



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

LENNY MAXWELL KIVUTI.....PETITIONER

VERSUS

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION (IEBC).....1ST RESPONDENT

THE EMBU RETURNING OFFICER.....2ND RESPONDENT

MARTIN NYAGA WAMBORA.....3RD RESPONDENT

DAVID KARIUKI.....4TH RESPONDENT

JUDGMENT

1. The petition herein was filed on 25th August 2017 by Lenny Maxwell Kivuti, herein after referred to as the petitioner, to challenge the declaration of Martin Nyaga Wambora, hereafter referred to as the 3rd respondent, as the Governor of Embu County in the general elections conducted on 8th August 2017. The other persons named as respondents in the petition are the Independent Electoral and Boundaries Commission (1st respondent), the Embu County Returning Officer (2nd respondent) and David Kariuki (4th respondent). The results declared were –

- (a) Cyrus Njiru - 2352
- (b) Kiragu Kithinji – 50440
- (c) Lenny Maxwell Kivuti - 96775
- (d) Leonard Muriuki Njeru - 2022
- (e) Martin Nyaga Wambora - 97760
- (f) Peter Njagi Njuki – 981.

2. The petitioner avers that the process of casting of ballots in respect of the gubernatorial election in Embu County on 8th August 2017 was smooth and peaceful, but alleges that the counting and tallying process was characterised by such irregularities as inflating of results in favour of the 3rd respondent, swapping of lower results for the 3rd respondent with the petitioner's or the other candidates, submission

of doctored or fraudulent results, tampering with Forms 37A at the tallying centres to reflect fictitious figures, submission of Forms 37A which had not been signed by agents, the barring of his agents from participating in the counting and tallying of ballots at polling stations, among others. It is pleaded that the counting of the votes was undertaken in a manner that contravened section 38A of the Elections Act, regulation 69(2) of the Election (General) Regulations 2012 and Article 81 of the Constitution. The petition seeks four principal prayers: a re-tally of the votes cast in two polling stations within Mbeere South Constituency, scrutiny and recount of all the votes cast within Manyatta and Runyenjes Constituencies with particular emphasis on the polling stations mentioned in the prayer, nullification of the results declared and a declaration that the petitioner was the validly elected Governor of Embu County.

3. The 1st and 2nd respondents filed a joint response to the petition, dated 11th September 2017. They deny the allegations made in the petition, and assert that they conducted the gubernatorial election for Embu County in accordance with the relevant law. The 3rd and 4th respondents, in their separate responses to the petition, dated 26th September 2017, assert that the election was conducted in a free and transparent manner, and that they were validly declared as victors after the proper counting of the votes.

4. The oral hearing commenced on 23rd November 2017. The petitioner was the first on the stand. He asserted that he won the gubernatorial elections held on 8th August 2017 and believed that his election was stolen. He stated that he had no problem with the voting process as he believed that the same went smoothly, but the counting of votes and the tallying thereof were erroneous in a gross way. He said that the totals announced by the 2nd respondent exceeded the number of registered voters by far. For instance in respect of Runyenjes Constituency, he said the total votes cast as announced were 129, 652 while the registered voters were only 86 977, meaning that the total votes cast exceeded the registered voters by 42 675. He also testified that the 2nd respondent announced that the total votes cast in Manyatta Constituency in the gubernatorial election were 105 700, yet the registered voters stood at 99, 339, meaning that there was a difference of 6 361 votes. He also stated discrepancies between the figures appearing on the portal and those announced by the 2nd respondent. The portal allegedly showed the 3rd respondent leading with 97 544 votes with the petitioner following with 96 597, as against the figures of 97 760 and 96 775, for the 3rd respondent and the petitioner respectively, announced by the 2nd respondent. He also cited discrepancies in Forms 37A and 37B, as between what was announced and what was recorded in polling stations. He said he saw presiding officers altering Forms 37As at Kangaru School. He also stated that the total votes cast for Governor exceeded those cast for Woman Member of Parliament and for Senator. He put the difference between the total votes for Governor and Woman Member of Parliament at 10 638. He testified that many Forms 37As were not stamped. He asserted that if the court allowed a recount of the votes he would emerge victorious. He stated that he had done his own tally which indicated that he would win with 97, 286 votes followed by the 3rd respondent with 96 717 votes. He urged the court to allow recount so as to get the actual totals. He stated that he wanted a scrutiny to establish the state of the electoral materials and thereafter a recount to get the actual totals. He said the truth lay with the ballots in the tamper proof envelopes. He said that he believed that 426 polling stations were affected. He stated that all the evidence that he placed before the court was geared to seeking recount to get to the truth of the votes cast and the correct results. He said that to the best of his knowledge, he had won the election, but his victory was taken away on account of errors, and that he was asking for a recount, verification and re-tallying of the votes and a declaration by the court of the results.

5. The other aspect of the petitioner's evidence touched on his agents. He testified that his agents went through enormous pressure and intimidation between 8th August 2017, that is the day of the actual voting, and 11th August 2017, the day of declaration of results. He asserted that he and his agents were subjected to a lot of discrimination, particularly by being denied copies of Forms 37A. He said that in many polling stations, his agents were denied a chance to sign Form 37A, yet the 3rd respondent's agents would be allowed or even only one agent would be allowed to sign. He stated that he wrote to the returning officer for Manyatta Constituency, after it proved difficult to talk to her, to request for copies of Forms 37A, but she declined to receive the letter and was told by her to go to court if he was aggrieved. He also said that his chief agent for Manyatta Constituency tried to sign Form 37B but he was denied the opportunity as

the form was grabbed from his hand. He also stated that some of the forms were signed by persons who purported to be his agents, yet they were not. He said that he had a list of genuine agents. He asserted that the 'fake' agents were meant to authenticate 'fake' Forms 37A. He stated that it was his agents who furnished him with copies of the unsigned Forms 37A attached to his petition, as well as those signed by one agent and those signed by the 'fake' agents. He stated that he had given his agents notes where they recorded the results as announced by the presiding officers.

6. The witness then went through the Forms 37A to point out the polling stations which had issues. He pointed out, for example, polling stations where he said the same returned similar results, suggesting that there was manipulation of the results. Those cited included Karau Primary School, Embu Urban Primary School, Munyori Primary School, among others. He asserted that statistics do not work that way and that that was evidence of doctoring of the results, and said that it was on that basis that he sought recount to establish the truth. He also pointed out the polling stations where he said the relevant forms had not been signed. These included Kareri Primary School, Githagare Primary School, Ndatu Catholic Church grounds, Thikima Coffee Factory, Kauga Tea Buying Centre, Itabua Primary School, among others. He stated that the significance of the unsigned of the forms was that the results were not authenticated and he wanted recount and re-tally so as to remedy the situation. He also pointed at polling stations where he allegedly lost votes and where the 3rd respondent was given votes he had not earned. These included Githunguriri Tea Buying Centre, Embu County Primary School, Gategi Primary School, Karau Primary School, Embu Municipal Stadium, St Andrews Primary School, Mikimbi Full Gospel Church grounds. He asserted that the total effect of the errors in Forms 37A and 37B was that his votes would increase by 817 votes and the 3rd respondent's votes would reduce by 615 votes, reducing the margin between them to 168 votes. He stated that there were votes recorded by his agents that were not reflected in Forms 37A and if those were taken into account he would be ahead of the 3rd respondent by 569 votes. He also pointed out polling stations where he alleged that Forms 37A had been altered. These included Embu County Primary School, Kirimari Boys Secondary School, Minai Coffee Factory, Muvandori Primary School, Ndatu Catholic Church grounds, Gichago Coffee Factory, Gikirima Coffee Factory, Kathugu Primary School, and St Michael's Primary School, among others.

7. During cross-examination by Mr Kibicho for the 1st and 2nd respondent, the petitioner asserted that he did write to the elections officials asking for copies of the relevant election results forms and raise issues with them over the irregularities that he had noted, but his efforts were rebuffed by the officials. He asserted that he had issues with 426 polling stations. He conceded that he had no problem with the voting process, which he said went smoothly, but insisted that his problem was with the total votes announced. He further said that he had no problem with the votes in the ballot boxes. He averred that his agents were entitled to be given copies of Forms 37A and 38B. When he was showed Forms 37A and 37B for Kamviu Primary School, Githunguriri Tea Buying Centre, Karau Primary School and Igumo Catholic Church grounds, he conceded that there were errors across the board where all the candidates lost votes or were credited votes they had not garnered during the transposition of the results from Form 37A to Form 37B. He conceded that the ballots for the gubernatorial election were counted last after the Presidential, Member of Parliament, Member of County Assembly, Woman Member of Parliament and Senator, and that that exercise usually started in the small hours of the morning of the next day. He conceded that the staff involved would work long hours and would by then be exhausted and could make mistakes in the process. He asserted that he was in court because of such mistakes so that if any were made then they could be corrected. He asserted that the 1st and 2nd respondents inflated results for the 3rd respondent, saying that the damage done to him was greater than that done to the other candidates, but conceding that in some stations results were inflated to his favour. On his agents, he was shown forms in respect of Embu County Primary School, Gathangariri Nursery School, Kivangua Coffee Factory, Kithegi Coffee Factory, among others, he conceded that some forms were indeed signed by his agents, but added that he needed to go back to his records to confirm whether some of the names appearing in the forms were for his agents. He asserted that in some cases his agents were chased away. He conceded, when confronted with material, that some of the agents he had denounced were actually his genuine agents. On swapping of results, he started that he was referring to the discrepancy between the results in the records held by his agents and those reflected in the forms prepared by the officials of the 1st respondent. He said that his agents were intimidated by presiding officers, even though he did not mention any of them by name. On

the KIEMS kits, he said that he was not sure if he was interested in them, as the same had be removed and he did not think that the data in the kits would be relevant. He asserted that he was only interested in the ballot boxes. He said that he had abandoned the allegation that the officials of the 1st respondent had put water in ballot boxes after the elections body had explained what had happened and after establishing that the ballot papers were stored in tamper proof envelopes. He said he was confident with the integrity of the electoral materials. He testified that his petition was about numbers. He said that according to his tabulation he had won the election by a margin of 569 votes, after taking into account the votes given to the 3rd respondent by error and the votes that he and the 3rd respondent had been denied by error.

8. The petitioner was cross-examined next by Mr Ahmednassir for the 3rd respondent. He conceded that the voting phase of the elections was peaceful, there was no violence and that whoever was entitled to vote voted. He said that none of his supporters were denied a chance to vote. He asserted that his problem was with the counting and tallying of votes. He said that there were irregularities with the transposition of results from one form to the next, which, in his view, amounted to fraud or rigging or illegal manoeuvring. He said the results declared were wrong. He said he could not tell how many votes the 3rd respondent garnered, except that he had lost to him, adding that that could only be known after a recount. He denied that after a recount the 3rd respondent would still win by 530 votes. He stated that he had listed polling stations in his petition where results were exaggerated; another list was of cases where votes were swapped and the other where the results were doctored. He stated that he did not believe that more people voted than were in the registers in Manyatta and Runyenjes Constituencies, saying that it was not possible that 42 000 people voted who were not on the register of voters. When shown records of the 1st respondent, he conceded that the persons who voted in the two constituencies were less than the number of registered voters. He said that in a number of polling stations the candidates were given similar number of votes, and stated that that was evidence that the numbers were made up. He cited a number of such stations, which he said included Munyori Primary School, Kaweu Primary School, Ugweri, Gatundu Coffee Factory, Kirigi Primary School, Gatunduri Primary School, Ndumari Primary School, among others. He said he had issues with 426 polling stations; his complaint being that the counting and tallying was not done properly. He asserted that going by the records from his agents, he should have won by about 570 votes. He said that the results from his agents were not ‘cooked’ and he did not want to be declared winner based on them. He said he would not be satisfied with an audit based solely on Forms 37A, 37B and 37C; but with a recount. He said he would also like to be declared the winner based on the results of the recount.

9. He was cross-examined next by Mrs Rugaita for the 4th respondent. He said that he was seeking recount only in three constituencies, that is to say Manyatta, Runyenjes and Mbeere South. He stated that he left out Mbeere North as he did not get enough material to establish issues there, although he did not mind a recount in the entire County. He said that he was not saying that no errors were committed in Mbeere North. He testified that he could not recall any of his agents being denied entry to a polling station In Mbeere North. He confirmed from material placed before him that his agents were present in the relevant polling stations. He also appointed out what he referred to as alterations on forms in respect of specific polling stations placed before him by Mrs Rugaita. He stated that although a polling official was at liberty to rectify any error that comes to his notice, the same must be done in the presence of the agents, failing which the same would amount to mischief. He said the errors apparent from the forms that he was confronted with were all human, and were correctable through a recount. In his view they affected the final tally. .

10. The petitioner called several of his agents to the witness stand. The first was Kenrodgers Munene Njiru. He was an agent of the petitioner at Embu County Primary School Stream 1. He said that the voting went well and there were no complaints. He was present at the counting, which he said was done professionally and there were no complaints. He said he was happy with the exercise. He noted the results declared by the presiding officer in his notebook. He signed the Form 37A for that polling station, and the results in his notebook tallied with what was in the form. He was followed by Justa Wawira Mwaniki. She was the petitioner’s agent at the Kithunguriri Tea Buying Centre. She was at the centre from the time it opened right up to the time counting was done and results declared. She testified that the voting went on well, no one complained and according to her the 1st respondent did a good job. The counting was

completed at 5.00 a.m she recorded the results declared in her notebook, and was given Form 37A to sign and she signed the same. She said that it was given to her without difficulty. She said that the total number of votes cast in all the six elections was 334. Selesia Muthua came next. He was the petitioner's agent at Karau Primary School. He said he made notes of the results as declared by the presiding officer at 9.00 a.m, and what he recorded tallied with what was in Form 37A. He stated that he did not sign Form 37A, although the same had in the column for agents his name. He said that he was not the Selasia Kinyua who was indicated in the form as having signed the same. He said he was the only agent from the petitioner's party at that station, and denounced Luka Ngoroi Njeru who had been listed in Form 37A as having been present as agent for the petitioner's political party. He said that 512 persons voted for the other five seats, save for Governor where 504 persons voted. Joseph Njiru Munene was the petitioner's witness at Mwenendega Primary School polling station stream 1. He said that he recorded the results in his notebook, but they differed with what was recorded in Form 37A, where the 3rd respondent was recorded as having scored 3 more votes than what had been announced. He said that although Form 37A indicated that he had signed the form, the actual position was that he never signed. He testified that he had asked the presiding officer to give the form to him to sign, but he was told to wait, and he eventually did not get to sign it. He also said that according to his notes 444 electors voted, but the Form 37A puts the figure at 455. He asserted that he was present when the results were declared and that the results in his notebook was what was announced and not what was in Form 37A. Purity Mumbi Guthiga was the petitioner's agent at Kagaari primary School polling station stream 2. She said that she did sign the Form 37A for that station, although her name was not reflected in the forms that the 1st respondent filed in court. She stated that the results in the form she signed tallied with the notes she took at the declaration of results, but the one filed in court had different results where the petitioner's votes were reduced by 9. Robert Njue Kirembui was the petitioner's agent at Kianjokoma Primary School polling centre. He stated that he signed Form 37A although the one filed in court did not bear his name. He said the results reflected in the form tallied with his notes save for the votes recorded in favour of the 3rd respondent. He said that although the form indicated the 3rd respondent as getting 336 votes in actual fact he got 186 votes or thereabouts. Catherine Nyaga was the petitioner's agent at Embu Municipal Stadium Primary School stream 3. She recorded the results declared in her notebook although she did not sign Form 37A, which she said she asked for but was not given. She got a copy from a friend, which had the same results as those in her notebook. Gladys Njoki Mwaniki was the petitioner's agent at Ena Primary School polling station stream 3. She testified that she recorded the results declared in her notebook and signed the relevant Form 37A. She however denounced the Form 37A filed in court by the 1st respondent, and also denounced the signature in the document purported to be hers. She asserted that the results reflected in Form 37A before the court were not correct for the petitioner and the 3rd respondent, and that in fact what was in her notes reflected the correct position. Grace Nduku Musomi was an agent of the petitioner at Gategi Primary School polling station stream 1. She testified partially before she was stood down on account of discrepancies in her affidavit. She was not subsequently recalled, and her testimony shall therefore be disregarded.

11. Three witnesses - Ambrose Muchungi Njeru, Daniel Njue Kamunda and James Njogu Muhigi - were called to testify on the events surrounding execution of orders that were obtained in late August 2017 with respect to preservation of electoral materials. That testimony is not relevant to the matters at hand.

12. The case for the 1st and 2nd respondent opened on 15th December 2017, when the 2nd respondent, Daniel Lenarum, testified. He was the Elections Manager for Embu County, and the County Returning Officer in respect of the elections conducted on 8th August 2017. He testified that he was the one who declared the results for the gubernatorial election, which were as follows—

(a) Kithinji Kiragu - 50 440

(b) Kivuti Lenny - 96 775

(c) Njeru Leonard – 2 022

(d) Njiru Cyrus – 2 352

(e) Njuki Peter Njagi – 981

(f) Wambora Martin Nyaga – 97 760

He stated that polling took place at polling stations on 8th August 2017 without any incidents of violence, intimidation, voter bribery or of campaigns. According to him all the processes regarding voting went on well. He stated that he did not receive any request for copies of the forms used to declare results. He asserted that no fraud was practiced at the County Tallying Centre, and that Form 37C was generated from Forms 37B received from the Constituency Returning Officers. He stated that he had no authority to change the results as reflected in Forms 37B. He said that from the Forms 37B submitted by the returning officer for Manyatta and Runyenjes Constituencies the total valid votes did not exceed the total registered votes for those two constituencies. Fewer people voted than those registered in the two constituencies. He denied that 42 000 persons voted in excess of those registered to vote. He said that for Runyenjes Constituency, there were 86 977 registered voters and out of that number 71 195 voted. For Manyatta, he said that there were 99 339 registered electors, out of which 79 964 voted. He said that there were minimal errors in the transposition of results from Forms 37A to Forms 37B. He explained that the same were clerical errors that could not affect the results that he declared. He denied inflating the numbers or exaggerating or changing them to favour the 3rd respondent. He also denied swapping results or doctoring them, saying that what he announced was what he received from the constituencies which he aggregated to generate Form 37C. He said that there could be a variance between the results for Governor and Woman Member of Parliament, but not to the extent of 10 000 votes as alleged by the petitioner.

13. During cross-examination by Prof. Ojienda for the petitioner, and upon being confronted with the results declared for elections of Governor and Woman Member of Parliament the witness conceded that the difference between the two was over 10 000 votes. He explained that the same may have been on account of stray ballots from the other election she said that he was not informed of mistakes from transfer of materials from Forms 37A to 37B; but he did notice some disparities after the petition was filed. He said he was not aware of the specifics. He stated that Form 37B for Gategi Primary School polling station had an arithmetical error to the extent that it reflected the 3rd respondent as having garnered 482 votes there instead of 82 votes. He said he did not deal with Forms 37A for the constituency returning officers were only required to submit Form 37B only. He said he had no responsibility to go through Forms 37A and had not been briefed of any errors in them. He explained that the errors might have been occasioned by fatigue on the part of the election officials. He opined that the errors could be cured through re-tallying. He said that he had received no reports about alterations on Forms 37A, nor that some forms had not been signed by the agents, nor that they had been signed by fake agents, nor that some of the forms had not been signed by the presiding officer. He explained that after filling in the forms, the presiding officers are required to stamp them with an official stamp of the 1st respondent and the forms would be authentic if not signed by the presiding officer but are signed by the agents. He denied that some polling stations posted results that were similar to those in neighbouring polling stations. He conceded that some Forms 37A were not signed by agents of the petitioner, but asserted that they were signed by the agents who were present and who happened to be from other political parties.

14. The second witness for the 1st and 2nd respondent was Amina Shakur Jarso, the Returning Officer for Runyenjes Constituency in the elections conducted on 8th August 2017. She testified that the said elections were conducted in accordance with the law. She said that she was not aware of any person who was entitled to vote who was denied a chance to do so. She said that she did proper tallying after voting came to an end, and that she did not inflate figures in favour of the 3rd respondent, neither did she swap results nor doctor them. She further denied that more persons voted than were in the register of voters for the constituency in question. She said that according to her records Runyenjes Constituency had a total of 86 977 registered voters, out of which 70 452 voted in the gubernatorial election, meaning that some 16 000 or so electors did not participate in the election. She stated that after going through her records after the filing of the petition she noted only one error, in Ugweri polling station stream 3 where the petitioner had been given 8 extra votes. She said she wanted that error corrected.

15. During cross-examination, she conceded to the error at Ugweri polling station and stated that that was

the only error she was aware of. She declared the results with the error. She stated that she could not alter the record from the presiding officers. On agents she said that she had briefed them, but it was not her responsibility to ensure that they were in attendance throughout. She said that her advice to presiding officers was that in the event an agent was absent, they ought to make a record of that and proceed to declare results, saying that results ought not to be withheld until all the agents had signed. She further stated that she did not inflate the results in favour of any of the candidates. She stated that she could not authoritatively talk about what transpired at the polling stations as she was not there and that she only dealt with Forms 37A as brought to her from the polling stations. She said that she was unaware of any alterations on Forms 37A, and further there was no significant difference between the votes cast in the gubernatorial election and those cast for the Woman Member of Parliament. She said that she declared the election results in the presence of agents, but the agent for the petitioner refused to sign the relevant form. She said that she asked him to but he refused to sign, although he did not object to what was going on. However, thereafter he began to say that she had refused to give him the form to sign, she stated that he was busy on phone and did not give much attention to what was happening.

16. Consolata Muthoni testified next. She was the Returning Officer for Mbeere South. She stated that that constituency had 72 143 registered voters, out of which 58 127 voted in the August 2017 election. She testified that the process of casting ballots went smoothly in Mbeere South and there were no reports of violence. She stated that there an error in the posting of results from Gategi Primary School polling station stream 1 from Form 37A to 37B, where the 3rd respondent was awarded an extra 400 votes. She explained that the error was not intentional, and was perhaps caused by fatigue. She said that after cross-checking the whole of Form 37B she noted another error in Marimari Primary School polling station where the 3rd respondent's votes were not recorded. During cross-examination, it transpired that there were other errors in other polling stations which the witness attributed to human error. In Munyori Primary School polling station, the petitioner's votes were understated by 32 votes. In Kamutwanjiru Primary School polling centre, the petitioner's votes were overstated by 9 votes, while there was another error at Kaweru Primary School polling station. She conceded that the results posted for Kaweru and Munyori polling stations were the same for the candidates, and said that there was nothing strange about that as such things could happen.

17. The 1st respondent's last witness, Faith Wambui Mugo, was the returning officer for Manyatta Constituency. She stated that the total number of registered voters for that constituency stood at 99 339, out of which 79 964 voted. She testified that the election was conducted in a peaceful and credible manner. There was no violence, the candidates did not campaign on election day and there was no case of vote buying. She said that there were no issues with counting and votes were not inflated. She denied that the petitioner ever requested for a recount. She pointed out polling stations where there were errors such as Kivangua Coffee Factory, St Andrews Primary School, Kithunguriri Coffee Buying Centre Karau Primary School, Kamviu Primary School, Kathangari Nursery School, Mikimbi Full Gospel Church and Embu Municipal Stadium. In these stations the candidates lost votes or gained extra votes. The witness said that that happened at random and did not affect the overall result. During cross-examination, she said that human errors occurred during transfer of data from Forms 37A to Form 37B, which she attributed to fatigue and disruptions occasioned by the petitioner. She said that she was considerably stressed due to the pressure and intimidation that she got from the petitioner. She conceded to errors in the results recorded in Form 37B for Kithunguriri Tea Buying Centre, St Andrews Primary School, Karau Primary School, Nthambo Primary School, Embu Municipal Stadium, Embu Primary School and Mikimbi Full Gospel Church grounds polling stations, where candidates' votes were either overstated or under recorded. She was confronted with several Forms 37A and asked questions on alterations thereon. She responded that what she could see in some of the forms were not alterations but overwrites and pressing of the pen, saying that the same was done for emphasis where the original writing was faint. She explained that they were using coupons and there were upto six copies, and it would appear that some of the writings were not clear in the copies that were way down the pile and there was therefore need to emphasis the writing by overwriting. She was also cross-examined extensively about agents. She said that the law gives agents a role in the electoral process, but said that she was not aware that any of them were barred from accessing the polling stations. She said that they were supposed to sign the forms declaring the results, but they were often absent for various reasons, but their absence could not prevent the making of the declaration.

18. The 3rd respondent was the last person to testify. He stated that he participated in the election and won fairly. He stated that the actual voting went on smoothly without incidents of violence or vote buying or electors being barred from voting or persons voting who ought not have been allowed to. He said that the 1st respondent did not give him undue advantage over the other candidates. He said that he visited the four constituency tallying centres and was satisfied that the exercise of tallying was carried out professionally and in a fair and transparent manner. He conceded that there were minor errors that were not intentional, which were of such nature that they could not affect the final result. He said he was aware of polling stations where votes in his favor were not transposed, and also where he was awarded more votes than he had earned. He said that he did not create any Forms 37A. During cross-examination he denied that he had a hand in the hiring of election officials. He stated that he was opposed to the scrutiny and recount. He said that he did his own re-tallying and established that he had been awarded 300 votes by mistake. He said he was unaware that he had been awarded extra votes in various polling stations that were put to him by counsel. He also stated that he was unaware of alteration of Forms 37A. When several such forms were placed before him, he said that all he could see was evidence of pressing of the pen to emphasize the writing.

19. The 3rd respondent called on witness, Samuel Njeru, who testified on matters relating to execution of the orders that the court had made earlier on preservation of electoral materials. His testimony is therefore no relevant for the purpose of determining the matters at hand.

20. The 4th respondent did not call any witnesses and elected to rely on the evidence on record.

21. At the end of the oral hearing, the petitioner filed an application dated 28th December 2017, seeking scrutiny and recount of the ballots cast in the gubernatorial election. After hearing submissions from counsel and reviewing authorities I allowed, in a ruling that I delivered on 18th January 2018, a partial scrutiny limited to recount of ballots in specified polling stations in Mbeere South, Manyatta and Runyenjes Constituencies. I also allowed a re-tally of the relevant forms. The 3rd respondent also filed an application dated 19th January 2018 seeking a tally of all Forms 37A and 37B for all the polling stations in Embu County. On the basis of that application I made orders on 24th January 2018 extending recount of ballots to six polling stations and directed the Deputy Registrar to carry out a re-tally exercise of Forms 37A, 37B and 37C in respect of the polling stations that were not going to be subjected to recount.

22. The exercise ordered on 18th and 24th January 2018 was carried out by the Deputy Registrar for Embu High Court, Vincent Obondi Nyakundi, who had been appointed by the Chief Justice as the Deputy Registrar for the purposes of the instant cause, assisted by other deputy registrars and other court staff. The Deputy Registrar thereafter compiled a report which was subsequently filed in court on 7th February 2018. The Deputy Registrar also filed the original forms used in the partial scrutiny, duly filled by hand and signed by the agents of all the parties and by the Deputy Registrar.

23. The report states that the Deputy Registrar and his team designed forms that they used to capture details of the result of the partial scrutiny for every ballot box scrutinized. The form was verified, at the end of the scrutiny of each ballot box, by agents of the parties to this cause before they appended their signatures on it. After all had executed the same, the agents would then be given copies thereof for their retention. The only observations made in the report relate to Munyori Primary School polling station where there were discrepancies as between what was reflected in Forms 37A, 37B and 37C and Gakundu Coffee Factory polling station where the Deputy Registrar had to carry out scrutiny in the two streams as there had been an error in the order which had not specified which of the two streams was to be the subject of the recount. The result of the recount and re-tally of Forms 37A is as follows. According to the report –

(a) Cyrus Njiru - 2367

(b) Kiragu Kithinji – 50930

(c) Lenny Maxwell Kivuti - 96989

(d) Leonard Muriuki Njeru - 2020

(e) Martin Nyaga Wambora - 97771

(f) Peter Njagi Njuki – 936.

The totals from the recount and a re-tally of Forms 37B and 37C is as follows, according to the report –

(a) Cyrus Njiru - 2367

(b) Kiragu Kithinji – 50917

(c) Lenny Maxwell Kivuti - 96957

(d) Leonard Muriuki Njeru - 2018

(e) Martin Nyaga Wambora - 97685

(f) Peter Njagi Njuki – 933 (Form 37B) and 931 (Form 37C).

24. Upon receipt of the report of the Deputy Registrar on 7th February 2018, I directed the parties to file and serve their respective final submissions to be highlighted on 13th February 2018. There was compliance with the directions as all the parties filed their respective written submissions complete with the authorities that they relied on. The submissions were highlighted on 13th February 2018. I have noted the arguments advanced in the written submissions as well as in the highlights. I have also perused through the authorities filed and cited and noted the legal points in each one of them.

25. Prof Ojienda for the petitioner urged the court that the petitioner was seeking two prayers, for declaration that the 3rd and 4th respondents had not been validly elected, and an order nullifying the results. He submitted that the critical issues were whether the elections were conducted in accord with the relevant law. He urged that there was non-conformity with the Constitution and electoral laws, and there were irregularities that affected the election. He stated that the petitioner had discharged the burden cast on him. He pointed out that it had been admitted that there were errors with regard to entry of the results, which necessitated the partial scrutiny. He stated that Articles 81 and 86 of the Constitution obliged the electoral body to conduct an election that was accurate, verifiable, transparent and accountable. He asserted that the scrutiny was done in 356 polling stations and irregularities emerged in 258 of the polling stations. It was submitted that the fact of irregularities in 258 polling station out of 356 was indicative of the mess in the way the counting and tallying of votes was done, which in turn compromised or tainted the integrity of the election. It was argued that as a result it cannot be said that the election was transparent, verifiable or accurate as required by the Constitution. He submitted that there were some 18 polling stations and another 11 with issues. Regarding the 18, it was submitted that the said 18 ballot boxes had counterfoils, but the ballot papers in the boxes exceeded those indicated in the counterfoils. It was also submitted that the total extra votes not supported by the counterfoils amounted to 165 votes. The written submissions indicate that in 11 polling stations the counterfoils of the used ballots were missing. It was submitted further that as a result of these anomalies the final election result cannot be ascertained, and I am invited to nullify the results in respect of these two groups of polling stations, that is to say the 18 where the ballot papers in the boxes exceeded the number issued from the counterfoils by 165 ballots and the 11 where the counterfoils of the used ballots for the polling stations were not found in the boxes. The petitioner proposes that once I nullify the results in these 29 polling stations, I should declare him the winner for without the results of the 29 polling stations he would be ahead of the 3rd respondent by over 4 000 votes. It was submitted that the alternative to declaring the petitioner the winner of the electoral contest should be nullification of the election.

26. Counsel for the 1st and 2nd respondents, Mr Ngige, did not directly address the issue of the 29 polling stations as raised by Prof Ojienda. He argued that the petitioner moved the court for a recount, which the court acceded to, the ballots were recounted and the results released, he should not turn back and renounce the said results. He further submitted that the petition did not have a prayer for nullification, as it sought mere declarations. He further submitted that the scope of the scrutiny was limited to recount and re-tally, and that the issues the petitioner was raising concerning the report of the Deputy Registrar, such as on the counterfoils, were new matters and the respondents had no opportunity to respond to them. He stated that the petitioner had overall not proved the allegations that he had made in his petition.

27. Mr. Ahmednassir for the 3rd respondent argued that the petitioner had not prayed for nullification of the election, as he had limited his case to a recount in anticipation that the same would show him as the winner. He submitted that there is no prayer for nullification and repeat election on the basis of breach of statute or the Constitution. He urged that the court to confine itself to the pleadings in its determination of the matter. He submitted that the petition as framed limited the scope of the issues for determination, which he stated was very narrow. He cited several authorities to support his contention. He further submitted that the report of the Deputy Registrar on scrutiny or recount was binding. He asserted that where there was a scrutiny and the numbers did not change then the inescapable conclusion should be that even if there were irregularities the court should not interfere.

28. Counsel for the 4th respondent did not make oral submissions. She associated herself with the submissions made by counsel appearing for the other respondents.

29. The petitioner makes seven (7) prayers in his petition, which I may summarize as follows-

- (a) *Re-tally of the votes cast in Gategi Primary School 1 and New Site Market polling stations;*
- (b) *Scrutiny and recount of the ballots cast in all polling stations within Runyenjes and Manyatta Constituencies and more specifically those set out in that prayer;*
- (c) *A declaration that the 3rd and 4th respondents were not validly elected on 8th August 2017,*
- (d) *The election of the 3rd respondent as Governor be determined and declared null and void;*
- (e) *A declaration that the petitioner was validly elected as the Governor for Embu County;*
- (f) *Costs; and*
- (g) *Any other relief.*

30. The first two prayers in the petition are spent, that is those relating to re-tally, scrutiny and recount. They were disposed of in the two rulings that the court delivered on 18th and 24th January 2018, when it directed the Deputy Registrar to carry out a partial scrutiny limited to recount and re-tally. The Deputy Registrar carried out the exercise of partial scrutiny and has filed a report, from which it emerges that the 3rd respondent was the overall winner of the gubernatorial contest in Embu County. So those two prayers are not available for consideration. I am left with the remaining prayers – the nullification of the election of the 3rd and 4th respondents and the declaration of the petitioner as the person validly elected as Governor.

31. I have read and re-read the remainder of the prayers in the petition, in particular prayers C, D and E, and I am persuaded that they are consequential to prayers A and B of the petition. I have carefully perused through the averments in the body of the petition and juxtaposed them against the prayers, and it would appear to me that the petitioner's case, as laid out in the pleadings and the prayers, was geared to obtaining a recount of the ballots cast in the last election on the proposition that should there be a recount he would emerge the winner. The tenor of his pleadings is that something went wrong with the counting process resulting in the 3rd respondent being returned as victor. My reading of the averments is that upon

a recount being done then all the issues raised in the petition would be answered. The principal complaints by the petitioner are detailed in paragraph 101 of the petitioner relating to inflated, swapped and doctored results, among others. His oral testimony too pointed to conduct of a recount as he was confident that he would emerge the winner. A recount showing him as the leading candidate would then lead automatically to a nullification of the results that returned the 3rd and 4th respondents as victors and a declaration, founded on section 80(4)(a) of the Elections Act, that the petitioner was the candidate who had won and who ought to have been issued with a certificate to that effect.

32. I have seen from the petitioner's written submissions that issues have been raised that the totals in the Deputy Registrar's report are not correct. He asserts that the votes he garnered in Kiritiri Primary School stream 1 and Kagumoini Dispensary – Don Bosco stream 2 have been understated. According to his arithmetic the results of the partial scrutiny should have given the 3rd respondent a win by a margin of 520 votes or thereabout, and the results ought to have been as follows after recount and re-tally of Forms 37A –

- (a) Cyrus Njiru - 2357
- (b) Kiragu Kithinji – 50850
- (c) Lenny Maxwell Kivuti - 97141
- (d) Leonard Muriuki Njeru - 2017
- (e) Martin Nyaga Wambora - 97659
- (f) Peter Njagi Njuki – 924.

The totals from the recount and re-tally of Forms 37B and 37C should have been as follows-

- (a) Cyrus Njiru – 2359
- (b) Kiragu Kithinji – 50837
- (c) Lenny Maxwell Kivuti - 97109
- (d) Leonard Muriuki Njeru - 2016
- (e) Martin Nyaga Wambora - 97662
- (f) Peter Njagi Njuki – 923.

Either way the 3rd respondent would still be ahead. I find it curious though that the figures of the margin in the petitioner's calculations come very close to the figure of 530 votes that the 3rd respondent's advocate put to the petitioner as the margin of victory for his client should the court order a recount.

33. Counsel for the 3rd respondent submitted that the exercise conducted by the Deputy Registrar effectively disposed of prayers C, D and E of the petition. The recount returned the result that the 3rd respondent was the winner of the contest, the consequence of which would be that there would be no basis for nullifying his election and declaring the petitioner as the person validly elected as Governor. That would be the natural consequence of the prayers as set out in the petition. The scrutiny that was ordered in the rulings delivered on 18th and 24th January 2018 was partial, limited to recount of the ballots cast in specific polling stations with a view to ascertain the number of votes garnered by each of the candidates who participated in the election. The re-tallying was to a similar vein. Since that was done and the 3rd respondent emerged as the winner, it would appear that prayers C, D and E of the petition have been effectively disposed of.

34. I, however, need to address my mind to the issue of nullification of results in the 29 polling stations raised by the petitioner. The counter position by the respondents is that the issue raised regarding the 29 polling stations is a new matter in respect which they do not have opportunity to respond. They argue that dealing with it would amount to expanding the scope of the matter beyond the pleadings which is not countenanced in law.

35. On the issue of confining myself to the pleadings, several authorities were cited. In *Mr Charles C. Sande vs. Kenya Cooperative Creameries Limited* Mombasa Civil Appeal No. 154 of 1992, the Court of Appeal said that -

‘... in our view, the only way to raise issues before a Judge is through the pleadings and as far as we are aware, that has always been the legal position. All the rules of pleadings and procedure are designed to crystalize the issue which the Judge is to be called upon to determine and the parties are themselves made aware well in advance as what the issues between them are.’

In *Nairobi City Council vs. Thabiti Enterprises Ltd* (EA) 1995-98) 231, at page 21, Akiwumi JA said -

‘I must now turn to another issue ... whether the Learned Judge had any jurisdiction to determine the compensation value of the suit land without the pleadings in the suit having been amended to make this an issue in the suit, notwithstanding the apparent acquiescence of the parties to this procedure. In this regard , Mr Ngatia for the Appellant cited a number of cases in support of his proposition that a Judge does not have jurisdiction to determine a matter which has not been pleaded unless the pleadings are suitably amended...’

The other decision is in *David Sironga ole Tukai vs. Francis arap Muge & 2 others* (2014) eKLR, where the Court of Appeal stated that –

‘It is well established in our jurisdiction that the court will not a grant a remedy, which has not been applied for, and that it will not determine issues, which the parties have not pleaded. In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way, none of the parties is taken by surprise at the trail as each knows the other’s case is as pleaded. The purpose of the rules of pleading is also to ensure that parties define succinctly the issues so as to guide the testimony required on either side with a view to expedite the litigation through diminution of delay and expense.

The court, on its part, is itself bound by the pleadings of the parties. The duty of the court is to adjudicate upon the specific matters in dispute, which the parties themselves have raised by their pleadings. The court would be out of character were it to pronounce any claim or defence not made by the parties as that would be plunging into the realm of speculation and might aggrieve the parties or, at any rate, one of them. A decision given on a claim or defence not pleaded amounts to a determination made without hearing the parties and leads to denial of justice.’

36. The authorities above pronounce the law as it is relates to civil proceedings such as the one that I am now conducting. I agree the new issue turns on counterfoils. It is a matter that is not pleaded in the petition, and there 1st respondent did not have opportunity therefore to address it during trial. It may therefore amount to an ambush to deal with it at this stage. However, it should also be noted that the instant proceedings are *sui generis*. They are civil by nature, but subject to their unique procedures. It may be well to consider case law relating to election disputes.

37. It would appear that the legal position could be different with respect to electoral disputes, although the same has not be articulated with helpful clarity. The general principle is that courts should proceed with caution with respect to material that may be unearthed during scrutiny and recount, for scrutiny and recount are not designed to discover new evidence or unpleaded matters that may found basis for

nullification of an election. There is a wealth of case law on this, some of it from the Supreme Court. In *Peter Gichuki King'ara vs. Independent Electoral and Boundaries Commission & 2 others* Election Petition No. 3 of 2103, the Supreme Court said–

'The law on scrutiny and recount ... suggests that scrutiny and recount ... is not a gambling exercise that sets the court to rummaging through the ballot boxes to see whether any scintilla of evidence of electoral malpractice or irregularity can be found. If the petition is based on any particular electoral malpractice or irregularity that would warrant scrutiny or recount of votes, the malpractice or irregularity must be pleaded and the evidence of such malpractice or irregularity laid out or established prior to an order for scrutiny or recount; the court must be satisfied that, on the basis of the evidence before it, it is necessary to call for a scrutiny and recount, if not for anything else, to confirm the truth of the particular evidence.'

38. From the available case law, it would appear that there are three possible approaches to such unpleaded material unearthed after recount and scrutiny. The first one mirrors the general principle. The court may ignore such material and proceed to dismiss the petition should the petitioner fail to prove the allegations made in his pleadings. That position was stated by the Supreme Court in *Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others* Supreme Court Petition No. 2B of 2014. The second approach appears to be that a party is at liberty to pose questions on such unpleaded materials and the court may make findings on the effect of such irregularities on the declared results. The Supreme Court stated so in the case of *Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 others* [2014] eKLR. The other approach is that the court ought not to turn a blind eye on serious electoral malpractices or irregularities as may be exposed by scrutiny or recount merely because they were not pleaded. That position was stated by the High Court in *Musikari Nazi Kombo vs. Moses Masika Wetangula & 2 others* (2013) eKLR. The said decision was challenged by way of appeal and the Supreme Court pronounced itself in *Moses Masika Wetangula vs. Musikari Nazi Kombo & 2 others* [2015] eKLR as follows–

“[137]

used, the serial numbers of the used ballot papers/counterfoils and the unused ballot papers/counterfoils. There are also columns capturing information relating to the seals both before and after scrutiny, with comments on whether they were found intact or broken. There is too another for the names and signatures of the representatives of the parties. Then there is space for notes, where the Deputy Registrar has made observations with respect to such matters as existence of stray ballots, ballots that were disputed, missing or illegible or unstamped Forms 37A, ballots that are missing or are unaccounted for, materials not sealed in the tamper proof envelopes, missing counterfoils, used and unused booklets for other elections found in the box, among others. The said forms were the working notes of the Deputy Registrar and the material in them is what was used to generate his report. The forms form part of the proceedings. The matters recorded in the notes of the Deputy Registrar are no doubt an indication that there were irregularities in the counting exercise.

42. Section 83 of the Elections Act states 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.’

43. The import of section 83 is that as a general rule, the court should not interfere with results where irregularities or non-compliance with the law is established so long as the election appears to have been conducted in accordance with the Constitution and the law and the non-compliance did not affect the result.

44. The Supreme Court in *Gatirau Peter Munya vs. Dickson Mwenda Githinji & 2 others* interpreted section 83 in the following terms—

‘[208]. 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. 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 ... If it should be shown that an election was conducted substantially in accordance with the principles of the Constitution and the Elections Act, then such election is not to be invalidated only on the grounds of irregularities. 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 ... Where an election is conducted in such manner as demonstrably violates the principles of the Constitution and the law, such an election stands to be invalidated.

[209]. ...

[210]. ...

[211]. ... a petitioner who is able to satisfactorily prove either of the two limbs of the Section can void an election. In other words, a petitioner who is able to prove that the conduct of the election in question substantially violated the principles laid down in the Constitution as well as other written law on elections, will on that ground alone, void an election. He will also be able to void an election if he is able to prove that although the election was conducted substantially in accordance with the principles laid down in our Constitution as well as other written law on elections, it was fraught with irregularities or illegalities that affected the result of the election’

45. The High Court had before then pronounced itself on these matters along the same lines in *Joho vs. Nyange* (2008) 3 KLR (EP), when it said—

‘The law if therefore clear as to when an election can be nullified. An election will be nullified if it

is not conducted substantially in accordance with the law as to elections. It will also be nullified, even though substantially conducted in accordance with the law as to elections, if there are errors or mistakes in conducting the elections which, however trivial, are found to have affected the result of the elections.'

46. Guided by the principles stated above I shall proceed to address my mind first to the question whether the election the subject of these proceedings was conducted substantially in accordance the Constitution and the relevant electoral law. The petitioner when he testified stated categorically that the voting process went on smoothly. He did not raise any issues whatsoever with respect to the campaign period. His petition was grounded solely on matters around the counting and declaration of results. The 3rd respondent did not raise any issues at all regarding the entire electoral process, from the campaigns to the declaration of results. I can in the circumstances conclude that the first phase of the election, the campaigns and the voting processes, was substantially conducted in accordance with the Constitution and the electoral law. It cannot be said that first phase of the election was conducted so badly that there was really no election at all. However, it has emerged from the material generated by the scrutiny that there were irregularities or non-compliance with the law on elections. The question then is whether these irregularities or errors or non-compliance with the law should invalidate the election the subject of these proceedings.

47. To answer the question that I have posed above, I shall address each of the irregularities or errors or non-compliance with the law one at a time. The irregularities identified relate to material that ought to have been found in the ballot boxes during recount. Regulation 81(1) of the Elections (General) Regulation 2012 is relevant. Regulation 81(1) is in mandatory terms. The effect of non-compliance with it would depend on the impact of the non-compliance on the total result. It states as follows-

'Upon completion of a count, including a recount, the presiding officer shall seal in each respective ballot box-

(a) valid votes,

(b) rejected ballots sealed in a tamperproof envelope,

(c) unused ballot papers sealed in a tamperproof envelope,

(d) counterfoil of used ballot papers sealed in a tamperproof envelope,

(e) copy of election results declaration forms, and

(f) stray ballot papers in a tamperproof envelope.'

48. The first non-compliance relates to failure to put and seal in the ballot boxes all the ballot papers used in the election, whether valid or rejected, contrary to Regulation 81. The record filed by the Deputy Registrar of the forms used during the partial scrutiny reveal that varying numbers of ballots in 184 polling stations were unaccounted for. The number of such ballots is 566. This is a case where the ballots actually cast are less than the total number of counterfoils of used ballot papers. It cannot be ascertained as to whether they were spoilt or rejected or valid, and if valid in whose favour they were cast.

49. The second non-compliance relates to omission to put and seal counterfoils of used ballot papers in the ballot boxes contrary to Regulation 81(1). The record of the forms used by the Deputy Registrar during the recount reveal that in 11 polling stations the counterfoils of the used ballot papers are missing, or, put differently, were not found in the respective ballot boxes. It cannot be ascertained therefore how many ballot papers were issued to electors and used, and therefore it would mean that the results cannot be ascertained and verified. It would appear that the ballot papers in the relevant ballot boxes were recounted against the record in Forms 37A for the relevant polling stations, but the accuracy of the record in Forms 37A cannot be ascertained without the counterfoils of the ballots used in those polling stations.

50. The third non-compliance is with respect to Form 37A. I have gone through the handwritten record of the forms that the Deputy Registrar prepared for the scrutiny and it discloses that in 12 polling stations there were no Forms 37A in the ballot boxes, and in 12 other polling stations copies of the Forms 37A found in the boxes were totally illegible. Form 37A is a critical document for the purpose of collation, tallying and declaration of results. Without the form, or even where the same has been rendered useless by illegibility, there cannot be any results to declare, as it is, it is this document which authenticates the results. This would effectively mean that the results of the election in the 26 polling stations have not been authenticated and validated.

51. The other issue, which is really not a matter of non-compliance, but an irregularity nevertheless, is about what the petitioner has called excess votes. These are ballot papers found in the ballot boxes during recount which did not issue out of the ballot booklets for the relevant polling stations for they could not be traced to the counterfoils of used ballot papers found in the ballot boxes. Such ballot papers in varying numbers were found in 12 ballot boxes from the record of the Deputy Registrars handwritten forms. The total excess ballot papers cast amounted to 111. This is an irregularity that seriously undermines the electoral process as it suggests that these materials were introduced into the ballot boxes unprocedurally. The effect is to defeat or subvert and distort the will of the people. The excess votes are not authentic and should not be in the system. Such ballots could only get in through an illegal process, and an outcome which is arrived at with such votes being taken into account cannot be said to be fair or accurate or authentic or verifiable.

52. The petitioner has urged that in view of the non-compliance or the irregularities disclosed the court should nullify the results in those polling stations, in which case he would emerge the winner and the court should proceed to declare him the duly elected Governor for Embu County. With respect, that submission is not tenable. Elections are about electors expressing their will at the voting booth as to who should lead them. Compiling the total results while excluding the votes of the electors in the affected polling stations would amount to disenfranchising them, something that the court should not countenance.

53. In the alternative, he pleads that the court should nullify the entire election. The respondents submitted that there is no jurisdiction to do so as there is no prayer in the petition for nullification, and in any event the issue of those irregularities in question should not arise as they were not pleaded. I have dealt with that issue in the foregoing paragraphs, and held that the law does allow an election court to make decisions with respect to unpleaded material that emerges after recount. The matter before me is not a suit commenced by plaint, but a petition. The petitioner has moved the court so that it can review the election conducted on 8th August 2017 to confirm and ascertain whether the same was conducted in accordance with the law and to audit the systems to determine whether the same produced results that were accurate, verifiable and accountable. The scrutiny and recount exercise was designed to determine that, and if it produced material that was not in the pleadings the court cannot ignore the same, but should look at it in the wider interests of electoral justice.

54. The second issue that I need to resolve is whether the irregularities noted above are of such nature as would affect the result declared in August 2017 or even that of the recount. The general principle as stated above is that even where an election was substantially conducted within the law, the court can still nullify the results if it is established that the irregularities noted affected the results. I have already made a finding that the election herein was substantially conducted according to the law, save for the irregularities noted during the recount. What I should determine is whether the non-compliance with the law or the errors noted affected the final results.

55. According to the report of the Deputy Registrar, the final tally of the results shows that the difference between the votes garnered by the petitioner and the 3rd respondent is between 700 and 800 votes. The petitioner claims that that tally was erroneous and according to his own tally the margin is a little narrower and should be in the region of 500 votes. Are the irregularities identified through the scrutiny likely to affect the result? I have noted that the non-compliance with regard to the unaccounted ballots affects ballots in the region of 566 votes, while that relating to missing counterfoils affects ballots in the region of 4000 votes, while those relating to missing or illegible Forms 37A are in excess of 10 000 votes. The excess votes amount to 111. Looking at all these figures globally there is no doubt that the

irregularities would affect the final results of the election.

56. I have come to the conclusion that the irregularities or errors or non-compliance with the law during the collating, counting and tallying of votes in the gubernatorial election held for Embu County on 8th August 2018 undermined the electoral process fundamentally and produced a result that cannot be said to be accountable, verifiable or accurate. Consequently, it cannot be said to reflect the will of the people of Embu County. It has not been established that the 2nd, 3rd and 4th respondents were complicit in any way to the non-compliance and the irregularities identified, which appear to have been caused either by fatigue or incompetence on the part of the elections staff hired by the 1st respondent.

57. The final orders that I shall make in the circumstances are as follows–

(a) That I shall and do hereby allow the petition in the terms that the results of the election held on 8th August 2017 are hereby nullified and order that a fresh gubernatorial election be held for Embu County;

(b) That costs, capped at Kshs. 3, 000, 000.00, subject to taxation, are awarded to the petitioner to be borne by the 1st respondent in the sum of Kshs. 2, 000, 000.00 and the 3rd and 4th respondents at Kshs 1, 000, 000.00; and

(c) That a certificate shall issue to the 1st respondent and the Speaker of Senate pursuant to Section 86 of the Elections Act.

DATED, SIGNED and DELIVERED at NAIROBI this 22nd DAY OF FEBRUARY, 2018.

W. MUSYOKA

JUDGE