



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

ELECTION PETITION APPEAL NO. 2 OF 2017

MBAYI SAYEED OMSIRITSA.....APPELLANT

VERSUS

NANCY IYADI.....1<sup>ST</sup> RESPONDENT

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....2<sup>ND</sup> RESPONDENT

NANDWA CHARLES EDWIN LISUNU...3<sup>RD</sup> RESPONDENT

JUDGMENT

1. The appellant herein, Mbayi Sayeed Omsiritsa, has filed the appeal herein after his election petition was struck out by Hon Felix Makoyo, Senior Resident Magistrate at Butere Law Courts upon application by the 3<sup>rd</sup> respondent. The reasons for the striking out of the petition were that the petition failed to comply with the mandatory provisions of the law in that it did not disclose the results of the election and the date of the declaration of the results of the election as required by the provisions of Rule 8(1) (c) and (d) of the **Elections (County and Parliamentary Elections) Petitions Rules, 2017** (herein referred to as the Elections Rules). The appellant was aggrieved by the ruling of the learned magistrate and filed the appeal on grounds, inter alia that:-

- The learned trial magistrate erred in law and in fact in holding that the petition did not comply with Rule 8(1) (c) and (d) of the Elections Petition Rules 2017
- The learned magistrate erred in law and in fact by failing to recognize that the appellant filed a declaration of results form 36B in the petition annexure which formed part of the petition and included the date of declaration of results as 10<sup>th</sup> August 2017
- The learned magistrate misdirected himself in failing to recognize that cases should be determined on evidence and merit and not on technicalities
- The learned magistrate erred in law and in fact by failing to consider the overriding objective of the court is to do justice to all parties
- The learned magistrate failed to consider the overriding objective of the election rules which is stipulated under rule 4(1) of the rules is to facilitate the just, expeditious, proportionate and affordable resolution of election petitions under the constitution and the Act
- The learned magistrate failed to recognize that the election rules are a testament of the provisions of Article 159(2) (d) of the constitution which obliges every court to dispense justice without undue regard to technicalities
- The learned magistrate erred in law in his strict and literal application of subsidiary legislation in contravention of the Elections Act 2011 as well as the letter and spirit of the constitution of Kenya 2010
- The learned magistrate failed to find and hold that in any event there was no prejudice occasioned to any party to the petition by the alleged omission.

2. The appeal was supported by written submissions of **Mr. Kiveu, advocate** for the appellant.

3. The appeal was opposed by the 1<sup>st</sup> and 2<sup>nd</sup> respondents vide the submissions of their advocates, **Kadima & Co Advocates**. It was also opposed by the 3<sup>rd</sup> respondent vide the submissions of their advocates, **Namatsi & Co. Advocates**.

#### **SUBMISSIONS:**

##### **Submissions by the Appellant-**

4. The advocates for the appellant identified the issues for determination as first, whether or not the petition complied with Rule 8(1) (c ) and (d) of the

Elections Petition Rules 2017 and secondly whether or not the decision of the learned trial magistrate in striking out the petition contravened article 159(2) (d) of the constitution and Rule 4(1) of the Election Rules that provide for the overriding objectives of the rules.

5. On the first issue, the advocates submitted that the petition did comply with rule 8(1) (c ) and (d) in that there was annexed to the affidavit in support of the petition a declaration of results form that clearly showed the results and the number of votes garnered by each of the candidates. The advocates submitted that the annexures were part of the affidavit. That by virtue of the provisions of Rule 12(2) (c ) and (d) of the Election Rules, an affidavit is an integral part of the petition. Therefore that the petition did declare the results of the election. The advocates cited the case of **Mercy Kirito Mutegi Vs Beatrice Nkatha Nyaga(2013)** eKLR where the court declined to strike out the petition for failure to set out the election results on the ground that the results were by virtue of provisions of the election rules obtainable from the 2<sup>nd</sup> respondent, the Independent Electoral and Boundaries commission, hence failure to set out the election results did not visit any prejudice on the respondent.

6. On the second issue, the advocates submitted that the policy of the law is to look at the substance rather than the form. That an election court is enjoined by the provisions of Article 159(2) (d) of the constitution of Kenya to excuse minor trivial deviations from the requirements of the rules made under the Election Act and strict adherence to the same. That the overriding objective of the election laws and regulations made hereunder is to ensure elevation of justice above technicalities and ensure that justice is not sacrificed at the altar of technicalities. That rule 5(1) of the Elections Rules grants discretion to the court to consider the gravity of any transgression and the effect it is likely to have to the administration of justice. The advocates cited the cases of **Washington Jakoyo Midiwo V Independent Electoral and Boundaries Commission & 2 Others(2017)** eKLR, **Caroline Mwelu Mwandiku V Patrick Mweu Musimba & 2 Others (2013)** eKLR and **William Kinyanyi Onyango V Independent Electoral and Boundaries Commission(2013)** eKLR in support of the proposition that election courts have discretion to excuse lapses in regard to rules and that rules should not be elevated above substantive justice.

##### **Submissions by 3<sup>rd</sup> Respondent:-**

7. The advocates for the 3<sup>rd</sup> respondent submitted that provisions of Rule 8(1) (c ) and (d) of the Elections Rules are mandatory and that the current petition does not comply with the provisions of the said rules. The advocates relied on the cases of **Amina Hassan Ahmed V Returning Officer Mandera County & Another (2013)** eKLR where the court struck out the petition for failure to state the results and the date of declaration of the results. The advocates also cited the case of **M'Nkiria Petkay Shen Miriti V Ragwa Samuel Mbae & Others(2013)** eKLR where the court held that the provisions of Rule 8(1) of the Election Rules are not mere technicalities but go to the root of the matters before the court .

8. On the question of the provisions of Article 159(2) (d) of the constitution, the advocates cited the Supreme Court in **Raila Odinga & Others V IEBC & Others Supreme court petition No. 3 of 2013** where the court held that:

**“.....The article simply means that a court of law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from courts of law”.**

9. The advocates further relied on the Court of Appeal decision in **Rosa Akinyi Buyu V Independent Electoral and Boundaries Commission(2014)** eKLR where the court endorsed the strict interpretation of Rule 8(1) of the Election Rules. The advocates urged the court to follow the said Court of Appeal decision and uphold the appeal.

##### **Submissions by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents:**

The advocates for the 1<sup>st</sup> and 2<sup>nd</sup> respondents relied on the Court of Appeal decision in the case of **Hon. Martha Wangari Karua V The Independent and Electoral and Boundaries Commission and 3 Others(2018)** eLKR where The court emphasized that dismissal of election petitions could only be done as a last resort where the petition is demonstrated to be hopeless or disclosing no reasonable cause. The advocates however submitted that the appeal has lapsed by virtue of the provisions of Rule 34(11) of the Election Rules that provides that:

**“An appeal filed under sub rule(1) shall be heard and determined within three months of the date of lodging the appeal”**

The advocates contend that the appeal was lodged on 14<sup>th</sup> November 2017. That by virtue of the said rule the three months expired /lapsed on 14<sup>th</sup> February 2018 hence the court has no jurisdiction to hear and determine the appeal.

10. The trial magistrate in his ruling found that the petitioner had in the petition failed to give detailed results. That the requirement to state

such particulars in the petition were mandatory. The magistrate made reliance on the Court of Appeal decision in the case of **John Michael Njenga Mututho Vs Jane Njeri Wanjiku Kihara(2008) 1KLR** and the High Court decision in the case of **Mbaraka Issa Kombo Vs Independent Electoral & Boundaries Commission** and came to the conclusion that the petition was incurably defective and hence struck it out with costs.

**The applicable legislative law:**

11. The relevant legislative law for the application before the court is to be found in the constitution, the Elections Act, 2011 and the Election Petitions Rules 2017.

Article 159(2) (d) of the constitution requires courts while administering justice not to put undue regard to procedural technicalities.

Section 80(d) of the Elections Act requires an election court to decide all matters that come before it without undue regard to technicalities.

Rule 4(1) of the Elections Rules states that:-

The objective of these election rules is to facilitate the just, expeditious, proportionate and affordable resolution of election petitions.

Rule 4(2) states that:-

An election court shall, in exercise of its powers under the constitution and the Act, or in the interpretation of any of the provisions of these rules, seek to give effect to the objective specified in sub-rule(1).

Rule 5(1) states that:

The effect of any failure to comply with these rules shall be determined at the court's discretion in accordance with the provisions of Article 159(2)(d) of the constitution.

**ANALYSIS AND DETERMINATION**

12. The questions before the court are whether:

- (1) the appellant has complied with the provisions of Rule 8(1) (c ) and (d) of the Elections Petition Rules.
- (2) the provisions of Rule 8(1) (c) and (d ) are mandatory and
- (3) what orders should the court make in the case.

Rule 8 of the Elections Petition Rules provides that:-

(1) An election petition shall state-

- (a) the name and address of the petitioner,
- (b) the date when the election in dispute was concluded,
- (c ) results of the election, if any and however declared,
- (d) the date of the declaration of the results of the election.
- (e ) the grounds on which the petition is presented and
- (f) the name and address of the advocate if any, for the petitioner which shall be the address of service.

13. The petition was filed in court on the 6<sup>th</sup> September 2017. It was supported by an affidavit of the petitioner. In paragraph 13 of the supporting affidavit, the petitioner stated as follows:

*“That the returning officer has returned one Mr. Nandwa Charles Edwin Lisunu as being duly elected member of the count assembly for Marama North Ward in Butere constituency in the elections and your petitioner the runners up(annexed herein with and marked as MSO - 4 and MSO 5 – is a copy of the form 36B from the Commission showing the total votes garnered and copy of the page of the Kenya gazette, Vol CXV-No. 45 Gazette Notice No. 3160 showing the gazettement of the 3<sup>rd</sup> respondent.*

14. The referred to form 36B indicates that the candidates in the election had garnered votes as follows:

Amariati David Omusundi	754
Lubanga Moses Mukuba	1249
Mbayi Sayyed Omsiritsa	2191
Mukolwe Livingstone Musala	28
Nandwa Charles Edwin Lisunu	3929
Ochango Jacob Makanga	468
Odongo Alice Eshiwani Grace	65

The form 36B is dated 10<sup>th</sup> August 2017.

15. The advocates for the petitioner contend that this was sufficient declaration of the date and the results of the election. That the form 36B was part of the petition as it was annexed to the supporting affidavit of the petitioner. That the affidavit together with its annexures was part and parcel of the petition and therefore that the results of the election and the date of the election were accordingly declared in the annexed form 36B.

16. Rule 12(10) of the Election Petition Rules provides that:

An affidavit shall-

- (a) state the substance of the evidence.
- (b) .....
- (c) contain a list of exhibits and copies of any documents which the deponent intends to rely on.

Rule 12(12) provides that:

An affidavit shall form part of the record of the hearing and may be deemed to be the deponent's evidence for the purposes of an examination-in-chief.

Rule 12(2) Provides that:

An affidavit in support of a petition under sub-rule (1) shall state –

- (a) the name and address of the deponent;
- (b) the date when the election in dispute was conducted;
- (c) the results of the election, if any, whoever declared;
- (d) the date of the declaration of the results of the election;
- (e) the grounds on which the petitioner is presented; and
- (f) the name and address of the advocate, if any, acting for the petitioner which shall be the address of service

17. A reading of the Election Rules indicates that a petition is composed of:

- (1) The petition itself which is required to be in form 1 set out in the Schedule and
- (2) Affidavit in support of the petition to be sworn personally by the petitioner or at least one of the petitioners.

18. The contents of both the petition and the affidavit in support thereof are the same as set out in rules 8(1) and 12(2) of the rules. Rule 8(1) (c) and (d) require the petitioner to state the results of the election and the date of the declaration of the results. Rule 12(2) (c) and (d) have the same requirement. In this case the petitioner did not state the results of the election and the date of declaration of the results in the petition but argues that he did so in the affidavit in support of the petition.

19. The annexures attached to the petitioner's affidavit were part of the supporting affidavit. The annexures indicated the results of the election and the date the results were declared. There was thereby compliance with Rule 12(2) (c) and (d) of the Elections Rules. However

there was no compliance with rule 8(1) (c ) and (d) of the Elections Rules as the petitioner was required to state both things in the petition and in the supporting affidavit. I thereby decline to accept the argument that there was compliance of rule 8(1) (c ) and (d) by virtue of compliance with rule 12(12) (c ) and (d). The petitioner thereby had not complied with the provisions of Rule 8(1) (c ) and (d) of the Elections Petitions Rules. The question then is what is the effect of such non-compliance.

19. The question that election courts have been grappling with in the last few years is whether the provisions of Rule 8 (1) of the Elections Rules are mandatory and the effect of non-compliance with the said rule. Some High Court judges have held the view that the rule is mandatory and that non compliance with the same means that the petition is incurably defective that should lead to it being struck out. Examples of High Court decisions that have held so are **Amina Hassan Ahmed V Returning Officer Mandera County and 2 Others (2013) eKLR**, **Jimmy Mkalla Kazungu V Independent Electoral and Boundaries Commission and 2 Others(2017)eKLR**, **Mbaraka Issa Kombo V Independent and Electoral and Boundaries Commission & 3 Others (2017) eKLR** and **Martha Wangari Karua Vs Independent Electoral and Boundaries Commission & 3 Others(2017)eKLR**

20. On the other hand there are some High Court judges who have held the view that though the rules of procedure under Rule 8(1) of the Elections Rules are mandatory, courts are obligated by the constitution, the Elections Act and the Election rules to accord precedence to substance over form and save the petition. Examples of High court decisions where the court opted to save defective petitions rather than striking them out are **Caroline Mwelu Mwandiko V Patrick Mweru Musimba & 2 Others (2013) eKLR**, **Washington Jakoyo Midiwo Vs Independent Electoral & Boundaries Commission and 2 Others (2017) eKLR**, **Shukra Hussein Gure V Independent Electoral and Boundaries Commission and 3 others (2017) eKLR** and **Samuel Kazungu Kambi V Independent Electoral and Boundaries Commission (2017) eKLR**.

21. In **Caroline Mwelu Mwandiko V Patrick Mweru Musimba & 2 Others(supra)** Majanja J. stated that:

**“39. The guiding principle in consideration of this matter is the overriding objective of the Rules which is stipulated under rule 4(1) of the rules as "to facilitate the Just, expeditious, proportionate and affordable resolution of election petition under the Constitution and the Act.” This objective is best realized by the election court having regard to the purpose and mischief that the rule seeks to cure and the prejudice that would be occasioned by insistence on the strict compliance with form. Rule 5 further obliges this court and the parties to conduct proceedings before it to achieve the following aims, (a) the just determination of the election petition; and (b) the efficient and expeditious disposal of an election petition within the timelines provided in the Constitution and the Act.**

**40. Rule 4 and 5 are therefore a testament of the provisions of Article 159(2) (d) of the Constitution which obliges every court to dispense justice without undue regard to technicalities. The fact that elections are special disputes governed by special rules does not exonerate the court from this prime obligation to do substantive justice ....”**

22. In **Washington Jakoyo Midiwo Vs Independent Electoral and Boundaries Commission and others(supra)** Maina J. held that:-

**“In their plain and ordinary meaning both Rule 8(1) and Rule 12(2) of the elections (Parliamentary and County Elections) Petitions Rules, 2017 are mandatory. Both rules use the word “shall” as opposed to “may” which would give the Petitioner discretion to decide whether to state or to omit the “results if any and however declared”. The petitioner in an election petition is therefore required to comply with these two rules and that includes stating the results of the election if any were declared....it is my finding that the omission to state the results in the petition and in the supporting affidavit do not call for its striking out. In my view the omission does not go to the root of the proceedings.”**

23. The Court of Appeal has also been divided over the issue with some decisions upholding strict interpretation of the rules while others support sustaining the defective petitions so as to do substantive justice to the parties. In **John Michael Njenga Mututho V Jayne Njeri Wanjiku Kihara & 2 others (supra)** (which authority the trial magistrate in this case relied on to arrive at his decision), the court held that:

**“.....the law has set out what a petition should contain. If any of the matters supposed to be included is omitted, then the petition is incurably defective”.**

24. In **Boy Juma Boy and 2 Others V Mwamlole Tchappu Mbwana & Another 2014 eKLR** where the a Court of Appeal was considering an application where the notice of appeal had not been served within the time stipulated by the Court of Appeal Rules, the court held that:

**“this is a mandatory provision which the respondent were under obligation to comply with. Indeed no good reason has been given for these serious omissions. Instead the respondent’s counsel merely made a feeble attempt to pass the back to the respondent’s former counsel. He did not even make any effort to seek leave of the court to file the missing documents out of time. The attempt to seek refuge under Section 3A and 3B of the appellate jurisdiction Act (the oxygen principles) cannot hold as these rules are intended to facilitate the just expeditious, timely disposal of appeals. They are not intended to assist an indolent litigant. Nor can the respondent rely on the negligence or mistake of counsel”**

25. In the case of **Nicholas Kiptoo Arap Korir Salat V Independent Electoral and Boundaries Commission & 6 Others(2014) eKLR** where the notice of appeal was not served within 7 days as required by the Court of Appeal Rules, Ouko JA, took a contrary view and held that the law places a heavy premium on substantive justice as opposed to undue regard to procedural technicalities. The learned judge held that striking of pleadings ought to be employed as a last resort and only in the clearest of the cases. In a majority judgment the judge held that:

**The power to strike out pleadings, and in the process deprive a party of the opportunity to present his case has been held**

over the years to be a draconian measure which ought to be employed only as a last resort and even then only in the clearest of cases .....

Deviations from and lapses in form and procedures which do not go to the jurisdiction of the court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed at the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness.

I reiterate what the court said in *Githere V Kimungu(1976-1985) E.A 101*, that:-

“... the relation of rules of practice to the administration of justice is intended to be that of a handmaiden rather than a mistress and that the court should not be too far bound and tied by the rules, which are intended as general rules of practice, as to be compelled to do that which will cause injustice in a particular case”.

Essentially the rules remain subservient to the Constitution and statutes. Article 159(2) (d) of the constitution, Section 14(6) of the Supreme Court Act, Section 3A and 3B of the Appellate Jurisdiction Act, Section 1A and 1B of the Civil Procedure Act and Section 80(1) (d) of the Elections Act place heavy premium on substantive justice as opposed to undue regard to procedural technicalities. A look at recent judicial pronouncements from all the three levels of court structure leaves no doubt that the courts today abhor technicalities in the dispensation of justice...

It ought to be clearly understood that the courts have not belittled the role of procedural rules. It is emphasized that procedural rules are tools designed to facilitate adjudication of disputes; they ensure orderly management of cases. Courts and litigants (and their lawyers) alike are, thus, enjoined to abide strictly by the rules. Parties and lawyers ought to be reminded that the bare invocation of the oxygen principle is not a magic wand that will automatically compel the court to suspend procedural rules. And while the court, in some instances, may allow the liberal application or interpretation of the rules that can only be done in proper cases and under justifiable causes and circumstances. That is why the constitution and other statutes that promote substantive justice deliberately use the phrase that justice be done without “undue regard” to procedural technicalities”.

26. More recently, the issue has been addressed by the Court of Appeal in *Hon Martha Wangari Karua V Independent Electoral and Boundaries Commission & 3 Others(2014) eKLR*. In the case the court was of the view that the John Mututho case (supra) was not an appropriate authority as the matter was determined in 2008 under a different regime of the constitutional and electoral law where the principles as enunciated under Article 159(2) of the constitution were not in the forefront as they are today. In the case the court reviewed some of the conflicting judgments from the High Court. It agreed with the sentiments expressed by Ouko JA. In the *Nicholas Salat* case and endorsed the view that summary dismissal of petitions could only be exercised as a last resort where the petition is demonstrated to be hopeless or disclosing no reasonable cause of action. Further that courts should endeavour to sustain a petition where the lapse complained of is curable and that the issues in dispute can be determined on merits. The court supported the High Court decision that were geared towards doing substantive justice against those that were inclined towards dismissing petitions on technicalities. The court rendered itself thus:

There is a positivist school of thought on the issue. One of the leading judgement in this school of thought was rendered by Koril J in the case of *Samwel Kazungu Kambi & Another Vs Independent Electoral and Boundaries Commission and 3 Others(2017) eKLR* who held the view that whereas there is need for strict compliance with the laws and rules governing the resolution of election dispute, the court ought to be mindful that the current constitution dispensation requires substantive justice to be done and that unless an election petition is so hopelessly defective and cannot communicate all the complaints and prayers of the petitioner, the court shall ensure that the petition is heard and determined on merit.

As stated herein above, Maina J in *Jakoyo Midiwo* case was of similar view as that of Koril, J. On our part, we entirely agree and endorse the position taken by the two learned judges. We say so because our current constitutional dispensation leans towards determination of disputes on merit. Therefore, taking into consideration our historical background which is replete with determination of disputes on technicalities, and now the legal underpinning provisions of superiority of our constitution value system, we think that the route taken by the learned judges to dismiss petitions on technicalities that do not affect the jurisdiction is not a reflection or manifestation of our current jurisprudence and justice system.

In deed one could go so far to say the superiority of the constitutional value system is the central premise or foundation of our 2010 constitution. The elevation and prominence placed on substantive justice is so critical and pivotal to the extent that Article 159 of the constitution implies an approach leaning towards substantive determination of disputes upon hearing both sides on evidence.

The jurisprudence from our courts in interpretation of the constitution has been to avoid summary dismissal of petitions and that power could only be exercised as a last resort where the petition is demonstrated to be hopeless or disclosing no reasonable cause of action”

27. While commenting on the equivalent of rule 8(1) (c ) after the 2013 general elections, Kimondo J. in *William Kinyanyi Onyango V Independent Electoral & Boundaries Commission & 2 Others (2013) eKLR* stated that:-

**“In my considered opinion, the petition Rules 2013 were meant to be handmaidens, not mistresses of justice. Fundamentally, they remain subservient to the Elections Act 2011 and the constitution. Section 80(1) (d) of the Elections Act 2011 enjoins the court to determine all matters without undue regard to technicalities. Rules 4 and 5 of the Petition Rules 2013 have in turn imported the philosophy of the overriding objective of the court to do substantial justice. Certainly, Article 159 of the constitution would frown upon a narrow and strict interpretation of the rule that may occasion serious injustice. This is not to say that procedural rules will not apply in all cases, only that the court must guard against them trumping substantive justice...”**

28. I think that the two Court of Appeal decisions in the **Nicholas Salat** case and **Martha Karua** case have, in my view, stated the correct law as regards procedural law viz a viz substantive justice. The principles which emerge from the case law are that:-

- (1) The provisions of rule 8(1) of the Elections Rules are mandatory.
- (2) It is of utmost importance for parties in an election petition to comply with election rules.
- (3) The provisions of the constitution and the Elections Act override those of the election rules.
- (4) where there is non-conformity with election rules, an election court has discretion to excuse the infraction.
- (5) The court could only dismiss a case for non-conformity with the rules when the infraction complained of has caused prejudice to the other
- (6) In that case it must be demonstrated that the infraction complained of goes to the root of the dispute that is before the court.
- (7) The court can dismiss a case for non-conformity with the election rules in a proper case.
- (8) The court should place substantive justice over procedural considerations especially where the infraction is curable. employed sparingly and as a last resort.

29. The objective of the election rules as captured in Rule 4(1) of the rules is to facilitate the just, expeditious, proportionate and affordable resolution of election disputes. When interpreting the rules, the court is required to give effect to the said objective. Article 159(2) (d) of the constitution requires courts when administering justice not to put undue regard to procedural technicalities. Section 80(d) of the Elections Act require an election court to decide all matters that come before it without undue regard to technicalities. All these provisions impels the court to place substantive justice above procedural technicalities.

30. The court is required to use its discretion when considering a failure to comply with the election rules. An exercise of judicial discretion should aim at doing justice to the parties as was held by the Court of Appeal in **Alex Winaina t/a John Commercial Agencies V Janson Mwangi Wanjihia(2015) eKLR** where the court said that:

**The principles governing the exercise of judicial discretion were set out by Ringera JA(as he then was) in the case of Gathiaka & Vs Nduriri(2004) eKLR 67. These are that such discretion should be exercised on sound reason rather than whim, caprice or sympathy and with the sole aim of fulfilling the primary concern of the court, that is to do justice to the parties before it.**

30. The appellant herein failed to declare the results of the election and the date of the declaration of the results as required by Rule 8(1) ( c) and (d) of the Elections Rules but did so in the supporting affidavit . In my view the non – compliance with Rule 8 ( 1) ( c) and (d) was a minor infraction as the results and the date of declaration of the results were stated in the affidavit in support of the petition. The respondents herein did not suffer any prejudice for the infraction as the matter complained of was stated in the affidavit in support of the petition . In any case when the 3rd respondent filed his response, he filed the same form 36B with the same results and the same date of declaration of results as that filed by the appellant.

31. The petitioner alleges in the petition that the results declared in form 36B were in some instances different from the ones declared at the polling stations. The issue then before the trial court was not whether the results were declared but rather whether the results contained in form 36B were correct. The petition therefore raised a serious issue.

32. The trial magistrate struck out the petition on reliance of High Court and Court of Appeal decisions that held that the provisions of Rule 8 (1) of the Elections Rules are mandatory and that failure to comply with them renders the petition incurably defective. In face of the more recent Court of Appeal decisions in the Nicholas Salat and Martha Karua cases quoted above, the decisions relied on by the trial magistrate are no longer good law . I am persuaded that striking out of a case should only be done as a last resort and only in the clearest of the cases where the infraction complained of goes to the root of the dispute before the court. This was not the case herein. Our constitution requires courts to place substantive justice above procedural technicalities. The objective of the Elections Petition Rules is to facilitate the just and expeditious resolution of election disputes. It was not just and proportionate for the petition to be struck out for failure to comply with minor rules of procedure. In doing so the trial magistrate did not exercise his discretion judiciously as required of him. As observed in the cases cited above, justice must not be sacrificed at the altar of procedural technicalities. The respondents in the case would not suffer any prejudice at all if the matter was determined on merits.

33. There was submission by the advocates for 1<sup>st</sup> and 2<sup>nd</sup> respondents that the appeal was filed on 14<sup>th</sup> November 2017 and that it should have been heard within 3 months. That the appeal has by now lapsed. However the court record indicates that the appeal was filed on 23<sup>rd</sup> November 2017. Though rule 34(11) of the Elections Rules states that an appeal filed under sub-rule (1) of Rule 34 has to be heard and

determined within three months of the lodging of the appeal, Section 75 of the Elections Act, 2011 provides that the appeal has to be heard and determined within six months from the date of the filing of the appeal. There is thereby a conflict between the rules and the act as to the period of hearing and determination of the appeal. In such a conflict the period provided by the Act takes precedence. The appeal has thereby not abated.

34. In the foregoing and for the above said reasons, I find that the appeal is merited and is hereby allowed. The orders of the trial magistrate striking out the petition dated 9<sup>th</sup> November, 2017 are hereby set aside. The appellant to have the costs of the appeal.

I direct that the file be remitted back to the trial magistrate for the hearing and determination of the petition on merits. Parties to appear before Mr. Felix Makoyo for directions on 28<sup>th</sup> May, 2018.

Orders accordingly.

**SIGNED: J. NJAGI**

**JUDGE**

**Delivered, dated and signed at Kakamega this 21<sup>st</sup> day of May, 2018**

**R.N Sitati**

**JUDGE**

**In the presence of:**

Mr. Kiveu(present .....for Appellant

Mr. Elung'ata h/b for.....for 1<sup>st</sup> Respondent

Mr. Kadima.....for 2<sup>nd</sup> Respondent

Mr. Getanda h/b for Namatsi.....for 3<sup>rd</sup> Respondent

Polycarp and Erick.....Court Assistant