



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, GATEMBU & M'INOTI, J.J.A.)

ELECTION PETITION APPEAL NO. 1 OF 2018

(CONSOLIDATED WITH ELECTION PETITION

APPEAL NO. 3 OF 2018)

BETWEEN

JAPTHET MUROKO.....1ST APPELLANT

ZACHEUS OKOTH OLIECH.....2ND APPELLANT

AND

INDEPENDENT ELECTORAL

& BOUNDARIES COMMISSION.....1ST RESPONDENT

JOSEPH MELE EROO,

RETURNING OFFICER NAIROBI COUNTY.....2ND RESPONDENT

KIOKO MIKE SONKO MBUVI GIDION.....3RD RESPONDENT

(Appeal from the ruling and order of the High Court at Nairobi (Msagha, J.) dated 9th January 2017 in

EP. No. 23 of 2017)

JUDGMENT OF THE COURT

This judgment determines two appeals, namely *Election Petition Appeal No. 1 of 2018 (EPA No. 1)* and *Election Petition Appeal No. 3 of 2018 (EPA No. 3)* concerning the Nairobi County gubernatorial elections held on 8th August 2017. It also determines a motion on notice filed on 12th February 2018 by the 3rd respondent, *Kioko Mike Sonko Mbuvi Gidion*, seeking to strike out EPA No. 3. Both appeals are from the ruling and order of the High Court at Nairobi (*Msagha, J.*) dated 9th January 2018 by which the learned judge struck out with costs *Election Petition No. 23 of 2017* challenging the election of the 3rd respondent as the Governor of Nairobi County.

The appellants in the EPA No. 1 are *Japthet Muroko (1st appellant)* and *Zacheus Okoth Oliech (2nd appellant)*, duly registered voters in Nairobi and the petitioners before the High Court. The 1st respondent is the *Independent Electoral and Boundaries Commission (IEBC)*, a constitutional Commission established by *Article 88* of the *Constitution* and responsible for among others things, conducting and supervising free and fair elections and delimiting electoral units. The 2nd respondent, *Joseph Mele Eroo*, was at the material time an officer of the IEBC deployed as the County Returning Officer for the Nairobi County gubernatorial elections. The 3rd respondent was one of the eight

candidates in the said elections and was declared the winner by the IEBC. The sole appellant in the EPA No. 3 is **Noah Akala Oduwo**, who was a witness, rather than a party, in the petition before the High Court. For convenience we shall refer to him as the **3rd appellant**. All the parties in the first appeal are the respondents in EPA No. 3.

Because of the commonality of the impugned ruling, the parties to the petition and the two appeals, and the issues raised therein, during the pre-hearing conference held on 12th February 2018, we directed, with the concurrence of all the parties, that pursuant to **rule 20** of the **Court of Appeal (Election Petition) Rules 2017**, the two appeals be consolidated. We further directed the parties to file their written submissions for both the motion and the substantive appeal, in readiness for highlighting the same on 13th March 2018.

Before we delve into the merits of the motion and the appeal, it is apposite to set out their brief background. During the general elections held on 8th August 2017, eight candidates offered themselves for election to the office of Governor, Nairobi County, and obtained votes as follows:

	Candidate	Votes
1	Evans Kidero Odhiambo	696,888
2	Francis Mwangi Inganji	1,569
3	Kenneth Peter	42,935
4	Kioko Mike Sonko Mbuvi Gidion	871,794
5	Macharia Lawrence Kamau	1,691
6	Miguna Miguna	10,308
7	Mumo Michael Mutinda	1,616
8	Waweru Godfrey Wanyoike	1,212

The IEBC declared the 3rd respondent the winner and vide **Gazette Notice No. 7845** dated 16th August 2017, gazetted him as the duly elected Governor of Nairobi, pursuant to which he was sworn into office on 21st August 2017.

On 8th September 2017, the 1st and 2nd appellants, in their capacity as registered voters in Nairobi County, filed a petition in the High Court challenging the 3rd respondent's election, contending that it did not comply with the **Constitution**, the **Elections Act** and the Regulations made thereunder. In particular they averred that the election was not transparent, accurate, verifiable, or free and fair; was vitiated by among others, inaccurate collation of results and opaque tallying; use of unstamped and unverified Forms; denial of access to polling stations and relevant Forms to agents of the 3rd respondent's opponents; bribery of voters; returns that showed more votes cast than registered voters; unusually high numbers of rejected votes; failure to account for all ballot boxes and election materials; and failure to use the KIEMs kits in all polling stations, as well as interference with the said kits. Accordingly they prayed for among others, scrutiny and recount of the votes cast in all polling stations and an order nullifying the election of the 3rd respondent as the Governor of Nairobi County.

The IEBC and the 2nd respondents filed their joint response to the petition on 19th September 2017. They explained in detail their mandate, the procedure during the elections, the officials involved in the conduct of elections and their respective duties and responsibilities, and the manner in which the elections in the County were conducted, which they maintained was strictly in accordance with the law. In particular they dismissed as fictitious the figures relied upon by the petitioners to show **more votes than registered voters**, as well as the **number of rejected votes**.

For his part, the 3rd respondent filed his response to the petition on 20th September 2017, defending his election and denying the averments by the 1st and 2nd appellants. He dismissed the petition as one founded on generalised allegations lacking in particularity and contended that the election was conducted in accordance with the Constitution and the electoral laws, was free and fair, and accurately reflected the will of the voters in Nairobi County.

Earlier on 15th September 2017, pursuant to **regulation 6** of the **Elections (Parliamentary and County Elections) Petition Rules, 2017**, the Hon. The Chief Justice appointed Msagha, J. vide **Kenya Gazette Notice No. 9060** of even date, to hear and determine the appellants' petition in Nairobi. It is important to point out that under section **75 (2)** of the Elections Act, a question as to the validity of an election of a county governor is to be heard and determined by the High Court within six months of the date of lodging of the petition. Conscious of that

fact, on 2nd November 2017, the learned judge set down the petition for hearing on **28th, 29th, 30th November** and **4th and 5th December 2017**. Those dates were set with the concurrence and consent of all the parties. As it turned out, the hearing did not take place as scheduled because 28th November 2017 was subsequently declared a public holiday for the inauguration of the president-elect and the parties had also in the meantime filed interlocutory applications that the learned judge deemed necessary to hear and determine before commencement of the hearing of the petition.

On 7th December 2017, after having disposed of the interlocutory applications, the learned judge gave further directions on the hearing and determination of the petition, again with the consent of the parties, as follows:

“All pending applications shall be heard on 14th December 2017 at 10.00 am.

...

The main petition shall be heard on 8th, 9th, 10th and 12th January 2018 from 10.00 am each day. No applications shall be filed thereafter and no adjournments shall be allowed.

(Emphasis added).

On 8th January 2018 when the hearing of the petition was scheduled to commence, the 1st and 2nd appellants did not show up in court. Their advocate, **Mr. Oluoch**, applied for **“a brief”** and **“a limited”** adjournment until the next morning, claiming that some unknown people had threatened the 1st appellant for which he needed time to make a report to the police and to obtain assurance regarding his safety and security. The 3rd respondent opposed the application for adjournment, essentially contending that it lacked *bona fides*.

The learned judge considered a number of factors before agreeing to grant an adjournment until noon, the same day. These were, his order of 7th December 2017 in which he warned the parties that he would not adjourn the petition; the fact that it did not require a whole day to make a report to the police; the absence from court of the 2nd appellant against whom there were no alleged threats; and the fact that the 1st appellant could have made his report to the police earlier if indeed the alleged threats were made the previous Saturday.

When the court convened at 12.25 pm, both the 1st and 2nd appellants were still not in court. Mr. Oluoch informed the court that the 2nd appellant had instead of attending court, decided to accompany the 1st appellant to the police station, apparently for moral support. None of their other witnesses was present in court either. So counsel applied for adjournment for **“a few hours”** until the next morning. Again the 3rd respondent strenuously opposed further adjournment of the petition, accusing the appellants of lack of seriousness, and noting in particular the absence from court of the 2nd appellant against whom no threats were alleged or any other of the appellants’ witnesses.

The learned judge concluded that he was called upon to balance the rights of the 1st and 2nd appellants and those of the respondents. In the circumstances, he once again acceded to the appellant’s application and adjourned the petition to the next morning, 9th January 2018, at 9.00 am. It is important to note that when they first applied for the adjournment on 8th January 2018, the 1st and 2nd appellants wanted an adjournment to the next day. At the end of the day, they had effectively obtained the adjournment to the day of their choice.

At 9.00 am the next morning, the petition was called out for hearing. This time **Mr. Oginga** and **Ms. Maumo**, learned counsel, were present for the appellants in lieu of Mr. Oluoch. Once more, the appellants were not ready to prosecute the petition. Instead they informed the court that they were in the process of filing an application that had a bearing on the Petition and asked for a 15 minutes adjournment, which the learned judge readily granted.

When the court convened after 15 minutes, the 1st and 2nd appellants informed the learned judge that they had just filed a notice of intention and an application to withdraw the petition. Ms. Maumo then applied for a further adjournment of the petition and requested the learned judge to give directions on the application to withdraw the petition. The 1st and 2nd respondents opposed any further adjournment of the petition, submitting that the latest application was a stratagem to obtain further adjournment and delay the hearing and determination of the petition. They informed the court that they were ready for the hearing of the petition, with forty witnesses. As in the previous occasions, the 3rd respondent again opposed further adjournment of the petition contending that way back on 7th December 2017 the court had advised the parties that it would not entertain adjournment of the hearing of the petition. He prayed for dismissal of the petition if the appellants were not ready to present their evidence.

After considering the matter, the learned judge declined to adjourn the petition further and called upon the 1st and 2nd appellants to call their witnesses in the petition, to which their counsel responded that they had no instructions to proceed with the hearing of the petition. The learned judge then adjourned the petition to 10.45 am when he delivered the impugned ruling and struck out the petition.

The appellants were aggrieved by the ruling and preferred the consolidated appeal now before us, in which the 1st and 2nd appellants, in blatant disregard of **section 85A(1)** of the Elections Act, which limit appeals to this Court to matters of law only, consistently alleges that the learned judge “*erred in law and fact*”. Be that as it may, the appellants contend that the learned judge erred by: striking out the petition; failing to give directions on their application to withdraw the petition; failing to afford members of the public an opportunity to take over and continue the petition; misapprehending the law on election petitions, their withdrawal, and public interest litigation; taking into account irrelevant considerations; and awarding costs against them.

As we earlier adverted, the 3rd respondent filed a motion to strike out EPA No. 3 on the grounds that it was an abuse of the process of the court, having been filed by the 3rd appellant who did not have *locus standi* because he was not a party to the petition in the High Court. We heard the motion together with the appeal, in view of the fact that even before this Court, **section 85A (1) (b)** of the Elections Act demand that an election petition appeal must be heard and determined within six months of the filing of the appeal.

Starting with the motion to strike out EPA No. 3, **Mr. Kinjanjui** and **Mr. Miller**, learned counsel for the 3rd respondent, submitted that the same was an abuse of the process of the court because the 3rd appellant, who lodged it, was only a witness and not a party to the petition in the High Court. Although he had the opportunity, it was urged, the 3rd appellant never applied to be joined in the petition either as a co-petitioner or an interested party. In counsel’s view, the election rules envision an appellant to be only a person who was a party to the petition and not a stranger like the 3rd appellant.

It was further submitted that the appeal was an abuse of the process of the court because the 3rd appellant was aware that the 1st and 2nd appellants, who were the petitioners in the High Court, had filed EPA No. 1 against the learned judge’s ruling dated 9th January 2018. Instead of applying to be made a party to that appeal, it was urged, he irregularly purported to file, without capacity, a separate appeal from the same ruling and raising the same issues as those in the EPA No.1. It was contended further that the 3rd appellant’s actions were a deliberate breach of the judicial policy of just, expeditious, and impartial determination of election petition appeals espoused in the Court of Appeal (Election Petition) Rules 2017.

None of the parties filed replying affidavits to the motion, but some of them addressed us in opposition to it. The 2nd appellant, represented by **Mr. Aduda**, learned counsel, urged us to dismiss the motion on the basis that under **Articles 19** and **38** of the Constitution, the 3rd appellant has enforceable political rights which he seeks to vindicate in the appeal. In counsel’s view, there was no law that restricted appeals to this Court to only persons who were parties to the petition in the High Court. The 3rd appellant urged us to find that the 3rd respondent’s application was based on technicalities contrary to **Article 159** of the Constitution, dismiss the same, and determine the appeal on merits.

Mr. Awele, learned counsel for the 3rd appellant also opposed the motion, urging us to dismiss the same because the 3rd appellant, as a citizen of the Republic Kenya and a registered voter in Nairobi Country had *locus standi* to file the appeal. He invoked **Articles 22** and **258** of the Constitution, which he contended bestows expansive *locus standi* upon citizens to enforce the Bill of Rights and to ensure public bodies like the IEBC operated within the law.

Like the 2nd appellant he contended that there was no law restricting the right of appeal in election petitions to the original parties in the High Court and that **rule 6** of the Court of Appeal (Election Petition) Rules, 2017 referred to “**any person who desires to appeal the decision of the High Court.**” In support of broad interpretation of *locus standi*, the 3rd appellant relied on the decision of the High Court in **Mark Ndumia Ndung’u v. Nairobi Bottlers Ltd [2018] eKLR**, that of this Court in **Law Society of Kenya, Nairobi Branch v. Malindi Law Society [2017] eKLR** and the decision of the Supreme Court in **Mumo Matemu v. Trusted Society of Human Rights Alliance [2014] eKLR**.

We have duly considered the application, the submissions by the parties and the authorities that were cited to us. The 3rd respondent’s complaint is that the 3rd appellant, having not been a party to the petition in the High Court has no standing to prefer EPA No. 3. He contends that election petitions would never come to an end if, after the judgment of the High Court, any member of the public who was not a party to the petition is allowed to prefer an appeal simply because the issues involved are of a public nature. To the 3rd respondent, an appellant must have been a party to the petition in the High Court and to be entitled to be heard in this Court, any other person must come either as an affected or interested party. In his view, it is an abuse of the process of the court for the 3rd appellant to raise in EPA No. 3 the very issues that the 1st and 2nd appellants have raised in EPA No. 1.

The 3rd appellant’s response is that election petitions are not disputes between the parties thereto only, but raise public interest issues that entitle him to lodge an appeal if he is aggrieved by the manner in which the petition has been determined. He points out that he is a citizen of Kenya and more importantly, a registered voter in Nairobi County, whose gubernatorial elections are the subject of this appeal. He argues that he is keen to take over and proceed with the petition if this appeal succeeds and the 1st and 2nd appellants are allowed to withdraw from it. He therefore urges us to find that he has sufficient interest and is entitled to bring EPA No. 3.

It cannot be gainsaid that since the promulgation of the Constitution of Kenya, 2010, the standing of citizens to institute proceedings, particularly for the enforcement of the Bill of Rights and in public interest litigation has been broadened. In **Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 Others** (supra), an appeal in the Supreme Court was challenged on the grounds that by the time the appellant preferred the same, it had already been deregistered as a Non-Governmental Organization. It was contended therefore that the appellant lacked capacity to prefer the appeal. The Supreme Court considered the evolution of *locus standi* in Kenya from the strict and narrow interpretation applied in **Maathai v. Kenya Times Media Trust Ltd [1989] KLR 267** to the current

liberal position under the Constitution of Kenya, 2010. It concluded that the Constitution had enlarged the scope of *locus standi* in Kenya and that **Articles 22, 258 and 260** thereof empowered ***every person***, including a person acting in public interest, to move the courts for purposes of contesting any alleged contravention of the Bill of Rights or the Constitution in general.

The issue raised in the motion before us, is of course slightly different, being whether a person who was not a party in the proceedings before the High Court has *locus standi* to file an appeal in this Court. A similar issue arose recently before a bench of five judges of this Court in ***Law Society of Kenya Nairobi Branch v. Malindi Law Society & 6 Others*** (supra). The appellant, who was not a party to the constitutional litigation before the High Court, filed a notice of appeal in this Court challenging the decision of the High Court. An objection was taken regarding the competence of the notice of appeal, on the basis that having not been a party to the proceedings in the High Court, the appellant lacked standing to lodge the appeal. The Court opined that the issue as to who has *locus standi* before a court of law has been crystalized to mean that it is **“an aggrieved party”**.

In upholding the right of the appellant to prefer the appeal, the Court found further support in **rule 75(1)** of the Court of Appeal Rules, which provides:

“75(1) Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the Registrar of the superior court.” (Emphasis added).

The Court noted that the rules refer to **“any person”** desirous of appealing rather than a person who was a party to the impugned decision. It concluded that a person, association, a body corporate or an unincorporated body have *locus standi* not only to institute original proceedings, but also appellate proceeding, provided that they are aggrieved by the decision intended to be challenged.

We agree with the above reasoning and note in respect of Election Petition Appeals, **rule 6 (1)** of the Court of Appeal (Election Petition) Rules, 2017 uses the same phraseology of **“a person who desires to appeal”** rather than a person who was a party to the petition. We think that is deliberate. Moreover, the rules of this Court have always inclined towards affording a person who claims to be affected by a decision of the court below, an opportunity to be heard, even though he was not a party to the proceedings in that court. Hence **rule 77(1)** of the Court of Appeal Rules requires the notice of appeal to be served upon **“all persons directly affected by the appeal”** whilst **rule 7(1)** of the Court of Appeal (Election Petition) Rules, 2017 requires service of the notice of appeal **“upon all affected parties.”**

This Court interpreted the wordings in the current rule 77(1) in ***Objula Enterprises Ltd v. Summaria [1986] KLR 655*** and stated as follows (***Nyarangi, JA***):

“The words „all persons directly affected by the appeal? properly understood would include more persons than if the words were, “the persons directly affected by the appeal?. The persons directly affected by an appeal need not be only those who were parties to the proceedings.” (Emphasis added).

Similarly in ***Ahn v. Openda [1982] KLR 87*** the Court concluded that a party who had taken no part in the proceedings before the High Court was nevertheless a directly affected person in so far as his actions or his property would be affected by any order made by this Court. We would also add, if his rights were affected. (See also ***Ethics & Anti-Corruption Commission v National Cereals & Produce Board & Another, CA No. 9 of 2012***).

Accordingly, we are not persuaded that there is any basis to strike out EPA No. 3 with the result that the 3rd respondent’s notice of motion filed on 12th February 2018 is hereby dismissed.

Turning to the substantive appeal, **Dr. Khaminwa**, learned counsel, who lead **Ms. Maumo** and **Mr. Oginga**, learned counsel, for the 1st appellant, submitted that the learned judge erred by striking out the petition whilst there was on record an application to withdraw the same. It was submitted that an election petition is not a dispute between the parties to it, that it implicates wider public interest, and that in dealing with a petition the court must pay due regard to that fact. The 1st appellant relied on the decisions in ***Joho v. Nyange & Another [2008] 3 KLR (EP) 156, Abdihaim Osman Mohammed & Another v. IEBC & 2 Others [2014] eKLR, David K. ole Nkedianye & 2 Others v. Joseph Jama ole Lenku & 4 Others [2017] eKLR*** and ***Peters v. Attorney General [2002] 3 LRC 32*** to emphasise the public interest nature of an election petition.

The 1st appellant further cited the ***Elections (Parliamentary and County Elections) Rules, 2017*** and submitted that **rules 21 to 24** thereof provide an elaborate procedure for withdrawal of election petitions, which is intended to safeguard the public interest by affording any willing member of the public an opportunity to take over and continue a petition that the original petitioner intends to withdraw. In their view the learned judge ought to have given those rules their natural and plain meaning and allowed the withdrawal of the petition instead of striking it out. They relied on the decisions of the High Court in ***Law Society of Kenya v Kenya Revenue Authority & Another [2017] eKLR*** and ***Council of Governors v. Attorney General & Another [2017] eKLR*** regarding statutory interpretation.

It was the 1st appellant’s further submission that the learned judge’s decision to strike out the petition instead of allowing its withdrawal was contrary to the Elections (Parliamentary and County Elections) Rules, 2017, unreasonable, irrational, in disregard of public interest, and in

violation of their constitutional right to be heard and to access justice. Learned counsel added that striking out of a pleading is a draconian measure to be resorted to sparingly and urged us to find that in this case the learned judge gave technicalities undue pre-eminence over substantive justice.

Next the 1st appellant submitted that the learned judge's exercise of discretion in refusing to adjourn the appeal and in denying him and 2nd appellant leave to withdraw the petition in the manner stipulated by the rules was injudicious and prayed, on the authority of *Mbogo & Another v. Shah [1968] 93*, that we interfere with the learned judge's exercise of discretion.

Lastly the 1st appellant contended that the learned judge also erred by awarding costs against them, because the petition was in the nature of public interest litigation intended to enforce their rights and those of other members of the public. He accordingly urged us once more to find that the learned judge misapprehended **section 84** of the Elections Act and **rule 30** of the Elections (Parliamentary and County Elections) Rules, 2017, exercised his discretion erroneously, and to interfere and set aside the order awarding costs against them.

Mr. Aduda, for the 2nd appellant, associated himself with the submissions made on behalf of the 1st appellant and added, if we understood him correctly, that an application for withdrawal of a petition must invariably be followed by substitution of the petitioner. It was contended that although the appellants had complied with the rules as regards their intention and application to withdraw the petition, the learned judge, without any basis, denied them their right to withdraw the petition and refused to afford any other member of the public the opportunity to take over and continue the same. The 2nd appellant cited the decision of the Supreme Court in *Nicholas Kiptoo arap Korir Salat v. IEBC & 7 Others [2014] eKLR* and submitted that a party's right to withdraw a matter before the court cannot be taken away.

Next we heard Mr. Awele for the 3rd appellant, who submitted that because election petitions are *sui generis* proceedings, the learned judge did not have any power to strike out the petition. The power to strike out pleadings, it was submitted, is peculiar to civil suits and cannot be imported into election petitions. In support of the proposition that the **Civil Procedure Rules** do not apply to election petitions, the 3rd appellant relied on a ruling by the learned judge dated 16th November 2017, in the petition (*Japhet Muroko & Another v. IEBC & 2 Others, EP. No. 23 of 2017*).

Even if the court had power to strike out the petition, it was further contended, the court could only have done so pursuant to a formal application. The judgment of the High Court in *Hillary Tururi Mwita v. Ismail Nyasimi [2017] eKLR* was cited in support of that contention. It was the 3rd appellant's further argument that striking out a pleading is a draconian measure, which should not have been adopted in the circumstances of this case. He added that in striking out the petition the learned judge had taken into account irrelevant considerations and failed to consider the merits of the petition and public interest.

Next the 3rd appellant submitted that the learned judge erred in striking out the petition while there was a pending application to withdraw the same, which had not run its full course under the Elections (Parliamentary and County Elections) Rules, 2017. He added that the striking out of the petition amounted to a denial of the right to be heard on the application to withdraw the petition and also a denial of the right of any member of the public to be substituted as a petitioner.

IEBC and the 2nd respondent were the next to submit and opposed the appeal through their learned counsel, **Mr. Nani Mungai** and **Ms. Karen Muthée**. The two respondents submitted that the appeal was essentially against the learned judge's exercise of discretion in refusing to adjourn the petition and that by dint of the decision in *Mbogo & Another v. Shah* (supra), this Court cannot interfere with exercise of discretion by the learned judge unless it is satisfied that he misdirected himself and arrived at a wrong decision or that on the whole he was clearly wrong in the exercise of discretion, leading to injustice. Although the learned judge had clearly indicated that he would not entertain applications for adjournment, it was contended, the 1st and 2nd appellants made three applications for adjournment, two of which the learned judge granted.

While conceding that the learned judge should have dismissed rather than struck out the petition for lack of evidence, the two respondents submitted that the error did not make any difference because the fate suffered by the petition was a natural consequence of the refusal of an adjournment and the 1st and 2nd appellants' failure to call evidence. On the authority of the decision of this Court in *Peter M. Kariuki v. Attorney General [2014] eKLR* and that of the Court of Appeal of Uganda in *Obiga Mario Kania v. Electoral Commission & Another, EP No. 4 of 2011*, it was submitted that an adjournment is not granted of right, but at the discretion of the court, taking into account the circumstances of the case and the conduct of the parties. In this case it was submitted that the learned judge had properly exercised his discretion taking into account the statutory time limit, the opportunities he had granted the 1st and 2nd appellants to proceed with the petition, the fact that only 59 days of the prescribed time were remaining, and that there were 47 witnesses lined up to testify in the petition. The application to withdraw the petition, it was contended, was a mischievous device to secure further adjournment of the petition.

It was the further submission of these respondents that the 1st and 2nd appellants suffered no prejudice when the petition was struck off because in any event they had intimated their intention to discontinue it and it was not for them and the 3rd appellant to purport to act for unknown and unidentified members of the public whom they presume would have taken up and continued the petition. Relying on the decision of the Supreme Court of Canada

in *Joseph Borowski v. Attorney General of Canada [1989] 1 SCR*, the two respondents urged us to find that the dispute embodied in the petition was now moot because the time within which the High Court was supposed to hear and determine the petition had already lapsed and that it no longer had any jurisdiction in the matter. They also cited the judgment of the Supreme Court in *Lemanken Aramat v. Harun Maitamei Lempaka & 2 Others [2014] eKLR* in support of the contention that after expiry of the prescribed period for hearing and determining the petition, the High Court no longer had jurisdiction to hear the same.

Lastly on award of costs, the 1st and 2nd respondents submitted that the learned judge did not err because costs follow the event and that the court had unfettered discretion to award and cap costs, including against parties like the appellant, who had caused unnecessary expenses.

The 3rd respondent, joined in opposing the appeal, submitting through his learned counsel, Mr. Kinyanjui and Mr. Miller that the grant or denial of an adjournment is discretionary and that there was no basis established for interfering with the learned judge's exercise of discretion because it was based on sound principles, given the circumstances of the petition. Learned counsel urged us to ignore the appellant's submissions regarding their application to withdraw the petition because on 9th January 2018, it was the petition and not the application, which was scheduled for hearing.

It was submitted that the hearing dates were taken by consent of all the parties and from 7th December 2017 when those dates were fixed to 8th January 2018 when the hearing of the petition was scheduled to commence, the appellants had sufficient time to file and prosecute the application to withdraw the petition. Before striking out the petition for lack of evidence, it was urged, the learned judge tried to accommodate the appellants and twice adjourned the hearing of the petition to enable them get their act together, which they failed to do. Citing *Mburu v. Gakuha & 2 Others (No. 2) [2008] 2 KLR (EP) 457* and *Gaji v. Sheikh & 2 Others [2008] 2 KLR (EP) 164*, where the High Court rejected applications for adjournment of the hearing of election petitions because of lack of good reasons, the 3rd respondent submitted that the learned judge was justified in refusing to adjourn the petition further and that in the circumstances there were no justification for interfering with his exercise of discretion. Counsel also cited the decisions in *Mbogo & Another v. Shah* (supra) and *Matiba v. Moi & 2 Others [2008] 1 KLR 670* to support this Court's approach of non-interference with exercise of discretion save in the specified circumstances.

On the jurisdiction of the High Court to strike out an election petition, the 3rd respondent submitted that even though the Civil Procedure Rules did not apply in election petitions, the High Court had inherent jurisdiction to strike out the petition. In support of that proposition he relied on the decision of the High Court in *Chelaite v. Njuki & 2 Others (No.3) [2008] 2 KLR (EP), 209*. The 3rd respondent concluded by urging us to find that the learned judge properly exercised his discretion and to dismiss the appeal with costs.

Those then are the positions adopted by the respective parties in the appeal. As we turn to consider the merits of this appeal, we must reiterate that at its centre is a challenge to the manner in which the learned judge exercised his discretion and rejected the 1st and 2nd appellants' application for adjournment of the hearing of their petition. Decisions abound in this jurisdiction, some which were cited by the parties, emphasizing the discretionary nature of the power of the trial court to adjourn or refuse to adjourn proceedings, to justify any lengthy reiteration. We shall only mention three decisions by way of example: *H. K. Shah & Another v Osman Allu [1947-1949] EA 45*, *Job Obanda v. Stage Coach International Services Ltd & Another [2002] eKLR* and *Peter M. Kariuki v. Attorney General [2014]*.

In *Kiriisa v. AG & Another [1990-1994] EA 258* the Supreme Court of Uganda described exercise of discretion as:

"[T]he faculty of deciding or determining in accordance with circumstances and what seems just, fair, right, equitable, and reasonable in those circumstances."

And in *Nanyuki Equator Sacco Co-operative Society Ltd v. Nyeri Sacco Society & Another, CA No. Nai 86 of 2005* this Court added that a discretion necessarily involves a latitude of individual choice according to the particular circumstances of each case.

Like all discretionary power, the discretion to grant or refuse an adjournment must be exercised judiciously and upon reason rather than arbitrarily, capriciously, on whim, or sentiment (See. *Jaribu Holdings v. Kenya Commercial Bank Ltd, CA No. 314 of 2007*). In *Nanyuki Equator Sacco Co-operative Society Ltd v. Nyeri Sacco Society & Another* (supra), this Court emphasized the limits of precedent as a guide in the exercise of discretion, because no two cases are exactly alike, and in any event, rigid adherence to precedent is itself a fetter of discretion.

Be that as it may, among the general considerations to bear in mind in determining whether to allow or reject an application for adjournment include whether the applicant was aware of the hearing date, the time he had to prepare and get up for the hearing, whether his conduct has been diligent or dilatory, the reason(s) for seeking adjournment, the sufficiency and truth of such reason(s), the nature of the dispute before the court, the need to afford the parties, as much as possible, an opportunity to fully agitate their cases, the overarching constitutional principle that justice shall not be delayed, whether a

miscarriage of justice is likely to be occasioned by refusal of adjournment, the prejudice that is likely to occur if adjournment is granted or denied, whether award of costs would ameliorate any prejudice to the respondent, and we would add, in an election petition, the effect of an adjournment on the time prescribed by the Constitution and statutes for determination of the dispute. (See *Abdala Habib v. Harban Singh Rajput* [1960] EA 325, *Savannah Development Co. Ltd. v. Mercantile Finance Co Ltd* [1992] KLR 463, *Job Obanda v. Stage Coach International Services Ltd & Another* (supra) and *Peter M. Kariuki v. Attorney General* (supra).

Once the trial court has exercised its discretion taking the above or other relevant considerations, as far as they are applicable, into account, an appellate court will be slow to interfere with the decision of the trial court because by law, the discretion belongs to the trial court, and not to the appellate court. The mere fact that the appellate court would have come to a different decision on exercise of discretion from the trial court, if it were seized of the matter in the first instance, is not a sufficient ground for interfering with the discretionary decision of the trial court.

The narrow latitude of an appellate court to interfere with exercise of discretion by the trial court was stated as follows in *Matiba v. Moi & 2 Others* [2008] 1 KLR 670:

“The High Court was exercising discretion and the Court of Appeal was not entitled to substitute the Judge’s discretion with its own discretion. It had to be shown that the Judge’s decision was clearly wrong because he misdirected himself or because he acted on matters on which he should not have acted on or because he failed to take into consideration matters which he should have taken into consideration and in doing so, arrived at a wrong decision.”

(See also *Mbogo & Another v. Shah* (supra) and *United India Insurance Co. Ltd v. East African Underwriters (Kenya) Ltd* [1985] E.A 898).

The matter scheduled for hearing before the trial court on 8th January 2018 was an election petition. On the one hand it was a matter of great public interest, of great moment, not only to the petitioners, but to the general public, and in particular the denizens of Nairobi County. In *Peters v. Attorney-General* [2002] 3 LRC 32, a decision that has been quoted with approval by many courts in this jurisdiction, the Trinidad and Tobago Court of Appeal stated thus:

“An election petition is not a matter in which the only persons interested are candidates who strive against each other in elections. The public are substantially interested in it and that it is an essential part of the democratic process. It is not a lis between two persons, but a proceeding in which the constituency itself is the principal party interested. The characteristics of an election petition are fundamentally different from civil proceedings.”

(See also *Kibaki v. Moi* [1999] eKLR and *Joho v. Nyange*, (supra). This is the aspect of the appeal that the appellants have emphasized throughout their submissions, for purposes of showing that much more was at stake in the petition than their personal interest, which fact ought to have weighed heavily on the learned judge’s mind before he dismissed their application for adjournment and struck out the petition.

On the other hand, the petition was a dispute, which, by express constitutional and statutory dictate, must be heard and determined timeously, and in any event within six months from the date of its lodging. In *Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others* [2014] eKLR, the Supreme Court considered among others the rationale and implication of section 87(1) of the Elections Act, which requires Parliament to enact legislation for “timely resolution of electoral disputes”. The Court noted that the quest for timeliness was a deliberate response to our pathetic past history when electoral disputes would take the entire term of the legislature to resolve. In a pithy passage, the Court stated:

“[62] Article 87 (1) grants Parliament the latitude to enact legislation to provide for “timely resolution of electoral disputes.” This provision must be viewed against the country’s electoral history. Fresh in the memories of the electorate are those times of the past, when election petitions took as long as five years to resolve, making a complete mockery of the people’s franchise, not to mention the entire democratic experiment. The Constitutional sensitivity about “timelines and timeliness” was intended to redress this aberration in the democratic process. The country’s electoral cycle is five years. It is now a constitutional imperative that the electorate should know with finality, and within reasonable time, who their representatives are. The people’s will, in name of which elections are decreed and conducted, should not be held captive to endless litigation.”

This is what the respondents have put great premium upon, to contend that the appellants were deliberately bent on stalling the hearing of the petition, in breach of clear constitutional and statutory demand.

Way back on 2nd November 2017, almost two months after the filing of the petition, the learned judge put all the parties on notice that he would hear the petition on day-to-day basis on 28th, 29th and 30th November and 4th and 5th December 2017. Those dates were set with the

concurrence of all the parties and were no doubt informed by the limited time and the large number of witnesses lined up to testify, over 40 in all. As we noted earlier, due to intervening events, some totally beyond the control of the court or the parties, the hearing of the petition could not proceed as scheduled.

On 7th December 2017 the learned judge once again set new hearing dates for the petition, namely 8th, 9th 10th and 12th of January 2018. All the parties, who had 30 days prior to the commencement of the hearing of the petition, consented to those dates. More importantly the learned judge advised the parties and put it on record, that he would not entertain further interlocutory applications and applications to adjourn the hearing of the petition, having conducted a pre-trial case management conference and set a specific date within which to dispose of all pending interlocutory applications. Under **rule 15(2)** of the Elections (Parliamentary and County Elections) Rules, 2017, after the pre-trial conference, no interlocutory applications, which by their nature could have been made before commencement of the hearing of the petition, are allowed. The order of the learned judge, we have no doubt, was informed by the importance of the petition and the attendant public interest, the large number of witnesses to be heard, and the prescribed time within which he was required to hear and determine the appeal.

We have already narrated what transpired on the day the hearing of the petition was scheduled to commence, and the following day. The appellants were aware for at least 30 days, of the dates of the hearing of the petition and cannot therefore be said, by any stretch of imagination, to have been taken by surprise. Indeed they had consented to those hearing dates and were aware of the order by the learned judge that he would not entertain further interlocutory applications or adjourn the hearing of the petition. The reason given for applying for adjournment at the first instance was that the 1st appellant had been threatened the previous Saturday and had gone to make a report to the police on the morning of the hearing. As the learned judge noted, granted the importance of the petition, the 1st appellant would have made the report earlier than waiting until the morning of the hearing. More intriguing was the absence from court of the 2nd appellant, against whom there was no alleged threat. If the appellants were really acting in good faith, it would have been expected that the 2nd appellant would be present in court to start off the hearing, as the 1st appellant reported his alleged threat to the police. We must note that in applying for the adjournment, the 1st and 2nd appellants' counsel represented that they were otherwise ready to start the hearing, but for the absence of the 1st appellant who had gone to the police. That is why they applied for "**a brief**" adjournment to the next morning. Although the learned judge was clearly not impressed, and rightly so in our view, he conceded to the application and adjourned the hearing until noon, after noting, again correctly in our view, that it did not take a whole day to record a statement with the police.

A few minutes after the appointed time when the court reconvened, both appellants were still not in court. The respondents were ready to start the hearing. Although in the morning the learned judge had adverted to the necessity of the 2nd appellant being in court to start the hearing, he too was not in court, having opted instead to go to the police station rather than to the court. Again the 1st and 2nd appellants applied for what they called "**a limited**" adjournment until the next morning. The clear representation that they made, just like in the morning, was that they were going to be ready for the hearing of the petition the next morning. We note that at that point the 1st and 2nd appellants did not inform the learned judge, let alone drop any hint, that they wished to **withdraw the petition**. Notwithstanding strenuous objection by the respondents, the learned judge once again acceded to a further adjournment until the next day, when he assumed that the 1st and 2nd appellants would get on with the hearing of the petition as they had represented.

The next morning, was not any different from the first day. Instead of getting on with the hearing of the petition, the 1st and 2nd appellants applied for yet another adjournment, this time to go through the motions of withdrawing the petition. It was at that point that the learned judge rejected the application for further adjournment, called upon the 1st and 2nd appellants to call their witnesses and eventually struck out the petition when their advocates indicated that they had neither witnesses nor instructions to prosecute the petition.

The 1st and 2nd appellants have made heavy weather of how the learned judge erred by denying them an opportunity to withdraw the petition and members of the public the opportunity to take it over. The point that they miss is that under the Elections (Parliamentary and County Elections) Petition Rules, 2017, withdrawal of a petition and substitution of the petitioner are not automatic or allowed as of right. Under **rule 21 (1)**, withdrawal of the petition is subject to the leave of the court and that rule makes it crystal clear that whether to grant or deny leave to withdraw the petition is at the discretion of the court. Similarly, under **rule 24 (2)**, whether to allow substitution of the petitioner is at the court's discretion.

As we adverted earlier, we cannot interfere with exercise of discretion by the trial court unless we are satisfied that the learned judge exercised the discretion injudiciously. In the petition before him, the learned judge was satisfied that the 1st and 2nd appellants were not acting in good faith and that their notice and application to withdraw the petition were made purely for purposes of forcing an adjournment of the petition in the face of his refusal to entertain frivolous applications for adjournment. The appellants had 30 days within which to withdraw their petition if they so wished, but did not do so. As late as the previous afternoon, they had represented to the learned judge that they would be prosecuting the petition the next morning and did not advert to their intention to withdraw the same. As of the morning of 9th January 2018 when the learned judge struck out the petition, there was no application for withdrawal of the petition listed before him for hearing and determination. That application was filed belatedly in the last minute. In these circumstances, other than having failed to demonstrate injudicious exercise of discretion on the part of the learned judge, we perceive that he indeed acted judiciously to forestall abuse of the process of the court, the undermining of prescribed timelines, and to drive home the point that the court cannot be held to ransom by litigants. The High Court of Uganda aptly observed in ***Kiwanuka Nsereko v. Returning Officer & Another [1995] V KALR 105***, that election petitions must be handled with the seriousness and strictness accorded to them by the

Constitution and statutes, so that they are concluded within the prescribed time. Accordingly, they cannot be handled at the speed and laxity at which other civil suits are, unfortunately, usually handled.

In our view it cannot fall from the mouths of the appellants to criticize the learned judge for alleged failure to appreciate and give effect to the public interest in the petition. Precisely because of the petition's public interest, the 1st and 2nd appellants who had taken it upon themselves to file it, were expected to proceed with a modicum of diligence and scrupulousness, consistent with people pursuing a matter of great interest to themselves and to the public in general. Instead, they proceeded as if they were at liberty to drag their feet, while it was the court's obligation to tag along, for the sake of public interest. The 1st and 2nd appellants cannot be allowed to blow hot and cold at the same time, by their words asserting the public importance of election petitions and by their actions proceedings as if those petition are of no moment. They also missed the obvious point that public interest has no room for dilatoriness in resolution of legal disputes, and may sometimes demand exactly what the learned judge did.

Rule 5(2) of the Elections (Parliamentary and County Elections) Petition Rules, 2017 expressly casts a duty on petitioners like the appellants and their advocates to assist the court to realise the objects of the rules, which include expeditious and affordable resolution of election petitions, and in that regard, to comply with orders and directions of the election court. The appellant cannot ignore their duty with impunity and in the same breath accuse the court of ignoring public interest.

While we agree with the appellants' submissions as regards applicability of the Civil Procedure Rules in election petitions, we cannot agree that in the face of recalcitrant litigants, the election court is utterly powerless. Like all courts, it has inherent power to ensure that the process of the court is not abused and that the timelines spelt by the Constitution and the statutes are not negated at will. Towards that end, we have absolutely no doubt that the court has inherent power to dismiss or strike out a petition where circumstances so demand. (See **Chelaite v. Njuki & 2 Others (No.3) [2008] 2 KLR (EP) 209.**)

In the same vein we do not think the appellant's interpretation of the decision of the Supreme Court in **Nicholas Kiptoo arap Korir Salat v. IEBC & 7 Others** (supra) to mean that a party is at liberty, without let or hindrance, to withdraw his suit at whatever stage, is correct or that it would apply readily in an election petition where specific rules on withdrawal have been promulgated. In **Beijing Industrial Designing & Researching Institute v. Lagoon Development Ltd [2015]** this Court considered the decision of the Supreme Court relied upon by the appellants and stated:

“The decision of the Supreme Court cannot be interpreted to mean, as the respondent implied, that a plaintiff has a right to discontinue his suit in sundry and all cases, even without leave where the law requires such leave. To so hold would be to reduce the requirement for leave to a mere formality, which we do not think is what was intended by the decisions of the Supreme Court or Order 25.”

In **Castanho v. Brown & Root (UK) Ltd & Another [1981] 1 ALL ER 143**, the House of Lords upheld the inherent power of the court to stop abuse of the process of the court by disallowing discontinuance of a suit. Speaking for the House, **Lord Scarman** stated:

“The court has inherent power to prevent a party from obtaining by the use of its process a collateral advantage which it would be unjust for him to retain; and termination of the process can, like in any other step in the process, be so used.” (Emphasis added).

In view of our finding that in the circumstances of this appeal the learned judge exercised his discretion judiciously, we do not deem it necessary to venture into the issue of mootness of the appeal and the petition, which was raised by the IEBC and the 2nd respondent. That issue is not necessary for the determination of this appeal and we advisedly and deliberately find that it will serve no purpose to delve into it.

As regards costs, they follow the event, unless the trial judge, for good reason directs otherwise. That principle is reiterated in section 84 of the Elections Act as regards election petitions. As was stated in **Kiska v. de Anelis [1969] EA 6**, a successful party should not be deprived of his costs unless his conduct has led to litigation which, but for his own conduct, might have been averted. Reasons should be given for departing from the rule that costs follow the event. In this case, costs followed the event and the learned judge did not depart from the general rule. (See also **Karanja v. Kabugi & Another [1976-1985] EA 165**).

In **Kohli v. Popatlal [1964] EA 219**, **Crabbe JA** expressed the approach of the appellate court as regards costs, as follows:

“Having regard to the above authorities it seems to me that where a discretion as to costs has been exercised by a judge, his decision is unimpeachable on appeal unless he can be shown to have taken into consideration matters which are irrelevant to the issue in the case, or nonexistent.”

And in **Devram Dattan v. Dawda [1949] EACA 35**, the former Court of Appeal for Eastern Africa, stated:

“It is well established that when the decision of such a matter as the right of a successful litigant to recover his costs is left to the discretion of the Judge who tried his case, that discretion is a judicial discretion, and if it be so its exercise must be based on facts....If,

however, there be, in fact, some grounds to support the exercise by the trial Judge of the discretion he purports to exercise, the question of the sufficiency of those grounds for this purpose is entirely a matter for the Judge himself to decide, and the Court of Appeal will not interfere with his discretion in that instance.”

(See also Supermarine Handling Services Ltd v. Kenya Revenue Authority, CA No. 85 of 2006).

The error that the appellants attribute to the learned judge regarding award of costs is that it was a public interest matter and therefore they should not have been ordered to pay costs. We are not aware of any such principle, at any event as regards election petitions, which entitle a person to drag the candidate declared to have been duly elected and the election management body to the election court and avoid payment of costs when his petition is dismissed, on the ground that the petition is public interest litigation. Those who lodge frivolous claims or claims that they do not intend to prosecute must be prepared to bear the consequences as regards the costs that they have made other parties to incur. As we have noted, the learned judge did not depart from the general rule that costs follow the event and we therefore do not see any basis to fault him. There is no suggestion that the learned judge awarded excessive costs in disregard of the purpose of capping of costs introduced by rule 30 of the Election Petition (Parliamentary & County Elections) Petition Rules 2017. (See Martha Wangari Karua v IEBC & 3 Others, CA No. 1 of 2017).

The only aspect of the learned judge’s ruling that may attract legitimate criticism is the order striking out the petition rather than dismissing the same. Having called upon the 1st and 2nd appellants to present their evidence in support of the petition and the two having failed to do so, the avenue open to the learned judge was to dismiss the petition for lack of evidence rather than to strike it out. However, in view Of what we have stated above that the learned judge had otherwise exercised his discretion judiciously, we agree with the respondents that the learned judge’s error is of no moment and cannot by itself lead to reversal of his decision.

Accordingly pursuant to **rule 31** of the Court of Appeal Rules, we substitute the order striking out Election Petition No. 23 of 2017 with an order dismissing it for lack of evidence. Save for that order, the consolidated appeals are otherwise dismissed in their entirety with costs to the respondents, which we cap at **Kshs 2 million**. It is so ordered.

Dated and delivered at Nairobi this 16th day of April, 2018.

R. N. NAMBUYE

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

K. M’INOTI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR