REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

ELECTION PETITION NO. 4 OF 2017

(CONSOLIDATED WITH ELECTION PETITION NO. 5 OF 2017)

IN THE MATTER OF THE ELECTIONS ACT, 2011

AND

IN THE MATTER OF SECTION 75 (1) (2) AND (3) OF THE ELECTIONS ACT, 2011

AND

IN THE MATTER OF THE ELECTION (PARLIAMENTARY AND COUNTY ELECTIONS) PETITION RULES, 2017

AND

IN THE MATTER OF THE ELECTION OF THE GOVERNOR KILIFI COUNTY

AND

IN THE MATTER OF ELECTION OF HON. KINGI AMAZON JEFFAH AS THE GOVERNOR KILIFI COUNTY

BETWEEN

SAMUEL KAZUNGU KAMBI…….....1ST PETITIONER

WILLIAM KAHINDI MGANGA….....2ND PETITIONER

AND

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION.....1ST RESPONDENT

NELLY ILONGO THE COUNTY

RETURNING OFFICER, KILIFI COUNTY.....2ND RESPONDENT

KINGI AMASON JEFFAH.....3RD RESPONDENT

GEDION EDMUND SABURI.....4TH RESPONDENT

RULING NO. 1

(3RD RESPONDENT'S NOTICE OF MOTION APPLICATION DATED 28TH SEPTEMBER, 2017)

1. In the General Election held on 8th August, 2017, the 2nd Respondent Nelly Ilongo, the Returning Officer for the County of Kilifi and the 1st Respondent the Independent Electoral and Boundaries Commission (IEBC) declared the 3rd Respondent Amason Jeffah Kingi and the 4th Respondent Gideon Edmund Saburi as the persons elected Governor and Deputy Governor respectively for the County of Kilifi.

2. Samwel Kazungu Kambi who was one of the candidates in the gubernatorial race subsequently filed Malindi High Court Election Petition No. 4 of 2017 seeking to invalidate the election of the 3rd Respondent. On 6th September, 2017, William Kahindi Mganga who identifies himself as a voter registered in Kilifi County and the Chief Agent for Jubilee Party and more so for Hon. Maitha Gideon Mung'aro the Jubilee Party aspirant for the Kilifi County gubernatorial race filed Malindi High Court Election Petition No. 5 of 2017 questioning the validity of the election of the 4th Respondent, Amason Jeffah Kingi as the Governor of the County of Kilifi. He named Gideon Edmund Saburi as the 5th Respondent.

3. When both petitions came up for pre-trial directions on 29th September, 2017, this court acting in compliance with Rule 17 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 (hereinafter simply referred to as the Elections Petitions Rules, 2017) consolidated the two petitions as a matter of course.

4. Housecleaning done with the consent of the parties led to the removal from these proceedings of Wafula Chebukati who had been named in Petition No. 5 of 2017 as the 2nd Respondent in his capacity as the Returning Officer of the National Tallying Centre.

5. As a result of the consolidation and housecleaning, Petition No. 4 of 2017 is now the lead file with Samwel Kazungu Kambi being the 1st Petitioner and William Kahindi Mganga being the 2nd Petitioner. The IEBC and Nelly Ilongo the Kilifi County Returning Officer are the 1st Respondent and 2nd Respondent respectively. Amason Jeffah Kingi is the 3rd Respondent and Gideon Edmund Saburi is the 4th Respondent.

6. The parties thereafter filed several interlocutory applications, one of them being the application to which this ruling relates. In view of the diverse nature of the applications, I have opted to write separate rulings for the applications save for those based on the same grounds.

7. In the Notice of Motion dated 28th September, 2017 brought under Articles 87(1), (2), 180(5), (6) and 182 of the Constitution; Section 2 of the Elections Act; Regulations 83 and 87 of the Elections (General) Regulations, 2012; and Rules 8 and 12 of the Elections Petitions Rules, 2017, the 3rd Respondent Amason Jeffah Kingi, prays for orders that:

> **"a. The Petition of Samuel Kazungu Kambi dated and filed in court on the 8th September 2017, be struck out, and or alternatively and without prejudice to the foregoing, it be dismissed.**
>
> **b. The costs of this application and the Petition be awarded to the 3rd Respondent/Applicant**

herein."

8. The application is based on two grounds. Firstly, that the Petition of the 1st Petitioner's is defective for failing to disclose the particulars of the election being challenged hence breaching specific provisions of the Elections Petitions Rules, 2017 and secondly, that the Petition is defective for failing to include the Deputy Governor Gideon Edmund Saburi as a respondent. When the matter came up for pre-trial directions on 29th September, 2017, Mr. Mosota for the 3rd Respondent indicated that he would, if need be, argue the second limb of the application later. This ruling therefore relates to the first limb of the application only.

9. In summary, the 3rd Respondent's case is that the 1st Petitioner's Petition does not comply with the requirements of rules 8 and 12 of the Elections Petitions Rules, 2017 as the results of the election as declared are not stated and neither is the date of the declaration of the results revealed.

10. The 1st Petitioner opposed the application through an affidavit sworn on 2nd October, 2017. He avers that the application is untenable and the prayers sought cannot be granted. He points at paragraph 4 of his Petition to show that he disclosed the date of the declaration of the 3rd Respondent's election as the Governor of Kilifi County and the votes he garnered. He avers that the people of the County of Kilifi were never made aware as to when and the manner in which the results were declared. In his view, there is no express provision in the law that states that the votes cast for each candidate and the total votes cast in a contested election must be indicated in a petition.

11. The 1st Petitioner further avers that the manner and nature of the conduct of the election specifically at Pwani University being the County Tallying Centre was so shambolic and disorganized that it is hard to decipher if the election procedures were adhered to and whether results were declared at all. It is his averment that the declaration of the results goes to the root of his Petition and this is an issue that can only be addressed during the hearing of the Petition.

12. It is the 1st Petitioner's averment that even the 2nd Respondent confirms in her affidavit sworn on 27th September, 2017 that the tallying process was suspended on 9th August, 2017. Further, that the 2nd Respondent never mentions the declaration of results in her affidavit and neither does she mention the resumption of the tallying process and the declaration of results.

13. The 1st Petitioner avers that striking out a petition is such a drastic and draconian step which should only be done in matters that are incurably defective and not in a matter like his Petition. Further, that the court has discretion as enshrined under Article 159(2) of the Constitution to excuse minor or trivial deviations or omissions.

14. The parties filed written submissions. In the submissions dated 2nd October, 2017 the 3rd Respondent pressed his case as follows. He stated that Article 87(1) of the Constitution provides for enactment by Parliament of legislation to establish mechanisms for timely settlement of electoral disputes whereas the time for filing an election petition is governed by Article 87(2) of the Constitution and is predicated upon the date of declaration of the results of the election.

15. His case is that Section 2 of the Elections Act defines election results to mean the **"declared outcome of the casting of votes by voters at an election."** That pursuant to the Elections Act, the Elections (General) Regulations, 2012 ("the Regulations") and the Elections Petitions Rules, 2017 were made. He points out that Regulation 87 (2)(c) of the Regulations provides for public declaration of the election results for the position of a county governor.

16. Referring to Rule 8(1)(c) of the Elections Petitions Rules, 2017, the 3rd Respondent asserts that an election petition shall, among other things, state the results of the election, if any, however declared. He also points out that Rule 12(2)(c) of the Elections Petitions Rules, 2017 also requires the affidavit sworn in support of a petition to state the results of the election, if any, however declared.

17. It is the 3rd Respondent's position that the Elections Act and the rules made thereunder are direct derivatives of the Constitution and failure to comply with the mandatory requirements as set in the rules amounts to non-compliance with the Constitution. It is his opinion that from the cited provisions it is clear that the results of an election are a key ingredient of an election petition and any petition questioning the outcome of an election must particularize the results of the election as declared. He urges the court to note that the provisions are worded in mandatory terms meaning that the results must be part and parcel of any petition questioning the validity of an election. He therefore opines that in the absence of this important component, the present Petition is defective and incompetent.

18. The 3rd Respondent goes ahead to state that the Petition does not state the number of votes cast in favour of each of the candidates who participated in the questioned election and that the total votes cast in the election is also missing.

19. It is also the 3rd Respondent's assertion that the supporting affidavits sworn in support of the two petitions are deficient of the mandatory requirements of matters which such affidavits should contain as more specifically set out in Rule 12(2)(c) and (d) of the Elections Petitions Rules, 2017.

20. It is the 3rd Respondent's case that failure to comply with the Elections Petitions Rules, 2017 goes to the root of the Petition. In support of this assertion, the 3rd Respondent placed reliance on the Supreme Court decision in **Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others [2014] eKLR** wherein the Court stated at paragraph 77 that:

> **"Bearing in mind the nature of election petitions, the declared elections results, enumerated in the Forms provided, are quantitative, and involve a numerical composition. It would be safe to assume, therefore, that where a candidate was challenging the declared results of an election, a quantitative breakdown would be a key component in the cause. It must also be ascertainable who the winner, and the loser(s) in an election, are."**

21. The emphatic statement of the Court of Appeal in **Mututho v Jane Kihara & others [2008] 1KLR 10** is also brought into the picture by the 3rd Respondent. In that case, the Court stated that:

> **"Election petitions are special proceedings. They have a detailed procedure and by law they must be determined expeditiously. The legality of a person's election as a people's representative is in issue. Each minute counts. Particulars are furnished to clarify issues not to regularize an otherwise defective pleading. Consequently if a petition does not contain all the essentials of a petition, furnishing of particulars will not validate it. Section 20 of the Act is clear that any amendment of a petition can only be legally done within 28 days. No supplemental petition was filed in terms of S. 20(3). Besides, the petitioner does not have results even now. Her advocate stated as much. If she does not have results, what is she challenging? The issues she raises are meant to nullify a particular result. But if she has not given the results, any findings on the issues raised will serve no useful purpose. Any evidence adduced or to be adduced is intended to show that certain irregularities affected the outcome of the election, but without the result it might not be possible to relate the irregularities to the result."**

22. The 3rd Respondent submitted that when the Court was confronted with a similar issue in the case of **Amina Hassan Ahmed v Returning Officer Mandera County & 2 others, Nairobi Election Petition No. 4 of 2013** the Court held that:

> **"The provisions of Rule 10 and others aforestated, are not mere technical requirements. If they are technical in so far as they are procedural and spell out the form and content of intended petitions, they nevertheless, at the same time, are substantive and go to the root and substance of issues and matters prescribed upon."**

23. Reference was also made to the decision of Sitati, J in **Evans Nyambaso Zedekiah & another v**

Independent Electoral and Boundaries Commission & 2 others [2013] eKLR wherein the learned Judge held that:

> **"My view of the matter is that since Rule 10 of the Rules (supra) clearly sets out the contents and form of an election petition, a petitioner has to comply with the same so as to give a chance to the Respondent(s) to know what case they are faced with and how they may prepare their defence. The authorities cited above all point to the fact that where material particulars are not included in the petition, then such a petition is fatally incompetent and must be struck out. That is the position in this case and I so find."**

24. Turning to the 1st Petitioner's submission that the Petition can be saved by Article 159(2)(d) of the Constitution which requires courts and tribunals to administer justice without undue regard to procedural technicalities, the 3rd Respondent contends that failure to plead results with particularity is not a mere technicality but a substantive question that goes to the root of an election petition. According to the 3rd Respondent, the answer as to whether the 1st Petitioner can seek refuge under Article 159(2)(d) was provided by the Court of Appeal in **Nicholas Kiptoo Arap Korir Salat v I.E.B.C. & 6 others [2013] eKLR** where Kiage, JA held that:

> **"I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succour and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned."**

25. The 3rd Respondent urges the court to strike out the petitions saying that however painful this may be to the petitioners, the court must stay its course and uphold the law. In this regard the 3rd Petitioner asked this court to do what Lenaola, J (as he then was) did in **Bernard Mwendwa Munyasia v Charity Ngilu & others, Machakos Election Petition No. 1 of 2008** when he stated that **"[s]triking out any pleading is a drastic remedy and this court would be the last to wield that painful knife but the law as I understand must be upheld in that regard."**

26. Counsel for the 1st and 2nd respondents filed submissions dated 4th October, 2017 supporting the 3rd Respondent's application. In the submissions it is pointed out that the two petitions of Samwel Kazungu Kambi and William Kahindi Mganga are identical word for word, save for the descriptive aspect. Further, that neither of them actually contain the results of the Kilifi gubernatorial election as is required by Rule 8 of the Elections Petitions Rules, 2017.

27. According to the 1st and 2nd respondents, the 1st Petitioner has acknowledged that the results were indeed not specified nor stated in the Petition nor the supporting affidavit. It is submitted for the 1st and 2nd respondents that rules 8 and 12 of the Elections Petitions Rules, 2017 are clear, categorical and mandatory and the failure by the petitioners to comply with the terms of the rules is fatal to their petitions. In support of the submissions of the 1st and 2nd respondents reliance was placed on the decisions in **John Njenga Mututho v Jane Kihara & others [2008] 1 KLR 10; Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others [2014] eKLR; Ismail Suleiman & 9 others v Returning Officer Isiolo County Independent Electoral and boundaries Commission & 4 others [2013] eKLR** and **Evans Nyambaso Zedekiah & another v Independent Electoral &Boundaries Commission & 2**

others [2013] eKLR.

28. Counsel for 1st and 2nd respondents asserted that the submission by the advocates for the petitioners that affidavits are treated as part of pleadings in election petitions is a misinterpretation of the Court of Appeal decision in **Dickson Mwenda Gathenji v Gatirau Peter Munya & 2 others [2014] eKLR**. According to him, the said decision clearly shows that there is a distinction between pleadings and evidence.

29. Opposing the application through the submissions dated 2nd October, 2017 counsel for the 1st Petitioner states that the question for determination by this court in this ruling is whether failure to specifically plead the election results in the petition and the supporting affidavit as required by rules 8 and 12 of the Elections Petitions Rules, 2017 renders an election petition defective and incompetent.

30. Counsel for the 1st Petitioner commences his submissions by stating that the guiding principle in considering the application is the overriding objective of the Elections Petitions Rules, 2017 as set out in Rule 4(1) namely to **"facilitate the just, expeditious, proportionate and affordable resolution of elections petitions."** Counsel asserts that the objective is best realized by the election court having regard to the purpose and mischief which the rule seeks to cure and the prejudice that would be occasioned by insistence on strict compliance with a particular provision. Counsel proceeds to point out that Rule 5(1) obliges the election court when determining the effect of failure to comply with the Elections Petitions Rules, 2017 to exercise its discretion in accordance with the provisions of Article 159(2)(d) of the Constitution.

31. According to counsel for the 1st Petitioner, rules 4 and 5 consecrates the provisions of the Article 159(2)(d) Constitution which obliges every court to dispense justice without undue regard to technicalities and as was pointed out by the Supreme Court in the case of **Raila Odinga & others v Independent electoral & Boundaries Commission & 3 others [2013] eKLR**, **"[t]he essence of that provision is that a court of law should not allow the prescriptions of procedure and form to trump the primary object, of dispensing substantive justice to the parties…."**

32. Thus the 1st Petitioner urges this court to find that failure on his part to particularize the results of the election he seeks to invalidate amounts to procedural lapses that can be cured by Article 159(2)(d) of the Constitution.

33. Counsel for the 1st Petitioner goes ahead to submit that the results of the election are indeed contained in annexure WKM3 of Paragraph 5 of the affidavit sworn on 5th September, 2017 by the 1st Petitioner in support of the Petition. Counsel submits that affidavits sworn in support of an election petition or documents annexed to such affidavits are deemed to be part of the petition and therefore part of the pleadings in the case. This particular submission is supported by statement of the Court of Appeal in **Dickson Mwenda Githinji v Gitirau Peter Munya & 2 others [2014] eKLR** that:

> **"160. Taking into account the explicit provisions of Rule 9(3)(b) of the Election Petition Rules and noting that annextures DMK2, DMK3 and DMK4 are expressly referred to in the body of the Petition lodged by the appellant and guided by the judicial decisions cited, we find that these annextures were part of the Petition and the learned Judge erred in finding that they were not part of the pleadings in the Petition. We find that the trial Judge's decision was made *per incuriam*.**
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> **161. Our finding that the learned Judge erred in striking out the annextures to the appellant's affidavit in support of the Petition is fortified by our consideration of the Supreme Court's decision in the matter of Application by Mr. R.A. Odinga to file a Further Affidavit in *Odinga & 5 others -v- Independent Electoral and Boundaries Commission & 3 others [2013] KLR – SCK*. The Supreme Court stated that the principle of substantive justice rather than technicalities particularly in a Petition was a matter of great public interest. That the basic tenet in admitting an affidavit is for the other party to be able to respond. In the instant case,**

it is our finding that the affidavit in support of the petition which contained annextures DMK2, DMK3 and DMK4 were filed with the Petition and the respondents had an adequate opportunity to respond to the issues raised therein. We find that these annextures having been part of the Petition did not introduce new evidence that was not in the original Petition. The annextures never changed the nature and character of the Petition and did not give rise to new facts and allegations. They were not a serious departure from the Petition as they were an integral part of the Petition as filed."

34. Also cited in support of the proposition that affidavits and documents annexed thereto are deemed to be part of the pleadings in an election petition are pages 63 to 64 of the Judiciary Bench Book on Electoral Disputes Resolution published by the Kenyan Judiciary in 2017.

35. The 1st Petitioner therefore urges the court to find that his Petition and supporting affidavit complies with rules 8 and 12 of the Elections Petitions Rules, 2017 and prays for the dismissal of the 3rd Respondent's application.

36. The 2nd Petitioner joined the 1st Petitioner in opposing the application. Counsel for the 2nd Petitioner started by pointing out that the application was specifically made against the Petition of the 1st Petitioner as it was filed prior to the consolidation of the two petitions. He opines that a fresh application ought to have been filed after the consolidation.

37. Turning to the substance of the application, he points out that the 2nd Petitioner had sworn an affidavit on 2nd October, 2017 in opposition to the application. Through the said affidavit the 2nd Petitioner avers that his Petition conforms with the requirements of rules 8 and 12 of the Elections Petitions Rules, 2017 as he had annexed to the supporting affidavit of his Petition documents showing the election results. It is also the 2nd Petitioner's averment that the application raises matters touching on technicalities and the court should invoke Article 159(2)(d) of the Constitution and dismiss the application so as to deal with the substantive matters in the Petition.

38. The 2nd Petitioner also filed submissions dated 2nd October, 2017 which mirrors those of the 1st Petitioner.

39. Counsel for the 2nd Petitioner submits that the election results could not be stated in the Petition as the petitioners had been kept away from the tallying centre. He asserts that his client disclosed in his pleadings that he got the results through the Kenya Gazette. His view is that there is 90% compliance with the Elections Petitions Rules, 2017 and the application has no merit. He urges the court to find that the authorities cited in support of the application are not relevant when one considers the facts of this case.

40. In response, Mr. Khagram for the 1st and 2nd respondents stressed the need for 100% compliance with the Elections Petitions Rules, 2017.

41. What is the effect of non-compliance with rules 7 and 12 of the Elections Petitions Rules, 2017 on an election petition? I will confine my decision to the post-August, 2010 scenario.

42. There are two schools of thought in the High Court in regard to the question I have posed. The advocates for the 1st to 3rd respondents have cited authorities in support of the school of thought that holds that failure to strictly comply with rules 8 and 12 of the Elections Petitions Rules, 2017 renders an election petition incompetent and fatally defective.

43. There is however another school of thought whose view is that failure to comply with the provisions can be ameliorated in light of Article 159(2)(d) of the Constitution. G. K. Kimondo, J spoke for this school when he stated at paragraph 24 of his judgement in **William Kinyanyi Onyango v Independent Electoral and Boundaries Commission & 2 others [2013] eKLR** that:

"[24.] I find the liberal and purposive interpretation of the rule by Majanja, Githua, Achode and Ngaah JJ, in the decisions I cited earlier, to be much more in tandem with our new laws. Furthermore, that approach cures the old mischief in Mututho vs Kihara (supra) under the repealed rules. That was clearly the intention of the new rule 21. What possible prejudice would be suffered by the respondents? None in my view. The 3rd respondent had been declared the winner. The petitioner was challenging that election on numerous grounds. True, he did not specify the aggregate votes of candidates. The results were available. He could have specified them by being a little more diligent. But the IEBC had custody of the results and was mandated by rule 21 to file them in court. The petitioner had annexed some results in forms 35 to his supporting affidavit. He deposed that he did not access all the forms 35. It is not a very sound argument. It means the aggregate results were available. But I have also seen on the record of the lower court the full results including forms 35 and 36. They are contained in a further affidavit of Marjorie Owino, the returning officer, sworn and filed in the lower court on 20th May 2013. That was at the hearing of the motion for striking out the action. At the time the learned Magistrate was dealing with the matter, the aggregate results for all candidates were right before him. It cannot then fall from the lips of the respondents, and the IEBC in particular, that they did not know the case they were to meet at the trial."

44. I come with the third view. In my view both schools of thought are correct to some extent. The determinant factor is the extent of compliance with the rules as gleaned from the facts of each case. In my view the decisions of **Ismail Suleiman and others** (supra) and **Evans Nyambaso Zedekiah and another** (supra) were most probably arrived at based on the fact that the election petitions in those matters were hopelessly inadequate that a hearing could not have been sustained on such pleadings.

45. On the other hand, G.K. Kimondo, J in the cited case of **William Kinyanyi Onyango** had recourse to Rule 21 of the then prevailing Elections Petitions Rules which required the Independent Electoral and Boundaries Commission to file results in court once a petition was filed. I suspect that rule is no longer in existence and I do not think a petitioner who fails to disclose the results would have his petition salvaged in the prevailing legal regime.

46. My take is that whereas there is need for strict compliance with the laws and rules governing the resolution of election disputes, the courts should always be mindful of the fact that the current constitutional dispensation requires substantive justice to be done. Unless an election petition is so hopelessly defective and cannot communicate at all the complaints and prayers of the petitioner, the court should ensure that the petition is heard and determined on merit.

47. I do not buy into submission by Mr. Khagram that compliance with the Elections Petitions Rules, 2017 should be 100% and nothing less. In my view, substantial compliance is good enough. Failure to disclose the results would indeed render an election petition untriable as the respondents will not be able to discern the petitioner's complaint so as to respond appropriately. However, where the respondents are in a position to understand the petitioner's case, such a petition should not be dismissed even if there are slight omissions and deviations from the rules.

48. In my view, requiring parties in election disputes to strictly comply with electoral law whereas other litigants are treated with kid gloves will result in double standards that may not augur well for our judicial system. I hold the view that Article 159(2)(d) of the Constitution is available to a litigant in an electoral dispute in the same manner that the provision comes to the aid of a litigant in any other ordinary litigation. In invoking the said constitutional provision, the court in an electoral dispute only needs to be conscious of the impact of any leeway extended to a party on the limited time availed for hearing and determining an election petition.

49. In **Rozaah Akinyi Buyu v Independent Electoral and Boundaries Commission & 2 others [2014] eKLR** the Court of Appeal acknowledged the applicability of Article 159(2)(d) of the Constitution to election disputes by stating that:

"It will therefore be seen that the courts in Kenya and elsewhere have interpreted electoral

law strictly within the corners and confines of the same as electoral law is a special jurisdiction created by the Constitution and statutes and civil process is not applicable to the same.

We are, of course, aware of Rule 4 of the Elections (Parliamentary and County Elections) Petition Rules, 2013 which declares the overriding objective of the Rules as being to facilitate the just, expeditious, proportionate and affordable resolution of election petitions under the Constitution and the Act. The court is also required, in exercise of its powers under the Constitution and the Act or in the interpretation of any of the provisions of the Rules to seek to give effect to the overriding objective of the Rules."

50. The court is therefore called upon to do a delicate balancing act so as to achieve strict compliance with the electoral law timelines and at the same time ensure that substantive justice is done in electoral disputes.

51. Back to the facts of this case. The instant application was filed prior to the consolidation of the two petitions and was specifically targeted at the Petition of the 1st Petitioner. I will therefore proceed along those lines even though the advocates for the 1st, 2nd, and 3rd respondents submitted on the presumption that the 2nd Petitioner's Petition was also under attack. Having said so, it goes without saying that the outcome of this ruling will affect the two petitions as they were drafted in similar language.

52. The 1st Petitioner indicated that he substantially complied with Rule 8(1)(c) of the Elections Petitions Rules, 2017. He cites Paragraph 4 of his Petition wherein he avers that:

"The 3rd Respondent is the incumbent Governor for Kilifi County under the Orange Democratic Movement (ODM) party having been declared the winner of the elections held on 8th August, 2017 on the 11th day of August 2017 with 218,686 votes and gazetted vide Kenya Gazette CXIX-118 dated 18th August 2017 Gazette Notice number 7845 and sworn in on Monday the 21st day of August, 2017 at Karisa Maitha Grounds vide Kenya Gazette Vol. CXIX-No. 117 dated 16th August, 2017 Gazette Notice number 7759."

53. The 1st Petitioner asserts that the information disclosed is sufficient for the purposes of Rule 8. The 3rd Respondent supported by the 1st and 2nd respondents think otherwise. The 1st Petitioner asserts that he does not know the results and he even doubts whether the same were declared. I will not go there as this is a matter left for the hearing stage, if we will reach there.

54. The question is whether the information disclosed in the Petition and the replying affidavit was sufficient to let the respondents know what the 1st Petitioner's case was in order to respond to the same. The answer is in the affirmative. The 1st Petitioner's pleadings clearly disclose that he is challenging the election of the 3rd Respondent as the Governor of the County of Kilifi. The number of votes garnered by the 3rd Respondent is disclosed. Therefore, the failure to disclose the votes garnered by each and every candidate in the gubernatorial race does not in any manner put any of the respondents in doubt as to the nature of the Petition. They knew the 1st Petitioner's grievance and they were in a position to respond as they have already done.

55. Considering what I have stated above, it becomes obvious that I find no merit in the 3rd Respondent's application dated 28th September, 2017. The application is dismissed. Costs shall abide the outcome of the Petition.

Dated, signed and delivered at Malindi this 31st day of October, 2017.

W. KORIR,

JUDGE OF THE HIGH COURT