



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Election Petition 4 of 2013

IN THE MATTER OF THE ELECTIONS ACT, 2011

AND

**IN THE MATTER OF INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION
ELECTIONS IN MANDERA COUNTY**

**IN THE MATTER OF THE ELECTION OF WOMEN REPRESENTATIVE MANDERA
COUNTY ELECTIONS IN THE KENYA GAZETTE OF 13TH MARCH, 2013, SPECIAL ISSUE
OF THE GAZETTE NOTICE NO. 3155**

BETWEEN

AMINA HASSAN AHMED. PETITIONER

VERSUS

RETURNING OFFICER MANDERA COUNTY. 1ST RESPONDENT

**INDEPENDENT ELECTORAL AND
BOUNDARIES COMMISSION. 2ND RESPONDENT**

FATHIA MAHBUB. 3RD RESPONDENT

R U L I N G

This election petition dated the 24th March, 2013 was filed by the Petitioner, Amina Hassan Ahmed, through her Advocates, M/s A T Oluoch & Company, on the 5th April, 2013. The file record shows that the Petition was accompanied by a supporting affidavit of the Petitioner sworn on the 24th March, 2013. It was also accompanied by several affidavits of evidence, sworn by those intended to be called by the Petitioner to testify as witnesses during the trial of the Petition.

After the service of the petition upon the Respondents, the latter entered appearance in the petition through their various advocates who also filed their several Notices of Appointment.

On 29th April, 2013 the 3rd Respondent, Fathia Mahbub who was the declared and gazetted winner of the Women Representative seat for Mandera County Constituency, filed her Answer to the Petition, dated the 26th April, 2013. A quick perusal of the Respondent's Answers shows that the Respondent specifically and generally denied all the allegations in the Petitioner's pleadings.

On the same day, the 29th April, 2013 the 1st and 2nd Respondents, being the Returning Officer for Mandera County and the Independent Electoral and Boundaries Commission, respectively, also filed their joint Answer to this petition. They also specifically and generally traversed the pleadings forming the petition and denied each and every allegation. All the Answers from the Respondents were properly and timely served upon the Petitioner.

Among the documents served by Respondents on the Petition together with the joint Answer to the Petition, was the Form 35's showing the election result for the Women Representative seat for each of the polling stations in the Mandera County Constituency. There was also annexed the Form 36 which is a single document holding all results contained in all the Form 35's aforesaid. And finally, there was annexed, another single document combining only the Women Representative seat results from each of the six National Assembly Constituencies in the whole Mandera County.

Thereafter on 7th May, 2013, the 3rd Respondent filed this application dated 3rd May, 2013 to strike out this Petition. The application is based on the following grounds: -

- i) That the petition is fatally defective for want of form and content due to failure by the Petitioner to state the election results and the date and manner of declaration of the said results and other information required to be included.**
- ii) That the court has no jurisdiction to entertain the petition due to (i) above.**
- iii) That the Petitioner's claims in the petition are not supported by evidence or particularized.**

On the 13th May, 2013 the Petitioner likewise filed an application in court by Notice of Motion seeking the following orders, in summary: -

- 1) That the District Commissioner, Rhamu in Mandera County and the Officer Commanding Police Station of Mandera East Constituency, be summoned to testify on issues alleged in the petition.**
- 2) That this court orders a scrutiny and recount of all votes cast in the 4th March, 2013 elections in respect of Women Representative seat in the Mandera County in respect of specified polling stations.**
- 3) That this court grants orders for the production of the elections material listed in Rule 32(4) (a-j) of the Elections (Parliamentary and County Elections) Petition Rules, 2013.**
- 4) That this court grants leave to the Petitioner to file and reply by further affidavits in response to the Respondents' Answers to the petition.**
- 5) That this court grants the Petitioner leave to amend the petition dated 3rd April, 2013.**
- 6) That the court grants the Petitioner leave to file and serve transcripts of photographs and video footages of Mandera County elections taken by one Mado Guhad Boray and Abdullahi Mohamed Ahmed whose affidavits of evidence, were properly filed on record.**
- 7) Costs.**

The main ground upon which the Petitioner's above application was based is generally that Petitioner by mistake and inadvertently, failed to include certain legally required information in the petition. and requires assistance and leave of court to bring certain Government Officers to testify and certain additional relevant information to be filed in the petition. The said application the Petitioner accordingly concedes, that the amendment she seeks, if allowed will enable her to include in the petition, the: -

- a) actual election results declared by the 1st and 2nd Respondents.**

b)the names of all candidates participating in the contested Mandera County Women Representative seat elections.

c) the dates and manner of declaration of the contested results.

d)prayer for an order in the petition, to declare the Petitioner as the validly elected candidate instead of the 3rd respondent who was so declared by the IEBC.

In the meantime the Petitioner, also on 13th May, 2013, in response to the 3rd Respondent's application to strike out the petition, filed a Statement of Grounds of Opposition dated the 11th May, 2013.

The record further shows that the pre-trial conference of the petition, took place on the same day, the 13th May, 2013. The Respondents and the Petitioner urged the court to hear the 3rd Respondents application to strike out the petition and the Petitioner's application to amend, simultaneously, because they agreed that the facts to determine the applications from the two sides, were similar and common. The court accordingly fixed the hearing of the two applications on 14th May, 2013.

On the 14th May, 2013, Mr. Havi for the 3rd Respondent prosecuted the application dated 3rd April, 2013 for striking out the petition. He at the same time in the process, also defended against the Petitioners application dated 17th May, 2013 seeking among other reliefs, leave to amend the petition.

Mr. Havi pointed out that the petition did not state the results of the elections being challenged. That it did not state the manner in which the results were declared and that it also failed to state the date when the contested elections were declared or announced, contrary to Rule 10 of Elections (Parliamentary and County Elections) Petition Rules, 2013. Mr. Havi's consequent submission therefore was that the petition, which he said was devoid of the information stated above, is incompetent and so much so, that it is beyond cure by any possible amendment, so that the only fate it awaits, is it's being struck out.

In an attempt to forestall the Petitioner's application for amendment of the petition, Mr. Havi further argued, that the petition as it is, is not amendable. That it is not only formless but is also without mandatory content, both elements going to the root and substance of envisioned petitions under the relevant law. He added that on those circumstances no court has jurisdiction to entertain the petition.

Mr. Havi further submitted that the Petitioner's petition, not only defied the Elections Act, 2011 but also the Elections (Parliamentary and County Elections) Petitions Rules, 2013. That the said Act is a special legislation which must be interpreted strictly because every provision in it was deliberately included for a specific reason with a view to achieve the expressly intended purpose of the Elections Act, 2011 and the Petition Rules made thereunder. That failure by a party to strictly comply with the Act and Rules, would lead to dire consequences.

Mr. Havi also submitted that the Elections Act, 2011 has donated only a tiny open window for amendment of an election petition under Section 76(4) which restricts any amendment only to a petition based upon an allegation of an election offence and filed within the period in which an election petition would be validly filed. That since the amendment sought by the Petitioner is outside the period of 28 days in which this petition was to be filed, then this court has no power to allow such amendment.

Mr. Havi, finally submitted that the court has no time space within which to allow any amendment since only five months remain to complete or finalise the outstanding election petitions. That any amendment if allowed, would roll the court back to starting the trial process afresh, which is bound to cause unnecessary delay. That in any case, the Petitioner does not deserve the favorable discretion to get leave to amend her petition since she failed to attach the intended amendment draft to give the court a chance to appreciate the nature and extent of the intended amendment. That in those circumstances, the Petitioner may take advantage of the leave, if granted, to amend in order to introduce new material that might change the nature and character of the petition, which would be a departure from the original case, contrary to the principles governing amendments.

For the above reasons Mr. Havi, who was all long assisted by Miss Ng'ania, called for the striking out of the petition with costs.

Mr. Melly for the 1st and 2nd Respondents wholly supported Mr. Havi's submissions. He however, addressed the court on the issues of scrutiny and recount of votes sought by the Petitioner in his application before the court dated 13th May, 2013 in case the court paid attention to that issue. He said that the court should not allow a scrutiny or recount of votes as sought since the Petitioner failed to seek those reliefs in the main petition. He said further that the Petitioner did not produce evidence in the supporting affidavits and arguments to justify orders for scrutiny or recount. He concluded that the Elections Act, 2011, does not envision any protracted court process such as the one being introduced by the Petitioner in asking for leave to amend and/or introduce new material into the petition.

Mr. Oluoch for the Petitioner, in response to the Respondents' submissions, pointed to his first prayer in his application dated 11th May, 2013 and filed on 13th May, 2013. He sought the court's assistance to bring the District Commissioner and the Officer Commanding Police Station of the County of Mandera, to court to testify. He thought it was a straight forward request and he did not hear the Respondents oppose it. The second prayer was for scrutiny and recount of votes in certain polling stations to which the petition made references and to which witness affidavits filed with the petition touched on. He felt the court has power to grant the prayer since he believed a sufficient base or foundation for same had been laid.

Mr. Oluoch argued that the third prayer flowed from the second prayer above. That scrutiny and recount depended on the used election material documents holding relevant data arising from voting. He, therefore, believed that this ground should be allowed along with ground two.

As to prayer four which sought leave to file further affidavits to bring on record more and further election voting and results data, Mr. Oluoch did not see much obstruction to granting it. He said that unlike in the Supreme Court Presidential Petition where time was severely critical, here the court has a whole five months within which it can allow any relevant process to take place, for the sake of fairness and justice. That this is formal application brought inter partes so as not to ambush the court or the Respondents. It should, therefore, be granted, he opined.

When Mr. Oluoch started to submit on the ground for leave to amend, he visibly showed facial strain. He conceded that the Petition before the court missed vital information required to be included in a petition as per the provisions of Rule 10(1) of the Elections (Parliamentary and County Elections) Petition Rules, 2013. He admitted that the petition did not show the address of the Petitioner although it gave that of her advocate. He also conceded in court that the petition had failed to give the date of conduct of the disputed elections and the results of the elections and however they were declared. The petition finally also failed to give the date of the declaration of the results of the elections.

Mr. Oluoch however argued that whatever the legal effect of the failure to include the above stated information may be, the Petitioner has nevertheless, taken quick steps to rectify the situation. That she filed the application dated 11th May, 2013 on the 13th May, 2013 seeking, inter alia, leave to file further affidavits to bring into it relevant facts and, to amend the petition to align it with the legal requirements of the Act. That that makes sufficient reason for this court to grant leave to amend, more so because the alternative request to strike out the petition is draconian and contrary to the spirit of Article 159 of the Constitution which calls upon courts to base their decisions on substantive justice, rather than on technicalities.

For failure to annex the intended amendment draft, Mr. Oluoch submitted that that was not fatal as the intended amendments are clearly specified in the body of the application before the court. He felt that the absence of actual figures of votes scored by the contestants, was not fatal since the name of the winner was given in the petition although not in the exact format required by the Elections Rules.

Faced with what he termed the silence of the Elections Act, 2011 over specific provisions for amendment of petitions, except for the expressly limited window under Section 76(4) of the Act, Mr. Aluoch said that

the court has unlimited power and discretion to grant amendment and that the court should not interpret the Act in a restrictive manner.

Mr. Oluoch finally and rightly referred the court to the overriding objective of the Act and Rules, which he said is to facilitate the just, expeditious, proportionate and affordable resolution of election petitions under the Constitution. He further said that striking out this petition would not be in fulfillment of the said objective and that instead, the court's purpose should be to save the petition so that all the parties would have their day in court.

Both sides referred the court to certain legal authorities which the court will consider and refer to in the body of this Ruling.

I have carefully perused the material in the court record, inclusive of the able oral submissions of counsel representing all the parties. I have taken into account the fact that the 3rd Respondent's application to strike out the petition was promptly filed on 5th April 2013 soon after service. I have noted the fact that the Respondent's application to amend the petition was filed on 13th May, 2013, about 39 days after the 3rd Respondent's application to strike out. The Petitioner, indeed, made no bones about the fact that her application, particularly the prayer for amendment of the petition, was intended to correct the form and content of the petition to bring it in line with the requirement of the law.

In my view, the people of Kenya, through the 2010 Constitution, decided the mechanisms through which electoral disputes should be timely settled. To that end Article 87(1) thereof, provides as follows: -

“(i) 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.”

Consequently, Parliament, under the above constitutional authority to enact relevant legislation, enacted the Elections Act, 2011. Section 96(1) of the said Act in turn similarly authorized the promulgation of Election Regulations and Rules. In particular, it empowered the Rules Committee, as constituted under the Civil procedure Act, Cap 21, to make rules to regulate the practice and procedure with respect to the filing of election petitions, particularly as concerns timelines, costs and any other relevant issues as the Committee would deem fit.

I have perused the Elections Act, 2011 and particularly Part VII thereof which deals with election disputes. The Act itself has no provisions detailing the form, content and method of filing of petitions in court. Hence the importance of section 96(1) of the Act aforesaid which donates power to the Rules Committee aforesaid to promulgate rules and regulations of practice and procedure of petitions and petitions trials. To that end the Rules Committee promulgated the Elections (Parliamentary and County Elections) Petition Rules, 2013 which were published and are contained in the Kenya Gazette Legal Notice No. 44 of 2013. Rule 10(i) thereof provides as follows:-

“(1) an election petition filed under rule 8 shall state: -

- (a) the name and address of the Petitioner;***
- (b) the date when the election in dispute was conducted;***
- (c) the results of the election, if any, and however declared;***
- (d) the date of the declaration of the results of the election;***
- (e) the grounds on which the petition is presented; and***

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

The section provides more regulations concerning the mode of signing and supporting the petition and the kind of prayers a petition should contain as well as other related form-and-content issues.

The conclusion I come to after studying the Rules, is that the Act and the Regulations and Rules made thereunder, have the legal sanction and authority of the Constitution and of the Act, respectively. Indeed in my view and finding, matters touching elections, and in particular petitions which are not provided for by the Constitution, are taken up and provided for in the Act, and likewise those not provided in the Act, are provided for in the Rules and/or Regulations.

Having made the above general but relevant observations, I now turn to the issues for resolution arising in this matter before me which I summarise as follows: -

i) Whether or not this petition before me is fatally incompetent for want of legal format and/or legal content.

ii) If the answer to (i) above is positive, whether or not this court has statutory or original jurisdiction to grant leave to the Petitioner to amend the petition to bring it in line with the relevant law.

iii) Whether or not this petition is liable for mandatory striking out.

As earlier pointed out, the Petitioner conceded, or did not dispute the fact that her petition, due to her or her counsel’s mistake and/or inadvertence, did not contain the certain information required to be contained in the petition. The missing information included; the actual declared results by the 1st and 2nd Respondents; the names of all the candidates and votes each scored; the name and address of the winner; the date and the manner of declaration of the election results being challenged by this petition and finally, the order or prayer seeking nullification of the election as well as the declaration that either there be new election or the Petitioner be declared the winner.

The Respondents, to that end, argued that without such information or particulars as are stated above, the petition is fatally incompetent. I have carefully considered the argument. As I earlier stated, the Rule 10 aforesaid, has the sanction of the relevant Act and the Constitution respectively. The promulgator of the Rule, clearly went into great lengths and details to provide the actual form of and the contents the petitions should contain. The probable reason for going to such details would be that a petition, as filed, should be complete with all the details defined so as to avoid the situation now prevailing in this petition in which the Petitioner is seeking leave to amend the petition or in which a party would be making similar moves that would cause unnecessary delays and thereby inflating trial costs. Under the old law dispensation, election petition trials would last for five years until the following electioneering period, thereby causing injustice and skyrocketing trial costs. The Kenyan Society, through the Legislature under the new Constitutional dispensation, consequently promulgated the new Elections Act and Rules whose deliberate overriding objective is to facilitate the just, expeditious, proportionate and affordable resolution of election petitions. This court therefore, in my view, is under, both administrative and legal obligation to interpret the said law strictly and give effect to the said overriding object. Parties to the petition must also from the onset, including the time of drafting and filing petition pleadings, assist the court to achieve the said objective.

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

and any deficient compliance is likely to lead to delay and injustice and would likely be frowned upon by the court. I am accordingly guided by the comment of the Court of Appeal in the case of **THE SPEAKER OF THE NATIONAL ASSEMBLY VS KARUME, [2008] IKLR, 425** where the court stated thus: -

“... where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, the procedure should be followed.”

Making a similar point while ruling on the nature or character of election petition legislation, the Supreme Court of India in the case of **JYOTI BASU & ORS VS DEBI GHOSAL & OTHERS** reported in AIR 1982 SC,983, held that: -

.....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, Court is put in a straight jacket.....
(emphasis)

And finally, a similar position was taken by our Court of Appeal in the case of **JOHN MICHAEL NJENGA MUTUTHO vs JAYNE NJERI WANJIKU KIHARA & TWO OTHERS, Nakuru Court of Appeal, Civil Appeal No. 102 of 2008**, at page 8,

“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.”

And earlier in the same judgment the court had stated as follows at page 7 of the judgment.

“What would happen where, as here the result as envisaged by regulation 40 above, are not introduced 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..... The law has set out what a petition should contain and if any of the matters supposed to be included is omitted, then the petition would be incurably defective...”

The petition before me failed to state the election result being contested. It failed to include the dates or time of the results. It even missed to state some of the prayers that the Petitioner ought to have included in the Petition for consideration. And yet she appealed to this court to consider such details and mandatory information in the petition as technicalities which the court should ignore or disregard as per the tenor of Article 159(2)(d) of the Constitution. In this court’s view, the Petitioner’s view is not in conformity with the said Constitutional provision. Indeed the Supreme Court of Kenya has recently guided the courts as to the meaning and intention of Article 159(2) (d), aforesaid in the Presidential petition of **RAILA ODINGA & 5 OTHERS VS IEBC & 3 OTHERS** in Supreme Court Petition No. 5 of 2013 where the court stated thus: -

.....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 operative words are the ones we have rendered in bold. The Article simply means that a court of

law should not pay undue 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.(emphasis mine)

In my view and finding based on the facts and reasons herein above, the Petitioner's petition is without doubt, fatally defective because it is deficient in form and lacks the vital prescribed content. To that end this court borrows and fully adopts the clear reasoning of the Kenyan Court of Appeal as well as the Supreme Courts of India in the cases quoted above.

The next issue is whether this court has power to grant an amendment to the Petition?

The Respondents have submitted that the court neither has power to allow amendment under the Elections Act, 2011 nor under the Rules promulgated under Section 96(1) of the Elections Act aforesaid. The Petitioner, on the other hand, submitted that this court has wide and original jurisdiction to allow a suitable amendment. He added that Section 76(4) of the Act, is not restrictive but only names a few of the many instances where the court can exercise its wide jurisdiction to allow amendment.

I have carefully considered this issue. In my view and finding, neither the Elections Act nor the Rules donate any provision for amendment of an election petition except for the limited window found in Section 76(4) of the Elections Act, 2011 which states: -

“A petition filled 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 election upon that ground may be presented.”

It is my finding from the above provision that the Elections Act, 2011 does not generally allow amendment of an election petition except where the following terms are complied with: that is to say: -

- (i) the petition to be amended questions a return or an election result upon an allegation of an election offence and;**
- (ii) the amendment is sought from the election court within the 28 days prescribed by the Act for filing an election petition and;**
- (iii) the election court is willing to exercise its original discretion in favour of granting the amendment sought.**

The above provision being statutory, must be interpreted and be complied with, strictly, especially because the statute itself, as earlier noted, is a special legislation. To that end, to argue that the Act is silent in relation to issues of amendment of an election petition, as did the Petitioner herein, is in my view, to get astray. This is because the Act has actually loudly pronounced the circumstances when an amendment may be granted by an election court. This also means that Section 76(4) of the Elections Act, 2011 has specifically taken away and/or restricted the original jurisdiction of this court to grant leave for amendment of election petitions. Mr. Oluoch further thought that Rule 17(1) (f) of the hereinabove stated Election Rules, might give this court jurisdiction to grant amendment of the petition. The court's view, however, is that the power given to the court thereunder, is limited to granting orders for the furnishing of further particulars. Such limited power cannot be used to correct deformity in the election petition. The answer to the second issue, therefore, is that this court has no power or jurisdiction to grant amendment of this petition as sought by the Petitioner. **What then should be the fate of this Petition?**

In ordinary civil cases, striking out a pleading by court is indeed draconian and is limited to cases or pleadings which are scandalous, embarrassing or oppressive. It is a jurisdiction which is exercised sparingly. It is an exception and not a norm, because it drives a party from the judgment seat without giving him a chance to be heard. As stated by Madan, J.A in **D. T. DOBIE & COMPANY (KENYA) LIMITED VS MUCHINA [1982] KLR, 1: -**

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. if a suit shows a mere resemblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

This petition is a creature of special legislations the Elections Act, 2011. It is not an ordinary civil suit and ordinary civil procedure principles arising from the interpretation of the Civil Procedure Act and Rules may not be applicable. The court has also already found that the petition before the court is defective. So defective that it cannot be resuscitated or cured. As it is therefore, the petition is as good and dead and however sympathetic this court can be to the petitioner, it can do but little to assist her. The fault lies with the Petitioner or her counsel, who for insufficiently explained reasons, failed to appreciate the mandatory requirements of the law when drafting and filing the petition.

I am aware of the decision of this court in the case of **DICKSON KARABA VS JOHN NGATA KARIUKI & ANOTHER [2010] eKLR** quoted in the case of **STEVEN KARIUKI VS GEORGE MIKE WANJOHI & TWO OTHERS** in **Nairobi Election Petition No. 2 of 2013**, where the former court used its inherent power to save a petition which had some defects in it. What is striking in that case however is the court’s statement questioning the power of court to strike out an election petition! The court stated: -

“Inherent power is a residual power which may be used upon unnecessary event and when it is just and equitable to do so in a particular case to ensure the observance of the due process of the law or prevent vexation or oppression or to do justice between parties and secure a fair trial between them. It is not intended to displace a party of his matured right which is likely to result in an injustice. I think, striking out of a petition is outside the inherent jurisdiction of the High Court and it cannot be exercised to aid a party who has not suffered any prejudice or injustice due to the acts or omission of another party.” (The stress is mine)

In my view, and with great respect to that court, election petitions are almost without exception, creatures of statute and more so, a special statute. The inherent power generally to be exercised in petitions is that one prescribed or donated by the Elections Act itself. Petition pleading, its form and contents are prescribed by the Act itself. The trial process is as well controlled by the Act. Failure of compliance of the provisions of the Act must as in other cases, attract effective sanction. Such sanction, in my view, is bound to include striking out a pleading liable or viable for striking out. How then can such striking out of petition intended by the Act, be outside the inherent jurisdiction of this court? The **Jyoti Basu** case earlier cited herein pronounces an election petition to be action, neither in common law nor in equity, but a creature of statute. The statute controls its nature, form and content. It controls its full process. This court surely can strike out a petition where it is proper and just to do so and where the purport of the Act so demands or intends it to be so.

The result, therefore, is that in the circumstances and for the reasons discussed above, the Petitioner’s application seeking amendment and other prayers, dated the 11th day of May, 2013 and filed in this court on 13th May, 2013 must and is hereby refused and dismissed with costs to the Respondents. On the other hand the 3rd Respondent’s application dated 3rd May, 2013 and filed in court on the 7th May, 2013, seeking the striking out of the Petitioner’s petition dated the 24th March, 2013 and filed in this court on the 5th of April, 2013, is hereby granted. The end result is that the said petition must be and is hereby struck out, with costs to the Respondents. Orders accordingly.

Dated and delivered in Nairobi this 22nd day of May, 2013.

.....
D A ONYANCHA
JUDGE

PRESENT

Mr. Oluoch for the Petitioner

Mr. Melly for the 1st and 2nd Respondents

Mr. Havi and Miss Ng'ania for the 3rd Respondents