



REPUBLIC OF KENYA  
IN THE PRINCIPAL MAGISTRATE'S COURT  
AT KILGORIS  
ELECTION PETITION NUMBER NO. 1 OF 2017  
IN THE MATTER OF ELECTIONS ACT CAP 7 LAWS OF KENYA  
AND IN THE MATTER OF SECTIONS 58 AND 59 OF CAP 7 LAWS OF KENYA  
AND IN THE MATTER OF VIOLATION OF ARTICLE 81 OF THE CONSTITUTION OF KENYA  
2010  
AND IN THE MATTER OF ELECTIONS FOR MEMBERS OF COUNTY ASSEMBLY-ANGATA  
WARD  
AND IN THE MATTER OF  
JOSEPH KIBIEGO KOECH.....PETITIONER.  
AND  
1. GABRIEL MIBEI.  
2. THE INDEPENDENT ELECTORAL  
AND BOUNDARIES COMMISSION  
3. THE RETURNING  
OFFICER KILGORIS CONSTITUENCY.....RESPONDENTS.

### **JUDGMENT**

#### **Introduction.**

1. Tuesday, the eight day of August, Two Thousand and Seventeen the year of our Lord, the people of Angata Barikoi Ward in Kilgoris Constituency within Narok County, like the rest of Kenya rose to the occasion of a general election. Seven candidates were cleared by the Independent Electoral and Boundaries Commission IEBC to battle it out for the position of Member of County Assembly. The candidates were; Agnes Chepkemoi, Chacha Daniel Obogo, Koech Joseph Kibiego, Mibei Gabriel Korir, Rutto Joel Kipkirui and Towet Samwel Kiprotich.

2. Mr. Gabriel Mibei 1<sup>st</sup> Respondent was declared as winner and validly elected MCA. The petitioner

dissatisfied with the result as declared filed this petition. This court is called upon to audit the election and determine whether the election met Constitutional and all electoral laws.

### **A. The Petitioner's Case.**

3. On 25<sup>th</sup> August, 2017, the Petitioner, through Masseurs Josiah Abobo & Co. Advocates, filed petition against the three Respondents. He prays for orders as follows;-

a. A declaration that the election of the 1<sup>st</sup> Respondent Gabriel Mibei was invalidly elected as a Member of County Assembly Angata Barikoi Ward during the General elections held of 8<sup>th</sup> August, 2017.

b. That the ballots cast be recounted in relation to Oldoinyo Orok Primary School Polling Station No.067 within Kilgoris Constituency.

c. Costs.

4. The Petitioner in his Petition as amended and in his testimony states that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents who were mandated to preside over the election committed and or allowed the commission of a number of irregularities and illegalities. The same are itemized in the petition and include;- That they failed to verify voters to an extent that one voter by the name Josiah Langat had cast his vote twice in two stations Enkoiperiai Primary School and another at Oldoinyo Orok Primary School and that this was with the consent of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent. That they rejected 60 voters their right to vote on allegations that their finger prints could not be captured by the IEBC gadgets. Disallowing the Petitioners agents to sign form 36A. That they denied the Petitioner his constitutional rights, the number of registered voters, what each candidate garnered and the number of valid votes cast. And that they violated the provisions of Article 81 of the Constitution of Kenya 2010.

5. It is the Petitioners averment that the 3<sup>rd</sup> Respondent declared the 1<sup>st</sup> Respondent as MCA elect for the Ward. He avers that the election was flawed and hence the prayer for recount of votes at Oldoinyo Orok Primary School Polling station. He further avers that his constitutional rights had been violated and thus was seeking the redress of this court.

6. The Petition is supported by affidavit sworn by the Petitioner. His is a 20 paragraph affidavit. He essentially reiterates the content of the Petition. I will not reproduce all its content but endeavour to address the salient features later in this Judgment. The Petition has annexed affidavit sworn by one Robert Ngeno. He depones that he was an agent for the Petitioner at Oldoinyo Orok Primary School Polling station. He says he was present during counting but the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents failed to allow him to sign form 34A. That they instead allowed strangers who were no accredited to sign. He also depones that on the polling day one voter by name of Josiah Langat who is from Enkoiperia Polling station voted at Oldoinyo Orok and that he was informed by way of telephone call that the said voter had voted at Enkoiperiai earlier on. He blames the 2<sup>nd</sup> Respondent for the irregularity and that it was due to mischief by the Respondents that he failed to sign form.

7. The Petition is also supported by affidavit of one Paul Mwanje (not called as a witness). He depones that he was an agent for the Petitioner at Enkoiperiai Primary School Polling Station. That he was present during counting but was not accorded opportunity to sign Form 34A. That instead strangers were allowed to sign. He also depones that one Josiah Langat who is his neighbor went to cast his vote at the station. He also says he received a call from an agent from Oldoinyo Orok Primary School Polling station asking him if the said voter had voted at his station and he had answered in the affirmative. He depones that it appears I.E.B.C were allowing people in polling stations to vote twice and attributes the anomaly to the electoral body.

### **B. The Respondents' Case.**

## **1<sup>st</sup> Respondent's response.**

8. The 1<sup>st</sup> Respondent responded to the petition by way of Replying Affidavit sworn on 1<sup>st</sup> September, 2017. He has also put in Affidavits of two witnesses Michael Ngeno and Richard Langat both called as witnesses during hearing. In his affidavit, that of his witnesses and in the testimonies, the Petitioner maintains he won the election which was free and fair and was lawfully declared the winner.

9. It is his averment that he ran for the seat of MCA as an Independent Candidate. That he ran a peaceful campaign that was issue based, people centered and people driven. That his victory was concrete. That he garnered a total of 3612 against the Petitioners 3413. This makes a difference of 199 votes and that this margin emphatically demonstrates the desire and the will of the residents of Angata. He terms the allegations in the Petition as general accusations, without particulars and devoid of any evidentiary or legal basis.

10. On the question of number of voters registered and those who voted at Oldonyorok Primary School, it is his averment that the polling center had 1393 voters. That the total votes cast in the center were 1,094. He further avers that the center has two polling stations 01 and 02. He further avers that the Petitioner had his agent one Robert Ngeno and who catered for his interests and never raised any issues over the election process. That in station 01 with 696 registered voters; he garnered 406 against the Petitioner's 121. He terms as baseless and frivolous the allegation that the number of voters allowed to vote exceeded the number of registered voters.

11. On the allegations one voter was allowed to vote at two stations, he terms it as baseless and unfounded. That this was not possible with an elaborate identification mechanism which used KIEMS machine. That there was alternative identification where Presiding Officer had to invite agents and candidates where the machine failed. He terms the mention of the said voter in the petition as violation of his natural justice and cannot be present to respond to the allegation.

12. On the prayers sought in the Petition, the Petitioner avers on advice of his advocate that the prayers contravenes Section 75 of the Election Act and thus none of the prayers should be granted.

13. The witnesses- in their respective affidavits and in their testimonies in court- essentially depone to the issues deponed by the 1<sup>st</sup> Respondent. Michael Ngeno says he was agent for 1<sup>st</sup> Respondent at Ondonyo-Orok Primary School Polling station 01 where he was with Robert Ngeno who was agent for the Petitioner. That the said agent was present throughout and never raised any issue. He depones that the agent was adamant that he wanted to sign form 34A and not Form 36A. He further avers that every voter who voted had their finger marked with indelible ink. And that no voter was turned away.

14. Mr. Richard Langat on his account says he was agent to the 1<sup>st</sup> Respondent at Polling Station 02. He also reports no anomalies and says no one raised any issues. He equally says no voter was turned away. That after the count the Petitioner garnered 409 against 132 for Petitioner. Further that the 1<sup>st</sup> Respondent garnered a total of 815 votes against 253 at the entire Polling Center.

## **2<sup>nd</sup> and 3<sup>rd</sup> Respondents Response to Petition.**

15. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents did a joint response through the firm of masseurs Morara Apiemi and Nyangito Advocates. The Response is supported by Affidavit sworn by Macharia Mbogo Elijah. The response attacks the petition as raising complaints against persons in relation to the conduct of County elections for Angata Ward without enjoining them as Respondents in the petition.

16. That the appointment of the Presiding Officers and other staff for Kilgoris Constituency were done in compliance with Election General Regulations 2012 and 2017. That the voting in all polling stations in Angata Ward was free and fair. That the counting of votes and declaration of results of Angata Ward was conducted as provided by the law. That the final tallying of the results for Member of County Assembly for Angata Ward was conducted in compliance with the law. And that the County elections of Angata

Ward was conducted in compliance with the principles laid down in the Constitution and that in case of any non compliance of the Election laws and Regulation, the same did not affect the result of the election declared.

17. It is their prayer that all allegations against persons not enjoined be expunged from the record with costs to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. That it be determined that the 1<sup>st</sup> Respondent was duly elected and the election was valid. And that the counted results for Angata Ward as declared by the 3<sup>rd</sup> Respondent be upheld and the petition dismissed with costs to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.

18. The 3<sup>rd</sup> Respondent who was the Returning Officer has sworn a 12 paragraph affidavit in support of their response and on authority of the 4<sup>th</sup> Respondent. He depones that he ensured all the clerks and polling clerks were trained. That all polling stations were manned by Presiding and Deputy Presiding Officers and clerks. That on or about 7<sup>th</sup> August he ensured that ballot boxes and election materials were supplied to all polling stations in the ward. That voting, counting and transmission of votes was concluded in all the polling stations as provided by the law. He has attached and produced the Form 36As. He depones that all the results from all the polling stations were properly and accurately verified, tallied and announced in accordance with the provisions of the law. He has attached Form 36B. That after declaring the result for the ward, he issued the 1<sup>st</sup> Respondent with form 36C the same being certificate of an elected MCA.

19. On the issue of errors, the 3<sup>rd</sup> Respondent avers that if there were errors in recording and or tallying of the votes, the same do not affect the result declared. That the challenges that might have occurred cannot be said to have distorted the expression of the people's intent. He further avers that the alleged double voting by a voter was neither reported to him nor the police and furthermore that the KIEMS machine were in perfect conditions to allow anyone voting twice.

20. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents Response is also supported by affidavits of three witnesses; Robinson Letaya, Stephen Kiruti and Nick Talengo. The trio were Presiding Officers at Enkoiperiai Primary School Polling Station 070, Oldonyorok Primary School Polling Stations 067- 2, and 067-1 respectively. According to Robinson Letaya, Station 070 opened at 6.00am in presence of agents, clerks and voters. That process went on well. That voter identification was by KIEMS and National Identification cards. That the voting ended at 5.00pm without any hitch and counting done captured and recorded and transmitted to the tallying center as required. He depones that it was impossible to cast vote twice and that he was not aware of the incident of a Mr. Langat casting his vote twice.

21. Mr. Stephen Kiruti, depones and testified the same of his Polling station and that all ended well. That agents witnessed the exercise signed the result forms before ballot boxes were sealed and taken to the constituency tallying center. He denies any knowledge of any voter who cast his vote twice. Nick Talengo depones the same of Polling station 067-1. That all was well and no anomalies noted in the exercise the whole day.

### **C. Hearing of Petition.**

22. Hearing commenced before this court on 6<sup>th</sup> December, 2017. The Petitioner called one witness Robert Ngeno Pw.2. The 1<sup>st</sup> Respondent called two witnesses- Richard Langat and Michael Ngeno- who were both his agents. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents called Stephen Kiruti the Presiding officers for Oldonyorok Polling station No.2 And the Returning Officer- Macharia Ombogo. At the close of hearing, Mr. Abobo made an oral application to have recount of votes at Oldoinyo-Orok Polling Station. The same was opposed by all the Respondents. By a separate ruling, this court dismissed the application for reasons referred to later in this judgment.

### **D. Submissions.**

23. At the conclusion of hearing parties through their advocates filed submissions and highlighted them

on 19<sup>th</sup> January, 2018. It is **submitted for the Petitioner** that there was a violation of Article 81 of the Constitution and particularly that an election must be 'administered in an impartial, neutral, efficient, accurate and accountable manner'. Mr. Abobo in his submissions cites Burgei and Olesoilal primary school polling stations as examples the stations where there are discrepancies in the votes as recorded in Forms 36A and 36B. He blames the Returning officer for failing in his duty to verify and tally the results before making his declaration. Mr. Abobo questions the impartiality of the Returning officer following the disparities in the recorded votes in Form 36A and 36B. On authority in *Raila Amolo Odinga & Another vs. IEBC & 2 Others*, it is submitted that it did not matter how many votes were garnered by the declared victor where there were irregularities and illegalities committed.

24. It is also submitted that Form 36As for Oldonyorok and Enkoiperiai Primary School were not signed by agents who queried the results. That the Presiding officers committed illegality and irregularity in not indicating the reasons for the failure of those agents to sign. That in not doing so, the electoral body has failed credibility test. Mr. Abobo also submits that there was double voting brought to the attention of the Presiding Officer who did not act to rectify the anomaly. Finally it is submitted that the election did not meet the ingredients of credible election as provided for under Article 81 of the Constitution and urge the court to allow the Petition and anul the 1<sup>st</sup> Respondents election. On costs it is submitted that costs follow the event. He pays for annulment of the 1<sup>st</sup> Respondents declaration as MCA Angata ward.

25. **The 1<sup>st</sup> Respondent** through Messers Muumbi and Co. advocates filed their submissions and was highlighted on 19<sup>th</sup> January, 2018. On the question whether the election at Angata Ward and more specifically Oldonyo-Orok was conducted within the laid down principles in the constitution and electoral law, it is submitted that it was. They did submit on the principles of law governing non-cancellation of an election on the basis of non-compliance with law. While at it they have pointed out various sections of law governing elections within our jurisdiction and made reference to various legislations and authorities local and from Diaspora. It is worth mentioning that they have referred to the English Ballot Act, 1872, the Representation of the People Act of England 1949 the cases in *Re Kensington North Parliament Election Case 1960. 2ALL ER*, the famous *Morgan vs. Simpson 1974. 3ALL ER* and *Fitch vs. Stephenson and Others 2008 ALL ER 13*.

26. On the question of irregularities noted on the forms from various Polling stations it is submitted that they were clerical errors. More specifically as regards Burgei it is submitted that the votes garnered by each candidate is reflected on the forms and that the only issue was a clerical error in form 36B and that the Petitioner was the beneficiary of that error. The same explanation is given for Olesoilal Primary School Polling station and that neither the Petitioner nor the 1<sup>st</sup> Respondent was the beneficiary of the error noted. It is submitted on authority in *Gatirau Peter Munya vs. Dickson Mwenda Kithinji and 2 Others SCK Petition No.2B of 2014 eKLR* that procedural or administrative irregularities and other errors occasioned by human imperfection, are not enough, by and of themselves, to vitiate an election.

27. On the allegation that some people were denied their right to vote it is submitted that that the same is farfetched and baseless. And that no one came forth to enforce that right as stipulated in Article 22 of the Constitution as regards enforcement of the Bill of rights. The claim that there were more votes recorded than the registered voters at Oldoinyo-Orok Polling Center is attack as being against the facts.

28. On the issue whether there were irregularities and illegalities that could have impacted on the validity of the election, it is submitted that there were no irregularities nor illegalities committed on 8<sup>th</sup> August, 2017. That the petitioner's allegations were based on mere apprehensions, feelings and unverified assertions. It is submitted on the meaning and application of Section 83 of the Elections Act and what needs to be proved on the strength of the case in *Raila Amolo Odinga and Another vs. IEBC & 2 Others Presidential Election Petition No.1 2017 (2017) eKLR*. On authority in *Jackton R.Ranguma vs. IEBC & 2 Others 2018 eKLR*, it is submitted that the allegations made by the Petitioner were vague. It is submitted that no voter was proved to have voted twice and no report was made to the police. The allegation is termed as false and baseless. The allegation that an agent was not allowed to sign form 36A is termed as far-fetched. That the agent admitted in court he did not sign for fear of losing his pay. It is submitted that an agent signed on behalf of Jubilee Party.

29. It is further submitted for the 1<sup>st</sup> Respondent that the Petitioner did not comply with rules regarding Petitions. That the failure goes to root of the Petition. More specifically it is submitted that the numbers of total voters at Oldonyo-rok Primary School Polling station as stated in the petition differs from the true figure. Further that the Petitioner completely failed to comply with the express provisions of Rule 8 and 12 of the Election Petition Rules. The same is with respect to form and content of the Petition.

30. It is submitted that the Petitioner presented evidence on two polling stations to wit Burgei and Olesoilal which were never specifically pleaded and that the same should be disregarded by this court.

31. On whether the declaration of 1<sup>st</sup> Respondent as MCA for Angata Ward was valid it is submitted that it was. On costs is submitted that the Petition is founded on shaky stilts and should therefore be dismissed with cost. That the costs should be borne by the Petitioner. On authority in Kalembe Ndile and Another vs. Patrick Musimba & Others 2013 is submitted that the same should be fairly adequate to compensate for work done. The advocate has proposed a capping of Kshs. 2,000,000/-

32. Advocate for the **2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed submissions** and highlighted them on 19<sup>th</sup> January, 2018. Their first point of submission is that the Petition did not meet the Election Parliamentary and County Elections Petition Rules 2017. That the petition did not meet particularly the provisions of Regulation 8 and 12. They submit on a number of authorities that the failure to comply was fatal to the Petition and failure cannot be cured by Article 159(2)d of the Constitution. That the Petition must fail. The particular authorities relied on are Martha Wangari Karua and Another vs. Independent Electoral and Boundaries Commission and 3 Others 2017 eKLR and Jimmy Mkala Kazungu vs. IEBC AND 2 Others 2017 eKLR.

33. They have also submitted on the issue of burden and standard of proof required in election petitions. It is submitted on authority in Raila Odinga vs IEBC and 3 others, Election Petition No.5 of 2013 –(Raila I) that where a party alleges non-conformity with 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 elections. They have also submitted on authority in Josiah Taraiya Kipelian vs. Dr. David Nkediye and 3 other 2013 eKLR which cited the case in Rashid Hamid Amana v IEBC and Others Malindi Election Petition No.6 of 2013 that it was not enough for petitioner to point out irregularities, petitioner must establish that they affected voters will and choice. It is further submitted on authority in Hosea Mundi Kiplagat vs. Sammy Komen Mwaita and 2 Others 2013 Eklr and Benjamin Ogunyo Andama vs. Benjamin Andola Andayi and 2 others 2013 eKLR that it is for the Petitioner to proof allegations that are of criminal nature on a higher standard.

34. On whether the election was conducted according to the Constitution and the law, it is submitted that it did. That it was not in dispute that,- the election was by secret ballot in compliance with Article 81(e)i of the Constitution and Regulation 59 of Elections General Regulations 2012, that the election was free from violence or intimidation as required under Article 81(e), that the election process was simple, accurate and verifiable in compliance with Article 86 (a) of the Constitution, that the Presiding Officers and polling clerks were competitively and transparently appointed in compliance with the Election General Regulations 2012, that the votes cast in each of the 22 polling stations were counted, tabulated and results announced in compliance with Article 86(b) of the Constitution. And finally that the results from all polling stations from the ward were delivered to the Constituency Tallying Center, collated and promptly announced by Returning Officer in compliance with Article 86(c) of the Constitution and Regulation 3(c) and 83(a) of the Elections General Regulations 2012.

35. On the question of whether there were irregularities and illegalities committed and their impact on the integrity of the election it is submitted that the Petitioner made allegation he did not proof. As regards issues over Burgei Primary School Polling station, it is submitted that it was an issue which was not pleaded and should be ignored by this court. That submission is supported by authorities Benjamin Ogunyo Andama vs. Benjamin Andola Andayi & 2 others 2013 eKLR, Mwakileo vs. Mwamzandi and Another Election Petition No 25 of 1979 and Nigerian Supreme Court Case in Comrade Adams Aliyu Oshiombe vs. Charles Ehigie Aishia Ubere Maj. Gen. Rtd and Others Suit No SC. 473/2012.

36. It is further submitted, on without prejudice, that the Petitioner did not prove his allegations over Burgei Polling station and that the same did not affect the credibility and integrity of the elections. It is submitted that the Petitioner failed to seek scrutiny at appropriate time and that Regulation 83(1)b of the Election General Regulations 2012 contemplates that the Returning Officer should disregard results where the total valid votes exceeds the number of registered voters and that should this be done over Burgei it would not tilt the scale.

37. On the issue of alleged double voting at Oldonyorok, it is submitted that the Petitioner did not meet the threshold required to prove the allegation. That double voting was an Election offence under S. 58(m) of the Election Act with a standard of proof higher than on balance of probability. That the voter alleged to have voted twice was never arrested, never reported and that there was no evidence that he was a voter in any of the two alleged polling stations.

38. On the question that an agent was denied chance to verify results and sign Form 36A, it is submitted that a party agent signed after the said agent walked out. And that an authorized agent as per definition of Agent in Section 2 of the Election Act did sign the statutory form in question. And citing Regulation 79(7) of the General Rules 2012 it is submitted that refusal to sign forms shall not of itself invalidate the results announced.

39. On the issue of variance of Form 36A and 36B for Olesoilal Polling station it is submitted that the votes garnered by each candidate and recorded in Form 36A are accurately entered and tallied in Form 36B. And that the only discrepancy lies in what is indicated as the total number of valid votes cast and that the same does not affect the votes of either candidate. That the discrepancy was not deliberate and meant to give advantage to anyone. On authority in *Wavinya Ndeti vs. IEBC and 4 others 2013 eKLR* it is submitted that error is human and allowance must be made for human error.

40. On whether the declaration and election of the 1<sup>st</sup> Respondent was valid, it is submitted that it was. That although the election may have had its challenges and human errors, the same did not substantially interfere with the credibility and integrity of the electoral process. It is submitted on strength of Section 83 of the Elections Act, that an election shall not be declared void for non-compliance with law if the non-compliance did not affect the results.

41. It is submitted that there be a declaration that the election was valid, credible, free and fair and in conformity with the Constitution and election laws and that the Petition be dismissed with costs to be borne by the Petitioner.

#### **E. Issues for determination.**

42. The following issues fall for the determination of this court,

- 1) Whether the elections were conducted in compliance with the Constitution and the electoral law.
- 2) Whether there were irregularities and illegalities in the conduct of the said election.
- 3) Whether the electoral malpractices and illegalities if any affected the integrity of the election and the declaration made by the 2<sup>nd</sup> Respondent.
- 4) If there were illegalities and irregularities what was their impact if any on the integrity of the election.
- 5) Whether the declaration of the 1<sup>st</sup> Respondent as Member of County Assembly for Angata Ward was valid.
- 6) What consequential orders, declarations and reliefs should the court grant if any.

#### **F. General Principles of Electoral Law.**

43. In the conduct of elections the IEBC is enjoined to do so with strict regard to the Constitution and the law. It is to ensure the elections are free and fair, free from violence, intimidation, improper influence or corruption, simple and transparent. See Art. 81 and 82 of the Constitution of Kenya. The law as to the election as MCA is governed by the Elections Act and the Elections General Regulations, 2012.

44. The law on recount of vote is set out in Section 80(4) (a) and 82 of the Elections Act, 2011 as read with Rules 28 and 29 of the Elections Parliamentary and County Election Petitions Rules, 2017. A recount is limited to establishing the number of votes garnered by the candidates and the tallying of such votes. It must be on pleaded matters. The Supreme Court of Kenya in Gatirau Peter Munya v Dickson Menda Kithinji and 2 Others gave the guiding principles for scrutiny and recount in the following terms;

*"any party to an election petition is entitled to make a request for recount and or scrutiny of votes, at any stage after the filing of petition, and before the determination of the petition....the trial court is vested with discretion under Section 82(1) of the Elections Act to make an order on its own motion for recount or scrutiny of votes as it may specify, if it considers that such scrutiny or recount is necessary to enable it to arrive at a just and fair determination of the petition. In exercising this discretion, the court is to have sufficient reasons in the context of the pleadings or the evidence or both. It is appropriate that the Court should record the reasons for the order for scrutiny or recount.... The right to scrutiny does not lie as a matter of course. The party seeking a recount or scrutiny of votes in an election petition is to establish the basis for such a request, to the satisfaction of the trial Judge or Magistrate. Such a basis may be established by way of pleadings and affidavits, or by way of evidence adduced during the hearing of the petition."*

45. In auditing an election, one thing should be borne in mind- that it is not envisaged that an election that is free from errors and irregularities anywhere in the world. The laws have always been put in place to take care of those minor irregularities. Section 83 of the Election Act prior to amendment vide Election Laws Amendment Act No 34 of 2017, provided as follows;-

*"No election shall be declared to be void by reason of non compliance with any written law relating to the election if it appears that the election was conducted in accordance with the principles laid down in the constitution and in that written law or that the non compliance did not affect the result of the election"*

46. On the burden of and the standard of proof in election Petitions, the Supreme Court of Kenya in Raila 2 (2017) eKLR in interpreting the said Section 83- which is applicable to this petition- stated as follows;

*"[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"*

47. The conduct and administration of an election must meet the Constitutional muster. Under Article 86 of the Constitution, IEBC is obliged to ensure, *inter alia*, that:

*"Whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent; the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station; the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials."*Emphasis added.

## **G. Analysis and Determination.**

48. The question of recount of votes for Oldonyo-orok Primary School Polling station was dealt with at length in the ruling of this court on 20<sup>th</sup> December, 2017. (**Visit-kenyalaw.org/caselaw/cases/view/145322/**). I need not reproduce the reasons in this judgment. The gist of the ruling and the reasoning of this court is that the prayer for recount did not meet the conditions for its grant. Drawing from the emerging jurisprudence and principles set out in *Gatirau Peter Munya Case supra*, this court found no basis for recount was laid to the satisfaction of this court. Given that the application was made at the tail end of trial in this petition, the thinking of this court over it has not changed any bit. The issue will rest at that.

49. The next crucial issue is the compliance with Election Petition Rules and particularly rules 8 and 12. The Rules are couched in mandatory terms and as argued by all Respondents it goes to the substratum of the Petition. Rule 8(1) provides that: - An election Petition **shall state** :- **a)** the name and address of the Petitioner; **b)** the date when the election in dispute was conducted; **c)** the results of the election, if any, and however declared; **d)** the date of the declaration of the results of the election; **e)** the grounds on which the petition is presented and **f)** the name and address of the advocate, if any, for the petitioner which shall be the address for service. Pursuant to Rule 12(1) the affidavit in support of the Petition should contain similar content.

50. Ordinarily this is an issue that is taken up as a preliminary issue or at the interlocutory stage. Nevertheless it suffices to address it regardless of the fact that it has been raised in submissions. The Respondents in their submissions say the Petition gives an erroneous figure on the number of registered voters at Oldonyorok Polling Centre. That the Petition has failed to disclose the date of the election as well as the date of the declaration of the results of the election in both the Petition and Affidavits.

51. On the argument that an erroneous figure of registered voters is given for Oldonyorok, it is true the Petitioner in his Petition as amended gives the figure as 1,357. The true figures as can be deduced from 36As from both Oldoinyork 067-1 and 067-2 are 696 and 697 respectively. This makes a total of 1393. That is an obvious error in Pleading. What is the impact? It is not clear which part of the Rules is offended by that error. The closest it touches is Rule 8(2) on the issue of grounds of Petition. The Respondents were not taken by surprise by the omission. All they needed to answer was whether the votes declared exceeded the registered voters. The figure pleaded by the Petitioner is specific albeit erroneous.

52. On the question that the Petition does not state the date of the election, I have had to revert to the Petition itself. The Petitioner in Paragraph 10 refers to the General Elections for the Year 2017. He also refers to the General Elections of 8.8.2017 in the prayers section of the Petition. That is also sufficient information as to the election being referred to. The Respondents were given fair notice of the Petitioner's case.

53. The only issue that is missing from the Petition is the date of the declaration of the results of the elections as required by Rule 8(1)(d). What can one make of the omission? Is it fatal to the Petition? Many of the cases cited by the Respondents and the most freshly served decision is the case In *Martha Wangari Karua & Another vs. IEBC & 3 Others (2017) eKLR* say that the Election Disputes Resolution Rules are not mere legal or procedural technicalities and cannot be cured by Article 159(2)(d) of the Constitution. The Supreme Court in *Raila 2 (2017)* was of different opinion. To the highest court in the land, actions which have drastic consequences cannot be justified if the scales of justice are to be weighed in favour of all the parties.

54. Justice Muchelule in *Francis Mwangangi Kilonzo vs. Independent Electoral and Boundaries Commission and 2 others 2017 eKLR*, Justice Muchelule, drawing from *Nicholas Kiptoo Korir Salat v IEBC & 6 Others 2013 eKLR*, *Dickson Mwenda Kithinji vs. Gatirau Peter Munya & 2 Others* Civil Appeal No 38 of 2013 at Nyeri and *Evans Odhiambo Kidero & 4 Others vs. Ferdinand Ndungu Waititu and 4 Others Supreme Court Petition No 18 of 2014* stated thus;

*"It is generally accepted that election petitions have to comply with any mandatory provisions of the law and **Rules**, and that the courts may strike out any petition that does not comply. The requirements of **rule 8 and 12(2)** are substantive and go to the root of the petition, and have to be complied with. The effect of non-compliance, however, has to be decided based on the peculiar facts of each case, and while paying attention to the need to do substantive justice to each petition".*

55. I will look at the peculiar circumstances of this case and strive to do substantive justice. The elections of 8.8.2017 are in question. What is the mischief sought to be cured by the rule on the date of declaration? It is to guard against Petitions filed out of prescribed timelines of 28 days. It is to identify from whence did the clock start ticking. This Petition was filed on 22<sup>nd</sup> August, 2017. That is fourteen days after the elections. It is within prescribed time. The omission is not fatal and is hereby excused.

56. During hearing, issues emerged over Burgei polling station. There was an allegation that 100 votes were added to the Petitioner and that the Returning Officer did not discharge his duty in tallying and in not rejecting the results for they exceeded the number of registered voters. I agree with the Respondents that this was not pleaded. Parties are bound by their pleadings. This is a cardinal rule that guards against an element of surprise. It guards against a fishing expedition. I agree with the Respondents that the allegations should be ignored. This court declines to make a determination on the matter on account that it was not pleaded.

57. As regards the allegation of double voting by one voter Josiah Langat, it is my finding that no sufficient evidence was adduced. No action was taken against the said voter if indeed this was true. He should have been arrested. The Petitioner withheld the testimony of one of his agents- Paul Mwanje. He swore an affidavit he was the Petitioners agent at Enkoiperia and the other agent- Robert Ngeno- says he was at Oldonyorok and was in communication with him over the said voter. And that the voter was advised to go away before he was arrested. During hearing, the Robert mentioned one Mwangi as the agent. He appeared not to have known the agent he referred to. The circumstances he describes of how the voter escaped arrest is not convincing. In the absence of the testimony of the witness there is no corroboration on the alleged offence. This court is entitled to draw an inference that his testimony would have been adverse to the Petitioners case. His affidavit has no probative value. Double voting is a criminal offence under the Election Offences Act. The reference to the repealed Section 58 of the Election Act is therefore erroneous. Nevertheless, the standard of proof for any election offence was definitely high: beyond reasonable doubt. It lay with the Petitioner. He did not discharge the evidentiary burden. The allegation fails and is hereby dismissed for want of proof.

58. On the question of variance between Forms 36A and 36B for Olosoilal polling station, it suffices to note as the Respondents point out that the same was not specifically pleaded. The Petitioner was granted leave to amend the Petition and apparently did not use the opportunity to be clear on all the expected issues. My take is that this court shall not inquire into matters that are not pleaded. I decline to make a finding as regards issues raised over the said polling station. That ground therefore flops.

59. On the crucial issue whether the election was conducted in compliance with the Constitution and the law, suffice it to state that after careful audit of documentary evidence and analysis of the testimonies of witnesses for both the Petitioner and the Respondents, I do find that the election was above board. It was free and fair. The paper trail left behind vouches for a credible and verifiable election envisaged under Article 81 of the Constitution. There were no illegalities or irregularities proved. The issue of which agent signed or did not sign is neither here nor there. Whose fault was it that the agent did not sign? It was not for the Respondents to train party agents on their role. No cogent evidence was adduced that any agents were denied right to sign any forms. The issue arose that they had queried the results appeared to me to have been an afterthought and never came out in the affidavit of the witness.

60. What was the will of the electorate at Angata Barrikoi Ward for the impugned election? An election is a game of numbers. I am afraid to say like in the racecourse it is the horse that finishes a neck ahead that wins the race. The people of Angata have spoken. This court resists any calls to hold contrary to their sovereign will as manifested in the declared results. For the victor, *hongera!* It is time to hit the road

running. I presume the people of Angata Barrikoi- as is with voters everywhere- are very expectant of service and not mere rhetoric. They should have an MCA worth his salt. A representative who makes promises and delivers on them. Apparently they may not care whether you are "independent" or not. Is their MCA from the bat or rodent family? They couldn't care less. All they care is service. They should not be disillusioned. For the worthy opponents- and particularly the Petitioner - it is worth keeping in mind that this is not only a game of numbers, it is also touted as a game of musical chairs. Tomorrow is another day. *Inshallah!*

## **H. Conclusion and Disposal Orders.**

61. In conclusion, I take this opportunity to thank everyone who has contributed to the expeditious disposal of this electoral dispute. The advocates for their professional and extensive research. The parties, their witnesses and the people of Angata Barrikoi for their patience. Finally, I do make the following orders;

- 1) The Petition is hereby dismissed with costs to the 1<sup>st</sup> Respondent. The costs shall be borne by the Petitioner.
- 2) I declare that the 1<sup>st</sup> Respondent was validly elected as Member of County Assembly for Angata Barrikoi Ward.
- 3) The Bill of cost shall be filed for assessment by this court in the ordinary manner.
- 4) The security for costs deposited in court shall form part of the cost payable and shall therefore be held in court for application upon assessment of Bill referred to in (3) above.
- 5) Pursuant to Section 86 of the Election Act, a Certificate of the determination of this petition shall issue contemporaneously to the Independent Electoral and Boundaries Commission and to the Speaker Narok County Assembly.

Orders to issue accordingly.

**Dated and delivered at Kilgoris this 16<sup>th</sup> day of February, 2018.**

By: D. K. Matutu Esq. [Senior Resident Magistrate].

In open court in the presence of;-

- 1) Mr. Kiprotich for the 1st Respondent.
- 2) Mr. Kiprotich Holding Brief for Mr. Morara for 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.
- 3) Mr. Abobo for the Petitioner.
- 4) Court Assistants: Mr. Mutai & Mr. Matiko.