



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ELECTION PETITION NO. 17 OF 2017

BETWEEN

HEZBON OMONDI.....PETITIONER

AND

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

FRIDAH CHEBET THE RETURNING OFFICER

EMBAKASI CENTRAL CONSTITUENCY....2ND RESPONDENT

BENJAMIN GATHIRU MWANGI.....3RD RESPONDENT

RULING

Introduction

1. With the court's permission pursuant to the Order for Directions (No. 2.3) issued on 3 November 2017, the Respondents in a joint motion dated 15 November 2017 have moved the court under urgency for an order to strike out/or dismiss the Petition. The core question raised by the application is whether an advocate can sign an election petition on behalf of the Petitioner.

2. The application is opposed.

Background

3. The Petition sought to be struck out and or dismissed concerns the election held for Embakasi Central Constituency in Nairobi County on 8 August 2017. By such election, the 3rd Respondent was declared elected as Member of the National Assembly of Kenya from Embakasi Central Constituency by the 2nd Respondent. The main relief sought and the prayer made by Hezbon Omondi ("the Petitioner") is a declaratory order that the election of the 3rd Respondent was invalid, null and void. There are other auxiliary prayers.

4. Admittedly, the Petitioner alongside other seven candidates contested the seat with the 3rd Respondent during the elections. The Petitioner was a candidate of the Orange Democratic Movement, while the 3rd Respondent was sponsored as a candidate of the Jubilee Party.

5. As per its constitutional and statutory mandate, the 1st Respondent commission conducted and supervised the elections. The declaration of results was made on 9 August 2017. The Petitioner came in second, some odd 11,000 votes behind the 3rd Respondent. The other candidates secured less votes than the Petitioner.

6. The Petition contains a raft of complaints. They range from non-compliance with constitutional provisions, lack of or failure of operation transparency, improper and invalid returns, defects in the process of voting, counting and tabulation of results as well as want of impartiality, neutrality, efficiency, accuracy and accountability. The Respondents do not currently take issue with the Petitioner's causes of action. The Respondents duly responded to the Petition within the prescribed timeline. The Respondents' current concern is that the Petitioner failed to comply with the Election (Parliamentary and County Elections) Petitions Rules, 2017 ("the Rules")

The application

7. The application, by way of Motion, has been filed by the Respondents under Article 87(1) of the Constitution, Section 2 of the Elections Act 2011 and Rule 8(4) of the Rules.

8. By the application the following grounds are urged for striking out or dismissal of the Petition.

8.1 The Petition is deficient, as decreed by law as:

8.1.1 The Petition has not been signed by the Petitioner;

8.1.2 The Petition is purportedly signed for the Petitioner but the name of the person who has signed the Petition is not stated and [sic] the Deponent has not deposed to having the authority to swear the Petition and no authority for that purpose has been filed in court and

8.1.3 The Respondents are consequently at a loss as to who is challenging the election and are thus prejudiced.

8.2 The statutory and regulatory provisions under the Elections Act 2011 and the rules thereunder made are derivatives of the Constitution and failure to comply with any provisions is fatal to an election petition.

8.3 The brief affidavit of the 3rd Respondent in support of the application to confirm that the Petition was never signed by the Petitioner but by an undisclosed agent.

9. The Petitioner contested the application.

10. While conceding that he did not sign the Petition, the Petitioner asserted that the Petition was signed by his authorized agent- the law firm of Agimba & Associates. The Petitioner relied further on the following grounds to oppose the application.

10.1 That his advocate Mr Tom O Agimba had the authority to sign the Petition and did so.

10.2 That there is no requirement to produce any authorization at the time of filing of the petition.

Constitutional, statutory and regulatory indexation

11. The application is pegged on Rule 8(4) of the Elections (Parliamentary County Elections) Petition 2017. The rules were promulgated pursuant to s.96 of the Act, which statutory provision itself derives its existence from Article 87(1) of the Constitution.

12. It is unnecessary, at this point, to index the enabling Article 87(1) of the Constitution as well as s.96

of the Act but comity dictates that, as Rule 8(4) of the Rules is in dispute, I replicate the said rule infra.

“8. Contents and form of Petition

1.

2.

3.

4. The Petition shall:-

a) Be signed by the Petitioner or by a person authorized by the Petitioners.

b) Be supported by an affidavit sworn by the Petitioner containing the particulars set out under rule 12; and

c) Be such number of copies as would be sufficient for the election court and all Respondents named in the Petition.

5.

13. The title to the application simply states that the application is made; inter alia, under Rule 8. Both in the course of oral arguments and in the founding grounds expressly stated on the face of the application, there is no contention that the Petitioner did not swear an affidavit in support of the Petition containing the particulars under Rule 12. Likewise it has not been alleged that the Petition was not in such number of copies as would be sufficient for the election court and all the Respondents.

14. Essentially, the issue in the current application revolves around Rule 8(4)(a) and not 8(4)(b) or 8(4)(c). In any event, I hasten to add that on 3 November 2017 the court, in the presence of the parties confirmed that the Petitioner had sworn an affidavit in support of the Petition and which was substantially in compliance with Rule 12 of the Rules. The court then also confirmed that the Petitioner had availed enough copies of both the Petition and affidavit for circulation to the court and to all named Respondents.

15. As it is an issue of compliance for determination, I also find it apposite to reproduce Rule 5 of the Rules. It states.

‘5. Compliance with these Rules

1. 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.

2. A party to a Petition or an advocate for the party shall assist an election court to further the objectives of these Rules and, for that purpose to participate in the processes of the election court and to comply with the directions and orders of the election court’.

16. Article 159 (2) (d) of the Constitution, referred to under Rule 5, states that ***“justice shall be administered without undue regard to procedural technicalities”***.

Arguments in court

Respondents submit

17. Ms. Dorothy Mageto urged the application on behalf of the Respondents.

18. According to Ms. Mageto there was non-compliance with Rule 8(4) as the Petition was not only

signed by the Petitioner, but also the signatory was an unknown person and the Petitioner had failed to file any authority he had given to the unknown person. To press the point home, counsel pointed out that the Replying Affidavits by both the Petitioner and Mr. Tom. Onyango Agimba had failed to depone whether Mr. Agimba had actually been authorized by the Petitioner to sign the Petition on his behalf.

19. Ms. Mageto insisted that the Petition was consequently incompetent as it was filed by an unknown person who could neither be identified as a voter nor an unsuccessful candidate as prescribed by Rule 2.

20. Ms. Mageto further submitted that the purpose of a signature requirement was to ensure the Petitioner owned the Petition and could not mid-stream abandon and disown the Petition or the consequences of the ultimate result as happened in the case of **Ismail Suleiman & 9 Others v Returning Officer Isiolo County IEBC & Others [2013] e KLR**, where 9 out of 10 Petitioners disowned the Petition midstream leading to its being struck off. She urged that the same fate should befall the instant petition.

21. Counsel then stressed the need for compliance with the requirements of Rule 8, stating that the prerequisites went to the root of the Petition and thus the jurisdiction of the court. Ms. Mageto submitted that non-compliance meant dismissal or striking out of the Petition. For this proposition counsel referred the court to the cases of **Martha Wangari Karua & Another v The IEBC & 4 Others [2017] eKLR**, **Jimmy Mkalla Kazungu v IEBC & 2 Others [2017] eKLR** and **Mwamlole Tchappu Mbwana v IEBC & 4 Others [2017] eKLR** where non-compliance with Rule 8 led to all the Petition being struck out.

22. In a quick twist, Ms. Mageto then drew the courts attention to the fact that the Petition was most likely filed late and after expiry of the statutory deadline as a response filed to the application indicated that the Petition was signed late in the night of 6 September 2017, yet the filing itself reflected the same date.

23. For Ms. Mageto, the only avenue opened for the court was that of striking out the Petition as happened in the case of **Jahazi v Cherogony [1982]eKLR**.

24. Mr. Duncan Okatch, for the 3rd Respondent, supported the application and associated himself with Ms. Mageto's submissions.

25. Mr. Okatch added that Rule 8(4) was an imperative rule and compliance was mandatory. While stressing the object of the Rule as ownership of the petition, counsel pointed out that in the instant case the Petition had been signed by a firm "Agimba & Associates Advocates" and not a person. And then referring to the case of **Amina Hassan Ahmed v Returning Officer Mandera County & 2 Others [2013]eKLR**, which was cited with approval in the case of **Martha Wangari Karua & Another –v- IEBC & 4 Others**, Mr. Okatch pointed that non-compliance with the rules simply led to delay and injustice and had to be frowned up by the court.

26. Counsel also urged the court to avoid the application of Article 159 of the Constitution as the non-compliance in the instant case was substantial, not merely technical or procedural. According to Mr. Okatch, defect in signing the Petition even if not substantive was fatal.

27. Mr. Okatch also revisited the issue of late night signing of the Petition. Whilst referring to the definition of 'filing' as per Black's Law Dictionary 9th Ed, counsel urged the court to *suo moto* strike out the Petition as it was not filed on time.

The Petitioner responds

28. Ms. Joy Othieno urged the Petitioner's case in response to the application.

29. Placing reliance on the two affidavits filed on 21st November 2017 by the Petitioner and Mr. Tom Onyango Agimba, Ms. Othieno's minimal submissions were as follows:

29.1 The Replying Affidavits had clearly established a client advocate relationship with a resultant

agency.

29.2 An advocate once duly instructed was obligated to do much more, either with express or ostensible authority.

29.3 The case of **Hosea Mundui Kiplagat v Sammy Komen Mwaita & 2 Others [2013]eKLR** which was on all fours with the instant case though persuasive, was the standing authority for the proposition that a Petition signed by an advocate for his client was not fatally defective.

29.4 The court had a wide discretion and justice demanded that the application be dismissed and the Petition be heard on its merits.

Rejoinder

30. In a pithy rejoinder, Ms. Mageto submitted that the case of **Hosea Mundui Kiplagat v Sammy Komen Mwaita & 2 others (supra)** was only persuasive and did not in any event constitute good law as the court had invoked the provisions of the Civil Procedure Rules yet such rules do not apply to an election court which had special jurisdiction.

Discussion and determination

Issues

31. Having heard counsel and having perused the application as presented as well as the affidavit in response, only two issues enchant me for determination. These are: was there compliance with Rule 8(4) (a) of the Rules? If not, what was the effect of such non-compliance? Secondly, is the petition caught up with limitation?

Analysis

32. It is common cause that the Petition was signed. It is also not in controversy that the Petitioner did not himself sign the Petition. The Petition has been signed on the Petitioner's behalf. The signatory is indicated as "Agimba & Associates Advocates" with an appropriate mark. Again there is no controversy that this particular law firm was on record for the Petitioner from 6 September 2017 until 16 October 2017 when the law firm of Othieno & Company Advocates took over the brief and duly filed a Notice of change of Advocates. What is in controversy is whether the Petitioner in failing to sign the Petition and in further failing to disclose who his authorized agent mandated to sign the Petition was, violated Rule 8(4) (a) of the Rules.

A question of discretion

33. Rule 5 of the Rules appreciates the possibility of failure to comply with any of the Rules. Without exception, Rule 5 is to the effect that any failure to comply with the rules is to be determined at the court's discretion in accordance with the provisions of Article 159(2)(d) of the Constitution and with the objective of the rules in mind.

34. The objective of the rules, referred to under Rule 5, is well captured in Rule 4. The latter Rule reads thus:

4. Objective of these Rules

1) The objective of these Rules is to facilitate the just, expeditious, proportionate and affordable resolution of election Petition.

2) An election court shall, in exercise of its powers under the Constitution and the Act, or in the interpretation of any of the provisions in these rules, seek to give effect to the objective specified

in sub-rule (1)”.

35. While therefore the general jurisdiction of the High Court *qua* election court to deal with election petitions is founded under Article 165(3)(a) of the Constitution (as to the unlimited original jurisdiction of the High Court) as read together with Rule 6, the specific jurisdiction of the High Court *qua* election court to hear and determine issues of non-compliance with the rules and the effect of such failure is founded under Rule 5.

36. A determination on the effect of failure to comply with any of the rules will naturally invite an interpretation of the relevant rule, the non-compliance of which is alleged. Interpretation of the rules, on the other hand, is provided for under Rule 4. *A fortiori*, the special jurisdiction of the court to hear and determine applications relating to non-compliance with the rules is thus founded under both Rules 4 and 5.

37. As read together Rules 4 and 5 grant the election court a wide latitude. Rule 5 exhorts the court to exercise discretion in accordance with the provisions of Article 159(2)(d) of the Constitution (as to reticence when it comes to procedural technicalities), while Rule 4 implores the court to observe the objective of the rules. The court is to take into account the need for a just, expeditious, proportionate and affordable resolution of election petitions.

38. In my judgment, the discretion extended to the court under Rule 5 is discretion in the loose sense of the word rather than discretion in the strict sense. The court, once it has observed and confirmed non-compliance, must determine the effect by paying due regard to the need to ensure the just, expeditious, proportionate and affordable resolution of the dispute at hand, which dispute is a contested election.

39. In the loose sense of the word discretion, as also encouraged by Rule 4, invites the application of a value judgment after ascertaining and confirming non-compliance with any rule. In this respects, it is not just about reference to Article 159 of the Constitution. The court must also make other factors count.

40. In my view, such factors include, but are certainly not limited to, an interpretation of the rule to gather its purpose and import, a determination whether the party alleged to have failed to comply is actually in substantial compliance (the doctrine of substantial compliance), a reflection on whether the non-compliance may be cured with expedition and minimal prejudice (the doctrine of curability), balancing the prejudice occasioned to the compliant party, ascertaining whether the defect is a stand-alone or part of an assembly of errors by an obviously slipshod party . The court is also to consider the status of the proceedings.

41. In my judgment as well, a court while exercising its specific jurisdiction under Rule 4 has a wide latitude on the orders it may make. It may strike out the Petition. It may excuse the non-compliance through curability subject to an order for costs. It may actually make any other order that the court considers appropriate. All the options would be legitimate, if exercised on the correct principles and no injustice or prejudice is manifestly seen to be occasioned: see **Coffee Board of Kenya v Thika Coffee Mills Ltd & 2 others [2014] eKLR**.

42. It would, in my view, be unseemly and contrary to the provisions of Rules 4 and 5, were the court to start splitting between substantial and procedural or technical requirements and then stating that substantial requirements not complied with mean an automatic dismissal of the Petition while procedural requirements not complied with mean an excuse. This, in my judgment would be an unnecessary restriction to and curtailment of the discretion conferred upon the court by the legislature who thought it best to let the court decide which action to take in the face of proven non-compliance.

43. The diversity in exercising discretion is more evident when one reflects on the cases of **Jimmy Mkalla Kazungu v IEBC & 2 Others [2017]eKLR**, **Mwamlole Tchappu Mbwana v IEBC & 2 Others [2017]eKLR**, **Hassan Omar Hassan & Another v IEBC & 2 Others [2017]eKLR** and **Wavinya Ndeti & Another v IEBC & Others [2017] eKLR**. In all the cases, the question in controversy was the effect of failure to state date of declaration of results of the impugned election and

the non-joinder of a deputy governor as a respondent to a petition challenging the election of a governor. It was held in the **Mkalla** and **Mbwana** cases that the non-joinder was fatal while in the **Wavinya** and **Omar Hassan** cases the court returned the verdict that the non-joinder was not fatal.

44. Comparatively, our election rules borrow heavily from the Representation of People Act, 1951 of India. In India, discretion is also invoked to deal with non-compliance unless the statute expressly provides otherwise. Thus in **Manohar Joshi v Nitin Bhaurao Patel [1996] 1 SCC 169**, the respondent pointed out various discrepancies. The court declined to strike out the petition, notwithstanding the findings that some of the discrepancies were substantive.

45. And, in **Ajay Maken v Adesh Kumar Gupta [2013] 3 SCC 489** eighteen deficiencies had been alleged and proven. The petition was dismissed *in limine* by the superior court. On appeal, the court found, among other deficiencies, that there was non-joinder of a necessary party and further that the grounds of the petition were laid out in a document annexed to the petition. The Supreme Court overturned the decision of the superior court and remitted the petition to be heard on merit.

46. There is obviously a need not to be overzealous in the enforcement of the rules with strike out orders, in so much as the court ought to be in the forefront encouraging compliance.

Legislative narration

47. Before returning to the facts of instant case, a brief reference to the legislation history of Rule 8(4) (a) may be a relevant.

48. Up till the repeal of the National Assembly and Presidential Elections Act (Cap 7) in 2011, the election petitions regulations required petitions to be signed personally by the Petitioner: see rule 4(3) of the National assembly Elections (Election Petition) Rules 1993 by the Petitioner. There was generally no room for an alternative signature. Failure to comply with rule, and it did not matter the reason, meant the Petition was fatally defective and was susceptible to being struck out. Thus in **Moi v Matiba & 2 others [2008] 1 KLR (EP) 622**, the Respondent challenged the election of the Appellant as the president of the Republic of Kenya. At first instance the appellant raised an objection that the Petition had not been executed by the Petitioner as the rules demanded. The objection was overruled (Amin J) prompting the appeal. On appeal, the objection was upheld and the decision of the High Court reversed. The court dismissed the Respondents arguments that he was incapacitated even though he had much earlier authorized his spouse, by way of a formal power of attorney, to sign pleadings on his behalf. The court then held the view that the requirement of a petitioner's signature was mandatory whilst giving the rule a strictly literal interpretation. Not even an attorney could cure the defect.

49. Years later the rule was amended to provide for the signing of petitions by either "*the Petitioner or by a person duly authorized by the Petitioner*". It was now not mandatory that the Petition be signed by the Petitioner only. An alternate was provided for.

50. In my judgment, the 2013 amendment cured the mischief occasioned by the court's literal interpretation of the then rule. Where the Petitioner was not able to sign or unavailable to sign the Petition for any reason in the face of the strict timelines for filing election petitions, a duly authorized person could sign the petition on his behalf.

51. The object of requiring signature not just by anybody but by the Petitioner was however still intact. The petition was still owned by the Petitioner who was bound to his pleadings (petition). Additionally, the rules also meant that unnecessary and vexing litigants could not simply file a petition on behalf of the Petitioner. Indeed, in my view, the words "*a person duly authorized by the Petitioner*" were designed to focus the mind of the persons signing the petition on whether they had authority to sign the petition on behalf of the Petitioner and bind the Petitioner.

52. In 2017, the rules were again amended. The new rule in relation to the signing of petitions now provide for the petition to be signed by "*the petitioner or a person authorized by the Petitioner*". The

word “*duly*” was deleted. The object and purport of the rule however remained the same. I will deal with the 2017 amended shortly.

53. I return now to the instant case, with the knowledge that each case must be adjudicated on the basis its own circumstances.

54. The election petition as prosecuted has been signed by an advocate’s law firm. The petition was signed by an advocate and is in substantial compliance with Rule 8(1),(2) & (3) save, allegedly, to Rule 8(4)(a) which has invited the instant application.

55. With no controversy that the law firm of ‘Agimba and Associates Advocates’ were originally attorned by the Petitioner to represent him in the Petition, the question worthy of a quick answer is whether an advocate duly attorned may qualify to be a person authorized by the Petitioner for purposes of Rule 8(4) (a). The Petitioner contends he qualifies. The Respondents contend that he does not, in so far as his name is not disclosed and no authority has been filed.

56. I start by stating that the provisions of Rule 8(4)(a) though mandatory in so far as the word ‘shall’ has been used are not stringent. The rule provides for alternative signatories to validate a Petition. There is however no express compulsion to disclose by providing for disclosure of the name of the person authorized through an instrument or an affidavit to be filed in court.

57. In my view, accepting Ms Mageto’s arguments that the authority must be filed would mean reading into Rule 8(4)(a) an additional requirement and thus an additional ground. It would amount to stretching and straining the language of Rule 8(4)(a) if the arguments of the Respondents were to be adopted and accepted. This would defeat the object of the rule which, as already identified, is to have the Petitioner own the petition and be able to deputize a signatory on his behalf for any reason whatsoever. There is always the possibility, as happened in **Moi v Matiba (supra)**, that the Petitioner may not even be in a position to sign the authority. Indeed, in my view, the object of the rule would also be defeated if the court placed a higher premium on a precise identification of the person authorized by the Petitioner.

58. In the instant case the signatory is only identified as “Agimba & Associates Advocates”. The response to the application by way of an affidavit confirms that the law firm of “Agimba & Associates Advocates” is a sole proprietorship run by Mr. Tom Onyango Agimba, whose practicing certificate is with the court. Even though Mr. Okatch, for the 3rd Respondent, urged that the website of Agimba & Associates Advocates reveals more partners, s.106 of the Evidence Act (Cap 80) would bar me from accepting such evidence presented by counsel from the bar and minus the requisite certificate under s106(4)B of the said Act. I must consequently, accept the affidavit evidence that the law firm of Agimba & Associates is a sole proprietorship and for purposes of the Registration of Business Names Act (Cap 499) treat the business name “ Agimba & Associates Advocates” as referring to Mr. Tom Onyango Agimba as an individual rather than as a firm as was urged by Mr. Okatch.

59. Both Ms. Mageto and Mr. Okatch for the Respondents added that there was need to file a proper letter of authority identifying the person who signed the Petition. In this regard, counsel relied on the case of **Mohammed Mwinyi Mtwana Jahazi v Francis Cherogony & Another [1982]eKLR** where a three-judge bench presided over by the then chief Justice S.J Wicks held that:-

“The requirement that a Petition be signed by the Petitioner is not a formality. Equity demands that a Petitioner assumes responsibility for his Petition by signing it.

We are satisfied and find that the provision contained in rule 4(3) that a Petition shall be signed by the Petitioner is mandatory and that this Petition not having been signed by the Petitioner is not properly before the court”.

60. According to counsel it was either the Petitioner himself or an identified person duly authorized by the Petitioner. In this instant, it was stated, that the Petitioner had failed to identify the authorized person.

61. The Petitioner has identified one Tom Onyango Agimba as the authorized person for purposes of Rule 8(4)(a). In an affidavit, Tom Onyango Agimba also confirms that he signed the Petition for the Petitioner who was his client and thus paved way for the Petitioner's argument that counsel had the authority by dint of the retainer held besides having been authorized by the Petitioner to sign: see paragraph 3 of the Replying Affidavit of the Petitioner.

62. The question as to whether an advocate duly retained by a Petitioner is also a person authorized to sign a Petition for purpose of Rule 8(4)(a) was considered by Achode J in the case of **Hosea M. Kiplagat v Sammy Komen Mwaita & Another [2013]eKLR**. This case was copiously referenced by the Petitioner's counsel Ms. Othieno.

63. In **Hosea M. Kiplagat v Sammy Komen Mwaita & Another (supra)**, Achode J after considering and reflecting on the legal and ordinary meanings of the words 'duly' and 'authorized' and also invoking the provisions of the Civil Procedure Rules (Order 9 rule 1 and Order 2 rule 16) proceeded to hold that 'a signature' is not to "be elevated above the substantive aspect of the [sic] pleading". The court then returned the verdict that an advocate could sign the Petition as a duly authorized person.

64. I found the reasoning in **Mwaita's** case sound and helpful save for the reference to the Civil Procedure Rules. Notwithstanding the Civil Procedure Rules, our Elections Act 2011 and the rules made thereunder, are elaborate. They prescribe how election petitions are commenced, what the petitions must contain, as well as the possible reliefs and also how a trial in an election petition from the pretrial conference is to be conducted. Any interpretation of the rules under the Act thus should not relate to the Civil Procedure Rules but ought to proceed as provided for under Rule 4(2) with the knowledge that an election petition invites a special jurisdiction.

65. Further, s.96 of the Elections Act mandated the Rules Committee to make rules generally to regulate the practice and procedure of the High Court with respect to the filing and trial of election and referendum petitions and generally with regard to "any other matter relating to an election and referendum petition as the Chief Justice may deem necessary." Statute must certainly sought to separate the two rules applicable to ordinary civil litigation and election/referendum petitions and it would be remiss to put them together.

66. Let me also point out that since the decision in **Mwaita's** case, the Rule as to signing of the Petition was subsequently amended. Legal Notice No. 117 of 2017 occasioned various amendments to the rules and the equivalent of Rule 8(4)(a) was amended by deleting the word 'duly'. Prior to the amendment, a petition could only be signed "by the Petitioner or a person duly authorized by the Petitioner". In my judgment this signified some proper and appropriate manner, and in the words of the 9th Ed of Black's Law lexicon, "*in accordance with legal requirements*". The rule prior to 2017 could thus easily pass as inviting invited some formality.

67. The 2017 amendment, in my view made it easier. Want of formalism was rid of and the mischief sought to be cured was to make it easier for the Petitioners to appoint substitute signatories. It was sufficient if the Petitioner consented. I would give Rule 8(4)(a) that liberal approach.

68. It brings me to the position of an advocate *qua* signatory to an election petition.

69. I have no doubt that the law of agency provides the starting point for many of the actions and legal consequences which emanate from a client- advocate relationship. An advocate acts on behalf of his client representing the client and also may alter or change the client's legal relations with third parties.

70. The advocate-client relationship is however, in my view, not a monolithic agency as an advocate unlike the conventional agent has boundaries not necessarily delineated by himself or his client. An advocate is, for example, bound by instructions. He is also an officer of the court and of the law and even where there are express instructions; he is bound to restrain himself from executing the instructions if execution would be contra his position as an officer of the court and of the law. There also exist significant regulatory, legal and ethical constraints generally.

71. The constraints aside, in my judgment, a basic proposition which encompasses most client-advocate relationship is that in the face of a retainer, an advocate's act binds his client so long as the advocate has actual or apparent authority subject only to the general rule that if the act amounts to a transgression then as an officer of the court the advocate may not avail himself a shield in agency.

72. With regard to signing of documents, the import of a signature may never be gainsaid.

73. It should not be in dispute that a signature confirms that one has acquainted himself with the actual and full contents of a document he signs and is thus bound. This explains why most signatures take the conventional form of the signatory's name or some variation or abbreviation of it or simply a mark, if a party so wishes, which is physically written or made on the document. This position must apply to petitions as well. I have no doubt that an advocate duly instructed and who prepares a petition is very well acquainted with the contents already and the signing would simply be additional confirmation which ultimately binds the Petitioner.

74. In the face of this general preamble, can it be said that an advocate has the authority to sign a petition on behalf of a petitioner? Prof F.E. Dowrick in his article "**The relationship of Agent and Principal**" [1954] 17 MLR 24, 37 talks of authority as

"a matter of fact, which connotes that one person has given instructions or permission to another to act on his behalf".

75. I could not agree more.

76. It ought to be established as a matter of fact that an advocate has been authorized to sign the petition. It ought to be established as a matter of fact that any person who signs a petition has been so authorized by the petitioner to do so on his behalf. The import of a signature dictates this. Likewise, in my view and in so far as advocates are concerned, advocates do not make an assumption when instructed that they will execute and sign documents on behalf of clients. Every case is to be adjudicated on its own facts and circumstances, to establish whether the advocate has authority to sign.

77. As rule 8(4) (a) does not dictate or demand a formal or express authority, the authority to be donated may take any form. The authority to sign must however be there and not simply implied in view of the language of Rule 8(4)(a). The authority may be actual. It may be constructive. It may be express. But certainly, it will not be general, implied or inherent or simply apparent. The facts must establish the authority.

78. In the instant case, on 2 September 2017, the firm of Agimba & Associates was instructed to file a petition on behalf of the Petitioner. Mr. Agimba depones that he prepared the Petition. He confirms that he also appended his signature to the Petition. Time was running out for the filing of the petition and late in the night of 6 September 2017 he signed the petition and filed it the same night. He signed for the Petitioner, though it is the firm's name indicated. He says he is a sole proprietor. The Petitioner also confirms under oath that Mr. Agimba signed the Petition on his behalf and that he had the authority to do so.

79. In my judgment and taking the totality of the circumstances and the affidavit evidence placed before me, I am satisfied that Mr. Agimba had the authority of the Petitioner to sign the Petition on behalf of the Petitioner and bind the Petitioner to the contents and any legal consequences emanating from such filing.

80. There is still one preliminary question surviving in this application.

A question of limitation

81. During both the informal pre-pretrial conference proceedings and the formal pre-trial conference, I pointed out to counsel various issues of concern with regard to both the Petition and the Responses.

82. The issues ranged from mundane matters like missing certificates of practice of counsel and missing copies of the court file receipts to crucial details like required dates, allegedly obliterated court receipts, post dated court receipts and unclear signatories. While, together with the parties as well as the Court's Deputy Registrar, I was able to resolve most of the patent questions, the issue as to who signed the Petition remained immediately unresolved and I directed that the Respondents be at liberty to file the instant application.

83. In the course of the parties' submissions and arising from the affidavits filed in response to the application it became unclear as to whether the Petitioner had actually complied with the provisions of Article 87(2) of the Constitution and presented his petition on time. As the jurisdiction of an election court is founded upon a petition filed within the constitutional timeline, the parties agreed that the record would bear both parties witness and all that was necessary was for the court to reconfirm when the court fees on the petition was paid and when the Petition was actually presented to the court. This ministerial act would with more certainty help determine whether the petition was time-barred or not.

84. For purposes of brevity, Article 87(2) states that:

“ Petitions concerning an election, other than a presidential election, shall be filed within twenty-eight days after the declaration of the election results by the Independent Electoral and Boundaries Commission”.

85. Article 87(2) of the Constitution is replicated under ss.76 and 77 of the Elections Act,2011. While it is acceptable as a proposition that a Petitioner must avail to himself limitation up to the very last date to the hour, the strict proposition in the event of non-compliance with the constitutional and statutory imperative under these specific provisions of the law is that any petition presented to the court after the limitation period has lapsed will not be entertained as the time line is inflexible and inextensible : see **Lemanken Aramat v Harun Meitamei Lempaka & 2 others [2014]eKLR** and also **Mary Wambui Munene v Peter Gichuki King'ara & Others [2014]eKLR**.

86. The question is thus whether the instant petition musters the provisions of Article 87(2) of the Constitution.

87. Before the court, the basic albeit conflicting facts were as follows.

88. The impugned election results were declared on 9 August 2017. Admittedly thus, the last date for filing the election petition according to the limitation prescribed under Article 87(2) of the Constitution was 6 September 2017. The court's official stamp confirming and acknowledging the filing of the petition reflects the date of 6 September 2017. The court's official receipt acknowledging receipt of the court fees was however issued on 7 September 2017. The Petitioner's then advocate has then sworn an affidavit and deponed that he only signed the petition between the hours of 2300 and 2330 on 6 September 2017.

89. The stated facts prompted the Respondents to point out, and justifiably so, that the petition may not have been filed on time. The Petitioner contended otherwise. As I was of the view that in any democratic set up, the purity and propriety of any judicial process is of utmost import, I agreed to conduct a ministerial exercise with the parties consent by reviewing the court registry's official records. This was also to ensure that the constitutional provision as to limitation of filing election petitions is not violated.

90. I confirm that the ministerial act has been undertaken with the assistance of the court's staff and the following revealed. The Petitioner paid the court fees on 6 September 2017 at 2104 hours. The petition was presented and received by the court registry on 6 September 2017 late in the night. The registry records reveal that indeed some petitions were received after this petition. Due to unavailability of the court registry staff seized with the duty of receipting payment, the official court receipt in acknowledgment of the paid court fees was however issued on 7 September 2017.

91. I am satisfied that the petition was presented and filed within the limitation period. There is no clear evidence that there was any iniquity on the part of the Petitioner. Even as the Petitioner's counsel

deponed that the petition was only signed after 2300 hours on 6 September 2017, payment of court fees had been made. The court records also reflect that the petition had been presented to the registry staff. I cannot fetch fault on the Petitioner in the circumstances.

Conclusion and disposal

92. By way of conclusion, I am satisfied that no deficiency has been proven or shown to cause the petition to be summarily struck out or dismissed at this stage. I am also satisfied that the Petition herein was filed on time.

93. Consequently and by way of disposal, I must now preemptorily dismiss the application dated 15 October 2017. It is dismissed.

94. I see no reason why the Petitioner should not be awarded costs of the application and he is so awarded. A certified copy of this ruling and of report on the filing of this petition is to be availed to the parties at no cost.

95. Orders accordingly.

Dated, signed and delivered at Nairobi this 24th day of November, 2017.

J.L.ONGUTO

JUDGE

In the presence of :

Ms. J Othieno for the Petitioner

Ms. D Mageto for the 1st and 2nd Respondents

Mr. D Okatch for the 3rd Respondent

Crt Asst: A Atelu