



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

HIGH COURT ELECTION PETITION NO. E001 OF 2021

**IN THE MATTER OF: THE CHALLENGE OF THE VALIDITY OF A MEMBER OF THE
NATIONAL ASSEMBLY, KIAMBAA CONSTITUENCY, CONDUCTED ON 15TH JULY, 2021.**

**IN THE MATTER OF: ARTICLES 1(1), 2(2), 3(1), 10, 21(1), 23, 38(3), 47(2), 48, 81 (2) (b),
84 (4)(5), 86, 87(2) (3), 88(5), 165(3)(a) & 180(1), OF THE CONSTITUTION OF KENYA, 2010**

AND

IN THE MATTER OF: SECTIONS 75, 76, 80, AND 82 OF THE ELECTIONS ACT, NO. 24 OF 2011

AND

IN THE MATTER OF: POLITICAL PARTIES ANCT NO. 11 OF 2011

AND

IN THE MATTTTER OF: LEGAL NOTICE NO. 128 OF 2012,

THE ELECTIONS (GENERAL) PETITIONS REGULATIONS, 2012,

AND

IN THE MATTER OF: THE ELECTIONS (PARLIAMENTARY AND

COUNTY ELECTIONS) PETITION RULES, 2017

AND

IN THE MATTER OF: LEGAL NOTICE NO. 126 OF 2012,

(THE ELECTION REGISTATION OF VOTERS) REGULATIONS 2012.

GEORGE THATA NDIA.....PETITIONER/APPLICANT

VERSUS

INDEPENDENT ELECTORAL AND BOUNDERIES COMMISSION (IEBC).....1ST RESPONDENT

PETER KAMAU MUIGAI,

THE RETURNING OFFICER KIAMBAA CONSTITUENCY.....2ND RESPONDENT

WANJIKU JOHN NJUGUNA.....3RD RESPONDENT

RULING

1. On the 2nd day of August 2021, the Petitioner, George Thata Ndia filed the petition herein, challenging the validity of the by-election of the Member of National Assembly of; Kiambaa Constituency, conducted on, 15th July 2021.
2. By the application dated 31st October, 2021, which is the subject of this ruling, the Petitioner applies for leave to withdraw the petition with no order as to costs, on the following grounds:
 - a) *That, it has come to the attention of the Petitioner that the 1st Respondent herein has resolved that, Kiambaa constituency will not be participating in the Enhanced Continuous Voter Registration (ECVR) exercise.*
 - b) *That, the 1st Respondent has indicated that its reason for this decision is because of the existence of this instant Election Petition No. E001 of 2021, challenging the validity of the by- election of Member of National Assembly of Kiambaa Constituency, conducted on, 15th July 2021.*
 - c) *That, as a result thereof, the people of Kiambaa Constituency, Kiambu County, have been disenfranchised from the ongoing nationwide ECVR.*
 - d) *That, the ongoing nationwide registration exercise is scheduled to close on 2nd November, 2021.*
 - e) *That, going by the indicative legal timelines for the conduct and determination of an election Petition as adopted by the directions of the Honourable Court on; 21st October 2021 during the pre-trial conference, it is indicative that, the Petition will not have been heard by the close of the ongoing voter registration exercise.*
 - f) *That, I am aware, as I am also advised by my advocates on record, which advice I believe to be true that, should the instant Petition be heard until the end and final Judgement delivered, parties shall be at liberty to appeal any such final Judgment. I am apprehensive that any such appeal could go beyond August 2022.*
 - g) *That, from the foregoing, I am deeply concerned that the people of Kiambaa Constituency, Kiambu County will continue to be disenfranchised if the instant Petition is not withdrawn.*
 - h) *That, it is with a view to protecting the people of Kiambaa Constituency against the said disenfranchisement that I am now forced to withdraw this Petition which I hereby seek the leave of this Honourable Court to do.*
3. The application is further supported by an affidavit sworn by the applicant and annexures thereto, including a document entitled “Intention to Withdraw Election Petition”, all dated 31st October, 2021 and stated to be filed pursuant to; Rule 21 (3) (a) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017, (herein “2017 Rules”).
4. The appellant avers that, he has received numerous texts, phone calls, messages forwarded posts, memo and press statements that, the 1st Respondent has decided to exclude the people of; Kiambaa constituency from the Enhanced Continuous Voter Registration (ECVR), citing the instant petition, as the reason thereof, That the 1st Respondent subject decision is supported by documents annexed to the affidavit in support of the application, including; an internal memo by the 1st Respondent dated 28th September, 2021, entitled “active election petition areas” which include the election petition number E001 of 2021; George Theta Ndia vs IEBC & 2 Others.
5. That, in addition, the 1st Respondent issue a press release on the status of; Enhanced Continues Voter Registration, which indicated exclusion of the people; Kiambaa constituency. Furthermore, on 12th October the 3rd Respondent discussed the issue in Parliament, citing the petition herein as the reasons why the people of Kiambaa constituency were excluded from the continuous voter registration exercise, (as indicated in copy of the excerpt of the Parliamentary Hansard provided).
6. In addition, the Petitioner filed submissions, which were orally highlighted. In a nutshell, he reiterates that, he filed the petition to protect the sanctity of the vote of the people of; Kiambaa constituency, pursuant to; article 38 (3) of the Constitution of Kenya 2010, which states that; “Every adult citizen has the right, without unreasonable restrictions to (a) be registered as a voter....”.
7. That, further due to the approaching general elections scheduled for August 2022, and the said decision by the 1st Respondent to exclude the people of Kiambaa Constituency from the ECVR, the people of Kiambaa Constituency, Kiambu County, will continue to be disenfranchised if the instant petition is not withdrawn. Hence, the Petitioner’s prayer to the Honourable Court for leave to withdraw this election petition.
8. The Petitioner avers that; he has complied with the requirements in respect to the application for withdrawal. Further, the application is unopposed by the Respondents and moreover, no person has applied to this Honourable court to be substituted as a Petitioner to replace him.
9. On the issue of costs, the Petitioner argued that, the application should be allowed with no orders as to costs. He relied on the Supreme Court of Kenya’s (SCOK) case of; *Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others [2014] e KLR*, where the court in declining to grant an order for costs stated as follow:

“It is plain to us that, at the time the petition was lodged in the Supreme Court, it was, in every respect, a valid cause of action; and

thus, no blame attaches to the act of filing. By Article 50(1) of the Constitution of Kenya, 2010 – ‘Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court...’

10. He argued that, the application to withdraw the petition is not in any way a concession by the Petitioner with respect to the substantive grounds of the petition. Rather, it is necessitated by the public interest grounds as set out in the grounds in support of the application.

11. Furthermore, article 48 of the Constitution of Kenya, 2010, provides that; “The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.”

12. In addition, the Supreme Court of Kenya has consistently adopted the approach that, election petitions are matters of public interest, ordering each party to bear their own costs. That, in the case of; Raila Odinga & 5 Others v Independent Electoral and Boundaries Commission & 3 others (2013) eKLR, the Supreme Court of Kenya in ordering each party to bear their costs, held that,

“(309) Yet we have to take into account certain important considerations, in relation to costs..... Although the petitions are filed by individuals who claim to have moved the Court in their own right, the constitutional issues are of a public nature, since such an election is of the greatest importance to the entire nation”.

13. It was further submitted that, in the case of; Independent Electoral & Boundaries Commission V Maina Kiai & 5 Others (2017) eKLR, the Appeal was dismissed, and the court made no orders as to costs due to public interest nature of the matter.

14. That, the Black’s Law Dictionary defines public interest as:

“The welfare of the public as compared to the welfare of a private individual or company. All members of society have a stake in this interest and the government recognises the promotion of and protection of the general public.”

15. The Petitioner urged the court to order that, each party meets its own costs as stated in the case of; John Harun Mwau & 3 Others vs Attorney General & 2 Others (2012) eKLR, where the court stated as follows; -

“(179) The intent of Articles 22 and 23 of the Constitution is that persons should have free and unhindered access to this court for the enforcement of their fundamental rights and freedoms. Similarly, Article 258 allows any person to institute proceedings claiming the Constitution has been violated or is threatened. The imposition of costs would constitute a deterrent and would have a chilling effect on the enforcement of the Bill of Rights...

(180) In matters concerning public interest litigation, a litigant who has brought proceedings to advance a legitimate public interest ...without private gain should not be deterred from adopting a course that is beneficial to the public for fear of costs being imposed. Costs should therefore not be imposed on a party who has brought a case against the state but lost.”

16. Finally, the Petitioner submitted that he will be highly prejudiced, if ordered to shoulder the costs of the application to withdraw the petition; as the application has been necessitated by the interest of the people of Kiambaa Constituency. He relied on the case of; Raila Amolo Odinga & Another vs Independent Electoral and Boundaries Commission & 2 others (supra) where the Supreme Court in ordering each party to bear their own costs held inter alia that: -

“(387) It (the 1st Respondent herein) is a heavily public funded constitutional organ and to burden Kenyans tax payers with litigation costs would be a grave matter”

17. However, the application was opposed by the 2nd Respondent on his behalf and on behalf of the 1st Respondent, vide a replying affidavit dated; 4th November 2021, in which he deposes that, although he has no objection to the application of withdrawal of the petition, the 1st and 2nd Respondents prays that, the court exercises its discretion and makes an order for costs in their favour.

18. That, the 1st and 2nd Respondents have incurred lots of cost in defending the petition, and gone through all the preliminaries including; pre-trial conference, an application filed, heard and fully determined and were ready to for the hearing on 2nd November 2021. Further, they had lined up eight (8) witnesses which obviously attracted a substantial amount of costs.

19. Finally, the 1st and 2nd Respondents had two counsels attending courts. As such, the costs be assessed at full scale and to mitigate the expenses, costs be fixed at a global sum of Kshs 3,500,3.

20. The 1st and 2nd Respondents filed their submissions and argued that, the provisions of; section 84 of the Election Act and Rule 30 of Rules 2017, as opposed to section 27 of the Civil Procedure Act, which govern awards of cost in civil proceedings, leave no room for judicial discretion on the issue of costs, as authoritatively stated in the case of; Joseph Amisi Omukanda vs IEBC & 2 Others, Civil Appeal No. 45 of 2013

21. Further, the general rule that costs follow the event does not apply where there is a specific rule on costs. That, in determining the costs, the court considers; the nature and extent of the allegations, the voluminous pleadings, short timelines within which to carry out research and drafting proceedings, court attendances, complexity of the matter, interest of the parties and the general conduct of the proceedings.

22. That although the Respondents had proposed the costs be capped at Kshs 3,500,000, nonetheless, in the spirit of posterity, they shall

waive the same and plead for Kshs 2,500,000. The Respondents relied on the case of; Gilphine Mokata Omwenga vs IEBC & 2 others (2018) eKLR, where the facts were similar as herein, and the court awarded and capped costs at Kshs 2,000,000.

23. The 3rd Respondent opposed the application vide his own replying affidavit dated; 5th November 2021. He averred that, he does not object to the application to withdraw the petition being allowed save that, the same be allowed with costs to him, pursuant to the provisions of; section 84 of the Election Act and Rule 30 of the 2017 Rules.

24. That, the power to award costs is a matter of exercise of judicial discretion and the courts have taken into account among other matters; the nature and the importance of the cause or matter, the interest of the parties, general conduct of the proceedings, care and labour required by the Advocates, the number and length of the paper to be perused. Finally, he deposes that, he had complied with all the pre-trial conditions and/or other steps or actions taken to defend or respond to the petition. Thus, the expenses incurred relates to the subject response, court attendances and other chronological events. Therefore, guided by several precedents, a sum of; Kshs 2,500,000, is just and reasonable to be awarded to him, as costs.

25. The 3rd Respondent, in his submissions dated 16th November 2021, cited the provisions of; section 84 of the Election Act and the case of; Johnson Muthama vs Minister for Justice and Constitutional Affairs & Another (2012) eKLR, where the court held that payment of costs does not violate constitutional provisions. That, in election petitions, it ensures that, only those with genuine interest file.

26. Further reliance was placed on the cases of; Anastacia Wanjiru Mwangi vs IEBC & Another (2013) eKLR, where the court held; abatement of a petition shall not affect liability to pay costs. Finally, the 3rd Respondent submitted that; "choices have consequences", in this case, in form of costs.

27. I have considered the application and I find that, the application is basically unopposed. However, it suffices to confirm that, the prerequisites under Rule 21 (rule 23 of revised rules) were complied with. In that regard that Rule states that;

(1) A petition shall not be withdrawn without leave of the court.

(2) The court shall grant leave on such terms as to the payment of costs or as the court may consider fit and just.

(3) An application for leave to withdraw a petition shall—

(a) be in the Form EP 5 set out in the Schedule;

(b) be signed by the petitioner or a person authorised by the petitioner;

(c) state the grounds on which the application is supported; and

(d) be filed at the office of the Registrar.

(4) The parties to the petition shall, before leave for withdrawal of a petition is granted, file affidavits stating the grounds on which the petition is intended to be withdrawn.

(5) Despite sub-rule (4), a court may, on cause being shown, dispense with the affidavit of a person if it seems to the court on The Elections (Parliamentary and County) Petition Rules, 2017 13 special grounds to be fit and just.

(6) Each affidavit shall state "to the best of the deponent's knowledge and belief, that no agreement or terms of any kind has been made, and that no undertaking has been entered into, in relation to the withdrawal of the petition."

(7) Despite sub-rule (6), where a lawful agreement has been made with respect to the withdrawal of the petition, the affidavit shall set out the terms of the agreement.

28. Pursuant to the aforesaid, I take cognizance of the fact that, the Petitioner has filed an affidavit of service of the application and the notice of the Intention to withdraw the petition, and pursuant to the requirements of; Rule 22 (rule 24 of revised rules), regarding the notice of intention to withdraw the petition, the notice was approved by the Honourable Deputy Registrar of the High Court on 2nd November and published on 3rd November, 2021.

29. Further that, after the publication of notice to withdraw the Petition, no other Person has applied to the court to be substituted as a Petitioner, in that case, I find that, the Petitioner has generally met the requirements of sub-rule 3, and although, there is no indication that, the requirement of sub-rule 6, was complied with, I find that, the non-compliance thereof is not prejudicial to any party.

30. The upshot is I find the application for withdrawal of the petition has merit and I allow it.

31. I shall now move to the issue of costs. The general rule is that costs follow the event. This is supported by the provisions of; section 27 of the Civil Procedure Act, (cap 21) Laws of Kenya. However, as regards the election petitions, the provisions of section 84 of the Election Act, states that, "an election court shall award costs of and incidental to a petition and such costs shall follow the event."

32. Pursuant thereto, Rules 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 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

33. Therefore, from the aforesaid, the court has the power to award costs and to determine inter alia, the amount payable, which party is liable to pay and who is to be paid. Additionally, sub-rule 6 gives the factors that, the court will take into account while assessing the amount payable as costs.

34. Further, case law is settled on costs as follows, in the case of; Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & 4 Others (supra), the Supreme Court of Kenya, stated as follows:

[18] It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation.

[19] It is on the basis of such principles, that the instant matter is to be resolved. It is clear that learned counsel, Mr. Oraro has focused his case on the basic principle: costs should follow the event. But he has gone further – urging (and this is not a subject of doubt) that the matter in contest has been pending for some time, and that bona fide circumstances warranting alternative dispute-settlement had been scoped-out in the Court of Appeal, but the petitioners missed-out on the opportunity.

[20] Learned counsel, Mr. Nyamodi’s response, for the petitioners, is that the suit at the time of filing, was founded upon a legitimate cause of action invoking the (extant) terms of Section 14 of the Supreme Court Act, 2011 (Act No. 7 of 2011); and that the destiny of the case arose from the conflict between that provision and the terms of the Constitution, rather than from any omission or commission attributable to the petitioners. The petitioners, it was urged, had not, in any respect, acted in abuse of Court process and, indeed, the legal position predetermining their cause to fail arose from a different matter, the Macharia case – a matter subsequent in time.

[21] Mr. Nyamodi’s initiative was, clearly, attended with

the perception that costs in litigation, bore a penal element; a view contested by Mr. Oraro who urged that costs, instead, evince a neutral face – just a logical consequence of legal proceedings initiated or prosecuted.

[22] Although there is eminent good sense in the basic rule of costs – that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases. The relevant question in this particular matter must be, whether or not the

circumstances merit an award of costs to the applicant.

35. Hence the urgency to preserve the KIEMS and ballot boxes and all other election materials. From the aforesaid decision, it is evident that, the ultimate factor is the judicial discretion. In that regard, it suffices to examine the comparative amount that has been awarded as costs. In the case of; Election Petition No. 3 of 2017, Jackton Nyanungo Raguma vs IEBC & 2 Other, after the case was fully heard, the 1st and 2nd Respondents were awarded; Kshs 2,500,000 and the 3rd Respondent was awarded a similar amount.

36. In Election Petition No. 1 of 2017; Jeremiah Ngwara Matoke vs IEBC & 2 Others, the Petition was fully heard. The costs were capped at Kshs 2,000,000 for the 1st and 2nd Respondent and Kshs 3,000,000 for the 3rd Respondent.

37. In the Election Petition No. 5 of 2013, Abdisalan Mohamed vs IEBC & Another, the petition was withdrawn and the 1st Respondent was awarded costs not exceeding Kshs 1,000,000 and the 2nd Respondents costs not exceeding Kshs 1,500,000. The costs were subject to taxation.

38. In the same vein, in the Election Petition No. 4 OF 2017, Samuel Kazungu Kambi vs Nelly Ilongo, the Returning Officer, IEBC and Amason Kingi after allowing the withdrawal of the petition application, the 1st and 2nd Respondent were awarded, a total of Kshs 600,000

and the 3rd and 4th Respondent a total of Kshs 750,000, the costs were not subject to taxation.

39. In the Election Petition No. 5 of 2017, Mugambi Imanyara Vs IEBC & 2 Others, after the withdrawal of the petition, the 1st and 2nd Respondents were awarded jointly a global sum of Kshs 500,000 and the 3rd Respondent a similar amount. In the Election Petition No.2 of 2017, Sammy Ndungú Waity & Another vs IEBC & 3 Others, the 1st to the 4th Respondents were awarded sum of Kshs 125, 000 each.

40. 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.

41. The Respondents have thus fully participated in the matter. The issue therefore, is assessment of the amount. It suffices to note in that regard, costs should fairly compensate a party for services rendered but should not be too exorbitant to deter litigants from approaching the temple of justice.

42. 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.

43. The upshot of all the aforesaid is that, the application for withdrawal of the application is allowed with costs as aforesaid.

44. Pursuant to the provisions of section 86 (1) of the Election Petition, the certificate of these decision shall be issued to IEBC who shall act accordingly.

It is so ordered.

DATED, DELIVERED VIRTUALLY AND SIGNED ON THIS 24TH DAY OF NOVEMBER, 2021

GRACE L NZIOKA

JUDGE

In the presence of

Ms Mboce for the Petitioner

Mr Anyoka and Mr Kamwaro for the 1st and 2nd Respondent

Mr Sigei and Ms Tusime for the 3rd Respondent

Edwin Ombuna - Court Assistant