



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: NAMBUYE, M'INOTI & OTIENO-ODEK JJ. A)**

**ELECTION PETITION APPEAL NO. 19 of 2018**

**IDRIS ABDI ABDULLAHI.....APPELLANT**

**AND**

**AHMED BASHANE.....1<sup>ST</sup> RESPONDENT**

**INDEPENDENT ELECTORAL**

**& BOUNDARIES COMMISSION.....2<sup>ND</sup> RESPONDENT**

**SIYAT MAHAT SABUL.....3<sup>RD</sup> RESPONDENT**

*(Appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Muigai, J.) dated 2nd March 2018*

*in*

*Garissa HC. EP. No. 6 of 2017)*

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**JUDGMENT OF THE COURT**

*The appellant, Idris Abdi Abdullahi and the 1st respondent, Ahmed Bashane, were two of the four candidates who offered themselves for election as **Member of the National Assembly** for **Tarbaj Constituency** in **Wajir County** during the last general election held on 8th August 2017. The appellant contested on a **Jubilee Party** ticket, whilst the 1st respondent ran on the **Party for Democracy and Reforms (PDR)** ticket. On 10th August 2017, *the 3rd respondent, Siyat Mahat Sabul*, who was the Constituency Returning Officer, declared the 1st respondent to have been duly elected, having garnered the most votes. According to the declaration, the candidates fared as follows:*

<i>Candidate</i>	<i>Votes</i>
<b>1. Idris Abdi Abdullahi</b>	<b>6,812</b>
<b>2. Ahmed bashane Gaal</b>	<b>6,836</b>
<b>3. Fatuma Ibrahim Ali</b>	<b>1,397</b>
<b>4. Siraj Jelle Hillow</b>	<b>38</b>

As is readily apparent, the margin by which the 1st respondent beat the appellant was literally paper-thin, being a bare 24 votes. The appellant was aggrieved by the result and on 5th September 2017 filed **Election Petition No. 6** in the High Court of Kenya at Garissa. Ultimately however, the petition was heard and determined in Nairobi. In addition to the 1st and 3rd respondents, **the Independent Electoral & Boundaries Commission, (the IEBC)**, which by dint of **Article 88** of the **Constitution** is charged with the responsibility of conducting or supervising transparent, free and fair elections, was joined to the petition as the 2nd respondent.

The petition was founded on alleged illegalities and irregularities committed in three polling stations, as well as other complaints regarding the conduct of the entire election. Beginning with **Kajaja II Primary School Polling Station**, the appellant pleaded that the results declared

by the presiding officer were at variance with those contained in **Form 35A**; that during the counting of the votes his agent was denied access to the tallying centre; that the tallying and recording of votes was conducted in violation of **regulation 79** of the **Elections (General) Regulations, 2012**; and that due to errors and omissions, **Form 35B** was not accurate, verifiable or accountable.

At **Berjini Dam Polling Station**, the appellant averred that while the ballot boxes were on transit to the tallying centre, the presiding officer, at the instigation of the 1st respondent, made an illegal detour, unlawfully opened the sealed ballot boxes, and undertook a recount of the votes in his absence and that of his agent, thereby compromising the integrity and transparency of the election. Lastly as regards **Haragal Primary School Polling Station**, the appellant pleaded that his agent was chased away for the better part of the polling day and was therefore unable to verify the voting process or the accuracy of the declared results.

The other complaints in support of the petition were that in “numerous” polling stations the 1st respondent manipulated and interfered with the ballot box seals, thereby undermining the integrity of the election; that a “significant” number of Form 35As did not have the authentic stamp of the IEBC, were not executed by the presiding officers or signed by the appellant’s agents, and were thus invalid; that during the election campaign, the 1st respondent breached the electoral code of conduct and committed election offences by falsely misrepresenting that he was the Jubilee Party candidate, donning Jubilee Party colours attire, and using the image of the Jubilee Party presidential candidate, so as to confuse and sway voters, whilst in fact it was the appellant who was the Jubilee Party candidate; and that there were unexplained disparities between the data in Form 35A and that in the **KIEMS kits**.

On the basis of all those alleged violations, the appellant prayed for among others, scrutiny and recount of the votes in 5 named polling stations; a declaration that the election was not conducted in accordance with the Constitution and election law; a declaration that the 1st respondent was not validly elected the Member of National Assembly; nullification of the 1st respondent’s election; and a declaration that it was the appellant who was duly elected Member of the National Assembly for Tarbaj Constituency.

The 1st respondent delivered his response to the petition on 18th September 2017, maintaining that the election was conducted strictly in accordance with the Constitution, the Elections Act and the regulations made thereunder and that he was validly elected the Member of Parliament for the Constituency. Responding to the appellant’s specific complaints, he pleaded that the appellant was personally present at Kabaja II Polling Station when the results were declared and that he personally signed Form 35A; that the results declared were the same results in the Form 35A; that at the appellant’s request, a recount of all the results for each polling station was conducted at the Tarbaj IEBC offices; that the results in the statutory forms were correctly entered; that the ballot boxes from Berjini Dam Polling Station were escorted to the Tarbaj IEBC offices by the police from the **Rapid Deployment Unit** after the appellant and his supporters caused chaos, and later to Tabarj Primary

School for recount of the votes with the agreement of all the parties, who duly signed Form 35A; and that the appellant’s agent, **Ibrahim Hussein Kassim** was at Haragal Primary School Polling Station throughout the voting and counting process. Otherwise the 1st appellant denied all the other averments in the petition concerning interference with seals, irregularities in Form 35As, breach of the electoral code of conduct, and commission of election offences. He maintained that there was no deceit in the campaign because the PDR party was affiliated to Jubilee Party and that the final results were those in Form 35A and not in the data entered in the KIEMS kits.

For their part, the IEBC and the 3rd respondent filed their joint response on 20th September 2017 and like the 1st respondent, denied all the appellant’s averments in the petition. They pleaded that none of the complaints raised by the appellant were reflected in the polling day diaries and gave a detailed narration of the voting process, including counting, verification, tallying and announcement of results, and the roles and responsibilities of polling and returning officers. They averred that the election was conducted strictly in accordance with the Constitution, the Elections Act and the regulations made thereunder and that the 1st respondent was duly elected in free and fair elections in accordance with the will of the voters of Tarbaj Constituency.

**Muigai, J.** took the evidence of a total of 18 witnesses and ordered two scrutiny and recount exercises, one on 31st October 2017 before the commencement of the hearing of the petition, and the other on 15th February 2018, upon conclusion of the hearing. By the judgment the subject of this appeal, she found that the appellant had failed to prove the allegations in the petition and that the 1st respondent was validly elected. Accordingly, she dismissed the petition with costs, which she capped at **Kshs 2,500,000.00** for the 1st respondent and **Kshs 2,500,000.00** for both the IEBC and the 3rd respondent.

The appellant was aggrieved by the judgment and lodged the appeal now before us founded on the following grounds of appeal in which he contends that the learned judge erred by:

- i) disregarding the evidence of the 1st respondent’s chief agent which showed that the appellant garnered more votes than the 1st respondent;**
- ii) ignoring the findings of the two scrutiny exercises ordered by the court, which unearthed numerous irregularities in the conduct of the election;**
- iii) interpreting section 83 of the Elections Act conjunctively and holding that the proven irregularities did not affect the result of the election;**
- iv) failing to hold that the IEBC and the 3rd respondent had failed to comply with the court’s order on scrutiny;**
- v) failing to hold that the 1st respondent had employed deceptive campaigns in the election;**
- vi) failing to find that the non-use of the printed copy of the register by the IEBC and the 3rd respondent was in contravention of the principles of the Constitution and electoral law;**

vii) *misapprehending the law on burden of proof;*

viii) *striking out the appellant's supplementary affidavit which was filed with the leave of the court;*

ix) *reaching a perverse decision which no reasonable tribunal would have reached on the evidence that was adduced; and*

x) *awarding punitive quantum of costs in a public interest petition.*

Pursuant to **rule 20** of the **Court of Appeal (Election Petition) Rules, 2017**, a pre-hearing conference was held on 16th April 2018 at which the parties agreed by consent to prosecute the appeal through written submissions and oral highlighting. **Mr. Mansur, Mr. Gitonga** and **Ms. Murangiri**, learned counsel, appeared for the appellant while **Mr. Ngaca** and **Mr. Wanjohi**, learned counsel, appeared for the 1st respondent, and **Mr. Otieno**, learned counsel for the IEBC and the 3rd respondent.

Urging the first ground of appeal, Mr. Mansur and Mr. Gitonga, who addressed us in turns, contended that the trial judge erred by ignoring the evidence of **Adan Musa Alaso (DW 7)**, the 1st respondent's campaign manager and chief agent, which showed that the appellant had won the election by 4 votes, having garnered **6812** votes against the 1st respondent's **6,808** votes. It was contended that the evidence in question was in the form of the agent's tallying sheet, which was attached to his affidavit sworn on 15th September 2017 in response to the petition. On this ground alone, it was submitted, the appeal ought to be allowed.

On scrutiny, counsel contended that the learned judge erred by ignoring the reports of the two scrutiny exercises, which confirmed that the election was not conducted in accordance with the Constitution and the law. He further submitted, quoting the judgment of the High Court in **Ramadhan Seif Kajembe v. Returning Officer, Jomvu Constituency & 3 Others [2013] eKLR**, that the purpose of the scrutiny was to determine whether the election was conducted in accordance with the Constitution and the law.

The appellant relied on six polling stations where scrutiny was ordered and contended that the scrutiny reports showed massive irregularities that should invalidate the election. At **Berjini Dam Polling Station**, he contended, the reports showed that Form 35A was not signed; that the aperture seal on the ballot box at the time of scrutiny was different from the aperture seal that was affixed on the ballot box at close of counting; that the number of valid votes cast as recorded in the Form 35A that was found in the sealed ballot box (501) was different from that recorded in the Form 35A that was used to declare the results (452); and that the printed copy of the register was not used in violation of **regulation 69(1)(d)** of the Election (General) Regulations, 2012.

At **Kajaja II Polling Station**, it was contended that the ballot box aperture seals at close of counting of the votes and scrutiny were different and that the tamper-proof envelopes had been interfered with. As for **Leheley Polling Station**, the appellant submitted that the scrutiny reports disclosed that Form 35A was not signed; that it was overwritten without any counter-signing; that it did not bear the IEBC stamp; and that all the counterfoils were missing. Turning to **Tarbaj Library Polling Station**, the appellant contended that Form 35A showed 304 votes cast but after scrutiny and recount, the number was 294. In his view the result from this polling station should have been ignored in totality under **regulation 83(1)(c)** of the Elections (General) Regulations, 2012. Regarding **Gunana Primary School Polling Station 2**, it was contended that the 3rd respondent never received Form 35A from the presiding officer as required by **regulation 5 (1A) (c)** of the Elections (General) Regulations, 2012 and therefore could not collate or tally the results for the polling station; that the ballot box aperture seal was tampered with; that during scrutiny Form 35A was not found in the ballot box; and that the tamperproof envelopes were opened. Lastly on **Dasheg Primary School Polling Station**, the appellant submitted that the Form 35A found in the ballot box at scrutiny was not signed and was different from that produced in court.

On the third ground of appeal, the appellant contended that the learned judge misapprehended and misinterpreted section 83 of the Elections Act, which she should have read and applied disjunctively. Citing **Raila Odinga v. IEBC & Others (2017) eKLR**, he submitted that if it is proved that an election was not conducted in accordance with the principles of the Constitution or the law, it is null and void without the need to consider the effect of the non-compliance. It was the appellant's further contention that he proved to the required standard violation of the Constitution and the law and that the learned judge erred by failing to nullify the election of the 1st respondent. He added that the learned judge misdirected herself and abdicated her duty by holding that it was not the role of the court to determine the will of the voters, whilst that was its sacred duty.

Next the appellant submitted that the IEBC and the 3rd respondent refused, without any reasonable justification, to provide the SD cards or the KIEMS kits for scrutiny and that the learned judge erred by failing to make a determination in that regard. In his view, the 1st respondent's election should have been nullified on account of that failure to provide necessary evidence for purposes of scrutiny.

Regarding use of the printed copy of the register, the appellant submitted that evidence was adduced which showed that the printed register was not used during the election but the learned judge held that the failure to use the register did not vitiate the election. In his view, that was misdirection because by dint of **regulation 69 (d)**, of the Elections, (General) Regulations, 2012, use of that register is mandatory. He relied on the judgment of this Court in **Clement Kungu Waibara v. Bernard Chege Mburu & 2 Others [2011] eKLR** and submitted that failure to comply with the applicable law affects the election results.

On burden of proof, the appellant urged us to find that the learned judge erred by failing to find that the evidential burden of proof had shifted to the IEBC and the 3rd respondent as regards his complaint that the KIEMS kits were interfered with. He cited **section 112** of the **Evidence Act** and contended that it was especially within the knowledge of the IEBC and the 3rd respondent whether the kits were properly working, and that they therefore bore the evidential burden in that regard.

Turning to the annexures to his supplementary affidavit, which the learned judge struck out on 14th December 2017, the appellant submitted that the annexures, which were Form 35As, did not introduce any new grounds or evidence as erroneously found by the learned judge, because he had pleaded in the petition that the Form 35As had errors such as lack of signatures of presiding officers and agents and IEBC stamps. He added that the expunging of the annexures from the record denied him the right to a fair trial. He relied on the decisions of the High Court in **Twahaer Adbulkarim Mohamed v. IEBC & 2 Others [2014] eKLR** and **Justus Mugumbu Omiti v Walter Enock Nyambati**

*Osebe & 2 Others, EP No. 1 of 2008*, and submitted that in the event of an illegality, the Court is obliged to investigate the issue, even if it is not pleaded.

On election offences, the appellant submitted that the learned judge erred by failing to determine the issue and by holding that allegations of commission of election offences during the election campaigns ought to have been referred to the IEBC or Jubilee Party. Citing the judgment of this Court in *Mohamed Abdi Mahamud v. Ahmed Abdullahi Mohamad & 2 Others [2018] eKLR*, the appellant argued that an election is a process rather than an event and that the trial court had jurisdiction to inquire even into issues of nomination.

Lastly on costs, the appellant submitted that the award of costs of Kshs 5,000,000.00 was exorbitant and not justified in view of the irregularities that were proved. He cited the judgment of the High Court in *Jackton Nyanungo Ranguma v. IEBC & 2 Others [2018] eKLR* and urged that award of costs should not unjustly enrich a party or undermine access to justice. On the basis of all the above submissions, the appellant urged us to allow the appeal and nullify the election of the 1st respondent.

Next to take the podium was Mr. Ngaca for the 1st respondent, who submitted that the appellant, having failed to establish the allegations that he had pleaded in the petition, had deviously changed his claim to hinge on irregularities allegedly unearthed in the scrutiny and recount exercises. In his view, the appellant's final submissions before the trial court and in this appeal were founded on a fishing expedition intended to present a case that was fundamentally different from what he had pleaded in the petition. We were urged to find that the slim margin between the winner and the runner-up was the result of a close contest rather than evidence of an improperly conducted election and therefore cannot by itself be a ground for nullifying the election. The 1st respondent added that the appellant did not adduce any evidence to the required standard of proof that could have justified nullification of the election, and further that whatever irregularities were established were not substantial to warrant nullification of the election.

Learned counsel submitted that on 12th August 2017 the IEBC supplied the appellant with copies of Form 35As and 35B, but when he filed his petition on 5th September 2017, the appellant complained substantively only about 3 polling stations whilst in respect of 4 other polling stations, he prayed only for scrutiny and recount. He contended therefore that the results from 43 out of the 50 polling stations in the constituency stood unchallenged. As regards the appellant's case before the trial court, it was contended that only the appellant and 4 witnesses testified and that their evidence did not establish the pleaded irregularities and illegalities.

Turning to scrutiny and recount, the 1st respondent submitted that the first was a partial scrutiny before the hearing of the petition, limited to only two polling stations, and that its report did not support the claims upon which the petition was founded. As regards the second scrutiny, the 1st respondent contended that it was confined to four stations only and that its terms were very limited and specific and the report of the deputy registrar, as clarified, did not disclose any irregularities that would have justified nullification of the election. The 1st respondent also contended that the complaints relied upon by the appellant as regards scrutiny were not captured in the registrar's report, but were instead the appellant's personal opinions and conclusions which were not accepted by the trial court. The 1st respondent added that contrary to the appellant's assertion, **regulation 73(3) and (4)** of the Elections (General) Regulations 2012, do not require counterfoils to be in the ballot boxes.

Regarding the tallying sheet by the 1st respondent's chief agent, Adan Musa Alaso (DW 7), learned counsel submitted that the document was PW7's personal notes and that the total votes therein did not support the appellant's contention because they were additions by the appellant himself and further that DW7 had clarified in his evidence that he had entered some wrong figures in his tally. It was contended that according to the evidence of DW7, it was indeed the 1st respondent rather than the appellant who obtained more votes. Moreover, it was submitted, the 1st respondent was declared the winner on the basis of Form 35B and not DW7's personal tally or notes.

On the contention that the IEBC failed to comply with the order of the court to provide the SD cards or the KIEMS kits for scrutiny, the 1st respondent's response was that the "read only" version of the KIEMS Kits were examined on 18th December 2017. He also contended that the appellant sought a further scrutiny of the KIEMS kits in his second application for scrutiny, which was properly rejected by the court on 15th February 2018 because no proper basis had been laid.

Regarding the learned judge's conclusion as regards the alleged deception in the campaign, the 1st respondent submitted that if there was any substance in the allegation, the appellant was expected to make a complaint to the IEBC as a pre-election issue, which he failed to do. In any event, it was also submitted, the appellant did not adduce evidence of any voter that was misled or influenced by the alleged deceptive campaign because the ballot papers bore the pictures of all the candidates.

On use of the printed copy of the register, it was the 1st respondent's submission that the appellant had not raised that as a ground or complaint in the petition and that the issue was a belated afterthought. He added that the learned judge had properly restricted herself to the matters that were pleaded in the petition and wisely refused to be drawn into new issues that were raised in the course of the hearing. The 1st respondent urged us to find that even where the printed register was not used, there were sufficient safeguards to ensure that no voter voted twice. Relying on the judgment of this Court in *National Super Alliance v IEBC & 2 Others [2017] eKLR*, he submitted that in any case the use of the printed register under regulation 69(1) (e) is required only in the event of failure of the electronic voter identification devices, which was not the case.

Next the 1st respondent addressed the appellant's supplementary affidavit, which the learned judge struck out. He contended that the learned judge's action was within the law because the affidavit sought to introduce new matters beyond the scope of the petition. On the application of Section 83 of the Elections Act, the 1st respondent submitted that the learned judge had neither misinterpreted nor misapplied the same so as to justify interference with her decision. Lastly on costs, it was submitted that the amount awarded was reasonable and within the range of awards in other election petitions.

Accordingly, on the basis of his arguments, which we have set out above, the 1st respondent urged us to dismiss the appeal with costs.

Lastly we heard Mr. Otieno for the IEBC and the 3rd respondent, who also opposed the appeal and urged us to dismiss it with costs, contending that a credible, free and fair election is not necessarily free from imperfections and administrative shortcomings. Citing the

decisions in *Peter Gatirau Munya v. Dickson Mwenda Kithinji & 2 Others [2014] eKLR*, *Peter Gichuki King'ara v. IEBC & 2 Others [2014] eKLR* and *Opitz v. Wrzesnewsky [2012] SCC 55*, counsel submitted that an election cannot be annulled merely because of administrative errors, which do not affect the results. He added, on the authority of *Peter Gatirau Munya v. Dickson Mwenda Kithinji* (supra), that in the absence of evidence proving to the required standard substantial irregularities affecting the result, the margin of victory, however narrow is immaterial.

On the first ground of appeal touching on the evidence of Adam Musa Alaso, these respondents contended that the appellant's submissions were an invitation of this Court to revisit the evidence that was considered by the trial judge and come to a different conclusion, which is not permitted by section 85A of the Elections Act.

Turning to the scrutiny reports, it was submitted that the appellant's complaints had no merit because the trial court comprehensively considered the reports before reaching its conclusions. On the specific polling stations, it was contended, as regards Berjini Dam polling station, that the Form 35A was duly signed and for Kajaja II polling station that the trial court found as a fact that the ballot box seals were not interfered with, thus making the argument that the tamperproof envelopes found therein were interfered with unsustainable.

For Leheley polling station it was submitted that the court also found as a fact that the presiding officer, his deputy and agents signed the Form 35A and that the former returned to the 3rd respondent the counterfoils of the used ballot papers and the unused ballot papers in sealed tamperproof envelopes as required by regulation 73(3) and (4) of the Elections (General) Regulations 2012. The decisions of this Court in *Timamy Issa Abdalla v. Swalleh Salim Swaleh Imu & 3 Others [2014] eKLR* and *IEBC & Another v. Stephen Mutinda Mule & 3 Others [2014] eKLR* were cited to support the proposition that the counterfoils are not required to be sealed in the ballot boxes. Further, the IEBC and the 3rd respondent argued that the issues raised by the appellant in the petition as regards Leheley polling station were the alleged failure to stamp Form 35A and denial of access of his agent to the polling station. These respondents also added that failure to stamp the statutory forms cannot invalidate the results.

As regards Tarbaj Library Polling Station, it was contended that the Forms 35A as well as the scrutiny report confirmed the votes cast to be 294 and that the issue was one of fact, which was conclusively determined by the learned judge, with no room for interference by this Court. On Gunana Primary 2 polling station, the IEBC and the 3rd respondent submitted that the appellant had not raised in the petition any complaint as regards that station. In any event, they contended, granted the finding that the ballot boxes were not interfered with, the envelopes therein could not be held to have been interfered with. Lastly on Dasheg Primary School polling station, it was submitted that the Form 35A was duly signed by the presiding officer, his deputy and the agents and that the trial court found as such.

Turning to the interpretation and application of section 83 of the Elections Act, the IEBC and the 3rd respondent submitted that the learned judge interpreted and applied the provision properly and consistently with the judgment of the Supreme Court in *Raila Odinga v. IEBC & Others [2017] eKLR* and that having found that there was no substantial violation of the Constitution or election law she was right in upholding the 1st respondent's election. These respondents also added that the alleged abdication of duty by the trial court was a misrepresentation by the appellant because the learned judge only noted that it was the electorate, which decided its will when it voted, and not the court.

On their alleged failure to comply with the order of the court on scrutiny, these respondents explained that the court directed them to provide read-only versions of the KIEMs kits, which they duly did. As for the failure to use the printed register, the two respondents submitted that the complementary system of voting envisaged by section 44 of the Elections Act entailed use of the manual register only when the KIEMs Kits failed, which did not happen.

On burden of proof, these two respondents submitted that the learned judge did not misdirect herself as contended by the appellant and that she appreciated, as held by the Supreme Court in *Raila Odinga v. IEBC & 2 Others* (supra), that although the evidential burden of proof keeps shifting depending on the efficiency with which the petitioner discharges the same, the legal burden of proof does not shift and it was all the time on the appellant, who failed to discharge the same to the intermediate category approved by the Supreme Court.

On the appellant's supplementary affidavit that the court struck out, the IEBC and the 3rd respondent defended the position taken by the court, arguing that the leave granted to the appellant to file a supplementary affidavit did not entitle him to expand the scope of the petition as he had sought to do. They relied on the decision of the Supreme Court in *Raila Amolo Odinga & Another v. IEBC & 2 Others* (supra) and of the High Court in *Jackson Nyanungo Ranguma v. IEBC & 2 Others [2018] eKLR* and submitted that a petitioner is not allowed to make out a case that is different from that he has pleaded.

Turning to the alleged use of deceptive campaign by the 1st respondent, these respondents submitted that the IEBC had jurisdiction under **Article 88(4)** of the Constitution and **section 74** of the Elections Act to resolve nomination and pre-election disputes, which the appellant should have invoked. In their view, having failed to avail himself of the prescribed remedy, the appellant could not raise the issue in the petition. They cited the judgment of the High Court in *Josiah Taraiya Kipelian ole Kores v. David ole Nkediye & 3 Others [2013] eKLR* in support of the proposition. They also contended that the appellant did not prove to the required standard commission of an election offence by the 1st respondent.

Lastly on costs, the IEBC and the 3rd respondent submitted that costs follow the event and that the quantum awarded by the trial court was not excessive in view of the fact that election materials were airlifted from Garissa to Nairobi twice for scrutiny and transport and accommodation of witnesses. They accordingly urged us, for the foregoing reasons, to find that the appeal did not have any merit and to dismiss it with costs.

We have carefully considered the judgment of the High Court, the grounds of appeal, the submissions by counsel for the respective parties, the authorities that were cited and the law. By dint of section 85A of the Elections Act, the jurisdiction of this Court in election petition appeals is limited to matters of law only. The provision stipulates as follows:

***“85A Appeals to the Court of Appeal***

***(1) An appeal from the High Court in an election petition concerning membership of the National Assembly, Senate or office of County Governor shall lie to the Court of Appeal on matters of law only and shall be-***

***(i) filed within thirty days of the decision of the High Court; and***

***(ii) heard and determined within six months of the filing of the appeal.***” (Emphasis added).

In ***Peter Gatirau Munya v. Dickson Mwenda Kithinji*** (supra) the Supreme Court explained that in the context of an appeal from an election petition, a matter of law arise in the interpretation or construction of the Constitution, statutes or regulations made thereunder as relates to elections, or in their application to the sets of facts established by the trial court, or lastly determination of whether the conclusions of the trial judge are based on the evidence on record or are so perverse that no reasonable tribunal would have arrived at them. (See also the judgments of the Supreme Court in ***Zachary Okoth Obado v. Edward Akongo Oyugi & 2 Other [2014] eKLR***, and ***Nathif Jama Adam Abdikhaim Osman & 3 Others [2014] eKLR***). In ***Mohamed Abdi Mahamud v. Ahmed Abdullahi Mohamad [2018] eKLR*** this Court rejected the view that in an election petition, an appellant can raise “***questions of mixed law and fact***”. That is the approach that we shall adopt in this petition.

In his first ground of appeal, the appellant contends that the learned judge erred by failing to rely on the evidence adduced by the 1st respondent’s chief agent, ***Adan Musa Alaso (DW 7)***, which showed that from the agent’s own tallying sheet the appellant had garnered more votes than the 1st respondent. We do not think there is any seriousness in this ground of appeal. That witness explained that the totals alleged to show the appellant as the winner were the appellant’s own additions and that in any case, DW7 had made errors in some of the entries. The learned judge, who heard and saw the witnesses, accepted the explanation in reaching her judgment. Those were findings of fact, which we cannot interfere with as the appellant invites us to do. In addition, as correctly submitted by the respondents, the 1st respondent was not declared the winner of the election on the basis of his agent’s tallies. This ground of appeal has absolutely no merit and we reject it.

The next issue is whether the learned judge erred in considering the reports of the two scrutiny exercises that she ordered. The first scrutiny was ordered vide a ruling dated 31st October 2017. Although the appellant had sought scrutiny in five polling stations, at that stage the court allowed scrutiny in only two, namely Kajaja II Primary School polling station and Berjani Dam polling station. At Kajaja II Polling Station, scrutiny was ordered for only one issue which was pleaded in the petition, namely, to determine whether the results in Form 35A which were declared at the polling centre were different from those announced at the tallying centre. As for Berjani Dam polling station, the issue that scrutiny was supposed to address was the appellant’s contention that a recount was conducted after an irregular detour, which returned different results from those announced at the polling station.

The second scrutiny was ordered vide a ruling dated 15th February 2018 and involved four polling stations, namely Leheley, Gunana 2, Dasheg and Tarbaj Library. Like the first, the second scrutiny was fairly limited as follows. For Leheley, the issue was alleged alteration of the seal numbers in the polling station diary which were not counter-signed; for Gunana 2 the issue to be settled was that the valid votes of that polling station were not those of Gunana 1 polling station; at Dasheg the issue was confirmation of the votes for each candidate, whilst at Tarbaj Library, the aim was to confirm the votes cast for each candidate in the Form 35A.

After considering the evidence and the scrutiny reports adduced, the learned judge found, at page 40 of the judgment, that all the Form 35As that the appellant had pleaded were confirmed to have been signed by the presiding officer and/or the deputy presiding officer; that where the forms were not legible, their details were confirmed from the original forms in the ballot boxes; that failure by agents to sign did not invalidate the results; and that it was not compulsory for the statutory forms to be stamped as they had other security features. She also found that after scrutiny, the results in Berjini Dam, Gunana 2 and Tarbaj Library were by and large the same. As for the alleged interference with the seals, the learned judge found that there was no interference, only that due to human error, the presiding officer recorded the opening seal numbers instead of the closing seal numbers, and upon realizing the mistake effected corrections. The trial court concluded thus:

***“The totality of the evidence on record is that the alleged interference with ballot boxes specifically in relation to Kajaja 2 Polling Station was/is human error and was conceded but it did not affect the votes even after scrutiny was conducted.”***

This was a factual finding where the learned judge who had the advantage of seeing and hearing the witnesses as they testified, accepted one version of the evidence over the other. From the record, the conclusion by the learned judge was reasonable and justified by the evidence, meaning that we have no basis for interfering with her conclusions.

In other respects, the appellant’s complaints regarding the scrutiny reports are not borne out by the reports that were submitted to the court by the deputy registrar but are based on his own subjective views and conclusions, which raise all manner of complaints beyond the issues that were intended to be addressed by the limited scope of the orders on scrutiny, which we have already set out above.

As regards application of section 83 of the Elections Act, the appellant contends that the learned judge erred by misinterpreting and misapplying the same, and in particular by failing to apply it disjunctively. In his view, a violation of the provisions of the Constitution or the Elections Act is enough by itself to invalidate an election, without having to consider whether the violation affected the results or not. On the other hand the respondents are of a different mind, contending that not every violation of the Constitution or the law, however trivial, should justify nullification of an election.

Section 83 of the Elections Act provides as follows:

***“S. 83 No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law or that the non-compliance did not affect the result of the election.”***

The Supreme Court considered the interpretation and application of the above provision in ***Raila Amolo Odinga & Another v. IEBC &***

***Others*** (supra), and in particular the kind of breaches of the Constitution or the law which would justify nullification of an election. Due to the use of the word “***or***” rather than “***and***”, the Court concluded that the provision must be read disjunctively rather than conjunctively. However as regards the kind of violation of the Constitution or the law that would vitiate an election, the Supreme Court expressed itself as follows:

***“[209] Therefore, while we agree with the two Lord Justices in the Morgan v. Simpson case that the two limbs should be applied disjunctively, we would, on our part, not take Lord Stephenson’s route that even trivial breaches of the law should void an election. That is not realistic. It is a global truism that no conduct of any election can be perfect. We will also go a step further and add that even though the word „substantially? is not in our section, we would infer it in the words „if it appears? in that section. That expression in our view requires that, before vitiating it, the court should, looking at the conduct of the whole election, be satisfied that it substantially breached the principles in the Constitution, the Elections Act and other electoral law. To be voided under the first limb, the election should be what Lord Stephenson called „a sham or travesty of an election? or what Prof. Ekirikubinza refers to as „a spurious imitation of what elections should be?.”*** (Emphasis added).

Accordingly, contrary to what the appellant submitted, it is not each and every breach of the Constitution or of the law, which would justify nullification of an election. It must be a breach, which, when the conduct of the election as a whole is considered, satisfies the court that it has affected the result. We are therefore not persuaded that the learned judge applied the provision contrary to the interpretation sanctioned by the Supreme Court.

The next ground of appeal is whether the learned judge erred by failing to draw an adverse inference against the IEBC and the 3rd respondent for failure to comply with the court’s order on scrutiny. The appellant’s contention is that the IEBC refused to avail the SD cards or the KIEMs kits for scrutiny as ordered by the court whilst the respondents counter that the IEBC was ordered to provide “read-only” versions, which it did.

The record does not show the appellant raising any complaint with the trial court over the alleged failure of the IEBC to comply with the court’s order as regards the KIEMs kits. Even in his final submissions, neither was the issue raised nor the court invited to draw any adverse inference against the IEBC. These facts appear in our view, to support the IEBC’s contention that it indeed supplied read-only versions of the kits. It is also very instructive that when the appellant made a formal application on 9th February 2018 for scrutiny of, among others, the KIEMs kits, the trial court rejected the application principally on the ground that the issue of the KIEMs kits was not pleaded or couched in specific terms or particularity regarding the polling stations that were alleged to have had voter turnout or valid votes exceeding the number of registered voters recorded in Form 35As. Ultimately the court concluded as follows:

***“In the absence of particulars of the polling stations whose votes exceeded the registered voters, this court cannot grant any scrutiny of the KIEMs kit as it would amount to a fishing expedition. The scrutiny for KIEMs kit is not granted.”***

In light of the foregoing, we are not persuaded that there was any legitimate basis upon which the trial court could be expected to draw an adverse inference against the IEBC for failure to provide that which the court did not order in the formal application for scrutiny by the appellant. This ground of appeal too has no merit.

The appellant’s next complaint is that the learned judge erred by failing to hold that the 1st respondent misrepresented himself as the Jubilee candidate in breach of the electoral code of conduct and **section 20** of the Election Offences Act. The evidence adduced by the appellant was that the 1st respondent, who was contesting on a PDR party ticket, campaigned together with **Issa Garore Robe** who was the Jubilee party MCA candidate whereby they misrepresented to voters that the 1st respondent was the Jubilee Member of National Assembly candidate for Tarbaj Constituency. The misrepresentation took the form of donning Jubilee party colours, branding the 1st respondent’s vehicle with the same colours and using the image of the Jubilee gubernatorial candidate and the Jubilee party slogan of **UHURUTO**.

The 1st respondent’s evidence on the issue was that nothing prohibited him from campaigning with the Jubilee MCA candidate; that his attire and vehicle were adorned with PDR rather than Jubilee party colours; that since PDR party did not have a presidential candidate it resolved to support the Jubilee Party presidential candidate thereby becoming an affiliate party; and that no voter was misled about the appellant’s or the 1st respondent’s party.

For the IEBC and the 3rd respondent, it was contended that if there was really any substance in the appellant’s complaint, he should have filed a complaint with the IEBC regarding breach of the electoral code of conduct.

The learned judge rejected the appellant’s claim, holding that the IEBC had jurisdiction to settle campaign disputes, which is the mechanism that the appellant should have invoked, but failed to do so. In reaching that conclusion, the learned judge relied on, among others the judgments of the High Court in

***Habil Najendo Bushuru v. IEBC & 3 Others [2018] eKLR*** and ***Rozaah Akinyi Buyu v. IEBC & 2 Others [2013] eKLR***.

**Article 88 (4) (e)** of the Constitution and **section 4 (e)** of the **Independent Electoral and Boundaries Commission Act** vests in the IEBC the responsibility of settling electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results. It is important to underscore that this function is given to the IEBC by the Constitution and therefore should not be taken lightly. As regards the Electoral Code of Conduct, the same is prescribed by **section 110** of the Elections Act. The appellant’s contention, as we understand it, was that the 3rd respondent had violated **clause 6(g)** of the Code of Conduct, which provides as follows:

***“6. All those bound by this Code shall, throughout an election period-***

...

**(g) avoid plagiarizing the symbols, colours or acronyms of other parties; and to discourage and, if possible, prevent the removal, disfigurement or destruction of political campaign materials of any party.”**

The enforcement of the Code of Conduct is the responsibility of the IEBC, which by dint of **clause 15(1)** of the Code is empowered to set up the **Electoral Code of Conduct Enforcement Committee** chaired by a person qualified to hold the office of Judge of the High Court and responsible for hearing complaints of alleged breaches of the Electoral Code of Conduct. The Committee has power to impose upon a person found to be in breach of the Code of Conduct any of the sanctions set out in **clause 7** of the Code, which include a formal warning, fine, restricting access to and use of the media, prohibition from holding public rallies, erecting placards or banners, publishing or distributing campaign literature, and even barring a candidate from participating in the elections.

It is trite that where a particular mechanism for resolution of a dispute has been prescribed, particularly by the Constitution, parties are not at liberty to ignore those mechanisms, for they are not established in vain. While we agree that an election is a process rather than an event, where the law and in particular the Constitution has deliberately provided a dispute resolution mechanism for a particular stage of the election, such mechanism should be strictly resorted to unless it can be demonstrated that it does not offer a meaningful remedy. In **Mutanga Tea & Coffee v. Shakira Ltd & Another [2015] eKLR**, this Court explained why it is necessary to resort to such prescribed mechanisms, as follows:

**“This Court has in the past emphasized the need for aggrieved parties to strictly follow any procedures that are specifically prescribed for resolution of particular disputes. Speaker of the National Assembly v. Karume (supra), was a 5(2)(b) application for stay of execution of an order of the High Court issued in judicial review proceedings rather than in a petition as required by the Constitution. In granting the order, the Court made the often-quoted statement that:**

**„[W]here there is a clear procedure for the redress of any particular grievances prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.?”**

**...It is readily apparent that in those cases the Court was speaking to issues of the correct procedure rather than of the correct forum for resolution of a dispute. However, we entertain no doubt in our minds that the reasoning of the Court must apply with equal force to require an aggrieved party, where a specific dispute resolution mechanism is prescribed by the Constitution or a statute, to resort to that mechanism first before purporting to invoke the inherent jurisdiction of the High Court. The basis for that view is first that Article 159 (2) (c) of the Constitution has expressly recognized alternative forms of dispute resolution, including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. The use of the word “including” leaves no doubt that Article 159(2)(c) is not a closed catalogue. To the extent that the Constitution requires these forms of dispute resolution mechanisms to be promoted, usurpation of their jurisdiction by the High Court would not be promoting, but rather, undermining a clear constitutional objective. A holistic and purposive reading of the Constitution would therefore entail construing the unlimited original jurisdiction conferred on the High Court by Article 165(3)(a) of the Constitution in a way that will accommodate the alternative dispute resolution mechanisms. Secondly, such alternative dispute resolution mechanisms normally have the advantage of ensuring that the issues in dispute are heard and determined by experts in the area; and that the dispute is resolved much more expeditiously and in a more cost effective manner. In Rich Productions Ltd v. Kenya Pipeline Co & Another, Petition No. 173 of 2014 the High Court explained why it must be slow to undermine prescribed alternative dispute resolution mechanisms thus:**

**„The reason why the Constitution and the law establish different institutions and mechanism for dispute resolution in different sectors is to ensure that such disputes as may**

**arise are resolved by those with the technical competence and the jurisdiction to deal with them. While the Court retains the inherent and wide jurisdiction under Article 165 to supervise bodies such as the 2nd respondent, such supervision is limited in various respects, which I need, not go into here. Suffice to say that it (the court) cannot exercise such jurisdiction in circumstances where parties before it seek to avoid mechanisms and processes provided by law, and convert the issues in dispute into constitutional issues when it is not.?”**

**On the same reasoning, this Court, in Republic v. National Environment Management Authority, CA No. 84 of 2010 upheld a decision of the High Court, which declined to entertain a judicial review application by a party who had a remedy, which he had not utilized, under the National Environment Tribunal. The Court reiterated that where Parliament has provided an alternative remedy in the form of a statutory appeal procedure, it is only in exceptional circumstances that an order of judicial review will be granted. More recently in Vania Investment Pool Ltd v. Capital Markets Authority & 8 Others, CA No 92 of 2014 this Court also upheld a decision of the High Court in which the court declined to entertain a judicial review application by an applicant who had failed to first refer its dispute to the Capital Markets Appeals Tribunal established by the Capital Markets Act.”**

In view of the foregoing, we are not persuaded that the learned judge erred in refusing to entertain a complaint in respect of which a particular dispute resolution mechanism is provided by the Constitution and statute, which for no apparent reason the appellant declined to utilize. The decision of this Court in **Mohamed Abdi Mahamud v. Ahmed Abdullahi Mohamad & 2 Others** (supra), which the appellant relied on, does not excuse failure to utilize prescribed mechanisms. It stands for the proposition that the High Court is not precluded from inquiring in an election petition whether a candidate was qualified to contest.

We may add too that under **section 20 (2)** of the Election Offences Act, as read with **section 24(1)**, breach of the Electoral Code of Conduct constitutes an election offence punishable, upon conviction, by a fine not exceeding one million shillings or imprisonment for a term not exceeding three years or both. As the Supreme Court noted in **Raila Odinga v. IEBC & Others** (supra), although the threshold of proof in an

election petition is above the balance of probability but not as high as proof beyond reasonable doubt, the normal standard of proof where criminal charges linked to an election are in question, is not affected. It remains proof beyond reasonable doubt. The Court expressed itself on the issue as follows, at paragraph 152:

***“We maintain that, in electoral disputes, the standard of proof remains higher than the balance of probabilities but lower than beyond reasonable doubt and where allegations of criminal or quasi criminal nature are made, it is proof beyond reasonable doubt. Consequently, we dismiss the petitioners’ submissions that the Court should reconsider the now established legal principle, as discussed above, and find that the standard of proof in election petitions is on a balance of probabilities”***  
(Emphasis added).

In our view, the evidence on record regarding the alleged breach of the Electoral Code of Conduct could not have satisfied the high standard required, in particular taking into account the evidence adduced by the respondents that the 1st respondent’s party was in alliance with Jubilee party in supporting the latter’s presidential candidate or the fact that in their branding, both parties use the red and yellow colours. Again not a single witness testified to having been misled by the 1st respondent to vote other than he or she wished. Accordingly we do not find any merit in this ground of appeal either.

As regards failure to use the copy of the printed register in the election, it is obvious that the appellant and the respondents were submitting at cross-purpose. Whilst the appellant was complaining of alleged failure to cross-out names of voters in the printed register once they had been electronically identified as required by regulation 69 (1) (d) of the Elections (General) Regulations, 2012, the respondents were responding to regulation 69 (1) (e) (iii) which provides for identification of voters using the printed register in the event of failure of the electronic voter identification devices.

Be that as it may, we have carefully perused the appellant’s pleadings, which we have set out in this judgment. The appellant’s complaints in the petition are very precise and specific. It was those specific complaints that the respondents answered. The appellant did not complain at all about the use or non-use of the printed register and it was not open to the trial court to entertain complaints that were not pleaded in the petition. In our view it is an unacceptable misuse of the device of scrutiny to allow a party to latch onto any irregularity that he thinks scrutiny has unearthed, even if he had not complained of such irregularity or laid a basis for it in the application for scrutiny.

We do not agree with the appellant that a scrutiny ordered by the court *suo motu* is a license to expand and address each and every conceivable irregularity that may come to light, whether pleaded or not. In *Gatirau Peter Munya v. Dickson Mwenda Kithinji* (supra) the Supreme Court held that even where the court orders scrutiny and recount on its own motion it must not only be satisfied that the recount is necessary to enable it to arrive at a just and fair determination of the petition, but also that it must have sufficient reasons based on the pleadings and evidence. In *Gideon Mwangangi Wambua & Another v. IEBC & 2 Others* [2013] eKLR, *Odunga J.* stated as follows regarding the purpose of scrutiny, which we agree with:

***“...[T]he aim of conducting scrutiny and recount is not to enable the Court 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.***

It has consistently been held by the courts in this jurisdiction, in the context of election petitions, that the court should only entertain and determine issues that have been presented by the parties in their pleadings. Thus for example, in *IEBC & Another v. Stephen Mutinda Mule & 3 Others* (supra) this Court quoted with approval the following pertinent passage from the judgment of the Supreme Court of Malawi in *Malawi Railway Corporation v. Nyasulu* [1998] MWSC 3:

***“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute, which the parties themselves have raised by the pleadings.”***

(Emphasis added).

Moreover, as far as we can discern, the crossing-out of names in the printed register under regulation 69 (1) (d) is one of the devices for stopping double voting. The others include the marking of a voter’s finger with indelible ink under regulation 69(2) (b) and the fact that the electronic devices for identification of voters, which were used in this election, could not allow for identification of a voter twice. Before a voter receives a ballot paper, the IEBC clerks also inspect his fingers to confirm that he does not bear the indelible ink signifying that he has already voted. In addition, the voting process takes place in the presence of agents of all the parties and independent observers, save for the actual marking of the ballot paper to signify the candidate of the voter’s choice. There was neither a complaint by the appellant nor any evidence of more votes than registered voters arising from double voting. In the absence of a complaint about or evidence of double voting, the failure to mark the printed register alone could not justify nullification of the election. But as we have stated, this was really not an issue properly before the trial court.

Turning to the learned judge’s alleged misapprehension of the law on burden of proof in election petitions, we understand the appellant’s contention to be that he had adduced sufficient evidence as regards his contention that the KIEMS kits were interfered with so as to shift the evidential burden to the respondents and that the learned judge erred in failing to do so. As far as we can discern from the record, the appellant’s specific contention in the petition, was not that the KIEMS kits were interfered with, but that there were unexplained disparities between the data in Form 35A and that in the kits, which is not necessarily the same thing. The data, which the appellant claimed had discrepancies (Form 35A), is really the results of the election at the polling stations.

The Supreme Court explained the interplay between evidential and legal burden of proof, as follows, in *Raila Odinga & Another v IEBC & 2 Others* (supra):

***“[132] Though the legal and evidential burden of establishing the facts and contentions which will support a party’s case is static and “remains constant throughout a trial with the plaintiff, however, “depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting” and “its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.”***

***[133] It follows therefore that once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce „factual? evidence to prove his/her allegations of breach, then the burden shifts and it behoves the respondent to adduce evidence to prove.”***

We fully agree with the above reasoning, which binds us.

Nevertheless, as far as this ground of appeal is concerned, it would appear to us that the appellant has merely appropriated the findings and conclusions of the Supreme Court in the above decision as regards inconsistencies between the Forms and the KIEMs Kits, without appreciating the fundamental fact that the Supreme Court was dealing with a presidential election rather than that of a member of the National Assembly. By dint of **section 39(1) C** of the Elections Act, the IEBC is required in **mandatory** terms in a presidential election to electronically transmit results from the polling station to the constituency and national tallying centres. The electronic results are expected to tally with the results in the Forms from which they are generated. In National Assembly elections, however, **regulation 82 (1)** requires the presiding officer, before ferrying the actual results to the returning officer at the tallying venue, to submit to him the results in electronic form. **Regulation 82(2)** expressly declares that such results are only **provisional**. **Majanja J.** explained the position as follows in *Jackton Nyanungo Ranguma v. IEBC & 3 Others* (supra):

***“Even accepting the errors, omissions and inconsistencies highlighted by PW 4 and the other witnesses, the legal position remains that the votes as recorded in Form 37A are final. Unless Forms 37A are disputed, any errors in electronic transmission of results or publication in IEBC public portal cannot, of themselves and without more, invalidate Forms 37A. Where the results are electronically transmitted from the polling station to any other portal as the IEBC may direct, such results can only be termed as provisional thus underlining the primacy and finality of Form 37A. Regulation 82 of the Elections (General) Regulations, 2012 suggests that these results are provisional.”***

In that scenario, we do not see how it can be said that the learned judge erred by failing to hold that on the issue of the working of the KIEMs kits, the evidential burden of proof had shifted to the IEBC and the 3rd respondent. We do not see the real value of such proof, granted that the results in the kits, unlike those in Form 35A, were only provisional. With respect, it would have been a futile quest to prove an issue that was only tangential, and which in the circumstances of this appeal, could not have vitiated the election even if proven.

The next issue is the annexures to the appellant’s supplementary affidavit that the court struck out, which he contends amounted to a violation of his right to a fair hearing. The record shows that on 6th October 2017 the court granted the appellant leave to file a supplementary affidavit, which he duly did on 17th October 2017. To that affidavit, the appellant annexed Form 35As for some 45 polling stations which the respondents objected to primarily on the basis that the polling stations the Forms related to were not subject of any dispute according to the pleadings and that the appellant was involved in a mischievous strategy to surreptitiously expand the scope of the petition. After hearing the parties, the learned judge struck out the annexures vide a ruling dated 14th December 2017, which is the subject of this ground of appeal.

We have already set out the specific polling stations in respect of which the appellant raised complaints in his petition and which the respondents answered in their responses. We must agree with the learned judge that the fact that the court granted the appellant leave to file a supplementary affidavit was not a license to introduce complaints and evidence on polling stations outside those complained of in the petition or to expand the scope of the petition long after the pleadings had closed. What the appellant was doing by introducing the Form 35As for the 45 additional polling stations was to make all the 50 polling stations in Tarbaj Constitution in issue, whilst his complaints in the petition were limited to specific polling stations. As we have already adverted, parties are obliged to confine themselves to their pleadings, unless the court specifically allows them to amend the pleadings and introduce new issues. The appellant appears to labour under the false assumption that merely because he had complained in the petition about Form 35As in particular stations, he was free to complain about any Form 35A from any polling station as and when he fancied. We do not agree with that view. As has been stated time and again, the purpose of pleadings is to focus the issues in dispute and it is those issues and those issues alone, that the trial court is obliged to resolve.

What we find more intriguing is the undisputed evidence on record that the IEBC had availed the Form 35As to the appellant on 12th August 2017, long before he filed his petition. There was no convincing reason why the appellant did not raise the issues of the 45 additional polling stations in the petition rather than attempt to sneak them in a supplementary affidavit. We are satisfied that the learned judge did not err in striking out the annexures, which she correctly found to be extraneous to the pleadings.

Moving on to the award of costs, the appellant contends that the award is manifestly excessive. The learned judge awarded the 1st respondent costs capped at Kshs 2,500,000.00 and a similarly capped sum to both IEBC and the 3rd respondent. While we agree with the appellant that the purpose of awarding costs is to compensate a successful party for the expenses incurred in the litigation and not to unjustly enrich him or her, **section 84** of the Elections Act reproduces the general principle that costs follow the event unless the trial judge decides otherwise for good reasons. **Rule 30** of the Election Petition (Parliamentary & County Elections) Petition Rules 2017, empowers the trial judge to among other things, set the total amount of costs payable, which the learned judge set as we have already stated.

To the extent that the learned judge did not depart from the principles on award of costs, we can not interfere with her exercise of discretion

in that regard unless it is demonstrated that the exercise of discretion was not judicious due to failure to take into account relevant factors or taking into account irrelevant factors and thereby arrived at a manifestly excessive or low award. (See Kohli v. Popatlal [1964] EA 219 and Supermarine Handling Services Ltd v. Kenya Revenue Authority, CA. No. 85 of 2006).

In our view, taking into account the fact that the witnesses and the parties had to travel from Garissa to Nairobi for the hearing of the petition and the undisputed airlifting of the election materials that the IEBC adverted to, the award of costs was not excessive. It was also within the range of the costs that the High Court awarded, for example in Jackton Nyanungo Ranguma v. IEBC & 3 Others (supra), Nasra Ibrahim Ibrin v. IEBC & 2 Others [2018] eKLR and Pius Yattani Wario & Another v. IEBC & 3 Others [2018] eKLR.

Lastly the appellant contended that the learned judge erred by reaching a perverse decision, which no reasonable tribunal could have reached in the circumstances. As we have already noted, it is an issue of law whether in light of the evidence on record, the decision of the trial court is perverse. The Concise Oxford Dictionary of Current English (Oxford Press, 7th Edition, 1984) defines the term “perverse” as follows:

**“persistent in error; different from what is reasonable or required; wayward; peevish; perverted, wicked.”**

Similarly, the Black’s Law Dictionary (Thomson West, 8th Edition, 2004) defines a “perverse verdict” as a verdict so contrary to the evidence that it justifies granting of a new trial. To reach the conclusion that the judgment of the learned judge is perverse, we must therefore be satisfied that no reasonable tribunal could have reached the judgment that the learned judge reached on the basis of the evidence on record.

The Supreme Court of India explained in Damodar Lal v. Sohan Devi & Others, CA No. 231 of 2015 that wrong reading of evidence alone does not render a decision perverse and that if there is some evidence on record which is acceptable and which could be relied upon, the conclusions of the trial court cannot be treated as perverse and its findings cannot be interfered with. The Court explained itself as follows:

**“Even if the finding of fact is wrong, that by itself will not constitute a question of law. The wrong finding should stem out on a complete misreading of evidence or it should be based only on conjectures and surmises. Safest approach on perversity is the classic approach on the reasonable man’s inference on the facts. To him, if the conclusion on the facts in evidence made by the court below is possible, there is no perversity. If not, the finding is perverse. Inadequacy of evidence or a different reading of evidence is not perversity.”** [Emphasis added].

Having carefully considered the entire judgment, we cannot agree with the appellant that it is perverse in the sense in which the term is used above.

Ultimately we find no merit in this appeal, which we hereby dismiss in its entirety. The appellant shall pay costs of **Kshs. 1,500,000.00** to the 1st respondent. He shall also pay costs of **Kshs. 500,000.00** to the IEBC and a like sum to the 3rd respondent. It is so ordered.

**Dated and Delivered at Nairobi this 6th day of July, 2018**

**R. N. NAMBUYE**

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**JUDGE OF APPEAL**

**K. M’INOTI**

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**JUDGE OF APPEAL**

**J. OTIENO-ODEK**

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**JUDGE OF APPEAL**

*I certify that this is a*

*true copy of the original*

**DEPUTY REGISTRAR**