



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT O KENYA AT KAKAMEGA**

**ELECTION PETITION NO. 8 OF 2013**

**BENJAMIN OGUNYO ANDAMA.....PETITIONER**

**V E R S U S**

**1. BENJAMIN ANDOLA ANDAYI..... 1<sup>ST</sup> RESPONDENT**

**2. SALLY CHESANG,**

**(RETURNING OFFICER)..... 2<sup>ND</sup> RESPONDENT**

**3. INDEPENDENT ELECTORAL &**

**BOUNDARIES COMMISSION ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

**Background**

1. After going through Pre-trial procedures on 6<sup>th</sup> June 2013, the court in the presence of counsel for all the parties, fixed the petition for hearing on 17<sup>th</sup>, 18<sup>th</sup>, 19<sup>th</sup>, 20<sup>th</sup> and 21<sup>st</sup> June 2013 at 9.30 a.m.
2. In addition, the court made the following orders –
  - **IEBC to deliver the election boxes to the court by 13/6/2013.**
  - **Deputy Registrar to contact and inform all counsel for the parties on the time and place of delivery of the election boxes, and the counsel may send agents to witness the delivery. IEBC will also deliver the results of the election to the Deputy registrar.**
3. I observe that the delivery of the election boxes was done and the original form from IEBC, indicating the condition of each box was filed in the court file. The said form was signed by the Returning Officer of Khwisero Constituency, Selly Chesang, J. M. Mulei, court Executive Officer and C. K. Kendagor (Deputy Registrar, High Court Kakamega), in the presence of Ashiono Auma Janerose, agent for the petitioner Benjamin Agunyo Andama and Vivian Ayuma Asiachi, agent for the 1<sup>st</sup> respondent Benjamin Andola Andayi.
4. When the petition came up for hearing on 17/6/2013, counsel for the petitioner informed the court that he had on that day filed a Notice of Motion under Article 159 of the Constitution of Kenya and Sections 59 (a), (j), (k), 67 (1), 76 (2), (3) and (5), and 83 of the Elections Act and Rule 12 (3), (4) and (5) of the Elections (Parliamentary and County Elections) Petition Rules 2013(Election Petition Rules). In addition, he filed a Supplemental Petition.
5. The application seeks the following orders –

1. **THAT this application be certified as urgent.**
2. **THAT service of this application be dispensed with in the first instance.**
3. **THAT leave be granted to the applicant to file affidavits to be sworn by the Petitioner, Janerose Ashiona Auma and Agnes Amanya in support of the Supplemental Petition.**

**or in the alternative**

4. **THAT the Petitioner, Janerose Ashiona Auma and Agnes Amanya be granted leave to give oral evidence in support of the Supplementary petition.**
5. **THAT costs of this application be provided for.**
6. The application lists several grounds. It is supported by an affidavit sworn on 16<sup>th</sup> June 2013 by the petitioner. The affidavit annexed a copy of the report on the delivery of the boxes already filed in court as "BOA".
7. The SUPPLEMENTAL PETITION was filed under Section 59 (a), (j),(k), (l) (e) 76 (2), (3) and (5) of the Elections Act. This SUPPLEMENTAL PETITION listed several complains as under –
12. **Your Petitioner nominated Jane Rose Ashiona to represent him at the said handing over of the ballot boxes and results.**
13. **Parties were instructed to gather at the Agricultural Finance Corporation offices, Kakamega for further instructions.**
14. **On arrival at the said offices, the Petitioner's agent and representative, Ms. Jane Rose Ashiona found the 1<sup>st</sup> Respondent's chief agent one Vivien Ayuma Asiache next to a truck parked outside the said AFC offices which was identified as holding the said ballot boxes and election results for Khwisero constituency.**
15. **The Petitioner had also sent his agent one Ms. Agnes Amanya to the Butere Cereals go down to witness the transfer.**
16. **1<sup>st</sup> Respondent's said representative in the company of the 2<sup>nd</sup> Respondent and other persons believed to be officers of the 3<sup>rd</sup> Respondent entered the Butere Cereals go down where the ballot boxes and associated results were kept took a while in the go down before loading them onto the truck.**
17. **It is after the said activities by the 1<sup>st</sup> Respondent's said representative, the 2<sup>nd</sup> Respondent and the 3<sup>rd</sup> Respondent's officials that it was noted and acknowledged by your petitioner's agent and all persons lawfully present and entitled to be present that there was tampering with ballot box seals and results.**

#### **PARTITULARS OF INTEFERENCE WITH BALLOT BOXES AND RESULTS**

- i. **The Form 35 that was plastered on the ballot box at the time of announcing election results for Mwhila Hospital Polling station is missing.**
- ii. **Seal Number 1243779 of Ballot Box Number 126813 for Elukanji Primary School polling station that was put in place after announcement of election results was removed.**
- iii. **Seal Number 3984383 of Ballot Box Number 127379 sealed with a different number tag instead of tag number 3984383 that was in place after announcement of election results of Mushichibulu Primary School polling station.**
- iv. **Seal Number 1217361 of Ballot Box Number 121743 Eshibinga Primary Polling Station Stream 1 that was put in place after the announcement of election results was removed and replaced with seal number 1243895.**
- v. **Seal Number 3663264 of Ballot Box Number 127467 Eshibinga Primary Polling Station Stream No. 2 that was put in place after the announcement of election results was broken.**
- vi. **Results for Emakuhe Primary School, Form 35 that was posted on the ballot box after the announcement of election results was missing.**
- vii. **Seal Number 1073386 of ballot box number 127468 Mushikongolo Primary School that was in place after the announcement of the results was removed and replaced by seal number 1073396.**

- viii. Results for Mundaha Primary School, form 35 that was posted on the ballot box after the announcement of election results was missing.
- ix. Seal Number 1269251 of ballot box number 125016 Emanyatta Tea Buying Centre that was in place after the announcement of the election results was missing.
- x. Results for Shirotsa Primary School Polling Station, Form 35 that was posted on the ballot box after the announcement of election results was missing.
- xi. Seal Number 12170 of ballot box number 120784 Eshikhungula Primary School Polling Station that was in place after the announcement of the results was broken.
- xii. Seal Number 0944774 of ballot box number 129785 Namasoli Primary School Polling Station that was in place after the announcement of the results was broken.
- xiii. Seal Number 3984023 of ballot box number 129781 Ebulonga Primary School Polling Station that was in place after the announcement of the results was missing. The aperture seal number is also changed.
- xiv. Seal Number 1073260 of ballot box number 126814 Emwaniro Primary Polling Station Stream 2 that was in place after the announcement of the results was missing.
- xv. Results for Emutalli Nursery School Polling Station, Form 35 that was posted on the ballot box after the announcement of election results was missing.
- xvi. Seal Number 1295679 of ballot box number 126765 Ebukwala Primary School Polling Station that was in place after the announcement of the results was partly broken.
- xvii. Two Seals that were not Numbered by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents for ballot box number 125027 Emako Primary School Polling Station that were in place after the announcement of the results were broken.
- xviii. Results for Mushiangubu Primary School Polling Station, Form 35 that was posted on the ballot box after the announcement of the results was missing.
- xix. Seal Number 1869954 of ballot box number 129849 Khumusalaba Mkt. Stream 2 that was in place after the announcement of the results was removed and replaced by seal number 18669938.
- xx. Seal Number 1869969 of the ballot box number 126733 Mundoli Primary School that was in place after the announcement of the results was removed and replaced by seal number 1869967.
- xxi. Seal Number 1269065 of ballot box number 126681 Mukhunzulu Primary School that was in place after the announcement of the results was broken.
- xxii. Seal Number 1654517 of ballot box number 126810 Shirali Primary School that was in place after the announcement of the results was removed. The broken and replaced seals aforesaid is representative of the systematic tampering with ballot boxes in the aforesaid polling stations by Vivien Ayuma, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents for the benefit of the 1<sup>st</sup> Respondent after the publication of the election results.

- 18. The custody, loading and transfer of ballot boxes and election results onto the truck by the 1<sup>st</sup> Respondent's representative and the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in the absence of duly authorized representatives of your Petitioner breached the integrity of the ballot boxes and election results.
- 19. For the foregoing the respondents are guilty of election offences, corrupt and illegal practices under the Elections Act.

- 8. The SUPPLEMENTAL PETITION was not filed with any supporting affidavit or any other document annexed to it.
- 9. When counsel for the respondents were informed of these new developments, Mr. Ouma for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents indicated that he wanted to argue a preliminary objection to the documents filed by the petitioner. The court then allowed parties to come on 18<sup>th</sup> June 2013 to argue the points of objection.
- 10. Following the above court's direction, counsel for the 1<sup>st</sup> respondent filed four points of preliminary objection as follows –

- 1. The application is incompetent, bad in law, fatally and incurably defective as it offends the

- mandatory provisions of Article 87 (2) of the Constitution of Kenya 2010, Section 76 (2), (3) and (5) of the Election Petition (should be Act).
2. The court lacks the jurisdiction to entertain the application that has been filed or to enlarge time for filing and serving the supplementary petition.
  3. The application is fatally defective and otherwise an abuse of the process of the court as it is contrary to the mandatory provisions of Rule 17 (2) of the Elections (Parliamentary and County Elections) Petition Rules 2013.
  4. That the leave is sought at a late stage with the sole intention to mutate the petition and gravely prejudice the 1<sup>st</sup> respondent who will not have a real chance or any chance at all to respond to the supplementary petition or the proposed affidavits that the petitioner wishes to admit.
11. Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents on the other hand filed a notice of Preliminary Objection which also had 4 grounds as follows –
1. That the provisions of section 76 (5) of the Elections Act, 2011 do not permit filing of a Supplemental Petition on any other ground other than those mentioned in Section 76 (2) and 76 (3).
  2. The Supplemental Petition has been filed out of time without leave of court.
  3. That the allegations in the Notice of Motion (Paragraph XXV) and the entire Supplemental Petition are *ex post facto* thus inconceivable grounds for the nullification of an election.
  4. That the affidavits in support of the Supplemental Petition and the Notice of Motion are scandalous, irrelevant and oppressive in contravention of Order 19 rule 3.
12. On 18<sup>th</sup> June 2013 the parties counsel made oral submissions in court.

### **1<sup>st</sup> Respondent's counsel submissions**

13. Mr. Omwanza for the 1<sup>st</sup> respondent submitted that a
- petition and any supplementary petition had to be filed within 28 days of the announcement of the results of the election. He relied on Article 87 (2) of the Constitution of Kenya 2010. Counsel contended that the petition had also to be served within the time duration set by law. Counsel argued that the application and supplemental petition filed on 17/6/2013 and served on the same day contravened the strict time limitations as the elections were held on 4/3/2013 which was more than two months ago.
14. Counsel argued that the court did not have jurisdiction to entertain the documents filed. He relied on Section 76 (1) (a) of the Elections Act which stated that a petition be filed within 28 days of gazettelement of the results of the election and served within 15 days of filing. Counsel argued that only under Section 76 (4) of the Act, can an amended election petition be filed, but even then, the same had to be filed within the same 28 days. Counsel argued that the petitioner has not even asked for enlargement of time to file the supplemental petition as required under Rule 20 of the Election Petition Rules 2013.
15. Fourthly, counsel argued that the Notice of Motion seeks leave to file further affidavits through the grounds and Particulars. Since the grounds and particulars in the Notice of Motion raise new grounds in the petition, that cannot be allowed in law as it would prejudice the 1<sup>st</sup> respondent who would be required to respond to all the new allegations.
16. Fifthly, counsel argued that the Notice of Motion was departure from the petition already filed which was not permissible in law. Counsel relied on the Supreme Court case **of Raila Odinga - vs IEBC and others – Petition 5 of 2013** – in which the application and scope of Article 159 (2) of the Constitution of Kenya 2010 was considered.
17. Counsel also relied on the case of **James Osogo -vs- Simon Chacha & Another - Elecation Petition No. 8 of 1988** (unreported) where the court struck out amendment of a petition without

leave. Counsel also relied on the case of **Muiya -vs- Nyaga & Others [2002] Z EA 617** which applied the principles in **Re Gideon Waweru Githunguri [1962] EA** on compliance with timeliness.

### **2<sup>nd</sup> and 3<sup>rd</sup> Respondent's counsel submissions.**

18. The counsel for 2<sup>nd</sup> and 3<sup>rd</sup> respondents, Mr. Ouma, submitted firstly that the Notice of Motion and Supplemental Petition do not comply with Section 76 of the Election Act. The supplemental petition and Notice of Motion relate to alleged offences having been committed by 2<sup>nd</sup> and 3<sup>rd</sup> respondents in collusion with 1<sup>st</sup> respondent. In counsel's view, sub section (2) only related to corrupt practices by the 1<sup>st</sup> respondent. Counsel also argued that illegal practices could also only be alluded against the person against whom an election is being challenged. Counsel sought to rely on the case of **George Alwanda -vs- Kangara & Others (2013) eKLR**.
19. Secondly, counsel submitted that the supplemental petition should have been filed within 28 days of the declaration of the election results. Reliance was placed on Section 76 (2), (3) and (5) of the Elections Act.
20. Thirdly, counsel argued that the alleged corrupt acts were committed after the election results were declared. Therefore, they could not affect the election results. If the allegation was on tampering with evidence, then in counsel's view, there were adequate remedies provided by law, but not the filing of a fresh petition. Reliance was placed on a case of **Re Semri [2003] sc** from Papua New Guinea Supreme Court.
21. Fourthly, counsel argued that the affidavits in support of the application and petition were scandalous, irrelevant and contained oppressive matters contrary to Order 19 Rule 3 of the Civil Procedure Rules. Counsel argued that the affidavit sworn by the petitioner, who was not at the warehouse was hearsay. Counsel stated that the deponent wrongly relied on the document marked "BOA" which was not a return. In counsel's view, the deponent should have made a request for the document by notice to produce to the 3<sup>rd</sup> respondent, before using the same, which he had not done.
22. Finally, counsel argued that the affidavit in support of the petitioner's Notice of Motion wrongly insinuated bad motive by the respondents, while the petitioner was infact not present during the alleged tampering. The deponent merely gave opinions in various paragraphs which violated Order 19 of the Civil Procedure Rules. Counsel relied on the case of **Surgipham Pharmacy Ltd. -vs- Aksher Pharmacy Ltd. [2004] eKLR** in which **Emukule, J.** highlighted the definitions of "irrelevant" and "oppressive". Reliance was also placed on Hasburys Laws of England 3<sup>rd</sup> and 6<sup>th</sup> Edition and Black's Law Dictionary.

### **Petitioner's counsel submissions.**

23. Mr. Simiyu, learned counsel for the petitioner, in response submitted that there were no legal grounds demonstrated by the respondents for striking out the affidavit. He relied on the **Surgipham Pharmacy** case (supra). Counsel sought to clarify that the affidavit filed was only in support of the Notice of Motion and not the Supplemental Petition.
24. Counsel contended that the said affidavit sought for leave to bring further evidence by way of affidavits under Rule 12 (4) & (5) of the Election Petition Rules. Counsel argued that the intended affidavits were not yet on record, in contradistinction to the **Emukule J.**'s decision in the **Surgipham Pharmacy** case (supra). Counsel argued that there had been no demonstration that there were specific paragraphs in the affidavit that were irrelevant or oppressive.
25. Counsel further argued that the arguments by his colleagues were preemptive of **Rule 12 (4) & (5)**

- of the Election Petition Rules** for the petitioner to comply with. Counsel argued that under **Order 19 (3) (i)** of the Civil Procedure Rules, in interlocutory proceedings, affidavits can contain information the sources of which have been disclosed. In the present case, the petitioner provided the source of the information in his affidavit, so there can be nothing objectionable to the affidavit.
26. Counsel argued that the petitioner had deponed to broken Seals which was a serious matter. Counsel relied on the Pagua New Guinea case of **Semri** (supra) and stated that he agreed with Mr. Ouma that important matters had to be pleaded and proved. Counsel submitted that the present case was similar to the **Semri** case (supra).
27. On **section 76 (2) & (3)** of the Election Act, counsel agreed with Mr. Ouma that the provisions did not apply to the 2<sup>nd</sup> & 3<sup>rd</sup> respondents. Counsel argued however that where the 2<sup>nd</sup> and 3<sup>rd</sup> respondents had misconducted themselves to benefit the 1<sup>st</sup> respondent, they then became responsible.
28. Counsel submitted that the case of **Raila Odinga** (supra) was not applicable to the present situation. In counsel's view, the court in that case stated that the petitioner had filed further affidavits without leave of the court. In the present case, the petitioner has not filed the intended further affidavits. Secondly, that case was a matter in a Presidential election Petition where the time frame for conclusion of the case was within 14 days unlike the present case where the period is 6 months.
29. On whether the Supplemental Petition was a departure from the main petition, counsel relied on **Article 87 (2)** of the Constitution. Counsel submitted that the petitioner complied with the 28 days deadline for filing a petition. Counsel submitted that what was now in issue was a supplemental petition under **section 76 (5)** of the Election Act. In addition **Article 86**, of the Constitution was relevant to the present case. In counsel's view, **Article 87 (2)** of the Constitution was inapplicable.
30. Counsel argued that since the Preliminary Objections were similar, he would concentrate more on the Preliminary Objection of the 2<sup>nd</sup> & 3<sup>rd</sup> respondents. Counsel submitted that under **S. 76 (2)** of the Election Act, a person could complain of any illegal practice. Illegal practices had been defined under **Section 2**, which refers to Part IV of the Elections Act. Counsel argued that a supplemental petition can be filed for tampering with election boxes after the announcement of the election results. He urged the court to give the sections of the law a plain meaning.
31. Counsel referred also to **Section 76 (4)** of the Election Act on time limits and asked the court to give the section a plain meaning. In counsel's view, only when a petitioner wants to amend a petition is he required to file the same within 28 days. In any case, the 28 days applied to irregular practices committed within 28 days of the publication of the results. If the irregularities were committed after that, there was no time limitation. Counsel submitted that **Section 76 (5)** which provides for filing of supplemental petitions had no requirement for leave or a time period. He referred to **Rule 82 (A) and 85** of the Court of Appeal Rules on the requirements for leave.
32. Counsel relied on the case of **Manchester Outfitters Ltd. –vs- Standard Chartered Nbi Civil Application 42 of 2001** relating to leave. In Counsel's view, if Parliament intended that leave should be granted, they would have specifically stated so. Counsel also relied on the case of **Hosea Kiplagat -vs- Sammy Mwaita [2013] eKLR** on the interpretation of **Section 76 (5) of the Election Act**. In Counsel's view, that sub-section was meant to cure a mischief committed after publication of the results. He relied on the English case of Hyden case and also the definition of **“amending”** and **“supplemental”** in Black's Law Dictionary.
33. Counsel urged the court not to place undue regard to technicality. Counsel urged the court to dismiss the Preliminary Objections.
34. In a short response, Mr. Omwanza for the 1<sup>st</sup> respondent, submitted that **Rule 10 (3)** of the

Election Petition Rules required the petition to be filed with a supporting affidavit. Counsel submitted that the affidavit filed was oppressive as it alleged criminality against Vivian Ayuma who is not a party to these proceedings.

35. Counsel also argued also that **section 76 (5)** of the Election Act cannot be read separately from **(2) and (3)**. In counsel's view, a supplemental petition can only be filed within 28 days of publication of the election results. In addition, **Rule 17 (2)** of the Election Petition Rules restricts the petitioner from raising new grounds. Counsel thought that if the court ruled otherwise, a petitioner could raise fresh issues in the middle of the trial.

36. Mr. Ouma for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents in a short response stated that **Section 87 (1)** of the Election Act makes an election Court inquisitorial, a departure from the adversarial procedure. The court could therefore enquire into allegations of illegalities even if committed during the trial and report to the DPP. That inquiry however did not entitle the amendment of an election petition.

37. Counsel also submitted that **section 76 (5)** of the Election Act is not separable from subsection **(2) and (3)** of the same section which limit time.

### **Court's Determination.**

38. I have considered the issues raised. I have considered the authorities cited to me. I have to caution myself that at this preliminary stage, it is not prudent for the court to delve into issues that could have the effect of determining the substantive issues in the petition.

39. I have been asked by counsel for the respondents to strike out the Supplemental Petition and Notice of Motion filed by the petitioner. Striking out documents filed is a draconian action. Courts are slow to do so. See **Microsoft Corporation -vs- Mitsumi Computer Garage Ltd. And Another [2001] KLR 470** where Ringera, J. as he then was stated –

***“Deviations from or lapses in form and procedure which do not go to the jurisdiction of the court or prejudice the adverse party in fundamental respect ought not 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”.***

40. The above **Microsoft case** was cited in the recent election petition case between **Hosea Kiplagat -vs- Sammy Mwaita & Others, Nairobi Election Petition No. 11 of 2013 – [2013] eKLR.**

41. There is also the overriding objective under Rule 4 and 5 of the Election Petition rules – which enjoins the election court to operate under certain legal principles. The rules provide –

4 (1) The overriding objective of these Rules is to facilitate the just, expeditious, proportionate and affordable resolution of election petitions under the Constitution and the Act

(2) The court shall, in the exercise of its powers under the Constitution and the Act or in the interpretation of any of the provisions of these Rules, seek to give effect to the overriding objective specified in sub-rule 1.

(3) A party to an election petition or an advocate for the party shall have an obligation to assist the court to further the overriding objective and, to that effect, to participate in the processes of the court and to comply with the direction and orders of the court.

5 (1) For the purpose of furthering the overriding objective specified in rule 4, the court and all the parties before it shall conduct the proceedings for the purpose of attaining the following aims –

- a. The just determination of the proceedings, and
- b. The efficient and expeditious disposal of the petition and in any case not beyond the timelines provided in the Constitution and the Act with respect to election petitions.

(2) The court may, where a party has breached any requirement of these Rules, issue orders, and impose penalties, as the court may consider just and fit including an order for payment of costs.

42. I will deal with the supplemental petition first, because it is the basis of filing of the accompanying Notice of Motion.

43. The Supplemental Petition was filed without an affidavit. Counsel for the petitioner states that the supplemental petition can stand without an affidavit. The other counsel differ. Counsel for the petitioner has not cited any statute or Rule that exempts it from the requirement to file a supporting affidavit. Through the Notice of Motion he asks for leave for the petitioner and others to file affidavits.

44. Rule 10 (2) of the Election Petition Rules provides –

**10 (3) An election petition shall –**

- a. **Be signed by the petitioner or by a person duly authorized by the petitioner.**
- b. **Be supported by an affidavit by the petitioner containing the grounds on which relief is sought and setting out the facts relied on by the petitioner; and**
- c. **Be in number of copies as would be sufficient for the court and all Respondents named in the petition.**

45. The petitioner's counsel has addressed the court at length on **section 76 of the Elections Act**. He has however, not addressed the court on the absence of an affidavit sworn by the petitioner to be filed with the petition. In my view, Rule 10 (2) of the Election Petition Rules is couched in mandatory terms. One cannot file a supplemental petition without an affidavit filed by the Petitioner, to support the supplemental petition, and then later make an application for leave from the court for the petitioner to file the supporting affidavit afterward. On that account, I am of the view that the supplemental petition cannot stand.

46. The second issue is whether the supplemental petition

was filed within the time stipulated by law. The petitioner's counsel maintains that it was filed within time provided in the law. In his view, **section 76 (5)** of the Elections Act does not require a supplemental petition to be filed within any time limit. The counsel for the respondents argue that the provisions **Section 76 (2), (3) and (5)** have to be read together. That the time limit provided in subsections (2) and (3) apply to subsection (5).

47. I will reproduce the relevant sections as hereunder –

**76 (2) A petition questioning a return or an election upon a 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 corrupt practice, be filed 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-eight days after the publication of the election results in the Gazette.**

(4) .....

**(5) A petition filed in respect of the matters set out in sub-sections (2) and (3) may where a petition has already been presented on other grounds be presented as supplemental petition.**

48. In my view, the only distinction between sub-section (2) and (3) on the one hand, and (5) is that in the latter case a petition has already been filed on other grounds. That is why it is called a supplemental petition. The matters to be complained of are still those that are set out in sub-section (2) and (3). The limitation of 28 days from the time of declaration of the election results therefore applies. In my view, if supplemental petition is to be filed after the mandatory time frame of 28 days, the petitioner has to seek leave of the court under Rule 20, which the petitioner herein does not wish to seek. Leave will be necessary because the court would consider the reasons for delay in view of the Constitutional six months period to finalize petitions under Article 105. Leave is also necessary because, in my view, in granting the leave, the court may give the necessary directions to comply with time frames.

49. In my view the supplemental petition as it stands is incurably incompetent for the above two reasons and I will strike it out.

50. I now turn to the Notice of Motion. The application seeks leave to file further (undisclosed) affidavits to support the supplemental petition. Nothing much turns on this. It cannot stand as the supplemental petition which it seeks to propel is not valid. The court cannot grant leave for a party to file affidavits to support nothing. Besides, this court does not know the nature and extent of the content of the affidavits to be filed. In my view, the intended draft affidavits should have been annexed to the application, if this application was going to be of any value. The Notice of Motion will also be struck out.

51. In the result, both the Supplemental Petition and the Notice of Motion filed on 17<sup>th</sup> June, 2013 are hereby struck out. Costs will follow the decision in the petition.

***Dated and delivered at Kakamega this 19<sup>th</sup> day of June, 2013***

**George Dulu**

**JUDGE**