



REPUBLIC OF KENYA
IN THE PRINCIPAL MAGISTRATE'S COURT OF KENYA AT KILGORIS
ELECTION PETITION NO. 1 OF 2013
IN THE MATTER OF ARTICLES 81, 86 AND 87 OF THE CONSTITUTION, 2010

AND

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

AND

IN THE MATTER OF ELECTION OF THE COUNTY ASSEMBLY REPRESENTATIVE FOR
MOGONDO COUNTY ASSEMBLY WARD

AND

IN THE MATTER OF THE PETITION OF KIBET RONO ANDERSON

BETWEEN

KIBET RONO ANDERSON ----- PETITIONER

VERSUS

MIBEI KENNEDY KIPSANG ----- 1ST RESPONDENT

SAMUEL N. CHACHA ----- 2ND RESPONDENT

THE INDEPENDENT ELECTORAL AND
BOUNDARIES COMMISSION-----3RD RESPONDENT

JUDGMENT

On 4th March 2013 Kenyans of all walks of life, but as registered voters trooped to polling stations to cast their votes and elect their new representatives under the new constitution. It was an election like no other since, for the very first time, they were being called upon to elect the President, Deputy President, Members of the National Assembly, Senators, County Governors and Members of County Assembly all at the same time.

This was no doubt therefore the most complex and unprecedented general elections in the history of the Republic of Kenya. This was all courtesy of the new constitution dispensation ushered in by the 2010 constitution.

Unlike in the previous dispensation this lower court was amongst the several courts gazetted by the Honourable Chief Justice of the Republic of Kenya to hear and determine petitions arising from disputes in election of County Representatives. This was a good move in the Kenyan jurisprudence as it was expected that there was going to be numerous disputes given the complex nature of the election.

The new constitution prescribed very strict time lines for concluding the elections that is 6 months from the date of declaration and thus the justification for expansion of the jurisdiction.

The petitioner **KIBET RONO H UNDERSON** filed a petition dated 9th April 2013 challenging the election process and the declaration of the **MIBEI KENNEDY KIPSANG(1st Respondent)** as the duly elected candidate for **MOGONDO COUNTY ASSEMBLY IN TRANSMARA EAST NAROK COUNTY**.

The two were amongst the five candidates who contested the elections which had the following results.

- **MIBEI KENNEDY KIPSANG(1ST RESPONDENT) - 1,441**
- **KIBET RONO H UNDERSON(PETITIONER) - 1,132**
- **JOSEPH KIPNGETICH KIRUI - 766**
- **SIGEI JULIUS KIPYEGON - 65**

The petitioner has enjoined the INDEPENDENT AND BOUNDARIES COMMISSION “IEBC” (3rd Respondent) and SAMWEL N. CHACHA(2nd Respondent) being person and body which conducted the elections as petitioner was not happy with the results as announced and the subsequent gazettement of the 1st Respondent as the duly elected County Representative of the above said place.

PETITIONERS CASE

The petitioner particularly takes issues with 2nd and 3rd respondents. 2nd respondent is joined in the petition because of his conduct and the conduct of presiding officers appointed by and subordinate to him who presided over the Election at Mogondo County Assembly Ward. He went further to accuse the 2nd and 3rd Respondents that they conducted the election in a manner substantially inconsistent with the principles laid down in the Laws of Kenya including but not limited to the principles laid down in the constitution.

The petitioner accuses the 2nd and 3rd respondents for declaring the 1st respondent a winner without verifying and completing form 36 in the presence of petitioner and his accredited agents and hence rendering the said forms susceptible to alteration, deletion and manipulation contrary to regulation 79 of the elections general regulations 2012.

The petitioner also alleged that the respondent returned to the 3rd respondent a tally which grossly differed with the votes actually counted, verified, declared and announced at many polling stations particularly at Chebaraa Polling Station in which tally votes of 1st Respondent were grossly inflated while those of the petitioner were decreased contrary to the express provision of the law. That the 2nd respondent(and his subordinates) unlawfully and unjustifiably engaged carried out and or indulged in a process whereby votes cast and declared in favour of the petitioner were awarded in favour of an opponent and thereby violating the constitutional threshold touching and concerning accuracy and transparency in vote counting and attendant tallying especially at Chebaraa Polling Station.

The gravamen of the petitioners complaint was that there were no free or fair elections and that the purported result announced by the 2nd and 3rd respondents were not accurate, verifiable and accountable and thus a reflection of the true will of the citizens of Mogondo ward.

The petitioner thus sought the following orders

- (a) The Honourable Court be pleased to order and or direct, scrutiny, verification, recount and retallying of votes with a view to establish the validity of the votes cast.

(b) A declaration that the 1st Respondent herein was not validly elected as the County Assembly Ward Representative for Mogondo County Assembly ward, whatsoever and or howsoever.

- A declaration that the petitioner herein received the Highest number of valid votes case and was thereby validly elected as the County Assembly Ward Representative for Mogondo County Assembly Ward, in lieu of the 1st Respondent.
- In the alternative a declaration be and is hereby made that the election was not held in compliance with the law relating to the conduct of the County Assembly Elections and in particular with the provisions of Articles 86 of the Constitution 2010.

(e) An order be and is hereby issued directing the 2nd and 3rd respondents and their successors in office and other relevant public officers to take remedial action to give effect to the declaration in (b) and (c) above.

(f) The costs of the incidental to this petition be and are hereby awarded to the petitioner and

(g) Such other or further orders as this honourable court may deem fit, just and expedient.

1ST RESPONDENT'S CASE

The 1st respondent responded by swearing and filing an affidavit dated 13th May 2013 filed on the same date, where he invited the petitioner to strict proof on the allegations and maintained that there was no irregularity and that he had won the election fair and square.

The first respondent in the alternative but without prejudice that in the event that there was an error, mistake and or oversight on the part of 2nd and 3rd Respondent in tallying, retallying, counting, recounting, announcing the results which in any event is denied then the 1st respondent contended that the same affected all the candidates without any one of them benefiting and or enriching himself and the same was never for the benefit of any particular candidate but was across the board and affected all candidates equally and the same was inadvertent and in good faith.

The 1st Respondent further contended that election was conducted in accordance with the principles laid down in the constitution and in accordance with the relevant written law and if there was any non compliance, the same did not effect the result of the elections and thus the proceedings herein are nullity by dint of the provisions of section 83 of the Election Act No. 24 of 2011.

The 1st respondent further contended that if at all the agents and or representatives of the petitioner did not sign and or inspect form 34, 35 and 36 or any such other relevant documents of the election or participate in any other relevant proceedings then the same was as a result of the fact that they did not avail themselves to partake in the process at the point and stage when agent and representative were accorded such opportunity and their commission and omission cannot be used to invalidate and or affect lawful process by virtue of the provisions of Rule 971(1) of the election general Regulations 2012.

2ND AND 3RD RESPONDENTS CASE

The 2nd and 3rd respondents responded by filing a joint answer via grounds dated 6th May 2013 and filed on same day, supported by a replying affidavit. They stated that they complied with the law and they put the petitioner to strict proof on his allegations. They further averred that none of the issues raised by the petitioner for determination by this Honourable court is borne by the material laid before the court in any event it is averred that in the unlikely event that any is found the same cannot be fundamental and or material as to invalidate the election of the 1st respondent. They attacked the petition for being foul to section 78 of the Elections Act.

EVIDENCE

Evidence was by way of affidavits though witnesses were called to highlight on agreement of the parties. The petitioner had five witnesses who deposed affidavits pursuant to provisions of rule 12 of the Elections(Parliamentary and County Elections) Petitions Rule 2013. The petitioner chose to call 3. The petitioner in his supporting affidavit deposed how he was nominated by the PROGRESSIVE PARTY OF KENYA(P.P.K.) to contest. He gave account how he visited the polling stations on the election date. On 4th March 2013 he particularly witnessed the declarations at Motosiet Primary School and Chebaraa Primary School. He stated that the results were as follows;-

MOTOSIET PRIMARY SCHOOL - 313 VOTES

CHEBARAA PRIMARY SCHOOL - 106 VOTES

He stated that the 2nd and 3rd respondents announced his tally at the tallying centre to be 13 votes and 300 votes respectively, thus reducing his votes by 300 votes. He averred that the form 35 in respect to Motosiet Primary School Polling Centre that was provided by the 2nd respondent amounted to 13 votes.

He accused the 2nd respondent by himself or through his agents of indulging and or engaging in a fraudulent exercise of altering, deleting and or superimposing figures on the entries with the deliberate to camouflage the true votes in his favour.

He deposed further that in respect of Chebaraa the same folly occurred in that instead of posting 106 votes they endorsed an erroneous figure of 92 votes. This was in accordance to the form 36 that 2nd and 3rd respondents provided. He summed that his total votes were supposed to 1,446 and not 1,132.

He further added that despite the irregularities which also included the tallying at Motosiet where the total votes cast differed and or varied from the total valid votes plus spoilt votes plus rejected votes the 2nd and 3rd respondents refused his prayer for recount and or retallying. He added that the 2nd and 3rd respondents failed to ensure that the statutory forms and in particular the elections results vide forms 35 were duly completed and the requisite statutory comments endorsed. In the premises he prayed that the court scrutinizes retallying the results in the above two mentioned centres.

The first witness that he called was **PHILIP KIPKORIR KOROS**. He was agent for the petitioner at **CHEBARAA POLLING STATION** and according to him he heard the results being declared as petitioner having garnered 106 votes and not the 92 that was declared at the tallying centre. The other 4 witnesses echoed the same. They concentrated on Chebaraa Polling Station after the counsels by consent agreeing that they narrow the issue down to only one station that is Chebaraa Polling Station thus omitting Motosiet Polling Station.

SCRUTINY AND RECOUNT

I had indicated that the parties had by consent agreed that the ballot box for Chebaraa Polling Station be reopened and there be a counting of votes cast. The parties had consented that whoever wins between the two should be declared the winner.

The 1st respondent also made an application praying that the court should reopen Motosiet Polling Station ballot box and there be a scrutiny and recount together with the Chebaraa Polling Station to determine the winner.

The court denied both sides the opportunity to do so as the parties had not formed a basis warranting the boxes re-opening. There is a presumption that the will of the people is in the ballot box and to disturb it one needs quite a justification. An order of scrutiny cannot be made as a matter of course.

The court directed that scrutiny shall be confined to the polling station in which the results are disputed and declared limited to the matters set out. I was guided by the cases

KISII HCC PN NO 9 OF 2013 CHARLES OIGARA MOGERE – VS – CHRISTOPHER

MOGERE OBURE, NYANGAU SHEM OBWORO AND IEBC.

After the petitioner making a reasonable account at the highlighting of the affidavits the court decided that it was the appropriate moment to open the ballot box for Chebaraa Ward only. The witnesses for the petitioner and the 1st respondent appeared to concur that Motosiet Polling Station reopening, recount and retallying was not necessary. The court directed that Motosiet Polling Station was not to be reopened and scrutinized since the witnesses from all parties appear to concur that there wasnt any problems there.

The court thus directed for the recount of Chebaraa Polling Station where both sides had a problem with. The court invoked Rule 33(1) of the electoral Rules which gave the court powers **at any stage** for purposes of establishing validity.

The court appointed the following personnel in this court to handle the opening, recount and scrutiny

- Silas Masira – E.O.
- Nicholas Bett
- Kennedy Kimiriny
- Simon Obwocha
- Paul Rotich

The recount was done under the supervision of this court and with involvement of the parties advocates. The parties themselves were present and it was done in open court in presence of the general public.

The Chebaraa Polling Box revealed the following:-

- **Original form 35**
- **A bundle of unfilled form 35(unused) completely sealed.**
- **1- stray ballot paper form – green in colour**
- **Five bundles of valid cast votes for each candidate.**
- **One spoilt ballot paper.**
- **One box lable indicating box was supplied to Chebaraa Polling station.**
- **Seven(7) counterfoils of used ballot paper.....no.....six counterfoils of used ballot papers (casted ballot papers).**
- **Form 33 accompanying ballot paper votes for each candidate. The ballot box recount revealed the following;-**

1. BETT JOSEPH KEBENE SCORED – 1(ONE) VOTE
2. JOSEPH KIPNGETICH KIRUI SCORED – 92(NINETY TWO)
3. KIBET RONO UNDERSON SCORED – 106(ONE HUNDRED AND SIX)
4. MIBEI KENNEDY KIPSANG SCORED – 90(NINETY
5. SIGEI J. KIPYEGON SCORED – 299(TWO HUNDRED AND NINETY NINE)

The court and the advocates for the parties noted the following:-

Form 33 for the last candidate **SIGEI J. KIPYEGON** indicated that the candidate received 299 votes(two hundred and ninety nine). The actual votes indicate he received 299, while form 35 shows he received 297(Two hundred and ninety seven). This is 2 votes less. In respect of candidate No. 2 above - **JOSEPH KIRUI** the actual votes counted indicated 92 ninety two votes). The form 35 supplied to court indicates he got 106(one hundred and six votes) indicating he received an increase of 14 votes more than

what was counted. In respect of candidate 3 above **KIBET RONO UNDERSON** votes counted was 106(One hundred and six) while form 35 supplied by 2nd respondent indicates he received 92(ninety two) a decrease of 14 votes.

In respect of candidate No. 4 **MIBEI KENNEDY KIPSANG** the recount revealed 90(ninety) votes indicated in form 35 supplied as 90 votes which corresponded.

In respect of candidate No. 5 Sigei Kipyegon the votes before court were 299(two hundred and ninety nine). Votes indicated in form 35 is 297(two hundred and ninety seven) – a decrease of 2 votes. The court and the corrum noted other issues which were as follows;-

- The declaration by the presiding officer in form 35 found in the box and the one supplied to court by affidavits have differences. The one found in the box is blank without names of presiding officers.
- Secondly it does not have signatures of the presiding officer(form 35).
- Thirdly it does not have ID numbers of the presiding officer.
- Fourthly the form 35 is not dated.
- Fifthly it does not have IEBC stamp. Turning overleaf the part of the deputy presiding officer has names of the deputy, his ID, his signature and same is dated 5th March 2013.
- Sixthly it is signed by 3 agents.

(a) Benard Kosilei

(b) Eric Kipngetich

(c) Edward Kenduiywa

SUBMISSIONS

PETITIONER'S SUBMISSIONS

The petitioners learned counsel **Mr. Oguttu** submitted and highlighted six issues. The first issue is whether the petition was filed within the requisite and statutory time lines vide article 87(2) of the constitution 2010 and section 76 subsection 2 of the elections Act no. 24 of 2011. He submitted that under 87(2) the time line is 28 days from the declaration of the result. Under section 76(2) the time line is 28 days after the publication of the result in the gazette. The gazette means Kenya gazette. Publication was taken on 13.3.2013. You find it vide gazette at pages 44 to 79 of the petition.

Mr. Oguttu urged the court to subscribe to the school of thought and not as the 2nd Respondent subscribes to that the court starts from the date of announcement at the tallying centre. He submitted that the court should be a proponent that section 76(2) of the election Act is not inconsistent with article 82 of the constitution. He supported his case with the court of appeal at Mombasa **HASSAN ALI JOHO & ANOTHER – VS – SULEIMAN SAID SHABAR AND 2 OTHERS Court of Appeal No. 12 of 2013.**

He also supported his case with **GIDEON MWANGANGI WAMBUA – VS – IEBC & 2 OTHERS MOMBASA ELECTION PETITION NO. 4 OF 2013 – Page 83.** Also in **EASTELINO – VS – RODRIGUEZ 1972 EA Pg. 223 – 226.** He also attacked the 2nd and 3rd respondents accusation that the petition does not contain the date of the declaration as legally not tenable.

The learned counsel also submitted on point No. 3 that after court ordering the recount of Chebaraa it was found that the petitioners allegation was actually correct that petitioners votes were indeed swapped with the votes of one Joseph Kipngetich Kirui.

He submitted that the recount ended confirming that the petitioners tally stood at 1,446 as contended earlier and thus the petitioner is vindicated as;

- The 1st respondent did not garner the highest number of valid votes cast.
- That indeed the person who garnered the highest votes case was the petitioner.

He submitted and quoted section 80(4) of the Election Act.

“where upon recount of the ballot cast the winner is apparent and

b) that winner is not found to have committed an election offence the court is enjoined to declare the winner.

He stated that in this case the petitioner emerged the undisputed winner as no election offence was committed by the petitioner. **Mr. Oguttu** also reminded the court of the overriding objectives of the rules – that the courts determination just, proportionate and affordable in the sense that where the winner is apparent the court must not decree a fresh election with the attendant burden of the financial resources. He summed up by inviting the court to section 80(1) (d) of the Elections Act to interrogate if some officials had committed any electoral offence and to order action to be taken by prosecuting them.

He pointed out to the 1st respondents document that he filed perceiving to be I.E.B.C. document. Finally he prayed that the court invokes section 84(d) to award costs in favour of the petitioner. **Mr. Otieno** for the 1st Respondent clarified why the client came to refer to the document alleged to be I.E.B.C. He denied that 1st respondent used the document to declare the results of the election and clarified that it was for personal reference. He denied that the 1st respondent masqueraded as 2nd and 3rd respondents.

1ST RESPONDENT'S SUBMISSIONS

Mr. Otieno also attacked the erroneous construction of section 80(4) of Election Act No. 24 of 2011 – that the court should go ahead and declare the petitioner a winner.

He stated that the court has been given a free hand in making decision in matters before it and can make any other order it deems fit in the circumstances. He invited the court to its wide jurisdiction especially section 75(3) and 80(4). He urged the court to note that in section 80(4) the word used is **may** and this gives the court discretion and it is not mandatory. He urged the court to look at other issues not only issues of recount.

The petitioner according to him never discharged the full burden of proof as bestowed upon them as they relied on mere allegations. He stated that the recount and scrutiny issue is not only about arithmetic it transcends beyond arithmetic in this decision. He urged the court to note that the both form 35 that the 2nd and 3rd respondents presented non-accorded with votes recount. He cited the High court decision of **JAMES OMINGO MAGARA – VS – MANSON ONYANGO NYAMWEYA** where the court went ahead to nullify the result stating that if form 16 which is equivalent to form 35 in this case is not properly filled people could not know the exact result.

He urged the court to find that the latches in form 35 found in the box vitiates the results for Chebaraa. He urged the court to disregard the Chebaraa ballot box and rely on the other stations to declare his client the winner as he would still lead. He stated that in the authority above form 17(A) is equivalent to form 36 in our current dispensation.

He added that the election complied with the law to a greater extent save for Chebaraa Polling Station and this 1st Respondent should not be victimized for that as he committed no electoral offence.

2ND AND 3RD RESPONDENTS' SUBMISSIONS

Mr. Rigoro for the 2nd and 3rd respondents submitted that the court should rely on a recent case that is Mombasa Appellate case No. Joho – vs – Shabal that time for filing of an appeal begins from the gazettelement of the results(publication) and not from the time of declaration of results at the tallying centre. He submitted that the petition should be struck out for reasons that the dates of the **result**

declaration was not on the petition. He quoted rules 10(i) (f). He urged the court to note that the petitioner failed to comply with the rules and thus the petition should be struck off.

On the issue of election for Mogondo Ward Dikir Constituency he submitted that all the parties had agreed on affidavit and in court that the election went well- free, fair and tenable, verifiable and accurate.

He added that even for the Chebaraa the only issue came in during the tabulation of the results where petitioner stated that his votes went for somebody else. He stated that these were errors which were inadvertent and innocent by the commission official who handled the election.

He stated that other than that there wasnt any fraudulent alteration or manipulation of the statutory forms. He stated that having been an innocent mistake it shouldn't constitute a cognizable offence or an election offence under the provisions of section 59(1) (a) of the Elections Act.

REJOINER

Mr. Oguttu urged the court to ignore the 2nd and 3rd respondents submissions that the mistake was honest and inadvertent and should not be visited upon the concerned official by extension the I.E.B.C.

He submitted that 2nd and 3rd respondents counsel was submitting from the bar as there was no evidence on record admitting that there was error on recount. He pointed out the 2nd and 3rd respondents submissions at page 22-24 which denied there being an error or mistake

He submitted that though the elections in other polling station were free and fair the point of departure was Chebaraa where inaccuracy was conceded which altered the final tally.

He urged the court not to call a re-election when all parties have agreed that it was free and fair and winner apparent.

On the issue that there was no form 35 to correspond with the final results he stated that the findings of the court do not require to be supported by any form 35.

He quoted **JAMES OMINGO MAGARA – VS – MASON OYONGO NYAMWEYA** which 1st respondent counsel quoted.

This was decreed for in **FITCH – VS – STEVENSON AND 3 OTHERS**. He stated that the **OMINGO MAGARA CASE** was previous election regime not the current one.

He finally urged the court to note that the jurisdiction of this court is circumscribed by section 80(4) Elections Act – which is clear that the only limitation to making a declaration where a winner is apparent is a finding that winner has committed an election offence.

The parties agreed on the following issues:-

1. Whether 4th march 2013 general election in respect of member of county assembly ward for Mogondo County Assembly Ward was substantially conducted in conformity with the constitution. The law and practice of election.

2. Whether the electoral process followed by the 2nd and 3rd Respondents in respect of the election of member of County Assembly Ward for Mogondo County Assembly Ward was lawful and legally sanctioned.

3. Whether the outcome of the election of member of County Assembly Ward for Mogondo County Assembly Ward was valid?

- Whether the declaration and the subsequent gazettelement of the 1st Respondent as the duly elected

- member of County Assembly Ward for Mogondo County Assembly Ward was valid.
- Whether the petition is legally competent.
 - Who is to bear the costs.
 - Whether the general elections held on 4th.3.2013 in respect of Mogondo County Assembly Ward complied and or were in accordance with provisions of article 81 and 86 of the Constitution 2010.
 - Whether the 2nd and 3rd respondents herein altered, doctored and or manipulated the statutory documents used and or in respect of the election of Mogondo County Assembly Ward.
 - Whether the 1st Respondent herein garnered the highest number of valid votes cast.
 - What orders should the honourable court make.

I have gone through these issues and I have realized that on completion of the case there were others introduced.

I therefore have decided to relook at the issues and I have come up with the following summary;-

SUMMARY OF ISSUES

- (1) Whether the petition is legally competent.
- (2) Whether the 1st Respondent is guilty of electoral offence.
- (3) Whether the Petitioner or the Respondent garnered the highest valid votes cast.
- (4) Whether the 2nd and 3rd Respondents altered, doctored and or manipulated the statutory documents used and or in respect of Mogondo County Assembly Ward.
- (5) Whether the general election held on 4.3.2012 in respect of Mogondo County Ward fully complied and or were in accordance with provisions of article 81 and 86 of the constitution.
- (6) Who is to bear the costs.

I went through the petitioner's case and the respondents' case. However, before I tackle these issues I found it prudent that the court duels on the general principles in determining the election petitions.

GENERAL PRINCIPLES

It should not be for the court to determine who comes to occupy the Mogondo County representatives office, save that this court is the ultimate judicial forum enlisted under the law to assert the supremacy of the constitution and the sovereignty of the people of Kenya. This court is mandated to safeguard the electoral process and ensure that individuals accede to power only in compliance with the law regarding elections.

It then follows that this court must hold in reserve the authority, legitimacy and readiness to pronounce or the validity of the occupancy of that office if there is any major breach of the electoral law as provided in the constitution and the governing electoral law.

Article 1 of the Constitution of Kenya is one of the sovereignty of the people of Kenya.

Article 38 articulates political rights which are given effect through the electoral system set out in chapter seven.

To adopt the words of **Hon. Justice Majanja** in **ELECTION PETITION NO. 7 OF 2013 AT MACHAKOS** and I quote;-

“In cases of allegations of election malpractices and other irregularities the petitioner is not

only required to establish that such electoral malpractices and irregularities actually occurred but they were of such magnitude that they substantially and materially affected the result of the election. The petitioner should for instance establish that the number of votes affected by the irregularities was sufficient to change the result of the election or that there were substantial violations of the requirements of the statute that render the reliability of the result of the election seriously in doubt.”

The primary consideration in an election contest therefore is whether the will of the electorate has been affected by the irregularities. Did the irregularities complained of adversely affect the sanctity of the ballot and the integrity of the election.

In the case of **MORGAN AND OTHERS -VS- SIMPSON AND ANOTHER(1974) 3 ALL ER 722, 728** quoted in the same judgment by Hon. Justice Majanja it was held by Lord Denny that.....

“But even though the election was conducted substantially in accordance with the law as to elections, nevertheless if there was a breach of the rules or mistake at the polls – and it did affect the result – then the election is vitiated.”

Another important principle given in the same petition is that of burden and standard of proof. Every election conducted in accordance with the law is presumed valid unless it is set aside by the court.

The burden of establishing the allegations of electoral being declared invalid rests on the petitioner. The court will not interfere with the results of the elections unless it is established to the required standard of proof and that the irregularity and electoral malpractice complained of render the said elections invalid.

The burden is therefore heavily on him who assails an election which has been concluded.

ON WHETHER THE ELECTION PETITION HELD AT MOGONDO IS COMPETENT

The 2nd and 3rd respondents through their counsel **Mr. Rigoro** submitted that this petition is incompetent as

- i) It is an affront to rule 10(1) (d) of the election rules
- ii) It is an affront to 10(1) as the petitioner has failed to state the declaration of the results of the election he is challenging.

The counsel submitted that the petition should be struck out for being incompetent for violating article 87(1) of the constitution.

The counsel for the 2nd and 3rd respondents further argued that the Article 87(2) of the constitution provides that petitions concerning an election other than a presidential election shall be filed within 28 days after the declaration of the election results by the I.E.B.C. He directed the Hon. Court to note that the petitioner on being examined in chief by his counsel stated that the election was declared on 5th March 2013. He thus stated that the last day to file the petition was the 2nd April 2013 as per guidance of Article 259(6) of the constitution. He urged the court to note that his petition was filed on 10th April 2013 which is 8 days after expiry of the deadline.

On the sub issue no. (ii) above he submitted that petitioner failed to state clearly which election he was petitioning against and thus this omission is fatal as it goes against the rules stated hereinabove.

I went through the petitioner's response which he highlighted wherein he urged the court to disregard the above issues for the following reasons. He submitted that the 2nd and 3rd respondents had misinterpreted the sections and the constitution. He submitted that what it means to declare results is by gazette in the official government gazette. He submitted that Article 87(2) and Section 76(2) of the Election Act No. 24 of 2011 are not in conflict and that the interpretation is that counting of days should start from the date

of gazettelement by I.E.B.C. Thus 28 days from 13th.3.2013 when the publication was done still leaves the petitioner with lots of time. The last day which should be on 3rd April, 2013.

He urged the court to look at the authorities which gave the guidance clearly which are **GIDEON MWANGANGI WAMBUA – VS – IEBC & 2 OTHERS MOMBASA ELECTION PETITION NO 4 OF 2013(Page 83)**. On the issue that the petition does not disclose, which election petitioner is petitioning the counsel submitted that his clients petition complies with rules 8 and 10 of elections. Parliamentary and County Election Rules.

He urged the court to take cognizance of legal notice No. 44 particularly rule 10(3) which states what an election petition shall be comprised of.

He states that his petition has stated the grounds they rely on and that paragraph 33 of the supporting affidavit (page 9) alluded to the dates of the publication of the results in the Kenya gazette and the date. He invited the court to the authority **CASTELINO – VS – RODRIGUEZ 1972 E.A. 223 – 226 Page 224**.

I have considered both the arguments.

On 22nd April 2013 the Chief Justice named 98 Judges and Magistrates to hear the petitions filed across the country by the close of the 28 day period set out by the constitution.

There has been two different interpretations of the Constitution and the Elections Act by the times petitions both in the lower and the high court were filed with many respondents raising preliminary objections challenging whether the counting of the 28 days should start;-

- (a) From the declarations made at polling stations.
- (b) From the declarations made at the tallying centres.
- From the declarations in the official government gazettelements.

Different views came out, but finally the correct interpretation was made in several cases at the appellate level.

Amongst others I was guided by the following;-

- CIVIL APPEAL NO. 12 OF 2013 AT MALINDI
- PETITION NO. 5 OF 2013 AT NYERI
- ELECTION PETITION NO. 4 OF 2013 AT HIGH COURT MOMBASA.

In all these cases the learned judges held that the guidance over this matter is provided by Article 87(1) of the constitution.

The article provided that parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes.

The parliament thus enacted the Elections Act and made specific provisions in section 76 as to the gazettelement of elections results and the period within which to challenge the results. The school of thought that declaration as referred to in Article 87(2) of the Constitution was to be made by the returning officer is thus not supported by the Elections(general) Regulations, 2012 and Article 86 of the Constitution.

The primary function of a returning officer was also established to be “announcement” and his role under Article 86 is only that. The “declaration” is thus mandated to the Kenya Gazette by IEBC. Therefore the section 76 of the Elections Act does not contradict the Articles 86 and 87 of the constitution. In our case

the 2nd Respondent gazetted the results via the Kenya Gazette notice dated 13th march 2013.

The petition was filed on 18th April 2013 and thus within the 28 days as stipulated in the constitution.

The 2nd and 3rd Respondents' argument on that issue must thus collapse. The 2nd and 3rd respondent has also raised the (ii) part that the petition never indicated which petition the petitioner was petitioning.

I have looked at rule 10(1) which states that the R10(1) An election petition filed under rule 8, shall state;-

(a) The name and address of the petitioner.

(b) The date when the election in dispute was conducted.

(c) The results of the election if any, and the manner in which it has been declared.

(e) The date of the declaration of the result of the election.

(f) The grounds on which the petition is presented.

(g) The name and address of the advocate if any for the petitioner which shall be the address for service.

Both these two issues by 2nd and 3rd respondents are basically matters that should be handled as interlocutory applications.

While hearing this case the court gave the parties time to raise issues before the matter was set down for prehearing conference. The 2nd and 3rd respondents never made any interlocutory application touching on these issues.

The parties also never touched these two at the prehearing conference itself. This matter suddenly this has been introduced at the submission level. I have however taken note that the legality of the petition was one of the issues agreed upon by the parties as an issue.

The question now is whether the omission to indicate the elections is fatally defective. I have looked at Article 59(2) (d) of the Constitution and it directs that justice shall be administered without undue regard to technicalities and (e) that the purpose and principles of this constitution shall be protected and promoted. When the constitution talks about procedural technicalities it means rules of procedure.

The election rules are there to be hand and glove with the law. However we have to be careful not to let the rules to cloud our minds at the expense of substantive justice. Rules are there to “ensure” the handling of the issue of law.

When handling an election petition the court has to pay attention to what is fair and just and I find that striking out this case for non compliance with 10(1) (d) of the Election Rules will not serve the ends of justice.

I have looked at the election Rule 41. It gives the overriding objective of these rules – that is to facilitate the just, expeditious proportionate and affordable resolution of the election petitions under the Constitutional Act.

To sum up the issue No. 1 I quote section 80(1) of the Election Act 2012 provides that an election court may in the exercise of its jurisdiction decide all matters that come before it without undue regard to technicalities.

We know the Election Act 2013 is a very strict law and must be followed by the court as it is a “straight

jacket law”. However it provides for flexibility when it comes to issues procedural and not substantive law.

The 2nd and 3rd respondents case on issue No. 1 must fail in favour of the petitioner as the petitioner clearly indicated the election he was petitioning against in his supporting affidavits. We went through the hearing and none of the parties appeared to be lost on the issue of which we are hearing.

The court was also very clear which petition it was to hear.

WHETHER 1ST RESPONDENT IS GUILTY OF ANY ELECTORAL OFFENCE

The petitioner has attacked the 1st Respondent claiming that 1st respondent is part of scheme together with the 2nd and 3rd respondents making false entries in the necessary forms 35 and 36 thus deliberately denying the petitioner several votes which was exposed by the recount.

The petitioner brought in an issue where the 1st respondent was found to have a fake form 35 which he alleged must have been part of ploy to defraud the elections.

I looked at the document which the 1st respondent responded was for his personal use as he never used it to declare any election and that he never took it to 2nd and 3rd respondent.

This is document on page 24 of the response of 1st respondent. My finding is that there is no link whatsoever linking the document to 2nd and 3rd respondents declarations.

The 1st respondent gave a reasonable explanation that he printed out to capture the results at the tallying office when 2nd respondent declared them.

The court does not see any link apart from that and I thus do not find the 1st respondent guilty of any offence. There was no evidence that it was “declared” as alleged. The burden of proof has not been discharged to the required level.

Issues 3, 4 and 5

I have gone through this case and I have decided to look into the issues 3,4 and 5 together as they are inter related. We need to find out.

- Who garnered the highest valid votes between the two.
- Whether the 2nd and 3rd respondent doctored Chebaraa Polling station results and thus
- Whether the elections in respect of Mogondo complied fully with the required provisions of article 81 and 86 of the constitution.

The petitioner in his petition raised issues that the respondents “stole” his votes and awarded them to 1st respondent making him the winner in polls held at Chebaraa Polling Station.

The petitioner who filed affidavit and called 3 witnesses gave account how the results announced at Chebaraa Polling station came to differ with what was announced at Emurua Dikirr tallying centre.

The agents gave account how they heard the presiding officer at Chebaraa Polling Station announce the results as follows;-

Julius Sigei 299

Joseph Kirui 92

Kipsang Mibe1(1st Respondent) 90

Joseph Kebere 1

The agents stated that despite having witnessed the declarations of results they trusted that the presiding officer shall communicate the same declared results to the 2nd respondent. However they were surprised when the 2nd respondent declared results which were at variance and or different with the results that were declared at the polling station more particularly against the petitioner who was stated to have garnered 92 in lieu of 106 votes declared at the Chebaraa Polling Station.

The petitioner and his witnesses stated that they were having no problems with the other polling centre results. The 1st respondent also echoed the same that he had no problems with the elections whatsoever and that he was satisfied with the results as originally announced.

The court moved itself *suo motu* and ordered the Chebaraa ballot box which was done and there was a recount and scrutiny of the contents of the box. The court found that indeed the petitioners votes were swapped with the votes of one Joseph Kipngetich Kirui.

The court found the petitioners tally to be 1,446 – what the petitioner had been contending as his lawful votes. It was found on physical count that;-

(i) The first respondent did not garner the highest number of valid votes case.

(ii) That indeed the person who garnered the highest votes cast was the petitioner. The question that arose was whether the court should say that the “fact spoke for itself” and thus announce petitioner as the winner.

The Election Act and constitution are very serious laws. The exercise itself is a serious exercise, and cannot be taken lightly. I quote **Justice Maranga** in the case of **Joho – vs – Nyange** whereby he stated as follows.....

“Election petitions are no ordinary suits but disputes in view of great public importance. They should not be taken lightly and generalised.”

This was the same position in **Kibaki – vs – Moi and Wanghu Nyaga & another – vs – George Owiti**. I got another inspiration from the case of **MORGAN & ANOTHER – VS – SIMPSON & ANOTHER 1917 2 ALL ER** – it was held.

“An election court was required to declare an election invalid if the irregularities in the conduct of the election had been such that it could not be said that the election had been so conducted as to be substantially in accordance with the law as to elections or if the irregularities had affected the results.”

The above Bowes case also held

“In my view in the phrase “affected result” the word result means not only the result in the sense that a certain candidate lost. The result may be said to be affected if after making adjustments for the effect of proved irregularities the contest seems much closer than it appeared to be when first determined, but when the winning majority is so large that even a substantial reduction still leaves the successful candidate a wide margin then it cannot be said that the result of the election would be affected by any particular non compliance with the rules.

An election is a process that must be seen to be free and fair and the fact that a person achieved the highest number of votes in not necessarily decisive of the election petition.

The court is obligated to consider the quality of the election and see whether it comports with the principles of election articulated in Article 81 of the Constitution in the case of DOROTHY E. BROWTON – VS- JEAN HART KANGAS & OTHERS(1997) MPLR (2nd) (Nfld. Sc) quoted at our local level by Hon. Justice Majanja in ELECTION PETITION NO 1 OF 2013 AT MACHAKOS. It was held that.....

“If there have been irregularities these should be exposed to the view of the general public through the returning officers and through the candidates and their agents involved in the recounts.”

We recounted the Chebaraa Polling centre and found that there were irregularities, the question is how do these affect the outcome?

Apart from finding that the petitioners vote tallying went up we found other issues in that ballot box.

OBSERVATIONS OF RECOUNT

1. Candidate Sigei J Kipyegons tally according to form 33 is 299 while the form 35 shows he received (two hundred and ninety seven. This means 2 votes less.
 2. Joseph Kipngetich Kirui actual votes counted was 92 while form 35 supplied indicated he got 106 indicating he got an increase of 14 votes more than what was counted.
- Kibet Rono Underson(Petitioner) actual votes counted was 106(one hundred and six) bit form 35 indicates 92(ninety two) a decrease of 14 fourteen.
 - Mibei Kennedy Kipsang(1st Respondent) counted votes 90(ninety only) votes indicated in form 35 supplied is 90(ninety) – votes correspond.
 - In respect of Sigei Kipyegon votes counted were 299(two hundred and ninety nine) votes indicated in form 35 is 297(two hundred and ninety seven) decrease of 2.

ON FORM 35

- There were 2 form 35
 - (a) One supplied by the 2nd and 3rd respondents on application by the petitioner at the High Court Kisii.
 - (b) One found in the Chebaraa ballot box.

Differences between the two

Similarities between the two

Form 35 supplied

1. Signed by the 3 agents.
2. Has names of the deputy presiding officer and his ID number and signature.
3. Has the presiding officer ID number as is required by law.
4. Is dated as is required by law.
5. Has IEBC stamp as is required by law.

Form 35 found in the ballot box

1. Signed by the 3 agents.
2. Has names of deputy presiding officer and his ID number and signature.
3. Does not have the ID number as is required by law.
4. Is not dated as is required by law.
5. Does not have IEBC stamp as is required by law.

These differences was compounded by the differences between entires in form 33 and 35 for the petitioner. The form 33 indicates the petitioner got 106 votes at Chebaraa while however when filling form 35 the presiding officer at Emurua Dikirr indicated that petitioner got 92 votes – which is a difference of 14 votes which confirmed the petitioners allegation that he had been deprived of votes at Chebaraa polling station.

The court went through the submissions by the petitioner and respondents. The petitioner and respondents appeared to have a common ground on the tallying and counting and the irregularities. The question now is two way

- Whether we can say that those irregularities invalidated the election at Chebaraa Polling Centre which is the subject of this petition and thus there is a requirement for fresh elections.
- Whether the irregularities were minor and what we call “small mistake” that should not make the court call for fresh elections.

The 1st respondents counsel seemed not to have much issue on the recount only that it shouldnt be considered as there were irregularities and thus he called for a fresh election.

The counsel for 1st respondent submitted that the petitioner was wrong in his submission on the issue validly of the conduct of the election by 2nd and 3rd respondents. He urged the court to look at other illegal activities and thus order fresh elections.

He argued that form 35 was an integral part of the election and failure to comply with proper filing of the same vitiates the entire election process.

He prayed that due to the fact that the Chebaraa centre polls were irregular the courts should alternatively omit the Chebaraa results and pronounce the 1st respondent as the winner and if not order for a re-election.

He urged the court be guided by the case **JAMES OMINGO MAGARA – VS – MANSON ONYANGO NYAMWEYA** page 9 where the court ordered that form 17A which is equivalent to form 35 in our case was not properly filled and thus people could not know the exact result.

This led to a nullification of the election in that case in the old dispensation. He pointed electoral out the anomalies that were observed by the court and all parties including the fact that the 2nd and 3rd respondents provision of two different form 35 which were not concurring.

He further submitted that even if the court found the petitioner as the winner of the election by virtue of recount of Chebaraa polling centre the court should note that there is no valid form 33, 35 and 36 to back the election so that we can say they were complete.

I was particularly troubled by the lack of proper response by the IEBC and 2nd Respondent. The 2nd and 3rd respondents in a style mostly seen in hearings in civil cases, decided not to take the witness stand in defence of the election they conducted. They appeared to leave it to the court to decide which to me left a lot to be desired. They “bolted” in other words, rather than explain to us what transpired.

The natural cause of event if they really took their work at Mogondo seriously should have been to at least try to explain to the public what happened to the votes they cast at Chebaraa polling station. Why were there discrepancies?

I had said earlier that an election is a serious matter! No explanation has been provided at all by the IEBC and its agents the glaring discrepancies despite the fact that it is the custodian of all electoral materials.

The IEBC and 2nd respondent had a right not to actively participate by not calling witnesses but at least the 2nd respondent was expected to actively participate without necessarily waiting for the court to call him. They owed some explanation to the electorate of Mogondo.

After the recount of Chebaraa Polling station and tallying the results with the other polling stations in the ward. The results changed drastically.

Results before the recount at Chebaraa indicated as follows;-

Petitioner – 1,132

1st Respondent – 1,441

On adding the 14 votes which were “stolen” from the petitioner the results changed as follows;-

Petitioner – 1,446 votes

1st Respondent – 1,441 votes

the form 35 had other irregularities which were alterations on the face(presented form 35) without any endorsements as required by law.

ANALYSIS AND DETERMINATION

From the submissions by parties I am left with these choices these are;-

- a) Whether to dismiss the petition.
- b) Whether the petitioner should be declared duly elected member of Mogondo County Assembly.

c) Whether the court should set aside the election by declaring that the 1st respondent was not duly elected.

The Article 81 of the constitution clearly spells out that the intent of voters is established by the number of votes cast in favour of the winning candidate in an election.

The court however has responsibilities under section 80(4) of the Act that it should exercise great restraint and caution so that it declares a winner in the clearest of circumstances that leaves no doubt as to what the will of voters on the material polling day was; otherwise the court risks disenfranchising the voters by substituting the will of the electorate with that of itself and imposing a leader on the electorate.

The parties agreed that the election in issue was perfect in all other stations – well attended free, fair, peaceful with turnout massive about 80%.

The only problem was at Chebaraa polling station which provides a “tie breaker” in the circumstances.

To make this very important decision I rely once more on Hon. Learned justice Majanja in the **PETITION NO. 7 OF 2013 MACHAKOS** and the case he quoted **BORTNER – VS – TOWN OF WOOLBRIDGE** et al 250 Conn 241, 736 A 2nd 104.

“In determining whether to order a new election to arrive at a sensitive balance among these powerful interests, all of which are integral to our notion of democracy, but which is a challenged election many pull in different directions. One such interest is that each elector who properly cast his or her vote in the election is entitled to have that vote counted. Correspondingly, the candidate for whom that vote properly was cast had a legitimate and powerful interest in having that vote properly recorded in his favour or her favour. When an election is challenged on the basis that particular electors votes for a particular candidate were not properly credited to him, these two interests pull in the direction of ordering a new election. The petitioner discharged his burden of proof which in this case was above the balance of probability.

The other grievances are that voting was marred with malpractices especially in filling the form 35.”

We had a similar scenario in the case of **ELECTION PETITION CASE NO 2 OF 2013 MACHAKOS THOMAS MALINDA MUSAU & OTHERS – VS – IEBC & OTHERS** where learned Hon. Justice Mutende tackled the issue of discrepancies in the form 35. The forms were not signed by agents. She brought out the significance of form 35 in an election. She pointed out at Regulation 79(2) (b) of the elections(General Regulations 2012) which provided that;-

“The presiding officer the candidates or agents shall sign the declaration in respect of the elections.....for purpose of sub regulation (1) the declaration form (b) National Assembly.....shall be in form 35 set out in the schedule(paragraph 75). She went further at paragraph 76 to state that form 35 is essential as it is the official document that the presiding officer the candidates or agents sign as the declaration. In respect of the National Assembly amongst others.

The form 35 indicates the number of registered votes in a particular polling station, the number of candidates and the votes that each secured. A reading of the regulation indicates that it is a mandatory requirement for the parties mentioned to append their signatures. However regulation 79(6) (7) regulates these”.

The form 35 and the register are important documents as they were the ones which should have indicated the registered votes tallying in comparison with the total voters for the day.

The form 35 that was provided in our case had no presiding officers comments to help this court, now that

the register not being availed probably being in the presidential ballot box.

The comments could have made the court know exactly what transpired.

The question now is whether the irregularities that have been found glaring affects the outcome.

The learned judge dealt with the issue of failure to stamp the form 35.

The presiding officer is required to put form 35 into the ballot box seal and take it to the returning officer. The form completed, must be signed and dated. It is not specifically stated that the form should be stamped. Like in our case the forms provided to the court had IEBC stamps unlike the one found in the box.

A stamp impression on a document would be used to authenticate it. It would be interpreted that forms without stamp impression of the IEBC lacked approval from the commission. Without the stamp impression its validity would be questioned. **(Paragraph 116 of Hon. Justice Mutende's judgment)** . The learned Judge in that case went further to add that minor typographical errors or alterations without endorsements were not a big deal, however.

In the same case the Honourable Judge relied on the case of MORGAN & OTHERS – VS – SIMPSON & ANOTHER 1974 3 ALL ER 722 where the court of appeal laid down certain principles in relation to Election petitions. It was held that (I quote):-

“An election court was required to declare an election invalid:-

a) If the irregularities in the conduct of the election had been such that it could not be said that the election had been so conducted as to be substantially in accordance with the law as to election.

b) If the irregularities had affected the results. Accordingly where breaches of the election rules although trivial, had affected the result 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 elections conversely, if the election had been conducted so badly that it was not substantially in accordance with the election law. It was vitiated irrespective of whether or not the result of election had been affected.”

In our case there were irregularities due to inefficiency and lack of accountability contrary to Article 81 of the constitution. The results were affected. The 1st respondent due to the above cannot be said to have validly elected.

The petitioner on the other hand appears to have been right in bringing this petition citing irregularities but he also cannot be said to be the validly elected leader due to irregularities detected in the system operated by 2nd and 3rd respondents.

The 1st respondent is however absolved of any wrong doing as no proof of electoral malpractice was proved against him.

This court will not be in a position to determine what the will of the people of Mogondo was clearly.

I risk substituting the will of the people of Mogondo expressed on 4/3/2-13 and whatever it was, the only appropriate relief is for this court to return the matter back to the people of Mogondo Emurua Dikirri constituency to decide whom their leader is.

This reminds me of one of my speeches which I gave in that constituency during the first judicial marches in the month of March 2012.

I recall telling the public that it is better matters of election being determined at the ballot and not anywhere else as that's where the will of the people is.

The IEBC has the mandate and resources to conduct a proper election. They just have to get it right this time.

In the premises I order that the election be nullified and fresh elections to be conducted afresh, and the people of Mogondo Emurua Dikirr to determine who will represent them in the county assembly.

ISSUES OF COSTS

The costs in an election petition are to follow the event.

Rule 36 of the Election Rules stipulate that 36(1) (b)

“The court shall at the conclusion of an election petition make an order specifying

(a) The total amount of costs payable.

(b) The person by and to whom the costs shall be paid.

When making this order for costs the court may

(a) Impose the burden of payment on the party who has caused an unnecessary expenses whether such party is successful or not, in order to discourage any such expenses.”

The 1st respondent was a victim of the failed system. Nothing touches on him. He is not responsible in any way to the filing of this petition. As for 2nd and 3rd respondents they are liable as their failure to explain what happened leading to the discrepancies means they are liable and shall pay costs in favour of the petitioner and the 1st respondent.

DISPOSITION

I wish to thank the members of the public for handling themselves in decent and peaceful manner. I wish also to thank the parties for showing a lot of maturity and patience in and out of the court.

I would also like to thank the counsels representing their clients. Indeed they showed that they were professionals and showed high calibre, of the the bar.

I wish not to forget the members of the security both regular and administration police being led by Cpl Hadija. I wish also to thank most sincerely the clerks under leadership of the Executive Officer Mr. Masira.

I am indeed indebted to them for ensuring the counting went on smoothly.

FINAL ORDERS

These are my final orders

a) I hereby declare that MIBEI KENNEDY KIPSANG was not validly elected as member of County Assembly Mogondo ward.

b) I direct that fresh election be held for Mogondo County Assembly ward.

- The certificate in accordance with section 86 of the Elections Act 2011 shall issue.
- d) 2nd and 3rd respondent shall bear the costs of the petitioner and 1st respondent. The petitioner and the 1st respondent to fill their bills for taxing in this Honourable Court.
- e) The security shall be released to the petitioner.

DATED AND DELIVERED AT KILGORIS THIS 23.08.2013

BENARD OCHIENG ONDEGO,

SENIOR PRINCIPAL MAGISTRATE(Ag.)

KILGORIS.

Judgment delivered in open court in presence of Mr. Oguttu for the petitioner Mr. Otieno for 1st Respondent, Mr. Odhiambo for 2nd and 3rd respondents C/c and interpreter Bett by me Ochieng B.O. SPM(Ag.) at Kilgoris this 23rd August, 2013.

S.P.M. Ag.

23.08.2013

Mr. Oguttu: We wish to extend our gratitude to you the chair, the court staff and security personnel that ensured that the entire proceedings were carried out and undertaken in a peaceful and suitable atmosphere.

Election issues are very emotive and the parties and their handlers ordinarily exhibit a lot of tension. I want to say that in this matter the parties and their handlers observed due decorum, and we want to say we are grateful.

Otherwise we thank court for endurance and patience. Election case require a lot of soul searching we thank you so much.

Mr. Otieno: We adopt the submissions. We appreciate particularly we thank the court for the concentration. We note the court extended beyond the research by counsels we are grateful.

Mr. Odhiambo: I share the same with the counsel. We thank the court for going through the evidence. The judgment speaks for itself it had been lengthy and a lot was put in research and coming up with the same.

We thank court for the diligence. For purposes of advise our client, we pray for supply with the copy of the judgment so that we advise them accordingly.

S.P.M. Ag.

23.08.2013

Court: Once again thank you. I promise the parties that they will get copies of the certified typed proceedings by end of next week that is by 30th August, 2013.

S.P.M. Ag.

23.08.2013