REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

ELECTION PETITION NO.1 OF 2017

IN THE MATTER OF THE ELECTIONS ACT NO. 24 OF 2011 LAWS OF KENYA AND THE ELECTIONS (GENERAL) REGULATIONS, 2012 AND ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS) PETITIONS RULES 2017

AND

IN THE MATTER OF THE PARLIAMENTARY(NATIONAL ASSEMBLY) ELECTIONS CONDUCTED ON 8TH AUGUST, 2017 IN GATUNDU NORTH CONSTITUENCY

BETWEEN

HON. CLEMENT KUNGU WAIBARA….....PETITIONER

VERSUS

HON. ANNIE WANJIKU KIBEH.....….1ST RESPONDENT

THE INDEPENDENT ELECTORAL AND BOUNDARIES

COMMISSION….....…2ND RESPONDENT

RULING

A. INTRODUCTION

1. At the conclusion of the General Elections held on 08/08/2017, Annie Wanjiku Kibeh("1st Respondent") was declared by the Returning Officer of Gatundu North Constituency, acting as an agent of the Independent Elections and Boundaries Commission (IEBC) ("2nd Respondent"), as the duly elected member of National Assembly for Gatundu North Constituency.

2. Clement Kung'u Waibara (the "Petitioner") was one of six other contestants for the seat. He was dissatisfied with the results and timeously filed a Petition challenging the declaration of the 1st Respondent as the duly elected Member of the National Assembly for Gatundu North Constituency. The Petitioner has named the Independent Electoral & Boundaries Commission (IEBC) as the 2nd Respondent in this Petition.

3. As part of its efforts to efficiently manage its elections Petitions docket, the Court scheduled the Petition for a mention on 29/09/2017 to give directions on the hearing of the Petition and, in particular, on the Pre-trial conference and the arguing of any interlocutory matters filed in the Petition.

4. The Parties appeared before me on 29/09/2017. After due consultations with Advocates for the parties, I gave certain directions meant to ensure the smooth and efficient hearing of the Petition given the constitutional and statutory timelines for resolution of electoral disputes. Among other directions, I directed that the Notice of Motion dated 18/09/2017 by the 1st Respondent to strike out some claims and paragraphs in the Petitioner's Petition and Supporting Affidavit would be heard *inter partes* on 12/10/2017. I also granted leave for the Petitioner to file an application to seek, among other things, for orders for:

i. Preservation of election materials by the 2nd Respondent;

ii. Production of evidence by the 2nd Respondent and certain third parties; and

iii. Scrutiny and recount.

5. In the same vein, I also allowed the 2nd Respondent to bring an application to place on the record certain additional evidence on the elections that was in its possession and which it is statutorily required to make available.

6. All the various interlocutory applications were scheduled for *inter partes* hearing on 12/10/2017.

7. Parties duly complied with the directions of the Court and filed their respective applications and responses – including skeletal submissions to the Notice of Motion dated 18/09/2017. They also appeared before me for the oral hearing on 12/10/2017.

8. This ruling will cover all the three applications. For logical reasons, I have re-ordered my determination of the applications.

B. APPLICATION BY THE 2ND RESPONDENT TO FILE FURTHER AFFIDAVITS

9. The 2nd Respondent filed a Notice of Motion dated 06/10/2017. It sought two related prayers:

i. First, it sought for leave to be granted to the 2nd Respondent to file affidavits by further witness out of time;

ii. Second, it prayed that the affidavits attached to the Application be deemed as duly filed and forming part of the court record.

10. The Application was supported by the affidavit of Patrick Muthee, the Constituency Returning Officer. The main reasons for the Application was that due to brevity of time to respond to the Petition, the 2nd Respondent had not been able to file affidavits by the Presiding Officer of Gikindu Primary Polling Centre and the ICT Officer of Gatundu North Constituency.

11. The 2nd Respondent is of the opinion that these two affidavits will be important for the due and just adjudication of the election dispute as these two deponents will be necessary and material witnesses at the election Petition.

12. Neither the Petitioner nor the 1st Respondent opposed this Application by the 2ndRespondent.

13. Under Rule 15(1) (h) of the Elections Petitions Rules, the Court has discretion to allow the filing of further affidavits and admit new evidence in an election Petition. Some of the factors that the Court considers in making a determination whether to acquiesce to the request include whether the adduction of new and additional evidence runs afoul of the statutory timelines on when an election Petition should be filed; whether the adduction of new evidence will prejudice or unfairly disadvantage the other parties; and whether granting the order to adduce further evidence will undermine the constitutional imperative of

timely resolution of electoral disputes.

14. In this case, after considering all these factors, the Court determined that it was just and fair to allow the 2nd Respondent's Application. Both prayers are, thus, allowed.

(C) <u>THE 1ST RESPONDENT'S APPLICATION DATED 18/09/2017</u>

15. I will next consider the 1st Respondent's Application dated 18/09/2017.

16. The 1st Respondent's Application sought two main prayers as follows:

> **<u>a. THAT</u>** paragraphs 10, 11 (b) & (h), 15 (ii), 16, 17, 20, 21, 22, 23, 24, 33, 34, grounds a) (i), (iv), (v), (vi) & (vii), ground c) (vii), ground e) (i) grounds f) (i), (ii), (iii), (iv) & (v) in the Petitioner's Petition dated 4th September 2017 be struck out in their entirety;
>
> **<u>b. THAT</u>** paragraphs 4, 6 (b), 8, 9, 13 (ii), 14, 15, 27, 28, 34, 35, 36, 37, 38, 41, 47 50 (d) & (g) of the Petitioner's Supporting Affidavit deponed on 4th September 2017 be struck out;

17. It is imperative to make three general comments about what I view as the proper approach to applications of this kind in the context of election Petitions. This approach is based on the recognition that election Petitions as a species of disputes, are, in essence, public interest litigation. See ***Sheodhan Singh -v- Mohan LalGautam (1969) 3 SCR 417; (1969) 1 SCC 408*****).** There are three aspects to this approach:

18. First, as in all types of cases, striking out of either pleadings or parts of pleadings is a draconian and extreme measure which the Court will only deploy as a last resort. It is only utilized where the pleadings or parts of pleadings are so hopeless that nothing can be done to redeem them. See ***D.T. Dobie & Company (Kenya) Limited v Joseph MbariaMuchina& another [1980] eKLR***. This general approach towards striking out of pleadings or parts thereof has been renewed by the Constitutional edicts to the Court about how it should exercise its authority – and in particular, the commandment that the Court should not be beholden to technicalities at the expense of substantive justice. See Article 159(2)(d) of the Constitution.

19. Second, in election Petitions, it is important for the Court to have a global view of the Petition as opposed to a retail perspective of the individual paragraphs. It is often possible that the Petition as a whole might be greater or convey a keener version of the complaint than the sum total of the individual paragraphs in the Petition or Supporting Affidavits.

20. Third, I do not view Rule 12 of the Elections Petitions Rules as instructing the Court to take the view that it is a judicial surgeon wielding a judicial scapel ready to pore over the pleadings delicately separating permissible from impermissible paragraphs or phrases or tributaries of claims at the interlocutory stage. Such an approach, in my view, will not only be unwieldly and inefficient but would also be potentially unfair to the Petitioner.

21. This is certainly not to say that a Petitioner is at liberty to make wild, unsubstantiated, general and stridently scandalous allegations or claims in his pleadings. It is to say that the Court views its authority to strike out as more properly exercisable in obvious cases where the cause of justice will be served best by striking out. Conversely, the Court will be slow to exercise that authority in close cases where the pleadings or paragraphs in question might be amenable to more than one interpretation or application of the law. In such cases, it is best that the Court permits the case to move forward and for determinations to be made after due analysis of the evidence and the law.

22. With this in mind, I will now address the 1st Respondent's prayers that certain paragraphs in the Petition and Supporting Affidavit be struck out.

i. *Should any of the Paragraphs in the Petition or Supporting Affidavit be Struck Out for Making Allegations of a Criminal Nature Against the Returning Officer who has not been made a Party to the Petition?*

23. The 1st Respondent argues that Paragraphs 4, 10, 11 (h) of the Petitioner's Petition make allegations of a criminal nature against the Returning Officer- who is not enjoined in the proceedings; yet he is a necessary party to the present proceedings as the Court may make a finding of the commission of an electoral offence against the Returning Officer, not as an agent of the 2nd respondent but in his own personal capacity. Hence, the 1st Respondent wants those paragraphs struck out.

24. The 1st Respondent further argues that Paragraphs 4, 10, 11 (h) of the Petitioner's Petition make similar allegations of a criminal nature against the Returning Officer and that, therefore, they should be struck out for the same reason.

25. The 1st Respondent's arguments are that the allegations pleaded against the Returning Officer are criminal in nature within the meaning of section 6 of the Election Offences Act and that if they proceed to hearing, the Court may ultimately make findings which could result in the Returning Officer being charged. This, the 1st Respondent insists, will prejudice the Returning Officer's right to fair trial.

26. The 1st Respondent further submitted that the nature of the allegations against the Returning Officer does not impeach his character as an agent of the 2ndRespondent but impeach him in his personal capacity.

27. I have looked at the claims the Petitioner has made against the Returning Officer. I am not persuaded that any of the claims are aimed at getting the Court to definitively conclude that the Returning Officer may have committed election offences so that their resolution would require the Returning Officer to be a party in the election Petition. Most of the claims made are such that they could be comprehended within the Returning Officer's scope of duty at the Commission. As such, there was no peremptory requirement that he should have been included as a party in the Petition.

28. Further, I note that there has been change in the law since January, 2017. The Election Laws (Amendment) Act, 2017 took away the power of the Court to find a person guilty of an election offence. Instead, the Court is only empowered to make a finding that an electoral malpractice of a criminal nature may have occurred and refer the matter to the Director of Public Prosecutions. The DPP is then required to direct that an investigation be carried out, and, based on the outcome of such investigation commence criminal prosecution or close the matter.

29. What this development means is that an election Court can no longer make a finding that a person has committed an election offence during the hearing of an election dispute. All that the Court can do is to refer a finding to the DPP for further investigations. This, in my view, lessens the need to have a party against whom a Court may ultimately find to have propagated an electoral malpractice which is criminal in nature to be a necessary party in the election Petition.

30. Finally, I note that our decisional law has moved in the direction that the joinder of the Returning Officer is not a requirement to successfully prosecute an election Petition even where specific allegations are made against the Returning Officer. See, for example, ***Wilson Mbithi Munguti Kabuti & 5 Others V Patrick Makau King'ola & Another [2013] eKLR*** and ***Wavinya Ndeti V Independent Electoral And Boundaries Commission (Iebc) & 4 Others*** **[2013] eKLR.** These decisions are based on two factors: First, that Rule 9 of the Elections Petitions Rules now states that the IEBC is the only necessary Respondent in election Petitions. Second, our case law has definitively held that Returning Officers serve as agents of the IEBC which must, therefore, be vicariously liable for the mistakes and misdeeds they commit as long as it is within their scope of duty, instructions or authority. For this last proposition, see, for example, ***Ayub Juma Mwakesi versus Mwakwere Chirau Ali and 2 others [2010] eKLR.***

ii. Should any of the Claims in the Petition be Struck Out for Lacking Evidential Support in the

Supporting Affidavit?

31. The 1st Respondent has relied on the rule conveyed in Rule 12 of the Elections Petitions Rules, 2017, to argue that some of the paragraphs in the Petition should be struck out because they are not supported by the Petitioner's affidavit and evidence. The argument is that if the said grounds are unsupported (via affidavit evidence), the respective paragraphs disclosing such grounds are defective and are worthy of being struck out at the first instance.

32. To this extent, the 1st Respondent applied for the striking out of Paragraphs 15 (ii), 37 (f) (at page 13), ground a) (v) & (vii) and ground f) (i) of the Petitioner's Petition.

33. Regarding paragraph 15(ii) of the Petition, the 1st Respondent's argument is that the mention of "Ihiga-ini" as one of the stations where the KIEMS kits failed should be struck out because it is not mentioned in the Supporting Affidavit. This is because, the 1st Respondent argues, at paragraphs 14 and 15 of the Petitioner's Petition it is pleaded that the malfunctioning of the KIEMS kits occurred at "Kawira, Ihiga-ini, Muirigo and Njathaini." Yet, the 1st Respondent argues, the Supporting Affidavit therewith (at paras 12 and 13) does not mention "Ihiga-ini" at all hence leaving the claim that KIEMS kit malfunctioned at Ihiga-ini as unsupported and amenable to be struck out under Rule 12.

34. Similarly, the 1st Respondent argues that at paragraph 37 (f) of the Petition (page 11/13) the Petitioner pleads that "the election was breached because the Returning Officer participated in electoral malpractices by allowing the breaking of the ballot boxes as well as allowing the burning of cast papers", but there is nothing in the Supporting Affidavit to specifically support this claim.

35. Finally, the 1st Respondent argues that the grounds advanced at grounds a) (v) and (vii)-Page 7/10 are unsupported thus worthy for striking out in that the allegations of tallying being conducted under "cellphone lighting" and technology which failed to detect the finger prints from many voters are not substantiated in the Petitioner's supporting affidavit.

36. I outlined above what, in my view, is the appropriate way to approach Rule 12 of the Elections Petitions Rules. The Rule was supposed to generally ensure that the Respondents are given adequate notice of the case the Petitioner plans to present against them. The Rule is not meant to legislate a requirement that the Supporting Affidavit must, in every formalistic and pettifogging detail, be the mirror-image of the Petition in terms of the allegations made. Instead, the Rule was meant to ensure that the general grounds relied on by the Petitioner are supported by the evidence.

37. It would be inappropriate, thus, in my respectful view, at the interlocutory stage to go through the Supporting Affidavit with a fine toothcomb determining which niggling and picayune detail is non-aligned to the Petition. Instead, the testing of the details in the affidavit, their veracity and credibility as well as their ability to support the grounds in the Petition will have to await the cross examination of the deponent during the hearing of the Petition. In my view, the power to strike out should only be exercised where the type and quantum of evidence adduced in the Affidavit is of a kind and quality that leaves no doubt that the grounds relied on by the Petitioner are wholly unsupported on an objective reading of the two sets of pleadings filed in the Petition.

38. For this reason, therefore, I decline to strike out the paragraphs suggested by the 1st Respondent at this point.

iii. Should any of the Paragraphs in the Petition or Supporting Affidavit be Struck Out for Being too Wide and/or for not Disclosing a Reasonable Cause of Action or for being frivolous, vexatious, scandalous oppressive or an abuse of the process of the Court?

39. The law requires that pleadings that do not disclose any reasonable cause of action or those that are scandalous, vexatious or frivolous should be struck out at the earliest instance. This is because such pleadings or parts of such pleadings adjudged to fit this description do not assist the Court to come to

proper determination of the matters at issue or are an abuse of the process of the Court. They may, additionally, embarrass the fair or timely determination of the matters at hand.

40. The 1st Respondent impugned Paragraphs 16, 17, 20, 21, 22, 23, 33, grounds a) (i), (iv) and (vi), ground c) (vii), ground e) (i), grounds f) (i), (ii) & (iii) of the Petitioner's Petition as not disclosing any reasonable cause of action, primarily for being too broadly pleaded.

41. The 1st Respondent also impugned Paragraphs 6 (b), 14, 15, 27, 47, and 50 (d) and (f) of the Petitioner's Supporting Affidavit as not disclosing or supporting any reasonable cause of action.

42. Additionally, the 1st Respondent has impugned Paragraphs 24, 34 and ground f) (iv) of the Petitioner's Petition and Paragraphs 27, 41 and 47 of the Petitioner's Supporting Affidavit as being frivolous, scandalous, oppressive, irrelevant and an abuse of the Court's process.

43. Given the uncontested principle of law which requires little analysis or explication, I will simply reproduce each of the impugned paragraphs and apply the law to the paragraph and come to a reasoned conclusion whether it is amenable to being struck out. It is important to point out that the general test applied is whether it is plain and obvious that the impugned paragraph discloses no reasonable question fit to be tried due to its diffuseness, vagueness, or vexatious nature. Generally, the Court will decline to strike out a paragraph or pleading for technical deficiency only; the defect must be substantial and irredeemable.

44. Paragraph 16 of the Petition states as follows:

> The Petitioner avers that his agents were cohered (sic) to take a 30 minutes break before the tallying and tabulation of the votes cast therefore tampering with the credibility of the whole process.

45. Paragraph 14 of the Supporting Affidavit is to the same effect.

46. The 1st Respondent argues that this averment is too general as to disclose a reasonable cause of action/violation of the law against either of the Respondents. As can be ascertained from the affidavits, these general allegations are not substantiated and detailed.

47. I agree. The averment lacks sufficient detail for the Respondents to meaningfully respond. It is embarrassing because it does not state the real issue in any intelligible form. It shall be struck out.

48. Paragraph 17 of the Petition is in the following terms:

> *The Petitioner avers that at Mwea Primary School the Presiding Officer influenced the assisted voters' choice by not reading out the all of the candidates' names on the ballot paper*.

49. Paragraph 15 of the Supporting Affidavit is to the same effect.

50. The 1st Respondent complains these Paragraphs are so widely pleaded that one is unable to ascertain the course it is supposed to take. The Petitioner pleads that "at Mwea Primary School, the Presiding Officer influenced the assisted voters' choice by not reading out the all (sic) of the candidates names on the ballot paper."

51. The 1st Respondent argues that Mwea Primary School Polling Centre has 5 polling stations -- with each station being assigned its own Presiding Officer. Hence, it is impossible for the Respondents to know in any meaningful way against which of the 5 Presiding Officers at "Mwea Primary School" the allegation has been made.

52. This critique is on point. The allegation by the Petitioner in Paragraph 17 of the Petition and Paragraph 15 of the Supporting Affidavit are impermissibly wide and embarrassing: the Respondents are

not able to respond in any meaningful way. They shall be struck out.

53. Paragraph 20 of the Petition reads as follows:

> *The Petitioner avers that all his agents were denied copies of Form 35A which bore the official results recorded by the Presiding Officers*.

54. Paragraph 18 of the Supporting Affidavit is to the same effect.

55. The 1st Respondent claims that the averment is too wide and lacks the level of details needed for a pleading in an election Petition. This is because, the 1st Petition argues, the averment does not name the agents who were denied copies of Form 35A.

56. This attack on Paragraphs 20 of the Petition and 18 of the Supporting Affidavit is without merit. The averment is specific enough: it alleges that all agents were denied the forms.

57. Paragraph 21, on the other hand states as follows:

> *The Petitioner avers that there was no presence of Forms 35A displayed on the door at the polling stations*.

58. Paragraph 19 of the Supporting Affidavit makes the same allegation.

59. The 1st Respondent's complaint is, again, that the allegation is too wide that it discloses no reasonable cause of action.

60. This attack fails as well. A reasonable interpretation of the averment is that Forms 35As were not disclosed on the doors of all polling stations. That is specific enough for the Respondents to proffer their responses.

61. Paragraph 22 of the Petition and Paragraph 25 of the Supporting Affidavit allege that:

> *…at the constituency tallying centre at St. Francis Girls Mang'u some Forms 35A had cooked up results contrary to the votes cast on the relevant Polling Stations*.

62. The 1st Respondent similarly complains that the allegations are too wide and do not contain sufficient details for a meaningful response.

63. While a closer question, this paragraph also survives. It at least identifies the polling station in question. One can only hope that the Petitioner will have actual evidence to support the allegation during the hearing of the Petition.

64. Paragraph 23 of the Petition and Paragraph 26 of the Supporting Affidavit are to the effect that:

> *The Petitioner avers that several ballot boxes were open upon arrival at the tallying centre*.

65. I readily agree with the Respondents that this allegation is embarrassingly diffuse and wide; properly aimed at a fishing expedition rather than pleading specific allegations of malpractices which invite the responses of the Respondents. These Paragraphs shall, accordingly, be struck out.

66. Paragraph 33 of the Petition alleges as follows:

> *The Petitioner avers that the results from the Gikindu, Ihiga-ini, Njathaini among others were not openly and accurately collated and promptly announced*.

67. I find nothing wrong with this averment. It is specific enough and it is not embarrassing or vexatious in any way. It stays.

68. Grounds a(i); (iv) and (vi) of the Petition allege as follows:

> *a(i) The Petitioner avers that the actions of the 1st and 2nd Respondents violates the principles and values in the Preamble, Articles 10, 38, 73, 81, 86 of the Constitution as read with the Election Act and Election Rules 2017.*
>
> *a(iv) The Presiding Officer was not displaying Form 35A properly for all agents to verify and he refused to allow us to cross-check and verify the results.*
>
> *a(vi) Some polling stations voting were peaceful and democratic but things changed when tallying commenced yet there was no sufficient lighting since agents were using cell phone lighting.*

69. The 1st Respondent argues that these grounds are too generalized and disclose no reasonable cause of action.

70. Whereas Ground a(i) is probably specific enough because it merely reiterates applicable constitutional and statutory provisions, Grounds a(iv) and (vi) as reproduced above are embarrassingly generalized and fanciful. They are cast in such general terms that it invites the sense that the Paragraphs are merely trifling with the Court. They shall be struck out.

71. Ground C (vii) reads thus:

> *The petitioner avers that in most polling stations Form 35A & 35B have different entries which draws an inference of manipulation of the results*.

72. The Respondents are correct that this ground is embarrassingly vague. It is worse that it does not seem to be supported by any averments made prior logically leading to the ground. It is will be struck out as well.

73. The same fate shall befall Grounds e(i) and f(ii) which read as follows:

> *e(i) Agents were threatened and intimidated and this affected the outcome of the results.*
>
> *f(ii)The elections were marred by bad influence, violence, threats and intimidation by the I.E.B.C officials and this affected the final outcome, by asking the voters to vote for the Jubilee candidate*.

74. In Ground f(i), the Petitioner charges as follows:

> *The Petitioner avers that the party leader of jubilee and presidential candidate urged voters to vote as a block for jubilee therefore disadvantaging the other candidates*.

75. The 1st Respondent complains that it is clear that the above ground does not disclose any ground or violation against either of the Respondents. This notwithstanding, no credible explanation can be advanced on the cause of action that is alleged (in form of a contravention and violation) against the said "party leader of jubilee and presidential candidate"- a non-party to the present petition.

76. Again, I readily agree. This particular ground is, indeed, vexatious: if it does not go to establishing the Petitioner's cause of action or does not advance any claim known in law. That Ground shall be struck out.

77. However, I find Ground f (iii) to be sufficiently detailed notwithstanding the 1st Respondent's claims. It provides as follows:

The Petitioner avers that cases of violence, threats and intimidation against his supporters which was at Gikindu, Njathai-ini, Muirigo Kawira among others the petitioners supporters were scared away.

78. It is true that the hedge "among others" at the end risks expanding the ground towards inoperable diffusion but if restricted to the list provided, it is specific enough to survive a motion to strike it out.

79. The 1st Respondent has protested that the following paragraphs in the Petition are frivolous, scandalous, oppressive, irrelevant and an abuse of the Court's process:

(24) The Petitioner avers that the 1st Respondents in collaboration with the 2nd Respondent used illegal and fake ballot papers to give the 2nd Respondent.

(34) The Petitioner avers that the 1st and 2nd Respondent promoted several electoral malpractices that affected the final outcome of the results particularly creating non-Gazetted polling stations and centers.

F (iv) The 1st Respondent used witchcraft to scare voters to vote for her

80. Paragraphs 27, 41 and 47 of the Supporting Affidavit are to the same effect respectively.

81. Paragraphs 24 and f (iv) of the Petition (and, consequently, 27 and 47 of the Supporting Affidavit) are not necessarily scandalous or oppressive to the extent that they are making specific claims of electoral malpractices against the Respondents. It is open to the Respondents to deny the allegations and put the Petitioner to strict proof.

82. However, Paragraph 34 of the Petition and 41 of the Supporting Affidavit must fall for the reason that they are unduly generalized and nebulous as to place an unfair and unreasonable burden on the Respondents on how to respond.

iv. Should any of the Paragraphs in the Supporting Affidavit be Struck Out for Being Impermissible Hearsay?

83. The 1st Respondent has also argued that the following paragraphs in the Petitioner's Supporting Affidavit should be struck out because they depone hearsay evidence: 28, 34, 35, 36, 37, 38 and 41.

84. The basis for this submission is Order 19, Rule 3 (1) of the Civil Procedure Rules which is specifically made applicable vide Rule 12 (12) of the Election (Parliamentary and County Elections) rules, 2017; Section 2 (2) of the Evidence Act further makes the provisions of the Evidence Act applicable to Affidavits; and Section 63 of the Evidence Act.

85. The 1st Respondent, supported by the 2nd Resondent have, in this regard, relied on ***Imanyara v Moi and 12 Others- (Election Petition No. 4 of 1993) (2008) 1 KLR (EP)***, where the High Court held that Order XVIII, Rule 3 [presently Order 19, Rule 3] *permitted hearsay in affidavits in interlocutory matters provided the source and grounds thereof were disclosed.*

86. In this case, the Respondents complain that the Petitioner in the paragraphs impugned as hearsay merely states that the "*[P]etitioner received information from members of the public", "received more information", "that the Petitioner was informed", that "the police said they will escalate the matter to IEBC". The Petitioner further cites "various media reports", "social media" his "Facebook" and "Whatsapp" accounts.*

87. Hearsay is an out of court statement, made in court, by a person based, not on what they know themselves but what they have heard from others, to prove the truth of the matter asserted. A statement is, therefore, hearsay evidence, if offered to prove the truth of the matter stated.

88. I have looked at the impugned paragraphs. I do not think they amount to hearsay evidence if read in the sense in which they are offered: not to prove the veracity of the matters asserted in those statements but to prove that the Petitioner did actually become aware of the existence of the statements or the social media accounts. Seeing these averments from that perspective saves them from the Rule against Hearsay – but I am doubtful of their utility in supporting the Petitioner's overall case for the nullifying of the elections. That will, however, await the final prosecution of his case.

v. Does Paragraph 13(ii) of the Supporting Affidavit Introduce a New Cause of Action?

89. The 1st Respondent complains that the Petitioner has introduced a new cause of action in his Supporting Affidavit which is not found in his Petition. This is, argues the 1st Respondent, that while the Petitioner complained that the KIEMs kits malfunctioned, he has specifically mentioned only four polling centres where such malfunctioned occurred (see paragraph 15 of the Petition). However, the 1st Respondent points out that the Petitioner impermissibly expands the number of polling centres where he alleges KIEMs kits malfunctioned by adding "Kamwangi" in his Supporting Affidavit (see paragraph 13 of the Petitioner's Supporting Affidavit).

90. The 1st Respondent argues that this amounts to an addition of a cause of action vide the Supporting Affidavit. She cites Rule 12 and ***Joseph Amisi Omukanda v Independent Electoral & Boundaries Commission (I.E.B.C.) & 2 others [2013] eKLR*** to argue that the Court should strike out paragraph 13(ii) of the Supporting Affidavit since it introduces new matters that were not pleaded in the Election Petition.

91. It requires little analysis here to conclude that the 1st Respondent is right. It is one thing to adduce general evidence which might not mirror the averments in the Petition in each trifling manner but it is quite another to add new claims for the first time in the Supporting Affidavit as the Petitioner does in Paragraph 13(ii) of the Supporting Affidavit. This is because, the Petition is the controlling document; the Master document governing the dispute which is before the Court. It cannot be expanded by way of any of the other pleadings. Indeed, the only way to expand or change the causes of action or grounds in the Election Petition is through an amendment with the leave of the Court – which must be done within the timeframe for filing election Petitions.

92. Consequently, the prayer to strike out paragraph 13(ii) of the Supporting Affidavit is granted.

(D) <u>THE PETITIONER'S APPLICATION DATED 02/10/2017</u>

93. The Petitioner filed a Notice of Motion dated 02/10/2017. It was expressed to have been brought under Rule 9 of the Election Regulations, 2017, Sections 60-83 of the Elections Act, Articles 10, 38, 81 and 159 of the Constitution and all other enabling provisions of the law.

94. The Application sought the following prayers:

> i. That the Honourable Court be pleased to direct for a scrutiny and re-tallying of votes cast for all Gatundu North Constituency.
>
> ii. That the Honourable Court be pleased to issue an order preserving the information/data in KIEMS SD Cards and any other order the Court may deem fit and just.
>
> iii. That the Honourable Court be pleased to direct County Secretary, Kiambu County to produce employment records and salary payments to the 1st Respondents for the month of July and August, 2017.
>
> iv. An order directing the DCIO in Kamwangi Police Station to produce the original ballot papers, counterfoils discovered by members of the public and OB number as reported to him on 20/08/2017.

95. Mr. Ondieki, Counsel for the Petitioner, argued the Application orally before me. He argued that the Application is underpinned by the law especially Section 82 of the Elections Act. He also referred the Court to Rule 30 of Election petition Rules.

96. Mr. Ondieki's main argument was that an order for scrutiny will save everyone much time and facilitate the just determination of the elections dispute. He argued that the Petitioner's main allegations are two-fold: that the ballot boxes were stuffed with the ballots in favour of the 1st Respondent and that the 2nd Respondent colluded with the 1st Respondent to use fake papers. He submitted that the Petition and the Supporting Affidavit had laid sufficient ground for the order for scrutiny because both allegations had been substantiated there.

97. He balked at the idea that scrutiny cannot be ordered because his Application had not named a specific number of polling stations where scrutiny should be held arguing that the Petition had given sufficient flavour of the kind of the polling stations where there were irregularities. He referred the Court to paragraphs 12, 13, 14 and 15 of the Petition. He also referred the Court to the bundle of documents filed by the IEBC (the statutory forms) which, he said, clearly indicated some of the malpractices during the elections. For example, he referred to the Polling Station Diary for Kiangunu Secondary School where the Presiding Officer says that the Biometric equipment failed and delayed the voting for more than 10 hours. They were thus forced to delay the voting up to 10 pm.

98. In particular, Mr. Ondieki insisted that "strange" and pre-marked ballots were used during the elections and only scrutiny would be able to confirm or disconfirm this. He appeared to vary the blanket request made in his Application by asking the Court for "representative" scrutiny. He suggested that if scrutiny is done for 10 Polling stations drawn from all the six wards in the constituency, it might shed light on what happened. A representative sample would enable the Court, he argued, to draw evidence-based conclusions.

9. Mr. Ondieki also urged the Court to grant the prayer on KIEM's SD Cards for each polling station as it would be able to substantiate the Petitioner's claims.

100. Mr. Ondieki supported the Petitioner's request for production of employment records and salary payments to the 1st Respondent with the argument that the 1st Respondent was a nominated MCA who, the Petitioner claims, remained on the payroll of the County government until 08/08/2017 contrary to the law. The Petitioner says he needs this information so that he can prove that the 1st Respondent was wrongly on the ballot paper.

101. Finally, Mr. Ondieki argued that the DCIO, Kiamwangi should be ordered to come and supply the Court with the information requested so that he can assist the Court to reach a just and fair determination in the case.

102. The Respondents have attacked the prayer for recount and scrutiny in two ways. First, the 2nd Respondent makes argument that the prayer for recount and scrutiny, as framed, cannot be granted because it confuses two very different processes which are mutually exclusive. Counsel for the 2nd Respondent submitted that recount and re-tallying of votes is espoused in Rule 28 of Elections Petitions Rules, 2017. Under Rule 28(b), an order for recount and/or re-tallying of votes cast can only be granted when the singular issue for determination in the election petition dispute is the count or tallying of votes received by the candidates. As such this order will dispense with the election dispute by determining the number of votes each candidate garnered.

103. On the other hand, the 2nd Respondent points out, the underpinning statutory provisions for scrutiny of votes is section 82 of the Elections Act No. 2011 and Rule 29 of the Election Petition Rules 2017. An order for scrutiny determines the validity of the votes cast that is it examines electoral malpractice and irregularities.

104. The 2nd Respondent argues that it is misguided and an abuse of the process of the Court for the

Petitioner to act for both orders at the same time. Counsel relied on ***Justus Gesito Mugali M'mbaya v. Independent Electoral and Boundaries Commission & 2 Others*** where it was held inter alia "*the outcomes of these two processes are different and in my view, it would be illogical to conduct these two processes in one petition. One cannot have it both ways. It is either an issue of miscounted numbers or validity of votes. Moreover, a Petitioner cannot on the one hand loathe an election process for being flawed and perform a recount or tally of the same process with the aim of being declared the winner if he/she emerges victorious.*"

105. Second, both Respondents argue that the Petitioner has not satisfied the conditions for the grant of an order for scrutiny. In particular, both Respondents argue that the Petitioner has not met the two mandatory conditions: **The first** is a party seeking for an order for scrutiny must establish sufficient reason for the same by dint of Rule 29 (2) of the Election Petitions Rules, 2017**. The second** condition is that the Party seeking a scrutiny must categorically specify the polling station(s) whose results are in dispute by dint of **Rule 29 (4) of the Regulations, 2017.**

106. The Respondents submitted that the Petitioner has not satisfactorily adduced any sufficient reason, to warrant an order for either scrutiny or recount of the votes cast. They relied on ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others*** where the Supreme Court held inter alia that *'the right to scrutiny and recount does not lie as a matter of course. The party seeking a recount or scrutiny of votes in an election petition is to establish the basis for such a request, to the satisfaction of the Trial judge or magistrate. Such a basis may be established by way of pleadings and affidavits or by way of evidence adduced during the hearing of the petition."*

107. The Respondents pointed out that in this case the Petitioner has requested for a "blanket" order of scrutiny for the whole of Gatundu North. The 2nd Respondent, indeed, argues that the Petitioner has not even said whether the scrutiny is only with respect to the elections for the member of National Assembly.

108. The Respondents, therefore, argue that the Petitioner has not laid sufficient basis for the orders of scrutiny. In particular, they argue that the Petitioner has not signaled the polling stations where he contests the results. Relying on ***Hassan Mohammed Hassan & another v Independent Electoral & Boundaries Commission & 2 others [2013] eKLR,*** they urged me to follow Onyancha J. in his holding that when scrutiny is sought in the pre-trial stage, relevant evidence "must be based on the affidavits, if any, supporting the Application.***"***

109. Here, the Respondents argue, the Affidavit sworn by the Petitioner does not adduce any evidence in support of the Application. They cite ***Philip OsoreOgutu V Michael OnyuraAringo& 2 Others [2013] eKLR*** where Tuiyott J held that:

> *The petition and the Affidavit in support should disclose the petitioner's cause of action and a cursory look at the two should reveal the petitioner's case. For a petitioner to deserve an order for scrutiny then, as a starting point, the petition and the affidavit in support must contain concise statements of material facts upon which the claim of impropriety or illegality of the casting or counting of ballots is made.*

110. On the other three prayers by the Petitioner, the 1st Respondent has responded as follows.

111. On the order seeking the preservation of the information/date in KIEMS SD cards, the 1st Respondent argues that the grant of the order would be unnecessary and a vanity as the said data is presently preserved by the 2nd Respondent pursuant to Regulation 86 (1) of the Elections (General) Regulations, 2012. Further, the 1st Respondent argues that Regulation 93 (1) of the Elections (General) Regulations, 2012 further places an obligation on the 2nd Respondent to store such information for 3 years after the election results have been declared.

112. The 1st Respondent, therefore, argues that the Court should not issue the order as it will be vain and since the Petitioner's application is" based on an alarmist and misguided notion"

113. The 1st Respondent also resists the prayer for an Order directing the County Secretary Kiambu County to produce the employment records and salary payments to the 1st Respondent for the month of July and August 2017.

114. The 1st Respondent argues that granting the order would be indulging the Petitioner "in his fishing expeditions." The 1st Respondent complains that the Petitioner does not show the Court (by his supporting affidavit) how the grant of this Order will assist the Court in the determination of his Petition. Neither does the Petitioner show the relevance of the Kiambu County Secretary in the present proceedings- an election petition pitting himself against the 1st and 2nd Respondents.

115. The 1st Respondent referred the Court to her Replying Affidavit sworn on 06/10/2017 where she deposed that she was validly nominated having met all the requirements for nomination to contest in the National Assembly elections and having resigned from office. Any challenge from that process, the 1st Respondent insists ought to have been pursued through the 2nd Respondent's Dispute Resolution Committee by dint of Article 88(4)(e) of the Constitution. It is that Committee that is cloaked with jurisdiction to hear disputes arising out of nominations, the 1st Respondent argued. The 1st Respondent relied on ***Francis Gitau Parsimei & 2 others v National Alliance Party & 4 others [2012] eKLR*** for the proposition that the IEBC has the original jurisdiction to hear disputes arising out of nominations pursuant to Article 88 (4) (e) and that such matters would not be entertained if the alternative process set out in Article 88 had not been exhausted.

116. Finally, the 1st Respondent equally resists the prayer for an Order directing the DCIO in Kamwangi Police Station produce original ballot papers. She argues that this is another attempt at a "fishing expedition" and asks the Court to "sternly reprimand" the Petitioner.

117. The 1st Respondent complains that neither the Notice of Motion nor the Supporting Affidavit spells out the grounds for the grant of Order 5 or adduce any evidence in support thereof; illustrating that this Order is sought to adduce additional evidence in support of the Petitioner's Petition.

118. On its part, the 2nd Respondent argues that both prayers 4 and 5 of the Petitioner's Application (for orders for 1st Respondent's salary information and for the DCIO to produce documents) is an abuse of the court process. The 2nd Respondent argues that the Petitioner seeks to expand the scope of his Petition through an interlocutory application by introducing new issues and cause of action.

119. The 2nd Respondent argued that the Petitioner is bound by his pleadings and is estopped from introducing new issues and cause of action through an interlocutory application. It cites Justice Kimaru in ***Mahamud Muhumed Sirat Vs Ali Hassan Abdirahiman And 2 Others Nairobi Petition No. 15 Of 2008 (2010) eKLR***where the Learned Judge said:

> *From the onset, 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 the petitioner's case [on] which he adduced evidence, but which were not based on the pleadings that he filed in court and in particular the petition.*

120. The 2nd Respondent also cites ***Ferdinand Ndungu Waititu vs. IEBC Nairobi Election Petition no. 1 of 2013 [2013] eKLR*** for the same proposition.

121. The 2nd Respondent also complains that the Petitioner has not adduced any ground and/ or evidence in support of these two prayers and submitted that these prayers are grossly incompetent and an abuse of

the court process and the same should be dismissed with costs.

122. I have carefully considered the rival submissions by the parties on the four prayers by the Petitioner. My analysis and determinations are as hereunder.

i. On the Prayer for an Order for Recount and Scrutiny

123. Recount of votes is provided for under Section 80(4)(a) of Elections Act, 2011 and Rule 28 of Election Petitions Rules, 2017. Scrutiny, on the other hand, is provided for under Section 82 of the Elections Act, 2011 and Rule 29 of the Election Petitions Rules, 2011.

124. As the Respondents point out, recount and scrutiny are two distinct if related concepts. A recount is limited to establishing the number of votes garnered by the candidates and the tallying of such votes. Scrutiny, on the other hand, goes beyond simple arithematic: it extends to determining the validity of the votes.

125. The principles and factors which the Courts consider in deciding whether to order scrutiny or not are now well established. The Supreme Court set out the guiding principles with respect to scrutiny and recount of votes in an election petition in ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others*** **(supra)**. At paragraph 153, the Court stated thus:

> *i. The right to scrutiny and recount of votes in an election petition is anchored in Section 82(1) of the Elections Act and Rule 33 of the Elections (Parliamentary and County Elections) Petition Rules, 2013. Consequently, any party to an election petition is entitled to make a request for a recount and/or scrutiny of votes, at any stage after the filing of petition, and before the determination of the petition.*
>
> *ii. The trial Court is vested with discretion under Section 82(1) of the Elections Act to make an order on its own motion for a recount or scrutiny of votes as it may specify, if it considers that such scrutiny or recount is necessary to enable it to arrive at a just and fair determination of the petition. In exercising this discretion, the Court is to have sufficient reasons in the context of the pleadings or the evidence or both. It is appropriate that the Court should record the reasons for the order for scrutiny or recount.*
>
> *iii. The right to scrutiny and recount does not lie as a matter of course. The party seeking a recount or scrutiny of votes in an election petition is to establish the basis for such a request, to the satisfaction of the trial Judge or Magistrate. Such a basis may be established by way of pleadings and affidavits, or by way of evidence adduced during the hearing of the petition.*
>
> *iv. Where a party makes a request for scrutiny or recount of votes, such scrutiny or recount if granted, is to be conducted in specific polling stations in respect of which the results are disputed, or where the validity of the vote is called into question in the terms of Rule 33(4) of the Election (Parliamentary and County Elections) Petition Rules.*

126. The Supreme Court later on re-stated and applied these principles in ***Nathif Jama Adama v. Abdikhaim Osman Mohamed & 3 Others*** Petition No. 13 of 2014; [2014] eKLR, where it held as follows (paragraph 75):

> *It emerges that, the primary considerations in determining whether to grant scrutiny, are whether there are polling stations with a dispute as to the election results; whether such a state of affairs has been pleaded in the petition; and whether a sufficient basis has been laid – to warrant the grant of the application for scrutiny….*
>
> *….But it is crucial that the polling stations which are the subject of a possible scrutiny, would have been already signalled in the pleadings, as having contested results. This is the import of the wording of Rule 33 (1) of the Elections Petition Rules, that an application for scrutiny can be*

applied for at any stage. A foreshadowing of such an application should have been embodied in the main lines of pleading, which mark out the terrain of any legitimate electoral contest.

127. In my view, the key principles emerging from our decisional law on scrutiny and recounting are the following:

i. Neither an order for scrutiny nor one for recount is granted as a matter of course: the party asking for it must lay sufficient basis for it.

ii. The basis for the recount or scrutiny must be laid in the pleadings and in the application and affidavit in support of the application.

iii. For an order for scrutiny or recount to be granted, it must be necessary for the just and fair resolution of the electoral dispute.

iv. There must be some prima facie case established on the material placed before the Court to warrant the orders based on the evidence pleaded.

v. Orders sought and granted must be specific not blanket. Fishing and roving inquiries are impermissible. As a general rule, scrutiny is usually ordered in specific polling stations where there are disputes.

vi. While scrutiny can assist the Court to determine the valid votes cast in favour of each candidate and, hence, the winner of the electoral contest, it also gives the Court a glimpse into the electoral system and how it was generally operationalized to allow the Court to form a general view of the integrity of the system and its technical soundness.

vii.The nature of the case and the allegations made in the Petition will normally shape the kind of order and directions the Court gives in scrutiny.

128. Applying these principles to the case at hand, I can readily say the following. First, this is an inappropriate case for a recount and re-tallying. As the 2nd Respondent points out, a recount of votes normally makes sense when the margin is fairly close and where the real issue is whether the ballots were properly counted. This is not an issue in this Petition. It was therefore misguided for the Petitioner to request for a recount and re-tallying. I note that the Petitioner's Counsel seemed to have abandoned this request at the time of the oral arguments.

129. Second, it is recommended that a party seeking for scrutiny of votes should be as specific as possible about the polling stations with respect to which they seek scrutiny. A blanket request will not do. In the present case, the actual request by the Petitioner in his Notice of Motion is a good example of a blanket request: it not only combines a request for recount with one for scrutiny – but it textually asks for scrutiny for the whole of Gatundu North Constituency.

130.The Respondents have complained that this blanket request is unavailing.

131. During oral arguments, Counsel for the Petitioner sought to modify the Petitioner's request to be for a representative 10 Polling Stations in the whole constituency. His argument was that a representative 10 polling stations will give enough statistical sample for the Court to come up with a proper determination about the claims the Petitioner has made.

132. It is true that a Petitioner must have laid sufficient basis in his pleadings for an order for scrutiny to be granted. It is also true that the nature of the claims and allegations by the Petitioner will usually dictate the kind of order that the Court would give. The bottom line is that the Court has to bespoke the order it gives to the circumstances of the case.

133. In this case, notwithstanding the lack of drafting precision by the Petitioner, a perusal of the Petition

and the Supporting Affidavit reveal that two of the more serious allegations by the Petitioner are that pre-marked fake ballots as well as ballot-stuffing occurred in favour of the 1st Respondent. The Petitioner backed up these allegations with what he says are genuine ballot papers discovered dumped somewhere in Kiamwangi. He claims that at the trial he will be able to adduce evidence to prove these claims. It is also true that the Petitioner included the request for scrutiny in his Petition hence sufficiently grounding it as required by our decisional law. See ***Philip Osore Ogutu vs Michael Aringo & 2 Others, Busia High Court Election Petition No. 1 of 2013.***

134. While I regret the lack of precision in his Notice of Motion, I would agree with Counsel for the Petitioner that given these two twin-claims by the Petitioner which are well established in the Petition, opening a representative number of ballot boxes from different polling stations will either prove or disprove the Petitioner's theory and possibly be potentially dispositive in the case.

135. Consequently, I will grant a limited order of scrutiny restricted to only ten polling stations which the Court will choose after due consultations with the advocates for the parties. This limited scrutiny will be conducted by the Deputy Registrar of this Court and a report filed in Court at the end of that exercise. Advocates for the parties will be at liberty to address the Court on the report filed by the Deputy Registrar before the Court makes findings on it.

(ii) ***<u>On the Prayer that the KIEMS SD Card be Preserved</u>***

136. The Petitioner has requested that the Court orders the 2nd Respondent to preserve the KIEM's SD Cards which were used in the polling stations in Gatundu North Constituency.

137. The Respondents have argued that the order is unnecessary because the 2nd Respondent is obliged by law to preserve the SD Cards anyway.

138. There is little reason to dwell on this request: Under Rule 86 and 93 of the Elections (General) Regulations, 2012, the 2nd Respondent is obliged to preserve all election materials (as defined in section 2 of the Elections Act, 2011) until further orders are granted by the Court. Rule 93 requires the 2nd Respondent to retain the materials for three years.

139. Consequently, there is no reason for the Court to issue this order as it will merely mimic the provisions of the Regulations. However, since there are specific allegations that the KIEM's kits malfunctioned in four polling stations, the Court will, at this point, direct that the SD Cards for those polling stations (all streams) be immediately deposited in Court for use by the parties in marshalling their respective cases.

140. The four polling stations are:Kawira, Ihiga-ini, Muirigo and Njathaini. The 2nd Respondent is directed to provide the following with respect to each of these polling stations:

i. A print-out of all the information in each of the KIEM's SD Cards with an annotated guide to the information;

ii. The physical SD Card for each polling station or each stream if some polling stations had more than one stream; and

iii. At least one KIEM's card reader.

(iii) ***<u>On the Request to Direct the County Secretary and the DCIO, Kiamwangi Police Station to Produce Certain Evidence</u>***

141. The Petitioner has also requested for orders directing the Kiambu County Secretary to produce documents related to the employment of the 1st Respondent as a Member of the County Assembly between July and August, 2017 as well as any salaries paid to her during that period. He also asked for

orders compelling the DCIO, Kiamwangi Police Station to "produce the original ballot papers, counterfoils discovered by members of the public and OB number as reported to him on 20/08/2017."

142. After due analysis, both of these requests must fail. This is because, if granted, the effect of both requests would be to expand the scope of the Petition beyond that originally filed by the Petitioner. The effect would be to travel outside the 28-day period during which the Petitioner must present his Petition as well as all the evidence he wishes to rely on in urging his case. This is a constitutional timeline that the Court must jealously protect.

143. In considering the requests for the kind of orders sought by the Petitioner in these two specific orders, the Court must be careful not to allow a party to expand his Petition beyond that which was presented within the constitutionally provided timeline of 28 days. The general rule is that the petitioner must file all the evidence he seeks to rely on within 28 days. The Courts would be very reluctant to grant orders for a Petitioner to adduce further evidence beyond the original 28 days provided by the Constitution especially where it can be demonstrated that the Petitioner is either on a fishing expedition or that the adduction of such further evidence would prejudice the Respondents.

144. The attitude which the Courts have wielded towards this question is the one exemplified by the Supreme Court ***Raila Odinga -V- Independent Electoral and Boundaries & 3 Others, S. C Petition No. 5 of 2013***. The Court gave the following guidelines for determining applications for the filing of further affidavits and admission of new or additional evidence:

> *i. The admission of additional evidence is not an automatic right. Instead, the election court has adiscretion on whether or not to admit the evidence.*
>
> *ii. Further affidavits must not seek to introduce massive evidence which would in effect, change the nature of the petition or affect the respondent's ability to respond to the said evidence.*
>
> *iii. Admission of new evidence must not unfairly disadvantage the other parties to an election petition.*
>
> *iv. Parties to an election petition should strive to adhere to strict time lines set out in EDR laws.*
>
> *v. Finally, further affidavits may not be filed without leave of the Court or after hearing has closed irrespective of their relevance.*

145. In this case, the Petitioner has not given any reasons at all why he was unable to get the evidence he seeks to be produced by a third party and file it as part of his Petition. He has not alleged that it would have been impossible to get the information from the third parties before the expiry of the 28 days. Neither has he indicated that he approached the Court before the expiry of the 28 days in an attempt to get the information. Indeed, by his very own Petition, the Petitioner was aware of the issue respecting the 1st Respondent's employment even before the elections. It is, therefore, quite prejudicial to permit the introduction of this new evidence at this late stage.

146. The Respondents have also urged me to disallow the prayer for the 1st Respondent's employment and salary information based on the fact that the claim the information seeks to establish is time-barred and in the wrong forum anyway. The argument is that any disputes related to nominations ought to have been filed at the 2nd Respondent's Dispute Resolution Tribunal established under Article 88(4)(e) of the Constitution.

147. I find this argument to be persuasive: it is too late for the Petitioner to raise this argument now – long after nominations and elections were held. The Court would, as a prudential matter, refuse to take jurisdiction to deal with this question at this time. In any event, I note that any information supplied by the County Secretary on the employment and salary of the 1st Respondent would not support any specific ground for annulment of the Petition. As such, any production and admission of evidence in this regard

would impermissibly expand the Petition beyond the constitutional timelines.

148. The upshot, then, is that the prayers to compel the County Secretary and the DCIO, Kamwangi Police Station to produce certain documents is hereby declined.

(E) DISPOSITION AND ORDERS

149. In the end, the orders and directions of the Court regarding the three Applications and multiple prayers are as follows:

I. The 2nd Respondent's Notice of Motion dated 06/10/2017 is allowed with the consequence that:

a. Leave is granted to the 2nd Respondent to file affidavits by further witnesses out of time;

b. The affidavits by Joseph Chege Ndung'u and John Thia Njui attached to the 2nd Respondent's Application are deemed as duly filed and forming part of the court record.

II. The following paragraphs and Grounds of the Petition are hereby struck out for reasons given above:

a. Paragraphs 16, 17, 23, and 34;

b. Grounds a(iv) and (vi); c(vii); e(i); and f(i) and (ii).

III. The following paragraphs in the Supporting Affidavit of the Petitioner are hereby expunged: Paragraphs 14, 15, 28 and 41.

IV. The request to strike out all the other paragraphs and grounds in the Petition and Supporting Affidavit is hereby declined.

V. A limited order of scrutiny restricted to only ten polling stations which the Court will name after due consultations with the advocates for the parties is hereby granted. The limited scrutiny will be carried out in accordance with the following parameters:

a. The limited scrutiny will be conducted by and under the supervision of the Deputy Registrar of this Court;

b. The limited scrutiny in the ten (10) selected polling stations shall involve:

i. The recount and ascertainment of the number of votes each candidate obtained in all the streams in each of the ten selected polling stations;

ii. The ascertainment of the authenticity of the ballot papers used as well as the validity of the votes cast for each candidate in all the streams in each of the ten selected polling stations.

c. Each party shall be permitted to have present one advocate and one other representative or agent during the scrutiny exercise;

d. The Deputy Registrar shall file a report in Court and serve a copy on each of the parties;

e. Each party will be at liberty to address the Court on the report filed by the Deputy Registrar before the Court makes findings on it and on the Petition; and

f. The Court shall issue further directions respecting the scrutiny.

VI. With respect to the following polling stations: <u>Kawira, Ihiga-ini, Muirigo and Njathaini</u>, the 2nd Respondent is directed to provide the following with respect to each:

a. A print-out of all the information in each of the KIEM's SD Cards with an annotated guide to the information;

b. The physical SD Card for each polling station or each stream if some polling stations had more than one stream;

c. At least one KIEM's card reader; and

d. The 2nd Respondent shall arrange for access and the Petitioner shall be at liberty to have a read only access of the data in the KIEMS kits with regard to the Elections for Member of Parliament for Gatundu North Constituency for the four polling stations. The access will be between 31st October, 2017 and 2nd November, 2017 between 8:30am and 5:00pm in the presence of the Petitioner and the other parties or their representatives.

VII. The request by the Petitioner for orders directing the Kiambu County Secretary to produce documents related to the employment of the 1st Respondent as a Member of the County Assembly between July and August, 2017 as well as any salaries paid to her during that period and for orders compelling the DCIO, Kiamwangi Police Station to "produce the original ballot papers, counterfoils discovered by members of the public and OB number as reported to him on 20/08/2017" is hereby declined.

VIII. Costs of all the Applications will be costs in the cause.

150. Orders accordingly.

Dated and delivered at Kiambu this 30th Day of October, 2017.

…….

JOEL NGUGI

<u>JUDGE</u>