



Case Number:	Election Petition 4 & 9 of 2013
Date Delivered:	18 Jun 2013
Case Class:	Civil
Court:	High Court at Mombasa
Case Action:	Ruling
Judge:	George Vincent Odunga
Citation:	Gideon Mwangangi Wambua v Independent Electoral and Boundaries Commission & 2 others [2013] eKLR
Advocates:	Mr. S.M. Kimani instructed by Stephen Macharia Kimani Advocate for the Petitioner in Petition No. 4 of 2013. Mr. Asige instructed by Asige Keverenge & Anyanzwa Advocates for the Petitioner in Petition No. 9 of 2013. Mr. Abed instructed by Balala & Abed Advocates for the 2nd Respondent. Ms. Kanabar for Mr. Khagram instructed by A B Patel & Patel for the 1st and 3rd Respondents.
Case Summary:	<i><b>Election Law</b> – election petition – striking out of election petitions – where the election for the position of Member of National Assembly of Lunga Lunga Constituency was contested for having been conducted contrary to the provisions of the Constitution of Kenya 2010 and the Election Laws – where it was submitted that a publication of the name of the person who won an election in the Kenya Gazette did not amount to publication of the results of the election-where the applicant wanted the petition struck out on basis of alleged failure to gazette election results– Elections Act 2011 section 76– Constitution of Kenya 2010 articles 159</i>
Court Division:	Constitutional and Human Rights
History Magistrates:	-
County:	Mombasa

Docket Number:	-
History Docket Number:	-
Case Outcome:	Dismissed
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA DISTRICT REGISTRY**

**THE ELECTIONS ACT, 2011**

**ELECTION PETITION NUMBER 4 OF 2013**

**BETWEEN**

**GIDEON MWANGANGI WAMBUA .....PETITIONER**

**VERSUS**

**1. INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION.....1<sup>ST</sup> RESPONDENT**

**2. KHATIB ABDALLA MWASHETANI..... 2<sup>ND</sup> RESPONDENT**

**3. JUMA MUSA (RETURNING OFFICER**

**LUNGA LUNGA CONSTITUENCY) .....3<sup>RD</sup> RESPONDENT**

**CONSOLIDATED WITH**

**ELECTION PETITION CAUSE NO. 9 OF 2013.**

**BETWEEN**

**HASSAN NJANYE CHARO.....PETITIONER**

**VERSUS**

**1. INDEPENDENT ELECTORAL AND BOUNDARIES**

**COMMISSION.....1<sup>ST</sup> RESPONDENT**

**2. JUMA MUSA.....2<sup>ND</sup> RESPONDENT**

3. **KHATIB ABDALLA MWASHETANI.....3<sup>RD</sup> RESPONDENT**

**RULING**

**INTRODUCTION**

1. On 23<sup>rd</sup> May 2013, I delivered a ruling in respect of the Chamber Summons dated 10<sup>th</sup> May 2013 (hereinafter referred to as the Chamber Summons) in this petition and petition number 9 of 2013 in which while dismissing an application for striking out both petitions, I *inter alia* directed the Hon. Attorney General to initiate the process of legislative amendment to the *Elections Act, 2011* with a view to providing a reasonable timeline within which the gazetting of results under section 76(1)(a) of the Act is to be undertaken by the Independent Electoral and Boundaries Commission. I further held that if such amendment is not undertaken within 60 days of the date of the said decision the said section will be deemed to contain a requirement that the said Commission is to gazette the results of the elections under section 76(1)(a) of the *Elections Act* within 7 days of the announcement of the results by the Returning Officer. This ruling arises out of application filed in Mombasa High Court Election Petition Nos. 4 and 9 of 2013.

2. The 2<sup>nd</sup> respondent (hereinafter referred to as the applicant) has now moved this court by way of a Motion on Notice dated 28<sup>th</sup> May 2013 in which he seeks an order that both petitions be struck out and dismissed.

**APPLICANTS' CASE**

3. The grounds upon which the Motion is based are as follows:

1. **That the petitions are prematurely brought.**

2. **That Section 76(1) of the Elections Act provides that the petition to question the validity of an election shall be filed within twenty eight days after the date of the publication of the results of the election in the Gazette.**

3. **That this Honourable Court in its ruling in Election Petition Number 4 of 2013 consolidated with Election petition Number 9 of 2013 delivered on the 23<sup>rd</sup> May, 2013 delivered by his Lordship Odunga J at Paragraph 89 was unable to find Section 76(1) (a) to be unconstitutional.**

4. **That further the Honourable Court in the above mentioned matter at paragraph 97 stated:**

**“...I hereby direct the Attorney General to initiate the process of legislative amendment to the Elections Act 2011 with a view to providing a reasonable timelines within which the Gazettment of results and not just the names of the winners of the Election....”**

5. The Gazette Notice dated 13<sup>th</sup> of March 2013 was not a declaration/publication of the results of the Election as required under Section 76(1) of the Elections Act but rather the said Gazette Notice was a declaration/publication of persons elected as members of the National Assembly thus a declaration as to who the winner was.

6. That the Honourable Judge in the said ruling rightly acknowledged in Paragraph 97 that it is not just the names of the winners of the Election which is to be published/declared in the Gazette, but the results of the Elections.

7. That until now there has not been a declaration/publication of Election results in the Gazette as required by Section 76 (1)(a) of the Election Act.

8. That in view of the foregoing the petitions are thus premature and ought to be struck out and or dismissed with costs.

#### **PETITIONER’S RESPONSE**

4. In opposition to the application the petitioner in Petition No. 4 of 2013 filed the following grounds of opposition:

1. The application is an abuse of the court process, and is otherwise embarrassing, frivolous and vexatious, in so far as it invites the court to revisit a determined issue on the basis of the applicant's interpretation of this court's ruling.

2. The application is aimed at derailing the time-lines for the hearing of this petition in the hope of defeating electoral justice process, to the grave prejudice of the petitioner.

3. The applicant has lodged a notice of appeal, challenging the ruling and order of this court delivered on 23.5.2013, and this application is applicant's *mala fide* attempt at a second bite at the cherry, merely intended to procrastinate these proceedings to the grave prejudice of the petitioner;

4. The law 'as it ought to be', which is the true purport of the order of the court made herein, cannot be used to defeat an existing petition while the amendment to the affected law has not been affected.

5. That the application lacks *bona fides* and should be dismissed peremptorily.

## **APPLICANT'S SUBMISSIONS**

5. In his submissions, the applicant contends that what was declared/published in the Kenya Gazette only amounted to a declaration/publication of the name of the person who won the election and therefore the declaration/publication of the results of the election of the Member of National Assembly for Lunga-Lunga Constituency has not been done to date. It is submitted that the word "shall" as used in section 76(1) of the ***Elections Act*** (hereinafter referred to as the Act) has a mandatory connotation hence it strictly directs a person who alleges electoral grievances to abide to the strict timelines as set out by the said section which is to file a petition twenty eight days after the date of publication of the results of the election in the gazette. As the Gazette notice did not indicate the results of the elections but only the names of the winners of the elections it is submitted based on **Election Petition Number 7 of 2013** and **Election Petition Number 2 of 2008** that the results of the election of the Member of the National Assembly for Lunga Lunga Constituency have not been published/declared in the Kenya Gazette to date hence the petition ought to be struck out or dismissed.

## **PETITIONER IN PETITION NO. 4'S SUBMISSIONS**

6. On behalf of the petitioner in petition no. 4 of 2013, it is submitted that the applicant having sought to appeal against the decision made on 23<sup>rd</sup> May 2013, he cannot rely on some parts of the same ruling to marshal yet another attack on the petition. As this would embarrass the court and vex the petitioner a second time. It is contended that the applicants having argued in the first application that the petition was filed out of time, it is not open for them to now urge the flip side of the original ground, that the petition is premature since he would otherwise be approbating and reprobating in the same breadth. It is submitted that the applicants should not be allowed to breathe hot and cold in the same matter, on the same issue before the same judge.

7. It is submitted that where an aggrieved party has decided to pursue his remedy on appeal to a higher court, he makes a deliberate choice of remedy, and it is an abuse of the court for the same party to pursue the same remedy, or even a different remedy, on the same matter and facts in yet another court when the appeal, the first choice of the remedy, has not been exhausted. To the petitioner, a man should not pursue a remedy on the same matter and facts in more than one court. In support of this submission the petition relies on **Thames Launches vs. Trinity [1961] 1 All ER 26 at 33**; **Saull vs. Browne [1874] 10 Ch. App. 65**; **Stannard vs. St. Giles [1882] 20 Ch.Div 190 at 196**; and **York Corporation vs. Pilkinton [1742] 2 Atk. 302**.

8. In the petitioner's view the application lacks *bona fides* and is otherwise an attempt at a second bite at the cherry and the proper forum to agitate such grievance is to the Court of Appeal. It is the petitioner's opinion that this application is meant to derail the imminent preliminary hearing of the petition and hence defeat the justice process by ensuring that the petition is not completed within the permitted timelines.

9. It is further submitted that without seeking to nullify the impeached gazette notice, this application cannot stand hence the application should be dismissed with costs to be paid by the applicant before the hearing of the petition.

### **PETITIONER IN PETITION NO. 9'S SUBMISSIONS**

10. On behalf of the petitioner in petition no. 9, it is submitted that since the principal and only complaint in the present application was the subject of the Chamber Summons hence it is not open to the 3<sup>rd</sup> respondent to re-litigate over the same issue or complaint in the present motion. To do so, it is contended amounts to an abuse of the court process.

11. It is submitted that the present motion is inviting the court to review or sit in appeal against the earlier ruling which the court cannot do. Since the issues raised herein are the issues which are the subject of the intended appeal to the Court of Appeal, it is submitted that it is an abuse of the process of the court to engage both this court and the Court of Appeal over the same issue at the same time.

12. In the petitioner's view, to argue that the results have not been published would mean that the National Assembly as currently constituted is illegal and to uphold the application would lead to an absurdity and ultimate chaos and anarchy in the country.

13. It is submitted that since under Rule 4 of the **Elections (Parliamentary and County Elections) Rules**, the court is required in the exercise of its powers under the Constitution and the Act or in the interpretation of any of the provisions of the rules to seek to facilitate just, expeditious, proportionate and affordable resolution of election petitions under the Constitution and the Act, proceedings that tend to derail, disrupt and delay the resolution of electoral disputes should be frowned upon and as this Motion defeats the overriding objective, it should be dismissed with costs.

### **DETERMINATIONS**

14. As indicated at the beginning of this ruling, the applicant herein had earlier applied for the striking out of these two petitions. Their ground for doing so was principally that the petitions were filed outside the period provided under Article 87(2) of the Constitution. Following the dismissal of the said Chamber Summons the applicants now contend that the petitions are after all not filed outside the time limited by the law but are filed before the period for doing so.

15. Following the delivery of the said ruling the applicants herein gave a notice of intention to appeal to the Court of Appeal which Notice of Appeal is still in existence. Without withdrawing the said notice of intention to appeal, they now impliedly contend that their earlier position, which position they still maintain by virtue of the fact that they are aggrieved by the decision thereon as evinced the said Notice of Appeal, no longer holds as the petitions were after all not filed outside the period but prematurely. These abortive proceedings, according to the applicants ought now to be terminated.

16. An appeal, it has been held is a continuation of the earlier proceedings. See **Kabundi vs. Trust Bank Ltd Nairobi HCCC No. 3679 of 1993 [1993] KLR 321**; Mugo and Others Vs. Wanjiru and Another Civil Application No. 17 of **1969 [1970] EA 481**; and **Zanzibar Theatres Ltd vs. Dyer-Merville and Another Civil Appeal No. 15 of 1963 [1964] EA 144**.

17. That being the position our system of law and dispute resolution should not countenance the existence and continuation of two parallel processes in respect of the determination of an issue arising between the same parties or parties claiming under them over the same subject matter. See **Niazons (K) Ltd vs. China Road and Bridge Corporation Kenya [2001] KLR 12**; **Kenya Pipeline Company**

**Limited vs. Datalogix Limited and Another Nairobi HCCC No. 490 of 2004 [2008] 2 EA 193.**

18. In determining whether a party is seeking determination of an issue which is the subject of the two processes it is not the terminology employed or the semantics involved that are the determining factor but the substance of what is sought and the effects of granting the orders sought. In other words it is not in every case that a party alters his position that the court will readily find that the said shifting of the position ought not to be sustained. As was held by **Madan, JA** (as he then was) in his dissenting judgement in **Mburu Kinyua vs. Gachini Tuti [1978] KLR 69; [1976-80] 1 KLR 790:**

**“Wherever possible, the specific procedure by way of appeal or review laid down under the rules should preferably be followed. There may, however, be a case where it is considered inadvisable to pursue the ordinary procedure of appeal or review upon refusal of a first application, and it is better advice to present to the court a second application with the defects in the first application (which led to its downfall) removed or corrected so as to obtain the relief which is wanted.....There is no bar generally to presenting more than one application until the conscience of the court comes to rest at ease that justice has been done. It is not correct to state that the court must act whether or not there is a right of appeal, review or application. It would depend on the circumstances in each case. Moreover the liberty to present more than one application is always subject to the court’s power to prevent abuse of its process, including mulcting the offending party in costs. It is also subject to the rule of *res judicata* including what is laid down in explanation (4) to section 7, unless a special circumstance is present in which event where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject matter of litigation in respect of a matter which might have been brought forward as part of the subject matter in a contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgement, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.”**

19. The majority however was of a different view. According to **Wambuzi, JA:**

**“The plea of *res judicata* applies not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgement, but to every point which properly belonged to the subject, and which the parties, exercising reasonable diligence, might have brought forward at the time.....Since there was no appeal against the first ruling the inference to be drawn is that the appellant was content with the court’s ruling on the application and this must mean that he was content with his case as it stood that the judgement should be set aside on the grounds put before the court. Those were the merits of the application and on the face of it the matter of setting aside the judgement had been adjudicated upon and refused by a competent court. And was therefore *res judicata*. There were two courses open to the appellant to question the decision and those were, an appeal or an application for review.”**

20. In the instant case, there is an intention to appeal. However, that appeal is yet to be determined. Accordingly, whereas one cannot say that the applicants are satisfied by the decision arising from the Chamber Summons, by relying on the said decision to found a cause of action one cannot but read *mala fides* in the present application.

21. On the part of **Law, JA:**

**“Successive application can only be made if there are fresh circumstances justifying a fresh application but only if the fresh circumstances consist of facts not known to the applicant at the time of the earlier application.”**

22. It is not alleged by the applicants that at the time they made the earlier application, the facts were not known to them. They can only argue that they misconstrued the provisions of the law. If that be the position the applicants would be hard put to justify going off-tangent as it were and seeking the same orders based on parallel grounds.

23. What would be the effect of granting the orders herein" If the court were to grant the orders sought and strike out the petitions and the applicants were to succeed in their impending appeal, we would be faced with decisions based on two conflicting and irreconcilable grounds. That, as correctly submitted by the petitioners would amount to an absurdity. By making the present application while not intimating that they intend to withdraw their intended appeal, the applicant are with respect playing lottery with the courts of law and that in my respectful view amounts to an abuse of the process of the court. In dealing with the issue of abuse of the process of the Court **Kimaru, J** in **Stephen Somek Takwenyi & Another vs. David Mbutia Githare & 2 Others Nairobi (Milimani) HCCC No. 363 of 2009** expressed himself as follows:

**“This is a power inherent in the court, but one which should only be used in cases which bring conviction to the mind of the court that it has been deceived. The court has an inherent jurisdiction to preserve the integrity of the judicial process. When the matter is expressed in negative tenor it is said that there is inherent power to prevent abuse of the process of the court. In the civilised legal process it is the machinery used in the courts of law to vindicate a man’s rights or to enforce his duties. It can be used properly but can also be used improperly, and so abused. An instance of this is when it is diverted from its proper purpose, and is used with some ulterior motive for some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process. But the circumstances in which abuse of the process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes on the extrinsic evidence only. But if and when it is shown to have happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instances. Others attract *res judicata* rule. But apart from and independent of these there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop the proceedings, or put an end to it”.**

24. The power to strike out a suit or pleading is clearly a discretionary power. Where a supplicant for

the orders clearly manifests bad faith or exhibits signs that he does not believe in the orders he is seeking or the grounds upon which such orders are based, the court would be disinclined to grant the orders sought since such orders would thereby be sought with some ulterior motive or for some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process. I therefore agree with the respondents that the bringing of the present application without withdrawing the intended appeal amounts to an abuse of the process of the court.

25. Apart from the foregoing, this court is doubtful whether a party is entitled to make more than one application seeking to strike out a petition in light of the statutory timelines stipulated in section 75(2) of the ***Elections Act*** as well as rule 4 of the Rules made thereunder. My doubt is grounded on the decision of the Court of Appeal in **Patrick Olasa Wabidonge vs. Kobil Petroleum Limited Civil Appeal (Application) No. Nai 36 of 2004** where it was held that:

**“Where the ground on which an application for striking out the appeal was existing when an earlier application for similar orders was filed, that ground should have been relied on in the first application and should be deemed to have been an issue in the first application.....To file a second application seeking to strike out an appeal before the order determining an earlier application seeking similar orders was made rendered the second application an abuse of the process of the Court.....Rule 80, envisages only one application to strike out a notice of appeal or appeal as the case may be.”**

26. Even if the present application was an application for review of the earlier ruling based on the same decision on the authority of **Said Hemed Said vs. Emmanuel Karisa Maitha & Another Mombasa Hcep No. 1 of 1998**, it is doubtful whether the application would have succeeded. In the said case, the applicant filed an application for review of a decision of the High Court based on the holding made by the Court of Appeal in another matter and the Court found that an application for review cannot succeed if the issue relied on is a decision of the Court of Appeal which decision had not been made at the time of delivery of the order sought to be reviewed because as at that time any diligent search could not have earthed what was not there.

27. Apart from the foregoing, to grant the orders sought herein is likely to plunge the country into a state of panic and anarchy. The National Assembly in which the 3<sup>rd</sup> respondent sits is in the process of and has conducted business of national importance. To hold that the results of last elections have never been declared would in my view be a recipe for chaos. Article 1(1) of the Constitution provides that all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with the Constitution while under Article 1(3)(c) sovereign power under the Constitution is delegated *inter alia* to the Judiciary and independent tribunals. Dealing with a similar provision in **Rwanyarare & Others vs. Attorney General [2003] 2 EA 664**, it was held with respect to Uganda that Judicial power is derived from the sovereign people of Uganda and is to be administered in their names. Similarly, it is my view and I so hold that in Kenya under the current Constitutional dispensation judicial power whether exercised by the Court or Independent Tribunals is derived from the sovereign people of Kenya and is to be administered in their name and on their behalf. It follows that to purport to administer judicial power in a manner that is contrary to the expectation of the people of Kenya would be contrary to the said Constitutional provisions. I therefore associate myself with the decision in **Konway vs. Limmer [1968] 1 All ER 874** that there is the public interest that harm shall not be done to the nation or public and that there are many cases where the nature of the injury which would or might be done to the Nation or the public service is of so grave a character that no other interest public or private, can be allowed to prevail

over it. Public interest, it is my view, falls within the purview of national values and principles of governance contemplated under Article 10 of the Constitution hence where what is sought is an exercise of judicial discretion the court is enjoined to consider the same.

28. The applicants relied on Machakos Election Petition No. 7 of 2013 - **Caroline Mwelu Mwandiku vs. Patrick Mweu Musimba & 2 Others [2013] eKLR**. I agree with my brother Hon. Mr. Justice Majanja that:

**“The question whether Gazette Notice.....is proper in its form must be approached purposively. It is not disputed that the Gazette subject of these proceedings was a notification of the persons duly elected as members of the National Assembly and not a declaration of results. A declaration of results contemplates the particulars of the all candidates, the votes attributed to each candidate, the rejected votes, the total votes cast and the total number of registered voters. In view of the finding that the ‘*declaration*’ for purposes of Article 87(2) must mean gazettelement, it follows that the Gazette Notice must be deemed to be the declaration for purposes of computing time. As the duty to declare the results in the Gazette is imposed on the Commission, failure to set out the results or an error or deficiency in the form and substance in the Gazette should not be the basis to penalise a litigant who files a petition based on that notice or complies with the Constitutional and statutory provision. It also means that the Commission must henceforth set out the results in the Gazette..... The rationale for the enactment was based on the idea that election petitions are primarily about figures and numbers and that being the ultimate challenge, then they ought to be set out in order to enable court address itself on what appropriate reliefs to issue. The provision must also be interpreted with regard to the historical context whereby returning officers would declare the winner of the elections but fail to disclose the precise figures at the time of announcement of election results and hence the provision, “*....and the manner in which it has been declared.*”**

29. The learned judge, however went on to express himself as follows:

**“In my view, rule 21 as read with rule 10(1)(c) of *the Rules* which now permit the petitioner to plead “*the results, if any, however declared*” was intended to deal with the mischief identified in *Mututho v Kihara*. The purpose of pleadings is to aid a fair trial. Rules of procedure are not mere formulae to be observed as rituals and elevated to a fetish. Beneath the words of a provision of law, lies a juristic principle. In this case the principle is that the rule is intended to enable the court fairly adjudicate the dispute between the parties....The guiding principle in consideration of this matter is the overriding objective of *the Rules* which is stipulated under rule 4(1) of *the Rules* as “*to facilitate the just, expeditious, proportionate and affordable resolution of election petitions under the Constitution and the Act.*” This objective is best realised by the Election court having regard to the purpose and mischief that the rule seeks to cure and the prejudice that would be occasioned by insistence on the strict compliance with form. Rule 5 further obliges this court and the parties to conduct proceedings before it to achieve the following aims, “*(a) the just determination of the election petition; and (b) the efficient and expeditious disposal of an election petition within the timelines provided in the Constitution and the Act.*”.....Rules 4 and 5 are therefore a testament of the provisions of Article 159(2)(d) of the Constitution which obliges**

every court to dispense justice without undue regard to technicalities. The fact that elections are special disputes governed by special reforms does not exonerate the court from this prime obligation to do substantive justice. In the recent Supreme Court decision in *Raila Odinga and others v Independent Electoral and Boundaries Commission and 3 others* Nairobi Petition No. 5 of 2013 [2013]eKLR the court stated in part as follows regarding this provision; “*The essence of that provision is that a Court of law should not allow the prescriptions of procedure and form to trump the primary object, of dispensing substantive justice to the parties...*”.....I am satisfied that in these circumstances no injustice has been or will be occasioned by the failure of the petitioner to set out the result of the election. The fact that election disputes are *sui generis* governed by special regime of rules does not exonerate the court of its prime obligation and indeed reason for its existence; that of delivering substantive justice.”

30. For my part I associate myself with the sentiments expressed by my learned brother and only with to add that section 72 of the *Interpretations and General Provisions Act*, Cap 2 Laws of Kenya provides:

***Save as is otherwise expressly provided, whenever a form is prescribed by a written law, an instrument or document which purports to be in that form shall not be void by reason of a deviation therefrom which does not affect the substance of the instrument or document, or which is not calculated to mislead.***

31. It is not alleged that by failing to declare the results of the election, the impugned Gazette Notice was calculated to mislead and that the applicants were thereby misled. In fact the applicants cannot contend that they were misled in light of their earlier posture in the Chamber Summons that the announcement of the results by the returning officer amounted to a declaration of results. Rules of procedure, it has been held time without a number are the handmaids and not the mistresses of justice and should not be elevated to a fetish since theirs is to facilitate the administration of justice in a fair, orderly and predictable manner, not to fetter or choke it and where it is evident that a party has attempted to comply therewith, it would be to elevate form and procedure to fetish to strike out the suit. Deviations from, or lapses in form and procedure, which do not go to jurisdiction of the court or prejudice the adverse party in any fundamental respect ought not to be treated as nullifying the legal instruments thus affected. In those instances the court should rise to its calling to do justice by saving the proceedings in issue. See **Peter Mburu Echaria vs. Priscilla Njeri Echaria Civil Appeal No. 247 of 1997 [1995-1998] 1 EA 56.**

32. With respect to the decisions made under the repealed Constitution, I wish to state that Article 159(2)(d) of the current Constitution, while not to be treated as a panacea for all ills enjoins the Court to administer justice without undue regard to procedural technicalities and reiterate the words of **Madan, JA** (as he then was) in **Chase International Investment Corporation and Another vs. Laxman Keshra and Others [1978] KLR 143; [1976-80] 1 KLR 891** that when the ghosts of the past stand in the path of justice clanking their medieval chains the proper course of the judge is to pass through them undeterred.

33. In determining this matter I have had occasion to read the decision of my learned brother **Hon. Wakiaga, J** in Nyeri High Court Election Petition No. 1 of 2013 – **Dr. Thuo Mathenge vs. Nderitu Gachagua & Others**. In that case as opposed to the present one, the petition was filed before the gazetting of the results by the Independent Electoral and Boundaries Commission and the learned

judge rightly in my view found that the same was prematurely filed since the time for filing the petition started to run from the date of gazettelement thereof. The learned Judge however went ahead to find that both the Constitution and the statute does not expressly provide that a petition filed irregularly ought to be struck out and each case must be decided on its own merits. The learned judge went on to hold that whereas the law seems to be against those who have moved the court out of the stipulated period of time taking into account the fact that petitions must be determined within six months from the date of filing, to punish the petitioner for coming too early would be a miscarriage of justice as equity ought to come to the aid of the vigilant and not the indolent.

34. That decision must however be distinguished from the present case where the petition was in actual fact filed after gazettelement which gazettelement only fell short of containing all the particulars that were required to be contained therein. Accordingly, the current petitions cannot be said to have been filed prematurely in the sense of the decision in **Dr. Thuo Mathenge's Case** (supra).

## **ORDER**

35. Consequently the order that commends itself to me is that the Notice of Motion dated 28<sup>th</sup> May 2013 lacks merit and the same is dismissed with costs to the petitioners.

**Dated at Mombasa this 18<sup>th</sup> day of June 2013**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Mr. S.M. Kimani** instructed by Stephen Macharia Kimani Advocate for the Petitioner in Petition No. 4 of 2013.

**Mr. Asige** instructed by Asige Keverenge & Anyanzwa Advocates for the Petitioner in Petition No. 9 of 2013.

**Mr. Abed** instructed by Balala & Abed Advocates for the 2<sup>nd</sup> Respondent.

**Ms. Kanabar for Mr. Khagram** instructed by A B Patel & Patel for the 1<sup>st</sup> and 3<sup>rd</sup> Respondents.

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