



REPUBLIC OF KENYA



KENYA LAW
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**Kuria v Independent Electoral and Boundaries Commission
(IEBC) & 2 others; Gichigo (Subsequent Party) (Election Petition
E001 of 2022) [2022] KEHC 18061 (KLR) (21 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 18061 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
ELECTION PETITION E001 OF 2022
RPV WENDOH, J
DECEMBER 21, 2022**

**IN THE MATTER OF THE CHALLENGE OF THE VALIDITY OF THE
MEMBER OF PARLIAMENT JUJA CONSTITUENCY ELECTION, 2022 P**

AND

**IN THE MATTER OF ARTICLE 1(1); 2(2); 3(1); 4(2); 10; 21(1); 22(1)23;35;
38 (3) (C);47(2); 48; 81 (1) (A) & (E); 82(2) (B); 84; 86; 87 (2) & (3);
88(5); 165(3)(A) AND (E);101 OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF SECTION 75, 76 (1), 80 & 82 OF THE ELECTIONS ACT, 2011

AND

**IN THE MATTER OF SECTION 8, 12, 28 & 29 OF THE ELECTIONS
(PARLIAMENTARY AND COUNTY ELECTIONS) PETITIONS RULES, 2017**

AND

IN THE MATTER OF THE AN ELECTIONS

BETWEEN

ALOISE KINYANJUI KURIA PETITIONER

AND

**THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION
(IEBC) 1ST RESPONDENT**

JUJA CONSTITUENCY RETURNING OFFICER 2ND RESPONDENT

GEORGE KOIMBURI NDUNG’U 3RD RESPONDENT

AND



RULING

1. This ruling is in respect to the petitioner’s application dated 7/12/2022 and the intended substituted petitioner’s application dated 18/12/2022. Both applications were canvassed orally on 20/12/2022.
2. On 8/12/2022, when this petition was coming up for further cross examination of the 2nd respondent, Mr. Bwire Counsel for the petitioner, indicated that the petitioner is desirous to withdraw the petition. The court directed that the petitioner do comply with the proper procedure provided in the Elections (Parliamentary and County Elections) Petition Rules, 2017 hereinafter referred to as ‘Rules’ on withdrawal of petitions and it would also consider any person who wished to come on record as a substituted petitioner on the date of the hearing.
3. Pursuant to those directions, on 16/12/2022, Mr. Omenke, Counsel for the petitioner confirmed compliance with the directions on the withdrawal of the petition and sought directions on the hearing of the petitioner’s application on withdrawal of the petition dated 7/12/2022. Counsel for the respondents did not object to the withdrawal save on the issue of costs which they asked this court to address itself on. The court directed that each party do file brief submissions on the issue of costs. On 19/12/2022, when the petition came up for mention on the filing of submissions, Learned Counsel Mr. Ndegwa previously acting for the petitioner, indicated that there was a person seeking to be substituted as the petitioner and in tandem with this, he had filed an application dated 18/12/2022.
4. The application for withdrawal of the petition, is premised on the following grounds:-
 - i. Consent was entered between the petitioner and the respondents.
 - ii. Cohesion for the people of Juja to allow for healing of losing side and development.
5. Mr. Omenke for the petitioner submitted that the petitioner has complied with the directions on withdrawal of petitions and on 16/12/2022, there was no objection from the respondents on the withdrawal of the petition. Counsel also submitted that the petitioner ought to be allowed to cease from acting as he met the threshold required. In relation to the costs, Counsel prayed that the deposited security for costs be refunded to the petitioner as he is no longer a party to the application.
6. Ms. Anami, Counsel for the 1st and 2nd respondents, had no objection to the withdrawal of the petition save on the issue of costs. Counsel referred the court to their submissions on the issue of costs dated 16/12/2022. She asked the court that the Kshs. 500,000/= be shared equally between the three respondents as per the prayer of the costs.
7. Mr. Manyara for the 3rd respondent was not opposed to the withdrawal of the petition save for the issue of costs. He referred the court to his submissions on the issue of costs dated 16/12/2022. As regards the request of refund, Counsel submitted that costs follow the event and, in this case, the withdrawal of the petition is the event and the security for costs should be released to the respondents to be shared among them.
8. On the application for substitution dated 18/12/2022, Jairus Gichigo the applicant seeks the following orders:-
9. That this court be pleased to issue a notice to the applicant allowing the applicant to be the substituted as petitioner in the current petition.



10. Costs be provided for.
11. The application is premised on the grounds thereof and the supporting affidavit of the applicant dated 18/12/2022. The applicant deposed that he is a male adult of sound mind living and working for gain in Kiambu County in the Republic of Kenya and that he is a law abiding citizen; that the current petition raises weighty issues of election malpractices which matters ought to be determined by the court; that the petition raises several instances where the 3rd respondent was in violation of Chapter 6 of *the Constitution* in so far bribery of voters is concerned and such matters of integrity of a person of a Member of a National Assembly cannot be taken for granted; that under Article 3 of *the Constitution*, he has an obligation to defend *the Constitution* of Kenya whenever the same is under threat of violation; that for the development of the law and for purposes of promoting the values and principles of *the Constitution*, he sought to be admitted as a petitioner.
12. The applicant further deposed that the several witnesses have testified in this petition and if it is allowed to suffer death, it means that the laws will be legislated through individuals who procure their win through fraud that offends the sovereignty of the people as enshrined under Article 1 and 94 of *the Constitution*; that the petition of this nature that has aspects of criminality cannot be allowed to die a natural death at the wills and wishes of the petitioner. Further, he urged that the petitioner has not given valid reasons why he has lost interest in the petition and it can be inferred that he has been comprised.
13. The applicant stated that there is only one witness for the 1st and 2nd respondent's witness remaining thus it is only fair that the case be heard to its logical conclusion in an effort to uphold Articles 1, 3 and 10 of *the Constitution*. It was also stated that the notice of withdrawal of the petition was not conspicuous and did not follow the prescribed form; that this application will not occasion any prejudice to the respondent and it is in the best interest of justice that the orders sought be granted.
14. In his oral submissions, Mr. Ndegwa for the applicant submitted that the petitioner could withdraw as the petitioner but the applicant is opposed to the withdrawal of the petition; that the petition seeks to interrogate how the sovereignty of the people was exercised as per Articles 10, 92, 93 and 94 of *the Constitution*. If the petition is withdrawn, it would deny the people of Juja and Kenya a chance to know whether the election was proper. Counsel further submitted that the petition solicited witnesses who alleged issues of bribery which is uncontroverted and the court should interrogate its truthfulness or not; that if the petition is withdrawn, the people will suffer prejudice. Counsel also stated that it would mean that legislation will be done by people not elected by the will of the people.
15. It was further submitted that the withdrawal of the election petitions is not automatic; that if there are massive allegations of malpractice, the court should enhance good governance and call for accountability, otherwise, the people will suffer prejudice; that the exiting petitioner lost the elections and will not suffer prejudice if substituted. On the issue of costs, it was submitted that the same is yet to be determined and that the court has its discretion to hold the costs deposited by the former petitioner.
16. Mr. Ndegwa further argued that once the advertisement is done, the petitioner acted in rem and any Kenyan could come to protect the sovereignty of the people; that the reason behind the advertisement was that Parliament knew that tendency to abuse court process; that it's also meant to guard against vexatious litigants and busy bodies from commencing petition for their own gain; that the application seeks to save the petition from death; that withdrawal is granted at the discretion of the court upon scrutiny of the evidence of the court.
17. On costs, it was submitted that the substituted petitioner will have assumed a public interest nature and condemning him to pay costs on pro rata basis or otherwise, will discourage future substitutions.



Article 48 of the Constitution provides that there should be access to justice without impediments. Counsel urged this court to find that security for costs already deposited should stand in for purposes of this petition so that the people should not suffer prejudice and the court should not affirm people who procured elections through election fraud.

18. The application was opposed. The 1st and 2nd respondents filed their grounds of opposition dated 20/12/2022. The grounds of opposition are as follows:-
- i. That the applicant issued its “Notice to be substituted as a petitioner” out of the time limit prescribed by the Elections (Parliamentary and County Elections) Petitions Rules, 2017. The Notice was issued on 19/12/2022 whereas the time to issue such notice expired on 16/12/2022.
 - ii. That the applicant has failed to demonstrate that he is a person qualified to be a petitioner in respect to the Member of National Assembly for Juja Constituency election held on 9/8/2022. The applicant has not provided any proof of his citizenship, place of residence or that he is a registered voter of Juja Constituency or at all as at 9/8/2022.
 - iii. That the applicant has further failed to address the court and parties on its ability and/or willingness to raise the security of costs within the time limit prescribed by the Elections (Parliamentary and County Elections) Petitions Rules, 2017. The applicant has neither demonstrated that they are capable or able to pay costs of the petition in the event that the same is dismissed.
 - iv. That the applicant, in any event, relied on the misguided or misconceived notion that the 3rd respondent is guilty of voter bribery, which averment is false as the 3rd respondent has not been adjudged as such by a court of competent jurisdiction.
19. Ms. Anami, Counsel for the 1st and 2nd respondents submitted on four grounds. On the first ground, Counsel submitted that the application dated 18/12/2022, and filed on 19/12/2022 was filed out of the prescribed time by the Rules and in particular Rule 22. Counsel referred to the contents in Form 6 on the timelines for filing an application after the notice has been issued which is 7 days which lapsed on 16/12/2022.
20. On the second ground, Counsel submitted that the applicant has not demonstrated that he is a qualified petitioner according to Rule 24 (1). Counsel stated that the word ‘qualified’ is not defined but it has been dealt with in persuasive decisions. Ms. Anami referred this court to the case of Hon. Dickson Daniel Karaba vs Hon. Kibiru Charles Reubenson & 2 Others (2018) eKLR at paragraphs 63 and 67 and submitted that a person qualified should be a resident or voter of the said constituency. Counsel also referred to the decision in Johnson Muthawali & Another v Kingi Michael Thoyah & 2 Others (2018) eKLR at paragraph 21 where it was held that a voter and resident is qualified to be a petitioner; that the applicant only gives the names and there is no proof that he is a resident of Juja; that there is also no proof that he is a Kenyan citizen as there is no Identity Number, no voter registration particulars and the court cannot know whether he is a qualified petitioner.
21. On the third ground, Counsel submitted that it has not been demonstrated that there is ability to raise the security for costs; that the importance of the security for costs and it is a prerequisite under Rule 24 even on substitution; that from the submissions of Counsel by the applicant, the intended petitioner is not able to raise security for costs as required by the Rules and if the petition is dismissed then costs follow the event, due to the costs of prosecuting election petitions. Counsel urged the court to consider the decision of Dickson Karaba (*supra*) at paragraph 69. Counsel further submitted that



- the substituted petitioner is to stand in the same way as the original and it is not unconstitutional and has never been declared unconstitutional.
22. On ground four, Ms. Anami submitted that the applicant's affidavit is misguided that the respondent is guilty of election malpractice and that the evidence tendered in court is uncontroverted by the respondents; that the 3rd respondent is not charged; that the allegations made by Mr. Aloise Kinyanjui some cannot stand. Counsel asked this court to dismiss the application with costs.
 23. With the leave of the court, Ms. Anami, also addressed the court as to whether the whole petition should be withdrawn, Counsel referred the court to the *Dickson Karaba* Case (*supra*) at paragraph 56.
 24. The 3rd respondent filed a replying affidavit sworn and dated 19/12/2022. The 3rd respondent contended that the intended petitioner has failed to prove that he qualifies to be a petitioner as per Rule 24 of the *Elections (Parliamentary and County Elections) Petitions Rules*, 2017; that by merely quoting *the Constitution* and ones obedience to the law, it does not qualify the intended petitioner; that the intended petitioner has not declared his willingness to abide by the direction of this court in terms of depositing security nor has he affirmed whether he will deposit the security; that the intended petitioner has failed to establish locus standi in this matter and he lacks supporting evidence of the same.
 25. The 3rd respondent further contended that he believes the intended petitioner is not a resident of Juja Constituency but a busy body for hire; that the intended petitioner has not laid any basis that he or the people of Juja Constituency will be prejudiced upon withdrawal of the petitioner by Mr Aloise Kinyanjui. In response to paragraph 11 of the application, the 3rd respondent stated that no agreement or undertaking has been entered into in relation to withdrawal of the petition and the allegation therein have no proof; that the intention of the intended petitioner is to delay the determination of this petition since it has been brought at the tail end of the proceedings. The 3rd respondent urged this court to find that the application lacks merit and it ought to be defeated.
 26. Mr. Manyara Counsel for the 3rd respondent submitted that the application is brought out of time as it ought to have been filed before 16/12/2022; that the notice was gazetted on 9/12/2022 inviting anybody who wished to take over within 7 days and the 7 days lapsed on 16/12/2022 without any such application; that there is no prayer in the application seeking time to file the application out of time and neither did Counsel seek such a prayer even in his oral submissions thus the application should be dismissed.
 27. Counsel further submitted that Rule 8 (1)(a) of the *Rules* requires that the petitioner includes his name and address in his proceedings; that Rule 12 (2) (e) the petitioner in his affidavit did not indicate his address which is critical; that the applicant could be a stranger. It was also submitted that it is not automatic to be substituted. On the issue of security for costs, Counsel submitted that the applicant should have indicated if he is willing to deposit the security or give a proposal on the same. On the bribery allegations, Counsel submitted that the intended petitioner should have annexed an O.B. extract to make a case before this court. The allegations were made by original petitioner. Counsel asked this court to dismiss the application.
 28. In a brief rejoinder, Mr. Ndegwa submitted that what qualifies an intended petitioner, one needs to be a Kenyan citizen. On the issues of the address of the applicant, it was submitted that there were mere averments and not an affidavit. Counsel submitted that the advertisement invites Kenyans in rem and not in persona and it is not restricted to any location in Kenya. Under Article 94(2) of *the Constitution*, once an MP is elected, he legislates on behalf of Kenyans not the people of Juja only. On the case referred



- to by the 1st and 2nd respondents, Counsel submitted that it is limited to a rural place in Kerugoya while the one before this court i.e Juja is for a cosmopolitan area where different people reside.
29. On the notice being filed out of time, it was submitted that the 7th day fell on a holiday and where the day falls on a holiday, it is the next day which is counted as per Section 57 (a) and (b) of Cap 2. On the security for costs, it was submitted that only the court can make an order on costs and the court has not made any order which the petitioner has failed to comply; that the originator of the complaint has left and the intended petitioner comes in to protect the court from abuse. It was submitted that Rule 24 (1) does not require applicant to lay basis. Counsel reiterated that the petition is a public interest litigation under Article 159 and 22 of *the Constitution*. Article 10 promotes good governance and the court cannot close its eyes on the malpractices raised during the hearing.
30. I have duly considered the applications on record, the oral submissions, arguments by Counsel for all parties, and the case laws cited. The following issues are for determination:-
- i. Whether the Petitioner has met the threshold for withdrawal of the Petition.
 - ii. Whether the application by the intended Petitioner was filed within time.
 - iii. Whether the intended Petitioner has met the threshold for substitution as Petitioner.
 - iv. Whether the intended Petitioner has complied with the requirements for deposit of security for costs.
 - v. Costs.
31. The petitioner filed an application dated 7/12/2022 indicating his intention to withdraw the instant petition. Rule 21 of the *Rules* provides for the procedure for the withdrawal of petitions. In addition to filing an application in the prescribed form and serving it upon all the parties, the petitioner is required under Rule 22 (2) to publish the intention to withdraw the petition in a newspaper of national circulation in Form 6 of the Schedule. The notice should also specify the time and place where the hearing of the withdrawal shall take place. This is because a petition is a public interest litigation and all interested had to know. On 16/12/2022, Mr. Omenke, Counsel for the petitioner, indicated to this court that the notice of the intention to withdraw was published in the Daily Nation Newspaper of 9/12/2022 and the same had been gazetted. This was confirmed by all Counsel present. Though Mr. Ndegwa states that the notice was not proper, he saw it and filed the application for the intended petitioner.
32. The decision to withdraw a petition is not an automatic right. Rule 21 states that the court “*may*” grant leave to withdraw the petition. The court has to exercise its discretion and may allow or deny the withdrawal of the petition. The reasons preferred by the petitioner were that he desires cohesion for the people of Juja and to allow healing for the losing side and development and that they had agreed with the respondents. The court is satisfied that the petitioner has sufficiently demonstrated his desire to withdraw the petition and it cannot sit and interrogate the reasons beyond what the petitioner has given this court. On the compliance of the procedure for withdrawal process, the petitioner has sufficiently demonstrated that he complied with the law on the procedure of withdrawal of the petition. The prayer to withdraw is therefore allowed.
33. Even as a petitioner indicates their intention to withdraw the petition, this being a public interest litigation, Rule 24 (1) of the *Rules* provides that the petitioner can be substituted. The Rule provides:-
- “At the hearing of the application for the withdrawal of a petition, a person who is qualified to be a petitioner in respect of the election to which the petition relates may apply to the



election court to be substituted as the petitioner in place of the petitioner who has applied to withdraw the petition.”

34. One Jairus Gichigo filed an application dated 18/12/2022 to become the substituted petitioner. His reasons for substitution are mainly that the petition raises issues of public interest and in this particular one, grave issues of malpractice were raised and if the petition is not heard to its logical conclusion, the people of Juja Constituency will be greatly prejudiced as they will be represented by a person who was allegedly elected in an unlawful manner.
35. The respondents jointly asked this court to dismiss the said application on three prong basis: that the application was filed out of time, the applicant has not demonstrated that he is qualified and the applicant has not provided security for costs. On the first point, Rule 22 (2) provides that the intention to withdraw the petition shall be in Form 6 as set out in the First Schedule of the Rules. Form 6 requires that any person who wishes to be substituted as petitioner do so by filing an application within 7 days from the date of the published notice. The notice was published on 9/12/2022. The seven days ran from 10/12/2022 to 16/12/2022. The application for substitution was filed on 19/12/2022. Mr. Ndegwa contended that the seventh day fell on a Sunday and where such a day fell on a Sunday, the court looks at the next day. He referred to Section 57 (a) and (b) of the Statute of *Interpretation and General Provisions Act* which provides:-

“In computing time for purposes of any written law, unless the contrary intention appears –

- (a) A period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;
 - (b) If the last day of the period is a Sunday or a public holiday or an official non-working days (which are in this section referred to as excluded days), the period shall include the next following day not being an excluded day;
 - (c) Where an act or proceedings is directed or allowed to be done or taken on a certain day, then, if that day happens to be an excluded day, the act or proceedings shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;
 - (d) Where an act or proceedings is directed or allowed to be done or taken within any time not exceeding six days excluded days shall not be reckoned in the computation of time.
36. The time when exclusion is to be done is specified under Section 57 (b) if the last day of the period falls on a Sunday, a public holiday or a non-official working day. To my knowledge, the last day when the application should have been filed, was not on a Sunday, a public holiday or a non - official working day. The last day on which the application was to be filed was 16/12/2022 which was a Friday. This matter was also mentioned on that Friday to confirm if there was a party desirous to be a substituted as petitioner but there was none. If indeed the applicant was keen on being substituted as a petitioner, even in the absence of a formal application, their presence in court on that day would have been a good demonstration of their keenness and interest to take over this petition. The application for substitution was filed outside the stipulated time frame. The fact that they filed an application out of time to become a substituted petitioner, goes to show that they were aware of the notice and when it was published. In addition, the applicant did not seek leave of the court to file the application out of time.
37. Time and again it has been said that where there are well and clear laid out procedures to be followed, a party cannot ignore such rules and procedures and expect the court to come to its aid or even seek refuge under Article 159 of *the Constitution*. Even in exercising its discretion, the court must ensure



that it is not done at one's whims, sympathy or caprice. The Supreme Court in *Raila Odinga vs IEBC & Others* (2013) eKLR, The Supreme Court held: -

“Article 159 (2) (d) of *the Constitution* simply means that a court of law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural requirements as they seek justice from court.”

38. The foregone is sufficient to dismiss this application for having been filed out of time.

Rule 24 (1) of the *Rules* provides: -

“At the hearing of the application for the withdrawal of a petition, a person who is qualified to be a petitioner in respect of the election to which the petition relates may apply to the election court to be substituted as the petitioner in place of the petitioner who has applied to withdraw the petition.”

39. The Rules do not provide the criteria to be considered for one to be deemed to be qualified. However, Parliament had the intention to have the person who is to be substituted as a petitioner to be one who is 'qualified'. To be qualified, it means that there are some conditions to be met before one can be substituted as petitioner. Parliament cannot legislate on every single issue and that is why the courts are given room to interpret the laws and exercise judicial discretion. For a person to seek to be a petitioner, he must have locus standi in the matter. The Supreme Court in *Abdi Khaim Osman Mohammed & Another -vs- Independent Electoral & Boundaries Commission and 2 Others*, Civil Appeal NO. 293 of 2013 (2014) eKLR stated persons who are affected by electoral disputes as follows:-

“The learned Judge further got the legal basis right when he stated that electoral disputes involve not only the parties to a petition, but also the electorate in the concerned electoral area and that they are therefore matters of great public importance and interest.”

40. In the case of *Mohammed Ibrahim Abdi vs IEBC and 2 Others* Election Petition No. 7 of 2017 the court found the applicants to be qualified substitutes on the following grounds:-

“The applicant have managed to show that they are residents and voters in Mandera North Constituency. In their application, they indicated their ID numbers, polling stations and wards. This has not been rebutted by the 1st respondent. It is the duty of an election court to ensure that the withdrawal of an election petition by a petitioner, does not terminate when there is a qualified substitute.”

41. Therefore, the persons who ordinarily have direct interest in election petitions are the electorates or residents within the particular area where the dispute arises and it is from this, that election petitions assume the nature of public interest. If the gates were to be opened for any person to come on board as a substituted petitioner in any electorate area where they do not reside or vote, of what interest or benefit will they gain or what might they be protecting? If the question is that a Member of Parliament legislates not only for the people of his or her constituency but the whole country, then the aggrieved Kenyan citizen has other avenues where they can seek to challenge the laws which are not only passed by the particular Member of Parliament but by Parliament itself.

42. I am therefore persuaded and agree with the findings of the court in the case of *Hon. Dickson Daniel Karaba vs Hon. Kibiru Charles Reubenson & 2 Others* (2018) eKLR where the learned Judge observed that the applicants had nothing to show that they were from the concerned electoral area and therefore



- they could not have come in as the substituted petitioners. The Court of Appeal sitting in Nyeri, on the appeal of *Dickson Daniel Karaba (supra)* being Election Petition Appeal No. 4 of 2018 did agree with the findings of the learned Judge and upheld her findings.
43. Interestingly, or is it by sheer coincidence, the firm of Ndegwa & Ndegwa where learned Counsel for the applicant Mr. Ndegwa practices, was acting for the persons who intended to be substituted as the petitioners. The Judge having reviewed the material on record, noted that the persons who wished to be substituted as petitioners were not registered in the said electoral area and thus dismissed their application which I reiterate, the Court of Appeal upheld. The Court of Appeal held that the learned Judge was right in finding that the applicants were not bona fide applicants and they lacked locus standi.
44. The foregone crystallizes the position that the applicant having failed to prove that he is a resident or a voter in the concerned constituency i.e Juja Constituency, lacks the locus standi to be substituted as petitioner. Not only did the applicant fail to demonstrate that he is not a resident of Juja but he also failed to attach his national identity card which also makes it difficult for this court to decipher whether he is fictitious or a real person and a citizen of Kenya for that matter. The applicant also failed to disclose the necessary particulars about himself as required in Rule 12 (2) (a) in his affidavit. He did not disclose his addresses which is curious. Where can he be found? In the end, I find that the application dated 18/12/2022 lacks merit and the same is dismissed.
45. As regards the issue of security for costs, having found that the applicant is not qualified to be substituted as petitioner, the same falls by the way. In any event, under Rule 24 (4) the intended petitioner would have 3 days in which to pay the costs, had the application been allowed.
46. As submitted by Mr. Ndegwa, because of the public interest nature of the petition, the court has the duty to ensure that the same is not withdrawn if there was a qualified petitioner to be substituted so that the electorate of Juja are not prejudiced. In this case, the intended petitioner has not met the threshold required. The first petitioner cannot be forced to continue with the petition and for that reason the petition stands withdrawn.
47. The only issue left is the one of costs. Ordinarily, costs will follow the event. In this case, the event is the withdrawal of the petition. Under Rule 30 and 36 of the Rules, award of costs is discretionary but such discretion has to be exercised judiciously. Costs should not be punitive but affordable and proportionate and should promote access to justice and not scare would be petitioners away. The respondents incurred costs in taking instructions, hearing of 30 witnesses in this case. The 1st and 2nd respondents were represented by two Counsel while the 3rd respondent was represented by three Counsel. The petition was heard for 4 weeks and only the cross examination of the Returning Officer was remaining.
48. It has been the practice of courts to cap costs so that the losers are not left at the whims of their competitors. In the *Karaba Case*, the court considered the case of *Henry Okello Nadimo vs IEBC & 2 Others* Busia Election Petition No. 2 of 2013 where the petition was withdrawn after being fully heard and the court awarded costs at Kshs. 4,000,000/=. In doing my best, I will cap the costs as follows:- the 1st and 2nd respondents costs are capped at Kshs. 4,000,000/=. The 3rd respondents costs are capped at Kshs. 4,000,000/=. The costs will be subject to taxation. The Kshs. 500,000/= deposited as security to be shared equally amongst the respondents as part of the payable costs.
49. In the end, the court makes the following orders:-
1. The Petition is hereby withdrawn with costs to the Respondents.



2. The Respondents will have costs of the application to withdraw the Petition.
3. Costs are capped at Kshs. 4,000,000/= for the 1st and 2nd respondents.
4. Costs are capped at Kshs. 4,000,000/= for the 3rd respondent.
5. The Kshs. 500,000/= deposited as security for costs be released to the Respondents to be shared equally and will form part of the payment for costs.
6. The application dated 18/12/2022 is dismissed with no order as to costs.
7. Counsel to file their respective bills of costs for taxation subject to capping the costs.
8. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MIGORI THIS 21ST DAY OF DECEMBER 2022

R. WENDOH

JUDGE

Ruling delivered in the presence of;

Mr. Omenke for the Petitioner.

Ms. Anami for the 1st Respondent.

Mr. Mwangi Ndegwa for the Intended Petitioner.

Mr. Manyara, Mr. Mageto and Ms. Chege for the 3rd Respondent

Kinyua - Court Assistant

