



**Kimani v Musyoki & 2 others (Election Petition 1 of 2022)
[2022] KEMC 15 (KLR) (21 November 2022) (Ruling)**

Neutral citation: [2022] KEMC 15 (KLR)

**REPUBLIC OF KENYA
IN THE LIMURU LAW COURTS
ELECTION PETITION 1 OF 2022
JO MAGORI, SPM
NOVEMBER 21, 2022**

BETWEEN

STEPHEN MWANGI KIMANI PETITIONER

AND

JOSEPH MUNYAU MUSYOKI 1ST RESPONDENT

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

JOSEPHINE NDUATA MUONGI 3RD RESPONDENT

RULING

1. The petitioner herein vied for the seat of member of county assembly Limuru central ward in Kiambu County in the elections held on August 9, 2022 as an independent candidate. Upon the declaration of the results the third respondent was declared the winner.
2. On August 25, 2022 the petitioner acting in person filed a petition dated 23rd August 2022, the same was uploaded on the e filing portal on 2nd September 2022.
3. The petition was filed together with a Notice of motion dated August 23, 2022, a supporting affidavit and statement by the petitioner.
4. In his petition the petitioner seeks for the following orders;
 - a. That the election conducted On August 9, 2022 in Limuru central ward by 1st and 2nd Defendants be declared as null and void and
 - b. That a fresh election be conducted hence forth.
 - c. That the 1st and the 2nd Defendant to be ordered to compensate to the petitioner for the damage.



- d. The cost of petition be awarded to the petitioner
 - e. That this honorable court does issue further orders as it may deem fit.
5. In the Notice of motion dated 23rd august 2022 the petitioner seeks for the following orders;
1. That the petitioner prays the honorable court be pleased to issue injunction orders barring and restraining the 3rd respondent namely JOSPHINE NDUTA MUONGI from being sworn in as member of the county assembly pending the hearing and determination of the present petition.
 2. That the petitioner prays the honorable court be pleased to nullify election conducted on 9th of August 2022 in Limuru Central ward on the ground that petitioner was not on ballot papers.
 3. Unless this petition matter is heard ex-parte in the first instance and such orders granted the applicant will continue to be greatly affected with continued irreparable damages that cannot be recovered thereafter.
 4. That cost of the petition be awarded to the petitioner
6. The first and second respondents filed a reply to the petition, a replying affidavit to the petitioner's application dated 23rd august 2022 and a notice of preliminary objection all dated 30th August 2022.
7. The Third respondent filed a response to the petition, a replying affidavit to the application dated 23rd august 2022 and a notice of preliminary objection, all dated 6th September 2022
8. This matter was fixed for pretrial directions on 7th October 2022. The petitioner indicated that he had filed a further affidavit dated 18th September, 2022 in response to the third respondent's replying affidavit. The replying affidavit was filed without leave.
9. This court issued the following directions;
1. The petitioner's affidavit entitled as a further replying affidavit in response to the third respondent's preliminary objection was deemed properly filed and the petitioner was directed to serve the respondents by close of business on 7th October 2022
 2. The respondents were granted leave to file and serve further affidavits in response to the petitioner's further affidavit within 3 days upon being served.
 3. The petitioner to file submissions in relation to his application dated 23rd august, 2022 and serve the respondents within 5 days and the respondents to file their submissions in response within 5 days.
 4. The respondents to file and serve submissions in respect to their preliminary objections within 5 days and the petitioner file his submissions in response within 5 days.
 5. The matter was fixed for mention on 17th October 2022 to confirm filing of submissions and for taking a ruling date.
10. On 17th October 2022 the respondents confirmed that they had filed their respective submissions in regard to their preliminary objections.
11. The petitioner informed this court that he had not filed submissions in respect to his application dated 23rd august 2022 nor any response to the respondents' submissions on the preliminary objections, instead he had filed a notice to withdraw the petition and served upon the respondents.



12. Counsels for the respondents indicated to court that the notice to withdraw the petition had no grounds and affidavit in support and did not conform to form 5 under rule 21(3) of the Elections (parliamentary and county Elections) petition Rules 2017.
13. This court expunged notice to withdraw petition dated 10th October,2022 from record and directed the petitioner to file a proper application in conformity to form 5 under rule 21(3) of the Elections (parliamentary and county Elections) petition Rules 2017 and serve the respondents by close of business on 18th October 2022.
14. The respondents were directed to file their replying affidavits to the application for withdrawal within 2 days upon being served.
15. The matter was fixed for hearing of the application for withdrawal on 26th October 2022, On the date for hearing of the application for withdrawal the petitioner confirmed that he had filed a notice of motion dated 17th October 2022 but had not complied with form 6 under rule 22(2) of the Elections (parliamentary and county Elections) petition Rules 2017 as regards advertisement. He requested for 2 days to comply.
16. The third respondent had filed a reply to the notice of motion but the first and second respondents had not filed their replying affidavit to the Notice of motion dated 17th October 2022.
17. The respondents informed this court that the application for withdrawal was not in conformity to form 5. under rule 21(3)(a) of the Elections (parliamentary and county Elections) petition Rules 2017.
18. This court issued directions as follows;
 1. The first and second respondents were granted leave to file their reply to the application for withdrawal
 2. The petitioner was granted leave to file form 5 in addition to the notice of motion dated 17th October 2022 for withdrawal filed earlier by close of business on 27th October 2022 and comply with form 6 under rule 22(2) by publishing in a newspaper of national circulation a Notice of intention to withdraw the petition.
 3. The application for withdrawal was fixed for hearing on 31st October 2022.
19. On 31st October 2022 the petitioner confirmed that he had filed form 5 under rule 21(3) and served but had not complied with form 6 under rule 22(2) and that he was to comply by Wednesday 2nd November 2022 since he had been informed at the Nation Media group and standard newspapers that the advertisement can only be done on the following Wednesday. He requested the court to allow him publish the advertisement on Wednesday 2nd November 2022.
20. Counsel for the first and second respondents objected to extension of time.
21. The court allowed the petitioner to publish the advertisement on 2nd November 2022 and upload a copy of the publication on the e filing portal and serve the respondents counsels by close of business on 3rd November 2022.
22. The matter was fixed for ruling on the application for withdrawal and the preliminary objections.



Application for Withdrawal

23. This court will first deal with the application for withdrawal of the petition that is the Notice of motion dated 17th october,2022 signed by the petitioner who is in person and supported by the petitioner's affidavit sworn on even date together with form 5 dated 27th October 2022 signed by the petitioner.
24. The application is filed under rules 21 and 22 of the Elections (parliamentary and county Elections) petition Rules 2017 and seeks for the following orders;
1. That there is application before the court on the other hand the petitioner prays the honorable court the leave to withdraw the present petition dated 23rd of August 2022 between the 1st ,2nd and the 3rd Respondents.
 2. That the court will first deal with the application to withdraw the petition, the notice of motion by the petitioner dated 17th of October 2022. It is executed by the petitioner acting in person on record and predicated upon a deposition sworn by the petitioner on even date.
 3. That the application is filled under rules 21 and 22 of the elections parliamentary and county elections petitions rules 2017 and any other enabling provisions of law and seeks the following orders:
 - i. That the petitioner be granted the requisite leave to withdraw the petition herein
 - ii. That the petition dated 23rd of August 2022 and all subsequent applications be marked as withdrawn.
 - iii. That each party to bear their costs.

The grounds on the face of the application and reiterated in the petitioner/applicant's affidavit are as follows;

- i. The Petitioner on his own will and volition has chosen to withdraw the Petition 23rd of August,2022 inter alia on the following grounds.
- ii. The Applicant has become irredeemably disillusioned with the electoral justice system and wishes to disengage from it forthwith.
- iii. Whereas in filing the Petition under Section 80(4) of the *Elections Act*, the Applicant expected to secure justice expeditiously in order for the confirmed true winner to be determined to serve the people of Limuru Central Ward; it is now obvious that in the circumstances of this case the Applicant cannot secure justice without a long drawn out and costly appeal process.
- iv. The Applicant is apprehensive that the prolonged electoral contestation over the outcome of the Member of the County Assembly election will be prejudicial to unity, public interest, cohesion and development vision of the people of Limuru Central Ward.
- v. In view of the foregoing, the Applicant after deep soul searching and reflection during the festive season has decided that the time has come for him to sacrifice his political ambitions by withdrawing this Petition in order to serve the greater interest and public good of the people of Limuru Central Ward to move on from the divisive electoral politics of 2022.



- vi. No agreement or terms of any kind has been made and no undertaking has been entered into in relation to the withdrawal of the Petition.
 - vii. The Petitioner undertakes to publish in a newspaper of national circulation a notice in the prescribed Form of his intention to withdraw the Petition.
25. The first and second respondents filed a replying affidavit sworn on 26th October, 2022 by the first respondent who deponed that no agreement or terms of any kind has been made and that no undertaking had been entered into, in relation to the Petition. He deponed further that the first and second respondents had no objection to the application for withdrawal of the Petition, provided that the Petitioner complies with the rules governing the process of withdrawal contained in the Elections (Parliamentary and County) Petition Rules, 2017 which he had not been complied with under Rule 21 and Rule 22(2)
26. The third respondent filed a replying affidavit sworn by herself on 26th October 2022 and deponed that the application for withdrawal of the petition does not conform to the provisions of Rule 21(3) of the Elections (Parliamentary and County) Petition Rules, 2017 as the same is not in the prescribed form. She further deponed that if this Honourable Court exercises its discretion and admits the Petitioner's application as it is, she does not oppose the withdrawal of the Petitioner's Petition and that she has not entered into any kind of agreement or undertaking with the Petitioner with relation to the withdrawal of his Petition. She prayed for costs of the petition if it is withdrawn and asked this court to direct that the security of costs deposited in Court, be released to her Advocates as part payment for the costs in this suit, after which a proper bill of costs shall be prepared.

Preliminary Objections by the Respondents:

27. The respondents filed preliminary objections to the petitioner's petition and application dated 23rd august 2022.

First and Second Respondents' Preliminary Objection

28. The preliminary objection by the first and second respondents to the petition and Notice of motion dated 23rd august 2022 is based on the following grounds;
1. That this Honourable Court lacks jurisdiction to entertain the present petition as it is contrary to the provisions of Article 88 (4) (c) of *the Constitution* of Kenya, 2010 which provides for Pre-election Dispute Resolution Mechanism by the 2nd Respondent;
 2. That this Honourable Court lacks jurisdiction to entertain the present petition as it offends the provisions of Section 74 (1) of the *Elections Act*, 2011, Cap 24 of 2011;
 3. That the Petition as drawn does not meet the requirements of Rule 8(1) of the Elections (Parliamentary and County Elections) Petition Rules, 2017 by failing to state the results of the election and date of declaration of results.
 4. That the Petition offends Rule 8 and 12 of the Elections (Parliamentary and County Elections) Petition Rules, 2017 as the same is not accompanied by an Affidavit in Support of Petition.
 5. That the Petitioner has failed to deposit security for costs contrary to the provisions of Section 78 of the *Elections Act*, 2011, Cap 24 of 2011.
 6. That this Petition is therefore incompetent, fatally defective, misconceived, and an abuse of the court process and warrants to be struck out with costs at the outset.



Third Respondent's Preliminary Objection

29. The preliminary objection by the third respondent is based on the following grounds;
1. That the Petition dated 23rd of August, 2022 and filed on 25th of August, 2022 is fatally defective as it has failed to meet the statutory provisions of Rule 8 of the Elections (Parliamentary and County) Petition Rules 2017 as read together with Rule 12 of the said Rules.
 2. That the Petition is not accompanied by an Affidavit which includes inter alia the particulars of the Deponent, the date when the election in dispute was conducted and the date of the declaration of the results, however declared and the grounds on which the Petition is presented.

Submissions on Preliminary Objections by the Respondents

30. Both counsels for the respondents filed submissions dated 13th October, 2022 on the preliminary objections.

First and Second Respondents Submissions

31. Counsel for the first and second respondents Ms. Anne Munene in her submissions gave a background of the petitioner's petition and the grounds of preliminary objection by the first and second respondents.
32. She submitted on the following issues;
1. On the issue of jurisdiction, counsel submitted that the allegations raised by the petitioner as regards his name Being Gazetted as Stephen Nwangi Mwangi instead of Stephen Mwangi Kimani are not within the jurisdiction of this court but fall within the ambit of pre-election disputes which are settled by the independent Electoral and Boundaries commission Electoral Disputes Resolution Committee. She submitted further that the petitioner cannot claim ignorance or feign surprise since he posted the sample ballot paper on his face book account and used it as a campaign material.
 2. She cited Article 88(4)(e) of *the constitution* of Kenya 2010 and the case of The owners of the motor vessel Lilian 'S' vs Caltex Kenya Ltd (1989) eKlr where the court held that jurisdiction is everything without it the court has no power to make any step and must down tools
 3. On the issue of Failure to indicate date of declaration of results by the petitioner and the results declared Counsel submitted that the petitioner has not indicated the date of declaration of the election results contrary to rule 8(1)(c)(d) of the Elections (parliamentary and county elections petitions rules 2017. She cited the cases; Amina Hassan Ahmed vs Returning officer Mandera County and 2 others Nairobi election petition No.4 of 2013
33. Jimmy Mkala Kazungu vs IEBC Election petition No 9 of 2017 it was held as follows;
- "... In view of the foregoing, this Court finds that the Petitioner failed to comply with the express and mandatory provisions of Rule 8(1) of the Elections (Parliamentary & County Elections) Petition Rules 2017. It must follow therefore that the Petition herein is incurably defective and allowing the same as presently drawn to proceed to trial would be an abuse of the Court process."



34. Martha Karua & Another vs Independent Electoral & Boundaries Commission & 3 others (2017) eKLR it was held that;

"The requirement under rule 8 (1) of the Rules are not mere technical requirements, they are substantive as they go to the root of the issue before an election court. A petition which has failed to state the date of declaration, the results of the election and how declared is fatally defective and beyond salvage. The consequence is that it must be struck out."

35. On the third issue Failure of the petitioner to include an affidavit in support of the petition. Counsel submitted that the petition is not accompanied with an affidavit in support of the petition as provided under rules 8 (4)(b) of the Elections (parliamentary and county elections petitions rules 2017

36. She cited the case of Pius Njogu Kathuri vs Joseph Kiragu Muthura & 3 others (2018) eKLR. It was held that;

It is a mandatory requirement that a petition be supported by affidavit of the petitioner. Having found that the petition is not supported by affidavits as mandatorily required under the Rules, the petition cannot stand. This is not a defect which can be cured under Article 159 (2) (d) of *the Constitution* which deals with procedural technicalities. It has been stated in Zacharia Okoth Obanado -V- Edward Akong'o Oyugi & 2 Others:-

" Article 159 (2) (d) of *the Constitution* simply means that a Court of Law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the Court."

37. The affidavits of the petitioner ought to be struck out for not being affidavits as envisaged by the law. The petition has not complied with the mandatory requirements with regard to affidavits. Failure to support the petition with affidavits goes to the root and content of the petition. The petition as it stands is fatally defective.

38. On the Fourth issue Failure of the petitioner to deposit security for costs Counsel submitted that the petitioner failed to deposit security for costs as stipulated in section 78(2)(c) and rule 13 of the Elections (parliamentary and county elections petitions rules 2017. She cited the cases of; Evans Nyambaso Zedekiah & Another vs Independent Electoral and Boundaries Commission & 2 others(2013) e KLR, Ibrahim Ahmed vs Independent Electoral and Boundaries Commission & 2 others (2017) e KLR It was held that;

In the premises therefore, this court holds that the failure by the Petitioner to deposit security for costs within the stipulated statutory period of ten days after filing the petition renders the petition fatally defective. The requirement for the deposit for security of costs is a substantive legal requirement and is not a procedural technicality that this court can excuse or extend time to enable compliance to be made. The petition herein is therefore struck out with costs to the Respondents.

39. On the fifth issue, Costs of the petition, counsel for the first and second respondents urged the court to exercise its discretion and strike out the petition dated 23rd august 2022 for being incompetent and an abuse of the court process with costs to the first and second respondents.



Third Respondents Submissions

40. Counsel for the third respondent Mr.Kabucho in his submissions gave brief facts of the petition and submitted on Competency of the petition, he referred to rules 4(1),7(1), 7(3)(b), 8 and 15(1) of the elections(Parliamentary and county) petition rules 2017 and submitted that the petition does not contain the results of the election, the date and how they were declared. He submitted further that the petition is not accompanied by an affidavit sworn by the petitioner on the facts supporting the petition, grounds set therein and the prayers sought. It was his submission that the above rules are in mandatory terms and must be followed failure to which the petition shall be fatally defective. He cited the following cases; Ismail Suleiman & 9 others vs returning officer Isiolo County Independent Electoral and Boundaries Commission & 3 others (2013) eKLR
41. The petition before this court does not disclose the results of the election of the Governor, Isiolo County and the manner in which the results had been declared.
42. Rule 10(1) (c) of the Petition Rules 2013 provides:-
- 10.
- (1) an election petition filed under rule 8, shall state
- (a)
- (b)
- (c) the results of the election, if any, and the manner in which it has been declared;
43. The above-mentioned provision contained in Rule 10(1),(c) of the Petition Rules 2013 as worded is mandatory as it states election petition shall state the results of the election if any and the manner in which it has been declared.
44. I have referred to Court of Appeal decision in the case of John Njenga Michael N. Mututho V Jane Njeri Wanjiku Kihara & 2 others(2008) 1KLR 10, where the Court of Appeal held:-
- “Regulation 40 implied that where the results were not included in the petition, it will be incomplete as the basis for any complainant would be absent and whatever complaints a Petitioner had about an election would be regarded as having no legal basis. The law sets out what a petition should contain, and if any of the matters supposed to be included was omitted, the petition would be incurably defective.”
45. Counsel for the third respondent prayed that the preliminary objection by the third respondent be allowed and the petition be dismissed with costs to the third respondent.

Issues for Determination

1. Whether the petitioner has met the required threshold for withdrawal of the petition
2. Whether the preliminary objections by the respondents should be allowed and the petition be struck out
3. Who shall bear the costs



Analysis and Findings:

1. Whether the petitioner has met the required threshold for withdrawal of the petition

46. There is a laid down procedure to be followed in withdrawal of a petition as outlined in rules 21,22 and 23 of the Election (Parliamentary and County) Petition Rules 2017 which provides as follows;

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1. A petition shall not be withdrawn without leave of the election court.
2. The election court may grant leave to withdraw a petition on such terms as to the payment of costs or as the election court may otherwise determine. 3. An application for leave to withdraw a petition shall-
 - a. be in Form 5 set out in the First Schedule
 - b. be signed by the petitioner or a person authorized by the petitioner
 - c. state the grounds for withdrawing the petition; and
 - d. be lodged at the registry.
4. The parties to a petition shall each file an affidavit, before leave for withdrawal of a petition is determined, addressing the grounds on which the petition is intended to be withdrawn.
5. Despite sub-rule (4), an election court may, on cause being shown, dispense with the affidavit of a party to the petition if it seems to the election court on special grounds to be fit and just.
6. Each affidavit filed under sub-rule (4) shall contain the following declaration - "to the best of the deponent's knowledge and belief, that no agreement or terms of any kind has been made, and that no undertaking has been entered into, in relation to the withdrawal of the petition."
7. Despite sub-rule (6), where a lawful agreement shall have been made with respect to the withdrawal of the petition, the affidavit shall set out the terms of the agreement.

22

1. The petitioner shall serve each respondent with a copy of the application to withdraw a petition.
2. The petitioner shall publish in a newspaper of national circulation a notice of intention to withdraw an election petition in Form 6 set out in the First Schedule and the petitioner.

23

1. The Registrar shall issue a notice for hearing an application to withdraw an election petition in Form 7 set out in the First Schedule, to the parties in an election petition.
2. The notice issued under sub-rule (1) shall specify the time and place for the hearing of the application for the withdrawal of the petition under rule 21.



47. It is clear from the above rules that the petitioner must file an affidavit and depone that no agreement has been reached and must publish in a newspaper of national circulation a notice in the prescribed form of his intention to withdraw the petition. A withdrawal of an election petition is not automatically allowed since the court has to grant leave to the petitioner to withdraw the petition on such terms as to payment of costs.
48. The petitioner initially filed a notice to withdraw the petition which was not in compliance with rule 21(3). The same was expunged from record and he was directed to file a proper application for withdrawal in compliance with the rules. He thereafter filed the Notice of Motion dated 17th October 2022, supported by an affidavit but failed to file the same as provided in form 5 and did not comply with form 6 of the rules. He was granted time to comply and later filed form 5 dated 27th October 2022 in addition to the notice of motion dated 27th October 2022. However, despite being granted adequate and extended time to comply with rule 22(2), the petitioner failed to comply.
49. The provisions of rule 22(2) are in mandatory terms;
- Rule 22(2) The petitioner shall publish in a newspaper of national circulation a notice of intention to withdraw an election petition in Form 6 set out in the First Schedule
50. The petitioner herein has therefore failed to comply with the required procedure and set down provisions under rule 22(2) for withdrawal of the election petition. The application for withdrawal is therefore dismissed with costs to the respondent.

2. Whether the preliminary objections by the respondents should be allowed and the petition be struck out

i Jurisdiction

51. The petitioner in his petition raised the issue that his name was wrongly captured in the ballot papers. Counsel for the first and second respondent. In her submissions submitted that this was a pre election issue which ought to have been handled by the IEBC dispute Resolution Committee
52. Article 88(4)(e) of *the constitution* of Kenya 2010 provides as follows;
- (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 to any elective body or office established by *the constitution*, and any other elections as prescribed by an Act of parliament
- (e) the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and dispute subsequent to the declaration of election results.
53. Section 74(1) of the *elections Act* 2011 provides as follows;
- Pursuant to Article 88 (4) (e) of *the Constitution*, the Commission shall be responsible for 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.
54. The petitioner had all the time to file his complaint before the second respondent's Dispute Resolution Committee but failed to do so at the appropriate time. The allegations by the petitioner fall under a pre-election dispute. This court has no jurisdiction to handle the issue. Am guided by the decision in



the case of The owners of the motor vessel Lilian 'S' vs Caltex Kenya Ltd(1989) eKlr where the court held that "jurisdiction is everything without it a court has no power to make one more step..... and no basis for continuation of proceedings pending other evidence"

55. It is my finding therefore that I have no jurisdiction to entertain the issue relating to ballot papers which ought to have been handled by the Independent Electoral and Boundaries Commission Dispute Resolution Committee.

ii Failure by the petitioner to indicate date of declaration of results, the results declared and failure to include an affidavit in support of the petition

56. I will handle the three issues together since they all relate to presentation and commencement of a petition. Counsels for the respondents submitted that the petition is defective for failure to comply with Rules 8 and 12. They submitted that the date of declaration of the results and the results declared are not indicated in the petition and there is no affidavit in support of the petition. They urged this court to strike out the petition.

57. Rules 8 and 12 of the Election (Parliamentary and County Elections) Petition Rules, 2017 Provides as follows;

8 Contents and form of a petition

- (1) An election petition 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 however 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.
- (2) The petition shall be divided into paragraphs, each of which shall be confined to a distinct portion of the subject, and every paragraph shall be numbered consecutively.
- (3) The petition shall conclude with a statement setting out the particulars of the relief sought which may include-
 - (a) a declaration on whether or not the candidate whose election is questioned was validly elected;
 - (b) a declaration of which candidate was validly elected;
 - (c) an order whether a fresh election should be held.
 - (d) scrutiny and recounting of the ballots cast and the election in dispute.
 - (e) payment of costs; or
 - (f) a determination as to whether or not electoral malpractice of a criminal nature may have occurred.
- (4) The petition shall-



- (a) be signed by the petitioner or by a person authorised by the petitioner.
- (b) be supported by an affidavit sworn by the petitioner containing the particulars set out under rule 12 and
- (c) be in such number of copies as would be sufficient for the election court and all respondents named in the petition.

12

1. A petition shall be supported by an affidavit which shall-
 - (a) set out the facts and grounds relied on in the petition;and
 - (b) be sworn personally by the petitioner or by atleast one of the petitioners,if there is more than one petitioner.
- (2) An affidavit in support of a petition under subrule (1) shall state-
 - (a) the name and address of the deponent;
 - (b) the date when the election in dispute was conducted
 - (c) the results of the election,if any,however declared
 - (d) the date of declaration of the results of the election
 - (e) the grounds on which the petition is presented;
 - (f) the name and address of the advocate,if any acting for the Petitioner which shall be the address for service
- (3) Each person who the petitioner intends to call as a witness at the hearing,shall swear an affidavit.
- (4) A petitioner shall,at the time of filling the petition,file the affidavits sworn under subrule (3)

58. I have perused the petition and agree with the respondent’s counsels that indeed the petition does not indicate the date of declaration of the results being challenged by the petitioner and the results declared in the Elections for Member of county assembly for Limuru Central Ward in the Elections held on 9th August 2022. The petition is not accompanied by a supporting affidavit.

59. The provisions of rule 8 and 12 of the Election (Parliamentary and County) Petition Rules 2017 as captured above are couched in Mandatory terms SHALL.

60. In this petition the date of declaration of the results and the results declared are unknown. The supporting affidavit which should be sworn by the petitioner personally and set out the grounds for the petition and the facts is missing. The supporting affidavit is a mandatory requirement. In the case of John Njenga Michael N. Mututho v Jane Njeri Wanjiku Kihara & 2 others(2008) 1klr 10, it was held that;

“The law sets out what a petition should contain, and if any of the matters supposed to be included was omitted, the petition would be incurably defective.”

61. This court finds that the petitioner failed to comply with the mandatory provisions of Rules 8(1(b)(c) (d) and (e) and rule 12 of the Election (Parliamentary and County) Petition Rules 2017.



62. The petitioner who is acting in person had an obligation to comply with the procedure. The law does not favor a petitioner who is acting in person in any way. The Election rules are in a very simple language and clear to understand even for a layman.
63. In view of the foregoing this court finds that the petition is incurably defective and is an abuse of the court process.

iii Failure of the petitioner to deposit security for costs

64. Counsel for the first and second respondents submitted that the provisions of section 78(2)(c) of the Elections Act, 2011 and Rule 13 of the Election (Parliamentary and County) Petition Rules 2017 are in mandatory terms and the petitioner's failure to deposit security for costs renders the petition fatally defective.

65. Section 78 of the elections Act 2011 provides as follows:-

78.

1. 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 under this part.
- (2) A person who presents a petition to challenge an election shall deposit:-
 - (a) One million shillings, in the case of a petition against a presidential candidate.
 - (b) Five hundred thousand shillings, in the case of petition against a member of Parliamentary or a county governor; or
 - (c) One hundred thousand shillings, in the case of a petition against a member of a County Assembly.
- (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 as the petitioner and the respondent may apply to the election court for an order to dismiss the petition and the payment of the respondent costs.

66. Rule 13 (1) of the Election (Parliamentary and County) Petition Rules 2017 provides as follows:- 'Within ten days of the filing of a petition, a petitioner shall deposit security for the payment of costs in compliance with section 78 (2) (b) and (c) of the Act.

67. I have confirmed that the petitioner did not deposit the required security for costs as provided in section 78(2)(c) of the Elections Act, 2011 and Rule 13 of the Election (Parliamentary and County) Petition Rules 2017.

68. Section 78 (2)(c) One hundred thousand shillings, in the case of a petition against a member of a County Assembly. Rule 13 (1) 'Within ten days of the filing of a petition, a petitioner shall deposit security for the payment of costs in compliance with section 78 (2) (b) and (c) of the Act.

69. The provisions of the stated section and rule captured above are in mandatory terms and have a limited time.

70. In the case of Ibrahim Ahmed vs Independent Electoral and Boundaries Commission & 2 others (2017) e KLR it was held that "deposit of security for costs is mandatory".



71. The petition is therefore incurably defective for failure of the petitioner to deposit security for costs.

3. Who shall bear the costs

72. It is trite law that costs follow the event Section 84 of the [elections Act](#) 2011 provides as follows:-

An election court shall award the costs of and incidental to a petition and such costs shall follow the cause.

73. Rule 30 of Election (Parliamentary and County) Petition Rules 2017 provides that;

1. The election court may, at the conclusion of a petition, make an order specifying-
 - a. The total amount of costs payable
 - b. Maximum amount of costs payable
 - c. The person who shall pay the costs under paragraph (a) or (b)and
 - d. The person to whom the costs payable under paragraph(a) and (b) shall be paid

74. The provisions of Section 84 of the [elections Act](#) 2011 are in mandatory terms. The respondents filed responses and preliminary objections. The petition was filed by the petitioner and the petitioner is therefore liable for the costs which the respondents have incurred.

75. I therefore have to award costs of and incidental to the petition and the award being discretionary, this court has powers to cap the costs.

76. It is a fact that the respondents have incurred costs in preparation of documentation and in defending this petition.

Determination

77. Considering the foregoing this court makes the following determinations;

1. The petitioners Notice of motion dated 17th October 2022 and the application dated 27th October,2022 for withdrawal of the petition are dismissed with costs to the respondents.
2. The preliminary objections by the first, second and third respondents are hereby allowed.
3. The petition is incurably defective and is an abuse of the court process together with the application dated 23rd August,2022. The petition is therefore struck out with costs to the respondents.
4. The petition having been struck out at the infancy stage, I award the first and second respondents jointly all inclusive costs Ksh.50,000/=.

The third respondent is also awarded all inclusive costs of Ksh.50,000/=

J.O. MAGORI –SPM

SIGNED

COURT – RULING DELIVERED VIRTUALLY VIA TEAMS IN OPEN COURT THIS 21ST DAY OF NOVEMBER, 2022

in the presence

Petitioner in person Absent



Ms Munene for first and second respondents

Ms Odongo for third respondent

