



REPUBLIC OF KENYA
IN THE HIGH COURT
AT KISII
ELECTION PETITION NUMBER 1 OF 2017
IN THE MATTER OF THE ELECTION ACT NO. 24 OF 2011 LAWS OF KENYA
AND THE ELECTIONS (GENERAL)
REGULATIONS, 2012 AND ELECTIONS (PARLIAMENTARY AND
COUNTY ELECTIONS) PETITION RULES, 2017
IN THE MATTER OF PARLIAMENTARY ELECTIONS FOR BOMACHOGE
CHACHE CONSTITUENCY, HELD ON 8TH AUGUST 2017
BETWEEN
JEREMIAH NYAGWARA MATOKE.....PETITIONER
VERSUS
INDEPENDENT ELECTORAL AND BOUNDARIES
COMMISSION(IEBC).....1ST RESPONDENT
RETURNING OFFICER BOMACHOGE CHACH
CONSTITUENCY.....2ND RESPONDENT
ALAFAH MIRUKA ONDIEKI.....3RD RESPONDENT

JUDGMENT

Introduction and background

1. **Article 1 (1) and (2)** of the Constitution of Kenya 2010 stipulates that all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with the constitution and further that the people may exercise their sovereign power either directly or indirectly or through their elected representatives.

2. The provisions of **Article 1** are actualized by **Article 38** of the Constitution which makes specific provisions for the citizens' political rights as follows;

38(1) Every citizen is free to make political choices, which includes the right -

(a) to form, or participate in forming, a political party;

(b) to participate in the activities of, or recruit members for, a political party; or

(c) to campaign for a political party or cause.

(2) Every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for-

(a) any elective public body or office established under this Constitution; or

(b) any office of any political party of which the citizen is a member.

(3) Every adult citizen has the right, without unreasonable restrictions-

(a) to be registered as a voter;

(b) to vote by secret ballot in any election or referendum; and

(c) to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office.

3. Pursuant to the above provisions of Articles 1 and 38 of the Constitution, general elections were conducted on the 8th August 2017 on which date, voters in Bomachoge Chache Constituency, and indeed the entire country, went to vote for their elected leaders, and when the results were declared, the 3rd Respondent was declared the duly elected Member of Parliament for Bomachoge Chache Constituency.

The Parties

4. The petitioner herein, JEREMIAH NYANGWARA MATOKE who describes himself as a Kenyan citizen was also one of the candidates in the Bomachoge Chache Constituency parliamentary election under the ticket of Orange Democratic Movement Party (hereinafter "ODM").

5. The 1st respondent is the Independent Electoral and Boundaries, Commission (hereinafter "IEBC") an Independent Commission established under **Article 88** as read with **Articles 248 and 249 of the Constitution of Kenya** which has the constitutional mandate to conduct elections to all the elective offices established under the Constitution. The 2nd respondent is the Returning Officer duly appointed by the 1st Respondent in respect to the elections in Bomachoge Chache Constituency while the 3rd respondent the candidate who was declared the winner of the said parliamentary seat.

The Petition

6. Following the said 8th August 2017 election of the 3rd respondent herein as the Member of Parliament for Bomachoge Chache Constituency, the petitioner herein JEREMIAH NYANGWARA MATOKE filed this petition on **5th of September 2017**, challenging the election and set out the declared results of the said election as follows;

2. Name of Candidates Number of votes

1) Alfah Miruka Ondieki – 19,639

2) Atika Astarliki Otieno- 370.

3) Edga Ombongi Arori- 87

4) Kibagendi Nehemiah Oyunge -98.

5) Matoke Addalla Nyagaka 1,893

6) Mititi Fredrick Mogere- 72.

7) Momanyi Peter Jim- 151

8) Nyakwara Pius Nyambane- 139

9) Nyangwara Jeremiah Matoke – 4,279

10) Obondi Lugard Mogusu- 138.

11) Ogari Simon Nyaundi – 3949

12) Ombati Evans Orenge- 59

13) Omwange Joshua Swanya- 357

14) Omwega Andrew Mbaka- 415

15) Ontiri Machana Mokuu- 36.

Total valid votes 31,828

Rejected 292

Disputed 0

Objected 0

Total registered votes 41,745.

7. A brief summary of the Petitioner's case was, *inter alia*, that:-

i. That there were two sets of results.

ii. That copies of form 35A's had different serial numbers from the original ones supplied.

iii. That some form 35A's had some alterations and they were not counter signed.

iv. That some form 35A's were not stamped

v. That some form 35A's for various polling stations had incorrect figures which do not tally

vi. That form 35A's from Kebege Coffee factory 1 of 2 and Public works yard 2 of 3 were not signed by any agent.

vii. That form 35A from Ntamocha Primary School 2 of 2 and Nyamiobo SDA Pri School 1 of 1 were not signed by the Presiding Officer or the Deputy Presiding Officer.

viii. That in most of the forms 35A the ODM agents never signed the said forms.

ix. That most forms 35A's do not have security water marks which are visible to the naked eye even on photocopy.

8. The petition was further premised on the following grounds.

i. That the election for Member of National Assembly for Bomachoge Chache Constituency was not conducted and carried out in accordance with the Constitution and the election laws

ii. The results as released from the polling stations and announced at the tallying centre were not the same and had errors, were inconsistent and inaccurate.

iii. That the results forwarded to the 1st Respondent by the 2nd Respondent were invalid.

9. The Petitioner set out the issues for determination as follows:-

i. Whether the parliamentary elections for Bomachoge Chache Constituency were conducted as per the law and the Constitution.

ii. Whether the unstamped forms 35A are genuine and valid and reliable in determining the final results for parliamentary elections for Bomachoge Chache Constituency.

iii. Whether the unsigned forms 35A by the agents, presiding Officer are valid in determining the final tally.

iv. Whether the omission to sign and stamp forms 35A and other irregularities affect the final tally of the votes cast.

v. Whether the two sets of results for Bomachoge Chache Constituency are genuine, accurate, accountable and verifiable.

vi. Whether the 3rd Respondent was validly elected and declared as Member of Parliament for Bomachoge Chache Constituency.

10. The Petitioner sought orders that:-

- i. An order for scrutiny and audit of all form 35A and 35B for Bomachoge Chache Constituency.**
- ii. An order for scrutiny and audit of the system and technology and not, limited to the KIEMS kits and all relevant material used by the 1st Respondent in the parliamentary elections for Bomachoge Chache Constituency.**
- iii. A declaration that the Parliamentary Elections held on the 8th August 2017 was not conducted in accordance with the Constitution and applicable laws therefore the results are inaccurate, null and void.**
- iv. A declaration that the 3rd Respondent was not validly declared as the Member of Parliament for Bomachoge Chache Constituency and the declaration is invalid, null and void.**
- v. An order directing the 1st Respondent to conduct fresh Parliamentary Elections for Bomachoge Chache Constituency.**
- vi. A declaration that the 1st and 2nd Respondents jointly and severally committed an election offence and they be tried and/or committed forthwith.**
- vii. Costs of the Petition.**
- viii. Any other suitable relief or orders this court may deem fit.**

11. On 15th September, 2017 the 1st and 2nd Respondents filed a joint Response and a Replying Affidavit sworn by Amosi Nyogesa Chilai the Returning Officer for Bomachoge Chache Constituency in which they denied all the allegations made against them by the petitioner and annexed all the Forms 35A, 35B, polling day dairies and 2 Witnesses Affidavits sworn by Job Oirere the Presiding Officer Tendere Secondary School and Ombiro Daniel the Presiding Officer Sengera girls Secondary School. They maintained that the election for the Member of National Assembly for Bomachoge Chache Constituency was conducted in full compliance with the relevant constitutional and statutory provisions and that the 3rd Respondent was validly elected.

12. On 18th September 2017, the 3rd Respondent filed his Response to the Petition and a Replying Affidavit in which he denied the petitioner's claims and stated that the subject election was held in compliance with the letter and spirit of the Constitution of Kenya 2010 particularly Articles 38, 81 and 87 of the Constitution, the Elections Act and the Regulations thereunder. He further averred that the Petitioner did not furnish proof of any irregularity or tender any evidence to show that there were two and/or three sets of results as alleged by his chief agent and only witness, one Mr. Ben Mayaka.

13. The 3rd Respondent further averred that the Affidavit of Ben Mayaka is defective as it violates the provisions of the Oaths and Statutory Declarations Act, Cap 15 Laws of Kenya and the same should be struck out. He sought the following prayers:-

- i. THAT this Honourable Court be pleased to declare that HON. ALFAH MIRUKA ONDIEKI was duly and validly elected as the Member of National Assembly for Bomachoge Chache Constituency subsequent to the elections held on 8th August 2017.**
- ii. THAT the petition dated 4th September 2017 be dismissed for being threadbare, vexatious and an abuse of the court process.**
- iii. THAT costs do issue to the 3rd Respondent as against the Petitioner.**
- iv. Any other orders that this Honourable Court shall deem fit and necessary to grant in the circumstances.**

Issues for determination

14. Even though the parties filed separate statements of issues for consideration, I am of the view that four main issues can be derived from the pleadings as follows;

- i. Whether the election of the Member of Parliament for Bomachoge Chache Constituency was conducted according to the Constitution and laws governing elections.**
- ii. Whether the allegations of irregularities made concerning the statutory forms and results for Bomachoge Chache constituency are true and if so, whether they affected the final tally of the votes cast.**
- iii. Whether there were two/three sets of results for Bomachoge Chache Constituency election of the member of the National Assembly.**
- iv. Whether the 3rd Respondent was validly elected and declared as the Member of Parliament for Bomachoge Chache Constituency.**

9. The petitioner testified in support of his petition and called one witness while the 1st and 2nd respondents called 1 witness. Similarly, the 3rd respondent testified and did not call any witness. At the close of the hearing the petitioner applied for the scrutiny of the voting materials used in the impugned elections which application was not allowed and the parties thereafter filed written submissions to the petition before judgment. Before I embark on considering each of the above mentioned issues for determination, I will highlight a brief summary of the evidence tendered by the parties during the hearing.

Petitioner's case

10. The Petitioner's case was that there were two sets of results in respect to the election for the member of parliament for Bomachoge Chache Constituency and that the results supplied to him were different from what was contained in the 1st Respondent's website. He also claimed that some of his agents were not allowed to sign the statutory forms used in the collation and declaration of results. The petitioner alleged that most of his agents were chased away from the polling stations in a bid to stop them from signing the said forms.

11. When cross-examined about the source of the second set of results, the petitioner stated that the 2nd respondent issued him with a flash disk containing the results when he made a visit to the 1st Respondent's offices and requested for the same after the declaration of the results. The petitioner did not, however, produce the said flash disk as an exhibit in court and neither did he produce any certified extract of the results he allegedly obtained from the website to confirm his claim that there were two sets of results.

12. On further cross-examination, the Petitioner stated that he visited the tallying centre on 9th of August 2017 where he requested the Constituency Returning Officer to avail over to him the statutory forms that had been used in collating and tallying the results. He confirmed having been given the said forms for his perusal and comparison with the forms that he had after which he returned the said forms to the 2nd respondent. He also confirmed that the only role he played, as a candidate in the impugned elections, was campaigning and casting his vote.

13. On further cross-examination, and based on his allegation that the information captured in forms 35A were different from that in form 35B, the Petitioner was taken through two forms 35A that were picked at random for which comparison was done with the corresponding data in form 35B for the respective polling stations. This exercise did not reveal any difference in data captured in forms 3A and 35B as alleged in the petition.

14. When asked to name any agent(s) who was allegedly chased away from the polling station or those who were not allowed to sign the statutory forms, the petitioner was unable to table any name and only claimed that he was informed about the issue without naming his informer(s).

15. The Petitioner's sole witness, one Ben Mayaka, testified that he was the petitioner's chief agent during the said elections. He also claimed that some of the agents were denied access to the polling stations and that some were not allowed to sign the forms but did not name the agents who were denied access to the polling station or denied the opportunity to sign the statutory forms. He did not furnish proof of his identity in court and neither did he produce his letter of appointment as a chief agent or state the date of his appointment.

1st and 2nd Respondents' Case

16. Even though three deponents filed affidavits in support of the 1st and 2nd Respondents' case, only one witness, Amosi Nyongesa Chilai, the Constituency Returning Officer for Bomachoge Chache Constituency, testified on behalf of the 1st and 2nd Respondents. His testimony was that all the forms used to declare the results were stamped and that he did not receive any report or complaint regarding the claim that some agents had been denied access to any of the 89 polling stations in the said constituency. He stated that all the accredited agents were issued with badges and allowed access to the polling stations.

17. On the issue of differences in the serialization of the forms 35A he explained that presiding officers in all the polling stations were issued with booklets containing 6 self-inking leaflets which bore different serial numbers and that it was therefore not possible for agents from one polling station to have forms bearing the same serial numbers.

18. He conceded that there were 6 polling stations in which the figures of the total valid votes cast did not tally, but explained that the same was as a result of error or fatigue of the polling clerks for which none of the candidates lost any vote as the error was only on the section for recording the number of total valid votes cast which error did not affect the votes garnered by any of the candidates.

19. He explained that the missing ballot paper for Tendere Primary School Polling Station 3 of 3 was accounted for when the missing ballot was discovered to have been a stray ballot which was found to have been put in the wrong ballot box. He further stated that he did not receive any complaint regarding any agent being denied access to the polling stations.

The 3rd Respondent's case

20. The 3rd respondent testimony was that he was validly elected as the Member of Parliament for the Bomachoge Chache parliamentary seat after garnering 19,639 votes which was about 62% of the total valid votes cast against the petitioners 4,279 votes which was 13% of the total votes cast in the said election. According to the 3rd respondent, the said election was free, fair and reflected the will of the people of the said constituency. He maintained that he was not guilty of any electoral malpractice and added that the results declared by the 2nd respondent were the correct results.

21. On cross examination, he reiterated that all the forms 35A that were issued to his agents at the polling stations bore the official IEBC rubberstamp and contained the same information as the forms that had been attached to the 2nd respondent's replying affidavit to the petition.

He further stated that he was present at the tallying centre when the results were declared after which the names and details of all the candidates present together with their agents were entered in the form 35B. He added that 2 agents of the petitioner's party, Orange Democratic Movement (ODM) signed form 35B among other party agents.

22. Before I embark on a more in-depth analysis of the evidence and submissions made by the parties herein I will first highlight some of the general principles applicable to election petitions.

General principles applicable

23. The general principles and laws governing elections and election disputes are well known and have been aptly set out in the parties' written submissions.

24. The rights outlined in **Article 38** of the **Constitution** which I have referred to at the beginning of this judgment can only be achieved through an electoral system that is envisaged under **Article 81(e)** which stipulates that the electoral system should comply with the principle of free and fair elections. According to this provision, elections are free and fair when they are by secret ballot, free from violence and intimidation, improper influence or corruption, conducted by an independent body, transparent and administered in an impartial, neutral, efficient, accurate and accountable manner.

25. As regards the conduct of voting, **Article 86** of the **Constitution** imposes specific obligations on the IEBC on the conduct of voting and states as follows:

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.**

26. An election is the ultimate expression of sovereignty and will of the people and therefore in any election contest, the will of the people should be expressed in an environment that is free from any form of threat or intimidation. The duty of a court handling an election dispute resolution process is to ascertain and give full effect and meaning to the intent of the voters while observing and upholding the principles that govern a free and fair election. In this regard, courts have always taken the view that once the will of the people has been expressed through an election in which a winner has been declared in accordance with the law, it is presumed that the said election was valid unless the same is set aside by the court and thus, the burden of establishing the allegations of non-compliance with the Constitution and the law, electoral malpractice and misconduct which would result in the election being declared invalid, rests on the petitioner. This means that the court will not interfere with the results of the elections unless it is established, to the required standard of proof, that such non-compliance with the Constitution and the law, the irregularities and electoral malpractices complained of render the said elections invalid. In the case of **Ramadhan Seif Kajembe v Returning Officer Jomvu Constituency & 3 others [2013] eKLR** it was held:

“An election petition is more serious matter and has wider implications than an ordinary civil suit. What is involved is not merely the right of the petitioner to a fair election but the right of the voters to non-interference with their already cast votes i.e. their decision without satisfactory reasons. To require the petitioner to satisfy such standard of proof is not only fair but reasonable in the circumstances. Petitions, as the Act itself provides, should not be easily allowed by mere production of evidence which might probably prove the allegations and this is why it not enough merely to prove the allegations but also necessary to prove that the allegations affected the results of the election. No doubt a person who seeks to avoid an election results has the duty of leading evidence in support of this allegation and without doing so, his petition would fail, although the trial court is not bound to decide an election petition only on the petitioner's evidence.”

Burden and Standard of Proof

27. It is now accepted and settled principle that in an Election Petition the burden of proving the allegations in a petition lies with the petitioner who is under an obligation to discharge the evidentiary and legal onus of proof. The common law concept of burden of proof is a question of law which can be described as a duty which lies on one or the other of the parties either to establish a case or to establish the facts upon a particular issue. The law places the common law principle of burden of proof on the person who asserts a fact to prove it. This principle is captured in **Section 107 of the Evidence Act, Cap. 80 Laws of Kenya** in the words;

“whoever desires any court to give a judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

28. In the Nigerian case of **Buhari v. Obasanjo (2003) CLR 11** the Supreme Court had the following to state on the petitioner's burden of proof:-

“A petitioner who contests the legality or lawfulness of votes cast in an election and the subsequent result must tender in evidence all the necessary documents by way of forms and other documents used at the election. He should not stop there. He must call witnesses to testify to the illegality or unlawfulness of the votes cast and prove that the illegality or unlawfulness substantially affected the result of the election. The documents are amongst those in which the results of the votes are recorded. The witnesses are those who saw it all on the day of the election; not those who picked the evidence from an eye witness. No. They must be eye witnesses too. Both forms and witnesses are vital for contesting the legality or lawfulness of the votes cast and the subsequent result of the election. One cannot be a substitute for the other. It is not enough for the petitioner to tender only the documents. It is incumbent on him to lead evidence in respect of the wrong doings or irregularities both in the conduct of the election and the recording of the votes; wrong doings and irregularities which affected substantially the result of the election. Proving an election petition or proof of an election petition is not as easy as the Englishman finding coffee on his breakfast table and sipping it with pleasure;”

29. In the oft cited case of **Raila Odinga & Others v. Independent Electoral and Boundaries Commission & Others**, Petition No. 5 of 2013 (as consolidated with Petition No. 3 and 4 of 2013) the Supreme Court held that:

“...a petitioner should be under obligation to discharge the initial burden of proof, before the respondents are invited to bear the evidential burden. 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. In the case of data-specific electoral requirements (such as those specified in Article 38(4) of the Constitution, for an outright win in the Presidential election), the party bearing the legal burden of proof must discharge it beyond any reasonable doubt.”

...Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections. It is on that basis that the respondents bear the burden of proving the contrary. This emerges from a long standing common law approach in respect of alleged irregularity in the acts of public bodies. All acts are presumed to be done rightly and regularly. So, the petitioner must set out by raising firm and credible evidence of the public authority’s departure from the prescriptions of the law.”

30. In the said **Raila Odinga case (supra)** the court observed that;

[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 be 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 laws.

31. As regards the standard of proof, the Court held that;

[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.

32. This higher standard of proof is based on the notion that an election petition is not an ordinary, private suit concerning the two or more parties to it but affects the entire electorate in a given electoral area whether or not they participated in the said election. An elected leader is deemed to have the mandate of the majority of voters to represent them in the given level of leadership which mandate should not be overturned except for very compelling reasons. The Tanzanian High Court succinctly stated the seriousness of an election petition in the case of **Madundo v. Mweshemi & A-G Mwanza HCCM No. 10 of 1970** in the following words:

“An election petition is a more serious matter and has wider implications than an ordinary civil suit. What is involved is not merely the right of the petitioner to a fair election but the right of the voters to non-interference with their already cast votes i.e. their decision without satisfactory reasons.”

33. In Kenya, Githua, J. aptly stated the rationale for this higher standard of proof in the case of **Sarah Mwangudza Kai v. Mustafa Idd & 2 Others [2013] eKLR**–

“[29]...it is important for this court to address its mind to the burden and standard of proof required in election petitions. This is because election petitions are not like ordinary civil suits. They are unique in many ways. Besides the fact that they are governed by a special code of electoral laws, they concern disputes which revolve around the conduct of elections in which voters exercise their political rights enshrined under Article 38 of the Constitution. This means that electoral disputes involve not only the parties to the Petition but also the electorate in the electoral area concerned.

It is therefore obvious that they are matters of great public importance and the public interest in their resolution cannot be overemphasized. And because of this peculiar nature of election petitions, the law requires that they be proved on a higher standard of proof than the one required to prove ordinary civil cases.”

34. Courts have maintained that the standard of proof in election petitions remains higher than the balance of probabilities but lower than beyond reasonable doubt and that where allegations of criminal or quasi criminal nature are made, the standard of proof is beyond reasonable doubt. In **Mufutau v. Muideen Thomas JCA, [2009] 32 WRN 150 at 163** the Nigerian Court of Appeal stated:-

“once the Electoral Commission announces the result of an election, it is presumed correct and authentic and the petitioner who alleges the opposite must offer clear and positive proof that the result is incorrect and not authentic. If the allegation is of fraud,

it must be proved beyond reasonable doubt, because fraud is a crime. If it is of violence, the spread whereby it substantially affects the result must be clearly pleaded given in evidence.”

35. Closely related to the burden and standard of proof is the principle that parties are bound by their pleadings in which case, the petitioner in an electoral dispute is bound to prove his case within the confines of his pleadings. This means that a petitioner is not permitted to expand his case beyond the pleadings and his affidavits and therefore his testimony must be consistent with and support the case pleaded. The rationale behind this principle is that the respondents are entitled to know the petitioner’s case beforehand so that they can adequately make their response to it. In **Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission and 2 Others SCK Presidential Petition No. 1 of 2017 [2017 eKLR]**, the Supreme Court quoted, with approval, 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 it stated that;

“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.”

36. The above position was also restated by Kimaru J., in **Mahamud Muhumed Sirat v Ali Hassan Abdirahman and 2 Others Nairobi EP No. 15 of 2008 [2010] eKLR** as follows;

“From the outset, this court wishes to state that the petitioner adduced evidence, and even made submissions in respect of matters that he had not 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.”

37. Taking a cue from the above cited cases, I will confine this judgment to the matters pleaded in the petition and supported by the evidence tendered during the trial. However, this is not to say that the court will place itself in a straitjacket and shy away from pronouncing itself on all matters that were raised by the parties in the course of the proceedings even if dealing with such matters may entail the court finding that they are matters that were not pleaded.

38. **Section 83 of the Elections Act** (hereinafter “the Act”), which section was amended by the **Election Laws (Amendment) Act, 2017 (Act No. 34 of 2017)**, set out the circumstances under which an election court will invalidate an election. The said section stipulates as follows:

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

39. It is worth noting that the amendment to Section 83 of the Act came into force on 2nd November 2017 and will therefore not be applicable to these proceedings which relate to the election of 8th August 2017 as the said amendment is not retrospective (see **John Harun Mwau & Others v Independent Electoral and Boundaries Commission SCK Presidential Petition Nos. 2 & 4 of 2017 (UR)**).

40. In **Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission and 2 Others, Presidential Election Petition No. 1 of 2017 [2017] eKLR** the Supreme Court observed that **section 83 of the Act** has two limbs; the first regarding compliance with the Constitution and the law on elections and the second, concerning irregularities that may affect the result of the election. The court noted;

“[203] Guided by these principles, and given the use of the word “or” in Section 83 of the Elections Act as well as some of our previous decisions, we cannot see how we can conjunctively apply the two limbs of that section and demand that to succeed, a petitioner must not only prove that the conduct of the election violated the principles in our Constitution as well as other written law on elections but that he must also prove that the irregularities or illegalities complained of affected the result of the election as counsel for the respondents assert. In our view, such an approach would be tantamount to a misreading of the provision.”

41. The Court reiterated what it had stated in **Gatirau Peter Munya v Dickson Mwenda Kithinji and 2 Others SCK Petition No. 2B of 2014[2014] eKLR** that;

[216] It is clear to us that an election should be conducted substantially in accordance with the principles of the Constitution, as set out in Article 81(e). Voting is to be conducted in accordance with the principles set out in Article 86. The Elections Act, and the Regulations thereunder, constitute the substantive and procedural law for the conduct of elections.

[217] If it should be shown that an election was conducted substantially in accordance with the principles of the Constitution and the Election Act, then such election is not to be invalidated only on ground of irregularities.

[218] Where however, it is shown that the irregularities were of such magnitude that they affected the election result, then such an election stands to be invalidated. Otherwise, procedural or administrative irregularities and other errors occasioned by human imperfection, are not enough, by and of themselves, to vitiate an election.....

[219] By way of example, if there would be counting or tallying errors which after scrutiny and recount do not change the result of an election, then a trial Court would not be justified, merely on account of such shortfalls, to nullify such an election. However, a scrutiny and recount that reverses an election result against the candidate who had been declared a winner, would occasion the annulment of an election. Examples of irregularities of a magnitude such as to affect the result of an election, are not however, closed.

[220] where an election is conducted in such a manner as demonstrably violates the principles of the Constitution and the law, such an election stands to be invalidated.

42. Courts have also taken the view that election processes can never be flawless as they are conducted human beings who are susceptible to errors, malpractices and other inadvertent mistakes and have held that in order to succeed in annulling the election, the petitioner must establish either that there was non-compliance with the Constitution and the law governing election or that election malpractices and irregularities that took place were of such magnitude that they substantially and materially affected the results of the election. In the case of **Peter Gichuki King'ara Vs. Iebc & 2 Others, [2014] eKLR** it was noted:-

“It follows that electoral systems and processes all over the world are not perfect, they are susceptible to human errors and other inadvertent mistakes as long as those mistakes do not affect the overall results and the democratic will of the people”

43. Similarly, in the case of **Wavinya Ndeti vs IEBC & 4 Others. Machakos Election Petition No. 4 of 2013**, Majanja J. held:

“An election is a human endeavor and is not carried out by programmed machines. Perfection is an aspiration but allowances must be made for human error”

44. Having set out the general principles governing elections, the burden and standard of proof expected in an election petition, and having highlighted the issues for determination in the petition, I will now consider each of the grounds listed by the petitioner for challenging the election of the 3rd respondent as the Member of Parliament for Bomachoge Chache Constituency based on the pleadings and evidence tendered by the parties during the hearing.

Different Sets of Results

45. The Petitioner's claim in both in the Petition itself and the supporting affidavit was that there are two sets of results for the subject elections. He alleged that the results announced by the 2nd respondent and/or the results supplied to him by the 1st and 2nd Respondents were different from the results that were posted in the 1st Respondent's portal. The petitioner stated as follows in paragraphs 9 and 10 of the petition:

“9 (i) The final results that were released by the 2nd Respondent and channeled to the 1st Respondent electronically are as follows”

NAME OF CANDIDATE	NO. OF VOTES
Alfah Miruka Ondieki	19,711
Atika Astarliko Otieno	368
Edga Ombongi Arori	80
Kibagendi Nehemiah Onyunge	96
Matoke Addalla Nyagaka	1,884
Mititi Fredrick Mogere	71
Momanyi Peter Jim	150
Nyakwara Pius Nyambane	160
Nyagwara Jeremiah Matoke	4,356
ObondiLugardMogusu	113
Ogari Simon Nyaundi	3,990

Ombati Evans Oreng	66
Omwange Joshua Swanya	353
Omwega Andrew Mbaka	393
OntiriMachanaMokua	34

“9 (ii) The 1st Respondent sent the following tallies to the Petitioner as results for Bomachoge Chache Constituency:-“

NAME OF CANDIDATE	NO. OF VOTES
Alfah Miruka Ondieki	19,639
Atika Astarliki Otieno	370
Edga Ombongi Arori	87
Kibagendi Nehemiah Onyunge	98
Matoke Addalla Nyagaka	1,893
Mititi Fredrick Mogere	72
Momanyi Peter Jim	151
Nyakwara Pius Nyambane	139
Nyagwara Jeremiah Matoke	4,279
ObondiLugardMogusu	138
Ongari Simon Nyaundi	3,949
Ombati Evans Oreng	59
Omwange Joshua Swanya	357
Omwega Andrew Mbaka	415
OntiriMachanaMokua	36
TOTAL VALID VOTES CAST	31,828
REJECTED	292
DISPUTED	0
OBJECTED	0
TOTAL REGISTERED VOTERS	41,745

10. The 1st and 2nd Respondent including the results announced at the tallying centre has two sets of results alleging to be results for Bomachoge Chache Constituency which makes the entire results a sham.”

46. In support of the claim that there were two sets of results, the petitioner testified that the results announced by the 2nd respondent were different from the results contained in a flash disk that was issued to him by the 2nd respondent. It was noteworthy that, the 2nd respondent was, in his evidence, categorical that he did not issue any such flash disk to the petitioner. The 2nd respondent explained that the correct procedure for obtaining results from the 1st respondent was through the making of a formal application to be supplied with certified copies of the statutory documents containing the said results. This court also noted that the alleged flash disk or a certified extract of its contents thereof were not attached to the petitioner's affidavit as proof of its existence or the claim that there were 2 different sets of results.

47. During cross examination, the petitioner stated as follows on the claim that there were two sets of results:

“At paragraph 7 of my affidavit, I indicated that results announced by the Returning Officer were different from the ones given to my agents. I do not have anything to show that what was announced was different from my results..... I do not have a video or anything to show that there were 2 sets of results.”

48. The petitioner's sole witness, Ben Mayaka, on the other hand, stated as follows at paragraph 11 of his affidavit in support of the petition:

“There are now (3) three sets of final results as provided by the 1st respondent and clearly the 3rd respondent's election is not clear.”

49. In response to the petitioner's claim that there were two sets of results the 2nd respondent, who was the Returning Officer in the said election, testified that he declared only one set of results that was captured in form 35B which was annexed to his affidavit as exhibit “ACN1”, which form was signed and/or acknowledged by the Petitioner's agent, one Joel Nyandoro Oyaró as being the actual and final results in the said election. I note that at no time, during the proceedings, did the petitioner deny that the said Joel Nyandoro Oyaró was his party's chief agent and neither did the said agent swear any affidavit disowning his acknowledgement of the said declared results.

50. My finding is that the allegation that there were different sets of results for Bomachoge Chache Constituency election for the position of Member of Parliament was not proved to the required standards or at all. I say so because the petitioner himself conceded, during cross examination, that he did not have anything to prove that there were two sets of results. The alleged flash disk containing the alleged different results or a certified copy of its contents was not produced in court as an exhibit. Needless to say, the petitioner's own witness contradicted him on this issue by stating that there were 3 sets of results. The petitioner's further claim that the results posted in the 1st respondent's portal were different from the results supplied to him was also not proved by any tangible evidence such as the production of a certified copies of the extracts from the said portal.

51. This court notes that the form 35B, which is the statutory document used in declaring the final results of the election of a Member of Parliament, that was produced by the petitioner as annexure “JMN1” was exactly the same as the 2nd respondent's annexure “ACN1”. This means that both the petitioner and the Respondents were in agreement on the issue of the final results declared by the 2nd respondent. If the petitioner's case was that there were two sets of results declared by the 2nd respondent, then it was incumbent upon him to produce a different form 35B in that regard. In the instant case, as I have already noted in this judgment, there was only one form 35B produced by the 2nd respondent as “ACN1” in support of the final results in the impugned election. Furthermore, even assuming that there were two sets of results, which assumption I have already found, was not proved, the results shown in the two tables above reveal that in both instances, the variance in the number of votes garnered by each candidate was very minimal if not insignificant, and further, that in both cases, that the 3rd respondent was the outright winner of the said election by a wide margin of more than 15,000 votes as against his closest rival the petitioner herein. The net effect of the above scenario is that the allegation that there were two sets of results would not change the overall outcome of the said election. I therefore reiterate my finding that the petitioner did not discharge the burden of proof in respect to the claim that there were two sets of results declared by the 2nd respondent.

Unlawful and Improper Returns

52. The petitioner's case was that there were several anomalies or irregularities in the statutory forms that were used in the declaration of the election results. He highlighted the alleged anomalies as follows:

- a) **Forms 35As that were not signed by his agents.**
- b) **Forms 35As that were not signed by presiding officers.**
- c) **Forms 35As that were not stamped with the official IEBC rubber stamp.**
- d) **Forms 35As that had alterations that had not been counter signed.**
- e) **Forms 35As that lacked security features**
- f) **Forms 35As that had errors**
- g) **Forms that had incorrect figures that did not tally**

Forms not signed by agents.

53. The petitioner alleged that the statutory forms 35A used in the declaration of the results were not signed by his agents thereby rendering the said returns invalid. He alleged that his agents were chased away from the polling stations. In his affidavit in support of the petition, however, the petitioner stated that his agents did not sign forms 35A in only 2 polling stations namely; Kebege Coffee Factory 1 of 2 and Public Works Yard 2 of 3. During cross examination, he testified that he did not know the names of his agents in the affected polling stations and could not tell if they were present at the polling stations at the time the forms were filled. The petitioner had the following to say during cross examination:

“At paragraph 8(a) I indicate that forms were not signed by agents. I have not submitted a list of my agents to court. I am not able to give a list of agents who did not sign the forms as they were not allowed at the polling stations.”

54. The Petitioner’s witness and alleged chief agent, Ben Mayaka (PW2), on the other hand, testified as follows on the allegation that the petitioner’s agents were denied the opportunity to sign form 35A:

” I cannot recall any agent who was denied forms 35A and I have not stated any in my affidavit..... I do not have any agent who has come here to say he was denied a chance to sign form 35A. I do not have any agent who signed an affidavit challenging the votes garnered by the petitioner in any station.”

55. In response to the petitioner’s claim that his agents were not allowed at the polling stations, the 2nd respondent testified that he did not receive any report regarding agents being denied access to the polling stations and added that some agents chose to leave the polling stations early before the conclusion of the vote tallying exercise.

56. My finding on this issue is that the petitioner did not present any concrete evidence from any of his alleged agents to confirm his claim that they were denied access to the polling stations. My take is that it was not enough for the petitioner to merely claim that his agents were denied access to the stations. The petitioner was required to prove this claim through tangible evidence and to the required standards, which I have already determined in this judgment, to be standard above the balance of probabilities. The least that the petitioner could have done in this regard was to tender the evidence of at least even one agent who was chased away from the polling station. This was not done and I therefore find that the petitioner has not laid a basis for this court to invalidate the results on the grounds that forms were not signed by his agents. Furthermore, I note that **Regulation 79 (4) of the Elections (General) Regulations, 2012** imposes an obligation on any agent who refuses or fails to sign a form to state the reasons for such refusal. The said Regulation stipulates as follows:

‘Where any candidate or agent refuses or otherwise fails to sign a declaration form, the candidate or agents shall be required to record the reasons for the refusal or failure to sign.’

57. Regulation 79 (7) and (8) of the Elections (General) Regulations, 2012 on the other hand stipulates as follows:

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

The absence of a candidate or an agent at the signing of a declaration form or the announcement of the results under sub-regulation (2) shall not by itself invalidate the results announced.’

58. Having regard to the above provisions of the **Elections (General) Regulations**, I find that failure and/or refusal by agent to sign the declaration forms, *per se*, is not a ground for invalidation of the results of the election. Moreover, it was the duty of the agents to state the reasons for their refusal or failure to sign the statutory forms. The mere fact that the forms were not signed does not mean that the results were not accurate. The petitioner needed to establish that the results contained in the said forms were not reflective of the true and accurate ballot count. A similar finding was made by Mabeya J. in the case of **Abdikam Osman Mohamed & another v Independent Electoral & Boundaries Commission & 2 others [2013] eKLR** wherein he observed as follows:-

“It is to be noted that Form 35 is prepared at the polling station and the Presiding Officer can only comply with this provision if the candidate or party agent is present at the time the results are declared. It was for the Petitioners to show that agents of their political party were present when results were declared but the Presiding Officer refused to give such agent the Form 35 when requested. Whilst it would seem PW1 met this criterion, PW3 did not. She was outside the polling station. She expected the Presiding officer to look for her and give her the Form 35. Apart from these two, there was no evidence to show which other agents of TNA and for which polling stations were not supplied with Forms 35....”

59. When faced with a similar claim in the case of **Philip Osore Ogutu v Michael Onyura Aringo & 2 others [2013] eKLR** Tuiyott J. observed thus:-

“Surprisingly, the Petitioner did not provide any evidence of the circumstances surrounding the alleged non-signing of the Forms by some agents. A remarkable feature of the Petitioner’s case is that not a single agent testified on his behalf. The reasons why all agents did not sign the Declaration Forms has to be a conjecture. The Petitioner has not laid a basis for this Court to impeach those results. At any rate the words “shall not by itself invalidate the results announced” appearing in sub regulations (6) and (7) are not idle. For results in the Form 35 to be invalidate it would have to be shown that they do not reflect a true and accurate count of the ballots. It was therefore not enough for the Petitioner to begrudge the non-signing of the forms. It was incumbent upon him to prove to this Court that the forms were untruthful and/or inaccurate. Having failed to do so, this Court is unwilling to oblige to his gesture that the results in the Forms 35 which are not signed by all agents be invalidated.”

Forms that were not signed by presiding officers

60. Closely related to the allegation that forms 35A were not signed by the petitioner's agents was the petitioners claim that presiding officers and their deputies did not sign forms in respect to Ntamocha Primary School 2 of 2 and Nyamiobo SDA Primary School 1 of 1 polling stations. The respondents' case was that the said forms were duly signed by the respective presiding officers.

61. Owing to the gravity of the claim and considering that the forms availed to the court by both the petitioner and the respondents were photocopies, the court allowed the 1st and 2nd respondents' counsel to present the original copies of the said forms in court and upon being shown the original forms, the petitioner stated as follows:-

“I can see 2 signatures of presiding officer and one Mary Nyanchoka the deputy presiding officer. Form 35A at page 24 of the 1st and 2nd Respondents bundle. Ntamochi Primary School Polling Station 2 of 2- I see signature of presiding officer and deputy presiding officer has not signed. The agents also signed including ODM agents.”

62. The 2nd respondent stated as follows in his evidence regarding the claim that the forms were not signed by presiding officers:

“I was shown the original form 35A for Nyamiobo polling station. The forms come in 6 sets/copies and all of them are originals. Each of the 6 forms have different serial numbers. The document was signed by the Presiding Officer but the photocopy is faint. I can see it was signed.”

63. Besides his confirmation that forms 35A for Ntamocha Primary School and Nyamiobo polling stations, were duly signed by the Presiding Officers, the petitioner also categorically asserted, during cross examination, that he had no complaint over the number of votes that he garnered in the said two polling stations. He stated that:-

“At paragraph 25 (affidavit) and paragraph 21 of the petition. Ntamocha primary polling station. I have no complaint on the votes I received and no agent has sworn an affidavit over how voting was conducted there. The same position applies to Nyamiobo polling station. I have no complaints and no agent has sworn an affidavit.”

64. The Supreme Court stated as follows in the case of **Nathif Jama Adam v Abdikhaim Osman Mohamed & 3 others [2014] eKLR**

“In this regard, the Petitioners did not lead any evidence that the lack of signatures or stamp of the presiding officers in Forms 35 for the above mentioned polling stations affected the outcome of the election. Further, the Petitioners did not even challenge the results that were tallied and declared at those polling stations. It is not enough for the Petitioners to merely allege and indicate failure on the part of the 1st and 2nd Respondent, but it was also essential for them to demonstrate that such failure affected the result of the election.”

65. My finding is that the petitioner's own confirmation that the forms in respect to the 2 polling stations of Ntamocha and Nyamiobo polling stations were duly signed by the presiding officers, coupled with his admission that he had no complaint over the number of votes he garnered in the two stations demystifies and settles his claim that certain forms 35A were not signed by the polling officials, I find that the claim that the presiding officers did not sign forms was not proved.

Forms that lacked the official IEBC rubber stamp.

66. The petitioner's claim was that the forms that were issued to his agents at the polling stations lacked the 1st respondent's official stamp and that for this reason, the results contained in the said forms were not verifiable. During cross examination, the petitioner confirmed that he was not present at any of the polling stations at the time the forms were being filled and that he was not responsible for the stamping of the said forms since that was the responsibility of the presiding officers. He also testified that he could not confirm if his agents were given all the forms 35A because they were not allowed at the polling stations.

67. In response to the petitioner's claim on lack of stamps on the forms 35A, the 1st and 2nd respondents produced all the forms 35A in respect to all the 89 polling stations in Bomachoge Chache Constituency which forms were all duly stamped. The 3rd respondent also confirmed that all the forms 35A that were issued to him by the 1st respondent bore the official IEBC rubberstamp.

68. This court takes judicial notice of the fact that the 1st respondent is the maker and the custodian of all the electoral materials including the statutory declaration forms. This being the case, the petitioner ought to have demonstrated that he formally obtained the forms that he produced in court from the 1st respondent. It was the 2nd respondent's testimony that any interested party was at liberty to apply for certified copies of the said forms from the 1st respondent.

69. It is noteworthy that none of the petitioner's alleged agents swore an affidavit or testified in court to confirm the petitioner's claim that they gave him the alleged forms, in which case, the source and/or authenticity of the forms which the petitioner presented in court were in doubt. This court had in its earlier ruling on the scrutiny application observed as follows:

“This case presents a scenario in which there are two sets of forms in respect to the same election, one set being the forms in the applicant's possession and the other set in the custody of the 1st respondent. The legal position however is that the 1st respondent is the maker and the custodian of all the election materials used in any election and therefore it would be a misdirection for anyone purporting to have forms that are not authenticated as having been issued to him by the 1st respondent to claim that such

forms should be taken into account in determining a sensitive case such as an election petition.”

70. I find that the source and authenticity of the forms that the petitioner claimed lacked stamps was not established. I further find that it was not open for the petitioner to obtain forms from unofficial sources only to turn around and blame the 1st respondent for lack of stamps or to claim that such forms lacked official stamps in the face of clear and uncontroverted evidence from the 1st and 2nd respondents that all the statutory forms were duly stamped.

71. Be that as it may, even assuming, for arguments sake, that some or all statutory forms used in the elections were not stamped, would that form a basis for nullification of the election results? My answer to the above question is to the negative. I find that there is no mandatory statutory requirement for the stamping of the forms which is a purely administrative function performed by the 1st respondent and which function does not translate into a statutory obligation. This is the position that has been taken by courts in several cases, the rationale being that stamping of forms is not a mandatory statutory requirement, but is instead a discretionary administrative function of the 1st respondent. In the case of **Independent Electoral and Boundaries Commission vs Stephen Mule & 3 Others [2014] eKLR** the court held:

“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. We agree with the submissions on behalf of the appellant that it is the signatures of the presiding officers and the agents that authenticate the forms 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, an invalidation of the forms 35 that did not contain the stamp.”

72. Similarly, in the case of **John Murumba Chikati v Returning Officer Tongaren Constituency & 2 others [2013] eKLR**, Gikonyo J. while commenting on the issue of unstamped forms 35's observed

“What about Form 35 which had not been stamped? The court takes the view that affixing the official stamp is important, but, lack of it does not invalidate the Form. The requirement of the law under regulation 79 of the Elections (General) Regulations, 2012 (hereafter General Regulations) is that the Presiding Officer signs the statutory Form. Under Regulation 5 of the General Regulations, Presiding Officer includes the Presiding officer and Deputy Presiding Officer duly appointed by IEBC. The statutory Form is valid once it has been signed by the Presiding officer; both the Presiding Officer and the Deputy Presiding Officer or by either of them. The Forms were signed by the Presiding Officers appointed for the polling stations in question and therefore, lack of the official rubber stamp does not invalidate the Form or the results thereto.”

73. Taking a cue from the above cited decisions, I find that the claim that the statutory forms were not stamped was not only not proved to the required standards or at all, but further, that such lack of stamps, *per se*, cannot be a ground for nullification of an election.

74. Regarding the authentication of results, courts have held the view that the signatures of the presiding officers and the available agents (not all) are sufficient to authenticate a form. (See **William Kinyanyi Onyango v Independent Electoral and Boundaries Commission (IEBC) & 2 others [2014] eKLR**)

75. In the present petition, the petitioner conceded that the results/information contained in the forms that he claimed were not stamped was exactly the same as the results contained in the stamped forms that were produced by the respondents. The petitioner did not contest any of the results contained in the said forms as his main point of dispute was the lack of stamps. I note that the petitioner did not demonstrate how the lack of stamps affected the results contained in the said forms. Furthermore, the Petitioner did not challenge the results that were tallied and declared at the polling stations where he claimed that the forms had not been stamped. In fact, in almost all the instances, the petitioner confirmed that he did not have any problem with the votes that he garnered at the polling stations. It is therefore apparent that the claim that the forms lacked stamps was an allegation made for its own sake. My take therefore is that it is not enough for the petitioner to merely allege and indicate a failure on the part of the 1st and 2nd Respondent, but it was also essential for him to demonstrate that such failure affected the result of the election.

Lack of security features and serial numbers.

76. The petitioner claimed that the statutory forms used in the declaration of results lacked security features. He did not however state the particulars of the said security features or if their presence on the forms was a mandatory legal requirement. The petitioner stated the as follows on the issue of security features:

“I have not seen the contract signed by the printers of forms 35A and B, and the IEBC. I have never seen the contract so as to know what was agreed on in terms of security features. I have never read the contract so as to know what a watermark is.”

77. On his part, the 2nd respondent maintained that all the statutory forms bore the requisite security features which he stated included serial numbers, watermarks and IEBC logo. **Regulation 77 of the Elections (General) Regulations 2012** stipulates as follows:

(1) At the counting of votes at an election, any ballot paper

(a) which does not bear the security features determined by the Commission;

(b) on which votes are marked, or appears to be marked against the names of, more than one candidate;

(c) on which anything is written or so marked as to be uncertain for whom the vote has been cast;

(d) which bears a serial number different from the serial number of the respective polling station and which cannot be verified from the counterfoil of ballot papers used at that polling station; or

(e) is unmarked, shall, subject to sub regulation (2), be void and shall not be counted.

78. From the above regulation, it is clear that the requirements for security features is only in respect to ballot papers which in my humble view, shows that the placing of security features on statutory declaration forms was not a mandatory statutory requirement the lack of which could result in the invalidation of an election. I find that the placing of security features on the statutory forms was an administrative act done at the discretion of the 1st respondent incapable of creating a statutory obligation or compromising the outcome of the said election.

79. The Petitioner further alleged that the serial numbers of the forms supplied to him did not match with the ones on the forms held by the 1st Respondent. He stated as follows in his evidence before the court:-

“At paragraph 8(a) the serial number of forms not complying with the duplicate supplied to us. I was not the one issuing the forms, I do not know the source. The original and copies are supposed to bear the same serial numbers.”

80. The 2nd respondent, on his part, explained the difference in the serialization of the forms thus:-

“IEBC gave two booklets in form A series e.g. for M.P had 2 booklets, each booklet had 6 leaflets. Each leaflet had different serial numbers in a progressive fashion e.g. MAOO1, MAOO2, MAOO3-4, 5, 6. So if the presiding officer fills the leaflets there is no way the form given to the agent can have the same serial number as the one put up on the door”

81. The 2nd respondent further stated that:-

“for IEBC all the forms 35A serial numbers are originals on their own they are not duplicate....forms 35A have running serial numbers”

82. My finding is that the 2nd respondent gave a satisfactory and reasonable explanation on the variance in the serial numbers on the statutory forms at the polling stations. The petitioner did not establish that it was a legal requirement that the forms must bear the same serial numbers or that the integrity of the results was affected by the difference in the serial numbers. The Petitioner did not challenge the results in those forms and a reasonable explanation was given as to why the forms have different serial numbers. I find that the allegation that the forms had different serial numbers is not a ground for nullification of the election.

Forms that had alterations that were not countersigned.

83. The petitioner alleged that there were alterations made in forms 35A from 7 polling stations, which alterations had not been countersigned. The 2nd respondent conceded that indeed out of all the 89 polling stations in Bomachoge Chache Constituency only 5 polling stations had forms with alterations. He listed the affected polling stations as:

- **Nyamonyo Farmers’ Cooperative Society.**
- **Getare Primary School**
- **Tendere Primary School 2 of 3**
- **Rianchogu Primary school 1 of 1**
- **Nyakenyerere Primary School 1 of 1**

84. While conceding to the said alterations, the respondents argued that they were made in good faith and with a view to correcting errors that were apparent on the face of the said forms and further that the alterations did not adversely affect any of the candidates to the said election. The petitioner conceded that he did not contest the results contained in the said forms with alterations.

85. The petitioner testified as follows over his results from Tendere Primary school and Nyamonyo Farmers’ Cooperative Society Polling Stations:

“I do not have any problem with the votes I got at Tendere and no agent has sworn an affidavit over that station... In Nyamonyo, I have no dispute in the number of votes I got at that station.”

86. Having found that the petitioner did not contest the results from the 5 polling stations where he claims there were alterations, I find that the 1st and 2nd respondents were vindicated from any ill motive in making the said alterations and further that it was not proved that the alterations affected the declared results significantly or at all. I am satisfied with the 2nd respondents’ explanation that the alterations were made in good faith to correct errors that were apparent on the face of the record and that failure to countersign the alterations was an excusable lapse or administrative error on the part of the 1st and 2nd respondents. I am guided by the decision in the case of **Nicholas Kiptoo Arap Korir Salat Vs Independent Electoral and Boundaries Commission & 7 Others, Civil Appeal Number 228 of 2013** wherein Gatembu J. A, while quoting the decision in **John Fitch Vs Tom Stephenson & 3 Others, QBD (2008), HC 501** held as follows:-

“...the Courts will strive to preserve an election as being in accordance with the law, even where there have been significant

breaches of official duties and election rules, providing the result of the election were unaffected by those breaches. This is because, where possible, the Courts seek to give effect to the will of the people...'

87. I further find that, even assuming this court was to find that the alterations were not made in good faith with the consequence that it disregards the results from the all the 7 polling stations listed by the petitioner in the petition, the outcome of the election would still not change since a calculation of the total number of votes cast in the said polling stations would come to a total of 2,443 votes only yet the margin of votes garnered by the 3rd respondent as against the petitioner who came 2nd in the said election was, as I have already found in this judgment, 15,360 votes. In other words, the 3rd respondent would still emerge the winner in the said election even if the votes in those affected polling stations were to be disregarded or added to the petitioner's votes. A similar finding was made in the case of **Jackton Nyanungo Ranguma Vs Independent Electoral and Boundaries Commission & 2 Others Election Petition No. 3 of 2017 (2017) eKLR** wherein the court observed as follows:-

“At the end of the day, the failure to record the results of the 5 polling stations within Kisumu East Constituency on Form 37B and Form 37C would not in any way affect the results as the petitioner was the winner of the election even assuming that the petitioner would have garnered all the votes in those stations. Applying the provisions of section 83 of the Act, I find that these irregularities would not have affected the ultimate result given the margin of votes and the fact that the irregularity occurred in only 5 out of over 1000 polling stations in the County.”

Forms with figures that were not tallying.

88. The petitioner's further claim was that there were several polling stations where the figures contained in the statutory forms declaring the results were not tallying. At the hearing, it was established that out of all the 89 polling stations within the Bomachoge Chache Constituency only 6 polling stations had incorrect entries in the respect to the total number of valid votes cast. It is worthy to note that the error was in the calculation/addition of the total number of valid votes cast and that the error did not affect the entries on the votes garnered by each candidate in the election contest.

89. At paragraph 22 of his affidavit in support of the petition, the petitioner listed the affected polling stations as follows:

- i) Sengera Girls' High School 1 of 2**
- ii) Riteke Primary School 1 of 2**
- iii) Nyataro Primary School 1 of 2**
- iv) Gakero Primary School 1 of 1**
- v) Nyamaonde Primary School 2 of 2**
- vi) Nyagesa Primary School 2 of 3**
- vii) Nyansara Primary School 1 of 1**
- viii) Rianyakwara Primary School 1 of 1**

90. From the above listed stations, I note that the forms in respect to five stations namely; Sengera, Riteke, Nyataro, Gakero and Nyamaonde were, by an order of this court made on 21st November, 2017, expunged from the court record thereby leaving only 3 polling stations for determination on the claim that the votes did not tally. I have carefully perused the forms 35A in respect to the above listed polling stations and I note that the error was on the entries at the section shown as “total number of valid votes cast”. I find that the error was in the addition of the total number of votes cast which error did not affect the votes garnered by the individual candidates in which case, no candidate benefitted from the defect in the calculation. Indeed, the figures that were ultimately transferred from forms 35A to 35B were the actual votes garnered by each candidate which remained constant and unaffected by the error made in form 35A in respect to the total number of valid votes cast.

91. During cross examination, the petitioner conceded that he did not have any problem with the votes that he garnered in the affected polling stations when he testified as follows:

“from all the stations mentioned in paragraph 22, I do not have any complaint on the votes garnered by each and every candidate except that the vote do not tally. No agent from those polling stations has filed an affidavit from those stations complaining of the votes. Paragraph 23 of my Affidavit, no agent has complained about the results in Rianyakwara. I do not have a complaint on the votes I received there. No agent has complained about the votes in that station. In respect to public works yard. I have no complaint and no agent has sworn an affidavit over it.”

92. On his part, the 3rd respondent testified as follows over the errors in the tallies:

“I acknowledge the errors in entries in 5 polling stations which errors did not affect the results or suggest any foul play-the errors were purely mathematical and did not take away or add the votes-the errors did not take away the will of the people. The affected polling stations are Sengera Girls High School polling station (expunged from the record), Riteke Primary

School, Nyataro Primary School (expunged from the courts record), Nyagesa Primary School and Nyasara Primary School (expunged from the record). The error was NOT on the individual candidates tally.”

93. My finding is that even though there were errors in tallying the total number of valid votes cast, the said anomaly did not change the number of votes garnered by each candidate and could therefore not alter the outcome of the election. My humble view is that these were errors that could mainly be attributed to fatigue or lack of concentration by the polling officials who had to handle numerous documents, entries for overly long hours. In the case of **Joho V Nyange & Another (No. 4) High Court at Mombasa Election Petition Nos. 1 and 2 of 2005** Maraga J. (as he then was) held that:

“Errors are to human. Some errors in an election like this conducted under a frenetic schedule are nothing more than what is always likely in the conduct of any human activity. If they are not fundamental they should always be excused and ignored. But where deliberate irregularities or forgeries are committed different considerations come into play. In either case, however, serious consideration should be given as to what effect if any, that those errors whether innocent or deliberate, have on an election before the same is vitiated.”

94. I am further guided by the decision in **Wavinya Ndeti v Independent Electoral and Boundaries Commission & 4 others [2013] eKLR** wherein, faced with a similar scenario, the court held:

“The other figures in the Part A of Form 35 require reconciliation of the votes cast vis-a-vis the other numbers. Thus to obtain the total valid votes cast, the rejected and disputed votes will be subtracted from the total votes cast. This mathematical exercise, carried out in dead of night or the wee hours of the morning, when the officers are tired and agents weary may lead to mistakes.”

95. In the same **Wavinya Ndeti** case (supra), the court further observed:

“An election is a human endeavor and is not carried out by programmed machines. Perfection is an aspiration but allowances must be made for human error. Indeed the evidence is clear that the counting and tallying was being done at night and in less than ideal conditions hence errors which were admitted were bound to occur particularly in tallying of the results. What is paramount is that even in the face of such errors, whether advertent or otherwise, it is important that the ultimate will of the electorate is ascertained and upheld at all costs”

Other matters/allegations that were raised.

Petitioner’s witness- Ben Mayaka

96. The 3rd respondent objected to the admissibility of the evidence of the petitioner’s witness and alleged chief agent, Ben Mayaka (PW2), on the basis that he was unable to produce the requisite documents to show that he was an agent. The respondent’s case was that PW2 did not produce crucial documents in support of his claim that he was the petitioner’s chief agent.

97. Section 2 of the Elections Act defines an agent as a person duly appointed by a political party or independent candidate and includes a counting and tallying agent. **Regulation 2 of the Elections (General) Regulations 2012** defines an agent as:

“a person appointed under Section 30 of the Elections Act. The agents are required to take an oath of secrecy prescribed in the third schedule to the Act.”

98. **Regulation 62(1) of the Elections (General) Regulations, 2012** provides that only authorized agents were to be allowed into polling stations. It provides that:-

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. Authorized agents;**

99. From the above provisions, it is clear that only political parties are allowed to appoint agents to cater for their interests at the polling stations or the tallying centres. The Petitioner conceded, during re-examination, that he was nominated by the ODM party to contest in the said elections and that the ODM party agents were not denied access to the stations. He stated as follow:-

“...only party ODM agents were allowed....The party agents were taking care of the interest of the party.”

100. **Regulation 62(4) of the Elections (General) Regulations, 2012** requires agents to display their official badges supplied by the commission. **Regulation 74(1) of the Elections (General) Regulations** requires candidates and political parties to submit the names and letters of appointment of the agents to polling stations. Only authorized agents are allowed to gain access to the tallying centres pursuant to the provisions of **Regulation 85(1) (e) of the Elections (General) Regulations, 2012**. From the above regulations, it is clear that to be an authorized agent and therefore liable to be admitted to a polling station or tallying Centre, one must demonstrate that:

i. The person was duly appointed as an agent of a candidate or party and has a letter of appointment

ii. The person must have sworn an oath of secrecy

iii. The person must have been issued with a badge by the 1st Respondent

101. During cross examination PW2 stated:-

“I have not attached my letter of appointment as a chief agent to my affidavit..... I know that only people who have appointment letters and accreditation can be given form 35B (paragraph7) I do not have my letter of appointment here.”

102. My finding is that Ben Mayaka was not a credible witness because he did not establish that he was a duly appointed agent in the impugned elections. I therefore find that his affidavit and testimony before the court had no probative value to this case. In the case of **Dickson Mwenda Kithinji v Gatirau Peter Munya & 2 others [2013] eKLR** the court observed:

“.....In her affidavit she had referred to an annexure being letter of appointment showing she was an agent, yet the same was not annexed at all. In view of the witnesses’ failure to attach such an important document in a serious matter as this one, to confirm that she was an authorized agent and indeed she was entitled to be at the polling station, the witness cannot be believed.”

Matters not pleaded

103. As I have already stated in this judgment, the general rule in civil cases is that parties to a case are bound by their pleadings. This rule is more pronounced in election petitions than in other civil cases because election petitions are special proceedings that have a detailed procedure and set timelines which must be strictly adhered to. The rationale behind this principle is that pleadings ensure that each party to the suit is fully aware of all the questions that are likely to be raised on time and beforehand so that they can have an opportunity to make a response and place all the relevant evidence before the court for consideration. In every case therefore, each party is entitled to know the case that he faces on time and beforehand so that he is not taken by surprise at the trial and so that he can make timely his response to it. Moreover, the court itself is also bound by the pleadings of the parties because issues for determination in a legal dispute are derived from the pleadings or statements of facts that are either admitted or denied by the opposing party in which case, the court cannot frame issues that are not arising from the pleadings. The Court of Appeal observed as follows in the case of **Vijay Morjaria-vs-Nansing Madhusingh, Hulashib Nansingh Darabar, Civil Appeal 106 of 2000:**

“A party is bound by his pleadings and must either succeed or fail within those pleadings. He is forbidden from shifting his case from that he set out in his pleadings.”

104. The Court of Appeal discussed the importance of pleadings in the case of **Dakianga Distributors (K) Ltd v Kenya Seed Company Limited [2015] eKLR** when it observed that :-

“A useful discussion on the importance of pleadings is to be found in Bullen and Leake and Jacob's Precedents of Pleadings, 12th Edition, London, Sweet & Maxwell (The Common Law Library No. 5) where the learned authors declare:-

“The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the two-fold purposes of informing each party what is the case of the opposite party which he will have to meet before and at the trial, and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial.”

105. In his submissions before this court, the petitioner stated that the form 35B that the 2nd Respondent used to declare results for Bomachoge Chache Constituency for the elections held on the 8th August 2017 was not the one provided for in the Act as he used form 34B (for Presidential Elections) which is totally different from the form provided for. This was an issue which was neither pleaded in the petition nor raised at the hearing. The petitioner’s main complaint was that the format of the form used to declare the results of the subject election differed from the format prescribed by the Elections (General) (Amendments) Regulations, 2017.

106. At the hearing, the 2nd respondent explained that there was a mistake in the subject form at the handing over section which was only applicable to Presidential, Gubernatorial, Senatorial and Women Representative seats. He stated that this was essentially the reason as to why the handing over section in the form used for the subject election was not filled and/or signed. I have perused the said form 35B used in declaring the results of the subject election and I note that all the essential elements of the form, as prescribed by the election regulations, were contained in the said form.

107. Without delving further into the nature of the alleged defect raised by the petitioner, I wish to reiterate that this was not one of the grounds listed either in the petition or in the affidavits in its support for seeking the nullification of the impugned election. My finding is that introducing the issue of the format of the form 35B at the submissions stage was a feeble attempt, by the petitioner, to inject more life into the petition by expanding its scope at the eleventh which is a move that cannot be countenanced by this court for the reasons that it is a new matter that was not pleaded and was not therefore one of the issues for determination in this petition. In any event, the petitioner did not explain how the alleged use of a different form affected the results of the impugned election.

Conclusion

108. Upon considering and analyzing all the grounds set down by the petitioner for the seeking the nullification of the election, I note that the big question that this court still needs to determine is whether the will of the electorate was reflected in the elections for Member of Parliament for Bomachoge Chache Constituency. The answer to the above question can be found in **Article 38 of the Constitution of Kenya 2010** which stipulates that:-

‘Every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors’

109. From the above Article, it is clear the will of the electorate is critical in the determination of electoral disputes. In the case of **Jackton Nyanungo Ranguma Vs Independent Electoral and Boundaries Commission & 2 Others Election Petition No. 3 of 2017 (2017) eKLR** it was observed that:-

‘Since an election is the ultimate expression of sovereignty of the people, the electoral system is designed to ascertain and implement the will of the people. Thus the bedrock principle of election dispute resolution is to ascertain the intent of the voters and to give it effect to the fullest extent while upholding the principles that underlie a free and fair election.

14. An election petition is not do-over of the just concluded election. It is not an opportunity to conduct another election through the court as every election conducted in accordance with the law is presumed valid unless it is set aside by the court.’

110. In the instant case, even though it was noted that there were a few errors, mainly in the tabulation of the results. I find that the said errors were minimal and in almost all the instances, the petitioner conceded that they did not affect the votes garnered by any of the candidates to the impugned election. I therefore find that the election was conducted within the confines of the law and that the outcome thereof reflected the will of the electorate at Bomachoge Chache Constituency.

111. **Section 83 of the Elections Act** provides that:-

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

112. In the case of **Wavinya Ndeti (supra)** the court observed:-

“That section [Section 83] of the Act is couched in negative language to emphasize the caveat placed on the election court. There is in it a rebuttable presumption in favour of the respondents that the election was conducted properly and in accordance with the law. It also implied by that provision that elections are not always perfect. Consequently, not all malpractices will lead to nullification of the result.”

113. In the case of **Mbowe v Eliufoo [1967] E.A 240** the court interpreted the phrase ‘affected the results’ as follows:-

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

114. In the instant case, I find that the petitioner did not prove that the errors he had highlighted were substantial to the extent of affecting the outcome of the results. In the case of **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR** while quoting the case of **Morgan v. Simpson (1975) 1 Q.B 151**, Lord Denning summarized the essence of Section 37 of Britain’s Representation of the People Act, 1949, which is couched in similar language to Section 83 of Kenya’s Elections Act, in three propositions:

a) If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected or not.

b) If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by breach of the rules or a mistake at the polls-provided that it did not affect the results of the election.

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

115. The Supreme Court further observed that:-

“Where, however, it is shown that the irregularities were of such magnitude that they affected the election result, then such an election stands to be invalidated. Otherwise, procedural or administrative irregularities and other errors occasioned by human imperfection, are not enough, by and of themselves, to vitiate an election. In this regard, we stand on the same plane as the learned Judges in Morgan, Opitz and Nana.”

116. In the end, I find that the subject election was conducted substantially in accordance with the constitutional principles and laws governing elections and that the flaws noted in the impugned elections were minor and insignificant to the extent that they did not materially affect the overall outcome or integrity of the election. I further find that the Petitioner has not demonstrated that he is entitled to the prayers sought in the Petition. Consequently, the Petition is dismissed and I declare that the 3rd Respondent was validly elected as the Member of Parliament for Bomachoge Chache Constituency. Accordingly, a Certificate under **Section 86** of the **Elections Act** shall issue.

Costs

117. The general rule is that costs ordinarily follow the event which means that the losing party pays the winner's costs. **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.”

118. **Rule 30 (1) of the Election (Parliamentary and County Elections) Petitions Rules** requires an election court, at the conclusion of an election petition **“to make an order specifying the total amount of costs payable and (b) the persons by and to whom the costs shall be paid.”**

119. In the case of **Kalembe Ndile and Another v Patrick Musimba and Others Machakos HC EP No. 1 and 7 of 2013 [2013] eKLR** I stated that,

“[C]osts awarded should be fairly adequate to compensate for work done but at the same time should not be exorbitant as to unjustly enrich the parties or cause unwarranted dent on the public purse or injure the body politic by undermining the principle of access to justice enshrined in Article 48 of the Constitution.”

120. The petitioner and the 1st and 2nd respondents did not make any submissions on costs while 3rd respondent urged this court to consider that he was represented by a Senior Counsel based in Nairobi who, together with his team had to make numerous trips to and from Kisii to represent him. He urged the court to take into account the time taken in prosecuting the case, the complexity and importance of the matters before court and the effort and skills invested including the research conducted. He relied on the decision in the case of **Martha Wangari Karua & another v Independent Electoral & Boundaries Commission & 3 others [2017] eKLR High Court of Kenya at Kerugoya Election Petition no. 2 of 2017** wherein the court capped the costs for the Petition at Kshs. 10,000,000.

121. **Rule 30(1) of the Elections (Parliamentary and County Elections) Petitions Rules** provides:-

“30. (1) The election court may, at the conclusion of an election petition, make an order specifying—

- (a) the total amount of costs payable;**
- (b) the maximum costs payable;**
- (c) the person who shall pay the costs under paragraph (a) and (b) and**
- (d) the person to whom the costs payable under paragraphs (a) and (b) shall be paid.”**

122. My finding is that this petition was fairly complex as it involved the advocates' perusal of several documents, mainly the statutory forms used in declaring the results in the impugned elections. Even though the issues for determination eventually turned out to be straight forward and that only 4 witnesses testified in the entire petition, it is clear that the respondents had to do a lot of research as shown in their well-researched written submissions. In determining the cap on costs, I have taken into account the time spent on research, preparation of pleadings, witnesses, applications and submissions.

123. Taking all the factors I have outlined above, the instructions fees for each party shall be capped as follows; **Kshs. 2,000,000/00** for the 1st and 2nd respondents and **Kshs. 3,000,000/00** for the 3rd respondent.

Disposition

125. The final orders are therefore as follows;

- (a) The petition is hereby dismissed.**
- (b) The respondents are awarded costs on the following terms:**
 - (i) Instruction fees for 1st and 2nd respondent are capped at an amount not exceeding Kshs. 2,000,000/00.**
 - (ii) Instruction fees for the 3rd respondent are capped at an amount not exceeding Kshs. 3,000,000/00.**
 - (iii) The costs shall be taxed and the total costs certified by the Deputy Registrar of this court.**

(iv) The certified costs awarded shall be paid out of the security deposit on a pro-rata basis.

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

124. Finally, I wish to extend this court's most sincere gratitude to all the parties and advocates who appeared before me in this petition. The advocates exhibited exemplary conduct, high standards of professionalism and decorum that ensured that the petition proceeded in a seamless fashion from its inception to the end. This court notes that it is the advocates' diligence, resourcefulness and remarkable appreciation of the law and the facts of the case that facilitated the expeditious disposal of the Petition.

Dated, signed and delivered in open court this 22nd day of February 2018

HON. W. OKWANY

JUDGE

In the presence of:

- Mr. Nyaberi & Oonge for the Petitioner
- Mr. Omwega for Miss Olando for the 1st& 2nd Respondents
- Mr. Kaburi for Omogeni Senior Counsel for the 3rd Respondent
- Omwoyo: court clerk