



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

IN THE MATTER OF THE ELECTIONS ACT, 2011 AND

IN THE MATTER OF THE INDEPENDENT ELECTORAL AND BOUNDARIES
COMMISSION ELECTIONS

IN ISIOLO COUNTY

IN THE MATTER OF THE IEBC RESULTS OF SENATE ISIOLO COUNTY ELECTIONS IN
THE KENYA

GAZETTE OF 13TH MARCH, 2013 SPECIAL ISSUE OF THE GAZETTE NOTICE NO. 3155

BETWEEN

ISMAIL SULEMAN

ABDI NUR ISMAIL

ABDRAHMAN ALI

GODFREY MURIERA

ADAN ABAKULA

HUSSEIN ALI WARSAME

JACKSON NYAMBUTI KENGELE

LAWRENCE AKWIMA KIRIMA

HALIMA NUR ELMI

JALDESA TUKE DABELLO.....PETITIONERS

VERSUS

RETURNING OFFICER ISIOLO COUNTY

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....1ST RESPONDENT

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

MOHAMED ABDI KUTI.....3RD RESPONDENT

CHAPFANO GUYO MOKKU.....1ST INTERESTED PARTY

ABDIRAHMAN ABDULLAHI ISMAIL.....2ND ST INTERESTED PARTY

RULING

The petition herein was filed by I.Ismail Suleiman, 2. Abdi Nur Ismail, 3. Abdrahaman Ali 4. Godfrey Muriera 5. Adan Abakan, 6 Hussein Ali Warsame 7. Jackson Nyamuti Kengele, 8. Lawrence Akwima Kirima 9. Halima Nur Elmi and 10. Jaldesa Tuke Dabello on 10th April, 2013 through the firm of M/S A.T. Oluoch & Company Advocates against the Returning Officer, Isiolo County Independent Electoral and Boundaries Commission, 1st respondent, Independent Electoral and Boundaries Commission, 2nd respondent, Mohammed Abdi Kuti, 3rd Respondent, Chapfano Guyo Mokku, 1st Interested Party and Abdirahman Abdullahi Ismail, 2nd Interested Party. The petition as per court's record show that it was accompanied by supporting affidavit of one of the Petition one Ismail Suleiman sworn on 6th April, 2013. The Petitioner was accompanied by several witnesses affidavits sworn by the intended witnesses for the Petitioners who the Petitioners intended to call to give evidence on their behalf during the trial of the petition.

That after service of the petition upon the Respondents, the respondents entered appearance in the Petitioner through their respective advocates. The 1st and 2nd Respondents were represented in the petition by the firm of M/S Sisule Munyi Kilonzo & Associates, whereas the 3rd respondent was represented by the firm of M/S Albert Kamunde, & Company Advocates.

On 2nd May, 2013 the 1st and 2nd Respondents being Returning Officer for Isiolo County and the Independent Electoral and Boundaries Commission respectively, filed their joint answer to the petition. They specifically and generally transversed the pleadings forming the petition and denied each and every allegation. All the 1st and 2nd Respondents response to the petition were properly and timely served upon the Petitioners' Counsel .

On the other hand, the 3rd respondent, Mohammed Abdi Kuti, who was declared and gazetted winner of Senate, Isiolo County filed his answer on 2nd May, 2013 to the petition dated 6th April, 2013. The 3rd respondent's answers show the respondent specifically and generally denied all the allegations in the Petitioners' pleadings.

The 1st and 2nd Respondents filed several documents which included a joint answer to the petition, Forms 35's showing the election results of Senate for each of the polling stations in the Isiolo County. There was also annexed the Form 36 which is a single document holding all results in all the form 35's aforesaid.

The 3rd respondent filed an application dated 7th May, 2013 and 10th May, 2013. The 1st and 2nd respondents also filed an application dated 15th may, 2013 and a preliminary objection dated 26th April, 2013 whereas the Petitioners filed an application dated 16th May, 2013 and Notice of Withdrawal of witnesses dated 15th May, 2013. On 17th May, 2013 the court gave directions to the effect that all the aforesaid application be heard together and that the 3rd respondent's application dated 7th May, 2013 shall start first and be followed by the other applications.

The 3rd Respondents application dated 7th May, 2012 brought under Rules 2, 3, 5(1),(2) (10) (1) (c) and (d), 3(a), and (b),4(b),12(1),(2),(3),(4),(5),(6) of the Elections(Parliamentary and County Elections) Petition Rules, 2013 seeks the following Orders:-

- 1. That the petition dated 6th April, 2013 and filed in this court on 10th April, 2013 be struck out.**
- 2. That the Petitioners/Respondents do bear the costs of this application and of the petition.**
- 3. That such further orders as the Honourable Court may deem fit to grant do issue in the circumstances.**

The application is based on the following grounds:-

- a. The face of the petition and preamble on page 2 of the petition has ten named persons listed as Petitioners in this petition. However, at paragraph 1 of the petition the Petitioners change and are stated under “parties to the Petition”, as a “male and female adults of sound mind and was a candidate for the Senate position in Mandera County during the just concluded elections having been validly nominated by the National alliance(TNA) party”. The 3rd respondent is prejudiced, and as the incumbent Senator for Isiolo County, is at a loss as to which Petitioner he is required to respond to and in respect of which Senate election.**
- b. At paragraph 5 and 6 under “parties to the petition”, the petition lists interested parties who under the law are not legally recognized parties. The inclusion in the petition of a purported candidate for the senate position in Mandera County, and the joinder of purported interested parties in this petition raises an issue as to the bona fides of the Petitioners and renders the petition incurably defective,**
- c. The petition is purported to have been filed at the behest of no less than ten(10) Petitioners. Nine Petitioners have not signed the petition. All the Petitioners have not sworn affidavits in support of the petition as required by the Rules of the Honourable Court. Further, the petition purports to have been signed by one Ismail Suleman as the Petitioner, who has not deposed to having the authority of the co-Petitioners to swear the supporting affidavit on their behalf, and no authority for that purpose has been filed in court. Further, the supporting affidavit by the said Ismail Suleiman thereof relates to a petition not before this Honourable Court, and**
- d. By reason of the grounds stated above, the 3rd respondent is at a loss as to who exactly is challenging his election, and to what end, and this has caused him prejudice necessitating the intervention of this Honourable Court. There is no valid and competent petition before the court.**

The application is supported by an affidavit by Mohammed Abdi Kuti sworn on 7th May, 2013.

The 3rd respondent further in an application dated 10th May, 2013 brought under Rules 4,5(1),15(5),17(10 and 20 of the Elections(Parliamentary and County Elections) Petition Rule 2013 seeks leave to file further affidavits of Pastor William Matet and Rashid Ali Demo and said affidavits having been filed and served alongside the application be deemed as properly filed and served upon interpartes hearing of the application. The application is based on grounds on the face of the application. It is supported by the affidavit of Mohammed Abdi Kuti sworn on 10th May,2013.

The 1st and 2nd Respondents in their application dated 15th May, 2013 brought under Rule 4, 5(1) and 20 of the Elections(Parliamentary and County Elections) Petition Rules 2013 seek the following:-

- 1. That the 1st and 2nd Respondents be granted leave to substitute the court copies of their response to petition, the replying affidavits of Ntuala Samuel Gikundi, Stanley Kanyoria Mwangi and Eunice Wathoni Maina all sworn on 26th April, 2013(all in hereinafter referred to as the 1st and 2nd respondent’s response).**
- 2. That upon substitution of the 1st and 2nd Respondents’ response, the 1st and 2nd Respondents be granted leave to file supplementary affidavit to be sworn by Stanley Kanyoria Mwangi and Eunice Wathoni Maina to correct typographical and/or clerical errors in the substituted replying affidavit and**

in the annexures thereto.

3. That the intended supplementary affidavits above be deemed properly filed under the relevant Rules of the Elections (Parliamentary and County Elections) Petition Rules, 2013

The main ground in support of the application is that at the time of filing the response the Counsel for the 1st and 2nd respondents inadvertently filed and supplied the court with the wrong copy of the 1st and 2nd Respondents response. That the copies intended to be placed on the court file have been served upon the Petitioner and that no prejudice would be occasioned to the Petitioners and Respondents and interested parties if the application is allowed. The application is supported by an affidavit of Nicholas Malonza, dated 15th May, 2013.

The 1st and 2nd Respondents preliminary objection dated 26th April, 2013 on the Petitioners' petition dated 6th April, 2013 raises preliminary objection on the following grounds:

- 1. The proceedings herein relate to the elections for the position of Senator, Isiolo county.**
- 2. The application is misconceived to the extent that it seeks the production by the Commission of Form 34, which is a form used to record Presidential Election results.**
- 3. In any event, the Commission has availed all the Form 34 from each of the 47 Counties on its website www.iebc.or.ke and the same are accessible free of charge by any member of the public.**
- 4. The Commission has already supplied the Applicants with copies of Forms 36 for the position of Senator in responding to the Applicant's petition dated 6th April, 2013.**
- 5. Prayers 1(ii),(iii) (iv) and 2 of the Application are premature and are not capable of being granted for the following reasons:**
 - a. (a) the materials and the details sought therein are sealed in the ballot boxes for the position of Senator, Isiolo county,**
 - b. Ballot boxes and the election materials therein for the election of the position of Senator, Isiolo County are in law required to be delivered to the court not less than 48 hours before date fixed for trial.**
 - c. The Commission lacks the authority to unseal ballot boxes the subject matter of an Election petition unless ordered by this Honourable Court to do so.**
- 6. The application is misconceived to the extent that it is based on a dispute by the applicants of the tally of results for the position of Senate whereas the proceedings herein relate to the position of Senator.**

The Petitioners in response to the 3rd Respondent's application dated 7th May, 2013 filed grounds of opposition dated 15th May, 2013 raising the following grounds:-

- 1. Striking out of a Petition is an extreme measure that this Honourable Court ought to resort to only on exceptional circumstances where the Petition or a claim is so hopeless that it cannot be salvaged by way of amendment.**
- 2. The Elections Court is guided by among others:**
 - i. The Constitution which provides at Article 159 (2) (d) that the Court shall administer justice without undue regard to technicalities.**

ii. The Elections Act, 2011 which provides at section 80 (1) (d) that “an Election Court may in exercise of its jurisdiction (d) decide all matters before it without undue regard to technicalities”.

iii. The Elections Act and The Elections (Parliamentary and County Elections) Petition Rules, 2013 which empowers the Court to enforce the overriding objectives of the Act.

iv. The Civil Procedure Act which applies in terms of the powers of the Court to order or grant leave to amend pleadings.

3. The error of mis-description of the Petitioners is not fatal and the mistake ought not to be visited upon the Petitioners in light of;

Errors of mis-description go into the form and not content of the Petition.

i. The face of the Petition as read with paragraphs 3 & 4 of the Grounds of the Petition is the proper description of the Petitioners who are ordinary citizens entitled under the Constitution to bring this Petition as residents of Isiolo County and registered voters.

ii. Paragraphs 2, 5 & 6 of the supporting affidavit to the Petition confirm who the identity of the Petitioners are and accordingly the mis-description at paragraph 1 of the preamble to the petition would not invalidate the proper description in the body of the Petition.

iii. Under Section 80 (i) (d) the Election Court is under a duty and has powers to determine matters without undue regard to technicalities.

iv. Rule 17 (1) (f) & (i) donate residual powers to the Court to direct the filing of additional evidence and particulars, resort to which would cure the apparent alleged irregularities.

4. The provisions of Rule 10 (1) (c), (d) & (e) are directory and not mandatory the non-inclusion or compliance of which is not fatal and does not warrant the striking out of a Petition.

5. The Petition involves the enjoyment of a fundamental right under the Constitution in Article 38 and striking out would be a draconian measure.

6. The 3rd Respondent has not shown what prejudice would be suffered as a result of the alleged omissions or by an order granting leave to amend.

7. The foregoing notwithstanding the Petitioner has contrary to ground 2 and 3 stated that the elections being challenged are for the elections conducted on the 4th of March, 2013 and in ground “C” of the prayers to the Petition specified that she seeks a nullification of the results declared vide Special Gazette Notice of 13th April, 2013 for the Mandera Women Representative.

8. The Petitioner has, contrary to the grounds of the 3rd Respondents application particularized the claims made of electoral mal practice under paragraph 4 of the grounds of the Petition.

9. It is in the interest of justice that the application to strike out the Petition is declined with cost to the Petitioners and with a view to hearing the substance of the Petition and not technicalities and reaching a just and expeditious determination.

The Petitioners on their part filed an application dated 16th May, 2013 brought under Section 75(3),(b) and (c),80(1),(a),(b),(c) and (d),(3),82(1) & (2) of the Elections Act, 2011,Rule 4 (1) & (2),5(1) (a),12,17, (1) (d) & (1),(2),20,21,(a) and (b),Rule 33,(1),(2),(3) and (4),(a) to (j) of the Elections(Parliamentary and County Elections Petition Rules 2013, Article 159 (2) (d) & (e) of the Constitution of Kenya, 2010 seeking the following Orders:-

1. An Order does issue pursuant the provisions of Section 80(1) (a), (b) & (c) of the Elections Act, 2012 directing and or summoning the Eastern Provincial Commissioner to give evidence on the alleged abuse of office by 3rd respondent by appointing a chief or influencing the appointment of a chief and elevation of an administrative unit during the official campaign period.

2. An Order does issue pursuant the provisions of Rule 21(a) &(b),33(1),(2) (3) & (4) (a) to (i) of the Elections(Parliamentary and County Elections) Petition Rules, 2013 for the scrutiny and recount of all votes cast for the entire Isiolo County Senate whose results are disputed by the Petitioner.

3. An Order does issue pursuant Rule 32(4) (a) to (j) of the Elections(Parliamentary and County Elections) Petition Rules, 2013 for the production of the election materials listed in the above Rule for purposes of scrutiny and recount requested in prayer 2 above.

4. An Order does issue pursuant Rule 12,17,(i) and 20 of the Elections(Parliamentary and County Elections) Petition Rules, 2013 granting leave file fresh witness affidavits and to the Petitioner to file and rely on further affidavits in response to the 1, 2nd and 3rd respondents reply and answer to petition.

5. An order does issue pursuant Rule 4 (1) and (2) & (5) (1) (a) &(b), Rule 10(4) (a) &(b) of the Elections(Parliamentary and County Elections) Petition Rules, 2013 as read with Rule 17(1) 9f) &(i) granting leave to the Petitioner to amend the Petition dated 3rd April, 2013.

6. An Order does issue pursuant Rule 17(1) (i),20 of the Elections(Parliamentary and County Elections) Petition Rules, 2013 granting leave to the petitioner to file and serve transcripts of photographs and video footages of the Isiolo County Elections.

7. An Order does issue granting leave to the petitioners to amend the petition dated 6th April, 2013 or in the alternative pursuant to Rule 17(1) (f) &(i) An order does issue directing the filing of further evidence and particulars to include:

i. The results of the Senate elections

ii. The date of declaration of the and

iii. The matter and place of declaration of the results

iv. To correct the error of mis-description of the petitioners

8. costs be provided for.

The application is based on the grounds on the face of the application. It is also supported by annexed affidavit of **Hussein Ali Warsame** sworn on 15th May, 2013.

The 1st and 2nd Respondents filed grounds of opposition dated 22nd May,2013 to the Petitioners' application.

1. The Application does not disclose grounds or basis for granting prayer 1 of the Application.

2. The Application does not disclose any and/or sufficient reason(s) for a scrutiny and recount of votes cast for the position of the Senator, Isiolo County.

3. The Application is ambiguous to the extent that it does not disclose the specific polling stations in which the election results for the position of Senator, Isiolo County are disputed and in which scrutiny and recount is required.

4. The Application is misconceived to the extent that prayer 3 of the Application relies on a nonexistent

provision of the law.

5. Without prejudice to Ground No. 4 above, the 2nd Respondent has discharged its obligations with respect to production of any election materials and documents and will, at the appropriate time, comply with any other requirement of the law with respect to the said election materials and documents.

6. Under the Elections (Parliamentary and County Elections) Petition Rules, 2013, Witness Affidavits form part and parcel of the Petition and cannot be filed on their own.

7. The Application does not disclose any and/or sufficient reason to warrant the granting of leave to file fresh witness affidavits.

8. This Honourable court lacks jurisdiction to grant an order for amendment of the election Petition herein at this point in time.

The 3rd respondent similarly objected to the Petitioners application and filed 6 grounds of objection.

1. In opposition to Prayer 1 of the Motion, the 3rd Respondent shall advance the following grounds of objection:-

a) The prayer is speculative, oppressive to the 3rd Respondent and an abuse of the court process in that the attendance of the so-called “Eastern Provincial Commissioner” is being sought after the 3rd Respondent has specifically answered in his answer to the petition and his witness affidavits the Petitioners’ allegations that he influenced the appointment of a chief;

b) The petitioners are fishing for more evidence after having read the rebuttals in the 3rd Respondent’s answer to petition, his own witness affidavit and the affidavits of his other witnesses;

c) The petitioners are seeking to build a fresh case against the 3rd Respondent which negates his right to a fair hearing; and

d) No grounds for the grant of the order have been advanced either in the body of the Motion or the supporting affidavit thereof;

2. In opposition to prayers 2 and 3 of the Motion, the 3rd Respondent shall advance the following objections:-

a) Under Section 82(1) of the Elections Act, No. 24 of 2011, (“the Act”) as read with Rule 32(1) of The Elections (Parliamentary and County Elections) Petition Rules, 2013 (“the Rules”) contemplate that such an order can only issue during or after the main hearing of the substantive petition;

b) The petition herein does not fall within the petition contemplated by Rules 32(1) and 32(2) of the Rules as to qualify for an order for scrutiny and recount at this early stage of the proceedings;

c) An order for scrutiny and recount can only be made once a basis thereof has been laid by the evidence to be adduced at the hearing;

d) Prayers 2 and 3 are therefore premature, baseless and an abuse of the court process.

3. In opposition to prayer 4 of the Motion, the 3rd Respondent shall raise the following grounds;

a) The provisions of Rule 12(1) of the Rules make it mandatory that a petition be filed alongside compliant witness affidavits intended to be used at the hearing;

b) Once the affidavits have been expunged from the record, it must be deemed that the petition was filed without witness affidavits and only a petitioner who has sworn a witness affidavit remains as a witness;

c) Only compliant affidavits filed together with the petition can be the subject of the grant of an order for leave to file further affidavits;

d) The grant of leave to file witness affidavits under Rule 12(5) as read with Rule 12(4) of the Rules contemplates that a petitioner must disclose the identity of all witnesses intended to be called by the petitioner at the time of filing and service of a petition;

e) Further affidavits can only be filed “further to” compliant affidavits filed together with the petition and not to substitute defective affidavits.

4. In opposition to prayer 5 of the Motion, the 3rd Respondent shall raise the following grounds;

a) The petition filed on 10th April 2013 raises allegations of electoral offences against the Respondents under Sections 76(2) and 76(3) of The Elections Act, No. 24 of 2011 (“the Act”);

b) Under Section 76(4) of the Act, an election petition filed on the grounds in 4(a) above can only be amended within 28 days of filing;

c) The prayer for amendment of the petition cannot therefore issue as this court has no jurisdiction to extend time limited by statute to allow such amendment.

d) Rules 17(1)(f) and 17(i) of the Rules are inferior to the Act which is the parent statute and the Rules cannot therefore be construed outside the provisions of Section 76(4) of the Act.

5. In opposition to prayer 6 of the Motion, the 3rd Respondent shall raise the following grounds:-

a) The prayer is speculative, oppressive and intended to ambush the 3rd Respondent as it seeks to produce further evidence that could have reasonably been filed with the petition;

b) No reasonable or justifiable reason has been advanced either in the grounds in support of the motion or in the supporting affidavit why such evidence could not be availed at the time of filing the petition;

c) The petitioners are merely fishing for more evidence to ambush the 3rd Respondent, an act that this court cannot be called upon to countenance.

6. In opposition to prayer 7 of the motion, the 3rd Respondent shall advance the following grounds:-

a) The 3rd Respondent shall reiterate the grounds in (4) above regarding amendment of the petition;

b) The provisions on Rule 10(1) of the Rules are mandatory that all the requirements therein must be stated in the original petition filed, and the same cannot therefore be the subject of “further evidence and particulars” as sought by the petitioners;

c) Such “further evidence and particulars” cannot be filed in court in any other way other than in a petition, and no supplemental petition is capable of being filed in the circumstances of this case.

The Petitioners had also filed Notice of Withdrawal of witnesses affidavits of sixteen witnesses purportedly under Rule 4 and 5 of the Elections(Parliamentary and County Elections) Petition Rules, 2013. The 3rd Respondents filed grounds of objection to withdrawal of witnesses affidavits dated 20th May, 2013.

The Pre-Trial Conference was held on 17th May, 2013 and it was thereafter that the applications herein above were set down for hearing on 24th May, 2013.

On 24th May, 2013 Mr. Albert Kamunde, learned Advocate for the 3rd respondent argued his application for striking out the Petitioners' petition dated 6th April, 2013 and at the same time opposed the Petitioners application dated 16th May, 2013 and Notice of Withdrawal of witnesses affidavit, dated 15th May, 2013.

Mr. Albert Kamunde, learned Advocate for the 3rd respondent argued that the petition by the Petitioners is fatally defective. He pointed out that the title of the petition and on the preamble of the petition on page 1 and 2 there are ten(10) named Petitioners and the ten petitioners are once again named as having declared that this is their petition.

That on Paragraph 1 of the petition, the Petitioners claim that the parties are male and female adults of sound mind and was a candidate for Senate position in Mandera County during the just concluded elections having been validly nominated by the National Alliance(TNA) party. He pointed out that the petition on page 1 is in reference to "In the Matter of Independent Electoral and Boundaries Commission Election in Isiolo County" and that again on title page of the petition the Petitioner stated "In the matter of the IEBC results of Senate Isiolo County Elections." Mr. Albert Kamunde, learned Advocate submitted that the 3rd respondent is prejudiced as incumbent Senator of Isiolo County as to which Petitioners or Petitioner he is required to respond to and in respect of which Senate Election because the title of the petition is in respect of Isiolo County Senate elections whereas on page 2 of the petition refers to Mandera County, which is different County from Isiolo County. He further contended that the 3rd respondent did not run for Senate position in Mandera County which is in the former North Eastern Province, in the Republic of Kenya during the 4th March, 2013 elections. He further pointed out that still under paragraphs 5 and 6 of the petition under sub-title "parties to the petition" the Petitioners included or listed in their petition what they are calling as 1st interested party one Chapfano Guyo Mokku and 2nd interested party Abdirahman Abdullah Ismail. It is stated under paragraph 5 of the petition that the 1st interested party was a candidate for the Senator of Isiolo County under(ODM) party and under Paragraph 6 of the petition that the 2nd interested party is a Senator for Mandera County under(ODM) party. He pointed out of great importance is that Mandera County once again features in the petition. Mr. Albert Kamunde, learned Advocate, submitted that under Election Laws, there is no provision for interested parties in an election petition. Mr. Albert Kamunde, learned Advocate in support of his proposition referred to Article 87(2) of the Constitution of Kenya, 2010, Section 76 of the Election Act on presentation of petitions. He also referred to the Election(General) Regulation 2012 and the Elections(Parliamentary and County Elections) Petition Rules, 2013. Mr. Albert Kamunde, learned Advocate referred the court to the case of **GAKENIA – V- KIMANI & 2 OTHERS(2008) 2 KLR 106** and urged the court to adopt the reasoning by Hon. Justice J. Mwera, as he then was, in that petition. He urged similar mistakes as were noted in GAKENIA's case have appeared in this petition as the Petitioners in this petition are referring to an election at Mandera whereas the petition itself is referring to an election at Isiolo County. He submitted that is prejudicial to the 3rd respondent as the petition itself is confusing as to which election and as regards to which county the petitioners are referring to.

Mr. Albert Kamunde, learned Advocate, on the issue of interested parties he submitted that there is no provision for interested parties in an election petition. He urged that the definition of the "***Petitioner***" and "***the respondent***" in the Elections(Parliamentary and County Elections) Petition Rules, 2013, do not envisage participation of other parties who will unnecessarily hinder expeditious disposal of an election petition. Besides that, he submitted an interested party can only be enjoined with the leave of the court once the nature of the third party's interest has been considered through an application. He urged that in an election petition there is no room for interested parties and the names of the interested parties in this petition ought to be expunged or struck out from the record as their being joined in the petition is an abuse of the court process.

Mr. Albert Kamunde learned Advocate, further pointed out that on page 9 of the petition, it is signed by Mr. Ishmail Suleman, who is described as a Petitioner. He pointed out that the Petitioner must state

his/her name and address, state the date when election in dispute was conducted. The results of the election and the manner in which those results were declared. He submitted that Rule 10(3) (a) of the Elections(Parliamentary and County Elections) Petition Rules 2013 requires that an election petition be signed by the Petitioner or by a person authorized by the Petitioner. He submitted that in this petition, there are ten(10) Petitioners and only one Petitioner Mr. Ismail Suleman signed the petition and there is no document to show that he had been authorized by the others to do so. He submitted further the other nine (9) Petitioners are not proper Petitioners before the court as the law requires. He urged the petition by the nine(9) Petitioners, who had not signed the petition was defective for want of signing.

On the supporting affidavit of Mr. Ismail Suleman sworn on 6th April, 2013, Mr. A. Makunde, learned Advocate referred to the description of the Petitioner in which the heading as regards the Petitioners, referred to only Mr. Ismail Suleman whereas the petition before the court has ten(10) Petitioners. He urged that the supporting affidavit is not meant for this petition and as such it does not satisfy the provisions that requires a Petitioner must file a supporting affidavit under Rule 10(3) (b) of the Elections(Parliamentary and County Elections) Petition Rules, 2013. He further urged that the petition do not comply with Rule 10(1) (c) of the Elections(Parliamentary and County Elections) Petition Rules 2013 which requires the Petitioner to state the results of the election the Petitioner is challenging.

He also stated that it is a requirement for the Petitioner to state the manner in which the results were declared. He urged that the Petitioner omitted or failed to comply with the particular provisions as set out under the Elections(Parliamentary and County Elections) Petition Rules, 2013 hence the petition is defective.

The learned Counsel referred this court to the case of **JOHN MICHAEL NJENGA MUTUTHO V JANE NJERI WANJIKU KIHARA & 2 OTHERS(2008) KLR 10.**

He submitted the facts of this petition is similar to Mututho's case and urged this court to follow the decision of Court of Appeal in Mututho's case.

Mr. Albert Kamunde, learned Advocate pointed out that the Petitioners have failed to comply with Rule 12 of the Elections(Parliamentary and County Elections)Petition Rules, 2013, on affidavits by witnesses. He urged that it is mandatory that a Petitioner at the time of filing a petition to file affidavits sworn by each witness whom the Petitioner intends to call at the trial.

He further submitted the affidavits by Daniel Sebastian Ekai and Halima Gonjonbe had not been attested or commissioned as required by Section 4 and 5 of the Oaths and Statutory Declaration Act(Chapter 15) of the Laws of Kenya. He urged that the said documents were not affidavits as required by Rule 12 of the Petition Rules 2013. On the other affidavits from that of Mr. Ismail Suleman, Mr. Albert Kamunde, learned Advocate, contended they referred to another petition other than the petition before this court.

He submitted that the 1st Petitioners' affidavit omitted or failed to list the other Petitioners and the 3rd respondent and the interested parties in its heading. He further contended the affidavit of Fatima Dahir omits the 3rd respondent and the interested parties. In its heading that the affidavit of Boku Sora Umba, omits the 3rd respondent and the 3rd respondent therein is a different person and third parties are also different and Petition's cause number is blank. That the affidavit by Agnes Nkirote Mutea, omits the 3rd respondent's name and that of interested parties are missing. The petition case number is also missing.

In the affidavit of Gedion Kaburuki Kirera, the 3rd respondent and interested parties are omitted and the petition case number is also omitted so have the affidavits of Joyce Karambu, Mohammed Ade Jillo; Abdi Nur Ismail, Isaac Mungathia Ngeraa; Francis Muriungi Gichunge, Habiba Wario Wako, Daniel Sebastian Ekai, Fatima Dahir, Hussein Ali Warsame, Abdu Rahim Ali, Roba Halkano Wako, Halima Ganjonbe, and Mohamed Adan Heris.

On affidavit by Adan Abukula, Mr. Albert Kamunde, learned Advocate for 3rd respondent pointed out that the same is contrary to The Oaths and Statutory Declaration Act as it had no parties at the heading.

He submitted the affidavit offends the provisions of Rule 12(6) of the petition Rules 2013 in failing to state the particulars of the parties. He thereafter submitted the petition dated 6th April, 2013 has no supporting affidavits and that there are no affidavits by witnesses as required by the Elections(Parliamentary and County Elections) Petition Rules, 2013. He submitted as such the petition is incompetent. Mr. Albert Kamunde, learned Advocate concluded by stating that the prayers by the Petitioners under page 9 of the petition under prayer (d) is baseless and if granted would serve no purpose. He urged the court to find that the petition dated 6th April, 2013 is incurably defective and should be struck out for the reasons adduced in favour of the 3rd respondent.

Mr. M. N. M. Malonza learned Advocate for the 1st and 2nd Respondents wholly supported Mr. Albert Kamunde's submissions, he however, addressed the court on Rule 10 of the Election(Parliamentary and County Elections) petition Rules, 2013. He averred that Rule 10 of the Petition Rules 2010, specifically requires inclusion of Election results. He urged in this Petition results had not been included though the Petitioners state they dispute the results. He referred to paragraph 10 and 14 of the petition and referred the court to Mututho's case(Supra). He therefore submitted the petition before the court is incomplete and incurably defective. He associated himself with the Court of Appeal decision holding in Mututho's case(supra). On the 1st and 2nd Respondents application dated 15th May, 2013, he urged the application is intended to correct typographical errors in the replying affidavit. He stated the error was due to mistake of the Counsel and that all the Respondents are seeking to do is to put on record the correct documents but not to amend their documents. He further urged that incase the court agrees with the submissions of the counsel for the 3rd respondent, that there will be no need of granting the 1st and 2nd respondent's application by 1st and 2nd Respondents. He further urged in granting that application there would be no prejudice that would be occasioned to the other parties in the petition but should their application be rejected, Mr. M. M. Malonza, submitted the 1st and 2nd Respondents would be prejudiced.

Mr. M. N. Malonza referred this court to the list of authorities being as follows:-

1. MOSES M. WETANGULA V JOHN KOYI WALUKE & OTHERS(2008) EKLK.

On Counsel mistake, he submitted the advocate mistake in filing wrong documents should not be visited on an innocent party. He urged the court to exercise its discretion and allow the 1st and 2nd Respondents application.

On the preliminary objection by 1st and 2nd Respondents, he submitted that the witnesses affidavits are not affidavits for want of compliance with the provisions of The Oaths and Statutory Declarations Act. The 1st and 2nd Respondents contested that they were served with unattested affidavits and prayed that they be struck out. In this regard he referred the court to the case of LLR NO. 623(cat) **DB SHAPRIYA & CO. LTD V BUSH INTERNATIONAL(Case Mp/ 253/2002 C.A Tanzania)**

Mr. A. T. Oluoch learned Advocate for the Petitioners, in response to the 3rd respondent's submission, stated that the application is opposed.

On issue of mis-discreption of the Petitioners he submitted that the striking out a petition is a drastic and draconian measure which court should result to in extreme circumstances. He urged the mis-discreption referred to by the 3rd respondent do not go to the contents of the petition but rather to the form of the petition. He urged further the said mis-discreption do not occasion any prejudice to the 3rd respondent.

He urged that the 3rd respondent entered appearance unconditionally as opposed to conditional appearance and as such he submitted that there was no doubt the 3rd respondent was clear as to what petition was filed by the Petitioners and to which petition he was responding to.

He urged the error of mis-discreption can be described as an inadvertently error by counsel and that it can be discerned by looking at the face of the petition itself. On paragraph 1 of the petition, the Petitioners described "***parties to the petition***" as candidates. Mr. Oluoch, learned Advocate, stated the true position

can be found under paragraph 3 and 4 of the petition, under which the Petitioners are described as Kenyan Citizens and registered voters of Isiolo County.

He urged that the said ground turn to nothing as basis for striking out the petition.

On the issue of parties referred to as interested parties to the petition Mr. Oluoch, learned Advocate, submitted that no prejudice is suffered by such rejoinder and that even if there was a prejudice the court can strike both names and the same won't be fatal to the petition. He urged that the matter raised goes to technicalities contrary to the provisions of Section 80(1),(d) of the Election Act, which requires court to decide matters that came before it without undue regard to technicalities.

Mr. Oluoch, learned Advocate, stated Rule 17(1), (f) and (1) of the Petition Rules, 2013 donates residue powers to this court to direct and require filling further affidavits and/or particulars that would clarify the misunderstanding as to who the Petitioners are. He urged if there are any misunderstanding as to who the Petitioners are that can be cured by Rule 17 of the petition Rules, 2013.

On the ground that the petition was filed by ten(10) Petitioners and signed by one Petitioner who had no authority from the other Petitioners, Mr. Oluoch, learned Advocate, conceded that no affidavits giving authority to the one(1) Petitioner were filed but went on to state that lack of such authority won't render the petition defective to the extent of being struck out. He submitted the very most the Petition would stand at its feet even with one Petitioner who filed his affidavit to that petition. He averred under Rule 20 of Petition Rules, 2013 and read with Rule 17(1) (i) of the Petition Rules, 2013 the requirements for other nine(9) Petitioners to give authority would be cured by reference to Rule 20 of the petition Rules 2013 and Rule 17(1) (d) and (i) of the Petition Rules, 2013.

He submitted in light of that window that ground turns to nothing.

On ground as to who is challenging the petition, Mr. Oluoch, learned Advocate, urged the court to find that there is no doubt as to who is challenging the petition. He submitted the 3rd respondent to the petition answered every single ground raised in the petition.

On ground No.2 of the 3rd respondent's application, Mr. Oluoch, submitted that Rule 10(1),(b) (c) and (d) of the Petition Rules, 2013 are directory as opposed to mandatory. He submitted that the court in looking at that Rule, it ought to consider what would have been the intention of parliament in prescribing the contents of an election can petition and whether failure to disclose the results of election can be the basis for denying Petitioner the right of being heard?. He submitted that could not have been the intention of parliament but the intention was to provide a prescriptive form which could be adopted with necessary variations. He urged the court to find the basis to strike out the petition to be without merits.

He further urged the court to avoid the easy part and use the liberal approach in the interpretation for advancing the cause of justice under Rule 4 and 5 of the Elections(Parliamentary and County Elections) Petition Rules, 2013.

On the witnesses affidavits, Mr. Oluoch, learned Advocate, was of the view that whereas affidavits served upon the 3rd respondents were not commissioned, the court would note that the copies in the court file were commissioned. He urged the court to refer to petition No. 2 of 2013 in which parties were allowed to serve the commissioned affidavits in the court file but not to file fresh affidavits. He urged under Rule 4 and 5 as read with Rule 20 of the Petition Rules 2013 the court can allow serving of such affidavits. Mr. Oluoch, concluded by urging the court to dismiss the 3rd Respondent's application seeking to strike out the petition.

Mr. Oluoch, further urged the court in case it is inclined to grant the 3rd respondent's application to note the petition has been brought up by ordinary residents of Isiolo County under circumstances under which the election was conducted and as such order that each party bears its own costs.

Mr. Oluoch, learned Advocate, now turned to his Notice of Motion dated 16th May, 2013 and filed on 17th May, 2013. He pointed out that the application has eight(8) prayers and he wishes to withdraw five (5) prayers out of the eight(8) prayers. On prayer No.1, he stated it was premature and he was required to lay basis for it before it could be granted.

On prayer No. 2 he sought similarly to have it withdrawn for being premature and had to lay basis for recount to be granted. On prayer for production of election materials as the petition Rules provides procedure for such production such prayer was premature. On prayer No. 4 he urged court to allow the Petitioners to serve properly commissioned witness affidavits but not to file fresh affidavits. On prayer No. 5 Mr. Oluoch, learned Advocate, sought to withdraw prayer No. 5 as the Petitioners concede to the provisions of the law and the relevant Act as being very stringent to the compliance with the provisions of the law.

On prayer No. 6 he urged the court to allow the same pursuant to Rule 17 of petition Rules,2013 to allow the filing of transcripts photographs and video footages as the court has discretion to do so. He urged the court to exercise its discretion and allow prayer No. 6.

On prayer No. 7 Mr. Oluoch, learned Advocate, pointed out that the Petitioners are only pursuing the alternative prayer seeking leave pursuant to Section 17(1)(f) and (i) of the Petition Rules 2013. Mr. Oluoch, learned Advocate for the Petitioners in seeking the alternative prayer urged that the line between the amendments and the discretion of the court under Rule 17(1) (i) of the petition Rules 2013 is very thin and urged the court to allow the Petitioners put in additional evidence and particulars.

Mr. Oluoch, learned Advocate, on his Notice of Withdrawal of witnesses affidavits he applied to withdraw the same.

Mr. N. M. Malonza learned Advocate for the 1st and 2nd Respondents in his response, stated that he has no objection to withdrawal of prayers No's 1, 2, 3 and 5 of the Petitioners Notice of Motion. On prayer No. 4 he submitted that he has no objection if the form and the content of the witnesses affidavits in the court file remains the same as are duly filed.

On prayer No. 6 Mr. N. M. Malonza, pointed out that under Rule 12(1) of the Elections(Parliamentary and County Elections) Petition Rules 2013 such evidence sought to be used should have been filed together with the petition at the time of presentation of the petition and as the same was not filed the Petitioners must demonstrate the reason or their incapacity in failing to file such evidence at the time of filing the petition. Mr. N. M. Malonza went on further to state on perusal of the grounds on the face of the application and supportive affidavit, there is no reason that has been advanced as to why such evidence is being sought to be adduced at this stage. He pointed out that the Petitioners only stated it is necessary that leave be granted.

He further pointed out that the prayer is also ambiguous and speculative. The Petitioners seek to file transcripts of photographs and video footage of Isiolo County election but the same has not specified the polling stations in which the results are disputed and what evidence would assist the Petitioners nor have they indicated what they want to put in their evidence.

On prayer No.7 Mr. N. M. Malonza, learned Advocate pointed out that under Rule 10, Petition Rules, 2013 the particulars sought to be included are under Rule 10, Petition Rules 2013 and ought to have expressly been expressed in the petition. He urged that these are matters which cannot be introduced by way of affidavit. He submitted the only option open to the Petitioners are to amend the petition, however, he submitted the court has no jurisdiction to grant leave to amend at this stage as the time of seeking amendment if any lapsed. He concluded by pleading with the court to dismiss the Petitioners application dated 16th May, 2013 with costs.

Mr. Albert Kamunde, learned Advocate in his response to the Petitioners application dated 16th May, 2013 started by pointing out that he has no objection to withdrawal of prayers No.1, 2, 3 and 5 of the

Petitioners Notice of Motion. He was nevertheless opposed to prayers No. 4, 6, and 7. On prayer No. 4 Mr. Albert Kamunde, learned Advocate, in which the Petitioners are seeking leave to file fresh witnesses affidavits submitted provisions of Rule 12(1), of the Petition Rules 2013 is mandatory that the petition be filed alongside with witnesses affidavits within the period provided for by the Constitution, Election Act, and the Petition Rules. He submitted that the petition has no witnesses affidavits and as such the Petitioners cannot seek to file further affidavits as the petition is not appropriate petition.

On Rule 17(1) (i) of the Petition Rules 2013, he submitted an application can only be brought within 7 days after receipt of the last response to the petition. He urged that Rule 17 of the Petition Rules 2013 is amenable to the Petitioner who has appropriate and competent petition before the court as provided for under Rules 10 and 12 of the Petition Rules.

On prayer 6 Mr. Albert Kamunde, adopted similar submissions raised in regard to prayer No. 4. He also added the prayer for filing transcripts photographs and video footages is speculative and intended to ambush the 3rd respondent as it seeks to produce evidence that could have been filed with the petition. He urged the prayer is not supported by any reasonable or justifiable explanation.

He further submitted contrary to the assertion by the Petitioner that the court has discretion to grant the Petitioners' prayers, there is no provision for the court to exercise discretion to grant the prayers under Rule 17(1) (i) of the Petition Rules, 2013.

On prayer No. 7 Mr. Albert Kamunde, learned Advocate submitted that he Petitioners are seeking to amend the petition. He objected to the prayer being granted as the application was not filed within the 28 days from the date within which the petition was supposed to be presented.

Mr. Albert Kamunde, learned Advocate referred to Section 76(4) of the Election Act and the Gakenia's case(supra) and Mututho's case(supra). He further referred to paragraph 4 of the supportive affidavit of HUSSEIN ALI WARSAME dated 15th May, 2013 which still referred to Women representative in Mandera County and he submitted the 3rd respondent is still confused to which County the Petitioners are referring to.

On mis-discretion of the Petitioners and omission of the parties, inclusion of parties who are not parties to the petition he submitted that is a fundamental defect to the petition and he termed the petition as an abuse of the court process.

He further submitted the Petitioners have not told the court how they intend to cure the defects pointed by the 3rd Respondent and submitted as such the 3rd respondent's application is unchallenged. He submitted the Petitioners have conceded the defects with witnesses affidavits and that the Petitioners had not signed the petition. He urged that there is no supportive affidavit as the one filed is referring to another petition and not the petition before this court.

On failure to include the results he submitted the court cannot adopt liberal interpretation as it is mandatory for the results to be disclosed and a petition without results is a defective petition and abuse of the court process.

He concluded by asking the court to strike out the petition with costs.

I have substantially reproduced the submissions by the counsel in this petition. I have carefully perused the materials in the petition and considered the able submissions by all counsel in this petition and authorities relied upon by each Counsel.

The issues for consideration in this petition as I understand the petition can be summarized as follows:-

1. Whether or not the petition before court is fatally defective for want of legal format and/or legal content.

2. Whether or not this court has statutory or original jurisdiction to grant leave to the Petitioners to amend or put in additional evidence after expiry of 28 days period of presenting the petition.

3. Whether or not the petition is liable for mandatory striking out.

Other points may be resolved on the way as ancillary to but still important nonetheless in this matter.

I will start by dealing with the Petitioners applications dated 16th May, 2013. The Petitioners under prayer No. 4 seek that the court do grant them leave to file fresh witnesses affidavits. Under Prayer No. 6 the Petitioners also seek leave to file and serve transcripts photographs and video footages of Isiolo County.

This petition was filed on 10th April, 2013 being the last day of presenting a petition.

The application dated 16th May, 2013, was filed on 17th May, 2013, 37 days after the last day of presentation of petition. Article 87(1), and (2) of the Constitution of Kenya, 2010 provides:-

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

(2) Petitions concerning an election, other than a presidential election, shall be filed within twenty-eight days after the declaration of the election results by the Independent Electoral and Boundaries Commission.

On the other hand Section 76(4) of the Election Act provides:-

“76. (1) A petition—

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

The Petitioner at the time of filing a petition is required to file affidavit sworn by witnesses whom the Petitioner intend to call at the trial. Rule 12(1), provides as follows:-

“12. (1) A Petitioner shall, at the time of filing the petition, file an affidavit sworn by each witness whom the Petitioner intends to call at the trial.

In my view at the time of filing a petition it is mandatory for a Petitioner to file affidavits sworn by each witness whom the Petitioner intend to call at the trial and the same be filed within the period provided for under Article 87(2) of the Constitution of Kenya, 2010 and Section 76(4) of the Election Act, 2011. Where a Petitioner wants to seek an amendment such an application must be filed before the period provided for presenting petitions has lapsed. It is only when application is filed within the said period a court can consider it, otherwise any application filed after 28 days has lapsed cannot be allowed as court has no jurisdiction to do so. Furthermore even where an application is filed before expiration of the 28 days period allowed for presenting a petition, for the court to grant such an application the petition must in such circumstances be appropriate petition as provided by law and the Petitioner must give sufficient reasons for failure to file an affidavit. Rule 12 (5) of the Elections (Parliamentary and County Elections) Petition Rules 2013 provides:-

“(5) The court shall not grant leave under sub rule (4), unless sufficient reason is given for the failure to file an affidavit.”

As regards prayers No's 4 and 6 of the Petitioners' application dated 16th May, 2013 I find that the application was filed 37 days after closure of time for filing petitions. The petitioners are in a way seeking to introduce new evidence to the petition after the period allowed had lapsed. That such evidence ought to

have been filed alongside with the petition failure whereof leave ought to have been sought before the expiry of 28 days within which to file the petition. The application by the petitioners is after expiry of the said period. This court cannot in view of the stringent provisions of the Election Act and the Constitution extend the period sought. It has no jurisdiction to do so. consequently the Petitioners' prayers No's 4 and 6 are rejected.

On Petitioners prayer No.7 seeking leave to amend petition dated 6th April, 2013 or in the alternative pursuant to Rule 17(1),(f) and (i) of Petition Rules 2013 seeking an order do issue for filing further evidence and particulars to include, the results of Senate election, the date of the declaration of the results and the manner and place of declaration of the results and to correct the error of mis-description of the Petitioners the Petitioners are in actual fact seeking to amend the petition in this prayer. The particulars sought to be included are specifically spelled out under Rule 10 of the Elections(Parliamentary and County Elections) Petition Rules 2013 and which ought to have expressly been expressed in the petition. These matters are mandatory in a petition and cannot be introduced in a petition by way of an affidavit. The said particulars can only be introduced in a petition by amendment and only if an application is filed within the prescribed period as set out under Section 76(4) of the Election Act and not otherwise.

An election court faced with a similar situation in the case of **GAKENIA V KIMANI & OTHERS CASE NO. 1 OF 1992 AT NYERI** stated as follows:-

“This court is of the view that the desired amendments were mistakes in naming specific places- the constituency and some polling stations. It is always of great importance that respondents know exactly where an irregularity or misdeed took place. This is not a trivial; matter and a petitioner is who is not careful drafting his petition, itself not an impossible task should not demand the importance or the errors he makes. Once the respondent gets a petition, he embarks on putting together what material he desires in his defence. He should not be confused and thrown in disarray by the unfortunate errors of the petitioner. If this petition remains for hearing as it is, the pleadings will allude to Changamwe while evidence is likely to come from Ol Kalou. This cannot be. It is trite law that pleadings accord with evidence. Nothing less. So this petition must go out. Even had the amendment gone through paragraph 7 would have differed from the original on Total Registered votes: 541 or 48 589? A sign of further errors?”

Further in the case of **JOHN MICHAEL NJENGA MUTUTHO AND JANE NJERI WANJIKU KIHARA & OTHERS(2008) 1 KLR 10** court of Appeal stated:-

“Election petitions are special proceedings. They have a detailed procedure and by law they must be determined expeditiously. The legality of a person’s election as a people’s representative is in issue. Each minute counts. Particulars furnished count if the petition itself is competent, not otherwise. Particulars are furnished to clarify issues not to regularize an otherwise defective pleading. Consequently if a petition does not contain all the essentials of a petition, furnishing of particulars will not validate it. Section 20 of the Act is clear that any amendment of a petition can only be legally done within 28 days. No supplemental petition was filed in terms of S.20(3). Besides, the petitioner does not have results even now. Her advocate stated as much. If she does not have the results, what is she challenging?. The issues she raises are meant to nullify a particular result. But if she has not given the results, any findings on the issues raised will serve no useful purpose. Any evidence adduced or to be adduced is intended to show that certain irregularities affected the outcome of the election, but without the result it might not be possible to relate the irregularities to the result.”

In my view therefore the Petitioners having not filed their application within the prescribed period as per Section 76(4) of the Election Act, they cannot benefit by way of amending their petition, as amendment of petition can only be legally done within 28 days and further filing of particulars which are not contained in the petition cannot in anyway validate a petition which does not contain all essentials of the petition. Consequently prayer No. 7 is rejected.

The upshot is that the Petitioners' application dated 16th May, 2013 is without merits and is dismissed.

I now turn to the 3rd respondent's application dated 7th May, 2013 for striking out the petition dated 6th April, 2013 and filed on 10th April, 2013.

The 3rd respondent urged that the Petitioners' petition is fatally defective. A quick look at the face of the petition on page 1 and the preamble on page 2 of the petition there are 10 listed Petitioners in the petition. That at paragraph 1 of the petition, the Petitioners change and is stated under "parties to the petition" as "male and female adults of sound mind and was a candidate for the Senate position in Mandera County during the just concluded elections having been validly nominated by the National Alliance Party(TNA) party."

The petition before me is in reference to "in the matter of Independent Electoral and Boundaries Commission Elections in Isiolo County" and "in the matter of IEBC results of Senate Isiolo County Elections". The petition is quite confusing from the way it is drawn and from its pleadings, I find the 3rd respondent is prejudiced as incumbent Senator of Isiolo County as to which petition or Petitioners he is required to respond to and in respect of Senate election because the title of the petition is in respect of Isiolo county Senate elections whereas on page 2 of the petition the Petitioners refers to Mandera County which is a different county from that of Isiolo County. The 3rd respondent it is clear that he did not contest for Senate position in Mandera County, in the former North Eastern Province, Kenya during the 4th March, 2013 elections.

The Petitioners in their petition under prayer (d) are seeking an order nullifying the gazettelement of the 3rd respondent Mohamed Abdi Kuti election as Senator for Mandera County in the election of 4th March, 2013. The petition itself is in the matter of IEBC results of Senate Isiolo County Elections and under paragraph 4 of the petition, the Petitioners have clearly stated that the 3rd respondent Mohamed Kuti is the Senator of Isiolo.

Considering the petition and the facts as are laid down, would one surely say if this petition is left to go to trial the public, the Respondents, the interested parties or even the Petitioners are certain about what County is in question? I think the answer is obvious; that not at all. The election petition published on 13th March, 2013 exhorted to the whole world that the election of Isiolo County was being questioned.

The Respondents on collecting a true copy or on being served with copy of the petition found in the body of the petition that it was Mandera County whose election were being questioned. can one say that is a minor thing or a mere mis-description? Can it be said after all that the public, the Respondents and even the Petitioners knows for sure the County is Isiolo and not Mandera? Can both counties elections be in issue in one petition?

Some years ago there was an election petition in a High Court of Kenya, at Nairobi in a petition between **JAMES CHARLES NAKWANGA OSOGO VS SIMON CHACHA & ANO. E.P NO. 8/88** which was in a matter of Election for Bunyala Constituency. There were claims of undue influence of oathing amongst other election offences. In that petition an amendment was sought under S.20(2) of the National Assembly and Presidential Election Act(Cap.7) (now repealed) and which Section is now replaced by Section 76(4) of the Election Act. From the ruling of the 3 Judge Election court, the Constituency had been described in the body of the petition as BELGUT. The court declined to effect the amendments for which had come after 28 days.

The court in their ruling reproduced part of the ruling in E.P. 11 of 1979. **ANDREW KIMANI NGUMBA V PAUL BOIT** which reads as follows:-

"A member of the Court mentioned by typographical errors and trivial mistakes yesterday. We see that the changes applied for now are not of that sort. They are unfortunately mistakes naming a specific place. It is always a great importance to the Respondents to know, where an irregularity or misdeed took place. There is no doubt that in this case it is not a trivial matter to change a complainant.....it is not an impossible task placed upon the Petitioners to phrase his petition so as to avoid these traps....."

In the recent decision of the High court of Kenya, at Nyeri **in EP 1 of 1998 STEPHEN KIMANI GAKENIA V FRANCIS MWANGI AND 2 OTHERS.** Hon. Justice J. W. Mwera as he was then was faced with similar application stated:-

This court is of the view that the desired amendments were mistakes in naming specific places - the constituency and some polling stations. It is always of great importance that Respondents know exactly where an irregularity or misdeed took place. This is not a trivial matter and a Petitioner who is not careful in drafting his petition, itself not an impossible task should not demean the importance or the errors he makes. Once the respondent gets a petition, he embarks on putting together what material he desires in his defence. He should not be confused and thrown in disarray by the unfortunate errors of the Petitioner. If this petition remains for hearing as it is, the pleadings will allude to Changamwe while evidence is likely to come from or concern Ol Kalou. This cannot be. It is trite law that pleadings accord with evidence. Nothing less. So this petition must go out. Even had the amendment gone through paragraph 7 would have differed from the original on TOTAL REGISTERED VOTES: 541 or 48589? A sign of further errors.”

I am of the view that the naming of two different counties, that is Isiolo and Mandera County has caused confusion to the Respondents as to which Senate election they are required to respond to. The respondents are confused as to which place the irregularities or misdeeds took place and which witnesses to call in response. That if the petition remains for hearing as it is, the pleadings will allude to Mandera County while evidence is likely to come from or concern Isiolo county. This cannot be allowed to go on. It is trite law that each party is bound by its pleadings and that the pleadings do accord with evidence. I am of the view that this petition has no basis and must be struck out. Allowed to proceed would be prejudicial to the 3rd respondent who never ran for Senate position in Mandera County, which is in the former North Eastern Province, in the Republic of Kenya at the further Northern corner of Kenya whereas the 3rd respondent is a Senator for Isiolo County in the former Eastern Province, in the Republic of Kenya.

Further on perusal of page 2 of the petition paragraph 5 and 6 of the petition under sub-title “parties to the petition”. The petitioners have listed or included in the petition what they refer to as “1st interested party Chapfano Guyo Mokku and 2nd interested party Abdirahman Abdullahi Ismail”. It is stated that the 1st interested party was a candidate for Senator for Isiolo County under(ODM) and that the 2nd interested party is said to be a Senator for Mandera County under (ODM). It is of importance to note Mandera County features more than once in this petition. The implication given in this petition is that Isiolo County and Mandera County are same and one County. This is not a simple mis-discreption of a place but a total confusion.

Under Rule 2(d) Of the Elections(Parliamentary and County Elections) Petition Rules 2013, any person whose conduct is complained of in relation to an election may be joined as “***interested party***” with the leave of the court once the nature of the interest has been considered through an application, otherwise there is no room for an interested party

Under Article 87(2) of the Constitution of Kenya, 2010, S.76 of the Election Act and the Elections(Parliamentary & County Election) Petition Rules 2013 and in Elections (General Regulations) 2012 there is no interested party in any election petition.

Under Rule 2 of the Elections(Parliamentary & County Elections) Petition Rules 2013 meaning of Petitioner and Respondent is given as follows:-

“Petitioner” means a person filing a petition and includes a cross-Petitioner;

“respondent” means the President-elect and includes the Deputy President-elect, the Commission and any other person named in the petition as a respondent.

In the instant petition there is no complaint against the 1st and 2nd interested parties conduct by the Petitioners nor has any application been filed to have the interested parties joined and Petitions the nature

of interested parties interest has not been declared. I find that the interested parties have no business in being parties in this petition. There is no evidence of their having been served with the petition. The Petitioners' Counsel conceded so and has no objection to the interested parties names being expunged or being struck out of the record. I accordingly in the interest of justice struck out the names of the 1st interested party CHAPFANO GUYO MOKKU and the 2nd interested party ABDIRAHMAN ABDULLAHI ISMAIL from the record of this petition.

The 3rd respondent further challenged the petition and averred the same is defective on the ground that the same is purported to have been filed at the behest of ten(10) Petitioners. That nine (9) Petitioners have not signed the petition and that all Petitioners have not sworn affidavits in support of the petition as required by the rules of the Elections (Parliamentary & County Elections) Petition Rules 2013. Honourable court. The petition on page 10 shows that the petition was signed by one Ismail Suleman who has not deponed as having the authority of the co-Petitioners to swear the supporting affidavits on their behalf. That no authority for that purpose has been filed in court.

It is conceded by the Petitioners that it is only Ismail Suleman who signed the petition and that he did not have authority from his co-Petitioners to sign the petition on their behalf. On supporting affidavit in an election petition, under Rule 10(3) of the Elections(Parliamentary and County Elections) Petition Rules 2013 is required to be filed by a petitioner or person duly authorized by the petition. Rule 10(3) (a) (b) and (e) of the Election(Parliamentary and County Elections) Petition Rules 2013 provides:-

“(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 made by the Petitioner containing the grounds on which relief is sought and setting out the facts relied on by the Petitioner; and

(e) the grounds on which the petition is presented; and

In this petition nine (9) Petitioners failed to sign or authorize the signing of the petition before the court, they did even file supporting affidavit. As regards the supporting affidavit by Ismail Suleman sworn on 6th April, 2013 the heading refers to Ismail Suleman as the only petitioner whereas the petition before me has 10 Petitioners. There is no explanation as to why the names of the other nine (9) Petitioners are omitted and my view is that the affidavit is meant for another petition and not the one before me.

The petition before me do not comply with the provisions of Rule 10(3) of the Elections (parliamentary and County Elections) Petition Rules 2013 as the petition is not supported by an affidavit made by the Petitioner or any of the Petitioners.

The 3rd respondent further submitted the petition is defective as it fails to comply with mandatory requirements that requires it to state the results of the election and manner and date in which they were declared, thereby making the petition merely speculative since the results themselves are not under challenge.

Under Rule 10(1) (a) to (f) of the Elections(Parliamentary and County Elections) Petition Rules 2013 it is provided:-

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

(a) the name and address of the Petitioner;

(b) the date when the election in dispute was conducted;

(c) the results of the election, if any, and 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.”

The 3rd respondent submitted that it is mandatory for the Petitioners to comply with the said rule failure whereof the petition is defective. The Petitioners view is that Rule 10 of the Elections(Parliamentary and County Elections) Petition Rules 2013 were directory as opposed to mandatory. It is this courts view that the Petitioners’ view is not in conformity with the provisions of the Rules in question. Indeed similar issue was dealt with by court of appeal in the case of **JOHN MICHAEL NJENGA MUTUTHO AND JANE NJERI WANJIKU KIHARA & 2 OTHERS(2008) KLR 10** where the Court of Appeal held:-

“Regulation 40 implied that where the results were not included in the petition, it will be incomplete as the basis for any complainant would be absent and whatever complaints a Petitioner had about an election would be regarded as having no legal basis. The law sets out what a petition should contain, and if any of the matters supposed to be included was omitted, the petition would be incurably defective.”

The present position of this petition is similar to Mututho’s case(supra). The Petitioner did not include the results in their petition and the manner in which it had been declared; the law set out under Rule 10 of the petition Rules 2013 what a petition should contain and if any of the matters supposed to be included are omitted, as in this case the petition would be incomplete and incurably defective.

The 3rd respondent further submitted that the petition failed to comply with Rule 12(6) of the Elections (Parliament and County Elections)parliamentary and County Elections) Petition Rules 2013 which provides:-

“(6) The provision of Order 19 of the Civil Procedure Rules, 2010 (L.N. 151/2010) and the Oaths and Statutory Declarations Act (Cap.15) shall apply to affidavits under this rule.”

Rule 12(1) of the petition Rules 2013 makes it mandatory for Petitioner at the time of filing the petition to file witnesses affidavits sworn by each witness whom the petition intends to call at the trial. The affidavits attached of Daniel Sebastian Ekai and Halima Gonjonbe have not been commissioned as required under Section 4 and 5 of the Oaths and Statutory Declaration Act(Cap.15) Laws of Kenya. The two are not affidavits as they have not been commissioned. The other witness’s affidavits have not indicated the petition case number, they referred to, they talk of third parties and have not included the 3rd respondent as a party in this petition. The affidavits by Adan Abukula has no parties on the heading and it is not clear what petition it refers to. The affidavits of Petitioners witnesses Ismail Suleman, Fatima Dahir, Boku Sora Umba, Agnes Nkirote Mutea, Gedion Kaburu Kirera, Joyce Karambu, Mohammed Ada Jillo, Abdi Nur Ismail, Isaac Mungathia, Ngera, Francis Muriungi, Gichunge, Habiba Wario Wako, Daniel Sebastian Ekai, Hussein Ali Warsame, Abdurahman Ali, Roba Halkano Wako, Halima Gonjonbe, Mohamed Adan Heris have not mentioned the 3rd respondent one of the Respondents in the petition.

The affidavits have no reference to the petition before me and are all expunged from the court record. The petition was as such filed without mandatory witnesses affidavits as required under Rule 12(1) of the Elections (Parliamentary and County Elections) Petition Rules 2013 and the same is incompetent .

Further affidavits by Boku Sora Umba, Agnes Nkirote Mutea, Gedion Kuburuki Kirera and Joyce Karambu do not have a petition case number. It is clear from the above that the Petitioners have no evidence that they can rely on if the petition was to go on. They have just an empty shell as there are no supporting affidavits nor are there witnesses affidavits. The petition is therefore incomplete, incompetent and incurably defective.

The 3rd respondent on relief sought in the petition averred that the same is speculative and inconsistent with the allegations raised in the body of the petition. The Petitioners under prayer (9) invites this court to nullify the gazette of the 3rd respondent as a Senator for Mandera County in election held on 4th March, 2013 through special issue of Kenya, Gazette, Notice No.3155. The face of the petition clearly point out that it is in the matter of IEBC results of Senate Isiolo County Elections. There is no mention of the IEBC results of Senate for Mandera County. This prayer is confusing what the Petitioners wanted to be granted by the court. The prayer is scandalous and an abuse of the court process. It cannot be granted as it would be an order in vain and based on non-existing facts as the 3rd respondent was never elected as a Senator for Mandera County nor was he declared as a Senator of Mandera County or gazetted through the alleged Gazette Notice No.3155 of 13th March, 2013. I pose and ask even if the prayer were to be granted what purpose would it serve? None at all. This is an abuse of the court process and an indication that the Petitioners were not keen and serious with this petition.

On application by 3rd respondent dated 10th May, 2013 and the 1st and 2nd Respondents dated 15th May, 2013 the Respondents are seeking to be granted leave to file further affidavits of their intended witnesses. The applications are based on Rules 4, 5, 15, 17 and 20 of the Elections(Parliamentary and County Elections) Petition Rules 2013. The court may for the purposes of ensuring that no justice 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. The Respondents under Rule 14 of the Elections(Parliamentary and County Elections) Petition Rules 2013 is upon service with an election petition may oppose the petition by filing and serving a response within a period of not more than 14 days upon service of the petition. The period of filing response by the Respondents is given in the Elections (Parliamentary and County Elections) Petition Rules. The court therefore under Rule 20 can extend the time within which to file further affidavits for the purposes of ensuring that no injustice is done to any party.

Under Rules 4, 5 and Rule 20 of the Petition Rules I am of the view that a respondent who has demonstrated the cause of delay and satisfied the court that failure to be allowed to put in the further affidavits would occasion injustice to the respondent, is entitled to an extension of time to file further affidavits on such terms or conditions as court may consider fit.

The 3rd Respondents application was not canvassed before me nor was it opposed. The 1st and 2nd Respondents application was argued by the 1st and 2nd Respondents but the Petitioner did not oppose the same. The 1st and 2nd Respondents urged the court to grant their application only if the petition is not struck out. I am of the view that the Respondents applications being unopposed and the refusal to allow them being likely to cause injustice, the same ought to be granted if the petition herein is not struck out.

I have carefully considered all the submissions by the learned Advocates in this petition and it is clear from the reasons I have given that this petition is for striking out. The court bears in mind that striking out a suit, in this case a petition, is a drastic thing especially at this stage. That striking out a suit should be only in a very clear and plain cases.

It is a step that ought to be very sparingly taken and when taken court must move with great caution. This is because a suit is filed by a party that feels aggrieved and seeks relief from the court, with the hope that justice will be done through hearing all parties and determination of the matter fairly.

It is the principal of justice and as enshrined in our constitution that disputes should go to trial and disputes be decided fairly. But one has to understand that this is only in litigation that passes the clear set bar. This petition has been seriously considered in the light of this and has been found wanting and it does not pass the test and allowing it to proceed to trial would be an abuse of the court process.

The Petitioners petition dated 6th April, 2013 and filed on 10th April, 2013 is struck out with costs to the Respondents.

DATED, SIGNED AND DELIVERED AT MERU THIS 14TH DAY OF JUNE, 2013.

J. A. MAKAU JUDGE

Delivered in open court in the presence of:

- 1. Mr.A. T. Oluoch for the Petitioners**
- 2. Mr. Kinget h/b for Malonza for the 1st and 2nd Respondents.**
- 3. Mr. Thurania h/b for Mr. Kamunde for 3rd respondent**

J. A. MAKAU JUDGE