



**REPUBLIC OF KENYA**

**IN THE CHIEF MAGISTRATE'S COURT AT NYAMIRA**

**ELECTION PETITION NO. 01 OF 2017**

**IN THE MATTER OF THE ARTICLE 1, 2, 22, 23, 38, 87 AND 88 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF SECTIONS 75 AND 76 OF THE ELECTIONS ACT**

**AND**

**IN THE MATTER OF THE ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS PETITION RULES 2017**

**AND**

**IN THE MATTER OF ELECTION FOR NORTH MUGIRANGO CONSTITUENCY**

**AND**

**IN THE MATTER OF THE COUNTY ASSEMBLY OF NYAMIRA**

**AND**

**IN THE MATTER OF MEMBER OF COUNTY ASSEMBLY EKERENYO WARD**

**AND**

**IN THE MATTER OF THE PETITION OF FRANCIS AMENYA NDUBI**

**BETWEEN**

**FRANCIS AMENYA NDUBI.....PETITIONER**

**=VERSUS=**

**1. INDEPENDENT ELECTORAL**

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

**2. MARJORIE PATIENCE OWINO.....<sup>2ND</sup> RESPONDENT**

**3. THADIUS NYABARO.....<sup>3RD</sup> RESPONDENT**

**JUDGEMENT**

**A. INTRODUCTION**

This is an election petition dated the 1<sup>st</sup> day of September, 2017. It is an election for the Member of County Assembly of Ekerenyo Ward, the Petition of Mr. Francis Amenity Ndubi.

## **B. BACKGROUND**

### **1. THE PARTIES**

That the Petitioner registered as a voter within Ekerenyo Ward of Ekerenyo Ward, North Mugirango Constituency, within the Republic of Kenya. That he was one of the contestants of the position of Member of the County Assembly of Ekerenyo Ward in the exercise of his constitutional rights.

That the 1<sup>st</sup> Respondent is a self –regulatory agency well established in Kenya whose core objective is to run and manage elections.

That the 2<sup>nd</sup> Respondent was the Returning Officer in Mugirango Constituency for the conduct of the General Elections held on the 8<sup>th</sup> day of August, 2017.

That the 3<sup>rd</sup> Respondent was one of the candidates in the said Member of County Assembly election and was declared to be the successful candidate and therefore the Member of County Assembly elect for the Constituency.

### **2. BRIEF FACTS OF THE CASE**

The Petitioner states that the election was held on the 8<sup>th</sup> day of August, 2017.

That twenty seven (27) candidates participated in the election of Member of County Assembly Ekerenyo Ward.

That the candidates who participated were: -

1. ARIAGA JACKSON OGWANKWA
2. ASAMBA JOSEPH NDUBI
3. ASUMARI RACHEL NYAKERARIO
4. AUMBI CHARLES MOSONGO
5. FINLAY ANYOTA KEGWAH
6. MANENGA PETER MAORE
7. MARITA JULIUS MICHIRA
8. MASAI BENSON NYABURI
9. MATWERE MOSES NYANDOCHE
10. MESA STEPHEN YOUNG
11. N. MOGA VICTOR
12. MOGERE LAMECH ONGERI
13. MOKAYA MARTHA KERUBO
14. MOMANYI THADEUS NYABARO
15. MOSE ISAAC MOMANYI
16. MOSE SIMEON ORWARU
17. NDUBI FRANCIS AMENYA
18. NGASORA EVANS MORIASI
19. NYATIGO DANIEL ABUGA
20. OKAMBARA BARNABAS KABORA

21. ONDIEKI WILFRED KAMBARA
22. ONGORI MARGARET NYANCHAMA
23. ONGUSO BERNARD ATUYA
24. ORWARU CALLEN KWAMBOKA
25. SIMION TIMOTHY KIBOGO
26. SOBERA ISAAC AND
27. SOGOTA DAVID MOGIRE

The Petitioner did plead that the Returning Officer has returned MOMANYI THADEUS NYABARO as being duly elected.

### **3. GROUNDS RELIED ON**

That the Petitioner was declared to have received one thousand one hundred and sixteen (1,116) votes from all the polling stations of Ekerenyo Ward.

Mr. Momanyi Thadeus Nyabaro was declared as duly elected with a total of one thousand one hundred and nineteen (1,119) votes, three votes more than the Petitioner.

The Petitioner states that the declaration was made in error of records arising from manipulation of records and serious political malpractice relating to failure to record the correct votes received by the Petitioner to rig out the Petitioner.

The Petitioner states that the correct number of votes received by the Petitioner was not correctly captured and were intentionally reduced to ensure that Mr. Momanyi Thadeus Nyabaro is declared as duly elected Member of the County Assembly of Ekerenyo Ward.

That in KEA DEB Primary School Polling Station, for instance, the Petitioner received a total of eight (8) votes but the second Respondent declared the Petitioner to have four (4) votes.

That if the four (4) votes that the 2<sup>nd</sup> Respondent intentionally failed to declare were to be declared, the Petitioner would be declared to have won the elections of Member of County Assembly of Ekerenyo with one (1) vote.

The Petitioner further says that the 3<sup>rd</sup> Respondent did not receive the number of votes alleged to have been received but it is a total manipulation of the records on various polling stations and a scrutiny and recount would easily demonstrate the same.

### **4. WHEREFORE, THE PETITIONER HUMBLY SEEKS THE FOLLOWING PRAYERS**

- a) Mr. Momanyi Thadeus Nyabaro, the 3<sup>rd</sup> Respondent was not duly elected as an MCA, Ekerenyo Ward.
- b) The Petitioner, Mr. Francis Amenity Ndubi was duly elected as Member of County Assembly, Ekerenyo Ward.
- c) A declaration that Mr. Francis Amenity Ndubi is the duly elected Member of County Assembly Ekerenyo Ward.
- d) An order to scrutinize and recount the votes cast in Ekerenyo Ward Polling Station on 8/8/2017.
- e) Costs of this petition.
- f) Any other relief that is just and fit to this court to grant.

### **THE PARTIES RESPECTIVE CASES WAS AS FOLLOWS:-**

#### **1. THE PETITIONER**

In proof thereof, the Petitioner filed his petition and the supporting affidavit dated, the 1/9/2017. He also relied on the contents of all the annexures which were marked as a bundle as "FAN" which were documents of evidence. The same were duly filed in court on the 1/9/2017.

The Petitioner offered his oral evidence in court on the 15/1/2018.

To buttress the Petitioner's evidence as contained in the Petitioner's leadings documentary evidence and his oral evidence his learned counsel, Mr. Dennis Anyoka Muturi filed written submissions dated the 1/2/2018 and duly filed in court on the 5/2/2018. The said counsel

relied on the law as laid down in all the decided cases he cited vide the Petitioner's list of authorities.

He did also rely on statutory law. The Petitioner's learned counsel highlighted on the said submissions on the 14/2/2018. He brazenly urged this court to allow the petition as prayed.

He relied on various reasons to support that prayer. It is worth noting that the Petitioner was emphatic in his oral evidence in chief, under cross examination by the Respondents' learned counsels and under re-examination by his learned counsel that; there were various manipulations of figures in various polling stations.

The Petitioner produced documentary evidence in addition to relying on the supporting affidavit. The said documents were produced in evidence as exhibits in support of the Petitioner's case. The Petitioner testified and explained on how his agents were not allowed to sign on Form 36A in various polling stations.

He also testified and explained how various candidates' results were altered hence causing figure manipulations.

It was the Petitioner's evidence that in many instances, a number of votes were not accounted for. This was in respect of Nyamotaro polling station where he stated that 4 votes were not accounted for.

The Petitioner further told the court that at Omorare polling station, one extra vote was added to a candidate. He also stated that 4 votes were not accounted for at Maagonga polling station. That at Gekendo polling station, 4 votes were not accounted for and a total 75 votes were not accounted for at Nyairanga polling station, among many others.

The Petitioner explained and pointed out how the total number of votes cast were not adding up, from the declared total votes cast and the actual votes on addition.

It was the Petitioner's evidence that it was only at Kiamogake polling station and Mwanacha polling station stream 2 that the correct actual number on total votes cast was declared.

The Petitioner further contended that no explanation had been offered in any of the Forms 36A as to the said manipulations or alterations and distortion of figures at all. It was the Petitioner's further evidence in chief that there were alterations on Form 36A of S/No. CA 000325 in respect of Mwanacha polling station 2.

It was the Petitioner's evidence that there were alterations in Forms 36A in respect of KEA DEB primary school polling station Form 36A S/No. 00265 indicates that the results were tampered with, in respect of Ogari Margaret Nyanchama. However, the Returning Officer did not explain for that alteration.

That at Mwanacha polling station, alterations were in respect of MASAI BENSON vide Form 36A S/No. 000325.

That there were alterations at Maagonga primary school polling station in respect of candidate no. 17 one, Amenity who is the Petitioner herein.

It was his evidence that his results were altered as exhibited by Form 36A S/No. 000061. The Petitioner did state that the Presiding Officer did not explain that alteration. That the remarks were that we had a few issues with the Kiems kits.

That at station 2 of Gekendo polling station, the entry for MOSE ISAAC MOMANYI, the figures were altered, and there is no explanation for that alteration.

The Petitioner did contend in his further oral evidence that his agents at Gekendo stream 1, at stream 2 and 3 of Ekerenyo, Kenguso, KEA DEB primary school polling station, Nyairanga stream 1 of 2, at Nyamego, Gesweswe, Omorare, Nyamotaro stream 2, Mwanacha polling stations were not allowed to sign on Forms 36A.

That also applies to Ikonge stream 1 of 6, Nyairanga stream 1 of 2 and Kenuma polling stations. That there is no explanation as to why the Petitioner's agents did not sign on Forms 36A.

To buttress his evidence, the Petitioner produced Forms 36A as P Exhibits 1 (a), 1 (b), 1(c), 1(d), 1(e), 1(f) up to 1(v) respectively, and sample ballot paper as P Exhibit 2, a letter dated the 14/8/2017 was produced as P Exhibit 3, the official receipt of S/No. 3408004 was produced as P Exhibit 4, the Petitioner's Certificate of Nomination was produced as P Exhibit 5, the Certificate No. PC0179 was produced as P Exhibit 6, Form 36B was produced as P Exhibit 7 and an extract from Gusii Star was produced as P Exhibit 8.

Under cross examination by Mr. Magero, Advocate representing the 1<sup>st</sup> & 2<sup>nd</sup> Respondents, the Petitioner told the court inter-alia that if Forms 36A are scrutinized, then he will be declared the winner. That he has issues with Forms 36B.

That he got 8 votes at KEA DEB primary school polling station as per Form 36A. The 3<sup>rd</sup> Respondent got some votes whose number the Petitioner did not know. However, the Petitioner told the court that Form 36B in respect of KEA DEB primary school polling station shows that he got 2 votes, meaning that the Petitioner was denied 6 votes at KEA DEB primary school polling station.

The Petitioner stated in his further cross examination that he had agents in all the 25 polling stations though he did not have a chief agent. That his agent at Nyamego polling station was DAVID MOGERE, and JOHN OGOK was his agent at Gesweswe polling station, though his

agents did not file affidavits in support of the petition.

Under further cross examination by the 1<sup>st</sup> & 2<sup>nd</sup> Respondents' learned counsel, the Petitioner told the court that the polling stations he talked about in his evidence in chief were not pleaded in the petition.

The Petitioner also told the court he was in PNU party. He also said that his agent, one DAVID MOMANYI was his agent at Maagonga primary school polling station. That he signed on the Form 36A as appropriate and he did not raise any complaint about the said Maagonga primary school polling station.

Under further cross examination by the 1<sup>st</sup> & 2<sup>nd</sup> Respondents' counsel, the Petitioner told the court that his votes at Mwanicha polling station 2 out of 2 were not altered. Same applies to the votes the Petitioner got at Gekendo polling station.

When cross examined by the 3<sup>rd</sup> Respondent's learned counsel, the Petitioner told the court that his petition is in respect of both the election and the results thereof. That his petition is challenging the election results.

That the petition does not indicate and/or state the date when the results were declared. That the date of the results are not in the petition and the supporting affidavit, though the Petitioner told the court that the Ward results were declared on the 10/8/2017 at 5.00 p.m. in the evening, by the 2<sup>nd</sup> Respondent herein.

The Petitioner further told the court under further cross examination by the 3<sup>rd</sup> Respondent's counsel that he did not plead the results for Ekerenyo MCA Ward for all the 27 candidates in his petition. The Petitioner also stated that he signed his supporting affidavit but that he did not appear before Nyamwange Advocate.

He also stated that he had not filed his agents' oaths or forms before court. The Petitioner did detail to the court that at KEA DEB primary school polling station, the 1<sup>st</sup> candidate got 4 votes as per Form 36A. That was a candidate by the name JACKSON who was given 4 votes in Form 36B.

That ASAMBA JOSEPH got 1 vote, but he was not given any vote in Form 36B though he was given 1 vote in Form 36A. That candidate no. 3, one, ASUMARI RACHAEL NYAKERARIO got 28 votes in Form 36A and she was given 28 votes in Form 36B, so that entry was correct.

That candidate no. 4 got 11 votes and the entry in Form 36B was correct. Candidate no. 5 got 2 votes as per Forms 36A and 36B. That candidate no. 6 had no vote. Candidate no. 7 got 36 votes and the entries in Forms 36A and 36B are correct. Candidate no. 9 got no vote and the entry in Form 36B is correct. Candidate no. 10 got 18 votes and the entries are accurate.

That candidate no. 11 got 1 vote and the entries are correct. Candidate no. 12 got 11 votes in Form 36A and the votes indicated in Form 36B are 28, thus indicating that there was an error there.

The Petitioner further noted other errors to wit that candidate no. 13 in Form 36A, got 28 votes, but she was given 62 votes in Form 36B. That candidate no. 14 had 62 votes in Form 36A and he was given 5 votes in Form 36B.

The Petition did state under cross examination by the 3<sup>rd</sup> Respondent's learned counsel that he could see that the results were mismatched during the transferring of the results from 36A to Form 36B. That the results from candidate No. 12 up to the last candidate are all wrong, to wit that candidate no. 15 had 5 votes in Form 36A and Form 36B shows 60 votes.

However, the 60 votes were for candidate no. 16 in Form 36A. That candidate no. 16 had 60 votes in Form 36A and 8 votes in Form 36B. That the Petitioner was to be given 8 votes; that he was given 8 votes in Form 36A and 2 votes in Form 36B. It is candidate no. 18 who got 2 votes but he was not given any vote in Form 36B. That candidate no. 19, had no vote but he was given 17 votes in Form 36B.

That candidate no. 20 was given 17 votes in Form 36A and 2 votes in Form 36B. That it is candidate no. 21 who was to be given 2 votes since he got 2 votes.

The Petitioner did tell the court that the 3<sup>rd</sup> Respondent lost 57 votes at KEA DEB primary school polling station; and he (Petitioner) lost 6 votes at the said polling station.

That if the 3<sup>rd</sup> Respondent is given the 57 votes then he could win with a bigger margin, as he could lead with 54 votes. In his further evidence under cross examination by the 3<sup>rd</sup> Respondents, the Petitioner told the court that he voted at stream 3 at the Ikonge polling centre on the 8/8/2017. That he went to KEA DEB primary school polling station, Nyamego polling station, Gesweswe polling station and he noted that the voting was going on well.

However, he noted a problem outside the Ekerenyo polling station. The Petitioner also told the court that the PNU agent who was at Maagonga polling station signed on Form 36A.

He also told the court that he outmatched the 3<sup>rd</sup> Respondent with many votes at Ikonge polling station where he got 761 votes out of 1116 votes.

Under re-examination by his learned counsel, the Petitioner told the court that he filed his petition in respect to alterations of the figures in

several polling stations. That there were malpractice and alterations in several polling stations. That figures were not tallying in Forms 36A and Forms 36B.

He also stated that you cannot tell whose 2 votes were placed where at Ikonge polling station. The Petitioner further stated under re-examination that he signed his supporting affidavit before and/or in the presence of an Advocate. Though he does not know all the names of the Advocates in Kenya.

The Petitioner also stated that there is nothing to show that his agents were present, so according to the Petitioner, he averred that perhaps alterations were done in the absence of his agents. That is a precise outline of the Petitioner's evidence.

To buttress the Petitioner's evidence with the reasons contained in the Petitioner's written submissions dated the 1/2/2018 and filed in court on the 5/2/2018 plus all the Law as laid down in all the authorities relied upon by the Petitioner and all the statutory Law invoked by the Petitioner.

The Petitioner's learned counsel was emphatic in his oral highlights dated the 14/2/2018 that the Petitioner adopted the submissions as filed. Secondly, that it is only the Petitioner who produced documentary evidence to prove his claim. That the Petitioner pointed out the alterations and how the figures were manipulated in those documents and/or documentary exhibits.

That the forms presented as exhibits showed the inconsistency of the figures declared.

That this includes a whopping 75 votes in a single polling station. That during the testimony of the 2<sup>nd</sup> Respondent, she admitted that every polling material is accounted for. She admitted that every spoilt vote which she called a ballot is accounted for and it is indicated on Forms 36A. However, she could not explain why there was inconsistency in various polling stations in terms of the variance of what was recorded as spoilt votes in Forms 36A and the total votes cast in Forms 36A and 36B. That no explanation was given as to the various figures that were manipulated which the Petitioner pointed out to the court.

That there was no explanation as to where the manipulations were done, who did the manipulations and at that point these alterations were done. That is whether it was at the polling station, whether it was at the tallying centre or somewhere on the road, on the way to the tallying centre.

The Petitioner's learned counsel relied on the Law as laid down in the Supreme Court case in ***RAILA AMOLO ODINGA & ANOTHER =VRS= INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION AND 2 OTHERS*** Presidential Election Petition No. 1 of 2017 (2017) eKLR and he submitted that whereas the evidential burden is static during the trial of the Election petition, the same burden shifts to the Respondents if the Petitioner has satisfied the court in terms of evidence adduced to support his petition and allegation in his petition.

He went on to submit that all the parties herein, including the 3<sup>rd</sup> Respondent, vide page 2 of his submissions has extracted paragraphs 9 to 15 of the petition and paragraph 11 as read with paragraph 15 of the petition alleges that the declaration of the 3<sup>rd</sup> Respondent result was made of error of records arising from manipulation of records and serious political malpractices relating to failure to record the correct votes in various polling stations. That from the onset the Petitioner attached Forms 36As together with the supporting affidavit which pointed out the various alterations and irregularities that the Petitioner sought to rely on to demonstrate the alleged malpractice and manipulation of figures to the extent that the Petitioner successfully pointed out where the alterations were, the difference in figures, to that extent therefore, the Petitioner discharged his burden of proof, beyond reasonable doubt as provided for in the RAILA ODINGA case.

The Petitioner's learned counsel did submit that at that point the burden of proof to demonstrate that there was no manipulation of figures and that the figures that were left out did not affect the result as declared shifted to the Respondent. That the Respondents opted not to produce any document to rebut the Petitioner's evidence.

The Petitioner's learned counsel further submitted that elections is not about individuals. That the courts have restated on a number of instances that the right to a fair, free and credible elections as constitutionally provided under Article 38 is not a right between the Petitioner and the Respondents. It is a right that involves the voters.

That in this instant case, the court must examine and by all means allow the voters of Ekerenyo Ward have their will expressed to wit that in the absence of any other documentary evidence to rebut the Petitioner's evidence, the result as declared by the 2<sup>nd</sup> Respondent cannot be allowed to stand.

That this is for the simple reason that the authenticity and integrity of the documents that were produced by the Petitioner in terms of the votes contained in those documents now in question.

That the Respondents only offered oral evidence to counter the Petitioner's documentary evidence.

That the Respondents' witnesses did not in any way participate in making of those documents and therefore their evidence was not primary evidence.

That no presiding officer was ever invited to come and explain the alleged alterations and manipulations. The Petitioner's learned counsel, did also submit that Dw-2, was a contestant in the disputed election. That he said that he voted and went home. That to that extent he had nothing to say on how the manipulations were done or how the alterations were done.

The Petitioner's counsel further submitted that Dw-3 did not have anything to prove his locus in this matter. That he could not prove the alterations and manipulations of figures as alleged by the Petitioner. That he did not prove that he was an agent. The Petitioner's counsel did also submit that the non-conformity and non-compliance of the Law affect the result as declared by the 2<sup>nd</sup> Respondent as regards this petition.

He further submitted that the disputed votes are 3 votes. That the number of votes in various polling stations which have not been accounted for and recorded are more than 75 votes. It was the Petitioner's counsel prayer to that extent that the court do find that the Petitioner has established the fact and proved the allegations and the petition should be allowed.

Counsel for the Petitioner submitted further that the issue on the form and content of the petition was dealt with by the court, in an application filed by the 3<sup>rd</sup> Respondent. That the 3<sup>rd</sup> Respondent sought the striking out of the petition for non-compliance of the rules. Such that revisiting the issue then becomes resjudicata as the same was determined. That no appeal or review was done against the court's decision.

The Petitioner's learned counsel did submit that the petition that was filed is compliant fully with the Law. That the Respondents are not pointing out what difficulties they had in responding to the petition. That they satisfactorily responded to the petition and in fact the 3<sup>rd</sup> Respondent called all the witnesses until he did not want to call more witnesses.

That the schedule to the Elections (Parliamentary and County) Petition Rules 2017 provide for forms for various documents. That Form EP1 sets out what needs to be contained in an election petition. Counsel for the Petitioner did submit further that presenting the petition in the manner it was presented by the Petitioner did not cause any prejudice to any party and that each party was able to ventilate their case.

The Petitioner's counsel did also submit that the anomalies contained in the Petitioner's exhibits cannot be trivialized as submitted by the 3<sup>rd</sup> Respondent in his paragraph 34 of his submissions, wherein he stated that the anomalies were few and immaterial.

The Petitioner's learned counsel further submitted that there is no departure from the pleadings in that paragraphs 11 to 15 of the petition were clear that there were manipulations in various polling station.

In his rejoinder to the Respondent's counsels' submissions, Mr. Anyoka reiterated part of his earlier submissions. He further stated that the court room is full of people. They are not the litigants in this case. He did urge the court to find that the right under Article 38 of the Constitution does not affect the litigants but it goes to the voters thus beyond the litigants herein. He further stated that paragraph 33 to 37 of the Petitioner's submissions has demonstrated that these were not minor transgressions.

It is worth noting that the Petitioner relied on the Law as laid down in the decided case of: -

***IEBC =VRS= MAINA KIAI, KHELEF KHALIFA, TIROP KITUR, AG, KATIBE INSTITUTE & COALITION FOR REFORMS & DEMOCRACY (2017), eKLR***, in which case the Court of Appeal held inter-alia that:

***"...an electoral system founded on, and infused with clearly defined core principles including in particular, free and fair elections that are conducted by an independent body are transparent in character and administered in an impartial, neutral, accurate and accountable manner."***

The Petitioner's learned counsel anchored his submission on the Law laid down in the afore-cited decision to support his version that the results of MCA Ekerenyo Ward cannot stand in the light of the Petitioner's evidence on record.

The Petitioner's learned counsel submitted under paragraphs 45 to 50 of their submissions that the Petitioner has proved that there were violations of the electoral principles, both statutory and constitutional. He supported his contention with the Law as laid down in the decided case of:-

***PETER GICHUKI KING'ARA =VRS= IEBC & 2 OTHERS (2014) eKLR*** in which case the court stated as follows: -

***"It follows that electoral systems and processes all over the world are not perfect, they are susceptible to human errors and other inadvertent mistakes as long as those mistakes do not affect the overall result and the democratic will of the people".***

Relying on the above decision (supra) the Petitioner's learned counsel submitted that the errors complained herein affect the overall results and the democratic will of the people of Ekerenyo Ward.

As regards the limb on who should bear the costs of this petition, under paragraph 51 of the Petitioner's submissions, the Petitioner stated that it is the Law that costs are given to the party that substantially succeeds. According to the Petitioner, he submitted that the facts of this petition are merited and it is therefore the Petitioner's prayer that the costs of the petition should be borne by the Respondents.

## **2. THE 1<sup>ST</sup> & 2<sup>ND</sup> RESPONDENTS CASE**

The 1<sup>st</sup> Respondent & the 2<sup>nd</sup> Respondent responded to the election petition dated the 1<sup>st</sup> day of September, 2017 by filing a response dated the 19<sup>th</sup> day of September, 2017.

They also filed a Replying Affidavit dated the 19<sup>th</sup> day of September, 2017. It was duly deponed by MARJORIE PATIENCE OWINO who was the duly appointed Returning Officer of North Mugirango Constituency during the General Elections held on the 8<sup>th</sup> day of August, 2017.

She annexed all Forms 36A and 36B as annexure marked as “MPO1”. These were in respect of all the 25 polling stations in North Mugirango Constituency.

The 2<sup>nd</sup> Respondent pleaded in paragraph 14 of her Replying Affidavit that, the error was in the entry of votes from KEA DEB primary school polling station which is the subject of the Applicant's application and petition herein. She attached Form 36A KEA DEB primary school polling station as an annexure marked as “MPO2”.

To support her evidence, the 1<sup>st</sup> & 2<sup>nd</sup> Respondents' learned counsel filed written submissions dated the 5/2/2018 and all the reasons contained in the oral highlights by the said counsel on the 14/2/2018.

The 1<sup>st</sup> & 2<sup>nd</sup> Respondents' learned counsel relied on all their documents as filed vide, the Replying Affidavit dated the 19/9/2017, the Affidavit filed by Marjorie Patience Owino dated the 19/9/2017 together with all the documents marked as “MP01” and “MP02” respectively.

In proof thereof, the 1<sup>st</sup> & 2<sup>nd</sup> Respondents' case, the 2<sup>nd</sup> Respondent herein-after referred to as Dw-1, one Majorie Patience Owino testified on the 16/1/2018.

The gist of her evidence in chief and under cross examination and re-examination was that; she relied on the contents of the 1<sup>st</sup> & 2<sup>nd</sup> Response to the election petition dated the 19/9/2017 and all the evidence contained in her Replying Affidavit dated the 19/9/2017 and all the documentary evidence contained in all the Forms 36A and 36B in respect of all the 25 polling stations in North Mugirango constituency, namely: -

1. Nyamotaro Primary School
2. Maagonga Primary School
3. Omorare Primary School
4. Ekerenyo EDN Centre (3)
5. Kiamogake Primary School
6. KEA DEB Primary School
7. Mwancha Primary School (2)
8. Gekendo Primary School (2)
9. Kenguso Primary School
10. Nyairanga Primary School (2)
11. Keimuma Primary School
12. Gesweswe Primary School
13. Ikonge Primary School (6)
14. Chisaara DEB Primary School

As the Election Co-ordinator, she told the court that every polling station is given several Forms 36A. That Ekerenyo Ward had 27 MCA candidates. Each had a right to a copy of Form 36A or each candidate's agent had a right to the same. That one of the said Form 36A is supposed to be forwarded to the Returning Officer at the tallying centre. Then one form is posted at the polling station. Then 2 copies are put in the ballot boxes. She further stated that a polling station would require 30 copies of Forms 36A at the least. That the IEBC packed the forms in a booklet which had 6 copies of Form 36A, the top being the original and the others are carbonated. That each booklet had its own serial number and that is how it is possible for one polling station to have different serial numbers of Forms 36A.

It was Dw-1's evidence that the agents would represent a party or a candidate. That the candidate is given priority to select an agent. That for the agent to be allowed in a polling as an agent they require original identification document vide, an appointment letter from the party, the IEBC oath of secrecy commissioned by a lawyer.

That the Petitioner belonged to the PNU party which party had 5 candidates in North Mugirango Constituency vide, one MP and 4 MCA

candidates.

It was Dw-1's further evidence that the PNU agents who were allowed at the polling stations were party agents. That they were to represent the interest of all the 5 PNU candidates in all the polling stations.

It was the 2<sup>nd</sup> Respondent's further evidence that the individual figures of the candidates have not been interfered with in respect of Gekendo polling station where there was a total number of valid votes of 436 at polling station 2 of 2. She said that when you add it, the proper figure is 440 votes, she also said that all the 6 agents including the PNU agent signed the Form 36A in respect of Gekendo polling station.

Dw-1's evidence was that before the agent signs the Form 36A, there is a declaration that they read and affirm to before they sign.

Dw-1 further stated that when you add the figures in respect of Mwanacha polling station 2 of 2, they come to 302 as indicated by the presiding officer and that the Form 36A was signed by the agent. That was the 2<sup>nd</sup> Respondent's response to the Petitioner's allegations in respect to the figures that were at Mwanacha polling station 2 of 2.

Dw-1 did respond to the Petitioner's allegations in respect of Nyamotaro polling station. She said that the total number of votes for all the candidates were 250 as indicated by the presiding officer; though the Petitioner indicated that the valid votes were 254.

According to Dw-1, she said that the Petitioner added the rejected votes to make 254 votes. Dw-1 further told the court that the figures of the individual candidates have not been affected at Omorare polling station. She also said that the agents signed on Form 36A. She further testified that there is a bit of writing on the votes got by the Petitioner, thus candidate no. 17; this was in respect of Maagonga polling station where the valid votes cast were 465 votes. That Form 36A was signed by the Jubilee and PNU agents, of which PNU party was an affiliate party to the Jubilee party.

Dw-1's response to the Petitioner's allegations in respect of the Ekerenyo polling station was that the form has 2 figures. The table on the extreme right where the figures for the candidates add up to 403 votes. That those are the valid votes. The table for polling station counts has 399 votes from this Form, it has 4 rejected ballots.

That if you add 399 with 4, it comes to 403 votes. That the valid votes cast should be 400 and not 393 as stated by the Petitioner since the rejected votes are not included in the valid votes, and they are not added to any individual candidate.

Dw-1 also stated that the Form 36A in respect of Ekerenyo polling station was signed by 4 agents. Dw-1 further stated that the presiding officer at Ekerenyo polling station 2 of 3 indicated the valid votes as 386 not 388 as stated by the Petitioner.

That at Ekerenyo polling station 3, the presiding officer indicated the valid votes as 393 votes, which is the correct figure according to Dw-1 not 390 valid votes as stated by the Petitioner.

It is worth noting that the 2<sup>nd</sup> Respondent vide Dw-1 herein told the court that the Petitioner did not plead all the issues he raised in his evidence in chief in his petition. That he only pleaded that he had a problem with KEA DEB primary school polling station. Due to that, Dw-1 did not file the supporting documents in response to the issues raised by the Petitioner during the hearing of his case.

Other than the afore-stated premise, it was Dw-1's further evidence that for Nyairanga polling station 2 of 2 the presiding officer indicated the valid votes cast as 300, but when you add it comes to 225. However, Dw-1 stated that this mistake has not affected the individual candidates. That that mistake was noted in the polling station diary for Nyairanga polling station. She also said that the form in respect of Nyairanga polling station was signed by 20 agents including the PNU agent and that the figures of the candidates in Forms 36A were correctly transferred to Form 36B.

According to Dw-1, she responded to the Petitioner's allegation in respect to Nyameko polling station as follows: -

She said that the Petitioner contested the total number of the valid votes cast. The Petitioner said that the figures were 195 valid votes, but Dw-1 said that the presiding officer indicated 193, valid votes, of which Dw-1 said that the said figure is correct.

It was Dw-1's contention that the Petitioner added the 2 rejected votes to make 195 votes. It was the 2<sup>nd</sup> Respondent's evidence that at KEA DEB polling station, the Petitioner and the 3<sup>rd</sup> Respondent were entered erroneously. That that applied to 15 other candidates.

Dw-1, stated that for the Petitioner, he got 8 votes in Form 36A, but only 2 votes were indicated in Form 36B. So he lost 6 votes. For the 3<sup>rd</sup> Respondent, he got 62 votes in Form 36A, yet only 5 votes were indicated in Form 36B, so he lost 57 votes.

Dw-1 further stated that for Ikonge polling station 6 of 6, the 3<sup>rd</sup> Respondent's votes in Form 36A were indicated as 7 and in Form 36B it is indicated as 1. So the 3<sup>rd</sup> Respondent lost a total of 63 votes. Dw-1 further stated that if the figures are correctly captured, the 3<sup>rd</sup> Respondent would have 1182 votes and the Petitioner would have a total of 1122 votes.

The 2<sup>nd</sup> Respondent's response to the Petitioner's P Exhibit 3 was that her role is to forward the list of winners to their head office as declared by herself. She also stated that they use the physical Form 36A then collate the information in Form 36B in declaring the results. That they did not use any electronic form in declaring the winner for the MCA position.

It was Dw-1's evidence that the Petitioner's P Exhibit 8, the Gusii Star is not an authority and that it gave wrong information about the

winner of the Ekerenyo Ward, because it is the IEBC which is the authority in the said Ekerenyo Ward election.

It is key to point out that the 2<sup>nd</sup> Respondent thus Dw-1 did reiterate her evidence in chief, when she was cross examined by the 3<sup>rd</sup> Respondent's learned counsel, and the Petitioner's learned counsel, and under re-examination by her learned counsel.

However, it is important to point out that, when cross examined by the 3<sup>rd</sup> Respondent's learned counsel, the 2<sup>nd</sup> Respondent, vide Dw-1, told the court, inter-alia, that; based on Forms 36As of all the polling stations, the 3<sup>rd</sup> Respondent had a total of 1182 votes and the Petitioner could have had 1122 votes.

Dw-1 told the court, that a part from KEA DEB primary school polling station and Ikonge stream 6 of 6, the figures in Forms 36A of the other polling stations are accurate and were accurately captured in Forms 36B.

Under further cross examination by the 3<sup>rd</sup> Respondent's counsel, Dw-1 admitted that there was an error in the entries made in Forms 36A and Forms 36B in respect of KEA DEB primary school polling station. That that error affected 16 candidates including the Petitioner and the 3<sup>rd</sup> Respondent. Dw-1 stated that the 3<sup>rd</sup> Respondent got 62 votes in Form 36A and only 5 votes were entered in Form 36B.

It was Dw-1's further evidence that the 3<sup>rd</sup> Respondent did not get any advantage as a result of that error. She also told the court that the error was not deliberate. She further stated that the 3<sup>rd</sup> Respondent lost 6 votes in stream 6 at Ikonge polling station, and the Petitioner did not lose any vote at Ikonge polling centre.

It was the 2<sup>nd</sup> Respondent's evidence under cross examination by the 3<sup>rd</sup> Respondent's counsel that the Petitioner was not giving accurate figures and/or tabulation. That he was adding the rejected votes with the total valid votes. It was Dw-1's evidence that there was no manipulation of the results and there was no political interference under cross examination by the Petitioner's learned counsel.

Dw-1 told the court inter-alia that the Petitioner could have gotten 1122 votes and the 3<sup>rd</sup> Respondent could have gotten 1182 votes with all the errors that she had pointed out to court in her evidence. She also said that Forms 36A and 36B did support her explanations.

She also stated that there were various areas in polling stations that had alterations but she had not availed any document to explain those alterations and that she was not there when the alterations were done.

Dw-1 also stated that the errors that were done were recorded in the polling station diary. She said that the alteration in the document in respect of Gekendo primary school polling station did not change the figures.

Dw-1 stated that the 4 votes that were not indicated were cast votes. This was in respect of Gekendo polling station 2. She further said that those 4 cast votes belonged to someone, but they are not accounted for.

Under re-examination by her learned counsel, the 2<sup>nd</sup> Respondent was emphatic that if the errors are corrected, they will not affect the winner who was declared as the victor of the Ekerenyo Ward.

To buttress the 1<sup>st</sup> & 2<sup>nd</sup> Respondent's evidence, Mr. Magero, the learned counsel for the said Respondents made oral highlights on the 14/2/2018. The 1<sup>st</sup> & 2<sup>nd</sup> Respondents' counsel filed their submissions dated the 5/2/2018, of which Mr. Anyoka Advocate for the Petitioner submitted that the said submissions do not oppose the Petitioner's prayers. That at page 11 of the 1<sup>st</sup> & 2<sup>nd</sup> Respondents' submissions refers to prayers relating to a stranger to these proceedings and they are referring to a strange election dated the 28/8/2018.

That notwithstanding, Mr. Magero, Advocate for the 1<sup>st</sup> & 2<sup>nd</sup> Respondents submitted that his clients do oppose the petition dated 1/9/2017 together with all the documents and supporting affidavit of Francis Amenya Ndubi. That they have filed a Replaying Affidavit of Marjorie Patience Owino dated the 19/9/2017 and the submissions dated the 5/2/2018. He relied on all the said pleadings.

The 1<sup>st</sup> & 2<sup>nd</sup> Respondents' learned counsel submitted, inter-alia, that if at all the correct figures in the KEA DEB primary school polling station were added then the Petitioner would have garnered 1123 votes as against the Respondent who would get 1182 votes. The learned counsel for the 1<sup>st</sup> & 2<sup>nd</sup> Respondent also submitted that the Petitioner did not comply with the requirements as concerns the particularity of the pleadings, as was held in the case of;

**NAIROBI COURT OF APPEAL NO. 290 OF 2012 MUMO MATEMU-----APPELANT =VRS= TRUSTED SOCIETY OF HUMAN RIGHTS ALIANCE & 5 OTHERS-----RESPONDENTS.**

The 1<sup>st</sup> & 2<sup>nd</sup> Respondents learned counsel did submit that the Petitioner did not provide any evidence to show that the 3<sup>rd</sup> Respondent was given an extra vote. Neither has he provide any proof to show that his votes were manipulated to favour the 3<sup>rd</sup> Respondent.

That the Petitioner did not call any witness to prove all his allegations pleaded in the petition. That the order for scrutiny and recount must be stated in specific terms and must be stated with particularity as to which polling stations within a constituency must attract scrutiny. That the Petitioner is not permitted to make a case outside the petition and his supporting affidavit. That that was the principle held in the cases of: -

**1. RAILA AMOLO ODINGA & ANOTHER =VRS= IEBC & 2 OTHERS Supreme Court of Kenya Presidential Petition No. 1 of 2017 (2017) eKLR**, in which case the Supreme Court held, inter-alia, that the Petitioner is bound to prove the case he has pleaded. A

Petitioner is not permitted to make a case outside the pleadings and his affidavits and testimony must be consistent with and support the case pleaded.

2. Judge Kimaru, observed the above stated principle in the case of:-

**MOHAMUD MUHUMED SIRAT =VRS= ALI HASSAN ABDIRAHMAN & 2 OTHERS NAIROBI EP NO. 15 OF 2008 (2010) eKLR.**

Counsel for the 1<sup>st</sup> & 2<sup>nd</sup> Respondents did submit that the Petitioner filed a petition which was defective in substance and form. He supported this version with all the reasons contained under paragraphs 41 to 57 of their submissions.

The court has read the same keenly as it should.

The 1<sup>st</sup> & 2<sup>nd</sup> Respondent's counsel anchored his submissions on the law as laid down in the decided cases of: -

1. **JACKTON NYANUNGO RANGUMA---PETITIONER =VRS= IEBC AND 2 OTHERS.** The decision by Judge Majanja in the High Court at Kisumu is an Election Petition No. 3of 2017, in which case Judge Majanja stated that the burden of proof rests with the Petitioner.

2. In the case of **RAILA ODINGA & OTHERS =VRS= IEBC & 3 OTHERS Supreme Court of Kenya Presidential Petition No. 5 of 2013 (2013) eKLR**, the Supreme Court held that the Petitioner bears the burden of proof.

Mr. Magero, Advocate did also submit that a Petitioner must not only prove that the conduct of the election violated all the written law but must prove that the irregularities affected the election.

That if it is shown that an election was held substantially in accordance with the law, such election should be left to stand. This principle was held in the case of;

**GATIRAU PETER MUNYA =VRS= DICKSON MWENDE KITHINJI & 2 OTHERS Supreme Court of Kenya Petition No. 2B of 2014 (2014) eKLR.**

Counsel for the 1<sup>st</sup> & 2<sup>nd</sup> Respondents did submit further that if in any event there is an error or mistake on the part of the 2<sup>nd</sup> Respondent, the same is cured by Section 83 of the Elections Act. Counsel did submit that the entire election process culminating into the declaration of the 3<sup>rd</sup> Respondent as the MCA of Ekerenyo Ward, was transparent, free and fair, reflecting the overall free will and choice of the electorate and should therefore be declared valid for all intent and purpose. Counsel was also emphatic that the alleged irregularity if any is not enough to nullify the elections; he also stated that the Petitioner has failed in his burden of proof as to warrant nullification of an election. He supported this averment with the decision of Judge G. K. Kimondo, in the case of; **STEPHEN KARIUKI =VRS= GEORGE MIKE WANJOHI & 2 OTHERS (2013) eKLR** in which case Judge G. K. Kimondo stated that the statutory and evidential burden of proof rests with the Petitioner. It is underpinned by Section 83 of the Election Act.

To support his submissions that the petition be dismissed because it is defective, Mr. Magero Advocate relied on the law as laid down in the case of; **MOSES MWICIGI & 14 OTHERS =VRS= IEBC.**

It was decided by the Supreme Court. He did also rely on the Law as laid down in the cases of:-

1. **ELECTION PETITION NO. 2 OF 2017. HON. MARTHA KARUA & ANOTHER =VRS= IEBC & 3 OTHERS.**

2. **AMINA HASSAN AHMED =VRS= RETURNING OFFICER MANDERA COUNTY & 2 OTHERS (2013) eKLR** in which case Judge Onyancha J. held;

***“Put differently, the provisions of Article 10 and others afore-stated, are not mere technical requirements. If they are technical in so far as they are procedural and spell out the form and content of intended petitions, they nevertheless, at the same time, are substantive and go to the root and substance of issues and matters prescribed upon. A further reason why the provisions of the Election Act and/or Rules must be complied with fully is because the Act, and therefore the Rules, are a special Legislation. They are legislation for the purpose as already stated above of efficiently prescribing the proper, efficient, and expeditious and just conduct of election petitions. Every provision in them therefore, is intended to achieve a required result and any deficient compliance is likely to lead to delay and injustice and would likely be frowned upon by the court.”***

Relying on the afore-stated legal authorities, the 1<sup>st</sup> & 2<sup>nd</sup> Respondents' counsel urged this court to dismiss the petition with costs to them. He also urged the court to consider their prayers under paragraph 24 of their response.

### **3. THE 3<sup>RD</sup> RESPONDENT'S CASE**

In response to the petition, the 3<sup>rd</sup> Respondent filed a response to the election petition. It is dated the 18/9/2017. He also filed an affidavit dated the 18/9/2017 in opposition to the petition.

His witness, one CHARLES AMWENO OEBA filed an affidavit in opposition to the petition. It is dated the 18/9/2017. The 3<sup>rd</sup> Respondent's other witness, one, JACKSON ONCHWARI ARASA filed an affidavit in opposing the petition. It is dated the 18/9/2017.

In proof thereof, the 3<sup>rd</sup> Respondent, thus Dw-2 herein contented that he is an elected MCA of Ekerenyo Ward. It was his evidence that he was not served with the petition by the Process Server. However, he got the copy of the petition and he responded accordingly, as earlier herein stated.

It was his further evidence that his chief agent, thus Dw-3 herein one Charles Amweno Oeba was the party's chief agent and that he is the one who deployed the agents that he went round all the polling stations. He also stated that Jackson Onchwari Arasa was the party's agent at KEA DEB primary school polling station. He also stated that he filed Forms 36As vide page 13 up to page 13 that they contain results from all the polling stations.

Dw-2 told the court that he was first elected in 2013 as MCA for Ekerenyo Ward. That he vied on the National Vision Party on the 8/8/2017 and that he was defending his seat.

It was his evidence that he voted at Mwanacha polling station at 6.30 a.m., in the morning and then went home.

He also told the court that they were 27 MCA candidates for the Ekerenyo Ward and the results were declared on the 10/8/2017 at Kebabe Girls Secondary School. That they were declared by the 2<sup>nd</sup> Respondent herein. That he was declared the winner with 1119 votes and the Petitioner garnered 1116 votes. That all the 27 candidates' results were declared.

It was Dw-2's further evidence that the Petitioner did not indicate the results and the date when the results were declared in the petition. That he did not also indicate in the petition how the results were declared.

It was the 3<sup>rd</sup> Respondent's evidence that his chief agent and his other agents informed him that he had garnered 1182 votes. So Dw-2 told the court that he noted that his total votes had been reduced after the results had been announced.

It was Dw-2's further evidence that the Petitioner and his (3<sup>rd</sup> Respondent's) results were not altered at Mwanacha, Gekendo polling stations. Dw-2 further stated that there were no mistakes in the entries made in Forms 36A and Forms 36B for Nyairanga polling station. He also told the court that the individual results or votes in form 36A and 36B from Omorare polling station are correct.

It was the 3<sup>rd</sup> Respondent's contention that all the results in Forms 36A, apart from KEA DEB primary school polling station and Ikonge stream 6 of 6 were correctly captured in Forms 36B for the individual candidate.

The 3<sup>rd</sup> Respondent disagreed with the Petitioner's averment that there were a total of 254 votes at Nyamotaro polling station. According to the 3<sup>rd</sup> Respondent he said that there were 250 individual votes added up together, as clearly exhibited by Form 36A of the said Nyamotaro polling station.

Dw-2 did fault the Petitioner's evidence in respect to the number of total votes at both Nyameko and Omorare polling stations. Dw-2 told the court that Form 36A of Nyameko polling station indicates that there was a total of 193 votes, yet the Petitioner stated that there were 195 total votes. Dw-2 further stated that Form 36A of Omorare indicates that there were 203 votes.

That the Petitioner said that there were 469 votes at Maagonga polling station but the 3<sup>rd</sup> Respondent told the court that Form 36A of the said polling station has 465 votes. It is worth noting that Dw-2 gave similar evidence to Dw-1 regarding what transpired at KEA DEB primary school polling station in respect to the MCA election during the 8/8/2017 general elections.

When cross examined by Mr. Magero for the 1<sup>st</sup> & 2<sup>nd</sup> Respondents and Mr. Anyoka, Advocate for the Petitioner, the 3<sup>rd</sup> Respondent reiterated his evidence in chief. Under re-examination by his Advocate, the 3<sup>rd</sup> Respondent stated inter-alia that he cannot be able to explain about the alterations since he was not the author of those documents. He did also state that capturing of the individual results in Forms 36A and 36B as from candidate number 12 up to candidate number 27 at KEA DEB primary school polling station and Ikonge stream 6 of 6 polling station are not correct.

Dw-3, one Charles Amweno Oeba, testified in his capacity as the chief agent of the 3<sup>rd</sup> Respondent's party. I relied on the contents of his affidavit dated the 18/9/2017 which he swore before Commissioner Bernard Akango. He adopted the said affidavit as his evidence in this petition.

The 3<sup>rd</sup> Respondent's party was the National Vision Party. What I mean is that the 3<sup>rd</sup> Respondent vied as an MCA candidate of Ekerenyo Ward on the said National Vision Party.

Dw-3 confirmed to the court that he deployed their agents in all the 25 polling stations of the Ekerenyo Ward. He also said that he went around the polling stations during the polling. According to him, he said that he did not receive any complaints from his agents about any irregularities.

It was his evidence that the 3<sup>rd</sup> Respondent won with 1119 votes, and that those were the declared results. He further said that the results were posted on the wall of each polling station and that the agents had the results on a paper and that each agent used to inform him (Dw-3) of the results.

It is important to note that Dw-3 told the court that there was a problem at KEA DEB primary school polling station, in the 3<sup>rd</sup> Respondent got 62 votes in Form 36A but he was given 5 votes in Form 36B. He also stated that there was a problem at Ikonge stream 6 of 6 polling station, to wit that the 3<sup>rd</sup> Respondent got 7 votes in Form 36A but he was given 1 vote in Form 36B, so the 3<sup>rd</sup> Respondent lost 6 votes but Dw-3 did not raise any complaint.

Mr. Magero Advocate for the 1<sup>st</sup> & 2<sup>nd</sup> Respondents did not cross examine Dw-3. Equally Mr. Ndubi, Advocate for the 3<sup>rd</sup> Respondent did not re-examine Dw-3.

When cross examined by Mr. Anyoka Advocate for the Petitioner, Dw-3 maintained his averment that he was a chief agent. That before the polling day, he was given an appointment letter to be a chief agent, though he did not produce the letter to show that he was a chief agent. He however told the court that he has the appointment letter as a chief agent but he had filed it in court.

Coupled with the foregoing premise, Dw-3 further stated that he had an oath of secrecy and he was trained in a seminar.

It was Dw-3's further evidence that he went to the tallying centre and to all the polling stations. He also stated that after receiving information from the agents about the results he went to the tallying centre together with the 3<sup>rd</sup> Respondent and many other people. He also said that they made their complaint at the tallying centre.

Dw-3 did confirm that he signed his affidavit at Mache place in Nakuru. It is crucial to point out that Mr. Ndubi Advocate for the 3<sup>rd</sup> Respondent did close the 3<sup>rd</sup> Respondent's case without calling his client's second witness on the sole ground that the said witness will repeat the evidence about the anomaly in Form 36B in respect to KEA DEB primary school polling station.

To buttress the 3<sup>rd</sup> Respondent's evidence, his learned counsel Mr. Ndubi filed written submissions dated the 9/2/2018. He did rely on all the Law as laid down in the five legal authorities contained in the 3<sup>rd</sup> Respondent's list of authorities.

He did also associate himself with the written submissions drawn, dated and duly filed by the 1<sup>st</sup> & 2<sup>nd</sup> Respondents, plus all the oral submissions tendered forth by the 1<sup>st</sup> & 2<sup>nd</sup> Respondents' learned counsel.

He was emphatic that the petition as filed is incompetent. He relied on all the reasons contained in paragraphs 10 up to 21 to support that averment. He did also relied/invoke the Law as laid in the case of **Election Petition No. 2 of 2017 HON. MARTHA WANGARI KARUA & ANOTHER =VRS= IEBC & 3 OTHERS**.

In the said case, supra, Justice Gitari in dismissing the petition held;

***“The requirement under Rule 8 (1) of the Rules are not mere technical requirements they are substantive as they go to the root of the issue before an election court. A petition which has filed to state the date of declaration of the results of the election and how they were declared is fatally defective and beyond salvage. The consequence is that it must be struck out.”***

Relying on the Law as laid in the above stated decision, the 3<sup>rd</sup> Respondent's learned counsel urged this court to dismiss the petition on the sole ground that it is incompetent, incurably defective.

The 3<sup>rd</sup> Respondent's learned counsel submitted further that the elections were free, fair and credible, and that the 3<sup>rd</sup> Respondent was validly elected. He also submitted that the alleged irregularities did not substantially affect the results of the elections. He relied on all the reasons contained in paragraphs 22 up to 39 of his submissions to support that averment.

He further submitted that the declared results as received by the 3<sup>rd</sup> Respondent was not as a result of manipulation of the records at polling stations. He relied on all the factors contained in paragraphs 40 up to 45 of his submissions to support that version.

Counsel for the 3<sup>rd</sup> Respondent did also submit that there is no application pending before this court for scrutiny and recount. He also submitted that the parties herein have already closed their cases so this court cannot be invited to order for scrutiny and recount.

The 3<sup>rd</sup> Respondent's counsel urged this court to follow the holding in the case of **IEBC =VRS= MAINA KIAI & 50 OTHERS NAIROBI COURT OF APPEAL CIVIL APPEAL NO. 105 OF 2017 (2017) eKLR**, the Court of Appeal underscored the finality of results recorded at the polling stations as final results and proceeded to make a holding that the results as declared at polling stations and captured in Forms 36A are final.

It is very important to point out that in his oral submissions, Mr. Ndubi Advocate for the 3<sup>rd</sup> Respondent in supporting his written submissions was emphatic that, this petition was actually dead at the time of filing. That it was a still birth and the Petitioner is asking the court to inject into it life. He also contended that for the grounds set out by the Petitioner as paragraph 9 to 15 of the petition, only 2 grounds are in support of this petition these are: -

1. In respect of KEA DEB polling station where the Petitioner alleges that he got 8 votes but only 4 votes were declared as what he got at this polling station.
2. That the 3<sup>rd</sup> Respondent did not receive the number of votes that were declared by the 2<sup>nd</sup> Respondent as his votes. That the 1119

votes which were declared as the votes of the 3<sup>rd</sup> Respondent got were as a result of manipulation of records.

Counsel submitted that; evidence on various polling stations is such that the Petitioner was allowed to go outside the boundaries of his petition since that oral evidence (supra) touched on matters he had not pleaded in the petition.

Counsel further submitted that even if the Petitioner was given the 8 votes he got at KEA DEB Primary school polling station, he would not have won the election, on the sole ground that on Form 36A of KEA DEB primary school polling station the 3<sup>rd</sup> Respondent got 62 votes but he was given 5 votes, so he lost 57 votes at that polling station.

The 3<sup>rd</sup> Respondent's learned counsel was emphatic that if the 3<sup>rd</sup> Respondent was given all the 62 votes from KEA DEB primary school polling station the margin of win could have expanded in his favour.

It is key to note that the 2<sup>nd</sup> Respondent herein explained that what happened in KEA DEB primary school polling station was a human error. She gave a genuine explanation that when collating the results from Forms 36A to Forms 36B results of one candidate were omitted. She said that from candidate no. 13 up to candidate no. 27, each candidate was being given the results of the next candidate. She alluded this to a human error.

Counsel also submitted that the 3<sup>rd</sup> Respondent was denied 6 votes in respect of Ikonge polling station. The 3<sup>rd</sup> Respondent's learned counsel did also contend that this court has not made a judicial determination as to whether this petition is incompetent or not. To support his averment that this petition is incompetent, Mr. Ndubi Advocate for the 3<sup>rd</sup> Respondent contended that the Petitioner did not comply with the provisions of Rule 8 (1) of the Elections (Parliamentary and County Elections) Petition Rules of 2017 which provides in mandatory terms that a petition shall contain; vide; that the Petitioner shall state the official results as pronounced by IEBC.

Secondly, the Petitioner has to state the date of the declaration of the results he was challenging. To support this point of Law the 3<sup>rd</sup> Respondent's learned counsel invoked and/or relied on the Law as laid down in the case of; **High Court at Kerugoya Election Petition No. 2 of 2017 HON. MARTHA WANGARI KARUA-----1<sup>ST</sup> PETITIONER, HON. JOSEPH GACHOKI GITARI-----2<sup>ND</sup> PETITIONER =VRS= IEBC AND 3 OTHERS** in which case, Lady Justice Gitari in dismissing the petition stated that requirements under Rule 8 (i) of the Elections (Parliamentary and County Elections) Petition Rules 2017 had not been complied with.

Relying on the above stated High Court decision the 3<sup>rd</sup> Respondent's counsel urged this court to be bound by the said decision. The 3<sup>rd</sup> Respondent's counsel did rely on the Law as laid down in the case of; the **High Court at Mombasa Election Petition No. 9 of 2017 TIMMY MKALA KAZUNGU-----PETITIONER =VRS= IEBC & 2 OTHERS-----RESPONDENTS**. The decision by Judge M. Thande to support his argument that the effect of non-compliance to the provided Election Rules by the Petitioner has made his petition incompetent.

The 3<sup>rd</sup> Respondent's counsel also submitted that, the Petitioner gave evidence in respect of Nyamotaro, Maagonga, Nyameko, Ekerenyo, Omorare polling stations, but he did not plead the issues about those polling stations in the petition and in the Petitioner's affidavit that counsel for the Petitioner has invited the court to permit the Petitioner to take refuge to accept the Petitioner's evidence on the strength of paragraph 15 of the petition.

On this point, the 3<sup>rd</sup> Respondent's counsel submitted that this should not happen on the sole ground that, the Petitioner did not specify his complaint. He also submitted further that the Respondents only responded to the issue of KEA DEB primary school polling station since it is the only station which was pleaded.

The 3<sup>rd</sup> Respondent's counsel did also submit that the Petitioner's evidence that goes outside the petition stands inadmissible because he cannot amend his petition midway. He supported the afore-stated arguments with the law as laid down in the cases of; -

**1. The Court of Appeal at Nairobi Civil Appeal No. 290 of 2012 MUMO MATEMU-----APPELANT =VRS= TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE & 5 OTHERS-----RESPONDENTS (2013) eKLR.**

**2. Kisumu High Court Election Petition No. 3 of 2017 JACKTON NYANUNGO RANGUMA-----PETITIONER =VRS= IEBC & 2 OTHERS-----RESPONDENTS.** In this case of Ranguma (supra) 6 witnesses testified but Justice Majanja did not consider their evidences because the same was outside the pleadings.

Mr. Ndubi Advocate for the 3<sup>rd</sup> Respondent also submitted that the Petitioner in respect to Nyamotaro polling station told the court that the total votes were 254 instead of 250 votes. When the 2<sup>nd</sup> Respondent testified, she took the court through Form 36A of Nyamotaro polling station and she said that the total votes were 250.

Counsel also submitted that human beings can never be perfect so the court cannot annul the election on minor transgressions or breaches or irregularities. He did submit that the election was conducted substantially in compliance with the Constitution and the Election Laws.

That is a very brief outline of the parties' evidences and their submissions.

This court has keenly considered the parties pleadings, their documentary evidence, their oral evidences and both oral and written submissions, each in its entirety as the court should and the court is of the considered view that to determine this petition the court must make a finding on the following issues, which have emanated from the parties' evidence, issues filed by the parties' learned counsels and the Law.

These issues are as follows: -

1. Whether the petition is incompetent.
2. Whether the results of Member of County Assembly of Ekerenyo Ward Election held on the 8<sup>th</sup> day of August, 2017 can be allowed to stand.
3. Whether the Petitioner should be granted the prayers as sought in the petition.
4. Who is to bear the costs.

As regards the first issue, this court has considered the Respondent's learned counsels detailed submissions on this issue on the one hand and the Petitioner's learned counsel's response thereto on the other hand and this court is of the considered finding that this court was guided by the Provisions of Article 159 (2) (d) of the Constitution of Kenya, 2010 in admitting this petition to be heard to its full hearing to enable all the parties ventilate all their issues in a fair, even, just and full hearing of this petition.

This court was further guided by the principle that each party to this petition has an unfettered right to be heard judiciously and a right to have this petition determined fairly and in a just manner.

On the second issue herein, the court's answer to this issue is that the results of Member of County Assembly of Ekerenyo Ward Election held on the 8<sup>th</sup> day of August, 2017 will be allowed to stand, on the following grounds,

One, the Returning officer, vide the 2<sup>nd</sup> Respondent herein conducted the election process of Ekerenyo Ward in compliance with Article 81 of the Constitution of Kenya 2010, and the Elections were free and fair inter-alia:-

- i. By secret ballot.
- ii. Free from violence, intimidation, improper influence or corruption.
- iii. Conducted by an Independent body.
- iv. Transparent; and
- v. Administered in an impartial, neutral, efficient, accurate and accountable manner.

The second reason, is that the 2<sup>nd</sup> Respondent herein explained in detail how there were errors and/or mistakes and she attributed the same to human errors.

The 2<sup>nd</sup> Respondent demonstrated in her testimony that the election was conducted substantially in accordance with the principles of the Constitution and the Election Act, and the relevant Laws.

In this petition, this court is of the considered view that the alleged procedural or administrative irregularities and other errors occasioned by human imperfections are not enough by and of themselves, to vitiate an election. To fortify my finding and/or view, I stand on the same plane as the learned Judges in the case of; -

OPITS C. =VR=S WRZESNEWSKYI (2012) 3SCR 76 (OPITZ) in which case, the Supreme court of Canada held that, such errors are to be expected in elections due to human error, limited training of election officials and fatigue as a result of working long hours before and during the elections. It held that to annul elections based on such errors would erode public confidence in the electoral process. It held: -

***“Given the complexity of administering a federal election, the tens of thousands of election workers involved, many of whom have no on-the-job experience, and the short time frame for hiring and training them, it is inevitable that administrative mistakes will be made. If elections can be easily annulled on the basis of administrative errors, public confidence in the finality and legitimacy of election result will be eroded (Emphasis added).”***

It is in the light of the foregoing premises that this court having considered the available evidence in this petition, as a whole the court has found out that the mistakes, errors, irregularities, which were claimed by the Petitioner did not materially tamper and/or affect the result of the Ekerenyo Ward election. The interest of the situation demands that the election be upheld.

It is worth noting that the Petitioner has not offered cogent evidence to prove that the anomalies in Forms 36A which he referred the court to and the other electoral irregularities did in any way vitiate the validity of the election or altered the outcome of the election.

The Petitioner has also failed to prove that the electoral process did not comply with the Constitution and Election Laws. In fact the 2<sup>nd</sup> Respondent's evidence all put together with the 3<sup>rd</sup> Respondent's evidence plus his witnesses' evidence did discharge the Petitioner's evidence totally to the effect and/or extent that, if there were any mishaps and/or transgressions, and/or errors or mistakes, then the same were little mishaps that affected the electoral process but that they do not alter the outcome of the election. It is crucial to point out that the Respondents in this case discharged their burden of proof.

It is also important to point out that in this case, the Petitioner's evidence did not prove that the errors in Form 36A and 36B for KEA DEB

primary school polling station led to a result different from the actual and true result that was declared.

The Petitioner has also failed to prove that the errors complained of by himself did negatively impact on the integrity of the election, that no reasonable tribunal would uphold it. The Petitioner did not give evidence of denial of opportunity to sign Forms 36A by his agents at any polling station.

The Petitioner did not prove that the non-signing of Form 36A by his agents did materially affect the final result of the Ekerenyo MCA Ward elections. Though the Petitioner claimed that his agents did not sign on Forms 36A as required this court is of the considered finding that the non-signing of Forms 36A by the Petitioner's agents cannot be a reason to invalidate the election in this matter. This court shall support the afore-stated finding on the Law as laid down in the case of: -

**JOHN MURUMBA CHIKATI =VRS= RETURNING OFFICER TONGAREN CONSTITUENCY & 2 OTHERS, Election Petition No. 4 of 2013**, in which case, the High Court of Kenya at Bungoma held, inter-alia that;

**“...the refusal or failure of a candidate or agent to sign the declaration or record reasons for their refusal to sign the form could not invalidate the results announced.”**

To support this decision, this court will also align itself with the decision in the case of **Kisumu High Court Election Petition No. 3 of 2017 JACKTON N. RANGUMA---PETITIONER =VRS= IEBC AND OTHERS-----RESPONDENTS** in which case, Judge Majanja was faced with a more serious challenge than abound in this election. There was an omission for greater than in one situation.

The result of 5 polling stations were not transposed at all into Forms 37B and 37C. The court applied the numerical test in Section 83 of the Election Act and established that the omission would not in any way affect the ultimate result.

Equally in this case, this court, after considering all the evidence herein, is of the considered finding that the outcome of the MCA election in Ekerenyo Ward met the constitutional requirements of transparency and accountability.

The sovereign will of the Kenyan people in Ekerenyo Ward expressed through the exercise of their democratic right to choose by a majority the 3<sup>rd</sup> Respondent as their MCA. The same cannot be vitiated by alleged arithmetical mistakes and immaterial non-compliance with election regulations.

As regards the Petitioner's prayer for scrutiny and recount, which was duly pleaded in the petition; this court's answer to this prayer is that, this prayer cannot be granted at this stage of the proceedings since the parties have already closed their cases. Secondly, the Petitioner's allegations that there were posting errors in Forms 36B cannot form the basis of scrutiny. Neither can the allegations that agents were not allowed to sign on Form 36A be a basis for scrutiny.

Thirdly, the Petitioner expressed in such general terms essentially seeking the scrutiny of various polling stations there is no specificity in what exactly the Petitioner seeks to be scrutinized.

Coupled with the foregoing premises, this court will also state that the court was only to consider matters that were pleaded. So any party's evidence that was outside his pleadings will be inadmissible while making and/or writing the final decision of this court. This is anchored on the trite law that parties are bound by their pleadings as held in the cases of; **RAILA AMOLO ODINGA AND ANOTHER =VRS= IEBC & 2 OTHERS of 2017 (2017) eKLR** the Supreme Court of Kenya aligned itself with the decision in the case of; **ARIKALA NARASA REDDY =VRS= VENKATA REM REDDYGARI & ANOTHER Civil Appeal Nos. 5710 – 5711 of 2012; (2014) SCR**, where the Supreme Court in India held that;

**“In absence of pleadings, evidence if any, produced by the parties cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration.”**

This court will point out that it is also clear from the petition that the Petitioner prayed for scrutiny. Although scrutiny is within the court's discretion, but the Petitioner must establish sufficient basis for the court to order scrutiny. This court will align itself with the Law as laid down in the case of; **RASHID HAMID AMANA =VRS= IEBC & OTHERS Malindi Election Petition No. 6 of 2013**, in which case the court held that; **although scrutiny is within the court's discretion, the Applicant/Petitioner, must establish sufficient basis for the court to order scrutiny. Further, the Petitioner must not be permitted to launch a fishing expedition under the guise of an application for scrutiny in order to discover new evidence upon which to foist his or her case to invalidate the election.**

The upshot of all the above stated premises is that this court has found out that the Petitioner in this case has not proved that the alleged non-conformity with the Electoral Law, did affect the election.

The Petitioner had the ONUS to prove that there had been non-compliance with the Law and that such failure of compliance had affected the validity of the elections.

In arriving at the foregoing finding, this court has aligned itself with the law as laid down in the case of; **RAILA AMOLO ODINGA & OTHERS =VRS= IEBC & 3 OTHERS Supreme Court of Kenya Election Petition No. 5 of 2013 (2013) eKLR** in which case the Supreme Court held that; **“...where a party had alleged non-conformity with the electoral Law, the Petitioner ought to not only prove that there had been non-compliance with the Law, but that such failure of compliance had affected the validity of the elections.”**

Having considered all the above-stated premises, and having considered all the facts that this petition has presented and weighing them against the Constitutional and Legal principles applicable, this court will return the verdict that the voters of Ekerenyo Ward expressed their will and validly chose the 3<sup>rd</sup> Respondent herein, one; THADDEUS NYABARO as their MCA, in an election that was free, fair and credible, the result that showed the Petitioner as the runner up was accurate.

The question that remains to be answered is whether given everything in the foregoing premises, it can be said that the 3<sup>rd</sup> Respondent herein was validly elected as the MCA for Ekerenyo Ward. The Black's Law Dictionary 9<sup>th</sup> Edition at page 1690 defines **VALID** to mean; **LEGALLY SUFFICIENT OR BINDING, MERITORIOUS**; I understand legal sufficiency in the election to mean that an election was conducted in a free, fair and credible manner and that it accurately represented the will of the electorate. It would not necessarily mean that the election was devoid of any errors, mistakes or irregularities. It means that if there were any such errors, mistakes or irregularities they were not of such magnitude that they substantially and/or materially affected the result.

It is therefore in the light of the above-stated premises that this court is of the considered finding that the petition has no merit. The prayers sought therein by the Petitioner cannot be granted. The court shall proceed to accordingly dismiss the petition.

As regards issue no. 4 vide; who is to bear the costs, to answer this issue, this court will align itself with the Supreme Court's decision in the case of; **RAILA AMOLO ODINGA & ANOTHER =VRS= IEBC & 2 OTHERS Supreme Court of Kenya Presidential Election Petition No. 1 of 2017 (2017) eKLR**, in which case, the Supreme Court held that; **"it is a heavily public funded constitutional organ and to burden tax payers with litigation costs would be a grave matter which we deem unnecessary in this petition."**

Relying on the law regarding to costs as laid down in the above cited Supreme Court decision, and considering the fact that the Petitioner herein had an unfettered right to file this petition, this court is of the considered view, that let each party therefore bear its own costs, in this matter, this court will also issue a certificate to the 3<sup>rd</sup> Respondent herein, one THADDEUS NYABARO as the validly elected Member of County Assembly Nyamira for Ekerenyo Ward.

Those shall be the orders of this court.

Orders accordingly.

**Judgement dated at Nyamira this 28<sup>th</sup> day of February, 2018.**

**M. O. WAMBANI – CM**

**28/02/2018**

**Court**

Orders accordingly.

**Judgement dated at Nyamira this 28<sup>th</sup> day of February, 2018.**

**M. O. WAMBANI – CM**

**28/02/2018**

**On 28<sup>th</sup> February, 2018**

Before Hon. Mrs. M. O. Wambani – CM

The Petitioner – Present

1<sup>st</sup> Respondent – Absent

2<sup>nd</sup> Respondent – Absent

3<sup>rd</sup> Respondent – Absent

C/c – Nyabonyi

Court – Interpretation/Language – English/Kiswahili/Ekegusii by C/c Nyabonyi

Mr. Anyoka for the Petitioner

Mr. Magero for both the 1<sup>st</sup> & 2<sup>nd</sup> Respondents – Absent

Mr Ndubi for the 3<sup>rd</sup> Respondent

**Court**

Judgement dated, signed, read and delivered in open court in the presence of C/c – Nyabonyi, the Petitioner, his Advocate Mr. Anyoka, the 1<sup>st</sup> & 2<sup>nd</sup> Respondents, their Advocate Mr. Ndubi holding brief for Mr. Magero. The 3<sup>rd</sup> Respondent is Present. His Advocate Mr. Ndubi is Present.

**M. O. WAMBANI – CM**

**28/02/2018**

**Court**

Judgement be and is hereby delivered accordingly.

The parties have a Right of Appeal.

**M. O. WAMBANI – CM**

**28/02/2018**

**Mr. Anyoka for the Petitioner**

We are grateful for the decision. We respect the court's verdict. I apply for certified copies of the judgement. I will seek instructions from my client on whether to appeal or not.

**M. O. WAMBANI – CM**

**28/02/2018**

**Mr. Ndubi for the Respondents**

On behalf of the 3<sup>rd</sup> Respondent, I do appreciate for the well-researched judgement. Though we have been denied costs. It has been exhausting travelling from Nakuru. The security of costs can be released after the period to file an appeal.

**M. O. WAMBANI – CM**

**28/02/2018**

**Mr. Anyoka for the Petitioner**

That is okay. I apply that the security for costs be released to the Petitioner.

**M. O. WAMBANI – CM**

**28/02/2018**

**ORDER**

The proceedings and the judgement be typed and certified copies thereof be supplied to the parties as appropriate.

**M. O. WAMBANI – CM**

**28/02/2018**

**ORDER**

The order for release of the security for costs will be considered after the period to file an appeal has elapsed/expired.

**M. O. WAMBANI – CM**

**28/02/2018**