



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Election Petition 2 of 2013

STEVEN KARIUKI.....PETITIONER

VERSUS

GEORGE MIKE WANJOHI.....1ST RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION...2ND RESPONDENT

MILIAM WANJIRU GACHIHI.....3RD RESPONDENT

RULING

1. On the 4th of March 2013 voters in Mathare constituency, Nairobi County, went to the polls to elect their representative to the National Assembly. The election was conducted by the 2nd respondent, hereafter referred to as the IEBC. There were 10 candidates who included the petitioner and the 1st respondent. The IEBC declared and gazette the 1st respondent as the duly elected representative. But that would be to simplify the narrative a little too much. At the conclusion of the voting, the returning officer, Miliam Wanjiru Gachihi, had in fact announced that the petitioner, Steven Kariuki, had won the election and gone ahead to issue him with a certificate of results in Form 38 of the Elections (General) Regulations 2012.

2. The 1st respondent then brought separate proceedings in Nairobi Petition No 150 of 2013 *George Mike Wanjohi Vs Steven Kariuki* challenging the issue of the certificate of results to the petitioner here. A consent was later entered into between the applicant in the case and the IEBC whose import was to cancel the petitioner's certificate and to issue a fresh certificate to the 1st respondent. The petitioner takes up cudgels on that conduct of the 1st respondent and the IEBC. He says it amounted to collusion and was illegal. He pleads that he garnered more votes than the respondent. The petitioner has thus presented this petition to nullify the election of the 1st respondent on those and many other grounds.

In the meantime, the 1st respondent has filed a notice of motion dated 23rd April 2013 seeking to strike out the entire petition. The primary grounds are as follows:

- a) *That the petition does not disclose sufficient grounds for granting the relief claimed under section 79 (a) of the Elections Act.*
- b) *That the petition was never served on the 1st Respondent within the meaning of Rule 13 (2) (b) of Legal Notice 54 of 2013.*
- c) *That the advertisement of the election petition carried in the Daily Nation newspaper of March 21st*

2013 failed to meet the requirements under Rule 13 (4) (a) and (b) of Legal Notice No. 54 of 2013.

d) That the petitioner failed to serve copies of the petition upon the Registrar of this court for such copies to be availed to the Respondents by the Registrar of the Court

e) That the petition was nebulous in reference to an unspecified “election” yet the general elections had 6 distinct and separate elections, 2 of which this court is divested of jurisdiction by operation of the law from adjudicating.

f) That the petition seeks the pleas at letters f, g, h, I, j, k, l and m in the petition together with other pleas in violation of Rule 32 (2) of the Elections (Parliamentary and County Elections) Petition Rules, 2013.

g) That paragraph 14a, 14e, 15b, 16, 19b, 20b and 21 of the Petition dated the 19th of March 2013 be struck out for lack of particulars of the alleged collusion and breaches.

h) That paragraph 26, 33a, 33e, 34b, 35, 37, 40b, 41b, 41c and 42 of the petitioner’s affidavit sworn on the 19th of March 2013 be struck out for being scandalous and oppressive.

In the alternative, the applicant prays as follows:

i) The affidavits of Geoffrey Ombogo Makwaro, Opingo Patrick Anyanzwa, Boniface Mosiori Osiemo, Peter Kamau Mwangi, Edwin Mbuthia Nyambura, Mathias Wangila, Isaiah Ochieng Mboke, Vincent Njenga Kimani and Juliana Mukulu Mukala, all sworn on the 19th March 2013 and annexed to the petition dated 19th March be struck out for being in breach of Order 19 Rule 3(1) of the Civil Procedure Rules, 2010.

ii) That the digital video device (DVD) produced by the petitioner herein, marked as exhibit “SK5” annexed to the Petitioner’s affidavit sworn on the March 19th 2013 be struck out.

3. The gravamen of the motion and evidence are set out in the annexed deposition of George Mike Wanjohi sworn on even date. The applicant’s case is that the witness statements filed in support of the petition are not affidavits and are contrary to the express and mandatory provisions of Legal Notice No. 54 of 2013. It was submitted that a *witness statement* is foreign to an *election petition* and only recognized under Order 3 rule 2 (c) of the Civil Procedure Rules. Furthermore, the purported depositions contravene the provisions of the Oaths and Statutory Declarations Act as read together with Order 19 of the Civil Procedure Rules 2010.

4. The applicant contended that the affidavits did not specify the sources of information and therefore ought to be struck out for offending the provisions of Order 19 rule 3(1). In this regard Learned Counsel for the applicant, Mr. Kinyanjui, relied on the case of Assanand & Sons (Uganda) Limited Vs. East African Records Limited [1959] EACA 360.

5. The petition was also impugned for non-joinder of The National Alliance Party, hereafter referred to as TNA. It was submitted that the Court may make an adverse finding against the political party without it being heard. The joinder of the party was thus necessary.

6. On the prayer that the petition contained scandalous allegations, the 1st respondent referred to the court proceedings annexed as “SK7”. Since there are allegations of collusion being made in relation to the withdrawal of High Court Election Petition No. 150 of 2013 and no reference of the collusion is made in the proceedings, the offending paragraphs ought to be struck out. It was submitted that it was not clear to the 1st Respondent what nature of agreement is alluded to or where it was reached. The 1st Respondent is therefore not able to respond sufficiently to the allegations.

7. The petition is also impeached for being nebulous. It was submitted that it failed to particularize the

elections or offices that were contested. The petitioner is thus inviting the court to act in vain. The applicant further contended that the petition was not properly served: it was not advertised and published in the font size prescribed by Rule 13 (4) and (b) of Legal Notice 54 of 2013. The advertisement by the petitioner in the Daily Nation newspaper of 21st March 2013 was thus defective.

8. Lastly, the petition is attacked for failing to provide the particulars of fraud. In that regard, the Court's mandate under Rule 4 (1) of the Regulations would be curtailed.

9. The petitioner contests the motion. There is filed a replying affidavit by Steven Kariuki sworn on 3rd May 2013. The respondent's learned counsel, Mr. Havi, in both the written submissions and oral submissions, responded to the applicant's case blow by blow.

10. The petitioner contends that the advertisement in Form EP3 published in the Daily Nation on 21st March 2013, met all the requirements of the law. It was published within 1 day of filing the petition. The petition was also served upon the 1st Respondent's advocate, on his request, on 2nd of April 2013. That constituted personal service and was well within 13 days of filing the petition. On the complaint that the name of the petitioner was omitted, he submitted that there was no such requirement on Form EP 3.

11. In response to the argument that the petition refers to a nebulous parliamentary election, the petitioner's case is that it is obvious that the petition relates to the parliamentary election for Mathare Constituency. The petitioner opined that where the Constitution, the Elections Act and the Rules refer to an election petition for Member of the National Assembly, it is synonymous with an election petition for Member of Parliament. In the event that the court finds that there is a deviation, the petitioner urges the court to find that it is a deviation in form and not substance. Reliance was placed on Section 72 of the Interpretation and General Provisions Act. It was further submitted that the 1st respondent has in any event responded to the petition. Accordingly, he is not prejudiced in any manner.

12. Regarding the claim that the petition does not disclose sufficient particulars, it is the petitioner's case that to do so would be to plead evidence. That evidence is found in the "affidavit" in support of the petition and the statements of witnesses. In any event, it will be open to the court to order for further particulars in terms of Rule 17 (1) (f) of the Rules.

13. On the prayer to have paragraphs 26, 33a, 33e, 34b, 35, 37, 40b, 41b, 41c and 42 of the petition struck out, the petitioner states that the 1st Respondent has not demonstrated they are scandalous and oppressive. He maintains that they are the backbone of the prayers a) to d) in the petition. They are also relevant as they contain evidence of collusion and breaches of electoral law by the respondents.

14. The petitioner contends that the documents titled "witness Statements" are sworn statements. They thus serve the same purpose as an affidavit. To strike them out would be to give undue regard to technicalities. He maintains that any defect in the statements is in any event curable by Order 19 rule 7 which provides that the court may receive any affidavit sworn notwithstanding any defect by misdescription of parties or other irregularity in its form.

15. In response to the plea to strike out the two DVDs, the petitioner's view is that only the trial court can determine their admissibility in evidence. He submitted that there is no basis at this stage to exclude that evidence. Regarding non-joinder of TNA, the petitioner contends that his complaints are limited to the actions of the 1st Respondent as a candidate nominated for election by TNA. The petitioner maintains that the reliefs sought in prayers f, g, h, i, j, k, l and m are not limited to recount of votes or examination or tallies. They are in the alternative and there is no bar under Rule 32 (2). The plea to strike them out at this stage is thus premature.

16. The 2nd and 3rd Respondents did not reply to the application. Their Learned Counsel left the matter to the decision of the court.

17. I have considered the pleadings and depositions. In particular, I have considered the written

submissions of both parties dated 7th May 2013 and 8th May 2013 respectively. I have also paid regard to the oral arguments. I take the following view of the matter. This petition is proceeding against the backdrop of the constitution of Kenya 2010. There are important principles that flow from that instrument: the right of voters to freely exercise their right of universal adult suffrage under Article 38(2); the right to a fair trial under Article 50; and, the right of the petitioner under Article 87 to bring electoral disputes to this Court for fair determination.

18. The Court should endeavour to ensure that the democratic rights and choices of the voter are given full effect or as much as is practicable. Elections are not perfect and not all malpractices will lead to nullification of the result. Section 83 of the Elections Act 2011 is emphatic on that point:

“83. No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law or that the non-compliance did not affect the result of the election”.

19. Once seized of the dispute, the Court is enjoined by Article 159(2) (d) of the Constitution to do substantial justice to the disputants expeditiously and without undue regard to technicalities. Rules of procedure have aptly been described as handmaidens of justice: not mistresses. See Edward Steven Mwiti Vs Peter Irungu & 2 others (No. 2) Nairobi High Court ELC105 of 2011[2012] eKLR. This overriding principle is a guiding beacon for the court:

“The principal aims of the overriding objective include the need to act justly in every situation; the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the courts by ensuring that the principle of equality of arms is maintained and that as far as it is practicable to place the parties on equal footing”.

Harit Sheth Advocate Vs Shamas Charania Nairobi, Court of Appeal, Civil Appeal 68 of 2008 [2010] eKLR.

20. But that is not to say that rules or technical rules shall not apply: only that the Court should not pay undue regard to them. If rules were to be thrown out of the window, chaos akin to a village *baraza*, will step in through the wide door. That was clearly not the intention of the legislature. I recently had this to say on the matter in Edward Steven Mwiti case, supra:

“First, an application for injunction should be brought by way of notice of motion under the Civil Procedure Rules 2010. The present application is a chamber summons application. It contravenes the express provisions of orders 40 and 51 of the Civil Procedure Rules 2010. Procedural rules have been aptly described as the handmaidens of justice. True, Article 159 of the constitution as read with sections 1A, 1B, and 3A of the Civil Procedure Act as well as Order 8 rule 5 of the Civil Procedure Rules 2010 frown upon technical objections. But this is not a simple matter of want of form. The plaintiff is represented by learned counsel. If procedural rules were to be waived in all cases, there would be disorder in court processes. I do not see why the legislature in section 81 of the Civil Procedure Act created the Rules Committee if the Civil Procedure Rules were to be waved away casually”.

21. The Supreme Court has succinctly interpreted the boundaries of Article 159(2)(d) in Raila Odinga and others Vs Independent Electoral and Boundaries Commission and 3 others Nairobi Petition No. 5 of 2013 [2013]eKLR. In a motion brought to strike out a further affidavit, the learned Judges delivered themselves as follows:

“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. This principle of merit, however, in our opinion, bears no meaning cast-in-stone, and which suits all situations of dispute resolution. On the contrary, the court as an agency of the processes of justice, is called upon to appreciate all the relevant circumstances and the requirements of a particular case and conscientiously determine the best course”.

22. Electoral dispute resolution is unique in many ways. But the principles applicable in a motion to strike out a pleading or action cut across the board. A good starting point is the standards applied in ordinary civil cases. Striking out a pleading is a draconian measure to be employed sparingly. See Wambua Vs Wathome [1968] E.A 40 and Coast Projects Ltd Vs M.R. Shah Construction [2004] KLR 119. See also Sankale Ole Kantai t/a Kantai & Company Advocates Vs Housing Finance Company of Kenya Limited Nairobi, High Court case 471 of 2012 (unreported).

23. The Court is fully clothed with the power and discretion to strike out a scandalous, embarrassing or oppressive pleading. This power can be exercised at any stage in the proceedings. The applicant's motion is thus properly before the Court. A pleading must disclose sufficient facts to enable the opposing party respond to it. What then is a scandalous pleading? In Brite Print (K) Ltd Vs Attorney General Nairobi, High Court case 1096 of 2000 (unreported) Justice A. Visram, as he then was, citing with approval of Fischer Vs Owen (1878) 8 C.D 645 that a matter can only be said to be scandalous if it is irrelevant. Cotton L.J. in the Fischer case at page 653 said "nothing can be scandalous which is relevant". In Black's Law Dictionary 9th edition, West Minnesota, the word scandal means:

"disgraceful, shameful or degrading acts or conduct. Defamatory reports or rumours, especially slander".

24. Oppression means an act or instance of unjustly exercising authority or power or an abuse of discretionary authority. Recourse may also be had to the provisions of Articles 25 and 50 of the constitution: the concept of fair trial and the cardinal precept that it cannot be derogated from.

25. Ideally, cases should be determined on tested evidence at a full hearing. Striking out a pleading should thus be an exception and not the norm. The bottom line cannot be better set than in the words of Fletcher Moulton L.J. in Dyson Vs. Attorney General [1911] 1 KB 410 at 418 when he delivered himself thus;

"To my mind, it is evident that our judicial system would never permit a plaintiff to be "driven from the judgment seat" in this way without any court having considered his right to be heard except in cases where the cause of action was obviously and almost incontestably bad"

See also Musa Misango Vs Eria Musigire & others [1966] E.A. 390 at 395 where Sir Udo Udoma C.J. cited with approval the above passage.

26. The dictum of Madan J.A. (as he then was) in D T Dobie & Company (Kenya) Limited Vs Muchina [1982] KLR 1 is an all time classic. He said at page 9;

"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 semblance 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".

See also Francis Ngira Batware Vs Ashimosi Shatabansi t/a Ashimosi Shatabansi & Associates Advocates and 2 others Nairobi High Court case 476 of 2009 [2013] e KLR.

27. I have studied paragraphs 33 a, 33 e, 34 b, 35, 37, 40 b, 41 b, 41 c and 42 of the petitioners witness statement. They may be embarrassing to the 1st respondent in the English meaning of the word, but they do not rise to the meaning of a scandalous or oppressive pleading as known in legal parlance. Applying the principles espoused by the courts recently in Dickson Karaba Vs John Ngata Kariuki [2010] e KLR and Raila Odinga and 4 others Vs Independent Electoral & Boundaries Commission and 2 others Nairobi Petition 5 of 2013 [2013] e KLR, it will not be in the interests of justice to strike out those paragraphs in the statement.

28. Section 79 of the Elections Act Provides as follows:

“Upon receipt of a petition, an election court shall peruse the petition and

a) If it considers that no sufficient ground for granting the relief claimed is disclosed therein may reject the petition summarily; or

b) Fix a date for the trial of the petition”.

29.The applicant contends that the petitioner has not pleaded sufficient facts or particulars. Under section 79, the Court, *suo moto*, can reject the petition summarily. It is open, but irregular, for the 1st respondent to move the court under that section for striking out. The court has the residual power to strike out a petition for want of particulars. The particulars sought by the 1st Respondent relate to paragraphs 14 a, 14e, 15b, 16, 19b, 20b and 21 of the Petition. These paragraphs make reference to the alleged commission of election offences. The 1st Respondent avers that they ought to be struck out. The 1st Respondent raised the matter in response to the petition but was never furnished with particulars at the close of pleadings.

30.The petitioner on the other hand maintains that the particulars of the said allegations are contained in the statements in support of the petition. Such deficiencies in the particulars can sometimes be remedied by an order for further particulars under Rule 17 (1) (f) of the Rules. In *Robert Nelson Ng’ethe vs. Mbogori Njeru & Another*[2005]e KLR Ojwang J. (as he then was) held that some of the particulars demanded “could only be responded to by giving the very evidence which will have to be produced at the hearing stage”. From the record, the 1st Respondent has not yet served a request for Particulars.

31.But I cannot entirely close my eyes to the more serious allegations by the applicant. The impugned paragraphs 14 a, 14 e, 15 b, 16, 19 b, 20 b, and 21 make generalized allegations that election offences were committed. No particulars of facts whatsoever are provided. Fraud and collusion are alleged. By making serious allegations of a criminal nature in such a general manner and without an outline of facts prejudices the 1st respondent. He cannot adequately or at all respond to the allegations. The window for filing a suitable response or reply has closed. I agree with the 1st respondent that he does not then know the true nature of the case against him under those paragraphs. See *Tipis Vs Ntimama & another* [2008] 1 KLR (EP) 346. The deficiency of particulars in the pleading or statements cannot then be salvaged by Rule 17 (1) (f). One fundamental precept underpinning our judicial system is equality of parties before the court. Article 50 of the constitution sets out the right to a fair trial. It is a fundamental right. Article 25 of the constitution states that the right cannot be derogated from. What was the fraud? What was the nature of collusion and which of the respondents was involved? The allegations do not even find full support in the witness statements filed. If those offending paragraphs are left standing, the 1st respondent will be left holding the shorter end of the stick. It is anathema to the concept of proportionality espoused in the overriding objective of the court. In the result, I order that paragraphs 14 a, 14 e, 15 b, 16, 19 b, 20 b and 21 be and are hereby struck out.

32.Rule 15 (7) of the Election Petition Rules imports the provisions of the Oaths and Statutory Declarations Act and order 19 of the Civil Procedure Rules 2010. The objection on form and substance of the documents titled “witness statements” in the petition is thus properly before the court. The 1st Respondent prays that the affidavits be struck out on the grounds that they offend that statute and Rules. The witness statements filed by the petitioner cannot be said to be affidavits. On the face of it, they are contrary to the provisions of Legal Notice No. 54 of 2013. It is worded in mandatory terms. Any witness must file an affidavit. An affidavit must conform with the Oaths and Statutory Declarations Act. A witness statement is only recognized under Order 3 rule 2 (c) of the Civil Procedure Rules. I note there is little or no room to amend a defective deposition. The legal regime and procedural framework of electoral dispute settlement is very strict. It is a self-contained code except where it imports other procedural rules. The petitioner and his legal advisors have not followed this code strictly. The electoral office under contest is ill defined. There is on the face of it no “affidavit” in support of the petition. Instead, there are filed documents titled “witness statements”.

33.The petitioner submitted that the defects, if any are of form and not substance and that it can be cured under the provisions of Order 19 rule 7 which provides that the court may receive any affidavit sworn

notwithstanding any defect by misdescription of parties or other irregularity in the form or any technicality. The rule reads as follows:

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

34. The application of that rule presupposes that an affidavit has been filed at first. That is truly not the case here. The witness statements are made under oath. They take the format of an oath. It is only the title that is misleading. They are in effect sworn witness statements. Their makers in the preamble state they are doing so under oath. The statements are attested to by a commissioner of oaths. If I strike out those statements, the entire petition will collapse. Is that justice? To strike out the affidavits on this ground would be too drastic. In Microsoft Corporation Vs. Mitsumi Computer Garage Ltd & Another (2001) KLR 470, at 482:

“Deviations from or lapses in form and procedure which do not go to the jurisdiction of the court or prejudice the adverse party in any fundamental respect ought not to be treated as nullifying the legal instruments thus affected, in those instances, the court should rise to its higher calling to do justice by saving the proceedings in issue”.

35. It does not appear to me that any serious prejudice is occasioned to the 1st Respondent by having the documents filed in support of the petition titled “witness statements”. The substance of the evidence of the petitioner is set out in the documents in such a manner as to allow him to meet the case against him. To allow the affidavits to be struck out for misdescription would, in my view, be tantamount to giving undue regard to a technicality. Indeed, this court remains guided by the provisions of Article 159 (2) (d) of the Constitution which enjoins it to administer justice without undue regard to procedural technicalities. See Raila Odinga & others Vs Independent Electoral & Boundaries Commission & 3 others Nairobi Petition Number 5 of 2013 [2013] e KLR referred to earlier.

36. The court in the election petition case of Dickson Karaba Vs. John Ngata Kariuki & Another 2010 e KLR stated as follows:

“...striking out is a very serious matter, it is draconian and it should be resorted to as an avenue when the cause filed is hopeless or it is meant or intended to abuse the process of the court...The court cannot also exercise its inherent jurisdiction, when the exercise will lead to an injustice. In my view the inherent jurisdiction of the court enables it, to exercise control over process by regulating its proceedings by preventing the abuse of the process. 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 to prevent vexation or oppression or to do justice between parties and to 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”.

37. There would be no opportunity in the present petition to cure the defect. The window has shut for the petitioner. To enable the court dig into the root of the dispute, I shall let the statements stand. I do so entirely in the interests of justice and to avoid a techist or legalistic approach to this electoral dispute.

38. The 1st Respondent prays that the petition be struck out for non-joinder of TNA. His contention is that the court may reach an adverse finding on TNA or make a report to the Registrar of Political Parties. That would be contrary to the principle of fair hearing and prejudicial to the TNA party Rule 2 defines a respondent to include “any person whose conduct is complained of in relation to an election petition”.

39. The petitioner on the other hand contends that he has no complaint against the party. His complaints are limited to the actions of the 1st Respondent as a candidate nominated by TNA. The allegations made

against the 2nd and 3rd Respondents are that they performed their duties under the influence of TNA. The petitioner alleges collusion between the party and the IEBC in compromising and withdrawing High Court Petition No 150 of 2013 and issuing a certificate to the 1st Respondent. I have already ordered some of those paragraphs to be struck out.

40.The Elections Act at Section 72 recognizes, for example, the following offence by a political party:

(1)A candidate who, during a nomination or an election campaign engages in or knowingly aids or abets an agent or any person who supports the candidate to engage in bribery, violence or intimidation against the opponents of the candidate or any other person under this part shall be disqualified by the Commission and shall not be eligible to participate in the elections.

(2)Where a political party knowingly nominates a candidate who does not meet the requirements of the Constitution, the political party commits an offence and shall be disqualified from nominating a candidate to contest in that election or in the next election in that electoral area.

(3)Where the offence under subsection (2) is discovered-

(a)After the candidate has been nominated to contest in an election, that candidate shall be disqualified by the Commission and shall not be eligible to contest in that election; or

(b)After the candidate has been elected, that candidate shall be disqualified by the Commission and shall not be eligible to contest in the next election.

(4)Where a political party under subsection (2) commits an election offence which the Commission considers to be of a grave nature or continually repeats the offence, the presidential candidate of the political party shall not be eligible to contest in a presidential election during the elections or subsequent election as a result of any vacancy in the office of the President where the presidential candidate knowingly abets or aids in the election offence.

41.The court is therefore not being truly called upon in this petition to make a finding as to the culpability of TNA in the conduct of the elections in Mathare Constituency. The court is only required to determine whether the 3rd respondent, as a member of the staff of the Commission committed the election offence that is described in Section 59 (1) (k) of the Elections Act. The penalty that is prescribed under section 106 seems to be aimed at individual persons.

42.Mr. Kinyanjui is not holding brief for TNA. There remains however a real risk of an adverse finding against TNA if the allegations in paragraphs 14 a, 14 e, 15 b, 19 b, and 20 b were to be sustained. That may occasion a failure of natural justice. It fortifies my earlier decision to strike out those paragraphs. In *Electoral Commission of Kenya and another Vs Mwakesi* [2009] KLR 511 the returning officer was removed as a party to the proceedings for want of personal service in accordance with the rules. An application was made to strike out the petition on the ground that an important and absolute party to the petition had been removed from it. It was also argued that to allow the petition to continue would be prejudicial to the Electoral Commission (ECK) in that it would be tantamount to asking the court to adjudicate upon the petition against the ECK on the basis of unproved wrongs or mistakes allegedly committed by a party not before it. The ECK sought to have the petition struck out on similar grounds. The court declined to strike out the petition, which decision was upheld by the Court of Appeal.

43.The Court of Appeal restated the dicta of Fletcher Moulton L. J. in *Dyson Vs. Attorney General* (1911) KB 418:

“But from this to the summary dismissal of actions because the Judge in chambers does not think they will be successful in the end lies a wide region, and the courts have properly considered that this power of arresting an action and deciding it without trial is one to be very sparingly used and rarely, if ever, excepting in causes where the action is an abuse of legal procedure... To my mind, it is evident that our judicial system would never permit a plaintiff to be “driven from the judgment seat” in this way without

any court having considered his right to be heard, excepting in cases where the cause of action was obviously and almost incontestably bad”.

See also *Alice Muthoni Wahome Vs James Maina Kamau and 3 others* Nairobi, Court of Appeal Civil Appeal 217 of 2011 (unreported). That case can be distinguished. The aggrieved party was the Electoral Commission. It had conducted the election through the presiding officer. TNA as a party is not in the same shoes. But having nominated the 1st respondent as a candidate, I cannot say that the petition is incontestably bad merely for want of joinder of TNA.

44. The 1st Respondent submitted there is a misjoinder of the reliefs sought. Rule 32 reads as follows:

“32. (1) Where the only issue in the election petition is the count or the tallying of the votes received by the candidates, the Petitioner may apply to the court for an order to recount the votes or examine the tallying.

(2) The Petitioner shall specify in the election petition that he does not require any other determination except a recount of the votes or the examination of the tallies”.

If I understood the applicant correctly, he was suggesting that a petitioner cannot seek any other relief if he prays for a recount. Paraphrased, he was saying that there cannot be a mixture of reliefs. That is not a correct reading. Rule 32 must be read together with Rule 33 that gives a petitioner the additional right to seek a recount or retallying of votes. Rule 33 provides as follows;

“33. (1) The parties to the proceedings may, at any stage, apply for scrutiny of the votes for purposes of establishing the validity of the votes casts.

(2). Upon an application under sub-rule (1), the court may, if it is satisfied that there is sufficient reason, order for a scrutiny or recount of the votes”.

45. Furthermore, section 82 of the Elections Act gives the court express power either on its own motion or upon application by any party to order scrutiny of votes. Rule 32 requires that a petitioner make it clear where scrutiny, retallying or recount is the only relief that they are seeking in the petition. In view of Rule 33, Rule 32 does not in any way preclude the plea for other reliefs. I find little or no merit in that ground.

46. It is the 1st Respondent’s case that the petition should be struck out for being nebulous or generally vague. The Court is at liberty to strike out a petition that does not disclose a semblance of a cause of action. The petition refers to *election for Member of Parliament* for Mathare. There is obviously no such elective office under the Constitution of Kenya 2010. Parliament is now a bicameral legislature consisting of an independent National Assembly and an independent Senate. The petition is clearly ambiguous as to what election it relates to. The petitioner’s learned counsel or the petitioner cannot escape the blame for poor draftsmanship. I have already referred to irregular titles in the “affidavits” in support of the petition. In the interests of justice, I sustained the offending witness statements to salvage the petition.

47. The petition makes repeated reference to the election of “Member of Parliament for Mathare Constituency”. It is there in the title to the petition and headings of pleadings all the way to the main prayers of the petition. The petition challenges the circumstances that led to the declaration of George Mike Wanjohi as the “Member of Parliament for Mathare Constituency”. It is only by inferring and assuming some facts that one can say that the petition does not seek to annul the election of say a senator in Nairobi or any other election contested on March 4th 2013.

48. When a petitioner comes to court to challenge an election, it is important to specify the election that is contested. The voters in Mathare constituency cast their votes in relation to 6 electoral seats. The court takes judicial notice that Mathare Constituency is in Nairobi County. In that county, and in Mathare, there were elections conducted simultaneously for member of the National Assembly, Senate and Governor for example. The prayers should thus be specific that the orders sought relate to the National Assembly seat

for Mathare Constituency. In other circumstances, the court would have considered the misdescription to be a sufficient ground for striking out the entire petition. However, the court thinks it prudent to remain faithful to the letter and spirit of Article 159 (2) (d) of the Constitution and the overriding objective as set out in Rule 4 of the Elections (Parliamentary and County Elections) Petition Rules, 2013.

49. But while that may help to sustain elements of the petition, it cannot, unfortunately extend to the prayers at prayers f, g, h and i of the petition. The prayers, in view of the ambiguity of the contested office are couched in such generality that the recount or retallying or inspection of documents may extend or apply to any of the elections that took place on 4th of March 2013 in Mathare or what the petitioner calls “Mathare Parliamentary election”. I have stated that the legal framework and procedures of electoral dispute settlement are very strict on the nature of pleadings, reliefs and timelines down to the nitty gritty of the font size of a newspaper advertisement. One only needs to look at article 88 of the constitution, Part VII of the Elections Act 2001 sections 74 to 85 and the Elections (Parliamentary and County Elections) Petition Rules 2013 to appreciate the very elaborate and strict procedures for electoral dispute settlement. I would refer here to the election petition in *Muiya Vs Nyaga & 2 others* [2008] 2 KLR (EP) 493 at 498:

“On this strictness, this Court has one thing or two to say:

Elections are serious matters of a State with its citizens. As elections are held, the outcome announced, the electorate must know their political leader quickly and assuredly. There must be limited or no uncertainty about this. Roles of elected representatives are many and diverse vis a vis their electors. To perform the roles well the elected must be sure of his post and the elector of his leader. And the sooner the better to give that certainty. So either the election is accepted at once and if challenged, that challenge must be moved along to the end swiftly enough to restore certainty. And for that, election petitions are governed by this Act with its Rules in a very strict manner. Election Petition law and the regime in general, is a unique one and only intended for elections. It does not admit any other laws and procedures governing other types of disputes, unless it says so itself. Here it spells out firmly and clearly that a petition must be presented and served within 28 days of the publication of the elections results. Anything outside that time is invalid and this one here is thus invalid”.

50. Prayers f), g), h) and i) are drawn in a poor style. They are general and have no reference at all to the electoral area. I will set them out verbatim:

f) There be a scrutiny of the rejected, void and spoiled ballot papers.

g) There be a scrutiny of the register of elections.

h) There be a scrutiny of the counterfoils of the votes cast and the counterfoils of all the other ballot papers used, rejected or spoiled.

i) There be a recount of the ballot papers cast at the election, the retallying of the totals of votes cast in all the polling stations in the election.

51. *Prima facie* and without more, the prayers are nebulous and opaque and their boundaries permeate and extend beyond the *national assembly* election in Mathare constituency. Since the prayers in the petition at f), g), h), and i) are vague and ambiguous they would, in a sense, only be granted in vain. I am then persuaded to strike out f), g), h), and i) of the petition *in limine*. For the reasons outlined earlier, paragraphs 14 a, 14 e, 15 b, 16, 19 b and 21 of the petition are also struck out.

52. The petition contains alternative prayers. Prayer (e) prays as follows;

“e). There be a scrutiny of the votes cast and recorded as having been cast in the parliamentary election in “Mathare constituency”.

The petition itself is instituted In *The Matter of the Parliamentary Election for Mathare*

Constituency'. Like there I have said, there is no such elective office for that constituency. That is clear from Article 93 of the constitution. The court can only grant that which is prayed for in a petition. See Cheshire Vs. Ruto and 2 others [2008] 2 KLR (EP) 526. If one lumps up both houses of parliament, then the voters in Mathare on 4th March 2013 were not just voting for their member of National Assembly: but also their senator for Nairobi County. Those two elective offices comprise the *parliamentary* election in Mathare. This is not a matter of form. It goes to substance. The prayer for scrutiny as couched in e) would then encompass the two elective offices. I have dealt with the inherent danger of that ambiguity. While I was ready to shut my eyes to the ambiguity in the descriptive parts of the petition, and to sustain the petition as much as practicably possible, there are serious patent and latent flaws in the wording of the prayer e). If granted as prayed, it would extend the scrutiny to the entire *parliamentary* election in Mathare Constituency. It cannot be amended now. That alternative prayer is thus *suo moto* struck out.

53. Paragraph 26 of the supporting "affidavit" of Steven Kariuki (which I said is only truly a sworn witness statement) made on 19th March 2013 states as follows:

"On the 8th day of March, 2013 the 1st, 2nd and 3rd Respondents colluded to compromise and had the 1st Respondent withdraw the petition on the misrepresentation by the 2nd and 3rd Respondents that I had been declared winner of the election in error and that they would cancel my certificate and issue another certificate to the 1st Respondent. True copies of hand written proceedings in Court in that regard are exhibited herewith and marked as "SK 7".

54. The proceedings referred to are handwritten Judges notes or transcript of proceedings in the High Court of 8th March 2013. Although the petitioner makes the grave charge of collusion and compromise over the High Court petition by the 1st, 2nd and 3rd respondents, he seems to suggest that the evidence is to be found in the "true copies of the handwritten proceedings". To the extent that the proceedings in Court are introduced into the serious allegations of collusion, compromise or even fraud, it is scandalous. I will thus strike out paragraph 26 of the statement of Steven Kariuki sworn on 19th March 2013 for being scandalous.

55. Section 77 (2) of the Elections Act 2011 and Rule 13 of the Elections (Parliamentary and County Elections) Petition Rules 2013 provide for the modes of service of an election petition. They are a departure from the era of personal service touted in Kibaki Vs Moi [2000] 1 E A 115. Now, service can be either personal on the respondent or by advertisement in any daily newspaper with national circulation. In the latter case, the advertisement must be carried within 14 days and conform with the requirements of Form EP 3 in the Rules. Section 77 (2) provides that the petition may be served *personally*. Rule 13 (a) of the Petition Rules states that the petition shall be served by *direct service*. Article 87 of the Constitution also uses the term *direct* service. On the face of it, the two terms may seem different but on closer scrutiny *direct* or *personal* service is mere tautology: it simply means service personally on the respondent. In our instant case, the respondent's counsel of record, at his instance, was served on 2nd April 2013 with the petition.

56. There is there an inherent admission that the 1st respondent *himself* was not served personally. I agree with the view of the Court of Appeal in Mint Holdings Limited and another Vs Trust Bank Limited Nairobi, Civil Appeal 249 of 1999 [2000] e KLR stated it was held:

"It is quite obvious that the appellants' advocates were bound to serve the summons and copy plaint on the advocates on record. Apart from what order III rule 8 as read with order III rule 3 of the Civil Procedure Rules says, it is a matter of common sense that once an advocate has been appointed to act for a party and he has taken the trouble to lodge a notice of appointment of advocates, service of any process ought to be made on that advocate".

57. I thus find there was effective personal service. But in the unlikely event I am wrong, I am satisfied that the respondent was then served by substituted means by advertisement in the Daily Nation newspaper of 21st March 2013. I have perused that advertisement. True, it did not name the petitioner in

person. There is no such requirement in Rule 13 of the Petition Rules. Even if there were, the omission does not vitiate the notice because the details that were published sufficiently identify the petition. It is addressed to the 3 respondents; it identifies the registration number of the petition as filed in this Court. It identifies the firm of advocates acting for the petitioner but without an address of service. It gives the respondents 14 days to answer to the petition. It has no proper heading or name of the petitioner. I have also looked at the original advertisement in the Daily Nation of 21st March 2013. The size is small but well within the requisite measurements. I am not persuaded that the font size did not conform to requirements of Form EP 3. Certainly, the petitioner could have dug a little deeper in his budget to carry a more prominent advertisement.

58. The applicant submitted that the petitioner did not file an affidavit of service or provide a copy of the advertisement. I think that is a false allegation. The High Court is a court of record. I have seen on the record an affidavit of service filed on 12th April 2013. There is also an earlier affidavit of service of the same deponent sworn on 5th April 2013. It is sworn by Isaac Opany, a process server. He depones at paragraph 4 that the notice was published. He annexes a copy of it. Even the notice of acceptance dated 19th March 2013 acknowledged by the 1st respondent's learned counsel contains a copy of that advertisement.

59. I agree with the 1st respondent that the annexures to those affidavits are not marked or annexed strictly in accordance with Rule 9 of the Oaths and Statutory Declarations Act. But to impugn the notice for the reasons proposed by the respondent would be, in Justice Ringera's words, to elevate technical requirements of form to a fetish. See *Microsoft Corporation Vs Mitsumi Computer Garage* [2001] KLR 470. I am persuaded by that purposive approach in interpreting statutes. It also finds support in section 72 of the Interpretation and General Provisions Act. Fundamentally, the 1st respondent, and indeed all other respondents have entered unconditional appearances to the petition. The argument on non-service is thus limping and water under the bridge. *Wanjiru Vs Mwangi* [1990] KLR 348.

60. The 1st respondent takes up cudgels on the two Digital Video Devices (DVDs). The devices are annexed to the petitioner's deposition sworn on 19th March 2013. The applicant's position is that the DVDs are inadmissible for want of a certificate to certify their authenticity. The respondent's reply is that it would be premature to exclude that evidence at this stage.

61. The question whether the DVD evidence will be allowed depends largely on its relevance and admissibility. Those are cardinal precepts of the law of evidence. If no certificate to verify its authenticity will be produced, it becomes fatal. The appropriate time to place the objection on admissibility of that evidence is at the trial. For the time being there is no difference between that DVD evidence and the witness statements filed by the parties. The capacity of those witnesses and admissibility of their evidence is not assured at this stage: it will be the true province of the trial court guided by the Evidence Act. The principle of restraint on the draconian power to strike out that I dealt with earlier is equally applicable here. It is better to err on the side of reason now than to regret a hasty decision to strike out the DVD evidence.

62. I am well guided on those points by *Cross & Tapper on Evidence* 8th Edition, Butterworths, London at page 52:

“Most discussion has hitherto centered on the admissibility of tape-recordings, but this has now been supplemented by a growing stream of authority on the admissibility of other media such as film, video-tape and computer output. In all of these cases the evidence is real evidence when it is tendered to show what it was that was recorded. The relevance of what was recorded, and the operation of other exclusionary rules may determine ultimate admissibility. Thus if a recording were obtained illegally or in breach of public policy it might be rejected on these grounds, but not because it was a recording. If the matter recorded is itself in issue, then the recording is capable of constituting real evidence of it. At a trial by jury the party relying on a recording or film must satisfy the Judge that there is a prima facie case that it is authentic, and it must be sufficiently intelligible to be placed before the jury”.

63. In a nutshell, I am not saying there is no merit in the objection to the DVD evidence: Only that the applicant has placed the cart before the horse. That ground collapses.

64. I would in conclusion return to the narrative of the gains of the new Constitution of Kenya 2010. This petition has many technical faults. Some of those technicalities go to form. Some cut quite close to failure to meet statutory requirements of form and content. In another place and time and absent the overarching benevolence of Article 159 of the constitution on substantial justice, the entire petition might have as well withered under attack. See for example *Mututho Vs Kihara* [2008] KLR 10, *Waluke Vs Wetangula & 2 others* [2009] KLR 735, and *Kibaki Vs Moi* [2001] 1 E A 616. This Court is now enjoined to navigate around those technical failures and to aim at resolving the primary dispute between the parties. By seeking to go to the root of the electoral dispute, the Court is only being faithful to the Constitution, the Elections Act 2011 and the regulations thereunder. Where the petition has deviated and drifted too far off course, I have, in the interests of justice, and for considered reasons struck out the offending parts of the petition to create a balance between the parties, to retain them at equal arms length and to safeguard the tenets of a fair trial.

65. For all the above reasons, the 1st respondent's notice of motion dated 23rd April 2013 succeeds in part as follows. Paragraphs 14 a, 14 e, 15 b, 16, 19 b, 20 b and 21 of the petition are struck out *in limine*. Paragraph 26 of the sworn witness statement of Steven Kariuki dated 19th March 2013 is struck out. Prayers e), f), g), h) and i) in the petition are also struck out. The remainder of the petition shall be set down for hearing.

Costs shall abide the final judgment.

DATED and **DELIVERED** at **NAIROBI** this 16th day of May 2013.

G.K. KIMONDO

JUDGE

Ruling read in open court in the presence of:

Mr. N.H. Havi with him Ms. Ng'ania and Mr. Kariuki for the Petitioner instructed by Havi & Company Advocates.

Mr. H.J. Kinyanjui for the 1st Respondent instructed by J. Harrison Kinyanjui & Company Advocates.

Mr. P.O. Nyamodi for the 2nd and 3rd Respondents instructed by V.A. Nyamodi & Company Advocates.

Mr. Collins Odhiambo, Court Clerk.