



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MALINDI
ELECTION PETITION NO. 4 OF 2017

SAMWEL KAZUNGU KAMBI.....1ST PETITIONER

VERSUS

**NELLY ILONGO THE COUNTY RETURNING
OFFICER, KILIFI COUNTY.....1ST RESPONDENT**

**THE INDEPENDENT ELECTORAL AND
BOUNDARIES COMMISSION.....2ND RESPONDENT**

AMASON JEFFAH KINGI.....3RD RESPONDENT

(AS CONSOLIDATED WITH ELECTION PETITION NO. 5 OF 2017)

WILLIAM KAHINDI MGANGA.....2ND PETITIONER

VERSUS

**INDEPENEDENT ELECTORAL AND BOUNDARIES
COMMISSION (I.E.B.C.).....1ST RESPONDENT**

**NELLY ILONGO (THE KILIFI COUNTY
RETURNING OFFICER).....2ND RESPONDENT**

AMASON JEFFAH KINGI3RD RESPONDENT

GIDEON EDMUND SABURI.....4TH RESPONDENT

RULING NO. 3

**[3RD & 4TH'S RESPONDENTS' PRELIMINARY OBJECTION DATED 6TH OCTOBER, 2017 &
NOTICE OF MOTION DATED 13TH OCTOBER, 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. The application dated 13th October, 2017 belongs to the 3rd and 4th respondents and is specifically brought against Petition No. 5 of 2017. It is said to be brought under sections 76(a), 77, 78, 79 and 80 of the Elections Act, Cap. 7 and rules 7, 8(a) and 32 of the Elections Petitions Rules, 2017 and all other enabling provisions of the law. Through the application, the 3rd and 4th respondents seek orders as follows:

“1. THAT this Court be pleased to stay any further proceedings in this Petition pending the hearing and determination of this Application;

2. THAT this Honourable Court reviews the order for consolidation of Petitions No. 4 & 5 of 2017 that was issued on 29th September 2017.

3. THAT the officer in-charge of the ICT Department at the Malindi Law Courts/High Court at Malindi do furnish this Honourable Court with copies of emails (bearing digital footprints including date & time) and the scanned copies of Petitions sent (from High Court at Malindi) to the Judiciary in Nairobi on 6th & 7th September 2017 pending the hearing and determination of this Application;

4. THAT the Chief Registrar of the Judiciary do furnish this Honourable Court with emails and their attachments /scanned copies of Petitions received from the High Court of Kenya at Malindi on 6th & 7th September 2017 pending the hearing and determination of this Application;

5. THAT this Honourable Court be pleased to strike out the entire purported Petition herein

dated at Malindi on the 5th September 2017 and purportedly filed on 06.09.2017 as the same was fraudulently filed and/or entered into the register without payment of any or any requisite Court fees.

6. THAT costs of this Application be provided for.”

8. The application is supported by the grounds on its face and the affidavits sworn on the date of the application by the 4th Respondent and Stella Adhiambo.

9. It is important to reproduce the grounds in support of the application as they summarize the 3rd and 4th respondents' case. They are as follows:

“a) That Petition herein dated at Malindi on the 5th September 2017 is not properly on record in that there are 2 Petitions against Hon Amason Kingi all allocated No. 5 of 2017 and no Court fees whatsoever has been paid in respect of one of the said petitions (being the latter petition hereinafter referred to as "the Malindi Petition").

b) That there exists two election Petitions in No. 5 of 2017 relating to the election of the Hon. Amason Kingi as Governor of Kilifi County herein with one dated at Kilifi and the second one dated at Malindi both allegedly filed on the 6th September 2017 and;

c) That the original Petition No. 5 of 2017 dated at Kilifi (hereinafter referred to as Kilifi Petition) has the following parties William Kahindi Mganga (1st Petitioner), IEBC (1st Respondent), Wafula Chebukati (2nd Respondent), The Kilifi County Returning Officer (3rd Respondent), Amason Jeffah Kingi (4th Respondent) & Gideon Edmund Saburi (5th Respondent).

d) That the subsequent Petition No. 5 of 2017 dated at Malindi (hereinafter referred to as Malindi Petition) has the following parties William Kahindi Mganga (Petitioner), IEBC (1st Respondent), Wafula Chebukati (2nd Respondent), Nelly Illongo (3rd Respondent), Amason Jeffah Kingi (4th Respondent) & Gideon Edmund Saburi (5th Respondent).

e) That the Kilifi Petition was filed on or about 11.30pm on 6th September 2017 and that the Malindi Petition was filed on/or about the 14th September 2017 and back-dated to 6th September 2017 with no court fees paid and similarly it was not entered/registered in the High Court Election Petition Register 2017;

f) That the Kilifi Petition which was filed herein on 06.09.2017 has been irregularly and/or unprocedurally and illegally plucked-off/expunged from the Court records;

g) That the absence of the Kilifi Petition (No. 5 of 2017 which was filed on 06.09.2017 at about 11.30pm) from the Court file and/or registry is an illegality, connivance and mischief which was sanctioned by Judicial Officers and the Petitioner's Counsel. This offends the legal maxim "He who comes to equity must come with clean hands".

h) That as at today (12th October 2017), there are no records in the Court file of letters exchanged between the Deputy Registrar and the Petitioner's Counsel requesting and/or allowing for the withdrawal of the Kilifi Petition filed on 06.09.2017.

i) That there are no pleadings and/or no proceedings in the Court file No. 5 of 2017 allowing for withdrawal of the Kilifi Petition filed on 06.09.2017.

j) That the Kilifi Petition No. 5 of 2017 (dated at Kilifi) was not served upon the Respondents as is required by law and therefore cannot be "recalled" to be heard and determined before this Honourable Court.

k) That no further proceedings can therefore be entertained by the Election Court save this Application.

l) That in the circumstances the Kilifi and the Malindi Petitions therefore renders itself for striking out and/ or dismissed with costs.

m) That it is only prudent and fair that the costs of this Application and the entire Kilifi and Malindi Petitions be borne by the Petitioner, and any sums deposited as security for costs, if any, be released to the 4th & 5th Respondents/Applicants herein as part of his costs.

n) That the Orders sought are well merited in law.”

10. The supporting affidavits reiterate the grounds in support of the application. In addition, the 4th Respondent avers that upon discovering that the 2nd Petitioner had filed two petitions in one file he instructed his counsel to conduct an enquiry. It is his averment that his counsel wrote to the Deputy Registrar, Malindi High Court whose reply confirmed that two petitions had indeed been filed by the 2nd Petitioner but one of the petitions had been withdrawn. In reference to the Deputy Registrar’s letter the 4th Respondent avers at Paragraph 17 of his affidavit:

“THAT I have had a close look at the response letter by the Deputy Registrar and noted the following issues,-

a) That the said letter clearly confirms that there are two petitions on record in the court file, filed by the Petitioner herein through the firm of Messrs Gatundu and Company Advocates on the 6th September 2017.

b) That the said letter alludes to the Petitioner having requested to file a fresh petition and whereas there is no formal request or letter from the Petitioner's Advocates requesting the same, thus, I am at a loss of how the said request was made.

c) That if at all the Petitioner had requested to file a fresh petition, which is denied, then the same ought to have been filed separately and given a fresh and/or separate number and fees for the same paid accordingly and not otherwise, thus, the petition (Malindi Petition) dated at Malindi on the 5th day of September 2017 is not properly on record as the requisite filing fees has not been paid for as required and further it was filed out of time.

d) That I verily believe the error, inadvertence or confusion on the part of the Petitioner that led him to file two separate petitions cannot be an excuse for failure to pay mandatory Court fees for the second—Malindi Petition-or fresh petition as confirmed by the Deputy Registrar.

e) That I verily believe that it is fraudulent on the part of the Petitioner to have purported to register and file the fresh petition-Malindi petition-dated at Malindi on the 5th September 2017 without payment of mandatory Court fees.

f) That I verily believe that it is fraudulent on the part of the Petitioner to have irregularly withdrawn the original Petition No. 5 of 2017 (Kilifi Petition) without following the due process as is required by law.

g) That I verily believe that the Malindi petition could not have been filed on the same day (since it was already past mid-night) and the Deputy Registrar was not in the office to authorize the filing of a second Petition (Malindi Petition) without registration and without paying the court fees.

h) That I verily believe that it is fraudulent on the part of the Petitioner to have caused the

original petition (Kilifi Petition) to be plucked and/or expunged from the Court records without being minuted by Court proceedings and/or formal letters exchanged between the Petitioner and the Deputy Registrar and/or the Court.”

11. It is the 4th Respondent’s averment that immediately the first Petition was filed on 6th September, 2017, he obtained a soft copy of the same. When their counsel perused the Petition against him and the other respondents that was advertised in the Daily Nation newspaper of 14th September, 2017 it was discovered that the same was different from the one that he had obtained and shared with her. It is his position therefore that the Petition on record was filed on 14th September, 2017 which was outside the 28 days provided by the law for challenging the election of a governor.

12. In her affidavit Stella Adhiambo avers that on 7th October, 2017 she visited the High Court Registry with one Amin and advocate Aoko. At the registry she took photographs of Petition No. 5 of 2017 which was not bound. She also noted that there was no communication between the Deputy Registrar and the Petitioner’s counsel. Adhiambo further deposes that on 13th September, 2017 while at the Registry she heard one process server by the name Maurice **“saying that some advocates were busy working on an amended Petition against the Governor and that it will be filed anytime and further it was needless for us to peruse that copy as it would be withdrawn.”**

13. It is important to note that the instant application was preceded by the 3rd and 4th respondents’ preliminary objection dated 6th October, 2017 which opposed the 2nd Petitioner’s Petition in terms similar to those of the application. For completion of record, I reproduce the said preliminary objection as follows:

“TAKE NOTICE that the 3rd & 4th Respondents will at Pre-trial Conference and/or hearing of the Petition No. 5 of 2017 dated 06.09.2017 raise the following Preliminary Objection to the said Petition.

1. THAT the date of filing of the second Petition in Petition No. 5 of 2017 is unknown, since there are two Petitions on file from the same Petitioner and having the same cause number. This is in itself is an act (of the Judicial officers and advocates of the Petitioner's) that violates Article 10 of the Constitution.

2. THAT the aforementioned 2nd Petition, which was served by Newspaper on 14th September, 2017 and backdated to read 6th September, 2017, was actually filed on 14th September, 2017. It is therefore filed seven (7) days out of time without (a) obtaining leave of the Court (b) amending the first Petition filed on 6th September, 2017.

3. THAT the presence of the 2nd Petition in the High Court Registry at Malindi is evidence of an act of corruption having taken place within the hallowed precinct of the High Court itself.

4. THAT likewise the absence of the original Petition (No. 5 of 2017 which was filed on 06.09.2017 at about 11.30pm) from the Court file and/or registry is an illegality, connivance and mischief which was sanctioned by Judicial Officers and the Petitioner's Counsel. This offends the legal maxim "He who comes to equity must come with clean hands".

5. THAT the original Petition No. 5 of 2017 was not served upon the Respondents as is required by law and therefore cannot be "recalled" to be heard and determined before this Honourable Court.

6. THAT the said 2nd Petition was never registered into the Elections Register for the High Court and no Court fees was collected. Therefore, no proper filing that is recognised by practise & law took place and the said Petition is thus incompetent, invalid and an abuse of the Court process.

7. THAT the Affidavits filed in this Petition offends the express provisions of Oaths and Statutory Declaration Act and the Election Petition rules 2017.”

14. When the application came up for hearing on 23rd October, 2017, Mr. Sanjeev Khagram who appears for the 1st and 2nd respondents indicated that his clients support the application.

15. The 2nd Petitioner opposed the application through a replying affidavit he swore on 21st October, 2017. On the prayer to set aside the consolidation order, the 2nd Petitioner’s position is that the consolidation was done by consent and in compliance with the Elections Petitions Rules, 2017.

16. Turning to the core issues raised in the application, the 2nd Petitioner avers at Paragraph 13 as follows:

“THAT in reply to paragraphs 12, 13, 14, 15, 16, 17 and 18 of the Affidavit, I swear that:

a. There was a lot of activity at the court registry on the 6th day of September.

b. On the 6th day of September, 2017 at around 11 pm whilst at the court precincts I met my then lawyer on record, Mr Gatundu who was visibly drunk when he got to court. He had inadvertently at around 4.30 pm while drunk presented to the registry officials the draft copy of my petition for purposes of assessment and paid the mandatory and requisite filing fees. A commotion ensued between me, other Jubilee Party petitioners and Mr Gatundu who then ran away. This commotion attracted the attention of the Hon. Deputy Registrar who came to the registry. At this juncture, Alice with whom all the Jubilee Party aspirants were working with delivered the correct bound petitions for the Kilifi Gubernatorial Seat, Kilifi Senatorial Seat, Kilifi Women Representative Seat and all the Member of National Assembly Seats in Kilifi County save for Magarini Constituency, which were all signed by Mr Binyenya on behalf of Mr Gatundu whom Ms Alice could not reach on phone. We had a team of ten (10) lawyers working on our petitions and Mr Binyenya was one of them. At the intervention of the Hon. Deputy Registrar, and mindful of the fact that Mr Gatundu had already paid the mandatory and requisite filing fees on my behalf, I was allowed to file this Petition a few minutes to midnight.

c. The Hon. Deputy Registrar to whom I am advised by my advocates on record, Aboubakar, Mwanakitina & Company Advocates, which advise I verily believe to be true that petitions of this nature are presented to for filing, in exercise of her discretion allowed me to withdraw the draft petition as presented by Mr Gatundu and present this Petition for filing. Mr Gatundu had paid the mandatory and requisite filing fees for this Petition in the sum of Kenya Shillings Thirty Five Thousand Four Hundred and Fifty (35, 450.00).

d. My advocates on record effected service of this Petition to the Applicant’s advocate on record who has since filed the Applicants’ response to petition. In the circumstances no prejudice has been occasioned to the Applicants.

e. On the 15th day of September, 2017 I deposited with court security for costs in the sum of Kenya Shillings Five Hundred Thousand (Kshs. 500, 000.00).

f. At no point did I act fraudulently.

g. I filed this Petition on the 6th day of September, 2017 and I did not back date the same.”

17. The 2nd Petitioner wonders where and how the 3rd and 4th respondents obtained a soft copy of his Petition. On the claim by Stella Adhiambo that she had perused the court file, the 2nd Petitioner deposes that no receipt had been attached showing that a perusal fee had been paid in order to support the claim

that she had indeed perused the court file.

18. According to the 2nd Petitioner, the issue before this Court is whether the election for the Governor of Kilifi County was free and fair and this application and the other applications by the respondents are just sideshows meant to circumvent and defeat justice.

19. The 2nd Petitioner also filed Grounds of Opposition dated 19th October, 2017. His position is that even where two petitions are filed, then by virtue of Section 6 of the Civil Procedure Act, Cap. 21 one petition shall be *sub judice* the other and the consequence is to stay one and proceed with the other. Further, that there is only one Petition on record.

20. It is the view of the 2nd Petitioner that the Deputy Registrar has provided sufficient and reasonable explanation as to what happened on 6th September, 2017 and the Deputy Registrar being in charge of the registry had the discretion to accept the documents in the manner she did in the interest of justice and fairness. It is the 2nd Petitioner's assertion that the explanation given by the Deputy Registrar discounts any notion of fraud and the legal maxim that 'he who comes to equity must come with clean hands' does not apply in the circumstances of the case and particularly in election petitions.

21. The 2nd Petitioner contends that there is no proof that his Petition was filed on 14th September, 2017 and the application is thus based on speculations and insinuations.

22. The 2nd Petitioner also asserts that having consolidated the two petitions as by the requirements of Rule 17 of the Petitions Rules and by consent of the parties, the consolidation cannot now be reviewed as there is no discovery of new evidence which could not be adduced on the date of consolidation.

23. Finally, the 2nd Petitioner contends that the provisions of sections 76(a), 77, 78, 79 and 80 of the Elections Act and rules 7, 8(a) and 32 of the Elections Petitions Rules, 2017 do not envisage the striking out of a petition on the ground that two petitions were filed at the same time.

24. The advocates for the 1st Petitioner support the 2nd Petitioner and submit that no basis had been established for deconsolidating the petitions and striking out the 2nd Petitioner's Petition.

25. When the matter came up for directions on 16th October, 2017, the advocates agreed that the same raised issues touching on the integrity of court operations. In the circumstances the advocates consented to the issuance of prayers 3 and 4 of the application. At the time of the hearing of the application the person in charge of the ICT Department at Malindi Law Courts had filed a report. The advocates for the parties were satisfied with the report and were no longer interested in the report of the person in charge of ICT at the secretariat of the Judiciary Committee on Elections (JCE).

26. The advocates for the parties highlighted the submissions on 23rd October, 2017. Ms Aoko urged the Court to strike out the 2nd Petitioner's Petition dated 5th September, 2017 and filed on 6th September, 2017 stating that the same was fraudulently filed or entered in the register without payment of any court fees. She submitted that the factual averments of the 3rd and 4th respondents were not controverted by the 2nd Petitioner. According to her, the facts clearly disclosed that two petitions were filed on 6th September, 2017 by the 2nd Petitioner and both given the number 5 of 2017. One was dated in Kilifi and the other one was dated in Malindi. She submits that this fact was also confirmed by the Deputy Registrar of this Court through a letter dated 26th September, 2017 in response to her letter dated 22nd September, 2017.

27. Ms Aoko asserts that the law is clear on how a petition is to be withdrawn. In her opinion, the rules are clear that withdrawal of a petition can only be done with the leave of an election court. Counsel submits that the leave of the court was not obtained in this matter and to show that there was mischief the Petition dated and signed at Kilifi was plucked off the court file yet this was the Petition sent to Nairobi

upon filing on 6th September, 2017. She contends that the fact that the Kilifi Petition is the one that was sent to the JCE in Nairobi is confirmed by the report filed by the ICT Officer, Malindi. She concedes that the Kilifi Petition was indeed filed in time.

28. Ms Aoko asserts that there is no receipt for the second Petition dated at Malindi and in the absence of a receipt indicating payment of court fees the only conclusion is that the same was filed out of time. It is her position that since the Kilifi Petition was not served upon the respondents it cannot be recalled for hearing. Further, that the parties in the two petitions have been described differently and the prayers are even different.

29. Ms Aoko made reference to the averment by Stella Adhiambo in her affidavit that she had perused the Court file on 7th September, 2017 and only saw the Kilifi Petition. Further, that Stella even took photographs of the Kilifi Petition. Counsel contends that the statements of Stella have not been controverted. She therefore urges this Court to find that two petitions were filed. Further, that the Kilifi Petition was filed in time and the Malindi Petition was filed out of time. It is her position that failure to pay court fees for the Malindi Petition renders the Petition defective.

30. Supporting the application, Mr Khagram for the 1st and 2nd respondents states that there is no petition capable of being heard by this court. He asserts that the 2nd Petitioner admits the first Petition is not traceable. According to him, the first Petition was expunged from the court record contrary to the clear procedure provided by the Elections Petitions Rules, 2107 for withdrawing petitions. Counsel submits that if indeed a draft petition was filed by mistake as alleged, the Deputy Registrar could have simply cancelled the 1st Petition and indicated it was a wrong document. Further, that the story of the Deputy Registrar and the version of the 2nd Petitioner as to what happened on the material day are different.

31. Turning to the Deputy Registrar's letter, counsel points out that the same talks of the 2nd Petitioner presenting two petitions. After the first Petition was filed a second Petition was filed by an advocate from the same firm. His opinion is that the 2nd Petition ought to have been given a different number. The 1st and 2nd respondents' counsel concludes by submitting that all the facts point to the conclusion that the only Petition that was before this court was the first one as the second was only sneaked in after the first one was removed. He also agrees with counsel for the 3rd and 4th respondents that the 2nd Petition ought to have been paid for.

32. Mr Aboubakar for the 2nd Petitioner strongly opposed the application. His position is that the prayer for striking out his client's Petition is based on allegation of fraud and failure to pay court fees. He asserts that the prayer does not mention the existence of two petitions but the submissions have revolved around the existence of two petitions. According to Mr Aboubakar, had there been two petitions they would have been given different numbers.

33. Counsel submits it is not disputed that Petition No. 5 was presented to the Deputy Registrar and paid for as required by the Elections Petitions Rules, 2017. It is his submission that the Deputy Registrar and the 2nd Petitioner have explained what happened on the material day. According to counsel, the 2nd Petitioner was dissatisfied with the representation of his advocate and sought to replace the filed petition with another petition. The 2nd Petitioner explained his predicament to the Deputy Registrar who allowed replacement of the petition that had already been filed with another one. That was before service was effected and on the same day.

34. It is Mr Aboubakar's assertion that the submission that the Deputy Registrar did not have the power to do what she did is not backed by any legal provision. His view is that the Deputy Registrar is part and parcel of the election court and had jurisdiction to do what she did in the interest of justice and for purpose of dealing with the substantive issues in the petition. He does not see any fraud in the Deputy Registrar's action asserting that there was no need for fresh payment of court fees as a fresh petition was not being filed.

35. Further, that the scanning and sending of petitions to the JCE is an administrative act and the parties have no role to play in the process and cannot therefore be held liable for failure by Judiciary employees to comply with administrative processes.

36. It is Mr Aboubakar's assertion that even if two petitions were filed in the same file, there is no provision for striking out. One should be stayed awaiting the outcome of the other. According to him, the provisions under which the instant application is made does not provide for the striking out of a petition in the manner suggested. He contends that this was not a withdrawal but a replacement and the withdrawal process envisaged under Rule 21 of the Elections Petitions Rules, 2017 can only be engaged once service of an election petition has been effected.

37. On the allegation that the subsequent petition was filed on 14th September, 2017, he submits that there is no evidence to support such averment.

38. Counsel for the 2nd Petitioner wonders whether it is possible to attack the 2nd Petitioner's case considering that this application was filed after consolidation. In his opinion Petition No. 5 of 2017 does not exist and the application is therefore incompetent. Counsel relied on the decisions in **Fatuma Zainabu Mohamed v Ghati Dennitah & 10 others [2013] eKLR** and **Hosea Mundui Kiplagat v Sammy Komen Mwaita & 2 others [2013] eKLR** in support of his submissions and urges the court to dismiss the application with costs to the 2nd Petitioner.

39. Mr Gicharu Kimani for the 1st Petitioner joined the 2nd Petitioner in opposing the application. He pointed out that the consolidation of the two petitions was effected by the court as required by Rule 17 of the Elections Petitions Rules, 2017 and all the parties had agreed to the consolidation.

40. In reply to the submissions by counsel for the 2nd Petitioner, Ms Aoko asserts that an election petition arises from a special set of laws and rules thereby making election proceedings special and necessitating adherence to the applicable law and rules. She stresses that the word replace is unknown to the rules and replacing is tantamount to withdrawing a petition which requires compliance with Rule 21 of the Elections Petitions Rules, 2017. It is her view that it is immaterial that the first petition had not been served.

41. Mr Mosota who teamed up with Ms Aoko and Mr Kibara for the 3rd and 4th respondents added his voice by stating that it was on record that the consolidation was on a without prejudice basis. He contends that the only way the first petition could be dealt with was through withdrawal as provided by the Elections Petitions Rules, 2017. Mr Mosota stresses that the submission that the Deputy Registrar is part of the election court is erroneous as the Deputy Registrar is defined separately and so is the election court. He concludes that the power to withdraw an election petition belongs to the election court and the Deputy Registrar cannot clothe himself/herself with the powers of an election court.

42. Mr Kibara wrapped up the 3rd and 4th respondents' reply by stating that the petitioners are relying on the order of consolidation of 29th September, 2017 to hide their mistakes. According to him, the order of consolidation was purely an administrative action for good case management and did not bar the respondents from raising any matters in respect of the defects found in the petitions. Further, that the order for consolidation was not by consent and was issued by the court *suo moto* as required by the law. He ends by submitting that consolidation did not mean defects in a petition should be overlooked because of the existence of the other petition.

43. It would not be proper to determine this application without reproducing the letter addressed to the Deputy Registrar by the advocate for the 3rd and 4th respondents and the Deputy Registrar's reply thereto. The letter dated 22nd September, 2017 from Aoko Otieno and Associates to the Deputy Registrar states:

“RE: MALINDI HIGH COURT ELECTION PETITION N. 5 OF 2017 WILLIAM KAHINDI MGANGA VS. IEBC, AMASON J. KINGI & ANOTHER”

The above refers.

Our clients, the 3rd and 4th Respondent herein have brought to our attention that there are 2 distinct petitions that have been filed and issued with the same number i.e. No. 5 of 2017. A copy of one of the petitions filed was availed to our client and it is different from the version that was served upon ourselves. Enclosed herewith is a copy of the said Petition No. 5 of 2017.

We have instructions from our clients to seek clarity on this issue since their source indicated that he witnessed the filing of the second Petition on 14th September 2017 which was then back-dated to read 6th September 2017. Further, our clients have informed us that one of the Malindi Advocates was spotted filing the second Petition on the said 14th September 2017 on behalf of Gatundu & Co. Advocates.

Kindly shed light on this.

We wait a response from you.”

44. The letter was received by the Deputy Registrar on 26th September, 2017 and responded to on the same date thus:

“RE: MALINDI HIGH COURT ELECTION PETITION NO. 5 OF 2017 WILLIAM KAHINDI MGANGA VERSUS IEBC, AMASON J. KINGI & ANOTHER

I refer to your letter dated 22nd September, 2017. I have noted the concerns therein under and I respond thus;

On the 6th September, 2017, the Petitioner presented two petitions. The first was received with a lot of commotion as the Advocate presenting it was drunk. Once they were assessed and paid for, an Advocate from the same firm presented a second petition with similar parties and asked to withdraw that first petition. I authorized the filing of the 2nd petition which was assessed and filed on the same date as the first which had just been withdrawn.

The High Court Registry and I are strangers to any petition being allegedly filed on the 14th September, 2017 and stamp being backdated to the 6th September, 2017.

I confirm that we received our last petition at the registry on the 6th September, 2017 as per our register.”

45. A perusal of the pleadings and the documents filed in respect to this application clearly shows that there is no dispute that the 2nd Petitioner filed a petition that was later removed from the file and replaced with the one that is currently on record. The 3rd and 4th respondents allege that the replacement of the Petition that had been filed is fraudulent and was done in collusion between the court registry staff and the 2nd Petitioner’s counsel. The 2nd Petitioner sees no evil in his action and classify this application as one of the tactics by the 3rd and 4th respondents to delay the hearing of his Petition.

46. A keen look at the application reveals that the 3rd and 4th respondents are questioning the jurisdiction of this court to hear this matter. In their view the Petition was filed over twenty-eight days from the date of the declaration of the election results thus contravening the Constitution and the Elections Act which requires any person desirous of questioning the validity of an election, other than that of the President, to file a petition within twenty-eight days after the declaration of the election results.

47. The questions that need to be answered in this ruling are whether the Petition on record was filed

within twenty-eight days from the date of the declaration of the results and whether there is a valid Petition on record. It is important to start by noting that the jurisdiction of this court in election disputes is a special one. This was confirmed by the Supreme Court in **Lemanken Aramat v Harun Meitamei Lempaka & 2 others [2014] eKLR**, when it stated at Paragraph 82 that:

“The original jurisdiction of the High Court in criminal and civil matters, by Article 165(3)(a) of the Constitution, is unlimited. In addition, the High Court has a *special jurisdiction* in electoral matters, conferred by the Constitution, and given effect under the Elections Act: this is the jurisdiction to determine any question as to whether a person has been *validly elected* as a Member of Parliament (Article 105(1)(a) of the Constitution). This jurisdiction is activated upon a *declaration by the authorized electoral body (IEBC) that a particular person has been returned as Member of Parliament, when there is a challenge to that electoral declaration (Article 87(2) of the Constitution).*”

At paragraph 83 the Court stressed that the jurisdiction is tied to the timeframes provided by the electoral law:

“By those terms of the Constitution, it is clear that the High Court’s special jurisdiction is time-bound. The Court’s jurisdiction has practical meaning only in the context of the prescribed timelines.”

48. It is therefore clear that unless the rules governing ordinary civil matters are expressly stated to be applicable to election petitions, the only legal instruments to be used in determining electoral disputes are the Constitution, the Elections Act plus the regulations and the rules made thereunder. In light of the above statement, it becomes clear that the 3rd and 4th respondents’ application is not an idle one as alleged by the 2nd Petitioner. If they can indeed prove that the Petition on record was filed outside the constitutionally prescribed time, then this court will have no option but to down its tools-see **Lemanken Aramat** (supra).

49. The case of the 3rd and 4th respondents is that the Petition on record was filed on 14th September, 2017. Emphasis is put on the affidavit of Stella Adhiambo who avers that on 7th September, 2017 she took photographs of the Petition in the court file. It is her deposition that the Petition was not bound like the one which is currently on record. In the affidavit she also avers that on 13th September, 2017 she heard a process server by the name Maurice say that some advocates were busy working on an amended Petition against the Governor and there was no need to peruse the one that was in the file.

50. The 2nd Petitioner dismisses the allegations insisting that his Petition was filed on 6th September, 2017 and the 3rd and 4th respondents have not placed any evidence before the Court to support their allegation that his Petition was filed on 14th September, 2017.

51. In resolving an election dispute, one must bear in mind that election petitions are charged affairs and parties are likely to make false allegations if the same would add value to their case. It is therefore important that where evidence in support of a claim is available, that evidence should be placed before the court. In the case at hand, Stella Adhiambo averred that she took photographs of the Petition on 7th September, 2017. She indicated her willingness to avail to the court the mobile phone she used to take the photographs. She, however, did not exhibit the photographs and neither was the offer to avail to the court the mobile phone actualized. It is also important to note that the 2nd Petitioner has raised an issue as to how a court file could be perused without payment of court fees. Stella Adhiambo has indeed not exhibited any receipt showing that she paid the fee for perusing the court file. The evidence in support of the allegation that the Petition on record was filed after 6th September, 2017 is therefore unreliable. I also agree with the 2nd Petitioner that there is no iota of evidence to support the claim that the second Petition was filed on 14th September, 2017.

52. Turning to the evidence of the 2nd Petitioner, I also find the same to be doubtful. A perusal of the ICT

report from Malindi Law Courts shows an email dated 6th September, 2017 from one Amos Njoroge Kimani to the Deputy Registrar Wandia Nyamu forwarding election petitions numbers 5, 6 and 7 of 2017. Petition No. 5 of 2017 is dated at Kilifi. This is the same Petition that was later forwarded to the JCE at 11.30pm. It is the one that was removed from the file and replaced with the one dated at Malindi. The interesting thing is that the Petition dated at Malindi and which is the one on record was signed on 5th September, 2017 by the firm of Gatundu & Co. Advocates. When was the 2nd Petition drafted? At what point did the 2nd Petitioner realize that he needed to replace the first Petition? If the Kilifi Petition was sent to the JCE at 11.30 p.m. on 6th September, 2017, when was the Petition dated at Malindi filed? The answers to those questions can only be provided by the 2nd Petitioner. He has not done. It is highly likely that the 2nd Petitioner's Petition on record in this case was filed after midnight thus rendering it illegitimate.

53. It is clear from the pleadings filed in respect to this application that the second Petition has no electronic footprints. Counsel for the 3rd and 4th respondents assert that this is sufficient evidence of fraud by the 2nd Petitioner and the court registry staff. With respect to counsel, I do not agree with this submission. The Internal Memo dated 1st March, 2017 from the Judiciary Committee on Elections (JCE) stated *inter alia*:

“By a copy of this memo I kindly request that every court;

1. Notifies the JCE secretariat immediately an election related case is filed.

2. Give constant updates to the JCE secretariat on the progress of the cases including sharing information on dates for mention and hearing of the cases.

3. Share soft copies of orders, rulings and judgements as soon as they are delivered to the JCE Secretariat by way of email to arikalilian@gmail.com and copied to Lciiru@yahoo.co.uk.

4. Identify a contact person that the JCE secretariat can reach for ease of communication.

5. Offer any other assistance that the secretariat may request from you.”

In my view, the Memo did not require that every document filed in an election petition be transmitted to the JCE. Failure to send the second Petition to the JCE cannot therefore be used to read fraud or collusion between the 2nd Petitioner and employees of the Judiciary. However, since the first Petition had been removed from the file it would have been prudent to transmit the second Petition to the JCE for purposes of enhancing transparency and ensuring that the Petition that is actually on record is captured by the JCE. In fact, what the JCE has is not the Petition on record and the purpose of the Internal Memo was thus not achieved due to the failure to transmit the second Petition to the JCE.

54. The evidence of the 2nd Petitioner does not explain how the second Petition was prepared and filed before midnight. My observation is that it is most likely that the second Petition was filed after midnight even though the date of its receipt is indicated as 6th September, 2017. I therefore agree with the 3rd and 4th respondents that the Petition on record being the second Petition was filed after twenty-eight days from the date of the declaration of the results of the election for the Governor of the County of Kilifi.

55. Apart from the fact that the Petition of the 2nd Petitioner may have been filed out of time, there is another reason why the application of the 3rd and 4th respondents should succeed. The 2nd Petitioner concedes that he replaced the first Petition with the one on record. Section 76 of the Elections Act provides the procedure for presentation of petitions to the courts. It states:

“76. Presentation of petitions

(1) A petition—

(a) to question the validity of an election shall be filed within twenty eight days after the date of publication of the results of the election in the *Gazette* and served within fifteen days of presentation;

(b) to seek a declaration that a seat in Parliament or a county assembly has not become vacant shall be presented within twenty-eight days after the date of publication of the notification of the vacancy by the relevant Speaker; or

(c) to seek a declaration that a seat in Parliament has become vacant may be presented at any time.

(2) A petition questioning a return or an election upon the ground of a corrupt practice, and specifically alleging a payment of money or other act to have been made or done since the date aforesaid by the person whose election is questioned or by an agent of that person or with the privity of that person or his agent may, so far as respects the corrupt practice, be filed at any time within twenty-eight days after the publication of the election results in the *Gazette*.

(3) A petition questioning a return or an election upon an allegation of an illegal practice and alleging a payment of money or other act to have been made or done since the date aforesaid by the person whose election is questioned, or by an agent of that person, or with the privity of that person or his election agent in pursuance or in furtherance of the illegal practice alleged in the petition, may, so far as respects the illegal practice, be filed at any time within twenty-eight days after the publication of the election results in the *Gazette*.

(4) A petition filed in time may, for the purpose of questioning a return or an election upon an allegation of an election offence, be amended with the leave of the election court within the time within which the petition questioning the return or the election upon that ground may be presented.

(5) A petition filed in respect of the matters set out in subsections (2) and (3) may, where a petition has already been presented on other grounds, be presented as a supplemental petition.”

56. The second Petition appears to be an amendment of the first Petition that was taken away by the 2nd Petitioner. If that is the case, then the second Petition is not properly before the court as the leave of the court as required by Section 76(4) was not sought before the amendment. Had the 2nd Petitioner left the first Petition on record, the court would have been obliged to hear that Petition. The same is however not available to the court. The 3rd and 4th respondents have also correctly pointed out that this particular Petition was never served.

57. It is also important to note that the decision of the 2nd Petitioner to take away the first Petition was irregular and thus erroneous. Once a petition is filed, it can only be withdrawn with the leave of the court and in accordance with rules 21 to 23 of the Elections Petitions Rules, 2017. Rule 21 clearly outlines the procedure for withdrawing an election petition as follows:

“21. Withdrawal of petition

(1) A petition shall not be withdrawn without leave of the election court.

(2) The election court may grant leave to withdraw a petition on such terms as to the payment

of costs or as the election court may otherwise determine.

(3) An application for leave to withdraw a petition shall—

(a) be in Form 5 set out in the First Schedule;

(b) be signed by the petitioner or a person authorised by the petitioner;

(c) state the grounds for withdrawing the petition; and

(d) be filed at the registry.

(4) The parties to the petition shall each file an affidavit, before leave for withdrawal of a petition is determined, addressing the grounds on which the petition is intended to be withdrawn.

(5) Despite sub-rule (4), an election court may, on cause being shown, dispense with the affidavit of a party to the petition if it seems to the election court on special grounds to be fit and just.

(6) Each affidavit filed under sub-rule (4) shall contain the following declaration-

“to the best of the deponent’s knowledge and belief, that no agreement or terms of any kind has been made, and that no undertaking has been entered into, in relation to the withdrawal of the petition”.

(7) Despite sub-rule (6), where a lawful agreement shall have been made with respect to the withdrawal of the petition, the affidavit shall set out the terms of the agreement.”

58. An election petition once filed becomes the property of the election court and can only be withdrawn with the leave of the election court. The Deputy Registrar has no power to allow a petitioner to remove, withdraw or replace a petition. The actions of the 2nd Petitioner and the Deputy Registrar in this matter were therefore contrary to the Elections Petitions Rules, 2017. Even if the second Petition was filed on 6th September, 2017, the same cannot be entertained as it is an amended Petition whose amendment was done without the leave of the court. In essence there is no Petition to be heard by this court.

59. The 2nd Petitioner may want to blame the Judiciary staff for his predicament. He cannot be allowed to do so. He admits he is the one who requested the Deputy Registrar to release to him the Petition dated at Kilifi and replace it with the one dated at Malindi. It is his own actions that have put him in the position in which he now finds himself and he alone should shoulder the blame for the fate that his Petition is destined to suffer.

60. In the case of **Esposito Franco v Amason Kingi Jeffah & 2 others [2010] eKLR** the appellant’s petition was dismissed by the High Court after he failed to deposit the security for costs within three days as was then required by the law. He tried to blame his predicament on misinformation by the court registry personnel. The Court of Appeal thought otherwise stating that:

“42. We have carefully examined the evidential material on record and in the end we are left in no doubt that the advocate seized of the matter on behalf of the petitioner was clueless about the provisions, and therefore the requirements of *section 21* of the Act and *Rule 12* thereunder. The expectation that he should have been advised by the court clerks on the law and procedure instead of offering that advice to them is as baffling to us as it was to the learned Judge of the superior court. It would not matter in the circumstances how long he wanted to take in cross-examining those clerks. We cannot therefore blame the Judge in surmising that the advocate either misread the law or was ignorant of it, or alternatively he did not have the deposit at all....More importantly, *Rule 12* designates the Registrar as the

recipient of the deposit. There was always a Deputy Registrar at Malindi Law Courts as the advocate lamented about the incompetence of the clerks, but he made no effort to seek audience with him. At no time in these proceedings did he explain why that was not possible. With respect, such conduct cannot form the basis of favourable treatment by a court of law.”

61. I surmise that the 2nd Petitioner is a victim of the now well-known Kenyan “last minute syndrome” in which matters are left to be dealt with on the last hour of the last day. The 2nd Petitioner having discovered a deficiency in his first Petition and realizing that it was too late to ask the election court to allow him to amend the Petition resorted to replacing the first Petition with the second one. That is not the way the law expect an election petition to be amended. I also wonder why the Judiciary treat members of the political class with too much deference. Although electoral disputes are attended by strict timelines I do not fathom the reason for making employees of the Judiciary wait until midnight for a litigant who has had twenty-eight days to file his petition.

62. How should the Court then proceed? The petitioners are of the view that the consolidation of the two petitions was done in compliance with the Elections Petitions Rules, 2017 and with the consent of the parties. Further, that there is nothing new that has come to light since the consolidation to warrant deconsolidation.

63. There is indeed no express provision in the Elections Petitions Rules, 2017 to govern deconsolidation. However, in my view, the power to consolidate comes with the mandate to deconsolidate. Once this court has determined that the 2nd Petitioner has no valid Petition before the court, it follows that the two petitions should be disengaged so that the 2nd Petitioner’s case can be laid to rest.

64. The submission by the counsel for the 2nd Petitioner that consolidation meant that Petition No. 5 of 2017 was no longer in existence is untenable. Consolidation could not have breathed life to a petition that was defective at the time of filing. A defective suit cannot be made good by consolidating it with a valid matter. From the beginning, there was nothing in Petition No. 5 of 2017 that could properly be consolidated with Petition No. 4 of 2017. The consolidation was therefore a nullity from the outset.

65. In the circumstances of this case, the order to consolidate Malindi High Court Election Petition No. 4 of 2017 and Malindi High Court Election Petition No. 5 of 2017 issued by this court on 29th September, 2017 is set aside. For the reasons already stated in this ruling, Malindi High Court Petition No. 5 of 2017 is struck out.

66. As per Section 84 of the Elections Act, costs shall follow the cause. The respondents shall therefore have the costs of the Petition. Rule 30 of the Elections Petitions Rules, 2017 empowers an election court to cap the costs payable in an election petition. It is important to note that election petitions are part of the mechanisms for ensuring full enjoyment of democratic rights by voters. As such, those who suffer setbacks in election petitions should not be made to pay punitive costs least genuine litigants are locked away from the seat of justice.

67. How then does the court determine what are the just costs to the winning party in an election petition? During submissions I asked the advocates for the parties to make proposals as to what they thought would be just as instruction fees in this matter. The proposals ranged between Kshs. 500,000 and Kshs. 7 million. The submissions are therefore unhelpful. I will therefore look elsewhere for guidance.

68. In the case of **Harun Meitamei Lempaka v Lemanken Aramat & 2 others [2014] eKLR** the Court of Appeal capped the costs of the election petition in the High Court at Kshs. 1,500,000 to be shared by the winning side. This is a matter which had proceeded to full hearing and over ten witnesses had testified. In fact the Court of Appeal had directed a recount of all the votes cast in all the 69 polling stations in the constituency.

69. Noting that the cited Court of Appeal decision was made in respect of an election petition for the last

election circle; considering that this matter did not proceed to hearing; and taking into account that the successful application was brought by the 3rd and 4th respondents, I award the 3rd and 4th respondents total costs of Kshs. 750,000. The 1st and 2nd respondents will get total costs of Kshs. 600,000. The meaning of this is that in accordance with Rule 30(1)(a) of the Elections Petitions Rules, 2017, the costs awarded are not subject to any taxation by the Deputy Registrar.

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

W. KORIR,

JUDGE OF THE HIGH COURT