IN THE COURT OF APPEAL

AT NYERI

(CORAM: MAKHANDIA, SICHALE & KANTAI, JJ.A)

ELECTION PETITION APPEAL NO. 2 OF 2018

BETWEEN

SAMMY NDUNG'U WAITY.....APPELLANT

AND

THE INDEPENDENT ELECTORAL AND BOUNDARIES

COMMISSION .....1ST RESPONDENT

NDERITU MURIITHI.....2ND RESPONDENT

JOHN MWANIKI..... 3RD RESPONDENT

COUNTY RETURNING OFFICER, LAIKIPIA COUNTY .....4TH RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nanyuki (Kasango, J.) dated 31st January, 2018 in HIGH COURT ELECTION PETITION NO. 2 OF 2017

****

JUDGMENT OF THE COURT

SAMMY NDUNG'U WAITY (the appellant herein) and ***DENNIS KIMNGAROR LEMAN*** were the 1st and 2nd Petitioners respectively before the High Court at Nanyuki in ***ELECTION PETITION NO. 2 of 2017*** wherein they contested the declaration of ***NDERITU MURIITHI*** (hereinafter 'the 2nd Respondent') and ***JOHN MWANIKI*** (hereinafter 'the 3rd Respondent') as the Governor-elect and

Deputy Governor-elect of Laikipia County by the ***INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION*** (hereinafter 'the 1st Respondent'), acting through the **COUNTY RETURNING OFFICER-LAIKIPIA COUNTY** (hereinafter 'the 4th Respondent').

The said declaration was made following the General Elections of **8th August, 2017** wherein the residents of Laikipia County turned up to elect leaders to various elective offices including but not limited to that of the President and the Governor. For completeness of the record, it would be worthwhile to point out at the outset that ***DENNIS KIMNGAROR LEMAN*** (hereinafter the 2nd petitioner) subsequently filed an application dated 18th September, 2017 in which he requested to withdraw from the petition. The same was allowed by the trial court leaving ***SAMMY NDUNG'U WAITY*** as the sole petitioner.

The Gubernatorial race in Laikipia County had attracted two candidates namely: - ***NDERITU MURIITHI*** initially of the Jubilee party, but who subsequently contested as an independent candidate and ***JOSHUA WAKAHORA IRUNGU***, of the Jubilee party. At the close of voting, the votes were counted, tallied and a declaration was made by the 4th Respondent that the said candidates had fared as follows in the election:-

NDERITU MURIITHI 100, 342 votes (50.5%)

JOSHUA IRUNGU 98, 349 votes (49.5%)

Consequently, the 2nd Respondent was declared the victor of the gubernatorial race, much to the displeasure of the appellant who expressed the same in a **petition** dated and filed on **8th September, 2017** at the High Court at Nanyuki.

The appellant sought the following orders in his petition:-

> **a. Upon filing of the petition herein, the 1*st* Respondent does provide ALL the materials including electronic data, devices, forms and polling day diaries as regards the Laikipia Gubernatorial election.**
>
> **b. Upon filing of the petition herein, the 1*st* Respondent does provide ALL the data as pertains the final tally at Laikipia County of all the elective posts namely:- Presidential, Governor, Senator, Member of the National Assembly and Women Representative as per the respective forms.**
>
> **c. Upon filing the petition herein, the 1*st* *Respondent does provide ALL the data as pertains to the voter turnout in Sosian Ward as reflected in the KIEMS Kits.***
>
> **d. A declaration that the 2*nd* *Respondent was not qualified to run as an independent in the gubernatorial election therefore his election is null and void.***
>
> **e. A declaration that the campaign method adopted by the 2*nd* *Respondent, even after being reprimanded by the 1st* Respondent's enforcement committee, was not lawful nor was it fair and thus rendered the results invalid.**
>
> **f. A declaration that the 1*st* *Respondent failed by proceeding with the election at Sosian Ward rather than postponing it.***
>
> **g. An order that the gubernatorial election for the position of Governor be conducted afresh at Sosian Ward.**
>
> **h. There be an order for scrutiny of all the votes cast at Laikipia County for the gubernatorial position and as they were transmitted by the KIEMS Kit.**
>
> **i. There be an order for recount of all the votes cast at Laikipia County for the position of Governor.**
>
> **j A declaration that the election as pertains to the Governor for Laikipia County was not conducted in accordance with the Constitution and the applicable law rendering the declared result invalid, null and void.**
>
> **k. A declaration that the 2*nd* *Respondent was not validly declared as the winner and that the declaration was and is invalid, null and void.***
>
> **l. An order that there be a fresh election held for the position of Governor, Laikipia County.**
>
> **m. Costs be assessed and awarded to the petitioners.**
>
> **n. Any other relief that the court may deem fit".**

The firm of M/s. J. M. Njengo & Co. Advocates entered appearance for and on behalf of the 3rd respondent and filed a **"response to the petition"** dated 15th September 2017. The firm of Gumbo & Associates advocates, on behalf of the 1st and 4th respondents lodged a response to the petition dated 14th September 2017 and filed on 18th September 2017, whilst the firm of Coulson Harney LLP, on behalf of the 2nd respondent, filed an extensive response dated 17th September 2017 and filed on 18th September 2017.

The contestations between the appellant and the respondents were considered in a trial conducted by Kasango, J. who in a judgment dated 31st January 2018 dismissed the appellant's petition. In the penultimate part, the learned Judge rendered herself as follows:-

> **"In the final analysis I find that the election of gubernatorial position of Laikipia County of 8th August 2017 complied with the written law relating to elections and with the provisions of the Constitution. And more importantly, despite the very grave allegations made by the petitioner in his petition, I find that only very minor failures occurred in the Forms 37A and Form 37B which failures had no substantial effect on that election or its results and to echo the Supreme Court's finding in Raila 2017 "No election is perfect. Even the law recognizes this reality.**
>
> **I am satisfied that the election of governor of Laikipia County was conducted substantially in accordance with the constitution and electoral law, and that as a result Ndiritu Muriithi was validly elected as the governor of Laikipia County. That election was free and fair. I hereby dismiss the petition with costs. The Petitioner Sammy Ndungu Waity shall pay costs to the 1st and 4th respondent which are capped at total sum of Kshs. 4,000,000(Four Million) and shall also pay the 2nd and 3rd respondents costs (each) capped at total Ksh.4,000,000 (four million). The costs awarded in this judgment are over and above those costs awarded by this court on 9th November, 2017 for the interlocutory application dated 18th September 2017, of Dennis Kimngaror Leman."**

The appellant was aggrieved by the said outcome and duly filed a Notice of Appeal dated 7th February 2018 at the High Court of Kenya at

Nanyuki, thus paving the way for the filing of a memorandum of appeal dated 1st March 2018. The following were listed as the grounds of appeal:-

"***1.*** **That the learned Judge erred in law and fact by expunging the affidavits of Denis Kimnagaror Leman, Danson Apaol Ngimor, Darwin Rionomutu, Maira Kang'aror, Makal Tulu and Simau Mamukong when allowing the withdrawal of the 2*nd*** **petitioner from the petition contrary to the letter and spirit of Rule 24 of the Election (Parliamentary and County Elections) Petitions Rules 2017, thereby materially affecting the substance of the petition before court.**

2. That the learned Judge erred in law and fact by failing to consider the appellant's intention to substitute and/or take over the 2*nd* ***petitioner's case in accordance with the provisions of Rule 24 of the Election (Parliamentary and County Elections) Petitions Rules 2017.***

3. That the learned Judge erred in law and fact by awarding exorbitant and excessive costs to the respondents for the application dated 18*th* **September, 2017 contrary to the provisions of the Advocates Remuneration Order, Article 22(2) and (3) of the Constitution of Kenya, Article 38(2) of the constitution of Kenya and Article 48 of the Constitution of Kenya**.

4. That the learned Judge erred in law and fact by awarding 1*st* ***and 4th respondents separate costs for the application dated 18th September, 2017.***

5. That the learned Judge erred in law and fact by exhausting all the money deposited as security for costs even before commencement of trial.

6. That the learned Judge erred in law and fact by allowing the application for review dated 21*st* ***November, 2017 without affording the appellant time to respond to it.***

7. That the learned Judge erred in law and fact by reviewing the orders made on 20*th* **November 2017 which were orders made on review of earlier orders thereby prejudicing the preparation and presentation of the appellant's case.**

8. That the learned Judge erred in law and fact in allowing the application for review dated 21*st* **November, 2017 which was against the interest of justice and which greatly prejudiced the appellant in the preparation and presentation of this case.**

9. That the learned Judge erred in law and fact by unfairly declining the application dated 13*th* **October, 2017 seeking to file affidavit of further witnesses thereby adversely affecting the appellant's preparation and presentation of this case.**

10. That the learned Judge erred in law and fact in failing to allow in full the application dated 2*nd* **October, 2017 seeking for access to information thereby adversely affecting the appellant's preparation and presentation of this case.**

11. That the learned Judge erred in law and fact in unfairly dismissing the Notice of Motion dated 27*th* **November, 2017 which sought an order for scrutiny of the votes in all polling stations in Sosian Ward for Gubernatorial election on 13*th*** **December, 2017; thereby affecting the fair and transparent determination of the petition before court.**

12. That the learned Judge erred in law and fact in making judgment against the weight of evidence.

13. That the learned Judge erred in law and fact in failing to consider the evidence of the SD Cards she had ordered be supplied to the appellant on 20*th* **November, 2017 thereby failing to fairly and transparently consider the petition and evidence availed to the court.**

14. That the learned Judge erred in law and fact in declaring that Peter Ngugi Ndonyo was not a competent witness for the appellant, thereby unfairly and unlawfully excluding part of the appellant's evidence.

15. That the learned Judge erred in law and fact in declaring that Bildad Namawa was not a competent witness for the appellant, thereby unfairly and unlawfully excluding part of the appellant's evidence.

16. That the learned Judge erred in law and fact and misinterpreted the provisions of Order 19 Rule 7 of the Civil Procedure Rules and its applicability to election petitions when dismissing the affidavits sworn by Peter Ngugi Ndunyo and Bildad Namawa, thereby arriving at an erroneous decision.

17. Without prejudice to the foregoing, that the learned Judge erred in law and fact in failing to allow the appellant's proposed witnesses, namely Peter Ngugi Ndonyo and Bildad Namawa, to swear fresh affidavits (maintaining the same evidence as was in their earlier affidavits) on application by the appellant's counsel on 23*rd* **November, 2017 thereby failing to serve substantive justice without undue regard to technicalities as envisioned under Articles 22(3) (d) and 159 of the Constitution.**

18. That the learned Judge erred in law and fact in failing to grant the appellant sufficient time to read the data supplied to him by the 1*st* **respondent and thereby unfairly prejudiced the preparation of his petition.**

19. That the Judge erred in law and fact by expunging the report on sealing of the ballot boxes filed in court on 15th December, 2017 yet she is the one who had ordered for the sealing of the ballot boxes, thereby shutting her eye to the status of electoral materials at the time the petition was being heard.

20. That the learned Judge erred in law and fact in failing to consider that the massive material discrepancies, errors and irregularities in the statutory electoral forms produced in court were sufficient to warrant a nullification of the gubernatorial election in Laikipia County.

21. That the learned Judge erred in law and fact in failing to find that the appellant, through his pleadings, affidavit evidence, oral evidence and evidence of cross-examination of the respondents' witnesses had discharged his burden of proof and that the same had shifted to the respondents, thereby arriving at an erroneous decision.

22. That the learned Judge erred in law and fact by finding that the declaration of the 2*nd* and 3*rd* respondents as Governor and Deputy Governor of Laikipia County was proper and lawful despite overwhelming evidence to the contrary.

23. Without prejudice to the foregoing, that the learned Judge erred in law and fact in awarding excessive costs contrary to the provisions of the Advocates Remuneration Order, Article 22(2) and (3) of the Constitution of Kenya, Article 38(2) of the Constitution of Kenya and Article 48 of the Constitution of Kenya."

On 10th July 2018 the appeal came before us for highlighting of the written submissions. Learned counsel, **Mr. Ramadhani Abubakar** teaming up with Mr. **Magee wa Magee** appeared for the appellant; learned counsel, **Mr. Bush Wanjala** and **Mr. Kelly Malenya** appeared for the 1st and 4th respondents; learned counsel **Mr. Cecil Kuyo** and **Miss Maria Mbeneka** appeared for the 2nd respondent whilst learned counsel, **Mr. J. M. Njengo** and **Mr. G.M. Wanjohi** appeared for the 3rd respondent.

In urging the appeal, Mr. Abubakar relied on the appellant's submissions filed on 23rd April 2018, and his lists of authorities filed on 23rd April 2018, 8th June 2018 and 3rd July 2018 respectively. Counsel segregated the various grounds and urged them as follows:-

GROUNDS 1 AND 2

The learned trial Judge was faulted for expunging the 2nd petitioner's affidavit together with the annextures therein being the affidavits of ***Danson Apaol Ngimor,* Darwin Rionomutu Pombo, Maira Kang'aror, Musa Makal Tulu and Mamukong Simau** on the basis that it ran afoul the provisions of **Rules 22(2), 24(1**) and **24(6**) of the Election (Parliamentary and County Elections) Petitions Rules 2017. These rules provide as follows:-

"**22(2) The petitioner shall publish in a newspaper of national circulation a notice of intention to withdraw an election petition in Form 6 set out in the First Schedule and the petitioner**." (sic)

24 (1) At the hearing of the application for the withdrawal of a petition, a person who is qualified to be a petitioner in respect of the election to which the petition relates may apply to the election court to be substituted as the petitioner in place of the petitioner who has applied to withdraw the petition.

6. Where there is more than one petitioner, an application to withdraw a petition shall be made with the consent of all the other petitioners."

GROUNDS 3, 4 AND 5

The learned trial Judge was faulted for awarding "**… costs at Ksh.125,000/- each which amount shall be paid from the amount paid into this court as security for deposit."** This order was made in a ruling dated 9th November 2017 following an application dated 18th September 2017 wherein:-

"***The 2nd* petitioner applies for leave to withdraw himself *from the petition as the 2nd petitioner and have his supporting affidavit from pages 117 - 157 of the petition expunged from the court records on the following grounds."***

It was counsel's view that the award of costs of Ksh.125,000/- each to the respondents was excessive given the nature of the application by the 2nd petitioner which was to withdraw from the petition and which application was not opposed. According to counsel, the costs should have been Ksh.3000/- as per **Schedule 6 (1) c. (vii)** of the **Advocates Remuneration Order.** Counsel further argued that such high costs are an impediment to the Constitutional right of access to justice.

GROUNDS 6, 7 AND 8

The learned Judge was faulted for reviewing the orders of 20th November 2017 based on an application dated 21st November 2017 by the 2nd petitioner who had withdrawn from the petition on 9th November 2017 and hence had ceased to have the requisite *locus standi.* Further, it was contended that the learned Judge failed to give the appellant's counsel sufficient time to respond to the motion filed on 21st November 2017 when it came up for hearing on 22nd November 2017.

GROUND 9

The learned trial Judge was faulted for disallowing the application dated 12th October 2018 that sought to file affidavits of ***Joseph Kipoipoi Nanyoi and Peter Colins Keshine*** so as to testify on behalf of the appellant.

GROUNDS 10, 13 & 18

The trial Judge was faulted for largely disallowing the appellant's application dated 2nd October, 2017 in a ruling dated 20th November 2017. In the motion the appellant had sought ***"…inter alia, supply of all material including electronic data on all devices used, forms 37A, B and C and polling day diaries for all polling station*** (sic) **in Laikipia in respect of gubernatorial election."**

GROUNDS 14, 15, 16 AND 17

The learned Judge was faulted for upholding the respondents' objection to have one ***Peter Ngugi Ndonyo*** adduce evidence as he was a deponent in an affidavit annexed to the appellant's affidavit in support of the petition.

GROUND 19

The learned trial Judge was faulted for expunging the report on the sealing of the ballot boxes undertaken by the appellant at a great expense. It was the appellant's contention that the report revealed electoral illegalities and irregularities to wit missing forms 37A, missing seals etc.

GROUNDS 11, 12, 19, 20, 21 AND 22

In these composite grounds of appeal, it was the appellant's contention that the 2nd respondent should not have been allowed to contest as he did not comply with **Section 33 (1) (c)** of the Elections Act which provides:-

> **"(1) A person qualifies to be nominated as an independent candidate for presidential, parliamentary and county elections for the purposes of Articles 97, 98,137, 177 and 180 of the Constitution if that person—**
>
> a. …;
>
> b. …;
>
> **c. has, at least ninety days before the date of a general election or at least twenty one days before the date appointed by the Commission as the nomination day for a by–election, submitted to the Commission the name and symbol that the person intends to use during the election."**

It was contended that in High Court Election Petition Appeal No. 10 of 2017 the 2nd respondent had vide a Memorandum of Appeal dated 9th May 2017 appealed against the decision of the Political Parties Tribunal (PPDT) and one of the prayers was that:-

> "**6. In the alternative and without prejudice to prayer 1*, 2 and 3 the IEBC be directed to extend time against which the 2nd*** **appellant may present his papers as an independent candidate."**

According to counsel, the above prayer was a direct admission that the 2nd respondent had not conformed to the dictates of **Section 33 (1) (c)** of the Elections Act. It was counsel's view that an election is a process and he relied on the High Court decision of ***Karanja Kabage vs. Joseph Kiuna Kariambegu Ng'ang'a & 2*** [2013] eKLR for this proposition. Further, that between 1st August 2017 and 8th August 2017 violence was meted out to the inhabitants of Laikipia North, a stronghold of the only other candidate, Joshua Irungu. Sosian Ward was cited as one of the areas that was adversely affected by the insecurity. It was counsel's view that given the insecurity the 1st respondent ought to have postponed the election. There was also the issue of alleged illegality and irregularities in that some stations opened and others closed before statutory time lines and that there were discrepancies on the number of voters identified vis-à-vis forms 37C's; agents were denied access; that the votes cast for other positions did not correspond with the votes cast for gubernatorial election. To this end the appellant paused the question in his written submissions ***"does it mean more votes*** *(sic)* **turned up to vote for the woman representative in Laikipia County than they turned up to vote for the governor?"**; that some forms did not have security features and that the forms had several inaccuracies and others were not signed.

GROUND 23

In her judgment, the trial Judge rendered herself as follows:-

> **"The petitioner Sammy Ndung'u Waity shall pay costs to the 1*st* and 4*th*** ***respondent which are capped at total sum of Ksh.4,000,000/- (four million) and shall also pay the 2nd and 3rd*** **respondents costs (each) capped at total Ksh.4,000,000/- (four million). The costs awarded in this judgment are over and above those costs awarded by this court on 9*th*** ***November 2017 for the interlocutory application dated 18th September 2017, of Dennis Kimnagaror Leman*****."**

The appellant's counsel contended that the costs of Khs.125,000/- awarded in a ruling made on 9th November, 2017 allowing the 2nd

petitioner to withdraw from the petition was excessive. As regards costs of Kshs. 12,000,000 awarded upon the determination of the petition, counsel argued that this is one of the highest awards in the country. He contended that the costs awarded were excessive.

The above is the gist of the appellant's appeal before us.

On behalf of the 1st and 4th respondents, Mr. Wanjala contended that although the appellant made various interlocutory applications which largely form the basis of this appeal, the rulings delivered therein were never challenged and/neither were Notices of Appeal filed in respect of each ruling contrary to Rule 35 of the Elections (Parliamentary and County Elections Petitions) Rules, 2017 and **Rule 6(2)** of the Court of Appeal (Election Petition Appeal) Rules, 2017. The latter rule provides that

> **"A person who decides to appeal to the court against a decision of the High Court in an election petition shall within seven days of the decision appealed against lodge a Notice of Appeal."**

On the burden of proof and standard of proof, counsel contended that this was not discharged as the appellant never led any evidence in support of the allegations in the petition.

On the issue of withdrawal of the 2nd petitioner from the petition and the expunging of the affidavits annexed to the 2nd petitioner's affidavit, counsel submitted that the trial court cannot be faulted for expunging them as these were not stand alone affidavits and the 2nd petitioner having withdrawn his part of the petition and the supporting affidavits, the annextures to his supporting affidavit fell by the way side.

On scrutiny and recount, counsel submitted that a petitioner has to lay a basis for scrutiny; that in the trial court, the appellant who was the sole witness was not present in any of the polling stations. Additionally, that he did **"… *not testify on* any forms and polling stations with discrepancies and irregularities to warrant scrutiny."**

On the appellant's contention that his counsel was not given time to prepare for various applications, counsel pointed out that election petitions being time bound, urgency remained paramount throughout the hearing of the petition; that the review application dated 21st November 2017 sought to clarify two rulings of 9th

November 2017 and 20th November 2017 and the appellant's request to seek more time to respond was unnecessary as the application was simple and straight forward as it sought to clarify the court's previous decision.

On costs, counsel submitted that the ground against the capping of costs (which were capped at a maximum of Ksh.12,000,000/-) is premature as the costs are yet to be taxed by a taxing master and further, that an award of costs is a discretionary matter, hence the trial court cannot be faulted in the exercise of its discretion.

In his oral highlights before us, Mr. Wanjala took issue with the purported Notice of Appeal which was filed at the High Court in Nanyuki as opposed to this Court's Registry.

Mr. Kuyo on behalf of the 2nd respondent submitted that this Court does not have jurisdiction to entertain this appeal as the appeal raises issues of fact and that to a large extent, the grounds of appeal relate to interlocutory applications where no Notices of Appeal were filed. On the expunging of the annexutures to the affidavit of the 2nd petitioner, it was counsel's view that the 2nd petitioner having withdrawn his petition, it follows that his affidavit and the annexutures thereto could not stand on their own right.

On the appellant's application for access to information and scrutiny of votes, Mr. Kuyo maintained that no basis was laid for this; that there was no evidence adduced of discrepancies and irregularities. On the award of costs pursuant to the withdrawal of the 2nd petitioner, counsel contended that the award of costs was against the 2nd petitioner who has not appealed against the order for costs. In relation to the costs of Ksh.4,000,000/- awarded to the 2nd respondent in the main cause, counsel submitted that section 84 of the Elections Act provides that costs follow the event. In conclusion, counsel pointed out that the Notice of Appeal having been filed at the High Court in Nanyuki and not in this Court's Registry, this Court is not seized of jurisdiction to entertain the appeal. Counsel relied on this Court's recent decisions of **Lesirma Simeon Saimanga and Another vs. The Independent Electoral and Boundaries Commission and Another** ***Election Petition Appeal (Application) No. 7 of 2018*** and **Musa Cherutich Sirma vs.The Independent Electoral and Boundaries Commission and 2 Others** ***Election Petition Appeal (Application) No. 9 of 2018 [2018] eKLR*** for his proposition that a Notice of Appeal filed at the High Court and not this court's registry renders the resultant appeal a nullity.

On her part, Mrs. Mbeneka supported the expunging of the affidavits annexed to the 2nd petitioner's petition and further, that the costs awarded were reasonable.

On behalf of the 3rd respondent, Mr. Njengo contended that the appeal before us was defective as the Notice of Appeal was not filed in this Court's Registry and secondly that the Notice of Appeal does not conform with the format provided in the Court of Appeal (Election Petition Appeal) Rules, 2017. Like counsel before him, whom he associated himself with counsel contended that the annextures in the affidavit of the 2nd petitioner could not stand after the 2nd petitioner had withdrawn his petition. On the appellant's application to file affidavits of further witnesses, he contended that these affidavits were to be filed out of time and hence had the effect of amending the petition as they alluded to "**new**" alleged malpractices hitherto not referred to; that the application to file the further affidavits was being made 64 days after closure of time for filing the petition. Further, counsel contended that the appellant failed to lay a basis for scrutiny as although various allegations were made touching on Sosian Ward, the appellant who was a Jubilee Chief Agent for Laikipia East Constituency was stationed at Nanyuki High School Tallying Centre and any allegations of irregularities was, at best *based on* hearsay. Counsel maintained that the appellant had failed to prove the alleged irregularities and further, that the appellant failed to discharge the burden of proof. On costs, it was counsel's view that

costs follow the event.

We have considered the record of appeal, the appellant's submissions and lists of authorities, 1st and 4th respondents submissions and the 3rd respondent's written submissions, the oral highlights made before us and the law.

On the preliminary issue, that no notice of appeal was filed in this Court, we take note that the Notice of Appeal herein was initially lodged at the High Court of Kenya at Nanyuki on 7th February 2018 with a request that "***the appeal be set down for hearing in the appropriate registry".*** An endorsement was made at the tail end of the Notice of Appeal by the Deputy Registrar of the High Court at Nanyuki on 7th February 2018. The Notice of Appeal was subsequently lodged at the Court of Appeal Registry at Nyeri on 7th February 2018, before being served upon the respective respondents on 8th February, 2018.

As we recently held in our decisions of **Lesirma Simeon Saimanga vs IEBC & 2 others** *(supra)* and ***Musa Cherutich Sirma & 2 others vs. IEBC*** (supra) Court of Appeal (Election Petition Appeal) rules 2017. The rules require that a Notice of Appeal be filed at this Court's Registry and not at the High Court Registry. It is then that the Court is seized of jurisdiction. In the instant matter although the Notice of Appeal was filed at the High Court in Nanyuki, it was subsequently transmitted and a stamp of this Court (Nyeri) affixed to it on the same day i.e. 7th February 2018 before it was served on the respondents. The transmission of the Notice of Appeal and the stamping thereof by this Court's Registry was well within time set for the filing of a Notice of Appeal. The situation prevailing herein was different from that in ***Lesirma Simeon Saimanga vs IEBC & 2 others*** *(supra)* and ***Musa Cherutich Sirma & 2 others vs. IEBC*** (supra) as in the two cases the Notices of Appeal were filed at the High Court in Nakuru and Kabarnet respectively. There was no attempt to transmit them to the court's Registry. In this case, the notice of appeal was filed at the registry of this Court within the time-lines required by the rules of this Court. We think that the position is different from that which obtained in the said 2 cases and although the notice of appeal does not conform with the format set out in the schedule of the Court of Appeal (Election Petition Appeal) Rules, 2017, this is a situation where irregularity is curable under **Article 159** of the Constitution of Kenya, 2010. Accordingly, we reject the invitation that there was no Notice of Appeal filed in this Court's Registry at Nyeri.

On the issue that the appeal herein does not raise issues of law, the respondents conteded that under **Section 85A** of the Election Act this court is seized of an appeal if it raises issues of law only. This issue speaks to the jurisdiction of this Court. In the Supreme Court decision of ***Samuel Kamau Macharia & Another vs. Kenya Commercial Bank & 2 Others [2012] eKLR*** it was held that:

> **"A court's Jurisdiction flows from either the *Constitution or legislation or both and that a court cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law*."**

The jurisdiction of this Court in election matters is donated by **Article 164(3)** of the Constitution and the Elections Act. **Section 85** of the Elections Act provides as follows:-

> **"an appeal from the High Court in an Election Petition concerning membership of National Assembly, Senate or of the Office of the County Governor shall lie to the Court of Appeal on matters of law only** *(emphasis ours)* ***and shall be:***
>
> **a. Filed within thirty days of the decision of the High Court.**
>
> **b. Heard and determined within six months of the filing of the appeal."**

The parameters of what constitutes issues of law and issues of fact were considered by the Supreme Court in the decision of **Gatirau Peter Munya vs. *Dickson Mwenda Kithinji and 2 others (2014) eKLR*** wherein it held:-

> **"Now with specific reference to Section 85(A) of the Elections Act, it emerges that the phrase '***matters of law only***' *means a question or an issue involving*:**
>
> **a. The interpretation, or construction of a provision of the Constitution, an Act of Parliament, Subsidiary Legislation, or any legal doctrine, in an election petition in the High Court, concerning membership of the National Assembly, the Senate or the office of county Governor;**
>
> **b. The application of a provision of the Constitution, an Act of Parliament, Subsidiary Legislation, or any Legal Doctrine to a set of facts or evidence on record, by the trial Judge in an election petition in the High Court concerning membership of the National Assembly, the Senate or the office of the County governor;**
>
> **c. The conclusions arrived at by the trial Judge in an election petition in the High Court concerning membership of the National Assembly, the Senate, or the office of County governor, where the appellant claims that such conclusions were based on '***no evidence'***, *or that that the conclusions were not supported by the established facts or evidence on record, or that the conclusions were '****so perverse'****, or so illegal, that no reasonable tribunal would arrive at the same; it is not enough for the appellant to contend that the trial Judge would probably have arrived at a different conclusion on the basis of the evidence."***

Further, this Court in **John Munuve Mati vs Returning Officer Mwingi North Constituency & 2 Others** ***[2018] eKLR*** "***matters of law***" were construed to mean:

> **"… the interpretation or construction of the Constitution, statute or regulations made thereunder or their application to the**

sets of facts established by the trial Court. As far as facts are concerned, our engagement with them is limited to background and context and to satisfy ourselves, when the issue is raised, whether the conclusions of the trial judge are based on the evidence on record or whether they are so perverse that no reasonable tribunal would have arrived at them. We cannot be drawn into considerations of the credibility of witnesses or which witnesses are more believable than others; by law that is the province of the trial court."

In the Memorandum of Appeal filed by the appellant, in all 23 grounds relied upon, it was stated that the learned Judge "***erred in law and in fact***". A similar scenario presented itself in the case of **Hassan Aden Osman Vs. IEBC & 2 others** NBI Election Petition No. 11 of 2018 wherein this Court deprecated the inelegant manner in which the memorandum of appeal was drawn. However, the above notwithstanding, the Court came to a conclusion that that did not take away the court's jurisdiction. It stated:

"The manner in which the grounds were framed in this appeal is baffling and confounding in view, first, of the clear provisions of section 85A, and second of the professional standing of counsel for the appellant and the past decisions of this Court on this subject. ….

Having so said, it bears repeating that elegance in a pleading is not a precondition to its legitimacy; that jurisdiction can only be conferred by the Constitution, or any written law, or both; and that no one, not even the court itself can, through judicial craft or innovation, arrogate to itself jurisdiction exceeding that which is conferred as aforesaid. Conversely, the jurisdiction of a court cannot be taken away merely by poor drafting of pleadings or even by the parties."

In the instant appeal, the inelegant drafting notwithstanding, we were not told of how the learned Judge erred in the interpretation or construction of a provision of the Constitution or any other law. We were also not told how the trial Judge erred in the application of a provision of the Constitution or any other law. Finally, on this point, it was not stated to us that the conclusion/s of the trial Judge were so perverse or so illegal that no reasonable tribunal would have arrived at the conclusion complained of. For this reason, we uphold the submissions of the respondent that the grounds of appeal did not conform to the dictate of **Section 85(A)** of the Elections Act.

On the scrutiny, the learned trial Judge was faulted by the appellant in dismissing his application on scrutiny. The legal basis for scrutiny and recount is set out in sections **80(3), 82(1)** of the Elections Act 2011 and **Rule 28** and **29** of the Elections (Parliamentary and County Elections) Petitions Rules 2017.

Section 80(3) of the Elections Act provides as follows:

(3) **Interlocutory matters in connection with a petition challenging results of presidential, parliamentary or county elections shall be heard and determined by the election court."**

Whilst **Section 82(1)** of the Elections Act provides as follows:

"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."*

Further, **Rules 28** and **29** of the Elections (Parliamentary and County Election) Petition Rules, 2017 provide as follows.

"28 A petitioner may apply to an elections court for an order to -

a. recount the votes; or

b. examine the tallying, if the only issue for determination in the petition is the count or tallying of votes received by the candidate.

29 (1) The parties to the proceedings may apply for scrutiny of the votes for purposes of establishing the validity of the votes cast.

(2) On an application under sub-rule (1), an election court may, <u>if it is satisfied that there is sufficient reason</u>, *(emphasis ours)* ***order for scrutiny or recount of the votes.***

(3) The scrutiny or recount of votes ordered under sub-rule (2) shall be carried out under the direct supervision of the Registrar or Magistrate and shall be subject to the directions the election court gives.

(4) The scrutiny or recount of votes in accordance with sub-rule (2) shall be confined to the polling stations in which the results are disputed and may include the examination of-

a. the written statements made by the returning officers under the Act;

b. the printed copy of the Register of voters used during the elections sealed in a tamper proof envelope;

c. the copies of the results of each polling station in which the results of the election are in dispute;

d. the written complaint by the candidate and their representatives

e. the packets of spoilt ballots;

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;

j. the polling day diary; and

k. the statements showing the number of rejected ballot papers."

In **Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others** (supra) the Supreme Court laid down the principles for consideration in an application for scrutiny. It stated:

> "**(a) The right to scrutiny and recount of votes in an *Election petition is anchored in Section 82(1) of the Elections Act and Rule 33 of the Elections (Parliamentary and County Elections) Petition Rules 2013. Consequently, any party to an election petition is entitled to make a request for a recount and/or scrutiny of votes, at any stage after the filing of petition, and before the determination of the petition.***
>
> **b. The trial court is vested with discretion under Section 82(1) of the Elections Act to make an order on its own motion for a recount or scrutiny of votes as it may specify, if it considers that such scrutiny or recount is necessary to enable it to arrive at a just and fair determination of the petition. In exercising this discretion, the court is to have sufficient reasons in the context of the pleadings or the evidence or both. It is appropriate that the court should record the reasons for the order for scrutiny or recount.**
>
> **c. The right to scrutiny and recount does not lie as a matter of course. The party seeking a recount or scrutiny of votes in an election petition is to establish the basis for such a request to the satisfaction of the trial judge or magistrate. Such a basis may be established by way of pleadings and affidavits, or by way of evidence adduced during the hearing of the petition.**
>
> **d. Where a party makes a request for scrutiny or recount of votes, such scrutiny or recount if granted, is to be conducted in specific polling stations in respect of which the results are disputed, or where the validity of the vote is called into question in the terms of Rule 33(4) of the Election (Parliamentary and County Election) Petition Rules."**

As has been stated times without number, a litigant desirous of obtaining an order for scrutiny must lay a basis for it. In the context of this appeal the appellant did not lay a basis either in his pleadings or in his evidence. For the record, the appellant was Jubilee's agent during the election's held on 8th August 2017. He was stationed at Nanyuki High School Tallying Centre as per his evidence. He did not dispute or challenge the validity of the elections in any named polling station. It is our considered view that the appellant failed to lay a basis for scrutiny and the learned trial Judge cannot be faulted in rejecting the appellant's application for scrutiny.

The appellant's other complaint was that the learned trial Judge erred for expunging the affidavits of ***Danson Apaol Ngimor, Darwin Rionomutu Pombo, Maira Kang'aror, Musa Makal Tulu*** and ***Mamukong Simau*** thus denying the appellant the right to call them as his witnesses. It bears repetition to state that there were two petitioners in the petition filed at the High Court, the appellant (the then 1st petitioner) and the 2nd petitioner. On 18th October 2017 the 2nd petitioner filed an application to withdraw from the Petition. In a ruling of 9th November 2017 the learned Judge allowed the 2nd Petitioner to withdraw from the petition. The effect of the withdrawal is that the 2nd petitioner's affidavit in support of the petition had no legs to stand on. It also follows that the annextures to the 2nd petitioner's supporting affidavit that had fallen by the way side had no legs to stand on. It was unfortunate that the affidavits of ***Danson Apaol Ngimor, Darwin Rionomutu*** **Pombo, Maira Kang'aror, Musa Makal Tulu** and ***Mamukong Simau*** were attached to the 2nd petitioners affidavit as annextures. The 2nd petitioner having withdrawn his affidavit, the annextures thereto could not remain as part of the record. We do not find any error on the Judge's conclusion that these annextures had to be expunged from the record. The appellant's complaint therein is unmerited and is hereby dismissed.

Then there was the issue as to whether this Court can revisit an issue that occurred before the election. The appellant contended that the 2nd respondent who initially was a Jubilee candidate having been locked out of the party and elected to run as an independent did not comply with **Section 33** of the Elections Act. It was further contended that the 2nd respondent had admitted as much as in High Court Election Appeal No. 10 of 2017 wherein he filed an application seeking enlargement of time to enable him comply with **Section 33** of the Elections Act. **Section 33** of the Elections Act states as follows:

> "**A person qualifies to be nominated as an independent candidate for presidential, parliamentary and county elections for the purposes of Articles 97, 98, 137, 177 and 180 of the Constitution if that person:**
>
> "**a. has not been a member of any political party for at least three months preceding the date of election;**

b. has submitted to the Commission, at least 60 days before a general election, a duly filled nomination paper in such a form as may be prescribed by the Commission.

c. has at least ninety days before the date of a general election or at least twenty one days before the date appointed by the commission as the nomination day for a by election, submitted to the commission the name and symbol that the person intends to use during election.

d. is selected in the manner provided for in the Constitution and by this Act."

The 2nd respondent appeal in election petition No .10 of 2017 was dismissed.

However, inspite of the dismissal, it was held that the 2nd respondent **" … had been cleared by the Registrar of Political Parties to contest the Governor's position in Laikipia County as an independent candidate"**. The appellant did not challenge the clearance of the 2nd respondent by the Registrar of Political Parties to run as an independent candidate. He cannot do so in this appeal.

This Court in **The Speaker of the National Assembly vs Karume (2008)1 KLR** held that "***where there is a clear procedure for the redress of any particular* grievance prescribed by the Constitution or any Act of Parliament the procedure should be followed.**"

Similarly in **Jared Odoyo Okelo vs. Idependent Electoral and Boundaries Commission and 3 Others** (supra) this court stated:-

"…we therefore concur with the learned judge that as an election court, he had no jurisdiction to entertain the appellant's nomination dispute. If the appellant was dissatisfied by the IEBC Dispute Resolution committee's decision dismissing his dispute, he should have filed a judicial review application before the High Court to determine the dispute under its supervisory jurisdiction."

In this courts recent decision of **Hon. Silverse Lisamula Anami vs. IEBC & 2 Others** ***(Kisumu) Election Petition Appeal No. 7 of 2018 (UR)*** this court stated:-

"**It is our considered view that the election court was divested of considering matters that had been dealt with by the PPDT and/or the DRC of the 1st respondent. One may as well imagine that if this was not the case, then litigation would be open ended and time lines to file an appeal and/or judicial review would be of no consequence as matters determined by the PPDT and/or DRC would later be urged in an election court inspite of their determination in the PPDT and/or the DRC. Such a fluid situation will not augur well in the administration of justice**".

In our view, the appellant should have pursued the available dispute resolution mechanisms as stipulated by the Constitution and statutes. If he was still aggrieved with the outcome of the appeal (No. 10 of 2017), then he should have explored other legal channels such Judicial Review or appeals. We hold the view that the unresolved issues arising before an election is not within the preserve of an election court. In our view, the Judge was correct in refusing to reopen issues arising before the election as that had been dealt with by other dispute resolution mechanisms.

In respect of the legal burden of proof, the Supreme Court in **Raila Odinga & 5 Others vs Independent Electoral and Boundaries Commission & 3 Others *[2013] eKLR*** (***Raila 2013***), rendered itself as follows:-

"…a petitioner should be under obligation to discharge the initial burden of proof before the respondents are invited to bear the evidential burden. The threshold of proof should in principle, be above the balance of probabilities, though not as high as beyond-reasonable-doubt. Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections. It is on that basis that the respondents bear the burden of proving the contrary."

As regards the standard of proof, this Court held in **Musikari Nasi Kombo vs. Moses Masika Wetangula & 2 Others** ***[2013] eKLR*** that**:**

"The standard of proof refers to the level or degree of *proof demanded by law in a specific case in order for the party to succeed. It is now settled that in election petitions, the standard of proof in allegations other than those of commission of electoral criminal offences is higher than that of balance of probabilities required in civil case although it does not assume the standard of beyond-reasonable-doubt. However, where the petitioner alleges commission of criminal offences, the standard of proof on the criminal charges is beyond-reasonable-doubt. Judicial authorities on this subject are legion and I need not multiply them.*"**

Did the Appellant discharge the legal burden of proof to the required standard?

In the trial court's analysis and determination of the petition, it stated:-

"Although far-fetching and very serious allegations of irregularities and illegalities were alleged in the petition, those allegations remained just that, allegations. Waity did not support those allegations, that there was failure to carry out election according to the Constitution and the law; allegation of inflation of votes; or allegation that agents of jubilee party were intimidated or that they were denied re-count.

Indeed, no agent testified of the alleged irregularities. Even though Waity relied on annexed affidavit of Me Jooli Frankline Lenana, that evidence cannot be considered by this court because Jooli was not called to testify before the court and therefore his evidence was not tested by cross-examination by the respondents. In my view, it would be highly prejudicial, to the respondents, for Waity to rely on that affidavit evidence when the respondents were not afforded an opportunity to test it.

It follows that Waity failed to meet the higher burden of proof discussed earlier in this judgment, and therefore failed to prove the allegations on irregularities."

We are in agreement with the summation of the learned Judge's findings that the appellant failed to prove the allegation of irregularities and/or illegalities.

On interlocutory applications, it is on record that the hearing of the petition before the trial court was preceded by several applications seeking several orders on various occasions. We have summarized them sequentially as follows:-

First, came (the then) 2nd Petitioner's application dated 18th September, 2017 whose main thrust was for his withdrawal as a petitioner, and for the expunging of his Supporting Affidavit to the petition. The same was opposed. However, in a ruling rendered 9th November 2017, the court allowed the application.

Second, was the appellant's Notice of Motion dated 2nd October 2017 whose primary prayers were inter alia:- the preservation of all election materials used during the 8th August, 2017 poll, provision of electronic data touching on the gubernatorial poll stored in the ***KIEMS*** kit and the provision of the final tally with respect to all other elective posts within Laikipia County. The same was opposed. On 20th November 2017 the court made a finding that the prayers sought were couched in wide terms, which would not facilitate the just and expeditious determination of the petition. Other than the said finding, the trial court ordered that the appellant be allowed to place seals (at his cost) on all ballot boxes which had been used for the gubernatorial contest.

Third, was the appellant's Notice of Motion dated 12th October 2017 which sought leave from the trial court to allow the applicant to file affidavits of further witnesses, albeit out of time, and that the affidavits filed therewith be deemed as duly filed. The same was opposed too. The trial court dismissed the application on 20th November 2017.

Fourth, was the 2nd Respondent's Chamber Summons application dated 19th October**,** 2017 whose letter and spirit was the striking out of paragraphs **6, 7, 8, 9 10, 13, 30, 31, 34, 35, 41 and 42** of the appellant's supporting affidavit sworn on 8th September, 2017. The same did not go unchallenged by the respondents, and was subsequently dismissed by the trial court on 20th November 2017. In the course of dismissing the said application, the trial court revisited its ruling of 9th November 2017 (allowing the 2nd petitioner to withdraw from the petition) and found that the affidavits annexed to the supporting affidavit of the then 2nd petitioner were still on record.

Fifth, was a Notice of Motion lodged by the then 2nd Petitioner dated 21st November 2017 wherein the trial court was moved to review its Ruling of 20th November 2017. The same was allowed vide a Ruling delivered on 22nd November, 2017 whose effect was that the affidavit attached to the 2nd petitioner's affidavit were expunged.

The curtains were drawn, so to speak by the appellant's Notice of Motion dated 27th November 2017 which was anchored primarily on a prayer for scrutiny. All the respondents opposed the motion. The trial court dismissed the application with costs on 13th December 2017.

The appellant did not at each single time express intention to appeal upon conclusion of any of the applications by filing a notice of appeal. In ***Hon. Dickson Daniel Karaba*** vs. **Hon. Kibiru Charles Reubenson Election Petition Appeal No.** 3 & 4 of 2018(consolidated) [2018] eKLR, it was stated thus:-

"It is true as submitted by learned counsel for the appellant, that a petitioner in a petition reserves the right to take up, on appeal, issues regarding rulings made in the election petition as appeals are not allowed against a rulings in interlocutory matters."

In **Cornel Rasanga & Another vs. William Odhiambo Oduol** ***[2013] eKLR*** this court stated that:

"What is of significance is the fact that a party who is aggrieved by a decision of the High Court in an interlocutory application has a clear remedy when a final d*ecision on the election petition has been pronounced".*

We agree.

Finally, we shall consider the issue of costs. The appellant contended that the costs awarded of Ksh.125,000/- each in respect of the 2nd petitioner's application to withdraw from the petition and which was unopposed was excessive. However, no intention to file an appeal was expressed by way of filing a Notice of Appeal after the determination of the ruling that gave rise to the costs complained of. This issue cannot be urged now.

As regards costs of Kshs. 12,000,000 awarded upon determination of the petition, the appellant's counsel urged us to find that the costs awarded were punitive, that costs awarded are meant to compensate one for expenses incurred and that the trial court ought to have considered that there is public interest in an election petition. We agree with the appellant's counsel submission. It is true that costs are meant

to compensate a litigant for costs incurred. It should never be construed as a commercial enterprise, otherwise it will shut out those who are aggrieved in the manner elections are conducted. On the other hand, if a litigant was to get away without costs, this may encourage vexatious litigants to bombard courts with matters not deserving the court's consideration.

In **Dickson Daniel Karaba vs. Hon. Kibiru Charles Reubenson** *(*supra) this court stated:-

> **"Section 84 of the Elections Act requires the election court to award costs to the winner of an election petition which accords with the general principle that costs follow the event which is the same as saying that the party who succeeds in court will normally get the costs of the litigation. This Court in the case of Philip Kyalo Kituti Kaloki vs. Independent Electoral and Boundaries Commission and 2 Others [2018] eKLR citing its decision in *Martha Wangari Karua (supra)* stated on the issue of costs:**
>
> **"It is up to the election court to determine whether a party would be awarded costs or not and in doing so the court must be guided by the principles of fairness, justice and access to justice"**

It is our considered view that the capping of costs at Ksh.12,000,000/- was excessive and unreasonable and does not accord with the dictate of fairness, justice and/or promotion of access to justice. We think that reducing the capped costs will be fair and just. Accordingly, we vary the capping of costs from what was awarded to Ksh.1,500,000/- each, subject to taxation.

The upshot of the above is that we dismiss the appeal, save for the variation of costs as stated above.

The appellant shall bear the costs of this appeal. It is so ordered.

Dated and delivered at Nairobi this 31st day of July, 2018.

ASIKE - MAKHANDIA

…….……..……

JUDGE OF APPEAL

F. SICHALE

…….…….

JUDGE OF APPEAL

S. ole KANTAI

……..

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR