



REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATES COURT

AT NYAHURURU

ELECTIONS ACT 2011

ELECTIONS (PARLIAMENTARY AND COUNTY

ELECTIONS) PETITION RULES, 2017

ELECTION PETITION NO.2 OF 2017

IN THE MATTER OF: ARTICLES 22(1) & (2)(B)(C), 23, 24, 38, 82,

252, 253(b), 258, 260 OF THE CONSTITUTION OF KENYA 2010

IN THE MATTER OF: THE CONTRAVENTION AND VIOLATION

OF ARTICLES 10(2) (b), 27(4)(6), 54, 55, 56, 90, 177

and 193 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF: SECTIONS 34, 35,

36, and 37 OF THE ELECTIONS ACT

IN THE MATTER OF: THE INDEPENDENT ELECTORAL

AND BOUNDARIES COMMISSION ACT, 2011

DAVID NDUNGU NDEGWAH.....PETITIONER

AND

THE INDEPENDENT ELECTORAL

AND BOUNDARIES COMMISSION.....1ST RESPONDENT

JUBILEE PARTY.....2ND RESPONDENT

MARGARET WANJIRU IRERI.....3RD RESPONDENT

GEOFFREY NGARUIYA KARIUKI.....4TH RESPONDENT

ESTHER WANJIKU MUHOHO.....5TH RESPONDENT

JOSEPH KARIUKI WAITHERA.....6TH RESPONDENT

RULING ON PRELIMINARY OBJECTIONS

Introduction

There are two preliminary objections raised in this petition, which were filed by counsel for 4th respondent and counsel for the 3rd, 5th and 6th respondents. The preliminary objections raise similar ground and therefore directions were taken to handle them together.

The 4th respondent filed a Preliminary Objection application dated 29th day of September 2017 and filed in court on 2nd October 2017 stating that they are objecting to the petitioners petition seeking to have the nomination of the 3rd, 4th, 5th and 6th respondents herein declared unconstitutional, therefore null and void. The 4th Respondent filed a preliminary objection in *limini* on the following grounds:

1. THAT the Honourable Court herein lacks Jurisdiction to hear and determination this Petition as it is premised as violation of some Articles in the Constitution of Kenya 2010 and for this reason the Original Jurisdiction lies within the High Court's Constitutional and Human Rights Division whereas an Election Petition should be premised when ballots were casted by the Voters as per the provisions of the **ELECTION ACT, 2011(No. 24 of 2011)**, and **THE ELECTIONS(PARLIAMENTARY AND COUNTY ELECTIONS) PETITIONS RULES, 2017** which statutes provide rules to apply only where a contest regards members who were elected through the ballot and casting of votes as opposed to Nominated members.
2. THAT the Petition filed herein is fatally defective, incompetent, bad in law as the Election Petition Rules 2017 provides that there ought to be a supporting affidavit particularly in **Rule 12(1) a, b, (2) a, b, c, d, e, f, (3) & (4)**. **And further no leave was granted by court to allow the Supporting Affidavit filed on the 27th day of September, 2017 and which leave a court can't allow going by the express provisions of Section 19 (2) THE ELECTION (PARLIAMENTARY AND COUNTY ELECTIONS) PETITIONS RULE 2017.**
3. THAT the **ELECTION PETITION** filed herein seeks prayers that by law are to be sought only in a Constitutional Petition and therefore contravenes the intention and rationale behind **Section 8(3) a, b, c, d, e, & f of THE ELECTION (PARLIAMENTARY AND COUNTY ELECTIONS) PETITIONS RULE 2017.**
4. THAT the Election Petition is wholly incompetent, misconceived, unprocedural, lacks merit and is an abuse of the court process as is both bad in law and incurably defective.

The above Preliminary Objections above are supported by a Supporting Affidavit sworn by 4th respondent **GEOFFREY NGARUIYA KARIUKI** on **29th September, 2017**.

The 3rd, 5th and 6th respondents filed a preliminary objection on the grounds that:

1. THAT the Honourable Court herein Lacks Jurisdiction to hear and determine this matter as Section 74(1) of the Elections Act and Section 4 of the Independent Electoral and Boundaries Commission Act make it explicit and mandatory for disputes arising from nominations to be heard and determined only by the Independent Electoral and Boundaries Commission (I.E.B.C).
2. THAT under Article 88(4)(e) of the Constitution, the I.E.B.C is responsible for settlement of electoral disputes including disputes relating to or arising from nominations.
3. THAT the I.E.B.C has therefore the exclusive jurisdiction to hear and determine disputes relating to nominations.
4. THAT the Constitution, the Independent Electoral and Boundaries Commission Act and the Elections Act establish a dispute resolution procedure that must be strictly followed before this Honourable Court is called into action.

The Petitioner herein David Ndung'u Ndegwah filed this petition on 5/9/2017, challenging the nominations of the 3rd to 6th respondents as nominated members of Nyandarua County Assembly. The 2nd respondent, Jubilee Party, submitted a list of 8 nominees to the 1st respondent, Independent Electoral And Boundaries Commission (herein referred as IEBC) that included the 3rd to 6th respondents for nomination as members of Nyandarua County Assembly.

The 1st respondent published the list of the nominees of 23rd of July 2017 in the Sunday Nation. The list of the nominees is indicated in the petition in paragraph 29. After the General Elections on 28th August, the 1st respondent gazetted the 3rd to 6th respondents as nominated members on Jubilee Party to Nyandarua County Assembly. And as per the list attached to the petition, the 3rd to 6th respondents were listed from number 1 to 4 respectively on the list.

The petitioner filed this petition seeking the court to issue a mandatory injunction to the 1st and 2nd respondents to scrap or nullify the said nominations as not having followed the law or the constitutional requirements. He also seeks the court to declare that the party list of the nominees was unconstitutional by failing to prioritize the representatives of persons with disability and the youth as required under the Constitution. He also seeks the court to order the 2nd respondent to reconstitute the party list and forward it to the 1st respondent which list will include the petitioner as a person with disability in the priority category and also fill the other positions as provided under section 36 of the Elections Act, 2011. He also seeks the court to declare that the names of nominated members of Nyandarua County Assembly as published by the 1st respondent in the Kenya Gazette Volume No.CXIX – 124 dated 28/8/2017 in which the 3rd to 6th respondents were gazetted be declared unconstitutional and therefore null and void. He further asks that the court do any other relief that it may deem just and expedient to grant and also costs of the petition to be awarded to the petitioner.

Basically he is challenging the nomination of the 3rd to 5th respondents which he is seeking to be set aside.

The petitioner did not file a supporting affidavit with the petition at the time of filing the petition on 5/9/2017. He filed the supporting affidavit on 27/9/2017 after the 3rd, 5th and 6th respondents had filed a response.

Counsels for the 1st respondent, 4th respondent as well as the counsel for the 3rd, 5th and 6th respondents filed Preliminary Objections asking the court to strike out the petition with costs. The said preliminary objections have been listed above.

It was agreed that the preliminary objections be handled together by way of oral submissions. Oral submissions were made on 22/11/2017. Before that on 8/11/2017 the counsel for the petitioner had orally applied for an interlocutory judgment to be entered against the 2nd respondent who had not entered appearance or filed a response to the petition after it was served by way of advertisement. The Counsel for the 1st, 3rd, 4th, 5th and 6th respondents objected to the application and raised the issue of the petition being incompetent on the basis that the supporting affidavit had been filed after the period to file the petition had passed. At that point the respondents counsels made substantial submissions on lack of supporting affidavit to the petition and why interlocutory judgment cannot be issued and they asked the court to dismiss the petition. The court made a ruling declining to grant the prayer for interlocutory judgment and deferred the issue of supporting affidavit to be argued at the time of hearing the preliminary objections. When the oral submissions on the preliminary objections were being made on 22/11/2017, the court was referred to also look at the oral submission that had been made on 8/11/2017.

The first to start the oral submission was Mr. Karanja, counsel for the 3rd, 5th and 6th respondents. He argues that this court has no jurisdiction to determine this petition because when you look at the petition, especially paragraph 28, 29 and 30, the petitioner is applying that the party list that was submitted by the 2nd respondent to the 1st respondent violates the provisions of the Constitution and therefore the proper court to deal with such prayers is not this court. That paragraph 30 of the petition is where the gist of the petition is because the petitioner is saying that he applied but was never listed. He states that a party who was offended by that list was supposed to apply to IEBC as per the provisions of article 88(4)(e) of the Constitution and section 74 of the Elections Act, 2011. Submits that under Article 88 of the Constitution and section 74(1) of the Elections Act, 2011, the petitioner should have gone to IEBC to challenge the list but he chose not to do that if he was dissatisfied with the party list. Therefore he was not supposed to file this petition before this court. He referred to **Election Petition No 83/2015. Isaiah Gichu Ndirangu V. IEBC and 4 others (2016) eKLR**; where in paragraph 40 the court evaluated where a person who was aggrieved by a nomination should take his complaint to. And that in paragraph 48 of that decision the court set out various organs that are mandated to resolve such disputes and they include the Political Parties Dispute Tribunal and IEBC. He states that the court in that decision said that where a person has a dispute arising from a nomination, the first place to go to is IEBC.

Another petition he referred to was **Josiah Taraiah kipelian Ole Kores V David Ole Nkediye and 3 others (2013) eKLR**, where the petitioner was challenging academic qualification of a candidate for nomination as deputy governor. And the court said that, the petitioner failed to use the prescribed procedure provided by law by failing first to refer the matter to the IEBC.

Another election petition he referred to was **Stanley Kilimo kore V Edward Katama Ngeywa and 2 others (2013) eKLR**, where the court held that the petitioner had not invoked the proper procedure and that he ought to have approached the IEBC to settle the nomination issue.

Based on those authorities which the court was asked to consider, the counsel for the 3rd, 5th and 6th respondents urges this court to strike out the petition on the basis that it has no jurisdiction to handle the petition.

The counsel for the 3rd, 5th and 4th respondents also submitted on the issue of the supporting affidavit stating that this petition was filed without a supporting affidavit. He states that when the petition was filed on 5/9/2017 it had no supporting affidavit and that the supporting that was filed on 27/9/2017 is incompetent. He referred to The Election (Parliamentary and County election) Petition Rules, 2017 (The Rules). He states that Rule 12 provides that a petition shall be supported by an affidavit. In fact the rules provide as follows;

12. (l) A petition shall be supported by an affidavit which Affidavit shall,

(a) Set out facts and grounds relied on in the petition; and

(b) Be sworn personally by the petitioner or by at least one of the petitioners, if there is more than one petitioner.

Therefore an affidavit in support of a petition is part and parcel of a petition and without it the petition becomes incompetent. He states that a petition has a time frame within which it must be filed and that it must be filed within 28 days. Therefore as you file a petition you also file a supporting affidavit in support of the Election Petition. That the Petition was filed in time, within 28 days on 5/9/2017, but the supporting affidavit was filed 22 days later and it was outside the 28 days required to file a petition. This is because the gazette of the 3rd to 6th respondent as nominated members of the Nyandarua County Assembly was published on 28/8/2017.

Therefore 28 days started running from that date. By the time the supporting affidavit was filed it was outside the 28 days. He refers the court to the Constitution, 2010, the Elections Act, 2011 and The Election (Parliamentary and County elections) Petition Rules. He also refers to the case of David Wamatsi Omusotsi V R.O Mumias East Constituency and 3 others, election petition No.9 of 2017; where the court struck out the petition in its entirety because it was not supported by a competent affidavit. He states that the court made a finding that a petition that is not supported by an affidavit is not a competent petition and that an affidavit in support of a petition is a mandatory requirement. He states that this petition is not supported by a competent affidavit because the supporting affidavit was filed outside the statutory period required to file the affidavit.

He submits that by the time the supporting affidavit was filed the election petition was already dead due to lack of a supporting affidavit, that an affidavit cannot be filed to resuscitate a petition that is already dead. He urges the court to find that the supporting affidavit is improperly on record and strike it out together with the petition.

Mr. Maina, Counsel for the 4th respondent in support of the preliminary objection filed in court on 2nd of October 2017, also submits that the

petition should be struck out because it is not supported by a competent affidavit. And he asks the court to look at the record because he had earlier submitted on this issue on 8/11/2017. He submits that the petitioner filed his supporting affidavit late; about 22 days after the petition was filed and outside the stipulated 28 days within which to file a petition.

He submits that the petitioner did not seek leave of the court to file the same. He submits further that even if the petitioner would have sought leave of the court, the court would not be able to grant it because an election petition such as this one has a time limit within which it must be filed and that this court does not have power to extend the timelines within which an election petition must be filed. Therefore the court would not have granted leave to file a supporting affidavit outside the time limit. He refers the court to the **Election Petition No.2/2017 at the High Court in Kiambu**, where the High Court considered the provisions of rule 19(2) of The Rules on the issue whether the court has powers to extend the time within which a petition can be filed, heard and determined and the court said that it cannot extend such time. He also refers to rule 5 of the Rules.

As to whether a petition can stand alone without a supporting affidavit, he submits that it cannot because the law is very clear that there must be a supporting affidavit and in support of this he refers to the case of **Patrick Ochieng Obachi and 6 others V Kenya Anti Corruption Commission (2010) eKLR**, where the court observed that failure to file a supporting affidavit is a fatal technicality as it goes to the root of the petition.

He also refers to the Case of **Charles Okello Mwanda V EACC and 3 others (2014) eKLR**, where the court held that, the requirement that a petition be accompanied by a supporting affidavit is not a procedural technicality as the affidavit contains the evidence a party wishes to rely on and the court held that a petition filed without a supporting affidavit is totally defective.

He further submits that this court lacks jurisdiction to properly handle the petition because the prayers sought by the petitioner are purely constitutional and human rights issues. That in such a case, it is only the High Court under the Constitutional and Human Rights Division that can properly handle the petition.

He further states that the petitioner is raising issues of nomination that ought to have been handled by the IEBC and not this court. He supports the preliminary objection raised by counsel for the 3rd, 5th and 6th respondents.

Mr Mugo who was holding brief for Mr Mbaye for the 1st respondent in support of the preliminary objection raised by the 1st respondent submits that the petitioner failed to deposit security for the payment of costs as required by law under sections 78(1) of the Elections Act. That section 78 (1) of the Elections act provides that security for costs are deposited within 10 days after presentation of a petition. He states that the petitioner filed this petition on 5/9/2017 but failed to deposit security as required within 10 days. That the petitioner deposited security for costs on 3/10/2017, which was 27 days after the petition had been filed, and that there was no application for leave to deposit the security for costs outside the required period. Therefore the failure by the petitioner to deposit the required costs within the timelines makes the petition substantially defective. That the requirement to deposit the security for costs is mandatory and substantially goes to the root of the petition. That failure to deposit the costs within the time limit is not a technicality that can be wished away or even cured under article 159(2)(d) of the Constitution, 2010.

He cited the **Election petition No 2/2017 Kiambu (Supra)**, where Justice Ngugi considered a situation similar to this petition and said that the requirement that a petitioner pays security for costs is not a technicality but a substantive question that goes to the root of the court's jurisdiction. He therefore asks the court to strike out this petition with costs because the security was not deposited within the time limit. He also supported the preliminary objections raised by the other respondents.

Mr Mbugua counsel for the Petitioner, in reply to the Preliminary Objections stated that the 1st Respondent was equally late in filing its response. He states that, however the 1st respondent sought leave of the court to file the response outside the time limit and the petitioner did not object to that. The court allowed the 1st Respondent's application to file its response outside the time limit.

On the issue of deposit of security for costs outside the time limit, the Counsel for the Petitioner states that courts have discretion to enlarge the time for depositing security for costs. He relies on the Bench book on Election Dispute Resolution where it indicates that courts have been extending the time for depositing security for costs. On the case law he relies on the case of **Charles Ongondo Were Versus Joseph Oyugi Magwanja (2013) eKLR**, the court exercised discretion in favor of the petitioner and dismiss objections on late deposit costs.

On the issue of lack of supporting affidavit Counsel for the petitioner states that while he concurs with counsels for the respondents that a supporting affidavit is essential, he does not support the application that the supporting affidavit filed by Petitioner be struck out and the petition be dismissed. He submits that they filed a supporting affidavit and that by then this court had not been constituted as an election court and there was nowhere to seek leave. He states that it does not matter whether leave was sought or not to file the supporting affidavit. That an election petition is a peculiar form of litigation and is also inquisitorial in nature and an election court would not be bound by precedence but would make its own decisions to administer justice and that courts have been reluctant generally to strike out election petitions. That the general judicial view is that summary dismissal of petitions is a drastic and draconian step that should only be used sparingly in the clearest of cases where the defect is incurable. That in the election petition of **David Wamatsi Omusotsi V R.O Mumias East Constituency and 3 others, election petition No.9 of 2017**; referred to by respondents the court struck out the petition because the supporting affidavit was incurably defective as it had not been commissioned by a qualified person. He urges the court to follow the ruling in **Election petition No. 1 of 2017 in the Supreme Court of Kenya** where the court refused to strike out certain documents that had been filed outside the time limit. He states that the Chief Justice having in mind the principle of substantive justice refused to strike out documents filed later because such a move would dispose off the entire suit at preliminary stage. That the court said that the failure to comply would not affect the way the court would dispose the petition. That in the petition before this court the respondents have not stated any real prejudice that has been occasioned by failure to file the supporting affidavit within the time.

On the issue jurisdiction he urges the court to rely on the **Supreme Court Election Petition No. 1 of 2015**, of Moses Michigan and 14 others v IEBC and 5 others. He states that the Supreme Court laid the basis that this court should follow in dealing with this petition. He urges the court to read paragraphs 66,67,68,,105,106,107,108,109,110 and also paragraphs 115 to 117 of that petition that dealt with the issue of

jurisdiction in election petitions relating to nominations of County Assembly members. That the court held that nomination for Special seats is an Electoral process and election courts are vested with jurisdiction to deal with such matters.

Counsel for the 1st, 3rd, 4th, 5th and 6th respondents responded to what the counsel for the Petitioner submitted had submitted in response to the preliminary objections and still asked the court to strike out the petition.

DETERMINATION

There are three issues for this court to determine from the preliminary objections;

- a) Jurisdiction of this court to deal with this petition
- b) Whether there is a valid supporting affidavit on record in support of the petition.
- c) Whether security for costs deposited outside the time limit and without leave of the court renders the petition defective.

On the issue of jurisdiction I wish to adopt the ruling in Election Petition No. 1 of 2017 before this because similar preliminary objections were raised that this court lacks jurisdiction. The respondents are the same in both petitions.

The court of appeal in the case of **Owners of Motor Vessel ‘Lillian S’ v. Caltex Oil (Kenya) Limited (1989) KLR 1** described Jurisdiction as;

“... Jurisdiction is everything. Without it, a court has no power to make one step, where a court has no Jurisdiction there would be no basis for a continuation of proceedings pending other evidence and a court of law downs its tools in respect of the matter before it, the moment it holds the opinion that it is without jurisdiction.”

The Supreme Court cited this holding in **Re Interim independent electoral commission (2011) eKLR**, and stated that courts should not cross over to other areas, which Kenyans specifically assigned other authorities to deal with.

It was submitted that this court cannot assume jurisdiction it does not have because that would be unlawful.

We are aware that IEBC has been tasked through the Constitution and the Elections Act to deal with disputes arising from nominations but that is before the General elections are held. It was submitted that if the Petitioners were aggrieved by the nomination they should have approached IEBC as provided under Article 88(4)(e) of the Constitution and Section 74(1) of the Elections Act. This petition was filed after the general elections had been held and the 1st respondent had gazetted the 3rd to 6th Respondents as nominees to the Nyandarua County Assembly. At that point jurisdiction passed from IEBC to the judiciary to handle election Petitions.

This court was gazetted by the Chief justice to handle this election petition. There is no dispute that what is before this court is filed as an election petition. The respondents have not challenged the powers of the Chief Justice who gazetted this court to deal with this petition knowing very well the nature of the petition it was and prayers it is seeking. I cannot overrule a legal direction given by the Chief Justice.

In the case of **David Okeka Oyugi V. Muslim Dida and 2 others (2016) eKLR**; the court stated that election petitions include such petitions that challenge the outcome of the electoral process. And an electoral process includes nominations and gazettelement of members of the County Assemblies. The 1st Respondent (IEBC) has no jurisdiction to handle an election petition such as this one because this is an election petition arising subsequent to gazettelement of the nominated members of the Nyandarua county assembly. It is my view therefore that only an election court can deal with this petition.

This question was raised in the Supreme Court in **Election petition No. 1 of 2015**, cited herein by Counsel for the Petitioner. The Supreme Court stated that a Gazette notice signifies completion of Election through nomination and finalizes the process of constituting the County Assembly in question and that it is therefore clear that publication of the gazette notice marks the end of the IEBC mandate and shifts any consequential dispute to the election court. It further stated that the gazette notice also serves to notify the public about those who have been “elected” to serve as nominated members of the County Assembly. Disputes that arise become election petitions because an “election” has taken place.

As far as the first ground is concerned as regards the jurisdiction of this court, I find that it has no basis and must fail.

The second issue still on jurisdiction is that this court lacks jurisdiction because the prayers sought in this petition raise issues on Constitutional and human rights violations. Mr Maina Ngaruiya for the 4th respondent submits that the prayers sought by the petitioner can only be granted in the High Court and are outside what this court cannot grant such prayers under the Elections Act and the Election (Parliamentary and County) Petition Rules, 2017.

As stated above this court has been mandated to deal with this election petition even with the knowledge of the prayers the petitioner is seeking. Basically the petition is challenging nomination and gazettelement of the 3rd to 6th respondents.

In the **Election Petition No1 of 2015** referred to above, the Supreme Court of Kenya dealt with a similar issue, where the court took note of the argument by council for the 3rd, 5th and 6th respondent in that petition who had raised the issue before the High Court and the Court of Appeal that the matter was a constitutional petition seeking to prevent the violation of the rights of the respondents in that petition. The

counsel for the 3rd respondent had urged the court to distinguish between an election petition and contestation over the validity of a political party list. The respondents had sought a declaration that the list of nominees for the Nyandarua County Assembly that had been published by IEBC had violated articles 90, 98, 174 and 177 of the constitution as it had excluded Ndaragua, Olkalau and Ol Joroorok constituencies from the nomination list. The Supreme Court stated that, it is not true that such a petition had nothing to do with elections and that it was only concerned with constitutional questions. It went on to state that this was a petition contesting the nomination of the appellants and that a nomination is an integral part of the electoral process. And that only an electoral process has power to disturb the status quo. That an aggrieved party would only initiate the process of ventilating his grievances by way of filling an election petition in accordance with section 75 of the Elections Act.

I believe that the orders sought in this case if granted can have the effect of nullifying the gazettelement of the 4th to 6th Respondent and it is my view that this court has jurisdiction to handle this petition.

By virtue of Article 87 of the Constitution an election court is recognized as an avenue of resolving electoral disputes and this court has been designed as an election court to deal with this petition in accordance with section 75 of the Elections Act.

In **Election Petition No1 of 2015**, the Supreme Court stated that to allow an electoral dispute to be transmuted to a violation of fundamental rights carries the risk of opening up a parallel dispute resolution regime that would only serve to complicate matters and defeat the *sui generis* character of an electoral dispute mechanism.

I find that the Preliminary Objections raised that this court lacks jurisdiction because the prayers sought are constitutional, lacks merit. Election petitions by nature are constitutional matters which courts have been assigned to deal with.

On the issue of supporting affidavit filed by the petitioner to support his petition, the affidavit that is on record was filed outside the timelines for filing an election petition. The 3rd, 4th, 5th and 6th respondents have objected to the supporting affidavit being used to support the petition because it was filed after 28 days from the date the respondents were gazetted and 22 days after the petition was filed. They want the court to find the affidavit incompetent and proceed to strike out the petition.

The petition was filed on 5/9/2017 but the supporting affidavit was filed on 27/9/2017. The supporting affidavit was therefore filed 22 days after filing of the petition. The affidavit was filed after 28 days were over from the date the 3rd to 6th respondents were gazetted on 28/8/2017. The supporting affidavit ought to have been filed within the timelines set by the law. **Article 87(2) of the constitution, 2010 provides that**

“ ...Petition concerning an election other than the Presidential elections shall be filed within 28 days after declaration of the election results by the IEBC...”

The constitution sets the framework within which all other laws and processed must operate. The use of the word ‘shall’ in article 87(2) of the Constitution means that timelines for filing election petitions are definite and cannot be expanded or extended. Section 76(1)(a) of the Election Act, 2011 provides that;

A petition to question the validity of an election petition (County Assemblies) shall be filed within 28 days after the date of declaration and served within 15 days of presentation.

Rules 8 and 12 of the Election (Parliamentary and County election) Petition Rules, 2017 made in pursuant to section 96 of the Elections Act to regulate practice and procedures in conducting elections provide that the timelines for filing election petitions cannot be expanded. In the case of M’Nkiria Petkay Shen Miriti V Ragwa Samwel Mbae and 2 others [Election Petition 4 Of 2013 - Kenya Law](#) the court talking about rule 10 (now rule 8) of the Election petition rules stated that the rule was not a mere technical requirement but lay down procedural requirements that are substantive and go to the of the petition.

Rule 8(4) of the Election Petition Rules provides that the petition shall be supported by an affidavit sworn by the petitioner containing particulars set out under rule 12.

Rule 12 ((1) provides that a petition shall be supported by an affidavit which shall

- a) **Set out facts and grounds relied on in the petition**
- b) **...**

Therefore at the time the petition was filed he was required to file a supporting affidavit. The Petitioner failed to file the supporting affidavit within the given time. The respondents are seeking to strike out the affidavit. The supporting affidavit was not filed with the leave of the court. The petitioner is asking the court not to strike out the petition and the supporting affidavit because they were filed before this court was gazetted as an election court. That it would be draconian for this court to strike out the petition. In my view that is not sufficient to justify the filing of the affidavit outside the time lines. The filing of an election petition has timelines, which this court cannot expand or extend. Rule 19 (2) specifically ousts the court’s discretion as relates to jurisdiction within which a petition can be filed and determined. It provides that the discretion in sub rule 1 shall not apply to sub rule 2. It states

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

prescribed or ordered by the Court may have expired. (2) Sub-rule (1) shall not apply in relation to the period within which a petition is required to be filed, heard or determined.

This means that the court cannot allow a petition to be filed outside the 28 days given under the statutes. Rule 19(2) applies to the petition and the supporting affidavit. To allow the petitioner's affidavit that was filed outside the 28 day period requirement would be outside the law. The petitioner asked the court to rely on the Supreme Court Election Petition No. 1 of 2017 where the court refused to strike out some document. However in that petition the issue was not about the supporting affidavit of the petitioner, but was about certain additional documents.

It is my view that allowing the supporting affidavit filed by the petitioner outside the timelines would amount to trashing the constitutional provisions and mandatory legal requirements. The petition without a supporting affidavit cannot stand. Counsel for the petitioner sought to rely on article 159(2)(d) of the Constitution, 2010. In my view failure to follow clear provisions of the law cannot be cured under article 159(2)(d) of the Constitution because there was no procedural technicality that was pointed out. I concur that the supporting affidavit was filed outside the timeline for filing election petitions. There is no proper supporting affidavit on record and without the supporting affidavit the petition cannot stand.

The 3rd issue is on deposit of security for costs a preliminary objection by the 1st respondent that the petitioner deposited security for costs outside the timelines, which renders the petition substantially defective. Section 78(1) of the Elections Act stipulates that within ten days of filing of the petition, a petitioner is required to deposit security for the payment of costs in compliance with section 78(2)(b) and (c) of the Act. The petitioner deposited security for costs on 3/10/2017 about 27 days after he filed the petition. The petitioner did not seek leave of the court neither did he give reason for depositing the costs late. Section 78(2) of the Act provides that a person who presents a petition to challenge an election shall deposit. ... (c) one hundred one hundred thousand shillings in case of a petition against a member of the County Assembly. Section 78(3) provides that where a petitioner does not deposit security as required by the section or if an objection is allowed and not removed no further proceedings shall be heard on the petition and the respondent may apply to the court to dismiss the petition.

In Evans Nyambaso Zedekiah & another v IEBC & 2 others, Sitati J expressed herself thus;

“ I entirely agree with the learned judges in holding that deposit for costs is a substantive issue that goes to the root of proceedings... “

That case may be said to differ with our case because in our petition, security was deposited but late. The 1st respondent has submitted that failure to deposit security for costs within the time limit as provided by law renders the petition defective. That there was no application for leave to deposit out of the time limit and therefore the court cannot exercise its discretion to extend the time for depositing the same outside the time limit. The petition was filed on 5/9/2017 but deposit of security was on 3/10/2017 that was beyond the stipulated time. In the case of **Evans Nyambaso Zedekiah (Supra); the judge stated that;**

“My understanding of Section 78 (1) of the act is that no further proceedings be heard on the petition where a) a petitioner does not deposit security as required by the act...”

Rule 11 of the Petition Rules require that security be deposited within ten days of the date of filing of the petition. In Election Petition No. 18 of 2017 at Milimani High Court Nairobi filed by Tom Onyango Agimba v IEBC and another the petition was struck out because security for costs was not deposited.

In the case of **Esposito Franco Vs Amazon Kingi Joffa and 2 others Civil appeal no. 248 of 2008** the court stated that;

“ We are in agreement with the respondents that an aggrieved party remits costs for costs upon filing an election petition is to restrict would be vexatious litigants... and ensure that the party coming to court is serious and will be able to pay the costs in the event that he is required to do so.

Regulation 13 of the Election petition rules in furtherance of section 78 of the Elections Act stipulates that

- 1) Within ten days of the filing of the petition a petitioner shall deposit security for the payment of the costs.

The issue of costs was also discussed in **Kiambu High Court Election Petition no. 2 of 2017 Milton Kimani Waitinga V IEBC and 2 others**

In the election Petition of Fatuma Zainabu Mohammed v Ghati Dennitah 710 others the court allowed extension of time to deposit security beyond the stipulated time but in that petition there was an application for extension of time to deposit security. In the present application there was no such application. The security was deposited outside the stipulated time and without leave of the court. No reason was given why the costs were not deposited as required. Failure to comply with section 78 of the Elections act was not justified. The court was urged to use its discretion and rely on article 259 (2)(d) of the constitution, 2010 but failure to comply with the law is not a technicality. It is a substantive issue that goes to the root of the petition. This court has no option but to strike out the petition with costs.

Based on the two grounds raised in the preliminary objections on filing a supporting affidavit outside the timelines as well as depositing security for costs outside the stipulated time without leave of the court I uphold the preliminary objection and proceed to strike out petition.

Having struck out the petition, the court should move to determine the issue of costs. The respondents sought the petition to be struck out with costs to the respondents. In pursuant to section 78(3) of the Elections Act, I award costs to the respondents.

It is further directed that a certificate of this determination be issued to IEBC as required by the law. A notification be given to the Speaker of Nyandarua County Assembly.

It is so ordered

Court Ruling read in open court this 6th day of December 2017

J.N. Wanjala

Chief Magistrate