REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

ELECTION PETITION NO. 2 OF 2017

MICHAEL GICHURU…….....……PETITIONER

VERSUS

HON. RIGATHI GACHAGUA…….....1ST RESPONDENT

KAHURA KANUA JOHN……....2ND RESPONDENT

INDEPENDENT ELECTORAL

& BOUNDARIES COMMISSION….....3RD RESPONDENT

RULING

1. Introduction:

[1] This petition is challenging the declaration of the 1st respondent as the duly elected Member of National Assembly for Mathira Constituency in Nyeri County after the General Elections held on 8th August, 2017. The petition was filed and duly served upon the respondents by way of an advertisement published in one of newspapers deemed to be of national circulation.

[2] All the respondents filed their responses to the petition and served them upon the petitioner's counsel. However, the 1st respondent filed his response five days late though he served it upon the Petitioner within the seven-day period prescribed by the Elections (Parliamentary and County Elections) Petitions Rules, 2017 (herein "the Elections Petitions Rules, 2017).

[3] Inevitably, by a motion dated 26th September, 2017 and filed in court on 29th September, 2017, the 1st respondent sought from this Honourable Court an order for the extension of time to cover the delay and for admission of his response, which comprised of affidavits sworn by three different persons, as having been duly filed.

On 2nd October, 2017, he filed a second motion dated 26th September, 2017 seeking an order to strike out the petition.

On his part, the petitioner filed a motion dated 5th October, 2017 seeking a raft of orders one of which was to strike out the 1st respondent's response for having been filed out of time.

[4] During the first pretrial conference convened on 10th October, 2017, directions were issued to the effect that the 1st respondent's two motions be heard together on 16th October, 2017. The motions were

heard as scheduled and immediately thereafter, I set the hearing of the petitioner's motion on 18th October, 2017. It was also heard on schedule.

This ruling is therefore in respect of the three applications. For ease of reference, the 1st respondent's motion for extension of time will henceforth be referred to as 'the 1st application', his motion to strike out the petition will be regarded as 'the 2nd application' and the petitioner's motion will simply remain as such-'the petitioner's motion'.

I must mention at the outset that the arguments on both facts and the law were largely common in the three applications and it is for this reason I find it appropriate to acquit myself on all the three applications in this ruling.

2. The 1st Respondent's Applications:

[5] The 1st application relates to compliance with **Rule 11** of the **Elections Petitions Rules, 2017, 2017**. The basic fact, which is that the response by the 1st respondent to the petitioner's petition was filed out of time, is not in dispute.

Counsel for the 1st respondent admitted that he filed the response outside the limitation period. He argued, however, that this was not a deliberate move to frustrate the determination of this petition but that he was simply mistaken as to the proper law applicable. According to him, he was not aware that the petition rules had been amended to the effect that the time of filing the response to a petition had been reduced from fourteen to seven days after service of the petition. He only learnt of this new development after he had filed his response.

[6] Counsel urged that the delay of three days (it was in fact five days) was, in any event, not inordinate; that he filed the application for extension of time as soon as he realised his mistake and if the application is allowed, the petitioner will not suffer any prejudice. On the contrary, if the application is declined the 1st respondent is likely to be subjected to undue hardship. He invoked **article 159(2)(d)** of the **Constitution**, **section 80 (3)** of the **Elections Act, 2011**(herein "the Act") and **Rules 4** and **19(1)** of the **Elections Petitions Rules, 2017** in support of his arguments.

[7] Article 159(2)(d) of the Constitution reminds the courts to be more concerned about the substance rather than the form of the disputes before them; **section 80(1)(d)** of the Act affirms the same position as is **Rule 4** that spells out the objective of the **Elections Petitions Rules, 2017** to be that of facilitating just, expeditious, proportionate and affordable resolution of elections petitions. Finally, **Rule 19** thereof gives the Election Court power to extend time to do any act so as to avoid injustice being visited upon any party.

[8] The learned counsel for the 1st respondent also cited the decision of this Court in **Kakuta Hamisi versus Peris Tobiko & Two Others (2013) eKLR** where, just like in the present petition, the respondent filed her response to a petition out of time; she was late by three days. The court (Kimondo, J.) declined to strike out the response; instead the learned judge held that he was satisfied that the delay was an inadvertent mistake for which the respondent had given a sufficient cause. Counsel urged me to follow this decision and allow the 1st application.

[9] In the second application, the first respondent moved from the defensive position and assumed an offensive stance; this time around, he impugned the petition for flouting **Rule 8** of the **Elections Petitions Rules, 2017**; that Rule provides as follows:

> ***8. (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 results of the election, if any, and however declared;

(d) the date of the declaration of the results of the election;

(e) the grounds on which the petition is presented; and

(f) the name and address of the advocate, if any, for the

petitioner which shall be the address for service.

[10] According to the 1st respondent, the results the petitioner has attributed to certain contestants as the final result of the election of the Member of National Assembly for Mathira Constituency is inconsistent with the election result declared by Constituency Returning Officer. To that end, the petitioner is accused of having breached **Rule 8(1)(c)** of these rules**.**

The 1st respondent has also taken issue with the fact that the petitioner has neither specified the date of the declaration of results in the petition nor in the affidavit in support thereof and in that regard, he contends that **Rule 8(1)(d)** of Rules has been breached.

[11] Apart from non-compliance with the Rules, the 1st respondent is also concerned that the petition is also tainted in several other respects the cumulative effect of which is that it should summarily be dismissed in accordance with **section 79 (a)** of the Act; that section of the law provides that if the court considers that no sufficient ground for granting the relief claimed is disclosed, the court may reject the petition summarily.

Some of the aspects the 1st respondent has taken issue with are first, the description of the petitioner as an 'administrative officer' of one the contestants. The petitioner argues that this description is not known in electoral law.

[12] Second, the 1st respondent has argued that while the petitioner has implied in certain paragraphs in his petition and the supporting affidavit that he was candidate for the parliamentary seat in question, he was not; to the extent that this deposition is untrue, the affidavits in which this deposition is contained are contrary to the provisions of the **Oaths and Statutory Declarations Act, (cap. 15).** In further contravention of this latter Act, there are no exhibits attached to the petitioner's affidavit yet they have been referred to in that affidavit; the exhibits have, instead, been attached to the affidavit of one of the petitioner's witnesses.

[13] Still on the question of averments in the petition and depositions in the affidavits, the 1st respondent contended that the polling stations listed as those stations where election irregularities occurred do not exist. These stations have been named as *Gitangaruri, Gathogorero, Gikambo, Karura, Unjiru and Cheha Primary School.*

Lastly the petition itself is misleading; it is titled as 'the High Court of Kenya at Nairobi' yet the petition was filed in this court sitting at Nyeri.

The learned counsel for the 1st respondent urged that all these faults render the petitioner's petition irredeemable, fatally defective and beyond amendment. He urged the court to follow the Court of Appeal decision in **Mututho versus Kihara & 2 Others (2008) KLR 10;** this court's decision in **Ismael & Others versus IEBC & Others (2013) eKLR (Meru) and Charles Kamuren versus Grace Chelagat Kipchoim & 2 Others (2013) eKLR (Eldoret)** and declare it so.

[14] Counsel for the petitioner opposed both applications. With respect to the first application for extension of time counsel argued that the fact that the 1st respondent's counsel was not aware of the

amendment of the **Elections Petitions Rules, 2017** was not a sufficient cause for the court to exercise its discretion in his favour. According to him, the petitioner's ignorance of the law was an act of negligence which did not arise in the decisions he cited in support of his arguments and to that extent those decisions were of little or no assistance at all to his cause.

On the second application to strike out the petition, counsel for the petitioner urged that there is substance in the petition and that the respondents have not demonstrated that they have suffered any prejudice as a result of the mistakes in it.

[15] Counsel urged that there is no dispute that the petition was filed at the High Court at Nyeri and therefore it does not matter that its title is expressed as the 'High Court at Nairobi'. As for the petitioner's description, counsel submitted that he has described himself as a voter in Mathira constituency and that in any case, any person can lodge a petition irrespective of his description.

Counsel insisted that the six polling stations whose existence the respondents have disputed do, in fact, exist; according to the learned counsel, it is only that their names have been wrongly spelt.

[16] As to the question of failure to state the date of declaration of the results, counsel relied on this court's decision in **Hosea Mundui Kiplagat versus Sammy Komen Mwaita & 2 Others (2013) eKLR** for the proposition that the omission is a matter of form that ordinarily is treated as a procedural technicality. Again, so argued counsel, failure to show the results is not fatal since the substance of the petition is evident; in this regard, counsel relied on the decision in **Charles Kamuren versus Grace Jelagat Kipchoim & 2 Others (2013) eKLR**. Counsel also referred to the Court of Appeal decision in **Nicholas Salat versus IEBC & Others (2013) eKLR** where it was held that before court dismisses any suit, it must satisfy itself that it does not disclose any reasonable cause of action.

Although counsel for the 2nd and 3rd respondents filed a replying affidavit to the 1st respondent's applications he supported the applications.

3. The Petitioner's Motion

[17] The final application is the petitioner's motion; the motion sought a plethora of orders; I can do no better than list the primary ones as they appear on the face of the motion; they are set out as follows:

> ***" 1…***
>
> ***2…***
>
> ***3. The Honourable Court be pleased to issue an order:***
>
> ***(a) directing the 3rd respondent to identify and declare the whereabouts of ballot boxes and all election materials as defined in section 2 of the Elections Act used in the parliamentary elections for Mathira constituency;***
>
> ***(b) securing the said ballot boxes and all election materials;***
>
> ***(c) the 3rd respondent to give actual or constructive custody of the said ballot boxes and all election materials to the court and the parties herein; and,***
>
> ***(d) the parties herein be allowed to put additional seals and/or security to the said ballot boxes and election materials.***
>
> ***4. The 3rd respondent be compelled to give access to the court and the parties the following information in its exclusive possession for the period between 1st and 15th of August 2017:***

a. The full list of all IMEI numbers of the KIEMS kits used in the polling stations in the elections conducted in Mathira constituency.

b. The GPRS locations of the KIEMS kits used in Mathira constituency on 8th of August, 2017.

c. The SD cards used in the KIEMS kits employed in Mathira Constituency which SD cards must be extracted from the KIEMS under the supervision of the parties.

d. Biometric register of all voters in Mathira constituency

e. Server logs (read access only) with the right to copy generated in the course of the 2017 general election is called out on 8th of August 2017.

f. Internal firewall configurations for the servers (read access only) with the right to copy used by the commission for the purpose of the 2017 elections.

5. The respondent compelled to provide and give access to the court and the parties to the following information in its exclusive possession:

a. The full list of all the polling stations in Mathira constituency.

b. Original Forms 35A and 35B prepared at and obtained from the polling stations by the presiding officers and used to generate the final tally for the Mathira National Assembly election, and pursuant to such production leave be granted for the use of an aid or reading device to assist in distinguishing the fake forms from the genuine ones.

c. Original Forms 35B used to tally results from polling stations in Mathira Constituency.

6. This honourable court be pleased to grant leave to the Applicant and any and all other parties to the petition to file a supplementary affidavit/report from the scrutiny exercise.

7. The Honourable court be pleased to grant leave to the petitioner to filed the annexed affidavit of Bildad Namawa Urandu and the same be deemed as properly filed in support of the petition.

8. This honourable court be pleased to grant leave to the petitioner to rely on the affidavit filed in support of this application to be the petitioner's further affidavit in support of the petition.

9. This honourable court be pleased to grant leave to the petitioner leave to make the typographical errors on the face of the petition and the supporting affidavits.

10. This honourable court be pleased to strike out the 1st respondent's response to the petition dated 26th September, 2017 which was filed and served way out of time without leave of court.

11. This honourable court be pleased to grant any other reliefs as it may deem fit to grant."

[18] Although the motion was heard separately, the arguments for and against it largely echoed the rival submissions in the 1st respondent's two applications. As a matter of fact, at the hearing of this motion, counsel for the respective parties adopted their submissions in the 1st respondent's applications on those common issues in the three applications. As I noted earlier, it is this common thread running through these applications that informs their disposal in this single ruling.

[19] The learned counsel for the petitioner commenced his submissions by inviting the Court to consider **Article 35** of the Constitution that guarantees every citizen the right to access to information held by the state. He also invoked **sections 2** and **4** of the **Access to Information Act, No. 31 of 2016.** Section 2 defines "information" to include all records held by a public entity or a private body while section 4 more

or less reiterates Article 35 of the Constitution; it says that every citizen has the right of access to information held by the State; and, another person, where that information is required for the exercise or protection of any right or fundamental freedom. It does not matter the form in which the information is stored, its source or the date of production. According to subsection 3 of section 4 access to information held by a public entity or a private body must be provided expeditiously at a reasonable cost.

[20] Counsel urged that according to Regulation 14(1) of the Elections (technology) Regulations, 2017 the 3rd respondent is enjoined to put in place mechanisms to ensure data availability, its accuracy, integrity and confidentiality. Under Regulation 15(1) of those regulations, the 3rd Respondent is also required to store and classify information in accordance with the principles set out in the Access to Information Act, 2016. As far as Electronic data is concerned, Regulation 17 requires the Commission to retain it in custody for a period of three years after the results of the elections have been declared but may be dealt with in any other manner if the court so directs.

[21] According to the learned counsel, the electronic data and the supporting electronic technology used in the elections in the August 2017 General Elections fall within the definition of 'election material' as understood in **section 2** of the **Elections Act** to which he is entitled access.

As for transmission of results, counsel made reference **to reg. 82(1)** of **The Elections (General) Regulations,2012** for the submission that the results of elections from polling stations to the constituency tallying centres were, or ought to have been transmitted electronically.

This, in a nutshell was the legal foundation of the petitioner's prayers 3, 4 and 5 on the face of the motion.

[22] The factual basis of those prayers, so the learned counsel submitted, were in the petition itself and the appurtenant petitioner's supporting affidavit. In those two documents, it was respectively pleaded and deposed that technology was not employed appropriately despite the assurances from the chairman of the 3rd respondent. In particular, the transmission of results from polling stations to the Mathira constituency tallying centre was not accompanied by the electronic picture or image of the prescribed Forms 35A. Yet it was a mandatory requirement and indeed a legitimate expectation that the data entered into the Kenya Integrated Elections Management System (KIEMS), which was part of the electronic technology employed by the 3rd respondent, was to be consistent, comparable and verifiable with information recorded in the Forms 35A as the final result.

[23] According to the petitioner, the discrepancies, disparities and inequalities in the number of voters registered, votes cast and the overall distribution and entry of election results in polling stations in Mathira constituency lead to a logical conclusion that the KIEMS kit either did not work or was not used in Mathira Constituency; accordingly, the election for Mathira parliamentary seat not only fell short of the acceptable credibility standards, of a free, fair, accountable, credible and transparent election but was also in breach of section 44 of the Elections Act. That section requires of the 3rd respondent to, among other things, engage an integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results and the technology used must be simple, accurate, verifiable, secure, accountable and transparent. **(See section 44(1)(3)).** By failing to employ technology at all or to employ it as required by the law, so it was submitted, the 3rd respondent did not administer the election in an efficient, accurate and accountable manner as required under the law and, in particular, it contravened **Article 81(e)** of the Constitution.

[24] In support of this arguments, counsel relied on the findings by the Supreme Court Presidential Election Petition No. 1 of 2017, **Raila Odinga & Another versus IEBC & Others,** where it was established that the 3rd respondent failed and/or neglected to lawfully administer the electronic electoral system for purposes of managing the elections of 8th August, 2017. Of particular interest was the scrutiny report submitted to court which showed that the results from Mathira Constituency were not posted on the public portal managed by the 3rd respondent as required by law or at all. The petitioner's case is that the results that were transmitted manually to the constituency tallying centre were from ungazetted polling stations and thus not credible. To add credence to his claims the petitioner also swore that the forms used

to tally the results either lacked the essential security features or were not the prescribed forms.

[25] In the face of these submissions, so counsel urged, it was in the interest of justice, the interest of the parties herein and more importantly, it was in the interest of the constituents of Mathira Constituency that the court directs the storage of the elections material in accordance with **Rule 16(1)** of the **Elections Petitions Rules, 2017.**

Counsel also urged the court to grant him leave to file a supplementary affidavit once the election material has been availed by the 3rd respondent. The court, according to the learned counsel, has power to grant such a leave under **Rule 15(1)(b)** as read **Rule 19** of the **Elections Petitions Rules, 2017.**

[26] As for the adoption of affidavit of Bildad Urandu, counsel urged that whatever depositions that are in that affidavit are matters that have been covered in the petition itself and therefore the adoption of that affidavit should not be interpreted to mean that new evidence has been introduced in the petition. Counsel relied on **Henry Okello Nadimo versus IEBC & 2 Others (2013) eKLR** and **Justus Kizito Mugala versus IEBC & Others (2013) eKLR** for the proposition that the court has the discretion to grant leave to parties to file further affidavits in an election petition. For the same argument, counsel also cited the decision in **Philip Mukwe Wasike versus James Lusweti Mukwe & 2 Others (2013) eKLR**.

[27] On correction of errors in the petition, counsel urged that those errors are mistakes that are technical in nature and which do not go to the root of the petition itself; their correction should be allowed under **Article 159(2)(d)** of the **Constitution**, **section 80(1)(d)** of the **Elections Act** and **Rule 4** of the Elections Petitions Act. In any event, the entire petition or affidavits in support thereof cannot be struck out simply because of some isolated errors; according to **Order 19(3)(6)** of the **Civil Procedure Rules,** only those parts of an affidavit that are deemed offensive can be struck out and not the entire affidavit.

As for the prayer for striking out of the 1st respondent's response, counsel adopted his earlier submissions in opposition to the 1st respondent's application for extension of time to file the response to the petition; the learned counsel for the petitioner rested his submissions on this note.

[28] Counsel for the 1st respondent opposed the Petitioner's application and relied on a replying affidavit sworn by the 1st respondent in that regard. To begin with counsel urged according to **Rule 5(1) (A)(d) of the Elections (General) Regulations, 2012** a presiding officer has no mandate to transmit results electronically other than those in respect of presidential elections. **Rule 82(1),** according to him, is not applicable as **Rule 5(1)(A)(d)** is a latter amendment and therefore prevails.

Rule 82. (1) provides as follows:

> ***The presiding officer shall, before ferrying the actual results of the election to the returning officer at the tallying venue, submit to the returning officer the results in electronic form, in such manner as the commission may direct.***

Rule 5(1)(A)(d) on the other hand states as follows: -

> ***5.(1A) The functions of a presiding officer shall be-***
>
> ***(a)…***
>
> ***(b)…***
>
> ***(c)…***
>
> ***(d)electronically transmitting presidential results to the constituency. Counties and national tallying centres.***

[29] As far as prayers 3 and 5 of the petitioner's motion are concerned, counsel urged that they are superfluous since **Regulation 93** of the **Elections (General) Regulations, 2012** enjoins the 3rd respondent to secure the election material for three years after the election.

On amendment of the petition, counsel urged that under **section 76** of the Elections Act, a petition can only be amended within 28 days after the declaration of the results. Counsel cited the same decisions of **Mututho versus Kihara (ibid); Ismael & Others versus IEBC & Others (ibid) and Charles Kamuren versus Grace Chelagat Kipchoim & 2 Others (ibid)** which he relied upon earlier in the prosecution of the 1st respondent's applications to argue that the intended amendments were out of time. He also argued that the petition itself was, in any event, incompetent and that there was no basis upon which the court could exercise its discretion in favour of the petitioner since he has not offered sufficient reasons for his application. Again, so counsel argued, the petitioner was seeking to introduce new evidence contrary to the provisions of **section 76(4)** of the **Elections Act**. The affidavit supporting the application for correction of errors doesn't also show the nature of the amendments sought and if the application was allowed in these circumstances, there is the danger that the petitioner may introduce fresh evidence that will definitely alter the substance of the petition.

[30] Counsel also argued that the misdescription of a polling station is not a clerical error; rather it is an error that goes to the root of the petition. The misrepresentation of the petitioner as a candidate, on the other hand was perjury which could not be cured by amendment.

Counsel for the 2nd and 3rd respondents opposed the application and associated himself with the submissions of the 1st respondent's counsel. He, however, added that he cannot procure the KIEMS kits because they were taken for reconfiguration in readiness for the presidential elections scheduled for 26th October, 2017. Counsel also argued that the declaration of the results was based on Forms 35A and 35B and there was no electronic transmission of results to the Constituency tallying centres because there is no legal requirement for such transmission. The learned counsel denied that the Supreme Court ever ordered for unfettered access of its electronic technology system because the court acknowledged that such access would compromise the integrity and the security of this system.

4. Analysis and determinations:

[31] The primary and overarching question in the 1st respondent's applications is the effect of non-compliance with the Elections Petitions Rules, 2017.

As a matter of necessity, courts must conduct their business in conformity with some procedure which, in itself, is nothing more than a codification of rules that, generally speaking, are intended to regulate the manner in which a dispute is lodged in court, heard and finally resolved. By extension, these rules will naturally define the conduct of parties in relation to the particular dispute in issue; for instance, they inform who between or amongst them should take what action, when it should be taken and how it should be taken. They are, in a way, intended to provide some level of certainty in the direction the dispute takes towards its resolution and also create a level playing field for all the players. As the impartial umpire, the court's role is to ensure that actors play by these rules and that the field is not tilted to the detriment of either of them.

[32] Crucial as they are, the application of rules of procedure in any dispute before court, irrespective of its nature; whether it is, for instance, an election petition such as the kind before court, or any other form of civil suit, is not meant to give prominence to those rules at the expense of determination of the real issue or the substance of the dispute itself. As I understand them, rules of procedure are specifically designed to provide a framework through which disputes can be determined in a more orderly, disciplined and predictable fashion. They are, as it were, a handmaid, and not, a mistress of justice.

[33] There is, of course, always the danger of these rules thrusting themselves to the fore, whenever opportunity arises, to assume the role of the mistress of justice rather than contending themselves in their proper place as servants of justice. More often than not, this happens when courts insist on strict

compliance with the rules despite the reality that their role in the overall objective of dispensation of justice is limited and their strict application only ends up clogging rather than helping the course of justice. Our duty as judges is to guard against such a danger and restrict the rules to their proper and subservient role.

[34] In all probability, there will be instances when courts will be called upon to be less strict and accommodate parties who have not complied with certain rules of procedure; without purporting to enumerate all such instances, I would say that where, for instance, non-compliance of any particular rule does not go to the core of the dispute before court; or, it does not undermine the determination of that dispute; or, it does not prejudice any of the parties to a dispute; or, it does not tilt the playing field and confer an undue advantage to a party to the detriment of the other; or, generally, it does not adversely affect the due administration of justice; courts of law should be hesitant to strike out a pleading and deny a party the opportunity to approach the seat of justice merely because that rule has not been complied with.

[35] As I have noted, there could be many other instances that militate against such drastic action; however, whether or not such instances are established to exist depends largely on the circumstances of each particular case. It is all left to the wisdom and good sense of a particular judge who alone is in a position to determine the weight to be placed upon any rule and the consequences that are bound to ensue in the event of its breach. Whichever course a judge takes, he should not feel so bound by the rules that he is compelled to do what may well turn out to be an injustice in the particular case.

[36] I reckon it is in this spirit that **article 159(2)(d)** of the Constitution implores the courts to administer justice without *undue* regard to technicalities. The Elections Act and the Rules made thereunder have themselves embraced this notion and in clear and unambiguous terms reminded the courts that as much as they have been bestowed with the discretion to determine the appropriate course in the event of non-compliance with the Rules, that discretion must be exercised in such a manner that the substance is not sacrificed at the altar of form. **Section 81(1)(d)** of the Act is a mirror image of **article 159 (2)(d)** of the Constitution in this regard; it states:

> ***80. Powers of election court***
>
> ***(1) An election court may, in the exercise of its jurisdiction—***
>
> ***(a) …***
>
> ***(b) …***
>
> ***(c) …***
>
> ***(d) decide all matters that come before it without undue regard to***
>
> ***technicalities.***
>
> ***(2) …***
>
> ***(3) …***
>
> ***(4) …***
>
> ***(5) …***

Rule 5 (1) of the **Elections (Parliamentary and County Elections) Petitions Rules, 2107** takes cue from these constitutional and statutory provisions and states as follows:

> ***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)(2) of the Constitution.

[37] As far as the first application is concerned, the Rule in issue is Rule 11 of the Elections Petitions Rules, 2017. The essence of that Rule is that a respondent who wishes to oppose an election petition must file his response within seven of the date of service of the petition; he must then serve the response to the Petitioner within seven days of the date of filing the response.

Until the 27th July, 2017 that Rule read as follows:

> ***11. (1) Upon being served with a petition in accordance with rule 10, a respondent may oppose the petition by filing and serving a response to an election petition within fourteen days.***

[38] By a legislative supplement in Legal Notice No. 117 of 2017, published in the Kenya Gazette of 27th July, 2017 the Rules Committee amended this particular rule vide Rule 3 of the Elections (Parliamentary and County Elections Petitions) (Amendment) Rules, 2017 in the following terms:

> ***3. Rule 11 of the principal Rules, is amended in paragraph (1) by deleting the words "and serving a response to an election petition within fourteen days" and substituting therefor the words 'a response to an election within seven days.***

[39] The effect of the amendment was, as previously noted, to reduce the time of filing the response to an election petition to seven days. The original Elections (Parliamentary and County Elections Petitions) Rules, 2017 had been gazetted a week earlier, on 21st July, 2017.

It is not in dispute that that the applicant failed to comply with this particular Rule. He was served with the petition on 14th September, 2017 but filed his response on 27th September, 2017 which was about five days outside the limitation period. The response was served on the Petitioner on 2nd October, 2017, four days after the filing; this was within the seven-day window and therefore within time.

According to the counsel for the Petitioner, the explanation offered for the delay by counsel for the 1st respondent was nothing more than an admission of being ignorant of the law; such ignorance, according to the learned counsel, is not a viable defence of the applicant's inactions.

[40] It is quite possible that having been amended soon after the gazettement of the original Rules and less than two weeks to the general elections, any person would have missed out on this amendment. Perhaps the 1st respondent's counsel could easily have noticed these changes in law if he was diligent enough as he was bound to. However, when I consider the circumstances under which he was mistaken and, considering the fact that he took immediate steps to rectify the error when he realised his misstep, and, finally and most importantly, when I consider the provisions of **Article 159 (2) (d), section 80(1)(d)** of the **Act** and Rule 5(1) of the Elections Petitions Rules, 2017 I am persuaded that this is not the kind of error that should be visited upon the 1st respondent. In these circumstances the delay of filing the response to the petition by five days is excusable and in my assessment, it is not a deliberate attempt by the 1st respondent to defeat the course of justice; to this extent, I agree with the reasoning in **Kakuta Hamisi versus Peris Tobiko & Others (ibid)** that technical procedural errors shouldn't be allowed to overshadow substantive justice. The petitioner has admitted that he was served with the response and therefore I see no prejudice that will be caused to him if it is duly admitted. On the other hand, if the application for extension of time is declined, the respondent will be left with no defence to the accusations levelled against him and therefore he is bound to suffer prejudice.

[41] In **Charles Kamuren versus Grace Chelagat Kipchoim & 2 Others (ibid)** which counsel for the petitioner cited for the proposition that the issue of service of a pleading is not a procedural technicality that can be said to be subject to **Article 159(2)(d)** of the Constitution, the service in question was in respect of the petition itself whose service schedule has been set by the Act and not by Rules (see **section 76(1)(a))**. Thus, the timeline set for service of a petition is not only statutory but it is also mandatory as well and it is in that context that the court held service was not matter of procedural technicality. On the

contrary, the service we are concerned with here is the service of the response whose timeline is fixed by the rules which go further to clothe the Election Court with the discretion to extend time.

[42] It is in exercise of this discretion, accorded to this Court by Rule 19. (1) of the Elections Petitions Rules, 2017, to extend or limit time prescribed or ordered by the court notwithstanding that such time has expired, that I am inclined to extend the time within which the 1st respondent ought to have filed and served his response. It follows that the 1st respondent's first application is allowed and the response filed on his behalf on 27th September, 2017 and served upon the petitioner on 2nd October, 2017 is hereby deemed as duly filed and served.

[43] The question of compliance or non-compliance with the Election Petitions Rules, 2017 also features prominently in the 1st respondent's second application. There is the issue of description of the petitioner as 'an administrative officer' which description the 1st respondent argues is alien to the Act and the rules; the petitioner has also in certain instances been misrepresented as one of the candidates for Mathira Parliamentary seat; there is the question of reference to polling stations that, according to the 1st respondent, do not exist in Mathira Constituency or at all; there is the question of omission of the date of the declaration of the results and closely related to this is the question of the inconsistencies between the results as pleaded in the petition or deposed to in the affidavit in support of the petition and the results as declared by the constituency returning officer.

[44] As I understood the 1st respondent, all these anomalies are said to have, in one way or the other, fallen short of the Rules and thereby rendered the petition fatally defective. Some of these issues are somewhat not only intertwined but they also encroach on the issues raised in the petitioner's own motion. While it would have been appropriate to address them seriatim, and I will strive to achieve that goal as much as possible, it should be understandable if these issues are not disposed of in any particular order.

[45] Starting with the question of the description of the petitioner, it must be understood that the Elections Act does not define who a Petitioner is; it, however, defines a petition to mean an application to the election court under the Constitution or under the Act itself. (see **section 2**). It is only in the Elections Petitions Rules, 2017 (Rule 2 thereof), that a 'Petitioner' is defined as a "*person who files a petition to the election court under the Constitution or under the Act in accordance with these Rules."* It is apparent that this definition is simply a derivative of the definition of the 'petition' in the Act.

[46] Be that as it may, this definition leaves it open to any person, irrespective of how he chooses to describe himself to challenge the validity of election of any person to any of the elective political positions either at the National Government or the County Government level; this of course includes, presidential, parliamentary (both the Senatorial and National Assembly) gubernatorial or County Assembly seats.

[47] The implication of this is that whatever description a Petitioner adopts, it is of little consequence, as long as he has the capacity to sue, or to be specific, he has the capacity to petition for annulment or invalidation of the election of any person to any of these seats. What counts, in my humble view, is whether there are sufficient grounds to sustain the petition and whether there is evidence in support of those grounds.

[48] It follows that it does not really matter that the Petitioner was an agent of one of the candidates and that he describes himself as such in the petition. As long as he has lodged the petition in his own right, despite the role he might have played for any of the candidates, he is properly before this Court. In short, he cannot be shut out from an election court only because he has disclosed that was an agent of one of the constants apart from being a voter.

I hasten to add that describing oneself as an agent of any particular candidate is one thing but suing as such is a totally different thing all together.

[49] As much as the Petitioner has demonstrated that he played a certain role for one of the parliamentary

candidates during the 8th August, 2017 General Elections, he couldn't purport to institute the petition on behalf of the candidate he represented during the elections, in whatever capacity. If he was to institute the petition in a representative capacity, whether as a representative of any or all of the unsuccessful candidates, or any section of the society, then the law applicable to such suits would come into play and the Petitioner would be hard put to demonstrate that such law is not only applicable in election petitions but also that he has complied with it.

[50] Certain paragraphs in the petition appear to have fallen foul of this legal requirement; these are paragraphs 15, 19,27,56 and 57. They are couched as follows:

> ***15. You Petitioner pleads that the reports from many of the Petitioner's agents served a uniform nature of Presiding Officers inquiring loudly from the voters as to who they wanted to cast their vote while crowds of people hung around polling stations which is a contravention of section 7 of the Elections Offences Act.***
>
> ***19. The Petitioner avers that when the Petitioner's agents complained on the irregular assisted voting, the presiding officers ejected them from their polling stations of assignment. You Petitioner avers that the said ejection was unfair and without legal justification.***
>
> ***27. In Unjiru primary school polling station in form 35A the 1st respondent has 262 votes while the Petitioner has 105 votes while in form 35B whereas the 1st Respondent's votes increased by 100 the Petitioners votes remain constant, the portal results indicate that the 1st respondent has about 350 votes more than the votes in Form 35B.***
>
> ***56. In the following polling stations agents of the Petitioner were not allowed into the polling stations by the 3rd Respondent's agents until way after voting process had commenced and the agents were therefore not able to participate in the opening of the ballot boxes to ensure the boxes were not stuffed beforehand: Karatina Open Air Market polling station; Karatina stadium polling station: Elimu polling station; Kianjogu secondary school; Guguru primary school; Kamanyunyu polling station.***
>
> ***57. The Petitioner states that despite the foregoing your Petitioner was not afforded any real opportunity to obtain a rechecking or retallying of the said result of the purported figures as they were entitled under the law and therefore contrary to the principle set out at article 81 of the Constitution.***

[51] These paragraphs depict the Petitioner as one of the candidates yet he was not. Even if the Petitioner is given the benefit of doubt, they cannot also be interpreted to mean that he is pleading on behalf of any of the candidates because he has neither demonstrated that he can possibly act in that behalf nor that he has complied with the requisite legal requirements to act as such.

[52] Counsel admitted that these are clerical mistakes or errors but in the same breath he submitted that he was only seeking to 'correct' and not to 'amend' them. Counsel was obviously unnecessarily juggling in semantics because as far as I am aware, the correction of any error or errors in any pleading is by way of amendment, assuming the error in question is itself amendable, so to speak**.** Ordinarily, this may be done upon a successful oral or formal application. **Section 76 (4)** of Act provides for amendment of an election petition but it appears to limit such amendment to a petition filed for the purpose of questioning a return or an election on allegation of election offence only. It states as follows: -

> ***76. Presentation of petitions***
>
> ***(1)…***
>
> ***(a)…***

(b)…

(c)…

(2)…

(3)…

(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)…

[53] Notwithstanding this provision, I doubt an election court is restricted from allowing any other amendment if, in its opinion, the amendment is justified and it is necessary in order to meet the ends of justice. If this provision is narrowly interpreted, it would imply that despite the human tendency to err, albeit inadvertently, a petitioner must rise to a superhuman level and be so meticulous in his petition that no mistake of whatever nature can be found in that pleading or the affidavit in its support. There is no doubt that it is humanly possible to file a flawless petition but I would pose the caveat that a narrow or restrictive interpretation of **section 76(4)** is bound to produce absurd results. In any event, this provision cannot be read in isolation of **section 80 (1)** of the Act that saves the inherent jurisdiction of the election court to decide all matters before it without undue regard to technicalities.

[54] The pertinent question, in my humble view, is not whether the petition can be amended; rather, it is whether, paragraphs 15, 19,27,56 and 57 of the Petition constitute mistakes or errors which can be dismissed as merely as 'clerical', and which therefore can be amended or in the learned counsel's own words, 'corrected' without changing the texture or the substance of the petition.

In my very humble view, it is a material alteration that goes to the root of the petition to amend a pleading the result of which is to substitute one party to the petition with another. This, I suppose, would be the result of amendment of the offending paragraphs to show that it is in fact the Petitioner himself, and not one of the candidates, that these paragraphs have made reference to. Accordingly, I must disagree with the learned counsel for the Petitioner that these are mere 'clerical' or 'typographical' errors that can be corrected at any time in the course of resolution of this election dispute. Of course, they are mistakes that can be amended, but owing to their magnitude, they could only be amended within the 28-day period of the declaration of the election results. Except in those instances where a party takes over a petition from the other, the respondents are entitled to know their adversary at the earliest opportunity possible, and in any event, not later 28 days from the date of the declaration of results.

[55] For these reasons I am reluctant to strike out the entire petition as the learned counsel for the respondents urged me to but rather I will limit the striking out order to the offending paragraphs only. Similarly, as far as the affidavits are concerned, I will only strike out those parts of the affidavit sworn by of Duncan Mugo sworn on 7th September, 2017 that purport to refer to the Petitioner as one of the candidates for Mathira Constituency parliamentary seat. Specifically, these are paragraphs 2 and 5 of the affidavit.

[56] I am encouraged to adopt this path by the words of Madan JA in D.T. **Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & Another [1980] eKLR where he stated:**

No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.

[57] Although the learned judge was addressing the then **Order 6 Rule 13** of the **Civil Procedure Rules** on striking out of suits when they do not disclose a reasonable cause of action, the principle is as much relevant to an election petition as it is to a civil suit filed under the Civil Procedure Act and the Rules made thereunder. No doubt it resonates with **Article 159(2)(d)** of the **Constitution** and, specifically with **Section 80(1)(d)** of the **Elections Act** as far as elections petitions are concerned.

Nicholas Kiptoo Arap Korir Salat versus IEBC & 6 Others (2013) eKLR is one of the various decisions that may be out there where this principle has been embraced in election disputes. In that case the Court of Appeal (Ouko, J.A.) held as follows:

> ***"Deviations from and lapses in form and procedures which do not go to the jurisdiction of the court, or the root of the dispute or which do not at all 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."***

In the same breath, I am persuaded that the omission to state the date of the declaration of the election result for Mathira constituency and the discrepancies related to results as pleaded in the petition or deposed in the affidavit in support of the petition are errors that can be corrected by way of amendment of the petition without resorting to the drastic and rather draconian option of striking out the petition.

[58] From the evidence on record, it is not in dispute that the 1st petitioner was declared as the elected member of National Assembly of Mathira constituency. Amongst the documents the petitioner filed and served the respondents with is a copy of **Form 35B** which is the formal declaration of results for the member of National Assembly for Mathira constituency. In that same form there is the tabulation of votes which each of the candidates garnered in every polling station in that Constituency. It also tabulates the aggregate results for each of the candidates and it is out of these aggregate results that it is evident that the 1st respondent garnered the most number of the valid votes. It is also apparent on the form itself that the declaration was made on 10th August, 2017.

[59] According to the declaration the valid votes which each of the candidates got were distributed as follows:

1. Gachagua Rigathi **52,757**
2. Kinyua Peter Weru **3,643**
3. Kiruta C. Maina **194**
4. Maranga P.C.Wambura **28,893**
5. Murage Nancy Wanjiru **210**
6. Thinwa George Warutere **1,153**
7. Thuku Phenasio **147**
8. Wanjohi Naphtally Muriuki **116**

In his petition, the Petitioner allocated the votes as follows:

1. Gachagua Rigathi	**52,757**
2. Kinyua Peter Weru	**3,643**
3. Kiruta C. Maina	**96**
4. Maranga P.C.Wambura	**28,984**
5. Murage Nancy Wanjiru	**204**
6. Thinwa George Warutere	**1161**
7. Thuku Phenasio	**87**
8. Wanjohi Naphtally Muriuki	**115**

[60] It is apparent that apart from 1st respondent, there are variations in the petition on votes cast for the rest of the contestants; the margin of the variation is, however, minimal and most importantly, there is no evidence, and indeed there was no suggestion by the 1st respondent that the numbers were deliberately varied to mislead the court. I would agree with the petitioner's counsel that these variations are what one may properly refer to as 'clerical' or 'typographical' errors and as such they can be corrected by way of amendment without any prejudice caused to any of the respondents. I am hesitant to follow the Court of Appeal decision in **Mututho versus Kihara & 2 Others (2008)KLR 10** because in that case the results of the election were not included in the petition at all and secondly, it appears that there were no provisions in the Presidential and Parliamentary Elections Regulations which applied then that are similar to such provisions as Rule 5(1) and Rule 19(1) of the current Elections Petitions Rules, 2017 which, as noted, gives an election court a wider latitude to focus more on the substance rather than the form. More importantly, this decision was made prior to the current Constitution and therefore provisions such as Article 159(2)(d) of the Constitution were not and could not have been considered.

If I may add something on the issue of the date of declaration results, I would say that stating that date is vital if a question arises as to whether the petition has been filed within the prescribed time. It is also important if the date is, in itself, the issue in dispute. None of these issues is a point of dispute in this petition and therefore the omission to state it cannot be deemed to be fatal.

[61] As far as the question of polling stations is concerned, the petitioner referred them to his affidavit in support of the petition and exhibited copies of forms from the 3rd respondent showing that these stations exist. These forms are Forms 35A and 35B whose authenticity has not been questioned by any of the respondents. Looking at the material before me, these polling stations exist only that the petitioner did not refer to them by their correct names. For instance, there is a polling station known as Gitangarori but which has apparently been named in the petition as 'Gitangaruri'; Gikumbo has been written as 'Gikambo'; Karura and Gathogorero Primary Schools have simply been written as 'Karura' and 'Gathogorero' without adding the words 'Primary School'. Unjiru polling and Chehe Primary Schools exist as such; I did get to understand the respondents' qualms with them. With these exhibits none of the respondents could possibly have been mistaken as to which polling stations the petitioner was referring to but if they were, the alternative available is to ask the petitioner to provide further and better particulars rather than strike out the entire petition. One way by which the petitioner can do this by filing a supplementary affidavit to identify the polling stations by their proper names.

[62] Counsel for the 1st respondent argued that the exhibits were attached to the affidavit of Duncan Mugo yet Mugo himself did not make reference to any exhibits in his affidavit. It is true that the exhibits marked and filed in court were only referred to in the affidavit of the petitioner yet they were physically attached to the affidavit of Duncan Mugo. I honestly think nothing much should turn on this because from what I gather, the petition together with the supporting affidavit of the petitioner and the affidavits of his witnesses were filed at the same time. The exhibits that the petitioner made reference to in his affidavit

are marked accordingly except that the four affidavits of the petitioner's witnesses are sandwiched between his affidavit and the exhibits. To me, this is nothing more than a disorganization of the pleadings, the affidavits and the exhibits at the time of filing.

[63] Turning now to the petitioner's motion and in particular prayers 3,4 and 5, regulation 93. (1) requires of the 3rd respondent to retain in safe custody all documents relating to an election for up to three years after the declaration of results. In his replying affidavit, Kahura Kanua John the constituency returning officer for Mathira constituency swore that all the election materials are in the 3rd respondent's safe custody and that the 3rd respondent is ready to produce them whenever called upon to do so except for the KIEMS kits which have been taken for reconfiguration for purposes of the repeat presidential election scheduled for 26th October, 2017. In these circumstances it may not be necessary to issue any order in terms of prayer 3(a), (b) and (c). However, in order to protect the contents of the ballot boxes in the custody of the 3rd respondent this court has the discretion to order for placement of additional seals on those boxes. This is the farthest the court can go as far as prayer 3 of the motion is concerned.

[64] As for prayer 4, I am persuaded that being a state organ, the 3rd respondent has a constitutional and statutory obligation to provide access to information it holds to any citizen more so when such information is necessary in order to protect the citizen's constitutional rights. There is no doubt the petitioner is a citizen who is entitled to, among other rights, the political rights under Article 38 of the Constitution. These rights include the right to free, fair and regular elections based on universal suffrage and free expression of the will of the electorate; they are fundamental and absolute rights which cannot be derogated from.

[65] Article 35 of the Constitution guarantees every citizen the right to access to information held by the state. This constitutional provision is reiterated in section **4** of the **Access to Information Act, No. 31 of 2016 w**hich expressly provides for the right to access to information held by a public body for purposes exercising or protecting any right or fundamental freedom. For avoidance of doubt **section 4(3)** of this Act is categorical that access to information held by a public entity or a private body must be provided expeditiously at a reasonable cost.

[66] Again, according to Regulation 14(1) of the Elections (technology) Regulations, 2017 the 3rd respondent is under duty to put in place mechanisms to ensure data availability, its accuracy, integrity and confidentiality. Regulation 17 of those regulations requires the Commission to retain the electronic data in its custody for a period of three years after the results of the elections have been declared but may be dealt with in any other manner if the court so directs.

These legal provisions are sufficient for the court to make the order sought for in prayers 4(a), (b), (c) and (d). That order is necessary for the petitioner's pursuit of his constitutional rights under Article 38 of the Constitution. I will however, not grant prayers 4(e) and (f) because it was not submitted to my satisfaction how the server logs and firewall configurations were connected to parliamentary elections, and in particular the election for Member of National Assembly for Mathira Constituency.

[67] For the same reasons I have given in granting some of the prayers sought in prayer 4, I opine that **prayers 5 (b)** and **(c)** are merited. Prayer 5(a) is spent with the 3rd respondent having filed Form 35B that contains all the polling stations in Mathira Constituency.

Prayer 6 appeals to me as a classic case of a fishing expedition. In my view the petitioner here is simply seeking for evidence upon which he can mount his petition should such evidence spring up. Suffice it to say, the door to fresh evidence being introduced was slammed shut at the expiry of 28 days after the declaration of the results.

I will also reject the prayer 7 partly because it is seeking to introduce fresh evidence out of time and also because no sufficient reason has been given why the intended affidavit of Bildad Namawa Urandu was not filed together with petition.

[68] As for prayer 8 all I can say is that the affidavit in support of the petitioner's motion is restricted to the motion only; it cannot serve the dual purpose of supporting the motion and at the same time be treated as a further affidavit in support of the petition. Indeed, if this prayer was to be granted the petitioner will have succeeded in getting what he could not get in prayer 7 which is introducing new evidence to the petition.

[69] Prayer 9 is allowed only to the extent that the petitioner is granted leave to amend his petition in the following respects:

(a) Correction of the names of the polling stations which have wrongly been spelt;

(b) Post the correct election results for election of the Member of National Assembly for Mathira as declared in Form 35B;

(c) State the date of the declaration of the results.

Prayer 10 is rejected.

5. Conclusion

[70] In conclusion the final orders in respect of all the three applications are as follows: -

1. The 1st respondent's motion dated 26th September, 2017 for extension of time to file the response to the petition is allowed and the response (which includes the replying affidavits) filed on 27th September, 2017 and served on 2nd October, 2017 is deemed as duly filed and served. Costs to the petitioner.

2. The 1st respondent's motion dated 26th September, 2017 for striking out the petition is dismissed; however, paragraphs 15,19,27, 56 and 57 of the Petition are hereby struck out. Paragraphs 2 and 5 of the affidavit of Duncan Mugo are struck out. The costs will abide the outcome of the petition.

3. The petitioner's motion dated 5th October, 2017 is determined as follows:

(a) Prayers 3 (a), (b) and (c) are rejected. Prayer 3(d) is allowed.

(b) Prayers 4(a), (b), (c) and (d) are allowed.

(c) Prayers 5(a), (b) and (c) are allowed; prayer (b) is limited to production of original forms 35A and 35B only.

(d) Prayer 6 is rejected.

(e) Prayer 7 is rejected.

(f) Prayer 8 is rejected.

(g) Prayer is allowed except that the amendments will be limited the following respects:

i. Correction of the names of the polling stations which have wrongly been spelt;

ii. Posting of the correct election results for election of the Member of National Assembly for Mathira as declared in Form 35B;

iii. Stating the date of the declaration of the results.

iv. Filing further affidavits for correction of errors as in (i), (ii) and (iii) above.

(h) Prayer 10 is rejected

(i) The costs of the petitioner's motion shall abide the outcome of the petition.

It is so ordered.

Signed, dated and delivered in open court this 24th day of October, 2017

Ngaah Jairus

JUDGE