



REPUBLIC OF KENYA



**Ngirici & another v Independent Electoral and Boundaries Commission & 3 others
(Election Petition E001 of 2022) [2023] KEHC 1795 (KLR) (27 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1795 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
ELECTION PETITION E001 OF 2022
RM MWONGO, J
FEBRUARY 27, 2023**

BETWEEN

PURITY WANGUI NGIRICI 1ST PETITIONER

ELIUD WANJAO NGIGE 2ND PETITIONER

AND

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 1ST
RESPONDENT**

RETURNING OFFICER- KIRINYAGA COUNTY 2ND RESPONDENT

ANN MUMBI WAIGURU 3RD RESPONDENT

WACHIRA DAVID GITHANDA 4TH RESPONDENT

JUDGMENT

1. The Petitioner was an unsuccessful candidate for the Gubernatorial Election for Kirinyaga County in the last General Election held on August 9, 2022. Dissatisfied with the election results, the petitioner filed a petition on September 7, 2022. All respondents filed their responses within time, save that the 1st and 2nd Respondents filed an application to file further affidavits to supplement their response.
2. At the Pre-Trial Conference held on October 5, 2022, counsel for the petitioners made an oral application to withdraw the petition. The court directed that a formal application for leave to withdraw be filed following the statutory procedures and requirements, including advertising the withdrawal.
3. The petitioners complied with the court's orders, and the withdrawal was placed in the Daily Nation of October 11, 2022. The formal application was filed on October 6, 2022
4. The 1st and 2nd respondents, whilst not opposed to the withdrawal, seek that the same be subject to payment of their costs, which they estimate at Kshs 3,000,000/- The 3rd and 4th respondents opted not



to participate in the costs issue. By consent, it was agreed that parties file their written submissions on costs simultaneously with submissions on the withdrawal.

Petitioner's Submissions

5. The applicant's application is brought under the provisions of Rule 21 of the *Elections (Parliamentary and County Elections) Petitions Rules 2017*. The Rules grant the court discretion on the issue of costs wherein they provide:

“The Election Court may grant leave to withdraw a petition on such terms as to the payment of costs OR as the election court may otherwise determine” (emphasis added)

6. The petitioner urges that even in cases where a petition has been heard conclusively, the wide discretion of the election court on the issue of costs is further underlined under Rule 30(2a). That Rule entitles the court to order a successful party to pay costs. This is a clear departure from the norm in ordinary civil suits where costs are said to follow the event.

7. In the instant application, the Petitioners urge this court to grant leave for withdrawal of the election petition with no order on costs for the following reasons:

- i. The Petitioners herein have moved to withdraw the petition at the earliest stage possible even before the pretrial conference was undertaken. This has undoubtedly saved precious court's time and expense for the court and the parties.
- ii. The election petition is not a dispute personal to the Petitioners or a chose in action unique to them. The petition is in the nature of a representative action or public interest litigation seeking to ensure compliance with the principles of the electoral system set out under Articles 81 and 86 of the *Constitution*.
- iii. The reliefs sought in the election petition were not meant to be for the sole benefit of the Petitioners but for the benefit of the entire electorate of Kirinyaga County by ensuring that their rights to vote and universal suffrage based on the aspiration to fair representation and equality of the vote is upheld.
- iv. The instant petition was only necessitated not merely by the election loss of the Petitioners but by failures and omissions on the part of the 1st and 2nd Respondents to uphold the principles and standards of the electoral system demanded by the *Constitution* and the law as particularized in the petition.

8. They submit, without prejudice to the foregoing, that Rule 30 of the *Election Petition Rules* further provides:

“The Election Court may, at the conclusion of a petition, make an order specifying:

- a. The total amount of costs payable;
- b. The maximum amount of costs payable;
- c. The person who shall pay the costs;
- d. The person to whom the costs shall be paid.

9. It is further submitted that in the that event this court determines that costs are payable by the Petitioners, it should exercise its power under Rule 30 to cap such costs to a reasonable amount.



10. The Petitioner notes that the 3rd and 4th Respondents concede to withdrawal of the petition, and make no claim for costs. On the other hand, the 1st and 2nd Respondents submit that they need to be compensated for costs of hiring counsel who filed the response which comprised the substantive response to the petition and only one supporting affidavit sworn by the County Returning Officer.
11. The petitioner also notes that in *Ombati Richard v Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR this court rendered itself thus:

“The Petitioner, by filing an election petition and electing to withdraw the same, has caused the respondents to incur expenses which they would not have incurred were it not for the election petition. The said expenses include those incurred in hiring counsel, preparing the responses to the Petition, in addition to the court attendances. The Petitioner shall pay the 1st and 2nd Respondents the costs of the election petition filed herein, and the total costs awarded to them jointly shall not to exceed Kenya Shillings Two Hundred Thousand (200,000/=) only”.
12. The Petitioner also notes the Court of Appeal’s position in *Philip Kyalo Kituti Kaloki v Independent Electoral and Boundaries Commission and 2 Others* [2018] eKLR where it cited its decision in *Martha Wangari Karua v Independent Electoral Boundaries Commission & 3 Others* [2018] eKLR as follows on the issue of costs:

“it is up to the election court to determine whether a party would be awarded costs or not and doing so the court must be guided by the principles of fairness, justice and access to justice”.
13. The Petitioner argues that the 1st and 2nd Respondents proposal of Kshs 3,000,000/= for costs, is excessive and punitive in the circumstances and contrary to guidance given by the Court of Appeal in *Dickson Daniel Karaba v Kibiru Charles Reubenson & 5 others* [2018] eKLR where it was stated that:

“... electoral disputes are in the nature of public interest litigation. They do not belong to the petitioner. The public in the electoral area and the general public in the Republic has an interest on how those matters are handled and determined. A balance must be drawn on the issue of costs where successful litigants are awarded costs but those who lose in electoral disputes should not appear to be punished by award of costs that may send the wrong message that a party should not approach the court if they feel aggrieved in the manner elections are conducted. We think these are necessary principles to guide a court in awarding costs in election petition.”
14. In the instant case, the petitioner argues, there was only one physical appearance and two virtual appearances in court before the petition was formally withdrawn. There are admissions by the 1st and 2nd Respondents for the occurrence of flaws. Bearing that in mind and given the very early stage at which the petition is being withdrawn, the Petitioners submit that an amount capped at Kshs 200,000 would be reasonable costs to cater for the 1st and 2nd Respondents expenses.
15. The petitioner submits that this Honourable Court should also take guidance from the moderate amount of Kshs 500,000 set out under section 78 of the *Elections Act* as security for costs payable by the Petitioner when filing an election petition. This points to a legislative guide that costs arising from election petitions ought not to be excessive, unbearable or prohibitive.



16. Finally, the petitioner notes that the court may direct that any costs awarded upon withdrawal of the instant petition be recovered from the security for costs deposited in court by the Petitioners and the balance thereof be released to the depositor.

Respondents' Submissions

1. The 1st and 2nd respondents' position is that Rule 21 of the Elections (Parliamentary & County Elections) Petition Rules, 2017 permits the court to make orders as to costs. In relevant parts the Rule stipulates that: a) a petition shall not be withdrawn without leave of the election court; and b) that the election court may grant leave to withdraw a petition on such terms as to the payment of costs or as the election court may otherwise determine.
17. They argue that the Petitioner has caused them to incur expenses which they would not have incurred were it not for the election Petition. The expenses are for hiring counsel who perused the bulky election petition (691 pages) within very limited timelines, researched on the matter, interviewed witnesses, prepared, filed and served response and witness affidavits and attended court. The 1st and 2nd Respondents should be compensated in costs.
18. The respondents rely on *Mugambi Imanyara v Independent Electoral and Boundaries Commission & 2 others* [2018] eKLR which held:

“...concerning costs this court has discretion to order payment of costs upon leave to withdraw being granted...”

In that case, a global sum of Kshs 500,000 was awarded for a withdrawn election petition.
19. In *Dickson Daniel Karaba v Kiburu Charles Reubenson & 5 others* [2018] eKLR an award of Kshs 5,000,000/= for costs of withdrawn election petition was reduced to Kshs 2,500,000/=.
20. The 1st and 2nd respondents pray for an award of Kshs 3000, 000/= in costs.

Issues for Determination

21. The only issue for determination is whether costs should be awarded for the withdrawn petition, and if so, how much.

Analysis and Determination

22. The question as to withdrawal of the petition is not contentious. Accordingly, the withdrawal is hereby allowed. As for the issue of costs, I have carefully considered the parties' submissions, and the authorities tendered. I have also perused the file to ascertain precisely the documentation involved placed on the record.
23. The court undoubtedly has discretion to award costs and to determine inter alia, the amount payable, which party is liable to pay and who is to be paid. Rule 30 (rule 32 of revised rules), of the 2017, Rules stipulates follows: -
 - “(1) The court shall, at the conclusion of a petition, make an order specifying—
 - (a) the total amount of costs payable; and
 - (b) the persons by and to whom the costs shall be paid. (2) When making an order under sub rule (1), the court may —



- (a) disallow any costs which may, in the opinion of the court, have been caused by vexatious conduct, unfounded allegations or unfounded objections, on the part of either the petitioner or the respondent; and
- (b) impose the burden of payment on the party who has caused The Elections (Parliamentary and County) Petition Rules, 2017 17 an unnecessary expense, whether such party is successful or not, in order to discourage any such expense.
- (3) The abatement of a petition shall not affect the liability of the petitioner or of any other person to the payment of costs previously incurred.”

24. The court having allowed the withdrawal, the petition has been concluded to the intent that no further proceedings are capable of continuation thereon.
25. In considering the costs awardable, I think the court must take into account:
- a. The appointments of counsel for purposes of instructions;
 - b. The nature of the pleadings filed;
 - c. The input required, and in fact expended, by counsel up to the stage where costs are in issue;
 - d. The stage of the proceedings at which the costs are sought;
 - e. Whether by making an award of costs, a message may be sent to the losing or withdrawing petitioner that such a party should not approach the court if they feel aggrieved in the manner elections are conducted;
 - f. Whether or not at the stage the matter has reached there was a justification for certifying for two or more counsel;
 - g. Whether costs, if any, should be capped and to what amount.
26. In the instant case, the pleadings comprising the petition are bulky covering 691 pages. The respondents had to review the entire pleadings and attached documentation and respond thereto, which they did. The 1st & 2nd Respondents filed a 79-page response and a certificate of urgency comprising 142 pages. The 3rd and 4th Respondents filed a 278-page response.
27. The court notes that thereafter, there was only one physical court appearance and two virtual court appearances before the petition was formally withdrawn. The latter appearances were in connection with the formal withdrawal, and the filing of submissions on costs.
28. However, at the commencement of the Pre-Trial conference the petitioner clearly stated, as the first order of business, that they were withdrawing the petition, and would not be pursuing the same. Indeed, the record shows that: the Pre-trial conference was not even substantially conducted; that the 1st and 2nd Respondents stated that given the intended withdrawal, there was “no need to progress the Pre Trial”, and that the 2nd & 4th respondents adopted the same attitude at that early stage.



29. In line with the Ombati case, the expenses incurred by the 1st and 2nd Respondent in hiring counsel, preparing the responses to the Petition and in court attendances, ought, properly, to be payable by the petitioner.
30. In the Imanyara case, the court awarded Kshs 500,000/- upon the withdrawal of the petition. There, the hearing had been concluded and only judgment was awaited. Here, the Petitioner submits that an amount capped at Kshs 200,000 would be reasonable costs to cater for the 1st & 2nd Respondents expenses in the circumstances.
31. Further in Imanyara, the court aptly stated:
- “It is my considered view that since the court has not had the opportunity to determine whether the petition is successful or not the petitioner will pay costs to mitigate the expenses incurred by the Respondents and a global sum of Kshs 500,000/- for 1st and 2nd Respondents jointly and Kshs 500,000 for 3rd Respondent would in my view be sufficient. The security deposited by the Petitioner should be utilised to pay part of the costs awarded to the Respondents. Orders accordingly.”
32. Likewise, this court has taken into account the fact that the security deposit amount paid into court is Kshs. 500,000 as set out under section 78 of the [Elections Act](#) for the purpose of security for costs should they become payable by the Petitioner at the conclusion of the election petition.
33. In the case of [George Thata Ndia v Independent Electoral and Bounderies Commission \(IEBC\) & 2 others](#) [2021] eKLR it was held:
- “In the instant matter, I find that, the Petitioner filed a petition running into 426 pages. The 1st and 2nd Respondent filed a response thereto of 83 pages. The 3rd Respondent too responded thereto of about 6 pages. Then the Petitioner filed an application seeking for inter alia; preservation of the election material that, was fully heard and determined. The parties then participated in the pre-trial conference and the matter was set for hearing and dates reserved for the same. Having considered the aforesaid and the fact that, election petitions are matters of public interest and costs should be reasonable, I award the 1st and 2nd Respondent herein a maximum sum of; Kshs 1,500,000 and the 3rd Respondent, a maximum of; Kshs 1,000,000 in costs. The costs awarded shall be subject to taxation.
34. Unlike the present situation, that petition was heard fully and was almost coming to its conclusion, hence the award of costs made.
35. As far as the [Advocates Remuneration Order](#) is concerned, Schedule 6 Paragraph 1 on Election Petitions provides for instructions fees as follows:
- “To present or oppose an Election Petition, such as it may be reasonable but not less than Kshs.500,000/=”.
- The amount indicated as instructions fees in similar, in this case to the amount paid in as the security deposit.
36. Taking all matters into account, I am of the view that the Petitioner should pay costs for dragging the Respondents to court. As the 3rd & 4th Respondents have made no claim for costs, only the 1st & 2nd Respondents will be entitled to costs, and I so find.



37. The petitioners submitted that should this court be inclined to award any costs, the same should be capped at Kshs 200,000/=. I think that figure is on the low side considering the bulk of pleadings and documents prepared, filed and served. In addition, each party had conscripted at least two counsel each indicating the seriousness, complexity and urgency of the suit.
38. In addition, I note from the pleadings that the Petitioners had at the outset pleaded that scrutiny and recount be conducted for all the polling stations within Gichugu and Kirinyaga Central constituencies, two of the three constituencies in the County. This would have been a mammoth exercise had the court agreed to a scrutiny and recount of even half of the polling stations in each of the two constituencies. A fair compensation should be recorded to the 1st and 2nd Respondents.
39. Ultimately, and for all the reasons herein, I am prepared to exercise the Court's discretion to award costs to the 1st and 2nd Respondents, limited and capped to the amount placed as security deposit, namely a global sum of Kshs 500,000/-. This is a fair and reasonable amount given that the Petitioner withdrew the petition at the earliest stage, obviating the incurrence of any other costs and time.
40. Accordingly, it is ordered and directed that the whole security deposit of Kshs 500,000/- held in court, be paid over to the 1st and 2nd Respondents as party and party costs.
41. Orders accordingly.

DATED AT KERUGOYA THIS 27TH DAY OF FEBRUARY, 2023

RICHARD MWONGO

JUDGE

Delivered in the presence of:

Mr Kamau for Petitioners.

No representation (Mwongela for 1st & 2nd Respondents)

Mr Barasa for Nyamondi for 3rd & 4th Respondents.

Court Assistant, Murage.

