



**Osebe v Independent Electoral and Boundaries Commission & 2 others
(Petition 28 of 2018) [2019] KESC 56 (KLR) (30 January 2019) (Judgment)**

Walter Enock Nyambati Osebe v Independent Electoral and Boundaries Commission & 2 others [2019] eKLR

Neutral citation: [2019] KESC 56 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
PETITION 28 OF 2018
MK IBRAHIM, JB OJWANG, SC WANJALA, N NDUNGU & I LENAOLA, SCJJ
JANUARY 30, 2019**

BETWEEN

WALTER ENOCK NYAMBATI OSEBE PETITIONER

AND

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 1ST
RESPONDENT**

DAVID KIPRONO TOWETT 2ND RESPONDENT

JOHN OBIERO NYAGARAMA 3RD RESPONDENT

*(Being an Appeal from the Judgment of the Court of Appeal at Kisumu Election Petition
Appeal No. 26 of 2018 (Makhandia, Gatembu & M'Inoti, JJ.A) dated 26th July, 2018)*

Evidence relating to un-pleaded facts arising from a scrutiny report cannot be relied on by a party to an election petition

The Supreme Court held that not every election petition appeal could be filed as a matter involving the interpretation or application of the Constitution. The court held that the petition of appeal and memorandum of appeal as filed by the petitioner did not raise issues of constitutional interpretation or application and did not lie within the ambit of article 163(4)(a) of the Constitution. The court also upheld the Court of Appeal's holding to the effect that findings in a scrutiny report could not be used to urge a case that was un-pleaded.

Reported by Beryl Ikamari

Jurisdiction - jurisdiction of the Supreme Court - appellate jurisdiction of the Supreme Court - matters of constitutional interpretation and application - claim that a petition of appeal before the Supreme Court, which was filed without leave/certification, was not one that raised matters of constitutional interpretation or application - whether the fact that electoral laws had a constitutional underpinning meant that election petition appeals were generally appellable as of right at the Supreme Court - Constitution of Kenya, articles 81, 86 and 163(4)(a).



Electoral Laws - scrutiny - grant of orders of scrutiny - probative value of evidence revealed during scrutiny - where a scrutiny report provided evidence relating to electoral irregularities which were details that were not part of the pleadings - whether a party could rely on evidence from a scrutiny report in support of his or her case, where the evidence did not relate to matters revealed in the pleadings.

Brief facts

The petitioner appealed against the decision of the Court of Appeal which upheld the High Court's decision to the effect that the 3rd respondent was validly elected as the governor for Nyamira County on August 8, 2017. At the High Court the petitioner cited various electoral irregularities and malpractices and sought various orders including orders for scrutiny and recount and also nullification of the result of the election. The High Court dismissed the petition and found that the petitioner had not discharged the burden of proof and also that he could not rely on the scrutiny report to introduce new grounds that had not been pleaded in the petition. On appeal at the Court of Appeal, the court upheld the High Court's decision and observed that the petitioner had shifted his focus from the allegations made in the petition to discrepancies and irregularities revealed in the scrutiny report but not pleaded in the petition.

The petitioner lodged a further appeal at the Supreme Court. Amongst the grounds of the appeal was the contention that the Court of Appeal erred in disregarding the scrutiny report and concluding that the petition sought nullification on the basis of un-pleaded grounds and that the Court of Appeal affirmed the findings of the High Court which were not supported by evidence. At the Supreme Court, the 3rd respondent filed an application seeking orders to strike out the petition on the ground that it was filed in violation of rules 31(1) and 33 of the Supreme Court Rules. The 3rd respondent stated that the petition was filed by strangers (a firm of advocates that was not on record), that there was no valid notice of appeal, that the petition sought to adduce new evidence through affidavits and that the petition did not adhere to Court Practice Directions.

Issues

- i. Whether the fact that electoral laws had a constitutional underpinning meant that election petition appeals were generally appealable as of right at the Supreme Court
- ii. Whether a petitioner could rely on evidence emerging out of a scrutiny report, which was not based on the petitioner's pleadings, in support of his case.

Held

1. Article 163 (4) (a) of the Constitution provided for the lodging of an appeal to the Supreme Court, as of right, in any case involving the interpretation or application of the Constitution. That right to appeal as of right was not applicable to every election petition appeal. It was necessary for an election petition to involve a question on the interpretation or application of the Constitution.
2. The petition of appeal and the memorandum of appeal did not raise any issue of constitutional interpretation or application. The issues identified by the petitioner did not bring the petition within the ambit of article 163(4)(a) of the Constitution.
3. The High Court and the Court of Appeal found that the irregularities revealed in the scrutiny report were not of such a degree as to affect the election result. There was no reason to fault the assessment of the two superior courts in that regard.
4. Scrutiny was not meant to aid a petitioner to find evidence in support of a case. A basis had to be laid for orders of scrutiny to be made. That basis was to be laid in the pleadings and affidavit evidence. Where a court ordered for scrutiny *suo moto*, it had to give reasons for the order. Parties were bound by their pleadings and they were not allowed to latch onto any evidence in order to make a case that they had not made in their initial pleadings. The Court of Appeal rightfully made the finding that the petitioner had moved out of his original petition at the High Court and was urging a different case based on un-pleaded claims.
5. The petitioner did not properly invoke the Supreme Court's jurisdiction. The petition of appeal did not raise any issue involving the interpretation or application of the Constitution.



Petition dismissed.

Orders

- i. *The preliminary objection was allowed.*
- ii. *The judgment of the Court of Appeal dated July 26, 2018 was upheld.*
- iii. *The petition of appeal was struck out.*
- iv. *The petitioner shall bear the costs of the 3rd respondent the instant appeal.*
- v. *The 1st respondent shall bear its own costs*
- vi. *For the avoidance of doubt, the declaration of the result of the election by the Independent Electoral and Boundaries Commission in respect of the Governor for Nyamira County was affirmed.*

Citations

Cases

Kenya

1. *Awiti, Cyprian & another v Independent Electoral and Boundaries Commission & 3 others* Election Appeal 5 of 2018; [2018] KECA 536 (KLR) - (Mentioned)
2. *Jobo & another v Shabbal & 2 others* Petition 10 of 2013; [2014] KESC 34 (KLR) ; [2014] 1 KLR 111- (Mentioned)
3. *Kidero & 4 others v Waititu & 4 others* Petition 18 & 20 of 2014 (Consolidated); [2014] KESC 11 (KLR) - (Mentioned)
4. *Kivuti v Independent Electoral and Boundaries Commission (IEBC) & 3 others* Petition 35 of 2018; [2019] KESC 51 (KLR) - (Mentioned)
5. *Macharia & another v KCB & 2 others* Application 2 of 2011; [2012] 3 KLR 199 - (Mentioned)
6. *Munya v Kithinji & 2 others* Petition 2B of 2014; [2014] KESC 38 (KLR)- (Followed)
7. *Nduttu and 6000 others v Kenya Breweries Ltd & another* Petition 3 of 2012; [2012] 2 KLR 804 - (Mentioned)
8. *Ngoge v Kaparo & 5 others* Petition 2 of 2012; [2012] KECA 6 (KLR) ; [2012] 2 KLR 419 - (Mentioned)
9. *Nyamache, Joshua v. Charles Kinanga Maema* Civil Case 153 of 2003; [2008] KEHC 3158 (KLR) - (Mentioned)
10. *Odinga and another v Independent Electoral and Boundaries Commission (IEBC) and 2 others* Election Petition 1 of 2017; [2017] KESC 52 (KLR); [2017] 2 KLR 101 - (Mentioned)
11. *Wetangula & another v Kombo & 5 others* Petition 12 of 2014 [2015] KESC 12 (KLR) - (Mentioned)

Philippines

New Rurak Bank of Guimba v Fermina S Abad and Rafael Susan GR NO. 161818 (2008) - (Mentioned)

Regional Court

Odd Jobs v Mubia [1970] 1 EA 476 (CAN) - (Mentioned)

Statutes

Kenya

1. Constitution of Kenya articles 81, 86, 163(4)(a) - (Interpreted)
2. Election (Parliamentary and County Elections) Petition Rules (cap 7) rule 12(12) - (Interpreted)
3. Elections Act (cap 7) section 85A - (Interpreted)
4. Evidence Act (cap 80) section 107 - (Interpreted)
5. Supreme Court Rules (cap 9B) rules 12, 31(1); 33 - (Interpreted)



JUDGMENT

A. Introduction

1. What is before the court is a Petition of Appeal dated 29 August 2018, filed on even date. The appeal is challenging the decision of the court of Appeal that upheld the High Court's decision upholding the election of the 3rd respondent as the Governor for Nyamira County in the 8 August 2017 General Elections.

B. Background

(i) At the High Court

2. Following the declaration of the 3rd respondent as the Governor elect for Nyamira County after garnering 63,949 votes against the petitioner's 57,432 votes, the petitioner was dissatisfied with the result and filed High Court Election Petition No 1 of 2017, *Walter Enock Nyambati Osebe v Independent Electoral & Boundaries Commission & 2 others*.
3. The petitioner, made a number of allegations in support of the petition. He alleged that the 1st and the 2nd respondents recruited and deployed 8 Presiding Officers working for the County Government of Nyamira, allowed unregistered voters to vote, tallied inexistent votes in 47 of the 553 polling centers in Nyamira County, and produced results which were higher than the registered voters in 47 polling stations (which the petitioner listed under Table 1).
4. The petitioner further alleged that the 1st and the 2nd respondents declared lower tallies of valid votes cast in 13 of 553 polling stations (which the petitioner listed under Table 2), thereby failing to account for 803 valid cast votes. That the 1st and the 2nd respondents overstated and declared higher tallies of valid votes cast in 15 of 553 polling stations (which the petitioner listed under Table 3), thereby adding to the tally 366 votes.
5. Thus, the petitioner sought the following prayers namely:
 - (a) There be a scrutiny of the votes recorded as cast in the election for the office of Governor, Nyamira County, on 8 August 2017, particularly the polling centers itemized in table 1, paragraph 14 of this petition, and table 6 paragraph 21 of the petition.
 - (b) There be a recount of the votes recorded as cast in the election for office of Governor, Nyamira County on 8 August 2017.
 - (c) There be a scrutiny and examination of all forms 37A, form 37B and form 37C, and all accountable documents used in the election for the office of Governor, Nyamira County, on 8th August, 2017.
 - (d) The election of the 3rd respondent as Governor Nyamira County be determined and declared null and void.
 - (e) A declaration that the third respondent was not validly elected Governor, Nyamira County.
 - (f) An Order to be made for holding a fresh election for the office of Governor, Nyamira County.
 - (g) Costs of the suit.



6. The 1st and 2nd respondents filed their response dated 20 September 2017 essentially denying all allegations and maintained that the 3rd respondent was duly declared the Governor of Nyamira County. The 3rd respondent through its amended response dated 28 September 2017 asserted that the allegations were baseless, an abuse of the court process and that the election was free, fair, transparent, accurate and accountable. He denied that any of his agents had been arrested for bribery and that there was nothing before Court to justify the nullification of his election.
7. On 28 February 2018, the Election Court (Makau J) dismissed the petition, holding that the petitioner had not discharged the burden of proof, in accordance with section 107 of the *Evidence Act* and the precedent set in *Raila Amolo Odinga and another v IEBC and 2 others*, Supreme Court Presidential Petition No 1 of 2017 the court further held that the scrutiny report did not support the allegations in the petition. the court also dismissed the bid by the petitioner to introduce new grounds that had not been pleaded in the petition.

(ii) At the court of Appeal

8. Dissatisfied by the trial Court's decision, the petitioner filed Civil Appeal No 26 of 2018, *Walter Nyambati Osebe v the Independent Electoral and Boundaries Commission & 2 others*, advancing five grounds of appeal. He claimed that the learned Judge erred in law in: not appreciating that there was a huge variance between the number of votes/counterfoils and voter turnout in more than 24 polling stations which was ascertained during the scrutiny and recount; not appreciating that the integrity of the final tally was in issue and consequently the will of the voters of Nyamira County was indeterminate; not holding that the final tally announced by the County Returning Officer was not verified; failing to consider and give effect to the Deputy Registrar's Report on scrutiny and recount; and not appreciating the full effect of the various illegalities and irregularities in respect of the conduct of the election of Governor, Nyamira County.
9. The Appellate Court identified only one issue for determination, that is, whether the Election Court erred in declining to nullify the election on account of alleged irregularities ascertained during the scrutiny and recount and for failing to consider and give effect to the Deputy Registrar's report on scrutiny and recount .
10. In dismissing the appeal, the learned Judges of Appeal observed that the appellant had shifted his focus from the allegations in his petition to alleged discrepancies and irregularities purportedly revealed by the scrutiny report, but not pleaded in the petition.

(iii) At the Supreme Court

(a) Appeal

11. Aggrieved further by the Appellate Court's decision, the petitioner filed this appeal seeking the following reliefs:
 - (i) An order setting aside the decision/order of the court of Appeal and substituting the same with an order allowing the appeal;
 - (ii) An order declaring that the gubernatorial election conducted in Nyamira County was not in accordance with the Constitution and written law;
 - (iii) An order declaring that the 3rd respondent was not validly elected as Governor, Nyamira County;



- (iv) An order directing the 1st and 2nd respondent to conduct a fresh election for the office of the Governor, Nyamira County;
 - (v) An Order awarding the costs of this Appeal, and proceedings before the court of Appeal and the trial Court to the petitioner.
12. The appeal is premised on 12 grounds, to wit, that the learned Judges of Appeal erred in law in: concluding that the petitioner sought nullification on un-pleaded grounds; disregarding the scrutiny report dated 21 November 2017; affirming conclusions of the trial Judge that were not supported by evidence; failing to make a finding that the declared results were unverifiable; failing to find that the scrutiny report dated 21 November 2017 was binding to the trial Court; failing to address the glaring irregularities that had been pleaded by the petitioner and confirmed by the scrutiny exercise; and departing from their decision on scrutiny reports and the probative value thereof, thus causing jurisprudential confusion;
13. The petitioner has itemized the following as his issues for determination:
- (i) Whether the learned Judges erred in concluding that the petitioner was relying on unpleaded issues;
 - (ii) Whether the learned Judges erred in affirming the trial Court's conclusions;
 - (iii) Whether the learned Judges erred in law in concluding that the errors established were of trivial nature;
 - (iv) Whether the court erred in law in concluding that the petitioner had not discharged the burden of proof;
 - (v) Whether the court erred in law in failing to nullify the 3rd respondent's election.
14. On 26 September 2018 the 3rd respondent moved this court by way of Notice of Motion, supported by his affidavit, seeking orders to strike out the petition on the ground that the petition was filed in violation of rules 31(1) and 33 of the *Supreme Court Rules*, that the petition was filed by strangers, that there was no valid Notice of Appeal, that the petition sought to adduce new evidence through the affidavits of Leonard Okari Moragu, Monicah Njeri Kamau and Bob Ndubi and finally, that the petition did not adhere to Court Practice Directions.
15. In opposition to the application, the petitioner filed grounds of opposition dated October 31, 2018, in which he contended that the appeal was filed on time, and that the affidavits of all intended witnesses formed part of the court record pursuant to rule 12(12) of the *Election (Parliamentary and County Elections) Petition Rules*, 2017.
16. With the concurrence of counsel, the court directed that the application be heard together with the appeal.

(ii) The Parties' Cases

(a) On Jurisdiction

17. The petitioner contends that the appeal is anchored on article 163(4)(a) of the *Constitution* involving the interpretation and application of the Constitution. He cites the case of *Hassan Ali Jobo & another v Suleiman Said Shabbal & 2 others*, SC Pet No 10 of 2013. He maintains that in interpreting the provisions of the *Elections Act*, the Election Court and the court of Appeal could not disengage from the *Constitution*, as the electoral law is founded on the *Constitution* namely, article 81 and 86. He also



cites the case of *Gatiru Peter Munya v Dickson Mwenda Kithinji & 2 others*, Application No 5 of 2014 in support of his argument for jurisdiction.

18. On the other hand, the 1st and 2nd respondents in the preliminary objection, contend that the appeal does not meet the threshold established under article 163(4)(a) of the *Constitution*, as it does not concern the interpretation of any article of the *Constitution*. They also submit that the appellant is inviting the court, to look into questions of fact, a task outside the jurisdiction under article 163(4)(a). The respondents further submit, that the petition is incompetent, having been filed by an advocate who has never been on record for the appellant.
19. The 3rd respondent submits that the appeal is flawed, vague, frivolous and premised on allegations that do not arise from the interpretation or application of the Constitution. It is his contention that, the petition raises issues of pure statutory nature. He cites the decision of *Samuel Kamau Macharia & another v KCB & 2 others* SC Civil App 2 of 2011 and *Lawrence Nduttu and 6000 others v Kenya Breweries Ltd & another* SC Petition No 2 of 2012; in support of his submissions. He maintains that the petitioner raises new facts that were not placed before the trial Court.

(b) Application to Strike-out

20. The 3rd respondent submits that the petition is incompetent for being filed by a firm of advocates who are strangers to the proceedings. In his view, failure to file a notice of change of advocates prior to the filing of the substantive appeal, invalidates the petition. He urges that the appellant ought to have filed either a notice of change of advocates or a consent order signed by both outgoing and incoming advocates. He relies on the High Court decision in *Joshua Nyamache v Charles Kinanga Maema* [2008] eKLR, that an advocate who is not duly appointed cannot file documents on behalf of a party.
21. The 1st and 2nd respondents support the motion and submit that the appeal is incompetent as it was filed on behalf of the petitioner by Ms Nchogu, Omwanza & Nyasimi advocates who were strangers to the proceedings having failed to file a notice of change of advocates from Ms. Ngatia and Associates, contrary to rule 12 of the *Supreme Court Rules*.
22. In opposition to the Motion, the petitioner submits that, a Notice of Appeal is a notification, by a litigant to another signifying that the litigation has not come to an end. He submits that such a notification was indeed made and since none of the respondents claims that they were unaware of the Notice of Appeal. No prejudice has been suffered. He further submits that the requirement to file a notice of change of advocates is necessary in 'live' proceedings as opposed to concluded ones as was the case in this matter.

(c) Scrutiny and Un-pleaded Grounds Arising Therefrom

23. The petitioner faults the conclusion by the learned Judges to the effect that he had shifted his focus from the pleadings in his petition at the Election Court. He maintains that he had specifically pleaded the issues which he later urged at the Appellate Court. He further argues that the election Court was bound to consider and determine, matters (irregularities) that had arisen during trial and canvassed by the parties, even if they had not been initially pleaded. He relies on the decisions in *Moses Masika Wetang'ula v Musikari Nazi Kombo & 2 others* [2015] eKLR and *Odd Jobs v Mubia* [1970] 1 EA 476 (CAN).
24. The petitioner finds fault with the manner in which the two superior Courts addressed the scrutiny report. He argues that having allowed the application for scrutiny, the report from the scrutiny exercise became part of the record and the two courts were bound to consider the findings made therein. In support of his arguments, the petitioner cites the cases of *Cyprian Awiti & another v Independent*



- Electoral and Boundaries Commission & 3 others* [2018] eKLR; and *Moses Masika Wetang'ula v Musikari Kombo and 2 others* [2014] eKLR. He subsequently submits that in a scrutiny exercise, an Election Court conducts a judicial inquiry.
25. The petitioner avers that the court of Appeal erred in affirming the trial Judge's findings which in his view, were not supported by evidence. He maintains that the trial Court preferred witness evidence over its own independent findings during the scrutiny, thus occasioning a miscarriage of justice.
26. The 1st and 2nd respondents, in agreement with the court of Appeal, submit that the petitioner's case before the Appellate Court had mutated into a completely different pleading from the case before the High Court. They submit that the petitioner cannot be allowed to flee from his pleadings before the trial Court by relying on emerging issues from the scrutiny and recount report. In addition, it is submitted that the learned Judges of Appeal could not disturb the trial Judge's conclusions in respect of the petitioner's case, as this would amount to recalibrating the evidence at the trial Court, contrary to section 85A of the *Elections Act*.
27. The 1st and 2nd respondents further submit that the trial Judge ordered scrutiny and recount in strict reference to the petitioner's specific allegations and not generally. Consequently, the resultant scrutiny and recount report was considered in accordance with those allegations which had been pleaded by the petitioner and which had formed the basis for the scrutiny exercise. The purpose of scrutiny, submit the respondents, is to aid the court in determining the veracity of the allegations in the petition. Scrutiny cannot be used as a fishing expedition to obtain evidence not presented before a trial Court. In support of their submissions, the respondents rely on this court's decision in *Gatirau Peter Munya v Dickson Mwenda Kitbinji & 2 others*; and a decision by the Supreme Court of Philippines in the case of *New Rurak Bank of Guimba v Fermina S Abad and Rafael Susan* GR No 161818 (2008).
28. The 3rd respondent agrees with the 1st and 2nd respondents' argument that the petitioner had used the scrutiny report to raise new grounds not pleaded before the trial Court. He contends that a party is bound by its pleadings. The 3rd respondent further contends that the petitioner invited the court of Appeal to re-examine the probative value of evidence tendered at the trial Court contrary to the section 85A of the *Elections Act*.

(d) Irregularities and Verifiability of Results

29. The petitioner submits that article 81 and 86 obligates the 1st respondent to conduct a verifiable, transparent, free and fair election. He maintains that the scrutiny had unearthed massive irregularities which called the integrity of the election into question. The petitioner further contends that given the grave irregularities that marred the election, the declared results were not verifiable.
30. In opposition, the 1st and 2nd respondents submit that the question is not whether there were irregularities during the election, but what effect, those irregularities had on the election. It is their submission that no election can be perfect and as such, unless it can be shown that the irregularities affected the result of an election, such election cannot be vitiated on ground only that there were irregularities. In support of their submissions, the 1st and 2nd respondents rely on this court's decisions in *Gatirau Peter Munya* [*supra*] and *Raila 2017* [*supra*]. The 3rd respondent supports the foregoing sentiments.

C. Issues For Determination

31. Having carefully considered the pleadings of the parties, the oral and written submissions by counsel for the parties, and the cases cited in support, we have come to the conclusion that there are only two issues for determination in this appeal. These are:



1. Whether this court has jurisdiction to determine the Petition of Appeal.
2. What effect is to be accorded new evidence that emerges out of a scrutiny exercise, which evidence was not part of the pleadings.

(i) On Jurisdiction

32. The preliminary objection raised by the respondents is based on the argument that the Petition of Appeal, brought under article 163(4)(a) of the Constitution, is incompetent, as the same has nothing to do with the interpretation and application of the Constitution. An appeal lies to this court under the said article as of right in any case involving the interpretation or application of the Constitution. It is the respondents' case that the petitioner, has not raised any issue involving the interpretation or application of the Constitution. On the contrary, submit the respondents, the petitioner is simply rearguing the appeal he filed at the Appellate Court. The situation is further compounded in their view, by the fact that, even at this stage, the petitioner is still agitating new grounds, that were not part of his original petition at the High Court. The respondents therefore pray that the Petition of Appeal be struck out as the appellate jurisdiction of this court, has not been properly invoked under article 163(4)(a) of the Constitution.
33. The petitioner on the other hand, submits that this court has jurisdiction to determine the appeal pursuant to article 163(4)(a) of the Constitution. He cites the case of Gatirau Peter Munya v Dickson Mwenda Kitbinji & 2 others, App No 5 of 2014 (Munya 1) wherein this court stated that “ The Elections Act, and the Regulations thereunder, are normative derivatives of the principles embodied in articles 81 and 86 of the Constitution, and in interpreting them, a court of law cannot disengage from the Constitution.” The petitioner further submits that his appeal is founded on both claims of non-compliance with the Constitution and Electoral laws.
34. The jurisprudence of the Supreme Court's appellate jurisdiction under article 163(4)(a) of the Constitution has been addressed in many of the court's decisions. Thus, the import, scope and limits of the court's appellate jurisdiction has been clarified in Samuel Kamau Macharia and Another v Kenya Commercial Bank and 2 others, [2012] eKLR; Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & another [2012] eKLR; Peter Oduor Ngoge v Francis Ole Kaparo & 5 others; [2012] eKLR; Gatirau Peter Munya v Dickson Mwenda Kitbinji & 2 others [2014] eKLR; Evans Odhiambo Kidero & 4 others v Ferdinand Ndung'u Waititu & 4 others [2014] eKLR; Hassan Ali Joho & another v Suleiman Shabbal & 2 others [2013] eKLR; among others. A number of principles have been developed in these cases to guide prospective appellants. These principles have been restated in a recent decision by the court in Lenny Maxwell Kivuti v IEBC & 3 others, Sup Court Petition No 5 of 2018 .
35. It is clear from these decisions that not every election petition appeal lies to the Supreme Court. Whether it be an Election Petition or any other appeal, if brought under article 163(4)(a) of the Constitution, such an appeal only lies to the Supreme Court if it involves a question of the interpretation or application of the Constitution.
36. We have considered the Petition of Appeal in its entirety. Of the twelve grounds in the Memorandum of Appeal, none raises any issue involving the interpretation or application of the Constitution. Not even the issues identified by the petitioner himself can suffice to bring the petition within the ambit of article 163(4)(a). The only oblique reference to the Constitution is in ground 5 where the petitioner faults the Appellate Court for “ failing to consider the effect of the irregularities, thus failing to apply articles 81 and 86 of the Constitution.”



From the record, both the High Court and Court of Appeal found that the irregularities revealed in the Scrutiny Report were not of such a degree as to affect the election result. We see no reason to fault the assessment of the two superior courts in this regard.

37. Mr Otachi, counsel for the petitioner, in urging that this Court has jurisdiction to entertain this appeal, sought to rely on the decision in *Gatirau Peter Munya (Munya 1)*, but said no more than to quote the celebrated pronouncement of the court in that case to the effect that “the *Elections Act*, and the *Regulations* thereunder, are normative derivatives of the Principles embodied in articles 81 and 86 of the *Constitution* and in interpreting them, a Court of law cannot disengage from the *Constitution*.” In *Kivuti v IEBC* the court has made it very clear that this oft-quoted pronouncement by those seeking to invoke the court’s appellate jurisdiction under article 163(4)(a), does not give a Carte Blanche for admitting appeals from the court of Appeal to the Supreme Court in Election Petitions [emphasis added].

What effect is to be accorded new evidence that emerges out of a scrutiny exercise, which evidence was not part of the pleadings:

38. In *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [Supra], this court was categorical that a scrutiny exercise, is not a fishing expedition. It was never meant to aid a petitioner in finding evidence to support his/her case. Before a scrutiny is ordered by the election court, a basis must be laid by a party seeking it. The basis is to be laid in the pleadings or affidavit evidence. Even where a court orders a scrutiny suo motu, it must give reasons for such an order. Parties are bound by their pleadings and as such, are not allowed to latch onto whatever evidence to make a case they had not made in their initial pleadings. These principles have repeatedly guided the courts in election disputes, and we see no reason to vary them. Towards this end, we are in agreement with the appellate Court in its finding that the petitioner/appellant had moved out of his original petition at the High Court, and was urging a different case on the basis of unpleaded claims.
39. Applying these principles to the appeal at hand, we find that the petitioner has not properly invoked this court’s jurisdiction. The Petition of Appeal does not raise any issue involving the interpretation or application of the Constitution. This finding leads to the inevitable consequence that the preliminary objection is for allowing.

D. Orders

- (i) The preliminary objection herein is hereby allowed.
- (ii) The Judgment of the court of Appeal dated 26 July 2018 is hereby upheld.
- (iii) The Petition of Appeal is hereby struck out.
- (iv) The petitioner shall bear the costs of the 3rd respondent in this appeal.
- (v) The 1st respondent shall bear its own costs
- (vi) For the avoidance of doubt, the declaration of the result of the election by the Independent Electoral and Boundaries Commission in respect of the Governor for Nyamira County is affirmed.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JANUARY, 2019.

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M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT



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J. B. OJWANG

JUSTICE OF THE SUPREME COURT

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S. C. WANJALA

JUSTICE OF THE SUPREME COURT

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NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA

JUSTICE OF THE SUPREME COURT

