



REPUBLIC OF KENYA

High Court at Machakos

Election Petition 7 of 2013

CAROLINE MWELU

**MWANDIKUPETITIONER
AND**

PATRICK MWEU MUSIMBA1ST RESPONDENT

GEDI ARALE NOOR 2ND RESPONDENT

**THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....3RD
RESPONDENT**

RULING

Introduction

1. On 4th March 2013, the general elections were held in the Country. Patrick Mweu Musimba was returned as the elected member of the National Assembly for Kibwezi West Constituency. The petitioner, who was a candidate in the elections, has brought this petition to challenge the validity of the said election.

The Application

2. The subject matter of this ruling is a Notice of Motion dated 24th April 2013 in which the 1st respondent (“the applicant”) moved the Court for the following orders:

1. *That the Petition filed herein by the Petitioner on 10/04/13 and is dated 10/04/13 be struck out or dismissed on the grounds:-*

i. *The petition was filed out of time and in contravention of Article 87(2), the Constitution of Kenya, 2010*

ii. *The petition as filed does not state the results of the election as declared on 05/03/13 and the date of the declaration of the results in contravention of Rule 10(1)(c) and (d) of the Elections(Parliamentary and County Elections) Petition Rules, 2013*

iii. *The petition filed herein lacks a cause of action, is frivolous and vexatious.*

2. *That costs of the petition and of this application be granted to the 1st Respondent/Applicant.*

2. The application is premised on the grounds that the petitioner filed the petition on 10th April

2013 which according to the applicant is well beyond the time stipulated in **Article 87** of the Constitution being 28 days after the declaration of the election results by the Independent Electoral and Boundaries Commission (“the Commission”). Patrick Mweu Musimba, the applicant, in his deposition in support of the application, states that the declaration of results took place when the Returning Officer announced the election results at the constituency tallying centre at Emali on the 5th March 2013 and therefore the 28 day time period began to run on the 5th March 2013 until the 2nd April 2013 during which period the petitioner ought to have filed the petition.

3. Mr Mari, learned counsel for the applicant, submitted that declaration of results is done by the returning officer and the IEBC’s only duty was to ‘publish’ the election results. He argued that the Kenya Gazette is not a declaration of results envisaged under the law as to trigger an election petition.

4. The applicant also impugned the petition on the ground that the petition does not state the results of the election as required by **rule 10(1)(c) and (d)** of the ***Elections(Parliamentary and County Elections) Petition Rules, 2013 (“the Rules”)***. The applicant’s assertion is that compliance with this rule is mandatory. The applicant states that paragraph 1 of the petition merely discloses the results attributed to him or to applicant but does not disclose the results of the other candidates, the number of votes cast, declared as spoilt, rejected or marked as disputed. Mr Mari relied on the Court of Appeal case in ***Mututho v Kihara and Others (1993 – 2009) 1 EAGR 270*** for the proposition that failure to state the results in the petition rendered the petition fatally defective.

5. The final ground of attack of the petition is that the petition did not disclose a cause of action. The applicant argued that the petitioners failed to disclose any material infringement on the petitioner’s legal rights, any legal injury suffered that would warrant granting of any of the reliefs prayed for from this election court.

6. The applicant submitted that based on the three grounds the court was entitled to strike out the petition. The applicant relied on ***Chelaite v Njuki (No.3) (2008) 2KLR (EP) 209*** where the court held that it had inherent jurisdiction to strike out a petition.

7. The 2nd and 3rd respondents, represented by Dr Abuya, supported the applicant’s position and asked the court to strike out the petition.

Petitioner’s Case

8. The petitioner opposed the Notice of Motion on the basis of oral submissions by his counsel, Mr Musyoki. In addition, Mr Musyoki deposed to a replying affidavit on 14th May 2013. The petitioner’s case is that the application lacks merit as it is based on misapprehension of the law and is an abuse of the court process and that the petitioner complied with the provisions of **rule 10(3) (c)** of ***the Rules***..

9. Mr Musyoki submitted that the petition raised serious issues for determination and that it sets out the facts which are necessary for the court to adjudicate the matters. He submitted that the supporting affidavits also provided the facts which comply with ***the Rules*** and that the results, in any case, were annexed to the petition. The petitioner contended that the respondents were not prejudiced in any event and as such the matter ought to proceed for hearing.

Determination

10. The first limb of the application deals with what constitutes ‘*declaration*’ under **Article 87** of the Constitution which determines the time for filing the petition. During the hearing of the application, I requested the parties to address me on the meaning of ‘*declaration*’ in view of the recent holding by Hon. Justice Mumbi Ngugi in ***Ferdinand Waititu v IEBC and Others Nairobi, Petition No. 1 of 2013(Unreported)*** where a similar issue was dealt with. I also drew the parties’ attention to the decision by Hon. Justice Mabeya in ***Josiah Taraiya Kipelian Ole Kores v Dr David Ole Nkediye and Others Nairobi Petition No. 6 of 2013 (Unreported)*** where the learned Judge followed the decision in

Waititu's Case.

11. Having considered the application and response and in light of the direction I issued at the hearing, I have framed two issues for purposes of disposing the application as follows:

- (a) What is meant by 'declaration' of the election results and when does time for filing the petition begin to run?
- (b) What is the effect of failure of failure by the petition to state the election results?_

Meaning of 'declaration' of results

12. An analysis of the meaning of 'declaration' must start from the Constitution which sets the time within which the petition should be filed. **Article 87** stipulates as follows;

87. (1) Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes.

*(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.* [Emphasis mine]

13. These provisions are replicated under **section 77(1)** of the **Elections Act, No. 24 of 2011 ("the Act")** which states as follows; "*A petition concerning an election, other than a presidential election, shall be filed within twenty-eight days after the **declaration** of the election results by the Commission.*"[Emphasis mine]

14. The time for filing the petition is pegged on the declaration by the Independent Electoral and Boundaries Commission ("the Commission"). Is it the time when the returning officer announces the results of elections at the tallying centre? Mr Mari vigorously defended the stance that the declaration of the election result is done by the returning officer, who is an agent of the Commission appointed to oversee the election at the constituency level. Accordingly, the role of the Commission is merely to publish the results. The applicant submitted that the Commission, through the returning officer on the ground determined and declared the relevant election results on the 5th March 2013 and that it is the Commission that published the same on 13th March 2013. The applicant cited **regulation 3(3)** of the **Election (General) Regulations("the General Regulations")** which states as follows;

Returning officers and other staff.

3. (1) The Commission shall appoint a returning officer for each constituency and may appoint such number of deputy returning officers for each constituency as it may consider necessary.

(2)

(3) The returning officer shall be responsible for –
(a) conducting elections at the constituency level

(b) receiving nomination papers in respect of candidates nominated for the post of National Assembly and Ward representative;

(c) the tallying of results from each polling station in the constituency;

*(d) **announcing results** from the constituency for purposes of the election of the President, Senator, Governor, woman representative to the National Assembly, member of National Assembly and county representatives;*

*(e) the **declaration of the results** tallied under paragraph (c); and*

(f) *such other functions as may be assigned by the Commission.* [Emphasis mine]

15. The applicant also cited **section 39** of *the Act* to support the argument that the declaration was done by the returning officers as agents of the Commission. **Section 39** of *the Act* states as follows;

39. (1) *The Commission shall determine, declare and publish the results of an election immediately after close of polling.*

(2) *Before determining and declaring the final results of an election under subsection (1), the Commission may announce the provisional results of an election.*

(3) *The Commission shall announce the provisional and final results in the order in which the tallying of the results is completed.* [Emphasis mine]

16. One of the canons of statutory interpretation is that provisions of a statute ought to be read as a whole in order to ascertain the intention the legislature intended to give them. In this case, words used in a particular provision may be used to clarify the meaning of the words of phrases used in the same context in other provisions within the Act. According to **Halsbury's Laws of England, 4th edition, Butterworths 1995, Vol 44(1)**, Para 1484; "It is one of the linguistic canons applicable to the construction of legislation that an Act is to be read as a whole, so that an enactment within it is to be treated not as standing alone but as falling to be interpreted in its context as part of the Act. The essence of construction as a whole is that it enables the interpreter to perceive that a proposition in one part of the Act is by implication modified by another provision elsewhere in the Act..." (see **Amalgamated Society of Engineers v Adelaide Steamship (1920) 28 CLR 129**).

17. **Article 87(1)** empowers the legislature to enact legislation to establish mechanisms for timely settling of electoral disputes hence the court is entitled to look at the legislation enacted to give effect to the provisions of the Constitution to discern the meaning of the 'declaration.' **Section 76** of *the Act* states as follows;

76. (1) A petition—

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

(b) *to seek a declaration that a seat in Parliament or a county assembly has not become vacant shall be presented within twenty-eight days after the date of publication of the notification of the vacancy by the relevant Speaker; or*

(c) *to seek a declaration that a seat in Parliament has become vacant may be presented at any time.*

(2) *A petition questioning a return or an election upon the ground of a corrupt practice, and specifically alleging a payment of money or other act to have been made or done since the date aforesaid by the person whose election is questioned or by an agent of that person or with the privity of that person or his agent may, so far as respects the corrupt practice, be filed at any time within twenty-eight days after the publication of the election results in the Gazette.*

(3) *A petition questioning a return or an election upon an allegation of an illegal practice and alleging a payment of money or other act to have been made or done since the date aforesaid by the person whose election is questioned, or by an agent of that person, or with the privity of that person or his election agent in pursuance or in furtherance of the illegal practice alleged in the petition, may, so far as respects the illegal practice, be filed at any time within twenty-eighty days after the publication of the election results in the Gazette;*

(4) *A petition filed in time may, for the purpose of questioning a return or an election upon an allegation of an election offence, be amended with the leave of the election court within the time within which the*

petition questioning the return or the election upon that ground may be presented.....

18. I have taken trouble to set out the above provisions verbatim to illustrate the point that a holistic reading of the Act reveals that Parliament must have intended that the twenty-eight day period must begin to run from the time the results are published in the Gazette of the 13th March 2013 as opposed to the ‘announcement’ by the returning officer. A contrary reading would imply and inject contradiction in the sections of the Act specifically **section 76** and other provisions such as the **section 77** of the Act. The Applicant in his submissions stated that the **section 76** is null and void in that it contradicts **Article 87(2)** of the Constitution.

19. Although this issue was not pleaded, I will mention that I see no inconsistency with the Constitutional provisions. **Article 87(1)** mandates Parliament to enact legislation to govern the elections and pursuant to this mandate the **Elections Act, 2011** and other statutes were enacted to govern the elections. **Article 87** is given effect through the legislation and the legislature has taken the position that the declaration to be effected by way publication of the results in the Gazette. One of the cardinal principles of statutory interpretation is the presumption that statutes enacted by Parliament are constitutional unless otherwise proved. (See **Ndyanabo vs. Attorney General [2001] 2 EA 485**). In the **Commission for the Implementation of the Constitution v Parliament of Kenya and Another Nairobi Petition No. 454 of 2012 (Unreported)**, the court cited with approval the case of **Re Application by Bahadur [1986] LRC 545 (Const.)**, where it was held, “I would only emphasise that one should not start by assuming that what Parliament has done in a lengthy process of legislation is unfair. One should rather assume that what has been done is fair until the contrary is shown...” The court concluded, “In the same vein I will reiterate that this court will start from the presumption that a statute as enacted by Parliament is constitutional, is fair unless the contrary is proven.”

20. I will also add that a provision of an Act is not rendered unconstitutional merely because it is crafted in a language which is difficult to follow, or is ambiguous or contradictory or impossible to apply because as was rightly held in **Ruturi and Kenya Bankers Association vs. Minister for Finance [2002] 1 KLR 84; [2001] EA 253** that only gives rise to questions of interpretation by the Court.

21. **Article 86** of the Constitution particularly **sub-article (c)** and various provisions of **the Act and the Rules** point to the fact that the returning officers are primarily responsible for the announcement of results at the Constituency or County level as opposed to the ‘declaration’ envisaged under **Article 87** and **section 77 of the Act**.

22. **Regulation 83** whose marginal note reads “Tallying and announcement of election results” reads in part as follows;

83. (1) *Immediately after the results of the poll from all polling stations in a constituency have been received by the returning officer, the returning officer shall, in the presence of candidates or agents and observers, if present—*

(a) tally the results from the polling stations in respect of each candidate, without recounting the ballots that were not in dispute and where the returning officer finds the total valid votes in a polling station exceeds the number of registered voters in that polling station, the returning officer shall disregard the results of the count of that polling station in the announcement of the election results and make a statement to that effect;

(b) in the case of an election, publicly announce to persons present the total number of valid votes cast for each candidate in respect of each election in the order provided in regulation 75(2);

(c) complete Form 34 and 35 set out in the Schedule in which the returning officer shall declare, as the case may be, the—

(i) name of the respective electoral area;

- (ii) total number of registered voters;
 - (iii) votes cast for each candidate or referendum side in each polling station;
 - (iv) number of rejected votes for each candidate in each polling station;
 - (v) aggregate number of votes cast in the respective electoral area; and
 - (vi) aggregate number of rejected votes; and
- (d) sign and date the form and—
- (i) give to any candidate, or agent present a copy of the form; and
 - (ii) deliver to the Commission the original of Form 34 and 35 together with Form 36 and Form 37 as the case may be.[Emphasis mine]

23. **Regulation 86** of the **General Regulations** further states that ‘After the final tallying and announcement of results, the returning officer shall seal up in separate tamper proof envelopes...’ From my reading of the above particularly **regulation 83(1)(c)** the returning officer’s duty is limited to ‘announcement of results’ and the ‘declaration’ referred to can only be read *ejusdem generis* to the act of ‘announcement’ of results. In **regulation 83(1)(c)** declaration is used in reference to Forms 34 and 35. It clearly does not envisage the formal ‘declaration’ of results by the Commission contemplated under **section 77 of the Act** and **Article 87**.

24. The applicant’s argument is also anchored on the fact that returning officer is an agent of the Commission. In the present context, and upon a close reading of **the Act** and **General Regulations** a line is drawn between the mandate of the returning officer and that of the Commission. For example, under **regulation 83** of the **General Regulations**, the returning officer has a duty to sign the forms and “**deliver to the Commission** the original of Form 34 and 35 together with Form 36 and Form 37 as the case may be.” Further **regulation 87(2)** provides that,

87(2) The returning officer shall after tallying of votes at the constituency level—

- (a) announce the results cast for all candidates;
- (b) issue certificates to persons elected in the National Assembly and county assembly elections in Form 38 set out in the Schedule; and
- (c) **electronically transmit the provisional results to the Commission.**

25. The **regulation 87(9)** and **(10)** of the **General Regulations** is even clearer as it talks of *provisional results* being submitted by the returning officers and the county returning officers to the Commission. **Sub-regulation 9** states that, “**The returning officer shall on completion of the tallying submit provisional, results to the Commission.**” While **sub-regulation 10** provides “**The county returning officer shall on completion of the tallying of the results at the county level, electronically submit the tallied provisional results to the Commission.**”

26. Surely the legislature cannot have intended that election petitions be filed based on ‘*provisional results*’ as pronounced or as ‘*declared*’ by the returning officers as opposed to the final results declared by the Commission. Furthermore under the **General Regulations**, the Commission and the returning officer as terms cannot be used interchangeably. The definition of ‘Commission’ in the interpretative part of the Rules is “*the Independent Electoral and Boundaries Commission established under Article 88 of the Constitution.*” A ‘returning officer’ under the **the Act** and the **General Regulations** means “*a person appointed by the Commission for the purpose of conducting an election or referendum under the Act.*”

27. Dr Abuya submitted the learned judge in *Waititu's Case* based her finding on the basis that the declaration of the results was the instrument and the Gazette notice constituted the instrument in the circumstances. Counsel argued that an instrument in law, according to *Blacks Law Dictionary, 8th Ed at page 436*, is one that sets out the rights and obligations of the parties and accordingly the Gazette was not an instrument that could fall within the meaning of the word declaration. He submitted that Form 38, the Certificate of Results, is one such instrument. Although this argument is attractive, I agree with Mr Musyoki, that even if I were to accept the meaning of instrument, that Form 38 does not satisfy this requirement. It merely certifies the winner of the election but does not even set out the result of the election.

28. I take the position that in assigning meaning to the word 'declaration' the *General Regulations* must be read in the context that they relate to a process of election which includes defining the duties delegated to the returning officer and the Commission in ensuring the election is carried out in accordance with the principles set out in the Constitution. Thus, the meaning of 'declaration' within that context must be read accordingly. At the end of the day the duty to declare the results is one cast on the Commission by **Article 87(2)** and the legislature under **section 76** of *the Act* contemplates that the manner in which the Commission declares the results is through gazettment.

29. In the circumstances I agree with the reasoning advanced in *Waititu's Case* by Hon. Justice Mumbi Ngugi where she stated as follows, "*Article 87(2) refers to 'the declaration of the election results by the Independent Electoral and Boundaries Commission.'* In my view therefore, what a returning officer is required to do is to **announce** the election results. The formal, official **declaration** of the election results must be done by the IEBC, not by any other party....[22]Black's law declaration talks of declaration especially '**by instrument.**' In the case of election results, I take the view that this has to be by formally publishing the results in the Kenya Gazette, and this is borne out by the provisions of the Elections Act which Parliament, in accordance with the mandate conferred on it under **Article 87(1)**, has enacted. **Section 76** of the Elections Act vests jurisdiction in the High Court to hear petitions filed within twenty eight days of publication in the Kenya Gazette. Thus, 'declaration' must mean publication in the Kenya Gazette, not simply the announcement of the results at the polling station or tallying centre. For a petition to be properly before the High Court therefore, it must be filed within twenty eight days of the publication of the results in the Kenya Gazette by the 1st respondent."

30. It must not be forgotten that it is the Constitution that is being expounded and its interpretation must give effect its purposes and objects of the Constitution. Transparency, accountability and good governance are some of the values articulated in **Article 10** necessary for a free and fair election. **Article 81** emphasizes these values as part of the general principles of the electoral system. Gazettement is one of the key ways of ensuring that the State and its organs reach out to the public and the public is kept informed. Publication in the Gazette brings the purport of the declaration concerned to the notice of the public or persons likely to be affected by it. Elections are an expression of sovereignty of the citizen expressed in the Preamble and **Article 1** of the Constitution. This necessitates that core matters of concern to the public such as 'declaration' of election results be done through the formality of the Kenya gazette. An announcement at the tallying centre by the returning officer does not satisfy the broad interests of the public.

31. I therefore come to the conclusion that even though the **section 39** of *the Act* provides that the Commission shall, "*determine, declare and publish the results*" and the *General Regulations* provide that returning officers have the mandate to 'declare' results, a reading of the Act will reveals that Parliament, in giving effect to **Article 87(2)**, in no uncertain terms intended that time starts to run from the date of gazettment. I do not see how by providing for Gazettment, **section 76** can be said to violate the Constitution in the absence of a clear definition of the term 'declaration' in the Constitution. That term can only be read to accord the meaning given under the enactment made pursuant to the Constitution. Further, the term 'declaration' as used in the regulations being subsidiary legislation cannot be used to oust clear statutory provisions that intend the results to be gazetted. In *Maitha v Said Hemed and Another (2008) 2 KLR (EP) 337*, Justice Gicheru, JA (as he then was) stated, "*Rules must be read*

together with their relevant Act; they cannot repeal or contradict express provisions in the Act from which they derive their authority. If the Act is plain the rule must be interpreted so as to be reconciled with it, or if it cannot be reconciled, the rule must give way to the plain terms of the Act.” I find and hold that the ‘declaration’ by returning officers, even if called so, cannot be of the import envisaged under **Article 87(2)** and **section 77 of the Act** as to trigger an election petition.

32. The question whether **Gazette Notice No. 3155** of the 13th March 2013 is proper in its form must be approached purposively. It is not disputed that the Gazette subject of these proceedings was a notification of the persons duly elected as members of the National Assembly and not a declaration of results. A declaration of results contemplates the particulars of the all candidates, the votes attributed to each candidate, the rejected votes, the total votes cast and the total number of registered voters. In view of the finding that the ‘declaration’ for purposes of **Article 87(2)** must mean gazetteement, it follows that the Gazette Notice must be deemed to be the declaration for purposes of computing time. As the duty to declare the results in the Gazette is imposed on the Commission, failure to set out the results or an error or deficiency in the form and substance in the Gazette should not be the basis to penalise a litigant who files a petition based on that notice or complies with the Constitutional and statutory provision. It also means that the Commission must henceforth set out the results in the Gazette.

33. I therefore find and hold that the declaration of election results envisaged by **Article 87(2)** of the Constitution and under **section 77 of the Act** is a declaration by made by the Commission and such a declaration was made in the Kenya Gazette of 13th March 2013. Using the 13th March 2013 as the date of declaration and by dint of **Article 259(5)(a)**, time will begin to run on the next day, that is 14th March 2013 taking us to the 10th April of 2013 which date is inclusive (See **Clr Elliot Lidubwi Kihusa v Independent Electoral and Boundaries Commission, Nairobi HC JR No. 94 of 2012 [2012]eKLR**). Accordingly, the present petition, having been filed on the 10th April 2013, is within the time stipulated by the Constitution and the law.

Failure to state election results

34. The other issue raised is that the petition did not state the results of elections as required by **rule 10(1)(c)** which provides that;

10. (1) An election petition filed under rule 8, shall state —

(a) ...

(b) ...

(c) the results of the election, if any, and the manner in which it has been declared;

35. The rationale for the enactment was based on the idea that election petitions are primarily about figures and numbers and that being the ultimate challenge, then they ought to be set out in order to enable court address itself on what appropriate reliefs to issue. The provision must also be interpreted with regard to the historical context whereby returning officers would declare the winner of the elections but fail to disclose the precise figures at the time of announcement of election results and hence the provision, “...and the manner in which it has been declared.”

36. Unlike the former regime of rules under the **National Assembly and Presidential Elections Act (Repealed)** which were subject of consideration in **Mututho v Kihara** case, **the Rules** now mandates the Commission to furnish the election results within a period of fourteen days of being served with the petition. **Rule 21 of the Rules** provides as follows;

21. The Commission shall deliver to the Registrar—

(a) the ballot boxes in respect of that election not less than forty-eight hours before the date fixed by the court for the trial; and

(b) the results of the relevant election within fourteen days of being served with the petition.

This effectively achieves the intended purpose of the provision of the election results.

37. The applicant has relied on the case of **Mututho v Kihara** to support the proposition that the petition is fatally defective for want of particulars. In that case, the Court of Appeal stated in part as follows, “*Election petitions are special proceedings. They have detailed procedure and by law they must be determined expeditiously. The legality of a person’s election as a people’s representative is an 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 essentials of a petition, furnishing of particulars will not validate it.... If she (petitioner) does not have results, what is she challenging? The issues she raises are meant to nullify a particular result. But if she has not given the results, any findings on the issues raised will serve no useful purpose. Any evidence adduced or to be adduced is intended to show that certain irregularities affected the outcome of the election, but without the result it might not be possible to relate the irregularities to the result.*”

38. In my view, **rule 21** as read with **rule 10(1)(c)** of **the Rules** which now permit the petitioner to plead “*the results, if any, however declared*” was intended to deal with the mischief identified in **Mututho v Kihara**. The purpose of pleadings is to aid a fair trial. Rules of procedure are not mere formulae to be observed as rituals and elevated to a fetish. Beneath the words of a provision of law, lies a juristic principle. In this case the principle is that the rule is intended to enable the court fairly adjudicate the dispute between the parties.

39. The guiding principle in consideration of this matter is the overriding objective of **the Rules** which is stipulated under **rule 4(1)** of **the Rules** as “*to facilitate the just, expeditious, proportionate and affordable resolution of election petitions under the Constitution and the Act.*” This objective is best realised by the Election court having regard to the purpose and mischief that the rule seeks to cure and the prejudice that would be occasioned by insistence on the strict compliance with form. **Rule 5** further obliges this court and the parties to conduct proceedings before it to achieve the following aims, “*(a) the just determination of the election petition; and (b) the efficient and expeditious disposal of an election petition within the timelines provided in the Constitution and the Act.*”

40. **Rules 4** and **5** are therefore a testament of the provisions of **Article 159(2)(d)** of the Constitution which obliges every court to dispense justice without undue regard to technicalities. The fact that elections are special disputes governed by special reforms does not exonerate the court from this prime obligation to do substantive justice. In the recent Supreme Court decision in **Raila Odinga and others v Independent Electoral and Boundaries Commission and 3 others Nairobi Petition No. 5 of 2013 [2013]eKLR** the court stated in part as follows regarding this provision; “*The essence of that provision is that a Court of law should not allow the prescriptions of procedure and form to trump the primary object, of dispensing substantive justice to the parties...*”

41. I am satisfied that in these circumstances no injustice has been or will be occasioned by the failure of the petitioner to set out the result of the election. The fact that election disputes are *sui generis* governed by special regime of rules does not exonerate the court of its prime obligation and indeed reason for its existence; that of delivering substantive justice.

Conclusion and disposition

42. While in the course of preparing this decision two of my colleagues delivered rulings on the meaning of declaration in **Article 87(2)**. Justice Odunga in **Gideon Mwangangi Wambua v Independent Electoral and Boundaries Commission & 2 Others, Mombasa Election Petition No. 4 of 2013 consolidated with Hassan Njanye Charo v Independent Electoral and Boundaries Commission and Others Mombasa Election Petition No. 9 of 2013 (Unreported)** and Justice Ochieng’ in **Suleiman Said Shahbal v Independent Electoral and Boundaries Commission & 3 others, Mombasa Election Petition No. 8 of 2013 (Unreported)** declined to strike out the petitions on the grounds advanced by the

applicant in this case. As the decisions were not subject of argument I shall not comment on them save that both judges expressed different reasons for coming to their conclusion.

43. As I close, I would be remiss if I did not point out the need for the law to be reformed in order to harmonize the use of the term '*declaration*' in ***the Act*** and ***the General Regulations***. Express definition of the term would be useful for clarity in subsequent electoral cycles.

44. For all the foregoing reasons, the 1st respondent's application dated 24th April 2013 is hereby dismissed with costs to the petitioner.

DATED and DELIVERED at MACHAKOS this 28th day of May 2013

D. MAJANJA

JUDGE

Mr Musyoki instructed by B. M. Musyoki and Company Advocates for the petitioner

Mr Mari instructed by Wachira Ndung'u and Company Advocates for the 1st respondent.

Dr Abuya instructed by J. Louis Onguto Advocates for the 2nd and 3rd respondents.