



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: AZANGALALA, J. MOHAMMED & KANTAI JJ.A)

CIVIL APPEAL NO. 41 OF 2013

IN THE MATTER OF: THE CONSTITUTION OF KENYA, 2010

AND

THE MATTER IN OF: THE ELECTIONS ACT, 2011

AND

IN THE MATTER OF: THE ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS) PETITION RULES, 2013

AND

IN THE MATTER OF: THE GOVERNOR'S ELECTION FOR KAKAMEGA COUNTY

BETWEEN

MABLE MURULIAPPELLANT

AND

HON. WYCLIFFE AMBETSA OPARANYA1ST RESPONDENT

PHILIP MUSEVE KUTIMA2ND RESPONDENT

NICHOLAS SUMBA3RD RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION (IEBC) 4TH RESPONDENT

(Being an appeal against the Judgment of the High Court of Kenya at Kakamega

(Said J. Chitembwe, J.) dated 13th September, 2013

in

ELECTION PETITION NO. 5 OF 2013)

JUDGEMENT OF THE COURT

This is a first appeal from the judgement of the High Court of Kenya at Kakamega (*Said J. Chitembwe, J.*) delivered on 13th September, 2013 where the petition by the appellant, **Mable Muruli**, challenging the gubernatorial elections for Kakamega County was dismissed. By **Section 85A** of the Elections Act Chapter 7 Laws of Kenya such an appeal to this Court lies only on matters of law.

In the Memorandum of Appeal to this Court the appellant has taken 11 grounds of appeal which are essentially this: that the trial court failed to appreciate the legal import of the appellant's constitutional rights to participate as a candidate in the said election; that such failure by the trial Judge led to the disenfranchisement of the electorate of the said County; that the learned Judge failed to understand the legal import of a consent order recorded in Nairobi High Court Petition No. 93 of 2013 *Mable Muruli v Independent Electoral & Boundaries Commission and Another*; that the learned Judge erred in holding that all issues pertaining to nomination of the appellant as a candidate for the said seat had been settled in the said petition No. 93 of 2013; that the learned Judge misapplied and misunderstood the concept of *res judicata* and *estoppel*; that the learned Judge erred in not holding that the electoral offence of bribery had been committed by the 1st and 2nd respondents and in any event applied a higher standard of proof than the law requires; that the learned Judge did not properly analyze the evidence presented by the appellant and the submissions on the same; that the learned Judge was biased in favour of the 1st and 2nd respondents and did not accord the appellant equality before the law; that dismissal of the appellant's petition was against the law and finally that the learned Judge displayed lack of clarity of mind and contradicted himself in analyzing the evidence on record as a consequence of which he erred and misdirected himself in law in finding that the 1st and 2nd respondents had been validly elected to office.

We may start with the complaint by the appellant as relates to alleged failure by the learned Judge to recognize the appellant's constitutional rights to participate as a candidate in the elections for the position of Governor of Kakamega County. Such a right is enshrined in the Constitution which by Article 38 (3) (c) donates this right to be exercised by every adult citizen who without unreasonable restrictions may be a candidate for public office, or office within a political party of which he is a member and, if elected, to hold office.

In the petition presented before the High Court subject to this appeal the appellant made various averments some of which we may reproduce in this judgement as they are material to the points in issue:

At paragraph 7 of the petition it is stated:

“The Petitioner had intended to contest for the now concluded 4th March 2013 General Elections as a candidate seeking for an elective post as a County Governor, Kakamega county and in so doing she was to contest as an independent candidate.”

At paragraph 8:

“Prior to the conduct of the General Elections conducted on the 4th March 2013, your petitioner did present her nomination papers to the 3rd Respondent for and on behalf of the 4th Respondent to enable her get clearance to contest as an independent candidate for the Governor position, Kakamega County but the said clearance was unlawfully denied as explained herein below.”

At paragraphs 12,13,14 and 15 it is averred that:

“12. Your Petitioner does not accept the result as declared by the 3rd respondent of being the true wish and reflective of the people of Kakamega County as she was unduly, unlawfully and maliciously locked out from participating in the elections by the 3rd Respondent on grounds that

she was either not academically qualified or that there was no sufficient time for the 4th Respondent to include her name in the ballot papers for the election of Governor of Kakamega County. The Petitioner avers that her exclusion from the said election was and remains unlawful, inter-alia, on the following grounds.

a) As a holder of a post-graduate degree in Leadership and Management from the City of London College, the Petitioner was duly qualified under Article 180 of the Constitution and Sections 22 and 32 of the Elections Act 2011 to contest as an independent candidate for the position of Governor of Kakamega County during the elections held on 4th March 2013.

b) By a judgement of this Honourable Court in **Nairobi High Court Petition No. 93 of 2013 Mable Muruli vs. The Independent Electoral and Boundaries Commission** dated and delivered on 13th February, 2013 in High Court granted the following orders:-

i. THAT a declaration be and is hereby made that the Petitioner is a degree holder within the meaning of Section 22(2) of the Elections Act, 2012 Cap 24 and is entitled

for the position of County Governor, Kakamega County upon meeting other requirements as set by the Commission/Statute.

ii. THAT a mandatory injunction do issue compelling the Commissioner to accept the Petitioner's nomination papers and issue a clearance certificate to her for her to contest the seat of County Governor Kakamega County slated for 4th March, 2013.

iii. THAT a mandatory injunction do issue compelling the Commission to accept and incorporate the Petitioner's name in the list of candidates and ballot papers as an independent candidate for the County Governors seat Kakamega County.

iv. THAT costs of this application be borne by the Commissions.(sic)

(c) The Petitioner avers that the 4th Respondent did not appeal or seek to review the said judgement and decree prior to the holding of the Election for County Governor of Kakamega County on 4th March, 2013.

(d) In view of the foregoing averments the Petitioner contends that the 3rd and 4th Respondents were enjoined in law to comply with the orders of the Court in order to give effect to the Petitioner's right under Article 38 of the Constitution to contest for the position of Governor of Kakamega County.

- The Petitioner avers that her exclusion by the Respondents from contesting for the position of governor of Kakamega County as an independent candidate invalidates the process and results of the said election and specifically renders

the election of the First and Second Respondents as invalid, null and void ab initio, inter-alia, on the following grounds:-

a) Under Article 81 and 88 of the Constitution the Commission was enjoined to ensure, inter-alia, that the elections for Governor and Deputy Governor of Kakamega County would be held in a way that:-

i. Upholds the freedom of Citizens to exercise their political rights under Article 38 either as voters or candidates.

ii. Conduct free and fair elections which are conducted, inter- alia, independently, transparently and administered in an impartial, neutral, efficient, accurate and

accountable manner.

b) *The Petitioner avers that her exclusion from participation in the impugned election as an independent candidate constitutes a violation of her rights under Article 38 of the Constitution and contravenes the duty of the 3rd and 4th Respondents to hold free and fair elections.*

- *The Petitioner avers that as a result of her exclusion from participating in the impugned Election as an Independent Candidate the election of the first and Second Respondents is vitiated, compromised and negated on the grounds of illegality and failure to meet or comply with the standards and principles of free and fair elections.*
- *It is your petitioner's contention and averment that the elections held in Kakamega County for the Governor and Deputy Governor seat was not impartial, free, fair and just and that there was a well calculated conspiracy intentionally designed to block your petitioner and her supporters from participating in the Kakamega County Gubernatorial race.”*

So from the foregoing the position was that the appellant presented nomination papers to the 3rd respondent, **Nicholas Sumba**, who was the Returning Officer for various elective positions in Kakamega County.

In an affidavit sworn by the said Returning Officer on 23rd April, 2013 and presented to the election court it was deponed *inter alia* that upon being appointed by the 4th respondent, **Independent Electoral and Boundaries Commission (IEBC)** as such officer he embarked on the process pertaining to his office by putting various notices within Kakamega County for candidates to collect nomination forms. The said officer deponed further that attached to nomination forms was a checklist showing what was required of candidates to various positions. The checklist that was attached to the affidavit required of independent candidates vying for position of Governor (*like the appellant*) to submit, 5 days before nomination date, the following:

“1. *Candidate name*

2. *Physical address of candidate*

3. *Letter to IEBC on intent to vie for Governor position*

4. *Certificate of Clearance from the Registrar of Political Parties indicating that the candidate has not been a member of any political*

party 3 months to the election date (i.e. before 4th December, 2012 as

per section 33(a) of the Elections Act 2011

5. *Degree certificate obtained and institution the candidate studied*

6. *Candidate National identification document number used to register as a voter*

7. *Candidate voter registration number.*

8. *A list of at least 500 supporters from the constituency/ county in a standard serialized A4 sheets of paper and in CD detailing their names, signatures, ID Passport Nos. who are*

a. *certified by IEBC as registered voters*

b. *certified by Registrar of Political Parties as not registered members of any registered political party.”*

The checklist required of independent candidates to submit the following on nomination day:

- *Originals and Photocopies of national identification document used to register as a voter (National Identity Card or Passport)*
- *Original and certified copy of Degree certificate obtained certified by a recognized institution the candidate studied.*
- *Certificate of Clearance from the **Registrar of Political Parties** indicating that the candidate has not been a member of any political party 3 months to the election date (**i.e. before 4th December, 2012 as per section 33(a) of the Elections Act 2011**)*
- *Duly filled and signed Nomination Paper for Governor Elections (Form 17)*
- *Colored Passport Size Photographs (**Write name and ID/Passport number at the back**)*
- *Duly filled and signed Statutory Declaration for purposes of Nomination for Parliamentary and County Elections (**From 19**)*
- *Candidate symbol approved by IEBC*
- *Duly filled and signed Electoral Code of Conduct (**2nd Schedule of Elections Act 2011**)*
- *If a candidate was a public officer, a letter of discharge from employer confirming resignation by 4th September, 2012 (Not applicable to current prime minister vice president, deputy prime minister member of parliament)*
- *Duly filled and signed Self Declaration Form (**1st Schedule of leadership and Integrity Act 2012**)*

(11 - missing)

12. Either

g. *Banker's cheque payable to IEBC of a non-refundable fee of Kshs. 25,000 for candidates who are Women, Youth and persons with Disabilities candidates OR;*

h. *Banker's cheque payable to IEBC of a non-refundable fee of and Kshs. 50,000 for any other candidates*

13. *Draft Campaign schedule prepared with regard to electoral code of conduct for finalization during campaign planning meeting with Returning Officer.*

The 3rd respondent deponed further in the said affidavit that the appellant did not present her nomination papers until the afternoon of 1st February, 2013, the last day appointed by the 4th respondent for presentation of nomination papers, and that upon doing so there was no degree certificate as required. Instead of a degree certificate the appellant presented transcripts from the City of London College and a letter from the Commissioner of Higher Education dated 31st January, 2013 confirming accreditation status accorded to the said City of London College. The 3rd respondent was unpersuaded that such transcript satisfied the legal requirement that a candidate for election to the position of Governor produce a degree certificate and therefore declined to accept the appellant's nomination papers. This provoked a flurry of activity.

In a complaint filed on behalf of the appellant to Independent Electoral and Boundaries Commission (IEBC) Nomination Dispute Resolution Committee it was prayed that an order be issued to compel the County Returning Officer for Kakamega to accept the appellant's documents and issue a clearance

certificate to enable the appellant contest the position of County Governor for elections then scheduled to be held on 4th March, 2013. It was further prayed that the appellant's name be included in the names of candidates for the said seat. The Committee after a hearing dismissed the appellant's complaint because:

“The complaint is hereby dismissed for failure by the complainant to meet the requisite educational qualifications for the position of Governor.”

That was on 7th February, 2013.

On 11th February, 2013 the appellant hastened to the High Court and filed High Court Petition No. 93 of 2013 against Independent Electoral and Boundaries Commission where it was prayed, *inter alia*, that:

“a) A declaration that the Petitioner is a degree holder within the meaning of section 22 (2) of the Election Act 2012 No. 24 and is entitled to contest for the position of County Governor, Kakamega county upon meeting other requirements as set by the Commission/ statute.

b) A mandatory injunction compelling the Commission to accept the Petitioners' nomination papers and issue a clearance certificate to her for her to contest the seat of county Governor, Kakamega County in the general elections slated for 4th March 2013.

- A mandatory injunction compelling the Commission to accept and incorporate the Petitioners' name in the list of candidates and ballot papers as an independent candidate for the County Governors' seat, Kakamega County.*
- Costs of this petition are borne by the Commission.”*

That contested petition was heard by the High Court which in a judgement delivered on 13th February, 2013 recognized the appellant as a degree holder and ordered that the appellant's nomination papers be not only accepted by the Independent Electoral and Boundaries Commission and clearance certificate issued to her but also that the appellant's name be included in the list of candidates as an independent candidate for the seat of County Governor for Kakamega County.

The 4th respondent appears to have encountered difficulties complying with the orders in the said judgement and this led to 2 applications being filed - on 15th February, 2013 the appellant moved the court by a Notice of Motion which prayed in essence that leave be granted to the appellant to apply for an order to commit the Chairman and the Chief Executive Officer of the 4th respondent to civil jail for contempt of court for failure to comply with the said judgement. Other prayers were also made.

On 19th February, 2013, the Independent Electoral and Boundaries Commission filed an application asking the court to stay and review the said judgement citing various reasons including that the court was not seised of all facts when it delivered the judgement.

The parties appeared in court on 20th February, 2013 for hearing of the 2 applications when instead of a hearing the following order was recorded:

“By consent:

- 1 THAT Petition be marked as settled.*
 - 2. THAT the Petitioner reserves her right under Section 75 of Elections Act.*
 - 3. THAT the Respondent to pay the Petitioners costs.*
 - 4. THAT the application for contempt dated 15th February, 2013 is herewith spent.*
- THAT the application dated 18th February, 2013 by the Respondent seeking to stay the judgement*

herein is also spent.”

When the appeal came for hearing before us on 11th December, 2013 learned counsel for the appellant Mr. Dismas Wakla submitted in respect of this aspect of the appeal that the appellant presented nomination papers to the 3rd respondent on 1st February, 2013 but was denied clearance. It was also submitted that the appellant obtained mandatory injunctive orders from the High Court but the suit was compromised the appellant reserving her rights under **Section 75** of the Elections Act. Counsel submitted further that the appellants' Article 38 (of the Constitution) rights were infringed and the people of the said Country were disenfranchised in the event. Counsel for the appellant appeared to be stating that the appellant had compromised the orders obtained from court opting instead to file an election petition. The Nigerian Supreme Court case of **Alh. Atiku Abubakar & Others v Alh. Umaru Musa Yar'adua & Others [2009] All FWLR (Pt.457) 1 S.C.** was cited for the proposition that a candidate for electoral office denied clearance would reserve rights and file an election petition. Also cited was **Morgan v Simpson [1974] 3 All ER 722** for the proposition that an election would be nullified if conducted in breach of the law.

In respect of this aspect of the appeal learned counsel for the 1st and 2nd respondents Mr. Ken Nyaundi submitted that Article 38 of the Constitution rights are not unlimited and are subject to reasonable constitutional or legal limitations. Counsel submitted that at the close of nominations the appellant did not hold a University degree and only held transcripts from a college that could lead to award of a diploma and was thus unqualified to stand for the position of Governor of the said County. On the effect of the consent order recorded in High Court Petition No. 93 of 2013 Mr. Nyaundi was of the view that the consent order settled all issues which were therefore spent.

Miss W. Thanji, the learned counsel for the 3rd and 4th respondents submitted that the appellant had failed to prove to the 3rd and 4th respondents at the material time that she was a holder of a university degree which it was her duty to do.

The learned Judge considered the issue on whether the appellant had furnished documents necessary for qualification as an independent candidate for the said seat and expressed himself thus in the judgement appealed from:

“The Petitioner maintains that the 3rd respondent ought to have known that an extended diploma was equivalent to a degree. She provided a BTEC document which gave the equivalence of her qualification to a degree. From the evidence on record I am satisfied that the petitioner did not present a degree certificate to the 3rd Respondent on the 1.2.2013 as required by the law. The petitioner could have had the qualification but she did not present a degree certificate which is the requirement. The document from BTEC giving the equivalences of the United Kingdom education standard could not help as it was not upon the 3rd respondent to rely on a foreign document as proof of degree equivalence. That proof had to be provided by CHE. It was upon the petitioner to have produced a letter from CHE indicating that the extended diploma from the City of London College was equivalent to a degree. That authentication was done on the 4.2.2013 which was after the nomination deadline. The transcripts that were provided by the petitioner were leading to the award of a diploma and not a degree. This is different from the Hassan Joho case where the transcripts were leading to the award of a degree. The 3rd respondent was therefore right to insist on a degree certificate. It was not up to the 3rd respondent to interpret the extended diploma and equate it to a degree. Indeed the checklist provided by the 3rd respondent indicated that independent candidates were to provide their documents five days to the nomination day. In the end I do find that the petitioner did not provide a degree certificate or proof (sic) that her qualifications were equivalent to a degree status to the 3rd respondent on the 1.2.2013.”

What was the effect of the consent order recorded in High Court Petition No. 93 of 2013? According to learned counsel for the appellant the order reserved a right to the appellant to file an election petition which she proceeded to do after elections were held and a winner declared. The respondents take a totally

different view and urge that the appellant compromised her rights and all issues pertaining to complaints lodged up to the date of the consent order were spent.

The consent order stated *inter alia* that the appellant reserved her rights under **Section 75** of the Elections Act, meaning, as we understand this aspect of the consent order and as submitted by learned counsel for the appellant that the appellant reserved a right to file an election petition after elections then slated for 4th March, 2013 had been held. The appellant did not therefore participate at all as a candidate in that election but stood aside and finally lodged the said petition subject of this appeal.

Section 75 of the said Act provides that a question as to the validity of an election of a county governor shall be determined by the High Court within the county or nearest to that county. This provision enables any party with a genuine grievance to approach the High Court in a petition challenging an election.

In **Alh. Atiku Abubakar & Others v Alh. Umaru Musa Yar'adua & Others** (*supra*) the petitioner petitioned the court on grounds *inter alia* that the 1st appellant was validly nominated but was unlawfully excluded from the election. The 1st appellant's name was not on the ballot papers until 4 days to the election and while the other candidates had 90 days to campaign, he had only 4 days which was when the Supreme Court of Nigeria in another matter before it gave its judgement directing that he takes part in the election. The 1st appellant was thus able to participate as a candidate in the election.

In **Morgan & Others v Simpson & Another** (*supra*), it was held *inter alia* that the election would be declared invalid for although it had been conducted substantially in accordance with the law as to elections the breach of rules in omitting to stamp 44 ballot papers had affected the result because on a proper construction of the relevant section of local election rules any breach which affected the result was by itself enough to compel the court to declare the election void.

These were the 2 cases cited before us by learned counsel for the appellant in support of the submission that the appellant was unlawfully excluded from the election for the gubernatorial seat of Kakamega County and that the election should accordingly be nullified.

The consent order recorded on 20th February, 2013 by the appellant and the 4th respondent in High Court Petition No. 93 of 2013 had several aspects - it stated that the petition be marked as settled; it reserved a right to the petitioner under **Section 75** of the Elections Act; the petitioner was to be paid costs; an application for leave to cite officers of the Independent Electoral and Boundaries Commission for contempt of court for failure to comply with a judgement *given in favour of the petitioner was marked as spent* as was an application by the Independent Electoral and Boundaries Commission for review of the said judgement which was also marked as spent.

As we have already seen the appellant had in the said petition prayed for various orders including a declaration that she was a degree holder; a mandatory injunction compelling the Independent Electoral and Boundaries Commission to accept her nomination papers; that Independent Electoral and Boundaries Commission issues to the appellant a clearance certificate to enable her contest the seat already stated, and a mandatory injunction compelling the Independent Electoral and Boundaries Commission to incorporate her name in the list of candidates and ballot papers as an independent candidate. All the prayers were granted in the judgement already referred to meaning that the appellant was on 13th February, 2013 (*the date judgement was delivered*) confirmed through court order as a holder of a valid degree certificate. There was in addition in force an order compelling the Independent Electoral and Boundaries Commission to accept the appellant's nomination papers, issue her with a clearance certificate and include her name as a candidate for the (*then*) forthcoming general elections set to be held on 4th March, 2013.

What did the appellant do with all these orders that she had obtained in her favour from court?

Unlike in the **Alh. Atiku Abubakar** case (*supra*) where the appellant had been denied participation in the election where he was entitled to participate as a candidate the appellant in this appeal went before the Judge on 20th February, 2013 and not only settled the petition where judgement had been pronounced in

her favour but also declared that the application to cite the Independent Electoral & Boundaries Commission officers for contempt for failure to comply with the said judgement had been spent.

Mr. Wakla submitted before us that the appellant through patriotic spirit did not want to pursue the application for contempt of court against the 3rd and 4th respondents because it would have created havoc to the elections if such orders against the Independent Electoral & Boundaries Commission officers had been granted literally on the eve of the elections. The short answer to this issue must surely be that choices have consequences. By freely walking away from the rights obtained in a regular judgement the appellant is attempting in this appeal and the election petition to have a second bite at the cherry when she freely compromised her rights. By settling that petition all applications that went with it stood settled and to talk of a reservation of certain rights under the Elections Act was probably as a result of a misapprehension of the law on that issue on the part of the appellant or her advisors.

Then there is the issue whether the matter was therefore *re judicata*. Mr. Wakla, learned counsel for the appellant, faulted the learned Judge for holding that in view of the compromise reached in High Court Petition No. 93 of 2013 the matter was *res judicata*. Counsel submitted that what was *res judicata* was whether the appellant was qualified to participate in the election but not that the appellant's constitutional rights had been violated.

Mr. Nyaundi, the learned counsel for the 1st and 2nd respondents submitted that the consent order recorded by the learned Judge in the said petition settled all issues and complaints by the appellant. He further submitted that the question whether the appellant had been properly excluded from participating as a candidate in the said election had been settled by the said order.

Miss Thanji, the learned counsel for the 3rd and 4th respondents submitted that the appellant had exhausted her rights in the said petition and could not pursue the same in an election petition.

The learned Judge considered all the material placed before him on this issue and held that the appellant had exhausted her remedies on the aspect of nomination which was therefore *res judicata*. The learned Judge rendered himself thus in the course of the judgement:

*“The essence of the doctrine of res judicata is that the same parties should not be allowed to litigate over the same issues over and over again. There should be an end to litigation. The main points for consideration by the court are whether the matter before it was fully and finally determined by a court or Tribunal of competent jurisdiction and whether the parties are the same. In the case of **BULHAN & ANOTHER V EASTERN & SOUTHERN AFRICAN TRADE DEVELOPMENT BANK (2004) 1 KLR 147** Justice Ibrahim held that for the principles of res judicata to apply the issues alleged to be similar must have been raised in the earlier suit, the suit must have been heard and finally determined or decided by the court. Whenever the doctrine of res judicata is raised, the court is at liberty to consider as to whether the parties who had not been enjoined ought to have been enjoined in the earlier suit. In the current situation the petitioner could not have enjoined the 1st and 2nd respondents as by that time the winner of the election had not been declared. Thus the two respondents were not parties to Petition No. 93 of 2013.*

*Are the issues and orders being sought similar in both petitions. The first prayer in Petition No. 93 of 2013 was for the petitioner to have been declared as possessing degree qualification within the meaning of **Section 22 (2)** of the Elections Act 2012. That prayer was granted. The petitioner was also seeking two mandatory orders of injunction against the 4th respondent so that she could be issued with a clearance certificate as well as be included in the list of candidates on the ballot papers for the election for County Governor seat for Kakamega County. Currently the petitioner is seeking an order that her fundamental rights and freedoms as enshrined in the Constitution were fundamentally violated and willfully compromised by the 3rd and 4th respondents and therefore would like the election of the 1st and 2nd respondents as Governor and Deputy be declared null and void and a certificate issued to that effect. Further in prayer (C) of the petition the petitioner maintains that the*

election held on the 4th of March, 2013 for the position of Governor and Deputy should be nullified so as to afford the petitioner and her supporters to participate in a free, fair and transparent election. The petitioner in her prayer (**D**) contends that the 3rd and 4th respondents failed to hold free, fair and credible nominations on the 31.1.2013 and 1.2.2013 as well the elections . 4.3.2013. (sic)

The body of the petition indicates that the 1st and 2nd respondents were not fairly elected. The votes announced by the 3rd respondent were initially found to be 229,000 but were later changed to 259,071 (paragraph 19 of the petition). The petitioner also contends that the votes cast for the position of Governor and that of Senator for Kakamega County did not tally. No evidence was adduced in relation to those allegations. It is clear to me that the petition is based on two grounds namely that the petitioner was wrongfully excluded from participating in the election for the position of Governor and secondly that the 1st and 2nd respondents were not elected fairly as they engaged in acts of bribing voters. As I have found hereinabove, the exclusion of the petitioner from participating in the elections got the petitioner's own blessings. The petitioner entered into a consent signifying that the elections could proceed and she cannot bring the same issue and allege that her exclusion vitiated the elections. Section 120 of the Evidence Act states as follows:-

“120 when one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.”

The consent recorded in court did indicate that the petitioner reserved her right to file a post-election petition in line with **Section 75** of the Election Act. **Section 75** of the said Act states as follows:-

75. (1) A question as to validity of a county election shall be determined by High Court within the county or nearest to the county

(2) A question under subsection (1) shall be heard and determined within six months of the date of lodging the petition.

(3) In any proceedings brought under this section, a court may grant relief, including

(a) a determination of whether or not the candidate whose election is questioned was validly elected;

(b) a declaration of which candidate was validly elected; or

(c) an order as to whether a fresh election will be held or not.

According to the provisions of **Section 75** the election court is supposed to evaluate whether the candidate whose election is being questioned was validly elected and whether a fresh election should be ordered. The petitioner is questioning the validity of the election of the 1st and 2nd respondents on two grounds as herein above stated. With regard to the ground that the election was not free and fair on the reason that the petitioner and her supporters were excluded from participating in the elections and that the nomination process was not free, fair and credible, I do find that that issue is similar to what was deliberated before the court in Petition No. 93 of 2013. The petitioner cannot re-open the same issue before this court. The petitioner could not have forfeited her right to participate in the elections only to thereafter file a petition that has the effect of affecting the rights of those who participated and won the elections. The petitioner is estopped from raising the same issue as she made the 4th respondent believe that the elections ought to have proceeded without the

petitioner being one of the candidates.

The petitioner permitted the 4th respondent to continue with the elections and cannot allege that the elections were not free and fair because she was not included on the ballot paper. The mere fact that the 1st and 2nd respondents were not parties to Petition No. 93 of 2013 cannot reopen the same issue as to whether the petitioner was unlawfully barred from participating in the elections since that issue had already been settled by consent. To enforce the prayer in petition No. 93 of 2013 that the petitioner's name be on the ballot papers is equivalent to nullifying the election and ordering a repeat of the process. The orders that were granted in the previous petition cannot be enforced by this court as those orders are spent and the matter is fully settled. The reservation by the petitioner to file an election petition as per the consent cannot lead to the re-opening of the issues that were dealt with in Petition No. 93 of 2013.

Res judicata can apply to a specific issue in a dispute and it does not mean that in all cases where the doctrine of res judicata is raised then the entire suit collapses. Where a specific issue has been dealt with by the court either through a full hearing or by way of a consent order then any of the parties to the dispute is estopped by res judicata from raising the same issue in a subsequent suit. The principles of estoppel by res judicata was dealt with in the English case of **ZURICH INSURANCE COMPANY PLC V COLIN RICHARD HAYWARD [2011] EWCA Civ 641**. In that case the respondent was involved in an industrial accident and filed a suit for damages. The appellant had insured the respondent's employer. A consent judgment was entered into whereby the respondent was paid about 135,000 Sterling pounds as damages. Subsequently the appellant got evidence from the respondent neighbours that the respondent had exaggerated the extent of his injuries and formed the opinion that the damages that had been paid to the respondent ought to have been reduced. The appellant filed a fresh suit against the respondent claiming that the respondent obtained the damages through fraudulent means. The respondent contended that the suit was res judicata. The court stated as follows:-

“Estoppel by res judicata, or estoppel by record, is a manifestation of the principle that judicial decisions once made must be accepted as final and are not open to challenge. Ultimately, it rests on a rule of policy that it is in the public interest for there to be finality in litigation, but it also sustains an important principle that decisions of competent tribunals must be accepted as providing a stable basis for future conduct. The Latin word “res judicata” mean simply “a thing judicially determined.” they may apply to the claim as a whole (usually referred to as “cause of action estoppel”), or may refer to one or more specific issues which the court was required to decide in the course of reaching its decision on the matter before it (what is generally referred to as “issue estoppel”.... The fact that an order is made by consent does not in my view prevent it from giving rise to an estoppel by record, provided that the nature of the order is such that it would otherwise have that effect.

In the case of **HENDERSON V HENDERSON [1843] 3Hare 100** (cited in the Zurich Insurance Company case) the court explained the doctrine of res judicata in the following terms-

“...the court requires that parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res-judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.” (emphasis added)

With regard to the right to file an election petition based on Section 75 of the Elections Act, the petitioner was at liberty to file an election petition based on other reasons such as irregularities, non-compliance with the law and bribery. Since the petitioner has raised some issues which are not related to nomination matters, I do find that the petition in its entirety is not res judicata. However, issues relating to nomination were dealt with in Petition No. 93 of 2013 and fully settled. The petitioner's contention that her fundamental rights were breached does not lead to nullification of the election on that basis. Her remedy does not lie in challenging the election due to the violation of her rights but the appropriate remedy would be for her to seek damages and this court is not the right forum to award damages. I am aware that the petitioner had legitimate expectation to participate in the elections but she blew off that opportunity willingly by entering into the consent on 20/2/2013.

The petitioner reserved her right to file this petition. The main question is, what did it mean to have the petition marked as settled, and what were the terms of the settlement. Could it be taken that the petitioner was simply suspending her petition No. 93 of 2013 and promising to re-open it through this election petition. Was the cost paid to the petitioner the consideration for the settlement? Although there are no details of the settlement, it can be concluded by the court that the petitioner cannot go back to that file and seek enforcement of the orders that were granted. Since the prayers sought intended to have the petitioner included as a candidate and those orders were spent, the petitioner cannot seek to have the election vitiated on the ground that her name was excluded from the ballot paper. Prayers (a), (b) and (c) of the petition, in as much as they concern the issue of nomination are res judicata. Even if the petitioner were to approach the court in petition No. 93 of 2013 and seek to enforce some of the orders like punishment of the IEBC officers, the answer would be that those issues are already settled. In the end I do find that the petitioner is estopped by res judicata from seeking nullification of the election on the basis of her exclusion from being one of the candidates but is free to seek nullification of the election on other grounds.”

It is difficult to improve on the way the learned Judge dealt with this issue of *estoppel* by *res judicata* thus quoting it extensively. By settling the said petition in the civil suit and compromising all the complaints that the appellant had taken before the court the appellant could not take up an issue of alleged contravention of constitutional rights when the court in the said petition had granted her orders allowing her to participate in the election as a candidate only for the appellant to willingly surrender such orders and rights thus allowing the elections to proceed only for her to go to the election court to ask for the clock to be wound back.

We note that elections for Governor of Kakamega proceeded where 6 candidates contested and a total of 462237 voters cast their ballots. No witness was called to say that he as a voter had been denied an opportunity to vote or had failed to vote because the appellant's name was not on the ballot.

Section 83 of the Elections Act provides that:

“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 following passage appears in **Morgan & Others v Simpson & Another** (*supra*):

“...The courts have never been anxious to upset elections for some trivial reason and that is why the requirement of “substantially” is reinforced by the words affecting the result of the election ...”

The grounds of appeal relating to alleged contravention of the appellant's constitutional rights must therefore fail.

The other aspect of this appeal relates to the appellant's complaint that the learned Judge erred by failing to appreciate that the offence of bribery of the electorate had been proved to the required standard. In this respect learned counsel for the appellant submitted that it had been proved through a video recording that the 1st respondent had bribed voters. Counsel submitted that the learned Judge erred in

applying a higher standard of proof than the law required and the judgement should therefore be set aside.

Mr. Nyaundi, on his part, in response submitted that it had not been proved at all whether any money had been offered or received and therefore the allegation of alleged bribery had no basis.

We note from the record that **PW3 Stanlaus Anami**, a witness called by the appellant to testify on the allegations of bribery is recorded as stating:

"...The 1st Respondent did not mention money at the church service. I didn't hear him speaking against bribery or telling people not to vote because of money. I heard the governor talking about the envelop. In the CD the Governor did not talk of the envelop. One cannot see what was in the envelope. The face at the beginning of the video is mine. There was the national anthem being sang. It is the woman Rep who took an envelope from her bag and put it on the table. The governor did not address the meeting after National Anthem. I did not describe the gadget I used in my affidavit. This was on 24.2.2013. I later communicated with the petitioner."

And on the issue of video recording the same witness stated:

"I did not prepare a certificate for recording of the CD. I did not produce the CD myself. I took the pictures to Befrey Anawa. I indicate in my affidavit that I produced the CD. I am seeing the certificate by Befrey. Befrey gives the dated (sic) of 14.3.2013. I am not aware that during production of CDs, images and voice can be manipulated. I have never edited a CD. I have not provided a translation of the CD."

PW4 Victor Shivega, another witness called to testify on bribery of voters stated in the course of his testimony before the election court:

"I know voter bribery is an offence. We reported to IEBC but I have not annexed the letter. We reported to the police but I do not have the O.B. number. I reported at Shinyalu police station after 2.00 p.m. I may not know if the Governor was not in Shinyalu on 1.3.2013."

I saw three aspirants, Prof. Khasian, the Governor and Rachael Ameso plus Bonface – County representative. The Governor told the gathering that he was like a father to them. He asked people if they wanted to drink milk from the father. I did not see the Governor giving out money to the gathering. I saw Bonface giving out money."

And later:

"...The CD does not show Mr. Oparanya giving out money. The big face shown on the video at the end is that of Bonface. The affidavit does not give the gadget used to record the CD. The equipment used is not given. The process used in producing the CD is also not given ..."

The learned Judge considered the allegations of bribery and the evidence tendered in support thereof and found that the allegations had not been proved to the required standard at all. **Section 64** of the Elections Act makes it an offence for any candidate in an election to be involved in bribery and a heavy penalty is imposed by the succeeding provision for a candidate who engages in bribery of voters.

Where allegations of bribery of voters or undue influence are made the burden is upon the person making them to prove the same. The standard of proof required is much higher than in the ordinary civil cases.

The High Court of Kenya while dealing with alleged malpractices held in **John Kiarie Waweru v Beth Wambui Mugo & Others HCEP NO. 13 of 2008** that a petitioner must establish that the electoral malpractices were of such a magnitude that it substantially and materially affected the outcome of the electoral process in regard to the election.

The Supreme Court of Kenya in **Raila Odinga v The Independent Electoral & Boundaries Commission & 3 Others Supreme Court Petition No. 5 of 2013** on the issue of burden of proof and the standard thereof rendered itself thus:

“[203] The lesson to be drawn from the several authorities is, in our opinion, that this Court should freely determine its standard of proof, on the basis of the principles of the Constitution, and of its concern to give fulfillment to the safeguarded electoral rights. As the public body responsible for elections, like other public agencies, is subject to the “national values and principles of governance” declared in the Constitution [Article 10], judicial practice must not make it burdensome to enforce the principles of properly-conducted elections which give fulfillment to the right of franchise. But at the same time, a petitioner should be under obligation to discharge the initial burden of proof, before the respondents are invited to bear the evidential burden. The threshold of proof should, in principle, be above the balance of probability, though not as high as beyond-reasonable-doubt – save that this would not affect the normal standards where criminal charges linked to an election, are in question. In the case of data-specific electoral requirements (such as those specified in Article 38(4) of the Constitution, for an outright win in the Presidential election), the party bearing the legal burden of proof must discharge it beyond any reasonable doubt.”

We have considered the aspect of appeal on the allegations of bribery of voters. Neither PW3 nor PW4 nor any other witness gave any direct evidence before the election court to show that the 1st respondent or any other person engaged in any act of bribery of voters. The appellant's complaints in that respect has no basis in law or at all.

The other grounds of appeal taken by the appellant are directly related to the matters we have discussed in this judgement and it is not necessary to cover them again.

Considering our findings on all grounds of appeal taken by the appellant it will therefore be seen that the appeal has no merit and we accordingly dismiss it with costs.

Dated and Delivered at Kisumu this 14th day of March, 2014.

F. AZANGALALA

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR