



Mogusu & another v Kebaso & 6 others (Election Petition Appeal E006 & E007 of 2023 (Consolidated)) [2023] KEHC 19688 (KLR) (6 July 2023) (Judgment)

Neutral citation: [2023] KEHC 19688 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
ELECTION PETITION APPEAL E006 & E007 OF 2023 (CONSOLIDATED)**

HK CHEMITEI, J

JULY 6, 2023

BETWEEN

MOCHUMBE JACKSON MOGUSU APPELLANT

AND

NYARIBO DENNIS KEBASO 1ST RESPONDENT

THE RETURNING OFFICER BORABU CONSTITUENCY .. 2ND RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDERIES COMMISSION 3RD RESPONDENT

OMWANCHA KEVIN MARANGA 4TH RESPONDENT

GEOFFREY ISABOKE KAMBUNI 5TH RESPONDENT

AS CONSOLIDATED WITH

ELECTION PETITION APPEAL E007 OF 2023

BETWEEN

NYARIBO DENNIS KEBASO APPELLANT

AND

MOCHUMBE JACKSON MOGUSU 1ST RESPONDENT

OMWANCHA KEVIN MARANGA 2ND RESPONDENT

GEOFFREY ISABOKE KAMBUNI 3RD RESPONDENT

THE RETURNING OFFICER BORABU CONSTITUENCY .. 4TH RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDERIES COMMISSION 5TH RESPONDENT



(Being an appeal from the decision and Judgment of Senior Resident Magistrate Hon. C. Ombija, issued on the 15th February 2023 in the Keroka MCEP No. E001 of 2022)

JUDGMENT

1. The two (2) appeals herein and a Cross-Appeal arise from election petition No. E001 of 2022 at Keroka Principal Magistrate Court wherein Mochumbe Jackson Mogusu was the petitioner while Nyaribo Dennis Kebaso was 1st Respondent, the Returning Officer Borabu Constituency was the 2nd respondent and the Independent Electoral and Boundaries Commission (IEBC) was the 3rd respondent. At the conclusion of the hearing of the petition, the trial court on 15th February 2023 allowed the petition and ordered as follows; -
 - a. A declaration invalidating the election of the 1st respondent as the Member of County Assembly Nyasiongo ward.
 - b. A certificate to issue forthwith pursuant to provisions of section 86 (1) of Election Act.
 - c. Directions that fresh election be held for MCA Nyasiongo Ward.
 - d. Costs to petitioner capped at 400,000/= to be paid by 2nd and 3rd respondent.
2. From the above decision of the trial court, two (2) appeals No. 006 of 2023 and No. E007 of 2023 and a Cross-Appeal were filed and the same were consolidated and heard together.
3. In Election Appeal No. 006 of 2018 filed on 19th February 2022 the appellant was Mochumbe Jackson Mogusu while the respondents were Nyaribo Dennis Kebaso as 1st respondent, the Returning Officer Borabu Constituency as 2nd respondent, the Independent Electoral and Boundaries Commission as 3rd respondent, Omwancha Kevin Maranga 4th respondent, Geoffrey Isaboke Kambuni 5th respondent with the grounds of appeal being:
 - a. The learned trial Magistrate erred in law in finding that the County Assembly Elections, Borabu Constituency Nyansiongo Ward were not conducted in a free, fair, transparent and credible manner and that the said elections were not conducted in accordance with the law.
 - b. The judgment dated 15th February 2023 was not based on the pleadings and/or orders sought by Appellant in the Petition filed before the Honourable Court.
 - c. The learned trial Magistrate erred in law in failing to issue an order as per Sections Section 75(3) (b) and 80(4) of the *Elections Act* directing the Commission to issue a Certificate of Election to the Appellant since upon recount of the ballots cast, the appellant was the winner apparent and the appellant was never found not to have committed an election offence.
 - d. The learned Magistrate erred in law by dismissing the appellant's Application dated 21st October 2022 which application sought to strike out the 2nd and 3rd Petitions for lack of compliance with mandatory provisions of the Elections Laws.



- e. The Learned Trial Magistrate erred in law by dismissing the 1st Petitioner's oral Application of 29th November 2022 which application sought to strike out the Affidavits of Daniel Otworu Akama, Jared Angwenyi, Stephen Nyaingiri, and Kennedy Mosera, which affidavits were dated on 8th August 2022, a day before the General Election.
 - f. The Learned Magistrate erred in law in failing to make a determination on Election the Petitions E002 and E003 of 2022 as consolidated by the orders of the Court of 12th October 2022.
 - g. The learned trial Magistrate erred in law in capping the costs of the Petition at Kshs. 400,000 given the nature of work involved and the consolidation of three petitions, and the various applications dealt with by the parties.
4. The appellant prayed for the appeal to be allowed, the Judgment and Decree of Hon. C. Ombija (SRM) delivered on 15th February 2023 in Keroka Magistrate's Court Election Petition No. E001 of 2022 be set aside, an order to be issued declaring him as the duly elected Member of County Assembly for Nyansiongo, an order to be issued as per section 80(4) of the Election Act directing the 3rd respondent to issue a Certificate of Election to him. He also prayed that the respondents be condemned to bear the costs of the appeal and that of lower court.
5. The cross-appeal was filed on 21st February 2023 in election petition no. E006 of 2023 by the Returning officer Borabu Constituency and Independent Elections and Boundaries Commission, the 2nd and 3rd respondents therein, being equally dissatisfied with the whole Judgment and Decree of honorable C. Ombija (SRM), delivered on 15th February 2023 in Keroka Magistrate Court Consolidated Election Petition Number E001 of 2022. The grounds of appeal are as follows:
- a. That the honourable Court erred in fact and in law, and totally misapprehended the law in failing to appreciate that there were three distinct election Petitions for determination, each of which raised different issues and sought diverse prayers.
 - b. That the honourable Court erred in fact and in law in lumping the three petitions together, and determining the three of them as though it was a single petition, and thereby misapprehended Rule 19 of the Elections (County and Parliamentary Elections) Petition Rules, 2017.
 - c. That the honourable Court erred in fact and in law, in failing to find that the 3rd Petitioner, Geoffrey Isaboke Kambuni, who had filed Keroka Magistrate's Court Election Petition Number E003 of 2022 - Geoffrey Isaboke Kambuni v The IEBC, The Constituency Returning Officer, Borabu Constituency & Nyaribo Dennis Kebaso, had failed discharge the burden proof placed upon him by the law.
 - d. That the Honourable Court erred in fact and in law, in failing to find that the 2nd Petitioner, Omwancha Kevin Maranga, who had filed Keroka Magistrate's Court Election Petition Number E004 of 2022 - Omwancha Kevin Maranga v Nyaribo Dennis Kebaso, The Constituency Returning Officer, Borabu Constituency & The IEBC had failed to discharge the burden proof placed upon him by the law.



- e. That the honourable Court erred in fact and in law when it allowed in favour of the 1st Petitioner, Mochumbe Jackson Mogusu, who had filed Keroka Magistrate's Court Election Petition Number E001 of 2022 - Mochumbe Jackson Mogusu v Nyaribo Dennis Kebaso, The IEBC & The Constituency Returning Officer, Borabu Constituency, orders that he had not prayed for in his Petition.
 - f. That the honourable Court erred in law and in fact and wrongly exercised his discretion under Rule 32 of the Elections (County and Parliamentary Elections) Petition Rules, 2017, and made a decision that lacks legal basis and factual clarity.
 - g. That the honourable Court erred in arriving at a decision lacked sound legal and factual basis and which amounted to a travesty of justice against the appellants.
6. On the above grounds of appeal, cross-appellants prayed that the judgment of the trial court be set aside by this court in its entirety, the Keroka Magistrate Court Election Petition numbers E003 and E004 both of 2022 be dismissed with costs. They also prayed that their appeal be allowed with costs in their favour.
7. Appeal No. 7 of 2023 was filed by Nyaribo Dennis Kebaso and the respondents were Mochumbe Jackson Mogusu as 1st respondent Omwancha Kevin Maranga as 2nd respondent, Geoffrey Isaboke Kambuni as 3rd respondent, the Returning Officer Borabu constituency as 4th respondent and Independent Electoral and Boundaries Commission 5th respondent. The grounds of appeal were as follows:
- a. The honourable Court erred both in fact and in law by coming to the - Conclusion that the elections of 09/8/2022 had to be nullified, nullified them and directed a fresh election.
 - b. The honourable Magistrate erred in law and in fact by finding that the elections held on 9th August 2022 for the member of the County Assembly for Nyasiongo Ward was not so held in accordance with the Constitution and the Election Laws.
 - c. The Learned Trial Magistrate erred in law and fact by filling the gaps left out by the Petitioners without any basis in law and evidence.
 - d. The Learned Trial Magistrate erred in law and fact by considering matters of fact and evidence that were extraneous in arriving at his decision.
 - e. The Learned Trial Magistrate erred in law and in fact and misdirected himself by completely going outside the allegations raised by the Election Petition and other filed pleadings and arrived at the wrong conclusion.
 - f. The Learned Trial Magistrate erred in fact and law by considering matters not pleaded in the Petition and taking into consideration extraneous facts and issues and hence arriving at an erroneous conclusion.
 - g. The Learned Trial Magistrate misdirected and misguided himself in holding that the results contained in the Forms 36A series were not verifiable.



- h. The Learned Trial Magistrate erred in law and fact by picking and choosing only those facts that would lead him to make findings in favour of the Petitioner while ignoring all the facts that would lead to the dismissal of the Petition and thereby violating the appellants' right to be heard as enshrined under Article 50 of *the Constitution*.
 - i. The Learned Trial Magistrate erred in law and fact by selectively reading and applying the scrutiny report and using the same as a basis in arriving at his conclusions and decision.
 - j. The Learned Trial Magistrate erred in fact and law by failing to appreciate the principles of interpretation of *the Constitution* moreover on the principles of elections and electoral disputes, and the purposive interpretation of *the Constitution*.
 - k. The Learned Trial Magistrate erred in fact and law by misdirecting himself on matters of both law and fact as to occasion a miscarriage of justice against the Appellant herein.
 - l. The learned magistrate erred in law and in fact in failing to consider any of the raised triable issues by the appellant and the submissions thereof against the claims in the petition.
 - m. The learned magistrate erred in law and in fact by failing to appreciate and consider the election laws, petitioner's petition and submissions on record thereby arriving at a decision which is biased and self-defeating.
8. On the above grounds of appeal, the appellant asked that the judgment of the trial court be varied/ set aside by this court to the effect that the elections results declared by the returning officer of the 5th Respondent for the Member of County Assembly, Nyansiongo Ward was valid and in conformity with *the Constitution* and laws of Kenya, A declaration that he was duly elected as an MCA, Nyansiongo Ward, an order dismissing the petition in the lower court and the cost of the appeal be borne by the respondents.
9. The appeals were canvassed by way of written submissions and the advocates for the parties highlighted the same.

Appellant's Written Submissions

- 10. The appellant in election petition no. E006 of 2023 filed his submissions on 29th March 2023 and identified two issues for determination.
- 11. On the first issue, whether the appellant having attained the highest number of votes in the recount exercise was entitled to be declared the winner of the impugned elections he submitted that where the process of the election was not sufficiently challenged as was in this case, the numbers ought to be used to ascertain the intent of voters and effect given to it. That in his case, the will of the people considered him to be the person who got the highest number of valid votes. He placed reliance on the case of Richard Kalembe Ndile & Another v Patrick Musimba Musau at Machakos High Court Petition 1 of 2017 [Unreported] at par 32.
- 12. The appellant submitted further, that with the will of the voters without any proved criminal conduct of the candidate with the highest number of votes, he was considered to be the candidate who got the



- highest number of valid votes cast. That none of the parties pleaded or even proved any allegation of electoral offences against him.
13. The appellant while placing reliance on the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji* [2014] eKLR submitted that even if the said allegations would have been proved, which he vehemently denied, they would not have materially affected the outcome of the results. It was also his submission that, save for Nyansiongo DOK primary school polling station 1/2, the election for MCA for Nyansiongo ward was free, fair and verifiable. That once the recount was done, it was established that the appellant attained the highest number of votes and winner pursuant to section 80 of the Election Act, 2011.
 14. The appellant went on to submit that form 36A had been retrieved from the ballot box confirmed the said allegations by him and the said form was adopted as exhibit by the trial court. That even by the wording of Regulation 83(1) (c) of the Election General Regulations 2012(as amended in 2016), if the results of the impugned polling station were to be disregarded in making form 36B, he would still lead with 2613 votes, followed by the 4th respondent with 2414 votes and then the 1st respondent with 2316 votes.
 15. He placed reliance on the cases of *Mohammed Feisal Gedi v Kolosho Hassan Aden & 2 Others* [2022] eKLR and *John Oroo Oyioka & Another v IEBC & 2 Others* [2013] eKLR, where the first court invalidated the election of the 1st respondent therein and declared the petitioner the legitimate winner. While the second court after recount and scrutiny had revealed the petitioner as the winner, nullified the election and declared the winner who was apparent.
 16. Lastly, on the issue of who was to bear the costs the appellant submitted that pursuant to section 84 of the Election Act the election court shall award costs of and incidental to a petition and such costs should follow the cause. Further, that rule 36(1) of the Election Petition Rules required an election court at the conclusion of an election petition to make an order specifying the total amount of costs payable and the persons by and to whom the same shall be paid. He prayed for costs capped at Kshs. 1,000,000/= for both his counsels.
 17. In conclusion, the appellant submitted that he had proved his case to the required standard to warrant the orders sought. He urged the court to uphold the intention of the voters, which intention was displayed by the number of valid votes cast for each candidate.

1st Respondent Written Submissions

18. The 1st respondent in election petition no. E006 of 2023 filed his submissions dated 5th April 2023. In the said submissions, the 1st respondent identified four issues for determination by this court but only two issues were captured in the said submissions.
19. On the first issue, whether the County Assembly elections, Borabu constituency Nyansiongo ward were in a free, fair transparent and credible manner and in accordance with the law the 1st respondent while placing reliance on the case of *Joho v Nyange & Another* [2008] 3 KLR at par 500, submitted that courts should always exercise caution when dealing with election petitions due to the potential consequences that flows from any decision that arises therefrom.
20. The 1st respondent submitted further that there was an overall concession by both the appellant and the 2nd respondent that their agents duly signed the forms after verifying the election as the true reflection of the count. That neither the appellant, the 2nd or 3rd respondents pointed out with specificity and particularity the nature of illegalities and irregularities. Also, that they did not state which provisions of *the Constitution*, *Elections Act* and the Regulations were contravened by him or the 5th respondent.



21. On the second issue, whether there was massive, systematic and deliberate non-compliance with *the Constitution* and the law and therefore if such extent of the flaws and irregularities significantly affected the results, he submitted that both the appellant and the 2nd respondent failed to present any evidence to connect him to the alteration of the form 36A's which inflated the votes in his favour. That the 2nd respondent had stated that he declared the results as per the form 36B which he had received and if at all there was any mistake then the same was an honest one.
22. The 1st respondent submitted further, that if the votes which were allegedly added to him were deducted he would have 2672 votes which would be the highest number of votes. Additionally, that the call by the appellant urging the court to declare him as the winner for having allegedly garnered the highest number of votes was totally misplaced as the court was duty bound to determine if the said allegations apart from the numbers had sufficiently been proved. He placed reliance on the case of *Dickson Mwenda Kithinji v Gatirau Peter Munya & 2 Others*, Civil Appeal No. 38 of 2013.

2nd and 3rd Respondents Written Submissions

23. The 2nd and 3rd respondents in election petition number E006 filed their submissions on 11th April 2023 and identified four issues for determination by this court.
24. On the first issue, whether the trial court failed to find the 2nd Petitioner's (4th respondent) proved his case to the required degree or standard of proof they submitted that failure by the trial court to specifically state whether the 4th respondent proved his case to the required standard meant that he never did. That therefore this court ought to evaluate the evidence tendered afresh and make its independent conclusion. They placed reliance on several cases among them being *Mohamed Mahamud Ali v IEBC & 3 Others* which cited the case of *Timamy Issa Abdallah v Swaleh Salim & 3 Others* [2014] eKLR.
25. On the second issue, whether the trial court erred in failing to appreciate that the real issue of the 2nd petitioner's (4th respondent) case was centered on discrepancies and whether the said discrepancies affected the result of the election as contemplated under section 83 of the Election Act the 2nd and 3rd respondent submitted that the issue of discrepancies was grave and needed to be examined by the trial court before coming to a conclusion. That the trial court failed to do so therefore resulting in failure to give the appropriate order as per section 75 (3) of Election Act.
26. They further submitted that the will of the people expressed in an election was sacrosanct and cannot lightly be overturned and should be given effect whenever possible. They placed reliance on section 83 of the Election Act and the cases of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* [2014] eKLR and *Richard Kalembe Ndile & Another v Patrick Musimba Mweu & 2 Others* [2013] eKLR
27. On the third issue, whether the impugned judgement was legally unsound and lacked ratio decidendi respondents placed reliance on *Ballantine's law dictionary* which defines ratio decidendi as the point in a case that determines the judgment or the principle that the case establishes. They also relied on Order 21 Rule 4 of the Civil Procedure Rules on the contents of a good judgment.
28. Lastly, on who should bear the costs they placed reliance on section 84 of the Election Act and submitted that costs should follow the cause. Further that under Rule 30(1) of the Election Petition Rules, the court was required to make order specifying the total amount of cost payable, by who and to whom the same shall be paid. The court's attention was also drawn to the case of *Kalembe Ndile & Another v Patrick Musimba and Others* [2013] eKLR where the court held in part that costs awarded



should be fairly adequate to compensate for work done but also not so exorbitant as to unjustly enrich the parties or cause unwarranted dent on the public purse.

29. In conclusion, they submitted that an election would not be nullified by the courts on the basis of unproved discrepancy arising from human imperfections or otherwise, unless they have substantial bearing on the integrity of the entire election or on the question of which candidate was actually elected by the people. They urge the court to dismiss the appeal with costs in their favour.

2nd and 3rd Respondents/Cross-Appellant's Written Submissions

30. In their submissions filed on 6th April 2023, they identified four issues for determination.
31. On the first issue, whether the failure by the trial court to pronounce itself on each of the distinct election petitions was a misapprehension of Rule 19 of the Elections (County and Parliamentary Elections) Petition Rules, 2017 it placed on the case of *Timamy Issa Abdallah v Swaleh Salim Imu & 3 Others*, where the court held that the purpose of consolidation was for convenience and proper time management, so that the inquiry into the facts of the elections was carried out together. They submitted that the trial court had proceeded as though there was only one petition even though every petitioner had a duty to prove its case as required by the law. That in doing so the same led to injustice to the respondents.
32. On the second issue, whether the petitioner in election petition no. E003 of 2022 discharged the burden of proof placed upon him by the law they cited the Supreme Court case *Raila Odinga & Other v IEBC & Others* Petition No. 5 of 2013[2013] eKLR where the court opined that a petitioner who sought to annul an election bore the legal burden of proof throughout. That the petitioner in Election Petition No. E003 of 2022 admitted that he did not have a credible petition before the court. Further, that he never called any evidence to buttress his allegations and he therefore could not have been deemed to have discharged the burden of proof in the election petition. It was therefore their submission that the trial court erred in allowing the said petition that it ought to have dismissed it with costs. They urged the court to correct that error by the trial court.
33. On the third issue, whether the court erred in granting in Election Petition number E001 of 2022 orders that the petitioner had not prayed for in his Petition they submitted that the court relied on recount and re-tallying as had been prayed for by the petitioner and nullified the election. That the court went ahead to grant him orders that he had not prayed for and it did not even make an attempt to justify why an order pursuant to Section 80(4) of the Election Act could not issue. They placed reliance on the case of *Civil Appeal No. 37 of 2003 Standard Chartered Bank Kenya Ltd v Intercon Services Ltd & 4 Others*, where the court held that courts would determine a case on the issues that flow from the pleadings and judgment would be pronounced on the issues arising from the pleadings.
34. Lastly, on the issue of costs they submitted that Rule 32(1) of the Election (County and Parliamentary Elections) Petition Rules, 2017 empowered the court to make orders on costs and in so doing the court may specify the amount to be paid and who was to pay. They submitted that they did not have an issue with the trial court awarding the Kshs. 400,000/= but what they disagreed with was the awarding of the said costs to the parties whose petition should have been dismissed.
35. In conclusion, the 2nd and 3rd respondents/cross-appellants submitted that they disagreed with the nullification of the elections and the calling for a fresh election as there was no basis for that. According to them, the appellants in Election Petition Appeal Number E006 of 2023 had proved his petition. They further urged the court to allow the cross appeal and make orders in terms of the memorandum of cross appeal. Additionally, on the issue of costs the court attention was drawn to the cases of



4th Respondent's Written Submissions

36. The 4th respondent in election petition appeal no. E006 of 2023 filed his submissions on 29th March 2023 and in the said submissions he identified three issues for determination.
37. On the first issue, whether the annexures in support of the appellant's case and annexed to affidavits were properly before the lower court and if not so, whether this court should expunge them from the record of appeal the 4th respondent placed reliance on Rule 9 of the Oath & Statutory Declaration Rules and submitted that by the use of the word 'shall' in the said provision of the law meant that there was no discretion in the choice of affixing the seal and serializing the exhibits in support of the affidavit.
38. He also placed reliance on the case of Jeremiah Nyangwara Matoke v IEBC & 2 Other [2017] eKLR where the court in expunging document purporting to be annexures to affidavits in an election petition held in part that exhibits to affidavits which were loose fly sheets for identification attached to them and did not bear exhibits marks on them directly must be rejected. The 4th respondent submitted that the annexures in support of the appellant's case and annexed to four affidavits were not properly before the lower court and thus should be expunged from the record.
39. On the second issue, whether the appellant made out a case for an order to issue under section 80 Election Act the 4th respondent submitted that the court could only grant an order section 80 (4) of the Election Act in the clearest of circumstances and that is where more specifically the will of the people could be seen. That it was noteworthy that for an order to be made under the said section the applicant must not be guilty of any offence but in the instant case the appellant committed several election malpractices that him, the 1st and 5th respondent could attest to. It was therefore the 4th respondent's submission that the appellant failed to make out a case for the issuance of an order under section 80 (4) of the Election Act.
40. Lastly, on the issue of what orders this court should make the 4th respondent submitted that the court should expunge the documents referred to under paragraph 15 of his submissions. That order under section 80(4) of the Election Act sought by the appellant should be dismissed. Further, that he agreed with the finding and order of the learned magistrate on the issue of costs and the same was in line with principles of awarding costs. Additionally, that under Rule 36(1) of the Election Petition Rules this court had jurisdiction to make an order for costs. He urged the court to issue cost of the appeal and consolidated petition in his favour.

5th Respondent's Written Submissions

41. The 5th respondent in election petition appeal no. E006 of 2023 filed his submission dated 5th April 2023 and identified two issues for determination.
42. On the first issue, whether the appellant having attained the highest number of votes in the recount exercise was entitled to be declared the winner the 5th respondent submitted that both the appellant and respondents conceded that there were some errors and omissions in the electoral process. That the said errors and fraudulent alteration of form 36(c) was a major and fundamental, thus affected the results. Therefore, the nullification of the election was inevitable. He placed reliance on Articles 81 and 86 of *the Constitution* and the case of Rishad Hamid Ahmed Amana v IEBC & 2 Others [2013] eKLR, Ferdinard Ndungu Waititu v IEBC & 8 Others [2013] eKLR and Morgan v Simpson [1974] ALL ER 722 at 728.



43. In conclusion, the 5th respondent urged the court to reach the conclusion that the election for the Nyansiongo member of County Assembly was not conducted in accordance with the law. Further, the court should find that the said election was vitiated irrespective of whether the result was affected or not and maintained the nullification of the election. He urged the court to dismiss the appeal with costs in his favour.

Analysis and Determination

44. As indicated above the court did consolidate the two petitions herein just as the trial court did during the hearing. The court has perused the grounds of appeal herein and in my respectful view the issues raised by the parties hinges basically on the question of recount and scrutiny of Nyansiongo DOK primary school stream 1 votes. Critical perusal of the proceedings at the trial court showed that all that the parties concentrated on the said polling station.

45. At the end of their oral evidence the trial court ordered scrutiny and recounting with the consent and in the presence of all the parties. The results were tabulated in their midst and clearly they all agreed that there was a problem with the same.

46. The 1st respondent from the altered form 36A obtained 2792 instead of 2497 votes. The trial court found for a fact that the said alteration affected the results and the appellant did not win.

47. What then is the effect of the above results done in the presents of the parties.? Naturally the results were not conclusive and in my view the finding by the trial court was spot on. It is not true as submitted by the parties that the court failed to consider the other germane issues and only dwelt on one single issue in the petition. The proceedings show that the complaining parties did not raise any other issues except the Nyansiongo primary school polling station results.

48. The appellant for instance in cross examination admitted that there were outright errors at Nyansiongo poling station. This admission was way before the scrutiny of the ballot boxes.

49. The other polling station touched was Kekinga primary school whose effect was not much and the infraction there did not alter much the results.

50. The submissions that the issue of scrutiny and recount were not part of the pleadings in the petition was not true. The trial court in the proceedings ably summarized the issues during pre-conference and this formed part of the issues. As a matter of fact, the IEBC generally admitted that there was no other breach of any electoral code or any other irregularity detected. This also came out during trial as there was nothing significance from the parties and witnesses to indicate any other irregularity.

51. The complain that the illegal affidavits were admitted by the trial court were well captured by the court when it explained itself in the ruling dated 30 November 2022 that the same were admissible by invoking the jurisdiction of the court granted under Article 159 of *the Constitution* and the related laws and authorities which empowered the courts to allow some evidence as long as they do not go to the root of the case. I do not find this argument plausible.

52. On the issue of Sections 75(3) and 80(4) of the Election Act i think it was appropriate for the trial court not to grant the 1st respondent the orders declaring him the outright winner after the scrutiny. Invoking the above sections is used very sparingly and the issues must be very clear and there must be no trace of any illegalities.

53. In the matter at hand it is evident that the impugned form 36A was tampered with. Nobody knows who did it. Each of the parties pleaded ignorance and innocence and IEBC absolved itself. It therefore means that nobody took up liability on the said malpractice. To declare the 1st respondent an outright



winner would disadvantage all the parties and in this regard I agree with the trial court that the parties would have to go back to the electorates and seek a fresh mandate.

54. It is also noted that some of the other fringe candidates may or may not have participated in the said malpractice and the safest way to go about it is ordering a fresh election as directed by the trial court.
55. On the issue of costs I agree that the trial court is sized with the discretion. This court is however of the considered opinion that taking the totality of the factors herein it could not be established with certainty who caused the alterations in the said form 36A. Neither the appellants nor the respondents led the court to any culpable individual or officer.
56. It therefore becomes difficult to punish one by way of costs as the purpose of costs is retributive and in a sense to compensate the loser. In this case and in the absence of any evidence of who did the alteration I think it will be fair to order each party to bear its own costs at the lower court and in this appeal.

Conclusion

57. For the reasons stated above it is hereby ordered that;
 - (a) The consolidated appeals herein are hereby dismissed with no orders as to costs.
 - (b) The trials court judgement is hereby allowed save on the issue of costs which is set aside and substituted with an order that each party shall bear its own costs.

DATED SIGNED AND DELIVERED AT NAKURU VIA VIDEO LINK THIS 6TH DAY OF JULY 2023.

H. K. CHEMITEI

JUDGE

