



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

ELECTION PETITION NO 8 OF 2017

IN THE MATTER OF THE ELECTION FOR THE MEMBER OF SENATE OF LAMU

AND

IN THE MATTER OF THE ELECTION ACT, 2011

AND

**IN THE MATTER OF THE ELECTION (PARLIAMENTARY AND
COUNTY ELECTION) PETITION RULES, 2017.**

BETWEEN

ALBEITY HASSAN ABDALLA.....PETITIONER

VERSUS

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION (I.E.B.C).....1ST RESPONDENT

MOHAMED ADAN ALI.....2ND RESPONDENT

HON. ANUAR LOITIPTIP.....3RD RESPONDENT

WIPER DEMOCRATIC MOVEMENT PARTY.....4TH RESPONDENT

RULING

1. At the close of the Respondents' case, the learned counsel for the petitioner renewed his Application for scrutiny and recount in a notice of motion dated 27/11/2017 which was coached in the following terms;

(i) THAT this Honourable Court do order a scrutiny and recount of votes in the following Polling Stations in Lamu County in respect of the election of the Senator of Lamu County held on 8th August, 2017.

- I. Kizingitini Dispensary 1.**
- II. Mtangawanda Primary School.**
- III. Mwangala Centre.**
- IV. Milimani Primary School.**
- V. Kiangwe.**
- VI. Mangai Primary School.**
- VII. Basuba Primary School.**
- VIII. Mararani Primary School.**
- IX. MandaYawi Nursery.**
- X. Mangu Primary School.**
- XI. Bahari Primary School 1.**
- XII. Zikomani Primary School.**
- XIII. Bahati Primary School.**
- XIV. Mlei Nursery School.**
- XV. Ichakani Primary School.**
- XVI. Shanga Ishakani.**
- XVII. Bori Centre.**
- XVIII. Kiunga Primary School.**
- XIX. Rubu Village.**
- XX. Matondoni Primary School.**
- XXI. Kandahar Playground.**
- XXII. Lamu Youth Polytechnic.**
- XXIII. Baragoni Primary School.**
- XXIV. Ndununi/Mswakini Village.**
- XXV. Kibiboni Primary School.**
- XXVI. Hindi Dispensary.**
- XXVII. Koreni Primary School.**
- XXVIII. Hongwe Primary School.**

XXIX. Mini Village.

XXX. Sese Primary School.

XXXI. Msefuni Primary School.

XXXII. DideWaride.

XXXIII. Boko Primary School.

XXXIV. Lake Amu Primary School.

XXXV. Swabaha Primary School.

XXXVI. Ngoi Primary School.

XXXVII. Lakeside Primary School.

XXXVIII. Muungano Primary School.

XXXIX. Ocean View Primary School.

XL. Mkokoni Primary School.

XLI. Mbwajumwali Primary School 2.

XLII. Tchundwa Primary School 1.

XLIII. Tchundwa Primary School 2.

XLIV. Siyu Primary School 1.

XLV. Siyu Primary School 2.

XLVI. Shanga Rubu Primary School 1.

XLVII. Shanga Rubu Primary School 2.

XLVIII. Patte Dispensary 1.

XLIX. Patte Dispensary 2.

L. Mtangawanda Primary School.

LI. Bori Centre.

LII. Myabogi Centre.

LIII. Kizingitini Secondary School 1.

LIV. Kizingitini Secondary School 2.

LV. Mwangala Centre.

LVI. Rasini Girls Primary School 1.

LVII. Rasini Girls Primary School 2.

LVIII. Faza Health Centre 1.

LIX. Faza Health Centre 2.

LX. Siyu Social Hall.

LXI. Patte Primary School.

LXII. Mbwajumwali Nursery.

LXIII. Ndau Dispensary.

LXIV. Ichakani Primary School.

LXV. Kiunga Primary School 1.

LXVI. Kiangwe Primary School.

(ii) THAT this Honourable Court upon granting of prayer 1 to direct that the scrutiny do include the examination of the following:-

a) The written statements made by the Returning Officers,

b) The examination of the written statements made by the Presiding Officers in the Polling Station Diaries.

c) Both the electronic and hard copy of the Register of voters as contains the biometric data and alpha numerical details of the voters entitled to vote at the stated Polling Stations.

d) The Kenya Integrated Electronic Machine System (KIEMS) and the information stored by it.

e) The Declaration of Results Forms 38A stored in the ballot boxes of all the named Polling Stations.

f) The packets of spoilt ballots.

g) The marked copy registers.

h) The packets of Counterfoils of used ballot papers.

i) The packets of counted ballot papers.

j) The packets of rejected ballot papers.

(iii) THAT the Costs of this application be paid by the Respondents to the Petitioner.

(iv) THAT this Honourable Court do order the 1st Respondent to avail to this court the following materials, items and or information in its custody for purposes of assisting this court in the scrutiny and recount of votes.

i. The Polling Station Diaries for all Polling Stations named in prayer 1 above.

ii. Both the electronic and hard copy of the Register of voters as contains the biometric and

alpha numerical details of the voters entitled to vote at the Polling Stations name in prayer 1 above.

iii. The Kenya Integrated Electronic Machine System (K1EMS) used in the Polling Stations named in prayer 1 above for purposes of accessing the information stored therein or in the alternative the information contained therein stored in accordance with the law.

iv. All declaration of Results Forms 38A's used in the declaration of results for the election of the Senator in Lamu County in respect of the Polling Stations named in prayer 1 above.

(v) All declaration of Results Forms 38B's used in the declaration of results for the election of the Senator in Lamu County.

2. The Application is based on the following grounds;

(i) THAT the Petitioner has proved that in 15 out of the 50 Polling Stations he listed in *paragraph 27 (b) of his petition and 21 (ii) of his Supporting Affidavit* that there were no agents at all either for the Petitioner or his Political Party the 4th Respondent herein.

(ii) THAT the Petitioner has proved that in 24 out of the 50 Polling Stations he listed in *paragraph 27 (b) of his petition and 21 (ii) of his Supporting Affidavit* that the agents present were not the agents appointed by the 4th Respondent as per the list it sent to the 1st and 2nd Respondents.

(iii) THAT the Form 38A for Hongwe Primary School 2 was not signed by the Presiding Officer and his deputy.

(iv) THAT the Form 38B for Lamu East Constituency produced by the 3rd Respondent has different results compared with those in Form 38C and the said Form 38B is not the prescribed Form and is not signed by any of the candidates or agent and was not issued to the petitioner and the 3rd Respondent or their agents making it a forgery or fake meaning no results for the entire constituency were lawfully declared.

(v) THAT the votes cast for the different elections for President, Senator, Member of National Assembly, Women Representative and Member of County Assembly do not tally a fact that demonstrate that invalid votes were cast.

(vi) THAT the Returning Officer for Lamu East Constituency and his deputy and the Deputy Returning Officer for Lamu West Constituency were colleagues, employees and or work mates of the running mate of the jubilee party candidate for governor in Lamu County a fact that compromised their neutrality and or impartiality.

(vii) THAT the Deputy Returning Officer for Lamu West Constituency was gazetted to conduct elections in Lamu East Constituency but she and her counterpart in Lamu West Constituency illegally exchanged their roles thereby rendering all the results declared by them illegal, null and void.

(viii) THAT at Mbwejumwali Polling Station a clerk was arrested for allowing 16 people to vote without being verified by the KIEMS KIT which is a grave election offence.

(ix) THAT the Petitioner was leading by 196 votes when the 3rd Respondent was declared the winner.

(x) THAT according to *Regulation 73 (2) of the Elections (General) Regulations, 2012* the Polling Station Diary contains the written statement of the Presiding Officer on:-

- i. The number of ballot papers issued to Presiding Officers.**
- ii. The number of ballot papers, other than spoilt ballot papers, issued to voters.**
- iii. The number of spoilt ballot papers.**
- iv. The number of ballot papers that remained unused.**

(xi) THAT therefore, the Polling Station Diaries are necessary in the verification of the votes cast, the spoilt votes, the rejected votes, the valid votes, any invalid vote cast which include that which is stuffed, or by a voter who votes more than once or by a person who is not a registered voter.

(xii) THAT as per *Regulations 61 (4) (a) of the Elections (General) Regulations, 2012* the Returning Officer is obliged to provide each Polling Station with both electronic and hard copy of the Register of voters or such part thereof as contains the biometric data and alpha numerical details of the voters entitled to vote at the Polling Station and if the same is availed to the court it will assist the court verify the names and the number of the voters who voted as against the votes cast and contained in declaration of Results Forms 37A as well as the actual ballot papers or votes contained in the ballot boxes for each Polling Station.

(xiii) THAT further, *section 44A of the Elections Act, 2011* requires the 1st Respondent to put in place a complimentary mechanism for identification of voters and the register mentioned in ground number 3 above suffices for that purpose.

(xiv) THAT *Section 44, the Elections Act, 2011* establishes an integrated electronic electoral system for purpose of biometric voter registration, electronic voter identification and electronic transmission of results. The system is required to be simple accurate, verifiable, secure, accountable and transparent therefore when the Kenya Integrated Electronic Machine System (KIEMS) is availed in court it will show with certainty, the names and number of the voters who voted, the Declaration of Result Forms 37A transmitted from the Polling Stations to the Constituency and County Tallying Centres, the day and time this was made which is important in verification of the actual valid votes cast at every Polling Station.

(xv) THAT considering the grounds stated herein above, it is therefore absolutely necessary for the 1st Respondent to provide the stated materials and or information for the court to be able to correctly, accurately and effectively carryout a proper scrutiny of votes and recount exercise.

(xvi) THAT the requested materials and or information are themselves key in determining whether the election of the 3rd Respondent was conducted by an Independent body, was transparent, administered in an impartial, neutral, efficient, accurate and accountable manner.

3. The application is supported by the supporting Affidavit of the petitioner in which he deposed as follows;

- (i) THAT I am the Petitioner/Applicant herein hence competent to swear this Affidavit.**
- (ii) THAT after witnesses have testified in this petition and documents produced as exhibits a number of pertinent facts have been established laying a basis for an order of scrutiny and recount. The facts are as follows:**
 - i. The margin of victory was minor which is 58 votes only.**
 - ii. The Petitioner has proved that in 15 out of the 50 Polling Stations he listed in *paragraph 27***

(b) of his petition and 21 (ii) of his Supporting Affidavit that there were no agents at all either for the Petitioner or his Political Party the 4th Respondent herein.

iii. The Petitioner has proved that in 24 out of the 50 Polling Stations he listed in paragraph 27 (b) of his petition and 21 (ii) of his Supporting Affidavit that the agents present were not the agents appointed by the 4th Respondent as per the list it sent to the 1st and 2nd Respondents.

iv. The Form 38A for Hongwe Primary School 2 was not signed by the Presiding Officer and his deputy.

v. The Form 38B for Lamu East Constituency produced by the 3rd Respondent has different results compared with those in Form 38C and the said Form 38B is not the prescribed Form and is not signed by any of the candidates or agent and was not issued to the petitioner and the 3rd Respondent or their agents making it a forgery or fake meaning no results for the entire constituency were lawfully declared.

vi. The votes cast for the different elections for President, Senator, Member of National Assembly, Women Representative and Member of County Assembly do not tally a fact that demonstrate that invalid votes were cast.

vii. The Returning Officer for Lamu East Constituency and his deputy and the Deputy Returning Officer for Lamu West Constituency were colleagues, employees and or work mates of the running mate of the Jubilee party candidate for governor in Lamu County a fact that compromised their neutrality and or impartiality.

viii. The Deputy Returning Officer for Lamu West Constituency was gazetted to conduct elections in Lamu East Constituency but she and her counterpart in Lamu West Constituency illegally exchanged their roles thereby rendering all the results declared by them illegal, null and void.

ix. At Mbwajumwali Polling Station a clerk was arrested for allowing 16 people to vote without being verified by the KIEMS KIT which is a grave election offence.

x. The Petitioner was leading by 196 votes when the 3rd Respondent was declared the winner.

(iii) THAT upon consideration of the averments of paragraph 27 (a) to (c) of petition herein where I have shown 50 Polling Stations there were no agents at all either for me or my political party the 4th Respondent herein and the confirmation by the 1st and 2nd Respondents Poling Station Diaries coupled with their failure to discount the rest of the listed Polling Stations then it becomes clear that the election was not conducted in accordance with the constitution and the law and the results doubtful and therefore an order should be granted to verify the same.

(iv) THAT considering the averments of paragraph 27 (i) of the petition herein where I have shown that the votes cast for the different elections for President, Senator, Member of National Assembly, Women Representative and Member of County Assembly do not tally which is a fact that demonstrate that invalid votes were cast then an order for scrutiny and recount should be granted.

(v) THAT considering the averments of paragraph 27 (j) of the petition herein where I have shown that that the Returning Officer for Lamu East Constituency and his deputy and the Deputy Returning Officer for Lamu West Constituency were colleagues, employees and or work mates of the running mate of the jubilee party candidate for governor in Lamu County which is a fact that compromised their neutrality and or impartiality then an order for scrutiny and recount should be granted.

(vi) THAT upon further consideration of the averments of paragraph 27 [k] of the petition herein where I have shown that the Deputy Returning Officer for Lamu West Constituency was gazetted to conduct elections in Lamu East Constituency but she and her counterpart in Lamu West Constituency illegally exchanged their roles thereby rendering all the results declared by them illegal, null and void I believe I have laid a basis for an order for scrutiny and recount.

(vii) THAT upon further consideration of the averments of paragraph 27 (1) of the petition herein where I have shown that at Mbwajumwali Polling Station a clerk was arrested for allowing 16 people to vote without being verified by the KIEMS KIT which is a grave election offence then an order for scrutiny and recount should be granted.

(viii) THAT upon further consideration of the averments of paragraph 21 to 25 of the petition herein where the voting process is shown to have lacked transparency, accountability and neutrality, and that I was leading by 196 votes when the 3rd Respondent was declared the winner then an order for scrutiny and recount should be granted.

(ix) THAT for the aforesaid reasons and in order to satisfy the nation and in particular the voters in Lamu County that the results are valid and are true reflection of the expression of their will I urge this Honourable Court to grant this application.

(x) THAT I know when the voting process is challenged in the manner I have done herein, the only other way to verify and ascertain the validity of the election is to order for the required materials and information to be availed in court.

4. The 1st and 2nd Respondents filed a Replying Affidavit dated 30th November 20117 sworn by MOHAMED ADAN ALI, (the 1st respondent) in which he deposed as follows;

(i) THAT at all material times I was the County Returning Officer for Lamu County in the elections that were held on 08:08:17. Fully conversant with the circumstances surrounding this Petition.

(ii) THAT I have read and understood the contents of the Petitioner's Notice of Motion application filed herein and seeking orders inter alia for scrutiny, recount in several polling stations as well as the examination of several polling materials set out on the face of the application, and the Affidavit filed in support thereof and do hereby wish to respond to the same as thus.

(iii) THAT this is the second application being made by the Petitioner/Applicant for the same orders.

(iv) THAT I reiterate in full the contents of my Affidavits respectively filed in response to the Affidavit sworn in support of the Petition herein, *the* Affidavit in response to the application for scrutiny and recount as well as the application for production of election materials.

(v) THAT I substantively and specifically responded to each and every allegation set out in the Petition in the Response filed and my Replying affidavit hitherto filed.

(vi) THAT this is a peculiar election Petition in that the main single and running complaint that the Petitioner has is with respect to the alleged failure by the party who nominated him to contest for the Senate seat and who is the 4th Respondent herein to appoint agents who were "friendly" to him.

(vii) THAT the Petitioner was and is clearly under the misconception that even though he was a nominee of the 4th Respondent, the law allowed him to have additional agents to specifically

take care of his individual interests.

(viii) THAT the Applicant despite being afforded a second bite at the cherry during the hearing failed to lay a basis for scrutiny, recount or production of the electoral materials.

(ix) THAT despite being give a full period of 28 days to gather evidence either by applying to Court pursuant to the laid out statutory provisions to be furnished with documents he could have used in support of his case , the Petitioner failed to exercise this right.

(x) THAT equally despite having a full period of 28 days to gather evidence and avail witnesses to swear Affidavits and testify as to the specific instances and polling stations wherein his allegations could have touched on , the Petitioner never presented any eye witnesses to Court and ended up alone in the dock with vague , unsupported and generalized allegations.

(xi) THAT the Petitioner is now on a second expedition to fill the gaping holes in his Petition and which he left uncovered even after he was given a chance to give viva voce evidence.

(xii) THAT I am advised by our advocates herein which I verily believe to be true that the present orders sought are unavailable to the Petitioner and the application is bad in law and an abuse of the Court as he cannot seek both orders of scrutiny and recount at the same time.

(xiii) THAT 1 am equally advised by our Advocates herein which I verily believe to be true that the order of scrutiny is not available to the Petitioner as he has not set out in his Petition any single polling station where the results which were announced were disputed by him or that he has a different set of results which he presented to this Court.

(xiv) THAT what is clear is that the Petitioner is asking this Court to allow him to go fishing for evidence from the records held by the 1st and 2nd Respondent whereas he admitted in his evidence that the 1st and 2nd Respondents:-

- a) availed the 4th Respondent who was his nominating Party an equal opportunity with other Parties/candidates to appoint agents to oversee the voting process
- b) had no powers to force/ensure that the 4th Respondent availed agents at all polling stations
- c) could not compel agents to remaining the polling stations throughout the exercise
- d) had no powers to compel agents to sign the statutory Forms after the declaration of the results
- e) availed copies of Form 38A's to the public and which were pasted outside every polling station the process from voting up to counting went on smoothly even at the station where he was personally present.

(xv) THAT in his Petition the Petitioner's claims touched on 50 polling stations whereas in his application he has now he has added a further 17 fresh polling stations including the following new polling stations:

- i. Kizingitini Dispensary 1
- ii. Bahari Primary School 1
- iii. Bahati Primary School

- iv. Ichakani Primary School**
- v. Kandahar Playground**
- vi. Ndununi/Mswakini Village**
- vii. Mini Village**
- viii. Mkokoni Primary School**
- ix. Mbwajumwali Primary School 2**
- x. Tchundwa Primary School 1**
- xi. Tchundwa Primary School 2**
- xii. Siyu Primary School 1**
- xiii. Siyu Primary School 2**
- xiv. ShangaRubu Primary School 1**
- xv. ShangaRubu Primary School 2**
- xvi. Patte Dispensary 1.**
- xvii. Patte Dispensary 2**
- xviii. Kizingitini Secondary School 1**
- xix. Kizingitini Secondary School 2.**
- xx. Rasini Girls Primary School 1.**
- xxi. Faza Health Centre 1.**
- xxii. Faza Health Centre 2**
- xxiii. Siyu Social Hall.**
- xxiv. Mbwajumwali Nursery**
- xxv. Ndau Dispensary.**
- xxvi. Ichakani Primary School.**
- xxvii. Kiunga Primary School 1.**

(xvi) THAT contrary to the contents of paragraph 2 of the Petitioner's Affidavit .from the evidence that has been adduced ,he has not laid any basis for this Court to order a scrutiny and recount of votes in the following Polling Stations in Lamu County in respect of the election of the Senator held on 8th August, 2017.

(xvii) THAT the Petitioner despite having an opportunity to do so never called any witnesses and or provided the names of his agents who were not allowed to the polling stations but gave

generalized and unsubstantiated allegations that his agents and the agents of the 4th Respondent were not allowed entry to the polling stations.

(xviii) THAT the Petitioner has not demonstrated that in any of the above polling stations the results were disputed and or any agents refused to sign because the results entered against any of the candidates was not what resulted from the count and further that in any of the Form 38As the any of the agents present recorded his reasons for refusing to sign.

(xix) THAT it is a matter of general and public notoriety that the 4th Respondent being part of the NASA coalition, the Petitioner's interests were taken care of by these agents of NASA as well as of the other constituent parties who signed the polling station diaries as well as the Form 35A's which were availed to Court in response to the allegations in the Petition.

(xx) THAT in any event the law specifically provides that the absence of witnesses is not a ground for challenging the results.

(xxi) THAT the Petitioner himself confirmed that he was present at Witu Primary polling station 1 where he had earlier on voted, witnessed the counting and signed the Form 38A after being satisfied with the results and the whole process on election day.

(xxii) THAT the Petitioner also confirmed that he never made a request for a recount of the Senatorial votes at any polling station in the entire County.

(xxiii) THAT though the Petitioner stated that he believed he is the one who won the elections, he gave evidence that he was unaware as to how many votes from his perspective he had garnered and further that he was never even at the Tallying Centre when the declaration was made.

(xxiv) THAT the Petitioner has therefore not equally laid any basis for this Court to direct that the scrutiny be allowed and further that the same do include the availing and extend to the examination of :-

- a) the written statements made by the Returning Officers,
- b) the examination of the written statements made by the Presiding Officers in the Polling Station Diaries.
- c) both the electronic and hard copy of the Register of voters as contains the biometric data and alpha numerical details of the voters entitled to vote at the stated Polling Stations.
- d) the Kenya Integrated Electronic Machine System (KIEMS) and the information stored by it.
- e) the Declaration of Results Forms 38A stored in the ballot boxes of all the named Polling Stations.
- f) the packets of spoilt ballots.
- g) the marked copy registers.
- h) the packets of Counterfoils of used ballot papers.
- i) the packets of counted ballot papers.
- j) the packets of rejected ballot papers.

k) all declaration of Results Forms 38B's used in the declaration of results for the election of the Senator in Lamu County.

(xxv) THAT in any event the purpose of scrutiny of votes is to strike off votes as stipulated by Section 81 (2) and since no particulars have been specifically given in the Petition as well as evidence touching on this presented before this Court, no basis for the grant of the order has been laid.

(xxvi) THAT the Petitioner has not shown how the materials sought can be used for purposes of striking off votes as stipulated by Section 81 (2).

(xxvii) THAT contrary to the allegation that the Form 38A for Hongwe Primary School 2 was not signed by the Presiding Officer and his Deputy, the same was duly signed only that the copy annexed to the Affidavit in my earlier Affidavit was faint as a result of photocopying and a copy of the clearer copy and polling station diary are annexed hereto in a bundle and marked as exhibit "MAA1".

(xxviii) THAT contrary to the Petitioner's allegations, all the statutory Forms used in the elections were not fake or a forgery and that the same met all statutory requirements and contained the results as transposed from the respective Form 38A's from Lamu East Constituency.

(xxix) THAT I have proffered to this Court credible information to the effect that there is always a reasonable variance in the votes cast for the different elections for President, Senator, Member of National Assembly, Women Representative and Member of County Assembly can never and this in no way can demonstrate that invalid votes were cast.

(xxx) THAT the Petitioner's generalized suspicions against the Returning Officers for both the Lamu East and Lamu West Constituencies did not prove how the outcome of the elections were affected.

(xxxi) THAT the Petitioner's allegations that at Mbwajumwali Polling Station a clerk was arrested for allowing 16 people to vote without being verified by the KIEMS KIT which is a grave election offence was not supported by any evidence at the trial.

(xxxii) THAT the Petitioner's allegation that he saw he was leading by 196 votes at the screen at the Tallying Centre when the 3rd Respondent was declared the winner was contradicted when he later on admitted that he was not present at the Tallying Center.

(xxxiii) THAT the Respondent herein relied on hearsay evidence which he was unable to substantiate during the hearing of the Petition and should now not be allowed to re-open his case by fishing for fresh evidence which was not in his possession at the time he was filing the Petition.

(xxxiv) THAT I swear this Affidavit in response to the application filed herein.

(xxxv) THAT what is deponed herein is true to the best of my knowledge and understanding save for sources of information and advise where otherwise disclosed.

5. The 3rd respondent also swore a Replying Affidavit of even date in which he deposed as follows;

(i) THAT I have read and understood the grounds of Albeity Hassan Abdalla, the Petitioner herein (hereinafter called "the Applicant") Notice of Motion Application dated the 27th day of November, 2017 and filed in court on the even date (hereinafter called "the said Application), the contents of the Supporting Affidavit (hereinafter called "the said Affidavit")

sworn on the 27th day of November, 2017 by the Applicant and in response thereto swear as follows:-

(ii) **THAT** I reiterate the contents of my Replying Affidavit in Support of the Response to Petition and in opposition to the Petition that I swore on the 3rd day of October, 2017 (hereinafter referred to as "the Replying Affidavit") and hereby reaffirm and solemnly repeat the facts and averments stated and included in the Response to Petition, including each of the paragraphs (each individually as well as cumulatively), and solemnly state that the facts therein are true and to my own knowledge, information and belief.

(iii) **THAT** I aver and affirm that the Applicant has not stated his postal address in the said Affidavit.

(iv) **THAT** I aver and affirm 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.

(v) **THAT** I aver and affirm that a party filing an Election Petition is from the outset, seized of the grounds, facts and evidence for questioning the validity of an election.

(vi) **THAT** I aver and affirm that the Applicant had twenty eight (28) days from the 11th day of August, 2017 to the 6th day of September, 2017 within which time he should have gathered all the evidence he desired to use in this Petition.

(vii) **THAT** I am advised by my advocates on record, Binyenya Thurania & Co. Advocates, which advise I verily believe to be true that the requirement that the Petition be signed by a Petitioner in Rule 8 (4) (b) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 and be supported by an affidavit made by the Petitioner containing grounds on which relief is sought and setting the facts relied on by the Petitioner under Rule 12 (1) (b) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 is not a formality. The Petitioner is supposed to assume responsibility for his Petition by signing it and supporting it with a supporting affidavit.

(viii) **THAT** I am advised by my advocates on record, Binyenya Thurania & Co. Advocates, which advise I verily believe to be true that Rules 8 (1) (e) and 12 (2) (e) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 requires in mandatory terms that the grounds upon which the Petition is based to be pleaded in the Petition and the facts in support thereof to be deposed in the affidavit in support of the Petition.

(ix) **THAT** I aver and affirm that the Applicant's grounds of the Petition are contained in Paragraph 28 of the Petition and Paragraph 22 of his Supporting Affidavit sworn in "support of the Petition by the Applicant on the 6th day of September, 2017.

Paragraph 28 of the Petition under the heading Grounds of the Petition provides as hereunder:

"28. The Petitioner's claim is that the Senatorial Elections held for Lamu County on the 8th August, 2017, by the 1st and 2nd Respondents and participated to by the 3rd and 4th Respondent was not free and fair and was unprocedural for the following reasons:-

a) Section 30 of the Elections Act, No. 24 of 2011 entitles a candidate to appoint one agent per polling station but the 1st Respondent denied the petitioner that entitlement thereby breaching article 38, 81 and 86 of the Constitution of Kenya, 2010.

b) Failure by the 1st Respondent to allow the petitioner to appoint an agent as per Section 30 of the Elections Act, No. 24 of 2011 breached the Petitioner's right to an impartial, transparent, efficient and accountable electoral system as per Article 81 (e) of the Constitution of Kenya, 2010.

c) Conduct of the Senatorial Elections in Lamu County by the 1st and 2nd Respondents was contrary to Article 88 (h) and (5) of the Constitution of Kenya, 2010.

d) Therefore, the 1st and 2nd Respondents conduct of the Senatorial Elections in Lamu County was wrong, unprocedural, unfair and or unjust to the Petitioner as it has denied him the right to fully participate, through a party agent, in the monitoring of the voting process therein.

e) There is no other Petition pending, and there have been no previous proceedings, in any court between the Petitioner and the Respondents over the same subject matter.

f) This Honourable Court has jurisdiction to hear and determine this Petition."

i. The Applicant avers as hereunder in Paragraph 22 of his Supporting Affidavit to the Petition:

ii. "22. That my claim is that the Senatorial Elections held for Lamu County on 8th August, 2017_T by the 1st and 2nd Respondents and participated to by the 3rd and 4th Respondent was not free and fair and was unprocedural for the following reasons:-

a) Section 30 of the Elections Act, No. 24 of 2011 entitles a candidate to appoint one agent per polling station but the 1st Respondent denied the petitioner that entitlement thereby breaching article 38, 81 and 86 of the Constitution of Kenya, 2010.

b) Failure by the 1st Respondent to allow the petitioner to appoint an agent as per Section 30 of the Elections Act, No. 24 of 2011 breached the Petitioner's right to an impartial, transparent, efficient and accountable electoral system as per Article 81 (e) of the Constitution of Kenya, 2010.

c) Conduct of the Senatorial Elections in Lamu County by the 1st and 2nd Respondents was contrary to Article 88 (h) and (5) of the Constitution of Kenya, 2010.

d) Therefore, the 1st and 2nd Respondents conduct of the Senatorial Elections in Lamu County was wrong, unprocedural, unfair and or unjust to the Petitioner as it has denied him the right to fully participate, through a party agent, in the monitoring of the voting process therein."

(x) THAT I aver and affirm that by the said Application, the Applicant is seeking to amend the Petition by the back door. Some of the Polling Stations in Prayer 1 of the said Application, to wit Kizingitini Dispensary listed as number I, Kiangwe listed as number V, Bahari Primary School 1 listed as number XI, Ichakani Primary School listed as number XV, Shanga Ishakani listed as number XVI, Mini Village listed as number XXIX, Mkokoni Primary School listed as number XL, Mb wajumwali Primary School 2 listed as number XLI, Tchundwa Primary School 1 listed as number XLII, Tchundwa Primary School 2 listed as number XLIII, Siyu Primary School 1 listed as number XLI, Siyu Primary School 2 listed as number XLV, Shanga Rubu Primary School 1 listed as number XLVI, Shanga Rubu Primary School 2 listed as number XLVII, Patte Dispensary 1 listed as number XLVIII, Patte Dispensary 2 listed as number XLIX, Kizingitini Secondary School 1 listed as number LIII, Rasini Girls Primary School 1 listed as number LVI, Rasini Girls Primary School 2 listed as

number LVII, Faza Health Centre 1 listed as number LVIII, Faza Health Centre 2 listed as number LVIX, Siyu Social Hall listed as number LX, Patte Primary School listed as number LXI, Ndau Dispensary listed as number LXIII, and Kiunga Primary School listed as number LXV fundamentally change the nature of the Petition in that they bring a new case in respect of the aforementioned polling stations which are new and are not pleaded anywhere in the Petition. In the Petition, the Applicant has issue with the polling stations mentioned in the following Paragraphs of his Petition:

- a) Paragraph 27 (b) where the Applicant alleges that there were no party agents from the 4th Respondent in fifty (50) polling stations;
- b) Paragraph 27 (g) where the Applicant alleges that Form 38As were not issued in nine (9) polling stations;
- c) Paragraph 27 (h) where the Applicant alleges that he witnessed a Presiding Officer from Dide Wa Ride Daniel Kazungu Karisa filling Form 38A at the Tallying Centre; and Paragraph 27 (i) where the Applicant alleges that a clerk was arrested at Mbujumwali Polling Station for allowing sixteen (16) people to vote without being verified by the KIEMS KIT.

(xi) **THAT** I aver and affirm that the Applicant vide a Notice of Motion application dated the 9th day of October, 2017 and filed in court on the even date and his Reply to the 1st, 2nd, and 3rd Responses to Petition which were both struck out by this Honourable Court on the 3rd day of November, 2017, the Applicant had unsuccessfully sought to introduce in the Petition herewith Kizingitini Dispensary listed as number I, Kiangwe listed as number V, Bahari Primary School 1 listed as number XI, Ichakani Primary School listed as number XV, Shanga Ishakani listed as number XVI, Mini Village listed as number XXIX, Mkokoni Primary School listed as number XL, Mbujumwali Primary School 2 listed as number XLI, Tchundwa Primary School 1 listed as number XLII, Tchundwa Primary School 2 listed as number XLIII, Siyu Primary School 1 listed as number XLIV, Siyu Primary School 2 listed as number XLV, Shanga Rubu Primary School 1 listed as number XLVI, Shanga Rubu Primary School 2 listed as number XLVII, Patte Dispensary 1 listed as number XLVIII, Patte Dispensary 2 listed as number XLIX, Kizingitini Secondary School 1 listed as number LIII, Rasini Girls Primary School 1 listed as number LVI, Rasini Girls Primary School 2 listed as number LVII, Faza Health Centre 1 listed as number LVIII, Faza Health Centre 2 listed as number LVIX, Siyu Social Hall listed as number LX, Patte Primary School listed as number LXI, Ndau Dispensary listed as number LXIII, and Kiunga Primary School listed as number LXV.

(xii) **THAT** I aver and affirm that the Applicant vide the aforementioned Notice of Motion application dated the 9 day of October, 2017 and filed in court on the even date confirmed to have received all the Form 38As after the filing of the Petition yet he had 28 days from the date the results were declared to prepare and file his case. The Applicant failed to take advantage of Regulation 93 (2) of the Elections (General) Regulations, 2012 and request for the supply of the statutory forms through the court between the period of 11th August, 2017 and 6th September, 2017.

(xiii) **THAT** I aver and affirm that the Applicant's grounds for scrutiny in his Notice of Motion No. Two application dated the 27th day of September, 2017 and filed in court on the 28th day of September, 2017 were *inter alia*.

1) **The 1st and 2nd Respondents violated Section 30 of the Elections Act, 2011 by refusing the petitioner to appoint his own agents and that the 4th Respondent betrayed him in appointing agents that were disloyal to him.**

2) In 50 Polling Stations there were no agents at all either for the Petitioner or his Political Party the 4th Respondent herein.

3) In a number of Polling Stations there were pre-marked ballot papers.

4) In 9 Polling Stations there were no Declaration of Results Forms 38A's. and that many of those which were available were not signed by the Presiding Officers and their Deputies and others were not stamped.

(xiv) THAT I aver and affirm that at the time of filing the Petition herein the Applicant was not aware of any discrepancies in Form 38A.

(xv) THAT I am advised by my advocates on record, Binyenya Thurania & Co. Advocates, which advise I verily believe to be true that there is no provision in the law allowing the court to allow extension of time provided for in the Elections Act, 2011.

(xvi) THAT I am advised by my advocates on record, Binyenya Thurania & Co. Advocates, which advise I verily believe to be true that an amendment outside the stipulated twenty eight (28) days is improper. Neither the Elections Act, 2011 nor the Elections (Parliamentary and County Elections) Petitions Rules, 2017 donates any proviso for" amendment of an election petition except for the limited window found in Section 76 (4) of the Elections Act, 2011.

(xvii) THAT I aver and affirm that his Honourable Court has no mandate to grant an amendment of the petition unless an amendment is made within twenty eight (28) days. This Court cannot bring into effect Section 80 (1) (d) of the Elections Act, 2011 and Article 159 (2) (d) of the Constitution of Kenya, 2010 where it has no mandate in the first place.

(xviii) THAT I am advised by my advocates on record, Binyenya Thurania & Co. Advocates, which advise I verily believe to be true that Rule 19 (2) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 provides that extension and reduction of time shall not apply in relation to the period within which a petition is required to be filed, heard or determined.

(xix) THAT I am advised by my advocates on record, Binyenya Thurania & Co. Advocates, which advise I verily believe to be true that an application for adduction of new and additional evidence must be made within twenty eight (28) days of the declaration of the results of the election.

(xx) THAT I am advised by my advocates on record, Binyenya Thurania & Co. Advocates, which advise I verily believe to be true that the Elections (Parliamentary and County Elections) Petitions Rules, 2017 provides that pleadings shall be closed upon the Respondents filing their last response to an election petition.

(xxi) THAT I aver and affirm that I and the 1st and 2nd Respondents have all filed and served our Responses to the Petition as is provided for in Rules 11 (2) & (5) and 12 (5), (6) & (7) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017.

(xxii) THAT I aver and affirm that Bori Centre is listed twice at numbers XVII and LI in Prayer 1 of the said Application.

(xxiii) THAT I aver and affirm that Mtangawanda Primary School is listed twice at numbers II and L in Prayer 1 of the said Application.

(xxiv) THAT in reply to Paragraph 2 of the Affidavit, I swear that:

a) I aver and affirm that for an order of scrutiny to be granted to the Applicant, he has

to establish he has set out in his Petition the grounds for scrutiny.

b) I aver and affirm that the Applicant has not pleaded with sufficient particularity or at all in his Petition and the Supporting Affidavit to the Petition which polling stations he would wish scrutiny to be carried out and the justification for such scrutiny.

c) In reply to paragraph (2) (ii) of the said Affidavit, I aver and affirm that as provided for in Regulation 62 (3) of the Elections (General) Regulations, 2012 as amended by Legal Notice 72/2017, the absence of agents shall not invalidate the proceedings at a polling station.

d) In reply to paragraph (2) (iii) of the said Affidavit, I aver and affirm that as provided for in Regulation 62 (1) (c) of the Elections (General) Regulations, 2012 as amended by Legal Notice 72/2017, the presiding officer shall regulate the number of voters to be admitted to the polling station at the same time, and may exclude all other persons except *inter alia* authorised agents. The 4 Respondent's agents who were present in twenty four (24) out of the fifty (50) Polling Stations the Applicant listed in Paragraph 27 (b) of his Petition and Paragraph 21 (ii) of his Supporting Affidavit were the 4th Respondent's agents.

e) I aver and affirm that it is the Applicant's case in Paragraph 27 (b) of his Petition and Paragraph 21 (ii) of his Supporting Affidavit that there were no party agents from the 4th Respondent in fifty (50) polling stations. The Applicant does not in his Petition dispute the results as declared in these fifty (50) polling stations. His only problem is there were no party agents from the 4 Respondent.

f) I aver and affirm that the Applicant has offered no evidence of a request for a recount in any polling station as provided for in Regulation 80 of the Elections (General) Regulations, 2012 as amended by Legal Notice 72/2017.

g) In reply to paragraph (2) (iv) of the said Affidavit, I aver and affirm that whereas Form 38A for Hongwe Primary School 2 was signed by the Presiding Officer and his Deputy, the allegation that the said Form 38A was not signed by the Presiding Officer and his Deputy is new and a complete departure to the Applicant's Petition filed herewith as the same had not been pleaded by the Applicant in his Petition. I and the other Respondents therefore, could not and had not responded to the same either in the pleadings or in the evidence that we had tendered in response to the pleaded matters. It is the Applicant's case in Paragraph 27 (g) of the Petition and Paragraph 21 (VII) of his Supporting Affidavit to the Petition that Form 38A was not issued at Hongwe Primary School (02). Annexed herewith and marked *AL 1" is a true copy of Form 38A for Hongwe Primary School (02).

h) In reply to paragraph (2) (v) of the said Affidavit, I aver and affirm that such an allegation is new and a complete departure to the Applicant's Petition filed herewith as the same had not been pleaded by the Applicant in his Petition.

i) In reply to paragraph (2) (vi) of the said Affidavit, I aver and affirm that the Applicant has not shown how the difference in the votes cast for the six (6) elective posts eventually affected the results of the election for Member of Senate for Lamu County. That has not been established by the Applicant.

j) In reply to paragraph (2) (vii) of the said Affidavit, I aver and affirm that as provided for in Regulation 3 (2) of the Elections (General) Regulations, 2012 as amended by Legal Notice 72/2017, prior to the appointment of the constituency returning officer for Lamu East and Lamu West Constituencies and their Deputies the Applicant has not led any evidence nor given particulars in his Petition to show that he made representations

against their appointment by the 1st Respondent.

k) In reply to paragraph (2) (viii) of the said Affidavit, I aver and affirm that whereas it is the mandate of the 1st Respondent to appoint constituency returning officers and their deputies, the Applicant has not led any evidence nor given particulars in his Petition to show how the alleged swapping of the deputy returning officers eventually affected the results of the election. Section 83 of the Elections Act, 2011 is quite apt that non-compliance with the law should be such that it affected the results. That has not been established by the Applicant.

l) In reply to paragraph (2) (ix) of the said Affidavit, I aver and affirm that the Applicant does not in his Petition dispute the results as declared in Mbwejumwali Polling Station. In any event, the Applicant garnered more votes than me in both streams at Mbwejumwali Polling Station.

m) In reply to paragraph (2) (x) of the said Affidavit, I aver and affirm that that provisional results transmitted to the 1st Respondent are subject to confirmation after the procedure described in Regulation 76 of the Elections (General) Regulations, 2012 where after the final results are declared.

(xxv) THAT in reply to Paragraph 3 of the said Affidavit I aver and affirm that as provided for in Regulation 62 (3) of the Elections (General) Regulations, 2012 as amended by Legal Notice 72/2017, the absence of agents shall not invalidate the proceedings at a polling station.

(xxvi) THAT in reply to Paragraph 4 of the said Affidavit I aver and affirm that the Applicant has not shown how the difference in the votes cast for the six (6) elective posts eventually affected the results of the election for Member of Senate for Larnu County. That has not been established by the Applicant.

(xxvii) THAT in reply to Paragraph 5 of the said Affidavit I aver and affirm that as provided for in Regulation 3 (2) of the Elections (General) Regulations, 2012 as amended by Legal Notice 72/2017, prior to the appointment of the constituency returning officer for Larnu East and Larnu West Constituencies and their Deputies the Applicant has not led any evidence nor given particulars in his Petition to show that he made representations against their appointment by the 1st Respondent.

(xxviii) THAT in reply to Paragraph 6 of the said Affidavit I aver and affirm that whereas it is the mandate of the 1st Respondent to appoint constituency returning officers and their deputies, the Applicant has not led any evidence nor given particulars in his Petition to show how the alleged swapping of the deputy returning officers eventually affected the results of the election for Member of Senate for Larnu County. Section 83 of the Elections Act, 2011 is quite apt that non-compliance with the law should be such that it affected the results. That has not been established by the Applicant.

(xxix) THAT in reply to Paragraph 7 of the said Affidavit I aver and affirm that save that the Applicant states that an incident occurred at Mbwejumwali Polling Station, the Applicant does not in his Petition dispute the results as declared in Mbwejumwali Polling Station. The Applicant has not led any evidence nor given particulars in his Petition to show how the alleged incident at Mbwejumwali Polling Station eventually affected the results of the election for Member of Senate for Larnu County. Section 83 of the Elections Act, 2011 is quite apt that non-compliance with the law should be such that it affected the results. That has not been established by the Applicant. In any event, the Applicant garnered more votes than me in both streams at Mbwejumwali Polling Station.

(xxx) THAT in reply to Paragraphs 8 and 9 of the said Affidavit I am advised by my

advocates on record, Binyenya Thuranira & Co. Advocates, which advise I verily believe to be true that as provided for in Section 39 (1C) of the Elections Act, 2011 electronic transmission and publication of polling results in a public portal is only a statutory requirement for the Presidential Election. Except for voter registration and identification; voting, counting, tallying and transmission of results of the election of the other elective posts including the Member of Senate for Larnu County are mainly manual. This Petition does not raise any query regarding registration and identification of voters and as such the KIEMS Kit would serve no useful purpose in this Petition.

(xxxix) **THAT** in further reply to Paragraphs 8 and 9 of the said Affidavit I am advised by my advocates on record, Binyenya Thuranira & Co. Advocates, which advise I verily believe to be true that the votes recorded in Form 38A are final. Where the results from the polling station are electronically transmitted from the polling stations to any other portal as the 1st Respondent may direct, such results can only be termed as provisional and are subject to confirmation after the procedure described in Regulation 76 of the Elections (General) Regulations, 2012 where after the final results are declared.

(xxxix) **THAT** I aver and affirm that the aim of scrutiny and/or recount is not to provide evidence. It is meant to confirm specific allegations as pleaded in the Petition.

(xxxix) **THAT** I aver and affirm that it would be an abuse of process to allow a party to use scrutiny for purposes of chancing on new evidence.

(xxxix) **THAT** in reply to Paragraphs 10, 11, and 12 of the said Affidavit, I aver and affirm that the Applicant has not in his Petition particularized any polling station in which he has disputed the results.

(xxxix) **THAT** I swear this Affidavit in opposition to the Applicant's said Application.

(xxxix) **THAT** what I have deponed to hereinabove is true to the best of my knowledge save as to matters deponed to on information sources whereof have been disclosed and matters deponed to on belief the grounds whereupon have been given.

SUBMISSIONS

6. The petitioner submitted as follows in writing in support of the Application dated 27th November 2017.

(i) **THAT** the Supreme Court laid down the law on granting of an Order of scrutiny and recount in a number of cases that they have considered.

And that in the case of *Raila Amolo Odinga & Another -versus- IEBC & 2 Others*, the Supreme Court analysed the Court's decisions on scrutiny and or recount of votes.

(ii) Its analysis of the High Court decisions established the following as reasons for grant of an order of scrutiny and or recount:

i. In the case of *Hassan Mohamed & Another -versus- IEBC & 2 Others*, an Application of Scrutiny and or Recount is made after adequate relevant evidence has been adduced during the trial, it will be such evidence that will provide, if at all sufficient reasons upon which the Court will make relevant Orders.

In this case, the Petitioner has established that in 15 Polling Stations he had no Agents to represent him. His efforts to appoint Agents were frustrated by the 1st, 2nd and 4th Respondents by refusing him the right to appoint Agents or to appoint Agents on his behalf.

Article 86 of the Constitution of Kenya, 2010 provides that:

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

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

Section 30 of the Elections Act, 2011 on its part provides as follows:-

- (1) "A political party may appoint one agent for its candidates at each polling station.
- (2) where a political party does not nominate an agent under subsection (1), a candidate nominated by a political party may appoint an agent of the candidate's choice."

It is the Petitioner's humble submissions that failure to allow the Petitioner or its party to have an Agent in the said 15 Polling Stations violated the provisions of Article 86 of the Constitution of Kenya, 2010, as the method used by the 1st and 2nd Respondents could not be verified by the Petitioner and therefore it could not be said to be secure, accountable and transparent.

Further, the denial of the Petitioner or his party of the right to appoint an Agent in the 15 Polling Stations is a breach of Regulation 62 of the Election (General) Regulation, 2012 as amended in 2017 which provides that:

"(1) The Presiding Officer shall regulate the number of voters to be admitted to the Polling Station at the same time, and may exclude all other persons except-

- (a) candidate
- (b) a person nominated as a deputy to the candidate, where applicable
- (c) Authorised agents...

(3) notwithstanding sub-regulation (1) the Presiding Officer shall admit to the Polling Station not more than one agent for each candidate or political party..."

The fact that neither the Petitioner nor his Political Party was allowed to have Agents in the 15 Polling Stations deprived him of the right to verify the election method or process. He was unable to account or what happened in those 15 Polling Stations. Therefore, the method cannot be said to be transparent.

Scrutiny and Recount of votes in those Polling Stations would serve to afford an opportunity to the Court to verify the process and confirm whether the process was proper or not.

ii. The Petitioner also proved that in 24 Polling Stations the Agents nominated by his

Political Party were not the ones who were in the Polling Stations on the Election Day. This is again a breach of Section 30 of the Elections Act, 2011. Further the 1st and 2nd Respondents action of allowing Agents other than those nominated by the party raises the implication of collusion with those people to undermine the Petitioner's results in those Polling Stations.

(iii) In the case of Philip Mukwe Wasike -versus- James Lusweti Mukwe & 2 Others, the Court observed that:-

"The purpose of Scrutiny is:

- 1) To assist the Court to investigate if the allegations of irregularities and breaches of the law of 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."

(iv) In Jacob Mwirigi Muthuri -versus- John Mbaabu Muriithi & 2 Others, the Court held that:-

"...unless an order for Scrutiny and Recount is the only prayer sought in the Petition, it cannot be ordered at the pre-trial stage. This is because the prayer should not be granted on the basis of untested evidence which would be the case if the prayer is simply granted at the pre-trial stage on the basis of the allegations in the Petition and the witness Affidavits of the Petitioner."

Having heard the witnesses it is clear that the results in over 25 Polling Stations do not tally between Form 38B and 38C. This situation requires Scrutiny of votes to confirm the valid results.

Similarly, in *Rishad H. A. Amana -versus- IEBC & 2 Others*, the Court emphasized the Recent trend is that Scrutiny can only be ordered where a Petitioner lays sufficient basis after he has adduced evidence during the actual hearing of the Petition.

(v) In the Supreme Court, in the case of *Gatirau Peter Munya -versus- Dickson Mwenda Kithinji & 2 Others*, the Court held:-

"On the contrary, judicial opinion distinctly favours 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. Otherwise, a prayer pointing to a Constituency but lading in specificity is not to be entertained."

(vi) Further, the Supreme Court in the said case held that a Court may order for Scrutiny:-

"If it considers that such Scrutiny or Recount is necessary to enable it to arrive at a just and fair determination of the Petition."

(vii) In the case of *Nicholas Kiptoo Arap Salat -versus- IEBC & 7 Others*, the Supreme Court noted that:-

"The foregoing principles are the basis for certain specific questions which we have to consider: did the Appellant provide a sufficient basis for the trial Court to make orders of Scrutiny and

Recount "did the denial of an order for Scrutiny compromise the Appellant's case" should this case interfere with the discretion of the trial Judge and overturn the decision of the Appellate Court upholding the trial Judges findings."

(viii) In *Nathif Jama Adama -versus- Abdi Khaim Osman Mohamed & 3 Others*, the Supreme Court held:-

"It emerges that, the primary consideration 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."

(ix) THAT paragraph 27 of the Petition clearly avers that the results were erroneous and or wrong for the reasons given and it specifies 50 Polling Stations whose results are disputed. The evidence on record after the hearing of the witnesses confirms that the dispute in the Polling Stations specified in this Application lays a basis for an order of Scrutiny.

(x) In the *Raila Odinga & 5 Others -versus- IEBC & 3 Others*, 2013, the Supreme Court ordered Scrutiny of the following Forms:-

(i) All Forms 34 which were used by IEBC in tallying the Presidential votes from each of the 33,400 Polling Stations.

(ii) All Forms 36 which were used by IEBC in aggregating the tallies of Presidential votes from all Forms 34.

(xi) In making the Orders the Supreme Court elaborated that Scrutiny would serve the following aims:-

(i) Establishing the accuracy or otherwise of the total tallies of the Presidential votes as indicated on the Form 34s.

(ii) Establishing the number of registered voters, the number of valid votes cast and the number of rejected votes as indicated on each Form.

(iii) Comparing the number of registered voters indicated in Form 34 and the number of registered voters on the principal register.

(xii) When giving its decision, the Court explained that the reason it ordered for suo motu Scrutiny was so that it could understand better the vital details of the electoral process and to gain impression on the integrity thereof

(xiii) In the case of *Hassan Ali Joho -versus- Hotham Nyange & Another*, Election Petition No. 1 of 2005, the Court held:-

"Scrutiny has also been ordered without laying foundations where the margins are wide on the ground that a Recount may lead to an expeditious disposal of the Petition. Burundi Nabewa -versus- Joshua Angatia Election Petition No. 4 of 1983 and Said -versus- Maitha & Another Election Petition No. 1 of 1998 where the margins were 521 and 534 respectively as cases on the point. I concur with the holding in Onamu -versus- Maitsi Election Petition No. 2 of 1983 that where the margin is very narrow justice will be done and seen to be done if Scrutiny and Recount is ordered right from the word go."

(xiv) THAT the above cases dealt with constituencies which are smaller compared to the county yet the margin of 521 and 534 votes were considered narrow. In our case the margin for the entire county was only 58 votes which is narrower compared to that in the quoted

cases.

(xv) Lastly, on the law on Scrutiny is the case of *Justus Mungumbu Omiti -versus- Walter Enock Nyambati & 2 Others, Election Petition No. 1 of 2008*, the Court held:-

"All issues raised in the Petition and those which crop up during the hearing, whether pleaded or not, and which had the potential to affect adversely the final results and the will of voters in a Constituency must come under spot light, Scrutiny and interrogation...such determination cannot be made if relevant evidence is locked out on technical grounds that the issues addressed by such evidence were not pleaded."

(xvi) THAT the issues raised in the grounds in support of the Application for Scrutiny have been established and on the basis of the case law referred to we submit that the Petitioner has established all the legal parameters required for the grant of the orders sought.

7. The 1st and 2nd Respondents replied as follows in writing;

(i) THAT the Petitioner seeks for an order of scrutiny and recount of votes in the 66 Polling Stations in Lamu County in respect of the election of the Senator held on 8th August, 2017.

(ii) The Petitioner has equally sought that the scrutiny do include the examination of :-

a) the written statements made by the Returning Officers,

b) the examination of the written statements made by the Presiding Officers in the Polling Station Diaries.

c) both the electronic and hard copy of the Register of voters as contains the biometric data and alpha numerical details of the voters entitled to vote at the stated Polling Stations.

d) the Kenya Integrated Electronic Machine System (KIEMS) and the information stored by it.

e) the Declaration of Results Forms 38A stored in the ballot boxes of all the named Polling Stations.

f) the packets of spoiled ballots.

g) the marked copy registers.

h) the packets of Counterfoils of used ballot papers.

i) the packets of counted ballot papers.

j) the packets of rejected ballot papers.

k) the packets of rejected ballot papers.

(iii) Equally sought by the Petitioner is an order that the 1st Respondent be directed to avail to this Court the following materials, items and or information in its custody for purposes of assisting this court in the scrutiny and recount of votes.

a) the Polling Station Diaries for all Polling Stations named in prayer 1 above.

b) both the electronic and hard copy of the Register of voters as contains the biometric and alpha numerical details of the voters entitled to vote at the Polling Stations name in prayer 1 above.

c) the Kenya Integrated Electronic Machine System (KIEMS) used in the Polling Stations named in prayer 1 above for purposes of accessing the information stored therein or in the alternative the information contained therein stored in accordance with the law.

d) all declaration of Results Forms 38A's used in the declaration of results for the election of the Senator in Lamu County in respect of the Polling Stations named in prayer 1 above.

e) all declaration of Results Forms 38B's used in the declaration of results for the election of the Senator in Lamu County.

(iv) The Petitioners grounds are inter alia that :-

a) the margin of victory was minor which is 58 votes only.

b) he 4th Respondent failed to appoint agents to represent his interests in the polling stations

c) he was not allowed to appoint agents

d) the Form 38A for Hongwe Primary School 2 was not signed by the Presiding Officer and his deputy.

e) the Form 38B for Lamu East Constituency produced by the 3rd Respondent has different results compared with those in Form 38C and the said Form 38B

f) the said Form 38B was not issued to him and is not signed by any of the candidates or agent

g) the said Form 38B is a forgery or fake

h) no results for the entire constituency were lawfully declared.

i) the votes cast for the different elections for President, Senator, Member of National Assembly, Women Representative and Member of County Assembly do not tally a fact that demonstrate that invalid votes were cast.

j) the Returning Officer for Lamu East Constituency and his Deputy and the Deputy Returning Officer for Lamu West Constituency were colleagues, employees and or work mates of the running mate of the Jubilee party candidate for governor in Lamu County a fact that compromised their neutrality and or impartiality.

k) the Deputy Returning Officer for Lamu West Constituency was gazetted to conduct elections in Lamu East Constituency but she and her counterpart in Lamu West Constituency illegally exchanged their roles thereby rendering all the results declared by them illegal, null and void.

l) at Mbwajumwali Polling Station a clerk was arrested for allowing 16 people to vote without being verified by the KIEMS KIT which is a grave election offence.

m) the Petitioner was leading by 196 votes when the 3rd Respondent was declared the winner.

(v) Save for the 4th Respondent who never participated in this case, all the other parties have proffered witnesses who have testified and closed their cases.

(vi) This is the second time that the Petitioner has sought for orders for scrutiny recount and production of electoral materials as his previous applications dated 27.09.2017 were both dismissed on 03.11.2017.

The Law

(vii) Section 82(1) of the Elections Act stipulates thus:

"...an election Court, may on its own motion or on an application by any party to the Petition order scrutiny of votes to be carried out in such a manner as the election Court may determine

(viii) Section 82(2) of the Elections Act proceeds to classify the categories of the votes to be struck off during the process of the scrutiny.

(ix) Rule 29 of the Elections (Parliamentary and county Election)Petition Rules, 2017 provides thus:

1) the parties to the proceedings may apply for scrutiny of the votes for purposes of establishing the valid votes cast

2) ...an election court may if satisfied that there is sufficient reason, order for scrutiny or recount of votes (not both)

3) The scrutiny or recount...shall be confined to polling stations in which the results were disputed

(x) Under Rule 28 of the Elections (Parliamentary) and County Elections Rules 2017, a party can apply for an order for recount of votes where only the issue in the Petition is the count or tallying of votes.

(xi) Under Rule 29 of the Elections (Parliamentary) and County Elections Rules 2017 , a party can apply for an order for scrutiny of the votes for purposes of establishing the validity of the votes cast.

(xii) A clear distinction is then brought by virtue of the wording of Rule 29(2) of the Elections (Parliamentary) and County Elections Rules 2017 , which states that the court may if satisfied that there is sufficient reason order for scrutiny or recount of the votes

(xiii) In view of the fact that the precipitating circumstances and purposes of recount and scrutiny of votes are distinct, we submit that the 2 rules are mutually exclusive of each other and cannot be sought concurrently.

(xiv) In Kisii H.C. E.P. No. 9 of 2013 Charles Oigara Mogere vs Christopher Obure , Sitati J found that it is not open to a party to apply for a dual order of scrutiny and recount under the same breath as this would be beyond the jurisdiction of the Court and on this ground dismissed a similar application.

(xv) Furthermore since the Petitioner has sought 6 prayers in his Petition the prayer for recount of votes is not the only prayer and hence he is disentitled to seek the same by dint of

Rule 28 of the Elections (Parliamentary) and County Elections Rules 2017.

(xvi) In any event the principles for granting orders of recount and or scrutiny have been settled to the effect that the same are not granted just as a matter of course as the Petitioner must produce satisfactory evidence and lay a basis in the Petition and the Affidavit evidence filed in support of the Petition.

(xvii) In his present application he has now added thereto a further 17 fresh polling stations :

- i. Kizingitini Dispensary 1**
- ii. Bahari Primary School 1**
- iii. Bahati Primary School**
- iv. khakani Primary School**
- v. Kandahar Playground**
- vi. Ndununi/Mswakini Village**
- vii. Mini Village**
- viii. Mkokoni Primary School**
- ix. Mbwajumwali Primary School 2**
- x. Tchundwa Primary School 1**
- xi. Tchundwa Primary School 2**
- xii. Siyu Primary School 1**
- xiii. Siyu Primary School 2**
- xiv. Shanga Rubu Primary School 1**
- xv. Shanga Rubu Primary School 2**
- xvi. Patte Dispensary 1.**
- xvii. Patte Dispensary 2**
- xviii. Kizingitini Secondary School 1**
- xix. Kizingitini Secondary School 2.**
- xx. Rasini Girls Primary School 1.**
- xxi. Faza Health Centre 1.**
- xxii. Faza Health Centre 2**
- xxiii. Siyu Social Hall.**
- xxiv. Mbwajumwali Nursery**

xxv. Ndaou Dispensary.

xxvi. Ichakani Primary School.

xxvii. Kiunga Primary School 1.

(xviii) Rule 8 of the Elections (Parliamentary) and County Elections Rules 2017 state that an election Petition shall state the grounds on which the Petition is presented.

(xix) Rule 12(1)(a) and (2) of the Elections (Parliamentary) and County Elections Rules 2017 state that an Affidavit shall state the grounds on which the Petition is presented.

(xx) The Petitioner therefore cannot be allowed to seek scrutiny and recount in stations in which he has not specifically pleaded in the Petition at the evidence a party intends to rely on should be brought to the attention of the opponents in advance to enable a party to prepare his defence.

(xxi) These polling stations are now sought to be introduced through the back door after this Court in its ruling dated 3.11.17 dismissed the application by the Petitioner to introduce them by way of further evidence.

(xxii) In the decisions of Kisii E.P. No. 9 of 2013, Charles O. Mogere vs Christopher M. Obure , Meru E.P. No. 1 of 2013, Dickson Githinji vs Gitarau Munya , Msa E.P. No. 1 of 2013, Philip Ndolo vs Omar Mwinyi, Nrb E.P. No. 7 of 2013, Mohamed Kuno vs Abdikadir Omar Aden the Court refused to entertain and disregarded the issues touching on the additional polling stations which were sought to be introduced in the application for scrutiny and recount which had not hitherto been mentioned in the Petition

(xxiii) The only underlying ground that the Petitioner relies on is the allegation that the agents appointed by the 4th Respondent were impartial and that he was denied an opportunity to appoint his own agents and hence he did not have agents in the 50 polling stations enumerated under paragraph 27(b) of the Petition.

(xxiv) Sec. 30 of the Elections Act, 2011 gives a political party the priority to appoint agents where it nominates a candidate. It is only when a political party does not nominate an agent that a candidate nominated by a party may appoint an agent of the candidates choice.

(xxv) In the present circumstances the Petitioner alleges that the agents appointed by the 4th Respondent did not represent his interests and he was not allowed to appoint agents.

(xxvi) A similar situation was dealt with in Nakuru EP No. 2 of 2013 Harun Lempaka vs Lemanken Aramat & others where he court found that the decision to admit Party's agents as opposed to candidate's agents was in conformity with the law and that the 1st Respondent had no power to direct as to how such an appointment was to be made. The Court further found that the allegation that the Petitioner did not know the agents appointed by his party had absolutely no bearing or impact on the transparency of the election processes. The Court further concurred that it would have been impossible to allow each candidates agent as the crowd would have made it difficult to the Presiding officer to conduct elections.

(xxvii) Regulation 79(6) read with (7) of the Elections (General) Regulations, 2012 is to the effect that the refusal of an agent to sign a statutory form or the absence of an agent at the signing of a declaration form shall not in itself invalidate the results.

(xxviii) Sec 82 (2) of the Elections Act,2011presupposes that the scrutiny will unearth instances of voting by unregistered voters, bribery, treating , cheating, undue influence, impersonation, double voting , voters by those disqualified from voting and votes cast for

disqualified candidate etc, the winning candidate has not obtained the votes he is entitled to in law and a basis for this has been laid out in the Petition and the Affidavit evidence

(xxix) *Rule 29 (2) of the Elections (Parliamentary) and County Elections Rules 2017*, provides that the applicant must satisfy the Court that there is sufficient reason for an order for scrutiny of the votes or recount.

(xxx) *Rule 29 (4) of the Elections (Parliamentary) and County Elections Rules 2017*, provides that the scrutiny or recount of the votes shall be confined to the results in the polling stations which are disputed.

(xxxi) In the entire Petition as well as the Affidavit in support thereof, the Petitioner never stated and or specified that the results of any polling station was disputed. All he complained of was that he was not duly represented in the process due to lack of agents and this is a dispute between him and the 4th Respondent as shown in Nakuru EP No. 2 of 2013 Harun Lempaka vs Lemanken Aramat & others.

(xxxii) The Petitioner allegations that agents were not present in the polling stations was rebutted by documentary evidence contained in the polling station diaries and Form 38As which showed that they were present.

(xxxiii) A further nexus was established that all agents of the constituent parties to the NASA coalition to which the 4th Respondent belonged and even NASA accredited agents were all present at the polling stations

(xxxiv) Apart from mere misconceived belief that he was entitled to appoint his own agents the Petitioner did not show with specificity that any of the results contained in any Form 38A was not as a result of the count and stated that he had not petitioned for a recount at any polling station.

(xxxv) An order for a recount presupposes that there has been no count according to the law.

(xxxvi) There is no evidence showing discrepancy to be answered by looking at the ballot boxes nor are there gaps

(xxxvii) The Petitioner further failed to show that the 1st and 2nd Respondent aided in the manipulation of votes by deflating the Petitioner's votes and inflating the 3rd Respondent's votes

(xxxviii) In the decisions of Kisii E.P. No. 9 of 2013, Charles O. Mogere vs Christopher M. Obure , Meru E.P. No. 1 of 2013, Dickson Githinji vs Gitarau Munya , Msa E.P. No. 1 of 2013, Philip Ndolo vs Omar Mwinyi , Nrb E.P. No. 7 of 2013, Mohamed Kuno vs Abdikadir Omar Aden , Nakuru EP No. 2 of 2013 Harun Lempaka vs Lemanken Aramat & others the various Courts found that sufficient reasons must be established by way of the Petition and Affidavit evidence before an order for recount can be made.

(xxxix) *The* Petitioner has not demonstrated how if the order of the examination of the materials he has sought for under *Rule 29 (4) of the Elections (Parliamentary) and County Elections Rules 2017* can lead to unearthing any invalid votes cast so as to reduce the margin of the votes between him and the 3rd Respondent, since he has not disputed any specific results by leading any evidence as required *Sec 82 (2) of the Elections Act,2011* of instances of voting by unregistered voters, bribery, treating , cheating, undue influence, impersonation, double voting , voters by those disqualified from voting and votes cast for a disqualified candidate.

(xl) All the Form 38As were signed by the agents to authenticate the results of the count at each and every polling station and in no station did any agent of any party/candidate refuse to sign and or endorse on any Form the reasons for their refusal to sign that the results were disputed.

(xli) The Respondent readily admitted that there were arithmetical errors in the Form 38B on the total votes cast and that these were only on the additions on the total votes cast and did not affect the votes garnered by the individual candidates. He clearly stated that these were corrected in the Form 38c after confirming that indeed the results recorded for the individual candidates were the same as in the Form 38As for the specified polling stations. These tallying errors did not affect the outcome of the elections at all.

(xlii) The Petitioner seeks these orders just as a mere matter of course but the Courts in the decisions cited have held that sufficient cause must be demonstrated by the Petitioner and the evidence adduced in Court and the only order therefore that is deserved for this application is for it to be dismissed with.

8. The 3rd Respondent also submitted as follows in writing;

(i) THAT the 3rd Respondent frames the following issues for determination:-

(a) Whether the Application is properly before this Honourable Court?

(b) Whether the Application is supported by the Petition?

(c) What is the effect of the Application?

(ii) THAT Rule 12 (14) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 provides that the Oaths and Statutory Declarations Act, Cap 15 of the Laws of Kenya and Order 19 of the Civil Procedure Rules, 2010 are applicable to affidavits in election petitions.

(iii) THAT the Application is incurably defective for the following reason:-

a. The Supporting Affidavit of the Applicant sworn on the 27th day of November, 2017 and filed in court on the even date (hereinafter referred to as "the said Affidavit) offends Order 19 Rule 4 of the Civil Procedure Rules, 2010.

(iv) THAT order 19 Rule 4 of the Civil Procedure Rules, 2010 provides as hereunder:-

"Every affidavit shall state the description, true place of abode and postal address of the deponent, and if the deponent is a minor shall state his age."

(v) THAT the Applicant has not stated his postal address in the said Affidavit.

(vi) THAT the deponents' description is an important part of an affidavit the reason being, that the fact that the affidavit, being in itself evidence, must be proven to be the sworn evidence of some real person with legal capacity and not a fictitious one.

(vii) The words shall, must and should appear in both the local and English provisions and are therefore mandatory. The postal address must be that of the deponent, a feature which, is absent in the said Affidavit.

(viii) THAT the defect in the Applicant's said Affidavit has nothing to do with the misdescription of parties. The irregularity herein is not restricted to the form but go to the

evidential value of the said Affidavit itself.

(ix) THAT since Applicant has not stated his postal address in the said Affidavit as mandatorily required in Order 19 Rule 4 of the Civil Procedure Rules, 2010 we urge this Honourable Court to strike out the said Affidavit.

b. Whether the Application is supported by the Petition?

Article 87 (2) of the Constitution of Kenya, 2010 provides as hereunder:-

"Petitions concerning an election, other than a presidential election, shall be filed within twenty-eight days after the declaration of the election results by the Independent Electoral and Boundaries Commission."

Section 76 (1) (a) of the Elections Act, 2011 provides as hereunder:-

"A petition to question the validity of an election shall be filed within twenty eight days after the date of declaration of the results of the election and served within fifteen days of presentation."

Section 76 (4) of the Elections Act, 2011 provides as hereunder:

"A petition filed in time may, for the purpose of questioning a return or an election upon an allegation of an election offence, be amended with leave of the election court within the time within which the petition questioning the return or the election upon that ground may be presented."

(x) THAT the provisions of the Elections Act, 2011 and the Elections (Parliamentary and County Elections) Petitions Rules, 2017, which are made pursuant to the provisions of Article 87 (2) of the Constitution of Kenya, 2010, constitute the constitutionally underpinned code of laws for dealing with election petitions. The jurisdiction to hear and determine election petitions is a special jurisdiction that is conferred by the Constitution itself, and the manner in which it is to be exercised is ordained by the Constitution when it donates power to Parliament to enact the requisite laws and Regulations for its exercise.

(xi) THAT whereas this Honourable Court has discretion to allow the filing of further affidavits and admit new or additional evidence pursuant to Rule 15 (1) (h) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017, an application for adduction of new and additional evidence must be made within 28 days of the declaration of the results of the election where the new or additional evidence, if it were to be admitted and acted upon, would have the effect of amending the election petition as the case is here.

(xii) THAT a party filing an Election Petition is from the outset, seized of the grounds, facts and evidence for questioning the validity of an election. It is trite law, that any allegations made in evidence outside the complaints or particulars in the pleadings, are not admissible.

(xiii) As the parties in dispute are adversaries, it is the parties themselves who set the agenda of the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. A Party's case is contained in its pleadings as supported by evidence from which this Honourable Court determines the issue(s) in dispute and awards relief accordingly. A party cannot be allowed to come to court and attempt to prove complaints which are not pleaded, unless a request for amendment of pleadings is considered and granted by the Court. This position was affirmed by the Court of Appeal (Coram: G.B.M. Kariuki, P.O. Kiage and K. M'Inoti, JJA) in its judgment of the 31st day of January, 2014 in Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR where it was held as thus:-

"The appellants' contention is that the learned Judge overstepped her mandate in crafting a new issue not brought by the parties and basing it to nullify the 1st respondent's election thereby essentially assisting the petitioner in an impermissible manner. The 1st respondent in submissions filed in this Court supported this argument by the appellant and cited to us two decisions of the Nigerian Supreme Court.

In the first, ADETOUN OLADEJI (NIG) LTD Vs. NIGERIA BREWERIES PLC S.C 91/2002, Judge Pius Aderemi J.S.C expressed himself, and we would readily agree, as follows;

"...it is now a very trite principle of 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."

Other judges on the case expressed themselves in similar terms, with Judge Christopher Mitchell J.S.C. rendering himself thus;

"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."

To the above submissions by the appellant and the 1st respondent through its learned counsel Mr. Kiugu, which are by no means insubstantial, we have been unable to find any answer by the 2nd to 4th respondents both in their written submissions and in the address before us by Mr. Laichena, their learned counsel.

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

This position was further affirmed by the Supreme Court (Coram: Maraga, CJ & President; Mwilu, DCJ & Vice-President; M.K. Ibrahim; J.B. Ojwang; S.C. Wanjala; N.S. Ndung'u, and I. Lenaola, SCJJ) affirmed this position at Paragraph 62 in its ruling of the 28th day of August 2017 in Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR. The Supreme Court at Paragraph 62 of its ruling held as thus:-

"[62] Having addressed our minds to the above issues, it is our view that first, we note that as correctly argued by Counsel for the 3rd 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. Any 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."

(xiv) THAT cognisant to the provisions of Article 163 (7) of the Constitution of Kenya, 2010, we urge this Honourable Court to be guided by the ruling of the Supreme Court in Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR.

(xv) THAT by filing the Application, the Applicant is seeking to amend his Petition by the back door. Some of the Polling Stations in Prayer 1 of the said Application, to wit Kizingitini Dispensary listed as number I, Kiangwe listed as number V, Bahari Primary School 1 listed

as number XI, Ichakani Primary School listed as number XV, Shanga Ishakani listed as number XVI, Mini Village listed as number XXIX, Mkokoni Primary School listed as number XL, Mbwajumwali Primary School 2 listed as number XLI, Tchundwa Primary School 1 listed as number XLII, Tchundwa Primary School 2 listed as number XLIII, Siyu Primary School 1 listed as number XLI, Siyu Primary School 2 listed as number XLV, Shanga Rubu Primary School 1 listed as number XLVI, Shanga Rubu Primary School 2 listed as number XLVII, Patte Dispensary 1 listed as number XLVIII, Patte Dispensary 2 listed as number XLIX, Kizingitini Secondary School 1 listed as number LIII, Rasini Girls Primary School 1 listed as number LVI, Rasini Girls Primary School 2 listed as number LVII, Faza Health Centre 1 listed as number LVIII, Faza Health Centre 2 listed as number LVIX, Siyu Social Hall listed as number LX, Patte Primary School listed as number LXI, Ndau Dispensary listed as number LXIII, and Kiunga Primary School listed as number LXV fundamentally change the nature of the Petition in that they bring a new case in respect of the aforementioned polling stations which are new and are not pleaded anywhere in the Petition. In the Petition, the Applicant has issue with the polling stations mentioned in the following Paragraphs of his Petition:-

- a. Paragraph 27 (b) where the Applicant alleges that there were no party agents from the 4th Respondent in fifty (50) polling stations;
- b. Paragraph 27 (g) where the Applicant alleges that Form 38As were not issued in nine (9) polling stations;
- c. Paragraph 27 (h) where the Applicant alleges that he witnessed a Presiding Officer from Dide Wa Ride Daniel Kazungu Karisa filling Form 38A at the Tallying Centre; and
- d. Paragraph 27 (i) where the Applicant alleges that a clerk was arrested at Mbwajumwali Polling Station for allowing sixteen (16) people to vote without being verified by the KIEMS KIT.

(xvi) THAT the Applicant does not in his Petition dispute any results as declared in any polling station in Lamu County.

(xvii) THAT the Application is a complete departure from the Petition.

(xviii) THAT the right to scrutiny of votes as well as recount of votes in an election petition is anchored on Section 82(1) of the Elections Act, 2011 and Rule 29 of the Elections (Parliamentary and County Elections) Petition Rules, 2017.

Section 82 (1) of Elections Act, 2011 provides as follows:-

"Scrutiny of votes

(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."

Rule 29 of the Elections (Parliamentary and County Elections) Petition Rules, 2017 provides as follows:-

"Scrutiny of votes

(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 spoiled 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 papers;

(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 envelop and such envelop shall be stored by the Commission subject to the elections court directions under rule 16."

(xix) THAT scrutiny is not meant to provide or unearth new evidence. It is meant to confirm specific allegations as pleaded in the Petition.

(xx) THAT Forms 38A and 38B could be provided to the Applicant or his political party agent at the polling station or tallying center respectively, on request. After the announcement of results at the County Tallying Centre, inspection of any documents in the custody of the 1st Respondent could only be done through an application to the High Court as provided for in Regulation 93 (2) of the Elections (General) Regulations, 2012. The Applicant failed to take advantage of Regulation 93 (2) of the Elections (General) Regulations, 2012 and request for the supply of the statutory forms through the court between the period of 11th August, 2017 and 6th September, 2017.

(xxi) THAT as provided in Rule 29 (4) of the Elections (Parliamentary and County Elections) Petition Rules, 2017 for orders of scrutiny to be granted to the Applicant he has to establish he has set out in the Petition the grounds for scrutiny.

(xxii) THAT Rules 8 (1) (e) and 12 (2) (e) of the Elections (Parliamentary and County Elections) Petition Rules, 2017 requires the grounds upon which the Petition is based to be pleaded in the Petition and the facts in support thereof to be deposed in the affidavit in support of the Petition. The Applicant has not pleaded with sufficient particularity or at all in his Petition and the Supporting Affidavit to the Petition which polling stations he would wish scrutiny to be carried out and the justification for such scrutiny .This position was affirmed by the Supreme Court (Coram: Maraga, CJ & President; Mwilu, DCJ & Vice-President; J.B. Ojwang; S.C. Wanjala; N.S. Ndung'u, and I. Lenaola, SCJJ) in considering an application for scrutiny dated the 13th day of October, 2017 in Njonjo Mue & another v Independent Electoral and Boundaries Commission & 3 others in declined the application held as hereunder:-

"(iii) Prayers 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 18 and 19 are hereby declined. The said prayers have been declined on the basis of very clear grounds which will be elaborated in a detailed version of this ruling to be issued by the Court at a later date. Some of the prayers have been declined due to the sheer impracticability of their implementation given the short time left for the determination of the petitions at hand. Others have been declined because they were not pleaded with sufficient particularity in the Petition. Yet others, were declined on grounds that they are couched in such general terms as to be no more than fishing expeditions."

This position was further affirmed by J.A. Makau, J in his ruling of the 31st day of October, 2017 in Justus Mongumbu Omiti v Independent Electoral and Boundaries Commission (I.E.B.C.) & another [2017] eKLR. J.A. Makau, J at Paragraph 38 of his ruling held as thus:

"[38. I now turn back to the prayer for scrutiny. The Petitioner in this application has not met the requirements for the granting of Orders of scrutiny. The Petitioner similarly in his petition has not stated which polling stations he would wish scrutiny to be carried out, what would justify scrutiny to be carried out, nor has he disclosed what would justify scrutiny to be ordered. He is seeking scrutiny for the whole constituency of Kitutu Masaba constituency without laying any basis. The application for scrutiny of Kitutu Masaba Constituency is general and wide, it should be specific as to what polling stations scrutiny should be limited to, a general or blanket prayer cannot be granted without the Applicant having laid basis for scrutiny, as scrutiny is laborious and time consuming exercise and may interfere with the timelines for hearing and determination of the petition. It appears the Petitioner is out on a fishing expedition, as in his application he sought leave to file supplementary affidavit/report from scrutiny exercise. He should also have ensured in seeking scrutiny that he specified the polling stations in respect of which he seeks scrutiny and the materials and documents that he wishes the court to scrutinize, and give reasons why the polling stations should be subjected to scrutiny and why the materials and documents in question should be scrutinized. He should also have ensured his petition and affidavit in support contain concise statements of materials facts upon which the prayer is based on scrutiny and as such should also have been one of the prayers in the petition. In the instant case, there is no prayer for scrutiny and such an order cannot be granted where scrutiny has not been specifically pleaded in the petition as a party, cannot be granted what he has not sought through the pleadings."

(xxiii) THAT the Application by the Applicant is not supported by the Petition.

c. What is the effect of the Application?

(xxiv) THAT the effect of the Application is to amend the Petition and procure fresh evidence not already contained in the Petition. If the Petitioner intended to make an application for scrutiny in the polling stations contained in prayer 1 of the Application he ought to have sought leave of this Honourable Court to amend his Petition as provided for in Section 76 (4) of the Elections Act, 2011. Such an application for leave to amend must have been made and granted within the time prescribed for challenging the election. Be that as it

may, there is no provision in the law allowing this Honourable Court to allow extension of time provided for in the Elections Act, 2011.

(xxv) THAT an amendment outside the stipulated twenty eight (28) days is improper. Neither the Elections Act, 2011 nor the Rules donates any proviso for amendment of an election petition except for the limited window found in Section 76 (4) of the Elections Act, 2011.

(xxvi) THAT this Honourable Court has no mandate to grant an amendment of the petition unless an amendment is made within twenty eight (28) days.

(xxvii) THAT this Court cannot bring into effect Section 80 (1) (d) of the Elections Act, 2011 and Article 159 (2) (d) of the Constitution of Kenya, 2010 where it has no mandate in the first place.

9. I have considered the Application dated 27/11/2017. I have also considered the rival submission filed in the application and the authorities relied on. My findings are as follows;

(i) Section 82(1) of the Elections Act, 2011 and Rule 29 of the Elections (Parliamentary and County Elections) Petition Rules, 2017 provides as follows with respect to the right to scrutiny and recount;

Section 82 (1) of Elections Act, 2011 provides as follows:

"Scrutiny of votes

(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."

(ii) Rule 29 of the Elections (Parliamentary and County Elections) Petition Rules, 2017 provides as follows:

"Scrutiny of votes

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

(7) 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.

(8) 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.

(9) 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 spoiled 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 papers;

(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 envelop and such envelop shall be stored by the Commission subject to the elections court directions under rule 16."

(iii) THAT the petition filed herein dated 6th September 2017 states as follows in paragraph 28;

C. GROUNDS OF THE PETITION

"28. The Petitioner's claim is that the Senatorial Elections held for Lamu County on 8^{Lh} August, 2017, by the 1st and 2nd Respondents and participated to by the 3rd and 4th Respondent was not free and fair and was unprocedural for the following reasons:-

a. *Section 30 of the Elections Act, No. 24 of 2011* entitles a candidate to appoint one agent per polling station but the 1st Respondent denied the petitioner that entitlement thereby breaching *article 38, 81 and 86 of the Constitution of Kenya, 2010*.

b. Failure by the 1st Respondent to allow the petitioner to appoint an agent as per *Section 30 of the Elections Act, No. 24 of 2011* breached the Petitioner's right to an impartial, transparent, efficient and accountable electoral system as per *Article 81 (e) of the Constitution of Kenya, 2010*.

c. Conduct of the Senatorial Elections in Lamu County by the 1st and 2nd Respondents was contrary to *Article 88(h) and (5) of the Constitution of Kenya, 2010*.

d. Therefore, the 1st and or 2nd Respondents conduct of the Senatorial Elections in Lamu County was wrong, unprocedural, unfair and or unjust to the Petitioner as it has denied him the right to fully participate, through a party agent, in the monitoring of the voting process therein.

e. There is no other Petition pending, and there have been no previous proceedings, in any court between the Petitioner and the Respondents over the same subject matter.

f. This Honourable Court has jurisdiction to hear and determine this Petition.

WHEREFORE your Petitioner prays that it be determined that:-

1) The 3rd Respondent, *Lotiptip Anuar*, was not validly elected as Senator for Lamu County.

2) The Petitioner, *Albeity Hassan Abdalla*, was the candidate who was validly elected as Senator for Lamu County.

3) In the alternative to prayer 2 above, a declaration that no candidate was validly elected between the Petitioner and the 3rd Respondent and therefore a fresh election should be held.

4) A scrutiny and recount of votes in all Polling Stations in Lamu County be conducted to ascertain the validity of the votes and ascertain the correct number of votes each candidate obtained thereat.

5) The 1st, 2nd and 3rd Respondents either jointly and or severally do pay the costs of this Petition.

6) Any other Order that this Honourable Court may deem just and fair to grant herein.”

(iv) I find that although the petitioner has pleaded in the petition that he is seeking a “**scrutiny and recount of votes in all Polling Stations in Lamu County be conducted to ascertain the validity of the votes and ascertain the correct number of votes each candidate obtained thereat**” the said prayer is too general and I find that it does not contain sufficient particulars and specific reasons for seeking the scrutiny and recount in all polling stations in Lamu.

(v) I also find that the petitioner’s attempt to specify the 50 stations which are in the petition and 17 additional polling stations added in the Application is an attempt to expand the petition through the said Application and it amounts to introduction of new evidence after the close of the petitioner’s case.

(vi) I rely on the case of **Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR** where the Supreme Court said at Paragraph 62 of its ruling as follows;

“...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. Any 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.”

(vii) I accordingly find that the Application dated 27th of November 2017 lacks in merit and I accordingly dismiss it.

(viii) The costs of the Application to abide the cause.

Dated, signed and delivered at Malindi this 15th December, 2017 in the presence of the parties.

ASENATH ONGERI

JUDGE.