



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KABARNET**  
**ELECTION PETITION NO. 2 OF 2017**

**JOSEPH MAKILAP KIPKOROS.....PETITIONER**

**VERSUS**

**THE INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION.....1<sup>ST</sup> RESPONDENT**

**JOSEPH LEBOO MASINDET.....2<sup>ND</sup> RESPONDENT**

**WILLIAM CHEPTUMO KIPKIROR.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

**Background.**

On the 8<sup>th</sup> August 2017, The Republic of Kenya held General Elections for the following positions, President, Governors, Senators, Members of National Assembly, Women Representatives and Members of County Assembly. The Petitioner herein was a candidate for Member of National Assembly Elections, Baringo North Constituency who had been nominated to vie under Party of Development and Reforms (PDR).

The 1<sup>st</sup> Respondent is sued as a Constitutional Organ established under Article 88 of the Constitution whereas the 2<sup>nd</sup> Respondent is sued as the Returning Officer for Baringo North Constituency and the 3<sup>rd</sup> Respondent William Cheptumo Kipkoror was nominated by Jubilee Party of Kenya and he was declared as validly elected Member National Assembly for Baringo North Constituency, and in the General Elections held on the 8<sup>th</sup> August 2017.

The Petitioner outlined the various provisions that govern Elections in Kenya including Elections the Constitution of Kenya 2010, the Elections Act No. 24 of 2011, Elections (General) Regulations, 2012 and Election's (Technology) Regulations, 2017. Further he claims that the Election's carried out on the 8<sup>th</sup> August, 2017 were not simple, verifiable, accurate and transparent. He specifically pleaded that:

On the voting day the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, it's agents, servants and/or employees failed, neglected and refused to adhere to the strict provisions of the law by;

- a) Filling in the results declared by the Presiding Officers on illegal and invalid Form 35As.

b) The results appearing in the public portal put up by the 1<sup>st</sup> Respondent differ from the results declared by the 2<sup>nd</sup> Respondent on 10<sup>th</sup> August, 2017. The 2<sup>nd</sup> Respondent declared the 3<sup>rd</sup> Respondent as the winner having garnered 12,413 votes and Petitioner came second with 12,374. The results appearing in the portal show that the Petitioner got 12,343 votes while the 3<sup>rd</sup> Respondent garnered 12,493.

c) That all the Forms 35As used by the 2<sup>nd</sup> Respondent to declare results of Member of National Assembly for Baringo North appear to have been prepared and signed by one person as evidenced by the handwriting appearing in the said Forms. This becks the question whether the results announced by the 2<sup>nd</sup> Respondent were cooked and / or prepared by the Respondents to hoodwink residents of Baringo North Constituency.

d) Some if not all of the Forms 35As which were used by the 2<sup>nd</sup> Respondent to collate the results and declare the 3<sup>rd</sup> Respondent as validly elected Member of National Assembly had different serial numbers to those supplied to the Petitioner's agents.

e) That in Koibaware Primary School, and Lake Kamnorok Primary School Polling Stations, the Form 35As used by the 2<sup>nd</sup> Respondent did not have the anti-copy security features. That further, the Forms did not originate from the 1<sup>st</sup> Respondents' as the rest of the Forms.

f) That in Lekepchun Primary School Polling Station, which is the Petitioner's stronghold, there were a lot of concerns noted and raised by the Petitioner's agents:

- (i) The number of rejected votes was the highest as compared to other Polling Stations.
- (ii) The 3<sup>rd</sup> Respondent mischievously defeated the Petitioner in the said Polling Station.
- (iii) The results from the said Polling Station which is about 30 kms from the tallying center was delayed only to be received at the tallying at around 4:30 p.m. on 9<sup>th</sup> August, 2017.
- (iv) There was fracas reported in the Polling Station during voting and counting of votes.
- (v) The agents, specifically those for the Petitioner, were being harassed and / or intimidated by the Presiding Officer.

The Petitioner further at paragraph 93 claims that the whole Election was surrounded in secrecy and fraud for example, results from Polling Station started streaming in the tallying centre around 6:30 p.m. on the 8<sup>th</sup> August, 2017. There was blackout at around 3:40pm. On 9<sup>th</sup> August, 2017 at the tallying room in Kabartonjo High School which affected the transmission of results electronically, his chief agent refused to sign the collated results announced by the 2<sup>nd</sup> Respondent in Form 35B.

Further that the 1<sup>st</sup> Respondent put in place mechanisms to comply with the provisions of Articles 86 (a) and (b) of the constitution. The Returning Officer failed in his duty under Article 86 (c) and (d) of the constitution by filling in the results declared by the Presiding Officers on illegal and invalid from 35As and that Form 35As used at Koibaware Primary School and Lake Kamnorok and Koibware Primary School did not have anti-copy security features. That the difference in votes garnered between the Petitioner and 3<sup>rd</sup> Respondent was 39 votes which is so minimal to warrant a recount and / or scrutiny of the votes.

The Petitioner contends that the whole Election was surrounded in secrecy and fraud and hence prays for the following orders;

*a. A declaration that the purported Member of National Assembly Election held on the 5<sup>th</sup> of*

*August, 2017 at Baringo North Constituency was unconstitutional hence null and void.*

*b. A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents failed, refused, and / or neglected to conduct a free fair and credible Election on the 8<sup>th</sup> of August, 2017.*

*c. A declaration that the 3<sup>rd</sup> Respondent was not validly elected, declared and gazetted as the Member of National Assembly, Baringo North Constituency during the Elections held on the 8<sup>th</sup> August, 2017.*

*d. An order that there be a recounting, tallying and scrutiny of votes in all the Polling Station of Baringo North Constituency and the court does not declare the Petitioner the winner in the event it is found that he garnered more votes than the 3<sup>rd</sup> Respondent.*

*e. A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents abdicated their responsibility to ensure a free, fair, verifiable and transparent Election in Baringo North Constituency.*

*f. There be fresh Election for the Member of National Assembly, Baringo North Constituency within the Republic of Kenya in strict compliance with the law.*

*g. The Respondents do pay the Petitioners cost.*

The Petition herein was supported by an affidavit by Joseph Makilap Kipkoror, who was deponing on the claims set out in the Petition. He confirmed to have been nominated by Party of Development and Reforms (PDR) and annexed his, nomination certificate as 'JMK' serial no. 017 and certificate of nomination by IEBC's 'JKM2'. he also annexed copies of Form 34As for Siam/Kipsaraman ward, Saimoi / Soi Ward, Barwesa ward, Bartabwa ward, the total results for Koibaware Primary School – code 123 1 of 1 and the results at the tallying center.

Joshua Komen who in his evidence in court stated that he was the chief agent also swore an affidavit on 6<sup>th</sup> September, 2017. He deponed that he was at the Constituency tallying center when results started streaming in at around 6:30 pm on the 8<sup>th</sup> August, 2017. He refused to sign the results announced by the 2<sup>nd</sup> Respondent in Form 35B. That the Election was full of fraud and deception.

The 2<sup>nd</sup> Respondent was the returning officer Baringo North Constituency aver that some paragraphs of the Petition should be struck out since they are superfluous. That they complied with the law and the Elections were conducted in a system that was devoid of fraud, the process was free, fair, transparent and credible which reflected the will of Kenya. The Elections was conducted through secret ballot as provided under Article 81(i) of the constitution which was free from violence, intimidation improper influence or corruption. The voting system was simple, accurate, verifiable, secure, accountable and transparent and the votes cast were counted, tabulated and the results announced promptly by the Presiding Officer at each Polling Station.

There was no fraud involved as alleged by Joshua Komen. Elections were conducted as from 6.00am to 5.00pm on Tuesday 8/8/2017 the people who were at the queue at the close of the Polling Station were allowed to vote. Counting and streaming in of results started with Presidential, Member of the National Assembly, Senator, Women Representative, County of National Assembly and Governor as provided under Amended Regulation 75 (2) of the Elections (General) Regulation, 2012. Results sent in from Polling Stations were never tallied or provisional results given as was decided in the **Maina Kiai and 2 others v. Independent Electoral and Boundaries Commission and 2 other** [2017] eKLR. Therefore the Petitioner was not leading as alleged.

That there was no blackout, and if at all there was, a standby generator was used from 3 a.m. on the 9.08 2017. There were emergency lanterns and laptops which had full power which enabled seamless working environment. The agents signed the results save for the Petitioner's agent who refused to sign. Results

were correct and accurately recorded in Form 35A and 35B. The results entered in Form 35B were not sourced from the results transmission system but were the actual results recorded by the Presiding Officer after votes were cast, counted, tabulated and results announced at the end of each counting at the various Polling Stations. Therefore both the qualitative and quantitative accountability indicated a win by the 3<sup>rd</sup> Respondent. Form 35A was the Primary data collection.

The Petitioner relied on (Article 82(2) of the Constitution which provides that voting at every Election should be simple, transparent and takes into account the special needs. No unqualified person voted. Further that the Election was not shambolic neither did it have inadequacies. Thus the dignity and glory of the people of Baringo North Constituency was fully upheld.

On the issue that some Forms were not stamped, they aver that most Forms which were received were stamped by the Presiding Officer. Forms 35A are produced in series, serialized in distinct serial numbers, and before stamping the agents are given to verify the sign thereafter. The agents could retain some of the Forms where they were scarce and failure to stamp the said Forms was not a violation of any law. All the Forms had anti-copying features; and all Forms were filled and signed by the agents. and Forms 35A were serialized and were in all Polling Stations as provided under Rule 79(2) of the Regulations

Further that from the casting of votes counting, tabulation, announcement and declaration of the results, it was clear on who won and who lost. There was no failure of technology in voter registration, identification and results transmission. Voters were identified by Kenya Integrated Election Management System (KIEMS), and if a voter could not be identified by this, then a Form 32A was filled in the presence of agents therefore the Petitioner cannot allege that some voters who were entitled to vote were denied. Paragraph 20 – 78 ought to be struck out for plagiarism as they are copied from Supreme Court Petition No. 1 of 2017 – **Raila Odinga v. Uhuru Kenyatta and 2 others**. The Presidential results cannot be a subject of this Petition pursuant to Article 140 of the Constitution.

There was compliance in accordance with the Constitution, Election laws and the Regulations when Elections were carried out. All Form 35As signed by the Presiding Officers were legal and valid and there was no error in tabulation and the effect that the results were so close does not make the results illegal. No voter was disenfranchised as alleged by the Petitioner. The opening of ballot boxes, recounting of votes comparison of documents in Forms 35 A and those deposited in ballot boxes is not called for. Form 35 A were patently made by different people as seen from the different ink and signatures. Elections were conducted well in respect to Koibaware Primary School.

The IEBC portal indicated the Petitioner had 12,343 votes whereas the 3<sup>rd</sup> Respondent garnered 12,493 votes. However Form 35B which declared the 3<sup>rd</sup> Respondent winner indicated the 3<sup>rd</sup> Respondent to have got 12,413 and the Petitioner 12,374. This was a transposition of figures; whereby it was indicated the Petitioner to have received 86 votes instead of 54 at Kabartonjo Primary School Polling Station (052-1 of 2) which resulted to an increase by 32 votes. Whereas the 3<sup>rd</sup> Respondents results was indicated as 6 instead of 86 which led to a decrease of 80 votes. This was a result in transposing results from Form 35A to 35B.

In response to Article of the constitution 80(d) they aver that the law required all Form 35As to be serialized; Forms 35A were not to be in duplicate of each other, and in different number, this was for accountability. A comparison between the original Forms and Forms given to the agents will confirm there was no difference in the results.

The response to paragraph 80(f) which is Lekepchun Primary School Polling Station, it is their contention that they had no control over the decision of voters. They recorded only what was cast, counted and tabulated. The 3<sup>rd</sup> Respondent garnered more votes than the Petitioner because the voters were not bound to vote for the Petitioner. The rejected votes were not valid and they did not in any way increase tally for any candidates. The Petitioner did not provide any scientific method to establish that it was his stronghold. No fracas was seen at the said Polling Station and neither was any agent harassed or intimidated by the Presiding Officer. There was no deliberate delay in delivery of results from

Lekepchun Primary School, Polling Station to the tallying center.

In addition to the above, there was no fraud or secrecy in the Elections. In response to Joshua Komen's affidavit they state that 6 Elections were held on 8/8/17 and the Presiding Officers started counting at the close of the voting. The Stations with the lowest number of voters reported first and the one with the highest Members reported late. Results were announced once the ballot boxes, non-strategic materials, strategic materials and the results in all the six- Election results were counted, tabulated and results announced at the Polling Station.

The grounds set by the Petitioner are not lawful, he did not emerge the winner and thus he could not be declared winner. His Petition should fail since the Commission discharged its mandate in compliance with the Constitution. The counting, tallying, transmission and declaration of votes and results were accurate, lawful, and accountable and a true representation of the will of the people, there was no voter disenfranchisement. All these does not warrant for the opening of the ballot boxes, recounting of votes, comparison of documents in Forms 35. The orders sought by the Petitioner should fail.

It is their prayer that the court finds that

- a) The 1<sup>st</sup> and 2<sup>nd</sup> Respondents were not in breach of or in contravention of the provisions of the Constitution, the Elections Act and Regulations made there under.*
- b) The electoral process for the Member of Parliament for Baringo North Constituency was valid and a valid declaration of the outcome was made.*
- c) By all stretch of imagination was the electoral process was not unlawful, illegal, irregular, a nullity, unfair or unjust or at all.*
- d) The 1<sup>st</sup> and 2<sup>nd</sup> Respondents did not commit electoral offences.*
- e) That any error, that may be found, which are denied, are not deliberate, or illegal, or fraudulent.*
- f) There was no deliberate, error, negligence or fraudulent change of results or change of the will of the people.*
- g) The 3<sup>rd</sup> Respondent was validly elected Member of Parliament for Baringo North Constituency.*
- h) The Petitioner should bear the cost of the Petition.*
- i) The people of Baringo North Constituency exercised their sovereign power to vote and their decision should be respected and upheld.*
- j) The will of the people was not affected.*

The response filed in court on 19/09/2017, which is dated 18/09/2017 is supported by an affidavit by Joseph Leboo Masindet. He was the appointed Returning Officer Baringo North Constituency. He was responding to the affidavit by Joseph Makilap Kipkoros. He stated that the voters exercised the political right freely and through secret ballot, free from violence, intimidation, improper influence or corruption.

He stated that the results declared by the 2<sup>nd</sup> Respondent were correct and reflected the free will of the people and as correctly and accurately recorded in Form 35A and 35B. He annexed all Form 35As and Form 35B. Form 35A contains the following.

- a) Name of the Polling Station and its code
- b) The ward and its code

- c) The Constituency and its code
- d) County name and its code.
- e) Number of votes cast in favour of each candidate:
  - i. The name of each candidate and number of votes obtained.
  - ii. The number of valid votes cast.
- f) Polling Station counts; this contained the following:
  - i. The Number of registered voters in the Polling Station
  - ii. Number of rejected ballot papers
  - iii. Number of rejected/objected to ballot papers
  - iv. Number of disputed votes
  - v. Number of valid votes cast
  - vi. The decision on disputed votes if any
- g) Declaration part: This is where the Presiding Officer and the Deputy Presiding Officer indicate their names, signature, date, name of Polling Station, they confirm the results is an accurate count of the ballots.
- h) Name of candidate or agent present at Polling Station. It includes;
  - i. Name of agent or candidate
  - ii. I.D /passport Number
  - iii. Party name / independent candidate
  - iv. Telephone contact
  - v. Signature and date
- i) Reason for refusal to sign if any
- j) Presiding Officers comment.

Forms 35B, were also annexed. It contains the following specific features

- a) Serial no, Constituency, County and code.
- b) Polling Station code
- c) Polling Station name
- d) Voters per Polling Station.

The information contained in Forms 35B was retrieved from Forms 35A. A copy of Form 35A and booklet in respect of Koibaware Primary School Polling Station (123 – 1 of 1) and Lake Kamnorok

Primary School Polling Station was also annexed (015 – 1 of 1). It is serialized in distinct serial numbers.

All the Forms had anti-copying features which were discernible by any Party who wished to photocopy. The Petition fraudulently photocopied Form 35A excluding the top where anti-copying features were to be thus creating an empty space at the bottom of the page. A good photocopied Form 35A should show a water feature within the body of the document from top to bottom and an anti-copying feature at the very top.

He further averred that he was aware of the duty to conduct the Elections strictly, accurately and in fidelity to the law. The portal results reflected the results transmitted, and there was no error in the tabulation of all the results. He confirms that Lekepchun Primary School Polling Station had the highest number of registered voters at 688, out of which 565 voted representing 82.56% voter turnout. The rejected votes do not in any way increase tally for any candidate thus there was no electoral advantage on any candidate. The difference between Lekepchun Primary School Polling Station and Kabartonjo tallying center is 65 Km. Due to the rains, and the road which is rough and hilly, it was difficult for the vehicle transporting Election materials to move at the allowable speed. However the time of arrival did not in any way violate the law and cause a change in the results.

In addition to the 2<sup>nd</sup> Respondent's affidavit, there is an annexure of affidavit for Joshua Komen, Vincent Chesire Kibet, Julia J. Kandie and Meshack Kiptoo Kangogo. They confirmed that the Elections were conducted in a transparent manner by being impartial, neutral, efficient, accurate and in an accountable manner.

Julia J. Kandie was the Presiding Officer for Koibaware Primary School, (Station No. 123- 1) of 1. She confirmed that Elections were conducted on 8/8/2017 and due regard was given to those who were in the queue at the close of the Polling Station. At this Station, counting commenced as follows; Presidential, Member of the National Assembly, Member of the County assembly, Senator, Woman Representative, Member to National Assembly and Governor as stipulated by Elections (General) Regulations 2012. She thereafter filled Form 33 with the results. She then transferred all the data from Form 33 to Form 35A accurately to the satisfaction of all the agents present. Annexure of Form 35A for Koibaware Primary Polling Station, (Station No. 123 – 1 of 1) was annexed. Then she announced the results for each candidate, the total votes cast, the rejected votes and the valid votes. Thereafter the agents present signed the results. She confirms to have conducted the matter in an impartial, neutral, and efficient accurate and accountable manner.

The Presiding Officer for Lekepchun Primary School Polling Station, (Station No. 008- 1 of 1) Mr. Meshack Kipturo Kangogo swore an affidavit he Averred that:

- a) That Election were held on Tuesday 8/8/2017 regard being given to those who were in the queue at the close of the Polling Station, there were 150 voters still in the queue and they voted till 8.00 p.m no incidence of violence recorded.
- b) After counting of votes, he filled Form 33, then transferred to Form 35A to the Station of all the agents present. Then the agents signed Form 35A.
- c) There was no deliberate delay in the delivery of the results to the tallying center. There were 6 elections conducted and counting had to begin as soon as voting closed; Lekepchun Primary School had the highest number of registered voters whose turnover was high.
- d) As a Presiding Officer he did not intervene in the manner the voter exercised his democratic right. Validity of votes is verified at the counting stage.
- e) The number of rejected votes was 20% being 3.5% of the total votes.
- f) That he conducted the Election in a transparent manner and did so in an impartial neutral efficient accurate and accountable manner.

**Vincent Chesire Kibet** was appointed the Presiding Officer for Lake Kamnorok Primary School Polling Station, Station No. 015 – 1 if 1. He confirms to have read the Petition and the supporting affidavit.

- a) That he avers the Station was opened and closed within the time permitted by the law.
- b) There were 6 positions in the Election that were carried out.
- c) He filled the results in Form 33, then transferred results to Form 35A in the presence of the agents who were present.
- d) He announced the results loudly,
- e) He conducted the Elections in a transparent manner and did so in an impartial, neutral, efficient, accurate and accountable manner.

### **3<sup>rd</sup> Respondent's response**

In response to the Petition, William Cheptumo Kipkiror stated that he was the duly elected Member of National Assembly, Baringo North Constituency after participating in a free, fair credible and transparent Election on 8/8/2017. He cited that the Petition should be struck out for being totally defective.

There were no Election irregularities seen on 8/8/2017 as claimed by the Petitioner. The Petitioner cited claims in relation to a Presidential Election. Results for Elections were filled in Forms 35A which is the prescribed statutory Form, copies of which are authentic and final.

Further the difference in the public portal results (12,493 for the 3<sup>rd</sup> Respondent) and Form 35B (12,413 for the 3<sup>rd</sup> Respondent) can be accounted for by a transposition error in Form 35A for Kabartonjo Primary School Polling I in comparison to entries made in Form 35B. The erroneous posting in Form 35B from Form 35A made the 3<sup>rd</sup> Respondent lose 80 votes. If this error is corrected in Form 35B then his votes in the public portal and Form 35 would tally. This correction would not have affected the outcome of the Election. The Petitioner has not specifically identified the various Forms he alleges were prepared by the same person.

In response to paragraph 80(d) the same is pleaded in bad faith to create an impression that there was manipulation of Forms 35A which have not been produced. The Forms 35A for Koibaware Primary School and Lake Kamnorok Primary School are not a true account since the originals show the anti-copy security feature and a serial number. In response to paragraph 80(f) and f (i) it's a myth for Petitioner to allege that Lepkepchun was his stronghold and it is not true that it had 688 registered voters thus the number of rejected votes would be higher than any other Polling Station which had lesser registered voters.

The allegation made by the Petitioner that he was mischievously defeated by the 3<sup>rd</sup> Respondent is untrue. It is 65Km from Lekepchun to Kabartonjo tallying center. Results were announced within the prescribed time limits as provided by law. All votes had to be collated in the 6 Elections prior to transporting the results to the tallying center.

There were no fracas reported during voting and counting as alleged neither was there any harassment and intimidation of the Petitioners agents. The failure to stamp any Form is not a requirement in law. That some of the Petitioners claim are not substantiated, lacks any justification in law and fact. The Election process was adhered to as provided under Article 86 of the Constitution. There was no blackout experienced at Kabartonjo tallying center and at no one point did the Petitioner lead by 169 votes during the tallying process. In addition he avers that there was no 'Constitutional coup' initiated by the Respondents as alleged in paragraph 94, since the results was a true reflection of the will of the people of Baringo North Constituency.

It is their response that the Petitioner has not demonstrated how the 1<sup>st</sup> and 2<sup>nd</sup> Respondents misapplied Article 96 of the Constitution in carrying out the Elections. It is his belief that he won the Election by a clear margin. Therefore the Petitioners claim on scrutiny and recount has to be based on pleadings, appropriate grounds and supporting evidence since vote margin is not a ground for vote scrutiny and recount. The Petitioner's list of issues pleaded beyond the scope of a Petition since the only clear one relates to Form 35A in regard to their collation and tallying. It is their contention that the whole Election Petition does not meet either the qualitative test or the quantitative test or both.

The 3<sup>rd</sup> Respondent supported his response with an affidavit sworn on 18/09/2017. He deponed that he was the duly elected Member of National Assembly Baringo North Constituency after satisfying all the pre-Election requirements and having garnered most votes. He annexed Form 35C which is the certificate of Elected Member of National Assembly issued under Rule 83(1)(g) of the Regulations.. The same was issued by the Constituency Returning Officer, Mr. Joseph Leboo Masindet the 2<sup>nd</sup> Respondent. He averred there were no electoral malpractices and the allegations in the Petition are an afterthought, inaccurate and farfetched.

The Form 35As used in declaration of results were those prescribed in law and gazetted in the rules. The Petitioner partly admits the contents of paragraph 6(b) save that the difference in the public portal was as a result of the transposition of Form 35A to 35B where the Petitioner erroneously garnered 56 votes, whereas he lost 80 votes the Petitioner garnered 32 votes. The correction of this error would lead to an increase in his win by a margin of 150 votes as opposed to the 39 margin votes as indicated in Form 35B. He annexed a copy of Form 35A for Kabartonjo Primary School Polling Station.

Further the number of Forms bearing different serial numbers have been specifically referred to or annexed. Forms 35A that were filled for Koibaware Primary School, and Lake Kamnorok Primary School are authentic, the Form 35A were signed by agents and the Petitioner's agents has not disputed the contents in the Forms in Saimo/Soi ward and Saimo Kipsaraman ward. Except in some Polling Station where the Petitioner's or his (3<sup>rd</sup> Respondents) agents did not sign the Forms. They include:

- a) Arusin Nursery School- The Petitioner's agent did not sign Form 35A.
- b) Barketiew Primary School- The Petitioner and the 3<sup>rd</sup> Respondent agents did not sign Form 35A
- c) Loruk Health Centre- The Petitioner and the 3<sup>rd</sup> Respondents' agents did not sign Form 35A
- d) Bartolimo Primary School- The Petitioners' and the 3<sup>rd</sup> Respondents agents did not sign Form 35A.
- e) AIC Kabartonjo Primary School – The Petitioner and the 3<sup>rd</sup> Respondents' agents did not sign Form 35A
- f) Kapchokor Primary School- The Petitioners' agent did not sign Form 35A
- g) Kapchepkisa Primary School - the Petitioner's agent did not sign Form 35A.

He further avers that paragraph 93 and 100, of the Petitioner's affidavit and paragraph 9 the affidavit sworn by Joshua Komen are without a basis and he shall rely on his tallying agents Almaida Symon Ayabei's affidavit. Paragraph 13 of the Petitioner's affidavit which cites fraud, deception, clandestine and small opaque activities lack particulars and are contrary to Election Petition Rules; whereas paragraph 14 and 15 of the Petition are vexations and scandalous with no evidentiary value to the Petition.

### **Applications**

The Petitioner filed an application under Notice of Motion dated 26/09/2017 which was filed on court on 26/09/2017. The same was amended on 11<sup>th</sup> October, 2017. The Petitioner sought for among other

orders specifically as follows:

*“Paragraph 2. Pending the hearing and determination of this Petition an order of mandamus do issue to compel the 1<sup>st</sup> Respondent and 2<sup>nd</sup> Respondents through the IEBC’s Chief Executive Officer, Ezra Chiloba to within 24 hours of making of this order, produce before this Honourable Court and furnish the Petitioner with:*

*a) The original and copies of Form 33 being the candidate vote tally sheet containing the results of each of the Polling Stations in the Election of National Assembly Member, Baringo North Constituency, Baringo County.*

*b) The original Form 41 being statements / in respect of the National Assembly Member, Baringo Constituency Baringo County.*

*The original Form 35A and 35B used in the declaration of Election results for the National Assembly Member, Baringo Constituency, Baringo County.*

*d) The original and copies of Form 32A being the voter identification and verification of each of the Polling Stations in the Election of National Assembly Member, Baringo North Constituency, Baringo County.*

*e) The original and copies of Polling Station diaries of each of the Polling Stations in the Election of National Assembly Member, Baringo North Constituency, Baringo County.*

*f) Pending the hearing and determination of the motion and Petition respectively, the KIEMS kits and all contents whereof as used on the 8<sup>th</sup> August, 2017 be supplied to the court for access by the Petitioner in its status as the declaration of the results for Baringo North Member of the National Assembly Elections alongside the ballot boxes and all the contents whereof, for safe custody, storage, scrutiny, verification by and through the supervision of the Honourable Court.”*

The said application was supported by supplementary affidavit sworn by Joseph Makilap Kipkoros, the Petitioner herein. The said application dated 26/09/17 was amended.

### **Replying affidavits and grounds of opposition**

The 2<sup>nd</sup> Respondent Joseph Leboo Masindet in response to the application dated 26/10/2017 filed a replying affidavit; he averred that;

a) All the Forms 35A and 35B were filled with results for the Elections conducted on 8/8/2017. That the strategic materials including the ballot boxes shall be delivered however most of them are within the sealed ballot boxes – They include :

- i. Packets of spoilt ballot papers
- ii. Packets of counter foils
- iii. Packets of valid votes
- iv. Packets of rejected ballot papers

b) The supply of KIEMS kits could not be granted since the kits had been forwarded to the service provider for purposes of preparation of the 26/10/2017 as ordered by the Supreme Court in Supreme Court Petition No. 1 of 2017 ***Raila Odinga v. Uhuru Kenyatta and 2 others.***

c) The request for scrutiny is a general request and he is informed by his advocate that one had to

lay an evidentiary basis, which the Petitioner has filed by not specifying the Polling Stations in question. The same is further not in the Petition, supporting affidavits or in the witness statements. This prayer if allowed shall lead to an amendment of the Petition. The court has to be satisfied before grant of such orders.

d) That the Petitioner and affidavit in support contain concise statements of material facts upon which the claim on impropriety or illegality of the casting or counting of ballots is made.

e) That the results in the public portal was as a result of an error during transposition of figures from forms 35A to 35B. Further that all forms used in the Elections originated from the 1<sup>st</sup> Forms used in the Elections originated from the 1<sup>st</sup> Respondent and they had all the security features.

f) That there was a standby generator in case of a minor power outage and the Elections were conducted in full compliance with the principles laid down in the Constitution and Elections law.

The 3<sup>rd</sup> Respondent filed grounds of opposition in response to the Petitioner's / applicants application dated 26/9/2017 by stating that:

(a) The application was premature as it is the court which is required under rule 15 and 16 of the Elections Parliamentary and County Petition Rules 2017 to settle pre-trial issues by giving directions on storage and preservation of Election materials.

(b) The application is defective and contains prayers which limit the preservation of Election materials, scrutiny of votes, recount of votes, furnishing of records but also it invalidates his swearing in.

(c) The prayers for scrutiny and recount is premature and evidence has not been adduced and summary trial of Elections is not supported by any law.

(d) He prayed that the application be struck out or dismissed with costs.

In addition to the above

Further grounds of opposition were filed on 18<sup>th</sup> October, 2017. He specifically stated that:

a) The supplementary affidavit filed on 2/10/17 in support of the applications dated 4/10/17 and 11/10/17 was inconsistent to the Petition as it introduces new allegations and new evidence.

b) All the strategic Election materials cannot be provided as prayed by the Petitioner since they are sealed in the ballot boxes and can only be provided upon scrutiny.

c) The Petitioner has gone beyond the Polling Stations complained at in his prayer for scrutiny and recount and if the prayer sought is granted then it shall amount to litigation in instalment.

d) He prayed that the whole application be struck out or be dismissed with costs.

The court ruled as follows on the Amended Notice of Motion dated 4<sup>th</sup> October, 2017:

a. The custody of all the electoral materials for the Baringo North Constituency will remain with the 1<sup>st</sup> Respondent IEBC to be stored in accordance with Rule 16 (3) of the Election (Parliamentary and County Elections) Petition Rules, 2017.

b. Pursuant to Rule 16 (5) of the Election (Parliamentary and County Elections) Petition Rules 2017 the Deputy Registrar of the Court shall in the presence of the parties, their counsel agents or suitable representatives, place additional seals to the ballot boxes on a date to be agreed between the

parties within seven (7) days.

c. Petitioner shall within seven (7) days supply further and better particulars with relation to the Petition, without amending directly or in effect the case of the Petitioner therein, and file further affidavits as necessary to amplify his case in the Petition.

d. The Respondents are liberty, if necessary, to file affidavits in response to the Petitioner's additional affidavits filed under Order No. 3 above within seven (7) days of service.

e. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent shall supply clear copies, where necessary, of Forms 35As for the polling stations in Baringo North Constituency.

f. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent shall within three days (3) file further affidavit(s) supplying to the parties Forms 33 and 41 and polling station diaries for the polling stations in Baringo North Constituency.

g. The application with regard to scrutiny and recount of votes is deferred to an appropriate time after the taking of evidence in the Petition and before determination thereof.

h. Further directions on the pretrial to given on a date to be fixed in consultation with counsel or the parties upon the filing of the affidavits aforesaid.

The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed agreed issues. They included;

(a) Whether or not Form 35A filed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent are authentic and legal, whether they were filled by one person and if failure to stamp invalidation the results of Election

(b) Whether there were cases of electoral malpractices or irregularities at Lekepchun Polling Station and at the Constituency tallying center.

(c) Whether the results as wilted and tallied represented the will of the people of Baringo North Constituency.

The Petitioner on the other hand filed his agreed issues as follows;

a) Whether the 1<sup>st</sup> and 2<sup>nd</sup> Respondent ensured full compliance with the law on 8<sup>th</sup> August, 2017 as regards the Elections were transparent, impartial, neutral, efficient, verifiable, accurate and accountable manner.

b) Whether the vote counting, tallying and scrutiny of votes was properly done in accordance with the Constitution, Elections Act and the Regulations and if the tallying of results was properly done by the 2<sup>nd</sup> Respondent.

c) Whether the rejected votes were validly and lawfully rejected in accordance with the provision of all the Election laws and whether they would confer electoral advantage to any of the candidates.

The court had ordered that the custody of all the electoral materials for the Baringo North Constituency to remain with the 1<sup>st</sup> Respondent herein. Pursuant to this order, the exercise of placing seals on parliamentary ballot boxes was conducted at Kabarnet IEBC warehouse at National Cereals and Produce Board on 16.11.2017. The Petitioner, his agent, the 1<sup>st</sup> Respondents agents, the 2<sup>nd</sup> Respondent, the 3<sup>rd</sup> Respondents agent and the representatives from the Judiciary were present to witness the same.

Upon delivery of the ruling, dated 31.10.2017, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed in court the Polling Station diaries. They did not file Forms 33 and 41 as ordered by the court. Upon receipt of the Polling

Station diaries. The Petitioner herein filed better particulars and further affidavits.

The Petitioner filed better particulars on 7<sup>th</sup> November, 2017 under Rule 15(i), (e) of the Election Petition Rules. He listed 99 Polling Station which gave details on discrepancies detected in Form 35A which included; rejected votes, no anti-copy feature, overwriting on carbon copy, Forms not stamped, alteration of figures, no signatures from Presiding Officers no signing and total number of registered voters not indicated, the further affidavits were sworn by Sammy Barchobo Changwony, Joshua Kataron and Daudi Chebet Bargoge.

a) Sammy Barchobo Changwony stated that he was the Petitioner's agent at Lekepchun Primary School Polling Station Barwesa ward in Baringo North Constituency, he averred that the Presiding Officer specifically made it his sole mandate to assist persons who could not be able to vote due to illiteracy, and the party agents would not be allowed to witness the same. Further that on the 8<sup>th</sup> August, 2017 there were no rejected votes in Form 35A at Lekepchun Primary School Polling Station yet the Form 35A supplied by the 1<sup>st</sup> Respondent had 20 rejected votes.

b) Joshua Kataron stated that he was a registered voter at Marigat Primary School Polling Station and on 8<sup>th</sup> of August, 2017 he voted at Marigat Primary School Polling Station. He was requested by the Petitioner to go to the IEBC offices on 11/08/2017 to collect copies of Form 34A. The Forms given to him and those given to the Petitioner himself on 10/10/17 had various discrepancies including different serial numbers on the two sets of Forms from the same Polling Stations and they did not have serial numbers. Thus from those discrepancies it was evident that the Elections conducted by IEBC in Baringo North Constituency were not free fair, credible and verifiable as required by the law.

c) Daudi Chebet Bargoge swore an affidavit on 7/11/17 and filed it on the same day. He avers that he was the Petitioners' agent at Kipkolony Primary School Polling Station. He annexed a copy at the appointment letter dated 6<sup>th</sup> August, 2017. That voting went on well but before the counting process, he was thrown out of the Polling Station by one Paul Yatich. Further he was denied an opportunity to raise his complaint with the Presiding Officer.

In response to the further affidavits filed, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed their further affidavits.

a) Collins Kiptalam averred that he was the appointed Presiding Officer at Kipkolony Primary School Polling Station (Station No. 024 – 1 of 1). The Petitioners agent at Kipkolony Primary School was Fabregas Rotich and not Daudi Chebet Bargoge. Daudi Chebet never presented himself as an agent nor produced the documents he attached in his affidavit. This is because only one agent is allowed per Polling Station. Further Daudi could not have been thrown out as he alleges. Yatich only provided security during Elections. The copy of the Polling Station Diary for Kipkolony Primary School referred to Fabregas Rotich of I.D NO. 34370732 an agent of PDR, he appended his signature on 9/08/2017.

b) Meshack Kiptoo swore his affidavit on 17<sup>th</sup> January 2018. He averred that he was the appointed Presiding Officer for Lekepchun Primary School Polling Station (Station No. 008 1 of 1). He confirms he read the affidavit by Samwel Changwony. The Elections were conducted in a transparent manner. The voting process was free, fair and people voted by way of secret ballot without coercion or undue influence. The station had 150 people still in the queue and they were allowed to vote. He assisted voters who had not been accompanied, but it was in the presence of the agents. The agents never complained about this and they willfully signed Form 35A at the conclusion of the counting process. Further there was no stray and unmarked ballot paper.

c) Joseph Leboo Masindet the 2<sup>nd</sup> Respondent herein also swore a supplementary affidavit on 13/11/2017 and filed the same day, in compliance with the court's ruling on 31<sup>st</sup> October, 2017, He stated that Forms 33 were used to assist the Election officials.

In the counting of votes together with the strategic materials they are kept inside the ballot boxes and can only be accessed upon breaking the seals and opening the ballot boxes. He attached the copies of Polling Station diaries and bundle of Forms 42 and statement of rejected ballot papers. However, they were to be supplied to the Petitioner as an order of the court. They cannot form part of the courts record. Finally that Forms 41 were inside the ballot box together with the strategic materials

The 3<sup>rd</sup> Respondent filed an application by way of Notice of Motion dated 8<sup>th</sup> November, seeking for directions to be given on Election materials of Form 33, 35As and 41 not to Form part of the courts record, save that they may be admitted for and counting of votes. The Petitioners on the other hand by way of Notice of Motion dated 13<sup>th</sup> November, 2017 asked the court to commit to civil jail the C.E.O of the 1<sup>st</sup> Respondent and the 2<sup>nd</sup> Respondent for disobedience of the court.

The two applications were consolidated and the court delivered a ruling on 11<sup>th</sup> January, 2018 granting the following orders;

- a) *“The Petitioner’s Notice of Motion dated 13<sup>th</sup> November, 2017 for contempt of court against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents was dismissed.*
- b) *The 3<sup>rd</sup> Respondent’s Notice of Motion dated 15<sup>th</sup> November, 2017 is granted to the extent that direction is hereby given that the Form 42 documents and copies of Poll Station Diaries supplied by the 2<sup>nd</sup> Respondent’s Affidavit sworn in response to the order of the Court for the supply thereof to the parties in the Petition are not evidence for use in the Petition within the meaning of Rule 12 (12) of the Election (Parliamentary and County Elections) Petitions Rules, 2017.*
- c) *The Respondents will have the seven (7) days granted under the ruling of 31<sup>st</sup> October, 2017 to file, if necessary, any replying affidavits to the particulars supplied and additional affidavits filed by the Petitioner.*
- d) *Thereafter the Petition shall proceed to hearing on dates to be fixed in consultation with Counsel for the parties.*
- e) *Costs in the cause.”*

The application for scrutiny and recount of votes was deferred to an appropriate time after the taking of evidence in the Petition and before determination hereof.

## **Evidence**

The Petitioner and four of his witnesses testified on 23<sup>rd</sup> January, 2018. The following are their testimonies:-

**(a) PW1 was Joseph Makilap Kipkoros** a Former MCA in Barwesa ward. He filed this Petition together with a supporting affidavit. He was supplied with Form 42 in lieu of Form 41 for rejected votes, Form 33 were never supplied for the reason that they were inside the ballot boxes. He filed better particulars. On cross- examination by Mr. Magare for 1<sup>st</sup> and 2<sup>nd</sup> Respondents he confirmed to have had 173 agents in all 173 Polling Stations but only two agents for Lakepchun (Station No.008) and Kipkolony (024) swore affidavits in his Petition he did not state that not all Stations gave different results.

He was supplied with Form 35As at IEBC office at Kabartonjo and the agent Nandik Selina who was stationed at Lake Kamnarok did not swear an affidavit.

Further that his chief agent was Joshua Komen. He stated that agents signed Form 35A since they represented their respective parties. The power blackout was at Kabartonjo Tallying Centre, and

provincial results were not declared. He never carried out a scientific research to prove Lekepchun was his strong hold. The 3<sup>rd</sup> Respondent got 86 votes whereas he got 54 as entered at Kabartonjo Primary School Polling Station and he could not doubt those results.

There was 9 difference in the portal and the results announced which prompted him to file a Petition since the 3<sup>rd</sup> Respondent was declared a winner. Then the IEBC explained the difference was an error made by the Returning Officer in filling Form 35A.

(b) On cross examination by Mr. Odhiambo for 3<sup>rd</sup> Respondent he testified that Form 35A had different serial numbers. His agent at Kipkolony (Station No. 024) was intimidated and thrown out of the Polling Station. He is aware there are 3 Polling Stations within Lakepchun area which is far from the Tallying Centre. In his Petition he claimed generally that the Presiding Officer assisted voters.

(c) On cross-examination by Mr. Kanjama for the 3<sup>rd</sup> Respondent. He stated that he was a KANU Member till the Party Primary nominations in April, 2017 when he resigned and joined PDR to vie for Member of National Assembly in Baringo North. There are 3 constituencies in the County and PDR had 2 candidates at the parliamentary level.

All Party agents were trained by IEBC at Kabartonjo but PDR secretariat also trained the agents too. That some of the agents were not given Forms 35A, he therefore had to source them by himself. His agents were never provided with communication infrastructure which they would use to call or text. He received results from the 173 Polling Stations through his agents which were later transmitted to the chief agent. He raised a complaint with the Returning Officer but he is aware general complaints were raised by his chief agent. And the 1<sup>st</sup> Respondent issued lamps and lanterns which were used during the black out.

(d) On re-examination by Advocate Ogolla, the Petitioner confirmed that he sent his agent Kataron to get the missing Forms 35As. He had filed Forms 35A for Barwesa, Lakepchun, Lake Kamnarok Polling Stations. The signing of the agents in Forms 35A meant they were present however his agent did not append his signature for Lake Kamnarok Polling Station. He acknowledged the error in the transposition of results in Kabartonjo (Station No. 052) which was given after results were declared. The irregularities contained in Form 35A have been explained in the better particulars that were filed. He did not complain about the difference in the votes but on the irregularities on the Form 35A's.

**a) PW 2 was Joshua Mathew Komen.** He was the chief agent of the Petitioner on cross examination by Mr. Tororei Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents he stated that there was a power blackout and it affected the Election transmission and the tallying was done on a laptop. There was one stand by generator. At some pointy during the power blackout, the difference in votes was 169. He did not sign the results because if there was a problem with electronic further he did not cite any irregularities in his affidavit.

On cross-examination by Mr. Magare counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondent he stated that he was a chief agent who had been trained by PDR and the Registrar of Political parties. He maintained records for results from the agents. The discrepancies seen in Akoroyan Polling Station are not raised in his affidavit. There was lighting in the tallying center and he never received any Forms 35A from his agents and he did not have any person involved in fraud.

b) On cross-examination by Mr. Kanjama for the 3<sup>rd</sup> Respondent. He testified that he raised a complaint on the alleged difference in votes for Akoroyan Polling Station (Station No. 115, 1 of 1) at Akaroyan Polling Station his agent Joseph Chemaiwa signed Form 35A. He was trained by IEBC on 6/8/2017 that he trained the other agents. The agent's role was to ensure no misconduct during Elections and they were to assist old voters. He was not aware his details were to be filled. He told his agents to sign Form 34A after counting of votes was concluded also to remain with a carbon copy of the Form. No agent took results using his phone. None of the agents sent a text

message and neither did they record the results on a note book. He received about 40-50 Forms out of the 173 Polling Stations, however they had irregularities. An agent was to append his signature, if not, had to give reason to that. He did not have evidence of complaints made since it was not recorded. In his affidavit he does not mention a Polling Station which had any discrepancies. There were lamps when black out occurred at about 10.00pm and 4.30am. Finally there was intimidation of agents. On re-examination by Mr. Ogola he testified that the issue on discrepancy in total votes the different Forms was not an issue. The Petitioner was challenging the irregularities and illegalities on Form 35As.

**PW 3 was Joshua Kataron.**

a) On cross examination he testified that he was a voter at Marigat Polling Station (002), he was not an agent. He received all the 173 Forms. When he was referred to annexure JKL. He said the Form had been torn and had different serial number from the Form that had been issued at the tallying center. He did not know whether the serial numbers in the Forms were sequenced in an increasing order, when he was referred annexure JLM4 in the replying affidavit of the 2<sup>nd</sup> Respondent.

b) On cross- examination by Mr. Magare for the 1<sup>st</sup> and 2<sup>nd</sup> Respondent he confirmed that he had not studied document analysis, he did not know how the Forms were prepared but he had noted the Forms were not signed by agents which was not mentioned in his affidavit. He was not the Petitioner's agent and the Forms issued at the tallying center were used in filing the Petition.

c) On cross-examination by Mr. Odhiambo for 3<sup>rd</sup> Respondent he testified that he was not aware it was an illegality when Forms had different numbers. There were two set of Forms, the ones from IEBC and the ones he got from the Petitioner. And that the voting was not fair, credible and verifiable since some were not stamped, though this was not in the affidavit.

On cross examination by Mr. Kanjama for 3<sup>rd</sup> Respondent he confirmed he was a registered voter, not an agent of the Petitioner. He assisted him to campaign. The Petitioner was given photocopies but not for the 173 Polling Stations. The carbon copy Form he was shown had a serial number NA001425 which was the same as the one in the photocopy. He confirmed that he did not know the meaning of discrepancies and anti copy as used in his affidavit.

On re-examination by Mr. Ogolla he stated that there were missing security features in some photocopies.

**PW 4 Sammy Barchobo.** He testified that he was an agent of the Petitioner at Lakepchun Primary School (008).

a) On cross-examination by Mr. Magare for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents he confirmed that he was present when counting was done at Lekepchun Polling Station where he was an agent. After counting Form 35A were placed in the ballot boxes but he did not transmit the results to the chief agent since he did not know him. He signed Form 35A but didn't recall signing Polling Station diary. He got 5 unmarked ballot papers at the Polling booth when voting was ongoing, which he told the Presiding Officer. They were not marked in favour of anyone.

b) On cross-examination by Mr. Tororei for 1<sup>st</sup> and 2<sup>nd</sup> Respondent he confirmed that voting went on beyond 5pm to allow those still in the queue to vote. There was a delay in counting. He did not annex Form 35A to his affidavit though he had signed as an agent. There were no rejected votes, the 5 unmarked ballots were in respect of the National Assembly. An unmarked ballot does not qualify as rejected vote.

c) On cross examination by Mr. Odhiambo for 3<sup>rd</sup> Respondent he stated that he was a trained teacher. All votes were put together and they agreed that ballots with marking outside the box, two marks or more and unmarked ballots were qualified as rejected. The seals on the ballot boxes were

broken. Votes were counted and Form 35A filled.

d) On cross-examination by Mr. Kanjama for 3<sup>rd</sup> Respondent he confirmed that he signed Form 35 A. At Lekepchun Station, the 3<sup>rd</sup> Respondent won; he had 239 votes wherein the Petitioner had 153. After counting and declaration of results, they were placed in the classroom. One given to the Presiding Officer and one was placed on the ballot boxes. He was not aware the Forms in the booklet had different serial numbers.

e) On examination by Mr. Ogolla he confirmed from 35 A for Lekepchun did not have rejected votes the 5 unmarked ballot papers were not counted.

**PW5 Daudi Chebet Bargoge.** He was an agent at Kipkolony Primary School (024) and he swore an affidavit on 7/11/2017.

a) On cross-examination by Mr. Magare for 1<sup>st</sup> and 2<sup>nd</sup> Respondent he stated he was not in Nairobi on 8/8/2017. He did not have a letter as an agent from the Party (PDR). There was a Presiding Officer whom he did not know his name.

b) On cross-examination by Mr. Tororei for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents he said that he did not know whether there were other agents at the Station and in Form 35A did not show if he went to the Polling Station.

c) On cross-examination by Mr. Odhiambo for 3<sup>rd</sup> Respondent and he stated that he went to Kipkolony Polling Station at 6.00 p.m. on 8/8/2017 and left at 3.00 pm in the evening. When the Station was closed, he was pushed out by the Kenya Police Reservist which was witnessed by other agents, he told the Petitioner only. He voted at Kabartonjo Polling center where he stayed outside as tallying was ongoing. He was a trained agent, but while at the tallying center those inside the room would go out and inform them of the results.

d) On re-examination by Mr. Ogolla for the Petitioner he confirmed that the Petitioner was vying under the PDR Party. He had a letter of appointment as an agent. He was trained and he took an oath of secrecy. He forwarded the results to the Petitioner.

The Petitioner closed his case. He did not call the 6<sup>th</sup> witness Douglas Cherutich therefore his affidavit cannot be used as part of the courts record.

### **1<sup>st</sup> and 2<sup>nd</sup> Respondents Evidence**

The 1<sup>st</sup> and 2<sup>nd</sup> Respondent called witnesses R1W1 Meshack Kiptoo Kangogo was sworn in Eng/Kisw. He had two affidavits dated 18/9/17 and 17/1/18 which were adopted to be used as evidence in court.

a) On cross-examination by Mr. Ogolla for the Petitioner, he averred that he was registered as a voter at Barwesa Primary School Polling Station, he was the Presiding Officer at Lekepchun Polling Station (008) though he did not carry his letter of appointment or any document as evidence to show that he was trained by IEBC on how to conduct Elections. When referred to statement of rejected votes for some of the Stations in the Constituency in the supplementary affidavits he confirmed that the statement of rejected votes for Lekepchun was not supplied. It was not true that he has not recovered statements of registered voters.

On reference to Form 35A for Lekepchun (008), he confirmed that agents signed Form 35 A, then counting was done before the sealing of the ballot boxes and sealing of boxes was done one after the other. After announcing of the results, people left so the Forms could not have all been signed. It's not true he had one rejected vote as stated in the affidavit of Sammy Barchobo. There is no overwriting on Form 35A and the copy in the replying affidavit he confirmed it was his handwriting but there was no overwriting.

b) On cross-examination by Mr. Odhiambo for the 3<sup>rd</sup> Respondent he said that the Form 35A was signed by him though Sammy Barchobo did not sign because he was not there at the moment. Both strategic and non-strategic materials were supplied in a black box. Ballot papers were in separate envelopes. None of the agents present asked for a copy of rejected votes Form. No fracas was reported at the Polling Station. The delay in presenting of ballot boxes to the tallying center was due to the waiting for results from the total three Stations: Kipkolony, Barwesa and Lekepchun and also the distance to Kabartonjo coupled with heavy rains and poor roads.

c) On cross-examination by Mr. Kanjama for 3<sup>rd</sup> Respondent he testified that he did not assist voters. However there were assisted voters whereby he would call the agents to witness. Voting at the Station ended at 7.42 pm since there were 150 people at the queue at 5.00 pm. The results declaration booklets were 6; the original and 5 copies. For each position he got 2 booklets; 2 had been filed at the same time; so if he had 6 Forms with 2 booklets each, he had 12 Forms. On declaration of the results he would place one copy on the ballot box, the other on the door of the Polling Station for the public to see and the 3<sup>rd</sup> he retained for purposes of recording, the 4<sup>th</sup> copy he would give to agents & the public. The 5<sup>th</sup> copy would give to the Returning Officer and the rest to the agents. If there was no extra copies agents would take screenshots when results were arraigned to the public.

When referred to Barchobo's affidavit, he testified that Barchobo could have signed the Form 35A left on the door. Each Form 35 had a different serial number from the carbon copies. Nobody challenged the results entered since the agents would witness the counting. He would then read out the ballot results to them; the clerks would check the ballot and confirm it had a stamp.

For a ballot to be rejected it had to have more than one mark, a non-recognized mark e.g (.) () (x) and marking outside the box since it would not be clear whom the voters choice was. There were 20 rejected votes and Barchobo was there when he announced the results with no objection. Agents had note books where they could record the results.

d) On re-examination by Mr. Magare he testified by stating that the bio-metric system was used in the 2017 system.

**R1W2 Collins Kiplimo Tallam.** He agreed his affidavit and exhibits to be used as evidence in court.

a) On cross-examination by Mr. Ogolla for the Petitioner he testified that to be a Presiding Officer you had to apply then be interviewed for the position. You had to have a diploma or degree certificate. Though it was not a requirement for him to be a resident of a particular ward. He signed an oath of secrecy and he did not get a letter of appointment. For one to be a Party agent he had to produce a letter of appointment by the Party, oath of secrecy and an identity card PDR had given Nandi's name as an agent to IEBC. He confirmed the letter of appointment was from PDR he knew that Fabrigas Rotich was the appointed agent by PDR and not David Bargoge. There were two security officers at the Polling Station namely; Mohammed Ali and Paul Yatich who were at the door and within the compound respectively. He could not confirm that Daudi was chased by Yatich.

b) On cross-examination by Mr. Odhiambo for 3<sup>rd</sup> Respondent he confirmed that he arrived at the tallying center at 6.00 pm on the 9/8/17 because the road from Kapkiamo to Barwesa was impassable due to heavy rains. He did not know Daudi Bargoge. Fabrigas signed Form 35, Daudi did not sign anywhere in the Polling Station. One agent per Party was allowed at the Polling Station.

c) On cross-examination by Mr. Kanjama for the 3<sup>rd</sup> Respondent he testified that he checked the agents before they were allowed inside the Polling Station. He had 8 agents including the PDR agent by showing his letter of appointment and oath of secrecy. Daudi never identified himself as an agent. All agents voted and the police reservist were keeping security. At 5.00pm there were 32

voters on the queue. Agents were allowed to observe the counting of votes and they signed Form 34A after he had filled it. Then he would take a screenshot and send to the tallying centre. There was no complaint either in oral or written that the announced results were not correct. Daudi Bargoge was never frog matched for about 100 meters; if there were people at the Station they would have seen it and the security officer would have informed him.

d) On re-examination by Mr. Magare he confirmed that he did not know Daudi Bargoge. If Daudi had come with all the documents he would be allowed in as an agent. After scrutiny of the documents, they sign Polling Station diaries.

**R2W1 Joseph Leboo Masindet.** He was the Constituency Election Coordinator for the 1<sup>st</sup> Respondent.

a. On cross-examination by Mr. Ogolla for the Petitioner stated that he supplied copies of rejected ballot papers. As a Returning Officer, he was the head of Elections in Baringo North. He trained Party agents and IEBC Presiding Officers, clerks at Moi High School Kabartonjo Baringo North. He further gave the letter of appointment and oath of secrecy to the clerks, poll officials and Presiding Officers but not the Party agents. The oath was taken before Hon. Temu during training. The clerks, Presiding Officers and poll officials were people with integrity in the ward in which they applied. Mr. Collins Tallam was a Presiding Officer at Kipkolony, Barwesa. He was not a resident of Baringo North Constituency.

Julia Kandie was a resident of Kapseret in Eldoret whereas Meshack Kiptoo's affidavit shows he is a resident of Kabarnet Town. That it was not true that he had imposed some Presiding Officers at Koibaware and Lekepchun Polling Station in favour of the 3<sup>rd</sup> Respondent. He had recovered a total number by 3 rejected votes from Konoo Polling Station. There were two Forms 35A in respect to Lake Kamnorok Polling Station, one had an IEBC logo and the other did not show the serial number, these Forms 35A are in bundles whose serial numbers starts from Number 6. Form 33 shows the number of valid votes, and he gave a statement of the rejected votes for Lake Kamnorok and Koibaware Primary School. Though he did not annex the letter in his affidavit indeed he supplied Form 42 as ordered by the court. There was no overwriting to alter the number of votes of the candidates received. When from 35A of Muchukwo Primary School was shown to the 3<sup>rd</sup> Respondent was counter-signed other was supposed to be 001 but it was written 159. The carbon copy was counter-signed this is not a direct copy of the original. The original Forms had no signatures but the carbon copy had been signed. He confirmed some Form 35A did not bear the IEBC stamp, the alterations were not counter-signed and for Station 70 no agent signed since they were absent. For Station 122 the number of registered voters was not indicated yet there were votes cast. Form 35A for Station 129 the original had a stamp but carbon copy did not have. Station number 134, the original Form 35 A has no stamp; the total number of voters is not clear and in Station no 139 the Presiding Officer did not sign.

b. On cross- examination by Mr. Odhiambo for the 3<sup>rd</sup> Respondent, confirmed that the Presiding Officers were trained. Ballots were to be counted in bundles of 50 and then Form 33 was to be ticked for every 50<sup>th</sup> ballot then put together with the ballot papers as confirmation of the count, they are sealed then taken to the Returning Officer.

In reference to Form 35A for Muchukwo station number (016 1 of 1) he stated that there was an original and a carbon copy. Though it had a tear at the top which had the serial number the entries are the same in both the original and the copy. He had never left the Station when there was a blackout; there was alternative source of lighting using gas lamps. The power blackout did not affect the results. There was no unauthorized persons at the tallying center. The irregularities in results for Kabartonjo (051) led to a reduction on votes for the 3<sup>rd</sup> Respondent, however Form 35A shows a difference of 39 yet he won by 151 votes. This did not change the end results. The 3<sup>rd</sup> Respondent was declared the winner. Once Form 35A have been submitted to the Returning Officer he could not alter the results since they are final.

c. On cross-examination by Mr. Kanjama he confirmed that the appointed Presiding Officers that had been trained on the law of Elections and electoral procedures. Applicants had to come from the

region, but in other circumstances he had to outsource where the applicants did not meet the qualifications. He would not employ people who had been involved in politics. He did not allude with the 3<sup>rd</sup> Respondent in the Elections. Training of the officers was conducted 3 days prior to the General Elections. The list of those who had qualified was posted at the tallying center therefore the candidates, agents and Members of the public could access the same.

He testified that there was no complaint in regard with his staff. Statements of rejected ballot declaration booklet were to be filed after the counting process. The result declaration booklet had 6 Forms, one original and 5 carbon copy; the carbon copies had conservative serial numbers. Two booklets were issued for each Election. On cases where the carbon was not clear then it would be entered manually. Then the Presiding Officer will counter-sign Form 35A then give to the agents and the declared results were the true reflection of the people votes in Baringo North.

A copy of Lake Kamnorok Polling Station result was scanned from the carbon copy which did not have the IEBC logo and anti-copy features it was detached from the anti-copy features. There was no variation of the votes of the candidates. There was no difference between the results in the KIEMS and Form 35A's. The only difference that was there arose when transferring entries from Kabartonjo which was entered by the ICT Officer in Form 35 B. There was no illegal and invalid Form 35A's as alleged by the Petitioner, and the transposition error did not change the overall outcome of the results, that Form 35A had different serial numbers. In reference to paragraph 80(8) he stated that the 3<sup>rd</sup> Respondent won in the Election. Results started streaming in at 6.30 pm in the evening and not 10.00 pm on 8/8/17 as alleged by the Petitioner. All agents who were present at the tallying center were given from 35A. However Joshua Komen while streaming in the results he kept saying "hiyo ni tofauti" but when he was asked to show his set of results he said his agents were not tallying the results. It is only Komen who kept complaining about the results. The results in the Form 35B was declared in the presence of the candidates, agents and observers. The chief agent of the Petitioner Mr. Komen did not sign the results.

In response to the allegation on fraud and Constitutional coup he said no Formal complaint has been made to the IEBC. Further he testified that there was no secrecy, voting was done in an open hall. In the presence of the clerks, observers, staff, CID and intelligence service. He conducted a free and fair Elections and the counting did not affect the quantitative and qualitative results. He asked the court to dismiss the Petition.

d) On re-examination by Mr. Magare he testified that the valid votes counted were the total votes for candidates and the rejected votes. The results declared at Muchukwo Polling Station were correct. Further he confirmed that he trained the Presiding Officers on how to handle the Form 33 which were to be put in the ballot box. He testified that he never conspired with the 3<sup>rd</sup> Respondent to give him more votes.

#### **R1W3 Vincent Chesire Kibet. .**

a) On cross-examination by Mr. Ogolla for the Petitioner he testified that he come from Kaptum Sub-location in Ossen. He was the Presiding Officer at Lake Kamnorok Primary School Polling Station. He prepared Form 35A. However it did not have the IEBC logo, serial number and the anti-copy features. There were 21 rejected votes prepared on 8.8.17in the Station which statement was handed over to the Returning Officer. On cross-examination by Mr. Odhiambo for the 3<sup>rd</sup> Respondent he testified that the upper part of Form 35A got detached from the booklet. The scanned copy was annexed in the 2<sup>nd</sup> Respondent replying affidavit. The Petitioner's agent Daudi Sirma signed the Forms. There was no issue with the rejected votes recorded.

b) On re-examination by Mr. Magare he gave his I.D number as 26786859, a resident of Ossen location within Kabartonjo Division.

**R1W4 Kandie Julia Chesire**, a teacher by profession. She swore an affidavit on 18/9/17

a) On cross-examination by Mr. Ogolla for the Petitioner she testified that she resides at Kapseret within Eldoret town. She was the Presiding Officer in Koibaware Primary School Polling Station. In response to Form 35A she stated that she never filled the number of registered voters, and she did not fill the statement of rejected votes. She had filled a Form in the supplementary affidavit by the 2<sup>nd</sup> Respondent. The rejected ballot is to be placed inside the ballot box for National Assembly. When Form 35A is detached, a counter foil remains which has a serial number. However the one supplied to the candidates did not have serial numbers. Form 35A for this Station did not have an IEBC logo.

b) On cross-examination by Mr. Odhiambo for 3<sup>rd</sup> Respondent he confirmed that the original Form 35A did not have part of the letter head which contains the IEBC logo and serial number. The carbon copy had serial number NA001504 whereas the counter-foil NA001501 were within the range of the serial numbers. All agents signed Forms 35A indicating the number of registered voters which was in the KIEMS. Each time a voter was identified by the KIEMS the number reduced. At the end of the voting you could identify the number of people who had voted could be identified. The Form 35A showed PDR had agent by the name Festus Chepkonga who signed the Form without coercion.

c) On re-examination by Mr. Magare she testified that the stray ballot belonged to the MCA seat, and all the agents agreed to that. She never received any objection from Party agents and finally she is from Koroto location Kabartonjo division Kabartonjo location Baringo. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents closed their case.

### **3<sup>rd</sup> Respondent's Evidence**

Mr. Kanjama counsel for the 3<sup>rd</sup> Respondent gave an opening statement as follows.

a) That the 3<sup>rd</sup> Respondent's response was filed on 18/9/17. His response was supported by three affidavits and 2 supplementary affidavits which filed pursuant to the leave of the court. The Petition was not challenging the actual Forms on number of votes cast and marked at the Polling Station in Form 35A's. The Petitioner was not contesting the actual figures of the Elections carried out in the transparent way and the people of Baringo North, agents, media, IEBC officials all played their roles and the outcome was accepted by all stakeholders in the Constituency level save for the Petitioner's chief agent who challenged the results with no documentary evidence. Further counsel stated that the Petition had generalized claims and it lacked particularization and urged the court to make an appropriate conclusion.

b) R1W1 William Cheptumo Kipkoror the 3<sup>rd</sup> Respondent herein confirmed he filed his response to the petition on 18/9/17.

On cross examination by Mr. Ogolla he confirmed that to have read the Petition and the affidavit in support. He testified that it was the duty of the Presiding Officer to fill Form 35A. The entries made in Form 35B were different from those in Form 35A in response to paragraph 7 of this Affidavit. There were alterations and the entries were not clear. The number of registered voters was not shown for Koibaware Polling Station. There were cancellations, no stamping overwriting of Form 35A in regard to Station no 114, 128, 126 and 122. He testified that votes are indicated in Form 33 for verification purpose and he could not verify what was contained in Form 33 and Form 35A.

c) On cross-examination by Mr. Tororei for 1<sup>st</sup> and 2<sup>nd</sup> Respondent he stated that in regard to the transposition error in Form 35A and Form 35B for Kabartonjo Primary School Polling Station he lost 80 votes, however it did not affect the results for national assembly he was still ahead with 39 votes. He stated that results from Muchukwo and Koroto are not contested since they were not pleaded in the Petition. He confirmed that all the Stations had the total number of registered voters. All Forms 35A in regard to 173 Polling Stations in Baringo North were supplied together with

Form 35B. The results declared were a true reflection of votes general as shown in the Forms. The results were similar to the results sent to him by his agents. The results in the portal were Primary results from the Polling Station to the national tallying center at Nairobi. The transmission was done as required by law at the need of the Polling and counting of votes.

d) On cross-examination by Mr. Magare he confirmed that he had been a Member of Parliament for 2 terms. It was the duty of the Presiding Officer to sign. He had Party agents in all Stations. There was no discrepancy in the number of votes gazetted and those declared in Form 35A. Furthermore that Lekepchun is within Barwesa and which is part of Kabartonjo. The shorter route is through the hills which is passable during rainy seasons. He stated that IEBC conducted the Election in a free and fair Election.

e) On cross-examination he confirmed he won at Lekepchum Station free and fairly. The parties agents had a duty to cross-check and see that what had been filed by the Presiding Officer tallied with the results recorded at each Polling Station.

**R3W2 Almaida Symon Ayabei** confirmed that there were gas lamps and his statement could be adopted as evidence.

a) He was the 3<sup>rd</sup> Respondent's chief agent at the tallying center. Results were being announced by the Returning Officer immediately Forms 35A were received this was done through a public address system with observers and agent taking the front seats. He confirmed that he heard the Petitioner's chief agent raise a complaint but could not remember which complaint in particular.

b) On cross-examination he testified that the Presiding Officer gave them a notebook, however the Petitioner's chief agent after declaration of results by the Presiding Officer did not sign the results. It is not true that the Returning Officer left the room when the blackout occurred and come later on. The laptops were being used when there was a power blackout. Tallying of the results was from the 8<sup>th</sup> to 10<sup>th</sup> August 2017.

c) On cross-examination by Mr. Magare for the 1<sup>st</sup> and the 2<sup>nd</sup> Respondent he testified that the Petitioner was leading by 169 votes. Results were announced for each candidate. In regard to Form 35B the chief agent for the Petitioner raised a complaint at the close of the tallying center but the portal had not shown the winner.

d) On re-examination by Mr. Kanjama he confirmed that he had an appointment letter, and he carried out his duty his duties diligently. The power blackout lasted 30 minutes within the entire School. The Petitioner's chief agent, raised a complaint about the results at the tallying center but sat down when asked to produce results.

**2. R3W3 Joshua Kipsang Kiptui..** He was jubilee agent at Kipkolony Primary School and he is aware Fabrigas Rotich was an agent for the Petitioner.

a) On cross-examination by Mr. Magare he testified that he knew Daudi Bargoge as a resident of Kibegan village. He was trained and given documents. Bargoge went to cast his vote at Kipkolony; there were three rejected votes and 2 blank ballot papers at the counting process.

b) On cross-examination by Mr. Tororei for 1<sup>st</sup> and 2<sup>nd</sup> Respondent he arrived at the Polling Station at 6.00 am and identified himself as required. Fabrigas was the PDR agent. No voter was allowed within the Polling Station after counting votes.

**R3W4 Gideon Barkachar.**

a. On cross-examination by Mr. Ogolla for the Petitioner he testified he had documents to verify he was the agent but did not avail the documents to court. He signed Form 35A and appended his

name. No candidate scored 6 votes. However Form 35B for Kabartonjo Station show one candidate had 6 votes.

b. On cross-examination by Mr. Magare confirmed that there was an error in indicating the 3<sup>rd</sup> Respondent had garnered 6 votes. Mr. Peter Kimwocho was the PDR agent and all agents signed.

The Petitioner through his counsel Mr. Ogolla indicates that he had abandoned his application for scrutiny. He asked the court to grant an order that the ballot boxes be opened for the purpose of Form 33 and 41.

a. In response to the Petitioner's application Mr. Magare for the 3<sup>rd</sup> Respondent urged the court to rely on Rule 29 and specifically sub-rule 4 which states rules on scrutiny and the purpose for establishing the votes cast. All ballot boxes are required to be sealed and can only be accessed under scrutiny by rule 29 and section 82 of the Election Act; and since the Petitioner had abandoned his application for scrutiny the request for opening ballot boxes automatically fails.

b. The Petitioner had to specify with evidence the purpose for scrutiny, which he failed to demonstrate. He has not shown which prejudice he shall suffer. The court gave a clear ruling that the documents were only to be used for the purpose of scrutiny. He asked the court to allow the matter to proceed to submissions on the Petition.

In response to the Petitioner's application

a. Mr. Magare for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents urged the court that Form 33 and 41 fall within regulation 67 and 68 of the regulations regarding scrutiny. One has to show he required the said documents from his Petition which is not the case here. During giving oral evidence it was adduced that there are 173 Polling Stations, the Petitioner could have requested for scrutiny at the Polling Station.

b. The Petitioner was using the backdoor to proceed with scrutiny through the Forms. The purpose for scrutiny had been outlined in section 82(a) and (7) of the Act. Further urged that parties have closed their case and there is no dispute on the figures as recorded in Form 35A. It would serve no purpose since the documents cannot be used in cross-examination as parties have closed their cases. Form 35A contains data that is found in Form 33, yet contents of Form 35A are not disputed by the Petitioner. Even if the basis could have been laid by the Petitioner it has to be a Station by Station basis.

In response to the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Respondents the Petitioner's counsel urged that

a. The court to rely on its ruling where it directed the Forms 41 and 33 be supplied to the Petitioner. The court considered the rules and regulations in granting its orders, the prayer for supply of documents was completely distinct from scrutiny of votes. The only reason the Forms 41 and 33 were not supplied is because the exercise of opening of the ballot boxes would be untidy.

b. The supply of Forms 41 and 33 had been pleaded in the Petition. The request for the documents is in compliance with the court orders that indeed the raw data in Form 33 is necessary even if the contents of Form 35A is not infringed; this was not tied to scrutiny. Finally no prejudice shall be suffered by anybody if the Form 33 and 41 were supplied to the parties and the court.

The court delivered a ruling 29/1/2018 in the presence of the counsel as follows:

### **Orders**

1) Accordingly, for the reasons set out above, the Court declines the Petitioner's prayer for the opening of the ballot boxes to retrieve the Forms 41 and 33 for the August 8, 2017 Election at the

Baringo North Constituency for purposes of the hearing and determination of the Petition herein.

2) Needless to say, for any other intendment the Petitioner and any other person are entitled to apply, in proceedings in that behalf, for the supply of these and other Election materials pursuant to Regulation 93 of the Election General Regulations, 2011.

3) Costs in the Cause.

### **Submissions**

#### **The Petitioner's submissions**

The Petitioner urged the court to rely on Article 86 of the Constitution Mandates the 1<sup>st</sup> Respondent to ensure that; the vetting system used is simple, accurate verifiable, secure, accountable and transparent; this votes cast should be counted, tabulated and results announced promptly by the presiding officer at each Polling Station. The results, the results are openly and accurately collated and promptly announced by the returning officer and electoral malpractices are put in place including the safe keeping of electoral materials.

#### **Interlocutory Applications**

He also urged the court to rely on the ruling delivered of the amended Notice of Motion dated 4<sup>th</sup> October 2017 where he was seeking among others for supply of the originals and copies of Form 33 supply of the rejected ballot papers in respect of the member of National Assembly, Baringo North Constituency, original Forms 35A and 35B leave to file supplementary affidavits and any relevant documents and an order for leave to file a further affidavit arising out of the documents supplied by the Respondents.

The court issued several orders amongst them the Petitioner shall within 7 days supply further and better particulars in relation to the petition without amending directly and file further affidavits necessary to amplify the case in the Petition and also supply to the parties of Forms 33 and 41 and Polling Station diaries by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

The Petitioner had also filed an application dated 13<sup>th</sup> November 2017 seeking to compel the 1<sup>st</sup> Respondent and 2<sup>nd</sup> Respondent himself to show course why they should not be committed to civil fail. This application was dismissed and the 3<sup>rd</sup> Respondents application was allowed to the extent that Form 42 documents and copies of Polling Station diaries are not evidence in court for use in the petition within the meaning of Rule 12(12) of the Election (parliamentary and county Elections) Petition rules, 2017. However that information could be used in cross-examination of any witness called by both parties before the court.

The counsel Mr. Ogolla urged the court to look at the certificate of Nomination issued by the Party of Development and Reforms (PDR) which was issued to the Petitioner. Also Forms 35A which had results of the Polling centers, in particular that Koibaware Primary School and Lake Kamnorok Primary School did not have the anti-copy security features and they did not have the IEBC logo. In addition further Polling Stations were listed in the better particulars that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had failed to reconcile the results from the Polling Stations and it was impossible to tell which results were the true reflection of the vetting.

The Form 35As used in the Petition were supplied by IEBC. He urged the court to consider his complaint on the irregularities in Form 35A's and not the votes also those Form 35C and a copy of Form 35A for Kabartonjo Primary School Polling Station.

#### **The Power blackout and transmission of results.**

It is their submission that the power blackout affected the display of the results at the tallying center. This

was a deliberate action of the Respondents to interfere with the electronic transmission of results which was used to rig Elections. Before electricity blackout he had lead over 169 votes and when power came back the 3<sup>rd</sup> Respondent had led by 39 votes. It is his contention that Form 35As, 35B and 42 were tailored to reflect the declared results which is different from the Primary data. That his agent Mr. Bargoge at Kipkolony Polling Station was denied access to the statutory Forms during the voting, counting, tallying and declaration of results he was also thrown out of the Polling Station by Paul Yatich. He does not agree with the 1<sup>st</sup> and 2<sup>nd</sup> Respondents claim that Fabrigas was the agent. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents did not have any letter of appointment to show the contrary.

### **Aid to the elderly**

Further that the presiding officer at Lekepchun Primary School assisted persons to vote without the participation of the party agents. Mr. Sammy Bargoge testified that there was no rejected votes and it did not have his signature.

The court *in Ahmed Abdulullahi Mohamad and Anr v. Mohamed Addi Mohamed and 2 others* [2018] eKLR, the court held that “in order to confirm that a voter was assisted in voting and in accordance with the law, the person assisting the voter is required to fill Form 32 and execute it before the presiding officer”

The above is laid down clearly so that the electoral process is meant to comply with the constitutional requirement that an Election should be transparent accountable, verifiable and credible. That sammy’s affidavit and evidence reveals votes were assisted and no evidence in the nature of Form 32 was given in rebuttal.

He urged the court that an Election petition involved the effect of the right of the Petitioner to a further Election and the right of the voters to non-interference with the already cast votes. *In Karanja Kabage v. Joseph Kiuna Kariambegu Ng’ang’a and 2 others* the High Court held that an Election is an elaborate process and the court is bound to examine the entire process up to the declaration of results.

### **Specificity**

On the particularity and specificity counsel urged the court that the Petitioner disputed the results in all the Polling Station and he filed a detailed statement of particulars citing that illegalities and irregularities complained of.

### **Burden of proof**

The burden of proof in Election petitions has been set out in *Raila Odinga v. IEBC and 3 ors* Supreme Court of Kenya Election Petition No. 1 of 2017 where it was held that the Petitioner has the burden of proof in Election matter. The Petitioner has proved non-compliance with. Articles 1, 2, 4,10,38,81,82,86,88, and 249 of the constitution of Kenya and the Election Act. It was their submission that in several Polling Stations the materials were altered, there was no countersigning several Forms 35A were not stamped, they did not contain counterfeit features and they did not have statement of rejected votes they have proved these allegations through the documents produced. It is not until the Petitioner fails to prove that the burden shifts to the Respondents.

Further counsel urged the court to rely on Justice Kimaru’s decision in *William Kabogo Gitau v. George Thuo & 2 others* where the court observed that it should look at the entire electoral systems and processes rather than results alone in dealing with malpractices. Also in *Benard Shivali Wasaka v. Boni Khalwale* Hon. Justice Lenaola held that where there was no way of authentication an Election by use of statutory documents, the results were irrelevant because the whole process was as crucial as the final results” it is their submission that the electoral process was flouted. These irregularities affected results to the extent that IEBC cannot accurately and verifiably determine what results were got by the Petitioner and 3<sup>rd</sup> Respondent.

## **Non-compliance of the law, irregularities in the counting and tabulation**

Article 86(a-d) of the constitution provides that the IEBC should ensure the system is simple, accurate, votes are counted promptly e.t.c. The anomalies in Form 35As such as alterations, overwritings were many.

- a. There were cases of multiple versions of rejected votes in Barwessa ward, Kabartonjo, Saimo / Kipseraman, Simo/Soi, Bartabwa wards which amounted to 143. This affected the final results.
- b. Form 35 at Lake Kamnorok – Barwessa ward did not have anti-copy feature and
- c. Stations with Form 35 not stamped.

The included Konoo, Kapluk, Mormorio, Kasiber Primary, AIC Kabartonjo Primary, Loruk Health center, Sitek ECD

- d. Stations with no carbon copy of Form 35A. They included Kapkole Primary, Kipkaren, Kabargobe; Sutiechun, Kalabata Primary in Bartabwa ward.
- e. Stations with no number of registered voters captured they included; Ossen Primary, Koibaware Primary and Karimo nursery.
- f. Stations with evident material alterations. They included Torolokwonin, Tiriondonin, Kaptum Primary/ Mormorio, Chepkesin Primary, Sesoi Primary and Kaptum Primary 2.
- g. Stations with Polling counts captured as all zero Kapkarani in Barwesa ward.
- h. Stations with no agents signing Form 35A. they include Torolokwonin and Kipkogom
- i. Stations with Form 35 not signed by the Presiding Officer Kalabata Primary in Bartabwa
- j. Stations with Form 35 not signed by the Deputy Presiding Officer – Kapturo Primary in Bartabwa
- k. Stations with no result for the Petitioner Muchukwo in Barwesa ward.

In relation to the above the Petitioner urged the court to find that this was a deliberate act by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to put in inaccurate and false entries in the statutory Forms which gave the 3<sup>rd</sup> Respondent an advantage. They contend that the total number of votes cast as shown in the Forms 35As are 22,432 but the 1<sup>st</sup> and 2<sup>nd</sup> Respondents declared 34,813 votes cast for the position of member of National Assembly in Baringo North Constituency. The Forms 35 are the Primary sources of information on the expression of the people but when they have many anomalies then it fails to serve their cardinal purpose as the expression of the will of the people.

The difference in the Petitioner's 1 and 3<sup>rd</sup> Respondents' votes in Koibaware is 70 votes and at Kamnorok is 75 votes. However in the finally tally in Form 33B the difference is 39. It is their submission that such a gap cannot be ascertained

The counsel also submitted that failure to sign and stamp the statutory forms would not authenticate the results. As held in *Manson Oyungo Nyamweya v. James Omingo Magara and 2 others* [2009] eKLR

*“There was sufficient evidence that some presiding officers failed to sign and stamp Forms 16A. in fact it is an Election offence for a presiding officer, without a reasonable cause, to fail and /or refuse to sign and required of him under the said regulation”*

The results from Kalabata Primary School and Kapturo Primary School and other Form 35A could not suffice since they had no presiding officers signature as was held in the appeal case of the above decision.

The same sentiments were held in ***Abdikhaim Osman Mohammed and Anor. V. IEBC and 2 others*** [2014] eKLR where the court of Appeal held:-

*“The learned judge estimated the affected votes to have been about 1000. That is clearly wrong because the results in respect of twelve Forms 35 which had neither the seal of the 2<sup>nd</sup> Respondent nor the Presiding Officer’s signatures should have been excluded on the ground that their authenticity could not be vouchsafed”*

Further Regulation 79 of the Elections (General) Regulations provides that the presiding officer, the candidate or agents shall sign the declaration in respect of Elections. However where a candidate or agent refuses to sign then the Presiding Officer shall give the reason for the refusal. It is their submission that the above excludes the candidate or agent but does not exclude the presiding officer. This is because it is an Election offence under Section 6(j) of the Election offences Act. That the signing and stamping of these Forms given it credence and makes the results accountable and verifiable.

In Bungoma Election Petition No. 4 of 2013 between ***John Murumba Chikati v. IEBC and 2 others.*** The court elaborated at length the importance of Forms 35.

*“it is a statutory tool which results are entered as declared at the Polling Station as required under Regulation 79(2)(b) of the Elections (general) Regulations.*

*It carries the requisite legal force and so the part in the Form requiring statutory comments by the presiding officer embodies a statutory requirement. The comments serve a useful purpose which include;*

- i) To give information on the general conduct of Elections in the particular Polling Station*
- ii) Helps IEBC, the court and the public to observe from the recorded comments what transpired in that Election in the particular Polling Station*
- iii) Helps the court IEBC and public to assess the impact of any impropriety recorded especially when questions on the integrity of the electoral process are raised.”*

### **Rejected votes and Forms 35**

Further it is their contention that Elections should be carried out in strict adherence of Article 81(e) and 86 whereby Elections should not have irregularities. It is shown the irregularities are of such a magnitude that they affected the Election result, then it stands to be invalidated.

Though the procedural administrative irregularities and other errors occasioned by human imperfection are not enough to vitiate an Election. Where an Election is concluded on a manner as demonstrably violates the principles of the constitution and the law, such an Election stands to be invalidated. These was sentiment held in ***Gatirau Peter Munya v. Dickson Mwenda Githinji and 2 other*** [2014]eKLR

In addition to this they submitted that Form 33 and Form 42 were requisite Forms set out in the Elections Act which had to reflect the results in Form 35 and ensure the results were accurate. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents supplied the court with copies of Forms 42 for comparison with Form 35. The information in Form 42 was to be contained in Form 35. The results reflected as this 2 Forms on rejected votes is not acceptable to the Petitioner and it was upon the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to prove the contrary. This is because all acts by the public bodies are pressured to be done rightly and regularly.

The 1<sup>st</sup> and 2<sup>nd</sup> Respondents failed to produce Form 42s in all Polling Stations. The Form 35 were

produced in court showed rejected votes. However Form 42s in respect of the following Stations were not produced;

- a) Kasirma (Station no.017)
- b) Kapluk (Station no.18)
- c) Kipkolony (Station. no. 24)
- d) Koiser (Station. 26)
- e) Turuturu (Station no.038)
- f) Kiptaiwa (Station no.041)
- g) Torolokwonin (Station no.049)
- h) Kaptumin (Station no.049)
- i) Kabartonjo Priamary School(Station no.052)
- j) Kipkiamo (Station no.048)
- k) Termet Primary School (Station no.053)
- l) Kaptum 1 (Station no.054)
- m) Kaptum 2 (Station no.054)
- n) Ossen (Station no.055)
- o) Tiloi (Station no.056)

The counsel submitted that there was no rejected votes on these Stations and the number of rejected votes was deliberately inserted on those Forms 35A to favour the 3<sup>rd</sup> Respondent.

Another irregularity is in Muchukwo Primary School Station number (016). Form 35A shows the Petitioner did not get any votes whereas the 3<sup>rd</sup> Respondent garnered 159 votes. In Form 35B the Petitioner had 199 votes. This was not possible to ascertain the number of registered voters since Form 35A shows 160 votes while Form 35B indicates 384 valid votes plus 3 rejected. The entries in the original Form 35 is not the same as the entries in the Form attached in the 1<sup>st</sup> Respondents response.

On the other hand there is no difference in figures at Kapkarani Polling Station in Form 35A and 35B. The Form 35A for Lake Kamnorok Primary School does not have a logo of the 1<sup>st</sup> Respondent, no anti-copy feature, no serialization yet the same Form was used in tabulation of results. Another discrepancy was shown in Form 35B for Ossen Polling Station (055) which indicate 287 votes whereas Form 35A shows zero(0) entry as result of the member of National Assembly Baringo North Constituency. This thus shows there was non-compliance with the law which affected the validity of the results. In ***William Kabogo Gitau v. Gerorge Thuo and 2 others [2010]*** eKLR Justice Kimaru set out the principles on which qualitative approach operates, It held that: *“the court should look more unto the effect of malpractices upon the systems and processes employed in the conduct of the Elections. The number of votes by which the candidate won will not be the issues for it is the integrity of the process which has been fundamentally entered by the electoral malpractices and any malpractice which seriously impeach the process so also impeach the results coming from that process.”*

The same upholding was held in **Besigye v. Museveni Election petition no. 1 of 2001** where the court held “*the expression non-compliance affected the results of the Election in a substantial manner: It can only mean that the votes candidate obtained would have been different in a substantial manner, if it were not for the non-compliance substantially.*”

Also in **Joho v. Nyange** (2008) eKLR (EP) 500 where the court quoted the case in **Morgan v. Simpson [1974] 3ALL (ER) 722** where it was stated that:

*“Collating all these cases together, I suggest that the law can be stated in these propositions (1) if the Election was conducted so badly that it was not substantially in accordance with the law as to Elections, the Election is vitiated, irrespective of whether the result is affected or not (2) if the Election was so conducted that it was substantially in accordance with the law as to Elections. It is not vitiated by a breach of the rules or a mistake at the polls provided that it did not affect the result of the Election. (3) But, even though the Election was conducted substantially in accordance with the law as to Elections, nevertheless if there was a breach of the rules or mistake at the polls and it did affect the result then the Election is vitiated.”*

It is their submission that any Election that does not comply with the constitutional principles is invalid and if it also does not comply with written laws and regulations it will be invalid if the effect of the non-compliance affects the results. The case in **Moses Masika Wetangula v. Musikari Nazi Kombo and 2 Ors** clearly elaborates Section 83 of the Elections Act. Whereby the court cannot appear to condone illegality in the Election process and would therefore investigate any alleged breach of the law since section 83 of the Elections Act empowers the Election court to declare an Election to be valid or invalid.

Further based on the averments in the affidavit of the Petitioner and his witnesses. It is evident that the results announced by the returning officer were not openly and accurately collated. There is a big variance in the results as tabulated in Forms 35A, 35B and Form 42 which were filed in court and the results displayed in the IEBC main public portal. Counsel urged the court to rely on the **Raila case** in rendering its final decision. “*whereby the emerging principle regarding the initiation of claims by way of Election petitions is that all proof should commence from the foundation of the physical ascertainment of voting records*”

In addition to the above the Petitioner submitted that failure of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to provide Form 33 even after the court had so directed violated the rights of the Petitioner under the constitution. The entries in Form 35A and 41 would only be verified by the entries made in Forms 33. That also Forms 41 was not supplied for some of the Polling Stations. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent did not offer any explanation as to why the said Forms were not supplied and no Polling Station offers swore an affidavit to that effect.

On whether there was a necessity for the Petitioner to file an affidavit in support of the better particulars the Petitioner urges the court to refer to its own ruling that a petition does not have to be supported by an affidavit evidence. He urged the court to look at the irregularities and discrepancies contained in Forms 35A’s. Further that the Respondents did not cross examine the Petitioner on the better particulars and implication that they did not challenge its contents counsel humbly urged the court to grant the prayers sought us the petition.

### **The 1<sup>st</sup> and 2<sup>nd</sup> Respondent’s submissions**

#### **The law**

It is their submission that there are General Principle’s governing Elections and Election disputes. In order to realize the Principle of Sovereignty of the People which is in Article 1 of the Constitution, Article 81(e) of the constitution on the electoral system was expected to be free and fair free from violence and intimidation.

Article 88(1) of the Constitution establishes IEBC which is an independent body.

Further Article 86 of the Constitution gives principle on how voting should be carried out. This is to ensure the intention of the voters is put to effect. In ***Jackton Nyanungo Ranguma vs IEBC and 2 others*** (2018) eKLR Majanja J. held.

*“The burden of establishing the allegations of non-compliance with the Constitution and the law, electoral malpractice and misconduct which would result in the Election being declared invalid rests on the Petitioner. The court will not interfere with the results of the Elections unless it is established to the Required Standard of proof that such non-compliance with the constitution and the law. The irregularities and the electoral malpractices complained of render the said Elections invalid.*

### **Particularity**

The Petitioner is bound to plead his case with particularity and he is bound to prove the case it has pleaded through affidavits and testimony .In ***Arikala Narasa Reddy v. Venkata Ram Reddy Reddygari and Another***. Civil Appeals no. S 5710-5711 of 2012 [2014] 2 SCR where the court held that “*in absence of Pleadings, evidence if any, produced by the parties cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond it’s pleadings and parties are bound to take all necessary and material facts in support of the case set up by them*” Pleadings ensure each side is aware of the questions that are likely to be realized and have an opportunity to place the relevant evidence before it.

Also in ***Mahamud Muhumed Sirat v. Ali Hassan Abdirahman and two others***. Nairobi EP. No 15 of 2008 [2010] eKLR, the Petitioner in this case had made submissions and even adduced evidence in respect of matters not specifically not pleaded. Whereas in ***Nyanungo Ranguma (supra)*** the court found that the allegations were specific to a certain Polling Station where errors had been made. The same principle in Election petitions was held in ***Wavinya Ndeti and Another v. IEBC and 2 others*** [2018] eKLR where the court held that the Petitioner is bound by his pleadings and bound to prove the case he has pleaded and neither can he make a case outside the Pleadings. His affidavits and documents have to be consistent with, and support, the case he has pleaded.

### **Burden of Proof**

It is their submission that the burden of proof in Election Petition is on the Petitioner who has to set out by raising firm and credible evidence of the Public authorities departures from the Prescriptions of the laws. On the other hand its standard of proof should be above the balance of probability though not as high as beyond – reasonable – doubt as was held in ***Raila Odinga and others v. IEBC and 3 others SCK Petition No. 5 of*** [2013] eKLR.

Further the Petitioner was to shoulder the obligation to discharge the initial burden of proof before the Respondents were invited to bear the evidential burden. It is upon the Petitioner to prove that there has been non-compliance with the law, but that such failure of compliance did not affect the validity of the Election that is when the Respondents can bear the burden of proof. The Evidential burden is the obligation to show is called upon to do so, that there is sufficient evidence to raise an issue as to existence or non-existence of a fact in issue as held in ***Gatirau Peter Munya v. Dickson Mwenda Kithinji and 2 others SCK Petition. No. 2B of*** [2014] eKLR where the Petitioner alleged the number of votes cast exceeds the number of registered voters.

In regard to the validity of the statutory Forms in issue the court in ***Mercy Kirito Muteji v. Beatrice Nkatha Nyaga and 2 others*** [2013] eKLR the court said that Forms 33 was a candidate tally sheet which is filled during tallying. It has no requirement to be authenticated by signing or for subsequent use. In order to nullify Elections based on this failure the Petitioner has to prove that it was a deliberate act intended to subvert the democratic right of voters to a candidate of their choice.

The Petitioner had opted not to pursue the quantitative consent which is the discrepancy in the total votes in different Forms. Then the court was left with the qualitative aspect of the Election. In Elections, human mistakes can occur. In ***Opitz C. v. WrZersnewskyj*** [2012] 3 S.C.R 76 - The Petitioner in this case had

lost in the Federal Elections in Canada. He asked the court to disqualify several votes, on account of administrative mistakes. The court opined that there were many workers who were involved and many of who had no job experience, the short-time frame for hiring and training them it was inevitable that administrative mistakes will be made. If Elections can be annulled on such errors public confidence in the finality and legitimacy of the Election results will be eroded. The Petitioner has to show that the conduct of the Election was devoid of merits and so distorted as not to reflect the expression of the People's electoral intent as was held in **Peter Munya v. Dickson Mwenda Kithinji and 2 others** SCK Petition No 2B of [2014] eKLR. These sentiments are also held in **Jackson Nyarungo** (supra) and in **Moses Masika Wentangula v Musiraki Nazi Kombo and 2 others** [2014] the issue on qualitative test was held as follows;

*“The Returning Officer was to make Forms 35 to each candidate or agent, and he had to complete by hand several copies. In such situations errors are bound to have occurred. It could not prevent the Election being a true Election”.*

### **The Role of Party Agents and their Credibility.**

They urge the court to find that PW2 Joshua Komen and PW4 Sammy Barchobo were agents in the Elections. That Sammy Bargoge was not an agent as he only alleged, since his name was not in the Polling Station Diary .In the case of **Wavinya Ndeti** (supra) the court outlined the role of agents as provided in the Elections (General) Regulations:

- (a) An agent is required to make an oath of secrecy before he is allowed to attend a Polling Station- Regulation 5(5) and 62 (1)(c)
- (b) During voting an agent is to inspect the ballot papers for use at the Polling Station and to note the serial number therein before voting commences - Regulation 68(7)
- (c) He is to witness the process of Voter identification – Regulation 62(1)(c) and 69(1)(e)(i)
- (d) He is to witness the voting Process - Regulation 70(1)(b)
- (e) He is to witness the sealing of the Ballot Boxes - Regulation 67(1)(b)
- (f) He is to witness counting of votes Regulation 76
- (g) He is to sign the Election declaration firm - Regulation 79(2A)(b)
- (h) He is to collect a copy of the Declaration of the results - Regulation 79(2A)(c)
- (i) And also witness the Tallying of results from the Polling Station – Reg 82

The role of the Agent is further emphasized in **Bwana Mohamed Bwana v. Silvano Buko Bonaya and 2 others** [2013] eKLR and **Harry Okello Nadimo v. IEBC and 2 ors** [2013] eKLR. Therefore how an agent carries out his duty, conducts himself treats or is treated by the Polling officials is very important. The agents have to ensure the IEBC officials administer the Election in an impartial, neutral, efficient, accurate and accountable manner since they participate and observe the electoral process.

### **Forms 35**

The Petitioner alleged several Forms were not stamped. It is their submission that there is no requirement that Forms 35 have to be stamped. The only requirement is the signature of the Presiding officer and the agents of the Candidates as was held in **IEBC and Another v Stephen Mutinda Mule and 3 others** (2014) eKLR.

The Petitioner had also raised an issue on Forms 35A from Lake Kapnarok Primary School. Polling

Station and Koibaware Primary Polling Station which did not have Anti-Copy security features and the 1<sup>st</sup> Respondents logo. It is their submission that Vincent Chesire Kibet (R1W3) gave satisfactory evidence when he said the agents signed and scanned the Copy had the logo and anti-copy features. The Forms were serialized and the Carbon copies had the serial numbers and the 1<sup>st</sup> Respondent's logo. The Petitioner did not prove beyond reasonable doubt to create doubt on the invalidity of those Forms as was held in *Mercy Kirito* (supra) case.

On the rejected votes for Lekepchun Polling Station (no. 1 of 1) they urge the court to find that the Petitioner's agent signed the Polling Station diary to certify that the number of rejected ballot was 20. The Presiding Officer testified that Barchobo who was the Petitioner's agent signed. He, Barchobo did avail in court the Form 35A that he alleges he signed which did not have rejected votes. The signing of the Polling Station Diary was done in regards to confirmation of agents who witnessed the sealing of ballots. The officials did not have control on the number of rejected votes. The Petitioner through his counsel abandoned the application for Scrutiny. In *Wavinya Ndeti* (supra) held that, "*the application for scrutiny, if successful, was going to present the Petitioners with the opportunity to examine the copies of the results of each Polling Station in which the results of the Elections were in dispute. (Rule 29(8) of the Elections (Parliamentary and, county Elections) Petition Rules, 2017). The Petitioners were going to be presented with the opportunity to examine all the original Forms 37 in respect of the Polling Station that were in dispute. This opportunity to test the allegation of irregularities and breaches of electoral law was lost by the none –prosecution of the application for scrutiny. Did the Petitioner's fear that scrutiny could have confirmed the results declared in the Gubernatorial Election held on 8<sup>th</sup> August, 2017.*"

They urge the court to find that there was no mischief in the 3<sup>rd</sup> Respondent defeating the Petitioner. No Particulars of mischief had been pleaded.

### **Fracas and Harassment**

There was no fracas or harassment of the Petitioner's agents at Lekepchun Primary School Polling Station. No report was made to the presiding officer. It cannot be said that by assisting the elderly, there was harassment. The Petitioner did not call any person who was assisted to vote as a witness. If this was an Election offence than the Petitioner did not prove this allegation beyond reasonable doubt.

It is their further submission that the allegation in the signing of Forms, alterations and counter signing was not pleaded in the better particulars. The Stations are;

- (a) Muchukwo (076)- an allegation an overwriting on the carbon copy. Upon perusal the alterations were countersigned. There was no complaint by the agents.
- (b) Torokwonin (041). There was an alteration on Form 35A. There was no alterations upon perusal.
- (c) Tiriondonin (051) alteration of figures on Form 35A. Upon perusal there was no alteration and no complain made by the agents.
- (d) Kaptum primary 1 (054) there was an alteration of figures on Form 35A on perusal there was no change.
- (e) Kaptum primary 2 (054) there was an alteration on figure in Form 35A, Alteration on figure in Form 35A there was an overemphasis and not an alteration.
- (f) Mormorio (060) there was an alteration on figures in Form 35 A. There was no alteration, no results were affected.
- (g) Sesoi primary 126 there was no alteration of figures in Form 34 A. In court the witness stated it was an over emphasize.

(h) Kalabata Primary School 139 it was alleged that the presiding officer (P.O) did not sign. Upon perusal the P.O signed.

(i) Kapturo Primary School 141 P.O did not sign, upon perusal it is alleged that the P.O signed.

(j) Chepkesin. Primary 141 an alteration of figures in Form 35A. there was no material change.

(k) Kipkogom Primary 070 it was alleged that no agent signed but upon perusal it was indicated that the agents were absent.

The above claims are not in the Petition nor in any of the affidavits filed in support thereof. The better particulars only listed the Stations with no supporting affidavit to give factual basis. The statement on rejected votes was not to Form part of the record and thus it is not evidence. In *Wavinya Ndeti* (supra) the court held that the issue on Form 37C was not valid because did not include the information contained in Regulation 87 (2) cannot be raised of it was not one of the grounds in which the Petition was based.

### **Delay in transmitting results.**

Further there were no delays in transmitting results from Lekepchun Polling Station. The Station had the largest number of registered voters at 688 and the turnout was 83% which was equivalent to 545 voter turn out. The Form 35A produced at the tallying center was the one that had been filed by the presiding officer at the Polling Station.

The Petitioner alluded that there were irregularities at the tallying center. There was a power blackout but this did not affect transmission of results. There is no mandatory requirement that parliamentary Elections have to be electronically transmitted. Section 39 of the Act provides as follows;

*39(1) the commission shall determine, declare and publish the results of an Election immediately after the close of Polling.*

*(1A)The commission shall appoint Constituency returning officers to be responsible for*

*(i) Tallying, announcement and declaration, in the prescribed Form, of the final results from each Polling Station in a Constituency for the Election of a Member of the National Assembly and Members of the County Assembly.*

*(ii) Collating and announcing the results from each Polling Station in the Constituency for the Election of the President County Governor, Senator and County Women Representative to the National Assembly.*

*(iii) Submitting, in the prescribed Form, the collated results from the Election of the President to the National Tallying center and the collated results for the Election of the County Governor, Senator and County Women Representative to the National Assembly to the respective county Returning Officer.*

*(1B) The Commission shall appoint county returning officers to be responsible for tallying, announcement and declaration, in the prescribed Form, of final results from constituencies in the county for purposes of the Election of the county governor, senator and county women representative to the nation assembly.*

*(1C) For purposes of a presidential Election the commission shall.*

*a) Electronically transmit, in the prescribed Form, the tabulated results of an Election for the President from a Polling Station to the Constituency tallying center and to the National tallying center.*

b) Tally and verify the results received at the national tallying center; and

c) Publish the Polling result from an online public portal maintained by the commission.

In view of the above the 1<sup>st</sup> and 2<sup>nd</sup> Respondents submit that the issue on electronic transmission should fail since it is a requisite on presidential Elections only. Further the court in **Nyamungo Ranguma** (*supra*) held that:

*“A reading of section 39 (1c) of the Act shows that electronic transmission and publication of Polling result in a public portal is only a statutory requirement for the presidential Election. Further, except for voter registration and voter identification, voting, counting, tallying and transmission of results for the Election of the other elective posts including that of the Governor are mainly manual.”*

In addition to the above allegation the 2<sup>nd</sup> Respondent did not leave the tallying center since it was him who announced the results. He accurately tallied all the results from Baringo North Constituency upon which he declared the 3<sup>rd</sup> Respondent as the winner with 12,473 votes with the Petitioner having 12,343 votes. In his testimony he clarified as to why the public portal indicated the Petitioner to have had 12,374 while the 3<sup>rd</sup> Respondent had 12,413.

This difference in the results as indicated in the IEBC public portal and Form 35 accrued when transposing the results by the entry clerks who transmitted results for Kabartonjo Primary School Polling Station that moved the results one step to the right hence creating a minor transposing error that resulted as follows:

i) *In Form 35B, the Petitioner was erroneously indicated to have garnered 86 votes instead of 54 votes at Kabartonjo Primary School. Polling Station, 052- 1of 2, resulting in a tally increase of 32 votes.*

ii) *In the same Kabartonjo Primary School 052 2 – of 2, the 3<sup>rd</sup> Respondent garnered 86 votes but his tally was erroneously entered as 6 votes in the Form 35B representing a decrease of 80 votes.*

iii) *If the results in Form 35A in respect of the said Kabartonjo Primary School Polling Station is taken into account, then both sets of results shall tally.*

iv) *The results were not affected.*

The counsel urged that upon perusal of Forms 35A, some Forms 35A had also not been signed by other party agents. Regulation 79(6)(7) of the Elections (General) Regulations, 2012 provides that:

i) *“(6) the refusal of a candidate or an agent to sign a declaration Form under sub regulation (4) or for record the reasons for their refusal to sign as required under this regulation shall not by itself invalidate the results announced under sub-regulation 2(a)*

*(7)The absence of a candidate or an agent of the signing of a declaration Form or the announcement of results under sub-regulation (2) shall not by itself invalidate the results announced.”*

An omission by a party agent to sign Form 35A cannot be seen to be an irregularity that can invalidate results.

The 1<sup>st</sup> and 2<sup>nd</sup> Respondents urged that once the Petitioner abandoned his application for scrutiny, he left his case in abeyance. That further the irregularities claimed by the petition if any have not been proved and that the same would not have affected the results in any event. They urge the court to make a determination that the said Hon. William Cheptumo Kipkiror the 3<sup>rd</sup> Respondent was duly elected and the Election was valid. Finally that the court finds the Election was conducted in compliance with the law.

## The 3<sup>rd</sup> Respondents Submissions

The lead counsel for the 3<sup>rd</sup> Respondent Mr. Kanjama made an opening statement by urging the court to find that the Petitioner's evidence is so weak with many inconsistencies. The standard of proof on Election matters was above the balance of probabilities. The 3<sup>rd</sup> Respondent William Cheptumo Kipkiror was declared the winner thus the member of the National Assembly for Baringo North Constituency having garnered 12,413. The Petitioner became second with 12,374 votes whereas the other candidate were Sammy Chelimo (914votes), Stephen Chebor Kipkemei Kipkebut (749votes), Moses Melis Kwonyike (405 votes), Nelly Jepkonge Yatic (7,134 votes). He urged the court to consider the Respondents' evidence and their response to the petition. The court to consider the evidence of all the witnesses who testified especially Joshua Kipsang Kiptui (R3W3) who had testified that he knew Fabrigas Rotich and Daudi Chebet Bargoge. That Daudi Chebet Bargoge resided in a neighboring village and he was not an agent at Kipkolony Station. He only went to the said Station to vote then left. That the party agent for PDR at Kipkolony Polling Station was Fabrigas Rotich.

He framed the following issues for the court to make a determination:

- i) Whether the Election for the member of the National Assembly for Baringo North was conducted in accordance with the law.
- ii) Whether the instructions witnessed in the conduct of the Election for the member of the National Assembly vitiate the entire Election.
- iii) Who should bear the costs of the Petition. It is his submission that an Election court should consider an Election as a process that involves many players and each party must discharge the duty expected of him. In ***Gatirau Peter Munya v. Dickson Mwenda Kithinji and 2 others*** [2004] eKLR the court stated that it is not desirable for a Petitioner to plead 30 grounds for challenging an Election but only offered evidence for 3 claims. That every party in an Election needs to pull their own weight to ensure that the ideals in Article 86 are achieved. This can be achieved by having simple, accurate, verifiable, secure, accountable and transparent Elections. The Election belongs to everybody and it is therefore in everybody's collective interest, and in everybody's collective and solemn duty, to safeguard it.

## The burden of proof

The court has to consider who bears the burden of proof. Section 109 of the Evidence Act provides that it is he who alleges that must prove. The Supreme Court in ***Raila Odinga v. IEBC & 3 Others*** [2013] eKLR held that: *"where a party alleged non-compliance with the electoral law, the Petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the Elections. It is on that basis that the Respondent bears the burden of proving the contrary."*

The principle of standard of proof was elaborated by the Supreme Court in ***Raila Amollo Odinga v. IEBC & Others*** [2017] eKLR where it held:

*"In many other jurisdictions including ours, where no allegations of criminal or quasi – criminal nature are made in an Election petition, an "intermediate standard of proof", one beyond the ordinary civil litigation standard of proof on a "balance of probability", but below the criminal standard of beyond reasonable doubt" is applied. In such cases, this court stated in 2013 **Raila Odinga** case that the threshold of proof should in principle be above the balance of probability, though not as high as beyond reasonable doubt..."*

It is in view of the above that the Petitioner herein has to prove his case to warrant the invalidation of the results for the member of the National Assembly for Baringo North Constituency.

It is their submission that in adversarial legal system such as Kenya legal system, a party cannot be

allowed to travel beyond his pleadings in an attempt to prove his case.

The court of Appeal in **Joseph Amisi Omukanda v. IEBC & 2 Others** [2004] eKLR where complains with respect to errors in Forms 35 were not captured in the petition. The court had however considered each and every complaint so raised. The court of Appeal stated that “*even if the complaints about errors in Forms 35 had foundation in the petition, the errors would not, have vitiated the final results which the Election produced.*” Further the court at paragraph 20 stated “*Another important principle in Election petitions is that, the Petitioner is bound by his pleadings and bound to prove the case he has pleaded. He is not permitted to make a case outside the pleadings. His affidavits must be consistent with, and support, the case he has pleaded.*” These sentiments were also upheld in **Arikala Narasa Reddy v. Ventaka Ram Neddy Reddgari & Another**, civil Appeals No. 5710-5711 of 2012 2014] 2 others where the court opined that in the absence of pleadings, evidence if any, produced by the parties, cannot be considered.

The 3<sup>rd</sup> Respondent also cited the case by **Justice Majanja in Jacton Nyanungo Ranguma v. IEBC & 2 others** [2018] eKLR where he reaffirmed the position on burden of proof is that the Petitioner is bound to prove the case it has pleaded. Also in **Mahammed Muhamed Sirat v. Ali Hassan Abdirahman and 2 others** Nairobi Election petition No. 15 of 2008 [2010] eKLR the court held that a decision rendered by a court of law shall only be on the basis of the pleadings that have been filed by the party making the court for appropriate relief. In this case the Petitioner wanted the court to make decisions in respect of matters that were not specifically pleaded.

Therefore the court limited itself to what had been pleaded in the petition and supported by the testimony and other evidence.

In addition to this he urged the court to find that the only way a Petitioner could discharge the burden of proof is through his agents. This was advanced by Justice **Muchelule in Wavinya Ndeti & Another v. IEBC & 2 Others** [2008] eKLR where the court at paragraph 20 outlined the definition and the role of an agent.

Section 2 of the Elections Act defines an agent as a person duly appointed by a political party or an independent candidate for the purposes of an Election or referendum under the Act. Under section 30 of the Act, a political party may appoint one agent for its candidates at each Polling Station where a political party does not nominate an agent, a candidate nominated by a political party may appoint an agent of his choice. An independent candidate may appoint his own agent.

In **Bwana Mohamed Bwana v. Silvano Buko Boriaya & 2 others** [2013] eKLR it was stated that “the role of agent in a Polling Station is a legal requirement which must not be taken lightly. A vigilant Polling agent would detect some wrongful acts at a Polling Station. He could initiate a complaint at the Polling Station or tallying center within minimum delay. Providing the agents with Form 35 makes their work easier and results is like a blind mouse as he goes to the tallying center. The empowerment by the commission is critical to the work of the agent. An agent ceases to be of any use to his candidate or party if he lacks the tools.

In **Hentry Okello Nadumo IEBC & 2 others** [2013] eKLR it was observed that how an agent carries out his duty, conducts himself, treats, or is treated by the polling officials is important. An agent who accepts or acquiesces to an outcome but wishes to recount it must give plausible reasons for the change of heart where at the hearing an agent raises complaints about the conduct of an Election, he must be asked about the action taken by him or her to seek intervention when the issue arose. Then where the agent is guilty of inactions then it will be hard to explain the inaction

In furtherance of the role of the agents, the counsel urged the court that the agent has a right to cause the presiding officer to re-check and re-count the votes. The agent is supposed to keep a record/which may be used as evidence of all the happenings during the voting process. This complaint is done through the presiding officer or the security officer present at the Polling Station. This position was upheld by **Justice Mwongo in Geroje Aladwa Omwera v. Benson Mutira Kang'ara & 2 others** [2012] eKLR who

observed that “agents are the eyes and ears of a candidate at the Polling Station and tallying centers. They ensure strict compliance with procedures. It is for candidates and their agents to ensure their presence at such centres and Stations. This position was also stated in **Joho v. Nyange and Another** [2008] 3 eKLR (EP) by **Maraga, J.** as he then was when he emphasized the importance of a candidates agent was to be present in the counting hall to ensure that the counting exercise was properly carried out and all votes cast in favor of his principal was credited to him.

The role of an agent presupposes a certain level of confidence, ability to work together and mutuality of effort and purpose.

The Petitioner’s further particulars is neither here nor there. It was a strange pleading and he urged the court to disregard it. It was an opinion and an attempt to expand the scope of the petition. The particulars did not evaluated the results of any candidate. In **Joseph Amisi Omukanda v. IEBC & 2 Others** [2013] eKLR.

The court of Appeal upheld the decision made by Justice Chitembwe by affirming that the complaints with respect to errors in Form 35 were captured in the Petition and thus strictly spreading no evidence should therefore have been led in purported proof of what had been pleaded.

### **Form 35A**

The petition at paragraph 80 (a) faults the 1<sup>st</sup> and 2<sup>nd</sup> Respondents for the use of invalid Forms 35A in the conduct of the Elections. The affidavit of Joshua Kataron deponed that he was sent by the Petitioner to collect Forms 35A from the 3<sup>rd</sup> Respondent. It was the 2<sup>nd</sup> Respondent’s evidence in court that as the Constituency Returning Officer he supervised the presiding officers, the collection of Forms 35A and he confirmed that the Forms used in the Election were lawful Forms supplied by IEBC.

Further the Petitioner at paragraph 80 (a) of the petition averred that the Forms 35A from Koibaware and Lake Kamnorok Polling Station lacked IEBC logo and anti-copy security features. He did not put further evidence in support of the station diary. On the other hand the 2<sup>nd</sup> Respondent testified that the original Form 35A for Lake Kamnorok (015) had an IEBC logo and security features only that the part containing the logo and security features got detached from the Form 35A booklet when the 2<sup>nd</sup> Respondent produced the carbon copies of these Forms then it was conclusive evidence.

### **Difference of results between the public portal and those in Form 35B.**

It was the Petitioners claim at paragraph 80(b) that the figures displayed in the IEBC portal and Form 35B as votes garnered by both the Petitioner and 3<sup>rd</sup> Respondent differed. Evidence was adduced in court by Joseph Leboo Masindet the 2<sup>nd</sup> Respondent that there was a transposition error for the results of Kabartonjo Polling Station (052). If the said error was corrected then the 3<sup>rd</sup> Respondents win would increase from a margin of 39 votes to 141 votes. This error prejudiced Mr. William Cheptumo. In **Ledama Ole Kina v. Samuel Tunoi & 10 others** [2013] eKLR: **Justice Wendoh** stated that:

*“The Primary document which contains the correct data is Form 35 from which the results are transferred to the Constituency Form 36 and the last in line is county Form 36. Constituency Form 36 was availed and confirmed that the error had indeed been made during transposition of the results from Constituency Form 36 to county Form 36 and the same was corrected during audit. The error did not affect the final results as it was corrected”*

The same position was held in **Joseph Amisi** (Supra) where the court of Appeal upheld the sentiments in the judgment delivered by Justice Chitembwe that:

*“Section 83 of the Elections Act is meant to assist in retaining Election results if it is established to the satisfaction of the court that the non-compliance with the law was not so serious as to make the Election not to be in compliance with the constitution and the Election laws or on the*

*alternative where the non-compliance did not affect the result of the Election.”*

In ***Hassan Abdalla v. Abu Mohamed Abu Chiaba & Another*** [2013] eKLR. it was held that Forms 35A are the Primary documents used to record results in an Election and when their validity is not disputed they express the voters will in an Election.

Further in ***Kakuita Maimai Hamisi v. Peris Tobiko*** Nairobi Election Petition No. 5 of 2013 the court alleged that Form 35 records the total registered voters and if there is no issue regarding validity of Form 35s or accuracy of results recorded therein and there is no evidence to suggest that the Election had not been conducted in a free and fair manner, the Form 35s reflect the will of the electorate in choosing their political leaders as expressed in the ballot paper- therefore Form 36 is a secondary document and its validity or otherwise or any irregularities it might contain cannot change the results declared in Form 35s.

### **Signing of Forms 35A**

At paragraph 80(c) of the Petition, the Petitioner alleges that several Forms 35A were in the same handwriting an indication that they were filled by the same person. No evidence was adduced in support thereof nor was a handwriting expert availed in court.

Forms 35A with different serial numbers

The Petitioner at paragraph 80(d) of his petition alleged that Forms 35A that were supplied to his agents had different serial numbers from those in possession of by IEBC. Joshua Kataron in his affidavit alluded that the Forms he was issued had different serial numbers from those issued to the 3<sup>rd</sup> Respondent. This was clarified by the 2<sup>nd</sup> Respondent who testified that the result declaration Forms (Forms 35A) had a booklet per Polling Station, each booklet had 6 Forms 35A which were serialized consecutively. In ***Joseph Amisi (Supra)*** after the court had issued an order for re-count, the court stated that: “

*Forms 35 are not filled in duplicate but in counter parts the printing of the Forms 35 may not be on the same series whereby each Polling Station has a particular serial number for its Form 35. Forms 35 for a single Polling Station can be in different series. Each of the agents of the candidates is expected to ask for a copy of the Form 35. Several other copies are thereafter distributed with some put in the ballot boxes before sealing, a copy is plastered on the ballot box while the original is taken to the IEBC offices. Therefore what is important is the content of the Form 35 in relation to the results of each candidate and not the serial number or the cancellations or corrections at the upper part. If an agent of a candidate has evidence to the effect that the results were altered, then that can be a good ground for an order for recount. No such evidence was adduced before the court.”*

### **Results for Lekepchun Primary Polling Station**

In the petition at paragraph 80(f), it is alleged that this Station. Lekepchun had the highest number of rejected votes; the results from the Polling Station were received at the Tallying center late; fracas erupted and that the Petitioner’s agent were harassed and intimidated by the presiding officer. Mr. Sammy Barchobo who alleges to be the Petitioner’s agent at Lekepchun Polling Station in his evidence in court did not state which mischievous activities the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were involved. He further testified that the presiding officer assisted voters in the absence of the agents and that the Form 35A which he has signed had no rejected votes yet the one supplied had 20 rejected votes.

It is their submission that 2 independent candidates’ agents and a KANU agent signed the Forms 35A which indicated 20 rejected votes. Sammy Barchobo could have supplied the court with the other Form where he signed as an agent on Form that did not have any rejected vote.

### **Credibility of witness**

They urge the court to find that the credibility of Meshack Kiptoo Kangogo was wanting. He had told the court he could not converse in English yet he was capable of accurately translating questions put to him in

English and responding in Kiswahili. Thus was his effort to frustrate counsels cross-examination and that court had noted that the witness did not take serious the proceedings seriously. His evidence and affidavit on there being no rejected votes contradicted the claim in the petition that the number of rejected votes was high at Lekepchum Polling Station.

### **Scrutiny**

The Petitioner herein admitted that this suit was not about numbers and further his counsel indicated that he had abandoned the prayer for scrutiny and recount. The 2<sup>nd</sup> Respondent urge the court to find that the Petitioner had denied the court an opportunity of testing the veracity of his allegations on rejected votes as was held by Justice Mechelule in ***Wavinya Ndeti and another v. IEBC and 2 others*** (2018) eKLR . Also in ***Philip Mukwe Wasike v. James Lesweti and 2 others*** (2013) eKLR the court ordered that:

- a. *“To assist the court to investigate if the allegations of irregularities and breaches of the law complained of are valid*
- b. *Assist the court in determining the valid votes cast in favor of each candidate*
- c. *Assist the court to better understand the vital details of the electoral process and gain impressions on the integrity of the electoral process. The application for scrutiny if successful, was going to present the Petitioners with the opportunity To examine the copies of results of each Polling Station in which the results of the Elections were I dispute (rule 29 (8) of Elections (parliamentary and county Elections)*

### **Intimidations of the agents**

It is the 3<sup>rd</sup> Respondent’s submission that no agents were intimidated at the Polling Station. No particulars was supplied to the court in support of the allegation.

### **Assisting voters**

That on the allegation of the presiding officer assisting voters alone and substitution of Form 34A was not pleaded on the petition as alleged by Sammy Barchobo was outside the scope of the petition. In ***Jakton Runguma*** (supra) it was held that parties should not be allowed to plead outside their pleadings. Counsel asked the court to disregard any evidence adduced in support of the allegation.

### **Unstamped Form 35A**

It was the Petitioners claim at paragraph 97(g) that Form 35A from various Polling Stations in Saimo/ Soi war and Saimo Kipsaraman ward did not have the official IEBC stamp. They urge the court to rely on the evidence adduced by the Petitioner that he did not dispute entries made of Form 35A of the 173 Polling Stations of Baringo north Constituency, but his only dispute was that the carbon copies supplied to his agents were not stamped by IEBC.

In ***IEBC and another v. Stephen Mutinda Mule and 3 others*** [2014] eKLR the court of Appeal emphasized the requirement for stamping in regulation 69 which provides;

Before issuing a ballot paper to a voter, an Election official shall;

- a. *“Stamp the counterfoil of the ball paper on the face with the official mark of the commission, and*
- b. *Stamp the ballot paper at the back with an official mark of the commission. This implies that there is no stamping requirement in the case of the Form 35. All that is required with regard to Form 35 as provided for in the regulation 79 is the signature of the presiding officer and the agents of the candidates. Counsel urged the court to disallow the issue of stamping as alleged by the*

*Petitioner.”*

### **Voters being ejected from Polling Stations**

It is the Petitioner's allegation through the further affidavit of Daudi Bargoge that his agents were intimidate and harassed at Lekepchum Polling Station as pleaded in paragraph 80 (f) v. It was the Petitioner's burden to prove this allegation and not stating that the 1<sup>st</sup> Respondent required to call the security officer to testify.

In addition to this, the Petitioner's agent at Kipkolony Primary Polling Station was Fabregas Rotich who had signed Form 35A as well as the Polling Station diary.

Joshua Kiptui, the 3<sup>rd</sup> Respondent witnessed clearly testified and stated that David Bargoge was not an agent but a voter. The issue on agent ejection was dealt with in the case of Jakton Nyanungo (supra) where the court required evidence in reference to a specific Polling Station the names of the presiding officers who allegedly barred the Petitioner's agents from the Polling Stations.

### **Alleged secrecy of the tallying center**

The petition at paragraph 93 states that the activities at the tallying center was shrouded in secrecy and fraud. That there was a power blackout and when the same was restored the Petitioner who had been leading was now trailing. When the Petitioner's chief agent raise the complaint the Constituency Returning Office put him off. It was the evidence of Joshua Komen, the Petitioner's chief agent that the power blackout did not affect the tallying process which was being done of a battery powered laptops and in evidence he could not give the exact complaint he had put across to the Constituency returning officer. Further when the 3<sup>rd</sup> Respondents witness Almaida Symon Ayabei (R3W2) testified he confirmed to the court that Joshua Komen did not have any writing material which he could refer to when results were being announced.

### **The voter margin**

The margin of 39 votes which was captured in the Form 35B was made in bad faith. Indeed the 2<sup>nd</sup> Respondent explained how the transposition error had occurred in regards the Kabartonjo results.

If this was corrected then the right margin would be 150 votes. In **Joseph Arusi** (Supra) the court found alleged errors, cancellations and erasures had no effect on the final results. There was no evidence that that the third Respondent had benefited from the errors. In **Heron Meitemei v. Remanken Aramat and 2 others** [2013] eKLR, **Justice Anyara Emukile** observed that:

*“This is equally the case a Petitioner claims that the margin of the votes between him and the winning candidate is narrow. The court as still the duty of assess and ascertain whether the claim of the alleged loss of votes was proved. That is both the jurisdiction and discretion vested in the Election court.*

*So in the game of politics the expectation of every candidate is to defeat his opponent, hands down. The reality however is the win or loss. For the Petitioner to say that he expected to have the most votes at Stations where he thought he had the most influence whether by clan or otherwise is to cast a spell on the spirit and freedom of his electorate is those Stations. Such expectations kills and renders meaningless the freedom of chance and secrecy of the actual electoral process.”*

The supreme court in **Raila and 5 others vs. IEBC and 3 others** [2013] eKLR at page 203, the court stated as follows on rules that data relate. in the case of data –specific electoral requirements (such as these specified in article 138 (4) of the constitution for an outright with the presidential Election). The party bearing the legal burden of proof must discharge it beyond reasonable doubt. It this their submission that the vote of margin do not in any way take away the merit in the 3<sup>rd</sup> Respondents win.

## **Whether the infractions witnessed in the conduct of the Election vitiated the entire Election.**

The counsel urged the court to refer to section 83 of the Elections Act which provides:

*83 nullification of an Election.*

*(1)A court shall not declare an Election void for non-compliance with any written laws relating to the Election if it appears that;*

*a. The Election was conducted in accordance with the principals laid down in the constitution and that written law, and*

*b. The non-compliance did not substantially affect the result of the Election.*

The court is to recognize sanctity on the right of voters and not nullify Elections on trivial infraction. In **Wavinya Ndeti** case (supra) the court ruling on Section 83 of the Elections Act held that:

*“Section 83 of the Elections Act recognizes the sanctity of the right of the people to choose their political leaders and forbids the court from trivializing that right by nullifying an Election merely because errors and irregularities have been shown to have been committed, or that a provision of the law relating of Elections has not been complied with.*

*The errors and irregularities, or that the compliance with Election law, must be of such gravity that the integrity of the Election is materially compromised.”*

Also in **Gatirau Peter Munya** (supra) the Supreme Court held that:

*“It is clear to us that an Election should be conducted substantially in accordance with the principles of the constitution as set out in article 81 (e). Voting is to be conducted in accordance with the principles set out in article 86. The Elections Act and the regulations there under, constitute the substantive and procedural law for the conduct of Elections.*

*The counsel urged the court to find that the Elections for the position of the member of the national assembly was conducted in substantial compliance with the law, and in cases where the unexpected events occurred, explanations have been offered”*

### **Issues on costs.**

It is this submission that costs follow the event. Section 84 of the Election Act provides;

*“84 an Election court shall, at conclusion of an Election petition make an order specifying*

*a. The total amount of costs payable*

*b. The person by and to whom the costs shall be paid.”*

In Election cases, costs are awarded to the successful party unlike in civil cases where costs is at the discretion of the court. This was held by the court of Appeal in **Joseph Amisi** (supra) where the court emphasized section 84 of the Election Act as stated above and also rule 36 of the Election (Parliamentary and County Elections) Petition Rules 2013.

*“36 (1) the court shall, at the conclusion of an Election petition, make an order specifying*

*a. The total amount of costs payable; and*

*b. The persons by and to whom the costs shall be paid.*

When making an order under sub rule (1) the court may

- a. Disallow any costs which may, in the opinion of the court, have been caused by vexalicious conduct, unfounded allegations or unfounded objections , on the part of either the Petitioner or the Respondent, and
- b. Imposed the burden of payment on the party who has caused an unnecessary expense, whether such party is successful or not in order to discourage any such expense.”

Mr. Kanjama urged the court to find that the Petitioner has failed to discharge the burden of proof to the set standard thus the Petitioner to bear the costs of Ksh. 20 million and a certification of two counsels be issued. Mr. Kanjama urged the court to rely on **Peter Odima Khasamule v. IEBC and 2 others** [2018] eKLR where the court awarded costs in the sum of Ksh. 12 million.

In light of the above submissions the 3<sup>rd</sup> Respondent sought for the following orders;

- i) The petition dated 6<sup>th</sup> September 2017, lacks merit and be dismissed
- ii) A declaration that the 3<sup>rd</sup> Respondent was duly elected as a member of the national assembly for Baringo North Constituency.
- iii) The Petitioner should meet the costs of the petition.

### **Issues for determination**

Upon considering the pleadings, evidence and submissions in this petition together with the suggested issues presented by the parties, the court finds the following arising for determination:

- (1) Impact of withdrawal of application for Scrutiny and abandonment of challenge on the numbers of the votes garnered by the candidates.
- (2) Whether the Petitioner has demonstrated that the election of 8/8/2017 at the Baringo North Constituency was conducted in contravention of the constitution and the law applicable to elections.
- (3) Whether there were any irregularities that affected the result of the election.
- (4) Whether and what consequential relief to be made in the petition.

### **Determination**

#### **The Law**

#### **Burden of proof and standard of proof in election Petitions**

1. The question of the burden of proof and standard of proof in election cases is now settled by the decision of the Supreme Court in **Raila v. IEBC & 3 others**. Supreme Court Petition No. 5 of 2013 that the legal burden of proof lies with the Petitioner in accordance with Section 107 of the Evidence Act but the Evidential burden lies initially with the holder of the legal burden shifting between the parties according to the weight of evidence given by the other side, *see Judiciary's Bench Book on Electoral Disputes Resolution at p.91*.

2. The Bench book notes that “generally the evidential burden will shift to the Respondent once the Petitioner proves (i) the evidence of electoral irregularities or malpractices; and (ii) that the electoral irregularities or malpractices have affected the result of the election citing **Raila v. IEBC, 2013**.”

The standard of proof is accepted as a standard higher than the standard on a balance of probabilities in civil case but that the standard of proof should be below reasonable doubt as in criminal case, save where the conduct in the alleged irregularity is or amounts to an election offence which must be proved by the standard of beyond reasonable doubt of criminal cases. *See Raila v. IEBC, 2013* and *Moses Masika Wetangula v. Musikari Nazi Kombo & 2 others* Supreme Court Petition No. 12 of 2014.

### **The test in section 83 of the Election Act.**

3. Section 83 of the Election Act provides for the parameters for the Court's consideration of an election petition as follows:-

#### **83. Non compliance with the law**

*No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law or that the non-compliance did not affect the result of the election.*

### **Abandonment of Application for scrutiny and challenges of the number of votes garnered by candidates in the election**

At the outset the court must determine the effect of the withdrawal by Petitioner of his application for scrutiny and abandonment of any challenge on the results returned by way of the numbers declared for the candidates. The counsel for the Petitioner is on record as withdrawing the application for scrutiny and altering the challenge on the figures as follows:-

“23<sup>rd</sup> January, 2018

#### **Mr. Ogolla for the Petitioner**

*The issue of discrepancy in the total votes in different forms is not an issue being raised by the Petitioner. **The Petitioner challenges the irregularities and illegalities apparent on the Form 35As.** There is nowhere that the Petitioner has said that I got this number of votes and it is recorded differently in another form. It is not part of our grounds.”*

“25<sup>th</sup> January 2018

#### **Mr. Ogolla for the Petitioner:**

***I abandon the application for scrutiny and pray that the ballot boxes be opened for purposes only of Forms 41 and 33.”***

As the court ruled in its ruling of 29<sup>th</sup> January, 2018 upon request for production of Form 41 and 33 of the election, following the withdrawal of the scrutiny application and the challenge on the returned figures of votes for the candidates in the election, the Petitioner's challenge to the 3<sup>rd</sup> Respondent's election changed from being one of both qualitative and quantitative to one of only qualitative challenge contesting the quality of the election rather than the amounts of figures of votes declared.

The Petitioner's case, therefore, becomes that the conduct of the election was not in accordance with the constitution and the law or contained irregularities or errors which would qualitatively affect the results as to make it unworthy of credit as an election mandated by the Constitution and Law.

The Petitioner cannot be permitted to reopen the issue of Forms 41 and Form 33 on, respectively on statement of rejected ballots and the collation sheets recording the votes for each candidate at the polling stations, because it would affect three cardinal principles of Judicial Process, namely *res judicata*,

estoppel by representation and constitutional right to fair hearing under Article 50(1) of the constitution.

## **Res judicata**

Section 7 of the Civil Procedure Act and section 89 applies to all proceedings of a civil nature, provides for the principle of res judicata as follows:

### **“7. Res judicata**

*No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”*

This court has already ruled on the question of Form. 33 and 41 in its last ruling of 29/1/2018 before final submissions as follows:-

### ***“The nature of the electoral dispute before the Court***

15. *With the abandonment of the Petitioner’s challenge on the figures of votes garnered by the candidates, the election dispute assumes a wholly **qualitative** character not dependent on the votes in the election. With the **quantitative** element of the challenge not being pursued, the election petition will fail or succeed on the Court’s evaluation of the **quality** of the election as the Petitioner is deemed to have accepted, or at least as being indifferent to, the figures of the votes result but to consider it as a product of a flawed election.*

16. *Forms 41 and 33 are, respectively, the statutory forms which to record the statement on the number of rejected votes and the valid votes cast for each of the candidates in the election, an issue which is no longer in contention.*

### ***Order overtaken by events?***

17. *In the circumstances, the order for the supply of the Forms 41 and 33 must be taken to be overtaken by the events of clarification by the Petitioner that he did not contest number of votes and his abandonment of the application for scrutiny which was pending before the Court following its deferral from the interlocutory to end of trial stage. The order for supply of the forms would no longer serve any lawful purpose.*

## **Conclusion**

18. *The Petitioner having abandoned the quantitative challenge on the figures in the election for the Member of Parliament for Baringo North Constituency and the parties having closed their respective cases on the evidence, and there now being no avenue for receipt of the evidence contained, or not contained, in the forms sought to be supplied via opening of the ballot boxes, there is no basis for the Court to order the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to supply to the parties and the Court the Forms 41 and 33 as sought by the Petitioner. The order of 31<sup>st</sup> October, 2017 for the same has now been overtaken by events.*

## **Promissory estoppel or estoppel by representation**

It is a principle of Equity which together with the substance of common law and statutes of general application of England as existing on 12<sup>th</sup> August 1897 are applicable Kenya by virtue of s. 3(2) of the Judicature Act.

Promissory or equitable estoppel provides that if a person makes a promise which he intends to be

building on the court to be acted upon by another person, he is bound by that promise if the other person acting on the promise changes his position to his detriment. **Harris J. in Mulji Jetha Ltd v. I. T. Commissioner** [1967] E.A 50, 57 discussed the principle of equitable estoppel as follows:-

*Lest I be mistaken in my evaluation of the evidence as a whole and in my conclusion that the company has failed to discharge the onus of proof resting upon it. I shall now consider shortly, in deference to the arguments submitted to me, the legal defences raised by the defendant.*

*First he says that the principle of equitable estoppel applies only to afford protection against the enforcement of contractual obligations. Although the passage from the sixth edition of CHESHIRE AND FIFOOT'S LAW OF CONTRACT to which I was referred, states at page 86, that to succeed in the defence of equitable estoppel "the promise must satisfy the court that it is equitable to allow the promisor to sue on the original contract", the **decision of DENNING, J. (as he then was) in Robertson v. Minister of Pension (2), recognises an extension of the principle to matters not connected with contract. In that case the appellant, a serving army officer serving army officer suffering from a disability, in reliance upon a letter written to him by the War Office assuring him that his disability had been accepted as attributable to military service, forbore to obtain at the time an independent medical opinion and the Respondent later decided that the disability was not due to the war service. On the pensions appeal tribunal affirming that decision the appellant appealed to the High Court and his counsel expressly relied ([1949] 1 K. B at P. 229) upon the fact that he had not contracted with the Respondent and at the time of the War Office letter he could not have done so because he was still serving officer. DENNING, J., held applying Central London Property Trust Ltd. V. High Trees House Ltd. (3) and Bob Guinness Ltd. V. Salomonsen (4), that the case fell within the principle that if a man gives a promise or assurance which he intends to be binding on him and to be acted on by the person to whom it is given, then, once it is acted upon, he is bound by it. Looking at the matter objectively it is not easy to see why the exercise of contractual rights should alone be amendable to restrain at the instance of equitable estoppel and I am not persuaded that the defendant would be entitled to succeed on this ground.***

*The defendant next submitted that equitable estoppel cannot be invoked to afford protection against the performance of a statutory duty, and he relied upon the decision of the Judicial Committee in Marine Electric Co. Ltd. V. General Dairies Ltd. (5). The case, however, turned upon the effect of an inference drawn by one party from a long-continued mistake made by the other and was not concerned with equitable estoppel by express representation as is the present case.*

The Petitioner by his counsel's submission in court made a promise to the Respondents that he did not challenge the figures of the voters which the Respondents acted on that representation by abandoning their planned calling off witnesses to testify on the numbers of the votes, and to allow the Petitioner to re-open the question of the votes recorded by the candidates would be unfair to the Respondents and against the rules of equity under the principle of promissory or equitable estoppel.

The constitutional right to fair hearing under Article 50(1) of the Constitution comes in play because to urge a contention on want of Form 33 and Form 41 as indicating lack of integrity of the results declared a challenge which the Petitioner expressly abandoned is to prejudice the Respondents who did not secure the wherewithal to rebut the challenge on the numbers of votes on the promise or representation that the Petitioner did not challenge the numbers.

In addition, upon withdrawal of the application for scrutiny, the subsequent application for the breaking of the boxes to retrieve the Forms 41 and 33 both which go to the abandoned challenge on the number of votes garnered by the candidates was declined by the Court, ruling at paragraph 13-14 of the Ruling of 29<sup>th</sup> January, 2018 as follows:-

**No evidence may be taken at this stage.**

13. Upon default by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to supply the Forms 41 and 33 which it is said were in the ballot boxes, the Court could only order access to the forms through an **order for**

*scrutiny* in which case the ballot boxes would have to be opened. Once abandoned the application for scrutiny, there is no basis for an order to open the boxes to access the forms. Any forms otherwise than through scrutiny obtained cannot be evidence before the Court unless they were introduced by valid affidavits filed in the Petition, the time for filing of which having lapsed with the commencement and conclusion of the hearing of the petition. No evidence may be taken at this stage.

14. At the stage of the petition where the respective cases for the parties have been closed there is no substratum for the presentation of any evidence in the petition. At this stage of the proceedings, the Petitioner has no forum or instrument at and by which to adduce in evidence whatever the information that may be contained, or not contained, in the said forms. Moreover, it would be only of academic interest even if it could lawfully be availed because the forms, which contain information as to rejected and valid votes cast, would only be relevant if there was a contest with regard to the actual figures of votes in the election.

To challenge the election now on the same ground of lack of Forms 41 and 33 the production of which the court has ruled on and declined, is to appeal from the ruling of the court through the back door.

Accordingly, the court rejects all challenges on the election result at Baringo North Constituency based on a dispute as to the results declared or as to the effect of irregularities to the numbers of the votes declared at the election.

The 1<sup>st</sup> and 2<sup>nd</sup> Respondents gave the corrected results after rectifying the anomaly of misposting of election results from Form 35A to form 35B at Kabartonjo Primary School polling station, the effect of which is to widen the margin of difference of the votes between the Petitioner and the 3<sup>rd</sup> Respondent to 150 votes in favor of the 3<sup>rd</sup> Respondent from the 39 votes declared in the Form 35B as announced after the election on 9/8/2017.

To succeed in the petition challenging the 3<sup>rd</sup> Respondent's declaration as winner the Petitioner must now prove his qualitative challenge on the election by cogent evidence to the standard of proof above the regular civil standard of balance of probabilities, or to proof beyond reasonable doubt, as appropriate to the particular nature of the challenge, to demonstrate either or both of two things, namely, pursuant to S. 83 of Election Act (a) that the election was so badly conducted as to offend the constitution on the law; and/or (b) that the election had irregularities malpractices, errors or misconduct that affects the result of the election regardless of the actual number of votes garnered by the candidates.

For example, if the Petitioner were to prove that arising out of a certain misconduct the results of a particular polling station or stations could not be relied upon because they were in some way the product of alleged misconduct, then the court would find such misconduct as effecting the results notwithstanding the actual vote differentials. Such may be taken to happen at a polling station where incidents of violence or bribery or voting day campaigns pervert the voting process as to make it impossible to have free and fair elections so that the results manifested the actual numbers of the votes garnered by the candidates and no representation on the will of the people. In such cases, the figures are not important and this would appear to the essence of **Raila, 2017** whether the election complied with the constitution and the law. See also **William Kabogo Gitau and Benard Shivali Masaka**, supra.

Article 81(e) lays down the principles of free and fair elections as follows:-

**81.** *The electoral system shall comply with the following principles—*

*(a) freedom of citizens to exercise their political rights under Article 38;*

*(b) not more than two-thirds of the members of elective public bodies shall be of the same gender;*

*(c) fair representation of persons with disabilities;*

- (d) universal suffrage based on the aspiration for fair representation and equality of vote; and
- (e) free and fair elections, which are—
- (i) by secret ballot;
  - (ii) free from violence, intimidation, improper influence or corruption;
  - (iii) conducted by an independent body;
  - (iv) transparent; and
  - (v) administered in an impartial, neutral, efficient, accurate and accountable manner.

Article 86 on its part sets out the obligation of the 1<sup>st</sup> Respondent IEBC in organizing and conducting voting in elections as follows:

*“86. At every election, the Independent Electoral and Boundaries Commission shall ensure that—*

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

### **Analysis of the evidence**

Accordingly, the evidence presented by the Petitioner and the Respondents must be analyzed in the context of the Supreme Court’s determination of the boundaries for interference by the Court of the election result declared by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents as the body and person authorized to declare the results of the election subject of the Petition.

In considering the evidence before the court, the court must limit the inquiry into the areas of justiciability dictated by the cause of action taken up by the Petitioner in his petition. The principal of pleading that a party is bound by his pleading has as this court noted in KBT Pet No. 1 of 2017, a special consideration in election petition proceedings because of the special nature of proceedings which are time bound by way of pleading, hearing and determination of the electoral disputes, under the Constitution Article 81 and 86 and the Election Act 2011, Rules and Regulations made thereunder. See also the decision of Supreme Court of India, **Arikala Narasa Reddy**, supra.

With leave of the court, the Petitioner filed particulars under Regulations 15(1) (e) of the Election (Parliamentary and County, Elections) Petitions Rules 2017. The Petitioner did not file any supplementary affidavit in support of the [Particulars as he could have under the terms of the leave of court given in the ruling of 31<sup>st</sup> October, 2017 as follows:-

***3. Petitioner shall within seven (7) days supply further and better particulars with relation to the Petition, without amending directly or in effect the case of the Petitioner therein, and file further affidavits as necessary to amplify his case in the Petition.***

**4. The Respondents are liberty, if necessary, to file affidavits in response to the Petitioner's additional affidavits filed under Order No. 3 above within seven (7) days of service.**

The Petitioners sought to rely on Affidavit filed by the 2<sup>nd</sup> Respondent in response to the court order for the supply of Forms 41 and 33, and upon objection taken by 3<sup>rd</sup> Respondent in application for directions the court ruled on 11/1/2018 as follows:-

*38. The Court agrees with the 3<sup>rd</sup> Respondent's argument that the documents filed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents should not be used for purposes of evidence in court. The court had ordered the 1<sup>st</sup> and 2<sup>nd</sup> Respondents within three (3) days to file further affidavit(s) supplying to the parties Forms 33 and 41 and polling station diaries for the polling stations in Baringo North Constituency. Once the Petitioner was supplied with the above document which was within his right, he would then file further affidavits and particulars, if necessary.*

Accordingly, the particulars supplied by the Petitioner pursuant to leave of the court are averments similar in nature to the pleadings in the petition which require evidential support in the supporting or other affidavit lawfully filed by the Petitioner.

The court's duty is, therefore, to examine the complaints raised in the petition and the particulars thereto filed subsequently with leave of the court, and taking into account the evidence adduced before the court consider whether the said claims are proved. If the complaints do not exhibit non-compliance with the constitution and the law, the court will go the further step of analysis to whether irregularities, malpractices or errors are proven which affect the result of the election in the qualitative sense.

The Petitioner also seemed to contend that the petition was for granting merely for of the small margin of difference in votes, at 39 according to the tally given in the Forms 35B between the Petitioner and the 3<sup>rd</sup> Respondent. Of course, in the system of majority wins, a win by (1) vote is good. It would only matter if some irregularities were demonstrated which could affect the result in view of the small margin. But without irregularities proved to affect the result, the small margin of victory must on the principle of vote by majority be upheld.

The court will now deal with each of the complaints set out in the petition and particulars.

### **Discrepancies on Forms 35As**

The Petitioner filed particulars pursuant to leave of court granted on the listed 99 polling stations which allegedly had discrepancies by way of rejected votes, anti-copy features, overwriting and carbon copy, lack of stamping alteration of figures, presiding officer not signing the forms, and no indication of the total number of voters in the polling station.

The Petitioner did not although he had liberty in the grant of leave to file further affidavits, file any affidavits in support of the particulars. Accordingly, these particulars, being in the nature of pleadings just like the petition remain unsupported by facts. Moreover, if the object of pointing to overwriting on carbon copies of the forms, alteration on forms and the want of indication of registered votes on the forms was a basis for a challenge on the returns of the election, the matter is not of any academic interest as the Petitioner has abandoned his challenge on the numbers given in the result of the election. It would only be relevant if it demonstrated a system of discrepancies and errors calculated to affect the elections regardless of the vote outcome.

Failure to indicate the number of registered voters in a polling station on a Form 35 could not be fatal to validity of the form. What is important on the Form 35A as a primary record of the result of voting at the particular polling station which is shown on votes for each candidate section the total of which must equal the number of valid votes cast shown in the aggregate section. The number of registered votes in a polling station is available in Form 35B of the Constituency tally sheet as a pre-printed number so that the results in the Form 35A could be verified against the pre-printed number to establish where there was any

over-voting that would invalidate the results.

As held in Kbt. Pet No. 1 of 2017, *Musa Sirma v. IEBC & 2 others*, the results declaration for Form 35A record will be signed by the Presiding Officer and the Deputy Presiding Officer. The Regulation 79 (1) requires the form to be signed by the Presiding Officer only, but allowance is made by Regulation 5 (4) of the Regulation for the Deputy Presiding Officer to do any act that the Presiding Officer is empowered to do under the Regulations. So a form that is signed by a Deputy Presiding Officer and not the Presiding Officer is as valid as that signed by the Presiding Officer alone or by both the Presiding Officer and the Deputy Presiding Officer.

There is no requirement by the Election Regulations for the stamping of the results declaration forms 35A. The requirement of stamp is proved for the Ballot Papers under Regulation 69 (4) which makes it an offence for an election officer not to stamp a ballot paper. Any gratuitous stamping of other statutory forms with the IEBC stamp, or lack of it cannot therefore invalidate declaration form.

The issue of over-writing on carbon copy was explained by the 2<sup>nd</sup> Respondent that it was necessitated by weak carbonation on the carbon copy which took their fruits from the original at the top with five (5) carbon copies underneath. As reasonable explanation for the over-writing on the carbon copies cannot be challenged with demonstrating that the figures so affected also affected the results of the election. This the Petitioner did not do, and in any event, has challenged now is not on the numbers of votes for the respective candidates in the election.

The question of rejected votes and the anti-copy features separately discussed below.

#### **Different Serial Numbers in Form 35A**

The claim was made by the Petitioner through by PW 3 Joshua Kataron who while testifying that he was not an agent but had received all the 173 forms from the polling stations in the Constituency some had been torn and had different serial numbers from the forms issued at the Tallying Centre, conceded that he did not know the meaning of discrepancy in the numbers of the forms. In his evidence the returning officer (R2W1) Joseph Leboo Masindet put paid the issue of different serial numbers with when he testified that “the result declaration booklet had 6 forms, one original and 5 carbon copies, the copies had consecutive serial numbers, two booklets were issued for each election.”

The Petitioner properly abandoned this line of challenge of different serial numbers must have been taken in ignorance of the numbering procedure of the forms at the 2017 election.

#### **Missing Anti-copy Features on some forms – the question of illegal and invalid Form 35 A**

The complaint arose from the Form 35A relating to Lake Kamnarok Polling Station and Koibaware whose forms did not have the IEBC logo, a serial number and the Anti-copy features. The Petitioner alleged that the Forms 35As which were used by the 2<sup>nd</sup> Respondent to collate the results and declare the 3<sup>rd</sup> Respondent as validly elected were different. It had different serial numbers unlike those supplied to his agents. Further he alleged and testified that the Form 35As filled by the Presiding officers in Particular Forms for Lake Kamnorok Primary School Polling Station and Koibaware Primary School Polling Station did not have anti-copy security feature and there was no bearing of the 1<sup>st</sup> Respondents name as the rest of the Forms.

The evidence of R1W1 and R1W4 the presiding officers from the two Polling Stations was as follows:

R1W3-Vincent Chesire Kibet testified that the upper part of the Form 35A got damaged when he was detaching the Form from the booklet. He had already taken a scanned image of the Form before he had detached it. Therefore the copy used in the replying affidavit for the 2<sup>nd</sup> Respondent was the scanned copy. It had a serial number as NA000175 and an ODM and PDR agent had signed on the Form. The original Form had the same details as those contained in the scanned

copy. Further he testified that the scanned copy had both the IEBC logo and the anti-copy features.

In addition to this one Kandie Julia Chesire (R1W4) testified that the Form 35 did not have part of the letter head containing the logo title and serial number. She had the counter foil and the carbon copy of the Form which showed the serial numbers. This was the copy that had been attached to the 2<sup>nd</sup> Respondents replying affidavit. The serial number of the carbon copy was NAOO1501. She had the front page of the booklet (which she showed to the court) which showed the range of the serial numbers to be between the range of NA001501- NA001506.

It was the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's submission that from the evidence adduced in court the carbon copy which was shown in court had the serial numbers and the logo. The torn part of the Form had also been availed.

The 3<sup>rd</sup> Respondent submitted that evidence had been adduced to the effect that the result declaration Form (Forms 35A) were issued in 2 booklets per Polling Station. Each booklet had 6 Forms 35A which were serialized consecutively. Therefore the Forms 35A issued at the respective Polling Stations to the agents would contain the same results that bear different serial numbers. The Presiding Officer (R1W3) Vincent Kibet testified that the Form 35A had in the process of detaching it from the booklets, torn off badly so that the IEBC logo, serial number and the anti-copy feature at the top of the Form were left on the booklet and the form scanned and sent to the tallying Centre had no disk anti-copy features. He however said that the number of votes were affected. He further testified that the Petitioner's own agents Daudi Sirma had in fact signed the Form 35A. The returning officer (R2W1) also confirmed at cross-examination that the copy of Lake Kamnarok Polling Station result was scanned from the carbon copy which did not have the IEBC logo and anti-copy features as it been detached from the anti-copy features but that there was no verification in the votes of the candidates and there was no difference between the results in the electronic transmission on KIEMS on Form 35A.

Dealing with a similar situation, the Court in *Joseph Amini Omukanda v. IEBC & 2 ors* [2013] eKLR where it was held that what was important was the content of the Form 35 in relation to the results of each candidate and not the serial number or the cancellations or corrections at the upper part.

The Petitioner did not prove that there was use of illegal Forms 35A as illegal, and there was on affected the results recorded thereon. The same was the case for Muchukwo which had an original and carbon copy with a tear at the top, and alterations on the carbon copy counter-signed. Julia Kandie, Presiding Officer at Koibaware also explained missing serial numbers. The Returning Officer had during cross examination by the Petitioner's counsel conceded that some Form 35As did not bear IEBC stamps, some alterations had not been signed; in the station (070) no agent had signed the forms since they were absent, station No. 122 number of required votes indicated, station (129) had stamp but carbon copy did not have, station No. (134) Form 35A did not have a stamp and in station No. (139) the Presiding Officer did not sign.

As stated above, the numbers of the votes not being under challenge and the discrepancies as regards the forms noted above not being shown to have affected the result in any way, the court must accept the failure to stamp, the mis-tearing, overwriting and alterations, counter-signed and not counter-signed as manifestation of the frailty and proneness of human beings to error which does not amount to systematic breach of the election procedures under the constitution and the law.

### **Rejected votes at Lekepchun Polling Station**

The claim that there had been no rejected votes at Lekepchun polling station made by PW 2 Sammy Barchobo Chengwony who claimed to have signed a different Form 35A, one without any rejected votes, from the one presented by the presiding officer.

Apart from the abandonment of the challenge on the numbers which must take the wind out the sails of this claim, the said witness did not offer any documentary evidence to support his allegation of lack of any rejected votes. He did not produce a copy of the Form 35A which he had signed which did not show

any rejected votes. As an agent he was entitled to receive a copy of the form 35A upon declaration of the results in accordance with Regulation 79 (2A) (c). The serious allegations of doctoring F35A alleged by the Petitioner through his witness required proof by cogent evidence which though on a balance of probability must achieve a high standard than the preponderance of evidence test, to persuade the court almost to beyond reasonable doubt that the presiding officer at Lekepchun doctored the result by indicating 20 votes as rejected votes.

There is nothing inherently untoward in rejected votes. The Regulations make provision for rejected votes at Regulation 77 with (5) categories of rejected ballots, as follows:-

**“77. Rejection of ballot papers, etc.**

(1) At the counting of votes at an election, any ballot paper— (a) which does not bear the security features determined by the Commission; (b) on which votes are marked, or appears to be marked against the names of, more than one candidate; (c) on which anything is written or so marked as to be uncertain for whom the vote has been cast; (d) which bears a serial number different from the serial number of the respective polling station and which cannot be verified from the counterfoil of ballot papers used at that polling station; or (e) is unmarked, shall, subject to subregulation (2), be void and shall not be counted. (2) A ballot paper on which a vote is marked— (a) elsewhere than in the proper place; (b) by more than one mark; or (c) which bears marks or writing which may identify the voter, shall not by that reason only be void if an intention that the vote shall be for one or other of the candidates, as the case may be, clearly appears, and the manner in which the paper is marked does not itself identify the voter and it is not shown that the voter can be identified thereby.”

The presiding officer for Lekepchun, Meshack Kiptoo Kangogo (R1W1) testified before the court that he had discharged his duties in a transparent manner and that the agents had signed his results declaration form at the end of voting. In such circumstances, the evidential burden lay with the Petitioner to rebut the cogent evidence, the Respondent’s protestation of free and fair balloting.

**Lekepchun as the Petitioner’s strong-hold**

The Petitioner suggested that the polling station Lekepchun was in an area of his stronghold of voters and he could not therefore have garnered less votes than the 3<sup>rd</sup> Respondent. The station had 688 voters of whom 545 voted with the Petitioner garnering 153 votes, the 3<sup>rd</sup> Respondent 239 votes and with 20 rejected votes as shown on Form 35A.

The court rejected this surmise because of want of any scientific correlation of a settlement of a people or community in an area and their political voting pattern. Moreover, as the immediate Member of Parliament for the area in the last Parliament, it may not be said that the 3<sup>rd</sup> Respondent had not done anything for the area which could endear himself to local electorate as to explain his win in the area where the Petitioner claims stronghold status. I refuse to enter into this realm of political speculation.

**Ballot papers left at Lekepchun Polling Booth**

The presiding Officer Meshack Kiptoo denied there had been any stray or unmarked ballots. The Petitioner’s witness Sammy Barchabo Changwony , however, alleged that they had picked up ballots at the polling booth and handed them over to the presiding officer. There was no allegation that such ballot papers had been used for purposes of double-voting. The witnesses said that they had given the ballot to the presiding officer. If it was meant to show by this that the election had been irregular and carried out in the contravention of the constitution and the law, the Petitioner did not disclose the heavy burden of proof for this highly unusual event. In the ordinary course of things, the Regulations required by that a voter marks with the ballots for all the 6 elections and place the marked ballot into their respective colour coded ballot boxes. All this happening as the agents and election officials witnessed, it is unlikely that a voter may insert two ballots of the same

colour (and election) into the same ballot box. It is also unlikely that a voter may refuse to mark his ballot and leave them at the polling booth. For their unlikelihood, cogent evidence is necessary to prove the witnesses said that they had found ballots with other agents. It should have been easy to call other agents to corroborate his unusual finding of unmarked ballots in the polling booths. Regulations 69 (2) and (3) marks the alleged occurrence very unusual on the persons involved to their offence dealing with the standard of proof on balance of probabilities in cases of serious allegations such as fraud the House of Lords in **Re: H (minors)** [1996] AC 563 set out in the following passage of **Phipson on Evidence** 16<sup>th</sup> ed. (2005) as held as follows:-

**b) Serious or criminal allegations**

*6 - 5.4 where a serious allegation is made in a civil case, such as and allegation of criminal conduct, the standard of proof remains the civil standard. Otherwise, where there was a claim for fraudulent misrepresentation and breach of warranty, the court might hold that the warranty claim was proven and the fraud claim was not proven on the same facts. However, if a serious allegation is made, then more cogent evidence may be required to overcome the unlikelihood of what is alleged, and thus to prove the allegation. Courts have for some time sought to grapple with the logical difficulty of requiring more cogent evidence to prove fraud, but still holding that the allegation must be proved on a balance of probabilities. The matter was explained by Lord Nicholls in **Re H (minors)***

*“The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind the factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury. A step father is usually less likely to have repeatedly raped and had a non-consensual oral sex with his stepdaughter than on some occasion to have lost his temper and slapped her. Built into the preponderance of probability standard is a generous degree of flexibility in respect of the serious of the allegation.*

*Although the result is much the same, this does not mean that where a serious allegation is in issue, the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established.”*

However, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have no control over what voters do or do not do at the polling booths.

**Lekepchun’s Assisted voters**

The Regulations make elaborate provisions for assisted voters at Regulation 72 as follows:-

“72. Assisted voters

*(1) On the application of a voter who is, by reason of a disability or being unable to read or write, and therefore unable to vote in the manner prescribed in these Regulations, the presiding officer shall permit the voter to be assisted or supported by a person of the voter’s own free choice, and who shall not be a candidate or an agent.*

*(2) Where the person who applies to be assisted is not accompanied by a person who is qualified to assist him or her, the presiding officer shall assist such voter, in the presence of the agents.*

(3) *The presiding officer may make such necessary and respectful inquiry in order to establish that the voter and the person the voter has chosen to assist him or her satisfies the provisions of this regulation.*

(4) *The person chosen by the voter is not required to be qualified to vote but is required to have attained the age of eighteen years.*

(5) *The following shall apply with respect to a person who assists a voter under this regulation—*

**(a) the person shall, before assisting or supporting the voter, make a declaration of secrecy before the presiding officer in Form 32 set out in the Schedule;**

*(b) a person who breaches his or her declaration commits an offence under the Act;*

*(c) the person shall assist or support only one voter at that election and have a mark as proof of assisting or supporting a voter.*

(6) *Where a presiding officer grants the request of a voter under this regulation, the presiding officer shall record in the polling station register against the name of the voter the fact that the voter was assisted and the reason for the assistance.*

(7) *No person other than a person acting under this regulation shall be present in a compartment of a polling station while a voter is in the compartment for the purpose of marking his or her ballot paper and any person who contravenes this subregulation commits an offence.”*

The presiding officer testified that there had been some assisted voters at the station whom he dealt with in accordance with the Regulations and assisted the agents to witness the process. Cogent evidence is discharging evidential burden is required to prove the allegation the presiding officer took it upon himself to help assisted voters alone. No evidence to the required standard has been availed and the issue of lack of Form 32 declaration by assisting persons was not pleaded nor taken up in the cross-examination of the Presiding officer and it is not properly taken in the submissions. Moreover, the Court considers that the Form 32 is a declaration for purposes of secrecy and confidentiality of the person assisting and has little bearing on the validity of the vote by assisted person, so that failure of the Presiding officer to produce it as proof that there were assisted voters does not affect the result of the election.

### **Distance from Lekepchun the Tallying Centre**

The Petitioner further challenged the validity of the results from the Lekepchun polling station on the basis of the time taken to deliver the votes in the Ballot boxes to the Tallying Centre at Kabartonjo High School. It was alleged that the polling station is only 30km away from the tallying Centre and there was no explanation why it was the last to deliver its ballot boxes. In cross-examination, PW 4, confirmed that voting went on beyond 5.00pm to allow those still on the queue to vote, The presiding Officer in that station Meshack Kiptoo Kangongo (R1W1) explained that the delay in presenting the ballots from the polling station to the tallying Centre was due to waiting for results from (2) other stations Kipkolony and Barwessa with whom they shared transport and because of having to take a longer passable route avoiding a shorter impassable route due to rains and bad road, and that voting at the station had gone upto 7.42pm because of the need to allow 150 voters who were on the queue at 5.00pm.

I do not find that the delay in the transportation of the ballot boxes to the tallying Centre is evidence of any malpractice impugning the integrity of the voting at Lekepchun polling station.

### **Chief Agent Joshua Komen’s objection - Results in the Public Portal**

The Petitioner alleged that there were different figures displayed on the public portal and Form 35B, on the number of votes garnered by the Petitioner and the 3<sup>rd</sup> Respondent Joseph Leboo Masindet. The 2<sup>nd</sup> Respondent declared the 3<sup>rd</sup> Respondent as the winner having garnered 12,413 votes and the Petitioner

12,374. The results appearing in the public portal showed the Petitioner got 12,342 whereas the 3<sup>rd</sup> Respondent garnered 12,493 votes.

The 2<sup>nd</sup> Respondent Joseph Leboo Masindet (R2W1) testified that Form 35B did not accurately capture the results of Kabartonjo primary Polling Station. There had been a transposition error which led to loss of 80 votes on the 3<sup>rd</sup> Respondent and a gain of votes on the Petitioner. The transposition error did not affect the vote outcome.

The chief agent's objection as to the votes declared by returning officer was conceded as having been made but when asked to give his alternative vote tally, he only said the tally declared was different in Kiswahili "*hiyo ni tofauti*". It would appear that the said chief agent was comparing the result on the portal and the result in IEBC Form 35B. As it turned out, the Chief Agent may have been correct in view of the error of transpositioning of the votes for Kabartonjo Primary School on to the Form 35B.

But as discussed below, the trans-positioning errors led to a gain to the Petitioner by 54 votes and loss of 80 votes for the 3<sup>rd</sup> Respondent, and it did not affect the result of the election.

In *Ledama Ole Kula v. Samuel Kuntai Tunai & 10 others [2013] eKLR* the Court held that the primary document which contains the correct data is Form 35 from which the results are transferred to the Constituency Form 36. When the Constituency Form was availed and confirmed that the error had indeed been made during transposition of results from Constituency Form 36 to county Form 36, the error was corrected and it did not affect the final results.

### **Alleged Fracas at Polling stations**

At paragraph (5) of the Affidavit of Sammy Barchobo Changwony who raised the issue, it is conceded that the election of the polling station was largely peaceful as follows:-

***5. "THAT voting was generally carried out in an orderly manner save that there were a few disruption which were occasioned by some actions that the Presiding Officer took and which actions the various party agents at the station were not agreeable to"***

The presiding officer denied that there was any form of violence at the polling station. The mere allegation of fracas with proof and with admission of largely peaceful election cannot pass the muster of violence capable of impeaching the integrity of the voting exercise at the polling station less still in the Constituency election.

Indeed as noted by the Petitioners witness, Daudi Chebet Bargoge who claimed to have been ejected by a police reservist in respect to Kipkolony Polling Station the polling exercise went on smoothly with no disruptions as below:-

***7. "THAT the voting exercise started and went on smoothly with no disruption up to 5.00 pm when all the voters in the queue had cast their votes: whereupon the ballot boxes were sealed in readiness for the counting of the votes."***

### **Power Black Out at the Tallying Centre**

The Petitioner alleged that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents conspired with the 3<sup>rd</sup> Respondent to create an artificial power blackout at the Baringo North Tallying Centre. This was a deliberate act that interfered with the electronic transmission of results since the power blackout was used to rig the elections. His witness Mr. Joshua Komen (PW2) testified to the effect that at the tallying centre at Kabartonjo, the lights went off at around 10.00 p.m. on 8<sup>th</sup> August 2017 and the lights resumed at around 3.30 p.m. on 9<sup>th</sup> August 2017 whereby the results showed that the 3<sup>rd</sup> Respondent was leading by 39 votes.

On cross examination Joshua Komen (PW2) testified that though there was a power blackout at the

tallying centre, the gas lamps were used. That the tallying process was being done on a battery powered laptop which were not affected by the blackout. This was confirmed by Joseph Leboo Masindet (R1W1) who was the Constituency Returning Officer of Baringo North Constituency who testified that though there was a powered blackout it did not affect the tallying process which was being conducted using battery powered laptops.

The Form 35B upon which the 3<sup>rd</sup> Respondent was declared winner was based on entries from Form 35As which were the primary data and it was clear that these were not affected by any alleged failure of transmission of the results. In any event, it was conceded that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had laptops and lanterns that lit the area and the suggested cooking of votes during the black out was impossibility.

### **Daudi Bargoge's Claim of ejection**

A party cannot succeed in proving a claim by evidence of an untruthful witness. Bargoge was not a witness of truth. He did not produce any evidence that he was an agent accredited by the IEBC and duly registered as such in the polling station diary. His village mate R3W3 Joshua Kipsang Kitua states that Bargoge voted and left the station. Bargoge claimed to have been ejected first ***“before the counting process of the votes commenced”*** (Paragraph 8 of witnesses' affidavit. The polling station diary showed the Petitioner's agents as Fabregas Rotich. If he was not an agent as he could not destitute that the accredited agent, IEBC would have been in order in accordance with Regulations 62, 63 and 69 (2) (d) to require the said Bargoge to leave the polling station after he had finished voting.

### **Allegation of irregular recruitment of Presiding Officer**

The Petitioner during Cross-Examination raised an issue on the credibility used on recruitment of Julia Kandie. He alleged that the 2<sup>nd</sup> Respondent colluded with the 3<sup>rd</sup> Respondent in appointing Julia Kandie. Joseph Leboo Masindet (R2W1) testified that for one to be a Presiding Officer one had to be a Kenyan citizen. In Baringo North he had a challenge. There were applicants who did not meet the qualification in regard to a degree or diploma. He did not get a local and they settled for Julia Kandie.

R2W1 testified that advertisement for the Presiding Officers was nationwide and it was circulated in notice boards and social media. Before he recruited any Presiding Officer he ensured that no one was active in politics and during an interview he would interrogate them and find if they had any political connection in relation with any politician and then they would take an oath of secrecy.

In Re-Examination Kandie Julia testified that she came from Korotwo Sub-location, Barton Location within Kabartonjo Division in Baringo County. She produced her I.D Card as proof to the above. I do not find any irregularity proved in this regard.

## **C ONCLUSION**

### **Compliance with constitutional law**

I respectfully agree with the decisions of the court in ***William Kabongo v. George Thuo & 7 Ors, Karanja Kabage v. Joseph Kiuna Kariambegu Nganga & Ors and Benard Shivali Masika V. Boni Khalwale*** Supra, on the importance of the whole election process as the final results thereof and as I understand it, ***Raila v. IEBC & 2 Ors, 2017*** has directed the Courts to consider the first limb of the test in section 83 of the Elections Act whether the elections were conducted in compliance with the constitution and the law as separate and equal consideration to the question whether any irregularities in the election affected the result in terms of numbers.

According to the dictates of the applicable statutory provisions of section 83 of the election and the direction in the holding of ***Raila v. IEBC 2017***, this court would be obliged nullify the election the object of this petition, if it found proved that the election of 8/8/2017 at the Baringo North Constituency was not conducted in accordance with the constitution on the law.

The general principle of free and fair election for Article 81 are given effect by the prescriptive provisions of Article 86 of the Constitution. In my view, isolated incidents not amounting to a system and not aggregation in effect on the election process cannot be held to support a finding that the whole election process was not held in compliance with the constitution and The Law. The principle of substantial compliance must be read into the provisions of section 83 of the Election Act so that for an election to be held not to be according to the constitution and statutory scheme of elections there must be wanton and widespread non-compliance with such provisions as registration of voters, campaign by candidates, recruitment of polling officers, voting process, counting and tallying of the votes, among other important steps in the election process.

The Petitioner's complaints herein turned around to entries on the election returns and rejected votes which, it was suggested, could easily bridge the gap of 39 votes between the Petitioner and the 3<sup>rd</sup> Respondent. The gap widened with the explanation of the transpositional errors in transferring the votes from the (099) AIC Kabartonjo Primary –School Polling Station making margin of difference as 150 votes in favour of the 3<sup>rd</sup> Respondent.

Having abandoned the dispute as to number of votes and the application of scrutiny, the Petitioner's case remained the integrity of the election on its want of compliance with the constitutional and statutory standards. Firstly, on the basis of the evidence presented by the Petitioner and Respondents in his case, the court is not able to find non-compliance with constitution and the law as proved.

Secondly, the irregularities proved by Petitioner or admitted by the Respondents, were not shown to affect the result of the election as a system of determination of the political official for the position of Member of Parliament for Baringo North Constituency nor in terms of the result of the candidate's election by the majority of votes in the election.

Even if the results of Lekepchun polling station, where it was claimed ballots are shown as having been rejected while the F 35A which the Petitioner's agent allegedly did not contain rejected ballots, are rejected in total as unreliable the results would not be affected. After deducting the votes garnered by each of them at the polling station as follows:-

<b>Petitioner</b>	<b>[12342 – 153] =</b>	<b>12189</b>
<b>3<sup>rd</sup> Respondent</b>	<b>[12493 – 239]=</b>	<b>12254</b>

(the figures take into account the trans-positional errors at Kabartonjo High School Tallying Centre, the 3<sup>rd</sup> Respondent would still be leading by 65 votes. The irregularities did not affect the result of the election in any way.

### **Reliefs**

Consequently, the Petitioner's prayers in the Petition are declined.

### **Determination Under Article 105 of the Constitution**

Accordingly, pursuant to Article 105 (1) (a) of the Constitution the Court determines that the 3<sup>rd</sup> Respondent **Hon. William Cheptumo Kipkiror** was validly elected as a Member of Parliament for Baringo North Constituency at the General Election of 8<sup>th</sup> August 2017.

A certificate of the Court under Section 86 of the Election Act shall issue accordingly to the Commissioner and the Speaker of the National Assembly.

### **Report of court electoral malpractice**

The Petitioner's witness Daudi Bargoge may have committed the offence of perjury and there is evidence

upon which a criminal court may properly convict him for the offence. However, the only conduct subject of the reporting mechanism under section 87 of the Election Act is “***an election malpractice of a criminal nature***”, and I, therefore, do not make any report thereunder.

### **Costs**

Rule 30 of the Election (Parliamentary and County Elections) Petition Rules 2017 give the court discretion to award costs having regard to the principles set in the Rule. By an application for scrutiny of votes abandoned on the hearing date, the Petitioner has caused the Respondents unnecessary expense, and for this the Petitioner is liable notwithstanding the principle that costs follow the event.

Counsel for the Respondents prayed for costs on the basis of two counsel and counsel for 3<sup>rd</sup> Respondent suggested a figure of Ksh. 20 million.

I consider that costs should properly be awarded to reflect the importance of the cases to the parties, the nature of the matter, an election petition occupying great importance to the parties and the electorates, and the complexity of the matters canvassed in the election Petitions, as well as the need for dispatch in the time bound litigation process of an election petition.

However, the costs should not be so high as to prevent aggrieved parties for accessing the courts for electoral justice. I am afraid that a cost award of Ksh.20 million for a Member of Parliament election petition on a party and party basis would today be excessive.

I consider also that a certificate for (2) counsel shall also be reserved for complex petitions involving consideration of multiple and complex issues and numerous polling stations and complaints which the present petition did not qualify in terms of the issues of law and fact presented before the election court for determination.

Accordingly, I direct that the costs in this petition be fixed at a total amount of Ksh. 2,000,000/- for each Respondent to be paid by the Petitioner.

### **Return of money deposited.**

In accordance with Rule 33 of the Rules, the money deposited into court under Rule 13 shall be refunded to the depositor upon payment of the costs as ordered herein.

**DATED AND DELIVERED THIS 5<sup>TH</sup> DAY OF MARCH 2018.**

**EDWARD M. MURIITHI**

**JUDGE**

### **Appearances:**

**Mr. Ogolla for the Petitioner**

**Mr. Tororei for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents**

**Mr. Odhiambo for the 3<sup>rd</sup> Respondent.**