



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MARAGA, GATEMBU & J. MOHAMMED, JJ.A)

CIVIL APPEAL NO. 272 OF 2013

BETWEEN

STEVEN KARIUKI APPELLANT

AND

GEORGE MIKE WANJOHI 1ST RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION 2ND RESPONDENT

**MILLIAM WANJIRU GACIHI 3RD
RESPONDENT**

(Being an Appeal from the Rulings and Orders given on the 16th day of May, 2013, 1st day of July, 2013 and 2nd day of July, 2013 and the Judgment and Decree of the (G. K. Kimondo, J) delivered on the 13th day of September, 2013

in

ELECTION PETITION NO. 2 OF 2013

JUDGMENT OF THE COURT

1. This is an appeal from the orders of the Election Court given on 16th May 2013, 1st July 2013, 2nd July 2013 and from the judgment of the same court delivered on 13th September 2013 in Election Petition No. EP 2 of 2013 at the High Court of Kenya at Nairobi the effect of which was to dismiss the appellant’s petition challenging the declaration of the 1st respondent as the duly elected Member of the National Assembly representing Mathare Constituency in Nairobi County.

Background

2. The appellant was one of ten candidates who contested to represent Mathare Constituency in the National Assembly during the General Elections held on 4th March 2013.

3. On 6th March 2013 at about 1:00 pm, after counting and tallying of votes was concluded, the 3rd respondent, who was the Returning Officer for Mathare Constituency, announced at the StTeresa's Girls Primary School tallying Centre, that the appellant was duly elected as the Member of National Assembly for Mathare Constituency. According to that announcement the appellant garnered 34,957 votes while the 1st respondent garnered 32,156 votes. The appellant was accordingly issued with a certificate of results (Form 38) on 6th March 2013 certifying him as the candidate elected as the Member of the National Assembly for Mathare Constituency.
4. On 7th March 2013, the 1st respondent filed an Election Petition in the High Court of Kenya at Nairobi, Election Petition No. 150 of 2013 in which 2nd respondent IEBC, Isaac Hassan, the Returning Officer of the National Tallying Centre, the Returning Officer Mathare Constituency and Stephen Kariuki (the appellant herein) were named as the 1 to 4th respondents respectively. In that petition the 1st respondent sought a declaration that he was the lawfully elected Member of the National Assembly for Mathare Constituency and that he should be issued with a certificate to that effect; he also sought a declaration that the appellant herein was wrongly issued with a certificate certifying him as the duly elected Member of the National Assembly for Mathare Constituency.
5. On 8th March 2013 the Election Petition No. 150 of 2013 was withdrawn and on the same date IEBC wrote a letter under the hand of the 3rd respondent addressed to the appellant in the following terms:

“8th March 2013

Mr. Stephen Kariuki

Nairobi

Re: Nullification of certificate of result of Member of National Assembly

This is to notify you tha the certificate of results in respect of your candidature in Mathare Constituency was issued to you in error. The same is hereby recalled for cancellation.

A new certificate has been issued to George Mike Wanjohi who was the rightful winner in that election. The results of the election can be accessed at the IEBC website iebc.or.ke.

Miriam Wanjiru Gachehe

Returning Officer Mathare Constituency”

6. A new certificate of results of Member to the National Assembly (Form 38) was accordingly issued on the 8th March 2013 to the 1st respondent based on which the 1st respondent was then gazetted as the winner on 13th March 2013.
7. Against that background, the appellant petitioned the High Court in Election Petition No. 2 of 2013 Nairobi in which his main complaint was that the 2nd and 3rd respondents became *functus officio* after declaring him the winner and issuing him with a certificate of results (Form 38) on 6th March 2013 and that the 2nd and 3rd respondents had no power thereafter to cancel the certificate in his favour and to issue another one in favour of the 1st respondent. The appellant therefore sought a declaration from the Election Court that the 1st respondent was not validly elected or declared as Member of the National Assembly representing Mathare Constituency and for a determination that he, the appellant, was the validly elected and declared Member for National Assembly for Mathare Constituency and that the 2nd and 3rd respondents be directed to gazette him as such. In the alternative, the appellant sought an order for scrutiny and recount of votes cast

in the election and a determination that the Parliamentary Election held on 4th March 2013 for Mathare Constituency was null and void and that a fresh election should be held.

8. In his reply to the petition, apart from complaints regarding non-service of the petition and absence of material, particulars and complaints that the appellant's petition contained general unsubstantiated allegations, the 1st respondent contended that the certificate of results in favour of the appellant had been issued in error and that the certificate issued in his favour and subsequent gazette were in accordance with the law; that there was no proof that the appellant was the validly elected and declared winner in the election and urged the court to dismiss the petition with costs.
9. In their joint reply to the petition, the 2nd and 3rd respondents pleaded that the results that were announced on the 6th March 2013 on the basis of which the appellant was certified as the duly elected member of the National Assembly for Mathare Constituency was erroneous since the tallying contained mathematical errors in that it showed the appellant to have obtained the majority of votes cast when in fact the 1st respondent was the winner. The 2nd and 3rd respondents further averred that in those circumstances the certificate in favour of the appellant was erroneous, invalid, null and void and that the 2nd and 3rd respondents did not become *functus officio* after the announcement of the tallied results as the 2nd respondent "*completes the act of declaration as envisaged by Article 88(4)(e) of the Constitution upon the gazette of the winners of various elected positions*". The 2nd and 3rd respondents went on to say that after proper tallying of the election results for the 115 polling stations in Mathare Constituency the 1st respondent received the highest number of votes amounting to 27, 262 votes against the appellant's 26, 916 votes thus giving a margin of 346 votes.
10. Based on an application dated 23rd April 2013 filed before the election court by the 1st respondent which was opposed by the appellant, the election court, in a ruling delivered on 16th May 2013, struck out paragraphs paragraphs 14a, 14e, 15b, 16, 19b, 20b and 21 of the petition as well as paragraph 26 of the appellant's affidavit and prayers (e) to (i) inclusive of the petition on the basis that the allegations contained in those paragraphs were not supported with particulars and those prayers were vague and ambiguous. In subsequent orders made on 1st July 2013, and on 2nd July 2013 the election court declared inadmissible two DVDs, a transcript and the certificate which had been filed by the appellant but admitted in evidence copies of Forms 35 and 36.
11. After hearing the parties, the election court delivered its judgment on 13th September 2013 in which the learned trial judge captured the central question in paragraph 39 of his judgment as follows; "*the crux of this matter is whether the 3rd respondent or IEBC had power to cancel the Form 38 of the petitioner after the public announcement of results on 6th March 2013 at the tallying hall.*" At paragraph 45 of the judgment the election court re-stated the issue for determination in these words:

"the key consideration is whether the original announcement that the petitioner had won was a final declaration. That is the elephant in the room. The answers are to be found in the law and recent pronouncements by the Court of Appeal."
12. Having framed those issues, the election court, basing its decision on Regulation 87(9) the Elections (General) Regulations 2012 went on to hold that the results announced by the Returning Officer at the tallying hall and the certificate in Form 38 are provisional thus rejecting the appellant's contention that IEBC becomes *functus officio* after the announcement of a winner at the tallying centre. For that holding the election court found support in the decision of this Court in the case of **Hassan Ali Joho V Suleiman Shahbal Civil Appeal 12 of 2013**. The election court proceeded to dismiss the appellant's petition.
13. Aggrieved by the orders made by the Election Court on 16th May 2013, 1st and 2nd July 2013 and

the judgment delivered on 13th September 2013 the appellant has appealed to this Court seeking to set aside that judgment and seeking orders that this Court do allow the alternative prayers in his petition before the election court.

14. Although the appellant set out 23 grounds of appeal in his memorandum of appeal, the critical question for the determination by this Court is whether the election court was right in its determination that the 2nd and 3rd respondents had power to cancel the certificate of results issued to the appellant and to issue another one to the 1st respondent and also in taking the view that the 2nd and 3rd respondents did not become *functus officio* after announcing the appellant as the winner at the tallying centre on 6th March 2013.

Submissions by Counsel

15. At the hearing of this appeal the parties were represented by learned counsel. Mr. N.A Havi appeared for the appellant while Mr. J Harrison Kinyanjui, appeared for the 1st respondent and Mr. P.O Nyamodi appeared for the 2nd and 3rd respondents.

16. Mr. Havi for the appellant faulted as premature the election court's ruling dated 16th May 2013 striking out paragraphs 14 (a), 14 (e), 15 (b), 16, 19 (b), 20 (b) and 21 of the petition as well as prayers (e), (f), (g), (h) and (i) in the petition on the basis of deficiency and faulted the learned Judge for doing so prior to the pre-trial conference.

17. With respect to the order striking out prayers of the petition counsel cited the case of **Nicholas Kiptoo Arap Korir Salat Vs IEBC and 6 Others (2013) eKLR** and submitted that the learned Judge failed to bear in mind that an election petition is not a matter in which the only persons interested are the candidates who competed and failed to have regard of the fact that the public are substantially interested in the its outcome.

18. Turning to the complaint that the Election Court erred in striking out DVD evidence, counsel submitted that the decision of the election court in that regard is inherently inconsistent in that in an earlier ruling the election court stated that admissibility would be a matter to be tested at the trial but subsequently went ahead to strike out the same.

19. Regarding the question whether the Returning Officer had authority to re-tally results after declaring the appellant as the winner, counsel referred us to Regulations 82(1) and 87(7) of the Elections (General) Regulations 2012 and submitted that the provisional results are those transmitted electronically and not contained in Forms 35 and 36. Counsel relied on the case of **Raila Odinga and 5 others Vs IEBC and 3 others (2013) eKLR** and maintained that the Returning Officer and IEBC do not have the power to revoke Form 35 and the election court therefore erred in declaring the 1st respondent as the winner.

20. Counsel concluded that as the Forms 35 and 36 that were produced before the election court are copies which are disputed, in keeping with the decision in the case of **Clement Kungu Waibara Vs Bernard Chege Mburu and 2 others (2011) eKLR** this Court should find that the election for the Member of National Assembly for Mathare Constituency was not transparent, free and fair and the same should therefore be annulled and an order for a new election should be made.

21. Mr. Havi submitted that Forms 35 to 38 constitute the final declaration of results and that the same are not provisional; that upon issuance of those Forms and in particular Form 38 the returning officer became *functus officio* and any alteration could only be made by the election court; and that the election court relied on the decision of the Court of Appeal in the case of **Hassan Ali Joho V Suleiman Shabal Civil Appeal 12 of 2013** which has since been overruled by the Supreme Court in **Hassan Ali Joho and Another Vs Suleiman Said Shabal and 2 others Petition No. 10 of 2013** where the Supreme Court held that the issuance of the certificate in Form 38 to the winner of the election marks the end of the electoral process "by affirming and declaring the election

results which could not be altered or disturbed by any authority”.

22. Mr. Havi also referred us to the case of **Peter Gichuki King'ara Vs IEBC and 2 others Nyeri Civil Appeal No. 31 of 2013** in support of the proposition that the error made by the Election Court in this matter should result in the nullification of the election and the appeal should therefore be allowed, the 4th March 2013 election for the Member of the National Assembly for Mathare Constituency should be annulled and a fresh election should be held.
23. Opposing the appeal, Mr. Harrison Kinyanjui for the 1st respondent supported the election court in striking out prayers (a) to (d) in the petition and disallowing DVD evidence and submitted that this Court has no jurisdiction to overturn that decision; that the decision of the election court can only be challenged only on points of law; that the decision of the Election Court is consistent with the Supreme Court decision in **Raila Odinga and 5 others Vs IEBC and 3 others** in which the Supreme Court took judicial notice of the failure of electronic transmission and that until results are gazetted they remain provisional. Mr. Kinyanjui also sought to distinguish the circumstances in this case from those in **Peter Gichuki King'ara Vs IEBC and 2 others** and submitted that the relief for annulment of the election is not available to the appellant in the circumstances of this case.
24. Regarding the question of who was declared the winner, Mr. Kinyanjui submitted that the announcement of the appellant as the winner was not supported by Form 36 with the result that the Form 38 issued to him was erroneous and had to be cancelled as it was in any event provisional under Regulation 87(9) of the Elections (General) Regulations 2012.
25. Mr. Kinyanjui submitted that the decision of the Supreme Court in the case of **Hassan Ali Joho and Another Vs Suleiman Said Shahbal and 2 others Petition No. 10 of 2013** is distinguishable as that court did not deal with the issue of a wrong person being declared in Form 38 as the winner. Mr. Kinyanjui went on to say that the circumstances in this case are similar to those in the case of **Dickson Daniel Karaba Vs John Ngata Kariuki and 2 others Election Petition No. 3 of 2008 (2010) eKLR** in that, here as in that case, it would be “*unquestionably erroneous to announce a loser as the true winner depriving the electorate of their right to be [represented by] a person of their choice.*” He said a Returning Officer is empowered under S. 39(2) of the Elections Act to correct such error so as to give effect to the provisions of Article 38 of the Constitution.
26. Counsel for the 2nd and 3rd respondent while also opposing the appeal submitted that the purpose of an election is to translate the will of the electorate into a result that is captured in Forms 35 to 36 and then transferred to Form 38. In the case of Mathare Constituency, the will of the people regarding their representative in the National Assembly is captured in Forms 35 and 36 from the 115 polling stations in that constituency which form part of the record in this appeal. As Form 38 that was issued to the appellant is at variance with Forms 35 and 36, the 2nd and 3rd respondents were right in correcting that error.
27. Regarding the scope of IEBC's mandate under Article 88(4) of the Constitution, Mr. Nyamodi submitted that IEBC can deal with disputes up until gazettelement and that the cancellation of Form 38 in favour of the appellant was lawfully done.
28. Mr. Nyamodi further submitted that the only substantial relief that the appellant sought from the election court was for an order for scrutiny and recount of votes which would have determined if the election would be nullified and a fresh election held. The election court having not conducted scrutiny, in light of Article 105 of the Constitution, limiting the period within which election petitions determined to six months from the date of declaration of the result, it is not open to this Court to remit the matter to the election court neither is it proper for this Court to nullify the election on the basis that scrutiny and recount should have been ordered but was not.
29. Although Mr. Nyamodi accepted the Supreme Court decision in **Hassan Ali Joho and Another Vs Suleiman Said Shabal and 2 others** that the Returning Officer's declaration of election

results in Form 38 is conclusive, he submitted that the election court cannot be faulted as it was bound by this Court's earlier decision in the same case which held that the declaration of results meant the gazettement of the same and not the announcement at the tallying centre of the results in Form 38. Mr. Nyamodi also submitted that the circumstances in that case are distinguishable from this one and cited the case of **Dickson Daniel Karaba Vs John Ngata Kariuki and 2 others** for the proposition that since the Forms 35 and 36 in this appeal demonstrate that the 1st respondent received the highest number of votes, this Court should, pursuant to S. 74(3)(b) of the Elections Act, declare him as the candidate validly elected to represent Mathare Constituency in the National Assembly. In that regard counsel referred us to the judgment of Denning J. as he then was in **Bracegirdle Vs Oxley [1947] 1 All ER 126** which was cited in **Timami Issa Abdalla V Swaleh Salim Swaleh Imu and 3 others (2014) eKLR** and submitted that in determining whether the Election Court properly performed its duty this Court must be satisfied that the Election Court acted judiciously and correctly applied the law. Mr. Nyamodi drew our attention to the case of **John Oroo Oyoka V IEBC and 2 others 2013 eKLR**, the case of **Timami Issa Abdalla V Swaleh Salim Swaleh Imu and 3 others** and the Ugandan case of **Honourable Oboth Marksons Jacob V Dr. Otiam Otaala Emmanuel [2012] UGCA 2** in support of the view that power exists to declare the 1st respondent the winner of the election.

30. According to Mr. Nyamodi the decision of this Court in **Peter Gichuki King'ara Vs IEBC and 2 Others**, which nullified an election on the basis that the election court erred in refusing to order scrutiny and recount, is unlawful. He said that the election court's failure to order scrutiny and recount per se without knowing what the result of that exercise would have been did not justify this Court's nullification of the election. He termed this Court's decision in that regard as an expansion of "*its jurisdiction through judicial craft or innovation*" which the the Supreme Court outlawed in **Samuel Kamau Macharia and another Vs Kenya Commercial Bank and 2 others (2012) eKLR**.

31. In reply to the submissions by counsel for the respondents, Mr. Havi submitted that the Supreme Court decision **Hassan Ali Joho and Another Vs Suleiman Said Shabal and 2 others** is applicable and that the question whether the Form 38 that was issued to the appellant was erroneous, is itself a dispute for determination by the election court and not a matter for correction by either the Returning Officer or IEBC.

Analysis and determination

32. We have considered the appeal and the submissions by learned counsel for the parties. As we have stated the main issue in this appeal is whether the election court was right in holding that, after declaring the appellant as the winner at the tallying centre on 6th March, 2013, the 2nd and 3rd respondents did not become functus officio and had power to cancel Form 38 issued to the appellant on 6th March 2013 and to thereafter issue another Form 38 in favour of the 1st respondent on 8th March 2013.

33. Under Article 86(c) of the Constitution, IEBC has a duty to ensure that "*the results from the polling stations are openly and accurately collated and promptly announced by the Returning Officer*". It is common ground that the returning officer, the 3rd respondent announced at the tallying centre that the appellant had the highest number of votes in Mathare Constituency and issued him with a certificate of results in Form 38 on the 6th March 2013. It is also common ground that two days later, the returning officer purported to cancel that certificate and to replace it with a certificate in favour of the 1st respondent. As noted by the Election Court in its judgment, the 3rd respondent:

"...conceded that she issued Mr. Wanjohi [the 1st respondent] with Form 38 on 8th March 2013. It was at IEBC headquarters after the court session in Petition 150 of 2013. She said IEBC headquarters was not the gazetted tallying centre. She clarified that she did not re-tally the results as such as she had finished the tallies at St. Teresa

tallying hall.”

34. The election court went on to say that under Regulation 84 Elections (General) Regulations 2012 the tallying of votes and announcement of the winner is required to be made at the tallying centre gazetted for that purpose by IEBC and agreed with the appellant that that could not be done anywhere else other than the tallying centre. The Election Court then expressed its finding as follows:

“In the result I have found that the irregularity of issuing the first certificate on provisional tallies was cured by grant of a valid certificate to the candidate who garnered the highest number of votes. That candidate was properly gazetted by the IEBC and certified to the Clerk of the National Assembly as the duly elected representative. In retrospect, IEBC could have acquitted itself better. It had no good reason to rush to announce half-baked results. The tallies could have been done in a more transparent manner. The 3rd respondent must shoulder the blame for this untidy situation. In the very end the petitioner has failed to impeach the certificate of results issued to the 1st respondent. The certificate in Form 38 issued to the 1st respondent is lawful.”

35. Under Article 88(4)(e) of the Constitution, IEBC is responsible for “settlement of electoral disputes including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results”. In view of the interpretation of Article 88 (4)(1) of the Constitution by the Supreme Court in the case of **Hassan Ali Joho and Another Vs Suleiman Said Shabal and 2 others** that;

“The certificate in Form 38 declares the winner of the election and terminates the mandate of the returning officer, who acts on behalf of the Commission, shifting the jurisdiction in respect of the electoral process to challenge the results of the election to the Election Court.

the election court erred in holding that the Returning Officer was not *functus officio* and had jurisdiction to cancel Form 38 and issue another one to another person.

36. With that pronouncement by the Supreme Court whose decision is binding on this Court by dint of Article 163(7) of the Constitution, the argument that the 2nd and 3rd respondents could cancel the certificate in favour of the appellant and issue another one in favour of the 1st respondent two days later is clearly wrong. In accordance with the decision of the Supreme Court, we hold that the 2nd and 3rd respondents became *functus officio* after announcing the appellant as the winner at the tallying Centre on 6th March 2013.

37. Before we make our final orders consequent upon our decision, we wish to deal with one issue raised by counsel for the respondents. They argued that given the time limit of six months set out in Article 105 of the Constitution and Section 85A(b) of the Elections Act within which election courts should determine Parliamentary and County election petitions, this Court has no jurisdiction to remit the matter back to the election court for determination of any issue even if that were necessary. In our view, that is a misapprehension of those provisions. Article 105 of the Constitution does not limit the powers of this Court to make appropriate orders on appeal including orders to remit back a particular matter to the election court for reconsideration and to give appropriate directions to such court. Article 105 of the Constitution must be construed in light of the equally important constitutional right of appeal. That, however, does not arise in this case in view of the orders we are about to make.

38. As in their opinion the 1st respondent was the winner of the election, counsel for the 2nd or 3rd respondents urged us to exercise powers granted to us under S. 74(3)(b) of the Elections Act and to declare the 1st respondent as the duly elected representative to the National Assembly for

Mathare Constituency based on our own evaluation of the copies of the Forms 35 and 36 contained in the record of appeal. We are reluctant to do so. This is why.

39. When the returning officer, the 3rd respondent, first announced the election results on 6th March 2013, she indicated that the appellant garnered 34,957 votes while the 1st respondent garnered 32,156. Based on that announcement therefore the appellant would appear to have had a lead of 2,801 votes over the 1st respondent. However, on 8th March 2013 the same Returning Officer announced that the appellant garnered 26,916 votes against the 1st respondent's 27,262 votes which effectively gave the 1st respondent a lead over the appellant with 346 votes. According to the evidence of the appellant and based on his own tally as at 5th March 2013 the 1st respondent had garnered 31,997 votes whilst the appellant had garnered 34,556 votes, a difference of 2,559 votes. The election Court opined that the 1st respondent "emerged triumphant by whisker." In view of these conflicting figures we cannot therefore declare the 1st respondent the winner we were urged to do. As a matter of fact we are unable to determine the winner of that election.
40. In the circumstances, we allow this appeal and hereby set aside the election court's judgment dated 13th September 2013 and the decree and orders consequent thereupon and order that a fresh election for the Member of the National Assembly for Mathare Constituency be held as required by law. As the unhappy state of affairs in this matter was brought upon by the 2nd and 3rd respondents, the 2nd respondent will bear the costs of the appellant both in the High Court and in this Court capped at Kshs. 1 million in the High Court and Kshs. 500,000/= in this Court. The 1st respondent will bear his own costs in the High Court and in this Court.

Dated and Delivered at Nairobi this 18th day of March, 2014.

D. K. MARAGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

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

REGISTRAR

ewm