



**Independent Electoral and Boundaries Commission & another v Mule & 3 others  
(Civil Appeal 219 of 2013) [2014] KECA 890 (KLR) (31 January 2014) (Judgment)**

*Independent Electoral and Boundaries Commission &  
another v Stephen Mutinda Mule & 3 others [2014] eKLR*

Neutral citation: [2014] KECA 890 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL 219 OF 2013  
GBM KARIUKI, PO KIAGE & K M'INOTI, JJA  
JANUARY 31, 2014**

**BETWEEN**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION .... 1<sup>ST</sup>  
APPELLANT**

**LEONARD OKEMWA (RETURNING OFFICER) ..... 2<sup>ND</sup> APPELLANT**

**AND**

**STEPHEN MUTINDA MULE ..... 1<sup>ST</sup> RESPONDENT**

**THOMAS MALINDA MUSAU ..... 2<sup>ND</sup> RESPONDENT**

**STEPHEN NDAMBUKI MULI ..... 3<sup>RD</sup> RESPONDENT**

**JOHN NTHULI MAKENZI ..... 4<sup>TH</sup> RESPONDENT**

*(Appeal from the judgment and decree of the High Court of Kenya at Machakos  
(Mutende, J.) dated 30th July, 2013 in Election Petition No. 2 OF 2013)*

**The Court of Appeal sets aside High Court's decision nullifying the election of the Member of Parliament for Matungulu Constituency.**

*In an election dispute, which related to the validity of the results for the 2013 election for the member of parliament for Matungulu Constituency, a scrutiny exercise revealed issues that were not raised in the petitioner's pleadings. The issues were about whether counterfoils of used ballot papers should have been stored in ballot boxes and whether the Form 35 used to declare the results of the election was valid notwithstanding the fact that it did not bear a stamp from the Independent Electoral and Boundaries Commission (IEBC.) The Court of Appeal held that the trial court erred when it considered issues that did not arise from the pleadings, after the trial court made the finding that the petitioner did not prove the allegations made in the petition. Additionally, the Court of Appeal*



determined that there was no legal requirement for counterfoils to be stored in ballot boxes and that a valid Form 35 did not require a stamp but it only required a signature from the presiding officer and the agents agents.

Reported by Njeri Githang'a

**Election Law** - election petition - parliamentary election - conduct and results - documents to be placed in the ballot box - ballot papers - counterfoils - whether there was a legal requirement that counterfoils of the used ballot papers be stored in ballot boxes - Elections (General) Regulations, regulation 81(2).

**Electoral Law** - election petition - parliamentary election - conduct and results - declaration of results - whether there was compliance with the election regulations - Form 35 - whether there was a legal requirement that Form 35 used for the declaration of results at polling stations should bear the IEBC stamp - Elections (General) Regulations, regulation 81(2).

### **Brief facts**

Stephen Mutinda Mule the 1<sup>st</sup> respondent had lost his seat as the Member of Parliament for Matungulu Constituency after his election was nullified by the High Court. He was however re-elected by the voters of that constituency in a by-election while the appeal was still pending in the Court of Appeal. The Court of Appeal nevertheless proceeded to issue a judgment. Among the grounds for appeal was that, having found the allegations in the petition not proved, the judge did not dismiss the petition and leave the 1<sup>st</sup> respondent's election undisturbed, as she should have.

The appellant asserted that during the scrutiny that was ordered by the judge in the course of the proceedings, new factual and legal issues arose around the counterfoils and the lack of the IEBC stamp on some of the Form 35. The appellant submitted that by unilaterally framing new issues for determination not pleaded or responded to by the parties; the judge abandoned her role as an independent and impartial adjudicator and descended into the arena of conflict.

### **Issues**

- i. Whether the Court erred in basing its decision on issues not pleaded by the petitioner.
- ii. Whether there was a legal requirement that counterfoils of the used ballot papers be stored in ballot boxes.
- iii. Whether there was a legal requirement that Form 35 used for the declaration of results at polling stations should bear the IEBC stamp.

### **Relevant provisions of the Law**

#### **Elections (General) Regulations, 2012**

**Regulation 81(2)** which lists the items or documents to be placed in the ballot box that should convey election results. It provides;

*“The presiding officer shall, after demonstrating to the candidates or agents as the case may be, that the ballot box to be used to carry the election results is empty, put into that box;*

1. *The packets specified in sub-regulations(1)*
2. *The statements under regulations 78 and 79.”*

The packets in sub-regulation (1) are separate tamper proof envelopes containing;

1. The counted ballot boxes which are not disputed
2. The rejected ballot papers together with the statement relating thereto
3. The disputed ballot papers
4. The “rejected objected to “ballot papers

**Regulation 69** provides;

1. *Before issuing a ballot paper to a voter, an election official shall ---*
  1. *Stamp the counterfoil of the ballot paper on the face with the official mark of the commission; and*
  2. *Stamp the ballot paper at the back with official mark of the Commission.”*



## **Held**

1. Rule 86(1) of the Court of Appeal rules provided that a Memorandum of Appeal had to set forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, specifying the points which were alleged to have been wrongly decided, and the nature of the order which it was proposed to ask the court to make. Had the drafters of the instant Memorandum observed the provisions of rule 86(1) of the Court of Appeal Rules, they would have found that by invoking factual errors, they were inviting jurisdictional objections to their entire appeal. However, no such objection arose in the instant matter.

2. Parties were bound by their pleadings which in turn limited the issues upon which a trial court could pronounce. The judge, no matter how well-intentioned, went well beyond the grounds raised by the petitioners and answered by the respondents before her and thereby determined the petition on the basis of matters not properly before the Court. To that extent, the court committed a reversible error.

3. Under regulation 73(3)(c) the presiding officer was required to seal the counterfoils of the used ballot papers. Under sub regulation (4) he was required to deliver the ballot boxes and the tamper proof sealed envelopes to the returning officer who should take charge thereof. It was quite clear that the ballot boxes were separate and apart from the sealed tamper proof envelopes. The two items were required to be delivered separately to the returning officer. There was no requirement that one be in the other.

4. The ballot box was meant to contain the sealed tamper proof envelopes containing the various classes or categories of ballot papers only. The counterfoils of the used ballot papers were not required to be in the ballot box. That being the case, it mattered not that other ballot boxes, save the eight, did contain the counterfoils. Their having the counterfoils was an accidental happening, not an act in obedience to any legal requirement. They could not form a basis for placing upon the appellant a burden the law did not impose and it was a clear error for the trial court to have come to the conclusion that a grave irregularity had occurred.

5. There was no stamping requirement in the case of the Form 35. All that was required with regard to Form 35 as provided for in regulation 79 was the signature of the presiding officer and the agents of the candidates.

6. It was the signatures of the presiding officers and the agents that authenticated the Form 35. If any such forms were stamped, it was a superfluous discretionary or administrative act incapable of creating a statutory obligation, less still the invalidation of the Forms 35 that did not contain the stamp.

*Appeal allowed.*

## **Orders**

- i. *The judgment and decree of the High Court set aside*
- ii. *The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents to pay the appellant and the 1<sup>st</sup> respondent the costs of the appeal and of the petition at the High Court.*

## **Citations**

### ***East Africa***

1. *Libyan Arab Uganda Bank For Foreign Trade and Development & another v Adam Vassiliadis [1986] UGCC 6 - (Explained)*
2. *Nyamweya, Manson Onyongo v James Omingo Magara & 2 others Election Petition No 3 of 2008 - (Distinguished)*

### ***Nigeria***

3. *Adetoun Oladeji (Nig) Ltd v Nigeria Breweries Plc SC 91/2002 - (Followed)*

### ***Malawi***

4. *Malawi Railways Ltd v Nyasulu [1998] MWSC 3 - (Explained)*

### ***United Kingdom***

5. *Jones v National Coal Board [1957] 2 QB 55; [1957] EWCA Civ 3; [1957] 2 All ER 155 - (Followed)*



6. *Yuill v Yuill* [1944] P 15; [1945] All ER 183 - (Mentioned)

## Statutes

### *East Africa*

1. Court of Appeal Rules, 2010 (cap 9 Sub Leg) rule 86(1) - (Interpreted)
2. Elections Act, 2011 (Act No 24 of 2011) section 85A - (Interpreted)
3. Elections (General) Regulations, 2012 (Act No 24 Sub Leg) regulations 69, 73(3)(c)(4); 78; 79; 81(1)(2) - (Interpreted)

## Texts & Journals

1. Robert, C., *et al* (Eds) (1960) *Current Legal Problems*, London Oxford University Press p 174

## JUDGMENT

1. By the time we were hearing this Appeal, the by-election necessitated by the High Court's (Hon L Mutende, J) judgment delivered on 30.7.13 had been held. Stephen Mutinda Mule the 1<sup>st</sup> Respondent, whose election as member of the National Assembly for Matungulu Constituency had been nullified by the High Court, was re-elected by the voters of that constituency in a by-election thus presenting to us a fortuitous *fait accompli*. We mulled on whether, in light of that by election and re-election, this Appeal had been rendered moot but in the end were persuaded by submissions preciously made on behalf of the Appellant and buttressed by Miss Muraguri, its learned counsel, that we needed to pronounce on some important questions of law spawned by the impugned judgment.
2. The Memorandum of Appeal filed herein raises no less than seventeen grounds of appeal. Some of the grounds contain what amounts to narrative or argument best left to submissions. We restate, as we have done so many times in the recent past, that the *Court of Appeal Rules* are quite clear as to what a proper Memorandum of Appeal should be. In respect of Civil Appeals, rule 86(1) states as follows;  

“A Memorandum of Appeal shall set forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, specifying the points which are alleged to have been wrongly decided, and the nature of the order which it is proposed to ask the Court to make.”
3. Those points in an appeal of the kind before us, being from an election court's decision, are further circumscribed by section 85A of the *Elections Act* which limits appeals to the Court of Appeal to matters of law only. It is therefore quite strange and improper that each of the seventeen grounds, without exception, commences with a standard expression “the judge erred in fact and law” or “the learned Judge erred in law and in fact.” Clearly the drafters of the Memorandum did not have the legal provision in active contemplation. Had they done so, they would have found that by invoking factual errors, they were inviting jurisdictional objections to their entire appeal. As no such objection in fact arose and, on proper consideration some of the grounds raise points of law notwithstanding the use of the stock phrases we have referred to, we say no more. At any rate, the decision on this Appeal will turn on some three issues which are legal in character, namely;
  - i. Whether the learned judge erred in basing her decision on issues not pleaded by the Petitioner.
  - ii. Whether there is a legal requirement that counterfoil of the used ballot papers should be stored in ballot boxes.



- iii. Whether there is a legal requirement that Form 35 used for the declaration of results at polling stations should bear the IEBC stamp.
4. On the first issue, it is quite indisputable that the learned judge considered all the evidence tendered in support of the grounds cited by the petitioner before her and concluded that it was not sufficient to prove any of the allegations. She proceeded to dismiss those grounds, as she had to. The complaint by the Appellant before us, in which it was supported by the 1<sup>st</sup> Respondent, is that having found the allegations in the Petition not proved, the learned judge did not dismiss the Petition and leave the 1<sup>st</sup> Respondent's election undisturbed as she should have. The Appellant asserts that during the scrutiny that was ordered by the learned Judge in the course of the proceedings, new factual and legal issues arose around the counterfoils and the lack of the IEBC stamp on some of the Form 35. It contends thus;

“The above issues were new and had not been pleaded in the Petition. The Respondents, therefore, could not and had not responded to the same either in the pleadings or in the evidence that they had tendered in response to the pleaded matters.”

5. The Appellant submits that by unilaterally framing new issues for determination not pleaded or responded to by the parties, the learned Judge abandoned her role as an independent and impartial adjudicator and descended into the arena of conflict. To support its contention, the Appellant cited the decision of the Malawi Supreme Court of Appeal in *Malawi Railways Ltd v Nyasulu* [1998] MWSC 3, in which the learned judges quoted with approval from an article by Sir Jack Jacob entitled “*The Present Importance of Pleadings*.” The same was published in [1960] Current Legal problems, at p 174 whereof the author had stated;

“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings. For the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The Court itself is as bound by the pleadings of the parties as they are themselves.

It is no part of the duty of the Court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the Court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “Any Other Business” in the sense that points other than those specific may be raised without notice.”

6. The Appellants also cited the Ugandan case of *Libyan Arab Uganda Bank for Foreign Trade and Development & another v Adam Vassiliadis* [1986] UG CA 6 where the Uganda Court of Appeal



(judgment of Odoki JA) cited with approval the dictum of Lord Denning in Jones v National Coal Board [1957] 2 QB 55 that;

“In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries.”

7. Lord Denning was of course alluding to the essential difference between an adversarial system of justice such as we have in which the judge is or ought to be more of an impartial umpire and the inquisitorial system where the judge is an active investigator after evidence and truth. The good law Lord had proceeded to quote Lord Green MR who had explained that justice is best done by a judge who holds the balance between the contending parties without himself taking part in their disputations for, by descending into the arena the judge is liable to have his vision clouded by the dust of conflict. See Yuill v Yuill [1945] All ER 183.

8. The Appellants contention is that the learned Judge overstepped her mandate in crafting a new issue not brought by the parties and basing it to nullify the 1<sup>st</sup> Respondent’s election thereby essentially assisting the Petitioner in an impermissible manner. The 1<sup>st</sup> Respondent in submissions filed in this Court supported this argument by the Appellant and cited to us two decisions of the Nigerian Supreme Court. In the first, Adetoun Oladeji (Nig) Ltd v Nigeria Breweries Plc SC 91/2002, Judge Pius Aderemi JSC expressed himself, and we would readily agree, as follows;

“..it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.”

9. Other judges on the case expressed themselves in similar terms, with Judge Christopher Mitchell JSC rendering himself thus;

“In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

10. To the above submissions by the Appellant and the 1<sup>st</sup> Respondent through its learned counsel Mr Kiugu, which are by no means insubstantial, we have been unable to find any answer by the 2<sup>nd</sup> to 4<sup>th</sup> Respondents both in their written submissions and in the address before us by Mr Laichena, their learned counsel.

11. As the authorities do accord with our own way of thinking, we hold them to be representative of the proper legal position that parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce. The learned Judge, no matter how well- intentioned, went well beyond the grounds raised by the Petitioners and answered by the Respondents before her and thereby determined the Petition on the basis of matters not properly before her. To that extent, she committed a reversible error, and the Appeal succeeds on that score.

12. Turning now to the contested counterfoils, they became an issue only after the recount ordered by the learned Judge had been concluded, the result of which were expressed by the judge thus;

“A reconciliation of the same would result into (sic) the 3<sup>rd</sup> Respondent still emerging as the winner, by an additional 11 votes. The recount therefore still verifies that the 3<sup>rd</sup> Respondent



was victorious in the Matungulu Elections with the runners (sic) up being Thomas Malinda Musau. The difference between them being some 2,262 votes.”

13. The grounds of the Petition having all been dismissed and the recount having confirmed the 3<sup>rd</sup> Respondent (the first herein) as the winner, the logical thing would have been for his election to be confirmed by the Court. That did not happen. Instead, the learned Judge embarked on the unilateralism we have already addressed on the basis that “the Court cannot however be oblivious of (sic) the fact that there were discrepancies that were noted during the scrutiny and recount.”
14. The first of these “discrepancies” in the learned Judge’s view was that there were no counterfoils found in the ballot boxes for some eight polling stations, which she identified.
15. Even though the learned Judge properly stated that a presiding officer is required by regulation 73(3) and (4) of the *Elections (General) Regulations* to seal counter-foils of the used ballot boxes in a tamper proof envelope for purposes of being delivered to the Returning Officer, she moved out of the Regulations as currently formulated to find a fault where there was none. Her error stemmed from her application of the case of *Manson Onyongo Nyamweya v James Omingo Magara & 2 others* [2009] eKLR in which Musinga, J (as he then was) had stated the law, as it then was;

“If scrutiny showed that the documents in the ballot boxes were substantially non compliant or that certain statutory documents were not contained therein, a recount of ballots per se cannot cure the inherent defect. The presence of a ballot paper in a ballot box is validated by the counterfoil thereof and the marked voters register. Without the two there is no telling how it found its way in [to] the ballot boxes (sic).”

16. Basing her decision on that authority, the learned Judge proceeded to state determinatively as follows;

“Lack of the counterfoils is therefore grave as the ballot boxes cannot be ascertained and verified if indeed they were duly cast as votes or not. Missing counterfoils would basically mean that ballot papers in ballot boxes were not the ones used by the voters.”

17. With tremendous respect to the learned Judge, she overstated that case in making such a sweeping statement. Worse, the learned Judge applied a judicial decision that was based on a statutory regime that had since significantly changed so that in so far as her decision on the point did not pay due regard to the changed state of the Regulations, she acted per incuram and applied a legal position that was bad for obsolescence.
18. As we have already stated, the learned Judge correctly read that under regulation 73(3)(c) the presiding officer is required to seal the counterfoils of the used ballot papers. Under sub regulation (4) he is required to deliver the ballot boxes and the tamper proof sealed envelopes to the returning officer who shall take charge thereof. It is quite clear to us that the ballot boxes are separate and apart from the sealed tamper proof envelopes. The two items are required to be delivered separately to the returning officer. There is no requirement that one be in the other.
19. The matter is put beyond argument, we think, by the provision of regulation 81 (2), which lists the items, or documents that are to be placed in the ballot box that should convey election results. It provides;

“The presiding officer shall, after demonstrating to the candidates or agents as the case may be, that the ballot box to be used to carry the election results is empty, put into that box;

- a. The packets specified in sub-regulations (1)



- b. The statements under regulations 78 and 79.”
20. The packets in sub-regulation (1) are separate tamper proof envelopes containing;
- a. The counted ballot boxes which are not disputed
  - b. The rejected ballot papers together with the statement relating thereto
  - c. The disputed ballot papers
  - d. The “rejected objected to “ballot papers Quite clearly, the ballot box is meant to contain the sealed tamper proof envelopes containing the various classes or categories of ballot papers only. The counterfoils of the used ballot papers are not required to be in the ballot box.
21. That being the case, it matters not that other ballot boxes, save the eight, did contain the counterfoils. Their having the counterfoils was a fortuitous happening, not an act in obedience to any legal requirement. They could not form a basis for placing upon the Appellant a burden the law did not impose and it is a clear error for the learned Judge to have come to the conclusion that a grave irregularity had occurred.
22. On this account too, the Appeal succeeds.
23. As to the Forms 35, the learned Judge’s view was that the fact of those from some 19 polling stations not being stamped with the IEBC stamp invalidated the results. With respect, she thereby misdirected herself on the law. This is all the more remarkable because the learned Judge herself did correctly state in her judgment that “it is not specifically stated that the form should be stamped.” She, however, followed this correct reading of the law with a speculative plunge as follows;
- “However, a perusal of most forms supplied to this Court shows that they bear stamp impressions of IEBC. The question to be answered is, what is the significance of the stamp impression? A stamp impression on a document would be used to authenticate it. It would be interpreted that forms without stamp impressions of the IEBC lacked approval from the Commission. Without that stamp impression, its validity would be questioned.”
24. Once again, we are of the respectful view that the learned Judge overstated the point and misstated the law. The requirement for stamping is to be found in regulation 69 which provides;
1. Before issuing a ballot paper to a voter, an election official shall -
    - a. Stamp the counterfoil of the ballot paper on the face with the official mark of the commission; and
    - b. Stamp the ballot paper at the back with official mark of the Commission.”
25. There is no stamping requirement in the case of the Form 35. All that is required with regard to Form 35 as provided for in regulation 79 is the signature of the presiding officer and the agents of the candidates.
26. We agree with the submission on behalf of the Appellant that it is the signatures of the presiding officers and the agents that authenticate the Form 35. If any such forms were stamped, it was a gratuitous and superfluous discretionary or administrative act incapable of creating a statutory obligation, less still the invalidation of the Forms 35 that did not contain the stamp. On this score too, the Appeal succeeds.
27. Having disposed of the three issues identified herein as we have, this Appeal succeeds. As to the orders to make, we shall in view of what has already transpired, set aside the judgment and decree of the High Court and substitute therefore an order dismissing the Petition with costs.



28. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents shall pay the Appellant and the 1<sup>st</sup> Respondent the costs of this Appeal and of the Petition at the High Court.

**DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JANUARY, 2014.**

**G.B.M. KARIUKI**

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**JUDGE OF APPEAL**

**P.O. KIAGE**

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**JUDGE OF APPEAL**

**K. M'INOTI**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**

