



REPUBLIC OF KENYA

High Court at Nyeri

Election Petition 5 of 2013

WILSON NGINGA

KIMOTHO .....PETITIONER

VERSUS

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION.....1<sup>ST</sup>  
RESPONDENT

ESTHER MURUGI MATHENGE.....2<sup>ND</sup>  
RESPONDENT

MARGARET LORNAH KARIUKI (NYERI CONSTITUENCY RETURNING OFFICER)....3<sup>RD</sup>  
RESPONDENT

RULING

The Petitioner vied for the seat of Member of National Assembly for Nyeri Town Constituency in the General Elections held on 4<sup>th</sup> March, 2013. The elections were conducted by the 1<sup>st</sup> Respondent pursuant to its mandate under **Article 88(4)** of the **Constitution**. The 3<sup>rd</sup> Respondent was the 1<sup>st</sup> Respondent’s duly appointed Returning Officer for purposes of conducting elections in Nyeri Town Constituency on the material date. Esther Murugi Mathenge, the 2<sup>nd</sup> Respondent herein, was eventually declared as the duly elected Member of National Assembly for Nyeri Town Constituency. In this Petition, the Petitioner is contesting the results of election of the 2<sup>nd</sup> Respondent as the Member of National Assembly for Nyeri Town Constituency.

The 1<sup>st</sup> and 3<sup>rd</sup> Respondents have filed a Notice of Motion dated 14<sup>th</sup> March 2013 seeking principally to strike out the Petition herein. The Motion is stated to have been brought under **Article 87(2)** of the **Constitution of Kenya, 2010 (the Constitution)**, **Section 80 (3) of the Elections Act, No. 24 of 2011(the Elections Act)**, **Rule 17 of the Elections (Parliamentary and County) Petition Rules, 2013 (the Elections Petition Rules)**, the inherent jurisdiction of the Court and all other enabling provisions of the law. It is supported by the affidavit sworn on 14<sup>th</sup> May 2013 by **Moses Kipkoge**.

The 2<sup>nd</sup> Respondent has also filed a Notice of Motion dated 20<sup>th</sup> May, 2013 substantially on all fours with the 1<sup>st</sup> and 3<sup>rd</sup> Respondent’s Motion and seeking similar prayers only that it is said to be brought **under Article 87 of the Constitution, Sections 77, 79 and 80 of the Elections Act, and Rule 17 of the Elections Rules, 2013**; the application is supported by the 2<sup>nd</sup> Respondent’s own affidavit sworn on 22<sup>nd</sup> May, 2013.

On 23<sup>rd</sup> May, 2013 directions were taken on the hearing of both motions; the Petitioner was asked to respond within seven days of the 22<sup>nd</sup> day of May, 2013 which is the date his counsel was served with the latest of the two motions on record. Parties were also directed to file and exchange written submissions by 29<sup>th</sup> May, 2013 and also file and exchange any authorities they wished to rely upon on or before the 29<sup>th</sup> May, 2013. All the Respondents complied with the directions given by the court; the Petitioner filed his replying affidavit outside the seven day period and did not file any written submissions. The two motions, however, proceeded for hearing as earlier scheduled.

The grounds upon which, on their face, the motions are based are three-fold; firstly, the Petition is alleged to have been filed out of time in breach of **Article 87(2) of the Constitution** and **Section 77 of the Elections Act**. According to the Applicants, the Petition was filed on 10<sup>th</sup> April, 2013 yet the results were announced on 5<sup>th</sup> April, 2013. In the Applicants' view the petition ought to have been filed within 28 days of the date of the declaration of results, which in their view, is the date the returning officer announced the election results for election of the Member of National Assembly for Nyeri Town Constituency.

Secondly, the Petitioner is accused of not depositing security for the payment of costs that may become payable by the Petitioner within the ten days of the date of presentation of the Petition; according to the 2<sup>nd</sup> Respondent/Applicant the security was deposited on 13<sup>th</sup> May, 2013 more than ten days away after the Petition had been filed.

Thirdly, the Petition was never served according to the provisions of the law. On this ground the 2<sup>nd</sup> Respondent has argued that she only knew of the Petition from members of the public and obtained copies thereof from the court registry. In the submissions filed on her behalf, the 2<sup>nd</sup> Respondent's counsel acknowledges that service was effected through the Star newspaper of 17<sup>th</sup> April, 2013 but even then that cannot be said to have been effective service as contemplated under **Section 77 (2) of the Elections Act** as read with **Rule 13(1) (a),(b) and (3) of the Elections Petition Rules** because, as the 2<sup>nd</sup> Respondent argues, the Star newspaper is not a newspaper of national circulation; even if the Star newspaper was a paper of national reach, the font size and the dimensions of the advertisement are less than those required under the Rules.

In their submissions, counsel for the Respondents opened another front of assault against the Petitioner's Petition; they argued that the Petition flouted **Rules 10** of the Elections Petition Rules in that it does not disclose the grounds and the particulars upon which it is based. The court allowed them to submit on this issue though not raised in their motions because, being a legal issue, the Petitioner would not be prejudiced if his counsel was accorded opportunity to respond to it. In any event, the Elections Petition Rules do not appear to bar any party from arguing any legal issue in applications such as the motions before court unless it is expressly raised on the face of the motions.

In his response to the motions, the Petitioner filed Replying Affidavits sworn by the Petitioner respectively on 22<sup>nd</sup> May, 2013 and 29<sup>th</sup> May, 2013; the affidavit sworn on 22<sup>nd</sup> May 2013 is to some extent deficient in form but the substance of the two affidavits is however clear and since none of the Respondents took any issue on any of these affidavits nothing much turned on the form or technical aspects of these two documents. In the affidavits, the Petitioner is categorical that the Petition was filed within time pursuant to the provisions of **Section 76(1) (a) of the Elections Act**. The Petitioner has also invoked the provisions of **Section 80 (1) (d) of the Elections Act** to argue that technicalities in election petitions ought to be relegated to the back banner.

As for time limitations the Petitioner argues that **Rule 20 of the Elections Rules 2013** gives the election court power to extend time for compliance for anything required to be done within set time limits.

The Respondents filed their skeleton submissions as earlier directed and highlighted them on 30<sup>th</sup> May, 2013. The Petitioner's counsel chose not to file any written submissions but made oral arguments in court. The court has duly considered counsel's able submissions, both oral and written in coming to the

conclusion that it has arrived at in the motions herein.

Apart from the additional ground that was introduced in the 1<sup>st</sup> and 3<sup>rd</sup> Respondent's counsel's submissions, the essential facts that make up the grounds upon which the motions are based are not in dispute; it is not in dispute that the Returning Officer declared the 2<sup>nd</sup> Respondent as the duly elected member of the National Assembly for Nyeri Town Constituency on 5<sup>th</sup> March, 2013; it is not in dispute that the Petition herein was filed in court on 10<sup>th</sup> April, 2013; it is not in dispute that the Appellant was issued with a court receipt for the deposit of security for the costs that may be payable on 13<sup>th</sup> May, 2013 and; it is not in dispute that the Petition was served by way of advertisement in the Star newspaper of 17<sup>th</sup> April, 2013 and that the fonts and the dimensions thereof are not consistent with those prescribed by the Rules.

Where the facts are thus clear-cut, the only issues for determination in these motions are the legal implications or consequences that flow from those established facts. If I were to frame the questions to be answered, the first question would be when does time begin to run against a Petitioner to file an election Petition? Does the clock start ticking at the time of the declaration of results by the returning officer or is it set in motion when his principal, the Independent Electoral and Boundaries Commission, gazettes the results for a particular electoral area, in this case Nyeri Town Constituency? The second question would be, where security of costs is deposited in court outside the ten-day period, contrary to **Rule 11(1) of the Elections Petition Rules** would that in itself be fatal to the Petition? Finally, where service is effected through an advertisement whose form does not fit the prescribed form does that render service of the Petition ineffective?

In answer to the first question, counsel for Respondents strongly argued that under **Article 87(2) of the Constitution**, petitions concerning an election of the Member of the National Assembly for a particular constituency such as the constituency in issue here must be filed within twenty-eight days of the date of the declaration of the results by the returning officer. **Article 87(2)** of the **Constitution** reads as follows:

***“87(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.”***

It is the Respondents' view that the declaration referred to in **Article 87(2)** of the Constitution is in reality the announcement by the returning officer of the results at a constituency tallying centre pursuant to **Regulation 87(2) (a) of the Elections (General) Regulations, 2012( the Elections Regulations)**. Under this Regulation the Returning Officer is enjoined to tally votes at the constituency level and announce the results of the votes cast for all the candidates including those contesting for Member of National Assembly seats and under sub-regulation **2(b) of Regulation 87** he is required to issue certificates in a prescribed form to persons elected to National Assembly and County Assembly. According to the Respondents the announcement and the issue of the winner's certificate constitute the declaration contemplated in **Article 87(2)** of the Constitution. If the Respondent's argument is correct, it logically follows that the phrase ***“...declaration of results by the Independent Electoral and Boundaries Commission...”*** in **Article 87(2)** of the constitution means declaration of results by the returning officer at the tallying centre and therefore the Independent Electoral and Boundaries Commission as understood in that article is synonymous with a returning officer.

In order to sustain their argument, counsel for the Respondents had to find fault with **Section 76 (a)** of the **Elections Act**, whose provisions are diametrically opposite to their arguments on what they deem the declaration of results to be. That section provides:

***“76(1) 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.”***

According to the Respondents, this provision of the **Elections Act** is in conflict with **Article 87(2)** of the Constitution and they urged the court to make a finding to that effect. If the court agreed with the Respondents it should go the whole hog to declare **Section 76(1) of the Elections Act** void to the extent that it is inconsistent with the Constitution.

Counsel relied on the decisions in **Nairobi High Court Election Petition No. 15 of 2013, Hon. Clement Kungu Waibara & Another versus Hon. Francis Kigo Njenga & 3 Others** in which the court (Mwongo, J) struck out a petition challenging the outcome of election of a Member of National Assembly for Gatundu North Constituency, for having been filed outside the twenty-eight day period. They also relied on the **Botswana High Court decision of Sethantsho versus Jankie & Another (1984) BLR 304** where the court struck out a petition because it was filed out of time. The relevant Botswana law was the **Electoral Act (Cap. 02:07); Section 115 (b)** thereof states:

*“The following provisions shall apply with respect to the presentation of an election petition...*

*(b)The petition shall be presented within thirty days after the day on which the result of the election has been declared by the returning officer...”*

It can quickly be seen here that the Botswana law is specific that it is the returning officer who makes the relevant declaration; time is computed against the declaration made by the returning officer.

I have carefully considered **Article 87(2)** of the **Constitution** and **Section 76(1)** of the **Elections Act**. It is true that neither the Constitution nor the Act define what the term *“declaration”* means; however, its meaning as a term of art may be inferred from **Section 2 of the Elections Act** where election results are defined as *“the declared outcome of the casting of votes by voters at an election”*. Such declarations on outcome of votes cast are made by different persons and at various stages during the electoral process for election of a Member of National Assembly, amongst other elective positions. Under the **Elections Regulations** the declaration of results for the election of a Member of National Assembly assumes three levels; the first and lowest level is by the presiding officer at a polling station (see **Regulation 79(2)(a)**) where announcements are made and declarations made in form 35 as per **Regulation 79(2) (b)**; the second level is by the returning officer at the constituency tallying centre (see **Regulation 87(2)(a)** and **(b)**) where relevant declarations are made in form 38; the third and the final one is by the Commission itself, its declaration takes the form of gazette notice pursuant to **Regulation 87(4)(b)**. This last declaration is the equivalent of the declaration made under **Section 115 (b)** of the **Electoral Act** of the laws of Botswana (ibid) except that in our case it is made by the Commission and not the returning officer.

The first two levels are declarations of provisional results whilst the last level is the final and formal declaration, hence the publication in the Government gazette as the official results for the particular elective post. It is apparent to me that this is the declaration that **Article 87(2)** of the Constitution is referring to and there is no ambiguity whatsoever as to whose declaration matters in terms of computation of time for filing election Petitions.

It follows that it would be wrong to assume, as postulated by the Respondents, that the Independent and Electoral Boundaries Commission is synonymous with the returning officer for purposes of declaration of results under **Article 87(2)** of the Constitution. It must be noted that the two persons have been defined under **Section 2 of the Elections Act** as distinct and separate persons with specific functions; while it is accepted that particular functions may be delegated to one in his capacity as an agent, the agent cannot thereby assume functions which only the principal can perform. It would be absurd, in my view, to assume that the declaration of the results which is the climax of the electoral process ends with the returning officer leaving the Commission with nothing else to do apart from clearing and forwarding those results for publication that may thereby be rendered inconsequential in filing of election petitions.

The Respondents have sought to impeach **Section 76(1) (a) of the Elections Act** because it does not find favour with their interpretation of **Article 87(2)** of the **Constitution**. **Section 76(1)(a)** of the Act is more explicit and unequivocal as to when the twenty-eight period begins to run; it is obviously more detailed as

to the time and the form the declaration takes because the constitution only provides the framework leaving the details for parliament to legislate. This is why **Article 87(1)** of the Constitution gives Parliament the constitutional mandate to enact legislation to establish mechanisms for timely settlement of electoral disputes; **Section 76(1) (a)** of the **Elections Act** fits squarely into such a legislation. The fact that **Section 76(1)** provides more details regarding the declaration and computation of time does not necessarily create a source of conflict between the **Constitution** and the **Elections Act**. While the Constitution identifies the person to make the relevant declaration, the Act goes further to provide the manner or form of the declaration and the computation of limitation period. **Section 76(1)** of the **Elections Act** is hand in glove with **Article 87 (1)** of the Constitution.

I am persuaded and I agree entirely with the decisions of my sister Ngugi J in **Nairobi Election Petition No. 1 of 2013 Ferdinand Ndung'u Waititu versus Independent Electoral and Boundaries Commission & Others** and my brother Mabeya J in **Nairobi Election Petition No. 6 of 2013 Josiah Taraiya Kipelian Ole Kores versus Dr David Ole Nkediye & Others** where similar issues on interpretation of **Article 87(2)** of the Constitution vis-à-vis **Section 76 (1)** of the **Elections Act** arose. The learned judges were unanimous in their respective decisions that there is no conflict between the two provisions of the law and going by the definition of the term “declaration” in the Black’s Law Dictionary it is the Gazette Notice by the Independent and Electoral Boundaries Commission which is the instrument that contains the formal declaration of results of an election for purposes of lodging election petitions under those provisions of the law. The same reasoning has been followed by Majanja J in **Machakos High Court Election Petition No. 7 of 2013, Caroline Mwelu Mwandiku versus Patrick Mweu Musimba & Others** in which the learned judge opined that a definition of the term “declaration” in the **Elections Act** and the **Elections Regulations** would be preferable. George Odunga J in **Mombasa Election Petition No. 9 of 2013, Hassan Nyange Charo versus Independent Electoral and Boundaries Commission & Others** arrived at the same decision but seems to have taken a different route from that followed by Ngugi J and Mabeya J. The judge alluded to the fact that insertion of gazettelement in **Section 76(1)(a)** of the **Elections Act** was meant to give certainty to computation of time; it is a legislative task that parliament duly delivered on to ensure certainty in electoral dispute resolution mechanisms. All in all he found that there is no inconsistency between the Constitution and the Elections Act.

Counsel for the Petitioner asked me to hold that should I find that there is a conflict between the Constitution and the Act, then that conflict should not be held against the Petitioner who innocently and faithfully lodged his Petition in accordance with the Elections law. In view of my finding that there is no inconsistency between the Constitution and the Act that question is now moot; I would not venture into it.

Inevitably, I have come to the conclusion that the time for filing of the Election Petition started running when the 2<sup>nd</sup> Respondent herein was gazetted as the duly elected Member of National Assembly for Nyeri Town Constituency on 13<sup>th</sup> March, 2013; the Petition herein was filed within the twenty-eight limitation period.

The second question concerns deposit of security. **Section 78 (1)** of the **Elections Act** provides that a Petitioner shall deposit security for the payment of costs that may become payable by the Petitioner not more than ten days after the presentation of a petition.

The penalty for failure to deposit security as required by **Section 78 (1)** is provided for under **Section 78(3)** which provides as follows:

***“(3) Where a petitioner does not deposit security as required by this section, or if an objection is allowed and not removed, no further proceedings shall be heard on the Petition and the respondent may apply to the election court for an order to dismiss the Petition and for the payment of the respondent’s costs.”***

Failure to deposit security as required under this section is open to several interpretations; it may mean failure to deposit security within the ten day period or deposit of lesser amount than the sum required; it may also mean failure to deposit security at all. Any of these scenarios may attract an objection. The Act

does not explain the nature of the objection referred to but it is presumed that it can only be an objection raised against the Petition by the Respondents or any of them. The fact that the Act contemplates a situation where the objection “is allowed and not removed” would possibly mean the objection raised though valid and sustainable may not be fatal to Petition. The possibility that the allowed objection may be removed means that the Petition may still exist in spite of the objection except that in such an event no further proceedings will be taken on the Petition or the Petition may be dismissed on the application of a respondent. The nearest illustration I can find is where certain conditions are imposed on the Petitioner to comply, say within a specific period, with **Section 78(1) of the Act** if it has not be complied with to the letter; the objector will apply to dismiss the Petition if the Petitioner fails to comply as directed.

**Section 78 (3)** could obviously have been more clearer but as far as I can gather, depending on the circumstances of any particular case, the election court is clothed with some discretion in disposing of questions relating to compliance with the requirement to deposit security. It does not follow that failure to deposit security as required *per se* will lead to failure of the Petition at the preliminary stage. The court will have to weigh an application to dismiss a petition on the ground of failure to deposit security as required against the circumstances before it.

The applications before me are not what could be regarded as “an objection which may be allowed and not removed” in the language of **Section 78(3)** of the **Elections Act**; they are substantive motions seeking to strike out the Petition on, amongst other grounds, failure to deposit security within time. If they are allowed the Petition dies instantly.

One of the decisions relied upon by the Respondents to augment their case is a Jamaican Court of Appeal decision in the case of **Abraham Dabdoub versus Daryl Vaz Application No. 87 of 2008** where the security deposit was made outside time and an application to strike out the appellant’s appeal for failure to comply with the relevant rule of the Election Petitions (Court of Appeal) Rules for failure to deposit security as required was refused and the appeal allowed to proceed. The court found the explanation proffered by the Appellant’s counsel that she had inadvertently overlooked payment of security as plausible and extended time for deposit for the security. Contrary to the Respondent’s argument the decision does not seem to support their argument that where security is not deposited as required the petition fails.

In the Supreme Court of India case of **Charan Lal Sahu versus Nandkishore Bhatt & Others (1973) AIR 2464**, the Court dismissed an election petition where the Petitioner either failed to pay the security or paid less than the specified amount. (See page 298 of the judgment). The relevant law was the **Representation of the People Act, 1951 Section 117** thereof which read;

***“117. Security for costs – (1) at the time of filing an election petition, the petitioner shall deposit in the High Court in accordance with the rules of the High Court a sum of two thousand rupees as security for the costs of the Petition.”***

The Petitioner in this Petition has conceded that indeed the Security was deposited outside the ten-day period though the delay was not as inordinate as the Respondents suggest; according to the Petitioner the sum of Kshs. 500, 000 was paid on 24<sup>th</sup> April, 2013 and this is clear from bank deposit slip listed in his documents in support of the Petition. Since he filed his Petition on 10<sup>th</sup> April, 2013, the last day he ought to have deposited his security was 20<sup>th</sup> **April, 2013** but that date fell on a Saturday and therefore the next available date was Monday the 22<sup>nd</sup> April, 2013. Payment was made on the 24<sup>th</sup> April, 2013 approximately, two days late. Contrary to the Indian Supreme Court case, the Petitioner in this Petition paid the full amount of security required and his only blot in satisfaction of this requirement was the late timing.

The Petitioner has asked the court to invoke **Rule 20 of the Election Rules 2013** and extend time within which the security deposit ought to have been made; he has also asked the court not to overly rely on technicalities at the expense of substantive justice. But the Respondents contend that timelines in election petitions are not merely technical or procedural issues that can be easily wished away; they go to the root of the Petition and they must strictly be observed; the court has no discretion to abridge them. According

to the Respondents the philosophy behind observance of strict timelines was stated in the Supreme Court of Kenya decision in **Petition No. 5 of 2013, Raila Odinga versus Independent Electoral and Boundaries Commission & Others**. Counsel referred me to paragraph 217 of the judgment where the judges of the Supreme Court acquitted themselves as follows:

*“The rigid timeframe for the resolution of Presidential-election disputes was not, in our opinion, conceived in vain at the time of constitution- making process. From the terms of Article 140 of the Constitution, it is clear that expedition is of the essence, in determining petitions relating to presidential elections. As the electoral process had, in this case, led to the declaration of a winner, but one who could not assume office pending the determination of the Petition, the protracted holding on of a President-elect, as well as a retiring President, would, in our opinion not serve the public interest. Expedition in the resolution of the dispute was all important: if the court affirmed the election of the President-elect, then the transition process would be responsibly accomplished; and if the court annulled the election, the electorate would pacifically attune itself to the setting for fresh election-to be held within sixty days.”*

The Respondents’ counsel have asked me to apply the same philosophy in construing timelines set by the Elections Act, the Rules and Regulations made thereunder for management of election petitions concerning National Assembly elections. Indeed Mr Wahome asked me to read “Member of National Assembly election disputes” in place of the phrase “presidential election disputes” and “Member of National Assembly-elect” in place of “President-elect” in the above quotation. In the same breadth, counsel for the Respondents have argued that **Section 80** of the **Elections Act** and even **Article 159 of the Constitution** may not be of any help to the Petitioner in view of the Supreme Court’s interpretation of **Article 159** of the Constitution in the *Raila Odinga case*. Counsel referred me to **paragraph 218** where the Supreme Court said;

*“The essence of that provision (that is Article 159(2) (d) of the Constitution) is that a court of law should not allow prescriptions of procedure and form to trump the primary object, of dispensing justice to the parties. This principle of merit, however, in our opinion bears no meaning cast-in-stone and such all situations of dispute resolution. On the contrary, the court as an agency of the processes of justice is called upon to appreciate all relevant circumstances and the requirements of a particular case and conscientiously determine the best course. Time lines for the lodgement of evidence, in a case such as this, the scheme of which is well laid out in the constitution, were in our view, most material to the opportunity to accord the parties a fair hearing, and to dispose of the grievances in a judicial manner. Moreover the constitution for the purposes of interpretation must be read as one whole: and in this regard, the terms of Article 159 (2) (d) are not to be held to apply in a manner that ousts the provisions of Article 140, as regards the fourteen-day limit within which a petition challenging the election of a president is to be heard and determined.”*

The application of the decision of the Supreme Court decision on the Presidential election petition to parliamentary elections must be approached cautiously; while it is agreed that Supreme Court made certain pronouncements of law that may apply to petitions generally and which, by reason of the doctrine of *stare decisis*, bind this court, we must acknowledge that the Court was dealing with a specific petition in very specific and peculiar circumstances and more importantly, subject to specific provisions of the Constitution, the Elections Act and Rules that are different from those that apply to county and parliamentary election petitions. The construing of those provisions of the law in the Constitution, the Elections Act and the Rules and Regulations made thereunder and which are specific to a presidential election petitions may have little or no influence at all to interpretation of the provisions law applicable and specific to County assembly and parliamentary elections. For this reason I am unable to accept the 2<sup>nd</sup> Respondent’s suggestion of equating a presidential election petition with that of the Member of National Assembly in resolving issues of compliance with set timelines whenever they arise. In my humble opinion, apart from the fact that **Article 140** and **Article 87** of the Constitution deal with election petitions at different levels of electoral representation there is little else in common between them in interpretation of timelines and management of election petitions. In my view, this is the reason the Supreme Court was seemingly restrictive in its interpretation and application of **Article 159 (2) (d)** vis-à-vis **Article 140** of the Constitution. I understand the Court to say its interpretation of **Article 159(2) (d)** in

construing timelines in **Article 140** of the Constitution was not a statement of general application to any case regardless of the circumstances obtaining in any a particular case. I am unable to impute any other meaning to the Court's statement that:

***“The essence of that provision (that is Article 159(2) (d) of the Constitution) is that a court of law should not allow prescriptions of procedure and form to trump the primary object, of dispensing justice to the parties. This principle of merit, however, in our opinion bears no meaning cast-in-stone and such all situations of dispute resolution. On the contrary, the court as an agency of the processes of justice is called upon to appreciate all relevant circumstances and the requirements of a particular case and conscientiously determine the best course.***

The court is acknowledging that that the primary objective of **Article 159(2) (d)** is to restate the pre-eminence of substantive justice over technicalities but in its view it is not always the case that technicalities will be relegated to the periphery; in certain circumstances such as those that obtained in the election petition before it, what may be considered as technicalities may well assume a central role in resolution of the dispute before the court. It is up to the court to exercise its discretion and weigh the competing demands between technicalities, procedural or otherwise, and substantive justice. Whichever direction the court takes will, to a large measure, depend on the circumstances of each particular case.

In the petition before the court, the Petitioner was unable to raise the Security deposit within the ten-day period; he was late by approximately two days. Can a delay of two days be said to prejudice the hearing and the determination of this Petition expeditiously or otherwise within the set statutory timelines? Has that delay prejudiced the Respondents and in particular caused uncertainty amongst the electorate in Nyeri Town Constituency as to who their representative in the National Assembly is as counsel for the 2<sup>nd</sup> Respondent has urged me to find? My answer to the first question would be that considering that the security deposit was made even before the pre-trial conference, the delay in deposit of this security would not have any impact on the set timelines for concluding this Petition. It follows that if, for any reason there is anxiety amongst the people of Nyeri Town Constituency as to their representation in the National Assembly, it will not be because the Petitioner deposited security for costs late as counsel for the 2<sup>nd</sup> Respondent's seems to suggest. If there is any uncertainty as to who the ultimate representative of the electorate in any particular electoral area is, for the sole reason that a petition challenging the election of the incumbent has been lodged in court, the legislature has, through **Section 75(2)** of the **Elections Act**, taken concrete steps to ensure that such uncertainty does not extend beyond six months from the time the Petition is filed in court. There is nothing in this petition to suggest that the Petition will not be heard and determined within that period only because the Petitioner deposited the security of costs late.

My understanding of the decisions cited by the Respondents themselves do not suggest that a Petition such as this should be nipped in the bud for late deposit security for costs; as noted in the Indian Supreme Court case of **Charan Lal Sahu versus Nandkishore Bhatt & Others (1973) AIR 2464**, the Court dismissed an election petition where the Petitioner either failed to pay the security or paid less than the specified amount. This is certainly not the case here. In the Jamaican Court of Appeal decision in the case of **Abraham Dabdoub versus Daryl Vaz Application No. 87 of 2008** the court even rejected an application to strike out the appellant's appeal for failure to comply with the relevant rule of the Election Petitions (Court of Appeal) Rules even though the court established that security of costs was deposited outside the accepted timelines.

As far as the **Raila Odinga case** decision is concerned the Supreme Court's direction on Article on **Article 159(2) (d)** of the Constitution is that circumstances of each particular case will dictate whether, in resolution of the dispute before court, prominence should be given to technical and procedural requirements rather than the substance or the merits of the case. On that note, my conclusion on this issue is that, in the circumstances of this case, the spirit behind **Article 159(2) (d)** of the Constitution as read with **Section 80(1) (d)** of the **Elections Act** bears heavily on my mind not to strike out or dismiss the Petitioner's petition on the ground of late deposit of security.

The third question relates to service of an election petition. **Section 77(2)** of the **Elections Act** provides the manner of effecting service of an election petition filed under **Article 87(2)** of the Constitution and

**Sections 76(a) and 77(1) of the Elections Act. It provides;**

***“77(2) A petition may be served personally upon a respondent or by advertisement in a newspaper with national circulation.”***

The details of advertisement by way of advertisement are provided for in the **Election Petition Rules and Rule 13(3)** thereof states as follows:

***“13(3) Where a Petition is served by publication in a newspaper as provided under Sub-rules (1) (b) and (2)(c), the advertisement shall be sufficient if it is-***

***(a) In form EP 3 set out in the 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 Petitioner in this Petitioner opted to serve his Petition by way advertisement and so he was under obligation to ensure that the advertisement and the newspaper in which it was carried complied with **Section 77(2) of the Elections Act and Rule 13(3)** of the Rules made thereunder. Indeed one of the questions raised in the motions is whether the Petitioner’s advertisement complied with the foregoing provisions of the law.

According to the Respondents, the advertisement in issue fell short of the legal requirements mainly because the Star newspaper is not a paper of national circulation and that its font and dimensions did not fit those prescribed by the Rules. Counsel for the Petitioner admitted that the dimensions of the advertisement were 12 by 8 centimetres instead of 10 by 10 centimetres; he did not deny that the fonts were less in size than those prescribed in the Rules. However, he was convinced, and he urged the court to find that the Star newspaper is a paper of national reach as contemplated under **Section 77(2)**.

As at the time of arguing this point, all the Respondents had complied with **Rule 14** of the **Election Rules** and responded to the Petition by filing, in a prescribed form, the responses to the Petition and their respective witnesses’ affidavits. Once the Respondents appeared and responded to the Petition, it appears to me that, with all its presumed deficiencies, the Petitioner’s advertisement seems to have achieved the purpose for which it was intended under the **Elections Act** and the **Rules** made thereunder. Accordingly, it would be of very little help in my opinion, if the court was to engage on a discourse on what amounts to effective or sufficient service by way of advertisement as contemplated under **Rule 13 (3)** of the **Elections Petition Rules**. I would have been prepared and indeed obliged to take that path if all or any of the Respondents had failed to appear in which event the Petitioner would have been put to task to explain whether a Petition whose service by advertisement does not strictly comply with every detail of **Rule 13 (3)** aforesaid can be sustained. As things stand that question is now moot and with the appearance of the Respondents it would defeat law and logic to strike out this Petition for want of service.

The final question relates to particulars in the Petitioner’s petition. The Respondents contend that the Petitioner has flouted **Rule 10(1) (c) and (e)** of the **Elections Petition Rules**. The relevant Rule and sub-rules provide as follows:

***“10. (1) An election petition filed under rule 8 shall state-***

***(a) ...***

***(b) ...***

***(c) the results of the election, if any, and however declared;***

(d)...

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

(f)...

According to the Respondents, the Petition has neither disclosed the results of the election nor the grounds upon which the Petition is based. And even if such grounds or particulars have been disclosed, which is denied, they have not been divided into paragraphs each of which should have been confined to a distinct portion of the subject as required under **Rule 10(2)** of the **Elections Petition Rules**.

Counsel has urged me to adopt and follow the decision in **Garissa High Court Election Petition No. 4 of 2013, Amina Hassan Ahmed versus Returning Officer, Mandera County & 2 Others** where the court (Onyancha J) struck out a petition challenging election of the county women's representative for Mandera County on grounds that salient particulars were not included in the petition. Some of the particulars found wanting were the date of the conduct of the disputed elections, the results of the election being contested and how and when they were declared, and the pertinent prayers which ought to have been included in the petition pursuant to **Rule 10(4)** of the **Elections Petition Rules**. The Petitioner conceded to these omissions and in order to rectify them she filed an application to amend her petition. In rejecting the application for the amendment the learned judge duly considered several decisions including that of **D.T. Dobbie & Company (Kenya) Ltd versus Muchina (1982) 1KLR 1** where **Madan JA** (as he then was) said:

*“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere resemblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”*

The learned judge could not follow this decision and spare the petition before him because, in his respectful view, an election petition is not an ordinary civil suit and therefore ordinary civil procedure principles arising from the interpretation of the Civil Procedure Act and Rules made thereunder may not be applicable. Relying on the Court of Appeal decision of **the Speaker of National versus Karume (2008) 1KLR 425**, the court noted that the election court exercises special jurisdiction which must always be exercised within the four corners of the statute creating it. The court noted that the **Elections Act** does not provide for amendment of Election Petitions save for limited instances under **Section 76(4)** thereof where amendments are restricted only to allegations of an election offence; even then, those amendments ought to be filed within the period which an election petition would have been validly filed.

The judge also relied on the Indian Supreme Court decision of **Jyoti Basu & Others versus Debi Ghosal & Others (1982) AIR 983** in striking out the petition. I have had the opportunity to read the whole decision and **paragraphs 326 and 327** of the decision, part of which the learned judge quoted in his judgment, caught my attention. In those paragraphs the Supreme Court of India said:

*A right to elect, fundamental though it is to democracy, is, anomalously enough, neither a fundamental right nor a Common Law Right. It is pure and simple, a statutory right. So is the right to be elected. So is the right to dispute an election. Statutory creations they are, and therefore, subject to statutory limitation. An election Petition is not an action at Common Law, nor in equity. It is a statutory proceeding to which neither the Common Law nor the principles of equity apply but only those rules which the statute makes and applies. It is a special jurisdiction, and a special jurisdiction has always to be exercised in accordance with the statutory creating it. Concepts familiar to Common Law and Equity must remain strangers to Election Law unless statutorily embodied. A court has no right to resort to them on considerations of alleged policy because policy in such matters as those, relating to trial of election disputes, is what the statute lays down. In the trial of election dispute, Court is put in a Straight jacket. Thus the entire election process commencing from the issuance of the final of notification calling upon a constituency to elect a member or members right up to the final*

***resolution of the dispute, if any, concerning the election is regulated by the Representation of the People Act, 1951, different stages of the process being dealt by different provisions of the Act.***

This undoubtedly is sound law and the learned judge had every reason to follow it in reaching the conclusions he reached in the applications before him. I would not hesitate to take cue from these decisions if the Petitioner's Petition was found equally wanting in its vital respects as the petition the learned judge struck out. However, looking at the Petitioner's petition together with his affidavit in support thereof I am persuaded that it is substantially consistent with the requirements of **Rule 10** of the **Election Rules** and the Petitioner ought to be given an opportunity to defend it. In my view much of the arguments or submissions by the 1<sup>st</sup> and 3<sup>rd</sup> Respondents' counsel against the Petitioner's Petition with regard to the substance and particulars of the Petition raise questions of the strength of the petition itself. Those are legitimate questions but they are questions that this court can only answer after the Petitioner has had his day in court.

As I conclude I must mention that in the decision of Onyancha J in the ***Amina Hassan Ahmed*** case, no reference appears to have been made to **Section 80(1) (d)** of the **Elections Act**. **That Section provides:**

***“80(1) An election court may, in the exercise of its jurisdiction-***

***(a)...***

***(b)...***

***(c) ...***

***(d)Decide all matters that come before it without undue regard to technicalities.”***

To my mind, that provision of the law gives the election court some leeway to manoeuvre where strict application of the Election Rules would produce unjust results; while it is acknowledged that the election court cannot exercise jurisdiction beyond that which has been donated by the Constitution and the Elections Act, **Section 80(1) (d)** of the Act which, for all intents and purposes, is reminiscent of **Article 159(2)(d) of the Constitution** creates some space within which the court can exercise some discretion if, in the circumstances of any particular case, it is meet and just to do so. Nowhere would such discretion be warranted than in the application of the rules which forever will remain handmaid rather than mistress of justice.

For the reasons I have given, I dismiss the Respondents' Motions respectively dated 14<sup>th</sup> May, 2013 and 20<sup>th</sup> May, 2013. The costs thereof will abide the outcome of the Petition.

**Signed, dated and delivered** in open court on the **10<sup>th</sup> June 2013**

NGAAH JAIRUS

**JUDGE**

**In the presence of:**

**Court Clerk:** Ndung'u/Njiru

**Counsel for the Petitioner:** Mr Ombongi

**Counsel for the 1<sup>st</sup> and 3<sup>rd</sup> Respondents:** Mr Munge

**Counsel for the 2<sup>nd</sup> Respondent:** Mr Wahome