



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUNGOMA**

**ELECTION PETITION NO. 4 OF 2017**

**(HEARING AT KITALE HIGH COURT)**

**IN THE MATTER OF: THE ELECTIONS (PARLIAMENTARY  
AND COUNTY ELECTIONS) PETITION RULES, 2017**

**AND**

**IN THE MATTER OF: THE MEMBER OF NATIONAL ASSEMBLY  
ELECTIONS FOR SIRISIA CONSTITUENCY, BUNGOMA COUNTY**

**THE HUMBLE PETITION OF:**

**LEVI SIMIYU MAKALI.....PETITIONER**

**VERSUS**

**KOYI JOHN WALUKE.....1<sup>ST</sup> RESPONDENT**

**KENNEDY OCHANYO.....2<sup>ND</sup> RESPONDENT**

**INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION.....3<sup>RD</sup> RESPONDENT**

**RULING NO. 5**

**Introduction: -**

1. This is a ruling on the Petitioner's application by way of Notice of Motion dated 15/11/2017 and filed in Court on 17/11/2017. The application was filed at the close of the full hearing of the petition and seeks the following orders: -

**1. THAT this Honourable Court be pleased to Order for Scrutiny of:-**

- a) The packets of spoilt Ballot Papers**
- b) The packets of Counter foils of used and unused ballot papers**
- c) The packet of Counted Ballot papers**
- d) The Packets of Rejected ballot papers**
- e) The statements showing the number of Rejected ballot papers**

*f) Polling Station Diaries for all 99 Polling Stations in Sirisia Constituency*

*g) Scrutiny of all Forms 35A in respect to all polling Stations that were in the Sirisia Constituency.*

*h) Form 32A – KIEMS Supervisor validation Forms*

*i) Forms 32 – Declaration of Secrecy for persons assisting voters*

*j) QR Code for all polling stations within Sirisia Constituency*

*k) Extracted Data captured by KIEMS Kit during voter Identification and results transmission and all their logs in all the polling stations of Sirisia Constituency.*

*l) Field Note books.*

*m) All other election materials used in Member of National Assembly – for Sirisia Constituency, Bungoma County.*

**2. THAT this Honorable Court be pleased to order for a re-count of all ballots papers in respect of all the 99 Polling Stations in Sirisia Constituency of Bungoma County.**

**3. THAT the scrutiny and re count be in respect of all 99 Polling Stations that were in Sirisia Constituency of Bungoma County.**

**4. Costs of this Application be provided for.**

2. The application was opposed by the Respondents.

**Background: -**

3. The application is hinged on the eight grounds appearing on its body and is supported by the Supporting Affidavit sworn by the Petitioner herein, **Levi Simiyu Makali**, on 16/11/2017.

4. In opposing the application, the first Respondent filed Grounds of Opposition on 24/11/2017 and an Affidavit sworn on 23/11/2017. The second and third Respondents filed a Replying Affidavit sworn by the second Respondent, **Kennedy Ochanyo** on 24/11/2017.

5. The application was heard by way of written submissions. All Counsels filed their respective submissions and highlighted on the same accordingly. All Counsels also filed their respective detailed Lists of Authorities.

**The Petitioner's/Applicant's submissions: -**

6. **Mr. Makokha**, Counsel for the Petitioner/Applicant relied on the application, the grounds thereon, the written submissions and the oral highlights in prosecuting the application. Counsel briefly revisited the legal basis for scrutiny and recount as **Sections 80, 81 and 82 of the Elections Act No. 24 of 2011** (hereinafter to as '**the Act**') and **Rules 28 and 29 of Elections (Parliamentary and County Elections) Petitions Rules, 2017** (hereinafter to as '**the Rules**'). He submitted that the purpose of the application was to assist the Court to determine the validity of the votes and if the allegations of irregularities and malpractices are valid. He remained alive to the fact that the prayers sought were purely discretionary, which discretion was wide. The cases of **Gatirau Peter Munya vs. Dickson Mwenda Githinji & 2 others (2013) eKLR** (hereinafter referred to as '**the Gatirau Peter Munya case**'), the ruling in the case of **Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR** (hereinafter referred to as '**the 2017 Raila ruling**'), **Philip Osore Ogutu vs. Michael Onyura Aringo & 2 others (2013) eKLR** among other cases were cited.

7. Counsel further submitted that there were irreconcilable irregularities which were clearly established during the hearing. They included the two Forms 35C (**Certificate of Elected Member of National Assembly**) dated 08/08/2017 and 09/08/2017 respectively meaning that the winner of the election was first declared before the collation of Forms 35A, the tallying of the results in the Forms 35A and the preparation of Form 35B. Submitting further, Counsel argued that another irregularity was on Form 35B. That, there were two such Forms on the record with glaring differences again which were not reconciled. He also argued further that there were so many Forms 35A which were missing and singled out 9 polling stations with such deficiencies. That, most of the Forms 35A's had various unexplained anomalies and discrepancies and pointed out those from over 30 polling stations. That, some Forms 35A were not signed by Ford-Kenya agents. It was submitted that the application was in full compliance with the law and especially **Rule 29 of the Rules** which require the naming of the polling stations with impugned results.

8. It was further submitted that the application was not a fishing expedition as no fresh evidence was to be called but what was at stake was the integrity and validity of the election. The case of **Gatirau Peter Munya** (supra) was cited to have so laid the position clear. There was also the question of the standard of proof in scrutiny and recount applications. Counsel submitted that going by the Supreme Court's decision in **Nicholas Kiptoo arap Korir Salat vs. Independent Electoral and Boundaries Commission & 2 Others (2015) eKLR** (hereinafter referred to as '**the Nick Salat case**') the standard was lower than that required in determining an election petition.

9. There was also the submission that the application was anchored in the petition and that the vote margin becomes material when the process leading thereto is not in question. Counsel urged this Court to find that there was sufficient basis for the grant of the orders sought.

**The first Respondent's submissions: -**

10. **Miss Antonina Muyoka Counsel**, appeared for the first Respondent. In opposing the application Counsel reiterated the legal basis of scrutiny and recount applications. She also referred to the **Gatirau Peter Munya** case (supra) and the Supreme Court of India case of **Arikala Narasa Reddy v. Venkata Ram Ressay Reddgar & Anr, Civil Appeal Nos. 5710-5711 (tel:5710-5711) of 2012: [2014] 2 S.C.R.** (hereinafter referred to as '**the Indian case**').

11. It was submitted that the application was seeking to expand the scope of the petition since the affidavits in support of the petition only mentioned 19 polling stations whereas the Petitioner sought for scrutiny of all the 99 polling stations in the Sirisia Constituency. The cases of **Gatirau Peter Munya** (supra), **Nick Salat** (supra) and **Kakuta Hamisi vs. Peris Peri Tobiko & 2 others (2013) eKLR** were submitted to have pronounced that such an attempt lacks legality and must be rejected as it was tantamount to expanding the scope of the petition and thereby amending the petition. Alongside that submission, it was argued that the application was a fishing expedition for new evidence to salvage the petition. Counsel referred to many cases on the issue including **Gatirau Peter Munya** (supra), **Gideon Mwangangi Wambua & Another vs. IEBC & 2 others, Philip Mukwe Wasike vs. James Lusweti Mukwe & 2 others (2013) eKLR, Peter Gichuki King'ara v. IEBC & 2 others (2013) eKLR.**

12. On the irregularities, it was submitted that the alleged irregularities were minor and sufficiently explained and that not every irregularity calls for a scrutiny. The high vote margin was submitted not to favour a scrutiny and recount and the case of **Hassan Joho vs. Nyange & Another (2008) eKLR (EP) 500** and several others were referred to. There was also the submission that the application was not in tandem with the petition and further that if the application is allowed as prayed the exercise will consume the time remaining to legally determine the petition.

13. Whereas the first Respondent had no objection to the scrutiny of the polling diaries and the Forms 34A for the polling stations which were named in the petition and the affidavits thereto, he altogether protested to the scrutiny and recount as he alleged that the Deputy Returning Officer was a very close relative of the Petitioner and had even formally complained of his involvement in the matter to the third Respondent hence the fear that the materials are likely to have been interfered with by now. The first Respondent however prayed that the application be dismissed with costs.

**The second and third Respondents' submissions: -**

14. **Mr. Kenei**, Counsel for the second and third Respondents also opposed the application. He also revisited the law on scrutiny and recount and some judicial pronouncements on the same being **the 2017 Raila ruling, Justus Gesito Mugali M'mbaya vs. IEBC & 2 others (2013) eKLR** and that of **Mohammed Mahat Kuno vs. Abdikadir Omar Aden (2013) eKLR.** Counsel emphasized that the Petitioner was duty bound to lay a sufficient basis for the application as the same is not an automatic remedy.

15. Counsel elaborately argued four points. On whether the application was in tandem with the petition, it was submitted that the two are at a variance since the petition did not identify any polling station with disputed results. That, paragraph 15 of the petition instead named 15 polling centers and not polling stations. That, the application had now named 33 new polling stations an act which was a departure from the pleading with the result of expanding the scope of the petition. Counsel urged this Court to be bound by the Supreme Court decisions in the **Raila Amolo Odinga & 5 others vs. Independent Electoral and Boundaries Commission & 2 Others (2013) eKLR** (hereinafter referred to as '**the Raila 2013 case**'), **Nathif Jama Adam vs. IEBC & 3 others (2014) eKLR** and that of the Court of Appeal in **Global Vehicles Kenya Ltd vs. Lenana Road Motors (2015) eKLR** on the essence of pleadings. The persuasive High Court decision of **Apungu Arthur Kibira vs. IEBC & 2 others, Kakamega Election Petition No. 6 of 2017** (unreported) was referred to on the submission that the Petitioner cannot attempt to rely on the documents filed by the Respondents to come up with further grounds in support of an application for scrutiny and recount as that will be tantamount to amending the petition through the backdoor.

16. As to the naming of the polling stations, Counsel submitted that the Petitioner failed to satisfy the requirement of **Rule 29 of the Rules** in asking for the scrutiny of all the 99 polling stations in the constituency whereas only some of them were the ones named in the petition. That was contrary to the principle laid in the **Nick Salat** case. It was also submitted that the application failed to name specific election materials which are to be subject of the scrutiny and recount and the case of **Harun Meitamei Lempaka vs. Lemanken Arama & 2 others (2013) eKLR** referred to in support thereof. It was further submitted that the Petitioner had failed to lay sufficient basis for the application as the petition was based on the grounds of bribery and violence, none of which can benefit from scrutiny and recount. That the ground of malpractices was generally couched without specificity and remained unproved and that since there was no allegation of theft of votes a recount would be an exercise in vain. The margin of votes between the first Respondent and the Petitioner was submitted to be so wide that there was no need of scrutiny and recount.

17. On the two Forms 35C, it was submitted that the Form 35C was only a Certificate and not the document used in declaring the winner and further that sufficient explanation had been offered. On the standard of proof, it was submitted that the **Nick Salat** case did not lower the standard as alleged. This Court was also called upon to be cautious and remain vigilant as an application filed at the tail-end of the proceedings may be used to seal some loopholes exposed during the hearing. Lastly, there was a submission that parties cannot prosecute cases through blackmail in posing questions like why oppose the application if there is nothing sinister. Counsel prayed for the dismissal of the application with costs.

**The Petitioner's submissions in response: -**

18. Counsel submitted that the petition and the application were in tandem as there was no attempt to overstep the foundation laid in the pleading neither is there an attempt to introduce any new or further evidence. That, the Respondents are the ones who introduced the two Forms 35C without any justification on the irregularities hence need for scrutiny and recount. On the timelines, it was submitted that the whole exercise cannot take more than 5 days and since the full hearing of the case was conducted there is no cause for alarm.

19. On the standard of proof, Counsel clarified that the standard remains the same as in the petition and submitted that the vote margin does

not matter if the process was flawed. He also submitted that the massive irregularities can only be reconciled by way of a scrutiny and a recount of Forms 35A, Forms 35B and Forms 35C. Counsel prayed that the application be allowed as prayed.

#### **Analysis and Determination: -**

20. I have carefully considered the application alongside the parties' affidavits and grounds of opposition coupled with the elaborate submissions and all the decisions referred to and I have clearly understood their purport. As I recently dealt with the aspects of what scrutiny and recount entails and their legal basis in **Kitale High Court Election Petition No. 1 of 2017 Robinson Simiyu Mwanga and Alpha Kitazi Chore vs. IEBC & 2 others (unreported)**, which position I am still ascribing to, I will reproduce the relevant sections of the said ruling herein.

21. In **paragraphs 32 to 42 inclusive** I had the following to say: -

#### **'What is recount and scrutiny?'**

32. The **Constitution**, the **Act** as well as the **Regulations** have not defined what scrutiny and recount is. The ordinary English dictionary (*The Concise Oxford English Dictionary, (2011) 12<sup>th</sup> Edition, (OUP)*) defines 'scrutiny' as 'the close and thorough examination, observation or study.' 'Recount' is simply 'to count something again'. Whereas the term 'recount' is easily understandable on one hand, the term 'scrutiny' on the other hand is a term with complex layers of meaning. That being so, the term 'scrutiny' has been variously defined and/or explained. In this conversation however, I will limit myself to the court-supervised scrutiny and recount. In legal jurisprudence for instance, The **Halsbury Laws of England**, (1990) 4<sup>th</sup> Edition, 12; 454 defines 'scrutiny' as 'a court supervised forensic investigation into the validity of the votes cast in an election'.

33. Whereas the two terms are conceptually different, they are often used together and interchangeably. In an attempt to distinguish them, the **Judiciary Bench Book on Electoral Disputes Resolution, 2017** at page 78 has the following: -

***"4.6.5. 1.....Although the terms 'scrutiny' and 'recount' are often used together and interchangeably, and petitioners often pray for 'scrutiny and recount' of the votes cast at an election, the two remedies are conceptually different. A recount is limited to establishing number of votes garnered by the candidates and the tallying of such votes (Justus Gesito Mugali v Independent Electoral & Boundaries Commission & 2 Others, Election petition (Kakamega) No. 6 of 2013). Scrutiny, on the other hand, goes beyond the simple question of the number of votes garnered by the candidates and extends to the question of the validity of such votes (Justus Gesito Mugali v Independent Electoral & Boundaries Commission & 2 Others, Election petition (Kakamega) No. 6 of 2013). There is no room for examination of electoral misconduct in a recount (Justus gesito Mugali v Independent Electoral & Boundaries Commission & 2 Others, Election petition (Kakamega) No. 6 of 2013). Although scrutiny and recount are conceptually different, the conduct of a scrutiny inevitably entails the conduct of a recount. The converse, however is not true."***

34. From the foregone, whereas a 'recount' only deals with the number of votes garnered and the retallying of those votes, 'scrutiny' is a more detailed exercise where votes and the other election materials are carefully and thoroughly observed and examined with a view to ascertain if such votes are valid in the first instance and the process, to an extent, was flawless. Scrutiny is therefore an intensive exercise which gives room for examination of *inter alia* electoral irregularities, malpractices, misconduct and even a re-examination of the tally. The rationale behind scrutiny is two-fold: that it is only the valid votes that confer an electoral advantage to a candidate in an election hence the need to establish the validity and the number of the valid votes a candidate garnered (**the quantitative aspect**) and that an election can be impugned based on electoral irregularities, malpractices, misconduct and non-compliance with the law (**the qualitative aspect**).

35. The **purpose** of scrutiny has also not been without judicial analysis. In one such instance it was revisited by **Kariuki, J** (as he then was) in **William Maina Kamanda vs. Margaret Wanjiru Kariuki**, Nairobi Election Petition No. 5 of 2008 as follows: -

***'The purpose of scrutiny is: -***

***(1) To assist the court to investigate if the allegations of irregularities and breaches of the law complained of are valid.***

***(2) Assist the court in determining the valid votes cast in favour of each candidate.***

***(3) Assist the court to better understand the vital details of the electoral process and gain impressions on the integrity of the electoral process".***

36. In the case of **Harun Meitamei Lempaka vs. Lemanken Arama & 2 others (2013) eKLR** the Court added its voice on the purpose of scrutiny as '***entailing the process of determining the validity of a vote. The object of scrutiny is to ascertain by striking out votes or adding votes which are found the candidate garnered.***'

#### **The Legal basis of recount and scrutiny: -**

37. The law on scrutiny and recount is clearly set out in **Sections 80(4)(a) and 82** of the **Act** as read with **Rules 28 and 29** of the **Rules**. The said sections of the **Act** are carefully tailored as under: -

*‘80(4) An election court may by order direct the Commission to issues a certificate of election to a President, a member of Parliament or a member of a county assembly if-*

*(a) upon recount of the ballots cast, the winner is apparent.*

*82(1) An election court may, on its own motion or on application by any party to the petition, during the hearing of an election petition, order for a scrutiny of votes to be carried out in such manner as the election court may determine.*

*(2) Where the votes at the trial of an election petition are scrutinized, only the following votes shall be struck off-*

*(a) the vote of a person whose name was not on the register or list of voters assigned to the polling station at which the vote was recorded or who had not been authorized to vote at that station;*

*(b) the vote of a person whose vote was procured by bribery, treating or undue influence;*

*(c) the vote of a person who committed or procured the commission of personation at the election;*

*(d) the vote of a person proved to have voted in more than one constituency;*

*(e) the vote of a person, who by reason of conviction for an election offence or by reason of the report of the election court, was disqualified from voting at the election; or*

*(f) the vote cast for a disqualified candidate by a voter knowing that the candidate was disqualified or the facts causing the disqualification or when the facts causing it were notorious.*

*(3) The vote of a voter shall not, except in the case specified in subsection (1) (e), be struck off under subsection (1) by reason only of the voter not having been or not being qualified to have the voter's name entered on the register of voters.*

38. The Rules as well provide as follows: -

*‘28.A petitioner may apply to an elections court for an order to*

*(a) recount the votes; or*

*(b) examine the tallying, if the only issue for determination in the petition is the count or tallying of votes received by the candidates.*

*29(1). The parties to the proceedings may apply for scrutiny of the votes for purposes of establishing the validity of the votes cast.*

*(2). On an application under sub-rule (1), an election court may, if it is satisfied that there is sufficient reason, order for scrutiny or recount of the votes.*

*(3). The scrutiny or recount of votes ordered under sub-rule (2) shall be carried out under the direct supervision of the Registrar or magistrate and shall be subject to the directions the election court gives.*

*(4). The scrutiny or recount of votes in accordance with sub-rule (2) shall be confined to the polling stations in which the results are disputed and may include the examination of -*

*(a) the written statements made by the returning officers under the Act;*

*(b) the printed copy of the Register of voters used during the elections sealed in a tamper proof envelope;*

*(c) the copies of the results of each polling station in which the results of the election are in dispute;*

*(d) the written complaints of the candidates and their representatives;*

*(e) the packets of spoilt ballots;*

*(f) the marked copy register*

*(g) the packets of counterfoils of used ballot papers*

*(h) the packets of counted ballot papers;*

*(I)the packets of rejected ballot paper;*

*(j)the polling day diary; and*

*(k)the statements showing the number of rejected ballot papers*

**(5) For purposes of sub-rule (4) (b), every returning officer shall upon declaration of the results, seal the printed copy of the Register of Voters used at that election in a tamper proof envelope and such envelop shall be stored by the Commission subject to the elections court directions under rule 16.”**

39. A reading of the foregone provisions reveals several salient issues. I will point out only three of them. One, that whereas an election Court may order for scrutiny of the votes on its own motion (**Section 82(1)**) or on application by a party (**Section 82(1)** and **Rule 29**), such a Court cannot order a recount of the votes or an examination of the tallying on its own motion (**Rule 28**). Be that as it may and as discussed above, the nature of a scrutiny naturally entails a recount but not the converse. Two, in an application for recount or scrutiny the court must be satisfied that there is sufficient reason for the grant of the order. Such an application is not granted a as matter of course. Three, it is the election court to determine the manner in which the scrutiny or recount will be done.

40. There has also been elaborate judicial jurisprudence on the subject where several guiding principles in such applications have been developed. In terms of precedence, the decision of the Supreme Court in the case of **Gatirau Peter Munya** (supra) remains the *locus classicus* on the subject. In that case my Lordships and Ladyships revisited the then emerging jurisprudence in the High Court and the Court of Appeal and had the following to say in **paragraphs 152** and **153** of the judgment: -

**‘[152] We have considered the wording of section 82(1) of the Elections Act and Rule 33 of the Petition Rules. Taking into account the intention of Parliament (which in this instance is “to provide legislative mechanisms for the timely resolution of electoral dispute”), and the judicial thought-process as expressed by the election Courts, we are of the view that:**

**(i)There is no fundamental inconsistency between Rule 33 (1) of the Petition Rules and Section 82 (1) of the Elections Act. It is our position that an order for a recount or scrutiny of the vote may be made at any stage after filing of an election petition or during the hearing of an election petition and before the determination of the said petition.**

**(ii)There is no inconsistency between Rule 33 (2) of the Petition Rules and Section 82 (1) of the Elections Act, as regards the exercise of discretion as to whether to order for scrutiny and recount or not. Contrary to dicta in some of the High Court decisions, the discretion vested in an election court by Section 82 (1) of the Act, is not unfettered. Such discretion must be exercised reasonably, so as not to be defeat the objectives of Article 87 (1) of the Constitution and the Elections Act.**

**[153] From the foregoing review of the emerging jurisprudence in our Courts, on the right to scrutiny and recount of votes in an election petition, we would propose certain guiding principles, as follows:**

**(a)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 filling of petition, and before the determination of the petition.**

**(b)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.**

**(c)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.**

**(d)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.”**

41. On whether scrutiny or recount can be ordered in all polling stations in a disputed election, and in breaking ranks with the Court of Appeal, my Lordships were of the holding that: -

**“[159] We are unable to agree with the view of the learned Judges of Appeal. The view that scrutiny and recount in a constituency “means scrutiny and recount in all polling stations in the constituency”, is not borne out by emerging jurisprudence from the most relevant for a of adjudication, namely, the election Courts. On the contrary, judicial opinion distinctly favors a view that commends itself to us: that, an application for scrutiny and recount, must be couched in specific terms, and clothed with particularity, as to which polling stations within a constituency are to attract such scrutiny. If a party lays a clear basis for scrutiny in each and all the polling stations within a constituency, then the order ought to be granted.....”**

42. The foregone principles were also re-emphasized by the differently constituted Supreme Court in the ruling on *inter alia* scrutiny in the case of **Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR** (hereinafter referred to as '**the 2017 Raila ruling**'). Given the volume of the principles as continually generated by election courts and in light of the parties' submissions, I will revisit some of them in consideration of the instant application'.

22. I will now look at some of the principles as they apply in this case.

**(i) Irregularities and discrepancies: -**

23. As I further stated in the **Kitale High Court Election Petition No. 1 of 2017** (supra) '*scrutiny will be readily ordered in the face of glaring and irreconcilable irregularities or discrepancies or where the evidence tends to bring out the dispute more clearly. However, not all irregularities or discrepancies call for scrutiny. An irregularity or discrepancy, whether minor or otherwise, which is sufficiently explained may not call for a further analysis by way of scrutiny.....*'

24. The alleged irregularities in this case are on Forms 35A, Forms 35B and Form 35C. I will look at all the forms at a time.

**Form 35C (Certificate of Elected Member of National Assembly)**

25. There are two Forms 35C on record. In other words, there are two Certificates of Elected Member of National Assembly for the Sirisia Constituency. One of them was produced by the first Respondent through his **Replying Affidavit** in response to the petition sworn on 21/09/2017 and filed on 22/09/2017. At **paragraph 4** thereof the first Respondent deposed as follows: -

***"THAT I was declared by the Returning Officer for Sirisia Constituency as the ultimate winner in the elections held on 8<sup>th</sup> August 2017, attached herewith and marked JKW 2 is a copy declaration Certificate."***

26. This form is dated 8<sup>th</sup> day of August 2017 and for the purposes of this discussion I will henceforth refer the same as '**the first Certificate**'.

27. The second Form 35C was produced by the second and third Respondents through their Bundle of Returns filed in Court on 25/09/2017. It is dated 09/08/2017. I will henceforth refer the same as '**the second Certificate**'.

28. When the second Respondent was asked about the two Certificates during cross-examination by the Counsel for the Petitioner, he had the following to say: -

***"I am looking at Form 35C. I issued this document after the announcement of the results of all candidates and the results declared. I issued it on 09/08/2017. I signed it on that day. It has serial No. NA0392171-1. The identity card number is 829017"***

***I am looking at the Response by the 1<sup>st</sup> Respondent. The identity card number of the 1<sup>st</sup> Respondent is 0829017. These two numbers are different. There is a Form 35C serial No. NA039217-2. It is dated 08/08/2017. It has ID No. 08291. The two certificates have different dates. They are both purportedly signed by me. The two certificates are on the same Constituency. I am not aware where the 1<sup>st</sup> Respondent got the Certificate dated 08/08/2017 from. The two identity card numbers are different as I omitted the zero (0) in my Certificate."***

29. On re-examination about the two Certificates, the second Respondent stated as follows: -

***"I have been referred to two Forms 35C. I issued the Certificate on 09/08/2017. There is a discrepancy in the identity card number involving a 'zero' as the first digit. The identity card number was from our excel sheet which does not pick the 'zero' when it is the first digit. All the other digits are similar save for the 'zero' which is the first digit."***

30. When the 1<sup>st</sup> Respondent was asked about the two Forms 35C by the Counsel for the Petitioner during cross-examination, he responded as follows: -

***"....My identity card number is 0829017. I attached the Form 35C in my Response. It is a fake document. The date is 08/08/2017 but it is doctored. It is clearly tampered with. I gave the original Form 35C to my Advocate. It was signed by the Returning Officer. That Form 35C which appears in my bundle is fake since even the signature is clearly forged. The serial numbers are not the same on the last digit. I believe that a dirty trick was played in relation to the Form 35C in my bundle."***

31. The second Respondent however denied the source of the first Certificate but not the contents and the signature therein. Although it may be taken that the second Respondent had knowledge of the presence of the first Certificate through the 1<sup>st</sup> Respondent's response, the second Respondent did not raise any concern over the said Certificate. He did not question the whereabouts of the same neither did he lodge any complaint over the same. His denial on the first Certificate in Court is clearly an afterthought.

32. I have carefully looked at the two Certificates. There are indeed discrepancies in them. Since the results were formally announced, and the winner of the election duly declared at the Constituency Tallying Centre on 09/08/2017 and not on 08/08/2017, then it means that the first Certificate was prepared and issued before the announcement and declaration of the winner of the election. Further, the second Certificate has an anti-copy security feature on its top whereas the first Certificate has no such a feature suggesting that the same may be an original one.

33. As the Respondents have not settled the presence of the two Certificates then the Petitioner's contention that the winner of the election was pre-determined cannot be just wished away. That hence calls for a further analysis on the Forms 35C.

**Form 35B (Declaration of the Member of National Assembly Election Results at the Constituency Tallying Centre): -**

34. The record before me has two complete Forms 35B and an incomplete one. The first one is contained in the Petitioner's Affidavit sworn on 05/09/2017 where it appears as **Exhibit LSM-4**. It is a complete Form 35B and I will refer it as '**the first Declaration Form**'. The second Form 35B is part of the second and third Respondents' bundle of documents. It is also a complete Form 35B and I will refer it as '**the second Declaration Form**'. The third Form 35B is contained in the Replying Affidavit of the second Respondent sworn on 24/11/2017 and filed in Court on 27/11/2017 in opposition to the instant application. It is an incomplete Form 35B and I will refer it as '**the incomplete Declaration Form**'.

35. The first Declaration Form is dated 08/08/2017. It is two-page document and is stamped on both pages with the IEBC Returning Officer's Stamp but signed by the second Respondent on the second page. It has the transposed results from Forms 35A and the tally of the votes for each candidate. The tallies indicate that the 1<sup>st</sup> Respondent (as the winner) garnered 18,077 votes whereas the Petitioner (as the 1<sup>st</sup> Runners up) garnered 9,669 votes among other candidates. The first Declaration Form is however not signed by any agents.

36. The second Declaration Form is also dated 08/08/2017. It is also a two-page document and is dated, signed by the second Respondent and stamped on both pages with the IEBC Returning Officer's Stamp. It also has the transposed results from Forms 35A. It however has tallies of the votes of only three candidates out of the six candidates. The tallies for the Petitioner and the 1<sup>st</sup> Respondent are not indicated but on the '**Aggregate Results segment**' the votes of all the candidates are indicated which show the 1<sup>st</sup> Respondent having garnered 18,077 votes against the Petitioner's 9,669 votes among other candidates. It is also allegedly signed by three agents.

37. The incomplete Declaration Form only has the first page. The page has no IEBC Returning Officer's Stamp and as well the second Respondent's signature. It has the transposed results from some of the Forms 35A.

38. The second Respondent used the second Declaration form to announce the winner of the election. The said form however did not have the tally for the Petitioner and the 1<sup>st</sup> Respondent. No explanation was given why the said form was in that state and what the basis of the figures appearing after the row for the tallies was. That raises the question of whether the number of votes appearing at the end of the said form and which were the basis of the announcement and declaration are a true aggregate of the figures contained in the form.

39. The issue of the forms also arose during the hearing. The second Respondent while being cross-examined by the Counsel for the Petitioner stated variously as follows:-

*"....There is another Form 35B in the Petition at page 14 and 15. The date therein is correct, but it is not signed. The stamp is like IEBC stamp. The Form 35 in my bundle has a stamp, date and my signature. Whenever I issued any form I must sign, date and stamp the same....."*

*....The Form 35B in my bundle was printed on 08/08/2017 as on page 2. The results were delivered on 09/08/2017. Form 35B in the Petition has a resemblance of our official stamp. Date of printing is 08/08/2017 and has my signature. It is almost my signature. I have not lodged any complaint to the police that my signature was forged. I cannot say that the same was issued by IEBC. It looks like an IEBC document. I have not made any complaint on the loss of document. IEBC is the only custodian of the forms and the same can be obtained from our offices. I am not the only one who can issue this Form 35B as it is available and can be availed by our staffs....."*

*...I prepared Form 35B together with the Constituency ICT Officer and the Constituency Presiding Officer ICT, Erick Masake was the Constituency Presiding Officer ICT. They were accessible to this form during preparation. ...."*

40. While clarifying some issues during re-examination, the second Respondent explained that: -

*"....I declared the results on 09/08/2017 using Forms 35A and Form 35B. The date of 08/08/2017 in Form 35B is the date of preparation of the forms where the number of the registered voters is entered in column 3 and then it is encrypted before it is sent to me for entry of the other details later. That exercise was done on 08/08/2017 which is the date on page 2..."*

*...The two Forms 35B in issue are different. Form 35B by the Petitioner does not have the date of declaration therein. It is not genuine...'*

*....I only became aware of the allegations after service of the Petition. Form 35B gives the final results of the election of Member of National Assembly which I prepared with the others, but I am the one responsible. The results in Form 35B is a replica of the results of Forms 35A from the whole constituency except in cases where the votes cast exceed the registered votes and in that case, I discard those results..."*

41. The second Respondent seems to suggest that the first Declaration Form is not genuine as it does not bear his signature and the date of the declaration of the results. A look at two declaration forms reveal that there is nowhere a Returning Officer is supposed to enter the date of the declaration of the results of the election in Form 35B. There is a very good reason for that. The reason is that Form 35B is the basis of the declaration of the results and not the declaration itself. Form 35B is supposed to contain the results from all the polling stations as entered in Forms 35A the exception being in cases where the number of the votes cast in a polling station exceed the number of the registered voters

and also in cases where the total number of votes exceed the total number of voters who turned up and voted in that polling station; in which cases the Returning Officer is empowered under **Regulation 83(b) and (c) of the Regulations** to disregard such results. Once the transposition exercise is over the Returning Officer is supposed to tally all the entries for each candidate and come up with the total number of votes for each candidate. Those aggregate results are to be entered immediately after the entry of the results from the last polling station. A look at the form will then clearly show who has garnered the highest number of votes. Once that is done, the agents of the candidates or the candidates themselves are at liberty to sign the Form 35B before the Returning Officer finally enters his identity card number and signs it. Having completed preparing Form 35B the Returning Officer then announces who the winner of the election is and then proceeds to formally declare the winner by the issuance of Form 35C. That is why, unlike Form 35B, Form 35C has the date the election was held and the date when the declaration was made. It is Form 35C which triggers all the other processes up to the swearing-in of the winner in the National Assembly and not Form 35B.

42. By way of a further analysis, the second declaration form which was the basis of announcement and declaration of the winner has two conspicuous irregularities. **First**, the form does not contain the tallies for three candidates including the Petitioner and the 1<sup>st</sup> Respondent. It however has some figures indicated as the '**Aggregate Results**' but whose basis is not clear. Form 35B must speak for itself. The Returning Officer must tally the results and indicate the total number of votes garnered by each candidate in that form. Such a crucial step in the electoral process cannot be left in suspense, skipped or ignored. **Second**, there are 7 polling stations whose codes were not entered in the first column of the form.

43. Further, having realized that the first declaration form was not genuine the second Respondent did not take any step towards vindicating himself that he knows nothing about that form. He however admits that the signature appearing thereon is his and that the form bears the IEBC stamps. He further admits that any staff of IEBC was accessible to and could issue the Form 35B. The Petitioner contends that the first declaration form is the one that was given to him by IEBC which his Chief Agent (PW6) did not sign as he had been thrown out of the tallying centre after questioning the role of the Deputy County Commissioner who according to him was interfering with the process towards the announcement and declaration of the results and the winner. PW6 reiterated so in his Affidavit and evidence before Court.

44. The Petitioner also averred in **paragraph 17** of the **Petition** that: -

***'17. Officers appointed by the 3<sup>rd</sup> Respondent did, deliberately or by way of commission or omission make false and inaccurate entries in the Statutory Forms for the Sirisia Constituency National Assembly election results which entries gave an undue advantage to the 1<sup>st</sup> Respondent herein. In particular at St. Antony Secondary School Sirisia Tallying Centre, the entries made in Form 35B were very different from those announced at the polling stations.'***

45. There is also '**the incomplete Declaration Form**' which was also introduced by the second Respondent through his Replying Affidavit in opposition to this instant application. Although Form 35B in this case contained only two pages only the first page was annexed. The second and equally important page is missing. I have however noted the rationale that it was the first page that was relevant to answer the matter at hand. Equally, there would have been no harm in annexing the other page of that document since IEBC had taken the position that the first declaration form was not genuine and that there were glaring differences between the first and second declaration forms. Since the incomplete Declaration Form is also not dated and has no signature of the second Respondent (and therefore different from the second Declaration Form) it was expected that the complete form be annexed for comparative analysis more so given that one of the Petitioner's contention was the presence of different statutory forms with conflicting information. That was however not the case.

46. Be that as it may, on consideration of the positions taken by the parties on the first and second declaration forms I am persuaded that the First and Second Declaration Forms were both issued by IEBC. Further, the First Declaration Form (which is denied by IEBC), unlike the Second Declaration Form (which was used in declaring the winner of the election), has the tallies of the votes garnered by all the candidates. Since the second Respondent did not give any explanation on the anomaly on the tallies in the second Declaration Form and in view of the Court's position that both Declaration Forms were issued by IEBC, there is again need for a further investigation of the two Forms 35B.

47. By way of summing up, **Article 86(c) of the Constitution (Voting)** requires IEBC to ensure that: -

***"the results from the polling stations are openly and accurately collated and promptly announced by the returning officers; and***

48. As said, it is only a duly and correctly filled in Form 35B which should form the basis of the announcement by the returning officer.

#### **Forms 35A (Member of National Assembly Election Results at the Polling Station): -**

49. The importance of a polling station in an election by way of universal suffrage cannot be overemphasized. The Court of Appeal in the case of **IEBC vs. Maina Kiai, Khelef Khalifa & 3 others (2017) eKLR** (hereinafter referred to as '**the Maina Kiai case**') made emphasis on the centrality of a polling station by stating that: -

***"...It is clear beyond peradventure that the polling station is the true focus for the free exercise of the voters' will. The counting of the votes as elaborately set out in the Act and the Regulations, with its open, transparent and participatory character using the ballot as the primary material, means, as it must, that the count there is clothed with a finality not to be exposed to any risk of variation or subversion. It sounds ill that a contrary argument that is so anathema and antithetical to integrity and accuracy should fall from the appellant's mouth..."***

50. The IEBC pursuant to **Article 86(b) of the Constitution** is supposed to ensure that: -

***"the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station."***

51. A Petitioner who therefore contends that the electoral process was marred by irregularities or discrepancies at polling stations during the voting up to the announcement of the results by the presiding officer must name the polling stations and the nature of the alleged irregularities or discrepancies complained of. That must be done from the inception of the case; in the pleadings. Revisiting the **Kitale High Court Election Petition No. 1 of 2017** (supra), I expressed the following position on the issue: -

***‘[50] A party must set its path of the contest clear from the word go. It must plead with clarity and tender evidence in support of those allegations. Blanket and general averments must be discouraged as they paint a scenario of either a party having no case against the adversaries or that such a party lacks any evidence in support of its allegations and hopes to unearth some evidence during the proceedings or through applications. If, for instance and I reiterate for emphasis, a party has a dispute or a problem with a certain polling station, then that polling station must be named, and the nature of the dispute clearly stated. That requirement applies across all the grounds a party relies on in an election petition. All the parties must enter the battle field with such clarity on the magnitude of the contest to avoid ambushing the other side and thereby causing prejudice. That is the essence of Rule 29(4) of the Rules unless a party has set into motion since inception of the petition that it seeks a full scrutiny or recount.’***

52. The Petition has named several polling stations and centers on various allegations. **Paragraph 15** of the Petition names the polling stations and centers where acts of bribery and treating of voters were allegedly witnessed. **Paragraph 17** of the Petition has it that the entries made at the Tallying Centre were different from the results announced at the polling stations. **Paragraph 20** of the Petition names the polling stations and the Centre where it was alleged that the agents of the Petitioner were ejected therefrom and were also denied access to *inter alia* the statutory forms. Wamono Polling Centre was named in **paragraph 21** of the Petition as where the KIEMS Kit failed but people still voted without the necessary verification.

53. **PW2, Musungu Khaukha Evans Vil**, was the Ford-Kenya agent at Malakisi CPK Primary School Poling Station 1 of 1. He deponed in his affidavit and also testified in Court that the agents were placed very far from the counting table during the verification and counting of the votes such that he could not follow up the process and despite raising the matter with the Presiding Officer nothing changed. He also testified that during the counting exercise the lights were deliberately put off and after some time the dim gas-powered lights were used. That issue of the lights going-off was not denied by the second Respondent.

54. The Chief Agent for Ford-Kenya testified as **PW6**. He was **Edward Barasa Wamunyong’oli**. He raised four issues which touch on the instant application. **First**, the issue of one Presiding Officer serving in more than one polling station. He averred and annexed statutory forms for polling stations to that effect. The stations were Lwandanyi Primary School Polling Station 2 of 2 and Mayekwe Primary School Polling Station 2 of 2; Kabkara Primary School Polling Station 1 of 2 and Londo ACK Primary School Polling Station 1 of 1 and lastly Kaburweti Primary School Polling Station 1 of 1 and Kamunyong’ole Primary School Polling Station 1 of 1. **Second**, the issue of the Deputy County Commissioner. He deponed in his affidavit and testified before Court that the Deputy County Commissioner interfered with the process at the Tallying Centre and when he raised the issue he was arrested and locked inside a waiting police vehicle and that he was released much later. **Third**, the absence and missing of some Forms 35A from 9 polling stations which he had requested for at the Centre and even in Court. The polling stations are Mufungu Primary School Polling Station 1 of 1, Chwele Boys’ Primary School Polling Station 2 of 3, Bukokholo Primary School Polling Station 1 of 2, Lwakhakha Primary School Polling Station 1 of 2, Lwandanyi Primary School Polling Station 1 of 2, Lwandanyi Youth Polytechnic Polling Station 1 of 2, Lurare Primary School Polling Station 1 of 1, Namwesi Market Polling Station 1 of 1 and Namawanga KAG Polling Station 1 of 1. **Fourth**, that he did not sign the Form 35B as alleged by the second Respondent as the results transposed therein from several polling stations were at variance with those announced at those polling stations. The names of those impugned polling stations were however not given.

55. In answer to the issue of missing Forms 35A from the 9 polling stations the second Respondent deponed in paragraph 21 of his Affidavit sworn on 24/11/2017 as follows: -

***“THAT the alleged missing forms were inadvertently left out in the bundle of returns so filed but the same are available. (Annexed and marked ‘KO 6(a)-(g) are the true copies of the Forms 35A).”***

56. There are also a further 34 polling stations named in the Petitioner’s Affidavit in Support of the instant application. The Petitioner detailed the various anomalies and discrepancies therein. These polling stations and that alleged discrepancies were neither pleaded in the Petition nor deponed to by any of the witnesses. It appears that the Petitioner long after filing the Petition and even testing in Court went through the Forms 35A filed by the second and third Respondents and picked out the alleged anomalies and discrepancies. He then cross-examined the second Respondent at length on those anomalies and discrepancies.

57. That being the extent to which the various polling stations came to the fore, I will deal with the nature and extent of the instant application but first if the application is anchored in the Petition.

**(ii) Whether the application is anchored in the Petition: -**

58. It is by now a well settled principle that an application for scrutiny or recount must find its basis in the petition. This principle was recently re-affirmed by the Supreme Court in **the 2017 Raila ruling** when the Court held in **paragraph 59** of the ruling that: -

***“Applying law and the principles relating to scrutiny as well as....., there is no doubt that the Petitioners have signaled their intention to seek scrutiny and we have in that regard set out the specific parts of the Petition in which the issue of scrutiny has been pleaded.....They have also set out the parameters of the intended scrutiny in the petition namely.....”***

59. That is the like position in this matter. The Petitioner stated clearly his intention to seek scrutiny and recount and the intended parameters in the Petition. The Petitioner went further and led evidence in support of that plea both by way of affidavits and witness evidence.

60. I therefore do not find any difficulty in finding this issue in the affirmative.

**(iii) The nature and extent of the scrutiny and recount sought: -**

61. The Petitioner in laying a basis for the instant application pleaded in prayers (a) and (b) of the **Petition** as follows: -

**“(a) An order for elaborate scrutiny of the Principal Voter Register for Sirisia Constituency and all documents related, including the polling station diaries and filed Notebooks, a security of the used and unused Ballot Papers, BVR records for the polling day and KIEMS (Kenya Integrated Election Management System) records for the polling day, and a recount of all ballot papers cast during the election held on 8<sup>th</sup> August, 2017.”**

**(b) An order for verification of all Statutory Forms 35A and 35B.”**

62. The Petitioner clearly stated the parameters of the intended scrutiny in the application to be a full scrutiny of all the election materials used in the impugned election.

63. I discussed above on the importance of naming a polling station and disclosing the anomaly complained of as one of the sound and settled principles in applications for scrutiny and recount. That has a firm basis in **Rule 29** of the **Rules**. That however does not mean a Court cannot make an order for a full scrutiny and recount. A Court has the powers and discretion to do so if a proper and sound basis for such an order has been laid in respect to each polling station. That position was affirmed by the Supreme Court in the case of **Gatirau Peter Munya’s** (supra) that **‘if a party lays a clear basis for scrutiny in each and all the polling stations within a constituency, then the order ought to be granted. Otherwise, a prayer pointing to a constituency but lacking in specificity is not to be entertained.’**

64. My earlier analysis on the allegations of irregularities and anomalies touched on several polling stations. The polling centers and stations in paragraph 15 of the Petition were on voter bribery and treating of voters. Such allegations do not call for scrutiny and/or recount. The allegation of entry of false and inaccurate results, that is wrong transposition, in Form 35B may attract a scrutiny upon proof. Likewise, the allegation of missing Forms 35A from 9 polling stations would attract a full scrutiny and recount in respect to those polling stations. This issue was confirmed by the second Respondent who eventually availed the said forms holding on inadvertence to avail them earlier on. It is worth to note that this Court had directed the supply of those forms and even gave the second and third Respondents time to do so before and during the hearing but to no avail.

65. The allegation that the KIEMS Kits at Wamono Primary School Polling Station failed but people still voted without verification may also call for scrutiny and recount but subject to proof. However, apart from so pleading in the Petition, the Petitioner and none of the witnesses led any evidence on that issue and as such no appropriate basis was laid. The allegation that the Petitioner’s Ford-Kenya agents were denied access into polling stations or were ejected therefrom also remain unproved. Apart from the Petitioner stating generally in the Petition and his Affidavit no such agent testified to that effect. It was only **PW2** (who was a Party Agent at Malakisi CPK Primary School) who testified that he was not allowed to go near the counting table during the verification and counting of the votes in that station and that the lights went off during the process. Such a status would attract a full scrutiny and recount in that polling station.

66. **PW6**, who was the Ford-Kenya’s Chief Constituency Agent also led evidence on how he was manhandled, arrested and locked up at the Tallying Centre when he questioned the involvement of the Deputy County Commissioner, who according to him was interfering with the process thereat. Whereas the second Respondent explained what happened according to him, it remains that what legally happened at the Tallying Centre was the collation of the results from the polling stations, the announcement of those results and the declaration of the winner. There was no recounting or verification of the votes cast at the Centre. The Returning Officer only dealt with Forms 35A in coming up with Form 35B and Form 35C. Therefore, if any scrutiny is to be eventually allowed then it must be within such confines.

67. **PW6** also raised the issue of one Presiding Officer serving more than one polling stations. He even adduced several statutory forms to that effect. A total of 6 polling stations were named with the alleged malpractice. In a rejoinder the second Respondent also availed other statutory forms in respect of the said 6 polling stations bearing different names of the Presiding Officers. The issue was hence not properly settled. To aid this Court undertake a further analysis of the issue, a full scrutiny and recount in respect to the said 6 polling stations is of essence.

68. There is also the issue of the 34 polling stations named by the Petitioner in his affidavit in support of this application. There is no doubt that the Petitioner is inviting this Court to an expedition aimed at unearthing new and further evidence in respect to the allegations in the 34 polling stations. A Petitioner cannot be allowed to rabble through the documents filed by the Respondents and come up with fresh allegations which were never in the Petitioner’s thinking in the first instance. Allowing such a scenario to prevail will visit prejudice to the Respondents as they may be condemned unheard and so contrary to **Article 50(1) (Fair hearing)** of the **Constitution**. That will as well lead to expanding the scope of the petition and thereby amending the petition through the backdoor. This Court declines the Petitioner’s persuasion by reiterating the finding of the Supreme Court in **‘the 2017 Raila ruling’** while quoting the persuasive decision in **‘the Indian case’**: -

**“[52] Further, the Court went on and observed that: -**

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

*indulge in a roving inquiry with a view to fish material for dealing the election to be void. The order of recounting can be passed only if the petitioner sets out his case with precision supported by averments of material facts.”*

53] *Although the above case relates to the issue of record of votes, we find the principles highlighted therein relevant in determining the basis under which a court can order scrutiny. Indeed, comparative jurisprudence from the already reviewed Kenya cases, aligns with the said holding.”*

69. My Lordships and Ladyships went ahead to state in **paragraph 62** that: -

*“Having addressed our minds to the above issues, it is our view that first, we note that as correctly argued by Counsel for the 3<sup>rd</sup> Respondent, a party must be bound by its pleadings and secondly, any scrutiny of either the Forms or the technology must be made for a sufficient reason. A prayer in the application that would seem to be an expansion of the case for the Petitioners or which would in effect be a fishing exercise to procure fresh evidence not already contained in the Petition would and must be rejected.”*

70. The Court of Appeal as well shares that position. The Court in **Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR** cited with approval the decision of the Supreme Court of Nigeria in **Adetoun Oladeji (NIG) VS. Nigeria Breweries PLC SC 91/2002** where Adereji, JSC expressed himself thus on the importance and place of pleadings: -

*“....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....*

*...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”*

71. On the attempt by a party to introduce new or fresh evidence through cross-examination, I fully concur with the position taken by **Hon. Justice (Prof.) Otieno-Odek** – Judge of Appeal and the Director, Kenya Judiciary Training Institute in his article entitled ‘**Election Technology Law and the concept of ‘Did the irregularity affect the result of the elections?’** where he stated that ‘**A party cannot be allowed to introduce, through cross-examination contests which were previously not specifically raised in the pleadings...**’

72. The foregone has hence laid the nature and extent of the scrutiny and recount contemplated in this matter with the belief that once the foregone exercise is undertaken the Court will be better placed to deal with those issues further.

**(iv) Other principles for consideration: -**

73. Several other settled principles are of essence in applications for scrutiny and recount. They include the margin of victory, whether the application will compromise the timely resolution of the matter, whether the application contravenes **Rule 15(2)** of the **Rules** among many others. I will however not venture into those principles since the above analysis is sufficient to dispose of the instant application. Any further discussion herein may be for academic purposes.

**Disposition: -**

74. From the foregone analysis and in view of the agreed issues for determination, the application must succeed but partly. The Petitioners have laid a sound basis to the effect that all Forms 35A, Forms 35B and Forms 35C should be scrutinized. Likewise, sufficient basis has been laid for the scrutiny and recount of the votes in the 9 polling stations where no Forms 35A were availed, in the polling station where the lights went off during the counting and verification exercise and in the 6 polling stations where there were allegations of one Presiding Officer serving in more than one polling station. That translates to 16 out of the total 99 polling stations within the Sirisia Constituency.

**Conclusion: -**

75. This Court now makes the following final orders: -

**(a) The Notice of Motion dated 15/11/2017 partly succeeds;**

**(b) There shall be a scrutiny of all the Forms 35A, Forms 35B and Forms 35C used in the election of the Member of National Assembly for Sirisia Constituency in Bungoma County held on 08/08/2017;**

**(c) There shall also be a scrutiny of the following election materials namely: - The packets of spoilt ballot papers, the packets of counterfoils of used and unused ballot papers, the packet of counted ballot papers, the packet of rejected ballot papers, the statements showing the number of the rejected papers, polling station diaries, Forms 32A, Forms 32 and the data captured by the KIEMS Kits during the voter identification in respect to the following polling stations: -**

**(i) Mufungu Primary School Polling Station 1 of 1,**

**(ii) Chwele Boys’ Primary School Polling Station 2 of 3,**

- (iii) Bukokholo Primary School Polling Station 1 of 2,
- (iv) Lwakhakha Primary School Polling Station 1 of 2,
- (v) Lwandanyi Primary School Polling Station 1 of 2,
- (vi) Lwandanyi Youth Polytechnic Polling Station 1 of 2,
- (vii) Lurare Primary School Polling Station 1 of 1,
- (viii) Namwesi Market Polling Station 1 of 1,
- (ix) Namawanga KAG Polling Station 1 of 1,
- (x) Lwandanyi Primary School Polling Station 2 of 2
- (xi) Mayekwe Primary School Polling Station 2 of 2;
- (xii) Kabkara Primary School Polling Station 1 of 2;
- (xiii) Londo ACK Primary School Polling Station 1 of 1;
- (xiv) Kaburweti Primary School Polling Station 1 of 1;
- (xv) Kamunyong'ole Primary School Polling Station 1 of 1
- (xvi) Malakisi CPK Primary School Poling Station 1 of 1.

(d) There shall also be a recount of the valid votes cast, the rejected ballot papers and the spoilt ballot papers used in the polling stations named in (c) above;

(e) For purposes of enabling the scrutiny in (b) and (c) above and the recount in (d) above: -

(i) the second and third Respondents herein shall avail to the Deputy Registrar of this Court all the original or duly certified copies of Forms 35A, Forms 35B and Form 35C together with the Schedule of the Polling Station Codes for all the polling stations within Sirisia Constituency in Bungoma County and also certified copies of the printed Registers of Voters for all the 16 polling stations named in (b) above;

(ii) the Deputy Registrar of this Court shall preside over the opening of the 16 ballot boxes named in (c) above which were part of those used in the election of the Member of National Assembly for Sirisia Constituency in Bungoma County held on 08/08/2017 and shall as well preside over the entire exercise of scrutiny and recount as ordered herein;

(iii) The Deputy Registrar shall keep a record of the seals on the ballot boxes before and after the exercise;

(iv) The above exercise shall be undertaken in Bungoma where the election materials are preserved or at any other secure place subject to the agreement between the parties and the Deputy Registrar;

(v) In view of (iv) above the Deputy Registrar of this Court shall be at liberty to seek the assistance of the Deputy Registrar of the High Court at Bungoma;

(vi) The Deputy Registrar shall also be at liberty to be assisted by any number of members of staff who may be necessary to ensure that the exercise is undertaken within the shortest time possible;

(f) Each party may avail not more than two Counsels who may be accompanied by their two assistants, the parties themselves and not more than three other representatives during the entire exercise. The second and third Respondents are however at liberty to summon the attendance of any or all the Presiding Officers who presided over the 16 polling stations named in (c) above.

(g) All the parties in attendance shall be under the strict direction of and shall comply with any such orders or directions that the Deputy Registrar may issue from time to time.

(h) The Kenya Police and the Kenya Administration Police County Commanders Bungoma County shall jointly provide adequate security during the above exercise.

(i) The Deputy Registrar shall then prepare and file a report on the exercise in any event on or before 10/01/2018. The report

shall also be served upon all the Counsels in this matter.

**(j) This matter shall then be fixed for a mention on 16/01/2018 at 09:00 am for purposes of confirming compliance and for further orders and directions.**

**Costs of the application shall abide the outcome of the petition.**

Those are the orders of this Court.

**DELIVERED, DATED and SIGNED at KITALE this 22<sup>nd</sup> day of December 2017.**

**A. C. MRIMA**

**JUDGE**

**Ruling delivered in open Court and in the presence of: -**

**Mr. Makokha** Counsel for the Applicant/original Petitioner.

**Mr. Katwa Kigen** and **Miss Antonina Muyoka** Counsels for the first Respondent.

**Mr. Kenei** and **Mr. Ogeta** Counsels for the second and third Respondents.

**Kirong** – Court Assistant

**Slyvia** - Court Assistant