REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATES COURT AT NAROK

ELECTION PETITION NUMBER 3 OF 2017

IN THE MATTER OF THE ELECTIONS ACT 2011

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

IN THE MATTER OF ELECTION FOR MEMBER OF COUNTY ASSEMBLY SUSWA WARD

KAPUSIA OLE SALONI…………………….………... PETITIONER

VERSUS

JAMES KIPAS LANGUES..1ST RESPONDENT

CONSTITUENCY RETURNING

OFFICER NAROK EAST CONSTITUENCY

CHRISTINE OTIENO……….. 2ND RESPONDENT

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION………………….. 3RD RESPONDENT

RULING

1. This matter came up for hearing on 22nd November 2017. However, the 1st Respondent had filed a Notice of Preliminary objection dated 17th November, 2017 and which was filed on 20th November 2017. The Preliminary objection is couched in the following terms;- "The 1st Respondent shall be raising a preliminary objection to be determined *in limine* that the Petitioner has failed to comply with the mandatory provisions and requirements of Rule 8(1) (c) of the Election (Parliamentary and County Elections) Petition Rules, 2017 (herein after *"Election Petition Rules 2017"*) having failed to state and or tabulate the results of the impugned elections , the entire Petition is *ex- facie* incurably defective and therefore incompetent.

2. The parties, through their respective counsel, were in agreement that the Preliminary objection ought to be determined first. In the directions this Court issued, it was my view that the Preliminary Objection raised pure points of law, being compliance or lack thereof, with the Election Petition rules and which issues may go to the jurisdiction of this Court in deciding whether to proceed with hearing of the Petition. Counsel appearing before me made oral submissions which I have summarized hereunder.

RESPONDENTS' SUBMISSIONS

3. Mr. Kiarie, learned Counsel for the 1st Respondent, based the Preliminary objection on Rule 8(1) (c) of the Election Petition Rules, Article 87 of the Constitution of Kenya and the provisions of the Election Act. Counsel submits that Rule 8(1) (c) requires that the Petitioner has to state the results of the impugned election and further that rule 12(2) of the Election Petition Rules requires that the same particulars be pleaded in the Petitioner's supporting affidavit. Counsel urges that the words used are "shall" and the Courts have held that this is a mandatory requirement which goes to the content and root of the dispute and not merely a procedural requirement. Counsel refers to the Court of Appeal decision in the case of ***John Michael Njenga Mututho v Jayne Njeri Wanjiku Kihara & 2 Others [2008] eKLR***, (hereinafter **"*Mututho*** case") where the Court stated;

> *"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 complaints 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. For instance, paragraph (a) of rule 4(1) deals with capacity to petition. If a petitioner omits to make an averment in that regard the petition will be incurably defective. Likewise, if the date of the election omitted that omission would be fundamental in nature and would of itself without more render a petition incurably defective. We say so advisedly. The provisions of the National Assembly and Presidential Elections Act, have been held, to provide a complete code of the law and rules on elections and election petitions. As rightly pointed out by Mr. Kilonzo for the appellant, that law has no provision for amendment of pleadings after the 28 days stipulated for lodging petitions. In view of the conclusions we have come to on that aspect, it follows that the term "shall" as used in rule 4, must be read as having a mandatory import. Reading it otherwise will render the provisions of that rule otiose"*

4. Counsel also refers to the case of ***Jimmy Mkala Kazungu v IEBC & 2 others [2017] eKLR (herein after "Kazungu case")*** where the Court relied on the holding in the Mututho case and Thade J stated:

> *"following the finding in the above case, the import of omission of the results in the Petition is that the Petition is incomplete as the basis for any complaint is absent. Likewise, all other omissions are so fundamental as to render the Petition incurably defective"*

5. Counsel submits that the effect of the none compliance with rule 8(1) (c) is that the Petition is rendered incurably defective. Counsel urges that under Section 74(6) of the Election Act, 2011, an amendment can only be made within 28 days after the declaration of results and therefore the window has already closed. The Section states:

> ***"A petition filed in time may, for the purpose of questioning a return or an election upon an allegation of an election offence, be amended with the leave of the election court within the time within which the petition questioning the return or the election upon that ground may be presented".***

6. It is further contended that the Petitioner has not even averred how and where the declaration was made. Counsel further relies on the case of ***Mwamlole Tchappu Mbwana v Independent Electoral & Boundaries Commission & 4 others [2017] eKLR*** *(hereinafter* ***"Mwamlole"*** *case)* where Thande J relied on the case of ***Moses Mwicigi & 14 Others v Independent Electoral and Boundaries Commission & 5 Others [2016] eKLR***, where the Supreme Court stated at paragraph 65;

> ***"This Court has on a number of occasions remarked upon the importance of rules of procedure, in the conduct of litigation. In many cases, procedure is so closely intertwined with the substance of a case, that it befits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is the handmaiden of justice. Where a procedural motion bears the very ingredients of just determination, and yet it is overlooked by a litigant, the Court***

would not hesitate to declare the attendant pleadings incompetent.”

7. Ms. Karanja for the 2nd and 3rd Respondents supports the Preliminary Objection and totally ascribes to the submissions made by Mr. Kiarie. Counsel submits that Rule 8 is applicable to both the Petition and the affidavit and the Petition should have pleaded the results of the election in both the Petition and in the affidavit in support. In this case, Counsel points that the results are only contained in the affidavit. Counsel relies in the case of Mututho (supra) and submits that the results of any election is an essential element and if an essential element is missing, the Petitioner has nothing to challenge. Counsel argues that the Petition has no legs to stand on, it is baseless and ought to be dismissed.

8. Ms. Karanja further submits that the contents of an affidavit should be deemed as part of the Petition if the contents are expressly referred to in the Petition. Counsel further urges that election Petitions are time bound and if the Petitioner intends to complain about anything in the conduct of the election, he should include all his complaints in the Petition including the results of the election. In this regard, it is the submission by Counsel that Article 87 of the Constitution provides mechanisms for timely settlement of electoral disputes and Rule 8 of the Election Petition Rules is derived from the Constitution. By extension, any none compliance with the rules would be in contravention of Article 2 and 3 of the Constitution and therefore null and void. Counsel urges that Rule 8 and 12 of the Election Petition Rules are mandatory and which require the date of the declaration of results and the outcome thereof be specifically pleaded.

9. Counsel relies on the case of ***Martha Wangari Karua & another v Independent Electoral & Boundaries Commission & 3 others [2017] eKLR*** (Hereafter *Martha Karua* case) where the Gitari J stated at paragraph 38;

> *“The date of declaration is crucial in determining the dispute. I am of the view that a petition which has not complied with Rule 8 (1) (c) and rule 8 (1) (d) even remotely is not compliant. The definition given of results talks of outcome, effect, consequence. It is not sufficient to talk of results without giving numbers. It is an outcome based on numbers which made her to come to court and the date when the results were declared. The omissions are fatal….”*

10. It is Counsel’s view that the Petitioner has had sufficient time, since the date of declaration of results, to obtain the results from the Independent Electoral and Boundaries Commission. Counsel argues that since the Petitioner omitted the results, there is nothing to be challenged and allowing the Petition to proceed without mandatory information would be a violation of the rights of the Respondents. Counsel submits that the Court should dismiss the Petition in its totality with costs to the Respondents.

PETITIONER’S SUBMISSIONS

11. Mr. Manyange, Counsel for the petitioner, submits that the Preliminary objection does not seek any specific orders. He points to the submissions by Mr. Kiarie and Ms. Karanja that the Petition should be dismissed. Counsel view is that the words “dismissal” and “struck out” should not be used inter changeably. According to Counsel, a Petition can only be dismissed after consideration of the merits of the case which is not the case here. In this regard, Counsel refers to the case of ***Mbaraka Issa Kombo v Independent Electoral and Boundaries Commission & 3 others [2017] eKLR*** at Paragraph 27 where the Court stated;

> *“Clearly in law, prior to hearing a matter on the 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 pleading. 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. 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."

12. The Petitioner's Counsel further submits that the Preliminary Objection is ill timed and an afterthought since the Court has concluded pre-trial and the parties have framed their separate issues. It is Counsel position that this objection should have raised at the Pre-trial stage and coming so late in the day and after the Respondents have filed further affidavits, it should be seen as a delaying tactic. In this regard, Counsel relies on Rule 15(2) of the Election Petition Rules which state;

> ***(2) An election court shall not allow any interlocutory application to be made on conclusion of the pre-trial conference, if the interlocutory application could have, by its nature, been brought before the commencement of the hearing of the petition.***

13. Without prejudice to the above, Counsel submits on the various authorities referred to by the Respondents. Counsel states that the case of *Mututho*(supra) is bad law which was decided in 2009 and essentially pre the 2010 Constitution. Counsel relies on the case of ***Williamkinyanyi Onyango v Independent Electoral And Boundaries Commission & 2 others [2013] eKLR (****Hereinafter* ***"Kinyanyi"*** *case)* where Kimondo J held at paragraph 17 and 18;

> *"A similar approach was taken in Nyamweya vs Oluoch and others [1993-2009]1 EAGR 377. A lot of water has passed under that bridge. We now have a fresh set of laws under the Constitution of Kenya 2010, the Elections Act 2011 and the Petition Rules 2013. That is the context within which to interpret the rule. See Steven Kariuki vs George Mike Wanjohi and 2 others Nairobi, High Court petition 2 of 2013 (unreported). In view of the new rule 21 requiring the IEBC to file the results in Court, I hold the opinion that failure to particularize the results is no longer fatal to a petition. Some genre of election petitions may, quite apart from results, challenge other aspects of elections. A good example is the petition in Kituo cha Sheria vs John Ndirangu Kariuki and another Nairobi, High Court election petition 8 of 2013 [2013] eKLR. That petition was filed after the general elections of 4th March 2013. It was not filed by any candidate or a voter. There was no complaint of electoral malpractices. It challenged the election of the 1st respondent as member of the National Assembly not on the results but his qualifications for nomination as a candidate on grounds of integrity. As the petition did not go to the root of the aggregate results, even the returning officer was not made a party. Rule 10 (1) (c) must thus be given a liberal and purposive interpretation that gives effect to the overriding objective of the Court to do justice to all parties."*

14. Counsel further submits that the Petitioner had stated how the results were declared in the supporting affidavit and had achieved *"substantial compliance"* as was held by Justice Kimondo In the Kinyanyi case(supra). Counsel urges that unless a Petition is so hopelessly defective, it ought to be heard on merit and since the Respondents have filed substantive responses, they should be estopped from submitting that the Petition is hopelessly defective.

15. Mr. Manyange has also referred the Court to the Supreme Court decision in the Presidential Petition Number 1 of 2017 (Raila 1) and submits that the Petition herein is not challenging the numbers of votes as declared but the process of the conduct of the election. This is what has jurisprudentially been referred as the qualitative test as embodied by Article 81 of the Constitution. In this regard, Counsel contends that failure to particularize the results does not go to the root of the Petition.

16. Counsel further refers to the decision by Majanja J in the case of ***Caroline Mwelu Mwandiku vs. Patrick Mweu Musimba & 2 others High Court, Machakos Election petition 7 of 2013 [2013] e KLR*** which was cited with approval by justice Kimondo in the case of Kinyanyi (supra). Majanja J stated:

> *"The applicant has relied on the case of Mututho Vs Kihara to support the proposition that the petition is fatally defective for want of particulars. In that case, the Court of Appeal stated in part*

as follows,……………….……..In my view, rule 21 as read with rule 10 (1) (c) of the Rules which now permit the petitioner to plead 'the results, if any, however declared' was intended to deal with the mischief identified in Mututho Vs Kihara. The purpose of pleadings is to aid a fair trial. Rules of procedure are not mere formulae to be observed as rituals and elevated to a fetish. Beneath the words of a provision of law, lies a juristic principle. In this case the principle is that the rule is intended to enable the court fairly adjudicate the dispute between the parties. The guiding principle in consideration of this matter is the overriding objective of the Rules which is stipulated under rule 4 (1) of the Rules as 'to facilitate the just, expeditious, proportionate and affordable resolution of election petitions under the Constitution and the Act'. This objective is best realized by the election court having regard to the purpose and mischief that the rule seeks to cure and the prejudice that would be occasioned by insistence on the strict compliance with form. Rule 5 further obliges this court and the parties to conduct proceedings before it to achieve the following aims, '(a) the just determination of the election petition; and (b) the efficient and expeditious disposal of an election petition within the timelines provided in the Constitution and the Act'. Rules 4 and 5 are therefore a testament of the provisions of Article 159 (2) (d) of the Constitution which obliges every court to dispense justice without undue regard to technicalities."

17. Counsel further submits that the decision in the Mututho case was rendered under the former rules which required the IEBC to file returns. However, under rule 9 of the Election Petition Rules 2017, the IEBC is an automatic Respondent. Counsel urges that failure to state the results of the election in the Petition would not prejudice the Respondents. Counsel also refers to the Rule 8(1) (c) and submits that the rule talks of results of an election *"if any"* and *however declared*. The word "if" as used, he submits, is conditional and envisages a situation where there are no results or a where a party so wishes to mention the results.

18. Counsel seeks to distinguish the case of *Martha Karua*(supra) by stating that in the said case, the Petitioner failed to state the results in the affidavit and did not also state the date of declaration of results. Counsel urges the Court to find that purposive interpretation of the subject rules dictate that the Court should lean towards substantive justice and that failure to particularize the results does not render the Petition defective. Counsel, in conclusion, refers the Court to the decision of Kimondo J in Kinyanyi case where at paragraph 24 the Judge stated;

"I find the liberal and purposive interpretation of the rule by Majanja, Githua, Achode and Ngaah JJ, in the decisions I cited earlier, to be much more in tandem with our new laws. Furthermore, that approach cures the old mischief in Mututho vs Kihara (supra) under the repealed rules. That was clearly the intention of the new rule 21. What possible prejudice would be suffered by the respondents" None in my view. The 3rd respondent had been declared the winner. The petitioner was challenging that election on numerous grounds. True, he did not specify the aggregate votes of candidates. The results were available. He could have specified them by being a little more diligent. But the IEBC had custody of the results and was mandated by rule 21 to file them in court. The petitioner had annexed some results in forms 35 to his supporting affidavit. He deposed that he did not access all the forms 35. It is not a very sound argument. It means the aggregate results were available. But I have also seen on the record of the lower court the full results including forms 35 and 36. They are contained in a further affidavit of Marjorie Owino, the returning officer, sworn and filed in the lower court on 20th May 2013. That was at the hearing of the motion for striking out the action. At the time the learned Magistrate was dealing with the matter, the aggregate results for all candidates were right before him. It cannot then fall from the lips of the respondents, and the IEBC in particular, that they did not know the case they were to meet at the trial."

<u>ISSUES FOR DETERMINATION</u>

19. I have considered the Preliminary Objection in its entirety and the oral submissions by learned Counsels for the Petitioner and the Respondents. I have also considered the various authorities relied on by the parties. The issues for determination are;

a) Whether the Preliminary Objection is properly before the Court

b) Whether the Petitioner failed to comply with Rule 8(1) (c) of the Election Petition Rules 2017

c) What would be the consequences of failure to comply with Rule 8(1) (c) of the Election Petition Rules 2017

ANALYSIS AND DETERMINATION

Whether the Preliminary Objection is properly before the Court

20. Mr. Manyange has submitted that the Preliminary Objection should have been raised during the Pre-trial stage in accordance with Rule 15(1) and (2). In particular, Counsel contends that rule 15(2) dictates that the Court should not allow any interlocutory application to be made on conclusion of the pre-trial conference, if the interlocutory application could have, by its nature, been brought before the commencement of the hearing of the petition.

21. In view of the strict timelines in hearing and determination of Election disputes, it is desirable that a Preliminary Objection should be raised at the earliest opportunity. This, in my opinion, was the intention of the Rules committee when formulating Rule 15 of the Election Petition Rules. The Preliminary Objection is raised *in limine which means an objection raised by one of the parties at the very beginning of the legal procedures and which seeks to pull the rug out from under the feet of the other party.*

22. Be that as it may, a Preliminary Objection raises points of law which can be raised at any stage in the trial process. In this case, the hearing is yet to commence but the parties had identified the issues for determination and the Court had settled other pretrial issues including interlocutory applications made. I am guided by the case of *Martha Karua(*supra) where the Court held points of law can be raised at any stage.

23. I also find the Preliminary Objection raises a pure point of law to wit non- compliance with Rule 8 (1) (c) of the Election Petition Rules and therefore satisfies the holding in the celebrated case of *Mukisa Biscuit Company vs Westend Distributors Limited (1969) EA 696*. Mr. Manyange submits that the Preliminary Objection does not specify the orders sought. The Objection states that the Petition filed herein is incurably defective. The import of those words is that, if the objection is upheld, the Petition would be rendered incurably defective and it follows that the only consequence would be to strike out the Petition. Therefore, it is not fatal to fail to state the orders sought in the Preliminary objection. I, however, agree with Counsel that a Petition can only be dismissed after hearing of the Petition on merits and the orders the Court should be invited to make is those of striking out the Petition. I am guided by the case of *Mabaraka Isa Kombo* (supra) where the Court held that *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.* I find that the Preliminary Objection is properly before the Court and falls for determination.

Whether the Petitioner failed to comply with Rule 8(1) (c) of the Election Petition Rules 2017

24. The contents and form of an election petition are contained in Rule 8 of the Elections (PARLIAMENTARY AND COUNTY ELECTIONS) PETITIONS RULES, 2017 which states at sub-rule (1) that an election petition shall state –

a. the name and address of the Petitioner

b. the date when the election in dispute was conducted

c. <u>the results of the election, if any, and however declared</u>

> *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 of service* ". (Underlining for emphasis)

25. Rule 12(2) of the Election Petition Rules requires that the same particulars as in rule 8(1) be stated in the affidavit of the Petitioner, in support of the petition. Section 2 of the Election Act, defines "*Election Results''* to mean the declared outcome of the casting of votes by voters at an election. Regulations 83 and 87 of the Election General Regulations confer upon the Returning officers at an election the onus of announcement of election results.

26. In this Petition, the Petitioner does not deny that the results of the Petition were not stated and or tabulated in the Petition. Mr. Manyange submits that the results were however stated in the Petitioner's supporting affidavit sworn on 6th September, 2017. I find that the Petitioner failed to state the results of the election in the Petition filed. As correctly submitted by Counsels for the Respondents, the Petition can only be amended, if the leave of the Court is obtained, within 28 days from the date of the declaration and the window is long shut. A question would arise as to whether failure to comply with Rule 8(1) (c) would make the Petition incurably defective and hence liable to be struck out. I shall endeavor to determine this issue in the rest of the Judgment.

What would be the consequences of failure to comply with Rule 8(1) (c) of the Election Petition Rules 2017

27. I have had an opportunity to consider the Superior Courts' decisions relied on by the parties. Mr. Manyange has submitted that the decisions have established two schools of thought. In accordance with Counsel, one school of thought is that non-compliance with the rules renders the Petition incurable defective while the other school of thought leans towards adopting a purposive interpretation of the rules in pursuit of substantive justice as provided under Article 159(2) d of the Constitution. Counsel urges the Court to adopt the latter school of thought. Mr. Kiarie on the other hand places reliance on the Court of Appeal decision in the Mututho case which, he argues, is binding to this Court and the High Court.

28. As a rule of the thumb, the decisions of Superior Courts are binding on the lower Court. This is the doctrine of *stare decisis* which is now provided for under Article 163(7) of the Constitution. In the case of ***Jasbir Singh Rai & 3 Others v Tarlochan Singh & 4 Others, Supreme Court Petition 4 of 2012;[2013] eKLR,*** the Supreme Court held that the rule of precedent promotes predictability, diminishes arbitrariness, and enhances fairness by treating all cases alike. In the case of ***George Mike Wanjohi v Stephen Kariuki & 2 Others [2014] eKLR***, the Supreme Court, at paragraph 79, held;

> *"Article 163(7) of the Constitution incorporates the doctrine of stare decisis as understood at common law. This doctrine holds that decisions of a higher Court, unless distinguished or overruled, bear the quality of law, and bind all lower Courts in similar or like cases"*

29. The question would be what recourse should a lower Court take when faced with two conflicting decisions of the High Court on similar issues. In such a scenario, my view is that the lower Court is bound to decide which decision is most persuasive taking into account the circumstances of the cases including any distinguishable facts. It is on the basis of these principles that I will consider the authorities relied by Counsel.

30. It is the Respondents' case that Rule 8(1) (c) requires that the Petitioner has to state the results of the impugned election and further that rule 12(2) of the Election Petition Rules requires that the same particulars be pleaded in the Petitioner's supporting affidavit. Mr. Kiarie urges that the words used are "shall" and the Courts have held that this is a mandatory requirement which goes to the content and root of the dispute and not merely procedural requirement. The Respondents rely on the case of *Mututho* (Supra) where the Court of Appeal was categorical that if a Petition fails to state the results of an election,

the essential element of the dispute would be lost and the Petition would be incomplete and incurably defective. The Court further held;

. In view of the conclusions we have come to on that aspect, it follows that the term "shall" as used in rule 4, must be read as having a mandatory import. Reading it otherwise will render the provisions of that rule otiose"

31. The case of Mututho was relied on by the Court in the case of *Martha Karua* where the Court stated;

"There is admission of non-compliance with Rule 8 (1) (d). As for rule 8 (1) (c) the Petition does not indicate the results. Similarly, the Petitioner's affidavit has not indicated the tabulated results. The Petitioner does not state there were no results as envisaged in the rules as it states "if any". She insists there were results and that she has complied. Such results must be stated in the Petition as well as in the affidavit. Where the rule states that "the results of the election if any, ………" it calls on the Petitioner to state those results with precision in the petition and in the affidavit. Rule 8 (1) (c) is couched in mandatory terms. Furthermore Rule 12 (2) of the rules requires that affidavit in support of the petition shall state the very items that are stated in a petition. This the petitioner as(sic) the petition and the supporting affidavit has not stated the results."

32. Mr. Manyange submits that the interpretation of the words "if any" as contained in Rule 8(1) (c) provides a conditional inference which would mean that there would be no obligation to state the results if there are no results or if a party wishes not to state the results. In this case, it is not the case that there were no results declared. Indeed, the Petitioner in the supporting affidavit at paragraph 3 has tabulated the results as declared. The rules require the results be pleaded in both the Petition and the Petitioner's affidavit in support and the Petitioner does not have the luxury in choosing whether to state the results or not. The issue for determination is whether the non- compliance would render the Petition incurable defective and incompetent.

33. Mr. Kiarie and Ms. Karanja submit that the failure to state the results goes to the root of the Petition. In this regard, they rely on the case of *Mwamlole Tchappu Mbwana*(supra) where the Court held;

. Rules of procedure in electoral disputes are not mere technical or procedural requirements. They go to the root and substance of the matters prescribed upon. They must not therefore be treated as optional. Every provision in the Election Petition Rules is important and is intended to achieve a required result. This is as was stated by Onyancha, J. in the case of Amina Hassan Ahmed v Returning Officer Mandera County & 2 Others[2013]eKLR,:

"Put differently, the provisions of Rule 10 and others aforestated, are not mere technical requirements. If they are technical in so far as they are procedural and spell out the form and content of intended petitions, they nevertheless, at the same time, are substantive and go to the root and substance of issues and matters prescribed upon. A further reason why the provisions of the Elections Act and/or Rules must be complied with fully, is because the Act, and therefore the Rules, are a special legislation. They are a legislation for the purpose, as already stated above, of efficiently prescribing the proper, efficient, expeditious and just conduct of election petitions. Every provision in them therefore, is intended to achieve a required result…"

34. The above holding is also apparent in the Martha Karua case where the Court held as follows;

"The Court is called upon to do substantial justice. I am of the view that the provisions do not aid the Petitioner. The requirement under Rule 8 (1) (d) and (c) are rules which the supreme court has stated in the case of Moses Mwicigi (supra) that they are procedural but intertwined with substantive issue. The date of declaration of results is a substantive issue as it is the starting point of the dispute and the end in view of the strict time lines for filing of the petition and the determination of the dispute. It determines whether the Dispute is filed within 28th days as stipulated in the Constitution. The results on the other hand is what sparked of the dispute as the

3rd respondent was returned as being duly elected and the petitioner lost. The non-compliance is substantive and cannot be cured under Article 159 (2) (d) of the Constitution and rule 5 (1) of the Rules. Rule 4 (1) of the rules does not assist the petitioner for the reason that it states the objective of the rules is to facilitate the just expeditious, proportionate and affordable resolution of disputes. This would be achieved by the Court not using its most needed time and resources in dealing with disputes which have failed to comply with the express provisions of the rules."

35. I have considered the above decisions in their entirety. Ms. Karanja submits that failure to comply with Rule 8 would results in failure to comply with Article 2 and 3 of the Constitution and therefore render the Petition null and void. Counsel submits that the Elections Act and the Rules thereunder made are direct derivatives of the Constitution which at Article 87(1) states that Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes. The Laws and Rules therefore made that require certain steps to be taken and particular matters to be included in an election Petition are so made for the purpose of fulfilling what the Constitution has allowed to be done, ''for the timely settling of disputes''. Therefore, a failure to comply with these mandatory requirements as set out in the Rules is a failure to comply with the requirements of the Constitution, since these laws are derivatives of that Constitution.

36. When considering interpretation of the Constitution, the Courts are enjoined, under Article 259, to interpret the Constitution in a manner that promotes its purposes, values and principles; advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; permits the development of the law; and contributes to good governance. This is, in essence, the purposive interpretation of the constitution. In the case of ***Washington Jakoyo Midiwo v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR*** (hereinafter Jakoyo Midiwo case), the Court (E.N. Maina J) referred, with approval, the case of ***Caroline Mwelu Mwandiku V. Patrick Mweu Musimba*** Majanja J stated –

"The guiding principle in consideration of this matter is the overriding objective of the Rules which is stipulated under rule 4(1) of the Rules as "to facilitate the just, expeditious, proportionate and affordable resolution of election petitions under the Constitution and the Act". <u>This objective is best realized by the Election court having regard to the purpose and mischief that the rule seeks to cure and the prejudice that would be occasioned by insistence on the strict compliance with form.</u> Rule 5 further obliges this court and the parties to conduct proceedings before it to achieve the following aims, (a) the just determination of the election petition; and (b) the efficient and expeditious disposal of an election petition within the timelines provided in the Constitution and the Act." (underlining mine for emphasis)

37. Maina J in the case of *Jakoyo Midiwo* stated;

"I could not agree more. The provisions of Rule 8(1) (c) go to the contents and form of the petition. While I agree that the rules are anchored on the Elections Act and by extension the Constitution and much as I find that by their wording they call for strict compliance these are procedural requirements. Rule 5 of the Elections (PARLIAMENTARY AND COUNTY ELELCTIONS) Petition Rules, 2017 has now expressly clothed election courts with discretion to excuse lapses in regard to the rules. The rule now simply states –

"5. Compliance with these Rules

The effect of any failure to comply with these Rules shall be determined at the Court's discretion in accordance with the provisions of Article 159(2)(d) of the Constitution"

38. In the *Jakoyo Midiwo* case, the Court referred to the Court of Appeal decision in the case of ***Nicholas Kiptoo Arap Korir Salat V Independent Electoral and Boundaries Commission & 6 Others [2013] eKLR.*** In the said case, in the majority judgment, Ouko JA stated;

"Deviations from and lapses in form and procedures which do not go to the jurisdiction of the

court, or which do not occasion prejudice or miscarriage of justice to the opposite party ought not to be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead in such instances the Court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness….It ought to be clearly understood that the courts have not belittled the role of procedural rules. It is emphasized that procedural rules are tools designed to facilitate adjudication of disputes; they ensure orderly management of cases. Courts and litigants (and their lawyers) alike are, thus, enjoined to abide strictly by the rules. Parties and lawyers ought to be reminded that the bare invocation of the oxygen principle is not a magic wand that will automatically compel the court to suspend procedural rules. And while the court, in some instances, may allow the liberal application or interpretation of the rules that can only be done in proper cases and under justifiable causes and circumstances. That is why the Constitution and other statutes that promote substantive justice deliberately use the phrase that justice be done without "undue regard" to procedural technicalities.

39. In the case of *Jakoyo Midiwo*(Supra) which is also a recent decision as the case of Martha Karua, the Court declined to strike out the Petition and *inter-alia* held;

"Each case must be decided on its own facts and circumstances. It is my finding that the omission to state the results in this Petition and in the supporting affidavit do not call for its striking out. In my view the omission does not go to the root of the proceedings. Moreover, whereas Rule 21 of the 2016 Election Petition Rules, which required the 1st Respondent to deliver the results of the relevant election to the court within fourteen days, no longer exists in the Rules the 1st Respondent has on its own accord delivered the results to this court. The results of this election are therefore on the record. They are also known to the 3rd Respondent and his Advocate's fear that there will be no results to compare the evidence with has been put to rest. In addition, it is my finding that the 3rd Respondent has in no way been prejudiced as even before bringing this Application he had filed his response and evidence meaning that he very well understood the case facing him. It was also argued that as the petition cannot be amended the only solution is to strike it out. While I agree that the rules would not allow for amendment of this petition so as to remedy the omission it is my finding that that in itself is not reason enough to strike out the petition. The results now form part of the record of the petition and an amendment of the petition would not be necessary. It matters not that they were filed by the 1st Respondent rather than the Petitioner. Should this court or any of the parties require to make reference to the results of the election they shall be available"

40. In this Petition, the Petitioner has tabulated the results of the election held at Suswa ward in the supporting affidavit sworn by the Petition. In the case of *Jakowo Midiwo(Supra),* the Court adopted, what is, in my view, a purposive interpretation considering that the Petitioner had not even stated the results in the affidavit. I find the case of *Mwanlole(supra)* relied on by the 1st respondent, is distinguishable. In the said case the Court held at paragraph 35;

"To my mind, these are not the declared election results as envisaged in Section 2 of the Act and Regulation 87(2)(b). The onus upon the Petitioner under Rule 8(1)(c) of the Election Petition Rules to state the results of the election would only be discharged if he set out the results as declared by the 2nd Respondent. The annexure marked "MTM4" cannot come to the aid of the Petitioner. This is because the annexure is not expressly referred to in the affidavit of the Petitioner and cannot be deemed to be part of the Petition as per Dickson Mwenda Githinji v Gatirau Peter Munya & 2 others [2014] eKLR."

41. The reasoning of the Judge is that if the results are expressly referred in the affidavit, the affidavit would be deemed to be part of the Petition. Although affidavits are not usually deemed to be pleadings,

the affidavit in support of an election petition and any documents annexed thereto are deemed to be part of the petition and therefore part of the pleadings. This was the holding in the cases (***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others, Supreme Court Petition No. 2B of 2014; Ferdinand Ndung'u Waititu v Independent Electoral & Boundaries Commission & 8 Others, Election Petition (Nairobi) No. 1 of 2013).***

42. Having considered all the issues, I find the Court of Appeal decision in the case of ***Nicholas Kiptoo Arap Korir Salat (Supra)*** persuasive and being a post 2010 decision, the decision is more alive to the provisions of Article 159(2) d of the Constitution. The *Mututho* decision, as analyzed in the case of *Jakoyo Midiwo*, was based on the repealed Election Laws which required the defunct Electoral Commission of Kenya, to file a return of the results declared. Rule 9 of the Election Petition Rules now requires that the Commission be enjoined as a respondent in an election petition. I am also persuaded by the decisions of *William Kinyanyi Onyango (Kimondo J)*, *Jakoyo Midiwo (Maina J)* and *Caroline Mwelu Mwandiku (Majanja J)*

43. I find and hold that no prejudice will be occasioned to the Respondents due to lack of strict compliance with the rule 8 (1) (c) of the Rules. The results are tabulated in the Petitioner's supporting affidavit sworn on 6th September, 2017. The affidavit forms part of the Petition. The 1st Respondent, in his response filed on 18th September, 2017, has also at paragraph 7 tabulated the results declared by the 2nd Respondent. The 2nd and 3rd Respondents have also, in their responses, annexed the relevant statutory results declaration forms authored at the polling stations. The Respondents submit that their rights would be violated if the Court orders hearing of this case to proceed. For the Respondents to state that they would not know what is being challenged, would be akin to a new mother denying the delivery of a baby safely held in her palms. The Respondents have filed their responses and have an opportunity to demonstrate to the voters of Suswa Ward that the baby was delivered in compliance with the tenets of the Constitution and the law. I resist the invitation to consider whether this Petition raises the qualitative or quantitative test. This is a matter for trial.

44. The upshot of the above is that I find that there has been substantive compliance with Election Petition Rules 2017. The Petitioner has pleaded the date of the declaration and provided the declared results in the supporting affidavit. This is distinguishable with the case of *Martha Karua*(supra) where the date of the declaration was omitted in the Petition. This Court is persuaded to lean towards pursuing substantive justice which should not be sacrificed at the altar of procedural technicalities.

45. Consequently, I dismiss the Preliminary Objection dated 17th November 2017 and order that the Petition shall proceed for hearing on merits as earlier directed. Costs of the Preliminary Objection shall be costs in the cause.

RULING DATED AND DELIVERED THIS 23rd DAY OF NOVEMBER 2017

H.M. NG'ANG'A

SENIOR RESIDENT MAGISTRATE

IN OPEN COURT IN THE PRESENCE OF:

FOR PETITIONER: MR. MANYANGE

FOR 1ST RESPONDENT: MR. KIARIE

FOR 2ND & 3RD RESPONDENTS: MS. KARANJA

COURT ASSISTANT: SHADRACK KASASO.

PETITIONER: PRESENT

1ST RESPONDENT: PRESENT

2ND RESPONDENT: PRESENT