REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMABAY

ELECTION PETITION NO. 2 OF 2017

IN THE MATTER OF THE CHALLENGE OF THE VALIDITY OF NYATIKE CONSTITUENCY ELECTION, 2017

AND

IN THE MATTER OF ARTICLE 1(1); 2(2) 3(1); 4(2); 10;21(1); 22(1); 23;38(3)(C); 47(2); 48;81(A); & (E); 82(2)(B); 84;86; 87(2) & (3); 88(5); 165(3)(A) AND (E); 94; 95; 97; 99 & 101 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTIONS 75, 76, 80 AND 82 OF ELECTIONS ACT NO. 24 OF 2011

AND

IN THE MATTER OF THE POLITICAL PARTIES ACT NO. 11 OF 2011

AND

IN THE MATTER OF LEGAL NOTICE NO. 128 OF 2012, THE ELECTIONS (GENERAL) REGULATIONS, 2012

AND

IN THE MATTER OF THE ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS) PETITIONS RULES, 2017

AND

IN THE MATTER OF LEGAL NOTICE NO. 126 OF 2012 (THE ELECTIONS REGISTRATION OF VOTERS) REGULATIONS, 2012

AND

FREDRICK KAGOSH OGENGA …….……..…….....…...… PETITIONER

VERSUS

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION …..... 1ST RESPONDENT

THE CONSTITUENCY RETURNING OFFICER NYATIKE …..…..... 2ND RESPONDENT

TOM MBOYA ODEGE …….....…. 3RD RESPONDENT

R U L I N G

1. Fredrick Kagosh Ogenga (Petitioner) participated in the general election held on the 8th August 2017 as one of the candidates for the seat of Member of the National Assembly (MP) for Nyatike Constituency within the County of Migori in the Republic of Kenya.

Tom Mboya Odege (Third Respondent), was also a candidate for the same elective post.

2. On the 9th August 2017, when the results of the election were announced or declared by **The Independent Electoral and Boundaries Commission** (First Respondent) through its **Returning Officer** for Nyatike Constituency (Second Respondent), it emerged that the winner of the election was the Third Respondent with a total of 26,872 votes while the runner up was the Petitioner with a total of 22,815 votes.

3. Being aggrieved with the outcome of the election, the Petitioner lodged this Petition on the 6th September 2017, seeking orders **"inter-alia"** that the parliamentary election held on 8th August 2017, in Nyatike Constituency be declared null and void and that the Third Respondent was not validly elected as the Member of the National Assembly for Nyatike Constituency.

4. Contemporaneously filed with the Petition was a Notice of Motion dated 5th September 2017, seeking interim orders for the preservation and safe keeping of the electoral material and for scrutiny and recount of votes as well as production of specified electoral material and related documents.

5. On the 13th September 2017, the application was presented before **Mrima, J**. sitting at the High Court in Migori for hearing. Thereafter, orders were issued to the effect that the ballot boxes and election gadgets used in the impugned election be delivered to the custody of the courts within five (5) days pending further orders.

6. The orders ignited the application by the Third Respondent dated 19th September 2017, and an addition application by the First and Second Respondents, both for setting aside the orders. However, on the 11th October 2017, the orders were set aside by consent of the parties. It was thereafter directed by the court that the application dated 5th September 2017, by the Petitioner be heard by affidavit evidence and written submissions which were to be orally highlighted on 25th October 2017.

7. It was later declared by the Government of Kenya that the 25th October 2017 was a public holiday. The application dated 5th September 2017 was therefore to be given a fresh date for hearing. However, on the 24th October 2017, the application was withdrawn by the Petitioner and substituted with a new application vide the Notice of Motion dated 18th October 2017 and filed on 19th October 2017.

8. Directions were given by the court that the new application be argued by way of affidavit evidence and written submissions which were to be orally highlighted on 8th November 2017, on which date learned counsel, **Mr. Biko**, appeared for the Petitioner while learned counsel, **Mr. Orego**, appeared for the First and Second Respondents and learned counsel, **Mr. Okongo**, appeared for the Third Respondent.

9. Basically, the application dated 18th October 2017 and filed on 19th October 2017, is of a similar nature to that dated 5th September 2017, which now stands withdrawn. The prayers sought in the appropriate Notice of Motion are essentially for the preservation and safe keeping of electoral material as well as production and/or supply of the material to the Petitioner.

10. Additional orders sought in the application include access to the electoral material linked to the **Kenya Integrated Election Management System** i.e the KIEMS Kits and scrutiny and/or recount of votes in specified polling stations.

Article 35(1) (a) and (b) of the **Constitution**, Section 4(1) of the **Access to Information Act**, Section 27 of the **Independent Electoral and Boundaries Commission (I.E.B.C) Act**, Section 80 (4) (a) and Section 82 of the **Elections Act**, Rules 15, 28 and 29 of the **Elections (Parliamentary and County Elections) Petition Rules, 2017**. Rule 3(1) and 3(2) of the **High Court (Practice and Procedure) Rules** of the **Judicature Act**, are the provisions of the law which have been invoked by the Petitioner in this application based on the grounds contained in the appropriate Notice of Motion.

11. The grounds are fortified by the facts contained in the Petitioner's supporting affidavit filed on 19th October 2017, together with affidavits deponed by one **Obonyo Samson Olima** and one **Dr. Noah Akala Oduwo**.

It is instructive to note that the Petitioner's supporting affidavit is undated and unattested while that of Mr. Olima and Dr. Akala are undated although properly attested. This omission and its impact on the application shall be reverted to later in this ruling.

12. Moving forward, all the Respondents are opposed to the application on the basis of the grounds contained in their respective replying affidavits dated 6th October 2017 and all filed on the 8th November 2017, with necessary leave of the court.

13. It is without doubt that the jurisdiction of the High Court in Electoral Disputes Resolution [EDR] is a special jurisdiction conferred by the **Constitution** and the **Elections Act 2011**, together with the Rules and Regulations made thereunder. So, in as much as the provisions of the Constitution and the Elections Act together with its Rules and Regulations are invoked in this application, it may be said that it is proper before the court notwithstanding the inclusion of provisions of the law which are seemingly outside the ambit of electoral disputes.

14. Nonetheless, this court, having given due consideration to the application and all its supporting grounds and those in opposition thereto and in the light of the rival submissions, hold the view that the basic issues for determination are **firstly**, whether the electoral materials used in the impugned parliamentary election ought to be preserved and kept in safe custody by the court pending hearing and determination of the Petition and **secondly**, whether there should be an order for scrutiny and recount of votes in selected polling stations pending the hearing and determination of the Petition. A **third** issue would be whether the First and Second Respondents should supply and/or provide access to the Petitioner to specified electoral material.

15. With regard to preservation and safe keeping of electoral material, Article 86 (a) of the Constitution obligates the Electoral Commission (I.E.B.C) to ensure that appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials.

16. It is therefore a constitutional duty imposed upon the First and Second Respondents to preserve all the electoral material which are defined under section 2 of the **Elections Act, 2011**, to mean, ballot boxes, ballot papers, counterfoils, envelopes, packets statements and other documents used in connection with voting in an election and includes information technology equipments for voting, the voting compartments, instruments, seals and other materials and things required for the purpose of conducting an election.

17. Under Rule 86 of the **Elections (General) Regulations**, a Returning Officer is empowered to keep in safe custody election material such as copies of all election result declaration forms and register of voters, the Electronic Voter Identification Device (EVID), sealed ballot boxes and all material relating to the election.

18. Under Rule 93 of the Regulations, electoral material are to be retained in safe custody by the

Returning Officer for a period of three years unless the Electoral Commission or the court directs otherwise. This application is clearly intended to have the electoral material preserved and kept in safe custody by the court rather than the First and Second Respondents. This fact may be deduced from the Petitioner's prayer two and seven in the Notice of Motion.

19. Rule 16 of the **Elections (Parliamentary and County Elections) Petitions Rules, 2017**, empowers the court to give direction on the storage of the election materials including ballot boxes and documents relating to the Petition. The court may also give directions on the handling and safety of the election materials as well as the time for furnishing the election materials to the election court.

In giving such directions, the court must consider the prudent, efficient and economic use of storage and transport facilities, the maintenance of the integrity of the election materials and ensure that the election materials are not interfered with.

20. In his submissions, the Petitioner contends that the electoral materials subject of this Petition have already been tampered with by being relocated to Nairobi and in particular the KIEMS machines which were used in Nyatike Constituency. It is also contended that the KIEMS Kits were to be reconfigured for usage in the presidential election held on 26th October 2017.

21. The Petitioner is therefore apprehensive that the aforementioned tampering and interference with the KIEMS Kits or machines by the First Respondent has compromised the security and integrity of the electoral material such that the First Respondent cannot be entrusted with preserving the material. It is for that basic reason that he (Petitioner) prays for necessary orders and/or direction from the court for preservation and safe keeping of the electoral material used in the impugned election.

22. The First and Second Respondents contended in their submissions that all the election materials are in their safe custody pursuant to the necessary provisions of the law and that the Petitioner's prayer in that regard is not only superfluous but absolutely unnecessary.

The Third Respondent on the other hand, contended that the allegation that the First Respondent has already compromised the security and integrity of the electoral material and cannot therefore be entrusted with preserving the electoral materials is self defeating.

23. To the Third Respondent, either the results of the election are secure and thus need to be preserved or they have been compromised and therefore securing already compromised results will serve no useful purpose. He (Third Respondent) contends that the alleged threat or interference with the electoral material is based on unreasonable and baseless apprehension while the fear of further interference is farfetched.

24. As regards the KIEMS Kits, the Third Respondent contended that even if the retrieval of the kits by the First Respondent led to the re-configuration of the KIEMS, the Petitioner has failed to show that such reconfiguration led to the deletion of the data stored therein.

25. The Petitioner also expressed fear that since the Second Respondent is a party to this Petition, he may interfere with the electoral material in his custody in order to protect his interest in the Petition.

26. This court's opinion with regard to the prayer for preservation and safe keeping of electoral materials is that the Petitioner has not provided credible and cogent evidence to establish interference and/or tampering with any of the electoral material by the First and Second Respondent who are constitutionally mandated to preserve and keep in safe custody all the electoral material for a period of three (3) years.

27. Mere apprehension without any demonstration of untoward activity or unlawful overt-activity on the part of the First and Second Respondents is not enough and although these Respondents have not denied that the KIEMS machines used in the impugned election may have been configured for usage in the recent Presidential Election held on 26th October 2017, the Petitioner has not established any interference or attempted interference with the all important data contained in the KIEMS Kits. It is not the machine

but the data contained therein which is important and which if interfered with would definitely compromise its integrity and security much to the detriment of the Petitioner.

28. It is for the foregoing reasons that the court would be very reluctant to order and direct that the electoral material used in the impugned election be removed from the safe custody of the First and Second Respondents to the custody of the court which in any event does not have sufficient and secure storage facilities.

29. However, it would not be prejudicial or injurious to the Respondents if the Petitioner is provided with access to all the original documentary electoral materials including results forms on a **"read only"** basis with liberty to photocopy the same at his own expense.

And, for the avoidance of doubt, the said electoral material shall not include the material inside the sealed ballot boxes.

30. As to the data contained in the KIEMS Kits, the Petitioner may be granted necessary access for purposes of downloading either digitally or electronically all the vital data contained therein. The Petitioner may also be granted access to the ballot boxes for purposes of affixing his own seals. In sum, the Petitioner's prayer for an order of preservation and safe keeping of the electoral material by the court is denied but the prayer to access specified material would be granted and should be implemented within a period of five (5) days excluding the weekend from this date hereof.

31. The prayer for supply of specified electoral material to the Petitioner by the First and Second Respondents shall effectively be served by grant of the order to access the electoral material.

32. With regard to the prayer for scrutiny and recount of votes in specified polling stations, prayer six (6) of the Notice of Motion is the most relevant. Thus, the Petitioner seeks an order for scrutiny and recount as well as retallying of the votes cast in the specified polling stations which are approximately forty (40) or thereabout.

33. The main reason given for prayer six (6) is that scrutiny and recount would ascertain the true status of the votes as cast in the named polling stations. Other reasons are contained in the Petitioner's supporting affidavit and they include that scrutiny will enable the court investigate the validity of the allegations of irregularities and breaches of the law raised in the Petition and will also enable the court to better understand the actual details of the electoral process as to transparency, verifiability, legality and/or credibility of the whole process.

34. Even as he mentioned the over forty (40) polling stations in which scrutiny should be conducted, the Petitioner averred that the most profound illegalities were transacted in North Kadem Kanyasa, Muhuru and Maclader Kanyarwada ward with far reaching crimes on the vote. He contended in his submission that there were irregularities in Forms 35A which were used to declare the results in Form 35B and while placing more emphasize on the preservation and security of the KIEMS Kits so as to protect the data contained therein, the Petitioner asserted that his contentions regarding the KIEMS Kits involve the technological systems of the First respondent and would help the court reach a fair and just determination of whether the KIEMS Kits was actually used in Nyatike Constituency and resolve the questions whether the results were transmitted electronically in compliance with the law and whether there were dead voters and/or aliens in certain polling stations.

35. It is for all the reasons foregoing that the Petitioner prays for an order for scrutiny and recount. However, all the Respondents are opposed to the application on the basic ground that the Petitioner has failed to lay a basis for grant of such order and is merely engaging in **"fishing expedition"** for evidence.

36. In the Petition, it is pleaded that the information and/or results contained in Forms 35A's do not conform and/or even match the information contained in Form 35B and that some of the Form 35A's issued to the Petitioner's agents by the presiding officers at various polling stations do not match the Forms 35A's that are in the custody of the First and Second Respondents.

37. It is further pleaded that at several polling stations and tallying centres, the counting and tallying was done or undertaken using false, incomplete, unsigned and unverified documents including Forms 32A and 35A.

In essence, the Petitioner contends that the process of vote counting and tabulation was fundamentally flawed as the electoral laws and regulations were not followed. That, the entire election was marred with incurable irregularities that only call for a recount of the votes to ascertain the actual winner of the elections.

Indeed, among the prayers sought by the Petitioner in the Petition include a scrutiny and recount of the votes in some polling stations.

38. Scrutiny and recount of votes is provided for in Section 82 of the Elections Act 2011. Thus, an election court may, on its own motion or on application by any party to the Petition, during the hearing of an election petition, order for a scrutiny of votes to be carried out in such manner as the election court may determine. Sub-section (2) of Section 82 provides for modalities of carrying out a scrutiny of votes.

39. Under Part VI (6) of the **Elections (Parliamentary and County Elections) Petitions, Rules 2017** scrutiny and recount are provided for in Rules 28 and 29.

Rule 28 provides that;

> **"A petitioner may apply to an election court for an order to-**
>
> > **a. Recount the votes, or**
> >
> > **b. Examine the tallying, if the only issue for determination in the Petition is the count or tallying of votes.**

And Rule 29 provides that:-

> **1. The parties to the proceedings may apply for scrutiny of the votes for purposes of establishing the validity of the votes cast.**
>
> **2. On an application under sub-rule(1) an election court may, if it satisfied that there is sufficient reason, order for scrutiny or recount of votes.**
>
> **3. The scrutiny or recount of votes under sub-rule (2) shall be carried out under the direct supervision of the Registrar or Magistrate and shall be subject to the directions the election court gives.**
>
> **4. The scrutiny or recount of votes in accordance with sub-rule (2) shall be confined to the polling stations in which the results are disputed ……..**

40. Although in most situations, the words **"scrutiny"** and **"recount"** are used together interchangeably, they are different in principle. Whereas a recount is pegged at the numbers of the votes garnered by each of the candidates in an election, a scrutiny goes beyond the numbers and examines the validity of votes. However, scrutiny of votes invariably includes a recount of votes.

41. In the pleadings and in this application, it is alleged by the Petitioner that irregularities relating to counting and/or tallying of votes and those relating to mistakes, errors and omissions in the result Forms 32A, 35A and 35B were widespread in a number of polling stations and hence, the request for scrutiny and recount.

42. In opposition to the application, the First and Second Respondents contended that the Petitioner has not set out in an affidavit the factual basis that he relies on in his quest to be granted the order for

scrutiny. That it is trite law that whoever alleges must prove and that the court (sic) cannot fish for any evidence from anywhere else including the Petition to support the application.

43. It is further contended by the First and Second Respondents that the Petitioner has not met the conditions in Section 82(2) of the Elections Act, 2011 and that he is on a fishing expedition with a view to altering the character of the Petition.

While agreeing that the Petitioner is on a fishing expedition, the Third Respondent submitted that there is no prayer in the subject Notice of Motion which cannot be answered by the directions given by this court pursuant to Rule 16 of the Election Petitions Rules or by the law as pronounced in the constitution and all electoral laws.

44. With regard to scrutiny, the Third Respondent contends that there is no allegation in the Petition that the votes declared at any particular polling station had a dispute and that although a polling station at a place called **"Paw Ndege"** is included in the application it is not mentioned in the actual Petition.

All the Respondents contend in sum that this application ought not to be granted because no basis for its grant has been laid by the Petitioner.

45. It is without doubt that in matters such as the present one, the primary duty of the election court is to give effect to the will of the electorate and therefore reasonable compliance with the procedures set out in statutes would be the standard to apply as was held in the English case of **Fitch -vs- Stephenson [2008] EOTC 501 Q.B**. So that, if the First and Second Respondents performed their duties carelessly and/or negligently especially in the preparation and validation of electoral forms, such carelessness and negligence has to be proved by necessary evidence to show how the omission affected the results and the integrity of the elections.

46. Such proof can only emanate from evidence adduced at the hearing of a Petition rather than at an interlocutory application similar to the present one. More often than not, Respondents in election petitions and even courts, have frowned upon such interlocutory applications for scrutiny and recount and considered them to be nothing but expeditions for **"fishing"** of evidence.

47. This question of scrutiny and recount has over the years been subjected to a variety of approaches by the courts as may be seen from several authorities on the subject cited herein by both the Respondents and Petitioner.

As if to give effect to Rule 29(2) of the **Elections (Parliamentary and County Elections) Petitions Rules, 2017** (i.e Rule 33(2) of the 2013 Rules), the courts have largely held that a basis has to be laid for an order of scrutiny and/or recount to issue to an applicant.

48. Indeed, in **Wavinya Ndeti –vs- I.E.B.C and Others Machakos Petition No. 4 of 2013**, the High Court held that:-

> **"An election is a human endevour and is not carried out by programmed machines. Perfection is an aspiration but allowance must be made for human error. Genuine mistakes and errors (especially those which would have a negligible effect on the final tally) need not form the basis for scrutiny".**

In **Harun Meitanei Lempaka –vs- Lemanken Aramat & Others [2013] eKLR**, the High Court held that an order for scrutiny can be made when it is prayed for in the Petition itself and when reason for it exists. It is not made as a matter of course. It is made when there is ground for believing that there are irregularities in the electoral process or if there was a mistake on the part of the Returning Officer or other election officials.

49. In **Nathan Nyange –vs- Anania Mwasambu Mwaboza [2006] eKLR**, the High Court held that where the margin in the votes is small a scrutiny may be ordered without laying a basis but where the

margin is big, the scrutiny could be done where a foundation is laid.

In **Raila Odinga –vs- Uhuru Kenyatta & Others SC Election Petition No. 5 of 2013**, the Supreme Court stated that the purpose of scrutiny was to understand the vital details of the electoral process and to gain impression on the integrity thereof.

50. The emerging **"locus-classicus"** on the issue of scrutiny and recount is the decision of the Supreme Court in the case of **Gatirau Peter Munya -vs- Dickson Mwenda Kithinji & Others [2014] eKLR**, in which useful guidelines were set out with regard to orders for scrutiny and/or recount. It was therein held that the right to scrutiny and recount of votes in an election petition is anchored in Section 82(1) of the **Elections Act** and Rule 33 of the **Elections (Parliamentary and County Elections) Petitions Rules, 2013**. Consequently, any party to an election petition is entitled to make a request for a recount and/or scrutiny of votes, at any stage after the filing of petition and before the determination of the Petition.

51. The court also held that the authority granted to the election court is discretionary in nature. In that regard, the court may order for scrutiny on its own motion or upon application by a party to the election petition. This necessarily entails that the court may decline to grant an order for scrutiny following an application seeking one. The court may also grant an order for partial scrutiny, even where a party has applied for scrutiny in a wider electoral area. In exercising this discretion, however, the court must act judiciously.

52. It was further held by the Supreme Court that an order for scrutiny must be rationalized on the basis of evidence or sufficient account in the pleadings and that the purpose of recount and scrutiny is to determine who actually won the election, the validity of votes and the integrity of the election. Therefore, it is only logical that recount and scrutiny follows **"disputed results"** or impugned electoral processes. If an election court was to order for scrutiny and recount in the absence of a specific dispute, then such order would amount to an abuse of discretion and act in vain.

53. Thus, as noted in **Halsbury Laws of England – 4th Edition**, an election court would order scrutiny or recount or retallying of votes if this would serve the purpose of establishing the sovereign will of the people and only after it is satisfied that the Petition contains adequate statement of material facts on which the Petitioner relies on in support of his case. Where there is ground for believing that there were irregularities in the election process or if there is a mistake or mistakes on the part of the election officials, an order of scrutiny may issue.

54. In this case, the irregularities alluded to by the Petitioner relate to the counting and/or tallying of votes. These are generally regarded as post election anomalies which do not actually affect the vote and indeed, the right to vote. Scrutiny involves striking out or adding votes in order to ascertain which candidate had the majority of the lawful votes. It is in essence, a numerically based initiative coming before or during the hearing of the Petition.

55. The Petitioner herein desires that the scrutiny and recount of the votes although prayed for in the Petition, be conducted before the hearing of the Petition.

In as much as scrutiny and recount form part of the prayers in the Petition and that the irregularities alleged therein and in this application relate to mistakes and/or errors and/or discrepancies in the electoral results Forms 32A, 35A and 35B, this court may safely state that a proper and satisfactory basis for scrutiny and recount of votes in specified polling stations has been laid by the Petitioner.

56. In that regard, prayer six (6) of the application would be granted, but to avoid anything akin to a fishing expedition at this juncture, and most importantly, to test by way of cross-examination the veracity of the allegations made by the Petitioner and seriously contested by the Respondents, it would be prudent that the order for scrutiny and recount be effected during the hearing of the Petition as the court may direct.

57. Reverting to the issue mentioned hereinabove of the defect in the Petitioner's supporting affidavit, the

copy filed herein is neither dated nor attested and/or commissioned. The other supporting affidavits by Mr. Olima and Dr. Akala are also not dated though attested. Having been filed in support of this application, the three affidavits and in particular that of the Petitioner provided a foundation for the application.

58. It would therefore, follow that the collapse of the Petitioner's affidavit which is the mother affidavit, would invariably translate to a collapse of the application in its entirety, **"ab-initio"**. However, all that would be dependant on whether the defect is incurable and hence, fatal.

It is trite that pleadings accord with evidence and nothing less. In interlocutory applications, the necessary evidence comes through affidavits either for or against an application.

59. Affidavits are therefore essential to the efficient conduct of most interlocutory applications. In an Article in the journal "**South Carolina Lawyer**" by Christopher M. Kelly and Laura G. Simons entitled **"Attacking Affidavits – Maintaining the Integrity of the Process"**, it is stated that affidavits are the means through which an applicant shows the existence of a material fact for trial. That, they are an effective method of presenting information crucial to the court's evaluation of the merits of the case.

60. That, the importance of maintaining and enforcing the standards established for sworn statements is as important as the integrity of the justice system itself. That, a party who submits evidence in the form of affidavits must do so, in the proper authenticated form. Even at a preliminary stage of trial, courts should not permit admission of documents that do not strictly comply with procedural rules. It is imperative that a party's sworn submission be sufficient in execution and substance as well as consistent with prior assertions, to ensure the integrity of the process.

61. From the foregoing, it is clear that the importance of sworn statements such as affidavits cannot be underestimated by a party who wishes the court to exercise discretion in his favour.

Essentially, an affidavit must contain a written oath embodying the facts as sworn by a deponent as well as the signature of the deponent and the attestation by a person authorized to administer the oath that the deponent was actually sworn before him.

62. With regard to election disputes, the election court is guided by **"inter-alia"**, the Constitution which provides at Article 159(2)(d) that the court shall administer justice without undue regard to technicalities, the **Elections Act, 2011** which provides at Section 80(1) (d) that an election court may in exercise of its jurisdiction decide all matters before it without undue regard to technicalities and the **Elections (Parliamentary and County Elections) Petition Rules, 2017** which together with the **Election Act** empowers the court to enforce the overriding objectives of the **Act**.

63. Rule 12 (1) of the **Elections (Parliamentary and County Elections) Petitions Rules, 2017**, provides that:-

> **"A Petition shall be supported by an affidavit which shall-**
>
> **a. Set out facts and grounds relied on in the Petition and**
>
> **b. Be sworn personally by the Petitioner or by at least one of the Petitioners, if there is more than one Petitioner."**

This provision is couched in mandatory terms and although Rule 12 generally applies to affidavits in a Petition it would be applicable **"Mutatis – Mutandis"** to interlocutory applications within a Petition.

64. Sub-Rule (12) of Rule 12, provides that:

> **"The Oaths and Statutory Declarations act and Order 19 of the Civil Procedure Rules, 2010, shall apply to affidavits under these Rules."**

Order 19 of the **Civil Procedure Rules**, proves for Affidavits and Rule 2(1) thereof provides that:-

> **"Upon an application, evidence may be given by affidavit, but the court may, at the instance of either party order the attendance for cross-examination of the deponent."**

Rule (7) of Order 19 **Civil Procedure Rules** provides for irregularity in form of affidavits and state that:-

> **"The court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof or on any technicality."**

65. The **Oaths and Statutory Declaration Act** (Cap 15 Laws of Kenya) provides in Section 4(1) that:

> **"A commissioner for Oaths may, by virtue of his commission, in any part of Kenya, administer any Oath or take any affidavit for the purpose of any court or matter in Kenya …….."**

And, Section 5 of the Act, provides that:-

> **"Every Commissioner for Oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and or what date the oath or affidavit is taken or made."**

66. It is clear from the foregoing that in as much as the Petitioner's own affidavit in support of this application is neither attested nor dated and those of Mr. Olima and Dr. Akala are undated, the mandatory provisions of Section 5 of the **Oaths and Statutory Declaration Act** were breached thereby rendering all the three affidavits fatally defective.

67. Every election petition must conform to any mandatory requirements set out in the Elections Act 2011, and the relevant procedural rules. However, election courts have discretion to excuse any non-compliance with procedural rules (see, **Dickson Mwenda Kithinji –vs- Gatirau Peter Munya & Others Petition appeal No. 36 of 2013 Nyeri (Court of Appeal)**.

The rationale for the discretion as stated in this case lay in the constitutional and statutory objective of administering electoral justice without undue regard to technicalities of procedures (see, **Article 159 (2) (d) Constitution and Section 80 (1) (d) Elections Act**).

68. But, the courts may dismiss or strike out and often does, election petitions which do not comply with prescribed mandatory requirements especially those related to contents of the Petition, affidavit in support of the Petition and Petitioner's witness affidavits.

The requirements set out in Rule 8 of the **Elections (Parliamentary and County Elections) Petitions Rules, 2017**, are not mere technical requirements limited to procedural form and content of election petitions. They are substantive requirements which go to the roots of the issues before the election court.

69. The breach of such requirements in a Petition or an interlocutory application in a Petition would not only be a serious matter but also fatal to the Petition or the application notwithstanding the provisions of Article 159 (2) (d) of the Constitution and Section 80 (1) (d) of the **Elections Act, 2011**.

Indeed, in the case of **Ismail Suleiman & Others –vs- Returning Officer, Isiolo County & Others [2013] eKLR**. An election petition was dismissed due to breach of Section 4 and Section 5 of the **Oath and Statutory Declarations Act**, in that two affidavits were not commissioned, hence, fatally defective such that they lost the privilege of being referred to as affidavits.

70. In the Indian case of **Arikala Narasa Reddy –vs- Venkataram Reddy Reddygari & Another Civil Appeals No. 5710-5711 of 2012**, the Supreme Court of India held that:-

"It is settled legal proposition that the statutory requirements relating to election law have to be strictly adhered to for the reason that an election dispute is a statutory proceeding unknown to the common law and thus, the doctrine of equity, etc does not apply in such dispute. All the technicalities prescribed/mandated in election law have been provided to safeguard the purity of the election process and courts have a duty to enforce the same, with all rigours and not to minimize their operation."

71. In another Indian case, **Dr. Shipra & Others –vs- Shanti lal Khorwal & Others [1996] 5 SCC 181**, the question raised for consideration by the Supreme Court was whether the copy of the election petition accompanied by the supporting affidavit served on the Respondent without the attestation part duly verified by Magistrate/Notary/ Commissioner for Oaths could be said to be **"true and correct copy"** of the Election Petition. Agreeing with a previous decision of the Constitutional Court of India, the Supreme Court opined that on account of a **"fatal"** defect the principle of substantial compliance cannot be accepted in the fact situation.

72. Therein, the defect was not merely the absence of the name of the Notary or his seal and stamp but a complete absence of **"notarial endorsement"** of the verification as well as absence of an affirmation or Oath by the election petitioner. The impression created by the omission was that there was no duly sworn and verified affidavit filed in support of the allegations of corrupt practice by the Petitioner.

73. In this case, the Petitioner's supporting affidavit is undated and unsworn/unattested while those of his two witnesses are undated. These are substantial omissions which cannot simply be ignored by the court. They render the three affidavits fatally defective with drastic effect on the application. Most unfortunately, the application must now meet its **"sudden death"** despite its initial pyrrhic victory.

In sum, the application must and is hereby dismissed for being fatally defective with no orders to costs. Ordered accordingly.

DELIVERED and **DATED** at **HOMA BAY** this **15TH DAY** of **NOVEMBER, 2017**.

J. R KARANJA

JUDGE

In the presence of:

……..……. for the Petitioner

…….. for the 1st and 2nd Respondents

……..…….. for the 3rd Respondent

…….……. court assistant

J. R. KARANJA

JUDGE