



Masavu v Independent Electoral and Boundaries Commission & 2 others (Election Appeal E001 of 2023) [2023] KEHC 22292 (KLR) (18 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22292 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
ELECTION APPEAL E001 OF 2023
MW MUIGAI, J
SEPTEMBER 18, 2023**

BETWEEN

DENNIS WAMBUA MASAVU APPELLANT

AND

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 1ST
RESPONDENT**

JACOB KILONDI MACHEKELE 2ND RESPONDENT

MAINGA DAIRUS KIOKO 3RD RESPONDENT

(Being an appeal from the judgment and decree of Honorable M.K Mutegi (PM) sitting at the Principal Magistrate Court at Tawa in Election Petition No. 2 of 2022 delivered on 23rd February, 2023)

JUDGMENT

Background

1. The general elections held on 9th August 2023 amongst the elections was one of Member of County Assembly for Kiteta Kisau Ward. There were 9 contestants amongst them, was Dennis Wambua Masavu, the Appellant who garnered 3616 votes and Darius Kioko Mainga, the 3rd Respondent who garnered 3626 votes.
2. The Appellant filed election petition before the Trial Court and raised various irregularities that marred a credible election reflecting the will of the people and that the election conducted was in violation of the [Constitution of Kenya](#), election laws and regulations that mitigated against the integrity of the election process.



Petition

3. Vide Amended Petition dated 2/12/2022 and filed on 7/12/2022 the Appellant sought inter alia the following reliefs: -
 - i. An order for scrutiny inspection and verification of all the rejected ballots in the ward elections in Kiteta/Kisau ward.
 - ii. An order for recount of all ballots validly cast rejected and spoiled in the ward elections in Kiteta/Kisau ward.
 - iii. An order for production of scrutiny, inspection and verification of all written statements made by all Presiding officers in the polling stations in Kiteta/Kisau made under the provisions of the *Elections Act* [General] Regulations and the *Elections (Parliamentary and County Elections) Petitions Rules, 2017* including but not limited to PSD for voters assisted to vote, voters identified by means other than KIEMS Kit and agents allowed and or not allowed in polling stations
 - iv. An order for the production for scrutiny, inspection and verification of KIEMS Kit.
 - v. An order for production and scrutiny of all Forms 36A and Form 36B for the ward elections in Kiteta/Kisau ward for scrutiny and tallying of results.
 - vi. A declaration that the 3rd Respondent was not validly elected as the members of the County Assembly Kiteta/ Kisau Ward.
 - vii. Upon scrutiny and recount of all votes validly cast rejected and spoiled, the court to declare the Petitioner as to have been validly elected as Member of County Assembly Kiteta/Kisau Ward.
 - viii. In the alternative, an order be issued to the 1st Respondent to conduct fresh ward elections for member of County Assembly Kiteta/Kisau Ward
 - ix. Costs of the amended petition be borne by the Respondent jointly and severally.
4. The amended petition was supported by an affidavit of one Dennis Wambua Masavu the Appellant herein.
5. The 1st and 2nd Respondent filed Responses denied the allegations made by the Petitioner and stated that the election was conducted in compliance with the *Constitution*, the *Elections Act* and the Regulations that govern the conduct of the elections in Kenya.
6. These responses were filed out of the statutory period and the Appellant raised objection to filing pleadings out of time without Court's leave and is the subject of Ruling delivered on 30th November 2022.
7. The Trial Court heard the evidence given by the petitioner/ Appellant and other four [4] witnesses who gave the evidence in support of the Petition.
8. Further the Trial Court also heard the Respondents case who also anchored their evidence on eight [8] witnesses called to support of their case.
9. On 2/9/2022 Notice of Motion Application was filed by the Appellant and sought orders to have scrutiny and recount conducted and Ruling of 6/11/2022 was delivered.
10. The matter was canvassed vide the written submissions.



Findings Of The Trial Court

11. The Trial Court on 23rd February 2023 rendered judgment and found as follows with regard to the pertinent issues raised during the election petition hearing;
12. The Trial Court found as to the issue of whether the election was conducted in a simple, accurate, secure, accountable, transparent, free and fair manner as required by the Constitution and Electoral laws, that the election was conducted in a simple, accurate, secure, accountable, transparent, free and fair as required by the Constitution and the Electoral laws.
13. The Trial Court found on whether there were irregularities and illegalities in the counting of ballots in the election of such magnitude as would affect the final result, that there was not a single irregularity or illegality reported or raised in regards to this election. Indeed, the alleged illegalities and irregularities raised by the Petitioner/Appellant were not proved. All Forms 36A were duly stamped. Over and above the requirement of stamping of Forms 36A, the Form 36 A other unique security features such as serial numbers and QR codes, logo for authentication purposes. Failure to sign Form 36A by an Agent does not amount to an illegality. An Agent who refuses to sign Form 36A ought to give reasons for not doing so. Therefore, there were no irregularities and/or illegalities in the counting of ballots in the election of MCA Kiteta/Kisau Ward
14. The Trial Court found on whether the 3rd Respondent was validly elected, that the Petitioner herein failed to discharge his burden of proof against the Respondent herein, a perceived narrow margin of victory cannot be ground enough to upset the will of the people of Kiteta/Kisau Ward. Even one vote is enough to concretely determine the outcome of an election. Thus the 3rd Respondent herein was validly elected as a Member of County Assembly Kiteta/Kisau Ward of Makueni County on the 9th August,2022.
15. The Trial Court found that the Amended Petition lacked merit and dismissed it with costs to the 1st 2nd and 3rd Respondents.

Memorandum Of Appeal

16. The Appellant being dissatisfied by rulings and judgment of the Magistrate's Court at Tawa in Election Petition No. 2 of 2022 filed an Election Appeal vide Memorandum of Appeal dated 21st March,2023 and filed in court on 27th March,2023 in which the Appellant sought prayers which are reproduced verbatim as hereunder:
 - a. The Ruling of the lower court delivered on 6th January 2023, be set aside;
 - b. An order for scrutiny and or recount be issued, as prayed in the application dated 2nd September, 2022;
 - c. The Ruling of the lower court delivered on 30th November,2022, be set aside;
 - d. The Judgment of the lower court delivered on 23rd February, 2023 be set aside;
 - e. The amended petition dated 2nd December, 2022 be allowed; and
 - f. The Appellant be awarded the costs of this Appeal and the costs of the lower court.
17. The Appellant herein appeals against: -
 - i. The Ruling delivered on 6th January,2023 by Honorable M.K Mutegi [PM] declining conduct of scrutiny and/or recount for lack of specificity.



- ii. The Ruling delivered on 30th November, 2022 by Honorable M.K Mutegi [PM] on admission of 1st & 2nd Respondents Responses to the Petition and Application after the statutory period.
 - a. The Appellant's Appeal against the whole judgment and decree Honorable M.K Mutegi (PM) delivered on 23rd February, 2023)
 - b. The learned Magistrate erred in law by dismissing the Appellant's application for scrutiny of election materials including ballot papers, in the contested polling stations within Kiteta Kisau Ward, and thus prejudiced himself when he rendered the instant judgment without making determination on the issue of mishandled ballot materials even after witnesses had testified and admitted such mishandling.
 - c. The learned Magistrate erred in law by failing to rely and or address relevant provisions of the law, precedent and the demeanor of witnesses in the instant judgment.
 - d. The learned Magistrate erred in law in finding the Appellant had not discharged the required legal evidentiary burden of proof to nullify the impugned elections for member of County Assembly Kiteta Kisau Ward.
 - e. The learned Magistrate erred in law in finding that the 1st and 2nd Respondent discharged their Constitutional and legal burden of conducting a simple, accurate, secure, accountable, free and fair elections for member of County Assembly Kiteta Kisau Ward.
 - f. The learned Magistrate erred in law by failing to find that the Appellant had established that the elections for member of County Assembly Kiteta Kisau Ward was not conducted in compliance with the provisions of the *Constitution* and electoral laws.
 - g. The learned Magistrate erred in law by addressing fundamental questions of law as a mere procedural technicalities.
 - h. The learned Magistrate erred in law in finding that the Appellant's objection against the 3rd Respondent's, whose deponents did not appear before a commissioner of oaths, was made late in the day, despite the fact that this discovery was made during the hearing of the 3rd Respondent's case upon cross-examination by the Appellant.
 - i. The learned Magistrate erred in law in finding that a deponent of an affidavit could virtually appear before a commissioner of oaths.
 - j. The learned Magistrate erred in law in finding that due to the strict timelines in filing the Response to Petition, the 3rd Respondent had the liberty to innovate legal provisions as regards signing and commissioning of affidavits.
 - k. The learned Magistrate erred in law in finding that the 3rd Respondent and his witnesses virtually signed their respective affidavits before a commissioner of oaths, despite their being evidence or admission by the 3rd Respondent and his witnesses that they in fact virtually appeared before a commissioner of oaths.
 - l. The learned Magistrate erred in law by failing to expunge from the record the impugned affidavits filed by the 3rd Respondent.
 - m. The learned Magistrate erred in law by finding that even though some Form 36A were overwritten, erased and generally interfered with, these irregularities were incapable of affecting the results at any given polling station.



- n. The learned Magistrate erred in law by failing to make a finding on the Appellant's thirteen [13] votes that were declared as rejected ballot papers, but nevertheless made a finding that the mishandling of election materials did not affect the results.
- o. The learned Magistrate erred in law in finding that the precise allegations of illegalities and irregularities raised by the Appellant were generalized and could not sustain an election petition.
- p. The learned Magistrate erred in law by failing to find that non-compliance with the Constitution and the electoral laws affected the conduct, validity and the results of the election for member of County Assembly Kiteta Kisau Ward by particularly failing to find that: -
 - a. The 1st and 2nd Respondent contravened Articles 38 of the Constitution of Kenya Section 10 of the Elections Act [the Act] and Regulation 66 [1] and [2] of the Elections (General) Regulations, 2012 by barring eligible voters from casting their votes.
 - b. The 1st and 2nd Respondent contravened Articles 38 of the Constitution of Kenya Section 10 of the Act by allowing persons whose registration status had not been verified by the KIEMS Kit or the Manual Register to vote.
 - c. The 1st and 2nd Respondent denied the Appellant's agents entry into several polling stations thus contravening Regulation 62 of the Regulations 2012.
 - d. Voter assistance was conducted in contravention of Regulation 72 of the [2] and [6] of the Regulations 2012.
 - e. Rejected ballot papers were incorrectly declared so, handled and recorded in the polling station diary, contrary to Regulation 77 of the Regulation 2012
- q. The learned Magistrate erred in law in failing to find that the election for member of County Assembly Kiteta Kisau Ward was marred with errors, inconsistencies and irregularities which when taken collectively or singularly affected the validity and the results of the said elections.
- r. The learned Magistrate erred in law in placing the burden of conducting investigations on elections offences and arresting of offenders on the Appellant and his party agents.
- s. The learned Magistrate erred in law in finding that the unsealing of the ballot box containing the Polling Station Diaries [PSD] by the 2nd Respondent, without any court order, did not affect the integrity of the elections for member of County Assembly Kiteta Kisau Ward.
- t. The learned Magistrate erred in law and in holding that the Appellant did not adduce sufficient evidence to annul the sham elections for member of County Assembly Kiteta Kisau Ward.
- u. The learned Magistrate erred in law by selectively applying the evidence produced by the Appellant, to the Appellant's detriment and his right to a fair hearing.
- v. The learned Magistrate erred in law in finding that the irregularities and illegalities in the counting of ballots in the elections for member of County Assembly Kiteta Kisau Ward were not of such magnitude as would affect the final results.



- w. The learned Magistrate erred in law in finding that there was no singular irregularity or illegality reported or raised in regards to the elections for member of County Assembly Kiteta Kisau Ward.
- x. The learned Magistrate erred in law in finding that the elections for member of County Assembly Kiteta Kisau Ward was free, fair, transparent and its conduct was accurate, verifiable, secure and accountable.

18. As per the Record of Appeal Vol 1 & 2, the Respondents did not file their responses to this election appeal. The 3rd Respondent filed Preliminary Objection on the Court's jurisdiction.

Submissions

Appellant's Written Submissions

Whether the Learned Magistrate Properly Exercised His Discretion in Allowing the 1st and 2nd Response to the Petition

19. With the Petition, the Appellant equally filed the application dated 25th October 2022 in which he sought the dismissal of the 1st and 2nd Respondents' Responses on the basis that they had been filed out of time. The said application was supported by the Affidavit of the Appellant. All the Respondents opposed the application by filing Replying Affidavits dated 28th October and 26th October 2022.
20. Ideally, the 1st and 2nd Respondents were the proper Respondents to the said application and filed the Reply sworn by the 2nd Respondent which upon close examination only shows one major response to the application, which is as contained in paragraph 18. The deponent states that;

“That the delay was occasioned by the difficult task of securing the presiding officers in time to provide accounts of what happened in their respective stations particularly with respect to the weighty allegations raised by the Petitioner regarding the various polling stations.” the Replying Affidavit sworn by the 2nd Respondent at page 799 to 806 of the Record of Appeal.

21. The answer to the Appellant's application is primarily contained in that paragraph of the 2nd Respondent's Replying Affidavit which it is expected, was to sufficiently answer the question as to whether or not the Response had been filed late, and why, and whether the court ought to have exercised its discretion in their favor.
22. The insufficiency of the said response is evident for the following reasons;

The Appellant served the 1st and 2nd Respondents with the Petition on 14th and 21st September 2022 respectively.

The 1st and 2nd Respondents ought to have filed and served their Notice of Address of Service by 26th September 2022 but they filed it on 5th October 2022 and served it upon the Appellant on 12th October 2022, and this is a total of 9 days late for filing and 16 days late for service of the Notice of Address of Service

The Response to the Petition was to be filed within 7 days of service of the Petition, but was also filed belatedly on 5th October 2022 and served on 12th October 2022



23. The Trial Court’s ruling, the trial court held as follows in determining the said application;

“I have looked at the reasons given by the 1st and 2nd Respondents that they had difficulties in tracing all the presiding officers involved to prepare which challenge was correspondences by the fact that the 1st Respondent was dealing with numerous cases filed throughout the country. I agree with the 3rd Respondent that, this explanation is logical and reasonable.”
At page 960, Volume II of the Record of Appeal.

24. The Appellant took issue with whether the Trial Court properly exercised its discretion in declining to strike out the 1st and 2nd Respondents’ Responses. The Appellant conceded the Trial Court is charged with discretion to extend or reduce the time limit for the doing of any act as contained in Rule 19 of the *Election (Parliamentary and County) Petition Rules*. However, the question is Rule 19 provides as follows;

(1) Where any act or omission is to be done within such time as may be prescribed in these Rules or ordered by an elections court, the election court may, for the purposes of ensuring that injustice is not done to any party, extend or limit the time within which the act or omission shall be done with such conditions as may be necessary even where the period prescribed or ordered by the court may have expired.

25. The Appellant relied on the following cases where extension of time as a discretionary power which ought to be exercised within certain parameters was considered in the Supreme Court decision of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR.

“However, it cannot be gainsaid that where the law provides for the time within which something ought to be done, if that time lapses, one need to first seek extension of that time before he can proceed to do that which the law requires.”

26. In Supreme Court decision of *Bookpoint Limited v Guardian Bank Limited & another* [2021] eKLR where the superior court pronounced itself as follows;

(21) “It therefore follows that the applicant ought to have lodged its Notice of Appeal on or before the 4th of January 2021. It did not, and neither has it sought extension of time to file its Notice of Appeal out of time. Consequently, there is no valid Notice of Appeal on record and given the jurisdictional importance of a Notice of Appeal as stated in the Nicholas Salat case, this motion for extension to file an appeal out of time is an act in futility.”

Whether the Appellant was entitled to an Order for Scrutiny and Recount as Per His Application dated 2nd September 2022

27. The Appellant considered Rule 29 *Election (Parliamentary and County) Petition Rules* which provides for scrutiny of votes.

28. The Appellant submitted, in determining whether or not a party is entitled to an order for scrutiny, the court exercises its discretion, and we have already laid out the principles under which a court sitting on appeal would interfere with it. In the instant case, the Appellant takes the firm position that the learned magistrate failed to consider factors that he should have, as well as misdirected himself on the requirements to be met by a party who seeks scrutiny.



The Appellant observed that the ruling delivered by the Trial Court correctly identified the specific polling stations where the Appellant sought scrutiny and recount in his application. The court observed as follows;

“The basis submitted for the Applicant is twofold; First that there was mishandling of election materials. That the counting and tallying process was irregular and ballot boxes, ballot papers, statutory forms 36A and 36B were mishandled, interfered with, wrongly marked, stamped or unstamped others were altered without being countersigned raising serious doubts of impropriety, misconduct and unfairness by the 1st and 2nd Respondents and their agents. The Applicant singled out Kimandi Polling Station alleging that 5 votes validly cast in favor of the Applicant were incorrectly cast in favor of the Applicant were incorrectly declared as rejected ballots. At Kyambusya ECD polling station 3 votes validly cast in favor of the Applicant were incorrectly declared as rejected ballot papers, that at Kieleeni Polling Station and Tulya polling station there were cumulative 26 rejected ballots which was an usually high number, a majority of which were valid votes cast in favor of the Applicant. The Applicant further listed the following stations Ndithini, Kakuswii, Katuma, Songeni, Uvuu, Kavuvoni, and Utuneni but did not state the reason for the applying scrutiny and recount.” At page 1027-1042 of the Record of Appeal.

29. As per Section 75(4) of the *Elections Act*, this court cannot re-interrogate the findings of fact as presented by the Appellant in the subordinate court, as its duty is restricted to determining issues of law only. This position is buttressed by several court decisions including *Timamy Issa Abdalla v Swaleh Salim Swaleh Imu & 3 others* [2014] eKLR where the Court of Appeal held thus;

(51) “That having been said it is evident that in determining whether the election court properly performed its duty, this court must be satisfied that the court acted judiciously and correctly applied the law. The conclusions of law drawn from the facts must also be reasonable and in accordance with the spirit and purpose of the *Constitution of Kenya*. This calls for examination of the findings of the election court and conclusions on primary facts in totality, taking into account the *Constitution* and the electoral laws, with a view to determining whether any conclusions of law arising therefrom have been properly arrived at. Thus the objection taken that the appeal is incompetent because the grounds of appeal raise issues of facts, was wrongly brought as a preliminary issue, as there is need to evaluate the conclusions arising from the primary facts.”

30. *Twaber Abdulkarim Mohammed vs IEBC & 2 Others* [2014] eKLR cited by Court of Appeal in *Patrick Mweu Musimba vs Richard Kalembe Ndile & 3 Others*, Civil Application No. NAI.231 of 2013, and went on to observe as follows;

“The mis-directions by the learned magistrate obviously led to a miscarriage of justice as the appellant did not get a fair chance to show the effect on the election through the scrutiny that the court could have ordered on its own motion or on the application by the appellant, had the court considered the submissions which set out the polling stations whose results were disputed and the related poll day diaries before the court, which obviously demonstrated sufficient reason within the meaning of Rule 33 of the Election (Parliamentary and County Elections) Petition Rules. This court as an appellate court cannot speculate whether the learned trial court would have made the order for scrutiny had it considered the submissions setting out the disputed polling stations. However, in not considering the application



for scrutiny on the basis of the missing Form 35s and the polling stations set out in the submissions following analysis of the polling Day diaries, the court was plainly wrong.”

31. Court of Appeal decision of *Peter Gichuki King'ara v Independent Electoral and Boundaries Commission & 2 others* [2014] eKLR where the Court of Appeal pronounced itself as follows on an appeal where the High Court declined to order for scrutiny;

[49] “However we do not agree with the following findings for reasons that there was no way the court could have established those findings without the benefit of accessing the information contained in the ballot boxes and scrutinizing the entire polling day diaries and other election materials that were in use during the said election....

(56) We find that without an opportunity of examining what was contained in the ballot boxes, we agree with the appellant that there was no evidential foundation for the trial Judge to conclude that the errors were minor.....

similarly, there was no way the appellant could have proved the following:

- His name was not substituted during the counting of votes with that of another candidate.
- Votes cast in his favour were not substituted for other candidates.
- Votes cast in his favour were not incorrectly stated in the forms 35 and 36.
- That seals collected from a polling station were not removed deliberately so as to tamper with the contents of the ballot box before the final tallying of votes was done to the appellant’s disadvantage.”

Whether the Appellant met the legal and evidentiary burden required to overturn the election

32. In *Abdi Abdullahi vs Ahmed Bashane & 2 Others* (2018) eKLR the court arrived at a similar finding as the learned magistrate in circumstances where the Petitioner had opposed the admission into evidence of affidavits which were photocopies. The Trial Court relied on Order 19 of the *Civil Procedure Rules* and held;

“Under Order 19 CPR Rule (7), the court may receive any affidavits notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof or any technicality.... Furthermore, the evidence was subjected to cross-examination by the Petitioner.”

33. The Appellant submitted on Section 4 of the *Oaths and Statutory Declarations Act* on the power of the Commissioner for Oaths & Rule 12(5) of the *Election (Parliamentary and County) Petition Rules* also provides guidance on filing of Petitions and Responses generally.

34. In *Stephen M Mogaka v Independent Electoral & Boundaries Commission (IEBC) & 2 others* [2017] eKLR the court struck out the affidavits sworn by the Petitioner and his witnesses on the basis that the same were sworn before a commissioner for oaths who worked in the office of the Petitioner’s counsel. It being a mandatory requirement that a petition must be accompanied by an affidavit, the court found that the Petition had no legs to stand on and dismissed it. See also *Geoffrey Gitinji Mwangi & 2 others v Jubilee Party & 11 others* [2018] eKLR on same point.



What was the impact of the unsealing of the ballot boxes by the 2nd Respondent in the absence of a court order?

35. The Appellant relied on Section 86 of [Elections Act](#) that provides for safe keeping of election materials by the 1st Respondent.
36. The Appellant made allegations that included the mishandling of the election materials in several polling stations and that information could only be verified from the ballot boxes which were in the 1st and 2nd Respondent’s custody and which the latter broke the seals on his own, extracted whatever election materials and testified in court as much. Can this election then be said to have been carried out in a fair and transparent manner as demanded by Article 81(e) of the [Constitution](#)?
37. Article 88 of the [Constitution](#) provides for the manner of voting and Rule 86 above must be read alongside Rule 93 of the same Rules, as well as Rule 16 of the [Election \(Parliamentary and County\) Petition Rules](#) which provide for retention and inspection of documents.
38. In [Abdirahman Ibrahim Mohamud v Mohamed Ahmed Kolosh & 2 others](#) [2018] eKLR relied on the decision of [William Odhiambo Oduol vs. Independent Electoral and Boundaries Commission & 2 others](#) (2013) eKLR, held as follows;

“Having looked at all these decisions, the jurisprudence that emerges from them is that, the votes in the ballot boxes following an election contain the best, primary and controlling evidence of the votes cast by the electorate. The Commission has, therefore, the responsibility to safeguard those votes by making sure that the ballot boxes in which they are contained are scrupulously secured until any litigation on them is concluded. The results as declared in the election forms should agree with the votes in the ballot boxes, and when they don’t agree the Commission has to explain the discrepancy. When the Commission is handing over the ballot boxes to court it should reasonably anticipate that scrutiny and recount may be ordered, at which time the handling of all election materials may be inquired into. It is the responsibility of the Commission at the earliest possible opportunity to indicate to the Court hearing the petition any instance of interference or tampering, so that appropriate action of inquiry can be undertaken.

39. The Court of Appeal in [Wavinya Ndeti & another v Independent Electoral and Boundaries Commission & 2 others](#) [2018] eKLR held as follows in relation to verifiability of elections;

“Underscoring the constitutional principles in Articles 81 86 of the [Constitution](#), the Supreme Court in Raila 2017 stated that verifiability involves “an election with a proper and verifiable record made on the prescribed forms...”

Whether the Appellant met the Evidential Burden to the Required Standard

40. The Amended Petition was supported by the affidavit of the Appellant as well as those of his witnesses which are at pages 158-352 of the Record of Appeal. In the affidavits in support of the Petition, the Appellant demonstrated that;
- i. Appellant’s agents were denied entry into various polling stations as pleaded in paragraph 5 of the Amended Petition
 - ii. Some Forms 36A were either not duly filled or were illegible
 - iii. The 1st and 2nd Respondents barred eligible voters from casting their votes



- iv. Persons were allowed to vote without any identifying document
 - v. Voters were not marked with indelible ink, and for that reason, there were areas where the number of votes cast was more than the number of ballot papers used. 114 ballot papers could not be accounted for
 - vi. Rejected ballot papers were incorrectly declared so
 - vii. Voter assistance was done in contravention of the law
 - viii. In several polling stations, the Form 36A were left blank, overwritten, erased or otherwise corrected in the absence of the Appellant's agents
 - ix. There was improper handling of election materials
 - x. Some presiding officers were campaigning for the 3rd Respondent
 - xi. The counting and tallying of votes were not open.
41. First, the learned magistrate misunderstood the nature of the proceedings before him, since all the parties' witnesses adopted their affidavits as evidence in chief and it was open for the Respondents to cross-examine them on the contents of the facts contained therein, and where they did not, it means that their testimonies were uncontroverted and the Court made an incorrect finding as to the need for contextualization as held by him. The Appellant had pleaded all these allegations with particularity in his Amended Petition as well as in the Affidavits sworn by his witnesses. They identified the specific polling stations where the irregularities occurred and hence placed the same in context. The conclusion of the court is thus not founded on any facts as contained in the pleadings.

1St & 2Nd Respondents Written Submissions Law On 1St Appeal

42. On the applicable law, Wilfred Kikaet Kuyo vs Letulal Ole Masikonde & 2 others [2018] eKLR, which is as follows:

Appeals from the magisterial election courts to this Court lie only on matters of law. This is clear from the provisions of section 75 of the [Elections Act](#) of 2011.

43. The standard of proof in election petition cases is one between proof beyond reasonable doubt that is applicable in criminal cases and on a balance of probabilities that is applicable in civil cases as stated in the case of [Raila Odinga & 5 Others v. IEBC & 3 others](#) [2013] eKLR. Additionally, where there are allegations of the commission of criminal offences, the standard of proof is beyond reasonable doubt, according to [Raila Odinga & 5 others v. IEBC & 3 others](#), *supra*.

44. The findings of fact by the Trial Court which are supported by evidence and the law may not be interfered with by this Court. Those findings should be scrutinized and re-evaluated by this Court to ascertain whether they are supported by the evidence and the law. It is trite law that this Court sits as a first appeal court in this instant Appeal. [Abuk James Odera t/a A. J. Odera and Associates v. John Patrick Machira t/a Machira t/a Machira and Company Advocates](#) [2013] eKLR & [Fredrick Otieno Outa v. Jared Odoyo Okello and 4 others](#) [2014] eKLR that provides;

“I am required to re-assess the entire evidence tendered at trial and make my own findings, while bearing in mind that I do not have the advantage of having seen and heard the life testimony of the witnesses. In those circumstances, I am required to generally defer to findings of fact as found by the trial court, which are based on credibility and the law.”



Whether The Trial Court Erred in Law and Fact in Refusing to Grant the Prayer for Scrutiny in the Appellant’s Application Dated 2nd December 2022.

45. The Appellant raised five (5) grounds of Appeal, starting from paragraphs 1 to 5 of the Memorandum of Appeal concerning this issue.
46. 1st & 2nd Respondents submitted that it was not the holding of the Trial Court, as alleged in Ground 2 of the Memorandum of Appeal, that allowing scrutiny after evidence of witnesses had been taken would be prejudicial to the Respondents.
47. It was not the holding of the Trial Court, as alleged in Ground 2 of the Memorandum of Appeal, that allowing scrutiny after evidence of witnesses had been taken would be prejudicial to the Respondents. The Trial Court was indirectly quoting what the High Court stated in [*Ledama Ole Kina v Samuel Kuntai Tunai & 10 others*](#) [2013] eKLR. See page 1041 of the Record of Appeal, Vol Two, to appreciate the Trial Court’s writing. The Trial Court was indirectly quoting what the High Court stated in [*Ledama Ole Kina v Samuel Kuntai Tunai & 10 others*](#) [2013] eKLR. See page 1041 of the Record of Appeal, Vol Two, to appreciate the Trial Court’s writing. It wrote as follows:

Indeed, a court cannot make an order for scrutiny and recount in " all polling stations within Kiteta Kisau Ward without basis. To do so will amount to a fishing expedition. In the case of Ledama Ole Kina – vs – Samuel Kuntai Tunai & 10 others (supra) the Court held inter alia that;

"All Application for scrutiny of all Narok South Constituency lacks specificity, is a blanket prayer that, in my view, cannot be granted. The Applicant needed to be specific on which polling stations he wanted scrutiny done. If he wanted scrutiny in all polling stations, then a basis should have been laid for each polling station."

48. In [*Francis Mwangangi Kilonzo v Independent Electoral and Boundaries Commission & 2 others*](#) [2017] eKLR Court further affirmed the position held by the Trial Magistrate and held:

“Under rule 29 of [*Elections \(Parliamentary and County Elections\) Petitions Rules, 2017*](#), made under the Act, parties to the election proceedings may apply for scrutiny of the votes for purposes of establishing the validity of the votes cast. The election court has to be satisfied that there is sufficient reason to order either scrutiny or recount of the votes. Under rule 29(4) the scrutiny or recount of votes shall be confined to the polling stations in which the results are disputed.

All counsel made reference during their written and oral submissions, to the decision in [*Gatirau Peter Munya –v- Dickson Mwenda Kithinji & 2 Others*](#) [2018] eKLR. The Petitioner’s counsel and the 1st and 2nd Respondent’s counsel referred to Raila Odinga – v- IEBC & Others [2013] eKLR. The law on scrutiny or recount of votes is not settled. The right to scrutiny or recount does not lie as a matter on course. The party seeking scrutiny or recount of votes has to establish the basis for seeking to invoke the right. Such basis must be pleaded in the Petition and evidence tendered, either through affidavit or orally on oath, to show that it is necessary to call for scrutiny or recount. The scrutiny or recount is called to confirm the truth of that particular evidence. It is also now clear that the scrutiny or recount must relate to a specific polling station whose results are in dispute, and the evidence called has to be specific in that regard.”



Whether the Trial Court Judiciously Exercised its Discretion by Regularizing The 1st and 2nd Respondents' Response filed out of time.

49. The Appellant raises eight (8) grounds of Appeal in paragraphs 6 to 13 of the Memorandum of Appeal concerning this issue. Taken together, the Appellant is challenging the exercise of discretion by the Trial Court to allow the 1st and 2nd Respondents' pleadings, which were filed out of time. The Appellant's main argument is that the 1st and 2nd Respondents had not sought such leave.
50. In *Christopher Odhiambo Karani v David Ouma Ochieng & 2 others* [2018] eKLR, the Court held;
- “The election court was exercising a judicial discretion which had to be exercised judicially upon the settled principles. That discretion was given to the election court. An appellate court cannot interfere with the exercise of that decision even if it could have exercised the discretion differently unless "it is satisfied that the Judge exercising the discretion has misdirected himself in some matter and, as a result, has arrived at a wrong decision or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion and that as a result, there has been injustice” (as per Newbold P. in *Mbogo versus Shah* [1968] EA 93 at page 96 – f-g).”
51. In *Raila Amolo Odinga & Another vs IEBC & 2 Others* (2017) eKLR the Supreme Court declined to strike out documents filed out of time; in *Lorna Chemtai & 4 others* (2017) the Court, upon considering all factors held that dictates of justice in the circumstance of this case required extension of time; and in *Apungo Arthur Kibira vs IEBC & 3 others* (2019) where the Court held that procedural shortcomings are curable through exercise of discretion in matters of technical character.
52. The 1st & 2nd Respondents invited this Court to conduct comparative reading and analysis of Rule 19(1) *Elections (Parliamentary and County Elections) Petitions Rules, 2017*, against Order 50, Rule 6 of the Civil Procedure Code and Section 79G of the *Civil Procedure Act*.
53. The discretion given to the election court permits it to admit such documents filed out of time for purposes of ensuring that injustice is not done to any party, even suo moto. Indeed, had the drafters intended for a late party to seek leave before documents filed out of time are admitted, the Rules should have expressly stated so.
54. In *Kakuta Hamisi vs Peris Tobiko & 2 Others* [2013] eKLR it was held that:
- “The election court thus has express power to enlarge the time within which to file the Response and replying affidavits. The fact that the 2nd and 3rd respondents had filed the Response and affidavits on 30th April 2013 does not vitiate that power. Those affidavits, though already filed, are meaningless and only continue to hover over the Petition until the grant of appropriate leave. Filing them without leave was irregular but by granting the necessary leave now, valuable time of the Court is saved. That in my view resonates very well with Rule 4 that calls upon the Court to facilitate the just, expeditious, proportionate and affordable resolution of election petitions.”
55. In *Lorna Chemutai & 4 others vs Independent Elections & Boundaries Commission & 2 others* [2018] eKLR, where an election appeal was filed out of time and without leave of the Court. When the matter went for direction, the 1st Respondent herein raised a preliminary objection on the basis that the



Appeal was filed out of time contrary to Rule 35(3) of the Election Petition Rules and filed and served out of time against Rule 35(5). The Court held:

“Rule 19 of the Election (Parliamentary and County) Petitions Rules allows the election court to extend time within which anything under the rules may be done in the following terms: ... Where any act or omission is to be done within such time as may be prescribed in these Rules or ordered by an elections court, the election court may, for the purposes of ensuring that injustice is not done to any party, extend or limit the time within which the Act or omission shall be done with such conditions as may be necessary even where the period prescribed or ordered by the Court may have expired. This power is extended to the High Court in exercise of its appellate jurisdiction by Rule 34 (10), which states that:... The High Court to which the Appeal is preferred may confirm, vary or reverse in whole or in part, the decision of the Court from which the Appeal is preferred and shall have the same powers and perform the same duties as are conferred and imposed on the Court exercising original jurisdiction...”

Whether the Trial Court was correct in both fact and law in holding that the elections for member of county assembly for Kiteta/Kisau ward was conducted in a simple, accurate, secure, accountable, transparent manner as required by the Constitution of Kenya 2010; electoral laws and regulations.

56. The 1st & 2nd Respondents referred to paragraphs 29 to 35 of our written submissions before the Trial Court, available on pages 906 to 922 of the Record of Appeal and noted;

- a) Not a single ballot paper cast in favor of the Appellant was declared as rejected ballot paper in any of the polling stations across the ward as evidenced in the Forms 36A, copies of which are available on 533 to 588 of the Record of Appeal;
- b) None of the Appellant’s agents objected to any of the rejected ballot papers across the ward as evidenced in the Forms 36A, copies of which are available on 533 to 588 of the Record of Appeal;
- c) There was no single discrepancy in issuing and recording of ballot papers in any of the polling stations within the ward compared to other elective positions;
- d) Not a single Form 36A was left blank, overwritten, erased or otherwise corrected in the manner alleged by the Appellant. See pages 533 to 588 of the Record of Appeal.

57. In the Court of Appeal decision in Dennis Magare Makori & another v Independent Electoral and Boundaries Commission & 3 others [2018] eKLR where the Appellant therein made similar allegations as captured in paragraph 17 of the said Judgment. The Court of Appeal stated as follows in affirming the decision of the High Court:

“After finding that the appellants had failed to discharge the burden of proof with respect to the unsealed ballot boxes, the election court thereafter held that:

137. Even if one was to assume that true, some ballot boxes were delivered unsealed to the tallying centre, a nexus has to be drawn between the failure to seal the ballot boxes after counting and declaration of results and the effect of that on the results or loss of votes by a candidate.



138. The invalidation of the people's will cannot be predicated on mere misdemeanours of IEBC officials where the infractions do not have a bearing on the declared results.”

77. The election court cannot be faulted for so finding.”

Whether trial court was correct in holding that there were no irregularities and illegalities in the election in the counting of ballot for member of county assembly for Kiteta/Kisau ward.

58. In case of *Michael Gichuru v. Rigathi Gachagua & 2 others* [2018] eKLR held;

“The Petitioner’s position on the forms that were not stamped was that the results which they represented were invalid and unauthenticated and were therefore unreliable. However, this argument is unsustainable for the simple reason that there is nowhere in the Elections Regulations where it is suggested that the forms ought to be stamped; neither is there a provision for such stamping in the forms as prescribed in the schedule to the Act.... In any event, there is ample evidence that the results as declared in those polling stations in which forms 35A were not signed were endorsed by the candidates’ agents. There is no evidence that any of the agents in those polling stations, including the agents for Phyllis Christabel Maranga whose interest the Petitioner appears to pursue, raised any issue on the validity of the votes cast or complained of any other irregularity during and after the elections... My conclusion on this question of omission to stamp the forms 35A is that if those forms are valid in every other respect, the omission to stamp them is neither an irregularity nor an illegality and therefore the election results which they portray cannot be nullified or invalidated only because the forms in which they were entered were not stamped.”

3rd Respondent’s Submissions

Exercise of Judicial Discretion

59. The 3rd Respondent relied on the case of *Nyaga Cottolengo Francis v Pius Mwaniki Karani* [2017] eKLR Court of Appeal sitting at Nyeri observed;

“...The application before the High Court required the exercise of discretion and therefore our duty is to determine in principle whether the discretion was exercised judicially, and if so, whether there is any ground for interference with the orders given. The principles upon which we should consider the matter are well settled and we take them from Sir Clement De Lestang V-P in *Mbogoh & Anor v Shah* [1968] EA 93:

“I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

60. See also; *Kenya Revenue Authority & 2 others v Darasa Investments Limited* [2018] eKLR Court of Appeal Ruling of the Trial Court delivered on 6th January 2023 in Respect of the Appellant’s Application for Scrutiny and Recount dated 2nd September 2022

61. In his said Memorandum of Appeal before the Court, the Appellant argues that the trial Court erred in finding that his said application on scrutiny and recount lacked specificity see para. 1 of the



Appellant's Memorandum of Appeal. He further argues that the trial Court erred in finding that his said application was generalized and that the motion was likely to be an avenue to introduce new evidence see paras. 3, 4 of the Appellant's Memorandum of Appeal.

62. The 3rd Respondent submitted that the Appellant's scope of the relief sought in relation to scrutiny and recount in the trial Court was simply too wide and incredible; as such it was untenable in terms of merit. The application sought scrutiny of Kenya Integrated Election Management System (KIEMS) voters' log, voters' register, all ballot papers cast, polling station diaries, ballots validly cast, rejected and spoilt votes and Form 36As in all the polling stations across Kiteta Kisau Ward. The scope of the relief sought by the Appellant was unreasonable, untenable and too wide. It was not practical and/or jurisprudentially wise for the relief sought in the said application to be granted, taking into account the peculiar and time-specific nature of the proceedings before the trial Court.
63. The 3rd Respondent submitted that the said application was full of generalized allegations of illegalities and irregularities as its basis. There was simply no prima facie case that was set out. The assertions contained in the affidavit in support of the said application were the same ones proffered in respect of the main suit. The Appellant's Written Submissions in support of the said application in the trial Court were also premised on the said general illegalities and irregularities.
64. The 3rd Respondent relied on the case of *Hassan Mohammed Hassan & another v Independent Electoral & Boundaries Commission & 2 others* [2013] eKLR as was follows;

"I have also carefully examined the Petitioners prayer for scrutiny and recount in the petition. It is too wide since it seeks scrutiny in respect of all votes cast in all the polling stations in the Wajir West Constituency. The likelihood of the alleged election misconduct taking place in every polling station in that constituency is possible but very unlikely. The Petitioners wide and unlimited prayers for scrutiny in respect to all polling stations, suggest a fishing expedition where amorphous intentions of the Petitioner are intended to be narrowed down and made logical or meaningful by the possible favourable findings of a scrutiny exercise. This court cannot allow such misuse of its judicial discretion by a party, at least at this stage of the proceedings..."

65. See also the case of *Robinson Simiyu Mwangi & another v Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR;

"I find a good reason for this requirement being that there will be no need of ordering a scrutiny or recount in an instance where there is no averment of any dispute in the pleadings or the averment turns out to be pure hearsay or the dispute is otherwise sufficiently explained by way of evidence. Precise pleadings mark a terrain for a legitimate electoral duel.

A party must set its path of the contest clear from the word go. It must plead with clarity and tender evidence in support of those allegations. Blanket and general averments must be discouraged as they paint a scenario of either a party having no case against the adversaries or that such a party lacks any evidence in support of its allegations and hopes to unearth some evidence during the proceedings or through applications."

Ruling of the trial Court delivered on 30th September 2022 in respect of the Appellant's Notice of Motion seeking the Striking Out of the 1st and 2nd Respondents' Response to the Petition dated 25th October 2022

66. Under the said Rule 19, the Trial Court had the power to extend and/or limit timelines suo motu. The Court did not necessarily need to be moved by a party. The 3rd Respondent submits that the facts



and circumstances of the case in the Trial Court succinctly spoke towards the need for the Court to invoke its powers under rule 19 and all other enabling provisions of the law, to ensure that the ends of justice were met.

67. The 3rd Respondent relied on the case of *John Munuve Mati v Returning Officer Mwingi North Constituency & 2 others* [2018] eKLR Court of Appeal sitting at Nairobi outlined the following

“24. There is no dispute that the appellant did not file and serve the notice of appeal within the period prescribed by the 2017 rules. Decisions of this Court abound where it has been held that the prescribed timelines as regards electoral dispute resolution must be strictly adhered to. (See for example Charles Kamuren -v- Grace Jelagat Kipchoim & 2 Others [2015] eKLR).

We agree with those decisions particularly given the constitutional and statutory demand for timely resolution of disputes. Nevertheless, the 2017 rules themselves now expressly confer on us discretion to determine the effect of any failure to comply with the rules, taking into account the fact that justice must be administered without undue regard to procedural technicalities, balanced against the need to observe prescribed timeliness.

.... No evidence has been adduced that any party has been prejudiced by non-compliance with the 2017 rules, which we have noted

68. The 3rd Respondent submitted that the trial Court had the unfettered discretion to remedy the slightly late filing of the 1st and 2nd Respondents' Response and to invoke article 159(2)(d) of the *Constitution of Kenya, 2010* to ensure that the ends of justice were met. The slight delay in filing of the said pleadings was accorded a plausible, logical and reasonable explanation. See para. 18 of the Affidavit of Jacob Machekele dated 28th October 2022.

Judgment of the Trial Court delivered on 23rd February 2023

69. In Memorandum of Appeal, the Appellant, faults the Court for dismissing his prayer for scrutiny at para. 14 of the Appellant's Memorandum of Appeal, and finding that he did not discharge the legal and burden of proof at para. 16 of the Memorandum of Appeal.
70. The Appellant also finds fault in the form of the affidavit evidence of the 3rd Respondent at paras. 20 to 26 of the Appellant's Memorandum of Appeal. He has contested the decisions of the Court that the Appellant's allegations of illegalities and irregularities were generalized and could not sustain an election petition at 27 of the 39.
71. On the nature of election petitions it will be noted that they are no ordinary suits. It follows that in the context of the Appeal before the Court and wherein the sacred will of the people is put to test, the Appellant must base the same on credible facts and cogent and sufficient evidence in support thereof. An appeal must not be anchored on generalized claims of electoral impropriety. The instant appeal is based on numerous generalized allegations, which were not proven through adducing of evidence in the trial Court.
72. On burden of proof the Appellant reiterates and relies on the case of *John Harun Mwau & 2 others v Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR wherein the Supreme Court pronounced itself as follows:

“... As stated in both in the Raila 2013 and 2017 decisions, the burden of proof, at all times, lies on a petitioner: and generalized claims, without evidence that meets clear threshold, are



of no value. Consequently, we find no basis for the petitioners' claim in this regard, and we dismiss the same."

73. The Appellant took issue with the Trial Court for not finding that eligible voters were barred from casting their votes, persons whose registration status was not verified voted, the Appellant's agents were denied entry into several polling stations, irregular voter assistance was conducted, and rejected ballot papers were incorrectly declared so at para. 28 of the Appellant's Memorandum of Appeal.
74. The Appellant submitted that the Trial Court made selective application of his evidence at para. 33 of the Appellant's Memorandum of Appeal and takes issue with its finding that he did not adduce sufficient evidence in support of his case at para. 32 of the Appellant's Memorandum of Appeal.

Admissibility of the Evidence of the Appellant before the Trial Court

75. The 3rd Respondent had challenged the evidence accompanying the Appellant's affidavits in the Trial Court for want of conformity with Section 106B of the *Evidence Act*.
76. Reliance is placed on the case of *John Lokitare Lodinyo v Independent Electoral and Boundaries Commission & 2 others* [2018] eKLR wherein the Court of Appeal sitting at Eldoret pronounced itself as follows:

"54. Essentially, the sections provide that electronic evidence which is printed out shall be treated like documentary evidence and will be admissible without production of the computer used to generate the information. The appellant claimed that his technical team downloaded the forms and had them printed. He admitted that the forms were from the IEBC public portal. Ordinarily, this would have meant accessing the IEBC portal, which one could only do if they had access to the internet, proceeding to log onto the IEBC portal page, clicking on the Forms 35A uploaded on Kacheliba Constituency, downloading the Forms 35A onto the computer's hard disk and finally printing the documents via a printer connected to the computer."

Appellant's Evidence scrutinized on its Merits or Lack Thereof

77. The Appellant alleged that voters were turned or chased away at various polling stations including Song'eni, Syunguni and Katuma. At paras. 14, 25 of the Amended Petition and Para. 7 of the Appellant's Supporting Affidavit in the Trial Court (page 145, 154, 155, 162 of the Record of Appeal). During trial, it became apparent that this allegation was not proved.
78. R1&2RW3 (Jacob Machekele) confirmed in examination-in-chief that he did not receive a single complaint in writing from the entire ward that any voter was turned away. PW4 (Charles Kioko), during cross examination, confirmed that he did not personally see any voter being turned away from any polling station. 3RW3 (Catherine Mutua), while being cross examined by Counsel, confirmed that she did not see any voter being chased away throughout the day at Song'eni Primary School Polling Station contrary to the allegations in the Appellant's pleadings. This was also confirmed by 3RW3 (Daniel Mutinda) during cross examination by Counsel.
79. The Appellant also alleged that officers of the 1st and 2nd Respondents were openly campaigning for the 3rd Respondent and asking voters to vote for him. At paras. 14, 25 of the Amended Petition and paras. 5, 20 of the Appellant's Supporting Affidavit in the Trial Court (page 145, 154, 155, 160, 161, 162 and 170 of the Record of Appeal). 3RW8 (Phiader Mueni), while being cross examined by Counsel for the 1st and 2nd Respondents, confirmed that no officer of the 1st and 2nd Respondents campaigned for the 3rd Respondent at Kyambusya Primary School. This is also the evidence of RW6



- (Ruth Syokau) whose affidavit confirms that no such campaigning happened at Katuma Primary School Polling Station. Indeed, all the 3rd Respondent's witnesses confirmed that no electoral illegality or irregularity occurred at their respective polling stations.
80. The Appellant alleged that voters were allowed to vote without being properly identified at polling stations such as Tawa, Yangua and Mukimwani. At para. 15 of the Amended Petition and para. 8 of the Appellant's Supporting Affidavit in the trial Court (page 146, 147, 148, 163, 164, 165 of the Record of Appeal). PW5 (Dennis Masavu) while being cross examined by Counsel for the 3rd Respondent, confirmed that he did not personally see anyone vote without an ID. This is contrary to the statements contained in his pleadings. This was the same case for PW1 (Francis Musila) who admitted that he did not see any electoral offence from "outside the polling station" at Song'eni Primary School Polling Station. It was also the evidence of 3RW7 (Monicah Muthoka) that no electoral malpractice occurred throughout the day at Mukimwani Primary School Polling Station where she was the 3rd Respondent's agent.
81. The Appellant alleged that there was failure of KIEMS kit in various polling stations and that the 1st and 2nd Respondents resorted to manual voting at paras. 15 (ii), 17 of the Amended Petition and para. 8 (ii), 10 of the Appellant's Supporting Affidavit in the trial Court (page 147, 148, 164, 165, 166 of the Record of Appeal). In his Written Submissions in the trial Court, the Appellant resorted to obfuscating the facts by claiming that 1&2RW2 (Philip Mutua) admitted that there was failure of KIEMS kit at his polling station. At para. 50 of the Appellant's Written Submissions in the trial Court (page 887 of the Record of Appeal). This is a lie as no such admission was made at any point during trial.
82. Indeed, the KIEMS kit failure allegation turned out to be a white lie. PW4 (Charles Kioko) and PW5 (Dennis Masavu) confirmed during cross examination that they did not personally see any KIEMS kit fail, with the former stating that he "heard from someone". Being hearsay, it was of no probative value. Indeed, the Appellant did not call any ICT expert to elaborate on the alleged failure. 1&2RW1 (Denis Kilungu) and 1&2RW2 (Philip Mutua) confirmed, during examination in chief, that there was no failure of the KIEMS kit in their respective polling stations. Most critically, 1&2RW (Jacob Machekele) confirmed, during examination in chief, that he did not receive even a single report of KIEMS kit failure across Kiteta Kisau Ward. Consequently, it becomes very clear that no voting using manual register happened at any given point in the entire Kiteta Kisau ward on 9th August 2022. 3RW2 (Joseph Musembi) also confirmed, during examination in chief, that he did not receive any report of failed KIEMS kit from any of the 3rd Respondent's agents on the ground. The non-failure of KIEMS kit was also corroborated by all of the 3rd Respondents witnesses who testified.
83. The Appellant alleged that there was issuance of more than one ballot paper to voters for the Member of County Assembly position and voters were being asked to vote for the 3rd Respondent at polling stations such as Ndithini, Syunguni, Song'eni and Mukimwani. At para. 15 (ii) of the Amended Petition (page 147, 148 of the Record of Appeal). PW1 (Francis Muli), PW2 (Justus Mwendwa) and PW4 (Charles Kioko), while being cross examined, admitted that they did not personally see anyone being issued with more than one ballot paper. Indeed, the allegation was denied by all witnesses of the 3rd Respondent as they saw no such thing at their respective polling stations. 3RWC5 (Dennis Kimeu) also confirmed this to Counsel during cross examination.
84. The Appellant's submitted in the Trial Court the allegation that 114 unused ballot papers could not be accounted for at Kimandi Primary School Polling Station. At paras. 17, 24 of the Amended Petition and Paras. 10, 12 of the Appellant's Supporting Affidavit in the trial Court (page 149, 154 of the Record of Appeal). This was succinctly rebuffed by the 1&2RW1 (Denis Kilungu) 1st and 2nd Respondent's Presiding Officer at Kimandi Primary School Polling Station who took his time to show



that the said unused ballot papers were actually accounted for and had been correctly recorded in the Polling Station Diary, as was indicated in the extract of the same filed in Court.

85. PW3 (Jeremial Musau Ndulu) the agent at the said polling station admitted, in cross examination, that he was given a chance to sign the Form 36A but declined, and that he was present during tallying and witnessed no single electoral malpractice. 3RW5 (Dennis Kimeu Wambua) confirmed that he was present during tallying at the said polling station and there was no such issue of unaccounted-for ballot papers. This is also captured in his Affidavit evidence before the Court as contained in the Record of Appeal See page 485, 486 of the Record of Appeal.
86. The Appellant alleged that his agents were denied entry into various polling stations such as Song'eni, Kimandi, Ndithini, Mukimwani, Katuma and Kyala. At paras. 18, 21 of the Amended Petition and paras. 5, 16, 22 (i) of the Appellant's Supporting Affidavit in the trial Court (page 149, 150, 151, 153, 154, 160, 168, 169, 170 of the Record of Appeal). These allegations were dismantled by Counsel during cross examination, wherein he showed that PW1 (Francis Muli Musila), PW2 (Justus Mwendwa Muoki) and PW3 (Jeremiah Ndulu) were present at the opening of their respective polling stations and in actual fact they appended their signatures to the Polling Station Diaries. Indeed, 1&2RW1 (Denis Kilungu) confirmed that the Appellant's agent was present at Kimandi Primary School Polling Station and he was never denied entry. 3RW5 (Dennis Kimeu Wambua) confirmed that no agent was denied entry at Kimandi Primary School Polling Station, together with the other witnesses of the 3rd Respondent who testified that no agent was denied entry at their respective polling stations as shown at pages 469 to 512 of the Record of Appeal.
87. The Appellant alleged that ballots validly cast for him were declared as rejected as ballots. At para. 19 of the Amended Petition and para. 11 of the Appellant's Supporting Affidavit in the trial Court (page 151, 152, 166, 167 of the Record of Appeal). This allegation was never substantiated and the 3rd Respondent called 3RW6 (Phiader Mueni) who categorically stated that no such thing happened at Kyambusya Primary School Polling Station as alleged by the Appellant see page 507, 508 of the Record of Appeal. The record will also reflect that not a single objection to any rejected vote was recorded in any Form 36A across the entire ward by any agent of the Appellant.
88. The Appellant also alleged that Form 36As were either left blank, overwritten, erased, mishandled, interfered with or not stamped. At paras. 22, 24, 28 of the Amended Petition and paras. 6, 17, 19, 23 of the Supporting Affidavit (page 154, 155, 162, 169, 170, 171 of the Record of Appeal). Firstly, the record will bear witness that copies of Form 36As supplied to the trial Court by the 1st, 2nd and 3rd Respondents are clear, visible and legible. The same cannot be said of the Appellant's copies of the same forms. Secondly, it can be conceded that a few of the forms had been written over in some numbers. These were all sufficiently explained by Counsel on record for the 1st and 2nd Respondents during the hearing. They also did not affect results at any given polling station such that it was not possible to tell who the winner was, the outcome or the respective votes for any given candidate. In fact, a number of them were countersigned as is required. The Appellant did not point out any single alteration that made it impossible to establish the results at a polling station.
89. The Appellant alleged that there were differences in the Form 36As available to his agent and those returned by the 1st and 2nd Respondents. At para. 23 of the Appellant's Supporting Affidavit in the trial Court (page 171 of the Record of Appeal). PW5 (Dennis Masavu), during cross examination, admitted that he had no evidence of such before the Court. 3RW1 and 3RW2 on their part, during examination in chief, confirmed that they had an opportunity to compare the Form 36As provided by their agents in picture form from their agents as stationed in the respective polling stations and copies of the said Forms supplied at the Constituency Tallying Centre and they did not identify even a single discrepancy or difference.



Determination

90. The Court outlined the substance of the pleadings and submissions filed by parties through Counsel in the instant appeal.

Preliminary Proceedings

91. At the outset the Court confirms that the judgment subject of the appeal emanated from Tawa Court in Makueni County.
92. On 13/6/2023, when the matter came up in this Court the 1st time, the online platform in this Court was not working. The Appellant's advocate Mr Omoiti informed the Court that a Preliminary Objection was on record. As other parties were not present/physically/online /represented, the matter was adjourned to 15/6/2023.
93. On 15/6/2023, all Advocates for parties were present; Mr Omoiti for the Appellant; Mr. Obedholding brief for Mr. Kithinji for the 3rd Respondent and Mr. Abongo for the 1st & 2nd Respondents as they were served by the Appellant's advocate to appear /attend Court proceedings of 15/6/2023.
94. Directions on disposal of the Preliminary Objection raised/filed by 3rd Respondent was that each party had 7 days to file and exchange skeletal written submissions on the Legal question whether this Court was clothed with requisite jurisdiction to hear and determine the instant appeal or not as the matter was from Makueni High Court.
95. The Applicant questioned why the appeal from Makueni County was filed in Machakos County yet there is Makueni high Court which rightfully ought to hear and determine the appeal.
96. The Court delivered Ruling on 24/7/2023 to the effect that the Court has jurisdiction to hear and determine the appeal under Article 165 of the Constitution, Makueni High Court though operational and equally competent to handle the appeal, during the period of filing the appeal, the Makueni Court was on official tour of duty and hence logging instructions were varied from Makueni High Court to Machakos High Court.
97. This Court considered that that the election appeal was statutorily timebound. This position is fortified by Section 75(1) of the Elections Act that provides;

A question as to validity of a election of a county governor shall be determined by High Court within the county or nearest to the county.

98. On 31/7/2023, the last official High Court working day of the Term before Court recess, the Respondents did not seek to file response to the Appeal or waived their rights to do so. Therefore, the Court gave directions on filing of written submissions to/on the appeal 14 days for each party and the matter would be before Deputy Registrar Machakos High Court during the Court recess and the matter scheduled for judgment on 15/9/2023.

Analysis

100. The Court on 1st Appeal recognizes the mandate bestowed by Section 75 (4) of the Elections Act that provides;

An appeal under subsection (1A) shall lie to the High Court on matters of law only and shall be –



- a. filed within thirty days of the decision of the Magistrate's Court; and
 - b. heard and determined within six months from the date of filing of the appeal.
101. In *Wilfred Kikaet Kuyo vs Letulal Ole Masikonde & 2 others* [2018] eKLR, the Court reiterated the role of the Court in an election petition appeal regarding County elections that the findings of fact as presented before and determined by the Trial Court cannot be substituted or varied and the Court's duty on appeal is to determine legal questions; issues of law only.
102. The Memorandum of Appeal filed on 27/3/2023 raises 36 grounds with regard to the Interlocutory appeals on the Trial Court's Rulings of 6/1/2023 and 30/1/2023 and the Judgment of 23/2/2023.

Issues For Determination

103. The Court shall condense these grounds into the following issues for determination;
- a. The Trial Court Ruling of 6/1/2023 where the Appellant contested the findings that the application lacked specificity as to which polling stations were earmarked for scrutiny and /or recount and offended Rule 29 of *Elections [County & Parliamentary elections] Petition Rules, 2017*; that allowing scrutiny after evidence of witnesses had been taken would be prejudicial to the Respondents as they would not have an opportunity to respond to any new issues that may be unraveled during scrutiny; That the Petitioner's Application remained generalized and did not lay any foundation for the grant of scrutiny and recount; that the Petitioner was on a fishing expedition and in view of the fact the hearing was concluded it would amount to introducing new evidence and that the Trial Court erred in finding that the irregularities raised by the Petitioner were [not] serious enough to warrant an order for scrutiny.
 - b. The Trial Court Ruling of 30/11/2022 where the Appellant contested the findings by the Trial Court that granted leave to 1st & 2nd Respondents filing Responses out of time Even though the 1st & 2nd Respondents had not sought leave for such extension of time; that the Trial Court found the Notices of Appointment and Responses to the Petition were filed out of time were deemed as duly filed and served; the Court failed to appreciate mandatory provision of Rule 10 (4) & Rule 11 of *Elections [County & Parliamentary Elections] Petition Rules 2017*; the failure to file Responses to the Petition on time was a procedural shortcoming that could [not] be cured through the exercise of judicial discretion; the authorities the Trial Court relied were on filing of Notice of Appeal & record of Appeal out of time; that the Trial Court erred in finding of failure to strike out the Responses filed out of time would not prejudice the Petitioner but the 3rd Respondent who would not have the opportunity to have main suit heard and determined on its merits, That the Trial Court selectively and inaccurately relied on Rule 5[1] of the *Elections [County & Parliamentary Elections] Petition Rules* and the reasons for delay, the Trial Court found t be logical and reasonable without any evidence to corroborate their excuses.
 - c. The Trial Court Judgment of 23/2/2023 as highlighted extensively above as contained in the Amended Petition and replicated in the Memorandum of Appeal in a nutshell, that the Trial Court erred and/or failed to rely on /address relevant law, precedent and demeanor of witnesses; finding that the Appellant had not discharged burden of proof and the Respondents conducted a simple, accurate, secure ,accountable, free and fair elections for MCA Kiteta Kisau Ward; addressed fundamental questions of law as mere procedural technicalities, in admitting instead of expunging improperly commissioned affidavits; finding some Forms 36 A were overwritten, erased and generally interfered with and that these irregularities were incapable



of affecting results in polling stations; finding Appellant's 13 votes were declared rejected votes and that mishandling of election materials did not affect the results; finding allegations of illegalities and irregularities were generalized; not finding that the 1st & 2nd Respondents contravened Art 38 CoK; Section 10 of *Elections Act*; Regulations 66(1) & (2), 72 [2] & [6] & 77 of 2012; placing the burden of investigating election offences and finding unsealing of ballot box containing Polling Station Diaries [PSD] by 2nd Respondent without a Court did not affect the integrity of the election.

Ruling Of 30/11/2022

104. The impugned Ruling is at Pg 952-962 of Record of appeal Vol 2.
- The Appellant contends the Trial Court that granted leave to 1st & 2nd Respondents filing Responses out of time even though the 1st & 2nd Respondents had not sought leave for such extension of time.
105. The Appellant filed Petition on 29/9/2022 under Rule 11 of Elections [County & Parliamentary Elections] Petition Rules 2017; hereinafter referred to as Elections Rules 2017. Rule 10 [4] of Rules 2017 requires upon service, the Respondent files Notice of Address within 5 days of service thereof.
106. The Petition filed on 7/9/2022 was served by 14/9/2022 and the Respondents ought to have responded by 21/9/2022 but filed Responses after 6 days outside the stipulated days. The Appellant stated Rule 19 of Election Rules 2017 donates discretion to the Trial Court to allow extension of time but it is based on evidence of circumstances that hindered the Respondents to file responses on time. The Appellant relied on the case of *Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 Others* (2014) eKLR (SC Pet 16/2016) supra
107. The 1st & 2nd Respondents also sought the Petition be struck off for want of form in compliance with Rule 8(2) of Election Rules 2017; the person sued was not the Returning Officer and an amendment would only suffice with leave of the Court. Secondly, service of the Petition was to one Dorcas Murugi a person not party to the election proceedings. Thirdly, Rule 19 of Election Rules 2017 does not make it mandatory for a party to seek leave before filing the pleadings out of time as compared to Order 50 Rule 6 CPR & Section 79 CPA.
108. The 3rd Respondent submitted that the Trial Court had discretion to extend the period for filing responses save for the timeline cast in stone is for filing the Petition only under Rule 19 of the Rules.
109. The Trial Court in its Ruling of 30/11/2022 found that Rule 5(1) in accordance with Art 159 (2) (d) CoK & 19 of Election Rules 2017, the Trial Court had discretion to extend time to file the Responses to ensure that an injustice is not done to any party.
110. The Trial Court considered the reason advanced by 1st & 2nd Respondents that the reason for late filing was due to difficulties in tracing the scattered Presiding Officers and which was compounded by the limited human resources due to the numerous petitions the 1st Respondent is involved in across the country. The Court agreed the explanation was logical and reasonable in the circumstances.
111. Rule 5 [1] of the *Election (Parliamentary and County) Petitions Rules, 2017*, is to the effect that:
- (l) The effect of any failure to comply with these Rules shall be determined at the Court's discretion in accordance with the provisions of Article 159 (2) (d) of the *Constitution*.”
- Under rule 11 [1], of the Rules it is provided that:

“(I) Upon being served with a petition in accordance with rule 10, a respondent may oppose the petition by filing and serving a response to an election petition within seven days.”



Under Section 19 of the Rules it is provided for extension and reduction of time

- (1) Where any act or omission is to be done within such time as may be prescribed in these Rules or ordered by an elections court, the election court may, for the purposes of ensuring that injustice is not done to any party, extend or limit the time within which the act or omission shall be done with such conditions as may be necessary even where the period prescribed or ordered by the Court may have expired.
 - (2) Sub-rule (1) shall not apply in relation to the period within which a petition is required to be filed, heard or determined.
112. As espoused in the cases of *Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 Others supra*; *Christopher Odhiambo Karani v David Ouma Ochieng & 2 others supra*; *Kakuta Hamisi vs Peris Tobiko & 2 Others supra* are grounds for granting extension/enlargement of time to file pleadings/herein responses to the Application and not filing Petitions/Appeals out of time.
113. The Court finds that the Trial Court was clothed with judicial discretion by law to extend/enlarge time to file Responses out of time. The Appellant took the view that judicial discretion was not exercised as the Respondents filed Responses out of time without first seeking leave of Court to do so and secondly, the reason advanced, evidence to prove such circumstances was not provided.
114. This Court finds that the relevant provisions on judicial discretion as outlined above make no reference to how leave and/or extension of time will be sought unlike under the CPR/CPA. The emphasis on ensuring injustice is not done to any party.
115. This Court finds also that there was no requirement for production of evidence to prove the reason that the 1st Respondent had difficulty tracing the scattered Presiding Officers and which was compounded by the limited human resources due to the numerous petitions the 1st Respondent is involved in across the country. The issue of conduct of General elections is judicially noticed, the 1st respondent was/is in charge/conduct of the national and county elections all over the country similarly, when disputes arise, the 1st Respondent spreads thin on the ground to attend to the election disputes and prepare for the election matters and obtain witnesses.

In fact, the Trial Court also exercised discretion and granted the Appellant leave to file Amended Petition instead of striking off the Petition as was pleaded by Respondents.

I find in the circumstances, the Trial Court exercised judicial discretion on sound legal basis.

Ruling Of 6/1/2023

116. The impugned Ruling is at Pg 1027-1043 of Record of Appeal Vol 2.

The Appellant contested the findings that the application lacked specificity as to which polling stations were earmarked for scrutiny and /or recount and offended Rule 29 of *Elections [County & Parliamentary elections] Petition Rules, 2017*;

Rule 29 of Election Rules 2017 for scrutiny of votes as follows;

- (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-.....
 - (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.
117. The Trial Court outlined the substance of the Appellant/Petitioner's petition and instant application that the election was marred by malpractices and irregularities; the counting and tallying process was irregular, ballot boxes and papers Forms 36A & 36B were mishandled, interfered with, wrongly marked, stamped or unstamped and others altered without being countersigned raising doubts of impropriety, misconduct and unfairness by 1st & 2nd Respondents and their agents.
 118. At Kimandi Polling Station it was alleged 5 votes validly cast in favor of the Appellant were incorrectly declared as rejected votes, similarly in Kyambusya Polling Station 3 votes validly cast for Appellant and Kieleeni Polling Station and Tulya Polling Station and cumulatively were 26 rejected votes which were the Appellant's votes.
 119. The Appellant listed 10 polling stations and alleged that ballot papers issued exceeded the voters and singled out Kimandi Primary School Polling Station were unused 114 ballot papers; 13 Polling Stations where Agents were sent away and Agents were not given copies of 36A Forms.
 120. There was widespread breach of Regulation 69 (1) (d) & (e) of the *Elections (General) Regulations 2012* in breach in conduct of vote assistance and Regulation 78 (3) of *Elections (General) Regulations 2012* was flaunted. There was widespread inconsistency in the records of results of candidates votes cast in Forms 36As, PSD, some Form 36As were overwritten, erased or otherwise corrected before or after results were announced at the polling stations.
 121. The Appellant/Applicant submitted that a strong basis and sufficient cause for an order of scrutiny and recount was made.
 122. The 1st & 2nd Respondents submitted that the application was couched in general terms and the Applicant ought to have specified the polling stations in respect of which scrutiny was required as Rule 29 is couched in mandatory terms. The Applicant made no reference to any specific station (s) where the results were disputed aside or specific malpractices marred the election and evidence was provided; apart from making general and unsubstantiated allegations and that the application is a fishing expedition to beef up the Petition. The Applicant did not lay the basis for the Court to grant prayers sought.
 123. The 3rd Respondent submitted the scope of the Application and relief sought was too wide and relied on case-law. The Application contained generalized allegations of electoral illegalities and irregularities, the same ones preferred in the Petition and un-particularized allegations at paragraphs 5,7 & 8 of the Applicant's submissions. The application is a bid to engage in a fishing expedition. The Court cannot nominate Polling Stations/Centres where scrutiny/recount can be undertaken.
 124. The 3rd Respondent posited the Application was full of inconsistencies; where the Applicant claims his agents were chased from various polling stations while at the same time makes allegations of



irregularities and illegalities in respect of the same polling stations That how would the Petitioner through his agents, witness the said allegations if the agents were not present in the said stations in the 1st place?

The Trial Court found;

‘that the Applicant made a generalized Application for scrutiny and recount and has not specified the polling stations in respect which scrutiny is needed and lay foundation for the grant of scrutiny and recount for each polling station. The application makes no reference to any specific polling station where results were disputed. I agree with 1st & 2nd Respondents that the Applicant has not specifically disputed results from any polling station aside from general allegations.’

‘The lack of specificity as to which specific polling stations the orders sought should apply renders the present application incompetent and it offends the tenets of Rule 29....

In a nutshell, the Petitioner/Applicant has not met the threshold to warrant orders sought in the Application dated 2/9/2022 and consequently the same is dismissed.’

125. The Amended Petition listed irregularities and/or illegalities.
126. The prayers sought by the Applicant were KIEMS Kit voters logs voter registers Forms 36A PSD be provided for ALL Polling Stations relative to Member of County Assembly elections in Kiteta Kisau Ward for scrutiny, inspection, verification, recount, tallying of entire ballots validly cast, rejected and spoilt in the said election.
127. The Appellant submitted denial for an order for scrutiny and verification was plainly wrong since he pleaded with specificity of all polling stations in Kiteta Kisau Ward.
128. It was evident there was widespread election malpractice hence the need for general order for scrutiny of the [election]materials for each of those stations.
129. The Appellant cited *Timamy Issa Abdalla v Swaleh Salim Swaleh Imu & 3 others supra* on the role of Appellate Court even under Section 75(4) of *Elections Act*.
130. The Appellant relied on the case of *Twaber Abdul Karim Mohammed vs IEBC & 2 Others supra* on the point that In the case of *Peter Gichuki King'ara v Independent Electoral and Boundaries Commission & 2 others supra* but on different part of the judgment;

“The right to scrutiny and recount does not lie as a matter of course. The party seeking a recount or scrutiny of votes in an election petition is to establish the basis for such a request, to the satisfaction of the trial Judge or Magistrate. Such a basis may be established by way of pleadings and affidavits, or by way of evidence adduced during the hearing of the petition.”

131. In *Francis Mwangangi Kilonzo v Independent Electoral and Boundaries Commission & 2 others supra* stresses the right to apply for scrutiny and recount but on sufficient reason to the election Court.
132. This Court refers to the case of *Robinson Simiyu Mwangi & another v Independent Electoral and Boundaries Commission & 2 others*;

“The starting point is the pleading which must signal all the areas of dispute and if for instance there is any dispute relating to a polling station then that polling station must be named, and the nature of the dispute revealed. Further, the basis for the scrutiny or recount in such a polling station must be laid by way of evidence so that a Court can exercise its discretion



on whether to allow such a scrutiny or recount in that polling station. I find a good reason for this requirement being that there will be no need of ordering a scrutiny or recount in an instance where there is no averment of any dispute in the pleadings or the averment turns out to be pure hearsay or the dispute is otherwise sufficiently explained by way of evidence. Precise pleadings mark a terrain for a legitimate electoral duel.”

133. In the case of *Albeity Hassan Abdalla v Independent Electoral and Boundaries Commission (IEBC) & 3 others* [2017] eKLR, Court expressed itself thus:

“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.

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.”

134. In the case of *Hassan Mohamed Hassan & another v IEBC & 2 others* Petition 6 of 2013; [2013] eKLR;

“... a party has liberty to apply for scrutiny and recount at any stage of the proceedings for the purposes of establishing the validity of the votes cast. However, the court has to be satisfied that there is sufficient reason for it to order for scrutiny or recount of votes. In my view and understanding, for a party to provide sufficient reason upon which the court can decide to grant the order, the party shall provide sufficient evidence to that end. If the request for scrutiny is made before the trial starts and therefore before the relevant evidence upon which such decision is adduced, then clearly and logically such relevant evidence must be based on the affidavits, if any, supporting the application....

On the other hand, where an application for scrutiny 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 reason upon which the court will make relevant orders. It is my view however that whether the application for scrutiny or recount is made before, during or at the end of the trial of a petition, the court must be satisfied generally, that there are sufficient grounds to order a scrutiny or recount on the basis that such scrutiny or recount will be in the interest of fairness and justice in settling the issues raised in the petition.

The decision to grant scrutiny or recount is clearly, not only discretionary but is also judicious. That is to say that the court’s reason to grant such order must be good, must be logical and must be necessary for the purpose of arriving at an expeditious, fair, just, proportionate and affordable resolution of the issues raised in the Petition.”

135. In the instant case, the application for scrutiny and recount was made after filing of the Petition and Responses and conduct of the election proceedings which commenced on 19/10/2022 and after the close of the Respondents case on 9/12/2022.

136. The Trial Court considered the pleadings on record by parties’ affidavits, statements and documents provided and oral evidence of witnesses tested through cross examination and the demeanor of witnesses by the Petitioner and Respondents.



1. The 1st & 2nd Respondents submitted at Paragraph 47 of Written Submissions and provided a list/summary of ALL Polling Stations the Appellant claimed his agents were denied entry and chased away from the Polling Stations. This is a summary of the 1st & 2nd Respondents Responses at Pg 517- 526 of Record of Appeal which are attached all Form 36As and Form 36B. The List gives full names of Agents ID numbers and the Polling Stations.
2. The 1st & 2nd Respondents submitted at Paragraph 34 of Written Submissions that they annexed Forms 36Aa & Form 36B copies at Pg 533-588 of the Record of Appeal and none of the Form 36As were left blank, erased or corrected and the rejected votes were not proved to have been in favor of the Appellant.
3. The Trial Court had the evidence of the Appellant's witnesses and the Respondents witnesses and is summarized in the Judgment of 23/2/2023.
4. The issue of the scrutiny and recount being a fishing expedition, the Trial Court record confirms the same as submissions by 1st & 2nd Respondents.
5. The issue of not granting scrutiny and recount after close of the hearing as the case was closed and would require the witnesses to be recalled to respond to the outcome of the scrutiny and recount, this was obiter dicta in in Ledama Ole Kina v Samuel Kuntai Tunai & 10 others [2013] eKLR.
6. Since the issue of denial of orders for scrutiny and recount is also raised against/ in the judgment of the Trial Court and the grounds for scrutiny and recount are both in the Petition and Application, this Court shall consider the matter together and give final order (s). Judgment by the Trial Court of 23/2/2023

Evidence

137. The Trial Court summarized evidence adduced by witnesses in the Judgment as follows;

PW1-Appellant's Agent at Songei Primary School-Polling Station- he was denied entry into the Polling station and he informed the Chief Agent – and he stayed outside until 4 pm.

He saw Presiding Officer assisting some people removing them from the line and taking them inside. He signed the Form 36A but he was not given a copy.

In cross examination-he admitted Dorcas Ngina Mwatu was a neighbor but did not know she was Agent for his Party. While outside, he could not see what was going on inside the Polling Station.

138. PW2- Appellant's Agent at Syunguni Primary School-Polling Station that he arrived at 6 am that he was denied entry into the Polling station and he informed the Chief Agent – and he stayed outside until 7 pm. At 5 pm Presiding Officer chased away voters. At some point the KIEMs Kit failed and the Presiding Officer came out to look for a charger and network. People were still voting and voters names were not verified in the Manual register. When he got to vote, he saw Presiding Officer allowing people to vote without ID or passport and also gave more than 1 ballot paper instructing them to vote for 3rd Respondent. When counting he saw 5 votes for the 3rd Respondent declared rejected votes. He complained and he was told it would be indicated in FORM 36A.He signed but was not given a copy.

In cross examination he reiterated he was not in when the Presiding and Deputy Presiding Officers were opening the Polling Station; the Presiding Officer went out to charge the KIEMsKit; At 5pm there were 70 people , he did not count them there were 5 votes that were rejected, he did not see voters voting without ID or Passport, He was not forced to sign Form36A.



139. PW3- Appellant's Agent at Kimandi Primary School-Polling Station, he arrived at 5 am and found voters waiting. He went to Presiding Officer handed the letter and he was asked for the badge, he asked to wait outside. He informed the Chief Agent. He organized for him to get the badge and he was allowed in the Polling Station. He saw voters who were not identified by KIEMs Kit were turned away. He saw the 3rd Respondent who came and talked to the Presiding Officer. At about 4pm he saw him collect 6 booklets and put them in a bag and he said he had misplaced the booklet and it was not placed in the box .He signed Form 36A.

In cross examination he admitted he was present at the time of opening of the Polling station. He signed the document but did not read it he was not there when Form36A was being filled in. He confirmed the signature is his. He had an option for refusing to sign with reasons. He admitted they counted the unused ballots before the Presiding Officer took the Booklet and the Security Officer was there. The 114 ballot papers were among the ballots not used and according to the document at Pg 248 of 1st & 2nd Respondents bundle of documents, the unused ballot papers for MCA election was 114 .

140. PW4 – Chief Agent of the Petitioner, he voted at Syunguni Primary School Polling Station and left to supervise Agents who had Appointment letters, badges and oaths of secrecy. There were 50 streams with 50 Agents.

At Katumu the 3rd Respondent's Agent was influencing voters to vote for him. He reported to Presiding Officer. At Ndathini, Presiding Officer told voters to vote for 3rd Respondent. He called the Petitioner to report to the Returning Officer. At Songeni the station closed late at Kimandi it closed early at 4pm.

In cross examination, he admitted that he did not know one Dorcas Ngina Mwatu was an Agent he had the name Irene Mbithi. The Replacement List was taken to IEBC by Petitioner.

141. The Petitioner told him that his Party Wiper told candidates to look for their own agents. He did not know why some Agents did not sign the Forms. The Manual Register was used and he did not see anyone vote without an ID card. At Syunguni there was 1 KIEMs Kit the other one failed and he did not see anyone given 1 ballot or anyone chased away from the Polling stations.

142. PW5- The Petitioner /Appellant one of the MCA candidates vying for Kiteta/Kisau Ward. He voted at Kitondo Primary School Polling Station. He had taken the List of his Agents to IEBC and some of the names were cancelled after they failed to turn up on 9/8/2022.He received many calls from PW4 Chief Agent that many of his Agents were denied entry; in Songeni, he called the Presiding Officer who refused to pick his call, he was informed that some people jumped the queue and voted without ID or passport and some were given more than 1 ballot paper. The KIEMs Kit failed and voters continued voting using the manual register. At Syunguni 5 votes were counted as spoilt votes at Kasyelia his agent was sent away called Joseph Mukami. At Musunguu his Agent Vaati Mutinda there was no Agent from WiperParty. At Katuma his agent was sent away. He stated that at PG 18 of 1st & 2nd Respondents bundle of documents Form 36A No.5 votes had been altered without countersigning and at Pg31 Uvyuu Polling Station the total valid votes were altered, At Tawa Mixed Polling Station, the total votes was altered and the Agent who signed was not his Agent. The difference was 10 votes. At Kimandi Polling Station 114 ballot papers were missing.

In cross examination PW5 stated that at Musunguu his Agent was not there, at Uvyuu one Onesmus Kyalo signed Form 36A but was an agent of the Wiper Party. He went to Kitondo, Katuma & Mayuni Polling stations and found his Agents outside. He admitted he did not see anyone vote without ID card or Passport and he saw people turned away because the KIEMs kit did not show their details. At Yangua Polling Station he saw the KIEMs Kit fail. Shadrack Mutuku Kivuitu was the Agent allowed inside



and he was not aware Musengya Kalee was present at Mwera Polling station. He stated that all Agents indicated for Wiper Party instead of his name were not his Agents. The Returning Officer refused to give copies and had already sent them to IEBC HQ. At Yangua Polling station his Agent Irene Mbithi saw Presiding Officer come out with the KIEMs Kit. At Songeni Polling Station 5 votes were declared spoilt and he did not know why the same was not recorded.

143. The Respondents presented evidence as follows;
144. PW1- Presiding Officer at Kimandi Polling Station denied sending the Petitioner's Agent Jeremiah Musau away. He signed PSD at 6.28 hrs and was present at the closing and witnessed voters identified by Kiems Kit. He did not use the Manual Register. In cross examination, he allowed the Agents to tally votes and raise any complaints, none was raised.
145. PW2- Presiding Officer at Syunguni Polling Station stated he did not turn away any accredited Agents Justus Mwendwa Muoki was present when he opened at 6.12 hrs. The Manual Register was not used no one objected to the vote and Agents signed the Form on agreeing with results.

In cross examination he admitted to making changes in PSD and countersigned.

146. PW3- Returning Officer for Mbooni Constituency, the Chief Agent of the Petitioner did not raise any complaints' with him.

The Presiding Officers remained at the Polling stations. At Kieleleni turnout was 56%; Songeni it was 64.33% and at Kimandi it was 71.33% and not 55% as alleged.

The Polling stations were opened at 5 am whether Agents were present or not; at Mukimwani Shadrack Mutuku Kivuitu signed.

He received the letter from the Petitioner of 10/8/2022 on request of recount of votes and noted it. The KIEMs Kits did not fail, he had 3 kits to backup and the Manual Register was not used. Josephine Mukami & her ID appear on the List of Agents.

In cross examination, the request for recount could only be conduct as required by Section 80 of the [Elections Act](#).

The ballot papers and booklet were sealed. Form 36A were sealed in a tamper proof envelope and the PSD is not sealed. The ballot boxes were sealed and were to be managed and kept in safe custody as required by Section 86 of the Act. He unsealed boxes upon service of the Petition and did not have the Court order to do so.

147. The 3rd Respondent called PW1 who voted at Kitondo, PW2 the Chief Agent supervised Agents and took photos of Forms 36 A and was present when Form 36b was filled in. Pw3 agent at Songeni and none of the Agents were chased away and she never left the Polling Station. Pw4 agent at Syunguni no agent was sent away, PW5 agent at Kimandi and none of 114 votes went missing, PW6 agent at Katuma Station voting went smoothly no one campaigned for 3rd Respondent PW7 was agent at Mukwimani.
148. It is the burden of proof of the Petitioner to prove 36 grounds of the memorandum of appeal, allegations of irregularities and illegalities in the Petition and for grant of scrutiny and recount in the Application.
149. In [Francis Moenga Omesa & Anor vs IEBC & 2 others](#) [2018] eKLR observed that standard of proof is higher than on a balance of probabilities but lower than beyond reasonable doubt [except in proving criminal election offences]

It is incumbent upon the Petitioner to prove these breaches and prove how they affected the result of the election.



150. In the instant case, the Trial Court evaluated the evidence in accordance with Section 83 of Elections Act.
151. In the Supreme Court case of Gatirau Peter Munya (*supra*) it was held;
- “We would characterize the three elements of the phrase matters of law as follows
- (a) The technical element involving the interpretation of a constitutional or statutory provision
 - (b) The practical element involving the application of the Constitution and the law to a set of facts or evidence on record.
 - (c) The evidentiary element, involving the evaluation of the conclusion of a trial court on the basis of the evidence on record” Based on the above binding authority, this court has the jurisdiction to evaluate the conclusion of the election court.
152. On the issue that the voters were turned away and failed to exercise their right to vote, the Court found that during voting hours people were allowed to vote and delayed at the time the KIEMs Kit failed at Kimandi & Syunguni and the Manual Register was not used. The fact of the stations closing early and how many people were turned away was not proved as at the said Polling stations the persons outside were not counted or verified and yet it was the Petitioner’s witnesses’ evidence in examination in chief that Petitioner’s Agents were chased away.
153. PW1 Agent at Songeni stated he was chased away PW2 -Agent Syunguni was chased away PW3- Agent at Kimandi who was denied access until he obtained a badge and was let in, were outside most of the time going by their testimonies, how were thy able to witness what was going on inside the Polling station that voters voted without presenting ID/Passport and/or without verification in KIEMS kit and/or Manual Register and later the Forms 36A were signed?
154. PW4 & PW5 the Chief Agent and Petitioner testimonies were based on what agents told them in each station and not what they witnessed. In the absence of direct/documentary evidence the allegations remain unproved.
155. At Kimandi the 5 votes rejected being the Petitioners was not proved as PW3 who eventually signed Form 36A,At Syunguni Zipporah Nzioka signed Form36A for Wiper Party; at Kambusya Meshack Mutuku signed for Wiper Party and at Kieleeni & Tulya agents did not object to any rejected votes.
156. On voters being turned away at Songeni, Syunguni Katuma & Ndithini RW3 confirmed he received no such compliants.PW4 Chief Agent confirmed he did not witness voter(s) who was/were sent away.
157. On voting without verification, not producing ID and /or Passport the Respondents witnesses confirmed they complied and checked voters through KIEMs Kit. None of the witnesses testified they voted without identification. The witnesses who testified were Agents who were outside for a while, how did the witness what was going on in side the Polling Station and if they did why did they not raise any question in the presence of all other agents, IEBC personnel, security, observers, press etc?
158. PW4 & PW5 confirmed they did not see any Kiems Kit fail and PW1,2 & 3 did not prove any voter was given more than 1 ballot paper, their case was that they were denied entry to the polling station and could not witness, the voters being irregularly aided, not giving the identification not verified on KIEMs Kits.



159. On rejected votes in Kimandi, Syunguni Kyambusa Kieleeni and Tulya , the Trial Court found Form 36A were all signed and no objections were raised and the witnesses did not testify to that effect.
160. The Forms 36A alleged to be blank, overwritten, erased or interfered with or not stamped, the Trial Court found the Forms 36A presented in Court were legible copies and where overwritten the Respondents witnesses explained the same and they were countersigned.
161. The allegation that the voters were not marked with indelible ink so as not vote twice, the Trial Court found it was not proved in Court by evidence through any witness and was not contextualized. None of the witnesses testified to witnessing this fact. The allegation was not proved.
162. On denial of Access of Agents at Polling Stations, the evidence by PW1, PW2, PW3 Pw4 & Pw5 depicts that there was confusion on the accredited Agents of the Petitioner, and/or his Party or those on his replacement list DMW2 as testified by PW4.
163. On the one hand, the FORM 36A presented in Court and Record of Appeal are signed by Agents of the Petitioner, yet in the case of PW1, he was denied access as there was another agent and other Agents faced similar other situations.
164. Regulation 62 of the [Elections \(General\) Regulations 2012](#) provides, the Presiding Officer shall regulate number of voters to admitted at the Polling Station except for, a Candidate, a person nominated as deputy to candidate where applicable, authorized [accredited] agents, members of Commission & election Officers on duty, Police Officers on duty, persons assisting voters with special needs or assisted voter, observers and representatives of print media. The Presiding Officer shall allow 1 agent for each candidate or political party.
165. The issue of denial of access of Agents if at all and at the same time Forms 36A are signed means that those not allowed in were not accredited/authorized and/or lacked the 3 requisite documents, accreditation letter, badge and oath of secrecy or there was already an agent representing the Party and/or Candidate.
166. The confusion on agents is confirmed by testimony of PW4 Chief Agent and PW5 the Petitioner, that the Party told candidates to get own agents and at the same time there were Party agents at Polling stations.
167. Regulation 79 of the [Elections \(General\) Regulations 2012](#),
The refusal to sign the Form 36A by a candidate or agent does not invalidate the election but the Presiding Officer ought to ask agent present to sign or record refusal if any.
168. It would seem that the internal arrangements regarding appointment of agents between the Political Party and candidate is outside the purview of Presiding Officers; all agents shall present appointment letters to be admitted to the Polling station. For these reasons, this Court finds the said irregularity on non-admission of agents not proved/not established by evidence on record.
169. This Court finds that the issue of denial of access for/by agents was not proved to the required standard by virtue of competing/conflicting evidence on the issue.
170. The Presiding Officer lawfully by virtue of Section 72 (5) of the [Elections Act](#) N0 24 of 2011 revised 2016 assists the voter on request. There was no evidence on how the Presiding Officer(s) assisted the voter(s) in any other way other than as provided by the Regulation.



171. The Petitioner/Appellant raised the issues regarding irregular voting as follows; eligible voters were barred from casting their votes in 11 polling stations. The allegation could only be proved by evidence not by scrutiny and recount as they did not vote.
172. The Appellant listed 10 polling stations and alleged that ballot papers issued exceeded the voters and singled out Kimandi Primary School Polling Station where 114 ballot papers were unused.
173. PW3 admitted they counted the unused ballots before the Presiding Officer took the Booklet and the Security Officer was there. The 114 ballot papers were among the ballots not used and according to the document at Pg 248 of 1st & 2nd Respondents bundle of documents, the unused ballot papers for MCA election was 114.
174. The allegation that persons whose status was not verified by KIEMs Kit or Manual Register were allowed to vote, such evidence was not provided in the Trial Court to prove this fact.
175. That the Kiems Kit failed and petitioner's agents were refused access so voters were allowed to vote without verifying eligibility from Manual Register. No evidence was presented in the Trial Court that a voter voted without verification from KIEMs Kit and/or Manual Register.
176. The Appellant raised the issue of voters who were not verified by KIEMs Kit not verified by Manual Register as required under Regulation 44 of Election Rules, at the same time the issue of Manual Registers not being provided was raised and the issue of voters voting without any verification was raised. All these complaints could not possibly happen at the same time in the election, if Manual Registers were not provided, verification was by/from KIEMs Kit only. Manual Register verification is a fallback verification process where KIEMs Kit fails if the voter's details are not in the KIEMs kit. If the Manual Register was missing as alleged then ALL candidates were deprived of votes as one could not anticipate who the voter would vote for if verified by/through Manual Register. These allegations were not proved by evidence on record.
177. The Court finds that the evidence adduced in the Trial Court on proving the allegations set out in the Petition and the Application for scrutiny and recount was conflicting as the Petitioner's witnesses attributed irregularities and illegalities to 1st & 2nd Respondents and they in turn relied on signed Forms 36A and List of Agents that were present and signed the Forms and did not raise any objection during the voting exercise.
178. The Petitioner's witnesses relied on Affidavits and testified on the content to illustrate irregularities and/or illegalities in various Polling Stations but in cross examination they seemed to retract the version given in examination in chief.
179. PW1 PW2 & PW3 testified with regard to 3 Polling stations, Songeni, Syunguni, Kimandi but no other, they retracted their versions in cross-examination and the Presiding Officers in the same polling stations controverted their evidence by Forms 36A presented and signed by Agents.
180. As the application for scrutiny and recount was made at the close of the hearing, the evidence on record as considered above was not sufficient to merit scrutiny and recount especially when the allegations of irregularities and/or illegalities were not specifically made with regard to each Polling station and evidence thereof provided for each of the polling stations in the Constituency as the scrutiny and recount was sought of all polling stations in the Constituency which was/is contrary to Rule 29 of Election Rules.



181. On the contest of Witness Affidavits, the Appellant took issue with the fact that the witnesses failed to physically appear before the Commissioner of Oaths and therefore the Affidavits ought to have been expunged from the record.
182. Section 12 of *Elections Act* on Affidavits;
- (12) An affidavit shall form part of the record of the hearing and may be deemed to be the deponent's evidence for the purposes of an examination-in-chief.
- (13) Every deponent shall, subject to the election court's direction, be examined-in-chief and cross-examined:
- Provided that the parties may, by consent, accept not to cross-examine the deponents but shall have the deponent's evidence admitted as presented in the affidavits.
- (14) The *Oaths and Statutory Declarations Act* (Cap. 15) and Order 19 of the *Civil Procedure Rules, 2010* (L.N No. 151 of 2010) shall apply to affidavits under these Rules.
183. The Trial Court relied on Rule 12 of Election Rules 2017 and relied on Art 159(2) *CoK* to invoke Order 19 Rule 7 *CPR 2010* in the interest of justice and exercised discretion by admitting the Affidavits as the Affidavits contents would be subjected to cross examination and no prejudice would emanate to any of the parties.
184. During the hearing, Respondent witness PW3 Returning Officer of Mbooni Constituency he confirmed opening the box with PSD contrary to Section 86 of Election Act after he was served with the Petition and was to retrieve the Polling Station Diary so as to respond to the Petition. This was/is an anomaly and the witness was honest of the action, which in the Trial Court's view did not affect the election in terms of Section 83 of the Act.
185. This Court finds that although this issue was not raised/pleaded in the Petition or Application it is one of concern and ought to be considered as follows; did it affect the integrity of the election or interfere with the will of the people? This Court thinks not, as there are several Forms confirming the process and outcome of the election, Form 36A from all Polling Stations in the Constituency and Form 36B already filled in from the Forms 36As and identical Forms at the close of the election handed over to IEBC. This Court also finds that it was an honest human error that the witness owned upto it and he would not interfere with ALL forms for the election while copies/originals are with the IEBC itself and were used to declare results of the election.
186. In Raila case Petition 1 of 2017 paragraph 211;

In our respectful view, the two limbs of Section 83 of the *Elections Act* should be applied disjunctively. In the circumstances, a Petitioner who is able to satisfactorily prove either of the two limbs of the Section can void an election. In other words, a Petitioner who is able to prove that the conduct of the election in question substantially violated the principles laid down in our Constitution as well as other written law on elections, will on that ground alone, void an election. He will also be able to void an election if he is able to prove that although the election was conducted substantially in accordance with the principles laid down in our Constitution as well as other written law on elections, it was fraught with irregularities or illegalities that affected the result of the election.”



Disposition

187. From the totality of the evidence on record and written submissions by parties, this Court finds as follows;
- a. The Ruling of Trial Court of 30/11/2022 is upheld.
 - b. The Ruling of Trial Court of 6/1/2023 is upheld.
 - c. The judgment of the Trial Court of 23/2/2023 is upheld.
 - d. The evidence adduced by parties, pleadings filed and documents annexed cumulatively were not sufficient to grant scrutiny and recount to All Polling stations in the Kiteta /Kisau Ward.**
 - e. The pleadings and evidence adduced and submissions made in this Court and Trial court record do not disclose sufficient evidence to prove irregularities and illegalities that affected the integrity of the election and will of the people.
 - f. The election of Member of County Assembly in Kiteta Kisau Ward was conducted substantially in accordance with the Constitution and election laws and the 3rd Respondent was validly elected as the Member of County Assembly for Kiteta Kisau Ward.
 - g. The Appeal and Amended Petition are dismissed and capped at Ksh 300,000/- for each Respondent.

JUDGMENT DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS ON SEPTEMBER 18, 2023 (PHYSICAL/VIRTUAL CONFERENCE).

M.W. MUIGAI

JUDGE

In The Presence Of:

Mr. Kithinji for 3rd Respondent - present

Mr. Aminza holding brief Mr. Omoiti for the Petitioner

Appellant: We request Court to Appeal.

Mr. Abongo for 1st and 2nd Respondents – present online

