REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

ELECTION PETITION APPEAL NO. 1 OF 2018

BETWEEN

GERALD IHA THOYA.....APPELLANT

VERSUS

CHIRIBA DANIEL CHAI.....1ST RESPONDENT

INDEPENDENT ELECTORAL & BOUNDARIES

COMMISSION.....2ND RESPONDENT

(An appeal from the Ruling dated 20th December, 2017 by Hon. S. R. Wewa, Principal Magistrate in Malindi CMC Election Petition No. 2 of 2017)

JUDGEMENT

A. INTRODUCTION

1. The Appellant, Gerald Iha Thoya was one of the candidates in the general election held on 8th August, 2017. He was seeking to represent the people of Jilore Ward in the County Assembly of Kilifi. At the conclusion of the election exercise, the 2nd Respondent, Independent Electoral and Boundaries Commission (IEBC) declared the 1st Respondent, Chiriba Daniel Chai, as the duly elected Member of County Assembly (MCA) for Jilore Ward. The Appellant was dissatisfied with the said declaration and moved to the Chief Magistrate's Court at Malindi vide Election Petition No. 2 of 2017 Gerald Iha Thoya v Chiriba Daniel Chai and IEBC seeking to upset the declaration of the results on various grounds.

2. By consent of the parties, the Appellant amended his petition on 18th September, 2017. Subsequently, through their respective applications dated 10th November, 2017 and 22nd November, 2017, the respondents sought the striking out of the petition as amended for failure to state the election results thus offending the provisions of Article 87(2) of the Constitution and contravening rules 8(1)(c) and (d) and 12(2)(c) and (d) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017. The Election Court (S. R. Wewa, Principal Magistrate) agreed with the respondents and struck out the Appellant's petition with costs in a ruling delivered on 20th December, 2017. That is the ruling that has brought the Appellant to this court.

3. Through the memorandum of appeal dated 5th January, 2018 and filed in court on 8th January, 2018 the Appellant seeks to overturn the decision of the Election Court on the grounds that:

> **"1. The Honourable trial magistrate erred in law in striking out the petition of the appellant by holding that the amendment to the petition extinguished the petition by implication dealing with the amendment as a substitution or replacement of the original petition thereby occasioning a miscarriage of justice.**
>
> **2. The Honourable trial magistrate erred in law in finding that the amended petition ought to have been supported by a new supporting affidavit in effect misinterpreting the law on amendment and disregarding the provisions of article 87 of the Constitution of Kenya, 2010, Section 76 of the Elections Act, 2011 and Rule 15 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 and the provisions of the Civil Procedure Act, Chapter 21 of the Laws of Kenya on amendments including the rules made thereunder.**

3. The Honourable trial magistrate erred in law in misapplying Rule 8 and or 12 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017.

4. The Honourable trial magistrate erred in law in failing to find: -

a) That the results were declared in the amended petition.

b) Even if she was to strike out the amendments, the petitioner had annexed all the declaration of result in Forms 36As and B in his Supporting Affidavit and thereby cured the omission in the petition.

c) Articles 259, 159(2)(d), 48 and 50 of the Constitution of Kenya, 2010, Section 80(1)(d) and 82 of the Elections Act, 2011 and Rule 15, 16 and 29 of the Elections (Parliamentary and County Elections) Petition Rules, 2017 provide for legal avenues that cures the said omission.

5. The Honourable trial magistrate erred in law in misapplying the provision of article 159(2)(d) of the Constitution of Kenya, 2010 with respect to the failure to declare results in the Petition.

6. The Honourable trial magistrate erred in law in awarding costs to the Respondents."

4. Consequently, the Appellant prays for issuance of orders as follows:

"1. An order setting aside the Honourable trial magistrate's Ruling and or order made on 20th December, 2017 in CMEP No. 2 of 2017 Gerald Iha Thoya -vs- Chiriba Daniel Chai & Another.

2. An order directing the Honourable trial magistrate to forthwith proceed to hear the Petition within the six (6) months period provided by law.

3. Costs of this appeal and of the application to strike out the appeal be awarded to the appellant.

4. Any other relief that this Honourable Court may deem fit to grant under the circumstances of this case.

5. The record of appeal was filed on 25th January, 2018. The appeal is opposed by the respondents.

B. THE 2ND RESPONDENT'S NOTICE OF MOTION DATED 8TH FEBRUARY, 2018

6. Due to the time constraints attendant upon election appeals, as they must be heard and determined within six months from the date of filing, I directed, with the consent of the parties, that the 2nd Respondent's notice of motion dated 8th February, 2018 be argued together with the appeal.

7. Through the notice of motion application dated 8th February, 2018 brought under Article 87 of the Constitution and Rule 34 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 the 2nd Respondent prays that the memorandum of appeal dated 5th January, 2018 and the appeal herein be struck out with costs being borne by the Appellant.

8. The application is supported by the grounds:

"a) THAT the Memorandum of Appeal dated 5th January, 2018 and filed in court on 8th January, 2018 contravene the Provisions [of] Rule 34 of the Election (Parliamentary and County Elections) Petition Rules 2017 by the failure to serve the 2nd Respondent.

b) THAT the 2nd Respondent herein only got notice of the appeal herein on service on 27/01/2018 of the Record of Appeal dated 24th January, 2018.

c) THAT the appeal is subject to the mandatory Rules applicable Election (Parliamentary and County Elections) Petition Rules 2017.

d) THAT the appeal is incurably defective and ripe for striking out.

e) THAT it is in the interest of justice the said orders be granted."

9. The application is also supported by an affidavit sworn by Masha Sudi Mwakulonda, the 2nd Respondent's Returning Officer for Malindi Constituency in respect of the elections held on 8th August, 2017. Through the affidavit the deponent relays the information that he was aware that the memorandum of appeal dated 5th January, 2018 was not served upon the 2nd Respondent. Further, that he had been informed by their advocate, Mr. Munyithya, that the record of appeal dated 24th January, 2018 was served on 27th January, 2018. He also avers that he had been advised by his advocate that the appeal herein is incompetent for contravening Rule 34 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 and is thus ripe for striking out.

10. Masha proceeds to aver that the omission to serve the memorandum of appeal goes to the very root of the dispute herein and affects the 2nd Respondent's fundamental right to a fair hearing and cannot thus be said to be a mere technicality. HHHe thus urges the court to enforce adherence to the rules and strike out the appeal.

11. The 1st Respondent filed a notice dated 19th February, 2018 in support of the 2nd Respondent's notice of motion. In summary, the 1st Respondent's position is that the 2nd Respondent is a necessary party for the purposes of Rule 34(5) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 and failure to serve the 2nd Respondent renders the entire appeal incompetent. The 1st Respondent posits that the appeal cannot proceed in the absence of the 2nd Respondent as this would breach the 2nd Respondent's right to a fair trial as guaranteed under Article 50 of the Constitution.

12. The Appellant opposed the application through his affidavit sworn on 21st February, 2018 in which he avers that service of the memorandum of appeal was effected upon the advocates for the 2nd Respondent by leaving the same at the door of the offices of the advocates. The Appellant has exhibited an affidavit of service sworn on 21st February, 2018 by Khamis Akida Kombo, a clerk with the advocates of the Appellant, showing how service of the memorandum of appeal was effected on 8th January, 2018.

13. The Appellant also avers that even if the memorandum of appeal was not served, the same is not fatal as the rules gives this court the discretion to extend the time of service for purposes of ensuring that injustice is not done to any party.

14. The Appellant's replying affidavit was countered by a supplementary affidavit sworn by Joseph Manzi Munyithya the managing partner of Munyithya, Mutungi, Umara & Muzna Co. Advocates. He denies the process server's claim that there was a notice on the door of their offices indicating that the offices were closed for holidays until 15th January, 2018. He avers that their offices were open on 8th January, 2018 from 8.00 a.m. to 6.00 p.m. and he was personally in the office on that day. He exhibits a notice issued to their clients indicating that their offices **"will close for December and New Year oldidHolidays on Friday 21st December 2017 and will re-open on Monday 8th January 2018."** On the notice, telephone numbers are provided for contacting named persons in case of any emergencies.

15. The fact that emerges from the evidence placed before the court is that the service of the memorandum of appeal was not effected physically on any person in the offices of the advocates for the 2nd Respondent. Khamis Akida Kombo who claims to have effected service avers that upon reaching the offices of the advocates for the 2nd Respondent **"I found the offices locked with a note at the door informing visitors that the offices were closed for holiday upto 15th January, 2018 and I therefore left a copy of the said document at the door as service upon the said firm which I return to this Honourable Court as duly served."** It is not clear what the process server means when he avers that he left the memorandum of appeal at the door. He does not say that he affixed the document on the door.

16. On the other hand, Mr. Munyithya has averred that their office was open on 8th January, 2018. He has supported the averment with a notice confirming his evidence. Can an advocate of long standing in practice put his reputation at stake by generating a fake notice and backing it with an affidavit? I doubt.

17. Looking at the evidence placed before me, the conclusion I reach is that the memorandum of appeal was not served upon the 2nd Respondent and even if there was such service, as alleged by the Appellant, the same was inappropriate and did not meet the standards expected in a serious matter like this. I therefore find that there was no service of the memorandum of appeal upon the 2nd Respondent.

18. Rule 34(5) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 provides that:

> **"The appellant shall, within seven days of the filing of the memorandum of appeal in accordance with sub-rule (3), serve the memorandum of appeal on all parties directly affected by the appeal."**

What is the import of failure to comply with the rule? Service is the act that draws the attention of the opposite party to the existence of a case. Where there is no service, the other party is deemed not to be aware of the case. Proceeding with such a case would prejudice the party not served. Where the law allows, the remedy lies in affording the unserved party an opportunity to come on board.

19. Is the striking out of the memorandum of appeal and the record of appeal the only recourse available to the court? In a ruling delivered on 9th July, 2010 in **Joseph Kiangoi v Wachira Waruru & 2 others [2010] eKLR**, the Court of Appeal was faced with an application to strike out an appeal for failure by the appellant to serve one of the parties. After finding that the party who had not been served was not going to be adversely affected by the appeal, the Court held that:

> **"In the circumstances, we think the unsuccessful attempt by the respondents to bring themselves within the proviso to rule 76(1) can be cured by our taking a broad view of justice as mandated by the overriding objective principle. The cure would come about because in the circumstances, justice is to be found in sustaining the appeal for it to be heard on merit instead of striking it out on a technicality. Indeed, in our view there cannot be a better case for the invocation of the overriding objective principle than this case. Courts should in our view lean more towards sustaining appeals rather than striking them out as far as is practical and fair. As a tool of justice, the overriding objective principle is both procedural and substantive."**

20. Earlier in a ruling delivered earlier on 7th May, 2010 in the case of **Ayub Murumba Kakai v Town Clerk of Webuye County Council [2010] eKLR**, the Court of Appeal had stated that:

> **"In the circumstances before us, we would not act justly if we were to strike out the appeal for failure to serve the memorandum of appeal within 7 days in a situation where the memorandum of appeal was served only one day before the**

expiry of the prescribed time and as regards the non-service of the notice of appeal, the Court could order its service on the affected party within a reasonable time so as to have the appeal heard on merit."

21. In **Shabbir Ali Jusab v Anaar Osman Gamrai & another [2013] eKLR**, a preliminary objection had been raised on the grounds that the notice of appeal and the petition of appeal had been filed out of the time provided by the Supreme Court rules. In a ruling delivered on 23rd April, 2013 the Supreme Court held that:

"15] The Supreme Court under Rule 53 of the Supreme Court Rules has power to extend the time limited by these rules and we hereby exercise this power and deem the Notice of Appeal and Record of Appeal to have been filed within time."

22. At paragraph 18 the Court explained its decision thus:

"In arriving at this decision, this Court is guided by rules and regulations and urges all parties to follow the same since they guide the court and the parties in obtaining justice. However, the Court is alive to the provisions of Article 159(2)(d) of the Constitution which requires the Court to administer justice without undue regard to procedural technicalities. Indeed, the Court in the case of Raila Odinga vs IEBC and 4 others Petition (No. 5 of 2013), pronounced itself on the matter thus;

"The essence of that provision is that a Court of law should not allow the prescriptions of procedure and form to trump the primary object, of dispensing justice to the parties. This principle of merit, however, in our opinion, bears no meaning cast-in-stone and which suits all situations of dispute resolution. On the contrary, the Court as an agency of the processes of justice, is called upon to appreciate all the relevant circumstances and the requirements of a particular case, and conscientiously determine the best course."

This is one of the cases where the Court disregards procedural technicalities in favour of substantive justice having regard to all relevant circumstances obtaining in this case."

23. The advocate for the 2nd Respondent has cited the decisions of the Court of Appeal in **Charles Kamuren v Grace Jelagat Kipchoim & 2 others [2013] eKLR** and this Court (Majanja, J) in **Patrick Ngeta Kimanzi v Marcus Muluvi & 2 others, Machakos election Petition No. 8 of 2013** to stress the importance of service in election petitions. I entirely agree with the law as propounded in the cited decisions. However, those decisions were concerned with service of an election petition. I am therefore inclined to follow the cited decisions of **Shabbir Ali Jusab, Joseph Kiangoi** and **Ayub Murumba Kakai**. I am alive to the fact that the said decisions were made in ordinary civil litigation and may not provide a good guide in election matters. However, they establish an important principle that an appeal should not be dismissed on technicalities.

24. In the case before this court, the issue is failure to serve the memorandum of appeal. The record of appeal was served on time. Whereas there is need to strictly adhere to the timelines provided in the rules, the courts should not overlook the need to do substantive justice.

25. I am thus not persuaded by the submission by counsel for the 1st Respondent that Article 159(2)(d) of the Constitution cannot come to the aid of the Appellant. In view of the decision of the Supreme Court in **Shabbir Ali Jusab** (supra), I need not make any comment on the British case of **Craig v Konssen [1943] 1 KB 256** cited by counsel for the 1st Respondent. My jurisprudential allegiance is to the Supreme Court as commanded by Article 163(7) of the Constitution.

26. Rule 19(1) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 provides for enlargement of time. The memorandum of appeal is one of the documents found in the record of appeal. I therefore find that the memorandum of appeal was served on the date of service of the record of appeal. In exercise of this court's discretion I enlarge time for the serving of the memorandum of appeal to the time when the record of appeal was served. It is thus deemed that the memorandum of appeal was properly served.

27. The consequence is that the 2nd Respondent's notice of motion fails and the same is dismissed. Costs for the application shall abide the outcome of this appeal.

C. <u>SUBMISSIONS ON THE APPEAL</u>

28. The Appellant's counsel started by submitting that an amendment does not extinguish the original pleading but only adds or deletes words therefrom. In support of this submission, he pointed to Rule 7(2) of Order 8 of the Civil Procedure Rules, 2010 which provides that:

"All amendments shall be shown by striking out in red ink all deleted words, but in such a manner as to leave them legible, and by underlining in red ink all added words."

29. Counsel proceeded to submit that the Oxford Advance Learner's Dictionary defines amendment as a small change or improvement that is made to a law or a document. In further support of his position, the Appellant's counsel cited the case of **Eastern Radio Services and another v R.J. Patel t/a Tiny Tots and another Civil Appeal No. 20 of 1961; [1962] E.A.**

30. Counsel therefore urged this court to find that the Election Court was wrong in holding that the amendment of a pleading extinguish the original pleading. According to counsel, the supporting affidavit filed with the original petition still supported the amended petition. The Appellant's counsel further submitted that the Election Court ought to have found the amended petition competent as the amendments were made by consent of the parties.

31. According to the Appellant's counsel, even if the failure to file a supporting affidavit to the amended petition was fatal, the action to be taken was to strike out the amendments and retain the original petition and not to strike out the entire petition.

32. Turning to the effect of failure by a petitioner to state the results in the petition and the affidavit in support of the petition, counsel for the Appellant contended that there could be situations in which the manner of the declaration of the results is disputed and in such circumstances compliance with the rules may not be practicable.

33. The Appellant's counsel submitted that complying strictly with the rules would require the results of each polling station to be stated which would be impracticable.

34. In the Appellant's view, Rule 8(1)(c) is only meant to bring to light several facts that would assist the election court when considering the grounds of the petition. Compliance with the requirement would disclose the person whose election is complained of. Further, that the tabulated results may help the court in determining the effect of some malpractices or illegalities by considering the margin of victory and in answering the question whether the effect of the illegalities and or malpractices have substantially affected the results.

35. The Appellant's counsel was of the view that where the petition and the supporting affidavit contain facts that may identify the issues positively then such a petition is competent. Counsel cited various decisions in support of his submissions. The decisions cited are **Hon. Washington Jackoyo Midiwo v IEBC & 2 others, Siaya HCEP No. 2 of 2017**; **Thomas Matwetwe Nyamache v IEBC & 2 others, Kisii HCEP No. 8 of 2017**; **Mwahima Mwalimu Masudi v IEBC & others, Mombasa HCEP No. 4 of 2017**, **Shukra Hussein Gure v IEBC & 2 others, Garissa HCEP No. 5 of 2017**; and **Samuel Kazungu Kambi & another v IEBC & 3 others, Malindi HCEP No. 4 of 2017**.

36. According to counsel, the judges in the cited decisions must have been guided by the decisions of the Supreme Court in **Raila Odinga & others v IEBC & 3 others Petition No. 5 of 2013** and the Court of Appeal in **Nickolas Kiptoo Arap Korir Salat v IEBC & 6 others [2013] eKLR** wherein it was stated that non-compliance with procedure and form should not be allowed to trump the primary object of dispensing substantive justice to the parties.

37. It is thus the Appellant's position that failure to comply with the provisions of Rule 8(1)(c) is not fatal to an election petition. Further, that the petition had at paragraph 5 listed the names of the candidates and the votes garnered by the person declared the winner. Also, that the date of the declaration of the results had been disclosed.

38. In conclusion, the Appellant acknowledged that there are decisions from some judges of this Court which hold that failure to state the results in the petition is fatal. The Appellant nevertheless urged this court to allow the appeal on the strength of the decisions cited in support of his position.

39. Responding to the Appellant's submissions, Counsel for the 1st Respondent submitted that in attempting to cure a blatant defect in the petition, the Appellant filed an amended petition wherein he introduced a paragraph containing a tabulation of the votes garnered by each participant. According to the 1st Respondent, these particulars are specifically spelled out under rules 7 and 12 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 and ought to have been specifically pleaded in the original petition and supporting affidavit.

40. It is the 1st Respondent's position that the amended petition was defective as there was no supporting affidavit filed with it. His view is that Rule 8(4)(b) requires that a petition be accompanied by a supporting affidavit and failure by the Appellant to swear an affidavit in support of the amended petition meant there was no evidence tendered in support of the petition rendering it frivolous and an abuse of the court process. It is the 1st Respondent's position that it is mandatory for an amended petition to be accompanied by a supporting affidavit. He stresses that no relief could be granted based on the amended petition as it was not accompanied by any evidence.

41. Turning to the effect of the amendment, counsel for the 1st Respondent claims that once amendments were made to the original petition, the original petition was extinguished and the amendments took precedence. He posits that the primary documents in the petition herein were therefore the amended pleadings and cites in support of his view the statement of Spry, V.P in **Dhanji Ramji v Malde Timber [1970] E.A. 427** that:

> **"First, as regards amended pleadings, it is clear that the court looks only to the pleadings as amended in deciding the issues. Again, where an original pleading contained an admission which was deleted in the amended pleading, that admission can no longer be relied on."**

Also cited is a statement in **Eastern Radio Services & another** (supra) to the effect that:

> **"Whereas a plaint as amended may be treated as if it were the original claim, there is nothing which requires that it must be so treated for all purposes and in all circumstances."**

42. The 1st Respondent concluded his submissions by asserting that by failing to comply with Rule 8 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017, the Appellant had gone against the spirit of Article 87(1) of the Constitution which requires timely settlement of electoral disputes and as such the petition was null and void.

43. Turning to the question of failure to state the results in the petition and the supporting affidavit, counsel for the 1st Respondent submitted that it was a mandatory requirement by Rule 12 that the date of the declaration of the results and the outcome of the election must be clearly and specifically pleaded in the petition and supporting affidavit.

44. Dismissing the Appellant's averment that he had annexed forms to his supporting affidavit which clearly set out the results of the contested election, the 1st Respondent cited the decision of P. J. Otieno, J in **Mbaraka Issa Kombe v Independent Electoral and Boundaries Commission & 3 others [2017] eKLR** where the learned Judge held that rules 8 and 12 requires that the petition and supporting affidavit contains the matters stated in those rules. Also cited in support of this position is the decision of the Court of Appeal in **John Njenga Mututho v Jane Kihara & 2 others, Civil Appeal No. 102 of 2008**. For purposes of record, it is noted that as this matter was pending delivery of judgement the cited decision in **Mbaraka Issa Kombe** was overturned by the Court of Appeal in **Court of Appeal (Malindi) Election Petition Appeal No. 3 of 2017 Mbarak Issa Kombe v Independent electoral and Boundaries Commission (IEBC) & 2 others.**

45. The statement of the Supreme Court in the case of **Ali Hassan Joho v Suleiman Shabal & 2 others [2014] eKLR** that **"where a petition is challenging the result of an election the quantitative breakdown of the votes cast is a key component in the cause"** is also cited in support of the assertion that the results must be stated in the petition and supporting affidavit.

46. Other cases cited in support of the position adopted by the 1st Respondent are **Amina Hassan Ahmed v Returning Officer Mandera County & Another, Garissa HCEP No. 4 Of 2013**; and **Ismail Suleiman & 9 others v Returning Officer Isiolo County Independent and Electoral Boundaries Commission & 4 others [2013] eKLR**.

47. According to the 1st Respondent's counsel, Article 159(2)(d) of the Constitution cannot come to the aid of the Appellant in the circumstances of this case as the said provision should never be employed in order to circumvent the rules of the court or render them otiose. The decisions in **Jimmy Mkala Kazungu v IEBC & 2 others [2017] eKLR** (Mugure Thande, J), **Law Society of Kenya v the Centre for Human Rights and Democracy & 12 others, Petition No. 14 of 2013** (Supreme Court); and **Nicholas Kiptoo Arap Korir Salat v IEBC & 6 others [2013] eKLR** (Kiage, JA) are cited in support of the submission.

48. When it was the turn of counsel for the 2nd Respondent to respond to the appeal, he started by addressing the Appellant's failure to state the results of the election in the petition and the supporting affidavit. He pointed out that the original petition did not state the results received by each candidate thus violating the requirement by rules 8 and 12 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 that the results of the election in dispute shall be stated.

49. Further, that the law requires a petitioner to swear a supporting affidavit containing the particulars stated in Rule 12. The 2nd Respondent's case is that the need for a petition to be accompanied by a supporting affidavit was affirmed by the Court of Appeal in **Dickson Mwenda Githinji v Gatirau Peter Munya & 2 others [2014] eKLR** when it held that **"an affidavit in support of the Petition is a mandatory requirement."** The 2nd Respondent's counsel urged that the original petition was non-compliant for failing to disclose the results and the amended petition was defective for not being accompanied by a supporting affidavit.

50. The 2nd Respondent asked this court to find that the failure by the Appellant to comply with Rule 8 was fatal as was held by judges of this court in the cases of **Jimmy Mkala Kazungu (supra); Mbaraka Issa Kombo** (supra); and **Martha Wangari Karua & another v Independent Electoral and Boundaries Commission & 3 others [2017] eKLR**.

51. As for the amendments to the petition, counsel for the 2nd Respondent asserted that the same was in breach of Section 76(4) of the Elections Act, 2011 which limits any amendment, for the purpose of questioning a return or an election upon an allegation of an election offence, to not more than 28 days from the date of the declaration of the results. It was urged that since the amendment introduced the results through paragraph 17 thus amounting to a challenge of the return as made by the 2nd Respondent's Returning Officer, the amendment was one not capable of being effected after 28 days from the date of the declaration of the results. Cited in support of this submission is the case of **Musa Cherutich Sirma v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR**.

52. According to the 2nd Respondent, the Appellant's pleadings breached rules 8 and 9 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 and Section 76 of the Elections Act and the Election Court was thus correct in striking out the Appellant's pleadings in their entirety.

53. In closing submissions on behalf of the 2nd Respondent, counsel asserted that the time for hearing the Appellant's petition has since lapsed as the same was filed on 6th September, 2017 and by virtue of Article 87 of the Constitution and Section 75(4)(b) of the Elections Act the same ought to have been heard and determined by 6th March, 2018. The Supreme Court decision in **Lemanken Aramat v Harun Meitamei Lempaka & 2 others [2014] eKLR** was quoted at length in support of the contention that an election court lacks jurisdiction to hear and determine an election petition outside the six months demarcated for it by the Constitution and the electoral law.

54. In a brief reply, counsel for the Appellant specifically addressed the 2nd Respondent's concluding submission by stating that in the cited case of **Lemanken Aramat**, the petition had been heard on merit and the six months had thus been exhausted. Further, that the Court of Appeal in **Martha Wangari Karua v Independent & Boundaries Commission & 3 others Nyeri Election Petition Appeal No. 1 of 2017; [2018] eKLR** had referred a petition to an election court for trial despite the fact that six months had lapsed from the time the petition was filed.

D. <u>ANALYSIS AND DETERMINATION</u>

55. In my view, this appeal raises five issues:

i) Whether the amendment of the petition extinguished the original petition;

ii) Whether the original petition survived the striking out of the amended petition;

iii) The effect of non-compliance by a petitioner with rules 8 and 12 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017;

iv) The import of Article 105(2) of the Constitution on this appeal;

v) Costs.

56. In light of the recent decision of the Court of Appeal in **Martha Wangari Karua** (supra), I find that the question as to the effect of the failure to state the results in a petition and the supporting affidavit has now been settled. In allowing the appeal in which the appellant was challenging the striking out of her petition for failure to state the results and the date of the declaration of the results, the Court of Appeal stated that:

> **"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."**

57. The Court also opined that:

> **"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."**

58. Further ahead the Court held that:

> **"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.**
>
> **....**
>
> **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."**

59. The Court, however warned that an election petition can be struck out but on very clear grounds. This is what the Court said:

> **"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."**

60. I have quoted the Court of Appeal at length in order to demonstrate that failure to tabulate the results of the candidates in a petition and or a supporting affidavit is not fatal to the petition particularly where the results are available in the annexures to the supporting affidavit or the responses of the respondents. This point was reiterated by the Court of Appeal in the judgement delivered on 10th May, 2018 in **Mbaraka Issa Kombe** (supra).

61. The message from the Court of Appeal is that cases should be heard on merit. Counsel for the 1st Respondent cited before me the decision of the Court of Appeal in **John Michael Njenga Muthutho v Jane Njeri Wanjiku Kihara & 2 others [2008] eKLR (Nakuru Civil appeal No. 102 of 2008)** to stress that the results must be given in the pleadings otherwise no findings on the issues raised will serve any useful purpose. However, I note that the Court of Appeal in **Martha Wangari Karua** retired its decision in **John Michael Njenga Muthutho** by stating that:

> **"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."**

62. In the appeal before me, the results of the winner had been declared in the original petition. The Appellant had also annexed the documents containing the results of each candidate to his supporting affidavit. The respondents were therefore well informed and aware of the case that was facing them. The failure by the Appellant to state the results in the original petition and the supporting affidavit did not prejudice them at all. The original petition was therefore a complete pleading and the Appellant was entitled to be heard on the same.

63. Discussing the exercise of discretion by courts in the **Martha Wangari Karua** case, the Court of Appeal stated that:

> **"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 exercise 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."**

64. Looking at the pleadings that were placed before the Election Court, I find that the Court acted in haste in striking out the Appellant's petition. Courts are tools of justice and for the courts to be perceived to be the guardians of justice, those who preside over cases should be slow in striking out cases hence denying the parties a chance to ventilate their grievances. When a court terminates a case on technicalities, the impression created is that the court is assisting the respondent to bury the claimant's evidence before the same can be put in the public domain.

65. A case should only be struck out where it is hopelessly defective and no amount of panel beating can salvage it. The cry of the people of Kenya to the courts as communicated through the Constitution is: hear us. I therefore find that in the circumstances of this case the learned trial Magistrate did not exercise her discretion correctly and the Appellant's submission that his petition was erroneously terminated has merit.

66. On the question of the amendment of the petition, it is a fact that the amendment was done after 28 days from the date of the declaration of the results. Secondly, the amendment was carried out by the consent of the parties. The consent which was entered on 11th October, 2017 granted leave to the Appellant to **"file and serve any amendments to the Petition within 7 days of date hereof."** Although the extent to which the Appellant could amend his petition was not stated, it was obvious that the amendments had to be done within the parameters allowed by the law.

67. The law on amendment of pleadings in election petitions as captured at page 75 of the **Judiciary Bench Book on Electoral Disputes Resolution** is that:

> **"4.6.2.1 An election petition filed in time and based on allegations of election offences may be amended *with leave of the election court* (s. 76(4) of the Elections Act, 2011). The application for leave/amendment must be made and granted within the time prescribed for challenging the relevant election, i.e. *within 28 days* of the declaration of the results of the election (s. 76(4) of the Elections Act, 2011; *Ismail Suleman & 9 others v Returning Officer Isiolo County & 2 others*, Election Petition (Meru) No. 2 of 2013; *Charles Nyaga Njeru v Independent Electoral & Boundaries Commission & Another*, Chief Magistrate's Court (Chuka) Election Petition No. 1 of 2013).**
>
> **4.6.2.2 The courts may allow amendments to correct inadvertent errors and omissions at any stage of EDR proceedings, including appellate stages, where the amendment would not occasion prejudice to any party (*Ramadhan Seif Kajembe v Returning Officer, Jomvu Constituency & 3 Others*, Election Petition (Mombasa) No. 10 of 2013). The courts do not, however, usually allow amendments which seek or purport to cure a fatal defect in an election petition, e.g. failure to comply with prescribed mandatory requirements (*Amina Hassan Ahmed v Returning Officer Mandera County & 2 Others*, Election Petition (Garissa) No. 4 of 2013; *Ismail Suleman & 9 Others v Returning Officer Isiolo County & 2 Others*, Election Petition (Meru) No. 2 of 2013). Further, the courts will not allow an application for amendment where such an application is no more than a fishing expedition for evidence (*Charles Nyaga Njeru v Independent & Boundaries Commission & Another*, Election Petition (Chuka) No. 1 of 2013).**
>
> **4.6.2.3 The amendment of a pleading extinguishes the previous pleading. Accordingly, an amended election petition must be supported by fresh affidavits by the petitioner and the petitioner's witnesses."**

68. Edward Muriithi, J further clarifies the law on amendment of election petitions in **Musa Cherutich Sirma v Independent electoral and Boundaries Commission & 2 others [2017] eKLR** when after considering the decision in **Amina Hassan Ahmed** (supra) that a petition cannot be amended outside 28 days from the date of the declaration of the results states that:

> **"12. While I respectfully agree with the learned judge on the special nature of the section sic petition proceedings and of the limited provision for amendment of a Petition for purposes of section 76(4) of the Elections Act, I do not agree that the Petition may never be amended for any other purpose including clarifying matters set out in the Petition. What an amendment cannot do is to question the election or a return on the ground of an election offence the Petition unless it is done with the period of 28 days after the publication of the results in the Gazette. (sic).**
>
> **13. I consider that an Election Petition may be amended for *any other purpose* other than for "*for the purpose of questioning a***

return or an election upon an allegation of an election offence," **say to correct dates, names, other particulars and any errors in the Petition, any time before hearing giving the respondents time to respond to the amendment, as necessary. The principle of amendment of pleadings in regular civil proceedings, that amendments before hearing should be freely granted if they can be done without injustice to the other side and that there is no injustice if it can be remedied by an award of costs must be applicable to the Election Petitions. [Eastern Bakeries vs Castellino (1958) EA 461.**

14. Accordingly, a petitioner may amend his petition only to correct any errors in pleading and to the extent that it does not effect amendments *"for the purpose of questioning a return or an election upon an allegation of an election offence"* or introduce another cause of action which would be time barred under section 76 of the Elections Act. I consider that the requirement of Article 159 of the Constitution and section 80 (d) of the Elections Act that the court deals with petitions before it without undue regard to technicalities, must be such as to allow the court some latitude in dealing with applications for amendment which do not go to change, out of the statutorily prescribed time, the root of the cause of action set out in the Petition filed within time."

69. In my view, what the law restricts is an amendment that will lead to the remodeling of the petition. Such an amendment can only be done with the authority of the court and within 28 days from the date of the declaration of the results of the election the petitioner is challenging. I do not believe that the Elections Act bars minor amendments that will not shift the foundation of a petitioner's cause of action. Requests for minor alterations, which do not go to the root of the cause, if brought timeously should be considered by an election court and where appropriate the court should exercise its discretion and allow the amendments.

70. I have perused the Appellant's petition dated 6th September, 2017 and compared it with the petition as amended on 18th October, 2017. The reliefs sought are the same. The only thing introduced through the amendment is paragraph 17(a) which tabulates the votes obtained by each of the candidates in the contest. Such an amendment, in my view, did not in any way change the cause of action. The amendment was with the consent of the parties and it is the kind of amendment which, in my view, is allowed by the electoral laws. In fact, the amendment as I have already stated was not necessary since failure to tabulate the results did not invalidate the petition.

71. The Election Court was of the opinion that the amended petition ought to have been accompanied by a fresh supporting affidavit. In my view, the Appellant needed not to have sworn a fresh supporting affidavit. However, the amended petition ought to have at least been accompanied by an affidavit 'uploading' the original supporting affidavit and the statements of the witnesses to it. That was the only way the amended petition could be complete. Otherwise, since the amended pleading dates back to the date of the original pleading, it is not necessary to file a fresh supporting affidavit especially if no new issue has been introduced. Accepting the decision of the Election Court that an entirely new petition was being filed would mean that a fresh petition was being filed outside the 28 days provided by the law.

72. Therefore, on the question as to whether the Election Court was correct in striking out the amended petition, my answer is that the Court was right in striking out the amended petition since the same was incomplete as it was not accompanied by an explanatory affidavit. Such an affidavit could have adopted the previous supporting affidavit and introduced the statements of the witnesses in the latest edition of the petition. There was therefore no proper pleading before the Election Court.

73. This brings me to the question as to whether the amendment extinguished the previous petition. The answer depends on whether one is dealing with a successful amendment or an aborted one like the one before me. Having said so, it is important to note, firstly, that an amended petition must stand on the original petition in order to have some legitimacy especially if the amendment is effected outside the statutory time for filing election petitions. Secondly, as submitted by Mr. Aboubakar for the Appellant, an amendment is a change or addition designed to improve a document. In amending a pleading, a party is just making the document more accurate or to be in tandem with the changing circumstances of the case. It does not amount to repealing the document. An amendment does not therefore entirely sweep away the previous pleading.

74. In **Regina Kavenya Mutuku & 3 others v United Insurance Co. Ltd [2002] eKLR,** Ringera, J, (as he then was) was of the view that amendment extinguishes the original pleading. He held that:

"I confess that is not an easy point in the circumstances of this matter. I think the answer turns on whether or not a party whose amended pleading has been struck out is entitled to rely on the original pleading on record. The advocates did not address me on this point. And I am afraid there is no rule to the point. The nearest guidance is in Order VI rule 1 (6) which is to the effect that where a party has pleaded to a pleading which is subsequently amended and served on him without leave of the court before the closure of pleadings, he shall be taken to rely on his original pleading in answer to the amended one if he has not amended the same. That rule is obviously inapplicable where, as here, the party has been served with a pleading amended pursuant to the order of the court and has actually filed his own amended pleading thereto. In my opinion where a pleading has been amended and the same has been struck out for whatever reason, the party affected has simply no valid pleading left on record. The effect of an amended defencing my judgment is to supersede and replace the original defence with the amended one for the purpose of determining what facts are admitted or traversed, as the case may be, and therefore what issues are joined for trial. But that is of course subject to the rule that the amended pleading relates back in point of time to the date of the filing of the original one. Having taken that view of the matter, I find that the defendant has no valid defence on record. In the premises, it would be idle of me to enter into any consideration of whether or not any of the matters raised in the invalid defence by the defendant raises any bona fide triable issues."

75. The view of Ringera, J (as he then was) is contrary to the position enunciated by Newbold J.A. in **Eastern Radio** (supra) that:

"Can it be said that any subsequent amendment of the plaint by abandoning the claim for possession has the effect of obliterating ex post facto an act having legal consequences which has already taken place. In my view clearly no. I entirely accept as was said in Sneade v Wotherton Barytes and Lead Mining Company Limited (7), that a plaint as amended may be treated as if it were the original claim, but I know of nothing in that case or any other case which requires that it must be so treated for all purposes and in all circumstances...

It is inconceivable that these words would have been used if the effect of the amendment was automatically to treat the previous pleading as if it had never existed. Logic and common sense requires that an amendment should not automatically be treated as if it, and nothing else, had ever existed."

76. The position taken in **Eastern Radio** was adopted in **Phoebe Wangui (Formerly known as Phoebe Wangui Kamore) v James Kamore Njomo, Nairobi High Court Civil Suit No. 367 of 2010**, where Odunga, J held that:

"I have read the decision of Ringera, J (as he then was) in Mutuku & 3 Others vs United Insurance Company Ltd (supra). Whereas I agree that the effect of an amended pleading is to supersede and replace the original pleading, that is only true with respect to the issues for determination. That, in my view, does not mean that the only relevant document is the amended pleading. In my view, that is the rationale behind the provision that the amendment in the amended pleading be legible and ought not be obliterated. To say that once an amended pleading is struck out, the party has no pleading on record would ignore the fact that a suit is not instituted by an amended pleading but by original pleading. Order 8 rule 2 for example empowers the Court to disallow or strike out an amended pleading if the same was improperly amended. That rule does not state that in that event the whole suit is struck out."

77. Applying the logic prevailing in civil litigation to election petitions, I reach the conclusion that where an amended petition is struck out, the original petition is not obliterated. The original petition is revived by the act of striking out the amendments and if the original petition is capable of being heard, then the election court should hear and determine the same on merit.

78. In summary, I find that the Election Court was right in striking out the amended petition for not being accompanied by an affidavit. However, the Court erred in failing to hear the original petition. Once the Court struck out the amended petition it ought to have reverted to the original petition. There was no void left by the striking out of the amended petition as the original petition had not been withdrawn and was capable of being heard as I have already stated.

79. In light of the above conclusion, the appeal should succeed and an order directing the Election Court to try the petition should issue accordingly. There was, however, a reservation raised by the 2nd Respondent's counsel as to the availability of such an order in the circumstances of this case. Although counsel for the Appellant cited the decision of the Court of Appeal in **Martha Wangari Karua** (supra) in pitching for an order directing the Election Court to hear the petition, the 2nd Respondent has submitted that based on the law and the decision of the Supreme Court in **Lemanken Aramat** (supra) such an order cannot issue.

80. In **Lemanken Aramat** (supra), the Court of Appeal had remitted an election petition to the High Court at Nakuru with an order for recount of the votes cast in all the 69 polling stations in Narok East Constituency. The appellant was aggrieved by the order and one of the grounds of his appeal in the Supreme Court was that the High Court no longer had jurisdiction to hear and determine the matter.

81. The Supreme Court dealt with the issue at length and concluded that:

"[139] The burden of the argument, founded upon the Constitution and the law as these stand; upon the lines of conviction in counsel submissions; and upon the relevant comparative judicial experience, in our perception, does not stand in favour of the 1st respondent. We would not agree with the opinion of counsel for the 1st respondent that the Appellate Jurisdiction Act (Cap. 9, Laws of Kenya) confers *jurisdiction* upon the Court of Appeal to remit an *electoral-dispute matter* back to the High Court after the six-month limit set out in Article 105(1) and (2) of the Constitution has lapsed. The Constitution and the Elections Act, which are the foundation of a special electoral-dispute regime, confer upon the High Court the power to determine electoral disputes *within six months;* and the appellate Court cannot confer upon itself powers to resurrect the jurisdiction of Election Courts, after such jurisdiction is exhausted under the law.

[140] It is a commonplace that the Constitution is the supreme law of the land, in the terms of its Article 2(1), which binds all persons and State organs. It follows that the Constitution is sovereign, and holds a place of superiority over any orders and decrees of a Court. Accordingly, the Court of Appeal could not confer jurisdiction upon the High Court to conduct a recount, as the jurisdiction of the High Court under Article 105(1) and (2) of the Constitution, was in the first place contestable on the ground of expired timelines, and would in any case have been already exhausted."

82. In reaching its decision the Supreme Court was persuaded by the decision of the Nigerian Supreme Court in the case of **Chief Doctor Felix Amadi & another v Independent National Electoral Commission (INEC) & Others S.C. of Nigeria Appeal No. 476 of 2011** where it was held that:

"There is no room for the exercise of any discretion in relation to the allotted time. Everything needed to deliver the judgment must be done and the judgment delivered within sixty (60) days of the date of delivery of judgment on appeal… The appeal in question has lapsed by one day as at 7th December 2011 when the same was listed for hearing. That means that as at that date the appeal had ceased to exist in law and could therefore not have been heard – it was dead in the eyes of the law and the Constitution."

83. I have anxiously gone through the decisions of the Court of Appeal in the already cited cases of **Martha Wangari Karua** and **Mbaraka Issa Kombe** and find that the issue as to whether the election courts still had jurisdiction to try the petitions was never taken up by any of the parties. As the issue was not raised, the Court never addressed it. Those decisions cannot therefore come to the aid of the Appellant.

84. Earlier in **Charles Kamuren v Grace Jelagat Kipchoim & 2 others [2013] eKLR,** the Court of Appeal had conveyed an opinion contrary to that of the Supreme Court by stating that:

"38. Turning to Article 105 of the Constitution which requires the High Court to hear and determine an election petition as to whether a person has been validly elected as a member of parliament or whether a seat of such a member has become vacant, within a period of six months of the date of lodging the petition, we are of the considered view that where such a petition had been struck out and on appeal against such an order this Court finds that the petition ought not to have been struck out, the Court has power to direct the High Court to hear and determine the petition, even if the six months' period stipulated under Article 105 has lapsed. In such an instance, it cannot be argued that the constitutional period for hearing and determining the petition has already lapsed. The period of six months shall begin to run from the date of delivery of the judgment by the appellate Court. It would occasion great injustice if a successful appellant, (that is, one whose election petition is found to have been wrongfully struck out), were to be denied the right to be heard simply because the appeal is determined after six months from the date the petition was lodged."

85. It is apparent that the said decision was upset by the decision of the Supreme Court in **Lemanken Aramat** which came later. Again by virtue of Article 163(7) this court is bound by the decision of the Supreme Court.

86. A perusal of the Constitution discloses that the people of Kenya wanted election disputes resolved expeditiously hence the imposition of timelines both in the Constitution and the electoral law. The Supreme Court has stressed this constitutional imperative in several decisions. In **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others S.C. Petition No. 2B of 2014; [2014] eKLR** the Court stated that:

"[136] And we returned to the timelines theme in the recent *Munya* case (at paragraph 62):

"*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" [emphasis supplied]."

Adherence to strict timelines is therefore part and parcel of the scheme of things in electoral disputes. Article 105(2) of the Constitution provides that a question of the validly of the election of a member of Parliament or whether a member's seat has become vacant **"shall be heard and determined within six months of the date of lodging the petition."** Section 85 of the Elections Act provides that an election petition under the Act shall be heard and determined within the period specified in the Constitution. The reference point is the date the petition is lodged. The calendar is not shifted by the conduct of the parties and neither can it be breached by the actions of the election court. The period is cast in stone and once the six months lapse the election court no longer has any powers to hear and determine the election petition. It must down its tools without prompting.

87. It is my humble view that where an appellate court, like this one, deems it necessary to have an election petition remanded to the election court for hearing, it can only do so if six months have not lapsed from the date of the lodging of the petition. Where the six months have lapsed, the appellate court cannot order the election court to hear the petition.

88. Acceding to the Appellant's request that I return this matter to the Election Court for trial will negate the command of the people of Kenya, as conveyed through the Constitution, that election disputes be expeditiously heard and determined. Much as I have found that the decision by the Election Court not to hear the petition was erroneous, I must surrender to the higher calling of the Constitution that requires election petitions to be heard and determined within six months from the date of filing. Indeed, there is no longer in existence a petition that I can direct the Election Court to hear. The petition died on the date the six months period lapsed. This appeal therefore fails on the ground that the election petition has been overtaken by constitutional timelines. The Appellant's appeal is therefore dismissed.

E. <u>THE NEED FOR REFORM</u>

89. The instant appeal aptly illustrates the need for retuning our electoral laws so that they can provide justice inside the timelines provided by the Constitution. The results stated in the amended petition shows that the 1st Respondent received 2,432 votes and the Appellant had 2,425 votes. The 1st Respondent therefore won by seven votes. Whereas an election can be won by one vote, a fully-fledged hearing would have given the people of Jilore Ward an answer as to whether the 1st Respondent actually won the election. Maybe a recount, if ordered, could have revealed some discrepancies in the tallying of the votes cast. Be that as it may, the opportunity to hear the matter on merit is now lost forever.

90. The Court of Appeal in **Martha Wangari Karua** (supra) had a strong and important message to election courts when it stated that:

"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."

91. We may need to limit the period for seeking the striking out of an election petition. We may even consider enacting legislation requiring the hearing of all election petitions on merit with applications for striking out being taken up as part of the response to the petition. This way, if an appellate court finds that the decision striking out a petition was wrong, it can proceed to determine the appeal on merit and issue orders accordingly without reverting to the election court. That way the appellate court will be able to deliver justice within the period reserved for hearing the appeal. There are various mechanisms that can be put in place in order to ensure that justice is not only done but is also seen to be done. The Judiciary must take the lead in engineering reforms that will blunt the perceived injustice in election petitions that are struck out.

92. My call for urgent reform is not new. I started the ball rolling in a ruling (Ruling No. 7) delivered on 21st November, 2017 in **Samuel Kazungu Kambi & Nelly Ilongo & 2 others Malindi HC EP No. 4 & 5 of 2017 (consolidated); [2017] eKLR** when I urged the Court of Appeal to revisit its decision not to hear appeals on interlocutory decisions in election petitions. I pointed at **Lemanken Aramat** (supra) and asserted that where an application for recount and or scrutiny is rejected, the petitioner's appeal against such a decision should be heard immediately even as the election court proceeds to hear the petition. My rallying call was that:

"38. As I conclude on this point, it is my humble view therefore that the doctrine of deferred and sequential appellate jurisdiction in regard to interlocutory decisions in electoral disputes should be revisited and tinkered with so that the Court of Appeal acting upon its wisdom and discretion can promptly review some decisions. How this can be achieved without staying the proceedings of the election court is a matter that can be addressed by the Court of Appeal or by an amendment to the Court of Appeal (Election Petition) Rules, 2017. The right of appeal provided by Article 164(3) of the Constitution should not be rendered sterile simply because the appeal is arising from an interlocutory decision in an election dispute. It is alright to defer an appeal where such deferment will not prejudice the parties. However, if postponing an appeal will result in injustice, then such an appeal should be heard without undue delay."

93. There should be continuous surveillance and reconfiguring of the electoral laws until such a time that we are satisfied that they allow the parties and the courts to attain justice within the constitutional timelines.

F. <u>COSTS</u>

94. This appeal having failed, the appropriate order should be to award costs to the respondents, however, it would be unconscionable to do so as the Appellant's election petition was erroneously struck out by the Election Court. That being the case, the only just order is to direct each party to meet own costs in respect of this appeal and the proceedings before the Election Court. It is so ordered.

G. <u>DISPOSAL OF THE APPEAL</u>

95. On the issues raised in this appeal I have held as follows:

i) The 2nd Respondent's application dated 8th February, 2018 seeking to strike out the appeal has no merit and the same is dismissed;

ii) The Election Court was correct in striking out the amended petition;

iii) However, the Election Court erred in failing to hear the election petition based on the Appellant's original petition;

iv) This appeal fails and is dismissed as the Election Court no longer has jurisdiction to hear the election petition; and

v) Each party to bear own costs in respect of this appeal and the proceedings before the Election Court.

Dated, signed and delivered at Malindi this 15th day of May, 2018.

W. KORIR,

JUDGE OF THE HIGH COURT