



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO. 154 OF 2013**

**(FORMERLY MALINDI ELECTION APPEAL NO. 2 OF 2013)**

**TWAHER ABDULKARIM MOHAMED ..... APPELLANT**

**VERSUS**

**INDEPENDENT ELECTORAL AND BOUNDARIES**

**COMMISSION (IEBC) ..... 1<sup>ST</sup> RESPONDENT**

**HAMISI HALFAN TSUMO ..... 2<sup>ND</sup> RESPONDENT**

**MWATHETHE ADAMSON KADENGE..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

- 0. This is the full length Judgment of the Court as a *first and final* appellate court in the electoral dispute relating to elections of 4<sup>th</sup> March 2013 in Shella Ward of the Kilifi County Assembly. The court’s decision was delivered in a summarized format, on 27<sup>th</sup> February 2014, in the interests of expeditious determination of the electoral dispute, so that the decision and judgment of the court is available immediately on delivery and the full length of the Judgment later, in accordance with the practice of the courts on *final* appeal.
- 0. The Appellant vied for the position of Member of County Assembly for Shella Ward in Malindi Constituency, Kilifi County, in the 4<sup>th</sup> March 2013 General Election under the Wiper Democratic Party/ Cord Coalition ticket. His contenders included the Third Respondent, MWATHETHE ADAMSON KADENGE who was declared duly elected by the 2<sup>nd</sup> Respondent.
- 0. Shella Ward (IEBC Code: 0079) has 26 Polling Stations. A total of 11 candidates vied for the position of Member of County Assembly for the ward. The result of the election per Form 36 was:

1	MWATHETHE ADAMSON KADENGE	2,947
2	ABBAS ABDALLA OMAR	1,092

3	ATHMAN SHEELALI	1,983
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4	ALI SHARI MAULANA HABIB	641
5	ANDREW NZEE MUTHAISU MUTHOKA	194
6	ARMON HARRE KOMBE	326
7	GILBERT KAMBI SHUTU	526
8	NICHOLAS KIOKO MUTUA	251
9	NJERI INGORI CAROLINE	162
10	PETER KOMBE KITHI	218
11	TWAHER ABDULKARIM MOHAMED	2,368

With a margin of 579 votes between the first and second candidates, the Third Respondent was returned as duly elected by the Second Respondent who was the Returning Officer. Being dissatisfied by the result, the Appellant filed Malindi CMCC Election Petition No. 1 of 2013.

### **The Petition**

0. The Petition was presented on 10<sup>th</sup> April 2013 by one Bakari Hassan Juma who on 2<sup>nd</sup> May 2013 disowned the Petition, claiming that it had been filed by the Appellant in his name without his consent. An Application dated 2<sup>nd</sup> May 2013 to Withdraw the Petition was filed thereafter by Bakari Hassan Juma and on 6<sup>th</sup> May 2013 the Appellant applied to court to be substituted as the Petitioner. On 14<sup>th</sup> May 2013, the court, upon terms as to security for costs and costs of the application, allowed the applications by Mr. Juma to withdraw and by the Appellant to be substituted.
0. According to the Petition filed on 10<sup>th</sup> April 2013 and Amended on 17<sup>th</sup> May 2013, the Appellant's grounds included that:
  - a. the Appellant was not allowed to appoint his individual agents;
  - b. the First Respondent (IEBC) restricted appointment of agents to Political Parties without considering conflicting loyalties;
  - c. BVR process was ineffective;
  - d. Voters not identified by BVR machines were allowed to vote;
  - e. Registers other than the master register was used to identify voters;
  - f. Party agents were denied Forms 33, 34, 35 and 36;
  - g. Electronic transmission of results failed;
  - h. Candidates were barred from accessing polling stations to monitor voting;
  - i. IEBC refused to scrutinize Forms 33, 34, 35 and 36;
  - j. IEBC refused to receive the candidates written complaint;
  - k. IEBC and its officers committed several election offences.
0. The petition was dismissed in a judgment delivered on 15<sup>th</sup> August 2013. The trial court in its determination stated that the witnesses testified that failure of the machines did not stop the voting exercise, and found that no evidence had been adduced to the effect that any voter had been turned away because of the failure of the machines.
0. This Appeal was filed on **28<sup>th</sup> August 2013**. Under Section 75 (4) (a) (b), the question as to the validity of the election of a member of the county assembly shall lie to the High Court on matters of LAW only, filed within thirty days of the decision of the magistrate's court and shall be heard and determined within six months from the date of filing the appeal (that is by or before **28.2.2014**). The Memorandum of Appeal dated 28<sup>th</sup> August 2013 contained 18 grounds of appeal as follows:

1. *The learned trial magistrate erred both in fact and in law in failing to consider the appellant's submissions on Article 35, 38, 81 and 82 of the Constitution of Kenya, 2010, section 25 and 27 of the Independent Boundaries and Electoral Commission Act and section 109 of the Election Act, 2011 thereby occasioning a miscarriage of justice.*
2. *The learned trial magistrate erred both in fact and in law in failing to find that there were people who voted in the election for member of the county assembly for Shella Ward in Kilifi county yet their names were not in the register, contrary to Section 2 of the Election Act, 2011.*
3. *The learned trial magistrate erred both in fact and in law in failing to hold that there were people who voted yet they could not be identified by the Electronic Voter Identification Device (EVID) contrary to Section 2 of the Election Act, 2011.*
4. *The trial magistrate erred both in fact and in law in failing to hold that people having voted yet their names were not in the register and or could not be identified by EVID, an election offence under Section 58 (ii) of the Election Act, 2011 was committed.*
5. *The learned trial magistrate erred both in fact and in law in failing to find that registers other than the authorized Principle Register of Voters were used and therefore an election offence under Section 56 (a) of the Elections Act 2011 was committed.*
6. *The learned trial magistrate erred both in fact and in law in failing to hold that the appellant's party agents ere denied Forms 33, 35 and 36 which denial was a breach of Regulation 79 (2) (c) of the Election (General) Regulations, 2012 and which breach amounted to an election irregularity.*
7. *The learned trial magistrate erred both in fact and in law in failing to find that the 1st Respondent denied the appellant the right to be heard as provided for under Section 74 (1) of the Election Act, 2011 when it received the appellant's written complaints, which denial amounted to an election irregularity.*
8. *The learned trial magistrate erred both in fact and in law in failing to consider and hold that failure by the Presiding Officer of Uhuru Gardens Stream 1 Polling Station to sign the form 35 for the said polling station was in breach of Regulation 79 (1) of the Election (General) Regulations, 2012 which breach rendered the results of the said polling station illegal, null and void.*
9. *The learned trial magistrate erred both in fact and in law in failing to hold that the Presiding Officer of Uhuru Gardens Stream 1 Polling Station having failed to sign the Form 35 he or she committed an electoral offence under Section 559 (1) (j) of the Election Act, 2011.*
10. *The learned trial magistrate erred both in fact and in law in failing to find that the Form 35 in respect of Town Primary School Stream 2 was signed by a person other than the Presiding Officer which is a breach of Regulation 79 (1) of the Election (General) Regulations, 2012 and which was an election offence under Section 59 (1) (j) of the Election Act, 2011.*
11. *The learned trial magistrate erred both in fact and in law in failing to hold that the 1st Respondent failed to provide results for Town Primary School Stream 1 and Uhuru Gardens Streams 3, 4 and 5 which is a breach of Rule 21 (b) of the Elections (Parliamentary and County Elections) Petition Rules, 2013 and therefore no results were validly declared in respect of the said Polling Station rendering the declaration of results irregular.*
12. *The learned trial magistrate erred both in fact and in law in failing to find that the candidates for election as member of County Assembly for Shella Ward in Kilifi County and or their agents did not sign Forms 35 in respect of AL-Nidhamia Social Hall Stream 2, Sir Ali Stream 1 and 2, Malindi High School Stream 2 and Town Primary School Stream 2 which failure is a breach of Regulation 79 (1) of the Election (General) Regulations, 2012 and which breach amounted to an election irregularity.*
13. *The learned trial magistrate erred both in fact and in law in failing to find that the Presiding Officers failed to give reasons, in all Form 35, for the candidates and or their agents failure to sign the said Forms 35 which failure was a breach of Regulation 79 (2), (3), (4) and (5) of the Election (General) Regulations, 2012 and which breach amounted to an election offence under Section 59 (1) (j) of the Election Act.*
14. *The learned trial magistrate erred both in fact and in law in failing to find that many voters could not vote because they could not find their names in the manual register, which is an irregularity and or illegality.*
15. *The learned trial magistrate erred both in fact and in law in failing to find that the Presiding*

- Officers refused agents to participate in assisting voters who required assistance contrary to Regulation 72 (2) of the Election (General) Regulations 2012 and which amounted to an election offence under Section 59 (1) (j) of the Elections Act, 2011.*
- 16. The learned trial magistrate erred both in fact and in law in failing to consider the evidence on record and the submissions of the appellant which failure occasioned a miscarriage of justice.*
  - 17. The learned trial magistrate erred both in law and in fact in failing to hold that the elections for the member of the County Assembly for Shella Ward in Kilifi County were not free, fair and transparent.*
  - 18. The learned trial magistrate erred both in fact and in law in failing to order for a scrutiny and recount.*
0. The appeal (filed as Malindi High Court Election Appeal No. 2 of 2013) was first mentioned on 29<sup>th</sup> October 2013 before the High Court at Malindi (Hon. Lady Justice Meoli) when it was deferred to 14<sup>th</sup> November 2013 awaiting directions from the Principal Judge on the judges who would hear election appeals. Following the directions, the appeal was mentioned again on 26<sup>th</sup> November 2013 before Hon. Lady Justice Meoli, and by consent of counsel for all parties, an order was made for transfer the matter to the High Court at Mombasa for hearing. When the appeal file was received in Mombasa it was assigned to this court for determination and on 16<sup>th</sup> December 2013, the parties agreed by consent to have the appeal heard by oral submissions on 13<sup>th</sup>, 14<sup>th</sup> and 15<sup>th</sup> January 2014. Upon objection by the appellant, the court made a ruling as to the issues which could be taken in the appeal, and the hearing was concluded on the 3<sup>rd</sup> February 2014 and ruling reserved. The ruling of 3<sup>rd</sup> February 2014 is set out in its entirety below:

## **“RULING**

### ***Introduction***

- 1. In the course of submissions by counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondent in this election petition appeal, counsel for the appellant objected to submission on the question of correctness of decision of the trial court in allowing substitution of the appellant as the petitioner upon an application to withdraw the petition by the original petitioner, an issue which has not been raised in the appeal and or any cross-appeal. The court directed that the objection be heard substantively and a ruling thereon delivered before proceeding with further submissions in the hearing of the appeal. The objection was argued on the 15<sup>th</sup> January 2014 and ruling was reserved.*

### ***Submissions for the parties***

- 2. The primary contention for the appellant/objector is that the High Court does not have jurisdiction to hear and determine an issue in the appeal which is not raised in the Memorandum of Appeal, in accordance with rule 34 of the Election (Parliamentary and County Elections) Petition Rules, which, it was contended, was the only applicable law on the filing of an election appeal to the High Court from the Resident Magistrate’s Court as an election court. For the respondents, it was contended by counsel that although there was no express provision allowing the respondent to raise grounds of opposition to an appeal, the section 78 of the Civil Procedure Act and Article 159 of the Constitution of Kenya, 2010 allowed the court to entertain a point not raised in the Memorandum of Appeal in the interests of substantive justice, subject to an opportunity of the appellant to respond.*
- 3. The verbatim submissions of counsel for the parties – Mr. Abubakar for the appellant, Ms. Ngugi for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and Mr. Mouko for the 3<sup>rd</sup> Respondent are set out below:*

**“Mr. Abubakar**

*The objection relates to admission of argument on an issue not raised in the appeal or cross-appeal. I refer to the ruling in Appeal No. 153 of 2013.*

*The jurisdiction of the court to hear and determine an issue in the appeal which is not raised in the Memorandum of Appeal does not exist.*

*The court's jurisdiction to hear the appeal is derived from section 75 (4) of the Elections Act. Section 75 (1A) – on a matter of law only and filed within 30 days from the date of the Election Court judgment. Rules made under the Act, the Election Petition Rules 2013. Rule 34 deals with appeals from the Resident Magistrate's Court to the High Court. Rule 34 (1) provides for a memorandum of appeal. The provisions of the Civil Procedure Act and Rules made thereunder do not apply to appeals under section 75 and Rule 34 of the Election Petition Rules. There is no specific reference to the Civil Procedure Rules unlike in Rule 35 where appeals from the High Court are directed to be governed by the Court of Appeal Rules. There is no similar rule in the appeals from the Magistrates' court to the High Court.*

*The jurisdiction of the court of appeal is derived from section 85 of the Elections Act.*

*The design of the rule 35 as only on line applying the Court of Appeal Rules. Rule 34 is equivalent to Order 42 of the Civil Procedure Rules. Rule 34 is sufficient to deal with appeals without assistance from any other rules including Order 42 of the Civil Procedure Rules. Rule 32 of Order 42 of the Civil Procedure Rules does not apply. It cannot be used to raise an issue which is not in the Memorandum of Appeal.*

*Rule 34 of the Election Rules provides for the framing of the Memorandum of Appeal. The sub-rule seeks to provide the issues to be canvassed in the appeal. The jurisdiction to hear election petitions is special. The considerations in appeals in election petitions are different from appeals in criminal and civil cases.*

*Rule 34 (9) of the Election Petition Rules. The High Court to fix appeal for directions as to the evidence and hearing of the appeals. If there was any issue that ought to have been dealt with it ought to have been done at the Directions. Where directions are given parties are bound by the grounds raised in the Memorandum of Appeal.*

*Rule 34 (10) of the Election Petition Rules – power of the High Court on appeal. The court sits as an appellate court but with the same powers as the Election Court exercising original jurisdiction:*

*Original jurisdiction is exercised by election court including powers under rule 17 of the Election petition Rules for pre-trial, framing contested and uncontested issues in the petition. The issues in the pre-trial are equivalent to directions in the hearing of the appeal. The issues to be canvassed are determined at Directions. Once the stage is finalised no other issue can be raised in the petition or the appeal.*

*Rule 17 (1) (b) of Election Petition Rules – contested issues are also determined.*

*In election petitions, evidence is set out in affidavits and cross-examination is based on the affidavits. In the appeal the hearing is confined to issues raised in the Memorandum of Appeal. The original jurisdiction may also be understood as conferred to the High Court. The Rules as to pleadings apply and no one can raise an issue not raised in the pleadings.*

*I refer to the authority of *Fernandez v. People Newspaper Ltd* (1972) 1 EA 63. No finding in an issue not raised in a pleading. There is no ground made on the issue the respondents wish to raise. I also refer to the decision of *Shah v. C. M. Patel* (1961) 1 EA 397. Issue must be pleaded to enable opportunity to respondent to address it. An issue cannot be raised by way of submissions. It should be in the Memorandum of Appeal.*

*The Civil Procedure Act – Rule 32 of Order 42 does not afford the respondent an opportunity to raise an issue which is not raised in the Memorandum of Appeal. It applies when two appeals are considered. It is a power to make a decision on the issue raised in the Memorandum of Appeal not necessarily in favour of appellant but in favour of the successful party. It is not a power to hear and determine an issue. It is a power to pass a decree that is not in the Memorandum of Appeal.*

*For the Respondent may file an appeal in the form of cross-appeal or raise the issue during directions so that the court may consider the directions and the merits of the issue. The respondents did not file an appeal, and they did not raise the issue at the time of directions for the hearing of the appeal.*

#### Ms. Ngugi for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents

*The Constitution of Kenya at Article 165 (6) and (7) - supervisory jurisdiction [of the High Court] over the subordinate courts and may call for record of proceedings. Even where there is no appeal or cross appeal the court can call for record of the subordinate court and determine an issue that the court failed to determine.*

#### Appeal, cross-appeal and directions

*The issue was raised at the trial court.*

#### Civil Procedure Act

*The Act applies because the Elections Act has no general regulations relating to the appeals from the subordinate court that have been set out to guide this court. The High Court is an appellate court for all purposes regardless of whether it is sitting on an election petition appeal. As an appellate court, it is guided by the provisions of section 78 of the Civil Procedure Act and Order 42 rule 32 of the Civil procedure Rules. Under Rule 34 (10) of the Elections Petition Rules – Court shall have the same powers as the election court. The issue whether the petitioner was a proper petitioner was before the election court and this court may properly hear and determine it.*

*The decision of Shah v. Patel (1961) 1 EA 397 at p.406. In the present case, the issue was canvassed in the election court and it was not decided. I rely on the authority of Moraa v. Matoke, Kisii HCCA No. 44 of 2010. Article 159 of the Constitution gives the court power to administer justice.*

#### Mr. Mouko

*The objection is unfounded. The objection is asking the court to gag the respondents. The Court has power under the Constitution to canvass on all matters that may be considered necessary in canvassing the rights. The appellant seeks to deny the respondents the right to express their views. The appellant has a right of reply to the submissions by the Respondents. The objection is a technical objection and for the court to allow it, it will be curtailing the rights of the respondent to be heard.*

*The Court should allow the respondent to raise the point and if it finds it invalid it will order so. Article 22 of the Constitution, sub-article (3) (d) – no unreasonable restriction by procedural technicalities. If the court orders that the respondent should not be heard, it would be denying them a right to be heard merely because there is no cross-appeal.*

*There is no provision for the respondents to set out grounds for opposing the appeal. This would have been one of the grounds. If the law allowed the setting out of grounds of opposing the appeal, the appellant could oppose the raising of the grounds. The appellant*

cannot choose the grounds on which to oppose the appeal.

Article 165 of the Constitution provides for the jurisdiction of the High Court. The Court on its own motion can order for the record and make necessary orders. It does not matter whether there is a cross-petition of appeal. The court should look at the record.

Rule 34 of the Election Petition Rules gives the court the power of the election court. The court is enjoined to look at the evidence, pleadings and arguments of the parties and make findings of law and fact. To say that there is no cross-appeal would be to say that the court would only look at what was brought by the appellant.

The Civil Procedure Act – The rules on appeal under Rule 34 of the Election Petition Rules are skeletal and do not apply to every situation that may arise. The court may fall back to the Civil Procedure Act. There is for example no provision for cross-appeal. One is compelled to fall back on the Civil Procedure Rules, particularly Order 42 rule 32. The law gives power to the court to make an order in favour of a person who is not even before the court. The court comes to this by virtue of looking at the record. Even if the 3<sup>rd</sup> respondent had not come to court, the court would still make an order after looking at the record.

Authorities by the appellant are under the Civil Procedure Rules:

1. *Fernandez* case is not an election matter. The point taken on appeal was not pleaded in the lower court. It does not apply to the present case.
2. *Shah v. Patel* case involved a point of law not pleaded in the original pleading not in the appellate stage. If the point of law had been pleaded in the original pleadings the other party would have responded to it.

The Court does not have power at this stage to shut out the submissions. The validity of the submissions will be determined at the final decision of the appeal.

Directions before the appeal court. Rule 34 (9) of the Election Petition Rules – directions do not entail argument. They are directions for evidence to be produced. The grounds are left for the parties which arise from the pleadings and argument from the lower court. There are no issues set out in the appellate court unlike in the trial court.

Mr. Abubakar in reply

1. Article 165 (6) and (7) of the Constitution do not apply. The relevant Article 165 (3)(e) that subject to sub-article(5) - appellate jurisdiction conferred by statute. It should be read with section 75 of the Elections Act. The appeal before the court is not supervisory jurisdiction. It is appellate jurisdiction. The Court has to be moved under the supervisory jurisdiction.
2. Section 78 of the Civil Procedure Act – The Civil Procedure Act does not apply. If it did, it related to the powers of the appellate court including framing of issues for determination. It is similar to Rule 34 on directions. Section 78 does not apply as the purport of the section has been taken care of by Rule 34 of the Election Petition Rules.
3. Section 65 of the Civil Procedure Act is on civil matters. Section 75 of the Elections act gives jurisdiction on appeals in election matters. The Civil Procedure Act does not apply.
4. Rule 34 (10) original jurisdiction. It means that the appellate court will consider the Memo of Appeal. The High Court shall be however moved by the Memorandum of Appeal and the trial court by the evidence produced before it.
5. *Shah v. Patel* - The issue was not raised by the pleading in the trial court. The issue sought to be raised is not raised in the Memorandum of Appeal.
6. *Moraa v. Matoke* - relates to section 78 of the Civil Procedure Act which does not apply.
7. Article 159 of the Constitution. The issue is not one of technicality but of jurisdiction. It is a substantive issue not technicality.

8. *Right of expression under article 33 must be exercised in accordance with the procedure of the forum of the court. I refer to Article 165 (3)(e) on the jurisdiction of the court.*
9. *The Memorandum of Appeal is meant to capture the issues to be addressed.*
10. *The justification of the rules is that the procedure assists the court to determine several issues before it.*
11. *Article 22 (3) (d) of the Constitution:*
  - *Natural justice has been invoked;*
  - *Unreasonably restricted by procedure – Rule of procedure when not followed by a party cannot be taken to be unreasonable;*
  - *The issue before the court is not a technicality.*
12. *Rule 34 of the Election Petition Rules: No grounds of opposition in an appeal . The Civil Procedure Rules have similarly no provision for grounds of appeal. The submission that Rule 34 is inadequate is not correct as the Civil Procedure Act is also inadequate.*
13. *Prejudice in allowing something that is not allowed by the rules to be heard.*
14. *Article 165 supervisory jurisdiction – court on its own motion does not apply and where it applies, there are procedures. Jurisdiction is conferred by the constitution, statute or rules. In the absence of a provision for the jurisdiction, the court cannot entertain the issue.*
15. *Authorities based on Civil Procedure. The Civil Procedure Act authorities apply in the scenario of the court acting in the original jurisdiction. The court is exercising its appellate jurisdiction.*
16. *No provision for cross-appeal. The Civil Procedure Act only has a mention of cross-appeal in Rule 32 of Order 42. Directions in the appellate court under rule 34 of the Election Petitions Rules may include directions as to the issues to be canvassed. Rule 34 is adequate and there is no need to import the Civil Procedure Act.*

*I urge the court to uphold the objection.”*

### **Issues**

4. *The submissions by counsel before the court was canvassed as simply whether the court will hear and determine an issue that is not expressly raised in the memorandum of appeal in the context of an appeal from the Resident Magistrate’s court as an election court. It would appear that the real issue before the court is whether the respondent in an appeal may rely on a ground not set out in the memorandum of appeal filed by the appellant where he [the respondent] has not filed his own appeal from the decision appealed against.*

### **Determination**

5. *With respect, the supervisory jurisdiction of the High Court under Article 165 (6) and (7) of the Constitution is, in my view, not applicable in election petition appeals which flows from the court’s appellate jurisdiction conferred by the Elections Act. The supervisory jurisdiction is meant for the review of decisions and proceedings of subordinate courts rather than appeals from such decisions for which the appellate jurisdiction is clearly given by Article 165 (3) (e) of the Constitution.*
6. *Election petitions are special proceedings under Article 87 of the Constitution whose objective is to afford expeditious disposal of the electoral disputes for the obvious public interest concerns that the electorate obtains a quick determination as to the legitimate winner of the vote. In this regard, the election courts have special procedures designed to facilitate expedition in the resolution of the election petitions and appeals therefrom. Article 87 (1) of the Constitution provides that –*

*“Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes.”*

7. *The Jurisdiction of the High Court to hear appeals generally is derived from the enabling*

provisions of Article 165 (3) (e) of the Constitution giving ‘any other jurisdiction, original or appellate, conferred on it by legislation.’ In the case of elections of county assembly representatives, the appellate jurisdiction is conferred by section 75(1A) and (4) of the Elections Act, which is in these terms:

Section 75(1A) and (4) –

“75 (1A) A question as to the validity of the election of a member of a county assembly shall be heard and determined by the Resident Magistrate’s Court designated by the Chief Justice. ....

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

(a) filed within thirty days of the decision of the Magistrate’s Court; and

(b) heard and determined within six months from the date of filing of the appeal.”

8. The provision that the appeal be restricted to matters of law only and to be determined within 6 months is the function of the constitutional requirement of expeditious disposal of election disputes, which the rules made under the Elections Act are designed to give effect. In interpreting the **Election (Parliamentary and County Assembly) Petition Rules 2013**, therefore, the court must aim to give effect to the principle of expeditious disposal of election disputes.
9. The emphasis on expeditious disposal of election disputes is clear from the objective of the rules as set out in the rules themselves. The overriding objective of the Election (Parliamentary and County Assembly) Petition Rules and the duty of the Court and the parties under the Rules are set out in Rules 4 and 5 thereof as follows:

**“Objective of Rules.**

4. (1) The overriding objective of these Rules is to facilitate the just, expeditious, proportionate and affordable resolution of election petitions under the Constitution and the Act.

(2) The court shall, in the exercise of its powers under the Constitution and the Act or in the interpretation of any of the provisions in these Rules, seek to give effect to the overriding objective specified in sub-rule (1).

(3) A party to an election petition or an advocate for the party shall have an obligation to assist the court to further the overriding objective and, to that effect, to participate in the processes of the court and to comply with the directions and orders of the court.

**Duty of court and parties.**

5. (1) For the purpose of furthering the overriding objective provided in rule 4, the court and all the parties before it shall conduct the proceedings for the purpose of attaining the following aims—

(a) the just determination of the election petition; and

**(b) the efficient and expeditious disposal of an election petition within the timelines provided in the Constitution and the Act.**

(2) The court may, where a party has breached any requirement of these Rules, issue

orders, or impose penalties, as the court may consider just and fit including an order for payment of costs.”

***Is Rule 34 of the Election (Parliamentary and County Assembly) Petition Rules, 2013 a self-sufficient provision of appeals from the magistrate’s court as an election court?***

10. *Rule 34 of the Election (Parliamentary and County Assembly) Petition Rules, 2013 provides for the procedure in appeals to the High Court as follows:*

*“34. (1) An appeal from a Magistrate’s Court under section 75 of the Act shall be in the form of a memorandum of appeal and shall be signed in the same manner as a petition.*

*(2) The memorandum of appeal shall concisely set out under distinct head, the grounds of appeal, without any argument or narrative, from the judgment appealed from and the grounds shall be numbered consecutively.*

*(3) The memorandum of appeal shall be filed at the nearest High Court registry within fourteen days from the date of the judgment.*

*(4) The appellant shall, upon filing the memorandum of appeal, pay the fee specified in the Second Schedule.*

*(5) The appellant shall, within seven days of filing the memorandum of appeal, serve the memorandum of appeal on all parties directly affected by the appeal.*

*(6) The appellant shall, within twenty one days, upon filing of memorandum of appeal file a record of appeal which shall contain the following documents—*

*(a) memorandum of appeal;*

*(b) pleadings;*

*(c) typed and certified copies of the proceedings;*

*(d) all affidavits, evidence and documents put in evidence before the magistrate; and*

*(e) signed and certified copy of the judgment appealed from and a certified copy of the decree.*

*(7) Upon the filing of the memorandum of appeal, the registrar of the court to which the appeal is preferred shall, within seven days, send a notice of appeal to the court from whose decree the appeal is preferred.*

8. *The court shall, on receiving a notice under sub-rule (7), send the proceedings and all relevant documents relating to the petition to the High Court to which the appeal is preferred.*

*(9) The High Court shall, within thirty days of lodging the memorandum of appeal, fix a date for —*

*(a) directions including directions as to the manner in which evidence and exhibits may be presented; and*

(b) hearing of the appeal.

(10) The High Court may confirm, vary or reverse the decision of the court from which the appeal is preferred and shall have the same powers and perform the same duties as are conferred and imposed on the court exercising original jurisdiction.”

11. From its design and content, Rule 34 of the Election Petition Rules aims at providing a comprehensive code of procedure for the filing and hearing of appeals from the decisions of the Resident Magistrate’s Court sitting as an election court. The rule contains provisions for the time and manner of filing an appeal, the contents of the memorandum of appeal, service, filing of the record of appeal, directions for hearing and the nature of orders that the appellate court may make upon hearing. It is similar to the provisions of section 78 of the Civil Procedure Act and Order 42 of the Civil Procedure Rules which are applicable to the appeals to the High Court under its civil jurisdiction and those of sections 349 -354 of the Criminal Procedure Code in relation to criminal appeals.
12. It was submitted for Respondents that the Rule 34 had a gap in relation to provisions for filing of cross-appeal or grounds of opposition to an appeal and that in such circumstances resort should be had to the Civil Procedure Rules which under its Order 42 Rule 32 which makes reference to cross-appeal and appear to allow the court deal with a matter that is not pleaded in an appeal or cross-appeal. This submission flowed from my ruling in a related appeal Mombasa High Court Appeal No. 153 of 2013 where, obiter, I gave such meaning to the Rule stating as follows:

“Without prejudicing the hearing of the appeal by the appellate court, I observe that in its judgment on appeal the High Court has power to decide the appeal as between the parties including making a decree on favour of a respondent who has not filed an appeal or cross-appeal. This is the provision of Order 42 rule 32 of the Civil Procedure Rules which in my view is applicable in the interests of the overriding objective under rule 4 (1) of the Election (Parliamentary and County Assembly Elections) Petition Rules 2013 ‘**to facilitate the just, expeditious, proportionate and affordable resolution of election petitions under the Constitution and the Act**’ and in the absence of any rule in the said election petitions rules to the contrary.”

**Does the Lacuna with respect to provision for cross-appeal or objections in Rule 34 of the Election (Parliamentary and County Assembly) Petition Rules, 2013 justify calling in aid Order 42 Rule 32 of the Civil Procedure Rules?**

13. Counsel for the 3<sup>rd</sup> Respondent thought that in the absence of provisions for cross-appeal one could fall back on the Civil Procedure Act and rules such rule 32 of Order 42 discussed above. As a matter of fact, there is no provision for the filing of cross-appeal or ground of affirming the decision in the Civil Procedure Act and Rules, which are applicable to the High Court. As observed by counsel for the appellant, other than its reference in rule 32 of Order 42 of the Civil Procedure Rules, there is no other reference to cross-appeal in the entire Civil Procedure Act. It means that under the Civil Procedure Rules, a successful respondent who is only dissatisfied with any part of the trial court’s decision, which is otherwise favourable to him or who seeks to urge the appellate court to uphold the trial court’s decision on grounds other than those relied on by the court must file an appeal under the Rules.
14. The only reference to **cross-appeal** in the Civil Procedure Act and Rules is at Order 42 rule 32 and it was introduced by the Civil Procedure Rules, 2010. The rule is in the following terms:

“32. The court to which the appeal is preferred shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of

*all or any of the respondents although such respondents may not have filed any appeal or cross-appeal.”*

15. Order 42 rule 32 of the Kenya Civil Procedure Rules made under the Civil Procedure Act is in *pari materia* with, and apparently borrowed from, Order 41 rule 33 of the Indian Code of Civil Procedure which is in these terms:

*“The appellate court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree as the case may require, and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection.”*

16. In their commentary on the Code of Civil Procedure, the learned authors of Mulla, **The Code of Civil Procedure** by Sir Dinshah Fardunji Mulla, 18<sup>th</sup> Ed. (2012) at p. 3561 state the scope and object of rule 33 (Kenyan rule 32) as follows:

*“Scope and Object - The object of the rule is to empower the appellate court to do complete justice between the parties. Order 41 rule 4 and this rule gives the court ample power to make the order appropriate to the ends of justice. Under the former rule, upon an appeal by one of the parties on the ground common to all, a decree may be varied in favour of all; under the latter rule, the court has power to make the proper decree notwithstanding that the appeal is as to only a part of the decree and such power may be exercised in favour of all or any of the parties, even though they may not have filed an appeal or objection. Order 41 rule 33 enables the appellate court to pass away decree or order which ought to have been made and to make such further order or decree as the case may be in favour of all or any of the parties even though the appeal is as to part only of the decree; and such party or parties may not have filed an appeal. **The necessary condition for the exercising the power under the rule is that the parties to the proceedings are before the court and the question raised properly arises out of one of the judgments of the lower court and in that event, the appellate court could consider any objection to any part of the order or decree of the court and set it right.** No hard and fast rule can be laid down as to the circumstances under which the power can be exercised under Order 41 rule 33 of the Code of Civil Procedure and each case must depend upon its own facts.”*

17. As shown in the foregoing paragraphs, I have had opportunity to consider the matter in detail and I find that the rule 32 Order 42 of the Civil Procedure Rules allows the court to consider and make judgment on objections to the judgment of the trial court even as to portions thereof as are not appealed from by the appellant or cross-appellant and in favour of parties who have not appealed. The question is whether the provisions of Order 42 rule 32 apply to election petition appeals under the Election Act.

18. In borrowing the provisions of Order 41 rule 33 of the Indian Code of Civil Procedure the drafters of the Civil Procedure Rules 2010 did not also borrow the related rule 22 which provides for the filing of cross-objections to appeals, and I would take this opportunity to request the Rules Committee to consider clarifying the matter and prescribing for the filing of cross-appeals or objections and grounds of affirming the decision as in India and our own Court of Appeal. Order 41 rule 22 (1) of the Indian Code of Civil Procedure makes provision for a respondent to file cross-objections to a decree as if he had preferred a separate appeal providing that:

*“(1) Any respondent, though he may not have appealed from any part of the*

*decree, may not only support the decree but may also state that the finding against him in the court below in respect of any issue ought to have been in his favour; and may also take any cross-objection to the decree which he could have taken by way of appeal provided that he has filed such objection in the appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for the hearing of the appeal, or within such further time as the Appellate Court may see fit to allow.”*

19. *In a similar way, the Kenya Court of Appeal has specific rules for the filing of a cross-appeal and grounds for the affirmation of the trial court’s decision under Rules 93 and 94 of the Court of Appeal Rules providing for the filing by a respondent of notice of cross-appeal or notice of grounds for affirming a decision seeking, respectively, reversal or variation of the decision or to support the decision appealed from. Rule 104 (a) of the Court of Appeal Rules provides as follows:*

*“104. At the hearing of an appeal—*

*No party shall, without the leave of the Court, argue that the decision of the superior court should be reversed or varied except on a ground specified in the memorandum of appeal or in a notice of cross-appeal, or support the decision of the superior court on any ground not relied on by that court or specified in a notice given under rule 93 or rule 94.”*

20. *The failure by the Rules Committee to provide in Rule 34 of the Election Petition Rules for cross appeal or grounds of affirmation may have been informed by the need to facilitate an expeditious disposal of electoral disputes in accordance with the requirement of Article 87 of the Constitution. The design and nature of Rule 34 of the Election Petition Rules as one rule containing provisions for appeals from the resident magistrate’s election court, contrasts with rule 35 which legislates by incorporation the entire body of the Court of Appeals Rules through the reference of the rules as the procedure for appeals from the High Court to the Court of Appeal. It connotes that the rule 34 on appeals to the High Court on election petition decisions from the resident Magistrate’s court as election court is the comprehensive provision on appeals and there is no justification for calling into aid the provisions of the Civil Procedure Rules which are applicable to the court’s ordinary civil jurisdiction. Indeed, the powers of the court on appeal are set out in rule 34 (10) in similar terms as the reciprocal provision of the Civil Procedure Act, section 78 whereof which is in the following terms:*

*“78. (1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—*

*(a) to determine a case finally;*

*(b) to remand a case;*

*(c) to frame issues and refer them for trial;*

*(d) to take additional evidence or to require the evidence to be taken;*

*(e) to order a new trial.*

*(2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.”*

### ***Failure of the Respondents to file appeal from decision***

21. According to first principles, pleadings are designed to facilitate the setting out of the plaintiff's claim with sufficient particularity to enable the defendant to respond. Accordingly, a party may not be permitted to raise a ground which is not pleaded because the respondent will not have had an opportunity to rebut it. It is clearly a matter of the justice of the case to see that the party against whom the new point is sought to be taken is not prejudiced by being taken by surprise at the new point on appeal without an opportunity to respond to the issue and have the facts investigated by the trial court.
22. The authorities cited by the appellant — respectively support the propositions that in civil suits issues are by way of pleadings and the court cannot found its judgment on an un-pleaded issue and that an issue should be raised in the pleadings to give the other party an opportunity to respond to it by evidence. They do not relate directly to the question whether a respondent to an appeal may be heard on an issue not raised in the appeal. The general principle that a new point not raised in the pleadings may not be allowed or used as a basis of judgment is set out in decisions of the courts cited by the appellant and also in *Girdhari Lal Vidyarthi v. Ram Rakha* (1957) EA 527 C.A., where the Court of Appeal, held that the appellant could not be heard to allege an express trust when he had only pleaded a resulting trust before the trial court.
23. **How about a situation where although a matter is raised before the trial court, it is not raised initially in the grounds of appeal and it is subsequently sought to be raised by the appellant or indeed by the Respondent? Does the want of an appeal by way of a memorandum of appeal under rule 34 in this case prevent the court from entertaining the point proposed to be raised by the respondents?** I think the matter may be resolved by reference to the analogy of the principles for raising a new point on appeal which was not dealt with at the trial court. Although the point had been raised in the trial court, having not been raised a memorandum of appeal by the respondent, it amounts to a new point taken in the course of the appeal, and the considerations of the ability to give the appellant a fair trial are paramount in the same way as with the new point not previously raised in the trial court.
24. The question of an appellant (and by like reasoning a respondent who has filed a cross-appeal) being heard on a new point which was not raised in the trial court has been dealt with by a long list of decisions of the Court of Appeal for East Africa and the Kenya Court of Appeal and the position that the court has a discretion in permitting a new point to be taken on appeal is now established. It was held by the Court of Appeal in **Securicor (Kenya) Ltd v. EA Drappers Ltd and Anor.** (1987) KLR 338, that the Court of Appeal has a discretion to admit a new point at appeal but that the discretion must be exercised sparingly, the evidence must all be on record, the new point must not raise disputes of fact and it must not be at variance with the facts or case decided by the court below. Similarly, in **Attorney General v. Revolving Tower Restaurant,** (1988) KLR 462, the Court of Appeal reiterated the principle that an appellate court has discretion to allow an appellant to take a new point before it if full justice can be done to the parties but found that in the case the facts bearing upon the new point had not been fully explored to show the relevance of the new point of law and the court would therefore not allow that new point. See also *Openda v. Ahn* (1983) KLR 165. In *Kenya Commercial Bank Ltd v. Osebe* (1982) KLR 296 and *Nyangau v. Nyakwara* (1986) KLR 712 the Court of Appeal held that it would allow a point to be raised for the first time on appeal where it was an issue going to jurisdiction.
25. The law on the matter was condensed by Platt JA in **Wachira v. Ndanjeru** (1987) KLR 252, as follows:

“The principles can be summarised as follows: the discretion to allow a point of law to be taken for the first time on appeal will not be exercised unless full justice can be done between the parties. It will not usually be allowed when to do so would involve disputed facts which were not investigated or tested at the trial. Nor will a party be allowed to raise on appeal, a case totally inconsistent with that which he raised in the trial court, even though evidence taken in that court supports the new case. (See *Tanganyika Farmers Association Ltd. v Unyamwenzi Development Corporation* [1960] EA 620, *Overseas Finance Corporation Ltd v. Administrator General* (1942) 9 EACA 1). But the court will allow a new question concerning the construction of a document or the legal effect of admitted facts, since no question of evidence arises, and it will usually be regarded as expedient in the interests of justice to do so.”

**Whether disputed facts bearing on the question of substitution of the petitioner were investigated or capable of being tested.**

26. Whether the facts upon which the plea that the court should not have allowed the taking over of the petitioner were admitted or established in the court below or capable of being established may be discerned from the Ruling sought to be challenged by the respondents made by the trial court on 14<sup>th</sup> May 2013, which is set out in full below:

**“Ruling**

*The nature of election petitions in the country is that they have their own twists and turns and therefore the present matter is no exception.*

*The court converged on 2/5/13 in compliance with the provisions of Rule 4 of the Election (Parliamentary and Country Elections) Petition Rules 2013.*

*Shortly thereafter an application dated the same day to withdraw the election Petition was filed.*

*The applicant denied having signed or filed the election petition. His contention was that he was approached to be a witness only to learn later that his name had been used as a petitioner.*

*Other parties to this petition were given an opportunity to respond to the issues raised and they accordingly filed replying affidavits.*

*A notice of intention to be substituted as a petitioner was also filed on 6/5/2013 by one Twahir Abdulkarim Mohammed along the petitioner to be substituted as a petitioner.*

*The grounds set out in the application are that Bakari Hassan Juma has given notice of his intention to withdraw the petition and he had actually not signed the petition. That it is in the interest of justice that the applicant be substituted as a petitioner.*

*The respondents replied to the application; and an order was made by the court that since both applications are related, they be heard together.*

*It is clear that the respondents are not opposed to the withdrawal of the petition per se, but the main contention is that now that the petitioner has denounced, having signed the Petition, there is no petition before the court and therefore the issue of substitution does not arise.*

***There are accusations and counter accusations between the petitioner and the person intended to be substituted as the petitioner namely TWAHIR ABDULKARIM MOHAMMED.***

***I have considered the application in question, the replying affidavits and the submissions made by all the learned counsel in this matter.***

***The petitioners identity card copy is annexed on the petition. However it does not bear the petitioners identification mark or signature by virtue of which the court would have been able to compare and make a finding on whether or not he is one who had signed the election petition.***

***The party intended to be substituted insists that indeed the petitioner***

*signed the petition whereas he alleges otherwise.*

*However from the depositions by the petitioner it is clear that he was aware of an intended petition and it would appear that he only accepted to being a witness and not a petitioner in the strict sense.*

*It is also alleged that the petitioner and the person who seeks leave, to be substituted are known to each other. The petitioner was the chief campaigner and agent for the applicant who seeks to be substituted.*

*Looking at the record, the deposit for security was made by a different person altogether.*

*On the face of it, it is not possible to ascertain all the allegations being raised in this matter by all the parties against each other. It would consume a lot of time and make the court lose track of the spirit and intendment of Rule 4 and 5 of the Election Petition Rules.*

*In my considered view, proceedings in an election petition are proceedings sui generis, they cannot be looked at with the same pair of spectacles like ordinary civil proceedings.*

*My understanding of an election petition that its life is not hinged on the existence of an individual. It is a matter of public interest.*

*Indeed that is why Rule 26 provides for substitution of the petitioner, Rule 27 deals with the death of a petitioner and Rule 2 provides for an application to be substituted as a petitioner....*

*In the case of **PETER NGUNJU GAKUNGA & DEDAN KIRAGU KINGORI VS FREDRICK MAINA & JOSEPH A. GATHENJI E.P NO. 47/1993**, the court had this to say about election petitions: -*

***“The power vested in the court for striking out a petition as a whole thereby driving a party away for the seat of justice is a draconian remedy. It should therefore be used sparingly and in plain cases”.***

*That authority was cited with approval in the subsequent case of **ROBERT NELSON NGETHE VS MBOGORI NJERU & ANOTHER [2005] E KLR.***

*The circumstances presented herein are not plain. The time frame for filing of Election Petitions came to an end. The result of striking out is that there would be no other forum to ventilate this issue even if there was a person who wished to be heard.*

*Due to the reasons I have already alluded to, I will allow the applications dated 2/5/13 and the one dated 6/5/13.*

*There should be an order for costs to the 1st, 2nd and 3rd respondents in respect of both applications.*

*The said costs shall be borne by the new petitioner Twaher Abdulkarim Mohammed and to be drawn from the security of costs already posted in court upon finalization of this matter.*

*An order is made that the substituted petitioner deposits in court a fresh security of costs in the sum of Kshs.100,000/- on or before 17/5/13 in default of which the respondents will be a liberty to apply for striking out of the petition.*

*The 1st respondent is also ordered to move with speed and comply with Rule 2 of election petition rules requiring the filing in court of the result of the election by 17/5/2013.*

*The substituted petitioner, will also file and serve any further witness affidavits upon the respondents on or before 17/5/2013.*

*The parties to agree on the petitioner's application dated 10/4/13 in default to file responses thereto and a hearing date to be given on 20/5/2013. Mention on 20/5/13."*

*It is clear to this court that the trial court did not establish the facts bearing on the point sought to be raised by the respondents as to the correctness of the substitution of the appellant as the petitioner. Nor is it possible for this court to establish the facts because appeal to this court is, in terms of section 75(4) of the Election Act, restricted to matters of law.*

### ***The effect of Article 159 of the Constitution.***

*27. The entrenchment of the Article 159 principle of substantial justice is testimony of the greater moment that our justice system regards the due administration of justice without over reliance on the format or process prescribed for its delivery. The constitutional principle is an upgrading of previous statutory underpinning by statute under the sections 1A , 1B and 3A of the Civil Procedure Act, and the Judicature Act section 3 (2) in terms that:*

*"The High Court, the Court of Appeal and all subordinate courts shall decide all such cases...according to substantial justice without undue regard to technicalities of procedure and without undue delay."*

*In Article 159, the makers of the Constitution of Kenya 2010 expressly provided for the supremacy of the principle of substantial justice over provisions on procedure whether these appear in statute or rules made thereunder.*

*28. I do not agree as contended by counsel for the appellant that the provisions of rule 34 of the Election Petition Rules go to the jurisdiction of the court and are therefore not amenable to the substantial justice principle of the Article 159 principle. However, I would agree that there are some categories of rules that go beyond mere provisions or 'technicalities' of procedure and therefore beyond the reach of Article 159 which proscribes 'undue regard to technicalities of procedure'. In this category, would fall any rule that appeared to grant or deny jurisdiction to hear and determine or take cognisance of a particular matter, such as those on principles of res judicata and sub judice, and those that make provisions for ensuring fair hearing, the right to fair trial being itself a constitutional right under the Bill of Rights. As Platt, JA observed in **Chalicha FCS Ltd. v. Odhiambo & 9 Ors.** (1987) KLR 182, 188:*

*"The rules of procedure carry into effect two objectives; first to translate into practice the rules of natural justice, so that there are fair trial[s]; and the second, procedural arrangements whereby the steps of a trial are carried out in good order and within a reasonable time. In my opinion where the rules are dealing with the precepts of natural justice, the courts would be slow to conclude that they are mere technicalities, which may be swept under the carpet by the brush of Section 3A of the Civil Procedure Act [on inherent jurisdiction of the court to do justice]."*

29. All rule 34 provides for is the procedure for the filing of appeals from the decisions of the Resident Magistrate's court as an election court for county assembly representatives. It does not grant or deny jurisdiction of the court on appeal which is conferred by section 75 (4) of the Elections Act. Accordingly, I find that the principle of Article 159 on substantial justice is applicable to the provisions of rule 34 of the Election Rules. This is consistent with the overriding objective the very Election Rules as set in Rules 4 and 5 of the Election Rules.
30. It cannot be contested that in applying the Article 159 principle, the court must act judicially. The applicant who wishes the court to disregard a particular rule of procedure must lay a basis by demonstrating reasonable grounds or excuse for failure to comply with the rule, and the court, in granting the request, must be satisfied that no injustice will be occasioned on the respondent by disregarding the rule.
31. The respondents have not shown any reason for failure to comply with the rule 34 for the filing of appeal against the decision of the election court on the point proposed to be argued on appeal. The 3<sup>rd</sup> Respondent filed an appeal before the final determination of the election petition, and although objection was taken in that appeal that the appeal could not be properly filed before the final judgment in the election petition, the same was not determined as the appeal was overtaken by lapse of time set by the Elections Act for the hearing of appeals (See Judgment in High Court Election Petition Appeal No. 153 of 2013.) However, to be sure, there was no appeal by any of the respondents upon the final judgment of the Court by on the point now sought to be raised. No reason has been given for the default, and the court has therefore no basis for the application of Article 159 of the Constitution, particularly in view of the time limit for the filing of the appeals under section 75(4) (b) of the Election Act.

### Findings

32. In conclusion, the position of the matter the subject of this ruling as I have found it is as follows:
- i. Rule 34 of the Election (Parliamentary and County Assembly Elections) Petition Rules, 2013 is a comprehensive provision for appeals from the Resident Magistrate's Court as an election court and it cannot justify reliance on the provisions of the Civil Procedure Act and Rules. The Rule does not contain provisions for the filing of cross-appeals or cross-objections. In the circumstances, any objection or issue proposed to be canvassed against a finding of the election court on appeal to the High Court must be filed as **an appeal. In the circumstances of this case, the respondents ought to have filed their independent respective appeals on the matter.**
  - ii. The Respondents did not file, upon the final judgment of the election court from which this appeal arises, an appeal against the decision of the court on the take-over of the petition by the appellant from an original petitioner. No reasons were given by the respondents for failure to file the appeal after the election court's final judgment. An appeal by the 3<sup>rd</sup> respondent against the take-over decision filed before the final judgment in the election petition is not before the court.
  - iii. The general principle is that issues are raised before the trial or appellate court by pleadings. However, even where a point is not raised before the trial court, it may be raised as a new point on appeal subject to certain principles established by case-law as where the facts bearing on the issue have been fully investigated, capable of investigation or admitted; or where the issue raises a point of law where no evidence is necessary; or where it relates to jurisdiction of the trial court. These considerations would also apply whether the issue, though raised before the trial court, is not raised in the memorandum of appeal before the appellate court.
  - iv. The issue proposed to be raised in this appeal regarding the court's grant of leave to the appellant to take over the petition from the original petitioner was taken before the trial court but the court was unable to decide on the applicable facts and, therefore, it cannot be said that the facts are admitted, fully investigated by the trial court or capable of full investigation before this court, bearing in mind that the appellate court has no jurisdiction to deal with matters of fact under section 75 (4) (a) of the Elections Act.
  - v. In accordance with the authorities, as the facts on which the point sought to be taken are not admitted and the trial court was not able to resolve the disputed facts and make a

*finding thereon, and bearing in mind that this appellate court cannot investigate the facts being an appeal on matters of law only, it would be against justice to permit the raising of the point when the truth of the facts relied upon by the respondents and disputed by the appellant, and vice versa, cannot be established. It would incurably offend the constitutional principle of fair hearing as the parties will not be able to avail evidence for investigation of the facts. In the circumstances, the application of the Article 159 principle requires the rejection of the proposed ground of appeal which has not been taken by way of filing a memorandum of appeal in accordance with Rule 34 of the Election Petition Rules.*

- vi. *Finally, to allow the raising of the proposed issue in the appeal by the **respondents** who did not file an appeal [unlike a situation where an **appellant** has already filed an appeal and the question is whether a new point could properly be taken on appeal when it was not taken before the trial court] is to allow an appeal outside the statutory period for the filing of appeals prescribed under section 75 (4) (a) of the Elections Act, a jurisdiction that neither the election court nor this court on appeal has.*

### **Orders**

33. *In the circumstances, the court must uphold the objection taken by the appellant and decline the request by the respondents to raise and make submissions on the point challenging the decision of the trial election court allowing the appellant to take over the election petition filed by an original petitioner who sought to withdraw his petition on the ground that it had been filed in his name without his authority.*
34. *Accordingly, the court directs that the appeal shall proceed to hearing on the basis of the issues raised in the appeal only. Costs in the cause.*

***Dated, signed and delivered on the 3<sup>rd</sup> February 2014.***

***EDWARD M. MURIITHI***

***JUDGE***

### **Submissions on Appeal**

0. Mr. Aboubakar for the Appellant submitted under Ground 1 of the Memorandum of Appeal, that the court had a duty to protect and enforce the Constitution by ordering the 1<sup>st</sup> Respondent to provide information to the Appellant. On ground 6 it was argued that although the courts had in various rulings found that the failure to provide agents with Forms 35 could not in itself nullify an election, section 59 (i) (j) of Elections Act, 2011 makes it an election offence for an officer of IEBC to fail to do what he is obligated to do. It was not enough for IEBC to claim that the number of copies were insufficient. The appellant had proved that the IEBC officers had failed in their duty, which failure would affect the verification of elections. On ground 8 and 9, it was submitted that the result of Uhuru Gardens Steam I ought to have been nullified since the Presiding Officer failed to sign Form 35, with no explanation given for this even in response to the Petition, as this casts doubt on the Form 35 in the ballot box. On ground 10, the Appellant submitted that the signature of the Presiding Officer was suspect, despite the said officer appearing in court to testify that the same was his. On ground 11, the absence of Form 35s for four polling stations ought to have resulted in the nullification of results from those stations. The failure by the candidates or their agents to sign Forms 35 without documented reasons was submitted under grounds 12 and 13 as amounting to election irregularities.
0. On ground 15, it was submitted that the Appellant had proved to the required standard that the IEBC officials assisted voters without inviting agents, and in some stations selected one or two to do so, which was illegal and showed bias on the part of the IEBC. On grounds 2, 3 and 4, the appellant submitted that the evidence of the witnesses who went to vote only to find that their names had already been crossed out yet they had not voted, implied that someone else other than the registered person voted and that is an election offence. On grounds 3, 4, 5 and 14, the

Appellant faulted the trial court for failing to order the production of the Register which was said to have been in the Governor's Ballot Box, for the reason that it would have been time-consuming, stating that the registers used in the polling stations were illegal. It was submitted that owing to the challenges in voter identification when the EVID system failed, many voters had been scared away from the polling stations. On ground 17, the Appellant it was submitted, had been denied hearing yet he filed a complaint before the results of the election were declared. Ground 18 of the appeal related to the Appellant's application for scrutiny which was denied. The Appellant also extensively submitted that sufficient grounds had been laid for the court to order scrutiny as prayed or on its own motion.

0. Miss Ngugi for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents opposed the appeal. It was submitted that the court's reasons for refusing to grant orders for scrutiny were given in the ruling of 6<sup>th</sup> June 2013. One of the reasons was that the Petitioner had not given the specific polling stations as required by law. It was argued that the variances in the polling day diaries could not be relied on by the Appellant as they had not been pleaded in the Petition/ Amended Petition. On the missing Forms 35 from 4 polling stations, counsel argued that the polling stations were not the subject of any affidavit challenging the results of the 4 stations. There was also no oral testimony of any witness on the 4 polling stations. Further, it had not been shown how the results from those 4 stations would have affected the outcome of the elections.
0. On the Form 35 that was alleged to have been signed by someone other than the Presiding Officer, it was submitted that the verification of a signature can only be proved by a hand-writing expert. In any event the presiding officer in question had in his testimony confirmed that the signature on the Form 35 was his which he had signed in a hurry and that was the reason it differed with the other signatures. On the issue of use of an illegal register, it was submitted that the Appellant did not bring the evidence of any other voter to corroborate the statement that the register used did not have the photographs of the voters. There was also no evidence of any voter who failed to vote because of the use of that register which contained certain errors. No voter was disenfranchised if the register did not have photographs. The election court considered the evidence and the submissions on record and arrived at a just decision. The court was referred to the submissions that were made before the election court at p. 1079-1217 of the Record of Appeal on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.
0. Mr. Muoko for the 3<sup>rd</sup> Respondent supported the submissions of Ms. Ngugi for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. He submitted in detail that the Appellant failed to lay sufficient evidence to support any of the allegations made in the Petition. He submitted also, that the Petitioner being bound to the pleadings contained in the amended Petition ought to prove only those allegation therein, and should not be allowed to venture into a fishing expedition, which is what he opined was the case. Further, the irregularities complained of, and which he submitted had not been proved, even if they had occurred, despite the lack of evidence, could not have affected the outcome of the election.
0. The parties referred the court to several authorities, which shall be considered hereinafter, and upon conclusion of the submissions, Judgment was reserved.

### **Determination**

0. The Court has considered the appeal and submissions made by counsel and the case-law and statutory authorities cited and has come to a decision and judgment on the appeal. As shown below, this court has also had the benefit of recent decisions of the Court of Appeal on the issues raised in this appeal. The decision of the court is based, principally, on the consideration of the issues as follows.

### **The Appeal on a matter of law**

0. Section 75 (1A) of the Elections Act provides that the appeal from the election court in the case of electoral disputes relating to a County Assembly ward shall lie to the High Court. Under sub-section (4), the appeal shall be on a **matter of law only** and it shall be filed within thirty days of the election court's judgment and be heard and determined within six months from the date of filing. Sub-section (4) provides:

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

(a) filed within thirty days of the decision of the Magistrate’s Court; and

(b) heard and determined within six months from the date of filing of the appeal.”  
[emphasis added.]

0. Although the phrase ‘a matter of law’ has not been defined by the Elections Act, it has been held in ***Timamy Issa Abdalla vs Swaleh Salim Swaleh Imu & 3 Others, Malindi Civil Appeal No. 39 of 2013 (Court of Appeal), (Okwengu, Makhandia & Sichale, JJA)*** of 13.01.2014 that a decision is erroneous in law if it is one to which no court could reasonably come to, citing ***Bracegirdle vs Oxney (1947) 1 All ER 126***. See also ***Khatib Abdalla Mwashetani vs Gedion Mwangangi Wambua & 3 Others, Malindi Civil Appeal No. 39 of 2013 (Court of Appeal), (Okwengu, M’inoti & Sichale, JJA)*** of 23.01.2014 following ***AG vs David Marakaru (1960) EA 484***.
0. In ***Peter Gichuki King’ara vs IEBC & 2 Others, Nyeri Civil Appeal No. 31 of 2013 (Court of Appeal) (Visram, Koome & Odek, JJA)*** of 13.02.2014, it was held that it is trite law that the exercise of judicial discretion is a point of law and that the trial court in denying a prayer of scrutiny is exercising judicial discretion. The Court concluded that it would not be feasible for the Court of Appeal to order for a recount and scrutiny as this would involve matters of fact that were within the jurisdiction of the trial court. The court further held that the question of whether the trial judge properly considered and evaluated the evidence and arrived at a correct determination that is supported by law and evidence – with the caveat that the appeal court did not see the witness demeanor – is an issue of law.
0. In the present appeal, the election court while dismissing the petition on the basis that the complaints of electoral malpractices and illegalities set out in the petition had not been proved by evidence, also refused an application by the petitioner for scrutiny and recount and held at p. 10 thereof as follows:

*“Another aspect of the petitioner's prayers that requires consideration is the one for recount of votes and an order for the scrutiny of the ballot papers cast, form 33, 34, 35 and 36 from the constituency tallying centers for the county representative of Shella Assembly Ward in Malindi Constituency.*

*The applicable law governing scrutiny and recount is set out at part vi of the Elections (Parliamentary and County Elections) Petition Rules 2013. Rule 32 (2) thereof provides that:*

*“The Petitioner shall satisfy in the election petition that he does not require any other determination except a recount of the votes or the examination of the tallies.”*

***My understanding of that provision is that where a prayer for scrutiny and recount is being sought, then it cannot be mixed up with other reliefs in the petition as is the present case.***

***Rule 33 (4) of the Elections (Parliamentary and County Elections) Petition Rules provides thus;***

*“Scrutiny shall be confined to the polling stations in which the results are disputed .....*”

***The Petitioner did not set out specifically in the petition the polling stations in which the results were being disputed and hence the need for scrutiny and recount. The Petitioner has cast his net too wide and it cannot be ascertained from the petition the specific areas that he seeks scrutiny and recount.***

***Due to the reasons I have alluded to, I find that I am unable to grant the relief sought of scrutiny and recount. The upshot of the matter is that I find that the Petitioner has not surmounted the requisite hurdle to warrant the grant of the relief sought in the petition. I therefore proceed to dismiss the petition with costs to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and make a finding that in the result, the 3<sup>rd</sup> Respondent was validly elected as member of the county assembly for Shella Ward in Kilifi County.”***

0. On appeal on matters of law, this court is not concerned with the facts of the case for their own sake and therefore the court cannot re-examine the evidence to determine whether the election court made the correct findings of fact. This court therefore defers to the Election Court on its findings of fact with respect to proof of irregularities and election of offences.
0. In addition, section 83 of the Elections Act is clear that irregularities and illegalities unless amounting to substantial non-compliance with the Constitution and the Act cannot invalidate an election unless they affect the result of the election.

### **The Issues for determination in the appeal**

0. The principal issues for determination in this appeal is whether in refusing the application for scrutiny, **as a matter of law**, the election court properly exercised its discretion and, if an improper exercise of discretion, whether the facts supporting the scrutiny application would affect the result of the election.

### **Whether the election court properly exercised discretion on appellant’s application for scrutiny and recount of votes**

0. In accordance with principles set out in ***Mbogo and Anor. v. Shah (1968) EA 93***, cited with approval in ***Peter Gichuki Kingára v IEBC and 2 Others***, (supra), a court of appeal should not interfere with the exercise of discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as result there has been injustice.
0. The election court refused the application for scrutiny and recount on two reasons that:
  - a. *‘My understanding of that provision is that where a prayer for scrutiny and recount is being sought, then it cannot be mixed up with other reliefs in the petition as is the present case.’*
  - b. *‘The Petitioner did not set out specifically in the petition the polling stations in which the results were being disputed and hence the need for scrutiny and recount. The Petitioner has cast his net too wide and it cannot be ascertained from the petition the specific areas that he seeks scrutiny and recount.’*
0. Rule 32 Elections (Parliamentary and County Assembly) Petition Rules, LN 54 of 2013, applies to recount of votes in the following terms:-

***“Petitioner may request for recount or examination of tallying.***

***32. (1) Where the only issue in the election petition is the count or the tallying of the votes received by the candidates, the Petitioner may apply to the court for an order to recount the votes or examine the tallying.***

***(2) The Petitioner shall specify in the election petition that he does not require any other determination except a recount of the votes or the examination of the tallies.”***

0. With respect, the provisions of rule 32 did not apply to the circumstances of the petition where other reliefs were sought and the court ought not to have considered the request for recount on the basis of the rule. There is an obvious error of law in the judgment because the rule did not apply to this petition which, as the court observed, had other reliefs sought in addition to the application for scrutiny and recount. The applicable rule is rule 33 as shown below.

0. Scrutiny of votes is provided for under Rule 33 of the Elections (Parliamentary and County Assembly Elections) Petition Rules L.N. No. 54 of 2013, as follows:

**“Scrutiny of votes.**

33. (1) *The parties to the proceedings may, at any stage, apply for scrutiny of the votes for purposes of establishing the validity of the votes cast.*

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

(3) *The scrutiny or recount of ballots shall be carried out under the direct supervision of the Registrar and shall be subject to directions as the court may give.*

(4) *Scrutiny shall be confined to the polling stations in which the results are disputed and shall be limited to the examination of—*

*(a) the written statements made by the presiding officers under the provisions of the Act;*

*(b) the copy of the register used during the elections;*

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

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

*(e) the packets of spoilt papers;*

*(f) the marked copy register;*

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

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

*(i) the packets of rejected ballot papers; and*

*(j) the statements showing the number of rejected ballot papers.”*

0. Section 82 of the Elections Act provides for scrutiny of votes in terms as follows:

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

0. As observed by the Court Appeal in **Patrick Mweu Musimba vs Richard Kalembe Ndile & 3 Others**, Civil Application No. NAI.231 of 2013, an election court has powers under section 80(1) (d) and 82 (1) of the Elections Act to order scrutiny **suo moto**. The court has power at any stage of the hearing to order for scrutiny of votes on own motion of the court or upon application by a party. Although, the Rule requires that scrutiny “*shall be confined to the polling stations in which the results are disputed,*” it does not require that the stations be set out in the petition or in the application for scrutiny. Moreover, the requirement is not in the enabling statutory provisions of section 82 of the Elections Act. Reliance by the Election Court on the lack of specification of the polling stations was not authorized by statute.
0. Although the Elections Act does not have the conditionality, in deference to the Rule 33, the conditions for the grant of an order for scrutiny by the court on its own motion or on application

are as follows:

- a. 'sufficient reason', and
- b. 'scrutiny shall be confined to polling stations in which the results are disputed'.

The conditions are in my view an attempt by the Rule Committee to provide guidelines for the exercise of the wide discretion in section 82 of the Elections Act. While it may be reasonable to offer such guide, the same cannot in law be used to limit the general statutory power to order scrutiny of votes.

0. There is no requirement that an applicant for scrutiny must have sought this in the petition and stated the disputed polling stations, although the petitioner did in fact seek orders for scrutiny and recount in the Petition and in his submissions set out polling stations whose results he challenges for various reasons. Moreover, it cannot be argued that because an applicant did not plead the issue, say of the irregularities in the Polling Day Diaries because they were delivered by IEBC in Court, it cannot subsequently be raised in the course of the hearing of the Petition. The issue of irregularity and illegality is of course pleaded in a generic way where it is contended that the elections did not comply with the provisions of the constitution and the electoral laws of Kenya at paragraph 3 (XVII) of the amended petition. If the position indicated by the Polling Day Diaries is correct it would appear there could have been illegality committed either in the records of the results entered in the respective Forms 35 and 36 or in the records of the polling materials – ballot papers, seals on ballot boxes etc. - used in the polls.
0. Either way, the effect on the election is that the results could not be verified and it could not be held to have been verifiable, accountable, free and fair as required by the Constitution. As I held **Eng. Peter Maranga and Anor. v. Joel Omagwa Onyancha**, Kisii Petition No. 7 of 2013, in cases of illegality, the court will investigate an issue even when such an issue has not been specifically pleaded. Similarly, in **Justus Mungumbu Omiti vs. Walter Enock Nyambati Osebe & 2 Others** EP No. 1 of 2008, the Court held that:

*'All issues raised in the petition and those which crop up during the hearing, whether pleaded or not, and which had the potential to affect adversely the final result, and the will of the voters in a constituency must come under spotlight, scrutiny and interrogation. They have interrogated and determination made thereon. In this case all illegalities and irregularities which impugn the credibility of the outcome of the elections ...have to be considered. It will be a sad day indeed if such evidence which comes through the petitioner, his witnesses, the respondents and their witnesses, as well, to be discarded and rendered irrelevant, or inadmissible merely on grounds that the same was not subject of any pleadings....At the end of the day what is of prime concern to this court, is whether the elections were conducted in a fair and free and transparent manner, and that they reflect the will of the voters and more importantly ....whether the respondent was validly elected. Such determination cannot be made, if relevant evidence is locked out on technical grounds that the issues addressed by such evidence were not pleaded.'*

0. Moreover, the Constitution under Article 81 requires that the election results be accountable and therefore verifiable. In the absence of Form 35s for four (4) polling stations, the results in those stations amounting to 1,763 votes cannot be verified, and this was sufficient reason in terms of rule 33 of the Election (Parliamentary and County Elections) Petition Rules.
0. Additionally, in 18 out of the 26 polling stations of the Shella Assembly Ward, the poll day diaries (whose main objective is expressed as being to assist the polling officials in management of polling station activities) indicated irregularities in the record of the ballot papers and ballot box serial numbers calling into question the accuracy of the election results. These irregularities were set out in the appellant's submissions before the court as follows:

**"SHOULD THERE BE A SCRUTINY OF VOTES**

*Your honor considering the anomalies, irregularities and offences that have proven herein scrutiny is irreversible to tie the loose ends or confirm further what is already on record.*

**Sections 82 of the Elections Act, 2011** provides that an election court may on its own motion or an application by any party to the petition, during the hearing of an election petition, order for la scrutiny of votes.

**Rule 33 of the Election (Parliamentary and County Elections) Petition Rules, 2013** , also allows the parties to an election petition to apply for scrutiny at any stage for purposes of establishing the validity of the votes casted.

This requires the court to exercise its discretion to order for a scrutiny if it is satisfied that there are sufficient reasons.

It is the Petitioner's submission that he has established a basis for scrutiny particularly when the Returning Officer admitted in cross-examination that the only way open to prove or disapprove certain evidence is by opening the ballot boxes concerned.

The Petitioner submits that has laid a basis for scrutiny in the following Polling Stations and for the reasons given:

### 3. **Town Primary School Stream 1**

The serial numbers of the ballot boxes for Member of County Assembly is recorded in the Polling Day Diary at the time of opening and closing of the stations is different. That is at **Pages 440** of the big book.

This shows a confusion and votes of the Member of County Assembly may have been casted in another box or vice versa.

The number of ballot papers issued for the election for the Member of County Assembly is not certain. The Diary shows 550 at **Page 440** of the big book but 50 at Page 451 and the same page also shows 550 and at Page 453 it shows 5 or if the 2nd Respondent explains this is true then 250.

This uncertainty can only be resolved by scrutiny.

The Form 35 of the Polling Station was signed by the person other than the Presiding Officer and a person who was not an agent at the Polling Station. On scrutiny we will ascertain from the Form 35 sealed in the ballot box.

### 4. **Uhuru Garden Stream I**

We have already submitted that the Presiding Officer did not sign the Form 35.

However from Diary the record shows that Presiding Officer was not issued with Form 33, 34 and 35. Apart from his testimony in court, which in light of failure to record ;in the diary is unbelievable, there is no other record to show where did they get these Forms.

**At page 424 of the Diary** the Presiding Officers acknowledges that names of voters were missing from the register. He also allowed voters whose names were not identified by EVID visually or by finger print to vote. These may by be illegal votes which will be established upon scrutiny.

### 5. **Uhuru Gardens Stream 2**

The Polling Day Diary shows that the Presiding Officer was not given the IEBC rubber stamp at **Page 395**. This means the ballot papers were not marked which makes them illegal by virtue of **Regulation 69 (1) (e)**.

The Diary also shows Forms 34 and 35 were not issued to the Presiding Officer. At Page 403 it indicates the Rubber Stamp for stamping ballot papers is missing. At **Page 405** of the big book it shows a fake record of the count of the ballot papers for the Ward.

At **Page 407** it shows spoilt ballot papers and yet in the Form 35 at **Page 27** of the 1<sup>st</sup> Respondent's Affidavit shows none. At the same page it shows un-used ballot papers as 50 but the counter foils of un-used ballot paper is **100**.

This is a proper case for scrutiny to ascertain the anomalies.

#### 6. Al-Nidhamia Stream 2

The Polling Day Diary shows that the opening of the serial number of the ballot box for Member of County Assembly was not recorded. This is Page 38 of the big book.

At **Page 43** it confirms a problem of grouping of voters as the register is not clear and the BVR failed.

Again at **Page 44** the serial number of the ballot box for Member of County Assembly is not given, Why?

At **Page 45** it does not show a proper record of the ballot paper count for Member of County Assembly. It is vague.

At **Page 47** it shows interference with the record of counter foils ballot papers used.

At **Page 50** it confirms that agent complained about assisting of voter.

Lastly, the Form 35 at **Page 28** of the 1<sup>st</sup> Respondent Affidavit shows it was not signed by any candidates or agent yet the diary shows there were agents throughout at Pages 36, 39, 40, and 48 of the big book.

This is a clear case for scrutiny.

#### Al-Nidhamia Stream 1

From the Diary no IEBC rubber stamp issued at **Page 55** of the big book. Ballot papers may not have been stamped.

At **Page 64** of the record of ballot papers count is vague and incomprehensible. There is no indication of how many ballot papers were used.

At **Page 67** the record does not make sense.

#### 8. Sir Al Bin Salim Stream 6

There is no record of ballot paper issued. At **Page 485** the IEBC Rubber Stamp is missing.

At **Page 486** it shows Form 33, 34 and 35 were not issued to the Presiding Officer.

At **Page 498** the record of ballot paper count is vague.

#### 9. Sir Ali Bin Salim Stream 3

In addition to Petitioner's submission herein above the Polling Day Diary at **Page 557** does not show for certain how many ballot papers were issued. At **Page 558** no Form 35

was issued to the Presiding Officer. At **Page 57** it shows the record of ballot as 396 yet the ballot papers yet the ballot papers used are 410 excluding 1 spoilt paper. At **Page 572** it shows counter foil of used ballot papers as 409 one less what is indicated at **Page 570**. The record should reflect 411 including the spoilt ballot.

At **Page 575** no serial number of the ballot box is given so as to confirm whether it was the same box as that given on **Page 569**.

The Form 35 at Page 38 of the 1<sup>st</sup> respondent's affidavit does not reflect any spoilt ballot paper but the diary reflects one.

#### **10. Sir Ali Bin Salim Stream 2**

The diary does not show how many ballot papers were issued. This is at **Page 571** shows that the stamp for rejected votes was not issued. At **Page 580**, shows that no Form 35 were issued to the Presiding Officer. At **Page 589**, entry conforms IEBC stamp inadequate. At **Page 598** shows total number of ballot papers used as **488** yet Form 35 at page 42 of the 1<sup>st</sup> Respondent's affidavit shows the total number of votes cast as **483**. There are five (5) votes unaccounted for.

The Form 35 showed was signed by the Presiding Officer on 5<sup>th</sup> March 2013 but was signed by the deputy on 4<sup>th</sup> March 2013.

These anomalies and illegalities exposed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents on the documents call for a scrutiny of the ballot boxes from the polling station.

#### **11. Sir Al Bin Salim Stream 1**

Apart from the submissions on the manner voters were assisted and those who could not vote. The diary does not show how many ballot papers were issued to the Presiding Officer at page 10. At page 11, it shows no form 33, 34 and 35 issued to the Presiding Officer. At page 15 it shows a serial number of ballot box as **180139** yet on page 20 it shows as **152141**. This raises the possibility that votes may have been cast in the wrong ballot box. The form 35 at Page 40 of the 1<sup>st</sup> Respondent's affidavit shows it was signed by the Presiding Officer on 4<sup>th</sup> March 2013 but was signed by the deputy on 5<sup>th</sup> March 2013. This raises the issue of authenticity of the Form. The only way to remove any doubt is by scrutiny in this station.

#### **12. Karima Stream 4**

Form 35, at page 50, shows it was signed on 4<sup>th</sup> March 2013 by the Presiding Officer but signed by the deputy on 5<sup>th</sup> March 2013.

The diary at page 124 does not show how many ballot papers were issued to the Presiding Officer. Only Five (5) form 35 issued to the Presiding Officer one for each position at page 125. At page 124, there was serial number of ballot boxes given.

#### **13. Karima Stream 3**

At page 147, it shows that no IEBC stamp was issued to the Presiding Officer. At page 138, it shows no Form 33, 34, and 35 were issued to the Presiding Officer. At page 157, no information is given. At page 160, it shows ballot papers used as 426 yet Form 35 at page 52 shows a total of valid votes cast as 423. There are three uncounted votes. The Form 35 is signed by the Presiding Officer on 4<sup>th</sup> March 2013 by the deputy on 5<sup>th</sup> March

2013 by the deputy 5<sup>th</sup> March 2013.

**14. Karima Stream 2**

*At page 194, it shows only 6 Form 35 were issued to the Presiding Officer. At page 206, it shows the number of ballot papers as 556, yet Form 35 shows the number of valid votes cast as 443. They are 113 unaccounted votes. The Form 35 is signed by the Presiding Officer but not dated when the deputy signed.*

**15. Karim Stream 1**

*At page 170 it shows only five (5) Form 35 were issued to the Presiding Officer. At page 1809, it shows only four (4) ballot papers were unused. This means 496 ballot papers were used. However, Form 35 at page 56 shows the total number of votes cast is 498. This is an excess of two (2) votes.*

*Page 187, confirms that in the morning session there was misunderstanding of the voting queues. Form 35 at page 56 shows alterations on the figures.*

**16. Airport Stream 2**

*At page 214, it shows only 8 Form 35 issued to the Presiding Officer. At page 223, the record of ballot paper count is vague. At page 225, it shows the number of ballot papers used as 364, yet form 35 at page 62, shows that the total number of valid votes cast as 365 with two (2) spoilt papers. The diary-should have reflected 367. As records stated there are three (3) ballot papers unaccounted for.*

**17. Airport Stream 1**

*At page 234, it shows only 10 Form 35, were issued to the Presiding Officer. At pages 238 and 243 the serial number of the ballot box for Member of County Assembly does not show. Page 244 record of ballot papers count is vague.*

**18. Uhuru Garden Stream 5**

*Form 35 was not delivered to the court. At page 329 of the diary, no Form 35 was issued to the Presiding Officer. Page 337 no serial number of ballot box is indicated. At page 338, it shows the number of ballot papers issued to be 1,000. It shows the number of used ballot papers as 395, number of unused 605 and one spoilt paper. This does not tally. There is one extra unaccounted ballot paper.*

*Page 340 shows the number of unused ballot papers at 505 and that of used as 395. This leaves 100 ballot papers unaccounted for. At page 343, the serial number of the ballot box is not indicated.*

**19. Uhuru Garden Stream 4**

*Form 35 was not delivered to court as is required by rule 21 (b). Page 350 indicates that the Presiding Officer received less Form 35 but does not indicate how many. Page 358, confirms there were few Form 35's. There was no stamp for spoilt votes. Page 360 shows the record of ballot paper is vague. It shows the number of used ballot papers as 555, for each candidate, yet Page 362 shows Member of County Assembly number of used ballot papers as 444. Form 36, shows the number valid votes cast as 443. There are 81 votes unaccounted for.*

**20. Uhuru Garden Stream 3**

*Form 35 was not delivered to court as required by Rule 21 (b).*

*Page 379 shows that the lids of 2 ballot boxes were initially interchanged then they were replaced. Confirming badges for agents were not adequate. It also confirms that voters were referred to other polling stations after they had queued for long periods. Page 382 shows that the record of ballot paper counts and the columns are vague. It shows each position got 583 ballot papers. However Page 384 shows ballot papers used as 441 and unused as 59 while spoilt was 1 and 34 were rejected. This indicates that only 535 ballot papers were issued. There are 48 ballot papers unaccounted for.*

*It is the Petitioner's submissions that he has laid a basis for scrutiny in all polling stations due to the failure to give Form 35 of the Stations to whom as well as failure to give reasons as required by the law.. However there is more in respect of these 18 stations that want scrutiny.”*

The total number of votes involved in the irregularities identified through the poll day diaries is 355.

0. These irregularities should have prompted the election court to order for scrutiny of votes in the said polling stations in accordance with the rules, whether on the basis of the application or on own motion having been made aware of the irregularities. In holding that recount could only be ordered where no other reliefs are sought, the learned magistrate was clearly wrong. Rule 32 of the Election (Parliamentary and County Elections) Petition Rules is clear that it is of limited application only such situations where the petitioner applies for recount and re-examination of the tallying ‘*where the only issue in the election petition is the count or the tallying of the votes received by the candidates,*’ and it has therefore no application to the present petition. In using the Rule 32 provision to reject the appellant’s application for recount, the learned magistrate, with respect, misdirected himself that the rule applied to the situation before him. The order for recount sought by the petitioner could have been submerged in the order for scrutiny because scrutiny must of necessity involve recount.
0. With respect, the court did not take up the opportunity presented by the application for scrutiny in the polling stations set out in the appellant’s submissions to establish whether the results of the election represented the wishes of the people of Shella County Ward. The reasoning that the appellant did not set out in the petition the polling stations in which the results were disputed, thereby, in the court’s view, denying the election court jurisdiction is faulty. There is no requirement for specific pleading in the petition of such information. It is sufficient that the information as to the polling stations disputed is brought to the knowledge of the court in the course of the hearing as in terms of section 82 of the Elections Act, which provides that the order for scrutiny is available at any stage in the course of the hearing. In this case, the information as to the polling stations disputed were clearly set out in the appellant’s final Submissions.
0. Section 82 of the Elections Act which gives the court power to order scrutiny on its own motion or on application does not limit the power by requirement for the setting out of polling stations in which the results are disputed. To be sure, even Rule 33 does not require that an applicant sets out in the petition or affidavit the polling stations whose results are disputed. It only requires the court to confine an order for scrutiny in the disputed stations, no doubt as a time-saving device and these polling stations may also be identified through oral testimony presented by the witnesses in court. Accordingly, I find that in apparently holding that the court could not order scrutiny because the petitioner had not set out in the petition the polling stations whose result were disputed, the learned magistrate misdirected himself on the law.
0. The mis-directions by the learned magistrate obviously led to a miscarriage of justice as the appellant did not get a fair chance to show the effect on the election through the scrutiny that the court could have ordered on its own motion or on the application by the appellant, had the court considered the submissions which set out the polling stations whose results were disputed and the related poll day diaries before the court, which obviously demonstrated sufficient reason within the meaning of Rule 33 of the Election (Parliamentary and County Elections) Petition Rules. This court as an appellate court cannot speculate whether the learned trial court would have made the

order for scrutiny had it considered the submissions setting out the disputed polling stations. However, in not considering the application for scrutiny on the basis of the missing Form 35s and the polling stations set out in the submissions following analysis of the polling Day diaries, the court was plainly wrong. See *Mbogo and Anor. v. Shah* (1968) EA 93.

### **Whether the Irregularities affected the result of the election.**

0. The Court of Appeal in *Peter Gichuki King'ara's case*, supra, quoted the Canadian case of *Opitz vs Wrzesnewsky (2012) SCC 55*: “If elections can be easily annulled on the basis of administrative errors, public confidence in the finality and legitimacy of election results will be eroded. Only irregularities that affect the result of the election and thereby undermine the integrity of the electoral process are grounds for overturning an election.”
0. The fact of irregularities with regard to the inconsistencies as to the numbers of ballot papers and the votes cast in accordance with Forms 35 and 36 points to an illegality to the accountability for the accurate votes garnered by the candidates at the election. The unexplained discrepancies with regard to the actual votes recorded as having been cast at the election against the ballot papers recorded in the polling day diaries should have put the court into inquiry by way of scrutiny either by its own motion or upon the application by the petitioner.
0. According to Form 36 Declaration of County Assembly Election Results at Shella Ward, the margin of difference in the votes between the appellant and 3<sup>rd</sup> respondent was 579, the former garnering 2,368 and the latter 2,947 out of total valid votes cast of 10,708. The total number of votes involved in the four polling stations whose Form 35s were not availed were 1,763 and the votes affected by the irregularities in 18 polling stations the subject of the scrutiny application was 355.
0. The Canadian Supreme Court in the 2012 case of *Opitz*, cited in the *Peter Gichuki King'ara* case, supra, adopted the ‘magic number’ test as to whether irregularities affected the result to warrant annulling the election holding that “the election should be annulled when the number of rejected votes is equal or greater than the successful candidate’s margin of victory.”
0. In *Richard Nyagaka Tongi v. IEBC and 2 Ors*, Kisii High Court Petition No. 5 of 2013, I adopted a similar test based on the margin of victory following the Tanzanian case of *Mbowe v. Eliufoo* [1967] EA 240 to the meaning of the phrase “affected the result” that is broader than merely bridging the gap between the two leading candidates, and the court will invalidate an election result if it leads to a change in the result unless the margin of difference is so big that despite a substantial reduction of the gap leaves the winning candidate still with a higher majority.
0. In assessing the relationship between the votes involved in the irregularities in this case, under both the strict test ‘magic number’ test of *Opitz* and the broader test in *Mbowe v. Eliufoo*, it is clear that the votes represented in the four stations in which Form 35s were not availed and the 18 polling stations in which Polling Day records contradicted the votes shown on Form 35s, there was a real likelihood that the election result would, on account of margin of vote difference, be affected upon scrutiny and recount had this been ordered by the court of its own motion or as requested by the appellant.

Accordingly, I hold that the irregularities in this petition affected the result of the election in Shella County Assembly Ward.

### **Orders**

0. Under section 75 (3) of the Elections Act, the appellate court has power to make orders as follows:
  - “(3) In any proceeding brought under this section, a court may grant appropriate relief, including—
    - (a) a declaration of whether or not the candidate whose election is questioned was validly elected;
    - (b) a declaration of which candidate was validly elected; or

(c) an order as to whether a fresh election will be held or not.”

0. **Should the appellate court order scrutiny on appeal?** Rule 34 (10) of the Election (Parliamentary and County Elections) Petition Rules, 2013 appear to authorize the making of the same orders that the trial election court could make in the petition, as follows:

“(10) The High Court may confirm, vary or reverse the decision of the court from which the appeal is preferred and ***shall have the same powers and perform the same duties as are conferred and imposed on the court exercising original jurisdiction.***” [emphasis added]

0. However, as this course of action is not authorized by the provisions of section 75 of the enabling Elections Act, set out above, the court is bound to give prevailing effect to the terms of the Statute over Rule 34(10) of the Election (Parliamentary and County Elections) Petition Rules. Moreover, as noted above, the Court of Appeal in ***Peter Gichuki Kingára v IEBC and 2 Ors***, supra, held the Appeal Court may not ‘*order for a recount and scrutiny as this would involve matters of fact that were within the jurisdiction of the trial court.*’
0. By reason of the foregoing, it is impossible to verify the results and determine whether the 3<sup>rd</sup> respondent was validly elected or which candidate was validly elected as contemplated by section 75 (3) (a) and (b) of the Elections Act, respectively. Without verification of results in the circumstances of the many irregularities in the Polling Day Diaries, it cannot be said that the election was free and fair and the result representative of the wishes of the people. Where, as in this case, the court cannot determine whether the respondent successful candidate was validly elected and whether the appellant or any other candidate was validly elected, the order which commends itself to the court is an order under section 75 (3) (c) that a fresh election be held.
0. **Accordingly, the court hereby allows the appeal, sets aside the judgment of the Election Court dated 15<sup>th</sup> August 2013 and makes an Order under section 75 (3) (c) of the Elections Act that a fresh election shall be held at Shella Ward of Malindi Constituency Kilifi County.**

#### Costs

0. It is the election court, which, in failing to direct an inquiry by way of scrutiny and recount of votes, denied itself an opportunity to make a finding as to whether the 3<sup>rd</sup> Respondent had been validly elected or whether the appellant or any other candidate had been validly elected. The court is not able to determine whether any party is to blame in initiating or defending the proceedings or making it necessary for any party to institute or defend, and the parties cannot be blamed for the outcome of the proceedings before the election court upon its failure to investigate the matter by an order for scrutiny and recount. I, therefore, do not consider it appropriate to order any party to pay the costs of the proceedings. Accordingly, each party will bear its own costs.

**Dated signed and delivered on the 27<sup>th</sup> February 2014.**

**EDWARD M. MURIITHI**

**JUDGE**

**Full Length Judgment Issued on the 17<sup>th</sup> March 2014**

**EDWARD M. MURIITHI**

**JUDGE**

In the presence of: -

Mr. Mwazogo for Abubakar for the Appellant

Miss Ngugi for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents

Miss Ngugi holding brief Mr. Mouko for the 3<sup>rd</sup> Respondent

Miss Linda - Court Assistant