REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

ELECTION PETITION NO 2 OF 2017

MORRIS MUINDI MUTISO……..……..PETITIONER

AND

NAOMI NAMSI SHABAN……..……1ST RESPONDENT

ABDUL SWALEH JAMANDA……..……2ND RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION…….. 3RD RESPONDENT

RULING

1ST RESPONDENT'S NOTICE OF MOTION APPLICATION DATED 30TH OCTOBER 2017 AND FILED ON 1ST NOVEMBER 2017 AND THE 2ND AND 3RD RESPONDENT'S NOTICE OF MOTION APPLICATION DATED 13TH OCTOBER 2017 AND FILED ON 17TH OCTOBER 2017

INTRODUCTION

1. The Petitioner herein filed the Petition dated 7th September 2017 on even date. The court fixed the matter for mention on 9th October 2017 with a view to giving directions in the matter herein. On the said date, counsels for the Respondents attended court on that date. However, the Petitioner did not do so. Unfortunately, there was no Affidavit of Service by the Court Process Server evidencing proof that the Petitioner had been served with the Mention Notice to attend court on the said date. There was, however, a Certificate of Postage showing that a Mention Notice dated 27th September 2017 was in fact sent to M/s Munee Katu & Associates Company Advocates for the Petitioner herein informing them of the aforesaid mention date.

2. On the said Mention date, Mr Nyakundi for the 1st Respondent told this court that his client had not yet been served with the Petitionwithin fifteen (15) days of its filing either personally or in a newspaper of national circulation as provided for in Section 76(1)(a) and 77 (2) of the Elections Act, 2011. On his part, Mr Anthony Lubullelah for the 2nd and 3rd respondents informed this court that their Response and Notice of Appointment of Advocates had been returned by M/S John Bwire & Advocates. Notably, M/S Munee Katu Associates Company Advocates were the ones who were on record for the Petitioner herein.

3. To move the matter forward, this court fixed the date for Pre-Trial Conference on 6th November 2017 and directed that a Pre- Trial Conference Notice do issue to the Petitioner by the 1st Respondent for the said date of 6th November 2017.

4. As counsels for the Respondents had expressed difficulties and frustrations in serving their Responses upon the firm of M/S Munee Katu & Associates Company Advocatesas its staff members was declining service of court process, this court granted leave to the Respondents to serve their court process by registered mail.

5. This court also took the initiative and caused the Petitioner to be served with a Pre-Trial Conference Notice dated 19th October 2017 through registered mail. Proof of service of the said Pre-Trial Conference Notice was evidenced by the Affidavit of Service of Lucy K Ngisiange that was sworn on 23rd October 2017 and filedon 30th October 2017.

6. It was not in dispute that the Petitioner did not deposit the security for costs within ten (10) days of filing the said Petition as required under Section 78(1) of the Elections Act, 2011 (hereinafter referred to as “the Act.”). However, the question of whether or not the 1st Respondent was served with Election Petition was hotly contested by the Petitioner.

7. On 17th October 2017, the 2nd and 3rd Respondents filed a Notice of Motion application dated 13th October 2017 pursuant to the provisions of Section 78(3) of the Actand Rules 7(3)(a), 11(1) and 17 (g) and (k) of the Elections (Parliamentary and County Elections) Petition Rules 2017 (hereinafter referred to as “the Petition Rules”) and all other enabling provisions of the law. They sought for the striking out of the Petition herein on the ground that the Petitioner had failed to deposit the security for costs in accordance with the law and that the Petition had not been signed by the Petitioner or by a person he had duly authorised to sign on his behalf.

8. Subsequently on 1st November 2017, the 1st Respondent filed a Notice of Motion application dated 30th October 2017 seeking the dismissal of the Petition herein on the ground that the Petitioner had failed to deposit the security for costs, the Petition was fatally defective as it had not been served on her and that the Petitioner was frustrating the hearing of the Petition by failing to accept service. Her application was premised on the provisions of Section 78(3)(4) of the Act.

9. On the date the mattercame up for Pre-Trial Conference on 6th November 2017, the firm of M/S Munee Katu & Associates Company Advocates filed a Notice of Motion application of even date seeking leave to cease acting for the Petitioner herein. However, by the time the court commenced dealing with the matter herein, no advocate or representative from the aforesaid firm attended court to prosecute the said application. This was strange as the said application had been filed that morning.

10. Although the Petitioner appeared in person, he had no audience of the court as he was represented by counsel. However, this court indulged him when he sought time to file a Notice to Act in Person. It was to adjourn briefly for him to file the said Noticeon condition that he would proceed with the Respondents’ applications.Bearing in mind the strict constitutional time lines to conclude election petition cases, this courtdeclined to grant him an adjournment when indicated that he would have to seek an adjournment to enable him instruct an advocate to argue his application to deposit the security for costs within fourteen (14) days thereof.

11. As the firm of M/S Munee Katu & Associates Company Advocates had not prosecuted their application to cease acting for him, for all purposes and intent, they remained on record for him.This court therefore directed counsels for the Respondents to proceed with their respective applications which

at this point were unopposed.

12. At the conclusion of the submissions by Eugene Lubullelah for the 2nd and 3rd Respondents which was at about 10.40 am, Mr John Bwire and Onesmus Mwinzi Advocates came into the court and informed it that they wished to be placed on record as holding brief for M/S Munee Katu & Associates Company Advocates. They argued that their application to cease acting for the Petitioner herein had not yet been prosecuted or orders therein granted and that for all purposes and intent, the said firm was still on record for him.

13. After hearing submissions from the counsels for the Petitioner and the Respondents, this court allowed the Petitioner's application and adjourned the matter briefly to enable him file his responses to the two (2) applications that had been filed by the Respondents herein. The Petitioner relied on Grounds of Opposition and List of Authorities dated 6th November 2017 on even date in support of his case.It is important to point out that this court's decision to indulge the two (2) advocates to respond to the said applications on behalf of the Petitioner herein was made purely in the interests of justice with a view to giving the Petitioner a reasonable and fair opportunity to be heard.

14. This court found it necessary to set out the history of this matter due to the many turns and twists. As the issues that were raised in the Respondents' respective applications and submissions were cross-cutting, this court deemed it prudent to address the issues raised in one (1) ruling as opposed to dealing with the applications separately.

LEGAL ANALYSIS

I. SIGNING OF THE PETITION

15. The 2nd and 3rd Respondents contended that the Petition herein was not signed either by the Petitioner or his duly authorised agent contrary to the mandatory provisions of Rule 8(4)(a) of the Petition Rules, which they said, was fatal to his case. They had argued that the copy in their possession was actually the original Petition as the same had assessment details of court filing fees and that the copy of the Petition in the court record was a copy thereof. Although the 1st Respondent did not submit on this issue, she associated herself with their submissions.

16. In this regard, the 2nd and 3rd Respondents placed reliance on the cases of **Mohamed Mwinyimtwana Jahazi vs Francis Cherogeny &Another [1982]eKLR**, **Ismael Suleiman & 9 Others vs Returning Officer Isiolo County & 4 Others [2013] eKLR** and **Abraham Mwangi Njihia vs IEBC & 2 Others [2013] eKLR**where the common thread was that signing of a petition was not a mere formality but that it was mandatory for an election petition to be signed by a petitioner or his or her authorised agent.

17. On his part, the Petitioner was emphatic that he signed the Petition before filing the same. He argued that this court ought not to make reference to the copy the 2nd and 3rd Respondents had shown it,but rather, it ought to only rely on the one in the court record. His counsel added that in any event, there was no indication that the firm of M/S Munee Katu & Associates Company Advocates did not have authority to sign the Petition on his behalf.

18. This court did not attach much weight to this latter submission by the Petition as it did not see any submissions by the Respondents that the Petition herein could not be signed by any other party other than the Petitioner herein. What this court understood to have been the gist of the 2nd and 3rd Respondents' assertions was that an election petition could be signed on behalf of a petitioner by a

person he or she had duly authorised to sign on his or her behalf.

19. This court had due regard to the case of **Ismail Suleiman & 9 others v Returning Officer Isiolo County Independent Electoral And Boundaries Commission & 3 other** (Supra) that the 2nd and 3rd Respondents had relied upon and noted thatonly the 1st Petitioner therein filed the Petition, a position that was rightly observed by the Petitioner. In that case, the petitioner therein had failed to demonstrate that he had the competence to sign on behalf of his co-petitioners. Makau J.A J struck out the petition therein on the ground that the failure by the petitioners' co-petitioners did not pass the test and that allowing it to proceed would be an abuse of the court process.

20. In striking out an election petition that had not been signed, in the case of **Mohamed Mwinyimtwana Jahazi vs Francis Cherogeny & Another** (Supra), the Court of Appeal stated as follows:-

"The requirement that a petition be signed by a petitioner is not a formality. Equity demands that a petitioner assumes the responsibility for his petition by signing it."

21. This court was therefore clear in its mind that the law had been settled that pleadings,which include election petitions, must be signed as a matter of course. Such signing is not a mere formality. The question of whether or not a pleading has been signed is a substantive issue that goes into the root of a case. Consequently, failure to sign a petition is fatal to a case lending it to an automatic dismissal.

22. This court perused the Petition in the court file and noted that the same bore details of the assessment of the court fees that were payable. The copy the 2nd and 3rd Respondents said they were served with and which they showed it,also had details of the assessment of the court filing fees. However, the wording of the said assessment of court fees in the two (2) documents was different.

23. Evidently, the question of whether or not the Petition was signed before it was filed was a case of the Petitioner's word against that of the 2nd and 3rd Respondents. As was rightly pointed out by the Petitioner, it is the documents that are in the court record that have credence. Sanctity and propriety of the court records can only be guaranteed if courts relied on the documents that are in their custody and possession.

24. In the absence of any evidence by the 2nd and 3rd Respondents to the contrary, this court found that it would be engaging in a game of speculation if it were to conclude that the copy the 2nd and 3rd Respondents were served with was the original because it also had in its record, a duly signed copy of the Petition.

25. This court therefore did not find it necessary to spend a lot of time on this issue as it was really not possible to say with certainty that the Petition herein was filed without being signed and that the Petitioner accessed the copy in the court file with assistance of possibly judiciary staff members and signed the same as the 2nd and 3rd Respondents had purported. Their assertions on impropriety of the affidavits were merely speculative and could not be relied upon to strike out the Petition herein.

26. Accordingly, having considered the oral and submissions in respect of this issue, the 2nd and 3rd Respondents failed to prove the assertion that the Petition herein was not signed. This court was thus not persuaded to strike out the Petition herein on the ground that the same was not signed as the copy of the Petition in its custody was duly signed by the Petitioner herein.

27. In that regard, the cases of **Abraham Mwangi Njihia vs IEBC & 2 Others** (Supra) and **Ismail Suleiman & 9 others v Returning Officer Isiolo County Independent Electoral And Boundaries**

Commission & 3 other(Supra) that the 2nd and 3rd Respondents had relied upon were distinguishable from the circumstances of the case herein and were not therefore applicable herein.

28. Notably, the Petitioner relied on the case of **Election Petition No 7 of 2017 Aziza Mohamed vs IEBC & 3 Others** to the effect that Ongeri J held that once a Petition is filed in court, it becomes the property of the court. However, this court was unable to trace in the Kenya Law Reports website. It could not therefore use the said case to fortify its conclusion.

II. ALTERATION OF THE AFFIDAVIT IN SUPPORT OF THE PETITION

29. Whereas none of the Respondents raised the issue of the alterations in the jurat of the Affidavit in support of the Petition herein, at the conclusion of the hearing of the applications, this court nonetheless sought the views of the parties regarding the said alterations as it could not turn a blind eye to it.

30. Mr John Bwire contended that several advocates were acting on thePetitioner's behalf and mistakes were made. He averred that the all Affidavits were prepared in Mombasa but because the witnesses were coming from Taveta, it was decided that deponents appear before Mr Onesmus Mwinzi for commissioning hence the alterations that they were sworn and commissioned in Voi.He added that there was no specific provision that states that white out could not be used in an affidavit and that all deponents were available for Cross-examination, if need be.

31. The 1st Respondent's counsel pointed out that he had noted the alterations but that they were intending to interrogate the same later. The 2nd and 3rd Respondent's Advocate pointed out that from the copy of the Petition in the court file, it was clear that the said Petition was dated in Mombasa but white out had been used to erase the word **"Mombasa"** and writing the word **"Voi"** by hand.

32. The Affidavits by the Petitioner's witnesses were not a major concern because it was not mandatory for them to testify in court. What was of concern to this court was his Affidavit in support of his Petition because it was the basis of his case. His said Affidavit showed another date to have been inserted therein. This was an alteration of the said Affidavit. It was thus not clear to this court if the Petitioner actually swore his Affidavit in support of his Petition on 7th September 2017 because the date **"7th"** and **"September"**had been inserted by hand where there were previous writings.

33. Although this court was not a handwriting expert, it was not difficult to see that original dates and place of dating in all the documents in the Petition had been overwritten with new dates and places of signing or swearing of Affidavits in the same hand.

34. This court was therefore not able to understand why Mr Onesmus Mwinzi, Commissioner would have wanted to date the Petition himself when his mandate was only limited to dating the Affidavits. If the Affidavit in Support of the Petition had been dated in Mombasa, then the same was contrary to the provisions of Section 5 of the Oaths and Statutory Declarations Act Cap 15 (Laws of Kenya) that provide that affidavits must be dated by a commissioner for oaths at the time of commissioning an affidavit.

35. Section 5 of the Oaths and Statutory Declarations Act is applicable to electoral laws by virtue of Rule 12 (14) of the Petition Rules. The same states as follows:-

"Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made."

36. The ramifications of not complying with the provisions of Section 5 of the Oaths and Statutory were also addressed by Kasango J in **C.M.C Motors Group Limited vs Bengeria Arap Korir Trading as Marben School & another [2013] eKLR** where she rendered herself as follows:-

"The affidavit is shown as having been sworn at Machakos in the presence of Leah Mbuthia Commissioner of Oaths on 13th October 2003 but whose stamp reads Nairobi. If the affidavit was sworn at Machakos, it should have been before a Commissioner for Oaths in Machakos and the stamp should show likewise. The only conclusion one can reach on looking at this affidavit is that the place the affidavit was sworn and where it was commissioned are two different places. That is irregular and unacceptable and that affidavit is, therefore, fatally defective as it was not sworn in the presence of a Commissioner for Oaths. It is likely that stamp was just affixed. This Court would have no alternative but strike off the replying affidavit as it is not properly commissioned and that means that the application would stand unopposed."

37. Appreciably, this court could not for a fact arrive at a definite conclusion that Mr Onesmus Mwinzi did not date the Affidavit in Support of the Petition after the original date had been erased with white out. Having said so, this court deemed it fit to look at the legal position relating to the alteration of affidavits, which is that an affidavit is an oath and/or evidence and cannot be altered and that if it is altered then the same is rendered defective leading to the striking out of the main pleading.

38. In the case of**John Barasa Kasembeli vs Shadrack Otieno Mutacho [2007] eKLR**, Ochieng J was emphatic that an affidavit cannot be amended. In **Greenhills Investments Limited vs China National Complete Plant Export Corporation t/a COVEC [2002] eKLR**, Ringera J (as he then was) concurred that an affidavit could not be amended. This case was also cited with approval by Dulu J in the case of **Republic vsKipkaren Division Land Disputes Tribunal & Another Ex-parte Joseph Kibiegen Chepkwony [2005] eKLR**. In that case, however, Dulu J declined to strike out an amended affidavit as doing so would be denying the party therein an opportunity to be heard on account on omissions by his advocate.

39.It must be understood that all the three (3) cases on the issue of amendment of affidavits were rendered by courts of equal and concurrent jurisdiction as this one and are therefore not binding on it. In such an instance, a court is left to choose the school of thought it wishes to associate itself with. It was therefore this court's conclusion that an affidavit cannot be amended as dating of an affidavit is a mandatory requirement under Section 5 of the Oaths and Statutory Declarations Act. Hence, the alteration of the Affidavit in support of the Petitioner's Petition herein rendered the Petition incurably defective.

40. On that ground alone, the Petitioner's Affidavit would not have stood the test leaving his Petition without a limb to stand on. The question as to whether afresh affidavit could have been filed is an issue that would have been interrogated had the application for striking out of the Petition herein be placed before this court.

41. Having said the above, this court was hesitant to strike out the Petition on the ground that it found the Petitioner's Affidavit defective because firstly, the Respondents had not placed before this court an application to strike out his Petition on the said ground. Secondly, this court merely asked counsel for the parties to address it on the said issue while they were on their feet. It would be a travesty of justice and gross miscarriage of justice to strike out the Petition herein on the aforesaid ground as the parties did not advance their legal arguments on the same for consideration by this court. This court will therefore say no more about this issue.

III. SECURITY FOR COSTS

42. The 2nd and 3rd Respondents argued that the Petitioner had contravened the provisions of Section 78(3) the Act,Rules 7(3)(a), 11(1) and 17 (g) and (k) of the Petition Rules 2017, a position that was adopted by the 1st Respondent. All the Respondents submitted that the deposit of security for costs was a substantive issue that went into the root of the proceedings and that non-payment of the same deprived the court of jurisdiction to deal with the Petition herein.

43. In their submissions, the 2nd and 3rd Respondents relied on the case of **Evans Nyambane Zedekiah & Another vs IEBC & 2 Others [2013] eKLR** wherein Sitati J had due regard to the holdings in the cases of **Franco vs Amason Jefah Kingi & 2 Others [2010] eKLR**, **Rotich Samuel Kimutai vs Ezekiel Lenyongopeta & Others [2005] eKLR** and **Fatuma Zainabu Mohamed vs Ghati Dennittah& 10 Others** (unreported) in which it was held that a court is deprived of jurisdiction if security for costs was not deposited as it was a mandatory provision.

44. Their argument was that the time to deposit security of costs could not be extended under the Petition Rules because Section 78 of the Act did not provide for the extension of time as was held in **Evans Nyambane Zedekiah & Another vs IEBC & 2 Others** (Supra).

45. On his part, the Petitioner admitted that Section 78 of the Act provides that security of costs should be paid within ten (10) days of filing of the petition. He submitted that the purpose of depositing the security for costs was to secure a respondent's costs. In other words, he stated that the mischief sought to be cured was to secure payment of a respondent's costs. He added that the Respondents herein would be in a more secure position if this court allowed him to deposit the security for costs. He pointed out that in the event the Petition herein was to be struck out, the Respondents would have no recourse to their costs.

46. He was categorical that failure to deposit the security for costs was therefore not fatal and persuaded this court to exercise to consider the substantive justice in this case and thus exercise its discretion to allow the Petition herein proceed on merit. He contended that his right to access justice was enshrined in the Constitution and he could not be shut out from being heard just because he did not have money to pay the security of costs at the time he filed his Petition because in any event, Pre-Trial Directions had not been given herein. He pointed out that he was ready to deposit the security for costs within fourteen (14) days.

47. He urged this court to interrogate his allegations that the District Commissioner interfered with the tallying of votes as opposed to striking out the Petition *in limine*. He reminded this court that election petitions are no ordinary suits as the same entailed the interpretation of the will of the people and in this case, to interpret whether or not the will of the people of Taveta County was violated.

48. It was therefore his submission that this court ought to weigh the public interest vis-à-vis the Petitioner's interests and urged it to dismiss the 2nd and 3rd Respondent's application and he be allowed to deposit the security for costs.

49. In support of his case, he placed reliance on the case of **Election Petition Number 4 of 2017 Malindi Samuel Kazungu Kambi vs Nelly Ilongo & 2 Others,**where in Paragraph 78, Korir J held that where a petitioner had indicated his willingness to deposit security for costs, a court ought not to shut him out unheard.

50. Section 78 of the Act provides as follows:-

1. A petitioner shall(emphasis court)**deposit security for costs for the payment of costs that may become payable by the petitioner not more than ten days after the presentation of a petition** (emphasis court).

2. A person who presents a petition to challenge an election shall (emphasis court)**deposit:-**

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

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

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

3. Where a petitioner does not deposit security by this section or if an application 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 respondent's costs.

4. The costs for hearing and deciding an application under subsection (3) shall be paid as ordered by the election court or if no order is made, shall form part of the general costs of the petition.

51. Rule 13 (1) of the Petition Rules further provides as follows:-

"Within ten days of the filing of a petition, a petitioner shall deposit security for the payment costs in compliance with Section 78(2)(b) and (c) of the Act."

52. Rule 19 of the Petition Rules provides that:-

1. Where any act or omission is to be done within such time as may be prescribed in these Rules or ordered by an election court, the election court may, for the purposes of ensuring injustice is not done to any party, extend or limit the time within which the act or omission shall be done with such conditions as may be necessary even where the period prescribed by the court may have expired.

2. Sub-rule (1) shall not apply in relation to the period within which a petition is required to be filed, heard or determined.

53. As was rightly pointed out by the Petitioner, the objective of deposit of security for costs is to offer recompense to a successful respondent. That, however, is not the only objective of deposit of security for costs. Equally important,such deposit serves to discourage any Tom, Dick and Harry who might be busy bodies from filing frivolous petitions just because Article 50 of the Constitution of Kenya stipulates that:-

"Every person has the right to have any dispute that can be resolved with the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal and body."

54. In the case of **Franco Esposito vs Amason Kingi Jeffa & 2 Others vs Civil Appeal (Nairobi) No**

248 of 2008, the court therein emphasised that the requirement to deposit security for costs was to discourage frivolous or vexatious litigants from challenging the results of an election.

55. While courts are called upon to exercise caution and restraint in not denying litigants fair and reasonable opportunity to present their cases, in the same breathe, courts are called upon not to entertain frivolous matters. As was correctly appreciated by the Petitioner herein, election petitions are not ordinary litigation. They cannot therefore be taken casually. They are a high- stakes game that has the potential of plunging the entire electoral process into disarray. They also have grave implications on the finances of a country. They also cause undue anxiety to respondents who are put on tenterhooks. Such respondents are unable to fully employ their minds to the tasks that have been given to them because election petitions hang over their headslike Swords of Damocles.

56. A respondent must therefore be certain very early after the filing of a petition that a petitioner intends to proceed with a petition to the very end. It is therefore imperative that as early as possible and in any event within ten (10) days after the filing of the petition as required by Section 78 of the Act, that a petitioner deposits security for costs to signify his or her intention of proceeding with the petition to enable the respondent prepare his or her arsenal to defend himself or herself from the challenging of an election by such a petitioner. .

57. The question of failure to pay security for costs is one that has been addressed by several courts. However, as will be evident, there does not seem to be a consensus on whether or not a petitioner who has not paid deposit ought to be granted extension of time to deposit such security of costs. Different courts have rendered themselves differently on the same question.

58. One school of thought holds the view that failure to deposit the security for costs within the prescribed time is fatal and not a mere procedural requirement capable of being excused under Article 159(2)(d) of the Constitution of Kenya which mandates courts to administer justice without having due regard to procedural technicalities- See **Said Buya Kirabae vs Hassan Dukicha Abdi & 2 Others Mombasa Election Petition No 7 of 2013** and **Simon Kiprop Sang vs Zakayo Cheruiyot & 2 Others Election Petition (Nairobi) No 1 of 2013**.

59. The other school of thought is that while deposit of security of costs is an essential prerequisite for the hearing of an election petition, the time within which it can be deposited is a procedural requirement and consequently the time within which it can be deposited can be extended- See **Fatuma Zainabu Mohamed vs Ghati Dennittah & 10 OthersElection Petition (Kisii) No 6 of 2013** and **Charles Ong'onda Were vs Joseph Oyugi Magwanga & 3 Others Election Petition (Homabay) No 1 of 2013**.

60. In the said case of **Charles Ong'onda Were vs Joseph Oyugi Magwanga & 3 Others**, the court therein rendered itself as follows:-

"I would have found favour with this position [i.e. dismissal of the petition] were it not for the provisions of s. 78 (3) of the Elections Act which presumes that the court may exercise discretion in favour of a petitioner who has not deposited the security against who an objection has been raised. It is only once the objection is not removed that no further proceedings can be taken. Here even before the objection had been taken the deposit had been paid so there will be no issue of removing the objection."

61. Again, as the aforesaid decisions were rendered by courts of concurrent jurisdiction as this one and were therefore not binding on it, this court took firm view that deposit of security of costs is a prerequisite

for the sustenance of petition. Failure to deposit the security for costs is not a procedural technicality that can be cured by Article 159 (2)(d) of the Constitution of Kenya. Notably, Article 159(2)(d) of the Constitution of Kenya is not a panacea of all omissions and commissions as some actions are hinged on mandatory and not discretionary provisions of the law.

62. Section 78(1) of the Act shows that the same is couched in mandatory terms. It does not give a court room to be flexible. The amount to be depositedunder Section 78(2) of the Act is also non-negotiable. In the case of petitions against a member of Parliament or a county governor, the deposit for security is Kshs 500,000/=. A court cannot therefore exercise its discretion to reduce or enhance the said deposit.

63. Notably, Section 78(3) of the Act is not conjunctive as it connotes two (2) scenarios where no further proceedings can be entertained in a petition. These are :-

a. Where the petitioner does not deposit security as required by Section 78(1) of the Act; or
(emphasis court)

b. If an objection is allowed and not removed.

64. As the court held in the case of**Charles Ong'onda Were vs Joseph Oyugi Magwanga & 3 Others**(Supra), the wording of the section connotes the possibility of an objection to the deposit of the security for costs upheld and also being removed. The court has revisited this issue later in its Ruling.

65. It is important to note that at the time the Pre-Trial Conference was held on 6th November 2017, the Petitioner had not made any application for extension of time to deposit the security for costs. This was almost two (2) months since he filed his Petition.

66. What the Petitioner made on the said date was an oral application to be allowed to deposit security for costs within fourteen (14) days. Hehad notice of the date of 6th November 2017. The least he could have done was to file and serve a formal application to enable the Respondents respond to the same. Making an oral application from the bar to be given additional time when he had failed to comply and adhere with a statutory time line was taking the matter too casually because he had not placed before this court any affidavit evidence to explain why he had failed to comply with the mandatory provisions of Section 78(1) of the Act.

67. Bearing in mind that the wording of Section 78(3) of the Act enables courts with a different view from this one to consider if extension of time could be given for him to deposit the security for costs, the Petitioner's failure to file a formal application for extension of time to deposit security for costs was inexcusable.

68. This court was thus not persuaded to find that the Petitioner could have benefitted from his omission or that it was a procedural technicality. It was difficult to see how he could have benefitted from an equitable relief due to the inordinate delay in making his application to deposit security for costs herein.

69. Indeed, time is of the essence in election petitions are as there constitutional times lines which cannot be shifted. The route taken by the Petitioner definitely had the potential of derailing the hearing of the Petition herein.

70. In the case of **Lemanken Aramat vs Harun Meitamei Lempaka & 2 Others [2014] eKLR**, the Supreme Court rendered itself on the issue of time lines when it stated as follows:-

“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 time-lines 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/it 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.”

71. Going further, whereas Rule 19(2) of the Petition Rules seemed to suggested that it was only the period of filing a Petition that could not be extended, this court was more persuaded to uphold the 2nd and 3rd Respondents’ argument that subsidiary legislation could not purport to extend an act that had been legislated in an Act of Parliament. In any event, Rule 19(1) of the Petition Rules was clear that what could be extended or reduced was any act or commission that was to be **prescribed in the Rulesorwhat had been ordered by an election court**(emphasis court). It did not refer to any act or commission in the Act.

72. However, this court agreed with the courts in **Fatuma Zainabu Mohamed vs Ghati Dennittah & 10 Others Election Petition** (Supra) and **Charles Ong’onda Were vs Joseph Oyugi Magwanga & 3 Others Election Petition** (Supra) that the wording in Section 78(3) of the Act seemed to suggest that an election court could exercise its discretion to extend time for depositing of security for costs and that under the same sub-rule, a petition could also be dismissed for failure to comply with the provisions of Section 78(1) of the Act.

73. In his ruling, in the case of **Samuel Kazungu Kambi vs Nelly Ilongo & 3 Others**(Supra), Korir J took the view that Mureithi J took in the case of **Fatuma Zainabu Mohamed vs Ghati Dennittah& 10 Others**(Supra) that if Parliament had intended that there would be no extension of time to deposit the security for costs, then it would have been clearer as it was in Section 96 (3) of the Act that states that:-

“Where, a petitioner does not deposit security for costs as required under this section after presenting of a referendum petition, the referendum petition shall be struck out.”

74. This court respectively took a different view from that of Korir and Mureithi JJ. It wasits considered opinion that making a finding that this court could extendor reduce time as envisaged under Rule 19(1) of the Petition Rules would be a misconception because accepting that argument would imply that an election court could also reduce or enhance the amount of the deposit for security for costs which were both couched in mandatory terms in Section 78(1) and (2) of the Act. Indeed Rule 19(2) of the Petition Rules seemed to suggest that only the time for the filing of the petition could not be enhanced or reduced.

75. Both reduction and extension appear in the same Rule and cannot be separated. They are conjunctive. If it is agreed that an election court cannot reduce or enhance the amount of deposit of security for costs, then it would also be correct to state that an election court cannot extend time within which deposit for security can be made.

76. In the mind of this court, the use of the phrase that **“if objection is allowed and not removed”** in Section 78(3) of the Act appeared to have no meaning and caused a lot of confusion as Section 78(1) of the Act was mandatory that petitioner would have to deposit security for costs not later than ten (10) days of filing his petition.In view of the fact that this court could not envisage a situation where **“objection was disallowed and removed”** which was the converse of **“if objection is allowed and not removed”** in Section 78(3) of the Act, the ambiguity led it to conclude that the said words contradicted Section 78(1) of the Act which was crystal clear of its intention and purport that deposit for

costs ought to be made within fifteen (15) days of the date of filing of a petition.

77. In view of the ambiguity of who would be allowing the objection and what removal means and if an objection can be disallowed and is removed, which clearly is not by the election court because if it were so the legislators would have expressly stated so, this court thus associated itself with the views of Sitati J in **Evans Nyambane Zedekiah & Another vs IEBC & 2 Others** (Supra). Indeed, none of the courts with concurrent jurisdiction bind this court. Their decisions are merely persuasive.

78. This court strongly recommends that Parliament re-looks the wording of Section 78(3) of the Act to avoid different courts interpreting the question of whether election courts could or could not extend time lines for the deposit of security for costs differently.

79. Accordingly, having considered the oral and written submissions and the case law that was relied upon by the 2nd and 3rd Respondents and the Petitioner herein, this court came to the firm conclusion that an election court did not have power to extend time to deposit security for costs as Section 78(1)of the Act was mandatory in nature. It was a substantive issue that went into the root of the Petition, a finding that Sitati J also arrived at in the case of **Evans Nyambane Zedekiah & Another vs IEBC & 2 Others** (Supra).

80. In that regard, this court found and held that the 2nd and 3rd Respondents' Notice of Motion application dated 13th October 2017 and filed on 17th October 2017 was merited and the same is hereby allowed with costs to them.

IV. SERVICE OF THE PETITION

81. The 1st Respondent's major complaint was that the Petitioner never served her with the Petition as provided in Section 77 of the Act which requires that a respondent be served either directly or through advertisement in a newspaper of national circulation. She stated that she obtained a copy of the Petition from the court file to enable her respond to the Petition herein and that failure by the Petitioner to file an Affidavit of Service, was proof that she was never served and. She relied on the case of **Evans Nyambane Zedekiah & Another vs IEBC & 2 Others** (Supra) where it was held that service upon a respondent is mandatory.

82. On his part, the Petitioner was categorical that the filing of an Answer to the Petition within fourteen (14) days of the filing of the said Petition was proof that the 1st Respondent was served and that in fact, service of the Petition was merely intended to notify her of the existence of the Petition herein. He added that she never protested service in her Answer to Petition.

83. He also argued that there was no letter or receipt of court fees in the court fileindicating that she applied to be supplied with a photocopy of the said Petition. It was his averment that had he known of the 1st Respondent's application, he would have called a process server to explain how service was effected. He therefore urged this court to dismiss her application and allow the Petition herein to proceed on merit.

84. According to Section 77 (2) of the Act:-

"A petition may be served personally upon a respondent or by advertisement in a newspaper with national circulation."

85. Further Rule 10 of the Petition Rules provides that:-

"I. Within fifteen days after the filing of a petition, the petitioner shall (emphasis court)**serve on the respondent by-**

a. direct service; or

b. An advertisement that shall be published in a newspaper of nation circulation."

86. When Mr Bwire attended court on 6th November 2017, he averred that he was holding brief for the firm of M/S Munee Katu & Associates Company Advocates for the Petitioner. A perusal of the Affidavit of Service of Wycliffe Isaadia that was sworn on 3rd November 2017 and filed on 6th November 2017 showed that the 1st Respondent's Notice of Motion application was sent on 1st November 2017 by way of registered mail to M/S Munee Katu & Associates Company Advocates as was evidenced by the Certificate of Postage S/No 10119103.

87. Notably, as was seen herein, this court had ordered service of court process upon the said firm of advocates through registered mail as it had returned the 2nd and 3rd Respondents' Answer to Petition by post after it had been received at the said firm's offices.

88. Mr Bwire's assertion that had they known of the said application they would have brought the Process Server was neither here nor there. Firstly, he did not explain how he became seized of the information that the said firm of advocates had not received the said 1st Respondent's Notice of Motion application. Secondly, having acknowledged that election petitions are no ordinary litigation cases, the Petitioner's advocates were under a duty to exercise due diligence and file an Affidavit of Service irrespective of whether or not the Respondents filed their respective Answers to Petition evidencing service. This is because the question of service is normally a contested issue.

89. If the Petitioner had filed an affidavit of service, this court would have expected the 1st Respondent to rebut and/or controvert the affidavit evidence of the process server. Failure to file an affidavit of service has not come to bite him as she had clearly denied ever having been served with the Petition.

90. In his Grounds of Opposition, the Petitioner purported to argue in his Grounds of Opposition that the Petition was served within time and all parties had since filed their responses within time and consequently the issue of service had been overtaken by events. This was a factual issue that was not supported by any affidavit evidence.

91. The 1st Respondent filed an Answer to the Petition. Her advocates also filed a Notice of Address of Service. It was these documents that the Petitioner argued were proof that she had indeed been served and that she was indeed aware of the Petition which is what service of the said Petition was intended to achieve.

92. This court carefully went through the court file and noted that contrary to the Petitioner's contentions, in a letter dated and filed on 13th September 2017, M/S Nyakundi & Co Advocates for the 1st Respondent wrote to the deputy Registrar High Court of Kenya Voi requesting for copies of the Petition and any other relevant documentation.

93. The contents of the said letter were as follows:-

"RE: PETITION NO 2 OF 2017 MAURICE MUINDI MUTISO VS NAOMI

SHABAB & ANOTHER

We act for Mhe (sic) **Naomi Shaban who we understand is the respondent in the above matter.**

Our client has not been served with any process. This is to request you for copies of the petition and/or any other documents filed in order for us to seek instructions and take necessary action."

94. It was clear from the aforesaid correspondence that the 1st Respondent had not been served with the Petition herein and actually went out of her way to obtain a copy of the same. This court took the considered view that the fact that the 1st Respondent filed her Answer to Petition was a precautionary measure that did not prejudice her rights to apply for the striking out of the Petition herein for want of service. Contrary to the Petitioner's assertions, service is not merely intended to notify an opposing party of legal proceedings. It is a legal and mandatory requirement of the Act.

95. Service also signals a petitioner's intention to proceed with the proceedings in court for determination. A party who files legal process and withholds service of the same sends mixed signals of his or her intention as whether he or she intends to proceed with the proceedings. Indeed, litigation is no longer an ambush as every person has a right under Article 50 of the Constitution of Kenya to a fair hearing. A fair hearing entails being informed of his opponent's case at the earliest possible time and being given a fair and reasonable opportunity to present his or her case.

96. The requirement of service of the Petition is couched in mandatory terms as it adopts the word **"shall"**. Service is therefore a prerequisite and is not done at the option or whims of a petitioner. In this case, fifteen (15) days of filing of the Petition herein had elapsed and there was no proof whatsoever, whether the Petitioner served the 1st Respondent directly or by way of an advertisement in a newspaper of national circulation, the two (2) modes permitted under Rule10 of the Petition Rules.

97. Appreciably, whereas the filing of an affidavit of service evidencing proof of court process is not specifically provided for in the Act and Petition Rules in the manner it has been provided for in Order 5 Rule 15 of the Civil Procedure Rules, 2010, common sense dictates that every service ought to be followed by filing of an affidavit of service. A party who serves another and fails to prove service by filing an affidavit of services puts himself in a precarious position in the event service of court process is challenged as has happened in this case.

98. In the case of **Omar Shallo vs Jubilee Party of Kenya &Another [2017] eKLR**, the court therein held as follows:-

"Rule 8 requires that service be made in person where it is practicable unless the defendant has empowered an agent to accept service on his behalf….Further, in line with Rules 13 and 15 a person who has been served is required to sign acknowledgment of service on the original summons, and an Affidavit of Service must be consequently filed as proof that service has been effected. The Affidavit of Service should show the time when and the manner in which summons was served and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of summons."

99. In the case of **Patrick Ngeta KimanzivsMarcus Mutua Muluvi & 2 Others** (Supra), the court therein rendered itself as follows:-

"Although the regime of service of election petitions has been liberalised. The requirement of service was not dispensed with. Service of the petition is still a requirement under the Constitution, the Act and the Rules. Without service, the opposite party is denied the opportunity to defend the case. Service is an integral element of the fundamental right to a fair hearing which

is underpinned by the wellworn rules of natural justice.As a component of due process, it is important that a party has reasonable opportunity to know the basis of allegations against him. Elementary justice demands that a person be given full information on the case against him and given reasonable opportunity to present a response."

100. In the case of **Evans Nyambaso Zedekiah &Another v Independent Electoral and Boundaries Commission & 2 Others**(Supra), Sitati Jstated as follows:-

"There is therefore no doubt that the law requires petitions to be served upon the respondents and in this regard I agree with the holding by learned Judges in the cases referred to herein that service of the petition upon a respondent is not a matter of choice by the petitioner. It is a mandatory step that must be taken by the petitioner as a prerequisite for a fair hearing of the petition…Knowledge or no knowledge of the existence of the petition without service as envisaged under both the Constitution and the Act means that the petitioners herein did not and have not discharged their obligation of effecting service upon the 3rd Respondent. They cannot run away from their obligation by saying that the 3rd Respondent was aware of the existence of the petition."

101. The importance of service was confirmed by the Supreme Court of Kenya inthe case of**Raila Odinga & 5 others v IEBC & Others [2013] eKLR**when it said as follows:-

"...Our attention has repeatedly been drawn to the provisions of Article 159 (2) (d) of the Constitution which obliges a court of law to administer justice without undue regard to procedural technicalities. …As we have shown, service of the Petition upon the respondents was a fundamental step in the electoral process and resolution of disputes arising therefrom. Failure to serve the petition upon the respondents went into the root of the petition and the petition could not stand when there was failure to serve the same.

102. In view of the aforesaid, this court came to the firm conclusion that the Petitioner failed to adhere to a mandatory provision of the law as relating to notifying the 1st Respondent of the existence of the Petition herein and sent her on a wild goose chase. This omission was also not a procedural technicality that could be cured or excused by Article 159 (2)(d) of the Constitution of Kenya.

103. Consequently, having had due regard to the affidavit evidence that was adduced by the 1st Respondent which was not rebutted and/or controverted by the Petitioner herein, this court found and held that the non-compliance with Section 77 of the Act and Rule 10 (1) of the Petition Rules by the Petitioner rendered any proceedings herein incompetent and could not proceed.It was irrespective that the 1st Respondent filed her Answer to Petition.

104. Having considered all the submissions and the case law that was relied upon by the parties herein, this court found that the 1st Respondent's Notice of Motion application was merited and was successful.

V. COSTS

105. This court called upon the parties to submit on the issue of costs in the event the Petition herein was struck out. The 1st Respondent's counsel submitted that Kshs 8,000,000/= was reasonable costs. The 2nd and 3rd Respondents also submitted that Kshs 8,000,000/= would be adequate for their costs. However, the Petitioner argued that the costs ought not to be more than Kshs 500,000/=.

106. Section 84 of the Act provides that:-

“An election court shall award the costs of and incidental to a petition and such costs shall follow the cause.”

107. Rule 30 (1) of the Petition Rules stipulates as follows:-

“1. The election court may at the conclusion of a petition, make an order specifying-

a. the total amount of costs;

b. the maximum amount of costs payable;

c. the person who shall pay the costs under paragraph (a) or (b); and

d. the person to whom costs under paragraphs (a) and (b) shall be paid.”

108. As can be seen hereinabove, this court can cap the costs that should be awarded herein. A careful perusal of the pleadings indicates that save for the fact that failure by the Petitioner to deposit security for costs and to serve the 1st Respondent, the Respondents had prepared all their evidence in readiness for the Trial.

109. The Petitioner was calling seven (7) witnesses to testify in support of his case. Their Affidavits had been filed in the Petition. The 1st Respondent had prepared Affidavits for eight (8) witnesses. Their Affidavits had been annexed to her Answer to Petition dated 19th September 2017 and filed on 20th September 2017. The 2nd and 3rd Respondents’ Answer to the Petition was also dated 19th September 2017 and filed on 20th September 2017. The 2nd Respondent was their only witness. Their Affidavits and copies of Form 35As for Taveta Constituency were attached to their Answer to Petition.

110. Bearing in mind the preparations that the Respondents had done in readiness for the trial, it was the view of this court that costs in the sum of upto Kshs 1,500,000/= for the 1st Respondent and a further sum capped at Kshs 1,500,000/= for the 2nd and 3rd Respondentwould be reasonable to costs.

CONCLUSION

111. Appreciably, Article 159(2)(d) of the Constitution of Kenya mandates courts to administer justice without undue regard to procedural technicalities. It is also trite law the court has discretion which is unfettered and aimed at curing excusable mistake or error by a party to avoid injustice or hardship.

112. In the case of **Shah v Mbogo [1967] EA 116** at 123B, the court said that:-

“This discretion is intended to so to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.”

113. Having said so, the omissions by the Petitioner in this matter were not of the nature that could be excused as having been procedural technicalities, inadvertence, excusable mistake or error. They were fundamental flaws as he failed and/or neglected to comply with the mandatory provisions of the law. His conduct made it seem as though he was not fully decided whether he wanted to proceed with the Petition herein or not. The bottom line was that the Petitioner’s non-compliance of the prerequisites before this matter proceeded to trial rendered the entire Petition incompetent and defective.

DISPOSITION

114. For the foregoing reasons, the upshot of this court's Ruling was that the 1st Respondent's Notice of Motion application dated 30th October 2017 and filed on 1st November 2017 and the 2nd and 3rd Respondent's Notice of Motion application dated 13th October 2017 and filed on 17th October 2017 were both merited and the same are hereby allowed as prayed.

115. The resultant effect of allowing the two (2) Notice of Motion applications rendered the Petitioner's Petition dated and filed on 7th September 2017 incompetent and the same is hereby struck out.

116. The 1st, 2nd and 3rd Respondents shall have the costs of their respective Notice of Motion applications and the costs of the Petition which are hereby capped at Kshs 1,500,000/= for the 1st Respondent and a further sum capped at Kshs 1,500,000/= for the 2nd and 3rd Respondents. For the avoidance of doubt, the costs of the two (2) applications are included in the capped amounts of Kshs 1,500,000/= as aforesaid.

117. It is so ordered.

DATED and **DELIVERED** at **VOI** this **16th** day of **November** 2017

J. KAMAU

JUDGE