



**Ndeda v Independent Electoral & Boundaries Commission & 2 others (Election
Petition E001 of 2022) [2022] KEHC 14749 (KLR) (2 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 14749 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
ELECTION PETITION E001 OF 2022
JR KARANJA, J
NOVEMBER 2, 2022**

BETWEEN

JAMES BABIRA NDEDA PETITIONER

AND

**THE INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION 1ST
RESPONDENT**

COUNTY RETURNING OFFICER - VIHIGA COUNTY 2ND RESPONDENT

GODFREY ATIENO OSOTSI 3RD RESPONDENT

RULING

1. The August 9, 2022, marked the day when the third general elections since the promulgation of the Kenya [Constitution, 2010](#) was conducted. A total of six (6) electoral positions were up for grabs including that of County Senator.

In the County of Vihiga, a whopping number of fourteen (14) candidates expressed an interest in contesting for the position of County Senator. These included the petitioner herein, James Babira Ndeda, and the third respondent, Godfrey Atieno Osotsi, who was returned as the ultimate winner and the duly elected Senator for the County with 62,798 votes against the petitioner's runner-up votes numbering 25,406.
2. Being aggrieved by that outcome, the petitioner lodged the present petition on the September 8, 2022, on the basis that the impugned senatorial election was conducted not in a manner consistent with [the constitution](#) and the electoral laws as demonstrated by alleged glaring systematic irregularities and illegalities in the electoral results forms among other things.
3. The petitioner therefore prays for a declaration of the Court that the impugned senatorial election was invalid and contrary to [the constitution](#) and the electoral laws and regulations, hence null and void and



also that an order be issued quashing the results as declared by the second respondent, Vihiga County Returning Officer.

Further, the petitioner prays for costs of the petition and any other relief that the Court deems appropriate.

The third respondent, the second respondent and the first respondent, the Independent Electoral & Boundaries Commission (IEBC), filed their respective responses in opposition to the petition. They all pray for the dismissal of the petition with costs.

4. Basically, under S.75 (1) of the [Elections Act 2011](#), any petition relating to governors and parliamentary representatives is filed in the High Court duly appointed as an election Court (Rule 6 of the [Elections \(Parliamentary and County Elections\) Petition Rules](#)).

An election petition such as the present one is the lawful prescribed procedure for challenging the process, conduct or result of elections in the Courts.

The jurisdiction and procedures of an election Court are as prescribed in [the Constitution](#), the [Elections Act](#), 2011 and the Rules made thereunder. Such is a special jurisdiction exercised under special or peculiar election law regime which is complete and self-contained in the context it was passed. The form, content and procedural requirement for governor, parliamentary and county assembly election are set out in the [Elections \(Parliamentary and County Elections\) Petition Rules](#).

5. This petition was formally filed on the September 8, 2022, and was served upon the respondents. Thereafter, on the October 5, 2022, the third respondent filed the Notice of Motion dated October 3, 2022 pursuant to the provisions of Rule 15 of the Election Rules, S.76 (1) (a) and 78 (1) & (2) (a) of the [Elections Act](#) and Order 2 Rules 15 and 51 of the [Civil Procedure Rules](#), seeking orders that:

- (a)(spent).
- (b) This honourable Court be pleased to strike out the petition in its entirety.
- (c) This honourable Court be pleased to grant any other orders as it may deem fit in the ends of justice.
- (d) The petitioner be condemned to pay the costs of the instant application and the petition.

6. The motion is anchored on the grounds that:

- (1) A declaration of senatorial election results of Vihiga County was done on August 12, 2022, being dissatisfied.

with the results the petitioner filed an undated petition and supporting affidavit sworn by various witnesses on the September 8, 2022.

- (2) However, in violation of the mandatory statutory provisions of S.76 (1) (a) of the [Elections Act](#), the petition was served on the third respondent through his counsel on record on September 27, 2022, well over 15 days from the date of its filing.
- (3) Further, in violation of the mandatory provisions of S.78 (1) and (2) (a) of the [Elections Act](#), the petitioner has not paid the requisite security for costs in Kshs. 500,000/-.
- (4) It has been more than 25 days since the election petition was filed and no attempt has been made by the petitioner to remedy the aforesaid omissions were applicable.
- (5) The petition is in the event irreparably defective and this Court lacks jurisdiction to hear and determine the same.



7. The grounds are fortified by the averments and annexures contained in a supporting affidavit deposed by the applicant/third respondent on October 3, 2022. At the pre-trial conference held on October 14, 2022, the Notice of Motion was marked and identified as the sole interlocutory application for determination in priority to the hearing of the petition. In that regard, upon confirmation that all the parties were duly served with the application the Court directed that responses thereto and written submissions in respect thereof be filed and served on or before the October 19, 2022 when the matter would be mentioned for confirming compliance and oral highlighting if necessary, of the written submissions.
8. The applicant/third respondent filed written submissions on the October 18, 2022, through Messrs. Awele Jackson Advocates, LLP, while the petitioner filed written submissions on October 19, 2022, through Messrs. Wasilwa Makhakara & Co. Advocates. The first respondent and by extension the second respondent filed submissions also on the October 19, 2022, through Messrs. Ogejo, Omboto & Kijala Advocates LLP.

The record is devoid of any responses to the application from the petitioner and the first/second respondents. None of them filed any replying affidavits and/or grounds of opposition.

However, it is instructive to note that the first and second respondents through their counsel Mr. Okoth, indicated during the pre-trial conference that they agreed with and supported the application. Their response to the petition also raises an objection on similar grounds.

9. It is also instructive to note that as at the scheduled date of October 19, 2022, the petitioner had not raised any objection to the application. In essence, the application remained unopposed and uncontroverted. In the circumstances, the application ideally ought to have been allowed without much ado. Regardless, the Court permitted the petitioner, in the interest of justice, to oppose the application through his written submissions and oral highlights thereto. The first/second respondents were also permitted to affirm their support of the application through their written submissions and oral highlights.
10. This Court, having given due consideration to the application, the supporting grounds, the supporting submissions and those in opposition thereto formed the opinion that the basic issue arising for determination is whether the petition as filed is proper, valid and competent for exercise of the Court's constitutional and statutory jurisdiction in such petitions.

By the failure to file a response to the application and as confirmed in his submissions, the petitioner conceded the fact of his failure to comply with the timelines prescribed by the electoral laws in relation to service of the petition upon the respondents and deposit or payment of security for costs.
11. The petitioner, however, contended that the failure to comply with the material statutory requirement was not a substantial defect but a mere procedural technicality which was curable by extension of time. This contention shows and establishes that the gravamen of the application is actually the effect of non-compliance with the applicable statutory requirements. Indeed, the jurisdiction of the Court to deal with this matter would be dependent on the consequences of non-compliance with statutory requirements on the part of the petitioner.
12. As the adage goes "jurisdiction is everything". A Court without jurisdiction downs its tools in respect of a matter before it the moment it holds the opinion that it is without jurisdiction. This was epitomized in the "locus-classicus" on jurisdiction, "*Owners of the motor vessel "Lillian S" Vs. Caltex Oil (K) Ltd* (1989) KLR 1"

It is axiomatic that being a duly gazetted election Court, this Court is crowned with both constitutional and statutory jurisdiction to deal with this petition and any application coming under it. However,



such jurisdiction may be ousted or diverted for failure by a party to comply with essential requirements and/or conditions imposed by the law in election petitions.

13. The thrust of the applicant's contention is that the petition as filed is improper, invalid, incompetent and incurably defective for want of non-compliance with mandatory statutory requirements on timelines and ought therefore be struck out and/or dismissed at this juncture.

In buttressing his contention, several decisions of courts of equal status with this Court were cited by the applicant. These included *Evans Nyambaso Zedekiah & Another Vs. IEBC & Others* (2013) eKLR, *Fatuma Zainabu Mohamed Vs. Ghati Dennitah & Others* Kisii Election Petition No. 6 of 2013, *Ibrahim Ahmed Vs. IEBC & Others* [2017] eKLR, *Milton Karani Wairinga Vs. IEBC & Others* Kiambu Election Petition No. 2 of 2017 and *Morris Muindi Mutiso Vs. Naomi Shaban & Others* [2017] eKLR.

14. These authorities came up with the proposal that the material requirements of the electoral laws on timelines are expressed in mandatory terms as to leave no room for extension of time in order to cure any defect in respect thereof.

On the contrary, the petitioner in opposing the application cited decisions indicating that non-compliance with the specified requirements was a mere procedural technicality which could be excused or cured by extension of time. These included, *Henry Okello Nadimo Vs. IEBC* (2013) eKLR and *Lokitare Lodinyo Vs. Mark Lomunokol & Others* (2013) eKLR, a decision of this Court which was informed more by the need to protect and promote the right to access justice under Article 48 of *the Constitution* considering the circumstances of the case.

15. Whereas the applicant as supported by the first/second respondents urged this Court to strike out the petition for non-compliance with statutory requirements, the petitioner pleaded with the Court to redeem the petition and determine it on the merits despite the defect of non-compliance which is any event, curable. In that regard, the petitioner sought this Court's discretion to extend time. It is instructive to note that the indulgence was sought "from the bar" through submissions rather than through a substantive application.

16. Be that as it may, the decisions cited by the parties are clearly in conflict with regard to the effect or consequence of non-compliance with statutory requirements of the electoral laws. There are therefore, two school of thoughts emerging from those decisions. The position holds to date and all that could be done to determine the present application is only to align with any particular school of thought and rule accordingly. However, that would not be a prudent approach as each case has to be considered on its own peculiar circumstances.

17. Towards that end, it is notable that the cause of action in an election petition is normally statutory or constitutional or both in origin. With regard to timelines in election disputes, Article 87 (1) of *the Constitution* provides that parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes while Article 105 (2), stipulate that the High Court shall hear and determine an election petition within six months of the date of filing. Under Article 105 (3), parliament shall enact legislation to give full effect of this Article.

18. The foregoing provisions of *the constitution* clearly emphasize the timely resolution of electoral disputes and demonstrate a clear intention that election disputes be determined within the shortest time possible without undue delay. The provisions give election petitions an exceptional time sensitive character. It is therefore without doubt that time is not only of essence but most importantly a constitutional principle in election disputes if only to lower public anxiety and tensions that come



with them. It is a truism, with due respect, that the “*hoi polloi*” are more emotional politically than the affluent citizens in most African countries.

19. The emphasize on timely resolution of election disputes would have the effect of restricting Court’s jurisdiction to the filing of and dealing with a petition within prescribed timelines.

Indeed, in the Case of *Lamenten Aramal Vs. Harun Meitamei Lempaka & Others* (2014) eKLR, the Supreme Court of Kenya (SCOK) stated that:

“A condition set in respect of electoral disputes, is the strict adherence to the timelines prescribed by the constitution and the electoral law....the parties have a duty to ensure they comply with their respective timelines and the court must adhere to its own. There must be a fair and level playing ground so that no party or the party loses the time that he/she is entitled to, and no extra burden should be imposed on any party or the Court, as a result of omissions or inadvertences which were foreseeable or could have been avoided”.

20. In the same case, the Court went on to state that the electoral disputes resolution timelines under the Constitution and the Elections Act 2011, especially those relating to filing and service of election petitions are inflexible and inextensible.

As was held by the same Supreme Court in the case of *Hassan Ali Joho Vs. Suleiman Shabal*, Election Petition No. 10 of 2013, the Elections Act and the Rules made thereunder constitute a complete code that govern the filing, prosecution and determination of the election petitions. That, being the case, any statutory provisions or rules of procedure that contradicts or detracts from the expressed spirit of Article 87 (1) and 105 (2) and (3) of the constitution is null and void.

21. It would therefore appear that in considering and deciding election petitions and applications coming under it, the Court is jurisdictionally limited to what the electoral laws or the constitution have provided. In that regard procedural rules associated with election petitions must be accorded due deference particularly by the party seeking to invalidate the results of an election. A departure from such rules could and often does prove fatal to the entire petition depending on the mandatory or directory nature of any one rule.

22. Thus, any rule on timelines framed in mandatory terms would be treated as a fundamental or substantial rule which goes to the root of the matter. On the other hand, a rule framed in directory terms would be treated as a mere procedural technicality which would be potentially curable by extension of time or even on the basis of Article 159 (2) (a) of the Constitution read with S.80 (1) (2) of the Elections Act, 2011.

Of course, time bound procedural rules are not without costs which would invariably lean more towards the petitioner. It would be the petitioner to pay the big price for deliberate or careless non-compliance with mandatory procedural requirements. It therefore behoves upon the petitioner to be extra diligent and careful in ensuring full compliance with mandatory procedural requirements in order to mitigate the risks that accompany non-compliance.

23. It would not be farfetched for this Court to opine that timelines do at times prove to be outcome determinate in some election disputes. In the English Case of *Fitch Vs. Stephenson* (2008) EWHC 501 (QB), it was stated that time bound procedural rules that are commonly associated with election petitions and which receive their policy justification from the “*sui generis*” character of an election petition generally operate to disadvantage the party that seeks to invalidate the results. They are such that departure from them could prove fatal to a case.



The failure to comply with mandatory statutory provisions would effectively render the petition incompetent and fatal and therefore amenable to summary dismissal.

24. The Court of Appeal in the case of *Martha Wangari Karua Vs. IEBC & Others* (2018) eKLR, said that:-

“.....it therefore behooves Courts to undertake and place substantial consideration above those of procedure especially where the procedural infractions are curable”.

The Court went on to state that “justice should not have been sacrificed at the altar of the procedural requirement because those lapses did not go to the fundamental dispute that was before the Court”.

It was however, clarified by the Court that “it did not mean that procedural rules should be cast aside, it meant that procedural rules should not be elevated to a point where they undermine the cause of justice”.

25. The same Court stated:-

“The elevation and prominence placed on substantive justice is so crucial and pivotal to the extent that Article 159 of *the constitution* implies an upwards leaning towards substantive determination of disputes upon hearing both sides on evidence”.

Further, the Court stated:-

“We are not saying that an election Court cannot strike out a petition at all. Far from it. There may be instances when the procedural infraction goes to the root of the dispute. There are instances when an election petition may be irredeemably defective, like when it is filed outside the constitutional or statutory time frames”..

26. In the present case, as may be deciphered from the grounds and submission in support of the application the major complaint by the applicant is the undisputed failure of the petitioner to firstly, serve the petition and secondly, deposit security for costs within the prescribed statutory timelines. On that basis, the applicant as supported by the first/second respondents maintains and contends that the petition is incompetent and fatally defective as to deprive the Court of its jurisdiction to deal with it. The petitioner’s contrary view and contention is that the procedural infractions complained of are not fatal and could be cured by extension of time thereby sustaining the Court’s jurisdiction to hear and determine the petition on the merits rather than summarily dismissing it on the basis of procedural technicalities.

27. It is clear that whereas the applicant/third respondent fronts for a summary dismissal of the petition, the petitioner by his resistance thereto fronts for a hearing and determination of the petition on evidence.

The prayer by the applicant for striking out the petition is another way of asking for summary dismissal of the petition for non-compliance with mandatory statutory requirements on timelines.

Summary dismissal of a petition is not an alien phenomenon and is actually provided for under S.79 of the *Elections Act*, 2011, on the basis of reasons other than incurable procedural defects.

28. The provision aforementioned provides that:-

“Upon receipt of a petition, an electoral Court shall peruse the petition and –



- a. if it considers that no sufficient ground for granting the relief claimed is disclosed therein may reject the petition summarily or
- b. fix a date for the trial of the petition”.

The wordings of this provisions are clearly in discretionary terms. This Court is yet to come across an election petition which has been dismissed on account of the said S.79 of the Elections Act by a Court of equal jurisdiction.

Perhaps, in this Court’s opinion, before striking out a petition on any ground a Court ought to take into consideration the wisdom or legal philosophy behind the provision, in particular sub-section (a).

29. Indeed, the Court of Appeal in the Martha Karua Case (*supra*) stated that:-

“The jurisprudence from our Courts in interpretation of the constitution has been to avoid summary dismissal of petitions and that power could only be exercised as a last resort where the petition is demonstrated to be hopeless or disclosing no reasonable cause of action. Another important factor, the trial Court was bound to consider was the strength and weakness of the petition before striking out the petition”.

A Court’s discretion is largely unfettered and must be exercised only to do justice, prevent delay and reduce expenses and inconveniences in a manner which is judicious and regular and not arbitrary, vague or fanciful.

30. So, in this case, with regard to the question of service of the petition upon the respondents, the relevant provision is S.76 (1) (a) of the Elections Act (The Act) which provides that:-

“A petition to question the validity of an election shall be filed within twenty-eight days after the date of declaration of the results and served within fifteen days of presentation”.

The mode of service is provided for under S.77 of the Act to the extent that the petition may be served personally upon a respondent or by advertisement in a newspaper with national circulation.

31. Although the petition herein is undated, the index annexed thereto is dated September 6, 2022. This may safely be regarded as the actual date of the petition. The failure to indicate the date in the petition may be treated as an excusable error although it would have been a different story if the index was also not dated.

Evidently, the petition was lodged or filed on September 8, 2022, although the supporting affidavits are erroneously dated August 5, 2022 before the filing of the petition and conduct of the disputed elections on the August 9, 2022.

As it were, the petitioner “kept the cart before the horse”. Apparently, the error appears to have been occasioned by a typographical slip.

32. Be that as it is may, the impugned result was declared on August 12, 2022. The period between the declaration and the filing of the petition inclusive of weekends was twenty-eight (28) days, well within the prescribed period.

Thereafter, service of the petition upon the respondents was to be effected within a period of fifteen (15) days from the date of filing i.e. on or before September 22, 2022. However, the applicant/third respondent averred in the supporting affidavit that he became aware of the petition on September 16, 2022 only after seeing a gazette notice to the effect that this Court was the duly appointed Court to hear



and determine the petition. It was then that he requested his advocates to trace, contact the petitioner and request him to effect service of the petition.

33. The applicant further averred that subsequently on the September 27, 2022 the petitioner through his advocate served the petition upon his (applicant's) advocate by way of G4S courier services, a period of about twenty-five (25) days after the filing of the petition thereby implying a delay of about six (6) days which fell outside the statutory prescribed period of fifteen (15) days, a fact undisputed by the petitioner.

It is unclear whether or not the first and second respondents were ever served or were served out of time. Their notice of appointment of advocate dated September 14, 2022, suggested that they were either served or were made aware of the petition in whatever way.

34. In *Patrick Kimanzi Vs. Marcus Muluvi* Machakos Petition No. 8 of 2013, it was held that:-

“Service of the petition is a necessary requirement and a petition that has not been served cannot proceed for hearing as the respondent is denied the opportunity to contest the facts of the petition”.

Similar position, would in this Court's opinion, apply where the petition is served outside the prescribed period of time. It was further held in the aforementioned case that:-

“Mere knowledge of existence of a petition by the respondent can neither cure want of service nor discharge the burden imposed on the petitioner by law. Service of the petition is not a mere procedural technicality but a mandatory requirement that must be complied with. It cannot be swept aside by the application of Article 159 (2) (a) and the overriding objectives set out in Rules 4 and 5 of the Rules unless waived by the respondent.

An affected party is entitled to apply to the Court to strike out the petition for want of service”.

35. S.76 (1) (a) of the *Elections Act* is clearly framed in mandatory terms, yet the petitioner disregarded it and undisputedly effected service of the petition upon the applicant/third respondent outside the prescribed period of fifteen (15) days. Such non-compliance with this mandatory provision of the law was not a mere procedural technicality but a substantial or fundamental infraction which went to the root of the dispute. This point was affirmed by the Court of Appeal in the case of *Rozah Akinyi Buyu Vs. IEBC & Others* Kisumu Civil Appeal Petition No. 14 of 2013, when it stated that:-

“Service of the petition upon the respondents was a fundamental step in the electoral process and resolution of dispute arising therefrom. Failure to serve the petition upon the respondents went to the root of the petition and the petition could not stand when there was failure to serve the same”.

36. Similar position, in this Court's opinion, would apply “Mutatis-mutandis” to service which is effected outside the prescribed period of time and more so considering the decision of the Supreme Court in the Aramat case (Supra) to the effect that timelines under the *Elections Act* in relation to filing and service of election petition are inflexible and inextensible.

It would therefore follow that the present petition on account of service is improper, incompetent, invalid and fatally defective.

37. On the question of non-payment of security for costs, the provisions of S.78 (1) of the *Elections Act*, were also evidently disregarded by the petitioner by his failure to deposit the security of Kshs. 500,000/-



within the prescribed period of ten (10) days after the filing of the petition and for his failure to apply formally for extension of time under Rule 19 of the Elections Petition Rules on even Article 159 (2) or Article 259 (9) of the constitution etc, etc.

Under the said S.78 of the Elections Act:-

“ 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”.

38. In this Court’s opinion, the provision is expressed both in mandatory and directory terms in the sense that whereas the element of deposit on payment of the costs is mandatory, the prescribed period of ten (10) days within which to pay the amount is directory, regard being given to the provisions of S.78 (3) of the Elections Act which provides that:-

“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 election Court for an order to dismiss the petition and for the payment of the respondents costs”.

The present application by the third respondent is such application for dismissal of the petition. Indeed, the applicant’s response to the petition raised the objection at the earliest opportunity.

39. It is evident that the petitioner did not deposit the security within the prescribed time nor as at the time the matter came up for mention for the first time on October 7, 2022, or even at the time the matter came up for pre-trial conference on the October 14, 2022. All along, the petitioner and his counsel on record knew that the security for costs had not been paid. Indeed, at the time the matter was mentioned for the first time the petitioner’s counsel indicated off record that security or part thereof would be paid on that date or in any event prior to the pre-trial conference.

However, nothing happened or no action was taken by the petitioner to rectify the situation by way of an application for extension of time.

40. The petitioner simply went into slumber all the way up to the October 19, 2022, when the matter came up for mention to confirm filing of written submissions and oral highlighting of the same if necessary. In effect, the application was heard inter-parties on that date and it was then that the counsel for the petitioner indicated that part of the security amounting to a sum of Kshs. 450,000/- was paid on October 17, 2022 to the Judiciary account by way of two bank transfers. Counsel beseeched the Court to exercise discretion in favour of the petitioner and extend time for the payment of the balance of Kshs. 50,000/-.

41. The allegation by the petitioner of payment of part of the security costs is not borne by evidence by way of a receipt and/or document from the Deputy Registrar of the Court to confirm as much. No such evidence is on this record thereby implying that no such payment was made or that it was made in the wrong account or in a manner not prescribed.

Even if part payment of the cost was indeed effected as alleged by the petitioner, the act did not amount to a compliance with S.78 (1) of the Elections Act as there was no full payment of Kshs. 500,000/- as stipulated in S.78 (2) (b) of the Act, nor was there an order of the Court or an application by the petitioner to extend time for payment of the full amount or the outstanding balance thereof.

42. Clearly, the petitioner’s conduct with regard to the payment of security for costs was most wanting and demonstrated a vexatious litigant bent on wasting the Court’s valuable time, lacking seriousness and diligence and out to cause annoyance, inconvenience and unnecessary expenses to the respondents



instead of pursuing a just cause. Most likely than not, the petitioner does not have confidence in his own petition and is suspicious of its strength as demonstrated in his lackluster approach in prosecuting it. Indeed, the pleadings point to ‘prima-facie’ a weak case which may be insurmountable to the petitioner on the basis of the “materiality test” applicable in election disputes.

43. Even if the Court was minded to rescue the petition towards its hearing and determination on the merits by extension of time for payment of security costs or any other purpose, the conduct of the petitioner mitigates against the exercise of discretion in his favour which exercise therefore became extremely elusive and a foregone conclusion. Not even equity would come to the petitioner’s rescue. On the contrary, equity would snub him as it does not aid the indolent. In any event, the principles of equity do not apply in election petitions as was held by the Indian Supreme Court in the case of *Arikala Narasa Reddy Vs. Venakata Ram Reddy* Civil Appeal No. 5710 – 5711 of 2012, which was herein cited by the applicant.

44. In another Indian Supreme Court case, *Jyoti Basu & Others Vs. Debi Ghosal & Others* (1982) AIR 983, SCR (3) 318, it was held that:-

“An election petition is not an action at common law not 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 statute 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. In the trial of election disputes, the court is put in a straight jacket”.

45. As was held by the Supreme Court of Kenya in the case of *Hassan Nyanje Charo Vs. Khatib Mwashetani & Others* (2014) eKLR, “in the emerging jurisprudence, the concept of timelines, and timelines is generally upheld as a vital ingredient in the quest for efficient and effective governance under *the constitution*. However, even as we take account of that context, we remain cognizant of the Court’s eternal mandate of responding appropriately to individual claims, as dictated by compelling consideration of justice”.

46. And, in *Zacharia Okoth Obado Vs. Edward Akongo & Others* (2014) eKLR, the rationale for striking out a matter for non-compliance with procedural rules even in the light of Article 159 (2) of *the constitution* mandating courts not to pay undue regard to technicalities was articulated by the Supreme Court in the following terms:

“Article 159 (2) (a) of *the constitution* simply means that a court of law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of the litigants to comply with procedural imperatives as they seek justice from the court”.

The same proposition, in the opinion of this court, may be extended to Article 48 of *the Constitution* which provides for access to justice. In any event, the filing of this petition was in itself an access to justice and all that the petitioner was required to do is simply comply with procedural imperatives that come with an election petition.

47. For all the forgoing reasons, it would also follow that the present petition even on account of failure by the petitioner to deposit the prescribed security for costs in the prescribed manner is improper, incompetent, invalid and fatally defective.



In the upshot, this court must and does hereby divest itself of the jurisdiction to deal with the petition by laying down its tools and taking no further step forward.

Consequently, it is the ultimate finding of this court that the present application by the third respondent with support from the first and second respondents is well merited and allowed to the extent that the petition be and is hereby struck out and dismissed in its entirety.

48. On the question of costs S.84 of the Elections Act, indicates that costs follow the event. Rule 30 (2) of the Election Rules provides for factors to be considered in the award of costs in the following terms:

“When making an order under sum-rule (1) the election court may –

- a. disallow any prayer for costs which may in the opinion of the election court have been caused by vexatious conduct, unfounded allegations or unfounded objections, on the part of either the petitioner or the respondent, and
- b. impose the burden of payment on the party who may have caused an unnecessary expense, whether that party is successful or not, in order to discourage any such expense”.

The Supreme Court in the case of Cyprian Awiti Vs. Another Vs. IEBC & Others (2019) eKLR, provided clear guidelines on the award of costs to wit:-The general rule that costs “follow the event” is applicable in election matters in which no special circumstances are apparent. However, an election court holds discretion in reserve, for awarding costs merited by the occasion. Costs are not to be prohibitive debarring litigants from moving the judicial process. Inordinately high costs are likely to compromise the constitutional right of access to process of justice. Costs are not an avenue to weaken and are not for enriching the successful litigants.

49. In this matter, the circumstances are such that the petitioner must be condemned to foot the costs of the application and the petition capped at Kshs. 500,000/- in favour of the applicant/ third respondent and Kshs. 300,000/- in favour of both the first and second respondents.

Order accordingly.

J.R. KARANJAH

J U D G E

[DATED AND DELIVERED THIS 2ND DAY OF NOVEMBER, 2022.]

