REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATES COURT AT MALINDI

ELECTION PETITION NO. 1 OF 2017

THEOPHILUS KALAMA FONDO…….…….....…….PETITIONER

VERSUS

RETURNING OFFICER MAGARINI SUB COUNTY..... …….1ST RESPONDENT

INDEPENDENT ELECTORAL& BOUNDARIES COMMISSION ……...2ND RESPONDENT

PETER ZIRO NGOWA…….....3rd RESPONDENT

RULING

This Election Petition (the Petition) was filed on 6th September 2017 by **THEOPHILUS KALAMA FONDO** (the Petitioner) challenging the election of **PETER ZIRO NGOWA** (the 3rd Respondent) as the **Garashi Ward** Representative to the Kilifi County Assembly. The Petitioner has also sued the Returning Officer for Magharini Sub-County (the 1st Respondent) and the Independent Elections and Boundaries Commission (the 2nd Respondent) who declared the 3rd Respondent as the winner. Both Respondents have duly filed their respective responses to the Petition hence pleadings have closed and a Pre-trial Conference date and subsequent hearing dates have been by consent set down.

Two Applications and one Notice of Preliminary Objection have so far been filed. The 3rd Respondent filed an application by way of Notice of Motion dated 6th October 2017 seeking orders that this court do strike out the Petition on account of failure by the Petitioner to deposit security of costs as stipulated by section 78 of the Elections Act and Rule 11 of the Elections Petitions (Parliamentary and County Elections) Rules 2017. The court considered the same and dismissed the application on 31st October 2017.

Soon thereafter the 1st and 2nd Respondent filed this application by way of Notice of Motion. This application seeks the following orders:

a. The Petition of Theophilus Kalama Fondo dated 6th September 2017 and filed in court on 6th September 2017 be struck out and or alternatively and without prejudice to the forgoing it be dismissed

b. The costs of this application and petition be awarded to the 1st and 2nd Respondents

The 3rd respondent chose to file a Preliminary objection Pursuant to Article 87(1), (2), 180 (5) (6), 182 of the Constitution, Section 2 of the Election Act, Regulations 83 and 87 of the Elections General Regulations and Rules 8 and 12 of The Election Petition Rules. The PO substantially joins issue with the

1st and 2nd respondent. It also seeks costs to be awarded to the 3rd respondent.

This court thus decided to collapse the application and determine both together as they raise similar issues hence no need to duplicate the contents. The grounds upon which the application and PO are premised can be summarized herein under;

> a. The petition and affidavit in support thereof contravened the provisions of Article 87(2) for failure to state the date of declaration of results.
>
> b. The petition contravened Rule 8(1) c & d and 12(2) c &d of the Election (Parliamentary and County Elections) Petition Rules by the failure to declare the results. That the petition is 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.
>
> c. 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.

The 1st and 2nd Respondents' Submissions

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

To that end, this Court borrows and fully adopts the clear reasoning of the Kenyan Court of Appeal as well as the Supreme Courts of India in the cases quoted above."

It is our humble submission that the above finding ought to resonate well with this Honourable court.

13. Then there is the Court of Appeal decision in Rozah Akinyi Buyu –v- IEBC & 2 Others (2014) eKLR where the Court cited the case of Amina Hassan with approval in this matter.

> "In a more recent decision in Amina Hassan –v- Returning Officer Mandera County & Another the Petitioner challenged the election of the 3 rd Respondent as Women Representative, Mandera County. "The 3 rd Respondent brought an application to strike out the Petition on grounds that the Petition was fatally defective for want of form and content due to failure by the Petitioner to state the election results and date and manner of declaration of the said results, and contended that the Court in the premises lacked jurisdiction to entertain the Petition. The Petitioner formally applied for leave to amend the Petition but the Court found the Petition fatally defective because it lacked form and content and the Court lacked jurisdiction to grant leave to amend'.

14. In yet other decision of the High Court on that point, and in the case of Evans Nyambaso –v- IEBC & 2 Others, 2013 eKLR. It is clear that one of the issues for determination by the Court is stated as follows:-

5. Whether failure by the Petitioners to give particulars in the Petition is fatal to the Petition.

At Paragraph 90 of that decision, the Court says:

> "Mr. Odhiambo argued that the Petition herein ought to be struck out on grounds that the Petitioner has not particularized the results complained of".

The Court analyzed the contents of Rule 10(1) of the Election Petition Rules (now Rule 8) and the John Mututho Case first cited above, as well as the Amina Hassan Ahmed decision, which has also been cited herein above, and then at Paragraph 92 continued thus:-

> "…..On an application to strike out the Petition, Onyancha J held that he information left out of the Petition was so vital that the Petition as it stood could not be rescued by the provisions of Article 159 (20 (d) and further;

That the Petition was so hopeless that even if amendment was possible, under the law, the same could not be rescued by any such amendment. The Petition was struck out with costs."

15. After such a detailed analysis as above, on that issue Sitati J concluded and held as follows:

> "My view of the matter is that since Rule 10 of the Rules clearly sets out the contents and form of an election Petition a Petitioner has to comply with the same so as to give a chance to the Respondents to know what case they are faced with.

The authorities cited above all point to the fact that where material particulars are not included in the Petition then such a Petition is fatally incompetent and must be struck out.

That is the position in this case and I so find."

At Paragraph 97 of her Ruling the Learned Judge rendered herself as follows:

97. Thirdly, I have reached the conclusion that the Petitioners did not comply with

Rule 10 of the Rules as to the content and form of the Petition. Having failed to

comply with the law in this regard I have to;

> "…..reluctantly wield that painful knife and chop off the head of this Petition."

16. It is on the basis of the foregoing material and attendant facts in this case that it is humbly urged that this Petition is defective and incurably for failure to state the results of the election that the Petitioner is challenging. Also the manner of declaration of those results, the number of candidates in the contest, and votes garnered by each candidate in that election, are all necessary matters of content that must be disclosed in an election Petition.

They are all missing from this Petition.

The courts have in recently dismissed Petitions that had been filed without due compliance with Rule 8 and 12 of the Election Petition Rules 2017. Justice M. Thande in Election Petition Number 9 of 2017 Jimmy Mkala Kazungu vs IEBC held as follows;

> "In order to determine whether the petitioner has complied with the mandatory requirements of Rule 8(1) of the Election Petition Rules, all this court is required to do is look at what is

contained in the petition against the provisions of Rule 8(1)..... The requirements in Rule 8 (1 of the Election Petition Rules are coached in Mandatory terms.

It is noteworthy that the same requirement are replicated in Rule 12 (2) of the Election Petition Rules which state that the affidavit in support of a petition shall state the very same things that are to be stated in a petition

To my mind the requirements to state the listed matters applies to both the petition and the Affidavit. It is not question of either or but applies to both the Petition and the Affidavit. It is not a question of "Either or" but a matter of "both and". The listed matters must be in both the petition and the supporting Affidavit.

In view of the foregoing, this court finds that the petitioner failed to comply with the express and

mandatory provisions of Rule 8(1) of the Elections (parliamentary & county Elections Petitions Rules 2017. it must follow therefore that the petition herein is incurably defective and allowing the same as presently drawn to proceed to trial would be an abuse of the court process)"

17. The Petitioner has under Paragraph 3 of his Replying Affidavit claimed that the present application before the court is incurably defective for failure to having been supported by an Affidavit. This misses the point as to the function of a Supporting Affidavit to an application.

The Supporting Affidavit is necessary and desirable where the Application raises material facts not on the face of the pleadings and when such a fact is likely to fall in dispute. The application raises and is based on factual matters strictly disenable on the face of the Petition and the Affidavit in support thereof by the Petition

18. The Authority in the circumstances cited by the Petitioner in his submissions of Sameul Kazungu Kambi & anor v Nelly Ilongo and 4 others (unreported) is distinguishable to the extent that the main issue for determination in the application before Justice Korir was striking out of the Petition for want of security deposit and obviously that was a factual matter that called for evidence to verify the fact of the deposit having been effected or otherwise. Justice J. Kamau in Skair Associates Architects v Evangelical Lutheran church of Kenya & 4 others [2015] eKLR has this to say in the face of such an objection to an application filed without a Supporting Affidavit.

"It is clear from the above that it is not all motions that can be supported by an affidavit.

Indeed no affidavit evidence is required were an application has raised points of law. An affidavit is, however, necessary were the motion is to be supported by evidence. In this regard the court did not wholly conquer with the Plaintiffs submissions that an application that was not supported by an affidavit was incurable defective as there are clear instances when such

affidavit evidence is not required.""In my view and finding based on the facts and reasons hereinabove, thePetitioner's Petition is without doubt fatally defective because it is deficient inform and lacks vital prescribed content."To that end, this Court borrows and fully adopts the clear reasoning of the KenyanCourt of Appeal as well as the Supreme Courts of India in the cases quotedabove." It is our humble submission that the above finding ought to resonate well with thisHonourable court.13. Then there is the Court of Appeal decision in Rozah Akinyi Buyu –v- IEBC & 2 Others (2014)eKLR where the Court cited the case of Amina Hassan with approval in this matter."In a more recent decision in Amina Hassan –v- Returning Officer ManderaCounty & Another the Petitioner challenged the election of the 3rd Respondent asWomen Representative, Mandera County. "The 3rd Respondent brought anapplication to strike out the Petition on grounds that the Petition was fatallydefective for want of form and content due to failure by the Petitioner to state theelection results and date and manner of declaration of the said results, andcontended that the Court in the premises lacked jurisdiction to entertain thePetition. The Petitioner formally applied for leave to amend the Petition but theCourt found the Petition fatally defective because it lacked form and content andthe Court lacked jurisdiction to grant leave to amend'.14. In yet other decision of the High Court on that point, and in the case of Evans Nyambaso –v-IEBC & 2 Others, 2013 eKLR. It is clear that one of the issues for determination by the Court isstated as follows:- 5.Whether failure by the Petitioners to give particulars in the Petition isfatal to the Petition.At Paragraph 90 of that decision, the Court says:"Mr. Odhiambo argued that the Petition herein ought to be struck out on groundsthat the Petitioner has not particularized the results complained of".The Court analyzed the contents of Rule 10(1) of the Election Petition Rules (now Rule 8) and theJohn Mututho Case first cited above, as well as the Amina Hassan Ahmed decision, which hasalso been cited herein above, and then at Paragraph 92 continued thus:-"…..On an application to strike out the Petition, Onyancha J held that heinformation left out of the Petition was so vital that the Petition as it stood couldnot be rescued by the provisions of Article 159 (20 (d) and further;That the Petition was so hopeless that even if amendment was possible, under thelaw, the same could not be rescued by any such amendment. The Petition wasstruck out with costs."15. After such a detailed analysis as above, on that issue Sitati J concluded and held as follows:

The 1st and 2nd Respondents submit that since Rule 10 of the Rules clearly sets out the contents and form of an election Petition a Petitioner has to comply with the same so as to give a chance to the Respondents to know what case they are faced with. That where material particulars are not included in the Petition then such a Petition is fatally incompetent and must be struck out.

They argue that this Petition is defective and incurably for failure to state the results of the election that the Petitioner is challenging. Also the manner of declaration of those results, the number of candidates in the contest, and votes garnered by each candidate in that election, are all necessary matters of content that must be disclosed in an election Petition. They are all missing from this Petition.

They cited authorities where courts have in recently dismissed Petitions that had been filed without due compliance with Rule 8 and 12 of the Election Petition Rules 2017. That in the case of ***Jimmy Mkala Kazungu vs IEBC*** Justice M. Thande in Election Petition No. 9 of 2017 held as follows;

> "In order to determine whether the petitioner has complied with the mandatory requirements of Rule 8(1) of the Election Petition Rules, all this court is required to do is look at what is contained in the petition against the provisions of Rule 8(1)..... The requirements in Rule 8(1 of the Election Petition Rules are coached in Mandatory terms. It is noteworthy that the same requirements are replicated in Rule 12 (2) of the Election Petition Rules which state that the affidavit in support of a petition shall state the very same things that are to be stated in a petition To my mind the requirements to state the listed matters applies to both the petition and the Affidavit. It is not question of either or but applies to both the Petition and the Affidavit. It is not a question of "Either or" but a matter of "both and". The listed matters must be in both the petition and the supporting Affidavit. In view of the foregoing, this court finds that the petitioner failed to comply with the express and mandatory provisions of Rule 8(1) of the Elections (parliamentary & county Elections Petitions Rules 2017. it must follow therefore that the petition herein is incurably defective and allowing the same as presently drawn to proceed to trial would be an abuse of the court process)"17. The Petitioner has under Paragraph 3 of his Replying Affidavit claimed that the present application before the court is incurably defective for failure to having been supported by an Affidavit. This misses the point as to the function of a Supporting Affidavit to an application. The Supporting Affidavit is necessary and desirable where the Application raises material facts not on the face of the pleadings and when such a fact is likely to fall in dispute. The application raises and is based on factual matters strictly disenable on the face of the Petition and the Affidavit in support thereof by the Petitioner.

In response to the petitioners submission that the application should be dismissed for failure to annex a supporting affidavit their response was that this was not a requirement that should lead to dismissal of an application. They referred to the case of ***Samuel Kazungu Kambi & Anor v Nelly Ilongo and 4 others*** (unreported) cited by the petitioner and argued that is distinguishable to the extent that the main issue for determination in the application before Justice Korir was striking out of the Petition for want of security deposit and obviously that was a factual matter that called for evidence to verify the fact of the deposit having been effected or otherwise.

They referred to the decision of Justice J. Kamau in ***Skair Associates Architects v Evangelical Lutheran church of Kenya & 4others*** [2015] eKLR which stated that in the face of such an objection to an application filed without a Supporting Affidavit.

> "It is clear… that it is not all motions that can be supported by an affidavit. Indeed no affidavit evidence is required were an application has raised points of law. An affidavit is, however, necessary were the motion is to be supported by evidence." In this regard they argued, the court did not wholly conquer with the Plaintiffs submissions that an application that was not supported by an affidavit was incurable defective as there are clear instances when such affidavit evidence is not required."

The 3rd Respondent's Submissions

According to the 3rd Respondent, the Elections Act and the Rules thereunder made are direct derivatives of the Constitution. 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. From the foregoing provisions, he states, it is clear that results as defined are a key ingredient of an election Petition and any Petition questioning elections must particularize the results of the election as declared.

It is also imperative to note that the provisions are worded in mandatory terms. Thus, the legislature intended that results must be part and parcel of any Petition questioning the validity of an election. In his view, an election Petition essentially questions the results of the election as declared. Therefore, in the absence of this important component of an election, the present Petition, he submits is defective and incompetent and cannot be remedied as the same is a nullity by virtue of the provision of Article 3 of the Constitution.

A perusal of the Petitions shows that it does not state the number of votes cast in favor of each of the candidates who participated in the questioned election. The total votes cast in the election is also missing hence deficient of the following mandatory requirements as decreed by law and also that the (tabulated) results of the Election as declared is not stated/given in the entire Petition.

Similarly, the Supporting Affidavit of the Petitioner Theophilus Kalama Fondo it is submitted, is deficient of the very germane mandatory requirements of matters which such affidavits should contain, as more specifically set out in Rule 12(2) (c) and (d) of the Election Petition Rules 2017. The double failure (on the body of the Petition and the Supporting Affidavit) on the part of the Petitioner to comply with the mandatory requirements of the law cited above thus makes the entire Petition wholly defective, incompetent and incurable.

The 3rd further submitted that the above requirements by the law are not mere technical requirements limited to procedural form as they are substantive in nature which go to the root of the Petition. He cited the Supreme Court case of ***Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others*** [2014] EKLR where the learned Judges stated as follows;

> "Bearing in mind the nature of election petitions, the declared election results, enumerated in the Forms provided, are quantitative, and involve a numerical composition. It would be safe to assume, therefore, that where a candidate was challenging the declared results of an election, a quantitative breakdown would be a key component in the cause (Emphasis Ours). It must also be ascertainable who the winner, and the loser (s) in an election, are''

He further places reliance in the Court of Appeal case of ***Mututho v Jane Kihara & Others*** [2008] 1 KLR 10 where the court of Appeal stated that:

> "Election petitions are special proceedings. They have a detailed procedure and by law they must be determined expeditiously. The legality of a person's election as a people's representative is in issue. Each minute counts. Particulars furnished count if the petition itself is competent, not otherwise. Particulars are furnished to clarify issues not to regularize an otherwise defective pleading. Consequently if a petition does not contain all the essentials of a petition, furnishing of particulars will not validate it. Section 20 of the Act is clear that any amendment of a petition can only be legally done within 28 days. No supplemental petition was filed in terms of S.20 (3). Besides, the petitioner does not have results even now. Her advocate stated as much. If she does not have the results, what is she challenging? The issues she raises are meant to nullify a particular result. But if she has not given the results, any findings on the issues raised will serve no useful purpose. Any evidence adduced or to be adduced is intended to show that certain irregularities affected the outcome of the election, but without the result it might not be possible to relate the irregularities to the result."

He submitted further that in ***Amina Hassan Ahmed v Returning Officer Mandera County & 2 Others***, Election Petition (Nairobi) No. 4 OF 2013, the court declined to allow the petitioner to amend the petition

and proceeded to strike it out. The same philosophy and line of reasoning permeated through the case of ***Evans Nyamboso Zedekiah & Another vs Independent Electoral and Boundaries Commission & 2 Others*** 2013 eKLR, ***Bernard Mwendwa Munyasia –vs- Charity Ngilu & others – Machakos*** Election Petition NO.1 of 2008 (unreported). Further the Petitioner filed tabulated results as annexures to his Petition, and if this is allowed it would gravitate against the reasoning in the case of ***Benjamin Oguyo Andama vs Benjamin Andolo Andayi*** Election Petition No. 8 of 2013 where the learned Judge stated

> "In my view, the evidence, whether by affidavit or otherwise, is meant to support what is contained in a party's pleadings and not to expand the cause of action. Affidavits being evidence, cannot attempt to bring evidence of allegations or complaints not contained within the ambit of the petition, or the answers to petition as the case may be"

The same line of reasoning they submitted can be found in the case of ***Mwakileo -vs- Mwamzandi & Another*** Election Petition No. 25 of 1979 – the point with regard to the connection between pleadings and evidence was hammered home, when the court emphasized that "of course any attempt to give evidence of allegations not pleaded or not considered to be within the ambit of the petition will not be allowed."

As to whether the petitioners have redress under article 159(2)(d) the 3rd respondent stated that Article 159(2)(d) commands that in exercising judicial authority, the courts and tribunals Justice shall be administer justice without undue regard to procedural technicalities.

He submitted that the Petitioners might argue that its failure to particularize the results in the Petition can be cured by dint of Article 159(2)(d) and try to convince this court not pay undue attention to procedural requirement over substantive justice. He reiterated that the failure to plead results with particularity is not a mere technical objection but a substantive question that goes to the root of the Petition. He referred the court to Mombasa in Election Petition No. 9 of 2017 of ***Jimmy Mkala Kazungu v IEBC & 2 Others*** when Judge Mugure Thande when confronted with a similar application for striking out for failure to comply with the mandatory provisions of Rule 8(1) of the Elections Petitions Rule 2017 held on 13th October 2017 that "..The Petition was incurably defective and allowing the same as presently drawn to proceed to trial would be an abuse of the Court process. The same was struck out. He also cited the case of ***Nicholas Kiptoo arap Korir Salat v IEBC & 6 Others*** [2013] eKLR where it was held as follows;

> "… I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succour and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is a clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned"

The 3rd respondent closed his submission by restating that the Petitioner's Petitions is incurably defective and that its recourse is to be struck out for want of mandatory form and content. Given that, the time line for bringing any amendments to the Petitions has long lapsed. To emphasize the issue of strict compliance with the rules and the seriousness with which courts around the world treat election related proceedings he cited the Botswana decision in ***Kono & Others v The Independent Electoral Commission*** 2001(2) BLR 325 (CA) it was held that:

> "The power of courts to consider the regularity of elections is therefore not derived from any inherent jurisdiction nor does it arise from the common law but it is to be found within the corners of the electoral statute, i.e. in Botswana in the Electoral Act. In applying that Act the courts must be astute not to disturb an election, which on the face of it appears fair and regular. Persons who allege

that it was not, have of course, a democratic right to challenge it but such challenge must not be frivolous, mischievous or ill-founded but be based on substantive F grounds. In bringing an election petition, too, a petitioner must ensure that he complies meticulously with the relevant provisions of the Electoral Act. The reason for this is not hard to find. An election petition can have dramatic and far-reaching consequences. It has special significance and must not be embarked upon lightly".

The court went further to conclude that:

> "We may therefore conclude that the Legislature did not desire an election to be set aside lightly; it regarded it as a matter in which the court should act with particular caution and circumspection; no matter how grave the mistake or non-compliance may be the Court may declare an election void except in the event mentioned in the section. " The seriousness with which the Legislature views election petitions is demonstrated by the fact that, once A lodged, they may not be withdrawn without the leave of the Court. It is accordingly essential that the requirements of bringing an election petition before court must be strictly complied with".

The 3rd petitioner appreciated that striking out a petition is drastic and painful but it must be done.

The Petitioner's Submissions

The petitioner objected to the application and preliminary objection filed by the respondents. He filed submissions and a replying affidavit in which he avers that there is substantial and material compliance to the said Rule at Paragraph 4 of the Replying Affidavit. That the issue of declaration of results, given the circumstances and the manner in which the election process was handled needs to be further ventilated and interrogated by the Court by hearing the matter fully and on merit and making a determination.

The Petitioner further contends that the Application is incurably defective as it has no Supporting Affidavit as was held by Weldon Korir J. in ***Samuel Kazungu Kambi and Anor vs. Nelly Ilongo and 4 others*** (unreported) in his Ruling on Affidavits stating that:

> "….Counsel for the 2nd Petitioner, was in my view, spot on when he submitted that the application not having been supported by an affidavit is a pleading without evidence. Without an affidavit to point out the alleged shortcomings in the impugned affidavits, the application lacks foundation and cannot succeed.

The law on striking out of pleadings the petitioner argues has been well settled by the celebrated case in the Court of Appeal of ***D.T Dobie & Company Ltd –vs- Muchina & Another*** (1982) KLR 1 in the finding of Madan, Miller & Potter, JJA wherein the court stated:-

> "No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no cause of action, and is so weak as to be beyond redemption and incurable by amendment." Madan J further stated "The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before missing a case for not disclosing a reasonable action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that function is solely reserved for the trial judge as the court itself is not usually fully informed so as to deal with the merits……. No suit ought to be summarily dismissed unless it appears so hopeless that is plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption…….a court of justice ought not to act in darkness without the full facts of the case before it"

Further the petitioner urges the court to take a general judicial view that striking out and/ or summary dismissal of a petition is such a drastic and draconian step and should only be done only in the clearest of cases where the defect is incurable and that it is not the case in this Petition as was observed by Weldon Korir J. in ***Samuel Kazungu Kambi and Anor Vs. Nelly Ilongo and 4 other***s (unreported) in his Ruling on enlargement of time to pay security for costs where he held:

> "On the other hand, it is noted that striking out a case is a drastic measure especially where the same touches on the exercise of democratic rights by the people as is the case herein. None of the Respondents shall suffer prejudice if this petition proceeds to hearing on merit."

The nature of this matter being an election petition the petitioner pleads with the court to be guided by Rules 4 and 5 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017, the objectives of which is to:

i. Facilitate the just, expeditious, proportionate and affordable resolution of elections petitions.
ii. Seek to give effect to the objective specified in sub-rule (1).

The petitioner urges the court to exercise its discretion in accordance with the provisions of Article 159 (2) (d) of the Constitution. They submit that the Petition filed herein have not attained that threshold to warrant striking out and more importantly, the Applicant has failed to show that the said defects are so material as to render the Petition incurably defective and hopeless.

On compliance with Rules 8 and 12 the petitioner refers to the holding by Weldon Korir J. in ***Samuel Kazungu Kambi and Anor vs. Nelly Ilongo and 4 others*** (2017) (unreported) stating that:

> "My take is that whereas there is need for strict compliance with the laws and rules governing the resolution of election disputes, the court should always be mindful of the fact that the current constitutional dispensation requires substantive justice to be done. Unless an election petition is so hopelessly defective and cannot communicate at all the complaints and prayers of the petitioner, the court should ensure that the petition is heard and determined on merit."

He submits that this court has discretion as enshrined under Article 159(2) of the Constitution to excuse minor or trivial deviations or omissions from any mandatory terms set out in a petition. (***Hosea Mundui Kiplagat v Sammy Komen Mwaita & 2 Others***, Election Petition (Nairobi) No. 11 of 2013).

Finally the petitioner prays that the application be dismissed with costs.

The Law, Issues and Analysis and Determination

I have carefully considered the application together with the preliminary objection, the grounds of the application, the affidavits filed, the submissions by all parties and the authorities cited.

The following are the issues for determination by this court:

- ***Whether this application should be struck out and or dismissed for failure to include a supporting affidavit.***
- ***Whether the petitioner has complied with the requirements of Rule 8 and 12 of the Election (Parliamentary and County) Petition Rules***
- ***What is the consequence of failure to comply with the rules?***
- ***What orders should be made on costs?***

Whether this application should be struck out and or dismissed for failure to include a supporting affidavit.

On the first issue for determination, the petitioner in his submission had stated that the application is incurably defective as it has no supporting affidavit. He cited the case of **Kazungu Kambi.**

A reading of the learned Judge's comments are indicative that in the case his lordship was referring to affidavits had been filed but were impugned and NOT that they had not been annexed *ab initio*. The learned judge did not make a finding that applications must be supported by affidavits. The case in my

considered view has been quoted by the petitioner out of context. It is common place that applications can be either supported by affidavit or grounds if the issues for determination are purely points of law hence no need to state facts. I agree with the 2nd and 3rd respondents' submission in response to this point. I am guided by the decision of Kamau J in ***Skair Associates Architects v Evangelical Lutheran church of Kenya & 4others*** [2015] eKLR which stated "that it is not all motions that can be supported by an affidavit…An affidavit is, however, necessary were the motion is to be supported by evidence...there are clear instances when such affidavit evidence is not required." I find that there is no justifiable ground upon which this court can strike out this application. It is properly on record and the court will consider it.

- ***Whether the petitioner has complied with the requirements of Rule 8 and 12 of the Election (Parliamentary and County) Petition Rules and the consequence of non-compliance.***

The issue of non-compliance and subsequent consequences are intertwined and will be analyzed interchangeably. In order to answer the first question it is imperative that some definitional issues be disposed of first so as to place the issue in perspective. The respondents rely on the provisions of the Elections Act, Election Petition Rules and Elections General Regulations.

Section 2 of the Election Act states that *"Election results means 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.

Rule 8(1) of the Election Petition Rules applicable in this Court provides that an election Petition shall state:-

(b) The date when the election in dispute was conducted.

(c) The results of the elections, if any, however declared

(d) The date of the declaration of the results of the election.

Similarly Rule 12 of the said Rules makes provision in this manner. According to Rule 12(2), an affidavit in support of a Petition under Sub-rule (1) shall state:-

(c) The results of the election, if any, however declared,

(d) The date of the declaration of the results of the election.

In the case of Supreme Court conclusively answered the question - '"What is the meaning of 'declaration of election results'", It restated the definition outlined in the case of ***John Njenga Mututho vs Jayne Kihara & 2 Others***, Civil Appeal No. 102 of 2008 as correct. The learned judges stated that the time of filing election Petitions is governed by Article 87(2) of the Constitution, and is predicated upon the date of declaration of the results of the election.

> "The marginal note to regulation 40 reads, Announcement of results. A careful reading of that regulation clearly suggests that the **result is not confined to just declaring who won.** The detailed result is what is envisaged. The regulation deals with **votes cast, votes spoilt, and those garnered by each candidate**. So when rule 4(1) of The National Assembly Elections (Election Petition) Rules, provides that the date of the election, the results and the grounds relied on must be stated it does not merely connote stating the name of the winner as Mr. Kihara suggested. It is clear from rule 4(1) (b), above that the issue in any election petition is the result of the election" [emphasis mine].

In the present case paragraph10 of the petition and paragraph 4 of the Petitioner's affidavit in support of

the petition reads thus;

> "The second respondent declared the third respondent as the winner of the said elections held on the 8th August 2017 on 10th August 2017 having purportedly garnered a total of one thousand four hundred and eighty eight (1488) votes closely followed by the petitioner who allegedly garnered one thousand three hundred and forty (1340) votes…"

Clearly the **votes cast, votes spoilt, and those garnered by each candidate** are not included in this definition. It is for this reason that the petitioner in his submissions is pleading with this court to accept the substantial material compliance and further to excuse minor and trivial deviations or omissions from any mandatory terms set out in the petition. That in my considered view is an admission that there are mandatory provisions demanded by the rules and that the same have not be complied with.

It is for this reason that the petitioner now invites the court to set in motion the provisions of Article 159(2) of the Constitution and by extension the oxygen rules and the overriding objectives) to salvage the error and allow the petition to be heard to its logical conclusion. I therefore find that the mandatory provisions of the rules have not been complied with by the petitioner.

That takes us to the next issue of the consequences of failure to comply with the rules. The decisions that have been handed down to the subordinate courts with respect to the effect of non-compliance with the rules are dichotomous. I have very carefully read and internalized the reasoning and analysis of the superior courts. One view is that failure to strictly comply with rules 8 and 12 of the Election Petition Rules renders an election petition incompetent and fatally defective. This I will refer to as the **strict view**. The other school of thought is of the view that failure to comply with the provisions can be ameliorated by article 159(2) (d) of the constitution. This I will refer to as the **liberal view**.

Korir J in ***Samuel Kazungu Kambi and another v IEBC and three others Election Petition No. 5 of 2017*** has now come up with what his lordship refers to as the **third view**. He finds that the two initial schools of thought are to some extent correct. He distinguishes his view from the others by arguing that the strict view were most probably arrived at based on the fact that the election petitions in those matters were so hopelessly inadequate that a hearing could not have been sustained on such pleadings. He is of the view that

> Whereas there is need for strict compliance with laws and rules governing the resolution of election disputes, the courts should always be mindful of the fact that the current constitutional dispensation requires substantive justice to be done. Unless an election petition is so hopelessly defective and cannot communicate all the complaints and prayers of the petitioner, the court should ensure that the petition is heard and determined on merit…where the respondents are in a position to understand the petitioners case such a petition should not be dismissed even if there are slight omissions and deviation from the rules….requiring parties in election disputes to strictly comply with electoral law whereas other litigants are treated with kids gloves will result in double standards that may not augur well with the judicial system."

The learned judge concludes that electoral disputes are no different from ordinary litigation and with respect to application of Article 159 (2) (d), the overriding objectives and oxygen principles should apply *mutatis mutandis*. The petitioner in his submission has urged this court to be guided by the reasoning of the **Kazungu Kambi** case and allow the petition to be canvassed by way of hearing and not strike it out as requested by the respondents.

The learned judge cites with approval Kanyi Kimondo J's ruling in ***William Kinyanyi Onyango V IEBC & 2 Others 2013 EKLR***. There are several other cases that align themselves to this view. They are Majanja J. in the case of ***Caroline Maweu Mwandiku v Patrick Musimba and 2 others*** and ***Richard Kalembe Ndile v Patrick Musimba Maweu***; Maina J in ***Washington Jakoyo Midiwo v IEBC and 2 others*** [2017] Eklr

The strict school of thought also has very many adherents. The Supreme Court had occasion to deliberate

of this issue at hand in the case of ***Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others*** [2014] EKLR. The learned judges were of the view that where a petition is challenging the result of an election the quantitative breakdown of the votes cast is a key component to the cause so that at a glance one sees who is the winner and loser(s) and by what number of votes. This view was cited with approval in the case of ***Amina Hassan Mohammed v Returning Office Mandera County and 2 others [2013] eKLR.*** The judges case reiterated their awareness of the Article 159 (2) (d) but went ahead and categorically stated that:

> This petition is a creature of special legislation. The Elections Act. It is not an ordinary civil suit ordinary civil procedure principles arising from interpretation of a civil procedure act and rules may not be applicable….this fault lies with the petitioner or her counsel who for insufficiently explained reasons failed to appreciate the mandatory requirements of the law when drafting and filing the petition

In ***Evans Nyamboso Zedekia and Another v IEBC and 2 others*** eKLR it was held that failure to give particulars are not mere technicalities but a defect fatal to the petition. In ***Jimmy Mkala Kazungu v IEBC and 2 others Petition No. 9 of 2017*** (Mombasa) the election date results and manner in which the results were declared were not stated in the petition, Thande J declined the invitation to by the petitioner to overlook this omission in the petition and deem the supporting affidavit as part of the petition for purposes of fulfillment of the mandatory requirement of rule 8(1) and found that the petitioner failed to comply with the express mandatory provision of rule 8(1) of the Election Rules.

In ***Hon. Martha Wangari Karua v Hon Joseph Gachoka Gitari & 3 Others*** Petition No, 2 of 2017 [Kerugoya] Gitari J while striking out the petition for failure to disclose election results stated thus:

> I am of the view the overriding objective is for electoral dispute to be settled in a timely manner. As such parties to a petition must avail all what is needed to achieve those objectives… The requirement under rule 8 (1) of the Rules are not mere technical requirements, they are substantive as they go to the root of the issue before an election court. A petition which has failed to state the date of declaration, the results of the election and how declared is fatally defective and beyond salvage.

In ***Mbaraka Issa Kombo v IEBC and three others*** Petition No. 10 of 2017 Malindi, the petition was truck out for want of form by Otieno J. He stated that:

> "It is not in vain that the Rules Committee has devoted two distinct but elaborate rules on what ought and must be stated in the petition and the affidavit. I hold the view that the overriding consideration is that the constitutional principle that that election dispute ought to be settled in timely manner. That dictate obliges the parties to a petition to avail all that is needed in clear and easily discernible manner so that the court employs no time in second guessing or just making assumptions. I hold that the sum total of article 87(2), section 76(1) of the Election Act and Regulation and rules made thereunder leave no doubt that a petitioner is obligated to give as much detail as possible and not less than the benchmark at rules 8(1) and 12(2).If timelines in determination of electoral disputes is a norm and principle of the constitution then all further such norms and principles are themselves derivative of the constitutional ethos and must of necessity be complied with to the letter.

Also see Onyancha J in Amina Hassan Case. ***Nicholas Kiptoo Arap Korir Salat v IEBC and 6 others*** [2013 eKLR and ***Zakaria Okoth Obado v Edward Akongo Oyugi & 2 others*** [2014] eKLR among many other cases are categorical that the court will not exercise discretion pursuant to article 159(2) (d) of the constitution of Kenya to excuse minor trivial and/or petty deviations from strict non-compliance with election Petition Rules and other mandatory requirements

Thus, this being a subordinate court it is my duty to follow precedent. The issues and the law are similar. The contexts are election petitions, and the *ratio decidendi* in each of the above cases however dichotomous are not distinguishable from the case before me. It therefore behooves me to align myself

with a specific school of thought. It is not in my place to critique that school of thought I choose not to be bound by, be it the strict, liberal or the third view. Like Korir J correctly stated the schools of thought now including the Third View are correct within the contexts to an extent. Even the Court of Appeal is divided on this issue (see the ***Nick Salat Case*** with a majority and dissenting opinion).

I will not attempt to unpack how each school sits within its context. Indeed each case is to be decided on its own merits. However in the above cases I did not find any instance where a judge has actually declared a petition before it is hopelessly defective and dismissed it, to enable this court to compare the issues before it with that case. None was brought to my attention in the submissions filed, this is not to say that no such case exists probably there could be limitations abounding.

What I am certain about is that the issues before me in this case are similar to the issues which have been canvassed before the superior courts in cases cited above. Almost all the authorities cited are post 2010 cases meaning that they were decided within the new constitutional dispensation and the new judicial order. I desisted from placing too much reliance on the pre-2010 authorities in view of the constitutional context within which they were decided. However I am aware that the substantive normative order has not changed much in spite of the shift in the constitutional order. Jurisprudence in this area as evidenced in the recent dichotomous decisions robustly developing and with time the issues will settle and clarity will emerge on this issue as the country grapples with more election petitions and lessons get learnt. For the subordinates courts ours is not to make law but follow the laws already made by the superior courts.

Be that as it may and there being no justification to depart from the three schools of thought, I am persuaded to align myself with the strict school of thought. I am very much alive to the caution issued by the learned judges in the case of ***Raila Odinga and 5 Others v IEBC 2013*** eKLR not to view article 159 (2) (d) as a panacea for all procedural technicalities.

With utmost respect to the liberal school of thought I am of the considered view that election petitions are special cases with specific timelines. Because the timelines are so strict pleadings are required to be a clear and as accurate as possible with little room for allowing petty errors that could lead to lengthening the time taken to determine these cases. That is why the rules are couched in strict and mandatory times.

The petitions occupy a very special place in the diaries of judicial officers and more so other ordinary cases are being pushed almost to the back banner to allow for petitions to be heard and determined more expeditiously than the other cases. Room for amendments and evidence that will eat up on this speed is therefore limited as compared to other ordinary cases.

Pleadings that are misleading like the current one wherein the petitioner gives an impression that this election for Garashi Ward was a two horse race and other contestants (8 in number) are blacked out and the total votes counted are not indicated in the face of the petition is a grave violation of the rules yet all that information was available immediately the gazette notice was issued.

A careful perusal of the petitioner's affidavit does not reveal any reason why the petitioner did not provide the information, Probably if he gave good reasons why he was not aware of the result on the announcement date for example that his agents were not availed the same or maybe there was violence or maybe that it was verbal and the declarations were not signed then the court would find good justification to salvage his case and those issues would be canvassed at the trial. He does not justify why he did not follow up on information that was easily available on the 10th August 2017 two days after announcement.

His argument that there is no provision in the law requiring the details is *per incuriam* of the law as laid down in the Joho case by the Supreme Court where the term election result is clearly defined. He is represented by counsel and I need not say more. His replying affidavit is therefore in sharp contradiction with his affidavit in support of his petition.

For example the Petitioner in this suit is seeking a recount of votes yet the results are not tabulated in the face of the petition neither are they detailed in his affidavit therefore how will this be reconciled by way of annexures? In the case of ***Andama vs Benjamin Andolo Andayi*** Election Petition No. 8 of 2013 the

learned Judge was of the view that:

> "…the evidence, whether by affidavit or otherwise, is meant to support what is contained in a party's pleadings and not to expand the cause of action. Affidavits being evidence, cannot attempt to bring evidence of allegations or complaints not contained within the ambit of the petition, or the answers to petition as the case may be"

I would want to believe that this is why failure to provide details is being treated very seriously by the judges of the strict school of thought. That is why in these cases the extent of non-disclosure has not been measured to serious or less serious. Once there is a finding that there is non-compliance the adverse consequences should therefore kick off. That is why none of the authorities in this school of thought have advised or considered a lesser transgression which if it occurred then a contrary consequence would be considered.

I have found that the petitioner has failed to give detailed results of the election results both in the petition and the affidavit. Consequently the petitioner having failed to comply with the law in this regard, I have to reluctantly "wield that painful knife and chop off the head" of this petition as Lenaola J (as he then was) said in ***Bernard Mwendwa Munyasia v Charity Ngilu and Others***

Consequently I order that:

1. The Petition of by **Theophilus Kalama Fondo** dated 6th September 2017 and filed in Court on 6th September 2017 against **Peter Ziro Ngowa** be and is hereby struck out

2. The costs of the petition to be borne by the petitioner and capped at 1,500,000/-

It is so ordered.

Hon. Dr. Julie Oseko

CHIEF MAGISTRATE

24th November 2017

Dated, delivered and signed in open court at Malindi this 24th day of November 2017 in the precence of :-

Petitioner/Advocate - M/s Muhonja holding brief Mr. Gicharu

1st Respondent/Advocate - M/s Owiti holding brief Mr. Nyongesa

2nd Respondent/Advocate

3rd Respondent/Advocate - Ms Aoko Otieno

Hon. Dr. Julie Oseko-

CHIEF MAGISTRATE

24th November, 2017