No.788

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ELECTION PETITION NO.10 OF 2013

IN THE MATTER OF THE ELECTIONS ACT NO.24 OF 2011 AND THE ELECTIONS (GENERAL) REGULATIONS MADE THERE UNDER AND THE POLITICAL PARTIES ACT NO.11 OF 2011

AND

IN THE MATTER OF AN ELECTION OF THE ELECTION OF THE WOMAN MEMBER OF THE NATIONAL ASSEMBLY, KISII COUNTY

AND

IN THE MATTER OF THE PETITION OF: EVANS NYAMBASO ZEDEKIAH

AND MABUTU NYAKERIGA

BETWEEN

EVANS NYAMBASO ZEDEKIAH

MABUTU NYAKERIGA ……..…… PETITIONERS

AND

INDEPENDENT ELECTORAL AND

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

SHEM NYANGA'U …….……. 2ND RESPONDENT

MARY SALLY KERAA alias MARY SALLY OTARA ……. 3RD RESPONDENT

RULING

Introduction and background

1. Consequent to the holding of the general elections of 4th March 2013, the 3rd Respondent herein, Mary Sally Keraa alias Mary Sally Otara was declared the duly elected Kisii County Woman

Representative to the National Assembly. Her election was challenged by the filing of this petition on 10th April 2013 by Ezekiel Okondo Onchieku.

2. By an application dated 29th April 2013, the Petitioner Ezekiel Okondo Onchieku (hereafter referred to as original petitioner) applied to withdraw from the petition. By another application also dated 29thApril 2013, the present petitioners Evans Nyambaso Zedekiah and Mabutu Nyakeriga (hereafter referred to as the petitioners) applied to the court to be allowed to take the place of the original petitioner as petitioners. The 2 applications were consolidated and heard together on the 29th May 2013. By a ruling rendered by this court on 11th June 2013, the two applications were allowed. While the original petitioner walked out of the petition, the petitioners entered.

3. While the two applications for withdrawal and substitution respectively were pending all the 3 respondents filed their respective applications by way of Notice of Motion both dated 22nd May 2013 seeking to have the petition herein struck out.

Notice of Motion dated 22nd May 2013 by the 1st and 2nd Respondents

4. The motion was filed on 23rd May 2013 pursuant to the provisions of **section 78 (3)** of the **Elections Act, No.24 of 2011** and **Rules 4, 10, 11** and **17** of the **Elections (Parliamentary and County Elections) Petition Rules, 2013** (hereinafter referred to as the Act and the Rules respectively). The applicants sought the following orders:-

a. *The petition herein be struck out and the same be dismissed;*
b. *The 1st and 2nd Respondents be paid costs of the petition.*
c. *Costs of this application be provided for.*

5. The application was supported by the grounds set out on the face thereof and by the sworn affidavit of Shem Obworo Nyangau dated 22nd May 2013; the main ground being that the deposit for security for costs was made 4 days outside the stipulated period, hence the application to strike out.
6. The application was opposed vide the Replying Affidavit sworn on 24thJune 2013 by Evans Nyambaso Zedekiah, the 1st Petitioner herein. The deponent says that the mere fact of the deposit for security not having been made within the stipulated time is not sufficient ground for striking out the petition. He therefore urged the court to dismiss the application with costs.

Notice of Motion dated 22nd May 2013 by the 3rd Respondent

7. The motion which was filed on 23rd May 2013 sought the following orders:-

a. *The petition herein be struck out and the same be dismissed.*
b. *The 3rd Respondent be paid the costs of the petition.*
c. *Costs of this application be provided for.*

8. The application was premised on the grounds set out on its face, the main grounds being that the petition herein was never served upon the 3rd Respondent at all ever since it was lodged in court contrary to **section 77** of the **Act** and secondly that the petitioners failed to comply with the mandatory provisions of **section 78 (1); (2) (b)** of the **Act** and **Rule 11 (1)** of the **Rules** in that they failed to deposit the security by deposit of money within the stipulated time.
9. The application was also supported by the sworn affidavit of Mary Sally Keraa, the 3rd Respondent herein dated 22nd May 2013.
10. The application was opposed. The Replying Affidavit was sworn on 24th June 2013 by Evans Nyambaso Zedekiah. He prays that the application be dismissed with costs for lack of merit.

The submissions

11. Counsel appearing made oral submissions on the issues arising in their respective applications. They also filed their lists of authorities/ statutes to support their positions in the matter; the details of which shall become apparent when analyzing the issues that are to be determined by this court.

Issues for Determination

12. After hearing all counsel for the parties, herein, the following issues arise for determination:-

1. *whether the petition herein was served upon the 3rd Respondent and if not, what are the consequences of such non-service;*
2. *Whether security by deposit was made in accordance with the law and if not what are the consequences of such non-compliance;*
3. *Whether security for costs is a substantive or procedural issue;*
4. *Whether this court has jurisdiction to validate the late deposit made by the petitioners;*
5. *Whether failure by the petitioners to give particulars in the petition is fatal to the petition;*
6. *Who shall bear the costs of these applications?*

Whether the petition was served on the 3rd Respondent, and if not, the consequences of such non-service

13. While the 3rd Respondent herein contends that she has never been served with the petition todate, the petitioners contend that they served her personally with the petition as supported by the sworn affidavit of service of James Moracha Ntabo dated 20th April 2013 and filed in court on 25th June 2013. The question this court has to answer is: which version of the story in this regard should be believed?
14. In the case of **Dickson Daniel Karaba –vs- John Ngata Kariuki & others – Civil Appeal No.125 of 2008 decided by the Court of Appeal** (unreported) an issue arose as to the truth on whether or not service of the petition was effected upon the respondents. In this unreported decision that was cited with approval by Majanja J in **Machakos High Court election Petition NO. 8 of 2013 – Patrick Ngeta Kimanzi –vs- Marcus Mutua Muhiri & 2 others** (also unreported), the Court of Appeal stated the following: *The central issue in this whole matter was to establish the truth about service of the petition filed by the appellant on the 1st respondent. The truth ought to have been established on a balance of probabilities and it lay between stories put forward by the process server and his supporter and by the 1st respondent and his supporter. Indeed the Superior Court and the parties appreciated the imperative at an early stage of the proceedings and the court made orders, correctly in our view, that the process server and the first respondent be examined on their affidavits. There was a good reason for that order, traceable to the law on such matters, that there is a presumption that the court process was properly served unless such a presumption is rebutted. We allude to the case of* **Shadrack arap Baiywo –vs- Bodi Bach – Civil Appeal No.122 of 1986** cited and applied in **Miruka –vs- Abok and Another [1990] KLR, 544 ---"** See also **MB Automobile –vs- Kampala Bus Service [1966] EA 480**; **Karatina Garments Limited –vs- Nyanarua [1976] KLR 94**.

15. In the **Karatina Garments case** (supra) the Court of Appeal for East Africa expressed itself thus on the issue of service: *We are of the view that in a case like this one where the respondent denied having been served with a summons, it was proper for the court to inquire into this aspect of the matter and in the face of the conflicting affidavits filed, it was again proper for the deponents to be examined on oath to try and ascertain the truth. It was then a matter of fact as to which party was to be believed."*

16. The 3rd Respondent avers in her affidavit dated 22nd May 2013 in support of the application to strike out the instant petition that she has not been served with the petition and that she was only served with the application for leave to withdraw the petition by the petitioner himself on 25th

April 2013. She contends therefore that the petitioners' failure to serve her with the petition contravenes the mandatory provisions of **section 78 (1)** and **2 (b)** of the **Act** as read with **rule 11 (1)** of the **Rules**.

17. In his affidavit of service dated 20th April 2013 but filed in court on 25th June 2013, the process server, James Moracha Ntabo says that he effected service upon the 3rd Respondent in the manner set out therein. For its full effect and import, I set out the 10 paragraph affidavit of service:

1. *THAT I am an adult male Kenyan of sound mind and disposition a duly licensed court process server competent to make and swear this affidavit.*
2. *THAT on the 18th day of April 2013 I received copies of an election petition dated 10th day of April 2013 and filed at the Kisii High Court on even date from the firm of Minda & Co. Advocates with instructions to effect service of same upon the 1st, 2nd and 3rd respondents herein.*
3. *THAT on the same day the 18th day of April 2013 I boarded a bus to Nairobi and travelled at night. On the 19th day of April 2013 at around 9.00 a.m. I proceeded to Parliament Buildings to make inquiries about the whereabouts of Mary Sally Otara who had just been elected to represent the County of Kisii as a Woman Representative. She was known to me as I came across her many times during the campaigns.*
4. *THAT upon arrival at the gates to Parliament Buildings I came across police officers who were guarding the gates and I introduced myself to them and the purpose of my visit. That the police officers told me that they only take me to the offices of the clerk to the National Assembly who would be able to assist.*
5. *THAT I was ushered in into the offices of the Clerk to National Assembly who introduced himself as Mr. Bundi. I explained to Mr. Bundi the purpose for my visit and that I wanted to serve Mrs. Mary Sally Otara the Women Representative for Kisii County with an election petition challenging her election as such.*
6. *THAT Mr. Bundi then made calls on his cell phone and then informed me that Mary Sally Otara would be available at the Hotel Intercontinental in the next 30 minutes. He advised me to go hotel intercontinental and await upon Mary Sally Otara.*
7. *THAT I arrived at hotel intercontinental within 20 minutes and lingered at the parking lot. After about 10 minutes I saw Mrs. Mary Sally Otara alighting from a car. She headed straight to a place near the pool side. I followed her there. After she had made herself comfortable I approached her and introduced myself and while referring to the call from the clerk to the National assembly to her earlier on, I informed her of the purpose of my visit. I served upon her a copy of election petition which she received and accepted service of; she perused it for around 10 minutes before she told me that she will not sign the copies in my possession.*
8. *THAT I herewith return a copy of the petition is served upon Mary Sally Otara and confirm that I personally served her with the petition though she declined to acknowledge receipt of it.*
9. *THAT on the same day the 19th day of April 2013 earlier at 10.43 a.m. at anniversary towers 7th floor is served another copy of an election petition upon the legal department of IEBC. A clerk thereat who introduced herself to me as Flora accepted service upon herself on behalf of IEBC by signing and affixing the official rubber stamp upon the copy in my possession. I herewith return a copy of the duly received petition.*
10. *THAT I verily know that all that is deposed to herein is true and correct to the best of my knowledge, information and belief.*

18. The 3rd Respondent filed a Supplementary Affidavit dated 26th June 2013 in response to the Replying Affidavit sworn by the petitioner Evans Nyambaso Zedekiah sworn on 24th June 2013 and the affidavit of service sworn by James Moracha Ntabo on 20th April 2013. The 3rd Respondent states in her said affidavit that she was never served with the petition as alleged by the process server, James Moracha Ntabo or at all. She explains therein how she came to know of the existence of the petition against her and that on the 18th April 2013, which she says was a Friday (from the calendar, 18th April 2013 was a Thursday), she was at her husband's place of work at

Itierio Boys High School Suneka in Kisii County and that at no time was she at the Hotel Intercontinental in Nairobi.

19. The 3rd Respondent also denies ever talking to Mr. Justin Bundi, the Clerk to the National Assembly on 18th April 2013. She contends that the first time she talked to the said Mr. Bundi was on 26th June 2013 when she confronted him with the Affidavit of Service dated 20th April 2013.

20. The 3rd Respondent maintains that she has never been served with the petition since it was filed by the original petitioner and that the original petitioner infact deponed to the fact that the 3rd Respondent had complained to him on the 25th April 2013 that she had not been served with the petition. She avers that she was neither personally served with the petition nor was any service upon her effected upon her by placing an advertisement in a newspaper with a nationwide circulation. The 3rd Respondent explains that she came to know about the petition when the original petitioner approached her on the 25th April 2013 to consent to an application to have the petition withdrawn and that on that day, she gave the original petitioner her consent to withdraw the petition with no order as to costs.

21. At paragraph 17 of his Replying Affidavit dated 6th May 2013, the Original petitioner, Ezekiel Okondo Onchieku stated the following: **"THAT I was only able to get the consent to withdraw the petition from the 3rd Respondent which I attached to my Application to withdraw the petition notwithstanding that she complained of not having been served with the petition."**

22. Mr. Justin Bundi, the Clerk to the National Assembly who was mentioned by the process server as having assisted him to reach the 3rd Respondent herein for purposes of effecting service of the petition upon the said 3rd Respondent also swore an affidavit dated 26th June 2013 and with leave of the court his Further Affidavit dated 16th July 2013 and filed on 18th July 2013 was also admitted in evidence.

23. In his affidavit of 26th June 2013, Mr. Bundi denies ever meeting the process server James Moracha Ntabo on the 19th April 2013 or at all and goes on to state that he has never met the said James Moracha Ntabo in connection with service of court process on Hon. Mary Sally Otara, the 3rd Respondent herein. Mr. Bundi states further that in light of **section 6** of the **National Assembly (Powers and Privileges) Act, Cap 6 of the Laws of Kenya**, he could not have assisted James Moracha Ntabo to access the 3rd Respondent herein as alleged. **Section 6** referred to above provides as follows:-

> **"Service of civil process**
>
> **No process issued by any Court of Kenya in the exercise of its civil jurisdiction shall be served or executed within the precincts of the Assembly while it is sitting, nor shall any such process be served or executed through the Speaker or any officer of the Assembly unless it relates to a person employed within the precincts of the Assembly or to the attachment of a member's salary."**

24. In his Further Affidavit, Mr. Bundi explains that access to the main Parliament Buildings is very restricted due to security concerns; that there are only two entrances to the main Parliament building, one located opposite the County Hall and used only by Members of Parliament, Senior Government Officials and Diplomats while the second entrance is the one opposite the Kenyatta International Conference Centre. This second entrance is what is popularly known as the Visitors' Gate and is used by all visitors coming out of or going into the National Assembly Clerk's Office

and other offices in the Main Parliament Building. Mr. Bundi explains that every visitor who passes through the Visitors' Gate must be cleared before being allowed entry.

25. Mr. Bundi further explains that the first gate facing County Hall is manned by General Service Unit (GSU) Officers while the Visitors' Gate is manned by Regular Police Officers (mainly Sergeant- at-Arms Officers) who take the visitor's details, give the visitor an access badge and then escort the visitor to his reception where the visitor is handed over to his secretaries who also take the visitors' particulars before clearing such a visitor to enter into the office which is located on the Mezzanine floor within the main Parliament Buildings. In view of the strict entry procedures, Mr. Bundi avers that the process server James Moracha Ntabo could not have gained access to his (Bundi's) Office without leaving his particulars both at the main entrance of the Visitors' Gate and at the secretaries' reception. Mr. Bundi denies ever having met Mr. Ntabo either on 19th April 2013 or at all. He also denies assisting Mr. Ntabo or any other person for that matter, in serving any court documents on any Member of Parliament whatsoever and in particular, denies that he assisted James Moracha Ntabo to effect service of process upon the 3rd Respondent herein, Mary Sally Keraa as that duty fell upon the Parliamentary Legal Counsel.

26. To support the prayer to strike out the petition on grounds of failure to effect service of the petition upon the 3rd Respondent, counsel for the 3rd Respondent submitted that there was ample evidence to show that the 3rd Respondent was never served with the petition as required under **section 77 (1)** and **(2)** of the **Act** and **Rule 13** of the **Rules**. Counsel also submitted that the 3rd Respondent's affidavit and Supplementary Affidavit clearly show that the 3rd Respondent only became aware of the petition when the original petitioner approached her on the 25th April 2013 with a request to agree with him to have the petition withdrawn. Counsel submitted that it was a cardinal rule of litigation that court processes must be effected upon those affected by them, so that such persons, like the 3rd Respondent herein, get an opportunity to prepare their defence.

27. Counsel also submitted that the events described by the process server at paragraph 7 of his Affidavit of service (supra) are not consistent and that these allegations of service by the process server have been demolished by the petitioner's averments at paragraphs 18 and 19 of the Replying Affidavit dated 24th June 2013. According to the petitioner Evans Nyambaso Zedekiah the 3rd Respondent was personally served within Nairobi and that in any event, the 3rd Respondent acknowledged service of the election petition upon her when she signed a document dated 25th April 2013 through which she consented to the withdrawal of the petition and how consequently, the 3rd Respondent approached and retained a lawyer to file an answer to the petition. Counsel urged the court to find that on the day of the alleged service of the petition upon the 3rd Respondent, the 3rd Respondent was not in Nairobi but in Kisii. Counsel also urged the court to find that the affidavits sworn by Mr. Justin Bundi completely destroy the process server's assertion that he was assisted by Mr. Bundi in tracing the whereabouts of the 3rd Respondent on the morning of 19th April 2013 for purposes of serving the petition upon her. Miss Aron, appearing for the 3rd Respondent cited the case of **Odha Maro –vs- The County Returning Officer Tan River & 3 Others – Malindi Election Petition No.15 of 2013** in which it was held (as was also held in the case of **Naomi Cidi –vs- The County Returning Officer Kilifi & 3 others – Malindi Election Petition No.13 of 2013**) that:-

> ***"The petition was filed within the stipulated period but was not served. Any pleading filed and not served on the opposite party has no legal force. It cannot be dealt with by the court and no lawful order can be drawn from it. Service of pleading accords the opposite party the chance to be heard. It is my considered opinion that this petition is a petition that never was."***

28. Counsel for the 3rd Respondent urged this court to make a similar finding in the instant case and to strike out the petition.

29. Mr. Odhiambo Kanyangi, counsel for the 1st and 2nd Respondents supported the application for striking out, albeit more on the basis of failure to make the deposit for security within the

stipulated time. Counsel also submitted, after the process server had been cross-examined that it was obvious that the purported service upon the 1st and 2nd Respondents was also in doubt.

30. In response to the submissions by counsel for the respondents on the issue of service, Mr. Minda, counsel for the Petitioners (Mr. Minda was the same counsel who filed the petition for the original petitioner) told the court that service was effected upon all the respondents herein and more particularly upon the 3rd respondent. He further submitted that all the forms of procedure as to service of the petition were complied with as is seen from the affidavit of service sworn by James Moracha Ntabo on 20th April 2013. Counsel urged the court to disregard the averments of the affidavit sworn by Justin Bundi for being a stranger to these proceedings and to find that the 3rd Respondent had knowledge of the existence of the petition as at 25th April 2013 when she signed a consent to withdraw the petition against her and also went ahead to appoint counsel to act on her behalf.
31. Counsel also submitted that if indeed the 3rd Respondent had not been served as alleged, she would have filed a protest to that effect. He also submitted that the 3rd Respondent's allegation of not having been served with the petition is a mere afterthought as it appears that the 3rd Respondent and the original petitioner were in some kind of league trying to scratch each other's backs. Counsel for the petitioners did not cite any authority on this issue, nor did he adduce any evidence to prove that the 3rd respondent and the original petitioner were acting in league to defeat this petition.

32. After submissions, the process server and the 3rd Respondent were cross-examined. The process server was taken though a lengthy cross-examination. The court also heard the testimony of John Njoro Mwaura, an Assistant Sergeant-at-Arms at the Main Parliament Buildings assigned to man the Visitors' Gate. The witness was called after the court allowed the Further Affidavit sworn by Justin Bundi on 16th July 2013 in lieu of the personal presence of Mr. Bundi who was out of the country on national duty. Each side maintained their respective hard positions on the matter.
33. At the close of the cross-examination, Mr. Odhiambo for the 1st and 2nd Respondents submitted that it had been demonstrated very clearly that the process server, James Moracha Ntabo was hard put to explain how he had effected service upon the Respondents as the time for effecting service upon the respondents who were admittedly housed or found at different locations on the morning of the alleged service is extremely blurred. That the process server could not explain how he had served the 1st and 2nd respondents at a time when he was lying in wait to serve the 3rd Respondent. Counsel also submitted that the process server's oral testimony contradicted the written word in the Affidavit of Service. Counsel urged court to find that the 3rd Respondent remained consistent both in her testimony and during cross examination on her averments in her two affidavits.

34. Miss Aron for the 3rd Respondent concurred with Mr. Odhiambo's submissions and urged the court to find that the process server's averments in the affidavit of service are inconsistent with his oral testimony during cross examination. The court was thus urged to allow the application for striking out on grounds of non-service of the petition upon the respondents.
35. Mr. Minda did not make any submissions in reply.
36. Now that I have heard all the submissions concerning the issue of service, I note that the date on which service was allegedly effected upon the Respondents was 19th April 2013. The 3rd Respondent is said to have been served within the precincts of the Hotel Intercontinental Nairobi while the 1st and 2nd Respondents were served at about 10.43 a.m. at Anniversary Towers, 7th Floor. According to paragraph 9 of the Affidavit of Service, a clerk by the name Flora at the offices of the 1st Respondent accepted service of the petition on behalf of the 1st Respondent by signing and affixing the official rubber stamp upon the copy of the petition. The rubber stamp of the 1st respondent is visible on the copy of the petition filed with the Affidavit of Service.
37. From the evidence before me, access to the Main Parliament Building is via two gates, one of which is used by Members of the Public. It is in evidence that entry into the Main Parliament Building is very restricted and anyone who enters through the visitors' Gate must go through a

security check which includes writing down their name, national identity card number, telephone number (if any) and being issued with a Visitors' Pass before being allowed to access the officer being visited. In the case of the process server herein James Moracha Ntabo, he stated he went to the office of the Clerk to the National Assembly, Justin Bundi which is situated on the ground floor. From affidavits of Mr. Bundi and the testimony of John Njoro Mwaura, the office of the Clerk to the National Assembly is on the mezzanine floor and is accessible either through the stairs or a lift and is also manned by Mr. Bundi's secretaries at his immediate reception area.

38. The process server stated that when he arrived at Parliament Buildings Visitors' Gate, he introduced himself and the purpose of his visit and was thereafter escorted by two security officers to Mr. Bundi's office which he said was on the ground floor. He also said that apart from Mr. Bundi, there were no secretaries in the office and that the two security officers took him direct to Mr. Bundi after they (officers) opened the door.
39. From all the evidence that is before me, I find it highly unlikely that James Moracha Ntabo, who said he was going to Parliament Buildings for the first time in his life could have walked through the gates thereof with the kind of ease he wants the court to believe. I am inclined to believe the version of the evidence given by both Mr. Bundi in his two affidavits and Mr. John Njoro Mwaura that the process server did not enter Parliament Building on the morning of 19th April 2013 as alleged or at all, for it he had, he would have signed himself in through the Visitors' Book. The book which was produced in court as an exhibit did not have the name of James Moracha Ntabo as one of the visitors to main Parliament Building at any time of day on 19th April 2013. I also hold the view that if Mr. Ntabo had entered Mr. Bundi's office, he would have had a clear perspective of the office of the Clerk to the National Assembly. Mr. Ntabo gave the size of Mr. Bundi's office as being half the size of the court room which would roughly be about 5 metres in length. That evidence was controverted by Mr. John Njoro Mwaura who said the Clerk's office was the size of the court room and had a reception manned by secretaries.

40. There is also evidence that Parliament Building is a high security area. I am therefore hesitant to accept the process server's testimony that he literally walked through the gates and doors of Parliament Building on his way to the office of Mr. Bundi. I am also hesitant to believe that there were no secretaries at Mr. Bundi's office when the process server was ushered into the office.
41. I have also carefully considered the process server's testimony on how he effected service upon the 3rd Respondent. According to him after he was ushered out of Parliament Building, he went straight to Hotel Intercontinental where he was told the 3rd Respondent would be within 30 minutes. The process server gave no indication of time when he entered Parliament Buildings and when he exited. He also did not say at what time he got to Hotel Intercontinental, but he stated that he served the 1st and 2nd Respondents at 10.43 a.m. on 19th April 2013. The process server also stated in one and the same breath that he saw the 3rd Respondent alight out of a vehicle whose make he could not tell and also that he first saw the 3rd Respondent when she was standing at the verandah of the Hotel Intercontinental before she entered the hotel and headed for the swimming pool area to where he later followed her and effected service upon her. The process server also stated that as he waited for the 3rd Respondent to arrive at Hotel Intercontinental, he took time to walk about both inside and outside the hotel, taking in all that he saw and that no one within or outside the hotel asked him what he was doing there as he paced up and down.

42. In my humble view, I find it highly unlikely that the process server would have had the kind of latitude he had to pace up and down the Hotel Intercontinental for more than 30 minutes (as he said 3rd Respondent did not appear within the 30 minutes) without attracting the attention of the security personnel at the hotel. To my mind, the process server did not go to the Hotel Intercontinental to serve the 3rd Respondent with the petition on the 19th April 2013 or at all. What he told the court was, in my view, a made up story.
43. In any event, the process server did not state, either in his affidavit or during cross examination (before the court prodded him) that on the morning of 19th April 2013, he made two trips to Parliament Buildings nor that before he went to Hotel Intercontinental to wait for the 3rd

Respondent, he first of all went to Anniversary Towers to serve the 1st and 2nd respondents. All these contradictions taken together go a long way in demonstrating that the process server in this case did not effect service of the petition upon the 3rd Respondent, though there is evidence that the 1st Respondent was served on 19th April 2013 at about 10.43 a.m.

44. The 3rd Respondent's contention that she was not served was supported by the original petitioner in his affidavit in support of the application to withdraw the petition. The original petitioner stated that when he met the 3rd Respondent on 25th April 2013, she complained to him that she had not been served with the petition which was filed on 10th April 2013.

45. For all the above reasons, I have reached the irresistible conclusion that on the balance of probabilities, that it is highly likely that the 3rd Respondent was not personally served with the petition as required under the Act and the Rules and on that basis, she is entitled to apply to have the petition struck out.

What are the consequences of non-service of the petition upon the 3rd Respondent?

46. The **Constitution of Kenya 2010**, the **Act** and the **Rules** all have provisions dealing with the issue of service of the petition upon the respondent(s). **Article 87** which deals with **Electoral Disputes'** provides as follows:-

> **"87 (1) Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes.**
>
> **(2) Petitions concerning an election, other than a presidential election, shall be filed within twenty-eight days after the declaration of the election results by the Independent Electoral and Boundaries Commission.**
>
> **(3) Service of a petition may be direct or by advertisement in a newspaper with national circulation.**

47. As a result of **Article 87 (1)** (supra) the **Act** was enacted to establish mechanisms for timely settling of electoral disputes. **Section 77** of the **Act** provides as follows:-

> **"77 (1) A petition concerning an election, other than a presidential election, shall be filed within twenty-eight days after the declaration of the election results by the Commission.**
>
> **(2) A petition may be served personally upon a respondent or by advertisement in a newspaper with national circulation."**

48. From the above provisions, a petitioner who files a petition has a choice between two modes of service: either to effect personal service or to effect service by way of advertisement in a newspaper which has national circulation. In the instant case, the petitioners chose to effect service personally.

49. The question that begs an answer is: when should a petition be served upon a respondent? **Section 76** of the **Act** deals with this issue and provides as follows:-

"76(1) A petition –

a. **to question the validity of an election shall be filed within twenty eight days after the date of publication of the results of the election in the Gazette and served within fifteen days of presentation."**

50. On the other hand, **Rule 13 (1)** of the **Rules** provides as follows on the issue of service:-

"13(1) The Petitioner shall serve the Respondent with an election

petition filed under the Rules, within fourteen days of filing

of the petition."

Rule 13 (2) of the **Rules** re-enacts the mode of service as provided under

Article 87 and **Section 77** of the **Act** which is to be done either directly upon the respondent(s) or by way of advertisement in a newspaper of national circulation.

51. It is to be noted here that **Rule 13 (1)** of the **Rules** seems to run counter to the provisions of **section 76 (1)** of the **Act** as to the actual time-frame for service of the petition. Since the rules are subservient to the provisions of the Act, the provisions of Rule 13 (1) are therefore *ultra vires* the provisions of **section 76 (1)** of the **Act**. In my humble view, the proper time within which to effect service of a petition upon a respondent is therefore 15 days.

52. There is hardly any need to overemphasize the fact that service of the petition upon a respondent within the time stipulated is a matter of great importance. Under the repealed electoral law, the courts held that personal service was the best form of service upon a respondent. In the case of **Patrick Ngeta Kimanzi –vs- Marcus Mutua Muluvi & 2 others – Machakos High Court Petition NO. 8 of 2013** – Majanja J referred to the cases of **Kibaki –vs- Moi [2000] 1 EA 115**; **Abu Chiaba Mohamed –vs- Mohamed Bakari CA Civil Appeal No.238 of 2003 [2005] e KLR**; **M'Mithiaru –vs- Maore & others (No.2) [2008] 3 KLR (EP) 730**; **Justus Mungumbu Omiti –vs- Walter Enock Nyambati Osebe & 2 others – CA Nairobi Civil Appeal No.183 of 2008** (unreported) and **Nasir Mohammed Dolal –vs- Duale Aden Bare & others – Nairobi EP No.28 of 2008 (unreported)**, to highlight the views held by courts on the issue of service under the old electoral regime.

53. I have read the above cited decisions, and I agree that under the old electoral regime, personal service was the recognized form of service. It is therefore a matter of great relief that under the current electoral law, a petitioner can choose to serve either personally or through advertisement in a newspaper. The only condition for the latter to be considered effective service is that the newspaper chosen for the advertisement must be one of national circulation. This requirement is intended to protect a respondent who may be purportedly served by way of advertisement in a newspaper whose circulation does not go beyond a county or some back street in downtown Nairobi. Once a petitioner elects which mode of service to use, he/she must fully comply with the Act as to mode of such service, including the period within which service is to be effected.

54. In the case of **Abdikham Osman Mohamed & another –vs- Independent Electoral and Boundaries Commission & others – Garissa High Court EP No.2 of 2013** (unreported), a case that was cited with approval by Majanja J in the Patrick Ngeta Kimanzi case (supra), Mutuku J had this to say with regard to the issue of service as provided under **Article 87** and **section 77** of the **Act** where the words used for personal service are **"direct"** and **"personal"**.

> *"What is personal or direct service? The Constitution refers to direct service; the Act refers to personal service while the Rules refer to direct service. The Black's Law Dictionary (Eighth Edition) defines personal service as actual delivery of the notice or process to the person to whom it is directed." It also states that personal service is*

termed as actual service. I think I am not wrong to state that personal service and direct service refer to the same mode of service which connotes the physical presence of the person being served." Likewise Hon. Justice Kimondo in **Steven Kariuki –vs- George Mike Wanjohi and others Nairobi EP No.2 of 2013** *(unreported) observed that, "section 77 (2) of the Elections Act 2011 and Rule 13 of the Elections (Parliamentary and County Elections) Petition Rules 2013 provide for the modes of service of an election petition. They are a departure from the era of personal service touted in Kibaki –vs- Moi [2000] 1 EA 115. Now, service can be either personal on the respondent or by advertisement in any daily newspaper with national circulation. In the latter case, the advertisement must be carried within 14 days and conform with the requirements of Form EP 3 in the Rules. Section 77 (2) provides that the petition may be served personally. Rule 13 (a) of the petition Rules states that the petition shall be served by direct service. Article 87 of the Constitution also uses the term direct service. On the face of it, the two terms may seem different but on closer scrutiny direct or personal service is mere tautology: it simply means service personally on the respondent."*

55. While I agree with the sentiments expressed by Mutuku J, as above stated, I think the envisaged service is to be effected within fifteen days of presentation of the petition and not 14 days as provided under **Rule 13 (1)** of the **Rules**. I have already given the reason for this view. In the final analysis, whether under the old or the new electoral regime, the petition must not only be served upon the respondent(s) but it must be served within the stipulated time frame so that such a respondent has an opportunity to prepare his/her defence without the possibility of an ambush. See **Kumbatha Naomi Cidi –vs- County Returning Officer Kilifi & others – Malindi EP No.13 of 2013** and **Mohamed Odha Mao –vs- The County Returning Officer, Tana River** (supra) where Githua J held that **"failure to serve a petition is a matter that goes to the very core of the proper and just determination of the petition and cannot be wished away."**
56. There is therefore no doubt that the law requires petitions to be served upon the respondents and in this regard I agree with the holding by learned Judges in the cases referred to herein that service of the petition upon a respondent is not a matter of choice by the petitioner. It is a mandatory step that must be taken by the petitioner as a prerequisite for a fair hearing of the petition as provided under the Bill of Rights – CHAPTER FOUR – and in particular **Article 50 (c)** which provides that every person has the right to **"have adequate time and facilities to prepare a defence**". What this means is that where a petition has not been served upon a respondent as is the situation in the instant case, then the respondent(s) are denied the opportunity and adequate time to prepare their defence. It has been submitted on behalf of the petitioners in this case that the 3rd Respondent had knowledge of the petition when on 25th April 2013, the original petitioner went to her and informed her that he intended to withdraw the petition he had filed against her. Unfortunately, for the petitioners that is not the law. Knowledge or no knowledge of the existence of the petition without service as envisaged under both the Constitution and the Act means that the petitioners herein did not and have not discharged their obligation of effecting service upon the 3rd Respondent. They cannot run away from their obligation by saying that the 3rd Respondent was aware of the existence of the petition.

57. As a court, I am aware of the seriousness of striking out pleadings. In the case of **DT Dobie & Company (Kenya) Ltd –vs- Muchina [1982] KLR1**, Madan JA held at holdings 3 and 9 as follows:-

> **"3 (Obiter Madan JA). As the power to strike out pleadings is**
>
> **exercised without the court being fully informed on the merits of the case through discovery and oral evidence, it should be used sparingly and cautiously.**
>
> **9 (Obiter Madan JA). The court should aim at sustaining rather than**
>
> **terminating a suit. A suit should only be struck out if it is so weak that it is beyond redemption and incurable by amendment. As long as a suit can be injected with life**

by amendment, it should not be struck out."

58. While the above principles apply to matters of an ordinary civil nature, the instant application to strike out is anchored on a fundamental right of the 3rd Respondent to be served with process within the stipulated time in accordance with the mandatory provisions of the law. The wording of **section 76 (1)** of the **Act** is mandatory and in my view this court has to look no further than those provisions in deciding whether or not to strike out the petition herein. In any event, the courts have acknowledged that election petitions are no ordinary suits. *"Though they are disputes in rem fought between certain parties, election petitions are nonetheless disputes of great public importance* ***– Kibaki –vs- Moi, Civil Appeal No.172 of 1999****. This is because when elections are successfully challenged, by-elections ensue which not only cost the country colossal sums of money to stage but also disrupt the constituents' social and economic activities. It is for these reasons that I concur with the election court's decision in* ***Wanguhu Ng'ang'a & Another –vs- George Owiti & Another, Election petition No.41 of 1993*** *that election petitions should not be taken lightly." (*Maraga J as he then was in ***Joho –vs- Nyange & Another (No. 4) [2008] 3 KLR (EP) 500****).*

59. I entirely agree with the above sentiments by Maraga J and hasten to add that anyone engaging himself/herself in an election petition as a petitioner must be prepared to go the full length of what it takes to get an election petition to a stage of hearing. Such petitioner must comply with and observe all the laws and regulations and rules governing the filing and service of petitions.

60. I am also aware of the provisions of **Article 159 (2) (d)** of the **Constitution** which behove courts to ensure that **"Justice shall be administered without undue regard to procedural technicalities."** As stated elsewhere in this ruling, failure by the petitioners to serve the petition upon the 3rd Respondent is not a mere technicality. That failure goes to the root of the entire petition for without service; the 3rd Respondent is denied her right to a fair hearing by being denied the opportunity and time to prepare her defence. As stated by the Supreme Court in part of its judgment in the case of **Raila Odinga & others –vs- Independent Electoral and Boundaries Commission & 3 Others – Nairobi Petition NO.5 of 2013 [2013] e KLR** concerning **Article 159 (2) (d):-**

> *"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 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."*

61. In the instant case, the petition was filed on 10th April 2013 and by 25th April 2013 when the original petitioner sought to withdraw the same, the 3rd Respondent had not been served. Further, the process server was unable to support his claims that he effected service upon the said 3rd Respondent on 19th April 2013. These circumstances, when put together lead the court to only one inference: that the petition must be struck out the provisions of **Article 159 (2) (d)** and **Rules 4** and **5** of the **Rules** notwithstanding. The petitioners were under a mandatory duty to effect service of the petition upon the 3rd Respondent and having failed to do so, the petition cannot stand and must therefore be struck out. There is no other way the 3rd Respondent would have become aware of the petition against her and set the process of defending herself into motion without being served. The contention by the petitioners that the 3rd Respondent had knowledge of the existence of the petition on 25th April 2013 cannot assist the petitioners to evade their obligation under the law.

62. A case in point is **Chelaite –vs- Njuki & others (No.3) [2008] 2 KLR 209**, a case that was applied by Majanja J in **Patrick Ngeta Kimanzi** (above). In that case, Pall JA was of the

considered view that –

> *"Once the election Court is satisfied that due to failure to serve the*
>
> *petition within the time prescribed by the law, the petition has become a nullity it surely has the power to strike it down without any more ado."*

63. The petitioners in this case, in my view, intended to ambush the 3rd Respondent with the petition and the only remedy now available to the 3rd Respondent is to strike out the petition.

Whether security by deposit of money was made in accordance with the law and if not what are the consequences of such non-compliance

64. It is not in dispute that the petition herein was filed on 10th April 2013. It is also not in dispute that the security by deposit of money was made on 24th April 2013 vide Receipt No.0228724 of even date.

65. The relevant provisions of the law governing the security by deposit of money are found in **Section 78** of the **Act** which provides as follows:-

> **"78 (1) A petitioner shall deposit security for the payment of costs that may become payable by the petitioner not more than ten days after the presentation of a petition under this Part.**
>
> **(2) A person who presents a petition to challenge an election shall deposit –**

a. **one million shillings, in the case of a petition against a presidential candidate;**

b. **five hundred thousand shillings, in the case of a petition against a member of parliament or a county governor; or**

c. **one hundred thousand shillings in the case of a petition against a member of a county assembly.**

> **(3) Where a petitioner does not deposit security as required by this section, or if an objection is allowed and not removed, no further proceedings shall be heard on the petition and the respondent may apply to the court for an order to dismiss the petition and for the payment of the respondents' costs.**
>
> **(4) The costs of hearing and deciding an application under subsection (3) shall be paid as ordered by the election court, or if no order is made, shall form part of the general costs of the petition.**

(5) An election court that releases the security for costs deposited under this section shall release the security after hearing all the parties before the release of the security."

66. For the reason that the security for costs by deposit of money was not made by the petitioners within the requisite period of ten days, the respondents in their respective applications urged me to strike out the petition with costs to themselves.

The arguments

67. Mr. Odhiambo Kanyangi, counsel instructed by the firm of Okongo Wandago & Co. Advocates contended that because the petitioner did not comply with the provisions of **section 78 (1)** of the **Act** (supra) the petition herein is a non-starter and a proper candidate for striking out. Counsel also relied on **section 78 (3)** of the **Act** (supra) and contended that the non-compliance with the said provision is not curable under the provisions of **Article 159 (2) (d)** of the **Constitution** because it goes to the root of the petition. Counsel also submitted that the petitioners in this case cannot seek refuge in the provisions of **Rule 4** of the **Rules**. For its full import, **Article 159 (2)** provides that in exercising judicial authority, the courts and tribunals shall be guided by the following principles –

a. **justice shall be done to all, irrespective of status;**
b. **justice shall not be delayed;**
c. **alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);**

d. **justice shall be administered without undue regard to procedural technicalities; and**
e. **the purpose and principles of this constitution shall be protected and promoted.**

68. **Rule 4** of the **Rules**, which sets out the objective of the Rules provides as follows:-

"4(1) The overriding objective of these Rules is to facilitate the just, expeditious proportionate and affordable resolution of election petitions under the Constitution and the Act.

(2) The court shall, in the exercise of its powers under the Constitution and the Act or in the interpretation of any of the provisions in the Rules, seek to give effect to the overriding objective specified in sub-rule (1).

(3)A party to an election petition or an advocate for the party shall have an obligation to assist the court to further the overriding objective and, to that effect, to participate in the processes of the court and to comply with the directions and orders of the court."

69. **Rule 5** (Duty of court and parties) is, in my view also relevant in the interpretation of the overriding objective as provided in **Rule 4. Rule 5** of the **Rules** reads as follows:-

"5(1) For the purpose of furthering the overriding objective provided

in rule 4, the court and all the parties before it shall conduct the

proceedings for the purpose of attaining the following aims –

a. **the just determination of the election petition; and**
b. **the efficient and expeditious disposal of an election petition within the timelines provided in the Constitution and the Act."**

70. In my understanding, rules 4 and 5 of the Rules must be read together, the aim of the rules being to ensure the efficient and expeditious disposal of the election petition within the timelines set by the Constitution and the Act. It is not in dispute that there are strict timelines set for the hearing and determination of election petitions arising out of the 4th March 2013 general elections.
71. To buttress his arguments as to why the overriding objective principle is not available to the petitioners, Mr. Odhiambo contended that the overriding objective cannot be applied in a vacuum. He pointed out that the petitioners flouted the law even more by not seeking leave of the court to deposit the security out of time and that todate, there has been no application in that regard. Further, that the petitioners have remained silent as to the reason for the delay in making the deposit and that in the circumstances the court should find that the petitioners' failure to deposit the money within the stipulated time is not a mere technicality but is a substantive issue that goes to the root of the petition.
72. Mr. Odhiambo also submitted that the consequences of not complying with **section 78 (3)** of the **Act** are dire for the petitioners. Reliance was placed on the case of **Esposito Franco –vs- Amason Jeffah Kingi & 2 others – Court of Appeal Nairobi Civil Appeal No.248 of 2008 [2010] e KLR**. In the case, the appellant did not make the deposit required within the stipulated three (3) days. Although it eventually transpired that the appellant's lawyer had been negligent in making the payment, the Court of Appeal held that the late payment which was made by a **'bankers'** cheque was properly rejected by the Deputy Registrar of the court and that in the final analysis, ***"there was simply no***

deposit of security made in accordance with the law ---- even if the law allowed for extension of time, which it does not." The Court of Appeal based its conclusions on the views expressed at paragraph 39 of their judgment to the effect that –

> ***"--- In our view, the tenor of the Constitution (now repealed), Statutory provisions, and rules relating to petitions, coupled with the absence of any express provisions for extension of time, are pointers to the intention of Parliament that time would not be extended. Another pointer to the intention to limit the discretion of the court was the deletion in 1979 (by Act No.19/79) of a useful provision in section 21 (4) which donated the power to the court to accommodate poor persons who were unable to raise the security deposit of Shs.5,000/= at the time. The upshot is that the terms set for the filing of an election petition are conditions precedent non-compliance of which attracts the irreversible consequence of nullifying the petition."***

73. In his further arguments, Mr. Odhiambo relied on the other case of **Esposito Franco –vs- Amason Kingi & 2 others – Nairobi JR Miscellaneous Petition NO.292 of 2008 [2009] e KLR**, a decision by Wendoh and Dulu JJ, in which the learned judges dealt with the same issue of failure to make the deposit within the stipulated timeframe, but from the standpoint of a Constitutional Court. Counsel urged this court to find that failure by the petitioners herein to make the requisite deposit within the stipulated time has removed the ground from under the feet of the petition which must now necessarily fall by being struck out.
74. On the issue of security, Mr. Minda submitted that non-compliance with **section 78 (3)** of the **Act** was a mere technicality and did not go to the root of the petition. Mr. Minda also submitted that if there are any issues touching on deposit of security, those issues should be attributed to the original petitioner and not to the petitioners who came into the fray after the original petitioner

bolted out. He also submitted that the petitioners herein have recourse to **Rule 20** of the **Rules** to move the court for an order validating the late deposit; and that in the circumstances, the petition ought not be struck out. **Rule 20** provides as follows:-

> **"20. Where any matter is to be done within one time provided for in these Rules or granted by the court, the court may, for purposes of ensuring that no injustice is done to any party, extend the time within which the filing shall be done on such terms or conditions as it may consider fit even though the period initially provided or granted may have expired."**

75. Counsel also distinguished the circumstances of the **Esposito cases** (supra) from those in the instant petition, arguing that the legal regime under which the Esposito cases were decided has now changed so that under the new electoral laws, time can be extended under **Rule 20** of the **Rules** (above) for the doing of anything upon such terms as the court may determine and further that because the petitioners in this case have deposited money, they should be treated differently from a petitioner who does not deposit money. Reliance was placed on **Kumbatha Naomi Cidi case** (supra).
76. In reply, both Mr. Odhiambo and M/s Aron reiterated their main submissions and urged the court to pay no attention to the submissions made on behalf of the petitioners on the issue of security and to allow their applications as prayed.
77. After carefully considering the rival submissions, two related issues arise for determination: **(a)** whether security for costs is a substantive or procedural requirement and **(b)** whether this court has jurisdiction to validate the late deposit made by the petitioners herein.

Whether security for costs is a substantive or procedural issue

78. This issue was considered by Muriithi J in Kisii Election Petition No.6 of 2013 – **Fatuma Zainabu Mohamed –vs- Ghati Dennitali & 10 Others** (unreported) on an application for extension of time to make the deposit. The learned judge noted that the law commands that where no security for costs is given, **"whether it is ordered in exercise of discretion by the court or by statutory requirement"** then no further proceedings in the matter should be undertaken by the court. He concluded the matter by saying the following:-

> **"Accordingly, security for costs, whether it is required by statutory provision or order of the court, must be taken as going to the root of the jurisdiction of the court to entertain the dispute. If no security for costs is deposited, then the petition or other proceeding though validly lodged before the court in accordance with the applicable procedure rules cannot proceed to hearing and determination as further proceedings are prohibited. As such, the provision for security for costs is, in my view, a substantive requirement underpinning the jurisdiction of the court to deal with the dispute in the proceeding in which the security for costs is required, and is based on the sound principle for the protection of the defendant from unrecoverable costs."**

79. In the **Patrick Ngeta Kimanzi case** above, Majanja J. dealt with the rationale for the deposit of security for costs. Applying the principle in the **Esposito case** (supra), the judge said that:-

> **"Security for costs ensures that the respondent is not left without a recompense for any costs or charges payable to him. The duty of the court is therefore to create a level playing ground for all the parties involved, in this case, the proportionality of the right of the petitioner to access justice vis-à-vis the respondent's right to have security for any costs that may be owed to him and not to have vexatious proceedings brought against him. (see Harit Sheth Advocate –vs- Shamas Charania – Nairobi Court of Appeal, Civil Appeal No.68 of 2008 [2010] e KLR."**

80. I entirely agree with the learned judges in holding that the deposit of security for costs is a

substantive issue that goes to the root of the proceedings as non-payment of the same deprives the court of the jurisdiction to deal with the matter further. I also agree that the requirement for deposit of security for costs keeps away from the court corridors some busy bodies who file cases in court while knowing that such cases have no chance of succeeding and also while knowing that they have no intention of paying the costs once they lose their cases. There is no argument that a court which has no jurisdiction cannot move one single step in a matter that is before it. See **Owners of the Motor Vessel "Lillian S" –vs- Caltex Oil (Kenya) Ltd [1989] KLR 1**.

Whether this court has jurisdiction to validate the late deposit made by the petitioners

81. The petitioners have anchored their argument on the provision of **Rule 20** in urging this court to find that they have a safety valve as far as the deposit is concerned and also that they are in better stead because they made the deposit albeit belatedly.
82. As far as this matter is concerned, **section 78** of the **Act** is the anchoring provision which requires a petitioner to make his deposit not later than 10 days from the date of filing of the petition. As can be seen from the wording of **section 78 (3)** of the **Act** (supra) where the petitioner does not comply, the court has no further business in the matter, so that although **Rule 20** of the **Rules** makes a general provision for extension of time by the court within which anything is required to be done under the rules, the anchoring statute does not make such a provision. In the circumstances, I agree with Muriithi J in the **Fatuma**

Zainabu Mohamed case (supra) that –

> **"--- the rules cannot legislate a power for extension of time which is not expressly authorized under the relevant section of the statute by the authority of which the Rules are made. There is no express provision under the Elections Act 2011 for the enlargement of time to deposit the security for costs. Accordingly the power to extend time cannot be authorized by the general power under Rule 20 of the Election Rules to extend time for the doing of any act under the Rules."**

83. The above position, in my view is the correct interpretation of the law regarding deposit of security. In the instant case, the petitioners are saying that they can apply to the court to validate the deposit by extending time for the deposit, but it is interesting to note that no such application has been made by the petitioners, either formally or informally. In the case of **Rotich Samuel Kimutai –vs- Ezekiel Lenyongopeta & Others Court of Appeal Nairobi Civil Appeal NO.273 of 2003 [2005] e KLR**, the Court of Appeal was faced with a similar situation of non-compliance with **section 21** of the repealed **Cap 7** of **Laws of Kenya**. On appeal against an order of the Superior Court dismissing the petition on account of failure to deposit security within the statutory time frame, the Court said the following:-

> **"Once again we think the intention of Parliament was clear in enacting the time limit in such peremptory languages "Not more than three days … shall give" does not admit ambiguity or further search for the intention of Parliament. Whether or not Parliament should have enacted a further provision for seeking extension of time is appropriate, would of course be academic for purposes of this appeal and in any event there was no attempt to apply for extension of time at all.**

Section 21 (3) provides for the consequences of non-compliance which is what in the end transpired in this case. Failure to deposit the money within the time was not a mere irregularity which could be waived by the party."

84. I note that the court in the **Esposito case** (supra) was persuaded and guided by the holding of the Court of Appeal as above stated. I am also so persuaded. I am further persuaded that the only law applicable in this case is the Act and the rules made thereunder. In this regard, I wish also to refer to **section 59** of the **Interpretation and General Provisions Act, Cap 2** of the **Laws of Kenya**, which gives a general power for the court to extend time in the following words:-

> **"59. Where in a written law a time is prescribed for doing an act or taking proceeding, and power is given to a court or other authority to extend that time, then, unless a contrary intention appears, the power may be exercised by the court or other authority although the application for extension is not made until after the expiry of the time prescribed."**

85.I have already pointed out herein that the Act does not give such power to the court to extend the time for making of the deposit, and further that even if it did, the party seeking the extension would have to move the court for the exercise of such power as provided under **Section 59** of **Cap 2** (above). The petitioners have not done so, so that even if the court had the power to extend the time, such extension or validation as the petitioners would like to call it, is not automatic. The court would have to judicially consider the application placed before it and decide whether in the prevailing circumstances, an extension is warranted. The court cannot move to extend the time on its own motion.

86.During submissions, counsel for the petitioners contended that it is the original petitioner who should be held responsible for the delay in making the deposit. It is however on record from the pleadings and the affidavits that it was this same advocate who filed the petition on behalf of the original petitioner and he is the same one who is acting for the two petitioners herein. Both the original petitioner and the petitioners have sworn affidavits to show that they were working together right from the beginning before the petition herein was filed and the deposit made. In my view therefore, there is no distinction between the original petitioner and the petitioners when it comes to the issue of the deposit for security.

87. I have read the decisions by Muriithi J in **Fatuma Zainabu Mohamed Case** (supra) and Majanja J in **Patrick Ngeta Kimanzi case** (supra) respectively in which the learned judges granted extension of time for deposit of security. In my view the circumstances in those two cases are distinguishable from the circumstances in the instant case. In the former, the petitioners made applications to the court to consider extending the time. Both judges were convinced that the court has power to enlarge time under **section 78** of the **Act**. With all due respect, I do not share the learned judges' view. My understanding of **section 78 (3)** of the **Act** is, unless my understanding is seriously mistaken, that no further proceedings shall be heard on the petition where –

a. ***a petitioner does not deposit security as required by the section; or***
b. ***if an objection is allowed and not removed.***

In the premises, and for the reasons given above, I find no reason to validate the late deposit of security made by the Petitioners in this case.

88.The above being the position I have reached the conclusion that this petition must be struck out

for non-compliance with the provisions of **section 78** of the **Act** and **Rule 11** of the **Rules** requiring security by deposit of money to be made within ten (10) days of the date of the filing of the petition.

Whether failure by the petitioners to give particulars in the petition is fatal to the petition

89. While counsel for the Respondents contend that this is the case, counsel for the petitioners holds a different view. Mr. Minda holds the view that since both the Act and the Rules do not prescribe the format of a petition, the particulars provided by the petitioner in this petition are adequate.
90. Mr. Odhiambo argued that the petition herein ought to be struck out on grounds that the petitioner has not particularized the results complained of. Counsel singled out paragraphs 27, 28, 30, 43, 44, 46, 48 and the whole of paragraph 49 (a)-(p) and 53 of the Supporting Affidavit which have glaring blanks. Counsel argued that leaving such glaring blanks in a pleading was lack of seriousness of the part of the petitioners resulting in a denial to the Respondents to prepare their defence. He contended that the petitioners were in contravention of **Rule 10** of the **Rules** which provides:-

"Contents and form of an election petition.

10(1) An election petition filed under rule 8, 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 the manner in which it has been 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.**

(2) The petition shall be divided into paragraphs, each of which shall be confined to a distinct portion of the subject, and every paragraph shall be numbered consecutively.

(3) An election petition shall –

(a) be signed by the Petitioner or by a person duly authorized by the Petitioner;

(b) be supported by an affidavit made by the Petitioner containing the grounds on which relief is sought and setting out the facts relied on by the Petitioner; and

(c) be in number of copies as are sufficient for the court and all Respondents named in the petition.

(4) The petition shall conclude with a prayer, requesting the court to make the appropriate relief which may include –

a. **a declaration on whether or not the candidate whose election is questioned was validly elected;**

(b) a declaration of which candidate was validly elected; or

(c) an order as to whether a fresh election should be held or not."

91. Counsel submitted further that it was not enough that the results concerning the election of the Kisii County Woman Representative were gazetted; it was incumbent upon the petitioners to set out as fully as possible in the petition what their complaint against the Respondents is and the basis for such complaint. Reliance was placed on the case of **Mututho –vs- Kihara and 2 others [2008] KLR 10**. In the case, the 1st Respondent had filed an election petition challenging the election of the appellant for non-compliance with the repealed **rule 40** of the **Presidential and Parliamentary Elections Regulations** which provided for the manner in which the election results are to be declared. The superior court, being satisfied that there was need to investigate the 1st Respondent's complaints made a ruling for the formal hearing of the petition. It was the view of the trial court that failure to give detailed results in the petition was a mere irregularity which did not affect the jurisdiction of the court to hear and determine the election petition. On appeal to the Court of Appeal, it was held, *inter alia*, at holdings 3, 4 6 and 8 that:-

> **"3. It was clear from rule 4 (1) (b) that the issue in any election petition was the result of the election. The result did not go to form but to the content of the petition; rule 4 (1) (b) was specifically concerned with content while Rule 4 (2), (3) and (4) was concerned with form.**
>
> **4. Regulation 40 implied that where the results were not included in the petition, it would be incomplete as the basis for any complaint would be absent and whatever complaints a petitioner had about an election would be regarded as having no legal basis. The law set out what a petition should contain, and if any of the matters supposed to be included was omitted, the petition would be incurably defective.**
>
> **6. Election petitions were special proceedings with a detailed procedure and by law they had to be determined expeditiously considering the fact that the legality of a person's election as a peoples' representative is in issue.**
>
> **8. Since the petitioner had failed to state the results, any findings on the issues raised would serve no useful purpose. Any evidence adduced would be intended to show that certain irregularities affected the outcome of the election and hence without the result it**

would be impossible to relate the irregularities to the result."

92. Based on the above statutory provisions and the **Mututho case** (supra) Mr. Odhiambo submitted that the petition herein is fatally defective as without the particulars of the results, any evidence that may be adduced touching on alleged irregularities would have no corresponding relation to the result. He also placed reliance on the recent decision in the case of **Amina Hassan Ahmed – vs- Returning Officer Mandera County & 2 others – Nairobi Election Petition No.4 of 2013**. In the case, the petitioner failed to state the election results and the date and the manner of declaration of the said results and certain other information required under **Rule 10** of the **Rules**. On an application to strike out the petition for want of form and lack of particulars of evidence, Onyancha J held that the information left out of the petition was so vital that the petition as it stood could not be rescued by the provisions of **Article 159 (2) (d)** and further that the petition was so hopeless that even if amendment was possible under the law, the same could not be rescued by any such amendment. The petition was struck out with costs. Counsel urged the court to do the same to this petition.

93. My view of the matter is that since **Rule 10** of the **Rules** (supra) clearly sets out the contents and form of an election petition, a petitioner has to comply with the same so as to give a chance to the Respondent(s) to know what case they are faced with and how they may prepare their defence. The authorities cited above all point to the fact that where material particulars are not included in the petition, then such a petition is fatally incompetent and must be struck out. That is the position in this case and I so find.

Conclusion

94. In the case of **Raila Odinga & Others –vs- Independent Electoral and Boundaries Commission & Others** (supra), the Supreme Court stated the following: **"--- 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 of action".**

95. The two major issues I have had to consider in this case are service of the petition upon the respondents and the security by deposit of money. The third issue I have had to consider concerns omission of certain essential particulars from the petition such as details of the election results being contested by the petitioners. I have reached the conclusion that service was not effected upon the 3rd Respondent as required by the law. The petitioners chose the mode of personal service, but from the evidence on record, the same was not done. I have also reached the conclusion that service is so vital to the petition that non-service as required by the law is not an omission that can be excused either under **Article 159 (2) (d)** or **Rules 4** and **5** of the **Rules**. Without service, this matter cannot proceed, and because the 3rd Respondent, who is the target in this petition, was not served as required she rightly exercised her right to apply to this court to strike out the petition. I hereby strike out the petition for want of service.

96. I have also reached the conclusion that the security by deposit of money was made outside the stipulated time and having made no application for extension of time for doing so, this court has no jurisdiction to extend the time for making of the deposit or for validating the deposit. On this ground and for the other reasons found in the body of this ruling, the petition herein is liable to be struck out and I so strike it out.

97. Thirdly, I have reached the conclusion that the petitioners did not comply with Rule 10 of the Rules as to the content and form of the petition. Having failed to comply with the law in this regard, I have to

reluctantly **"wield that painful knife"** and chop off the head of this petition. See **Bernard Mwendwa Munyasia –vs- Charity Ngilu & others – Machakos Election Petition NO.1 of 2008** (unreported).

98. For all the above reasons, this petition be and is hereby struck out.

Costs

99. There is no doubt in this case that the Respondents have incurred costs in defending this petition. They prepared and filed their responses to the petition and also filed a number of affidavits; apart from defending the application to withdraw the petition and the application for substitution and now the instant applications to strike out. Costs normally follow the event and as provided by **section 84** of the **Act**, **"An election court shall award the costs of and incidental to a petition and such costs shall follow the cause."** And **Rule 36** of the **Rules** provides as follows:-

> **"36 (1) The court shall, at the conclusion of an election petition, make an order specifying –**

a. **the total amount of costs payable; and**
b. **the persons by and to whom the costs shall be paid;**

(2) When making an order under sub rule (1), the court may –

(a) disallow any costs which may, in the opinion of the court, have been caused by vexatious conduct, unfounded allegations or unfounded objections, on the part of either the Petitioner or the Respondent; and

(b)the burden of payment on the party who has caused an unnecessary expense, whether such party is successful or not, in order to discourage any such expense.

(3) The abatement of an election petition shall not affect the

liability of the Petitioner or of any other person to the

payment of costs previously incurred."

100. If for any reason the court does not determine the costs as provided under **Rule 36,** then the Registrar shall tax the costs in the usual manner under the **Civil Procedure Act, Chapter 21 Laws of Kenya**.

101. In the instant case, each of the Respondents has succeeded on their respective applications to strike out the petition. Though the petition has not gone the full length of the hearing it is clear to me that much work has been put into the petition by counsel for the respondents. Defending an election petition is not child's play. I have also considered the fact that apart from counsel for the petitioners, the other counsel have had to travel to Kisii town from either Migori or Kisumu to attend the hearings. In the circumstances and because the petition has been concluded at the interlocutory stage, I cap the total aggregate costs for both parties at Kshs.3,000,000/= (Kenya Shillings Three Million only). The costs shall be taxed and certified by the Deputy Registrar subject to the above limit. The sum of Kshs.500,000/= deposited by the petitioners shall be applied in the first instance towards settlement of the said costs.

Final Orders

102. These are as follows:-

1. *The petition herein be and is hereby struck out.*
2. *All the 3 Respondents are awarded costs of the petition. The 1st and 2nd Respondents are awarded costs of all the 3 applications so far heard and determined by this court. The 3rd Respondent is awarded costs on only the 2 applications for striking out.*
3. *A certificate of this determination in accordance with **section 86 (1)** of the **Act** shall issue to the Independent Boundaries and Electoral Commission and the Speaker of the National Assembly.*

103. Orders accordingly.

Dated and delivered at Kisii this 31st day of July 2013

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

Mr. Minda for Petitioners

Mr. Odhiambo Kanyangi for 1st and 2nd Respondents

Miss Aron for 3rd Respondent

Mr. Bibu - Court
Clerk