



IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & ODEK, JJ.A)

CIVIL APPEAL NO. 29 OF 2013

BETWEEN

DR. THUO MATHENGE 1ST APPELLANT

MICHAEL MWANGI KIBICHO 2ND APPELLANT

AND

NDERITU GACHAGUA 1ST RESPONDENT

RETURNING OFFICER, NYERI COUNTY 2ND RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION 3RD RESPONDENT

(An appeal from the Judgment and Decree of the High Court of Kenya at Nyeri

(Wakiaga, J.) dated 9th September, 2013

in

H.C Election Petition No. 1 of 2013 consolidated with Petition No. 2 of 2013)

JUDGMENT OF THE COURT

1. Before us is a consolidated appeal against the decision of the High Court (Wakiaga, J.) dated 9th September, 2013 wherein the appellants' Petitions were dismissed.
2. By Petitions dated 8th March, 2013 and 2nd April, 2013, the 1st and 2nd appellants respectively challenged the gubernatorial elections conducted on 4th March, 2013 in Nyeri County. These two Petitions were consolidated by the High Court for the purpose of hearing and determination. The

- 1st appellant was one of the candidates who vied for the Governorship seat in Nyeri County while the 2nd appellant was a registered voter in the concluded general elections of Kenya held on 4th March, 2013. The other candidates who vied for the said post were the 1st respondent as well as Gakuru Patrick Wahome, Mutahi Mwangi Njururi and Wang'ondou John Githinji. On 13th March, 2013 after the conclusion of the said elections the 3rd respondent announced the election of the 1st respondent as the Governor of Nyeri County through publication of a notice in the Kenya Gazette.
3. The appellants claimed that the 1st appellant lost the said elections due to the fact that the 3rd respondent misprinted the name of his running mate in the ballot papers as Geoffrey Gitonga Ndegwa instead of Dr. Geoffrey Kamau Kibui. It was their case that the 1st appellant's supporters voted against him in protest because they thought he had misled them in respect of his running mate being Dr. Geoffrey Kamau Kibui so as to get their votes. The appellants sought the following declaratory orders:-
- ***The 1st respondent was not validly elected as the Governor of Nyeri County.***
 - ***The gubernatorial elections held in Nyeri County were void and a nullity due to the error on the 1st appellant's running mate.***
 - ***That fresh gubernatorial elections be held in Nyeri County.***
 - ***The costs of the Petitions be borne by the 2nd and 3rd respondents.***
4. The respondents filed their respective responses contending firstly that the said gubernatorial elections for Nyeri County were free and fair; secondly, that the appellants did not bring to the attention of the 2nd and 3rd respondents the said error in the 1st appellant's running mate's name and only raised it after the elections were concluded; thirdly the 1st appellant did not have the requisite academic qualifications to vie for the Governor's seat and fourthly, that the 2nd appellant had no *locus standi* because he had not disclosed any cause of action against the respondents. The parties herein filed their respective affidavit evidence. On 19th June, 2013 both Petitions were consolidated and set down for hearing together. By consent the parties herein framed the following issues for determination by the trial court:-
- ***Whether the 2nd appellant (2nd Petitioner in the Election Petition) was aggrieved and whether he had a cause of action.***
 - ***Was there an error in the ballot paper as far as the name of the running mate of Thuo Mathenge (1st appellant), a candidate for the governor seat is concerned?***
 - ***If the answer to the above is in the affirmative, did the error render the election of the Governor of Nyeri County invalid?***
 - ***If the answer to the above is also in the affirmative, did the 1st appellant notify the 2nd and 3rd respondents of the error and within time?***
 - ***Whether the 1st respondent was duly elected as the governor of Nyeri County?***
 - ***Whether the court has jurisdiction to determine the issue of eligibility of election candidates?***
 - ***If the answer to the above is in the affirmative was the 1st appellant eligible to run for the office of Governor?***
 - ***Who will bear the costs of the Petition?***
5. The trial began with Michael Mwangi Kibicho (Michael), the 2nd appellant, giving his evidence.

In his affidavit sworn on 2nd April, 2013, Michael deponed that he was a registered voter in Mukurweini Constituency in the just concluded 2013 general elections. He was also a County Representative Candidate for Mukurweini West Ward and was duly sponsored by Saba Saba Asili. It was his evidence that the 1st appellant was nominated as the Saba Saba Asili's candidate for the Governor's seat in Nyeri County; on 31st January, 2013 the 1st appellant and his running mate Dr. Geoffrey Kamau Kibui presented their papers as Saba Saba Asili's nominated candidates for the Governor and Deputy Governor's seats in Nyeri County to the County Returning Officer and that they were duly issued with Certificate of Nomination by the 3rd respondent. He stated that on the election day, 4th March, 2013 he discovered that the 3rd respondent had erroneously indicated on the ballot paper the name of the 1st appellant's running mate as Geoffrey Gitonga Ndegwa instead of the name of Dr. Geoffrey Kamau Kibui; that Geoffrey Gitonga Ndegwa was vying for the County Representative Seat for Mugunda ward in Nyeri County and therefore his name appeared twice on the ballot paper as the 1st appellant's running mate and as a candidate for the County Representative Seat.

6. He deponed that though he voted for the 1st appellant he believed that most of the 1st appellant's supporters voted against him in protest believing that the 1st appellant had misled them in respect of his running mate so as to get their votes. He stated that the voters had based their choice on the overall package of the nominated Governors and their running mates. Michael maintained that the 1st appellant lost the gubernatorial election of Nyeri County on account of the misprinted ballot papers by the 3rd respondent which depicted him as being unreliable and deceitful. He also deponed that he himself had to face the wrath of voters who accused him of supporting a deceitful candidate. It was Michael's evidence that on account of the said error and the fact that the 2nd and 3rd respondents did not postpone the elections for the Governor's seat once they were informed of the error, the 1st appellant suffered prejudice and the results therein were not a true reflection of the will of the people of Nyeri County.
7. Upon being cross-examined by the respective counsel for the respondents, Michael stated that it was only the Governor's seat that was subject to the elections and not the Deputy Governor's seat; once a candidate of the gubernatorial elections was nominated he could not thereafter change his running mate and once a candidate is elected as the Governor, his running mate automatically becomes the Deputy Governor. He also testified that during his party's nominations they only nominated the Governor and not the Deputy Governor.
8. PW2, Kimani Mbugua (Kimani), the 1st appellant's chief campaigner, deponed that on 31st January, 2013 the 1st appellant was nominated as the party's candidate for the Governor's seat and his running mate was Dr. Geoffrey Kamau Kibui. After the nominations of the candidates for the 2013 general elections, the 3rd respondent gazetted the names of the said candidates and the seats they were vying for. Kimani deponed that after the said gazettement he discovered that the 3rd respondent had erroneously indicated the 1st appellant's running mate as Geoffrey Gitonga Ndegwa. He instructed Angela, the secretary to the 1st appellant's campaign summit to write a letter to the 3rd respondent informing them of the error and to request correction of the same. A letter dated 18th February, 2013 was written and delivered on the same day in Kimani's presence to the 2nd respondent, through his secretary, one Ruth. Kimani maintained that the 2nd respondent through his mobile phone directed that the said letter be left with his secretary because he had travelled to Meru and had carried with him his rubber stamp for receiving documents.
9. Kimani stated that he continued following up on the issue to ensure that the 1st appellant's running mate was correctly indicated in the ballot papers; the 2nd respondent kept on assuring him that he was taking action to rectify the error; on 27th February, 2013 the 1st appellant's advocate also wrote to the 3rd respondent vide its e-mail address, rpp@iebc.ke, raising the issue of the error; despite the e-mail being delivered to the 3rd respondent neither the 2nd nor 3rd respondent responded; on 4th March, 2013 the aforementioned error was still indicated on the ballot papers; the 1st appellant's advocate wrote to the 3rd respondent about the error using the 3rd appellant's aforementioned e-mail address and yet again the 3rd respondent did not give any response. It was

- Kimani's evidence that on the following day, 5th March, 2013, out of frustration he obtained the mobile phone number of Commissioner Letangule, a Commissioner of the 3rd respondent, and sent a message informing him of the error on the ballot papers and requested for the election results in respect of the Governor Seat be postponed and fresh elections be conducted. He stated that the said Commissioner called him and informed him that the 3rd respondent was aware of the said error and that its attempts to reach the printer of the ballot papers for correction did not bear fruits; the Commissioner advised him to wait for the declaration of the results and thereafter file a Petition challenging the results and that the 3rd respondent would concede to the said Petition. He also maintained that the 1st appellant had been prejudiced by the conduct of the 2nd and 3rd respondents because the 1st appellant's right to a free and fair election had been breached.
10. PW3, Joseph Mathai Ndiang'ui (Joseph), a registered voter in Kieni Constituency, Nyeri County deponed in his affidavit that it was his intention to vote for the 1st appellant as the Governor of Nyeri County following the conclusion of the campaign period. However, on the election day, 4th March, 2013 he discovered that the 1st appellant's running mate had been indicated in the ballot paper as Geoffrey Gitonga Ndegwa as opposed to Dr. Geoffrey Kamau Kibui; he was surprised and confused because all along the 1st appellant in his campaigns had fronted Dr. Geoffrey Kamau Kibui as his running mate; he had decided to vote for the 1st appellant because of his able leadership and also because he had nominated an equally able running mate, Dr. Geoffrey Kamau Kibui. It was his evidence that based on the foregoing he believed that the 1st appellant had deliberately misled his supporters so as to get their votes and he therefore, voted against him in protest.
11. During cross-examination, Joseph testified that he was aware that if the 1st appellant had won the Governor's seat his chosen running mate would have assumed the office of the Deputy Governor. PW4, Samuel Maingi Magenda (Samuel), PW5, Anne Wanjugu Kagwamba and PW6, Benson Gichohi Ngure (Benson) all being registered voters in Nyeri County maintained in their respective evidence that though the 1st appellant was their candidate of choice for the Governor's seat they voted against him in protest because of the misprint in respect of his running mate. They contended that they all had initially decided to vote for the 1st appellant and his running mate, Dr. Geoffrey Kamau Kibui, as a team because of their manifesto.
12. The 1st appellant, in his affidavit evidence, deponed that on 31st January, 2013, he presented his nomination papers as a gubernatorial candidate for Nyeri County to the 2nd respondent and also presented Dr. Geoffrey Kamau Kibui as his running mate; the 3rd respondent through the 2nd respondent cleared him as duly qualified to contest in the gubernatorial elections. However, the 3rd respondent gazetted a different person as his running mate; the 1st appellant on several occasions vide a letter dated 18th February, 2013 and an e-mail dated 27th February, 2013 through his agents brought to the attention of the 3rd respondent the said error and requested for the same to be corrected. The 1st appellant stated that he personally followed up the issue with the 2nd respondent, Mr. Peter Wanjohi, through telephone conversations on a nearly daily basis and that the said Mr. Wanjohi assured him he had informed the 3rd respondent to make the said corrections. Despite the foregoing requests, the 1st appellant noticed on the election date that the 3rd respondent misprinted the ballot papers by erroneously indicating that his running mate was Geoffrey Gitonga Ndegwa as opposed to Dr. Geoffrey Kamau Kibui; his advocate wrote another email dated 5th March, 2013 bringing to the attention of the 3rd respondent the error in the ballot paper and requested for the said election results not to be announced and a fresh election in respect of the Governor's seat to be carried out; the 3rd respondent neglected and ignored to respond to the said letter.
13. It was the 1st appellant's case that on account of the 2nd and 3rd respondents conduct, he was prejudiced because his supporters thought he had misled them in respect of his running mate in order to get their votes and consequently his supporters voted against him. He also contended due to the foregoing he was prejudiced because the electoral playing field was distorted to his detriment which resulted in unfair elections.

14. On the issue of his academic qualifications, the 1st appellant argued that the trial court had no jurisdiction to delve into the same because the 3rd respondent had already cleared him as duly qualified to vie for the Governor's seat. He also deponed that vide a letter dated 23rd January, 2013 John Mwenja Murage, Senior Assistant Commission Secretary to the Commission for University Education, confirmed that the degree awarded to him by Fairland University was recognized in Uganda and by extension also in Kenya. He maintained that his certificate was genuine and that it was surprising that the said John Murage who had approved his academic qualifications and certificates in January, 2013 later denied his qualifications in June, 2013.
15. The 1st appellant deponed that after filing his Petition before the trial court, it came to his knowledge that the 1st respondent was not fit to contest in the gubernatorial elections because a public investment committee on accounts of state corporations had recommended in its report that he should be barred from holding any public office in Kenya.
16. During cross examination, the 1st appellant testified that he received his Honorary Degree from Fairland University in January, 2013 and that the celebrations were held at Kiganjo at one of the processing plants of Bradegate Poultry Industries Limited wherein he is the chairman. He gave evidence that the said Degree was in recognition of his social contribution to East Africa. He stated that there was a proposal that Fairland University would open a branch at Nyeri on land to be donated by him; the said branch would be known as Bradegate International University and a Degree in Poultry Science would be offered therein. He testified that the requisite charter had not yet been obtained. He stated that he acquired the title of Doctor from members of the public because he had opened several clinics in the country and hired professional doctors to provide them with medical services.
17. He stated that some of the voters in Nyeri County where Dr. Geoffrey Kamau Kibui offered his Veterinary services knew him as Dr. Jeff Kamau Kibui; during the campaign period they explained to the voters that Dr. Jeff Kamau Kibui and Dr. Geoffrey Kamau Kibui referred to one and the same person, the 1st appellant's running mate, and that the name that would appear in the ballot papers was Dr. Geoffrey Kamau Kibui.
18. The 1st appellant testified that he sat for KNCE exams in 1980 at Kirangari High School in Kiambu County wherein he obtained Division III with 38 points. He stated that he enrolled in Fairland University in Jinja, Uganda in the year 2009; he used to attend classes in Uganda every week on Friday, Saturday and Sunday and would come back to Kenya on Monday and that he completed his Degree in 2012. He testified that he was unsure whether John Murange in the letter dated 23rd January, 2013 claimed that Fairland University was a recognized university in Kenya or if the recognition was in respect of the Degree he obtained therein. He also confirmed that in the said letter, there was a disclaimer by Commission for Higher Education to the effect that it was not responsible for the authenticity of any Degree certificate that was attached by him. Upon being shown other Degree certificates and transcripts issued to third parties by Fairland University, the 1st appellant admitted that the said certificates bore the same date as his certificate; the certificates were different and the signature of the academic registrar on his transcripts differed with the one on the other transcripts produced by the 1st respondent. The appellant contended that upon seeing the said transcripts and certificates produced by the 1st respondent he called Prof. Solomon Wakambi, the Vice Chancellor of Fairland University to verify the same; Prof Solomon Wakambi confirmed that the said Degrees were not issued by Fairland University. He further contended that Prof. Solomon Wakambi vide a letter dated 18th January, 2013 informed the Commission for Higher Education that the University had changed the form of Degree certificates it issued effective from 15th November, 2012. The 1st appellant maintained that he used to travel from Nairobi every Thursday evening at around 4:00 p.m. so as to arrive in Jinja, Uganda on Friday morning; he used to travel sometimes by a private vehicle or use public means. The 1st appellant was convinced that had the 3rd respondent correctly indicated his running mate in the ballot papers he would have won the Governor's seat. He also testified that on account of the said error he did not vote for himself.
19. PW8, Geoffrey Gitonga Ndegwa (Geoffrey), testified that he was contesting for the position of a member of the County Assembly in Mugunda Ward in the concluded general elections. On the election day, Geoffrey testified that he was amongst the first people to vote at his polling station

and he noticed that his name appeared twice on the ballot paper, as a running mate to the 1st appellant and also as a candidate for the position of member of the County Assembly for Mugunda Ward. He maintained that he was never the 1st appellant's running mate and in fact he did not have the requisite academic qualification for the said position. According to Geoffrey, the members of his Ward did not vote for him because they believed he had colluded with the 1st appellant to deceive them.

20. It was the 1st respondent's case that the 1st appellant did not possess the requisite academic qualifications to vie for Governorship. RW1, John Mwenja Murage (John), Senior Assistant Commission Secretary to the Commission for University Education (previously known as the Commission for Higher Education) (Commission), deponed that on 21st January, 2013 he received an application for recognition of academic qualifications from the 1st appellant. He stated that recognition of degree certificates entailed confirmation of accreditation status of the institution and equation of the degree qualification; vide a letter dated 23rd January, 2013 he verified and confirmed that Fairland University was at the time of the application a recognized university in Uganda and therefore by convention which was in force the Commission was bound to recognize the institution. He deponed that on 21st June, 2013 he received a letter from the 1st respondent's advocates seeking confirmation of the above mentioned letter dated 23rd January, 2013 on Fairland University's accreditation status; he informed the said advocates that information on degree certificates could only be availed to the individual whose name appears on the certificate unless otherwise ordered by the Court. He stated that on 27th June, 2013 he was served with a court order requiring him to testify in respect of the 1st appellant's degree certificate.
21. Pursuant to the aforementioned court order, John swore the affidavit on record. He stated that at the time of the 1st appellant's application he was able to certify that Fairland University was recognized in Kenya based on that university's status in Uganda; however he was unable to equate the degree presented by the 1st appellant because of several reasons. Firstly, the degree certificate was different in form from other certificates conferred on the same date to other students by the said university; secondly the signatures of the Chancellor and Vice Chancellor in the 1st appellant's degree certificate were different from those certificates issued on the same day to other students; thirdly, the signatures of the Faculty Dean and the Academic Registrar in the 1st appellant's degree certificate and the transcripts differed with those on certificates and transcripts of other students issued on even date; fourthly, the 1st appellant had obtained a Division III at "O" level while the minimum entry requirement for University was Division II or Higher plus "A" level of two principles or a diploma from a recognized examining body; therefore, because the 1st appellant would not have qualified for admission to the University in Kenya, the resultant degree would not be recognized in Kenya; fifthly, the 1st appellant had presented a Diploma in Business Management Administration from Cambridge Tutorial College obtained in 1996 and that the said Diploma was not academic but was a professional Diploma without transcripts. John further deponed that Fairland University's provisional license issued by the Ugandan National Council for Higher Education was revoked on 11th March, 2013.
22. During cross examination by the appellants' advocate, John testified that the Commission's role is not to invalidate certificates issued by foreign universities but simply to validate those certificates based on the established criteria. He stated that with regard to the elections, the Commission's role and mandate was only to confirm whether the university attended by a candidate was recognized or not and not to confirm whether the degree presented is recognized in Kenya or not.
23. RW2, Wilson Kariuki Munene (Wilson), a registered voter in Mathira Constituency in Nyeri County testified that in his view the only elective office to be filed in the gubernatorial elections was that of the Governor; as a voter he had resolved to vote for the 1st respondent for the Governor's seat and that no discrepancy in the ballot paper would have swayed his resolve to vote for the 1st respondent because his decision was made before entering the polling station. He deponed that he believed that the person elected to the office of Governor would not be elected on the basis of who his running mate was but rather on the candidate's manifesto. According to Wilson, the gubernatorial elections were free and fair. On cross examination, Wilson testified that if indeed the 1st appellant had attended University he would have known because he came from

- the same village as the 1st appellant.
24. RW9, Ephantus Maina Muriithi (Ephantus), the 1st respondent's chief campaigner deponed that the 2nd appellant did not suffer any prejudice because he was never a candidate in the said gubernatorial elections. He testified that the 3rd respondent in compliance with its duty under the law, gazetted the names of persons nominated as candidates for the position of Governor as well as their running mates; the purpose of gazettment was to notify the public that the names therein would be printed on the ballot papers; therefore any person who was aggrieved with the contents of the gazette notice ought to have informed the 3rd respondent expeditiously for the necessary corrections to have been made. He maintained that the appellants only raised the issue of misprint of the 1st appellant's running mate after the conclusion of the elections and that the said conduct led to the inference of ill motive on the part of the appellants. According to Ephantus, the electoral choice of voters was premised on the well informed choices on a candidate's manifesto. He maintained that misprint on the ballot paper as to a candidate's running mate could not affect a voter's choice and this to him was clearly evident by the conduct of the 2nd appellant who, despite the error, voted for his candidate of choice, the 1st appellant.
25. Ephantus testified that out of the 324,159 voters who turned up to vote in Nyeri County 136,985 expressed their preference for the 1st respondent by voting for him as their Governor; the gubernatorial election results for Nyeri County which represented a 90% turn out of registered voters were clearly reflective of the democratic will of the people of Nyeri County. Ephantus stated that during the campaign period, the 1st appellant continuously misled and confused the voters of Nyeri County as he used different names to refer to his running mate. He stated that the 1st appellant's sample ballot paper indicated his running mate as Dr. Jeff Kamau Kibui; in one of his campaign speeches the appellant referred to his running mate as Dr. Jeff Njoroge and that on one of several billboards, his running mate's name appeared as Dr. Jeff Kamau. Ephantus was convinced that the choice of a running mate was the prerogative of the candidate vying for the Governorship and the same was not subject to the electorate.
26. RW12, Benedict Muruku Musembi, a private investigator, testified that on 15th March, 2013 he received instructions from the 1st respondent to investigate whether the 1st appellant had attended Fairland University and the course he graduated in. Benedict travelled to Fairland University in Jinja Uganda to carry out his investigations. He stated that his efforts to meet the said University's Chancellor, Prof. Solomon Wokambi came to nought; being suspicious that Prof. Solomon was avoiding him he wrote two letters one to Prof. Solomon and the other to the Ugandan National Council of Higher Education wherein he sought clarification as to whether the 1st appellant attended the said University and his academic qualification. He took the said letter to Mr. Wasiwa, the administrator of the University, who refused to acknowledge receipt by affixing the University's stamp on Benedict's copy. After making inquiries, Benedict found out that the Ugandan National Council for Higher Education (Council) was in Kyambogo University, in the outskirts of Kampala. Upon arriving at the Council's offices he served the said letter upon Faridah Bukirwa Sitamicah, the Legal counsel, who acknowledge receipt of the same and advised him to go back for a response the following day on 20th March, 2013.
27. The following day, the legal officer took him to the Council's Acting Executive Director, Prof. Moses L. Golola and the three of them had a lengthy meeting. From the meeting Benedict learnt that the Council was having problems with Fairland University because the said University never made any returns of their graduates as required by law; denied the Council access the University's premises since the year 2005 and neglected to submit relevant information and the University was offering Honorary Degrees and Distance learning and opening other study centres without the approval of the Council. It was Benedict's evidence that following his investigation he discovered that Degrees from Fairland University were even being sold in the streets. It was Benedict's evidence that the 1st appellant had vested interest in Fairland University because he wanted to open a branch in Nyeri which would be funded by Bradegate Industries Limited wherein he was the Chairman.
28. He testified that Fairland University did not give him any information on the 1st appellant's education therein and further the Ugandan National Council for Higher Education did not have

- any information on the 1st appellant. Based on his investigations, Benedict testified that Fairland University was no longer a registered University in Uganda, its license having been revoked on 11th March, 2013 by the Ugandan National Council for Higher Education. On cross examination, Benedict affirmed that based on his investigations, Fairland University was licensed to offer University courses and to issue degrees between 18th March, 2005 and 10th March, 2013.
29. With regard to the 2nd and 3rd respondents' case, only one witness swore an affidavit and gave evidence. Peter Wanjohi (Peter), the Returning Officer of Nyeri County in the concluded elections, testified that he successfully coordinated the electoral process in Nyeri County and particularly in the gubernatorial elections therein; the elections conducted on 4th March, 2013 were in accordance with the **Constitution** and the relevant electoral statutes. He maintained that the position of Deputy Governor of Nyeri County was not an elective post in the concluded general elections and that the successful gubernatorial candidate was expected to nominate the Deputy Governor. Following the tallying exercise after the elections, Peter announced the 1st respondent as the winner of the Governor's seat in Nyeri County because he had garnered the majority votes cast. He stated that the 1st appellant was a distant third in the said election results. It was Peter's evidence that immediately he announced the 1st respondent as the winner he began receiving verbal complaints from the 1st appellant and his agents that there was an error on the ballot paper which indicated a stranger as the 1st appellant's running mate. He stated that he informed the 1st appellant and his agents since the said elections had already been concluded his hands were tied and he could not do anything. He maintained that there was a duty placed on the 1st appellant to raise the issue of misprint of his running mate's name immediately after the publication of the gazette notice indicating the names of all the candidates.
30. Peter testified that in his view, a mistake in the name of the Deputy Governor was not prejudicial, as long as the Governor's name was correct. He stated this was clearly evident in the 2nd appellant's testimony wherein he stated that despite the error he voted for the 1st appellant because he was his candidate of choice. He maintained that the appellants had not proved to the required standard that the error on the ballot papers as to the 1st appellant's running mate was the reason that majority of the voters of Nyeri County rejected the 1st appellant's candidature. Peter denied receiving any complaints from the 1st appellant or his agents over the error on the name of the 1st appellant's running mate prior to the election date. He also testified that the email address the 1st appellant alleges to have sent his complaint to the 3rd respondent was not the 3rd respondent's email; the email used by the 1st appellant's advocate was rpp@iebc.or.ke while the 3rd respondent's email address which is indicated in all the 3rd respondents publications is info@iebc.or.ke and that the email used by the 1st appellant belongs to the Registrar of Political Parties which is distinct office from the 3rd respondent.
31. After the close of the parties' respective cases, the trial court directed the parties to file written submissions. Vide a judgment dated 9th September, 2013 the trial court (Wakiaga, J.) dismissed both Petitions. It is against the said Judgment that the appellants have filed this current appeal based on the following grounds:-
- ***The learned Judge erred in law by rendering an erroneous interpretation of the provisions of Section 22 of the Elections Act, 2011 and Regulation 47(2) of the Election (General) Regulations, 2012 (the Regulations).***
 - ***The learned Judge erred in law in entertaining the issue of eligibility of the 1st appellant when the question before the superior court was the validity of the elections of the county Governor under Section 75 read together with Section 86(1) of the Elections Act.***
 - ***The learned Judge erred in law by directing the Director of Public Prosecutions to order investigations in respect of violations of the provisions of Article 157(4) and 157 (10) of the Constitution.***

- *The learned Judge erred in law by failing to appreciate that for an election to be valid in law, it must comply with the Constitutional principles as to what constitutes a free and fair election as prescribed by Article 81(e) of the Constitution.*
- *The learned Judge erred in law by failing to find that the provisions of Section 83 of the Elections Act could not be used to protect, sustain, defend or otherwise shield from invalidation or nullification of an election not conducted in accordance with all the principles laid down in the Constitution and in the written electoral law.*
- *The learned Judge erred in law by holding that the contents of the ballot paper, however erroneous do not affect the legal validity of the ballot paper as long as the form, the pattern or the outline of the ballot paper complies with Form 29 prescribed by Regulation 68 (1)(c) of the Regulations.*
- *The learned Judge erred in law by misconstruing and misinterpreting the provisions of Article 180(6) of the Constitution in so far as the joint election of the Governor and Deputy Governor is concerned.*
- *The learned Judge erred in law in evaluating the evidence before him in an impartial and unfair manner thereby rendering the appellants' constitutional rights to a fair hearing under Article 50(1) of the Constitution illusory.*
- *The learned Judge erred in law by allowing his religious beliefs to influence and colour his judgment in violation of the judicial oath of office prescribed by the 3rd schedule to the Constitution.*

32. At the hearing of the appeal before us the appellants were represented by Mr. Kioko Kilukumi who led Miss Lucy Mwai and Mr. Abbas Esmail; Mr. Njoroge Regeru appeared with Miss Karani for the 1st respondent while Mr. Hiram Gachugi appeared for the 2nd and 3rd respondents. Mr. Kilukumi submitted that under **Section 22** of the **Elections Act** and **Regulation 47(2)** of the **Regulations** there was no requirement for a degree obtained by a candidate from a foreign university to be validated and that the learned Judge in holding that the 1st appellant's degree was not recognized went outside his mandate as an election court. He emphasised that in this case the golden rule of interpretation was applicable and it was imperative for the learned Judge to give effect to Parliament's intention; that Parliament's intention did not disclose an obligation on a candidate to have his/her degree from a foreign university recognized. Mr. Kilukumi argued that according to **Section 22(2)** of the **Elections Act** what was required is recognition of the University and not the degree; further that **Regulation 47 (2)** of the **Regulations** simply requires a candidate who has a degree certificate issued by a foreign university to seek authentication of the said university from the Commission for Higher Education. Therefore, according to him, the learned Judge introduced his own amendment to the provisions requiring authentication of foreign universities by holding that the recognition of the 1st appellant's degree was also required.
33. Mr. Kilukumi referred to this Court's decision in **Italframe Ltd -vs- Mediterranean Shipping Company (1986) KLR 54** wherein it was held that it was not a court's duty to amend legislation but that the duty lay with Parliament. He also relied on the cases of **Ngobit Estate Ltd -vs- Carnegle (1982) KLR 437** and **H.R.H Prince Ernest Augustus of Hanover -vs- Attorney Genral (1955) 3 ALL ER 647** to emphasise that it was the trial court's duty in interpreting the electoral statutes to give effect to the intention of Parliament. It was Mr. Kilukumi's position that a court should always strive to give effect to the intention of Parliament whenever it interprets a statute even if such interpretation could lead to absurdity. In support of the above mentioned submission he relied on the case of **Stock -vs- Frank Jones (Tipton) Ltd (1978) 1 ALL ER 948**. In relying on this Court's decision in **Kibaki -vs- Moi (2000) 1 EA**, Mr. Kilukumi maintained that the electoral law in Kenya which includes the **Elections Act**, the Rules and Regulations thereunder and the **Constitution** is a complete regime and therefore the trial court erred in relying on the **Universities Act** to determine the issue of eligibility of the 1st appellant. He maintained that the golden rule of

interpretation applied in interpretation of electoral laws because the said laws are a complete regime governing elections in Kenya.

34. Mr. Kilukumi submitted that the learned Judge erred in entertaining the issue of the 1st appellant's eligibility to vie for Governorship yet the Petitions before him were seeking determination of the validity of the concluded gubernatorial elections in Nyeri County. He argued that the 3rd respondent had already found the 1st appellant eligible to vie for Governorship; therefore under **Section 75(3)** of the **Elections Act** the issue of eligibility could not be entertained by the election court and only three orders are capable of being issued by the election court; **Rule 10(4)** of the **Elections (Parliamentary and County Elections) Petition Rules, 2013 (Election Rules)** outlines the orders that can be sought in an election Petition and **Section 86** of the **Elections Act** clearly stipulates that at the conclusion of every election Petition, the election court is required to determine the validity of any question raised in the Petition. According to Mr. Kilukumi since the issue of the 1st appellant's eligibility was not raised in the Petition before the court, the trial court erred in delving into the issue. He further stated that by virtue of **Rule 14** of the **Election Rules** the issue of eligibility of the 1st appellant could not be raised in the respondent's answers to the Petitions and the only issue their responses ought to have been restricted to was whether the gubernatorial elections were valid or not.
35. Mr. Kilukumi stated that under **Article 157 (4) & (10)** of the **Constitution** the power to institute criminal prosecution lay exclusively with the Director of Public Prosecution and the said power was not subject to control by any other authority; therefore, it was wrong for the learned Judge to direct the Director of Public Prosecution to commence investigations over the alleged forgery of the 1st appellant's degree certificate. According to Mr. Kilukumi the said direction by the learned Judge was an infringement on the discretion vested in the Director of Public Prosecution of whether or not to commence investigations. He maintained that the learned Judge could only recommend and not direct the Director of Public Prosecutions to carry out investigations. He referred us to the Supreme Court's decision in **Raila Odinga & Others -vs- IEBC & Others- Petition No. 5 of 2013** wherein the Supreme Court made recommendations to the Director of Public Prosecutions to investigate the issue at hand, but issued no directions.
36. Mr. Kilukumi submitted that for an election to be free and fair it must comply with the principles set out in **Article 81(e)** of the **Constitution**. He argued that the gubernatorial elections in Nyeri County did not comply with the above mentioned principles because the 3rd respondent indicated the wrong person as the 1st appellant's running mate in the ballot paper. He maintained that inaccurate ballot papers could influence the outcome of an election and therefore the learned Judge did not appreciate the centrality of a ballot paper. In relying on the decision of this Court in **Omar & Another -vs- Mbuji & Another (2008) 3 KLR EP**, Mr. Kilukumi argued that the error in the ballot paper as to the 1st appellant's running mate was fundamental and it misled the voters as to the actual running mate; that the said defect was major and therefore the said elections ought to have been nullified. He maintained that the accuracy of the contents of the ballot paper was an important factor and relied on the case of **Ntwiga -vs- Musyoka & 3 others (2008) 2 KLR 276**. Mr. Kilukumi urged us to adopt the decision in **Re K. A. Thabiti (1967) E. A 772** wherein the court nullified the elections on the grounds that the error in the ballot paper was substantial. He argued that there was evidence tendered by the 1st appellant that the error in the ballot paper was so substantial that the voters reacted to the same by voting against the 1st appellant. Therefore, according to him, the learned Judge erred in finding that the said elections were free and fair and that the said error in the ballot paper did not affect the outcome of the results.
37. It was Mr. Kilukumi's position that the learned Judge (Wakiaga, J.) erroneously concluded that the error as to the 1st appellant's running mate was only on the gazette while in actual fact the error was both in the gazette notice and on the ballot paper. He argued that the learned Judge in considering the form of the ballot paper disregarded **Regulation 68(3)** of the **Regulations** which invoked **Regulation 51(5)** of the **Regulations** which requires the names of the nominated candidates to be published in the Kenya Gazette and by virtue of **Article 180 (5)** which requires a candidate for Governorship to nominate a candidate for the position of Deputy Governor, the name of the 1st appellant's running mate ought to have been correctly indicated since he was also a nominated candidate.

38. He argued that the learned Judge in considering the form of a ballot paper was wrongly influenced by the Indian case of **Mahadeo -vs- Babu Udai Pratap Singh 1996 AIR 824, 1966 SCR (2) 564**; the learned Judge misunderstood the said case. He argued that **Regulation 77(1)** of the Regulations sets out when a ballot paper ought to be rejected.
39. Mr. Kilukumi argued that the learned Judge was not impartial, given the way he unfairly treated the parties; his evaluation of the evidence; his disbelief of the appellants' witnesses without any basis; and his treatment of the 1st appellant's degree certificate as being invalid. He argued that the learned Judge unfairly shifted the 3rd respondent's burden of proof regarding the error in the ballot paper to the 1st appellant. Mr. Kilukumi submitted that the learned Judge erred in allowing his religious beliefs to influence his decision that Fairland University did not hold classes on Saturday being a Seventh Day Adventist institution even when there was no evidence to support such a finding. In relying on the case of **Kenya Breweries Ltd -vs- Alex Ephraim Induswe- Civil Appeal No. 215 of 1997**, he maintained that the learned Judge should not have based his conclusions on his personal belief.
40. Mr. Regeru in relying in this Court's decision in **Nderitu Gachagua -vs- Thuo Mathenge & Others – Civil Appeal No. 14 of 2013**, submitted that the trial court had both original and unlimited jurisdiction over election Petitions; by virtue of **Article 165** of the **Constitution** the trial court also had jurisdiction to entertain an issue on interpretation of the **Constitution**. He argued that a court in interpreting the **Constitution** ought to be guided by **Article 259** of the **Constitution** and that the interpretation adopted should be one that promotes constitutionalism. Mr. Regeru maintained that a court ought not to shut its eyes to documents which are manifestly wrong or to an issue raised on the validity of a degree. He emphasised that it would be wrong for the trial court not to have questioned obvious wrongs.
41. He submitted that the court is also required to give a purposive approach in interpreting the **Constitution** and Electoral statutes; if there is an underlying purpose the court ought to take the same into account in interpretation. Mr. Regeru argued that modern jurisprudence requires substantial justice to be done and technicalities to be disregarded. He referred to **Section 80 (1) (d)** of the **Elections Act** which requires an election court in exercise of its jurisdiction not to pay undue regard to technicalities. In referring to **Raila Odinga & Others -vs- IEBC & Others (supra)**, Mr. Regeru submitted that a court ought to conscientiously determine the best cause of action in any matter before it. He argued that absurdity ought to be avoided and the **Constitution** should be interpreted in 'Wanjiku's' sense of fairness. Mr. Regeru stated that the court also should take into account the principle of proportionality while interpreting the relevant provisions of the law. He maintained that the fundamental issue in this appeal is whether it is fair to set aside the entire gubernatorial election results for Nyeri County because of a minor mistake.
42. According to Mr. Regeru there was overwhelming evidence tendered in the trial court that the 1st appellant was not even qualified to vie in the gubernatorial elections; RW 1, John, who was an independent and authoritative witness explained to the court why the 1st appellant's degree was not recognized in Kenya. He argued that the provisions which require a candidate to have a degree from a recognized university imply that the degree held also has to be valid and since there was evidence that the 1st appellant's degree was not valid the trial court could not shut its mind to that fact. He maintained that once the Kenyan Commission for Higher Education which regulates university education in Kenya found that the 1st appellant's degree was not valid, the same could not be ignored. Mr. Regeru argued that despite the 1st appellant contending that he used to travel every week to attend classes in Jinja, Uganda, the 1st appellant claimed that his passport was never stamped at the Kenya – Uganda border.
43. Mr. Regeru submitted that the trial court had jurisdiction to entertain the issue of the 1st appellant's eligibility since it had jurisdiction over election matters. He stated that contrary to the appellants' allegations that the issue of the 1st appellant's eligibility was not raised in the pleadings, the issue was amongst the agreed issues framed by parties herein, and that the appellants were bound by the same. He referred to this Court's decision in **Air Alfaraj Ltd. -vs- Raytheon Aircraft Credit Corporation & another – Civil Appeal (Application) No. 29 of 1999**.
44. Mr. Regeru maintained that the trial court was correct in directing the Director of Public Prosecutions to order an investigation surrounding the circumstances upon which the 1st appellant

- obtained his degree. According to him serious questions had been raised about the 1st appellant's degree and therefore public policy dictates that a court cannot ignore evidence of criminal acts lest it is seen as condoning an illegality.
45. Mr. Regeru in addressing us on the threshold of a free and fair election submitted that despite the **Constitution** being the supreme law it was not the only applicable law in election processes; the **Constitution** provides broad provisions and donated power to Parliament to provide detailed laws. He argued that there will always be claims of breaches in every elections, but the issue the court should be concerned about is whether the breaches complained of have had a substantial effect on the results. Citing the case of **Mahadeo -vs- Babu Udai Pratap Singh (supra)**. Mr. Regeru argued that the law does not require 100% compliance but substantial compliance as there is indeed no perfect system of elections. In this case, Mr. Regeru maintained that everything went like clockwork during the gubernatorial elections. He submitted that the election results were not affected by the mistake in the ballot papers which he said, clearly indicated the main candidates name, photograph and party details. He relied on the following persuasive authorities, **Bernard Shinali Masaka -vs- Dr. Boni Khalwale- H.C Election Petition No. 2 of 2008, Charles Maywa Chedotum & another -vs- IEBC & 2 Others- H.C Election Petition No. 11 of 2013.**
46. Mr. Regeru submitted that there was no evidence of bias on the part of the learned Judge who was entitled to take Judicial Notice of certain procedures in a particular faith. On the issue of costs, he argued that though costs usually follow the event, the trial court had the discretion to impose costs on parties based on their respective conduct, and urged us to dismiss the appeal herein with costs against the appellants.
47. Mr. Gachugi, learned counsel for the 2nd and 3rd respondents, in opposing the appeal, relied on his written skeleton arguments filed before this Court on 23rd October, 2013. Mr. Gachugi submitted that the learned Judge having taken oath to uphold the law and in exercise of his original and unlimited jurisdiction was correct in directing the Director of Public Prosecutions to investigate the issue of the 1st appellant's degree.
48. In response to the submissions made on behalf of the respondents, Mr. Kilukumi asked us to interpret of the **Constitution** purposively, sensibly and apply a proportionate remedy which in this case would entail nullifying the election. With regard to the list of agreed issues presented to the High Court, Mr. Kilukumi argued that the issue required two levels of inquiry, firstly, whether the High Court had the right to entertain the same and secondly, whether the issue could be considered at that forum; therefore he submitted that the appellants had not approbated and reprobated regarding the issue of eligibility.
49. Mr. Kilukumi submitted that by virtue of **Section 60** of the **Evidence Act**, Chapter 80, Laws of Kenya the learned Judge should have excluded his personal views regarding religious practices in his decision. With regard to costs although Mr. Kilukumi agreed that the same was discretionary, he submitted that the 3rd respondent's mistake had caused this matter to be before the courts and that the 3rd respondent should bear full responsibility for the same.
50. We have considered the record, grounds of appeal, submissions by parties and the law. **Section 85A** of the **Elections Act** stipulates:-

“85A. An appeal from the High Court in an election petition concerning membership of the National Assembly, Senate or the office of county governor shall lie to the Court of Appeal on matters of law only and shall be-

(a) filed within thirty days of the decisions of the High Court; and

(b) heard and determined within six months of the filing of the appeal.”

Based on the aforesaid the appeal before us herein is restricted to matters of law only. See also this Court's decision in **Peter Gichuki Kingara -vs- IEBC & 2 Others- Civil Appeal No. 23 of 2013.** Further, by virtue of **Rule 35** of the **Election Rules** in considering the appeal before us we are governed by the **Court of Appeal Rules**.

51. Having expressed ourselves as above we are of the considered view that the following issues arise

for our consideration:-

- ***What are the applicable principles in interpreting both constitutional and statutory provisions regarding electoral matters?***
- ***What is the threshold of free and fair elections?***
- ***What was the nature of the error on the ballot paper?***
- ***What was the effect of the error on the gubernatorial elections?***
- ***Did the trial court have jurisdiction to entertain the issue of a candidate's eligibility in respect of academic qualifications in the Petition?***
- ***Was the learned Judge biased against the appellants?; Did the learned Judge rely on his personal religious beliefs to make his decision?; if so was it proper?***
- ***Who should bear the costs both of the Petition and this appeal?***

A. Applicable principles in interpretation of Constitutional and Statutory provisions: `

52. The Supreme Court and this Court has on numerous occasions set out the applicable principles in interpretation of constitutional provisions. Firstly, it ought to be interpreted in a manner that promotes **Article 259** of the **Constitution** which provides in part as follows:-

“(1) This Constitution shall be interpreted in a manner that-

a) Promotes its purpose, values and principles

b) Advances the rule of law, human rights and fundamental freedoms in the Bill of Rights

c) Permits the development of the law and d) Contributes to good governance.’

(2)

(3) Every provision of the Constitution shall be construed according to the doctrine of interpretation that the law is always speaking”

Secondly, the spirit and tenor of the **Constitution** which embodies the ideals, aspirations and values of the Kenyan citizens must preside and permeate the process of interpretation. Further, in determining and understanding the spirit of the **Constitution** the language of the various provisions of the **Constitution** ought to be taken into account. In **Kashava Menon –vs- State of Mombay (1951) S.C.R. 228**, the court held as follows:-

“A court of law has to gather the spirit of the Constitution from the language of the Constitution. What one may believe or think to be the spirit of the Constitution cannot prevail if the language of the Constitution does not support that view.’

See also the Supreme Court of Kenya decision in **Samuel Kamau Macharia & another –vs- Kenya Commercial Bank & 2 others- Application No. 2 of 2011**.

Thirdly, the **Constitution** ought to be given a purposive interpretation so that the objectives of a particular provision are realized. In **Re the matter of the Interim Independent Electoral Commission (2011) eKLR**, the Supreme Court adopted the finding of the Namibian Supreme Court in the case of **Minister of Defence, Namibia -vs-Mwandinghi, 1992 (2) S.A 355** at page 362 as follows:-

“The Namibian Constitution must therefore be purposively interpreted to avoid the ‘austerity of tabulated legalism.’”

See also this Court’s decision in **Equity Bank Ltd. –vs- West Link MBO Ltd. - Civil Application**

No. Nai. 78 of 2011.

53. Interpretation of the *Constitution* in our view is distinct from interpretation of provisions of statutes. In *Njoya & 6 others -vs- Attorney General & 3 others 2 KLR (EP)*, this Court held,

“The Constitution is not an Act of Parliament but the supreme law of the land. It is not to be interpreted in the same manner as an Act of Parliament. It is to be construed liberally to give effect to the values it embodies and the purpose for which its makers framed it.”

In *Re the matter of the Interim Independent Electoral Commission (supra)*, the Supreme Court held,

“Interpreting the Constitution is a task distinct from interpreting the ordinary law. The very style of the Constitution compels a broad and flexible approach to interpretation.”

In *Ngobit Estate Limited -vs- Carnegie- Civil Appeal No. 57 of 1981*, Potter J.A held,

“The function of the judiciary is to interpret the statute law, not to make it. Where the meaning of a statute is plain and unambiguous, no question of interpretation or construction arises. It is the duty of the judge to apply such law as it stands.”

An act of Parliament ought to be construed according to the intent of Parliament; if the words of the statute are in themselves precise and unambiguous the words should be given their natural and ordinary meaning as the words best portray the intention of Parliament. In *Halsbury's Laws of England, 3rd Edition, Vol. 36 at paragraph 584*, the learned authors expressed themselves as follows:-

“it is not competent to any court to proceed upon an assumption that Parliament made a mistake, there being a strong presumption that Parliament does not make mistakes. If blunders are found in legislation, they must be corrected by the legislature, and it is not the function of the court to repair them. Thus while terms can be introduced into a statute to give effect to its clear intention by remedying mere defects of language and to rectify obvious misprints or misnomers no provision which is not in the statute can otherwise be implied to remedy an omission.”

See *Intalframe Ltd. -vs- Mediterranean Shipping Company (1986) KLR 54*, *Bristol Guardians -vs- Bristol Waterworks Co. (1914) AC 379* & *H.R.H Prince Ernest Augustus of Hanover -vs- Attorney Genreal (1955) 3 ALL ER 647*.

B. Threshold of a free and fair election:

54. It was the appellant's contention that the gubernatorial elections subject of this appeal was not free and fair. **Article 81(e)** of the *Constitution* requires that an electoral system should comply with the following principles—

“(a) freedom of citizens to exercise their political rights under Article 38;

(b)

(e) free and fair elections, which are—

(i) by secret ballot;

(ii) free from violence, intimidation, improper influence or corruption;

(iii) conducted by an independent body;

(iv) transparent; and

(v) administered in an impartial, neutral, efficient, accurate and accountable manner.”

What then is the measure of a free and fair election? We are of the considered view that for an election to be free and fair it should substantially comply with the above mentioned constitutional principles as well as other conditions spelt out in the relevant electoral statutes. By virtue of **Section 83** of the **Elections Act** it is not in all circumstances that non-compliance with the above principles leads to unfair elections. **Section 83** of the **Elections Act** provides:-

“ 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 non compliance did not affect the result of the election.”

Therefore, the threshold of a fair and free election is one which complies with the electoral law and/or which despite non-compliance does not affect the results which reflect the will of the electorate. The election must therefore substantially conform to the existing electoral law. The Supreme Court in ***Raila Odinga & Others -vs- IEBC & Others (Supra)***, held at paragraphs 303 and 304,

“ 303. We came to the conclusion that, by no means can the conduct of this election be said to have been perfect, even though, quite clearly, the election had been of the greatest interest to the Kenyan people, and they had voluntarily come out into the polling stations, for the purpose of electing the occupant of the Presidential office.

304. Did the Petitioner clearly and decisively show the conduct of the election to have been so devoid of merits and so distorted as not to reflect the expression of the people's electoral intent? It is this broad test that should guide us in this kind of case, in deciding whether we should disturb the outcome of the Presidential election.”

C. What was the nature of the error on the ballot paper in respect of the gubernatorial elections?

55. It is not in dispute that there was an error on the ballot paper in respect of the name of the 1st appellant's running mate. The 1st appellant's running mate was Dr. Geoffrey Kamau Kibui. However, the ballot paper indicated his running mate as Dr. Geoffrey Gitonga Ndegwa. Was this error an error of substance, formality, procedure, technicality or content?
56. **Regulation 68** of the **Regulations provides** that the ballot paper in respect of gubernatorial elections should be in accordance with Form 29 of the Schedule therein. The matters to be indicated on the Form include party/candidates symbol, the name and photograph of the candidate for Governor, the name of the Deputy Governor and the voter's mark. Having considered the ballot paper on record we concur with the learned Judge's finding that the ballot paper in question did conform with all the formalities set out in Form 29. We are also of the considered view that the error in the name of the 1st appellant's running mate was neither procedural nor technical.
57. We find there was an error of content since the ballot paper erroneously indicated the 1st appellant's running mate as Geoffrey Gitonga Ndegwa instead of Dr. Geoffrey Kamau Kibui. This error amounted to a misrepresentation of fact as to the identity of the 1st appellant's running mate. Was this misrepresentation fraudulent as alleged by the appellants'? It was the appellants' case that on 31st January, 2013 the 1st appellant was nominated as his party's candidate for the Governor's seat while his running mate was Dr. Geoffrey Kamau Kibui; subsequently the 3rd respondent erroneously gazetted the 1st appellant's running mate as Dr. Geoffrey Gitonga Ndegwa. The 1st appellant contended that vide a letter dated 18th February, 2013 the 3rd respondent was notified

- of the error and requested to rectify the same; further by an e-mail dated 27th February, 2013 the 1st appellant's advocate notified the 3rd respondent of the said error; despite the above mentioned notifications the 3rd respondent fraudulently caused the ballot papers to be printed with the same error. The appellants' contended that by a further email dated 5th March, 2013 the 1st appellant's advocates informed the 3rd respondent of the error in the ballot papers; the 3rd respondent fraudulently refused/ignored to postpone/cancel the gubernatorial elections. PW2, Kimani, testified that upon discovering the said error on the ballot papers on the election date he called one of the 3rd respondent's commissioners namely Mr. Letangule who informed him that the 3rd respondent was aware of the error; that the 3rd respondent's efforts to reach the printers of the ballot papers to effect the correction came to nought. It was Kimani's evidence that Mr. Letangule advised him to file an Election Petition challenging the elections therein since the elections had been concluded and assured him that the 3rd respondent would not oppose the said petition. On the other hand, the 3rd respondent through Peter, the Returning Officer for Nyeri County, denied receiving any communication from the appellants in regard to the error in the name of the 1st appellant's running mate prior to the elections. Peter testified that the appellants raised the error in the ballot papers only after he announced the election results.
58. It is a well settled principle of law that where fraud is alleged, its particulars must be pleaded and strictly proved. See this Court's decisions in ***Nabro Properties -vs- Sky Structures Ltd- Civil Appeal No. 175 of 1999 & Gudka -vs- Dodhia- Civil Appeal No. 21 of 1980***. It was incumbent on the appellants to prove that the 3rd respondent fraudulently caused the name of the 1st appellant's running mate to be erroneously indicated. See the decision in ***Derry -vs- Peek (1889) 14 App. Cas. 337***.
59. Having evaluated the evidence before the trial court we concur with the learned Judge's findings that the evidence on record did not support the appellants' position that they had informed the 3rd respondent of the error of content on the ballot paper. Firstly, Kimani testified that the letter dated 18th February, 2013 was served upon the 2nd respondent through one Ruth who acknowledged receipt by affixing her signature on the letter. There is no evidence that Ruth had the authority to accept service on behalf of the 2nd respondent. Further, there is no evidence to corroborate Kimani's contention that it was indeed the 2nd respondent who had directed them through the phone to serve the said letter on Ruth. Secondly, the 3rd respondent clearly provided evidence that the appellants' had sent the above mentioned emails to rpp@iebc.or.ke which address belongs to the Registrar of Political Parties instead of sending the same to the 3rd respondent's email address which was info@iebc.or.ke. Further, the 3rd respondent gave uncontroverted evidence that its email address was always indicated in its official documents which were in the appellants' possession. Thirdly, there is no evidence that the appellants or their agents talked to the 2nd and 3rd respondent about the issue prior to the election date. Therefore, the appellant's did not prove fraud on the part of the 3rd respondent. Further, the appellants did not prove that the 3rd respondent carelessly or without reasonable ground of believing that the name of the 1st appellant's running mate was Geoffrey Gitonga Ndegwa caused the ballot paper in question to be printed with the aforementioned error.
60. We are cognisant of the requirement under ***Regulation 51 (5)*** of the ***Regulations*** wherein the 3rd respondent is required to publish the names of cleared candidates. Upon such publication in the Kenya Gazette, the obligation to point out any error is upon any member of the public but more particularly on an aggrieved person, in this case being the 1st appellant. We find that the 1st appellant failed to discharge this obligation. However, the obligation of the 3rd respondent to ensure the accuracy of the contents of the ballot paper cannot be diminished by an allegation that the 1st appellant was to inform them of any error.

D. What was the effect of the error on the gubernatorial elections ?

61. It was the appellants' case that on account of the said error on the ballot papers the 1st appellant was portrayed as a dishonest person; his supporters, believing that he had deceived them in regard

to his running mate so as to get their votes and voted against him in protest. The appellants relied on the decisions in ***Omar & Another -vs- Mbuji & Another (2008) 3 KLR EP 269 & Re. K.A Thabiti (1967) EA 722*** wherein the election results were nullified on account of errors on the ballot papers. The appellants contended that the results were not a true reflection of the will of the electorate; the concluded gubernatorial elections were not free and fair. On the other hand, the 1st respondent contended that the said error in the ballot papers did not affect the election results because firstly, the voters had already made up their minds as to which candidate they would vote for by the time they went to cast their votes and therefore the misprint could not have changed their minds; secondly, the only position that was subject to the election was the Governor's seat and not the Deputy Governor's seat; thirdly the said election results which represented a 90% turn out of registered voters and placed the 1st appellant a distant third were clearly reflective of the democratic will of the people of Nyeri County.

62. In considering this issue we have to make a determination of whether the error of content went to the root of the electoral process in respect of the gubernatorial elections. We must evaluate the effect of the error of content on the totality of the entire gubernatorial elections to ascertain if this error had an effect on free and fair elections. In doing so we have to consider the following:-

- Did the error of content affect the validity of the ballot paper used in the gubernatorial elections?
- Did the error of content affect the validity of the candidature of all persons who were cleared to contest for the Governor's seat?
- Did the error affect the validity of all the nominees for the position of Deputy Governor in the gubernatorial elections?
- Did the error affect the will of the people?
- Did the error affect the outcome of the election results?

63. There are a number of things that are part of the contents of a ballot paper as illustrated in Form 29 of the Schedule to the **Regulations**. The contents of a ballot paper include the party/candidates symbol, the name and photograph of the candidate for Governor, the name of the Deputy Governor and the voter's mark. We are of the view that the error in content as to the name of the 1st appellant's running mate was minuscule compared to the accuracy of the other contents in the ballot paper. This is because firstly, the centrality of party symbols in elections cannot be understated. The political party and its symbol are the hallmark of elections. Elections are fought on the party and its symbol. In this case, the name of the 1st appellant's political party and its symbol were properly captured and reflected on the ballot paper. Given the central role that the party and its symbol play in elections, the 1st appellant was not prejudiced by the said error of content. Secondly, **Article 180 (6)** of the **Constitution** provides:-

“The Independent Electoral and Boundaries Commission shall not conduct a separate election for the deputy governor but shall declare the candidate nominated by the person who is elected county governor to have been elected as the deputy governor.”

The error of content in the ballot paper affected the position of Deputy Governor. Based on the foregoing provision it is our considered view that the error was an error of a position in respect of which no elections were being held and therefore such an error cannot affect the validity of the election results. We find that despite the error in the 1st appellant's running mate the ballot paper which was used in the gubernatorial elections was valid and the error did not vitiate the ballot paper.

64. Taking into account the fact that there was no error as regards the symbol, identity, name and party of any of the candidates vying for Governorship in Nyeri County we find that the error on the ballot paper did not affect the legality of the candidature of any individual who had been cleared to contest in the said elections. Having found that the error in respect of the name of the 1st appellant's running mate was minuscule and that the ballot paper was valid we hold that the error did not affect the validity of any and all running mates of the gubernatorial candidates.

65. The next issue that falls for our consideration is whether the ballot paper (although containing an

error) as used and cast by the voters reflected the will of the people. The will of the people is reflected through the ballot paper that was cast and tallied. The electoral results of the gubernatorial elections for Nyeri County using the ballot paper containing the error was follows:-

Gachagua James Nderitu (1 st respondent)	– 136, 985
Gakuru Patrick Wahome	- 126,449
Thuo Mathenge (1 st appellant)	- 48,667
Mutahi Mwangi Njururi	- 9,212
Wang'ondu John Githinji	- 2,836

66. The 1st appellants witnesses deposed in their various affidavits that when they discovered the error in regard to the 1st appellant's running mate they decided to vote against the 1st appellant believing he had deceived them during the campaign period as to the identity of his running mate. Samuel Maingi Magenda, PW4, in his affidavit deposed as follows:-

“That the discovery that the ballot papers indicated a different running mate from the one I knew, shocked me and I decided to cast my vote against Thuo Mathenge (1st appellant) in protest, as I thought he had deliberately cheated the voters during his campaign.”

Anne Wanjugu Kagwamba, PW5, and Benson Gichohi Ngunjiri, PW6, in their respective affidavits also reproduced the aforementioned paragraph. It was also the 1st appellant's evidence that he believed that his supporters voted against him because they believed he was dishonest due to the error on the ballot paper; he maintained that as a result the election results were not a true reflection of the will of the people. In reinforcement of his contention the appellant stated in his affidavit,

“15. That the voters were confused and frustrated, as they honestly believed I had a hand in the confusion of the name of my running mate, and that I had deliberately cheated them during the campaigns.

16. That the voters must have voted against me in protest as they regarded me as a dishonest person. I am also aware that the IEBC suspended elections in at least five wards in Nyanza Province due to similar mix up of names. It is not clear why the Nyeri Governor's election was not similarly suspended event though the IEBC was notified about the problem in good time. The different and prejudicial treatment accorded to Nyeri County does amount to discrimination and did defeat the express will of the people.

17. That I have been prejudiced by the conduct of the 2nd and 3rd respondents, and I believe I have lost the position of Governor for Nyeri County as a result.”

67. At this juncture it is imperative to consider the standard of proof in an Election Petition and who bears the burden of proof. The Supreme Court in ***Raila Odinga -vs- IEBC & Others (supra)*** expressed itself as follows:-

“ 191. Comparative judicial practice on the burden of proof helps to illuminate this Court's perceptions, in a case which rests, to a significant degree, on fact. In a Ugandan election case, Col. Dr. Kizza Besigye -vs- Museveni Yoweri Kaguta & Electoral Commission- Election Petition No. 1 of 2001, the majority on the Supreme Court Bench held:-

“...the burden of proof in election petitions as in other civil cases is settled. It lies on the Petitioner to prove his case to the satisfaction of the Court. The only controversy surrounds the standard of proof required to satisfy the Court.”

192. Similarly in the Canadian case, Optiz -vs- Wrzesnewskyj 2012 SCC 55-2012-10-256 it is thus stated in the majority opinion:-

“An applicant who seeks to annul an election bears the legal burden of proof throughout.....”

193. Such a line of judicial thinking is also found in the Nigerian case, Buhari -vs- Obasanjo (2005) CLR 7K, in which the Supreme Court stated:-

“The burden is on petitioners to prove that non-compliance has not only taken place but has also substantially affected the results..There must be clear evidence of non-compliance, then that the non-compliance has substantially affected the election.”

The Nigerian Supreme Court further stated:-

“He who asserts is required to prove such fact by adducing credible evidence. If the party fails to do so its case will fail. On the other hand if the party succeeds in adducing evidence to prove the pleaded fact it is said to have discharged the burden of proof that rests on it. The burden is then said to have shifted to the party's adversary to prove that the fact established by the evidence adduced could not on the preponderance of the evidence result in the Court giving judgment in favour of the party.”

.....

196. We find merit in such a judicial approach, as is well exemplified in the several cases from Nigeria. Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections. ”

From the practice and history of this country, the standard of proof required in Election Petitions is higher than a balance of probabilities but not beyond reasonable doubt. See Muliro -vs- Musonye & Another (2008) 2KLR (EP) 52 & Nganga & Another -vs- Owiti & Another (No.2) (2008) 1KLR (EP) 799. Therefore, did the appellants' prove to the required standard that the gubernatorial election results were not a reflection of the will of the people ?

68. We are of the considered view that the evidence adduced by the 1st appellant that he believed his supporters voted against him because of the error on the ballot paper was based on opinions and speculations. We say so because we did not find any basis for such speculations and opinions in the evidence adduced. Firstly, from the foregoing it is clear that it is only the Governor who is directly elected by the voters. We cannot help but note that the appellant's witnesses did admit that they were aware that it was only the Governor who was being directly elected by the voters and that the successful candidate's nominee would be the Deputy Governor. Therefore, we find the contention by the appellants' witnesses that they had supported the 1st appellant on account of Dr. Geoffrey Kamau Kibui being his running mate and that the error on the ballot papers influenced them to vote against the 1st appellant unreasonable. It is quite clear that the said witnesses understood that it was only the Governor who would be directly elected; his running mate would be the Deputy Governor. Therefore, at no instance were the appellants' witnesses voting for the Deputy Governor. We further find this contention to be unreasonable because if indeed the said Dr. Geoffrey Kamau Kibui was the appellants' witnesses preferred candidate for the position of Deputy Governor, why then would they vote for another candidate vying for the seat of Governorship whose running mate was not Dr. Geoffrey Kamau Kibui?

69. Secondly, from the evidence of the appellants' witnesses, it is clear that they knew that the 1st appellant had nominated Dr. Geoffrey Kamau Kibui to be his running mate and both the 1st appellant and his nominee were from the same party. We concur with the following findings by the learned Judge,

“ 125. It is clear from the evidence tendered before the court that almost all the witnesses knew that Mr. Thuo Mathenge had appointed Dr. Geoffrey Kamau Kibui as his running and since the party symbol and the picture of Thuo Mathenge were correctly printed on the ballot paper, therefore it would not be unreasonable to take into account the fact that a large majority of voters concentrated on the symbol of the party and the pictures of the candidates rather than the name taking into account the fact that people were voting for six positions in five minutes.”

Thirdly, as correctly pointed out by the learned Judge the appellants did not prove that the error on the ballot papers resulted in the voters changing their preferred choice. The evidence adduced by the appellants on this issue was based on opinion and speculation. This position was clearly supported by the evidence of the 2nd appellant who testified that despite the said error he voted for the 1st appellant being his preferred candidate. On his part the 1st appellant does not give the basis for his belief that voters must have cast their votes against him in protest. He also did not demonstrate the basis for the statement that the voters were confused and frustrated. The appellants failed to show that any candidate and particularly that the 1st respondent benefited from the error of content.

70. There was no credible evidence on record to show that the will of the people was not reflected by the tally of the votes counted. It is our considered view that the appellants have only given speculative, opinion and conjecture evidence. The burden of proof in Election Petitions is upon the Petitioner. Courts cannot set aside an election based on surmises and conjecture, unless it is established by positive evidence that the elections results were materially affected by the error.

71. A free and fair election is not determined per se by the ballot paper. The electoral process has several components which start with the clearance of candidates by political parties to casting of votes and ultimately declaration of a winner. In all these processes there was no error in the electoral process in respect of the gubernatorial elections. The only error was the misrepresentation of the 1st appellant's running mate on the ballot paper. Did this error go to the root of the entire gubernatorial electoral process? The appellants' contended that the error of content in the name of the 1st appellant's running mate affected the electoral results. We are of the considered view that in an Election Petition founded upon the ground that the result of the elections were affected, the following two steps are involved:-

i) The court has to first decide whether certain ballot papers were improperly

received or cast due to the error; and

ii) An arithmetical calculation has to be made. If as a result of such

calculations the winning candidate still maintains a lead over his nearest

rival the election cannot be nullified because the results of the elections

have not been materially affected. Tanzania's High Court in Ng'weshemi

-vs- Attorney General Mwanza- HCMCC No. 5 of 1970 expressed itself as

follows:-

“The question whether non-compliance with the provisions of the Act relating to

elections affected the result of the election would depend on the nature of the particular complaint or irregularity and the margin of victory...Where a specific irregularity has been proved and the number of votes affected established with some provision then allowance should be made for that and if after such adjustments have been made the successful candidate still retains some margin of victory then the irregularity has not really affected the result of the election..."

In the instant case the appellants who had the burden of proof did not present any material evidence that would enable the court to take the above mentioned steps.

72. The error of content was non-compliance with the electoral rules. Not every non-compliance with an electoral provision can be raised to such a high pedestal that its violation should *ipso facto* result in setting aside the verdict of the electorate as shown in the results. (See **Bhoop Singh -vs- Bar Council of Punjab and Haryana**, AIR 1977 A & H 40). If there is substantial compliance then a minor non-compliance cannot vitiate the electoral result. We are satisfied that the ballot paper used in the gubernatorial elections was in substantial compliance with the **Elections Act**.
73. We are of the considered view that the said error of misrepresentation did not go to the root of the entire electoral process. This because as herein above stated both the ballot paper and the entire electoral process was valid; the identity of the 1st appellant's running mate was clear to all the electorate and it was clear to the electorate it was only the Governor who would be directly elected in the said elections. It is our considered view that other than elections for the main political offices such as the President and Governor, voters go by the political party and symbol allotted to the party and the candidate and not necessarily the names of the candidate. (See **Akhand Pratap Singh -vs- Kunwar Surendra Pratap Singh** (1996) 2 SCC, 273, AIR 1996 SC 1532.) It would therefore have been different if the misrepresentation was in relation to the name of a candidate who vied for Governorship. In totality we are of the considered view that the error of content did not affect the will of the electorate in Nyeri County.
74. Having found that the subject elections were substantially in conformity with the law and that the error on the ballot papers did not affect the gubernatorial election results of Nyeri County, we find that the trial court correctly declined to nullify the said elections. See **Re Kensington North Parliamentary Election** (1960) 2 ALL E.R. Section 83 of the **Elections Act** prohibits an election being declared a nullity on the grounds of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the law; or if there is non-compliance, the same did not affect the results. In **James Omingo Magara -vs- Manson Onyongo Nyamweya & 2 others- Civil Appeal No. 8 of 2010** it was held,

“The courts will strive to preserve an election as being in accordance with the law, even where there have been significant breaches of official duties and election rules provided the results of the election was unaffected.”

In **Morgan & others -vs- Simpson & Another** (1974) 3 ALL ER 722, it was held,

“An election court was required to find an election invalid-

a) if irregularities in the conduct of elections had been such that it could not be said that the election had been conducted as to be substantially in accordance with the law as to election, or

b) If the irregularities had affected the results.

Accordingly, where breaches of the election rules, although trivial, had affected the results, that by itself was not enough to compel the court to declare the election void..”

75. We are of the considered view that the said election results reflected the electoral intent of the people of Nyeri County. As was clearly expressed in the Supreme Court's decision in **Raila Odinga -vs- IEBC & Others** (*supra*), a Court should not be a limiting factor to the enjoyment of

free political choices by the people. Therefore, having found that the ultimate will of the electorate in Nyeri County was ascertained in the gubernatorial election results both the trial court and this Court have a duty to uphold the same.

76. We now turn to the decision in ***Omar & Another -vs- Mbuji & Another (supra)*** wherein this Court in upholding the trial court's decision declaring the elections therein a nullity expressed itself as follows:-

“In this case, the defect was in the ballot papers in that a party which sponsored a candidate had its symbol missing from the ballot papers and instead another party's symbol was assigned to its candidate. In our view the ballot paper, as we have stated is an integral part of the election. It guides the voter on who is a candidate and his/her party symbol. We cannot on our part, conceive a more important defect in an election than a ballot paper that, instead of guiding voters, misleads them.... We find no hesitation in finding that the defect went to the foundation of any election namely, ensuring that the elections are free and fair by providing to all candidates offering themselves for elections and their parties a level playing ground by ensuring each candidate has his party symbol which he had been using during the campaign period properly assigned to him for voters to see and thus make informed decision on whom to vote for.”

In ***Re. K.A. Thabiti (Supra)***, the Tanzania's High Court held,

“The voters had been assured by the candidates in their election campaigns that they were respectively represented by symbols announced by the District Council and by the candidates. It would appear that a voter who was illiterate and wanted to vote for the Petitioner on the strength of the symbol, would cast his vote to the wrong candidate.”

In our humble view, the above mentioned cases are distinguishable. In both ***Omar*** and ***Thabiti*** the defect/error on the ballot paper was on the candidate's party symbol and while in this instant case the error was in respect of the 1st appellant's running mate. In above mentioned cases the error related to the main candidate who was contesting in the elections while in this case the 1st appellant's running mate was not contesting in the election; only the candidate vying for Governorship could be directly elected by the electorate in the gubernatorial elections. The details pertaining to the 1st appellant's name, party name and party symbol were accurate. Therefore the ballot papers in this instant case did not mislead the electorate on the 1st appellant's details.

E. Did the trial court have jurisdiction to entertain the issue of a candidate's eligibility in respect of academic qualifications in the Petition?

77. **Article 180 (1)** of the **Constitution** provides that for a person to be eligible for election as a County Governor, he/she must be eligible for election as a member of the County Assembly. **Section 25(1)(a)** of the **Elections Act** provides that for a person to be eligible to be nominated as a member of a County Assembly he/she must satisfy any educational, moral and ethical requirements prescribed by the **Constitution** and the Act. **Section 22** of the **Elections Act** provides as follows:-

“22 (1) A person may be nominated as a candidate for an an election under this Act only if that person-

a)

b) holds a post secondary school qualification recognized in Kenya.

2) Notwithstanding subsection (1)(b), a person may be nominated as a candidate for election as a President, Deputy President, County Governor or Deputy County Governor only if the person is a holder of a degree from a university recognized in Kenya.”

Emphasis added

Despite an amendment of the above provision vide **Section 3** of the ***Elections (Amendment) (No.3) Act, 2012***, the requirement to be a degree holder was applicable to candidates who vied for the positions of Governor and Deputy Governor.

78. Based on **Section 22(2)** of the ***Elections Act***, as set out above, for a person to be eligible as a candidate for Governor and Deputy Governor he/she is required to first be a holder of a degree and secondly the degree must be issued by a university recognized in Kenya. The 1st appellant having vied for Governorship was subject to the aforementioned educational qualifications. It was the 1st appellant's case that he obtained a degree of Bachelor of Social Work and Social Administration from Fairland University in Jinja, Uganda. **Regulation 47** of the ***Regulations*** prescribes the procedure of how a candidate's educational qualifications are ascertained. The regulation provides as follows:-

“47(1) For purposes of ascertaining the educational qualification of persons for an elective post, a person seeking nomination shall submit to the Commission copies of certificates of the educational qualification.

(2) Where the body that issued the certificate is not based in Kenya, a candidate shall be required to seek authentication of that body with the Kenya National Examinations Council, in the case of form four certificates, or the Commission for High Education, in the case of University degrees.”

79. In this case, John Mwenja Murage, a Senior Assistant Commission Secretary to the Commission of University Education, gave uncontroverted evidence that Fairland University was a recognized university in Kenya at the time the 1st appellant claimed to have received his bachelors degree on 15th November, 2012; subsequently, on 11th March, 2013 the said university's license was revoked by the National Council for Higher Education in Uganda. The issue that was in controversy at the trial court was whether the 1st appellant was a holder of a valid degree from the said university.

80. At this juncture the issue that arises for our determination is who is a holder of a degree? The Concise Oxford English Dictionary, 11th Edition defines a degree as an academic rank conferred by a college or university after examination or after completion of a course or conferred as an honour. A honorary degree is usually granted in honour of the recipient's contribution to a specific field or to society in general without the recipient undertaking any examination. A honorary degree is not an educational qualification degree as it has not been obtained pursuant to learning and examination . We hold that a holder of an honorary degree does not possess educational requirements for the degree. An academic degree is an earned degree conferred to an individual after undergoing a process of learning, tutoring and examination consequent to which a certification is given. A holder of an earned academic degree must have undertaken courses of study whether through class work, electronic or distance learning and have been examined on those courses by the university's competent organs and certified to have met all the requirements for that degree. A holder of a degree in the context of **Section 22 (2)** of the ***Elections Act*** and in the constitutional context of educational requirement should be interpreted to mean a holder of an earned academic degree.

81. Having expressed ourselves as above the next issue for consideration is whether the trial court had the jurisdiction to entertain the issue of whether the 1st appellant was a holder of a valid degree. Pursuant to part IX of the ***Regulations*** once a Returning Officer verifies nomination papers as well as academic qualifications of a candidate vying for Governorship and is satisfied that they are in order, he issues the candidate with the nomination certificate. In this case the 1st appellant contended that he submitted his nomination papers to the 2nd respondent on 31st January, 2013 and the 2nd respondent being satisfied with his academic qualifications issued him with a nomination certificate. The appellants argued that the trial court sitting as an Election Court had no jurisdiction to entertain any question as to his academic eligibility to vie for Governorship

because firstly, the issue was not before the court for determination; Secondly, the 2nd respondent acting as the 3rd respondent's agent had already dealt with the issue at the nomination stage and was satisfied with the 1st appellant's academic qualifications. Consequently, the appellants' submitted that the issue regarding the validity of the 1st appellant's degree was outside the jurisdiction of the trial court and this issue could only be determined by the Returning Officer at the point when candidates are being cleared to contest an electoral seat.

82. The **Constitution** and the Electoral laws provide for qualifications that a candidate must possess to be eligible to contest for an electoral seat. Whether an individual possesses such qualifications is a matter at first instance to be ascertained by the political party that sponsors the candidate; at the second instance by the Returning Officer as an agent of the 3rd respondent. The High Court as an election court has unlimited and original jurisdiction in parliamentary and gubernatorial electoral processes. In ***Nderitu Gachagua -vs- Dr. Thuo Mathenge- Civil Appeal No. 14 of 2013*** we expressed ourselves as follows:-

“Firstly, Section 2 of the Elections Act defines an election court as follows:- ‘election court’ means the Supreme Court in exercise of the jurisdiction conferred upon it by Article 163(3) (a) or the High Court in the exercise of the jurisdiction conferred upon it by Article 165(3) (a) of the Constitution.’ (emphasis added) Article 165 (3) (a) of the Constitution grants the High Court original and unlimited jurisdiction in criminal and civil matters. In fact, it is the only court that has original jurisdiction to deal with election petitions, other than Presidential election disputes.

Indeed, Article 88 (4) (e) grants the 3rd respondent jurisdiction to deal with electoral disputes before the declaration of the results. However, that does not take away the High Court's original and unlimited jurisdiction to deal with any matter brought before it. It does not “exclude” or “limit” the High Court's jurisdiction. So, both the 3rd respondent and the High Court enjoy concurrent jurisdiction over disputes prior to the declaration of the results, and the High Court enjoys exclusive jurisdiction after the declaration of results.

*The Supreme Court in ***Hermanus Phillipus Steyn –vs- Giovanni Gneccchi Ruscone – Application No. 4 of 2012*** adopted the definition of concurrent Jurisdiction under the **Black’s Law Dictionary** which provides as follows,*

‘Jurisdiction which might be exercised simultaneously by more than one court over the same subject matter and within the same territory, a litigant having the right to choose the court in which to file an action.’

We find that based on the foregoing the High Court has the jurisdiction to determine whether an individual is eligible to contest for an electoral seat or to be elected to an electoral office. The fact that the 3rd respondent clears candidates to run for elective posts does not oust the jurisdiction of the High Court in determining electoral eligibility.

83. Further, the issue was framed by the parties herein as an issue for determination by the trial court in their agreed issues. **Section 86 (1)** of the **Elections Act** provides that an election court shall, at the conclusion of the hearing of an election petition, determine the validity of any question raised in the Petition. As was stated in the case of ***Galaxy Paints Co. Ltd. – vs - Falcon Guards Ltd.- EALR (2000)2 EA 385***; the issues for determination in a suit generally flow from the pleadings and a court could only pronounce judgment on the issues arising from the pleadings or such issues as the parties framed for the court’s determination. We find that the learned Judge did not err in finding that the court had jurisdiction to consider the 1st appellant's eligibility to vie for Governorship.

84. Having expressed ourselves as above the next issue for consideration is whether the above provisions relating to academic qualifications apart from requiring recognition of the university also require recognition of the degree issued. We are of the considered view that the recognition

stipulated in **Section 22** of the **Elections Act** and **Regulation 47** of the **Regulations** require both recognition of the University attended by the candidate as well as the degree issued to the candidate. We find that to hold that only the university is required to be recognized will lead to an absurdity. This is because as correctly pointed out by the 1st respondent's counsel there is a possibility that the university from which the degree is allegedly obtained from is a recognized university in Kenya but the degree held by the candidate could be suspect or not recognized in Kenya. We believe that the purpose of the legislature imposing academic qualification to certain elective posts is to ensure proper representation of the people of Kenya; to hold otherwise would defeat the intention of the Legislature.

85. Was the 1st appellant a holder of an earned academic degree? In this case it was the 1st appellant's case that he received his bachelors degree from Fairland University in Jinja, Uganda on 15th November, 2012. As set out above, in order for a person to be conferred with an academic degree, he/she ought to have undergone a process of learning, tutoring, examination and met all the requirements of the said degree. The 1st appellant alleged to have attended classes in Jinja, Uganda every week from Friday to Sunday; he would travel to Uganda either by private means or a public bus; he would leave Nairobi every Thursday evening and arrive in Uganda Friday morning; and again leave Uganda for Nairobi every Monday morning. We take Judicial Notice that whenever a person crosses a border of a certain country and enters another there are immigration and customs clearances checkpoints wherein either one's passport or temporary pass is stamped by the border authorities to certify custom clearance as well as border control. Just like the trial court, we are unable to accept the 1st appellant's evidence that all the times he travelled to Uganda he was never asked by the border check points to produce his passport and neither was it ever stamped. From the evidence on record, the 1st appellant neither proved that he attended classes or sat for examinations in respect of the degree he claimed to have received.
86. RW1, John, a Senior Assistant Commissioner to the Commission for University Education gave uncontroverted evidence that he was unable to equate the degree presented by the 1st appellant due to several reasons. He stated that the degree certificate was different in form from other certificates conferred on the same date to other students by the said university; the signatures of the Chancellor and Vice Chancellor in the 1st appellant's degree certificate were different from those certificates issued on the same day to other students; the signatures of the Faculty Dean and the Academic Registrar in the 1st appellant's degree certificate and the transcripts differed with those on certificates and transcripts of other students issued on even date. He also testified that the 1st appellant had obtained a Division III at "O" level while the minimum entry requirement for University was Division II or Higher plus "A" level of two principals or a diploma from a recognized examining body; therefore based on the foregoing criteria the 1st appellant would not have qualified for admission to the University in Kenya, the resultant degree would not be recognized in Kenya.
87. The 1st appellant contended that Fairland University's Dean, Prof. Solomon Wokambi examined the degree certificates that were relied on by the 1st respondent and informed him that they were forgeries. Unfortunately, the said Prof. Wokambi neither swore an affidavit nor testified before the trial court. Therefore, we are unable to place any weight on the 1st appellant's contention. It was further the 1st appellant's contention that the trial Judge erred in relying on the **Universities Act** to determine the issue of academic qualifications yet the electoral law is a self contained regime. On this issue we agree that the Electoral Law in Kenya is a special regime under which the election process are governed and as such the Electoral law must be construed and applied strictly; in that what is provided therein is what the legislature intended to be there in the manner and extent it is there. See this Court's decisions in **H. Adongo & others -vs- Savings & Loans Society (Kenya) Ltd- Civil Appeal No. 22 of 1987 & Murathe -vs- Macharia (2008) 2KLR (EP) 244**. However by virtue of **Regulation 47(2)** of the **Regulations** which requires a candidate to seek authentication of a university not based in Kenya with the Commission of Higher Education the provisions of the **Universities Act** are invoked by implication. This is because firstly the Commission is established under the Act; secondly the Commission's mandate which includes accreditation of degree conferred by foreign universities is also exercised under the Act. We, therefore, find that the trial court did not err in relying on the **Universities Act** to determine the

- validity of the degree held by the 1st appellant.
88. It was the 1st appellant's evidence that he started being referred to as Dr. Thuo in the year 1990 when he started opening medical clinics in Kiambu and Nairobi; he stated that he was not a qualified doctor but he hired trained doctors to offer their services in the said clinics. Further, the 1st appellant gave evidence that he was awarded an honorary doctorate degree on 4th January, 2013 by Fairland University in recognition of his contribution to the society. As illustrated above an honorary degree is not the degree envisaged under **Section 22 (2)** of the **Elections Act** therefore, the same cannot be considered as proof of the 1st appellant's academic qualifications.
89. Based on the foregoing we find that the evidence on record did not establish that the 1st appellant holds a degree recognized in Kenya. The totality of the evidence adduced casts doubt on the circumstances in which the 1st appellant obtained his bachelors degree. We are of the considered view the trial court did not err in directing the Director of Public Prosecution to investigate the circumstances under which the 1st appellant obtained the alleged bachelors degree.
90. We have perused the record and note that the learned Judge erroneously relied on his religious belief to hold that Fairland University did not conduct classes on Saturdays because it was a Seventh Day Adventist Institution. There was no evidence that was tendered to support the above mentioned conclusion made by the learned Judge. See this Court's decision in **Sheik t/a Hasa Hauliers -vs- Highway Carriers Ltd. (1982-88) KLR 308**. Otherwise we find no prejudice or discrimination of the parties by the learned Judge as alleged by the appellants.

F. Costs:

91. On the issue of costs, the learned Judge held that the dispute herein arose as a result of the error on the ballot papers which the 3rd respondent was responsible for; the 3rd respondent never offered any explanation as to how the error arose. Consequently, the learned Judge ordered the 3rd respondent to bear the costs of the Petitions. He further directed that the appellants be granted half of the taxed costs and the taxed costs should not exceed total aggregate of Kshs. 2.5 million. **Section 84** of the **Elections Act** provides:-

“ An election court shall award the costs of and incidental to a petition and such costs shall follow the cause.”

92. Taking in to account the above provision of law, we concur with the learned Judge that the dispute arose on account of the error on the ballot boxes and that the 3rd respondent was to blame for the dispute despite the fact that the said error did not affect the election results. We find that the trial court correctly burdened the 3rd respondent with the costs of the Petitions before the High Court.
93. We find that the appeal herein has no merit and is hereby dismissed with costs to the respondents. The appellants having filed this appeal at their own initiative, costs must follow the event. We appreciate the outstanding contribution of all counsel appearing before us. We acknowledge them for their ingenuity and enterprise, in urging before us the vital questions of law.

Dated and delivered at Nyeri this 4th day of December, 2013.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

.....

JUDGE OF APPEAL

J. OTIENO-ODEK

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR