

**REPUBLIC OF KENYA**

**IN THE SUPREME COURT OF KENYA AT NAIROBI**

*(Coram: Ibrahim, Ojwang, Wanjala, Njoki & Lenaola, SCJJ)*

**PETITION NO. 28 OF 2018**

**—BETWEEN—**

**WALTER ENOCK NYAMBATI OSEBE.....PETITIONER**

**—AND—**

**THE INDEPENDENT ELECTORAL AND  
BOUNDARIES COMMISSION.....1<sup>ST</sup> RESPONDENT**

**DAVID KIPRONO TOWETT.....2<sup>ND</sup> RESPONDENT**

**JOHN OBIERO NYAGARAMA.....3<sup>RD</sup> RESPONDENT**

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*(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 26<sup>th</sup>  
July, 2018)*

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**JUDGMENT OF THE COURT**

**A. INTRODUCTION**

[1] What is before the Court is a Petition of Appeal dated 29<sup>th</sup> 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 3<sup>rd</sup> respondent as the Governor for Nyamira County in the 8<sup>th</sup> August, 2017 General Elections.

## **B. BACKGROUND**

### ***(i) At the High Court***

**[2]** Following the declaration of the 3<sup>rd</sup> 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 1<sup>st</sup> and the 2<sup>nd</sup> 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 1<sup>st</sup> and the 2<sup>nd</sup> 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 1<sup>st</sup> and the 2<sup>nd</sup> 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<sup>th</sup> 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<sup>th</sup> 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 8<sup>th</sup> August, 2017.*
- (d) The election of the 3<sup>rd</sup> 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 1<sup>st</sup> and 2<sup>nd</sup> respondents filed their response dated 20<sup>th</sup> September, 2017 essentially denying all allegations and maintained that the 3<sup>rd</sup> respondent was duly declared the Governor of Nyamira County. The 3<sup>rd</sup> respondent through its amended response dated 28<sup>th</sup> 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<sup>th</sup> 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 1<sup>st</sup> and 2<sup>nd</sup> 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<sup>st</sup> 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<sup>st</sup> 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 3<sup>rd</sup> respondent's election.*

**[14]** On 26<sup>th</sup> September, 2018 the 3<sup>rd</sup> 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 Leornard 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 31<sup>st</sup> October, 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 Joho & Another v. Suleiman Said Shabhal & 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 1<sup>st</sup> and 2<sup>nd</sup> 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 3<sup>rd</sup> 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 3<sup>rd</sup> 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 1<sup>st</sup> and 2<sup>nd</sup> 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 1<sup>st</sup> and 2<sup>nd</sup> 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 1<sup>st</sup> and 2<sup>nd</sup> 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 Kithinji & 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 3<sup>rd</sup> respondent agrees with the 1<sup>st</sup> and 2<sup>nd</sup> 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 3<sup>rd</sup> 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 85 A of the Elections Act.

#### ***(d) Irregularities and Verifiability of Results***

[29] The petitioner submits that Article 81 and 86 obligates the 1<sup>st</sup> 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 1<sup>st</sup> and 2<sup>nd</sup> 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 1<sup>st</sup> and 2<sup>nd</sup> respondents

rely on this Court's decisions in *Gatirau Peter Munya [supra]* and *Raila 2017 [supra]*. The 3<sup>rd</sup> 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 Kithinji & 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.s Dickson Mwenda Kithinji & 2 Others*** [2014] eKLR; ***Evans Odhiambo Kidero & 4 Others v. Ferdinand Ndung’u Waititu & 4 Others*** [2014] eKLR; ***Hassan Ali Joho & Another v. Suleiman Shahbal & 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<sup>th</sup> July, 2018 is hereby upheld.*
- (iii) The Petition of Appeal is hereby struck out.*
- (iv) The petitioner shall bear the costs of the 3<sup>rd</sup> respondent in this appeal.*
- (v) The 1<sup>st</sup> 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 30<sup>th</sup> 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

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**I. LENAOLA**  
JUSTICE OF THE SUPREME COURT