



**REPUBLIC OF KENYA**

**IN THE CHIEF MAGISTRATES COURT AT KILIFI**

**ELECTION PETITION NO. 5 OF 2017**

**IN THE MATTER OF: THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: THE ELECTION (PARLIAMENTARY AND COUNTY ELECTIONS)  
PETITION RULES 2017**

**BETWEEN**

**ABEL KIPKILEI KIPTOO.....PETITIONER**

**VERSUS**

**1. THE INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION (I.E.B.C)**

**2. NEEMA KARISA - RETURNING OFFICER,**

**KILIFI SOUTH CONSTITUENCY**

**3. VICTOR GOGO MWAGANDA .....RESPONDENTS**

**RULING:-**

1. Before me is the 1<sup>st</sup> and 2<sup>nd</sup> Respondent application dated 27<sup>th</sup> October 2017 brought under Article 82(2) of the constitution of Kenya 2010, section 2 of the election Act, regulations 83 and 87 of the election general regulations and rules 8 and 12 of the election petition Rules 2017 seeking for orders that the petition dated 6<sup>th</sup> September 2017 and filed in court on 7<sup>th</sup> September 2017 be struck out and/or alternatively, without prejudice to the foregoing be dismissed.

2. The applicants equally sought for the costs of the application and petition to award.

3. In support of the application, the 1<sup>st</sup> and 2<sup>nd</sup> respondent enumerated a list of grounds which, in a nutshell summarizes as follows:-

**(i) The petition contravened the provisions of Article 87(2) of the constitution for failure to state the date of declaration of results.**

**(ii) The petition contravened Rule 8 & 12(2) (c) and (d) of the Election (Parliamentary and**

**County Elections) Petition Rules by the failure to declare the results.**

**(iii) In the absence of the date of declaration of the election results computation of time envisaged in article 87(2) of the constitution can not be realized or determined.**

**(iv) The petition is premised upon the Rules applicable for Presidential Election Petition in the Supreme Court and failure to observe the Elections (parliamentary and County Elections) Petition Rules.**

4. In response to the application, the petitioner filed a replying affidavit, which in a dint, faulted the application as merely being based on technicalities and not substance.

5. The respondent argued that **section 80(1)(d) of the Election Act 2011 and the constitution under article 159(2)(d)** provides that, the court may in the exercise of its jurisdiction decide all matters that come before it without undue regard to technicalities

6. That the application offends the provisions of **Rule 15(2) of the elections (parliamentary and county elections) petitions rule 2017**, (henceforth called rules), thus prays that the same be dismissed with costs.

7. The petitioner further argued that in the event the court disallows the application, the applicant/respondents shall suffer no prejudice as they will be accorded time to cross examine on the same and present evidence in opposition of the petition.

8. In closing, both sides filed their written arguments supported by authorities and there annextures. The applicant's submissions were dated **3<sup>rd</sup> November 2017** and filed the same day whereas the Petitioner/Respondent's are dated **2<sup>nd</sup> November 2017 but filed on 3<sup>rd</sup> November 2017**.

9. I have at great lengths, gone through the legal arguments advanced and in purview of the law cited and argued, I summarizes each parties submissions as follows;-

**SUBMISSIONS OFFERED BY THE APPLICANTS (1<sup>ST</sup> AND 2<sup>ND</sup> RESPONDENTS)**

10. The thrust of the applicant's submission was that the petition should be struck out on grounds that it does not meet the mandatory requirements as envisaged under **Rule 8 and 12 of the election petition rule 2017**.

11. The applicant further argued that the rules are so mandatory that there is no room for discretion and choice on whether to comply or not.

**12. Rule 8(1) (c)** in particular was argued to captioned the mandatory requirement for a petitioner *to declare the contested outcome* which the applicant argues, was not done in the petition of **7<sup>th</sup> September 2017**.

13. To buttress these arguments, the court was invited to look into the court of appeal decision of **JOHN MUTUTHO =VS= JAYNE KIHARA 2008 EKLR** where a similar issue was exhaustively interrogated.

14. Counsel for the applicant argued that this decision has been applied in several other high court election cases, with instances given as the election petition of **AMINA HASSAN AHMED =VS= IEBC & 2 OTHERS – 2013 Eklr** *where the court found the petition to be fatally defective for want of form and content due to failure by the petitioner to state the election results and the date and manner of declaration of the said results.*

A similar finding was equally reached in the court of appeal decision of **ROZAH AKINYI BUYU =VS= IEBC & 2 OTHERS (2014) eklr** *where the court cited with approval, the case of AMINA HASSAN and lastly, the High court decision of EVANS NYAMBASO =VS= IEBC & 2 OTHERS, 2013 eklr where*

*the court under paragraph 92 of its findings, observed that the information left out which had been addressed under paragraph 90 and entailed the particularization of the results was so vital that the petition as it stood could not be rescued by the provisions of Article 159(2)(d); to name just but a few.*

15. In conclusion, counsel for the applicant argued that, in recent times, the high court has dismissed several petitions that had been filed without due compliance of **rules 8 and 12 of the Election Petition Rules 2017**.

An example was given of *PETITION NO. 9 OF 2017 – JIMMY MKALA KAZUNGU =VS= IEBC AND 2 OTHERS*, where *Hon Justice M. Thande struck out a petition for not complying with the provisions of Rule 8(1) of the Election Petition Rules 2017, terming it incurably defective.*

16. In respect to **Article 159 (2) (d) of the constitution**, which the respondent/petitioner substantively predicated his response on, counsel sought to rely on the supreme court finding in *RAILA (2013)* a decision where the supreme court found that, the provision was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from courts of law.

### **SUBMISSIONS BY THE PETITIONER /RESPONDENT**

17. The petitioner/respondent on the flipside, through counsel attacked the application on premise that, it was brought in bad faith, aimed at scuttling the hearing, which had been confirmed for **30/10/2017, 31/10/2017 and 1/11/2017**.

18. Counsel further argued that the application lacked substance and that section **80 (1) (d) of the Election Act 2011** and **Article 159(2)(d) and (e)** of the constitution dictates that, in exercising their authority, courts should not dwell on technicalities but on substantive justice.

19. According to counsel, this application should not be entertained as it was only filed to scuttle the hearing that had already been confirmed.

20. Citing **Rule 15(2) of the Election Rules 2017**, counsel submitted that an election court should not allow any interlocutory application to be made on conclusion of pretrial conferencing if the application, could by its nature have been filed before commencement of the hearing.

21. Lastly, counsel submitted that since the respondents would be accorded an opportunity to cross examine the petitioner and interrogate the petition on the issues raised in the application and also present their own evidence and submissions in opposition to the same, the court should disallow the application as no prejudice shall be occasioned if so is done.

### **ISSUES, ANALYSIS AND DETERMINATION**

22. Having read the application, the responses thereto and the submissions and list of authorities cited, the following issues present themselves as asking the court for resolution and determination:-

*(i) Did the petitioner comply with the dictates of Rule 8 and 12 of the Elections (Parliamentary and County Elections) Petition Rules?*

*(ii) What is the effect and ramification of failure to comply with the said Rules.*

*(iii) What is the fate of the petition upon determination of the two foregoing questions?*

*(iv) What orders need to be made on costs.*

23. Before I venture into considering the merits and demerits of the application if any, it is necessary to consider the substantive prayer in the application. The prayer in verbatim, is worded as follows:-

*The petition of Abel Kipkulei Kiptoo dated 6<sup>th</sup> September 2017 and filed on the 7<sup>th</sup> September 2017 be struck out and alternatively and without prejudice to the foregoing, be dismissed.*

24. In the **HIGH COURT ELECTION PETITION CASE NO.10 OF 2017, MBARAKA ISSA KOMBO =VS = I. E.B. C & 3 OTHERS**, the learned judge observed that;-

*“Clearly in law, prior to hearing a matter on merits, the court has no mandate to dismiss a matter. Where the pleading is alleged to be defective and therefore deserving no employment of judicial time by production of evidence, and if the court finds that there is indeed defect that renders the pleading unremitting of a hearing, so as to be terminated before the merits are scrutinized and delved into, the court only strikes out. The two terms, ‘dismissal and striking out’ must therefore be differentiated for their true meaning and import and cannot be used interchangeably nor confused with each other.*

25. Further, the learned judge observed, that;-

*“I hold the view that striking out is a summary procedure that investigates no merit of the dispute but looks at the propriety of the matter as presented and how it sits with the law. Therefore, a suit would be struck out on account of facts including; lack of jurisdiction, failure to meet the thresholds of statutory requirement like not revealing a genuine and justiciable cause or for being an abuse of the court process like where it is res judicata or merely calculated to achieve a vexation of the defendant. To the contrary, dismissal of a cause would follow scrutiny of the merits of the dispute as articulated and after consideration of the facts and evidence grounding the cause.”*

26. In the case at hand, the respondents faults the petition for non-disclosure of results which is contrary to the special elections rules crafted for one and sole purpose of providing uniformity of form and content and provide a clear and uniform pathway to follow in filing and presentation of election disputes.

27. This as clearly as it seems, expressly connotes that the application as brought, contests not the merits but form, content and compliance of structured mandatory rules expected of all petitions. Hence, it obviously follows that this court shall limit itself on the contractions of striking out, if merited and not, dismissing the petition.

28. The thorny question therefore would be, ***did the petitioner offends the mandatory provisions of rules 8 and 12 of the Election Petition rules 2017 and if so, what would be the implication for non-compliance?.***

29. The two rules, just to point out, are word for word for each other. The only difference being that ***Rule 8 is on the content of a petition whereas, rule 12 is on the content of the affidavit in support of the petition.***

30. The two provisions expressly command that the petition and the affidavit “**SHALL STATE**”

a). **The date when the election in dispute was conducted**

b) **The results of the election, if any, however declared**

c). **The date of the declaration of the results of the election.**

31. The applicant had argued that particularization of the results, from the date of election, the date of declaration and the result itself were central to the contents of any petition and as such, should specifically have been stated in the petition. The respondent on the reverse, argued that, that was a mere technicality that can be surmounted by the provisions of **Section 83 of the Election Act and Article 159(2) (d) of the constitution.**

32. From the petition, beginning **paragraph 1 to 13**, which stipulates the reliefs sought, nowhere has the petitioner disclosed the result as required by **Rule 8 (1) (b) (c) and (d) of the Election Petition Rules 2017**. Similarly, from **paragraph 1 to 15 of the affidavit in support**, nowhere has the petitioner particularized the results as required under **rule 12 of the same**.

33. Other than paragraph four of the petition where the petitioner/respondent, in describing the **3<sup>rd</sup> respondent**, intimated that he was the declared winner in the elections held on **8<sup>th</sup> August 2017**, the result of that general election was never disclosed both on the petition and the affidavit in support.

34. **Section 2 of the Elections Act** states that;-

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

***Rule 8(1) (c) requires this result to be set out in specific terms in any petition***

35. On the petition’s supporting affidavit, even the date of the declaration and election were not cited leave alone, particularizing the result as required under **rule 12**.

36. In the trend setting case of **ALI HASSAN JOHO =VS= SULEIMAN SHABAL & 2 OTHERS (2014) eKLR**, the Supreme Court held that where a petition is challenging the result of an election, the quantitative breakdown of the votes cast is a key component in the case so that at a glance one sees who the winner and losers were and by what number of votes.

37. Further, in the **Court of Appeal** case of **JOHN MUTUTHO =VS= JAYNE KIHARA (2008) 1 KLR**, the appellate court reversed the decision of the High Court and struck out a petition, which did not disclose the results even though the failure to declare results was occasioned by the post-election chaos of 2007 – 2008, and which admittedly, were beyond control of parties.

38. Two other high court cases extensively submitted by the applicant, includes one of **AMINA HASSAN AHMED =VS= RETURNING OFFICER, MANDERA COUNTY & 2 OTHERS (2013) EKLR** as well as **EVANS NYAMBOSO ZEDEKIEAH & ANOTHER –VS- IEBC & 2 OTHERS (2013) EKLR**, where the court, in both instances held the proposition that, failure to give the particulars of results are not mere technicalities but a defect, fatal to the petition.

39. This said, and particularly noting the most recent high court ruling by **Justice Patrick J. Otieno**, **[MALINDI - ELECTION PETITION CASE NO. 10 OF 2017]**, (*supra*) where, citing the court of appeal decision in the **JOHN MUTUTHO =VS= JAYNE KIHARA CASE**, **which in part read;-**

***“What would happen where, as here, the results as envisaged by regulation 40 above are not included in the petition. In our view, an essential element would be missing. The petition shall be incomplete as the basis for any complaint will be absent. Whatever complaint a petitioner may be having about an election may be regarded as having no legal basis. The law has set out what a petition should contain and if any of the matters supposed to be included is omitted, then the petition would be incurably defective.”(Emphasis added)***

the court found that the petitioner, having failed to give ***a detailed results and the date of declaration***, and noting that such particulars were mandatory, reached the conclusion that the petition filed by **MBARAKA ISSA KOMBE** was incurably defective and as such, merited no further scrutiny

40. From the above walk-through analysis, it is therefore true that it is not enough for the petitioner to state who won the elections as was highlighted under **paragraph 4 of the petition**. Similarly, it is not enough for the petition to inform the court of who declared the result as was explicated under the same paragraph of the petition. The court is very well aware of who the **1<sup>st</sup>** respondent mandates to make that declaration.

41. The duty imposed upon the petitioner would only be discharged if he set out and tabulates in the

petition, the complete result of the elections as declared by the Returning Officer. That would entail stating what each of the candidates garnered so as to meet the threshold as interpreted by the Supreme Court in the **JOHO'S CASE (SUPRA)**. It is not therefore enough to state, that so and so won with so many votes. Details have to ensue both on the petition and on the supporting affidavit.

42. In consonance to the foregoing, I therefore find no cause to depart from the wisdom of the distinguished judge (**Patrick j. Otieno**) and not wholly bind myself to the findings of the court of appeal in the **JOHN MUTUTHO CASE**, with equal attribution made on the Supreme Court finding in the **JOHO'S CASE**.

43. In a dint and in the upshot of the condensing findings reached, only one result can accrue and that is, the current petition as is, is wanting in form and content and in total non-compliance of the mandatory rules stipulated under **Rules 8(1) and Rule 12 of the Election Petition Rules 2017** which cannot be deviated, derogated and/or negated.

44. I do further note of the "technicality" defence advanced by the petitioner/ respondent's counsel but even at that, it must be noted that such a defence can not hold as the omissions made and identified, are so central that without disclosing the result, the election contest and/or dispute can not stand. Any dispute emanating from an election process ordinarily challenges the result first and any other issue, second.

45. Additionally, though **rule 15 of the Election Petition rules** cautions the court not to entertain interlocutory application after pretrial directions are exhausted, the nature of this application can not be ignored as it points out, grave omissions whose ramifications runs to the heart of the dispute.

46. As observed in the JANE KIHARA'S CASE, an election dispute squarely challenges the result and if no result is pleaded, then there is no legal basis to the petition. An election court cannot purport to try facts and evidence of a dispute that has no legal basis or the main factual basis, is undisclosed.

47. From the replying affidavit and submissions by the petitioner/respondent, counsel argued that such an omission can well be cured by the application of **Article 159(2) (d) and Section 83 of the Election Act**. However, I hold a contrary view. The transgressions pointed out are not only just on the form, but of the content which is provided vide the mandatory prescriptions of the rules, solely crafted to give a uniform pathway of how such disputes should contain, how they should be lodged and most importantly, how they should be handled. A departure from either of them cannot therefore be excused, overlooked and/or ignored.

48. In ***NICHOLAS KIPTOO ARAP KORIR =VS= I.E.B.C & 6 OTHERS***, the court of appeal held the view that **Article 159(2)(d) is not a panacea and cure for all ills because to apply it so, would be to create an anarchical 'free for all situation' that would then not be regulated and handled as expected in an organized manner.**

49. It therefore follows that **Article 159(2) (d)** should not be employed in order to circumvent the Rules of the court or to render them otiose as rules of procedure are and remain the handmaidens to justice.

50. Similarly, in ***RAILA =VS= IEBC & 2 OTHERS (2013)*** it was the supreme court proposition that **Article 159(2)(d) of the constitution** was never meant to oust the obligation of litigants to comply with procedural imperatives. In the contrary, it should be propelled in assisting the court into arriving at a just finding of fact and law.

51. In closing therefore, my case will lose impetus if I would not buttress the ramifications of my findings and what striking out or dismissal of a petition implies.

52. In **petition no. 10 of 2017, (supra)** the learned judge directed his mind to this issue and found:-

***"From my understanding of the law, I will consider the application by Notice of Motion dated 28/9/2017 to urge the court to consider striking out the petition rather than dismissing it".***

Under paragraph 29 of his judgement, the judge clarified further and stated;-

***“There also exists a distinct difference on the effect and ramification of the orders a court gives when the two terms are employed. A matter that is struck out may be brought properly if its parameters of Limitation of Action Act do allow. To the contrary, a matter which is dismissed stands dismissed and is not capable of being re-litigated”.***

53. This being clear and considering the substantive prayer of the motion dated **27<sup>th</sup> October 2017** essentially seeks for either striking out or dismissal of the petition, I will confine myself to only striking out of the petition as the merits of the petition have not been tested.

**54. Prayer no. 1** of the motion is therefore allowed to the extent that the petition dated **6<sup>th</sup> September 2017 and filed on 7<sup>th</sup> September 2017** is struck out with costs, awarded to the respondents.

55. It is thereby so ordered.

**RULING DATED AND DELIVERED AT SHANZU THIS 27<sup>TH</sup> DAY OF NOVEMBER, 2017 IN THE PRESENCE OF:-**

**THE PETITIONER COUNSEL: .....Mr Kinaro.....**

**1<sup>ST</sup> AND 2<sup>ND</sup> RESPONDENTS COUNSEL...Ms. Owiti...H/B For Sherman Nyongesa**

**3<sup>RD</sup> RESPEONDENT COUNSEL...Mr. Matata.....**

**COURT ASSISTANT .....Ms. E. Mbashu.....**

**L.T LEWA**

**SENIOR RESIDENT MAGISTRATE**