



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KABARNET**  
**ELECTION PETITION NO. 2 OF 2017**

**JOSEPH MAKILAP KIPKOROS.....PETITIONER**

**VERSUS**

**THE INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION.....1<sup>ST</sup> RESPONDENT**

**JOSEPH LEBOO MASINDET.....2<sup>ND</sup> RESPONDENT**

**WILLIAM CHEPTUMO KIPKIROR.....3<sup>RD</sup> RESPONDENT**

**RULING**

**INTRODUCTION**

1. The Petitioner herein moved the Court by an Amended Notice of Motion dated 4<sup>th</sup> October 2017 seeking for various orders as follows:

*i. An order compelling the 1<sup>st</sup> respondent and the 2<sup>nd</sup> respondent through the IEBC's Chief Executive Officer, Ezra Chiloba to produce before the Honorable Court and furnish the Petitioner with the original and copies of Form 33 being the candidate vote tally sheet containing the results of each of the polling stations in the election of National Assembly Member, Baringo North Constituency, Baringo County.*

*ii. The Original Forms 35A and 35B used in the declaration of Election results for the National Member, Baringo North Constituency, Baringo County*

*iii. That the 1<sup>st</sup> and 2<sup>nd</sup> respondents be compelled to supply all elections materials in respect of National Assembly Member Baringo North Constituency, thereafter the Petitioner be at liberty to further amend the motion and the Petition.*

*iv. Pending the hearing and determination of the Petition and subject to the directions as the court may grant an order for the opening of the ballot boxes and scrutiny of the votes for all the polling stations do issue for the purposes of establishing the validity of the votes cast in the said Constituency.*

2. Upon submissions by Counsels of all parties the Court by its ruling of 31<sup>st</sup> October 2017 issued the orders as follows:

1. *The custody of all the electoral materials for the Baringo North Constituency will remain with the 1<sup>st</sup> respondent IEBC to be stored in accordance with the Rule 16(5) of the Election (Parliamentary and County Elections) Petition Rules, 2017.*

2. *Pursuant to Rule 16(5) of the (Parliamentary and County Elections) Petition Rules, 2017 the Deputy Registrar of the Court shall in the presence of the parties, their counsel, agents or suitable representatives, place additional seals to the ballot boxes on a date to be agreed between the parties within seven (7) days.*

3. *The Petitioner shall within the seven (7) days' supply further and better particulars with relation to the Petition, without amending directly or in effect the case of the Petitioner therein, and file further affidavits as necessary to amplify his case in the Petition.*

4. *The respondents are at liberty, if necessary, to file affidavits in response to the Petitioner's additional affidavits filed under Order No.3 above within seven (7) days of service.*

5. *The 1<sup>st</sup> and 2<sup>nd</sup> Respondent shall supply clear copies where necessary of Forms 35A for the polling stations in Baringo North Constituency.*

6. *The 1<sup>st</sup> and 2<sup>nd</sup> Respondent shall within three days(3) file further affidavit(s) supplying to the parties Forms 33 and 41 and polling station diaries for the polling stations in Baringo North Constituency.*

7. *The application with regard to scrutiny and recount of votes is deferred to an appropriate time after the taking of evidence in the Petition and before the determination thereof.*

3. The court directed that further directions on the pre-trial were to be given on a date to be fixed in consultation with counsel for the parties upon the filing of the affidavits.

4. The Petitioner served the order of the court upon the 1<sup>st</sup> and 2<sup>nd</sup> respondents. By way of Notice of Motion under Certificate of Urgency dated 13<sup>th</sup> November 2017 supported by his affidavit and a statutory statement, the Petitioner seeks the committal to civil jail of the C.E.O. of the 1<sup>st</sup> respondent and the 2<sup>nd</sup> respondent for disobedience of the court's order.

5. The Petitioner's application seeks the following specific orders:

i. That this application be certified as urgent and be heard on priority basis

ii. That Ezra Chiloba, Chief Executive Officer of the 1<sup>st</sup> Respondent herein and Joseph Leboo Masindet, the 2<sup>nd</sup> Respondent herein do show cause why they should not be committed to civil jail.

iii. That an order of committal to civil jail be made against Ezra Chiloba, Chief Executive Officer of the 1<sup>st</sup> Respondent herein and Joseph Leboo Masindet, the 2<sup>nd</sup> Respondent herein to prison for a period of six months or in the alternative a fine of Ksh 2,000,000/= each for disobedience of the Order made herein on the 2<sup>nd</sup> of November, 2017 directing them to file further affidavits supplying the Petitioner herein Forms 33 and 41 and polling diaries for the polling stations in Baringo North Constituency within 3 days of making the said order.

iv. That an order for costs of this application be provided for.

6. The Petitioner's affidavit and grounds for the application are similar in that he avers that the court ordered the 1<sup>st</sup> and 2<sup>nd</sup> respondents to file further affidavits supplying the Petitioner with the Forms 33 and 41 and polling day diaries, despite service of the said order, the same was not complied with.

The following are the other grounds upon which the prayers are sought:

- i. Further that the 1<sup>st</sup> and 2<sup>nd</sup> respondents know that election Petitions have constitutional timelines within which they ought to be heard and determined and it's upon that basis that the court ordered the same to be filed within 3 days.
- ii. That the C.E.O. of the 1<sup>st</sup> Respondent and 2<sup>nd</sup> Respondent both disobeyed the courts order and violated the Constitution leading to contempt.
- iii. That the Director of Public Prosecutions has been served with a 24 hour notice of intention to commence contempt of Court proceedings as per the law.

7. The 1<sup>st</sup> and 2<sup>nd</sup> respondent did not file any affidavit in response to the Petitioner's application for contempt dated 13/11/2017.

8. The 3<sup>rd</sup> respondent filed an application by way of Notice of Motion dated 8<sup>th</sup> November 2017 seeking for directions to be given on election materials of Forms 33, 35As and 41 not to Form part of the record, save that they may be admitted for scrutiny of votes and there be limitation on the particulars to be supplied only to the extent of the polling stations as complained by the Petitioner.

9. The grounds relied on in support of the application included that pursuant to rule 16(c) of the Election Petition Rules, materials supplied to the Petitioner should not Form part of the record and may only be referred to with leave of the court and if not then the 3<sup>rd</sup> respondent will be heavily prejudiced since the court will have aided the Petitioner in establishing his case.

10. The 3<sup>rd</sup> respondent amended this application. He relied on Article 159 of the Constitution, section 80 of the Elections Act 2011, Rule 15(i) of the Elections (Parliamentary and County Elections) Petition Rules 2017. By amendment a clause was added seeking that the affidavits by Sammy Barchobo and Daudi Chebet Bargoge be struck out for going beyond the scope of a Petition. It was contended that the statement filed by Sammy Barchobo Chagwony introduces a new issue of alleged vote malpractice by a presiding officer assisting voters in secrecy whereas the statement filed by one Daudi Chebet Bargoge introduces a new issue of an agent being thrown out of the polling station during counting and tallying of votes. The amended application did not have a supporting affidavit.

11. In response to the application, the Petitioner stated that he was not served with the original application dated 8<sup>th</sup> November 2017 amended by the instant application of 15/11/2017. He further avers that there is no supporting affidavit to the application thus it is incompetent; fatally defective and it should be struck out. The 3<sup>rd</sup> respondent's application refers to Form 33 which is yet to be supplied upon him. The question on harassment, intimidation and throwing out of agents was captured at paragraph 89 of the Petition thus the filed affidavits are within the contents of the Petition, and he therefore prayed that the application be dismissed.

12. The 2<sup>nd</sup> respondent filed his replying affidavit dated 24<sup>th</sup> November 2017 and filed on 27/11/2017 stating that the affidavits filed by Daudi Chebet Borgoge and Sammy Barchobo Changwony introduce new issues not pleaded in the Petition and they should be expunged from the court's record. He contended that further that the said Daudi Bargoge was not listed as an agent at Kipkolony Primary School and his affidavit should be expunged.

## **SUBMISSIONS BY THE PARTIES**

13. The Counsel for the parties argued both applications orally in court on 11/12/17. Mr. Ogolla, for the Petitioner argued that failure to file a response by the 1<sup>st</sup> and 2<sup>nd</sup> respondents was fatal thus the sought should be granted. An affidavit of service was filed in court as proof of service of the court orders. The only documents served upon the Petitioner were Form 42 and the polling station diaries. He argued that

Form 33 was not kept in the ballot boxes as alleged by the 2<sup>nd</sup> respondent. He urged the court to look at Rule 81 & 93 of the Elections Regulations and the case in **Sam Nyamweya & 3 Others v. KPL Ltd & 2 Others** (2015) eKLR.

14. As regards the 3<sup>rd</sup> respondent's application dated 15/11/2017, he urged the Court to find it incompetent, totally defective, scandalous and an abuse of the court process, that it is not supported by any affidavit. The respondent raised an issue on striking out the affidavits and argued that the same had been dealt with in the ruling delivered on 31/10/2017. Further that the affidavit filed by Sammy Barchobo raises issues already pleaded in the Petition and that once a document has been filed in court it serves as the courts record. He finally prayed for the Petitioner's application to be struck out.

15. In response to the application dated 13/11/17, Counsel for the 3<sup>rd</sup> respondent, Mr. Odhiambo, indicated that the court had in its ruling observed that Form 33s were inside the ballot boxes and it's for that reason that the same was not supplied to the Petitioner. He urged the court to look at Rule 81(2), 93(4) of the Regulations. He further argued that the court order was to be specific on supply of the documents as stated in Regulation 93(4), failure which the 1<sup>st</sup> and 2<sup>nd</sup> respondent are not in contempt.

16. Counsel urged on the application dated 15/11/2017 by relying on **Skair Association vs Evangelical Church of Kenya** (2015) eKLR, that not all motions require to be supported by affidavits unless they raise points of law. Further that the materials supplied by the 1<sup>st</sup> and 2<sup>nd</sup> respondents should not Form part of the courts record unless ordered by the court. However if documents are filed pursuant to Rule 12(9) of the Election Petition Rules then they can be part of the record. He relied on the case of **I.E.B.C Vs Stephen Mutinda Mule** (2014) eKLR which emphasizes on the adversarial system of adjudication. He also asked the court to consider **Nairobi Election Petition No. 10/2017 Ndwiga Steve Mbogo v IEBC** on the effects of supplementary affidavit under Rule 12(9). Only a party can move to court to seek leave to file a supplementary affidavit if its pleadings or documents are incomplete. The Petitioner complained of only 28 stations but after filing of particulars dated 6/11/2017 he has listed 99 polling stations.

17. He further argued that by allowing the Petitioner to file further particulars it is prejudicial to the 3<sup>rd</sup> respondent. An Election Petition should not allow litigation by installment through the further affidavits, he submitted, and urged that his application dated 15/11/2017 should be allowed.

18. Mr. Tororei Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents associated himself with the 3<sup>rd</sup> respondent's arguments. He relied on the **Ndwiga Steve Mbogo (supra)** case that the Petitioner ought to have analyzed his case before filing the Petition. The documents filed by the 1<sup>st</sup> and 2<sup>nd</sup> respondents can only be used for reference by the court but not reliance as evidence by the Petitioner. On contempt of court, counsel argued that the 2<sup>nd</sup> respondent filed a supplementary affidavit containing polling day diaries, and that Form 33s are in the ballot boxes as indicated during the hearing of an earlier application and they have fully complied with Rule 81.

19. In response, Mr. Ogolla argued that it is not true the court held that Form 33s were inside the ballot boxes. The 1<sup>st</sup> and 2<sup>nd</sup> respondents could have asked the court for a review of the ruling. The **IEBC v. Mule (Supra)** Case deals with the question on counter foils and that Rules 81, 86 and 93 indicated Form 33 should be outside the ballot boxes and that rule 12(9) should be read together with Rule 15 and Form 42 is not provided by the law. The Petitioner's further affidavits contain averments already pleaded in the Petition. He therefore urged that the application for contempt be allowed and the 3<sup>rd</sup> respondent's application be dismissed.

20. The 3<sup>rd</sup> respondents counsel stated that pursuant to rule 16 of the Elections Rules the 2<sup>nd</sup> respondent filed supplementary affidavit. The court can look at the filed affidavits' and strike out issues not contained in the Petition. He sought for the courts direction and leave to respond to the further affidavits.

21. Mr. Tororei, Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents stated that Form 42 contains the very content required of Form 41 under the Election Regulations.

## ISSUES FOR DETERMINATION

22. The Court has considered both applications and heard arguments from all Counsel. The issues for determination are as follows:

- i. Whether the omission by the 1<sup>st</sup> and 2<sup>nd</sup> respondents to supply Forms 33 and Form 41 were a contempt of court.
- ii. Whether the issues filed affidavits and the particulars supplied by the Petitioner raise new issues thus amending the Petition.
- iii. Whether failure by the 3<sup>rd</sup> respondent to file a supporting affidavit together with the Amended Notice of Motion dated 15/11/2017 is fatal to the application.

## DETERMINATION

23. On issue (1) above, the court herein had made a ruling on an earlier application dated 4<sup>th</sup> October 2017. Paragraph 44 of the said ruling the court ordered that the Petitioner was entitled to be supplied with Elections materials of Forms 33 and 41 and polling station diaries in accordance with Regulations 78 and 93 of the Elections (General) Regulation, 2012. The Original Forms 33s and 35As were in the ballot boxes and could only be supplied upon successful application for scrutiny. The 2<sup>nd</sup> respondent filed a supplementary affidavit in compliance with Order 6 of the ruling. In his replying affidavit in response to the order of the Court for supply of the Forms 33, Mr. Joseph Leboo Masindet stated that the said Forms were to assist the election official in counting of votes and after the counting process they are placed in ballot boxes. He however attached copies of the polling diaries and Forms 42 which contains the Rejected votes

24. There is no question that the Court has power to punish for contempt under section 4 of the Contempt of Court Act No. 46 of 2016, which came into force on 13<sup>th</sup> January 2017. There was no question as regards service of the Court order or that the respondents were aware of the order. What came up for resolution was whether the 1<sup>st</sup> and 2<sup>nd</sup> respondents had in their alleged inability to comply with the order of the court become guilty of contempt.

25. The Black's Law Dictionary (Ninth Edition) defines contempt of court as:-

***“Conduct that defies the authority or dignity of a court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment.”***

27. I respectfully agree with Odunga, J in **Nairobi Misc. Application No. 58/2014** where he held:

***“In my considered view, Court orders are not made in vain and are meant to be complied with. If for any reason a party has difficulty in complying with court orders the honorable thing to do is to come back to court and explain the difficulties faced by the need to comply with the order. Once a Court order is made in a suit the same is valid unless set aside on review or on appeal. In Econet Wireless Kenya Ltd vs. Minister for InFormation & Communication of Kenya & Another [2005] 1 KLR 828 Ibrahim, J (as he then was) stated:***

***“It is essential for the maintenance of the rule of law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a Court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void.”***

28. The 1<sup>st</sup> and 2<sup>nd</sup> respondents argued that they have not violated any order and that they should not be committed to civil jail. The reason given by the 2<sup>nd</sup> respondent was that Form 33s were kept in the ballot boxes thus they could not be accessed. The Petitioner seeks that Mr. Ezra Chiloba should be committed to civil jail, but has not shown in their statutory statement and in his supporting affidavit dated 13/11/2017 how he had refused to comply. It is a case of impossibility of compliance with the court order. If the Forms were in the ballot Boxes, it is impossible to supply them without breaking the boxes to access them.

29. The 2<sup>nd</sup> respondent in his replying affidavit at paragraph 4 has attached copies of the Polling Station diaries which contains all the polling stations within the County. Paragraph 5 attaches a bundle of Forms 42 and statements of rejected ballot papers. The Court has noted Form 42 contains the details on the rejected votes. The Court had ordered supply of Forms 33 and 41. The Petitioner raised an issue on the wrong documents supplied by the 1<sup>st</sup> and 2<sup>nd</sup> respondents. However, it is the opinion of the Court that the documents supplied have the same content as those contained in Form 42. Therefore they have not disobeyed the court order with regard to the supply of the information on the rejected ballot papers. The objection as to the Form of presentation of the information is a technical objection, which is cured by section 80 (d) of the Elections Act. The 1<sup>st</sup> and 2<sup>nd</sup> respondent partly complied as argued by the Petitioner and the 2<sup>nd</sup> Respondent in his supplementary affidavit dated 13/11/2017 at paragraph 3 gave out reasons as to why Forms 33 were not supplied. The 2<sup>nd</sup> respondent's explanation as to the impossibility of compliance with the order in my view suffices and the Court may give other directions on the matter as an outstanding issue in accordance with Rule 15 (1) (f) of the Election Petitions Rules, 2017.

### ***Notice of Motion of 15<sup>th</sup> November 2017***

#### ***Lack of Supporting Affidavit***

30. The court also has to consider the effect on failure to file a supporting affidavit to an application. The 3<sup>rd</sup> respondents counsel argued that it was not fatal at all unless one's application was based on issues of fact. It was submitted that where an application was based on provisions of law, there was no need for an affidavit. He relied on Nairobi Civil Case No. 342/2014 ***Skair Associates Architects Vs the Evangelical Lutheran Church of Kenya & 4 others*** where **Kamau, J.** relied on Order 51 Rule 4 of the Civil Procedure Rules, 2010 which provides as follows:

***“Every notice of motion shall state in general terms the grounds of the application, and where any motion is grounded on evidence by affidavit, a copy of any affidavit intended to be used shall be served.”***

31. The Court held that no affidavit evidence is required where an application has raised points of Law, but it is to be included where the motion is to be supported by evidence as argued by the 3<sup>rd</sup> respondents Counsel.

32. In the same vein, this Court in ***Isaac Aluoch Polo Aluochier v National Alliance and 542 others*** [2016] eKLR, considered the effect of lack of a supporting affidavit in a constitutional Petition for enforcement of rights and fundamental freedoms and held as follows:

#### ***“Want of supporting evidence to the Petition.***

***10. Under The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedures Rules, 2013, for the enforcement of the Bill of Rights and which by the practice of the Court have been used for all constitutional litigation, there is no requirement that a petition be supported by an affidavit on the facts. In Bryson Mangla v. A.G & Ors. Nairobi Pet. No. 284 of 2016, this Court held that:***

***“13 The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and***

*Procedures Rules, 2013 do not require that a petition must be supported by an affidavit, see Rule 11 thereof in these terms:*

***“11. Documents to be annexed to affidavit or petition***

*(1) The petition filed under these rules may be supported by an affidavit*

*(2). If a party wishes to rely on any document, the document shall be annexed to the supporting affidavit or the petition where there is no supporting affidavit.”*

***14. It is conceivable that a petition which challenges, for example, constitutionality of a particular legislative text may not require an affidavit. Where however, a petition relies on matters of evidential fact, this must be proved by affidavit or oral testimony as the court may direct.”***

***11. So where, as here, it is sought to rely on matters of fact a suitable affidavit with documentary annexures ought to be filed in discharging the burden of proof of a plaintiff in terms of section 107, 108 and 109 of the Evidence Act....”***

33. The current application by the 3<sup>rd</sup> respondent is brought under Article 159 of the Constitution, section 80 of the Elections Act, 2011, Rule 15(j) of the Parliamentary and County Election Petitions Rules, 2017. I would agree that the application by the 3<sup>rd</sup> respondent raised a matter of law calling for examination of the petition and the contents of the impugned affidavits for which a supporting affidavit was not necessary.

34. The 3<sup>rd</sup> respondent in his Amended Notice of Motion at paragraph 3 refers to affidavits filed by Sammy Barchobo and Daudi Chebet Bargoge. He prays that the court strikes them out. At Paragraph 6 of the affidavit by Sammy Barchobo Changwony states that the Presiding Officer made it his sole mandate to assist persons who could not be able to vote by themselves either due to illiteracy or other factors and he would not allow any person including the agents to witness as he helped such persons. He further contended that there were no rejected votes included in the Form 35A that he signed at Lekepchun Primary School.

35. The Petitioner at paragraph 80 g (iv) of the Petition states that there were fracas being reported at the Lekepchun Primary School. At paragraph 97 a-e of the Petition brings out issues on filling, signing and declaration of Forms 35A together with declaration of results. The allegations of malpractice by a Presiding Officer assisting voters in secrecy and an agent being thrown out; are all contemplated by the pleadings in the petition. At paragraph 100, the Petitioner claims that the Election in the whole Constituency Tallying Center was conducted in secrecy and fraud.

36. The Petitioner herein also filed in Court Particulars pursuant to Rule 15(1), (e) of the Election Petition Rules. The list gives a total of 99 various polling station/ward complained of. The Particulars contain discrepancies detected in Form 35A such as rejected votes, Forms not stamped, alteration of figures, overwriting on carbon papers, Forms that do not have Anti-copy features. The court has looked at the cited paragraphs of the Petition. Paragraph 80 is about the 1<sup>st</sup> and 2<sup>nd</sup> respondents, agents, servants, or employees who failed or neglected to adhere to the strict rules of the Law and it goes further to elaborate on the discrepancies in Forms 35As.

37. At paragraph 90 and 92 the Petitioner states that the Forms 35As did not have the 1<sup>st</sup> respondent's official stamp. It was not possible to tell who won the elections since there was a question on whether Form 35As that were used were genuine. Paragraph 97 describes how the 2<sup>nd</sup> respondent failed in his duty under Article 86(c) of the Constitution providing a basis for evidence in the further affidavits for alleged misconduct of the returning officer.

***Whether Documents attached to the 2<sup>nd</sup> Respondent's Affidavit in compliance with the order for***

***supply of the documents are evidence in the petition***

38. The Court agrees with the 3<sup>rd</sup> Respondent's argument that the documents filed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents should not be used for purposes of evidence in court. The court had ordered the 1<sup>st</sup> and 2<sup>nd</sup> respondents within three (3) days to file further affidavit(s) supplying to the parties Forms 33 and 41 and polling station diaries for the polling stations in Baringo North constituency. Once the Petitioner was supplied with the above document which was within his right, he would then file further affidavits and particulars, if necessary.

***Striking out of the further affidavits and particulars***

39. It is indeed trite law that parties are bound by their pleadings. I respectfully agree with the decision of a three judge bench at Mombasa Civil Appeal no. 7 of 2015 ***Global Vehicles Kenya Limited and Lenana Road Motors*** where the Court held that;

*“It can therefore be argued that pleadings also contribute immensely to the realization of the cardinal constitutional principle that justice shall not be delayed. Jessel M. R. articulated this view very well in **Thorp v. Holdsworth**, (1876) 3 Ch. D, 637 at 639, as follows:*

*“The whole object of pleadings is to bring the parties to an issue and the meaning of the rules was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to the definite issues, and thereby to diminish expense and delay, especially as regards to the amount of testimony required on either side at the hearing.”*

40. The Court has had an opportunity to look at the affidavit by Sammy Barchobo and Daudi Chebet Bargoge. The affidavit by Sammy Barchobo at paragraph 8 & 9 relates to Forms 35A. The Petition at paragraph 80 to 93 pleads the matter of irregularities regarding Forms 35A and further paragraph 100 talks of secrecy and fraud which issues have been stated by both the deponents.

41. The 3<sup>rd</sup> respondents counsel relied on Civil Appeal No.219 of 2013 between ***I.E.B.C & Anor. v. Stephen Mutinda Mule & 3 others***; the issue in this case was on counterfoils and signing of Forms 35 which were new issues. Counsel had argued that the court was assisting the Petitioner by granting leave to file further affidavits. ***Ndwiga Steve Mbogo vs I.E.B.C & 2 others*** (*supra*) related to a further affidavit sworn and filed did not bring out factual evidence which was not in the Petition. However that is not the case in this instant amended application by the 3<sup>rd</sup> respondent, since what has been pleaded in the Petition as stated above is what is deponed to in the affidavits.

42. The Petitioner herein has not gone outside the Petition that was filed on 6<sup>th</sup> September 2017, and thus prayer 3 of the amended application dated 15/11/2017 fails. The 3<sup>rd</sup> respondent (applicant herein) has not claimed nor demonstrated that the filing of the particulars dated 6/11/2017 and the affidavits sworn by Daudi Chebet and Sammy Barchobo seek to introduce new evidence, or change the claims of the Petition.

43. The Petition makes claims of chaos at polling stations and harassment of agents in Paragraph 80. (f) at subparagraph (iv) that “there was fracas reported in the polling station during voting and counting of votes” and (v) “the Agents, specifically those for the Petitioner, were being harassed and/or intimidated by the presiding officer.”

44. Similarly at page 11 of the Petition, paragraphs 93, it is pleaded that “the whole Election was shrouded in secrecy and fraud. As can be discerned from the sworn affidavit of Joshua Komen, the following incidences took place in the Constituency tallying Centre” and at paragraph 97 (a) – (e) the election was challenged on the irregularities set out therein as follows:-

**(a) Filling in the results declared by the presiding officers on illegal and invalid Form 35As.**

(b) The results appearing in the public portal put up by the 1<sup>st</sup> Respondent differ from the results declared by the 2<sup>nd</sup> Respondent on 10<sup>th</sup> August, 2017. The 2<sup>nd</sup> Respondent declared the 3<sup>rd</sup> Respondent as the winner having garnered 12, 413 and the Petitioner came 2<sup>nd</sup> with 12, 374. The results appearing in the portal show that the Petitioner got 12, 342 while the 3<sup>rd</sup> Respondent garnered 12, 493 votes.

(c) **That all the Forms 35As used by the 2<sup>nd</sup> Respondent to declare results of Member of National Assembly for Baringo North appear to have been prepared and signed by one person as evidenced by the handwriting appearing in the said Forms.** This begs the question whether the results announced by the 2<sup>nd</sup> Respondent were cooked and/or prepared by the Respondents to hoodwink residents of Baringo North Constituency.

(d) **Some if not all the Forms 35As used by the 2<sup>nd</sup> Respondents to collate the results and declare the 3<sup>rd</sup> Respondent as validly elected Member of National Assembly had different serial numbers to those supplied to the Petitioner's agents.**

(e) That in Koiboware Primary School and Lake Kamnarok Primary school polling stations, the Form 35As used by the 2<sup>nd</sup> Respondent did not have the **anti-copy security features. That further, the Forms did not originate from the 1<sup>st</sup> Respondent as they had no bearing of the 1<sup>st</sup> Respondent's name as the rest of the Forms....**

45. It is the court's opinion that the Petitioner herein has not gone outside the claims in the Petition and introduced new claims at this stage. Indeed the Respondents in their joint Agreed Issues dated 16<sup>th</sup> October 2017 identified as arising from the Petition, the following issues (as material here) to which the particulars and the further affidavits are clearly aligned:

“Agreed issues

1. *Whether or not Form 35A filed by the 1<sup>st</sup> and 2<sup>nd</sup> respondents are authentic and legal.*
2. *Whether or not all the Form 35A were filled by one person.*
3. ...
4. *Whether or not the failure to stamp Form 35A invalidates the results of an election.”*

46. Consistently with the terms of the order of 31<sup>st</sup> October 2017 directing the petitioner to supply further particulars the court would not have hesitated to strike out the particulars had it found that the petitioner had breached the direction to **“supply further and better particulars with relation to the Petition, *without amending directly or in effect the case of the Petitioner therein.*”**

## **Conclusion**

47. The Court has neither desire nor mandate to enter into the arena of conflict in an election petition or indeed any other proceedings. What the Court sought to do by its ruling and order of 31<sup>st</sup> October 2017 is to afford the petitioner the opportunity to which he was entitled under the applicable Rules to elaborate his claims already set out in the Petition relating to the alleged irregularities in the election process and the statutory Forms of declaration of election results which are facts in issue in the Petition, as acknowledge by the Respondents in their own joint statement of Agreed Issues.

48. Rules 15 (1) (e) of the Elections (Parliamentary and County Elections) Petitions Rules 2017 entitled the petitioner to file better particulars and Rule 15 (1) (h) further affidavits to give evidence in support of his case. For this purpose,, the Court directed the 1<sup>st</sup> and 2<sup>nd</sup> respondents to supply copies of relevant

statutory Forms. In so supplying the required documents the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were to use affidavits, not as further affidavits within the meaning of Rule 12 (9) of the Rules, but only as a vehicle for such conveyance of the documents to the parties. This did not result in affidavits within the context of the petition which by virtue of Rule 12 (12) of the Rules become part of the record and subject to cross-examination of their deponents may be used as evidence in the petition.

49. Accordingly, while I would agree with the 3<sup>rd</sup> Respondent and make a direction that the Affidavit of 2<sup>nd</sup> Respondent supplying the documents ordered by the court order of 31<sup>st</sup> October, 2017 and the documents therein did not become part of the record of the Court and consequently may not be used as documents in evidence before the Court in terms of Rule 12 (12) of the Rules. The affidavit and the documents therein contained were not filed by a party in support of or in opposition to any case of any party and were merely the mode directed by the court for delivery and transmission of the information sought by the petitioner. Such information would only become evidence when properly adduced by a party in support of his case or in opposition to the case of another party in accordance with Rules 12 of the Rules, such as when the petitioner was given 7 days to file further affidavits and the respondents 7 days to file replying affidavit thereto. The information supplied may, of course, however, be used in cross-examination of any witnesses called by the parties before the Court.

50. The 1<sup>st</sup> and 2<sup>nd</sup> respondents have explained their failure to supply the Forms 33 and Form 41, the former being said to be in the ballot boxes and the latter being said to be non-existent and another document Form 42 being used in its place to record the information on rejected votes. With this explanation, the Court cannot hold the said respondents to be in contempt of Court since the ballot boxes may not be opened save with an order of Court and the contents of the document referred to as Form 41 in Regulation 78 (3) of the Election Regulations, 2011 being already provided by the 2<sup>nd</sup> Respondents as Form 42. The fact of failure to deliver the Forms 33 which are said to be in the ballot boxes may, of course, be a fact to be considered at a later stage in the pending application for scrutiny of the votes upon taking of oral evidence during the hearing.

51. Upon examination of the further affidavits and particulars supplied by the petitioner pursuant to the order of the Court of 31<sup>st</sup> October, 2017, I find the same to be wholly within the claims or causes of action pleaded in the petition, and the evidence and particulars therein merely elaboration of claims already set out in the Petition.

## **ORDERS**

52. Accordingly, for the reasons set out above, the Court makes the following orders on the Petitioner's Notice of Motion dated 13<sup>th</sup> November, 2017 and the 3<sup>rd</sup> Respondent's Amended Notice of Motion dated 15<sup>th</sup> November, 2017:

1. The Petitioner's Notice of Motion dated 13<sup>th</sup> November, 2017 for contempt of court against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents is dismissed.
2. The 3<sup>rd</sup> respondent's Notice of Motion dated 15<sup>th</sup> November, 2017 is granted to the extent that direction is hereby given that the Form 42 documents and copies of Poll Station Diaries supplied by the 2<sup>nd</sup> Respondent's Affidavit sworn in response to the order of the Court for the supply thereof to the parties in the Petition are not evidence for use in the Petition within the meaning of Rule 12 (12) of the Election (Parliamentary and County Elections) Petitions Rules, 2017.
3. The Respondents will have the seven (7) days granted under the ruling of 31<sup>st</sup> October, 2017 to file, if necessary, any replying affidavits to the particulars supplied and additional affidavits filed by the Petitioner.
4. Thereafter the Petition shall proceed to hearing on dates to be fixed in consultation with Counsel for the parties.

5. Costs in the cause.

**DATED AND DELIVERED THIS 11<sup>TH</sup> DAY OF JANUARY 2018.**

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances:**

**Mr. Ogolla for the Petitioner**

**Mr. Tororei for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents**

**Mr. Odhiambo for the 3<sup>rd</sup> Respondent**