



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, WAKI & MURGOR, J.J.A)

ELECTION PETITION APPEAL NO. 23 OF 2018

BETWEEN

OSCAR OMOKE OCHOLLA.....1ST APPELLANT

KARIUKI KAVORE.....2ND APPELLANT

KIRAGU MARGERY NDUTA.....3RD APPELLANT

AND

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION (IEBC).....1ST RESPONDENT

MARTIN SIMOTWO.....2ND RESPONDENT

NIXON KIPROTICH GENERALI.....3RD RESPONDENT

ODERA DANIEL TRESVANT.....4TH RESPONDENT

HILARY OKUMU MULILIA.....5TH RESPONDENT

(Being an appeal from the judgment and decree of the High Court at Nairobi (Njuguna, J.) delivered on 27th February 2018

in

Election Petition Appeal No. 20 of 2017)

JUDGMENT OF THE COURT

On 8th August 2017, the voters of Langata Constituency in the exercise of their constitutional rights went to the polls to elect amongst others Member of the National Assembly.

After counting and tallying of the votes cast the 3rd respondent, Nixon Kiprotich Generali Korir was declared the winner of the elections. The results were announced as follows;

| <i>Candidate</i> | <i>Form 35B</i> |
|---------------------------------------|-----------------|
| <i>Korir Generali Nixon Kiprotich</i> | <i>41,086</i> |
| <i>Ocholla Oscar Omoke</i> | <i>39,593</i> |

| | |
|-------------------------------------|------|
| <i>Sijeny Judith Achieng</i> | 5292 |
| <i>Kirwa William Kipkemboi Arap</i> | 1274 |
| <i>Kariuki Kavore</i> | 1447 |
| <i>Kithyaka Douglas Mbuvi</i> | 592 |
| <i>Kiragu Margery Nduta</i> | 589 |
| <i>Omar Abdullahi Shariff</i> | 490 |
| <i>Mulialila Okumu Hillary</i> | 433 |
| <i>Kipkemboi Epega Robert</i> | 422 |
| <i>Syongoh Musaari Kahiga</i> | 369 |
| <i>Odera Daniel Tresvant</i> | 349 |
| <i>Isaac Tonui Kiprotich</i> | 335 |
| <i>Thuo John Kibathi</i> | 280 |
| <i>Chenani Daniel Akweli</i> | 187 |
| <i>Otula Amos Onyango</i> | 127 |
| <i>Teigut Stephen Kipruto</i> | 59 |

Oscar Omoke Ocholla, Kariuki Kavore and Kiragu Margery Nduta, the 1st, 2nd and 3rd appellants respectively, and **Odera Daniel Tresvant**, and **Hilary Okumu Mulalia, the 4th and 5th respondents, (the appellants)** were aggrieved with the outcome of the election and filed a petition in the High Court on 8th September 2017 against the 1st respondent, **the Independent Electoral and Boundaries Commission, (IEBC), Martin Simotwo, the 2nd respondent** and the 3rd respondent, on the following grounds;

- a) Violation of the principle of free and fair elections and electoral process.**
- b) Lack of impartiality, neutrality, efficiency, accuracy and accountability.**
- c) Lack of verifiability of the results.**
- d) Contravention of electoral regulations governing voting.**
- e) Substantive non-compliance, irregularities and improprieties.**
- f) Discrepancies in the statutory vote tallying documents leading to the declaration of manifest wrong results.**
- g) Irregularities and inconsistencies in the counting, tallying of votes and filing in of forms 35A and 35B.**
- h) Failure to properly record the votes, display the same and avail the respective Forms 35A to the agents;**
- i) Failure to seal the ballot boxes.**
- j) Failure to secure polling stations and their environs.**
- k) Irregular appointment of polling clerks and**
- h) Failure to regulate access to the use of public resources.**

Under these heads, the appellants complained that firstly, there was lack of impartiality, neutrality, efficiency, accuracy and accountability, considering that there were numerous instances where the IEBC, and the 2nd respondent selectively manipulated, engineered, deliberately distorted and grossly inflated the votes cast and counted in favour of the 3rd respondent which affected the final results; that the presiding officers forged and or altered Form 35As after chasing away agents, from polling stations, in particular, KPA polling station.

Secondly, that there was lack of verifiability of the results as the results in the Form 35As were not consistent with those recorded in the Form 35B, so that the results did not tally. Furthermore, the results were not transmitted through IEBC's website or portal.

Thirdly, the appellants claimed that the electoral regulations were contravened as in over 130 polling stations in Langata Constituency the votes cast and captured in Form 35As differed from the results in the Form 35B and the website results. They contended that the results announced by the 2nd respondent were not openly collated, and therefore the results on Form 35 B were inaccurate thereby rendering the election process fundamentally flawed. It was their further complaint that their agents were not issued with identification badges so that voting commenced in their absence and they were unable to obtain the serial numbers of the ballot papers used in the elections; further, that assisted voters cast their votes in the absence of the agents.

Fourth, it was alleged that there was substantive noncompliance, with the election regulations as the returns were not indicated in the prescribed forms so that Form 35A for Uhuru Gardens Primary School stream 14 of 15 was used to declare the results for Nyayo National Stadium stream 11, Form 35A for Madaraka Primary School stream 6 of 12 was used to declare results for Madaraka Primary School stream 7 of 12. It was further contended that a substantial number of Form 35As were tampered with by the presiding officers, that the Forms were not signed or stamped or signed by the agents; and that the presiding officers failed to indicate the number of Form 35As handed over to them.

Fifth, that the discrepancies in tallying led to the declaration of manifestly wrong results, as the presiding officer presented the appellants with a Form 35B that consisted of glaring discrepancies, and which did not tally with the Form 35As.

Sixth, that the presiding officers failed to properly record and display the votes and make the Form 35As available to the respective agents. It was further contended, that in 38 polling stations, agents were not allowed to sign the Form 35As, the copies of which were not placed in the ballot boxes.

Seventh, it was claimed that when the ballot boxes arrived at the Constituency Tallying Centre, they were not sealed. In particular, the seals for St. Mary's Primary School, KIRDI stream 4 of 5 and KPA polling stations had been tampered with, and in Karen, ballot papers were found partially burnt.

Eighth, the appellants alleged that there was failure to secure the polling stations and their environs, as the presiding officers failed to remove the 3rd respondent's security and his police officers from the precincts of the KIRDI, KPA, and KIWI polling stations where they interrupted vote counting and ordered agents to leave the polling stations, so that counting proceeded in their absence. It was further alleged that one of the 1st appellant's agents was beaten at Kongoni Polling Station where his mobile and identity card were stolen.

Ninth, it was asserted that presiding officers were irregularly appointed, as the list of presiding officers and polling clerks was not made available in advance to the appellants; that the IEBC engaged several supporters of the 3rd respondent as presiding officers and polling clerks, and charged them with the responsibility of conducting the elections in Langata Constituency. They claimed that one Kiprotich Ngetich Gedion was the 3rd respondent's manager in his Lee 64 pub and also his chief agent during the Jubilee nominations; that Dennis Cheruiyot alias Waziri was the 3rd respondent's store keeper; that Nicholas Motai and Benjamin Rono were his supporters as was one Essie, who was a Deputy Presiding Officer at Kalsa Primary School polling centre.

Finally, it was alleged that there was failure to regulate the use of public resources, as on 5th July 2017, the 3rd respondent accompanied by senior Government officials, held a function in Langata where he oversaw the recruitment of youths to the National Youth Service as part of his campaigns.

As such, they sought the following reliefs;

- a) This Honourable Court be pleased to order a scrutiny, recount and verification of all the votes cast in the election for Member of the National Assembly for Langata constituency in the elections held on 8th August, 2017.***
- b) This Honourable Court be pleased to find that the 1st and 2nd Respondents jointly and severally abetted Election offences in the course of the election for Member of the National Assembly for Langata Constituency.***
- c) That this Honourable Court do find that the elections of Member of the National Assembly for Langata Constituency was not free and fair and was vitiated by the illegalities stated above.***
- d) An order do issue for a fresh election for the office of Member of the National Assembly for Langata Constituency.***
- e) The Respondents be condemned to pay costs to this petition.***
- f) This Honourable Court grant such other and further reliefs or orders as it may deem mete and just.***

The petition was supported by the appellants' and witness affidavits which reiterated to a large extent the grounds in the petition. The IEBC, the 2nd respondent and the 3rd respondent denied *in toto* the contentions in the petition and annexed witness affidavits in opposition. In their view, the elections were transparent, free and fair.

In the course of the proceedings, the appellants filed a Notice of Motion dated 28th September 2017 and an amended Notice of Motion dated 2nd October, 2017 seeking, amongst other orders (i) a recount of all ballot papers; (ii) a retally of all results and, (iii), scrutiny of all polling

material. The learned judge declined to order scrutiny, but ordered recount of ballot papers of 6 polling stations.

After the close of the proceedings, where 9 witnesses testified on behalf of the appellants, 12 on behalf of the IEBC and the 2nd respondent, while 6 witnesses testified for the 3rd respondent, the election court (*Njuguna, J*) rendered a judgment dismissing the petition. The learned judge found that the appellants had failed to prove to the required standard that on account of massive, systematic and willful non-compliance with the Constitution and electoral laws by the respondents, the 3rd respondent was not the validly elected Member of National Assembly for Langata Constituency.

The appellants were aggrieved by the decision and have brought this appeal on the grounds that the learned trial judge erred in failing to shift the burden and standard of proof to the respondents; failed to order a recount and scrutiny of votes in 57 polling stations in Langata constituency despite the existence of material evidence; disregarded evidence arising from the recount despite finding several irregularities; in finding that the irregularities and errors proved by the appellants did not affect the results of the parliamentary elections; in finding that the results contained in a partly filled Form 35B were valid, and in failing to fault the declaration of polling stations results on improvised Forms 35As and unsigned alterations in Forms 35A; in disregarding evidence on the irregular possession of election materials by a Presiding Officer, and PW6's evidence on the results contained in Form 35A for Kongoni Primary School polling stations stream 3.

The appellants further faulted the learned judge for failing to evaluate the evidence on record and misapplying the law on admissibility of evidence of DW 1 the third respondent whose source could not be authenticated or verified; in admitting hearsay evidence, and for finding that the Langata Parliamentary elections were free and fair and in accordance with the Constitution of Kenya 2010. They also took issue with the capping of instruction fees separately from costs of the petition at Kshs. 2.5 million each payable to the 1st, 2nd and 3rd respondents, which they claimed was the highest costs so far awarded for a Parliamentary seat.

Before the parties commenced making submissions before us on 28th June 2018, **Mr. Kimani**, learned counsel for the 4th and 5th respondents informed the Court that his clients wished to withdraw from the appeal. There being no objection from the appellants and the 1st to 3rd respondents, we granted the 4th and 5th respondents leave to withdraw from the appeal with no orders as to costs.

Mr. Sigei, learned counsel for the 3rd respondent took issue with this Court's jurisdiction to hear the appeal. He sought leave to argue a Preliminary Objection dated 8th June 2018 seeking to strike out the appeal which he claimed was incompetent as it was filed in the High Court. Despite objections from **Mr. Ogado**, learned counsel for the appellants, we granted leave to Mr. Sigei to argue the Preliminary Objection.

Counsel begun by contending that there was no valid appeal before us as, the Notice of Appeal was initially filed in the High Court, and not in this Court; that as a consequence, there was no competent appeal before the Court. He also argued that, the grounds specified in the memorandum of appeal sought to address matters of fact contrary to the stipulations of **section 85 A** of the **Elections Act** which limited this Court to the consideration of only matters of law.

Mr. Malonza, learned counsel for IEBC and the 2nd respondent supported the Preliminary Objection. Counsel submitted that the Notice of Appeal having been filed in the High Court was filed out of time and this being an election petition that was subject to timelines, time for filing the appeal could not be extended.

Mr. Ogado, learned counsel for the appellants stated that despite the title of the Notice of Appeal being the High Court instead of the Court of Appeal, and though the Notice referred to the wrong rules, and was initially lodged in the High Court, it was nevertheless in this Court within the requisite period, and there was nothing wrong with the Notice of Appeal. Counsel pointed out that this Court's stamp appears on its face and is dated 5th March 2018, which showed that it was filed within time. Counsel further argued that the Preliminary Objection was not filed within the period specified by **rule 25** of the **Court of Appeal Election Petition rules** which provides that the court shall not allow any interlocutory application made after the hearing of the appeal has commenced if the interlocutory application could have, by its nature, been brought before the commencement of the hearing. This application was filed just before the hearing.

We have considered the Preliminary Objection, and the parties' submissions. As it turns out, this was a non-issue, as despite the Notice of Appeal having been addressed to, and filed in the High Court, it was also filed in this Court on 5th March 2018, which was within the seven (7) days period stipulated by the rules. Consequently, we are satisfied that the Notice of Appeal was properly filed, and that this Court has jurisdiction to hear and determine this appeal. The Preliminary Objection is accordingly, hereby dismissed.

We turn now to the assertion that the memorandum of appeal centered on matters of fact and that by virtue of **section 85A of the Elections Act** we have no jurisdiction to delve into the contestations under the appeal.

In the case of **Gatirau Peter Munya vs Dickson Mwenda Kithinji & others, Supreme Court Petition No. 2 of 2014**, the Supreme Court set out the principles that would provide guidance in defining what constitutes "matters of law". The court identified three elements; technical, practical and evidentiary, and summarized them to mean, "...a question or an issue involving the interpretation, or construction of provisions of the law; the application of the law to a set of facts recorded by the election court and the conclusion arrived at by the trial judge in an election petition."

It is apparent from the memorandum of appeal that the appellants' complaints are, amongst other issues, concerned with alleged violations of **Article 38, 81 and 86** of the **Constitution**, the Elections Act and the regulations. Given the specified parameters, and the issues in contention we take the view that, it is well within this Court's competency and mandate to discern or distinguish between those matters in the appeal which are of fact, and those of law, and to limit ourselves to matters that are within our remit, and determine them accordingly. We therefore dismiss this argument.

Turning to the substantive appeal, Mr. Ogado, submitted that the elections for Langata Constituency were not conducted in accordance with

Article 86 of the **Constitution** and the electoral laws, as the appellants had demonstrated to the trial court that there were anomalies in the Forms 35As in that, some Form 35As designated for specified polling stations were used to declare the results of other polling stations. Counsel further submitted that an election is a meticulous process, where prescribed forms were purpose specific, and any deviation required to be indicated in the Polling Station Diary.

It was further submitted that electoral material was not stored in the manner prescribed as ballot boxes were broken into and ballot papers found to be missing; that about 40 Form 35As were blank, or illegible, and the results difficult to ascertain, so that about 16,800 votes could not be accurately verified or accounted for, while for others, the results had alterations and not countersigned. It was also asserted that, alteration of results took place in some instances after results were announced at the polling station which was not permissible.

Counsel went on to submit that, despite 57 polling stations having been identified in the application, the learned judge declined to order scrutiny, but only allowed recount in respect of 6 polling stations.

Another complaint submitted by counsel was that two Form 35Bs were used to declare the final results for Langata Constituency, one which the appellants alleged was properly signed by agents and given to them by the 2nd respondent at the tallying centre, and the other which had only one agent's signature, that the IEBC and the 2nd respondent contend they used to declare the final results and it was further submitted that the 'Total Registered Voters' in the appellants' Form 35B showed that each polling station had more than 700 voters, which was contrary to the law, while the IEBC's Form 35B showed that the 'Total Registered Voters' were less than 700 voters per polling station.

Counsel argued that since the appellants' Form 35B and not the IEBC's Form was used to declare the final results at the Constituency Tallying centre, the IEBC's form was invalid. And, because, the number of registered voters in the appellants' Form was overstated, this served as a sufficient basis upon which the elections ought to have been nullified.

Another irregularity, counsel submitted, was that presiding officers should have been appointed before the elections and their names circulated to the political parties prior to the elections, yet some presiding officers were appointed one day before the General Elections which was irregular.

Counsel continued that the difference in votes between the 3rd respondent and the 1st appellant was 1,300 votes, which it was argued, should be reduced by 400 votes, and a further 200 votes that were not found in favour of the 3rd respondent.

Counsel took issue with the decisions of the Supreme Court and this Court that only the presidential election results were to be transmitted electronically. It was argued that this was contrary to **rule 82** of the **Elections (General) Regulations** which clearly provided that all election results were to be transmitted electronically from the polling stations.

Finally counsel submitted that costs were wrongly capped at instruction fees only of Kshs. 2.5 million each for the 1st, 2nd and 3rd respondents instead of being capped at Kshs. 2.5 million each for the entire petition.

On his part, Mr. Malonza who opposed the appeal submitted that the identified irregularities did not affect the results of the election. Counsel stated that since human beings conduct elections, it was inevitable that errors would occur, and mere errors should not be the basis of voiding elections; that further, before nullifying an election, the errors must demonstrably be shown to have affected the results of the election. In support of this proposition counsel relied on the case of **Raila Odinga & Another vs Independent Electoral and Boundaries Commission & 2 others, Presidential Petition No. 1 of 2017 (Raila 2017)** and **Richard Nchapi Leiyagau vs Independent Electoral and Boundaries Commission & 2 others [2014] eKLR**. It was further submitted that, the irregularities in this election did not reach the required threshold, since the correct results were indicated, on the improvised Form 35As which the appellants' agents signed; that in any event the improvised forms were used in only 3 polling stations, and explanations were provided for the alterations on the Form 35As. On the list of presiding officers, counsel countered that since the appellants did not specify the effect of the appointment of presiding officers had on the election results, it could not be relied upon as a ground for nullifying the elections. Finally, on the costs, counsel submitted that since an award of costs is mandatory in an election petition, they cannot be set aside.

Mr. Sigei, learned counsel for the 3rd respondent also opposed the appeal and associated himself with the submissions of the IEBC and 2nd respondent. On the irregularities, counsel submitted that they did not affect the election; that though some irregularities were identified, the trial court rightly found that they were insufficient to nullify an election. With respect to the claim that the appellants' agents were denied access to various polling stations, it was submitted that the trial court rightly found that there was no evidence produced to support the allegations.

As regards the alleged alterations of the Forms 35As and 35B, counsel submitted that the errors were not so substantial in nature as to affect the result of the election, and that any errors affected all the candidates equally; that furthermore the failure to sign the Forms 35As did not affect the polling stations results, though counsel pointed out, the issue was not pleaded in the Petition.

In respect of scrutiny and recount, counsel submitted that only 15 polling stations were pleaded for scrutiny and recount, and as no sufficient reason or basis was laid, the court was right to decline to order scrutiny and to allow a recount in 6 polling stations.

On the costs counsel concluded by submitting that the court has the discretion to decide on the issue of costs which are mandatory in election petitions.

In reply, though Mr. Ogado conceded that of the two Forms 35 Bs, the one given to the appellants at the polling station was submitted in error, it was contended that it was the only valid form having been used to declare the final results; and that the returning officer subsequently became *functus officio*, so that it was only the election court that could determine its status. Counsel asserted that the IEBC's Form 35 B that replaced it was null and void.

We have considered the pleadings and the submissions of the parties.

The appellants have raised a number of issues for determination, which are;

- i) *Whether the learned judge misapplied the law and selectively allowed scrutiny in only 6 polling stations instead of in 57 polling stations;*
- ii) *Whether the learned judge failed to consider the manner in which the presiding officers were appointed and assigned to polling stations;*
- iii) *Whether the learned judge rightly held that the results for Member of National Assembly were not required to be transmitted electronically;*
- iv) *Whether the IEBC and the 2nd respondent prevented the appellants' agents from accessing the polling stations, to participate in observing the conduct of the elections;*
- v) *Whether the learned judge wrongly found that there was no violence, intimidation and improper influence at the polling stations;*
- vi) *Whether the learned judge disregarded the appellants' evidence and submissions on irregular possession of election materials by a Presiding Officer, and the PW6's evidence on the results as contained in Form 35 A for Kongoni Primary School Polling Station 3;*
- vii) *Whether the wrong Form 35 As were used in several polling stations; and whether the learned judge was wrong to accept the reasons given by the Returning Officer;*
- viii) *Whether the Form 35 B used to declare the results at the Constituency Tallying centre was fake;*
- ix) *Whether there were blank and illegible Form 35 As used in the tabulation, tallying and announcement of the results;*
- x) *Whether the trial court exceeded its jurisdiction in awarding costs in respect of instruction fees only.*

Before embarking on the analysis and determination of the contestations in this appeal, it is essential that we set out the constitutional prerequisites applicable to the circumstances of this case.

Article 81 of the *Constitution* reads:

“The electoral system shall comply with the following principles –

- (a) freedom of citizens to exercise their political rights under Article 38;***
- (b) not more than two thirds of the members of elective public bodies shall be of the same gender;***
- (c) fair representation of persons with disabilities;***
- (d) universal suffrage based on the aspiration for fair representation and equality of vote; and***
- (e) free and fair elections, which are***
 - (i) by secret ballot;***
 - (ii) free from violence, intimidation, improper influence or corruptions;***
 - (iii) conducted by an independent body;***
 - (iv) transparent; and***
 - (v) administered in an impartial, neutral, efficient, accurate and accountable manner.***

As regards voting, **Article 86** requires that;

“At every election, the Independent Electoral and Boundaries Commission shall ensure that –

- a. whatever voting method is used the system is simple, accurate, verifiable, secure, accountable and transparent;***

b. the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station.

c. The results from polling stations are openly and accurately collated and promptly announced by the returning officer; and

d. appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election material.” (Emphasis supplied)

This brings us to the question of the burden and standard of proof. The Supreme Court of Kenya, in *Raila Odinga & Others vs The Independent Electoral And Boundaries Commission & Others*, (Supreme Court Election Petition No. 5 of 2013), at paragraph 195, held that:

“There is, apparently, a common thread in the foregoing comparative jurisprudence on burden of proof in election cases. Its essence is that an electoral cause is established much in the same way as a civil cause: the legal burden rests on the petitioner, but, depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting. Ultimately, of course, it falls to the Court to determine whether a firm and unanswered case has been made.” (Emphasis ours)

With respect to the standard of proof in election petitions, the Supreme Court in *Raila 2017 (supra)* stated thus;

We maintain that in electoral disputes, the standard of proof remains higher than the balance of probabilities but lower than beyond reasonable doubt.”

In other words, it was upon the appellants’ in all cases to satisfy the election court that the allegations were supported by sufficient evidence, as to leave little doubt that what was alleged to have transpired or not actually did or did not take place.

Bearing these principles in mind, we will begin with the complaint that the learned judge selectively allowed a recount of votes to be conducted in only 6 polling stations instead of allowing scrutiny in the 57 polling stations specified in the application.

The background to the complaint is that the appellants filed an amended Notice of Motion dated 2nd October 2017 seeking amongst other orders recount, re-tally and scrutiny in the following terms;

“i) A recount of all ballots cast with the involvement of the Petitioners/Applicants and Respondent’s agents and Advocates respectively and/or in Langata Constituency for the parliamentary election held on 8th August 2017;

ii) A re-tally of all election results for the election of the parliamentary election held on 8th August 2017 for the member of National Assembly Langata Constituency;

iii) Scrutiny of all polling materials including the written statements made by the presiding officers under provisions of the Elections Act; the printed/hard copy of the voters register used in the election; spoilt ballot papers; all counterfoils, packets of rejected votes, packets of counted votes, polling day diaries used in the parliamentary elections for the member of National Assembly Langata Constituency held on 8th August 2017.”

The application was premised on the grounds that the appellants were challenging the outcome of the elections, where, irregularities and malpractices were apparent including, but not limited to, submitting of inflated results in favour of the 3rd respondent in particular polling stations; swapping of lower results of the 3rd respondent with the 1st appellant’s higher results; submission of fraudulent and doctored results; altering of Form 35A at the tallying centres to reflect fraudulent fictitious figures; using Form 35As that were not signed by agents; refusing to display results of the elections at the entrance of the polling stations; failing to properly record, count and tally the votes and failing to seal ballot boxes. The motion was supported by the affidavit of Oscar Omoke Ocholla, which repeated the contestations set out in the motion.

In affidavits both sworn on 6th October 2017, 1st respondent and 2nd respondent, who was the Returning Officer for Langata Constituency opposed the application. The 3rd respondent also opposed the application vide a grounds of opposition dated 5th October 2017.

In its ruling, the election court declined to grant scrutiny, but instead ordered a recount to take place in 6 polling stations, namely KPA Staff Quarters stream 1, KPA Staff Quarters stream 2, St. Mary’s Primary School stream 4, MOW Stream 5 and Kongoni stream 3 and 4 for reasons that there seemed to be discrepancies in the polling stations results between Forms 35A and 35B, and in Kongoni streams 3 and 4 where similar results were recorded in the two polling stations.

It was further ordered that recount would be restricted to ascertaining the number of valid votes cast at each specified polling station and assigned to each candidate and any unaccounted votes.

Section 82 (1) of the *Elections Act* specifies;

“An election court may, on its own motion or on application by any party to the petition, during the hearing of the election petition, order for a scrutiny of votes to be carried out in such manner as the election court may determine.”

Rules 28 and 29 of the *Election (Parliamentary and County Elections) Petition Regulations 2017* are clear.

Rule 28 provides;

“A petitioner may apply to an election court for an order to-

(a) recount the votes; or

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

Rule 29 further stipulates that;

“(1) The parties to the proceedings may, at any stage, apply for scrutiny of the votes for purposes of establishing the validity of the votes cast.

(2) Upon an application under sub-rule (1), the court may, if it is satisfied that there is sufficient reason, order for a scrutiny or recount of the votes.

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

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

In particular, rule 29 (4) of the *Election (Parliamentary and County Elections) Petition Regulations 2017* is categorical that scrutiny and recount should be limited to polling stations in which the results are disputed.

In the case of *Peter Gatirau Munya vs Independent Electoral and Boundaries Commission and Others SC Appeal No. 28 of 2014*, the Supreme Court outlined certain principles to be considered in an application for an order of scrutiny and recount in election petitions thus;

“a)... any party to an election petition is entitled to make a request for a recount and/or scrutiny of votes, at any stage after the filing of petition, and before the determination of the petition...”

b)...In exercising this discretion, the Court is to have sufficient reasons in the context of the pleadings or the evidence or both. It is appropriate that the court should record the reasons for the order for scrutiny or recount.

c) The right to scrutiny and recount does not lie as a matter of course. The party seeking a recount or scrutiny of votes in an election petition is to establish the basis for such a request, to the satisfaction of the trial Judge or Magistrate. Such a basis may be established by way of pleadings and affidavits, or by way of evidence adduced during the hearing of the petition.

d) Where a party makes a request for scrutiny or recount of votes, such scrutiny or recount if granted, is to be conducted in specific polling stations in respect of which the results are disputed, or where the validity of the votes is called into question.”

In *Nicholas Kiptoo Arap Korir Salat vs Independent Electoral & Boundaries Commission SC Petition No. 23 of 2014* the Supreme Court expounded upon the necessity of clarity and particularizing pleadings in applications for scrutiny when it stated thus;

“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. In other words a party should not expect the court to make an order for scrutiny simply because he has sought such an order in the petition. The petitioner ought to set out his case with sufficient clarity and particularity and adduce sufficient evidence in support thereof in order to justify the court to feel that there is a need to verify not only the facts pleaded but the evidence adduced by the petitioner in support of his pleaded facts. 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” [emphasis supplied].

A consideration of the petition and the 1st appellant’s supporting affidavit disclosed that 15 polling stations were in contention, while the Amended Notice of Motion referred to a total of 57 polling stations, most of which were not pleaded in the petition. The learned judge declined to order prayer 4 (ii) for retallying of all results for the elections and prayer 4 (iii) for scrutiny of all polling material, as the court considered them to have been set out in general terms.

When we consider the application, and the supporting affidavit, it is true that the prayers for retallying and scrutiny were spelt out in especially general terms. No distinct or direct relationship could be drawn between the appellants’ complaints in the pleadings and the prayers for retallying and scrutiny. In addition, the application failed to lay a basis for scrutiny, or specify the polling stations where the results were disputed. In effect, it fell short of the threshold for ordering retallying and scrutiny, and instead bore the characteristics of a fishing expedition.

With respect to prayer 4 (i) for recount the learned judge took the view that save for 6 polling stations where recount was ordered as similarities and discrepancies were apparent in the results, the court declined to order a recount for the remaining 9 polling stations as it concluded that the queries concerning them were sufficiently addressed by the evidence, particularly with regard the improvised forms used in 3 polling stations; and that no discrepancies were apparent from the Form 35As and 35B. The court was satisfied that a recount of the ballots of those polling stations would not have served any useful purpose.

We remind ourselves that the learned judge was exercising judicial discretion to decide whether or not to order a recount, retallying or scrutiny. In *Matiba vs Moi & 2 Others 2008 1 KLR 670*, this Court reiterated that;

“The High Court was exercising discretion and the Court of Appeal was not entitled to substitute the Judges’ discretion with its own discretion. It had to be shown that the Judges’ decision was clearly wrong because he misdirected himself or because he acted on matters on which he should not have acted on or because he failed to take into consideration matters which he should have taken into consideration and in doing so, arrived at a wrong decision”.

See *Mbogo & Another vs Shah [1968] EA 93*.

Having regard to the above, we are of the view that the learned judge took into account the relevant matters in determining whether or not to grant the orders sought, and in ordering limited recount, and declining to order retallying and scrutiny, we find that she exercised her discretion judicially and we have no reason to interfere. This ground is therefore without merit.

We next consider the contention that the presiding officers in Langata Constituency were irregularly appointed. It was submitted that contrary to the law, the presiding officers were appointed a day before the elections, and that, the IEBC conspired with the 3rd respondent to engage or hire the latter’s supporters and campaigners as election officials for the Constituency’s elections. It was further alleged that Nicholas Mutai, Benjamin Rono, one Essie, the Deputy Presiding Officer at Kalsa Primary School polling centre were supporters of the 3rd respondent, while Kiprotich Ngetich Gideon was a manager in his Lee 64 pub and his chief agent during the Jubilee nominations. Dennis Cheruiyot alias Waziri was said to be his store keeper.

In her findings on the issue, the learned Judge stated;

“No evidence was adduced to support the allegations that Nicholas Mutai, Benjamin Rono and Essie were supporters of the 3rd Respondent. Similarly, no evidence was adduced to prove that Kiprotich Ngetich and Dennis Cheruiyot alias Waziri were employees of the 3rd Respondent”.

It should be observed that, since the election court was addressing a matter that concerned a finding of fact, having found the evidence to be insufficient to reach a finding that the named persons were associated with the 3rd respondent, we are precluded from addressing the issue. At any rate, it was not contended before us that such evidence was available. But returning to the appointment of presiding officers, **regulation 5 (1) of the Elections (General) Regulations** stipulates that, the IEBC shall, “... transparently and competitively appoint a presiding officer for every polling station and may similarly appoint such number of deputy presiding officers.” **Regulation 5 (2)** further stipulates;

“Prior to appointment under subregulation (1), the Commission shall provide the list of persons proposed for appointment to political parties and independent candidates at least fourteen days prior to the proposed date of appointment to enable them make any representations.”

In effect, the regulations are clear that the IEBC is required to provide political parties with a list of persons proposed for appointment as presiding officers 14 days prior to their appointment. From the evidence, it is apparent that presiding officers were appointed and assigned to polling stations in Langata Constituency. The appellants have not however shown that prior to appointment they contested the presiding officers’ appointments, or that they raised objections to their assignment to Langata Constituency because they were affiliated to a candidate or party.

In addition, the regulations make reference to appointments, but they do not specify the period within which a presiding officer may be assigned to a polling station. Therefore nothing precluded the IEBC from assigning presiding officers to a polling station a day to the elections, provided no objections to such assignment had been previously raised. With respect to the allegation that one was appointed on the same day of the elections, it has not been shown in what manner that appointment affected the election. Without any basis for the complaint that the presiding officers were appointed immediately prior to the elections it is not possible to ascribe any merit to the allegations, and the learned judge was right to dismiss them.

The next issue concerns the electronic transmission of election results. This issue was not included in the memorandum of appeal, and as such, it is difficult to discern the nature of the complaint against the learned judge’s determination.

But this notwithstanding, the appellants submitted that the learned judge was wrong to conclude that the use of technology or electronic transmission of results was not a requirement for elections other than in the presidential elections. In their view, **rule 82 of the Elections (General) Regulations** specifically provides that before ferrying actual results of the election to the tallying venue, they should be submitted to the returning officer in electronic form, and that therefore electronic transmission of all results was mandatory.

In the Petition, the appellants’ generally alleged that the results were not transmitted through the IEBC website or portal. There was no specific complaint that incorrect results for identified polling stations were transmitted through the portal or, that the results transmitted for identified polling stations did not tally with the results on the Forms 35As and 35B.

Needless to say, the IEBC and the 2nd respondent sought to demonstrate that results were transmitted through the portal and that **rule 82** was complied with. In his evidence the 2nd respondent stated;

“I used what I tallied in the tallying centre to declare 3rd Respondent as the winner. These were the results that I am supposed to use under the law. The data posted on the portal are provisional results. They are not there at the portal. The law recognized the results that are on Forms 35A and 35B and not the ones on the portal. I would still have declared without the results on the portal. I was not able to tell the results that were not reflected in the portal but I can confirm that they were sent.”

It was therefore the 2nd respondent’s evidence that he uploaded all polling stations results onto the portal, and relied on the Forms 35As and 35B to declare the final results. Since no specific complaint was raised in the Petition regarding transmission of individual polling station results, we find the allegation that results were not transmitted through the portal to be without basis, and we accordingly dismiss it.

On the issue that the learned judge disregarded the appellants’ evidence and submissions on irregular possession of election materials by a Presiding Officer, the learned judge took the view that, the election materials in Mrs. Osir’s possession concerned the position of Member of County Assembly and had nothing to do with the petition before her. As the elections materials did not fall within the election court’s remit, we consider that there was no reason for the court to take it into account, as that would amount to extrapolation of evidence which is not permissible. We find that the learned judge rightly declined delving into that issue.

With respect to the evidence on the results for Kongoni Primary School Polling Station 3, we consider this complaint to be unfounded, as it is clear that this was one of the polling stations where a recount was ordered, and further the judgment made a finding that there were discrepancies in the results for that polling station in that, *“... the 3rd Respondent had been added 1 vote while the first petitioner had been denied 7 votes.”* This ground is therefore without merit.

The next complaints are two fold, and appear to be the crux of the appellants’ grievances. Firstly, there is the claim that, the appellants’ agents were prevented from accessing the polling stations to observe the conduct of the elections, which made it possible for the presiding officers to alter the results on the Forms 35As and 35Bs for the benefit of the 3rd respondent. They further claim that their agents were chased away from the polling stations, and that they were not allowed to assist elderly and illiterate voters or to verify the results or to sign the Form 35As and 35Bs. Secondly, they allege that in the absence of their agents, the IEBC and the 2nd respondent manipulated the results by using the wrong Forms 35As to declare result of certain polling stations, and that many Form 35As used in the tabulation, tallying and announcement of the results were blank or illegible while for many other Forms 35As, the results specified did not tally with the Form 35Bs. It was also alleged that the wrong Form 35B was used to declare the final results for the election of Member of National Assembly for Langata Constituency.

When addressing the various allegations concerning the appellants’ agents in the judgment, the learned judge stated thus;

“Though pw2, pw3, pw5 alleged that their agents were denied access or mishandled none of them called any evidence to support those allegations and therefore, the evidence that they gave in court amounts to hearsay evidence which has no probative value as it was not corroborated. It would have helped if those agents were called to testify.”

And on the allegation that the appellants’ agent were not allowed to assist elderly or illiterate voters contrary to **regulation 72** of the **Elections (General) Regulations, 2012**, the judge concluded that, the complaint was not supported by particulars, as none of the elderly or illiterate voters who were assisted testified, nor were any of the appellants’ agents called as a witness to support that allegation.

Concerning the contention that the agents were not shown ballot papers for inspection, and that they were intimidated, the court once again observed that this allegation was unsubstantiated as none of the appellants’ witnesses testified in its support. Linked to this were the allegations of violence, intimidation and improper influence at the polling stations, where the appellants’ claimed that the presiding officers failed to remove the 3rd respondent’s security officers and police from within the precincts of the KIRDI, KPA and KIWI polling stations, when they interrupted the counting of votes at KIRDI stream 4 of 5 and at KPA polling stations, in particular.

After considering the evidence in respect of this allegation, the trial court’s concluded that;

“The 3rd Respondents witnesses DW1 and DW2 were his agents at KPA polling stations. They denied the allegations that he visited those polling stations. It was the duty of the petitioners to call evidence and more particularly their agents in those polling centres to wit KIRDI, KPA and KEWI to prove those allegations. They failed to do so. In the absence of any other evidence in support, the allegations stand unproved.”

The trial court also considered and discounted the allegations that Joseph Owambo Odira PW6, the 1st appellant’s agent, was beaten within the Kongoni Polling station because, the polling station was not amongst those the 3rd respondent alleged to have been visited and disrupted. In addition, the court was not convinced of the witness’ credibility since he had not reported the incident to the police, and that despite testifying that he was an Orange Democratic Movement (ODM) agent, he was subsequently found to be a Ford Kenya agent. As a result the court found him to be an untruthful witness, and his evidence unreliable.

When the allegations are considered, it is evident that upon analysis of the material that was before the court, the learned judge was not satisfied that the allegations were proved to the required standard. The court did not find that the appellants demonstrated to its satisfaction that their agents were denied access to the polling stations, or that their agents were not allowed to assist the elderly or illiterate persons or were chased away by the 3rd respondent’s security. For our part, these being matters of fact where the trial court had reached a finding, we are constrained to adopt them, and to similarly conclude that without the requisite proof, it could not be said that the appellant’s agents were denied access to the polling stations to observe the election processes.

That said, did the IEBC and the 2nd respondent manipulate the Forms 35As and Form 35B that were used to declare the results for Langata Constituency in favour of the 3rd respondent?

The complaints concerning the Form 35As were that the Form 35A for Uhuru Gardens Primary School stream 14 of 15 was used to declare the results for Nyayo National Stadium stream 11, and Form 35A for Madaraka Primary School stream 6 of 12 was used to declare results for Madaraka Primary School stream 7 of 12, so as to manipulate the results. In conjunction with this, the appellants complained that their agents did not sign alterations on the forms.

Specifically addressing the complaint that Form 35As were used to declare results for polling stations that were different from the ones to which they were assigned, the learned judge stated that;

“In his evidence, the 2nd Respondent dwelt on this allegation at length. It was his evidence that he was called at around 3pm by presiding officers who informed him of that anomaly. He admitted there was that anomaly affecting the three stations aforesaid. His explanation was that forms 35A for Madaraka 2 were not delivered, the package that was there was reading Madaraka 7. Madaraka 7 had issues and they used the forms for Madaraka 6. That, to remedy the situation, Madaraka 2 used forms for Madaraka 7 while Madaraka 7 used forms for Madaraka 6 and Nyayo stadium 7 used forms for Uhuru Gardens. He, as the returning officer directed the presiding officers to use the forms that were available. He received the information late as the forms are only supposed to be opened in preparation of counting. He contended that the forms may have been different but the contents were for the correct polling stations. He further explained that the problem was with the printer when the forms were printed. The court is satisfied with that explanation as that was the only reasonable thing to do in those circumstances.”

Section 39 of the **Elections Act** addresses the manner of declaration of results and the format of the Forms to be used. It stipulates that;

“(1) The Commission shall determine, declare and publish the results of an election immediately after close of polling.

(1A) The Commission shall appoint constituency returning officers to be responsible for—

(i) tallying, announcement and declaration, in the prescribed form, of the final results from each polling station in a constituency for the election of a member of the National Assembly and members of the county assembly;

(ii)...

(iii)...(emphasis ours)”

The above provisions therefore require the presiding or returning officer to tally, announce and declare the final results from each polling station for a member of the National Assembly on the prescribed form. And according to **Regulation 79 (2) (b)** of the **Elections (General) Regulations 2012** the Forms 35A, 36A, 37A, 38A set out in the Schedule required to be used for the purposes of declaring the results of National Assembly, County woman representatives, Senator, Governor and county assembly elections.

In tandem with this, **section 26** of the **Statutory Instruments Act 2013** is instructive. It provides;

“(1) Where an enabling legislation confers power on any person to prescribe any form, then unless that person prescribes such form, any form approved for the purpose by that person may be used;

(2) Where any form has been prescribed by or under any legislation, a document of statutory instrument which purports to be in such form shall not be void by reason of any deviation there from which does not affect the substance thereof of which is not calculated to mislead.

(emphasis ours)”

What this means is that any form that departs from the prescribed form would not be voided if the departure does not affect the substance of the form or is not calculated to mislead.

In the case of **Raila 2017 (supra)** at paragraph 282 the Supreme Court explained the necessity of adopting prescribed forms thus;

“Of importance are the expectations of transparency, accountability, simplicity, security, accuracy, efficiency and especially verifiability of the electoral process. These terms should be understood to refer to:

(a) an accurate and competent conduct of elections where the ballots are properly counted and tabulated to yield correct totals and mathematically precise results; an election with a proper and verifiable record made on the prescribed forms, executed by authorized election officials and published in the appropriate media; a secure election whose electoral processes and materials used in it are protected from manipulation, interference, loss and damage.”

In the instant case, the Returning Officer improvised the prescribed Form 35As for some polling stations so as to declare results of other polling stations. His explanation was that the relevant forms were inadvertently excluded from the election materials of the concerned polling stations, which compelled him to utilize the Forms 35A of other polling stations to declare the results. The election court was satisfied, that the use of improvised forms was not intended to manipulate the results, since no other material was adduced to controvert his evidence. As

the appellants did not demonstrate or prove that there were sinister or ill motivated reasons for the use of improvised Forms, we consider that the learned judge was right to rely on the explanation provided.

Additionally, the election court also found that the appellants' assertions that their agents were not allowed to sign against the alterations of Form 35As, was not supported by evidence. It cannot therefore be said that the appellants' agents were deliberately and willfully denied the opportunity to sign them, and nothing demonstrated that the alterations were for the sole benefit of the 3rd respondent. We would hasten to add that, in accordance with **regulation 79 (6)** of the **Elections (General) Regulations** the refusal or failure of a candidate or an agent to sign a declaration form or to record the reasons for their refusal to sign did not of itself invalidate the election results.

Related to the claims surrounding the Form 35As are claims in respect of two Form 35Bs, the appellants' Form 35B and the IEBC's Form 35B. It was alleged that, the appellants' Form 35B was used to declare the results at the Constituency Tallying Centre, but had no security features or a serial number apparent, though it was signed by agents. It was further alleged that it indicated that more votes were cast than registered voters per polling station. For the IEBC's Form 35B, it was alleged that it was not signed by all agents, and was not used to declare the final results at the Constituency Tallying Centre and as a result, it was null and void. The other claim was that, this form was only partly filled.

After considering the two forms the learned judge had this to say;

“The entry for the total number of valid votes in both forms is 92,524, while the total number of rejected votes in both forms is the same. The court has looked at the two forms 35B, it is true that the form on page 215 has some errors but which do not affect the results as declared by the returning officer. The total number of valid votes garnered by each candidate is the same in both forms. The petitioner did not tell the court how the errors in form 214-215 affected the results if at all.”

Explaining the anomalies, the Returning Officer testified that, the appellants' Form 35B was a working document which he produced from his laptop, and that he used the IEBC's Form 35B, to declare the results. He conceded that the votes entered on the appellants' Form 35B had more total votes per polling station recorded. He explained that this was because the excel program that they *“...were using picked up the numbers for all the registered voters. The error did not affect the actual result.”*

We begun by comparing the IEBC's Form 35B with the Form 35B set out in the Schedule of the Elections Act, and found it to be a replica of the Form prescribed in the Schedule. As concerns the security features and serial number, these were matters of fact that ought to have been adduced in evidence before the trial court. Since they were not, it cannot be raised at this stage.

That said, an appraisal of both forms shows that, in the appellants' Form 35B, under the column headed *“VALID VOTES”*, the total valid votes displayed ranges from between 967 and 1,255 valid votes. This is certainly well in excess of the designated number of 700 voters per polling station specified by **section 38A** of the **Elections Act**.

But on the other hand, in the IEBC's Form 35B, the numbers in the *“VALID VOTES”* column are all below 700. When the number of valid votes in this Form are added to the registered voters per polling station, it becomes clear that in the appellants' Form 35B, the total of valid votes were added to the total number of registered voters thereby increasing the total number of registered voters per polling station, which was indeed an error. But there is no difference in the total valid votes in the two forms. And, it did not affect the votes attained by each of the candidates or the final results of the election. What mattered was that when the total number of valid votes on the two forms is considered, the same total is reflected on both forms, making it clear that the final results of the election were not affected. We also find that the allegation that the Form 35B was partly filled is unfounded.

Our analysis of the complaints touching on the allegations that the appellants' agents were prevented from fully observing the conduct of the elections, leads us to the conclusion that the claims were not substantiated. We are also not satisfied that the appellants demonstrated that the IEBC and the 2nd respondent manipulated the Forms 35As and 35B so as to alter the results for the benefit of the 3rd respondent.

These findings notwithstanding, the appellants have faulted the learned judge for failing to nullify the elections for the irregularities identified in respect of the Forms 35As and 35B, and have now urged us so to do.

Section 83 of the **Election Act** provides that;

“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.”

It is not in dispute that Form 35As for three polling stations were used to declare the results of three other polling stations. It was also not controverted that the Form 35B used to declare the results for Langata Constituency had errors on its face, and was replaced with another Form 35B. The question at this juncture is whether this was reason enough to nullify the elections?

The Supreme Court in **Peter Gitarau Munya case (supra)** further expounded on the effect of procedural and administrative errors in an election when it stated;

“If it should be shown that an election was conducted substantially in accordance with the principles of the Constitution and the Elections Act, then such election is not to be invalidated only on grounds of irregularities. When however it is shown that the irregularities were of such magnitude that they affected the election results, then such an election stands to be invalidated. Otherwise, procedural or administrative irregularities and other errors occasioned by human imperfection are not enough by and of themselves to vitiate an election”.

The necessity of having to use improvised forms arose when the 2nd respondent was informed that they were missing from the election materials for the three polling stations. We consider these omissions to be procedural or administrative in nature, and insufficient to nullify the elections.

With respect to the Form 35B, we are satisfied that the error in the total registered voters did not affect the final results of the elections, and therefore such error was also not sufficient to nullify the elections.

Before we conclude, there is one final issue that we think is important to dispense with. This is in relation to the assertion that there were 42 blank and illegible Form 35As, some devoid of the results, allegedly used in the tabulation, tallying and declaration of results. It was submitted that without the result of Forms 35A it would not be possible to produce Form 35B so as to declare a final result. It was further submitted that for this reason, the trial court ought not to have upheld the election of the 3rd respondent.

In our view, this is a serious matter as it is true that the Form 35As are the source of the results to be transposed onto Form 35B's. Without the results derived from Form 35As, there can be no final declaration of results with the Form 35Bs.

But having said that, it is apparent from a consideration of the appellants' Petition that the issue of illegible and blank Form 35As was not a matter that was pleaded. Also not pleaded were the polling stations to which the blank and illegible Form 35As related. What was pleaded was that the results entered in respect of the Form 35As differed with the results indicated in the Form 35Bs. At no time was it alleged that the results were not indicated or could not be ascertained. More particularly the Petition specified that;

“53. On 10th August 2017 following a shambolic tallying of votes at the constituency tallying centre, the 2nd Respondent presented the Petitioners with a Form 35B which in many instances bore glaring discrepancies with the respective Forms 35A.

54. It is common ground that the figures stated on the aforesaid Form 35B should be drawn from the respective Forms 35A and hence the same ought to tally.

55. However the figures recorded by the 2nd respondent in the Form 35B did not tally with those in the respective Form 35A. The only inference one can draw is that the figures have been tampered with either by the 2nd Respondent or by persons known to him and/or acting at his behest.”

It is axiomatic that, parties are bound by their pleadings. This Court in *Independent and Electoral Boundaries Commission & another vs Stephen Mutinda Mule (supra)* which cited the Supreme Court in *Malawi Railways vs Nyasulu [1998] MWSC 3* thus;

“... the court itself is bound by the pleadings of parties as they are themselves. It is no part of the duty of the court to enter upon any enquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties have raised by themselves in pleadings. Indeed the court will be acting contrary to its own character and nature if it were to pronounce any claim of defence not made by the parties. To do so would be to enter into the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice...”

We are therefore precluded from venturing into an area that was not raised in the pleadings, as to do so would be to unfairly and indiscriminately mount an ambush on the respondents who would not have had an opportunity to prepare their case and to answer the allegations as necessary. Further, it is apparent that the appellants are relying on photocopies of original forms which are not certified as the copies of the original.

Consequently, we find that the trial court rightly concluded that no basis was established for reaching a finding that the elections of member of National Assembly for Langata Constituency was not free and fair.

The final issue that we must consider is the award of costs. The appellants' case is that the trial court awarded instruction fees of a sum of

Kshs. 2,500,000 each for the 1st, 2nd and 3rd respondents together with costs to be taxed and the total costs to be certified by the Registrar of the court.

Section 84 of the **Elections Act** makes provision for the court to award the costs of and incidental to an election petition. It provides that costs shall follow the cause. **Rule 30 (1)** of the **Elections (Parliamentary and County) Petition Rules, 2017**, provides as follows:

“The election court may, at the conclusion of an election petition, make an order specifying –

(a) the total amount of costs payable;

(b) the maximum amount of costs payable;

(c) the person who shall pay the costs under paragraph (a) or (b); and

(d) the person to whom the costs payable under paragraphs (a) and (b) shall be paid”.

In Mercy Kirito Mutegi vs Beatrice Nkatha Nyaga & 2 others [2013] eKLR, the Court of Appeal capped the total costs at KShs.2.6 million.

In this case the learned judge specified only instruction fees, instead of specifying the 'total' or 'maximum' costs. This was a misdirection on her part and we find it necessary to interfere with that decision.

In view of the judicial decisions in general on the award of cost in election petitions, we would cap the costs at KShs. 2,500,000 each payable to the 1st and 2nd respondent on one part and 3rd respondent on the other part.

The final Orders of this Court are as follows:

- 1. This appeal has no merit and is hereby dismissed.*
- 2. The costs are capped at Ksh.2, 500,000 each payable to the 1st and 2nd respondents on one part and the 3rd respondent on the other part.*
- 3. The appellants shall bear the costs of this appeal which shall be taxed. It is so ordered.*

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

E.M. GITHINJI

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

A.K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR