the 1<sup>st</sup> Respondent was responsible for it or that the mistake substantially affected the result of the election. The petition therefore lacks merit and is hereby dismissed.

#### **4. Who shall bear the Costs**

It is trite law that costs usually follow the event. **Section 84 of the Elections Act** has mandated the court to award costs of and incidental to a petition. This court therefore awards the cost of the petition to the Respondents. In that regard, the sum that was deposited in court shall remain so deposited pending the assessment of the costs as per the Advocates Remuneration Order by the Respondents. It is so ordered.

Delivered and signed this 21<sup>st</sup> day of August 2013.

Anthony. K. Mwicigi

Ag. Principal Magistrate.

Nairobi.

In the presence of:-

Mrs.Kogweno and Mr Githendu Advocate for the 1<sup>st</sup> Petitioner.

Mr.Thuita Advocate for the 2<sup>nd</sup> and 3<sup>rd</sup> Petitioner's.

Mr. K. Macharia Advocate for the IEBC in Petition 2/2013

Mr. Mwangi Advocate for the IEBC in Petition 6/2013.

In the absence of :-

Mr. Kulecho Advocate for the 2<sup>nd</sup> Respondent.