**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT SIAYA**

**ELECTION PETITION NO. 2 OF 2017**

**IN THE MATTER OF THE ELECTION FOR MEMBER OF NATIONAL ASSEMBLY, GEM CONSTITUENCY**

**BETWEEN**

**HON. WASHINGTON JAKOYO MIDIWO.....PETITIONER**

**VERSUS**

**THE INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION.....1ST RESPONDENT**

**THE RETURNING OFFICER**

**GEM CONSTITUENCY ……..……...…..... 2ND RESPONDENT**

**HON. ELISHA ODHIAMBO …..... 3RD RESPONDENT**

**RULING NO. 1**

By the Notice of Motion dated 9th October 2017 the 3rd Respondent seeks orders that:-

> **a. The petition of Hon. Washington Jakoyo Midiwo dated 5th September 2017 and filed in court on the 6th 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 4th (sic) Respondent/Applicant herein.**

The application is premised on grounds that:-

> **1. "That the petition is fatally defective for want of form and content due to failure by the Petitioner to state the election results and the date and manner of declaration of the said results.**
>
> **2. The time of filing election Petitions is governed by Article 87(2) of the Constitution, and is predicated upon the date of declaration of the results of the election.**

**3. Section 2 of the Election Act, defines ''Election Results'' as follows:-**

> **''Election results means the declared outcome of the casting of votes by voters at an election''.**

**4. Regulations 83 and 87 of the Election General Regulations confer upon the Returning officers at an election the onus of announcement of election results.**

**5. Rule 8 of the Election Petition Rules applicable in this Court provides as follows:-**

**8 (1) An election Petition shall state:-**

> **(b) The date when the election in dispute was conducted.**
>
> **(c) The results of the elections, if any, however declared**
>
> **(d) The date of the declaration of the results of the election.**

**6. Similarly Rule 12 of the said Rules makes provision in this manner:**

**12(2) An affidavit in support of a Petition under Sub-rule (1) shall state:-**

> **(c) The results of the election, if any, however declared,**
>
> **(d) The date of the declaration of the results of the election.**

**7. The need to particularize the results of the election as declared, the date of the election, and the date the results are declared, are all central matters of content which must be specifically stated in a Petition.**

**8. The petition filed herein lacks and is deficient of the following mandatory requirements as decreed by law:-**

> **a. The results of the Election as declared is not stated/given in the entire Petition.**
>
> **b. The date of declaration of the Results of the election has been completely left out/omitted.**
>
> **c. In the absence of the date of declaration of the election results computation of time envisaged in Article 87(2) of the Constitution cannot be realized or determined.**

**9. An election Petition essentially questions the results of the election as declared. In the absence of this important component of an election, the present Petition is defective and incompetent.**

**10. A perusal of the Petition shows that it does not state the number of votes cast in favour of each of the candidates who participated in the questioned election. The total votes cast in the election is also missing.**

**11. The Supporting Affidavit of the Petitioner has failed to comply with, and is deficient of the very germane mandatory requirements of matters which such affidavit should contain, as more specifically set out in Rule 12(2)(c) and (d) of the Election Petition Rules 2017.**

**12. The double failure on the Part of the Petitioner to comply with the mandatory requirements of the law cited above makes the entire Petition wholly defective and incompetent.**

**13. The Elections Act and the Rules thereunder made are direct derivatives of the Constitution which at Article 87(1) states:**

> **(i) Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes.**

**14. The Laws and Rules therefore made that require certain steps to be taken and particular matters to be included in an election Petition are so made for the purpose of fulfilling what the Constitution has allowed to be done, ''for the timely settling of disputes''.**

**15. Therefore, a failure to comply with these mandatory requirements as set out in the Rules is a failure to comply with the requirements of the Constitution, since these laws are derivatives of that Constitution.**

**16. The omissions pointed out above, having contravened the law and the Constitution, have no way of being remedied, other than to have the entire Petition struck out/or alternatively, dismissed.**

**17. Finally, the Petition is further defective for having followed the Rules applicable to a Presidential Petition filed in the Supreme Court, at the expense of observing the mandatory requirements for petitions brought in this election Court.**

**18. The *malafides* attendant to this petition calls for its striking out, with costs. And will be supported by such arguments and reasons that will be advanced at the hearing of this Motion."**

The application is supported by the affidavit of Elisha Ochieng Odhiambo – the 3rd Respondent, sworn on 9th October 2017 in which, reiterating the grounds stated on the face of the application, he deposes that as the petition essentially questions the results of the election as declared, the absence of the results and the date of the declaration of those results renders the petition defective and incompetent. He further deposes that the number of votes cast in favour of each of the candidates who participated in the questioned election and the total votes cast in the election is missing. He deposes that the Elections Act and the Rules thereunder are direct derivatives of Article 87(1) of the Constitution and consequently the double failure by the Petitioner to comply with the mandatory requirements of the law both in the Petition and in the affidavit in support of the petition is a failure to comply with the requirements of the Constitution. He contends that the omissions have no way of being remedied other than by striking out the petition. He concludes by stating that the petition is also defective for having followed the Rules applicable to a Presidential Petition in the Supreme Court at the expense of observing the mandatory requirements for Petitions brought in this Court.

The application is vehemently opposed. In his replying affidavit sworn on 13th October 2017 the Petitioner/Respondent deposes firstly, that this application is an afterthought, frivolous, vexatious and merely calculated at defeating the ends of justice. Secondly he deposes that he has fully complied with Sections 76(1)(a) and 77(1) and (2) of the Elections Act in that this Petition was filed within the stipulated period of 28 days; thirdly, that he did not state the results in the petition as the same were never publicly declared at the tallying centre as required by law and he could not have risked to perjure himself by stating a result which was not declared publicly. Fourthly he states that this is a classic example of petitions which fall under the ''íf any'' and ''however declared'' category and states that this shall be ably canvassed during the hearing of the petition. At paragraph 26 of his affidavit he goes on to state that his Chief Agent Samuel Ochieng Onyango Opot has annexed a Form 35B which he obtained much later to his affidavit dated 5th September 2017. He states that the said annexture clearly captures the results purportedly garnered by each of the candidates. He states that the petition has fully complied with all the requirements for an election petition in form and content and that he is entitled to a fair hearing under Article 50 of the Constitution and as such the Petition should be heard on merit and not struck out on a technicality. He urges this court to be guided by Article 159(2)(d) of the Constitution and contends that even were the court to find there was a deficiency in form it ought not to visit it upon the over 200,000

residents of Gem. He alleges that under the rules the duty now falls upon 1st Respondent to furnish the court with the results a thing which he contends the 1st Respondent has neglected and/or refused to do. He deposes that the world over courts have been extremely reluctant to strike out or dismiss election petitions at the interlocutory stage without hearing and determining them on merit; that it is for that reason the 3rd Respondent has not annexed a single authority to aid his argument save for one case based on different circumstances. He urges this court not to strike out the petition.

The 1st and 2nd Respondent did not file any response to the application by the 3rd Respondent.

This court heard the oral arguments of the Advocates for the parties.

Mr Willis, Learned Advocate for the 3rd Respondent/Applicant submitted that Rule 8(1) (c) of Election Petition Rules 2017 that require the results to be stated is mandatory; that it is those results that constitute the dispute before the court and that in so far as they are not stated the court is left with a petition that is merely speculative. He contended that in the absence of the results there will be nothing to compare with the evidence adduced considering that a petition is intended to determine how the irregularities and illegalities alleged affected the result. Mr Willis submitted that the allegation by the Petitioner that he does not know the results of the election is not an averment in the petition and it cannot be properly raised at this stage.

Mr Willis further stated that the depositions of Samuel Ochieng Onyango Opot in the affidavit dated 5th September 2017 to the effect that he refused to sign the form because he did not agree with what was tabulated, is testimony that the results were known to the Petitioner/Respondent. He describes the averments by the Petitioner at paragraph 22 and 23 of the replying affidavit as a mischievous attempt to amend the petition so as to qualify in the "if any" category. He contended that if indeed the Petitioner did not know the result he should have pleaded that in the petition so that it could form the basis of this dispute. He contended that none of the grounds impeach the Returning Officer for failing to declare the results. He submitted that as the results were known but were not stated in the Petition the petition must be struck out for failure to conform to the rules.

In support of his submissions Mr Willis relied on the Court of Appeal decision in **John Njenga Mututho V. Jayne Njeri Wanjiku Kihara & Two Others Nakuru Court of Appeal No. 102 of 2008** cited with approval by Onyancha J in **Amina Hassan Ahmed V. Returning Officer Mandera County & Two Others [2013] eKLR** where a similar issue was raised and where Onyancha J struck out the petition. Mr Willis also relied on **Caroline Mwelu Mwandiku V. Patrick Musimba & Two Others [2013] eKLR** in support of his argument that a petition is primarily about figures and numbers and that the said figures must be stated. He submitted that as it is now sixty days since the declaration of results in this election the petition cannot be amended. He also stated that Article 15 (2)(d) cannot be a cure for this gross irregularity. He contended that the same is not a mere technicality but a matter of substance and the only way to deal with the petition is to strike it out. He prayed that the Notice of Motion be allowed.

The 1st and 2nd Respondents supported the application. M. Wesonga, Learned Advocate for the 1st and 2nd Respondent submitted that the issue of results is a substantive one that is not just regulated by the rules but by Articles 87(2) of the Constitution. He submitted that the results as declared are the central issue from which a petition will arise and that the results cannot even be the subject of further particulars. He submitted that election petitions are sui generis and this court cannot import the flexibility of rules of equity to cure the defect in this petition. He argued that the petition is fatally defective and urged this court to strike it out.

In opposing the application Mr Sala, Learned Advocate for the Petitioner/Respondent submitted that the petition has raised a substantial cause of action for determination by this court. He submitted that whereas the results are not stated in the petition the same have been annexed to the affidavit of Samuel Ochieng Onyango Opot sworn on 5th September 2017 as well as that of the 2nd Respondent dated 17th September 2017. He submitted that the affidavits in the bundle forming the petition are part of the petition and as such the results of the election have been availed to this court. He contended that as the

affidavit to which the results are attached were filed less than 28 days from the date of polling let alone the date of declaration then the same were filed within time. Mr Sala, submitted that in any event the provisions of Rule 8 are not strictly mandatory in that sub-rule 8(1) (c) has introduced the phrase "if any" and "however declared". He urged this court to ask itself what mischief this rule was intended to cure. He reiterated his client's position that the results were never publicly declared and how it was difficult to obtain Form 35B. Mr Sala in further answer to the submission by Counsel for the 3rd Respondent/Applicant that the affidavits wherein the results are annexed were filed outside the requisite 28 days reminded Counsel that the affidavits were so filed with the leave of this court in exercise of its discretion to extend time. He contended this court having granted leave to the parties to file the affidavits the documents are properly on record.

On the case of **Amina Hassan Ahmed V Returning Officer Mandera County (suppra)** cited in support of this application Mr Sala invited this court to find that the same relied on **John Njenga Mutotho V. Jayne Njeri Wanjiku Kihara & Two Others (suppra)** which many superior courts now agree is bad law. To this end he cited-

**a) WilliamKinyanyi Onyango V. Independent Electoral & Boundaries Commission & Two Others [2013] eKLR.**

**b) Caroline Mwelu Mwanduku V. Patrick Mweu Musimba & Two Others [2013] eKLR.**

**c) Richard Kalembe Ndile V. Patrick Musimba Mweu [2013] eKLR.**

He stated that what the respondents are doing amount to elevating the rules to a fetish. He urged this court to rely on Article 159(2) (d) of the Constitution and concentrate on substantive justice by allowing the petition to go for hearing on merit rather than dismiss it for want of form. He submitted that an election petition is in the nature of public interest litigation and the people of Gem and the Petitioner have a right to be heard on merit under Article 50 of the Constitution. Mr Sala urged this court to find that the petitioner has fully complied with the rules pertaining to election petitions and to dismiss this application with costs.

In reply Mr Willis, for the 3rd Respondent/Applicant, reiterated his submission that the Petitioner cannot challenge results which he has not disclosed. He submitted that this court's discretion to extend time to file documents can only be exercised if a petition is competent but cannot be exercised to cure an illegality; that Rule 8(1) of the Election Petition Rules imposes a compulsory obligation upon the Petitioner to state the results in the petition and in the supporting affidavit. He contended that the phrase "if any" can only apply where the allegation is that there were no results. He submitted that is not the case here as the affidavit of Samuel Onyango Opot has the results. He reiterated however that the fact that the results are in the affidavit of Samuel Onyango Opot is not sufficient as the substance of the petition is found in the petition itself and the supporting affidavit of the Petitioner but not that of a witness. He contended that the results ought to have been in court on 6th September 2017 and the affidavits of the 1st and 2nd Respondents filed on 18th September 2017 cannot cure the defect in the petition. He submitted that as at 12th September 2017 when the 3rd Respondent/ Applicant filed his response there was no cause of action disclosed as the results of the election were not stated. Describing the Petitioner's reliance on the Form 35B filed by the 1st and 2nd Respondents as an excellent illustration of a fishing expedition Mr Willis stated that it is not open to the Petitioner to rely on those documents. He stated that the drafters of the new rules deliberately left out the rule (Rule 21) which required the 1st Respondent to deliver the results to the court so that it is now left to the Petitioner to prove his case. He contended that the removal of that rule now takes us back to the position of the decision of the Court of Appeal in **John Njenga Mutotho V. Jayne Njeri Wanjiku Kihara & Two Others (suppra)** . He urged this court to allow the application as prayed.

The contents and form of an election petition are contained in Rule 8 of the **Elections (PARLIAMENTARY AND COUNTY ELECTIONS) PETITIONS RULES, 2017** which states at sub-rule (1) -

**(1) "An election petition shall state –**

**(a) the name and address of the Petitioner**

**(b) the date when the election in dispute was conducted**

**(c) the <u>results of the election, if any, and however declared</u>**

**(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 ".** (Underlining mine).

Rule 12(2) of the same Rules requires that the same particulars as in rule 8(1) be stated in the affidavit of the Petitioner, in support of the petition.

An argument arose as to whether the above provisions are mandatory. Mr Sala, for the Petitioner/Respondent opined that they are not. To use his own words they are not "strictly mandatory". On his part Mr Willis, for the 3rd Respondent/Applicant, contended that the provisions impose upon the Petitioner a compulsory or mandatory obligation to state the results. Opinion of the High Court on this issue is also divided. In **Amina Hassan Ahmed V. Returning Officer Mandera County & Two Others [2013] eKLR** Onyancha J held the view that they are. He stated –

> **"The petition before me failed to state the election result being contested. It failed to include the dates or time of the results. It even missed to state some of the prayers that the Petitioner ought to have included in the petition for consideration. And yet she appealed to this court to consider such details and mandatory information in the petition as technicalities which the court should ignore or disregard as per the tenor of Article 159(2) (d) of the Constitution. In this court's view, the petitioner's view is not in conformity with the said Constitutional provision ……**
>
> **In my view and finding based on the facts and reasons herein above, the Petitioner's petition is without doubt; fatally defective because it is deficient in form and lacks the vital prescribed content ……"**

In **William Kinyanyi Onyango V. Independent Electoral & Boundaries Commission & Two Others [2013] eKLR** Kimondo J was of a different view. He stated at paragraph 23 –

> **"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 ……."**

Majanja J held this same view in **Caroline Mwelu Mwandiku V. Patrick Mweu Musimba & Two Others [2013] eKLR** and in **Richard N. Kalembe Ndile V. Patrick Musimba Mweu & Two Others [2013] eKLR.**

My view is 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.

Having so stated the issues for determination in this application are –

**i) Whether the Petitioner has complied with the strict provisions of Rule 8(1)(c) of the Rules; and**

**ii) If he has not what is the effect of that non-compliance to the petition. In other words should that omission result in striking out of the petition?**

**DETERMINATION**

**i) Whether the Petitioner herein has complied with Rule 8(1)(c)**

The simple answer to the above question is that the Petitioner has not complied with the strict provisions of Rule 8(1)(c) of the ELECTIONS ( PARLIAMENTARY AND COUNTY ELECTIONS) PETITION RULES, 2017. He has not either in the petition itself or in his affidavit in support of the petition stated the results of the impugned election. The nearest he comes to stating the results is at paragraph 9 of the petition where he states –

**"The results as declared by the 2nd Respondent on 9th August 2017 are that the 3rd Respondent was declared the winner".**

At paragraph 38 of the petition the Petitioner avers –

**"The Petitioner having invested heavily in agents in all the Gazetted Polling Stations; he was able to get parallel results in the original Form 35As. After reconciling Forms 35As obtained from his agents and Form 35Bs used by the 1st Respondent to declare the said results, the Petitioner has conducted a review of the same and discovered massive numerical discrepancies that fundamentally affected the final result to his disadvantage. Indeed, a simple collation of the results in Form 35As demonstrates that the Petitioner won the said elections with an overwhelming majority of the votes".** (Emphasis mine).

It is clear from the above averment that on 9th September there was a declaration of results in this election and that by the time of filing this petition those results however declared were known to the Petitioner. My finding is fortified by the deposition in the affidavit of Samuel Ochieng Onyango Opot sworn on 5th September 2017 where at paragraph 19 and 20 he states –

**"That Form 35B was signed by the Returning Officer on 10th August 2017 after the result had been declared. I did not sign the form as I did not agree with the result as tabulated.**

**20. That to my surprise when I later got a copy of Form 35B from the Independent Electoral and Boundaries Commission , I noticed that one Douglas Otiato had signed the form purportedly as the party agent (Attached herein and marked SOOO – 2 is a copy of Form 35B".**

Samuel Ochieng Onyango Opot was the Petitioner's Chief Agent in the election and if he was privy to the results of the election so was the Petitioner. The Petitioner cannot therefore be heard to say that the reason he did not state the results was because he did not know the results. Mr Sala urged this court to find that the attachment of the results to the affidavit of this witness and those of the 1st and 2nd Respondents should suffice. My view is that it does not. Rule 8(1) (c) and 12(2) require the Petitioner himself and not his witnesses or any other party to state the results. As the Petitioner did not state the results as required he did not comply with rule 8(1) (c) of the rules.

**(ii) <u>What then is the effect of non-compliance with the rule and Should this petition be struck out?</u>**

I had earlier in this ruling alluded to the different approaches taken by the Judges of this court faced with similar applications.

In **Amina Hassan Ahmed V. Returning Officer Mandera County & Two Others** (Suppra) Onyancha J relied on the Indian case of **Jyoti Basu & Others Vs Debi Ghosal & Others AIR 1982 SC, 983** where it was held that :-

> **"… An Election Petition is not an action at common law nor in equity. It is a statutory proceeding to which neither the common law nor the Principles of Equity apply but only those rules which the statute makes and applies. It is a special jurisdiction and a special jurisdiction has always to be exercised in accordance with the statute creating it. Concepts familiar to common law and equity must remain strangers to Election Law unless statutoriry embodied. A court has no right to resort to them on considerations of alleged policy because policy in such matters, as those, relating to the trial of election disputes, is what the statute lays down. In the trial of election disputes, court is put in a straight jacket ……"**

Onyancha J also relied on the decision of our own Court of Appeal in **John Michael Njenga Mututho V. Jayne Njeri Wanjiku Kihara & Two Others** (Suppra) where the court considering the same issue this court is faced with struck out the petition. Onyancha J also took the view that non-compliance with the rules could not be cured by Article 159(2) (d) of the Constitution. I am also aware of the decision of my sister Thande J delivered on 13th October 2017 in **Mombasa High Court Election Petition No. 9 of 2017 Jimmy Mkala Kazungu V. Independent Electoral and Boundaries Commission & Two Others** where she struck out the petition on this same ground. That is the position that Learned Counsel for the 3rd Respondent/ Applicant and the 1st and 2nd Respondents have urged me to take. I however find persuasion in the approach taken by my brother Majanja J in **Caroline Mwelu Mwandiku V. Patrick Mweu Musimba & 2 Others** (Suppra) and **Richard N. Kalembe Ndile V. Patrick Musimba Mweu & Two Others [2013]** (Suppra) and also Kimondo J in **William Kinyanyi V. Independent Electoral and Boundaries Commission & Two Others** (Suppra). In these three cases the Judges grappled with the same issue raised by the applicant in this application.

In **Caroline Mwelu Mwandiku V. Patrick Mweu Musimba** Majanja J stated –

> **"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 petitions under the Constitution and the Act". This objective is best realised 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. Rules 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……."**

I could not agree more. The provisions of Rule 8(1) (c ) go to the contents and form of the petition. While I agree that the rules are anchored on the Elections Act and by extension the Constitution and much as I find that by their wording they call for strict compliance these are procedural requirements. Rule 5 of the Elections (PARLIAMENTARY AND COUNTY ELELCTIONS) Petition Rules, 2017 has now expressly clothed election courts with discretion to excuse lapses in regard to the rules. The rule now simply states –

"**5. Compliance with these Rules**

**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."**

In the circumstances while this court may find itself operating in a straight jacket in so far as the provisions of the Constitution and of the Elections Act in regard to election petitions are concerned that is not so in regard to the rules. I am alive to the caution by the Supreme Court in **Raila Odinga & Others V. Independent Electoral and Boundaries Commission & 3 Others [2013] eKLR** that Article 159(2) (d) is not a panacea for all procedural technicalities. Indeed in **Nicholas Kiptoo Arap Korir Salat V Independent Electoral and Boundaries Commission & 6 Others [2013] eKLR** Kiage JA sitting with Ouko JA and Mohammed JA, as he then was, stated-

**"I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek 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 and 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…."**

In the majority judgment however Ouko JA stated-

**"Deviations from and lapses in form and procedures which do not go to the jurisdiction of the court, or which do not occasion prejudice or miscarriage of justice to the opposite party ought not to 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 on the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness….**

**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.**

When the above petition went to the Supreme Court on appeal the court observed as follows on the issue of form –

**"[40] We are clear that an appeal of this kind should not be held to fail on mere account of form. Although the Rules of this Court give guidance on the form which an appeal should take, we are cognizant of the fact that Article 159 (2) (d) of the Constitution accords precedence to substance, over form. Rule 3 (5) of the Supreme Court Rules, 2012 empowers us to invoke our inherent power to make such Orders and directions as are necessary for the attainment of ends of justice, and to prevent abuse of Court process. In this regard, and in order to serve the sanctified task of interpreting the Constitution, and for the purpose of**

**resolving this protracted electoral dispute, we are guided by Article 159 (2) (d)- towards saving this appeal for determination on merits. The presentation form in this appeal, by no means violates the mandatory tenets of the Constitution, or the law, so as to compel the striking out of the appeal *in limine*. Though the petition is presented in its current form, our determination of the appeal will focus only on the issues canvassed, and as determined by the other superior Courts."**

Each case must be decided on its own facts and circumstances. It is my finding that the omission to state the results in this 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. Moreover whereas Rule 21 of the 2016 Election Petition Rules, which required the 1st Respondent to deliver the results of the relevant election to the court within fourteen days, no longer exists in the Rules the 1st Respondent has on its own accord delivered the results to this court. The results of this election are therefore on the record. They are also known to the 3rd Respondent and his Advocate's fear that there will be no results to compare the evidence with has been put to rest. In addition it is my finding that the 3rd Respondent has in no way been prejudiced as even before bringing this Application he had filed his response and evidence meaning that he very well understood the case facing him. It was also argued that as the petition cannot be amended the only solution is to strike it out. While I agree that the rules would not allow for amendment of this petition so as to remedy the omission it is my finding that that in itself is not reason enough to strike out the petition. The results now form part of the record of the petition and an amendment of the petition would not be necessary. It matters not that they were filed by the 1st Respondent rather than the Petitioner. Should this court or any of the parties require to make reference to the results of the election they shall be available,

Accordingly the Notice of Motion to strike out the petition is dismissed but as the application was necessitated by the Petitioner's failure to comply with the rules I direct that each party bear their own costs.

**It is so ordered.**

**Signed, dated and delivered at Siaya this 30th day of October 2017**

**E. N. MAINA**

**JUDGE**

In the presence of:-

For the 3rd Respondent/ Applicant

For the Petitioner/ Respondent

For the 1st and 2nd Respondents

Court Assistant(s)