REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE'S COURT AT NANYUKI

ELECTION PETITION NO. 2 OF 2017

EMMA NKIROTE NTONGAI ……..….. 1ST PETITIONER

PARTY OF NATIONAL UNITY ……..….2ND PETITIONER

VERSUS

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION ……..... 1ST PETITIONER

LAIKIPIA COUNTY ASSEMBLY ……2ND PETITIONER

CLERK LAIKIPIA COUNTY ASSEMBLY ……..…..3RD PETITIONER

AND

CATHRYN NYAWIRA MATHENGE ……... 1ST INTERESTED PARTY

ZAMZAM SALMA HUSSEIN ……..…… 2ND INTERESTED PARTY

CHRISTOPHER MARK SAID ……..3RD INTERESTED PARTY

PETER LEMERIAN MATUNGE ……... 4th INTERESTED PARTY

(ELECTION FOR MEMBER OF COUNTY ASSEMBLY- NOMINATED, LAIKIPIA EAST CONSTITUENCY, LAIKIPIA COUNTY)

RULING

This Ruling is in respect of the 1st respondent's Notice of Motion dated 21st November 2017 which seeks to strike out the petitioner's petition and affidavit in support of the petition dated 6th September 2017 in "*limine*". The motion is founded on the grounds that the petition was not served on the 1st respondents as provided for under the law.

The motion is supported by the affidavit of **Thuku Mbaaru** Counsel for the 1st respondent.

The Motion was heard contemporaneously with the **Preliminary Objection** dated 22nd November 2017 by the interested parties.

The preliminary objection is founded on the grounds that **Kiprotich William Kiget** is suspended as an Advocate and hence had no capacity to commission the affidavit dated 6th September 2017. It was prayed on behalf of the interested parties that the petition be dismissed as the same was not supported by an affidavit as provided for by the Law.

The petitioners did not file any relying affidavit or grounds of objection. Instead, Counsel for the petitioners opted to respond to the motion and the objection orally.

Before I proceed with my determination, a brief background of the petition will suffice. The 1st petitioner is member of the **Party of National Unity (P. N. U)** which is the 2nd petitioner herein.

The 1st petitioner's names were presented to the 1st Respondent by the 2nd petitioner as the preferred nominee for the gender top up seat to the County Assembly of Laikipia.

However, the 1st Respondent allocated all the 9 (nine) nomination slots to the **Jubilee Party.**

The 2nd petitioner contends that having won one seat during the General elections in the County Assembly out of 15 wards, the 2nd petitioner was entitled to one nomination slot.

The record shows that the 1st Respondent vide **Gazette Notice No.8380 dated 28/8/2017** allocated all the seats for the marginalized groups and the gender top up seats to **Jubilee Party** nominees who includes the interested parties herein. The petitioners then filed this petition seeking inter alia a declaration that the nomination of members of the County Assembly Laikipia County was unlawful, good governance (sic), discriminatory, in violation of the constitution and is therefore null and void. They also sought for an order of specific performance to compel the 1st respondent to publish a new list capturing the names of the 1st petitioner.

On 11/10/2017 the Interested Parties who are among the nominated Members of County Assembly (MCA) filed an application seeking to be enjoined in the petition.

The application was allowed on 24/10/2017 as it was not opposed by the petitioners.

The petitioners had also filed an application dated 6/9/2017 seeking a temporary injunction to halt and or restrain the swearing in of all the nominated members of the County Assembly of Laikipia County scheduled for 7/9/2017.

These orders were however not granted and the nominees were subsequently sworn into office.

Having been gazetted and sworn into office the nominees became members of the County Assembly and any subsequent dispute over the said nomination shifted to the election court through this election petition.

Submissions by the 1st Respondent

As regards the Notice Motion dated 21st November, 2017 Counsel for the 1st respondent Mr. Mwangi submitted that the 1st respondent has never been served with the petition Contrary to the Provisions of **Rule 10** of the **Election** (**Parliamentary and County Elections) Petition Rules, 2017** which makes it mandatory to effect service on the Commission. Counsel submitted that the petition having been filed on 6th September, 2017, the last date to effect service was on 13th September 2017(sic).

Further it was submitted on behalf of the 1st Respondent that it was the counsel for the Respondent who alerted the 1st respondent about the existence of the petition.

Counsel submitted that failure to effect service upon the 1st Respondent cannot be regarded as a technicality.

Further, that the petitioners had not explained the reasons why the petition was not served upon the respondent.

Counsel relied on the cases of **Jacob Thoya Ithe – vrs- IEBC & 3 Others [2017] eklr** and **Rozaah Akinyi Buyu – versus - I E B C & 2 Others (2014) eKLR** to stress the point that service of an election petition is mandatory and urged the court to strike out the petition on the ground of non-service.

He submitted that election petitions are not common litigation but are time bond litigation where every minute count. As such a party who fails to comply with the rules must be punished.

Submissions by the Interested Parties

Regarding the preliminary objective, the counsel for the interested parties Mr. Mbaabu submitted that the affidavit in support of the petition is incompetent as it was not properly commissioned by a competent person.

Counsel submitted that the affidavit was commissioned by Kiprotich William Kiget who has been suspended from practicing as an Advocate.

As such, counsel submitted that he could not commission the affidavit in support of the petition. Counsel annexed an extract of the Advocate profile showing that the said Advocate had been suspended.

He further submitted that an election petition must be supported by an affidavit in terms of 'Rule 8 (4) of the Election Regulations' and as such the petitioner's petition cannot stand.

He relied on the case of **David Wamatsi Omusotisi – versus – The Returning Officers Mumias East Constituency and 2 others [2017] eKLR.**

In the said case, the court struck out the supporting affidavit and the petition after it found that the affidavit had been commissioned by "**Kiget and Company Advocates"** contrary to the oaths and Act.

Rejoinder by the Petitioners

In response , Counsel for the Petitioners Mr. Mutembei submitted that the 1st Respondent filed its response on 9th November 2017 and 15th November 2017. On the other hand the 2nd and 3rd respondents field their response on 16th November 2017. As such counsel argued that the application is mischievous as the respondents had already filed their responses. .

Secondly, that the petitioner filed this petition together with a Judicial Review application before the High Court and that it was not until 29th September 2017 when this court was gazetted to hear the election petition.

Thirdly, counsel submitted that the petition could only be served in Nairobi where the offices of the 1st Respondent are located. Counsel submitted that there was political turmoil at the material time which made it difficult for the petition to be served in Nairobi.

Counsel for the petitioner referred the court to the provisions of **Article 159 of the Constitution** which provides that a party cannot be prejudiced by mere adherence to technicalities.

He also referred the court to the **Oxygen Rule (Section 1 A and 1B of the Civil Procedure Act).** Counsel submitted that the court should allow the petition to proceed to full hearing as the issues raised cannot be determined at preliminary stage.

Counsel for the petitioner referred this court to the following list of authorities;

a. Mukisa Biscuits Manufacturing Co. Ltd – v- West End Distributors Limited [1996] EA.696;

b. Dr. Chris Nwebueze Ngige – V- Peter Obi and 436 Others [2006] Vol. 18 WRN 33;

c. *Githere – V- Kimungu [1976-1985] E.A. 101;*

d. *Abdirahman Abdi also known as Abdirahman Muhumed Abdi – V- Safi Petroleum Products Ltd. & 6 others, Civil Application No. Nai 173 of 2010;*

e. Abok James Odera t/a A.J. Odera & Associates V. John Patrick Machira t/a Machira & Co. Advocate, Civil Appeal No. 161 of 1999;

f. *Joseph Kiangoi – V- Waruru Wachira & 2 others, Civil Appeal (application) No. 130/2008*

g. Biguzzi –vs - Rank Leisure PLC[1999] W. L. R 1926

h. City Chemist (NRB) & Others- Vs- Oriental Commercial Bank Ltd., Civil Application No. NAI. 302 of 2008 (UR 199/2008),

The said authorities emphasize the overriding objective principle which is to enable the court achieve fair, just, speedy, proportionate, time and cost saving disposal of cases before it.

Secondly, the authorities restate the principle that courts should not be too far bound and rigidly tied by the rules, which are intended as general rules of practice, as to be compelled to do that which will cause injustice in a particular case. Further that the court should weigh the prejudice that is likely to be suffered by the innocent party against the prejudice to be suffered by the other party if the court were to struck out the suit.

Counsel submitted that every litigant has an inherent right to have their matters conclusively determined by the court.

As regards the preliminary objection, Counsel for the petitioner submitted that the affidavit was commissioned on 6th July 2017. He submitted that there was no evidence to prove that the Advocate had been suspended at the time the affidavit was commissioned. He submitted that the Preliminary objection did not raise a pure point of law. Counsel for the petitioners asked this court to dismiss the preliminary objection and the Notice of Motion and allow the petition to proceed to full hearing so that the issues can be fully determined.

Reply by the 1st Respondent

In response to the submission by the petitioners Counsel, the 1st respondent submitted that the mere fact that the respondent filed a response, cannot provide cover to the petitioner to violate the law.

Further that service upon the I E B C may be effected at the Constituency office or at any other designated office. Lastly, that the petitioners did not exercise their right to serve the petition through advertisement.

Reply by Interested Parties

Mr. Mbaabu counsel for the interested parties submitted that the petitioners had not provided contrary evidence that the Advocate was not suspended. Lastly he submitted that this court could seek for clarification from the Law society of Kenya on whether the said Advocate was allowed to practice.

Issues, Analysis and Determination.

I have considered the said Preliminary Objection, the Notice of Motion, the rival submissions and the authorities tendered before me.

The following are the issues for determination.

Preliminary Objection

1. **Whether the affidavit in support of the petition is defective for want of commissioning.**

2. **Whether the affidavit and the entire petition should be dismissed**

Notice of Motion

1. **Whether the petition was properly served upon the respondents.**

2. **What is the effect of failure to serve the petition?**

3. **Whether the petition and the affidavit should be struck out.**

I will deal with the issues raised in the preliminary objection first. In the classic case of **Mukisa Biscuits Manufacturing Company Ltd – versus - West End Distributors (1969) E.A 696, t**he court had this to say on what constitutes a preliminary objection:

> " **so far as I am aware, a preliminary objection consists of a point of Law which has been pleaded or which raises by clear implication out of pleadings, and which if argued as a preliminary point , will dispose of the suit ……..**

Again in the case of **John Masakeli – versus- Speaker County of Bungoma & 4 Others [2015] eKLR**, Justice Mwita stated as follows:

> "**The position in law is that a preliminary objection should arise from the pleadings and on the basis that facts are agreed by both side. Once raised the Preliminary objection should have the potential to disposing of the suit at that point without the need to go for trial. If however facts are disputed and remain to be ascertained, that would not be suitable preliminary objection on a point of law.**

Counsel for the petitioners submitted that if indeed it was proved that the affidavit in support of the petition was commissioned by a person who is not authorized to practice, the preliminary objection would be merited and certainly would have the potential to dispose off the petition without going to full trial.

The record shows that the supporting affidavit of Emma Nkirote Ntongai the 1st petitioner herein dated 6th September 2017 was sworn before Kiportich W. Kiget Advocate and Commissioner for oaths.

It was submitted on behalf of the interested parties that the said Advocate had been suspended and as such could not legally commission an affidavit.

Section 2 (1) of the Oaths and statutory Declarations Act provides that the Chief Justice may, by commission signed by him, appoint persons being practicing advocates to be commissioners for oaths, and may revoke any such appointment**.**

Section 4 of the Act empowers the commissioner for oaths to administer any oath or take any affidavit.

From the above provisions, an Advocate who is not authorized to practice cannot legally administer an oath or take any affidavit.

The interested parties produced on profile extract of an Advocate by the names Kiprotich William Kiget dated 22/11/2017. The same shows that the said Advocate had been suspended.

The affidavit in support was commissioned on 6th September 2017 almost three (3) months before the date of the said profile.

As rightly put by counsel for the petitioner , there is no evidence to prove that the said Advocate was not authorized to practice and or had been suspended on 6th September, 2017 when he commissioned the said affidavit.

It was the duty of the interested parties to tender evidence before the court to prove that the said Advocate had been suspended on 6th Septembe 2017. This court has no obligation to write to the Law Society of Kenya and confirm if the Advocate was suspended at the material time.

It was the duty of the interested parties to write to the Commission and seek clarification whether the Advocate was suspended at the material time and tender the evidence before the court.

He who asserts must prove. That is a cardinal principle of the law of evidence as codified in **Section 107** and **109 of the law of Evidence Act**.

The burden of proof lay on the interested parties to prove that Kiprotich W. Kiget was not authorized to practice as an advocate when he commissioned the supporting affidavit of Emma Nkirote on 6th September, 2017.

My finding is that the interested parties failed to discharge that burden and the preliminary objection is hereby dismissed.

Notice of Motion

The petitioners did not dispute the fact that the respondents were not served with the petition.

Accordingly to the records, the petition was filed in court on 6th September 2017.

The petition came up in court for mention on 6/9/2017, 13/9/2017, 27/9/2017 and 24/10/2017 when the application by the interested party was allowed.

On 9th November 2017 when the matter came up for directions the court noted that there was no representation from the 2nd and 3rd respondents and ordered that they be served.

On its part, the 1st respondent had entered appearance on 2/11/2017. The 1st respondent counsel deponed that he is the one who alerted the 1st respondent about the existence of the petition when the same was mentioned in court in his presence although he was in court for a different matter. That fact has not been controverted by the petitioners.

The only record of service is the affidavit of one Timothy Mutembei Njagi filed in court on 10/11/2017 which shows that the 1st, 2nd and 3rd respondents were served with the petition on 9/11/2017.

That is a period of more than two (2) months after the petition was filed. Further, it was not until the court raised the issue of service with the counsel for the petitioners.

The petitioners gave several reasons why the court should overlook the issue of non-service.

First, the petitioners contend that the court had not been gazette as an election court. The record shows that this court was gazetted to hear this petition on 6/10/2017 vide gazette Notice No. 9913.

However, the mere fact that this court had not been gazetted as an election court did not bar the petitioners from serving the petitioner.

The petitioners had the duty to serve the petition upon the respondents and wait for the court to be gazetted. That argument is therefore a fallacy and the same is rejected.

The second reason given by the petitioners is that the petition could only be served at the National offices of the 1st respondent in Nairobi and that due to the political turmoil at the material time, it was not possible to serve the same. That argument cannot hold water.

Section 10(2) of the Elections (Parliamentary and county Elections) Petitions Rules, 2017 provides as follows:

Service on the Commission shall be by:-

a. delivery at the constituency, county or head office of the commission:-

b. delivery at such other office as the Commission may notify or

c. on advertisement that is published in a newspaper of National circulation.

It is therefore not true that the petitioner could only serve the 1st respondent in Nairobi. As rightly pointed out by counsel for the 1st respondent, the constituency offices of the 1st respondent are situated a few metres from this court.

Further, the petitioners did not file an affidavit to prove that there was tension and or violence that prevented them from effecting personal service. But they also had the option of serving through advertisement which was not exercised.

As regards the 2nd and the 3rd respondents, no explanation was given as to why they were not served in time.

Thirdly, the petitioners contend that the respondents have already filed their response and as such the petition should be allowed to proceed to hearing. The argument of the petitioners, as I understand it is that once the respondents file their response it is immaterial whether or not they were properly served.

On this issue, I am of the considered view that the conduct of the respondent in filing a response cannot operate as an estoppel such as to preclude them from raising the issue of lack of service.

A party cannot fail to serve process and when the other party finds about the petition through other means and files a response, claim that the omission has been cured by the filing of the response.

Service of process generally and a petition in particular is a very crucial stage in the election dispute litigation as it gives the other party a chance to respond.

A party who fails to effect service of an election petition must be ready to bear the consequences.

In the case of **Alicen Chelaite- vs- David Manyara Njuki & 2 Others (Nakuru) Civil Appeal NO. 150 OF 1998** the respondent filed an application to strike out the petition on the ground that service was un procedural irregular, incompetent and defective.

The court proceeded to strike out the petition on the ground that the service was effected out of time and the petition was not accompanied by a notice of presentation as required by then Rule 14.

On appeal it was held inter alia that strict compliance with the said rule was mandatory and failure to

comply **was not a curable irregularity which could be waived by conduct of the respondents (***emphasis mine***) .**

In the case of C**raig –vs- Kanssen (1943) I KB 256,** a case referred to in the case of **Rozaah Akinyi** supra it was held:

> "**Failure to serve process where service of process is required renders null and void an order made against the party who should have been served. Failure to effect service was fatal. It could not even be cured be by waiver because no waiver can give validity to a nullity (*emphasize mine)***

The fact that the respondents filed their response cannot be construed to mean that they had waived their right to be served as required by the law.

Failure to serve the petition upon the respondents cannot be cured by fact that the respondents have already filed their response.

Finally, the petitioners sought refuge in **Article 159 (1) (d) of the constitution** and **Section 1 A and 1B** of the **Civil Procedure Act** commonly referred to as the Oxygen principle**.**

Counsel submitted that the court should not give undue regard to technicalities so as to deny the petitioners their right to be heard. The petitioner contends that the issue of failure to serve the petition is a technicality which should not deny the petitioners their constitutional right to have the petition determined on merits.

This court is alive to the provisions of **Article 159 (1) (d) of the Constitution** which provides that courts should administer justice without undue regard to procedural technicalities.

I am also aware of the overriding objective as envisaged under **Section 1 A of the Civil procedure Act** which is to facilitate the just, expeditious, proportionate, and affordable resolution of Civil disputes.

I am also not ignorant of the provisions of **Section 80 (d) of the Elections Act** which provides that the election court shall decide all matters that comes before it without undue regard to technicalities.

This provision is repeated in **Rule 4 (1) of the Election (Parliamentary and County Elections) Petition Rules, 2017** which provides that the objective of the rules is to facilitated the just expeditious proportionate and affordable resolution of election petitions.

The issue of determination is whether, failure to serve the election petition is a technicality which could be disregard by the court in view of the above provisions.

The superior courts have cautioned against the blanket importation of the provision of the Civil Procedure Act to Election petitions litigation where there are express provisions in the Election statutes.

This issue was exhaustively determined by the Court Of Appeal in the case of **Rozaah Akinyi supra.**

In the said case, the Judge had held that the petition had not been served upon the 2nd and 3rd respondent. The Hon. Judge proceeded to examine the provisions on service of Civil process in the Civil Procedure Act and held, inter alia that although service of the petition was bad in law it did not go to the root of the petition and could be waived as on irregularity which could not nullify the petition.

On appeal, the Court Of Appeal posed the following question:

> **" having found, as he did, that the petition was not served on the 2nd and 3rd respondents, could the Learned Judge proceed, as he did, to use the provision of the Civil Procedure Act and Rules and still hold the petition to have been valid.**

The court referred to a number of authorities to answer the said question.

In the case of ***CHELAITA supra,*** the court observed that the National Assembly Elections (Election Petition Rules) was a complete code for all matters of Election Petitions except where the Rules were silent on any procedural matter where resort could be had on Civil Procedure Rules. That where there is a specific rule in the rules, it alone to the exclusive of the rules of Civil Procedure shall prevail and it must be strictly complied with since election Petition are a subject of special jurisdiction.

Again the Court Of Appeal referred to the supreme court of India in **Toyota Basin & Others – versus – Debi Ghosal & Others** 26/2/1982, where it was held:

> **"An election petition is not an action at common law, or in equity. It is a statutory proceeding to which neither the common law nor the Principles of Equity apply but only those rules which the statue makes and applies. It is a special jurisdiction, and a special jurisdiction has always to be exercised in accordance with the statutory (sic) creating it. Concepts familiar to common law and Equity must remain strangers to Election Law unless statutorily embodied. A court has no right to resort to them on consideration of alleged policy because policy in such matters as those, relating to the trial of elections dispute is what the statute lays down.**

Section 77 of the **Elections Act** and **Rules 9 and 10 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017** provide the procedure for service of an election petition.

There is no deficiency in the law or the rules that would warrant recourse to the provision of the Civil Procedure Act. The law on service of an election petition in clearly stipulated in the Act and the Rules and the court need not resort to the provisions of the Civil Procedure Act. The decisions quoted by the petitioners are therefore distinguishable as they did not arise from election petitions.

It is also clear that **Article 159 (2) (d) of the Constitution** is not a panacea for all irregularities.

The Supreme Court of Kenya in ***Raila Odinga & 5 Others – versus – I E B C & Others, Election Petition No. 3 of 2013*** on the purport of Article 159 of the Constitution and had this to say:

> **" our attention has been repeatedly drawn to the provisions of article 159 (2) (d) of the Constitution which obliges a court of law to administer justice** *without undue regard* ***to procedural technicalities. The operative words are the ones we have rendered in bold (italic). The article simply means that a court of law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural importance as they seek justice from court of law (emphasis mine)".***

The petitioners cannot therefore seek refuge in **Article 159 (2) (d) of the Constitution** and relinquish their obligation to serve the petition.

As it has been stated severally by the courts, Election petitions are special jurisdiction matters. They are also matters where the public has a lot of interest.

The emerging electoral jurisprudence is that service of an election petition is a fundamental step in the electoral process dispute resolution and that failure to serve a petition is a fatal omission.

It does not matter whether it is an election petition in the strict sense of the word or it is a 'nomination petition' as in this case. The petition must comply with the provisions of the Elections Act.

This was the holding by the Apex court in Kenya in the case of **MOSES MWICIGI AND 14 OTHERS –VS- IEBC AND 6 OTHERS (2016)eKLR** where the court dealt with the issue in detail as follows:

> "**[105] It is clear from the foregoing provisions that the allocation of nomination –seats by**

the IEBC is a time bound process that starts with the proportional determination of the number of seats due to each political party . On that basis IEBC then 'designates', or 'draws from' the allocated list the number of nominees required to join the County Assembly . To 'designate' or 'draw from' entails the act of selecting from the list provided by the political party. It is plain to us that the Constitution and the electoral Law envisage the entire process of nomination for the special seats, including the act of gazettement of the nominees names by the IEBC as an integral part of the election process.

[106] The Gazettee Notice in the case, signifies the completion of the 'election through nomination and finalizes the process of constituting the Assembly in question. On the other hand and "election by registered voters", as was held in the JOHO CASE, is in principle , completed by the issuance of Form 38, which terminates there returning officer's mandate, and shifts any issue as to the validity of results from the IEBC to the Election Court.

[107] It is therefore clear that the publication of the Gazette Notice marks the end of the mandate of IEBC, regarding the nomination of party representatives and shifts any consequential dispute to the Elections Courts. The Gazettee Notice also serves to notify the public of those who have been "elected" to serve as nominated members of a County Assembly.

[108] We have taken note of the argument by counsel for the 3rd 5th and 6th respondents that what was before court of Appeal (and the High Court) , was not an "election Petition", but a constitutional petition seeking to prevent the violation of rights of the respondents. Counsel for the 3rd respondent urged us to distinguish between an "election petition" and a contestation over the "validity of a political -party list ". On this question, however, the broader spectacle is compelling : the electoral –process is dominant: and it allows no separation between Article 90 (which deals with party – list seats) and article 177 (which deals with membership of County Assemblies).

[109] The respondents had sought a declaration that the list of nominees for Nyandarua County Assembly published by the IEBC, had violated Articles 90,98,174 and 177 of the Constitution, as it purported to exclude Ndaragwa, O'l kalou and O'joroorok Constituencies. Indeed, one of the respondents ' contentions in the court of Appeal was that the High Court erred by failing to consider the diversity of Nyandarua County, in the formulation of T N A's Party list. Is it conceivable that such a petition had nothing to do with elections, and was only concerned with constitutional questions" Not in our view: this was a petition contesting the nomination of the appellants nomination which we hold to have been an integral part of the electoral process, in the terms of the Constitution and the electoral law.

[110] It follows that only an Election Court had the powers to disturb the status quo. Any aggrieved party would have to initiate the process of ventilating grievances by way of an election petition, in accordance with Section 75 of the Elections Act. The High Court had declined jurisdiction on the perception that this dispute ought to have originated at the Political Parties Disputes Tribunal.

It is therefore clear that this petition had to comply with the provision of **Section 75 and 77(1) (2) of the Elections Act** and also **Rule 10 of the Election (Parliamentary and County Elections) Petitions Rules, 2017**.

The petitioner had the duty to serve the petition upon the Respondents fifteen (15) days after filing of the petition.

The importance of service of an Election petition also finds legal underpinning in **Article 87 (3) the Constitution.**

Case law also shows that that failure to serve an election petition renders it fatally defective.

In the case of **Onalo – vs- Ludeki & Others [2008] 2KLR** the respondent applied to strike out the petition on various grounds inter alia that they were not served with it in the manner required or within the time prescribed by the law.

In striking out the petition, the High court stated that the Petition not having been served personally upon the 2nd respondent within the time prescribed by the law was incurably defective and would be struck out. The court further held that the whole substratum of the petition had been washed away and the petition against the 1st and 3rd respondent would also be struck out.

In the case of **Ayub J Mwakesi – versus – Mwakwere Chirau Ali & 2 Others [2008] eKLR**, the High court stated.

> "….. **If petition is not properly served upon all the respondents named, then the entire petition will be rendered incompetent.**

In the case of ***Evans Nyambaso Zedakiah & Another -versus -I E B C and 2 others [2013] eKLR, the court stated:***

> **"In the instant case, the petition was filed on 10/4/2013 and on 25/4/2013 when the original petitioner sought to withdraw the same, the 3rd respondent had not been served. Further, the process server was unable to support his claims that he affected service upon the said 3rd respondent on 19/4/2013. These circumstances, when put together lead the court to only one inference, that the petition must be struck out the provisions of Article 159 (2) (d) and Rule 4 and 5 of the Rules notwithstanding".**
>
> **The petitioners were under a mandatory duty to effect service of the petition upon the 3rd respondent and having failed to do so, the petition cannot stand and must be struck out. There is no other way the 3rd respondent would have become aware of the petition against her and start the process of defending herself into motion without being served. The contention by the petitioners that the 3rd respondent had knowledge of the existence of the petition on 25/4/2013 cannot assist the petitioners to evade their obligation under the law.**

Again in the case of ***Chelaita supra***, the court stated as follows;

> **Once the election court is satisfied the due to failure to serve the petition within the time prescribed by law, the petition has been a nullity it surely has the power to strike it down without any more ado.**

Justice Muchemi in the case of **Kumbatha Naomi Adi– versus - the County Returning Officer, Kilifi & 3 others [2013] eKLR** where the court stated as follows:

> "**The petition was filed within the stipulated period but was not served. Any pleadings filed and not served on the opposite party have no legal force. It cannot be dealt with by the court and no lawful orders on be drawn from it. Service of pleadings accords the opposite party the chance to be heard. It is my considered opinion that this petition is a petition that never was."**

The Court of Appeal in **Rozaah Akinyi supra,** stated as follows on the issue of failure to serve an election petition:

> "**As we have shown, service of the petition upon the respondents was a fundamental step in the electoral process and resolution of disputes arising therefrom. Failure to serve the petition upon the respondents went into the root of the petition and the petition could not stand when there was failure to serve the same. The Learned Judge was clearly wrong in his holding as he**

misdirected himself on the law applicable where he had found as a fact that the 2nd and 3 respondents were not served".

It is therefore clear that failure to serve an election petition is not a procedural technicality which can be cured by the provisions **Article 159 (2) (b) of the Constitution** or **Section 80 (d) of the Elections Act** nor **Rule 4 of the Elections (Parliamentary and County Elections) Petition Rules, 2017** or even **Section 1A** and **1B** of the **Civil Procedure Act**.

It is a fundamental step in the Electoral dispute litigation and failure to serve any of the respondents is a fatal omission which goes into the entire substratum of the petition.

For the foregoing reasons, I find that the notice motion dated 21/11/2017 has merits. The same is allowed and the petitioners' petition dated 6/9/2017 is struck out with costs to the respondents and the interested parties.

Dated and Delivered at Nanyuki this 11th Day of December 2017

W J GICHIMU

PRINCIPAL MAGISTRATE

In the presence of;

…….for the Petitioners

...…...…….for the 1st Respondent

...……for the 2nd and 3rd Respondents

.....……for the Interested Parties