



**Kidero & another v Independent Electoral and Boundaries Commission & 4 others  
(Election Petition E001 of 2022) [2022] KEHC 15547 (KLR) (18 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 15547 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT HOMA BAY  
ELECTION PETITION E001 OF 2022  
RE ABURILI, J  
NOVEMBER 18, 2022**

**BETWEEN**

**EVANS ODHIAMBO KIDERO ..... 1<sup>ST</sup> PETITIONER**

**ELIJAH ODONDI KODOH ..... 2<sup>ND</sup> PETITIONER**

**AND**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION .... 1<sup>ST</sup>  
RESPONDENT**

**COUNTY RETURNING OFFICER HOMABAY COUNTY FREDRICK  
APOPA ..... 2<sup>ND</sup> RESPONDENT**

**GLADYS ATIENO NYASUNA WANGA ..... 3<sup>RD</sup> RESPONDENT**

**JOSEPH OYUGI MAGWANGA ..... 4<sup>TH</sup> RESPONDENT**

**ORANGE DEMOCRATIC MOVEMENT PARTY ..... 5<sup>TH</sup> RESPONDENT**

**RULING**

1. This ruling determines three (3) applications. The two Petitioners' application is dated 29<sup>th</sup> September, 2022 whereas the 3<sup>rd</sup> and 4<sup>th</sup> Respondents' two (2) applications are dated 4<sup>th</sup> October 2022 and 30<sup>th</sup> October 2022.
2. The Petitioners' application dated 29<sup>th</sup> September 2022 seeks for the preservation and the scrutiny of election materials. The prayer for preservation of the election materials was granted on the court's own motion during the pretrial conference held on 7<sup>th</sup> October 2022 and already the parties and the court under the supervision of the Deputy Registrar have had the electoral materials secured and preserved.



### **The Petitioners' application dated 29<sup>th</sup> September, 2022**

3. In the above application, the Petitioners seek the following orders:
  - i. Spent
  - ii. Spent
  - iii. Spent
  - iv. Spent
  - v. That the Honourable Court do order that there be an inspection of the ballot boxes, scrutiny and recount of the votes cast and recorded as having been cast in the Gubernatorial Election in Homa-Bay County held on 9<sup>th</sup> August 2022, specifically in the polling stations particularized in paragraphs 11, 16, 17, 20, 22 and 28 of the affidavit sworn by Dr Evans Odhiambo Kidero on 27<sup>th</sup> September 2022 in support of this application.
  - vi. That this Honourable Court order examination, verification and scrutiny of the Secure Digital Memory Cards (SD Cards) for each of the KIEMS kit used in the Gubernatorial Election in Homa-Bay County specifically in the polling stations particularized in paragraphs 11, 16, 17, 20, 22 and 28 of the affidavit sworn by Dr Evans Odhiambo Kidero on 27<sup>th</sup> September 2022 in support of this application.
  - vii. That the parties be at liberty to appoint 4 agents each who may include (an) IT expert(s) to assist in the scrutiny exercise.
  - viii. That the costs of this application be provided for.
  - ix. Any other or further orders that this Honourable Court may deem fit, just and expedient.
4. The petitioners' application is premised on the matters set out in the Supporting Affidavit of Dr Evans Odhiambo Kidero, the 1<sup>st</sup> Petitioner herein.
5. It is the petitioners' case that the entire election process and the subsequent declaration of the 3<sup>rd</sup> and 4<sup>th</sup> Respondents herein as Governor & Deputy Governor-Elect of Homa-Bay County respectively on the 12<sup>th</sup> of August 2022 was against the principles of elections under Article 81 and 86 of the Constitution of Kenya, 2010 and in total contravention of the Elections Act, 2011 and the Election Offences Act, 2016.
6. The Petitioners further aver that there was deployment of force, violence and undue influence by the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents herein against both the electorate and their political opponents throughout the election period and that the election failed to satisfy even the basic threshold for a free and fair elections under Article 81(e)(ii) of the Constitution of Kenya of Kenya 2010 and further that the violence and the intimidation provided a conducive environment for illegalities and irregularities committed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents against their solemn duty to conduct an election in keeping with the Constitution of Kenya.
7. The petitioners further claim that the illegalities and irregularities complained of include but are not limited to instances of voter-inflation, the unlawful ejection of the Petitioners' agents from polling stations, voter suppression, irregular and unlawful assisted voting, alteration of form 37As, several unstamped Form 37As, several unsigned Form 37As and flagrant bribery of voters.
8. It is the petitioners' assertion that that the electoral malpractices and breaches of the law established by the petitioners through the evidence on record in the Petition and in this application are of such



fundamental nature that they bring into question the credibility of the entire gubernatorial election that was conducted in Homa-Bay County in the 2022 elections and therefore, an order for scrutiny and recount will assist the court to better understand the vital details of the electoral process and gain impression of its integrity and also help the court investigate if the allegations of irregularities and breaches of the law complained of are valid.

9. The Petitioners asserted further that the declaration Form for the results for the Gubernatorial election, Form 37C was neither signed nor stamped by the 2<sup>nd</sup> Respondent, raising serious questions as to the entire verification and tallying process. Additionally, that on the same Form, the column indicating “Votes Cast” has identical figures with the ones on the column labelled “Valid Votes” yet the declaration form clearly sets out a column for rejected votes. They therefore assert that the said Form is irredeemably flawed and cannot be relied upon.
10. The petitioners aver that there were serious and glaring inconsistencies between the number of votes cast for Governor Homa-Bay County per polling station as recorded under several Form 37As and the number of people identified by KIEMS kits in the said polling stations, implying that there was voter inflation and potential ballot stuffing as is detailed in paragraph 16 of the supporting affidavit. Further, the petitioners aver that there were instances where the KIEMS Kits identified more people than the number of people who were recorded to have actually voted in several Form 37As as detailed in paragraph 17 of the supporting affidavit.
11. The petitioners claim that the KIEMS kits entry of the number of identified voters exceeds the number of votes cast as indicated on the Form 37As and thus for the above reasons, it is imperative that a thorough scrutiny is done on, inter alia, the KIEMS kits and the polling station diary in order to understand the vital details of the electoral process.
12. The first and second respondents represented by Mr Olendo relied on the response filed by the 3<sup>rd</sup> and 4<sup>th</sup> Respondents. The 5<sup>th</sup> Respondent ODM Party too did not file any replying affidavit but relied on what the 3<sup>rd</sup> and 4<sup>th</sup> Respondents filed and submitted on.

### **The 3<sup>rd</sup> and 4<sup>th</sup> Respondents’ Replying Affidavit**

13. Opposing the application, the 3<sup>rd</sup> and 4<sup>th</sup> Respondents filed a replying affidavit sworn on the 14<sup>th</sup> October 2022 by the 3<sup>rd</sup> Respondent Gladys Atieno Nyasuna Wanga in which she deposes that the aim of conducting scrutiny and recount is not to enable the Court to unearth new evidence on the basis of which the petition could be sustained but to assist the Court to verify the allegations made by the parties to the petition which allegations themselves must be hinged on pleadings.
14. It was deposed by the 3<sup>rd</sup> respondent that the orders sought in the petitioner’s application did not meet the cogency standard established by law for scrutiny and recount of votes and was at best a fishing expedition intended to aid the petitioners’ frivolous claims.
15. The 3<sup>rd</sup> respondent deposed that the KIEMS data relied on by the petitioners in their application was illegally obtained despite the petitioner’s allegation that the same was sourced from the Supreme Court Election Petition No E001 of 2022. It was further deposed that the petitioner’s application seeks blanket scrutiny of over 200 polling stations on the premise of concocted, illegal and speculative evidence.
16. The 3<sup>rd</sup> respondent further deposed that the allegation of alterations that was pleaded in the petition was not backed up by any evidence by any witness or the petitioners and the forms referred to are an afterthought and inadmissible. It was further deposed that a review of the forms availed in support of the said allegation noted that the petitioners had deliberately produced illegible forms and where



there are alterations, it is clear that the same were in less than 4 polling stations and relate to minor summation errors or entries on the wrong rows and are countersigned.

17. The 3<sup>rd</sup> respondent further deposed that although the petitioners now seek inter-alia a recount of votes, they never pleaded that their agents requested for a recount as they were entitled to under regulation 80 of the Elections (General) Regulations and as such the application for a recount is in the circumstances demonstrably an afterthought and dishonest.
18. It was deposed that the difference in the number of votes garnered between the petitioner and the 1<sup>st</sup> respondent was so wide and had not been controverted as to warrant any practical basis to undertake the arduous and resource intensive task of a recount and/or scrutiny.

The Petitioner's Written Submissions on the application dated 29<sup>th</sup> September, 2022

19. It was submitted that the statutory basis for scrutiny and recount is found in sections 80 (4) and 82 of the *Elections Act* 2011 and Rules 28 and 29 of the *Elections (Parliamentary and County Elections) Petition Rules* 2017, as well as Articles 35 and 81 of the *Constitution* of Kenya, Section 4 of the *Access to Information Act*, 2016 and section 27 of the *Independent Electoral and Boundaries Commission Act*, 2011.
20. The petitioners submitted that scrutiny and recount was a way of enforcing transparency, accuracy and accountability which are the building blocks of a free and fair election. Further to this, the petitioners submitted that the sui generis nature of election petitions where the key evidence is in the hands of the standard respondent, the IEBC, necessitates the need for scrutiny and recount.
21. On the purpose of scrutiny, the petitioners relied on the case of *Philip Mukwa Wasike v James Lusweti Mukwe & 2 Others* [2013] eKLR as well as the locus classicus by the Supreme Court of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR.
22. The petitioner's submitted that the standard of proof for a sufficient reason/basis for scrutiny was set out by Majanja J in the case of *Richard Kalemebe Ndile & Another v Patrick Musimba Mweu & 2 others* [2013] eKLR as "not to the requisite standard".
23. On the burden of proof, it was submitted that at this preliminary stage of the hearing of the petition, as no witness has been called, the court is at liberty to form an opinion based on the pleadings and affidavit evidence on record. Reliance was placed on the case of *Hassan Mohamed Hassan & Another v IEBC & 2 others* [2013] eKLR as well the cases of Raila 2013 and 2017.
24. The petitioners thus submitted that to satisfy the court for a grant of an order for scrutiny and/or recount, the petitioners had to build up a prima facie case for non-compliance of the electoral law by the IEBC as the principal respondent.
25. It was submitted that in the instant case, the petitioners had made a prima facie case for scrutiny at Ongeti Primary School through the two affidavits of Dan Ojjo of 7<sup>th</sup> September 2022 and 14<sup>th</sup> October 2022 which have not been controverted by the respondents as well as Akala Primary School Polling Station.
26. On the KIEMS kit, it was submitted that the data relating to voters apparently identified using the physical register has not been provided as a rebuttal to controvert the KIEMS Kit data the petitioners have provided and further that the data provided by the 1<sup>st</sup> respondent and annexed as Exhibit FA2, is not titled and does not state when the data was retrieved from the device thus it is impossible to reconcile how many voters were registered in each polling station and how many were identified by the KIEMS Kit.



27. The petitioners further submitted that the burden of proof is on the respondents to show what legal functions the persons who purported to sign the Form 37As over and above the one person appointed to serve as agent of the 3<sup>rd</sup> and 4<sup>th</sup> respondents served in each of the polling stations. It was submitted that the concept of over-confirmation of results as proposed by the 3<sup>rd</sup> and 4<sup>th</sup> respondent was alien to our electoral laws and further demonstrated the mischief by the strangers and masqueraders.
28. The petitioners submitted that for each prayer for scrutiny and recount, the petitioners had shifted the evidentiary burden of proof to the respondents and established sufficient basis for scrutiny whereas the respondent had not done competent rebuttals that would deny the petitioners the prayers sought.

### **The Petitioners' oral Submissions on the application dated 29<sup>th</sup> September, 2022**

29. Mr Aduda counsel for the petitioner's submitted on the Petitioners' application dated 29/9/2022 relying on the affidavit sworn by the 1<sup>st</sup> petitioner and filed on the same day. He further relied on the petitioners' written submissions dated 25/10/2022 together with their filed list and bundle of authorities.
30. Referring to paragraph 13 of the petition, Mr Aduda submitted that on 22/8/2022, the petitioners while invoking their rights under article 35 of the Constitution of Kenya and section 4 1(c) of Access to Information Act, wrote to IEBC asking them to supply them with the information (see Exhibit 1), which information was now the subject matter of the instant application but that there was no response to that letter which was received and duly stamped at the IEBC headquarters in Nairobi as well as at the IEBC Homabay branch.
31. Mr Aduda submitted that their application required polling stations as listed out in paragraphs 11, 16, 17, 20, 22 and Tables A to E where they had listed the specific polling stations in issue. He further submitted that they had considered a replying affidavit sworn by the 2<sup>nd</sup> Respondent in which at paragraph 7 he stated that the KIEMS Kit can only provide the total number registered in each polling station and total number of voters cleared to vote. He submitted further that the KIEMS Kit report was divided into two sections. Mr Aduda further submitted that the first section identified the polling stations within the respective code references, that the next section purported to provide the registered number of polling stations and the number of voters authenticated via the KIEMS Kit.
32. He submitted that the second part did not identify the first entry which relates to Homabay County, Homabay Town, registered voters and number of voters authenticated to vote. It was his concern that therefore they do not know for what polling stations the entries refer and that they needed the SD Cards so as to know that such number of voters were cleared to vote via KIEMS Kit or manually. Counsel submitted that this was a reason to grant the prayers sought in the application.
33. Mr Aduda further submitted at that Paragraph 8 of the 2<sup>nd</sup> Respondent's affidavit, he deposes that the information sought by the petitioners was in an SD Card safely kept by the 2<sup>nd</sup> Respondent but that the question is, why that SD Card was not produced as an exhibit in the response to the Petition. Counsel submitted that IEBC must bring forth all the information as sought pursuant to Article 81 of the Constitution of Kenya.
34. Mr Oriri another counsel for the petitioners submitted that the principles of transparency and accountability were entrenched in section 80 of the Elections Act and article 35 of the Constitution of Kenya. He submitted that Election disputes are sui generis proceedings. It was his submission that the 1<sup>st</sup> Respondent was the sole custodian of materials being sought by the Petitioners and that only a scrutiny and recount could ascertain the validity of the process and whether the allegations by the Petitioners were true or not.



35. On the purpose and rationale for scrutiny and recount, Mr Oriri relied on the cases of Gatirau Peter Munya case, Kennedy Akide and Raila Odinga verses IEBC and others (Raila I). He submitted that the Court was not being asked to assist the Petitioners but to ascertain the position.
36. On the Principles of Grant of Orders, Mr Oriri submitted that the allegations must be specifically proven; that such applications can be made at any point after or during the filing of the petition. He referred the court to the Kalembe Ndile case on standard of proof and submitted that the applicant needs to have a good reason or sufficient basis for the court to ascertain the validity of the Election process as contained at pages 17 – 24 of their submissions. Mr Oriri further submitted that no rebuttal had been made to justify denial of the Petitioners to access the materials.

### **The 1<sup>st</sup> Respondent's oral Submissions on the application dated 29<sup>th</sup> September, 2022**

37. The 1<sup>st</sup> Respondents IEBC made oral submissions relying on the replying affidavit sworn on 14/10/2022 by the 3<sup>rd</sup> Respondent Gladys Atieno Nyasuna Wanga and their written submissions filed on 25<sup>th</sup>/10/2022. Mr Olendo submitted that elections are anchored on certain principles, rules and regulations hence the application must also be based on the same principles, rules and regulations. It was his submissions that Paragraph II of the petitioner's affidavit relied on refers to violence and that the violence being referred to is said to have occurred on 9/8/2022 at 11.00pm way after the voting and tallying process were concluded and what was pending was entry of results in form 37A when the Returning Officer was being coerced to enter wrong results in 37A but that after calm had been restored, he entered the correct results and submitted to the County Returning Officer at Rangwe. Mr Olendo submitted that complaints or issues raised cannot be answered by opening the ballot boxes.
38. On the issue of the violence at Akal Primary, Mr Olendo submitted that the violence was at the end of voting and that the Returning Officer had sworn an affidavit saying that the violence did not interfere with the voting and counting and that he had produced the drawing of the polling station to show that all agents were satisfied with the process and signed. Mr Olendo submitted that scrutinizing of the ballot boxes would not help as the ballot boxes were secured when the violence begun hence there was no interference with the ballot boxes.
39. Mr Olendo submitted that at paragraph 16 on the polling station diary, this did not require a genius to explain the difference. It was his submission that a number of voters could not be identified in the KIEMS Kit and were not turned away but allowed to vote using a manual register. He submitted that there was no sufficient ground to warrant scrutiny as it was not demonstrated how the difference between votes identified by KIEMS Kit vis a vis valid votes cast affected the validity of the elections. Mr Olendo submitted that they had sufficiently explained the difference.
40. It was his submission that the SD card contained data relating to registered voters in that polling station and votes identified by KIEMS Kit and that there were no specific allegations to warrant availing of SD card. On the letter requesting for information, Mr Olendo submitted that the letter was post facto the election process and that failure to respond to the letter does not cast doubt on the validity of the election.
41. He further submitted that no single basis had been laid to grant the orders sought and that the petition was more qualitative than quantitative. Mr Olendo submitted that the petitioners had not challenged the numbers but the process hence even if the ballot boxes were opened, they would not give the answer.
42. On the principles for grant of the orders sought, Mr Olendo submitted that a basis must be laid and that scrutiny must not be a fishing expedition as is the case in the application as there was no specific allegation challenging the numbers to call for scrutiny. He submitted that they had availed all form



37As and all polling stations diaries, and confirmation in the presence of all agents who verified the process and signed off and thus urged that the instant application be dismissed with costs.

#### **The 3<sup>rd</sup> and 4<sup>th</sup> respondent's Written Submissions on the application dated 29<sup>th</sup> September, 2022**

43. In their written submissions, it was submitted on behalf of the 3<sup>rd</sup> and 4<sup>th</sup> Respondents that at this stage, it is impractical that the court can on the basis only of allegations in the Petitioner's pleadings, specifically the parties' affidavit evidence, and which have been sufficiently answered, determine the sufficiency of the petitioner's evidence/case to warrant scrutiny and that the only way the court can reasonably make that determination is by having the veracity of allegations made in the petition tested through examination of witnesses.
44. Reliance on the aforementioned submission was placed on the case of *Jacob Mwirigi Muthuri v John Mbaabu Muriithi & 2 Others* [2013] eKLR where Lesiit, J held *inter alia* that an order for scrutiny and recount cannot be ordered at the pre-trial stage because the prayer should not be granted on the basis of untested evidence. Further reliance was placed on d in the case of *Rishad H. A. Amana v IEBC & 2 others* [2013] eKLR
45. It was further submitted that that scrutiny and/or recount is not intended to provide evidence but to confirm specific allegations already made in the Petition and witness affidavits only, as was held in the case of *Philip Osoke Ogutu v Michael Aringo & 2 others*, Busia High Court Petition No 1 of 2013.
46. Further submission was that the application for scrutiny should be considered and disposed of strictly within the four corners of the applicable law and parameters as set out by the Supreme Court in the case of *Gatirau Munya v Dickson Mwenda & 2 others*.
47. The 3<sup>rd</sup> and 4<sup>th</sup> respondents further submitted that the petitioners' basis for scrutiny and recount are devoid of merit and do not meet the sufficiency threshold to warrant scrutiny or recount.
48. Regarding the KIEMS kit evidence filed by the petitioners, it was submitted that the application for scrutiny must be strictly evaluated based on the Pleadings and affidavits originating the Petition and not on new evidence mischievously introduced into the petition as an afterthought and that evidence given in previous judicial proceedings must be proved and is only admissible if the same meets prescribed conditions under section 34 of the *Evidence Act* including that the proceedings must relate to the same parties or their representatives and that the questions in issue must be substantially the same.
49. It was submitted that although the Petitioners are seeking *inter alia* a recount of votes, nowhere in the Petition is it pleaded that their agents requested for a recount as they were entitled to under Regulation 80 of the applicable Regulations. Reliance was placed on the case of *Harun Lempaka v Lemanken Aramat* [2013] eKLR where it was held that an applicant for a recount of votes at the pretrial stage must *inter alia* show he or his agents were denied the right to recount under Regulation 80 of the *Election (General) Regulations*, 2012."
50. It was therefore submitted that the evidence adduced does not warrant expenditure of the court and party's limited resources to aid such an exercise in vain and as such the application dated 29<sup>th</sup> September 2022 has not met the threshold set in our jurisprudence, lacks merit and should be dismissed with costs.

#### **The 3<sup>rd</sup> & 4<sup>th</sup> Respondents' oral Submissions on the Application dated 29<sup>th</sup> September, 2022**

51. Mr Orieyo counsel for the 3<sup>rd</sup> and 4<sup>th</sup> respondents submitted opposing the Petitioners' application for scrutiny. He relied on the replying affidavit sworn on 14/10/2022 by the 3<sup>rd</sup> Respondent and the written submission filed on 24/10/2022. He submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents declared



results where the Petitioner got 155,182 votes whereas the 3<sup>rd</sup> and 4<sup>th</sup> Respondents got 244,559 votes, a difference of 90,000 votes.

52. It was his submission that Section 82 of the [Elections Act](#) and Rules 28 & 29 of the [Election \(Parliamentary & County Elections Rules\)](#) 2018 set out the basis for scrutiny. He further submitted that the petitioners had not demonstrated that they meet the threshold. Mr Orieyo submitted that an application for scrutiny was not a lottery or a fishing expedition and that one had to demonstrate that the problem was with the ballot boxes.
53. He further submitted that only 2 stations were referred to yet the petitioners wanted 200 stations to be scrutinized. On the allegation on the KIEMS KIT, it was submitted that the applicants stated that they obtained information on KIEMS materials from the Presidential Election Petition whereas the petition was for Presidential Election and could not be used or impact Governor's election. Mr Orieyo submitted that Section 12 of the [Supreme Court Acts](#) only related to information on results in form 34. It was his submission that the applicants had the burden of proof to tell the court where they got the information from.
54. It was his submission that there was no justification or sufficient basis for scrutiny and recount. He submitted that scrutiny must be limited to contested posted results as held in the Gatirau Peter Munya case. It was his submission that the applicants must also demonstrate that at the polling station they applied for a recount and that the same was denied.
55. Senior Counsel Mr Kanjama on behalf of the 3<sup>rd</sup> and 4<sup>th</sup> Respondents also submitted that the court's role was to determine the question of whether the application was merited or premature or whether sufficient reasons are given. He referred the court to the Petitioner's own bundle of authorities and affidavits at page 80 of Petitioner's submissions. It was his submission that it was not enough to say that there were irregularities but that the irregularities must have affected the distribution of votes for scrutiny to be achieved. He further submitted that the results that had been filed had not shown any irregularities. It was his submission that in the Gatirau Peter Munya Case, the Supreme Court found that the Court of Appeal misunderstood rules regarding scrutiny.
56. Mr Kanjama submitted that the 3<sup>rd</sup> and 4<sup>th</sup> Respondents concurred with the submissions by 1<sup>st</sup> and 2<sup>nd</sup> Respondents on SD cards as they would not assist the court in resolving any of the allegations raised. He further submitted that there was no contestation on the validity of Form 37C and that the elections were primarily manual.

### **The Petitioners' Rejoinder Oral Submissions on the Application dated 29<sup>th</sup> September, 2022**

57. In a brief rejoinder, Ms. Soweto counsel for the Petitioners submitted that the only question that the applicant had to satisfy in an application for scrutiny was sufficient basis. She further submitted that it was not the purpose of the court to wait and consider the merits of the evidence as that would be seeking for a summary hearing of the petition but rather that the standard set by the court is on a prima facie basis without going into the merits of the case before it.
58. Ms. Soweto submitted that the Respondents had gone into the merits of the case to prove to the court why scrutiny was not merited whereas the purpose of scrutiny was to assist the court to investigate the irregularities and breaches of the law complained of as provided for in Section 82 of [Elections Act](#). Ms. Soweto submitted that the basis for scrutiny changes on a case to case basis as the section does not set out conditions for scrutiny. She further submitted that even the court itself can order for scrutiny of the votes to enable it arrive at a just and fair result and that the scrutiny would disprove the allegations against the Respondents and help the court dispose of the questions hence this court has a wide latitude to determine scrutiny.



59. Ms. Soweto further submitted that scrutiny would be made where there are errors, irregularities, alterations on the results and that the purpose was not for quantitative but to determine whether the votes cast were valid as the validity of a vote or an election can upset a result if the court finds that the votes cast were not valid regardless of the numbers. She further submitted that the petitioner in paragraphs 16, 17, 20, 22 of the supporting affidavit set out numerous polling stations where questions are raised specifically that form 37A were not signed by the Presiding Officer, they lacked valid stamps which speak to the validity of that election. Ms. Soweto referred the court to the case of Richard Kalembe Ndile to support her argument.
60. It was her submission that they had asked for inspection of Ballot boxes and election materials, to see if they were sealed as required or whether they were tampered with which goes to the root of validity of the election. She further submitted that the respondents were not saying that it was not impractical at this stage to order for scrutiny. Ms. Soweto submitted that the court could allow scrutiny if it is satisfied that a prima facie case has been made for scrutiny and that it was not for the court at this stage to delve into the evidence to determine whether or not to allow a scrutiny. It was her submission that the burden of proof applied in election petitions was not applied in application for scrutiny which is prima facie and sufficient basis to be laid.

### **The 3<sup>rd</sup> and 4<sup>th</sup> Respondents' Application dated 4<sup>th</sup> October 2022**

61. The application dated 4.10.2022 was brought by the 3<sup>rd</sup> and 4<sup>th</sup> respondents in which they seek to strike out some of the pleadings filed by the petitioners. The applicants seek the following orders:
- i. Spent.
  - ii. That this Honourable Court be pleased to strike out the affidavit of Enosh Ongweya Bolo filed in Court on 14th September 2022.
  - iii. That this Honourable Court be pleased to strike out exhibits marked EOK 16 referred to in the affidavit of Dr Evans Odhiambo Kidero sworn on the 7th September 2022 annexed from page 192 in volume 1 to page 199 (h) in volume 2 of the petitioners' bundle of documents.
  - iv. That this Honourable Court be pleased to strike out paragraphs 138 and 139 of the petition and paragraphs 61 and 62 of the supporting affidavit sworn by Dr Evans Odhiambo Kidero on 7th September 2022.
  - v. That this Honourable Court be pleased to strike out exhibit marked EOK21 referred to in the affidavit of Dr Evans Odhiambo Kidero sworn on 7<sup>th</sup> September 2022 annexed from page 377 in volume 1 to page 1203 in volume 2 of the petitioners' bundle of documents.
  - vi. That this Honourable Court be pleased to strike out paragraphs 87 – 95, 98 and 99 of the petition and paragraphs 17 – 30 of Dr Evans Odhiambo Kidero's supporting affidavit.
  - vii. That this honourable court be pleased to strike out the affidavit of Silas Okinyi Rawo in its entirety.
  - viii. That this Honourable Court be pleased to grant such other or further orders as it may deem fit to further the ends of justice.
  - ix. That the petitioners be jointly and severally condemned to pay the costs of the instant application.



62. It is the 3<sup>rd</sup> and 4<sup>th</sup> Respondents' case that the affidavit of Enosh Ongweya Bolo was filed in court on the 14<sup>th</sup> September 2022, 5 days after the prescribed deadline and without leave of court, which is in contravention of Rule 12 (7) and (8) of the *Elections (Parliamentary and County Elections) Petition Rules*. The applicants further aver that the exhibit marked EOK 21 referred to at Paragraph 104 of the supporting affidavit of Dr Evans Odhiambo Kidero merely produces the said exhibit without laying any basis for the same as the exhibit is not anchored on any pleading in the petition or averment in the supporting affidavit and that unless expunged from the record, it is intended to and will aid the Petitioner in furthering the fishing expedition for which the petition was clearly filed and thereby unfairly prejudice the Respondents' defence in contravention of Article 47 and 50 of the *Constitution* of Kenya.
63. The applicants aver that the Petitioner was at all material times under duty to implead the grounds of his Petition with specificity strictly within the 28-day period from the date of declaration of results as to enable the Respondents respond to the same failure and that any reliance on the said exhibits otherwise than as strictly pleaded, if at all, shall amount to an amendment of the Petition contrary to the law.
64. It is the applicants' case that the Affidavit of Silas Okinyi Rawo, Paragraphs 87-95, 98 and 99 of the Petition and paragraphs 17-30 as well as the Supporting Affidavits adversely mention the Rt. Hon Raila Odinga who is not a party to this petition and accordingly, has no right of reply or the opportunity to defend himself. The applicants aver that this was meant to disparage his character as a politician and leader of the 5<sup>th</sup> Respondent Part and that the omission of Rt. Hon Raila Odinga as a party to the Petition was deliberate and intended to abuse the privileges of this court's proceedings for ulterior political purposes.
65. The applicants aver that the said allegations are scandalous, libelous and with no rational connection with the purpose for which election Petitions were intended and amount to a violation of Articles 28, 35(2), 47 and 50 of the *Constitution* of Kenya.
66. It was the applicants' case that evidence of KIEMS data annexed by the petitioners and which the 1<sup>st</sup> respondent has disowned render the said evidence either inadmissible as having been illegally obtained or fabricated to further a fraudulent purpose.

**The Petitioners' Replying Affidavit to the 3<sup>rd</sup> and 4<sup>th</sup> Respondents' Application dated 4<sup>th</sup> October, 2022**

67. In opposing the application, the petitioners through the 1<sup>st</sup> petitioner swore a replying affidavit on the 18<sup>th</sup> October 2022. It is the petitioners' contention that the applicants' application is an omnibus application incapable of proper adjudication by the court as it seeks several reliefs governed by different rules thus is incurably defective and ought to be struck out.
68. It is the petitioners' case that other than prayer 2, all other prayers sought by the applicants are merit-based questions that should be tested at the trial stage to avoid a miscarriage of justice as election petitions are prosecuted by way of oral evidence where opportunity is availed to all parties to test the evidence produced.
69. It is the petitioners' contention that the exhibit marked EOK 16 (a) together with paragraphs 138 and 139 of the petition as well as paragraphs 61 and 62 of the 1st petitioner's supporting affidavit speak to information and data from the KIEMS kit that raises doubt on the credibility of the information provided by the 1st respondent regarding voter turnout and that this evidence does not stand on its own but that a basis is laid in paragraphs 135 -137 of the petition and paragraphs 58 – 60 of his supporting affidavit.



70. It is the petitioners' further contention that paragraphs 85 – 117 of their petition lays the basis for the limb of violence, intimidation and improper influence perpetrated by the 5<sup>th</sup> respondent and its party leader as further set out in the affidavit of Silas Okinyi Rawo.
71. It is contended by the petitioners that these are election proceedings in which all allegations raised by the petitioner go towards impeaching the credibility of the process and results and that none of the prayers in the petition are against any leader of the 5<sup>th</sup> respondent other than the 3<sup>rd</sup> and 4<sup>th</sup> respondents whose election is being challenged.
72. The petitioners contended that the affidavit of Enosh Ongweya Bolo was filed electronically on the 9th September 2022 at the e-filing portal and a hard copy delivered on the 14th September 2022.

### **The 3<sup>rd</sup> and 4<sup>th</sup> Respondents' Written Submissions on the Application dated 4<sup>th</sup> October, 2022**

73. It was submitted that the petitioners filed the further affidavit of Enosh Ongweya Bolo on 14<sup>th</sup> September 2022, 5 days after the deadline for the filing of the Petition and its supporting documents without leave of court and have to date failed to seek leave of court to regularize the same which omission is in the circumstances fatal to the additional evidence and thus to permit the said evidence to remain on record would be a mockery of the rules and set a dangerous precedent for the timeous administration of electoral disputes.
74. The 3<sup>rd</sup> and 4<sup>th</sup> respondents further submitted that the data produced by the Petitioner as EOK 16 is, despite its public character, of undisclosed authorship/record/register and has been disowned by the very institution from whom it ordinarily ought to originate from thus inferring that it is intended solely to aid the Petitioner in a fishing expedition vide the scrutiny application and the same ought to be struck out as it is likely to unnecessarily convolute proceedings and risk the timely resolution of the petition. Reliance was placed on the case of *Clement Kungu Waibara v Annie Wanjiku Kibeh & another* [2017] eKLR.
75. It was further submitted that in the event that there was any merit in the said data, the same would amount to illegally obtained evidence and would in the event be inadmissible as was held in the case of Presidential Election Petition No 4 of 2017, *Njonjo Mue & another v Chairperson of Independent Electoral and Boundaries Commission & 3 others* [2017] eKLR.
76. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents submitted that exhibit EOK 16 and all averments anchored on it are inadmissible in these proceedings and should be struck out as the same would render the trial unfair or would otherwise be detrimental to the administration of justice.
77. Further submission was that the annexure "EOK-21" does not plead the substance of the evidence adduced in the said exhibit nor is there any pleading in the petition upon which it is anchored and thus it does not disclose with specificity the substance or purpose for which it was annexed so as to enable the Respondents fashion a reasonable defence/response and thus violates the most basic tenets of fair hearing and if sustained on record will amount to trial by ambush. It was submitted that the said exhibit serves no essential purpose in the proceedings and ought to be expunged from the record forthwith.
78. It was submitted that the Affidavit of Silas Okinyi Rawo, paragraphs 87-95, 98 and 99 of the petitions and paragraphs 17-30 of the Supporting affidavit of Dr Evans Kidero adversely and scandalously mention Raila Odinga in a malicious and libellous terms that impugn his integrity as a person and politician and amount to a violation of Article 28, 35(2), 47 and 50 of the *Constitution* of Kenya and are otherwise scandalous.



79. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents submitted that the offending paragraphs have deviated and drifted too far off the course and that it was in the interest of justice that the court strikes out the same to ensure equality of arms and to safeguard the tenets of a fair trial.

### **The 3<sup>rd</sup> and 4<sup>th</sup> Respondents' Oral Submissions on the application dated 4<sup>th</sup> October, 2022**

80. Mr Awele advocate for 3<sup>rd</sup> and 4<sup>th</sup> Respondents submitted relying on the affidavit sworn by the 3<sup>rd</sup> Respondent and written submissions filed on 24/10/2022 referred to above. Counsel further submitted that elections are special proceedings thus sui generis so tightly regulated by all laws applicable to elections starting with the Constitution of Kenya, the Elections Act and the Regulations and decisional laws made by the superior courts.

81. Mr Awele submitted that the proceedings must be timeously resolved. It was his submission that the controlling objectives of all those regulations was timeous resolution of these special proceedings and as such whether in permitting the Petitioner to rely on the documents sought to be expunged, the court would be giving effect to the law and the Constitution of Kenya or diluting the said laws as Regulation 4 of (EP&CE PR) was clear on what this court was expected to do in such matters as was upheld in the case of Ankala Narasa Reddy that doctrines of Equity do not apply in election proceedings.

82. It was his submission that Regulation 12(4) required that a Petitioner shall at the time of filing a petition, file supporting affidavit, witness affidavit and documents. He submitted that the witness' statements were filed 5 days after the filing of the petition, and thus had to be expunged. He however conceded that in the event that the affidavit was filed on 9/9/2022 then he would have no issue with it. He further submitted that Exhibit EOK16 purported to produce KIEMS data was evidence that offended the principle that the court must not countenance an illegality to form a course of action.

83. It was his submission that all exhibits and documents produced must conform to a certain canons and rules of evidence in those sui generis proceedings. He submitted that the evidence was concocted to facilitate scrutiny. Mr Awele submitted that the exhibits offended the rules that the public documents must be produced in accordance with the law. He further submitted that the KIEMS data produced was from a public record that as admitted under section 38 of the Evidence Act and that it must be from a record or entry.

84. Mr Awele submitted that the data produced before the Supreme Court was mined from logs and was thus not the record. He submitted that under section 12 of Elections Act, IEBC was mandated to produce election results and not logs and thus if the Petitioner claimed that they got the exhibits from the previous judicial proceedings, they must prove that they were parties to those judicial proceedings. It was his submission that if the court countenanced the exhibits, a dangerous precedent would be set as it would encourage fishing of exhibits.

85. Mr Awele submitted that Election OCK21 was another exhibit which offended rule 12. It was his submission that Paragraph 104 of the 1<sup>st</sup> Petitioner's supporting affidavit annexed documents whose basis was not laid out in the affidavit or petition which posed a danger that the Petitioners would have a basis to expand their case with new grounds based on the exhibits whose pleadings was not contained in the petition and the affidavit.

86. Mr Awele submitted that the affidavit of Silas Okinyi Rao was dedicated singularly to Right Hon Raila Odinga as well as paragraphs 87 to 95, 98 and 99 of the Petition and Paragraph 17 to 30 of the supporting affidavit which was scandalous against a party who was not a respondent to this petition as the petitioners never enjoined him to the petition to defend himself. He submitted that the right to dignity and to non-discrimination must apply to all.



## The Petitioners' opposing written Submissions to the Application dated 4<sup>th</sup> October, 2022

87. It was submitted that the affidavit of Enosh Ongweya Bolo was filed electronically within the stipulated time on the 9<sup>th</sup> September 2022 but that the hard copy that was presented to court was stamped on the 14<sup>th</sup> September 2022. Reliance was placed on the case of *Gitobu Imanyara v Daniel Torotich Arap Moi & 12 Others* High Court Election Petition No 4 of 1993. The petitioners submitted that e-filing is now the primary means of filing documents and that in this case the requirement to file physical copies was a decision taken later that does not negate or invalidate e-filing.
88. The petitioners further submitted that this could be remedied under Rules 4, 5(1) and 15 (h) of the *Elections (Parliamentary and County) Petition Rules* 2017 and the letter and spirit of Article 159 (2) of the *Constitution* of Kenya.
89. Regarding the prayer to strike out the annexure marked EOK 21, the petitioners submitted that the letter and spirit of the law, specifically Rule 12 (10) of the *Elections (Parliamentary and County) Petition Rules* 2017, has been complied with as the petitioners set out their entire case and the evidence they seek to rely on.
90. The petitioners submitted that the issue raised in this instance goes to the substance and merit of the election petition that would entail the court going into a summary determination of the substance and merit of the petition without allowing a fair hearing of the issues.
91. Regarding prayers 3,4,6,7 and 8 of the application, it was submitted that the 3<sup>rd</sup> and 4<sup>th</sup> respondents had not demonstrated how the pleadings are frivolous, scandalous, vexatious and embarrassing and that the respondents had misapprehended the petitioners' complaints.
92. It was submitted that the complaint against Raila Odinga is not about his character as stipulated by the 3<sup>rd</sup> and 4<sup>th</sup> respondent but against the improper instrumentalization or weaponization of his persona to unduly influence, affect or toxify the arena of the election. Reliance was placed on the case of *Hassan Ali Joho v Inspector General of Police & 3 others* [2017] eKLR.
93. It was submitted that the petitioners are at liberty to make whatever case they wish to make as long as the issues fall within the court's jurisdiction for determination. Reliance was placed on the Court of Appeal cases of *Kennedy Moki v Hon Rachael Kaki Nyamai & 2 others* Election Petition Appeal No 4 of 2018 and that of *Mohammed Abdi Mohamed v Ahmed Abdullabi Mohamed & 3 others*, Nairobi Election Petition Appeal No 20 of 2018.
94. It was submitted that the court cannot summarily decide an issue outside of the context of the entire petition particularly where the petitioners have pleaded that the evidence sought to be struck out lays the basis and/or buttress other complaints made in the petition.
95. Regarding the KIEMS Kit data that was sought to be struck out, the petitioners submitted that the source, credibility or integrity of the evidence is a matter for trial that cannot be questioned before the trial or determined summarily.
96. The petitioners submitted that striking out of pleadings should only be undertaken under exceptional circumstances and only in the clearest of cases where the defect is incurable as was held in the case of *Raila Odinga and others v Independent Electoral and Boundaries Commission and 3 others* SCK Petition No 5 of 2013 [2013] eKLR as well as the case of *D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another* [1980] eKLR.



### **The Petitioners' opposing oral Submissions to the application dated 4<sup>th</sup> October, 2022**

97. Ms. Soweto for the petitioners opposed the application dated 4<sup>th</sup> October, 2022 and submitted that there was a concession that if that affidavit allegedly filed later was in the portal then the 3<sup>rd</sup> and 4<sup>th</sup> Respondents have no issue with it. Relying on the Replying affidavit and submissions and authorities filed, Counsel submitted that they had annexed a screen shot showing that the affidavit was filed on 9/9/2022.
98. Ms. Soweto submitted that Entry No19 and 20 were made on 7/9/2022 when the petition was filed while Entry No18 showed that on 9/9/2022 at 9.09.21 the petition was filed and that was when the affidavit in question was filed electronically.
99. On the prayers to strike out certain paragraphs of the petition and evidence in support thereof, Ms. Soweto submitted that the application was not merited. She further submitted that the 3<sup>rd</sup> and 4<sup>th</sup> Respondents were trying to short circuit matters that can only be determined at the trial. It was her submission that the allegations of concocted evidence were a question of fact that could not be dealt with summarily without parties being allowed to prove at the trial.
100. She further submitted that the application sought to strike out a pleading and asking the petitioner to plead or make out a case in a particular way. It was her submission that striking out was a question of law and that that would happen only if it was vexatious, frivolous, scandalous and embarrassing. Ms. Soweto submitted that the oral and written submissions had not stated how the petitioners' pleadings were vexatious, frivolous, scandalous and embarrassing. She submitted that if the petition proved complaints of certain acts or utterances, the respondents would only be concerned with how that proves or disproves the petition and not to seek to strike out the petition or complaint.
101. Ms. Soweto submitted that the mention of Right honourable Raila Odinga could not be a basis for striking out the petition. She submitted that their complaint was how the 3<sup>rd</sup> and 4<sup>th</sup> Respondents used the name and persona of Right Hon Raila Amolo Odinga to unduly influence the arena of elections and outcome of the elections subject of this petition. She relied on the case of Hassan Ali Joho verses Inspector General of Police in which Justice Ogolla took cognaisance of the fact that the words of a person such as the President can be taken out of context, abused and taken out of context by political actors depending on what they seek to achieve.
102. Ms. Soweto submitted that on the question of KIEMS Kits allegations that the same was illegally obtained and that it is fictitious/false do not hold as the two cannot be.
103. The 1<sup>st</sup> and 5<sup>th</sup> Respondents did not file any replying affidavits or submissions but they submitted in a nutshell, supporting the submissions by the 3<sup>rd</sup> and 4<sup>th</sup> Respondents which caused the petitioners' counsel to raise issues as to why the 1<sup>st</sup> Respondent was expected to be neutral in elections.

### **The 3<sup>rd</sup> and 4<sup>th</sup> Respondents' Rejoinder oral submissions to the application dated 4<sup>th</sup> October, 2022**

104. Counsel for the 3<sup>rd</sup> and 4<sup>th</sup> Respondents submitted that the 5<sup>th</sup> Respondent was also entitled to be represented by an advocate holding brief. It was his submission that an election petition is sui generis and a party is not allowed through pleadings to broaden the scope of elections beyond section 87 of *Elections Act* as held in Raila III where the Supreme Court dismissed two petitions summarily because they raised questions which were outside the decision-making frame work of election proceedings.
105. Senior Counsel Mr Kanjama submitted that in the final judgment of the court, the Supreme Court reiterated that an Election Petition scope should not be expanded beyond section 83 of the *Act* and thus



this court has to look at pleadings and if they do not conform, strike them out. He further submitted that it was not the applicant telling the petitioners how to plead but the *Constitution* of Kenya and the law and that keeping such pleadings on record interferes with the ability of the Court to deal with the petition in an expeditious manner.

106. It was his submission that pleadings are scandalous to the parties before the court and embarrassing to the parties who is referred to and cannot defend itself and thus the court should remove the chaff and relieve what is relevant and core to this petition for determination. He further submitted that a direct attack against a person who is not a party is collateral sideshowes and exceeds the scope of this petition
107. Mr Kanjama submitted that the Hassan Joho case is distinguishable from the instant case as it refers to criminal proceedings and threatened prosecution of the petitioner. He further submitted that the authority of Mohammed verse Mohammed was overturned by the Supreme Court because they disagreed with the reasoning highlighted by the petitioners hereto on when the issues arising prior to the election should be dealt with during nominations where there is a specific dispute Resolution mechanism and not to be mixed with an election Petition.
108. It was his submission that on the question of KIEMS Kit and alternative argument that the evidence cannot be illegally obtained and at the same time being fake, the arguments are made in the alternative. He submitted that they argued that the evidence was illegally obtained and if not, then it was fake and falls a foul of Article 50(4) of the *Constitution* of Kenya.

#### **The 3<sup>rd</sup> and 4<sup>th</sup> Respondents' Application dated 30<sup>th</sup> October 2022**

109. The application dated 30<sup>th</sup> October 2022 was filed by the 3<sup>rd</sup> and 4<sup>th</sup> respondents seeking the following orders:
- i. That this Honourable Court be pleased to strike out the following affidavits sworn by new witnesses and which raise new issues filed in Court on 15<sup>th</sup> October 2022.

NO	Affidavit	Date
1.	Affidavit sworn by Washington Osito Kale	14 <sup>th</sup> October 2022
2.	Affidavit sworn by Emmanuel Okelo	7 <sup>th</sup> September 2022
3.	Affidavit sworn by Celestine Milicent Adhiambo	7 <sup>th</sup> October 2022
4.	Affidavit sworn by Evance Ochieng	14 <sup>th</sup> October 2022
5.	Affidavit sworn by Daniel Juma Ayoko	14 <sup>th</sup> October 2022



- ii. That this Honourable Court be pleased to strike out the following affidavits sworn by existing witnesses but which raise new issues not previously pleaded or deponed to by the Petitioner or their witnesses filed in Court on 15<sup>th</sup> October 2022.

NO	Affidavit	Date
1.	Further affidavit sworn by Dr Evans Odhiambo Kidero	14 <sup>th</sup> October 2022
2.	Further affidavit sworn by David Obonyo Mireri	14 <sup>th</sup> October 2022
3.	Further affidavit sworn by Silas Okinyi Rawo	14 <sup>th</sup> October 2022
4.	Further affidavit sworn by John Okambo Kisiara	14 <sup>th</sup> October 2022
5.	Further affidavit sworn by Maurice Odhiambo Gumbi	14 <sup>th</sup> October 2022
6.	Further affidavit sworn by Lameck Oketch Odhiambo	14 <sup>th</sup> October 2022
7.	Further affidavit sworn by George Oketch Ochieng	14 <sup>th</sup> October 2022
8.	Further affidavit sworn by Dickson Ouma Ayuo	14 <sup>th</sup> October 2022
9.	Further affidavit sworn by John Ogila Nyabola	14 <sup>th</sup> October 2022
10.	Further affidavit sworn by Andolo Dan Ojijo	14 <sup>th</sup> October 2022
11.	Further affidavit sworn by Maurice Onyango Osodo	14 <sup>th</sup> October 2022
12.	Further affidavit sworn by Samuel Obunga Milama	14 <sup>th</sup> October 2022
13.	Rejoinder affidavit	25 <sup>th</sup> October, 2022

- iii. That this Honourable Court be pleased to grant such other or further orders as it may deem fit to further the ends of justice.
- iv. That the Petitioners, jointly and severally, be condemned to pay the costs of the application.



110. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents' case is that on 7<sup>th</sup> October, 2022, this court gave directions pursuant to rule 15(1)(h) of the *Elections (Parliamentary and County Elections) Petitions Rules* for the filing and service of further affidavits by the Petitioners but that in compliance with the said directions, the Petitioners filed affidavits by new witnesses and which raise new evidence and issues that materially depart from the issues pleaded in the petition as originally filed and materially reconstruct the Petitioner's case.
111. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents aver that the new evidence and issues effectively amend the Petition and unless expunged from the record will unfairly prejudice the Respondent's Response/Defence as filed.
112. It is their case that the Petitioner had 28 days to prepare and file the Petition and that the alleged inadvertence to file some affidavits and/or to plead the new evidence produced thereon was foreseeable and accordingly inexcusable.

**The Petitioners' Replying affidavit to the 3<sup>rd</sup> and 4<sup>th</sup> Respondents' Application dated 30<sup>th</sup> October, 2022**

113. In opposition, the petitioners filed a replying affidavit deponed by the 1<sup>st</sup> petitioner Dr Evans Odhiambo Kidero in which he contended that the application was mala fide, misconceived, incompetent, vexatious, frivolous and an abuse of the process as it amounted to an invitation to the Court to sit on appeal of its own Orders and directions issued at the Pre-trial conference on 7<sup>th</sup> October 2022 which orders having been perfected and complied with by the parties to this case, this Honourable Court became functus officio.
114. It was deponed by the 1<sup>st</sup> petitioner that the Orders and directions of the Court at the Pre-trial conference having been adopted by consent of all parties present on the 7<sup>th</sup> of October, 2022, the applicants were precluded from divorcing themselves from their merits or implication. He further deposed that the fact that the directions of the court were complied with by the parties means that the instant application has been overtaken by events.
115. The petitioners further aver that the applicants, in a bid to ignite unwarranted controversy, has strenuously tried to draw a distinction between 'additional/further evidence' and 'new evidence'
116. Further, the petitioners averred that no prejudice will be suffered by the applicants at all with the affidavits remaining on record as they will have ample opportunity to test the probative value of such evidence during substantive hearing of the Petition.

**The 3<sup>rd</sup> and 4<sup>th</sup> Respondents' Written Submissions on the application dated 30<sup>th</sup> October 2022**

117. It was submitted in support of the application that the nature, extent and scope of the impugned affidavits are new and substantial and are such as should have been introduced within the 28 day period within which Election Petitions should be filed and thus to countenance the affidavits on record will not only require the expenditure of substantial time and resources in the verification of the new evidence, tracing of new witnesses and preparation of new witness affidavits, the same will be an implicit extension of inflexible and inextensible constitutional and statutory timelines.
118. Reliance was placed on the case of *Raila Odinga & 7 others v Independent Electoral and Boundaries Commission & 3 others* (Petition 5, 3 & 4 of 2013 (Consolidated)) [2013] KESC 1 (KLR) (26 March 2013) (Ruling), where the Supreme Court declined to admit a further Affidavit filed by the Petitioner and proceeded to set out the legal contours for the admission of further affidavits.



119. The 3<sup>rd</sup> and 4<sup>th</sup> respondent further relied on the cases of *Nabashon Akunga v Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR, *Martha Wangari Karua & another v Independent Electoral & Boundaries Commission & 3 others* [2017] eKLR, *Seth Ambusini Panyako v Independent Electoral & Boundaries Commission & 2 others* [2017] eKLR and that of *Benjamin Ogunyo Andama V Benjamin Andola Andayi & 2 others* [2013] eKLR.

### **The Petitioners' written opposing Submissions to the 3<sup>rd</sup> and 4<sup>th</sup> respondents' application dated 30<sup>th</sup> October, 2022**

120. The petitioners submitted that the overriding objective facilitates the just, expeditious, proportionate and affordable resolution of election petitions within our Constitutional framework and the *Elections Act* and thus, the mandatory duty of the court in the exercise of its powers is to render substantive justice. Reliance was placed on the case of *Stephen Boro Gitiba v Family Finance Building Society & 3 others* Civil Application No Nai. 263 of 2009 where the court held *inter alia* that the overriding objective overshadows all technicalities, precedents, rules and actions which are in conflict with and whatever is in conflict with it must give way.
121. The petitioners further relied on the case of *Mohamed Ali Mursal v Saadia Mohamed & 2 others* [2013] eKLR where the Court, dealing with a similar issue regarding additional evidence, held that “under the current legal dispensation championed by the *Constitution* of Kenya and the laws enacted thereunder, emphasis is on access to and administration of justice.”
122. It was submitted that the Courts have consistently held that for the election court “it is only fair and just to have the Petitioner and the Respondents to lay all the evidence in their possession before the court, of course within the confines of the law, to enable the interrogation of all issues for an informed decision of the court,” as held in the cases of Mohamed Ali Mursal supra and *Abdirabman Adan Abdikadir & another v Independent Electoral & Boundaries Commission & 2 others* [2017] eKLR.
123. The petitioners submitted that Rule 15(1)(h) of the *Elections Petition Rules* gives the election court power to admit further and/or additional evidence and that the Petitioners' affidavits, whether of new witnesses or witnesses who had already filed affidavits, all speak to matters that have already been pleaded in the Petition and contrary to what the 3<sup>rd</sup> and 4<sup>th</sup> Respondents allege, do not introduce any new issues but simply add further evidence to what is already on record in order to meet the ends of justice.
124. It was submitted that the 3<sup>rd</sup> and 4<sup>th</sup> Respondents also erroneously contend that the additional evidence should be shut out in light of the constitutionally set timelines for the hearing and determination of the petition but that this argument is misconceived as statutory timelines are a servant and tool to meet the ends of justice but should not be used as a bad master to frustrate substantive justice.

### **ANALYSIS AND DETERMINATIONS ON ALL THE THREE APPLICATIONS DATED 29<sup>TH</sup> SEPTEMBER 2022, 4<sup>TH</sup> OCTOBER 2022 AND 30<sup>TH</sup> OCTOBER, 2022**

#### **A. The Application dated 29th September 2022**

125. I have examined the application dated 29<sup>th</sup> September 2022 alongside the parties' respective supporting and opposing affidavits as well as the elaborate rival written and oral submissions and all the statutory provisions, the constitutional provisions and judicial decisions cited.
126. The request for recount and scrutiny is anchored on the right to access information held by the State. This is clearly spelt out under Article 35 of the *Constitution* of Kenya; section 4 of the *Access to*



*Information Act*, 2016; section 27 of the *IEBC Act*, 2011; and the Supreme Court decision in *Raila Amolo Odinga & Another v IEBC & 2 Others*, Presidential Election Petition No 1 of 2017).

127. The statutory underpinning on scrutiny and recount of votes is set out in sections 80(4)(a) and 82 of the *Elections Act*, 2011 as read with Rules 28 and 29 of the *Elections (Parliamentary and County Elections) Petitions Rules*, 2017.

128. The said sections of the Act are carefully tailored as follows:

80(4) An election court may by order direct the Commission to issue a certificate of election to a President, a member of Parliament or a member of a county assembly if-

(a) upon recount of the ballots cast, the winner is apparent.

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.

(2) Where the votes at the trial of an election petition are scrutinized, only the following votes shall be struck off-

(a) the vote of a person whose name was not on the register or list of voters assigned to the polling station at which the vote was recorded or who had not been authorized to vote at that station;

(b) the vote of a person whose vote was procured by bribery, treating or undue influence;

(c) the vote of a person who committed or procured the commission of personation at the election;

(d) the vote of a person proved to have voted in more than one constituency;

(e) the vote of a person, who by reason of conviction for an election offence or by reason of the report of the election court, was disqualified from voting at the election; or

(f) the vote cast for a disqualified candidate by a voter knowing that the candidate was disqualified or the facts causing the disqualification or when the facts causing it were notorious.

(3) The vote of a voter shall not, except in the case specified in subsection (1) (e), be struck off under subsection (1) by reason only of the voter not having been or not being qualified to have the voter's name entered on the register of voters.



129. On the other hand, Rules 28 and 29 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 provide as follows:

28. A petitioner may apply to an elections court for an order to
- (a) recount the votes: or
  - (b) examine the tallying, if the only issue for determination in the petition is the count or tallying of votes received by the candidates.

29

- (1). The parties to the proceedings may apply for scrutiny of the votes for purposes of establishing the validity of the votes cast.
- (2). On an application under sub-rule (1), an election court may, if it is satisfied that there is sufficient reason, order for scrutiny or recount of the votes.
- (3). The scrutiny or recount of votes ordered under sub-rule (2) shall be carried out under the direct supervision of the Registrar or magistrate and shall be subject to the directions the election court gives.
- (4). The scrutiny or recount of votes in accordance with sub-rule (2) shall be confined to the polling stations in which the results are disputed and may include the examination of -
  - (a) the written statements made by the returning officers under the Act;
  - (b) the printed copy of the Register of voters used during the elections sealed in a tamper proof envelope;
  - (c) the copies of the results of each polling station in which the results of the election are in dispute;
  - (d) the written complaints of the candidates and their representatives;
  - (e) the packets of spoilt ballots;
  - (f) the marked copy register
  - (g) the packets of counterfoils of used ballot papers
  - (h) the packets of counted ballot papers;
  - (I) the packets of rejected ballot paper;
  - (j) the polling day diary; and
  - (k) the statements showing the number of rejected ballot papers



- (5) For purposes of sub-rule (4) (b), every returning officer shall upon declaration of the results, seal the printed copy of the Register of Voters used at that election in a tamper proof envelope and such envelope shall be stored by the Commission subject to the elections court directions under rule 16.”

130. Whereas the two terms scrutiny and recount are conceptually different, they are often used together and interchangeably. In an attempt to distinguish them, the [\*Judiciary Bench Book on Electoral Disputes Resolution\*](#), 2022 at page 119 states as follows:

“Although the terms ‘scrutiny’ and ‘recount’ are often used together, interchangeably, and petitioners often pray for ‘scrutiny and recount’ of the votes cast at an election, the two remedies are conceptually different. A recount is limited to establishing the number of votes garnered by the candidates and the tallying of such votes (*Justus Gesito Mugali M’mbaya v IEBC & 2 Others*, Kakamega Election Petition No 6 of 2013).

Scrutiny, on the other hand, goes beyond the simple question of the number of votes garnered by the candidates and extends to the question of the validity of such votes (*Justus Gesito Mugali M’mbaya v IEBC & 2 Others*, Kakamega Election Petition No 6 of 2013; and *Halsbury’s laws of England*, at 12:454, defines ‘scrutiny’ as ‘a court supervised forensic investigation into the validity of the votes cast in an election’ (1990, Fourth Edition, LexisNexis)).

Consequently, there is no room for examination of electoral misconduct in a recount (*Justus Gesito Mugali M’mbaya v IEBC & 2 Others*, Kakamega Election Petition No 6 of 2013). Although scrutiny and recount are conceptually different, the conduct of a scrutiny inevitably entails the conduct of a recount. The converse, however, is not true.”

131. From the foregoing, whereas a ‘recount’ only deals with the number of votes garnered and the retallying of those votes, ‘scrutiny’ is a more detailed exercise where votes and the other election materials are carefully and thoroughly observed and examined with a view to ascertaining if such votes are valid in the first instance and the process, to an extent, was flawless. Scrutiny is therefore an intensive exercise which gives room for examination of inter alia- electoral irregularities, malpractices, misconduct and even a re-examination of the tally. The rationale behind scrutiny is two-fold: that it is only the valid votes that confer an electoral advantage to a candidate in an election hence the need to establish the validity and the number of the valid votes a candidate garnered (the quantitative aspect) and that an election can be impugned based on electoral irregularities, malpractices, misconduct and non-compliance with the law (the qualitative aspect). See the case of (*Justus Gesito Mugali M’mbaya v IEBC & 2 Others*, Kakamega Election Petition No 6 of 2013)

132. The purpose of scrutiny has also not been without judicial examination. In [\*William Maina Kamanda v Margaret Wanjiru Kariuki\*](#), Nairobi Election Petition No 5 of 2008 Kariuki J (as he then was) stated as follows:

“The purpose of scrutiny is: -

- (1) To assist the court to investigate if the allegations of irregularities and breaches of the law complained of are valid.
- (2) Assist the court in determining the valid votes cast in favour of each candidate.



- (3) Assist the court to better understand the vital details of the electoral process and gain impressions on the integrity of the electoral process”.
133. In the case of *Harun Meitamei Lempaka v Lemanken Arama & 2 others* (2013) eKLR the Court added its voice on the purpose of scrutiny as ‘entailing the process of determining the validity of a vote. The object of scrutiny is to ascertain by striking out votes or adding votes which are found the candidate garnered.’
134. The principles of scrutiny and recount were laid down by the Supreme Court in the locus classicus case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others*, Supreme Court Petition 2B of 2014, as follows:
- a. The right to scrutiny and recount of votes in an election petition is anchored in Section 82(1) of the *Elections Act* and Rule 33 of the *Elections (Parliamentary and County Elections) Petition Rules*, 2013. Consequently, any party to an election petition is entitled to make a request for a recount and/or scrutiny of votes, at any stage after the filing of petition, and before the determination of the petition.
  - b. The trial Court is vested with discretion under Section 82(1) of the *Elections Act* to make an order on its own motion for a recount or scrutiny of votes as it may specify, if it considers that such scrutiny or recount is necessary to enable it to arrive at a just and fair determination of the petition. In exercising this discretion, the Court is to have sufficient reasons in the context of the pleadings or the evidence or both. It is appropriate that the Court should record the reasons for the order for scrutiny or recount.
  - c. The right to scrutiny and recount does not lie as a matter of course. The party seeking a recount or scrutiny of votes in an election petition is to establish the basis for such a request, to the satisfaction of the trial Judge or Magistrate. Such a basis may be established by way of pleadings and affidavits, or by way of evidence adduced during the hearing of the petition.
  - d. Where a party makes a request for scrutiny or recount of votes, such scrutiny or recount if granted, is to be conducted in specific polling stations in respect of which the results are disputed, or where the validity of the vote is called into question in the terms of Rule 33(4) of the *Election (Parliamentary and County Elections) Petition Rules* [2013] [now Rule 29(4) of the *Elections (Parliamentary and County Elections) Petitions Rules*, 2017].
135. The Supreme Court in *Raila Amolo Odinga & Another v IEBC & 2 Others* [2017] eKLR (SC) (Raila Odinga 2017) (at para 51) went further and provided the criteria for an application for recount, relying on the Indian Supreme Court case of *Arikala Narasa Reddy v Venkata Ram Reddy Reddygari & Anr*, Civil Appeals Nos 5710-5711 of 2012, where it held as follows:
- (i) The court must be satisfied that a prima facie case is established;
  - (ii) The material facts and full particulars have been pleaded stating the irregularities in counting of votes;
  - (iii) A roving and fishing inquiry should not be directed by way of an order to re-count the votes;
  - (iv) An opportunity should be given to file objection; and
  - (v) Secrecy of the ballot should be guarded.
136. It follows that the order for recount can be made only if the petitioner sets out his/her case with precision, supported by averments of material facts. The Court will not allow an application for



recount or scrutiny unless the same has been specifically pleaded in the petition. Where there is no supporting evidence, or the evidence is contrary to the averments in the petition, the application would fail. See the cases of Raila Odinga 2017 and *IEBC & Another v Stephen Mutinda Mule & 3 Others*, Civil Appeal No 219 of 2013).

137. On whether scrutiny or recount can be ordered in all polling stations in a disputed election, and in breaking ranks with the Court of Appeal, the Supreme Court in the *Peter Gatirau Munya* case held that:

“(159) We are unable to agree with the view of the learned Judges of Appeal. The view that scrutiny and recount in a constituency “means scrutiny and recount in all polling stations in the constituency”, is not borne out by emerging jurisprudence from the most relevant fora of adjudication, namely, the election Courts. On the contrary, judicial opinion distinctly favors a view that commends itself to us: that, an application for scrutiny and recount, must be couched in specific terms, and clothed with particularity, as to which polling stations within a constituency are to attract such scrutiny. If a party lays a clear basis for scrutiny in each and all the polling stations within a constituency, then the order ought to be granted...”

138. It is also a well settled principle that an application for scrutiny or recount must find its basis in the petition. This principle was re-affirmed by the Supreme Court in Raila Odinga 2017 Ruling.

139. My perusal of the petition and the accompanying affidavits reveals that the petitioner has prayed for following orders that are relevant and material to the application for recount and scrutiny:

“An Order be and is hereby made for forensic audit, scrutiny, re-count and re-tallying of all the returns with respect to the polling stations referred to in paragraphs 138, 139 and 177 of the Petition;

An Order be and is hereby made for scrutiny and forensic audit of all equipment, system and technology used by the 1<sup>st</sup> Respondent in the Gubernatorial Election including but not limited to the KIEMS kits, the Server(s); website/portal;”

140. The now settled principle is that apart from the application having its basis in the pleadings, both the pleadings and the application must also be very clear and specific in terms of the areas of dispute which call for scrutiny or recount. The pleading must signal all the areas of dispute and if for instance there is any dispute relating to a polling station then that polling station must be named, and the nature of the dispute revealed. See Rule 29(4), *Elections (Parliamentary and County Elections) Petition Rules* 2017; Gatirau Peter Munya *supra*; *Albeity Hassan Abdalla v IEBC & 2 Others*, Malindi High Court Election Petition 8 of 2017; and *Annie Wanjiku Kibeh v Clement Kungu Waibara & another*, Nairobi Civil Appeal 20 of 2018.

141. Further, the basis for the scrutiny or recount in such a polling station must be laid by way of evidence so that the Court can exercise its discretion on whether to allow such a scrutiny or recount in that polling station.

142. In this Petition, the petitioners in their petition impugned the results of the governor’s elections from 7 out of 8 constituencies of the county as detailed in paragraph 138 of the petition and reiterated from paragraph 16 of the supporting affidavit to the instant application.

143. The petitioners specifically stated that declaration form for the results for the Gubernatorial election, Form 37C was neither signed nor stamped by the 2<sup>nd</sup> Respondent, raising serious questions as to the entire verification and tallying process, that on the same form, the column indicating “Votes Cast” had



identical figures with the ones on the column labelled “Valid Votes” yet the declaration form clearly sets out a column for rejected votes. The petitioners further faulted the serious and glaring inconsistencies between the number of votes cast for Governor, Homa-Bay County per polling station as recorded under several Form 37As and the number of people identified by the KIEMS kits.

144. From the foregoing, it is clear that in this case, the Petitioners are seeking an almost full-scale scrutiny. As was held in the Gatirau Peter Munya’s case (supra) ‘if a party lays a clear basis for scrutiny in each and all the polling stations within a constituency, then the order ought to be granted. Otherwise, a prayer pointing to a constituency but lacking in specificity is not to be entertained.’
145. The petitioners have prayed for inspection of the ballot boxes, scrutiny and recount of the votes cast and recorded as having been cast in the Gubernatorial Election in Homa-Bay County held on 9<sup>th</sup> August 2022, specifically in the polling stations particularized in paragraphs 11, 16, 17, 20, 22 and 28 of the affidavit sworn by Dr Evans Odhiambo Kidero on 27<sup>th</sup> September 2022 as well as the examination, verification and scrutiny of the Secure Digital Memory Cards (SD Cards) for each of the KIEMS kits used in the Gubernatorial Election in Homa-Bay County.
146. Rule 29(4) of the Rules gives a list of documents and items that may be examined during the scrutiny exercise. The list is not however exhaustive and for ease of reference it includes:
- (a) the written statements made by the returning officers under the Act;
  - (b) the printed copy of the Register of voters used during the elections sealed in a tamper proof envelope;
  - (c) the copies of the results of each polling station in which the results of the election are in dispute;
  - (d) the written complaints of the candidates and their representatives;
  - (e) the packets of spoilt ballots;
  - (f) the marked copy register
  - (g) the packets of counterfoils of used ballot papers
  - (h) the packets of counted ballot papers;
  - (I) the packets of rejected ballot paper;
  - (j) the polling day diary; and
  - (k) the statements showing the number of rejected ballot papers
147. I observe that a scrutiny will be readily ordered in the face of glaring and irreconcilable irregularities or discrepancies or where the evidence tends to bring out the dispute more clearly. However, not all irregularities or discrepancies call for scrutiny. An irregularity or discrepancy, whether minor or otherwise, which is sufficiently explained may not call for a further analysis by way of scrutiny. One such instance is as was put by Majanja, J in *Wavinya Ndeti v Independent Electoral and Boundaries Commission & 4 Others* (2014) eKLR where the Learned Judge stated that:
- “An election is a human endeavor and is not carried out by programmed machines. Perfection is an inspiration, but allowance must be made for human error.”
148. The 3<sup>rd</sup> and 4<sup>th</sup> respondents contended that the difference in the number of votes garnered between the petitioner and the 1<sup>st</sup> respondent was so wide and had not been controverted as to warrant any practical basis to undertake the arduous and resource intensive task of a recount and/or scrutiny.



149. The Court of Appeal in the case of *Hassan Jobo v Nyange & another* (2008) eKLR (EP) 500 rightly settled the above issue as follows: -

“Where the margins are narrow, the courts have ordered scrutiny without necessarily seeking that a foundation to be laid. The Judge did not say that where the margin is wide, then no scrutiny will be ordered. It only means that, the task of laying sufficient basis is made difficult the wider the margin...”

150. In the instant case, and from my analysis, I find that the application by the petitioners is founded on the main petition, is specific on the parameters of the scrutiny and recount sought and with regard to the items sought to be scrutinized. Accordingly, I find that the petitioners have laid a prima facie and sufficient basis to warrant scrutiny and recount. I find that the Petitioners have laid a sound basis to the effect that Forms 37A, Forms 37B and Form 37C should be scrutinized. Likewise, the scrutiny of those forms should include the tallying and for the scrutiny and verification of the KIEMS Kits data used in the August 9<sup>th</sup> 2022 Gubernatorial election in Homa Bay County.

151. For the above reasons, the application dated 29<sup>th</sup> September, 2022 as prayed in prayers numbers v, vi and vii as framed in this Ruling succeeds but partly to the extent that although the petitioners prayed for scrutiny and recount of all votes in the gubernatorial election carried out on 9<sup>th</sup> August 2022 in Homabay County, they specifically allege irregularities in 7 out of 8 constituencies in the County. Accordingly, a scrutiny as sought by the petitioners shall only be carried out in the 7 constituencies of Kasipul Constituency, Rangwe Constituency, Suba South Constituency, Kabondo Kasipul Constituency, Ndhiwa Constituency, Suba North Constituency and Homa Bay Town Constituency and only in the specified polling stations as per paragraph 138, 139 and 177 of the Petition but within the herein named seven (7) constituencies.

#### **B. The Application dated 4<sup>th</sup> October 2022**

152. The 3<sup>rd</sup> and 4<sup>th</sup> respondents in their application dated 4<sup>th</sup> October, 2022 seek the striking out of some pleadings and affidavits filed by the Petitioners herein. Firstly, the applicants impugn the further affidavit of Enosh Ongweya Bolo on the grounds that it was filed on 14<sup>th</sup> September 2022, 5 days after the deadline for the filing the Petition and its supporting documents without leave of court.

153. The two respondents also seek to strike out what they consider to be illegally obtained evidence contained in the the KIEMS data relied on by the petitioners in their application despite the petitioner’s allegation that the same was sourced from the Supreme Court Election Petition No E001 of 2022.

154. Opposing the application, the petitioners aver that the said further affidavit was filed on time, electronically on the 9<sup>th</sup> September 2022 and that upon directions to forward the physical copies, the same was done on the 14<sup>th</sup> September 2022.

155. The petitioners further contend that the question of whether the KIEMS Kits Data evidence was illegally obtained can only be canvassed at the main hearing of the trial and not through an application which may turn out to be summary trial.

156. I have considered the pleadings and depositions. Timelines in electoral disputes is a constitutional principle as it underpins the ability of the people to exercise their sovereignty under Article 1. Courts, therefore, strictly enforce requirements relating to prescribed timelines in EDR. In *Gatirau Peter Munya v Dickson Mwenda Kitbinji & 2 Others*, Supreme Court Petition No 2B of 2014, the Supreme



Court explained the historical context and rationale for the strict enforcement of EDR timelines in the following terms:

“This provision [i.e., Article 87(1) of the Constitution of Kenya] must be viewed against the country’s electoral history. Fresh in the memories of the electorate are those times of the past, when election petitions took as long as five years to resolve, making a complete mockery of the people’s franchise, not to mention the entire democratic experiment...It is now a constitutional imperative that the electorate should know with finality, and within reasonable time, who their representatives are. The people’s will, in [the] name of which elections are decreed and conducted, should not be held captive to endless litigation.”

157. Similarly, in *Martha Wangari Karua v IEBC & 3 Others*, Supreme Court Petition No 3 of 2019, the Supreme Court held that:

“Section 75 undoubtedly derives its authority from Article 87 of the *Constitution* of Kenya which requires timely resolution of electoral disputes. We have already explained why there was a need to provide for defined timelines for settling electoral disputes. As such, we hold and maintain our position that once an election petition is filed at the High Court sitting as the Election Court, it must be determined within a period of 6 months. The courts, therefore, are hesitant to uphold legislation or conduct that tends to undermine the constitutional objective of timely resolution of electoral disputes (*Raila Odinga v IEBC & 3 Others*, Supreme Court Petition No 5 of 2013; *Paul Posh Aborwa v IEBC & 2 Others*, Kisumu Civil Appeal No 52 of 2013; and *Mary Wambui Munene v Peter Gichuki King’ara & 2 Others*, Supreme Court Petition No 7 of 2014).”

158. The underlying spirit of the law and practice in matters elections is that Courts should endeavour to ensure that the democratic rights and choices of the voters are given full effect as much as is practicable. Once seized of the dispute, the Court is enjoined by Article 159(2) (d) of the *Constitution* of Kenya to do substantial justice to the disputants expeditiously and without undue regard to procedural technicalities. Rules of procedure have aptly been described as handmaidens of justice and not mistresses. See *Edward Steven Mwiti v Peter Irungu & 2 others* [2012] eKLR.

159. This overriding principle is a guiding beacon for the court:

“The principal aims of the overriding objective include the need to act justly in every situation; the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the courts by ensuring that the principle of equality of arms is maintained and that as far as it is practicable to place the parties on equal footing.”

160. That is not to say that rules or technical rules shall not apply; only that the Court should not pay undue regard to them.

161. The Supreme Court concisely interpreted the boundaries of Article 159(2)(d) in *Raila Odinga and others v Independent Electoral and Boundaries Commission and 3 others* [2013] eKLR, in a motion brought to strike out a further affidavit, the learned Judges delivered themselves as follows:

“The essence of that provision is that a Court of law should not allow the prescriptions of procedure and form to trump the primary object, of dispensing substantive justice to the parties. This principle of merit, however, in our opinion, bears no meaning cast-in-stone, and which suits all situations of dispute resolution. On the contrary, the court as an agency



of the processes of justice, is called upon to appreciate all the relevant circumstances and the requirements of a particular case and conscientiously determine the best course”.

162. Electoral dispute resolution is unique in many ways. However, the principles applicable in a motion to strike out a pleading or action cut across the board. A good starting point is the standards applied in ordinary civil cases. Striking out a pleading is a draconian measure to be employed sparingly. See *Wambua v Wathome* [1968] EA 40 and *Coast Projects Ltd v M.R. Shab Construction* [2004] KLR 119. See also *Sankale Ole Kantai t/a Kantai & Company Advocates v Housing Finance Company of Kenya Limited Nairobi*, High Court case 471 of 2012 (unreported).
163. The relevant Rule 12 (7) and (8) provides that:
- (7) A respondent shall, at the time of filing the response to a petition, file the affidavits sworn under sub-rule (6).
- (8) Except with the leave of the election court and for sufficient cause, a witness shall not give evidence unless an affidavit sworn by the witness is filed as required under these Rules.
164. The petitioners in response to the application dated 4<sup>th</sup> October 2022 produced evidence of a screenshot of the Judiciary E-filing portal showing that the said affidavit of Enosh Ongweya Bolo was filed electronically on 9<sup>th</sup> September 2022. That screen shot has not been found to be invalid or not emanating from the Judiciary e-filing portal. Accordingly, I find and hold that the said affidavit was filed within time and is therefore validly and properly on record.
165. Secondly, the 3<sup>rd</sup> and 4<sup>th</sup> Respondents/applicants sought to have exhibits marked EOK 16 and EOK 21 referred to in the affidavit sworn by Dr Evans Odhiambo Kidero struck out on the grounds that the same are annexed without any basis being laid in the supporting affidavit.
166. The petitioners dispute this allegation and aver that the basis for production of the said exhibits had already been laid out in paragraphs 135 - 139 of the petition.
167. I have considered the attack on the exhibits in question and their foundation. I find that these are issues that can be settled at the main trial. It does not appear to me that any serious prejudice is occasioned to the 3<sup>rd</sup> and 4<sup>th</sup> Respondents by having the documents filed in support of the petition titled EOK16 and EOK21 remaining on record. From a cursory reading of the petition, it appears to me that the basis for the said exhibits has been, prima facie, laid in the petition. The substance of the said basis and the probative value of the said documents can only be tested at the main hearing.
168. The court in the election petition case of *Dickson Karaba v John Ngata Kariuki & Another* [2010] eKLR stated as follows concerning striking out where it has not been demonstrated that the adverse party would not suffer any prejudice:

“...striking out is a very serious matter, it is draconian and it should be resorted to as an avenue when the cause filed is hopeless or it is meant or intended to abuse the process of the court... The court cannot also exercise its inherent jurisdiction, when the exercise will lead to an injustice. In my view the inherent jurisdiction of the court enables it, to exercise control over process by regulating its proceedings by preventing the abuse of the process. Inherent power is a residual power which may be used upon unnecessary event and when it is just and equitable to do so in a particular case to ensure the observance of the due process of the law or to prevent vexation or oppression or to do justice between parties and to secure a fair trial between them. It is not intended to displace a party of his matured right which is likely to result in an injustice. I think, striking out of a petition is outside the inherent jurisdiction of



the High Court and it cannot be exercised to aid a party who has not suffered any prejudice or injustice due to the acts or omission of another party”.

169. Finally, regarding the prayer that paragraphs 87 – 95, 98 and 99 of the petition and paragraphs 17 – 30 of Dr Evans Odhiambo Kidero’s supporting affidavit as well as the affidavit of Silas Okinyi Rawo in its entirety be struck out on account of the same mentioning the Rt. Hon Raila Odinga adversely despite the fact that he is not a party to the petition, this prayer is opposed by the petitioners who contend that the same speak to the undue influence of the 5<sup>th</sup> respondent and its leader, the Rt. Hon Raila Odinga, over the electorate in Homabay County that affected the electoral process in Homabay County.
170. I have perused the paragraphs 87-95, 98 and 99 of the petition that are alleged to be targeting the Rt. Hon Raila Amolo Odinga and note that the same are not scandalous or libelous but rather an attempt by the petitioner to link the alleged botched nomination process of the 5<sup>th</sup> respondent & the alleged hatching of an atmosphere riddled with violence, intimidation, improper influence & corruption upon which the petitioners’ petition is predicated.
171. The same applies to the affidavit of Silas Okinyi Rawo as well as paragraphs 17 – 30 of the 1st petitioners’ supporting affidavit to the petition.
172. As to whether such a nexus has been created and as to whether that alleged connection affected the outcome of the elections subject of this main petition remains a matter for deliberation and proof to the required standard at the main trial and consideration by the Court thereafter. In the case of *Jackson Ngechu Kimotho V Equity Bank Limited*, Nrb HCCC No 587 of 2011 which was cited with approval in *Raphael Kitur v Radio Africa T/A Star*, [2014] eKLR, the court held that:
- “If a pleading raises a triable issue even if at the end of the day it may not succeed, the suit ought to go on trial since in civil litigation as opposed to criminal trials there is no provision for holding mini trials or a trial within a trial. ...”
173. In *Ternic Enterprises Ltd v Waterfront Outlets Limited* [2018] eKLR the Court of Appeal held inter alia, that a triable issue is an issue which raises a prima facie defence which should go to trial for adjudication. It is not an issue that must succeed at the trial.
174. On the allegation that the petitioners have annexed illegally obtained evidence regarding the data from the Kiems Kit which they now claim was obtained from the Presidential Election Petition. My finding on this complaint is that this is an issue which can be adequately canvassed during the trial of the main petition and that the Respondents are in no way prejudiced at this stage as there is sufficient authority on how evidence should be obtained. The burden of proof will be on the Petitioners to establish how they obtained that evidence and whether that was an acceptable way of obtaining evidence to be used in these proceedings.
175. The upshot of the above is that I find that the application dated 4<sup>th</sup> October 2022 lacks merit and the same is declined and dismissed.

### **C. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents’ Application dated 30<sup>th</sup> October 2022**

176. The applicants herein, the 3<sup>rd</sup> and 4<sup>th</sup> respondents, impugn the filing and service of further affidavits by the Petitioners by new witnesses which new evidence and issues effectively amend the Petition and that unless expunged from the record, will unfairly prejudice the Respondents’ Response as filed.
177. On their part, the petitioners contended that the said affidavits were filed in compliance with the court directions issued on the 7<sup>th</sup> of October, 2022 and that no prejudice will be suffered by the applicants at



all with the affidavits remaining on record as the 3<sup>rd</sup> and 4<sup>th</sup> Respondents will have ample opportunity to test the probative value of such evidence during the substantive hearing of the Petition.

178. On the 7<sup>th</sup> October 2022, this court gave the following directions:

- a. That the Petitioner's application dated 29<sup>th</sup> September, 2022 shall be heard simultaneously with the 3<sup>rd</sup> and the 4<sup>th</sup> Respondent's application dated 4<sup>th</sup> October, 2022. To that end, all the Respondents have 7 days of 11/10/2022 to file and serve their responses to the said application.
- b. On the application by the 3<sup>rd</sup> and 4<sup>th</sup> Respondents, the Petitioner and any other of the 1<sup>st</sup> and 5<sup>th</sup> Respondents have 7 days of 11/10/2022 within which to file and serve their respective response.
- c. All the responses shall be filed and served both in soft and hard copy formats.
- d. That the Petitioner's shall have 7 days of the date of receiving of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents' responses, to file and serve their written submissions to canvass their own application dated 29<sup>th</sup> September, 2022. Similarly, they have the same period of time within which to file and serve written submissions on the 3<sup>rd</sup> and 4<sup>th</sup> Respondents' application dated 4<sup>th</sup> October, 2022, upon receipt of the submissions by the 3<sup>rd</sup> and 4<sup>th</sup> respondents.
- e. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents shall have 7 days of receipt of the responses to their application dated 4/10/2022 within which to file and serve their written submissions upon which the Petitioners and all the other Respondents shall have 7 days of the date of service within which to file and serve their written submissions.
- f. The Petitioners have leave of court to file and serve further affidavits to the petition within 7 days of today.
- g. The Respondents have leave of court to file and serve supplementary affidavits within 7 days of the date of service or receipt of the Petitioner's further affidavits.
- h. The 1<sup>st</sup> & 2<sup>nd</sup> Respondents has leave of court to file and serve a supplementary affidavit to the response dated 20/9/2022 annexing the evidence that was not within their reach as at the time that they were filing their response dated 20/9/2022.
- i. The Petitioner has right and leave to file a rejoinder affidavit addressing the matters arising from the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' supplementary affidavit, and to the Responses filed by all other Respondents' within 7 days of service.
- j. The parties counsel shall appear physically before court for the highlighting of written submissions on 28/10/2022 at 9.00am.
- k. In the meantime, parties are urged to set aside dates in their respective diaries for the substantive hearing of the petition in order to maximize on the time left for the hearing and disposal of the petition.
- l. By consent, the hearing of the main petition is reserved for the following dates:
  - i. November 2022 - 24<sup>th</sup>, 25<sup>th</sup>, 26<sup>th</sup>, 27<sup>th</sup>, 28<sup>th</sup> 29<sup>th</sup> and 30<sup>th</sup>.
  - ii. December 2022 – 1<sup>st</sup>, 2<sup>nd</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>
  - iii. December 2022 – 19<sup>th</sup>, 20<sup>th</sup>, 21<sup>st</sup>, 22<sup>nd</sup> and 23<sup>rd</sup>.
  - iv. January 2021 – 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup>.



- m. Further directions will be issued by the court in consultation with the parties' counsel at the next session.
- n. The highlighting of submissions remains on 28<sup>th</sup> October, 2022.
179. An election court has discretion to allow the filing of further affidavits and admit new or additional evidence. See *Raila Odinga v IEBC & 3 others*, Supreme Court Petition No 5 of 2013. However, an election court will not grant an application for the adducing of new or additional evidence where the grant of such an application will prejudice the other parties to the dispute or undermine the constitutional imperative of timely resolution of electoral disputes as was held in *Raila Odinga v IEBC & 3 others*, Supreme Court Petition No 5 of 2013.
180. In *Raila Odinga v IEBC & 3 others*, Supreme Court Petition No 5 of 2013, the Supreme Court gave the following guidelines for determining applications for the filing of further affidavits and admission of new or additional evidence:
- i. the admission of additional evidence is not an automatic right. Instead, the election court has a discretion on whether or not to admit the evidence;
  - ii. further affidavits must not seek to introduce massive evidence which would, in effect, change the nature of the petition or affect the respondent's ability to respond to the said evidence;
  - iii. the parties to an election petition should strive to adhere to the strict timelines set out in EDR laws; and
  - iv. admission of new evidence must not unfairly disadvantage the other parties to an election petition.
181. From the foregoing it is clear that this court vide its order (f) granted the petitioner leave to file further affidavits to its petition and correspondingly vide order (g), the respondents had leave to respond to the same. What the court did not allow was the filing of new affidavits by new witnesses.
182. In the instant case, the petitioners did not seek leave of court to file affidavits by new witnesses as particularized in paragraph 1 of the applicants' prayers in the instant application. By allowing the new affidavits by completely new deponents to be on record, this court would have unfairly disadvantaged the respondents herein and would also have allowed the Petitioners to substantially amend the petition without leave to amend being sought.
183. However, the further affidavits particularized in paragraph 2 of the applicant's prayers are in accordance with the pretrial directions given by this court on 7/10/2022 and for which the respondents were given ample time to counter the same. I find that those affidavits are validly before court and the probative value of that evidence will be tested during the hearing of the main petition.
184. The upshot of the above is that the application dated 30<sup>th</sup> August 2022 is partially successful to the extent that only prayer 1 seeking the striking out of affidavits deposed by new witnesses is allowed. The other prayers are declined.
185. Those are the orders of this court settling all the three applications on record.
186. Further, in order to maximize on the time set for the hearing of the petition, the order for scrutiny and recount for the 7 out of the 8 constituencies and for the specifically named polling stations particularized in paragraphs 11, 16, 17, 20, 22 and 28 of the affidavit sworn by Dr Evans Odhiambo Kidero on 27<sup>th</sup> September 2022 in support of that application shall be carried out under the direct supervision of the Deputy Registrar of this Court as stipulated under Rule 29(3) of the



*Elections (Parliamentary and County Elections) Petitions Rules, 2017* in the presence of each of the parties' four (4) agents (not more than four for each party) led by the IEBC officials, as soon as possible on any date from 21<sup>st</sup> November, 2022 and in accordance with the guidelines for scrutiny and recount as set out in Rule 29 (4). A report thereto shall be filed by the Deputy Registrar as soon as possible and parties shall be allowed to submit on the same during the hearing of the main petition.

187. Each party to bear their own costs of the three applications herein determined.

188. Parties are now guided to prepare adequately for the substantive hearing of the main petition commencing the 24<sup>th</sup> November, 2022.

**DATED, SIGNED AND DELIVERED AT HOMABAY THIS 18<sup>TH</sup> DAY OF NOVEMBER, 2022 VIA JUDICIARY ONLINE PLATFORM**

**R.E. ABURILI**

**JUDGE**

