IN THE COURT OF APPEAL

AT MALINDI

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

ELECTION PETITION APPEAL NO. 3 OF 2017

BETWEEN

MBARAKA ISSA KOMBE.....APPELLANT

AND

INDEPENDENT ELECTORAL AND

BOUNDERIES COMMISSION (IEBC).....1ST RESPONDENT

D. KOMBE HILARY.....2ND RESPONDENT

TEDDY NGUMBAO MWAMBIRE.....3RD RESPONDENT

(An appeal from the Ruling of the Election Court at

Malindi (Otieno, J.)dated 2nd November, 2017

in

Election Petition No. 10 of 2017.)

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JUDGMENT OF THE COURT

1. Striking out pleadings renders the said pleadings non-existent which in turn has the effect of depriving a party of what he/she had anticipated, that is, adjudication of his/her claim or defence by a court of law. Because of the draconian nature of this power it is sparingly invoked by a court as a last resort. This was not always the case in our courts as appreciated by Ouko, J.A in ***Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 6 others [2013] eKLR (Nicholas Salat case)***. He observed that prior to 2010, more specifically, before the promulgation of the current ***Constitution*** and enactment of the overriding objective principle in a number of statutes, striking out of pleadings for reasons that were purely technical was the rule rather than the exception.

2. Our brother went on to demonstrate this shift that a court ought to aim at sustaining a suit rather than terminating it summarily. He expressed himself as follows:-

> ***"Deviations from and lapses in form and procedures which do not go to the jurisdiction of the Court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the Court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness."*** *[Emphasis added]*

3. It is common ground that whenever a court is faced with the question of whether to strike out a pleading or a suit, the court exercises its discretionary jurisdiction. This is the position the Election Court at Malindi in Election Petition No. 10 of 2017, the subject of this appeal,

found itself in. By a ruling dated 2nd November, 2017 the learned Judge (Otieno, J.) struck out the petition therein for failure to comply with ***Rules 8(1)(c) & (d)*** of the ***Elections (Parliamentary and County Elections) Petitions Rules, 2017 (the Election Petition Rules)***.

4. We take cognizance that ***Section 85A (1)*** of the ***Elections Act*** restricts our jurisdiction in such an appeal to points of law only. Consequently, in a nutshell what we are being called upon to determine is whether the learned Judge exercised his discretion properly. In doing so, we ought not to interfere with the exercise of such discretion unless we are satisfied that the learned Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the learned Judge was clearly wrong in the exercise of discretion and occasioned injustice. See ***Mbogo & Another vs. Shah [1968] EA 93***.

5. Having the foregoing in mind a brief summary of the facts will place the appeal in context. Following the general elections held on 8th August, 2017 **D. Kombe Hillary** (the 2nd respondent), the then Returning Officer of Ganze Constituency, declared **Teddy Ngumbao Mwambire** (the 3rd respondent) as the duly elected Member of the National Assembly of the said Constituency. This did not go well with **Mbaraka Issa Kombe** (the appellant) who was not only a registered voter in the said Constituency but also the Chief Agent of one Mr. Peter Safari Shehe who had vied for the elective post in question under the Jubilee Party. In his view, the election in question was not free and fair as envisioned under ***Article 38*** of the ***Constitution***. As a result, he filed an election petition challenging the results on grounds that the election was marred with irregularities and malpractices and sought the following orders:

> ***a) A declaration that the Ganze Constituency Member of National Assembly*** *(sic)* ***held on 8th August, 2017 was not conducted in accordance with the Constitution and the applicable law rendering the declared result invalid, null and void.***
>
> ***b) A declaration that the 3rd respondent was not validly declared as the Member of National Assembly for Ganze Constituency and that the declaration is invalid, null and void.***
>
> ***c) An order directing the 1st respondent to organize and conduct a fresh Ganze Constituency Member of National Assembly election in strict conformity with the Constitution and the Elections Act, 2011.***
>
> ***d) A declaration do issue that the degree and extent of electoral offences and malpractices perpetrated by and/or attributable to the agents of the respondents in the Ganze Constituency Member of National Assembly*** *(sic)* ***conducted on 8th August, 2017 invalidated the said election.***
>
> ***e) A declaration do issue that the degree and extent of electoral offences and malpractices perpetrated by and/or attributable to the agents of respondents in the conduct of the Ganze Constituency Member of National Assembly*** *(sic)* ***of the 8th August, 2017 were in breach of, and violated Article 86 of the Constitution.***
>
> ***f) A declaration that each and all the respondents jointly and severally committed election offences, malpractices and/or irregularities.***
>
> ***g) Costs of the Petition.***

6. The 1st and 2nd respondents put in a joint response to the petition denying the appellant's allegations. Apart from denying the allegations, the 3rd respondent also raised a preliminary objection challenging the competency of the petition. The long and short of it was that both the petition and the supporting affidavit thereto did not comply with ***Rules 8(1) & 12*** of the ***Election Petition Rules***. In particular, the date of the disputed election, declared results and the date the results were declared were not disclosed in the said pleadings. In his view, the omission rendered the petition fatally defective.

7. The learned Judge agreed with the 3rd respondent to the extent that he found that the particulars of the declared results and the date those results were declared had not been disclosed in the petition. In his own words he stated:

> ***"Having found that the petitioner failed to give detailed results and the date of declaration and that such particulars are mandatory and being bound by the decision of the Court of Appeal in Mututho's case, I have come to the conclusion that the petition filed herein by MBARAKA ISSA KOMBE is incurably defective and being so incurably defective it means no further scrutiny*** *(sic)* ***whether the complaints by him can be proved or supported by evidence. It presents itself to only one fate, having not been heard on it*** *(sic)* ***merit, of being struck out."***

8. It is that decision that the appellant is disgruntled with and complains that the learned Judge erred in law by-

> ***i. Finding that there was non-compliance with Rule 8(1)(c) & (d) of the Election Petition Rules without considering the full meaning and purport of the same in line with Articles 259, 159(2) (d), 50, 38 and 78 of the Constitution.***
>
> ***ii. Misinterpretation of the Supreme Court's decision in Ali Hassan Joho vs. Suleiman Shahbal & 2 Others [2014] eKLR.***
>
> ***iii. Relying on the case of John Mututho vs. Jayne Kihara [2008] 1 KLR which decision was made before the promulgation of the Constitution, 2010 thus, was no longer good law.***
>
> iv. ***Awarding costs which were in any event excessive***.

9. In his opening remarks, Mr. Aboubakar, learned counsel for the appellant submitted that contrary to the learned Judge's findings, the petition complied with ***Rule 8(1)(c) & (d)*** of the ***Election Petition Rules***. By way of illustration, he stated that paragraph 5 of the petition set out the names of all the six candidates that vied for the said post and the total votes garnered by the 3rd respondent. Paragraphs 4 and 11 of the same petition disclosed that the results were declared on 11th August, 2017. What is more, the supporting affidavit sworn by the appellant annexed Form 35B which was the 1st respondent's declaration of the results as contemplated under ***Section 39*** of the ***Elections Act***. The said annexture was sufficient as ***Rule 8(1)(c)*** was clear that the petition should state the results of an election however declared.

10. Besides, failure to comply with ***Rule 8(1)(c) & (d)*** which delineate procedural requirements, if any, did not prejudice the respondents and was curable under ***Rule 5*** of the ***Election Petition Rules*****.** In support of that line of argument, counsel made reference to ***Raila Odinga & Others vs. IEBC & 3 Others [2013] eKLR*** wherein the Supreme Court held:

> ***"A court of law should not allow the prescriptions of procedure and form to trump the primary objective of dispensing substantive 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."***

11. Citing the Supreme Court's decision in ***Hassan Ali Joho & another vs. Suleiman Said Shahbal & 2 others [2014] eKLR*** (***Hassan Joho case***) and this Court's decision in ***Martha Wangari Karua vs. Independent Electoral & Boundaries Commission & 3 others [2018] eKLR (Martha Karua case)***, Mr. Aboubakar faulted the learned Judge for exercising his discretion in the manner he did. He urged us to allow the appeal.

12. On his part, Mr. Owuor, learned counsel for the 3rd respondent, also holding brief for Mr. Chege, learned counsel for the 1st and 2nd respondents, opposed the appeal. He begun by arguing that the ***Elections Act*** & the ***Election Petition Rules*** and the ***Regulations*** thereunder are derivatives of ***Article 87(1)*** of the ***Constitution***. It follows therefore that failure to comply with the mandatory provisions thereunder was tantamount to failure to comply with the ***Constitution***.

13. He reiterated that the date of the election in dispute, the date of declaration of the results as well as the particulars of the declared results were key ingredients in any petition challenging an election. The absence of those ingredients renders a petition defective as was the case with the appellant's petition. He went on to submit that the omission of those particulars disregarded the respondents' right to a fair hearing. As far as he was concerned, Form 35 annexed to the supporting affidavit was not sufficient.

14. The provision in question makes it mandatory for such particulars to be stated in the body of the petition. Moreover, such an omission could not in any way be equated to a technicality because it went to the root and substance of the petition. In that regard, counsel placed reliance on the Supreme Court's decision in the ***Hassan Joho case*** *(supra)*. Similarly, the appellant could not take refuge under ***Article 159 (2)(d)*** of the ***Constitution***. To that extent, he referred the Court to the sentiments of Kiage, J.A in the ***Nicholas Salat case*** (supra) thus:-

> ***"I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succour and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned."***

We also understood Mr. Owuor to contend that the omissions went to the jurisdiction of the Election Court.

15. We have considered the record, submissions by counsel and the law. In our view, the appeal turns on the construction of ***Rule 8(1)*** of the ***Election Petition Rules***. It is trite that electoral law is a special jurisdiction whose interpretation is strictly confined within the parameters of the ***Constitution*** and relevant electoral statutes. See this Court's decision in ***Rozaah Akinyi Buyu vs. Independent Electoral and Boundaries Commission & 2 others [2014] eKLR***. On that very issue, the Supreme Court of India in ***Jyoti Basu & Others vs. Debi Ghosal & Others AIR 1982 SC 983*** succinctly held:-

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

16. We believe that discerning the intention of the Rules Committee in making the Rule in question cannot be solely based on the language employed thereunder. Regard has to be given to the parent statute, that is, the ***Elections Act*** as well as the context within which both the parent statute and the ***Election Petition Rules*** were formulated. Our position is fortified by the often quoted sentiments of the Supreme Court of India in ***Reserve Bank of India vs. Peerless General Finance and Investment Co. Ltd. and others {1987} 1 SCC 424***:-

> ***"Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the***

textual interpretation match the contextual."

17. The starting point would then be ***Article 87(1)*** of the ***Constitution*** which tasked the legislature to establish mechanisms for timely settling of electoral disputes. In discussing the rationale behind the said Article, the Supreme Court in ***Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others [2014] eKLR*** stated:

> ***"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 the name of which elections are decreed and conducted, should not be held captive to endless litigation."***

See also the Supreme Court's decision in ***Lemanken Aramat vs. Harun Meitamei Lempaka & 2 others [2014] eKLR***.

18. In fulfilling that task, the legislature enacted a number of electoral statutes, key among them being the ***Elections Act***. Pursuant to ***Section 96(1)*** of the ***Elections Act*** the Rules Committee made the ***Election Petition Rules*** regulating the practice and procedure at the Election Court with respect to election petitions. It follows that interpretation and application of provisions relating to resolution of electoral disputes should be geared towards facilitating the aforementioned constitutional objective, that is, the expedient resolution of electoral disputes.

19. Accordingly, the Rules Committee in ***Rule 8(1)*** of the ***Election Petition Rules*** set out the contents that an election petition should have for purposes of advancing the said objective. The provision stipulates:

> ***8(1) An election petition shall state-***
>
> ***(a) the name and address of the petitioner;***
>
> ***(b) the date when the election in dispute was conducted;***
>
> ***(c) the results of the election, if any, and however declared;***
>
> ***(d) the date of the declaration of the results of the election;***
>
> ***(e) the grounds on which the petition is presented; and***
>
> ***(f) the name and address of the advocate, if any, for the petitioner which shall be the address for service.***

20. The aforementioned particulars certainly give clarity to both the parties and the court as to the issue in dispute; it enables the concerned parties to prepare suitable defence; and it enables parties not to stray from the issues so identified; all of which facilitate expedient resolution of the dispute in issue. As Jessel, M.R in ***Thorp vs. Holdsworth (1876) 3 Ch. D. 637 at 639*** put it:

> ***"The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules…was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing."***

21. So, what happens in the event a litigant does not comply with that Rule? Certainly this is not the first time this question has been raised. The Election Court has had its fair share of dealing with this issue. Most recently, this Court (differently constituted) in the ***Martha Karua case*** *(supra)* had the opportunity to pronounce itself on the issue. The Court in that matter set out in detail the decisions of the Election Court and we find no need to rehash the same. Similarly, the Court rightly noted that from the said decisions two schools of thought had emerged. It articulated those schools of thought in the following manner:

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

22. In our view, whether non- compliance would warrant striking out or saving of the petition can only be determined on a case by case basis. In addition to the constitutional timeline objective the court will be guided by ***Rule 4*** of the ***Election Petition Rules*** which requires it to give effect to the overriding objective thereunder.

23. On the applicability of the overriding objective principle, we wish to draw guidance from decisions of this Court. The goal of the overriding objective principle is to enable a court to achieve fair, just, speedy, proportionate, time and cost saving disposal of cases before it.

See ***Karuturi Networks Limited & another vs. Daly & Figgis Advocates [2009] eKLR***. As this Court in the ***Martha Karua case*** aptly articulated:

> ***"There should be a meticulous balance of those four objectives. It should not appear as though, an election court is simply concerned about expeditious disposal of the election petition by quickly striking it out, without carefully considering whether the decision to strike out, the petition is actually just to all the parties concerned, whether it is proportionate and whether the same could be avoided."***

24. Therefore, it confers courts with considerable latitude in the exercise of its discretion in the interpretation of the law and rules made thereunder. See ***City Chemist (NB1) & Another vs. Orient Commercial Bank Limited. Civil Application No. Nai 302 of 2008 (unreported)***. However, its application does not operate to uproot established principles and procedures but emboldens the court to be guided by a broad sense of justice and fairness. See ***Karuturi Networks Limited & another vs. Daly & Figgis Advocates (supra)***.

25. The court will also in exercise of its discretion take into account ***Rule 5(1)*** of the ***Election Petition Rules*** which provides:

> ***"The effect of any failure to comply with these Rules shall be determined at the Court's discretion in accordance with the provisions of Article 159 (2)(d) of the Constitution."***

Article 159(2)(d) advocates that a court in exercising judicial authority should not pay undue regard to procedural technicalities. In other words, as the Supreme Court put it in ***Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 others [2015] eKLR*** it accords precedence to substance, over form. As we have said severally, rules of procedure are meant to be handmaidens and should never be elevated to the status of mistresses of justice.

26. In totality, the Election Court will have to look into the nature of the non-compliance, that is, does it go the jurisdiction of the Court? Does it go the root of the dispute? Does it occasion prejudice to the other party?

27. Going back to the appeal before us, ***Rule 8(1) (c)*** of the ***Election Petition Rules*** requires results of the election in issue to be set out on the face of the petition. Election results as defined by ***Section 2*** of the ***Elections Act*** means the declared outcome of the casting of votes by voters at an election. We cannot help but note that the appellant, save for naming the candidates who vied for the post in question, only set out the 3rd respondent's results in the petition. Applying the principles discussed herein above, we, unlike the learned Judge, find that the non-compliance did not render the petition defective.

28. We say so because the appellant disclosed the declared results in his affidavit in support of the petition. He did so by annexing thereto Form 35 which is the prescribed form for tallying, announcement and declaration of the final results from each polling station in a constituency for the election of a Member of National Assembly. See ***Section 39(1A) (i)*** of the ***Elections Act*** and ***Regulation 83 (1)(e)*** of the ***Elections (General) Regulations, 2012***. The said form clearly sets out the total votes cast in favour of each candidate who vied for the position as well as the rejected votes.

29. In our view, the supporting affidavit is part and parcel of the petition. Equally, the reference of the annexure in question in the supporting affidavit incorporated the contents of Form 35 into the petition. In ***Castelino vs. Rodriques (1972) EA 233***, the Court of Appeal at Kampala held:

> ***"As a general rule, a reference in a document to an annexure has the effect of incorporating the contents of the annexture in the document.***

This Court in ***Dickson Mwenda Githinji vs. Gatirau Peter Munya & 2 others [2014] eKLR*** reiterated as much by holding that annexures were part of the petition. Furthermore, in upholding the above finding the Supreme Court in ***Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others [2014] eKLR*** opined:

> ***"We agree with the Court of Appeal in its faulting of the trial Judge's statement that "annexures to an affidavit cannot be said to constitute pleadings." The reasoning by the Court of Appeal regarding this question, in our view, represents the correct position in the law and practice relating to pleadings."***

30. Consequently, we find that the learned Judge erred in ignoring the contents of the appellant's supporting affidavit and Form 35 annexed thereto. In as much as the results were not set out on the face of the petition, the respondents as well as the Election Court were not in the dark with regard to that issue. Therefore, the omission did not go to the jurisdiction of the court or go to the root of the dispute; nor did it prejudice the respondents. We also find that the learned Judge erred in relying on this Court's decision in ***John Michael Njenga Mututho vs. Jayne Njeri Wanjiku Kihara & 2 others [2008] eKLR*** because it was decided in the year 2008 under the previous constitutional dispensation and the repealed ***National Assembly and Presidential Elections Act***. Moreover, the facts therein are distinguishable from the case before us. The Petitioner therein had not set out the election results at all thereby placing the court as well as the other parties therein in a position of uncertainty with respect to the issue in dispute.

31. Our perusal of the petition on record reveals that contrary to the finding of the learned Judge, the date the election results in question were declared was clearly indicated. Paragraph 4 thereof read:-

> ***"The 3rd respondent is the elected Member of National Assembly of Ganze … and was declared the winner of the said elections by the 2nd respondent on the 11th day of August, 2017."*** *[Emphasis added]*

Further, paragraph 11 thereof read:

> ***"The 2nd respondent declared the 3rd respondent as the winner of the said election held on the 8th day of August, 2017 on the 11th day of August, 2017…"*** *[Emphasis added]*

32. For the aforementioned reasons, we find that the learned Judge misdirected himself in striking out the appellant's petition. Consequently, we allow the appeal and make orders as follows;

i. The learned Judge's ruling dated 2nd November, 2017 is hereby set aside in its entirety.

ii. The costs of the application striking out the petition be in the petition.

iii. Election Petition No. 10 of 2017 be heard and determined on merit in Malindi before any Judge with jurisdiction other than P.J. Otieno J.

iv. We award the appellant costs of this appeal which we cap at Ksh.500,000.00, as against the 3rd respondent.

Dated and delivered at Mombasa this 10th day of May, 2018.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M.K. KOOME

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR