



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

THE ELECTIONS ACT 2011

ELECTION PETITION NUMBER 5 OF 2017

MWAMLOLE TCHAPPU MBWANA.....PETITIONER

VERSUS

INDEPENDENT ELECTORAL & BOUNDARIES

COMMISSION.....1ST RESPONDENT

KWALE COUNTY RETURNING OFFICER

AMINA HUSSEIN SOUD.....2ND RESPONDENT

CONSTITUENCY RETURNING OFFICER

KINANGO (CHARO KALUME CHARO)

LUNGA LUNGA, (SAHA MWADZUNGU ISAIAH)

MSAMBWENI (YUSUF ABUBAKAR MOHAMED

MATUGA (KASSIM MWAGOMBA KAEMA).....3RD RESPONDENT

THE PRESIDING OFFICER & DEPUTY PRESIDING OFFICER

BARAKA PARK, MATUGA.....4TH RESPONDENT

HON. SALIM MVURYA MGALA.....5TH RESPONDENT

RULING

1. Mwamlole Tchappu Mbwana the Petitioner herein has filed the election petition herein (the Petition”) dated 5.9.17 on 6.9.17 challenging the election of Hon. Salim Mvurya Mgala the 5th Respondent, as the Governor of Kwale County. The Independent Electoral and Boundaries Commission, the 1st Respondent, Amina Hussein Soud, Kwale County Returning Officer, the 2nd Respondent, Charo Kalume Charo, Saha Mwadzungu Isaiah, Yusuf Abubakar Mohamed and Kassim Mwangomba Kaema the Kinango, Lunga Lunga, Msambweni and Matuga Constituency Returning Officers respectively, the 3rd Respondents collectively and the Presiding Officer & Deputy Presiding Officer, Baraka Park, Matuga, the 4th

Respondent filed their joint response on 20.9.17. The response of the 5th Respondent was filed on 18.9.17.

2. Before me for consideration are two preliminary points of law raised by the 5th Respondent. The first is raised by way of a Preliminary Objection dated 2.11.17 and filed on 3.11.17 on the following ground:

“The failure to enjoin the Deputy Governor within twenty eight (28) days of declaration/publication of results renders the whole Petition incompetent and a violation of the Deputy Governor’s rights to fair hearing under Article 50 of the Constitution.”

The second preliminary point of law was raised orally by the 5th Respondent on the ground that the Petition and Supporting Affidavit do not state the date of declaration of the results of the election thus rendering the Petition incompetent.

3. Learned Counsel for the Petitioner and the Respondents urged their respective cases before me on 8.11.17. I will consider each of the preliminary points of law separately.

Failure to plead the date of declaration of the election

4. It is the 5th Respondent’s case that the Petition does not comply with Rules 8 and 12 of The Elections (Parliamentary and County Elections) Petitions Rules 2017 (“the Elections Petitions Rules”). It was submitted by Mr. Mogaka, learned Counsel for the 5th Respondent that the question of the date of declaration of the election results goes to the root of the Petition and jurisdiction. The date of declaration of the election results is not just procedural but goes to jurisdiction. Failure to state the date of declaration of the election results in both the Petition and the Supporting Affidavit is fatal and renders the Petition a nullity. The Court therefore lacks jurisdiction to hear the Petition in terms of the finding of Owners of the Motor Vessel Lilian ‘S’ v. Caltex Kenya Limited (1989) KLR 1. It was further submitted that it is an established principle of law that parties are bound by their own pleadings as stated in the cases of Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR and Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR. Even if the Petition were to proceed to full trial, the Petitioner will not be able to produce evidence that is not pleaded in the Petition.

5. Learned Counsel further submitted that rules must be complied with as they must be read as having a mandatory import. The Petition has failed to comply with the mandatory Elections Petitions Rules. The Court was urged to allow the Preliminary Objections with costs.

6. Mr. Wasuna, learned Counsel for the Petitioner submitted that the preliminary objection herein is a mischievous way of raising an interlocutory point by the 5th Respondent through the back door. Citing the case of Mukisa Biscuit learned Counsel submitted that a preliminary objection must raise a pure point of law. Where any fact has to be proved or if any matter is subject to judicial discretion then an interlocutory application has to be filed. Relying on Rule 5, it was contended that the alleged non-compliance with the matters contained in Rule 8(1) of the Elections Petitions Rules are subject to judicial discretion in terms of Article 159(2)(d). Any issue of non-compliance can only be moved by a substantial interlocutory application so that grounds and evidence can be adduced to sway the Courts discretion. In this regard, the Court has not been properly moved or moved at all.

7. Learned Counsel submitted that if the objection is that the Petition was not filed within 28 days then that is an issue of fact that must be established. Article 87 of the Constitution and Section 76 of the Act stipulate the matters of fact to be adhered to before a petition is filed. It is the Petitioner’s case that the Petition was filed within 28 days from date of declaration of results which date can be established and adduced as an evidentiary issue. It was further argued that dates are not pleaded but cited in pleadings. The Petition has set out justiciable grounds upon which the Court is capable of taking evidence and making a determination.

8. On compliance of the Rules, Counsel submitted that with the exception of Rule 8(1)(d) the Petition is compliant with Rule 8(1) of the Elections Petitions Rules. Form 37C declaring the results has been cited and relied upon in the Petition. Although the date of declaration of the results was missing, another Form 37C containing the date was filed. It was submitted that the 1st to 4th Respondents cited the date of declaration in their responses. It was argued that as long as the results are part of the record in the Petition and supporting affidavit, they can be the basis for determination of the issues before the Court. The purpose of timelines is not to kill the Petition without it being heard on merit. The Petition is meritorious and is of great public interest.

9. Mr. Ambwere learned Counsel for the Petitioner submitted that the issue of non-compliance with the Rules is under Rule 5 of the Elections Petitions Rules an issue of the Court's discretion in accordance with Article 159(2) of the Constitution. It was Counsel's submission that an affidavit is part of the Petition as found by the in the case of Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR. Counsel urged the Court to depart from its own decision in Election Petition Number 9 of 2017 Jimmy Mkala Kazungu v IEBC and 2 Others. Counsel further urged the Court to dismiss the two backdoor applications which have been brought out of time, with costs to the Petitioner.

10. Mr. Wanyama learned Counsel for the 1st-4th Respondents submitted that Rule 8 is couched in mandatory terms and the Court has no discretion whatsoever when the Rules have been breached. Counsel contended that the reason why date of declaration must be pleaded in the Petition and in the Supporting Affidavit as per Rules 8 and 12 is that the date has a jurisdictional implication. When date is not stated, a constitutional and statutory issue as to whether the Petition was filed on time arises. The Court has no jurisdiction to consider a petition not filed within the 28 days' timeline and this date cannot be inferred from the pleadings of the Respondent. Under Rule 17(2) of the Elections Petitions Rules, the time for filing petition cannot be extended.

11. On whether the preliminary objection ought to have been raised by way of application, it was submitted that the preliminary objection meets the threshold in Mukisa Biscuit case (supra) as it raises a pure point of law which can determine the Petition. Procedure is handmaiden of justice and must be followed as required in Rule 8 of the Elections Petitions Rules. The Petitioner cannot ask the Court to overlook procedural failure just because the Petitioner states that the Petition has merit or that election of a governor is a serious issue of great public interest. These are all the more reason why the Petitioner should have complied with all substantive procedural requirements.

Non-joinder of the deputy governor

12. It is the 5th Respondent's case that the deputy governor is a necessary party in this Petition and must be enjoined within 28 days of the declaration of the results of the election. Mr. Mogaka, learned Counsel for the 5th Respondent submitted that the marginal note of Article 180 of the Constitution of Kenya 2010 refers to the election of the county governor and deputy county governor. Article 180(5) requires the person to be nominated as deputy governor to have the same qualification as the governor. It was submitted for the 5th Respondent that once the names of nominated members of Parliament and of County Assemblies are presented to the 1st Respondent and gazetted they are deemed to be validly elected. The only way to get them out of those seats is through an election petition as found in the cases of Moses Mwigigi & 14 others v Independent Electoral and Boundaries Commission & 5 others [2016] eKLR and Kipkalya Kiprono Kones v Republic & another Ex-parte Kimani Wa Nyoike & 4 others [2006] eKLR. The same is true of a Deputy Governor. Failure therefore to enjoin the deputy governor herein in the stipulated period renders the Petition a nullity.

13. It was further submitted that the Petition in seeking the nullification of the gubernatorial election of Kwale County does not seek to spare the deputy governor. The principles of natural justice will not allow a party to be condemned unheard. The right to fair trial in Articles 25 and 50 of the Constitution are not subject to limitation and any act that violates these articles is null and void. Once the Governor and deputy governor were elected they were gazetted by the 1st Respondent as the governor and deputy governor of Kwale County. The deputy governor having been duly elected should not be denied an

opportunity to defend herself in this Petition. She ought to have been made a respondent herein within 28 days of declaration of the results of the election. The timelines for filing a petition are constitutional and statutory and the Court has no jurisdiction to extend time. Where no application for amendment of Petition has been made under Section 76 of the Election Act then the Petition is a non-starter and the Court has no discretion to exercise under Article 159 of the Constitution to cure the same. Failure to enjoin the deputy governor therefore renders the whole Petition a nullity.

14. Ms Oyier learned Counsel for the Petitioner submitted that non-joinder of the deputy governor is not a jurisdictional issue. The Court derives its jurisdiction from Article 87(1) of the Constitution and Section 75 of the Elections Act. The dispute relates to Kwale County and the High Court at Mombasa is nearest to the County. Further this Court was gazetted by the Honourable Chief Justice in accordance with Rule 6 of the Election Petitions Rules. The requirements of statute and the Election Petition Rules have been satisfied in this Petition. It was further contended that the deputy governor does not have to be enjoined in every litigation concerning the governor. Non-joinder cannot render the Petition incompetent and cannot deny the Court jurisdiction. Learned Counsel further argued that if the deputy governor feels that her rights have been violated, she has the liberty to have her rights protected by filing a constitutional petition under Article 23(1) of the Constitution.

15. It was further submitted that directions were given on 27.10.17 that hearing would commence on 6.11.17 and that witnesses would adopt their affidavits and be cross examined thereon. As such the matter became part heard and the issue of non-joinder is therefore time barred. Under Rule 15(2) the 5th Respondent is barred from bringing the issue which ought to have been raised at the interlocutory stage.

16. Learned Counsel submitted that it is trite law that an allegation of violation of rights must be specific but argues that out of the several limbs in Article 50 the 5th Respondent has not specified which aspect he relies on.

17. It was further argued that non-joinder is not fatal. It is only the 1st Respondent who under Rule 9 of the Elections Petitions Rules is a mandatory respondent. A respondent is defined as a person whose election is complained of. The governor is elected directly by the voters under Article 180(1) of the Constitution. The office of the deputy governor is created under Article 180(5) of the Constitution. According to the Petitioner, the Constitution, the Act and the Rules are clear that the seat of a deputy governor unlike that of the governor is not elective. The deputy governor is a nominee of the governor. Election Petition No. 10 of 2017, Hassan Omar Hassan & Another v IEBC & and 2 Others was cited to buttress this submission. It was contended that the rights of the deputy governor will not be infringed by non-joinder. The Petitioner further submits that they have filed Form 37C the heading of which reads 'election of county governor'. The only declaration made is that of the governor. It is therefore absurd to expect the Petitioner to enjoin a party he has no complaint against.

18. Mr. Ambwere learned Counsel for the Petitioner urged the Court to consider the finding in Hassan Omar Hassan case (supra) where similar prayers were sought but declined. The Constitution put the governor and the deputy governor together. Learned Counsel further cited the case of M'Nkiriya Petkay Shen Miriti v Ragwa Samuel Mbae & 2 Others [2013] eKLR where Lesiit, J. found that non-inclusion of governor is not fatal. It was further argued that the fact that neither the Court of Appeal nor the Supreme Court has pronounced itself on the non-joinder of a deputy governor just goes to show that it is a non-issue. Counsel prayed that the Preliminary Objection be dismissed and Petition be heard on merit.

19. For the 1st-4th Respondent Mr. Nyamodi urged the Court not to be persuaded by the finding in the Hassan Omar Hassan case (supra). Learned Counsel submitted that the Court in that case relied on the Petkay Miriti case (supra) which dealt with Section 87(2) of the Election Act which has since been repealed. The finding is therefore *per incuriam*.

20. On non-compliance with Rule 8(1) of the Election Petition Rules, learned Counsel submitted that the Petitioner's counsel admitted that there was non-compliance. Counsel pointed out that the document in pages 56-65 of the Petition purports to be Form 37C but is not signed and does not state the date of the declaration of the results of the election. On the face of the document, there is a stamp by commissioner

for oaths as annexure “MTM4”. However, the said document is not in the affidavit. The annexures referred to in the affidavit are MTM 1-3 only. Even if that document contained the date of the declaration which does not, it is not part of the affidavit. The Court was urged not to depart from its finding in the Jimmy Mkala Kazungu case (supra). On compliance with the Rules, learned Counsel relied on the case of Moses Mwicigi & 14 others v Independent Electoral and Boundaries Commission & 5 others [2016] eKLR.

21. Mr. Wanyama learned Counsel for the 1st-4th Respondents submitted that failure to enjoin deputy governor is a jurisdictional issue. Under Article 180(6) of the Constitution the deputy governor is deemed elected and only an election petition can invalidate that election. Learned Counsel faults the Petitioner’s submissions that the deputy governor is at liberty to seek to be enjoined in these proceedings or seek redress in a separate constitutional petition if at all she feels her rights have been or will be infringed or violated by the proceedings herein. It is the duty of the Petitioner to enjoin the deputy governor and failure to do so renders this Petition defective.

22. I have given due consideration to the submissions by the parties and the authorities cited. The issues for determination are:

- i) Whether the Preliminary Objection raises pure points of law
- ii) Consequences of failure to state date of declaration of the results of the election.
- iii) Whether the deputy governor is a necessary party

Whether the Preliminary Objection raises pure points of law

23. The two issues raised by the 5th Respondent are firstly, that failure to enjoin the deputy governor in the Petition within 28 days of declaration of the results renders the Petition incompetent and a violation of the deputy governor’s rights. Secondly, failure to state in the Petition the date of declaration of the result of the election renders the Petition incompetent. It is the Petitioner’s case that the preliminary objection herein does not raise pure points of law and therefore does not meet the threshold set in the Mukisa Biscuit case. Where any fact has to be proved or if any matter is subject to judicial discretion then an interlocutory application has to be filed. Under Rule 5 Elections Petitions Rules any non-compliance with the matters contained in Rule 8(1) of the Elections Petitions Rules is subject to judicial discretion in terms of Article 159(2)(d). Any issue of non-compliance can only be moved by a substantial interlocutory application so that grounds and evidence can be adduced to sway the Courts discretion. For the Respondents it was submitted that the question of the date of declaration of the election results is not just procedural but goes to the root of the Petition and jurisdiction. The non-joinder of the deputy governor within 28 days is also a jurisdictional issue. The preliminary objection therefore meets the threshold in Mukisa Biscuit case (supra) as it raises a pure point of law which can determine the Petition at this stage.

24. In Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696, Law JA had this to say:

“ so far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a Preliminary Objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

On his part, Sir Charles Newbold, President stated:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what I sought is the exercise of judicial discretion.”

25. The issue for determination is whether this Court has jurisdiction to hear the Petition herein which according to the 5th Respondent is incompetent on account of failure to comply with Rule 8 of the Election Petition Rules and to enjoin the deputy governor. An objection to the jurisdiction of this Court cannot be subject to judicial discretion and no fact needs to be ascertained. It is a pure point of law which upon being argued as a preliminary objection may very well dispose of the Petition. This would realize the overriding objective of the Elections Petitions Rules. I am not persuaded by the Petitioner's submission that the issues herein ought to have been raised by way of motion.

26. On the submission that the matter is already part heard and therefore the 5th Respondent is barred from bringing the issue which ought to have been raised at the interlocutory stage, I am guided by Nyarangi, JA in Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1, where he stated:

"I see no grounds why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado."

The 5th Respondent has raised an issue of jurisdiction and this Court is obligated to hear and dispose the issue without further ado.

Consequences of failure to state date of declaration of the results of the election

27. It is not disputed that the date of the declaration of the election is omitted in the Petition. It was conceded for the Petitioner as much. Mr. Wasuna for the Petitioner submitted:

"It is the Petitioner's argument that with the exception of Rule 8(1)(d) the Petition is compliant with Rule 8(1)."

28. It is the 5th Respondent's case that failure to state the date of declaration of the results of the election in the Petition and in the supporting affidavit contravenes Rules 8 and 12 of the Elections Petitions Rules and renders the Petition incompetent. Rule 8(1) of the Elections Petitions Rules stipulates the matters that are to be stated in an election petition as follows:

(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 election is presented; and

(f) The name and address of the advocate, if any, for the petitioner which shall be the address for service. (emphasis added)

29. Rule 8(1)(d) requires that the date of the declaration of the results of the election be stated in a petition. Rule 12(2)(d) provides that the date of the declaration of the results of the election be stated in the affidavit in support of a petition sworn by the petitioner. The Constitution of Kenya and the Elections Act provide the period within which an election petition must be filed. Article 87(2) of the Constitution provides:

"(2) 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.”

Section 76(1)(a) of the Elections Act provides:

(1) A petition—

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

30. The requirement to state the date of declaration of the election result in both the Petition and Supporting Affidavit is couched in mandatory terms. I have carefully looked at the Petition. I do note that the same does not state the date when the result of the election was declared. The supporting affidavit does not also contain the said date. Further the Petitioner has in fact conceded that there has been non-compliance with the requirement of the law in this regard.

31. There is one other critical thing I have noted. Rule 8(1)(c) requires that the Petition shall state the results of the election, if any, and however declared. Section 2 of the Elections Act provides:

“election results” means the declared outcome of the casting of votes by voters at an election;”

Regulation 87(2)(b) of the Elections (General) Regulations, 2012 provides:

“2. The county returning officer shall upon receipt the results from the constituency returning officers as contemplated under regulation (1)—

(b) complete Forms 37C, 38C and 39C set out in the Schedule in which the county returning officer shall declare, as the case may be, the—

a. name of the respective electoral area;

b. total number of registered voters;

c. votes cast for each candidate or referendum side in each polling station

d. number of rejected votes for each constituency;

g. aggregate number of votes cast in the respective electoral area; and

f. aggregate number of rejected votes;”

32. The only statement in the Petition that resembles election results is found in Paragraphs 4.16 and 6.25 of the Petition. Paragraph 4.16 sets out a table of malpractices for 30 polling stations. The table contains the number votes cast in each of the said polling stations. It then shows what is referred to as Makwere’s actual score, Mwakwere’s moderated score and Mvurya’s moderated score in each of the 30 polling stations. The Petition goes on to state at Paragraph 6.25:

“the results and the returns made by the 1st, 2nd 3rd and 4th Respondents do not comply with the law and regulations governing the electoral process and do not meet or satisfy the test of verifiability. The threshold is that there should be no discrepancy between the results announced and declared at the polling stations and Tallying centres. The final tally on form 37C which shows the following results are contested.

SALIM MVURYA MGALA - 119,680

MWAKWERE ALI CHIRAU - 29,741

33. According to paragraph 2 of the Petition there were 6 candidates at the election held on 8.8.17:

“Honourable Amb. Mwakwere Ali Chirau, Honourable Salim Mvurya Mgala, Dena James, Daniel Gerza, Kipera Issah Athuman and Ruwa Sammy Nyamawi were candidates...”

34. To my mind, these are not the declared election results as envisaged in Section 2 of the Act and Regulation 87(2)(b). The onus upon the Petitioner under Rule 8(1)(c) of the Election Petition Rules to state the results of the election would only be discharged if he set out the results as declared by the 2nd Respondent. The annexure marked “MTM4” cannot come to the aid of the Petitioner. This is because the annexure is not expressly referred to in the affidavit of the Petitioner and cannot be deemed to be part of the Petition as per Dickson Mwenda Githinji v Gatirau Peter Munya & 2 others [2014] eKLR.

35. Rules of procedure in electoral disputes are not mere technical or procedural requirements. They go to the root and substance of the matters prescribed upon. They must not therefore be treated as optional. Every provision in the Election Petition Rules is important and is intended to achieve a required result. This is as was stated by Onyancha, J. in the case of Amina Hassan Ahmed v Returning Officer Mandera County & 2 Others[2013]eKLR,:

“Put differently, the provisions of Rule 10 and others aforesated, are not mere technical requirements. If they are technical in so far as they are procedural and spell out the form and content of intended petitions, they nevertheless, at the same time, are substantive and go to the root and substance of issues and matters prescribed upon. A further reason why the provisions of the Elections Act and/or Rules must be complied with fully, is because the Act, and therefore the Rules, are a special legislation. They are a legislation for the purpose, as already stated above, of efficiently prescribing the proper, efficient, expeditious and just conduct of election petitions. Every provision in them therefore, is intended to achieve a required result...”

36. The provision requiring the date of declaration of the result of the election is intended for a specific purpose. It is the date that the period of 28 days within which the Petition is to be filed begins to run. Stating the said date is therefore critical as it would determine whether or not the Petition was filed within time. Without stating the date of declaration of the result of the election it becomes difficult, nay impossible to determine whether the Petition herein was filed within time or not and by extension whether the Court has jurisdiction to entertain the Petition or not.

37. Onyancha, J. in the Amina case went on to say and I concur:

“The promulgator of the Rule, clearly went into great lengths and details to provide the actual form of and the contents the petitions should contain. The probable reason for going to such details would be that a petition, as filed, should be complete with all the details defined...”

38. In the case of In John Michael Njenga Mututho v Jayne Njeri Wanjiku Kihara & 2 others [2008] eKLR, the Court of Appeal observed:

“What would happen where, as here the results as envisaged by regulation 40, above are not included in the petition”? In our view an essential element would be missing. The petition shall be incomplete as the basis for any complaint will be absent. Whatever complaints a petitioner may be having about an election may be regarded as having no legal basis. The law has set out what a petition should contain, and if any of the matters supposed to be included is omitted, then the petition would be incurably defective. For instance, paragraph (a) of rule 4(1) deals with capacity to petition. If a petitioner omits to make an averment in that regard the petition will be incurably defective. Likewise if the date of the election omitted that omission would be fundamental in nature and would of itself without more render a petition incurably defective. We say so advisedly. The provisions of the National Assembly and Presidential Elections Act, have been held, to provide a complete code of the law and rules on elections and election

petitions. As rightly pointed out by Mr. Kilonzo for the appellant, that law has no provision for amendment of pleadings after the 28 days stipulated for lodging petitions. In view of the conclusions we have come to on that aspect, it follows that the term “shall” as used in rule 4, must be read as having a mandatory import. Reading it otherwise will render the provisions of that rule otiose.”

39. As per the above finding of the Court of Appeal, the Election Petitions Rules are clear as to what an election petition should contain. If any of the matters listed in the Rules is omitted then the petition would be incurably defective. The Rules must be read as having a mandatory import otherwise they will be rendered otiose. This Court must therefore interpret the Rules strictly and give effect to the overriding objective in Rule 5 which is to facilitate the just, expeditious, proportionate and affordable resolution of elections petitions. Parties coming to seek justice in an election Court are also under an obligation from drafting and filing pleadings to prosecuting and defending petitions to assist the Court to achieve the said objective.

40. Where a petitioner overlooks procedural imperatives such as in the present case, the Court should not hesitate to declare the petition incompetent. In so saying, I am guided by the case of Moses Mwicigi & 14 others v Independent Electoral and Boundaries Commission & 5 others [2016] eKLR where Supreme Court had this to say regarding compliance of rules of procedure in paragraph 65:

“This Court has on a number of occasions remarked upon the importance of rules of procedure, in the conduct of litigation. In many cases, procedure is so closely intertwined with the substance of a case, that it befits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is the handmaiden of justice. Where a procedural motion bears the very ingredients of just determination, and yet it is overlooked by a litigant, the Court would not hesitate to declare the attendant pleadings incompetent.”

41. The Rules Committee expended much time and effort to come up with the Elections Petitions Rules which ensure that a petition is as complete as possible, clearly setting out in detail the case for the Respondents to respond to with a view to achieving the just, expeditious, proportionate and affordable resolution of electoral disputes. Under Rule 4(2) this Court is enjoined in exercise of its powers under the Constitution and the Elections Act and in the interpretation of any of the provisions in these Rules, to seek to give effect to the aforesaid overriding objective.

42. Parties are bound by their own pleadings. A Court cannot frame an issue not stated in the pleadings. In line with this well established principle of law, this Court cannot frame any issue in respect of the date of declaration of results of the election and indeed in respect of the results of the election. The Supreme Court has guided the Courts on this legal principle in the case of Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR. The Court cited the Supreme Court of India in the case of Arikala Narasa Reddy v. Venkata Ram Reddy Reddygari & Anr, Civil Appeal Nos. 5710-5711 of 2012; [2014] 2 S.C.R and stated:42.

[52] Further, the Court went on and observed that:

“In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings. The court cannot exercise discretion of ordering recounting of ballots just to enable the election petitioner to indulge in a roving inquiry with a view to fish material for dealing the election to be void. The order of recounting can be passed only if the petitioner sets out his case with precision supported by averments of material facts.”

43. In the case of Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR one of the grounds of appeal was that the learned Judge unilaterally framed new issues for determination that were not pleaded or responded to by the parties. The Court of Appeal in allowing this ground of appeal stated:

“As the authorities do accord with our own way of thinking, we hold them to be representative of the proper legal position that parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce. The learned Judge, no matter how well-intentioned, went well beyond the grounds raised by the petitioners and answered by the respondents before her and thereby determined the petition on the basis of matters not properly before her. To that extent, she committed a reversible error, and the appeal succeeds on that score.”

By proceeding with a Petition in which the date of declaration of the results and the results have not been pleaded, this Court will run the risk of abandoning its role as an independent and impartial arbiter and descend into the arena of conflict. In the circumstances, I find that the Petition is incompetent for not having stated the date of declaration of the election. Though the failure to state the results was not one of the issues raised in the preliminary objection, the Court cannot shut its eye to the omission.

Whether the deputy governor is a necessary party

44. The 5th Respondent is of the view that the deputy governor is a necessary party in this Petition. The deputy governor once elected can only be removed from office by an election petition. To him, the non-joinder of the deputy governor will result in violation of her right to fair trial enshrined in Article 50 of the Constitution. This right is not subject to limitation under Article 25 and any act that infringes on this right is null and void. For the Petitioner, it was submitted that the deputy governor is not a necessary party and only the 1st Respondent is a mandatory party in every petition. Further that the deputy governor is not elected but only a nominee of the governor. The deputy governor is at liberty to apply to be enjoined as a party herein and in the alternative may file a separate constitutional petition to protect her rights. Further that the Petitioner has no complaint against the deputy governor.

45. Article 180 of the Constitution of Kenya 2010 makes provision for the election of the county governor and deputy county governor as follows:

“(1) The county governor shall be directly elected by the voters registered in the county, on the same day as a general election of Members of Parliament, being the second Tuesday in August, in every fifth year...”

(5) Each candidate for election as county governor shall nominate a person who is qualified for nomination for election as county governor as a candidate for deputy governor.

(6) The Independent Electoral and Boundaries Commission shall not conduct a separate election for the deputy governor but shall declare the candidate nominated by the person who is elected county governor to have been elected as the deputy governor.”

46. From the foregoing provisions it is clear and it is not disputed that the governor is directly elected by the registered voters in the county. As regards the deputy governor, Article 180(5) requires each candidate for election as governor to nominate a person qualified for nomination for election as county governor as a candidate for deputy governor. Article 180(6) provides that no separate election shall be conducted for the deputy governor. The provision then goes on to state that the candidate nominated by the person who is elected county governor shall be declared ***“to have been elected as the deputy governor.”*** The clear reading of the wording of that provision is that once a governor is elected then the person he nominates shall also be declared to have been elected as the deputy governor. I am therefore not persuaded by the argument that the deputy governor is merely nominated and not elected.

47. Having found that a deputy governor is elected and not nominated, I now turn to the question of how to remove a deputy governor from office. In the case of Moses Mwicigi & 14 others v Independent

Electoral and Boundaries Commission & 5 others [2016] eKLR the Supreme Court stated at paragraph 117:

“It is clear to us that the Constitution provides for two modes of ‘election’. The first is election in the conventional sense, of universal suffrage; the second is ‘election’ by way of nomination, through the party list. It follows from such a conception of the electoral process, that any contest to an election, whatever its manifestation, is to be by way of ‘election petition’.”

I have found that the deputy governor is elected but even if the deputy governor were a mere nominee as submitted by the Petitioner, the only legally recognised process of removal is through an election petition. Indeed the Supreme Court stated that that any contest to an election, whatever its manifestation, is to be by way of election petition.

48. In Kipkalya Kiprono Kones v Republic & another Ex-parte Kimani Wa Nyoike & 4 others [2006] eKLR the Court of Appeal had this to say about submissions which sought to draw a distinction between nominated and elected members of the National Assembly.

“There are basically two routes of becoming a member of the Assembly – through election and through nomination and those two routes are set out by the Constitution. But in terms of removal, the Constitution has set out only one process; we would have expected that if the makers of the Constitution had wanted different ways of removing members from the Assembly, they would have specifically spelt out two ways as they did with entry into the Assembly ... a seat in the National Assembly can only be declared vacant under the circumstances stated in the Constitution and through the processes set out therein.

49. Although the cases of Moses Mwicigi (supra) and Kipkalia Kones (supra) relate to members of the county assembly and of the national assembly respectively, the constitutional process of removal from office set out therein applies to all electoral positions including that of the deputy governor. The deputy governor came into office through the law and can only be removed through a process set out in the law.

50. The argument by counsel for the Petitioner that the Petitioner has no complaint against the deputy governor is noted. It is however inconceivable that this Petition challenging the election of the governor has nothing to do with the election of the deputy governor. Indeed the Petitioner has submitted that if the election of the governor is nullified, the deputy governor would suffer the same fate.

51. This brings me to the principles of natural justice specifically *audi alteram partem*, which literally means 'hear the other side'. If the deputy governor were to be condemned unheard in this Petition, it would offend all notions of justice. I am guided in this regard by the decision in the case of Mbaki & Others v. Macharia & Another [2005] 2 EA 206, at page 210, where the Court of appeal stated as follows:

“The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.”

The Court went on to say:

In Pashito Holdings & another V Ndungu & 2 others KLR (E&L)1 295 it was held that “The rule of audi alteram partem, which literally means 'hear the other side', is a rule of natural justice. It is an indispensable requirement of justice that the party who has to make a decision shall hear both sides, giving each an opportunity of hearing what is urged against him”

52. As stated earlier, the deputy governor will be adversely affected if this Petition succeeds. It will be dishonest and unfair to hear this Petition as no notice has been given to the deputy governor that she is being proceeded against. This is a failure of natural justice as held in Nyongesa & 4 others v Egerton University College (1990) KLR 692:

“There was a failure of natural justice. It was necessary for each applicant to be served with a notice that he was being proceeded against and each organ which dealt with the applicants was required to act honestly and fairly.”

53. When the deputy governor was declared duly elected, took oath of office and assumed office, certain rights accrued to her. Those rights cannot be taken away from her without giving her an opportunity to defend those rights. In this regard, the decision in Cozens v North Devon Hospital Management Committee and Another (1966) 2 All E. A. 799 is instructive where Salmon L.J, had this to say:

“I start from the point that the general rule of the law is that the courts will not make orders in legal proceedings affecting a party’s rights without giving that party an opportunity of being heard ... To my mind very clear words would be required to take away fundamental rights which are ordinarily accorded by the law and indeed by natural justice.”

54. The legal imperative of hearing a person who is likely to be adversely affected by a decision before the decision is made cannot be overemphasized. The Court of Appeal sitting in Malindi observed in the case of J M K v M W M & another [2015] eKLR:

“The courts of this land have been consistent on the importance of observing the rules of natural justice and in particular hearing a person who is likely to be adversely affected by a decision before the decision is made.”

55. In the performance of its judicial function, this Court is required to observe the principles of natural justice. Any decision made by the Court in this Petition will be unjust and unfair if the Court deprives itself of the views of the deputy governor who will be affected by the decision. In Msagha vs. Chief Justice & 7 Others Nairobi HCMCA No. 1062 of 2004 [2006] 2 KLR 553 the High Court stated:

In RIDGE –VS- BALDWIN [1963] 2 ALL ER. 66, it was observed of the principles of natural justice that:-

“An essential requirement for the performance of any judicial or quasi-judicial function is that the decision-makers observe the principles of natural justice... a decision is unfair if the decision-maker deprives himself of the views of the person who will be affected by the decision.”

The Court went on to say:

“The consequences of the breach of the principles of natural justice were stated by Lord Wright in GENERAL MEDICAL COUNCIL -VS- SPARCKMAN [1943] 2 ALL E.R. 337 at 345 as follows:-

“If indeed the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principle of justice. The decision must be declared to be no decision.”

56. The steadfastness of our Courts in upholding the principles of natural justice and in particular hearing a person who is likely to be adversely affected by a decision before the decision is made in ordinary litigation cannot disaffirmed. The same steadfastness must also be applied in electoral disputes. To proceed to hear this Petition without notice to, or the participation of the deputy governor, is to go against the principles of natural justice. This Court cautions itself that any decision it may make in violation of these principles however “right” the decision may be, such decision must be declared to be no decision.

57. Going back to the submission that the Petitioner has no complaint against the deputy governor and thus did not need to enjoin her as a co-respondent, the question begs, if this Court were to allow the Petition and nullify the election of the governor, what would be the fate of the deputy governor? It must be borne in mind that upon election of the 5th Respondent, the deputy governor was also declared to have been elected as deputy governor in line with Article 180(6). The deputy governor was issued with her

own Form 37D being the certificate declaring her as duly elected. Through what legal process, instrument or order will the Form 37D issued to the deputy governor be vacated, set aside or quashed if she is not a party herein?

58. What would happen if upon nullification of the election of the governor, the deputy governor declines to vacate office on the ground that she is not aware of the proceedings or of any order against her? What if she insists on assuming the position of county governor of Kwale County under Article 182(2)? My view is that she would be within her legal right to so insist. Article 182(1) makes provision for vacancy in the office of a county governor:

“(1) The office of the county governor shall become vacant if the holder of the office—

(a) dies;

(b) resigns, in writing, addressed to the speaker of the county assembly;

(c) ceases to be eligible to be elected county governor under Article 180 (2);

(d) is convicted of an offence punishable by imprisonment for at least twelve months; or

(e) is removed from office under this Constitution.”

59. The law relating to electoral disputes is anchored in the Article 87 of the Constitution of Kenya 2010. The removal of a governor from office by means of a successful election petition is therefore removal from office under the Constitution. Article 182(2) of the Constitution provides:

“(2) If a vacancy occurs in the office of county governor, the deputy county governor shall assume office as county governor for the remainder of the term of the county governor.

60. In Kithinji Kiragu v Martin Nyaga Wambora & 2 Others [2013] eKLR, a similar question arose and Ong’udi, J observed:

“This Court’s view is that the provision of Article 181 and 182 concern a validly elected Governor. If the election is challenged and the Governor is found to have been unlawfully elected, then it means he/she has to vacate office alongside his/her deputy. The Deputy Governor could not therefore be enjoined as a party as his/her nomination is not in question.”

61. Likewise Achode, J. was of the same mind as Ong’udi, J. in Petition No. 10 of 2017 Hassan Hassan Omar Hassan v IEBC and Others where she stated:

“...in the event an election petition against a County Governor results in a nullification of the results, the Deputy County Governor no matter how compelling a case he/she may put forward, suffers the same fate as the Governor by dint of having assumed office through the same irregularly declared ticket.”

62. With profound respect to my sister Judges, their views are not backed by law. As a matter of fact there is no law that requires the deputy governor to vacate office upon nullification of a governor’s election. Nor is there any law that bars the deputy governor from assuming office of the governor upon a vacancy in that office arising by means of a nullification of the election of the governor.

63. In Election Petition No. 1 of 2017 Wavinya Ndeti & Another v IEBC and Others, Muchelule, J. considered this very issue of non-joinder of the deputy governor. He stated,

“In other words the deputy governor is not directly elected by voters in the county. He will only assume office of the governor if it falls vacant under any of the circumstances under Article 182. If the validity of the election of the governor is successfully challenged by petition, then both him

and the governor will leave office.”

The learned judge went on to state:

“In my view unless there is an election act or omission alleged against a deputy governor during the election of the governor he will not become a necessary party in the election petition filed against that the (sic) governor. He will not be a respondent in the petition. The governor will be the respondent in the petition because he is the one who has been directly elected in the election, and he is therefore the one who will cease to hold office if the election is validly and successfully challenged. The deputy governor will be collateral damage as it were.”

64. While I agree with the learned Judge that it is the governor who will cease to hold office upon a nullification of his election, I do find with respect, the conclusion that the deputy governor will be collateral damage and must also leave office, not anchored in law. There must be specific legal provisions to provide that the deputy governor whether enjoined in a successful petition against the governor or not shall also leave office. As the law stands, the deputy governor cannot legally be expected to vacate office on the basis of an order made in proceedings of which she had no notice, in which she was not a party and on the basis of an order not directed at her. As posed above, through what legal process, instrument or order will the Form 37D issued to the deputy governor be vacated, set aside or quashed?

65. Article 180(6) of the constitution provides:

“The Independent Electoral and Boundaries Commission shall not conduct a separate election for the deputy governor but shall declare the candidate nominated by the person who is elected county governor to have been elected as the deputy governor.”

The people of Kenya in promulgating the Constitution were emphatic in Article 180(6) that the candidate nominated by the person who is elected county governor shall be declared to have been elected as the deputy governor. The people of Kenya however did not state emphatically or otherwise that upon removal of the county governor by way of nullification of the election the deputy governor shall by that removal also be removed. If this had been the intention of the people of Kenya, they would have specifically made such provision in the Constitution or in legislation through their elected representatives.

66. For the above reasons, I wish to break ranks with my brother and sister Judges and find that the deputy governor is a necessary party in an election petition that seeks the nullification of the election of the governor. Non-joinder of the deputy governor renders this Petition incompetent and incurably defective.

67. Having said that, the law envisages a situation where an election petition may contain errors and has made provision for amendment. Section 74(6) of the Elections Act provides:

“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”.

However the window to remedy the defects in the Petition by way of amendment closed 28 days after declaration of the election results which is the time specified for filing the Petition. This therefore renders the Petition incurably defective.

68. The Court has no jurisdiction to entertain an incurably defective petition and without jurisdiction there would be no basis for a continuation of proceedings pending other evidence. The locus classicus on jurisdiction is the celebrated Court of Appeal case of Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1 where Nyarangi, JA. eloquently stated that:

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest

opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

69. For the reasons stated above, I uphold the Preliminary Objection. My finding is that failure to comply with the mandatory requirements of Rules 8(1)(c) and (d) and 12(2)(c) and (d) of the Elections Petitions Rules and further, failure to enjoin the deputy governor herein renders the Petition incurably defective. In the circumstances the Petition is hereby struck out. I award costs to the Respondents. Given that the Petition has been concluded at the interlocutory stage, I cap the costs at Kshs. 2,500,000/=. The costs shall be taxed by the Deputy Registrar but subject to the above limit.

70. Before I conclude, I wish to state that from the foregoing, it is evident that there are gaps in the provisions relating to the deputy governor in the Constitution, and even in the County Governments Act. Perhaps it is time that Parliament considers amending the County Governments Act to plug the gaps identified herein. Other provisions that Parliament may wish to consider relate to the removal of a deputy governor from office and appointment of another deputy governor upon assumption by the deputy governor of the office of the governor.

DATED, SIGNED and DELIVERED in MOMBASA this 16th day of November 2017

M. THANDE

JUDGE

In the presence of: -

..... **for the Petitioner**

.....**for the 1st - 4th Respondents**

..... **for the 5th Respondent**

.....**Court Assistant**