



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, MUSINGA & GATEMBU, JJ.A)

CIVIL APPEAL NO. 286 OF 2013

BETWEEN

LEDAMA OLEKINAAPPELLANT

AND

SAMUEL KUNTAI TUNAI1ST RESPONDENT

ARYASA EVALYN CHEPKIRUI2ND RESPONDENT

THE INDEPENDENT ELECTORAL AND BOUNDARIES

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

DR. MICHAEL K. CHERUIYOT (*COUNTY RETURNING*

***OFFICER, NAROK, COUNTY*)..... 4TH RESPONDENT**

SAMUEL CHACHA (*RETURNING OFFICER, EMURUA*

***DIKIR CONSTITUENCY*)5TH RESPONDENT**

JOSHUA TULWO (*RETURNING OFFICER,*

***KILGORIS CONSTITUENCY*)6TH RESPONDENT**

JACKTON OKUBASU (*RETURNING OFFICER, NAROK*

***WEST CONSTITUENCY*)7TH RESPONDENT**

MARTIN MALONZA (*RETURNING OFFICER, NAROK*

***SOUTH CONSTITUENCY*)8TH RESPONDENT**

MOHAMMED RAKA (*RETURNING OFFICER,*

***NAROK NORTH CONSTITUENCY*)9TH RESPONDENT**

ISAAC RUTO (RETURNING OFFICER, NAROK

EAST CONSTITUENCY)10TH RESPONDENT

(An appeal from the judgment and decree of the High Court of Kenya at Nakuru (Wendoh, J.) dated 20th September, 013

in

ELECTION PETITION NO. 3 OF 2013)

JUDGMENT OF THE COURT

Introduction.

1. This is an appeal by **Ledama Olekina** (“Olekina” or “the petitioner”) against the decision of the High Court, (Wendoh, J.) sitting in Nakuru in which the learned judge, on 20th September 2013, dismissed his election petition. The petition related to the gubernatorial election for Narok County held during the general elections in the country on 4th March, 2013. Initially Olekina was joined in the petition by two other persons: **Joseph Tiampati Ole Musuni** and **Francis Simiren Nkoitoi**, but these two withdrew before the petition was heard and their names were struck out on 2nd July 2013.

2. The petition was filed against the declared winner of the election, **Samuel Kuntai Tunai** (Tunai), the 1st respondent before us; his running mate and Deputy Governor, **Aruasa Evalyn Chepkirui** (Evalyn), 2nd respondent; The **Independent Electoral and Boundaries Commission** (IEBC), which is the constitutional organ in-charge of elections, 3rd respondent; the **County Returning officer** for Narok County, **Dr. Michael Cheruiyot** (CRO), who declared the results, 4th respondent; and six Returning officers from six different constituencies of Narok County, namely: **Emuria Dikir, Kilgoris, Narok West, Narok South, Narok North** and **Narok East** (the Returning officers), who are the 5th to 10th respondents before us.

3. In this appeal all the parties retained the same learned counsel who represented them before the High Court: **Mr. Saitabao** of Kanchory & Company Advocates, led by **Prof. P.L.O. Lumumba** for Olekina; **Mr. Julius Kemboy** for Tunai; **Mr. Nelson Havi** for Evalyn; and **Mr. P. M. Munge** of Muriu Mungai & Company Advocates, for IEBC, the CRO and all six Returning officers.

Geopolitical Setting.

4. Narok County is one of 47 counties created under the **Constitution of Kenya, 2010** and is located in the Rift Valley. Its geographical size is enormous, covering about 17,944 square kilometers, which is about five times the size of Nairobi County. The number of voters in the county for the general election was also large at 263,366 out of which over 230,000 actually voted in the six constituencies referred to earlier. There were 651 polling stations spread across the county manned by 3,900 IEBC officials, and six tallying centres, one for each constituency, presided over by the Returning officers. Some polling stations, it turned out, were more than 100 kilometers away from the tallying centres. A seventh tallying centre at Narok town covered the entire county and was presided over by the CRO.

5. There were seven candidates fighting for the gubernatorial seat. Olekina contested the election as an independent candidate while Tunai was sponsored by the United Republican Party (URP). The official results declared by the CRO were as follows:-

CANDIDATE

VOTES

• Daniel Talengo Kiptunent	20,073		
• Francis Simiren Nkoitoi	20,789		
• John Oloishuro Koncheloh	9,207		
• Johnson Parsamet Nchoe	39,100		
• Joseph Tiampati Ole Musuni	55,008		
• Ledama Olekina	4,175		
• Samuel		Kuntai	Tunai
			87,832

6. It is evident at once that the difference in the votes announced between Olekina and Tunai is 83,657. But that is the least of Olekina's worries. He contends, and he is right in so contending, that elections are not just about numbers. If it were so, any thieving crook would be the peoples' representative. An election is rather an exercise in ascertaining the will of the electors through a free, fair, transparent, credible and peaceful process. What happened in Narok County, however, he asserts, was nowhere near an election but a sham. We shall examine those principles and assertions later in this judgment.

The Petition.

7. The specific complaints pleaded in the petition which Olekina sought to prove were: that the credibility, integrity and accuracy of election data, and in particular **Forms 35 and 36** was questionable; that in some constituencies, particularly Narok South Constituency, and some polling stations, particularly **Siana Boarding Primary School** and **Iladoru** polling stations, there was a voter turnout in excess of 100%; that several Forms 35 had curious cancellations and alterations which were not countersigned; that Forms 35 and 36 were returned incomplete and unverifiable as they lacked statutory comments by presiding officers, signatures by the deputy presiding officer and party agents; that authorized party agents, particularly in **Emurua Dikirr** and **Kilgoris** constituencies were harassed, obstructed and hindered by the presiding officers from performing their duties; that there was bribery and other corrupt and illegal practices amounting to election offences committed by Tunai and his proxies who distributed sugar and money to villagers in **Angata Barrikol** Ward and **Kuseret**; that Tunai bribed all the six Returning Officers to skew the election by cooking and doctoring Forms 35 and 36 in his favour; and finally that the results declared by the Returning officers and the CRO were fictitious and fraudulent since the lack of fairness, transparency and freedom of the voter negated the possibility of declaring credible results or winner. In sum, the election was a farce, complete sham, travesty of justice and mockery of democracy.

8. He prayed for the following orders:-

- *“Declaration that the election for Narok County Governor held on 4th March, 2013 was null and void for not being free, fair and transparent and for lacking credibility.*
- *A declaration that the election for Governor, Narok County held on 4th March, 2013 was such that it could not possibly produce credible results or indeed a credible winner and therefore the 1st and 2nd respondents were not validly elected Governor and Deputy Governor, respectively of Narok Country in the election.*
- *That the declaration of the results for Governor, Narok County made on 6th March, 2013 and the certificate issued pursuant thereto and the subsequent gazettelement of the 1st and 2ⁿ respondents as Governor and Deputy Governor, respectively of Narok County be quashed and nullified.*
- *That a fresh election for Governor Narok County be held.*
- *The respondents bear the costs of the petition.*
- *Such other orders and directions as the honourable court shall deem fit.”*

9. All the respondents filed their responses to the petition refuting the allegations made by Olekina and asserting that the election was free and fair. At the close of the pleadings, the following issues were framed and agreed on by the parties:-

- “1. Whether the election results of Narok County Governor’s election was credible and accurate;
2. Whether there were instances of votes cast exceeding the number of registered voters in specified polling stations as alleged in the petition or at all;
3. Whether there were alterations and cancellations to the electoral documents and whether such alterations or cancellations had an impact on the results of the election;
4. Whether some of the authorized agents were obstructed and harassed or at all;
5. Whether there was bribery, corruption and illegal practices including election offences and bias of electoral officials as alleged or at all;
6. Whether the election for Governor of Narok County was transparent, free and fair or a complete utter sham as alleged;
7. Whether the alleged irregularities which (sic) if proved, materially affected the outcome of the election;
8. Whether the 1st and 2nd respondents were properly declared as Governor or Deputy Governor of Narok County;
9. Whether the petitioners are entitled to the prayers sought;
10. Who is entitled to costs.”

High Court decision.

10. Only Olekina testified in an effort to prove the allegations made in the petition and the issues arising from the pleadings. He was cross-examined at length by all counsel for the respondents and in the end Prof. Lumumba expounded on the written submissions filed on his behalf. All the respondents also testified and were cross-examined on their testimony. The chief agent in Narok County for URP also testified. They all refuted the allegations made by Olekina, admitting only to various procedural irregularities and errors which they contended were explicable and were corrected. They also filed written submissions and expounded on them.

11. In view of the admissions by the Returning Officers in the course of their testimony, Olekina applied for, and the court issued, an order for scrutiny of Forms 35 and 36 in respect of **Narok West** and **Kilgoris** Constituencies, the scrutiny and recount of valid votes for **Iladoru** polling station, and re-tallying of Forms 35 and 36 to establish what each candidate received in the election. That exercise was finalised by the Deputy Registrar of the court in the presence of all parties to the petition.

In the course of the exercise some 19 ballot boxes from Narok West and Kilgoris Constituencies were found to have no Form 35s and were excluded by the Deputy registrar from re-tallying, while some other boxes had some missing seals.

12. Upon considering the evidence on record, the submissions of learned counsel, and the authorities cited in support of the respective submissions, the court held that election petitions are a special jurisdiction as they are neither Civil nor Criminal and are not guided by procedural provisions in those jurisdictions. It further held that the burden and standard of proof lay on the petitioner to demonstrate to a standard higher than a balance of probabilities, but lower than beyond reasonable doubt, not only that the errors, irregularities and malpractices complained of occurred, but also that they substantially affected the election results. In reaching these conclusions of law, the court was guided by various decided cases, including: **BENJAMIN OGUNYO ANDAMA vs. BENJAMIN ANDOLA ANDAYI & 2 OTHERS CIVIL APP. 24/2013**, **JOHO vs. NYANGE (2008) 3KLR 500**, **WILLIAM KABOGO**

GITAU vs. GEORGE THUO & OTHERS (2010) KLR, JOHN KIARIE WAWERU vs. BETH MUGO & 2 OTHERS (2008) KLR, RAILA vs. IEBC (2013) eKLR, BUHARI vs. OBASANJO (2005) CLR 7K and OPITZ vs. WRZESNEWSKY (1012) SCC 55-2012-10-256.

13. More importantly, the court embraced what it referred to as "*the guiding statutory provision on the burden of proof*" which is **Section 83** of the **Elections Act 2011**. It provides as follows:-

“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 results of the election.”

14. As the court prepared to answer the ten issues posed by the parties, it lamented the generality of the pleadings made by Olekina, because, on the basis of the authorities cited, election petitions require that pleadings ought to be precise, specific and unambiguous since they have time constraints and need to be responded to specifically. It also lamented the paucity of the evidence tendered in support of the complaints relating to Forms 35 and 36 despite the petitioner having obtained a court order to be supplied with all Forms 35 and 36 for the entire county. The petitioner produced only 6 exhibits as follows:

- Exhibit 2 - Form 36 for Narok County;
- Exhibit 4 - Form 36, Narok East Constituency;
- Exhibit 5a - Form35 for Topoti Primary School;
- Exhibit 5b - Form35 for Kabolecho Primary school;
- Exhibit 5c - Form35 for Siana Boarding primary school;
- Exhibit 5d - Form 35 for Mosiro Primary school.

15. On the substantive agreed issue relating to **“bribery, other corrupt and illegal practices, election offences and bias of election officials”**, the court found that the petitioner abandoned those complaints at submissions stage although they were pursued during the hearing of the petition. Apart from the petitioner's own feeble evidence and confession in cross-examination that he did not witness the alleged misconducts but only believed what he heard, which amounted to hearsay, he did not call any other evidence in support of the allegations. The court, nevertheless, considered and dismissed the allegations on merits, despite the belated decision by the petitioner to abandon them.

16. On the issue of **“Obstruction and harassment of authorized agents”**, the court examined the evidence tendered by Olekina to prove that claim in form of a letter addressed to the CRO on 6th March 2013 complaining that his agents in some polling stations in Emurua Dikkir and Kilgoris constituencies had been obstructed from entering the polling stations. It also examined the evidence of the CRO and the Returning officers from those constituencies who denied receiving any complaints from Olekina. It came to the conclusion that Olekina was in error when he made no complaint to the only people on the ground, the Returning officers, who under **Regulation 3 (3) (a)** of the Regulations would have taken action on such complaints. At all events, in his oral evidence, Olekina called none of the alleged agents to confirm that they were harassed or obstructed as alleged, except his own testimony on the obstruction of his agent based at **Eor Ekule Primary School** polling station where he voted, which complaint was not pleaded in his petition and was therefore excluded under the Rules of pleadings. More importantly, the court found that despite the claim by Olekina in oral evidence that he had appointed 1300 agents, he did not submit a list of those agents to the IEBC for accreditation as required under the Elections Act and Regulations, and did not even produce that list before the court.

17. In the end, the court stated on that issue as follows:

“In view of the foregoing, the Petitioner’s evidence is all hearsay as he neither witnessed the alleged harassment nor obstruction. It is only the Petitioner who knew his agents, if at all, and that evidence was within his knowledge. I wish to invoke Section 112 of the Evidence Act, Cap 80 Laws of Kenya that those were facts peculiarly within his knowledge yet he failed to bring the same before the court and

the court can only but draw an adverse inference. I draw an inference that the Petitioner either had agents who were not diligent, had agents who were not authorised to enter polling stations or did not have agents assigned to every polling station or had no agents at all.”

18. The next issue was the **“votes cast exceeding the number of registered voters” or “over 100% voter turnout”**. This was at *Siana Boarding Primary School* and *Iladoru* polling stations where allegedly 109% and 153% voter turnout was recorded, respectively. After full scrutiny and recount of all valid votes as ordered by the court, it turned out that the registered voters at Iladoru were 511 and the votes cast were 483. There was therefore no voter turnout in excess of 100%. The figures entered in Forms 35 and 36 were, however, erroneous but that did not affect the results of the election. It was excused as human error. As for Siana Boarding primary school, it was explained by the Returning officer that there were 84 voters who were registered manually and recorded in a “Green Book” which was as authentic as the Biometric Register and therefore the total number of valid voters for that station was 709 as opposed to 625 appearing in the Biometric Register which was cited by Olekina. The 84 voters had a right to vote as guaranteed under Article 83 of the Constitution and **Section 10** of the Elections Act. In addition, the court stated, the issue of the validity of the Green Book was decided by the Supreme Court in the *Raila Case*. Indeed, in his own testimony, Olekina did not find his name in the Biometric register of Eor Ekule polling station but was able to vote as it was in the manual register. That explained the complaints on Siana Boarding school polling station, which also had no voter turnout in excess of 100%. A further complaint relating to **Musiro** polling station was dismissed on the ground that there was no authentic challenge to the Biometric register exhibited in court which had the right information on registered voters for that polling station.

19. Regarding complaints about **“incomplete electoral Forms 35 and 36”**, and **“alterations and cancellations made to electoral documents”**, the specific complaints on the latter were that Forms 35 and 36 lacked statutory comments by presiding officers and signatures by deputy presiding officers and agents; that the county Form 36 lacked a breakdown of the results of Narok West, Kilgoris and Narok East constituencies; that the results bore only signatures of agents from two political parties, TNA and URP; and that the results of three polling stations in Narok East and Narok West constituencies, were duplicated. The court considered the provisions of the law relating to those complaints under **Regulations 79 and 83** as well as the submissions of counsel, and appreciated that they were indicators for a free, fair, transparent and credible election. Guided by the provisions of **Regulation 79 (6) and (7)**, however, the court held that although it was good practice that candidates and/or agents sign the Forms, the failure to do so did not invalidate the results unless such failure was done knowingly and for malicious purposes by the presiding officer, a candidate or agent.

20. The provisions of **Regulation 79 (6) and (7)** were introduced after repeal of the earlier Election Regulations and now state as follows:

“6. The refusal or failure of a candidate or an agent to sign a declaration form under sub-regulation (4) or to record the reasons for their refusal to sign as required under this regulation shall not by itself invalidate the results announced under sub-regulation (2) (a).

7. The absence of a candidate or an agent at the signing of a declaration form or then announcement of results under sub-regulation (2) shall not by itself invalidate the results announced.”

21. Applying those provisions to the evidence, the court found that Olekina's agent at Eor Ekule Primary school, where he voted, did not sign the Form 35 and there was no explanation for such failure. Olekina himself refused to sign the Form 36 at the county tallying centre citing insecurity but gave no evidence on the nature of insecurity. In view of its earlier finding on Olekina's agents, the court was doubtful that he had any agents who could sign the forms.

22. As regards the errors and omissions by presiding officers to sign some Forms 35, the court found

that there was no sufficient pleading and proof of the specific areas where those omissions were made or how they affected the results of the election. Nevertheless, in their evidence, the Returning officers admitted and explained the procedural errors and omissions as honest human errors. The court accepted that evidence and the explanation that the elections were complex as they took three sleepless days and nights resulting in fatigue and that the errors were neither deliberate nor ill intentioned, and were not proved to be so.

23. In relation to **unauthenticated alterations and cancellations on Forms 35**, the court appreciated, as submitted by Prof. Lumumba, that it should apply both a qualitative and quantitative test to determine not just the numbers obtained in the election, but also the integrity and credibility of the process. The court stated as follows:

“In Richard Kalembe Ndile & Another v. Dr. Patrick Musimba Mweu & 2 Others, Machakos EP No. 1 of 2013, J Majanja observed that other than considering the intent of voters by the number of votes cast in favour of the winning candidate, the court is obliged to consider the quality of the election and see that it conforms with the principles of elections articulated in Article 81 of the Constitution.

I totally agree with the above stated positions. The court cannot ignore the conduct and process by which the results were arrived at. It is a constitutional mandate. If the process is not impartial, neutral, efficient, accurate and transparent as envisaged under Article 81 of the Constitution, then the court will not uphold the election just because of the numbers.”

24. The court considered several authorities on the issue and also examined on its own, since Olekina did not make specific pleadings or tender evidence thereon, the Forms 35 which were produced in evidence by the Returning Officers confirming that there were alterations and cancellations which were not countersigned in four constituencies as follows:

Narok East Constituency - 6 polling stations;

Emurua Dikirr Constituency - 9 polling stations;

Kilgoris Constituency - 6 polling stations;

Narok West Constituency - 6 polling stations.

These were 27 Forms 35.

25. Considering that there were over 600 polling stations in Narok County, the court surmised that 27 Forms were minimal and that there was no proof that the alterations and corrections were negligently made with deliberate ulterior or sinister motives. In the court's view, guided by decided cases, the courts will generally look at the gravity of the errors, motives and effect on the results. It held that a petitioner has to, not only specify the irregularities and non compliance with the Constitution and electoral laws and Regulations, but also establish that such irregularities and non compliance were so massive that they substantially affected the outcome of the election.

26. There were also other errors admitted by the Returning officers and the CRO and found by the court to exist after **scrutiny and recount**. These related to **inconsistent and conflicting results, use of wrong results and duplication of results**. In **Topoti Primary School** polling station, all candidates, except one, were given wrong results in county Form 36. In **Iladoru Primary School** polling station the results in Forms 35 and 36 were different. The results in Form 36 for **Sintakara Primary School** and **Entashata Primary School** polling stations in Narok East were duplicated through a wrong entry in recording the results of **Oloikarere** and **Moshoro** primary schools polling stations. So were the results for **Chepinying** polling station in Narok West. The tabular presentation of those discrepancies was as follows:

POLLING STATION**PETITIONER 1ST RESPONDENT**

Oloikarere Primary school (Narok East Constituency)	11	311
Moshoro Primary School (Narok East Constituency)	14	256
Entashata Nursery School (Narok East Constituency)	0	98
Sintakara Primary School (Narok East Constituency)	9	418
Chepinying Primary School (Narok West Constituency)	0	176

27. The court examined those complaints but considered and accepted the explanations given by the Returning officers and CRO that they were transposition errors which did not affect the result of the election as a whole. Of particular interest was a transposition error involving the results for Narok East Women's representative which were cut and pasted twice on Form 36 as the Narok Governor's results, thus ending up with the following figures in tabular form:

CANDIDATE'S NAME	NAROK EMURUA		NAROK EAST	NAROK EAST	NAROK SOUTH	KIGORIS	NAROK WEST	TOTAL
Daniel								
Talengo	1,255	2,260	6,984	6,984	2,957	10,059	2,471	32,970
Kiptunent								
Francis	2,552	289	1,499	1,499	3,684	1,010	10,239	20,772

Simiren								
Nkoitai								
John								
Oloishuro	715	326	75	75	1,858	5,334	439	8,822
Konchellah								
Johnson								
Parsamet	14,368	249	516	516	7,736	4,555	8,211	36,152
Nchoe								
Joseph								
Tiampati Ole	24,122	10,797	240	240	7,126	5,003	2,407	49,935
Musuni								
Ledama Ole	763	536	2,988	2,998	774	503	948	9,000
Kina								
Samuel Tunai	Kuntai 9,271	11,353	13,970	13,970	21,640	18,731	16,132	105,067

28. The court tested those figures after scrutiny and correction by the CRO and found that the error did not materially affect the results of the election as depicted in the table of results put in evidence below:-

CANDIDATE'S NAME	PENULTIMATE PAGE RESULTS	DECLARED
Daniel Talengo Kiptunen	32,970	20,073
Francis Simiren Nkoitai	20,772	20,789
John Oloishuro Konchella	8,822	9,207
Johnson Parsamet Nchoe	36,151	39,100
Joseph Tiambati Musumi	Ole 49,935	55,008
Ledama Ole Kina	9,000	4,175
Samuel Kuntai Tunai	105,067	87,832

The declared results for Governor, it held, were therefore correct.

29. As stated earlier, the court made an order, *suo motu*, on 26th June 2013 for **scrutiny and re-tallying** of Forms 35 and 36 for Kilgoris and Narok West constituencies in order to satisfy itself on the authenticity of the results in Form 36, and that it was verifiable. The exercise conducted by the Deputy Registrar of the court came up with the following results, again in tabular form:

KILGORIS CONSTITUENCY

NAME

OF CANDIDATE	VOTES DECLARED	VOTES AFTER RE-TALLY	VARIANCES
Samuel Kuntai Tunai	18,731	17,970	-761
Francis Simiren Nkoitoi	1,010	1,011	+1
Johnson Parsamet Nchoe	4,555	4,549	+6
Joseph Tiampati Ole Musuni	5,003	4,906	+97
Daniel Talengo Kiptunen	10,059	9,835	+224
Ledama Ole Kina	503	441	-62
John Oloishuro Konchella	5,334	5,279	-55
Total		1,206	

NAROK WEST CONSTITUENCY

NAME

OF CANDIDATE	VOTES DECLARED	VOTES AFTER RE-TALLY	VARIANCES
Samuel Kuntai Tunai	16,132	12,391	+3,741
Francis Simiren Nkoitoi	1,239	7,558	+2,681
Johnson Parsamet Nchoe	8,211	6,451	+1,760
Joseph Tiampati Ole Musuni	2,407	2,018	+389
Daniel Talengo Kiptunen	2,471	1,662	+809
Ledama Ole Kina	448	251	+197
John Oloishuro Konchella	439	168	+271

Total

9,848

30. In the court's view, the variations that were noted affected each candidate and there was no evidence of ulterior motive or manipulation. Furthermore, they did not affect the final results. Every candidate was affected, and the gap between Olekina and Tunai was starkly significant as he obtained 251 votes as against 12,391 in Narok West and 441 as against 17,970 in Kilgoris respectively. Citing authorities, the court upheld the proposition that it is not the law that every irregularity in filling the forms with figures on election results is fatal and inexcusable. What is paramount is that even in the face of errors and irregularities, whether advertent or otherwise, the will of the electorate is ascertained and upheld at all costs.

31. On the issue raised by Olekina relating to **broken seals** in some ballot boxes during scrutiny, the court held, firstly, that there was no pleading in the petition on that issue, and secondly, on the facts, that none of the boxes was without a seal and there was no provision under **Regulation 81 of the Election (Governor) Regulations** as to the number of seals necessary. Furthermore, each ballot Box had over four seals and there was no evidence that the material required to be in the ballot boxes had been tampered with, a far cry from the situation of total mess in the ballot boxes in **MAINA KAMANDA V. MARGARET WANJIRU & 2 OTHERS (2010) KLR** and **MAGARA V. NYAMWEYA & 2 OTHERS C.A 8 of 2010**.

32. In the course of scrutiny, nineteen (19) ballot boxes - 4 from Kilgoris and 15 from Narok West constituencies - were found without Forms 35 and the court grappled with the issue whether that alone rendered the poll invalid. It reasoned, however, that all the counter foils were in the ballot boxes and could be used for verification; that Olekina had applied for and obtained an order to be supplied with all Forms 35 and 36 and there was no complaint that these were not supplied; that if there was any complaint relating to those Forms, Olekina would have raised them in the petition but none was raised; that even after the scrutiny, Olekina did not allege that the results in the Forms 35 he had were any different; and that there was therefore no prejudice caused to Olekina. The invitation to the court to find that the missing Forms 35 were the tip of a botched election iceberg was thus speculative and factually unfounded.

33. In the end, the court acknowledged that there were some errors and irregularities established by the petitioner and through scrutiny, but found that the IEBC, CRO and the Returning officers were candid in their admissions and forthright in their explanations of the errors and irregularities. The court tested the entire evidence against the relevant provisions of the Constitution, the Elections Act and Regulations, and further considered various authorities, including **BESIGYE V. MUSEVENI (PEP 1/2001)**, **JOHN FITCH V. TOM STEPHENSON & 3 OTHERS QBD (2008) EWH 501**, **BUHARI V. OBASANJO, MORGAN V. SIMPSON (1974) 1QB 151**, **JOHO V. NYANGE**, **CAMSELL V. RABESCA (1987) M.W.T.R 186 (S.C)** and **WAVINYA NDETI**, among others, before coming to the conclusion that the election was not perfect but the irregularities shown to have occurred were not substantial enough to affect the result of the election as a whole.

34. We may quote the court verbatim in that conclusion:

“The Returning Officers namely DW1 to DW5, DW7 and the County Returning Officer DW6 all explained to this court that there were indeed errors and irregularities that occurred during the election, mostly during the tallying and transposition of results but they were minor and they owed to the fact that the 3rd respondent’s officers had been working for three days without sleep or rest and were fatigued. This court cannot also lose sight of the fact that the process was complex in that this was the first election where 6 leaders were being elected at once and the fact that the 3rd respondent had expected to use the electronic transmission system which failed to work midway. They had to resort to manual operations. This is also an

exercise that takes place once in five years. The petitioner having withdrawn the allegations of bribery and impropriety, the allegations that remained all relate to transposition of the results from one statutory form to another and arithmetic errors. Taking into account all these circumstances, an allowance had to be made for such errors. In any event, the requirement that the elections be accurate does not mean that they will be perfect and devoid of genuine human errors or/and mistakes.”.....

“In the instant case, even with the admitted errors and the results of the scrutiny exercise, the margin between the petitioner and the 1st respondent is large, that is over 80,000 votes. In my view, the petitioner did not establish that any of the errors were intentional, or due to negligence or ulterior motive on the part of the respondents. Because of the large margin between the petitioner and the 1st respondent’s votes, I find the errors and irregularities did not affect the outcome of the gubernatorial results of Narok County as to render the election null and void. In the end, I find no substance in any of the grounds of the petition. The election was free, fair and credible, conducted substantially in accordance with the Constitution and the Elections act in the circumstances. The will of the people of Narok must be upheld. I find and hold that the 1st respondent was validly elected as the Governor of Narok pursuant to Article 81 of the Constitution.”

The petition was dismissed.

The Appeal.

35. Olekina was aggrieved by that decision and sought to challenge it on 15 grounds of appeal which may be summarized:-

"The learned Judge erred in law and misdirected herself in:-

1. *finding that the litany of errors admitted by the respondents and the various irregularities borne out by the evidence on record did not negate the principle of free and fair elections required to be administered, inter alia, in an efficient, accurate, accountable and transparent manner within the meaning of Article 81 (e) (iv) & (v) and Article 86 of the Constitution.*
2. *failing to set out and consider the petitioner’s case and submissions and/or by totally disregarding the same hence misdirecting herself on what the petitioner’s case was and whether the petitioner had established his case.*
3. *disregarding matters that were unearthed during scrutiny on the basis that the same were not pleaded or agreed upon by the parties*
4. *interpretation and application of Section 83 of the Elections Act vis-a-vis the Constitution.*
5. *finding that there was a misjoinder of the 4th to 10th Respondent while these were by law proper and necessary parties to the petition.*
6. *considering an issue that had been expressly abandoned by the petitioner.*
7. *holding that mistakes in the election could be corrected in scrutiny exercise.*
8. *completely going against the evidence and facts placed before her and failed to fully consider the submissions made by the appellant.*
9. *paying undue regard to the question of who between the petitioner and the 1st respondent got more votes.*
10. *awarding costs to the 3rd to 10th respondents despite them having admitted the numerous mistakes giving rise to the petition.*
11. *failing to appreciate that where the voter turnout exceeds the number of registered voters then it is immaterial whether the same is caused by over 100% turnout or simply by an inflation of the number of votes cast.*
12. *exhibiting partiality in her assessment of the evidence and by disregarding evidence prejudicial to the respondent’s case and excusing and downplaying serious and numerous anomalies in the*

- election.*
13. *holding that the petitioner made generalized allegations when the same were clearly particularized in the petition.*
 14. *predisposing her mind to a position unfavourable to the appellant and thereby depriving the appellant of his cardinal right to a fair, impartial and unbiased hearing.*
 15. *making a self contradictory and plainly wrong (judgment) and the same is clearly unjust.*

Those grounds were urged through written and oral submissions in four tranches as follows:-

36. **Ground 1 and 4 - Litany of errors vis- a- vis Articles 81(e) and 86 of the Constitution AND effect of Section 83 of the Elections Act:**

This is easily the most profound and attractive of the four categories of grounds of appeal. Leading counsel for the appellant Prof. Lumumba, took considerable time inviting us to firmly and robustly set down the law on elections which are shown to have been replete with errors, irregularities, inaccuracies and discrepancies. In his view, the first port of call, the litmus test, is the constitutional test. If an election fails to meet the requirements of **Articles 81** and **86** of the Constitution, he submitted, it is dead on arrival and must be declared a nullity. **Article 81 (e)** provides for “free and fair elections” which are:

- “(i) by secret ballot;**
- (ii) free from violence, intimidation, improper influence or corruption;**
- (iii) conducted by an independent body;**
- (iv) transparent; and**
- (v) administered in an impartial, neutral, efficient, accurate and accountable manner.”**

And **Article 86** provides for “Voting” and the duty of IEBC, at every election to ensure that-

- “(a) whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent;**
- (b) the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station;**
- (c) the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and**
- (d) appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials.”**

In his submission, those unequivocal and peremptory provisions are a constitutional prerequisite for a free and fair election and if they are transgressed, the election cannot be said to have been carried out in accordance with the law.

37. According to Prof. Lumumba, **Section 83** of the Elections Act, which is invariably regarded as a “refugee camp” for those who flout constitutional provisions and electoral laws, cannot, and does not, permit noncompliance with the Constitution and if it purported to contravene or contradict any constitutional provision, it would be void to that extent. We have reproduced that Section above.

38. Prof. Lumumba cited some 22 irregularities, inaccuracies and discrepancies disclosed in the petition, and some admitted by IEBC and its officers, to demonstrate that the results declaring Tunai and

Evalyn as Governor and Deputy Governor, respectively, were incomplete, inconsistent, unverifiable, grossly inaccurate and lacking in credibility. He castigated the liberal acceptance of those errors by the court as “human errors”, thus descending into the abyss of mediocrity and incompetence by public officers, who ought to be discouraged from squandering enormous resources and public confidence placed on them, by doing a shoddy job and claiming they were human beings who make mistakes. He also decried the application of **Section 83** to the errors and omissions, which were mischaracterized as ‘minor breaches’ and “mere non compliance with the Regulations”, when in fact and in law, they were violations of constitutional requirements on the election, particularly those of accuracy of the election results and efficiency in administration of elections.

39. **Grounds 2,6,8,9,11,12,13,14,&15 - Evaluation of evidence.**

In totality, the above grounds cover the manner in which the High Court evaluated the evidence on record. It was submitted that the court totally ignored or flippantly treated the petitioner’s case while it preserved considerable space in the 85-page judgment analyzing the case of the respondents. Six of those pages, it was stressed, were unnecessarily spent on an abandoned issue of bribery and corrupt and illegal practices. It was also submitted that the court did not fully appreciate the facts and submissions made on behalf of the petitioner and was biased and not objective. The court particularly misconstrued, misrepresented, and misapprehended various pieces of evidence relating to declared results exceeding the number of registered voters; the admission by Olekina that he did not personally witness any bribery or corrupt practices; the fact that the constituency Form 36 was used to announce results and the effect thereof; the finding that the allegations made by Olekina were generalized when they were specific and itemized; the undue emphasis on the numerical difference in votes between Olekina and Tunai; and the ready acceptance of the respondents’ case while overstating the weaknesses in the petitioner’s case.

40. **Grounds 3& 7- Scrutiny.**

It was submitted that the court deliberately turned a blind eye on the anomalies unearthed during scrutiny such as broken/missing seals and missing Forms 35, on the basis that they were not pleaded and did not form part of the issues for determination. This, in the petitioner’s view, was an absurdity since he could not know about the anomalies before scrutiny, and also a miscarriage of justice since the issues were left undetermined.

41. **Grounds 5 & 10 - Misjoinder of 4th – 10th Respondents and Costs.**

Prof Lumumba attacked the finding that the CRO and the Returning officers ought not to have been enjoined in the petition, on the basis that **Rule 2** of the Elections (Parliamentary & County Elections) Rules defines a “**Respondent**” to include “**any other person whose conduct is complained of in relation to an election**”. The seven Returning officers, it was asserted, were the people on the ground who made the errors complained of, some of which they each admitted, and they were therefore necessary parties to the petition. It was thus erroneous for the court to reward the Returning officers with huge costs when they were to blame.

42. In response to those submissions, learned counsel for Tunai, Mr. Kemboya, drew our attention to similar submissions filed before the High Court and the written submissions filed before this Court. He submitted that unlike ordinary appeals where this Court has considerable latitude to re-evaluate and re-assess factual evidence, there was statutory provision under **Section 85A** of the Elections Act circumscribing appeals in election petitions and limiting them to “**matters of law only**”. The appellate court was bound by the findings of fact. In his view, this appeal is based on a case reconstructed by the appellant from his own appreciation of the matrix of facts before the trial court and also mischaracterization of the findings and holdings of the trial court.

43. On the fundamental issue of law raised by Prof. Lumumba, Mr. Kemboya submitted that **Section 83** was neither unconstitutional nor bad law as it was enacted through the power donated to Parliament by the same Constitution in **Article 87**. Parliament was alive to the incontrovertible reality that there can

never be a picture perfect election and that in any election there was a distinct possibility of irregularities and non-compliance with the law. It did not therefore require the attainment of 100% accuracy in the collation of election results, but rather the materiality of any irregularities, hence the enactment of **Section 83**. The section itself, it was submitted, has pedigree as it is distilled from numerous local decisions and global electoral processes. It recognizes that elections are not an event but a process, and they can only be voided where the non-compliance with the law and regulations substantially affects the results of the election. The will of the electorate, which must be respected, is the only constant. At all events, he concluded on this issue, the Supreme Court in the **Raila case**, which is binding on all lower courts, endorsed the section and therefore the philosophy behind it.

44. On the second broad ground relating to evidential matters, Mr. Kemboya referred to the record and specific findings of the High Court to demonstrate that there was no litany of errors as alleged in the appellant's submissions. The record plainly shows that the petitioner's case was fully stated and considered as was the evidence of each of the parties and the agreed issues in a lengthy judgment. The findings, based on a proper evaluation of the evidence established, *inter alia*, that there was no bribery or corrupt and illegal practices, no harassment or locking out of the petitioner's agents, no voter turnout in excess of 100% in two stations as alleged, and that the irregularities in form of alterations and corrections on Forms 35 and 36, which were noted and admitted, were explicable and did not materially affect the result of the election.

45. Furthermore, Mr. Kemboya submitted, the court was careful enough to order scrutiny of Forms 35 and 36 and re-tallying in order to satisfy itself on the complaints made by the petitioner. As for costs, he submitted, they are at the discretion of the court but follow the event unless there are good reasons to decide otherwise.

46. Those submissions found support in Mr Havi, learned counsel for Evalyn, who first took a sharp turn and called for the striking out of the appeal on account of failure to include a certified copy of the Decree appealed from when the appeal record was filed on 18th October, 2013. In a notice of motion taken out on 5th November, 2013, the hearing of which we consolidated with the main appeal, Mr. Havi contended that the failure to file the certified Decree within 30 days of the judgment of the High Court rendered the appeal incurably defective and incompetent. In making those contentions, Mr. Havi cited **Section 85A (a)** of the **Elections Act** which requires an appeal to be filed within 30 days of the decision of the election court, **Rule 35** of the **Election Rules** which directs that the appeal shall be governed by the **Court of Appeal Rules, 2010 (CAR)**, **Rule 82** CAR which sets a time limit of 60 days from the date of filing the notice of appeal, **Rule 87(1) (h)** CAR which requires inclusion of a certified copy of the Decree, and **Rule 88** CAR which gives relief for late filing of the decree, i.e 15 days without leave, or with leave thereafter. No leave was sought from the Registrar in this case. In his view, **Section 85A (a)** of the Elections Act ousted the application of **Rule 88** CAR with the result that all election petition appeals should be filed in accordance with **Rule 87** within 60 days. He also cited the cases of **WETANGULA V. WALUKE & 2 OTHERS (2008) eKLR** and the **Raila case** in support and submitted that the timelines set by the Constitution and the Elections Act were not procedural technicalities which could be overlooked under **Article 159** of the **Constitution** or **Sections 3A** and **3B** of the **Appellate Jurisdiction Act**. We shall revert to these submissions and the responses thereto shortly.

47. On the main appeal, Mr. Havi conceded in oral and written submissions, that the Constitution is supreme but submitted that it is the one that says the procedures for election disputes be determined by Parliament which has complied by enacting **Section 83**. The principal test in election disputes is therefore whether or not non-compliance substantially affected the outcome of the election, a legal position which this Court emphasized in the case of **WAIBARA V. MBURU & 2 OTHERS (2011) eKLR**. As to the petitioner's case, he observed that it was fully stated in one paragraph of his petition and the issues raised therein were thoroughly analyzed and decided on by the court in unbiased and just manner. The observation by the court that the petition was generalized was borne out by the fact that the petitioner had no witnesses to back up material allegations and only produced scanty documentary evidence although he could have done better. According to Mr. Havi, 80% of the complaints related to the Returning officers but these were not only abandoned by the petitioner but were also not proved. There was therefore a clear misjoinder of the Returning officers as held by the court.

48. The final submissions were made by Mr. Munge, learned counsel for the Returning officers, who supported both Mr. Kemboya and Mr. Havi in their submissions. He submitted on the main legal issue that the reliance on **Article 81** of the Constitution downplays the equally weighty constitutional right of the citizen under **Article 38(2)** to vote. In this case, the court has to balance the rights of 260,000 voters of Narok County who cast their votes, as against the right of one candidate who was 83,000 votes behind the winner. That is why, in his view, Parliament enacted **Section 83**, and the courts have consistently held, that there should only be substantial compliance with electoral law and procedure. He cited the **Besigye case** and the **Raila case** in support. As for the issue of bribery, he submitted that this was a serious allegation amounting to an election offence, and failure to consider it when it had been pleaded, agreed on as an issue and dealt with in evidence, would have been prejudicial to all the Returning officers. The criticism leveled against the judge for considering it should therefore be rejected.

49. Mr. Saitabao, learned counsel assisting Prof. Lumumba, responded to the motion for dismissal of the appeal. In the first place, Mr. Saitabao submitted that there was no basis in law for the submission made that the time limit for filing an appeal is 60 days from the date of filing the notice of appeal. That provision is made under **Rule 82** of CAR which cannot purport to override **Section 85 A (a)** of the Elections Act limiting the time to 30 days. He pointed out that the record of appeal in this case was filed timeously on 18th October 2013. Fourteen days thereafter, on 4th November 2013, a supplementary record of appeal containing the original Decree was filed. This, in his view, was permissible under **Rule 88** of CAR. That Decree was however not “certified” owing to some photocopying mix-up, but it was rectified on 16th December 2013 when a supplementary record of appeal was filed under **Rule 92 (3)** CAR. Neither the authenticity nor the veracity of the two documents is questioned by any party and therefore, in Mr. Saitabao’s view, no prejudice was caused as the record of appeal is complete. He blamed the rush to seek an order for striking out on the hangover of the old regime of the Rules of this court which regaled on technicalities, and distinguished between primary and secondary documents. He reminded us that this Court has distanced itself from the yoke of technicalities after the amendments to the Appellate Jurisdiction Act to introduce **Sections 3A** and **3B**, and the Court of appeal Rules to introduce **Rule 88**. The jurisprudence of the court on striking out thereafter, took a decisive turn towards administering justice without undue regard to technicalities, a language now expressly spelt out in **Article 159** of the new Constitution. He cited several cases to illustrate the trend adopted by the court, including **DEEPAK KAMANI & ANOTHER V. KENYA ANTI-CORRUPTION COMMISSION & 3 OTHERS [2010] EKLK**, and **DORCAS WASIKE V. BENSON KHISA [2010] EKLK**.

50. On the main appeal, Prof. Lumumba in closing responses warned against blind reliance on the Supreme court decision in the **Raila case** because, though historic, it was *sui generis* and the *ratio decidendi* in the case is only useful in Presidential elections. The rules governing presidential elections were, for example, different, as are the timelines applicable to such petition. In his view, the only principle propounded in the **Raila case** which may be applicable in other election petitions is the burden of proof and standard of proof. He re-emphasized that the Constitutional test is paramount and that **Section 83** cannot be available to one who offends the Constitution. By delegating the power to enact the Section, the Constitution did not abdicate its force. The complaints made by Olekina must therefore be subjected to a qualitative test and measured against the Constitution.

Decision on the Notice of Motion.

51. We must on the outset decide on the interlocutory issue, since it would matter not what the result of the main appeal is, if the application is granted. We have considered the application, the affidavits on record, and the submissions of counsel. The sole reason cited for striking out is the late filing of the “certified Decree”. The applicant says the one on record was filed outside permitted timelines and therefore the record of appeal purportedly filed pursuant to **Section 85A (a)** was invalid. We think there can be no denying that the timeline of 30 days set by the Elections Act and the timeline set by the Court of Appeal Rules, which are applicable by dint of **Rule 35** of the **Election Rules**, and which allow 60 days for filing an appeal, pose an interpretational challenge. So too extensions of time which are permissible under CAR, but not under the Elections Act. At an opportune time when these issues squarely present themselves before the court, they will be given due consideration.

52. The issue before us does not take us that far. There is an appeal which was filed in time, both within the Act and the CAR. Only one document was missing- the Decree. In days of yore, it was classified as a primary document without which there would be no valid appeal. The appeal would simply be incompetent without it. But that is no more since the amendments to CAR in 2010. It may now be filed subsequent to the filing of the record of appeal, just like any other document necessary for the appeal if it is left out inadvertently. Indeed, under **Rule 92** CAR, a supplementary record may be filed by any party to the appeal. This is for good reasons. While the Rules are important and ought to be observed, human error is always present, and the main objective of the court should be the determination of the dispute between the parties on its merits and with expedition. Parliament has codified it as an overriding objective in **Sections 3A** and **3B** of the Appellate Jurisdiction Act and there are numerous decisions of this Court on the application of those provisions, including the **Deepak Kamani case** (supra). It is also instructive that the Constitution now requires that justice be administered without undue regard to procedural technicalities. The operative words are “undue regard”, not that procedural provisions are not important. We find no basis for the submission that those provisions of the law are not applicable here.

53. We are told in this matter, and it is not disputed, that a Decree was filed pursuant to **Rule 88 CAR** on 4th November 2013. But it was not the “certified” version envisaged under the Rules. A supplementary record had to be filed to introduce the “certified” one, which on the facts was identical to the uncertified one, and there is no challenge to that. The question is whether the original Decree, properly filed in time but without certification, should be ignored? We think not. The conduct of the appellant in the filing of the appeal was not contumacious. There was compliance in all aspects including a frantic effort to file the missing document. No prejudice was caused to any of the parties.

54. For the above reasons we are inclined to reject the application to strike out the appeal, and dismiss it, which we now do, with costs to Olekina.

Main appeal: Analysis and Disposition.

55. Guiding principles

Some relevant and non-contentious principles may be restated without belaboring them:

- **Article 164 (3)** of the **Constitution** confers on this court the jurisdiction to hear appeals from the High court. **Section 85A** of the **Elections Act** provides for appeals from the High court to this Court and states that they “**shall lie on matters of law only**”. That is a significant express provision because, in ordinary civil appeals, this Court, on first appeal, is bound to reappraise and re-evaluate the factual evidence on record in the manner of a retrial and to reach its own conclusions in the matter. See **SELLE & ANOTHER V. ASSOCIATED MOTOR BOAT CO LTD & OTHERS [1968] EA 123**. The findings of fact made by the trial court in an election petition must therefore command some considerable deference and will rarely be disturbed. They will be disturbed as a matter of law, however, where they are based on no evidence, or on a misapprehension of the evidence or if the trial court is demonstrably shown to have acted on wrong principles. See **MWANGI V. WAMBUGU [1984] KLR 453** and **MWANASOKONI V. KENYA BUS SERVICES LTD [1985] KLR 931**.
- The oft cited reason for respecting the trial court’s findings of fact is that the court would have seen and heard the witnesses and therefore been in a better position than the appellate court to assess the significance of what was said, how it was said and equally important, what was not said. See **HAHN V. SINGH [1985] KLR 716**. Where the trial court’s findings depend on the credibility of the witnesses, the court will also have gauged this through cross examination and observations on the demeanor of the witnesses. An appellate court will therefore not interfere with the findings of the trial court based on assessment of credibility and demeanor of witnesses, unless it was wrong in principle or had no basis in law. See **TAYAB V. KINANU [1983] KLR114**.
- As for interference with the exercise of discretion of the trial court, this too is circumscribed and we need only cite what this court stated in **MBOGO & ANOTHER V. SHAH [1968] EA 93** at page 96, thus:

“An appellate court will interfere if the exercise of the discretion is clearly wrong because the judge has misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate court should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result there has been misjustice.”

- The burden lies upon the petitioner to prove the allegations made in the petition, and the standard of proof is generally to the satisfaction of the court, higher than on a balance of probability but not beyond reasonable doubt, unless the allegations amount to commission of election offences, in which case they must be proved beyond reasonable doubt. See *Raila case* (supra) and *Joho v. Nyange* (supra).

The issues for determination.

56. We have considered the election petition and the response thereto, the findings and holdings of the trial court, the grounds of appeal, the submissions of counsel before the trial court and before this Court, and the numerous authorities cited before us. If we do not expressly refer to some of the authorities cited, it will be because the same principle was restated in other authorities. In the end, we perceive that there are two germane issues that will determine this appeal:

1. *Whether Articles 81 and 86 of the Constitution are the sole basis for determining electoral disputes, and, if so, whether Section 83 of the Elections Act contravenes the Constitution and is therefore rendered otiose;*
2. *Whether the gubernatorial election for Narok county was substantially conducted in accordance with the Constitution and electoral law; if it was conducted in accordance with the law, whether breaches of the rules and irregularities vitiated it; or whether the breaches and irregularities materially affected the result of the election.*

Issue 1

57. The two **Articles** of the Constitution and **Section 83** are reproduced above. We cannot but agree with Prof. Lumumba that an election is not an election which is not based on universal suffrage, not by secret ballot, not transparent and free from violence, intimidation, improper influence or corruption; one which is not conducted by an independent body with impartiality, neutrality, efficiency, accuracy and accountability; one where the voting method is not simple, accurate, verifiable, secure, accountable and transparent; one where the structures and mechanisms for eliminating electoral malpractices are not put in place. In sum, an election that goes against the grain as set by the Constitution, and is not free and fair, is invalid, without more. The Constitution does not set the standard. It is the standard. The issue is how ordinary mortals can measure up to that lofty level. One way is to hold perfect elections in sync with the Constitution. The other, in our view, is provided by the Constitution itself. Through **Article 87**, the Constitution donates to Parliament the power to legislate for electoral disputes and that power has been exercised by enactment of the **Elections Act, No 24 of 2011**. It has 112 Sections catering for the conduct of elections to various offices, conduct of referenda, election dispute resolution and connected purposes. There is also subsidiary legislation on procedural matters.

58. The tenor and content of **Section 83** is not new. It is a codification of well known principles of elections which have universal application. It acknowledges the universal truth that human beings are not perfect. Without lowering the Constitutional bar, it provides that the principles set out in the Constitution and other electoral laws shall be complied with substantially. And it provides guidance to those who are charged with the duty of resolving electoral disputes. Lord Denning admirably stated the principle in **MORGAN V. SIMPSON [1974] 3 All ER 728**, thus:

- *If the election was conducted so badly that it was not substantially in accordance with the law*

as to elections, the election is vitiated, irrespective of whether the result was affected or not.

- *If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by a breach of the rules or a mistake at the polls – provided that it did not affect the result of the election.*
- *But even though the election was conducted substantially in accordance with the law as to elections, nevertheless if there was a breach of the rules or a mistake at the polls – and it did affect the result – then the election is vitiated.*

59. Back home, **Section 83**, and the philosophy behind it, has been applied by the Supreme Court in the ***Raila Case***, where it was held that to void an election, the petitioner must prove that the non-compliance with the election law impugned the integrity of that election. It has also been applied in numerous other cases including ***Joho v. Nyange*** (supra), ***JOHN KIARIE WAWERU V. BETH MUGO & 2 OTHERS [2008] eKLR***, and ***MUNYAO V. MUNUVE & 4 OTHERS [2008] eKLR 20***. Despite the passionate plea by Prof. Lumumba for us to ignore the ***Raila case***, we find no reason to do so especially on the legal principles established in the case which are, in any event, binding on this Court. Ultimately, we are persuaded that **Section 83** and the philosophy behind it, is not antithetical to the provisions of **Articles 81** and **86** of the Constitution and is good law.

Issue 2

60. To answer this issue, we must be satisfied that the trial court subjected the evidence on record to both qualitative and quantitative tests. That is because, as we stated earlier, elections are not merely about numbers. The former determines the integrity and quality of the election; whether it was free and fair. As was stated in ***MANSON NYAMWEYA V. OMIGO MAGARA & 2 OTHERS, No 3 of 2008***:

“To determine whether the results as declared in an election ought to be disturbed, the court is not dealing with a mathematical puzzle and its task is not just to consider who got the highest number of votes. The court has to consider whether the grounds as raised in the petition sufficiently challenge the entire electoral process and lead to a conclusion that the process was not transparent, free and fair. It is not just a question of who got more votes than the other. It cannot be said that the end justifies the means. In a democratic election, the means by which a winner is declared plays a very important role. The votes must be verifiable by the paper trail left behind, it must be demonstrated that there existed favourable circumstances for a fair election and that no party was prejudiced by an act or omission of an election official.”

61. The quantitative test is most relevant where the numbers and figures are in issue and was endorsed by the Supreme Court in ***JOHO & ANOTHER V. SULEIMAN SHAHBAL & 2 OTHERS SCP NO. 10 OF 2013***, thus:

“Bearing in mind the nature of election petitions, the declared election results, enumerated in the Forms provided, are quantitative, and involve a numerical composition. It would be safe to assume, therefore, that where a candidate was challenging the declared results of an election, a quantitative breakdown would be a key component in the cause. It must also be ascertainable who the winner, and the loser (s) in an election, are.”

62. Olekina set out to prove to the standard required, that there was a litany of deliberate, negligent and contumacious infractions of the Constitution and electoral laws which vitiated the election. He particularized these and they formed the basis of the decision by the trial court. The most serious allegation, as it amounts to an election offence which has dire consequences, was that Tunai, not only committed corrupt and illegal acts, but also bribed his way to victory through the six Returning Officers who conducted the election, and the CRO. This claim was, however, withdrawn at the tail end of the hearing of the petition and was in any event found to have no merits on the facts. The other factual

findings were that Olekina and his agents were not obstructed or harassed, and that there was no voting in excess of the registered voters as alleged in the petition. In making these findings the trial court relied principally on its assessment of the credibility of Olekina as the sole witness in the petition, the six Returning Officers, the CRO and one Chief Political Party agent. The court believed the version of events narrated by all the respondents and we have no reason to depart from that assessment of credibility. We have carefully examined the evidence and we are also persuaded that it supports the conclusions of fact made by the trial court on those issues. There was no error in principle and we have no reason to disturb those findings.

63. There were findings, however, which were conceded by the Respondents, that there were irregularities in the conduct of the elections and in **Forms 35** and **36** which are crucial documents in determining accountability. Irregularities were defined by this Court (differently constituted) in **DICKSON MWENDA KITHINJI V. GATIRAU PETER MUNYA & 2 OTHERS, C.A No.38 of 2013** as;

“mistakes and serious administrative errors in the conduct of elections”.

The Respondents explained the irregularities as human errors which explanations the trial court accepted.

64. We have considered the nature of the irregularities pleaded by the petitioner and the explanations given by the respondents and we are satisfied that there was no error in principle in the approach taken by the court. In the *Peter Munya case* (supra) this Court accepted the premise that errors and mistakes are made by humans. The court also reviewed several decisions before reaching the conclusion that:

“The jurisprudence on human error in Kenya’s electoral law leans in favour of a general principle that human error is an excuse for collating and tallying errors/mistakes in the conduct of elections. However, such a general principle is not absolute.....”

It is our considered view that whereas human error may be an excuse for tallying mistakes, a party that raises this excuse must prove the existence of human error. Human error is not a blanket excuse that justifies and excuses any arithmetic, collating or tallying mistakes. Human error is neither an excuse for all errors or mistakes in transposition nor is it an excuse for failure to have the statutory forms duly signed by authorized persons. Simply stating that human error is responsible for the mistakes is not proof of existence of the error. The burden to prove the existence of human error rests on he who asserts. Human error must be proved. Human error is excusable if it is a single, isolated and random occurrence. When the mistakes or errors are multiple and persistent such mistakes cease to be human errors and point towards an inefficient, negligent, careless or even deliberate occurrence of the errors and this affects the credibility of the declared results”.

The court also stated:

“If the mistakes are premeditated and persistent, multiple and systemic, substantial and reveal a pattern or cause prejudice to any particular candidate, or affect the will of the people; then the integrity and credibility of the declared results comes into question”.

We find no evidence ourselves that the human errors conceded and explained in this case reached those levels.

65. The trial court finally subjected the irregularities to the materiality test to see if they affected the results of the election. Again, we find no error in principle in so doing. Commenting on this as a quantitative test, this Court in the *Peter Munya case* stated:

“Materially affecting the result of election” is interpreted to mean that the final aggregate figure arising from the tallying process will be affected arithmetically to the extent that the margin between the returned candidate and the runner up is not only narrowed but significantly eliminated to the point that a reasonable doubt is raised as to whether the returned candidate garnered votes that exceed the runner up. If after an arithmetical calculation has been made and the returned candidate still maintains a lead over his nearest rival, the results of the election has not been materially affected. The purpose of the arithmetical calculation is to remove any possibility that any difference in votes between the returned candidate and the nearest rival could be wiped out and the result of the election being materially affected.

In the case of **MBOWE V. ELIUFOO (1967) EA 240**, the Election Court in Tanzania while interpreting the meaning of “affected the result” stated:

“Affected results means not only the result in the sense that a certain candidate won and another one candidate lost. The result may be said to be affected if, after making adjustments for the effect of proved irregularities the contest seems much closer than it appeared to be when first determined. But when the winning majority is so large that even a substantial reduction still leaves the successful candidate a wide margin, then it cannot be said that the result of the election would be affected by any non-compliance of the rules.”

66. We have come to the conclusion that there was no serious error of principle made by the trial court in the assessment of evidence and the appreciation and application of the relevant law. We further find and hold that the gubernatorial election for Narok County was substantially held in accordance with the law and that the irregularities committed did not vitiate the election or materially affect the result. As stated earlier, the vote margin between Olekina and Tunai at the end of the day was incapable of creating reasonable doubts. The appeal is thus for dismissal and we so order.

67. The order for costs made by the High Court was attacked on the basis that it rewarded Returning officers who had admitted to serious electoral irregularities. It seems to us, however, that the Returning officers were joined in the petition as parties because they were alleged to have participated in bribery and other corrupt and illegal activities. To that extent, they were necessary parties. Those serious allegations were not proved against them and were in fact withdrawn after the Returning officers had defended themselves. It would otherwise not have been necessary to join them in the petition which had also enjoined their employer, the IEBC.

68. Ordinarily, costs follow the event unless there are reasons, which must be stated, to depart from that principle. **Section 84** of the **Elections Act** states in mandatory tone as follows:

“An election court shall award the costs of and incidental to a petition and such costs shall follow the cause”.

The petition in the High Court was dismissed and costs followed that event. The only omission was to specify the total costs, or cap the costs, as required under **Rule 36** of the **Elections (Parliamentary and County Election) Petition Rules, 2013**. We now do so by ordering that the costs of Tunai and Evalyn in the High Court shall not exceed shillings one (1) million each. We cap the costs of IEBC at shillings five hundred thousand (500,000) and shillings one hundred thousand (100,000) for each of the Respondents 4 to 10. The costs of this appeal shall be capped at shillings seven hundred and fifty thousand (750,000) for each of the Respondents 1 and 2, Shillings three hundred thousand (300,000) for the 3rd respondent and shillings fifty thousand (50,000) for each of the 4th to 10th Respondents. The costs payable to Olekina on the dismissed motion shall be taxed by the Registrar, unless they are otherwise agreed.

Orders accordingly.

Dated and delivered at Nairobi this 28th day of March, 2014

P.N. WAKI

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

REGISTRAR