Walubengo v Independent Electoral and Boundaries Commission & 2 others (Election Petition 2 of 2022) [2022] KEHC 14481 (KLR) (31 October 2022) (Ruling)

Neutral citation: [2022] KEHC 14481 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

ELECTION PETITION 2 OF 2022

WM MUSYOKA, J

OCTOBER 31, 2022

BETWEEN

KELLY BARASA WALUBENGO .... PETITIONER

AND

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

WEBUYE WEST CONSTITUENCY INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION RETURNING OFFICER .... 2ND RESPONDENT

SITATI DANIEL WANYAMA .... 3RD RESPONDENT

RULING

1. A pre-trial conference was held in this matter on October 7, 2022, whereat a number of issues were raised by the parties. In the end, it was noted and directions were given as follows:

    a. That the 6 months life of the election cause is set to expire on the March 6, 2023;

    b. That the petitioner proposed to call 5 witnesses, the 1st and 2nd respondents were to call 6 witnesses, and the 3rd respondent 3 witnesses;

    c. That the oral hearings of the cause are to be conducted between November 15, 2022 and November 30, 2022, with the petitioner being heard on November 15, 2022, November 18, 2022 and November 21, 2022; the 1st and 2nd respondents on November 23, 2022, November 24, 2022 and November 25, 2020; and the 3rd respondent on November 25, 2022; and the 3rd respondent on November 28, 2022 and November 30, 2022;

    d. That any interlocutory applications on record or to be filed, argued and disposed of within the month of October 2022;

e. That the application dated September 12, 2022 was to be served, subject to its being paid for, on all the parties by October 12, 2022, and the respondents were to file their replies to it within 7 days of service, together with written submissions, and a ruling on the said application to be delivered on October 31, 2022;

f. That the petitioner to file, by October 10, 2022, an application to summon witnesses that he had indicated, and to serve the same on the respondents by October 12, 2022, who would, thereafter, respond to it within 7 days, together with written submissions, and a ruling thereon to be delivered on October 31, 2022;

g. That the court was to peruse the pleadings, and eventually rule on whether or not Mr Nyaribo, Advocate, or referred to as Mr Isinta, should continue to act for the petitioner, and to state the issues for determination, by the next pre-trial conference; and

h. That the next pre-trial conference was to be on October 17, 2022.

2. At the pre-trial conference on October 17, 2022, the petitioner confirmed that he had filed and served 2 applications. The 1st and 2nd respondents confirmed being served, and indicated that they had filed and served their responses. The 3rd respondent also confirmed service, and stated that he would respond to the 2 applications. The court reiterated October 31, 2022 as the due date for delivery of the ruling on the 2 applications. The petitioner indicated that he had made the mandatory Kshs 500, 000.00 deposit, although the payment was not reflected on the record. He undertook to file documents as evidence of the same, and leave to do so was granted. I did not release to the parties the issues or questions for determination in the petition, and I shall do so in this ruling. Mr Wasilwa for the 3rd respondent had indicated, on October 7, 2022, that he had prepared and circulated issues in draft. I have not seen that draft of the issues in the record before me. I have equally not seen a response, to the petition, from the 3rd respondent. I have not had access to the physical file, but am informed by the Deputy Registrar that whatever is in the portal tallies with what is in the physical file. The 3rd respondent may have to regularise his position, by ensuring that his filings are on record, otherwise he may find himself being excluded from the oral hearings.

3. From the record before me are two interlocutory applications, both by the petitioner, dated September 12, 2022 and October 8, 2022. I have also come across the responses to the 2 applications by the 1st and 2nd respondents, being an affidavit in reply, sworn on October 19, 2022, and written submissions of even date. There are no written submissions by the petitioner on both applications, and I have not come across any response to the applications nor written submissions by the 3rd respondent.

4. So, this ruling shall deal with the following issues: the matters the subject of the 2 applications dated September 12, 2022 and October 8, 2022, the matter of the propriety of Mr Nyaribo appearing in this cause on behalf of the petitioner, the matter of the statutory deposit of the security for costs by the petitioner, and the issues or questions for determination.

5. I will start by considering the 2 applications in turn, beginning with that dated September 12, 2022. It mainly seeks 3 principal orders, as outlined in prayers 3, 4 and 5 of the application. Prayer 3 seeks access to the biometric devices or appliances used in the subject election, and related matters. Prayer 4 seeks access to information and data relating to polling station diaries, written complaints by candidates or their representatives, packets of spoilt and stray ballots, packets of counterfoils of used ballot papers, packets of counted ballot papers, packets of rejected ballot papers, polling day diaries of all rejected ballot papers and all rejected ballot papers for all the polling stations designated in the application. Prayer 4 also seeks access to the 1st and 2nd respondents election technology system network architecture for the period of 30 days before the elections to the date of the order of the court, covering items set out

in the application; the 1st and 2nd respondents election technology system redundancy plan covering the items set out in the application; import testing certification in relation to the KIEMS kits used during the election in the constituency in the polling stations delineated in the application; and related issues arounds the KIEMS kits used in the constituency in the designated polling stations listed in the application. Prayer 5 seeks that the 1st and 2nd respondents give access and supply to the court and the parties copies of all the Forms 35A for the polling stations listed, and leave to use reading devices to assess the genuineness of the said Forms.

6. The application is premised on the grounds set out on its face. The petitioner alleges that the election was marred by irregularities, anomalies and discrepancies, and that there were instances of illegality, criminal negligence, electoral fraud, bribery, threats of violence and intimidation. It is argued that the net effect of all that was it was impossible to tell who won the election. It is averred that a scrutiny of the votes and a recount would ascertain the legitimacy of the number of votes cast, the total number of votes cast, the total number of valid and rejected votes cast, and the correct number of voted to be ascribed to each of the candidates. It is averred that the application is a form of discovery proceedings, to facilitate access to information and a fair hearing, and to assist the court investigate whether or not the election was conducted in a manner that was in accordance with the applicable law. It is averred that the information sought was exclusively in the possession of the 1st and 2nd respondents, who had declined to disclose it to the petitioner.

7. In his affidavit, sworn on September 12, 2022, the petitioner says that there was collusion between the respondents. He points at the fact of his agents being denied access to polling stations by agents of the 1st and 2nd respondents, or such access was frustrated. He also points at his agents declining to sign Forms 35A, and absence of signatures of his gents in some of the forms. He further avers that there were irregularities in 39 polling stations detailed in the affidavit, which include absence of his agents at those stations. He also avers that the agents of the 1st and 2nd respondents abandoned ballot materials, leaving them unattended at polling stations and at the constituency tallying centre, and in particular Kakimanyi Primary School. He avers that ballot box number 115470 for the National Assembly election was not sealed or was insufficiently sealed. He has also cited other ballot boxes for various elections that he says were abandoned or sequestered, at a location which was not designated for tallying or storage. He also avers to irregularities on the polling station diary for Kabolon polling station, which was even not within the subject constituency. He avers that there were discrepancies in the returns from his agents with respect to Forms 35A and Form 35B, for 18 specified polling centres. He points at what he calls forgery and fraudulent manipulation of electoral returns between the total number of votes garnered as per Forms 35A relative to the entries in Form 35B, in 71 specified polling stations. He further points at discrepancies between the gazetted number of registered voters and the declared number of registered voters in 46 specified polling stations. He further points at forgery or fraudulent amendments or erasures and irregular stamping on Forms 35A in 23 specified polling stations. He asserts that the discrepancies and irregularities were not explained, and it was for that reason that he was seeking scrutiny and recount in the specified polling stations.

8. As the 1st and 2nd respondents have made a consolidated response to both applications, I have no option but to consider the case by the petitioner in the second application, dated October 8, 2022. The said application principally seeks that a total of 18 individuals be summoned to attend court as witnesses. The list comprises mainly of police commanders and polls officials, and the managing director of a hotel within Webuye. It is averred that the attendance of those individuals as witnesses was critical to address the issues raised in the petition. In his affidavit, the petitioner avers that violence broke out at various places and his agents or supporters were attacked, and that required police intervention. He further avers that he made reports of fraud and malpractice by some of the agents of the 1st and 2nd

respondents, which led up to some polling officials being arrested. He states that he made reports to various police stations on the matters that he has deposed to, and he would like the police occurrence books bearing those reports to be produced. He avers that the material that the witnesses he would like the court to summon would be crucial for a fair and just determination of the petition.

9. The response by the 1st and 2nd respondents to the 2 application is by way of an affidavit, by Peris Saina Cheruto, the 2nd respondent herein, sworn on October 19, 2022. On the application dated September 12, 2022, she avers that the same was fatally incompetent and incurably defective as it was grounded on the wrong and non-existent provisions of the law. It is further argued that the affidavit in support of that application was by an Advocate who did not hold a valid practicing certificate as at the date he commissioned the affidavit.

10. On the merits, it is averred that a basis had not been laid for the court to order scrutiny, and, in any event, the 1st and 2nd respondents had controverted the allegations around that in their answer or responses to the petition. Secondly, it is averred that the petitioner had not established that voters in the class set out in section 82(2) of the *Elections Act*, had cast their ballots in the elections, persons who were not in the register of voters for the particular polling station had voted, a voter who was procured by bribery had cast their vote, a voter who was party to personation, a voter who cast his ballot in more than 1 constituency, a voter who was disqualified from voting on account of conviction for an electoral offence, or a voter who cast a ballot for a disqualified candidate had voted. She avers that, with respect to the discrepancies alluded to, that she had dealt with those in her response to the petition, stating that the said discrepancies did not exist, or did not relate to the petitioner or affect his vote count, or were inadvertent and of a minor nature and did not affect the final result. On the prayer for recount, she avers that the petitioner has not demonstrated that he requested for a recount or challenged the results in the Forms 35A before the same were declared. She asserts that the material supplied by the 1st and 2nd respondents demonstrated that the election process, inclusive of the declaration of results at the polling stations, happened in the presence of agents for the candidates. She further asserts that the petitioner had not demonstrated that malpractices or illegalities that he complains about cannot be explained without resorting to a scrutiny or recount or audit of the KIEMS kits and election technology. She further argues that the petitioner had not specified the polling stations that are alleged to have counted invalid votes or failed to count valid votes. She states that she had already disclosed, through her affidavit in support of her response or answer to the petition, copies of all the Forms 35A and polling station diaries for all the polling stations mentioned by the petitioner in the petition. She argues that seeking scrutiny of polling diaries and Forms 35A not mentioned in the petition would amount to getting out of the pleadings, thereby engaging in a fishing expedition. She submits that the application for scrutiny was premature, for the petitioner needed to lay a basis first, by way of evidence tested through cross-examination. She further avers that the application for scrutiny is based on evidence founded on audio-visual recording, which has not been filed nor served on the other parties. She further states that prayers 3 and 4 of the application seeks access to material that applies only with respect to the Presidential election, and that there is no legal requirement for transmission of the results for the National Assembly election from the polling stations to the constituency tallying centre.

11. She further avers that no material had been presented to effect that the agents of the 1st and 2nd respondents had allowed persons who were illegible to vote and denied those eligible to vote a chance to do so. She avers that no proof had been provided that he or his agents had written complaints on election materials, he has not raised or provided any grounds surrounding spoilt and stray ballots, he has not raised or provided proof of use of foreign ballot papers to warrant production of packets of counterfoils of used ballot papers, he has not raised or provided any grounds surrounding rejected ballots, has not raised or provided any grounds surrounding the election technology system network architecture, and he has not raised or provided any grounds surrounding the election

technology system redundancy plan. She avers that there has been no compliance with section 27 of the *Independent Electoral and Boundaries Commission Act* and Rules 15 and 16 of the Elections (Technology) Regulations, 2017, before moving the court seeking for access to the information stored by the 1st respondent.

12. Regarding the application dated October 8, 2022, for additional witnesses, it is argued that the same is incompetent for it is founded on the wrong provisions, non-existent provisions, and were commissioned by an Advocate who did not hold a practicing certificate as at the date of the commissioning. She further avers that some of the persons sought to be summoned had already sworn and filed witness statements as witnesses for the 1st and 2nd respondents. She states that the petitioner had not laid a basis for the summoning of the police officers, and, in any event, the said police officers could only provide secondary information on the reports filed at the police stations, the evidence about the reports to the police ought to be adduced by the persons who made them, and that the 1st and 2nd respondents were not opposed to the police occurrence books being produced without calling the police officers. It is further averred that the matters in respect of which the police commanders were being summoned to testify on, fell within the jurisdiction of criminal courts not the election court, no basis had been laid for their being summoned, and no evidence demonstrated that the commanders were in charge of the investigations into the alleged offences. She further avers that the complaints made at the various police stations had not been pleaded in the petition or the application to warrant the orders sought being made. She submits that the petitioner was using the application to gather evidence, and argues that it should not be the role of the court to assist the petitioner in that regard. Regarding the summoning of the presiding officers, it is averred that agents for the petitioner had not raised any complaints at the polling stations, and they had signed the various Forms 35A. It is pointed out that in the polling stations where the presiding officers are sought to be summons, the petitioner obtained the highest number of votes cast.

13. The 1st and 2nd respondents raised technical objections to the 2 applications, to effect that they were based on wrong or incorrect or non-existent provisions of the law. The omission to ground an application on the proper provisions of the law is not fatal or incurable. Article 159 of the *Constitution* takes care of the matter. The second objection is that the Commissioner for Oaths, who commissioned the affidavits drawn in in support of the 2 applications, did not have a valid practising certificate, and, therefore, he was not qualified to commission the documents. That, again, is not fatal, going by the current judicial trend or thinking on the matter, which is, to an extent, linked to Article 159 of the *Constitution*. The failure to obtain a current practising certificate does not mean that the Advocate is in the same position with an Advocate who has be deregistered or removed from the Roll of Advocates. He still remains an Advocate. Indeed, the taking out of a certificate to practise is seen as having more to do with taxation than anything else. Similarly, going by the same principle, it ought not affect the commission to administer oaths. It does not mean that the failure to take out a practising certificate leads to the Commissioner for Oaths being decommissioned. The effect of that judicial thinking is that any documents drawn by such an Advocate or affidavits commissioned by such a Commissioner for Oaths would still be valid despite the lack of permission to practise. I do not quite agree with that trend, for there is still need for the courts to enforce discipline in the legal profession, by rendering invalid anything done by an Advocate who has not been licensed to practise. However, it is the predominant position currently, and I feel that it would be unjust for me to go against it, for it would disadvantage parties who find themselves litigating before Judges who hold the minority view.

14. The first application is primarily about scrutiny of election materials, being both the hardware and software technology deployed in the election, election information and data in the hands of the 1st and 2nd respondents, and the results sheets in Forms 35A and 35B. The foundation for scrutiny is the *Constitution* and the *Elections Act*, and the subsidiary legislation made under it. The

constitutional basis for it is the right stated in Article 35 of the *Constitution*, which should be read together with section 4 of the *Access to Information Act*, 2016, section 27 of the *Independent Electoral and Boundaries Commission Act* and *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR* (Maraga, CJ & P, Mwilu, DCJ & VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ).

15. The principles that underpin an order for scrutiny have been set out in a number of decisions. The basic principles were pronounced in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR* (Mutunga, CJ & P, Rawal, DCJ & VP, Tunoi, Ibrahim, Ojwang, Wanjala & Njoki, SCJJ). These are that there is a right to apply for scrutiny, the court has discretion to order it on its own motion or on application, the party applying for it must lay and establish a basis either in the pleadings and affidavits or in the evidence adduced at the hearing of the petition, and the same must be restricted to specific polling stations whose results are disputed or the validity of the vote questioned. In *Mohamed Mahamud Ali & others v Independent Electoral and Boundaries Commission & 2 others [2018] eKLR* (N Mwangi, J) and *Joseph Oyugi Magwanga & another v IEBC & 3 others [2017] eKLR* (JR Karanjah, J), it was said that where the order is sought by a party, a sufficient factual basis must be laid in the petition. According to *Joseph Obiero Ndiege v Independent Electoral and Boundaries Commission & 2 others [2018] eKLR* (Chemitei, J), the order would usually be made where there are numerous alterations, errors and omissions in the forms. The other principle, stated in Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR (Mutunga, CJ & P, Rawal, DCJ & VP, Tunoi, Ibrahim, Ojwang, Wanjala, Njoki, SCJJ), is that reasons must be assigned for the order. In *Samwel Kazungu Kambi v Nelly Ilongo County Returning Officer Kilifi County & 2 others [2018] eKLR* (W Korir, J) and *Edward Tale Nabangi v James Lusweti Mukwe & 2 others [2017] eKLR* (Ali-Aroni, J), an application for scrutiny should be heard after the evidence has been tendered, even if the same was filed at the interlocutory stage. The last principle is that scrutiny should not be used to fish for new evidence or unpleaded matters upon which the election could otherwise be possibly nullified. See Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others, [2014] eKLR (Mutunga, CJ & P, Rawal, DCJ & VP, Tunoi, Ibrahim, Ojwang, Wanjala, Njoki, SCJJ) and *Martin Nyaga Wambora v Lenny Maxwell Kivuti & 3 others [2018] eKLR* (Ouko, P, Musinga & Sichale, JJA).

16. From the principles enumerated above, it should be plain that is within the rights of the petitioner to seek or request for a scrutiny or recount. A basis or factual background must be demonstrated though, either in the pleadings and affidavits, or the evidence at the oral hearing of the petition. Ultimately, the best time to consider making the order is after taking oral evidence or testimonies, as there would then be adequate material upon which to determine whether or not a basis has been laid. Of course, this rides on the fact that ordering scrutiny or recount is at the discretion of the court, and the court can order the same on its own motion. Going by Samwel Kazungu Kambi v Nelly Ilongo County Returning Officer Kilifi County & 2 others [2018] eKLR (W Korir, J) and Edward Tale Nabangi v James Lusweti Mukwe & 2 others [2017] eKLR (Ali-Aroni, J), it may be imprudent to go into the substance or merits of the application at this stage. Since I can even order the scrutiny and recount suo moto, and Article 159 of the *Constitution* eschews technicalities of procedure, I would shy away from using the technical weaknesses of the filings, raised by the 1st and 2nd respondents, to dismiss the application. So, I shall hold that the matter of the scrutiny of the electoral materials shall be revisited and considered after the close of the oral hearings. This order does not, of course, obviate the obligation on the part of the 1st and 2nd respondents to furnish the court with the mandatory forms, which they have already done through the statements of their witnesses.

17. The second application is for issuance of witness summonses upon a number of police commanders and polls officials. Witness summonses issue upon persons that a party wishes to call, but who it feels they may be reluctant to attend court, because of their official position, and may require to be formally

summoned by the court. I note from the record that none of the persons listed, in respect of whom I am invited to issue witness summonses, are in the list of the petitioner's witnesses. Consequently, there is no basis for me to grant the order sought. Ideally, they can only come in as neutral witnesses, for cross-examination by all the sides. Crucially, evidence from police commanders can only be secondary, as the police acts only on reports or complaints made to them. It is incumbent upon the petitioner to adduce primary evidence on the matters in respect of which he would like the police commanders to be summoned, principally from the individuals who filed the reports with the police, for the evidence from the police alone would amount to mere hearsay. See *Odera Arthur Papa v Oku Edward Kaunya & 2 others [2017] eKLR* (Majanja, J). In any case, the court reserves the power, under section 80(1)(b) of the *Elections Act*, 2011, to summon any such officers, at any stage of the proceedings, should the same become necessary.

18. The second category of persons, in respect of which the petitioner seeks to have witness summonses issued, are the presiding officers of a number of the polling stations. The 1st and 2nd respondents have pointed out that some of them are their witnesses, who have already filed witness statements. I reiterate what have stated in the foregoing paragraph, that there is reserve power for me to summon any witness at any stage of these proceedings should that become necessary. Let the petitioner lay the basis for it first, by way of oral evidence, to demonstrate that these would be critical witnesses, that the court should hear from, for it to do justice in the matter. No basis has been laid at all to have the Managing Director of Downhill Springs Hotel, Webuye, summoned as a witness.

19. The next issue for consideration is the propriety of Mr Nyaribo, Advocate, appearing in this matter for the petitioner. The issue is that he ought to be barred from representing the petitioner on grounds of being conflicted, in the sense that he could be called as a witness on account of having commissioned some or all of the affidavits by the witnesses of the petitioner.

20. The law on this is in Rule 8 of the *Advocates (Practice) Rules*, 1966, made under the *Advocates Act*, Cap 16, Laws of Kenya, which provides that:

> ' No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear:
>
> Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears.'

21. Rule 8 of the Advocates (Practice) Rules should be understood as presenting two scenarios. The first is where the Advocate has reason to believe that he may be required to give evidence as a witness. This would be a case where the Advocate has not yet been required to give evidence, but there is a possibility of his being required to. The second scenario is where it becomes apparent that he will be required as a witness, from the goings on in the matter in which he is acting, that is where there is some certainty about it.

22. This case falls under the first scenario, that of a possibility of being called as a witness. Mr Nyaribo commissioned affidavits of the witnesses that the petitioner will be calling. It would appear that at the time the affidavits were being commissioned it was not envisaged that Mr Nyaribo's involvement would go beyond commissioning those affidavits, to include playing the role of lead Counsel. By taking up the position of lead Counsel, Mr Nyaribo then becomes an Advocate for the petitioner, leading the

witnesses, whose affidavits he commissioned, in evidence-in-chief. Issues may arise during the trial, on the authenticity or integrity of the affidavits, such as where the execution of the affidavits is questioned or doubts expressed as to whether the witnesses ever appeared before the Commissioner for Oaths at the time of the alleged execution, among others. In such a scenario, the Commissioner for Oaths would be a critical potential witness. This does not necessarily present a conflict of interest, in terms of the Advocate/Commissioner for Oaths appearing to act for two clients or representing the interests of two sides at the same time. What it does is to put the Advocate/Commissioner of Oaths in an embarrassing situation, where he has to abandon his place at the Bar, as the Advocate for the client, to take to the witness stand as a witness for the client. It still presents a conflict, between acting as an Advocate for the client and his witness at the same time. There is not as much ethical or moral opprobrium attached to it, compared with the other type of conflict of interest, but it is a disorderly way of doing business. It is untidy, and undisciplined. Ideally, the Advocate should stick to one of the roles, either retain the role of the Advocate for the client or take up the place of a witness for the client. Of course, there is usually little choice for the Advocate, once it is clear that the documents creating the situation are already on the record. He cannot recall his signature, he can only recuse himself, by stepping aside from conduct of the matter. The Advocate should not wait until the issue is raised, or until the validity or authenticity of the affidavit is challenged, or an indication given that the rival side would wish to call him as a witness. It is enough that there is a possibility of that arising at any stage of the proceedings.

23. In this case, it would appear that Mr Nyaribo is an Advocate who ordinarily practises in Nairobi, given the address appearing in his rubberstamp for Commissioner for Oaths and Notary Public, embossed on the affidavits that he commissioned, that are in the record before me. Most of the deponents of these affidavits are residents of Webuye West in Bungoma County, and it is indicated that the affidavits were sworn at Bungoma. Issues could arise, as they often do, on the propriety of these affidavits, around how they were commissioned, about how the deponents and the Commissioner for Oaths were situated at the time of the said commissioning, and which could require that both the deponents and the Commissioner for Oaths explain themselves. Even if the Commissioner for Oaths, who is also the Advocate for the petitioner, one of the deponents of the subject affidavits, does not have to take to the witness stand for that purpose, there is still a possibility of him being placed in an embarrassing position, which would expose the court and the proceedings, and the petitioner, to some level of disrepute and embarrassment, depending on whatever may come out of the enquiry, given that an Advocate and a Commissioner for Oaths are officers of the court. I am, of course, alive to the constitutional right to legal representation by an Advocate on one's choice. However, constitutional rights are not absolute. They are all subject to derogations of one kind or other. In this case, the right to legal representation by an Advocate of one's choice would be subject to professional rules and ethics and other considerations, developed for maintenance of good order and discipline within the legal profession, and with respect to practice and conduct in court. Such considerations include where there is a conflict of interest and others.

24. I believe I have said enough to demonstrate that Mr Nyaribo, having commissioned the affidavits that the petition as lodged herein to support his petition, and in respect of which he intends to call the deponents as his witnesses, places him in a corner with regard to whether he should act for the petitioner having commissioned his affidavit and those of his witnesses. Situations could arise, with regard to those affidavits, which could put Mr Nyaribo in a conflict, and place him in an embarrassing situation, should the other side ask that he be called for cross-examination, on the circumstances of the commissioning of the affidavits. He was invited, by Mr Odhiambo, at the pre-trial conference on October 7, 2022, to consider stepping aside from the matter on that account, but he appears to have chosen not to. It falls upon me, in the circumstances, to have to make the decision that he should not, and shall not, continue to represent the petitioner in this matter, which I hereby do.

25. The next issue is with regard to deposit of security for costs. It is prescribed by section 78 of the *Elections Act*, 2011. It should be made within 10 days. The deposit, with respect to the election of a member of parliament, is Kshs 500, 000.00. The record before me indicates that the deposit has not been paid. At the pre-trial conference on October 7, 2022, Mr Nyaribo indicated that the petitioner had paid the same online, and said he would follow up to have the deposit reflected in the record. at the mention on October 17, 2022, he asked for leave to place material on record as proof of the deposit. As I deliver this ruling the record does not reflect the deposit, and the petitioner is yet to provide any proof of the payment.

26. The consequence on not paying the deposit is stated in section 78(3) of the *Elections Act*, 2011. It is provided that the no further proceedings should be heard on the petition, and the respondent may apply for dismissal of the petition and payment of costs to him. For avoidance of doubt, the said provision states as follows:

> ' Where a petitioner does not deposit security as required by this section, or if an objection 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 payment of the respondent's costs.'

27. There are 2 schools of thought on the consequence of not making the deposit on costs. The first school is that the same should be fatal to the petition, and the petition ought to be struck out. That is stated in such cases as *Kumbatha Naomi Cidi v County Returning Officer, Kilifi & 3 others [2013] eKLR* (Muchemi, J)and *Simon Kiprop Sang v Zakayo K Cheruiyot & 2 others, Nairobi Election Petition No 1 of 2013 (unreported)*. The other school sees it as a matter of procedure, and, therefore, there should be discretion to the court to extend time for compliance. The position is stated in such cases as *Charles Ong'ondo Were v Joseph Oyugi Magwanga & 3 others [2013] eKLR*(Maina, J); *Charles Maywa Chedotum & another v IEBC & 2 others [2013] eKLR* (JR Karanja, J); and Samwel Kazungu Kambi v Nelly Ilongo County Returning Officer Kilifi County & 2 others [2018] eKLR (W Korir, J)Q1. The position stated by the second school appears to be the predominant view. In my opinion that is the correct interpretation, for under section 78(3), the non-deposit of security for costs merely has the consequence of the proceedings being held in abeyance, unless the respondent makes an application for dismissal, whereupon the court may exercise discretion to either extend time or dismiss the petition. Section 78(3) is permissive, not mandatory. The respondents have not applied for dismissal of the petition on that account, and, therefore, should the petitioner not make the deposit, or provide proof of having made the deposit, by the date assigned for the oral hearings, scheduled to commence on November 15, 2022, then the said oral hearings shall not happen.

28. Finally, is the matter of the issues or questions for determination in this petition. The issues that I have framed for determination are:

    a. Whether there was inadequate voter education by the 1st and 2nd respondents, as alleged in paragraphs 22 to 25 of the petition, and whether the same affected the outcome of the election, to the disadvantage of the petitioner;

    b. Whether the election was conducted in a manner that did not adhere to the principles of the *Constitution* and the applicable legislation, as alleged in paragraphs 26 to 29 of the petition, and whether that impacted the final results, to the detriment of the petitioner;

    c. Whether there were irregularities in voter identification, balloting, counting of the ballots, and collation tallying and declaration of results, as alleged in paragraphs 30 to 37, 47 to 50 and 54 to 61 of the petition, significant to upset the results declared;

d. Whether the elections were marred by blatant denial of voters' rights, voter bribery, voter treatment and voter manipulation, as alleged in paragraphs 38 to 43, and 61 of the petition;

e. Whether there was insufficient security for voters and whether electoral violence was meted out by the 3rd respondent, as alleged in paragraphs 44 to 46 of the petition, and whether the same impacted on the final tally;

f. Whether there was intimidation and harassment of the election agents of the petitioner, as alleged in paragraphs 51 to 53 of the petition, and the extent to which the same affected the overall conduct of the election and the final tally;

g. Whether the court should order an audit and scrutiny of the system and technology deployed in the election, in the terms proposed in paragraph 62 of the petition; and

h. Who should bear the costs of the litigation.

29. The final orders/directions are:

a. That the application dated September 12, 2022 is disposed of in the terms set out in paragraph 16 hereabove;

b. That the application dated October 8, 2022 is disposed of in the terms set out in paragraphs 17 and 18 hereabove;

c. That the matter of Mr Nyaribo, Advocate, continuing to act in these proceedings, as Advocate for the petitioner, is disposed of in terms of paragraph 24 hereabove;

d. That the matter of the deposit of security for costs is disposed of in terms of paragraph 27 hereabove;

e. That the issues for determination in the petition are set out in paragraph 28; and

f. That the costs of the 2 applications shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 31ST DAY OF OCTOBER 2022

W. MUSYOKA

JUDGE

Erick Zalo, Court Assistant.

Mr. Nyaribo, Mr Owano, Ms. Kiprono, Mr. Omondi, Mr. Omeri and Mr. Michabe, instructed by Omondi Omeri & Mwasaru, Advocates for the petitioner.

Mr. Odhiambo, instructed by Muthaura Mugambi Ayugi & Njonjo, Advocates for the 1st and 2nd respondents.

Mr. Wasilwa, instructed by Masinde & Company, Advocates for the 3rd Respondent.