**REPUBLIC OF KENYA**

IN THE SPM'S COURT AT KILIFI

ELECTION PETITION NO 3/2017

**BETWEEN**

COSMAS FOLENI KENGA V/S I.E.B.C & 2 OTHERS.

**CORAM:** R.K. ONDIEKI- SPM.

**HEARD:** 6th NOVEMBER, 2017.

**DELIVERED:** 10th NOVEMBER, 2017.

**RULING OF THE COURT:**

Perhaps, it is apt from the outset while putting my thoughts together and grapple about this application and indeed this Petition, I find it wise in this prologue to set out two schools of thought which both come in two flavours and cite them as my anchorage while holding in mind that the outcome may or may not collapse the Petition in limine. Whereas standing on the altar of strict adherence of procedural law, the first school hold and emphasize that election disputes are sui generis and as such, fidelity to the Constitution, Written law and Rules are the foundation upon which they stand and anything else, is sinking sand.

The proponents of the second school of thought ride on Laisez faire approach and rest their case on the age long global principle that form and procedural infraction ought not be allowed to triumph but the Court should conscientiously administer substantive justice.

Applicant's Case:

In the Notice of Motion dated 2nd November 2017 brought under Sections 76 (1) (a), 77, 78 and 80 of the Elections (Parliamentary and County Election) Petition Rules 2017, Article 159 of the Constitution 2010 and all other enabling Provisions of the Law, the Learned Counsel beseeches this Honourable Court to strike out the Petition dated 6th September, 2017 filed by *COSMAS FOLENI KENGA*, together with the supporting affidavit.

Consequently, the prayer sought is striking out the impugnated Petition and its dismissal with effect that this Petition disintegrates at this stage. The grounds are that it offends Rule 8 (1) (c) and Rule 12 (2) of the Elections (Parliamentary and County Election) Petition Rules 2017. The same grounds are reiterated on the body of the application and the affidavit in support.

Mr. Nyamwange for the applicant amplified the grounds which restated Rule 8 sub rule 1 (b) (c) and (d) that the Petition herein missed the mandatory particulars set out under that Rule. It is averred that the Petitioner did not set out the disputed polling station and so this cannot be amended as time has since

lapsed. Further, the applicant depones in his affidavit that the Petitioner failed at the pre-trial conference to take out Notice of Motion for scrutiny and the re-count, an act which vitiates the prayer sought to be canvassed at the full hearing.

Madam Wambua for the 1st and the 2nd Respondents associated herself with the submissions by Mr Nyamwange and filed a list of authorities which are a duplication of those filed by Mr Nyamwange and as such, I shall condense the submissions into one.

To affirm their case, the submissions reiterated the averments in the supporting affidavit and sought to rely on the superior Courts' decisions; *Joho vs. Nyange & Another [2008] 3 KLR 500, Evans Nyambaso Zedekiah Nyakeriga and Another v Independent Electoral and Boundaries Commission and 2 OthersKISII EP No. 10 of 2013 [2013] eKLR, Samuel Kazungu Kambi & another v Independent Electoral & Boundaries Commission & 3 others [2017] eKLR, Hosea Mundui Kiplagat vs IEBC High Court Eldoret and Jacob Thoya Iha vs IEBC and 2 Others, High Court Malindi.*

The Respondent's case:

*Mr Kinaro appearing together with Mr Waswa for the Petitioner vehemently opposed the application and in similar manner, filed affidavit in opposition and the written submissions. The submissions were capped up with a single authority, to wit, Raila Odinga & Ano. V. Independent Electoral and Boundaries Commission & 2 Others [2017] eKLR*.

First and foremost, it was submitted that the date of the declaration of the results has been disclosed in paragraph 4 of the Petition and so it is not true that it is omitted in the Petition.

Secondly, Mr Kinaro submits that the current application ought to have been brought during the pre trial conference and not at the eve of the trial. The learned Counsel further submits that Rule 15 (2) of Elections (Parliamentary and County Election) Petition Rules 2017 bars the Election Court from allowing any interlocutory application made on conclusion of the pre-trial conference

The third argument is on further affidavits that are in the file. Counsel submitted that the further affidavits were allowed by the Court on the strength of Rule 19 (1) of the Elections (Parliamentary and County Election) Petition Rules 2017 since the said Rule provides for the extension of time to do an act for the ends of justice. On the issues of scrutiny and recount, he submitted that the matter is well settled by the Supreme Court in *RAILA ODINGA & ANO. V. INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 2 OTHERS [2017] eKLR* and it is not an issue at this stage.

The Fourth argument was based on the authorities cited which according to Counsel do not serve any useful purpose as they were decided a while ago yet the Rules have changed and so these rules may not assist the Court with the matter at hand.

Finally, the learned Counsel submitted on Section 80 of the Election Act, 2011 and said that there was nothing substantial raised, but just technicalities and the Rules enjoins that matters to be decided on their merits other than technicalities.

In a rejoinder, Mr Nyamwange, submitted that the issues raised in the application are not interlocutory in nature as their finding may determine the Petition *in limine*. The core issue in this application is figures which is the missing essential content which ought to be mandatorily contained in the Petition itself and the affidavit in support.

**Analysis and Determination:**

The first segment regards the timing of the application at hand. The Respondent/Petitioner in this application was of the opinion that the application ought to have been filed before the pre-trial conference as that was the window for such an application. It was further submitted that Rule 15 (2) bars the Court from entertaining any application after the conference has closed. My understanding is, that this is not an

interlocutory application as it seeks to collapse the Petition at once and even if it was, it has been filed before the commencement of the trial of the election Petition. But more importantly again, is the exception provisions of the Rule where a party can be allowed to file an application during the trial if circumstances were that it could not have been brought before commencement of the trial of the election Petition. I hold therefore, that the application is properly before Court.

The second issue is about further affidavits filed in Court on 13th October, 2017. This segment was canvassed before me and I made a ruling admitting those affidavits and gave my justification and so I do not wish to reopen the matter as I am *functus officio.*

The third issue raised herein is the missing dates and the results which is basically the form and content of the Petition. Having put the rival arguments and submissions on scale, and having carefully perused the Petition and the supporting affidavit, I find the date of the declaration is mentioned in paragraph 4 of the Petition and so, it is not true that the date is missing.

However, my further perusal of both the Petition and the supporting affidavit which ought to contain the results, reveal that this fundamental content is missing. The nearest the Petitioner attempted to fetch the results into this Petition was the filing of the list of polling stations in dispute and that notwithstanding, the list filed with leave of Court, did not numerically tabulate the results garnered by candidates, individually.

To get a handle of this argument, I now reproduce the formal and procedural imperatives of *Rule 8 of the Elections (Parliamentary and County Elections)* Petitions Rules of 2017, provides as follows as regards the form and contents of a petition:

> *"8. (1) An election petition shall state -*
>
> *(a) the name and address of the petitioner; (b) the date when the election in dispute was conducted; (c) the results of the election, if any, and however declared; (d) the date of the declaration of the results of the election; (e) the grounds on which the petition is presented; and (f) the name and address of the advocate, if any, for the petitioner which shall be the address for service. (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) The petition shall conclude with a statement particulars of the relief sought which may include-*
>
> *(a) a declaration on whether or not the candidate setting out the whose election is questioned was validly elected; (b) a declaration of which candidate was validly elected; (c) an order as to whether a fresh election should be held; (d) scrutiny and recounting of the ballots cast at the election in dispute; (e) payment of costs; or (f) a determination as to whether or not electoral malpractice of a criminal nature may have occurred. (4) The petition shall- (a) be signed by the petitioner or by a person authorised by the petitioner; (b) be supported by an affidavit sworn by the petitioner containing the particulars set out under rule 12; and (c) be in such number of copies as would be sufficient for the election court and all respondents named in the petition."*

In this regard therefore, I shall refer to decisions from a far field and those in our local jurisdiction on this segment of form and content of a Petition. The Supreme Court of India, held that in election disputes, the Election Court is put on strict adherence to the electoral laws as these are no ordinary civil suits. Consequently, in *JYOTI BASU & OTHERS VS DEBI GHOSAL & OTHERS AIR 1982 SC, 983* it was held that :-

> *"… An Election Petition is not an action at common law nor in equity. It is a statutory proceeding to which neither the common law nor the Principles of Equity apply but only those rules which the statute makes and applies. It is a special jurisdiction and a special jurisdiction has always to be exercised in accordance with the statute creating it. Concepts familiar to common law and equity must remain strangers to Election Law unless statutoriry 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, court is put in a straight jacket ……"*

Coming back home, and in *JOHN MICHAEL NJENGA MUTUTHO vs. JAYNE NJERI WANJIKU KIHARA & TWO OTHERS, NAKURU COURT OF APPEAL, CIVIL APPEAL NO. 102 OF 2008,at page 8*

*"Election petitions are special proceedings. They have detailed procedure and by law they must be determined expeditiously. The legality of a person's election as a people's representative is an issue. Each minute counts. Particulars furnished count if the petition itself is competent, not otherwise. Particulars are furnished to clarify issues, not to regularize an otherwise defective pleading. Consequently, if a petition does not contain all essentials of a petition, furnishing of particulars will not validate it.... If she (petitioner) does not have results, what is she challenging? The issues she raises are meant to nullify a particular result. But if she has not given the results, any findings on the issues raised will serve no useful purpose. Any evidence adduced or to be adduced is intended to show that certain irregularities affected the outcome of the election, but without the result it might not be possible to relate the irregularities to the result."*

And earlier in the same judgment the Court had stated as follows at page 7 of the judgment.

*"What would happen where, as here the result as invisaged by regulation 40 above, are not introduced in the petition? In our view an essential element would be missing. The petition shall be incomplete as the basis for any complaint will be absent..... The law has set out what a petition should contain and if any of the matters supposed to be included is omitted, then the petition would be incurably defective..."*

Yet in another case, *AMINA HASSAN AHMED V. RETURNING OFFICER MANDERA COUNTY & TWO OTHERS [2013] eKLR* Onyancha J dismissed a Petition which lacked election results being part of the essential salient features of a Petition and had this to say;

*"The petition before me failed to state the election result being contested. It failed to include the dates or time of the results. It even missed to state some of the prayers that the Petitioner ought to have included in the petition for consideration. And yet she appealed to this court to consider such details and mandatory information in the petition as technicalities which the court should ignore or disregard as per the tenor of Article 159(2) (d) of the Constitution. In this court's view, the petitioner's view is not in conformity with the said Constitutional provision …… In my view and finding based on the facts and reasons herein above, the Petitioner's petition is without doubt; fatally defective because it is deficient in form and lacks the vital prescribed content ……"*

*In the year 2014,* the Supreme Court of Kenya in the case of*ZACHARIA OKOTH OBADO VS EDWARD AKONG'O OYUGI & 2 OTHERS*(2014) eKLR while commenting on the strict observance of the mandatory provisions of the Constitution, the Election Act, and the Rules, stated thus**:-**

***"Article 159 (2) (d) 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 litigants to comply with procedural imperatives as they seek justice from the court."***

It was therefore, a behove on the part of the Petitioner, to give the numerical tabulation of all the garnered results of the candidates and the wisdom in this Rule, as I understand it, was to tame and not to assuage hapless Petitioners riding on a fishing expedition.

There is the other school of thought in respect to the form and content of a Petition. The proponents of this view is that form *per se* cannot render a Petition being struck out *in limine* but emphasize that focus ought not be centred on the form but rather on substance. Many are the decisions of the superior Courts in this respect but I shall mention a few. *In*WILLIAM KINYANYI ONYANGO V. INDEPENDENT

*ELECTORAL & BOUNDARIES COMMISSION & TWO OTHERS [2013] EKLRKimondo J stated at paragraph 23 –*

> *"In my considered opinion, the Petition Rules 2013 were meant to be handmaidens, not mistresses of justice. Fundamentally, they remain subservient to the Elections Act 2011 and the Constitution. Section 80(1) (d) of the Elections Act 2011 enjoins the Court to determine all matters without undue regard to technicalities. Rules 4 and 5 of the Petition Rules 2013 have in turn imported the philosophy of the overriding objective of the court to do substantial justice. Certainly, Article 159 of the Constitution would frown upon a narrow and strict interpretation of the rule that may occasion serious injustice. This is not to say that procedural rules will not apply in all cases; only that the court must guard against them trumping substantive justice ……..."*

In *CAROLINE MWELU MWANDIKU V. PATRICK MWEU MUSIMBA* Majanja J stated

> *".The guiding principle in consideration of this matter is the overriding objective of the Rules which is stipulated under rule 4(1) of the Rules as "to facilitate the just, expeditious, proportionate and affordable resolution of election petitions under the Constitution and the Act". This objective is best realised by the Election court having regard to the purpose and mischief that the rule seeks to cure and the prejudice that would be occasioned by insistence on the strict compliance with form. Rule 5 further obliges this court and the parties to conduct proceedings before it to achieve 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. Rules 4 and 5 are therefore a testament of the provisions of Article 159 (2) (d) of the Constitution which obliges every court to dispense justice without undue regard to technicalities. The fact that elections are special disputes governed by special rules does not exonerate the court from this prime obligation to do substantive justice…."*

Yet again in *NICHOLAS KIPTOO ARAP KORIR SALAT V INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 6 OTHERS [2013] eKLR* Kiage JA sitting with Ouko JA and Mohammed JA, as he then was, stated-

> *"I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek substantial justice in an efficient, proportionate and cost effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This court and indeed all courts must never provide succour and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even handed…."*

In the majority judgment however Ouko JA stated-"Deviations from and lapses in form and procedures which do not go to the jurisdiction of the court, or which do not occasion prejudice or miscarriage of justice to the opposite party ought not to be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead in such instances the Court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness…. It ought to be clearly understood that the courts have not belittled the role of procedural rules. It is emphasized that procedural rules are tools designed to facilitate adjudication of disputes; they ensure orderly management of cases. Courts and litigants (and their lawyers) alike are, thus, enjoined to abide strictly by the rules. Parties and lawyers ought to be reminded that the bare invocation of the oxygen principle is not a magic wand that will automatically compel the court to suspend procedural rules. And while the court, in some instances, may allow the liberal application or interpretation of the rules that can only be done in proper cases and under justifiable causes and circumstances. That is why the Constitution and other statutes that promote substantive justice deliberately use the phrase that justice be done

without“undue regard” to procedural technicalities.

When the above Petition went to the Supreme Court on Appeal, the Court observed as follows on the issue of form –

> *" We are clear that an appeal of this kind should not be held to fail on mere account of form. Although the Rules of this Court give guidance on the form which an appeal should take, we are cognizant of the fact that Article 159 (2) (d) of the Constitution accords precedence to substance, over form. Rule 3 (5) of the Supreme Court Rules, 2012 empowers us to invoke our inherent power to make such Orders and directions as are necessary for the attainment of ends of justice, and to prevent abuse of Court process. In this regard, and in order to serve the sanctified task of interpreting the Constitution, and for the purpose of resolving this protracted electoral dispute, we are guided by Article 159 (2) (d)- towards saving this appeal for determination on merits. The presentation form in this appeal, by no means violates the mandatory tenets of the Constitution, or the law, so as to compel the striking out of the appealin limine. Though the petition is presented in its current form, our determination of the appeal will focus only on the issues canvassed, and as determined by the other superior Courts."*

My reading of this decision is that, the Supreme Court was more focused on the content ( what was canvassed by the superior Court ) and not the form in which the Appeal was placed before it. The adjudication of content therefore, remains to be a significant component in Election Petition Dispute.

Equally in the case of *RAILA ODINGA AND OTHERS V INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION AND OTHERS NAIROBI PETITION NO. 5 OF 2013 [2013]EKLR,* the Supreme Court explained what was meant byArticle 159 (2) (b)in the following terms;

> *" 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."*

In summary, it is abundantly clear from the decisions, that the Supreme Court appear in each of the two schools of thought and so my understanding is that the effect of the two approaches really hinges on the portal that each case revolves and the relevant material contained therein. It cannot therefore gainsaid, that while form and content are mandatory requirements under the Rules, however, Court need not ride on form and render the Petition being struck out *in limine* and so, focus ought not be centred on the form but rather on the substance. This then, is the will of the Kenyan people.

In this Petition, I have carefully turned its pages and the supporting affidavit(s) and note that all the requirements of a Petition have been embodied save as to results of the election in dispute. Having said that, I now take a detour through the Responses filed by the 1st and 2nd Respondents and find that all the results of, not only the impugnated polling stations but all the stations of Tezo Ward have been set out, numerically tabulated and votes each candidate garnered.

It is therefore clear, that the material in these pleadings are sufficient in respect to the segment of results. So that were somebody to refer to the pleadings to find the results, it would be available for the whole world to see.

A similar scenario befell Justice E. N. Maina in the case of *WASHINGTON JAKOYO MIDIWO V INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 2 OTHERS [2017] eKLR* and this is what the Honourable Judge said while dismissing an application to strike out a Petition on 30th October, 2017;

> *"Each case must be decided on its own facts and circumstances. It is my finding that the omission*

*to state the results in this Petition and in the supporting affidavit do not call for its striking out. In my view the omission does not go to the root of the proceedings. Moreover whereas Rule 21 of the 2016 Election Petition Rules, which required the 1stRespondent to deliver the results of the relevant election to the court within fourteen days, no longer exists in the Rules the 1st Respondent has on its own accord delivered the results to this court. The results of this election are therefore on the record. They are also known to the 3rd Respondent and his Advocate's fear that there will be no results to compare the evidence with has been put to rest. In addition it is my finding that the 3rd Respondent has in no way been prejudiced as even before bringing this Application he had filed his response and evidence meaning that he very well understood the case facing him. It was also argued that as the petition cannot be amended the only solution is to strike it out. While I agree that the rules would not allow for amendment of this petition so as to remedy the omission it is my finding that that in itself is not reason enough to strike out the petition. The results now form part of the record of the petition and an amendment of the petition would not be necessary. It matters not that they were filed by the 1st Respondent rather than the Petitioner. Should this court or any of the parties require to make reference to the results of the election they shall be available..."*

In the circumstances, I tend to lean towards, the second school as it is the current and trending thought on the platform of form and content of a Petition.

Accordingly the Notice of Motion to strike out the petition is dismissed but as the application was necessitated by the Petitioner's failure to comply with the rules I direct that each party bear their own costs.

Further I direct that matter starts for hearing from 14th November, 2017 at 8.30am daily till 17th November, 2017.

Written dated and delivered in the Open Court this 10th November, 2017.

R.K. ONDIEKI,

SENIOR PRINCIPAL MAGISTRATE.

**KILIFI LAW COURTS.**

**CITATIONS:**

**1**. Raila Odinga vs. Independent Electoral and Boundaries Commission & 3 Others Supreme Court Petition No. 5 of 2013.

2. Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 Others [2013] eKLR.

3. Jyoti Basu & Others vs. Debi Ghosal & Others Air 1982 SC, 983.

4. Amina Hassan Ahmed v. Returning Officer Mandera County & Two Others [2013] eKLR

5. John Michael Njenga Mututho vs. Jayne Njeri Wanjiku Kihara & Two Others, Nakuru Court of Appeal, Civil Appeal No. 102 of 2008,

6. Zacharia Okoth Obado vs. Edward Akong'o Oyugi & 2 Others(2014) eKLR

7 William Kinyanyi Onyango v. Independent Electoral & Boundaries Commission & Two Others [2013] eKLR

8. Caroline Mwelu Mwandiku v. Patrick Mweu Musimba

9 Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 Others [2013].

10. Washington Jakoyo Midiwo v Independent Electoral and Boundaries Commission & 2 Others [2017] eKLR.