



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & KOOME, J.J.A)

ELECTION PETITION APPEAL NO. 4 OF 2018

IN THE MATTER OF THE ELECTION FOR GOVERNOR OF LAMU COUNTY

AND

IN THE MATTER OF THE HIGH COURT OF KENYA AT MALINDI

ELECTION PETITION NO. 3 OF 2017

BETWEEN

TIMAMY ISSA ABDALLAAPPELLANT

AND

INDEPENDENT ELECTORAL AND BOUNDARIES

COMMISSION.....1ST RESPONDENT

ADAN ALI MOHAMED.....2ND RESPONDENT

FAHIM YASIN TWAHA.....3RD RESPONDENT

ABDULHAKIM ABOUD BWANA4TH RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Malindi (Chepkwony, J.) dated 2nd March, 2018 in Election Petition No. 3 of 2017)

JUDGMENT OF THE COURT

Introduction:

1. This is an appeal against the judgment of the Election Court (**Chepkwony, J.**) dated 2nd March, 2018 wherein **Timmay Issa Abdalla's** (the appellant) petition challenging the election of **Fahim Yasin Twaha** (the 3rd respondent) and **Abdulhakim Aboud Bwana** (the 4th respondent) as the Governor and Deputy Governor of the County of Lamu respectively was dismissed.
2. Mr. Aboubakar and Mr. Odera, learned counsel appeared for the appellant, Mr. Munyu appeared for the **Independent Electoral and Boundaries Commission** (the 1st respondent), and **Adan Ali Mohammed** (the 2nd respondent) while Mr. Kilonzo appeared for the 3rd and 4th respondents.
3. Before the appeal was heard, an application dated 23rd April, 2018 was filed at the instance of the 3rd and 4th respondents basically challenging the competency of the said appeal. Following this Court's directions, both the application and the appeal were canvassed together. Thus, we deem it appropriate to first deal with the application, which, in the event it succeeds, will dispose of the appeal as well.

Application:

4. The application which was anchored on **Section 34 of the Advocates Act, Rules 17(1) and 19(1)** of the **Court of Appeal (Election Petition) Rules, 2017 (Election Appeal Rules)** sought *inter alia*:

1. THAT this Honourable Court be pleased to extend time within which the 3rd and 4th respondents are supposed to file the application and the application be deemed as having been properly filed within this Court's timelines.

2. THAT the Notice of Appeal dated 6th March, 2018 and the Record of Appeal filed in this Court on 26th March, 2018 be struck out.

5. Those prayers were premised on the grounds that the application had not been filed within 7 days of service of either the Notice or Record of Appeal as required under **Rule 19** of the **Election Appeal Rules**. Be that as it may, this Court is clothed with discretionary power under **Rule 17** to extend timelines prescribed under the **Election Appeal Rules**. The Notice of Appeal against the decision of the Election Court was filed on 6th March, 2018 in the Election Court as opposed to this Court contrary to **Rule 6** of the **Election Appeal Rules**. What was more, the said Notice of Appeal indicated it was against 'the whole judgment' of the Election Court, thus, calling upon this Court to consider issues of both facts and law contrary to **Section 85A** of the **Elections Act**. The net effect of the foregoing rendered the said Notice invalid and divested this Court of its jurisdiction under **Section 85A**, so submitted counsel for the 3rd and 4th respondents.

6. Moreover, the Notice and Record of Appeal were drawn and/or prepared by the appellant's advocate, Mr. Aboubakar, who, at the time, did not hold a current practising certificate. This was evidenced by the Law Society of Kenya advocates search engine which as at 23rd April, 2018 reflected the said advocate's status as 'inactive'.

7. In opposing the application, the appellant deposed that the application was a non-starter having been filed out of time. **Rule 19** of the **Election Appeal Rules** barred the 3rd and 4th respondents from making such an application out of time. The provision stipulates:

“19.

1. A person affected by an election petition appeal may, within seven days from the date of service of the notice of appeal or record of appeal, as the case may be, apply to the Court to strike out the notice or the record of appeal on the ground that no appeal lies or that some essential step in the proceedings has not been taken within the time prescribed by these Rules.

2. Where no application is filed within the period stipulated under sub-rule (1), a person may not raise the issue later.”

Consequently, the Court could not invoke **Rule 17** to extend time as sought by the 3rd and 4th respondents.

8. Mr. Aboubakar deposed that he had applied and paid for his current practising certificate for the year 2018 in time and had sent the payment to the Law Society's offices in Nairobi via G4S courier. He attached a letter dated 15th May, 2018 under the hand of the Law Society to the effect that he had been certified to act as an advocate in the year 2018. However, it seems by a subsequent letter dated 24th May, 2018 this time round annexed to 3rd respondent's further affidavit in support of the application, the Law Society specified that Mr. Aboubakar had applied and paid for his practising certificate on 27th April, 2018 and it was from the said date that he was certified to practise as an advocate.

9. As far as Mr. Aboubakar was concerned, he was not aware that he had been classified as 'inactive' in the advocates search engine. After contacting the Law Society the said mistake was corrected and he is currently categorized as 'active.'

10. The appellant also deposed that the Notice of Appeal was filed both in the Election Court and this Court. In any event, the effect of the non-compliance as alluded to by the 3rd and 4th respondents lay within the Court's discretionary remedy. He urged us not to strike out the appeal since it would be tantamount to denying him the right to be heard.

11. Mr. Kilonzo began by submitting that this Court has unfettered discretion under **Rule 17(1)** of the **Election Appeal Rules** to either extend or reduce timelines set under the Rules on sufficient reason(s). Additionally, the Court under **Rule 5** of the **Election Appeal Rules** is empowered to determine the effect of non-compliance with the said Rules. Taking into account that **Rule 19** is not couched in mandatory terms, the Court could exercise its discretion to extend time within which the 3rd and 4th respondents could file the application in question. The fact that the application was raising a jurisdictional issue was sufficient to warrant us to exercise our discretion in favour of the said respondents.

12. He argued that the Notice of Appeal having been filed in the Election Court as opposed to this Court as dictated under **Rule 6** of the **Election Appeal Rules** was rendered invalid. Furthermore, the Notice of Appeal being a primary document in an appeal as delineated under **Rule 87(1)** of the **Court of Appeal Rules** meant that it also had the effect of nullifying the Record of Appeal which was subsequently filed.

13. Making reference to this Court's decisions in **Boy Juma Boy & 2 others vs. Mwamlole Tchappu Mbwana & Another [2014]** and **Abok James Odera T/A A.J Odera & Associates vs. John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR**, Mr. Kilonzo contended

that in the absence of a valid Notice of Appeal, there was no proper basis upon which this Court's jurisdiction could be anchored. Laying further emphasis, counsel referred to **Lesirma Simeon Saimanga vs. Independent Electoral and Boundaries Commission & 2 Others [2018] eKLR (Lesirma case)** wherein this Court expressed:

“The centrality of a Notice of Appeal was further amplified in Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 Others [2014] eKLR wherein it was stated that a notice of appeal is a primary document that gives a court jurisdiction. Indeed Kiage, J.A. in his judgment referred to it as a “jurisdictional document”. We agree that our jurisdiction is invoked by the filing of a valid Notice of Appeal. It follows that an invalid Notice of Appeal cannot confer jurisdiction upon the Court.

That being the position, there is no valid appeal before us as it is only a proper Notice of Appeal that can give rise to the filing of an appeal.”

14. Counsel went on to add that the Notice of Appeal was incapable of being cured by **Article 159(2)** of the **Constitution**. More so, since **Rule 6** of the **Election Appeal Rules** is couched in mandatory terms. In support of that proposition, we were referred to the following sentiments of the predecessor of this Court in **Boyes vs. Gathure [1969] E.A. 385**:

“We have repeatedly said that the rules of procedure are designed to give effect to the rights of the parties and that once parties are brought before the courts in such a way that no possible injustice is caused to either; then a mere irregularity in relation to the rules of procedure would not result in the vitiation of the proceedings. I should like to make it quite clear that this does not mean that the rules of procedure should not be complied with. Indeed they should be but non-compliance with the rules of procedure of court which are directory and not mandatory rules, would not normally result in the proceedings being vitiated if, no injustice has been done to the parties.”

Besides, this Court appreciated in **Mwamlole Tchappu Bwana vs. IEBC & 4 Others – Mombasa Election Petition Appeal No. 4 of 2017** that electoral laws should be strictly interpreted and applied.

15. It was also submitted that the appellant's advocate at the time of drawing and filing both the Notice of Appeal and Record of Appeal did not hold a valid practising certificate. The only evidence available in that regard was that he paid for his practising certificate on 27th April, 2018. Even so, as per **Section 24(1)** of the **Advocates Act** a practising certificate takes effect from the date of its issue and to date the appellant's advocate had not produced his practising certificate.

16. Whereas **Section 34B (2)** of the **Advocates Act** and the Supreme Court's decision in **National Bank of Kenya Ltd. vs. Anaj Warehousing Ltd. [2015] eKLR (National Bank of Kenya case)** seems to give validity to documents drawn by an advocate without a practising certificate, **Section 31** as read with **Section 34(1) & (3)** of the **Advocates Act** bars such an advocate from appearing before a court and even goes ahead to criminalize such conduct. Therefore, the appellant's advocate should not have appeared before this Court without a practising certificate.

17. In the end, the juridical question, as the 3rd and 4th respondents put it, was what is the fate of the appeal in light of the foregoing? To them, the appeal's undeniable fate is to be struck out in its entirety.

18. In support of the application, Mr. Munyu contended that the Court's power to enlarge time under **Rule 17** was circumscribed to the extent that we could not extend timelines set by the **Constitution** or **Elections Act**. It would be in order for this Court to extend time within which the application could be filed since it had not been prescribed by the **Constitution** or the **Elections Act**. Further, such extension would not interfere with the timelines of disposing an election appeal as stipulated under **Section 85A** of the **Elections Act**. Counsel submitted that the application raised fundamental issues which went to the validity of the proceedings before us. He also made reference to this Court's decision in **Andrew Toboso Anyanga vs. Mwale Nicholas Scott Tindi & 3 Others [2017] eKLR** wherein **Githinji, J.A** allowed a Notice of Appeal to be filed out of time, to persuade us to extend time as sought by the 3rd and 4th respondents.

19. With regard to the Notice of Appeal being lodged at the Election Court and being drawn by an advocate who did not hold a current practising certificate, Mr. Munyu took a similar position as the 3rd and 4th respondents and urged us to strike out the same.

20. In opposing the application, Mr. Odera stated that an application to strike out a Notice or Record of Appeal should be filed within 7 days of service of the Notice or Record as the case may be. The Notice and Record of Appeal in question were filed on 6th March, 2018 and 26th March, 2018 respectively and thereafter, served upon the respondents on even date. The application before the Court was not filed within 7 days of service of either the Notice or Record of Appeal. Rather, it was filed after about 49 days of service. It followed that the application was incompetent by virtue of **Rule 19(1)** of the **Election Appeal Rules**. In other words, the respondents were barred from making an application to strike out the Notice or Record of Appeal. In that respect, we were referred to a plethora of cases and to mention but a few; **Pickwell Properties Limited vs. Kenya Commercial Bank [2016] eKLR**; **William Mwangi Nguruki vs. Barclays Bank of Kenya Ltd [2014] eKLR** and **Joyce Bochere Nyamweya vs. Jemima Nyaboke Nyamweya & Another [2016] eKLR**.

21. Referring to **Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 Others [2014] eKLR**, Mr. Odera submitted that extension of time is not a matter of right but falls within the discretion of the Court. There was no reason to warrant this Court to exercise the said discretion in favour of the 3rd and 4th respondents because the delay was inordinate and no satisfactory explanation was given for the delay.

22. On the validity of the pleadings drawn by their advocate, Mr. Odera also cited the Supreme Court's decision in the **National Bank of Kenya case** and the provisions of **Section 34B (3)** of the **Advocates Act** to underscore that a legal document could not be rendered invalid solely on the ground that it was drawn by an advocate who was by then not holding a current practising certificate. In any event, Mr. Aboubakar had demonstrated that he is an advocate of the High Court of Kenya and had taken out a practising certificate for the year 2018.

23. Placing reliance on *Section 72* of the *Interpretation and General Provisions Act* which stipulates in part:

“... whenever a form is prescribed by a written law, an instrument or document which purports to be in that form shall not be void by reason of a deviation therefrom which does not affect the substance of the instrument or document, or which is not calculated to mislead.”

Counsel claimed that the respondents attack on the propriety of the Notice of Appeal was hinged on a procedural technicality of form rather than on substance.

24. He stated that the Notice in question was filed both in the Election Court and this Court and specified that the appellant desired to appeal against the entire decision of the Election Court. In his opinion, the object of a Notice of Appeal is to inform the Election Court and the respondents of the appellant’s intention to appeal.

25. Urging the Court not to strike out the appeal, counsel posited that striking out of an appeal is a draconian step which ought to be as a last resort and only in the clearest cases. Further stating that the Court should lean more towards sustaining the appeal than striking it out. Putting it another way, Mr. Odera argued that the substantive aspect of sustaining an appeal should, in the interest of justice, override the procedural rule requiring striking out. In support of that line of argument, counsel relied on *Joseph Kiangoi vs. Waruru Wachira & 2 Others [2010] eKLR*; and *Andrew Toboso Anyanga vs. Mwale Nicholas Scutt Tindi & 3 Others [2017] eKLR*. In addition, that the Court should be guided by the constitutional principle that justice should be administered without undue regard to procedural technicalities and determine the appeal on merits.

26. In our view, the central thread running through the application and the appellant’s opposition to the same is the effect of non-compliance with the *Election Appeal Rules*. On our part, we are convinced the effect of non-compliance can only be determined on a case by case basis being guided by the overarching objectives in the administration of justice that aims and lays more emphasize on substantive justice. Our position is fortified by the provisions of *Rule 5* of the *Election Appeal Rules* which reads:

“The effect of any failure to comply with these Rules shall be a matter for determination at the Court’s discretion subject to the provisions of Article 159(2)(d) of the Constitution and the need to observe the timelines set by the Constitution or any other electoral law.” [Emphasis added]

27. Looking at the words used by the Rules Committee it is clear that the Court is clothed with discretionary power of determining the effect of ‘any’ non-compliance. This means that the 3rd and 4th respondents’ contention that the Court could only exercise its discretion thereunder where the Rule which is subject of non-compliance is couched in permissive as opposed to mandatory terms fails. Our interpretation is informed by *Hill vs. William Hill (Park Lane) Ltd [1949] AC 530* at page 546 wherein **Viscount Simons** stated:

“When the legislature enacts a particular phrase in a statute the presumption is that it is saying something which has not been said immediately before. The rule that a meaning should, if possible, be given to every word in the statute implies that, unless there is good reason to the contrary, the words add something which had not been said immediately before.”

28. Just like any other judicial discretion, it ought not to be exercised capriciously or arbitrarily but judiciously. Further, *Rule 5* enjoins this Court while exercising its discretion thereunder to pay regard to the overriding objective and the constitutional timelines for resolution of electoral disputes.

29. The goal of the overriding objective principle is summed up in a number of decisions as to enable a court to achieve fair, just, speedy, proportionate, time and cost saving disposal of cases before it. See *Karuturi Networks Limited & Another vs. Daly & Figgis Advocates [2009] eKLR*. This Court in *Martha Wangari Karua vs. Independent Electoral & Boundaries Commission & 3 Others [2018] eKLR (Martha Karua case)* appreciating that the aforementioned objectives need to be balanced succinctly stated:

“There should be a meticulous balance of those four objectives. It should not appear as though, an election court is simply concerned about expeditious disposal of the election petition by quickly striking it out, without carefully considering whether the decision to strike out, the petition is actually just to all the parties concerned, whether it is proportionate and whether the same could be avoided.”

Even though the Court in the above case was considering whether it was appropriate to strike out an election petition in the Election Court the aforementioned sentiments equally apply to an election appeal filed before this Court.

30. Further, the Supreme Court in *Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 Others [2015] eKLR* observed that the overriding objective accords precedence to substance over form. However, this does not uproot the settled position taken by this Court on numerous occasions that the overriding objective is certainly not a panacea of all procedural shortfalls.

31. As for constitutional timelines, the rationale behind the establishment of mechanisms for timely settling of electoral disputes was well captured in this Court’s decision in *Mbaraka Issa Kombe vs. Independent Electoral and Boundaries Commission (IEBC) & 2 Others [2018] eKLR*. The long and short of it being that elections or the electoral process should not be held captive to endless litigation, that is, electoral dispute resolution should be timely. This means that while the Court exercises its discretion under *Rule 5* it should be careful not to upset constitutional timelines.

32. Applying the principles set out herein above, we find it prudent to extend time within which the 3rd and 4th respondents’ application

could be filed. This is because the application challenges the competency of the appeal before us which extends to whether we have jurisdiction to entertain the same. It is common ground that an objection on jurisdiction can be raised at any point in time and the minute such objection is raised the Court ought to consider the same before embarking on the merits of the matter before it. In the words of this Court in *Kakuta Maimai Hamisi vs. Peris Pesi Tobiko & 2 Others* [2013] eKLR:

“So central and determinative is the question of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceeding is concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it, once it appears to be in issue, is a desideratum imposed on courts out of a decent respect for economy and efficiency and a necessary eschewing of a polite but ultimately futile undertaking of proceedings that will end in barren cul de sac. Courts, like nature, must not act and must not sit in vain.”

33. The gist of the 3rd and 4th respondents’ application was an attack on the validity of the appeal before us on three fronts. Firstly, that the Notice of Appeal did not comply with **Rule 6** of the *Election Appeal Rules* hence it was invalid.

34. It is not in dispute that unlike the procedure laid down under the *Court of Appeal Rules*, the Notice of Appeal against the decision of an Election Court should be filed in this Court. It is equally not in dispute that the appellant filed the Notice of Appeal in question in the Election Court on 6th March, 2018. Did this non-compliance on the appellant’s part render the Notice of Appeal invalid?

35. Once again, we are not persuaded by the 3rd and 4th respondents’ argument that since **Rule 6** is couched in mandatory terms there is no room for this Court to exercise its discretion under **Rule 5** of the *Election Appeal Rules*. We discussed the import of our discretion under **Rule 5** in the preceding paragraphs. It follows therefore, that the said respondents cannot call on **Rule 5** to aid their application which was filed out of time and in the same breath purport to draw limitation of its application where the appellant is concerned. As the adage goes what is good for the goose is surely good for the gander.

36. What is the effect of this non-compliance? We agree with the 3rd and 4th respondents that it is a Notice of Appeal that invokes the appellate jurisdiction of this Court. Be that as it may, whether a Notice of Appeal against the decision of an Election Court is invalid for the reason of non-compliance with **Rule 6** depends on the circumstances of each case. In the case at hand, it is without doubt that apart from lodging the Notice in question in the Election Court the appellant also filed the same Notice on even date in this Court’s registry. We find that filing of the Notice of Appeal in this Court within the requisite time frame mitigated against the anomaly of the same having been filed in the Election Court and activated our appellate jurisdiction in the matter.

37. Furthermore, there was no prejudice occasioned to the 3rd and 4th respondents who were served with the very same Notice of Appeal on time. In the circumstances, we exercise our discretion to save the Notice of Appeal as opposed to declaring it invalid.

38. Secondly, the Notice of Appeal was challenged on the ground that it raised issues of facts which did not fall within this Court’s jurisdiction as stipulated under **Section 85A** of the *Elections Act*. Specifically, the Notice of Appeal indicated that the appellant was appealing against the ‘whole judgment’ of the Election Court. In the 3rd and 4th respondents’ view, the said Notice raised issues of facts since the whole judgment was based on facts and law.

39. It is important to note that the Supreme Court in *Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others* [2014] eKLR (*Gatirau Munya case*) delved into great detail in determining what amounts to a point of law under **Section 85A**. Whether crafting the Notice of Appeal in the manner the appellant did or whether grounds of appeal of mixed facts and law or better still, prefixed under the assertion that the ‘learned Judge erred in fact and law’ divests this Court of its jurisdiction under **Section 85A** of the *Elections Act* has been considered in a number of decisions by this Court. As it stands, two schools of thought have emerged from those decisions.

40. The first being that where an appeal is purportedly anchored on mixed grounds of law and facts the same is unsustainable. See *Mohamed Abdi Mahamud vs. Ahmed Abdullahi Mohamad & 3 Others* [2018] eKLR (*Mohamed Abdi Mahamud case*), *Apungu Arthur Kibira vs. Independent Electoral and Boundaries Commission & 2 Others- Kisumu Election Petition Appeal No. 11 of 2018 & Lesirma case*. The other school whilst appreciating that an appeal to this Court from the Election Court should be on points of law takes a liberal approach which involves the Court looking beyond the craftsmanship of the Notice or grounds whichever the case may be, to determine whether there are points of law raised and address its mind on the same. See this Court’s decision in *Stanley Muiruri Muthama vs. Rishad Hamid Ahmed & 2 Others – Mombasa Election Petition Appeal No. 1 of 2018 as consolidated with Election Petition Appeal No. 3 of 2018 & Owino Paul Ongili Babu vs. Francis Wambugu Mureithi & 2 Others* [2018] eKLR (*Babu Owino case*).

41. Our position in this case is no different from the one we took in the *Stanley Muiruri case* which resonates with the sentiments of our brothers in *Wavinya Ndeti & Another vs. Independent Electoral and Boundaries Commission & Another* [2018] eKLR (*Wavinya Ndeti case*) thus:

“Section 85A is not a blanket, ‘no entry zone’ for this Court not to consider and address its mind on grounds of appeal simply on account of a plea in the memorandum of appeal that the trial judge “erred on facts and law.”

We are mindful that drafting of pleadings is a technical matter. If the judge had deduced an unknown legal principle from the facts of the case to arrive at his decision, it would be preposterous to shut out a litigant simply on account of inelegance in drafting. The Court has to ensure that justice prevails at all times and that Section 85A is not used as a roadblock to shut out genuine grounds of appeal on account of poor drafting of the grounds of appeal. In essence the Court has to undertake a delicate examination to ensure that appeals are not outrightly and without proper investigation rejected. In the same breadth, we underscore the importance of compliance with Section 85A but we are mindful that often times points of law may inescapably be difficult to separate from factual determination. The line is opaque and therefore circumspection is

necessary.” [Emphasis added]

Accordingly, we decline to accede to the 3rd and 4th respondents’ prompting to strike out the Notice of Appeal solely on the ground that it indicates it is against the whole judgment without addressing our minds on the grounds raised in the memorandum of appeal on record which we shall do at a later stage of this judgment.

42. On the issue of whether the said Notice and Record of Appeal which were drawn by Mr. Aboubakar, who is alleged not to have had a valid practising certificate, we think it is settled that the propriety of a legal document cannot be called into question simply on the ground that it was drawn/prepared by an advocate who did not hold a current practising certificate at the time. This was the Supreme Court’s finding in the *National Bank of Kenya case*. Thereafter, that finding was crystallized by the amendment of the *Advocates Act* by *Section 2* of the *Statute Law (Miscellaneous Amendments) Act, 2017* which inserted *Section 34B* thereunder which provides:

“34B

1. A practising advocate who is not exempt under section 10 and who fails to take out a practising certificate in any year, commits an act of professional misconduct..

2. Notwithstanding any other provisions of this Act, nothing shall affect the validity of any legal document drawn or prepared by an advocate without a valid practising certificate.

3. For the purpose of this section, "legal document" includes pleadings, affidavits, depositions, applications, deeds and other related instruments, filed in any registry under any law requiring filing by an advocate. [Emphasis added]

43. It is not in dispute that the appellant’s advocate, Mr. Aboubakar paid for his practising certificate for the year 2018 on 27th April, 2018 as evidenced by the Law Society’s letter dated 24th May, 2018. The Law Society went ahead to clarify that the said advocate was certified to practise as such as from the 27th April, 2018. However, we understood the 3rd and 4th respondents to argue that we should conclude that the Mr. Aboubakar did not hold a valid practising certificate since he had not produced a copy of the same before this Court. We are not persuaded by the respondents’ argument because the Law Society’s letter is clear in that respect and there was no evidence suggesting otherwise.

44. It follows, therefore, that the Notice of Appeal and Record of Appeal were prepared by Mr. Aboubakar when he did not hold a practising certificate. Nevertheless, as set out herein above coupled with *Section 34B (3)* of the *Advocates Act*, the said documents were not rendered invalid. We cannot help but note from the record that Mr. Aboubakar appeared before us for the first time on 10th May, 2018 when he submitted on the appellant’s application seeking transfer of the appeal to Nairobi. By this time, Mr. Aboubakar had already taken out his practising certificate for the year 2018 on 27th April, 2018. For that reason the 3rd and 4th respondents contention that he had appeared before us without a practising certificate holds no weight.

45. All in all, we find that the 3rd and 4th respondents’ application lacks merit and is hereby dismissed and we therefore proceed to determine the substantive appeal.

Appeal:

Background:

46. During the 2017 general elections not less than five aspirants contested for the governorship of the County of Lamu. Upon the close of the said election, the 2nd respondent on 11th August, 2017 declared the 3rd respondent as the duly elected Governor for Lamu having garnered 22,972 votes and issued a certificate to that effect. Following close behind was the appellant who got 22,420 votes.

47. Convinced that the election in question was not free, fair or credible and did not reflect the will of the people of Lamu, the appellant filed Election Petition No. 3 of 2017 before the Election Court at Malindi. The petition was predicated on the grounds that the 1st respondent had failed to manage and conduct the said election in accordance with the *Constitution* and electoral code. Additionally, that the election was tainted with irregularities which affected the outcome thereof.

48. The illegalities and non-compliance ranged from allegations that the 1st and 2nd respondents had denied about 85 voters their right to vote in contravention of *Articles 38 & 81(e)* of the *Constitution*. They were denied their right to vote by either their names being omitted from the register of voters; the 1st and 2nd respondents transferring the voters to other polling stations where they had not been registered to vote without their knowledge or consent; or failing to transfer voters to other polling stations as they had requested prior to the closure of the registration process. The said respondents also turned away voters who had not been identified biometrically through the Kenya Integrated Elections Management Systems (KIEMS) Kit without resorting to the alternative identification through alphanumeric system contrary to *Regulation 69(1)(e)* of the *Elections (General) Regulations, 2012 (Elections Regulations)*.

49. The election was not transparent or impartial due to the undue advantage conferred upon the 3rd respondent by the 4th respondent being his running mate. In that prior to the election the 4th respondent was the 1st respondent’s employee and acted as the Lamu West Registration Officer. Coupled with the fact that Khadija Mohamed Ahmed (Khadija) who had been gazetted as the Deputy Constituency Returning Officer for Lamu East Constituency swapped with her counterpart, Abdul Issa Mohammed (Abdul) who had been gazetted as the Deputy Constituency Returning Officer for Lamu West in violation of *Regulation 3(2) & (4)* of the *Elections Regulations*. The appellant imputed

there was a sinister motive behind the swap and contended that as a result, the integrity of the election in Lamu East and West was vitiated and should be declared a nullity.

50. The appellant also alluded that there were pre-marked ballot papers which were used in the election following what he termed as an unusual agreement between Presiding Officers and agents in the affected polling stations. Votes which were cast in favour of the appellant were treated as rejected votes; Polling Officers had failed to facilitate assisted voters to vote as required under **Regulation 72** of the **Elections Regulations**. Instead, the 1st respondent's officers took advantage to influence the said voters to vote in favour of the 3rd respondent; there was either shortage or lack of declaration forms which are required to be executed by persons rendering assistance to such voters; agents were barred from witnessing the assistance of such voters; in some instances, the 1st respondent's officers barred such voters from being assisted on the ground that they had appended signatures on their national identity cards evidencing their literacy despite the fact that some or most were elderly and had poor vision.

51. A number of Presiding Officers in various polling stations had failed to display votes to agents for verification during sorting and tallying of votes in various polling stations contrary to **Regulation 76** of the **Elections Regulations**. There was a case of about 16 voters being allowed to vote without verification through the KIEMS kit at Kizingiti Secondary School which led to the arrest of the polling clerk, Nafia Abbas (Nafia); results in respect of Lamu East were collated in Form 36B which is meant for Member of the National Assembly as opposed to Form 37B; and that there was variance between the votes cast in the different elective posts.

52. Accordingly, the appellant sought the following orders:

- a. An order for scrutiny and recount of votes in the disputed polling stations stated in paragraphs 30, 34, 36 37 and 43 in the petition, in accordance with rule 29 of the Elections (Parliamentary and County Elections) Petition Rules, 2017.**
- b. An order for scrutiny and recount of all the rejected votes (totaling 797) for the purpose of establishing the validity or otherwise of the rejection.**
- c. A declaration that from the evidence available and anomalies cited in the petition, the election for Governor and Deputy Governor respectively held on 8th August, 2017 in Lamu county was not conducted in accordance with the mandatory provisions and requirements of Articles 38, 81 and 86 of the Constitution, the election Act, and Rules and Regulations thereunder and therefore invalid, null and void.**
- d. A declaration that the 3rd and 4th Respondents were not validly elected as Governor and Deputy Governor respectively of Lamu County in the general election that was held on the 8th August, 2017.**
- e. An order that a fresh election be held for the position of Governor and Deputy Governor respectively in Lamu County.**
- f. In the alternative to the prayers hereinabove and upon the results of the vote scrutiny and recount as sought in prayer (a) and (b) above, the honourable court be pleased to declare the petitioner as the validly elected governor of Lamu County;**
- g. The costs of this petition be awarded to the petitioner and paid by all the Respondents;**
- h. Any other order that the Honourable court may deem fit and just to grant.**

53. In their joint response, the 1st and 2nd respondents denied the appellant's allegations maintaining that the election was conducted in accordance with the law and that the illegalities, if any, did not affect the results of the election. The election was free, fair and verifiable as well as a representation of the will of the electorate. Similarly, the 3rd and 4th respondents in their joint response took a similar position and argued that there was no reason for the said election to be nullified.

54. Before the petition proceeded for hearing the appellant filed an application dated 26th September, 2017 praying for several orders including orders of scrutiny and recount of votes in all the 167 polling stations. Some of the orders therein were granted with the ones relating to scrutiny and recount being held in abeyance until after the hearing. After hearing about 142 witnesses in support of the parties respective positions, the learned Judge by a ruling dated 2nd February, 2018 allowed limited scrutiny in the following terms:

“In compliance with the law and rules with regard to election and jurisprudence, this court proceeds to allow a scrutiny of the votes under Rule 29 (1) and (4) of the Elections (Parliamentary and County Elections) Petition Rules, 2017, which scrutiny will be limited to following matters;

- a. the written statements made by the returning officers (ROs) under the Act;**
- b. the register of voters used in the election and sealed in tamper proof envelopes;**
- c. the copies of results for the station in dispute;**
- d. the written complaints of candidates or their agents;**
- e. the packets of spoiled ballot papers (if any);**

- f. the marked copy of register;
- g. the packets of rejected ballot papers;
- h. the Polling Day Diary (PDD).

The said scrutiny to apply to the following stations;

- a. Lamu West constituency
 - i. Mapenya primary (1) and (2)
 - ii. Mpeketoni Youth Polytechnic (1) and (2)
 - iii. Lamu Port Hall polling station (4) and (5)
- b. Lamu East constituency
 - i. Mbwajumwali Nursery school
 - ii. Mbwajumwali Primary school
 - iii. Kizingitini primary school
- c. All the forms 37As in Lamu East constituency

55. The learned Judge also directed the Deputy Registrar to take charge of the exercise and a report was filed thereafter on 12th February, 2018.

56. After weighing the evidence before her the learned Judge in a judgment dated 2nd March, 2018 expressed:

“Ultimately, the question is whether the burden of proof has been discharged to the required standard to warrant the Lamu county Gubernatorial election conducted on 8th August, 2017 nullified and a fresh election ordered.

Having considered the evidence in view of my findings on every issue that was raised in the petition, I find that the petitioner raised irregularities or malpractices or breaches which were not substantive enough to affect the integrity of the process or results of the election of the governor of Lamu County, to result in the nullification of the same. Refer to Francis Mwangangi Kilonzo V IEBC & 2 others [2018] eKLR at paragraph 33; Raila 2017 case (Supra); Gatirau Peter Munya case (2014) e KLR at paragraph 216-220; and case of Joho V Nyange (Supra).

In conclusion, I find that the petitioner having failed to discharge the burden of proof with respect to the allegations he set out in his petition by failing to demonstrate how the irregularities and malpractices raised affected the process of the election or results, the 3rd Respondent and 4th Respondent were validly elected in the General election held on 8th August, 2017 in Lamu County. The petition therefore stands dismissed with costs to the Respondents.”

57. The learned Judge went on to issue the following orders:

- a. The petition be and is hereby dismissed.
- b. The respondents are awarded costs on the following terms;
 - i. the instruction fee for the 1st and 2nd Respondents are applied at Kshs.6,000,000.
 - ii. the instruction fee for the 3rd and 4th Respondents are applied at Kshs.6,000,000.
- c. The costs shall be taxed and total costs certified by the Deputy Registrar of this court.
- d. The certified costs awarded shall be paid out of the security deposit on pro-rate basis.
- e. A certificate of the determination in accordance with section 86 (1) of the Election Act, 2011 shall issue to the Independent Electoral and Boundaries Commission and the speaker of the bench.

58. It is this decision that provoked the appeal before us which is premised on 41 grounds.

Submissions:

59. The appeal was disposed by way of written submissions as well as oral highlights by counsel for the respective parties.

Appellant's submissions:

60. Mr. Odera submitted that the crux of the appeal was that the learned Judge misapprehended the import of **Section 83** of the **Elections Act**. Specifically, she failed to appreciate firstly, that the appellant had established that the election in question had not been conducted in accordance with the principles laid down in the **Constitution** and other electoral laws. Secondly, the appellant had not only demonstrated that the said elections were fraught with illegalities and irregularities but also that the illegalities and irregularities had affected the result of the election. In a nutshell, the appellant had discharged both the legal and evidential burden thus there was no reason for the petition to be dismissed.

61. Elaborating on the perceived misapprehension, Mr. Odera stated that the learned Judge had not considered and/or understood the implication of the observations made in the scrutiny report by the Deputy Registrar concerning the election in issue. The report revealed that the election was marred with irregularities and illegalities which affected the result therein. For instance, out of the 45 polling stations in Lamu East Constituency, Form 37A's from seven polling stations representing about 1973 votes were missing; further, Form 37A's in respect of 18 polling stations which accounted for about 6,398 votes were either partly or completely illegible. Taking into account that the margin between the 3rd respondent and appellant was 500 votes, the foregoing anomalies without doubt had substantial impact on the results and rendered the election therein unverifiable.

62. The report disclosed that about 10 votes which had been cast in favour of the appellant had been categorized as rejected votes at Mbujumwali Nursery School and Kizingiti Primary School. There were discrepancies as to the votes cast in favour of the 3rd respondent at Shanga Ishakani Primary School Polling Station which indicated he garnered 32 votes while the Form 37A availed in court by the 1st respondent showed he got 52 votes. The serial numbers on Form 37A's availed at the Election Court by the 1st respondent in respect of 12 polling stations differed with the serial numbers on corresponding Forms 37A's which were in the ballot boxes. In addition, all the registers of voters were not marked and polling stations diaries were not stored in a separate sealed ballot box as required under **Regulation 86(2)(a)** of the **Elections Regulations**.

63. It is on the basis of the aforementioned grounds that Mr. Odera took issue with the learned Judge's finding that the scrutiny report disclosed minor errors which did not affect the outcome of the election.

64. The learned Judge was further faulted for holding that the appellant had not established that registered voters had been denied the right to vote. According to counsel, the learned Judge went off the mark by stating that the appellant should have applied and produced copies of the poll registers to confirm that indeed some voters had been denied the right to vote in the manner he had pleaded. As per **Regulation 81(2)** of the **Elections Regulations** the Presiding Officer is required to deliver to the Returning Officer the register of voters used in the election and in turn the Returning Officer is under a duty to seal and keep the same under safe custody. In point of fact, the registers were in the custody of the 1st respondent and as such, the appellant could only have access through a court order.

65. Besides, the appellant had prayed for scrutiny of the entire register of voters vide his application dated 26th September, 2017. Nonetheless, the learned Judge limited scrutiny of the register of voters to 10 polling stations. Consequently, the learned Judge was wrong in holding that there was no evidence that the appellant had applied for the production of the register of voters.

66. The learned Judge was also criticized for ignoring the persuasive case of **Omiti vs. Osebe [2014] 5 KLR (EP) 620** wherein **Makhandia, J**, (as he then was), found that a person could prove that he/she is a registered voter by oral or affidavit evidence. Moreover, the Supreme Court in the **Gitarau Munya's case** was clear that the evidential burden regarding the contents of the register of voters lies with the 1st respondent.

67. We understood Mr. Odera to argue that once the appellant tendered evidence with regard to voters being denied the right to vote, the burden shifted to the 1st respondent to disprove the same. In support of this line of argument, the Supreme Court's decision in **Raila Amolo Odinga vs. The Independent Electoral and Boundaries Commission [2013] eKLR (Raila Odinga, 2013 case)** and this Court's decision in the **Mohamed Abdi Mahamud case** were cited.

68. Mr. Odera argued that the election was not free and fair but was eclipsed with improper influence and lack of impartiality. In that the persons who were in charge of the conduct of the said election were either the 4th respondent's colleagues or worked under his supervision prior to his resignation from the 1st respondent's employment. The 4th respondent was the registration officer in Lamu West Constituency from the year 2016 until his retirement on 15th January, 2017. In that regard reliance was placed on the **Babu Owino case**.

69. He went on to argue that swapping of the Constituency Deputy Returning Officers was not sanctioned by law for the reason that there was no gazette notice to that effect. To that extent, we were referred to Election Court's decision in **Francis Mwangangi Kilonzo vs. Independent Electoral and Boundaries Commission & 2 Others [2018] eKLR** where **Muchelule, J.** held:

“The next issue is whether the 2nd respondent was validly and legally appointed as the Returning Officer for the Yatta constituency election... The 2nd respondent testified, and it was evident, that Lucy Mbithe John was gazetted on 5th May 2017 to conduct the Yatta constituency election, but that on 26th May 2017 there was a corrigenda by which the 2nd respondent was appointed instead... I find that the 2nd respondent was validly and legally appointed to conduct the election in Yatta constituency.”

70. Therefore, Khadija and Abdul's actions were illegal and nullified the election process in Lamu East and West constituencies. Based on the foregoing, Mr. Odera was at a loss as to why the learned Judge chose to overlook the said violations which raised a reasonable apprehension of bad faith and bias as against the appellant. He also referred us to the cases of **Tumaini vs. Republic [1972] EA 441** and **Metropolitan Properties (F.G.C) Ltd. vs. Lannon & Others [1968] 1 ALL ER 354.**

71. It was advanced that contrary to the learned Judge's findings there was evidence to the effect that pre-marked ballot papers were used during the election. A case in point was Mapenya Primary School 1 and 2 where the Presiding Officers entered into illegal and unconstitutional agreements with agents for the use of the pre-marked ballot papers by voters. Notwithstanding that the mark on the ballot may have been caused by a printing error such a ballot should not have been used let alone counted as a valid vote. Buttressing that line of argument, reference was made to **Regulation 77(1)(b) & (c)** of the **Elections Regulations.**

72. Reiterating that Presiding Officers did not facilitate assisted voters within the meaning of **Regulation 72** of the **Elections Regulations** to vote in over 20 polling stations and also failed to count/tally the votes as required under **Regulation 76(2)** of the **Election Regulations,** we were taken through the evidence tendered by the appellant's witnesses. In the appellant's opinion, the fact that the 1st respondent failed to call the Presiding Officers in question to rebut the said evidence an inference should have been drawn by the Election Court as we also should that their evidence would have been adverse to the 1st and 2nd respondents case. In that regard, Mr. Odera relied on the **Mohamed Abdi Mahamud case.**

73. It was submitted that despite the learned Judge appreciating that there was evidence of a polling clerk, Nafia at Kizingitini Secondary School who had failed to verify voters through the KIEMS kit she erroneously concluded that there was no evidence to support the allegation that about 16 voters had voted without verification.

74. Discounting that the election results in Lamu East Constituency were openly and accurately collated, Mr. Odera submitted that the 2nd respondent did testify that all Form 37B's for the said constituency were destroyed during printing and alternative Form 36B's were used to collate the results. Form 36B's are designated for declaring the results for Members of County Assembly hence using the same in the manner the 1st respondent's officers did was contrary to the law. Furthermore, the 3rd and 4th respondents' witness, Mohamed Kassim Shee, attached a Form 37B in his affidavit and upon cross examination he stated he got the form from a clerk at the Lamu East Constituency. This demonstrated a disconnect in the respondents evidence.

75. In counsel's opinion, the disparity of votes cast in various elective posts went to corroborate the appellant's evidence that some voters were either given more than one ballot paper for any given elective post or were in the reverse denied a ballot. In Lamu County a total of 49,865 votes were cast for the Presidential post, 50,124 for the Governor's post and 50,200 for the Senator's seat. The 1st respondent did not give any explanation for the said variance.

76. As far as Mr. Odera was concerned, the conclusions reached by the learned Judge that the election was conducted in accordance with the law and that the irregularities therein did not affect the result could not hold and should be set aside.

77. Last but not least, Mr. Odera posited that the learned Judge misdirected herself in the exercise of her discretion by awarding and capping costs at Kshs.12,000,000. The said costs, in his view, were punitive and impeded access to justice contrary to **Article 48** of the **Constitution.**

1st and 2nd respondents' submissions:

78. Rising on his feet, Mr. Munyu revived the objection with respect to our jurisdiction to entertain the appeal. The objection was anchored on the ground that this Court's jurisdiction had not been properly invoked since the Notice of Appeal sought to challenge 'the whole judgment'. Apart from the manner in which the Notice of Appeal was crafted, it was evident that the grounds in the memorandum of appeal on record raised issues of mixed facts and law contrary to **Section 85A** of the **Elections Act.** Placing reliance on the **Gatirau Munya case,** **Mohamed Abdi case** and **Lesirma case,** counsel urged us to strike out the appeal which was incapable of being cured under **Article 159(2)** of the **Constitution.**

79. Equating an election petition to an audit being undertaken by the Election Court on the basis of complaint(s) raised thereunder, counsel argued that the essence of such an audit is to confirm whether an election was undertaken in accordance with the **Constitution** and electoral law. All in all, an Election Court or this Court should not be used to substitute the will of the voters but should aim at giving effect to the said will. In support of that proposition, the case of **John Fitch vs. Tom Stephenson & 3 others [2008] EWHC 501 QB6** was cited and in particular the following sentiments of the Court were highlighted:

“The decided cases, including those which Lord Denning considered in Morgan vs. Simpson, establish that the courts will strive to preserve an election as being in accordance with the law, even where there have been significant breaches of official duties and election rules, provided the results of the election was unaffected by those breaches... This is because where possible, the courts seek to give effect to the will of the electorate.”

80. Addressing us on the burden of proof, Mr. Munyu argued that in an election petition the evidential burden rests with the petitioner to prove the grounds raised therein. The requisite standard of proof is above a balance of probabilities but not beyond reasonable doubt. It is not sufficient for a petitioner to generally point out irregularities that allegedly took place, as the appellant did in this case; the petitioner is required to go further by adducing firm and credible evidence to prove the irregularities and also demonstrating that the irregularities affected the outcome of the election. Laying emphasis, counsel referred to the Supreme Court's decision in **Raila Odinga, 2013 case.**

81. Mr. Munyu went on to state that contrary to the appellant's allegation, the learned Judge did not apply the principles delineated under

Section 83 of the *Elections Act* conjunctively.

82. In counsel's view, the learned Judge correctly found that the onus lay with the appellant to prove that indeed the 85 voters he claimed were denied the right to vote were first, registered voters and second, were barred from exercising their right to vote. It was only after the appellant had made out a *prima facie* case that the 1st respondent would have been called upon to disprove the same. The appellant had failed to do so. To that extent reliance was placed on the Supreme Court's decision in the *Gatirau Munya case* wherein the Court rendered itself as follows:

"... On the other hand, the evidential burden is a shifting one, and is a requisite response to an already- discharged initial burden. 'The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue'...

Can it be said that an electoral register, a public document, is a fact 'especially' within the knowledge of the IEBC in the context of the provisions of Section 112 of the Evidence Act. In our view, what was within the power of the IEBC is the custody of the register, and its production will be a matter of course, upon an application by a party who wishes to rely on its contents. We would agree with the learned Judges of Appeal, however, that the evidential burden regarding the contents of the register and declared results lies on the IEBC; save that this burden is activated, in an election petition, only when the initial legal burden has been discharged."

83. In any event, the appellant did not establish to the Election Court's satisfaction that any registered voter had been denied the right to vote. Proof to the satisfaction of the court must be that which leaves the court without reasonable doubt. In support of that line of argument counsel relied on the persuasive High Court case of *Benard Shinali Masaka vs. Bonny Khalwale & 2 Others [2011] eKLR*.

84. According to Mr. Munyu, allegations relating to the scrutiny report were factual in nature and outside the ambit of this Court's jurisdiction. Be that as it may, the learned Judge extensively considered and evaluated the scrutiny report. Counsel went ahead to demonstrate the same by setting out instances that the learned Judge considered the observations made therein by the Deputy Registrar in the impugned judgment.

85. Nonetheless, Mr. Munyu's position was that the scrutiny report could not be used to support new allegations that were not pleaded in the petition as the appellant purported to do. Elaborating further, counsel argued that the scrutiny report could not be used to substantiate the allegations that there were missing

Forms 37A's or that some of the forms in question were illegible for the reason that they were never pleaded in the petition. What was more the appellant had not demonstrated that the learned Judge erred in concluding that scrutiny report revealed minor errors which did not affect the outcome of the results.

86. Citing this Court's decision in *Independent Electoral and Boundaries Commission vs. Maina Kiai & 5 Others [2017] eKLR (Maina Kiai case)*, as it pertains to the results declared at the polling station, counsel submitted that there was no challenge against the results declared in the Forms 37A's. It followed therefore, that the results entered therein were verifiable, accurate and accountable.

87. With respect to lack of impartiality, neutrality and unfair advantage, the 1st and 2nd respondents' stand was that the allegations were not based on evidence but mere suspicion. There was nothing to suggest that the 4th respondent who had resigned from the 1st respondent's employment was involved in the voter registration which took place in February, 2017 or that he had interfered or tampered with the voter register. Equally, there was no evidence of bias against the appellant simply because some of the persons who were conducting the said election were once the 4th respondent's colleagues or working under his supervision during his employment with the 1st respondent. More importantly, there was nothing to show that the appellant or his agents had objected to any of the persons in question conducting the election. The appellant admitted that he knew of the 4th respondent's interest to vie for the Deputy Governor's seat way back in the year 2016 but did not object to the same.

88. Swapping of the Deputy Constituency Returning Officers was based on genuine and valid reasons, that is, Khadija who had been gazetted as the Lamu East Constituency Deputy Returning Officer was experiencing security and transport challenges and her request to be transferred to Lamu West was officially and transparently approved. Counsel urged that the fact that there was no corrigendum gazetted in respect of the swap did not divest the Constituency Deputy Returning Officers of the power of performing their duties as such or invalidate any action taken by them in the election. To bolster that proposition, we were referred to the persuasive decision of the High Court in the case of *Mundia Njeru Geteria vs. Embu County Government & 3 Others [2013] eKLR* wherein the Court observed:

"The Gazette does not as it were constitute the notice or the law itself but rather the official announcement of its existence or coming into force. Such that the validity or otherwise of a law or notice is not resident in the Gazette but the persons or bodies tasked with the responsibility to make such laws or issue such notices in accordance with the law and the Constitution. The Gazette merely confers a seal of authority or officialdom to existence of the notice or the law."

89. Furthermore, there was no evidence of violation of the rights of any voter on account of the swap. In any event, the responsibility of conducting elections at the Constituency level is placed on the Constituency Returning officer who in turn assigns duties to the Deputy Constituency Returning Officers. The Constituency Returning Officers for Lamu East and West never abdicated or delegated their responsibilities.

90. Mr. Munyu contended that contrary to the appellant's allegations there was no evidence to substantiate that voters were forced to use pre-marked ballot papers. In point of fact, the 1st and 2nd respondents' uncontroverted evidence was that the only complaints raised were with

regard to presidential ballot papers in Mapenya Polling Stations 1 & 2 having printing marks. There were no printing marks or for that matter pre-marked ballot papers in the election in question.

91. He added that the effect of the agreement signed between the Polling Officers and agents of the respective candidates was to confirm that there were no pre-marked ballot papers save that there were ink marks which appeared randomly on the presidential ballot papers; the same did not affect the validity of the ballot papers or prejudice the voters in any way. The Presiding Officers were not precluded from concluding such an agreement taking into account that they are empowered under **Regulations 62, 63, 64, 70 & 71** of the **Elections Regulations** to take charge of a polling station, maintain order and facilitate voting as prescribed by law.

92. Besides, the evidence tendered at the Election Court was clear that agents had signed all Forms 37A's confirming the results therein as being accurate. The declaration signed by the said agents read as follows:

“We the undersigned being present when the results of the count were announced do hereby declare that the results shown above are true and accurate count of the ballots in ... polling station...”

Consequently, the appellant could not properly speaking expect the Election Court or this Court to adjudicate on matter he or his agents never raised at the polling station.

93. Commenting on the incident involving the clerk by the name Nafia, Mr. Munyu stated that the said clerk did not allow voters to vote without verification as alluded to by the appellant. Rather the clerk in question had failed/neglected to validate the verified voters before issuing them with ballot papers. The mistake was administrative whose effect has been recognized under **Section 83** of the **Elections Act**.

94. It is common ground that elections are conducted by human beings who are prone to mistakes. This much was appreciated by the Supreme Court of Canada in *Optiz vs. Wrzesneskyj*, 2012 SCC 55[2012] 3 SCR in the following manner:

“We are dealing here with a challenge based on administrative errors. There is no allegation of any fraud, corruption or illegal practices. Nor is there any suggestion of wrongdoing by any candidate or political party. Given the complexity of administering a federal election, the tens of thousands of election workers involved, many of whom have no on-the-job experience and the short time frame for hiring and training them, it is inevitable that administrative mistakes will be made. If elections can be easily 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...the practical realities of election administration are such that imperfections in the conduct of elections are inevitable.”

What was of importance was the impact such human errors had on the declared result. To that extent reference was made to this Court's decision in *Philip Kyalo Kaloki vs. Independent Electoral and Boundaries Commission & 2 Others* [2018] eKLR.

95. According to Mr. Munyu, the allegations that votes cast in favour of the appellant had been treated as rejected votes and that Presiding Officers had failed to help assisted voters to vote were not proved. In an attempt to persuade us not to give into the appellant's invitation to draw a negative inference based on the fact that Presiding Officers were not called as witnesses to rebut the foregoing, counsel made reference to this Court's decision in *Jackton Nyanungo Ranguma vs. Independent Electoral Boundaries Commission & 2 Others* [2018] eKLR (*Jackton Ranguma case*) thus:

“In the instant case, if the trial court were to draw an adverse inference against the 1st and 2nd respondents, the legal effect would be to shift the legal burden of proof from the petitioner to the respondent. This would be wrong in law. Further, noting that there is no legal requirement stipulating the number of witnesses a party can call to prove a fact in issue, an adverse inference ordinarily should not be drawn simply because a respondent has chosen not to call any or some witnesses. The legal burden of proof always remains with the petitioner and a court should be careful not to draw adverse inference when a respondent who has no legal burden to prove any fact fails to call a witness or witnesses.”

96. In counsel's opinion, the 1st and 2nd respondents had given a reasonable explanation for the variance of votes cast in various elective posts. There was an extra polling station, Hindi Prison where the 17 registered voters only voted for presidential seat, stray and rejected votes. He also urged us to be guided by this Court's observation with respect to this issue in the *Jackton Ranguma case*.

97. Acknowledging that the results of Lamu East were collated in Form 36B instead of 37A Mr. Munyu claimed that the appellant and the 3rd respondent's agents had executed the Form 36B confirming the correctness of the results as collated therein. In the premises, the use of Form 36B did not affect the results therein or render the same void.

98. Mr. Munyu submitted that it is trite that costs follow the event and election petitions are no exception. In this case, the learned Judge appreciated and rightly so, that the issues raised in the petition were unique; a total of 140 witnesses testified; hearing lasted for 21 days and most of times extended beyond normal working hours; and the time and strain experienced in drafting of pleadings and preparation for hearing, in awarding and capping costs at Kshs.12,000,000. The sum was reasonable and there was no justification for this Court to interfere with that award.

99. Summing up, Mr. Munyu contended that there was nothing to warrant the nullification of the election in question and as such, the learned Judge's finding to that effect was sound. We were urged to dismiss the appeal with costs.

3rd and 4th respondents' submissions:

100. On his part, Mr. Kilonzo argued that with the exception of the ground touching on costs, the appellant had tried to disguise all the other grounds in the memorandum of appeal which raised questions of fact as points of law. He asked us to resist the appellant's attempt to draw us to re-examine points of facts contrary to **Section 85A** of the **Elections Act**. Reinforcing this line of submission, counsel relied on the Supreme Court's decision in the **Gatirau Munya case** wherein it was expressed:

“A petition which requires the appellate court to examine the probative value of the evidence tendered at the trial court, or invites the court to calibrate any such evidence, especially calling into question the credibility of witnesses, ought not to be admitted. We believe that these principles strike a balance between the need for an appellate court to proceed from a position of deference to the trial Judge and the trial record, on the one hand, and the trial Judge's commitment to the highest standards of knowledge, technical competence and probity in electoral dispute adjudication, on the other hand.”

He stated that the entire appeal was a replica of the complaints raised in the petition before the Election Court. To him, the learned Judge properly analyzed the facts and judiciously reached the right conclusion.

110. Concurring with the 1st and 2nd respondents, Mr. Kilonzo also asserted that an election could not be nullified solely for the reason that there was non-compliance with the electoral law or irregularities. A person seeking nullification is required to demonstrate the alleged non-compliance or irregularities affected the outcome of the election. To that extent the **Babu Owino case** was cited wherein this Court adopted the following views of **Otieno Odek, J.A.**:

“Odek, JA. in his book – “ELECTION TECHNOLOGY LAW AND THE CONCEPT OF: DID THE IRREGULARITY AFFECT THE RESULT?” the learned judge at pages 081 and 082 argues that:

‘For an election irregularity to vitiate the result, the result must be affected. Which result must be affected? There is only one result that must be affected - the result that “A” is the winner of the election. “Result” means the success of one candidate over another and not merely an alteration in the number of votes given to each candidate.

For an election petition to succeed, evidence must be led to prove that the result and conclusion that “A” is the winner of the election is affected by the irregularities or non-compliance with the constitutional principles and electoral law. The evidence led must demonstrate that the irregularities or non-compliance raise doubt as to whether “A” is the winner and better still that the irregularities or non-compliance prove that “A” is not the winner.’

The appellant had failed to discharge the aforementioned burden of proof.

111. Reading from the same script as Mr. Munyu, Mr. Kilonzo urged that the learned Judge's findings with respect to the scrutiny report were matters of fact which fell outside this Court's mandate. He went on to state that Deputy Registrar did not open the ballot boxes to confirm the result as per her report instead she scrutinized the Form 37A's affixed on the ballot boxes. The anomalies on the said forms were post-election and attributable to logistical issues of transport, handling, storage and weather conditions. All the same, the appellant did not dispute the result in any of the 45 polling stations in Lamu East Constituency and his agents had signed the respective Form 37A's and 37B's used therein.

112. Counsel submitted that the appellant was purporting to expand the application of the scrutiny report to polling stations and irregularities which were neither pleaded in the petition nor addressed by the respondents. Underscoring the principle that parties are bound by their pleadings reliance was placed on the **Jackton Ranguma case** wherein the following sentiments of the Supreme Court in **Zacharia Akongo Oyungi & 2 Others [2014] eKLR** was quoted:

“The Court of Appeal, as we hold, ought not to have overstepped the evidentiary bounds marked out by the trial Court, whether on the basis of pleaded or unpleaded issues. By making findings regarding irregularities in those polling stations, which the trial Judge discounted on the ground that the petitioner had not pleaded them- and thus denying the respondents the right of reply – the Court of Appeal made plain findings of fact, and in this way misdirected itself. Parties, as is well recognized, are bound by their pleadings. The Court of Appeal also erred, with much respect, by failing to restrict their observations to the limit of the findings of fact by the High Court; the appellate Court extended the scope of such observations – avowing that the irregularities appeared to have been widespread, and of a greater magnitude than was observed by the High Court.”

113. Counsel associated himself with the submissions made by Mr. Munyu with respect to lack of impartiality on account of the 4th respondent's candidature and swapping of the Constituency Deputy Returning Officers. In his view, the appellant had not laid any basis to show that the 4th respondent's participation and/or the swap had affected the integrity of the election. He asserted that the appellant could not challenge the 4th respondent's candidature at the particular point in time he did. This proposition was premised on the case of **Kennedy Moki vs. Rachel Kaki Nyamai & 2 Others [2018] eKLR** where this Court rendered itself as follows:

“In the instant case, the nomination certificate issued to the 1st Respondent by the Jubilee Party was not challenged in any proceedings prior to the elections held on 8th August 2017. We are persuaded by the decision in Jared Odoyo Okello vs. Independent Electoral & Boundaries Commission (IEBC) & 3 others [2013] eKLR, where on a similar issue the trial court held that election court does not sit to supervise the decision of nomination dispute resolution bodies but sits to determine validity of the elections. The High Court correctly held that if petitioner loses an opportunity to challenge the decision of a nominating body, such a petitioner cannot be heard to raise the issue in an election court. Further, in the instant case, whether or not fresh nomination was conducted is a question of fact outside the jurisdiction of this Court as an appellate court.”

114. As far as Mr. Kilonzo was concerned, the allegation that registered voters were denied their right to vote could not be maintained without a challenge to the manner in which the register of voters was kept by the 1st respondent. Consequently, the learned Judge could not be faulted for dismissing this ground since the appellant had not challenged the manner in which the register of voters was kept in his pleadings.

115. To counter the allegations of pre-marked ballot papers, failure to display ballot papers to agents during counting of votes and appellants votes being treated as rejected votes, counsel submitted on more or less similar grounds as the 1st and 2nd respondents.

116. As for the allegation that 16 voters were allowed to vote at Kizingitini Primary School without verification, the 3rd and 4th respondents agreed with the 1st and 2nd respondents submissions in that respect. To them, the failure of the polling clerk to validate voters before issuing ballot papers did not affect the outcome of the results in the said polling station wherein the appellant emerged as the winner. In addition, the appellant's agents had signed the Form 37A containing the results of the polling station signifying the validity of the results. Regardless of the fact that the clerk in question was arrested no evidence was adduced as to whether she was charged and/or convicted with any electoral offence hence the Election Court and this Court could not infer an electoral malpractice and/or fraud without more evidence.

117. Mr. Kilonzo contended that the only evidence adduced with regard to the assisted voters not being assisted to vote was by the appellant's agents who contrary to their testimonies had not raised the issue in the respective polling stations and had even signed the relevant Form 37A's signifying the accuracy and validity of the results therein. The appellant did not call any assisted voter to give evidence in that respect therefore, the learned Judge correctly held that the allegations was not proved to the required standard.

118. Mr. Kilonzo claimed that the collation of the Lamu East gubernatorial election results in Form 36B as opposed to Form 37B was neither here nor there. This is because the Form used to declare results for the gubernatorial election is Form 37C which is filled by the County Returning Officer using the primary documents, that is, Form 37A from the various polling stations. Besides, not only had the 1st and 2nd respondents given a reasonable explanation why Form 36B was used but also the appellant's agents signed the said Form 36B confirming that it tallied with the results declared at the polling stations. In support of the contention that there was no evidence that the use of Form 36B affected the integrity of the results, reference was made to the *Wavinya Ndeti case*.

119. Mr. Kilonzo concluded by submitting that the learned Judge had properly exercised her discretion in awarding costs of Kshs.12,000,000 and urged us to dismiss the appeal.

120. In a brief rejoinder Mr. Aboubakar expressed that the appellant's appeal was founded on the grievance that learned Judge had erred in the assessment of the facts and law which suffices as a point of law.

Analysis:

121. We have considered the record, submissions by counsel and the law. We would first begin by addressing the issue of jurisdiction which has been raised yet again by the respondents. It is worth noting that the scope of our jurisdiction is clearly spelt out under **Section 85A (1) of the Elections Act** which stipulates:

“An appeal from the High Court in an election petition concerning membership of the National Assembly, Senate or the office of county governor shall lie to the Court of Appeal on matters of law only.” [Emphasis added]

122. Whether a particular issue amounts to a matter of law as rightly pointed out by this Court sitting in Kisumu in *Cyprian Awiti & Another vs. IEBC & 3 Others-Election Petition Appeal No. 5 of 2018* is not the appellations given to such a question by the party raising the same. Furthermore, as we have discussed in the preceding paragraphs of this judgment the manner in which the Notice of Appeal and/or the memorandum of appeal is crafted cannot in itself divest us of our jurisdiction. This much was restated by this Court sitting in Kisumu in *Hassan Aden Osman vs. The IEBC & 2 Others – Election Petition Appeal No. 11 of 2018* as follows:

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

123. It involves a consideration of whether the issue conforms to the litmus test developed by the Supreme Court in the *Gatirau Munya case* thus:

“Now with specific reference to Section 85A of the Elections Act, it emerges that the phrase “matters of law only”, means a question or an issue involving:

a. the interpretation, or construction of a provision of the Constitution, an Act of Parliament, Subsidiary Legislation, or any legal doctrine, in an election petition in the High Court, concerning membership of the National Assembly, the Senate, or the office of County Governor;

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

124. It is for this Court to determine which of the 41 grounds if not all raise issues of law and consider the same. See *Gatirau Munya case and Joel Makori Onsando & Another vs. Independent Electoral & Boundaries Commission & 5 Others - Kisumu Election Petition Appeal No. 17 of 2018*. Be that as it may, taking into account the 41 grounds raised in the appellant’s memorandum most of which contain arguments and evidence we do not hesitate to echo the warning by this Court in *Law Society of Kenya vs. Centre for Human Rights and Democracy & 13 Others [2013] eKLR* that:

“... it is quite astonishing that the LSK preferred some forty-one grounds of appeal out of that single issue. Some of the grounds have as many six sub-grounds and, running into eight typed pages, the document contains arguments more suitable for submissions.

Purported memoranda of appeal that are repetitive, argumentative and replete with such material as excerpts and quotations from books and judgments, as well as historical and political background, do no favours to counsel who prepare them. Moreover, they serve only to obfuscate issues”.

125. What are the point(s) of law raised in the memorandum of appeal? In our view, the grounds which raise points of law can be abridged as follows:

a. Whether the learned Judge erred in applying Section 83 of the Elections Act conjunctively.

b. Whether the learned Judge erred in her interpretation and application of the burden and standard of proof in an election dispute.

c. Whether the learned Judge erred in concluding that the election was conducted in accordance with the principles laid down in the Constitution, Elections Act and Regulations made thereunder.

d. Whether the learned Judge erred in finding that the illegalities and irregularities set out and established by the appellant did not affect the results of the election.

e. Whether the learned Judge erred in the exercise of her discretion by capping the costs at Kshs.12,000,000.

Application of Section 83 of the Elections Act:

126. It is common ground that elections represent the will of the people and as such a court aims at preserving this will where it is manifestly discernible even to the extent of overlooking irregularities which do not affect the outcome of the elections. In *Hassan Aden Osman vs. IEBC & 2 Others – Nairobi Election Petition Appeal No. 11 of 2018* this Court put it best:

“There is a rebuttable presumption in election matters that the results declared by the electoral body are correct until the contrary is proved. To invalidate an election therefore, is a weighty prospect and it requires compelling and credible evidence because invalidation of an election has wider implications beyond the contestants; the right of the voters to non-interference with their already cast votes without satisfactory reasons.”

127. We believe the foregoing was the rationale behind *Section 83* of the *Elections Act* prior to its amendment by *Section 9* of the *Election Laws (Amendment) Act, 2017* which is applicable in this case. The provision stipulated:

“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.”

128. Addressing its mind on the implication of *Section 83*, the Supreme Court in *Raila Amollo Odinga & Another vs. IEBC & 2 Others (2017) eKLR (Raila Odinga, 2017 case)* rendered itself as follows:

“In our respectful view, the two limbs of *Section 83* of the *Elections Act* should be applied disjunctively. In the circumstances, a petitioner who is able to satisfactorily prove either of the two limbs of the *Section* can void an election. In other words, a petitioner who is able to prove that the conduct of the election in question substantially violated the principles laid down in our Constitution as well as other written law on elections, will on that ground alone, void an election. He will also be able to void an election if he is able to prove that although the election was conducted substantially in accordance with the principles laid down in our Constitution as well as other written law on elections, it was fraught with irregularities or illegalities that affected the result of the election.”

Having perused the impugned judgment we note that the learned Judge correctly appreciated the foregoing.

Burden and Standard of proof:

129. This issue is settled and there is no harm in rehashing the position as captured by the Supreme Court in the *Raila Odinga, 2017* case:

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

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.” [Emphasis added]

Was the learned Judge’s conclusion with respect of the election being in compliance with the electoral law and the effect of the irregularities supported by evidence?

130. The foregoing discussion relating to our jurisdiction and burden of proof will form the foundation of our consideration of whether the learned Judge’s conclusion to the effect that the election was conducted in conformity with the principles laid down by Constitution and Electoral law; and that the irregularities and illegalities did not affect the outcome of the election in question was supported by the evidence on record. Of course, this would also entail consideration of the various illegalities and/or irregularities which the appellant alleges that the learned Judge failed to take into account. Nevertheless, we are cognizant that our evaluation of the evidence on record with regard to the irregularities is only to enable us to determine whether the conclusions of the trial Judge were supported by such evidence, or whether such conclusions were so perverse, that no reasonable tribunal would have arrived at the same. See *John Lokitare Lodinyo vs. Independent Electoral and Boundaries Commission & 2 Others - Kisumu Election Petition 24 of 2018 (John Lokitare case)*.

131. We shall first proceed to consider whether the learned Judge findings with regard to the following illegalities and/or irregularities raised by the appellant were supported by the evidence.

Denial of the right to vote:

132. In this regard, the learned Judge after weighing the evidence before her made the following remarks:

“It also worth –noting that it was not for the 1st Respondent or any of the Respondents to provide such information or evidence as there was no basis for them to do so. It was the petitioner’s case and the reaction elicited from the 1st Respondent was that all persons who were registered voters and turned up at respective polling stations and voted .In fact a number of witnesses during cross – examination and the record of Forms 37As attached to the affidavit of the 2nd respondent confirmed or showed that the voting took place and a majority of voters voted. The “Remarks column” on the polling station Diaries (PSD) indicated no remarks to the effect that any voters were turned away without voting or that the KIEMS kit device failed. No agent recorded or reported such incidents, which appear to have been of such high magnitude.

In view of the foregoing, this court finds that the evidence of the petitioner (Pw1), Pw 2, Pw 3, Pw 11, Pw 33, Pw 35, Pw 37, Pw 38, Pw 39, Pw 41, Pw 46, Pw 47, Pw 49, Pw 50, Pw 54, Pw 55, Pw 56, Pw 57, Pw 58, Pw 59, Pw 61, Pw 67, Pw 68, Pw 69, Pw 70, Pw 95, Pw 96, Pw 98, Pw 99, Pw 100, Pw 101, Pw 102 and Pw 103 failed to meet the required standard of prove with regard to failure by registered voters to vote, registration, failure of KIEMS kit to identify votes, transfer of votes or appearance at the polling stations. Clearly, the burden of proving all these allegations was upon the petitioner, but he failed to do so by failing to obtain copies of all the poll registers used during the elections during the filing of the petition to corroborate his evidence and that of this witnesses. He therefore failed to discharge his burden.”

133. The above findings were based on the learned Judge’s evaluation of the evidence before her. Our reading of the appellant’s submission with respect to this issue is that he is calling upon us to reconsider the witnesses’ evidence as well as the probative value of same and make our own independent factual finding. Certainly, the same is beyond our jurisdiction and cannot be allowed. See the *Mohamed Abdi Mohamud case* wherein this Court faced with a somewhat similar predicament held:

“As stated earlier, we do not think we have the latitude to heed the invitation of the appellant to wade into the labyrinth of the evidence presented before the trial court and make our own determination on facts.”

Lack of impartiality and transparency in the election:

134. This perceived irregularity was based on the fact that the 4th respondent was an employee of the 1st respondent immediately prior to the election in question. Whilst we appreciate the sentiments of this Court in the *Wavinya Ndeti case* that the 1st respondent’s obligation to conduct a free and fair election imports a responsibility to see that no party derives an unfair benefit by virtue of its acts or omissions, the burden of proving that the participation of the 4th respondent placed the appellant at a disadvantage lay with him. See this Court’s decision in *Nixon Ngikor Nicholas vs. The Independent Electoral and Boundaries Commission 2 Others –Kisumu Election Petition Appeal No.28 of 2018*.

135. The learned Judge found that the perceived lack of impartiality had not been established and was based on mere suspicion and unfounded fear. Again this finding was based on the learned Judge’s appreciation of the evidence before her and amounted to a finding of fact. Like we have pronounced ourselves herein above, we are required to pay homage to the findings of fact by the Election Court unless it

is demonstrated that such finding is perverse which is not the case here. See this Court's decision in *John Munuve Mati vs. Returning Officer, Mwingi North Constituency & 2 Others [2018] eKLR (John Munuve case) Swapping of the Deputy Constituency Returning Officers*:

136. The learned Judge held that in as much as it was not disputed that the Deputy Constituency Returning Officers had swapped the appellant fell short of demonstrating how the same affected and/or vitiated the conduct and outcome of the election therein. This finding like the foregoing relates to the probative value attached by the learned Judge to the evidence adduced. Consequently, we are restricted from deliberating on the same. See the *Gatirau Munya case*.

Failure of Presiding Officers to facilitate assisted voters and display votes to agents during the sorting out and counting of votes:

137. Likewise, the learned Judge's finding on the above to the effect that the appellant had not proved those allegations are matters of fact which do not fall within our jurisdiction.

138. It is common ground that the burden of proof to establish any illegality or irregularity raised by a party lies with that party. In this case, the burden lay with the appellant to prove those allegations. It is only after the appellant had made out a *prima facie* case that the respondents would have been required to rebut the same and not a moment sooner. See this Court decision in the *John Lokitare case*.

139. It follows therefore, that the contention that an adverse inference should be drawn for the failure of the 1st respondent to call the Presiding Officers from the polling stations identified falls flat on its face. Our position is guided by this Court's decision in *The Independent Electoral & Boundaries Commission & Paul Musyimi Nzengu [2018] eKLR* and *Dennis Magare Makori & Another vs. The Independent Electoral and Boundaries Commission & 3 others – Kisumu Election Petition Appeal No. 22 of 2018 (Dennis Magare case)*.

Pre-marked ballot papers:

140. The parties herein took divergent positions with the appellant on one hand, alleging that there were pre-marked ballot papers in 10 polling stations which were used contrary to *Regulation 77* of the *Election Regulations*. On the other, the respondents evidence as led by the 2nd respondent was that there were no pre-marked ballot papers rather the ballot papers for presidential election at Mapenya Primary School Polling Station 1 and 2 bore printing marks. It is on the basis of this evidence that the learned Judge directed for scrutiny at Mapenya Primary School.

141. After taking into account the scrutiny report with respect to this issue and the evidence adduced the learned Judge observed:

“It is such evidence that caused this court to order for a scrutiny in limited number of polling station, including Mapenya primary school polling stations 1 and 2. The results of the scrutiny showed that from the polling station Diaries (PSDs) of these stations, and form 37As, the voting was without incident and no presiding officer including Pw 65, made any remarks with regard to the presence of pre-marked ballot papers at Mapenya primary school polling station 1. Also Form 37 A for stream 2 was signed by agents and the presiding officer. There were also no comments or remarks by the agents, candidates or the presiding officers including Pw 65 and Dw1. The only incident which was recorded was that, the marks on the ballot papers were as a result of printing ink.

It is also worth noting that during cross examination ,the presiding officer of Mapenya primary school stream 1 (Pw65) and her team agreed to make note of the marks and accept the ballot papers as properly marked notwithstanding the marks, after consulting with the Lamu West Returning Officer, Mr Mwarua Chikophe (Dw4). It is further noted that this officer was on oath of office while performing her duties at this polling station as a presiding officer, and by swearing a second affidavit on a fact she knew was not correct, I find she committed perjury and recommend that the matter be investigated by the County Director of Criminal Investigations in Lamu and thereafter, if found culpable, the matter be referred to the Director of Public Prosecution for appropriate action recommendation or guidance.

...

For the foregoing findings, I hold that the petitioner proved that there were no pre-marked ballot papers used and dismiss this ground accordingly.”

142. The foregoing observations and conclusions are matters of fact touching on the probative value of the evidence and the credibility of witnesses and in particular, PW65, the then presiding officer of Mapenya Primary School. To that extent, we decline to accede to the appellant's suggestion to interfere with the same without any reasonable ground.

Voters voting without verification:

143. It is not in dispute that a polling clerk by the name Nafia was arrested at Kizingitini Secondary School on account of an incident that occurred during the election. Apparently, she had failed to either verify or validate voters before issuing ballot papers; it is not clear which of the two she failed to do since the appellant alleges she failed to verify while the respondents state she had failed to validate the voters. The learned Judge noted that the evidence led in favour of the appellant was contradictory. Another thing which is not clear is how many voters she had failed to verify/validate before issuance of the ballot papers. According to the appellant, they were 16 voters.

144. Faced with the foregoing we cannot fault the learned Judge for coming to the conclusion that the said allegation had not been

conclusively proved. Furthermore, there was no evidence as to what the police investigations came to and/or the effect of the said allegation to the election in question. In the *Mohamed Abdi Mohamud case* we took cognizance that there ought to be a nexus between the alleged constitutional violations and the result of the impugned election. In respect to this allegation there was no connection established that even if the 16 votes were meant for the appellant, that would not have affected the results

Use of Form 36B to collate election results for Lamu East Constituency:

145. Statutory Forms are integral part of an election and an election outcome will depend largely on the information contained in the forms used in the process. In this case the 1st and 2nd respondent explained that the use of Form 36B which is meant for Member of National Assembly was due to the fact that Forms 37Bs had been destroyed during printing. The results collated in the said form tallied with Form 37A. In the appellant's opinion the use of the wrong form nullified the results therein.

146. The learned Judge found that the use of Form 36B did not affect the results of the election in Lamu East Constituency. In point of fact, agents for various parties signed the said Form confirming that the entries therein matched the ones in Form 37A and the scrutiny report also revealed as much. Yet again this is a finding of fact which we cannot interfere with.

147. In addition, *Section 26* of the *Statutory Instruments Act* provides that:

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 or 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 or which is not calculated to mislead. [Emphasis added]

Variation of votes cast in different elective seats.

148. In this regard, the learned Judge in her own words stated:

“I have considered the allegations by the petitioner and his witnesses and the explanation by the Respondents with regard to the alleged variances or discrepancies in the vote tally for different elective posts, and I am convinced by the Respondents explanation that this can be caused by stray ballots, rejected votes, or even errors in the recording of votes cast in the statutory forms. I also wish to note that the number of said votes has not been specified for this court to determine whether it was so huge or small so as to make a difference in the result. Again, the petitioner's evidence in this regard has not been substantiated effectively. In fact, the voters, who according to Pw 107 were not issued with ballot papers should have been called to testify to confirm this allegation if at all they were there because his amounts to depriving them a right to vote.”

This being a factual finding we are precluded from interfering with the same.

Besides, this Court in the *Jackton Ranguma case* aptly held:

“Whereas comparison of votes cast in one election with another is informative, such comparison per se cannot be a ground to nullify the results of one election as against the other. Each election result must be challenged on its own ground. Each election petition is a stand-alone petition and any allegation contained therein must be proved. It is the result of a specific election that is being challenged and not the results of all other elections. It is impermissible to use the results of one elective position to challenge or prove that the result of another elective post is vitiated. If one were allowed to do so, this would be speculative and extrapolation of evidence which is impermissible. We find that it is inappropriate without cogent evidence to draw an inference that mere difference in votes cast between the various electoral seats is proof of electoral malpractice or irregularity. Accordingly, we find that the trial court did not err in its finding that the appellant had not laid out a factual basis for the alleged malpractices or irregularities in each polling station which led to the difference or variation in the number of votes cast in the Presidential, Senatorial and the gubernatorial elections. This ground of appeal fails.” [Emphasis added]

149. All in all, the learned Judge's conclusions with respect to the aforementioned illegalities and irregularities were supported by evidence.

150. There is one more issue we feel we ought to address, that is, the allegation that the learned Judge failed to consider the scrutiny report. Our perusal of the impugned judgment reveals that the said contention is far from the truth. The fact that the learned Judge's observation or conclusion on the said report did not conform to what the appellant thought did not negate the fact that she took the same into consideration.

151. There was also the issue raised by the appellant before us on the basis of the said scrutiny report. He alleged that the reports revealed that there were missing and illegible Form 37As for Lamu East Constituency thus rendering the results unverifiable. We cannot help but note this was not pleaded in the appellant's petition.

152. Undoubtedly, pleadings play a critical role in defining the scope of the dispute on which the court is called upon to adjudicate. See *the Wavinya Ndeti Case*. This Court in the *Independent Electoral and Boundaries Commission & Another vs. Pauline Akai Lokuruka & Another – Kisumu Election Petition No. 31 of 2018* further observed:

“As submitted by the 1st respondent, an election court is concerned with inquiring into the conduct of an impugned election

in order to determine whether such election was conducted in accordance with the law and principles governing the conduct of elections. However, in light of what we have stated in paragraph 54 and 55 herein, such an inquiry cannot go outside the boundaries of the petition. The fact that the bundles of statutory forms submitted by the appellants are part of the record is not a basis for an election court to traverse the annexures beyond what was pleaded. An inquisition into the conduct of an election court is not a borderless foray. The allegations pleaded or issues that arise following a process of scrutiny and recount limit it. These are the issues that all parties have had notice of and anticipate to respond to.”

153. In light of the foregoing, we find that anomalies alleged to have been earthed by the scrutiny exercise should be addressed. We also cannot help but note that the Deputy Registrar of the Election Court indicated that she did not open the ballot boxes but used the Form 37As affixed on the ballot boxes for the exercise. It was also brought to light that the Form 37As which the Deputy Registrar indicated as missing were not missing and were inside the ballot boxes. In our minds, the totality of the foregoing is that the alleged anomalies were not substantiated and that is all we are prepared to say with regard to that issue.

154. We, like the learned Judge, find that the appellant had not established that the irregularities alluded to affected the results of the election. We also find that the election in question was conducted substantially in compliance with the principles laid down in the Constitution and Electoral Code. Accordingly, there was no basis for the Election Court to interfere with the election in question.

155. Accordingly, we find that the appeal, except for what we shall say about costs below, has no merit and is dismissed.

Costs:

156. The issue of costs in electoral disputes has received substantial consideration by this Court. In the *Martha Karua case* this Court rendered itself on this point as follows:

“It is up to the election court to determine whether a party would be awarded costs or not and in doing so the court must be guided by the principles of fairness, justice and access to justice. It is meant to compensate a successful litigant. It is not a punishment or a deterrent measure to scare away litigants from the doors of justice.”

The foregoing was restated by this Court in *Albeity Hassan Abdalla vs. The*

Independent Electoral and Boundaries Commission & 3 Others- Mombasa Election Petition No. 2 of 2018 and in the *Dennis Magare case*.

157. Bearing in mind costs awarded both at the Election Court and this Court in comparable election disputes as the one before us, we find that the award of Kshs.12,000,000 was on the excessive side regardless of the number of witnesses who testified, the complexity of the petition and/or time involved in preparation of the same. Consequently, we interfere with the learned Judge’s discretion which we find she did not exercise properly and set aside the costs capped at Kshs.12,000,000 and substitute thereto with costs to be capped at Kshs.3,000,000 to be paid equally between the 1st and 2nd respondent, on one part and the 3rd and 4th respondents, on the other part.

Disposition:

158. In the end, we make the following orders:-

- a. **The appellant’s appeal, except in relation to costs, is hereby dismissed.**
- b. **The appellant’s appeal herein succeeds in part to the following extent:**
 - i. **The costs capped by the Election Court at Kshs. 12,000,000 is hereby set aside and substituted with an order that the appellant shall bear costs capped at Kshs. 3,000,000 to be shared equally between the 1st and 2nd respondent on one part and the 3rd and 4th respondents, on the other part.**
- c. **Given the partial success of this appeal, each party shall bear its costs with regard to this appeal.**

Dated and delivered at Mombasa this 9th day of August, 2018.

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

M.K. KOOME

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR