



REPUBLIC OF KENYA

High Court at Eldoret

Election Petition 1 of 2013

CHARLES KAMUREN.....PETITIONER
VERSUS

GRACE JELAGAT KIPCHOIM.....1ST RESPONDENT

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION (IEBC).....2ND RESPONDENT

MARTIN KITUYI WEKESA.....3RD RESPONDENT

RULING.

Background

1. The general elections were held on 4th March 2013 where the 1st Respondent was declared the duly elected Member of National Assembly for Baringo South Constituency. The Petitioner was among the 6 candidates who contested for the seat of Member of National Assembly, Baringo South Constituency. Dissatisfied with the outcome of the said election, the Petitioner filed an Election Petition on 8th April to challenge the election of the 1st Respondent.

The Applications

1. All the Respondents filed their respective responses on diverse dates after which several applications were filed by all parties namely; (1) Application dated 10th May 2013 filed by the 1st Respondent to strike out the Petition for late service; (2) Application dated 14th May 2013 filed by the 2nd and 3rd Respondents to strike out the Petition for non compliance with **Rule 10(1) (c) and (d)**; of the **Elections (Parliamentary and County Election) Petition Rules, 2013** [hereinafter ‘the Rules’]; (3) Application dated 21st May 2013, filed by the Petitioner seeking extension of time to effect service, (4) Application dated 14th May 2013 by the Petitioner seeking leave to amend the Petition and (5) Application dated 21st May 2013 by the Petitioner seeking an order for delivery into court of the ballot boxes.

2. When the matter came up for hearing on 24th May 2013, it was agreed, by consent of all parties that Applications No. 1 to 4 be consolidated, thus all the parties were required to file agreed or separate issues and written submissions.

3. **The Application by the 1st Respondent dated 10th May 2013**, seeks to have the Petition struck out for the reason that the Petitioner failed to serve the Petition within the stipulated period of 15 days. The Application is supported by the Affidavit of Grace Jelagat Kipchoim, the 1st Respondent, sworn on 10th May 2013, who deponed that she got notice of the Petition challenging the validity of her election through an advertisement in *The Standard* newspaper of 6th May 2013. She further avers that the failure to serve the petition has so prejudiced her that she has not been able to file a response to the Petition. The 1st Respondent further avers that the Petitioner did not seek the leave of Court to serve the Petition out of time and has not provided valid reasons for failing to abide by the prescribed period of service.

4. **The Application by the 2nd & 3rd Respondents, dated 14th May 2013**, was brought under **Rule 10 (1)(c) and (d)** of the **Rules**, seeking for orders that the Petition be struck out for want of legal format and content as prescribed by the Rules. The Application is supported by the Affidavit of the 2nd Respondent sworn on 14th May 2013 and that of the 1st Respondent sworn on 15th May 2013. The Application challenges the Petition for being defective in that the Petitioner, enumerated inaccurate results of each candidate which the Applicant contends, are not the results that were announced by the 2nd Respondent, while the official results, which he ought to have relied on are contained in Form 36, that is attached to the 2nd and 3rd Respondents' Response to the Petition.

5. **The Application dated 14th May 2013 by the Petitioner** seeks leave to amend the Petition. It is supported by the Affidavit of the Petitioner sworn on 15th May 2013. The Petitioner states that the Application was necessitated by the discovery of more evidence of electoral malpractices in other polling stations not included in the Petition and the need for a new prayer for orders of fresh elections. The Petitioner further pleads that the intended amendments were occasioned by refusal by the 2nd Respondent to surrender information ordered by the Court on 6th April 2013 and that there was secret re-tallying which was admitted at paragraph 7 of the 3rd Respondent's Response. The Petitioner states that the said secret re-tallying narrowed down the margin between the votes cast for the Petitioner and the 1st Respondent to 3 votes from 3 polling stations. The Petitioner also sought for an order or delivery of ballot boxes for the safe custody in court. The Application was opposed by the 2nd and 3rd Respondents through the Replying Affidavit of the 2nd and 3rd Respondents dated 20th May 2013.

6. **The Application dated 21st May 2013 filed by the Petitioner** was brought by way of Notice of Motion **under Articles 159, 163 and 105 of the Constitution; Sections 80(1)(d) and 96A of the Elections Act and Rules 4, 13, and 14(3) of the Rules**, seeking extension of time to effect service of the Petition or in the alternative to validate the service of the Petition that was done by way of an advertisement on 6th May 2013. It is supported by the Affidavit of the Petitioner sworn on 21st May 2013. The Application was opposed. The 1st Respondent filed Grounds of Opposition dated 24th May 2013, in which she states that the Application as filed lacks legal basis for none of the provisos set out confer jurisdiction on the Court to grant the orders sought. The 1st Respondent further argues that the Court cannot validate service of petition retrospectively. The 1st Respondent states that in any case, by this Application, the Petitioner admits that service was effected out of time and has not set out sufficient reasons for failing to comply with the law.

Petitioner's Response

7. The Petitioner, in opposition to the Application to strike out the Petition filed by the 1st Respondent, filed Grounds of Opposition dated 14th May 2013 and a Replying Affidavit sworn by the Petitioner on 15th May 2013. The Petitioner avers that the application is incompetent, frivolous and without merit on both facts and the law. On facts, the Petitioner contends that the Affidavit did not disclose where the Applicant was residing in the four possible abodes the Process Server visited or where she was reasonably expected to be. Further, the Petitioner states that the act of obtaining the Petition from the Registrar by the 1st Respondent after the advertisement completed the process of service since those who fail to provide the address of service are served in such a manner.

8. On the law, the Petitioner states that the 1st Respondent failed to comply with **Rule 7 of the Rules** and has therefore come to Court with unclean hands. The Petitioner reads mischief in the failure by the 1st Respondent to show her location or address of service as required by law, which in his view, shows that she was hiding from the Petitioner to avoid service. The Petitioner adds that the mischief sought to be cured by the Rules are actions such as those of the 1st Respondent. He surmises that it is evident from the provisions of **Rule 7(3)** that service is impliedly automatic from the time the Petition is presented to the Registrar; thus, by leaving the Petition documents with the Registrar, service is deemed to be effected, and the Petitioner is cushioned against the effect of **Section 76(1)** of the **Elections Act** that requires service to be effected within 15 days of filing a petition. The Petitioner also states that the Process Server made all attempts to effect personal service and on failing placed an advertisement in the newspaper. Furthermore, the Petitioner states that by virtue of **Rule 14(3)** as read with **Rule 14(1)**, the 1st Respondent has no audience with the Court which is conferred by filing a response, thus the Application is frivolous. The Petitioner reasons that the legislature and the Rules Committee intended that service of petition ought not to be a contentious matter as it would oust **Articles 105 and 159** of the **Constitution** and **Rules 4 and 5**.

Issues

The parties filed written submissions and issues for determination.

The Petitioner filed the following issues for determination

1. Whether the 1st Respondent is in breach of **Rule 14(1)** and is therefore precluded from the proceedings by virtue of **Rule 14(3)**,
2. Whether or not the 1st Respondent was duly served and had sufficient notice to comply with **Rule 14(1)**,
3. If (1) and (2) above are in the affirmative, should the 1st Respondent be excluded from the proceedings and Application dated 10th May 2013 dismissed?,
4. Whether or not the Court has power to extend time and validate service under **the Constitution, the Elections Act** and the **Rules**,
5. Whether or not **Article 105, 159 and 163** of the **Constitution** can aid the Court to grant orders sought by the Petitioner under **Section 80(1)(d)** of the **Elections Act** and **Rule 20** of the Rules,
6. Whether or not the 2nd and 3rd Respondents are entitled to the orders sought in the Application dated 14th May 2013 in view of their express admission of the date of election in their response,
7. What causes of action are disclosed by the parties pleadings filed in court?,
8. Whether the Petitioner is therefore entitled to the orders sought in the Application so that the Petition can be heard on merit,
9. Whether there will be any breach of **Rule 21** if the orders in the Application dated 21st May are granted,
10. What orders should the court make on the consolidated applications and the Application dated 21st My 2013.

The Respondents filed the following agreed issues dated 31st May 2013:

1. Whether or not the Petition is competent pursuant to provisions of **Rule 10 (1) (c) & (d)** and if not,

whether the Petition should be struck out with costs,

2. Whether or not the Petition herein was served on the 1st Respondent out of time,
3. Whether or not the Court has power to extend the time for service of the Petition under the Constitution, the Elections Act, and the Rules, and if the time for serving an election Petition cannot be extended, what are the consequences of such a failure?,
4. If the answer to no. 3 above is in the affirmative, whether the Petitioner placed any valid reasons and material before the court to warrant the grant of relief of extension of time,
5. Whether or not the Court has the jurisdiction to entertain and grant the Petitioner's Application for amendment under the provisions of the **Constitution, the Elections Act, and the Rules**,
6. Whether or not **Articles 159, 163 and 105** of the Constitution and **Rule 4** of the **Rules** can aid the Petitioner's applications in view of the clear provisions of the Constitution, the Elections Act, and the Rules,
7. What orders should be made on each of the Applications?,
8. Who should pay costs of the Application?

Submissions

9. At the hearing of the Applications, Mr. Limo and Mr. Gicheru appeared for the 1st Respondent while Mr. Yego appeared for the 2nd and 3rd Respondents. Mr. Barasa held Mr. Kadima's brief for the Petitioner.

Submissions on the results and date of declaration

10. In his submissions for the 2nd and 3rd Respondents, with respect to the Application dated 14th May 2013, Mr. Yego addressed the issue of the results being challenged. Learned Counsel submitted that the Petitioner has not told the Court whether or not he is contesting the results in the official Form 36. He urged that the Petitioner should not be allowed to generate his own results and invite the IEBC to defend them. Accordingly, Counsel surmised, the official results have not been contested.

11. It was submitted that the Petitioner, despite being supplied with the correct Form 35 and Form 36 pursuant to a consent order entered on 6th May 2013, deliberately opted to rely on a Form 36 that did not bear the logo of the IEBC and did not indicate that the results were in respect of Member of National Assembly, the latter which was indicated by the Petitioner in his own handwriting. It was argued that therefore, the deliberate omission of the official results declared by the 2nd Respondent renders the Petition fatally defective. Mr. Yego further submitted that it is evident that the Petitioner is not challenging the officially declared results and the same are not the subject of the Petition and urged that the only recourse is to have the Petition struck out for want of content as prescribed under **Rule 10(1) (c)** and **(d)**. He posed two questions: (a) Should a respondent be called upon to challenge false results and (b) should a respondent be invited to defend results that are manufactured by the Petitioner?

12. Mr. Yego directed me to the decision of the Court of Appeal in the case of ***John Michael Mututho v Jayne Njeri Kihara & 2 Others Election Petition No. 102 of 2008*** where in striking out the petition for failing to state the exact results it was held that the absence of the results goes to the content of the petition in that in the absence of results, there would be no legal basis for the petition. Learned Counsel further, submitted that this reasoning was adopted in the recent decision of Onyancha, J, in ***Amina Hassan Ahmed v the Returning Officer, Mandera County & 2 Others, High Court at Garissa Election Petition No. 4 of 2013*** where the Court held that the petition was fatally defective for not stating the results. He therefore urged the Court to strike out the Petition for failing to state the results being contested and the date of declaration of the said results. He contended that in as far as the contravened Rules were concerned, the intention was to cure the mischief such as the one exhibited by the Petitioner and to guard against cases, such as the instant case, where the respondents are called upon to defend fabricated results.

13. The above position on the results was also supported by the 1st Respondent. Mr. Limo for the 1st Respondent, associating himself with the submissions of learned Counsel, added that the Petition, in addition failed to state the date and the place where the results were declared and that was a fatal omission.

14. In response to Mr. Yego's submissions Mr. Barasa, for the Petitioner submitted that responded that the failure to indicate the results being contested and the date the results were declared was an omission which cannot be a ground for striking out the Petition. He argued that **Rule 10** cannot override **Article 159** of the **Constitution** and that any defect could be cured by a Supplementary Affidavit during the pre-trial conference and that the Petition which raises triable issues ought to be heard on merit. He urged that the 2nd and 3rd Respondents' Application should be dismissed.

Submissions on Service

15. In response to the **Petitioner's Application dated 21st May 2013 for extension of time of service**, it was submitted on behalf of the 2nd and 3rd Respondents that the Petitioner had admitted that service was done out of time and that the Application therefore runs contrary to the Affidavit of Service sworn by Hesbon Odhiambo Omolo on 7th May 2013. It was further argued that **Rule 7** does not put an obligation on the Respondents to deposit their addresses of service before a Petition is filed and is merely directory. It was also submitted that **Rule 20** relied upon by the Petitioner provides for extension of time for matters whose time is prescribed in the Rules but not those prescribed in the Act and cannot therefore be applied when seeking extension of time to effect service. In addition, there was no reasonable and viable explanation that was advanced by the Petitioner to explain the late service while the 1st Respondent was available to be served. In response to the Petitioner's, submissions, it was further stated that the issue of service is not a procedural technicality and goes to the root and content of the election petition. Counsel relied on the decision of the Supreme Court in **Raila Odinga v Independent Electoral and Boundaries Commission & 3 Others Supreme Court of Kenya, Petition No. 5 of 2013** to support his submissions that insistence on constitutionally decreed timelines does not amount to paying undue regard to procedural technicalities and that election laws ought to be applied strictly.

16. It was emphasized that **Article 87(1)** of the **Constitution** envisages timeliness in settlement of electoral disputes to be guided by the enacted legislation. Learned Counsel highlighted the case of **Ephraim Njeru v Justin Muturi [2006] eKLR** to support his submissions that the Petitioner did not demonstrate due diligence and seriousness in attempting to effect service within the entire 15 days available for service where there were no claims of evasion of service by the 1st Respondent. It was also noted that the 2nd Respondent was not served as alleged by the process server and furthermore, that service by advertisement did not follow the prescribed dimensions. This, it was argued, was a further demonstration of the Petitioner's lethargy that does not warrant him deserving of the orders sought in his Application. Counsel submitted that the Petitioner had ample time to effect service by advertisement and that therefore his Application is incompetent and ought to be dismissed.

17. In further response to the Petitioner's Application dated 21st May 2013 for extension of time of service: Mr. Limo for the 1st Respondent contended that the Petitioner did not exercise due diligence thereby rendering the Petition defective. In support of this view, Mr. Limo relied on the cases of **Ephraim Njugu Njehu v Justine Bedan Njoka Mutahi Court of Appeal Civil Appeal No. 13 of 2003** and **Titus Kiondo Muya v Peter Njoroge Baiya & Another High Court Election Petition No. 31 of 2008**. He emphasized that the issue of service was not a technicality since it goes to the substance of the Petition. On the same breadth, Counsel urged the Court to strike out the Petition and also dismiss the application for extension of time since the Court has no jurisdiction to extend time to effect service under the electoral laws. He urged that the power to extend time under **Rule 20** does not apply to the issue of service of the Petition which is governed by **Section 76** of the **Elections Act** and cited the case of **Clement Kiringu Wambalia v Kigo Njenga & 4 Others Election Petition No. 15 of 2013**.

18. In the alternative, Mr. Limo urged that were the Court to have discretion to extend time of service, that would call for material to be presented before Court to enable the Court consider the issue. The Petitioner needed not look for the Respondent in order to effect service since under **Rule 7** he had an alternative mode of service. The Affidavit of Service filed does not disclose the people the process server

met and the places he visited in an attempt to effect service. Counsel challenged the Petitioner's argument that the issue of service was a matter of form or technicality as incorrect.

19. He relied on the decision of the court in the case of *Jyoti Basu & Others vs Debi Ghosal & Others Supreme Court of India, 1982 SCR (3) 318* where it was held that an election court exercises a special jurisdiction which should be exercised in a straight jacket and that even doctrines of common law and equity do not apply, adopted in *John Michael Mututho v Jayne Njeri Kihara & 2 Others* (Supra), and the case of *Raila Odinga & 5 Others v IEBC & 2 Others*. (Supra). On the overriding objective, Counsel urged the Court to consider the decision of *Ramji Devji Vekaria v Joseph Oyula, Application No. 154 of 2010*, that the overriding objective does not permit a party to disregard the law and other rules, as was also held in *Amina Hassan Ahmed v Returning Officer Mander County & 2 Others*, and *Clement Kungu Waibara & Another v Hon. Francis Kigo Njenga & 3 Others High Court at Nairobi, Election Petition No. 15 of 2013*.

20. In response to submissions made on the issue of service, Mr. Barasa submitted that there was no documentary evidence to show that the 1st Respondent attended Parliament and Safari Park Hotel or where else she was from the date the filing of the Petition to the time of service of the Petition. He submitted that the Court has discretion to extend time under **Rule 20** of the **Rules** and that the Respondents had not demonstrated what prejudice would be suffered should the Petition be allowed to proceed on merit and could and in any case, they could be compensated by costs. Learned Counsel, relying on **Rule 4** of the **Rules** and **Article 159(2)(d)** of the **Constitution** urged the Court to dismiss the Respondents' Applications and allow the Petition to proceed for the interests of justice to be served.

21. In rejoinder, Mr. Gicheru submitted that the Petitioner had admitted that the date of the results was not indicated and contended that the same could not be cured by an Affidavit since they are facts that ought to be pleaded and not stated by way of an Affidavit. He noted that the Petitioner had withdrawn the application to amend the Petition which was in any case, out of time. He reiterated the principle in the case of *Amina Hassan Ahmed v Returning Officer Mander County & 2 Others*, (Supra) that triable issues have no tentative value if there are no results and further that the Court has no jurisdiction to extend time for service. Where the law is not followed, the natural consequence of that failure must follow. On **Rule 7**, Mr. Gicheru submitted that that provision is permissive, thus, once a petition is filed, it must be served on time. **Section 76** of the **Elections Act** requires mandatory service which cannot be by implication.

Submissions on Signing of Petition

22. Mr. Limo submitted that the Petition was incompetent as it was not signed by the Petitioner in accordance with **Rule 10** of the **Rules**. He submitted that the firm of Gordon Ogolla and Co. Advocates was not duly authorized as there was no demonstration of the authorization either by an affidavit or a letter. He urged that the Rules do not assume that the advocate has authority to sign and cannot invoke the **Civil Procedure Rules** which do not apply in election petitions. Thus, if the advocates had no authority, the Petition is not signed and is thereby defective.

23. On Mr. Limo's submission regarding the signing of an election petition, Mr. Barasa countered that an Advocate having prepared the petition is qualified to sign it on behalf of the Petitioner, a petition being a pleading and not an Affidavit. Thus, the Petition was properly before the Court and ought not to be struck out on that ground.

Submissions on Application to Amend Petition

24. In response to **the Application by the Petitioner dated 20th May 2013 to amend the Petition**, Mr. Yego for the 2nd and 3rd Respondents contended that the Petitioner is thereby seeking to introduce a new prayer and in any event, the application is barred by **Section 76(4)** of the **Elections Act**. It was further submitted that the Petitioner did not particularize the malpractices alleged and used his own generated results to move the Petition which amounts to an abuse of the court process. Counsel relied on the decision of the court in *Amina Hassan Ahmed v Returning Officer Mander County & 2 Others*, where the court disallowed an application for amendment since the mandatory provisions of **Section 76(4)** were not complied with. Counsel urged for the dismissal of the application.

Determination

25. The parties having filed their issues and submitted before me, I have condensed the issues for my determination to the following:

- a) Whether or not the Petition is incompetent for non compliance with **Rule 10 (1) (c) & (d)** of the Rules,
- b) Whether the signing of an election Petition by the Advocate for the Petitioner invalidates the Petition,
- c) Whether or not the Court has the jurisdiction to entertain and grant the Petitioner’s Application for amendment under the provisions of the Constitution, the Elections Act, and the Rules,
- d) Whether the Court has power to extend time within which an election Petition can be served or validate service effected out of time,
- e) Consequent to (d) above, whether failure to effect service of the Petition within the prescribed period renders the petition fatally defective,
- f) Costs

Whether or not the Petition is incompetent for non compliance with Rule 10 (1) (c) & (d)

26. It was contested by the 2nd and 3rd Respondents that the Petition is defective for failing to state the results being contested, how the results were declared and the date those results were declared. Further, that the Petitioner is inviting the Respondents to defend erroneous results. This submission was premised on the ground that the results that the Petitioner stated were not the ones that were declared by the 2nd Respondent. The Petitioner refers to the following as the results that were declared:

- a) Grace Jelagat Kipchoim - 8,169
- b) Charles Kamuren - 8,201
- c) Amos Ledaa Ole Mpuka - 5,203
- d) Daniel Rotich Kandagor - 794
- e) Enock Haroun Tuitoek - 1,380
- f) Peter Cheboiwo Moindi - 465

While the learned Counsel for the 2nd and 3rd Respondents submitted that the following were the correct results declared by the 2nd Respondent:

- a) Grace Jelagat Kipchoim - 8,205
- b) Charles Kamuren - 8,202
- c) Amos Ledaa Ole Mpuka - 5,263
- d) Daniel Rotich Kandagor - 487
- e) Enock Haroun Tuitoek - 1,369
- f) Peter Cheboiwo Moindi - 469

27. **Rule 10 (1)** provides that

“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 the manner in which it has been 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.”

28. It is not correct to say that in this case, the Petitioner did not particularize the results he is contesting. As a matter of fact, he has stated the results, whether or not these are the correct results is a different matter. This issue of the exact results that were declared in my opinion is a matter of fact that can only be ascertained through evidence to determine the valid results. This is because the Petition relies on a copy of Form 36 which the 2nd Respondent denied as issued by him. It would be premature at this stage to determine a matter that can be ascertained by way of evidence. The Petitioner did not indicate the date the results were declared by the 2nd Respondent but has indicated the date they were gazette. Does this deficiency qualify to determine the Petition as fatally defective?

29. I think not. This is a matter of form that I believe does not go to the substance of the Petition. In finding this I am guided by the provisions of **Article 159(2)(d)** which behooves the Court not to accord undue regard to procedural technicality. The shortfall highlighted is one such that ought not to be a basis for striking out the Petition. Therefore, the Application by the 2nd and 3rd Respondents dated 14th May 2013 fails.

Whether the signing of an election Petition by the Advocate for the Petitioner invalidates the petition

30. Mr. Yego for the 1st Respondent submitted that the Petition was defective as it was not properly signed as required by the Rules. The issue of signature is provided for under **Rule 10 (3) (a)** as follows:

“An election petition shall—

be signed by the Petitioner or by a person duly authorized by the Petitioner;

31. I have had occasion to consider this issue at length in the case of **Hosea Mundui Kiplagat v Sammy Komen Mwaita & 2 Others, High Court at Nairobi Election Petition No, 11 of 2011.** I wish to adopt my reasoning in that case on this issue where, in determining whether an advocate is ‘a person duly authorized’ I took recourse to various provisions concerning signing of a pleading. An election petition, as rightly submitted on behalf of the Petitioner is a pleading. In the applicable **Civil Procedure Rules**, an advocate is treated differently from an agent who requires express authorization to sign a document on behalf of another person. An advocate, in my opinion, once instructed, could sign the Petition on behalf of the Petitioner. As I reasoned in the above-cited case, the express inclusion that a petition could be signed by a person other than the petitioner sought to cure the mischief that resulted in the strict application of the then applicable rules and further that the issue of signature was a matter of form, that ought not to be elevated above the substantive aspect of the pleading.

Whether or not the court has the jurisdiction to entertain and grant the Petitioner’s application for amendment under the provisions of the Constitution, the Elections Act, and the Rules

32. I note that the Petitioner did not make any submissions in respect of his Application to amend the Petition. Nevertheless, I address myself to this issue since the Respondents submitted on it. The **Elections Act in Section 76(4)** provides for amendment of an election petition, as follows,

“ a petition filed in time may, for the purpose of questioning a return or an election upon an allegation of an election offence, be amended with the leave of the election court within the time which the petition questioning the return or the election upon that ground may be presented.

This means that the option to amend the Petition was available before the expiry of the prescribed period for filing the petition that is 28 days. The Court has no jurisdiction to allow the amendment of a petition outside the period provided for in the law. This application would therefore have lacked merit.

On the powers of the Court to extend time within which an election petition can be served

33. It is not in dispute that the Petition was served out of time. The Petitioner did not deny this fact and it is also apparent on the face of the advertisement that was published in *The Standard* newspaper on 6th May 2013. It was submitted on behalf of the Petitioner that the Petition ought not to be struck out on the issue of late service. The issue is therefore, whether the Court has jurisdiction to extend the time for effecting service of an election Petition, and secondly, whether service of an election petition out of time renders the Petition fatally incompetent.

34. The Petitioner argued that the 1st Respondent did not provide an address for service under **Rule 7**. This Rule provides that:

“(1) A person elected may, at any time after the election, file at the office of the Registrar a notice, in writing, signed by the person or on the person’s behalf—

(a) appointing an advocate to act, in case there should be a petition against the person; or

(b) stating the intention to act in person.

(2) The person giving notice under sub-rule (1) shall give an address in Kenya at which notices addressed to the person may be served.

(3) Where no notice is given by the person elected in accordance with sub-rule (1), all notices and proceedings may be served by leaving them at the office of the Registrar.”

From a reading of this provision I find that it is not a mandatory but rather an optional measure. Nevertheless, it does not take away the duty of the Petitioner to ensure service of court process. A Petitioner cannot transfer the obligation to serve to the respondent. I agree with submissions on behalf of the 1st Respondent that **Rule 7** does not absolve a person who has filed an election petition from effecting service upon a respondent.

35. The provisions governing service of an election petition are **Article 87(3)** of the **Constitution**, **Section 77(2)** of the **Elections Act** and **Rule 13(1)** of the **Rules**, that a petition may be served personally or by advertisement in a newspaper with national circulation. The Petitioner attempted to attribute his failure to serve the Petition on time on his inability to locate the 1st Respondent. The Act and the Rules have made it very easy to ensure that the Petition is served on time by providing an alternative mode of service by way of advertisement. All the Petitioner needed to do was to serve by publishing in the newspaper. The explanation given that attempts were made to ensure personal delivery is not a plausible reason since all the while, the Petitioner had the alternative.

36. The law is now so liberal that there is no requirement that a petitioner first makes an attempt to effect personal service before opting to serve by way of advertisement. The Petitioner’s explanation as supported by the averments of the process server, Hesbon Odhiambo in his Affidavit of Service do not hold in the circumstances where the law is now flexible as to the mode of service. A historical appreciation of the previously applicable electoral laws reveals that respondents would mischievously evade personal service with the aim of defeating, what would be an otherwise meritorious election petition. To cure this mischief, the **Elections Act** and the **Rules** now provide for alternative mode of service and there is no condition precedent to opting for service by advertisement. Service by advertisement is wholesomely as good as personal service.

37. The Petitioner also urged the Court to find that it had discretion to extend time under **Rule 20**. The provisions on service of an election Petition are contained in **Section 76(1)** of the **Elections Act** and **Rule 13(1)** of the **Rules**.

Section 76(1)(a) reads:

“A petition—

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

Rule 13(1) provides:

“The Petitioner shall serve the Respondent with an election petition filed under these Rules, within fourteen days of filing of the petition”

38. There are two provisions on service, in the substantive provisions of the **Elections Act** and the **Rules**. The applicable period of service, is 15 days in that the provisions of the Act take precedence over the Rules. That said, the period is limited by the Act and the Rules do not vest in the Court power to extend time for service of Petition. This is because from the wording of the said Rule, recourse to the provision extension of time is only available where time limit is prescribed in the Rules or by the order of the Court. The provision reads thus:

“Where any matter is to be done within one time provided for in these Rules or granted by the court, the court may, for purposes of ensuring that no injustice is done to any party, extend the time within which the thing shall be done on such terms or conditions as it may consider fit even though the period initially provided or granted may have expired.”

39. This was the position stated in the case of ***Clement Kiringu Wambalia v Kigo Njenga & 4 Others*** (Supra) where the Court held that *“the time for the service of an election petition is a timeframe provided for not by the rules or by an order of the court, but by the express provisions of that statute. It was restated in the case of **Josiah Taraiya Kipelian Ole Kores v Dr. David Ole Nkediye & 3 Others High Court of Kenya Nairobi Petition No.6 Of 2013** that, “Rule 20 is very clear that time is to be extended where such time has been limited by the Rules or by the court. Such extension does not extend to instances where the time is limited by the substantive Act or the Constitution.”* Thus, where time is limited by the statute, it follows that **Rule 20** would not be applicable to seek to extend the time so prescribed and the Petitioner’s argument on this issue fails.

40. The Act does not provide for any powers to extend time where time that is prescribed in the Act. **Section 76(1) (a)** is couched in mandatory terms, and nowhere in the succeeding provisions does the Act give the Court powers to extend the period prescribed in the statute. It is therefore clear on the face of the provision that the intention was to have the time of service which impacts on other ensuing processes limited in view of the strict timelines provided for in the **Constitution** and the **Elections Act** for disposing of election petitions. The objective of the enactment of specialized electoral laws and rules of procedure is as captured in **Article 87** of the **Constitution** which states that:

“Parliament shall enact legislation to establish mechanisms for the timely settling of electoral disputes”

41. Again, the Constitution was alive to the need for timely conclusion of electoral disputes. This need is carried forth in the provisions of the **Elections Act** which prescribes timelines on filing and service of elections petitions among other processes. The determination of election disputes must remain true to and preserve the right of citizens to *free, fair and regular elections based on universal suffrage and the free expression of the will of the electors*. The prescription of strict timelines was meant to counter instances where the hearing of electoral disputes would be stretched over time such that their eventual determination would serve no purpose, especially where the outcome overturned the decision of the electoral body, thereby, defeating the express will of the people. Any act that therefore goes against the grain of the objective of timely resolution of electoral disputes goes against the intended purpose espoused by the Constitution and the Elections Act and the Rules. The process of determination of the election dispute must therefore encompass the need to preserve the will of the people and the purposes for which the laws to guide the process of determination of these disputes were enacted. Timely resolution of disputes is one of those core purposes. **Article 105** which is also relied on by the Petitioner’s application for extension of time is in line with the need to observe these timelines, as it sets out the period within which electoral disputes must be determined and the laws enacted pursuant to this provision should *“give full effect to this Article.”*

42. The Petitioner relies on **Articles 159, 163 and 105 of the Constitution; Sections 80(1) (d) and 96A of the Elections Act and Rules 4, 13, and 14(3) of the Rules** in support of the Application for extension of time to effect service. These provisions are as follows:

Article 159 on the exercise of judicial authority provides:

“(1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles

(a) justice shall be done to all, irrespective of status;

(b) justice shall not be delayed;

(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause

(d) justice shall be administered without undue regard to procedural technicalities; and

(e) the purpose and principles of this Constitution shall be protected and promoted.”

Article 163 deal with the establishment of the Supreme Court has no relevance to the issues in this Court.

Article 105 which provides that,

“(1) The High Court shall hear and determine any question whether—

(a) a person has been validly elected as a member of Parliament; or

(b) the seat of a member has become vacant.

(2) A question under clause (1) shall be heard and determined within six months of the date of lodging the petition.

(3) Parliament shall enact legislation to give full effect to this Article”

43. The argument that the court should have no undue regard to procedural technicalities finds no place in the matter herein. This is because the issue of service is not a procedural technicality. As the Court rightly said in ***Kumbatha Naomi Cidi v The County Returning Officer, Kilifi & 3 Others, High Court at Malindi, Election Petition No. 13 of 2013,***

“Any pleading filed and not served on the opposite party has no legal force. It cannot be dealt with by the court and no lawful order can be drawn from it. Service of a pleading accords the opposite party the chance to be heard. It is my considered opinion that this petition is a petition that never was.”

While in this case service was effected out of time, the Court, as already reasoned above, has no jurisdiction to extend the period for service, or as matter-of-factly pleaded by the Petitioner to validate the service that was done out of time. In the result therefore, the status is as if there was no service at all. Service is a matter so core to the court process at hand that a cause of action will not stand without it. I must read the provisions of **Article 159** wholesomely and that includes the duty to ensure that *“the purpose and principles of this Constitution shall be protected and promoted”*, including the duty to uphold the purpose of timely resolution of electoral disputes. The direction to not have undue regard to procedural technicalities does not erase the obligation to uphold procedural technicalities. Regard must therefore be had to timelines defined by the **Elections Act** and the **Rules**.

44. In the case of ***Daniel Kipkemoi Bett & 7 Others v Margaret Wanjiku Chege Civil Appeal (Application) No. 81 of 2010*** the court, adopted the words of the Court of Appeal in the case of ***Deepak Chamanlal Kamani & Another vs. Kenya Anti-Corruption Commission & 3 Others, Civil Appeal (Application) No. 152 of 2009 (unreported)*** that:

“So that as Lord Woolf says in the BIGGUZZI Case the initial approach of the courts now must not be to automatically strike out a pleading but to first examine whether the striking out will be in conformity with the overriding objectives set out in the legislation. If a way or ways alternative to a striking out are available, the courts must consider those alternatives and see if they are more consonant with the overriding objective than a striking out.”

45. While justice should be done to all parties, and while striking out a pleading ought to be a measure of last resort, I find no alternative available in the law to order otherwise. The timeline is defined by a statute that does not give the Court express authority to act otherwise to extend the prescribed timeline. **Section 76(1)(a)** does not contemplate jurisdiction to extend the time prescribed. Any contrary intention would have been expressly provided for. The delay in this case was unexplained and inordinate. As stated in the case of ***Ramji Devji Vekaria v Joseph Oyula*** Court of Appeal at Eldoret, **Civil Appeal (Application) No 154 of 2010 [2011] eKLR:**

“The overriding objective will no doubt serve us well but it is important to point out that it is not going to be the panacea for all ills and in every situation. A foundation for its application must be properly laid and the benefits of its application judicially ascertained.”

46. Equity aids the vigilant and not the indolent. The Court is duty-bound to uphold the express provision of the law. Having taken into consideration the foregoing, I find no legal basis to support the prayers sought by the Petitioner to extend time for service. The Application by the Petitioner dated 21st May 2013, fails and the Application by the 1st Respondent dated 10th May 2013 seeking to have the Petition struck out therefore succeeds. The Petition dated 8th April 2013 is hereby dismissed with costs to the Respondents.

SIGNED DATED and DELIVERED in open court this 17th day of June 2013.

**L. A. ACHODE
JUDGE**

In the presence of:

Mr. Baraza Adv. Holding brief for MS Kadima Adv. for the Petitioner

Mr Limo Adv. And Mr. Kiplimo Adv. (h/b for Mr. Gicheru adv.) the 1st Respondent

Mr. Chanzu Adv for 2nd and 3rd Respondents

Andrew Omwenga Court Clerk

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.