



Case Number:	Election Petition 4 of 2013
Date Delivered:	27 Sep 2013
Case Class:	Civil
Court:	High Court at Meru
Case Action:	Judgment
Judge:	Jessie Wanjiku Lessit
Citation:	M'nkiria Petkay Shen Miriti v Ragwa Samuel Mbae & 2 others [2013] eKLR
Advocates:	Mr. Agwara for Petitioner Mr. Mithega for 1st Respondent Ms. Omuko h/b for Mr. Munge for 2nd& 3rd Respondents
Case Summary:	<p><i>Electoral law – election petition – conduct of the election – where the election for the position of Governor of Tharaka-Nithi County was contested for having been conducted contrary to the Constitution of Kenya 2010 and the Electoral Laws – where there were allegations of widespread irregularities in the conduct of the election – whether the electoral process was conducted in accordance with the law – whether the irregularities complained of seriously affected the results of the elections as to invalidate it – whether the Governor for Tharaka-Nithi County was validly elected – Elections (General) Regulations 2012, regulation 62, 72, 76(3), – Elections (Parliamentary and County Elections) Petition Rules 2013, rule 12, 34 & 36 – Elections Act 2011 sections 43, 63, 71, 72, 82 – Constitution of Kenya 2010, articles 83(1)(c), 86, 138(3).</i></p>
Court Division:	Civil
History Magistrates:	-
County:	Tharaka Nithi
Docket Number:	-

History Docket Number:	-
Case Outcome:	Petition Dismissed
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	Kshs 5,000,000

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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

ELECTION PETITION NO.4 OF 2013

THE ELECTIONS ACT NO.24 OF 2011:

THE ELECTIONS

(PARLIAMENTARY AND COUNTY ELECTIONS) PETITION RULES, 2013

**IN THE MATTER OF THE ELECTION FOR THE COUNTY GOVERNOR OF THARAKA-NITHI
COUNTY**

THE PETITION OF

M'NKIRIA PETKAY SHEN

MIRITI.....PETITIONER

-VS-

**RAGWA SAMUEL MBAE.....1ST
RESPONDENT**

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION.....2ND
RESPONDENT**

**SAMUEL MUCHERU.....3RD
RESPONDENT**

JUDGEMENT.

INTRODUCTION

1. In the General Elections of 4th March, 2013 Ragwa Samuel Mbae hereinafter the 1st Respondent, M'Nkiria Petkay Shen Miriti hereinafter the Petitioner, and Mutegi Francis Kijogi hereinafter Petitioner's Witness number two (PW2) were the candidates for election of Governor of Tharaka-Nithi County. The 1st Respondent Ragwa Samuel Mbae garnered 70,088 votes, followed by the Petitioner with 54,813 votes and Mutegi Francis with 10,741 votes. Pursuant to the said elections the 3rd Respondent announced the winner of the gubernatorial elections. The 2nd Respondent subsequently declared the results by a Notice in the Kenya Gazette Special Issue Number 3155 VOL. CXV-NO.45, of 13th March, 2013 in which the 1st Respondent, Ragwa Samuel Mbae of the National Alliance Party (TNA) was declared the duly elected Governor of Tharaka-Nithi County.

2. The Petitioner filed this Petition on 10th April 2013, challenging the election of the 1st Respondent as

the duly elected Governor of Tharaka-Nithi County. The Petitioner's contention is that the announcement and subsequent declaration of the 1st Respondent as the duly elected Governor for Tharaka-Nithi County was irregular and unlawful as the 1st Respondent engaged in numerous election offences and malpractices; that it is the Petitioner who had lawfully and regularly won the elections and ought to have been declared the duly elected Governor for Tharaka-Nithi County.

THE RELIEFS SOUGHT

3. The Petitioner has sought the following orders:

- a). **A declaration that Ragwa Samuel Mbae committed election offences and engaged in serious electoral malpractices contrary to section 71,72 and 82 of the Election Act.**
- b). **A declaration that Ragwa Samuel Mbae was not validly and lawfully elected as governor for Tharaka-Nithi County due to his participation in the electoral malpractices as stated above;**
- c). **A declaration that the 2nd and 3rd Respondents conducted the elections for Governor of Tharaka-Nithi in an irregular, unlawful and unfair manner with the intention of denying the Petitioner his right to be elected as the governor thereof .**
- d). **An order nullifying the election of Ragwa Samuel Mbae as the Governor for Tharaka-Nithi County.**
- e). **A declaration that the validly elected Governor for Tharaka-Nithi County is the Petitioner herein.**
- f). **Costs of this Petition be awarded to the Petitioner.**
- g). **Such further, other and consequential orders as this Honourable Court may lawfully make.**

PETITIONER'S CASE

4. The Petitioner's case against the 1st Respondent is that the 1st Respondent's votes were largely procured through bribery, treating and undue influence, and that further the 1st Respondent committed numerous election offences and malpractices which renders the 2nd and 3rd Respondents announcement and declaration of the 1st Respondent as the duly elected Governor for Tharaka-Nithi County null and void. The Petitioner has particularized the said election offences against the 1st Respondent at paragraph 8 of the Petition as follows:

- a). **Communicating with the voters during the election process in various Polling Stations contrary to Regulation 65 of the Elections (General) Regulations; 2012 (hereinafter Regulations).**
- b). **Unduly influencing voters to vote for him by dishing out bribes on the election date contrary to Section 63 of the Election Act.**

c). Unduly inducing voters to vote for him paying bribes using treated money on the election date contrary to Section 63 of the Election Act.

d). Visiting a witchdoctor to procure the treatment of monies through culturally unacceptable ways with a view of confusing and tricking voters who received the moneys into voting for him.

5. The Petitioner in paragraph 6 of the Petition has accused the 1st Respondent on one hand, and the 2nd and 3rd Respondents of collusion to deprive him of some of his votes by either failing to record the same and transferring others to the 1st Respondent.

6. The Petitioner in paragraph 9 of his supporting affidavit deposes that he voted at around 8 am at Kibubua Tea Buying Centre, after which he escorted his mother to vote at Mugomoini Primary school where he witnessed one Mugambi Mucheke and Gitonga Peter both of whom were the 1st Respondent's Agents continuously talking to voters who were queuing to vote. He deposes that he brought this to the attention of the Presiding Officer who undertook to take action.

7. The Petitioner at paragraph 30 of his Petition deposes that there was systematic, strategic, planned and executed manipulation of the election tallying process in favour of the 1st Respondent and demonstrated it in the table below.

Polling Station	Registered Number of Voters (Maara Constituency)		
	National Assembly	Governor	Senate
022 Magundu Primary School	416	416	22
043 Mumbuni Primary School	398	398	468
053 Itara Primary School	362	361	361
108 NkaNgani Primary School	314	341	314
111 Ntumu Boarding School	186	166	186
112 Ndunguri Primary School	682	582	682
116 Nturiri Primary School	364	384	384
131 Makuri Primary School	395	375	395
148 Mutindwa Primary School	288	228	288
152 Mwema Coffee Factory	454	464	454

8. He gave the particulars of the Respondents manipulation and tampering with voter registers as follows:

a. In *Magundu Primary School* the registered number of voters as shown in the table and on form 36 for Maara Constituency for the Senatorial seat was 22 while that for the Governor and National Assembly seat were 416 respectively. There cannot exist different registered number of voters for every particular seat.

b. The discrepancy in the collated results was widespread and the Respondents deliberately created the same to favour the 1st Respondent thus casting doubt on the transparency, veracity and integrity of the outcome of the results as announced and declared by the 2nd Respondent

c) Entries in Form 36 were made in pencil to allow for future manipulation and as such defeating the whole objective of providing a tamper proof and credible method of verifying results that should have been in indelible ink.

d. As a result of the foregoing, it was easy to doctor and manipulate the results in favour of a particular candidate as against another as was the intention from the onset.

e. The 2nd Respondent showed outright favouritism to the 1st Respondent and his Agents contrary to the Election Act and the Regulations made there under.

9. Several affidavits have been sworn in support of the Petition. Njeru Nkoroi (PW1) has sworn an affidavit in support of the Petition where he deposes that on 17th February, 2013 he was at his home when the 1st Respondent accompanied by one Gitonga Mbaka visited him. He deposes that the 1st Respondent informed him that he was vying for the Governor's seat in Tharaka-Nithi County and was not confident that he could win as he faced strong competition from the Petitioner who was more popular. The 1st Respondent requested him to perform some rituals to enable him win the election and he obliged. He deposes that they agreed that he would conduct the said rituals at cost 50,000 shillings but on condition that the 1st Respondent won the elections failure to which he would refund he entire amount. PW1 stated that he performed various rituals in which he instructed the 1st Respondent to strip naked and walk backwards and do certain things in order for the rituals to be effective. He deposed that the 1st Respondent did all he directed him to do after which he treated him and the money he was to use to give to the voters. PW1 stated that he was a witch doctor and that it was the ritual he performed on the 1st Respondent that caused him to win the elections.

10. Humphrey Gitonga Muriungi (PW6) was a Polling Agent for the SAFINA PARTY at Kiarugu Polling Station. He deposes that only the TNA Agent was allowed to assist the disabled and illiterate voters at the Polling Station. He deposed that the said Agent tore several ballot papers where the voters voted for any other party except TNA candidates. He also claimed that Polling Clerks were also directing voters who needed assistance to vote only for TNA candidates. He did not however give particulars of the Agent was or how he knew from which party he was. PW6 deposed that during counting of votes, several ballot papers cast in favour of the Petitioner were placed in the stash where the 1st Respondent's ballots were. He also claimed that the lighting at the Polling Centre was very poor and

that he was not able to clearly see what was going on during the counting of the ballot papers. He claims that at one point, the election materials at the Polling Station were all carried away in a Land rover and the Agents asked to follow on foot. He complains that only the Presiding Officer and the Police Officer guarding him entered the vehicle.

11. Oswald Nyaga Raini (PW8) deposes that he was a Polling Station Agent for UNITY PARTY OF KENYA based at Kirubia Polling Station. He deposes that the Deputy Presiding Officer at the Polling Station joined a group of people with TNA T-Shirts and left the Station with them. The Deputy Presiding Officer was subsequently arrested.

12. Gillian Karimi Nyaga (PW9) deposed that she was a DEMOCRATIC PARTY Agent for Kian'gondu Polling Station. In her affidavit she deposes that on her way to Kian'gondu Polling Station to resolve DP representation there, she found three people in a vehicle reg.no. KBR 372N, which was parked along the road offering passersby 50/- in order to vote for TNA Candidates. She too was offered 50/- which she declined. She reported to the Constituency Returning Officer, Mr. Wario and shortly later Police went to the scene causing the three to drive away.

13. Dereba Njeru Peter, (PW5) deposed that he was the County Chief Agent for the UNITY PARTY OF KENYA. He deposes that he was the one who had the responsibility to hire Agents for the party and ensure all had the necessary documentation required by the IEBC to allow them entry into Polling Station. He deposes that despite this five of his Agents were not allowed into the Polling Station. He complains that at the initial stages the only results released were for TNA Candidates, which was discontinued only when other Candidates complained. PW5 deposes that despite waiting throughout between 4th and 6th March, no results were announced, or any explanations given until after 6pm on 6th, when he and the Petitioner left the County Tallying Centre. He deposed that as a result his party did not get Form 36 and his efforts to secure them after the elections did not bear fruits.

14. Amram Muthee Njoka (PW10) stated that he was the Chief Agent for Democratic Party of Kenya. In his affidavit he deposes that he got a call from Unity Party of Kenya's Chief Agent, one Mr. Njeru, who informed him that one of their Agents had been chased away from Muthambi Polling Centre, whereupon he proceeded to the Polling Station and confirmed indeed that the Agent had been evicted. He further deposes that there was widespread election malpractice including bribery of voters.

15. Mutegi Francis Kijogi(PW2) who had also contested for the gubernatorial seat for Tharaka-Nithi on a Wiper Party ticket has also sworn an affidavit in support of the Petition. He has deposed inter alia that on the material day, he was at Tunyai Primary School where he was called and informed by one of his Agents that there was vote buying at Meru boys whereupon he proceeded to the scene and found the 1st Respondent's running mate with a group of people where he was allegedly dishing out money and asking them to vote for the 1st Respondent. Francis Kijogi, PW2 deposes that his Agents were locked out from Polling Stations and that as such the elections as conducted by the 2nd Respondent were not free and fair.

16. Elias Mwenda (PW13) in his sworn affidavit in support of the Petition deposes that he witnessed three people standing outside a vehicle registration number KBR 375N, bribing voters in exchange for a promise that they will vote for the 1st Respondent.

17. Professor Lawrence Mbae (PW4) in his affidavit in support of the Petition deposes that he was an Agent of the Coalition of Restoration for Democracy (CORD), and that at around noon on the election day, he received a call from one John Peter Mundi, informing him that the 1st Respondent's Agent was dishing out money to voters and instructing them to vote for the 1st Respondent. PW4 deposes that his

party's Agents were evicted from Polling Stations.

18. Mwathi Franklin (PW3) a Wiper Party Agent, has also sworn an affidavit in support of the Petition where he deposes that he witnessed a lady giving money to voters and asking them to vote for TNA candidates. PW3 deposed that he received a number of calls from their WIPER PARTY Agents informing him that they had been locked out of Polling Stations.

19. Justin Gitonga Mbaka (PW7) has sworn an affidavit in support of the Petition where he deposes to have met a bespectacled man at Kibugua Market who asked him for directions to "Mr. Chemical". He deposes that he drove him to "Mr. Chemical's" place in the taxi he operated. Upon reaching Chemical's place, the man asked him to urgently get him an egg, which he did from a nearby shop. He stated that he did not know the man but that he had seen him address a rally at Chuka.

20. Muriithi Bore (PW11) has sworn an affidavit in support of the Petition where he deposes that one day before the General Elections he saw Beatrice Nkatha, Woman Representative Candidate for Tharaka-Nithi County, and two other people respectively, dishing out money and bribing voters asking them to vote for TNA candidates. PW11 confessed that he also received a bribe from Beatrice Nkatha.

21. James Muriithi Nanua (PW12) has sworn an affidavit in support of the Petition where he deposes that he saw a red pickup and a dark Probox vehicles parked one Kilometer from the Kiunguni Polling Station where he was based. He said that the two occupants who were inviting people going to vote to the car and giving them 50/-. He stated that when he confronted them they drove away.

22. Grace Wangeci (PW14) was the Coordinator for the DEMOCRATIC PARTY, Maara Constituency during the 4th March elections. Her testimony was that their party's Agents were denied access into various Polling Stations and were only allowed in when she personally intervened with the Presiding Officers, and that she was forced in some of the cases to vehemently protest the denial of access. She also deposes to an incident where a person she did not name tried to influence passersby, including her, to vote for the Dove (TNA) by offering money. The incident took place at Ndunguri Polling Station. PW14 stated that she was convinced that the man was an Agent of NKATHA, the Woman Representative Candidate for Tharaka-Nithi County on a TNA ticket. She deposes further that at Ngatia Polling Station, she found people at the gate wearing TNA T-Shirts and caps asking people to choose six piece for TNA Candidates.

THE 1ST RESPONDENT'S CASE:

23. The 1st Respondent contends that the Tharaka-Nithi County Governor elections held on 4th March 2013, were in accordance with the spirit and intention of Article 81 of the Constitution of Kenya, 2010, the Election Act, 2011 and the Elections (General) Regulations, 2012 all which promote the holding of free, fair and transparent elections. Consequently he urges this court to strike out the Petition with costs and declare the 1st Respondent herein was duly elected as the Governor for Tharaka-Nithi County.

24. The 1st Respondent further categorically denies the allegations of malpractices and election offences leveled against him and avers that he was not involved in any irregularities and or unlawful acts in the entire election period, and further that he was lawfully and legally declared the duly elected Governor of Tharaka-Nithi County with a total of 70,088 votes, against the Petitioner's 54,813 thus creating a margin of 15,275 votes between the two.

25. The 1st Respondent further contends that in response to the alleged electoral offences, all are cognizable offences and if indeed they were committed, then the Petitioner ought to have inter alia recorded appropriate statements with the police to facilitate the arrest and prosecution of the 1st Respondent, and any other person alleged to have committed the offences.

26. The 1st Respondent contends that the Petitioner has totally failed to provide any reasons as to why the 2nd and 3rd Respondents were out to favour the 1st Respondent as against the Petitioner or any other candidate, and that as such all the allegations of malpractice against the 1st and 2nd Respondents for the benefit of the 1st Respondent are totally misplaced, false, farfetched, unreasonable and incompetent and ought to be totally rejected for lack of any material evidence and want of particulars.

27. The 1st Respondent further avers that he did not have any personal Agents in the said elections, but rather his party had various Agents in the various Polling Stations under the leadership of the Chief County Agent. The 1st Respondent has also deposed that on 17th February 2013 which is the day that he was alleged to have been with the confessed witch, that he was actually in Tharaka in the company of his running mate one Eliud Muriithi, Basilio Gitonga, Stephen Thiga and Kaburu Bundi strategizing on how to conduct his campaigns in Tharaka effectively. He stated that he was more than 70 kilometers away from Kibugua where it was alleged that he was picked by Justin Gitonga to be taken to the confessed witch, and that he did not leave the meeting with his running mate and three friends until when it ended at 11 P.M, when he left in the company of one Godfrey Kaburu Bundi who took him straight to his residence at Meru town.

28. Several affidavits have been sworn in favour of the 1st Respondent and against the Petition. Njagi Mburia Kenneth was the first witness for the 1st Respondent, hereinafter RW1. He stated that he was the Chief County Agent for the 1st Respondent's party TNA. In his affidavit he deposes that he visited a number of Polling Stations, five in Chuka-Igambang'ombe Constituency; twelve in Maara Constituency and five in Tharaka Constituency. He deposes that he did not experience any problems. He deposes that his party had a clear and good network for monitoring the elections. He confirmed that he never witnessed any malpractice by any person during the elections, and further that none of his party's Agents were involved in any malpractice.

29. Eliud Muriithi Mate, RW6 who was the running mate for the 1st Respondent has sworn an affidavit in which he states that he did not witness any malpractice in any of the Polling Stations he visited during the elections. He specifically denied all allegations made against him in the Petitioner's case, and in particular those made by PW2. He denied that he engaged in any electoral malpractices. He has further denied that he was found by one Francis Mutegi with a large group of people, at Meru Boys' Polling Station dishing out bribes. He denied ever using motor vehicle registration number KAW 479Q Subaru, and stated that he did not know its owner. He denied that he was ever assisted by one David Mutegi, and stated that he knows no one by that name.

30. Godfrey Kaburu Bundi, RW3 and Stephen Nthiga Mitugo, RW4 in their respective affidavits depose that they both actively campaigned for the 1st Respondent. Each of them stated that on the 17th February, 2013 between 6.00 pm and 11.00 pm they were in the home of Eliud Muriithi where they were subsequently joined by one Basilio Gitonga. They depose that the 1st Respondent found them there and that he arrived in the same vehicle driven by Godfrey Kaburu. They depose that they stayed at the home of RW6 till about 11.00 P.M when they all left for their respective homes. Each of them testified that it was not possible that the 1st Respondent could have met the witch doctor Njeru Nkoroi, as alleged in the Petitioner's case since the 1st Respondent was in Tharaka constituency, a distance of over 80 kilometers from the home of the witch doctor.

31. Francis Kiambi Kiriuro, RW5 a registered voter at Nkarini village has in his affidavit denied being involved in any electoral malpractice in Githunguri Polling Station or at all. He also denies being the owner of any red Prado or at all and denies being the Chief Campaigner for the 1st Respondent (as alleged in the affidavit of one Ishmael Mwani Kamenyi, not called as a witness). He further denies having ever given money to the Presiding Officer at Githunguri Polling Station.

32. Julius Mugambi Mugambi, RW2 in his affidavit denied that he ever swore any affidavit in favour of this Petition, and points out that his full names are not Julius Mugambe Mugambi, as indicated in the said affidavit. He deposes that he was a Polling Agent of one Mercy Kirito who was vying for the seat of Women Representative in Tharaka-Nithi County on a DP ticket. He deposed that he gave a statement to Mercy Kirito's advocate at the Former's house in support of an intended Petition by Mercy Kirito against Beatrice Nkatha. He denies signing that statement and that he was greatly dismayed and surprised to find out that an affidavit allegedly sworn by him had been used in support of the instant Petition. He further deposes that in the said affidavit, he is described as an Agent of UPK but that he was an Agent of DP.

34. The 1st Respondent's case was that the General Elections of 4th March 2013 were free, fair and transparent enabling voters to exercise their rights as envisaged under Article 38 of the Constitution; were free from violence, intimidation, improper influence or corruption on the 1st Respondent's part; and were administered in an impartial, neutral, efficient accurate and accountable manner. The 1st Respondent deposes that he was not involved in election malpractices, irregularities and offences, and or unlawful acts and that he was lawfully and legally declared the duly elected Governor for Tharaka-Nithi County. He also denied colluding with either or both the 2nd and 3rd Respondents in order to manipulate the election results in his favour.

THE 2ND AND 3RD RESPONDENT'S RESPONSE:

35. The 2nd and 3rd Respondents on the other hand contend that the gubernatorial elections conducted by the 2nd Respondent in Tharaka-Nithi County met the provisions and standards set out in Article 81 (e) of the Constitution, the Elections Act, and its attendant Regulations which included Part X111 of the Elections (General) Regulations, 2012.

27. The 2nd and 3rd Respondent further aver that the electoral management system put in place by the 2nd Respondent complied with the provisions of Article 86 of the Constitution to the extent that the elections in Tharaka-Nithi County were simple, accurate, verifiable, secure, credible, accountable and transparent, as evidenced by the various electoral management Regulations that the 2nd Respondent formulated, and Parliament approved, which Regulations outlined the electoral management system.

28. The 2nd and 3rd Respondents case is further that upon a cursory reading of the Petition, the affidavits filed in support thereof and the annexure therein, the Petitioner is not challenging the tallying process or the number of votes cast for candidates running for governor, but rather circumstantial matters around the electoral process, which issues did not affect the number of votes cast or could not in any way influence the votes cast for each candidate who contested the elections of the Governor for Tharaka-Nithi County.

29. With regard to the issue of voter register, the 2nd and 3rd Respondents' case is that the conduct of voter registration exercise was carried out throughout the country from 17th November 2012 to 18th December 2012 using BVR kits. That at the conclusion of the voter registration exercise on 18th

December 2012, the commission sought and collated statistics on voter registration from its various registration offices in the field of Tharaka-Nithi County and that after the inspection process, the 2nd Respondent realized that there were 417 persons who had been registered and whose biometric details had not been captured due to their nature of work, age or disability as a result of which they did not have biometric features. This group was registered in a section of the principal register referred to as the special register so as not to disenfranchise them.

30. With regard to the allegations deposed to in paragraphs 30 to 32 of the Petitioner's affidavit, the 2nd and 3rd Respondents averred that there were 161 Polling Stations and a total of 166 streams in Maara Constituency. The 2nd and 3rd Respondents further aver that upon completion of the voting exercise in Tharaka-Nithi County and a scrutiny of the applicable Forms, more so the Forms 36 annexed by the Petitioner, it was apparent that:

- a). the Respondents' officials would transfer the details from Form 35 from all the Polling Stations and tabulate them to the Constituency Form 36 so as to collate the votes cast for each candidate in the specific Polling Station.
- b). the process of scrutinizing and transposition was done by hand, cautiously and under strict timelines.
- c). the numbers were being transposed from Form 35 which is the primary document to Form 36, the secondary and abridged results.

31. The 2nd and 3rd Respondents further contend that throughout the transposition process, it was the intention of the 2nd Respondent to ensure that the process was fair and credible, and that it did not affect the actual results; and that it was improbable to achieve a flawless perfect exercise without minor errors including in Form 36, and that the errors that occurred at the material time were inadvertent and unintentional. The 2nd and 3rd Respondents attributed this to human error through transposition errors of numbers from one Form to another or the myriad of numbers that a tallying clerk had to work with, from hundreds of Polling Centers, exhaustion, limited resources and time, amongst other factors.

32. With regard to the use of technology, the 2nd and 3rd Respondents aver that the same was intended to act as a check and control system, and not a replacement of the legal system and as a check and control tool, the technology achieved its objectives. The 2nd and 3rd Respondents aver that Presiding Officers in the county experienced challenges in the use of the electronic voter identification devices in some of the Polling Stations, and had to resort to using the manual register alone and the manual register also contained biometric details of the voters, and more specifically the passport sized photographs of the voters.

33. With regard to delays in the tallying process, the 2nd and 3rd Respondents have averred that this was occasioned by several factors namely;

- a). the Constituency Tallying Centre had to wait for all the Polling Stations in the constituency to count their votes and record them in Form 35,
- b). the Presiding Officers were counting votes cast for different electoral positions,
- c). given the sensitive nature of counting of votes cast for candidates, and the various electoral positions, the process was time consuming,
- d). it was until the constituency tallying centre received all the Form 35 from all the Polling Stations in the

constituency that it would generate a constituency Form 36.

34. The 2nd and 3rd Respondents further aver that the results were announced within the legally stipulated period and the delays did not only affect the Petitioner but all the candidates.

35. The 2nd and 3rd Respondents further aver that all Agents who were accredited by their respective parties and/or candidates were allowed to the Polling Stations throughout Tharaka-Nithi County and that no Agents were barred from signing from Form 35 after verification or at all.

36. The 3rd Respondent has further deposed that no reports were made to him or the security Agents at the material time on voter bribery, voter or Agent intimidation, denying valid voters their Constitutional right to vote, violence or any other electoral offence as pleaded in the Petition.

37. The 2nd and 3rd Respondents called as witnesses Hellen Mutuva, herein after RRW1, Wario Ibrahim Ali, RRW2 and George Karani, RRW3 who were Constituency Returning Officers for Maara, Chuka Igambango'mbe and Tharaka Constituencies respectively. In their affidavits, they have all deposed that the elections were conducted in a free and fair manner, and that no reports were made to them or to the Security Agents at the material time of any voter bribery, voter or Agent intimidation, denial of Constitutional rights to valid voters to vote, or any other electoral offences as pleaded in the Petition.

38. Consequently, the 2nd and 3rd Respondents pray inter alia that the Petition herein be dismissed with costs to the 2nd and 3rd Respondents.

WITNESS CALLED BY THE COURT

39. Pursuant to witness summons issued by this court on 19th July 2013, Basilio Gitonga swore an affidavit dated 12th August, 2013 and also came to testify in answer to the following issues as stated in the summons:

1. **Whether one Njeru Nkoroi visited his office at any time in connection with this Petition.**
2. **Whether he paid the said Njeru Nkoroi the sum of Kshs 45,000 or any sum of money whatsoever"**
3. **If answer to the above is in positive:**
 - a). **on whose behalf he was acting**
 - b). **what was the purpose or reason for the payment and what was the payment in consideration of**
 - c). **to produce a duplicate copy of any acknowledgement for the payment**
 - d). **whether Njeru Nkoroi signed any document in his office during the said visit, and if so**
 - e). **what document he signed a copy of which he should produce in court**

d). whether he signed voluntarily or was forced, induced coerced to sign

40. Summoning Mr. Basilio Gitonga was necessitated by the fact he is alleged to have drawn an affidavit from PW1 in which he recanted the affidavit sworn in favour of the Petition. PW1 denied recanting his affidavit in favour of the Petitioner and even testified in favour of the Petitioner. Mr. Basilio Gitonga in his affidavit confirmed that Njeru Nkoroi visited his office on 30th April 2013. He deposes that earlier on, he had received a call from his colleague Mr. Mithega of **Messr Mithega & Kariuki advocates**, requesting him to do an urgent affidavit from a certain witness since Mr. Mithega had travelled out of town. He deposed that at around 10:00 am, one Njeru Nkoroi under the escort of one Justin Mugambi was ushered into his offices by a clerk from Mr. Mithega's office. He deposed that Njeru Nkoroi informed him that he had learnt that an affidavit allegedly sworn by him had been filed in an election Petition by the Petitioner, challenging the election of the 1st Respondent; and that he was a stranger to the contents of the said affidavit; and that he had already contacted Mr. Mithega, whom he had learnt was acting for the 1st Respondent with a view to disowning it; that he had brought with him a close confidant, Justin Mugambi, since he was illiterate.

THE ISSUES FOR DETERMINATION

41. **The uncontested issues are:**

(i) Whether the 1st Respondent committed election offences and engaged in serious electoral malpractices contrary to Section 63, 71, 72 and 82 of the Elections Act"

(ii) Whether the 2nd and 3rd Respondents conducted the elections for Governor for Tharaka-Nithi County in an irregular, unlawful and unfair manner with the intention of denying the Petitioner his right to be elected as the Governor thereof"

(iii) Whether the 1st Respondent was validly and lawfully elected as the Governor for Tharaka-Nithi County in the elections held on 4th March 2013 due to his participation in the electoral malpractices as alleged"

(iv) Whether or not there are valid grounds to nullify the election of the 1st Respondent as the elected County Governor for Tharaka-Nithi County; and if so should the elections of the 1st Respondent be nullified"

(v) Whether the Petitioner is entitled to any of the reliefs sought in this Petition"

(vi) What orders, remedies and declarations the Court should make"

(vii) Who should bear the costs of this Petition"

Contested issues adopted by the court as issues for determination

(viii) Whether or not the irregularities if any were so substantial as to affect the results declared by the 2nd and 3rd Respondents"

(ix) Whether or not the results in the 10 Polling Stations specified in paragraph 30 of the Petitioners supporting affidavit to the Petition were properly counted, tallied and corrected in the Statutory Forms"

The Court has merged some of the issues for consideration.

THE EVIDENTIAL, INCIDENCE, BURDEN AND STANDARD OF PROOF

42. This being an Election Petition filed under the new Election Laws, the issue of the Evidential Burden of Proof is sorted out due to the requirement that the Issues for Determination by the Court be settled at the Pre-Trial stage of the proceedings. As for the Incidence and Burden of Proof the fundamental principle is based on the Latin Maxim '*ei qui affirmat, non ei qui negat, incumbit probatio*' applies, that is '**The Burden of proof lies upon he who affirms and not upon he who denies.**' In this case therefore the burden lies with the Petitioner to prove the allegations made in the Petition. The court will consider the substance of the issue(s) asserted, not just the form in which it has been presented, and determine, as against the Respondents, whether the Petitioner has been able first and foremost to establish that the acts or omissions complained or alleged were indeed committed, and then secondly whether he has proved that these acts or omissions did affect either the outcome and/or validity of the elections.

43. In **Raila Odinga vs IEBC & OTHERS Supreme Court Election Petition No. 5 of 2013** the court held:

"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."

44. As to the Standard of Proof, that will depend on whether the affirmation made is based on allegations of quasi criminal nature, in which case proof must be above preponderance of probability but below proof beyond reasonable doubt. That will be the Standard of Proof I will adopt in determining the allegations of fraud, undue influence and treating. In the case of all other issues not of quasi criminal nature the Standard of Proof will be on a balance of probabilities. In the case of **Benard Shinali Masaka –vs- Boni Khalwale & 2 others (2011) eKLR**, the Court held:

"Further, I agree with the proposition grounded on the decision in *Mbowe vs Eliufoo [1967] E.A. 240* that any allegations made in an election petition have to be proved to the "satisfaction of the court". Like Rawal J. in *Onalo*, I am certain that the standard of proof, save in matters where electoral offences are alleged, cannot be generally beyond reasonable doubt, but because of the quasi – criminal nature of some election petitions, it is almost certainly on a higher degree than merely on a balance of probabilities, the latter being the standard in civil cases."

45. The Court will consider the pleadings, the evidence adduced in the filed affidavits and the testimony of those called to testify, and will consider the principles and provisions of the relevant applicable substantive law, precedent and oral and filed submissions by counsels in this case.

FACTS NOT IN DISPUTE.

46. It is not disputed that the Petitioner duly contested for the County Governor seat for Tharaka-Nithi County against two other contestants that is RAGWA SAMUEL MBAE, and MUTEGI FRANCIS KIJOGI.

It is also common ground that in the said election, the 2nd and 3rd Respondents announced the 1st Respondent, RAGWA SAMUEL MBAE as the election winner with 70,088 votes; followed by the Petitioner with 54,813 votes and MUTEGI FRANCIS with 10,741 votes respectively. It is not in dispute that pursuant to the above, the 2nd Respondent subsequently declared the election results by gazetting the 1st Respondent, RAGWA SAMUEL MBAE as the duly elected Governor for Tharaka-Nithi County vide Gazette Special Issue Notice Number 3155 VOL. CXV – NO. 45. of the 13th March, 2013.

PRELIMINARY POINT FOR DETERMINATION

47. Mr. Mithega urged a preliminary point of law that the Petition has not complied with the following rules;

a. **Rule 10(1)(c) – The results of the elections, if any, and the manner in which it has been declared,**

b. **Rule 10(1)(d) – The date of the declaration of the election results,**

c. **Rule 10(1)(e) – The grounds on which the petition is presented,**

d. **Rule 10(3)(b) – Be supported by an affidavit made by the Petitioner containing the grounds on which relief is sought and setting out the facts relied on by the Petitioner,**

e. **Rule 12(6) – The provisions of Order 19 of the Civil Procedure Rules, 2010 and the Oaths and Statutory Declarations Act shall apply to affidavits under this rule.**

48.

Rule 10 are not mere technical requirements laying down procedural form and content of intended Election Petitions but are substantive as they go to the root and substance of the issues and matters prescribed upon. Since the Rules, like the Elections Act, are a special legislation created to give effect to

the overriding objective mentioned in Rule 4, which is to facilitate the just, expeditious, proportionate and affordable resolution of election petitions under the Constitution and the Act. Every Rule is intended to achieve a required result geared towards, inter alia, expedition in the resolution of the petitions.

49.

The test is whether the Petitioner has pleaded particulars vital to support her case, and in this regard whether she has a ground to file this Petition. The results pleaded are approximate figures. I am satisfied that they meet the requirement as they show that the Petitioner lost the election, and that is the basis for filing the Petition in the first place.

50.

Paragraphs 3 and 4 of the Petition plead the results of the Election the subject matter of this Petition, the manner in which they were declared, and the date the results were declared. As for Rule 10(1)(e) and Rule 10(3)(b), the grounds on which the Petition is presented and an affidavit made by the Petitioner containing the grounds on which relief is sought and setting out the facts relied on by the Petitioner, are all met as these grounds run through out the Petition and the affidavit in support, and are the basis upon which the issues for determination were drawn.

51.

I find that the requirements of Rule 10 of the Rules were met, and that the Petition, as filed is competent.

ANALYSIS AND EVALUATION

(i) Whether the 1st Respondent committed election offences and engaged in serious electoral malpractices contrary to Section 63, 71, 72 and 82 of the Elections Act"

52. Under this first issue the offences and malpractices alleged must relate to those envisaged under sections 63, 71, 72 and 82 of the Elections Act and, by virtue of my finding above, also those which touch on bribery under section 64 of the Elections Act herein after referred to as the Act.

53. Section 63 of the Act relates to undue influence and stipulates as follows:

“A person who, directly or indirectly in person or through another person on his behalf uses or threatens to use any force, violence including sexual violence, restraint, or material, physical or spiritual injury, harmful cultural practices, damage or loss, or any fraudulent device, trick or deceit for the purpose of or on account of –

(a) Inducing or compelling a person to vote or not to vote for a particular candidate or political party at an election;

(b) Impeding or preventing the free exercise of the franchise of a voter;

(c) Inducing or compelling a person to refrain from becoming a candidate or to withdraw if he has become a candidate, or

(d) Impeding or preventing a person from being nominated as a candidate or from being registered as a voter,

commits the offence of undue influence.” (Emphasis mine)

54. Only section 63 (a) and (b) are relevant under this issue in this case since going by the Petitioner’s pleadings and the evidence adduced, the only undue influence alleged related to direct use of harmful cultural practices geared towards unduly influencing voters to vote for the 1st Respondent, and thereby impeding or preventing the free exercise of the franchise of voters. Under paragraph 8 of the Petition particulars of allegations against the 1st Respondent are given as follows:

a). Communicating with voters during the election process in various Polling Stations contrary to Regulation 65 of the Elections (General) Regulations, 2012.

b) Unduly influencing voters to vote for him by dishing out bribes on the election date contrary to Section 63 of the Elections Act.

c) Unduly inducing voters to vote for him by paying bribing them using treated money on the election date contrary to Section 63 of the Elections Act.

d). Visiting a witchdoctor to procure the treatment of monies through culturally unacceptable ways with a view of confusing and tricking voters who received the moneys into voting for him.

55. Apart from the Petitioner, two witnesses PW1, Mr. Njeru Nkoroi and PW7, Mr. Justin Gitonga Mbaka, are the witnesses called by the Petitioner in support of the allegations under this section. PW7’s evidence was to the effect that he took a politician, whose name he did not know, to the home of PW1, a known witch doctor in Chuka area. PW7 stated that the same politician went back to him the same evening asking him to assist him get an egg which he did.

56. PW1 on his part relied on his affidavit as his evidence in support of the Petition. In the affidavit, he gave graphic details of how the 1st Respondent went to him for treatment and the treatment of his money which he was to use in bribing voters through witch craft. PW1 testified that he treated the 1st Respondent and also his money through witch craft which involved nudity and unorthodox acts.

57. 51. The 1st Respondent produced a second affidavit sworn by PW1. PW1 denied before the court that he ever made any other affidavit and even denied supporting the 1st Respondent in this Petition. The advocate who took the affidavit from him was, as earlier stated, summoned by the court as a witness. Basilio Gitonga produced a copy of the same affidavit annexed to the 1st Respondent's response to the Petition, and confirmed that he took it from PW1, and that a person who accompanied PW1 read over the affidavit to PW1 in Chuka language which he understood, before he signed it. He stated that he also recorded on tape what transpired due to the sensitivity of the issues.

58. 52. The court did not allow him to produce the said tape as the summons to Mr. Gitonga was very specific as to what was required of him. Furthermore, it was very evident that the tape he attempted to produce was the same one the 1st Respondent had earlier tried to adduce in evidence, and in which respect the court made a ruling.

59. 52. Mr. Gitonga deposes, and in court testified that after he drafted the affidavit, he requested Justin Mugambi to read through the contents and interpret the same to Njeru Nkoroi. He further deposes that Njeru Nkoroi signed the said affidavit voluntarily without any force, inducement or coercion from himself or anybody else. He deposes that he did not give the sum of 45,000 shillings or any other sum at all to Njeru Nkoroi, and stated that instead it was he who was paid for the services he rendered in that case.

57. I am aware that Basilio Gitonga was a close associate of the 1st Respondent, and indeed he was part of his Campaign Strategy Planning Team. There were some questions which remained unanswered, for instance how the Petitioner's advocate came into contact with the witch doctor, and how the decision was reached to use Mr. Basilio to take the affidavit from him" There was also an issue of some payment to PW1 for his services to the 1st Respondent which has not come out clearly. Mr. Basilio's evidence needs to be treated with caution. That notwithstanding, it cannot be denied that PW1 swore two affidavits in this Petition, one in favour of the Petitioner in which he makes serious allegations against the 1st Respondent, and a second recanting it. Which one can the court believe"

58. The Petitioner was required to adduce evidence that was exact, cogent and unequivocal in proof of the allegations made. Under Rule 12 of the Election Petition Rules, herein after the Rules, it provides that the affidavits of witnesses should contain the substance of the evidence in support of the facts and grounds in the Petition and the Petitioner's supporting affidavit. It is required that such evidence is exact and to the point in relation to a specific allegation of fact.

59. PW7 did not follow his client and cannot say with certainty where he went. His evidence on that point is speculative and therefore inadmissible for lack of corroboration. Similarly PW7 did not state who it was he took to Mr. Chemical, PW1. It is therefore only the evidence of PW1 that the 1st Respondent went to see him. No evidence was called to corroborate that evidence. The 1st Respondent has denied going to his house. The issue is whether the Petitioner through his witness PW1 has adduced cogent, exact and unequivocal evidence as required of him.

60. PW1 swore two affidavits which are irreconcilable and the averments made therein so contradictory that there is a distinct dichotomy of assertions that renders the evidence of PW1 unbelievable, unreliable and untrustworthy; and in regard to his credibility a person of doubtful integrity. He testified that he was a great friend of the Petitioner and that he believed in him. Yet he 'treated his opponent' and according to him, enabled him to win the elections. PW1 was clearly not a person of integrity, but more relevantly, he was unreliable and an incredible witness.

61. The Petitioner's evidence regarding this issue is on record. He did not personally witness anything

and relies on PW1's evidence. The Petitioner started by stating that he had no contact with PW1 and said that he knew that the 1st Respondent had visited a witch doctor only after seeing the affidavit sworn by PW1. Yet in his evidence he admitted that before he filed this Petition,

'I am saying I am aware he executed an affidavit to a lawyer I led him to. I took him to the lawyer and he wrote...I remember that after I presented the petition Mr. Nkoroi came to me in a happy mood and told me that he had been paid his money. There before he had told me that after treating Ragwa there was a balance of 45,000/= so this time he told me he had been paid that money in Meru'.

62. The Petitioner clearly not only knew PW1 before he filed this Petition. Most importantly he discussed with him concerning his alleged involvement with the 1st Respondent and came to an agreement that he was to be his witness in this Petition. In the Petitioner's own evidence, he chose the advocate who was to take PW1's affidavit. Furthermore, he led him to that advocate. The Petitioner was clearly evasive and dishonest as far as the witch doctor, PW1 and his association with him was concerned. He clearly knew him before this Petition, they met and discussed this Petition and considered him such an important witness that he even called him as his first witness.

63. The allegations pleaded in paragraph 8 (d) of the Petition must be supported by evidence. It is pleaded that;

“Visiting a witch doctor to procure the treatment of monies through culturally unacceptable ways with a view of confusing and tricking voters who received the money into voting for him”

64. The Petitioner needed to adduce evidence not only to prove that the 1st Respondent visited a witch doctor, but also to prove that indeed there were voters who received the 'treated money' and that as a result of that they were confused and tricked into voting for the 1st Respondent. No such evidence was adduced.

65. The 1st Respondent put forward an alibi in answer to the allegations made against him by PW1 and 7 that on the 17th February 2013, he did not visit any witch doctor or PW1, as claimed. He also denied to have had witchcraft acts performed on him. The 1st Respondent testified that he was in Tharaka, in the home of his running mate, Mr. Eliud Muriithi, in a Strategy Meeting in preparation for the campaigns. He called Mr. Eliud Muriithi, Mr. Stephen Mitugo and Mr. Kaburu Bundi, who corroborated his evidence.

66. Mr. Agwara has urged the court not to believe this evidence that there was ever such a meeting as alleged by the 1st Respondent and his three witnesses on the grounds that the three were great friends of the 1st Respondent, and had testified that they could do anything to assist him, and because they had greatly benefited from the 1st Respondent's victory on account of being appointed Ministers in his government.

67. The burden of proof lies with the Petitioner to prove the allegations he has affirmed in his Petition against the Respondents. The 1st Respondent's duty as far as the allegation of witch craft is concerned was to raise a doubt that such happenings as alleged by the Petitioner, ever took place.

68. I find that the 1st Respondent's alibi was very strong. The Petitioner's key witness on the other hand has only convinced the court of two things, one that he is a witch doctor practicing as same in contravention of Witch Craft laws. The second one is that his affidavit in favour of the Petitioner was recanted by him so that whatever he swore he did to the 1st Respondent was recanted and at the end of the day, the court had nothing left of his two affidavits to go by, due to the dichotomy of the averments in both. His evidence was worthless due to the contradictory nature of the averments in the two affidavits attributed to him.

69. In the Court of Appeal case of **NDUNGU KIMANYI –V- REPUBLIC [1979] KLR 283**, MADAN, MILLER and POTTER JJA held:

“The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.”

70. Even though the court in the cited case was dealing with a criminal case, the principle applies here as well because an allegation of involvement in witch craft is a quasi-criminal in nature. The standard of proving this allegation is higher than proof on a balance of probabilities. The evidence should equally be highly credible and cogent. I find PW1 was not a straightforward witness. His evidence is valueless to the Petitioner.

71. The Petitioner did not adduce any evidence to the effect that any person ever saw the 1st Respondent communicating with voters during the election process in the various Polling Stations. He did not adduce any evidence to the effect that the 1st Respondent unduly influenced voters to vote for him by dishing out bribes on the election date. Neither was there any evidence of any person who saw the 1st Respondent unduly influencing voters to vote for him by paying bribes using treated money on the election date. The Petitioner is on record as saying that he did not see the 1st Respondent, whether

before or during the election, dishing out any bribes to voters. These particulars were therefore neither established nor proved.

72. The next offence pleaded is under section 71(1) of the Elections Act, 2011 which provides;

“71(1) A person who aids, abets, counsels or procures the commission of or attempts to aid, abet, counsel, or procure the commission of an offence specified in this Part commits an offence.

(2) An offence under subsection (1) shall be cognizable”

73. Mr. Mithega submitted that Section 71 deals with the offence of aiding and abetting commission of offences under the part. Counsel urged that offence was not pleaded in the body of the Petition. Counsel urged further that to the contrary the Petitioner, in his own admission, not only committed the election offence under Section 71, but he also breached the Electoral Code of Conduct and the Oath of Secrecy. This is because the Petitioner admitted that he did not report the alleged offences even though he was aware at the time they were allegedly committed because the 1st Respondent is his friend.

74. That is correct. The Petitioner admitted in cross examination that in as much as the alleged acts of bribery were committed before and during the elections and he was made aware of them, he did not make any complaint to the police and/or the IEBC. He explained that he did not report the acts because it would have taken long for any action to be taken. He agreed that he did not make such complaint even though he knew that if such complaint was made and found to be true, it could have led to the disqualification of the 1st Respondent by the IEBC. He said that after all the 1st Respondent was his friend.

75. Mr. Munge on his part submitted that no evidence was tendered by the Petitioner or any of his witnesses as relates to commission of an offence under section 71 of the Act. Counsel urged that the Petitioner's submissions do not address this issue in the first place, and that the Petitioner failed to prove commission of any offence by the Respondents for any offence known in Law as envisaged by Section 71 of the Elections Act, within the required standard or threshold. He urged the Court to find that this has not been proved.

76. No evidence was adduced to support the allegations in the Petition that the 1st Respondent committed offences under section 71 of the Act. No submissions were made by the Petitioner's advocate either in support of these allegations. I agree with the Respondents advocates that this allegations were not proved as required.

77. The Counsel for the 2nd and 3rd Respondents has urged that the submissions filed by the Petitioner have attempted to introduce new issues and sections of Law relating to other provisions of the Elections Act which are not in issue before this Court, and has urged the court to disregard same. It is true. Mr. Agwara in his filed submissions made reference to section 64(1) of the Election Act and urged the court to find that there was evidence of wide spread voter bribery before and during the elections.

78. The Issues for determination were drawn from the pleadings, and agreed upon by the parties as uncontested issues and included those adopted by the Court as contested. The parties signed the Issues for Determination and the same have been duly filed. Those filed Issues do not include any determination of issues concerning bribery of voters. It could have been an afterthought to adduce

evidence in support of bribery allegations and to submit on same. It is trite law that fresh issues cannot be introduced after the Issues for Determination have been agreed upon. However, both the Petition and the affidavit in support make clear reference to issues of bribery and leaving them out as part of the issues for determination was a mistake on my part. Paragraph 8 and 9 of the Petition and paragraph 9 and 17 of the supporting affidavit raise only one issue which is of bribery.

79. The 1st Respondent in his response to this Petition answered to the allegations of bribery leveled against him. That was in paragraph 9 and 11 of the Petition and 18 of the supporting affidavit. This is an indication that the 1st Respondent recognized that bribery was an issue and therefore responded to same. It should be considered as an issue in the Petition.

80. Section 64(1) of the Act which creates the offence of bribery provides:

“ A candidate who-

a. directly or indirectly in person or by any other person on his behalf gives, lends or agrees to give or lend, or offers, promises or promises to procure or endeavour to procure any money or valuable consideration to or for any voter, or to or for any person on behalf of any voter or to or for any other person in order to induce any voter- (i) To vote or refrain from voting for a particular candidate; commits the offence of bribery.”

The **Black's Law Dictionary Eighth Edition** defines bribery and gives an illustration as follows:

“The corrupt payment, receipt, or solicitation of a private favour for official action. Bribery is a felony in most jurisdictions.”

81. Mr. Agwara urged that the 1st Respondent committed the election offence of bribery contrary to Section 64 and 72 of the Election Act.

82. Section 72 of the Election Act relates to an election offence by a candidate or political party. The said provision stipulates offences committed during nominations or campaigns and the remedies under the said provision is disqualification of a candidate or the political party. It is of no application here as the nomination and campaign issues are not in issue here.

83. The Petitioner has tendered the evidence of Mutegi Francis Kijogi PW2, Elias Mwenda Nthiri PW13, Mwathi Franklin Kirimi PW3, Muriithi Bore PW11, Prof Lawrence Mbae PW4, James Muriithi Nanua PW12, Grace Wangeci PW14, Gillian Karimi Nyaga PW9 and Oswald Nyaga Raini PW8 in a bid to demonstrate that there was wide spread voter bribery carried out by the 1st Respondent through his Agents and/or supporters.

84. In paragraph 6 of the affidavit sworn by Mutegi Kijogi, PW2 deposes that he found the 1st Respondent's running mate, one Mate bribing voters and asking them to vote for the 1st Respondent. He further deposes that he knew the people receiving the bribes because he came from that area, yet he does not give the full particulars of these people.

85. RW6 at paragraph 3 of his affidavit confirms voting at Chiakariga Primary Polling Station on 4th March 2013 at 11 am. Mr. Agwara urged the Court to consider that it was not a coincidence that PW2 testified that he saw the 1st Respondent bribing voters and asking them to vote for the 1st Respondent at the said Polling Station, at the same time RW6 said he had been to vote there.

71. Gillian Karimi Nyaga (PW9) deposed that she was on her way to Kian'gondu Polling Station when she found three people in a vehicle reg.no. KBR 372N, offering passersby 50/- in order to vote for TNA Candidates. The identity of these people is not given, neither is the registered owner of the vehicle mentioned.

72. Elias Mwenda, PW13 stated that he witnessed three people standing outside a vehicle registration number KBR 375N, bribing voters in exchange for a promise that they will vote for the 1st Respondent. The particulars of these persons are not given, neither is the owner of the vehicle disclosed.

73. Professor Lawrence Mbae, PW4 stated that at around noon on the Election Day, he received a call from one John Peter Muindi, informing him that the 1st Respondent's Agent was dishing out money to voters and instructing them to vote for the 1st Respondent. The said John Peter Muindi did not swear any affidavit. The evidence of PW4 was therefore hearsay evidence which cannot be relied upon without corroboration.

74. Mwathi Franklin, PW3 stated that he witnessed a lady giving money to voters and asking them to vote for TNA candidates. The name of the lady is given as Salome. He stated that he had seen the lady in the company of TNA candidates including the 1st Respondent, during the campaigns.

75. James Muriithi Nanua, PW12 has sworn an affidavit in support of the Petition where he deposes that he saw a red pickup and a dark Probox vehicles parked one Kilometer from the Kiunguni Polling Station where he was based. He said that the occupants of the two vehicles were inviting people going to vote to the cars and giving them 50/-. He stated that when he confronted them they drove away.

76. Grace Wangeci, PW14 stated that a person she did not name tried to influence passersby, including her, to vote for the Dove (TNA) by offering money. The incident took place at Ndunguri Polling Station. PW14 stated that she was convinced that the man was an Agent of NKATHA, the Woman Representative Candidate for Tharaka-Nithi County on a TNA ticket. The basis of that conviction was not disclosed.

77. Muriithi Bore, PW11 stated that one day before the General Elections he saw Beatrice Nkatha, Woman Representative Candidate for Tharaka-Nithi County, and two other people dishing out money and bribing voters asking them to vote for TNA candidates. PW11 confessed that he also received a bribe from Beatrice Nkatha, and that at the time he took it, he knew it was an offence under the election laws to do so.

78. Mr. Mithega urged that the Petitioner's position is that those who allegedly committed the offence

of bribery were the 1st Respondent's Agents and they did so for and on behalf of the 1st Respondent. Mr. Mithega urged that the Petitioner however admitted that he did not have any evidence to connect the 1st Respondent with any of the alleged Agents whom he did not even identify. Counsel urged that the Petitioner said that he did not know whether the 1st Respondent had any personal Agents duly appointed pursuant to Section 30 of the Elections Act. Counsel urged that since there is no precise rule as to what would constitute evidence of agency, the Petitioner needed to name the specific persons he considered and believed to be 1st Respondent's Agents and reasons for such belief. Counsel urged that the Petitioner did not show that the acts complained of were done with the knowledge and consent of the 1st Respondent. Counsel urged that there was nothing on record to show that the 1st Respondent had any Agents and in particular those who were allegedly dishing out money in various places.

79. Mr. Mithega drew the court's attention to the evidence of RW6 where he denied the accusations leveled against him by PW 2. Counsel urged that PW 2 in his affidavit alleges in paragraph 5 that RW6 was bribing people at "**Meru Boys in Chiakariga Polling Station**". Mr. Mithega submitted that there is no Polling Station known as "*Chiakariga Polling Station*", only Chiakariga Primary School Polling Station No.119 and Chiakariga Girls High School Polling Station No.120. Counsel urged that for that reason paragraph 5 of PW2's affidavit is ambiguous for lack of appropriate material particulars of the relevant Polling Station the witness is referring to.

80. Mr. Munge on his part submitted that no evidence was tendered by the Petitioner or any of his witnesses relating to the commission of an offence by the 1st Respondent under this limb. Mr. Munge urged the court to note that it was noteworthy that the Petitioner's submissions do not address this limb directly, but in a manner that is indirect or evasive. In view of the afore going Counsel submitted that the Petitioner had failed to prove commission of any offence by the Petitioner for any offence known in Law as envisaged by Section 72 of the Elections Act, within the required standard or threshold as pleaded above.

81. Allegations of bribery are quasi-criminal in nature and should be proved on a standard above balance of probabilities but below proof beyond any reasonable doubt. The Petitioner therefore needed to adduce evidence that was cogent, reliable, exact and unequivocal in proof of the offence alleged. The evidence adduced falls far too short of the required standard.

82. In the case of PW11 Muriithi Bore, he was clear that he saw a Woman Representative Candidate bribing voters, and he confessed that he took a bribe from her. The question is whether PW11 was a credible witness" In Election Petition number 5 of 2013, where the woman alleged to have given PW11 a bribe is the 1st Respondent, (in that it is her election as Women Rep which is challenged), PW11 had a different story to tell. In his evidence in that Petition where he was PW8, he stated:

"PW8 in his affidavit paragraphs 2, 3 and 4, and also in his evidence in court, PW8 testified that the 1st Respondent in person invited people to take money from her and that she had a bundle of Ksh.200/- which she dished out to the people telling them to buy "gachai" and also asking them to vote for her... He admitted taking money for tea. When asked by Mr. Mithega whether he bought the tea, PW8 stated that he bought the tea because he was thirsty. He further went on to say that the tea did not influence his voting and that he did not vote for the 1st Respondent."

83. When dealing with witnesses of this nature it is important to note that they are partisan witnesses, which may exaggerate or even lie in order to assist their favoured candidate. PW11 clearly shifted

positions. In the instant Petition he says that he received a bribe from a candidate. In the **Meru Petition No 5 of 2013** (Supra) he said that he was not being bribed but was given money to buy 'gachai'. The bottom line is he was shifty, evasive and all in all dishonest.

84. It was not enough to show that the candidate alleged to have been seen dishing out bribes was from the same party as the 1st Respondent. There was a need to establish a connection between the alleged offender and the 1st Respondent, for instance any evidence to show 1st Respondent aided or abetted the commission of the offence. The evidence adduced was not sufficient and therefore did not prove that the candidate who gave bribes to influence voting did so for other candidates other than herself.

85. In respect to the evidence of Prof. Mbae, PW4 he did not witness anything himself. He was merely informed. The person who told him, one John Peter was not a witness. That evidence is hearsay and worthless in the circumstances.

86. In respect of Mr. Kijogi Mutegi, PW2 who was the only other gubernatorial candidate; he said that he saw the 1st Respondent's running mate bribing voters in company of many others. Yet he took no action. I was not persuaded that this witness was telling the truth for the simple reason that had he truly seen RW6 bribing voters, he would have reported the matter immediately and one of the consequences would have been disqualification of the 1st Respondent from vying in the election. Besides, PW2 had taken an oath which required him to report offences, malpractices and any irregularities to either the police or IEBC. Failure to do so was an offence. Given these facts, I cannot believe that PW2 could have allowed an offence of that magnitude pass without taking an action.

87. The other point is that RW6 has denied being involved in bribery and has raised issue with the actual place PW2 alleged he saw him. It has not been contested that there was more than one Polling Station having the name Chiakariga. It is not accurate or cogent evidence for PW2 to allege he saw RW6 at Chiakariga, without specifying in which of the more than one Polling Station bearing that name he actually saw him. In those circumstances RW6's evidence that he was elsewhere at the time alleged creates doubt whether indeed PW2 saw him as he claims. That allegation is therefore not proved.

88. In relation to the rest of the witnesses, apart from giving evidence of general voter bribery, and despite giving registration numbers of vehicles used by those alleged to be dishing out bribes, no cogent and exact evidence was adduced to establish a connection between these people and the 1st Respondent. The names of those seen giving out bribes was not given, even though in court they made it very clear they knew the identity of the culprits. The Petitioner was required, not just to prove that bribes were dished out, but that the alleged bribes influenced the voting or the election results. This burden was not discharged. Their evidence was of no evidential weight to establish the claims made. Nothing turns on this issue.

89. The Petitioner at paragraph 33 of his affidavit in support sets out a number of Polling Stations where malpractices were committed by the Respondents. That averment is vague as it does not provide particulars. For instance who is it who committed malpractice and what was the nature of the malpractice" Without these details it would amount to an ambush to expect the Respondents to respond to them.

90. The other allegations of election offences and malpractices under issue number one are pleaded pursuant to section 82 of the Election Act. This section relates to scrutiny of votes. Mr. Munge submitted that no evidence was tendered by the Petitioner or any of his witnesses as relates to commission of any offence under this limb. Counsel urged that it is noteworthy that the Petitioner's submissions filed herein

do not address this limb. None of the other counsels have submitted on this point.

91. Section 82 of the Act does not create an offence. It deals with scrutiny of votes. There is therefore nothing worth considering under this limb.

92. Mr. Agwara has dwelt on section 43 of the Election Act which deals with the participation of public officers in the election process claiming that the 1st Respondent was involved in violation of that provision. Section 43 of the Act provides as follows:

“43(1) A public officer shall not-

(a) engage in the activities of any political party or candidate or act as an agent of a political party or a candidate in an election;

(b) publicly indicate support for or opposition against any party, side or candidate participating in an election;

(c) engage in political campaigns or other political activity; or

(d) use public resources to initiate new development projects in any constituency or county for the purpose of supporting a candidate or political party in that constituency or county

(2) A public officer who contravenes subsection (1) commits an offence and is liable on conviction, to a fine not exceeding one million shillings or imprisonment for a term not exceeding three years or to both.

(3) A person who knowingly aids in contravention of subsection (1) commits an offence and is liable, on conviction to a fine not exceeding one million shillings or to imprisonment for a term not exceeding three years, or to both such fine and imprisonment.

(4) A candidate who knowingly aids in contravention of subsection (1) shall not be eligible to contest in the election.”

93. Mr. Mithega urged that the offence under this section is not classified as an election offence under PART VI of the Elections Act, 2013; secondly, that court should observe that this offence does not apply among others, to a County Governor; thirdly, that when read in its totality, this law is meant to apply in the pre-election period; fourthly, an important ingredient of knowledge of the offence is necessary; fifthly, that the section contradicts the Bill of Rights and in particular Article 38 of the Constitution of Kenya, 2010; sixthly, the section in as much as it purports to limit Political Rights enshrined in Article 38 of the Constitution has failed to comply with the provisions of Article 24 of the Constitution; seventhly, matters relating to this Section are not pleaded in the petition and they are not among the issues for the court's determination at all and it is not among the reliefs sought; and lastly, and in any event, the 1st Respondent was not cross-examined on this matter to test his knowledge of this offence, which is the material ingredient of the offence.

94. Breaches under section 43 of the Act were not part of the issues for determination by the court in this case. As a matter of fact, the 1st Respondent against whom the issue should have been raised, was

it an issue, did not make any mention of that issue in his response and did not deal with it during the trial. Most importantly he was not cross examined on it either. It will be against Rule 11 of the Election Petition (Parliamentary and County Elections) Rules to introduce this as an issue in the final submissions.

95. Even though the court is not obliged to consider or make this an issue at this late stage of the case, never the less I think it is in order to make a comment about it. The circumstances that make it an offence for public servants to participate in elections are set out clearly under section 43 (1) (a) to (d). None of these circumstances were alleged against the 1st Respondent's supporters. In their evidence the said public servants, RW3 and 4 gave details of their involvement with the 1st Respondent as limited to night and secret meetings in private venues. There was no evidence to contradict theirs. That is not the participation envisaged under section 43 of the Act. The 1st Respondent has no liability in that regard and the complaint lacks in basis.

96. I find that the Petitioner has failed to prove that the 1st Respondent committed election offences and engaged in serious electoral malpractices contrary to Section 63, 71, 72 and 82 of the Elections Act.

ISSUE 2. Whether the 2nd and 3rd Respondents conducted the elections for Governor for Tharaka-Nithi County in an irregular, unlawful and unfair manner with the intention of denying the Petitioner his right to be elected as the Governor thereof"

ISSUE No. 8. Whether or not the irregularities if any were so substantial as to affect the results declared by the 2nd and 3rd Respondents"

87. The Petitioner has complained of various breaches and non compliance of the electoral laws by the 2nd and 3rd Respondents and the Officers of the 2nd Respondent. The Petitioner has to show that not only was there non compliance or breaches of electoral laws by the two named Respondents and their Officers, but that the non compliance with the law affected the validity of the elections.

88. The Petitioner further states that the 2nd Respondent breached election Regulations by counting, collating and tallying votes in an opaque manner and in the absence of the Petitioners Agents and the same was therefore not witnessed as required by law and the results declared thereof were on the basis of unsigned Form 35 and 36 contrary to law. The Petitioner further averred that the election results as read by the 2nd and 3rd Respondents were inconsistent as there were wide disparities on the votes cast and the announced results and that in some Polling Stations, the number of votes cast were more than the number of registered voters which discrepancies were designed to favor the 1st Respondent.

89. The Petitioner's case was that Regulations 62 (1) and (2) and 74 of the Elections (General) Regulations 2012 obligated the 2nd Respondent through its Presiding Officers to admit into every Polling Station not more than one agent for each candidate or political party. He contends that the 2nd Respondent disregarded this Regulation first because it irregularly and unlawfully denied entry and declined to admit a large number of the Petitioner's Agents into various Polling Stations; secondly showed favoritism by admitting two Agents of the 1st Respondent to every Polling Station during the said election within Tharaka-Nithi County. The Petitioner contends that the 2nd Respondent's said acts were deliberate and denied him a free, fair and transparent election.

90. Mr. Agwara submitted that under Article 86 of the Constitution, the 2nd Respondent is mandatorily

obligated to ensure that in every election:

- a. **whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent;**
- b. **the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each Polling Station;**
- c. **the results from each Polling Stations are openly and accurately collated and promptly announced by the returning officer; and that;**
- d. **appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safe keeping of election materials.**

91. Mr. Agwara urged further that Regulations 62 (1) and (2) and 74 of the Elections (General) Regulations 2012 obligated the 2nd Respondent through its Presiding Officers to admit into every Polling Station not more than one Agent for each candidate or political party. He urged that the 2nd Respondent disregarded this Regulation and declined to admit a large number of the Petitioner's Agents into the various Polling Stations, which act the Petitioner contends was deliberate and denied him a free, fair and transparent election. Mr. Agwara urged that the Petitioner provided sufficient evidence confirming that his Agents were irregularly and unfairly denied the opportunity to oversee the elections as required under Regulations 62 (1) and (2) and 74 of the Elections (General) Regulations 2012. Counsel urged that this action allowed the 2nd Respondent to manipulate the election results and the Petitioner is justified to so state as the 2nd Respondent provided no reason why the Petitioner's Agents were barred from participating in the process.

92. Mr. Mithega for the 1st Respondent urged that Election Agents are appointed under Section 30 of the Elections Act, 2011 which provides:

“30(1) A political party may appoint one agent for its candidates at each Polling Station.

(2) A candidate nominated by a political party may appoint an agent of the candidate's choice.

(3) An independent candidate may appoint his own agent.”

93. Mr. Mithega submitted that in cross-examination, the Petitioner stated that he had personally selected and appointed his Agents for the 569 Polling Stations, and had given them letters of appointment. Counsel urged that this meant that he appointed them pursuant to Section 30(2) of the Elections Act, 2011. Mr. Mithega urged that since the Petitioner failed to attach a copy of a list of his

Agents, letters of appointment, Oaths of Secrecy, and/or any other appropriate document in support thereto; and since he failed to give full particulars of the Agents who were allegedly barred from representing him; since he failed to give the relevant IEBC Officers and the names of the Polling Stations concerned, then he did not prove the allegations.

94. Mr. Munge urged that the issues the court should address under this limb was firstly whether the 2nd and 3rd Respondents conducted the elections in an, Irregular, Unlawful or Unfair manner. Secondly, whether the 2nd and 3rd Respondents had the intention of denying the Petitioner his right to be elected as the Governor. Counsel's submissions were that there was no credible evidence by the Petitioner or any of his witnesses to prove the issues raised herein within the required standards or threshold. To the contrary, counsel urged, the 2nd and 3rd Respondents' witnesses testified how the elections were undertaken without any negative or bad intention against the Petitioner or any of the candidates in the gubernatorial elections in Tharaka-Nithi County.

95. Mr. Munge urged that the Petitioner's submissions that the 1st Respondent's witness, Mr. Njage Mburia, RW1 testified that he sent two Agents to every Polling Station and that they were allowed into the Polling Stations and that hence purports this was an act of favourism; Mr. Munge submitted that the Petitioner's submissions on this aspect was speculative and not credible as it is not pleaded in the Petition and the Petitioner appears to be on a fishing expedition for evidence to support the Petition.

96. The Petitioner contends that the 2nd and 3rd Respondents conducted the elections in an irregular, unlawful and unfair manner with the intention of denying the Petitioner his right to be elected as the Governor of Tharaka-Nithi County. The burden lies with the Petitioner to adduce cogent and credible evidence to prove every allegation made. The ambit of that proof was discussed by the Supreme Court in the case of **RAILA ODINGA VS IEBC** case, supra. I have quoted it within the judgment but I will repeat it here for ease of reference. The Court held, inter alia 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.”

97. In **Malindi, Election Petition No. 6 of 2013, Rishad Hamid Ahmed Amana –vs- Independent Electoral and Boundaries Commission & 2 others**, it was held that:

“A Petitioner is not only required to establish that there were irregularities which were committed during the elections, he must also establish that such irregularities (non-compliance with the law) were of such magnitude that it affected the outcome of the results. This is what is referred to as the material test”

98. The particulars of the Polling Stations and relevant IEBC officials where the alleged favoritism and non compliance took place were not given. The Petitioner gave a rough estimate of a figure of 156 Agents he asserts were not allowed into some Polling Stations by some IEBC officials. The Polling Stations and the IEBC Officials concerned were both not disclosed. It was not enough to make allegations and state facts. The Petitioner ought to have adduced evidence to support the allegations and facts.

99. During cross examination particularly by Mr. Mithega, the Petitioner was shown various Forms 35 duly signed by several Agents and he could not confirm whether or not his Agents were among those listed as having signed the Forms. He said that he could not tell at a glance whether any of them were his Agents since he did not annex his list of Agents, neither had he carried it to court with him on that day. He went further to admit that it was possible that he was represented in the Polling Stations. He admitted he did not have any documentary evidence to prove that his Agents were barred from representing him. He further confirmed that none of his affected Agents had sworn affidavits in support of these allegations.

100. I find that the allegations of unlawful and irregular denial of entry to Petitioner's Agents into various Polling Stations were not proved as required or at all.

101. The Presiding Officer has discretion but he is not obliged to allow more than one per party or candidate into a Polling Station. This is my understanding of Regulation 73(3) of the Elections (General) Regulations which provides:

“A presiding officer shall not be obliged to admit more than one agent of any political party, candidate or referendum committee, as the case may be, to the counting venue.”

102. Even if the Petitioner did not have Agents in some Polling Stations, that *per se* does not affect the integrity of the election unless evidence to prove otherwise is tendered. Regulation 62(3) of the Elections (General) Regulations stipulates that :

“The absence of agents shall not invalidate the proceedings at a polling station.”

103. The Petitioner has failed to adduce material evidence to prove that his Agents were denied entry into Polling Station, and that the failure to allow them that access significantly affected the results of the election. The Petitioner needed to prove that his Agents had accreditation to enable them gain entry into the Polling Station. There is evidence which emerged that the Agents denied entry to the Polling Stations did not have the necessary accreditation required by IEBC to access these Stations. There was evidence that some had letters of appointment from more than one political party. The more reason cogent and credible evidence was required to prove that despite having all the necessary certification the 2nd Respondent denied entry to Polling Stations to the Petitioner's Agents.

104. The Petitioner alleged that his Agents were denied Forms 35 and 36. Mr. Agwara submitted that while the Petitioner could not obtain any Forms 35 or 36 the 1st Respondent's Agents were given the two Forms and urged that this further confirmed that the elections were not free and fair.

105. Mr. Munge urged the court to note that the Petitioner failed to call his accredited Agents or Party Agents to testify before this Court to substantiate these allegations but instead he relied on “agents of other parties” though their position as agents was not proved. Counsel gave the list of the Agents who testified on behalf of the Petitioner as the following:

- (i) Amram Muthee Njoka – Chief Agent of Democratic Party;**
- (ii) Mutegi Francis Kijogi – Candidate on Wiper Party;**
- (iii) Ishmael Mwani Kamenyi – County Agent on Wiper Party;**
- (iv) Elias Mwenda Nthiiri – Agent of Democratic Party;**
- (v) Prof. Lawrence Mbae – Agent of CORD;**
- (vi) Franklin Kirihi Mwathi – County Coordinator for Wiper Party;**
- (vii) Justin Gitonga Mbaka – Not an agent but a supporter;**
- (viii) Mr. Njeru Nkoroi – Not an agent but alleged witch;**
- (ix) Murithi Bore – Agent of Democratic Party;**
- (x) James Murithi Nanua - Agent of Democratic Party;**
- (xi) Oswald Nyaga Raini – Agent of Unity Party of Kenya;**
- (xii) Humprey Gitonga Murungi – Agent of Safina Party;**
- (xiii) Dereba Njeru Peter – Brother to the Petitioner and Chief Agent of Unity Party of Kenya;**
- (xiv) Grace Wangechi – Coordinator of Democratic Party.**
- (xv) Gillian Karimi Nyaga – Agent of Democratic Party.**

106. Mr. Munge urged that from the above list of witnesses who testified on behalf of the Petitioner only two (2) witnesses claimed to be his Agents or those of his party, Unity Party of Kenya (“UPK”)[PW5 and 8]. Counsel submitted that the evidence of all the witnesses who alleged to be Agents in the elections was not credible or proved within the required standards, being above a balance of probability, as the onus was on the Petitioner to attach to their affidavits their letter of appointment as Agents or badges to show they were accredited Agents, but that he failed to discharge the said burden.

107. Mr. Mithiga on his part sought to demonstrate from letters annexed by the Petitioner as proof he sought election Forms from the 2nd Respondent after the elections, that contrary to his contention, the Petitioner had Forms 35 and 36. I have considered his submissions on that point.

108. The very first letter written by the Petitioner or his party as per the annexed letters is the one

dated 12th March, 2013. This letter requests for **“Copies of Tallying Sheets for Tharaka Constituency and Tharaka-Nithi County Code Numbers 062 And 013 Respectively”**. The second letter is addressed to the Returning Officer, Chuka-Igambangombe Constituency by the parties County Chief Agent Mr. Edwin Dereba Njeru Peter (PW 5). It is dated 14th March, 2013 and requests for **“Form 36 for the gubernatorial election in Chuka-Igambangombe Constituency.”** The next letter is dated 15th March, 2013. It **“Requests for Copies of Tallying Sheets for Maara and Chuka-Igambangombe Constituencies in Tharaka-Nithi County Code Numbers 060 And 61 Respectively”**.

109. Having scrutinized these letters, it is very clear that at no point in time did the Petitioner or his Agents request to be supplied with Forms 35 for all the Polling Stations in Tharaka-Nithi County or at all. The only reasonable explanation for this is that they did not require the said forms for reason they already had them. Furthermore these letters contradict the Petitioner's that he and his Agents were not given copies of Forms 35 at all. The only logical conclusion one can reach given these facts is that the Petitioner did not ask for Forms 35 because they had them. Secondly, they did not call for Forms 36 for Maara and Tharaka Constituencies as well as Form 36 for Tharaka-Nithi County at all for the same reason, that they had them. I do not believe the Petitioner's evidence that he was denied these Forms.

110. Mr. Agwara submitted that the Petitioner tendered evidence confirming that the 2nd Respondent through its Presiding Officers allowed Agents of the 1st Respondent's party to assist illiterate voters to vote contrary to the express requirement of Regulation 72 (1) and (2) of the Elections (General) Regulations 2012 which expressly excludes Agents and/or Candidates from assisting such voters to vote.

111. The only witness who testified concerning this point was Humphrey Gitonga Muriungi (PW6), who was a Polling Agent for the SAFINA PARTY at Kiarugu Polling Station. He deposes that only the TNA Agent at that Polling Station was allowed to assist the disabled and illiterate voters. He deposed that the said Agent tore several ballot papers and alleged he did so in instances where the challenged voter voted for any other party except TNA candidates.

112. The evidence of this witness was devoid of necessary detail to assist the court determine whether from where he was seated, he could hear the conversation between the alleged Agent and the alleged voters. Secondly no distances were given of the distance he was from the Agent and voters. Thirdly, he does not say why he concluded that the person who was allegedly assisting voters was a TNA Agent and on what basis"

113. Regulation 72 of the Election (General) Regulations provides that a voter who is unable to vote on their own shall be assisted by a person of their free choice who shall not be a candidate or Agent and where the voter is not accompanied, then the Presiding Officer shall assist in the presence of the Agents.

114. There was evidence that party Agents were seated a far distance from the voting booths, so that all they could do was see but not hear clearly conversations going on at the voting booths. The court cannot therefore access independently whether it was possible for this witness to know what was going on between the voter and the person assisting, and therefore whether he really knew to what extent the voter was assisted and whether there was interference.

115. It is also unbelievable that the witness remained calm and raised no issues if at all he saw an Agent of a political party interfering with voters and ballot papers. This was an Agent who had been taken through training and therefore was expected to know which acts constituted an offence under the electoral laws. He wants the court to believe that he witnessed commission of three electoral offences and did not do anything. He should also have known that failure to report offences and malpractices was

an offence in itself.

116. I fail to comprehend that allegation by PW6 considering that he had been appointed by a party to take care of the interests of the party. He also had the duty to ensure that voters exercised their right to vote in candidates of their choice without interference. He knew he was to ensure that the integrity of the elections was observed and preserved, and where it was not, he was expected to raise the issue with the necessary authority. I was not convinced by the evidence of PW6 that any political party's Agent was ever allowed to assist voters and interfere with the exercise of their constitutional rights of voting for the candidate of their choice, free of intimidation or interference.

117. Mr. Agwara urged that contrary to Regulation 76 (3) of the Elections (General) Regulations 2012, the Presiding Officers did not enter the results in a Tallying Sheet Form 33, set out in the Schedule and required by the Regulations. Counsel urged that the said Form 33 in which the results were required to be entered after counting were designed in such a way that it is hard to alter the results once entered, as opposed to Form 35 which could easily be doctored once the results are entered therein.

118. Mr. Mithega for the 1st Respondent submitted that Forms 33 are Electoral Tallying Sheets and that there is no Regulation that obliges the IEBC to give copies of these Forms to the candidates or their agents. The Forms 33 are provided for under Regulation 76(3) which states:

“The Presiding Officer shall record the count of the vote in a tallying sheet in Form 33 set out in the schedule”

119. It is trite law that the Petitioner had the burden to prove that failure to comply with the law, rules or regulations affected the integrity and outcome of the elections, and not just demonstrate lack of compliance. In regard to Form 33, the Petitioner needed to show in what way failure to fill them affected the final result of the election. This Form was a Tallying Sheet and was provided for to enable the 2nd Respondent carry out its tallying of the results. It is not an accountability document as is Form 34 for the Presidential election, or Form 35 and 36 in the case of the other elections. It is not one of the Forms required to be signed by Candidates or their Agents. Lack of the Form has no effect on the results of the election. I find that the Petitioner did not satisfy the test and in the circumstances I find the allegation without basis.

120. Mr. Agwara urged that Regulation 82 of the Elections (General) Regulations 2012 obligated the Presiding Officers to electronically transmit the results to the Returning Officers prior to the delivery of the actual results. It is not disputed that the electronic transmission failed and as such the transmission was done manually. Counsel urged that though it is not an issue that the electronic transmission method failed, the issue is that the Presiding Officers having no reason whatsoever, refused to enter the results in the tallying Sheet Form 33 as required by law and decided to deliberately enter the same in Forms 35 which could easily be altered and/or doctored. They then transported the said results alone to the Returning Officers without any involvement by the Petitioner's Agents.

121. The Petitioner's advocate submits that in the process of transmitting the results, the 2nd Respondent altered and/or doctored the results as recorded in Form 35 to favour the 1st Respondent and this explains why the Forms 35 were full of alterations and majority of them were not witnessed by the Petitioner's Agents.

122. Mr. Agwara urged that contrary to Regulation 83 of the Elections (General) Regulations 2012, the Returning Officers failed to tally the results as required in law, and did not make the entries in Form 35 as required by law therefore allowing the Presiding Officer to make the said entry and doctor the results as contained in Forms 35 contrary to the express requirements of Regulation 83 (1) (a), (b), (c) and (d). Counsel urged that the requirement that the Returning Officer Fills Form 35 was put in the Regulations pursuant to the provisions of Article 86 (c) and (d) of the Constitution and the compliance thereto was mandatory to ensure a free, fair and transparent election. Counsel urged that contrary to the requirements of Regulation 87 of the Elections (General) Regulations 2012, the Constituency Returning Officers testified that they did not forward to the County Returning Officer the results in Form 38 as required under Regulation 87(1)(b).

123. Mr. Mithega on his part urged that the declaration of results Forms are filled or completed after the poll is closed and the votes are counted in a Polling Station. Counsel urged that if there are failures in the correct filling or signing of the declaration of result Forms in any Polling Stations that could be a ground to justify recount. Counsel submitted that such failures would not affect the result of the election because such a failure does not invalidate the votes otherwise properly cast.

124. In regard to the failure of the electronic system and the impact to the entire electoral process, I am bound by the Supreme Court of Kenya in the case of **Raila Odinga vs. The Independent Electoral and Boundaries Commission and 4 others, SC Petition No.5 Of 2013**, supra, where the Court had this to say this about use of technology:

“from case law, and from Kenya’s electoral history, it is apparent that electronic technology has not provided perfect solutions. Such technology has been inherently undependable, and its adoption and application has only been incremental, over time. It is not surprising that the applicable law has entrusted discretion to IEBC, on the application of such technology as may be found appropriate. Since such technology has not yet achieved a level of reliability, it cannot as yet be considered a permanent or irreversible foundation for the conduct of the electoral process. This negates the Petitioner’s contention that, in the instance case, injustice or illegality in the conduct of election would result, if IEBC did not consistently employ electronic technology. It follows that the Petitioner’s case in so far as it attributes nullity to the presidential election on grounds of failed technological devices is not sustainable.”

125. I have already dealt with the issue of Agents and found that there was no evidence to prove that the Petitioner Agents that were denied entry to Polling Stations had accreditation. This is because there was no List of Agents annexed. The Petitioner cannot be heard to complain that his Agents were denied entry to Polling Stations. If they were not there, then they could not have signed Form 35 and 36. Since he did not call any of the so called Agents, the Petitioner’s contentions remained mere allegations without proof.

126. The Petitioner needed to adduce exact, accurate and cogent evidence to demonstrate how Form 35 was easier to manipulate than Form 33. He needed to adduce evidence to show where the mischief was, and how the non-compliance was applied by the Respondents to unfairly and irregularly tamper with or alter the election results in favour the 1st Respondent, and how the non-compliance affected the results of the election and the integrity of the elections. This he failed to do.

127. In regard to the breaches of failing to fill the Forms required in the Regulations, it is my view that

unless evidence is led to show that the omission affected the results, or the omissions was deliberately orchestrated to create a loop hole in order to facilitate a fraud or illegality in relation to the results of the election to the disadvantage of any of the Candidates to that election, or was meant to affect the integrity of the elections. Where no evidence is adduced to show that the omissions were deliberate, calculated or created with an ulterior motive that was illegal, unlawful or unfair, then the court must find that the 2nd Respondent acted in good faith, which I hereby do.

128. Mr. Agwara challenged the conduct of the 2nd Respondent's Officers in the manner in which they conducted the elections and tallied the results.

129. Mr. Agwara submitted that it is very suspicious that the 3rd Respondent announced the Tharaka-Nithi County Election Results sat 11pm on 6th March, 2013 in the presence of three respective candidates who were all members of the same party and were allegedly the winners in the said election for Governor, Senator and Woman Member of Parliament. And further the County Returning Officer testified before Court that he was not sure whether or not he signed the final results

130. Regarding the allegation that the County Returning Officer admitted that he was not sure whether or not he signed the County Form 36, a copy of the said Form 36 is annexed to the Petitioner's affidavit as annexure "PM1". It is duly signed by the 3rd Respondent. That should put that issue to rest.

131. Regarding announcement of the results in the presence of the winners in three of the elective posts being suspicious, the 3rd Respondent was not shown to have had any control over the movement of Candidates at the time he announced the results. There is no evidence that only the TNA Candidates were present in the hall at the time. It has also not been shown how this affected the results or integrity of the elections. As Mr. Agwara submitted it was a mere suspicion and I find it has no basis whatsoever, and that in any event it has no bearing to the end results of the elections.

132. Mr. Agwara urged that the Constituency Returning Officer for Chuka- Igambang'ombe Constituency, Mr. Wario RRW2, testified that he announced the results to the candidates and later 'doctored' the same after the candidates had left. Counsel submitted that the witness alleged that the doctoring was done after he established a mistake in the results tallying, but that he did not inform the court how he established the said mistake and under what circumstances the Form 36 attached to his Affidavit only showed the Result for the 1st Respondent who is the only candidate who signed the same. Counsel urged that the altering of the result was done to suit the 1st Respondent and consequently deny the Petitioner a free and fair election.

133. Mr. Munge submitted that it is noteworthy that the allegations made against Mr. Wario were not proved by the Petitioner or any of his witnesses to the required standard or threshold. Counsel urged that the submissions presented to Court by the Petitioner's counsel have, with respect, gone into facts or allegations that were not presented or adduced before the Court by the Petitioner or any of his witnesses. He urged the Court to disregard all the allegations.

134. Mr. Wario Ibrahim Ali, RRW2 was the Constituency Returning Officer for Chuka-Igamban'gombe Constituency. He is accused of doctoring results of the Constituency where he was overseeing. In his evidence in Court, RRW2 testified that after he read the results of the gubernatorial election at 4am, later in the morning he decided to counter check the results in Form 36 against Form 35 and he found there was an error. He testified that the error affected the three Candidates. He gave the breakdown of the error as follows. RRW2 stated that after the correction the 1st Respondent got less votes by 47, the Petitioner got less by 968 and Francis Kijogi got less by 26 votes. Mr. Wario stated that the final results were not fundamentally affected because the Petitioner, who was leading in the Constituency got 40,

153 votes while the first runners up, the 1st Respondent got 8,400. He testified that since the margin between the first two candidates was 31, 753, the error in issue was of no consequence.

135. I find that the complaint by the Petitioner, that RRW2 doctored the results is not proved. RRW2 has demonstrated why he made the correction, and has shown that the error was not caused by him, but due to human error. He stated that the error affected all three Candidates. RRW2 gave the explanation that mistake may have occurred due to the failed electronic system, the resultant delay of three days between the Election Day and the day results were announced, and the fatigue IEBC Officials suffered. Having considered the mistake or error in issue, the extent to which each Candidate was affected by it, and the lack of material difference to the margin of the overall results, I am satisfied that there was no evidence of doctoring, and that in any event, the error did not fundamentally affect the results. As a matter of fact, the winner in this Constituency was the Petitioner by over 30000 votes. The error involved a pittance 1041.

136. Mr. Agwara urged that it was interesting to note that while the Constituency Returning Officer for Chuka-Igambang'ombe Constituency, Mr. Wario, RRW2 testified that he changed the results in Form 36 presented before Court, the County Returning Officer, Mr. Mucheru, RRW4 testified that he did not see any such changes in the election results for Chuka- Igambang'ombe. Mr. Agwara urged the court to find that the results as announced by the County Returning Officer were completely different to those announced at the Chuka-Igambang'ombe Constituency level.

137. I have already found that the errors involved in Mr. Wario's Form 36 were explained, were topographical in nature, and were of no consequence to the final result. They were also not deliberate, fraudulent or intended to assist any Candidate. What Mr. Agwara is challenging is whether the Constituency Returning Officer should inform the County Returning Officer of changes, alterations and or corrections made while filling Form 36 at the Constituency Tallying Centre.

138. Part of the duty of the 2nd Respondent is stipulated under Article 86 of the Constitution which provides that:

“At every election, the Independent Electoral and Boundaries Commission shall ensure that—

(b) the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station;

(c) the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and

(d) appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials.”

139. Tallying of results has a Constitutional under pinning and Article 138 (3) of the Constitution takes cognizance of this exercise and reads:

“After counting of votes in the polling stations the Independent Electoral and Boundaries Commission shall tally and verify the count and declare the results”

140. What Mr. Wario did was part of his duty as the Constituency Returning Officer. Accurate collation and tallying of results, including correction of errors before announcing results was part of that duty. Being their responsibility, I do not find it a reasonable expectation that for every mistake or error corrected at every level, the Officer forwarding results to the next Senior Officer must disclose all the corrections made, so long as they can be able to account for the same if required. Besides there is no such a requirement either in the Elections Act, the Rules or Regulations.

141. In answer to this issue I find and hold that the 2nd and 3rd Respondent conducted the gubernatorial elections in a regular, lawful and fair manner and that there was no evidence adduced to show that the 2nd and 3rd Respondents conducted the election with the intention of denying the Petitioner his right to be elected as the Governor.

142. Having said all these, I must say that I went a step further and read Regulation 83 (1) (c). The provision requires the returning officer to fill Form 35. The schedule under the Regulation provides that Form 35 is a declaration of results at the Polling Station. The returning officer is based at the tallying centre not at the Polling Station. I find that there is a conflict between the Regulations and the Schedule there under which needs to be addressed.

143. Forms 35 are completed at the Polling Stations according to the Schedule under the Regulations. The schedule reads **‘DECLARATION OF GOVERNOR ELECTION RESULTS AT A POLLING STATION’**. It is the Presiding Officers who are based at the Polling Stations and who have the information required to complete these Forms. That information is then delivered to the County Coordinator in Form 35 which is an open document; and is accompanied by the parent documents where the data is obtained from sealed in ballot boxes. These other documents include statements, all the ballot papers, whether cast or not, rejected, contested, valid and spoilt, among others. This is clear proof that the Presiding Officer, who is the custodian of all these documents containing the required data to complete Form 35, should fill the said Forms. The Presiding Officer is the Officer accountable for the information contained in all the supporting documents. His role cannot under any circumstances be taken over by any other Officer, apart from of course his Deputy. Form 35 is completed at the Polling Station by the Presiding Officer, and not at the Constituency Tallying Centre where the Coordinators were stationed.

144. I find that the requirement under the Regulation 83, that the Returning Officer should complete the details of Form 35 is not only humanly impossible but also ludicrous. I recommend an amendment to Regulation 83 to remove the absurdity created by that requirement.

145. In conclusion on these two issues (2 and 8) I find that the irregularities if any were trivial, and that they did not fundamentally affect the result of the election. The elections were conducted in a regular, fair and lawful manner.

146. The complaint against Maara Constituency is the subject of issue No. 9 of this Petition. There is no harm dealing with that issue now.

ISSUE No. 9. Whether or not the results in the 10 polling stations specified in paragraph 30 of the

Petitioner's supporting affidavit to the petition were properly counted, tallied and correctly recorded in the Statutory Forms"

147. The 10 Polling Stations mentioned here are all from Maara Constituency. In regard to the Constituency Returning Officer for Maara Constituency, Mr. Agwara submitted that she had more Forms 36 than prescribed under the law. Mr. Agwara urged that the Officer, Ms. Hellen Mutuva, RRW1 testified that she had various Form 36 which she kept on changing while calling others original and others drafts yet there is no provision in the Election Act, the Rules and/or the Regulations allowing for preparation of draft election results as alleged. Counsel urged that the Constituency Returning Officer for Maara confirmed having prepared draft election results and entered the same in Form 36, which she signed and gave out to the Agents to sign as the results for the Governor election in Maara. He urged that she then later changed these results and came to court with a totally different result, whose entries depart from the once she had originally signed and given out to some of the Agents to witness. Counsel urged that this action is not only irregular and unlawful, but confirmed the manipulation of results at the Constituency Tallying Centre.

148. Mr. Agwara submitted that the fact that these Returning Officers who were charged with ensuring a free and fair election at the Constituency level could easily and readily alter the results confirms that the results as recorded in the various Forms 35 and 36 were altered to favour the 1st Respondent.

149. Mr. Munge submitted that the 2nd Respondent's witness, Ms. Hellen Mutava, admitted in Court that one of the clerks manually prepared a draft Form 36 as she was announcing the results using Forms 35 at the Constituency Tallying Centre, as they were being presented by Presiding Officers, and at the same time another clerk was entering the same results in the computer. Counsel urged that these were being done simultaneously without any ill motive, and that she explained the process at the Tallying Centre while tallying results from Polling Stations and how she eventually used the typed Form 36 to announce the results for Maara Constituency.

150. Mr. Munge continued to submit that Form 36 was what the Returning Officers use to announce the final results and the votes cast for each candidate in an electoral area, and thereafter declare who the winner is in an election. Counsel urged that based on that background the first set of results or what was referred to as the draft Form 36 by Ms. Mutuva cannot be considered or titled Form 36. Counsel urged that the reason for that was "*The draft Form*" which was handwritten was not used by the Returning Officer to declare results in Maara Constituency and as such it does not qualify to be referred to as Form 36. Mr Munge urged that besides it was handwritten whereas the others were typed. This was affirmed by the witness, Ms. Hellen Mutava, as she clearly testified on cross-examination that the typed Form 36 was what she used to announce and declared who the winner was.

151. Mr. Mithega submitted that the Petitioner did not offer any evidence to prove that the election in the 10 Polling Stations listed in paragraph 30 of his affidavit were not properly counted, tallied and correctly recorded in the Statutory Forms. During cross-examination, the Petitioner was thoroughly led through Forms 35 for those polling station and Form 36 thereof and revealed that there was no material irregularities/anomalies that would substantially affect the results declared in those Forms. Counsel urged that this issue ought to be determined in favour of the Respondents.

152. Just to start at the last sentence in Mr. Agwara's submission, the mere fact results were altered is not proof that they were so altered to favour the 1st Respondent. The Petitioner had the burden to

adduce evidence to prove this. We do not have such evidence before court. In the case of Chuka-Igamban'gombe from the evidence adduced, all Candidates were affected, and it cannot be said that the alteration favoured any particular Candidate.

153. The evidence of Ms Mutuva was that she counter checked the manual Form 36 which an IEBC Clerk had filled using Form 35, and realized that it had a mistake. Ms. Mutuva testified that she checked the Computer Form 36 and corrected it before printing the final results. Ms. Mutuva stated that she did not announce the results until she printed the final copy. Ms. Mutuva clarified that the role she played was to ensure that the entry in Form 36 was the same as Form 35, and that in case of disparity it was the Form 36 which was rectified. The court noted that indeed the Form 36 which was produced in court had the signatures of Agents which proves that this was the Form 36 that was the copy used to declare results. It is important to reiterate that the actual results announced by Ms. Mutuva are not contested or challenged.

154. Ms. Mutuva referred to paragraph 7 of her affidavit where she gives details of the errors corrected in the ten Polling Stations in issue. She said that the same were merely topographical, and that they did not affect the results. Paragraph 7 was sworn in answer to paragraph 30 of the Petition where a table was provided which has been included in the judgment at an earlier stage.

155. In response to each of the discrepancies noted, Ms. Mutuva deposed that they were topographical errors, that it affected the number of those registered to vote, and finally that it did not affect the final result. The witness also demonstrated that the number of registered voters as recorded did not exceed the votes cast in any of the 10 Polling Stations in issue. I find the explanation given by Ms. Mutuva reasonable. The error was the number of registered voters in 10 out of 165 Polling Stations. In total the discrepancy involving the Governor's election in terms of numbers of votes was 300. That number was so insignificant that it could not make any difference to the result of the election especially considering that the margin between the winner and the runner up was over 15000 votes.

156. Also noteworthy is the fact that the Forms 35 in issue in paragraph 30 of the Petition were all signed by Agents across the board without any objections being made.

157. Ms. Mutuva was taken through Forms 36 annexed to the Petition, and Form 35 (availed to the Parties advocates before the trial started) and against the averments under Paragraph 30 of the Petition. After that exercise, it was clear to the court that the discrepancies complained of in that paragraph were trivial and topographical in nature and that they do not fundamentally affect the results of the election. There was nothing adduced in evidence to suggest that they were deliberately made to perpetrate irregularity, unlawfulness or unfairness against any Candidate. They do not create any doubt as to the integrity of the election or the validity of the results.

ISSUE No. 3. Whether the 1st Respondent was validly and lawfully elected as the County Governor for Tharaka - Nithi County in the election held on the 4th March, 2013 due to his participation in electoral malpractices as alleged"

158. Mr. Agwara submitted that the Petitioner had proved that the 1st Respondent participated in the electoral malpractices and that therefore his election was not valid and/or lawful as the same was in contravention of Section 43, 63, 64 and 72 of the Elections Act. Counsel urged that the 1st Respondent knowingly and unlawfully engaged public officers in his campaigns which public officers were his

campaign strategists and an integral part of his political endeavours and campaigns contrary to the express provisions of Section 43 of the Election Act.

159. Mr. Agwara urged further that the 1st Respondent engaged in acts of witchcraft, treating and undue influence contrary to Sections 63 of the Election Act, and in voter bribery contrary to Section 64 and 72 of the Elections Act. Counsel urged that the evidence adduced by the Petitioner confirmed that 1st Respondent's involvement in the above acts which involvement invalidated his election as the governor Tharaka Nithi County which election was in any event unlawful.

160. Mr. Mithega on his part submitted that that there is no evidence tendered to question the validity and legality of the election and declaration of the 1st Respondent as the duly election Governor for Tharaka-Nithi county. Counsel urged that there was no single witness who testified against the 1st Respondent on allegations of bribery, communicating with voters, undue influence or at all; and that the allegations of witchcraft were also not corroborated as required and that in any event the confessed witch recanted his affidavit sworn in support of the Petition. Mr. Mithega submitted that the 1st Respondent also gave a tight alibi which did not collapse in the face of the intense cross-examination by the Petitioner's Counsel. Counsel urged that since issue number one failed, this issue also ought to be determined in favour of the 1st Respondent.

161. Mr. Munge submitted that the 2nd and 3rd Respondents called the Constituency Returning Officers for the three Constituencies in Tharaka-Nithi County and they confirmed the results announced in their respective Constituency Tallying Centre. Counsel urged that the 3rd Respondent, Mr. Samuel Mucheru, also testified before Court and explained his role as the County Returning Officer; that he verified the results from the three (3) Constituencies within the County and thereafter announced the final results.

162. Mr. Munge submitted that the 3rd Respondent testified that the 1st Respondent was elected validly and there were no objections or complaints made to him on any of the issues and allegations pleaded in the Petition herein. The 3rd Respondent while being cross examined by the counsel for the Petitioner admitted that there could have been transposition errors during the elections in issue herein due to human errors, fatigue and others due to failure of the electronic system at the material time. He urged that the 3rd Respondent stated that the failure in the electronic system affected all candidates in equal measure, and they were not deliberate at all neither did it affect the eventual results of votes cast for the candidates. As relates to transposition errors or the errors in Chuka/Igambang'ombe Constituency Mr. Munge urged that Mr. Mucheru testified that they affected all candidates in the elections, more so the Petitioner was affected by 950 votes and the 1st Respondent by 47 votes, and that the said errors did not close the margin or gap between the 1st Respondent and the Petitioner so as to affect the will of the people of Tharaka-Nithi County. Mr. Munge submitted that the 2nd and 3rd Respondents expressly admitted areas wherein errors occurred and candidly explained them while confirming that they did not affect the ultimate results and the fact that the 1st Respondent was elected as the Governor for Tharaka-Nithi County.

163. Mr. Munge submitted that he had perused the Petitioner's submissions on this limb and noted, with respect, that the said submissions make allegations and issues that were not tendered in evidence and as such they are extraneous issues. We humbly urge the Court to disregard all such issues as set out in the Petitioner's submissions in that they are new and extraneous.

164. Just to pick up from Mr. Munge's last sentence in his submissions all the issues raised in Mr. Agwara's submissions under this head which are not part of the issues for determination must be disregarded.

165. The answer to this issue is demonstrated in the issues discussed in regard to the manner in which the Presiding and Returning Officers conducted the elections as discussed above. I have considered the evidence which emerged in regard to the 2nd Respondent's Officers. I find that the officers conducted the elections with great challenges experienced by their colleagues across the country. The Biometric machines failed yet so much emphasis had been put on them. The counting, collation and tallying process stretched over days; the Officers were not expected to leave their positions until the exercises were over. I must say it was a stressful time for these Officers. It was therefore not out of the ordinary that towards the end of that exercise some days after it started, the main complaint of the Agents and candidates was that they were rude, indifferent and generally numb to their inquiries. It was a difficult time to all. There shortcoming should be understood against that scenario.

166. In answer to this issue, the court has found that no evidence was adduced to establish that the 1st Respondent, whether personally or through Agents or proxy, participated in electoral malpractices.

ISSUE No. 4. Whether or not there are valid grounds to nullify the election of the 1st Respondent as the elected County Governor for Tharaka – Nithi County; and if so should the elections of the 1st Respondent be nullified"

167. Mr. Agwara submitted that since 1st Respondent participated in the electoral malpractices, his said election cannot be valid and/or lawful as the same was in contravention of Section 43, 63, 64 and 72 of the Elections Act. Counsel urged that the election malpractices the 1st Respondent engaged in were so fundamental and the same cannot be countenanced by a court of law. He urged that the above matters coupled with the election irregularities carried out by the 2nd and 3rd Respondents offer valid and sufficient grounds for the nullification of the election of the 1st Respondent as the County Governor for Tharaka Nithi County.

168. Mr. Mithega submitted that there are no sufficient grounds for the nullification of the 1st Respondent's election because the Petitioner failed to tender any evidence that would warrant the nullification of the said election. Counsel urged that the election of the 1st Respondent reflects the true will and wish of the voters of Tharaka-Nithi County and as such their democratic right to elect a Governor of their choice was properly exercised and it should not be disturbed.

169. Mr. Munge on his part submitted that from a review of the Petition as drawn and filed herein, and the evidence adduced by the Petitioner and his witnesses there are no valid grounds presented to warrant the nullification of the 1st Respondent as the duly elected Governor of Tharaka-Nithi County. Counsel urged that having perused the submissions filed by the Petitioner on this limb he noted that they are, with utmost respect, shallow and that they do not address any facts or evidence to warrant any orders in favour of the Petitioner.

170. This issue was dependent on the outcome of the first, second, eighth, third and ninth issues which I have considered herein above in favour of the Respondents. The answer to this issue is that no valid grounds have been adduced to justify nullification of the election of the 1st Respondent as the elected County Governor for Tharaka – Nithi County.

ISSUE No. 5. Whether the Petitioner is entitled to any of the reliefs sought in this Petition"

ISSUE No. 6. What orders, remedies and declarations the court should make"

171. Likewise under these two limbs (5&6), the court having ruled in favour of the Respondents in all the issues above, the answer to this issue is in the negative.

ISSUE No. 7. Who should bear the costs of this Petition"

170. . I have considered the rival arguments of the counsels to the parties. Rule 36 of the Elections (Parliamentary and County Elections) Petition Rules 2013 provides as follows:

“36 (1) The Court shall, at the conclusion of an election Petition, make an order specifying-

the total amount of costs payable; and the persons by and to whom the costs shall be paid.

(2) When making an order under sub rule (1), the court may-

(a).....

(b) impose the burden of payment on the party who has caused an unnecessary expense, whether such party is successful or not, in order to discourage any such expense.”

171. Costs usually follow the events. In this Petition, it is the Petitioner who has lost her case. It is only fair and just that the Petitioner pays costs to the Respondents pursuant to Rule 34 (1) (a) of the Election Petition Rules. Pursuant to Rule 34 of the Rules, I order that the maximum amount of costs that the Petitioner shall pay to the Respondents is Kshs. 5 million. The 1st Respondent shall be paid a maximum of Kshs. 3 million while the 2nd and 3rd Respondents shall be paid a maximum of Kshs. 2 million. The amount deposited with the court shall remain deposited in court pending the taxation of the costs.

172. **FINDINGS AND CONCLUSION**

Preliminary Point for Determination

A. Paragraphs 3 and 4 of the Petition plead the results of the Election the subject matter of this Petition, the manner in which they were declared, and the date the results were declared. As for Rule 10(1)(e) and Rule 10(3)(b), the grounds on which the Petition is presented and an affidavit made by the Petitioner containing the grounds on which relief is sought and setting out the facts relied on by the Petitioner, are all met as these grounds run through out the Petition and the

affidavit in support, and are the basis upon which the issues for determination were drawn.

B. I find that the requirements of Rule 10 of the Rules are met, and that the Petition as filed is competent.

1. In answer to issue number 1 :

- Bribery was one of the allegations pleaded against the 1st Respondent both in the Petition and affidavit in support, and is the subject of several dispositions by the Petitioner's witnesses and should be considered as one of the issues for determination under issue number one which deals with the question whether the 1st Respondent was involved in electoral offences and malpractice.
- I find and hold that the Petitioner has failed to prove that the 1st Respondent committed election offences and engaged in serious electoral malpractices contrary to Section 63, 71, 72 and 82 of the Elections Act.

2. In answer to issue number 2 and 8

- I find and hold that the Petitioner has failed to adduce material evidence to prove that his Agents were denied entry into Polling Station, and that the failure to allow them that access significantly affected the results of the election.
- I was not convinced by the evidence of PW6 that any political party's Agent was ever allowed to assist voters and interfere with the exercise of their constitutional rights of voting for the candidate of their choice, free of intimidation or interference.
- The Presiding Officer has discretion but he is not obliged to allow more than one per party or candidate into a Polling Station.
- The Petitioner has failed to adduce material evidence to prove that his Agents were denied entry into Polling Station, and that the failure to allow them that access significantly affected the results of the election.
- Under Regulation 62(3) of the Elections (General) Regulations, Even if the Petitioner did not have Agents in some Polling Stations, that per se does not affect the integrity of the election unless evidence to prove otherwise is tendered.
- In regard to Form 33, the Petitioner needed to show in what way failure to fill them affected the final result of the election. This Form was a Tallying Sheet and was provided for to enable the 2nd Respondent carry out its tallying of the results. It is not an accountability document.
- Having scrutinized the letters written to the IEBC , it is very clear that at no point in time did the Petitioner or his Agents request to be supplied with Forms 35 for all the Polling Stations in Tharaka-Nithi County or at all. The only reasonable explanation for this is that they did not require the said forms for reason they already had them. Secondly, they did not call for Forms 36 for Maara and Tharaka Constituencies as well as Form 36 for Tharaka-Nithi County at all for the same reason, that they had them. I do not believe the Petitioner's evidence that he was denied these Forms.
- I am bound by the Supreme Court decision in RAILA ODINGA VS IEBC & others ,supra, in

- regard to the failed employment of electronic transmission of results to the effect
- “Since such technology has not yet achieved a level of reliability, it cannot as yet be considered a permanent or irreversible foundation for the conduct of the electoral process. This negates the Petitioner’s contention that, in the instance case, injustice or illegality in the conduct of election would result, if IEBC did not consistently employ electronic technology. It follows that the Petitioner’s case in so far as it attributes nullity to the presidential election on grounds of failed technological devices is not sustainable.”

Having considered the mistake or error in issue, attributed to Mr. WARIO, RRW3, the extent to which each Candidate was affected by it, and the lack of material difference to the margin of the overall results, I am satisfied that there was no evidence of doctoring, and that in any event, the error did not fundamentally affect the results. As a matter of fact, the winner in this Constituency was the Petitioner by over 30000 votes.

- I find and hold that the errors involved in Mr. Wario’s Form 36 were explained, were topographical in nature, and were of no consequence to the final result. They were also not deliberate, fraudulent or intended to assist any Candidate.
- The Petitioner needed to adduce exact, accurate and cogent evidence to demonstrate how Form 35 was easier to manipulate than Form 33. He needed to adduce evidence to show where the mischief was, and how the non-compliance was applied by the Respondents to unfairly and irregularly tamper with or alter the election results in favour the 1st Respondent, and how the non compliance this affected the results of the election and the integrity of the elections. This he failed to do.
- Regarding the complaint against RRW4, Ms Mutuva Ms. Mutuva was taken through Forms 36 annexed to the Petition, and Form 35 availed to the Parties advocates and later to the Court against the averments under Paragraph 30 of the Petition. After that exercise, it was clear to the court that the discrepancies complained of in that paragraph were trivial and topographical in nature and that they do not fundamentally affect the results of the election. There was nothing adduced in evidence to suggest that they were deliberately made to perpetrate irregularity, unlawful or unfairness against any Candidate. They do not create any doubt as to the integrity of the election or the validity of the results.
- I find and hold that the 2nd and 3rd Respondents conducted the gubernatorial elections in a regular, lawful and fair manner and that there was no evidence adduced to show that the 2nd and 3rd Respondents conducted the election with the intention of denying the Petitioner his right to be elected as the Governor.
- Forms 35 are completed at the Polling Stations according to the Schedule under the Regulations. The schedule reads ‘DECLARATION OF GOVERNOR ELECTION RESULTS AT THE POLLING STATION’. It is the Presiding Officers who have the information required to complete these Forms. That information is then delivered to the County Coordinator Form 35 which is an open document; and is accompanied by the parent documents where the data to complete it is obtained from sealed in ballot boxes. These other documents include statements, all the ballot papers, whether cast or not, rejected, contested, valid and spoilt, among others. This is clear proof that the Presiding Officer, who is the custodian of all these documents containing the required data to complete Form 35, should fill the said Forms. The Presiding Officer is the Officer accountable for the information contained in all the supporting documents. His role cannot under any circumstances be taken over by any other Officer, apart from of course his Deputy. Form 35 is completed at the Polling Station by the Presiding Officer and not at the Constituency Tallying Centre where the Coordinators are stationed.
- I find that the requirement under the Regulations 83, that the Returning Officer should

complete the details of Form 35 is not only humanly impossible but also ludicrous. I recommend an amendment to Regulation 83 to remove the absurdity created by that requirement.

- In conclusion on these two issues (2 and 8) I find that the irregularities if any were trivial, and that they did not fundamentally affect the result of the election. The elections were conducted in a regular, fair and lawful manner.

3. In answer to issue number 9

- The error was the number of registered voters in 10 out of 165 Polling Stations. In total the discrepancy involving the Governors election in terms of numbers of votes was 300. That number was so insignificant that it could not make any difference to the result of the election especially considering that the margin between the winner and the runner up was over 15000 votes.
- I find and hold that it was clear to the court that the discrepancies complained of in that paragraph were trivial and topographical in nature and that they do not fundamentally affect the results of the election. There was nothing adduced in evidence to suggest that they were deliberately made to perpetrate irregularity, unlawful or unfairness against any Candidate. They do not create any doubt as to the integrity of the election or the validity of the results.

4. In answer to issue number 3 I find and hold that the court has found that no evidence was adduced to establish that the 1st Respondent, whether personally or through Agents or proxy participation in electoral malpractices.

5. In answer to issue number 4 I find that this issue was dependent on the outcome of the first, second, eighth, third and ninth issues which I have considered herein above in favour of the Respondents. I find and hold that no valid grounds have been adduced to justify the nullification of the election of the 1st Respondent as the elected County Governor for Tharaka – Nithi County.

6. In answer to issues numbers 5 and 6 Likewise under these two limbs (5&6), the court having ruled in favour of the Respondents in all the issues above, the answer to this issue is in the negative.

7. In answer to issue number 7, I find as follows:

It is only fair and just that the Petitioner pays costs to the Respondents pursuant to Rule 34 (1) (a) of the Election Petition Rules. Pursuant to Rule 34 of the Rules, I order that the maximum amount of costs that the Petitioner shall pay to the Respondents is Kshs. 5 million. The 1st Respondent shall be paid a maximum of Kshs. 3 million while the 2nd and 3rd Respondents shall be paid a maximum of Kshs. 2 million. The amount deposited with the court shall remain deposited in court pending the taxation of the costs.

APPRECIATION

173. Before I end this judgment may I express my gratitude to the advocates to all the parties in this Petition, Mr. Agwara for the Petitioner, Mr. Mithiga for the 1st Respondent and Mr. Munge for the 2nd and 3rd Respondents. They were extremely courteous to the court and to one another throughout these proceedings, and observed time both by their punctuality in court and in the presentation of their respective client's case. They have exercised great patience and understanding throughout the trial process. They demonstrated their great commitment to their clients by tirelessly and professionally prosecuting their respective cases. The counsels were diligent in their research, which is exemplified by the excellent standard and quality of submissions made and authorities cited by them I am indebted to all of you.

FINAL ORDER

174. **In the result this Petition is dismissed with costs as specified herein above.**

175. **I declare that the 1st Respondent was validly lawfully and legally elected as the Governor of the Tharaka-Nithi County in an election that was in the opinion of this court free, fair and transparent with an overwhelmingly big margin of votes. I declare that the results of the election reflect the will of the electorate and the people of Tharaka- Nithi County. Consequently I will not interfere with the results.**

READ AND DELIVERED IN OPEN COURT THIS 27TH SEPTEMBER, 2013.

JESSIE LESIIT

JUDGE.

JUDGMENT READ AND DELIVERED IN OPEN COURT

In the presence of

Mr. Agwara.....For Petitioner

Mr. Mithega.....For 1st Respondent

Ms. Omuko h/b for Mr. Munge.....For 2nd & 3rd Respondents

Jane/Kirimi Court Clerks.

JESSIE LESIIT,

JUDGE.



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