



**Mussa & another v Independent Electoral and Boundaries Commission & 2 others  
(Election Petition E001 of 2022) [2022] KEMC 18 (KLR) (29 December 2022) (Ruling)**

Neutral citation: [2022] KEMC 18 (KLR)

**REPUBLIC OF KENYA  
IN THE DAADAB LAW COURTS  
ELECTION PETITION E001 OF 2022  
JJ MASIGA, PM  
DECEMBER 29, 2022**

**BETWEEN**

**ABDULLAHI OMAR MUSSA ..... 1<sup>ST</sup> PETITIONER**

**HUDKE HASSAN GERALD ..... 2<sup>ND</sup> PETITIONER**

**AND**

**THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION .... 1<sup>ST</sup>  
RESPONDENT**

**ABDI SHEIKH MOHAMED (THE RETURNING OFFICER DADAAB  
CONSTITUENCY) ..... 2<sup>ND</sup> RESPONDENT**

**HASSAN OMAR ABDI ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

**Introduction**

1 This is the ruling on four application filed by both the petitioners and the respondents. Two of the application dated, October 9, 2022 and October 10, 2022 respectively were filed by the petitioners. Whereas, the applications dated October 17, 2022 and October 18, 2022 were filed by the 3<sup>rd</sup> and 1<sup>st</sup> and 2<sup>nd</sup> respondents respectively. I deliberately write a single ruling because, upon perusal of all the above applications, I notice that they are inter-related. The orders in both the petitioner's and the respondent's applications are similar. The outcome of the petitioner's applications shall have a bearing on the outcome of the respondent's applications. Therefore, in my view, and in line with the time lines set out by the laws on election petitions, it is prudent that the four applications be determined together.



## Background

- 2 The brief background of this case is that, the petitioner filed this petition, on the September 6, 2022. They served the 1<sup>st</sup> and 2<sup>nd</sup> respondent on the September 19, 2022 whereas the 3<sup>rd</sup> respondent was allegedly served on the September 20, 2022. The 1<sup>st</sup> and 2<sup>nd</sup> respondents filed their responses *vide* response to petition and supporting affidavits dated October 7, 2022, whereas, the 3<sup>rd</sup> respondent filed his response *vide* response to petition and supporting affidavit dated September 20, 2022. These responses in the view of of the petitioners were filed out of time thereby prompting them to file the applications dated October 9, 2022 and October 10, 2022 seeking to strike out the responses. The respondents on the other hand filed the applications dated October 17, 2022 and October 18, 2022 respectively seeking leave to file their responses out of time. I will first determine the petitioner's applications dated October 9, 2022 and October 10, 2022 having been filed earlier in time.
- 3 The application dated October 9, 2022, is brought by way of motion pursuant to the provisions of section 79 (a), 80 (3) of the [Elections Act](#), section 4 (1) of the [Oaths and Statutory Declarations Act](#), rules 11 (1) & (8), 12 (1), (2), (3), (4), (14) and 15 (1) & (2) of the [Elections \(Parliamentary and County\) Petitions Rules, 2017](#), rule 9 of the [Oaths and Statutory Declarations Act](#) and other enabling provisions. The application seeks the following orders;
1. That, this honourable court be pleased to strike out the response to petition dated October 7, 2022 and the accompanying affidavit filed by the 1<sup>st</sup> and 2<sup>nd</sup> respondents for non-compliance with the [Elections \(Parliamentary and County\) Petition rule](#) 11(1) having been filed out of time without the leave of court.
  2. That, this honourable court be pleased to order that the petition shall proceed undefended by the 3<sup>rd</sup> respondent who has not filed a response to the petition under [Elections\(Parliamentary and County\) Petitions Rules](#) (1) and (8).
  3. That, in the alternative and without prejudice to prayers 1 and 2 above, the honourable court be pleased to strike out from the court record all annexures attached to the affidavit of Abdi Sheikh Mohamed sworn on the October 7, 2022 that are referred to generally as ASM1 at paragraph 22 of the said 2<sup>nd</sup> respondent's affidavit and appearing from page 23 to 34 of the response to petition, save for the for the first annexure, for being incurably defective because the annexures are not securely sealed under the seal of the commissioner for oaths and are not individually marked with serial numbers or identification in compliance with rule 9 of the [Oaths and Statutory declarations Act](#).
  4. That, this honourable court be pleased to strike out and expunge from the record of this court record the affidavit of Abdi Sheikh Mohamed sworn on October 7, 2022 for being incurably and fatally defective.
  5. That, upon grant of prayers (3) and (4) herein above, the 1<sup>st</sup> and 2<sup>nd</sup> respondent's response to the petition be dismissed for want of evidence. In support thereof.
  6. That, the costs of the application be awarded to the petitioner.
- 4 The application is premised on the grounds on the face of the application and the supporting affidavit of Abdullahi Omar Mussa the 1<sup>st</sup> petitioner herein sworn on the October 9, 2022.
- 5 The petitioner second application dated October 10, 2022 is also brought by way of motion and is brought pursuant to the same provisions of law save for the provisions under the [Oaths and Statutory Declarations Act](#) cap 15 Laws of Kenya. The application also seeks that the honourable court does strike



out the response to petition dated September 20, 2022 and the accompanying affidavit filed by the 3<sup>rd</sup> respondent for non-compliance with the [Election \(Parliamentary and County\) Petitions rule](#) 11 (1) having been filed out of time and without leave of court. The application also seeks that the costs be in the petition. The application is also premised on the ground on the face of the application and the affidavit of the 1<sup>st</sup> petitioner herein.

- 6 The applications are opposed *vide* the replying affidavits sworn on October 9, 2022 and October 18, 2022 by Hassan Omar Abdi, the 3<sup>rd</sup> respondent and Abdi Sheikh Mohamed for the 1<sup>st</sup> and 2<sup>nd</sup> respondents respectively.
- 7 The petitioners raises two main grounds in support of both application, to wit; for both applications, the responses against the petition were filed out of time in contravention of rule 11 (1) of the [Election \(Parliamentary and County Election\) Petition Rules](#), and with regards to the application dated October 9, 2022 against the 1<sup>st</sup> and 2<sup>nd</sup> respondent, the affidavit sworn on October 7, 2022 by one Abdi Sheikh Mohamed and commissioned by Kennedy Ondieki is incurably defective for the reason that, save for the first annexure, the rest are not sealed under the seal of the commissioner, and further, they are not individually marked with serial numbers for identification thus contravening the provisions of rule 9 of the [Oath and Statutory Declarations Rules](#).
- 8 In reply, the 1<sup>st</sup> and 2<sup>nd</sup> respondents, aver that, the failure to file their complete pleadings within timelines provided by the [Elections \(Parliamentary and County Election\) Petition Rules](#) was occasioned by the fact that the 1<sup>st</sup> respondent has been receiving numerous election petitions country wide at its headquarters at Anniversary Towers. Somehow, the file for Damajale ward election petition was misplaced at their registry in Anniversary Towers and it took a while before it was recovered by the officials of the 1<sup>st</sup> respondent. Secondly, the 2<sup>nd</sup> respondent avers that he was not personally served despite being a party in this petition thus causing the late delay in filing responses. The 3<sup>rd</sup> respondent on the other hand, avers that he was not served with the petition and only learnt of it *vide* Gazette Notice No 11183 of 2022 dated September 15, 2022 by the Chief Justice appointing this court to hear this case. He further avers that he has never met one Stanley Wachira Mugo, the process server who allegedly served him.

#### **Petitioner's Submissions:**

- 9 In their submissions, the advocates for the petitioners submit that the petition dated September 5, 2022 was filed on the September 6, 2022. It was served upon the 1<sup>st</sup> and 2<sup>nd</sup> respondents on the September 19, 2022 at the 1<sup>st</sup> respondents Headquarters at Anniversary Towers in Nairobi within 15 days of filing the petition in compliance with rule 10 (1) of the [Elections \(Parliamentary and County Election\) Petition Rules, 2017](#). They submit further that there is an affidavit of service on record sworn on October 3, 2022 by one Joyce Musangi. They posit that it was not necessary to serve the 2<sup>nd</sup> respondent because rule 10 (2) allows IEBC only to be served. Their view is that, the response dated October 7, 2022 was filed and served out of time without the leave of court in contravention of rule 11 (1) of the rules. With regards to the 3<sup>rd</sup> respondent, the petitioners submit that he was served with the petition on the September 20, 2022 by one Stanley Wachira Mugo a licensed process server. There is an affidavit of service sworn on September 21, 2022 to that effect. As at the time these applications were filed, the 3<sup>rd</sup> respondent had not filed his responses yet contrary to rules 11 (1) and (8) of the rules. The petitioners submit that they are willing to present the process for cross-examination by the court on the issue of service upon the 3<sup>rd</sup> respondent to dispel any doubts as to service. They cite section 80 (1) of the [Election Act](#) on the powers of the Election Court. They also cite the following authorities in support of their submissions:



- 1 Ltd-v-jacaranda Nur Nassir Abdi v ali Wario & 2 Others (2013) e KLR.
  2. [Simon Nyaundi Ogari v Hon Joel Omagwa Onyancha & 2 others](#), Kisii Election Petition No 2 of 2008.
  3. Wildlife Lodges Hotel Ltd, Civil Appeal No 249 of 1999.
- 10 The petitioners posit that the 3<sup>rd</sup> respondent cannot be allowed to defend a petition for which no response and affidavits have been filed as they are locked out by operation of law. They submit further that the 2<sup>nd</sup> respondent does not work at the headquarters of the 1<sup>st</sup> respondent, and therefore cannot depose anything with regards to the misplacement of the petition for Damajale ward. In their view, that would be hearsay. With regards to the 3<sup>rd</sup> respondent, the petitioners submit that he was served with the petition on September 20, 2022 in the afternoon in compliance with rule 10 (1) of the rules. However, the 3<sup>rd</sup> respondent declined to receive the documents and directed the process server to serve his advocates on record. He posits further that the 3<sup>rd</sup> respondent has not disclosed to court where he got the petition that he relied upon to prepare the response dated September 20, 2022 as he had not been served yet. Their view is that this was an attempt to obscure the facts and mislead the court to allow a response that was filed hopelessly out of time.

### **1<sup>st</sup> and 2<sup>nd</sup> Respondent's Submissions**

- 11 In reply, the 1<sup>st</sup> and 2<sup>nd</sup> respondents submit that, it is trite principle that striking out of pleadings is a draconian measure which should be exercised sparingly by court. They cite the following authorities in support thereof:-
- 1 [Kakuta Hamisi v Peris Tobiko & 2 others](#) [2013] E Klr.
  - 2 [Nicholas Kiptoo Arap Korir Salat v IEBC & 6 others](#) [2013] E Klr.
  3. [Mary Emaase Otucho v Geoffrey Omuse & another](#) [2017] E Klr.
- 12 The respondents posit that the affidavit of service sworn on October 3, 2022 by Joyce Musangi Munyao, an Advocate of the High Court confirms that position. They submit that this caused the delay in filing the responses to the petition. They also argue that the delay was also occasioned by the fact that the 2<sup>nd</sup> respondent was not served in person. They submit further that, in granting an order for striking out a response to an election petition and its supporting affidavit, the court must balance the prejudice and injustice the applicant will suffer on the one side and the respondent on the other side. In support of this contention, the 1<sup>st</sup> and 2<sup>nd</sup> respondents rely on the decision in [Zebedeo John Opore v IEBC and 2 others](#) [2017] e KLR. They posit that the petitioner will suffer no prejudice and injustice in the event that the 1<sup>st</sup> and 2<sup>nd</sup> respondents response and its supporting affidavit are admitted and deemed to be properly filed. On the other hand, if the 1<sup>st</sup> and 2<sup>nd</sup> respondent's response and supporting affidavit are struck out they would become lame duck and would have absolutely no factual material that they would rely upon to answer the petition. They submit further that the election court can extend time under the [Election \(Parliamentary and County\) Petition Rules, 2017](#). As to whether the annexures of the supporting affidavit of Abdi Sheikh Mohamed sworn on October 7, 2022 are incurably defective for contravening rule 9 of the [Oath and Statutory Declarations Rules](#), the 1<sup>st</sup> and 2<sup>nd</sup> respondent submit that the same have been marked as ASM-3 in paragraph 22 of the said affidavit as a bundle. The first page of the bundle has been securely sealed with the seal of the commissioner. therefore, it is their submission that the annexures comply with the requirements of the [Oaths and Statutory Declarations Act](#) and Rules.



### 3<sup>rd</sup> Respondent's Submissions:

- 13 The 3<sup>rd</sup> respondent on the other hand submits that he only learnt of the petition *vide* Gazette Notice No 11183 of 2021 dated September 15, 2022 by the Hon Chief Justice appointing various judges to hear and determine petitions country wide including this petition. After learning of the appointment of this court to hear this petition, out of caution, the 3<sup>rd</sup> respondent instructed counsel to follow and mount a defense. The 3<sup>rd</sup> respondent submit that the process server Stanley Wachira Mugo is a stranger to him and the contents of the affidavit referred to in the application are premised on falsehood intended to frustrate the 3<sup>rd</sup> respondent's right to be heard. The 3<sup>rd</sup> respondent submits further that rule 10 (1) of rules sets out the procedure to be followed in serving an election petition to a respondent. He posits that failure to serve him denied him the right to do a prompt response to the petition thereby contravening the rules of natural justice. He submits further that if the application is allowed he shall suffer great prejudice. In support of his submission, the 3<sup>rd</sup> respondent cites the following authorities:-
1. [\*K.T.K Advocates v Baringo County Government\*](#) [2018] e KLR.
  2. [\*Kagunyi v Gatbua & another \(No 3\)\*](#) (2008) 3 e KLR.
  3. *Osogo v Shikanga & 2 others*.
  4. [\*Suya v Musaba\*](#) [2008] e KLR.
- 14 He submits that section 80 (1) of the [\*Election Act\*](#) empowers the court to exercise its discretion in all matters without undue regard to procedural technicalities.
- 15 Turning to the two applications filed by the respondents, *vide* their application dated October 18, 2022 and brought pursuant to the provision rules 19 (1) and 5 (1) of the [\*Election \(Parliamentary and County Election\) Petition Rules\*](#) and article 159 (2) (d) of the [\*Constitution\*](#) of Kenya, the 1<sup>st</sup> and 2<sup>nd</sup> respondents sought the following orders;
1. That this application be certified as urgent and service be dispensed with in the first instance.
  2. That the 1<sup>st</sup> and 2<sup>nd</sup> respondents be granted leave to file the response dated October 7, 2022 and its supporting affidavit out of time.
  3. That the response dated October 7, 2022 and its supporting affidavit as filed in the e-filing platform be deemed as duly filed.
  4. That the 1<sup>st</sup> and 2<sup>nd</sup> respondents be granted leave to file witness affidavits of Yussuf Aden Ali, Abdirahman Hire, Abdullahi Kheir Yussuf, Abdifatah Yarow and Ibrahim Farah Hassan out of time.
  5. That the witness affidavits of Yussuf Aden Ali, Abdirahman Hire, Abdullahi Kheir Yussuf, Abdifatah Yarow and Ibrahim Farah Hassan as filed in the e-filing platform be deemed as duly filed.
- 16 The application is supported by the grounds on the face of the application and the supporting affidavit sworn on the October 18, 2022 by Abdi Sheikh Mohamed.
- 17 On the other hand, *vide* the application dated October 17, 2022 and pursuant to the provisions of section 80 of the [\*Elections Act\*](#), rules 4, 17 (1) (d) and 20 of the [\*Election \(Parliamentary and County Election\) Petition Rules, 2017\*](#), order 51 rule 1 of the [\*Civil Procedure Rules\*](#) and sections 1A and 3A of the [\*Civil Procedure Act\*](#), the 3<sup>rd</sup> respondent sought the following orders;



1. That the 3<sup>rd</sup> respondent be allowed to file his response to petition and affidavits annexed thereto out of time
  2. That upon enlargement of time, the response and the affidavit both dated September 20, 2022 be deemed as properly filed and served;
  3. That the 3<sup>rd</sup> respondent herein be awarded costs of the application; and
  4. That the court grants any other just and equitable reliefs that the honourable court deems fit and in the interest of justice.
- 18 This application is also premised on the ground on the face of the application and supporting affidavit of Hassan Omar Abdi on the October 17, 2022.
- 19 The applications are opposed *vide* the replying affidavit sworn by Abdullahi Omar Mussa on the October 21, 2022.
- 20 The 1<sup>st</sup> and 2<sup>nd</sup> respondent raise four main grounds in support of their application, to wit; that the petition for Damajale ward was misplaced in the 2<sup>nd</sup> respondent's registry due to the numerous petition received country wide by them. Therefore, it took time to trace the same; secondly, despite the 2<sup>nd</sup> respondent being a party to the petition, he was not served with the petition, thirdly, the 1<sup>st</sup> respondent employed the presiding officers on a temporary basis and their engagement ended upon submission of the election material and result at the constituency tallying center, therefore, tracing them to file sign affidavits was a challenge; and lastly, the application has been brought without undue delay and no prejudice will be suffered by any of the parties if the orders sought are granted.
- 21 On the other hand, the 3<sup>rd</sup> respondent main ground in support of his application is that he was never served with the petition. He only learnt of this petition *vide* Gazette Notice No 11183 of 2022 dated September 15, 2022 by the Chief Justice appointing various judges to hear and determine election petitions country wide.
- 22 In reply, the petitioner seeks to rely on the supporting affidavit annexed to his application dated October 9, 2022 and sworn on the same date by Abdullahi Omar Mussa. He deposes that the 1<sup>st</sup> and 2<sup>nd</sup> respondents bid to add additional affidavits sworn by Ibrahim Farah Hassan, Abdifatah Yarrow, Yussuf Aden Ali, Abdullahi Kheir Yussuf and Abdirahman Hire sworn on October 17, 2022 is against rules 12 (6) and (7) of the [Elections \(Parliamentary and County Election\) Petition Rules](#). He avers that there is no justifiable reason why the 1<sup>st</sup> and 2<sup>nd</sup> respondents who filed their responses 12 days out of time did not file the said affidavits at the time of filing the response to petition. He deposes further that the said affidavits were curiously sworn on October 17, 2022 yet the presiding officers do not live together. Therefore, the argument that the presiding officers could not be traced does not hold any water.
- 23 In their submissions in support of the application dated October 18, 2022, the 1<sup>st</sup> and 2<sup>nd</sup> respondents submit that extension of time in election petition is governed by rule 19 of the [Election \(Parliamentary and County Elections\) Petition Rules, 2017](#). They further submit that section 80 (1) (d) of the [Election Act, 2011](#) vests an Election Court with powers to decide all matters that comes before it without undue regard to technicalities. They posit that, whereas the Election Court does not have jurisdiction to extend Election Dispute Resolution timelines set out in the [Constitution](#) and the [Election Act, 2011](#), it can extend time or reduce timelines under the Rules. They rely on the decision of [Rishad Hamid Ahmed v IEBC & 2 Others](#) [2017] eKLR. They submit that the grounds for the enlargement of time are reasonable and that the contents of the witness affidavits do not materially depart from the grounds pleaded by the 1<sup>st</sup> and 2<sup>nd</sup> respondents joint response hence no prejudice will be suffered by any of the parties in the event leave is granted to the 1<sup>st</sup> and 2<sup>nd</sup> respondents.



- 24 In support of his application dated October 17, 2022, the 3<sup>rd</sup> respondent submits that if his application to enlarge time is not allowed he stands to suffer great injustice as the petitioner has infringed on his rights under the principals of natural justice, the Constitution of Kenya and other written laws and regulation. He posits that failure to put in a response to petition was occasioned by delay of service of the petition by the petitioners upon him. he submits further that the procedure of serving a petition is laid down under rule 10 (1) of the Election (Parliamentary and County Election) Petition Rules, 2017. He submits that the use of the word “shall” in rule 10 (1) of the rules imputes a mandatory procedure that a petitioner has to consider for proper and valid service of a petition. He cites Mativo J decision in K.T.K Advocates v Baringo County Government [2018] e KLR he also cites the following authorities:
1. Suva v Musaba [2008] eKLR.  
He posits that section 80 (1) of the Election Act, 2012 empowers the court to exercise its discretion in all matters without undue regard to procedural technicalities. To that effect, he cites the following authorities:
  2. Hassan Nyanje Charo v Khatib Mwasbetani & 3 others, Supreme Court civil application No 15 of 2014.
  3. Dickson Karaba & Hon John Ngata Kariuki, civil appeal No 125 of 2008.
  4. Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 others [2013] e KLR.
- 25 He also cites the decision of the Supreme Court in Nicholas Kiptoo Arap Salat v IEBC & 7 others, civil application No 16 of 2014 wherein the Supreme Court laid down the guiding principles for determining applications for extension of time. He finally submits that this petition is of public interest and it is only fair that he be allowed to file the response to petition out of time owing to the fact that he is the duly elected member of the County Assembly, Damajale Ward.
- 26 In reply, the petitioners, submit that, all the respondents filed their application for enlargement of time after the petitioner had filed his applications to strike out the responses to the petition. They submit further that rule 19 of the rules allows the Election Court to extend time. However, this right is not automatic. The power to extend time is not only discretionary but it has to be exercised judiciously. There has to be a reasonable justification for extension of time otherwise the petitioner shall be prejudiced. They posit that the respondents have not tendered any reason why the applications were not filed before October 3, 2022. They submit that an Election Court is a special court that is guided by its own rules and election petitions are causes sui generis that are governed by special set of legal regimes with timelines which do not allow non-compliance to be remedied by article 159 of the Constitution. In support of this contention, the petitioners cite the Supreme Court decision in Moses Masika Wetangula v Musikari Nazi Kombo & 2 others [2015] eKLR, the Supreme Court of India decision in JYoti Basu & others v debi Ghosal & Others [1982] SCR (3) 318, Murathe v Macharia 2 Klr And Muiya v Nyaga & 2 others [2008] 2 KLR (EP) 493. They submit further that, the violation of the mandatory provisions of rule 11 (1) of the rules cannot be cured by art 159 of the Constitution. In support of this supposition the cite the decisions in James Mangeli Musoo v Eztec Limited [2014] EKLr, Lee Njiru v lokorio & another [2018] EKLr, Raila Odinga & 5others v IEBC & 3 others, Supreme Court Petition No 5 of 2013 and Moses Mwicigi & 14 others v IEBC & 5 others. The petitioners further submit that, the delay by the respondents in filing their pleadings has greatly undermined the courts authority to determine the dispute timeously as is required by the overriding principles that govern this Election Court. The petitioners reiterate that the affidavit of Abdi Sheikh Mohamed sworn on the October 7, 2022 is incurably defective. They argue that, since the annexures are unmarked and unsealed they contravene the provisions of rule 9 of the Oath and Statutory Declaration Act, Cap 15



Laws of Kenya. In support of this supposition, they cite the decision in *Pharmacy And Poison Board & Another V mwiti & 21 Others, Kenya National Union Of Nurses v kiambu County Services & 5 Others* [2019] e KLR, *Giovanni Gaida & 19 Others v gian Carlo Ferrari* [2014] e KLR, *Anne Njeri Mbugua v anjelo Bertolacci & another* [2005] e KLR, *Kitundu v shiekh* [2022] e KLR. *Abraham Mwangi v S.O Omboo & others*, HCCC No 1511 of 2002. They ask the court to strike out the entire affidavit. With regards to prayer 5 of the 1<sup>st</sup> and 2<sup>nd</sup> respondents application dated October 18, 2022 seeking to introduce new affidavits, the petitioner submits that there is n justifiable reason why the affidavits were not file d alongside the response to petition. The posit that the filing of the affidavits is an afterthought. They argue that the delay could not have been occasioned by the failure to trace the Presiding Officers, because, in any event the 2<sup>nd</sup> respondent has not an affidavit on the difficulties of tracing them and how he eventually found them on the October 17, 2022 to swear the affidavits. They submit that the additional evidence the 1<sup>st</sup> and 2<sup>nd</sup> respondents wish to introduce is not significance and constitutes mere denials and not congent evidence that could aid their case. In support of this argument, the petitioners cite *Robert Nelson Ngethe v Mbogori Njeru & another* [2006] e KLR.

### **Determination:**

28 I have gone through all the four applications and the supporting affidavits annexed thereto. I have also carefully considered the rival submissions of the parties hereto and the numerous authorities cited therein. Having done so, what emerges as issues for determination on all the four application are the following;

1. Whether the respondent's responses to the petition and the supporting affidavits thereto should be struck out.
2. Whether the time for filing the responses to petition and additional affidavits should be enlarged.

### **Whether the Respondent's responses and the supporting affidavits thereto be struck out:**

29 In both the applications dated October 9, 2022 and October 10, 2022, The petitioner prays that the respective responses and supporting affidavits dated October 7, 2022 and September 20, 2022 respectively be struck out. As stated earlier in this ruling, the petitioner raises two main grounds in support of the two applications, to wit, firstly, for both applications, the responses were filed out of time in contravention of rule 11 (1) of the *Election (Parliamentary and County Election) Petition Rules* and secondly, for the application dated October 9, 2022 against the 1<sup>st</sup> and 2<sup>nd</sup> respondents, the affidavit of sworn by Abdi Sheikh Mohamed on the October 7, 2022 is incurable defective as, save for the first annexure, all the rest are not individually marked with serial numbers and properly sealed with the Commissioner for Oaths seal as stipulated by the *Oath and Statutory Declaration Rules*. In their submissions, the petitioners are of the view that these infractions cannot be cured by either article 159 (2) (d) of the *Constitution* or section 80 (1) (d) of the *Election Act*. In reply, the 1<sup>st</sup> and 2<sup>nd</sup> respondent aver that the delay was caused by the fact that the petition for Damajale ward was misplaced in the 1<sup>st</sup> respondent's registry and it took time to find it, secondly, the aver that the 2<sup>nd</sup> respondent was not personally served with the petition. Whereas, the 3<sup>rd</sup> respondent deposes that he was not served with the petition. It their submission that striking out of pleading is draconian and should be used as a last resort. They submit that, for the court to strike out their responses, it must balance the prejudice and



injustice the petitioner will suffer on the one hand and the respondents on the other hand. Rule 11 (1) of the [Election \(Parliamentary and County Election\) Petition Rules, 2017](#), provides as follows:

11 (1) Upon being served with a petition in accordance with rule 10, a respondent may oppose the petition by filing a response to petition within seven days.

- 30 From the application and the supporting affidavit annexed thereto, the 1<sup>st</sup> respondent was served with the petition on the September 19, 2022. The 2<sup>nd</sup> respondent deposes that he was not personally served. The 3<sup>rd</sup> respondent disputes being served with the petition at all though the petitioner alleges to have served him on the September 20, 2022. In both cases, there are affidavits of service on record. Clearly, from the dates provided, the responses were filed out of time, the reasons for the delay notwithstanding. However, if rule 11 (1) above is closely read, it is clear that it is not couched in mandatory terms. The word used in the rule is “may” and not “shall”. Therefore, the question the court needs to address is whether the failure to file the responses within time is curable. It is worth noting that this issue is to be decided purely at the discretion of the court as donated by rules 5 (1) and 19 (1) of the rules.

Rule 5 (1) provides as follows;

5 (1) The effect of any failure to comply with these rules shall be determined at the courts discretion in accordance with the provisions of article 159 (2) of the [Constitution](#).

Whereas rule 19 (1) stipulates;

19(1) Where an act or omission is to be done within such time as may be prescribed in these rules or ordered by the election court, the election court may for the purpose of ensuring that injustice is not done to any party extend or limit the within which the act or omission shall be done with such conditions as may be even necessary even when the period prescribed or ordered by the court has expired.

- 31 Clearly, the discretion donated by this rule is for the sole purpose of preventing injustice to any of the parties of a petition. The principles governing the exercise of judicial discretion are expressed by the Court of Appeal in [Alex Wainaina T/a John Commercial Agencies v Johnson Mwangi Wanjibia](#) [2015] eKLR. Quoting Ringera J as he then was, they rendered themselves thus;

“The principles governing the exercise of judicial discretion were set out by Ringera J (as he then was) in the case of [Gathiaka v Muiruri](#) [2000] eKLR This are that such discretion should be exercised on sound reason rather than whim, caprice or sympathy and with the sole aim of fulfilling the primary concern of the court, that is to do justice to the parties before it”.

- 32 To be able to determine this issue, I will be guided by the following provisions of law:

Article 159 (2) (d) of the [Constitution](#) of Kenya stipulates;

1. In exercising judicial authority, the courts shall be guided by the following principles-
  - (d) Justice shall be administered without undue regard to procedural technicalities.

- 33 Whereas, section 80 1 (d) of the [Election Act](#) provides;

1. An election court may, in the exercise of this jurisdiction-



(d) decide all matters before it without undue regard to technicalities.

34 To be able to understand the above provisions of law, it is important that the phrase “procedural technicalities” be understood. Ngugi J (As he then was), defines “procedural technicalities” in *Anchor Ltd v Sport Kenya* [2017] eKLR as follows;

“Combining the meaning of these words “procedural technicalities” may be described as those that are more concern with modes of proceedings rather than substantive rights under the law. This may not be an all encompassing definition, but I think people generally associate procedural technicalities with annoying strictures and rules that hinder the achievement of substantial justice”.

35 In my view, this is the closest we come to the definition of “procedural technicalities”.

36 In arriving at my decision I am also guided by the principles laid down by Njagi J in *Alexander Khamasi Mulimo v IEBC & 2 others* [2018]. He pronounced himself thus;

“I think the two Court of Appeal decisions in Nicholas Salat case and Martha Karua case have in my view stated the correct law as regards procedural law visa vis substantive justice. The principles which emerge from written law and case law are that:

1. It is utmost important in election petitions to comply with election rules.
2. The provision of the *Constitution* and the election Act override those of election rules.
3. Where there is non-conformity with election rules, an election court has discretion to excuse the infraction.
4. The court could only dismiss a case for non-conformity with election the rules when the infraction complained of has caused prejudice to the other party.
5. In that case, it must be demonstrated that the infraction goes to the root of the dispute that is before the court.
6. The court can dismiss the case for non-conformity with election with the election rules in a proper case.
7. The court should place substantive justice over procedural consideration especially where the infraction is curable.
8. Striking out of pleadings is a draconian measure that should be employed sparingly and as a last resort”.

37 Applying the laws and principles enunciated above, my view is that the petitioners have not substantially demonstrated how the delay in filing responses to the petition has prejudiced or occasioned injustice to them. In my opinion, the respondents are bound to suffer more prejudice and injustice if their responses are struck out, their delay in filing responses notwithstanding. I say this for the reason that, with regards to the 1<sup>st</sup> and 2<sup>nd</sup> respondent, the 1<sup>st</sup> respondent is the only body mandated to conduct election in this country. Therefore, whichever way this case goes, the orders thereof can only be enforced by the 1<sup>st</sup> respondent and by extension the 2<sup>nd</sup> respondent who happens to be their employee. My view is that locking them out will prejudice them and occasion great injustice to them.



With regards to the 3<sup>rd</sup> respondent, suppose, just suppose, at the end of this proceedings, it turns out that the 3<sup>rd</sup> respondent legally won the election yet the court locked him out, would that not be great injustice not only to him but also to the voters of Damajale ward who voted for him? Besides, my finding is that the delay in filing responses does not go to the substance or the root of the petition.

38 Turning to the second ground raised for striking out of the response of the 1<sup>st</sup> and 2<sup>nd</sup> respondent's response to petition and the affidavit thereto, to wit, whether the affidavit sworn by Abdi Sheikh Mohamed is fatally defective for not complying with rule 9 of the *Oath and Statutory Declarations Rules*. Rule 9 of the *Oath and Statutory Declaration Rules* provide as follows:-

9. All exhibits to the affidavit shall be securely sealed thereto under the seal of the commissioner, and shall be marked with serial letters of identification.

Rule 9 of the *Oath and Statutory Declarations Rules* appears to be couched in mandatory terms, however, rule 12 of the *Election (Parliamentary and County) Petition Rules* provides;-

12(14) The *Oaths and Statutory Declaration Act* (cap 15) and order 19 of the *Civil Procedure Rules 2010* shall apply to affidavits under these rules.

39 Whereas order 19 rule 7 of the *Civil Procedure Rules* provides:-

(7) The court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof or any technicality.

40 I have no doubt that rule 12 of the rules was deliberately included in the rules to cure defects in form in affidavits sworn in election petitions. Therefore, to avoid occasioning injustice to any party by striking out their affidavit because of a defect in form, rule 12 of the rule, the *Oath and Statutory Declaration Act* and order 19 of the *Civil Procedure Rules* should be read together. In my view, in this case, the defect in the affidavit of Abdi Sheikh Mohamed is purely technical. Therefore, I cannot strike out the said affidavit for that reason only. I also wish to associate myself with the authority cited by the 1<sup>st</sup> and 2<sup>nd</sup> respondents which, in my view is *pari materia* to this case, to wit *Litein Tea Factory Company Ltd & another v Davis Kiplangat Mutai & 5 others*

41 In conclusion, with regards to the petitioners applications dated October 9, 2022 and October 10, 2022, and for the reasons stated above, I am not convinced that there are satisfactory reasons to strike out the respondent's responses to petitions and the affidavits thereto. My view is that these infractions are curable and therefore I dismiss both applications with no orders as to costs.

#### **Whether the time for filing responses to the petition and additional affidavits should be enlarged:-**

42 With regards to the second issue above, it is rather obvious that having dismissed the two applications by the petitioner seeking to strike out the respondent's responses, the respondents should be granted leave to file their responses out of time. Indeed, for pretty much the same reasons I disallowed the petitioners applications dated October 9, 2022 and October 10, 2022, I will allow the respondent's applications October 17, 2022 and October 18, 2022. I hasten to add that with regards to the additional witness affidavits sworn by Yussuf Aden Ali, Abdirahman Hire, Abdullahi Kheir Yussuf, Abdifatah Yarrow and Ibrahim Farah Hassan, as far as this court is concern, the 1<sup>st</sup> and 2<sup>nd</sup> respondent's responses were not properly on record. Therefore, in my opinion, that is the equivalent of having filed no responses at all. Now that the application for leave to file responses has been allowed, the additional affidavits will also be allowed alongside the responses. In conclusion I make the following orders:-



1. The petitioner's applications dated October 9, 2022 and October 10, 2022 are hereby dismissed.
2. The respondent's applications dated October 17, 2022 and October 18, 2022 are hereby allowed.
3. The respondents are hereby granted leave to file their responses to petition together with the accompanying affidavits out of time.
4. The 1<sup>st</sup> and 2<sup>nd</sup> respondents are granted leave to file the witness affidavits sworn by Yussuf Aden Ali, Abdirahman Hire, Abdullahi Kheir Yussuf, Abdifatah Yarrow and Ibrahim Farah Hassan.
5. The responses to petition, supporting affidavits and witness affidavits mentioned above and filed on the e-filing platform are hereby deemed to be duly filed.
6. All parties to bear their own costs.

**DATED, SIGNED and DELIVERED this 29<sup>th</sup> day of DECEMBER 2022**

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**J. J. MASIGA**

**PRINCIPAL MAGISTRATE**

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