



REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATES COURT AT NYAHURURU

ELECTIONS ACT 2001

ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS) PETITION RULES, 2017

ELECTION PETITION NO. 1 OF 2017

IN THE MATTER OF: ARTICLES 22(1) & (2)(B)(C), 23, 24, 38, 82, 252, 253(B), 258, 260 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF: THE CONTRAVENTION AND VIOLATION OF ARTICLES 10(2)(B), 27(4)(6), 54, 55, 56, 90, 177 AND 193 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF: SECTIONS 34, 35, 36, AND 37 OF THE ELECTIONS ACT

IN THE MATTER OF: THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION ACT, 2011

MONICAH GATHONI GITHAE1ST PETITIONER

SOLOMON KIMANI KURIA.....2ND PETITIONER

AND

THE INDEPENDENT ELECTORAL AND BOUNDARIES .

COMMISSION..... 1ST RESPONDENT

JUBILEE PARTY.....2ND RESPONDENT

MARGARET WANJIRU IRERI. 3RD RESPONDENT

GEOFFREY NGARUIYA KARIUKI.....4TH RESPONDENT/APPLICANT

ESTHER WANJIKU MUHOHO.5TH RESPONDENT

JOSEPH KARIUKI WAITHERA..... 6TH RESPONDENT

RULING

On 6th December 2017 this court delivered a ruling in respect to preliminary objections that had been raised by counsel for the 4th respondent and counsel for the 3rd, 5th, and 6th respondents. The preliminary

objection had raised similar grounds of objection and therefore they were handled together and a ruling was read. The grounds of objections raised were inter alia that

a. That this court lacked jurisdiction to grant the orders being sought in the petition and that such orders could only be properly handled in the High court in the Constitution and Human Rights Division. Related to the Objection on jurisdiction of this court was that this court lacked jurisdiction to handle this petition because the issues touched on nominations of the 3rd, 4th, 5th and 6th respondents which matter would properly be handled by the Independent Electoral & Boundaries Commission as provided by law or by the Political Parties Disputes Tribunal.

b. Another ground of objection was that the election petition was totally defective incompetent and bad in law in that the same was not supported by supporting affidavits sworn by the two petitioners as is required by the law. That only one petitioner (the second petitioner) had sworn a supporting affidavit but the 1st petitioner namely Monicah Gathoni Githae had not sworn a supporting affidavit. It was further argued that they were not sure that the supporting affidavit sworn by the second Petitioner was supporting the petition as well as the Notice of Motion. Therefore the petition was incompetent for lack of supporting affidavit sworn by both petitioners.

This court considered the preliminary objections and ruled that it had jurisdiction to handle the petition and that there were supporting affidavits to support the petition. The ruling was delivered on 6th December 2017 and it was not appealed against.

On 19th December 2017 the counsel for the 4th Respondent brought a Notice of Motion dated 18/12/2017 praying that

1. This Hon court be pleased to review vary and or set aside the orders made on 6th December 2017 by this court on reading the ruling that ruled that this petition filed by the petitioners herein is competent before this court and that the two petitioners herein have indeed sworn supporting affidavits in support of both the Notice of Motion and the petition herein.

2. That this Hon Court be pleased to strike out the petition filed by the two petitioners herein for having been instituted simultaneously with the + Petition No. 431/2017 which was filed in the High court Nairobi and both are seeking similar reliefs and were filed by the petitioners herein against the same 1st and 2nd respondents herein.

3. That the Hon Court be pleased to declare the Nyandarua County Assembly properly and constitutionally constituted in light of the existence of two Members Nyandarua County Assembly who are persons living with disability.

4. That cost of this application be provided for.

The application is based on the following grounds contained on the face of the notice of motion and the supporting affidavit sworn by the 4th respondent. The grounds are as follows.

(I) There is an error apparent on the face of the record in the ruling delivered on 6th December 2017 by this Hon court where the court erroneously held that the two petitioners namely Monicah Gathoni Githae and Solomon Kimani Kuria had both sworn supporting affidavits in support of the notice of motion and this petition filed on 31st August 2017, whereas the truth of the matter is that the supporting affidavit filed in support of the Notice of Motion as well as the petition were sworn by the second petitioner Solomon Kimani Kuria and the advocate on record that time being Samuel Kamunye Gichigi – Advocates.

That the Hon Court erroneously found that the two petitioners namely Monicah Gathoni Githae and Solomon Kimani Kuria had sworn supporting affidavits to support the petition as well as the Notice of

Motion whereas only one petitioner had sworn an affidavit and it is not clear that the supporting affidavit was supporting both the Notice of Motion and the petition.

5. That there is discovery of new and important matter discovered by the 4th respondent to the effect that the 2nd petitioner herein Solomon Kimani Kuria had filed another petition in the High Court. That the said petitioner filed this election petition jointly with the 1st petitioner on 31.8.2017 and sought for injunctions which after failing to get the injunction orders also moved and filed a High Court Constitutional Petition number 431/2017 against the same respondents seeking similar reliefs.

6. That there is further discovery of new and important information that the Nyandarua County Assembly which is the subject of this petition on the basis of being unconstitutionally constituted for failing to include persons living with disability actually has two elected members who are living with disabilities being Hon Hussein Ndungu Kassana as elected member of the Nyandarua County Assembly for Magumo Ward and Hon Justus Gaita Wagura who is the elected Member of the County Assembly for Kiriita Ward. That both of them are therefore representing persons living with disabilities.

7. That this is a court of equity and he who comes to court must come with clean hands whereas the petitioners have come to this court with unclean hands because they have filed simultaneous petitions both in this court and in the High Court seeking similar reliefs and that is not acceptable. That this is an abuse of the process of the court. That the petition in the High Court has proceeded severally and is currently proceeding before Justice Mativo where several court orders have been made and directions have been given of which the petitioners are fully aware. That the petitioners are aware that there is another matter they have instituted in the High Court but they have not informed this court. That if the petitioners are allowed to come back to this court after their quest in the High Court fails to yield the expected results, it would be case of blatant abuse of the Court process.

8. That if this court does not review, vary and or set aside its ruling dated 6.12.17 and all consequential orders the 4th respondent will suffer great injustice. That in the circumstances and in the interest of justice this court should proceed to review, vary and or set aside its ruling to forestall irreparable loss and damage being occasioned to the 4th respondent.

The supporting affidavit by the 4th respondent raised similar grounds that;

a. There is an error on the face of the ruling delivered on 6th December 2017 where the court ruled that the 1st and 2nd petitioner had sworn supporting affidavits to support the petition. That the truth is that the 1st petitioner Monicah Gathoni Githae did not swear a supporting affidavit. Only the 2nd petitioner Solomon Kimani Kuria swore a supporting affidavit to the petition.

b. That the 4th respondent has discovered that the 2nd petitioner herein after filing this election petition in this court proceeded to institute another petition in the High Court being Constitution Petition number 431/2017 pending in the Constitutional & Human Rights Division, High Court Nairobi. That the High Court Constitutional Petition is equally against the same respondents as in this petition and it is seeking same reliefs as this petition.

c. The 4th respondent has discovered a new and important matter that there are two persons living with disability who are already members of the Nyandarua County Assembly the same being Hon Hussein Ndungu Kassana Member of Nyandarua County Assembly for Magumu Ward and Hon Justus Gaita Wagura the Member of the Nyandarua County Assembly for Kiriita Ward.

d. That there is sufficient cause for this court to review its ruling and set it aside together with all consequential orders and dismiss the petition with costs for abuse of the court process.

Thus the court is being asked to review its ruling on two main grounds.

- a. Error apparent on the face of the record.
- b. Discovery of new and important information sufficient to cause this court to review and set aside the ruling dated 6th December 2017.

The application has been brought under section 3A and 80 of the Civil Procedure Act Cap 21 and order 45 rule 1 of the Civil Procedure Rules and all other enabling provision of the law. Under these sections the court is being asked to review vary and or set aside its ruling. The applicant annexed to his application the High Court petition number 431/2017 but the court orders are not attached. The application is further supported by the submissions filed in court on 15th January, 2018 together with the authorities relied on. There were oral submissions also to highlight the written submissions. The application is also supported by the 1st respondent (IEBC) who has filed written submissions dated 15th January 2018 through Kiruki Kayika Advocates and oral submissions made in court on 22.1.2018. Counsel for 3rd, 5th and 6th respondents also supports the application through oral submission made in court on 22.1.2018.

The application is opposed through a replying affidavit sworn by the 1st respondent Monica Gathoni Githae dated 9th January 2017 and filed in court on the same date. It is also opposed through oral submissions made in court on 22/1/2017 through Mr Kariuki Njiri Advocate.

I have considered the application and the supporting affidavit as well as the written and oral submissions made by counsel for the 4th Respondent/applicant. Under order 45(1) of the Civil Procedure Rules any person who is aggrieved by a decree or order to which an appeal should be filed but which appeal has not been preferred or is aggrieved by a decree or order from which no appeal is allowed but discovers new and important matter which with exercise of due diligence would not have been known can apply for review. The person can also apply for view if there is an error apparent on the face of the record. Order 45(1) flows from section 80 of the Civil Procedure Act which give a court power to review its orders where an appeal has not been preferred or for other sufficient cause.

Also under Article 35(2) of the Constitution 2010, a person has a right to correction or deletion of untrue or misleading information that affects the person. Hence the 4th respondent has a right to apply for review of this Court's orders if he feels that there is a mistake appearing in the ruling that this court made or that he has discovered new and very important information related to this petition on which he was not aware of before and which could significantly affect the ruling of the court. I have taken into accounts the grounds upon which this application for reviews has been made.

Is there an error appearing on the face of the records? In my view there is no error apparent on the face of the ruling because in the petition there is an affidavit sworn by Monicah Gathiru Gitae. The same is attached to the replying affidavit of Monicah Gathoni Gitae. The same can be found on pages 32 to 42 of this election petition. The same is attached to the replying affidavit to this application.

As regards the High Court Constitutional Petition the parties agree that the petition was filed. The applicant states that the petition is ongoing but the petitioners/respondents states that the same has been abandoned. On this ground of objection the applicant relies on the following authorities.

1. Thiba Min Hydro Co Ltd VS Josphat Karu Ndwiga(2013) e KLR where the judge stated that it is not the form in which the suit is framed that determines whether the suit is subjudice rather it is the substance of the suit and the judge proceeded to strike out the case because the pleadings in the two suits in that court were substantially the same.
2. Republic VS Chairman District Alcoholic Drunks Regulations Committee and 4 others and 2 others experte Detlef Heier where the High Court stated that a party who wishes to file a suit that is substantially similar to an existing suit must withdraw the 1st suit. He further stated that the court

cannot allow parties to be filing multiplicity of suits on the same basis.

3. Co-operative Umon Ltd vs Co-operative Coffee Millers Ltd and Another (2016) e KLR where the Judge held that filing two suits on the same matter makes the suit subjudice. The subjudice principle is defined in section 6 of the civil Procedure Act as follows

“No court should proceed with a matter in which the matter is also proceeding in another court between the same parties”.

4. Benosi Vs Wivley the court explained what constitutes an abuse of the court process – that this is a matter to be determined by the circumstances of each case.

5. Margaret Migwi VS Barclays Bank of Kenya Ltd (2016) e KLR where the judge stated that filing of a fresh notice of Motion where there is pending another undetermined Notice of Motion would be a blatant abuse of the court process. He submits that the petition before this court must therefore, fail for being a clear case of abuse of the court process.

He submits that the 4th respondent would be prejudiced greatly if this Election petition is allowed to continue alongside the Constitutional Petition in the High Court. He further submits that the 4th Respondent is in the process of seeking to be enjoined in the High court petition because his rights are likely to be affected by the orders that will be made in the High court. He therefore asks this court to review its ruling and dismiss this election petition.

The first respondent supports the application by the 4th respondent on the following grounds. The 1st respondent submits that the 4th respondents application has merit and therefore the same should be allowed with costs. That the petitioners filed this election petition with the Notice of Motion dated 31st August 2017 in this court on 1.9.2017 and on 4.9.2017 filed the Constitutional Petition No 431/2017 in the High Court and both petitions are dealing with the same issues and both are seeking substantially the same orders. That both petitions are ongoing and therefore there is a risk of this court issuing orders that would be contradicting the ones issued in the High Court's Constitutional Petition No 431/2017. That the 2nd petitioner failed to disclose to this court the existence of the High Court Constitutional Petition number 431 /2017. That under section 80 of the Civil Procedure Act Cap 21 of the laws of Kenya and Order 45 Rule 1 the application discloses that there is new and important matter or evidence which after the exercise of due diligence was not within the knowledge of the 4th respondent at the time the ruling was made. That there is therefore new and important evidence that has been brought to this court's attention that warrants the ruling to be reviewed, varied and or set aside. That Justice Matuo in the case of PEVANS EAST AFRICA LTD AND ANOTHER VS BETTING CONTROL AND LICENSING BOARD AND OTHERS defined abuse of court process as “A factual scenario where a party is pursuing the same matter by two court process” where a party is involved like in a gamble of chance to get the best in the judicial process.

That the petitioners have admitted to have filed petition number 431 of 2017. That in both petitioners are seeking very similar orders which orders are basically seeking to remove the 3rd, 4th, 5th and 6th respondents as Nominated Members of the Nyandarua County Assembly and have the petitioners replace them. He states that the reply by the petitioners that the 2nd petitioner has since abandoned the High Court Constitutional Petition court cannot be believed because no proof has been provided to this court to show that the petition has been abandoned or withdrawn. That this court is being placed in an awkward position where it is likely to give contradictory orders to the High Court orders and thus get embarrassed in the process. That this honourable court should strike out the petition for being an abuse of the process of the court by filing two concurrent petitions and failing to notify the court as soon as practicably possible.

The 1st respondent also relied on the case of MBARAKA ISSA KOMBO VS IEBC AND THREE OTHERS (2017) e KLR where it was stated that

“I hold the view that striking out is a summary procedure that investigates no merit of the dispute but looks at the propriety of the matter as presented and how it sits with the law. Therefore a suit would be struck out on account of facts including lack of jurisdiction, failure to meet the threshold of statutory requirements or for being an abuse of the court process”

The counsel for the 3rd, 5th and 6th respondent also submits that he supports the application by the 4th respondent.

He states as follows

“We fully support the application dated 18th December 2017 filed for and on behalf of the 4th respondent. We ask that in line with that application the petition be struck out with costs to the 3rd, 5th and 6th respondent.

The counsel for the petitioner Mr Kariuki submits that the application by the 4th respondent is strongly opposed. That it is not true that there is an error on the face of the court’s ruling where it ruled that the petitioners had sworn supporting affidavits because the 1st petitioner Monica Githae swore a supporting affidavit as can be seen on pages 32 to 42 of the election petition.

The second ground of opposition is that the first petitioner in this case is not a party to the Constitutional Petition number 431 of 2017 in the High Court. Similarly the 3rd, 4th, 5th and 6th respondents in this election petition are not parties to the Constitutional Petition in the high court.

The third point is that the two petitioners are seeking different reliefs. That the prayers in this Election petition are specific and are in regard to the special seats which deal with the marginalized groups of persons and the prayers in this Election petition are seeking to nullify members nominated under the special seats while the Constitution Petition in the High Court is seeking to nullify the entire Nyandarua County Assembly. That those are different and distinct reliefs that are being sought.

That the other ground relied on by the 4th respondent that there are two members of the County Assembly who were persons living with disability. This is a matter of evidence which cannot be decided in an application like this. That by the time the 4th respondent filed his response to the petition the elected and nominated members of the Nyandarua County Assembly had been sworn in office therefore the applicant was expected to know those that had been sworn in but he did not indicate that information in his response to the petition and he cannot be permitted to raise the issue at this stage. That the 1st respondent herein (IEBC) is the one that co-ordinated the elections. That all members are members of jubilee party. The 3rd, 4th, 5th and 6th respondents are members of Jubilee Party and are members of the Nyandarua County Assembly. They ought to have known if there were nominated or elected MCAs who are person living with disabilities or the youth. He argues that the respondents having not raised the issue when they were arguing the preliminary objections are estopped from raising such issues at this state and in this ruling. He relies on the case of Mohammed Mohammed Dily VS Hassan Abdi Rahman and two Others (2010) e KLR where it was held that an issue that has not been pleaded by a party should not be allowed to be relied on by a party.

He submits further that this Election petition before me is distinct (different) from the High Court Constitutional Petition Number 431 of 2017 because the prayers sought are different and the parties are not all the same. That it is only the 1st respondent and 2nd respondent who are respondents in the High Court petition and the 2nd petitioner is a Party also. The rest of the parties in this election petitions are not parties in the High court petition.

DETERMINATION

This application has been brought under Section 3A and 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules.

Section 3A provides or recognizes the inherent jurisdiction of this court to make such orders as may be necessary for the ends of justice to prevent abuse of the process of the court. This court has been urged to invoke its discretion and grant certain orders for ends of justice to be met, specifically to review its ruling and orders made on 6th December, 2017.

Review of court orders is provided for under Order 45 of the Civil Procedure Rules. Rule 1 provides that any person considering himself aggrieved:

- a. By a decree or order for which an appeal is allowed but from which no appeal has been preferred or
- b. By a decree or order which no appeal is hereby allowed and who from the discovery of new and important matter or evidence which after exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made or for any other sufficient reason, desires to obtain a review of the decree or order may apply for review to the court which passed the decree or made the order without on reasonable delay.

Thus a party seeking review must satisfy at least any one of the following:

- i. There is discovery of new and important matter which after the exercise of the due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or
- ii. On account of some mistake or error apparent on the face of the record, or
- iii. For any other sufficient reason.

The application must be brought without unreasonable delay.

The 4th respondent has brought this application without unreasonable delay. The 4th respondent must prove existence of sufficient reasons in terms of order 45 to persuade this court to grant prayers that he is seeking. His grounds for bringing this application are:

- i. That there is an error apparent on the face of the ruling delivered by this court on 6th December, 2017 where the court ruled that the two petitioners had filed supporting affidavits to the petitioner, yet that was not the case and the court readied a wrong ruling.
- ii. That the 4th petitioner has discovered new and important information that warrants the ruling to be reviewed, varied and or set aside. That there is new and important information that the 4th respondent has discovered that there is another petition in the High Court in the Constitutional and Human Rights Division that is similar to this petition and the parties are the same.

The two petitions raise similar issues and are seeking similar reliefs, therefore that discovery warrants this court to review its ruling dated 06/12/17.

Another discovery is that the 4th respondent has discovered that there are two Members of the Nyandarua County Assembly who are persons living with disability and therefore the County Assembly as constituted already has persons living with disability in its composition which that was one of the grounds for filing this petition. That this discovery calls for review of the Ruling of the court delivered on 6th December, 2017 and proceed to dismiss the petition.

- iii. Whether this court has jurisdiction to continue to hear this petition in view of the existence of the High Court petition No. 431/2017.

The counsel for the petitioners submits that the grounds raised by the 4th respondent seeking review of the

ruling of this court are not sufficient to warrant such review or variation of the court's ruling.

I have taken into account the submissions made by counsels for the 1st respondent, 4th respondent, 3rd respondent, 5th respondent and 6th respondent and the petitioners' counsel. On the issue whether there is an error apparent on the face of the ruling, after fully considering the application and the submissions and the authorities used I am not persuaded by the 4th respondent to find that there is error appearing on the face of the ruling.

In the ruling this court found that both petitioners had filed supporting affidavits to the petition. The court looked at the petition and saw affidavits sworn by the 1st petitioner and by the 2nd petitioner. The 1st petitioner in her replying affidavit to this application has attached a copy of the supporting affidavit that she swore. The court carefully considered the preliminary objections raised on the issue of lack of jurisdiction on the basis that the 1st petitioner had not sworn a supporting affidavit and the court dismissed that objection in its ruling dated 6th December, 2017.

In my view the 4th respondent has not come out clearly and pointed out how the court was mistaken by holding that there were supporting affidavits filed by both petitioners. In the oral submission before court on 22nd January, 2018 counsel for the 4th respondent did not submit on the issue of lack of supporting affidavit, but he just submitted that there exists an error on the face of the ruling.

“In the case Michael Moliga vs Ford Kenya Elections and Nominations Board and Others (2013) e KLR the court held that it was of the view that for one to succeed in having an order or ruling reviewed for mistake or error apparent on the face of the record he must demonstrate that the order or ruling contains a mistake that is there for the whole world to see”.

In the case of National Bank of Kenya Ltd vs Njau (1965 – 98) 2EA The Court of Appeal held this, “a review may be granted wherever the court considers that it is necessary to review an apparent error or omission on the record of the court. The error must be self evident and should not require an elaborate argument to be established. It may not be sufficient to grant review, merely that another Judge could have taken a different view of the matter, nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion on the law”.

If this court ruled that the 1st petitioner had filed a supporting affidavit and this was wrong the 4th petitioner should have pointed out how that was a mistake. The 1st petitioner has shown in her replying affidavit that she filed a supporting affidavit to the petition. If that is not a supporting affidavit and the court has already ruled on that the 4th respondent should seek remedy elsewhere. There is a ruling to show that what is on record of the petition sworn by the 1st petitioner is a supporting affidavit. In my view this ground of the application is for summary dismissal. The court fully considered the submissions made on the preliminary objections on the issue of lack of supporting affidavits and dismissed that ground of objection. To ask this court to review its ruling is like asking this court to sit on appeal of its own ruling. To me that is not for this court to do.

The 4th petitioner can only seek to challenge the ruling in the High Court. The 4th petitioner can only be considered to implying that he wants this court to change the ruling and strike out the petition, which cannot be done in this application. The best option is to appeal against the ruling.

The second issue raised is that the 4th respondent has discovered new and important information to warrant review of the ruling this court delivered on 6th December, 2017, in that the 4th respondent has discovered that there is another similar petition in the High Court filed by the same petitioners. That the 4th respondent has discovered that the petitioners are abusing the court process by pursuing two petitions one in this court and another one filed in the High Court being Constitutional Petition No. 431/2017.

That the 2nd petitioner is a petitioner in the High Court petition and in this court's petition, thus he is

abusing the court process by filing petitions in different courts seeking the same or similar reliefs. It is submitted that if this court continue with this election petition it is likely to make orders that may conflict with the High Court orders and that might embarrass this court.

I have considered the application based on this ground. While there is no doubt that there is a Constitutional Petition that was filed in the High Court Constitutional Petition No. 431/2017 and that the second petitioner is also a petitioner in the High Court Petition, it is also equally important to note that the 1st petitioner in this petition is not listed as a party or petitioner in the High Court Petition No. 431/2017. It is not correct to seek this court to assume that because the 2nd petitioner in this petition is also a petitioner in the High Court Petition then the 1st petitioner in this case is also a party in the High Court Petition. It was argued that the petitioners are like conjoined twins therefore they are petitioners in the High Court by virtue of having filed this petition jointly. If that is the case then it would also be assumed that since the 1st respondent in this petition is also the 1st respondent in the High Court Petition then the 4th respondent is also a respondent in the High Court. Then it would be assumed that the 4th respondent was aware of the High Court Petition even before the preliminary objections were filed and ruling made. In my view that is not the correct position to take.

It is also argued that the petitioners are seeking similar reliefs in this petition and in the High Court Petition. I have looked at a copy of the High Court Petition. The reliefs are similar but not the same. The High Court Petition for example is seeking to disband the entire Nyandarua County Assembly for having failed to include persons to represent persons with disabilities and the youth.

In this petition the petitioners want the nomination of the 3rd, 4th, 5th and 6th who were nominated under the special category to be nullified. In my view the reliefs being sought in the two petitioners are not entirely the same. Further it is my view that the court cannot be asked to review its ruling or vary it simply because there is another petition pending in the High Court. The applicant has only attached the prayers they sought in the High Court but has not attached any single order emanating from the High Court. The court was told that the High Court Petition was set for mention on 29/11/17 but was not told what happened in that petition on that date of 29th November, 2017. The petitioners counsel indicated that the 2nd petitioner in this case has since abandoned the High Court Petition. If it turns out to be true that the 2nd petitioner has abandoned the High Court Petition and we dismiss this petition we might not be doing justice to the parties. The best option in my view is to stay this petition pending the outcome of the High Court. There is no order to stay this petition from proceeding. This court has also reliably learned that the High Court Petition is not proceeding now. This court cannot stop its proceedings without directions or orders that affect this petition.

It was submitted that if this court had been aware of the High Court Petition then it would have reached a different decision or ruling. Perhaps at this stage this court is not in a position to determine such an issue.

The other issue is that the 4th respondent has discovered another new and important information in that the 4th respondent has discovered that there are two members of Nyandarua County Assembly who are persons living with disabilities and therefore the County Assembly is properly constituted as it already has persons living with disability. Looking at this petition the 2nd petitioner Solomon Kimani Kuria is not a person living with disability. He filed this petition in the category of the youth. The 1st petitioner is the one who filed this petition on the basis of a person living with disability and she is not a party to the petition in the High Court.

Furthermore when the 4th respondent filed his response to this petition he had already been sworn in as a nominated Member of Nyandarua County Assembly and ought to have known who were members of the County Assembly by the time of filling his response to the petition. He did not raise that issue in his response and it cannot be said that the issue of the two Members of the County Assembly being persons living with disability were not known to him a member in the County Assembly. It cannot be said that he learned of that fact only on 18/12/18 when he filed this petition so as to term it as a new and important

information to warrant review of the ruling.

Furthermore the said two Members of the County Assembly are 'elected' but the petitioners are challenging those that were nominated under the special seats category. I do not think that the existence of two elected Members of the County Assembly would warrant this court to review, vary and or get aside the ruling and strike out the petition as is being sought in his application.

My further view is that the existence of two Members of the County Assembly who are living with disability is a matter of evidence to be adduced which can only be done during the hearing of the petition because it must be proved through evidence. The 1st petitioner is supporting the application by the 4th respondent. The 1st petitioner is the one that conducted the elections but failed to raise the issue of the existence of two Members of the County Assembly who are living with disabilities. In its response the 1st respondent has not indicated that it was not aware of the said two Members of the County Assembly who are persons living with disability.

Furthermore the 1st respondent and the 2nd respondent are parties in both petitions – the issue of two elected Members being persons living with disability cannot be send to be new and important information which that could not have been discovered if they exercised due diligence in the matter. By the time the 1st respondent was raising preliminary objections it was a party to the High Court Petition and was aware of the composition of the Members of the County Assembly because it had conducted the elections.

Also the nature of the disability has not been disclosed. No evidence of disability was shown to the court. Therefore this ground is not sufficient to be used to review or vary and set aside the ruling of this court.

For the foregoing reasons I am not satisfied that the 4th respondent/ applicant has made a case warranting review of this court's ruling delivered on 06/12/2017 and to cause this court to strike out or dismiss the election petition. Consequently I dismiss the Notice of Motion dated 18th December, 2017 and filed in court on 19th December, 2017 with costs to the petitioners.

I further order that this petition shall proceed for hearing on merit. It is so ordered.

J. WANJALA

CHIEF MAGISTRATE

05/02/18

5.2.2018

Cora J Wanjala CM

Parties

Mr Maina for 4th Respondent present

MR MAINA

Ms Wangechi holds brief for Mr Kariuki for 1st petitioners. I am on record for the 4th respondent. I also hold brief for Mr Maina Karanja for the 1st respondent and similarly holding brief for Mr Gatonye for the 3rd, 5th and 6th respondent. This matter is coming up for purposes of taking a ruling for the 4th respondents application dated 18.12.2017

J. WANJALA

CHIEF MAGISTRATE

The ruling is delivered on open court in the presence of Mr Maina for the 4th respondent and who is holding brief for Mr Maina Macharia for the 1st Respondent and Mr Gatonye for the 3rd, 5th and 6th respondents.

Court clerk Mr Kamau

J. WANJALA

CHIEF MAGISTRATE

MR GATONYE

I am now present for the 3rd, 5th and 6th respondent. I was before the High court.

J. WANJALA

CHIEF MAGISTRATE

MS Wangechi

My instructions are to take directions on the main petition. The petitioners wish to proceed to the hearing of the main petition by way of oral evidence. However the respondents are at liberty to choose their mode of proceeding.

J. WANJALA

CHIEF MAGISTRATE

MR MAINA

On the part of the 4th respondent he is in support of the position taken by the petitioners regarding the mode of procedure. We will not be oppose to having the petitioners call oral evidence. Ti is not clear whether we determine how we will proceed or we get clear a date for pre trial especially in view of the fact that this court has limited time in hearing and determining this petition now.

MR GATONYE

On the part of the 3rd, 5th and 6th respondent we suggest that a date for pre trial be set. It's at that time that we will allocate time each party will take and its necessary that each party's counsel be present to guide the court on the amount of time that each will take.

J. WANJALA

CHIEF MAGISTRATE

MS WANGECHI

The petitioners will be calling two witnesses but I don't have/know the time they will take.

J. WANJALA

CHIEF MAGISTRATE

MR MAINA

I would require to be properly instructed as to whether the present oral evidence or affidavit evidence. The matter can be set down for a pre trial conference properly.

J. WANJALA

CHIEF MAGISTRATE

MR GATONYE

Equally I would wish to have a conference with my client to discuss the mode of procedure. We ask for a pretrial conference.

Court

Pre trial conference on 12.2.18 and hearing of the petition to start next week.

J. WANJALA

CHIEF MAGISTRATE