



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA
ELECTION PETITION NO. 2 OF 2017

HON. MARTHA WANGARI KARUA.....1ST PETITIONER

HON. JOSEPH GACHOKI GITARI.....2ND PETITIONER

-VERSUS-

THE INDEPENDENT ELECTORAL & BOUNDARIES

COMMISSION.....1ST RESPONDENT

MR. SEKI LEMPAKA.....2ND RESPONDENT

HON. ANN WAIGURU.....3RD RESPONDENT

HON. PETER NDAMBIRI.....4TH RESPONDENT

RULING

1. The 3rd Respondent **Hon. Ann Waiguru** and 4th Respondent **Hon. Peter Ndambiri** filed an application dated 17th October, 2017 under **Article 159 (2) (b)** of the **Constitution** and **rules 4** and **5** of the **Elections (Parliamentary and County) Petition Rules 2017** and all other enabling provisions of the Law seeking the following orders:

(1) That the application be certified as urgent and fit to be heard forthwith.

(2) That the petition dated 5th September, 2017 together with the supporting affidavits thereof filed on 5th, 6th and 7th September 2017 be struck out.

(3) That the Court be pleased to grant such orders it may deem just and expedient in the circumstances.

(4) That costs of this application be provided for.

The first prayer was spent as the applicants were directed to serve the application. The ruling relates to prayer 2 and 3 with prayer being the substantive prayer.

2. The application is based on the following grounds:

(a) That the petition does not comply with the mandatory provisions of Rule 8(1) of the Elections

(Parliamentary and County Elections) petition rules, 2017 thereby rendering it fatally defective.

(b) That the petition does not comply with the provision set by the Court of Appeal in the cases of Anarita Karimi Njeru v Republic (1976-1980) 1 KLR 1272 and Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others (2013) eKLR (CA No. 290 of 2012), requiring a party seeking redress from the High Court for an alleged violation of the Constitution, to set out with a reasonable degree of precision the compliant, the provisions said to have been infringed and the manner in which they have been infringed.

(c) That due to the strict Constitutional and regulatory timelines, the effects of grounds (a) and (b) hereinabove which are substantive and go to the root of the petition are incurable under Article 159 of the Constitution thereby rendering the petition bad in law and incompetent.

(d) That subject to grounds (a) and (b) hereinabove, the applicant's right to fair trial under Article 50 of the Constitution has been violated.

3. The 1st and 2nd Respondent the Independent Elections and Boundaries Commission and Seki Lempaka did not oppose the application.

4. The Petitioners Martha Wangari Karua and Joseph Gachoki Gitari opposed the application and filed grounds of opposition stating as follows:

(1) The petition is compliant with Rule 8 (1) of the Elections (Parliamentary and County Elections) Petition Rules, 2017.

(2) The 3rd and 4th respondent misapprehended the import of overriding objective of rule 8 (1) of the Elections (Parliamentary and County Elections) Petition rules, 2017 and Article 159 (2) of the Constitution.

(3) The application is ill-timed, spent and/or is overtaken by events.

(4) The import of the ruling of the court delivered on 23rd October, 2017 is that there is a duly filed petition on record with a prima facie case made out.

(5) The application seeks to frustrate and embarrass the court process and more particularly the execution of the court order issued on 23rd October, 2017.

(6) The application ought to be determined contemporaneously with the main petition.

(7) The petition is not a private litigation but public law and interest litigation seeking to determine the will of the people of Kirinyaga County under Articles 1 and 2 of the Constitution.

(8) The said application is on the face of it frivolous, vain, incompetent and vexatious; and

(9) The said application is an abuse of the court process and is not bona fide.

5. The application proceeded by way of oral submissions in Court.

6. 3rd and 4th Respondents Case:

It is submitted that the Petitioners have not complied with Rule 8(1) of the Elections (Parliamentary and County) Petition Rules 2017 (to be referred to as the 'Rules'.) He submits that the mandatory requirements under the rules have not been disclosed in the petition. He submits that the non-compliance is fatal to the petitioner's petition.

7. The Respondent submits that there are authorities and the case in point is that of **Jimmy Mukala Kazungu -V- Independent Electoral and Boundaries Commission and two Others Mombasa High Court Petition No. 9 of 2017** where the petition was struck out for non-compliance with **Rule 8 (1) of the Rules**. It is further submitted that the non-compliance cannot be cured by amendments as the window for amendment closed and the defects cannot be cured by amendments. It is further submitted that the petitioners did not file an affidavit on the facts to prove compliance. That the authorities and the submissions are evidence from the bar. The Respondents urge the Court to disregard them as they are facts which cannot be relied on.

8. It is submitted that the petitioner had admitted that they have not complied with **Rule 8 (1) (d)**. That **rule 8(1)** they have not referred to the petition but to the affidavits of the 2nd and 3rd respondents. They urge the Court to consider whether the rule is mandatory on the Petitioner or on the Respondent.

9. They submit that the word used is shall. Further that the petition is the pleading and is the one the Court should look at just like a plaint supported by affidavit.

10. The Respondent further submits that the Petitioner has advanced 3 grounds, that is to say:

- Constructive compliance
- Procedural technicality
- Timing.

To this he submits that grounds 1, 5, 6, 9 and 10 be struck out as they are factual and are not supported by an affidavit. With regard to **rule 8 (1) (c)** they have not complied. That the Court to look at the pleading and not the evidence. They urge the Court to strike it out.

11. The Respondents raise the issue of results and date of declaration are substantive. Results touch on disputes. That if the date of declaration is not given the Court will not be able to determine jurisdiction to hear the matter under **Article 87 (2)** of the **Constitution**. The date of declaration will determine whether the petition was filed within 28 days. They have not indicated the figures as required under the rules. This the Respondents submit is a substantive issue and not a technicality. It is not a typing error which can be amended. It would amount to amending the petition contrary to the provisions of **Section 76 (4)** of the **Elections Act** which provides that a petition cannot be amended unless it is done within 28 days with leave of the Court. That the Court lacks jurisdiction to cure the omission by can amendment.

12. They submit that this application was properly filed as the pre-trial conference has not been concluded. That the Court has jurisdiction to strike out at any stage. They rely on **Bashir Haji Abdullahi -V- Adan Mohamed Noor & 3 Others (2013) eKLR** where it was stated that:

“In my view a petition should prima facie show a determinable issue to be investigated by the election court and rule 10 (1) was intended to help a petitioner know what information should be included in the petition in order to constitute a noble cause of action.”

13. The Respondents in response to ground No. 3 by petitioner states that the Court did not state that she has a *prima facie* case. The Court allowed her to enjoy the rights *viz a vis* the Independent Electoral and Boundaries Commission (I.E.B.C.) On the issue of public Interest, it is submitted that it is about the Law. It is further submitted that the Court should not allow abuse of Court process. The application is premised on **Rule 5 (1)** on compliance. If compliance is not procedural it is not curable. It was submitted that Courts are governed by the **Elections Act** and **Rules** made thereunder and courts are in a straight jacket when it comes to adherence. They referred to the case of **Ferdinand Ndungu Waititu -V- Independent Electoral and Boundaries Commission I.E.B.C. & 8 Others (2013) eKLR** where it was stated:

“The second consideration I must take into account is the status of the proceedings. It needs no

restatement that these are election petition proceedings, which are conducted under special jurisdiction. In EP No. 15/2013 Clement Kungu Waibara & Another vs Francis Kigo Njenga & Others, this court pointed out the unique circumstances of a petition and the straight jacket into which the court is put by the relevant statute. The court cited with approval, Iyoti Basu & others v Debi Bhosal & others reported in AIR 1982 SC, 983, where the Supreme Court held as follows:

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

14. The Respondent urged the Court to find that the deficiency goes to the jurisdiction. **Article 87 (2)** of the **Constitution** gives Court jurisdiction. It is submitted that there would be prejudice on the 3rd Respondents as it would amount to amending the petition.

15. It is further submitted that public interest is a diverse concept. The process of election dispute is in the **Constitution, Article 87 (1)**. It requires Parliament to enact legislation. That has been done and is the subject of the petition. The regulations define a Petition. It is a special pleading which requires certain components in whose absence there is no petition. By the Petitioners admission, there is no petition as anticipated in the regulation. The public interest is that there be compliance to safe resources with respect to time and other resources in terms of compliance with the law and the **Constitution**. That the public interest is that the Court should not hear a petition which has not complied with the law.

Petitioners' Case:

The petitioner submits that the application violates **rule 15 (2)** since it was brought after the pre-trial conference. That the application seeks to strike out the petition and the 3rd and 4th respondent cannot state that they have discovered that the petition is defective. The petition has been fixed for hearing and witnesses have been prepared. That a ruling has been given allowing scrutiny on the KIEMS KITS and statutory forms and to invite it to strike out on account of defects is asking the Court to back track and review the order.

16. It is submitted that the petition has complied with the rules and that Anne Waiguru was elected as stated in the affidavit of the petitioner. That the rules do not obligate the petitioner to tabulate the figures of all the candidates. That the 3rd respondent's affidavit has indicated the results and date of declaration.

17. It is further submitted that the overriding objectives of the rules as provided under **Rule 4 (1)** is to facilitate the just, expeditious and proportionate determination of disputes. This should be read with **Article 159 of the Constitution** which mandates Court to do substantive justice other than giving undue regard to procedural technicalities. They urged the Court to consider whether the petition has given notice or communicated the prayers. They seek reliance on the case of **Raila Odinga and another -V- Independent Electoral and Boundaries Commission (IEBC) Election Petition No. 1 of 2017** where the Supreme Court held that an election is not a mathematical exercise but a process. They are questioning whether 3rd Respondent was elected and rules followed. The sovereign will cannot be stifled by a mistake of rules when filing. The Petitioner states that when she says an election was held on 8th August, 2017 and Anne Waiguru was declared as winner means the result and the declaration.

18. It is further submitted that **rule 8 (1) (d)** was not complied with but that this did not occasion any prejudice as the 3rd respondent has annexed the certificate. The Court to take judicial notice of the date of declaration the 3rd respondent has supplied and which was gazette. That the Court should advance the

rule of law and disregard technicalities on cases that attract public interest. They urge the Court to dismiss the application.

19. I have considered the application, the submissions and the case law cited by the parties. The issues which arise for determination are:

1. The timing of the application.
2. Whether the Petition has complied with the rules and what were the consequences of non-compliance.
3. Failure to quote provisions on the alleged violation of the Constitution.

20. **TIMING OF THE APPLICATION**

Rule 15 (1) (c) of the **Elections (Parliamentary and County Elections) Petitions rules, 2017** provides:

“Within seven days after the receipt of the last response to a petition the Election Court shall schedule a pre-trial conference with the parties which the election court shall – determine interlocutory applications.”

21. The present application was filed under a certificate of urgency to arrest a ruling on another application which was to be delivered on 23rd October, 2017. However, the Court directed the applicants to serve. The pre-trial was conducted on 12th October, 2017. It was not concluded as the parties did not agree on which issues were contested and the ones not contested. The Court was to give a summary of the issues at the beginning of the hearing.

22. The application is based on points of law. Points of law can be raised at any stage. The rule is very clear that the only stage an interlocutory application may not be brought is after the conclusion of the pre-trial conference and after the hearing of the petition. **Rule 15(2)** provides:

“An election Court shall not allow any interlocutory application to be made on conclusion of the pre-trial conference if the interlocutory application could have by its nature, been brought before the commencement of the hearing of the petition.”

The pre-trial will conclude once the contested and the non-contested issues are determined. The hearing will then commence. The timing of the application in my view is proper because generally the interlocutory applications relating to an election petition must be filed and determined before the commencement of the trial. The trial has not commenced. In the case of **Mable Muruli -V- Wycliff Ambesa Oparanya & 3 Others Election Petition No. 5 of 2013 High Court Kakamega**. It was stated that, the only exception to this rule, the rationale of which lies in the Constitutional objective of timely resolution of electoral disputes, is where the nature of the interlocutory application could not have been brought before the commencement of the trial of the election petition. The emphasis is on the interlocutory application not being filed to disrupt the trial if the party could have done so earlier. The ruling of this Court giving the petitioner some orders under an interlocutory application do not amount to the beginning of the trial. If they are not founded on a valid pleading they cannot be allowed to stand. They are preliminaries to commencement of the trial. The pre-trial is not concluded. The timing of the application is within the ambit of **Rule 15 (1) and 2** of the rule and it is properly before this Court.

23. Indeed the Petitioners agreed that the Petition has been fixed for hearing and witnesses have been prepared. They have not testified. These applications where they are filed must be determined before the trial. They cannot be reserved for determination contemporaneously with the main petition. The rule is clear that the time for determination is at the pre-trial and that is where we are in this petition. The application in my view is not ill timed nor has it been overtaken by events. Grounds 3 and 6 by the petitioners must fail.

24. The 2nd issue is whether there is non-compliance with **Rule 8 (1) (c)** and **8 (1) (D)** of the **Rules** and what are the consequences. In considering this issue, the following matters arise:

- The petitioner did not swear an affidavit in reply to the application.
- The rule is mandatory.
- Is the non-compliance a substantive issue or a procedural technicality which can be cured under **Article 159 (2) (d)** of the **Constitution** and **Rule 5** of the rules.
- Prejudice.
- Public Interest
- Overriding Objectives of **rule 4 (1)** of the rules.

25. The Petitioners filed grounds of opposition. The Petitioners did not file a replying affidavit. The petition is the substantive pleading. Facts must be deposed in an affidavit. Failure to file the affidavit leave the party with the only option of relying on points of law alone and not matters based on facts. Grounds 1, 5, 6 and 9 are factual grounds and ought to have been raised in an affidavit. The petitioner chose to submit in support of the grounds. This must be viewed as submitted by the Respondents' evidence from the bar which cannot be relied on. It was fatal for the Petitioners to fail to file a replying affidavit to prove compliance with **rule 8 (1) (c)** and seek to submit on facts. There is no denial that the matters pleaded in the grounds pointed out are factual matters. Without affidavit it must be assumed that a party will only raise points of law. However, the Petitioners have submitted on facts to show compliance and other matters raised in the above grounds. The only points of law are raised in the 1st and 2nd ground and even then on ground -1- no averments were made in an affidavit to prove how the petition is compliant. The grounds must be struck out for failure to aver the facts in an affidavit.

26. The Petitioner was candid and submitted that there was non-compliance with **Rule 8 (1) (d)** of the **rules**. This rule provides:

“An election petition shall state –the date of the declaration of the results of the Petition.”

This being the case, there is no dispute that there was indeed no compliance with this rule. The 3rd and 4th Respondents have submitted that the Petitioner has not complied with **Rule 8 (1) (d)** of the **rules**. The rule is mandatory.

27. The Petitioner alleged compliance but as I have stated above, no affidavit was sworn to prove the allegation that there was compliance. **Rule 8 (1) (c)** of the rules provides:

“An Election Petition shall state –

The results of the election, if any and however, declared.”

28. The Petition under sub-heading **Introduction and effects of Supreme Court decision in Election Petition No. 1 of 2017** states ‘that the election was held on 8th August, 2017 where Hon. Ann Mumbi Waiguru was returned as duly elected.’ She has further alleged that the votes were inflated by 48,000. This the Petitioner submits amounts to compliance with **Rule 8 (1) (c)** of the **Rules** as the outline definition of results is given as follows:

‘a thing that is caused or produced by something else, a consequence or outcome, upshot, result etc’

The supporting affidavit of the petitioner has not stated the results and how they were declared.

29. The legal framework of the disputes is Article 87 of the Constitution and the Elections Act. At Article 87 (1) it is provided:

“Parliament shall enact legislation to establish mechanism for timely settling of Electoral disputes.”

Parliament obliged and enacted the Elections Act No. 24 of 2011 which made provisions for elections disputes resolution. The Petition herein is brought under the Act. The Petition is defined as –

“Means an application to the election court under the Constitution or under this Act.”

It is a special pleading which requires certain components. In their absence there is no petition. The regulations relating to Elections Petitions are to be found in the Election (Parliamentary and County Elections) Petition Rules which I have referred to herein as the Rules. The regulations relating to a Petition are provided under rule 8 (1) which provides as follows ‘Contents and Form of a Petition “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 results of the election.

(e) The grounds on which the petition is presented.

(f) The name and address of the advocate if any, for the Petitioner which shall be the address for service.”

30. There is admission of non-compliance with Rule 8 (1) (d). As for rule 8 (1) (c) the Petition does not indicate the results. Similarly the Petitioner’s affidavit has not indicated the tabulated results. The Petitioner does not state there were no results as envisaged in the rules as it states “if any”. She insists there were results and that she has complied. Such results must be stated in the Petition as well as in the affidavit. Where the rule states that “the results of the election if any,

” it calls on the Petitioner to state those results with precision in the petition and in the affidavit. Rule 8 (1) (c) is couched in mandatory terms. Furthermore Rule 12 (2) of the rules requires that affidavit in support of the petition shall state the very items that are stated in a petition. This the petitioner as the petition and the supporting affidavit has not stated the results.

31. The Petitioner has submitted that the affidavit of the Respondent have the tabulated results with their annexture No. 2. However this annexture does not form part of this application for the reason that the affidavit was not annexed to the grounds of opposition nor were averments there in a replying affidavit. The submission shows that there were tabulated results which the Petitioner ought to have stated in the Petition and in her affidavit. The Rule 8 (1) (c) requires that the results if any and however declared be pleaded in the Petition and in the Petitioner’s affidavit and not anywhere else. In the submission by **Mr. Chalanga** for the Petitioner stated that the Respondent has provided the material and is what is required under rule 8(1). The respondents have no responsibility to comply with this rule 8 (1) (c) of the rules. The submission confirms that the Petitioner was required to provide the tabulated results. Mr. Chalanga further admitted that there are authorities which state the burden is on the Petitioner and that the burden shifts as the trial proceeds. The burden is on the Petitioner to show the results if any and the burden has not shifted.

32. The Petitioner urged the Court to consider the overriding objectives of rule 4 (1) of the rules and Article 159 as well as Article 259 of the Constitution and aim to do substantive.

33. The Petitioner urged the Court to distinguish the case of **Jimmy Mukala Kazungu -V- Independent Electoral and Boundaries Commission (IEBC), Nuru Faraj & Bady Bady Twalib Mombasa High Court Election Petition No. 9 of 2017, M. Thande, Judge** where the Court struck out the Petition for non-compliance with **rule 8 (1)** of the rules. The Petitioner urged the Court to disregard the authority as the Judge relied on the case of **John Mututho -V- Jane Kihara & 2 Others (2008) eKLR** as it is a pre-2010 Constitution, the oxygen rules and the overriding objectives. I have considered the case of **Jimmy Mukala Kazungu -V- I.E.B.C. & 2 Other (Supra)** which is a persuasive decision. The Judge found that the Petition had not complied with the mandatory provisions of **rule 8 (1)** of the **Rules**. It should be noted that in the case, the petitioner had given the results in her supporting affidavit unlike in this case. The Judge found that matters in the petition must also be pleaded in the affidavit. It worth of note that in the present petition the omission in the petition are also omitted in the affidavit of the Petitioner. **Rule 8 (1)** is couched in mandatory terms as it states shall and yet the results are not pleaded anywhere. I am persuaded by the findings of Thande J., as she has appreciated the correct position of the rules.

34. The Petitioner urged the Court to rely on the case **Nicholas Kiptoo Arap Korir Salat -V- IEBC & 6 Others (2013) eKLR** where the Court held that there was substantial compliance with the rules stated. The authority is distinguishable from what is before this Court. What was before the Court of Appeal was the issue of time frame for service under **rule 77 Court of Appeal rules** which provides:

“An intended appellant shall, before or within seven days after lodging notice of appeal, serve copies thereof on all person directly affected by the appeal.”

A reading of the judgment will show that the Court was addressing matters of procedure which do not go to the jurisdiction. It stated:

“Deviations from and lapses in form and procedures which do not go to the jurisdiction of the Court or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not to be elevated to the level of a criminal offence attracting such heavy punishment of the offending party who may in many cases be innocent since the rules of procedure are complete and technical.”

While I entirely agree with the holding in the case which in any case binds this Court, nevertheless what is before me is not a procedural lapse but a substantive issue which goes to the root of the dispute. Considering the definition of the Petition given in the **Elections Act** non-compliance with **rule 8 (1)** which provides for the contents of a petition, means there is no dispute which an election Court has jurisdiction to preside over. In the case of **Evans Nyambaso Ledekiah & Another -V- IEBC & 2 Others (2013) eKLR** Sitati J. stated:

“My view of the matter is that since Rule 10 of the Rules (Supra) clearly sets out the contents and form of an election petition a petitioner has to comply with the same so as to give a chance to the respondent(s) to know what case they are faced with and how they may prepare their defence. The authorities cited above all point to the fact that where material particulars were not included in the petition then such a petition is fatally incompetent and must be struck out.....”

35. The Petitioner also urged this Court to be persuaded by the holding of Justice Kimondo in the case of **William K. Onyango -V- IEBC and 2 Others (2013) eKLR** while dealing with **rule 10 (1) (c)** which is similar to **Rule 8 (1) (c)** and he considered the divergent view by various High Court judges as to whether the rules are technicalities which can be cured under **Article 159**. The Court held:

“In my considered opinion, the Petition Rules 2013 were meant to be handmaidens, not mistresses of justice. Fundamentally, they remain subservient to the Elections Act 2011 and the Constitution. Section 80 (1) (d) of the elections Act 2011 enjoins the Court to determine all matters without undue regard to technicalities. Rules 4 and 5 of the Petition Rules 2013 have in turn imported the philosophy of the overriding objective of the court to do substantial justice. Certainly, article 159 of the Constitution would frown upon a narrow and strict interpretation of

the rule that may occasion serious injustice. This is not to say that procedural rules will not apply in all cases: only that the Court must guard against them trumping substantive justice. The analysis at Paragraph 24 shows that the results were available though they were not specified. There was substantial compliance with the requirement of the rule.

36. He was not dealing with a blanket non-compliance with rules as is the case here. In my view, where the rules are purely on procedure and not content, the Court should have regard to **Article 159** and **Rule 5** and regard them as technicalities which should not be approached with a strict requirement of compliance. Where on the other hand they are on content and goes to the root of the dispute which is intended to assist the Court to determine the dispute between the parties fairly they cannot be wished away as technicalities where there is some degree of compliance the Court will aim to do substantial justice. It is a matter for the Court to exercise discretion depending on the circumstances of each case.

Justice Kimondo stated: **Section 80 (1) (d)** of the **Elections Act 2011** enjoins the Court to determine all matters without undue regard to technicalities. A Court has to determine what will pass as a technicality due to non-compliance and what is substantial compliance. If it is a technicality recourse should be had to **Article 159** and exercise of discretion under **rule 5**. If non-compliance is on content and goes to the root of the dispute **Article 159** and **Rule 5 (1)** will not apply. There is nothing for determination. This to me would seem to be the best approach.

37. The Petitioner also relied on **Malindi High Court Petition No. 4 of 2017 in Samuel Kazungu Kambi & Another -V- IEBC and Others, Justice Korir**: where the Judge held that there was substantial compliance and declined to strike out the Petition. What was before Justice Korir was failure to disclose the particulars of the election being challenged and hence breaching specific provisions of the **Election Petitions Rules 2017** and failing to include the deputy governor Gideon Edmund Samburi as a respondent. The Judge stated, and rightly so that there are two schools of thought amongst the High Court with one holding that failure to strictly comply with **rules 8 (1)** and **12 (1)** renders an election petition incompetent while the other is that failure to comply can be ameliorated in the right of **Article 159 (2) (d)** as held in **William Kanyi Onyango -V- IEBC and 2 Others, supra**. Justice Korir stated that both schools of thought are correct to some extent and found that unless the petition is so hopelessly defective and cannot communicate at all the complaints and prayers of the petitioner, the Court should ensure that the petition is heard and determined on merits. He further stated.....

“Failure to disclose the results would indeed render an election petition untriable as the respondents would not be able to discern the petitioner’s case so as to respond appropriately.....” They are called upon to do a balancing act so as to achieve strict compliance. The Judge at paragraph 53 the stated 1st petitioner had substantially complied with rule 8 (1) (c) by stating who was declared the winner of the elections held on 8th August, 2017. Declaration was on 11th August, 2017 with certain number of votes and gazette vide Kenya Gazette CX14 dated 18th August, 2017 and sworn in on 21st August, 2017 at Karisa Maitha Grounds vide Kenya Gazette CX15 No. 117 dated 16th August, 2017. Gazette Notice No 7759.”

The judge found such information was sufficient. Though the Petitioner is relying on this ruling her petition and supporting affidavit are devoid of such details or anything close to compliance.

38. My view is that failure to comply with **Rule 8 (1) (c)** and **(d)** touch on the dispute and goes to the jurisdiction of the Court. **Article 87 (2)** of the **Constitution** provides:

“Petitions concerning an election, other than a presidential election, shall be filed within 28 days after the declaration of the election results by Independent Electoral and Boundaries Commission.”

The date of declaration is crucial in determining the dispute. I am of the view that a petition which has not complied with **Rule 8 (1) (c)** and **rule 8 (1) (d)** even remotely is not compliant. The definition given of results talks of outcome, effect, consequence. It is not sufficient to talk of results without giving

numbers. It is an outcome based on numbers which made her to come to court and the date when the results were declared. The omissions are fatal. I lean on the supreme Court decision in **Moses Mwigigi & 14 Others -V- IEBC** where it was held:

“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.

Yet procedure, in general terms, is not an end in itself. In certain cases, insistence on a strict observance of a rule of procedure, could undermine the cause of justice. Hence the pertinence of Article 159 (2) (d) of the Constitution, which proclaims that.....This provision, however, is not a panacea for all situations befitting judicial intervention; and inevitably, a significant scope for discretion devolves to the courts.”

Rule 8 (1) (c) and **8 (1) (d)** though rules of procedure are intertwined in the substance of the case as provided under the **Constitution** and the **Elections Act**. The requirement under the rules bears the ingredients, components and contents for the just determination of the petition and where overlooked by a litigant the consequence is to declare the petition incompetent.

39. In **John Michael Njenga Mututho -V- Jane Njeri Wanjiku Kihara & 2 Others (2008) eKLR** it was stated:

“It is clear from rule (1) (b), above that the issue in any election petition is the result of the election. It should be noted that other than a statement on capacity to bring the petition and the date of the elections, the only other important factor to be included in an election petition is the result. The marginal note of that rule makes the position abundantly clear. It talks about the contents and Form of an election petition.....

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.....

Election petitions are special proceedings. They have a detailed procedure and by law they must be determined expeditiously. The legality of a person’s election as a people’s representative is in issue. Each minute counts. Particulars furnished count if the petition itself is competent, not otherwise. Particulars are furnished to clarify issues not to regularize an otherwise defective pleading. Consequently if a petition does not contain all the essentials of a petition, furnishing of particulars will not validate it.”

40. In the case of **Jimmy Mukala (supra)** the Judge declined to overlook the omission and found the petition was not compliant. Similarly in the case of **Mukala Issa Kombo -V- IEBC, Wafula Chebukati Ganze Sub-County Returning Officer and Teddy Mwamburire Election Petition Case No. 10 of 2017, Justice P. J. Otieno**. The Court in dealing with **Article 87 (2)** – failure to state the date of declaration of Results and contravention of **rule 8 (1) (c)** and **(d)** and **12 (2) (c)** and **(d)** where the Court in striking out the petition for non-compliance found that,

“the provision of Rule 8(1) (d) & (c) and 12 (2) (c) and (d) are mandatory though in the petition he had given a brief overview and grounds, the full results were not disclosed anywhere as well as the date of declaration of results. That the petitioner should have given a tabulation of results and date of declaration to trigger computation of time so that the court establishes when time to file a petition would start to run and end.”

Having looked at these authorities I hold that the petition has not complied with the provisions of **Article 87 (2)** of the **Constitution** and **Rule 8 (1) (c)** and **8 (1) (d)** of the **Rules**.

41. The issue is what is the consequence of non-compliance. The petitioner has urged the Court to consider the omissions as procedural technicalities which can be cured under **Article 159 (2) (d)** of the **Constitution** and **Rule 5(1)** of the Rules. **Article 159 (2) (d)** provides:

“Justice shall be administered without undue regard to procedural technicalities.”

Rule 5 (1) provides:

“the effect of any failure to comply with these rules shall be at Court’s discretion in accordance with the provisions of Article 159 (2) (d)”.

42. The Court is called upon to do substantial justice. I am of the view that the provisions do not aid the Petitioner. The requirement under **Rule 8 (1) (d)** and **(c)** are rules which the supreme court has stated in the case of **Moses Mwicigi (supra)** that they are procedural but intertwined with substantive issue. The date of declaration of results is a substantive issue as it is the starting point of the dispute and the end in view of the strict time lines for filing of the petition and the determination of the dispute. It determines whether the Dispute is filed within 28th days as stipulated in the **Constitution**. The results on the other hand is what sparked of the dispute as the 3rd respondent was returned as being duly elected and the petitioner lost. The non-compliance is substantive and cannot be cured under **Article 159 (2) (d)** of the Constitution and **rule 5 (1)** of the **Rules**. **Rule 4 (1)** of the rules does not assist the petitioner for the reason that it states the objective of the rules is to facilitate the just expeditious, proportionate and affordable resolution of disputes. This would be achieved by the Court not using its most needed time and resources in dealing with disputes which have failed to comply with the express provisions of the rules.

43. In **Amina Hassan Ahmed -V- Returning Officer Mandera County & 2 Others (2013) eKLR** in dealing with an application to strike out a petition by Women representative for failure to state the results and election date, manner of declaration and date of declaration Onyancha J. held:

“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, and expeditious and just conduct of elect petitions. Every provision in them therefore, is intended to achieve a required result and any deficient compliance is likely to lead to delay and injustice and would likely be frowned upon by the court.”

44. I am persuaded to agree entirely with this holding in view of the omissions in the petition. The petitioner will seek to bring in what is omitted in the course of the trial. This would be prejudicial as it would amount to allowing amendments outside the time allowed because it would be difficult to make the declarations the petitioner is seeking in the petition as presented for example prayer (d) and (e) as particulars required in **Rule 8 (1) (c)** and **(d)** of the rules are not in the petition. It would prejudice the respondent and affect her right to fair trial. These particulars are also not in her supporting affidavit. The 1st and 2nd respondent have not given these particulars. It is the petitioner who was supposed to plead the particulars. She cannot shift the burden on the respondents. As stated in **Amina Hassan Ahmed (supra)** rules are supposed to ensure that the petition would give full and complete particulars in order to communicate the dispute to the respondent (s) with a view to achieve the overriding objectives of the rules. The respondents should not be made to wonder in a tiring aimless journey with no idea as to what the petition is all about. This prejudices the respondents.

45. In **Raila Odinga & 5 Others -V- IEBC & 3 Others** in the Supreme Court Petition No. 5 of 2013 the Court stated:

“Our attention has repeatedly been drawn to the provisions of Article 159 (2) (d) of the Constitution which obliges a Court of law to administer justice without undue regard to procedural technicalities. The article simply means that a court of law should not pay attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from courts of law.”

In my view the petition is hopeless. The petition in **Mukala Case (supra) and Issa Kombo -V- IEBC (supra)**, the petitioners had stated the date of declaration and the results in the affidavit. I have not seen a provision or an authority which can salvage the petition. She could seek to lean on the supporting affidavit with success but it lacks nothing that can come to its aid. I must then consider the consequences of non-compliance. In **Bashir Abdulahi -V- Adan Mohammed Nooru & 3 Others 2013 EKLR High Court** it was stated that:

“In my view a petition should, prima facie show a determinable issue to be investigated by the election court and rule 10 was intended to help the petitioner know what information should be included in the petition in order to constitute a probable cause of action. If therefore an election petition is devoid of the material required to make it one as dictated by the provisions of rule 10 (1) aforesaid, the Court in my view would at any stage of the proceedings, have jurisdiction to strike the petition out whether at instance of the respondent or ‘suo moto’. That is so because a petition which is not a petition for lack of substance and form is not a petition envisaged in the Elections Act. It therefore has no basis for going to trial in its fatally defective form since such a trial would be an exercise in futility.”

This is a post 2010 judgment. I need not say more.

46. The overriding objectives the rules, **rule 4 (1)** is to facilitate the just, expeditious and proportionate determination of disputes. In **Nicholas Kiptoo Arap Korir Salat -V- IEBC & 6 Others supra** it was stated:

“I am not in the least persuaded that Article 159 and Oxygen principles which both commands courts to seek substantial justice in an efficient and proportionate and cost effective manner to eschews defeatist technicalities were ever meant to aid in overthrow of rules of procedure and create anarchical tree for all in administration of justice. This Court, indeed all Courts must never provide must never provide succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines are to serve the process of judicial adjudication and determine fair, even headed, fair, just certain and even handed courts cannot aid in bending or circumventing of rules and a shifting of goal posts for while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules.”

It was upon the petitioner to comply with the rules. The rules can only aid a party who has complied in order to achieve the clear objectives of the Oxygen Rules particularly in electoral disputes which must be determined within strict timelines.

47. On the issue of public interest, matters of electoral disputes attract public interest. It is the public interest that there be compliance with the Constitution and the legislation and rules made there under to save on resources in respect of time and resources. The people of Kirinyaga want to know if their County governor was validly elected or is legally in office. It would not serve that interest to proceed with the petition which is not compliant. The Court has discretion under **rule 5** of the rules and the discretion of the Court will not be exercised in favour of a litigant who has chosen to disregard rules. The omission is not as simple as correcting a typing error but goes to the root of the dispute. The exercise of discretion is not meant to give life to an otherwise dead pleading but to aid a party where there may be a procedural lapse which can be cured under **Article 159** of the **Constitution**.

48. **Amina Hassan Ahamed Case (supra) (2013 eKLR:**

“Failure to give particulars of results are not mere technicalities but a defect fatal to the petition.”

It is not in vain that the rules committee has devoted two distinct but elaborate rules on what ought and must be stated in a petition and the affidavit. I am of the view the overriding objective is for electoral dispute to be settled in a timely manner. As such parties to a petition must avail all what is needed to achieve those objectives.

49. **In conclusion:**

The requirement under **rule 8 (1)** of the **Rules** are not mere technical requirements, they are substantive as they go to the root of the issue before an election court. A petition which has failed to state the date of declaration, the results of the election and how declared is fatally defective and beyond salvage. The consequence is that it must be struck out.

50. I order that the petition herein be struck out with costs to the respondents.

51. On costs **Section 84** of the **Elections Act** and **rule 30** of the **rules** obliges the Court to award and cap costs. I cap the costs at Ksh.10,000,000/=. The Deputy Registrar of the Court will at appropriate time tax the costs.

Dated and delivered at Kerugoya this 15th day of November, 2017.

L. W. GITARI

JUDGE

Ruling read out in open Court; Petitioner present, M/S Hon. Martha Karua present and holding brief for Mr. Imanyara and Mr. Chelanga. Mr. Kathungu for 1st and 2nd Respondent, Mr. Kamotho for 3rd and 4th Respondent, court assistant Naomi Murage this 15th day of November, 2017.

L. W. GITARI

JUDGE

15.11.2017