



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**THE ELECTIONS ACT 2011**

**ELECTION PETITION NUMBER 8 OF 2017**

SAAD YUSUF SAAD.....PETITIONER

VERSUS

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION (IEBC).....1<sup>st</sup> RESPONDENT

NANCY WANJIKU KARIUKI.....2<sup>nd</sup> RESPONDENT

MOHAMED ASHA HUSSEIN.....3<sup>rd</sup> RESPONDENT

**RULING**

1. Saad Yusuf Saad the Petitioner herein has through an election petition (the Petition”) dated 6.9.17 challenged the election of Mohamed Asha Hussein the 3<sup>rd</sup> Respondent herein, as the Mombasa County Woman Member of the National Assembly. Also named in the Petition as respondents are the Independent Electoral and Boundaries Commission and Nancy Wanjiku Kariuki, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents respectively.

2. The Notice of Motion before me for determination is dated 25.9.17 (“the Application”), in which the 3<sup>rd</sup> Respondent seeks orders that:

***“(a) The Petition of Saad Yusuf Saad dated 6<sup>th</sup> September 2017 and filed in this Court on 7<sup>th</sup> September 2017 be struck out.***

***(b) Alternatively and without prejudice to Payer (a) above, the said Petition dated 6<sup>th</sup> September and filed in Court on 7<sup>th</sup> September 2017, be dismissed.***

***(c) The costs of this application and the Petition be awarded to the 3<sup>rd</sup> Respondent/Applicant.***

3. The Application is premised on several grounds. The 3<sup>rd</sup> Respondent claims that the Petition was not served upon her either personally or by advertisement as required by Article 87(3) of the Constitution, Section 77(2) of the Elections Act (“the Act”) and Rule 10(1) of the Elections (Parliamentary & County Elections) Petition Rules 2017 (“the Election Petition Rules”). She claims that the Petition was given to her 8 year old son Hussein Mwashe Maganga at her residence on the morning of 16.9.16. At the time she was at Ukunda in the company of Mwanaisha Hassan who has sworn an affidavit in support of the Application to confirm this fact. Consequently, the 3<sup>rd</sup> Respondent claims, there has never been any service of the Petition upon her as prescribed by law.

4. It is claimed that the Petition does not state the description of the Petitioner or his address and the capacity in which he brings the Petition as required by Rule 8(1) of the Election Petitions Rules. The Petition is defective in that it is not signed by the Petitioner as required by Rules 7(b) and 8(4) of the Election Petitions Rules. The 3<sup>rd</sup> Respondent further states that the requirements of Rule 8(1) of the Election Petitions Rules are wholly and completely omitted. It is not possible to tell from the Petition, the number of candidates who contested in the election, the results or number of votes garnered by each candidate or the date the results of the election were declared. It is further claimed that the Petitioner has not sworn an affidavit in support of the Petition as required in Rule 12(1) of the Election Petitions Rules. The Petition is drawn to comply with the Rules applicable to petitions in the Supreme Court thus failing to comply with the rules applicable for petitions in this Court.

5. In his Replying Affidavit sworn on 5.10.17, the Petitioner reiterates the contents of his 2 affidavits sworn on 6.9.17 and reaffirms the facts and averments stated and included in the Petition. The Petitioner avers that the Application is a fabrication and a desperate side show to steal a match and to divert the Court's attention from the main issues which she has failed to respond to. The Petitioner denies that the Petition was served upon a minor. He asserts that Patrick Mwema a licenced process server served the Petition on a Mr. Mohamed on 12.9.17 who had been sent by the 3<sup>rd</sup> Respondent at Social Security House 7<sup>th</sup> floor the Petitioner's advocates' office, to collect the same. The 3<sup>rd</sup> Respondent had been informed of the Petition by Patrick Mwema through her mobile number 0722-355524. Patrick Mwema averred in his affidavit of service that the 3<sup>rd</sup> Respondent called him at 15:02 and told him that she would send her brother Mohamed.

6. The Petitioner contends that the Petition contains all ingredients required in an election petition. The name and address of the Petitioner is clearly indicated in the Petition and all supporting affidavits. The Petitioner avers that he swears the Replying Affidavit to confirm that he has signed the Petition and has in any case authorised his advocate on record to sign the same on his behalf. The Petitioner further avers that the date when the disputed election was held, the results of the election as declared are all included in the 2 supporting affidavits and various affidavits filed herein. The date of declaration of the results of the election is stated in paragraph 3 of the Petition. The Petitioner further contends that the number and names of candidates who contested the disputed election, the results, total number of votes garnered by each candidate and the date the results of the elections were declared are all contained in paragraphs 31 and 32 of the affidavit of Amina Abdalla.

7. The Petitioner further avers that contrary to what is alleged by the 3<sup>rd</sup> Respondent he has indeed filed an affidavit in support of the Petition duly sworn by himself. He further avers that the affidavit in support of an election petition and documents annexed thereto are deemed to be part of the petition and that is why they are bound together as a booklet to be read in their entirety. He further avers that the Court has discretion under Article 159(2)(d) of the Constitution of Kenya 2010 to excuse minor, trivial and/or petty deviations from strict non-compliance with the Election Petition Rules and other mandatory requirements. According to the Petitioner, all grounds raised herein are relate to the form and fall in the category of technicalities and should not take precedence over substantive matters.

8. The Petitioner asserts that the draconian orders sought herein ought to be refused in the interest of justice and fairness. The Petition seeks to establish whether the election of the Mombasa County Women Representative was free and fair and the side show is cunningly crafted to circumvent and defeat justice. He further avers that the conduct of the 3<sup>rd</sup> Respondent of repeatedly lying under oath and documented mischief are done in bad faith with the sole intention of blocking the Court from hearing and determining the Petition herein. He further stated that the 3<sup>rd</sup> Respondent lied that the Petition was filed on 7.8.17 even before the election and invited this Court to make a finding that the 3<sup>rd</sup> Respondent and her counsel are seasoned pathological liars who have blatantly lie under oath.

9. This Court has considered the Application, the rival affidavits and submissions as the well as the authorities cited by the parties.

10. To begin with, the Petitioner has sought the striking out the Affidavit in support of the Application under Order 19 of the Civil Procedure Rules (CPR). It is judicious that the Court considers this matter first. It is the Petitioner's submission that the said Affidavit sworn by the 3<sup>rd</sup> Respondent does not meet the threshold as contemplated in Order 19 of the CPR and Rule 12 of the Elections Petition Rules. It is the Petitioner's case that the deponent of the Affidavit does not describe herself and fails to state whether she is male or female or whether she is of sound mind. It is the Petitioner's view that these are critical elements in drawing affidavits. Further, in the *jurat*, the Affidavit lacks the name of the person of the deponent. It was submitted that these are fatal omissions which warrant the striking out of the said Affidavit. On behalf of the 3<sup>rd</sup> Respondent, the Court was urged to take judicial notice under section 60 of the Evidence Act that the Petition is dealing with the women representative's seat. It was submitted that even if the Court was to find that the Affidavit was deficient as alleged this would not convert non service into service.

11. Rule 12(12) of the Elections Petition Rules (which really should be Rule 14 but for an error in numbering) provides:

***“The Oaths and Statutory Declarations Act and Order 19 of the Civil Procedure Rules, 2010 shall apply to affidavits under these Rules”***

12. Section 5 of the Oaths and Statutory Declarations Act provides what is to be contained in the *jurat* as follows:

***“5. Particulars to be stated in jurat or attestation clause Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.”***

The form of *jurat* is contained in the Third Schedule of the Oaths and Statutory Declarations Rules. The form requires that the name of the commissioner for oaths, date and place where the affidavit is sworn be stated.

13. Order 19 Rule 5 of the CPR provides the manner of drawing an affidavit:

***“5 Manner of drawing affidavit:***

***Every affidavit shall be drawn in the first person and divided into paragraphs numbered consecutively which shall be confined as nearly as may be to a distinct portion of the subject.”***

Order 19 Rule 6 of the CPR further provides that:

***“The court may order to be struck out from any affidavit any matter which is scandalous, irrelevant or oppressive.”***

14. I have looked at the Affidavit sworn by the 3<sup>rd</sup> Respondent. It is drawn in the first person. It is divided into paragraphs that are numbered consecutively. The Affidavit further states the date and the place at which it was sworn. It also has the name of the commissioner for oaths before whom the Affidavit was sworn. Further, no material has been placed before me to persuade me that the Affidavit is scandalous, irrelevant or oppressive. I am therefore satisfied that the Affidavit as drawn has complied with both Order 19 of the CPR and the Oaths and Statutory Declarations Act and I find no reason to strike out the same.

#### Failure to serve the 3<sup>rd</sup> Respondent

15. It is the 3<sup>rd</sup> Respondent's case that she was not served with the Petition as required by law. She contends that the Application and the Affidavits in support the Petition was served upon her 8 year old son Hussein Mwashe Maganga on 16.9.17 at 11 am while she was at Ukunda with her friend Mwanaisa Hassan. The Application and in the Affidavits in support were served upon the Petitioner on 25.9.17. The 3<sup>rd</sup> Respondent argues that the Petitioner did not in his Replying Affidavit controvert or deny the averments in the said affidavits. The 3<sup>rd</sup> Respondent challenges the affidavit of service. The process server does not disclose how and in what manner the 3<sup>rd</sup> Respondent became aware that the Petition against her had been filed given that the same was not advertised. It is also not disclosed how Mr. Mohamed was identified as the brother of the 3<sup>rd</sup> Respondent for purposes of effecting service. The 3<sup>rd</sup> Respondent contends that service whether upon her minor son or upon her alleged brother was not in accordance with the law. It was contended that the Constitution, the Act and the Election Petition Rules were not followed in as regards service of the Petition. The case of Rozaah Akinyi Buyu v IEBC & Others [2014] eKLR was cited to buttress the submissions.

16. For the Petitioner it was submitted that the affidavit of Siraji Wawire a senior clerk at the advocate's office and a call log show that the 3<sup>rd</sup> Respondent was duly called on 12.9.17. The first phone call lasted 14 seconds while the second phone call lasted 35 seconds. The process server avers in his affidavit of service that the 3<sup>rd</sup> Respondent told him she would send her brother Mohamed to the Petitioner's advocate's office to collect the Petition which she did and he accepted service but declined to sign for the same. Siraji Wawire stated in his affidavit that Patrick Mwema the process server borrowed his phone number 0707169424 to call the 3<sup>rd</sup> Respondent.

17. I have looked at the call logs annexed to the affidavit of Siraji Wawire. They indeed show that there were 2 outgoing calls from Siraji Wawire's number to the 3<sup>rd</sup> Respondent's number. These calls were made at 13:45 and 13:48 respectively on 12.9.17. However, the logs do not show any incoming call to Siraji Wawire's number from the 3<sup>rd</sup> Respondent's number as averred by Patrick Mwema. Indeed there was no call incoming or outgoing from Siraji Wawire's number at 15:02. No call logs in respect of Patrick Mwema's phone number were produced to show that the 3<sup>rd</sup> Respondent did indeed call him as alleged. From the material before me, I am unable to find that the 3<sup>rd</sup> Respondent called Patrick Mwema to tell him that she is sending someone to collect the Petition on her behalf.

18. Article 87(3) of the Constitution provides:

***“Service of a petition may be direct or by advertisement in a newspaper with national circulation.”***

Section 77(2) of the Election Act provides:

***“A petition may be served personally upon a respondent or by advertisement in a newspaper with national circulation.”***

Rule 10(1) of the Election Petition Rules provides:

***“(1) Within seven days after the filing of a petition, the petitioner shall serve the petition on the respondent by—***

***(a) direct service; or***

***(b) an advertisement that is published in a newspaper of national circulation.”***

19. Service as contemplated under the Constitution, the Act and the Election Petition Rules is direct service or advertisement in a newspaper of national circulation. Direct service has been defined in Rule 2 as personal service or service on a duly authorized agent. In this case, the process server said he spoke to the 3<sup>rd</sup> Respondent who had told him she would send her brother Mohamed to collect the Petition. The Petition was thus served on Mohamed at the Petitioner's advocates' offices. The 3<sup>rd</sup> Respondent denies having sent Mohamed to collect the Petition on her behalf and claims that it was her 8 year old son who was served at her home on 16.9.17.

20. The averments contained in the affidavit of service are not uncontroverted. They have been challenged by the 3<sup>rd</sup> Respondent who contends that she did not send anyone to collect the Petition on her behalf. Moreover, if Patrick Mwema had clear and express instructions from the Petitioner's advocates to effect personal service on the 3<sup>rd</sup> Respondent, did he comply with these instructions? It appears not. He served Mohamed who claimed that he had been sent by the 3<sup>rd</sup> Respondent to collect the Petition. Patrick Mwema avers in part:

***“I proceeded to the office of Mwaniki Gitahi At N.S.S.F building 7<sup>th</sup> floor, upon my arrival I met the said clerk who pointed out to me the said Mr. Mohamed, whom I introduced myself to him (sic) and the purpose of my coming, whereafter I served him with a copy of the petition he accepted service but declined to sign on my service copy by indicating to me that his instructions were just to pick the copy of the petition on behalf of the 3<sup>rd</sup> Respondent.”***

21. The 3<sup>rd</sup> Respondent has denied sending the said Mohamed to collect the Petition on her behalf. Further one would wonder why if

Mohamed was indeed authorised to accept service on behalf of the 3<sup>rd</sup> Respondent, he would refuse to sign on the service copy. Given the seriousness attached to service of election petitions did Patrick Mwema as a licenced process server take any steps to identify the said Mohamed or obtain a copy of his identity card? Did he ask for a written authority by the 3<sup>rd</sup> Respondent before handing over the Petition to a Mohamed who was not known to him? In view of the foregoing, I am not satisfied that the affidavit of service of Patrick Mwema can be relied upon.

22. In the circumstances I do find that service upon Mohamed the purported agent of the 3<sup>rd</sup> Respondent is not proper service as contemplated under the law. In so finding, I am guided by the Court of Appeal in the case of Rozaah Akinyi Buyu case (supra), where it observed:

***“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.*”**

23. Learned Counsel for the Petitioner submitted that under Order 19 Rule 2 of the Civil Procedure Rules any person who disputes the contents of any affidavit can apply for the attendance of the deponent for cross examination. Order 19 Rule 2(1) provides:

***Upon any application, evidence may be given by affidavit, but the court may, at the instance of either party, order the attendance for cross-examination of the deponent.***

In the instant case, no such application is before me for consideration. Even if the Court were to give Patrick Mwema the benefit of doubt that the Petition was served on Mohamed, the 3<sup>rd</sup> Respondent denies having sent Mohamed or any person to collect the Petition on her behalf. Mohamed cannot be deemed to be a duly authorised agent of the 3<sup>rd</sup> Respondent. The requirement of the law on personal service or service on a duly authorised agent has not therefore been satisfied.

24. The current constitutional and legal dispensation unlike in the past, has addressed the issue of service on respondents who would otherwise make themselves scarce. Service of petitions has been simplified considerably and made stress-free. The dispute as to whether service was effected properly or at all such as in the present case need not arise. All a petitioner needs to do is place an advertisement in a newspaper of national circulation in the specifications provided in the Election Petition Rules to effect proper service of a petition. It is not clear why the Petitioner herein chose the more complicated path with potential dispute. Having taken all the foregoing into account, I am not persuaded that that service was effected on the 3<sup>rd</sup> Respondent on 12.9.17 as alleged.

#### Failure to sign the Petition

25. It was submitted for the 3<sup>rd</sup> Respondent that Petition is incompetent as it was signed by Mwaniki and Partners Advocates for the Petitioner and not the Petitioner himself contrary to Rule 8(4) of the Election Petitions Rules. Learned Counsel argues that a firm of advocates cannot be an authorised person as envisaged under the Election Petitions Rules. It was argued that in the acknowledgement of receipt of an election petition, the Deputy Registrar received a Petition said to be signed by the Petitioner. He relied on the case of Jahazi v Cherogony [1984] 814 to buttress his submission. For the Petitioner, it was submitted that the Rules by the Petitioner and/or his agent and an advocate is a duly authorised agent. He urged the Court to adopt the reasoning in the case of Charles Kamuren v. Grace Jelegat Kipchoim & 2 Others [2013]eKLR.

26. Rule 8(4) of the Election Petition Rules provides:

***“(4) The petition shall—***

***(a) be signed by the petitioner or by a person authorised by the petitioner;***

***(b) be supported by an affidavit sworn by the petitioner containing the particulars set out under rule 12; and***

***(c) be in such number of copies as would be sufficient for the election court and all respondents named in the petition.”***

27. I have looked at the Petition. Although the Petitioner avers in paragraph 11 that he signed the same, the truth of the matter is that it was signed by Mwaniki Gitahi & Partners, Advocates for the Petitioner. Rule 8(4)(a) is explicit that a Petition shall be signed by the petitioner or a person authorised by the petitioner. (emphasis added). The intention of the Rules Committee is evident from the clear wording of the Rule. A petition may be signed by the petitioner or a person authorised by the petitioner. In the case of Jahazi v Cherogony (supra), the petition was dismissed for the reason that the same was not signed by the Petitioner as required by the applicable Rule 4(3). That case is however distinguishable as the signature of the Petitioner under Rule 4(3) of the then National Assembly Elections (Election Petition) Rules was mandatory. The Court observed:

***“...Rule 4(3), which is relevant to the objection provides:***

***“The Petition shall conclude with a prayer as for instance, that some specified person should be declared duly elected or nominated or that the election should be declared void, and shall be signed by all petitioners.”***

***We have underlined the relevant words. The petition before us is endorsed: “ADEMBESA & CO ADVOCATES FOR THE PETITIONER” with Mr. Adembesa’s signature above it.”***

28. Rule 4(3) of the previous rules did not have an alternative as our present Rule 8(4) of the Election Petition Rules. Under the previous rules, only the petitioners could sign the petition. Today however, the Election Petition Rules allow a person authorised by the petitioner to sign the petition.

29. This brings me to the persuasive reasoning of Achode, J in the Charles Kamuren case (supra) where she stated:

***“I have had occasion to consider this issue at length in the case of Hosea Mundui Kiplagat v Sammy Komen Mwaita & 2 Others, High Court at Nairobi Election Petition No, 11 of 2011. I wish to adopt my reasoning in that case on this issue where, in determining whether an advocate is ‘a person duly authorized’ I took recourse to various provisions concerning signing of a pleading. An election petition, as rightly submitted on behalf of the Petitioner is a pleading. In the applicable Civil Procedure Rules, an advocate is treated differently from an agent who requires express authorization to sign a document on behalf of another person. An advocate, in my opinion, once instructed, could sign the Petition on behalf of the Petitioner. As I reasoned in the above-cited case, the express inclusion that a petition could be signed by a person other than the petitioner sought to cure the mischief that resulted in the strict application of the then applicable rules and further that the issue of signature was a matter of form, that ought not to be elevated above the substantive aspect of the pleading.”***

30. I agree with Achode, J that once instructed an advocate does not require special authorisation to sign any pleading on behalf of his client. In the circumstances, I am satisfied that the Petition herein is duly signed as required by the Election Petition Rules.

#### Lack of Supporting Affidavit

31. The 3<sup>rd</sup> Respondent states that there is no supporting affidavit sworn by the Petitioner. It was submitted that this omission contravenes the mandatory provisions of Rule 12 of the Election Petitions Rules and vitiates the competence of the Petition and renders it incurably defective. It is argued that the 2 supporting affidavits in the bound document are in support of the chamber summons application and the notice of motion filed together with the Petition and none of them is in support of the Petition. Even if the Court were to treat the 2 affidavits as also being in support of the Petition, none of them contains the material required in in Rule 12(1) and (2). For the Petitioner, it was submitted that the 2<sup>nd</sup> Affidavit is in support of the Petition and states so in paragraph 13. The affidavit has the number of votes in paragraph 4 including the constituency and county totals and has therefore complied with the mandatory requirements of the Election Petition Rules.

32. Rule 12(1) of the Election Petition Rules provides:

***“(1) A petition shall be supported by an affidavit which 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.”***

33. I have looked at the bound document which contains the Petition and the 2 applications and several affidavits. The affidavit in support of the Petition comes immediately after a notice of motion and one would be forgiven to suppose that the same is in support of the said notice of motion. The Petitioner avers in paragraph 13 of the said affidavit that he swears the same ‘in full support of the petition before court praying that the said sham election of Mombasa county women representative be nullified’. I am therefore satisfied that the Petitioner has indeed complied with Rule 12(1) of the Election Petition Rules to the extent that he has filed an affidavit in support of the Petition duly sworn by himself.

34. Having found that the Petitioner has in fact filed an affidavit sworn by himself in support of the Petition, I now turn to the contents of the said affidavit. Rule 12(2) of the Election Petition Rules provides:

***“(2) An affidavit in support of a petition under sub-rule (1) shall state—***

***(a) the name and address of the deponent;***

***(b) the date when the election in dispute was conducted;***

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

***(d) the date of the declaration of the results of the election;***

***(e) the grounds on which the petition is presented; and***

***(f) the name and address of the advocate, if any, acting for the petitioner which shall be the address for service.***

35. The Affidavit contains the name and address of the Petitioner. The Affidavit does not state the date when the election in dispute was conducted. The Affidavit does not state the results of the election. Paragraph 4 of the Affidavit states the number of votes cast and the number of votes not accounted for in Kisauni, Nyali and Likoni Constituencies. In Mvita constituency, the Petitioner avers that the total number of votes cast including the rejected votes exceed the total number of voters at any given polling stations. The last part of paragraph 4 is reproduced hereunder:

## **“COUNTY TOTALS**

***The total number of votes in the county total for all the aspirants is 339,814, add rejected votes being 64,597 to total 404,411 as the total votes cast for women representative. However the IEBC declared 278,357 as valid votes. Once you add the 61,457 rejected votes the total is 342,954.***

***There is a whopping 61,457 mysterious votes not accounted for.”***

36. The Petitioner contends that he has complied with the mandatory requirement of stating the results of the disputed election. To my mind the results as contemplated in Rule 12(c) should state the total number of votes cast, the spoilt and rejected votes and the number of votes garnered by each of the candidates.

37. The date of declaration of election is not categorically stated in the Affidavit. The Petitioner states that on 12.8.17, he was sent by Hon. Amina Abdalla to Bamburi College to collect a copy of declaration of the election results. He was given provisional results by the county returning officer who asked him to return later for the final results. He further avers in paragraph 5 that upon noticing anomalies set out in paragraph 4 of the affidavit, he raised the issue with the county returning officer who gave out official results after declaration of winner. In paragraph 9 of the Affidavit the Petitioner avers:

***“THAT when I insisted to be given the correct result for women representative the returning officer (2<sup>nd</sup> respondent) refused to and grabbed the document the (sic) had earlier given me on 12.8.17 and tore it to pieces and insisted that the latter document was the official results and declined to avail the same have (sic) it stamped with the date stamp of 1.9.17.”***

From the above, it is difficult to establish the date the results of the disputed elections were declared.

38. The grounds on which the election is presented can be gleaned for the Affidavit. The body of the Affidavit does not contain the name and address of the advocate acting for the Petitioner which shall be the address for service. In view of the foregoing, I am not satisfied that the Petitioner has complied with the provisions of Rule 12(2) and has in fact contravened sub-Rules (2) (b) (c) (d) and (f) of the Election Petition Rules.

### Failure to comply with Rule 8(1) (a) (b) and (c) of the Election Petition Rules.

39. It was submitted for the 3<sup>rd</sup> Respondent that the Petition is incurably defective in that it does not contain the results or the date of declaration of the results he is challenging. The cases of John Michael Njenga Mututho v Jayne Njeri Wanjiku Kihara & 2 others [2008] eKLR and Evans Nyambaso Zedekiah & another v Independent Electoral and Boundaries Commission & 2 others [2013] eKLR were cited in support of this argument. In response, learned Counsel for the Petitioner urged the Court to be guided by the decision of Korir, J. in Election Petition No. 4 of 2017 consolidated with Election Petition No. 5 of 2017, Samuel Kazungu Kambi & Another v IEBC and Others.

40. Rule 8(1) of the Election petition Rules provides:

***(1) An election petition shall state –***

***(a) The name and address of the petitioner;***

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

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

***(d) The date of the declaration of the results of the election;***

***(e) The grounds on which the election is presented; and***

***(f) The name and address of the advocate, if any, for the petitioner which shall be the address for service.***

41. The Petition, other than on the heading does not state the name of the Petitioner. It does not state the address of the Petitioner. The date when the disputed election was conducted is stated in the Petition. I note that in paragraph 3 thereof, the Petition does state the date of the declaration of the election results. The claim by the 3<sup>rd</sup> Respondent in this regard is therefore incorrect. However, the results of the election are not indicated. All that the Petition states is that the 3<sup>rd</sup> Respondent was declared winner by the 2<sup>nd</sup> Respondent after garnering 186,144 votes. This is not the election results as contemplated under Section 2 of the Elections Act and Regulation 87(2)(b) of the Elections (General) Regulations, 2012.

42. Section 2 of the Elections Act which provides:

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

Regulation 87(2)(b) of the Elections (General) Regulations, 2012 provides:

**“2. The county returning officer shall upon receipt the results from the constituency returning officers as contemplated under regulation (1)—**

**(b) complete Forms 37C, 38C and 39C set out in the Schedule in which the county returning officer shall declare, as the case may be, the—**

- (i) name of the respective electoral area;**
- (ii) total number of registered voters;**
- (iii) votes cast for each candidate or referendum side in each polling station**
- (iv) number of rejected votes for each constituency;**
- (v) aggregate number of votes cast in the respective electoral area; and**
- (vi) aggregate number of rejected votes;”**

43. It is also noted that the body of the Petition does not contain the name and address of the advocate for the petitioner which shall be the address for service. By failing to include the omitted matters in the Petition, the Petitioner has failed to satisfy the prerequisites in Rule 8(1) of the Election Petition Rules.

44. In the Mututho case (supra) as in the present Petition, the results of the election were not contained in the petition and the Court of Appeal had this to say:

**“What would happen where, as here the results as envisaged by regulation 40, above are not included in the petition”? In our view an essential element would be missing. The petition shall be incomplete as the basis for any complaint will be absent. Whatever complaints a petitioner may be having about an election may be regarded as having no legal basis. The law has set out what a petition should contain, and if any of the matters supposed to be included is omitted, then the petition would be incurably defective. For instance, paragraph (a) of rule 4(1) deals with capacity to petition. If a petitioner omits to make an averment in that regard the petition will be incurably defective. Likewise if the date of the election omitted that omission would be fundamental in nature and would of itself without more render a petition incurably defective. We say so advisedly. The provisions of the National Assembly and Presidential Elections Act, have been held, to provide a complete code of the law and rules on elections and election petitions. As rightly pointed out by Mr. Kilonzo for the appellant, that law has no provision for amendment of pleadings after the 28 days stipulated for lodging petitions. In view of the conclusions we have come to on that aspect, it follows that the term “shall” as used in rule 4, must be read as having a mandatory import. Reading it otherwise will render the provisions of that rule otiose.”**

45. In the Evans Nyambaso Zedekiah case (supra), Sitati, J observed:

**“My view of the matter is that since Rule 10 of the Rules (supra) 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 Respondent(s) to know what case they are faced with and how they may prepare their defence. 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.”**

46. I could not agree more with Sitati, J. Where, as in the present Petition material particulars such as the challenged results are omitted then such a petition is fatally incompetent and must be struck out. Sitati, J went on to say:

**“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.”**

47. Rule 10 is the present Rule 8 of the Election Petition Rules. Onyancha, J in the case of Amina Hassan Ahmed v Returning Officer Mandera County & 2 Others[2013]eKLR observed as follows regarding Rule 10 and I concur:

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

48. Learned Counsel for the Petitioner submitted that the results of the disputed election are all contained in paragraphs 31 and 32 of the affidavit of Amina Abdalla. With respect, the Rules require the results of the disputed election to be contained in the Petition and in the affidavit of the petitioner in support of the petition. The Petitioner cannot fail to include the results in his Petition and in his affidavit in support as required by the Rules and then point the Court to the Affidavit of one Amina Abdalla who is not the Petitioner.

49. The Court was urged to be guided by Korir, J. in the Samuel Kazungu Kambi (supra) in which he declined to strike out the Petition. Korir, J. observed:

***“42. There are two schools of thought in the High Court in regard to the question I have posed. The advocates for the 1<sup>st</sup> to 3<sup>rd</sup> respondents have cited authorities in support of the school of thought that holds that failure to strictly comply with rules 8 and 12 of the Election Petition Rules, 2017 renders an election petition incompetent and fatally defective.*”**

***43. There is however another school of thought whose view is that failure to comply with the provisions can be ameliorated in light of Article 159(2)(d) of the Constitution.***

***44. I come with the third view. In my view both schools of thought are correct to some extent. The determining factor is the extent of compliance with the rules as gleaned from the facts of each case.”***

50. The Court of Appeal in the Mututho case (supra) was emphatic that if results as envisaged in the law are not included in the petition then an essential element would be missing. The petition shall be incomplete as the complaints of the petitioner will have no legal basis. The Court was also unequivocal that the law has set out what a petition should contain, and if any of the matters supposed to be included is omitted then the petition would be incurably defective. The Supreme Court in the case of Raila Odinga v. I.E.B.C & others (2013) eKLR, this Court observed:

***“Article 159(2) (d) of the Constitution 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 imperatives as they seek justice from the Court.”***

51. This Court is bound by the decisions of the Supreme Court and the Court of Appeal. Consequently this Court will follow the reasoning in the decision in the Raila and Muthutho cases (supra) and not that in the Samuel Kazungu Kambi case which is the decision of a Court of concurrent jurisdiction. Further, the orders sought in the Petition for nullification of the election of the Mombasa county women representative to the National Assembly are very drastic orders indeed. It therefore behoves the Petitioner to ensure that he has fully complied with all the mandatory requirements of the law, in order to present a competent petition for consideration by the Court.

#### The fatalities of plagiarism

52. It is the 3<sup>rd</sup> Respondent’s case that the Petitioner plagiarised Election Petition No. 1 of 2017 in the Supreme Court. In particular the petition was framed in terms of Form A of the Second Schedule of the Supreme Court Petition Rules and is a replica of the presidential petition filed in the Supreme Court. The 3<sup>rd</sup> Respondent further contends that a whole section in the Petition is entitled “Questions for determination by the Court” which is a mandatory requirement in the Supreme Court and not in this Court. At the bottom of Form A, provision is made for advocate for the petitioner to sign the petition whereas in Form 1 in the First Schedule of the Election Petition Rules, provision is made for the Petitioner alone to sign. It was submitted that there was no room for the Petitioner’s advocate to sign the Petition. For the petitioner, it was submitted that the Election Petition Rules do not provide that a party shall be penalised for plagiarism. The Petition in the Supreme Court has the names of Raila Odinga and Uhuru Kenyatta while the Petition herein has the name of Saad Yusuf Saad and Mohamed Aisha Hussein. The issue of the Petition being a replica of the Supreme Court Petition is therefore neither here nor there.

53. Having considered the submissions of the parties in this regard, this Court does not find fault in the section in the Petition titled “Questions for determination by the Court”. Indeed setting out the questions for determination will only serve to assist the Court in framing the issues for determination at the hearing of the Petition. As regards signing of the Petition by the advocates for the Petitioner and not the Petitioner, this matter has been addressed at length earlier in this Ruling. Consequently, the grounds herein in my view hold no water.

54. In the case of Amina Hassan Ahmed v Returning Officer Mandera County & 2 Others[2013] eKLR, where the petition did not as in the instant case contain the requisite information, Onyancha, J observed:

***“The promulgator of the Rule, clearly went into great lengths and details to provide the actual form of and the contents the petitions should contain. The probable reason for going to such details would be that a petition, as filed, should be complete with all the details defined...”***

55. The Rules Committee in promulgating the Election Petition did indeed go to great lengths to provide detailed rules to regulate the practice and procedure of the High Court with respect to the filing and trial of election petitions. Rules 8, 10 and 12 contain the term “shall and must therefore be read as having a mandatory import. See Mututho case (supra).

56. The Petitioner’s obligation to comply with the procedural imperatives contained in the Election Petition Rules as he seeks the far-reaching orders of nullification of the election herein cannot be gainsaid. A party who neglects to comply with mandatory rules of procedure should not be allowed to seek refuge in Article 159(2)(d). In stating thus, I am guided by the words of Kiage, JA in Nicholas Kiptoo Arap Korir Salat v IEBC & 6 others [2013] eKLR:

***“... 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 succor and cover to parties who exhibit scant respect for rules and timelines...”***

57. Having evaluated the evidence and the law relevant in this matter, I draw the conclusion that service of the Petition was not effected upon the 3<sup>rd</sup> Respondent as required by Rule 10(1) of the Election Petition Rules. Secondly, The Petitioner failed to comply with Rule 8(1) (a) (c) (f) and Rule 12(2) (a) (c) and (f) of the Election Petition Rules. In the circumstances the finding of this Court is that the Petition herein is incurably defective and the same is hereby struck out. I award costs to the Respondents. Given that the Petition has been concluded at the interlocutory stage, I cap the aggregate costs at Kshs. 3,000,000/=. The costs shall be taxed by the Deputy Registrar apportioned to the Respondents on a pro rata basis taking into account the applications so far heard and determined but subject to the above limit.

**DATED, SIGNED and DELIVERED in MOMBASA this 13<sup>th</sup> day of November 2017**

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**M. THANDE**

**JUDGE**

**In the presence of: -**

.....for the Petitioner

.....for the 1st & 2<sup>nd</sup> Respondents

.....for the 3rd Respondent

.....Court Assistant