IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MUSINGA, AZANGALALA & KANTAI JJ.A)

CIVIL APPEAL NO. 45 OF 2013

BETWEEN

JOSEPH AMISI OMUKANDA…..... APPELLANT

AND

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION (I.E.B.C.)…..... 1ST RESPONDENT

WILSON KIMUTAI KIPCHUMBA …..... 2ND RESPONDENT

EMMANUEL WANGWE …..... 3RD RESPONDENT

(Appeal from the Judgment/Decree of the High Court of Kenya at Kakamega (Chitembwe,J.)

dated 20th day of September, 2013)

in

ELECTION PETITION NO. 4 OF 2013

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JUDGMENT OF THE COURT

This is an appeal from the decision of ***Chitembwe, J.*** given on 20th September, 2013 by which the learned Judge dismissed an election petition which was filed by ***Joseph Amisi Omukanda*** *(hereinafter "the petitioner")* following the election of ***Emmanuel Wangwe*** (hereinafter "the 3rd respondent") as member of the National Assembly for Navakholo constituency in the general election held on 4th March, 2013.

The appellant was one of the eight candidates who contested the seat. He garnered a total of 10,246 votes and the 3rd respondent garnered 10,214. The other six candidates faired as follows:-

Vance Udoto …..... 6184

Moni Wekesa …..... 6156

Leonard Mayende …..... 298

Emmy Nawanjaya Siganga.. 297

Saleh Mung'ang'a …..... 258

Stanley Kevin Bushuru …... 210

The other six candidates are not involved in this appeal nor were they parties to the petition although Vance Udoto was a witness for the petitioner.

Being aggrieved by the outcome of the election in the said constituency, the petitioner filed a petition being Kakamega High Court Election Petition No. 4 of 2013. The appellant, in the petition, alleged that ***Wilson Kimutai Kipchumba*** *(hereinafter "the Returning Officer")* did not accurately collate the results from various polling stations; failed to promptly announce the results; did not promptly supply the petitioner or his agent with forms 35 and 36 and when he did, the total valid votes entered in the said forms did not tally with the figures orally announced on completion of polling.

The petitioner further complained that the total votes received by all the candidates were indicated to be more than the total valid votes; that the total votes received by all candidates equalled the total votes cast, meaning that rejected votes were not accounted for and that the number of rejected votes entered in form 36 and form 35 did not agree.

In the premises, according to the petitioner, the tallying and collating of results by the Returning Officer was casual and hence below the Constitutional and statutory standards. The only claim by the petitioner in his petition was for a recount of all the votes cast and examination of the tallying thereof and upon the recount and retallying a declaration be made that the candidate with the highest number of votes was the one validly elected member of the National Assembly for Navakholo Constituency.

The Independent Electoral and Boundaries Commission (hereinafter *"I.E.B.C.")* was joined by virtue of ***Article 86*** of the Constitution which requires it to hold elections using a simple, accurate, verifiable, secure, accountable and transparent system.

In the course of the hearing of the petition, each of the parties called several witnesses whose evidence was recorded and fully considered by the learned Judge.

On the plea for scrutiny, recount and retallying of all votes cast, the learned Judge did not find basis for scrutiny and recount of all votes cast. He however, ordered a recount of votes for one polling station called ***Kaunda*** and for one stream of another polling station called ***Emuhuni.*** The learned Judge further ordered a retallying of all the votes entered in forms 35.

The learned Judge found that the initial form 36 did not include results of the above polling stations which showed that the 3rd respondent won with a margin of 32 votes. After taking the results of the two polling stations into account that margin widened. The learned Judge also found that the Returning Officer duly tallied and computed the votes garnered by each candidate but an error occurred which did not affect the results.

On alleged errors, cancellations and erasures in forms 35, the learned Judge said:-

> ***" I have gone through the forms 35 for each of the 27 polling stations and noted that apart from Shikomari stream one and St. Mary polling stations, the party agents signed the forms 35 for all the other polling stations and this confirm(s) the authenticity of the results by the I.E.B.C. as opposed to those picked by PW 5".***
>
> He then concluded on the same complaint as follows:-

"Given the evidence on record I do find that the allegations of mathematical errors and variances are not proved. Counsel for the petitioner picked on the minor corrections on the forms 35 and ignored the substantial information in those forms which is the results per each candidate. This part of the forms 35 is titled the number of valid votes cast in favour of each candidate".

" I have gone through all the forms 35 and the only alterations are the balancing of the upper part of the forms where the presiding officers were giving a summary of the total votes cast, spoilt votes, total valid votes and total rejected votes. Due to normal human errors in some polling stations the presiding officers interchanged the valid votes and total votes cast and they cancelled and corrected the anomaly. In all the forms 35 there is no single cancellation of any candidate's results. It is the same results that were retallied by the Deputy Registrar and after the tabulation there was no submission by the petitioner's counsels to the effect that there was alteration of the results.

….....

The totality of the evidence on record shows that the results for each of the candidates from each polling station were correctly posted".

The learned Judge then concluded:

"The only irregularity on this election is the fact that two polling stations were not properly posted on the form 36. The form 36 is a final tally of all the results from each polling station. Since the paper trail in the forms 35 is still available, the error can be detected and rectified. Further the error did not affect the final result. Section 83 of the Elections Act therefore comes into play in this matter."

In the end the learned Judge held that the 3rd respondent was validly elected as member of the National Assembly for Navakholo Constituency and dismissed the petition but ordered each party to bear their own costs.

The appellant was aggrieved by that decision and lodged this appeal which is premised on some ten grounds. ***Mr. Amasakha,*** one of the learned counsel for the appellant, canvassed grounds 5, 6, 8, 9 and 10 first and ***Ms Ashioya,*** the 2nd learned counsel for the appellant, canvassed grounds 1, 2, 3, 4 and 7. Grounds 5, 6, 8 and 9 are expressed as follows:-

"5.) The learned trial Judge erred in fact and in law in failing to order a recount of votes in all the polling stations by ignoring that the margin between the appellant and the 3rd respondent was only 32 votes and the evidence that there were unaccounted for votes that exceeded the said margin.

- *The learned trial Judge erred in fact and in law in failing to order a recount of votes in all the 82 polling stations of Navakholo constituency by disregarding material evidence tendered by the petitioner and his witnesses without any legal or factual basis.*

- *The learned Judge erred in fact and in law by making an order dismissing the application on scrutiny and recount dated 24th June, 2013 with no order as to costs, when he had partially allowed it.*

- *The learned trial Judge erred in fact and in law by making final conclusive determinations at the interlocutory stage which should have been made at the final determination of the entire petition.*

- *The learned trial Judge erred in fact and in law by ordering the release of the ballot boxes to the IEBC before delivery of his final judgment showing a pre-determined mindset to dismiss*

the petition even before considering the submissions of the parties, and prejudicing the petitioner's right of appeal."

As can be observed, grounds 5, 6, 7 and 8 revolve around the learned Judge's order refusing recount and scrutiny of votes cast in all the 82 polling stations of the constituency. In the appellant's view, there was basis for the recount and scrutiny of all the votes cast in the polling stations of the constituency. Mr. Amasakha, learned counsel for the appellant, submitted that the appellant adduced evidence which showed that unaccounted for votes exceeded 32 votes which was the margin of votes between the 3rd respondent and the appellant. Learned counsel contended that the evidence of unaccounted for votes was given by the petitioner and the Returning Officer. Those two, according to counsel, agreed that rejected votes were in excess of 400 and given the small margin of 32 votes, should have convinced the learned Judge to carry out a recount and scrutiny of all votes cast in all the 82 polling stations of the constituency.

Counsel further submitted that forms 35 supplied to the appellant and his agents were different from the ones produced by the Returning Officer pursuant to an order of the Court. The latter forms, according to the appellant, had erasures, alterations and cancellations which matters were ignored by the learned Judge of the High Court. According to the appellant, the authenticity of the forms supplied by the Returning Officer was even questioned by the Deputy Presiding officer of one of the polling stations.

Finally, on the issue of recount and scrutiny, counsel submitted that the learned Judge on his own perused copies of forms 35 without inviting counsel for the parties to comment on the same and on the basis of the said forms, allowed a partial scrutiny.

On ground 10, learned counsel contended that the learned Judge released ballot boxes to I.E.B.C. after final submissions and not after his judgment which event, according to counsel, showed a pre-disposed mind on the part of the learned Judge.

On her part, Ms Ashioya, the 2nd learned counsel for the appellant, submitted on grounds 1, 2, 3, 4 and 7 that the learned Judge in his unilateral perusal of forms 35 used the forms furnished by the Returning Officer rather than the original ones which were already in the custody of the court. In counsel's view, some of the forms 35 used by the learned Judge of the High Court were inadmissible.

Ms Ashioya also submitted that the forms relied upon by the learned Judge had erasures which were not counter-signed. The errors, according to counsel, were admitted by the Returning Officer. Counsel further referred to the testimony of ***Wandera Zalo*** (DW 3) who was the Deputy Presiding Officer at Bushili Primary School polling station. This officer denied a signature on one form 35 which the Returning Officer alleged was his. In counsel's view that was evidence of forgery and given DW2's further evidence that he witnessed forms 35 being filled in a laboratory was proof of a flawed election. Counsel further referred the Court to various contradictions in the testimonies of the respondent's witnesses which in her view should have convinced the learned Judge that the election in the constituency was flawed.

On erasures to forms 35, counsel submitted that the same were material and did affect the results contrary to the finding of the learned Judge. Counsel specifically singled out the results of ***Ematiha*** Primary School polling station which, according to counsel, showed more voters than those registered turned out to vote which event should have resulted in disregarding the results of the polling station.

In response to the above submissions, ***Mr. Lubullella,*** learned counsel for the 1st and 2nd respondents, submitted that the appellant's complaints in his petition related to the events which happened at the tallying centre but the appellant in his presentation of this appeal expanded his complaints. In answer to the expanded complaints counsel contended that the material furnished to the court by the Returning Officer comprised all the forms 35 used in the election and no question was raised regarding the substance in the forms. There was therefore no issue of admissibility at any stage.

On the complaint that the said forms 35 had erasures, alterations and/or cancellations, counsel submitted that the same did not affect the results as found by the learned Judge. On the issue of partial recount and

scrutiny, counsel contended that the learned Judge exercised his discretion which exercise was not on whim or caprice. In counsel's view, presence of arithmetical errors did not mean there were unaccounted for votes as claimed by the appellant. Indeed, according to counsel, the partial recount and scrutiny resulted in a wider winning margin in favour of the 3rd respondent. Counsel referred the Court to the alleged erasures, cancellations and alterations and pointed out that the same did not affect any of the candidates' votes. In his view, notwithstanding the said anomalies, the results of the contested election were verifiable and agents signed the forms.

It was counsel's further submission that neither the appellant nor his agents applied for a recount at any of the 82 polling stations. There would therefore have been no basis for re-opening of the ballot boxes. The only complaint made by the appellant was after the announcing of results when the appellant demanded a recount which, according to counsel, would not have been done. In counsel's view a small margin of difference is not an automatic basis for a recount.

On release of ballot boxes, Mr. Lubulella submitted that the order was made when final submissions had been made and after all interlocutory applications had been disposed of. In counsel's view, there was no basis to fault the learned Judge when he ordered the release of the same.

On the issue of costs, counsel contended that the same were at the discretion of the learned Judge who exercised the same judicially.

On his part, ***Mr. Namada,*** learned counsel for the 3rd respondent, submitted that on the material availed to the learned Judge, he was entitled to hold that the election of the 3rd respondent as member of the National Assembly for Navakholo Constituency had been valid. Counsel further contended that all the complaints of the appellant were analysed by the learned Judge on the facts availed to him and this appeal, being grounded on such findings, is incompetent. In counsel's view, this appeal is an attempt to furnish evidence from the bar which evidence was not adduced by witnesses during the hearing of the petition. Counsel referred the Court to the complaints made in the petition and in this appeal and contended that the present chief complaint of manipulated forms 35 and 36, was not part of the appellant's case at the High Court.

With regard to the complaints regarding forms 35, counsel submitted that throughout the appellant's case he did not produce the forms 35 his agents were given. The figures given in the evidence of one of his witnesses according to counsel were not backed by the said forms. There was therefore no basis to re-open the ballot boxes as no basis for such action had been laid.

Counsel agreed with counsel for the 1st and 2nd respondents that a small margin per se could not have been a basis for recount and scrutiny of all votes cast in the Constituency. In counsel's view, the learned Judge analysed the material before him and determined that a recount and scrutiny of votes cast in two polling stations be conducted. Those two polling stations had been omitted in the final tally announced by the Returning Officer at the close of the election exercise. The Deputy Registrar of the High Court duly carried out the exercise and the 3rd respondent retained the lead with an even wider margin. In counsel's view, there were valid reasons for the order of recount and scrutiny for the two polling stations which was not the case when the appellant applied for a recount and scrutiny on the basis of original forms 35. Counsel contended that at no time had the appellant cast aspersions on the forms 35 used before his application for another recount and scrutiny.

In his brief submission on the cross-appeal, counsel contended that the same related to costs. Counsel argued that the petition having been lost, the 3rd respondent was entitled to the costs of the petition and no good reason had been given for denying him his costs.

In her brief response on the issue of costs, Ms Ashioya submitted that the appellant was not found guilty of any misconduct but the Returning Officer had admitted errors. In those premises, according to counsel, if costs were to be awarded, the Returning Officer and I.E.B.C would have to bear the same.

On the same issue of costs, Mr. Lubulella for I.E.B.C. and the Returning Officer submitted that the errors

made by the Returning Officer were minor and unintended and should not attract an order for costs against either I.E.B.C. or the Returning Officer. In his view, the appellant had erroneously lodged the petition and should bear the costs.

The starting point in this appeal is the appellant's original claim in his petition which was never amended upto the time of hearing this appeal. The appellant averred in paragraph 17 of his petition as follows:-

> ***"17. Your petitioner does not require any other determination except a recount of all the votes cast and examination of the tallying thereof."***

That was also the first relief the appellant sought in the prayers of the petition. The 2nd and 3rd reliefs were consequential to the 1st relief. The 2nd relief was expressed as follows:-

> ***"b) That upon the recount and retallying a determination that the candidate with the highest number of votes is the one validly elected Member of National Assembly for Navakholo Constituency."***

Prayer (c) sought an order of the court condemning I.E.B.C. and the Returning Officer in costs.

These prayers had foundation in paragraphs 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, and 16 of the petition. Paragraph 5 alleged that the Returning Officer did not accurately collate the results from various polling stations. Paragraph 6 alleged that the same officer failed to announce the results promptly. In paragraphs 7 and 8, it was averred that the Returning Officer did not supply the appellant or his agents forms 35 and 36 as soon as the results were announced but only supplied form 36 on 6th March, 2013. In paragraphs 9, 10 and 11, it was averred that the form 36 the appellant supplied contained different figures from both the ones verbally announced at the tallying centre and the figure given in another form 36 dated 23rd March, 2013. In paragraph 12, it was averred that the total valid votes received by all candidates as entered in both forms did not tally with forms 35 supplied by the Returning Officer. In paragraph 13, it was averred that the votes received by all the candidates were indicated to be more than the total valid votes. Paragraph 14 alleged that the total votes received by all candidates equalled the total cast votes meaning that rejected votes were not accounted for. In paragraph 15, it was alleged that the number of rejected votes entered in both forms 36 were different from the figures reflected in forms 35. From the foregoing the appellant concluded in the petition, that the Returning Officer casually handled the election which was below the Constitutional and Statutory requirements.

It is plain from the averments that the appellant did not complain about erasures, alterations or cancellations in any form 35 or form 36. With respect to forms 35, his complaints were that he or his agents were not given the same at the time of announcing the results at the tallying centre and that the total valid votes received by all candidates as entered in forms 36 did not tally with forms 35 he was supplied with by the Returning Officer. With regard to form 36, the appellant complained that he was supplied with two sets of forms 36: one dated 3rd May, [March] 2013 and another dated 23rd March, 2013 and that the figures in the two sets differed from each other and from the figures announced verbally at the tallying centre.

It is also plain that the appellant was supplied with forms 35 and 36 long before lodging his petition at the High Court. If those forms, had erasures, alterations and cancellations, which the petitioner thought were material, nothing would have been easier than complaining about the same in his petition.

The appellant did not also complain about missing signatures, excess signatures or missing stamps on any forms 35 in his entire petition nor did he complain about any forged signature by either an election official or any other person. We have perused his affidavit in support of the petition which he swore on 2nd April, 2013, we find that he did not annex the forms 35 he was supplied with. In his evidence which he gave on 19th June, 2013 he did not produce any single form 35 to buttress his averments in the plaint.

In paragraph 6 of the said affidavit in support of the petition, the appellant averred as follows:-

"6. That I confirm that on 4th March, 2013 voting begun and ended generally well at about 6 p.m. in all the 82 polling stations within Navakholo Constituency."

And at the trial he stated as follows, while being cross-examined by counsel for the 3rd respondent:-

"My complaint is what happened during the tallying process. The elections were done-properly and there were no incidents."

Later he added:-

"There is no posting in the two forms 36 I have produced which shows that my results were posted wrongly."

Later still he said:-

"I did not indicate in the affidavit that there was erasing at the tallying centre

….....

"..... I was given the forms 35 for all polling stations. According to forms 35 given to us by the I.E.B.C., I have not totaled them as some of them are erased. I have also not totaled the votes of the winner."

The appellant's chief agent was ***Nicanor Erics Wangwe.*** He swore his affidavit as the appellant's witness on 2nd April, 2013. In paragraph 4, he deponed that the voting process progressed well. At the trial, he testified as PW 5. He repeated the said statement that the voting ***"went on very well. No incidents were reported."*** The witness produced his record of results from each polling station which the learned Judge compared with those furnished by I.E.B.C. which did not agree.

It is significant that PW 5 admitted when cross-examined by counsel for the 1st and 2nd respondents, that he had not totalled the votes for all candidates. He also admitted that he did not know the total valid votes cast and those rejected. The affidavit of PW 5 never mentioned erasures, alterations or cancellations in forms 35.

From the above material it is plain that the appellant did not raise any issue concerning forms 35 in his petition. He did not complain that he had been issued with photo copies which were not certified. He did not at any stage seek to peruse the original forms which he acknowledged were in the custody of the Court. He and his chief agent admitted that they did not know the total valid votes cast and those rejected. He also admitted that by the time of his testimony, he had not totalled the votes for all the candidates.

In considering the complaints identified above, the learned Judge appreciated the provisions of the Constitution – ***Article 86,*** the Elections Act including the Regulations made (thereunder) ***Regulations 76 and 79).*** The learned Judge also considered various case law within and outside this jurisdiction including the Nigerian case of ***Kundu Swam -Vs- Dzungwe [1966] CLR 2(a) (Sc), Re Kensington North Parliamentary Elections, [1960] 2 All ER 150 Morgan -Vs- Simpson [1974] All ER 722 and Fitah -Vs- Stephenson & Others [2008] All ER (D) 13 April or [2008] EWHC 501 QB.***

We have no doubt that the learned Judge had the correct principles in mind when he considered the appellant's petition and the evidence adduced by him and the respondents. The learned Judge found that results in form 36 used to announce the results of the election did not include those of one polling station *(Emuhuni Primary School polling station stream one)* and some of the results for the 3rd respondent for Kaunda market polling station. After taking into account these results, the 3rd respondent still emerged the winner. The error did not therefore affect the final outcome of the election.The learned Judge therefore concluded as follows:-

> ***"The election was properly conducted and the tabulation was also properly done. There was a normal human error which did not affect the final outcome. It would have been different if the polling stations that had been left out made a different winner to be the winner. However, since the 3rd respondent still emerged the winner by widening the gap, the error cannot be the cause of vitiating the results."***

On the issue of alleged erasures, cancellations or alterations in forms 35 which were not countersigned, and the ones without or with excess signatures, the learned Judge stated:-

> ***"The forms 35 were provided by the 1st and 2nd respondents. Although they are photocopies, there is no allegation in the petition to the effect that those forms 35 are not authentic or that the result contained in any one of those forms is not correct. No agent of the petitioner came to court to complain that at the polling station where they were standing in for the petitioner the results have been changed. The petitioner himself did not pin point any single polling station where his results were altered or where the 3rd respondent or any of the other candidate's were changed. It is upon the petitioner to tell the court where he thinks that his results were altered to his disadvantage. Counsels for the petitioner picked on minor cancellations and alterations on forms 35 which have no effect on the individual results for each of the candidates."***

As the learned Judge in our view, correctly pointed out, the complaints with respect to errors in forms 35 were not captured in the petition. Strictly speaking, no evidence should therefore have been led in purported proof of what had not been pleaded. Indeed, in our view, the learned Judge could not base his decision on unpleaded issues. If he had done so, the respondents would be the ones complaining. Our perusal of the record however, leaves no doubt in our minds that notwithstanding that the complaints with respect to forms 35 had no foundation in the petition, the learned Judge nonetheless considered in great detail each and every complaint so raised and found that the same related to minor errors which did not vitiate the final results. That was generous and gratuitous of the learned Judge. Like him, even if the complaints about errors in forms 35 had had foundation in the petition, the errors would not, in our view, have vitiated the final result which the election produced. This view finds fortification in ***Section 83*** of the Elections Act which deals with situations in which there is non-compliance with written law. This section was indeed extensively considered by the learned Judge. It reads as follows:-

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

This section has received judicial interpretation by this Court and the Supreme Court of Kenya. In ***Raila Odinga - vs - I.E.B.C. And Others [Supreme Court Petition No.5 of 2013] (UR),*** it was held, inter alia, as follows:-

> ***"196..... Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections. It is on that basis that the respondent bears the burden of proving the contrary. This emerges from a long-standing common law approach in respect of alleged irregularity in the acts of public bodies. Omnia praesumuntur rite et solemniter esse acta: all acts are presumed to have been done rightly and regularly. So the petitioner must set out by raising firm and credible evidence of the public authority's departures from the prescription of the law."***

In the end, it is common knowledge that the Supreme Court held, on not disimilar complaints, that notwithstanding the same, the Kenya Presidential election had indeed been conducted in accordance with law and there was no basis for annulling the outcome of the Presidential election. It is significant that there, the complainants had basis in the petition. Unfortunately for the appellant, his complaints with respect to errors in forms 35 did not have such a foundation.

We agree with the learned Judge that the alleged errors, alterations, cancellations and erasures had no effect on the final results and like the learned Judge, we have come to the conclusion that the 3rd respondent did not benefit from those errors. Having come to that conclusion, we must, as we hereby do, dismiss grounds 1,2,3,4,6 and 7 of the appeal.

In ground 5, the appellant complains that the the learned Judge erred in fact and in law in failing to order a recount of votes in all the polling stations by ignoring that the margin between the appellant and the 3rd respondent was only 32 votes and the evidence that there were unaccounted for votes that exceeded the said margin. The complaint is two fold. First, that the learned Judge should have ordered a recount of all the votes cast because of the slim margin of 32 votes and second, that there was evidence of unaccounted for votes.

The learned Judge considered the said slim margin and rendered himself as follows:-

> ***"However, it is not a legal principle that whenever the winning margin is narrow then the court must order scrutiny and recount of the votes. Such a principle would make the court to be partisan. The impartiality role of the court is to evaluate the petition and the evidence on record and form its opinion as to whether a basis for recount has been laid or not. If there are no complaints from any single polling station about the results, why would the court order a recount of the votes.***
>
> ***An election is a competition and the winner is declared because he or she would have obtained the highest number of votes. The quality of the electoral process also counts in deciding whether or not the election was properly conducted. It is not upto the court to require a wide winning margin yet it is the voters who cast their votes according to their own decisions. The court cannot call upon the voters to ensure that whoever wins gets a bigger margin than his competitor. The votes were counted and the results that were announced gave a margin of 34 votes (sic). There is no evidence that those votes were either fictitious or that some votes were deducted from another candidate and given to the winner. The contentions that the 3rd respondent got the rejected votes is not proved."***

We entirely agree that a win remains a win even if the same is by one vote if the election is so conducted that it was substantially in accordance with the law as to elections, and if breach of the rules or mistake at the polls did not affect the result. So, the mere fact that the margin was small would not of itself have influenced the learned Judge to order a recount of all the votes cast for member of the National Assembly for the constituency. The appellant had the burden of proving that such a recount was necessary. In his petition he alleged that he was furnished with different forms 36 with different results which did not also tally with the figures in forms 35 he was given. He also alleged that there were different sets of rejected votes and that the total votes received by all the candidates exceeded the total valid votes. The appellant did not prove these allegations as we have already observed. Having failed to do so, he could not have been entitled to a re-count of all the votes cast for member of the National Assembly for the constituency.

The learned Judge ordered partial recount and scrutiny for reasons which he gave. He was exercising judicial discretion. He did so on sound principles and not on whim or caprice. The appellant would only frame an issue of law from the exercise of discretion by the learned Judge if he had availed material to demonstrate that the learned Judge improperly exercised his discretion. In our view he failed to do so. The ground that the learned Judge should have ordered recount and scrutiny of all votes cast in the constituency for member of the National Assembly therefore fails.

In ground 8, the appellant complains that the learned Judge erred in fact and in law by dismissing the appellant's application for scrutiny and recount dated 24th June, 2013 with no order as to costs when he had partially allowed it. In his oral submissions before us, counsel for the appellant argued that having ordered partial recount and re-tallying of all votes cast, the learned Judge should have awarded the appellant costs of the application. Counsel must have had in mind ***Section 84*** of the Elections Act in making that submission. We shall consider this issue in our discussion of the cross-appeal.

We turn to ground 9 in which the appellant complains that the learned Judge made conclusive determinations at interlocutory stage. In his oral submissions before us, counsel explained that the learned Judge carried out a scrutiny of his own which exercise should have been left to the Deputy Registrar as he had ordered. Counsel was particularly concerned that only photocopies of forms 35 were used during the unilateral exercise. We have considered this complaint and have come to the conclusion that it does not deserve any detailed analysis. The learned Judge had a duty to consider the complaints made in the petition as he knew best. His finding that the results of two polling stations were not fully captured in the tally provided by the Returning Officer could not have been possible if he had not considered all the forms 35 availed. The discrepancy was confirmed by the witnesses who testified at the trial of the petition. The appellant at no time alleged that the findings by the learned Judge were without basis or that his conclusion with respect to the two polling stations was wrong. The parties had laid material before the Judge for his consideration and the learned Judge cannot be faulted for considering the same. A Judge is not restricted to only consider evidence adduced at the conclusion of the trial. Even as we listened to learned counsel in this appeal, no suggestion was made that the findings of the learned Judge after unilateral perusal of the forms 35 were wrong. We therefore find no merit in this ground of appeal.

The last ground of appeal alleged that the learned Judge erred in fact and in law by ordering the release of ballot boxes to I.E.B.C. before delivery of his final judgment. The complaint was made because, in the appellant's view, the action demonstrated a predetermined mindset to dismiss the petition even before considering
the submissions of the parties, and thereby prejudicing the petitioner's right to appeal. We think this ground can also be disposed of summarily. Release of ballot boxes as did the learned Judge did not prevent him from recalling the same if the need would subsequently arise. We are afraid we cannot appreciate the alleged prejudice that was occasioned to the appellant. After all he still appealed anyway. We find no merit in this ground and the same fails.

The upshot is that the entire appeal has no merit and we dismiss it.

We now turn to the cross-appeal which was lodged by the 3rd respondent. It was against the order on costs made by the learned Judge. After dismissing the appellant's petition, the learned Judge said as follows:-

> ***"Costs***
>
> ***Section 84 of the Elections Act provides that an election court shall award costs of and incidental to a petition and such costs shall follow the cause. Although that is a statutory provision the courts have discretion to either award costs or not. The petitioner herein sought from 1st and 2nd respondents the forms 35 used in the election. He noted some errors on the form 36 and came to court. I do find that justice being fairness, it will be unfair to condemn the petitioner to pay costs. It will also be unfair to condemn the 1st and 2nd respondents to bear the costs of the petition as the irregularities complained of were normal human errors. The 3rd respondent should be satisfied with his new title as Member of National Assembly for Navakholo Constituency. I do order that each party shall meet his/its own costs."***

Section 84 of the Act reads as follows:-

> ***"84. An election court shall award the costs of and incidental to a petition and such costs shall follow the cause."***

Rule 36 of the **Elections (Parliamentary and County Elections) Petition Rules, 2013** amplifies the aforesaid section and states as follows:

> ***"36. (1) The court shall, at the conclusion of an election petition, make an order specifying-***

(a) the total amount of costs payable; and

(b) the persons by and to whom the costs shall be paid.

- ***When making an order under subrule (1), the court may-***

  (a) disallow any costs which may, in the opinion of the court, have been caused by vexatious conduct, unfounded allegations or unfounded objections, on the part of either the Petitioner or the Respondent; and

  (b) imposed the burden of payment on the party who has caused an unnecessary expense, whether such party is successful or not, in order to discourage any such expense.

- ***The abatement of an election shall not affect the liability of the Petitioner or of any other person to the payment of costs previously incurred."***

The language of **Section 84** as read with **rule 36** above is different from the language of **Section 27** of the Civil Procedure Act. The latter is the section which governs the award of costs in civil proceedings. That section clearly saves the discretion of the court on the issue of costs. **Section 84** of the Act on the other hand, leaves no discretion to the court on the issue of costs. The section screams: **"an election court shall award the costs of and incidental to a petition".** Then as to which party is to pay the costs which must be awarded by the election court, the section brooks of no other alternative, the awarded costs **"shall"** follow the cause. **Section 84** of the Elections Act was enacted in 2011, decades after **Section 27** of the Civil Procedure Act was enacted. In enacting **Section 84** of the Elections Act the framers thereof must have been fully alive to the provisions of **Section 27** of the Civil Procedure Act and deliberately used language which is mandatory in nature. I our view, the legislature clearly intended to depart from the provisions regarding costs

obtaining in **Section 27** of the Civil Procedure Act to the provisions in **Section 84** of the Elections Act which exclude discretion on the part of the court.

That being our view of the matter, our conclusion is that the learned Judge, with all due respect to him, fell into error when he stated that the courts have discretion to either award costs or not. In our view, that was a serious misdirection as Section 84 of the Act, which the learned Judge considered, allowed him no discretion in the matter. He had an obligation by the language of the section to award costs to the successful party. Applying the law in our view is the very essence of justice and fairness. Operating outside the provisions of the law cannot be said to be doing justice and being fair. The learned Judge misinterpreted and misapplied the law. We are therefore entitled to interfere.

- Accordingly, we set aside the order of the learned Judge on the costs of the petition and substitute therefor an order dismissing the petition with costs to the 3rd respondent capped at Kenya shillings one million five hundred thousand (Ksh.1,500,000/=). The costs shall be paid by the petitioner, the appellant herein.

Given our above analysis, we must revisit the order of the learned Judge of 24th June, 2013, by which he partially allowed the appellant's application for

recount and scrutiny but did not award costs to the appellant as mandated by Section 84 of the Act. We also set aside that order and substitute therefor an order partially allowing the application with costs to the appellant against the I.E.B.C. and the Returning Officer which costs are capped at Kenya shillings one hundred thousand (Kshs.100,000/=).

With regard to the costs of this appeal, it is now obvious that as the appeal has been dismissed, the appellant shall pay costs thereof to the 1st, 2nd and 3rd respondents which are capped at Kenya shillings one million (Ksh.1,000,000/=) for each of the respondents.

DATED AND DELIVERED AT KISUMU THIS 14TH DAY OF MARCH, 2014

D.K. MUSINGA

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JUDGE OF APPEAL

F. AZANGALALA

….....

JUDGE OF APPEAL

S. ole KANTAI

….....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR