



**REPUBLIC OF KENYA**

**IN THE PRINCIPAL MAGISTRATE'S COURT AT GICHUGU**

**ELECTION PETITION NO. 1 OF 2013**

WILSON WAWERU WAMBUGU ..... PETITIONER

**VERSUS**

IEBC ..... 1<sup>ST</sup> RESPONDENT

DENNIS OMARE ..... 2<sup>ND</sup> RESPONDENT

KABENGI K. RICHARD ..... 3<sup>RD</sup> RESPONDENT

JAMLICK KARIUKI KIURA ..... 4<sup>TH</sup> RESPONDENT

**J U D G M E N T**

1. The first general election under the Constitution 2010 was held on 4/3/2013 and by the Kenya Gazette Notice No. 3160 dated 13/3/2013 the 4<sup>th</sup> Respondent was returned the winner for the elective post of the member of the County Assembly Ward representative for Njukiini Ward within the Gichugu Constituency of Kirinyaga County.

The Petitioner and the 4<sup>th</sup> Respondent and 4 other candidates had competed against each other albeit under their respective party ticket for the post of member of County Assembly Ward representative for Njukiini Ward. Dissatisfied with the electoral results the Petitioner had on 8/4/2013 filed his petition dated 8/4/2013 which was supported by requisite documents. In his petition the petitioner had prayed as

follows;

*“1. That the Independent Electoral and Boundaries*

*Commission be ordered to produce all the ballot papers cast in respect of the election for Member of the County Assembly for Njukiini Ward.*

*2. That a scrutiny and recount be ordered in respect of all the votes cast in respect of Njukiini Ward for the election of the member of the County Assembly representing Njukiini Ward.*

*3. That it be determined that the said Jamlick Kariuki Kiura was not duly elected and the election was void.*

*4. Costs of this petition.*

The respondents had filed their responses to the petition.

The prayers No. 1 and 2 of the petition were dealt with in my ruling dated 16/8/2013 when I allowed for a partial scrutiny and recount in respect of votes cast in Kanjuu Primary School Polling Station and Ngirambu Primary School Polling Station.

2. The Petitioner, namely, Wilson Waweru Wambugu and his witness, namely, Simon Wachira Mbungu had testified on oath in support of the petitioner’s case as PW1 and PW2. They shall hereinafter be referred to as Waweru and Wachira respectively.

The 4<sup>th</sup> respondent, namely, Jamlick Kariuki Kiura and his witnesses, namely, Ephantus Njogu Murage and Ngaire Kitonyi, had testified on oath as DW1, DW2 and DW3. They shall hereinafter be referred to as Kariuki, Njogu and Ngaire respectively.

The 3<sup>rd</sup> & 2<sup>nd</sup> respondents, namely, Kabengi Nyaga Richard and Dennis Omare had testified on oath as DW4 and DW5.

They shall hereinafter be referred to as Nyaga and Omare respectively.

### **3(a) Summary of Petitioner's case**

Waweru had contested the elective post of the member of the County Assembly (hereinafter referred to as M.C.A.) under the ticket of a political party known as "The National Alliance" and Wachira was his agent in the Kanjuu Primary School Polling Station stream No. 1 on the election day where Nyaga was the presiding officer. That polling started early morning and at between 9.00 a.m. and 9.30 a.m. Nyaga had been instructed by Kariuki to eject Wachira from the polling station. That for no reason at all Nyaga had ejected Wachira from the polling station and that a replacement was found and took over from Wachira one hour after Nyaga had ejected Wachira. That during the one hour when Waweru was unrepresented in the polling station some electoral irregularities had taken place.

That present in the same polling station, namely, stream I

of Kanjuu Primary School Polling Station (hereinafter referred to as Kanjuu Stream I) were 2 polling clerks, namely, Joan and Wawira who were a relative and neighbour respectively of Kariuki. That Nyaga had tasked Wawira with the counting of ballot papers of votes cast for Kariuki and that Wawira had manipulated the results in favour of Kariuki. That Wawira and Joan had committed irregularities in Kanjuu stream which had manipulated the results in favour of Kariuki. That during the counting of ballot papers in the evening, Nyaga had committed irregularities by failing to pick up the ballot papers from the ballot box containing ballots for elective post of M.C.A and reading out the name of the person for whom the ballot was cast.

That Nyaga had instead assigned a particular clerk to collect ballot papers cast for a particular candidate and that each clerk would select ballot papers cast for a candidate for which he had been assigned to collect and count.

That Nyaga did not allow the agents to witness the polling clerks collecting and counting the ballot papers cast for the post of the M.C.A. That Nyaga had properly counted the votes cast for other elective posts by himself picking up each ballot paper and reading the candidate in favour of whom it had been cast.

### **3(b) Summary of the Respondents' case**

Kariuki had stated that he was elected fair and square and by a majority of valid votes cast. He had denied that he had colluded with Nyaga to eject Wachira from Kanjuu stream 1. Kariuki stated that his agent in Kanjuu stream 1 was a lady called Alice. Kariuki further stated that he had garnered 70 votes in Ngiriambu Primary School Polling Station stream 2 (hereinafter referred to as Ngiriambu stream 2) and that the results in form 35 in each polling station of Njukiini Ward had been accurately transposed in form 36 save that the 70 votes cast for him at Ngiriambu stream 2 were erroneously transposed in form 36 as 7 votes.

Njogu had stated that he was Kariuki's agent at Ngiriambu stream 2 where 70 votes were cast for Kariuki.

Ngaire stated that he had sworn an affidavit to state that he was Kariuki's agent in Kanjuu stream 1. In cross-examination Ngaire stated that he was instead Kariuki's agent in Kanjuu Primary School Stream 2 (hereinafter referred to as Kanjuu stream 2). Ngaire had stated that he knew nothing about what had transpired in Kanjuu stream 1. Ngaire had stated that Nyaga had called him into Kanjuu stream 1 to

witness the ejection of Wachira and that Nyaga had wanted Ngairi to replace Wachira in Kanjuu stream 1. Ngairi said he could not remember the presiding officer of Kanjuu stream 2. Nyaga stated that he was the presiding officer in Kanjuu stream 1 and that the polling exercise and counting in that polling station was conducted in a free and fair manner. Nyaga had denied that he had ejected Wachira from Kanjuu stream 1 at the behest of Kariuki. Nyaga said that he had ejected Wachira from Kanjuu stream 1 because Wachira was influencing voters on whom to vote for.

Omari stated that the elections for the post of M.C.A. for Njukiini Ward was conducted in a free and fair manner and he said that it was okay if Nyaga had called Ngairi into Kanjuu stream 1 to witness Nyaga eject Wachira from Kanjuu stream 1. Omari stated that Waweru's protest letter of complaint against the conduct of Nyaga had been received by Omari's employer, namely, The Independent Electoral & Boundaries Commission (hereinafter referred to as the I.E.B.C.). Omari stated that 2 forms 36 had been generated with respect to Njukiini Ward and he stated that there were discrepancies between the 2 forms 36 with respect to some of their entries.

That is the abridged version of both the Petitioner's and Respondents' cases.

4. During the pre-trial conference the parties had agreed upon 12 issues as follows:-

*(a) Whether the elections of 4/3/2013 was free and fair.*

*(b) Whether the petitioner was denied his constitutional right to compete in a free and fair election.*

*(c) Whether the election of 4/3/2013 was conducted transparently.*

*(d) Whether the petitioner's agents were victimised and undue advantage shown to the 4<sup>th</sup> respondent.*

*(e) Whether the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents exercised their mandate as stipulated by the Election Act 2011.*

*(f) Whether there were glaring electoral malpractices committed by 3<sup>rd</sup> respondent.*

*(g) Whether the 3<sup>rd</sup> respondent discharged his duty as stipulated in the Elections Act 2011.*

*(h) Whether the whole exercise of counting and tallying at Kanjuu Polling station and entire Ward was improper or not.*

*(i) Whether the petitioner or his agent made any complaints or reports of electoral malpractices on the 4/3/2013.*

*(j) Whether there was any doctoring of results which led to*

*the petitioner's loss in the election.*

*(k) Whether the counting and tallying in respect of Kanjuu*

*Primary School and Ngiriambu Primary School Polling*

*Stations had fundamentally affected the results as*

*appearing in form 36.*

I have carefully considered the issues at hand and it is my view that 15 following issues should be lumped together as follows:-

*(i) Issues (a) and (c)*

*(ii) Issues (b) and (d),*

*(iii) Issues (e), (f), (g), (h) & (k)*

Issues No. (i) and (k) will be considered on their own.

The issues can be paraphrased into 5 issues namely:-

*(i) Whether the elections of 4/3/2013 was free and fair.*

*(ii) Whether the Petitioner was denied his constitutional  
right to compete in a free and fair elections through  
victimisation of his agents.*

*(iii) Whether the process of polling and counting and  
tallying of votes respectively had been conducted in  
accordance with the law by the 3<sup>rd</sup> and 2<sup>nd</sup> respondents  
respectively.*

*(iv) Whether the Petitioner or his agent made any  
complaints or reports of the electoral malpractices on  
the 4/3/2013.*

*(v) Whether the counting and tallying in respect of Kanjuu  
Primary School and Ngiriambu Primary School Polling  
Stations had fundamentally affected the results as  
appearing in form 36.*

5. Section 107 of the Evidence Act provides that he who alleges must prove; and to the required standard.

The standard of proof in an election petition is higher than a balance of probabilities in ordinary civil

cases but not beyond reasonable doubt as required in criminal cases (See **Muliro v/s Musonye (2008)2 KLR (E.P.) 52** and **Raila Odinga & Others v/s I.E.B.C. & Others**).

All acts are presumed to be done rightly and regularly. So the petitioner must set out by raising firm and credible evidence of the public authority's departure (here the I.E.B.C.) from the prescription of the law (See **the Raila Case (ibid)**). In making the above proposition the Supreme Court was restating a view long held by the High Court in the Election dispute settlement (See **Munyao v/s Munuve 2008 KLR (E.P.)20**).

6. Under the provisions of Elections Act, 2011 and the Election Petition Rules 2013 the parties in an election petition are mandatorily required to file and serve all documentary exhibits that they intended to rely upon at the trial.

The Returning Officer, one, Omari who had testified as DW5 had when he was being cross-examined by the Petitioner's counsel made reference to a form 36 which he had brought with him into court and which was different from the copy of form 36 that had been filed and served by his counsel. Put another way Omari's form 36 was not the original of the copy that his counsel had filed in court.

I had allowed the new form 36 to be produced as an exhibit notwithstanding that it was introduced as an exhibit at the cross-examination of the maker of the document, namely, Omari. An election petition is not an action at common law, nor in equity. It is a statutory proceeding to which neither common law nor principle of equity apply. Concepts familiar to common law & equity must remain stranger's to election law unless statutorily embodied. An election petition is in the realm of a special jurisdiction, and a special jurisdiction has always to be exercised in accordance with the statute creating it (See the case of **Jyoti Basu & Others v/s Debi Ghosal & Others** as was used with approval in **Garissa High Court Election Petition No. 4/2013 – Amina Hassan Ahmed v/s Fathika Mahbub and 2 others**).

In ordinary civil cases the practice is that a document is introduced as an exhibit by a witness when he/she is giving his evidence in chief. In my view therefore an election petition is only governed by the common law and principles of equity only to the extent to which the Elections Act, 2011 permit.

In the interest of justice, an election court has a duty to receive, where the circumstances of the case so require, any material that will assist the court to deliver justice. I state so because under **Section 80(1) (d) of the Election Act**, an election court is required in exercise of its jurisdiction to decide all matters that come before it without undue regard to technicalities.

Omari had on his own volition chosen to rely on a form 36 which he knew was not part of the record. Once he had chosen to refer to a relevant document which was not part of the court record, he had lost the argument that the document should have been excluded from the court record.

I find that the "new" form 36 had been properly admitted as part of the court record.

7. Omari had in his evidence admitted that Waweru had lodged a protest letter with the 1<sup>st</sup> respondent, namely, I.E.B.C. complaining about the conduct of Nyaga in the manner in which Nyaga had conducted the polling and counting process in Kanjuu stream 1. It's clear that Omari's admission had materially corroborated the petitioner's case that a complaint letter had been made by Waweru.

On the 1<sup>st</sup> issue for determination I find that Waweru had made complaints of alleged electoral malpractices of 4/3/2013.

8. It is clear that Ngunjiri had sworn an affidavit on 21/4/2013 as a witness of Kariuki primarily to state that he was an agent of Kariuki in Kanjuu stream 1. In his affidavit he had stated that he was in stream 1 from the polling to counting process inside that polling station and he had further deposed that he was present when Wachira was ejected from that polling station for violating the law.

It is clear from the evidence that Kariuki was contesting on the ticket of the "Democratic Party." In

the heat of cross-examination, Ngaire had admitted the truth that he was an agent for Kariuki in Kanjuu Primary School Polling Station stream 2 (hereinafter referred to as Kanjuu stream 2) and that he was not Kariuki's agent in Kanjuu stream 1 and that he did not know what had transpired in Kanjuu stream 1. Ngaire had lied under oath when he deposed a false affidavit. It's clear that he was in Kanjuu stream 2 as Kariuki's agent.

I find that his adverse evidence against the petitioner's case was untrustworthy. Ngaire was a respondent's witness. I note that he had given adverse evidence against the respondents' case when he said that Nyaga had called him into Kanjuu stream 1 to witness Nyaga ejecting Wachira. Ngaire had said that Nyaga had asked him to replace Wachira before Ngaire went back to his own stream No. 2.

In my view it did not make sense for Nyaga to ask Ngaire to replace Wachira in Kanjuu stream 1 since Wachira was a T.N.A. Party agent representing Waweru while Ngaire was a D.P. Party agent representing Kariuki.

To put a close to the evaluation of the evidence of Ngaire, I found him to have been an unreliable witness unworthy of credit. Making matters worse is that he had deposed falsehoods in his affidavit. I find that Wachira and Nyaga had both corroborated each other that Nyaga had readmitted Wachira into the Kanjuu stream No. 1 at 7.30 p.m.

Page 19 of polling day diary for Kanjuu stream No. 1 purports to show that Wachira was present at the close of the polling station. There was evidence that Wachira was readmitted at 7.30 p.m. just before the start of the counting of votes in the polling station. If Wachira was absent from the polling station at the close of polling, Nyaga had failed to explain the circumstances under which Wachira could have signed on page 19 that he was present at the close of the polls. Besides, Wachira had denied that he had signed at page 19 of the polling day diary.

**8.** I have carefully perused both forms 36 in respect of Njukiini Ward. Of notable difference is that while the first form 36 shows that total votes cast were 10,224 and that the valid votes cast were 10,111, the second or new form 36 shows that the total votes cast were 10,214 and that the valid votes were 10,101.

Another notable difference is that the first form 36 shows that Kariuki garnered 7 votes from Ngiriambu stream No. 2 while the second form 36 shows that Kariuki garnered 70 votes from the same stream.

It was clear from both forms 36 that save for the first form 36 which had indicated that Kariuki had garnered 7 votes at Ngiriambu stream, the accurate results of valid votes cast for each candidate at each polling station as captured in form 35 had been transposed into each forms 36.

In the end it was Kariuki who had been prejudiced by the first form 36 when his 70 votes as per form 35 of Ngiriambu stream No. 2 was erroneously transposed as 7 votes in the first form 36. It's clear that the first form 36 had denied him 63 votes. It's clear from both forms 36 that Waweru's votes did not change even in the second form 36. I find that whatever discrepancies existed between the two forms were minor and insignificant as to have prejudiced the rights of Waweru.

In the case of **Kakuta Maimai Hamisi v/s Peris Pesi Tobiko & Others – Nairobi High Court E.P. No. 5/2013 (unreported)** it was held that form 36 is not a static document and it was held that "I am satisfied that the process can result in clerical errors due to the speed and flow of information. What is material is whether the final form 36 corresponds in all particulars with entries in part B of all forms 35. It is not a static form. It is built as more and more entries are filed. That is the primary duty of the Returning officer at Regulation 83 (1) (a) of the Elections (General) Regulations 2012. It is thus not entirely true that there were 2 forms 36. In reality there is only one final & valid form 36".

I cannot agree more, I further state that the discrepancy between the 2 forms 36 was excusable. I find that the second form 36 having been made later was the final and valid form 36 for Njukiini Ward.

I note that both forms 36 had had transposed in them that 235 votes had been cast for Timothy Kariuki Kathuri at the Ngiriambu stream 1. This figure was erroneously transposed from form 35 which showed that Timothy had garnered 255 from the above said polling station. However I find that Timothy wasn't prejudiced in any way because he has a **distant** third in the race.

9. The following are my brief observations from the results of scrutiny and recount of votes of Ngiriambu stream Nos. 1 & 2 and Kanjuu stream Nos. 1 and 2.

**(a) Negative Observation**

(i) *With regard to Ngiriambu stream 2 and Kanjuu stream 1, the seals numbers which had sealed the boxes did not match with those numbers indicated in their polling day diary.*

**(b) Positive observation**

(i) *With regard to Kanjuu stream 2, the seals numbers which had sealed the boxes matched with the numbers indicated in the polling day diary.*

(ii) *There was an insignificant change in the total number of votes garnered by each candidate vying for the elective post of M.C.A.*

It is important to highlight and compare the votes garnered by Waweru and Kariuki both before and after the scrutiny of votes with respect to the 4 polling stations in issue.

| <b>1. <u>Kanjuu Stream 1</u></b>    | <b><u>Before Scrutiny</u></b> | <b><u>After Scrutiny</u></b> |
|-------------------------------------|-------------------------------|------------------------------|
| - Jamlick Kiura Kariuki             | 454                           | 440                          |
| - Wilson Waweru<br>Wambugu          | 112                           | 112                          |
| <b>2. <u>Kanjuu Stream 2</u></b>    |                               |                              |
| - Kariuki                           | 510                           | 509                          |
| - Waweru                            | 124                           | 125                          |
| <b>3. <u>Ngiriambu Stream 1</u></b> |                               |                              |

|    |                                  |     |     |
|----|----------------------------------|-----|-----|
|    | - Kariuki                        | 59  | 60  |
|    | - Waweru                         | 41  | 41  |
|    | <b><u>Ngiriambu Stream 2</u></b> |     |     |
| 4. | - Kariuki                        | 224 | 224 |
|    | - Waweru                         | 27  | 26  |

The conclusion to be made from the above statistics is as follows:-

*(a) That before the scrutiny, Kariuki had 1247 votes while*

*Waweru had 304 from the 4 polling stations in issue.*

*(b) That after the scrutiny Kariuki had 1233 votes while*

*Waweru had 304 votes from the 4 polling stations in issue.*

*(c) That Waweru's total votes tally from the scrutiny of votes*

*remained unchanged at 304 votes while Kariuki's tally*

*after the scrutiny had reduced his total number of votes*

*by 14 votes from the 4 polling stations in issue.*

From the final form 36 it's clear that Kariuki and Waweru had garnered 2,886 and 2,806 respectively. The margin of votes between the above 2 was 80 votes before the scrutiny as per the final form 36. Therefore Kariuki having lost 14 votes after the scrutiny, the margin between him and Waweru was reduced to 66 votes.

From the final form 36 it's clear that the total number of valid votes cast for the post of M.C.A. were 10,101 while the total number of valid votes from the above said 4 polling stations was 1,574. It is clear that the deciding factor in the victory of Kariuki was the huge number of votes of 440 and 509 votes that he had received from Kanjuu streams 1 & 2 respectively. It's clear that both Kanjuu streams 1 and 2 had had the highest number of votes for any single polling station at 640 & 714 valid votes cast respectively.

There is no evidence that the process of polling and counting of votes and the tallying of votes was unlawful or tainted with malpractices which settles the 2<sup>nd</sup> issue for determination.

As I have already stated, it was the rich harvest of votes that Kariuki had received from both Kanjuu streams numbers 1 and 2 that had delivered victory into his hands.

This must have come as a surprise to Waweru since he like Kariuki hailed from Kanjuu. The election loss to Waweru was telling to him since he was running on a T.N.A. Party (The National

Alliance) ticket which party I take judicial notice of was the dominant party in this County.

On the 3<sup>rd</sup> issue for determination, I find that the process of counting and tallying in respect of Kanjuu Primary School and Ngiriambu Primary School had fundamentally affected the results as appearing in form 36, but, such counting and tallying of votes had reflected the natural outcome of the results.

**11.** An election petition must succeed or fail on its pleadings and evidence. All that is meant by that onus propandi is that the petitioner, must present sufficient evidence and secondly the evidence must be of a persuasive quality. It is then that the respondents are called to rebut it. In the end the petitioner must show that the preponderance of evidence inures in his favour. If he fails to rise to the standard the petition must be dismissed. (See the case of **Nairobi High Court Election Petition No. 2/2013 – Steven Kariuki v/s I.E.B.C. & 2 others**).

Wachira was the only eye witness in support of Waweru’s case. I find that his evidence that he was ejected from Kanjuu stream 1 by Nyaga at the behest of Kariuki was not corroborated in material particulars as required. Further Nyaga had given his evidence of rebuttal when he stated that he had ejected Wachira from Kanjuu stream 1 for attempting to influence voters. Even if Nyaga had committed malpractices it was not proved in evidence.

**12.** The golden thread running through the constitution is one of the sovereignty of the people of Kenya articulated under Article 1 of the Constitution. The exercise of this sovereignty of the people is anchored by other rights and fundamental freedoms such as the freedom of expression, association and freedom of access to information which are to be found under Articles 33, 36 and 35 of the Constitution. In addition Article 38 articulates political rights which are given effect to through the political system set out in chapter 7 titled “*Representation of the People.*” Under a democratic form of government an election is the ultimate expression of the sovereignty of the people and the electoral system is designed to ascertain and implement the will of the people.

The bedrock principle of the election dispute resolution is to ascertain the intent of the voters and to give it effect whenever possible. (See the case of **Richard Kalembe Ndile and Another v/s Patrick Musimba Musau – Machakoes High Court E.P. No. 1 and 7 (consolidated) of 2013 – (unreported)**).

It was the intention of the I.E.B.C. to conduct a perfect general election on 4/3/2013. That goal was an aspiration as the election which was a manual driven election process was likely to have been affected by malpractices although it is not all malpractices that would lead to the nullification of the results.

**13.** Section 83 of the Elections Act states that no election shall be declared to be void for non-compliance of any written law related to the election provided that:

*(a) That elections was conducted in accordance with the principles laid down in the Constitution and in the written law.*

**or**

*(b) That the non-compliance did not affect the result of the election.*

Article 81 of the Constitution lays down the general principles for the electoral system.

I note that the manner in which the polling day diaries for the 4 polling stations in issue were filled may have been less than perfect. I note that after the counting of votes in the polling stations, some of the forms 35 were not signed or endorsed by the presiding officer as was required, but, failure by agents or their candidates or by the presiding officer to sign or endorsed forms 35 was excusable under Regulation 79 of the Elections (General) Regulations, 2012.

I note that seals fastening the ballot boxes of Kanjuu stream 1 and Ngiriambu stream 2 had had serial Numbers which were different from those serial numbers captured in the polling day diary. There is no evidence that the mismatch of serial numbers was an indication of a malpractice.

**14.** Waweru had presented himself as a candidate for the post of the M.C.A. There is no evidence that he was not represented by his agents in all the 22 polling stations within Njukiini Ward. Wachira stated that after he was ejected by Nyaga he was replaced in 1 hours' time. It is clear that Waweru was effectively represented by his agents.

In the **4<sup>th</sup> issue** for determination I find that the petitioner was not denied his constitutional right to compete in a free and fair election and neither is there evidence that his agents were victimised.

**15.** Section 83 of the Elections Act in my view is a saving clause available to the respondent to maintain the status quo on grounds that even if there was any breach of the law, there has not been any effect on the election result. Such is our situation as the scrutiny of votes did not affect fundamentally the election results.

The scrutiny of votes had yielded very insignificant changes in number of votes garnered by the candidates. Besides the entries from all forms 35 had been accurately transposed into form 36.

If Nyaga and Omari as I.E.B.C. officials had committed any errors, then I have this to say *“error is to human. Some errors in an election like this conducted under a frenetic schedule are nothing more than what is always likely in the conduct of any human activity. If they are not fundamental they should always be excused”* (See the case of **John v/s Nyange & Another (2008) 3 KLR E.P. 500**).

**16.** On the **5<sup>th</sup> issue** for determination I find that the poll and the declaration of results was free and fair. There was no evidence that the manner of vote counting for posts of M.C.A. in Kanjuu Primary School Polling Stations had not complied with Regulation 76 (2) of the Elections (General) Regulation 2012 or that it was different from the manner in which counting of votes for other elective posts was done. I find that the election results were a manifestation of the will of people who had elected the 4<sup>th</sup> respondent as their representative in our “first past the post” electoral system. I find that the 4<sup>th</sup> respondent Jamlick Kariuki Kiura was validly elected.

## **17. Costs**

The trial had been concluded 9 weeks after the petition was filed. Oral applications that were made by counsel were decided upon in an open court immediately after they were made.

I note that Kariuki had brought in as his witness a person called Ngaire who had deponed a false affidavit.

I also note that a lady called Alice who was the agent of Kariuki in Kanjuu stream 1 did not make an affidavit and was not called as a witness.

Could Alice have refused to testify because she had had reservations about the conduct of Nyaga in Kanjuu stream 1? The answer could be a matter of pure conjuncture.

Section 84 of the Elections Act and R 34(1) (a) of the Election Petition Rules when read together provide that costs shall follow the event.

I don't think that the petition was frivolous although in the end the petitioner's evidence did not rise to the required standards. Under the circumstances it is my opinion that each party should bear its own costs of the petition.

**18.** I thank the counsel for their industry. I thank the counsel for the petitioner for remaining calm in

those moments when some of his colleagues were struggling to control their tempers. I thank the Registrar of the Election Court, one, Margaret Gaitho for displaying leadership in the efficient and calm manner in which she had presided over the scrutiny of votes.

I thank the people of Njukiini Ward for peacefully and patiently waiting for the outcome of the election.

**19.** The petitioner, namely, Wilson Waweru Wambugu had failed to prove his case to the required standards and his petition is dismissed and I further order as follows:-

*(a) That each party to bear own costs of the petition.*

*(b) A certificate of determination of this petition required*

*under Section 86 of the Elections Act 2011 shall issue*

*forthwith.*

**Delivered at Gichugu this 20<sup>th</sup> September 2013**

**T. M. MWANGI**

**PM**

**Others present**

Court clerk – Jane Ngari

Maina Kagio advocate for the petitioner

Ndegwa advocate for the 4<sup>th</sup> respondent who is also holding brief for Kibicho advocate for the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> respondent.

**Court:** Right of Appeal 30 days explained.

**T. M. MWANGI**

**PM**

**Court:** Security deposited be refunded to the petitioner.

**T. M. MWANGI**

**PM**

**20/9/2013**