



REPUBLIC OF KENYA

High Court at Malindi

Election Petition 8 of 2013

IN THE MATTER OF THE ELECTIONS ACT, 2011

AND

IN THE MATTER OF THE ELECTION OF THE NATIONAL ASSEMBLY KILIFI SOUTH CONSTITUENCY

BETWEEN

SARAH MWANGUDZA KAI.....PETITIONER

V

MUSTAFA IDD SALIM.....1ST RESPONDENT

ASHA ABUBAKAR(sued in capacity as

the Returning Officer IEBC Kilifi.....2nd RESPONDENT

THE INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION3RD RESPONDENT

RULING

1. In the recently concluded General Elections held on 4th march 2013, the people of Kilifi South constituency, Kilifi County went to the polls to elect their representative to the National Assembly. The election was contested by sixteen candidates including the 1st Respondent who was eventually declared and gazetted as the duly elected representative of Kilifi South constituency.

The elections were conducted by the 3rd Respondent hereinafter referred to as ***“the commission.”***

The County Returning Officer was named as the 2nd Respondent.

The Petitioner who avers that she is a registered voter who participated in the said elections was dissatisfied with the outcome of the elections and she filed this petition on 3rd of April 2013 challenging the validity of the said elections.

2. The subject of this ruling are two applications filed by way of Notice of Motion by the 1st Respondent

on different dates. The first application is dated the 26th April 2013 and was filed on 29th April 2013. The application seeks orders to strike out the petition on grounds that the petition was served on the 1st Respondent, hereinafter referred to as the Applicant, outside the time prescribed by the law.

3. In the second application dated 21st May 2013 filed on 22nd May 2013, the Applicant prays that the petition be struck out allegedly because it was incurably defective as it had been filed by an incompetent person. The applicant also contends that the petition was invalid as the petitioner had failed to disclose the election results as required by **Rule 10 (1) (c) of the Elections (Parliamentary and County Elections) Petition Rules, 2013** hereinafter referred to as the Rules.

4. In order to facilitate the expeditious disposal of the applications considering the strict timelines within which an election petition ought to be heard and determined and considering also that the two applications sought identical orders of striking out the petition, the court directed that the two applications be heard together. By consent of the parties, the applications were fixed for hearing on the 28th May, 2013.

5. For purposes of good order, I propose to deal with the three issues raised in the two applications sequentially starting with the issue of service raised in the first application.

6. The gist of the Applicant's case in the application dated 26th April 2013 as clearly brought out by the Applicant in his supporting affidavit sworn on 27th April 2013 and the submissions made by his learned counsel Mr Paul Buti is that though the Petitioner purported to serve the petition through an advertisement published in the Standard Newspaper of 15th April 2013, service was not properly effected on the Applicant as a copy of the Petition was not available at the Malindi High Court Registry for collection by his advocate's clerk on 23rd April 2013 though the advert had indicated that a copy of the summons and petition may be obtained from the High court Registry at Malindi.

7. Mr. Buti, submitted that by virtue of the provisions of **Rule 13(1) of the Rules**, the Petitioner was enjoined to effect service of the petition within 14 days of filing of the petition. He added that this provision was brought in under the Elections Act pursuant to **Article 87(1)** of the Constitution to ameliorate the legal rigours concerning service of petitions which existed under the previous election law regime. Under **Section 20(1)** of the National Assembly and Presidential Elections Act 2007, a petition was required to be filed and served within 28 days of publication of the election results and any service effected outside the 28 day's period was invalid. For this proposition, Mr. Buti relied on the case of *Muiya v Nyaga & Others (2003) EA 616*

8. Mr Buti further submitted that since the petition herein was filed on 3rd April 2013, the 14 day period when service was supposed to be effected started running from 4th April 2013 since under the provisions of the Interpretation and **General Provisions Act (Cap 2)**, the day of the event is excluded. The 14 day period then expired on 17th April 2013.

9. Though conceding that the petitioner had effected service through publication of an advertisement in the standard newspaper on 15th April 2013 which was within time, Mr Buti argued that the publication of the advert did not constitute sufficient or proper service. He contended that service is only complete when the Respondents are served with a copy of the petition which did not happen in this case till 24th April 2013 when a copy of the petition was forwarded to him by the Petitioner's advocates.

10. It was his contention that when he sent his clerk to collect the Applicant's copy of the Petition on 23/4/2013, the same was not available and his clerk was informed by the Registry personnel that the Petitioner had deposited only one set of the petition which had since been collected by the 2nd Respondent. This submission is premised on the depositions made by the Advocate's clerk Mr John Omboga sworn on 27th April 2013 in support of the application.

11. To further buttress this point, Mr Buti relied on two letters exhibited as annexures to the applicant's

supporting affidavit to show that he wrote to the Deputy Registrar High Court on 23rd April 2013 and to the petitioner's Advocates twice on 23rd April 2013 and on 24th April 2013 requesting to be supplied with a copy of summons and the petition to enable him advise his client accordingly. It was after writing the second letter on 24th April 2013 that the petitioner's Advocates wrote to him on the same day forwarding a copy of the petition to him.

Based on the above facts, counsel asserted that since a copy of the petition was not availed by the petitioner for his collection at the court Registry and one was only availed to him on 24th April 2013, it means that service of the petition was effected on the Applicant on 24th April 2013 which was 21 days after the petition was filed which translated to service eight days outside the time limited by the law for service of petitions.

12. Finally on this point, Mr Buti submitted that since the petition was served late by eight days and the petitioner had failed to take advantage of **Rule 20** of the petition Rules by applying for enlargement of time within which to effect service of the petition, service of the petition on the applicant remained improper. The late service of the petition amounted to a contravention of **Rule 13(1)** of the Petition Rules which vitiated the service by advertisement made on 15th April, 2013 and rendered the petition invalid.

For these reasons, he invited the court to strike out the petition.

13. Mr. Sigei Learned counsel for the 2nd and 3rd Respondents supported the application. He associated himself with the submissions made by Mr. Buti but added that the advertisement as placed by the Petitioner in the newspaper did not amount to sufficient service as it fell short of complying with the requirements of **Rule 13(4)** of the Rules regarding the font and size of an advert meant to effect service of a petition. He claimed that the font in the advert was not size 12 and the measurements captured by the advert was 10cms width and 8.5cms in length not 10 by 10 cms as required by the Rules.

14. Counsel contended that failure to ensure that the advert conformed to the format prescribed in **Rule 13 (4)** was not a technicality but went to the substance of the petition. He relied on the authority of **DANIEL KIPKEMOI BETT & 7 OTHERS v MARGARET WANJIKU CHEGE Civil Appeal (Application) No. 81 Of 2010** on the definition of the term "**technicality.**" He urged the court to dismiss the petition with costs to the Respondents.

15. The application is opposed through a replying affidavit sworn by the petitioner on 24th May 2013 and another affidavit sworn by Jack W. Matheka, an Advocate practising in the firm of M/s Musinga & Company Advocates which firm has the conduct of the petition on behalf of the Petitioner. In his affidavit, Mr Matheka deposed that on 5th April 2013, he took three copies of the election petition to the court registry at Malindi subsequent to which the petition was advertised in the Standard Newspaper of 15th April 2013.

16. In opposing the Motion, the petitioner averred that the requisite number of copies of the petition were left in the court registry by Mr Matheka. She stated that though form EP3 set out in the schedule to the Rules refers to summons, there is no form providing for service of summons under the Rules and therefore, failure to serve summons was not fatal especially in this case where the Applicant has since entered appearance and responded to the petition.

17. In his submissions in response, learned counsel for the Petitioner Mr. Wameyo argued that the issues raised by the Applicant amounted to procedural technicalities and urged the court to disregard them under **Section 80** of the Elections Act and **Article 159** of the Constitution. He relied on the definition of the term "technicality" as espoused by the Court of Appeal in the case of **DANIEL KIPKEMOI BETT & 7 OTHERS v MARGARET WANJIKU CHEGE (supra)** where the court defined technicalities to mean issues that do not challenge the inherent merit of a matter before the court. He claimed that the application did not challenge the inherent merit of the petition but attacked it on matters of form.

18. Mr Wameyo further submitted that from the affidavit of John Omboga, it was clear that he went to

the Registry to collect a copy of the petition on 22nd March, 2013, a month before the petition was filed and obviously by that time, there was no petition which would have been available for his collection. He invited the court to find that the Applicant has not availed any evidence to demonstrate that he went to collect copies of the petition from the Registry as alleged and failed to obtain the same.

19. The petitioner's case, according to Mr. Wameyo is that the Applicant was properly and effectively served with the petition. Service was effected through an advertisement in the standard newspaper on 15th April, 2013 which was within the time allowed by the law. In his view it was not therefore necessary to apply for extension of time under Rule 20 as suggested by Mr. Buti.

20. Regarding the format of the advert, Mr Wameyo submitted that the advert conformed to the requirements set out by **Rule 13 (4)**. He went on to add that the purpose of the Rule was to ensure that the advert was noticed by the parties affected by the petition and in the instant case that purpose was achieved since the Applicant concedes to have read the advert on the date it was published, instructed his advocates and thereafter filed his answer to the petition within the timelines set by the law.

21. It was his position that even if the advert fell short of complying with **Rule 13(4)**, it would be unfair and unjust to strike out the petition on that ground alone as clearly the Applicant had not suffered any prejudice. He therefore argued the court to dismiss the 1st Respondent's application.

22. Having considered the application and the submissions made by counsel on record for the parties I find that the only issue for determination in this application is whether the Petitioner properly effected service of the Petition on the Applicant within the time prescribed by the law.

23. The legal position regarding service of Election Petitions is provided by both the Constitution and the law. The **Elections Act 2011** was enacted by parliament pursuant to the mandate given to it by the people of Kenya in **Article 87 (1)** of the **Constitution of Kenya 2010** which provides as follows:-

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

Under **Section 77** of the **Elections Act** which reproduces the provisions of **Article 87 (2) & (3)** of the Constitution, it is clear that a petition concerning an election other than a presidential election should be filed within 28 days after the declaration of the election results by the independent Electoral and Boundaries Commission (the commission) and may be served directly or personally upon a Respondent or by advertisement in a Newspaper with national circulation. The time within which service ought to be effected is set by **Section 76 (1)** of the **Elections Act** and **Rule 13 (1) (2)** of the **Rules**.

Section 76(1) of the **Elections Act** (the Act) states as follows-

“ 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) of the **Rules** is in the following terms-

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

Rule 13 (2) proceeds to specify the modes of service. It provides that service of the petition under subrule(1) shall be by –

“(a) Direct service; or

(b) Publication in a newspaper of national circulation.”

24. My reading of the above provisions of the law reveals that there is a slight conflict between the provisions of **Rule 13 (1)** of the **Rules** and **Section 76 (1)** of the Act regarding the time within which a petition should be served. **Rule 13 (1)** provides for fourteen days while **Section 76 (1)** limits the time to fifteen days. This apparent conflict can easily be resolved by the fact that the **Rules** amount to subsidiary legislation whose provisions must give way to pronouncements of the law in the parent legislation in this case, **Section 76 (1)** of the **Elections Act**. It is therefore my view that the time within which an Election Petition challenging the validity of elections other than a Presidential Election should be served within fifteen days of filing of the petition.

25. As regards the modes of service, the legal regime covering this area comprising the Constitution, the Elections Act and the **Rules** as shown in paragraph 23 leaves no doubt that service of a petition can be properly effected by service on a Respondent either personally or through an advertisement in a Newspaper of national circulation. My take on this is that a Petitioner is given an option to decide which one of the two modes of service set out under **Article 87(3); Section 77(2)** and **Rule 13(2)** he would use when serving an Election Petition.

26. In my view, these provisions of the law were enacted to cure the mischief which existed in the previous electoral law regime where Respondents aware that Election Petitions had been filed against them did everything in their power to avoid service within twenty-eight days to defeat the provisions of **Section 20 (1)** of the National Assembly and Presidential Elections Act (now repealed) which made it mandatory for a petition to be filed and served within twenty-eight days of declaration of the election results.

27. In this case, it is not disputed that the Petitioner placed an advertisement in the Standard Newspaper of 15th April, 2013. The Applicant has also conceded that the said advert was published within fourteen days of filing of the Petition. It is also not disputed that the Standard Newspaper is a Newspaper with national circulation.

Applying the law cited above on time and modes of service to these undisputed facts, it is clear to me that in placing an advertisement in the Standard Newspaper on 15th April, 2013 containing the details specified in form EP3, the Petitioner discharged the duty imposed on her by the constitution and the law regarding service of the petition on the Applicant.

28. The Applicant has admitted that he saw and read the advertisement on the same date it was published. Part of the advert read in part that:-

“Service of summons and petition on you will be by means of this advertisement. A copy of the summons and the Petition may be obtained from the court at the Malindi High Court Registry at Malindi P. O Box 2 Malindi.”

Once the Applicant became aware of the petition, it became incumbent on him to make arrangements to collect a copy of the petition from the High Court Registry at Malindi as directed in the advert.

In this case, the Applicant claims that his advocate’s clerk visited the court registry with the aim of collecting a copy of the summons and petition but none were available for his collection.

29. This claim however is not backed by any evidence since the letters relied upon by Mr. Buti were letters written by him addressed to the Deputy Registrar and to the Petitioner’s Advocates. There was no evidence availed emanating from the court, say for example a letter from the Deputy Registrar confirming the Applicants allegation that no copy of the petition was available for the Applicant as the Petitioner had only supplied the court with one copy which had been collected by the 2nd Respondent.

30. The Petitioner has provided evidence through the affidavit sworn by Mr. Matheka to the effect that he took three copies of the Petition to the court for collection by the Respondents. This position was repeated by advocates acting for the Petitioner in their letter dated 24th April, 2013 forwarding a copy of the

Petition to Mr. Buti for the Applicant. With this evidence, the Petitioner has effectively countered the claim by the Applicant that he was unable to collect a copy of the Petition as the Petitioner had not provided sufficient copies to the court registry.

31. That being the case, I have no reason to disbelieve Mr. Matheka. I am well aware and take judicial notice that while filing documents at any court Registry, the court staff require all the copies of pleadings supposed to be to be filed to be produced, paid for and stamped. It is difficult to understand how Mr. Matheka would have failed to comply with this requirement. But even if I was wrong on this point, I do not think that there is sufficient evidence on record to enable the court make a determination of fact concerning this issue. The allegations by both the applicant and the petitioner are deponed to in affidavits and it is therefore the word of the applicant against that of the petitioner.

32. It is trite law that whoever alleges must prove. And under **Section 3 (4)** of the Evidence Act, a fact is not proved when it is neither proved nor disproved. In the circumstances, I am satisfied that in this case, the Applicant has failed to prove his claim that the Petitioner did not supply sufficient copies of the Petition to the Courts Registry for collection by all Respondents within the time limited by law for service of Election Petitions.

33. I hasten to add that even if such copies had not been provided to the court Registry as alleged, It is my view and I so find that no prejudice would have been occasioned to the Applicant since he was able to obtain a copy of the Petition the day after his advocate started the search for a copy of the petition and was able to file his reply to the petition in good time.

34. As regards the format of the advertisement, I have looked at the original version of the advert and am satisfied that it contained all the details stipulated in form EP3 set out in the schedule to the **Rules** and **Rule 13 (4)** of the Rules. **Rule 13 (4)** provides that:-

“Where petition is served by publication in a Newspaper as provided under sub-rule (2) (b) and (3) (c), the advertisement shall be sufficient if it-

(a) Is in form EP 3 set out in the first schedule and contains, as a minimum, the details required in that form;

(b) Is of, at least, font size twelve, and

(c) is captured in dimensions of not less than ten by ten centimetres.

The advert sufficiently identified the registration number of the Petition as filed in this court, the name of the Petitioner and her advocates including their address for service. It also identified the Respondents by name and gave them fourteen days notice to answer to the petition. I am therefore satisfied that the format of the advert including its font size and measurements are in conformity with form EP3 and **Rule 13 (4)** of the **Rules**.

35. Just to add a comment or two regarding the complaint that the Applicant was never served with a copy of the summons mentioned in the advert. It is important to note that the law does not provide that a Respondent should be served with any summons after the filing of an election petition. Though form EP3 makes reference to summons, the Elections Act and the Rules made thereunder only talks about service of an election petition. Consequently, the petitioner had no legal obligation to serve summons on the Respondents.

36. For the foregoing reasons, it is my finding and decision that the Applicant was properly and effectively served with the Petition herein and that the said service was not done outside time. It was done using one of the modes of service recognised by the constitution and the law and also within the timelines set out by both **Section 76 (1)** of the Act and **Rule 13 (1)** of the Rules.

Given this finding, it automatically follows that the Application dated 26th April, 2013 lacks merit and it

is hereby dismissed.

37. Turning now to the second application dated 21st May 2013, it is the applicant's case that the petition should be struck out on two main grounds. The first ground advanced by the applicant was that the petition was defective for having been filed by an incompetent person.

It was the applicant's position that the petitioner, being a voter, lacked capacity to file an election petition challenging the outcome of elections.

In the second ground supporting the Motion, the applicant claims that the petition is invalid as the petitioner failed to disclose the results of the elections thus contravening the provisions of Rule 10 (1) (c) of the **Rules**.

38. In his submissions in support of the first ground, Mr Buti asserted that the Petitioner who has described herself as a voter has no locus standi to bring and sustain the petition. He argued that the repealed constitution at section 44 (3) (b) gave a registered voter the right to petition the High Court to question the election of a candidate. However, he argued, that provision was not imported in our current constitution. Counsel further stated that even in the Elections Act which is the legislation enacted by parliament under **Article 87(1)** of the constitution, no provision was made granting a voter the right to file an election petition.

39. It was further argued on behalf of the Applicant that the only law that gives an indication as to who qualifies to challenge the outcome of elections and sets out an election petition as the mechanism through which such a challenge can be mounted is the Electoral Code of Conduct made by the Commission under **Section 109(3)** of the Elections Act.

40. Mr Buti submitted that the only persons who were enjoined to the code were political parties participating in the elections and every candidate. That at paragraph 6, political parties and their candidates are duty bound to accept the election results as declared, announced and certified. If dissatisfied with the results, the code gives candidates the right to question the validity of the results through an election petition but does not give a voter the same right.

In his view, since the petitioner did not have capacity to file or maintain the petition, the petition was defective and ought to be struck out.

41. In response, Mr. Wameyo referred the Court to the case of **RAILA ODINGA v IEBC & OTHERS (supra)** and invited the court to note that **only** one petitioner out of the five petitioners in the consolidated petitions was a candidate in the Presidential Election held on 4th March 2013. He argued that the Supreme Court did not throw out those petitioners on the ground that those petitioners did not have locus standi to file the petitions.

42. Counsel further submitted that **Article 87** must be read together with **Article 38** of the Constitution which gives every person the right to a free and fair election based on universal suffrage. Mr Wameyo urged the court to give a liberal interpretation to **Article 38** and hold that any person who feels that his right to a free and fair election has been infringed and that the results of an election are not in accordance with the will of the people has a constitutional right to file a petition.

43. Mr Wameyo further contended that the Petitioner, being a registered voter had a right to bring a petition to question the outcome of an election. It was his position that the Respondent has not demonstrated that the Constitution and the Election Act has any provision that prohibited a voter from filing a petition. He therefore urged the court to find that the petitioner had locus standi to institute and maintain the petition.

44. In reply, Mr. Buti submitted that the issue of locus was not one of the issues identified for determination by the Supreme Court in the Raila Odinga case (supra). He went on to add that **Article 38** does not limit itself to general elections. That it establishes fundamental rights which can be canvassed

under **Article 22** of the Constitution by filing a constitutional petition and not by filing an election petition.

Mr Buti also claimed that even if the court were to hold that a voter had a right to file a petition, the petitioner had not proved that she was actually a registered voter.

45. The Petitioner, in her affidavit sworn in support of her petition describes herself as a registered voter at Kidutani Primary School Polling Station. It is true that she did not produce her identification documents in court. But the 1st Respondent did not lead any evidence to discredit the existence of the Petitioner or that she was a registered voter.

In the circumstances, I have no reason or legal basis to disbelieve the Petitioner. At this point, I am minded to quickly remind the Applicant that our justice system is adversarial and the role of the court is limited to determining disputes based on evidence placed before it. I will say no more on this point.

46. Having said that, I now wish to consider whether the petitioner has *locus standi* to institute this petition.

Article 38 of the constitution provides for political rights *inter alia* under the Bill of Rights. This Article states that;

“38. (1) Every citizen is free to make political choices, which includes the right—

(a) to form, or participate in forming a political party;

(b) to participate in the activities of, or recruit members for, a political party; or

(c) to campaign for a political party or cause.

(2) Every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for

(a) any elective public body or office established under this Constitution; or

(b) any office of any political party of which the citizen is a member.

(3) Every adult citizen has the right, without unreasonable restrictions—

(a) to be registered as a voter;

(b) to vote by secret ballot in any election or referendum; and

(c) to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office.

47. I fully agree with Mr Wameyo in his submissions that Article 38 should be read together with **Article 81** of the constitution which outlines the general principles which an electoral process must comply with.

Article 81 provides the following;

81. The electoral system shall comply with the following principles—

(a) Freedom of citizens to exercise their political rights under Article 38;

(b) Not more than two-thirds of the members of elective public bodies shall be of the same gender;

- (c) Fair representation of persons with disabilities;
- (d) Universal suffrage based on the aspiration for fair representation and equality of vote; and
- (e) Free and fair elections, which are—
 - (i) By secret ballot;
 - (ii) Free from violence, intimidation, improper influence or corruption;
 - (iii) Conducted by an independent body;
 - (iv) Transparent ; and
 - (v) Administered in an impartial, neutral, efficient, accurate and accountable manner.

48. A literal interpretation of Article 81 clearly shows that the Political rights established under Article 38 of the Constitution form part and parcel of the principles enunciated in that provision which must be observed in any electoral system. The principles stress that the electoral system must be free and fair which means *inter alia* that the election process must be free from violence, intimidation, improper influence and that the elections are administered in an impartial, transparent, neutral , efficient, accurate and accountable manner. It is common knowledge that a registered voter is entitled to exercise her democratic rights under **Article 38** to choose a leader of his or her choice in an electoral system which complies with the requirements of Article 81 of the constitution.

49. The question that this court is now called upon to determine is what relief is available to a voter who participated in the elections and who feels that his/her rights to a free and fair election under **Article 38** have been violated by failure of the electoral process to comply with any of the principles established under **Article 81**. Can such a voter enforce the rights under **Article 38** through an election petition or would she be required to approach this court by way of a constitutional petition as proposed by Mr. Buti?

50. The Constitution at **Article 22** has granted every citizen a right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights had been denied, violated or infringed or is threatened with violation. Under **Article 23** of the Constitution, the High Court is empowered to hear and determine applications for redress of a denial, violation or infringement of a right or fundamental freedom in the Bill of Rights.

Article 165 of the Constitution also gives the court jurisdiction to hear and determine any question regarding the interpretation of the constitution.

In my understanding, the petitioner has not invoked the jurisdiction of this Court under **Article 22** or **Article 165** of the constitution.

51. The petitioner has filed this petition questioning the manner in which the election for the office of Member of National Assembly, Kilifi South Constituency was conducted by the 2nd and 3rd Respondents. She has sought *inter alia* orders for the nullification of that election. Under **Article 23(3)**, an order for nullification of elections is not among the reliefs that a court exercising its jurisdiction under Article 22 can grant to a petitioner. This leads me to the conclusion that filing a constitutional petition would not offer adequate relief to a voter dissatisfied with the conduct and outcome of elections.

52. I think that in determining whether the petitioner has standing before this court, I must consider the provisions of **Articles 87(2), 88(4)(e)** of the Constitution, provisions in the Elections Act and the Elections Rules 2013

Which apply to hearing of election petitions in general, and to hearings in respect of election petitions for Members of the National Assembly in particular . **Article 87(2)** of the Constitution provides that-;

“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. (Emphasis added)”

Article 88(4)(e) provides, with regard to the 3rd Respondent that;

“The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for—

(e) “the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results”

53. A reading of these constitutional provisions shows that, prior to declaration of election results; it is the Commission which has the mandate to resolve election disputes, with the jurisdiction of this court arising after declaration of the results.

54. The provisions of the Elections Act and the **Elections (Parliamentary and County Elections) Petition Rules, 2013** are made pursuant to **Article 87 (1)** of the Constitution, which empowers

Parliament to enact legislation to establish mechanisms for timely settling of electoral disputes. These laws constitute the constitutionally underpinned Code of Laws for dealing with election petitions. It therefore follows that the jurisdiction to hear and determine election petitions is a special jurisdiction that is conferred by the Constitution itself and the manner in which it is to be exercised is found in the Election Act and the Rules thereof. This Petition is challenging election results. It revolves around an election dispute and as a matter of necessity it must be filed in an election court.

55. The argument that only candidates in elections have the right to file election petitions and that the petitioner being a voter has no capacity to file this petition flies right out of the window for the simple reason that there is no known provision under the constitution or other electoral laws that prohibits a voter from filing a petition.

The **Election Rules** at **Section 2** defines a **Petitioner** as-;

“a person who files an election petition to the election court under the constitution or under the Act in accordance with these Rules.”

This definition does not say that only candidates in elections or political parties qualify to be petitioners. In my view, this definition leaves no doubt in my mind that any person including a voter who is aggrieved by the conduct and outcome of elections can file an election petition for redress.

Had it been the intention of the framers of the Constitution, Parliament or the Rules Committee that a voter cannot file an election petition; nothing would have been easier than for them to say so.

56. The reference to the Supreme Court case of ***Raila Odinga v IEBC & Others (supra)*** which entertained the Presidential Petition filed by non-candidates and actually a non-governmental organisation must be distinguished from our instant case. Granted, the issue of locusstandi was not an issue before the Supreme Court. This issue would obviously not have arisen because the constitution is very clear that any **“person”** may file a petition challenging the election of the president-elect.

Article 140 of the constitution provides that-;

“A person may file a Petition in the Supreme Court to challenge the election of the President-elect within seven days after the date of the declaration of the results of the presidential election.”

57. It must be understood that election petitions are unique in many ways. Besides the fact that they

involve the application of a special code of electoral laws, they can be classified as actions *sui generis*. This is because they are not actions in which an individual asserts a private civil right as in a civil claim. Petitions are basically instituted for the benefit of all voters in the affected electoral area and generally in the public interest.

I wholly associate myself with the sentiments expressed by Kimaru J in *John Kiarie Waweru v Beth Wambui Mugo & 2 Others [2008] eKLR* when he stated that;

“...election petitions are not ordinary suits where a party is enforcing a right that accrues to him as a person. The court has to take cognizance of the fact that an election is a signification of the exercise of the democratic rights of the people to have a person of their choice represent them in the National Assembly.”

58. The public nature of election petitions was also aptly captured by Gikonyo J. in *Milka Nanyuki Masungu v Robet Wekesa Mwembe & 2 Others, Bungoma Election Petition No. 2 of 2013*. In that case, the Hon. Judge when considering whether or not to transfer an election petition wrongly filed in the High Court to the subordinate court expressed himself thus:

“To cap the reasons above, all election disputes raise questions on the integrity of the electoral process, which is a public-serving process. There is, therefore, real practical value in those statements by the Honourable Judge, and are imbued with public law connotations. Public law disputes operate erga omnes, so to speak, and scarcely does strict inter partes fairness in such disputes, do justice to rights and obligations of a public character-least of all in public-election disputes. Thus, momentous electoral issues should not be determined only as between the parties in the proceeding, but with reference to the wider interest of the residents of the concerned electoral area [Misikhu Ward] to challenge the validity of the election of a member to the county assembly as their representative: a right that is guaranteed under the Constitution...”

59. A close look at **Rules 23 to 29** of the petition Rules also fortifies my finding that any person including a voter can file election petitions. In my opinion, they also confirm the public interest nature of election petitions. The rules relate to the withdrawal of petitions, their abatement and substitution of a petitioner. Under **Rule 23(1)** of the **Rules**, a withdrawal of a petition can only be made with leave of the Court and this can only be done after the intention to withdraw has been published in the Kenya gazette.

60. The purpose of the publication of the notice of withdrawal in the gazette in my understanding is to notify the people or voters in the electoral area in issue of the petitioner's intention to withdraw from the petition to give room to any other person aggrieved by the outcome of the elections to apply to the court to be substituted as the petitioner.

61. Rule 26 read together with **Rule 28** empowers the court after allowing the withdrawal of a petitioner to appoint any other person desirous of being substituted as a petitioner in a petition. This reinforces my earlier finding that any person be it a candidate in the elections or a voter qualifies to be a petitioner.

62. It therefore follows that the argument that the petitioner herein had not adduced evidence to prove that she was actually a registered voter is neither here nor there since the law, as demonstrated above allows any person to file or maintain a petition challenging election results.

63. This then brings me to the inevitable conclusion that the petitioner is a competent person to file and maintain the current election petition.

64. Lastly, the final ground on which the application is premised is that the petitioner failed to comply with the law by her failure to disclose election results which is a requirement under **Rule 10(1) (c)** of the petition Rules.

While advancing arguments in support of this ground, Mr Buti claimed and rightly so, that the petitioner

had omitted to disclose the name of one candidate known as Kimani Kiarie who had garnered 81 votes. It was his position that **Rule 10(1)** uses the word “*shall*” twice and as such the requirement to disclose results had a mandatory import. He relied on the case of *John M.N Mututho v Jane Kihara Civil Appeal No. 102 of 2008*, which dealt with a similar matter and the Court of Appeal held that details supposed to be included in election petitions if omitted makes the petition incomplete and the omission renders the petition incurably defective.

65. Mr. Wameyo in reply submitted that the Petition Rules provide a sample of a form that must be used in filing of the petition, (Form EP1) and that the form only requires the petitioner to state the name of the Petitioner, the candidates and the person who was declared the winner. He asserted that the results of the petition would mean the declaration of the person who was declared the winner since the Election Act provides that election petitions must be filed within 28 days of gazettment of the results. And what was gazetted by the Commission were the names of the election winners. He thus submitted that it would be ridiculous to intimate that election results mean itemization of votes cast for each candidate. He submitted that in this case, the Petitioner had fully complied with the law having stated the name of the candidate who won the elections.

66. He noted that the High Court has been making conflicting decisions on the issue of what results mean. He referred me to the decisions made by Ochieng J in *SULEIMAN SHAHBAL v INDEPENDENT ELECTORAL*

AND BOUNDARIES COMMISSION ELECTION & OTHERS PETITION No. 4 of 2013 and Odunga J in *Gideon Mwanganga Wambua v Independent Electoral and Boundaries Commission Election & Others Petition No. 2 of 2013*. He argued that as what was gazetted was the winner of the elections in all Constituencies in the Country, the petitioner in disclosing the winner of the elections in Kilifi South constituency had complied with **Rule 10(1) (c)** of the Petition Rules.

67. Finally, he submitted that it would be in the interest of justice if this petition was heard and determined on its merits and not be struck out on procedural technicalities. He urged the court to be guided by the overriding objective of the **Rules** and Article **159** of the Constitution.

68. Mr. Buti in reply contended that the issues he had raised were not technicalities but are substantive issues because **Article 87** of the Constitution has empowered Parliament to make Rules and those Rules have stipulated the manner in which certain things ought to be done. He urged that Article **159(2)(d)** of the constitution cannot come to the aid of the Petitioner. He relied on the case of *RAILA ODINGA v INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & OTHERS Supreme Court Petition No. 5 of 2013* and asserted that **Article 159(2)(d)** should not be read in a manner that ousts the provisions of **Article 87(1)** of the Constitution. He thus urged the court to strike out the petition as prayed.

69. Having considered counsel’s submissions and all authorities cited, I find that the only question that this court needs to resolve is what is meant by the term “**Election Results**” and whether failure to disclose results in the manner attributed to the Petitioner in this case is fatal to her Petition.

70. At the outset, it is important to note that in the previous electoral law regime established under the repealed constitution and the National Assembly and Presidential Elections Act, the courts consistently held that the requirement to state the results as declared was mandatory in an election petition. In *MUTUTHO v KIHARA AND OTHERS [1993 – 2009] 1 EAGR 270* which was decided under the repealed law, the Court of Appeal held that the rule requiring the pleading of election results was mandatory and could not be cured by an amendment or request for particulars. The Court expressed itself in the following terms-;

“Election petitions are special proceedings. They have detailed procedure and by law they must be determined expeditiously. The legality of a person’s election as a people’s representative is an issue. Each minute counts. Particulars furnished count if the petition itself is competent, not otherwise. Particulars are furnished to clarify issues, not to regularize an otherwise defective pleading.

Consequently, if a petition does not contain all essentials of a petition, furnishing of particulars will not validate it... if she (petitioner) does not have results, what is she challenging? The issues she raises are meant to nullify a particular result. But if she has not given the results, any findings on the issues raised will serve no useful purpose.

Any evidence adduced or to be adduced is intended to show that certain irregularities affected the outcome of the election, but without the result it might not be possible to relate the irregularities to the result.”

A similar holding was made in *Kigen Luka Kipkorir v Joel Langat and Chelaite Alicen Ronoh Nakuru EP No. 4 of 2003* and *Mudavadi v Kibisu and Another [1970] EA 585*.

71. I think it is important at this stage to reproduce verbatim the provisions of **Rule 10(1)** of the **Rules** in order to appreciate it's a full import. **Rule 10(1)** states:-

“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.”

Majanja J has dealt with the issue whether failure to disclose results in an election petition is fatal. In *Wavinya Ndeti v IEBC & 4 Others Machakos Election Petition No. 4 of 2013* he stated as follows;

“I am satisfied that in these circumstances no injustice has been occasioned by the failure of the petitioner to set out the result of the election in the petition. The fact that elections disputes are sui generis governed by special regime of rules does not exonerate the court of its prime obligation to deliver substantive justice. It is the primary duty of the court to entertain grievances and to resolve them. Technical matters must not be allowed to defeat the broad issue of justice as between litigants particularly electoral justice.”

72. From a reading of Rule 10(1)(c) which stipulates that a petition shall state “**results of the election, if any, and the manner in which it has been declared**” it is clear in my view that this requirement is not mandatory. The Rule envisages a situation where the petitioner may not have the election results and the rule requires him to state the election results only if he has them.

73. I have perused the petition filed in this matter. I think it is erroneous for Mr, Wameyo to create the impression that the Petitioner did not itemize the election results in her petition and only stated the name of the person who was declared the winner. The correct position is that the Petitioner fully disclosed the total number of votes garnered by fifteen out of the sixteen candidates who contested for the office of Member of the National Assembly, Kilifi South Constituency. She stated in paragraph 5 of the petition as follows;

“After the counting of the votes allegedly cast in the elections, the 2nd Respondent being the returning officer of the said constituency announced and/or declared that the said candidates has received votes as follows:-

| | | |
|-----|------------------------|-------|
| (a) | Mustafa Iddi SAalim | 7305 |
| (b) | Richard Chonga Kiti | 6629 |
| (c) | Nicholas Mrima Wanyepe | 6687 |
| (d) | Victor Nyale | 2799 |
| (e) | Shadrack Lewa | 2198 |
| (f) | Vincent Mwachiro | 2070 |
| (g) | Benedict Gunda | 1924 |
| (h) | Margaret Safari | 1492 |
| (i) | I. Madenje | 887 |
| (j) | Racheal Dzombo | 624 |
| (k) | Chituto Lewah | 528 |
| (l) | Omar Masumbuko | 522 |
| (m) | Mary Kabani | 501 |
| (n) | John Futu Mwachai | 409 |
| (o) | Chome | 126'' |

74. The term Election results is defined under section 2 of the Elections Act which states that-;

“Election results means the declared outcome of the casting of votes by voters at an election.”

Given this definition, the results can only mean the itemization of the total number of votes garnered by each candidate in an election out of the total number of votes cast.

I disagree with Mr Wameyo’s submissions that the decisions in *SULEIMAN SHAHBAL v INDEPENDENT ELECTORAL*

AND BOUNDARIES COMMISSION ELECTION & OTHERS PETITION No. 4 of 2013 and Gideon Mwanganga Wambua v Independent Electoral and Boundaries Commission Election & Others Petition No. 2 of 2013 were concerned with a definition of election results. In my view, the two authorities were concerned with a determination of what the term ‘‘publication of election results’’ as stated in the Constitution and the Elections Act referred to and whether the petitions in those cases had been filed within time. The two authorities are not therefore relevant to the issues raised before me in this application.

75. In the instant case, the petitioner has actually itemized the names of the fifteen candidates and votes garnered by each of them out of the total votes cast. But for unexplained reasons, the Petitioner failed to disclose the name of one candidate, Kimani Kiarie and the votes garnered by him. It is not the 1st Respondent's case that this omission occasioned him any prejudice. Given that the failure complained about is the omission to disclose the name of only one candidate and votes cast in his favour, it is my view that the petitioner has substantially complied with the requirement to state election results. I do not

think that the said omission is significant enough to affect the substance and the merits of the petition.

76. In so finding, I find support in the fact that even in cases where election results have not been disclosed at all, this Court has held that failure to disclose results is not fatal to the validity of an election petition and has declined to strike out election petitions on this ground alone. See WAVINYA NDETI v THE INDEPENDENT AND BOUNDARIES COMMISSION AND 4 OTHERS, Machakos Election Petition No. 4 of 2013 and CAROLINE MWELU MWANDIKU V PATRICK MWEU MUSIMBA, Machakos Election Petition No. 7.

77. As stated earlier, the 1st Respondent has neither pleaded nor demonstrated that he is likely to suffer any prejudice as a result of the omission attributed to the Petitioner in this case. My take is that the Applicant does not stand to suffer any prejudice by the said omission.

Unlike in the previous electoral law regime which existed prior to the promulgation of the Constitution of Kenya 2010, the current legal framework that governs the settlement of electoral disputes has provided a mechanism which would cure the omission by Petitioners to state election results. This in my view is the purpose of **Rule 21(b)** of the Election Rules which provide as follows;

“21. The Commission shall deliver to the Registrar—

(a) the ballot boxes in respect of that election not less than forty-eight hours before the date fixed by the court for the trial; and

(b) the results of the relevant election within fourteen days of being served with the petition.”

78. My reading of this rule is that the Commission has the responsibility of delivering the results of the election in question to the Deputy Registrar within 14 days of being served with the petition. In the former regime of Electoral Laws and specifically under the National Assembly and Presidential Elections Act (Repealed) which did not have a similar provision and which was the subject of consideration in MUTUTHO v KIHARA (supra), the Court had no benefit of having access to the election results in issue other than what would be stated by the petitioner in the petition. I believe this must be the reason why failure to state election results in petitions filed under the repealed law was fatal.

79. I wholly agree with the sentiments expressed by Majanja J in Caroline Mweu Mwandiku v Patrick Mweu Musimba (supra), when ruling on a similar issue when he stated as follows;

“In my view, rule 21 as read with rule 10(1)(c) of the Rules which now permit the petitioner to plead “the results, if any, however declared” was intended to deal with the mischief identified in Mututho v Kihara. The purpose of pleadings is to aid a fair trial. Rules of procedure are not mere formulae to be observed as rituals and elevated to a fetish. Beneath the words of a provision of law, lies a juristic principle. In this case, the principle is that the rule is intended to enable the court fairly adjudicate the dispute between the parties. The guiding principle in consideration of this matter is the overriding objective of the Rules which is stipulated under rule 4(1) of the Rules as “to facilitate the just, expeditious, proportionate and affordable resolution of election petitions under the Constitution and the Act.”

He went on to state the following about the prejudice that would be occasioned by insistence on compliance with matters of form-;

“This objective is best realised by the Election court having regard to the purpose and mischief that the rule seeks to cure and the prejudice that would be occasioned by insistence on the strict compliance with form. Rule 5 further obliges this court and the parties to conduct proceedings before it to achieve the following aims, “(a) the just determination of the election petition; and (b) the efficient and expeditious disposal of an election petition within the timelines provided in the Constitution and the Act.”

80. I am alive to the obligation imposed on courts under **Section 80 (1) (d)** of the Elections Act and **Article 159 (2) (d)** of the Constitution to administer substantive justice to litigants without undue regard to procedural technicalities. The Supreme Court in Petition No. 5 of 2013 **RAILA ODINGA V THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & OTHERS** [*supra*] had occasion to pronounce itself on **Article 159 (2) (d)** of the Constitution. The court expressed itself in the following terms:-

“The essence of that provision is that a court of law should not allow the prescriptions of procedure and form to trump the primary object, of dispensing substantive justice to the parties. This principle of merit, however, in our opinion, bears no meaning cast-in-stone and which suits all situations of dispute resolution. On the contrary, the court as an agency of the processes of justice is called upon to appreciate all the relevant circumstances and the requirements of a particular case, and conscientiously determine the best course.”

81. I am satisfied that in the circumstances of this case, where the omission complained about by the Applicant goes more to form rather than the substance of the petition and as no prejudice has been occasioned by the Applicant owing to the said omission, the dictates of substantive justice requires that this Petition be heard and determined on its merits. It is my finding that the failure complained about by the Applicant cannot be a basis for taking the drastic action of striking out the Petition as prayed in this case.

82. In view of the foregoing reasons, the second application dated 21st May, 2013 also fails for lack of merit and it is hereby dismissed.

83. Costs of these applications shall abide the final judgment in the petition and since the two applications were heard together and determined in one Ruling, such costs shall be treated as costs for a single application.

84. It is so ordered.

C. W. GITHUA

JUDGE

DATED and DELIVERED at MALINDI this 12TH day of JUNE, 2013 in the

presence of :-

Mr. Wameyo for the Petitioner

Mr. Paul O. Buti for the 1st Respondent

Mr. Sigei for the 2nd and 3rd Respondents

M/s Caroline Kadaga court clerk

C. W. GITHUA

JUDGE