Case Number:	Election Petition 1 of 2017
Date Delivered:	09 Nov 2017
Case Class:	Civil
Court:	High Court at Embu
Case Action:	Ruling
Judge:	William Musya Musyoka
Citation:	Lenny Maxwell Kivuti v Independent Electoral and Boundaries Commission (IEBC) & 3 others [2017] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Constitutional and Human Rights
History Magistrates:	-
County:	Embu
Docket Number:	-
History Docket Number:	-
Case Outcome:	Application dismissed
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

ELECTION PETITION NO. 1 OF 2017

IN THE MATTER OF THE CHALLENGE OF THE VALIDITY OF THE EMBU COUNTY GOVERNOR ELECTION, 2017

LENNY MAXWELL KIVUTI.....
.....PETITIONER

VERSUS

THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (IEBC).....1ST RESPONDENT

THE EMBU COUNTY RETURNING OFFICER.....2ND RESPONDENT

MARTIN NYAGA WAMBORA.....3RD RESPONDENT

DAVID KARIUKI.....
.....4TH RESPONDENT

RULING

1. The application I am called upon to determine is a Motion dated 31st October 2017. It seeks two principal orders: the striking out of the petition herein and a finding that the petitioner, Lenny Maxwell Kivuti, committed election offences. There is a further prayer that upon the finding that election offences were committed by the petitioner I should direct that appropriate steps be taken with respect thereto. The grounds upon which the Motion are premised are set out on the face of the application, and the facts deposed in the affidavit of the applicant, the 3rd respondent herein, Martin Nyaga Wambora, sworn on 31st October 2017. From the grounds set out on the face of the application, the 3rd respondent anchors the Motion on the events that ensued after grant of orders by this court on the 28th and 31st days of August 2017. It is pleaded that the petitioner abused those orders by interfering with electoral materials in the course of executing the said orders. It is also averred that the petitioner concealed from the other parties the orders made on 30th August 2017. It is submitted that the effect of the interference was erosion of the integrity of the electoral materials and ballot boxes, and the court is urged not to allow the petitioner to benefit from abuse of the court process or to steal a march over the other parties.

2. In the supporting affidavit, the 3rd respondent gives a factual background to the application. He states that the petition herein was filed on 25th August 2017, simultaneously with an application seeking preservation of the electoral materials the subject of the petition. Orders were granted on 28th August 2017 allowing the petitioner to fix his seals on his ballot boxes and his own locking gadgets to the rooms or premises where the election materials were stored. The orders were to remain in force until *inter partes* hearing on 20th September 2017. There was a direction as to service of the application and the orders on the respondents. The petitioner followed up that application with another filed on 30th August 2017, upon which orders were made on 31st August 2017 directing the Embu County Commissioner to

provide security for the fixing of seals and locks as ordered on 28th August 2017, that the 3rd and 4th respondents be represented by their lawyers and agents during the exercise and that the petitioner, the 3rd and 4th respondents and their supporters do stay away .from the exercise. The 3rd respondent's case is that he was not served with the orders made on 28th and 30th August 2017, and the applications upon which they were made, and therefore he did not participate in the fixing of seals on ballot boxes and locks on the rooms by the petitioner. He also expresses misgivings as to whether the 2nd respondent had been properly served with the said orders and applications. He complains that the petitioner, through his agents, moved ballot boxes in his absence. He states that there was interference with the electoral materials which compromised their integrity. He states that election offences were committed in the process. He would like the petition struck out on those grounds. To the supporting affidavit, the 3rd respondent has attached several annexures to support his case. There are copies of the formal orders extracted from the orders made on 28th August and 31st August 2017, dated 30th August 2017 and 1st September 2017, respectively. There is copy of the affidavit sworn by Daniel Njue Kamunda on 19th September 2017, wherein he details steps taken to comply with the orders dated 30th August 2017 and 1st September 2017. There is copy of another affidavit by Daniel Njue Kamunda sworn on 27th October 2017, dwelling on the execution of orders that the court had made on 16th October 2017. There are also two other materials that are not germane to determination of the matter now before me.

3. The application has been responded to by the petitioner and the 1st and 2nd respondents.

4. The petitioner's affidavit in reply was sworn on 2nd November 2017. He denies that he interfered with electoral materials used in the gubernatorial elections, asserting that he fully complied with the orders issued by the court. He explains that he obtained orders on 28th August 2017 to affix seals on ballot boxes and to place his locks on the rooms where the materials are stored, and another on 29th August 2017, and not 30th August 2017, to correct errors in the formal order extracted from the orders of 28th August 2017. He asserts that the respondents were served with the petition and the orders as detailed in the affidavits of Daniel Njue Kamunda. He states that the exercise of placing seals on ballot boxes and locks on the rooms stopped when it was realised that the 3rd and 4th respondents were not present. He states he was present when the 2nd respondent was served with the orders and when he discussed with his advocates on execution thereof. He avers that the orders were executed in the presence of the agents or representatives of the 1st respondent, and asserts that he could not possibly have interfered with the materials in their presence. To support his case, he has attached to his affidavit the orders made in the matter, and which are the subject of these proceedings, as well as the affidavit of Mr Kamunda which details how the said orders were enforced.

5. For the 1st and 2nd respondents, two affidavits were sworn by Daniel Lenarum and Faith Mugo, on 2nd November 2017. The two persons are the returning officers responsible for Embu County and Manyatta Constituency, respectively. Daniel Lenarum is named in the petition as 2nd respondent. In his affidavit he states the duties and role of the 1st respondent with respect to election materials after declaration of results. He states that the 1st and 2nd respondents complied with the court orders by letting the petitioner affix his seals on the ballot boxes and secure the premises with his own locks. He alludes to the reports of interference made in the 3rd respondent's affidavits, but he states no position as to the veracity of the allegations, save to say that when the materials were received from the polling stations they were in good condition and that there were no complaints whatsoever received with regard to them. The affidavit of Faith Mugo is in similar vein, save that she complains that the exercise of affixing seals and locks extended in one case beyond 10.00pm.

6. Although directions had not been given on filing of written submissions, the petitioner and the 3rd respondent did file written submissions, complete with the authorities that they relied on. The 1st and 2nd respondents have not filed any.

7. In his written submissions, the 3rd respondent submits that the petition on record ought to be struck out on account of abuse of the court process. He breaks the same into subthemes, lack of jurisdiction by the court to make the orders that the petitioner is alleged to have abused and improper execution of the said court orders. On the first limb, it is submitted that the orders made on 28th and 30th August 2017, which the petitioner is alleged to have abused, were made without jurisdiction, and therefore in abuse of the court process. The primary argument being that the Judge who made those orders, Muchemi J, had no jurisdiction over the matter as Her Ladyship had not been gazetted to handle the petition. It is submitted that the proceedings conducted with regard to election disputes are neither civil nor criminal, they are *sui generis* or a special jurisdiction bestowed upon the court by the Elections Act, No 24 of 2011, through section 75 thereof. Rule 6 of the Elections (Parliamentary and County Elections) Petitions Rules, which are made under section 96 of the Elections Act, provides for the constitution of an election court, by the Chief Justice through a a notice in the *Kenya Gazette*. It is pleaded that the Chief Justice constituted the election court in this matter by a notice appearing in the *Kenya Gazette* of 15th September 2017. It is therefore argued that the court which made the orders in question had not been properly constituted, it had no jurisdiction over the matter, the orders it made were null and void *ab initio*, and therefore the proceedings herein have been so irredeemably polluted by breach of the purity of the process, and the petition herein has become untenable and a nullity. To support the first limb, the 3rd respondent has cited several authorities. The decision in the *Owners of the Motor Vessel 'Lillian S' vs. Caltex Oil (Kenya) Ltd* (1989) KLR 1 deals with jurisdiction, and states that where a court seized of a matter should down its tools the moment it forms the opinion that it has no jurisdiction, and should it proceed with the matter without jurisdiction its decision in the end would amount to nothing. In *Joseph Oyugi Magwanga & Another vs. Independent Electoral and Boundaries Commission & 3 others* (2017) eKLR the court held that jurisdiction over an election petition flows, by virtue of Rule 6 of the Elections (Parliamentary and County Elections) Petitions Rules, from the gazettement by the Chief Justice of a particular Judge to preside over an election court, and that prior to that no Judge would have jurisdiction to deal with any matter touching on an election petition and any such proceedings, conducted prior to the gazettement of the election court, would be a nullity for want of jurisdiction. On the second limb, it is submitted that the petitioner while executing the orders that he had obtained in abuse of the court process, compounded that abuse by executing them in a manner that completely eroded the sustainability of his petition. It is alleged that the orders were executed by the petitioner in the absence of the other parties and that there was tampering with ballot boxes. He cites a decision of an American court, *Henderson vs. Maley* (1991) OK 8, where recount was declined upon evidence of inadequate preservation of electoral materials.

8. In response, the petitioner addresses only one issue in his written submissions, whether the petition should be struck out or not. He argues that striking out of pleadings is a draconian measure; it is a remedy not available at the whim of any party. He cites the decision in *Ismail Suleman & 9 others vs. Returning Officer Isiolo County Independent Electoral and Boundaries Commission & 4 others* (2013) eKLR, where it was stated that striking of a suit should be only in very clear and plain cases and the step should only be taken sparingly and generally the court ought to proceed with caution. That position is also stated in *Hosea Mundui Kiplagat vs. Sammy Komen Mwaita & 2 others* (2013) eKLR and *DT Dobie & Company (Kenya) Limited vs. Muchina* (1982) KLR 1. He submits that the issues raised by the 3rd respondent are issues that should be dealt with in the context of the scrutiny and recount sought in his petition.

9. The Motion was argued orally before me on 3rd November 2017. Mr Marete urged the case for the 3rd respondent. He largely highlighted and reiterated the arguments made in the 3rd respondents written submissions. Prof. Ojienda argued the case for the petitioner, and he too highlighted and reiterated the arguments made in the petitioner's written submissions. Mr. Marete stated that the petition was essentially for scrutiny and recount of the votes cast, and it was imperative that the same be preserved

as they were after declaration of results. He submitted that scrutiny and recount were not attainable as the electoral materials had since been tampered with by the petitioner. He submitted that the conduct of the petitioner and the nullity of the orders upon which he acted eroded the petition irredeemably and undermined the credibility of the whole process and the equality of the parties to arms. His position was supported by Mrs Rugaita, who reiterated his arguments. Mr Kibicho stated that the 1st and 2nd respondent supported the motion to strike out the petition. He submitted that the first and 2nd respondents had complied with the court orders impugned by preserving the materials, added that the issues raised by the 3rd respondent ought not to be wished away. He stated that the sanctity of the ballot boxes could not be guaranteed, and therefore the court risks engaging in an academic exercise by hearing the petition and ordering scrutiny. Prof. Ojienda opposed the application. He submitted that the said application is largely founded on a report that is not annexed to any affidavit, and which can only be put in evidence by way of a full trial. He asserted that no evidence has been led on it, and therefore it cannot be relied on, and the court was being invited to strike out the suit on untested evidence. he argued that the only report that the court ought to rely on is one prepared by the Deputy Registrar following scrutiny should the court order the same, for it would be during scrutiny that the electoral materials would be forensically audited to test their integrity.

10. The petition herein was filed on 25th August 2017. Contemporaneously filed with it was a Motion of even date brought under certificate of urgency. The matter was placed before Muchemi J. on 28th August 2017, who made orders for preservation of the electoral materials, and allowed the petitioner to place his own seals on the ballot boxes and locks on the rooms where the materials are stored. The said orders were expressed to last pending hearing and determination of the application *inter partes*. It was directed that the application and the orders be served on the respondents.

11. Further orders were made by Muchemi J. on 31st August 2017 on an application dated 30th August 2017, to the effect that –

'1) That County Commissioner, Embu, under whose jurisdiction the electoral materials are kept by the 1st and 2nd respondents, do provide security for the fixing of seals and locks as ordered earlier in sub-counties named in this application.

2) that the applicant, the 3rd and 4th respondents be represented in the exercise by their lawyers and two agents in each sub-county storage facilities.

3) that the applicant, the 3rd respondent and 4th respondent will not participate in the exercise personally and should keep off their supporters from the exercise and from the premises in question.

4) the 2nd respondent to file a report on the exercise in court and on the compliance within seven (7) days.'

12. The Motion for determination turns on the two sets of orders above. They are challenged on two grounds. The first is that Muchemi J. had no jurisdiction to make those orders, and therefore they are null and void; while the second is that the said orders were executed by the petitioner in a manner that amounted to tampering or interfering with the electoral materials, thereby making nonsense of their integrity. The fact that the orders are null and void and were executed in manner that tainted the purity of the materials amounted, it is pleaded, to abuse of court process, the overall effect of which is to render the petition a nullity, which should be struck out. I will deal with the two issues sequentially, starting with the question of jurisdiction.

13. The jurisdiction to hear and determine electoral disputes is *sui generis* or a special one. Although the

same is civil in nature, it is governed by its own processes, which are saved by section 3 of the Civil Procedure Act, Cap 21, Laws of Kenya, which states as follows:-

'In the absence of any specific provision to the contrary, nothing in this Act shall limit or otherwise affect any special jurisdiction or power conferred, or any special form or procedure prescribed, by or under other law for the time being in force.'

14. For the purposes of this case, the special jurisdiction over electoral disputes is conferred on the courts by the Elections Act and the rules made thereunder. Jurisdiction is vested through section 75(1)(1A) thereof, which states that –

'(1) A question as to validity of an election of a county governor shall be determined by the High Court within the county or nearest to the county.

(1A) A question as to the validity of the election of a member of a county assembly shall be heard and determined by the Resident Magistrate's Court designated by the Chief Justice. '

15. This provision should be read together with Rule 6 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017, which provides for constitution of an election court, which states as follows –

'6(1) An election court shall be properly constituted to hear and determine –

(a) a petition in respect of an election of a member of Parliament or to the office of governor, if it is composed of one High Court Judge; or

(b) a petition in respect of an election of a member of a county assembly, if it is composed of a Resident Magistrate designated by the Chief Justice under section 75 of the Act.

(2) The Chief Justice may –

(a) in consultation with the Principal Judge of the High Court, designate judges for the purposes of sub-rule (1)(a); and

(b) designate magistrates for the purposes of sub rule (1) (b), as may be required.

(3) The Chief Justice shall publish the name of the Judges and Magistrates designated under sub-rule (2) in the Gazette and in at least one newspaper of national circulation.'

16. The Chief Justice gazetted the judges and magistrates designated to hear and determine electoral disputes on 15th September 2017. The question then that arises is what would be the fate of orders that might have been made before judges were designated by the Chief Justice to hear the petitions.

17. My reading of the provisions in section 75(1) (1A) of the Elections Act and Rule 6 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 is that the jurisdiction of a High Court Judge to hear and determine an election petition for governor does not derive from his designation by the Chief Justice for that purpose and publication of that designation in *the Kenya Gazette* and in a newspaper of national circulation. The primary provision is section 75 of the Elections Act. Whereas that provision mandates the Chief Justice to designate the magistrates to hear and determine election petitions, it confers no such mandate on him with respect to the High Court judges. The effect of this is that a High

Court Judge does not have to be designated by the Chief justice to hear an election petition in respect of a gubernatorial election. Under section 75(1) the High Court has jurisdiction over election petitions with respect to the election of a governor within the county where the High Court station is located or of the nearest county. However, for the magistrates, there is no jurisdiction to hear and determine election petitions unless and until the magistrate is designated by the Chief Justice as per section 75(1A) of the Elections Act. The jurisdiction of a High Court Judge to hear petitions in respect of gubernatorial elections flows directly from section 75(1) of the Elections Act, and not from the edict of the Chief Justice. The designation by the Chief Justice and gazettement thereof envisaged in Rule 6 merely amounts to allocation of the matter to a particular Judge to hear it.

18. The question of the Chief Justice designating High Court Judges to hear and determine validity of the election of a governor arises from subsidiary legislation, and not the main legislation. Rule 6(1) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 does reiterate the provisions in section 75(1)(1A) of the Elections Act, but then goes on at sub rule (2) to give power to the Chief Justice to designate High Court Judges to hear election petitions. It should be of note that sub rule (2) uses the permissive 'may.' The effect is that the matter is at the discretion of the Chief Justice. He may or may not designate High Court Judges in that regard. If he chooses not to designate them to hear any particular election petitions, then it should follow that the petitions shall be allocated to the Judges in the normal course of the court's business. If he does exercise the discretion to make designations, then the petitions should be heard by the Judges so designated. The bottom line is that the Chief Justice does not have to make any designations as they are not required by section 75(1) of the parent Act. However, once he chooses to make the designations, whether of High Court Judges or of magistrates, he should cause the fact to be publicised in the manner envisaged by Rule 6(3) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017. In my very humble view, the provisions in Rule 6(2) (a) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 do not and cannot take away the jurisdiction conferred upon the Judge of the High Court by section 75(1) of the Elections Act.

19. The conclusion to be drawn from the examination of the above provisions is that Muchemi J. had jurisdiction to make the orders made on 28th and 31st August 2017 by dint of the provisions of section 75(1) of the Elections Act, and Rule 6(1) (a) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017, for she derived her jurisdiction not from gazettement by the Chief Justice, but rather directly from section 75 of the Elections Act. Once an election petition challenging the validity of election of a governor is properly filed in accordance with the Constitution and statute, any Judge of a High Court station within the county where the petition is filed or the nearest county has jurisdiction, by dint of section 75 of the Elections Act, to handle the matter. The orders made were and are therefore valid and subsisting. There was no abuse of process whatsoever in the making of the said orders.

20. My attention has been drawn to the decision in *Joseph Oyugi Magwanga & Another vs. Independent Electoral and Boundaries Commission & 3 others*, which is by a court of concurrent jurisdiction. With respect, I do not agree with it. The same was founded on the provisions of the subsidiary legislation, and the provisions of the parent legislation were not adverted to. Perhaps, if the attention of the court had been drawn to section 75(1) of the Elections Act the court would no doubt have arrived at a different conclusion.

21. Even if I were wrong, and I believe that I am not, the High Court still has inherent jurisdiction, which has not and cannot be taken away by subsidiary legislation, such as Rule 6 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017. There is also Article 159(2) (d) of the Constitution; the court is enjoined to do substantive justice to the parties expeditiously and without undue regard to technicalities. Article 50 of the Constitution is also relevant, the right of parties to a fair hearing. It would be manifestly unjust to say that a party would be without remedy in the period between when the

petition is lodged in court and when the Chief Justice designates judges to hear the matter and causes publication of that designation. The law abhors a void. The parties are entitled to a remedy within that period. It should not be countenanced that the High Court would fold its arms and declare that it has no jurisdiction and direct the parties to wait until the Chief Justice acts under Rule 6(2)(a) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017.

22. The second question that I should address is whether the orders impugned were executed improperly to the extent of tampering with electoral materials, and, should I find that that was so, whether the petition herein should be struck out for that reason.

23. The 3rd respondent's case is that after the court made the impugned orders, the petitioner embarked on executing them in the absence of the other parties, and in the process tampered with the electoral materials. The basis of his assertions on the interference with the electoral materials is on a document filed herein on 24th October 2017 titled 'The 3rd and 4th Respondents Joint Report.' It is dated 24th October 2017, and is signed by Martin Ireri Njue, Kenneth Gitonga Nyaga, Jacob Gititi, Sammy Njeru and Jane Mugambi. It was allegedly made pursuant to orders that I had made herein on 16th October 2017 which concerned the retrieval of KIEMS kits, the fixing of seals on ballot boxes and placing of locks on the rooms where the materials are stored. The report deals with what transpired during execution of the orders of 16th October 2017, and the observations that the 3rd and 4th respondents, or their agents, made during the exercise. It indicates that they inspected ballot boxes and made observations, and took photographs to support what was observed.

24. I note that the 3rd respondent himself was not party to execution of the order of 16th October 2017; he had been barred from it by order, and the exercise was therefore undertaken by his agents, which means that the observations made in the report are those by the said agents. I note too that the said report is not annexed to the affidavit of the 3rd respondent. Indeed, it was filed in court separately and on a different date. It was lodged in court on 24th October 2017 and the application followed on 1st November 2017.

25. The said report purports to have been made pursuant to my order of 16th October 2017, but it is not indicated under what circumstances the same was lodged in court. The orders made in the ruling I delivered on 16th October 2017 did not direct the parties to prepare and file reports in court. In the proceedings that led up to the orders of 16th October 2017, the respondents had sought to have the court direct its Deputy Registrar to supervise the retrieval of the KIEMS kits, sealing of ballot boxes and fixing of locks on the rooms where the materials are stored, and to have him thereafter file a report on the state that he would have observed the electoral materials to have been in at the time of the proposed exercise. I declined to have the Deputy Registrar involved in that exercise and to file the report sought; instead I left it open to the respondents to prepare such reports as they pleased to be used by them as they pleased. There was therefore no order that once the respondents were pleased to prepare reports, and did indeed prepare reports, that the same were to be filed in court thereafter.

26. This raises questions as to the propriety of the filing of the report upon which the Motion dated 31st October 2017 is mounted. The said report is neither a pleading nor an application, and therefore it could not be placed on record without leave of court. I have scrupulously perused the court record and I have not encountered any application having made by the 3rd respondent to have that report placed on record, neither is there any order allowing the filing of the said report. At the hearing of the Motion dated 31st October 2017, the 3rd respondent did not ask the court to have the report admitted on the record. Documents of the nature of the said report can only be lodged in court with the leave of court. Consequently, the said report was lodged irregularly and certainly it cannot form basis for the mounting of an application of the nature of the Motion before me.

27. The material set out in the report is of evidential nature. The facts set out therein, including the photographic materials, form the foundation of the claim by the 3rd respondent that there was interference with the electoral materials. For the court to rely on that material as evidence the same must be placed before the court in the prescribed manner. If the party who seeks to rely on them brings an interlocutory application founded on them, then the said materials ought to be introduced to the record by way of an affidavit, where they are attached as annextures duly commissioned in accordance with the rules of evidence and procedure. If it is proposed to rely on them at the hearing of the main suit, then the document ought to be introduced by witnesses properly sworn. The court in this application is being invited to look at and rely on evidence that has not been subjected to an oath, for the report has not been introduced herein by a sworn witness nor is it introduced on the record as an annexture to an affidavit duly sworn by the person wishing to rely on the contents of the report. I cannot therefore place any reliance whatsoever on the said report in the circumstances. That report is of no probative value unless and until it is properly placed on record.

28. I have read through the affidavit of the 3rd respondent sworn in support of the application, and it is quite clear that he has no other evidence outside of the report to support his application for the orders sought.

29. Storage of electoral materials is the function of the 1st respondent, who should therefore have a say on matters that touch on the integrity of the electoral materials at the time when they are under its custody. The 1st respondent has responded to the Motion through the two affidavits sworn by its two officers, the 2nd respondent and Faith Mugo. I have read and reread the two affidavits. In both affidavits, the deponents acknowledge receipt of the order by Muchemi J., which they depose they complied with, by letting the petitioner, through agents, have access to the 1st respondent's warehouses to affix his seals on the ballot boxes, and thereafter to place his locks on the premises. They depose that the petitioner did have access, fixed his seals on the ballot boxes and thereafter sealed the premises. The two have not deposed to the petitioner or his agents doing anything that amounted to tampering or interfering with the ballot boxes. Indeed, they do not aver on anything touching on the state of the materials after the exercise which followed the execution of the order of Muchemi J. nor any observations that they had made of the materials during the exercises that I ordered on 16th October 2017. The only complaint made is that the exercise to enforce the orders of Muchemi J. went on well into the night on one occasion despite their protests.

30. The averments in the affidavits of the 2nd respondent and Faith Mugo are not in sync with the sentiments that were expressed by their advocate, Mr. Kibicho, during argument of the application. The said affidavits do not support the case that there was interference with the electoral materials by the petitioner and that he committed election offences in the process. I find it to be a matter of some significance that the custodians of the electoral materials have not in their affidavits alluded to any interference or tampering with or damage of electoral materials, and have not suggested that anyone ought to be pursued for election offences relating to such interference. To my mind the Motion dated 31st October 2017 ought ideally to have been brought at the instance of the 1st respondent as custodian of the electoral materials, saying that the electoral materials under its custody had been interfered with by the petitioner, and urging the court to sanction the offender. The fact that the affidavits of the officers of the 1st respondent are silent on this is, to me, telling.

31. So were the electoral materials interfered or tampered with, or even destroyed" And if so, was it the petitioner who is responsible therefor" I find myself unable to answer these questions one way or the other, given that the material before me is insufficient in that regard. I have a report that has not been properly placed on record, and which, in any event, cannot be of any probative value at this stage, and affidavits by custodians of the electoral materials who do not make any averments to support the case

that such interference or tampering with or damage to the electoral materials that are supposed to be under their care and custody occurred. So at this interlocutory stage, no sufficient material has been placed before me to support the case that the petitioner tampered with or destroyed electoral materials in the custody of the 1st respondent.

32. There were submissions regarding the affidavits sworn by Mr Kamunda, who is one of the advocates of the petitioner, and who was involved in the execution of the orders made by Muchemi J. and of the orders I made on 16th October 2017. It was submitted that there were contradictions and inconsistencies in what he averred in the two affidavits, suggesting that that there must have been something untoward that happened during the execution of the orders made by Muchemi J., and suggesting that the latter affidavit was not candid to the extent that it said that there were no broken or empty ballot boxes. Whether there are inconsistencies or contradictions in the averments in the two affidavits sworn by Mr. Kamunda, in my view, is not fatal to the petition. The whole issue about execution of the orders made by Muchemi J. should be a matter that ought to be dealt with at the full trial, together with the facts contained in the report upon which the Motion the subject of this ruling is premised. The averments in the said affidavits and the contents of the said report are all allegations of fact that should be subjected to testing by having the deponent of the affidavits and the makers of the report put on the witness box and subjected to cross-examination.

33. The 3rd respondent cited the decision in *Henderson vs. Maley* to support his case that where it is established that the preservation of the materials was inadequate the court ought to decline a recount. I have read through the judgement in that decision; the trial court had declined a recount after it had taken evidence relating to preservation of the electoral materials. In this case, evidence is yet to be adduced to establish whether or not there was adequate preservation of the materials. I reiterate what I have said here above in paragraphs 25, 26, 27, 29 and 30, that the report the 3rd respondent is relying on is not properly on record, and it is therefore of no probative value at this stage, while the affidavits of the officers of the 1st respondent, the custodian of the electoral materials, have not pointed to any interference or tampering with the electoral materials in their custody. It is only after evidence is taken from the officers of the 1st respondent about how they went about preserving the materials, and from the other parties on what might have been done to the materials, that the principle stated in *Henderson vs. Maley* would apply. For now it would be premature to subject the petition before me to *Henderson vs. Maley.* In any event, the petitioner has not yet laid basis for a recount. He is yet to take the witness stand and to place material before me for me to assess whether I should allow the recount or scrutiny or not. It should be after that that the 1st and 2nd respondents would table evidence of the steps that they took to preserve the election materials, and the 3rd and 4th respondents would adduce their evidence on tampering with those materials. It is only after that that I can be invited to test the evidence on preservation of the electoral materials against the principles in *Henderson vs. Maley*.

34. The Motion before me is for the striking out of the petition. There is ample authority on the principles that govern striking out of pleadings. Some of those authorities are set out in paragraph 8 hereof. It is common ground that striking out is a drastic measure to be taken only in plain and obvious cases. Usually pleadings would be struck out based purely on the pleadings, where the argument would be that the pleadings on their face do not disclose any cause of action or do not bring out any dispute for the court to resolve or are deficient in some manner, say due lack of competence because they were filed out of time or before a tribunal without jurisdiction.

35. The 3rd respondent has not hinged his application on the matters that I have set out above, but on abuse of the process of the court. He cited the decision of the Court of Appeal in *Tana and Athi Rivers Development Authority vs. Jeremiah Mbogho Mwakio & 3 others* (2015) eKLR, where, while relying with approval on the decisions in *Beinosi vs. Wiyley* (1973) SA 721 (SCA) and *Muchanga Investments Ltd vs.*

Safaris Unlimited (Africa) Ltd & 2 others (2009) eKLR, it was said abuse of process of court would occur in cases where the proceedings permitted by the rules of the court to facilitate pursuit of the truth are used for purposes extraneous to that objective. The appeal in that case arose from entry of an *ex parte* judgement by the superior court against the appellant. The appellant had filed a defence which did not disclose pertinent particulars, so the plaintiff had sought further and better particulars. The appellant did not address the request. The plaintiff obtained an order for supply of the particulars and served it on the appellant, who, despite service, did not comply with the order. The plaintiff then successfully applied for striking out of the defence and entry of judgement, leading up to the appeal. It was said that there was abuse of process in that case by the appellant in falling to supply particulars of defence despite request and service of a court order, on the basis that failure to act was intended to abuse the process by occasioning delay.

36. It has been underscored in the cases cited above that striking out of pleadings is permissible only in clear, plain, straightforward and obvious cases. That would mean that one need not adduce extrinsic evidence to establish a case for striking out. The material that the court would require to making a finding as to whether striking out ought to ordered should be in the record before it, the pleadings and the proceedings. The court would be looking for deficiencies in the pleadings: whether they disclose a cause of action or were initiated purely to vex a party and therefore abuse the court process or were filed without jurisdiction. All these would emerge from the pleadings themselves. Abuse of process is often detected in the record of the proceedings, such as the case in *Tana and Athi Rivers Development Authority vs. Jeremiah Mbogho Mwakio & 3 others,* where the appellant abused process by failing to respond to a request for particulars. Those would be cases that are plain and obvious from looking at the face of the record.

37. Cases where evidence outside of the court record is necessary to establish a deficiency in the pleadings or to demonstrate that the pleadings are vexatious or that the court process has been abused are not suitable for striking out of pleadings as such cases are not plain nor obvious nor straightforward for if they were then no evidence outside of the court record would be necessary. In most cases, striking out of pleadings can be achieved without the filing any formal application, by a party simply raising and arguing a preliminary point of law, as usually little or no evidence is required to establish it. Where substantial evidence will be necessary to establish it, then it would go without saying that that case would not be suitable for striking out. In the present case, the 3rd respondent is not relying solely on the record to demonstrate his case for striking out; he is relying on extraneous evidence. It cannot be said that the case herein for striking out is plain and obvious to the extent that the 3rd respondent has to collect evidential material outside the record to file in court to support that plea.

38. The 3rd respondent invited me to find that the petitioner, or his agents, had committed election offences. Election offences are criminal in nature, and before the court recommends any person for prosecution for such offences basis must be laid. The standard of proof in criminal cases is beyond reasonable doubt. The material upon which I should recommend prosecution must be of such nature as to demonstrate to me beyond doubt that those offences were committed by the persons sought to be cited. I do not think that I have before me any material upon which I can make such a recommendation. I have already ruled that the report that the 3rd respondent relies on herein is not properly on record. In criminal cases due process must be followed, for the outcome of such cases often has serious ramifications on a person's liberty and property. The material upon which prosecution is sought must therefore be placed on record properly and in accordance with the law. Secondly, the recommendation for prosecution cannot be obtained on the basis of interlocutory proceedings. A full trial must be conducted where all the evidence implicating the persons in question is tendered and the said persons are accorded the opportunity to cross-examine the persons making the allegations against them. That has not been done in this case.

39. I need not say more. The Motion dated 31st October 2017 is without merit. I shall accordingly, and I hereby do, dismiss the same with costs. I reiterate the order that I made on 1st November 2017 that no other or further interlocutory applications are to be filed effective from that date. I also hereby direct that the pre-trial conference put-off on 1st November 2017 shall be held on 14th November 2017 at 11.00 am. No adjournments shall be allowed on the said date.

DATED, SIGNED and DELIVERED at NAIROBI this 9TH DAY OF NOVEMBER, 2017.

W. MUSYOKA

JUDGE