Case Number:	Civil Appeal 40 of 2013
Date Delivered:	21 Feb 2014
Case Class:	Civil
Court:	Court of Appeal at Kisumu
Case Action:	Judgment
Judge:	Daniel Kiio Musinga, Festus Azangalala, Sankale ole Kantai
Citation:	Rozaah Akinyi Buyu v Independent Electoral and Boundaries Commission & 2 others [2014] eKLR
Advocates:	Mr. Mwenesi, counsel for the appellant. Mr. Ragot, counsel for the 1st & 2nd respondents.
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Kisumu
Docket Number:	-
History Docket Number:	Petition 2 of 2013
Case Outcome:	Appeal dismissed.
History County:	Kisumu
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MUSINGA, AZANGALALA & KANTAI, JJ. A)

CIVIL APPEAL NO. 40 OF 2013

BETWEEN

ROZAAH AKINYI BUYU.....APPELLANT

AND

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....1st RESPONDENT

HANSON NJUKI MUGO.....2nd RESPONDENT

JOHN OLAGO ALUOCH.....3rd RESPONDENT

(Appeal from a Judgment and Orders of the High Court of Kenya at

Kisumu (Chemitei, J) dated 4th September 2013

in

KISUMU PETITION No. 2 OF 2013

****

JUDGEMENT OF THE COURT

This appeal arises from the Judgement of H. K. Chemitei, J, delivered on 4th September, 2013 in the matter of the election for the member of National Assembly for Kisumu West Constituency. The 3rd respondent, John Olago Aluoch, was declared by the 1st respondent, Independent Electoral and Boundaries Commission, as the elected member of the National Assembly for the said constituency but that declaration was challenged by the appellant, Rozaah Akinyi Buyu, in the said election petition which the learned Judge found without merit and dismissed. Some 20 grounds of appeal were taken by the appellant in the Memorandum of Appeal drawn by her learned counsel, S. Musalia Mwenesi Advocate, and it is proposed that the appeal be allowed, the election of the 3rd respondent be set aside and costs be awarded to the appellant.

The 1st and 2nd respondents being the electoral body and its Returning Officer, respectively, filed a joint cross appeal where 13 grounds of cross – appeal are taken and it is proposed that the appeal be dismissed, that some of the findings of the learned Judge be set aside and we are also asked to set aside the order capping costs and order that costs be taxed by the Registrar in the usual way. Also filing a cross – appeal was the 3rd respondent, who raised 6 grounds of cross – appeal and prayed that

the cross appeal be allowed, it be found that the petition should have been dismissed on all grounds and we also asked to set aside the order capping costs

Section 85A of the Elections Act No. 24 of 2011 limits jurisdiction on appeals to this Court from the High Court concerning membership of the National Assembly to matters of law only.

The overriding objective of the Elections (Parliamentary and County Elections) Petition Rules, 2013 is to facilitate the just, expeditious, proportionate and affordable resolution of election petitions under the Constitution and the Elections Act. The Court, in exercise of its powers shall seek to give effect to the overriding objective so created.

Rule 35 of the said Rules states that:

“An appeal from the judgement and decree of the High Court shall be governed by the Court of Appeal Rules.”

Various averment were made in the petition filed in the High Court. These ranged from the contention that the election was not conducted in accordance with the Elections Act and the Rules made thereunder and this made the declaration of the 3rd respondent as validity elected to be a null and void. It was therefore prayed that tallying of votes be examined, that ballots be re-counted, that a fresh election be ordered and the Speaker of the National Assembly be duly notified.

All the averments were denied by the respondents in the responses filed in that behalf and the respondents also raised as an issue alleged lack of service of the petition as required by law and alleged failure to deposit security for costs. This is how the 1st and 2nd respondents, on the one hand, and the 3rd respondent, on the other, raised these issues: At paragraphs 24 and 25 of “**the 1st and 2nd respondents' Joint Answer to the Petition”** it was alleged:

“ 24. Without Prejudice to the contents of the Answer to the Petition as set out herein above, the 2nd Respondent shall at the hearing hereof raise a Preliminary Objection to the Petition on the basis that he was not personally served or served at all, with the instant Petition having been in Nairobi with his family at the time of the alleged service as noted in the newspaper

advertisement, and only got to know of the existence of the same from the 1st Respondent and later by a newspaper advertisement which appeared in the Daily Nation newspaper of 24th April 2013 on page 35, which from its wording did not constitute service by advertisement within the meaning of the relevant statute.

25. The 1st and 2nd respondent shall also take a Preliminary Objection to the Petition seeking to have the same struck out on the basis that the Petitioner has not complied with the statutory and mandatory requirement for deposit of security for Costs of the Petition within the time stipulated or at all.”

The 3rd respondent took the issue this way in “Response of the 3rd respondent and Opposition to the Petition”:

“8. The 3rd Respondent asserts that the Petitioner has failed to comply with the mandatory provisions of Section 77 (2) of the Elections Act Cap 24 of 2011, Section 78 (1) and 78 (2) (b) and

Clause 11 (1) of the Elections (Parliamentary and County Elections) Petition Rules 2013 and the 3rd Respondent shall apply under Section 78 (3) of the Election Act Cap 24 for the dismissal of the petition and payment of the 3rd Respondent's costs."

As the issue is in the nature of a preliminary objection we choose to examine it first by reviewing how it was dealt with by the election court.

At a status conference conducted by the learned Judge on 10th May, 2013 the Judge ordered the parties to file and serve applications and affidavits, if any, by 15th May, 2013; a final status conference was to be held on 17th May, 2013 and a time -table for the hearing was set and agreed. It was further ordered that parties raise any issues during submissions and further affidavits were to be limited to what was contained in the petition. The implication of this order therefore meant, *inter alia*, that no party could take any preliminary issue as such issues had to be taken only at the hearing and during submissions.

In testimony given in court on behalf of the 1st and 2nd respondent, the 2nd respondent denied having been served personally or at all with the petition, stating that he only got to know about the same from the 1st respondent. It was therefore prayed in the written submissions, filed in Court on 15th July, 2013 for the 1st and 2nd respondent that the petition be dismissed for lack of any or any proper service on the 2nd respondent.

The 3rd respondent likewise in testimony in court on 23rd July 2013 denied having been served with the petition as required in law and prayed that the petition be dismissed for lack of service on himself as a respondent.

The learned Judge in the said judgement identified as the first issue for determination whether the petition had been served on the respondents. This was a correct approach as the law as relates to election petitions has an elaborate procedure on how election petitions are to be instituted and proceedings conducted therefrom.

Apart from oral evidence on the issue of service of the petition or lack of service the other relevant material before the learned judge was the Affidavit of Service of Ms Millicent Ogutu, an Advocate, sworn on 25th July, 2013 which addressed the issue of service of the petition. Ms Ogutu deponed, *inter alia*, that having received instructions from the Advocate for the appellant to file and serve the petition, she proceeded on 10th April, 2013 to the Kisumu High Court Registry where she paid for and filed the petition whereafter on the same day she proceeded to the offices of Olago-Aluoch & Co Advocates at Alpha House, Kisumu, and served the petition on a clerk of that firm who declined to sign for the same, stating that he had not been authorised by the 3rd respondent to receive the petition. Ms Ogutu deponed also that on the next day, 11th April, 2013 she proceeded to the 1st respondents regional offices at Maseno but found it closed. She obtained a telephone number from the appellant said to belong to the 2nd respondents secretary, one Yvonne, and upon calling the number the said person directed her to one Diana Awuor at the 1st respondents regional offices, Kisumu, and that this last person received the petition documents and signed for the same. Ms Ogutu further deponed that she served the 1st respondent at its headquarters, Nairobi, on 16th April, 2013 and that on 23rd April, 2013 the law firm of the appellant placed an advertisement in the Daily Nation newspaper announcing service of the petition.

As already stated the 2nd and 3rd respondents denied service of the petition upon themselves or at all.

The learned judge correctly, we think, identified the various provisions of law relating to filing and service of election petitions. He was cognisant of and quoted Section 77 (2) of the Elections Act which provides that:

" A petition may be served personally upon a respondent or by advertisement in a newspaper with national circulation."

The learned judge identified the relevant rule as relates to service of an election petition and rendered himself thus:

"29. The Election (Parliamentary and County Elections) Petition Rules 2013 makes it mandatory. It states in Rule 13 (1), that "An election petition shall be served by the petitioner on the Respondent by:-

(a) direct service or

(b) Publication in a newspaper of national circulation.

30. These are the two options provided under the law. In the case of Kibaki v Moi (2000) 1EA. 117 direct service means service upon the respondent directly and not through an agent or proxy.

31. In the ordinary service as provided by the Civil Procedure Rules Order 5 Rule 8, Service can be effected upon an agent who is empowered to receive on behalf of a party. On the contrary election petitions and its rules are distinct, clear and precise.

32. From the case at hand it is evident that the 2nd and 3rd respondent were not directly available for service. There is no effort exhibited by the petitioner that she made to ensure that they were served directly. The petition intended for the 2nd respondent was left at the Kisumu Branch Offices whereas that of the 3rd respondent was left at his law firm.

33. The option that was left was for the petitioner (sic) to be served through newspaper advertisement. Rule 13 of the Election (Parliamentary and County Election) Petition Rules 2012 (4) provides:-

"Where a petition is served by publication in a newspaper as provided under Sub Rule 2 (b) and 3 (c), the advertisement shall be sufficient if it-

(a) Is in Form EP3 set out in the First Schedule and contains, as a minimum, the details required in that Form.

(b) Is of, at least, font size twelve and

(c) Is captured in dimensions of not less than ten by ten centimeters".

34. On perusal of the newspaper advertisement by the petitioner the same in my considered opinion is not an advertisement as envisaged by the above quoted rules. What is exhibited is a notification to the parties that the petition as served upon them and the documents are in their respective offices.

35. Having found that no service was effected upon the 2nd and 3rd respondent should the petition be disallowed on this ground as prayed for by the respondents"."

We may add that the provision on how election petitions are to be served upon a respondent has

constitutional footing because Article 87 (3) of the Constitution of Kenya, 2010 provides that service of a petition may be direct or by advertisement in a newspaper with national circulation, language borrowed directly by the Elections Act, which we have already shown in this judgement.

The learned judge, having found as fact that the election petition was not served on the 2nd and 3rd respondents personally or by advertisement, proceeded to examine provisions on service of civil process in the Civil Procedures Act and held, *inter alia*, that although service of the petition was bad in law it did not go to the root of the petition and could be waived as an irregularity which, in his view, could not nullify the petition.

In urging the cross appeal before us on the issue of service of the petition, **Mr. Ragot,** learned counsel for the 1st and 2nd respondents, faulted the learned judge for relying on civil law when, according to counsel, election petitions were a creature of a special jurisdiction where ordinary civil process was inapplicable. On whether the 1st and 2nd respondents had acquiesed and waived rights by filing responses and participating in the proceedings (as held by the judge) counsel submitted that it was the judge who ordered at status conference that all issues be taken during submissions and that the 1st and 2nd respondents had in effect participated in the proceedings in protest or without prejudice to their rights to take up the issue of lack of service of the petition. The 3rd respondent, who appeared in person in the High Court and also before us, on the cross appeal submitted that there was no service on himself as envisaged in law or at all.

Mr. Mwenesi, learned counsel for the appellant, submitted on the issue of service of the petition that because the respondents were aware of the filing of the petition and fully participated in the proceedings, the issue of service of the petition could not be brought up as it was too late for the respondents to do so.

Section 20 of the National Assembly and Presidential Elections Act Cap 7 Laws of Kenya (now repealed) on the issue of election petitions provided in mandatory terms that a petition to question the validity of an election had to be presented and served within 28 days after the date of publication of the result of the election in the Gazette. This created practical difficulties because respondents could go into hiding or travel abroad for the sole purpose of avoiding service within the said time-lines created in law. This is the reality that must have informed legal changes that were introduced through Act No. 7 of 2007 which brought in a new subsection which provided:

“(iv) where after due diligence it is not possible to effect service under paragraph (a) and (b), the presentation may be effected by its publication in the Kenya Gazette and in one English and one Kiswahili local daily newspaper with the highest circulation in each case.”

This therefore enabled a petitioner who could prove that he had made unsuccessful attempts to serve a respondent to have an escape window where presentation could be effected by publication in the Kenya Gazette and published in the local press.

As we have seen, the Constitution of Kenya, 2010 has provided the two modes of service of an election petition – it may be direct service or substituted service through advertisement. The Elections Act has a similar provision. The relevant Rule in the Elections (Parliamentary and County Elections) Petition Rules, 2013 is well set out in full in the judgement appealed from. The law on service of election petitions in our jurisdiction has therefore developed, shifting from the position where only personal service was permitted to the new position where a petitioner who can show that he has been unable to serve a petition on a respondent has an opportunity to use substituted service through advertisement. The relevant Rule has an elaborate procedure on how substituted service is to be effected including the

form, the size of the petition, the font, the language and the details to be set out in the notice.

Having found, as he did, that the petition was not served on the 2nd and 3rd respondents, could the learned judge proceed, as he did, to use provisions in the civil Procedure Act and Rules and still hold the petition to have been valid"

This issue has been considered in various decisions of the High Court of Kenya, other courts in other jurisdictions and also by this Court. Let us look at some of them.

In **Chalaite v Njuki & others (Nakuru) Civil Appeal No. 150 of 1998,** the petitioner contended that the parliamentary election for Nakuru Town Constituency was not conducted in accordance with the law and principles thereunder and that this affected the elections to the detriment of the petitioner. The respondent filed an application to strike out the petition on ground that service of the petition was unprocedural, irregular, incompetent and defective. The court agreed and struck out the petition, finding that service was out of time, and the petition was not accompanied by a Notice of presentation as required by the then Rule 14. On appeal, it was held that a notice of presentation of a petition is one of the two principal documents which must be served upon every respondent in accordance with the said Rule and notice must be accompanied by a copy of the petition. It was further held that strict compliance with the said Rule was mandatory and failure to comply was not a curable irregularity which could be waived by conduct of the respondents. Failure to serve a notice of presentation of a petition is a fatal defect which renders the petition incurably defective. The court observed that the National Assembly Elections (**"Elections Petition Rules"**) was a complete code for all matters of election petitions except where the rules were silent on any Procedural matter where resort could be had on Civil Procedure Rules. Where there is a specific rule in the rules, it alone to the exclusion of the rules of civil procedure shall prevail and it must be strictly complied with because election petitions are a subject of special jurisdiction.

In **Onalo v Ludeki & others (2008) 2 KLR 508,** the petitioner challenged the election of the 2nd respondent which had been gazetted on 3rd January, 2003. Therefore by dint of the relevant provisions he was required to present his petition and serve it within 28 days of publication of the result in the gazette. The petition was presented on 9th January, 2003. The respondents made applications asking the court to strike out the petition on various grounds including that they had not been served with it in the manner required or within the time prescribed by law. The court considered affidavits of 4 persons, including one by an advocate of the High Court, in which they deponed that they had effected personal service on the 2nd respondent. In striking out the petition, the court held that a petition must be filed and served within 28 days after the date of publication of the result of the election in the Kenya Gazette, and that service must be personal. Service through publication in the Kenya Gazette was not proper service. The petition not having been personally served upon the 2nd respondent within the time prescribed by law was incurably defective and would be struck out. The court held that the whole substratum of the petition had been washed away and the petition against the 1st and 3rd respondent would also be struck out.

This court differently constituted rendered itself thus in **Kagunyi v Gathua & Anor, Civil Appeal No. 6 of 2004:**

".... election petitions are of such importance to the parties concerned and to the general public that unless parliament has itself specifically dispensed with the need for personal service, then the courts must insist on such service. The other modes of service are only alternative to personal service...."

The High Court in **Ayub J. Mwakesi v Mwakwere Chirau Ali & 2 others (2008)e KLR** said:

".... if the petition is not properly served upon all the respondents named, then the entire petition will be rendered incompetent....."

In **Abu Chiaba Mohamed v Mohamed Bwana Bakari Civil Appeal No. 238 of 2003 (ur)** this Court differently constituted explained its stand in **Kibaki v Moi** when it made it clear what personal service entailed. Omolo, J.A. who rendered the majority opinion stated:

"The decision clearly recognized that if personal service which is the best form of service in all areas of litigation is not possible, other forms may be resorted to. Otherwise why would the court have expected to be given reason or reasons why personal service was not effected" Why would the High Court and this Court have expected that some attempt at personal service be tried on the President and be shown to have been repelled""

In the British case, **Craig v Kanssen [1943] 1 KB 256,** it was held that:-

" failure to serve process where service of process is required renders null and void an order made against the party who should have been served. Failure to effect service was fatal. It could not even be cured by waiver because no waiver can give validity to a nullity" See the case of Oulton v Radcliff (1873 74) 9 LRC 189 at 193 per Keating J."

In a more recent decision in **Amina Hassan Ahmed v Returning Officer Mandera County & Anor (Garisa) High Court Election Petition No. 4 of 2013 (ur)** the petitioner challenged the election of the 3rd respondent as Women Representative for Mandera County. The 3rd respondent brought an application to strike out the petition on grounds that the petition was fatally defective for want of form and content due to failure by the petitioner to state the elections results and date and manner of declaration of the said results and other relevant information required to be included and contended that the court in the premises lacked jurisdiction to entertain the petition. The petitioner formally applied for leave to amend the petition but the court found the petition to be fatally defective because it lacked form and content and the court lacked jurisdiction to grant leave to amend.

The Supreme Court of India has pronounced itself on the same issue in **Tyota Basu & others v Debi Ghosal& others 26th February, 1982** where it held:-

".....An Election petition is not an action at Common Law, nor, in equity. It is a statutory proceedings to which neither the Common Law nor the principles of Equity apply but only those rules which the statute makes and applies. It is a special jurisdiction,and a special jurisdiction has always to be exercised in accordance with the statutory (sic) creating it. Concepts familiar to Common Law and Equity must remain strangers to Election Law unless statutorily embodied. A Court has no right to resort to them on considerations of alleged policy because policy in such matters as those, relating to the trial of election disputes, is what the statute lays down. In the trial of election disputes, Court is put in a straight jacket. Thus the entire election process commencing from the issuance of the notification calling upon a constituency to elect a member or members right up to the final resolution of the dispute, if any, concerning the election is regulated by the Representation of the People Act, 1951, different stages of the process being dealt with by different provisions of the Act. There can be no election to Parliament or the State Legislature except as provided by the Representation of the People Act 1951 and again, no such election may be questioned except in the manner provided by the Representation of the People Act. So the Representation of the People Act has been held to be a complete and self contained

code within which must be found any rights claimed in relation to an election or an election dispute."

It will therefore be seen that the courts in Kenya and elsewhere have interpreted electoral law strictly within the corners and confines of the same as electoral law is a special jurisdiction created by the constitution and statues and civil process is not applicable to the same.

We are, of course, aware of Rule 4 of the Elections (Parliamentary and County Elections) Petition Rules, 2013 which declares the overriding objective of the Rules as being to facilitate the just, expeditious, proportionate and affordable resolution of election petitions under the Constitution and the Act. The court is also required, in exercise of is powers under the Constitution and the Act or in the interpretation of any of the provisions of the Rules to seek to give effect to the overriding objective of the Rules.

Learned Counsel for the appellant submitted before the learned judge and also before us that even in the event that the petition was not served on the 2nd and 3rd respondents, those respondents were aware of the petition, responded to it and fully participated in the proceedings. Counsel cited Article 159 (2) (d) of the Constitution which declares that justice shall be administered without undue regard to procedural technicalities for the proposition that we should give a purposeful interpretation while construing the provisions on electoral law relating to service of election petitions.

The Supreme Court of Kenya in **Raila Odinga & 5 others v IEBC & others Supreme Court Petition No. 3 of 2013 (ur)** on the purport of Article 159 of the Constitution had this to say:

"....Our attention has repeatedly been drawn to the provisions of Article 159 (2) (d) of the Constitution which obliges a court of law to administer justice *without undue regard* **to procedural technicalities. The operative words are the ones we have rendered in bold. The Articles simply means that a court of law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from courts of law..... (emphasis mine)."**

The learned judge against whose judgement this appeal has arisen, after considering the submissions, authorities and the law in respect of service of the petition and having found that the 2nd and 3rd respondents were not served, proceeded to hold:

".... consequently, though the service was bad in law it did not go to the fundamental root of the petition and it can be waived as an irregularity. Though the respondents might have acquiesce (sic) the same cannot be a ground to nullify the petition herein ...."

As we have shown, service of the Petition upon the respondents was a fundamental step in the electoral process and resolution of disputes arising therefrom. Failure to serve the petition upon the respondents went into the root of the petition and the petition could not stand when there was failure to serve the same. The learned judge was clearly wrong in his holding as he misdirected himself on the law applicable where he had found as fact that the 2nd and 3rd respondents were not served.

That, in our view, would dispose of the appeal but because of the other grounds taken in the appeal and cross appeals we shall make further findings.

We think that it is expedient to deal with the grounds of appeals and the cross- appeal together.

The grounds of appeal set out in Memorandum of Appeal are:

"1. The learned Judge of the Superior Court erred in law and rendered a decision that the Petition is dismissed with costs to the respondent.

2. **The Learned Judge of the Superior court erred and failed to appreciate the proper effect and purport of the evidence and arrived at a decision which is not supported by the weight of the evidence and is against the weight of the evidence on record.**

3. **The Learned Judge of the Superior court erred and held that the Petitioner's agents signed the Form 35's and so validated the results notwithstanding the proved irregularities and non-compliance with the written law pertaining to the election which affected the result of the election.**

4. **The learned Judge of the Superior court erred and held that, "My considered finding is that though there were election irregularities as demonstrated above and non- compliance with the law especially the filing to form 35s for Marera and Robert Ouko polling station and crossing and countersigning of form 36 the same did not affect the results of the election. The results in essence did not fundamentally affect the wishes and aspirations of the electorates of Kisumu West Constituency."**

5. **The Learned Judge of the Superior court erred in law and applied the test that the "results in essence did not fundamentally affect the wishes and aspirations of the electorates of Kisumu West Constituency" without defining or stating what "fundamentally affect" in the context means.**

6. **The Learned Judge of the Superior court erred in law purported (sic) to rely on information introduced by the 3rd Respondent in submissions and only alluded to by the 3rd Respondent and never produced and tested in evidence, namely a purported memorandum of understanding purporting to allow parties namely ODM, Ford Kenya and Wiper Democratic Party to use each others colours and symbols.**

7. **The Learned Judge of the Superior court erred to (sic) rely on the purported memorandum of understanding between ODM, Ford Kenya and Wiper Democratic Party and thus render insignificant the fact that under law a candidate is nominated by a political party and is bound through the political party to the Code of Conduct prescribed pursuant to section 110 of the Elections Act, 2011.**

8. **The Learned Judge of the Superior court erred in that despite finding that origin date and ownership of the form 36 for the Kisumu West Constituency was not known and the form had not been completed according to the written law prescribing such a form the Learned Judge went ahead to hold that there were valid results for Kisumu West Constituency election for Member to the National Assembly.**

9. **The Learned Judge of the Superior court misdirected himself in concluding that the wishes and aspirations of the electorates of Kisumu West Constituency were not fundamentally affected despite proved irregularities and despite lack of a credible declaration of results.**

10. **The Learned Judge of the Superior court erred in law and failed to hold that form 36 as presented to court by the 2nd Respondent contravened the law and was calculated to mislead**

contrary to section 72 of the Interpretation and General Provisions Act, Cap 2 of the Laws of Kenya and so void under that section: it was unsigned, undated, unauthenticated, did not emanate from the 1st Respondent as a copy of the original submitted to the 1st Respondent and carried a number for registered voters different from the registered voters recorded on form 35s from the polling stations and as proved by the Petitioner.

11. **The Superior court did not receive a copy of the results of the election from the 1st Respondent as required by law under rule 21 (b) of the Elections (Parliamentary and County Elections) Petition Rules, 2013.**

12. **The Learned Judge of the Superior court erred and failed to hold that there was no declaration of results of the election for Member of the National Assembly for Kisumu West Constituency and that such a circumstances affected the result of the election and the election was not valid according to the guidance of the Supreme Court when interpreting section 83 of the Elections Act, 2011 in *Raila Odinga v IEBC and Others* cited with approval by the Learned Judge of the Superior court.**

13. **The Learned Judge misdirected himself and failed to apply fully and properly the test on tallying in *Bernard Shinali Masaka v Dr. Boni Khalwale & 2 others Kakamega E.P No. 2 of 2008* which he cited: once one of the form 35s has an error the tallying exercise is a sham.**

14. **The Learned Judge misdirected himself and failed to properly apply the test on cancellation and alteration in a statutory form in William Kabogo Gitau v George Thuo & 2 others (2010) e KLR (Nairobi) Election Petition No. 10 of 2008 which he cited.**

15. **The Learned Judge of the Superior court erred and failed to fully consider the effect of non-compliance with the Constitution of Kenya, 2010 particularly the principles for the electoral system in Article 81, Article 2 (4), 10, 20 and Article 38.**

16. **The learned Judge of the Superior court ignored and neglected that elections and expression of the electorates will is a matter of fundamental human rights and freedoms and deserves to be strictly adjudicated especially as it pertains to the Constitution in circumstances where the 3rd Respondent had stated that there could be violence.**

17. **The Learned Judge of the Superior court erred in law to condemn the Petitioner / Appellant to pay costs of the petition after finding that the 3rd Respondent was guilty of undue influence and may have used materials which portrayed the ODM colours of the Petitioner's party and that there were proved irregularities occasioned by the 1st and 2nd Respondents and their officers in the conduct of the election.**

18. **The learned Judge erred in not nullifying the election of the 3rd Respondent after finding that the election was affected by undue influence attributable to the 3rd Respondent's supporters and which the 3rd Respondent had not denied at all and that there were proved irregularities.**

19. **The order on costs is unwarranted, without proper basis in law and injudiciously arrived at and contrary to rule 34 of the Elections (Parliamentary and County Elections) Petition Rules, 2013.**

20. **There was interference with the freedom of the judiciary by persons who said they were**

supporters of the 3rd Respondent wrote to the Court threatening violence depending on how the court would decide."

Apart from the issue of service of petition which we have dealt with, the 1st and 2nd respondents in the cross -appeal take the following issues: that the judge erred in finding that the 3rd respondent had used undue influence through threats and intimidation upon those respondent; that the learned judge erred in holding the 1st and 2nd respondents liable for such undue influence; that the learned judge erred in holding that deposit on security for costs had been made on time or at all; that the judge erred in awarding a quantum of costs without hearing the parties and that the judge erred not only in capping costs but also in taking away the mandate of the Registrar as the Taxing Master on matters of costs.

The 3rd respondent, apart from the issue of service of the petition, took as grounds in the cross -appeal as an issue lack of deposit of security for costs; that the judge was wrong in failing to appreciate the standard of proof and nature of evidence expected of the appellant to prove allegations of threats, intimidation and undue influence. The 3rd respondent also took issues on award and capping of costs similar to the grounds taken by the other respondents.

In support of the said grounds of appeal, Mr. Mwenesi, the learned counsel for the appellant, submitted that the appellant was aggrieved because the petition was dismissed with costs to the respondents when, according to counsel, the learned judge had noted grave discrepancies in the manner in which the election had been conducted. Counsel reminded us that although our jurisdiction was mandated to deal only with issues of law, it was our duty to review evidence if a judge had reached a wrong conclusion on the evidence before him. Reliance was laid on the case of **Kenya Ports Authority v Kuston (Kenya) Ltd, [2009] 2EA 21**2 for the proposition that on a first appeal from the High Court, this Court should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance for that. Counsel therefore submitted that because the learned judge found irregularities in the way the election was conducted the petition should not have been dismissed or costs ordered against the appellant.

Counsel submitted further that undue influence on the part of the 3rd respondent had been proved against the 1st and 2nd respondents and relied on the case of **Mbogori v Kangethe & Anor, [2008] KLR 168** where, we note, it was held that although the evidence did not show how the admittedly substantial error in the total number of votes declared in favour of the 2nd respondent occurred, the error did not show *ipso facto* that the election was so badly conducted that it could not really be said to be an election. It was held that the error was not fatal to the election. There was also the case of **Mbondo v Galgalo & Anor [2008] 1KLR 142** where allegations in the petition related to the morning when submission of nomination papers for the preliminary elections for the relevant parliamentary constituency was to be done. The petitioner alleged that the 1st respondent instigated a big crowd to compel and coerse the petitioner by any means to withdraw his nomination and the 2nd respondent threatened his life unless he withdrew the nomination. The petitioner claimed that he lost his nerve and withdrew nomination but in the petition claimed that such withdrawal was invalid because it occurred after the period laid down for presentation of nominations. The 2nd respondent's case was that the petitioners papers were not in order and that he simply pointed this out to him. He denied addressing the crowd or noticing any hostility in the crowd. It was held that the petitioner had proved his allegation because there was evidence that he was compelled to withdraw his candidature through undue influence. It was proved that the 2nd respondent not only took part in the threatening of the petitioner with death unless he withdrew his nomination but actually incited the crowd against him. This led to the

petition being allowed.

Learned Counsel for the 1st and 2nd respondents, Mr. Ragot, in opposing the appeal submitted that the polling documents particularly some of the Forms 35 although not signed by the Presiding Officer at polling stations were not irregular because they had been signed by party agents and this, according to him, should be construed as validating the documents. Where party agents had not signed the said forms, counsel submitted, the same were still valid as an explanation to the effect that party agents had already left the polling station by the time the documents were completed was a reasonable explanation which had not in any event been seriously challenged. Counsel submitted further that although there were admitted alterations on some of the Forms 35 such alterations did not affect the outcome of the election as each candidate was given their true votes.

On the issue of the order for costs, learned counsel wondered how the learned judge reached a maximum figure of Kshs. 1,500,000/= without hearing the parties.

Mr. Olago Aluoch, the 3rd respondent, submitted that the appellant had not only failed to show that there were any discrepancies or irregularities but also failed to show how such discrepancies, if any, could have affected the election. Mr. Aluoch also faulted the judge for finding that there was intimidation and undue influence, the subject of his cross appeal. In that regard, he submitted that intimidation or undue influence, which amount to criminal acts, must in an election petition be proved to the required standard. He further submitted that the only witness called in respect of that allegation implicated suspects against whom no action was taken by police at all. On the issue of award and capping of costs, Mr. Aluoch adopted the 1st ad 2nd respondents' submissions.

In reply, learned Counsel for the appellant wondered who the learned judge awarded costs. Where intimidation was proved, submitted counsel, the petition should have been allowed.

On the nature and standard of proof required on the allegation of undue influence through threats and intimidation as taken by the appellant in the election court and also before us, such influence, if proved, has serious consequences against a perpetrator of the same as will be seen in the relevant provisions of The Elections Act.

What was the material placed before the learned judge by the appellant in proof of the allegations on threats and intimidation through undue influence"

There was evidence of Maurine Atieno Odhiambo (PW5). She testified that while travelling on 25th January, 2013 , on reaching Kiboswa she noticed that the appellant's billboard had been destroyed. After informing the appellant she made a report to police and then telephoned Dan Mbai and Joseph Yaya and requested them to also visit the scene to witness destruction of the said billboard. The witness launched her own investigations and came up with a list of suspects but in the course of it she received threatening reports from people she said were the 3rd respondents supporters. In cross – examination the witness stated:

“.... When I saw the billboard I didn't report to the police. I rang Dan and Joseph to do so. Dan and Joseph have not sworn any affidavits. I was sent by Rozaah to pick the police diary …. its indicated that they don't know who did it....”

The learned judge considered this evidence and held that even though the police did not make any arrests, there was nevertheless a threat which was directed at the appellant's supporters and more so PW5. The learned judge went on to state that it was thereafter the duty of the police, not the appellant or

PW5, to take the matter further. The learned judge went on to discredit the 3rd respondent for not allegedly denying the allegations of threats and intimidation, holding that the 3rd respondent should have made a direct denial.

An allegation of bribery was thrown out by the learned judge because no evidence was tendered in support of the same.

The 3rd respondent testified before the election court and the relevant part of the testimony as regards undue influence shows:

"…. I noticed the allegation made against me and my supporters for defacing her billboards, threats to her supporters and distributing of defamatory leaflets. I deny these allegations in my affidavits in response to the petition. These allegations were based on hearsay and I don't wish to refer to them. During the campaign I didn't see any leaflets attacking the character of the petitioner but I saw at different times leaflets attacking my character. I made jokes about them during the rallies. I didn't bother about the authors. …."

At paragraphs 5 of the 3rd Respondent's affidavit sworn on 19th April, 2013 it was deponed:

"5. That the Petitioner's allegations of threats of violence, defacing of her billboard, defamatory pamphlets or bribery based on the affidavits of the Petitioner, Maurice Atieno Odhiambo and Dennis J. B. Raridiak are false."

As seen in the evidence on record, PW5 merely saw a defaced billboard belonging to the appellant and decided to inform various people about it including the appellant and Dan and Joseph. Dan and Joseph neither swore affidavits nor were they called as witnesses by the appellant. Threats of violence were denied by the 3rd respondent. The police who received a report chose not to take any action. On what basis does the learned judge take blame against the 3rd respondent when it is possible that the police, upon considering the report received did not find any credibility in it thus a decision not to take any action" The holding by the learned judge in respect of this aspect of the matter does not appear to be supported by the evidence before him and is probably a misdirection. We say this because the learned judge in the course of the judgement finds:

"....The source of PW5 list of suspects she gave to the police is not known. Obviously, there were other candidates vying for the same position and it is difficult at this juncture based on the evidence on record to lay blame upon the 3rd respondent. Is it possible that the billboard was brought down by an act of nature, say, rain or wind" In the premises it is not possible to conclude that the persons allegedly suspected by the petitioner's witnesses were indeed the 3rd respondent's supporters or caused the destruction of he petitioner (s) billboards. In any event there was no eyewitness to the alleged destruction. The petitioner nor her witness (sic) did not follow it up with the police in any event...."

On the issue of leaflets distributed in the constituency which the appellant alleged to have been the act of the 3rd respondent, the learned judge held that no evidence had been put before him to find the author of the leaflets.

On the evidence before the learned judge which we have taken time to review, we are of the respectful opinion that it is difficult to find how the learned judge could have reached the conclusion that any of the respondents were involved in any act that amounted to threats or intimidation that would constitute undue influence.

The other issue raised by the appellant relates to the signing of Form 35 at polling centres by the presiding officer and by party agents.

Section 83 of the Elections Act states that:

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

Mr. Mwenesi submitted that it was wrong for the learned judge not to have invalidated the election when it had been proved that some of the Forms 35 and 36 were undated and unsigned. The learned judge considered the evidence placed before him on this issue by the appellant and the respondents and came to the conclusion that there were major discrepancies in Form 35 from Dr. Robert Ouko Primary School Stream 001 Polling Station No. 21 as well as Marera Primary School Polling Station No. 061 where the entries did not tally with the results posted in Form 36. The learned judge however found that the overall picture was that the final results announced by the 2nd respondent were reflective of the votes garnered by each candidate and that where there were omissions by the presiding officer in failure to sign Form 35 the same had been validated by being signed by party agents.

In **Manson Nyamweya vJames Magara & 2 others [2009] e KLR** the petitioner alleged that the election was not conducted according to law and cited various irregularities including bribing of voters, perpetration of terror, violence and intimidation on the petitioners supporters, prevention of the petitioners supporters from voting due to apprehension of violence and commission of electoral irregularities by the electoral officials. On an order for scrutiny of the ballot boxes, the court found that most ballot boxes had seals broken or missing; three ballot boxes were empty; one ballot box had its lid open and contained ballot papers for only 3 of the 17 candidates; in 53 polling stations out of a total of 110 the presiding officers had not signed Forms 16A; in 53 polling stations party agents had not signed Form 16A and names of presiding officers in various polling stations had not been indicated in Forms 16A. The election court found these to be grave and glaring anomalies and voided the election.

We have considered the grounds of appeal relating to alleged malpractices in the conduct of the elections and the standard of proof required to establish the same and have come to the conclusion that the appellant did not prove to the required standard that there were anomalies or irregularities in the conduct of the election that affected the results as would void the same.

The respondents in the cross - appeals fault the learned judge for finding that deposit on security for costs was made by the appellant on time, or at all.

Section 78 (1) of The Elections Act provides that a Petitioner shall deposit security for the payment of costs that may become payable by the petitioner not more than 10 days after the presentation of a petition.

The petition was presented at the High Court of Kenya, Kisumu, on 10th April, 2013. An affidavit of Ms Millicent Ogutu, Advocate sworn on 25th April, 2013 on the issue of payment of security for costs depones, *inter alia,* that after the said Advocate presented petition as aforesaid and having obtained a bank account from the Registrar of that court to which deposit could be paid, the appellant's law firm did on 19th April, 2013 pay the requisite deposit by two bankers cheques to the court's account in Nairobi. A copy of bank deposit slip was accordingly produced before the election court.

The respondents' complaint that the said deposit was not a payment because there was endorsed on the deposit slip the words **"CHEQUES WILL BE GIVEN VALUE WHEN PAID"**, cannot in our respectful opinion have any legal basis. The legal requirement was to pay the requisite deposit by a way known or recognized in the normal banking or payment processes, and a payment by bankers cheques made within the 10 day period required by law was a good and proper payment.

All the parties to this appeal took issues with the learned judge for the order made on costs. Counsel for the appellant wondered who, indeed, among the respondents had been awarded costs and complained that the appellant should not have been condemned to pay costs when, according to counsel, the learned judge had found grave irregularities by all the respondents.

The 1st and 2nd respondents on the one hand, and the 3rd respondent, on the other, in the cross – appeals, took issue with the judge for capping costs when, they submitted, that should have been left for taxation by the Registrar in the manner envisaged by the Advocates Act.

Section 84 of The Elections Act provides that an election court shall award the costs of and incidental to a petition and such costs shall follow the cause. Rule 36 of the 2013 Rules provides:-

" 36. (1) The court shall, at the conclusion of an election petition, make an order specifying -

(a) the total amount of costs payable; and

(b) the persons by and to whom the costs shall be paid.

(2) When making an order under subrule (1), the court may

(a) disallow any costs which may, in the opinion of the court, have been caused by vexatious conduct, unfounded allegations or unfounded objections, on the part of either the Petitioner or the Respondent; and

(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.

(3) _."

Rule 37 proceeds to make provision for taxation and recovery of costs in ways not dissimilar to civil proceedings. So that whereas the relevant provision in the Civil Procedure Act (Section 27) gives the court or judge a discretion on award of costs, Section 84 of The Elections Act mandates the election court to award costs and shall order who shall pay the same. The further power donated to the election court is to specify the total amount of costs payable and declare the persons by and to whom the costs shall be paid.

The appellant complains that costs should not have been awarded to the respondents at all and that the order on costs is not even clear on which respondent the learned judge was awarding costs.

The 1st and 2nd respondents on their part, and the 3rd respondent are unhappy that the learned judge capped costs at Kshs. 1,500,000/= thereby, according to them, taking away from the Registrar the power on taxation which should remain his domain like in other civil process.

The learned judge after dismissing the petition held on the issue of costs:

“ … Consequently, this petition is hereby dismissed with costs to the respondent. The costs shall be assessed by the Deputy Registrar of the court and the same should not exceed Kshs. 1.5 Million.”

It will therefore be seen that the appellant's petition had failed and the election court had no option but to award costs to the respondents in view of the provisions of law we have cited under The Elections Act and the Rules. The order made by the learned judge is clear on the capping of costs at Kshs. 1,500,000/= but according to the appellant it is not clear whether this was an order capping costs for the respective respondents or all respondents lumped together.

As will however be seen, the 1st and 2nd respondents, on the one hand, and the 3rd respondent, on the other, were separately represented throughout the hearing of the election petition and it does not accord with ordinary practice that costs be awarded to all of them together when the various positions taken in the petition were as different as the parties who were before the court.

We have considered the positions taken by the respective parties in respect of the award of costs and are satisfied that complaint by the respondents on capping of costs has no basis in law. The election court was within its mandate to cap costs as it did as the relevant rule which we have set out gave it authority to do so. The only issue left is a determination on which respondent was awarded costs and it would appear to us that the 1st and 2nd respondent, on the one hand, and the 3rd respondent, on the other, were respectively awarded costs not to exceed Kshs. 1, 500,000/=.

Having considered the whole matter, the Memorandum of Appeal, the cross-appeals, the submissions made before us and the law, we are satisfied that the appeal has no merit and we accordingly dismiss it with costs to the respondents. The cross -appeals succeed to the extent that we set aside the findings of the learned judge on undue influence against the respondents and we also vary the order on costs as set out in this judgement.

Those, then, are our orders.

Dated and Delivered at Kisumu this 21st day of February, 2014

D. MUSINGA

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR