



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAKURU  
ELECTION PETITION NO. 1 OF 2017

ISOE OCHOKI ANDREW MINGATE.....PETITIONER

VERSES

INDEPENDENT ELECTORAL AND

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

GILBERT SEREM CONSTITUENCY RETURNING OFFICER

NAKURU TOWN WEST CONSTITUENCY.....2<sup>ND</sup> RESPONDENT

ARAMA SAMUEL.....3<sup>RD</sup> RESPONDENT

JUDGMENT

**Introduction**

1. In exercise of their right under Article 38 of the Constitution, the people of Kenya trooped to polling stations throughout the country on 8<sup>th</sup> August 2017 to elect their representatives to various seats. The petitioner, **Isoe Ochoki Andrew Mingate** and the 3<sup>rd</sup> respondent, **Arama Samuel**, were candidates for the Member of the National Assembly for Nakuru Town West Constituency, election to which seat was conducted by the 1<sup>st</sup> respondent, the body constitutionally mandated under Article 88(1) of the Constitution of Kenya to conduct and supervise elections for any elective office established in Kenya.

2. There were ten (10) candidates for the Nakuru Town West constituency parliamentary seat. The petitioner stood on an **Orange Democratic Party (ODM)** ticket, which was a constituent party of the political alliance known as National Super Alliance (NASA) while the 3<sup>rd</sup> respondent was on a **Jubilee Party** ticket. After the voting, counting and tallying of results, the 2<sup>nd</sup> respondent, the Returning Officer for Nakuru Town West constituency announced the following as the outcome of the elections in the constituency

1. Arama Samuel	-	29682
2. Isoe Ochoki Mingate	-	25071
3. Stephen Kemoi Andrew A. Koech-		581
4. Ezekiel Kiprotich Komen	-	759

<b>5. Joseph Kariko Mwangi</b>	-	<b>12766</b>
<b>6. Peter Gitare Ndubi</b>	-	<b>218</b>
<b>7. Erick Otieno Ogada</b>	-	<b>1596</b>
<b>8. Debora Chengetich Sang</b>	-	<b>716</b>
<b>9. Sospeter Nyakundi Nyang'a</b>	-	<b>50</b>
<b>10. Fravian Wairimu Wacira</b>	-	<b>169</b>
<b>Total</b>	-	<b>71608</b>

3. Accordingly, the 2<sup>nd</sup> respondent announced the 3<sup>rd</sup> respondent as the duly elected member of the National Assembly for the said seat. There was a difference of 4611 votes between the petitioner and the 3<sup>rd</sup> respondent. A total of **71,608** valid votes were cast, and there were **665** rejected votes.

### **The Petition**

4. The petitioner was dissatisfied with the outcome of the elections and on 5<sup>th</sup> September 2017, he filed this present petition in which he challenges the declaration of the 3<sup>rd</sup> respondent as the duly elected member of the National Assembly for Nakuru Town West constituency.

5. The petitioner makes various allegations against the conduct of the election in the constituency, all of which he deems sufficient to render the election so flawed as to render the said results invalid. The petitioner contends, *inter alia*, that the 1<sup>st</sup> and 2<sup>nd</sup> respondents (hereafter together referred to as IEBC where the context so admits) connived with the 3<sup>rd</sup> respondent to conduct the election in a fundamentally flawed manner in order to ensure victory for the 3<sup>rd</sup> respondent. He takes issue with the process of appointment, accreditation and admission of agents which he alleges was done in such a manner as to disadvantage him and benefit the 3<sup>rd</sup> respondent. He contends that his agents were denied access to polling stations and the tallying centre, and that they were denied access to copies of statutory documents.

6. It is also his contention that IEBC used non-statutory return forms in order to tamper with and alter the results from polling stations so that they could declare the 3<sup>rd</sup> respondent winner on the basis of altered and fake final results of the election. He also contends that the 2<sup>nd</sup> respondent announced the results for the constituency while leaving out of the final tally results from Kibowen Komen Primary School polling station code no. 002 and 003.

7. The petitioner further alleges that IEBC used, allowed or condoned the use of bribery, intimidation, violence and undue influence by the 3<sup>rd</sup> respondent in order to influence and secure the outcome of the fraudulent election results. It is his contention that IEBC conducted the elections in a manner that contravened the constitutional requirement of free and fair elections; that the system used in the election contravened the constitutional requirements of simplicity, accuracy, verifiability, security, accountability and transparency; that it contravened the constitutional requirement of impartiality, neutrality and efficiency; and that the elections were conducted in violation of the election laws and regulations as well as the IEBC's internal operating standard practice and procedures in a manner that compromised the validity of the results declared.

8. The petition is supported by an affidavit sworn by the petitioner on 4<sup>th</sup> September 2017 as well as affidavits sworn on the same date by 10 other persons who describe themselves as agents of the petitioner. The petitioner seeks the following orders:

***a. A specific order for scrutiny of the rejected and spoilt votes;***

***b. A declaration that the rejected and spoilt votes count toward the total votes cast and in the computation of the final tally of the Parliamentary Election;***

***c. An order for scrutiny and audit of all the returns of the Parliamentary Election including but not limited to Forms 35A and 35B;***

***d. An order for scrutiny and audit of the system and technology used by the 2nd Respondent in the Parliamentary Election including but not limited to the KIEMS Kits, the Server(s); website/portal;***

***(Note: e, f, missing in the petition)***

***g. A declaration that the non-compliance, irregularities and improprieties in the Parliamentary Election were substantial and significant that they affected the result thereof;***

***h. A declaration that all the votes affected by each and all the irregularities are invalid and should be struck off the from the final tally and computation of the Parliamentary Election;***

***i. A declaration that the Parliamentary Election held on 8th August 2017 was not conducted in accordance with the Constitution and the applicable law rendering the declared result invalid, null and void;***

***j. A declaration that the 3rd Respondent was not validly elected as the member of National Assembly elect and that the declaration is invalid, null and void;***

***k. An order directing the 1st Respondent to organize and conduct a fresh Parliamentary Election in strict conformity with the Constitution and the Elections Act;***

***l. A declaration that each and all of the Respondents jointly and severally committed election irregularities;***

***m. Costs of the Petition; and***

***n. Any other orders that the Honourable Court may deem just and fit to grant.***

## **The Response**

9. The respondents opposed the petition and filed their respective responses thereto. IEBC filed a response dated 18<sup>th</sup> September 2017 together with affidavits sworn by the 2<sup>nd</sup> respondent, Gilbert Serem, and 8 presiding officers.

10. IEBC asserts that the election for the constituency seat was free and fair and that the 3<sup>rd</sup> respondent was validly elected as the winner. It further asserts that the election was carried out in the most transparent manner and in accordance with all the electoral laws; and further, that there were no illegalities or irregularities capable of affecting the outcome of the election. With respect to the contention that the Returning Officer declared the winner without the results for Kibowen Komen stream 2, IEBC contends that form 35A in respect of that polling station was inadvertently placed in the ballot box by the Presiding Officer and sealed in.

11. It contends, however, that it was proper for the 2<sup>nd</sup> respondent to declare the results without the Kibowen Komen stream 2 results as, taking into account the results garnered in the 158 polling stations out of the 159 polling stations in the constituency, the 3<sup>rd</sup> respondent was leading with a substantial margin which could not be altered even if the petitioner garnered all the votes in Kibowen Komen stream 2. IEBC prays that the court determines that the 3<sup>rd</sup> respondent was duly elected and the election was valid, and for the petition to be dismissed with costs.

12. The 3<sup>rd</sup> respondent filed a response in opposition to the petition dated 14<sup>th</sup> September 2017. Together with the response, the 3<sup>rd</sup> respondent filed an affidavit which he swore on 14<sup>th</sup> September 2017, as well as two affidavits sworn on the same date, one by his chief agent, Japheth Omuko Ombwera and the other by his personal assistant, John Kipngeno Koech. The 3<sup>rd</sup> respondent contends that he was legitimately elected in an open and fair election held in accordance with the Constitution and the law governing elections. He further denies the allegations of bribery, violence and intimidation levelled against him and his agents. He terms the petition speculative and lacking a factual basis, and prays that it be dismissed with costs.

### **Interlocutory and Procedural Matters**

13. The petitioner filed an application dated 12<sup>th</sup> September 2017 in which he sought, inter alia, an order for scrutiny of the election materials, particularly forms 35A, 35B and 32A, the ballot boxes seals and the ballot themselves, and for an order of recount of votes cast in the elections for the constituency. On 10<sup>th</sup> October 2017, the court had, on its own motion, made an order directing IEBC to file in court for purposes of inspection all the original copies of forms 35A and 35B in respect of the constituency. An order was also made, pursuant to an application by the 3<sup>rd</sup> respondent which was acceded to by IEBC, that the ballot boxes be produced in court and the petitioner and 3<sup>rd</sup> respondent be permitted to affix their own seals to the ballot boxes. The order was duly complied with and an inspection took place on 13<sup>th</sup> October 2017, thereby disposing of the orders relating to the production, storage and sealing of the electoral material sought by the petitioner.

14. The parties were also directed, in order to facilitate the smooth and expeditious hearing of the petition, to file in court by 24<sup>th</sup> October, 2017 the list of the witnesses whom they required to have availed for purposes of cross-examination. It appears that IEBC filed its notice, but the petitioner did not.

15. After hearing the petitioner's application dated 12<sup>th</sup> September 2017, the court (Maureen Odero J), in her ruling dated 7<sup>th</sup> November 2017, made an order for scrutiny of forms 35A and 35B of the parliamentary election for Nakuru Town West constituency, such scrutiny to be limited to the statutory forms in relation to the polling stations whose results were disputed as listed at paragraph 24-50 of the applicant's affidavit sworn on 12<sup>th</sup> September, 2017.

16. The court also made an order that the ballot box for Kibowen Komen polling station 002 be availed in court by IEBC and that it be opened in the presence of the Deputy Registrar and the form 35A said to have been inadvertently sealed in the ballot box retrieved and the ballot box re-sealed in the presence of all parties. The form was also to be scrutinized together with the forms set out in the petitioner's affidavit in support of the application for scrutiny. The court declined to grant the order for a recount.

17. Following the ruling of the court, the scrutiny was duly undertaken as directed by the court, in the presence of Counsel for and representatives of the parties, and a report dated 14<sup>th</sup> November 2017 prepared by the Deputy Registrar. I shall advert to the findings of the scrutiny in the course of this judgment.

### **The Petitioner's Case**

18. In his grounds in support of the petition, the petitioner contends that IEBC deliberately set out to conduct an inconsistent, impartial (sic) and non-uniform parliamentary election with the goal of manipulating the results by using different forms 35A at the polling stations. He alleges that the forms used were demonstrably contradictory, defective and bear fatal irregularities affecting Kibowen Komen Primary School polling station Code No. 002 and 003 and many other polling stations.

19. According to the petitioner, the deliberate use of inconsistent and different forms and returns demonstrates lack of consistency, uniformity, neutrality, impartiality and indicates an intention to manipulate the results and the returns. It is his case that a substantial number of forms 35A and 35B have

been tampered with, are not signed as required by the law and regulations, do not bear the IEBC authentic stamp or at all, and do not bear the signatures of the candidates' agents nor the reason for refusing to sign. Accordingly, these forms 35As are wholly compromised and the results that they contain cannot be relied upon, thus rendering a material number of votes cast and represented by those forms and returns invalid.

20. In the course of his evidence on this issue, the petitioner pointed out that there were discrepancies in the last digits in the serial numbers of the forms 35As, which was conceded by IEBC.

21. The petitioner called 8 witnesses and filed written submissions dated 10<sup>th</sup> January 2018 and submissions in reply to the respondents' submissions dated 16<sup>th</sup> January 2018. The petitioner's case is that the election of the 3<sup>rd</sup> respondent was marred with irregularities and illegalities that rendered the said elections invalid. While the petitioner and his witnesses aver in their affidavits in support of the petition that they were initially satisfied with the conduct of the elections, they allege that they were thereafter unhappy with various elements of the conduct of the elections. The petitioner avers that he had cast his vote at around 8.00 a.m. on 8<sup>th</sup> August 2017 at Koinange Primary School polling station. He had then set out on a tour of various polling stations within the constituency where he monitored events and the voting process. He states that he was fairly satisfied with IEBC's conduct of the elections.

22. He complains, however, that there were illegalities in respect of the elections which should render the elections invalid. In this regard, he avers that the 2<sup>nd</sup> respondent declared results for the member of the National Assembly before tallying the final results from each polling station, a reference to the results of Kibowen Komen polling station stream 002.

23. He further complains that his agents were denied access to the polling station and tallying centre in the course of sorting out and counting of the votes, and that the sorting of votes was not properly done as the votes were not displayed to the candidates' agents. He further alleges that forms 35A from various polling stations were not signed by the Presiding Officer and the Deputy Presiding Officer. Other forms were either not signed by his agents, or were not stamped.

24. The petitioner had a number of complaints with respect to the forms used: that some had two sets of figures, while others such as Muslim Primary/0321750875031 stream 006 was blank with no figures filled in, and was neither stamped nor signed by both the Presiding and Deputy Presiding Officers; that form 35A for Muslim Primary/0321750875031 stream 008 was not stamped with the official IEBC stamp; that the form 35A for Muslim Primary Stream 004 was allegedly damaged, while the form for Mama Ngina Primary School Stream 001 was not stamped and was not legible, and the figures on it could not be ascertained.

25. The petitioner further alleges that forms 35As for Mama Ngina Primary School streams 002, 003, 004 and 005 were not stamped with the official IEBC stamp, while there were two different forms 35A with respect to Mama Ngina Primary School Stream 003. He also alleges that Nakuru West Primary School Stream 003 had two different forms, which were also not stamped with the official IEBC stamp. Other forms that were allegedly not stamped with the official IEBC stamp included forms 35As for Nakuru West Clinic stream 003, Kenyatta Secondary School Stream 004, Crater View Secondary School stream 002, Kapkures Health Centre stream 007, Soko Mjinga streams 003, 005, 008 and 009, and for Milimani Primary School Streams 004 and 008, while the latter was also deficient as the names of both the Presiding and Deputy Presiding officer were not indicated on it.

26. The other complaint with respect to forms 35As related to the signatures of agents. The petitioner alleged that some forms 35As were signed by only one agent, or that his agents were not allowed to sign the forms. There was also a complaint that form 35A for Soko Mjinga/0321750872014 had not been signed by the Presiding Officer and his deputy, but the stream is not indicated.

27. The third main complaint by the petitioner relates to violence and intimidation. In his affidavit, he avers that there was violence against his agents, in particular at the tallying centre, by goons hired by the 3<sup>rd</sup> respondent, and he therefore decided to leave the tallying centre, leaving his Chief Agents to wait for

the results.

28. The petitioner's fourth complaint is that his agents were denied access to the polling stations and the tallying centre. The petitioner contends that his agents were not allowed into the polling stations during the counting of votes or into the tallying centre, nor were they allowed to sign forms 35As. He alleges that those who signed forms 35As were not his agents but ODM party agents. His averments are echoed by his witnesses, Caspar Ondoro (PW2), Hezron Okiki Othoo (PW5) and Geoffrey Nyangau Nyaanga (PW6), all of whom aver that the petitioner's agents were denied access in a number of polling stations.

29. The petitioner's fifth complaint relates to alleged bribery of voters by agents of the 3<sup>rd</sup> respondent. This emerges from the averments and evidence in cross-examination of the petitioner's witnesses, Julius Momanyi Ochiengi (PW4) and Cleophas Simiyu Mulongo (PW3), who allege that the 3<sup>rd</sup> respondent's agents came to the polling station with the intention of bribing voters but were turned away.

30. The petitioner also alleges that power was switched off in two polling stations, Heshima and Kaptembwa, to facilitate the manipulation of votes in favour of the 3<sup>rd</sup> respondent. Hezron Okiki Othoo makes this averment in the affidavit in support of the petition. Onchieku Hesborn Mosiori (PW7) also averred that power was deliberately switched off at around 7.00 p.m. at Kaptembwa and Heshima Primary Schools, and that when they intervened, the Kenya Power and Light personnel who restored the power ascertained that it had been tampered with as neighbouring institutions had electricity.

31. A final complaint relates to the alleged refusal to allow supporters of the petitioner to vote when they could not be identified using the KIEMS kit. According to Rostika Okech Achuth (PW8), some voters who could not be identified using the biometric kit were allowed to vote if they were the 3<sup>rd</sup> respondent's (Jubilee) supporters, but those who were the petitioner's supporters were sent away.

### **The Case for IEBC**

32. IEBC denied the allegations contained in the petition and filed its response as well as an affidavit in reply sworn by the 2<sup>nd</sup> respondent, Gilbert Serem (Serem), who also gave evidence on its behalf. Though IEBC had filed affidavits by some presiding officers as indicated earlier, they were not called to give evidence at the hearing.

33. In his affidavit sworn on 18<sup>th</sup> September 2017, Serem avers that he received forms 35A from all polling stations except Kibowen Komen stream 2. The Presiding Officer for this polling station explained that he had placed all forms 35As in the ballot boxes and sealed the boxes, and that he had done this in respect of all the elective seats.

34. Serem testified that he had then conveyed this information to all the agents present at the tallying centre, had also informed them that he could not open the ballot boxes without a court order, and they had agreed that he could continue with the tallying. He had found that at the end of the tallying, the 3<sup>rd</sup> respondent had more than 4500 votes more than the petitioner; that Kibowen Komen stream 2 had 577 votes, and that even if the said votes were all added to the petitioner, they would not make a difference as the 3<sup>rd</sup> respondent would still have over 4,000 votes more than the petitioner.

35. With respect to the complaint about stamping of forms, the evidence of the 2<sup>nd</sup> respondent is that there is no need for stamping of form 35As. All that is required under **Regulation 79 of the Elections (General) Regulations**, is the signature of the Presiding Officer and the agents of the candidates. Where the forms had been stamped, such stamping was a gratuitous and superfluous administrative act incapable of creating a statutory obligation. However, according to the 2<sup>nd</sup> respondent, all the forms mentioned in the petition had been stamped.

36. IEBC denies the allegation that the elections were marred by violence and intimidation. The 2<sup>nd</sup> respondent avers that when he announced the results at the tallying centre, the petitioner created a

commotion by banging the table, and he was escorted out by security officers.

37. As for the contention by the petitioner that some results were not visible, his averment is that the forms were self-carbonating, and it is possible that some carbon copies may not be clear. It was the position of IEBC therefore that the election for Nakuru Town West constituency was free fair and transparent, and any error or mistake that may have arisen is not so substantial in nature as to affect the results of the election.

### **The 3<sup>rd</sup> Respondent's Case**

38. The 3<sup>rd</sup> respondent's case is set out in his reply to the petition and the affidavits in support thereof. He also testified before this court, as did his two witnesses, his chief agent, Japheth Omuko Ombwera and his personal assistant, John Kipngeno Koech. The 3<sup>rd</sup> respondent asserts that he was validly elected as the Member of Parliament for Nakuru Town West constituency. The elections held on 8<sup>th</sup> August 2017 were peaceful and were conducted in accordance with the Constitution and election laws. There were, in his view, no malpractices, violations, omissions or irregularities in the conduct of the elections that would justify the annulment of the elections.

39. The 3<sup>rd</sup> respondent denies involvement in bribery or violence. He asserts that he had not visited any polling station other than Kaptembwa Primary School where he voted, and had gone to the tallying centre just before the announcement of the results. His evidence was that it was the petitioner who caused a commotion in the tallying centre by confronting the Returning Officer and banging the table after the Returning Officer announced the 3<sup>rd</sup> respondent as the winner of the elections.

40. With regard to the allegation of bribery, the 3<sup>rd</sup> respondent observes that the petitioner's witnesses make allegations of "**intention to bribe voters**". He denies that either he or his agents intended to or actually bribed voters, or being in the place where the alleged intention to bribe took place, or in the company of the person he was alleged to have been intending to bribe voters with-a sub-county administrator. He also specifically denies owning a white Range Rover which he was alleged to have been using at the time of the alleged intention to bribe.

### **Analysis and Determination**

41. I have considered the pleadings of the parties and the documents in support of their respective cases. I have also considered their oral evidence, as well as their respective written submissions which their Counsel very ably and eloquently highlighted before me. I note that the parties have, in their respective pleadings and submissions, set out what they consider the issues for determination in this petition. Having taken into consideration their submissions and the issues that they identify, I believe that at the core of this petition, and the main issue for this court to determine, is the question **whether the elections for the Nakuru Town West constituency parliamentary seat were conducted substantially in accordance with the Constitution and the elections laws and regulations**. As a corollary to this main issue is the question **whether the 3<sup>rd</sup> respondent was validly elected as the Member of Parliament for the Nakuru Town West Constituency**.

42. The petitioner asserts that the answer to these two issues should be in the negative. He has set out in his pleadings and submissions, which I have set out above, allegations of non-compliance and irregularities that he believes support his position. The respondents, as would be expected, are of the view that the response to the two issues should be in the affirmative. In answering these two main issues therefore, the court will need to examine the various allegations of non-compliance with the Constitution and the law, and the electoral irregularities and illegalities alleged by the petitioner and establish, first, whether there was sufficient evidence before the court to support the allegations and secondly, whether the alleged instances of non-compliance, illegalities, irregularities and malpractices, if established, are sufficient to invalidate the election of the 3<sup>rd</sup> respondent.

43. The petitioner has, in his written submissions, identified the following as the instances of non-

compliance with the law and regulations:

- i. Appointment, accreditation and admission of agents.**
- ii. Denial of access to statutory documents.**
- iii. Inconsistency, tampering and alterations of return forms and results.**
- iv. Alteration of results in the return forms.**
- v. Reduction of the petitioner's votes.**
- vi. Bribery and undue influence.**
- vii. Intimidation and violence of (sic)voters and agents.**

44. I note that the respondents do not identify substantially different issues, and I will therefore address myself to each of the instances set out above before proceeding to determine the two main issues. However, before doing so, it is important to consider the law and the principles applicable in election petitions.

### **Applicable Law and Principles**

45. Article 38 of the Constitution guarantees citizens the right to make political choices. This right encompasses the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the people. In exercising this right, the people are thereby realising the principle of sovereignty which is set out in Article 1 of the Constitution.

46. In order to realise the right set out under Article 38, the Constitution sets out at Article 81(e) the principles of free and fair elections. The Constitution defines free and fair elections as elections which are by secret ballot, free from violence, intimidation, improper influence or corruption, conducted by an independent body, transparent, and administered in an impartial, neutral, efficient, accurate and accountable manner.

47. The independent body mandated by the Constitution to conduct elections is the IEBC. It is established under Article 88(1), while Article 86(1) provides as follows with respect to its mandate:

***86. At every election, the Independent Electoral and Boundaries Commission shall ensure that-***

- (a) whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent;***
- (b) the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station;***
- (c) the results from the polling stations are openly and accurately collated and promptly announced by the returning officer, and***
- (d) appropriate structures and mechanisms to eliminate electoral malpractices are put in place, including the safekeeping of electoral materials.***

48. When exercising its mandate under Article 88, the IEBC must do so in accordance with the law set out in the **Elections Act 2011** and the **Elections (General) Regulations 2012** made under Section 109 of the Elections Act.

49. In an election petition, the court is called upon to determine a claim, usually between the loser in an

election and the person declared winner. However, an election petition is not just a contest between the winner and loser. It involves the electorate, which has an interest in the outcome, both of the elections, which determines the person(s) to whom the electorate delegate their sovereign power, but also of any petition challenging that outcome. As Maraga J (as he then was) observed in **Joho vs Nyange & another (2008) 3 KLR (EP)**:

*“Election petitions are no ordinary suits. Though they are disputes in rem fought between certain parties, election petitions are nonetheless disputes of great public importance – Kibaki vs Moi, Civil Appeal No. 172 of 1999. This is because when elections are successfully challenged by-elections ensue which not only cost the country colossal sums of money to stage but also disrupt the constituents’ social and economic activities. It is for these reasons that I concur with the election court’s decision in Wanguhu Ng’ang’a & Another vs George Owiti & Another, Election Petition No. 41 of 1993 that election petitions should not be taken lightly”.*

50. In arriving at its decision in an election petition therefore, the court is required to consider the material before it and make a determination whether the results under challenge represent the will of the people. If they do, then the court is under a duty to uphold the elections. If the evidence indicates that the results do not reflect the will of the people and that the elections were conducted in such a manner as to be a violation of the sovereign will of the people, then the elections shall be nullified.

51. However, the burden of establishing that the elections were conducted in a manner that failed to comply with the Constitution and the law, or that such malpractices and misconduct were committed in the conduct of the elections as would lead to the elections being declared invalid, rests on the petitioner. The rationale for this was explained by the Supreme Court in **Raila Odinga and another vs Independent Electoral and Boundaries Commission and 2 Others SC Election Petition No. 1 of 2017** (thereafter “**Raila 2017 petition**”) in which the Court observed as follows:

*[130] The law places the common law principle of onus probandi on the person who asserts a fact to prove it. Section 107 of the Evidence Act, Cap 80 of the Laws of Kenya, legislates this principle in the words: “Whoever desires any Court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.” In election disputes, as was stated by the Canadian Supreme Court in the case of Opitz v. Wrzesnewskij[48], an applicant who seeks to annul an election bears the legal burden of proof throughout. This Court reiterated that position in the 2013 Raila Odinga case, thus:*

*“[195] There is, apparently, a common thread in...comparative jurisprudence on burden of proof in election cases...that an electoral cause is established much in the same way as a civil cause: the legal burden rests on the petitioner....*

*[196] This emerges from a long-standing common law approach in respect of alleged irregularity in the acts of public bodies. Omnia praesumuntur rite et solemniter esse acta: all acts are presumed to have been done rightly and regularly. So, the petitioner must set out by raising firm and credible evidence of the public authority’s departures from the prescriptions of the law.”*

*[131] Thus a petitioner who seeks the nullification of an election on account of non-conformity with the law or on the basis of irregularities must adduce cogent and credible evidence to prove those grounds[49] “to the satisfaction of the court.” (Emphasis added)*

52. As for the threshold to be met in election petitions, section 83 of the Elections Act provides as follows:

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

53. The Supreme Court in the **Raila 2017** petition interpreted the threshold set by section 83 of the Elections Act as follows:

*[211] In our respectful view, the two limbs of Section 83 of the Elections Act should be applied disjunctively. In the circumstances, a petitioner who is able to satisfactorily prove either of the two limbs of the section can void an election. In other words, a petitioner who is able to prove that the conduct of the election in question substantially violated the principles laid down in our Constitution as well as other written law on elections, will on that ground alone, void an election. He will also be able to void an election if he is able to prove that although the election was conducted substantially in accordance with the principles laid down in our Constitution as well as other written law on elections, it was fraught with irregularities or illegalities that affected the result of the election.”(Emphasis added)*

54. A key question to be borne in mind is the standard of proof that a petitioner has to meet. In the **Raila 2017** petition (supra), the Supreme Court held as follows:

*[203] .... The threshold of proof should, in principle, be above the balance of probability, though not as high as beyond-reasonable-doubt – save that this would not affect the normal standards where criminal charges linked to an election are in question.*

55. The standard in criminal cases is, of course, beyond reasonable doubt.

56. I now turn to consider the two issues identified above by considering the instances of malpractices and non-compliance alleged by the petitioner against the constitutional and legal principles set out above.

#### **Appointment, accreditation and admission of agents.**

57. It has been submitted on behalf of the petitioner that in terms of section 30 of the Elections Act, a candidate nominated by a political party and an independent candidate are each entitled to appoint their own agents for purposes of the elections. The petitioner contends that he appointed and presented a list of his agents to IEBC for accreditation, but some of his agents were not accepted for accreditation on the grounds that his sponsoring party, ODM, had already presented a list of agents. He stated in his evidence that his personal agents were not allowed into the polling stations as there were already ODM agents, but the ODM agents were not his agents as he had his own agents. He did not produce the list of agents that he had submitted to IEBC for accreditation.

58. IEBC counters that as a candidate sponsored by ODM, the petitioner was represented by the agents appointed by the party, and had suffered no prejudice as a result of the non-admission of his personal agents. It relies on **Regulation 62(1), (2) and (3) of The Elections (General) Regulations 2012** which allows the Presiding Officer to regulate the number of persons admitted to a polling station. The 3<sup>rd</sup> respondent submits that as the petitioner was sponsored by ODM whose agents were at the polling stations, there is no difference between the ODM agents and the petitioner's agents.

59. The starting point on this issue is section 30 of the Elections Act, which provides as follows:

***(1) A political party may appoint one agent for its candidates at each polling station.***

***(2) Where a political party does not nominate an agent under subsection (1), a candidate nominated by a political party may appoint an agent of the candidate's choice.***

***(3) An independent candidate may appoint his own agent.*** (Emphasis added)

60. It is thus evident from a plain reading of section 30 that a candidate nominated by a political party can only appoint an agent if the party on whose ticket he stands does not appoint one. In the case of the petitioner, he was nominated by the ODM party. From his evidence, there were ODM agents in the polling stations in the constituency, and these were the agents who signed forms 35As. As a candidate

nominated by a party which already had a list of agents submitted to IEBC, whose agents were in the polling stations, he could not also be allowed to have his own personal agents in the polling stations. **Regulation 62 of the Elections (General) Regulations, 2012** provides as follows

***(1) The presiding officer shall regulate the number of voters to be admitted to the polling station at the same time, and may exclude all other persons except—***

***(a) a candidate;***

***(b) a person nominated as a deputy to the candidate, where applicable; (c) authorised agents;***

***(d) members of the Commission and election officers on duty;***

***(e) police officers on duty;***

***(f) persons necessarily assisting or supporting voters with special needs or assisted voter; and***

***g) observers and representatives of the print and electronic media accredited by the Commission.***

***(2) Notwithstanding sub-regulation (1), the presiding officer shall admit to the polling station not more than one agent for each candidate or political party.***

***(3) The absence of agents shall not invalidate the proceedings at a polling station.***

***(4) Every agent appointed by an independent candidate or political party for the purposes of these Regulations shall at all times during the performance of the duties authorized by the independent candidate or political party display the official badge supplied by the Commission.***  
(Emphasis added)

61. The party which had nominated the petitioner had already appointed agents in the polling stations in the constituency. They were allowed to sign the forms 35As, and from the evidence of the petitioner, he did not doubt the agents of his party but would have preferred to have his own. The law did not allow him to have agents at the polling stations if his party had already appointed agents, and they had been accredited by IEBC.

62. In any event, the evidence before the court does not support the petitioner's contention that his agents were denied access to polling stations. First, the petitioner did not present evidence that he had submitted a list of agents to IEBC for accreditation. Secondly, all the witnesses who testified in support of the petitioner described themselves as 'super agents' who were moving among polling stations supervising other agents. None testified that he was the petitioner's agent at a particular polling station but was denied access in that station or stream. Thus, the allegation that the petitioner's agents were denied access to the polling stations is unsupported both by the law and the evidence. I therefore find no merit in the claim that there was non-compliance with the law in the appointment, accreditation and admission of agents.

### **Denial of access to statutory documents**

63. The petitioner submits that even in the few polling stations where his agents were admitted and allowed to participate in and witness the voting, counting and tallying of the votes, some of them were denied the right to sign form 35A and the right to a copy of the forms. He also submits that all the forms presented in court do not bear the reasons why the petitioner's agents refused and/or failed to sign the forms. The petitioner relies on the affidavit of **Eunice Atieno Orende**, who stated that she was an agent of the petitioner but was not allowed to sign Form 35A and to retain a copy. The petitioner also cites the evidence of **Rostika Oketch Achuth** who testified that she was the petitioner's agent at Koinange

Primary School polling station 1, but that form 35A was signed by one Kennedy Otieno who was not the petitioner's agent.

64. The court notes that **Eunice Atieno Orende** was not called to testify so that her evidence could be tested in cross-examination. As submitted by IEBC in reliance on the decision in **Ferdinand Ndung'u Waititu vs Independent Electoral & Boundaries Commission (IEBC) & 8 Others [2013] eKLR**, her affidavit evidence cannot be relied on. The court in that case stated as follows:

*“The court determined, pursuant to Rule 12(2) (c) of the Election Petition Rules, that the evidence of the uncalled witnesses would remain on record as evidence in chief. However, in absence of cross examination, such evidence would be affected as to its relevance, materiality and weight.*

65. Further, in **Moses Wanjala Lukoye vs Bernard Alfred Wekesa Sambu & 3 others [2013] eKLR** Gikonyo J observed as follows when faced with a similar issue:

*“...the only safeguard design of the law is either the court does not consider such evidence at all or exercises its discretion under section 80(1) and (2) of the Elections Act and summon the witnesses. It must be appreciated that rule 12 of the Elections Rules was deliberately tailored that the affidavits filed in an election petition are by persons whom the Petitioner intends to call as a witness. As an election petition is not an interlocutory application, but a substantive cause, affidavit evidence should be tested in cross-examination unless the parties consent to the admission of the evidence without calling the maker. If, therefore, it bears repeating, the Petitioner does not call the deponents to testify; their evidence should not be considered unless the court exercises its jurisdiction under section 80(1) and (2) of the Elections Act or the parties have given consent to the admission of the affidavit evidence without calling the maker. The issue rests there.”*

66. Finally, in **Noah Makhalang'ang'a Wekesa vs Albert Adome & 3 others [2013] eKLR** the court stated as follows:

*“In as much as the rest of the petitioner's witnesses who deposed supporting affidavits were not availed in court for cross examination for purposes of testing the veracity of their averments, their evidence though forming part of the petitioner's case may be treated as being inconsequential and devoid of probative value.”*

67. I agree with the views expressed in the above cases. I am therefore unable to place any reliance on the affidavit evidence of a witness whose credibility was not tested by cross-examination.

68. With regard to the evidence of **Rostika Okech Achuth** (PW8), her evidence in cross examination by Mr. Karanja for IEBC was that she was present when the votes were being counted. She did not sign form 35, though she states she was the only ODM agent present. The form in that station was signed by an ODM agent, one Kennedy Otieno.

69. There is thus clear contradiction between her affidavit evidence and her evidence in cross-examination, but the effect of it is to show that while she may have been appointed by the petitioner, she was not an ODM agent, and that the party had agents appointed to represent all its candidates, including the petitioner. Consequently, and in light of my findings in relation to the appointment, accreditation and admission of agents, I am satisfied that this complaint with regard to signing of forms or access to forms by the petitioner's agents is without merit. The evidence of the petitioner's chief agent, **Caspar Ondoro** (PW2), supports this conclusion. He testified as follows:

*“I was the Chief agent for the petitioner. We had agents in all polling stations. I was in charge of recruitment of agents. Dr. Ochoki was a candidate for ODM. I cannot tell whether ODM had agents in all polling stations. I visited more than 30 polling stations. During the counting, I visited fifteen (15) polling stations. At the conclusion of counting, I was at Stima Line, - stream*

**3. Immediately before they concluded, I rushed to Kibowen.**

***I was at Kibowen but I cannot remember the stream. There were 5 streams. I witnessed the conclusion of the counting in Kibowen Komen stream 1. The only issue was that towards the end of the exercise the agents were outside, except the NASA agents. There were ODM agents who were not for Dr. Ochoki. Dr. Ochoki was sponsored by ODM.***

***I did not get a Form for Kibowen Komen... It was easy to get Form 35A. It was not a problem getting the forms.”***

70. The complaint that the petitioner’s agents were denied the right to sign the statutory forms or access to the forms has, in my view, no foundation.

**Inconsistency, tampering and alterations of return forms and results.**

71. In his written submissions, the petitioner has cited the pleadings in his petition, paragraph 3(f) to (q) thereof, which he submits were not addressed by the respondents. In these paragraphs is contained the substance of his case with respect to the forms used by IEBC in the elections. These are, briefly, that the respondents used inconsistent and different forms and returns with the intention of manipulating the results; that a substantial number of the forms 35A and forms 35B have been tampered with; that some have not been signed; that a substantial number of forms 35A do not bear the IEBC authentic stamp or at all; that a substantial number of forms 35A and 35B do not bear the signatures of the candidates’ agents nor the reason for refusing to sign; that in more than half of the polling stations, the returning officer failed to indicate the number of forms 35A handed over to them as required under the law and the regulations.

72. The petitioner contends that as a result, it is not possible to verify a number of forms and returns used in the election, and the integrity of a material number of forms 35A and forms 35B used in the elections in dispute was wholly compromised, thus rendering a material number of votes cast and represented in those forms invalid. It is also his contention in this regard that the cumulative number of the invalidated votes materially affects the final result declared by the 2<sup>nd</sup> respondent.

73. Further, according to the petitioner, by using returns and forms unknown to the law, IEBC manufactured the results of the parliamentary elections to an extent that substantially affected the final outcome of the Parliamentary election. He has also set out in the said paragraphs his complaints with respect to the results in Kibowen Komen polling station 002 and 003. I turn to consider these contentions against the evidence, and revert to the contents of the scrutiny report alluded to earlier.

**Absence of IEBC stamps**

74. The petitioner questioned the validity of the votes represented in forms 35As on the basis that they did not bear the IEBC authentic stamps or at all. During his cross-examination at the hearing of this matter, the petitioner was taken through a number of the forms, and he conceded that he did not dispute the results, but that his concern was that the forms had not been stamped.

75. What emerged from the scrutiny ordered by the court as set out in the report of the Deputy Registrar dated 14<sup>th</sup> November 2017 is that the majority of the forms presented for scrutiny bore the IEBC stamp. Two of the polling station streams referred to in the petition, Muslim Primary School streams 006 and 008 were non-existent as Muslim Primary School had only 4 streams. The scrutiny report indicates that all but two forms bore the IEBC stamp. One of the forms was for Kibowen Komen stream 002 whose results were not included in the final tally.

76. That notwithstanding, the question is whether the absence of the IEBC stamp had any effect on the validity of the forms and the results set out therein. The IEBC submission is that there is no requirement in law for the forms to be stamped: that stamping was a gratuitous and superfluous discretionary or administrative act incapable of creating a statutory obligation. The respondents cite **regulation 79** of the

**Elections (General) Regulations** titled “**Candidates, etc. to sign declaration**” which states as follows:

**79. (1) The presiding officer, the candidates or agents shall sign the declaration in respect of the elections.**

**(2) For purposes of subregulation (1), the declaration for—**

**(a) Presidential election results shall be in Form 34A set out in the Schedule; and**

**(b) National Assembly, County women representatives, Senator, Governor and county assembly elections shall be in Forms 35A, 36A, 37A, 38A, and 39A set out in the Schedule.**

**(2A) The presiding officer shall—**

**(a) immediately announce the results of the voting at the polling station before communicating the results to the returning officer;**

**(b) request each of the candidates or agents present to append his or her signature;**

**(c) provide each political party, candidate, or their agent with a copy of the declaration of the results; and**

**(d) affix a copy of the declaration of the results at the public entrance to the polling station or at any place convenient and accessible to the public at the polling station.**

**(3) Where any candidate or agent refuses or otherwise fails to sign the declaration form, the candidate or agents shall be required to record the reasons for the refusal or failure to sign.**

**(4) Where a candidate or an agent refuses or fails to record the reasons for refusal or failure to sign the declaration form, the presiding officer shall record the fact of their refusal or failure to sign the declaration form.**

**(5) Where any candidate or agent of a candidate is absent, the presiding officer shall record the fact of their absence.**

**(6) The refusal or failure of a candidate or an agent to sign a declaration form under subregulation (4) or to record the reasons for their refusal to sign as required under this regulation shall not by itself invalidate the results announced under subregulation (2)(a).**

**(7) The absence of a candidate or an agent at the signing of a declaration form or the announcement of results under subregulation (2) shall not by itself invalidate the results announced.**

**(8) After complying with the provisions of this regulation, the presiding officer shall, as soon as practicable, deliver the ballot boxes, and the tamper proof envelopes to the returning officer who shall take charge thereof. (Emphasis added)**

77. I have carefully examined the provisions of regulation 79 which, in view of the emphasis laid upon the issue of stamping by the petitioner, I have considered prudent to set out in full. I have found nothing in the said regulation that would require that, in order for form 35A to be considered valid, it must bear the IEBC stamp. What is required is the signature of the Presiding Officer and of the candidates or their agents. Further, as regulation 79(6) provides, the failure or refusal of a candidate or agent to sign shall not, of itself, invalidate the results. In its decision in **Independent Electoral and Boundaries Commission & Another vs Stephen Mutinda Mule & 3 Others[2014] eKLR**, the Court of Appeal stated as follows:

***“There is no stamping requirement in the case of the Form 35. All that is required with regard to Form 35 as provided for in Regulation 79 is the signature of the presiding officer and the agents of the candidates.***

***It is the signatures of the presiding officers and the agents that authenticate the Form 35. If any such forms were stamped, it was a gratuitous and superfluous discretionary or administrative act incapable of creating a statutory obligation, less still the invalidation of the Forms 35 that did not contain the stamp.”***

78. I believe what I have set out above is sufficient to dispose of the claim with regard to stamping.

### **Inconsistency in serial numbers**

79. The petitioner has relied on the provisions of Article 86 of the Constitution to question the use of forms 35As and 35B with what he sees as inconsistent serial numbers. Article 86(a) provides that:

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

***(a) whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent;...***

80. In cross-examination by Dr. Nyaundi for the 3<sup>rd</sup> respondent, the petitioner stated as follows with respect to the serial numbers:

***“The serial numbers and features in my form were different compared to the IEBC forms. I said the 2<sup>nd</sup> respondent manufactured forms because of the serial numbers. I got the copies of forms 35A that I have from my agents. I got others from those pinned at the polling centres. I did not write a letter to IEBC requesting for the forms. ....There are two sets from Form 35B. The serial number ended with 123. The one that came during the results had serial number 456. They did not teach us how the forms were serialized.”***

81. In his submissions, the petitioner contends that *“each form 35A was supposed to come in several copies, comprising an original and several carbonated copies. Each such form is supposed to have a serial number. Ordinarily, a document that has several copies bares (sic) a single serial number on all the copies. A carbonated copy cannot therefore have a serial number different from the serial number on its original.”*

82. The fact that the forms 35As and 35B had different serial numbers was conceded by IEBC from the outset. Their explanation was that the forms had the same serial numbers, up to where the hyphen started, and the numbers then differed: one set had the serial number then -123, while another had the same number and then -456, for instance NA 32175 -4. In his evidence on this issue, the 2<sup>nd</sup> respondent stated in cross-examination by the petitioner’s Counsel as follows:

***“Form 35B came in pieces. It did not come in duplicate. It came as originals. They were of the same texture. The set we brought to court is not a photocopy. It is an image of Form 35A that was directly uploaded into the IEBC portal by the presiding officers at the polling stations. Form 35B was uploaded at the tallying centre to the IEBC portal. The one filed by IEBC lawyers was uploaded.***

***The serial numbers were put on the forms by the manufacturer. In the two copies the serial numbers are the same upto where we have the hyphen. That is where the numbering changes to facilitate paper count or paper trail.”...***

83. I have considered the petitioner’s testimony and submissions, as well as the response from IEBC. I note the explanation that the difference in serial numbers was necessitated by the need to keep a paper count or paper trail. I have also noted that the results in the forms with the different serial numbers are the

same. The question that I ask myself is whether the explanation given by IEBC is reasonable and credible.

84. In answering this question, I observe that there is no difference in the results recorded in the forms with the different serial numbers after the hyphen. These forms were, on the orders of the court, scrutinised by the Deputy Registrar in the presence of the parties. The Deputy Registrar notes that with respect to a number of forms, the petitioner stated that the serial numbers were different from the serial numbers in the forms in his possession. I further observe the willingness of the IEBC, from the outset, to produce the original forms, and the demeanour of the 2<sup>nd</sup> respondent in his testimony before the court on the reasons for the differences in the serial numbers.

85. Had the results in the forms before the court been different, then there would have been reason for concern. As this is not the case, in the circumstances, I am satisfied that the explanation given by IEBC is reasonable, and the differences in the last digits of forms 35A and 35B was not intended to manipulate the results, and there is no evidence that such manipulation took place at all. Further, I am not satisfied that the use of the forms contravenes the provisions of Article 86 of the Constitution.

### **Inconsistencies in the Anti-photocopying security features and watermarks**

86. Related to the question of serial numbers is what the petitioner alleges to be differences in the anti-photocopying security features and water marks. His submissions are that any photocopy or carbonated copy of an original form 35A must bear the writing “copy” at the top; that this feature can be seen in the photocopies supplied by the petitioner, as well as the certified copies made from the originals produced in court and supplied to the petitioner. They are not, however, present in the majority of the photocopies supplied by the IEBC in its response to the petition, and only fourteen of the forms have the anti-photocopying security feature.

87. The petitioner further notes that the watermarks written “**Independent Electoral and Boundaries Commission**” which must show in any photocopy made from the original or from any carbonated copy, can be seen in the documents he filed, as well as the certified photocopies made by the court from the originals supplied by the IEBC. They are, however, missing in all the photocopies supplied by IEBC in its response. The petitioner makes similar submissions with respect to form 35B.

88. To his question with respect to the differences in the watermarks, his answer is that the respondents are relying on fake documents in court, that they manufactured results and declared them on non-statutory forms which do not conform to the IEBC security features, and that it is from these non-statutory forms that they made the photocopies they attached to their response.

89. The petitioner also suggests that the respondents manufactured yet another set of documents which they supplied to court when they were ordered to supply the originals by the court; that they managed to get unused genuine IEBC statutory forms 35A and 35B and transferred manufactured results from the fake documents to these genuine forms before producing them in court; and that they could not get unused genuine forms 35A and 35B that bear the same serial numbers with those already produced in court which, in the petitioner’s view, explained the differences in the serial numbers and other security features in their copies and purported originals.

90. The response from IEBC to this submission is that it is scandalous, has no factual basis, and was not put to any witness. It points out that the forms attached to the response have the same serial numbers as the originals produced in court. Further, that the forms 35A produced by the petitioner, the ones attached to the IEBC response and the originals produced in court have the same results. The explanation for the lack of security features in the forms annexed to their response, according to the 2<sup>nd</sup> respondent, was that the set of forms brought to court by IEBC was not a photocopy but an image of forms 35A that was directly uploaded into the IEBC portal by the presiding officers at the polling stations. As for the form 35B which had been filed in court by the IEBC lawyers, his explanation was that it was uploaded at the tallying centre to the IEBC portal.

91. The submissions by the petitioner that IEBC manufactured the documents that it produced in court for scrutiny contains a very grave charge against the electoral body, one that imputes serious criminal conduct on its part. In my view, this is a charge that should not be made lightly, and not without evidence. The issue was not put to the 2<sup>nd</sup> respondent when he was cross-examined by Counsel for the petitioner, and in the absence of evidence to support the accusation, it is a submission that the court cannot lay any credence on. Further, given the fact that the results in all the forms, including the forms in the possession of the petitioner which he testified he obtained from his agents or plucked from where they had been posted in the polling stations, are the same, the court finds that the explanation by the 2<sup>nd</sup> respondent is reasonable, and the petitioner's complaint one without foundation.

### **Inconsistency in the entries in the forms**

92. The petitioner has raised in his submissions various issues in connection with the entries in the forms 35As. He submits that a number of inconsistencies have been noted in the forms he filed and the ones supplied by IEBC. These inconsistencies relate to the polling station counts, names and signatures of the presiding officers and their deputies, number of valid votes obtained, decisions on disputed votes, number of agents or candidates present, reasons for refusal to sign the forms, presiding officers' comments and the IEBC stamp.

93. In the course of highlighting of submissions, Mr. Karanja, Learned Counsel for IEBC, pointed out that the petitioner had raised in his submissions matters that he had not pleaded in his petition, and he asked the court to disregard the submissions.

94. It is indeed correct that the petitioner raises several issues in relation to other polling stations which were not in his petition. These polling stations are set out in the submissions, but were not among the polling stations that the petitioner's case related to. The court notes that the petitioner had named in his petition, at paragraph 24-50, the polling stations with respect to which he had grievances, and specifically pleaded those stations. Thirty two (32) of the forms from these polling stations were the subject of the scrutiny exercise. Two of the streams mentioned in the petition were non-existent, while a specific stream in Soko Mjinga had not been identified.

95. In the Submissions in Response and in the oral submissions of his Counsel, Dr. Kangu, the petitioner strenuously argued that he was entitled to raise the new issues related to the polling stations that had not been included in his petition. His submissions were that an election petition before a court is an audit exercise, and it would be strange if the court was asked not to look at documents before it. The petitioner relied on the decision in **Eng. Peter Kimori Maranga and Another vs Joel Omawa and Others Kisii High Court Election Petition No 7 of 2013** in which Muriithi J observed as follows:

*“For my part, I have considered that where there is an alleged issue of illegality, I have allowed the matter to be raised notwithstanding that the issue has not been raised in the petition. I consider that the substantial justice principle of Article 159 of the Constitution allows the consideration of such an issue of alleged illegality notwithstanding non-pleaded status because the rule of law of which legality is a central part is one of the values of the new constitution. There cannot be greater illegality than the contravention of the constitution.*

*34. In addition, election petitions are about the enforcement of the fundamental constitutional right to vote under Article 38 of the Constitution, and any unconstitutional act should be examined without the strictures of the technicalities of pleading. However, being mindful of the object of pleading to inform the respondent of the claim against him and afford him an opportunity to respond, the court must grant an opportunity to the respondent of the unpleaded issue to respond to the issue before decision is based on it. See Gandy v. Caspair Air Charters Ltd.(1956) 23 EACA 139.”*

96. In reply, IEBC relied on the decision in **Mahamud Sirat –vs- Ali Hassan Abdirahman and 2 Others Nairobi Election Petition No. 15 of 2008** in which Kimaru J stated:

***“From the outset, this court wishes to state that the petitioner adduced evidence, and even made submissions in respect of matters that had not been specifically pleaded in his petition. It is trite law that a decision rendered by a court of law shall only be on the basis of the pleadings that have been filed by the party moving the court for appropriate relief. In the present petition, this court declined the invitation offered by the petitioner that required of it to make decisions in respect of matters that were not specifically pleaded. This court will therefore not render any opinion in respect of aspects of the petitioner’s case which he adduced evidence but which were not based on the pleadings that he had filed in court, and in particular, the petition.*”**

97. In **Independent Electoral and Boundaries Commission and Another vs Stephen Mutinda Mule and 3 Others [2014]eKLR** the Court of Appeal observed:

***“As the authorities do accord with our own way of thinking, we hold them to be representative of the proper legal position that parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce. The Learned Judge, no matter how well-intentioned, went well beyond the grounds raised by the petitioners and answered by the respondents before her and thereby determined the petition on the basis of matters not properly before her. To that extent, she committed a reversible error, and the appeal succeeds on that score.”***

98. I make two observations on the question of the unpleaded matters raised in the petitioner’s submissions. First, in effect, the petitioner changes the tenor of his claim at the closing stage of the matter, and the respondents have no opportunity to respond to the issues raised at this stage. Secondly, the court had ordered a scrutiny of the forms in respect of the polling stations which the petitioner had pleaded in his petition. Had the petitioner raised the matters he now raises in his submissions in his petition, then not only would the respondents have had a chance to respond, but the forms which are now being analysed would have been the subject of scrutiny by the court, and there would be an independent report to inform the decision of the court.

99. I am not therefore persuaded, as the petitioner seeks to do, that the court can deal with unpleaded matters raised at the stage of submissions. A party in an election petition must present his entire case in his petition, so that the respondents have an opportunity to respond thereto. I cannot therefore address myself to the issues that were unpleaded but which have been raised for the first time in the submissions. I am bolstered in this view by the decision of the Supreme Court in **Raila 2017** (supra) in which the Supreme Court quoted with approval the decision of the Supreme Court of India in **Arikala Narasa Reddy v Venkata Ram Reddy Reddygari and Another Civil Appeal Nos. 5710 -5711 of 2012[2014] 2 SCR** where that court stated:

***“In absence of pleadings, evidence if any, produced by the parties cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.”***

100. The question then is whether there is any basis for the complaint with regard to the alleged inconsistencies in the entries in the forms in respect of the polling stations pleaded in the petition that would justify a finding that the votes in the forms in question are invalid as submitted by the petitioner.

101. In making this determination, I go back to the evidence of the petitioner, who was taken through each of the forms in respect of each polling stations that he had mentioned in his petition. His evidence in respect of the specified polling stations was either that his agent had not signed the forms, but had not sworn an affidavit on why he had not done so (Koinange stream 3); that he had complained about streams that did not exist (Muslim Primary School, streams 6 and 8, which he referred to as a typing error); that the forms did not have an IEBC stamp (Mama Ngina streams 2, 3, 4 5 and 6, Nakuru West Clinic, among

others). He confirmed in cross-examination, however, that the forms before the court had the IEBC stamp, and that they had been signed by Presiding Officers and ODM agents. With respect to the votes garnered by each candidate, his response was that he had no problem with the votes reflected in the forms: ***“The entries are the same for what was given to my agents and what was retained by IEBC”***.

102. The petitioner also confirmed in his evidence that the only polling station with respect to which he had problems with ‘manipulation of figures’ was Kibowen Komen stream 2. He conceded that he was aware that the final results for the stream were missing; that he was aware that the form had been put in the ballot box; he was present when the ballot box for the stream was opened and the form retrieved; that he got 272 votes in that stream while the 3<sup>rd</sup> respondent got 135. His evidence further was that the form he had in respect of the stream, serial number 1598, which was given to him by his agent, had the same votes as the retrieved form, serial number 1597; that the results were the same in both forms, and that both forms had been signed by his agent. The petitioner also confirmed that the difference in votes between himself and the 3<sup>rd</sup> respondent declared by IEBC is about 4,000, and that even if all the votes in Kibowen Komen stream 2 were given to him, it would not make a difference to the declared results.

103. With respect to Kibowen Komen stream 3 in respect of which he had complained about his votes being deducted and added to the 3<sup>rd</sup> respondent, his evidence in cross-examination was that he was allocated 256 votes, while the 3<sup>rd</sup> respondent was allocated 145. He further confirmed that there was no addition to the 3<sup>rd</sup> respondent’s figures as he had alleged.

104. What emerges from the petitioner’s evidence is that the inconsistencies that he has alleged in respect of the polling stations enumerated in his petition were not borne out by the evidence. From the scrutiny ordered by the court, it emerged that only a minimal number of forms- two, including the one for Kibowen Komen stream 2, had not been stamped; that the majority of forms had been signed by the Presiding Officers; that agents of ODM or the coalition to which it belongs, NASA, were present at polling stations and had signed the forms. Where there was no signature or reasons indicated for the agent not signing, in view of the provisions of regulation 79, the omission cannot be laid at the feet of IEBC, and cannot, by itself, be sufficient to invalidate the results. The petitioner’s evidence was that ***“My only complaint on manipulation of figures is Kibowen Komen”***, and as the analysis of the evidence above indicates, this complaint was not justified. All in all, I am not satisfied that there are such inconsistencies in the forms in respect of the polling stations complained about by the petitioner in his petition that would justify interfering with the results in Nakuru Town West constituency.

### **Reduction of the petitioner’s votes.**

105. The petitioner contends that IEBC, in collusion with the 3<sup>rd</sup> respondent, reduced his votes and added them to the 3<sup>rd</sup> respondent. He makes reference to the scrutiny report to allege that his votes were reduced in Kibowen Komen stream 3 by 16 votes, while the 3<sup>rd</sup> respondent was added 10 votes. He makes a similar submission in respect of Kibowen Komen stream 4, and makes allusions to other polling stations which are not pleaded.

106. The petitioner seeks to support his allegation on reduction of votes with the evidence of PW4, Julius Momanyi Ochiengi, who described himself as a *“super agent”* in charge of 9 agents at Soko Mjinga. His evidence, according to the petitioner, was that the petitioner’s votes were being removed and added to the 3<sup>rd</sup> respondent.

107. The petitioner further relies on the evidence of Rostika Okech Achuth to support the claim on reduction of votes. He submits that she observed at Koinange Primary stream 7 that the petitioner’s supporters who could not be identified biometrically were denied a chance to vote while the 3<sup>rd</sup> respondent’s supporters were allowed to vote, which he terms a violation of Article 83(3) with regard to eligibility to vote and the right to vote.

108. I have already addressed the issue of the reduction of votes in part in the section above, and noted that the petitioner’s evidence was that the only station on which he had a complaint about manipulation of

votes was Kibowen Komen.

109. The evidence of Julius Momanyi Ochiengi on the reduction of votes was as follows:

***“I was in stream 4 partially during the counting. I left midway. There was a problem with the counting when I was there. Some of the ladies seated at the far end of the table were removing the votes of the petitioner and adding to the third respondent. We found two votes for the petitioner on the floor, so we picked them up and dismantled the arrangement and the counting went on well.”***

110. Is this evidence that the votes of the petitioner were being removed and added to the 3<sup>rd</sup> respondent? Is it evidence that can be given any credence, given the serious nature of elections? If such conduct was ongoing, wouldn't the first act of the super agent have been to alert the Presiding Officer? Ochiengi concludes his evidence by stating that ***“...we dismantled the arrangement and the counting went on well”***. I am unable to find anything in the evidence of Julius Momanyi Ochiengi that supports the allegation of reduction of votes.

111. Rostika Okech Achuth testified that she saw the petitioner's supporters who were not identified using the biometric kit being turned away and denied a chance to vote, while the 3<sup>rd</sup> respondent's supporters similarly situated were allowed to vote. She conceded that no voter who had been denied a chance to vote on this basis had been brought to court to testify. In any event, the allegation here is on reduction of the petitioner's votes, and their being added to the 3<sup>rd</sup> respondent.

112. Denying a registered voter the right to vote is an entirely different matter. It is to disenfranchise the voter and violate his or her rights under Article 38. One cannot make such a claim without clear and cogent evidence, and in this case, other than the testimony of Rostika Okech Achuth, there is no evidence that such an incident took place. In the event, I find that no evidence has been placed before me to support the allegation that the petitioner's votes were reduced and added to the 3<sup>rd</sup> respondent, or that any voters were turned away on the basis that they could not be identified biometrically.

### **Bribery and undue influence.**

113. At paragraph 35 and 36 of his petition, the petitioner pleads as follows:

***35. The Petitioner avers that the Parliamentary Election was marred and significantly compromised by intimidation and improper influence or corruption contrary to Articles 81(e)(ii) of the Constitution as read together with the Elections Act and Regulations 3 and 6 of the Electoral Code of Conduct.***

***36. With impunity, the 1st and 2nd Respondents contravened the Rule of Law and the principles of conduct of a free and fair election through the use of intimidation, coercion of public officers and improper influence of voters.***

114. In support of this contention, the petitioner relies on the affidavit evidence of his witnesses, Hesborn Onchieku Mosiori and Julius Momanyi Ochiengi. These witnesses aver that the 3<sup>rd</sup> respondent bribed both voters and IEBC officials to influence them to vote in a particular way, and to influence the outcome of the results.

115. The 3<sup>rd</sup> respondent denies this allegation. He notes that the petitioner's witnesses allege that he visited polling stations ***“with the intention to bribe”*** voters. He terms the allegations dry and bare accusations bereft of any substance and directed at casting aspersions on a well conducted and supervised election.

116. I have considered the evidence of the petitioner's witnesses with regard to the bribery allegation. PW3, Cleophas Simiyu, averred that the 3<sup>rd</sup> respondent's agents ***“came to the polling centre with the intention of bribing voters.”*** According to PW4, Julius Momanyi Ochiengi, ***“Arama's agents came to***

*the polling centre with the intention of bribing voters but they were turned away.*”The evidence of PW7, Onchieku Hesborn Mosiori, was that he had seen the 3<sup>rd</sup> respondent and a sub-county administrator, in a white Range Rover, bribing voters behind Nakuru West Secondary school.

117. The 3<sup>rd</sup> respondent and his personal assistant, John Kipngeno Koech, acknowledged that he has a Range Rover, but that it is silver in colour and had been at a garage for a number of months. He also denied having left his house, other than to vote, on 8<sup>th</sup> August 2017. The petitioner makes much of this fact in his submissions, arguing that it is not reasonable conduct on the part of a candidate not to go around polling stations during the elections. However, as I observed earlier in this judgment, the burden of proof is on the petitioner to prove his allegations, not on the 3<sup>rd</sup> respondent to disprove them. This is particularly so with respect to an allegation of bribery, which is a serious criminal offence with penal and other consequences if proved in an election petition-see the decision of the Supreme Court in **Frederick Otieno Outa vs Jared Odoyo Okello & 4 others [2014] eKLR**

118. In its decision in **Mohamed Ali Mursal-vs-Saudia Mohamed and others-Garissa Election Petition No. 1 of 2013**, the court (Mutuku J) stated as follows:

*“The Petitioner bears the burden of proving all the allegations he has made and in determining the issues raised, this court will apply the standard of proof that is higher than proof on a balance of probabilities and lower than proof beyond reasonable doubt. However, where the allegations are in respect of election offences, the standard of proof required is higher. For instance, offences like bribery, forgery and undue influence in my view would attract a higher standard of proof than the one prescribed for electoral disputes. They are offences in the ordinary sense of that word. Forgery or bribery by any other name remains just that and there can be no difference between such an offence in an election petition and in a criminal case.*

119. The Court of Appeal re-emphasised this point in its decision in **Moses Masika Wetang’ula vs Musikari Nazi Kombo & 2 others [2014] eKLR** in which it stated:

*“39. Section 107 of the Evidence Act legislates the obvious principle that he who alleges a fact has the burden of proving his allegation. In election petitions, it is the petitioner who, on one or more grounds, seeks the nullification of an election. The burden is therefore, upon the petitioner to prove his allegations; and the standard of proof in election petitions is generally to the satisfaction of the court, higher than on a balance of probabilities but not to the level of beyond reasonable doubt. See Raila Odinga Vs IEBC & Others and Joho v Nyange (supra).*

*40. However, if there are allegations of commission of election offences in an election, the law requires that those allegations be proved beyond reasonable doubt. In other words, the standard of proof required in allegations of commission of election offences made in election petitions is beyond reasonable doubt. Once again see Raila Odinga vs IEBC & Others and Joho v Nyange (supra).*

*41. There is good reason for this requirement. Election offences are criminal offences. For anyone to be held criminally liable, Article 50(2)(a) of the Constitution requires that the case against such person should be proved beyond reasonable doubt. In election petitions, the law requires the election court to report such person to the IEBC, which may bar such person from contesting in that or future elections.[16]This is besides the sentence that may be meted out to such person if criminal charges are brought against him. It is on account of these dire consequences that the law demands proof beyond reasonable doubt of allegations of commission of election offences.”*

120. The petitioner himself did not testify that he witnessed any bribery. His evidence on cross-examination by Dr. Nyaundi was **“There is an allegation of bribery in the petition. I did not witness any bribery.**”Indeed, he does not directly allege in his petition that the election of the 3<sup>rd</sup> respondent was tainted by bribery: the word appears in his petition only once, when he cites the provisions of Section

82(2) of the Elections Act. The allegation of bribery is made by his witnesses. PW4, Julius Momanyi Ochiengi, had averred in his affidavit that the 3<sup>rd</sup> respondent's agents had gone to the polling station with an intention to bribe voters. In his evidence on cross-examination, he stated:

***“I have not given any names of Arama's agents in the affidavit. They came with the intention of bribing voters. I did not read their minds. I heard a conversation between Madowa and the Presiding Officer. I have not stated in my affidavit that I overheard a conversation between the Presiding Officer and Madowa.”***

121. PW7, Onchieku Hesborn Mosiori, alleged that he had seen the 3<sup>rd</sup> respondent and a sub-county administrator bribing voters behind Nakuru West Secondary School. He alleged that the 3<sup>rd</sup> respondent was in a white Range Rover, and that he was giving money to some (unnamed) people.

122. Weighed against the burden that a petitioner in an election petition has to prove when he alleges an election offence that is also a criminal offence, the evidence adduced by the petitioner falls far below the required standard. The petitioner's witnesses talk of 'intention to bribe voters' in their affidavits, which changes, on cross-examination, to bribing of a Presiding Officer in one case, and a conversation with a Presiding Officer that was overheard, which had not been deposed to in the affidavit in support of the petition. The standard of proof is beyond reasonable doubt. In this case, there is no evidence that would meet even a lesser standard. The allegation of bribery of voters or election officials is, in my view, totally unfounded.

### **Shifting of polling stations**

123. The petitioner has alleged in affidavits sworn by his witnesses that there was uncalled for movement of certain polling stations to a church. He submits that this movement of the polling stations was contrary to Article 86(d) of the Constitution which requires that ***“appropriate structures and mechanisms to eliminate electoral malpractice are put in place including the safe keeping of electoral materials”***. It is also his contention in his submissions that the movement lacked transparency contrary to the requirements of Articles 81(e)(iv) and (v), 82(2), and 86(d), and that the movement was aimed at creating an opportunity to swap or stuff ballot boxes leading to the counting and tabulating of fake votes in place of those that had been cast by the voters.

124. Julius Momanyi Ochiengi avers that streams 2 and 9 at Soko Mjinga Open Ground polling centre were shifted to a church from their original location. In his evidence in cross-examination, he stated as follows:

***“I was an agent at Soko Mjinga. I was in stream 5. I was on and off in the room. Evans Odibo was stationed in that room. My role was to relieve the nine(9) agents in the centre and to co-ordinate the activities in the centre. I was a super agent. I was co-ordinating the agents in the nine(9) centres. I was there at the counting. I was in stream 4 at the time of counting of MP votes.***

125. With respect to the shifting of polling stations his evidence was as follows:

***“It is correct that during the voting, stream 9 was shifted to the church. I do not know why. I was not there. It was a tent. I cannot remember that it was flooded. The church was about 20m away. We had an agent in the stream. He was not there when it was shifted. I do not know why it was shifted. The voting was complete at the time the voting centre was shifted, from an open ground to a church. There was electricity in the church. Stream 2 and 9 were moved to the church.”***

126. The petitioner submits that his agents were not involved in the movement, and that they were denied access to the new locations where counting was done. He also submits that the ODM agent who signed form 35A for Soko Mjinga stream 9 was not his agent. In response, IEBC's evidence and submission is that the polling stations were moved after the close of voting to a church, which was 20 metres away, due

to flooding.

127. I have considered the respective evidence and submissions of the parties on this issue. I note that the petitioner's 'super agents' were moving between stations, and that there was an ODM agent who signed the forms for Soko Mjinga streams 2 and 9. The petitioner's witness on this issue, Julius Momanyi Ochiengi, was not in the streams that were moved. His evidence was that he was moving around, and that he was in stream 4 or 5 at the time the stations were moved. It seems to me that the allegations made with respect to the movement of the polling stations to a church a few metres away are based on what is close to paranoia about every act by IEBC. There is no evidence to justify the allegation that it was intended to allow for swapping or stuffing of ballots, and I find no merit in this allegation at all.

### **Interruption of electricity supply**

128. The petitioner submits that electricity was deliberately switched off at Kaptembwa and Heshima polling stations. His witnesses, Hesborn Onchieku Mosiori and Hezron Okiki Othoo, allege that the power went off just before counting of the votes started. They aver that they intervened and called Kenya Power and Lighting personnel, who reconnected the power. They further allege that the disconnection was deliberate as surrounding areas had power. IEBC concedes that there was a power interruption around 7.00 p.m. Its case, however, is that it had gas lamps, which were lit at 6.00 p.m. The 3<sup>rd</sup> respondent testified that he did not know about a power interruption, but his second witness indicated that he was aware that there had been a power interruption. He denied, however, any involvement by the 3<sup>rd</sup> respondent's agents.

129. I have considered the evidence on this point. The only thing that is clear is that there was a power interruption at Heshima and Kaptembwa polling stations. The interruption was around 7.00 p.m. Kenya Power personnel were called, and they rectified the problem. The petitioner's witnesses allege that it was the 3<sup>rd</sup> respondent's agents who caused the interruption, but there is nothing to back this up. There is also nothing to suggest that the interruption affected the counting of the votes. The petitioner and his witnesses agree that there were gas lamps at the polling stations, and that the gas lamps were on. The petitioner also confirmed that he did not know whom to blame for the power going off.

130. His witness, Cleophas Simiyu Mulongo (PW3), also stated that he did not know who was responsible for the power going off, but it was restored by Kenya Power personnel. Hezron Okiki Othoo testified that he was informed, after 8.40 p.m., that there was a problem at Heshima polling station so he went there and found that there were gas lamps. In cross-examination by Dr. Nyaundi, he stated that the power outage was around 9.00p.m. The counting of votes was to start with the presidential votes, then the Governor, Senator, then Member of Parliament. He conceded that they would not have reached the Member of Parliament votes at the time power went off, and were probably counting those of the President.

131. With all due respect to the petitioner, I believe the power outage issue is a rather wide off the mark shot in the dark. Even if there was a power outage, there is no evidence to link it with the 3<sup>rd</sup> respondent, or any of the respondents. There was in place a plan for such situations, in the form of gas lamps, which the petitioner acknowledges were on at the time the lights went off. In addition, it is conceded that the counting of votes for the seat of President was probably ongoing, and there is no indication that the power interruption affected in any way the counting of votes for the parliamentary seat, or that it was engineered in any way to favour the 3<sup>rd</sup> respondent. This argument therefore does not advance the petitioner's case in any way.

### **Intimidation and violence against voters and agents.**

132. I turn now to consider the last issue identified by the petitioner-the allegation that the elections were marred by violence and intimidation perpetrated against him and his agents. This allegation is set out at paragraph 36 of his affidavit in support of the petition as follows:

**36. THAT there was violence as against my agents in particular at the tallying centre by goons hired by the 3<sup>rd</sup> Respondent.**

133. In support of this contention, the petitioner stated in cross-examination by Mr. Karanja that he had made an allegation about violence at the tallying centre after the tallying was complete, but conceded that he did not make a report on the alleged violence either to police or to the IEBC. PW6, Geoffrey Nyangau Nyaanga, stated in cross examination that there was a fracas at the tallying centre. In re-examination, he stated that he was not there when the results were being announced and he was not there to see if there was a fracas.

134. The evidence of PW2, Caspar Ondoro, in cross-examination by Mr. Karanja, was as follows:

***“I was at the tallying centre when the results were announced. He (petitioner) rejected the results. He moved to the front towards the Returning Officer. There was an altercation. He confronted the Returning Officer. The Returning Officer directed security to remove the candidate. There could not have been an altercation if he had walked out... “***

135. A statement that is repeated in all the affidavits sworn by the petitioner’s witnesses is that the voting, tallying and tabulation of results in Nakuru Town West constituency went well. The petitioner himself confirms in his affidavit that he was satisfied with the conduct of the elections by IEBC. The only time throughout the voting, counting and tallying of the results for the constituency seat that there was anything that could, even remotely, be termed violence was when the petitioner moved forward to confront the Returning Officer after the Returning Officer declared the 3<sup>rd</sup> respondent the winner of the parliamentary seat and was preparing the certificate to hand over to him. In other words, the only fracas or commotion witnessed in Nakuru Town West constituency at the time of the elections was at the tallying centre, and it was caused by the petitioner himself.

136. As submitted by the IEBC, the petitioner was the author of the incident at the tallying centre. The evidence of the 2<sup>nd</sup> respondent, the Returning Officer, was that the petitioner approached him as he was writing the certificate and banged the table twice before he was escorted out by security officers. There would have been no commotion, according to the petitioner’s own witness, if the petitioner had not confronted the Returning Officer. I find therefore that there was no violence in the election for the Member of the National Assembly for Nakuru Town West constituency.

## **Conclusion**

137. I set out earlier in this judgment what I considered the two main issues at the core of this petition. After examining the instances of alleged non-compliance with the Constitution, the election laws and regulations, I have come to the following conclusions with respect to the two issues:

***i. The elections for the Member of the National Assembly for Nakuru Town West constituency was conducted substantially in accordance with the Constitution, the elections laws and regulations;***

***ii. The 3<sup>rd</sup> respondent was validly elected as the Member of the National Assembly for Nakuru Town West constituency.***

138. Accordingly, it is my finding that this petition has no merit, and it is hereby dismissed.

## **Costs**

139. The petitioner has submitted that he should be awarded the costs of this petition against the IEBC regardless of the outcome. The basis of this submission is that the petition does not concern just the petitioner’s private personal interests but involves fundamental public interest in the proper conduct of elections required by the Constitution.

140. In determining if, and against or in favour of whom, to make an award in costs in this matter, I am guided by the provisions of the law with respect thereto. Section 84 of the **Elections Act** provides that **“An election court shall award the costs of and incidental to a petition and such costs shall follow the cause.”** In this case, the petitioner has been unsuccessful, and the costs are to follow the event in accordance with the law.

141. The election court has wide discretion in the award of costs, as provided under Rule 30 (1) of the Election Rules, which provides that the court shall make an order, at the conclusion of an election petition, specifying the total amount of costs payable and the person by and to whom the costs shall be paid.

142. In my view, this petition did not present any complexity, whether in preparation or presentation of the respective cases of the parties, nor were the issues that it raised complicated. In the circumstances, I see no basis, as urged by the parties, to issue a certificate for more than one Counsel, nor to make a high award in costs. Accordingly, I award costs to the respondents capped at Kenya shillings **two million five hundred thousand (Kshs 2,500,000)** for the IEBC and **Kshs 2,500,000** for the 3<sup>rd</sup> respondent. The costs shall be taxed and the total costs certified by the Deputy Registrar of this court.

143. A certificate in respect of this determination in accordance with section 86(1) of the Elections Act, 2011 shall issue to the Independent Electoral and Boundaries Commission and the Speaker of the National Assembly.

**Dated Delivered and Signed at Nakuru this 22<sup>nd</sup> day of February 2018**

**MUMBI NGUGI**

**JUDGE**

**Dr. Kangu, Mr. Mongeri and Mr. Ochoki instructed by the firm of Mongeri & Co. Advocates for the plaintiff.**

**Mr. Karanja instructed by the firm of Mirugi Kariuki & Co.**

**Advocates for the 1<sup>st</sup> and 2<sup>nd</sup> respondent.**

**Dr. Nyaundi & Mr. Nyagaka instructed by the firm of Marende & Nyaundi Advocates for the 3<sup>rd</sup> respondent.**