IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), MUSINGA & SICHALE, JJ.A)

ELECTION PETITION APPEAL NO. 6 OF 2018

BETWEEN

MARTIN NYAGA WAMBORA.....APPELLANT

VERSUS

LENNY MAXWELL KIVUTI.....1ST RESPONDENT

THE EMBU COUNTY RETURNING OFFICER....2ND RESPONDENT

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION (IEBC).....3RD RESPONDENT

DAVID KARIUKI.....4TH RESPONDENT

(Being an appeal from the Judgment and Decree of the High Court of Kenya at Embu, (Musyoka, J.) dated and delivered on 22nd February 2018

in

Election Petition No. 1 of 2017)

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JUDGMENT OF THE COURT

The August 8th 2017 election outcome for the Governor, Embu County was indeed a close contest with the votes almost evenly divided between Martin Nyaga Wambora, the appellant, and Lenny Maxwell Kivuti, the 1st respondent. In situations like that, each party will claim victory and try to bring all forms of evidence to prove that victor; and that is perfectly understandable.

When the voting closed, the 2nd respondent declared the following results for the gubernatorial election;

(a) Cyrus Njiru – 2,352

(b) Kiragu Kithinji – 50,440

(c) **Lenny Maxwell Kivuti - 96,775**

(d) Leonard Muriuki Njeru – 2,022

(e) **Martin Nyaga Wambora – 97,760**

(f) Peter Njagi Njuki – 981,

and declared the appellant with 97,760 votes as the duly elected Governor with the 1st respondent, as the runner-up with 96,775, the difference between them being 985 votes. The latter was, however, aggrieved by this outcome and claimed in his petition before the election court that, although the process of casting of ballots in respect of that election was smooth and peaceful, the counting and tallying process was characterized by grave irregularities; that the results were inflated and swapped in favour of the appellant; that Forms 37A were tampered with at the tallying centres to reflect fictitious figures; that some Forms 37A were not signed by agents; that his agents were barred from participating in the counting and tallying of ballots at the polling stations; and that the counting of the votes was undertaken in a manner that contravened **Article 81** of the Constitution, **section 38A** of the Elections Act and **Regulation 69(2)** of the Election (General) Regulations 2012.

In the end, the 1st respondent applied for a re-tally of the votes cast in two polling stations within Mbeere South Constituency, scrutiny and recount of all the votes cast within Manyatta and Runyenjes Constituencies, nullification of the results declared, and a declaration that he was the validly elected Governor of Embu County.

Responding to the 1st respondent, the appellant, the 2nd, 3rd and 4th respondents denied all the allegations by the 1st respondent and asserted instead, that the gubernatorial election was conducted in accordance with the Constitution and the law; that it was free, fair and transparent; and that the appellant and the 4th respondent were validly declared the Governor and Deputy Governor, respectively.

Taking the witness stand, the 1st respondent insisted that he won the gubernatorial elections; that the votes announced by the 2nd respondent exceeded the number of registered voters by far. He gave the example of Runyenjes Constituency and said that the total votes announced were 129,652 while the registered voters were only 86, 977, exceeding the number of registered voters by 42, 675. In Manyatta Constituency, the total votes cast were 105,700, yet the registered voters were only 99,339, a difference of 6,361 votes. It was also claimed that there were discrepancies in Forms 37A and 37B, in respect of what was announced and what was recorded at the polling stations. The 1st respondent testified of how he witnessed the presiding officers altering Forms 37A at Kangaru School; that the total votes cast for the Governor exceeded those cast for the Woman Representative and for the Senator; and that many Forms 37A were not stamped.

He was optimistic that, if the court allowed scrutiny and a recount of the votes, he would win with 97,286 votes against the appellant's 96,717; that it was only through scrutiny that the state of the electoral materials and the actual total votes would be established.

Regarding his agents, the 1st respondent testified that they were intimidated and subjected to discrimination, by being denied copies of Forms 37A and an opportunity to sign them, while agents of the appellant were allowed to access and to sign. His efforts to bring these matters to the attention of the returning officer for Manyatta Constituency bore no fruits as the said returning officer dismissed him. He also stated that some of the forms were signed by strangers who purported to be his agents.

He alleged that results were manipulated in Karau Primary School, Embu Urban Primary School, Munyori Primary School polling stations, among others; that he lost and the appellant gained votes in Githunguriri Tea Buying Centre polling station, Embu County Primary School, Embu County Primary School Stream 1, Gategi Primary School, Karau Primary School, Embu Municipal Stadium, St. Andrews Primary School, Mikimbi Full Gospel Church polling stations; that the effect of the errors in Forms 37A and 37B was that his votes increased by 817 and those of the appellant reduce by 615 votes, narrowing the margin between them to 168 votes; that if the votes recorded by his agents were taken into account in Forms 37A he would have been ahead of the appellant by 569 votes; that in the following polling stations Forms 37A were altered; Embu County Primary School, Kirimari Boys Secondary School, Minai Coffee Factory, Muvandori Primary School, Ndatu Catholic Church grounds, Gichago Coffee Factory, Gikirima Coffee Factory, Kathugu Primary School, and St Michael's Primary School.

Kenrodgers Munene Njiru, Justa Wawira Mwaniki and Catherine Nyaga, agents of the 1st respondent, were unanimous in their testimony that the voting and counting went on well and that at the end of counting, save for Catherine Nyaga, they signed Forms 37A for their respective polling stations, confirming that the results were indeed correct. Although Selesia Muthua, the 1st respondent's agent at at Karau Primary School did not sign Form 37A, he was satisfied with the voting. He noted however that 512 persons voted for the other five seats, but only 504 voted for Governor in his polling station.

At Mwenendega Primary School polling station stream 1, Joseph Njiru Munene noted that the appellant had 3 votes more in Form 37A than what had been announced; and that, according to his notebook 444 people voted, yet Form 37A indicated that number to be 455. Purity Mumbi Guthiga was the 1st respondent's agent at Kagaari primary School polling station stream 2. According to her the results in the form she signed tallied with the notes she took at the declaration of results, but the one filed in court had different results, where the petitioner's votes were reduced by 9. For his part, Robert Njue Kirembui who oversaw voting at Kianjokoma Primary School polling centre, the results reflected in the form tallied with his notes save for the fact that votes recorded in the form in favour of the 3rd respondent reflected 336 votes while in fact he got 186 votes "or thereabouts".

Before us, senior learned counsel for the 1st respondent submitted, in addition to the foregoing that the appeal was incompetent and the Court has no jurisdiction to entertain it for the notice of appeal was filed in the wrong court; that the notice of appeal was initially filed in the High Court registry on 22nd February, 2018 instead of this Court's registry. It is conceded, however that the same notice was filed in or

transmitted to our registry on 28th February, 2018, well within time. Because the answer to this issue is straight forward, we dispose of it right away by stating that in **Sammy Ndungu Waity V IEBC & 3 Others,** Election Petition Appeal No. 2 of 2018 this Court clarified that under Rule 6 of the Court's Election Petition Rules, the notice of appeal must be filed in this Court. In this appeal, the notice of appeal, though initially filed in the High Court, it was shortly thereafter also filed in or transmitted to the Court of Appeal registry within the time set for the filing of a notice of appeal. For that reason, we are of the view that nothing really turns on that complaint. See also **Owino Paul Ongili Babu V Francis Wambugu Mureithi & 2 Others,** Election Petition Appeal No. 18 of 2018.

The combined effect of the 2nd to the 4th respondents' case was that, like the 1st respondent and his witnesses, polling was free of violence, intimidation or voter bribery. They denied that the results in the forms were altered and maintained that there was no evidence that the total votes cast exceeded the total registered votes for Manyatta and Runyenjes Constituencies. They insisted that as against the registered voters, less people voted.

They maintained that errors, if any, in the transposition of results from Forms 37A to Forms 37B, were minimal, clerical and could not affect the results declared; that if there was a variance in the results between those of Governor and Woman Representative, they could not be to the extent alleged by the 1st respondent; and that in any case the variance could be explained; that the minor errors noted might have been occasioned by fatigue on the part of the election officials.

The only errors conceded were detected in Runyenjes Constituency, Ugweri polling station where the appellant benefited from 8 votes which he did not deserve. At Gategi Primary School polling station stream 1, in Mbeere South constituency, the appellant was awarded an extra 400 votes in error. But his scores in Marimari Primary School polling station were, mistakenly not recorded. The 1st respondent's votes at Munyori Primary School polling station were understated by 32 votes while in Kamutwanjiru Primary School polling centre, his votes were overstated by 9 votes. These anomalies, the 2nd to 4th respondents maintained, were not enough to alter the overall results.

At the end of the oral hearing, the petitioner filed an application for scrutiny and recount of the ballots in several specified polling stations in three of the four constituencies in Embu County, Mbeere South, Manyatta and Runyenjes constituencies. The Judge, in granting the request for re-tallying of forms 37A, 37B and 37C in respect of specific polling stations, directed that the exercise be undertaken by the Deputy Registrar. Upon concluding the exercise the Deputy Registrar filed a report as directed.

Upon considering the report and the entire evidence presented before him, the learned Judge noted that, on the basis of Forms 37A, the appellant was ahead of the 1st respondent as follows;

> Martin Nyaga Wambora - 97,659
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> Lenny Maxwell Kivuti - 97,141, a difference of 518 votes,
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> On the other hand the totals from the recount and re-tally of Forms 37B and 37C were-
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> Martin Nyaga Wambora - 97,662
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> Lenny Maxwell Kivuti - 97,109, constituting a difference of 553 votes.

In either scenario, the learned Judge concluded on this point that the appellant was still ahead of the 1st respondent. He stressed that the purpose of scrutiny, re-tallying and recount was to ascertain the number of votes garnered by each of the candidates; and that from that exercise, the duly elected candidate was the appellant.

Citing the decisions in **Charles C. Sande V. Kenya Co-operative Creameries Limited,** LLR 314 (CA) **Nairobi City Council V. Thabiti Enterprises Ltd** (1995-98) (EA) 231 and **David Sironga ole Tukai V. Francis arap Muge & 2 Others** [2014] eKLR, the learned Judge warned himself of the need to confine his consideration of the petition to the pleadings and evidence before him. Guided by the above authorities, the Judge agreed with the submission that the issue of counterfoils not being sealed in the ballot box was not pleaded in the petition; that the appellant did not have opportunity to address it during the trial; and that raising it at that stage amounted to an ambush.

Having made what we consider to be the correct decision, the learned Judge proceeded to distinguish those principles on the basis that election proceedings are *sui generis;* and that, though *"they are civil by nature, they are subject to their unique procedures".* He further observed that the legal position whether unpleaded matter which is subsequently revealed through scrutiny could be used to nullify an election was unclear from the recent jurisprudence. In his opinion, there are different viewpoints on this question. He identified **Peter Gichuki King'ara V Independent Electoral and Boundaries Commission & 2 others,** [2014] e KLR. **Gatirau Peter Munya V. Dickson Mwenda Kithinji & 2 others,** S. C. Petition No. 2B of 2014 and the S.C. and **Zacharia Okoth Obado V Edward Akong'o Oyugi & 2 others,** [2014] eKLR as some of the decisions expressing varied positions. The learned Judge himself appeared persuaded by the decision of the High Court in **Musikari Nazi Kombo V Moses Masika Wetangula & 2 others** (2013) eKLR, which was ultimately upheld by the Supreme Court in **Moses Masika Wetangula V. Musikari Nazi Kombo & 2 others** [2015] eKLR to the effect that, in the wider interests of electoral justice, the court cannot condone

an **"illegality in the election process, and would therefore investigate any alleged breaches of the law, even where these were not in the pleadings but arose in the course of the trial."**

Applying that proposition to the facts before him, the Judge maintained that, as an election court he could **"look at the material that emerged from a scrutiny or recount and which is unpleaded and make a decision one way or the other with respect to the same. A court is not precluded from studying the materials merely because the same was not pleaded".**

Turning to the 1st respondent's written submissions and the hand-written notes (not the report) of the Deputy Registrar of partial scrutiny, the Judge identified four (4) instances of non-compliance with the law relating to election and irregularities in the election that emerged from the scrutiny exercise and gleaned from the hand-written notes. They were: failure to put and seal in the ballot boxes all the ballot papers, whether valid or rejected with the result that 566 ballots in 184 polling stations were unaccounted for; counterfoils of used ballot papers were not in the ballot boxes, resulting in uncertainty of ballot papers in 11 polling stations; absence of Form 37A in the ballot boxes in 12 polling stations; and 111 ballot papers were found in the ballot boxes during recount which were not issued out of the ballot booklets for the relevant polling stations as they could not be traced to the counterfoils of used ballot papers.

To answer the all important question, whether the election before him was conducted substantially in accordance with the Constitution and the relevant electoral law, the Judge came to this conclusion;

> **"His petition was grounded solely on matters around the counting and declaration of results. The 3rd respondent did not raise any issues at all regarding the entire electoral process, from the campaigns to the declaration of results. I can in the circumstances conclude that the first phase of the election, the campaigns and the voting processes, was substantially conducted in accordance with the Constitution and the electoral law. It cannot be said that first phase of the election was conducted so badly that there was really no election at all. However, it has emerged from the material generated by the scrutiny that there were irregularities or non-compliance with the law on elections. The question then is whether these irregularities or errors or non-compliance with the law should invalidate the election the subject of these proceedings……. The irregularities identified relate to material that ought to have been found in the ballot boxes during recount.....The record of the forms used by the**
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> **Deputy Registrar during the recount reveal that in 11 polling stations the counterfoils of the used ballot papers are missing……It cannot be ascertained therefore how many ballot papers were issued to electors and used, and therefore it would mean that the results cannot be ascertained and verified….. the handwritten record of the forms that the**
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> **Deputy Registrar prepared for the scrutiny discloses that in 12 polling stations there were no Forms 37A in the ballot boxes, and in 12 other polling stations copies of the Forms 37A found in the boxes were totally illegible. Form 37A is a critical document for the purpose of collation, tallying and declaration of results. Without the form, or even where the same has been rendered useless by illegibility, there cannot be any results to declare, as it is, it is this document which authenticates the results. This would effectively mean that the results of the election in the 26 polling stations have not been authenticated and validated…….The total excess ballot papers cast amounted to 111. This is an irregularity that seriously undermines the electoral process as it suggests that these materials were introduced into the ballot boxes unprocedurally..... The excess votes are not authentic and should not be in the system. Such ballots could only get in through an illegal process, and an outcome which is arrived at with such votes being taken into account cannot be said to be fair or accurate or authentic or verifiable".** (our emphasis).

With that, the learned Judge came to the ultimate conclusion that the election of the Governor, Embu County;

> **"…..was substantially conducted according to the law, save for the irregularities noted during the recount. ….. that the irregularities or errors or non-compliance with the law during the collating, counting and tallying of votes in the gubernatorial election held for Embu County on 8th August 2018 undermined the electoral process fundamentally and produced a result that cannot be said to be accountable, verifiable or accurate".** (Our emphasis).

While the report of the Deputy Registrar showed that the difference between the votes garnered by the appellant and the 1st respondent was between 700 and 800 votes in favour of the former, and whereas the 1st respondent's own estimation was that the margin was in the region of 500 votes, the learned Judge for himself estimated the ballots affected by the missing counterfoils to be **"about 4,000"** votes, those relating to missing or illegible Forms 37A were **"in excess of 10,000"** votes and the excess votes amount to 111. In the learned Judge's estimation, he stated, "**looking at all these figures globally, there is no doubt that the irregularities would affect the final**

results of the election".

With that, the petition was allowed, leading to the nullification of the results of the Embu County gubernatorial election with costs.

The appellant has challenged that determination on 23 grounds that have been condensed in the written submissions and argued in seven clusters.

In the first place, the appellant submitted that the learned Judge erred in law in failing to refer to the Deputy Registrar's report, which formed part of the record pursuant to an order of 18th January 2018, and instead used documents purported to be handwritten copies of forms allegedly used by the Deputy Registrar which were annexed to the 1st respondent's List of Authorities and therefore not forming part of the court record; that despite the 1st respondent's prayer for the examination of the packets of counterfoils being denied, the learned Judge made significant findings on the alleged irregularities on the missing counterfoils; that he did so purely on the basis of a document he baptized: "*The Handwritten notes* of the Deputy Registrar".

Secondly, the appellant complains that the learned Judge erred in sanctioning the unlawful execution by the 1st respondent of *ex-parte* orders of Muchemi, J. of 28th and 31st August, 2017; that the abuse of the *ex parte* orders went to the root of the integrity of the electoral material and it was unconscionable to permit the 1st respondent to benefit from the abuse of those orders by tampering with the preservation of the material. By the two orders in question Muchemi, J.in chambers ordered that, pending the hearing and determination of the application, an order do issue**;**

> **"....for the preservation and safekeeping of all the Kenya Integrated Electoral Systems Kits(KIEMS) .....and all the election materials used for all the polling stations and tallying centres with respect to the gubernatorial election for Embu County."**

She further ordered that;

> **"...the 1st and 2 nd respondent to allow the applicant to fix their own seals on the ballot boxes named in orders 1 and 2 above and/or place/fix their own locking gadgets to the rooms or premises where the materials are kept. The seals and locking gadgets of be placed/fixed by the applicant will be in addition to those already placed/fixed by the 1st and 2nd respondents.... the County Commissioner, Embu under whose jurisdiction the electoral materials are kept by the 1st and 2nd respondents, do provide security for the fixing of seals and locks as ordered earlier in sub-counties named in this application. That the applicant, the 3rd and 4th respondent be represented in the exercise by lawyers and two agents in each sub-county storage premises. That the applicant, the 3rd and 4th respondent will not participate in the exercise personally and should keep off their supporters from the exercise and from the premises in question. The 2nd respondent to file a report on the exercise in court and on the compliance of the orders within seven (7) days".**

On the third cluster, it was contended that the learned Judge erred in holding that the evidence before him was sufficient to grant the order of scrutiny and recount; that there was no basis laid to warrant an order for scrutiny and recount except on the account of a narrow margin only; that by seeking to scrutinize 426 of the 710 polling stations, constituting 60% of the polling stations within Embu County, the 1st respondent was engaged in a fishing expedition. In the same vein, it was argued that the 1st respondent did not provide evidence to justify an order of re-tallying of all the Forms 37As, 37Bs and 37Cs.

The fourth ground is to the effect that the learned Judge erred in determining the petition on the basis of matters beyond the pleadings and evidence presented before him in the petition; beyond the scope of the petition and his own ruling on scrutiny and recount dated 18th January 2018; and against the scrutiny report.

We were urged on the fifth ground, to find that the learned Judge erred in his conclusion that there were irregularities that violated **Regulation 81 (2) of the Elections (General) Regulations, 2012** with regard to the sealing of counterfoils in the ballot boxes, and concerning the status of some Forms 37A despite evidence to the contrary; that in so holding, the learned Judge misconstrued, misinterpreted and misapplied **Regulation 81** aforesaid on the question of counterfoils; that he ought to have considered and applied **Regulation 73(4).**

We were asked to allow the appeal on the sixth ground because as far as the appellant was concerned, the learned Judge had no justification in holding that there were irregularities, errors or non-compliance with the law during collating, counting and tallying of votes that affected the results; that in putting the difference between the appellant's and the 1st respondent's votes at 700 and 800 in addition to 566 votes from what he termed as votes from non-compliance with regard to unaccounted ballot, 4,000 votes relating to missing counterfoils affecting ballots and over 10,000 votes unaccounted for in respect of the illegible or missing Form 34As, the learned Judge went beyond the scope of the 1st respondent's case as pleaded and presented.

On the seventh and final ground, it was contended that the learned Judge misapplied the principles of the standard and burden of proof; that the burden was on the 1st respondent to establish that the irregularities he identified in his petition and in evidence were enough to justify the invalidation of the election; that he was required to prove that the votes cast in the three constituencies, Manyatta, Runyenjes and Mbeere South, exceeded the number of the registered voters; that the allegation was rebutted by the entries in Forms 37Bs and 37Cs of the three constituencies and the testimonies of the 2nd and 3rd respondents' witnesses, to the effect that those who voted were less than the registered

voters.

Because the 2nd, 3rd and 4th respondents are on the same side of the divide with the appellant in their support of this appeal, we next consider their arguments.

The 2nd and 3rd respondent filed a cross appeal on 27th March, 2018. The grounds upon which it is premised are similar to those in the appellant's memorandum of appeal and can be summarized as follows: that the learned Judge enlarged the petition by considering new issues that were not pleaded in the petition and new evidence tendered during submissions; disregarded **section 82** of the Elections Act, and expanded the purpose and intent of the scrutiny; it had not been demonstrated or proven how the final statistical outcome of the elections had been compromised by irregularities; and the Judge wrongfully exercised his discretion in condemning the 3rd respondent to meet costs of the petition. They have asked the Court to set aside the judgment and decree of the High Court dated 22nd February, 2018, and the dismissal of the petition with costs to the 2nd and 3rd respondents.

Whereas the 4th respondent, by and large agrees with the foregoing submissions, he however is concerned with how the Judge treated the question of interference by the 1st respondent with electoral material following the orders of Muchemi, J. directing the preservation and safe keeping of the said electoral materials; that after holding that he would answer that question in the judgment, the learned Judge, in the judgment categorically stated that the issue was irrelevant; that in the end the question whether or not Muchemi, J. had, in the first place jurisdiction to entertain the application, not being a gazetted Judge for that election, was never determined. Further, it was submitted for the 4th respondent, that the learned Judge erred in allowing scrutiny and recount solely on account of a narrow margin of victory; that since the 1st respondent was convinced that in the event of a recount, he would emerge the winner of the gubernatorial election, it was erroneous for the Judge to go beyond this limit; and that clearly the application for scrutiny and recount was only a fishing expedition and the grant thereof was equally an error.

On the interpretation and application of **Regulation 81** of the Elections (General) Regulations 2012, it was argued that the Judge erred in holding that there were irregularities that fundamentally affected the election.

Responding to these submissions, the 1st respondent denied interfering with the electoral material and insisted, instead, that under **Regulation 93** of the Elections (General) Regulations 2012, the custodian of all the ballot boxes and material is the 3rd respondent; that indeed, the 3rd respondent confirmed that it had safe and secure custody of the materials under a 24 hour security; and that the orders issued by Muchemi, J. were carried out under the supervision and with the participation of the 3rd respondent's officials, who confirmed that neither the 1st respondent nor his agents interfered with the electoral materials.

On the question of scrutiny, the 1st respondent believed that he laid sufficient basis for the scrutiny of votes in all the 385 polling stations; and that considering that the appellant had garnered a paltry 985 votes more than what he himself got; he argued that the learned Judge properly exercised his discretion in granting an order of scrutiny.

The 1st respondent rejected the suggestion that the Judge went beyond the pleadings and evidence before him and explained that the Judge relied partially on the scrutiny report from the Deputy Registrar; that all the irregularities and illegalities which were unearthed during the scrutiny exercise and detailed in the Deputy Registrar's report were exhaustively pleaded in the petition; that the "handwritten notes" formed part of the Deputy Registrars' report and in any case the typed report was generated from the handwritten report. It was the 1st respondent's submission that he had demonstrated beyond reasonable doubt from the irregularities identified in the process, how the final statistical outcome was thereby affected; and that even from the scrutiny exercise, it was not known with certainty what the actual numbers were or the real vote margin. Accordingly, the discrepancies observed revealed the variance of the total votes cast for the position of Governor, Senator and Women Representative, hence the election was not verifiable, accountable, secure and transparent.

Noting that there are three schools of thought on how to deal with matters, which, though not pleaded, are disclosed in the process of scrutiny, the 1st respondent urged us to accept the school that postulates that an election court cannot turn a blind eye on serious electoral malpractices or irregularities exposed by scrutiny or recount merely because such malpractices or irregularities were not pleaded as was stated in **Musikari Nazi Kombo V Mose Masika Wetangula & 2 others,** Election Petition (Bungoma) No. 3 of 2013.

The 1st respondent urged that he had demonstrated that the counting and tallying process during the election was so badly conducted and managed by the 2nd and 3rd respondents that it failed to comply with the Constitution and other laws relating to elections. He reiterated in closing that in terms of **section 83** of the Elections Act, where an election is conducted in such a manner as demonstrably violates the principles of the Constitution and the law, such an election stands to be invalidated.

To begin with, we remind ourselves of the following basic principles in the determination of any election dispute. By the provisions of **Section 85A** of the Elections Act, this Court has the power to hear appeals from the High Court in an election petition concerning membership of the National Assembly, Senate or the office of county governor on "matters of law" only. What constitutes "Matters of law" has been enunciated with reference to **Section 85A** aforesaid by the Supreme Court in **Gatirau Peter Munya V. Dickson Mwenda Kithinji & 2 others** [2014] eKLR, to mean a question or an issue involving ;

> **"(a) the interpretation, or construction of a provision of the Constitution, an Act of Parliament, Subsidiary Legislation, or any legal doctrine, in an election petition in the High Court, concerning membership of the National**

Assembly, the Senate, or the office of County Governor;

(b) the application of a provision of the Constitution, an Act of Parliament, Subsidiary Legislation, or any legal doctrine, to a set of facts or evidence on record, by the trial Judge in an election petition in the High Court concerning membership of the National Assembly, the Senate, or the office of County Governor;

(c) the conclusions arrived at by the trial Judge in an election petition in the High Court concerning membership of the National Assembly, the Senate, or the office of County Governor, where the appellant claims that such conclusions were based on "no evidence", or that the conclusions were not supported by the established facts or evidence on record, or that the conclusions were "so perverse", or so illegal, that no reasonable tribunal would arrive at the same; it is not enough for the appellant to contend that the trial Judge would probably have arrived at a different conclusion on the basis of the evidence".

We entertain no doubt that the seven grounds argued before us and which we have set out in the preceding paragraphs concern matters of law and each can be subsumed in any of the above strictures.

Secondly, the nullification test laid down by **Section 83** of the Elections Act, makes a rebuttable presumption that the results declared by the electoral body are correct unless the contrary is shown. To invalidate an election therefore, is a weighty prospect and when necessary, it requires compelling and credible evidence. **Section 83** states;

> **"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."**

Section 83 is the legal threshold; the fulcrum upon which the decision to nullify an election rests. That threshold must be measured against the general electoral principles laid down in **Articles 81 and 86** of the Constitution, that, *inter alia*, elections must be free and fair, conducted by secret ballot; free from violence, intimidation, improper influence or corruption, transparent and administered in an impartial, neutral, efficient, accurate and accountable manner; that whatever voting method is used, the system must be simple, accurate, verifiable, secure, accountable and transparent; that the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station; that the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and that there be in place appropriate structures and mechanisms to eliminate electoral malpractice, including the safekeeping of election materials.

Section 83 further acknowledges that elections are conducted by fallible human beings, and errors are likely to occur in the process; consequently, it stipulates in effect that not all failures to comply with any written law relating to an election will lead automatically to nullification of the result. So long as it **appears** that the election was conducted in accordance with the principles laid down in the Constitution and written law or that any non-compliance with the Constitution and law did not affect the result of the election, the court will not nullify the results.

The third principle that must naturally follow from the foregoing is that a party alleging that there was non-compliance with the Constitution and the law or that that the non-compliance affected the result of the election bears the burden to prove the claim in terms of **sections 107**, **108** and **109** of the Evidence Act. In election matters, it is established on both the burden and the standard of proof by the Supreme Court in **Raila Odinga & Others V. The Independent Electoral And Boundaries Commission & Others**, S. C. Election Petition No. 5 of 2013 and **Raila Odinga & Another V. Independent Electoral Boundaries Commission & Others**, S. C. Presidential Petition No. 1 of 2017, respectively that**;**

> **"[195] There is, apparently, a common thread in…comparative jurisprudence on burden of proof in election cases…that an electoral cause is established much in the same way as a civil cause: the legal burden rests on the petitioner….**
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> **[196] This emerges from a long-standing common law approach in respect of alleged irregularity in the acts of public bodies. *Omnia praesumuntur rite et solemniter esse acta:* all acts are presumed to have been done rightly and regularly. So, the petitioner must set out by raising firm and credible evidence of the public authority's departures from the prescriptions of the law**." See **Raila Odinga** (2013).

In **Raila Odinga** (2017) that Court developed this principle further stating that;

> **"[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.**
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> **[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 compliance with the law..... [148] In many other jurisdictions including ours, where no allegations of a criminal or quasi-criminal nature are made in an election petition, an 'intermediate standard of proof', one beyond the ordinary civil litigation standard of proof on a 'balance of probabilities', but below the criminal standard of 'beyond reasonable doubt', is applied. In such cases, this Court stated in the 2013 Raila Odinga case that "[t]he threshold of proof should, in principle, be above the balance of probability, though not as high as beyond-reasonable-doubt…."

The final principle relevant to this appeal is that our legal system being adversarial, it is left to each party to formulate and present his case in his own way, subject only to the basic rules of pleadings. Once framed, the party, for the sake of certainty and finality, is bound by those pleadings and cannot be allowed to raise a different or fresh case without due amendment. Without such amendments, the Judge, as an independent and impartial adjudicator, is similarly bound by what the party pleads and places before him. See: **Independent Electoral and Boundaries Commission & another V Stephen Mutinda Mule & 3 Others** [2014] eKLR. We shall of course consider the so-called different schools of thought regarding this principle later in this judgment.

Our starting point for now is a summary of the 1st respondent's case as pleaded and presented. That case expressed in the Petition before the trial Court was that:

i. the 3rd respondent inflated record of results in favour of the appellant in particular polling stations thereby occasioning higher and exaggerated results for the latter,

ii. the results were swapped to favour the appellant and disadvantage the 1st respondent in specified polling stations,

iii. the results were doctored in named polling stations,

iv. forms 37A were amended at the tallying centres to reflect fraudulent and fictitious figures in favour of the appellant some of which were recorded in video cameras,

v. the 1st respondent's agents were intimidated by the presiding officers,

vi. there was widespread use, acceptance and submission of forms 37A and 37B that were not signed by agents,

vii. the 3rd respondent allowed 964 votes in excess of the 700 legal limit for every polling station to be cast at Gategi Primary School Stream 1 polling station,

viii. the 1st respondent's agents were denied the opportunity to participate in vote counting and tallying at various polling stations and tallying centres,

ix. forms 37A and 37B were not signed by all the candidates' agents,

x. the 2nd and 3rd respondents failed to display the results of the elections on the doors of the polling stations,

xi. the 2nd and 3rd respondents refused to address serious concerns and objections raised by the 1st respondent and his agents in regard to the conduct of the vote counting and tallying process, and in particular they refused to receive or acknowledge receipt of the applicant's written request to halt the process of declaring the results of the election until such grave concerns had been addressed,

xii. the declaration results when the number of registered voters constituencies, number of votes cast exceeded the in Manyatta and Runyenjes

xiii. Form 37C of Mbeere South Constituency had similar results from different polling stations for different candidates, casting aspersions as to the credibility of results and therefore raising "**the need for scrutiny and verification of the results in all such polling stations"**,

xiv. some Forms 37C and 37B for Runyenjes and Manyatta constituencies indicated that in many polling centres, total votes cast were the same across all the polling stations, in defiance of the common knowledge that it is not possible for all the polling stations to have the same number of voters **"and therefore the need for scrutiny and verification of the results in all such polling stations particularly in these two constituencies"**, and finally,

xv. the total number of votes cast in the other posts did not tally according to form 38C, 39C and 37C, which reflected the following results;

a. Woman Rep - 242,525

b. Senator - 251,564

c. Governor - 253,163

The 1st respondent was firm that the above acts of omissions and commissions were so grave that it was not possible to discern whether the results were a true, lawful and proper expression of the will of the voters in Embu County. He pleaded with the trial court:

> **"... to do no less than order scrutiny, tally and recount of votes cast and/or appropriately nullify and declare invalid the alleged declaration, on 8th August, 2017 of the 3rd respondent as Governor of Embu County.....that there was no proper tallying, count or totaling of the votes cast in the said election. In the circumstances there should be a scrutiny, recount, inspection and audit of the register of electors, used ballot papers and the counterfoils thereof, unused ballot papers, ballot boxes, returns, statutory documents, reports, Kenya integrated Election Management Systems machine and other election documents and materials."** (Our emphasis).

In this regard the 1st respondent listed several polling stations where he claimed there were widespread electoral malpractices.

We have highlighted the above passages because it is apparent to us, as it was obvious to the learned Judge, that the 1st respondent earnestly believed that the true outcome of the election lay in the scrutiny and recount of votes; that the outcome of his petition depended on the application for scrutiny and recount; and that through a recount, he would, no doubt emerge the winner. That was the heart of his pleadings and testimony.

He is recorded as telling the trial court as follows:

> "**I believe I won the Gubernatorial Elections held in Embu on … and I believe my victory was stolen.....**
>
> **I am 100% sure if the court allows the counting of my votes, the people of Embu will get the real truth of what happened.....the calculation would end up with Wambora**
>
> **getting 96 717 votes and my total would be 97 286.....I would pray to court to order a recount so that we can get to know the genuine votes cast. My main prayer is scrutiny to make sure the state of the electoral materials, we count and get the actual totals** (sic). **That is what I ask for.....All my evidence is aimed at seeking recount to get to the truth of the votes cast and the correct results.....the votes must have been doctored.**
>
> **We would like a recount to establish the truth.....**
>
> **I had no issues with the voting process. The system employed by IEBC with regard to voting was okey with me. I have issues with the total votes announced. I have no issue with the votes in the ballot box....**
>
> **.....The presiding officer oversees the whole process. He works for long hours. It is normal for them to get exhausted. When mistakes are made, I am here because such mistakes. If they make mistakes the same ought to be corrected.....There was no violence at all. Everyone entitled to vote voted, my only problem is counting and tallying."**

It could not have been clearer, coming, as they say, from the horse's mouth. And we could go on and on with many instances where the 1st respondent pleaded, indeed begged for recount and scrutiny.

Precisely because of his resolve, the 1st respondent, at the conclusion of the trial, took out two motions on notice principally for this objective; to prove that it was him and not the appellant who won the election. In granting him his wish with regard to the first application, the learned Judge ordered for partial scrutiny of votes **"limited to recount and ascertainment of the number of votes each candidate garnered"** in the specified polling stations in Mbeere South, Manyatta and Runyenjes Constituencies; that thereafter, there be a partial scrutiny of Forms 37B for Mbeere South, Manyatta and Runyenjes Constituencies as against Forms 37A limited to the named polling stations for purposes of re-tallying; that the exercise would be undertaken under the supervision of the Deputy Registrar of the court; and that the Deputy Registrar would at the conclusion of the exercise, "**prepare and place on record a detailed report of his findings, which report shall form part of the proceedings of the court".**

The second application sought the extension of the scrutiny exercise limited to re-tallying to include **all Forms 37A and 37B** in respect of **all the polling stations** within Embu County and in the alternative, that the earlier ruling on scrutiny be reviewed to include a **scrutiny of**

Forms 37B for all the four (4) constituencies as against all Forms 37A for all the 710 polling stations.

This was going to be a massive exercise cutting across the entire county. The court, in exercise of its discretionary powers, and in granting the alternative prayer, reviewed its earlier decision and ordered the inclusion of more polling stations in Manyatta constituency for a recount of votes. In the result, the Deputy Registrar was further directed to carry out a partial scrutiny **of Forms 37A for all polling stations in Mbeere South, Mbeere North, Manyatta and Runyenjes Constituencies** where a recount had not been ordered limited to tallying the figures in those forms with those in Forms 37B and 37C.

The appellant and the 2nd and 3rd respondents have complained before us that the learned Judge erred in granting the two applications because, in so doing, he extended the scope of the petition and also because no basis was laid for the grant of the orders of scrutiny and recount.

Whether or not to grant an application for scrutiny is a question that involves the exercise of judicial discretion. Once exercised, this Court will not easily overturn the decision unless the order made or denied resulted to an injustice, or exercise or denied without basis. See **Gatirau Peter Munya** (supra).

Section 82 of the Elections Act grants an election court the power to order for a scrutiny of votes, either on its own motion or on application by any party to the petition during the hearing of an election petition. The scrutiny of votes will be ordered to be carried out in such manner as the election court may determine.

The learned Judge was alive to this power and properly considered the conditions to be met before an order of scrutiny can be made. He supported his determination of this point with decided cases and the law, from which he was satisfied that there were sufficient grounds to warrant the issuance of the order for scrutiny in both rulings of 18th and 24th, January, 2018, respectively. The learned

Judge, we find, judicially exercised his discretionary powers in the two rulings of 18th and 24th January, 2018, respectively. That ground must fail.

The Deputy Registrar filed a report pursuant to the orders directing him to supervise the exercise. Because of its importance and we reproduce the Deputy Registrar's report herebelow;

> **"In the scrutiny of forms 37A, B and C we observed the following discrepancies;**
>
> **- In Munyori polling station code (072) number stream one of one form 37A shows Kithinji Kiragu garnered 21 votes while forms 37B and C shows he garnered 8 votes.**
>
> **Forms 37A shows Lenny Kivuti garnered 485 vote while forms 37B and C shows he garnered 453 votes. Leonard Muriuki is shown to have garnered 2 votes in form 37A while forms 37B and C show him to have garnered 1 vote.**
>
> **Form 37A shows that Cyrus Njiru obtained 2 votes while forms 37 B and C show he scored 4 votes. Form 37A show that Peter Njagi garnered one vote while forms 37B and C show him to have scored 0 votes.**
>
> **Form 37A show Martin Wambora to have obtained 8 votes while forms 37B and C show that he actually obtained 11 votes.**
>
> **- The other observation worthy noticing is that the order issued on 18th January, 2018, required us to scrutinize votes in Gakundu Coffee Factory Streams 1 and 2 (code -003), however the correct code for this polling station is 002 and this polling station has one stream. Code 003 belongs to Gakundu Coffee Factory Offices. Upon perusal of the application filed by the petitioner for scrutiny, we realized that the petitioner had also sought scrutiny of the two polling stations."**

From this report there was evidence that the results declared did not change in terms of which party had more votes.

The learned Judge being satisfied that with that report, the prayers A (a re-tally of the votes) and B (for scrutiny and recount) were spent, leaving prayers C (for a declaration that the appellant and the 4th respondent were not validly elected), D, that the election of the appellant as the Governor of Embu be determined and declared null and void), E. (a declaration that the 1st respondent was validly elected as the Embu County Governor) and issues of costs.

The Judge was of the correct view that the first two were disposed of by the two rulings allowing for scrutiny. He thus determined the remaining prayers;

> **"30. The first two prayers in the petition are spent, that is those relating to re-tally, scrutiny and recount. They were disposed of in the two rulings that the court delivered on 18th and 24th January 2018, when it directed the Deputy Registrar to carry out a partial scrutiny limited to recount and re-tally. The Deputy Registrar carried out the exercise of partial scrutiny and has filed a report, from which it emerges that the 3rd respondent was the overall winner of the gubernatorial contest in Embu County. So those two prayers are not available for consideration. I am left with the remaining prayers – the nullification of the election of the 3rd and 4th respondents and the declaration of the petitioner as the person validly elected as Governor.**

> **31. I have read and re-read the remainder of the prayers in the petition, in particular prayers C, D and E, and I am persuaded that they are consequential to prayers A and B of the petition. I have carefully perused through the averments in the body of the petition and juxtaposed them against the prayers, and it would appear to me that the petitioner's case, as laid out in the pleadings and the prayers, was geared to obtaining a recount of the ballots cast in the last election on the proposition that should there be a recount he would emerge the winner. The tenor of his pleadings is that something went wrong with the counting process resulting in the 3rd respondent being returned as victor. My reading of the averments is that upon a recount being done then all the issues raised in the petition would be answered. The principal complaints by the petitioner are detailed in paragraph 101 of the petitioner relating to inflated, swapped and doctored results, among others. His oral testimony too pointed to conduct of a recount as he was confident that he would emerge the winner. A recount showing him as the leading candidate would then lead automatically to a nullification of the results that returned the 3rd and 4th respondents as victors and a declaration, founded on section 80(4)(a) of the Elections Act, that the petitioner was the candidate who had won and who ought to have been issued with a certificate to that effect"**. (Our emphasis).

Clearly, with the result of the scrutiny contained in the Deputy Registrar's report, the 1st respondent's case collapsed. The appellant, who was the 3rd respondent in the court below, had more votes than the 1st respondent. The latter had, through and through, pleaded that the truth was in the recount and scrutiny of the votes. Both the 1st respondent and the learned Judge himself were satisfied with the report by the Deputy Registrar, save for the argument by the 1st respondent, that totals in the Deputy Registrar's report were not correct; that the votes he garnered in Kiritiri Primary School stream 1 and Kagumoini Dispensary – Don Bosco stream 2 were understated; that according to his arithmetic the results of the partial scrutiny should have given the appellant a win by a margin of 520 votes or thereabout. But the learned Judge did not agree with the complaint stating that **"either way the 3rd respondent would still be ahead".**

No other question was raised to challenge the integrity of the exercise. Indeed, the Judge had no difficulty in arriving at the conclusion that, with the Deputy Registrar's report, the remaining prayers C, D and E in the petition had effectively been disposed of with the result that the appellant was the winner of the contest. He said the following as if to conclude ultimately;

> **"That would be the natural consequence of the prayers as set out in the petition. The scrutiny that was ordered in the rulings delivered on 18th and 24th January 2018 was partial, limited to recount of the ballots cast in specific polling stations with a view to ascertain the number of votes garnered by each of the candidates who participated in the election. The re-tallying was to a similar vein. Since that was done and the 3rd respondent emerged as the winner, it would appear that prayers C, D and E of the petition have been effectively disposed of".**
>
> Undoubtedly, that ought to have brought the matter to an end.

However, appearing not to be satisfied with this outcome and appreciating the fact that he was about to venture into new matters outside the pleadings and evidence, the learned Judge sought to justify this departure. He turned to the handwritten notes from which he picked what he believed there were irregularities. He justified this course by relying on the decision in **Moses Masika Wetangula V. Musikari Nazi Kombo & 2 others** [2015] eKLR that a court cannot close its eyes to irregularities that emerge during scrutiny. He of course was alive to the fact that the alleged irregularities were not pleaded; and even that there are numerous binding authorities that have stood the test of time, all to the effect that the only way to raise issues in a matter is through the pleadings, such as **Charles C. Sande V. Kenya Cooperative Creameries Limited** Mombasa Civil Appeal No. 154 of 1992, **Nairobi City Council V Thabiti Enterprises Ltd (EA)** 1995-98) 231, and a more recent **David Sironga ole Tukai V Francis arap Muge & 2 others** (2014) eKLR, on the subject. The Judge, however sought to distinguish them, saying they related to civil proceedings while the matter before him was *sui generis,* where the court would have the liberty to consider new and unpleaded issue; that though the appellant did not have opportunity to address the new matters during the trial; and even though that may amount to an ambush, it was proper, nonetheless, to determine the new matters at that stage.

The general principle is that scrutiny and recount are not designed to discover new evidence or stumble upon matters that were not contemplated or pleaded or raised during the trial. In **Peter Gichuki King'ara V Independent Electoral and Boundaries Commission & 2 others**, (supra) the Supreme Court stressed that –

> **"The law on scrutiny and recount … suggests that scrutiny and recount … is not a gambling exercise that sets the court to rummaging through the ballot boxes to see whether any scintilla of evidence of electoral malpractice or irregularity can be found. If the petition is based on any particular electoral malpractice or irregularity that would warrant scrutiny or recount of votes, the malpractice or irregularity must be pleaded and the evidence of such malpractice or irregularity laid out or established prior to an order for scrutiny or recount; the court must be satisfied that, on the basis of the evidence before it, it is necessary to call for a scrutiny and recount, if not for anything else, to confirm the truth of the particular evidence."**

See also another Supreme Court case of **Zacharia Okoth Obado V Edward Akong'o Oyugi & 2 others** (supra).

But the Judge relied on the High Court case of **Musikari Nazi Kombo V. Moses Masika Wetangula & 2 others** (2013) eKLR, which was upheld in the Supreme Court decision in **Moses Masika Wetangula V. Musikari Nazi Kombo** & **2 others** [2015] eKLR where their Lordships stated that:

> **"[137] Section 83 of the Elections Act empowers the election Court to declare an election to be valid or invalid, following an election petition, on the basis of certain conditions. The Court cannot appear to condone illegality in the election process, and would therefore investigate any alleged breaches of the law, even where these were not in the pleadings but arose in the course of the trial."**

On two fronts, this authority does not overturn the earlier decisions cited above**, Peter Gichuki King'ara** (supra) and **Zacharia Okoth Obado** (supra). First, in **Moses Masika Wetangula** (supra) the Court was dealing with a situation of an illegality as opposed to an irregularity. It was a case where election offences of treating of voters and bribery contrary to **sections 62** and **64**, respectively, of the Elections Act had been alleged. The election court, by the provisions of **Section 87(1)** of the Elections Act, was required to investigate the alleged offence before making a report to the Director of Public Prosecutions. Secondly, the case made it clear that the court could address such questions, though not pleaded, so long as they arose in the course of the trial. The other distinguishing factor in that case is that the illegality was infact pleaded, evidence presented and tried as expressed by the election court (Gikonyo, J.) in this passage in the judgment;

> **"In the instant case, however, the malpractices have been properly pleaded and laid bare before the court. What is remaining is to establish;**
>
> > **1) whether the malpractice was as a result of the scheme allegedly contrived by the 1st Respondent to subvert the electoral process; and**
> >
> > **2) whether the malpractice impeached the integrity of the electoral process, thus, affecting the validity of the results?"**

The Supreme Court, we believe, has settled this question without doubt in **Zacharia Okoth Obado**, (supra) which bears some similarity to the instant appeal. In that case the Court delivered this position, reproduced *in extenso* because of its importance;

> **"[150] The appellate Court in its Judgment relied on the Deputy Registrar's report, and made observations on matters that had not been indicated as "disputed," in the trial Court. A reading of the record shows that the Deputy Registrar, after re-tally, found that the winning margin of the returned candidate, had increased. Such is a factor which the Court of Appeal ought to have taken into account, rather than just highlighting the irregularities, oblivious to**

their lack of effect upon the declared results – which lack of effect the Deputy Registrar's report had illuminated. Besides, the trial Judge is not to be faulted for upholding the appellant's right to fair trial, by disallowing surprise "new pleadings" by 1st respondent at the stage of final submissions.

[151] In our opinion, the trial Judge rightly refused to consider any issues that had not been canvassed fairly, such as the introduction of new matters which had not been disputed by the petitioner.....It is worthy of note that the trial Judge, after deciding as he did, considered the effect of the irregularities on the election results, and found that these irregularities did not affect the declared result, the declared winner was still in the lead, and the candidate falling in the second position (1st respondent herein) retained that position.

[152]..... The process of scrutiny, recount or re-tally is not to be used as a fishing expedition, enabling a petitioner to secure evidence in support of impromptu claims. This Court, in the Peter Munya Case, cited with approval the decision of Odunga J. in Gideon Mwangangi Wambua & Another v. IEBC & 2 Others, Mombasa Election Petition No. 4 of 2013 (consolidated with Election Petition Cause No. 9 of 2013), bearing the following passage (paragraph 26):

> ***'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. … Where a party does not sufficiently plead his facts with the necessary particulars but hinges his case merely on the documents filed pursuant to Rule 21 of the Rules, the Court would be justified in forming the view that the petitioner is engaging in a fishing expedition or seeking to expand his petition outside the four corners of the petition.'***

[153] We hold it to be improper that, when re-tally is conducted, a party should take this as an opportunity to introduce new spheres of disputes, which had not been signalled in his or her original pleadings. It is vital, in election disputes, that the respondent should know the case that faces him or her. Hence the petitioner ought to have indicated in his or her pleadings the disputed matters, with clarity and specificity, as a basis for being allowed to urge that there were irregularities in those spheres, after re-tally has been conducted. However, where a trial Court exercises its discretion and, suo motu, orders a scrutiny, recount or re-tally, revealing irregularities other than those that were pleaded, then there is a proper basis for any party to pose questions upon such new findings; and the Court then will make findings on the effect of those irregularities on the declared results". (Our emphasis).

We have highlighted the last sentence because that is where the distinction lies. That it is only in situations where the court in exercise of its discretion orders, *suo motu,* a scrutiny, recount or re-tally, and irregularities other than those that were pleaded are revealed, the new irregularities may be relied on in the final determination of the petition if parties are availed opportunity to pose questions upon such new findings. But if a party petitions an election court alleging non-compliance with any written law relating to that election or that the nature of non-compliance was such that the result of the election was affected, then the party is bound by those averments because the burden remains upon that party to bring evidence in proof. Thereafter, the petition must be decided on the issues on the record; and if it is desired to raise other issues, they may be placed on the record only by amendment of the petition.

It was not open to the learned Judge to rummage through "*handwritten notes"* and the 1st respondent's submissions to find something to use to nullify the appellant's election when the order for scrutiny was unambiguous. The Deputy Registrar was directed, in the relevant part of that order to **"prepare and place on record a detailed report of his findings"**. That report, the Judge further directed, was to **"form part of the proceedings of the court".** In his own ruling of 13th February, 2018 the learned Judge was more than clear that;

> **"The parties are to submit <u>on the basis of the Report of</u> <u>the Deputy Registrar;</u> and shall limit their submissions to <u>points of law and the facts set out in the report.</u> The opportunity to file written submissions should only be limited to the setting out of the legal arguments of the parties <u>and not to introduce evidential material.</u> I shall accordingly order that the Petitioners written submissions be limited to arguments and legal authorities. Any other document of evidential nature be excluded. <u>Counsel to submit purely on the basis of</u> <u>the report of the Deputy Registrar as that is what is part of the proceedings."</u>** (Emphasis supplied)

The Supreme Court in **<u>Evans Odhiambo Kidero & 4 Others V. Ferdinand Ndungu Waititu & 4 Others</u>** [2014] eKLR stressed the importance of the scrutiny report; that scrutiny is a necessary tool in assessing the credibility of the election and the court must take the scrutiny report into consideration in arriving at its determination; that, if there are questions regarding the report, parties must be allowed to interrogate it; that if there are newly discovered irregularities, the petitioner must identify them and show how those irregularities affected the results; and that it is only then that the court will determine the petition. Again, in the instant dispute, the 1st respondent identified for himself what he perceived to be irregularities. The trial court considered it and found it had no substance and rejected it.

We can do no better in this regard than to paraphrase **Lord Denning** in **<u>Jones V. National Coal Board</u>** **[**1957]2 QB 55 - that in the system of trial, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of the parties or society at large; that justice is best done by a judge who holds the balance between the contending parties without himself taking part in their disputations; and that the court's determination must always be based, not on speculations but facts and the law.

Having found that the learned Judge committed an error of law in delving into matters not pleaded or argued before him, we now turn to consider the merits of the grounds upon which the learned Judge invalidated the appellant's election. Basing his decision on the handwritten notes of the Deputy Registrar, the learned Judge identified the following four (4) instances of non-compliance with the law;

> a) that the 2nd respondent failed to put and seal in the ballot boxes all the ballot papers used in the election, contrary to Regulation 81; that 566 ballots in 184 polling stations were unaccounted for based on the fact that the ballots actually cast are less than the total number of counterfoils of used ballot papers; and that it was difficult to tell whether they were spoilt or rejected or valid, and if valid in whose favour they were cast.
>
> b) that the 2nd respondent omitted to put and seal counterfoils of used ballot papers in the ballot boxes contrary to Regulation 81(1); that in 11 polling stations the counterfoils of the used ballot papers were not found in the respective ballot boxes; that it could not be ascertained therefore how many ballot papers were issued to electors and used, hence the results could not be ascertained and verified; and that the accuracy of the contents in Forms 37A could not be ascertained without the counterfoils of the ballots used in those polling stations.
>
> c) that in 12 polling stations there were no Forms 37A in the ballot boxes, and in 12 other polling stations copies of the Forms 37A found in the boxes were totally illegible thereby the results in 26 polling stations could not be authenticated and validated.
>
> d) that there were ballot papers found in 12 ballot boxes during recount which were not issued out of the ballot booklets for the relevant polling stations for they could not be traced to the counterfoils of used ballot papers found in the ballot boxes. The total excess ballot papers cast amounted to 111; that this constituted an irregularity that seriously undermined the electoral process as it suggested that these materials were introduced into the ballot boxes unprocedurally and intended to defeat or subvert and distort the will of the people.

For the above four (4) factors, the Judge was persuaded that, by their nature, those irregularities affected the results. He concluded, rather strangely thus;

> **"I have already made a finding that the election herein was substantially conducted according to the law, save for the irregularities noted during the recount. What I should determine is whether the non-compliance with the law or the errors noted affected the final results. According to the report of the Deputy Registrar, the final tally of the results shows that the difference between the votes garnered by the petitioner and the 3rd respondent is between 700 and 800 votes. The petitioner claims that that tally was erroneous and according to his own tally the margin is a little narrower and should be in the region of 500 votes. Are the irregularities identified through the scrutiny likely to affect the result? I have noted that the non-compliance with regard to the unaccounted ballots affects ballots in the region of 566 votes, while that relating to missing counterfoils affects ballots in the region of 4000 votes, while those relating to missing or illegible Forms 37A are in excess of 10 000 votes. The excess votes amount to 111. Looking at all these figures globally there is no doubt that the irregularities would affect the final results of the election..... It has not been established that the 2nd, 3rd and 4th respondents were complicit in any way to the non-compliance and the irregularities identified, which appear to have been caused either by fatigue or incompetence on the part of the elections staff hired by the 1st respondent".** (Our emphasis).

The significance of the highlights in the above passage is three-fold. Under **section 83** of the Elections Act, no election can be declared to be void for failing to comply with any written law relating to that election so long as it is apparent to the court, it was nonetheless, conducted in accordance with the Constitution and law or if the court is satisfied that non-compliance did not affect the result of the election. Therefore, if the court finds, as the learned Judge did, that the election was conducted substantially in accordance with the principles of the Constitution and the relevant law, then, without qualification, such election is not to be invalidated only on the grounds of irregularities. That is the position posited by the Supreme Court in **Gatirau Peter Munya v. Dickson Mwenda Githinji and 2 Others** (2014) eKLR, where it explained that;

> **" ..… If it should be shown that an election was conducted substantially in accordance with the principles of the Constitution and the Election Act, then such election is not to be invalidated only on ground of irregularities. Where however, it is shown that the irregularities were of such magnitude that they affected the election result, then such an election stands to be invalidated. …Where an election is conducted in such a manner as demonstrably violates the principles of the Constitution and the law, such an election stands to be invalidated."**

In that same case, the Court underscored the fact that;

> **"....procedural or administrative irregularities and other errors occasioned by human imperfection, are not enough, by and of themselves, to vitiate an election."**

The other baffling question arising from the learned Judge's penultimate determination reproduced above is this; by exonerating the 2nd and 3rd respondent from blame for the non-compliance and irregularities identified by the Judge and in attributing them to fatigue or incompetence on the part of the staff of the 3rd respondent, how could he find that such administrative errors as enumerated in the four (4) grounds affected the outcome of the election in the absence of allegation of any fraud, corruption or illegal practices? It is accepted that in any election, it is inevitable that procedural and administrative mistakes will be made and that if elections can easily be annulled on the basis of administrative errors, public confidence in the finality and legitimacy of election results will be eroded. See: **Opitz C V. Wrzesnewskyj** (2012) 3 S.C.R 76 where the Canadian Court stated thus:

> **"…If elections can easily be annulled on the basis of administrative errors, public confidence in the finality and legitimacy of election results will be eroded. Only irregularities that affect the result of the election and thereby undermine the integrity of the electoral process are grounds for overturning an election."**

It will be recalled that an application was made in which the appellant in essence questioned the integrity

of electoral materials following the orders of Muchemi, J. for preservation. In determining that application, the Judge observed thus;

> **"The 3rd respondent..... argued that the electoral materials had been interfered with during the exercise that the petitioner undertook in execution of the orders that he had obtained in August 2017. Evidence was led on this aspect of the matter and it is an issue that I will have to determine in the final judgment".** (Our emphasis).

In the judgment, he did not address that question but went on to find that there were administrative irregularities which he could not attribute to the 2nd and 3rd respondents. He nonetheless, went ahead to nullify election on the very issues he had postponed and declared irrelevant, without assigning any reason for that conclusion. We believe that had the learned Judge determined the merit of the complaint raised by the appellant regarding interference, for which evidence was led, he would probably have ascertained whether or not there was indeed interference with the material. That would have explained the doubts he entertained regarding their integrity.He would have known how the orders issued, *ex parte* by Muchemi, J. were executed.

Regarding the four (4) grounds set out above, upon which the election was invalidated, we think there was no basis to say that failure to seal used ballot papers and counterfoils of used ballot papers in the ballot boxes; failure to locate some Forms 37A in the ballot boxes; the presence of ballot papers in 12 ballot boxes whose ballot booklets could not be located; and the alleged excess of 111 ballot papers, were irregularities of such magnitude that they seriously undermined and affected the election result. Conclusions made on the excess votes of 111, the vote difference between the appellant and the 1st respondent estimate by the learned Judge as "in the region of" 566, 700, 800, 4000, 10 000 votes were completely unsupported by any empirical proof and have no reference to any specific polling station. The 18 polling stations where the Judge found that the ballots cast exceeded the number of the ballots reflected in the counterfoils, and the 26 other polling stations where it was alleged that the ballot boxes did not have the requisite Forms 37A, were never specified. Also not named are the 11 polling stations where it was contended that the ballot boxes did not have the used counterfoils and 216 others said to have more counterfoils of the used ballot papers than the ballot papers found in the ballot box.

Heavy weather was made over where the counterfoils ought to have been kept, with the learned Judge concluding that failure to seal used ballot papers and counterfoils of used ballot papers in the ballot boxes seriously undermined and affected the election result. **Regulation 81(1)(d**) of the Election (General) Regulations, 2012 as amended by **L.N No. 72 of 2017**, requires that upon completion of a count, including a recount, the presiding officer shall seal in each respective ballot box, counterfoils of used ballot papers sealed in a tamperproof envelope. Although Regulation 73 does not mention sealing the counterfoils in a ballot box, we are convinced from the plain reading of the two regulations that they are not in conflict with each other but must be read together. After the counterfoils have been placed in tamper proof envelope, the envelope is in turn sealed in the ballot box of the respective seat for which the election relates.

The 1st respondent and, with utmost respect, the learned Judge, appeared preoccupied with the narrow margin of votes between the appellant and the 1st respondent. In its decision in the now so often cited in **Gatirau Peter Munya** (supra), the Supreme Court reiterated that;

> **"[202] The issue of margins in an election other than a Presidential election, can bear only transient relevance and only where it is alleged that there were counting, and tallying errors or other irregularities that affected the final result. A narrow margin between the declared winner and the runner-up beckons as a red flag where the results are contested on allegations of counting and tallying errors at specified polling stations. Where a re-count, re-tally or scrutiny does not change the final result as to the gaining of votes by candidates, the percentage or margin of victory however narrow, is immaterial as a factor in the proper election-outcome.**
>
> **.....**

> **[205A] We would state as a principle of electoral law, that an election is not to be annulled except on cogent and ascertained factual premises. This principle flows from the recurrent democratic theme of the Constitution, which safeguards for citizens the freedom "to make political choices" [Article 38 (1)].**

For our part, we wish only to add that by **Article 180(4)** of the Constitution, a gubernatorial election where two or more candidates are nominated, an election shall be determined on the basis of **"the candidate who received the greatest number of votes".**

In conclusion, and to reiterate part of the ratio in **Raila Amolo Odinga & Another V Independent Electoral and Boundaries Commission & 2 Others** (2017) eKLR, the burden of proof was on the 1st respondent to show either, that the conduct of the election in question substantially violated the principles laid down in the Constitution as well as other written law on elections, or that, although the election was conducted substantially in accordance with the principles laid down in the Constitution and other relevant laws on elections, it was fraught with irregularities or illegalities that affected its outcome.

The 1st respondent's assertion that more people (129,652) voted in Runyenjes Constituency when there are only 86,977; that in Manyatta Constituency, the total votes cast were 105,700, yet the registered voters were only 99,339, was not supported by the evidence before the court. That evidence showed that in respect of Runyenjes 71,195 out of 86,977 registered voters voted, while 79,964 out of 99,339 registered voters voted in Manyatta. In Mbeere South constituency where there are 72,143 registered voters, 58,127 of them voted, according to Forms 37Bs and 37Cs of the three constituencies. This information was authenticated by the evidence of DW-1 Amina Jarso, DW-2, Consolata Muthoni and DW-3 Faith Mugo who were the three (3) Returning Officers in the respective above-mentioned constituencies.

It was clear from the above that the 1st respondent did not discharge the legal burden of proof to the required standards to show these alleged irregularities.

From what we have said, that burden was not discharged and therefore the learned Judge erred in invalidating the appellant's election as Governor of Embu County.

Before we conclude finally, we give our reasons for dismissing the 1st respondent's application dated 6th July, 2018. This is the background. After hearing this appeal and reserving judgment for today, 17th August, 2018, the 1st respondent, took out a motion on notice for the court to be pleased to call for the High Court file in Embu Election Petition No. 1 of 2017, **Lenny Maxwell Kivuti Vs. Martin Nyaga Wambora & 3 others,** in order to determine the documents filed by the Deputy Registrar as part of his report, and secondly, that we;

> **".....do consider the following pages in volumes 8-10 of the Record of Appeal in its final decision on the irregularities discovered in the election of Governor, Embu County....in order to determine the documents filed by the Deputy Registrar as part of his report, and to consider certain pages of that report and the decision of the court below on the question of excess votes, missing forms 37A's and missing counter foils".**

We heard arguments in the application on 27th July, 2018 and, finding no merit, *ex tempore* dismissed it with a promise to give our reasons for doing so in this judgment.

The application was premised on the fact that during the hearing of the appeal, we asked questions regarding specific pages of the Deputy Registrar's report dealing with the polling stations that had irregularities; that the record of appeal was not well paginated as it was haphazardly photocopied by the appellant making it difficult to refer the court to specific pages during the hearing; and that the irregularities as observed from the Deputy Registrar's report contained in the record of appeal and as highlighted in the application are important for the Court to consider in the judgment. It was argued that although the Court had retired to write its judgment, it has jurisdiction to entertain the application before the judgment is delivered because the proceedings were yet to be concluded.

The application was opposed by the respondents who argued that it was bad in law for lack of basis under any written law; that it was intended to introduce into this appeal issues of fact, contrary to **section 85A (1)** of the Elections Act; that it also violates **rule 25** of the Court of Appeal (Election Petition) Rules, 2017 which prohibits interlocutory applications after the hearing of an appeal; that it was an attempt by the 1st respondent to re-open his case and tender evidence in apprehension of the outcome of the appeal after it occurred to the 1st respondent that he had not adequately responded to the arguments of the appellants and cross-appellants in their submissions and during hearing.

We have considered these arguments. It suffices here to state that after parties are heard in an appeal, it is envisaged by the rules of this Court that the next stage is the delivery of judgment. It is expected also that through pre-trial administrative mechanisms of the Court, parties have opportunity to assemble all the material they wish to rely on when the appeal comes up for hearing. To obviate what, in common parlance is called hearing by installments, the rules allow the filing of supplementary record of appeal or amendment of the memorandum of appeal. But as far as we know, there is no procedure for what this application seeks.

The 1st respondent in his written submissions summarized what he specifically seeks thus;

> **"The application is premised on the fact that the court, when writing its ruling should be guided and well versed with the record of appeal. During the hearing of the appeal, it was clear that the court was not clear on some issues as highlighted by the parties and therefore it is incumbent upon the applicant to confirm that their case has been well represented and the court is clear on the various issues raised in the appeal".** (Our emphasis).

We are not quite sure what to make of this submission, especially the emphasis. But perhaps that is why we find the application strikingly novel. The record of appeal, in compliance with **rule 8** of the Court of Appeal (Election Petition) Rules, 2017 contains all the proceedings of the trial court without any need to point out to this Court where to find what, particularly when sufficient opportunity was availed to the 1st respondent before and during the hearing.

The application is therefore superfluous and made on unfortunate assumption that the Court may overlook some aspects of the 1st respondent's case in its judgment.

In conclusion of this application, we reiterate what **rule 25 (1)** of the Court of Appeal (Election Petition) Rules, 2017 provides regarding the conduct of an election appeal before this Court. That;

> **"25(1) At the conclusion of the hearing of an election appeal, the Court may make an order—**
>
> **(a) dismissing the appeal;**
>
> **(b) declaring the election to be—**
>
> **(i) valid; or**
>
> **(ii) invalid.**
>
> **(c) invalidating the declaration made by the Commission;**
>
> **(d) on payment of costs; or**
>
> **(e) as it may deem fit and just in the circumstances".**

It cannot, in our view be just and fit, in the circumstances of this case, to make an order to call for the trial court file in order to determine the documents filed by the Deputy Registrar, when, in fact, that record is what is reproduced in the record of appeal before us; and when that application does is to consume more judicial time and resources. The rule does not envisage the filing of "*interlocutory*" applications after the

conclusion of a hearing.

In terms of substance and procedure, this application is bereft, hence our decision of 27th July, 2018 to dismiss it. We award to the respondents in the application its costs. With the determination of the main appeal, the cross-appeal necessarily succeeds.

In the result, we allow this appeal. Because the appellant was validly elected we set aside the judgment of the election court rendered on 22nd February, 2018 and subsequent orders. The costs of the appeal and cross appeal, to be met by the 1st respondent are awarded to the appellant, the 2nd, 3rd and 4th respondents, to be taxed, but not to exceed Kshs. 1,500,000.00.

The appellant together with the 2nd, 3rd and 4th respondents shall have costs of the petition to be be borne by the 1st respondent, which are capped at Kshs. 3,000,000, to be shared equally and, of course, subject to taxation.

Dated and delivered at Nairobi this 17th Day of August, 2018.

W. OUKO, (P)

.....

JUDGE OF APPEAL

D.K. MUSINGA

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR