



REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATE'S COURT AT NANYUKI
THE ELECTIONS ACT 2011
PETITION NO. 1 OF 2013

EPHANTUS KARIITHI MWANGI..... PETITIONER

AND

THE I.E.B.C.....1ST RESPONDENT

PAUL KURENYI LESHUEL.....2ND RESPONDENT

JUDGEMENT

Following the General Elections held on 4th day of March 2013, the 2nd respondent herein was returned as member of County Assembly representative for Mugogodo East Ward. The Elections were conducted over by the 1st respondent (I.E.B.C).

The petitioner, being dissatisfied with the manner the Elections were conducted, filed his petition dated 2nd April 2013, on 3rd April 2013. The petitioner seeks the following orders:

- a. It be determined that the said PAUL KURENYI LESHUEL was not dully elected and the Election was void.
- b. There be scrutiny of the votes of Mugogodo East Ward.
- c. There be a recount of the votes of Mugogodo East Ward.
- d. That there be a proper examination of the tallying of Mugogodo East Ward.

The grounds set for the challenges, are discernible from the petition and the Affidavit in support sworn by the petitioner on 22nd March 2013, in brief as follows:- He was aggrieved that the elections were not conducted in a just and fair manner, that the elections of 2nd respondent was marked with discrepancies and malpractice. The petitioner complained that the I.E.B.C official in charge of Mugogodo East Ward polling centre conspired with **PAUL KURENYI LESHUEL** to ensure that he emerged winner. Petitioner also averred that the ballot boxes from Mugogodo East Ward reached the tallying centre in the afternoon of the 5th March, 2013 and the same was received with broken seals at the tallying centre. The petitioner contended that the electoral officers gave doctored results to elevate **PAUL KURENYI LESHUEL**. That same ballot boxes were opened and counting done at the tallying centre, which led to inflated figures. He further complained that what agents got and what was announced at the tallying centre by the electoral officials did not tally.

The first respondent filed its response to petition. The 1st respondent filed a replying affidavit sworn by the Returning officer of Laikipia North Constituency on 22nd April 2013. He stated that the Elections for

Member of County Assembly of Mugogodo East heard was conducted transparently, freely and fairly in accordance with the constitution of Kenya 2010 and the electoral Laws of the land. He further denied all the contents contained in the petitioners petition.

The 2nd respondent also filed his response to the petition. He filed a response dated 16th August 2013, denying the allegations in the petition.

Several interlocutory applications were filed before the petition ----- for full hearing. The same were disposed off and the petition scheduled for hearing. But, on 20th June 2013, during the pre-trial conference, the issues for determination were filed by the petitioner were considered. The following issues were finally adopted to be the issues for determination.

1. Whether there was any conspiracy between the 1st respondent officials and the 2nd respondent in ensuring victory of the 2nd respondent?
2. What time did the ballot boxes from Mugogodo East Ward reach the tallying centre and whether the arrival affected the result?
3. Whether the ballot boxes from Mugogodo East heard were received at the tallying centre with broken seals?
4. Did the 1st respondent return the validly elected winner for Mugogodo East Ward?
5. (a) Whether any ballot boxes from Mugogodo East Ward were opened at tallying centre and a re-count done?

(b) If (a) is to the affirmative whether such re-count affected the results.
6. Whether there was any discrepancy between results announced at the polling centre and those at the tallying centre and if so whether such discrepancy affected the validity of the results?
7. Whether the elections at Mugogodo East Ward were conducted in a transparent fair and just manner?
8. Whether the petitioner is entitled to the relief sought?
9. Who bears the costs for the petition?

After disposing off the interlocutory applications that had been filed, this court heard oral evidence adduced by the witnesses called by the petitioner, the 1st respondent and the 2nd respondent. A total of nine (9) witnesses were heard. All of whom filed affidavits in compliance with rule 12 of Election petition rule 2013, before giving evidence. Before witnesses testified, the petitioner raised issue with form 36 supplied to them by 1st respondent alleging that is not a proper form 36. Also form 35 for Ngenia Secondary School polling station had not been supplied to the petitioner. This court will deal with the two aspects raised, later in this judgment.

Evidence in brief!

The petitioner testified as the first witness. His evidence were that he vied for member of county Assembly for Mugogodo East Ward, under G.N.U Party ticket on 4th March 2013, general elections. He had party agents in polling stations within the said ward. At Dol dol tallying center, he said he experience some problems, as ballot boxes from Arjijo Primary School polling station, Mumana Irusha and Ilgwesi Banda Polling stations reached tallying center on 5th March 2013. He said results he received from his agent from Arjijo Primary School polling station was different from what was announced at the tallying center. His evidence was that he garnered 3 votes, the 2nd respondent garnered 80 votes, but at the tallying center, it was announced he got (0) zero votes and 2nd respondent got 107 votes. The 2nd respondent votes were inflated by 27 votes and his reduced by 3 votes. He said he would have been a winner if proper tallying would have been done. The problem in Arjijo Primary School polling station

was similar in Mumana Irusha and Ilgvesi Banda. Further his evidence were that ballot boxes were opened and re-counting done at the tallying centre, his agent did not sign form 36 and he wrote a complaint to the Chairman IEBC, adducing P.Exhibit No.1 He was not given form 35 and the same not affixed at the tallying center and at Arjijo Primary School Polling Station.

The petitioners 2nd witness, testified that he was a presiding officer at Dol dol tallying center Laikipia North Constituency, having been employed by 1st respondent on 4th March 2013. He said he recovered Form 34 and Form 35 on 5th March 2013 at 10.00 A.m to 11.00 A.m, and he expected them on 4th March 2013 at 10.00p.m. At the tallying center he said ballot box for Ngenia Secondary was re-opened. He said he noticed an anomaly on documents presented by the presiding officer for Arjijo Primary School, as there were a cancellation on 35, which he was asked to counter sign.

The petitioners, 3rd witness in his testimony told the court he was a G.N.U Party Agent in charges of Mugogodo East. He told the court that when results for Arjijo Primary School polling station were announced, it did not match results he was given by his agent at Arjijo Primary School, polling station. His evidence were that the petitioner had received 3 votes but 0 (zero) votes were announced, the 2nd respondent had garnered 80 votes but 107 votes were announced. He further said results for Arjijo Primary School which is a nearer polling station arrived the tallying center late on 5th March 2013, at 11.30A.m. He said he was not given form 35 and also said he complained to Returning Officer who could not listen to him. He was at the tallying center from 4th March 2013 to 5th March 2013. On being referred to page 27 of polling day diary for Ilgvesi he said it does not indicate time ballot boxes were presented.

The petitioners, 4th witness testified that he was the chief campaigner for the petitioner during the campaigns prior to the general elections. He said, he voted at Ngenia then went to Dol dol tallying center. He met Simon Mutite, who gave him a list of votes he had received from his agents for Arjijo Polling station. The 2nd respondent had 80 votes, but 107 votes were announced, petitioner 3 votes but 0 zero votes were announced.

First respondents evidence were given by the Laikipia North elections co-coordinator and the returning officer. His evidence were that during 4th March 2013 general elections, rules and regulations were duly followed and elections at Mugogodo East Ward were conducted through the law. He said no complaint was taken to him that the election of 2nd respondent was marred with discrepancies. According to his evidence form 35 for Arjijo Primary School showed the winner garnered 107 votes and Simon Mutite 5 votes total votes cast was 112 votes.

On 2nd petitions witness, he said he was a data clerk who would transfer into the computer results and print form 36, 1st respondent exhibit No. 1. He produced polling day diaries for Arjijo Primary School as 1st respondent exhibit 4 "A", "B" for Muruaria Irusha, 4 "C" for Ilgvesi Banda, form 38 1st respondent exhibit No.3.

Further, in his evidence he said the elections were conducted freely and fairly save for the issue of the documentation. He was not aware whether a copy of form 35 was put at the polling station. On 1st respondent exhibit No.4 "a" Judith Korir signed and her signature is not in Form 35. For Arjijo. At paragraph 27 of 4 "a" the names in form 35 are not there. He stated that there was no tampering and interference of the ballot boxes. He admitted not signing 1st respondent. Exhibit No. 3 form 38.

The respondent testified as well calling three other witnesses. In his own evidence, he said he contested for member of county assembly for Mugogodo East, under U.R.P ticket, in the last general elections. He said he garnered 107 votes at Arjijo Primary School while petitioner got 0 votes. He was issued a certificate after he was declared a winner.

On form 35 for Arjijo Primary School polling station, he said his agents told him he signed them, but his agents signatures is not in form 35.

Second respondents 2nd witness was a U.R.P agent stationed at Ilgwesi Bandas polling station told this court he signed form 35. He was at the station until when it was closed. However on being shown form 35 in court for Ilgwesi Banda polling station he confirmed he did not sign it. On 1st respondent exhibit 4 “c”, he said he signed on page 4 but not on page 18, 19, 20 and 27.

The 2nd respondent 3rd witness was a URP agent at Mumama Irusha Primary School polling station. He confirmed that he did not sign form 35. Further he said, his affidavit was read over to him before he signed, he also said he signed so many forms and he did not know what form 35 was. But again said form 35 was pasted at the door of the polling station.

The 2nd respondent 4th witness, testimony, was that he was a URP agent at Arjijo Primary School polling station. ON 1st respondent exhibit No. 4 “a” page 4, he confirmed his name appears there, on page 27 his name is not there. He was present as per his evidence when votes were counted the 2nd respondent garnered 107 votes, petitioner “0” zero votes, Simon Muitite 5 votes. He confirmed Judith Korir was present during the elections. He signed form 35. He confirmed the contents of his affidavit are true. He said form 35 in court is the right form.

SUBMISSIONS:-

As regarding the petitioner, counsel for the petitioner on the issue as to; “whether ballot boxes reached the tallying center with broken seals? – He submitted the returning officer did not sign page 28 of 1st respondent exhibit 4 “A” 4 “B” and 4 “C” to signify he received the ballot boxes form the said respective polling stations.

On whether, there was sufficient evidence to prove that the elections results were doctored so that different results were announced at tallying centre? – he submitted that the genuine form 35 which bears correct results is not the one presented in court; but in the ballot box.

Whether there is evidence of discrepancy in the manner that results were made by the returning officer; - counsel submitted declaration of results ought to be made under regulation 83 (2) of election (General) regulations, 2012 vide form 36. Form 36 does not confirm with mandatory requirements of Election Regulations 2012, and was made on 6th March 2013 after 2nd respondent was issued with form 38.

On the issue of Narrow margin of votes between the 2nd respondent and the

petitioner; he submitted that if proper tallying would have been done, the petitioner would have garnered 2035 votes and respondent 2032 and the petitioner would have been declared the winner.

Whether the election of member of County Assembly was marked with discrepancies and malpractice, the petitioners contention was that regulation 93(1) of Election (General) regulation 2012, provides that documents relating to an election shall be retained in safe custody by the returning officer for 3 years after the elections. He submitted, same seals for ballot boxes were broken. Form 35 for Ngenia Secondary School polling station was not availed, 1st respondent exhibit No.3 had glaring irregularities. It was not certified as it did not bear signatures of returning officer and details of candidates’ occupation and place of residence were blank. On form 35 for Arjijo, he argued the 3 agents who signed did not sign 4 “A” at page 27. He averred that form 35 signed by other agents does not explain why other agents did not sign them. Also polling day diaries for Arjijo, Muruara , Irusha and Ilgwesi Banda were not duly signed.

Counsels submission on the evidence of the respondent and their witnesses was contradictory, hearsay and inevitable. In support of the same, he contended that 1st respondent witness averred party agents were given form 35 and a copy affixed to the door of polling station, but in court he submitted, the witness wouldn’t know if any form 35 was affixed at the door of polling station. He averred that there was massive irregularity because the witnesses were merely appending signatures on documents presented to them by the presiding officers. He finally submitted the evidence of the respondents

corroborate the petitioner's evidence.

2ND RESPONDENT SUBMISSION.

Counsel for 2nd respondent in his submissions to re-visit the submission on rule 10 of Election (Parliamentary and County Elections) petition rules 2010. On evidence, he submitted the petitioner did not attribute any malpractice on 2nd respondent. On evidence of PW2, he stated that the witness did not prove his employment status with 1st respondent.

He submitted that the Affidavit of Judith Korir adopted does not fit within perimeters set out in Section 33 of Evidence Act.

Counsel's, submission on standard of proof, is that beyond a balance of probability relying on case of Raila Odinga & 5 others –Vs- I.E.B.C & 3 others. Responding to the petitioners submissions, counsel contended that prayer (b) & (c) of the petition have been overtaken by events. On issues of broken seals, he submitted that no witness or even the petitioner himself gave serial numbers of the broken seals. He also said the petitioner has not demonstrated how the said breakages affected the results. The issue of doctoring results to reflect different results at the tallying, counsel contended that no other form 35 was availed in court to reveal different results from the one announced.

On issue of unsigned form 38, counsel said, it was not pleaded in the petition. On the narrow margin, he submitted election cannot be invalidated on the narrow margin of votes. The academic qualification of 2nd respondent raised, was submitted by Mr. Mwangi counsel for the 2nd respondent as a fishing expedition as it was not among the issues raised. And the court lacks jurisdiction to determine the same.

On the affidavits filed by the petitioner and its witnesses, he submitted that it offends Section 35 of Advocates Act, relying on case of Ochieng Sese –Vs- Johnson Ocharo (2005) CKLR. He finally sought the petition be dismissed with costs.

FIRST RESPONDENTS SUBMISSIONS.

Mr. Kariuki counsel for 1st respondent submitting on whether there was conspiracy between 1st respondent officials and 2nd respondent to ensure victory of 2nd respondent contended that the petitioner did not lead any evidence to demonstrate conspiracy. On the late arrival of ballot boxes to the tallying center, he submitted that the petitioner did not adduce any evidence of the time ballot boxes arrived the tallying center and how the same affected the results. The issue of ballot boxes being received at the tallying center with broken seals, counsel submitted, the petitioner did not give details of seals from which boxes were broken at the tallying centre.

On whether the 2nd respondent was validly elected, he submitted the petitioner garnered 2059 votes and 2nd respondent garnered 2032 hence the 2nd respondent was declared the winner. He urged the court that, failure to sign declaration form shall not invalidate the results announced under regulation 79 (b) of the Elections (General) Regulations 2012.

He contended that no ballot boxes were opened at the tallying centre. He submitted that the elections of 4th March 2013 were free, fair and transparent. He quoted case of Jared Odoyo Okello –Vs- I.E.B.C and others, High Court at Kisumu.

On the reliefs sought by the petitioner, he submitted that no legal basis has been laid to demonstrate that the 4th March, 2013 Mugogodo East Elections were illegal. He urged the court to be guided by Section 83 of the Elections Act, 2011. On issue of costs, he submitted Section 84 of Elections Act, as well as Articles 27 (1), 40,50, 159 of the constitution.

Other issues were raised, counsel for 1st respondent submitting on Section 22 (1) (b) on qualification of

the 2nd respondent, relied on case of Johnstone Muthama –Vs- Minister for Justice and Constitutional Affairs & Another, where the court held Section 22 (1) (b) of the Election Act 2011, unconstitutional addressed is on form 36 which is unsigned. He averred rule 79 (b) of Elections (General) regulations 2012, provides that failure of an agent to sign declaration form shall not invalidate results announced. Further he submitted that the affidavits of witnesses who did not attend court for trial to be expunged from court record. On form 35 for Ngenia Secondary School he submitted the same can be found in the ballot box. He finally urged the court to dismiss this petition with costs.

Although the petitioner filed a total of (8) eight witness affidavits including (his) petitioners, he only managed to avail 3 witness to give oral evidence in court who were duly cross-examined by the 1st and 2nd respondents advocates. The petitioners sought the affidavit of Judith Korir to be considered without necessarily calling her to adduce oral evidence in court and for cross-examination. This was necessitated by alleged threats on the life of the said witness, and after, the court made several attempts to secure her attendance to court. That is through court summons failed. The court adopted to consider the contents of her affidavit pursuant to Section 33 of the evidence Act. However, in considering such untested evidence of Judith Korir, this court shall exercise caution and warns itself on the dangers it may pose. On the part of the petitioner, he testified as first witness in court in support of the petition and was cross-examined accordingly.

The 1st respondent called the returning officer for Laikipia North constituency who gave oral evidence and was also cross-examined accordingly as well the 2nd respondent with his 3 witnesses.

The petitioner prayers sought in the petition (b) (c) and (d) were disposed vide the ruling delivered by this court on 26th July 2013; however the court shall still re-visit the issue of the integrity of the ballot boxes. The court also, pursuant to rule 21 of the Election (Parliamentary and County petition rules, 21 received ballot boxes, it took note of the ballot boxes serial numbers and the seals used to seal the same. A record of the same kept as part of court records, the same shall be considered.

Nonetheless, after reading the pleadings filed by the parties herein in support of their respective positions. Evaluating the oral evidence of the witnesses who testified and after considering submissions filed by the counsel for the respective parties to this petition, I am now left to determine the issues that were framed during the pre-trial conference held on 20th June 2013 which I earlier enumerated above.

In determining election petitions the court shall be guided by the constitution of Kenya, Elections Act 2011 and Regulations and the Election rules (Parliamentary and County) petition rules 2013. Article 81 of the constitution establishes the general principles for the electoral system. Those who are charged with the responsibility of conducting elections, must ensure it is conducted in a free and fair manner embracing secret ballot, free from violence, intimidation, improper influence or corruption, conducted independently, transparency, administered in an impartial, neutral, efficient, accurate and accountable manner.

It would be on the basis of the said principles laid by the constitution of Kenya, 2010, the evidence adduced in this petition that the prayers sought in the petition and issues framed and issues that arose at the course of hearing of the petition will be determined.

The will of the people of Kenya to exercise their political rights should at all times be protected, as enshrined in Article 38 of the constitution. The will of the people should not be subverted and unreasonable restrictions should not be imposed for a voter to exercise his or her right, in this case, the people of Mugogodo East Ward.

Also to note in determining this petition is Section 83 of the Elections Act. It provides as follows:

“ 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 the Election”.

The court is therefore supposed to look into the irregularities that may be present by the petitioner or noted in seeking the nullification of the results. If the same does not substantively affect the results or change the will of the voters, then it would be improper to nullify the particular elections.

The High Court in Kitale in Charles Maynta Chedotum & Another – Vs- I.E.B.C and 2 others, Election Petition No.11 of 2013 cited the decision in the English case of Morgan and Others -Vs- Simpson and Another (1974) 3 all ER 722, where it was stated that: “An election court was required to find an election invalid (a) if irregularities in the conduct of 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

The court in determining this election petition shall take ---- regard to the afore-stated principles and provisions of the law.

As regards to the standard of proof, it is this court's view that the petitioner must discharge and persuade the court that the allegations he has pleaded in his case are correct. As was stated in the case of :

Raila Odinga -Vs- I.E.B.C & Others Election Petition No.5 of 2013:

“Whether a party alleges non-conformity with the electoral law, the petitioner must not only prove that there had been non-compliance with the law, but that such failure of compliance could affect the validity of the election. It is on that basis that the respondent bears the burden of proving the contrary. This emerges from a ----- standing common law approach in respect of alleged irregularity in the acts of public bodies “ *Omnia praesumuntur rite at solemniter esse acta*”. - *All acts are presumed to have been done rightly and regularly. So, the petitioner must set out by raising firm and credible evidence of the public authority's departures from the prescription of the Law*”.

Therefore, allegations of malpractice, irregularities, breach of the electoral law must be proved by the petitioner to the set standards required.

In this petition regarding the first issue for determination, whether there was conspiracy between the 1st respondent officials and 2nd respondent in ensuring victory for 2nd respondent, having considered the evidence tendered by the petitioner, I do not find any evidence to prove any sort of conspiracy. The petitioner and his witnesses did not adduce any evidence to demonstrate there was conspiracy between the officials of 1st respondent I.E.B.C. And 2nd respondent. In fact during cross-examination by the 2nd respondent counsel, the petitioner himself said - “ I do not have any evidence of conspiracy”.

The petitioner did not lead any evidence, to show which I.E.B.C. Officer and the 2nd respondent conspired to have the 2nd respondent declared the winner. I have not seen any evidence as to the nature of conspiracy, the place the conspiracy took place. Further, the 2nd respondent in his own evidence told the court that on 4th March 2013, he did cast his vote at Melau Nayou Primary School polling station, then he proceeded home to watch the television, up to 9.30p.m when he went to Dol dol tallying center. His evidence to that effect were not controverted, therefore it is clear the 2nd respondent did not visit any other polling station or even remained in the polling station he voted, to conspire with any of 1st respondents officials. This court therefore holds that there was no conspiracy between the 1st respondent officials and the 2nd respondent to have 2nd respondent declared winner.

This court will now consider the evidence adduced by the petitioner to establish, what time the ballot boxes from Mugogodo East Ward reached the tallying center and whether the arrival affected the results? Firstly, I will consider the evidence on time the ballot boxes reached the tallying center. PW1, the petitioner in his evidence told the court, results and ballot boxes from Arjijo Primary School, Muruari Irusha Primary School and Ilgwesi Banda polling stations reached the tallying center on 5th March 2013 yet they are nearer polling stations to the tallying center. But on his Affidavit at paragraph 4 he deposed that the ballot boxes for Ol-Arjijo Primary School polling station reached polling station at 7.30p.m. Petitioners evidence to that effect are contradicting, I hence will not rely on the same solely on the issue of time which ballot boxes reached the tallying center. However, the PW2 was employed by 1st respondent as date entry person that was confirmed by the 1st respondent witness, who is the returning officer for Laikipia North Constituency. He PW2 was present at the tallying centre all along. His evidence were that the ballot boxes and results for Ol Arjijo Primary School polling station reached the tallying center on 5th March 2013 at around 11.00 A.m. His evidence was corroborated by PW3 and PW4 to that effect. The Returning Officer on his part said the ballot boxes reached tallying center at 2.00A.m. In that case therefore, I have perused the polling day diaries for Arjijo Primary School, Muruama Irisho and Ilgwesi, Banda polling stations. None of the polling day diaries for the polling stations stated has the dates at which it was received at the tallying center, as required (See page 27 and 28) of the said polling day diaries. I therefore hold that the ballot boxes and the results for Ol Arjijo Primary School, Muruama Irusha and Ilgwesi Banda polling stations reached the tallying center on 5th March 2013 as alleged by the petitioner. The returning officer did not sign receipt of the ballot boxes and results upon receipt of the same. It cannot therefore be said with certainty that the ballot boxes reached tallying center at 2.00A.m as stated by the returning officer. On whether, the arrival of ballot boxes and results affected the results?. I have not been led to the evidence to demonstrate how the late arrival of ballot boxes or results affected the result.

Another issue for determination is whether the ballot boxes from Mugogodo East Ward were received with broken seals at the tallying center. Having evaluated the evidence on record, I do not find any evidence tendered by the petitioner or his witnesses to prove the allegation. The petitioner has not tabled the details of the particular ballot box, the details of the serial numbers broken to prove his case. However, during the hearing of this petition, this court took details of serial numbers of the ballot boxes and serial numbers for the seals used to seal the boxes. From the details, taken it is quite clear that serial numbers for the seals of the ballot boxes for Olekenyei Primary School, one seal was broken, Ngenia Primary School, one seal was broken, Mia Moja primary School, one seal was broken. The Returning officer who testified as 1st respondent witness explained that the breakage may have resulted during or at the course of transportation and storage.

I have however not been told how the broken seals affected the results. Further, the explanation given by the Returning officer is reasonable and acceptable, as the breakage was not so grave such that it would allow access to the contents of any ballot box. All the ballot boxes whose seals were broken had five (5) seals and only one of each was broken. Still access to the contents therein could not be possible in the circumstance. I therefore hold that the breakage of the seals has not affected the results of Mugogodo East heard.

As regards to the issue whether 1st respondent return the validly elected winner for Mugogodo East Ward. Counsel for the petitioner submitted that the petitioner is a Primary School graduate and his nomination was illegal and contravention of the law. He submitted that was contrary to Section 22(1) (b) and 25 (1) (b) of the election Act, 2011. Counsel for 2nd respondent in his submissions averred that issues to do with disputes arising act of nominations is a preserve of I.E.B.C. As provided under Article 88(4) (8) of the constitution and Section 74 of the Election Act. He contended that this court has no jurisdiction to deal with issues of nominations.

Indeed, during cross-examination of the 2nd respondent by the petitioners counsel the 2nd respondent admitted he was a Primary School graduate. That was a nomination issue which should have been handled by the 1st respondent pursuant to Article 88 (4) of constitution and Section 74 of Election Act. I

agree with 2nd respondent counsel that this court does not have jurisdiction to deal with matters arising out of nomination. I will not consider the issue. However, I shall duly give my final finding on issue 5(a) whether 1st respondent returned validly elected winner.

The other issue raised is whether any ballot boxes from Mugogodo East Ward were opened at the tallying centre and a re-count done? And if the answer is to the affirmative, whether such re-count affected the results? PW2 in his evidence stated that ballot boxes for Ngenia Secondary School was re-opened at the tallying centre where he was based. The 1st respondent witness denied that ballot box was re-opened at the tallying centre and results doctored. The petitioner did not call any other witness to corroborate his evidence on the issues of re-opening of ballot box for Ngenia Secondary School. Pw2's evidence required corroboration as the 1st respondent who is the returning officer controverted his evidence. I therefore hold that no sufficient evidence have been tendered by the petitioner to demonstrate that ballot box for Ngenia Secondary School was re-opened at the tallying centre and re-counting done. Since, I have held no ballot box was re-opened, issue 5 (b) will not be considered.

The petitioner other complainant, in respect to issue No. 6 as framed, complained that there was discrepancy between results announced at the polling station and those at the tallying centre. In particular, the petitioners complaint was that his agent at Arjijo Primary School polling station told him he garnered 3 votes, the 2nd respondent 80 votes, but at the tallying centre, he said it was announced he got (0) zero votes and 2nd respondent got 107 votes. Eventually, the 2nd respondent was declared winner with a total of 2059 votes and his votes were 2032, yet, he would have been the winner. His evidence was corroborated by that of PW3 and PW4.

The 1st respondent witness, the returning officer in his evidence, told the court as per form 35 for Arjijo Primary School polling station, the winner got 107 votes, Simon Mutite 5 votes and total votes cast was 112. The 2nd respondent in his evidence said he garnered 107 votes at Arjijo Primary School polling station; petitioner got zero (0) and Simon Mutite got 5 votes.

The 2nd respondent witness number 4 in his evidence said he was URP agent at Arjijo Primary School polling station. On being shown 1st respondent exhibit No.4 "a", he confirmed his name was not there. He corroborated the evidence of 2nd respondent that, the 2nd respondent at Arjijo Primary School polling station garnered 107 votes, petitioner (0) zero votes and Simon Mutite 5 votes. The petitioner further complaint was that, the same --- also happened at Murmana Irusha and at Ilgwesi Bandas Polling station. There were no much details given by the petitioner in respect to Muruana Irusha and Ilgwesi Banda polling stations compared to the one of Arjijo Primary School polling station.

The main thrust of the complaint made by the petitioner is that form 35's which contain the results for the polling stations, Arjijo Primary School, Murmana Irusha and Ilgwesi Banda presented in court are not the genuine ones. His contention is that the ones presented in court does not depict the true results announced at the particular polling stations. The petitioner did not avail a witness in court to give an account of what happened at Arjijo Primary School polling station. The reason for not availing their witness who was a GNU agent was explained and this court noted that concern of threats against her. However, since her evidence ---- not tested, I shall be careful in considering the same.

I have perused the affidavits filed by the 2nd respondents witnesses who were at the polling stations, whose results are in contention. That is Ilgwesi Banda, Muruamana Irusha and Arjijo Primary School pooling stations. They all swore affidavits that they signed form 35's in the respective polling stations; they were attached as URP agents. At Ilgwesi Banda polling station Saita Gitonga stated he was URP agent there, in his evidence he said he did not sign form 35. on the part of 2nd respondent's witness number 3, Ramson Tumbes Legei was at Muruana Irusha polling station. In his evidence, he said did not sign form 35 shown to him. He further stated hat he does not know what form 35 is, and later again said form 35 was pasted at the door of polling station. At Arjijo Primary School polling station, Augustine Lemarti Murio was the URP agent there. On cross-examination he said he did not sign form 35. All the 3 witnesses called by the 2nd respondent stated that there were so many forms they signed and they did not

sign others.

Having, looked at form 35's for Ilgvesi Banda, Muruaman Irusha and Arjijo Primary School polling stations, I find none of the 2nd respondents witnesses appended their signatures, to 1st respondent. Exhibit No. 2(a), 2 (b) and 2 (c) form 35's could it then be concluded the form 35's presented in court are not the genuine one's signed at the polling station?. If indeed as deponed by the witness they signatures, I am convinced the form 35's 1st respondents exhibit No.2 (a), 2 (b) and 2 (c) are not the genuine ones showing the exact results as announced in the respective polling stations. There was a discrepancy which of course affected the results as form 35 bears the results of a particular polling station for a particular post.

Regulation 79 (2) (b) requires a presiding officer to request each candidate or their agents to append their signatures on form 35. if a candidate or an agent refuses to sign the form 35 under regulation 79 (3) of the election regulations, the candidate or agent is required to record reasons for such failure or refusal, to sign. Regulations 79 (4) requires a presiding officer where a candidate or an agent refuses to record the reasons for refusal or failure to sign the declaration form, the presiding officer shall record the fact of their refusal or failure to sign the declaration form. Under regulation 79 (5) where a candidate or agent of a candidate is absent, the presiding officer shall record the fact of their absence. Regulation 79 (b) of Election regulations provides that the elections results shall not e invalidated by the fact that a candidate refused to sign form 35 or was absent when form 35 was filled. The 2nd respondent case was that the petitioner did not adduce evidence to show the 1st respondent denied them an opportunity to sign requisite document during the polling day. The petitioners contention is that the lack of signatures of candidate or their agents in the form 35 and polling day diaries to evidence of that election process lacked transparency.

I have considered the -----submissions by the counsel for the parties herein. Indeed having held that forms 35 presented in court are not the genuine one's. I still comment on the same on compliance with the law. Participation of candidates or their agents in an electoral is an important component of electoral process. It promotes transparency and accountability. The presiding officers if I am to presume the form 35 presented in court are the genuine ones, failed in their statutory duty to state the reasons why some of the candidates or their agents refused to sign form 35 or failure to record their absence. It is my considered view that the results contained in form 35, 1st respondent, exhibit 2(a), 2(b) and 2(c) are invalid. The regulations, particularly regulation 79 (2) of election regulations is couched in mandatory terms. The word "shall" has been used, therefore the presiding officer had no option but to comply, however he failed.

Another issue raised by the petitioner was that they were not supplied with form 35's, declaration of the results. The 1st respondent witness was at the tallying centre and stated that he would not know whether form 35 in the respective polling station was provided to each political party, candidate or agent. The 2nd respondent's witnesses did not know or understood what form 35's were. In regard to form 35 for Ilgvesi Banda, mumana Irusha and Arjijo Primary School polling station, the petitioner averred, that he was not supplied with the same. No evidence were tendered to the contrary of the petitioners assertion. The 1st respondent did not avail the presiding officers of the 3 polling stations where the petitioner alleges he was not supplied with form 35 to rebuilt the evidence of the petitioner and his witnesses. It is even clear form 35 for Ngenia Secondary School was not supplied as ordered by this court, up to date. That being the case, the petitioner has proved to my satisfaction that they were not supplied with form 35, contrary to Regulation 79 (2) (c) of Election Regulations.

The other issue for determination is whether the elections at Mugogodo East Ward were conducted in transparent, fair and just manner?. As I have stated earlier that the evidence tendered establish that the petitioner was not supplied with form 35 "a declaration of results", it is my considered view that failure amounts to lack of transparency, of elections. The failure of the electoral officials to promote equality by complying with regulation79 (2) (c) of Election regulations was a promotion of unfairness and failure to undertake their responsibility.

Also to note is the evidence of 2nd respondent's witnesses, who testified that they were signing forms after the elections which they did not know what forms were. In their affidavits they were categorical they signed form 35, but while giving evidence in court they confirmed they did not sign the same form 35. The signing of documents by the said witnesses without knowledge of what the documents constitute in effect was a demonstration of lack of transparency in the electoral process. Transparency demands that the participants in an election process understands what is happening and knows what documents he or she is suppose to sign before appending signatures.

I have examined 1st respondent exhibit No.1, form 36. it is dated 6th March 2013. A look at 1st respondent exhibit No. 3, form 38 is dated 5th March 2013. The 1st respondent's witness explained in court that upon receipt of results from polling centers, the same are filled in form 36, 1st respondent exhibit No.1, then once all results from all polling stations have been availed, he announces the final result, from the entries in form 36.

Though he explained there was no source of power to print out form 36, on 5th March 2013, as it was a soft copy, I am not convinced why the certificate of results form 38 is dated earlier than date in form 36. Even if there was no power to print out the soft copy, that cannot be an excuse for the date in form 38 indicate earlier. It therefore rests that, the 2nd respondent was issued with a certificate before the results were declared. Further, though not pleaded in the petition, form 38 is not signed by the Returning officer as required. The court cannot close its eyes when it notices an anomaly, there is nothing which stops the court from considering such faults, to ensure justice is not only done but seen to be done. In the circumstances, a serious electoral malpractice was apparent during the conduct of the elections for the post of member of County Assembly for Mugogodo East Ward.

The 2nd respondents counsel in his submission re-visited issues to do with rule 10 of the election (Parliamentary and County Elections) petition rules, 2010. He urged the court to re-consider the submissions and arguments made while prosecuting their application dated 27th May 2013. The 2nd respondents application on rule 10 was heard, submissions of the respective parties considered and this court delivered its ruling on 18th June, 2013. The courts finding is still intact and in place, however if the 2nd respondent is seeking for a review or an appeal, then this is not the form to entertain the same.

The 2nd respondent in reply to the petitioner's contention that form 35's in court are not genuine, counsel submitted the petition has not availed any other form 35. The said form 35 as I have earlier held was not supplied by 1st respondent officials to the petitioner. Howe would the petitioner get another form 35?. it should be noted form 35 is a statutory document containing declared results, one cannot generate his own.

The 1st respondent in regard to form 35 for Ngenia Secondary School polling station explained that form 35 is in the ballot box. This court could have evaluated the anomaly raised in respect to form 35, if it could have been in a position to order. For a scrutiny of the contents in the ballot boxes. Unfortunately, this court could not possibly have ordered for the said ballot boxes to be scrutinized when the integrity of some of them had been seriously brought into question as a result of the breakage of the IEBC warehouse where the ballot boxes were kept and contents of some of the ballot boxes tampered with. It is apparent that the said ballot boxes were tampered just before the petitioner's application for scrutiny could be heard. Now investigations into the matter is still going on, and some people who have been accused for the same have been arraigned in court. I leave it at that, as the respective courts will deal with that criminal aspect adequately.

It is also imperative to note that rule 15(7) of elections (Parliamentary and County Assembly) petition rules 2013, has borrowed the entries provisions of order 19 of the civil procedure rules 2010. order 19 (7) provides,; "The court may receive any affidavit sworn for the purposes of being used in any suit notwithstanding any defect by mis-description of the parties or otherwise in the title or other irregularity in the form thereof or on any technicality".

The a foregoing provision adequately cures the anomaly raised in respect to the form of the affidavits.

An election court, such as this is mandated by law to determine whether a person declared by an electoral body as a winner of an election was validly elected. As was held, by the learned Judges I. Lenaola in Bernard Shimalo Masaka -Vs- Boni Khalwale & 2 others (2011) CKLR. Page 39. The judge held:-

“An election court, such as this one, is the body mandated by the constitution and stature (Section 19 of the Act) , to determine whether a person has been validly elected as a member of the National Assembly, where such a court is confronted with a situation where the process, from voting to tallying, cannot be validated, then it would be a ----- of duty for that court to say that the process was fair and the will of the electorate should be left to stand -----“

Indeed the process of election of Mugogodo East Ward for member of County Assembly, in the circumstances prevailing can't be validated. An electoral system should at all cost be designed to implement the will of the people. This court is meant to ascertain the intent of votes for Mugogodo East Ward. As was observed by D.S Majanja J, in Richard Kalembe Ndile & Another –Vs- Patrick Musimba Musau, Machakos High Court, Election Petition 1 (consolidated with petition No.7 of 2013, the learned Judge held”.

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

The petitioner has to establish his case to the required standard of proof. In election petition, the standard of proof is higher than on a balance of probabilities, but lower than beyond reasonable doubt. The court in case of William Kabogo Gitau –Vs- George Thuo & 2 others (2010)CKLR cited with approval decision of Marage J in Joho –Vs- Nyange & Another (No.4) (2008) 3KLR (EP) 500 at page 507 where the learned judge set out what constituted the burden of proof and the standard of proof that ought to be discharged in an election petition; as follows:

“ I agree with counsel for the second respondent that the petitioner being the one seeking to nullify an election he has the burden of proof. As to the standard of proof, whereas I agree with the holding in Mbowe –Vs- Eliufoo (1967) EA 240 that it has to be proved to the satisfaction of the court and that the court cannot be said to be satisfied when it is in doubt. I would, however, not say that the standard of proof required is beyond reasonable doubt. Like in fraud cases, I would say that the standard of proof required in election petitions is higher than on a balance of probabilities. And where there are allegations of election offences having been committed, as the election court in Joseph Wafula khaoya –Vs- Eliakim Ludeki & Lawrence Sifuna Election Petition NO.12 of 1993 held a very high degree of proof is required”

In the instant case, the petitioner has discharged his responsibility of proving his case. The question then is has he met the thresholds of proving the case to the required standards?. I have already found that, form 35 presented in court is not the one showing the actual results in polling stations of Arjijo Primary School, Mumana Irusha and Ilgvesi Banda. That being the case, I do not find that the will of the voter can be ascertained. Noting the margin between the winner of member of County Assembly for Mugogodo East Ward and the petitioner was narrow, I hold that the irregularities established and proved by the petitioner proves the petitioner's case to the required standards.

There were irregularities in the manner the electoral forms were filled, the same are so serious as it affects the validity and the integrity of the results. In the case of Bernard Shimoni Masaka –V-Boni Khalwale & 2 others (2011) CKLR I. Lenaola, learned Judge cited with approval decision of Rawal J. In Reuben Ndolo –Vs- Dick Wathika & 2 others E.P 11/2008 (Nbi), when she stated:-

“ Where in the same circumstances as in this case the form 17A had arithmetical errors, the form 16A's were not signed by the presiding officers, their candidates and/or their agents, the court (must nullify) the election of the 1st respondent. The---- upshot of all the above is that (where evidence of serious and admitted or undisputable anomalies and non-compliance of important and mandatory provisions of the electoral law by the electoral officials are placed before the court (then) this court in all

fairness has no option but to come to the conclusion that the Parliamentary election of Makadara Constituencies was not free, fair and transparent and that the 1st respondent was not validly elected as the member of parliament of the said constituency”.

The returning officer for Laikipia North, in this petition did not sign form 38 presented in court, form 38 was issued before results in form 36 were announced, the candidates and/or their agents did not sign form 36 as required by the regulations. What then should follow? I am guided by the decision taken by the learned Judge I. Lenaola in Bernard Shinali Masaka Case. The results declared, I hold are irrelevant.

It is clear from the evidence that the irregularities and electoral malpractices seriously affected the credibility of the results declaring the 2nd respondent the winner in the 4th March 2013 general elections at Mugogodo East Ward. Form 36 used to declare results for Mugogodo East Ward is riddled with irregularities that the same cannot be considered under any circumstances to constitute a statutory form which stands up in legal and public forum for scrutiny. It therefore cannot be said the elections of the Mugogodo East Ward on 4th March 2013 complied with the general electoral principles expounded in Article 81 of the Constitution of Kenya 2010.

The irregularities electoral malpractices & established by the petitioner, are of such magnitude that this court cannot ascertain the will of the voters of Mugogodo East Ward and determine that the elections were transparent, free and fair.

In conclusion, having considered the pleadings on record, the evidence adduced, written submissions by the respective counsels and the authorities filed, I hold that the petitioner established to the required standard that the elections were not transparent free and fair. I find that the 2nd respondent was not validly elected as the member for County Assembly for Mugogodo East Ward during the 4th March 2013 general elections. This court therefore declares and hereby pronounces the elections and results of Mugogodo East Ward null and void. Consequently, a fresh election shall be conducted for the member of county assembly for Mugogodo East Ward.

A certificate to the effect shall be issued to the commission in accordance with Section 86 (1) of the elections Act, 2011.

Pursuant to Section 84 of the Election Act, costs follows the cause. Since the petitioner has succeeded in his petition he will be paid his full costs; by the respondents, which shall be taxed by the registrar as provided under rule 35 (1) of the Election (Parliamentary and County Election) petition rules, 2013. The security deposited shall be released to the petitioner, pursuant to rule 36 (1) of elections rules.

I appreciate the decorum and courtesy demonstrated and extended largely to one another by the advocates who appeared in this matter, and of course for their excellent research and diligence in the conduct of the petition. I also thank the parties in this petition with their respective supporters for conducting themselves in a peaceful manner throughout the hearing of this petition.

It is so ordered.

V.K. KIPTOON

Senior Resident Magistrate

5/7/2013.

Delivered, signed and dated in open court before me in presence of the counsel/advocate for petitioner Mr. Abubakar, Mr. Mwauura holding brief for Mr. Kariuki for the 1st respondent, Mrs Ndorongo and Mr. Mwangi for the 2nd respondent, petitioner and 2nd respondent also present.

Court Clerk Karanja.

Information Technology: Kenneth

V.K. KIPTOON

Senior Resident Magistrate

5/9/2013.

Court: Right of Appeal explained to the parties.

Mr. Mwangi: I apply for certified copies of the judgment and proceedings to be supplied.

V.K. KIPTOON

Senior Resident Magistrate

Court: Certified copies of judgment and proceeding be supplied to the parties.

V.K. KIPTOON

Senior Resident Magistrate