REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

ELECTION PETITION NO.5 OF 2013

LESIIT, J.

THE ELECTIONS ACT, 2011 THE ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS) PETITION RULES, 2013

IN THE MATTER OF THE ELECTION FOR THE WOMAN MEMBER OF THE NATIONAL ASSEMBLY FOR THARAKA- NITHI COUNTY

THE PETITION OF

MERCY KIRITO MUTEGI……..…….……PETITIONER

V E R S U S

BEATRICE NKATHA NYAGA…….....1ST RESPONDENT

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION……2ND RESPONDENT

RULING

1. This ruling is in respect of two applications filed by the respondents in this case seeking to strike out the Petition herein. The applications are dealt with together because they seek similar orders and the grounds on which the Petition is sought to be struck out are essentially the same.

2. The first Application filed on the 24th of May 2013 is a Notice of Motion under the Constitution, the Elections Act of 2011, the Elections (Parliamentary and County Elections) Petition Rules, 2013 (hereinafter referred to as the Petition Rules) the Elections (General) Regulations, the Civil Procedure Act and all the enabling provisions of the law.
3. The application seeks the following orders:
    a. **That this honourable court be pleased to strike out the Petition dated the 8th of April and filed on the 10th of April 2013.**
    b. **That in the alternative, this honourable court be pleased to strike out the various affidavits filed together with the Petition for being bad in law.**
    c. **That the Petitioner be ordered to pay the costs of the application and the entire**

Petition and any interest accrued thereof.

4. The second Application filed on the 10th of June 2013 is a Notice of Motion under the Constitution, the Elections Act of 2011, the Elections (Parliamentary and County Elections) Petition Rules, 2013 (hereinafter referred to as the Petition Rules) the Elections (General) Regulations, and all the enabling provisions of the law.
5. The application seeks the following orders:
    a. **A declaration that section 76 (1) (a), 76 (2) and 76 (3) of the Elections Act which require Election Petitions to be filed within 28 days of the publication of the results in the Kenya Gazette are inconsistent with Article 87 (2) of the Constitution.**
    b. **A declaration that the provisions of sections 76 (1) (a), 76 (2) and 76 (3) of the Elections Act are void to the extent that they are inconsistent with Article 87 (2) of the Constitution.**
    c. **A declaration that the Petitioner's Petition dated the 8th of April 2013 and filed on the 10th of April 2013 is invalid for having been filed out of time contrary to Article 87 (2) of the Constitution and section 77(1) of the Elections Act.**
    d. **An order that this court do strike out the Petition dated 8th of April 2013 and filed on the 10th of April 2013.**
    e. **An order that the costs of this application and the Petition be borne by the Petitioner.**

6. The grounds upon which the applications are based include the fact that pursuant to the provisions of Article 87(2) of The ***Constitution of Kenya, 2010***, it is provided that *Petitions concerning an election……shall be filed within twenty eight days <u>after the declaration of the election results</u> by the Independent Electoral and Boundaries Commission,* while section 76(a) of the ***Elections Act*** (hereinafter referred to as the Act) on the other hand provides that *a Petition to question the validity of an election shall be filed within twenty eight days <u>after the date of publication of the results of the election in the Gazette</u>*.
7. It is alleged, among other grounds, that there is no provision, statutory or subsidiary, that requires the publication of the results in the Kenya Gazette and as such the requirement under section 76 (1) (a) of the Act is unconstitutional.
8. It is further contended that this Honourable court does not have the jurisdiction to entertain this Petition because it is invalid and it therefore ought to be struck out.

In my view the issues for determination are as follows:

1. **What is meant by the term 'declaration' and when does time begin to run in relation to the filing of Election Petitions?**
2. **What is the effect of failure to set out results in a Petition as required by rule 10 (1) (c)?**
3. **Whether the court has jurisdiction to entertain this Petition?**
4. **Whether the affidavits filed together with the Petition are valid**?
5. **Who should pay costs of the applications**?

<u>Jurisdiction</u>

9. The issue of jurisdiction to entertain this Petition must of necessity be addressed first because it goes to the root of the matter. Jurisdiction is everything. Without jurisdiction, the court has no power to issue any of the orders sought in the applications. As was succinctly stated by Nyarangi JA in **<u>The Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Limited (1989) KLR 1</u>**:

    Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

10. The jurisdiction of the High Court is set out in the Constitution and as such can only be limited by

the Constitution itself. Article 165 which establishes the High Court gives it unlimited original jurisdiction in civil and criminal matters. The only fetter to this jurisdiction is set out in Article 165 (5) which states:

> **(5) The High Court shall not have jurisdiction in respect of matters—**
>
> **(*a*) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or**
>
> **(*b*) falling within the jurisdiction of the courts contemplated in Article 162 (2).**

11. In relation to electoral disputes, jurisdiction has been distilled into several watersheds with jurisdiction to resolve disputes at each watershed being vested in a separate body. Article 87 of the Constitution provides as follows:

> ***87. (1) Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes.***
>
> ***(2) Petitions concerning an election, other than a presidential election, shall be filed within twenty-eight days after the declaration of the election results by the Independent Electoral and Boundaries Commission.***

At Article 88(4) (e), the Constitution provides, with regard to the IEBC, that:

> ***(4) 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;***

12. It is therefore clear from these Constitutional provisions that, prior to declaration of election results, it is the IEBC which has the mandate to resolve election disputes, with the jurisdiction of the court arising after declaration of results. Indeed there is clear jurisprudence from the High Court that disputes relating to elections should be dealt with in accordance with the strict procedures set out in the law. This is because electoral disputes are not ordinary civil disputes but are disputes *sui generis*. This position was captured very concisely in my view by Mwongo J. in **Nairobi Election Petition No. 15 of 2013 Clement Kungu Waibara v. Francis Kigo Njenga and Others** where he cited with approval the Indian Supreme Court decision in Jyoti **Basu & Others v. Debi Bhosal & Others reported in AIR 1982 SC, 983.** That court held that:

> ***An Election Petition is not an action at common law, or 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 statute 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 the trial of election disputes, is what the statute lays down. In the trial of election disputes, the Court is put in a straight jacket....”***

13. In our own country, this position has found support in various decisions including ***Narok Council Vs Transmara County Council*** **[2002] 1 E.A. 161,** ***The Speaker of the National Assembly Vs***

James Njenga Karume*, Court of Appeal, Civil Application 92 of 1992 (unreported), *Kipkalya Kones Vs Republic & another ex parte Kimani wa Nyoike & 4 others* [2006] e KLR, *Wanyoike Vs Electoral Commission of Kenya (No 2)* [2008] 2 KLR (E.P) 43** and more recently ***In Re Francis Gitau Parsimei & others v. National Alliance Party and others Nairobi Petition No. 356 of 2012.

14. The election that the Petition seeks to annul is that of the County Woman Representative of the National Assembly. The definition of a Parliamentary Election includes the election of a County Woman Representative. This is because County Women Representatives are Members of Parliament and specifically the House of Parliament referred to as The National Assembly. **Article 105** of the Constitution confers specific jurisdiction in relation to Parliamentary Elections to the High Court in the following terms:

> ***(1) The High Court shall hear and determine any question whether—***
>
> ***(a) a person has been validly elected as a Member of Parliament; or***
>
> ***(b) the seat of a Member has become vacant.***

15. For a court to exercise jurisdiction in relation to elections, there are several steps that are required to be taken. As was noted by Mumbi J. in **Nairobi Election Petition 1 of 2013 Ferdinard Waititu v. IEBC & Others**:

> ***The Rules also contemplate that several steps must be taken prior to the actual hearing of the Petition. For instance, the Rules require, among other things, that the Chief Justice gazettes, by name, the Judge or Magistrate who has authority to hear an Election Petition.***

The procedure for designating an election court is set out in the Petition Rules as follows:

A court shall be properly constituted, for purposes of hearing—

> ***(a) an Election Petition in respect of an election to Parliament or to the office of Governor, if it is composed of one High Court Judge; or***
>
> ***(b) an Election Petition in respect of an election to a county assembly, if it is composed of a Resident Magistrate designated by the Chief Justice under section 75 of the Act.***

(2) The Chief Justice may—

> ***(a) in consultation with the Principal Judge of the High Court, designate such judges; and***
>
> ***(b) designate such magistrates, as are necessary for expeditious disposal of Election Petitions.***

(3) The Chief Justice shall publish the name of the Judge or

> ***Magistrate designated under sub-rule (2), in the Gazette and in at least one newspaper of national circulation.***
>
> ***(4) A Judge or a Magistrate designated under sub-rule (2) may not, for the duration of the Election Petition, be engaged in any other court matter except a matter for which a ruling or judgment was pending and the date of which ruling or judgment is within the period before the Judge or Magistrate concludes the Election Petition.***

Once an election court is published in the manner set out above, it becomes an election court in terms of section 2 of the Elections Act which provides:

"election court" means the Supreme Court in exercise of the jurisdiction conferred upon it by Article 163 (3) (a) or the High Court in the exercise of the jurisdiction conferred upon it by Article 165 (3) (a) of the Constitution and the Resident Magistrate's Court designated by the Chief Justice in accordance with section 75 of this Act;

16. It has been held that the establishment of this procedure for designating election courts does not take away from the jurisdiction that is conferred on the election court by the Constitution itself. In the words of Odunga J in **Gideon Mwangangi Wambua v. IEBC & Others Mombasa Election Petition 4 of 2013:**

It therefore follows that even under the Act Election Court refers to the Supreme Court and the High Court exercising their jurisdiction under the Constitution respectively. In the absence of the limitation placed upon the High Court under Article 165 of the Constitution with respect to the handling of Election Petitions save for Petitions arising from Presidential Election Petitions, no limitation can be placed upon the jurisdiction of any High Court judge to hear and determine Election Petitions whose jurisdiction is conferred upon the High Court to determine. In my view the Gazettement of judges to hear Election Petitions is meant for administrative purposes and to ensure that Election Petitions are determined within the time stipulated within the Constitution. Whereas the hearing of an Election Petition by a Judge who is not gazetted may invite disciplinary action in my view the mere fact that a Judge who hears a Petition is not gazetted to do so does not deprive him or her of the jurisdiction conferred upon him or her under the Constitution. On this score I associate myself with the dissenting decision of Ibrahim, J (as he then was) in Kinyanjui vs. Attorney General [2005] 2 KLR 454 in which he expressed himself as follows:

"In the absence of any other provisions under the Constitution other than section 65(2) and (3) which empowers the High Court to supervise civil and criminal proceedings before a subordinate court or Court Martial, there is only one High Court of Kenya which is constituted and manned by the Honourable Chief Justice and other judges (not less than 11) as may be prescribed by Parliament. There are no two or more High Courts and we can only have judgements, rulings, orders and other decisions given by a specific judge, or specific judges (Bench or Benches) if empanelled in accordance with the law. The High Court as an institution in an inanimate body that must be run, and activated, managed and controlled by animate organs authorised by law. There are judges who must of essence be human beings and according to the Constitution, the judges of the High court as must of necessity in law be of equal rank and standing. This is because the jurisdiction, authority and powers are conferred on the High Court as a Constitutional institution or body and not on the individual judge. It follows that when exercising and invoking the jurisdiction of the High Court under say section 60 of the Constitution or any other part or provisions of the Constitution or statute, all judges are of equal ranking and standing. Each decision under any provision of the Constitution, statute or other law have the same effect and force of law as it is not the personality, age, excellence or seniority in being appointed to the Bench or the number of judges sitting in a particular case that gives the decision the force of law but the jurisdiction of the High Court given under section 60 which establishes it in the first place. Section 60 is the mother of the High Court of Kenya.....It follows that it does not matter in what "type" of High Court, a judge is sitting when hearing a particular case, be it a (Constitutional Court" under section 84, a "civil" or "criminal court" under section 60 or specific statutes (other law), or even an "Election Court" under section 44. It is the jurisdiction of the court as an institution under the Constitution or any other law that is paramount and not the attributes of the judge or judges constituting such a Court or type or nature of proceedings or case at hand at any given time. There is only one High Court under the Constitution with specific jurisdiction conferred on it by section 60(1) of the Constitution. There is no "other or another Court of co-ordinate jurisdiction". There are no two, three or more High Courts. There is only "a High Court" as singularly created and established by the said provision."

The above position was affirmed by the Court of Appeal in <u>Peter Nganga Muiruri vs. Credit Bank Limited & Another Civil Appeal No. 203 of 2006</u> where the Court expressed itself thus:

"The part of the Constitution which deals with the establishment and jurisdiction of courts in Kenya is headed "The Judicature" and section 60 of the Constitution establishes the High Court with "unlimited original jurisdiction in Civil and Criminal matters and such other jurisdiction and powers as may be conferred on it by the Constitution or any other law". Although the Constitution stipulates that the jurisdiction of the High court in criminal and civil matters is unlimited, it is circumscribed by rules of practice and procedure to enable the court to function side by side with courts and tribunals subordinate to it and to guide it in the manner of exercising its jurisdiction and powers...Section 64 of the Constitution establishes the Court of Appeal with such "…jurisdiction and powers in relation to appeals from the High Court as may be conferred on it by law". On the basis of this provision the Court of Appeal cannot directly entertain an appeal from any other Court other than the High Court...Sections 65 and 66 of the Constitution establish courts subordinate to the High Court which are Magistrate's Courts and Kadhis' Courts, and also Court Martial. Each of these courts exercises such jurisdiction and powers as "may be conferred on it by law"...There is no provision in the Constitution, which establishes what, is referred to as Constitutional Court. In Kenya we have a division of the High Court at Nairobi referred to as "Constitutional and Judicial Review" Division which is not an independent Court by merely a division of the High Court. The wording of section 67 of the Constitution which donates the power to the High Court to deal with questions of interpretation of sections of the Constitution or parts thereof does not talk about a Constitutional Court but talks about the High Court...With regard to the protective provisions section 84 of the Constitution, it does not in any of its sub-sections talk about the Constitutional Court but instead talks about an application being made to the High Court...The Hon. The Chief Justice must have been aware that no such Court is established under the Constitution and that would explain why he created a Constitutional Division and not a Constitutional Court. The creation of the Constitutional and Judicial Review Division was an administrative act with the sole object of managing the cause list. The Chief Justice would have no jurisdiction to create a Constitutional court as opposed to creating a division of the High Court...Any single Judge of the High Court in this Country has the jurisdiction and power to handle a Constitutional question. The fact that a Constitutional Division was established did not by such establishment create a court superior to a single Judge of the High Court sitting alone. It would be a usurpation of power to push forward such an approach and whatever decision, emanates from a court regarding itself as a Constitutional Court with powers of review over decisions of Judges of concurrent or superior jurisdiction such decision, is at best a nullity. Jurisdiction is everything and without it, a court has no power to make one more step...courts must follow the law as it is currently...The appellant by filing the Originating Summons which was referred to the Chief Justice and also the motion before Nyamu J. was challenging the doctrine of finality. There is neither Constitutional nor Statutory authority to support that approach. Therefore, neither the Chief Justice, nor Nyamu J. had the jurisdiction to entertain the appellant's application to the extent that he was seeking to challenge a decision of a court of competent jurisdiction against which no Constitutional or Statutory right of appeal or review was available. This matter had been concluded a long time back and attempts to revive it can only have one outcome – failure".

17. Furthermore, Article 165(3) (d) (i) of the Constitution confers upon the High Court the power to determine the question whether any law is inconsistent with or in contravention of this Constitution. The court in this case has been asked to find and hold that sections 76 (1) (a), 76(2) and 76(3) of the Elections Act are unconstitutional. In the exercise of this jurisdiction, the court stands guided by the established principles of Constitutional interpretation. These principles are well-established in the Tanzanian case of **<u>Ndyanabo vs. Attorney General [2001] 2 EA 485</u>** where the Court of Appeal held that there was a rebuttable presumption that legislation was Constitutional and that the onus of rebutting the presumption rested on those who challenged that legislation's status.

18. It is also trite law that the principle of harmonization plays an important role in Constitutional interpretation. This principle provides that provisions of the Constitution must be read together in order to get a proper interpretation. This principle was enunciated in the case ***Tinyefuza Attorney General Constitutional Appeal No. 1 of 1997*** where the court stated:

The entire Constitution has [to] be read as an integrated whole and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and the rule of paramountancy (sic) of the written Constitution.'

19. It is alleged that these provisions are unconstitutional because they provide for the filing of Election Petitions within 28 days of publication of the results in the Kenya Gazette whereas there is no requirement that this be done under Article 87 (2) of the Constitution. This provision of the Constitution cannot be read in isolation. The Elections Act was enacted pursuant to this provision of the Constitution. It is the Act that gives effect to the provisions of the Constitution on elections, and gives the procedures for the resolution of disputes in relation to elections. This was also noted by the court in **Ferdinard Waititu v. IEBC & Others** ***(supra)*** where Mumbi J. stated at page 11:

> ***In my view, however, and I agree with the 4th respondent on this, the provisions of the Elections Act and the Elections Rules, which are made pursuant to Article 87 (2) of the Constitution, constitute the Constitutionally underpinned Code of Laws for dealing with Election Petitions. 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 ordained by the Constitution when it donates power to Parliament to enact the requisite laws and Regulations for its exercise. Such truncation as there may be of the right to approach the court under Article 165(3) (a) has therefore been done by the Constitution itself. Consequently the Petitioner cannot disregard the electoral laws and cite the provisions of Articles 159 and 165(3) (a) of the Constitution as empowering him to do so. Article 165(3)(a), and indeed all other provisions of the Constitution, cannot be read in isolation but must be read and interpreted in the context of the entire Constitution.***

20. The Constitution itself does not set out the meaning of declaration of election results, neither does it set out the manner in which this is to be done. It is silent on this issue, leaving it instead to statute. The Elections Act, steps in at section 76 (1) (a) to provide that the manner in which the declaration is to be done is by publication in the Kenya Gazette.
21. It is clear that the Elections Act and the rules made pursuant to the Act are intended to 'give full effect' to the provisions of the Constitution on elections. This is exactly what section 76 (1) (a) purports to do; give effect to the Constitution. It is therefore my humble view that where section 76 (1) (a), 76(2) and 76 (3) provide that Petitions shall be filed within 28 days of publication of the results in the Kenya Gazette, the Act is simply giving full effect to the provisions of the Constitution on the manner in which the declaration of the results is to be done.
22. The Applicants have asked the court to find that declaration has the meaning attached to it under Regulations 79 and 83. In my view the declaration that is referred to in Regulations 79 and 83 is in respect of particular polling stations and tallying centres. What this means is that if 'declaration' were to be taken to mean the issuance of the forms, it would have the effect of creating several declaration dates, which would result in an absurdity. It could not have been the intention of the drafters of the Constitution that it be interpreted in a manner that would result in an absurdity. Indeed this is contrary to the purposive approach that is required to be adopted in relation to Constitutional interpretation. Indeed the publication of the results in the Kenya Gazette provides a uniform reference point for assessing when the jurisdiction of the IEBC ends and that of the High Court begins, as provided for in the Constitution. In my view the insertion of gazettement in section 76(1) (a) of the Act was meant to give certainty and uniformity to reckoning of time. It was not meant to create a parallel time frame or a contradiction to the Constitution. I am unable to find that by merely requiring that the results be gazetted, section 76(1) (a) is unconstitutional on that score.

23. In any case, the law allows any person to file an Election Petition to challenge the validity of the any election. Since not every person is present in the polling stations at the time of announcement of results, it cannot have been intended that the declaration in the polling stations be the final declaration. As was noted by Mabeya J. in **Nairobi Petition 6 of 2013**,

> ***It is well known that a declaration contained in the Gazette is to the whole world and has a force of law.***

I agree with my learned brother. In line with the principles of transparency and accountability under Article 10, the Kenya Gazette, being the official mode of government communication to the public, it follows that declaration of results must necessarily be carried in the Kenya Gazette. I therefore find no inconsistency between Article 87 (2) and section 76 of the Act.

24. Furthermore, the requirement under the Constitution is that the declaration be done by the Commission, not by any other person. The declaration that is referred to under Regulations 79 and 83 is made by Presiding Officers and Returning Officers respectively. The definition of *'Commission'* in the interpretative part of the Rules is *"the Independent Electoral and Boundaries Commission established under Article 88 of the Constitution."* A "*returning officer*" under ***the Act*** and the ***General Regulations*** means *"a person appointed by the Commission for the purpose of conducting an election or referendum under the Act."* As was found by Majanja J. in **Machakos Election Petition 7 of 2013 Caroline Mwelu Ndiku v. Patrick Mwelu Musimba & Others**, these two terms cannot be used interchangeably. The role of declaration of results is that of the Commission.
25. As to the manner in which the declaration is to be done, the same has been the subject of adjudication in the case of **John Michael Mututho v. Jayne Njeri Kihara (Civil Appeal 102 of 2008) (2008) eKLR** where the court dealt with the failure by the Petitioner to particularize election results in an Election Petition. Looking at **Regulation 40** of the **Presidential and Parliamentary Elections Regulations** (similar to the present regulation 83) the Court of Appeal held at page 3 that:

> ***A careful reading of that regulation clearly suggests that the results is not confined to just declaring who won. The detailed result is what is envisaged. The regulation deals with votes cast, votes spoilt and those garnered by each candidate.***

26. There was an obligation on the part of the IEBC to set out clearly not just the names of the elected persons as it did on the 13th of March 2013, but also to particularize the votes cast, spoilt and garnered by each candidate. This was not done in Gazette Notice No. 3157 which declared the persons elected as the County Women Members of the National Assembly. This default was however on the part of the IEBC and should not be visited on the Petitioners who placed reliance on it in computing the time for the filing of their Petition.
27. In view of the finding that '**declaration**' as set out in Article 87 (2) means **'publication in the gazette'**, it follows that the Gazette Notice must be deemed to be the declaration. I therefore find that the Petition, having been filed within 28 days of publication of Gazette Volume No. 3157 of 2013, is properly within the Constitutional timelines set out in Article 87 (2) of the Constitution.
28. I am aware of the decision of the court in **Suleiman Said Shabhal v. IEBC & Others Mombasa Petition 8 of 2013** where there was a contrary finding. The decision of that court is however merely persuasive, and therefore not binding on this court.

Failure to State Results

29. The Petition is also challenged for failure by the Petitioner to set out the results of the election as required under Rule 10 (1) (c) of the Rules. The said rule provides as follows:

1. ***An Election Petition filed under rule 8, shall state —***

…

(c) the results of the election, if any, and the manner in which it has been declared;

From a cursory look at the wording of Rule 8, the requirement to include the results of the election in the Petition is mandatory. The rule states that the Petition **'shall state…'** the results.

30. The previous electoral regime had this to say on the content and form of a Petition at **Rule 4 (1) of the 1993 The National Assembly Elections (Election Petition) Rules**:

An Election Petition shall–

> ***(a) state whether the Petitioner is entitled to Petition under section 44 of the Constitution; and***
>
> ***(b) state when the election was held and results of the election, and shall state briefly the facts and grounds relied on in support of the Petition.***

Rule 4(2) is a replica of the current Rule 8(2).

31. The court, in the context of the previous electoral regime had occasion to rule on the import of the requirement to state the results of the election in the Petition. In the case of **John Michael Njenga Mututho v. Jayne Njeri Kihara & 2 Others** ***(supra)***, two applications were filed to strike out the Petition on among other grounds, the failure by the Petitioner to state the holding and the result of the election, contrary to the provisions of Rule 4 (1). The court found that the term 'shall' as used in the rule was mandatory and to hold otherwise would be to render the term otiose.
32. On the effect of non-inclusion of the results in the Petition, the court held that the Petition was aimed at nullifying an election result. Where the results were not given, any findings on the issue would serve no useful purpose. This was because any evidence adduced or intended to be adduced was 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.
33. The High Court has had occasion to rule on the effect of not including results on the fate of the Petition under the present electoral laws. In **Garissa High Court Petition 4 of 2013 Amina Hassan Ahmed v. Returning Officer, Mandera County and 2 Others** the court held at page 21:

> ***In my view and finding based on the facts and reasons herein above, the Petitioner's Petition is without doubt, fatally defective because it is deficient in form and lacks the vital prescribed content.***

The court proceeded to strike out the Petition after finding that it had no power or jurisdiction to grant an amendment to the Petition. It relied on the position taken in the **Mututho case** ***(supra)*** on this issue. A different position was however taken on the matter by Githua J. in Malindi Petition 8 of 2013, **Sarah Mwangudza Kai v. Mustafa Idd Salim & Others** and Majanja J. in **Machakos Election Petition 7 of 2013 Caroline Mwelu Ndiku v. Patrick Mwelu Musimba & Others.**

34. In addition to the provision in **Rule 8** requiring the Petitioner to state the date when the elections were held and the results of the same, there is now a requirement under **Rule 21** for the Electoral Commission to deliver to the Registrar the ballot boxes in respect of the election not less than 48 hours before the date fixed by the court for the trial, and the results of the relevant election within fourteen days of being served with the Petition.

35. The position of the court in the ***Mututho case*** is that the court was not able to relate any irregularities alleged in the Petition with the results because the results were not stated. I have reviewed the law in operation at the time. There was no requirement under that law for the electoral commission to avail copies of the results to the court. The court was therefore not able to assess the validity of the election where these were not availed. The provision in **Rule 21** cures this. The court is able to assess the allegations in the Petitions against the results that are availed to it by the Electoral Commission. In my humble view, there is therefore no prejudice that is

occasioned to the Respondents where the results are not stated in the Petition. As was stated by Majanja J in ***Machakos Election Petition 4 of 2013 <u>Wavinya Ndeti v. IEBC & Others:</u>***

> ***"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 justic***e.'

<u>The 1st Respondent urged the court that in the alternative, this honourable court be pleased to strike out the various affidavits filed together with the Petition for being bad in law.</u>

36. In relation to the allegations by the 1st Respondent that the affidavits are bad in law for being false, I will repeat here what I said in **Petition No. 4 of 2013**, **<u>Petkay Miriti V Ragwa SamueI Mbae and others</u>** that as section 109 of the Evidence Act provides, the burden of proof of particular facts lies on the person who alleges those facts. The applicant contends that he did not commit the election offences cited by the Petitioner in his affidavits and that the testimony that has been set out by the Petitioner's witnesses is not to be believed. He contends that these witnesses have since recanted their evidence and attaches affidavits in this regard. There is therefore on the record of the court two conflicting sets of facts. The veracity of the contents of affidavits can only be tested when the witnesses of either side take the stand. This makes the issue unsuitable for determination at the preliminary stage as the court has not had an opportunity to hear the witness evidence. The Applicants are therefore asking the court to make a decision on the basis of untested evidence which this court cannot do.
37. I am persuaded by Ngaah J. in **<u>Peter Gichuki King'ara v. IEBC & Others</u> Nyeri Election Petition 3 of 2013** where he observed:

> ***It must be noted that witness affidavits in an election Petition constitute evidence-in-chief which is subject to cross-examination and re-examination by virtue of Rule 12(2) (c). To admit it as self-sufficient on the matters deposed upon without cross-examination will not only prejudice the Respondents against whom the adverse comments have been made in that affidavit but will also be contrary to Rule 12(2) (c) of the Rules which guarantees the Respondents the right and the option to cross-examine witnesses on their affidavits.***

38. The issue for the court to consider in this regard is what the effect of the allegations is and whether they are relevant to the issue at hand. What the Petitioner alleges is the commission of election offences within the meaning of the Elections Act. Election offences, if proved, would have the effect of showing that the election that is challenged was not free and fair. This would be contrary to Article 81 of the Constitution which sets out the principles. The allegation of commission of election offences by the applicant might be embarrassing in the English sense of the word but cannot be said to be irrelevant to the matter at hand and therefore fall short of the legal threshold of scandalous.
39. The various affidavits sworn in support of this Petition are not self-reliant but are subject to cross examination and re-examination by virtue of Rule 12(2) (c) of the Rules. The allegations of commission of election offences are neither irrelevant nor scandalous. The veracity of each of them will be tested during the trial.

<u>Costs</u>

40. As to the costs of the applications, it is trite law that the costs follow the cause.

<u>CONCLUSION</u>

41. Having carefully considered the two applications by the Respondents to this Petition I have come to the conclusion:

1. **This court has the jurisdiction to hear and determine this Petition.**
2. **There was an obligation on the part of the IEBC to set out clearly not just the names of the elected persons as it did on the 13th of March 2013, but also to particularize the votes cast, spoilt and garnered by each candidate. This default was however on the part of the IEBC and should not be visited on the Petitioners who placed reliance on it in computing the time for the filing of their Petition. In view of the finding that 'declaration' as set out in Article 87 (2) means 'publication in the gazette', it follows that the Gazette Notice must be deemed to be the declaration. I therefore find that the Petition, having been filed within 28 days of publication of Gazette Volume No. 3155 of 2013, is properly within the Constitutional timelines set out in Article 87 (2).**
3. **The veracity of the contents of affidavits can only be tested when the witnesses of either side take the stand. This makes the application to strike out affidavits named, whether in part or the whole; unsuitable for determination at the preliminary stage as the court has not had an opportunity to hear the witness evidence. The various affidavits sworn in support of this Petition are not self-reliant but are subject to cross examination and re-examination by virtue of Rule 12(2) (c) of the Rules. The allegations of commission of election offences are neither irrelevant nor scandalous. That prayer is therefore premature.**

FINAL ORDERS

42. **The 1ST Respondent's application dated 24th May, 2013 and the 2nd and 3rd Respondents' application dated 10th June, 2013 are dismissed with costs.**

DELIVERED IN OPEN COURT AT MERU THIS 25TH DAY OF JULY 2013.

LESIIT, J.

JUDGE