IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MAKHANDIA, GATEMBU & M'INOTI, JJ.A.)

ELECTION PETITION APPEAL NO. 17 OF 2018

BETWEEN

JOEL MAKORI ONSANDO...1ST APPELLANT

FRANCIS MACHOGE OMAO..2ND APPELLANT

AND

INDEPENDENT ELECTORAL

& BOUNDARIES COMMISSION................................1ST RESPONDENT

ROBERT ISAAC SYDNEY NAMULUNGU...............2ND RESPONDENT

JAMES ELVIS OMARIBA ONGWAE........................3RD RESPONDENT

JOASH ARTHUR MAANGI GONGERA..................4TH RESPONDENT

NAFTALI OBWOCHA ORINA...................................5TH RESPONDENT

JUSTRY P. LUMUMBA..6TH RESPONDENT

(Appeal from the judgment and decree of the High Court at Kisii (Omondi, J.) dated 27th February 2018

in

EP. No. 3 of 2017)

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JUDGMENT OF THE COURT

On 8th August 2017, the registered voters in ***County No. 45, Kisii County,*** joined other Kenyans in a general election that would ultimately determine their President, Governor, Senator, Members of the National Assembly, Woman Representatives in the National Assembly, and Members of the County Assembly, for the next five years. Contesting the office of Governor in the County were seven candidates, who, the ***1st respondent, the Independent Electoral & Boundaries Commission (the IEBC)*** declared to

have garnered votes as follows:

Bagwasi Charles Maranga - 4,542

Mogeni Kepha - 2,923

Nyaberi Justry P. Lumumba - 18,485

Nyamao Samuel Nyachwaya - 3,297

Nyaweya Manson Oyongo Charles - 53,083

Obure Christopher Mogere - 110,760

Omboto Boniface - 3,405

Ongwae James Elvis Omariba - 206,164

On the basis of those results, the IEBC determined that the ***3rd respondent, Ongwae James Elvis Omariba (Ongwae),*** who happened to be the incumbent Governor, had obtained the most votes and declared him the winner, on 11th August 2017. Subsequently he was gazetted vide ***Gazette Notice No. 7845*** of 16th August 2017 as the Governor-elect and ultimately sworn in office as the Governor of Kisii County. By dint of ***Article 180 (5)*** of the ***Constitution,*** Ongwae had prior to the election nominated the ***4th respondent, Gongera Joash Arthur Maangi***, ***(Maangi)*** his running mate. Upon Ongwae being declared duly elected the Governor, Maangi was automatically declared the duly elected ***Deputy Governor*** under ***Article 180(6)*** of the Constitution and was gazetted and sworn in office as such.

On 5th September 2017, the two appellants in this appeal, ***Joel Makori Onsando (1st appellant)*** and ***Francis Mochoge Omao (2nd appellant),*** who are registered voters in Kisii County, lodged ***Petition No. 3 of 2017*** in the High Court at Kisii, challenging the election of Ongwae. In addition to the IEBC, Ongwae, and Maangi, the appellants named as respondents ***Robert Isaac Sydney Namulungu (Namulungu),*** who was the ***Kisii County Returning Officer*** and ***Naftali Obwocha Orina (Orina)***, who they alleged was the County Chief Agent of the ***Orange Democratic Movement (ODM),*** the political party on whose ticket Ongwae had run.

The appellants challenged Ongwae's election on a total of seven grounds. First they averred that there was no credible voter register, which made it impossible to have simple, accurate, verifiable, secure, accountable, and transparent elections as required by ***Article 86*** of the Constitution. In particular they contended that the number of registered voters varied significantly in all the six elections in the polling stations and constituencies of the County. Secondly they alleged that it was mandatory for a voter to receive ballot papers for the six elections that were held simultaneously on the same day, but there were significant differences in the number of votes cast in each election, thus putting the accuracy of the results in doubt. The third ground was the alleged striking similarities between the votes for the candidates, including the garnered and rejected votes, in different streams of the same polling station, which in the appellants' view was an impossible coincidence, and symptomatic of deliberate manipulation. Fourthly they alleged that both Ongwae and Maangi were not qualified under the Constitution to run for election because the ***Hennepin County District Court*** in the USA had convicted Maangi of disorderly conduct in ***Case No. 020001451***, whilst the ***Anoka District Court***, also in the USA, had convicted him of operating a motor vehicle under the influence of alcohol in ***Case No. 06075459***. They added that the convictions and the failure by Maangi to disclose the information in the nomination self-declared forms showed dishonesty and lack of integrity. To the extent that Ongwae's and Maangi's candidature and election was joint, the appellants contended that Maangi's disqualification affected and disqualified Ongwae as well. In their view, the nomination of the two was contrary to the Constitution, null and void and as a result they could not have been validly elected.

In the fifth ground of the petition, the appellants pleaded that the election materials and ballot papers for ***Nyachenge Polling Station, Bobasi Constituency,*** were delivered to the tallying centre outside the ballot box, thus undermining the credibility of the election. They also claimed that some of the statutory forms used in the election did not have security features and therefore could not be authenticated. The sixth ground was that the IEBC, contrary to its policy and directives, hired polling officers, clerks and observers for the election, who were employees of the Kisii County Government. In the appellants' view such officers lacked independence and impartiality and were biased towards Ongwae who, as the incumbent Governor, for all intents and purposes was

their employer, thus undermining the credibility of the election.

In the seventh and last ground of the petition, the appellants challenged the election on the ground that Ongwae and Maangi appointed Orina as their chief agent whilst he was employed by the Kisii County Government as the Health Records and Information Management Assistant. It was their contention that Orina was a public officer within the meaning of ***Article 260*** of the Constitution and that his appointment as an agent for political purposes violated, among others, the Constitution, ***section 12*** of the ***Political Parties Act***, ***sections 16*** and ***23 (3)(a)*** of the ***Leadership and Integrity Act*** and the ***Electoral Code of Conduct*.** They also contended that the appointment constituted an election offence by Ongwae and Orina contrary to ***sections 15(1)(a)*** and ***15(2)*** of the ***Election Offences Act***, and also an unlawful use of public resources, which rendered Ongwae ineligible to contest the election.

On the basis of those averments, the appellants prayed the court to find, among others, that the gubernatorial election for Kisii County was flawed and vitiated; to hold that Ongwae and Maangi were not validly elected; to find that they committed election offences; to nullify their election; and to bar them from contesting elections for 5 years.

The IEBC and Namulungu filed their joint response to the petition on 18th September 2017. They denied the allegations on which the petition was founded and specifically pleaded that the register had no fault and was within the requirements of the law and the Constitution; that although all voters were issued with six different ballot papers, it was not mandatory to vote in all the six elections and that stray votes also accounted for differences in votes cast in each of the six elections; that the alleged similar returns from different streams were a mere reproduction of the results of the same polling stations attributable to innocent human error in making entries in ***Form 37B***; that Ongwae and Maangi presented all the documents required before nomination and that neither the appellants nor any other person challenged their suitability or qualification to run for office; that the vehicle transporting the election materials from Nyachenge Polling Station to the tallying centre was involved in an accident leading to breakage of ballot boxes, but that was after the election and it did not affect the results; that the presiding officers and polling clerks were validly recruited and their names were availed in advance to the political parties and independent candidates as required by ***regulations 5*** and ***6*** of the ***Elections (General) Regulations, 2012*** without any objection; and that no complaint of violation of the Election Code of Conduct by Ongwae or Maangi was received by IEBC.

On their part, Ongwae, Maangi and Orina filed a joint response to the petition on 18th September 2017 and separate replying affidavits, in which they similarly denied the averments in the petition. They averred that their chief agent was ***Geoffrey Mogire,*** who was neither an employee of the Kisii County Government nor a public officer, and not Orina, as alleged by the appellants. They added that what the appellants called a register that was not credible was not the ***Principal Voter Register***, but the statutory forms. They denied the alleged variation of the number of registered voters in the six elections and explained that only one voter register was used in all the six elections, without any variations and any mistakes in the statutory forms did not affect or impeach the voter register. They added that the total number of votes cast did not exceed the registered voters in any polling station.

As regards the alleged striking similarities of results in different streams, these respondents pleaded that the allegations were based on recording errors which were not reflected in ***Forms 37A*** and ***37C***. Turning to their alleged disqualification, Ongwae and Maangi pleaded that they were lawfully cleared by the IEBC to contest the election and that no evidence of their alleged disqualification had been presented. Particularly as regards Maangi, it was contended that he had already served a full term of five years as Deputy Governor without any issue raised as regards his qualification or integrity and hence his alleged conviction was a contrived afterthought.

On the election materials for Nyachenge polling station, these respondents also relied on the accident to explain the condition of the election materials when they were received at the tallying centre, which they explained did not affect, favour or prejudice any of the candidates. Regarding recruitment of the polling officers, it was contended that they were hired by the IEBC, which is independent, and that Ongwae, Maangi, and the County Government had no role in the recruitment. Lastly, they denied having committed any election offences and termed the appellants' assertion as mere speculation that was not backed by any cogent evidence, adding that none of them had been charged with an election offence, let alone convicted of one. Accordingly these respondents prayed the court to dismiss the petition with costs for lack of merit.

On the same day that the appellants filed their Petition, ***Justry P. Lumumba (Lumumba)***, who was one of the candidates for the Kisii gubernatorial seat, filed a second Petition, namely, Kisii High Court ***Petition No. 7 of 2017***, challenging Ongwae's election. That petition was consolidated with Petition No. 3 of 2017 vide an order made on 19th October 2017. However the court set separate dates for hearing of the two petitions, with the appellants' case being heard on 22nd and 23rd November 2017, while that of Lumumba was to be heard on 27th and 29th November 2017. We do not deem it necessary to dwell at length on Lumumba's petition

because, as it turned out, it had a rather short and brutish life, which we shall advert to shortly.

After hearing a total of six witnesses, one of whom was stood down and never recalled, the learned judge dismissed Petition No. 3 upon finding that the appellants had failed to prove the allegations on which it was founded. She accordingly issued a certificate under ***section 86*** of the Elections Act that Ongwae was validly elected the Governor of Kisii County. On costs, she awarded IEBC and Namulungu costs capped at ***Kshs 2 million***, and Ongwae, Maangi, and Orina costs capped at ***Kshs 3 million***. The appellants were aggrieved and lodged the appeal, which is now before us.

In the course of hearing the petition, the learned judge heard a number of applications and delivered several rulings relating to the two petitions, which have been made the subject of this appeal. For completeness of the background, it is necessary to advert to those applications and their outcome.

One of those applications was made in Lumumba's petition on 6th October 2017, and sought recusal of the learned judge on the grounds that her spouse was a close friend and personal physician of the ODM party leader, ***Hon. Raila Odinga;*** that the said spouse and Ongwae, were close friends of the said party leader; and that the spouse had contested the Nakuru County senatorial seat on an ODM ticket. The application was opposed by the respondents to that Petition and by a ruling dated 19th October 2017, the learned judge dismissed the application after finding that it was founded on general and unsubstantiated allegations, which could not give rise to reasonable apprehension of bias on her part.

On 10th November 2017, Lumumba made the second application that concerns us, seeking to withdraw his petition. He duly advertised the notice of withdrawal in *The Standard* newspaper on 11th November 2017, and the other parties indicated that on principle, they had no objection to the withdrawal. However, because the application to withdraw the petition had not been served on all the parties as required by the rules, the learned judge fixed the same for hearing on 29th November 2017. Come that day, Lumumba had a change of heart and indicated that he, after all, wished to prosecute the petition. After hearing the other parties, the learned judge made an order marking the application to withdraw the petition as abandoned and directed Lumumba's petition to proceed to hearing. The record indicates that after the learned judge directed the hearing of Lumumba's petition to proceed, the appellants' counsel, ***Mr. Ombati,*** applied to be excused from participating in the hearing of that petition, an application that was duly granted by the court.

The third and last ruling as relates to Lumumba's petition arose from a preliminary objection raised by Ongwae on the competence of the petition after the learned judge ordered it to proceed to hearing. He contended that the petition was drawn and presented in violation of the Elections Act because while it named the IEBC, Namulungu and himself as the respondents, the complaints in the petition were against ***Laban Chweya*** and ***Charles Birundu*** of the ***Wiper Democratic Party***, Lumumba's party, who were not respondents in the petition. Those two people were referred to in the body of the petition and supporting affidavits as respondents though they were not parties in the petition. Ongwae also complained that the petition sought adjudication of disputes between members of the Wiper Democratic Party whilst there was a specific prescribed mechanism for resolution of such disputes, which in any case, could not be adjudicated in an election petition. They added that the petition also made complaints and sought remedies against specified media houses, which was not an issue for an election petition. Lastly they argued that the petition was fatally defective for failure to make Maangi, the running mate, a party, and for seeking award of damages for alleged loss of campaign funds, money paid to agents, and money spent in organizing and holding campaign meetings. Lumumba opposed the objection, although he conceded to the errors in the petition, which he described as "technical" and sought leave of the court to amend the petition.

The learned judge found that indeed the petition had a litany of errors, which were not merely technical, but substantive; that it was long past the time prescribed by ***section 76(1)*** of the Elections Act for amendment of the petition; that the proposed amendments to the petition would change the nature of the complaints therein; that if the petitioner were allowed to amended the petition, the respondents would be required to make substantial amendments to their responses; and that in the circumstances, it would be prejudicial to the respondents to allow the amendments. The learned judge was also persuaded that failure to join Maangi in the Petition was fatal. Accordingly she sustained the objection, struck out Lumumba's petition and awarded the respondents costs capped at ***Kshs 500,000.00***. That left the appellants' only petition No. 3 of 2017, which proceeded to full hearing without Lumumba's participation.

On 11th December 2017, Lumumba filed a notice of appeal against the striking out of his petition. However, he withdrew that notice of appeal on 30th January 2018 thus marking the end of Petition No. 7 of 2017. At the hearing of this appeal, in which he was named as a respondent, Lumumba applied and we allowed him to withdraw from the appeal as he deposed that he was no longer interested

in the dispute. That however did not stop the appellants, who did not participate in Lumumba's petition, purporting to fault the learned judge for decisions made as regards that petition. We shall address the issue fully later in this judgment.

As regards the appellants' petition, the learned judge delivered the first ruling of concern in this appeal on 23rd November 2017. Its effect was to expunge from the record some documents, which the appellants wished to rely on, but which the learned judge found had not been served upon Ongwae, Maangi and Orina when they were served with the petition. During the hearing of the appellants' petition, counsel for those respondents objected to two sets of documents marked ***JMO-17*** and ***JMO-18,*** which he contended had not been served on him with the petition. He submitted that his clients had been denied, through the non-service, an opportunity to specifically answer to those documents in their response. JMO-17 comprised photocopies of postings on a *Facebook* page alleged to belong to Orina, showing him engaging in political activity in support of Ongwae, whilst JMO-18 were photocopies of two pages allegedly showing Maangi's conviction for two misdemeanors in the USA. The two sets of documents were also challenged because they purported to be annextures to an affidavit sworn by ***James Makori Onsando***, whom the 1st appellant, whose name is ***Joel*** Makori Onsando, stated he did not know.

Counsel for the appellants urged the court not to expunge the documents from the record, although he conceded that indeed the issue of problems with and omissions in the petition had arisen earlier. He argued that the 1st appellant had already been examined on the documents; that counsel for Ongwae, Maangi and Orina were not diligent and should have compared the record that was served upon them with the court's; and that the reference to the deponent as ***James*** was a mere technicality.

While the learned judge was prepared to overlook the reference to wrong names as a genuine mistake, she found that Ongwae, Maangi and Orina were not served with the annextures JMO-17 and JMO-18, which was prejudicial to them. Accordingly she expunged those documents from the record.

The last ruling regarding the appellants' petition is dated 16th January 2018 and determined their application for scrutiny and recount. After conclusion of the hearing, the appellants applied by a notice of motion dated 8th December 2017, for scrutiny and recount of all the votes obtained by each candidate in 13 polling stations in 3 Constituencies; scrutiny and audit of the registered voters in 129 polling stations in two constituencies; scrutiny and audit of the statutory forms used to declare election results in 29 polling stations across 3 constituencies; and scrutiny of the security features of all Form 37Cs used in the election. The appellants contended that they had laid sufficient basis in the evidence that they had adduced, for the orders sought and that scrutiny was the only way of ascertaining whether the irregularities they complained of had occurred.

All the respondents to the petition opposed the application arguing that no basis for an order of scrutiny had been laid and that the appellants were merely on a fishing expedition, which is not the purpose for scrutiny and recount. They also argued that the Court had already directed IEBC to supply the parties with statutory forms in the A, B, and C series, thus making a further order unnecessary and superfluous.

After hearing the application, the learned judge allowed scrutiny, limited to the ballot boxes in the gubernatorial election in only 4 polling stations. Further, the scrutiny was limited to the counted votes for Ongwae and the runner-up candidate, ***Obure Christopher Mogere***, as well as the rejected and spoilt ballot papers.

As we have already adverted, after the dismissal of their petition No. 3 of 2017, the appellants filed this appeal founded on some 15 grounds. Grounds No. 8, 12 and 13 raise the same issue, namely the striking out of Lumumba's Petition No. 7 of 2017. Grounds No. 3 (disqualification of Ongwae and Maangi), ground No. 4 (commission of election offences by Orina) and ground No. 6 (credibility of the voters' register), are all prefixed by the claim that the learned judge ***"erred in law and fact".*** The right of appeal to this Court from an election petition in the High Court is expressly limited by ***Section 85A*** of the Elections Act to matters of law only.

Section 85A of the Elections Act was exhaustively considered and interpreted by the Supreme Court in ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others [2014] eKLR*** and in ***Frederick Otieno Outa v. Jared Odoyo Okello & 4 Others [2014] eKLR.*** The Court held that a matter of law within the meaning of that provision arises in three situations only, namely, first, the interpretation or construction of the Constitution, statutes or regulations made thereunder touching on elections, or second, their application to the sets of facts established by the trial court or lastly, determination of whether the conclusions of the trial judge are based on the evidence on record or whether they are so perverse that no reasonable tribunal would have arrived at them.

Recently in ***Mohamed Abdi Mahamud v. Ahmed Abdullahi Mohamad & 3 Others [2018] eKLR***, this Court reiterated that an

appeal from an election petition must be strictly confined to issues of law only as delineated by the Supreme Court. The Court expressed itself thus:

"Given that sparkling clear position in both the statute itself and authoritative pronouncements that this Court cannot, without an unlawful usurpation of jurisdiction, entertain questions of fact, we find it perplexing that the memorandum of appeal herein expressly purports to challenge factual findings. We think it is a case of artful dodging for an appellant to frame a complaint as comprising an "error of law and fact". We are quite clear in our minds that in electoral matters there is no such thing as "questions of mixed law and fact" and grounds of appeal that are a composite of both are clearly inappropriate and probably incompetent...We must emphasize that for a memorandum of appeal to pass muster and be compliant with section 85A, it must raise only questions of law which must be distinctly, concisely and precisely set forth. Anything short is deserving only of dismissal."

As the Supreme Court explained in ***Gatirau Peter Munya v Dickson Mwenda Kithinji*** (supra), it is ultimately for this Court to determine whether an appeal raises issues of fact or of law. But that is not a license to the appellant to raise all manner of issues in the belief that it is the duty of the court to sort out the relevant from the irrelevant. The appellant is not relieved of his duty to ensure that what is presented in an election petition appeal are strictly matters of law. An appellant who has taken time to appreciate the nature and limit of the Court's jurisdiction under section 85A is expected to eschew matters of fact, whether in the phraseology employed or in the actual issues raised. For it would be very unusual to expect a party who boldly asserts that he is complaining of matters of fact, to have raised only matters of law.

In addition, to reach the conclusion that the trial court's decision is perverse we have to be satisfied that no reasonable tribunal could have reached that decision on the basis of the evidence on record. In ***Damodar Lal v. Sohan Devi & Others, CA No. 231 of 2015,*** the Supreme Court of India explained that wrong reading of evidence alone does not render a decision perverse and that if there is some evidence on record which is acceptable and which could be relied upon, the conclusions of the trial court cannot be treated as perverse and its findings cannot be interfered with. The Court explained itself as follows:

"Even if the finding of fact is wrong, that by itself will not constitute a question of law. The wrong finding should stem out on a complete misreading of evidence or it should be based only on conjectures and surmises. Safest approach on perversity is the classic approach on the reasonable man's inference on the facts. To him, if the conclusion on the facts in evidence made by the court below is possible, there is no perversity. If not, the finding is perverse. Inadequacy of evidence or a different reading of evidence is not perversity." [Emphasis added).

Accordingly, outside those three situations, this Court will not engage in a general review or reappraisal of evidence, as is the norm in ordinary first appeals. We must defer to the conclusions of fact by the trial court, except in the limited situations where it is established that the conclusions by the trial court on the evidence are so perverse that no reasonable tribunal could have reached the conclusions the court did. (See ***John Munuve Mati v. Returning Officer, Mwingi Constituency [2018] eKLR).***

The appellants compressed their 15 grounds of appeal into five grounds, in which they contended that the learned trial judge erred by:

i) upholding the election of Ongwae and Maangi despite unexplained inaccuracies in election materials affecting 184 polling stations;

ii) misinterpreting and misapplying constitutional and electoral law principles on the credibility and integrity of elections;

iii) expunging from the record evidence of disqualification of Ongwae and Maangi and commission of election offences by Orina;

iv) wrongly exercising her discretion and limiting the extent, nature, and scope of scrutiny and recount, and by failing to consider the report of the scrutiny;

v) striking out Lumumba's Petition No. 7 of 2017; and

vi) refusing to recuse herself from hearing the petition.

Pursuant to ***rule 20*** of the ***Court of Appeal (Election Petition) Rules, 2017***, a pre-hearing conference was held on 20th April 2018 at which the parties agreed to file written submissions, which they subsequently highlighted orally. In that regard the following learned counsel appeared for the parties at the hearing of the petition: ***Mr. Gershom Otachi, Mr. Edward Begi*** and ***Ms. Constatine Ogari***, for the appellants; ***Mr. Isaac Odhiambo,*** for the ***IEBC*** and ***Namulungu, Mr. Okongo Omogeni, SC,*** and ***Mr. Peter Wanyama***, for Ongwae, Maangi and Orina; and ***Mr. Jackson Awele,*** for Lumumba. As we indicated earlier, Lumumba applied to be excluded from the appeal as he had not filed any notice of appeal as regards his petition that was struck out, and he did not have any interest in the appeal arising from the appellants' petition No 3 of 2017. We allowed that application and proceeded to hear the appeal.

Presenting the appellants' case in turns, Mr. Otachi and Mr. Begi submitted that the appellants had adduced sufficient evidence to prove that there was no credible voters' register because the Forms 34C, 37C, 38C and 39C all indicated different figures of registered voters for 184 polling stations. They contended that those Forms indicated different numbers of registered voters for each of the six elections that were conducted on 8th August 2017, which puts the credibility of the voters' register and the election itself, into question. Learned counsel further contended that instead of addressing the appellants' complaint, the learned judge merely glossed over the issue.

On application of constitutional and legal principles on free, fair and credible elections, the appellants submitted that the learned judge erred by concluding that the identified irregularities and non-compliance with the law was insignificant and incapable of affecting the credibility and integrity of the election. In their view, they adduced sufficient evidence to prove inaccurate entries and declarations in returns affecting 12 polling stations, where the figures in Forms 37A, 37B and 37C differed materially, which was evidence of manipulation of the results. They further urged that in 7 constituencies, the County Returning Officers did not indicate in the Form 37Bs that they had received any Form 37As, which proved that the results were announced on the basis of incomplete documents and therefore the election cannot be valid. The appellants also submitted that they adduced sufficient evidence proving to the required standard, the use of Kisii County employees as presiding officers, which compromised impartiality. They added that use of public officers as agents of Ongwae and Maangi, which was an election offence, was also proved. They therefore submitted that the learned judge misdirected herself by holding that the above irregularities were not substantial and in refusing to nullify the election.

As regards the expunging of the evidence from the record, the appellants submitted that the learned judge erred by excluding crucial evidence in support of their petition, without a formal application. They added that the conclusion that Ongwae and Maangi were not served with annextures JMO-17 and JMO-18 was erroneous because those documents were in the court file and in any event the issue was a technicality for which they should not have been penalized. They relied on the judgment of the High Court of Uganda in ***Kikongo Noelina v. The Electoral Commission & Another, EPA No. 75 of 2011*** in support of the proposition that what matters is the record with the court and not what was served on the parties, and the decision of the Court of Appeal of Nigeria in ***Chief Raphael Onwuka v. Lukuman Owolewa, CA/10/99*** for the view that the object of courts is to decide cases and not to punish parties for infractions that they may have committed.

Turning to the exercise of discretion by the learned judge as regards scrutiny, the appellants submitted that they had applied for scrutiny of statutory documents in 258 polling stations in the County and recount of votes in 13 polling stations but the learned judge allowed scrutiny in only 7 polling stations. Even in those few stations, it was submitted that the judge failed to properly evaluate the findings of the scrutiny report with reference to the mistakes found in Forms 37B and 37C, which showed unexplained variations in results. The appellants also contended that the learned judge erred by relying on the evidence of Namulungu to the effect that he had corrected the mistakes in Form 38B in Form 37C whilst there were no such corrections. In their view, the learned judge also erred by failing to hold that by making the wrong entries in Form 38C, Namulungu had commit an election offence under ***section 6(a)*** of the Elections Act.

Next the appellants addressed the striking out of Lumumba's petition. They contended that all interlocutory applications were supposed to be disposed of by the pre-trial stage and therefore the learned judge erred by entertaining the application to strike out the petition later in the proceedings.

On the last ground regarding recusal of the learned judge, the appellants submitted that she erred by failing to disclose to them, as she did to Lumumba, the information that prompted him to make the application for her recusal. They added that the non-disclosure was not only irregular, but also prejudicial to them, because they were denied an opportunity to be heard on the issue. In their view, the allegations on which the application for recusal was founded were so serious that the learned judge should have recused herself, because in the mind of a reasonable person there was likelihood of bias on the part of the judge. In support of this last ground, the appellants cited the judgments of the House of Lords in ***Re Pinochet [1999] UKHL 52*** and the Supreme Court of Appeal of South Africa in ***Sonwabiso Maxwell Ndimeni v. Meeg Bank Ltd, Case No. 692/09*** and ***Dr. Wouter Basson v. Prof. JFM Hugo & 2***

Others*, *Case No. 968/16 and submitted that the purpose of recusal is to preserve the administration of justice from any suspicion of impartiality and that a judge must recuse himself or herself where there is a reasonable suspicion that he or she will not decide the case impartially.

Mr. Odhiambo for the IEBC and Namulungu opposed the appeal, submitting that the appellants completely failed to prove the allegations on which the petition was founded to the required standard of proof, which he contended, citing the decision of the High Court in ***William Kabogo Gitau v. George Thuo & 2 Others [2010] eKLR***, was above a balance of probabilities but lower than proof beyond reasonable doubt.

Beginning with the appellants' contention that there was no credible register, counsel submitted that the appellants did not adduce any evidence to challenge the register, but were merely relying on human errors in some of the statutory forms to claim that the register itself had errors. It was contended that the 1st appellant had admitted in cross-examination that he had never looked at the register kept by IEBC and that what he was relying on to impeach the register was a self-prepared spreadsheet. These respondents added that the appellants did not challenge the figures in the register as published in the *Kenya Gazette* and relied on the judgment of the High Court in ***Charles Obara Orito & Another v. IEBC & 2 Others [2018] eKLR*** in support of the view that there is a clear distinction between lack of a credible voter register and erroneous entry of figures in the statutory forms.

Turning to the documents that were expunged from the record and the alleged non-qualification of Ongwae and Maangi, learned counsel submitted that annextures JMO-17 and JMO-18 were properly expunged from the record after the learned judge found as a fact that they were not served on the parties who were directly affected by them. Secondly, it was contended that annexture JMO-18 was not admissible to prove conviction of Maangi, because it was a mere download from the internet without any certificate of electronic recording as required by ***section 106B*** of the ***Evidence Act.***

On whether the learned judge erred by failing to find that Orina had committed election offences, it was submitted that after annexture JMO-17 was expunged from the record, there was no other evidence in support of the allegation. In addition, it was contended, the learned judge found as a fact, which we cannot disturb, that it was Geoffrey Mogire, not Orina, who was Ongwae's and ODM agent.

On the striking out of Lumumba's petition, the IEBC and Namulungu submitted that the objection to the petition was properly raised as a preliminary objection and that a preliminary objection could be raised at any time. They cited the decisions of the High Court in ***Ali Oshan & Others v. Catherine Kaswii Nyiha & Others [2004] eKLR*** and ***Republic v. Chief Registrar of the Judiciary & 2 Others ex parte Riley Services Ltd [2015] eKLR*** in support of that view. It was further contended that in any event the preliminary objection and the striking out of Lumumba's petition did not affect the appellants' petition and that Lumumba did not complain or file an appeal against the decision to strike out his petition. Lumumba, it was further pointed out, admitted the defects in the petition and sought leave to amend. These respondents further added that the appellants had voluntarily withdrawn from the hearing of Lumumba's petition and therefore could not turn round and purport to be aggrieved.

In the view of these respondents, the mere fact that the two petitions were consolidated did not entitle the appellants to raise issues that were specific to Lumumba's petition because, depending on circumstances, consolidation can result in separate judgments. They added that the purpose of consolidating the petitions was purely for good management and timely conclusion of the petitions. They cited the ruling of the Environment and Land Court in ***Joseph Okoyo v. Edwin Dickson Wasunna [2014] eKLR*** and of the High Court in ***Korean United Church of Kenya & 3 Others v. Seng Ha Sang [2014] eKLR,*** in support of that view.

Turning to the ground of appeal on scrutiny, the IEBC and Namulungu submitted that contrary to the appellants' assertion, the learned judge had considered the report of scrutiny but concluded that the errors it disclosed did not affect the outcome of the election. They added that the errors noted by the court were transposition errors attributed to fatigue and lack of sleep rather than deliberate and systemic fraud. They cited the judgment of the High Court in ***Joash Wamang'oli v. IEBC & 3 Others [2013] eKLR*** and submitted that clerical and arithmetical errors in transposing results in the relevant forms were expected human errors and would not in themselves lead to annulment of an election. These respondents also contended that out of 1,126 polling stations in the County, the errors were in only 12 polling stations.

Lastly as regards recusal of the learned judge, the IEBC and Namulungu submitted that this ground of appeal was an afterthought because the application for recusal was made by Lumumba and not by the appellants, who in any event did not support it. It was contended that in the circumstances they should not be allowed to turn round and criticize the learned judge for dismissing the application for recusal.

Like counsel for the appellants, counsel for Ongwae, Maangi and Orina, submitted in turns. They urged us to ignore grounds 3, 4 and 6 in the appellants' memorandum of appeal because they purported to raise questions of fact or mixed questions of law and fact, which as we have already stated, this Court has no jurisdiction to address in an election petition.

Beginning with whether the learned judge misapplied constitutional and electoral law principles and whether the established irregularities were substantial enough to warrant nullification of the election, the three respondents submitted that the 1st appellant had admitted that he had never checked the register of voters or the Form 37As before filing the petition and that he had no evidence of manipulation of the register. Pursuant to ***section 6A(b)*** of the Elections Act, it was urged, the register of voters was published online and the appellants had no justification for confusing statutory forms with the register of voters. It was further submitted that Forms 34B, 35B, 36B, 38B and 39B had no relevance to the gubernatorial elections and being derivative forms, they were not the register of voters as the appellants purported. Relying on the judgment of the Supreme Court in ***Raila Odinga v. IEBC & Others [2013] eKLR***, these respondents submitted that the burden of proof was on the appellants and that the standard of proof in an election petition is higher than on a balance of probabilities but lower than beyond reasonable doubt. It was also their contention that the appellants utterly failed to discharge the burden of proof on them. They cited the judgment of this Court in ***IEBC v. Maina Kiai & 3 Others [2017] eKLR***, and submitted that the appellants did not adduce any evidence, particularly from agents, to prove irregularities at the polling stations, where results, which are final, are declared.

The three respondents urged that by a ruling dated 10th October 2017, the learned judge directed IEBC to supply the parties with all the statutory forms used in the gubernatorial election, which was duly done. The appellants opted to use only Form 37Bs and ignored Form 37As, which were the primary forms and had no issues. It was further submitted that the errors that were noted were mere transposition errors affecting no more than 1,000 votes, which did not affect the outcome of the election. ***Morgan v. Simpson [1974] 3 All ER 722*** was cited to support the argument that if an election is conducted substantially in accordance with the law, it will not be vitiated by irregularities that do not affect the result.

Moving on to disqualification of Ongwae and Maangi, commission of election offences by Orina, and the expunging of documents from the record, the said three respondents submitted that *ex facie* these grounds challenge findings of fact, which the Court has no jurisdiction to inquire into. Possibly out of abundant caution, they added that the earned judge properly expunged the documents in question from the record because they were not served upon them with the petition and in any event were sourced from the internet and could not be admissible without compliance with section 106B of the Evidence Act, which on the authority of ***County Assembly of Kisumu & 2 Others v. Kisumu County Assembly Service Board & 6 Others [2015] eKLR*** is mandatory. Upon the expunging of the said documents, it was submitted, there was no evidence before the court to prove the alleged disqualification and commission of election offences.

On the question of scrutiny, the three respondents submitted that the trial judge could not be faulted because scrutiny and recount are discretionary and that to be entitled to them, a party must establish basis to the satisfaction of the judge. In this case it was contended that in their evidence the appellants had compared Ongwae's votes with those of the runner-up and in the circumstances the learned judge did not err by restricting scrutiny to those two candidates. We were therefore urged to find that the learned judge exercised her discretion rationally and judiciously. As for the report of the scrutiny, it was submitted that the learned judge duly considered the same but it did not disclose any irregularities that would have justified nullification of the results.

Regarding the striking out of Lumumba's petition, these three respondents contended that all the parties, including the appellants, were heard when Lumumba changed his mind on withdrawal of his petition. Immediately after the learned judge allowed the petition to proceed to hearing, the appellants' counsel applied to be excused from participating in the hearing of the petition, which request the court granted. Thereafter the objection was taken on the competence of the petition, leading to it being struck out. In the circumstances it was contended that the appellants could not be heard to claim that they were denied an opportunity to be heard on the application to strike out Lumumba's petition. Similarly, it was submitted that the appellants could not raise issues pertaining to Lumumba's petition because consolidation of the same with their petition was purely for convenience, so that for all intents and purposes the two petitions remained distinct and separate. In addition, it was argued that there was no notice of appeal on record as regards Lumumba's petition.

Again, probably out of abundant caution, these three respondents also submitted that on merits, the learned judge did not err by striking out Lumumba's petition because Lumumba was inviting the court to determine political party disputes, alleged breaches of the election code of conduct and complaints against the media in an election petition, whilst the Political Parties Act, the Elections Act, and the Media Council Act provided mechanisms for resolution of such disputes. In the view of these respondents, the learned judge too did not err by holding that the petition was fatally defective for failure to make Maangi a party because a Deputy Governor ought not to lose his office without being heard. They therefore urged us to find that the striking out of Lumumba's

petition, which was distinct from the appellants' petition, did not prejudice them.

Lastly on the question of recusal, the three respondents submitted that it was Lumumba who applied for the learned judge's recusal and that the application was made in his petition before it was consolidated with the appellants' petition. They accordingly urged us to find that the appellants had no basis for complaining about the ruling in Lumumba's petition. In any event, it was submitted, the decision by the learned judge not to recuse herself was sound in the circumstances of the case. Citing the ruling of this Court in ***Philip Tunoi & Another v. Judicial Service Commission & Another*** ***[2016] eKLR,*** counsel submitted that recusal is only justified where the facts would lead a fair-minded and informed observer to apprehend bias on the part of the judge, which was not the case in this appeal because no such facts existed.

Those are the positions that were articulated by each party in this appeal. As we address the grounds of appeal, we must reiterate what we have already stated, namely that in light of the clear provisions of section 85A of the Elections Act as interpreted by the Supreme Court and this Court, we shall not be drawn into a reappraisal of the evidence that was before the learned judge as though this is an ordinary first appeal. We propose to deal with the grounds of appeal sequentially, in the manner in which the appellants argued them, but we shall reserve to the end the question whether in the circumstances of this appeal, the learned judge misinterpreted and misapplied the constitutional and electoral law principles pertaining to free, fair and credible elections and whether any irregularities proved were of a quality and nature to warrant nullification of the election.

The first issue is what the appellants contended was lack of a credible register for the Kisii gubernatorial elections. The appellants made extensive claims from paragraphs 12 to 31 of the petition in which they asserted that the register of voters must be uniform for all the six elections. They however contended that the gubernatorial election in Kisii County was conducted on the basis of a defective register of voters devoid of credibility, so that the number of registered voters varied and differed in some polling stations and in the six elections in a manner suggesting that the IEBC was using different registers. They specifically pleaded thus:

"22. The petitioners aver that the total number of registered voters in various polling stations and constituencies in Kisii County varied significantly in the statutory forms returning the results of the six elections.

...

25. The petitioners aver that in the absence of a credible voters' register, the elections in Kisii County cannot be said to be accurate, transparent, credible and verifiable.

26. The petitioners state that the voters' register used to conduct elections and declare results was defective and this anomaly undermined the quality and integrity of the impugned elections.

27. The petitioners aver that the absence of a credible voters register was substantial enough as to affect the credibility of the entire election.

28. The petitioners state that in the absence of a credible voters' register, the 1st and 2nd respondents cannot tell whether or not ineligible people voted in the elections.

29. The petitioners state that in the absence of a credible voters' register, the gubernatorial elections in Kisii County were unlawful and the results invalid, null and void."

All the respondents took the position that there were no errors in the register of voters and that what the appellants were capitalizing on to purport to impeach the register were transposition errors in some of the statutory forms in which erroneous figures for registered voters were entered. In cross-examination of the 1st appellant, the respondents extracted damning admissions that the appellant had never bothered to look at the register of voters itself or even the Form 37A containing the election results for Governor at the polling station, before making the categorical claim that the register of voters was not credible. Moreover the respondents contended that in none of the polling stations did the total number of votes exceed the registered voters.

For her part the learned judge concluded that the appellants were relying on derivative forms (the B and C series) rather than the primary forms (the A series) to impeach the register of voters. She found that to be case as regards the gubernatorial election as well as the other five elections, where the appellants contended there were different numbers of registered voters as well as differences in

the votes cast. She therefore concluded that the appellants had failed to prove their complaint that the register of voters was not credible.

In this appeal, the parties have taken exactly the same positions as they took before the trial court, the only difference being that the learned judge is faulted for finding one way rather than the other. As we have already pointed out, as pleaded, the appellants' claim was very specific and targeted alleged faults in the register of voters. But what evidence did they present before the learned judge to prove the alleged faults in the register" The appellants did not adduce any evidence regarding errors or inconsistencies in the register itself, which by his own admission, the 1st appellant had not even bothered to examine.

Section 2 of the Elections Act defines ***"register of voters"*** to mean:

"A current register of persons entitled to vote at an election prepared in accordance with section 3 and includes a register that is compiled electronically."

The reference to section 3 is clearly erroneous because the register of voters is provided for by section 4. Be that as it may, the register of voters comprises five parts, namely a register in respect of every polling station; every ward; every constituency; every county, and a register of voters residing outside Kenya. By dint of section 6 of the same Act, the register of voters is open for inspection by members of the public at all times save when the IEBC decides otherwise. Subsection 4 of the same section requires the register of voters to be kept at the IEBC headquarters and copies thereof relating to the constituencies to be kept at the IEBC's constituency offices. Further section 6A (3) of the Act obliges the IEBC to publish the register of voters online and in such other manner as may be prescribed by regulations.

Evidence was adduced before the trial court that the IEBC posted the register of voters in each polling station and made the same available online. By dint of section 6(4), a copy of the register would have been at each constituency office of the IEBC, because it was never alleged that the register of voters was not available as required by law. In addition, on 29th September 2017 the appellants applied to the court for an order directing the IEBC to produce in court, before the commencement of the hearing of the petition, original copies of Forms 34B, 35B, 37B, 38B, 39B, 37C, 38C and 39C for some specified polling stations. By a ruling dated 10th October 2017, the learned judge granted the application and directed the IEBC to supply the appellants with copies of the statutory forms relating to the Kisii County gubernatorial elections. We should add that the forms were supplied to all the parties, including Forms 37As. We refer to this application and the order by the learned judge to make the point that if the appellants had any difficulties in accessing the voters' register, it could have been expected that they would have sought an access order when they made that application.

Much time was spent on the various Forms that we think it is necessary to advert on what they are, their contents and purpose, so as to put the parties' contentions into proper perspective. Because there are six elections conducted on the same day, different statutory Forms are prescribed for each election, right from the polling station where the votes cast are counted, up to the certificate that the IEBC presents to the candidate who it determines to have won the election. The table below sums up those forms:

	Polling Station	**Constituency Tallying Centre**	**County Tallying Centre**	**National Tallying Centre**	**Certificate of Election**
President	Form 34A	Form 34B	X	Form 34C	Form 34D
Member of National Assembly	Form 35A	Form 35B	X	X	Form 35C
Member of County Assembly	Form 36A	Form 36B	X	X	Form 36C

Governor	Form 37A	Form 37B	Form 37C	X	Form 37D
Senator	Form 38A	Form 38B	Form 38C	X	Form 38D
Woman Representative to the National Assembly	Form 39A	Form 39B	Form 39C	X	Form 39D

The Form "A"s for each of the six elections bear the results declared in each polling station. In ***IEBC v. Maina Kiai & 5 Others*** (supra), this Court considered the finality of the election results announced at the polling station, albeit in the context of a presidential election, and concluded that those results are not provisional, temporary or interim, but final, and only to be disturbed by the election court. This is how the court rendered itself:

"It is clear beyond peradventure that the polling station is the true locus for the free exercise of the voters' will. The counting of the votes as elaborately set out in the Act and the Regulations, with its open, transparent and participatory character using the ballot as the primary material, means, as it must, that the count there is clothed with a finality not to be exposed to any risk of variation or subversion."

Once the votes have been counted at the polling station, the presiding officer is required by ***Regulation 79*** of the ***Elections (General) Regulations, 2012*** to announce the result of the voting at the polling station and among others things, fill the Form "A"s for each of the six elections and affix a copy of the declaration of the results at the public entrance to the polling station or at any other place convenient and accessible to the public at the polling station. Thereafter the presiding officer is required to seal the election materials and the election results declaration forms in the ballot boxes which are then delivered to the returning officer at the constituency tallying centre, who in turn is supposed to tally the results from all the polling stations and publicly announce the results of each election in each polling station in the constituency. The returning officer is next required to fill the relevant Form "B"s for each of the elections and publicly declare the results for Member of County Assembly and Member of the National Assembly and issue to the candidates determined to have won, the certificate of election (Forms 35C and 36C). While the constituency returning officer sends the collated constituency results for the presidential election to the national tallying centre, those for Governor, Senator and Woman Representative to the National Assembly are sent to the county returning officer at the final tallying centre. The county returning officer similarly tallies the received results from the constituencies and announces the result for Governor, Senator and Woman Representative to the National Assembly before completing forms 37C, 38C, and 39C, respectively, certifying the persons elected to those offices.

For the purposes of this appeal, part of the information required to be provided in the Form As at the polling stations, Form Bs at the constituency tallying centre and Form Cs at the county tallying centres is the total number of registered voters. In this case, when the information as regards the number of registered voters was entered in Forms 37Bs and 37Cs, errors were made, which the IEBC readily admitted. It is due to those errors that the appellants maintained that there was no credible register of voters.

From the evidence on record, which the learned judge accepted, the Form 37As for the polling stations had no problems and they correctly reflected the number of registered voters as it was in the register of voters and further that there were no complaints regarding the number of votes received by each candidate at the polling stations and as reflected in Forms 37As. The IEBC provided the appellants with Form 37As as directed by the court, but the appellants did not produce or use those Forms in court, opting instead to produce the Form Bs and Cs which had errors. It was to the same purpose that the appellants referred to the Forms used in the other elections, in particular Form 38C (declaration of Senate election results at the County tallying centre) and Form 39C (Declaration of County Woman Representative to the National Assembly election results at the County tallying centre) to try and show errors regarding the number of registered voters which they attributed to errors in the register itself.

In our view, the appellants, rather deviously, we may add, tried to prove errors in the register by pointing out at errors in the forms, which they wanted the court to believe arose from the register itself. It is one thing to prove errors in the figures entered as the number of registered voters in the statutory forms. It is an entirely different thing to prove that the errors were in the register of voters itself. The court cannot be asked to assume, as the appellants do, that merely because there were errors in the statutory forms regarding the number of registered voters, there must also have been errors in the register of voters itself. The easiest way to prove that the register of voters was not credible was to adduce evidence regarding the register itself, which was in any event readily available.

We are satisfied that there is no basis upon which we can interfere with the finding by the learned judge that the appellants failed to prove that the register of voters used in the Kisii gubernatorial elections was not credible. The votes obtained by each candidate as set out in Form 37A, which in ***IEBC v. Maina Kiai & 5 Others*** (supra) were declared to be final results, were found to have no mistakes and the votes affected by the transposition errors to be about 1,000. The further finding by the trial court, which cannot be faulted, was that the errors affected all the candidates without benefiting any one of them and did not dent the margin of Ongwae's win which was 95,404 votes.

The second ground of appeal is whether the learned judge erred in expunging from the record annextures JMO-17 and JMO-18. As we have already noted JMO-17 were photocopies from a *Facebook* page that purported to show Orina engaging in political activity in support of Ongwae, whilst JMO-18 were copies of Maangi's alleged convictions for misdemeanors in the USA. Those documents were expunged from the record vide a ruling dated 23rd November 2017, following complaints by Ongwae, Maangi and Orina that they were not in the copy of the petition that was served upon them; that they were therefore denied an opportunity to specifically respond to the documents; and that they stood to be prejudiced if the court relied on them. Having carefully perused the record and the proceedings that took place before the documents were expunged, it is obvious that the appellants did not seriously resist the complaint that the copy of the petition that was served upon Ongwae, Maangi and Orina did not include those two documents. They readily conceded other omissions and mistakes in the copies of the petition. Their response was primarily that it was enough that the documents in question were in the record with the court; that it was the obligation of the respondents to the petition to compare the copy of the petition that was served upon them with that filed in court; and that in any case, the issue was a mere procedural technicality curable under Article 159 of the Constitution.

Rule 15(2) of the Elections (Parliamentary and County Elections) Petition Rules, 2017 prohibits interlocutory applications after the conclusion of the pre-trial conference. That rule is informed by the need to ensure that because of the strict timelines set for the hearing and determination of election petitions, the hearing is not unnecessarily disrupted by spurious interlocutory applications. It is in the same mould as ***rule 20***, which requires, except in exceptional circumstances, that once the hearing of the petition has commenced, it should proceed on day-to-day basis without interruption. Even then there is a qualification in ***rule 19(2):*** the interlocutory applications that are barred are those that by their nature could have been brought before the commencement of the hearing of the petition. Ongwae, Maangi and Orina contend that they did not make an interlocutory application, but only took an objection to reliance on documents, which they were not served with.

We are satisfied that the objection in question was properly taken in the course of the hearing, when it came to light that the documents which the appellants were relying upon had not been served upon their opponents, much as those documents were in the court file. It was really the obligation of the appellants to ensure that the documents that they filed in court were exactly the same copies that they served on the respondents because it is the respondents, and not the court, who were called upon to respond to the allegations founded on JMO-17 and JMO-18. Therefore, it does not avail the appellants to claim that they had filed the relevant documents in court, so long as they did not serve those documents on the persons who were directly affected by the petition and who were required to respondent within specified time. We are also not persuaded that the appellants can lightly evade their responsibility and shift the burden to the concerned respondents so as to require them to troop to the court to confirm that the documents served upon them were exactly what was in the court file.

The trial court found, and properly so in our view, that the documents that the appellants omitted to serve were critical and it would be prejudicial to Ongwae, Maangi and Orina for the appellants to rely on those documents when their opponents had neither seen nor been notified about them. The right to fair trial is a sword, which cuts both ways and is an entitlement of both the appellants and the concerned respondents. The appellants, who were obliged to serve the complete and correct record cannot be heard to claim that they were denied the right to a fair trial when they were the cause of the problem. To accede to their argument would mean elevating the appellants' right to fair trial to a higher pedestal than that of the concerned respondents when the former were at fault, and the latter the victims.

Nor do we think that the omission of JMO-17 and JMO-18 in the copy of the petition that was served upon Ongwae, Maangi and

Orina was a mere technicality excusable under Article 159 of the Constitution as contended by the appellants. In ***Lamanken Aramat v. Harun Maitamei Lempaka,*** ***SC Pet. No. 5 of 2014,*** the Supreme Court explained that there are instances where the court may properly exercise its discretion under Article 159 of the Constitution to excuse procedural failings of a technical character or defects in form if the lapse, for example, does not affect the court's jurisdiction or, we may add, if it does not impinge on a fair hearing or trial. The Supreme Court expressed itself thus:

"The Court's authority under Article 159 of the Constitution remains unfettered, especially where procedural technicalities pose an impediment to the administration of justice. However, there are instances when the Constitution links certain vital conditions to the power of the Court to adjudicate a matter."

In this instance, we are satisfied that the failure to serve upon the respondents most affected by the petition some of the annextures on which a substantial part of the petition was founded, went to fair trial and was not a question of mere technicality that the trial court could readily ignore. See also ***LSK v. Centre for Human Rights & Democracy and 12 Others, SC. Pet. No. 14 of 2013).***

The next ground of appeal was the exercise of discretion by the learned judge as regards scrutiny and her alleged failure to properly consider the report of the scrutiny exercise. The appellants applied for scrutiny vide a motion on notice dated 8th December 2017. They sought four substantive orders as follows:

(i) Audit and scrutiny of all declared number of registered voters in Forms 37C (Governor), Forms 37B (Governor), Form 38C (Senator), Form 35B (MP) and Form 34B (President) used in the elections in Kisii County in 129 polling stations in 2 constituencies;

(ii) Audit and scrutiny of all the statutory forms used to declare results in Forms 35B (MP), 37C (Governor), 38C (Senator) and 39C (Woman Representative) in the elections in Kisii County in 3 constituencies;

(iii) Scrutiny and recount of the votes obtained by each candidate in 13 poling stations in three constituencies; and

(iv) Scrutiny of the features of Form 37C (Governor) used to declare the results of the gubernatorial elections in Kisii County.

As is readily apparent, the first two prayers sought to establish the lack of credibility in the register of voters affecting all the six elections in the County, which we have already addressed in the first ground of appeal.

In determining the application, the learned judge noted, among other things, that on 10th October 2017 she had directed the IEBC to avail to the appellants Forms 37As, 37Bs and 37C for the gubernatorial election, which was duly done; that the other forms that the appellants wished to be scrutinized were not relevant to establish the total number of registered voters; that from the evidence already adduced, whatever errors were in the forms were transposition errors due to human error occasioned by fatigue and not the result of systemic manipulation or fraud; and that the results in form 37As were not disputed. Accordingly she ordered partial scrutiny limited to the following four polling stations, namely:

(i) Endereti Primary School stream II,

(ii) Gaitei Primary School streams I and II,

(iii) Nyantira Primary School streams I and II and

(iv) Nyachenge polling station.

The scrutiny was further limited to the counted votes for Ongwae and the runner-up candidate, Obure Christopher Mogere, as well as the rejected and spoilt ballot papers. For Nyachenge polling station where the motor vehicle transporting the ballot boxes was involved in an accident, the scrutiny was also to establish the condition of the ballot box.

The Deputy Registrar submitted her scrutiny report on 24th January 2018, which the learned judge considered in her impugned judgment. The report showed that for Endereti polling station, there were two rejected votes that ought to have been counted in

favour of Ongwae, making the correct tally as Ongwae 136 and Obure 137; for Gaitei polling station there were 3 disputed ballot papers; Nyantira polling station had one disputed ballot paper; and as for Nyachenge polling station where there was an accident, the ballot box was found to be intact with four seals, but with a crack on one side. Two votes counted for Obure were agreed to be for Ongwae, while one ballot paper counted in favour of Obure was determined to be a disputed ballot. The learned judge accordingly concluded that votes affected by errors were less than 1000 and that given the margin of victory, whatever irregularities were brought to light were sufficiently explained and could not form the basis for invalidating of the election.

Under ***section 82*** of the Elections Act and ***rule 29*** of the Elections (Parliamentary and County Elections) Rules 2017, the election court is empowered, either on its own motion or on application by any party to the petition, to order scrutiny and recount of votes for purposes of establishing the validity of the votes cast. By rule ***29(4),*** the scrutiny or recount of the votes is to be confined to the polling stations in which the results are disputed. In ***Gatirau Peter Munya v. Dickson Mwenda Kithinji*** (supra), the Supreme Court considered at length the circumstances and conditions under which scrutiny and recount of votes may be ordered. It distilled the following principles:

"[153] From the foregoing review of the emerging jurisprudence in our courts, on the right to scrutiny and recount of votes in an election petition, we would propose certain guiding principles, 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."

In short, the appellants were entitled to seek scrutiny and recount only in polling stations where the results were disputed; they were obliged to lay a basis for scrutiny and recount, either in the pleadings or in the evidence already adduced, and the trial court had to satisfy itself that in the circumstances of the petition, scrutiny and recount was really necessary. Lastly, in allowing or rejecting an application for scrutiny and recount, the trial court is exercising a judicial discretion.

In rejecting the prayer for scrutiny of the statutory forms, the learned judge noted that the purpose for which the appellants sought that scrutiny was to establish that the register of voters was not credible. She also took into account that she had already directed the IEBC to provide the parties with the statutory forms, which it had duly done. She therefore declined to allow scrutiny for that reason and the fact that such scrutiny was not necessary to establish the appellants' complaint. As we have already stated in the first ground of appeal, to establish that the register of voters was not credible required evidence about the register itself, not the figures of the registered voters entered in some of the derivative statutory forms, which were admitted to be erroneous. To that extent, we cannot fault the learned judge for refusing to order scrutiny of the statutory forms.

As regards the scrutiny and recount of the votes obtained by each candidate in 13 polling stations, the learned judge found that such scrutiny and recount was necessary in only four polling stations and only as regards Ongwae and Obure, who were the clear frontrunners, having garnered between themselves ***316,924 (78.7%)*** of the ***402,659*** votes that were cast in the Kisii gubernatorial election. She also considered that the results in Forms 37As were not disputed. As we have noted, the report of the scrutiny did not unearth any significant irregularity in the tally. Having carefully considered the learned judge's ruling on scrutiny, we are not persuaded that there is any basis upon which her conclusion can be impeached. She cited the judgment of the Supreme Court in

Gatirau Peter Munya v. Dickson Mwenda Kithinji (supra), took into account the principles set out therein, and correctly applied the same to the petition before her. We also bear in mind that in making her determination, the learned judge was exercising discretion, which we are not at liberty to interfere with, unless we are satisfied that her decision is clearly wrong because she misdirected herself, or because she considered matters she should not have considered, or failed to consider matters she should have. (See ***Matiba v. Moi & 2 Others [2008] 1 KLR 670).*** There is no evidence in that regard and the decision of the learned judge on scrutiny must therefore stand.

The next ground of appeal relates to the striking out of Lumumba's petition. The appellants contend that the learned judge erred by entertaining the application to strike out that petition; by denying them an opportunity to be heard on the application; by ignoring that Lumumba's petition was consolidated with theirs; and in any event by striking out the petition. All the respondents take umbrage at the appellants' contentions and submit that the appellants cannot validly raise issues about Lumumba's petition; that Lumumba has not appealed against the striking out of his petition; that indeed Lumumba himself admitted fundamental defects in that petition; that the appellants knowingly and consciously withdrew from the hearing of Lumumba's petition; and that consolidation did not make the appellants' petition and Lumumba's one and the same petition.

We have already set out in detail in this judgment the background to the striking out of Lumumba's petition. We shall only reiterate that when objection was taken to the form of the petition and in particular that it was inviting the court to determine matters that were extraneous to an election petition, Lumumba conceded to the defects, and applied to amend the petition, which request was turned down, leading to the striking out of the petition. Although Lumumba filed a notice of appeal against the decision to strike out the petition, he subsequently withdrew the same and at the hearing of this appeal, in which he was made a respondent, he applied and we allowed him to withdraw from the appeal, after he stressed that he was no longer interested in the dispute.

We have carefully considered this ground of appeal and we are satisfied, with respect, that the appellants cannot purport to revive Lumumba's petition in this appeal. The mere fact that Lumumba's petition was consolidated with theirs does not entitle the appellants to continue litigating over the issues raised specifically by Lumumba, long after he admitted fundamental errors in his petition and gave up his intention to challenge the order striking it out. That this ground of appeal is a desperate afterthought is laid bare by the fact that the appellants had signalled to the court on 29th November 2017 when the hearing of Lumumba's petition commenced, that they did not wish to participate in it and the court duly excused them from participating in that petition, before it was ultimately struck out.

Rule 17 of the Elections (Parliamentary and County Elections) Petition Rules, 2017 provides for consolidation of petitions in the following terms:

"Where more than one petition is lodged relating to the same election, the election court shall consolidate the petitions, and hear and determine them together."

Whether consolidation of actions results in one action or separate actions will depend on the circumstances of each case because even in consolidated suits, the court is at liberty to determine the issues separately either in the same judgment or in separate judgments. In ***Nyati Guards & Security Ltd v. Mombasa Municipal Council, HCCC No 992 of 1994, Maraga, J.*** (as he then was) explained that the main purpose of consolidation is to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one. And in ***Law Society of Kenya v. The Centre for Human Rights and Democracy, SC. Pet. No. 14 of 2013***, the Supreme Court explained that:

"The essence of consolidation is to facilitate the efficient and expeditious disposal of disputes, and to provide a framework for a fair and impartial dispensation of justice to the parties. Consolidation was never meant to confer any undue advantage upon the party that seeks it, nor was it intended to occasion any disadvantage towards the party that opposes it."

Even after consolidating the two petitions, the learned judge directed each to be heard on different dates, with the parties in each petition calling their witnesses and addressing the issues raised therein separately. As we have already noted, by their own volition the appellants elected not to participate in Lumumba's petition even before it was struck out. In these circumstances, we are not persuaded that they are at liberty to resurrect issues in a petition that was struck out without their participation and in which they had consciously elected not to participate. In the same vein they cannot be heard to claim that they were denied the opportunity to be heard on the application to strike out Lumumba's petition. This ground of appeal is totally bereft of merit.

We now turn to the ground of appeal on recusal of the learned judge. The appellants contend, firstly that the learned judge erred by

dismissing Lumumba's application for her recusal and secondly by failing to disclose to them the information that led Lumumba to apply for her recusal, presumably because it would have enabled them make a similar application. Having concluded that the appellants cannot validly raise issues, which were specific to Lumumba's petition, we do not deem it necessary to venture into whether or not the learned judge erred in her ruling dated 19th October 2017 in Lumumba's petition, by which she refused to recuse herself from that petition.

As regards the disclosure that the appellants claim the learned judge failed to make, it was simply that the learned judge's spouse had contested the Nakuru County senatorial seat on an ODM party ticket and lost. The nexus between the learned judge and Ongwae was to say the least rather tenuous, being only that the learned judge's spouse and Ongwae had contested on ODM party tickets, not only for different seats but also in different counties.

The records of proceedings for both Lumumba's and the appellants' petitions show that both petitions were before the learned judge on 28th September 2017 for directions when she informed the parties that her spouse had contested in the elections but lost. That's what prompted Lumumba to make the application for her recusal, whilst the appellants did not make any similar application. A reading of the ruling by the learned judge dated 19th October 2017 by which she declined to recuse herself, leaves no doubt that the appellants' advocates were present when the learned judge informed the parties about her spouse's unsuccessful dalliance in politics. This is what the learned judge stated in the ruling:

"When this matter alongside other election petitions in Kisii came up for directions on 28/9/2017, I called all counsel who were present in my Chambers and informed them that my spouse had been an ODM senatorial candidate in both 2013 and 2017 in the general election in Nakuru." (Emphasis added).

The record therefore does not bear out the appellant's claim that the learned judge made the disclosure to Lumumba only and not to them.

Secondly, even assuming that the learned judge did not make the disclosure to the appellants, which the record contradicts, we do not see how the appellants' intended application for the recusal of the learned judge could have had a different outcome from Lumumba's, based on the same information. For our part, we are satisfied that the mere fact of the learned judge's spouse having contested a different election in a different County on an ODM party ticket, of itself could not have been a valid ground for her recusal from hearing the Kisii gubernatorial election petition.

In ***RFS v. JDS, CA. No. 288 of 2011***, this Court decried spurious applications for recusal of judges, when it stated:

"It is not and never has been the law that at the slightest expression of apprehension or doubt by a party as to whether he or she will get a fair trial judges must perforce cower, recoil and recuse themselves. Such a proposition could well surrender the ability of judicial officers to adjudicate cases to the fickle whims of litigants. The law is and must necessarily be that the recusal of Judges must be subject to clearly established principles and he who asserts a fear must place it beyond mere feeling and locate it on facts or factors that render his apprehensions reasonable. It is a function of sound decision and not mere whim or caprice."

The test whether a judge should recuse himself or herself is an objective test of whether there is reasonable apprehension of bias. In ***Attorney General of Kenya v. Prof. Anyang Nyong'o & 10 Others, EACJ App. No. 5 of 2007***, the East Africa Court of Justice propounded the test as follows:

"We think that the objective test of "reasonable apprehension of bias" is good law. The test is stated variously, but amounts to this: do the circumstances give rise to a reasonable apprehension, in the mind of the reasonable, fair minded and informed member of the public that the judge did not (will not) apply his mind to the case impartially. Needless to say, (a) litigant who seeks disqualification of a judge comes to court because of his own perception that there is appearance of bias on the part of the judge. The court however, has to envisage what would be the perception of a member of the public who is not only reasonable but also fair minded and informed about all the circumstances of the case."

(See also ***Kalpana H. Rawal v. Judicial Service Commission & 2 Others [2015] eKLR***).

We are satisfied that there were no grounds upon which a reasonable person could, on the mere fact that the judge's spouse had contested the Nakuru senatorial seat on an ODM ticket and lost, concluded that she would be biased in favour of Ongwae because

he had also contested the Kisii gubernatorial seat on an ODM ticket. We reject this ground of appeal also

The last issue in this appeal is whether the learned judge erred by misinterpreting and misapplying constitutional and electoral law principles on the credibility and integrity of elections. Section 83 of the Elections Act provides as follows:

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

The Supreme Court considered at great length the application of the above provision in ***Raila Amolo Odinga & Another v. IEBC & Others*** (supra) and the circumstances under which an election may be nullified for failure to adhere to provisions of the Constitution and the law or on account of irregularities. It concluded that due to the use of the word "or" instead of the word "and", the provision must be read disjunctively. However, the Supreme Court was equally clear that notwithstanding the disjunctive application of the provision, not every breach of the Constitution or the law, however trivial, would justify nullification of an election. The Court rendered itself thus:

"[209] Therefore, while we agree with the two Lord Justices in the Morgan v. Simpson case that the two limbs should be applied disjunctively, we would, on our part, not take Lord Stephenson's route that even trivial breaches of the law should void an election. That is not realistic. It is a global truism that no conduct of any election can be perfect. We will also go a step further and add that even though the word 'substantially' is not in our section, we would infer it in the words 'if it appears' in that section. That expression in our view requires that, before vitiating it, the court should, looking at the conduct of the whole election, be satisfied that it substantially breached the principles in the Constitution, the Elections Act and other electoral law. To be voided under the first limb, the election should be what Lord Stephenson called 'a sham or travesty of an election' or what Prof. Ekirikubinza refers to as 'a spurious imitation of what elections should be'. " (Emphasis added).

Looking at the manner in which the gubernatorial election for Kisii County was conducted as a whole, we do not, just like the trial judge, find any substantial breach of the Constitution or the law that would have justified nullification of the election of Ongwae. By no stretch of imagination can the election be described as a sham, spurious or travesty of an election. The rather huge margin by which Ongwae beat his closet rival, of ***95,404*** votes is in our view, not the product of any electoral fraud or irregularity but a clear expression of the will of the voters of Kisii County regarding their governor.

Ultimately, we have come to the conclusion that this appeal has no merit and we dismiss the same in its entirety. The appellants shall pay costs capped at ***Kshs. 1,000,000.00*** jointly to the IEBC and Namulungu and costs capped at ***Kshs 1,000,000.00*** each to Ongwae, Maangi and Orina. It is so ordered.

Dated and delivered at Kisumu this 26th day of July, 2018

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

....

JUDGE OF APPEAL

K. M'INOTI

....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR

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