



Case Number:	Civil Appeal 293 of 2013
Date Delivered:	23 Apr 2014
Case Class:	Civil
Court:	Court of Appeal at Nairobi
Case Action:	Judgment
Judge:	David Kenani Maraga, John Wycliffe Mwera, Philomena Mbete Mwilu
Citation:	Abdikhaim Osman Mohammed & another v Independent Electoral and Boundaries Commission & 2 others [2014] eKLR
Advocates:	-
Case Summary:	<p><u>Judicial discretion must always be exercised judicially and not whimsically and where it was denied reasons for such denial must be stated.</u></p> <p>Abdikhaim Osman Mohammed & another v Independent Electoral and Boundaries Commission & 2 others [2014] eKLR</p> <p>Civil Appeal No. 293 of 2013</p> <p>The Court of Appeal at Nairobi</p> <p>D K Maraga, J W Mwera & P M Mwilu JJA</p> <p>April 23, 2014</p> <p>Report by: Njeri Githang'a Kamau &</p>

Charles Mutua

Brief Facts

During the March 4, 2013 general electoral process, the 3rd Respondent, [Nathif Jama Adan] was declared the successful gubernatorial candidate for the County of Garissa and thereby became the Governor-Elect for the said County. He had garnered a total of 37,910 votes ahead of his closest rival ALI BUNOW KORANE whose declared votes were 35,098.

Those results were the source of dissatisfaction to two Kenyan citizens who were also registered voters in Garissa County. The petitioners filed the petition alleging breaches of the Constitution and the law on elections and averred that those elections were not free, fair, free from violence and intimidation. The petitioners also claimed the elections were not transparent and were not administered in an impartial manner as a result of which the validity, legality and credibility of the gubernatorial elections held in Garissa County were so seriously affected as to be fatally flawed. The petitioners prayed that the gubernatorial election in Garissa County be nullified.

Issues

(i) Whether or not the trial court appreciated

the Constitutional and legal threshold for a free, fair and verifiable election;

(ii) Whether there were irregularities and errors in the conduct of the Garissa County gubernatorial election and if so whether or not those irregularities and errors affected the credibility and the integrity and/or the result of that election

(iii) Whether the appellants pleaded for scrutiny and whether or not the trial judge exercised his discretion judicially in refusing scrutiny;

(iv) Whether the appellants discharged their burden of proof

Constitutional Law-fundamental rights and freedoms-political rights-realization of political rights-whether irregularities and malpractices in the electoral process amount to violation of political rights-whether violation of political rights renders an election a nullity-whether the trial judge appreciated the Constitutional and legal threshold for a free, fair and verifiable election-whether there were irregularities and errors in the conduct of the Garissa County gubernatorial election and if so whether or not those irregularities and errors affected the credibility and the integrity and/or the result of that election-Constitution of Kenya 2010, articles 38,81 & 86;

Electoral law- scrutiny- circumstances under which scrutiny could be ordered- where there were a multitude of allegations of irregularities and errors- where scrutiny was not pleaded- exercise of judicial discretion-whether an order for scrutiny and recount could be granted in such circumstances- Elections Act 2011, section 82

Evidence-burden of proof-standard of proof-burden and standard of proof in an electoral cause-party on whom the burden lies-the standard to which the burden is to be discharged-where evidential burden keeps shifting depending on the circumstances-threshold to be met by a petitioner in an electoral cause- whether the appellants had discharged their burden of proof.

Judicial officers-judicial discretion-exercise of judicial discretion-power of an election court to order scrutiny suo motto- whether or not the trial judge had exercised his discretion judicially in refusing scrutiny

Held

1. The Constitution of Kenya, 2010 had clearly laid down the basis and manner of the citizen's political rights under

article 38 and how they were to be realized. Article 81 followed which on its part provided for the principles governing the election process and the all-important article 86 which placed responsibility on the Independent Electoral and Boundaries Commission (the IEBC) to ensure that the election process was fair.

2. A material violation of any of the above safeguards would, in appropriate cases, render an election a nullity and that was so because an election which was not substantially conducted in compliance with the Constitution and electoral law was null and void. The Elections Act, 2011 as well as the Regulations and the Petition Rules made thereunder were designed to give effect to the Constitutional requirements and safeguards.
3. Irregularities and malpractices in the electoral process were matters of law as clearly they were breaches either of the Constitution, Statute, Rules, Regulations or the law generally. The Court of Appeal would interfere with a finding of fact by the trial court if such finding of fact was based on no evidence or on a misapprehension of the evidence or the trial court demonstrably acted on the wrong principle to reach its finding. Undoubtedly the manner of the exercise of discretion was also an issue of law.

4. World over, the validity and integrity of any election was derived from that election being conducted substantially in compliance with the relevant electoral law.

5. The Petitioners not only bore the burden of proof to establish that there were violations, omissions, malpractices and irregularities in the conduct of the Garissa gubernatorial election, but they had to also illustrate to the court that the said violations, omissions, malpractices and irregularities, if any, affected the result of the election. It was after the Petitioners had established the foregoing that the burden shifted to the respondents, to establish that the results were not affected.

6. The standard of proof in election disputes was higher than that of a balance of probability that was applicable in civil cases but lower than that applicable in criminal cases of proof beyond reasonable doubt. The electoral disputes involved not only the parties to a petition but also the electorate in the concerned electoral area and that they were therefore matters of great public importance and interest.

7. The law was quite clear on election irregularities under section 83 of the Elections Act. In other jurisdiction, courts had interpreted provisions

similar to that one as authorizing the nullification of an election only if the irregularities committed in the conduct of an election violate the Constitution or the electoral law or affect the result of an election. But, even though the election was conducted substantially in accordance with the law as to elections, nevertheless, if there was a breach of the rules or a mistake at the polls and it did affect the result, then the result was vitiated. [*Morgan v Simpson* [1974] 3 ALL ER 722]

8. Though the trial court appreciated the appropriate law and guidelines, it glossed over and completely misdirected itself on the effect of the massive irregularities committed in the conduct of the election which not only dented the integrity of the election but also affected its result.
9. Scrutiny was not granted as a matter of course. It had to be justified and the basis for granting an order for scrutiny laid in a case such as the one that was before the trial court with a multitude of allegations of irregularities and errors, scrutiny even if not sought, was the one tool that the trial court should have employed to resolve the various alleged irregularities.
10. The trial Judge erred despite the clear provisions of the law where he made up his mind not to order scrutiny simply because, according to him, it was not

pleaded. Rule 33 of the Elections Petition Rules provided for the request for scrutiny at any stage of the proceedings and section 82(1) of the Elections Act, 2011 empowered an election court to order scrutiny *suo motto* (on its own motion).

11. An order for scrutiny was a discretionary one and the Court of Appeal could not substitute its discretion for that of the trial court. Judicial discretion must always be exercised judicially and not whimsically and where it was denied reasons for such denial must be stated. There was material in abundance to warrant an order for scrutiny even on the Judge's own motion.
12. A formal application for scrutiny was made and counsel for the appellant repeatedly orally sought it. The trial court was obliged to give serious considerations to the events alleged and their effect to guide the exercise of his judicial discretion. By that the trial Judge erred in his exercise of judicial discretion to deny scrutiny.
13. Elections and electoral processes are governed by law. Regulation 64(1) of the Elections (General) Regulations, 2012 provided for the adjournment of voting for given reasons. That included where they were interrupted by a riot, violence, natural disaster or other occurrence, shortage of equipment or

other materials or other administrative difficulty, but where the presiding officer did so, the presiding officer had to re-start the proceedings at the earliest practicable moment.

14. Regulation 66(1) which was headed "*Polling time*" provides that voting was to commence at 6 o'clock in the morning and ended at 5 o'clock in the afternoon on the polling day. The unambiguous meaning of the Regulation was that voting was confined to the voting day and the people to vote outside the stipulated time were those on the queue at 5.00 pm. That was made clear by Regulation 66(2) which directed that, a person who was on a queue for the purposes of voting before 5 o'clock in the afternoon had to be allowed to vote despite the fact that the voting time might have extended to after 5 o'clock, no reason was given why the people still on the queue at about 10.40 pm on March 4, 2013 were not allowed to vote.

15. The cumulative effect of the irregularities was that the gubernatorial election in Garissa County was not conducted in an efficient, accurate and accountable or verifiable manner thereby compromised its integrity. The cumulative effect of the admitted irregularities rendered the election result indeterminate.

Appeal allowed. The 1st and 2nd Respondents to meet the costs of the appellants in the High Court at Kes.2 million, the appeal at Ksh 2 million, 3rd Respondent to bear his own costs.

Cases

East Africa

1. *Magara v Nyamweya & 2 others* [2010] 1 KLR 136 –(Applied)
2. *Mbogo & another v Shah* [1968] EA 93 –(Explained)
3. *Mbowe v Eliufoo* [1967] EA 240 –(Explained)
4. *Morgan v Simpson & another* (1974) All ER 722; [1975] 1 QB 151 –(Applied)
5. *Odinga, Raila & 5 others v Independent Electoral and Boundaries Commission & 3 others* Petition No 5 of 2013 –(Explained)

Canada

1. *Opitz v Wrzennewsky*, 2012 SCC 55; 2012 3 SCR 76 –(Explained)

Statutes

East Africa

1. Civil Procedure Act (cap 21) In general –(Interpreted)
2. Constitution of Kenya, 2010 articles 38, 81, 86, 159(2)(d) –(Interpreted)
3. Elections Act, 2011 (Act No 24 of 2011) sections 80(d); 82(1); 83; 85A –(Interpreted)
4. Elections (General) Regulations, 2012 (Act No 24 of 2011 Sub Leg) regulation 64(1); 66(1)(2) –(Interpreted)
5. Elections (Parliamentary and County Elections) Petition Rules, 2013 (Act No 24 of 2011 Sub Leg)

	rules 21, 33–(Interpreted) Advocates 1.Mr Mbugwa for the Appellants 2.Mr Muganda & Mr Sagana for the 1 st & 2 nd Respondents 3.Mr Muriithi for the 3 rd Respondent
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	Election Petition NO. 2 OF 2013
Case Outcome:	Appeal Allowed.
History County:	Garissa
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MARAGA, MWERA & MWILU JJA.)

CIVIL APPEAL NO. 293 OF 2013

ABDIKHAIM OSMAN MOHAMMED.....1ST APPELLANT

SAHAEL NUNO ABDI.....2ND APPELLANT

VERSUS

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

**RETURNING OFFICER, GARISSA COUNTY..... 2ND
RESPONDENT**

**NATHIF JAMA ADAN.....3RD
RESPONDENT**

**(Being an Appeal from the Judgment and Decree of the High Court of Kenya at Garissa as heard
in the High Court of Kenya at Nairobi (The Hon. Mr. Justice A. Mabeya) delivered on the 25th
September, 2013**

in

Garissa Election Petition NO. 2 OF 2013)

BETWEEN

ABDIKHAIM OSMAN MOHAMED.....1ST PETITIONER

SAHAEL NUNO ABDI.....2ND PETITIONER

VERSUS

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

RETURNING OFFICER, GARISSA COUNTY.....2ND RESPONDENT

NATHIF JAMA ADAN3RD RESPONDENT

JUDGMENT OF THE COURT

1. At the conclusion of the March 4th, 2013 General Electoral process, the 3rd Respondent herein, **NATHIF JAMA ADAN**, was declared the successful gubernatorial candidate for the County of Garissa and thereby became the Governor-Elect for the said County. He had garnered a total of **37,910** votes ahead of his closest rival **ALI BUNOW KORANE** whose declared votes were **35,098**. Mr. Mohamed Maulid Shurie brought the rear with 8,486 votes cast in his favour.

2. Those results were the source of dissatisfaction to two Kenyan citizens who are also registered voters in Garissa County, to wit, **ABDIKHAIM OSMAN MOHAMED** and **SAHAEL NUNO ABDI** (Petitioners) who filed the Petition dated 25th March, 2013, challenging the election of **NATHIF JAMA ADAN**. They alleged breaches of the Constitution and the law on elections and averred that those elections were not free, fair, free from violence and intimidation, they were not transparent and were not administered in an impartial manner as a result of which the validity, legality and credibility of the gubernatorial elections held in Garissa County were so seriously affected as to be fatally flawed. The Petitioners particularized their complaints in the petition into specific grounds of malpractices, irregularities, errors, breaches and contraventions of the law. They therefore prayed that the gubernatorial election in Garissa County be nullified.

3. The 1st and 2nd Respondents in their Response to the petition stated that the election was conducted in a free and fair manner and in compliance with the Constitution and the election law. They denied all the allegations of the Petitioners and put them to strict proof thereto.

4. Similarly, the 3rd Respondent in his Response denied all the complaints by the Petitioners adding that the Petition was an abuse of the court process, and a waste of judicial time which ought to be struck out *in limine*.

5. The trial judge considered all the matters raised by the parties before him and found that the gubernatorial elections for Garissa County were conducted substantially in accordance with the Constitution and electoral law and for that reason he dismissed the petition.

6. That provoked this appeal vide which the Appellants have drawn six (6) grounds of Appeal alleging that:-

“1. The Honourable Judge erred in law by finding that the Garissa Gubernatorial Elections were free and fair and in accordance with the Constitution of Kenya 2010.

2. The Honourable Judge erred in law in finding that the irregularities and errors proved by the Appellants did not affect the results of the gubernatorial elections in accordance with section 83 of the Elections Act, 2011.

3. The Honourable Judge erred in law in disallowing the Appellants’ formal and oral Application (sic) for scrutiny dated 7th June, 2013 and the oral application on 18th July, 2013, respectively and in finding that no orders of scrutiny could be issued under the law without specific prayers for the same in the Petition.

4. ***The Honourable Judge erred in law by finding that the elections held in Saka Primary School on 5th March, 2013 did not render the entire Garissa gubernatorial election invalid.***

5. ***The Honourable Judge erred in law in finding that the results contained in unsigned and unstamped Forms 35 are valid.***

6. ***The Honourable Judge erred in law by finding that the Respondent had furnished the court with all the documents required in accordance with Rule 21 of the Elections (Parliamentary and County Elections) Petition Rules, 2013.***”

The Appellants then prayed that the Appeal be allowed and the decision of the trial court be set aside and be substituted with an order allowing the Appellants’ petition dated 25th March, 2013. They also prayed for the costs of the appeal both here and in the High Court.

7. At the commencement of the hearing of the appeal we directed parties to file written submissions which we later allowed their counsel to highlight.

8. For the Appellants learned counsel Mr. Mbugwa in his submissions stated that the Appellants had proved numerous irregularities such as twelve (12) forms 35 not bearing the seal of the 2nd Respondent or the presiding officer’s signature; thirty-one (31) forms 35 missing while some seventy-six (76) forms 35 were altered and such alterations were not countersigned; fifty-five (55) forms 35 not signed by any party agent with no explanations noted on the appropriate parts of those forms; and that there were discrepancies in the entries on forms 35 *vis-à-vis* form 36.

9. Counsel for the Appellants added that the trial judge found that some of the forms 35 had material alterations; there were several errors noted in forms 36 as regards the votes garnered by each candidate; that ballot box number 070696 had a broken seal; several forms 35 were not signed by party agents and the results for Abukaile for one candidate were not included in the final aggregate; the 1st Respondent’s officer’s irregularity led to the cancellation of the results for Mathahlibah Polling Station; and finally that the learned Judge admitted that discrepancies and errors on forms 35 and 36 resulted into about 1000 votes being unaccounted for.

10. Further submission for the appellants was that the learned Judge erred when he held that the proved irregularities did not affect the result yet the cumulative effect of the irregularities was to reduce the margin between the two leading candidates.

11. The trial Judge was also faulted for refusing scrutiny which would have determined the validity of the votes cast for a fair and substantive determination of all the issues raised. Counsel’s position was that the voting at Saka Polling Station on a date other than the Gazetted date was an illegality that should have rendered the entire election invalid. There was also submission that the 1st Respondent did not furnish the court with all documents that are prescribed by **Rule 21 of the Elections (Parliamentary and County Elections) Petitions Rules, 2013**(the Election Petition Rules) and we were invited to draw an adverse inference from that failure.

12. Learned counsel Mr. Muganda for the 1st and 2nd Respondents in his submissions started at the point of the issues framed for determination and agreeing with the finding of the trial Judge that these elections were conducted substantially in accordance with the Constitution and electoral law and prayed that the appeal be dismissed. Counsel urged us to ignore generalized allegations and consider that election disputes are matters of great public importance which should be taken seriously. He submitted that courts must exercise judicial restraint and respect for the democratic choice of voters. He reminded

us that we must consider issues of law only. He said that it is the Petitioners' burden to prove not only non-compliance with electoral law but also that such non-compliance affected the results of the election and he stated that the burden in this kind of case is higher than that in civil cases of a balance of probability and below that in criminal cases of beyond reasonable doubt.

13. Mr. Muganda was of the view that a decision of a court shall only be based on the pleadings filed by the party moving the court for the appropriate relief as a court is only bound to interrogate facts pleaded and ignore any evidence adduced on matters not pleaded in the filed pleadings. Counsel added that an election conducted substantially in accordance with the law as to elections is not vitiated by a breach of the rules or mistakes at the polls that did not affect the result of the election or the will of the electorate and that allowances must be made for human error.

14. Counsel told us that the issue whether or not the trial Judge erred in law in holding that these elections were free and fair and in accordance with the Constitution of Kenya, 2010 and his finding on the issues of irregularities and errors are issues of fact which do not fall within the purview of **section 85A** of the **Elections Act** for consideration by this court. In agreement with the trial Judge counsel stated that failure to sign form 35 does not affect the validity of the figures on that form and that such failure does not invalidate the results nor does the failure to indicate the results in that form. On the issue of the missing forms 35 Mr. Muganda stated that Mr. Mbugwa counsel for the appellants admitted in court that he had all the documents and nothing was missing and he further objected to the admission of the originals and he he was thus bound by his admissions. Counsel added that all the errors, alterations, mistakes in forms 35 and 36 and lack of signature and rubber stamps on some of them did not affect the results. As regards the errors in postings of figures from forms 35 to 36, counsel submitted that as there was no proof of malicious intent to alter the results in favour of any candidate and as even after adjusting the admitted and proved errors the results remained unchanged, the errors on those forms were inconsequential in their effect. Counsel saw no irregularity or malpractice in extending the voting period for a day beyond the prescribed election date and in any case no party was prejudiced by the voting conducted on 5th March, 2013.

15. Mr. Muriithi learned counsel for the 3rd Respondent described this as a speculative appeal as in his view the alleged irregularities did not affect the result of the election. He told us that nowhere in the Petition did the Petitioners seek scrutiny and there having been no basis laid for it, the trial court was right in declining an order for scrutiny. Counsel added that the only scrutiny that would have been allowed if a basis had been laid was for the inspection of ballot box number 070696 and as there was no allegation of tampering with its contents, the scrutiny would have been limited to ascertaining whether or not its seals were broken as the appellants had alleged. Counsel therefore urged us to dismiss this appeal just as the court below had done for the reason that the Appellants did not discharge their burden of proof. He said that there was no substantial non-compliance with the law and there was no breach of duty. He agreed with the trial court and Mr. Muganda for the 1st and 2nd Respondents that a party is bound by his pleadings and since there was no pleading for scrutiny none could be ordered and the Judge's exercise of discretion was correct. He urged us not to interfere with that discretion and that we should ignore the claim that certain forms 35 were unsigned and the evidence on it as the same was not pleaded.

16. Mr. Muriithi's further submission was that the ground of appeal regarding irregularities and errors has to fail because those are issues of fact and evidence and not point of law and as such this court cannot interrogate them. And also the court cannot interrogate allegations of discrepancies, rejected or excess votes and errors in postings for the same reason. We heard counsel submit that the holding of election the day following the designated election date was within the law, and that unsigned and unstamped forms 35 did not affect the results of the gubernatorial election for Garissa County, instead

the court, by accepting those unsigned and unstamped forms, was preserving the voters' inalienable right to vote.

17. That then represents the totality of written submissions and oral highlighting before us and brings us to the interrogation of the issues at hand. Having considered the above submissions and the entire record of appeal, we find the following to be the issues for our determination in this appeal:

(i) whether or not the trial judge appreciated the Constitutional and legal threshold for a free, fair and verifiable election;

(ii) whether or not there were irregularities and errors in the conduct of the Garissa County gubernatorial election and if so whether or not those irregularities and errors affected the credibility and the integrity and/or the result of that election;

(iii) whether or not the appellants pleaded for scrutiny and whether or not the trial judge exercised his discretion judicially in refusing scrutiny;

(iv) whether or not the appellants discharged their burden of proof; and

(v) what is the appropriate order on costs.

18. The Constitution of Kenya, 2010 has clearly laid down the basis and manner of the citizen's political rights and how they are to be realized. For ease of reference we would like to quote verbatim the relevant Constitutional provisions in this regard.

Article 38 declares that,

“Every citizen is free to make political choices, which includes the right –

- a. ***to form, or participate in forming, a political party;***
- b. ***to participate in the activities of, or recruit members for, a political party; or***
- c. ***to campaign for a political party or cause.***

Then follows **Article 81** which on its part provides that:-

“The electoral system shall comply with the following principles –

- a. ***freedom of citizens to exercise their political rights under Article 38;***
- b. ***not more than two-thirds of the members of elective public bodies shall be of the same gender;***
- c. ***fair representation of persons with disabilities;***
- d. ***universal suffrage based on the aspiration for fair representation and equality of vote; and***

- e. ***free and fair elections, which are –***
 - i. ***by secret ballot;***
 - ii. ***free from violence, intimidation, improper influence or corruption;***
 - iii. ***conducted by an independent body;***
 - iv. ***transparent; and***
 - v. ***administered in an impartial, neutral, efficient, accurate and accountable manner.***

And the all important **Article 86** which places responsibility on the Independent Electoral and Boundaries Commission (the IEBC) to ensure that -

“86. At 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 the polling stations are openly and accurately collated and promptly announced by the returning officer; and***
- d. ***appropriate structures and mechanics to eliminate electoral malpractice are put in place, including the safekeeping of election materials.***

A material violation of any of the above safeguards would, in appropriate cases, render an election a nullity and that is so because an election which is not substantially conducted in compliance with the Constitution and electoral law is null and void. And of course the **Elections Act, 2011** as well as the **Regulations** and the **Petition Rules** made thereunder are designed to give effect to the such Constitutional requirements and safeguards.

20. The Respondents have in uniformity described nearly all the grounds of appeal as being matters of fact and therefore not amenable to discussion by this court. The limit of our involvement herein is prescribed by **section 85A** of the **Elections Act, 2011** which confines appeals to this Court from election petition decisions to only matters of law. We doubt not that the issue of the evaluation of the availed evidence by the trial court and whether that evaluation was done properly or otherwise and whether that

led to the rightful decision is a matter of law.

Irregularities and malpractices in the electoral process are matters of law as clearly they are breaches either of the Constitution, Statute, Rules, Regulations or the law generally.

And, of course this court would interfere with a finding of fact by the trial court if such finding of fact is based on no evidence or on a misapprehension of the evidence or the trial judge demonstrably acted on the wrong principle to reach his finding. Undoubtedly the manner of the exercise of discretion is also an issue of law. In the words Sir Charles Newbold in the case of **MBOGO & ANOTHER V SHAH [1968] EA 93**,

“A Court of Appeal should not interfere with the exercise of the discretion of a single judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice ...”

21. World over, the validity and integrity of any election is derived from that election being conducted substantially in compliance with the relevant electoral law. Lord Denning M.R succinctly stated this point in **MORGAN V SIMPSON [1974]3 ALL ER 722 at pg 728**thus,

“----- collating all these cases together, I suggest that the law can be stated in these propositions:-

- i. If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result is affected, or not ---***
- ii. If the election is so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by breach of the rules or a mistake at the polls ---***

But, even though the election was conducted substantially in accordance with the law as to elections, nevertheless, if there was a breach of the rules or a mistake at the polls and it did affect the result, then the result is vitiated.”

22. That indeed is the position in our electoral law. Visualize this from Section 83 of the **Elections Act, 2011**;

“83. 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.”

The **Elections Act, 2011** at **section 80(d)** just like **Article 159(2)(d)** of the Constitution, 2010 enjoins the election court to;

“80(d) decide all matters that come before it without undue regard to technicalities.”

23. In this case, the learned trial Judge set down what he called '*legal beacons and clear strictures*' within which he was to determine the Petition before him. This he did from paragraph 16 through to paragraph 19 of his judgment. And he got it right on the correct standard of the burden of proof in this kind of case when, after citing and quoting from the authority of **RAILA ODINGA –V- IEBC & 3 OTHERS E.P. NO. 5 of 2013** he stated at paragraph 17 of his judgment;

“17. Accordingly, the Petitioners not only bear the burden of proof to establish that there were violations, omissions, malpractices and irregularities in the conduct of the Garissa gubernatorial election held on 4th March, 2013, but must also illustrate to the court that the said violations, omissions, malpractices and irregularities, if any, affected the result of the election. It is after the Petitioners have established the foregoing that the burden shifts to the respondents, to establish that the results were not affected.”

The learned trial judge further got the legal basis right when he stated that electoral disputes involve not only the parties to a petition but also the electorate in the concerned electoral area and that they are therefore matters of great public importance and interest. He further guided himself correctly that the standard of proof in election disputes is higher than that of a balance of probability that is applicable in civil cases but lower than that applicable in criminal cases of proof beyond reasonable doubt. The issue for our determination in this appeal is whether the learned trial Judge was guided by the lofty constitutional principles that he so correctly set down at the commencement of his judgment to guide him in arriving at his decision.

24. Our resolution of issues (i), (ii) and (iii) will in turn determine the appellants' grounds 1, 2 and 5. Those grounds raised a myriad of allegations ranging from unsigned and unsealed statutory forms, to wit, forms 35 and 36; incorrect entries into those statutory forms; omission to enter results into the statutory forms; alterations on those statutory forms which were not countersigned; unexplained closure of polling and tallying centres; ejection of agents from those centres; failure to announce results at polling centres immediately after polling and tallying; cancellation of results; and several other allegations.

25. In his evidence in court, the County Returning Officer, **ALI ADAM ABDULLAH** (RIWI), readily conceded that errors and mistakes occurred in the conduct of the election but he excused them as regrettable human errors and oversights. In paragraphs 79, 81, 85, 96, 97, 116, 135 of his judgment, the learned trial Judge quite correctly found that the appellants had indeed proved some of those irregularities. In his own words:-

“135. From the foregoing, I have found that the Petitioners have proved certain irregularities in the conduct of the Gubernatorial election for Garissa County. These are as follows:- that one ballot box serial No. 070696 for Dertu polling station was broken, that the TNA agent for Danyere polling station was not given Form 35, that there were several Form 35 that were not signed by the party agents, that the results for Abakaile polling station were not indicated in the final results, that the results for Mathahlibah polling station were cancelled thereby disenfranchising 216 registered voters. The Petitioners were also able to show that a couple of form 35 had not been stamped by the Presiding Officer and finally that due to some discrepancies and errors in forms 35 and 36, close to 1000 votes were unaccounted for.”

What then is the effect of that admission and finding that irregularities were indeed committed in the conduct of an election"

26. The law is quite clear on election irregularities. **Section 83** of the **Elections Act** declares that,

“83. 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.”

In other jurisdiction, courts have interpreted provisions similar to this one as authorizing the nullification of an election only if the irregularities committed in the conduct of an election violate the Constitution or the electoral law or affect the result of an election. We once again quote from **MORGAN V SIMPSON [1974] 3 ALL ER 722** where Lord Denning M.R stated at p. 728

“But, even though the election was conducted substantially in accordance with the law as to elections, nevertheless, if there was a breach of the rules or a mistake at the polls and it did affect the result, then the result is vitiated.”

In **Opitz Wrennewsky, 2012 Scc 55, 2012 3SCR 76** the Canadian Supreme Court asserted that;

“only irregularities that “affected the result of the election” permit the annulment of election Irregularities must be of a type that could affect the result of the election and impact a sufficient number of votes to have done so.”

Nearer home, in the Tanzanian case of **MBOWE V ELIUFOO [1967] EA 240 GEORGES, C.J.** had this to say on the point at p. 242,

“In my view in the phrase “affected the result” the word “result” means not only the result in the sense that a certain candidate won and another candidate lost. The result may be said to be affected if after making adjustments for the effect of proved irregularities the contest seems much closer than it appeared to be when first determined. But when the winning majority is so large that even a substantial reduction still leaves the successful candidate a wide margin, then it cannot be said that the result of the election would be affected by any particular non-compliance of the rules.” (our emphasis)

The issue then is: did the irregularities in this case affect the result of the Garissa gubernatorial election" We think they did.

27. In his testimony in court, the County Returning Officer, **ALI ADAM ABDULLAH** (RIWI) for instance conceded in cross-examination that in Danyere Primary School Polling Station which had two streams, *“[o]nly one stream was reflected in Form 36.... None of the parties had their results for this stream.”* He attributed that to human error and trivialized the error by the assertion that even if the results for that stream had been added, they *“would not have changed the results because the winner [was] ahead by close to 2800 votes. In that stream, Ali Korane got 362 votes.”* He further conceded that at Mathahlibah Polling Station, the entire results were cancelled due the negligence of the presiding officer who, after consultation with IEBC headquarters, was charged with negligence. It was admitted by witnesses, including the 3rd respondent that Mathahlibah was one of Ali Korane's strong-hold. According to the Returning Officer that station had a total of 216 registered voters. At Modika Polling Station which had four streams, also Ali Korane's strong-hold, results for two streams were not reflected, although the Returning Officer claimed he took them in the final tallying without even giving the figures of the votes garnered by any of the candidates. In Borehole 5 Mobile Centre (040) where the 3rd respondent garnered only 19 votes, the IEBC officials gave him 878 votes which was an exaggeration by 859 votes.

28. On further cross-examination, the Returning Officer admitted that twelve (12) forms 35 did not bear

the seal of the 2nd Respondent or the presiding officer's signature; thirty-one (31) forms 35 were missing while some seventy-six (76) forms 35 had alterations which were not countersigned against; fifty-five (55) forms 35 which were not signed by any party agent and no explanations were given. There were also discrepancies in the entries in forms 35 *vis-à-vis* form 36.

29. The learned Judge estimated the affected votes to have been about 1000. That is clearly wrong because the results in respect of twelve forms 35 which had neither the seal of the 2nd Respondent nor the presiding officer's signatures should have been excluded on the ground that their authenticity could not be vouchsafed. In **James Omingo Magara v. Manson Nyamweya & 2 Others**, Civil Appeal No. 8 of 2010, this Court held that when a document is not signed by its author, it means that the author does not own it. It follows therefore that in this case the forms 35 with no presiding officer's signature were worthless and their results should have been excluded from the final tally. In the same vein, the absence of countersignatures against alterations, especially where such alterations related to votes garnered by the candidates, the result of the election on those forms were unverifiable. With these anomalies as well as the cancellation of the entire results for Mathahlibah Polling Station; with results of two streams at Modika Polling Station not reflected; with the 3rd respondent's votes being exaggerated by 859 votes at Borehole 5 Mobile Centre (040), in our view, not only significantly narrowed, if not altogether obliterated, the margin between the 3rd respondent and the runners-up but also rendered the result of the Garissa gubernatorial election indeterminate.

30. In the circumstances we find that, though the learned trial judge appreciated the appropriate law and guidelines, he glossed over and completely misdirected himself on the effect of the massive irregularities committed in the conduct of the election which we find not only dented the integrity of the election but also affected its result. Consequently, we allow grounds 1, 2 and 5 of this appeal.

31. Ground 3 of Appeal concerns scrutiny. The learned trial judge declined to order scrutiny mainly on the ground that "***the Petitioners did not pray for scrutiny in their petition.***" This was despite the appellants' application dated 7th June 2013 for an order for limited scrutiny and the learned Judge's own statement at paragraph 98 of his judgment where he stated:-

"98. It is noteworthy, that once discrepancies in Part B of Form 35 are noted, the only sure way of ascertaining what the respective candidates garnered in as (sic) election would be through a recount and scrutiny. In this case the Petitioners did not pray for any scrutiny or recount in the Petition or in their affidavits. Secondly, at the pre-trial stage there was no indication that was given by the Petitioners that they were to make such or any other application with regard to the scrutiny or recount in those polling stations where the Form 35 had alterations." (Emphasis ours)

32. It is common ground that scrutiny was sought in the appellants' chamber summons dated 7th June, 2013. There was also an oral application on 18th July, 2014. Both were strenuously opposed by the Respondents. And despite the learned trial Judge's said acknowledgement that a recount and scrutiny were the surest way of resolving the issue of the irregularities, the Judge nevertheless declined an order for scrutiny on account of non pleading for the same in the Petition. What then is a '*pleading*'"

The **Civil Procedure Act, Cap. 21 Laws of Kenya** in the interpretation clause defines "*pleading*" in the following words:-

"pleading" includes a petition or summons, and the statements in writing of the claim of demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the Plaintiff to any defence or counterclaim of a defendant." (our emphasis)

Not many words are needed to prove that, in light of the above, a summons such as the chamber summons taken out by the appellants on 7th June, 2013, constituted a pleading, if any was needed.

But for an order for scrutiny to issue, does a party, requiring the benefit of such scrutiny in an election Petition, need to plead in his petition “*specifically with sufficient detail*” as the judge stated in paragraph 118 of his judgment”

Of course scrutiny is not granted as a matter of course. It must be justified and the basis for granting an order for scrutiny laid. And we think in a case such as the one that was before the trial judge with a multitude of allegations of irregularities and errors, scrutiny even if not sought, was the one tool that the trial Judge should have employed to resolve the various alleged irregularities. In this case scrutiny was not only sought, pleaded if you like, but it was justifiably needed. A scrutiny and recount was exactly what the trial judge required to establish the correctness or otherwise of the allegations of the Petitioners – See **SAID V HEMED [2008]e KLR (ED) 322**.

33. And not just that, **section 82(1)** of the **Elections Act, 2011** empowers an election court to order scrutiny *suo motto*. It mandates-

“82(1) An election court may, on its own motion or on application by any party to the Petition, during the hearing of an election Petition, order for a scrutiny of votes to be carried out in such manner as the Election Court may determine.” (emphasis ours)

Similarly **Rule 33** of the Elections Petition Rules provides for the request for scrutiny at any stage of the proceedings when it provides:-

“33 (1) the parties to the proceedings may, at any stage, apply for scrutiny of the votes for purposes of establishing the validity of the votes cast.” (emphasis provided).

At page 1590 of the record learned counsel Mr. Sagana for the 1st and 2nd Respondents offered aid to the trial court when he said that scrutiny could issue *suo motto*. At page 1660 of the record learned counsel Mr. Muriithi for the 3rd Respondent said that there should have been scrutiny and recount to have clarity and certainty. But it would appear that, the judge despite these clear provisions of this law had made up his mind not to order scrutiny simply because, according to him, it was not pleaded. He erred.

34. We are crystal clear in our minds that an order for scrutiny is a discretionary one and that we cannot substitute our discretion for that of the trial court. We are further crystal clear in our minds that judicial discretion must always be exercised judicially and not whimsically and where it is denied reasons for such denial must be stated. See the **Mbogo case** (supra). In this case, as we have stated, there was material in abundance to warrant an order for scrutiny even on the Judge’s own motion. He himself acknowledged that it was the surest way to resolve the alleged irregularities, a formal application was made and counsel for the appellant repeatedly orally sought it.

Besides the quantitative irregularities mentioned above, there were also qualitative irregularities brought to the attention of the Judge which he nevertheless ignored. The learned Judge had received evidence that the contest was too close to call. He had been told that the voting patterns heavily leaned on clanism. Candidates received virtually all votes from the areas of their clans. So when events or irregularities occurred in any of those candidates’ strongholds, the Judge was obliged to give serious considerations to those events and their effect to guide the exercise of his judicial discretion. He ignored all that. In the circumstances, we find that the learned trial Judge erred in his exercise of judicial

discretion to deny scrutiny. Consequently, ground 3 of the grounds of appeal succeeds.

35. Ground 4 of appeal is on the extension of the voting period. On the evidence on record, it is clear that an election was held at Saka Primary School Polling Station on 5th March, 2013 because polling had been closed the previous day at about 10.40 pm. The reasons for the closure of that polling centre at about 10.40 p.m. were not given. What came out clearly in evidence though is that polling was closed at that polling station while voters were still on the queue awaiting their turn to vote. That provoked a fight between some two county assembly candidates. The availed evidence did not disclose any acts of violence prior to the closure of the polling station. But that is of little moment right now. What is of concern is whether the voting that took place on 5th March, 2013 as the Returning Officer, RIWI admitted was in breach of the law and, if so whether that breach affected the Garissa gubernatorial election.

36. Elections and electoral processes are governed by law. **Regulation 64(1) of the Elections (General) Regulations, 2012** provides for the adjournment of voting for given reasons. It directs that,

“64(1) Notwithstanding the terms of any notice issued under the Act or these Regulations, a presiding Officer may, after consultation with the returning officer, adjourn the proceedings at his polling station where they are interrupted by a riot, violence, natural disaster or other occurrence, shortage of equipment or other materials or other administrative difficulty, but where the presiding officer does so, the presiding officer shall re-start the proceedings at the earliest practicable moment.”

The learned trial Judge considered the matter in paragraphs 128, 129, 130, 131, 132, 133 and 134 of his judgment and concluded that the voting on 5th March, 2013 was quite in order. We hold a contrary view.

37. **Regulation 66(1)** which is headed “**Polling time**” provides that:-

“66 (1) subject to regulation 64, voting shall commence at 6 o’clock in the morning and end at 5 o’clock in the afternoon on the polling day.” (emphasis ours)

The unambiguous meaning of the above Regulation is that voting is confined to the voting day and the people to vote outside the stipulated time are those on the queue at 5.00 pm. This is made clear by **Regulation 66(2)** which directs that,

“66(2) Notwithstanding sub-regulation (1), a person who is on a queue for the purposes of voting before 5 o’clock in the afternoon shall be allowed to vote despite the fact that the voting time may extend to after 5 o’clock.”

In this case no reason was given why the people still on the queue at about 10.40 pm on 4th March 2013 were not allowed to vote and as we have already observed that was the reason for a fracas.

38. It follows therefore that the voting that was conducted by the officials of the 1st Respondent at Saka Primary School polling centre on 5th March, 2013 was a nullity and its effect was that the votes cast on that should have been excluded from the final tally. This is yet another irregularity committed by the 1st and 2nd Respondents and its effect was to clearly affect all the candidates who vied for the various seats in Garissa County. And because of the clan voting patterns of the Garissa County voters, as the record shows, certain candidate(s) to whom Saka was a stronghold would be more affected by the exclusion of the votes at that polling centre than others. The question then is whether the voting on that day of itself nullified the entire gubernatorial election in Garissa County. The answer is no. The voting at

Saka Primary School polling centre, though a nullity, did not of itself render the entire Garissa County gubernatorial election invalid. The results from that voting are the ones that are a nullity and must be excluded from the final tally. That resolves ground 4 of the grounds of appeal.

39. Ground number 6 of this appeal relates to the delivery of ballot boxes and results of the relevant election to the registrar of the court where an election Petition has been filed as required by **Rule 21** of the **Election Rules** under the **Elections Act, 2011**.

It turned out during cross-examination of a witness that the documents provided to the appellants' counsel differed from those that the court and the Respondents had. An order was then issued by the court on 17th June, 2013 directing the 1st and 2nd respondents to supply the Petitioner's advocates with a bundle of documents similar to those with the court and the Respondents. At some stage during the hearing counsel for the Petitioners said he had been given a bundle "*akin to the one in the court file and with the 3rd Respondent.*"

During the hearing of this appeal the issue arose again. The correct bundle which Mr. Muganda learned counsel for the 1st and 2nd Respondents said they had supplied to the Petitioners' counsel could not be traced. He said that he had checked with the original High Court file and he could not find a copy therein. None was in our files either. He had a copy which did not have a court stamp and consequently we refused to rely on it. Whether or not it was supplied to counsel for the appellants was a matter that ought to have been resolved by the trial Judge. But we do not know if the same issue was raised after Mr. Mbugwa had said that he had a bundle akin to the others in court or before. We shall leave the issue at that as we are not the trial court. What is evident is that the issue of missing forms 35 was not an afterthought as stated by the trial Judge in paragraph 92 of his judgment. It was a persistent issue in the proceedings. In our considered view nothing turns on it really as Mr. Mbugwa was able to mount a full and aggressive cross-examination of RIWI and it was confirmed that indeed certain forms 35 were missing. In the premises ground 6 of appeal fails.

40. In the result, we find that the cumulative effect of the irregularities stated above, is that the gubernatorial election in Garissa County was not conducted in an efficient, accurate and accountable or verifiable manner thereby compromising its integrity. We also find, as we have already stated, that the cumulative effect of the admitted irregularities, rendered the election result indeterminate. Consequently, we allow this appeal, set aside the judgment of Mabeya, J dated 24th September 2013 upholding the election of **NATHIF JAMA ADEN** as the Governor for Garissa County and substitute therefor an order allowing the petition dated 25th March 2013 with costs.

41. We declare that as a consequence of our findings herein, the 3rd Respondent was not validly elected as the Governor for Garissa County and we quash any certificate issued in that regard. We order that a fresh gubernatorial election for Garissa County be held as stipulated by law. A certificate in terms of **Section 86** of the **Elections Act** shall issue to the Independent Electoral and Boundaries Council and the Speaker of the Garissa County Assembly.

42. As regards costs and noting that costs follow the event, and further seeing as we do that the bungling of the Garissa gubernatorial election was solely caused by the 1st and 2nd Respondents, we order that the 1st and 2nd Respondents shall meet the costs of the appellants in the High Court which we cap at Kes.2 million, and the costs of this appeal which we cap at Kes. 2 million. The 3rd Respondent who opposed the Petition, the application for scrutiny and this appeal shall bear his own costs.

It is so ordered.

Dated and delivered at Nairobi this 23rd day of April , 2014.

D. K. MARAGA

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JUDGE OF APPEAL

J. W. MWERA

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JUDGE OF APPEAL

P. M. MWILU

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JUDGE OF APPEAL

I certify that this is a true copy of the original

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