IN THE REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(*Coram: Maraga, CJ & P, Mwilu, DCJ & V-P, Ibrahim, Ojwang, Wanjala, Njoki and Lenaola, SCJJ*)

PRESIDENTIAL PETITION NO. 1 OF 2017

BETWEEN

1. RAILA AMOLO ODINGA……1ST PETITIONER

2. STEPHEN KALONZO MUSYOKA……2ND PETITIONER

AND

1. INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION…….....1ST RESPONDENT

2. CHAIRPERSON, INDEPENDENT ELECTORAL

AND BOUNDARIES COMMISSION…….....2ND RESPONDENT

3. H.E. UHURU MUIGAI KENYATTA……..3RD RESPONDENT

ORDER

[1] This Court gave its Ruling on 28th August, 2017, partially allowing the Petitioners Notice of Motion Application dated 25th August, 2017, which sought scrutiny of votes and technological materials. At paragraph **[32]** and **[34]** of the Ruling, the Court made reference to Rule 33 of the Elections (Parliamentary and County Elections) Petition Rules, 2013, which have since been revoked.

[2] We have noted that we inadvertently cited the repealed Rules of 2013 instead of the Elections (Parliamentary and County Elections) Petition Rules, 2017. In that regard, and in exercise of the powers conferred to this Court by Section 21(4) of the Supreme Court Act (Act. No. 7 of 2011), we hereby correct the error on record and order a deletion of the reference to Rule 33 of the Elections (Parliamentary and County Elections) Petition Rules, 2013 and replace it with Rule 29 of the Elections (Parliamentary and County Elections) Petition Rules, 2017.

[3] Consequently, **paragraph 32** shall henceforth read as follows:

"We shall in the above regard begin by addressing the law regarding scrutiny and in that regard, the right to scrutiny of votes and specifically and generally as well as and recount of votes in an

election petition is anchored on Section 82(1) of the Elections Act (Act. No 24 of 2011) and Rule 29 of the Elections (Parliamentary and County Elections) Petition Rules, 2017. The Presidential Election Petition Rules, 2017 are however silent on the issue of scrutiny."

[4] On the same breadth, **paragraph 34** shall read as follows:

"On the other hand and by way of comparison only, Rule 29 of the Elections (Parliamentary and County Elections) Petition Rules, 2017 provides:

"Scrutiny of votes.

(1) The parties to the proceedings may apply for scrutiny of the votes for purposes of establishing the validity of the votes cast.

(2) On an application under sub-rule (1), an election court may, if it is satisfied that there is sufficient reason, order for scrutiny or recount of the votes.

(3) The scrutiny or recount of votes ordered under sub-rule (2) shall be carried out under the direct supervision of the Registrar or Magistrate and shall be subject to the directions the election court gives.

(4) The Scrutiny or recount of votes in accordance with sub-rule (2) shall be confined to the polling stations in which the results are disputed and may include the examination of—

(a) the written statements made by the returning officers under the Act;

(b) the printed copy of the Register of voters used during the elections sealed in a tamper proof envelope;

(c) the copies of the results of each polling station in which the results of the election are in dispute;

(d) the written complaints of the candidates and their representatives;

(e) the packets of spoilt ballots;

(f) the marked copy register;

(g) the packets of counterfoils of used ballot papers;

(h) the packets of counted ballot papers;

(i) the packets of rejected ballot papers;

(j) the polling day diary; and

(k) the statements showing the number of rejected ballot papers."

(5) …..

[5] By virtue of this Order, the Ruling dated 28th August, 2017, is accordingly amended and this correction shall constitute part of the Ruling of the Court.

DATED and **DELIVERED** at **NAIROBI** this **11th** Day **September,** 2017.

…… **……..**

D.K. MARAGA **P.M. MWILU**

CHIEF JUSTICE & PRESIDENT **DEPUTY CHIEF JUSTICE &**

OF THE SUPREME COURT **VICE-PRESIDENT OF THE SUPREME COURT**

…… **……..**

M.K. IBRAHIM **J.B. OJWANG**

JUSTICE OF THE SUPREME **JUSTICE OF THE SUPREME**

COURT **COURT**

…… **…….**

S.C. WANJALA **N.S. NDUNG'U**

JUSTICE OF THE SUPREME **JUSTICE OF THE SUPREME**

COURT **COURT**

……

I. LENAOLA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy

of the original

REGISTRAR

SUPREME COURT OF KENYA

RULING OF THE COURT

A. INTRODUCTION

[1] The present petition was filed on 18th August 2017. At paragraph 27 thereof, the petitioners contend that *"upon scrutiny of the total rejected and spoilt votes, this honourable court will confirm that a total of 395,510 votes were unlawfully deducted from the 1st petitioner and added to the 3rd respondent".*

[2] At paragraph 28, they further contend that *"the discrepancy in rejected and spoilt votes as shown in the 1st respondent's forms 34B and its public portal, with the latter showing a significantly higher number".*

[3] At paragraphs 21.2.1 they also claim that the data and information recorded in Forms 34A at the individual polling stations were not accurately and transparently entered into the KIEMS kit at the individual polling stations and specifically that in *"more than 10,000 polling stations, the data entered into the KIEMS Kits was not consistent with the information and data from the respective Forms 34A."*

[4] As regards Forms 34B, it is the petitioners' contention that the results declared in those forms were inconsistent with the results in Forms 34A which were the primary documents from which the former are required by law to be created. They plead in that regard that *"in excess of 14,000 fatally defective returns from polling stations representing in excess of 7 Million votes"* were allowed into the vote tally without verification at all.

[5] It is therefore their prayer in the petition in the above context, that the following orders ought to be granted and relevant to the present Ruling, namely:

"(a) …

(b) …

(c) A specific order for scrutiny of the rejected and spoilt votes;

(d) …

(e) An order for scrutiny and audit of all the returns of the Presidential Election including but not limited to Forms 34A, 34B and 34C;

(f) An order for scrutiny and audit of the system and technology used by the 1st respondent in the Presidential Election including but not limited to the KIEMS Kits, the Server(s); website/portal".

(g) …"

[6] Subsequent to the filing of the petition they filed a Notice of Motion dated 25th August 2017 and premised on Articles 19, 20, 22, 23(3), 35, 81, 86, 140, 159 and 258 of the Constitution, Section 39 and 44 of the Elections Act, Section 27 of the Independent Electoral and Boundaries Commission Act, Sections 12, 23 and 26 of the Supreme Court, Rule 18 of the Supreme Court (Presidential Election Petition) Rules, Access to Information Act and the Elections (Technology) Regulations. In the said Motion they seek the following orders:

"***1. This application be certified as extremely urgent, heard and orders given before the hearing of the substantive Petition.***

2. The application be heard and determined expeditiously and in priority to the petition but in any event before 25th August 2017.

3. This honourable court be pleased to order the 1st respondent to give access to the petitioner/applicant to the following:

a. Direct, unfettered access to relevant persons and systems at Safran in order for the forensic information technology experts to fully understand the KIEMS system.

b. Full and unfettered physical and remote access to each biometric electronic appliance used at each voting/polling station location used to verify voters IP voters' identification against the list of registered voters and for the appliances to be forensically imaged to capture, inter alia, metadata such as data files, creation ties and dates, device IDs MAC addresses, IP.

c. Addresses, geographic and local communications mast information.

d. Full and unfettered physical and remote access to any local server(s) connected to the electronic device(s) used to verify voters' identification against the list of registered voters at each polling station, from which a forensic image will be taken.

e. Electronic device(s) used to capture Form 34A's and Form 34B's onto the KIEMS system and transmitted to a) the CTNs and b) the NTC.

f. Full and unfettered access to any form of scanning device which saved images onto access to any form of scanning device which saved images onto a access local server(s) for onward transmission.

g. Access to any scanning device which would serve to establish whether the Form 34A was captured, stored and forwarded in the expected timeframes.

h. Full and unfettered physical and remote access to any server(s) at the CTNs for storing and transmitting voting information.

i. Full and unfettered physical and remote access to any servers at the NTC for storing and transmitting voting information.

j. Addresses, source and destination IP Addresses, server details and user details.

k. Full and unfettered to access to all source codes, including all programming codes, pursuant to The Election Regulation Technology, 2017,

4. This honourable court be pleased to order the 1st Respondent to give access to all Parties, the following information and data that is in the exclusive possession;

a. The IEBC Election Technology System Network Architecture for the period of 30 days before the elections to the date of the Order of this Court comprising but not limited to:

(i) All the servers used during the Elections;

(ii) number of servers;

(iii) location of servers;

(iv) firewalls;

(v) IP addresses;

(vi) Operating systems;

(vii) Software running applications

b. The IEBC Election Technology System Redundancy Plan comprising but not limited to:

(i) Password policy;

(ii) Password matrix;

(iii) Owners of system administration password(s)

(iv) System users and levels of access

c. The IEBC Election Technology System Redundancy Plan comprising:

(i) Business continuity plan;

(ii) Disaster recovery plan.

d. Certified copies of certificates of Penetration Tests conducted on the IEBC Election Technology System prior to and during the 2017 General and Presidential Election including:

(i) Certified copies of all reports prepared pursuant to Regulation 10 of the Elections (Technology) Regulations, 2017; and

(ii) Certified copies of certificate(s) by a professional(s) prepared pursuant to Regulation 10(2) of the Elections (Technology) Regulations, 2017.

ed. In relation to KIEMS Kits:

(i) Import testing certification in relation to all KIEMS Kits;

(ii) Static IP addresses of each KIEMS Kit used during the Presidential Election;

(iii) Specific GPRS location of each KIEMS Kit used during the Presidential Election for the period between and including 05th August 2017 and 11th August 2017;

(iv) Certified list of all KIEMS Kits procured but not used and/or deployed during the Election;

(v) Polling station allocation for each KIEMS Kit used during the Presidential Election;

(vi) Audit log of what each KIEMS Kit used during the Presidential Election transmitted from Polling Stations to Constituency Tallying Centres and to IEBC National Tallying Centre; and from IEBC Result Transmission Database to Media Houses Application Protocol Interface (API)(logs of media data update). Log must also show:

(a) Time of transmission from KIEMS Kit to the IEBC Result Transmission Database; and

(b) Time of transmission from IEBC Result Transmission Database to the Media Houses API;

(c) Count of Identified Voters by each KIEMS Kit;

(d) Soft copy of Ids captured in each KIEMS Kit;

(e) Audit log of transmission of scanned Forms 34A from each of the KIEMS Kits.

(f) Technical Partnership Agreement(s) for the IEBC Election Technology System including but not limited to:

(i) List of the technical partners;

(ii) Kind of access they had;

(iii) List APIs for exchange of data with the partners.

(g) Log in for the period of 30 days before the elections to the date of the order of this court of trails of showing the trail of users and equipments into all the IEBC Servers.

(h) Log in for the period of 30 days before the elections to the date of the order of this court of trails of users and trails of users and equipments into the KIEMS Database Management Systems.

(i) Administrative access log into the IEBC public portal between 5th August 2017 to date.

5. The 1st Respondent be compelled to give access to and supply to the court and to the Petitioners for scrutiny, certified photocopies of the original Forms 34A's 34B's and 34Cs prepared at and obtained from the polling stations by Presiding Officers and used to generate the final tally of the Presidential election, and pursuant to such production leave be granted for the use of an aid or reading device to assist in distinguishing the fake forms from the genuine ones.

6. The 1st Respondent be compelled to give the Petitioners access Form 34A's 34B's and 34 C's from all 40,800 polling stations.

7. This honourable court be pleased to grant leave to the Petitioner/Applicants

TO:

(a) Rely on and or file further affidavits in support of the petition and or the affidavits of (i)Rt. Hon. Raila Amolo Odinga, Omar Yusuf Mohamed, (ii)Omar Yusuf Mohamed, (iii) Dr. Edga Ouko Otumbo, Nyangusi Oduwo and (iv) Norman Norman Magaya dated 24/8/2017 be admitted on record and or be deemed to have been properly filed.

(b) File such other affidavits in response to or reply to any responses filed by the respondents

8. This Honourable Court be pleased to grant any other reliefs that become just and fit to grant.

The Petitioner's case

[7] The Motion before us is supported by the affidavits of Raila Amolo Odinga, Dr. Edgar Ouko Otumba, Omar Yusuf Mohamed and Norman Magaya. It is their contention that, while the 1st respondent

was obligated by Articles 81 and 86 of the Constitution as well as Section 39(1C) of the Elections Act to transmit election results electronically, the Elections Technology System was *"penetrated and/or deliberately compromised and used in a manner not intended by law so as to interfere with and affect the result of the Presidential Election."*

[8] They also contend that prior to 8th August 2017, the 1st Respondent deliberately refused to respond to or accede to numerous requests that were made by NASA through its Chief Executive Officer, Mr. Magaya, and its agents. It is their further contention that the information and data that is sought is critical to demonstrate that the 1st Respondent did not conduct a free, fair, secure, verifiable, accountable and transparent election.

[9] The Petitioners, aware of the limited time this court has to determine the Presidential Election Petition before it, pray that the orders sought should be granted expeditiously as no prejudice would be caused to the Respondents in granting them.

[10] In addition to the above, it is the Petitioners' case that based on Dr. Otumba's analysis and hypotheses of the Presidential Election contained in his report dated 17th August 2017, the results declared by the 2nd Respondent, it is impossible to verify individual results obtained from any individual polling station and the systematic data, with no characteristic of randomness, indicated a programmed data transmission system that was symptomatic of unreal and cooked figures hence the need for the orders sought in the Notice of Motion.

[11] Regarding spoilt and rejected votes, it is the Petitioners' case that an analysis of those votes shows that 395,510 such votes are unaccounted for and are indicative of illegal manipulation as well as alteration of rejected and spoilt votes during tallying of all votes.

[12] That therefore a scrutiny of the IEBC System, logs and returns is imperative and in submissions, the Petitioners have argued that the Presidential Election Results were made in absolute breach of/and non-compliance with the mandatory provisions of Sections 39(1C) and 44 of the Elections Act as well as the Elections (Technology) Regulations, 2017. In that regard, they contend that the KIEMS was designed in a manner to ensure that text results could not be transmitted without images on the prescribed form embodying the totality of election results in every polling station. The end result, in their view, was that the evidence adduced, points to indicators of interference with the KIEMS system, fraud in the filing of Forms 34A, 34B and 34C and the KIEMS system was not secured as by law required. It is their other view that the said system was breached and/or deliberately compromised and used in a manner not intended in law.

[13] Relying on the decisions of this court in ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others*** Petition No.2B of 2014; [2014] eKLR and ***Nicholas Kiptoo Arap Salat v. Independent Electoral and Boundaries Commission & 7 Others,*** Petition No.23 of 2014; eKLR [2015], they submit that they are entitled to a scrutiny under Section 82(1) of the Elections and that based on the evidence in the affidavits in support of the application they have established sufficient reasons for such an order.

[14] Relying further on Regulation 15 of the Elections (Technology) Regulations 2017, the Petitioners submit that the computer and system logs requested are permanent and leave a perpetual trail that is relevant in determining some of the issues raised in the petition. They have also relied on Sections 2 and 4 of the Access to Information Act (No. 31 of 2016) to make the point that they are entitled to the information sought as a matter of right and that this court should invoke both Article 50 of the Constitution *(on the right to a fair trial)* and Article 259 thereof *(construing and interpreting the Constitution)* and grant the orders sought.

1st and 2nd Respondents' Case

[15] In response to the Application, the 1st Respondent filed a replying affidavit sworn on 26th August 2017 by Mr. Moses Kipkogei, its Legal Officer. In the said affidavit, it is the 1st respondent's case that:

(i) the application seeks to expand the petition in an unconstitutional manner in that it seeks to introduce new evidence after the limitation period established by Article 140 of the Constitution had lapsed;

(ii) no basis has been laid in law for the grant of scrutiny under Section 82 of the Elections Act, No.24 of 2011;

(iii) the applicants are foraging, in an unconstitutional manner, for evidence which should have otherwise been sought prior to the filing of the petition;

(iv) grant of the information sought is likely to compromise the integrity and security of the information technology systems; and

(v) compliance with the orders sought would be onerous in view of the strict timelines prescribed under the Constitution for hearing and determination of the petition; and that Regulation 15 of the Elections (Technology) Regulations 2017 provides an avenue for obtaining the information sought which Regulation has not been complied with.

[16] In submissions filed contemporaneously with the application, the 1st Respondent submitted that this court should be persuaded by the decision of the Court of Appeal in ***Nicholas Salat v. Wilfred Rotich Lesan & Others, Civil Appeal No 228 of 2013*** where by a majority decision of the Court, it was held that where no sufficient basis for a scrutiny had been laid, no such order should be granted.

[17] They also submitted that Onyancha J. in ***Hassan Mohamed Hassan & Another v. IEBC & 2 Others,*** H.C at Garissa Election Petition No.6 of 2013, had set out the law as regards scrutiny and held that a sufficient reason had to be given on why a scrutiny should be ordered.

[18] The 1st Respondent in addition submitted that reading Section 82 of the Elections Act and Rule 33 of the Election Petition Rules 2013, which set out the principles to be applied in any application for scrutiny, the applicants have been unable to show that they are deserving of the said order taking into account the strict timelines for hearing and determining Presidential Election Petitions in Kenya.

[19] Lastly, and regarding Regulation 15 of the Elections (Technology) Regulations 2017, the 1st Respondent stated that the application before us falls outside the said regulation and should not be granted. Instead, the same should be dismissed with costs.

3rd Respondent's Case

[20] In response to the Motion, the 3rd Respondent filed an affidavit in reply sworn on 25th August, 2017 by Brian Gichana Omwenga, a technology advisor employed by the Jubilee Party and in it, he deponed that the application is misguided and devoid of merit because first, while the 1st Petitioner places great emphasis on *"the results that were being streamed in at a public electronic display in Bomas of Kenya and on an online portal",* the Constitution nor any written law do not impose an obligation on the 1st Respondent to *"exclusively use electronic systems to transmit results"* save that whatever system is used must be simple, accurate, verifiable, accountable and transparent.

[21] Second, and as a corollary to the above, Section 44A of the Elections Act grants the 1st Respondent discretion to use a complementary mechanism where *"technology either fails entirely, fails to work properly or does not meet the constitutional threshold of a system that is simple, accurate, verifiable, accountable and transparent."*

[22] Third, that the election of 8th August 2017 was conducted within the law as casting of ballots, the counting, announcement and transmission of the votes and results were undertaken in the presence of agents of the Petitioners, a fact confirmed by independent observers such as Elections Observation Group (ELOG).

[23] Fourth, that the streamed results were sent electronically and following the Elections (General) Regulations, 2017 as well as the directions by the Court of Appeal in the case of ***The Independent Electoral & Boundaries Commission (IEBC) v. Maina Kiai & 5 Others,*** **Civil Appeal No. 105 of 2017;** [2017] eKLR and that the results in all 290 constituencies were conclusively tallied, collated and announced.

[24] Fifth, that there was no legal requirement that the 1st Respondent ought to avail Forms 34A to any presidential candidate for verification.

[25] Sixth, that the 1st Respondent does not have telecommunication facilities of its own and relied on Safaricom Ltd, Airtel Kenya Ltd and Telkom Kenya Ltd to provide transmission services and that Regulations 20 and 24 of the Elections (Technology) Regulations while obligating the service providers to provide technological services as requested by the 1st Respondent, technology is nonetheless susceptible to failure, sabotage or human error.

[26] Seven, that for the above reasons, Section 44A of the Elections Act was introduced by the Election Laws (Amendment) Act, 2017, obligating the 1st Respondent to put in place a complementary mechanism for both identification of voters and transmission of election results to ensure compliance with Article 38 of the Constitution, which mechanism it put in place; an action confirmed and upheld by both the High Court H.C. Constitution Petition No. 328 of 2017, ***National Super Alliance Kenya v. Independent Electoral & Boundaries Commission & 2 Others*****.** That decision was later upheld at the Court of Appeal.

[27] Ninth, pursuant to Regulation 21 of the Elections (Technology) Regulations, the 1st Respondent posted to the public a list of 11,000 polling stations without 3G coverage and this was a matter well within the Petitioners' knowledge. In addition, that in such situations, the Forms 34A would be ferried physically to the Constituency Tallying Centres or transmitted electronically in places where there was 3G network coverage.

[28] Tenth, that even if the Petitioners were to be granted access to the information and equipment that they were seeking, the 1st Respondent would require 14 days to do so as the computer logs for example run into approximately 100,000 pages.

[29] Lastly, that the application and prayer for leave to file additional affidavits is a fishing exercise to help the Petitioners engage in a wild goose chase for information only meant to affirm their bias and conspiracy theories and that their hacking of systems claims have been discredited by experts. That, therefore, the application ought to be dismissed with costs.

B. ANALYSIS

[30] Having read the Notice of Motion and responses to it and having heard the submissions by Counsel representing the parties herein, the question that we must answer is whether the petitioners are entitled to the prayers in the said Motion. In answering that question we note that as framed and argued, the application seeks three kinds of prayers:

(i) access to information relating to the hardware and software used in the conduct of the Presidential Election and particularly in transmission of results.

(ii) access to and scrutiny of certified copies of Forms 34A, 34B and 34C.

(iii) leave to file further affidavits.

[31] We shall in that context address the second issue as the first and peripherally address the right to information generally as we see that implicit in scrutiny is also the fact that the information sought is first granted before any scrutiny can be initiated.

[32] We shall in the above regard begin by addressing the law regarding scrutiny and in that regard, the right to scrutiny of votes specifically and generally as well as and recount of votes in an election petition is anchored on Section 82(1) of the Elections Act (Act. No 24 of 2011) and Rule 29 of the Elections (Parliamentary and County Elections) Petition Rules, 2017. The Presidential Election Petition Rules, 2017 are however silent on the issue of scrutiny.

[33] Section 82 of Elections Act thus reads as follows:

"Scrutiny of votes

(1) An election court may, on its own motion or on application by any party to the petition, during the hearing of an election petition, ***order for a scrutiny of votes to be carried out in such manner as the election court may determine.***

(2) Where the votes at the trial of an election petition are scrutinized, only the following votes shall be struck off—

(a) the vote of a person whose name was not on the register or list of voters assigned to the polling station at which the vote was recorded or who had not been authorised to vote at that station;

(b) the vote of a person whose vote was procured by bribery, treating or undue influence;

(c) the vote of a person who committed or procured the commission of personation at the election;

(d) the vote of a person proved to have voted in more than one constituency;

(e) the vote of a person, who by reason of conviction for an election offence or by reason of the report of the election court, was disqualified from voting at the election; or

(f) the vote cast for a disqualified candidate by a voter knowing that the candidate was disqualified or the facts causing the disqualification, or after sufficient public notice of the disqualification or when the facts causing it were notorious.

The vote of a voter shall not, except in the case specified in subsection (1)(e), be struck off under

subsection (1) by reason only of the voter not having been or not being qualified to have the voter's name entered on the register of voters."

[34] On the other hand and by way of comparison only, Rule 29 of the Elections (Parliamentary and County Elections) Petition Rules, 2017 provides:

Scrutiny of votes.

(5) The parties to the proceedings may apply for scrutiny of the votes for purposes of establishing the validity of the votes cast.

(6) On an application under sub-rule (1), an election court may, if it is satisfied that there is sufficient reason, order for scrutiny or recount of the votes.

(7) The scrutiny or recount of votes ordered under sub-rule (2) shall be carried out under the direct supervision of the Registrar or Magistrate and shall be subject to the directions the election court gives.

(8) The Scrutiny or recount of votes in accordance with sub-rule (2) shall be confined to the polling stations in which the results are disputed and may include the examination of—

(a) the written statements made by the returning officers under the Act;

(b) the printed copy of the Register of voters used during the elections sealed in a tamper proof envelope;

(c) the copies of the results of each polling station in which the results of the election are in dispute;

(d) the written complaints of the candidates and their representatives;

(e) the packets of spoilt ballots;

(f) the marked copy register;

(g) the packets of counterfoils of used ballot papers;

(h) the packets of counted ballot papers;

(i) the packets of rejected ballot papers;

(j) the polling day diary; and

(k) the statements showing the number of rejected ballot papers.

(5) …..

[35] In addition to the above statutory provisions, there has been consistent jurisprudence from our Courts, on how the law on scrutiny should be applied in electoral matters. We will analyse some of the decisions as here below:

(i) High Court

[36] In the case of ***Hassan Mohamed Hassan & Another v. IEBC & 2 Others*** Petition 6 of 2013; [2013] eKLR, the petitioner had sought scrutiny of votes in 15 polling stations. The Court (*Onyancha J*) in dismissing the application pronounced itself as follows:

"… a party has liberty to apply for scrutiny and recount at any stage of the proceedings for the purposes of establishing the validity of the votes cast. *However, the court has to be satisfied that there is sufficient reason for it to order for scrutiny or recount of votes.* ***In my view and understanding, for a party to provide sufficient reason upon which the court can decide to grant the order,*** *the party shall provide sufficient evidence to that end.* ***If the request for scrutiny is made before the trial starts and therefore before the relevant evidence upon which such decision is adduced, then clearly and logically such relevant evidence must be based on the affidavits, if any, supporting the application….***

On the other hand where an application for scrutiny or recount is made after adequate relevant evidence has been adduced during the trial, it will be such evidence that will provide, if at all, sufficient reason upon which the court will make relevant orders. It is my view however that whether the application for scrutiny or recount is made before, during or at the end of the trial of a petition, the court must be satisfied generally, *that there are sufficient grounds to order a scrutiny or recount on the basis that such scrutiny or recount will be in the interest of fairness and justice in settling the issues raised in the petition.*

The decision to grant scrutiny or recount is clearly, not only discretionary but is also judicious. *That is to say that the court's reason to grant such order must be good, must be logical and must be necessary for the purpose of arriving at an expeditious, fair, just, proportionate and affordable resolution of the issues raised in the Petition."* [emphasis added.]

[37] Further, in the case of ***Philip Mukwe Wasike v. James Lusweti Mukwe & 2 Others,*** Bungoma High Court Petition. No. 5 of 2013; [2013] eKLR, the learned Judge (*Omondi J*) observed that:

"The purpose of scrutiny is:-

(1) To assist the court to investigate if the allegations of irregularities and breaches of the law complained of are valid.

(2) Assist the court in determining the valid votes cast in favour of each candidate.

(3) Assist the court to better understand the vital details of the electoral process and gain impressions on the integrity of the electoral process."

[38] Further elaboration on the issue of scrutiny was provided in the case of ***Philip Osore Ogutu v. Michael Aringo & 2 Others,*** Busia High Court Petition No. 1 of 2013 wherein the Petitioner had sought scrutiny of votes in 15 polling stations during the pre-trial conference. Upon making a formal application, *Tuiyott J* after setting out the law regarding scrutiny, observed that as pertaining to the timing of the application, it would be upon the party seeking scrutiny to choose when to approach the Court. He thus observed [paragraph 18]:

"…It all depends, I think, on the ability of the Applicant to marshal sufficient evidence to persuade the Court that scrutiny is deserved. And there is no reason why this cannot be made prior to the hearing given that the Election Petition Rules require that the substance of the evidence to be relied on by the parties be set out in the Affidavits accompanying the Petition or

the responses."

[39] The learned Judge further observed [paragraph 20]:

"There would be several reasons why scrutiny should not be ordered as a usual course. First, there is a need to guard against an abuse of the process. I would agree with Mr. K'opot that a party must not be allowed to use scrutiny as a fishing expedition to discover new or fresh evidence. It would be expected that a party filing an Election Petition is, from the outset, seized of the grounds, facts and evidence for questioning the validity of an election. And where the evidence is unclear then a party can, on application to Court, seek and obtain better particulars of that evidence from its adversary. But it would be an abuse of process to allow a party to use scrutiny for purposes of chancing on new evidence. Scrutiny should not be looked upon as a lottery."

[40] We also note that in the case of ***Jacob Mwirigi Muthuri v. John Mbaabu Murithi & 2 Others,*** High Court at Meru, Petition No. 2 of 2013; [2013] eKLR, the Court (*Lesiit J*) held that [paragraph 28 & 29]:

"[28]… Unless an order for scrutiny and recount is the only prayer sought in the Petition, it cannot be ordered at the pre-trial stage. This is because the prayer should not be granted on the basis of untested evidence, which would be the case if the prayer is simply granted at the pre-trial stage on the basis of the allegations in the Petition and the witness affidavits of the Petitioner.

[29] It is clear from the foregoing that where an application for scrutiny is made, the court must be satisfied that an order for scrutiny and recount has been justified by the party applying and secondly, that the order is necessary for the just resolution of the election Petition. Scrutiny is one of the tools that the court uses to investigate whether an election was conduced in accordance with constitutional principles and to establish that indeed the result as declared was a reflection of the will of the electorate that took part in that election. The only way the court can test whether an order for scrutiny and recount is deserved and justified is first by considering the Petition and the Affidavit in support to find out whether they disclose the Petitioner's cause of action and whether they contain concise statements of the material facts relied upon in support of the allegations of impropriety or illegality and secondly by calling of evidence and testing of that evidence through cross examination and re examination process to test the veracity of the same. There can be no need to call evidence for examination through the trial process if none has been advanced in the Petition and the Petitioner's pleadings and in particular the affidavits of potential witnesses."

[41] Similar sentiments as above were expressed by *Kimaru J* in the case of ***Rishad H. A. Amana v IEBC & 2 Others*****,** High Court at Malindi Petition No. 6 of 2013; [2013] eKLR where he emphasized that [paragraph 34]:

"…the recent trend is that scrutiny can only be ordered where a Petitioner lays sufficient basis. Such basis can only be laid after the Petitioner has adduced evidence during the actual hearing of the petition. The Petitioner cannot therefore demand that there be scrutiny and recount of the votes before the commencement of the trial. The Petitioner may do so after his or her witnesses have testified. The ideal situation, however, is that such an application for scrutiny should be considered by the court after all the witnesses of the Petitioner and the Respondents have testified. At that stage of the proceedings, the court will be in a position to properly assess the

veracity of the allegations made by the Petitioner that there is need for scrutiny."

(c) Court of Appeal

[42] In the case of, ***Dickson Mwenda Githinji v. Gatirau Peter Munya & 2 Others*****,** Civil Appeal. No. 38 of 2013; [2014] eKLR, the Court of Appeal took the position that [paragraph 148]:

"If the trial court had adopted a purposive interpretation of Rule 33(4), it would be apparent that if a petitioner seeks scrutiny and recount of votes in a constituency, the purposive approach is that he is seeking scrutiny and recount of votes in all the polling stations in the constituency. Further, it is also our considered view that Section 82 of the Elections Act is the legal foundation for scrutiny. In this section, the mandate of the Court is to order scrutiny of votes and not scrutiny of polling stations. Rule 33(4), must be interpreted so as not to negate and violate the import of Section 82 that provide [sic] for scrutiny of votes without imposing a restriction that scrutiny is confined to polling stations. It is our view that a regulation cannot add a limitation to a statutory provision when no such limitation exists in its enabling statute."

[43] On appeal to the Supreme Court in the case of ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others*** Petition No. 2B of 2014; [2014] eKLR the Supreme Court in disagreeing with the above holding of the Court of Appeal, held as follows [paragraph 157]:

"This gives the impression that where a petitioner makes a claim for a recount or scrutiny in a constituency, it should be granted as a matter of course. If such a position were to be sustained, it would stand as a contradictory precedent, with the potential to disrupt the stability of decision-making already evolving, in the practice of scrutiny and recount. It would mean that once an application for recount or scrutiny refers to a constituency, then the trial Court must automatically order scrutiny in all the polling stations in the constituency."

[44] In its further elaboration, the Supreme Court opined [paragraph 159]:

"On the contrary, judicial opinion distinctly favours a view that commends itself to us: that, an application for scrutiny and recount, must be couched in specific terms, and clothed with particularity, as to which polling stations within a constituency are to attract such scrutiny. If a party lays a clear basis for scrutiny in each and all the polling stations within a constituency, then the order ought to be granted. Otherwise, a prayer pointing to a constituency but lacking in specificity is not to be entertained."

(c) Supreme Court

[45] In the case of ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others*** **(supra)**, this Court set out the following guiding principles with respect to scrutiny and recount of votes in an election petition. At paragraph 153, the Court pronounced itself as follows:

a. The right to scrutiny and recount of votes in an election petition is anchored in Section 82(1) of the Elections Act and Rule 33 of the Elections (Parliamentary and County Elections) Petition Rules, 2013. Consequently, any party to an election petition is entitled to make a request for a recount and/or scrutiny of votes, at any stage after the filing of petition, and before the determination of the petition.

b. The trial Court is vested with discretion under Section 82(1) of the Elections Act to make an

order on its own motion for a recount or scrutiny of votes as it may specify, if it considers that such scrutiny or recount is necessary to enable it to arrive at a just and fair determination of the petition. In exercising this discretion, the Court is to have sufficient reasons in the context of the pleadings or the evidence or both. It is appropriate that the Court should record the reasons for the order for scrutiny or recount.

c. The right to scrutiny and recount does not lie as a matter of course. The party seeking a recount or scrutiny of votes in an election petition is to establish the basis for such a request, to the satisfaction of the trial Judge or Magistrate. Such a basis may be established by way of pleadings and affidavits, or by way of evidence adduced during the hearing of the petition.

d. Where a party makes a request for scrutiny or recount of votes, such scrutiny or recount if granted, is to be conducted in specific polling stations in respect of which the results are disputed, or where the validity of the vote is called into question in the terms of Rule 33(4) of the Election (Parliamentary and County Elections) Petition Rules. [Emphasis added.]

[46] In the case of ***Nicholas Kiptoo Arap Salat v. Independent Electoral and Boundaries Commission & 7 Others,*** Petition No. 23 of 2014; [2015] eKLR this Court then answered the question whether the law on scrutiny and recount was properly applied by the High Court and the Court of Appeal. Upon analyzing certain specific authorities, the Court noted as follows [paragraph 52]:

"*The foregoing principles are the basis for certain specific questions which we have to consider: did the appellant provide a sufficient basis for the trial Court to make Orders of scrutiny and recount" did the denial of an Order for scrutiny compromise the appellant's case" should this Court interfere with the discretion of the trial Judge, and overturn the decision of the Appellate Court upholding the trial Judge's findings""* [Emphasis added.]

[47] The court had earlier settled the law on the matter in the case of ***Nathif Jama Adama v. Abdikhaim Osman Mohamed & 3 Others*** Petition No. 13 of 2014; [2014] eKLR, where it held as follows (paragraph 75):

"It emerges that, the primary considerations in determining whether to grant scrutiny, are whether there are polling stations with a dispute as to the election results; whether such a state of affairs has been pleaded in the petition; and whether a sufficient basis has been laid – to warrant the grant of the application for scrutiny."

[48] The Court went ahead and pronounced itself as follows [paragraph 76]:

"But it is crucial that the polling stations which are the subject of a possible scrutiny, would have been already signalled in the pleadings, as having contested results. This is the import of the wording of Rule 33 (1) of the Elections Petition Rules, that an application for scrutiny can be applied for at any stage. A foreshadowing of such an application should have been embodied in the main lines of pleading, which mark out the terrain of any legitimate electoral contest."

[49] We further note that the Court in the case of ***Raila Odinga & 5 Others v. Independent Electoral & Boundaries Commission & 3 Others*****,** Petitions No. 3, 4 & 5 of 2013 (consolidated), ordered a scrutiny of the following forms: all Form 34 which were used by the IEBC in tallying the presidential votes from each of the 33400 polling stations including the Forms 34 used by IEBC in tallying the diaspora votes and all Forms 36 which were used by IEBC in aggregating the tallies of presidential votes from all Forms 34. In making the orders, the Supreme Court elaborated that scrutiny would serve the following aims:

(i) Establishing the accuracy or otherwise of the total tallies of the presidential votes as indicated on the Form 34s.

(ii) Establishing the number of registered voters, the number of valid votes cast and the number of rejected votes as indicated on each Form.

(iii) Comparing the number of registered voters indicated in Form 34 and the number of registered voters on the principal register. The principal register to be used would be the external hard drive presented by the IEBC in the annexure in the replying affidavit of Ahmed Isaac Hassan.

[50] When giving its decision, the Court explained that the reason it ordered for a *suo motu* scrutiny was so that it could understand better the vital details of the electoral process, and to gain impressions on the integrity thereof.

(d) Comparative Analysis

[51] In the case of ***Arikala Narasa Reddy v. Venkata Ram Reddy Reddygari & Anr,*** Civil Appeal Nos. 5710-5711 of 2012; [2014] 2 S.C.R the Supreme Court of India held that [paragraph 8]:

"Before the Court permits the recounting, the following conditions must be satisfied:

(i) The court must be satisfied that a prima facie case is established;

(ii) The material facts and full particulars have been pleaded stating the irregularities in counting of votes;

(iii) A roving and fishing inquiry should not be directed by way of an order to re-count the votes;

(iv) An opportunity should be given to file objection; and

(v) Secrecy of the ballot should be guarded.

[52] Further, the Court went on and observed that:

"In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings. The court cannot exercise discretion of ordering recounting of ballots just to enable the election petitioner to indulge in a roving inquiry with a view to fish material for dealing the election to be void. The order of recounting can be passed only if the petitioner sets out his case with precision supported by averments of material facts."

[53] Although the above case relates to the issue of recount of votes, we find the principles highlighted therein relevant in determining the basis under which a court can order scrutiny. Indeed, comparative jurisprudence from the already reviewed Kenyan cases, aligns with the said holding.

What of the right to access information" What is the law governing the said right"

[54] The right of access to information is provided for in various legal instruments as hereunder:

Article 35 of the Constitution provides that:

(1) Every citizen has the right of access to""

(a) Information held by the State; and

(b) Information held by another person and required for the exercise or protection of any right or fundamental freedom.

(2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.

(3) The State shall publish and publicise any important information affecting the nation.

[55] Further, Section 4 of the Access to Information Act, 2016 (No. 31 of 2016) provides:

(1) Subject to this Act and any other written law, every citizen has the right of access to information held by—

(a) the State; and

(b) another person and where that information is required for the exercise or protection of any right or fundamental freedom.

(2) Subject to this Act, every citizen's right to access information is not affected by—

(a) any reason the person gives for seeking access; or

(b) the public entity's belief as to what are the person's reasons for seeking access.

(3) Access to information held by a public entity or a private body shall be provided expeditiously at a reasonable cost.

(4) This Act shall be interpreted and applied on the basis of a duty to disclose and non-disclosure shall be permitted only in circumstances exempted under section 6.

(5) Nothing in this Act shall limit the requirement imposed under this Act or any other written law on a public entity or a private body to disclose information."

[56] The Access to Information Act, also defines the term ‘information’ to include all records held by a public entity or a private body, regardless of the form in which the information is stored, its source or the date of production.

[57] In addition, Section 27 of the Independent Elections and Boundaries Commission Act, 2011 (No. 9 of 2011) provides:

(1) The Commission shall publish and publicize all important information within its mandate affecting the nation.

(2) A request for information in the public interest by a citizen""

(a) Shall be addressed to the Secretary or such other person as the Commission may for that purpose designate and may be subject to the payment of a reasonable fee in instances where the Commission incurs an expense in providing the information; and

(b) May be subject to confidentiality requirements of the Commission.

(3) Subject to Article 35 of the Constitution, the Commission may decline to give information to an applicant where""

(a) The request is unreasonable in the circumstances;

(b) The information requested is at deliberative stage by the Commission;

(c) Failure or payment of the prescribed fee; or

(d) The applicant fails to satisfy any confidentiality requirements by the Commission.

(4) The right of access to information under Article 35 of the Constitution shall be limited to the nature and extent specified under this section.

(5) …

[58] Further, the Elections (Technology) Regulations, 2017 provides for information security and data storage. In this regard, Regulations 15, 16 and 17 provide:

15. Data Storage and access to Information

(1) The Commission shall store and classify data in accordance with the principles set out in the Access to Information Act, 2016 (No. 31 of 2016)

(2) An application to access information shall be in writing in English or Kiswahili and shall be made in the Form set out in the Second Schedule providing details and sufficient particulars for the public officer or any other official to understand what information is being requested.

(3) …

(4) The information officer shall reduce to writing, the request made under sub-regulation (3) in the Form set out in the Second Schedule and the information officer shall then furnish the applicant with a copy of the written request.

16. Request for Information

" A person may request for information from the Commission, in accordance with Section 27 of the Independent Elections and Boundaries Commission Act, 2011 (No. 9 of 2011)"

17. Data Retention and Archive

"All electronic data relating to an election shall be retained in safe custody by the Commission for a period of three years after the results of the elections have been declared, and shall, unless the Commission or the court otherwise directs, be archived in accordance with the procedures prescribed by the Commission subject to the Public Archives and Documentation Service Act (Cap. 19) and the Kenya Information and Communications Act, 1998 (No. 2 of 1998)."

[59] Applying law and the principles relating to scrutiny as well as and the law on access to information to the present application, there is no doubt that the Petitioners have signalled their intention to seek scrutiny and we have in that regard set out the specific parts of the Petition in which the issue of scrutiny has been pleaded as well as the kind of information they intend to access. They have also set out the parameters of the intended scrutiny in the petition namely, all rejected votes and spoilt votes, the returns of the Presidential Election including but not limited to Forms 34A, 34B and 34C, and the KIEMS Kit, the server(s) and website/portal.

[60] At the hearing of the application, a question was posed by the court as to the efficacy of a scrutiny of all the documents and equipment listed in the application taking into account the timelines for determining a Presidential Election dispute. It was the Petitioners' Counsel's position that the whole exercise involving both access to the Forms and technology should not take more than a few hours. Counsel for the 1st Respondent on the other hand stated that the access to Forms 34A and 34B may be granted and a report generated by the Registrar of this Court within a day. Indeed, it was Counsel's position that the 1st Respondent would avail all the original Forms 34A and Form 34B, as requested by the Petitioners, as long as the exercise that would ensue thereafter would be supervised by the Court.

[61] Counsel for the 2nd Respondent on his part stated that some of the prayers sought by the Petitioners would be impossible to implement. As a way of example, he stated that the KIEMS devices that were being sought, are kept in the respective constituencies and hence it would be impracticable to retrieve them within a short time for purposes of access by the petitioners. Furthermore, Counsel also urged that if the Court were to allow the Petitioners or any other person access to the KIEMS system as pleaded, the Commission would require to put in place a back-up system in order to safeguard the information stored therein, which system would take very long to set up. In addition, the Commission would also need to test the forensic tools that are to be used by the Petitioners in order to ensure that they are compatible with the system. We also note that Counsel for the 1st, 2nd and 3rd Respondents cautioned that any meaningful access to the software would take at the very least 3 weeks.

[62] Having addressed our minds to the above issues, it is our view that first, we note that as correctly argued by Counsel for the 3rd Respondent, a party must be bound by its pleadings and secondly, any scrutiny of either the Forms or the technology must be made for a sufficient reason. Any prayer in the application that would seem to be an expansion of the case for the Petitioners or which would in effect be a fishing exercise to procure fresh evidence not already contained in the Petition would and must be rejected.

[63] In the above regard, and noting the submissions by Counsel for the 1st Respondent regarding access to Forms 34A and 34B prayers 5 and 6 of the application read as follows:

"5. The 1st Respondent be compelled to give access to and supply to the court and to the Petitioners for scrutiny, certified photocopies of the original Forms 34A's 34B's and 34Cs prepared at and obtained from the polling stations by Presiding Officers and used to generate the final tally of the Presidential election, and pursuant to such production leave be granted for the

use of an aid or reading device to assist in distinguishing the fake forms from the genuine ones.

6. The 1st Respondent be compelled to give the Petitioners access to Form 34A's 34B's and 34 C's from all 40,800 polling stations. (sic)***"***

[64] In submissions before us, Mr. Muite, learned Senior Counsel on behalf of the 1st Respondent, stated that his client had no objection to access being granted in the above terms and in such other terms as the court may determine. Counsel for the Petitioners did not address this apparent concession but Counsel for the 3rd Respondent partly addressed the issue and conceded to a limited and programmed access to information contained in Forms 34A and 34B.

[65] On our part, we see no reason to deny the said prayers more so when the 1st Respondent has assured the court that any report on the access to and scrutiny of the Forms 34A and 34B would be filed in court within 48 hours of any such order by this court and we shall therefore make the necessary orders at the end of this Ruling.

[66] Regarding prayers 3 and 4 of the application, on the technological aspects of the election, noting the limited time that this Court has to hear and determine the petition challenging the Presidential Election and noting the need to ensure that only those orders that are practicable, reasonable and helpful in reaching a just and fair determination of the petition should be granted, we shall invoke that criteria in addressing the said prayers. We also particularly note the Petitioners' apprehension that the physical Forms 34A and 34B produced in Court by the 1st Respondent may not necessarily contain the results that were electronically transmitted and hence the request to access the IEBC's system in order to confirm the validity of the information contained therein. We further take into account the fact that our electoral system is partly electronic by its nature and hence the role played by technology in this regard cannot be completely ignored. Consequently, we hereby analyze the merit of each of the Petitioners prayers as hereunder.

[67] With regard to prayer 3 specifically, some of the actions for which access is sought have the potential of compromising the integrity and security of the 1st Respondent's electoral technological system and of individuals persons which, if granted, it is likely that the future use of the system may be compromised and therefore it is important to ensure that there is absolute confidentiality of passwords and usernames, locations of servers, identity of password holders, IP addresses and software running applications *inter alia.*

[68] Prayer 3 further seeks access and supply of a large number of software and hardware but in our view, there are possible security and software integrity issues that militate against a blanket grant of all the orders sought therein. Some of the orders sought also go outside the relevance and purview of the petitioners' case. Consequently, any order granted with respect to this prayer must be practical, timeous and relevant to the issues in contest. We shall at the end of this Ruling therefore grant orders of access and supply of information that meet the above criteria and we are confident that the said information will also assist the court reach a fair decision in the petition and without jeopardizing or compromising any party's stated position in it.

[69] Regarding prayer 3(a), the same is impractical and difficult to grant because Safron Identity and Security, it was submitted by counsel for the 1st and 3rd respondents, is a soft ware company based in France and not being party to these proceedings, to demand that "*persons and systems"* related to it should be accessed by the Petitioners is impractical and may unnecessarily delay the hearing and determination of the petition.

[70] Regarding prayer 7 on the filing of further affidavits arising from the above information being obtained, noting the time left for hearing and determination of the petition (less than 4 days), such an order would only but delay the proceedings and we see prejudice if the respondents would not be able to respond to the issues raised therein. That prayer is therefore disallowed.

[71] Having so held, one aspect of the Petition and application require addressing at this stage. It has been the Petitioners claim in pleadings that during the Presidential Election, Forms 34A were not captured, stored and transmitted in the expected timeframe, a claim partly raised in prayer 3(g) of the application. In that context, we hereby order that the 1st Respondent shall supply to the Petitioner and 3rd Respondent for their scrutiny scanned and transmitted copies of Forms 34A and 34B forthwith.

C. FINAL ORDERS

[72] Having so held, the final Orders we make are that the Petitioners as well as the 3rd Respondent shall be granted a read only access, which includes copying (if necessary) to –

(a) Information relating to the number of servers in the exclusive possession of the 1st Respondent.

(b) Firewalls without disclosure of the software version.

(c) Operating systems without releasing the software version.

(d) Password policy.

(e) Password matrix.

(f) System user types and levels of access.

(g) The IEBC Election Technology System Redundancy Plan comprising of its business continuity plan and disaster recovery plan.

(h) Certified copies of certificates of Penetration Tests conducted on the IEBC Election Technology System prior to and during the 2017 General and Presidential Election including:

(i) Certified copies of all reports prepared pursuant to Regulation 10 of the Elections (Technology) Regulations , 2017; and

(ii) Certified copies of certificate(s) by a professional(s) prepared pursuant to Regulation 10(2) of the Elections (Technology) Regulations, 2017

(i) Specific GPRS location of each KIEMS Kit used during the Presidential Election for the period between and including 5th August, 2017 and 11th August, 2017.

(j) Certified list of all KIEMS Kits procured but not used and/or deployed during the Election;

(k) Polling station allocation for each KIEMS Kit used during the Presidential Election;

(l) Technical Partnership Agreement(s) for the IEBC Election Technology System including but not limited to:

(a) List of the technical partners;

(b) Kind of access they had; and

(c) List of APIs for exchange of data with the partners

(m) Log in trail of users and equipments into the IEBC Servers.

(n) Log in trails of users and equipments into the KIEMS Database Management Systems.

(o) Administrative access log into the IEBC public portal between 5th August 2017 to date.

(p) The information listed in (m), (n) and (o) above shall be issued in soft copy to the petitioners and 3rd respondent.

(q) Certified photocopies of the original Forms 34A's 34B's and 34Cs prepared at and obtained from the polling stations by Presiding Officers and used to generate the final tally of the Presidential election, and pursuant to such production leave be granted for the use of an aid or reading device to assist in distinguishing the fake forms from the genuine ones.

(r) Forms 34A 34B and 34 C from all 40,800 polling stations.

(s) Scanned and transmitted copies of all Forms 34A and 34B.

[73] Consequent upon the said Orders, we hereby make the following further Orders:

(i) The Registrar of this court assisted by a number of judicial officers and staff as she may determine shall supervise access to the certified copies of original Forms 34A and Forms 34B by the petitioners and 3rd Respondents at such a venue as she shall determine in consultation with the parties. A report on that exercise and related issues shall be filed by the Registrar by Tuesday, 29th August 2017 at 5.00 p.m. and parties are at liberty to submit on it at the end of the hearing.

(ii) In the exercise set out in (a) – (p) above, priority shall be given to the;

(1) 292 Polling stations as deponed to at paragraph 12 of Norman Magaya Affidavit sworn on 23rd of August 2017;

(2) 688 polling stations as deponed to at paragraph 15 of Omar Yusuf Mohammed affidavit sworn on 24th August 2017;

(3)14,078 polling stations as deponed at paragraph 70 of Dr. Nyangasi Oduwo's affidavit dated 18th August 2017

(iii) An ICT officer designated by this court from among its ICT staff and two independent IT experts appointed by the court shall supervise access to the technology in paragraph 72 above at such a venue as they may determine in consultation with the parties. A report on that exercise and related issues shall be filed by the said officer and experts by 5.00 p.m. on Tuesday, 29th August 2017 and parties are at liberty to submit on it at the end of the hearing.

(iv) The parties to the petition are entitled to have a maximum of two agents/experts in each of the exercises above. The agents shall at all times comply with the directions of the Registrar and the ICT officer to ensure expeditious conclusion of the above exercise.

(v) There shall be no order as to costs.

(vi) It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this **28th Day** of **August, 2017**

…….. **……**

D. K. MARAGA **P. M. MWILU**

CHIEF JUSTICE & PRESIDENT **DEPUTY CHIEF JUSTICE & VICE**

OF THE SUPREME COURT **PRESIDENT OF THE SUPREME COURT**

…… **……**

M. K. IBRAHIM **J. B. OJWANG**

JUSTICE OF THE SUPREME COURT **JUSTICE OF THE SUPREME COURT**

…… **……..**

S. C. WANJALA **S. N. NDUNG'U**

JUSTICE OF THE SUPREME COURT **JUSTICE OF THE SUPREME COURT**

……

I. LENAOLA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy

of the original

REGISTRAR

SUPREME COURT OF KENYA