



REPUBLIC OF KENYA
IN THE MAGISTRATES COURT AT MARIMANTI
ELECTION PETITION NUMBER 1 OF 2017

BETWEEN

NJERU BENSON MWANGANGI.....PETITIONER

-VERSUS-

NDUYO SUSAN NGUGI.....1ST RESPONDENT

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....2ND RESPONDENT

CALEB S. GEKONDE/ CONSTITUENCY RETURNING

OFFICER, THARAKA CONSTITUENCY.....3RD RESPONDENT

JUDGMENT

INTRODUCTION

1. Article 1(1) of the Constitution of Kenya provides that all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution. Article 1(2) provides that the people may exercise their sovereign power either directly or through their democratically elected representatives.
2. Pursuant to Article 1(2), the citizens of Kenya exercised their sovereign power through a general election held on the 8th of August 2017 to elect the members of Parliament, members of county assemblies the President and his Deputy.
3. The 2nd respondent cleared eight candidates namely; Kaimba Bruno Kibaara, Kajiita Daniel Mutegi, N Mbiiri Mugiira Mugao, Nduyo Susan Ngugi (1st respondent), Njeru Benson Mwangangi (petitioner), Njeru Peter Murugu, Njeru Sospeter Mugambi and Samuel Grace Karegi to contest for the position of Member of County Assembly (hereafter MCA) Marimanti Ward of Tharaka Constituency within Tharaka-Nithi County county.
4. At the close of the electoral process, the 3rd respondent declared the 1st respondent the winner of election and duly elected as a MCA representing Marimanti Ward with 3939 votes with the petitioner as the runners up with 3682 votes.

5. The petitioner being aggrieved with the manner the election was conducted brought the petition herein against the respondents seeking the following prayers:-

- a) THAT the said NDUYO SUSAN NGUGI was not duly elected and the election was void.
- b) THAT there be a by-election in respect of Marimanti Ward in Tharaka-Nithi County forthwith.
- c) THAT the costs of the Petition be paid to the Petitioner.

The Petition

6. This Petition is based on only two broad grounds. The first ground is that the elections were not free and fair while the second ground is that the elections were marred with irregularities. The petitioner goes ahead to particularize and enumerate 16 irregularities and reasons why the elections were not free and fair as well. What is enumerated on the face of the petition appears to have been copied and pasted in the affidavit in support of the petition word for word. The particulars aforesaid are set out herein below with slight variations for ease of comprehension, with care being taken not to compromise the intended meaning;

- a) There was unexplained inconsistency between the results captured in Form 36 (B) signed by Returning Officer, Mr. Caleb S. Gikonde on 8th August, 2017 which indicated that the petitioner had 3682 votes against the 1st respondent's 3939 and the BVR which indicated that the petitioner had 3700 against the 1st respondent's 3908.
- b) The petitioner was denied the right to appoint his own agents to oversee his votes in various polling stations such as Igumo Primary School, Kaarani Primary School, Kaguuma Primary School among others.
- c) Some of the agents that purported to represent the petitioner were not known to him could not represent his interest.
- d) Some of the purported forms 36A were not signed by the petitioner's agents and they were not stamped by IEBC officials.
- e) The elections of MCA Marimanti were not free and fair because of irregularities.
- f) On 9th August, 2017, the votes on the screen at the tallying centre at Tharaka Boys High School, remained constant 2355 for the petitioner and 2016 for the 1st respondent.
- g) The elections for MCA Marimanti were manned (sic) by massive irregularities such as inconsistency between the Biometric transmission report, the Returning Officer report as per Form 36 B and the reports by agents.
- h) The Returning Officer refused to supply the Petitioner with form 36A.
- i) The Petitioner's votes were reduced in various polling stations. For instance, at Gituri Pry School, Form 36B indicates the petitioner garnered 1389 but biometric transmission report shows a figure of 1407. The votes for the 1st respondent in Form 36B are 475 but in biometric transmission report they are 444. The votes for Kaimba Bruno Kibaara in Form 36B are 252 but in biometric transmission report are 263. Thus the Petitioner was deducted 18 votes and added to the 1st respondent.
- j) At Marimanti, the 4th candidate's results in Form 36B are 117 yet under biometric transmission report are 180. A total of 63 votes were deducted.

k)\ At Marimanti market, the total votes cast for stream one is given as 397 in Form 36B but actual additions should add to 334 votes. This difference is seen on biometric transmission report where one Grace Karegi's total are less with 63 votes. Form 36B gives her 117 while Biometric transmission report gives her 180 votes. The total number of rejected votes in marimanti market are given as 2 in Form 36B and 8 in Biometric transmission report.

l) There are other errors such as at Riakaugi Nursery, Form 36B indicates total cast votes are 114 but actual votes were 144 yet the difference of 30 votes was not accounted for.

m) At Munandani polling station, the total cast votes exceeded the total registered votes. Total registered votes are 434 yet the total valid and spoilt were 435.

n) The actual total votes that were cast in Munandani market was 354 but this was inflated arithmetically to add to 434 as per Form 36B.

o) There was abnormal consistency of tallying of votes at Gituuri Pry School whereby form 36B results of stream 2 were omitted and those of stream 5 have been duplicated as results of stream 2. These can be seen in form 36A of the two streams, that is stream 2 and stream 5. In the omitted stream the petitioner got 288 votes but awarded 270 votes, the 1st Respondent got 74 but is awarded 105 votes.

p) In stream 3 of Gituri primary school the total number of disputed votes is 2 as per Form 36A while in Form 36B it is indicated 0.

q) Total number of rejected votes in stream 2 of Gituri primary was 2 in Form 36A yet in Form 36B it was recorded as 12 votes.

r) As alluded to herein before, the supporting affidavit was by and large a duplication of the particulars of the single ground relied by the petitioner to prosecute this petition. The only additional content was the annexures to the affidavit which included a letter from the petitioner to the 3rd respondent dated 11th August 2017, some forms 36A and form 36B.

Response by the 1st Respondent

7. The 1st respondent filed her response dated 24th August 2017 on the 25th August 2017 in which she contended that she won the elections held on the 8th August 2017 through a fair, transparent, just and democratic election responsibly manned, overseen and/or supervised by the 2nd respondent devoid of any malpractices at the polling stations.

8. The 1st respondent denied existence of any inconsistencies between the contents of Form 36(B) signed by Returning Officer, Mr. Caleb S. Gikonde on 8th August 2017 and the BVR results as claimed by the petitioner.

9. The 1st respondent contended that each and every candidate in all the six elective positions were represented by their respective party agents in all the polling stations within the Ward and not personal/own/individual agent as suggested. The 1st respondent urged that the petitioner contested the election on a Democratic Party of Kenya ticket and the party was duly represented by an agent who signed form 36A.

10. The 1st respondent also urged that the petitioner should have raised a complaint or notified the 2nd respondent if he was aggrieved that his agents were turned away or if he noticed that there were strangers posing as his party agents which he did not.

11. Regarding the failure to sign forms 36A by the petitioner's agents, the 1st respondent urged that the

agents were at liberty to sign or decline to sign but whatever action they took was presumed to be on behalf of their petitioner.

12. The 1st respondent held the view it was the final result of the election declared by the 2nd respondent that mattered and not the provisional or any other unofficial results.

13. The 1st respondent urged that the errors, differences and inconsistencies enumerated under paragraph 9 (j), (k), (l), (m), (n), (o) and (p) of the petition and replying affidavit and petition were a creature of the petitioner's wishful thinking.

14. The 1st respondent urged that she defeated the petitioner who was her closest rival by a clear and significant margin such that it could not make any difference to the final result even if the petitioner's vote tally was increased by the total number of disputed and rejected votes.

15. The 1st respondent concluded by alleging that the petitioner was on a fishing expedition and relied on exhibits that were unreliable and unhelpful to the court due to lack of material contents as such the petition was ill-fated, and after-thought, and a mere academic exercise that cannot yield the reliefs sought.

16. The 1st respondent that the court determines that the said Nduyo Susan Ngugi was duly elected and the election was valid and dismiss the petition with costs to the 1st respondent.

Response by the 2nd & 3rd Respondents

17. The 2nd and 3rd respondents in their response to the petition pleaded that they conducted election for the MCA Marimanti Ward and declared the result as follows:-

a) Kaimba Bruno Kibaara	3425
b) Kajiita Daniel Mutegi	606
c) N. Mbiiri Mugiira Mugao	182
d) Nduyo Susan Ngugi	3939
e) Njeru Benson Mwangangi	3682
f) Njeru Peter Murugu	25
g) Njeru Sospeter Mugambi	456
h) Samuel Grace Karegi	1576

18. The 2nd and 3rd respondents urged in their response that results from the polling station were captured in forms 36A collated from all the polling stations and used to prepare form 36B in the presence of the candidates and agents present at the tallying Centre in the early hours on 9th August 2017 when the final results confirming that the 1st Respondent NDUYO SUSAN NGUGI, had garnered the highest number of votes before she was declared elected as MCA Marimanti Ward.

19. In response to paragraph 6 of the Petition, the 2nd and 3rd respondent pleaded that the transmission clearly and correctly indicated that the 1st respondent had the most votes and the declaration of the election was done based on Forms 36B and not Biometric transmission. The purpose of Biometric transmission was merely to transmit results from polling stations to the tallying center.

20. In response to paragraph 9 of the Petition, the 2nd and 3rd respondents averred that the elections were

free and fair and in accordance with the dictates of the constitution, The Independent Electoral and Boundaries Commission Act, The Elections Act, The Regulations thereunder and all other relevant provisions of the law. They further averred that each candidate was required to appoint agents of his choice and all the appointed agents were allowed into the polling stations to oversee the whole process, sign form 36A, and receive copies of form 36A on behalf of the candidates. The claim that the petitioner was never issued with copies of form 36A and his agents denied entry into polling stations was untrue.

21. The 2nd and 3rd respondents deny the allegations that votes were altered and the petitioner is put to the strictest proof of the allegations. They further aver that the presiding officers were the ones charged with preparation of form 36A in their respective Polling stations after counting of ballots in the presence of agents and not Returning Officer whose role was limited to collating votes contained in form 36A in form 36B and adding up the total number of votes from the polling stations.

22. The 2nd and 3rd respondents denied the allegations made by the petitioner in paragraph 9(j) and averred that the results displayed on the screen monitors in the tallying centre were not the final results and had no effect the outcome of the election.

23. The 2nd and 3rd respondents further clarified that an error occurred during transposition of data from Form 36A to 36B in respect of Riakugi Nursery Polling station in which the total valid votes cast was shown as 114 when in fact the total valid votes was 144 but the error did not interfere with the individual results of the petitioner or any other candidate.

24. The 2nd and 3rd respondents admitted that Form 36B indicates the total valid votes cast as 434 and one (1) rejected vote which exceeds the registered voters of 434 but averred that the error occurred when the results were transferred to form 36B as the results in Form 36A indicates the total valid votes cast as 354 and one (1) rejected vote. The 2nd and 3rd respondents further aver that the error did not affect the votes cast in favour of each candidate or the final outcome of the election.

25. In response to paragraph 9(n) of the Petition, it is true that the Petitioner garnered 288 votes in Gituri Primary School Polling station number 5 as shown in the Form 36A and the votes indicated in Form 36B for the same Polling station are 270. This error occurred during transfer of data from Form 36A and was due to fatigue after working for long hours. The error aforementioned in above was not deliberate or targeted on the petitioner and can be attributed to fatigue having worked for more than 24 hours straight. In Gituri Polling station number 2, Kaimba Bruno Kibaara garnered 66 votes as indicated in Form 36A but in Form 36B it indicates he got 55. The error stated above is not material and does not in any event affect the outcome of the election as the vote difference between the Petitioner and the 1st respondent is more than 200 votes and which gap cannot be bridged by the Petitioner as evidenced by the contents of form 36B.

26. The 2nd and 3rd Respondents aver that the substance of the Petitioner's claim does not allude to a claim of election malpractice and contend that the Petition herein is frivolous, bad in law, a waste of judicial time and an abuse of this court's process.

27. The 2nd and 3rd Respondents asked the court do find that the Petition had no merit for failing to meet the evidential threshold and dismiss it and make a determination that NDUYO SUSAN NGUGI was duly elected and the election was valid.

Petitioner's Submissions

28. The petitioner's submissions were no different from the petition itself and the supporting affidavit attached thereto. At some stage, the court was tempted to perceive that it was duplicating itself. Through his advocate Mr Kurauka, the petitioner submitted that the subject matter is the declaration of the winner of the election of Marimanti Ward pursuant to elections conducted by the 2nd respondent on 8th August 2017 in which there were 8 candidates including the petitioner and the 1st respondent.

29. It is clear that the race between the 1st respondent and the petitioner was tight as the 1st respondent was declared the winner with 3,939 votes against the petitioner's 3,682 votes. The difference between the two is 257 which the petitioner urged was narrow and that any irregularity could affect the outcome of the election.

30. The Petitioner further submitted that his petition and supporting affidavit had disclosed alarming irregularities and inconsistencies in tallying/tabulating the votes that rendered the election of the MCA Marimanti invalid. The irregularities aforesaid were captured in various forms to which the respondents conceded but saved face that the same did not affect the final result.

31. The petitioner submitted that he was denied the right to appoint his own agents to oversee his election at Igumo Primary, Kaarani Primary School among others. He told the court that he was not represented in most of the polling stations. The petitioner drew the court's attention to the fact that the 3rd respondent made an assumption that the agents of the Democratic party were also his agents. The petitioner urged that not all democratic party agents were agents of the petitioner. The petitioner urged that he was treated with gross discrimination and unfairness by not being allowed to bring his agents. That rendered the election not to be free and fair. The petitioner alleged that there was evidence to suggest that some Democratic Party agents were supporters of the respondent.

32. He further submitted that the form 36A submitted by the parties in this petition were not signed and stamped by the IEBC officials thus lacked authenticity. Some others forms were not signed by agents and the serial numbers were not consistent. Others forms had water marks while other did not yet all were supplied by the 3rd respondent. The petitioner contended that form 36A filed in court by the petitioner were photocopies supplied to him by the 3rd respondent and had water marks yet those filed by the respondent did not have water marks. The law binds the parties to file correct documents in court to assist the court determine the Petition. Some of the forms were not signed by the Presiding Officers and Deputy Presiding Officers.

33. There was inconsistency in terms of serial numbers. Examples are Gituri Primary School, Marimanti Youth. The petitioner drew the attention of the court to form 36A in respect of Gituri Primary School 5 of 5 in the form 36A supplied to the petitioner. The court was notified a similar occurrence kept repeating itself yet the 2nd respondent did not bother to explain the inconsistency.

34. The same inconsistencies appear in tallying the results where for instance the petitioner's and other candidates votes were reduced at Gituri Primary School and added to the 1st respondent. The biometric report showed 1407 votes in favour of the petitioner but the votes appear to have been reduced. The petitioner submitted that all the errors were in favour of the 1st respondent and no other candidate and cast doubt in the correct tabulation of the votes at Gituri Primary. In Riakaugi Nursery, form 36B shows that the total votes cast are 114 but the form 36A shows 144. A number of votes are not accounted for yet the number of votes should be consistent. At Munandani the total votes registered were 434 yet the voters that voted were 435. Assuming all the votes came out, the total votes should have been 434. The inconsistencies cast doubt on fairness and credibility of the elections. The results in different streams at Gituri Primary were identical. The similarity of the results are unusual and unexplained. In one of the streams at Gituuri Primary, stream 3, in form 36A the disputed votes are indicated as 2 but in form 36B they are indicated as 0. In stream 2 of Gituri Primary School, the rejected votes in form 36A were indicated as 2 but in form 36B they are shown as 12. The petitioner urged that the respondents in their affidavit are not contesting the inconsistencies but they are saying that they did not affect the result. The petitioner however contended that the evidence tendered clearly demonstrated that the inconsistencies could alter the result and determine who could be declared the winner.

35. The petitioner submitted that the 2nd and 3rd respondent did not conducted the elections in strict compliance with Article 81 Constitution of Kenya and failed meet the threshold bestowed upon them under the applicable laws. He submitted that the rules also provide that an aggrieved part can raise a complaint and the complaint be resolved by the 3rd respondent but the 3rd respondent failed to respond to his complaint.

36. On the issue as to whether the elections were free and fair, the petitioner submitted that the results were not free and fair owing to the inconsistencies pointed out.

37. The last issues the petitioner tackled was that of costs to which he submitted the 2nd respondent should be condemned to pay the costs.

38. The petitioner relied on the decision of **Supreme Court in Petition No. 1 of 2017 RAILA ODINGA & ANOTHER -V- IEBC & 2 OTHERS** where it was held that adherence of the code of conduct of elections cannot be compromised because the will of the people is paramount to support his submissions.

Submissions by the 2nd and 3rd Respondents

39. Mr. Munene for the 2nd and 3rd respondents began by pointing out that parties are bound by their pleading and departure from the pleadings is not acceptable. He urged that the petitioner can only be allowed to raise the issues contained in the Petition dated 16th August 2017 and the supporting affidavit sworn on the same day by the petitioner.

40. One of the issues raised was transmission of the results by BVR. The 2nd and 3rd respondents contended that transmission of results by BVR is reserved for the Presidential Election only. It is contained in Regulation 5(d) of the Elections (general) Regulations 2012. It provides that the Presiding Officer shall electronically transmit the results of the presidential election to the Returning Officer. The same is captured in **IEBC -V- Maina Kiai & 6 others page 17 KLR**. Where the Court of Appeal ruled that electronic transmission of the result is a preserve of the presidential election. The 2nd and 3rd respondents submitted that it was not necessary for the election of the MCA Marimanti Ward to be transmitted electronically. They further submitted that the BVR report was not availed to the court for the inconsistencies to be seen. The 2nd and 3rd respondent contended that it was the duty of the petitioner to avail the BVR report and show the inconsistencies.

41. The 2nd and 3rd respondents submitted that the difference of the votes between the petitioner and the 1st respondent were 287 votes which was declared on the basis of form 36A whose data is manually transferred to form 36B by people after the votes have been counted. Mr. Munene submitted that no single evidence was tendered to show that voting and tallying was not properly conducted. The agents present at polling stations could have refused to sign form 36A and give the reasons why they felt the elections were not properly conducted in the same form. He further submitted that none of the forms has any comment on the space provided for any comments implying that every candidate was satisfied that the election conducted on 08th August 2017 were satisfactory.

42. The 2nd and 3rd respondents submitted that the petitioner did not tender any evidence to show that any of his agent was denied entry to a polling station. They urged the court to find that no agent was denied entry to the polling station. They further urged that the petitioner should not be allowed to mislead the court by not giving factual evidence. They contended that the petitioner should have filed affidavit of the agents that were denied entry to the polling stations. The 2nd and 3rd respondents submitted that the individual presiding officers (hereinafter 'PO') of the polling stations in which the petitioners raised issues have sworn affidavits and annexed the diaries to show who was present.

43. The 2nd and 3rd respondents questioned how the petitioner got the forms that he filed in court since he alleged in paragraph 9(i) of the petition that he was not provided with form 36A.

44. On the issue of stamping of forms, Mr. Munene submitted that all the forms that the 3rd respondent filed were duly signed and stamped. He argued that the petitioner should have been specific in his allegations and clearly tell the court which forms were not stamped instead of saying 'some' since no polling station goes by the name 'some'.

45. On the issue of serial numbers wish to submit that the forms were in form of booklet. All the booklets

had carbon features. The copies of the copies had different serial numbers. Nevertheless, the petitioner concedes that the contents are the same.

46. Mr. Munene agreed with the petitioner that each party was at liberty to complain to the Presiding Officer at the polling station or the Returning Officer at the tallying center but denied that any such complainant was lodged by the petitioner. He further submitted that the petitioner's letter dated 11th August 2017 to the Returning Officer Tharaka Constituency did not raise any complaint but indicated that the petitioner disagreed with the results.

47. The 2nd and 3rd respondents submitted they did not admit the existence of any inconsistencies in tallying of votes. What the 2nd and 3rd respondents conceded was that there were human errors in the transfer of data from form 36A to form 36B but the errors did not affect any candidate. The petitioner has not shown any situation where he was deducted votes and given to the 1st respondent. The court has been pointed to Riakugi Nursery School where 114 votes were indicated instead of 144. The 30 votes were not added to any candidate. The error was only on the total but the rest of votes are correct. The other error is where it was indicated that 435 votes were cast instead of the total registered of 434. We have listed issued authorities which include ***Mercy Kirito Muteji -V- Beatrice Nkatha Nyaga & 20 others eKLR, Gatirau Peter Munya v/s Githinji & 2 others.*** The errors that occurred were as a result of fatigue and did not involve any candidate.

48. Finally the 2nd and 3rd respondent concluded that the issues raised by the petitioner were baseless, not supported by any evidence and the petition must be dismissed with costs. They implored the court determine that the people of Marimanti Ward exercised their democratic right to elect the leader of their choice as there is no evidence to show that the election was not fair and accurate. They urged the court to dismiss the petition.

Submissions by Ndubi for 1st Respondent:

49. The 1st respondent chose to be the last to submit. Mr. Ndubi for the 1st respondent began his submissions pointing out election for the position of the MCA Marimanti Ward was not a contest between the petitioner and the 1st respondent, but a democratic process through which the people of Marimanti Ward exercised their right to elect a leader of their choice. He relied on the reasoning adopted by ***Lady Justice Sitati sitting at Kisii in High Court Petition No. 2 of 2013*** while relying on the ***Indian Supreme Court case of Rahim Khan -vs- Khurshid Ahmed AIR (195)SC 290*** where it was held that:-

“An election once held is not to be treated in a light manner and defeated candidates or disgruntled electors should not get away with it by filing election petitions on unsubstantiated grounds and irresponsible evidence, thereby introducing a serious element of uncertainty in the verdict already rendered by the electorate. An election is a politically sacred public act, not of one person or of one official but of the collective will of the whole constituency. Courts naturally must respect this public expression secretly written and show extreme reluctance to set aside or declare void an election which has already been held unless clear and cogent testimony compelling the Court to uphold the corrupt practice alleged against the returned candidate is adduced...”

50. The 1st respondent submitted that the official election results for the MCA position Marimanti Ward were transmitted through the biometrics by the presiding officers from the various polling stations between 8th August, 2017 and 9th August, 2017 and a declaration of the final tally was made by the 3rd respondent on 9th August, 2017. There were no MCA results, therefore, transmitted on 10th and 11th August, 2017 which could have made the petitioner take the lead throughout including 10th and 11th August, 2017 as alleged. She further submitted the burden of proof lay on the petitioner to prove that he won the election according to the BVR results as he alleges. The 1st respondent asked the court takes Judicial notice of the fact that the sole purpose of the biometric is and was to transmit results to the tallying centre as captured in the form 34As (*sic*) at the polling stations. The 1st respondent denied the

existence of 'biometrics results' and accused the petitioner's assertion that he was leading the 1st respondent throughout the election and up to 11th August, 2017 to be not only misleading but also misplaced. Accordingly, one cannot talk of differences between the results recorded in form 36B and what the petitioner calls biometric results.

51. In response to paragraph 9 (a) and (b) of both his petition and the supporting affidavit, the 1st respondent submitted that the Elections Act 2011, does not provide for BVR results. She averred that from whatever angle one looks at it, she was the ultimate winner and whatever minor differences alluded to at paragraph 9(a) and (b) of the petition could not have made any significant difference the final tally.

52. Regarding the allegation on the part of the petitioner that he was denied a right to appoint his agents, the 1st respondent submitted that it is a matter of public notoriety that every political party is required to be represented by agents of its own choice at the polling stations where it has interest. The petitioner vied on a Democratic Party of Kenya (DP) Party ticket while the 1st respondent vied on a Jubilee party ticket. Both these parties were duly represented by their respective agents at each of the polling stations within the ward as already demonstrated by the 3rd respondent. The 1st respondent further submitted that the agents appointed by DP party were supposed to monitor and oversee the petitioner's votes at every polling station and the tallying centre thus obviating the need for the same petitioner to appoint his own personal agents side by side with those of his party. The 1st respondent urged that the petitioner failed to point out who of the 2nd respondent's presiding officers denied his party's agents and or his agents the right to oversee the party candidates' votes.

53. The respondent further submitted that the DP party on whose ticket the petitioner contested fielded other candidates for other elective posts including the MP but none of the other DP candidates has complained or petitioned or even sworn an affidavit to the effect that DP party was not duly represented at any polling station or at the tallying centre. She went further to point out that the DP party's candidate for MP whose votes were overseen and monitored by the same DP agents won the election.

54. The 1st respondent submitted that the petitioner did not provide prove of the agents who he appointed to represent him since all agents representing various parties and individuals including the petitioner's DP party were appointed by their respective parties and took an oath of secrecy long before the date of the election. She further submitted that the intended agents who were rejected have not sworn or filed any affidavits stating and no complaint was lodged by the complainant over the alleged rejection.

55. The 1st respondent found interesting the allegation at paragraph 9(e) that some of the agents purported to represent him were not known to him and they were not his supporters and could not support his interest. She interpreted the allegation to either mean that his party's agents were forced on him or that his party agents in lieu of representing his interest as a party candidate betrayed him at the ballot thus the blame was on the petitioner and his own party.

56. The 1st respondent submitted that the forms 36A filed in court by 2nd respondent who is the sole lawful custodian of all the electoral materials are the true copies of the forms used in the election of the MCA Marimanti Ward and leave no doubt that the same are duly signed by the agents of all political parties including those the petitioner's DP party, the 1st respondent's Jubilee Party and bears the 2nd respondent's (IEBC's) official stamp. There is, therefore, no irregularity at all in the Form 36As as far as the stamping and signing is concerned.

57. The 1st respondent submitted that the petitioner have been interfered with some of the form 36As annexed to his petition and numbered 2,4,5,6,7,8,9 and 11 so as to paint a wrong impression that they were not stamped by the 2nd respondent IEBC. The 1st respondent avers that the petitioner ought to have filed certified copies by the IEBC (2nd respondent) if he was keen in proving his claim against the respondents instead of using documents that he has already tempered with to try and sway the court's mind in his favour.

58. The 1st respondent further submitted that failure to stamp form 36As or any other form by the 2nd respondent) cannot vitiate an election unless the petitioner demonstrates that such failure goes to the very root and has affected the outcome of the election. The 1st respondent submitted that the petitioner had not alleged any malpractices, fraud, bribery, collusion or otherwise that could have driven the 2nd respondent not to stamp the form 36As so as to tilt the final outcome of the election to the 1st respondent's favour. The 1st respondent urged that if there are any form 36As that were not stamped by the 2nd respondent, which is denied, then that was a mere administrative error that did not at all affect the validity of the election of the 1st respondent as MCA Marimanti Ward.

59. The 1st respondent submitted that there no such thing as screen votes under Election Act 2011 or any other law. She told the court that she could not fathom what the petitioner referred to as screen votes. All that mattered according to the 1st respondent was the final tally of the total votes cast and garnered by each candidate. The 1st respondent further submitted that the petitioner's allegation at paragraph 9(h) of the petition that on 9th August, 2017 the votes shown on the screen at the tallying centre at Tharaka Boys High School indicated which were constant as petition (2355) and 1st respondent (2016) was not supported by any cogent evidence but a mere fabrication and wishful thinking by the petitioner.

60. In response to the allegation by the petitioner that the RO refused to supply the petitioner with copies of the forms 36A, the 1st respondent wondered where the petitioner got the copies he annexed to his petition as **NBM1(b)**. The 1st respondent further submitted that the allegation by the petitioner that he was not supplied with the form 36As by the presiding officer, implies that the copies of forms 36A filed and relied by the petitioner as exhibit No. "**NBM1**" "**b**", which he claims are not stamped by 2nd respondent or his agents were indeed neither obtained from IEBC nor the 3rd respondent thus not genuine form 36As used at the election.

61. On the allegation by the petitioner of inconsistencies between the BVR report and the Returning Officer's report as per form 36B, the 1st respondent submitted that the petitioner did tender any report from an agent to establish the alleged inconsistency with the returning officer's alleged report.

62. Regarding the allegation that the petitioner's votes at Gituri Primary School were reduced from 1407 (per BVR) to 1389 and that there is a variation between the 1st respondent's BVR results and those entered in form 36B, the 1st respondent submitted the petitioner did not place before the court any proof what he referred to as the BVR results. She further submitted that under The Elections Act 2011 and according to paragraph 13 of the 2nd and 3rd respondents' replying affidavit, there is no such thing as BVR results. The BVR is merely a transmission system used to transmit results from the various polling stations to the tallying centre and not a record of results *per se* and hence the petitioner's comparison of the two does not at all add up.

63. The 1st respondent accused the petitioner of 'search for sympathy' under paragraph 9(i) of the petition, when he purported litigate on behalf of the 4th candidate who is not a party to this petition by pointing out that his results in Form 36B were reduced from 180 to 117 but failed to show the votes so reduced added to those of the 1st respondent or affected the final tally. The 1st respondent further submitted the 4th candidate had not sworn an affidavit or filed any election petition claiming reduction of his votes as purported by the petitioner.

64. As regards to the errors alluded to at paragraph 9 (k), (l), (m), (n), (o) and (p) in the petitioner's submissions, the 1st respondent averred that she is perfectly right in pleading innocence in what the petitioner in his own exaggeration calls "**numerous errors**" and deny the existence of any such errors. The 1st respondent further submitted that the errors aforesaid were flimsy administrative and typographical errors that can only be incapable of overturning the democratic will of the electorate of Marimanti Ward. She further averred that even if the said errors were to be rectified, the same will not have any effect over the final results in view of the fact that the 1st respondent had defeated her closest

rival; the petitioner by 257 votes.

65. The 1st respondent termed the letter dated 11th August 2017 annexed to the petitioner's affidavit and marked “**NBM1**” an afterthought. She averred that the letter was written two days after the 3rd respondent had announced the result and proceeded to declare the 1st respondent winner. She further urged that had the petitioner ought to have raised any complaints with the 3rd respondent long before the declaration of the result if indeed he was aggrieved over his agents having been denied an opportunity to oversee his votes. The 1st respondent also took issue with the fact that the letter is not particular on the nature of the petitioner's complaint/concern over the results.

66. The 1st respondent took issue with the petitioner relying on the verdict of the Supreme Court of Kenya delivered on 11th September, 2017 and averred that it was pre-mature for the petitioner to purport to rely on a decision that was yet to be delivered. The 1st respondent supported her submissions with the **Supreme Court of Kenya Presidential Petition No. 5 of 2013 (consolidated) Raila Odinga & 5 Others v Independent Electoral and Boundaries commission & 3 others [2013] eKLR** where the supreme court relying on the provisions of section 83 of the Elections Act held that:-

“... if it should be shown that an election was conducted substantially in accordance with the principals of the constitution and the Elections Act, then such election is not to be invalidated only on the ground of irregularities”

Section 83 of the Elections Act 2011 states:-

“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 principals laid down in the constitution and the written law, or that the non compliance did not affect the result of the election.”

67. The 1st respondent further submitted that the election of the MCA Marimanti Ward was conducted in accordance with the laid down constitutional principles. No allegations of bias, fraud, collusion or bribery have been made. The election was thus held in a fair, transparent and credible manner. It was her submission that if there existed any errors in the recording and or tabulation of votes garnered by the petitioner and the 1st respondent, the same were superficial minor, typographical and of an administrative nature and never affected the final results of the election as the election was conducted substantially/largely in accordance with the principles of the constitution and the Election Act 2011. She supported her submissions with the decision of the **Canadian Supreme Court Case of Optiz** which Supreme Court of Kenya adopted with approval when where it was held in part that:-

“... if elections can be easily annulled on the basis of administrative errors, public confidence in the finality and legitimacy of election results will be eroded ...”

The 1st respondent pleaded with the court not to interfere with the will of the people of Marimanti Ward exercised in a fair, just and transparent election of the 1st respondent as their MCA.

68. The 1st respondent urged that going by the concerns advanced by the petitioner under paragraph 9(a) - (p) of the petition, it was incumbent on the petitioner to pray for a recount of the votes cast or scrutiny of the form 36As and 36B. if he had any doubt in the decision of the people of Marimanti Ward in electing the 1st respondent as their MCA. She submitted that the court could not blindly Order a by-election of the MCA Marimanti Ward as doing so would be tantamount to placing the cart before the horse. The 1st respondent urged that the petitioner, should not expect the court to act blindly and annul a lawful election based on the story as told by him which cannot be taken as gospel truth without cogent evidence.

69. The 1st respondent supported her decision with the following decisions:-

Supreme Court of Kenya At Nairobi –Petition Nos. 5,3 & 4 of 2013 (consolidated) Raila Amolo Odinga & 5 others –vs- IEBC & 4 Others (hereinafter 'Raila 1')

Supreme Court of Kenya at Nairobi –Petition No. 4 of 2014 Zachary Okoth Obado –vs- Edward Okong’o Oyugi & 2 others

High Court of Kenya at Kisii -Election Petition No. 2 of 2013 John Oroo Oyioka –vs- IEBC & 2 others

High Court of Kenya at Kitale –Election Petition No. 11 of 2013 Charles Mayura Chedotum & Another –vs- IEBC & 2 others

70. The 1st respondent submitted that her election as MCA Marimanti Ward which has now been endorsed and buttressed by her election as the Deputy Speaker of Tharaka Nithi County Assembly was conducted by the 2nd and 3rd respondents in accordance with the democratic principles of fairness, transparency and integrity and in accordance with the prevailing Electoral Law. She further submitted the court should not negate her election by people of Marimanti Ward clearly exercised and expressed their democratic right of electing her as their MCA at the alter of a self-seeking petitioner or on account of minor administrative procedural and technical errors that do not at all affect the final outcome of the election. She urged the court to dismiss the petition with costs to the 1st respondent.

Issues for determination

71. The parties filed their submissions before the issues for determination were agreed upon. At the insistence of the court, the petitioner and the 1st respondent filed separately their respective issues for determination. The petitioner listed fourteen issues while the 1st respondent listed four issues. The court considered the two separate lists of issues and condensed them to the following four issues:-

i. Whether or not the elections held on the 8th August 2017 in respect of the Member of county Assembly for Marimanti Ward were free, fair and in strict conformity with the constitution and the applicable laws;

ii. Whether the elections held on the 8th August 2017 in respect of the Member of county Assembly were marred with illegalities and irregularities;

3. If there were irregularities and illegalities, what was their impact, if any, on the integrity of the election?

4. What consequential orders, declarations and reliefs should this Court grant, if any?

72. One other issue that cuts across the four issues aforesaid is whether the petitioner discharged the burden of proof to the required standard in election petitions. The court found it unnecessary to list as a separate issue given that same apply and be determined contemporaneously with each of the other issues save for the fourth issue.

73. The supreme court settled the law as regards to the burden and standard of proof in elections petitions in the case of **Raila Odinga & 5 Others -v- Independent Electoral and Boundaries commission & 3 others[2013] eKLR** in the following words

“..... a petitioner should be under obligation to discharge the initial burden of proof, before the respondents are invited to bear the evidential burden. The threshold of proof should, in principle, be above the balance of probability, though not as high as beyond reasonable doubt save that this would not affect the normal standards where criminal charges linked to an election, are in question.”

74. One other fact that the court noted but is not an issue for determination is the understanding of terminologies used in new regime of electoral laws. The amendments to the Elections Act introduced the Kenya Integrated Electoral Management System (KIEMS). The Independent Electoral and Boundaries Commission (IEBC) acquired devices referred to as KIEMS kits intended to be used in the biometric voter register (BVR), biometric voter identification (BVI) and also the transmission of election results from polling stations simultaneously to the Constituency Tallying Centre (CTC) and the National Tallying Centre (NTC).

75. Regulation 82(1) of the Elections (General) Regulations, 2012 provides that the presiding officer shall, before ferrying the actual results of the election to the returning officer at the tallying venue, submit to the returning officer the results in electronic form, in such manner as the Commission may direct. Regulation 82(2) provides that the results submitted under sub-regulation (1) shall be provisional and subject to confirmation after the procedure described in regulation 76.

Determination of the issues

Whether or not the elections held on the 8th August 2017 in respect of the Member of county Assembly for Marimanti Ward were free, fair and in strict conformity with the constitution and the applicable laws

76. It is paramount to define the term free and fair before the court can determine whether or not the elections held on the 8th August 2017 in respect of the Member of county Assembly for Marimanti Ward were free and fair. The **Supreme court in Raila 1** held in part that:-

“Article 38 (3) of the Constitution provides safeguards for the right to vote in a free and fair election, and the right to be registered as a voter. These two rights give life to every other subsequent procedure, including the constitutional creation of the IEBC, and the procedures to be used in registration, voting, transmission, tallying and verification of the results. To concretize this position, Article 83 states that administrative procedures to be undertaken by IEBC are to facilitate, and not to deny an eligible voter the right to vote. This consideration must therefore be the foundation of all interpretations made to the law by IEBC, and all Courts sitting in appeal from the decisions taken by IEBC.”

77. From the excerpt above, a free and fair election envisages a situation where all administrative procedures are undertaken to facilitate an eligible voter to exercise the democratic right and free will to vote without any hindrance, intimidation, undue influence or coercion and above all devoid of any violence. It is therefore essential for a party to any election to establish the existence of any one or more of the several factors obstructing any voter from exercising his free will. **The High Court at Kisii in John Oroo Oyioka & another v Independent Electoral And Boundaries Commission & 2 others [2013] eKLR** adopted an observation made by the Supreme Court of India in the case of Rahim Khan – vs- Khurshid Ahmed AIR [1975] SC 290 thus:

“An election once held is not to be treated in a light hearted manner and defeated candidates or disgruntled electors should not get away with it by filing election petitions on unsubstantiated grounds and irresponsible evidence, thereby introducing a serious element of uncertainty in the verdict already rendered by the electorate. An election is a politically sacred public act, not of one person or of one official but of the collective will of the whole constituency. Courts naturally must respect this public expression secretly written and show extreme reluctance to set aside or declare void an election which has already been held unless clear and cogent testimony compelling the court to uphold the corrupt practice alleged against the returned candidate is adduced. Indeed election petitions where corrupt practices are imputed must be regarded as proceedings of a quasi-criminal nature wherein strict proof is necessary. The burden is therefore heavy on him who assails an election which has been concluded.”

78. In the instant case, the petitioner has not alleged the existence of violence, intimidation, undue influence, obstruction, corruption, fraud or coercion perpetrated by the respondents or any other person so

as to impact the exercise of free will of the electorate of Marimanti Ward. The only allegation made is that his agents were denied access to polling stations to oversee the elections. None of the agents denied access has sworn an affidavit in support of the petition. The petitioner has not file any document showing that he appointed agents and notified the 2nd or 3rd respondents of the appointment of agents. To the contrary the respondents averred that the petitioner was represented in the polling stations by agents of the DP party on whose ticket the petitioner contested.

79. There is an elaborate procedure of appointment of agents to oversee elections at polling stations including the fact that the agents need to take an oath of secrecy. The petitioner did tender any evidence that he appointed any agents or that the agents took the oath of secrecy. Failure to show the agents appointed may lead the court to form a rebuttable presumption that the petitioner never appointed agents of his own and those appointed by his party failed to secure his interest in which case he cannot blame the respondents for his predicament.

80. In any case, the fact that no other candidate in the contention for the other six elective positions has lodged a complaint that the elections held on the 8th August 2017 were not free and fair is clear and unambiguous suggestion that the elections were free and fair.

81. The other issue raised was whether the elections held on the 8th of August 2017 were held in strict conformity with the constitution and the applicable laws. The grounds of the petition did not specifically point out the particular Articles of the constitution or the sections of the law that the respondents breached. The **Supreme court held in Raila 1** (supra) that:-

“... 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. It is on that basis that the respondent bears the burden of proving the contrary. This emerges from a long-standing common law approach in respect of alleged irregularity in the acts of public bodies. Omnia praesumuntur rite et solemniter esse acta: all acts are presumed to have been done rightly and regularly. So, the petitioner must set out by raising firm and credible evidence of the public authority’s departures from the prescriptions of the law.”

82. The petitioner did not tender or set out evidence to establish the instances where the respondents departed or failed to comply with the constitution and the electoral laws. It is important for the court to point out that the instances of breach or failure to comply with the constitution and the electoral laws need to be particularized and evidence tendered in respect of each allegation to enable the court make findings on each allegation accordingly. A party who makes blanket and ambiguous of failure to comply with the constitution and the law will not only find it difficult to prosecute the allegations but also makes it difficult for the court to render determinations on the allegations

Whether the elections held on the 8th August 2017 in respect of the Member of county Assembly were marred with illegalities and irregularities; if there were, what was their impact, if any, on the integrity of the election?

83. To begin with, the petitioner did not tender any evidence to establish the illegalities or irregularities alleged. An irregularity may be defined as something done irregularly or without following the laid down regulations to execute a task while an illegality may be defined as any act or omission that is in breach of a particular provision of the law. It is therefore imperative for a party who alleges the existence of irregularities and illegalities to specify the regulations and legal provisions breached. It is not enough to mention acts and omissions perceived to be irregular and/or illegal and expect the respondents or the court to fill in the missing regulations and sections. Rule 10 of Order 2 of the Civil Procedure Rules provides that every party pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party relies.

84. The effect of any irregularities and illegalities was captured by the Supreme Court of Kenya when

interpreting section 83 of the Elections Act in **Raila 2** where it was held:-

"[211] In our respectful view, the two limbs of Section 83 of the Elections Act should be applied disjunctively. In the circumstances, a petitioner who is able to satisfactorily prove either of the two limbs of the Section can void an election. In other words, a petitioner who is able to prove that the conduct of the election in question substantially violated the principles laid down in our Constitution as well as other written law on elections, will on that ground alone, void an election. He will also be able to void an election if he is able to prove that although the election was conducted substantially in accordance with the principles laid down in our Constitution as well as other written law on elections, it was fraught with irregularities or illegalities that affected the result of the election." (emphasis supplied)

85. The interpretation given to the section is wide enough to accommodate a party who is able to prove that irregularities and illegalities occurred in the conduct of any election. The only evidence the petitioner provided was in the form 36A and 36B which is also relied upon by the 2nd and 3rd respondents. The irregularities pointed out by the petitioner constitute of typographical errors, minor arithmetical errors, transposition of figures and the most grave reduction of votes of certain candidates and increase of votes of the votes for the 1st respondent.

86. The first irregularity alleged was failure to sign form 36A by the petitioner's agents and failure to stamp it by IEBC officials. The petitioner complained that the 2nd and 3rd respondent denied his agents access to the polling stations. The court has made its finding that there is no proof that the petitioner appointed any agents. On the other hand the respondents have demonstrated that the petitioner was represented by agents of DP party who signed form 36A on behalf of the petitioner. The petitioner claimed that the 3rd respondent refused to supply him with form 36A. The forms filed by the 2nd and 3rd respondents were stamped by IEBC officials. The court found no irregularity or illegality in aspect.

87. The petitioner alleged that the votes displayed on the screen at the tallying centre at Tharaka Boys High School remained constant at 2355 in favour of the petitioner and 2016 in favour of the 1st respondent. The court does not fathom how the votes displayed on the screen affected the final tally of the results declared by the 3rd respondent in respect of the MCA Marimanti Ward.

88. The Petitioner's contended that the elections of Marimanti Ward were "manned by massive irregularities" such as inconsistency between the Biometric transmission report and the returning officer report. It has been pointed out elsewhere in this judgment that it appeared the simple electoral system adopted by IEBC is after all not that simple for everybody to understand. So as not to antagonize anybody any further, let it be clear that the reports alleged to be inconsistent were matters of evidence that was supposed to be availed before court. The burden and standard of prove as set out in **Raila 1** (supra) still remains on the petitioner. One may be tempted to ask how a petitioner can bring evidence in the custody of the respondent to court. The answer is simple, an application for scrutiny or fall back to the provisions of Order 16 of the CPR.

89. The Petitioner argued that his votes were reduced at Gituri Primary School where Form 36B indicated that he garnered 1389 while the biometric transmission report showed a figure of 1407. He further alleged that votes for the 1st respondent in Form 36B are 475 but in biometric transmission report they are 444, those for Kaimba Bruno Kibaara in Form 36B are 252 but in biometric transmission report are 263. The Petitioner urged the court to find that he was deducted 18 votes which were added to the 1st respondent. This court has found elsewhere in this judgment that the petitioner failed to present evidence to proof the allegations before the burden of proof could shift to the respondents. The position has not changed and the allegations by the petitioner could not be substantiated devoid of evidence to confirm the veracity of his assertion.

90. Assuming the petitioner had provided evidence to support his contention, the court finds that a deduction of 18 votes from the 1st respondent's tally and an increase of the same to the petitioner's tally could reduce the margin of the 1st respondent's win by 36 votes from 256 to 226 votes but could not alter

the final result of the election. The same yardstick applied in the case of Gituri Primary School herein above, shall apply to the petitioner's allegation that the 4th candidate's results were reduced by 63 from 180 reflected the biometric transmission report to 117 shown in the Form 36B.

91. The petition alleged that Form 36B indicates total votes cast at Riakaugi Nursery were 114 when the votes cast were 144. He urged the court that the difference of 30 votes was not accounted for. The court scrutinized form 36B and noted that the number of votes attributed to each candidate at Riakaugi Nursery polling station summed up to 144 thus the error was only on the total votes cast and not the individual votes garnered by each candidate. The error does not affect the outcome of the final result as well.

92. Another error identified by the petitioner was at Munandani polling station where the total registered votes are 434 but the total votes cast was 434 and one spoilt vote making the total votes cast 435; one more than the registered votes. Similarly the court scrutinized forms 36A and 36B in respect of the said polling station and found that the total votes cast were in fact 354 which was erroneously transposed to read 434. The number of votes attributed to each candidate did not change and summed up to 354. It is the finding of this court that the error did not affect the final tally of any candidate.

93. The petitioner successfully urged the court to find the results of stream 2 at Gituri Primary School were omitted in form 36B results and instead the results of stream 5 duplicated to appear as results of stream 2. In the omitted stream the petitioner got 288 votes but awarded 270 votes thus reducing his vote tally by 18 votes while the 1st respondent got 74 but is awarded 105 votes thus increasing her vote tally by 31 votes. The total difference that resulted from the omission of the correct results was a whopping 49 votes. When the error is rectified the margin of the 1st respondent's win will be reduced by 49 votes from 256 to 207 votes but still does not alter the final result of the election.

94. The petitioner did not forget to scrutinize the number of disputed and rejected votes. From his scrutiny he found that total number of disputed votes in stream 3 at Gituri primary school was 2 as per Form 36A but in Form 36B it is indicated zero. Similarly the number of rejected votes in stream 2 at Gituri primary was 2 in Form 36A but in Form 36B it was recorded as 12 votes. The petitioner never pointed out the effect of the errors on the final results declared. The court as well find no effect.

What consequential orders, declarations and reliefs should this Court grant, if any?

95. It is noteworthy that the petitioner did have good grounds to lodge the petition herein though he did not succeed in full. The court has already found his total tally was reduced by 49 votes which will be effected in the consequential orders which is no mean task. The court is of the view that following the decision in **IEBC -V- Maina Kiai & 6 others page 17 KLR** it necessary that legislative intervention be put in place to allow IEBC to approach the court for authority to amend minor transposition, typographical, arithmetical errors that do not go to the root of an election to avoid petitions based on such errors coming before court.

96. In conclusion, this court takes deeply appreciates the contribution and industry counsels put to ensure that this petition is heard and determined within the constitutional time line. The court will not forget to thank the parties for their cooperation. It is no mean task for a person to offer candidature for an elective position in this country. It is even difficult to ventilate upon ones political rights once infringed given the costs associated with the political exercise and election petitions. At the end of it all, this court makes the following declarations and orders:-

- (1) THAT the election of 1st respondent NDUYO SUSAN NGUGI as Member of the County Assembly representing Marimanti Ward is upheld.
- (2) THAT the 2nd and 3rd respondent do rectify the error that affected the vote tally in as determined in paragraph 94 herein above.
- (3) THAT the 2nd respondent shall bear costs of the Petitioner and the 1st Respondent.

(4) The cost payable is hereby capped at Kshs. 300,000/= for the both the Petitioner and 1st Respondent.

(5) The security for costs deposited in court shall be released to the Petitioner/depositor.

(6) Pursuant to Section 86 of the Election Act, a Certificate of the determination of this Petition shall issue to the Independent Electoral and Boundaries Commission-(IEBC).

Dated, Delivered and Signed at Marimanti this 9th day of February, 2018.

MESA L. N.

(Senior Resident Magistrate)

In the presence of:

Court Clerk: J. Kendi

- 1) Mr. Kurauka for the petitioner
- 2) Mr. Munene for 2nd & 3rd respondents.
- 3) Mr. Gikonyo H/b for Mr. Ndubi for the 1st respondent.