Case Number:	Election Petition 1 of 2017
Date Delivered:	31 Oct 2017
Case Class:	Civil
Court:	Election Petition in Magistrate Courts
Case Action:	Ruling
Judge:	M L Nabibya (SRM)
Citation:	James Shairo Shimanyiro v Independent Electoral & Boundaries Commission & 2 others [2017] eKLR
Advocates:	Miss Kyamazima; for the 3rd Respondent and who is also holding brief for Mr. Wesonga for the 1st and 2nd respondents.
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Vihiga
Docket Number:	-
History Docket Number:	-
Case Outcome:	Application dismissed.
History County:	-
Representation By Advocates:	One party or some parties represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE SENIOR RESIDENT MAGISTRATE'S COURT AT HAMISI

ELECTION PETITION NUMBER 1 OF 2017

JAMES SHAIRO SHIMANYIRO.....PETITIONER

VERSUS

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION.....1ST RESPONDENT

THOMAS NGETICH.....2ND RESPONDENT

OBAMO ERICK ODEI.....3RD RESPONDENT

RULING

Introduction.

General elections were held in our great country of Kenya on the 8/8/17 and amongst the contested positions were that of Member of County Assemblies. The petitioner and third responded participated in the said elections in Gisambai Ward of the Hamisi Constituency within Vihiga County. The same was presided over by the 1st and 2nd respondents whose roles were to conduct and declare the election results respectively. On the 10/8/17, results were declared by 2nd responded with 3rd respondent being the winner (elected Member of Gisambai County Assembly). The petitioner being aggrieved with that decision filed a petition in this court on the 24/8/17 challenging the declaration.

It is on the basis of the filed petition that the 3rd respondent, in his response filed in court on the 28/9/17 wherein, raised a notice for a Preliminary Objection (PO) to the petition.

During the pretrial conference held on the 6/10/17, the court ordered that the PO be filed and on the 9/10/17, the same was indeed filed raising two issues as hereunder;

1.) THAT the petition is rendered fatally defective by reason of the petition having failed to serve the 3rd respondent directly or by advertisement published in a newspaper of national circulation contrary to the provisions of the Kenya Constitution 2010, the Elections Act and the Elections (Parliamentary & County Elections) Rules 2017.

2.) THAT the petition is rendered fatal and or a nullity by failure of the petitioner to serve the petition upon the respondents within the time stipulated by the provisions of the Kenya Constitution 2010, the Elections Act and the Elections (Parliamentary & County Elections) Rules 2017.

The PO was argued in court and parties filed submissions in support for and in favor of their positions save for the 1st and 2nd respondents whose counsel Mr. Wesonga, in support of the PO, filed a list of authorities. No authorities were filed in favor of the petitioner.

3rd Respondent's submissions.

Miss Kyamazima, Counsel for the 3rd respondent submitted that the petition was fatally defective for failure by the petitioner to serve the same directly or through an advertisement in newspaper with national circulation which contradicted provisions of the Constitution at its article 87(3), the Election Act and the Elections (Parliamentary& County Elections) rules 2017. Further that service was contrary to the provisions of rule 10 requiring service within 15 days from date of filing.

She added that service was on the 14/9/17 which was contrary with the strict wording of the statutes and rules. Among the cases relied on were the following;

a) Mwai Kibaki vs. Daniel Arap Moi, HCC election Petition Number 1 of 1998

In which the court then in interpreting section 20(1) a of the National Assembly and Presidential elections Act, Cap 7 and the election petition rule 14 (now repealed) on failure to personally serve the respondent, it went ahead to declare that service of the petition was a nullity since personal service was not effected as provided for under the provisions of section 20(1) (a) and rule 14(1). Failure to effect personal service was a fundamental flaw and not a mere irregularity.

The said Act's and rules specific provisions were as follows;

Section 20(1);

'A petition …. to question the validity of an election. Shall be presented and served within twenty eight days after the date of the publication of the results of the election in the Kenya gazette. '

Rule 14 of the then petition rules provides as follows;

14(1) notice of the presentation of a petition, accompanied by a copy of the petition shall, within ten days of presentation of the petition be served by the petitioner on the respondent.

2) Service may be effected either by delivering the notice and a copy to the advocates appointed by the respondent….or by posting them by registered letter…or if no advocate has been appointed or no such address has been given, by notice published in the Kenya gazette. The court proceeded to hold that;

b) Clement Kungu Waibara & Henrey Njenga Mbote v Hon Francis Kigo and 3 others Nairobi HCC Election Petition no. 15 of 2013

In this case, Justice R. M. Mwongo held that the court had no power under the Elections Act to review its decision, and further, that the review of the provisions of the Civil procedure Act and Rules are not imported into to comprehensive, substantive and procedural electoral law regime.

c) Bett v IEBC and 2 others (No. 2) (petition number 1 of 2013),

Where the court held that failure to effect personal service within the prescribed 28 days was fatal and that if the petitioner was not in a position to effect personal service then he would have gone ahead to apply for an alternative mode or substituted service, for instance through advertisement in the media, both print and electronic.

The court further said that service was a legal process and not a mere technicality and that service through a caretaker was no service.

The 3rd responded urged the court to declare the entire petition a nullity for violation of the provisions with respect to service.

Petitioner's submissions

The submissions by Counsel Wekesa on behalf of the petitioner were that the 3rd respondent failed to show the documentary evidence of the mode of service besides failing to demonstrate any prejudice that will be suffered in the event that the PO is not allowed. He also told court that costs would be sufficient to mitigate any loss on the part of 3rd respondent.

The court was invited to look at rule 4 and 20 of the Elections (Parliamentary and County Elections) rules 2017 (herein after referred to as the rules). Article 159(2) of the Constitution was also said to be applicable as the call to dismiss the PO was reiterated.

1st and 2nd Respondents submissions.

The PO was supported by the oral submissions together with filed authorities by the 1st and 2nd respondents through their advocate Mr. Wesonga who reiterated that provision of Article 87 constitution on service of petitions, section 76(1) of the elections Act were violated since the petition was served through an agent and after the lapse of 15 days, actually, it was 6 days after the statutory time which went to the root of the petition. That such was not a technicality as per article 159(2) of the Constitution or rule 4 of the Elections Rules 2017.

Counsel for the 1st and 2nd respondents further submitted that the extension of time can be done through rule 19 but Constitutional and statute timelines cannot be extended even in application of the supremacy rules as provided for under the Judicature Act at its section 3, since subsidiary rules are inferior to the main statutes.

The court was invited to look at the cases of;

a) Rozaah Akinyi Buyu v IEBC and 2 others, (2014) eKLR where

b) Charlse Kamuren v Grace Jelagat Kipchoim and 2 others (2013) eKLR

c) Evans Nyambaso Zedekiah & another v IEBC and 2 others (2013)eKLR

In the cases, the courts held that service was key since it went down to the root of the petitions; it wasn't an issue of procedure to be cured by the provisions of Article 159(2) of the Constitution.

Determination.

The definition of a P O was well set out in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors ltd** (**1969) EA 696** where the court held as follows;

"So far as I'm aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit."

This was followed up by the judgment of **Sir Charles Newbold** in the same case who observed that:

"The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary Objection. A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop"

This court must now consider whether the issues raised in this Preliminary Objection are matters of fact or law. I have considered the reasons by the 3rd respondent in his Preliminary Objection as pleaded and submitted in court and noted that the issue of service as provided for under the Constitution at article 87(3), the Elections Act section 76(1) and the Rules are the points of reference. The response by the petitioner also relied on provisions of the Constitution, article 159 which are issues of law only. I will therefore entertain the PO.

Courts would not ordinarily entertain preliminary objections if they are not founded or don't argue issues of law only. This was the decision in **National Bank of Kenya Limited vs Peter Kipkoech Korat and another (2005)** eKLR where **Gacheche J**. had detailed:

"Mr Kuloba, learned Counsel for the bank was however of the view that the Preliminary Objection is not sustainable, as the issues of conflict of interest cannot be raised by way of a Preliminary Objection. I am inclined to agree with him as the legal position regarding Preliminary Objection was well laid down in the case of Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors (1969) EA 696, in which Law JA, stated that *'…a Preliminary objection consists of a point of law argued as a preliminary point may dispose of the suit….'* It is clear to me that the issue raised by the defendants pertaining to representation of these parties, would require evidence and in which case they cannot be entertained by way of Preliminary Objection as relations cannot be inferred and on that ground alone, this objection cannot be sustained."

Having been satisfied that the raised PO is on matters of law, I have gone ahead to consider submissions and framed the following issues as those to be considered;

a) Whether or not the petition is incompetent for non compliance with the provisions of the Constitution, section 76(1) of the elections act and rule 10 (1) (a) (b) of the rules.

b) Whether the court has power to extend time within which an election petition can be served or validate service effected out of time.

c) Whether civil procedure Rules would mitigate the situation.

d) Consequent to (b) above, whether the failure to effect service of the petition within the prescribed time and means renders petition fatally defective.

a) Whether the petition was not served as per the provisions of article 87 (3) Constitution, section 76(1) of the Elections Act and rule 10(1) (a) (b) of the Rules.

The 3rd respondent alluded to the fact that the petition though filed on the 24/8/17, was served on the 14/9/17, being more than 15 days as required by the provisions of section 76(1) of the Elections Act. With rule 10 providing for personal service or through a newspaper with national circulation, petitioner admitted that service was after the statutory period of 15 days and invited the respondents to prove the

mode of service used. However my feeling is that it was upon the petitioner to prove that there was compliance with the provisions of article 87(3) of the Constitution, section 76(1) Elections Act and rule 10(1) (a) and (b) and not for the respondents to prove that service was personal or through a newspaper of national circulation. For this, the petitioner failed to establish the mode of service adopted. The petitioner also failed to give an explanation as to why service was late and not according to the legally provided for methods.

In Kagunyi v Gathua & Anor, Civil Appeal No. 6 of 2004, the court held that;

“.... Election petitions are of such importance to the parties concerned and to the general public that unless parliament has itself specifically dispensed with the need for personal service, then the courts must insist on such service. The other modes of service are only alternative to personal service....”

Also, the High Court in **Ayub J. Mwakesi v Mwakwere Chirau Ali & 2 others (2008) eKLR** said that if the petition is not properly served upon all the respondents named, then the entire petition will be rendered incompetent. The words ‘not properly served’ to me refers to failure to go by the relevant laws as appertain service.

In **Abu Chiaba Mohamed v Mohamed Bwana Bakari Civil Appeal No. 238 of 2003 (ur)** the court explained its stand in **Kibaki v Moi** when it gave a description of what personal service was through Omolo, J.A. who rendered the majority opinion as follows;

“**the decision clearly recognized that if personal service which is the best form of service in all areas of litigation is not possible, other forms may be resorted to. Otherwise why would the court have expected to be given reason or reasons why personal service was not effected" Why would the High Court and this Court have expected that some attempt at personal service be tried on the President and be shown to have been repelled""**

Across borders, the supreme court of India said as follows in the case of **Tyota Basu & others v Debi Ghosal& others 26th February, 1982** where it held:-

“.....An Election petition is not an action at Common Law, nor, in equity. It is a statutory proceedings to which neither the Common Law nor the principles of Equity apply but only those rules which the statute makes and applies. It is a special jurisdiction, and a special jurisdiction has always to be exercised in accordance with the statutory (sic) creating it. Concepts familiar to Common Law and Equity must remain strangers to Election Law unless statutorily embodied. A Court has no right to resort to them on considerations of alleged policy because policy in such matters as those, relating to the trial of election disputes, is what the statute lays down. In the trial of election disputes, Court is put in a straight jacket. Thus the entire election process commencing from the issuance of the notification calling upon a constituency to elect a member or members right up to the final resolution of the dispute, if any, concerning the election is regulated by the Representation of the People Act, 1951, different stages of the process being dealt with by different provisions of the Act. There can be no election to Parliament or the State Legislature except as provided by the Representation of the People Act 1951 and again, no such election may be questioned except in the manner provided by the Representation of the People Act. So the Representation of the People Act has been held to be a complete and self contained code within which must be found any rights claimed in relation to an election or an election dispute.”

Clearly, Kenya and other countries have therefore interpreted electoral laws strictly and within the corners and confines of the same due to its special jurisdiction created by the constitution and statues and civil process, common law and doctrines of equity are not applicable to the same. The relevant laws as correctly referred to by parties are;

Article 87(3) of the constitution provides as follows;

'Service of a petition may be direct or by advertisement in a newspaper with National circulation'

Section 76 of the elections Act provides for Presentation of petitions.

(1) A petition—

(a) to question the validity of an election shall be filed within twenty eight days after the date of declaration of the results of the election and served within fifteen days of presentation;

Rule 10(1) a and b provides;

10. (1) Within seven days after the filing of a petition, the Petitioner shall serve the petition on the respondent by -

(a) Direct service; or

(b) An advertisement that is published in a newspaper of national circulation.

The petitioner stated that the 3rd respondent was aware and confirmed service for the 14/9/17; however this was not sufficient to explain why the service was not personally done or published on a newspaper with national circulation which was the alternative. There was no explanation why service (if any) had to be done after the statutory provided timelines to an extend that there was a 7 day delay.

The Elections Act and the Rules have made it very clear and easy to ensure that the Petition is served on time by providing an alternative mode of service which is advertisement. All the petitioner needed to do was effect service by making a publication in a newspaper of national circulation if was presumed that direct service would involve challenges. While the Petitioner was required to effect service, the law is liberal so that there is no requirement that an attempt to effect personal service before opting to serve by way of advertisement be made. The Petitioner's failure to use either of the available options and going ahead to effect late service through ways not described or prescribed by law was illegal.

b) Whether the court has powers to extend time

Under this head, I have discussed various issues which include but not limited to extension of time of service.

In the petitioner's submissions the urged court was urged to consider the provisions of rule 20, and validate the process, though I think he meant the now rule 19 which provide as follows;

19. (1) where any act or omission is to be done within such time as may be prescribed in these Rules or ordered by an elections court, the election court may, for the purposes of ensuring that 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 or ordered

by the Court may have expired.

On the other hand, **Rule 4. (1)** provides that the objective of these Rules is to facilitate the just, Expeditious, proportionate and affordable resolution of elections petitions.

On this, the court in the case of **Clement Kiringu Wambalia v Kigo Njenga & 4 others** held that;

"the time for the service of an election petition is a timeframe provided for not by the rules or by an order of the court, but by the express provisions of that statute. The same position was restated in the case of* Josiah Taraiya Kipelian Ole Kores v Dr.David Ole Nkedienye *& 3 Others* High Court of Kenya Nairobi Petition No.6 Of 2013** that, ***Rule 20 is very clear that time is to be extended where such time has been limited by the Rules or by the court. Such extension does not extend to instances where the time is limited by the substantive Act or the Constitution."

Thus, where time is limited by the statute, as is it in this case, it follows that **Rule 20 (now rule 19 of the 2017 rules)** would not be applicable to seek extension contrary to what is prescribed and the Petitioner's argument on this issue fails.

Section 76(1) of the Elections Act is specifically couched in mandatory terms, and nowhere in the succeeding provisions does it give the Court powers to extend the period prescribed in the statute. It is therefore clear on the face of the provision that the intention was to have the time of service which impacts on other ensuing processes limited in view of the strict timelines provided for in the Constitution and the Elections Act for disposing of election petitions. The objective of the enactment of specialized electoral laws and rules of procedure is as captured in **Article 87** of the **Constitution (supra)** and **rule 4.**

The petitioner's argument that article 159(2) of the Constitution will mitigate the issue of late service also fails on the grounds that failure to effect service in election petitions is not a procedural technicality issue since it touches on the petition itself. The article provides as follows;

Article 159:

"(1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles

(a) justice shall be done to all, irrespective of status;

(b) justice shall not be delayed;

(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause

(d) justice shall be administered without undue regard to procedural technicalities; and

(e) the purpose and principles of this Constitution shall be protected and promoted."

In support of the fact that service goes to the root of the petition, the court in **Kumbatha Naomi Cidi v**

The County Returning Officer, Kilifi & 3 Others, High Court at Malindi, Election Petition No. 13 of 2013 held that;

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

Therefore the argument that the court should have no undue regard to procedural technicalities finds no place in the matter herein.

In **Onalo v Ludeki & others (2008) 2 KLR 508,** the petitioner challenged the election of the 2nd Respondent which had been gazette on 3rd January, 2003. Therefore by dint of the relevant provisions he was required to present his petition and serve it within 28 days of publication of the result in the gazette. The petition was presented on 9th January, 2003. The respondents made applications asking the court to strike out the petition on various grounds including that they had not been served with it in the manner required or within the time prescribed by law. The court in striking out the petition held that the petition not having been personally served upon the 2nd respondent within the time prescribed by law was incurably defective and would be struck out. It went ahead to say that the whole substratum of the petition had been washed away and the petition against the 1st and 3rd respondent would also be struck out.

Again, in the case of **Charlse Kamuren v Grace Jelagat Kipchoim and 2 others (2013) eKLR,** it was held that rule 20 of the rules(now rule 19) is not a mandatory but rather an optional measure and it does not take away the duty of the Petitioner to ensure service of court process. A petitioner cannot transfer the obligation to serve to the respondent. Further, the learned judge addressed the issue of late service as follows;

"While in this case service was affected out of time, the Court, as already reasoned above, has no jurisdiction to extend the period for service, or as matter-of-factly pleaded by the Petitioner to validate the service that was done out of time. In the result therefore, the status is as if there was no service at all.

Service is a matter so core to the court process at hand that a cause of action will not stand without it. I must read the provisions of Article 159 wholesomely and that includes the duty to ensure that "the purpose and principles of this Constitution shall be protected and promoted", including the duty to uphold the purpose of timely resolution of electoral disputes. The direction to not have undue regard to procedural technicalities does not erase the obligation to uphold procedural technicalities. Regard must therefore be had to timelines defined by the Elections Act and the Rules".

I consequently agree with the 1st and 2nd respondent's submissions in the case of **Rozaah Akinyi Buyu v Independent Electoral and Boundaries Commission & 2 others [2014] eKLR** where the court reiterated the position that, service of the Petition upon the respondents was a fundamental step in the electoral process and resolution of disputes arising there from. 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. This happened after the court of appeal was faced with a cross appeal from the 3rd responded who claimed not being served through the statutory provided means.

In the final analysis, whether under the old or the new electoral regime, the petition must not only be

served upon the respondent(s) through the legally provided for means but it must be served within the stipulated time frame so that such a respondent has an opportunity to prepare his/her defense without the possibility of an ambush, (see **Kumbatha Naomi Cidi –vs- County Returning Officer Kilifi & others – Malindi EP No.13 of 2013** and **Mohamed Odha Mao –vs- The County Returning Officer, Tana River** Where Githua J held that **"failure to serve a petition is a matter that goes to the very core of the proper and just determination of the petition and cannot be wished away."**

There is no doubt the law require petitions to be served upon respondents and within the prescribed time. Service is a mandatory step that must be taken by the petitioner as a prerequisite for a fair hearing of the petition as provided under the Bill of Rights and in particular **Article 50 (c)** which provides that every person has the right to **"have adequate time and facilities to prepare a defence**".

This means is that where a petition is said to have been served, as claimed in this case, and which mode of service is not clear, one cannot conclude that personal or advertisement in the newspapers of national circulation was the method used in effecting the said service. The 3rd respondent denied service and with no contrary evidence, the respondent can be said to have been denied opportunity and adequate time to prepare for his their defence.

I am also aware that the purpose of service is to simply inform interested parties of existence of proceedings and recently, courts have held that alternative modes of service could be considered and admitted but with caution. A case in point is that of **Chama Cha Mashinani & 2 others versus Beatrice Chebomoi (Nrb Election Petition No. 44 of 2017).** The court ruled so after being confronted with arguments that the respondent was timely served through the social network called 'WhatsApp'. The said mode was described and found that the respondent received the papers but chose not to respond, however, in the current scenario, the Constitutional and Election laws and Rules have not been complied with, with petitioner failing to confirm or prove that service was in fact done through any named process and/ or authorized agents (as per Rule 2).

On service through an agent, in the case of **Paul Osore Ogutu v Michael Manyara Aringo & 2 others, Busia EP no. 1 of 2013 (2013**) eKLR, Tuiyott J, held that a party who chooses to serve court processes on agent of an adversary carries the burden of proving that the person served is indeed an agent of the adversary and its authorized to receive court processes. The converse of this is also true that if a service is effected through an agent, it must be proved that the process server/agent was authorized to serve the process and that indeed, service was properly done.

The petitioner failed to adduce evidence to the effect that 3rd respondent was 'aware' of existence of the petition for this court to rule out that service out of time indeed took place and even if it was so, the petitioner could not run away from their obligation by saying that the 3rd Respondent was aware of the existence of the petition.

Generally and as noted above with support of the various case laws it is clear that this court has no jurisdiction to extend time with respect to service as the legal provisions on the same are mandatory, service is not just a procedural technicality.

c) Whether Civil Procedure Rules would mitigate the situation.

As argued by the 3rd respondent while relying on the case of **Clement Kungu Waibara & Henrey Njenga Mbote v Hon Francis Kigo and 3 others(supra)** where Justice R. M. Mwongo held that the court had no power under the Elections Act to review its decision, and further, that the review of the provisions of the Civil procedure Act and Rules are not imported into to comprehensive, substantive and

procedural electoral law regime, the position has been adopted in **Aluodho Florence Akinyi v IEBC & 2 Others Siaya Election petition No 4 of 2017** where **Majanja J**, in referring to the case of **Rozaah Buyu (supra)** in which the trial judge held that the 2nd and 3rd respondent in the matter had not been served personally or through advertisement but went ahead to examine the process of service under the Civil Procedure Rules and held that although service was bad in law, it did not go to the root of the petition and could be waived as an irregularity which could not nullify the petition.

However, the court of appeal reiterated the position that the trial judge could not have recourse to the Civil Procedure Rules as these were not applicable to election petitions as election petitioners were governed by a complete code of rules. These rules, the court held, are to be construed strictly.

From the above findings, it's clear that the provisions of Civil Procedure Rules on service are not applicable in election petitions.

d) Whether the failure to effect service of the petition in the prescribed methods and period renders petition fatally defective.

While reiterating the findings in the case of **Charlse Kamuren v Grace Jelagat Kipchoim and 2 others (supra),** I conclude that the petitioner filed the petition in a timely manner however failed to comply with law on the procedure and time within which the same was to be served upon the 3rd responded. This violated the provisions of article 87(3) of the Constitution, section 76(1) of the Elections Act and rule 10 of the Elections (parliamentary and county) Rules hence making the petition a nullity. The petition has become one that never was.

In the case of **Evans Nyambaso Zedekiah & another v Independent Electoral and Boundaries Commission & 2 others [2013] eKLR** the court cautioned that striking out pleadings must be a measure of last resort since the consequences are dire. In another case of **DT Dobie & Company (Kenya) Ltd –vs- Muchina [1982] KLR1**, Madan JA held at holdings 3 and 9 as follows:-

" 3 … As the power to strike out pleadings is exercised without the court being fully informed on the merits of the case through discovery and oral evidence, it should be used sparingly and cautiously.

9….The court should aim at sustaining rather than terminating a suit. A suit should only be struck out if it is so weak that it is beyond redemption and incurable by amendment. As long as a suit can be injected with life by amendment, it should not be struck out."

Equally in ***Daniel Kipkemoi Bett & 7 Others v Margaret Wanjiku Chege Civil Appeal (Application) No. 81 0f 2010*** the court, adopted the words of the Court of Appeal in the case of ***Deepak Chamanlal Kamani & Another vs. Kenya Anti-Corruption Commission & 3 Others, Civil Appeal (Application) No. 152 of 2009 (unreported)*** in discussing the consequences of striking out pleadings that:

"So that as Lord Woolf says in the BIGGUZZI Case the initial approach of the courts now must not be to automatically strike out a pleading but to first examine whether the striking out will be in conformity with the overriding objectives set out in the legislation. If a way or ways alternative to a striking out are available, the courts must consider those alternatives and see if they are more consonant with the overriding objective than a striking out."

While the above principles apply to matters of an ordinary civil nature, the instant application to strike out is anchored on a fundamental right of the 3rd Respondent to be served through a process and within the

stipulated time in accordance with the mandatory provisions of the law. The wording of **article 87(3)** of the Constitution and **section 76 (1)** of the **Elections Act** are mandatory and in my view this court has to look no further than those provisions in deciding whether or not to strike out the petition herein. In any event, the courts have acknowledged that election petitions are no ordinary suits. **"Though they are disputes in rem fought between certain parties, election petitions are nonetheless disputes of great public importance – Kibaki –vs- Moi, Civil Appeal No.172 of 1999**. And 'that election petitions should not be taken lightly' **-Wanguhu Ng'ang'a & another –vs- George Owiti & Another, Election petition No.41 of 1993.**

A petitioner must comply with and observe all the laws and regulations and rules governing the filing and service of petitions. Whereas the provisions of **Article 159 (2) (d)** of the **Constitution** which provide that courts shall ensure **"Justice shall be administered without undue regard to procedural technicalities."** As stated elsewhere in this ruling, failure to comply with the law on service goes to the root of the entire petition for it would deny 3rd respondent right to a fair hearing by being denied sufficient time to prepare his defense.

Considering all the circumstances in this case, and although the 3rd respondent filed a response out of the stipulated time wherein he raised a notice for this PO, and all relevant matters when put together leads this court in concluding that petitioner failed in complying with the substantive laws. In **Chelaite –vs- Njuki & others (No.3) [2008] 2 KLR 209**, a case that was applied by Majanja J in **Patrick Ngeta Kimanzi,** Pall JA was of the considered view that –

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

Conclusion.

I therefore find no alternative available in law other than allowing the PO by the 3rd respondent which has the effect of striking of the petition. The Petition dated 22nd August 2017 is therefore and hereby struck out with costs to the Respondents.

M L Nabibya,

SRM,

Hamisi Law Courts.

31/10/17

Ruling Signed, Dated and Delivered in open court this 31st Day of October 2017 in the presence of;

1) Miss Kyamazima; for the 3rd Respondent and who is also holding brief for Mr. Wesonga for the 1st and 2nd respondents.

2) Kiplagat; Court Assistant.

Mr. Wekesa for the petitioner is absent although he was duly notified of today's date.

M L Nabibya,

SRM,

Hamisi Law Courts.

31/10/17