IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, MUSINGA & OUKO, JJ.A)

ELECTION PETITION APPEAL NO. 1 OF 2017(NYERI)

BETWEEN

HON. MARTHA WANGARI KARUA ……..……...….....….APPELLANT

AND

THE INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION ……...…..1ST RESPONDENT

MR. SEKI LEMPAKA …….……....2ND RESPONDENT

HON. ANNE WAIGURU …….……3RD RESPONDENT

HON. PETER NDAMBIRI …….……..4TH RESPONDENT

(Being an appeal from the whole of the ruling and order of the High Court of Kenya at Kerugoya (L. W. Gitari, J.) dated 15th November 2017

IN

ELECTION PETITION NO. 2 OF 2017

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JUDGMENT OF THE COURT

On 8th August 2017, the people of Kirinyaga County, like other Kenyans, went to various polling stations to vote for members of various national offices. The appellant and the 3rd respondent were among those who contested the position of Governor of Kirinyaga County. After the votes were counted and tabulated, the 3rd respondent was declared the duly elected Governor of Kirinyaga County after garnering 161,343 votes. The appellant came second with 122,091 votes. The appellant was aggrieved with the declaration of the results and on 5th September 2017 filed a petition before the High Court at Kerugoya in which she challenged the election of the 3rd respondent, alleging that the elections were not credible, free, fair or verifiable since there was massive cheating, intimidation, voter bribery, exclusion of her agents, use of unauthorized persons to man polling stations, tampering with ballot boxes, forgery of ballot papers and breach of constitutional requirements in the voting, counting, tallying and transmission of votes across the

County.

It is also contended that the 3rd respondent's votes were inflated by over 48,000 votes, distributed in a majority of the polling stations throughout the County. The appellant prayed for, among others, a declaration that the 3rd respondent was not duly elected as the Governor of Kirinyaga; and that the election be declared null and void and a fresh one be conducted.

On 12th October, 2017 the parties appeared before the election court to canvass an application for scrutiny and access to the KIEMs kits that were used in the elections. The ruling was reserved for 23rd October 2017. Before this could happen, the 3rd and 4th respondents filed an application dated 17th October 2017 under Article 159 (2) (b) of the Constitution and Rules 4 and 5 of the Elections (Parliamentary and County) Petition Rules 2017 (Petition Rules), urging the court to strike out the petition dated 5th September 2017 as well as the supporting affidavits sworn in support thereof. There was no affidavit filed by the 3rd and 4th respondents in support of the application. However, the application was premised on grounds that the petition did not comply with the mandatory provisions of Rule 8 (1) of the Petition Rules, and it was therefore defective; that the petitioner failed to set out with a reasonable degree of precision the manner in which the law was infringed; that the aforesaid defects in the petition were substantive. It was also the case of the 3rd and 4th respondents that due to the strict constitutional and statutory timelines, which are substantive and go to the root of the petition, the alleged infringement of or failure to comply with Rule 8(1) could not be cured by Article 159 of the Constitution thereby rendering the petition bad in law and incompetent.

The appellant opposed the application and contended, inter alia, that the petition was compliant with Rule 8(1) of the Petition Rules, that the application was ill-timed, overtaken by events and was in any case intended to frustrate and embarrass the court process. The appellant further contended that the application was intended to undermine the will of the people of Kirinyaga County.

In a ruling dated 15th November 2017, the trial court found that failure to comply with the Rule 8(1)(c) and (d) of the Petition Rules rendered the petition incurably defective and went to the jurisdiction of the court.

In allowing the application, striking out the petition, the court held;

> **"My view is that failure to comply with Rule 8(1) (c) touch** (sic) **on the dispute and goes to the jurisdiction of the court…The date of declaration is crucial in determining the dispute. I am of the view that a petition which has not complied with Rule 8(1) (c) and 8(1) (d) even if remotely is not compliant…Rule 8(1) (c) and 8(1) (d) though rules of procedure are intertwined in the substance of the case as provided under the Constitution and the Elections Act. The requirement under the Rules bears the ingredients, complaints and contents for the just determination of the petition and where overlooked by a litigant the consequence is to declare the petition incompetent."**

The trial court, after analyzing several decisions of the High Court on this point, came to the conclusion that the petition had not complied with the provisions of Article 87(2) of the Constitution and Rules 8(1) (c) and (d) of the Petition Rules holding that;

> **"The date of declaration of results is a substantive issue as it is the starting point of the dispute and the end in view of the strict timelines for filing of the petition and determination of the dispute."**

The court stated that the non compliance was substantive and could not be cured under Article 159(2) (d) of the Constitution or Election Petition Rules.

The trial judge further held;

> **"It is the petitioner who was supposed to plead the particulars. She cannot shift the burden on the respondents. As stated in Amina Hassan Ahmed*(supra)* rules are supposed to ensure that the petition would give full and complete particulars in order to communicate the dispute to the respondent(s) with a view to achieve** (sic) **the overriding objectives of the rules. The respondent should not be made to wander in a tiring aimless journey with no idea as to what the petition is all about. This prejudices the respondents…In my view the petition is hopeless…I have not seen a provision or an authority which can salvage the petition."**

Consequently the learned judge struck out the petition challenging the election of the 3rd respondent. In doing so, the trial court awarded costs to the respondents and in line with rule 30 of the Election Petition Rules, capped the costs of the petition at Kshs.10 million.

Being aggrieved by the decision of the trial court and the attendant orders, the appellant lodged the present appeal. In her Memorandum of Appeal, the appellant has laid out 14 grounds upon which she seeks this Court to set aside the decision and orders of the High Court.

The gist of the appeal is that; the learned trial judge gravely erred in law by striking out the petition well after she had conducted the pre-trial hearing and fixed the case for hearing on set dates, by elevating rules of procedural technicalities above Article 159 of the Constitution, the Elections Act and Rule 4 of the Elections Act (County and Parliamentary) Rules 2017; by finding that Rule 8(1) required the petitioner to tabulate the figures received by each candidate when that is a statutory function of the 1st respondent; and by declaring that the failure to so comply went to the jurisdiction of the court.

Another essential ground is that the judge failed to appreciate that the declaration of the results is a statutory function of 1st respondent, which were published in the Kenya Gazette and the judge ought to have taken judicial notice of the same. Consequently, it was argued, there was a miscarriage of justice and by capping the costs at the punitive figure of Kshs.10 million in a matter that did not proceed to full hearing. The parties filed written submissions which were highlighted orally before us.

Having considered the Grounds of Appeal and the rival submissions of the parties, we find that the main issue for our consideration in this appeal is whether or not the petition filed in the High Court complied with the provisions of Rule 8(1) of the Election Petition Rules, and if not, the consequences or effect of such non-compliance.

In exercise of judicial authority, the court is subject only to the Constitution and the law, which it must apply impartially and without fear, favour of prejudice. In performance of that duty, the court must appreciate that every case is made up of two elements, facts and law. On facts, the trial judge is supreme and whoever desires any court to give judgment as to any legal right or liability, dependent on existence of facts, must assert and prove the existence of the same. Equally, whoever desires the court to determine that a party has not complied with any legal requirement, it is within his responsibility to show the existence, import and consequence of non-compliance with the said provision.

In our understanding, rules of procedure must be applied to the advancement of substantial justice, to enforce rights in a manner not injurious to the society, by enlarging the remedy, if necessary, in order to do justice, to prevent delay, reduce expenses and inconveniences. We must also state that many things, especially in the domain of procedure, are left to the discretion of trial judges, and the best judge is the one who relies least on his/her own opinion. A trial judge has a wider field for the exercise of his/her discretion and an appellate court, would be most reluctant to interfere with such exefrcise of discretion. It will only interfere where the trial judge is shown to have been clearly wrong.

Again, where discretion is left to a trial judge, the court is to a great extent unfettered in its exercise. Discretion, when properly applied, means sound discretion grounded on the law, and rules; it must not be arbitrary, vague or fanciful; but judicious and regular. Discretion must not be exercised in a manner absolutely unreasonable and opposed to justice.

As evident from the ruling of the trial judge, there are several conflicting decisions of the High Court on

the construction of Rule 8 (1) aforesaid. The said Rule provides for the content and form of an election petition in the following terms;

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 petition is presented; and

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

The rule is couched in mandatory terms and it is common ground, that the petition as presented did not disclose either the results of the election or the date of the declaration of the results, that is, (c) and (d) above. It therefore did not fully conform to the requirement of Rule 8 (1).

The question we must ask from the onset, is whether this failure was a procedural or technical omission or one that went to the root or materially affected the substantive issues raised in the petition. And secondly, whether anything could have been done to salvage or sustain the Petition, in view of the failure or omission resulting from the appellant .

The appellant faults the trial court for striking out the petition on a technicality contrary to the provisions of Article 159(2)(d) of the Constitution, section 80 (1) (d)of the Elections Act and Rule 4 of the Petition Rules, all of which call upon courts to ensure that justice is administered without undue regard to procedural technicalities. According to the appellant, Rule 8 of the Petition Rules does not require a tabulation of the results and that such failure is not fatal as the law avails that statutory duty to the 1st and 2nd respondent.

The appellant submitted that the said respondents did fulfill these obligations because in their responses to the petition, they gave detailed evidence of the aggregate and specific results obtained by each of the candidates who participated in the gubernatorial election. The appellant further submitted that the 3rd and 4th respondents were not prejudiced, in any way, since they were aware of the case against them, as was shown by the fact that in their responses to the petition, they lodged certificates provided to them by the 1st respondent in which the result of the election as declared was indicated.

Mr. Gathungu, learned counsel for 1stand 2ndrespondents, submitted that Rule 8(1) is mandatory and since the petition as filed, did not comply with the requirements thereof, it was not a proper petition as envisaged by the Elections Act, was fatally defective and the trial court was right to strike it out.

Mr. Nyamodi, learned counsel for 3rd and 4th respondents submitted that once the appellant admitted that the election petition before the High Court did not comply with Rule 8(1) of the Petition Rules, the only recourse, the trial court had was to strike it out because it failed to disclose any cause of action and therefore lacked the necessary facts to successfully establish a claim.

More specifically, Mr. Nyamodi contended that due to the failure to strictly comply with mandatory requirements of Rule 8(1), the petition could not precisely set out the issues that the court was to determine, and as such, the constitutional imperative to expeditiously determine election disputes would be undermined. For this proposition, counsel relied on **Fredrick Otieno Outa v Jared Odoyo Okello & 4 others [2014] eKLR (Petition No.6 of 2014)** where it was observed that **“evidence, in instances where an election offence is alleged, is crucial to the making of a proper judicial finding. This evidence should be clear, cogent, and certain…”**

Learned counsel also relied on the decision of the Supreme Court in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others [2014] eKLR (Petition No.2B of 2014)** where the Supreme Court stated that:

> *"**it is time (to develop) our election petition litigation: we must depart from the current practice in which a petitioner pleads 30 grounds for challenging an election, but only proffers cogent evidence for 3. …Every party in an election needs to pull their own weight, to ensure that the ideals in Article 86 are achieved: that we shall once and for all have simple, accurate, verifiable, secure, accountable, transparent elections. The election belongs to everybody, and it is, therefore, in everybody's collective interest, and in everybody's collective and solemn duty, to safeguard it."***

Mr. Nyamodi further submitted that there is a direct relationship between Article 87(2) of the Constitution and Rule 8(1)(d) of the Election Petition Rules. Article 87 provides for the timeframe of 28 days within which a petition (other than a petition concerning a presidential election) should be filed. He relied on the decision of the Supreme Court in **Lemanken Aramat v Harun Meitamei Lempaka & 2 others [2014] eKLR (Petition No.5 of 2014)**

where it was observed that:

> ***"(a) condition set in respect of electoral disputes, is the strict adherence to the timelines prescribed by the Constitution and the electoral law. The jurisdiction of the Court to hear and determine electoral disputes is inherently tied to the issue of time, and a breach of this strict scheme of time removes the dispute from the jurisdiction of the Court."***

Mr. Nyamodi contends that rule 8(1)(d) is mandatory because it aids the court in determining when the 28 day period provided under the Constitution begins to be computed, and therefore sets out the jurisdiction of the High Court in determining election petitions, and a petitioner invokes this jurisdiction once it files a proper petition before the High Court. Rule 8(1)(d) creates an obligation on a petitioner to state the date of declaration and without this information, the petition would become a nullity.

As we have stated above, there are conflicting decisions from the High Court with respect to the effect, import and the consequences of failing to comply with Rule 8(1) of the Election Petition Rules. In the last cycle of election dispute resolution following the general election held on 4th March 2013, the High Court, then adjudicating on Rule 10 of the now retired Elections (Parliamentary and County) Petition Rules, 2013, which was similar to rule 8 of the Election Petition Rules, considered the failure to state the results and date of declaration and the effect this would have on an election petition. In **Amina Hassan Ahmed v Returning Officer Mandera County & two others [2013] eKLR (Election Petition No. 4 of 2013)** Onyancha, J. held the view that failure to state the results or the date of declaration was fatal to an election petition. He stated that:

> **"The petition before me failed to state the election result being contested. It failed to include the dates or time of the results. It even missed to state some of the prayers that the Petitioner ought to have included in the petition for consideration. And yet she appealed to this court to consider such details and mandatory information in the petition as technicalities which the court should ignore or disregard as per the tenor of Article 159(2) (d) of the Constitution. In this court?s view, the petitioner?s view is not in conformity with the said Constitutional provision…**
>
> **In my view and finding based on the facts and reasons herein above, the Petitioner?s petition is without doubt; fatally defective because it is deficient in form and lacks the vital prescribed content…"**

In this case, the court relied on the decision of this Court in **John Michael Njenga Mututho v Jayne Njeri Wanjiku Kihara & 2 others (2008) eKLR (Nakuru Civil Appeal No.102 of 2008)** where it held that:

"Election petitions are special proceedings. They have detailed procedure and by law they must be determined expeditiously.

The legality of a person?s election as a people?s representative is an issue. Each minute counts. Particulars furnished count if the petition itself is competent, not otherwise. Particulars are furnished to clarify issues, not to regularize an otherwise defective pleading. Consequently, if a petition does not contain all essentials of a petition, furnishing of particulars will not validate it… If she (petitioner) does not have results, what is she challenging? The issues she raises are meant to nullify a particular result. But if she has not given the results, any findings on the issues raised will serve no useful purpose. Any evidence adduced or to be adduced is intended to show that certain irregularities affected the outcome of the election, but without the result it might not be possible to relate the irregularities to the result."

Onyancha, J. therefore found the petition before him to be fatally defective, held that no provision of law could be invoked to cure those defects and therefore dismissed it.

Majanja, J. took a different approach in **Caroline Mwelu Mwandiku v Patrick Mweu Musimba & 2 others [2013] eKLR (Election Petition No.7 of 2013**. He considered the judgment of the Court in **John Michael Njenga Mututho vs Jayne Njeri Wanjiku Kihara & two others (supra)** and stated that rule 10(1) (c) of the Election Petition Rules 2013 was intended to deal with the mischief of insisting on strict compliance of form. The learned judge held that:

"The purpose of pleadings is to aid a fair trial. Rules of procedure are not mere formulae to be observed as rituals and elevated to a fetish. Beneath the words of a provision of law, lies a juristic principle. In this case the principle is that the rule is intended to enable the court fairly adjudicate the dispute between the parties.

The guiding principle in consideration of this matter is the overriding objective of the Rules which is stipulated under rule

4(1) of the Rules as „to facilitate the just, expeditious, proportionate and affordable resolution of election petitions under the Constitution and the Act?.

This objective is best realized by the election court having regard to the purpose and mischief that the rule seeks to cure and the prejudice that would be occasioned by insistence on the strict compliance with form. Rule 5 further obliges this court and the parties to conduct proceedings before it to achieve the following aims,

„(a) The just determination of the election petition; and

(b) the efficient and expeditious disposal of an election petition within the timelines provided in the Constitution and the Act?.

Rules 4 and 5 are therefore a testament of the provisions of Article 159(2) (d) of the Constitution which obliges every court to dispense justice without undue regard to technicalities.

…

I am satisfied that in these circumstances no injustice has been or will be occasioned by the failure of the petitioner to set out the result of the election. The fact that election disputes are sui generis governed by special regime of rules does not exonerate the court of its prime obligation and indeed reason for its existence; that of delivering substantive justice."

In **William Kinyanyi Onyango v Independent Electoral & Boundaries Commission & 2 others**

[2013] eKLR (Election Petition Appeal No.2 of 2013) Kimondo, J. took a similar approach to that of Majanja, J. In that appeal, the learned judge was faced with an appeal from the Resident Magistrate's Court which had struck out a petition for failure to comply with rule 10(1)(c) of the Elections (Parliamentary and County Elections) Petition Rules, 2013 by failing to state the results of the election. After considering the conflicting decisions of the High Court, he held that:

> **"In my considered opinion, the petition Rules 2013 were meant to be handmaidens, not mistresses of justice. Fundamentally, they remain subservient to the Elections Act 2011 and the Constitution. Section 80(1) (d) of the Elections Act 2011 enjoins the Court to determine all matters without undue regard to technicalities. Rules 4 and 5 of the Petition Rules 2013 have in turn imported the philosophy of the overriding objective of the court to do substantial justice. Certainly, Article 159 of the Constitution would frown upon a narrow and strict interpretation of the rule that may occasion serious injustice. This is not to say that procedural rules will not apply in all cases; only that the court must guard against them trumping substantive justice…"**

These decisions have had a bearing on the manner in which petitions arising out of the general election held on 8th August 2017 have been handled.

The approach to save petitions that did not comply with Rule 8 was adopted with approval in **Washington Jakoyo Midiwo v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR (Election Petition No.2 of 2017).** In this case, Maina, J. held that:

> **"In their plain and ordinary meaning both Rule 8(1) and Rule 12(2) of the elections (Parliamentary and County Elections) Petitions Rules, 2017 are mandatory. Both rules use the word "*shall*" as opposed to "may" which would give the Petitioner discretion to decide whether to state or to omit the "results if any and however declared". The petitioner in an election petition is therefore required to comply with these two rules and that includes stating the results of the election if any were declared."**

The learned judge went on to consider what the effect of non-compliance of this rule was. Aligning herself with the findings of Majanja, J. in **Caroline Mwelu Mwandiku v Patrick Mweu Musimba & 2 Others (supra)** and Kimondo, J. in **William Kinyanyi Onyango v Independent Electoral and Boundaries Commission (supra),** she stated that:

> **"The provisions of Rule 8(1) (c) go to the contents and form of the petition. While I agree that the rules are anchored on the Elections Act and by extension the Constitution and much as I find that by their wording they call for strict compliance these are procedural requirements."**

The learned judge therefore declined to strike out the petition and its supporting affidavit, stating that the petition should be heard in its entirety on its merit Later, the High Court sitting in Mombasa in **Mwamlole Tchappu Mbwana v Independent Electoral & Boundaries Commission & 4 others [2017] eKLR (Election Petition Number 5 of 2017)** considered a similar issue on a preliminary objection. In that case, the court noted that the petition was defective for failing to include the date of declaration of the result of the election and held that:

> **"36. The provision requiring the date of declaration of the result of the election is intended for a specific purpose. It is the date that the period of 28 days within which the Petition is to be filed begins to run. Stating the said date is therefore critical as it would determine whether nor not the Petition was filed within time. Without stating the date of declaration of the result of the election it becomes difficult, nay impossible to determine whether the Petition herein was filed within time or not and by extension whether the Court has jurisdiction to entertain the Petition or not."**

Thereafter, the court declined to find that the petition could be saved and rendered itself as follows:

"…By proceeding with a Petition in which the date of declaration of the results and the results have not been pleaded, this Court will run the risk of abandoning its role as an independent and impartial arbiter and descend into the arena of conflict. In the circumstances, I find that the Petition is incompetent for not having stated the date of declaration of the election."

Similarly, in **Jimmy Mkala Kazungu v IEBA & 2 others [2017] eKLR(Election Petition Number 9 of 2017)** Thande, J found that an election petition that was not compliant with Rule 8(1) was incurably defective and therefore struck it out. This was also the position in **Mbaraka Issa Kombo v Independent Electoral and Boundaries Commission & 3 others [2017] eKLR (Election Petition No.10 of 2017)** where the court, finding non-compliance with Rule 8(1) (c) and (d), stated that such a petition would be defective, and would directly controvert the constitutional imperative of timely resolution of electoral disputes as contained in Article 87(2) of the Constitution. According to that court, **"If timelines in determination of electoral disputes is a norm and principle of the Constitution then all the rules that further such norms and principles are themselves derivatives of the constitutional ethos and must as of necessity be complied with to the letter."**

In these two decisions, the court relied, in part, on the findings of this Court in **John Michael Njenga Mututho v Jayne Njeri Wanjiku Kihara & 2 Others (supra)**, which in our view, may not be appropriate as that matter was determined in 2008, under a different regime of constitutional and electoral law and where the principles as enunciated under Article 159(2) of the Constitution were not in the forefront as they are today.

We have sampled, some of the conflicting jurisprudence, in order to paint a clear picture on the approaches taken by courts in dealing with issues of non-compliance with Rule 8(1) (d) of the Election Petition Rules, 2017.It can be gleaned from that analysis, that the first school of thought considers the rules mandatory in nature, but would hesitate to take steps to strike out pleadings for such shortcomings. Anchoring the petition on Rule 4 of the Election Petition Rules as well as Article 159(2) (d) of the Constitution of Kenya, the proponents of this approach would save the petition. On the other hand, is the school of thought, that considers non-compliance with the said rule a violation that goes to the root of the petition, and one that so adversely affects its substance. For those who follow this school of thought, non-compliance with Rule 8(1) is non-curable violation of Article 87 of the Constitution which detrimentally affects the timelines within which an election petition must be heard and determined.

In this appeal, the appellant would have us endorse the findings of the High Court that failure to comply with mandatory provisions of Rule 8(1) would not render a petition defective. On the other hand, the respondents takes a different view, stating that in those cases where the courts have saved defective positions, they fail to consider the import and effect of Article 87 of the Constitution. Article 87 (2) of the Constitution states that petitions other than Presidential elections shall be filed within 28 days after declaration of the results by the Independent Electoral and Boundaries Commission. It also requires Parliament to enact a legislation for the timely settling of disputes; and finally provides for the manner of service of an election petition. On the other hand, Rule 8(1) provides for the content and form of an election petition. This rule as we have noted earlier in this judgment is couched in mandatory terms. What then would be the effect of non-compliance? To answer this, we must consider the purpose of pleadings in an election petition. First, it provides an opportunity to the respondents to see the case that is alleged against them, secondly, it is to set out with sufficient clarity the dispute to enable the court appreciate and properly adjudicate the matter before it.

Another important factor is to determine whether Article 87 (2) of the Constitution has been complied with. And thirdly, to enable the court to determine whether the petition substantially complies with the requirements of the law. As we have stated, it is common ground, that the result of the election as well as the date of declaration were not provided by the appellant either in the petition or in any of the documents filed to support it. This information was, instead provided comprehensively and clearly by the respondents. It is therefore clear that the information required by Rule 8(1) was before court and all the parties even as the trial court struck out the petition for not supplying that very information. The law, as we understand it, is that a party to an election petition or an advocate representing a party shall have an

obligation to assist the court to further the overriding objectives. For purposes of furthering the overriding objectives specified in Rule 4, the court and parties shall conduct proceedings for purposes of attaining;

a. The just determination of the dispute

b. The efficient and expeditious disposal of the petition.

In essence, the objective of the Petition Rules as set out under Rule 4 should be **borne in mind to ensure the just, expeditious, proportionate and affordable resolution of an election petition.** There should be a meticulous balance of those four objectives. It should not appear as though, an election court is simply concerned about expeditious disposal of the election petition by quickly striking it out, without carefully considering whether the decision to strike out, the petition is actually just to all the parties concerned, whether it is proportionate and whether the same could be avoided.

Section 83 of the Elections Act provides;

> **"No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law or that the non-compliance did not affect the result of the election"**

The question that comes to our mind once again is whether non-compliance with Rule 8 (1) (c) requiring the stating of the results and the date of declaration of the election affects the results of the election. Rule 5 states as follows;

> **"(1) The effect of any failure to comply with these Rules shall be determined at the Court?s discretion in accordance with the provisions of Article 159(2) (d) of the Constitution.**
>
> **(2) A party to a petition or an advocate for the party shall assist an election court to further the objective of these Rules and, for that purpose, to participate in the processes of the election court and to comply with the directions and orders of the election court."**

The 2nd respondent through a replying affidavit dated 18th September 2017, attached a copy of the declaration of the results of Kirinyaga County stating that there were 661 polling stations throughout Kirinyaga County and that the 3rd respondent garnered 161,343 votes against the petitioner's 122,091 votes. Consequently, he declared the 3rd respondent as the winner. As a result the 3rd respondent was issued with a certificate dated 10th August 2017 as the duly elected Governor of Kirinyaga County. Those are factual and material facts which were before the trial court before the application to strike out the petition was filed. They were undisputed since the said information was brought by the respondents, in particular the 2nd respondent, in exercise of its statutory duty.

The 3rd and 4th respondents were alive to the said information and the case against them. Again the certificate which was exhibited by the 3rd respondent indicated the date of the return of the election subject of this dispute. The trial judge held that the omission is not a technicality but goes to the jurisdiction of the court. Was the court saying, that it was not able to deal with the petition because the date of declaration and the results of that election were not known?

It is clear from the record the date of declaration and tabulation of the results were available to the court. The court ignored that information merely because it did not come from the petitioner. The court also stated that the petitioner admitted the default and that it was not entitled to look elsewhere.

It is common factor that the petition was filed on 5th September 2017. The date of declaration of results was on 10th August 2017 and if one were to compute the days from 10th August 2017, the petition was filed within 25 days of the date of declaration of the results.

If the court had looked at the pleadings, it would have concluded from obvious facts, that petition was filed within time. How then, with respect, could the learned judge conclude, that it was impossible, to determine whether the petition was filed within time?

In our view, the construction assigned to Rule 8 (1) (c) and (d) by the trial judge was too artificial and absurd. For our part, the plain and ordinary construction of the rule in view of the fact that all the materials required under that rule were before it, the plain ordinary construction of the rule ought to have been in favour of sustaining the Petition and determining it on merit; unless the petition was irredeemably defective, which we think is doubtful.

When Parliament imposes a strict provision upon the courts, it would not have given the discretion to weigh the scales of justice. In our view, it would be absurd to impose a non-existent control on the discretionary power vested upon the court by simply saying it is mandatory, therefore we fold our hands. The court must address its mind of the reasonableness and implication of sustaining a petition, against an abrupt termination of the same. It was unfortunate to terminate the proceedings on the strength of such non compliance without the court addressing its mind to the nature, extent and import of such a route. It suffices to say, that, in this case, the evidence to determine whether the petition had been filed within 28 days was clear beyond peradventure, from the material and evidence supplied by the party alleging non-compliance. The documents were in the possession of the 3rd and 4th respondents and were properly before the court.

It should be noted that failure to comply with the provisions of Rule 8(1) *per se* does not mean that the petition is invalid. The remedies provided by the Constitution and the Statute, the words under Article 159(2) are unambiguous and mean that, unless the results of the election and date of declaration cannot be ascertained or determined from the materials filed by the parties, the condition is satisfied. In our judgment, the reason is that these provisions have to cover a number of different situations specified and any other construction is wholly inappropriate. Nothing in the language of the statute suggests that the documents in the file courtesy of any other party other than the petitioner, can or should be ignored as a basis of giving life to Rule 8(1) (c) and (d).

Even if the rule does place the obligation to provide the date of declaration and the results on the petitioner, in this appeal, it is our considered opinion that the trial judge acted improperly in striking out the petition when the evidence was available before her. In our view, despite the failure of the appellant, there was more than ample legal ground that could save the petition. The objective of the Election Petition Rules, 2017 is found in Rule 4 which provides that:

> **"(1) The objective of these Rules is to facilitate the just, expeditious, proportionate and affordable resolution of elections petitions.**
>
> **(2) An election court shall, in the exercise of its powers under the Constitution and the Act, or in the interpretation of any of the provisions in these Rules, seek to give effect to the objective specified in sub-rule (1).**

Rule 5 of the Election Petition Rules, 2017, provides that "the effect of any failure to comply with these Rules shall be determined at the Court's discretion and in accordance with the provisions of Article 159 (2) (d) of the Constitution." In view of this, the trial court was required to place substantive justice over the procedural considerations.

As has been oft stated by courts in this country, election petitions are *sui generis*, and akin to public interest litigation. These are not disputes that are primarily between only the parties to the petition; there is a greater concern because the electorate has an interest in knowing the winner; and if they were disenfranchised in the conduct of that election. It therefore behooves, courts to undertake and place substantive considerations above those of procedure, especially where the procedural infractions are curable. In addressing the consequences of non-compliance by the Petitioner and being alive to Article 159(2)(d) of the Constitution and Rule 5(1) the trial court held;

"The Court is called upon to do substantial justice. I am of the view that the provisions do not aid the Petitioner…The date of declaration of results is a substantive issue as it is the starting point of the dispute and the end in view of the strict time lines for filing of the petition and the determination of the dispute. It determines whether the Dispute is filed within 28 days as stipulated in the Constitution. The results on the other hand is what sparked of the dispute as the 3rd respondent was returned as being duly elected and the petitioner lost. The non-compliance is substantive and cannot be cured under Article 159(2) (d) of the Constitution and rule 5(1) of the Rules."

We are not persuaded by these fears. We do not think they provide sufficient reason for making and allowing an application for striking out the Petition. The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged. In the majority of petitions, identification of the documents upon which a party relies, together with copies of that party's witness statements, will make the details of the nature of the case the other party has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise. The documents in the subject appeal were annexed to the replying statements filed by the respondents. In essence, the parties were aware that the documents were part and parcel of the pleadings filed by the parties. Again the said documents could even be produced in evidence by the appellant at the hearing of her case. We agree that pleadings are still required to mark out the parameters of the case that is being advanced by each party. The critical point here is that, we have a party who files pleadings and documents in support of its case but thereafter blames the appellant for not supplying documents already in the court file. Two issues then arise, one of blaming the petitioner for abrogation of duty and secondly, the court sustaining non-existent grievances without focusing more effectively on the practical implications of the outcome.

We must say that although initially the appellant was under a duty to comply with Rule 8(1), the same duty was extinguished or abrogated by the conduct of the respondents fulfilling the requirement of Rule 8(1) (c) and (d). The requirements of proximity and forseeability form the basis on which the existence of the duty may be said to have been extinguished in the particular circumstances of the facts before us. The trial court was of the considered view that since the results and date of declaration were missing in the Petition and supporting affidavits, then it would amount to allowing amendments outside the time. And that the petitioner cannot shift the burden to the respondents.

Again we are not persuaded by these fears. We do not think they provide sufficient reason for treating the case of the appellant in a territory outside the downtrodden path of pleadings. Suffice to say that the existence of a duty owed should not be regarded as furnishing, a basis on which generalized assertions should be made. It was common ground and rightly so, that the alleged omission which exceedingly made a simple question difficult was available to all parties. We confess, we entertain, no doubt, on how that question should be answered. This seems to us to be, on its face an example per excellence of a situation where a non-existent question was raised by the respondents and answered by the trial court in a manner prejudicial to the rights of the appellant. The question and answer is with respect a distinction without a difference.

We reject the respondents' argument that failure to comply with the said Rule goes to the jurisdiction of the Court. In the petition before the court, the contest did not concern the date of declaration or the fact that the 3rd respondent was declared the winner of the Kirinyaga County gubernatorial election. The contest revolved primarily around the manner in which the 3rd respondent came to win the election. We fail to see how the non-compliance with Rule 8(1) undermined the jurisdiction of the Court to hear and determine this issue. The jurisdiction of the High Court to hear and determine election petitions stems from Article 87(2) and section 75 of the Elections Act. The High Court has six months within which to hear and determine an election Petition. Where the Rules are not complied with, this does not affect the right of the court to make a determination on that petition. We draw from the judgment of this Court in **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 Others [2013] eKLR (Civil Appeal No. (Application) 228 of 2013)** where Ouko, JA. in the majority stated that:

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

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

We agree with those sentiments. In this appeal as well, justice should not have been sacrificed at the altar of the procedural requirements of Rule 8(1), particularly because those lapses did not go to the fundamental dispute that was before the court. This does not mean that procedural rules should be cast aside; it only means that procedural rules should not be elevated to a point where they undermine the cause of justice.

We are fortified in this finding by the decision of the Supreme Court in ***Moses Mwicigi & 14 others v Independent Electoral and Boundaries Commission & 5 others [2016] eKLR (Petition No.1 of 2015)*** where the Court stated that:

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

(66)Yet procedure, in general terms, is not an end in itself. In certain cases, insistence on a strict observance of a rule of procedure, could undermine the cause of justice. Hence the pertinence of Article 159(2) (d) of the Constitution, which proclaims that, "…courts and tribunals shall be guided by…the principle that] justice shall be administered without undue regard to procedural technicalities". This provision, however, is not a panacea for all situations befitting judicial intervention; and inevitably, a significant scope for discretion devolves to the Courts."

Various decisions rendered by the High Court in particular **Mwambole Tchappu Mbwana v Independent and Electoral Boundaries Commission & 4 others [2017] eKLR, Jimmy Mkala Kazungu v IEBC & 2 Others [2017]**, **Mbaraka Issa Kombo v Independent Electoral and Boundaries Commission and 3 others [2017] eKLR,** have all held that rules of procedure in electoral disputes are not mere technical or procedural requirements but go to the root and substance of the matters prescribed upon. The learned judges were of the view that if any of the matters listed in the rules and are omitted, the petition is incurably defective and the court should not hesitate to declare them incompetent. There is a positivist school of though on the same issue. One of the leading judgment in this school of thoughts was rendered by Korir J in the case of **Samuel Kazungu Kambi & Another v Independent Electoral & Boundaries Commission & 3 others [2017] eKLR** who held the view that whereas there is need for strict compliance with the laws and rules governing the resolution of election disputes, the court ought to be mindful that the current constitutional dispensation requires substantive justice to be done and that unless an election petition is so hopelessly defective and cannot communicate all the complaints and

prayers of the petitioner, the court should ensure that the petition is heard and determined on merit.

As stated hereinabove, Maina, J. in **Jakoyo Midiwo case** was of similar view as that of Korir, J. On our part, we entirely agree and endorse the position taken by the two learned judges. We say so because our current constitutional dispensation leans towards determination of disputes on merit. Therefore, taking into consideration our historical background which is replete with determination of disputes on technicalities, and now the legal underpinning provisions of superiority of our constitutional value system, we think that the route taken by the learned judges to dismiss petitions on technicalities that do not affect the jurisdiction is not a reflection or manifestation of our current jurisprudence and justice system.

Indeed one could go so far to say the superiority of the constitutional value system is the central premise or foundation of our 2010 Constitution.

The elevation and prominence placed on substantive justice is so critical and pivotal to the extent that Article 159 of the Constitution implies an approach leaning towards substantive determination of disputes upon hearing both sides on evidence. Any other construction placed on Rule 8(1) in view of the fact that the materials allegedly not produced by the petitioner were before court and supplied by the respondents, was an attempt to move the goal posts after the ball had been kicked. There is nothing in the language of Rule 8(1) that suggests that documents in the court file, courtesy of another party other than the petitioner, can be ignored or be a basis for dismissing or striking out the petition.

The learned trial judge was of the view that the requirements under Rule 8 (1) are not technical requirements but substantive matters that went to the root of the issue before court. And that Rule 4 cannot aid a party who has failed to comply with the Rules. That therefore, the issue of public interest was a non issue. In her considered view it is in the public interest that there should be compliance with the Constitution, legislation and Rules made thereunder to save on resources and time.

As stated above, the petition raised serious issues and therefore it could not be termed hopeless, as the learned judge described it. The petitioner was saying that the election was not credible, free, fair and that the results obtained by the candidates were not verifiable and that there was massive cheating, intimidation, voter bribery, etc. We think these are grave issues requiring determination on merit.

We agree with the learned judge on one point that the people of Kirinyaga wanted to know if their Governor was legally and validly elected. And that was the point in contention in the petition before the High Court. It is upon investigation of the allegations and determination that would give rise to the ultimate truth as to who won the election held on 8th August 2017, vide which the 3rd respondent was declared the winner. The primary duty of the court in exercise of the powers donated under Articles 2, 159, 165 and 259 of the Constitution, Sections 75, 79, 80, 82, 83 and 85 of the Elections Act and the relevant Rules made thereunder bestows upon the court the duty to determine the dispute on merit and ensure that the petition is sustained so as to ensure the grievances contained therein are determined on merit.

We are not saying that an election court cannot strike out a Petition at all. Far from it. There may be instances where the procedural infraction goes to the root of the dispute. There are instances when an election Petition may be irredeemably defective, like when it is filed outside the Constitutional or statutory timeframes. It is for the court to determine whether a particular candidate was eligible to contest the election, having met the Constitutional and statutory requirements, and that the voting and the declaration of results were conducted in accordance with Article 86 of the Constitution.

In this case the issue in dispute was whether the votes cast were counted, tabulated and the results announced was an accurate reflection of the will of the people of Kirinyaga County. That can only be done by giving the parties opportunity to present their case for hearing and determination by the election court. That was not done. It was not done because the petition was struck out for failure to comply with Rule 8(1) (c) and (d). In our view, the trial judge did not exercise her discretion correctly. In the case of ***Hon. Lemanken Aramat v Harun Meitamei Lempaka & 2 others [2014] eKLR*** the Supreme Court held;

> ***"A Court dealing with a question of procedure, where jurisdiction is not expressly limited in scope – as in the case of Articles 87(2) and 105(1) (a) of the Constitution – may exercise a discretion to ensure that any procedural failing that lends itself to cure under Article 159, is cured. We agree with learned counsel that certain procedural shortfalls may not have a bearing on the judicial power (jurisdiction) to consider a particular matter. In most cases procedural shortcomings will only affect the competence of the cause before a Court, without in any way affecting that Court's jurisdiction to entertain it. A Court so placed, taking into account the relevant facts and circumstances, may cure such a defect; and the Constitution requires such an exercise of discretion in matters of a technical character."***

The question we are posing is whether it was reasonable, fair, legal and regular to strike out the petition when the required particulars were before court, when there was no dispute as to the results obtained by the parties, the date of declaration, the validity of the petition, and as to whether it was filed within 28 days from the date of declaration of the results. There was no contest to the fact that the results were declared. The contest was that the results were not a reflection of the will of the people, which was is to be determined at the trial. Therefore, to our mind, a court granted discretion should be exercised by ensuring that justice is sustained at all times.

In our view a strong case has been made out to enable us overrule the exercise of discretion by the trial judge.

We are satisfied that the discretion was not exercised in accordance with the law. It was, in our view, exercised in an erroneous view of the law or an obvious mistake of facts. No court entrusted with power of administering justice is without restraint. Here, with profound respect, the trial judge did not exercise the necessary restraint. She failed to appreciate that in the circumstances aforesaid the breach committed by the appellant was cured and was therefore rendered a non-issue, and it was not committed in bad faith. In our understanding, the irregularities were corrected by the respondents and it was not reasonable afterwards to allow the party to complain of such irregularities, particularly after the pre-trials were done and dates for the substantive hearing fixed. To conclude the point, we think what the petitioner did or omitted to do, but was sufficiently supplied by the respondents, was not so felonious as to be incurable under Article 159 of the Constitution.

In striking out the petition without addressing the nature and ramification of the said Article, the trial court wrongly exercised its discretionary power. The Rules of natural justice require that the court must not necessarily drive any litigant from the seat of justice without a hearing, however weak his or her case may be. It was therefore incumbent upon the trial judge to substantively address her mind to the grave allegations contained in the petition and to consider that public interest required determination of disputes on merit.

The jurisprudence from our courts in interpretation of the Constitution has been to avoid summary dismissal of Petitions and that power could only be exercised as a last resort where the petition is demonstrated to be hopeless or disclosing no reasonable cause of action. Another important factor, the trial court was bound to consider, was the strength and weakness of the Petition before striking out the Petition. We have noted that the trial court did not address its mind to the strength and weakness of the petition and responses filed by the parties. That primary duty was not carried out before arriving at the decision striking out the Petition. The trial court termed the Petition as hopeless without any basis and consideration. We therefore think the conclusion by the trial judge that the Petition was hopeless was draconian, drastic and unjustified.

We also think the trial court did not carry out a balancing exercise of the correct consideration for striking out the Petition. In view of the clear provisions of the law, we think the basis for striking out was not plain. That was cured by the availability of the necessary documents in the record. In the circumstances we think the appellant was deprived of her right to have her suit determined in a full trial without a just cause and on no legal basis. In essence, without any consideration the Petition cannot be termed as frivolous, without substance, groundless or fanciful, hopeless or offensive, or that it was intended to embarrass a fair trial or stated immaterial matters or raised irrelevant issues which were likely to

prejudice the respondents. That was not the case as no determination was made by the trial court.

Consequently, the appellant's challenge on the finding of the trial court is meritorious, and we find that the trial court erred in striking out the petition for being defective for want of compliance with Rule 8(1) of the Election Petition Rules, 2017. On the whole, we are satisfied that the trial judge reached the wrong conclusions, in the manner she addressed her mind to the relevant and pertinent questions.

Another issue which was raised by the appellant is that the trial court was wrong to entertain the application for striking out the petition because it was filed after the pre-trial conference had already been concluded. The respondents on the other hand contend that the application was properly filed, heard and determined because the trial court had yet to settle the issues to be determined in the petition. It is clear to us when the application for striking out the petition was filed on 17th October 2017, the issues for determination had not been settled by the court. We do not think anything turns on this ground since Rule 12(2) of the Election Petition Rules gives an election court the power to hear and determine any interlocutory application even after the conclusion of pre-trial conference. In any case, being a jurisdictional question, it could be raised at any stage before the final determination.

Another ground that was raised by the appellant is that the trial judge used intemperate language, imported extraneous matters in the ruling and was biased. As a Court of record, and having scrutinized the record of the proceedings before us and the rulings rendered by the trial judge, we do not see anything to show that the trial judge used inappropriate language or imported extraneous issues in a manner that suggested any bias. She may have used unnecessary strong language to express her appreciation of the law and issues before, but that per se cannot be construed to imply that she was biased. So we similarly reject that ground.

The final issue we turn to is whether or not the trial court erred in awarding costs of the petition, capped at Kshs.10 million to the respondents. The appellant invited us to find that the award was excessive due to the fact that in all, the parties appeared less than ten times before the trial court. The respondents on the other hand naturally found no fault with the award, and while conceding that the appearances before the trial court did number less than ten, they maintained that the costs were reasonable. We appreciate that an award of costs is in the discretion of the trial court, and this Court would only interfere with such discretion if it is seen that "there was misdirection in some matter and as a result, the Judge arrived at a wrong decision or, that he or she misapprehended the law or failed to take into account some relevant matter." See **Mercy Kirito Mutegi v Beatrice Nkatha Nyaga & 2 Others [2013] eKLR (Civil Appeal No.48 of 2013)**.

We notice that the trial court did not indicate the basis of making the award. In our understanding, the capping of costs provided under Rule 30 of the Petition Rules, 2017 was to ensure that parties approach courts without fear of being subjected to excessive costs. Despite this rule, the current trend in the capping of costs at inordinately high amounts shows that we are going back to the era where costs in election petitions were very high. Capping of costs was intended to curb the practice of awarding large sums in costs. High costs are an impediment to the right of access to justice and are not meant to be punitive. In our view, this petition and the applications thereunder were not particularly complex or protracted. To our collective minds, the amount of Kshs.10 million, even where this amount is to be shared amongst all the respondents, was excessive.

Section 84 of the Election Act provides that it is within the discretion of the election court to award costs and that costs shall follow the cause. Again as stated, Rule 30 of the Election Petition Rules gives the court unfettered discretion which means that the discretion exercisable by the taxing master under paragraph 16 of the Advocates Remuneration Order 2009 has been circumscribed. It is up to the election court to determine whether a party would be awarded costs or not and in doing so the court must be guided by the principles of fairness, justice and access to justice. It is meant to compensate a successful litigant. It is not a punishment or a deterrent measure to scare away litigants from the doors of justice. In a matter that was determined on a preliminary application, and where the parties appeared before court eight times, the capping of costs at Kshs. 10 million was unreasonable and unmerited. We agree with the appellant that such costs would discourage citizens from filing election petitions before the High Court.

We also agree that it is a bar and impediment to the constitutional principle under Article 48 of the Constitution of access to justice. It is also not clear how the figure was arrived at and the basis of the same.

In **Esposito Franco v Amason Kingi Jeffah & 2 Others [2014] eKLR** the court held that:

> **"Although this observation is obiter, the new electoral dispute regime has introduced a mechanism for capping of costs in election petitions. This was certainly intended to keep costs at a manageable level so as not to limit access to justice by litigants of moderate incomes. In many petitions filed after the 2013 General Elections that went into full hearing, costs were capped by courts at between shs.1.5 to shs.2m."**

In **Marble Muruli v Wycliffe Oparanya & 3 others [2013] eKLR**, costs were capped at Kshs.5 million shillings to be shared between the petitioner, 1st respondent and the 2nd respondent. Those awarded to the 1st respondent were capped at Kshs.2.8 million while those to the 2nd and 3rd respondents jointly capped at Kshs.2.2 million.

In **Ferdinard Ndung?u Waititu v Independent Electoral & Boundaries Commission (IEBC) & 8 others [2013] eKLR** the court capped the total costs at Kshs.5 million, capping the costs payable to the 1st to 3rd respondents jointly at Kshs.2,500,000/= and to both the 4th and 5th respondents jointly at Kshs.2,500,000/=.

In **Jackton Ranguma v IEBC & others [2017]** the court awarded the 1st and 2nd respondents Kshs.2.5 million in costs while the 3rd respondent was awarded Kshs.2.5 million.

In **Mercy Kirito Mutegi v Beatrice Nkatha Nyaga & 2 others [2013] eKLR**, the Court of Appeal capped the total costs at Kshs.2.6 million.

We therefore think that such a huge cost as awarded here by the learned Judge would result in a miscarriage of justice as there was no basis for capping the costs at Kshs.10 million as we said earlier, in a matter that did not proceed to hearing. Having found that the learned Judge erred in law in striking out the Petition, the order made on costs as a result cannot stand. Consequently, this limb of appeal succeeds as well and the award of costs is hereby set aside.

After careful and meticulous consideration of all the representations made and for the reasons given above, we allow the appeal and set aside the ruling by Gitari, J. made on 15th November 2017. Considering the labour of preparing voluminous records of appeal, three attendances before this court, as well as eight attendances before the High Court, we award the appellant costs capped at Kshs.2 million. We direct the parties to appear before Gitari, J. on 5th March 2018 for directions on hearing and disposal of the Petition. Orders accordingly.

Dated and delivered at Nairobi this 2nd day of March, 2018.

M. WARSAME

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

W. OUKO

…….....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR