IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MAKHANDIA, GATEMBU & M'INOTI, JJ.A)

ELECTION PETITION APPEAL NO. 26 OF 2018

BETWEEN

WALTER ENOCK NYAMBATI OSEBE.....APPELLANT

AND

THE INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION.....1ST RESPONDENT

DAVID KIPRONO TOWETT.....2ND RESPONDENT

JOHN OBIERO NYAGARAMA.....3RD RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Nyamira (Makau, J) dated 28th February, 2018

in

ELECTION PETITION NO. 1 OF 2017

****

JUDGMENT OF THE COURT

Introduction

1. In a judgment delivered on 28th February 2018, the High Court at Nyamira (J.A. Makau, J) held that the 3rd respondent was validly declared by the 1st respondent hereinafter, Independent Electoral & Boundaries Commission (IEBC) as having been duly elected as the Governor of Nyamira County during the general elections held on 8th August 2017. The appellant, who had petitioned the High Court to nullify that election, has appealed to this Court to reverse the said decision of the High Court and to order IEBC to conduct a fresh election for the office of Governor of Nyamira County, in conformity with the Constitution and election laws and regulations.

2. The 3rd respondent has in turn applied, by an application dated 28th March 2018, to have this appeal struck out on the grounds that the notice of appeal as well as the memorandum and record of appeal are incompetent because the appellant did not file a notice of appeal in accordance with Rule 6 of the Court of Appeal (Election Petition) Rules, 2017.

Background

3. In the general election held on 8th August 2017, nine candidates contested for the position of Governor, Nyamira County. Amongst the contestants were the appellant, Walter Enock Nyambati Osebe and the 3rd respondent, John Obiero Nyagarama. Following that election, the 2nd respondent (the county returning officer) declared the 3rd respondent as duly elected with 63,949 votes. Second was the appellant with 57,432 votes. The other contestants were: Kumenda Aboko (5,413 votes); Nyakiba Erneo Mageto Moruri (8,848 votes); Okioma Samson Mwancha Nyang'au (29,033 votes); Okongo Kennedy Mongare (9,938 votes); Ondicho James Gesami (23,515 votes); Ongaga Evans Nyatigo (923 votes); and Onyancha David (4,387 votes). Subsequently, IEBC gazetted the 3rd respondent as the duly elected governor of Nyamira County.

4. The appellant was dissatisfied with the manner in which IEBC conducted the election. He moved the High Court by a petition dated 4th September 2017 seeking nullification of the election. He asserted in his petition that the election was marred by massive irregularities and breaches of the Constitution and the election laws; and that IEBC and the 2nd respondent acted in breach of their statutory and legal duties and declared results that were not verifiable in favour of the 3rd respondent.

5. In his petition, the appellant complained that IEBC recruited and deployed eight presiding officers who were working for the County Government of Nyamira and who were subordinates of the 3rd respondent and owed allegiance to him; that in 47 out of the total 553 polling centers, "unregistered voters" were allowed to vote with the result that a total of 13,488 votes were added to the overall tally of valid votes; that in 13 out of the 553 polling centres in the County, IEBC understated and declared lower tallies with the result that 803 valid votes were not accounted for; that in 15 out of the 553 polling centres in the County, IEBC overstated and declared higher tallies with the result that 366 votes "not accounted for" were added; that there were discrepancies and unexplained variances and alterations in Forms 37A's, 37B's and 37C as well as unsigned and unauthenticated forms in 20 polling centres; that in 13 polling centres there was inexplicable duplication of results; and that the 3rd respondent was, by himself and through agents, engaged in bribery of voters.

6. Consequently, the appellant asserted, the election held on 8th August 2017 for the office of Governor, Nyamira County was not free and fair; was conducted in a manner inconsistent with the law; and the results declared were not verifiable.

7. In their reply to the petition, IEBC and the 2nd respondent denied the claims by the appellant and asserted that the election was free and fair; that the positions for presiding officers and deputy presiding officers were advertised and filled competitively and the persons complained of by the appellant were previously unknown to IEBC; that no complaint was received from any political party or candidate despite the list of successful candidates for the position of presiding officers and their deputies having been published; that the employees of the County Government of Nyamira are in any event employees of the County Service Board and not employees of the 3rd respondent; that no misconduct on the part of any of those officers was demonstrated or that their hiring violated any law or regulations.

8. IEBC and the 2nd respondent denied that: persons, other than registered voters, were allowed to vote; that votes were either understated or overstated; or that there was duplication of results. They averred that the conduct of the election was transparent; that results were accurately tabulated, verified and declared; that all forms were openly and accurately transposed in the presence of agents; that they discharged their functions in accordance with the law; that a formulaic malfunction that affected the tally of valid votes cast being erroneously summed up did not affect the result of the election; that there were few insignificant errors of transposition that did not affect the results; that there were no violations of the Constitution or the law to justify nullification of the election.

9. On his part, the 3rd respondent averred that the appellant's complaints are baseless; that the petition was an abuse of the process of the court; that the results that were declared represented the will of the people of the County of Nyamira expressed in free and fair elections; and that the elections were transparent, accurate and accountable. He denied that he committed any electoral offence or malpractices and denied that any of his agents had been arrested for bribery. He deposed that there was nothing before the court that would justify nullifying the results.

10. After conducting a hearing and considering the submissions made on behalf of the parties and the law, the learned Judge delivered the impugned judgment in which he found that there was no evidence to support the allegations made by the appellant and no basis for nullifying the election of the 3rd respondent as Governor. He accordingly dismissed the petition; awarded costs to the respondents capping the instruction fee payable to the 1st and 2nd respondents at Kshs. 3.5 million. The instruction fee payable to the 3rd respondent was also capped at the same amount. Aggrieved, the appellant lodged this appeal on 26th March 2018.

11. On 28th March 2018 the 3rd respondent moved this Court by a notice of motion supported by affidavit seeking orders to strike out the notice of appeal as well as the record of appeal. That application was based on the ground that the notice of appeal was not lodged in accordance with Rule 6 of the Court of Appeal (Election Petition) Rules, 2017 in that the notice of appeal was lodged in the High Court at Nyamira as opposed to the registry of this Court.

12. In opposition to the application, the appellant filed a replying affidavit sworn on 5th April, 2018, in which he deposed that the notice of appeal was duly served on the respondents; that despite the notice of appeal having been filed in the High Court, it was duly transmitted to the registry of this Court; that the notice of appeal was duly served and the respondents have not demonstrated what prejudice they have suffered; and that considering the appeal raises weighty and important matters, it should be determined on its merits.

13. With the concurrence of counsel, we directed that the application be heard together with the appeal.

The appeal and submissions by counsel

14. In his memorandum of appeal, the appellant complains that: the Judge failed to appreciate the huge variance between the number of votes and voter turnout in more than 24 polling stations ascertained during scrutiny and recount; the Judge failed to appreciate that the integrity of the final tally was in issue; the Judge failed in not holding that the final tally announced by the 2nd respondent was not verified and did not reflect the will of the people; the Judge erred in failing to consider and give effect to the Deputy Registrar's report on scrutiny and recount; the Judge erred in failing to appreciate the full effect of the various illegalities and irregularities.

15. During the hearing of the appeal, which, as already stated was heard together with the 3rd respondent's motion, all the parties were represented by learned counsel. Mr. F. Ngatia and Mr. O. Mogikoyo appeared for the appellant. Mr. G. Nyamweya and Mr. J. Mamboleo appeared for the 1st and 2nd respondents while Mr. J. Nyachiro, Mr. K. Ndege and Mr. A Rioba appeared for the 3rd respondent. Counsel relied on their respective written submissions that they highlighted.

16. In relation to the 3rd respondent's motion dated 28th March 2018, seeking to strike out the appeal, counsel for the appellant, Mr. Ngatia, submitted that following delivery of the judgment by the election court on 28th February 2018, the appellant filed a notice of appeal in the High Court at Nyamira on 5th March 2018 and served the same on the respondents; that under Rule 19(1) of the Court of Appeal (Election Petition) Rules, 2017 (the Election Rules) a party served with a notice of appeal has seven days, from the date of service of the notice of appeal, within which to make an application for striking out of the notice; that under Rule 19(2) of the Election Rules, a party who fails to comply with Rule 19(1) of the Election Rules cannot raise the matter later; that the 3rd respondent's application was filed on 29th March 2018 well outside the time permitted under Rule 19(1) of the Election Rules and is incompetent and should not be entertained. In that regard counsel referred us to a ruling of this Court in ***William Mwangi Nguruki vs Barclays Bank of Kenya Ltd [2014] eKLR.***

17. Counsel submitted that filing of the notice of appeal in the High Court registry as opposed to the registry of this Court did not occasion any prejudice to the respondents; that based on Article 159(2)(d) of the Constitution and Rule 5 of the Election Rules the Court is enjoined to administer justice without undue regard to procedural technicalities. In that regard reference was made to decisions of this Court in ***Abdirahaman Abdi aka Abdirahman Muhumed Abdi vs Safi Petroleum Products Ltd & 6 others, Civil Application No. 173 of 2010*** and ***Joseph Kiangoi vs Wachira Waruru & 2 others, Civil Application No. 130 of 2008***.

18. Turning to the appeal, counsel submitted that the appellant established before the election court, to the required standard, that there were massive irregularities in the conduct of the election; that the scrutiny undertaken in accordance with the order of the election court confirmed the irregularities in the form of unexplained votes, ballot stuffing, variance between ballot counterfoils and recorded voter turnout, counting and tallying errors, votes cast exceeded voter turnout, missing counterfoils; that the irregularities were widespread with the result that the election was not conducted in accordance with the constitutional principles under Articles 81 and 86 of the Constitution.

19. Counsel submitted that in determining the petition, the learned trial judge misdirected himself in failing to appreciate the correct test; that had the judge applied the qualitative test, he would have allowed the appellant's petition. Citing the Supreme Court decision in ***Raila Amolo Odinga & another vs IEBC & 2 others [2017] eKLR*** (***Raila 1, 2017***) counsel submitted that the irregularities established by the appellant "*go to the very heart of electoral integrity*" and that the margin of votes between the appellant and the 3rd respondent is irrelevant as the numbers are the product of many unanswered questions. Counsel submitted that the appellant established that there were many unanswered questions and unexplained numbers that IEBC did not answer or explain; and that IEBC failed to discharge its evidentiary burden in that regard.

20. Mr. Nyamweya for the 1st and 2nd respondents began his address by supporting the application by the 3rd respondent to strike out the appeal; he urged that under Rule 6 of the Election Rules, the appellant was required to lodge the notice of appeal in the registry of this Court and not in the High Court; and that as the appellant did not do so, his appeal is incompetent. In his view, Rule 19(1) of the Election Rules does not apply.

21. On the appeal, Mr. Nyamweya submitted that the appellant has introduced new matters in the appeal that were not before the election court. He submitted that parties are bound by their pleadings beyond which the scope of the dispute cannot be expanded. To support that argument, he referred us to several decisions including that of this Court in ***IEBC and another vs. Stephen Mutinda Mule & 3 others [2014] eKLR***. He urged that the respondents cannot be expected to deal with matters raised on appeal that were not grounded in the petition and the court should reject the attempt to introduce new matters. It was submitted that the appellant is seeking to introduce, on appeal, complaints in relation to 36 polling stations in respect of which IEBC had no opportunity to address before the election court.

22. Counsel submitted that on 4th December 2017, the election court granted orders for scrutiny and recount based on the pleadings; that in his judgment, the Judge took into account the registrar's report on that exercise and found that the allegations of irregularities made by the appellant in his petition were not established; that it was not shown that the votes cast exceeded the number of voters; that there was neither an understatement or overstatement of votes in any of the polling station nor was there a duplication of results as the appellant claimed.

23. It was submitted that the object of scrutiny is to assist the court verify a petitioner's allegation; that, as held by the Supreme Court in ***Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 others [2014] eKLR***, scrutiny is not undertaken for purposes of seeking to uncover new grounds of attack, it is not a fishing expedition.

24. Counsel went on to say that administrative errors are inevitable and cannot be the basis for nullifying the election and that the key question is whether the errors are of such a magnitude as to affect the result. In that regard, reference was made to the Supreme Court decision in ***Nathif Jama Adam vs. Abdikhaim Osman Mohamed & 3 others [2014] eKLR***, among others. Pointing out that the 3rd respondent had a clear margin of over 6,500 votes, counsel urged us not to disturb the will of the people of Nyamira County by upholding the election.

25. For the 3rd respondent, Mr. Nyachiro began by submitting that the appeal is incompetent; that the notice of appeal was not filed in the registry of the Court; that the notice of appeal filed by the appellant in the High court cannot be a notice of appeal under the rules of this Court, notwithstanding the claim that the registrar of the High Court, Nyamira did, upon receiving the notice, forward the same to this Court; that in effect, an "essential step", within the meaning of Rule 19 of the Election Rules that goes to the competence of the appeal was omitted; that without a notice of appeal, there cannot be an expressed intention to appeal and there cannot be a competent appeal. Reference was made to the decision of this Court in ***John Munuve Mati vs IEBC & others, Nairobi Election Petition Appeal No. 5 of 2018***.

26. Turning to the appeal, counsel for the 3rd respondent referred us to the appellant's petition before the election court, and in particular to the grounds upon which the petition was based and submitted that different complaints have been framed in this appeal that are a departure from the complaints before the election court. It was submitted that parties are bound by their pleadings and it is not open to the appellant to urge a different case from that which he pursued before the election court. Counsel went on to say that it was incumbent upon the appellant to prove the allegations he made before the trial court to the required standard but failed to do so. The burden of proof was not discharged, counsel urged. ***Raila 1, 2017*** was cited.

27. Referring to ***Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 others*** (above) and to ***Raila 1, 2017*** counsel submitted that the election was conducted substantially in accordance with the principles of the Constitution and electoral laws although there were transpositional errors that did not affect the validity of the election.

28. According to counsel, the appellant is using the report on recount and scrutiny to raise new grounds that were not pleaded. It was urged that the object of scrutiny and recount is not to unearth new evidence to sustain a petition; that the recount and scrutiny was premised on the complaints in the petition and it is not open to the appellant to bring up a new case. In that regard, counsel urged that the complaints that there was a higher voter turnout than registered voters; or that the turnout was lower than the votes cast; or that there was ballot stuffing cannot be raised at this stage.

29. Counsel concluded by submitting that the complaints raised are not matters of law for this Court under Section 85A of the Elections Act; that the election court properly interrogated and determined the issues that were raised in the petition and that the appeal should be dismissed with costs.

30. In his reply, counsel for the appellant maintained that all the issues raised by the appellant are founded on the petition; that it was incumbent upon the election court to act upon the scrutiny report; that the scrutiny exercise confirmed the appellant's case; that the anomalies that were identified were not explained and are a clear indication that ballot stuffing was prevalent; and that the results declared are not accurate and cannot be verified.

Analysis and determination

31. We have considered the 3rd respondent's application for striking out the appeal as well as the appellant's replying affidavit in answer thereto as well as the submissions by counsel in relation to that application. We have also considered the appeal and the submissions by counsel in relation to the same. The first issue that we must address stems from the 3rd respondent' application to strike out the appeal. It is whether the appeal is competent in light of the notice of appeal having been filed in the High Court as opposed to this Court. If we find the appeal is properly before us, we will then consider the appeal.

32. We begin with the 3rd respondent' application to strike out the appeal. It is not in dispute that the appellant's notice of appeal in this matter was filed in the High Court registry at Nyamira. As already stated, the 3rd respondent's contention, which is supported by the 2nd and 3rd respondents, is that under the Election Rules, the notice of appeal should have been filed in a registry of this Court; that since no notice of appeal was lodged in this Court, the appeal is incompetent and should be struck out.

33. Under Rule 6(1) of the Election Rules, a person desiring to appeal to this Court is required to file a notice of appeal in the "*registry*". Under Rule 2 of the Election Rules, the "*registry*" envisaged is the registry of this Court. That is in contrast to the requirement under Rule 75 of The Court of Appeal Rules, 2010, which requires a person desiring to appeal to this Court to give notice in writing "*which shall be lodged…with the registrar of the superior court*" from which an appeal lies. (See Rule 2 of the Court of Appeal Rules, 2010).

34. To the extent that the appellant's notice of appeal herein was filed in the High Court at Nyamira, there is no doubt, therefore, that that notice of appeal was not lodged in accordance with Rule 6(1) of the Election Rules. As this Court recently stated in ***John Munuve Mati vs. Returning Officer Mwingi North Constituency and 2 others [2018] eKLR***, in election appeals to this Court, it is only when there is no applicable provision in the Election Rules that The Court of Appeal Rules, 2010 apply provided there is no inconsistency. Consequently, the appellant was enjoined, under Rule 6(1) of the Election Rules, to lodge a notice of appeal in the registry of this Court. It did not do so. In the result, the appellant failed to comply with Rule 6(1) of the Election Rules. The matter does not end there.

35. Under Rule 5 of the Election Rules, however, this Court is empowered to determine the effect of any failure to comply with the Election Rules. The exercise of that power is subject to the provisions of Article 159(2)(d) of the Constitution that demands that justice shall be administered without undue regard to procedural technicalities and the need to observe timelines set by the Constitution and any other electoral law. In ***John Munuve Mati vs. Returning Officer Mwingi North Constituency and 2 others*** (above) the Court stated:

> ***"Nevertheless, the 2017 rules themselves now expressly confer on us discretion to determine the effect of any failure to comply with the rules, taking into account the fact that justice must be administered without undue regard to procedural technicalities, balanced against the need to observe prescribed timeliness."***

36. We are aware that this Court, differently constituted, has in ***Lesirma Simeon Saimanga vs. IEBC and 2 others, EPA (Application) No. 7 of 2018 (Nakuru***) and in ***Musa Cherutich Sirma vs. IEBC and 2 others, EPA (Application) No. 9 of 2018 (Nakuru)*** taken the view that the failure to comply with Rule 6(1) of the Election Rules is fatal. The circumstances in those cases are however distinguishable from those obtaining in the present case.

37. In the present case the notice of appeal was duly served on the respondents although it was filed in the wrong registry. The Court was informed that the Registrar of the High Court, Nyamira, transmitted the notice of appeal to the registry of this Court immediately it was filed there. The 3rd respondent has not alluded to, nor demonstrated, what prejudice he has suffered, on account of the failure by the appellant to file the notice of appeal in the correct registry in compliance with Rule 6(1) of the Election Rules. Recently, in ***Martha Wangari Kamau vs. IEBC & 3 others [2018] eKLR*** this Court stated that it "***behooves courts to undertake and place substantive considerations above those of procedure especially where the procedural infractions are curable***." Furthermore, and as pointed out by the appellant, the 3rd respondent did not file his application "*within seven days from the date of service of the notice of appeal*" stipulated under Rule 6(1) of the Election Rules.

38. All in all, we are satisfied that the circumstances of this case are such as to warrant the exercise of our discretion in favour of the appellant by declining to strike out the appeal in order to do substantive justice. We are fortified in the view we have taken by the

pronouncement of the Supreme Court in ***Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 others [2014] eKLR*** where that Court in refusing to strike out a notice of appeal on grounds that the same had not been served in accordance with the rules stated:

> ***"[43] Informed by the role that the notice of appeal plays, it is our considered opinion that such a document ought to be filed first before the appeal. However, while the rules require that it be served, to allow the respondent(s) to file an address of service, and the address of service then to be contained in the record of appeal, the lack of that address of service does not warrant striking out of the appeal. We add that the nature of the instant matter, which is urgent and constitutionally time - bound, is one of those exceptional cases where this Court will apply Article 159 of the Constitution, in order to render substantive justice. It is also our view that Article 163(4) (a) of the Constitution gives the appellant a 'right' to come to Court when seeking a constitutional interpretation and/or application. Such a right should not be abruptly excluded blatantly for non-compliance with a procedural rule, especially where no apparent prejudice to the other party can be deduced" (***Emphasis added***).***

39. Being of the same persuasion, and particularly in the absence of any demonstrable prejudice suffered by the respondents on account of the notice of appeal having been filed in the High Court registry, and bearing in mind that the notice of appeal was in turn transmitted to the registry of this Court and duly served on the respondents, the order that we think is just to make is to dismiss, which we hereby do, the 3rd respondent's application dated 28th March 2018 and filed in Court on 29th March 2018. We make no order as to costs regarding that application.

40. We turn to the appeal. Although counsel for the appellant and for the 1st and 2nd respondent filed a joint statement of issues while the 3rd respondent filed a separate list of issues, the principal issue for determination, based on the memorandum of appeal, is whether the election court erred in refusing to nullify the election on the account of alleged irregularities "*ascertained during scrutiny and recount*" and for "*failing to consider and give effect to the Deputy Registrar's report on scrutiny and recount*."

41. Citing the decision of the High Court in ***Justus Mongumbu Omiti vs. Walter Enock Nyambati Osebe & 2 others, Kisii Election Petition No. 1 of 2008 [2011] eKLR***, counsel for the appellant submitted that it was incumbent upon the election court to address ***"****all the issues raised in the petition and those which crop up during the hearing, whether pleaded or not, and which had the potential to affect adversely the final result*…***"***

42. In that regard, the appellant asserts in this appeal that the scrutiny exercise brought to the fore: that in a number of polling stations, the presiding officers failed, upon completion of counting, to place counterfoils of used ballot papers in the ballot boxes; that in two polling stations, no counterfoils were found in the ballot boxes; that in one polling station, only 37 counterfoils of ballot papers were found when 393 voters had allegedly cast ballots; that in several polling stations, the ballot papers were not sealed in a tamper proof envelope and that Regulation 81 of the Elections (General) Regulations, 2012 and Section 6 of Election Offences Act were violated; that there was widespread '*ballot stuffing'*; that in the sample of 36 out of 46 polling stations, it was shown that the number of votes cast exceeded the voter turnout as confirmed by KIEMS; and that the appellant's votes in a number of polling stations were not reflected in Forms 37B and 37C and that in four polling stations, the scrutiny revealed that 616 of the appellant's votes were not recorded in Forms 37B and 37C.

43. According to the appellant the scrutiny exercise revealed massive irregularities that not only proved variance between votes cast and actual voter turnout, but also made it impossible to verify the final tally. The appellant submitted that in those circumstances, the election was not conducted in accordance with Articles 81 and 86 of the Constitution and should have been nullified by the election court. The appellant relied on several High Court decisions for the proposition that without counterfoils, ballots are unverifiable and therefore it becomes impossible to ascertain the will of the people. The appellant urged this Court to nullify the election and call for a fresh election and also bar the 3rd respondent from participating therein for having committed the offence of ballot stuffing under Section of 5 of the Election Offences Act.

44. Having considered the appeal, it is difficult to reconcile the appellant's complaints before this Court with the complaints on the basis of which he petitioned the election court to nullify the election. As we have already stated, in his petition before the election court, the appellant sought nullification of the election on the basis that IEBC recruited and deployed eight presiding officers who were working for the County Government of Nyamira and who were subordinates of the 3rd respondent and owed allegiance to him; that "*unregistered voters*" were allowed to vote in 47 out of the total 553 polling centres which resulted in 13,488 votes being added to the overall tally of valid votes; that IEBC understated and declared lower tallies in 13 out of the 553 polling centres resulting in 803 valid votes not being accounted for; that IEBC overstated and declared higher tallies in 15 out of the 553 polling centres resulting in 366 votes "*not accounted for*"; that there were discrepancies and unexplained variances and alterations in Forms 37A's, 37B's and 37C as well as unsigned and unauthenticated forms in 20 polling centres; that in 13 polling centres there were inexplicable duplication of results; and that the 3rd respondent, either directly or indirectly bribed voters. It was on the basis of those particular complaints that the appellant contended that there were massive irregularities and breaches of the Constitution and the election laws and that the declared results are not verifiable.

45. The election court, after a full hearing, made findings that: no polling station had a higher voter turnout then registered voters; there was no evidence to support the allegation that 803 votes were unaccounted for or that votes in 13 polling stations were unascertainable; there was no polling station with more declared voters than actual voter turnout; that the irregularities noted were not massive, systematic or deliberate but administrative errors resulting from human transposition errors which did not affect the election results; recount did not reveal any duplication of results as alleged; votes in Form 37A from Matongo Primary School polling station 2/2 were invalidated for breaching Regulation 79(1) Election (General) Regulations, 2012 as the form was not signed by either the Presiding or Deputy Presiding Officer; and finally that failure by the IEBC to stamp the forms did not invalidate the results as it was not a legal requirement.

46. With regard to the claim in the petition that there were 46 polling stations with higher voter turnout than the registered voters. The learned judge found, in his judgment, that:

> ***"73. The Petitioner on Table 1 where he had pleaded, that there were 46 polling stations with higher voter turnout than the registered voters in his evidence-in-chief, he confirmed all Forms 37As in respect of the aforesaid polling stations, indicated***

correct number of the registered voters and that the votes comprising of total number of voters obtained by individual candidates did not exceed the registered voters. PW8 was in his evidence unable to point out a solitary Polling station with more votes cast than the registered number of voters. He was unable to demonstrate the aggregate of votes cast for the individual candidates in each of the number polling stations compared with the number of registered voters revealed any higher voter turnout exceeding the registered number of voters. He failed to show that the Second Respondent added the figure of 13,488 votes to the overall tally of valid votes cast for candidates and the candidate who benefitted from them.

74. RW1 and RW4 gave evidence touching on Table 1. Their evidence which was not controverted at all showed that there was no polling station that revealed a higher voter turnout as compared to the number of the registered voters. Petitioner never adduced evidence supporting the allegation that unregistered voters were allowed to vote or that inexistent votes in 46 polling stations were tallied so as to result in illegal and inexplicable results. He failed to demonstrate or show that any single candidate benefitted from the alleged 13,488 votes allegedly added to the overall tally as valid votes cast for the candidates in the election to the office of Governor Nyamira County."

47. The learned judge, having considered the scrutiny report, did not find the discrepancies as alleged by the appellant in his petition.

48. In this appeal, the appellant has shifted his focus from the allegations in his petition to the discrepancies and irregularities which he says have been revealed by the Deputy Registrar's report on scrutiny and recount that were not pleaded in his petition. Therefore, the foundation on which the appellant's appeal is built is that the scrutiny and recount exercise that was undertaken pursuant to orders of the election court brought out or unearthed malpractices and irregularities, quite apart from those on which the appellant had based his petition, on the basis of which the election court should have annulled the election. That foundation is weak in that the appellant is in effect seeking nullification of the election on grounds that were not pleaded.

49. In ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR*** the Supreme Court adopted the views expressed by Odunga J in ***Gideon Mwangangi Wambua & Another v. IEBC & 2 Others, Mombasa Election Petition No. 4 of 2013*** that:

"The aim of conducting scrutiny and recount is not to enable the Court [to] unearth new evidence on the basis of which the petition could be sustained. Its aim is to assist the court to verify the allegations made by the parties to the petition which allegations themselves must be hinged on pleadings."

50. And in ***Raila 2017*** the Supreme Court adopted with approval passages from the Supreme Court of India's decision in ***Arikala Narasa Reddy v. Venkata Ram Reddy Reddygari & Anr, Civil Appeal Nos. 5710-5711 of 2012; [2014] 2 S.C.R]*** to the effect that it is neither desirable nor permissible for a court to frame issues not arising from the pleadings and 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."

51. The allegations in the petition on the basis of which the appellant sought and was granted orders of scrutiny and recount were: that 46 polling stations had higher voter turnout than registered voters; that in 13 polling stations there was less declared votes than actual turnout; that in 15 polling stations there were discrepancies between Forms 37A, 37B and 37C; and that there was duplication of results in 16 polling stations. Scrutiny and recount was ordered with a view to verifying whether those allegations were well founded or not. It was not ordered with a view to enabling the appellant fish out new grounds on the basis of which he could challenge the election.

52. It was incumbent upon the appellant, who was seeking to nullify the election on the specific ground set out in the petition, to prove those allegations to the required standard by tendering cogent evidence to the satisfaction of the court. As the Supreme Court of Kenya stated in **Raila 2017.**

"…a petitioner who seeks the nullification of an election on account of non- conformity with the law or on the basis of irregularities must adduce cogent and credible evidence to prove those grounds "to the satisfaction of the court" That is fixed at the onset of the trial and unless circumstances change, it remains unchanged."

53. With reference to the specific complaints that were pleaded, the trial Judge, as we have already stated, made findings based on the evidence tendered. In our view, the conclusions reached by the Judge are based on his appraisal of the evidence presented before the election Court.

54. We do not have any basis for interfering with those findings as they were demonstrably supported by evidence. We can only interfere with the Judge's findings if the same were arrived at without evidence. As Justice Kurian of the Supreme Court of India stated in ***Damodar Lal vs. Sohan Devi and others, Civil Appeal No. 231 of 2015***,

"30. The findings of fact recorded by a court can be held to be perverse if the findings have been arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant/inadmissible material. The finding may also be said to be perverse if it is against the weight of evidence, or if the finding so outrageously defies logic as to suffer from the vice of irrationality. If a decision is arrived at on the basis of no evidence or thoroughly unreliable evidence and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, the conclusions would not be treated as perverse and the findings would not be interfered with." *[Emphasis].*

55. In conclusion therefore, there is no merit in the complaint that the election court failed to consider and give effect to the scrutiny and recount report or that the court failed to appreciate that the election was not verifiable. In our view, the appellant did not discharge his burden

of proof to establish that the election for the position of governor, Nyamira County, was not conducted in accordance with constitutional principles and that the election court erred in upholding the declaration by IEBC that the 3rd respondent was validly elected governor, Nyamira County.

56. Consequently, we do not have any basis on which we can interfere with the decision of the election court. Accordingly, the appeal fails and is hereby dismissed with costs to the respondents. The costs of the 1st and 2nd respondent is capped at Kshs. 1,500,000.00 and the costs of the 3rd respondent is also capped at Kshs. 1,500,000.00.

Orders accordingly.

Dated and delivered at Kisumu this 26th day of July, 2018.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR