



REPUBLIC OF KENYA



**KENYA LAW**  
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**Maore v Independent Election Boundaries Commission & 2 others (Petition 1 of 2022) [2022] KEHC 16047 (KLR) (29 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 16047 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
PETITION 1 OF 2022  
SM GITHINJI, J  
NOVEMBER 29, 2022**

**BETWEEN**

**MAOKA RICHARD MAORE ..... PETITIONER**

**AND**

**INDEPENDENT ELECTION BOUNDARIES COMMISSION 1<sup>ST</sup> RESPONDENT**

**IGEMBER NORTH CONSTITUENCY RETURNING OFFICER .... 2<sup>ND</sup>  
RESPONDENT**

**M'ANAIBA JULIUS TAITUMU ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The petitioner moved this court *vide* the petition dated September 8, 2021 seeking the following reliefs;
  - a. Declaration that there was non-compliance irregularities and improprieties that affected the final results.
  - b. Declaration that the parliamentary election was not conducted in accordance with article 81 of the [Constitution](#) rendering the election void.
  - c. Declaration that the 3<sup>rd</sup> respondent was not validly elected.
  - d. An order for scrutiny and recount for 46 polling stations.
  - e. Declaration that the petitioner was validly elected.
  - f. An order for fresh parliamentary elections.
  - g. A determination on whether there was an electoral malpractice of a criminal nature.
  - h. Costs.



2. The petitioner's account is that in the polling stations his agents were barred, denied access and/or chased away by the 1<sup>st</sup> respondent's presiding officers thus it was impossible for his agents to witness and inspect the opening of ballot boxes, actual voting, counting and declaration of results and sealing of election materials. He stated that their actions undermined accuracy, accountability, simplicity, verifiability and transparency. In addition, form 35A's in the said polling stations were not signed by his agents.
3. The petitioner had three witness swear affidavits in support of his petition who stated that some voters were denied the right to vote on account of KIEMS kit failing to identify their biometres and the presiding officers in the said areas refused to invoke the use of manual voters register because voters were in support of the petitioner.
4. The 1<sup>st</sup> and 2<sup>nd</sup> respondents filed their responses dated September 19, 2022. The 1<sup>st</sup> respondent filed replying affidavits sworn by Elizanah Kiunga, Benson Murangiri Kamencu and Kinyua Nkunja M'iweta all presiding officers in various stations within the constituency. Ms Elizanah Kiunga who was the presiding officer Ntunene Coffee Factory polling station stated that all voters in her polling station were allowed to vote and nobody was turned away. That there were no incidents of voter bribery, collusion or bias. Further, the petitioner did not have an agent at her polling station. Mr Benson Murangiri the presiding officer Antuambai Secondary School polling station deponed that he did not take any ballot papers out of the ballot box and later return them. Lastly, Mr Kinyua Nkunja the presiding officer Nthangarine Primary School polling station deponed that seven people in his station voted alphanumerically and he did not turn away any voters.
5. The 2<sup>nd</sup> respondent on the other hand deponed that the election was free and fair. That it is not true the petitioners agents were denied access or chased away but the petitioner agents in the 46 polling stations refused to show up.
6. The 3<sup>rd</sup> respondent did not file a response.
7. The matter came up for pre-trial on October 28, 2022. All parties were present in court on that day. Counsel for the petitioner Mr Mikwa informed the court that the petitioner did not wish to proceed with the petition and sought 14 days leave to engage the withdrawal procedure. Counsel for the respondents did not oppose the application. Counsel for the 3<sup>rd</sup> respondents indicated that they had not been officially served despite having made a request to that effect. He also pointed out that the petitioner had not paid security for costs. The application for leave to initiate withdrawal was granted.
8. On November 18, 2022 the matter came up for mention to confirm filing of the application for the withdrawal of the petition. Mr Mikwa, counsel for the petitioner told the court that the petition is not proper as it was not served on the respondents and security for cost was not deposited. He urged the court to strike out the petition with no orders as to costs.
9. Mr Kathungu counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents in response stated that the petitioner did not inform the court the legal section under which the petition can be struck out. Further that the petitioner was to make an application for leave to withdraw and that there is a petition on record whether incompetent or not and if the petitioner is not ready to proceed, he should have withdrawn the same. He added that if struck out, it should with costs to them.
10. Mr Ashaba holding brief for Mr Mutuma for the 3<sup>rd</sup> respondent stated that they do not oppose the application to have the petition struck out as the petition is incompetent for lack of service and lack of payment of security for costs. He added that costs follow the event and whichever the case, costs are deserved and it is only fair that the 3<sup>rd</sup> respondents be entitled to costs.



11. Mr Mikwa in response to the issues raised stated that they did not serve the respondents and they responded on their own thus cannot claim costs for filing responses. In the event costs are to be granted, the deputy registrar should tax it or minimal costs be granted.

### **Analysis and Determination**

12. I have considered the arguments advanced by the parties herein. The two issues arising for determination are; -
  - i. Whether the application for striking out the petition is merited.
  - ii. Costs
13. The petitioner indicated that he no longer wished to pursue the petition and intended to commence the withdrawal process. However, he turned back and stated that the petition is a nullity as it was not served and security for costs was not deposited and therefore should be struck out.
14. Section 78 of the *Elections Act* provides; -
  1. A petitioner shall deposit security for payment of costs that may become payable by the petitioner not more than ten days after the presentation of a petition under this act.
  2. A petitioner who presents a petition to challenge an election shall deposit –
    - a. One million shillings, in case of a petition against a presidential candidate.
    - b. Five hundred thousand shillings in case of a petition against a member of parliament or a county governor.
    - c. One hundred thousand shillings, in case of petition against a member of a county assembly.
  3. Where a petitioner does not deposit any 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 the payments of the respondent’s costs.”
15. Further, rule 13 of the *Elections (Parliamentary & County Elections Rules, 2017* provides that; -
  - (i) Within ten days of the filing of a petition, a petitioner shall deposit security for the payment of costs in compliance with section 78 (2) (b) and (1) of the act; -
  - (2) The security for costs deposited under sub-rule (1) shall-
    - a. be paid to the registrar,
    - b. be for the payment of costs, charges or expenses payable by the petitioner; and
    - c. Subject to the directions of an election court, be vested in, and drawn upon from time to time by, the registrar for purposes for which security is required”

Rule 19 further provides that,

  - (1) where an act or omission is to be done within such time or may be prescribed in these rules or ordered



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

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

16. Several Courts of concurrent jurisdictions have pronounced conflicting opinions regarding the issue of deposit for security for costs. In *Fatuma Zainab Mohamed v Ghati Dennittah & 10 Others [2013] eKLR* the court held that failure by the petitioner to deposit security for costs within the stipulated period was not fatal to the petition and therefore amenable to the court’s discretion to extend time to enable the petitioner comply with the requirement for the deposit of the security for costs.

17. In *Milton Kimani Waitinga v IEBC & 2 Others* unreported, the court held that;

In the circumstances, given the clear stipulation of section 78 (2) (b), rule 13 and our decision law, it follows that the notice of motion dated September 21, 2017 must succeed. The clear requirement of the statute and subsidiary legislation is that a petitioner is required to deposit security for costs within ten days of filing their petition. This did not happen here.....”. The petitioner had also not made any effort to get leave of the court to deposit security for costs out of time.”

18. In the instant petition, I am of the view that the requirement for the deposit for security for costs is mandatory as anticipated by section 78 of the *Election Act*. The law is stringent that the security for costs must be paid within ten days upon lodging the petition. The petitioner has not sought leave to extend time to pay for the security for costs. He has indicated that he has lost interest in pursuing the petition. It is my finding therefore, in light of the circumstances herein, that the failure by the petitioner to deposit security for costs renders the petition fatally defective. The requirement for deposit for costs is a substantive legal requirement and not a procedural technicality. Taking into account the above and the petitioner’s disinterest in the petition, the petition herein struck out as wished by him.

19. On the issue of costs, the petitioner argued that the petition was not served on the respondents. The 1<sup>st</sup> and 2<sup>nd</sup> respondents however, did file their responses. In my opinion, I find that the petitioner’s argument on costs holds no water. By filing the petition which is in public domain, was an invitation for the parties named to respond, whether served or not. It is trite that costs follow the event. Considering that the parties had prepared for a hearing of the petition which did not take place and the fact that parties attended the two mentions and are virtually present for the delivery of this ruling which involved both time and resources, I award costs to the respondents capped at Kshs 300,000/=.

**RULING READ, SIGNED AND DELIVERED VIRTUALLY THIS 29<sup>TH</sup> DAY OF NOVEMBER, 2022.**

.....

**SM GITHINJI**  
**JUDGE**

