



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

ELECTION PETITION NO. 4 OF 2017

**IN THE MATTER OF THE ELECTIONS ACT, 2011 AND THE ELECTIONS
(PARLIAMENTARY AND COUNTY ELECTIONS) PETITION RULES, 2017**

AND

IN THE MATTER OF THE SENATE ELECTIONS FOR KIRINYAGA COUNTY

BETWEEN

HON. DICKSON DANIEL KARABA.....PETITIONER

VERSUS

HON. KIBIRU CHARLES REUBENSON.....1ST RESPONDENT

SAMUEL SEKI LEPATI.....2ND RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION (IEBC).....3RD RESPONDENT

RULING

1. There are three applications before the court and all are intertwined. On the one hand, the petitioner craves leave to withdraw the petition dated 6th September 2017. On the other hand, James Karimi Karubiu, Stephen Karua Nyoike and Duke Nyairo Ondieki pray to be substituted as the petitioners.

2. This court will first deal with application to withdraw the petition, the Notice of Motion by the petitioner is dated the 9th January 2018. It is executed by the petitioner's counsel on record and, predicated upon a deposition sworn by the petitioner on even date.

3. The application is filed under Rules 21 and 22 of the Elections (Parliamentary and County Elections) Petition Rules 2017 and any other enabling provision of the Law and seeks the following orders;

i. That the Petitioner be granted the requisite leave to withdraw the Petition herein.

ii. That the Petition dated 6th September 2017 and all subsequent applications be marked as

withdrawn.

iii. That each party to bear their costs.

4. The grounds on face of the application and reiterated by the Applicant's Supporting Affidavit are as follows;

- a. The Petitioner on his own will and volition has chosen to withdraw the Petition, inter-alia on the following grounds.
- b. The Applicant has become irredeemably disillusioned with the electoral justice system and wishes to disengage from it forthwith.
- c. Whereas in filing the Petition under Section 80(4) of the Elections Act, the Applicant expected to secure justice expeditiously in order for the confirmed true winner to be determined to serve the people of Kirinyaga; it is now obvious that in the circumstances of this case the Applicant cannot secure justice without a long drawn out and costly appeal process.
- d. The Applicant is apprehensive that the prolonged electoral contestation over the outcome of the Senate election will be prejudicial to unity, public interest, cohesion and developmental vision of the Kirinyaga people.
- e. In view of the foregoing, the Applicant after deep soul searching and reflection during the festive season has decided that the time has come for him to sacrifice his political ambitions by withdrawing this Petition in order to serve the greater interest and public good of the people of Kirinyaga to move on from the divisive electoral politics of 2017.
- f. No agreement or terms of any kind has been made and no undertaking has been entered into in relation to the withdrawal of the Petition.
- g. The Petitioner undertakes to publish in a newspaper of national circulation a notice in the prescribed Form of his intention to withdraw the Petition.

5. In opposing the application, the 1st respondent filed Grounds of Opposition dated 22nd January 2018 stating that;

- a. To the knowledge of the 1st Respondent, a Notice of Intention to take over the petition has been lodged in the matter.
- b. Consequently, the intended withdrawal neither serves the expeditious disposal of the petition nor bringing the desired harmony in the county.
- c. Consequently, the dispute will be expeditiously resolved by this court disallowing the above application and having the matter proceed with the parties highlighting their respective submissions and subsequently giving a judgment date.
- d. It is not in the interest of justice for this court in line with Article 259 of the Constitution and court's overriding objectives for expeditious disposal of suits to grant leave to withdraw as sought by the petitioner.

6. The application was also opposed by the 2nd and 3rd Respondents who filed replying affidavit dated 24th January 2018 in which its deponed *inter alia*-

- a. The timing of the withdrawal of the Petition is suspect and questionable because this application has been instituted too late in the day after the matter has been fully heard. Further all parties had

filed and served their final submissions and what was pending was highlighting of those submissions and taking judgment date.

b. In the circumstances therefore, such a withdrawal of the Election Petition would render nugatory the ultimate end of justice which the 2nd and 3rd Respondents have pursued since the commencement of this Petition.

c. That this honourable court should take judicial notice that this Election Petition is not a personal dispute. It touches on the interest of many of the residents of Kirinyaga County who may not necessarily be parties to the dispute but are anxious to know the outcome of the Election Petition and therefore such a withdrawal of the petition at the very tail end of the proceedings would amount to an enormous miscarriage of justice.

d. To the best of his knowledge and belief, no agreement or terms of any kind has been made, and that no undertaking has been entered into, in relation to the withdrawal of this petition.

Now turning to the applications for substitution of the petitioner.

7. The second application is the Intended Substitute Petitioner's Notice of Motion dated 19th January 2018 filed under Rules 4, 19, 22 and 24(1) of the Elections (Parliamentary and County Elections) Petition Rules 2017, Order 50, Rule 5, Order 51 Rule 1 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law by which application Stephen Karua Nyoike and Duke Nyairo Ondieki seek to be substituted as petitioners.

8. The application seeks the following orders;

i. That the Applicant herein be substituted as the Petitioner in Election Petition No. 4 of 2017 in place of Dickson Daniel Karaba who has applied to withdraw the petition.

ii. That the Court be pleased to make such order as to security deposit of the original Petitioner as it may deem fit.

iii. That costs of the application be in the cause.

9. The third application is the Intended Substitute Petitioner's Notice of Motion dated 19th January 2018 filed under Rules 4, 19, 22 and 24(1) of the Elections (Parliamentary and County Elections) Petition Rules 2017, by which application James Karimi Karubiu seeks to be substituted as petitioner.

10. The application which is based on the grounds on face of the application and reiterated by the Petitioner's Supporting Affidavit and a supplementary affidavit, seeks the following orders;

i. That the Applicant herein be substituted as the Petitioner in Election Petition No. 4 of 2017 in place of Dickson Daniel Karaba who has applied to withdraw the petition.

ii. That the Honourable Court be pleased to make such order as to security deposit of the original Petitioner and cost of the proceedings up to the point of withdrawal of the Petitioner as it may deem fit.

iii. That upon the Applicant being substituted as the Petitioner, the Honourable Court be pleased to grant him leave to file supplementary final submissions.

iv. That the Respondent be directed to furnish the Applicant with copies of pleadings.

v. That costs of the application be in the cause.

11. The 1st respondent did not file any response to the applications for substitutions.
12. The applications for substitution were opposed by the 2nd and 3rd Respondents who filed Replying Affidavits dated 23rd January 2018 in which its deponed *inter alia*-
- a. That the intended petitioners have failed to establish ***locus standi*** in this matter.
 - b. No basis has been laid that the intended petitioners will be prejudiced upon withdrawal of the Petition.
 - c. Save for stating that they are willing to abide by direction of this court in terms of depositing security, the intended petitioners have not demonstrated their ability to pay costs of the Election Petition in the event of it being dismissed. As a matter of fact this court ordered that one of the intended petitioner, James Karimi Karubiu, to pay costs of dismissal of his Election Petition capped at Kshs.300,000/= which remains unpaid to date.
 - d. To the best of his knowledge and belief, no agreement or terms of any kind has been made, and that no undertaking has been entered into, in relation to the withdrawal of this petition.
 - e. That the intended petitioners' application is a crafty maneuver to defeat the course of justice through delaying the speedy determination of the Election Petition. This is so because the application has been brought at the tail end of the proceedings after the election petition has been fully heard, final submissions have been filed and served by all the parties.
13. All the parties filed their respective submissions and oral submissions were made on 25th January 2018.

APPLICANT'S SUBMISSIONS

14. Mr. Kibe Mungai, learned counsel for the petitioner, relied on the written submissions filed together with the list of authorities. He also relied on the pleadings as filed.
15. He proceeded to give a background to the application. That the Petitioner at the stage where proceedings had reached needed to disengage and withdraw. His reasons given are in the Notice of Motion and affidavit which include that in view of the decisions, he believes his search for justice will be long and protracted resulting in the appellate system which would prolong the dispute to disadvantage of people of Kirinyaga and himself.
16. That the Petitioner reckoning he filed a simple Petition to determine if Hon. Kiburu got more votes than his but there was no simple answer to that.
17. It was his submission that the Laws of the Country are that Petitioner though having filed the petition but it is not really his case. It is to vindicate the rights of every citizen. That according to Election Petition, one has to advertise intention to withdraw which he did on 12th January 2018 whereby 3 Kenyans showed up stating that they wanted the Petition to be concluded
18. Mr. Kibe Mungai further submitted that he had five points to make.

i. Requirement of Leave

Leave is necessary because the intention of Law is that the entire electoral constituency needs assurance that election was conducted properly and the duty of the courts is to determine whether the Petition should be withdrawn. There are some courts which have refused to have the case withdrawn in order to protect public interest.

ii. Jurisprudence of withdrawal

He referred to **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2015] eKLR** at paragraph 5 where the Supreme Court held:

“A party cannot be barred from withdrawing”

He also referred the court to **Ombati Richard v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR** at Paragraph 10 & 11.

That under the Law, there are persons who can take over the matter and the petitioner should not be held against his will. In principle the right to withdraw is an absolute right but court has to ensure that it protects the public interest.

iii. Procedure

That the respondents are being allowed to choose the petitioner and have an opinion. Under Rule 21 (4)(6) of the Election Petition Rules, the respondents are only allowed to do an affidavit to address the grounds given by the petitioner in his application. However, their affidavits are challenging the petitioner’s right to withdraw and they want the petitioner to remain.

iv. Costs

There are two legitimate issues that should concern the court;

a. As of today there are rulings in court file that Petition shall pay costs therefore will the new Petitioners inherit such costs? Those are the legitimate costs for the Petition that he can bear. For purposes of Petition, the costs are addressed in a judgment that is what the Law requires under **Section 84 of the Elections Act**.

b. Security of costs

That security is tied to Petition that was filed. The question of whether the security that was given is it to be given back or new Petitions provide fresh security is for the court to decide.

v. That determination of the petition should be by 5/03/2018. If Petition exists then it continues where it has reached and there is no prejudice on time limits since the Court can still render a judgment. He therefore prayed to be allowed to exit.

He relied on the case of **Harun Mwau Vs IEBC [2017] (Unreported)**.

SUBMISSIONS OF INTENDED PETITIONERS (STEPHEN KARUA NYOIKE AND DUKE NYAIRO ONDIEKI)

19. Mr Mwangi, advocate for the intended petitioners, referred to Notice of Motion dated 19/01/2018 and filed on even date where Mr. Duke Nyarios and Stephen Karua have applied to be substituted as Petitioners. He associated himself with submissions of Mr Kibe, learned counsel for Petitioner on record which are relevant to their application.

20. Mr. Mwangi further submitted that he had three facets;

i. Locus standi

That under Article 3 of the Constitution 2010, any Kenyan /Person has right to move to court and defend the Constitution whenever any provisions are threatened. That the Elections Act is a creature of the Constitution and Election Petition is a bedrock of dispute before the court. in addition, Article 22 of the

Constitution 2010 gives any Kenyan the right to stand and defend any right whether his or any other person which is threatened or aggravated and whichever right is threatened, denied or violated under Chapter IV of the Constitution.

He sought to move court to take judicial notice of questionnaire published in Judiciary website on the question of who can file a Petition relating to Governor, Member of Parliament, Senator, Women Reps and Member of County Assembly where the answer states any person. He also referred **Petition No.7 of 2013** where Omondi J stated that an Election Petition affects interests of entire public.

ii. Disclosure of interest in Petition

This was not a requirement in the notice published. He referred to Paragraph 9 and 11 of affidavit. That the intended Petitioners have tremendous faith in the Electoral Justice System and are desirous to see it to its conclusion. Under paragraph 12 it is the interest of the general public interest to ensure matter proceed to logical conclusion.

iii. Costs

Under Prayer No.3 the Court be pleased to make such order as to security deposit as it deems fit. In addition, under paragraph 13 they are ready and willing to deposit this security as ordered by court.

21. In conclusion, Mr. Mwangi stated that **Rule 24 (1) of the Election (Parliamentary and County Elections) Petition Rules, 2017** does not set out the requirements, threshold/Bench mark as to who the petitioner shall be. He invited court to look at **Rule 4 (1) of the Election (Parliamentary and County Elections) Petition Rules, 2017** the overriding objectives to guide the court and the Court should facilitate the just, expeditious, proportionate and affordable resolution of election.

SUBMISSIONS OF INTENDED PETITIONER (JAMES KARIMI KARUBIU)

22. Mr Njoroge, advocate for the interested party submitted that he had four issues to be addressed;

i. Locus Standi

ii. Substitution

iii. Security for Costs

iv. Costs – final Costs of Petition

i. Locus Standi

That **Article 1(3) of the Constitution 2010** enjoins all citizens to respect uphold and defend the Constitution. James Karimi is a Kenyan Citizen, a Resident of Kirinyaga County and was a Candidate during 2017 General Election vying for Senate seat for Kirinyaga County.

The learned counsel emphasized that though he filed Constitutional Petition which was gazetted as an Election Petition, there was a breakdown in communication with former advocates whereby he learnt that his Petition had been dismissed for want of compliance with the Electoral Laws. The Court did not address itself on the substantive issues raised in the Petition.

That in his compliance with Order No.3, costs were to be taxed and certified by Deputy Registrar but to date he is not aware of any Bill of costs filed in this Hon. Court.

The intended Petitioner submits that though he filed previous Petition it should not preclude him from being substituted as a Petitioner in the current proceedings. He submits that there is no nexus between the two Petitions to warrant compliance with orders made in the erstwhile Petition No.3 of 2017. That as a

contestant duly registered voter Mr. James Karimi has Locus to be substituted as a petitioner in these proceedings.

ii. Substitution

He associated himself with submissions of both Mr Kibe and Mr Mwangi for petitioner and other intended petitioner that one must give notice of intention to withdraw which notice was published in Daily Nation of 12/01/2018. That Mr Karimi has enjoined himself in these proceedings under **Rule 24 (1) Election (Parliamentary and County Elections) Petition Rules, 2017.**

That the interest of Mr Karimi is clear in his application and as a contestant he has an interest in the truth being known. Mr Noroge referred to case of Okwany J. Kisii who cited Omondi J

“Election Petition not for individual but affects entire public.” He submitted that prosecution of the Petition to its finality shall serve justice on the electorate of Kirinyaga County and Mr James Karimi be substituted as petitioner alongside any other person(s) who may have expressed such an interest.

iii. Security for Costs

On the issue of security of costs, Mr Karimi shall abide by the directions of the court. Security has already been provided to the court and this should be factored in. It can be divided between the 2 other intended Petitioners.

23. Mr. Njoroge in closing his submission prayed that the application be allowed and Mr James Karimi be substituted as petitioner.

1ST RESPONDENT'S SUBMISSIONS

24. Mr. Ongoya, Learned counsel for the 1st Respondent opposed all the applications. In opposing request by petitioner for leave to withdraw petition, he submitted that joinder of intended petitions is fully dependant on leave. In the absence of leave issue of joinder becomes an issue.

25. The Petitioners case for withdrawal is because it has reached a certain stage where he has no electoral faith in electoral justice system and wants to take a walk. However, having filed the Petition the choice to take a walk is not absolutely his.

26. The Court must ask if it will facilitate expeditious disposal of this dispute. Is it proportionate for Petitioner to just take a walk? Will it facilitate affordable resolution? The petitioner must lay out a case known to Law. Under **Rules 21** and **Rules 24**, leave of court is mandatory before withdrawal and there is no walking away without leave of court. Under **Rule 22 (2)**, the grant of leave is discretionary and is not an automatic right. Therefore the power to grant leave must be exercised judiciously and the court must take account the history and entire body surrounding the case.

27. He submitted that under **Rule 24 (1)** there is no automatic right to joinder. He referred to Indian case **Jagal Kshoie S/o Lalchard Vs Dr. Balder Prakash**, at paragraph 7 and 8 of the authority. That leave would become redundant if court were not allowed to exercise judicial discretion. Therefore each case dealt with peculiar circumstances and the circumstances of this case is that the applicant expressly conceding that he is filing the application to escape the consequences of a long drawn appeal process.

28. Counsel also submitted that Petitioner filed the Petition that he be declared senator for Kirinyaga County. Petition has been heard fully and each party has filed and exchanged final written submissions wherein the final submissions of Petitioner, he has conceded that he has lost the Petitioner and that Court limits its judgment on issue of costs.

29. That in all the authorities referred by Petitioner's Counsel where petitions were withdrawn, hearing had not started and substitution was allowed at that stage. This is the only case among the authorities

supplied where all evidence has been led and submissions filed therefore application for withdrawal ought to be denied.

30. On the issue of substitution, learned counsel for the 1st Respondent submitted that the same is not automatic. He referred to Affidavit sworn on 19/01/2018 at Paragraph 1 and 2 of Affidavit of the 2 applicants Duke and Stephen where they state that they are registered in Nairobi County and in addition registered in Kisii and Murang'a Counties. On the face of it, the applicants are registered voters in more than one county and by necessary construction this would amount to an election offence and they have disqualified themselves from any favourable exercise of discretion through this "prima facie" confession.

2ND AND 3RD RESPONDENT'S SUBMISSIONS

31. In opposing the application, Mr. Mwangela, Learned counsel for the 2nd and 3rd Respondents submitted that the Court has discretion to permit Petitioners substitutes to enjoin themselves or not. The wording of the Rules operative word is "**may**" grant leave to a person to join as a substitute petitioner. In Refusing to grant leave to withdraw, the motive of Petitioner should be interrogated for seeking to withdraw the Petition.

32. That the application seeking to withdraw Petition was filed in the morning schedule for hearing of final submissions in this case. Submissions were already on record all parties were present before court and ready to highlight submissions and take a judgment date.

33. That upon perusal of Petitioners final submissions he concedes the Petition and he argues that the only matter left is determination of matter on costs. That Election Petitions are matter of great public interest. Will it be served by withdrawal of an Election Petition that has been fully heard and only awaiting highlighting of written submission so that a determination may be made?

34. He submitted that Voters and Citizens of Kirinyaga County have a legitimate expectation of these proceedings as soon as possible so that they know who is the Senator and the matter brought to rest. An attempt to withdraw it must be looked at in light of two (2) applicants waiting in the wings. What is that the petitioner is seeking to withdraw at this level? Is he withdrawing or passing the buck or running away from an embarrassing outcome of the matter. Timelines for agitation of evidence is long exhausted therefore not in the interest of expeditions disposal of this matter.

35. On the issue of costs, he submitted that the 2nd and 3rd Respondent incurred costs in defending matter which will be escalated if the matter withdrawn and new Petitioners take over the matter.

36. In regard to the application by Mr James Karimi Karubiu, his application be dismissed because it is an abuse of due process of court. The applicant filed what he had styled as a Constitutional Petition and upon court hearing the matter, found that it was an election Petition disguised as a constitutional petition. He referred to **Election Petition 3 of 2017** – whereby the ruling of this court was that the Petition was dismissed not on a technicality but on a finding that he failed to comply with the law. Substantive non-compliance was failure to deposit security for costs.

37. He referred to paragraph 4 of Supporting Affidavit of James Karimi Karubiu where deponent creates the impression that he was kept in the dark and that he did not know what was happening in that matter. However, Mr Karimi appeared in person at one instance and sought to appoint another advocate whereby the court gave him indulgence. In making appropriate order on costs consider the conduct of Mr James Karimi Karabiu.

38. Counsel referred to page 4 of written submission in respect to Mr James Karubiu's application where there is an authority of **Ya tung Investment Co. Ltd Vs Hang Buith** stating that it is an abuse of court process to raise in subsequent proceedings matters that could have been litigated in earlier proceedings.

39. This court found that Petition No.3 /2017 was a proper election Petition concealed as a constitutional

petition. No appeal has been filed by Mr. James Karimi and he now seeks to take over an election Petition in same Kirinyaga County yet he had time to raise all these in Election Petition No.3/2017

40. In regard to the application for substitution by Duke Nyairo Ondieki and Stephen Karua Nyoike, there is no evidence availed to show that they were voters or residents in Kirinyaga County. The Court should interrogate the motive of these two in applying to take over the Petition.

41. In closing, the counsel urged the court to dismiss the Notice of Motion since the Petition was heard to its conclusion and what is pending was highlighting and judgment date. Therefore joinder at this point will defeat Rule 4 overriding objectives.

REJOINDER

APPLICATION FOR WITHDRAWAL

42. Mr. Kibe Mungai stated that the issues are simple. The Petitioner who can continue with Petition is the one who had locus to file it. Who can file a Petition? It is any person provided that he must be a Kenyan, he doesn't need to be a voter. Rights under Article 38 of the constitution, political rights are enjoyed by Kenyans. That discretion is fettered and the court must address itself to public interest. The concern of court is to ensure Petition be concluded as opposed to blocking intended Petitioners.

43. Mr James Karubiu filed a Constitutional Petition and has never filed an Election Petition.

44. That there was a distinction between India Law and Kenyan Law. In India it is withdrawn so that new evidence will be introduced and leave is granted before publication. However, rules of Kenya are different. There is an absolute right to withdraw, **Article 24 of Constitution** is very clear on the right to file a Petition and take over is a right under Bill of Rights. There is no limitation that where Petition has reached it cannot be taken over.

45. When the Petitioner came to court there were no requirements for petitioner to file petition. Therefore no rules should be there for the substitutes, not even residency and he urged the court to allow the application for withdrawal of the Petitioner and allow the substitutes to take over.

APPLICATIONS FOR SUBSTITUTION

46. Mr. Mwangi submitted that under Article 27 of Constitution everyone has an equal right before the Law. That is primitive for court to set higher bar than that of the Petitioner. He referred to **Rules 8 and 21 (1) Election (Parliamentary and County Elections) Petition Rules, 2017** and **Article 88 (4) of the Constitution** and stated that 3rd and 4th Respondent are creatures of the Constitution to conduct Election Petitions therefore no prejudice can be said to have been suffered.

47. That Duke Nyairo Ondieki deponed the affidavit on his own behalf and Stephen Karua Nyoike. The application was brought in best interest of justice and that his clients/substitutes should not be condemned to pay any costs at this stage but pay in a final determination if enjoined in public interest.

48. Mr. Njoroge in his rejoinder stated that in regard to the submission that the motive to withdraw the Petition is so as to substitute the Petitioner, nothing can be further from the truth. There has been no such basis laid to warrant such a suspicion.

49. In regard to the issue of new evidence, he referred to application dated 19/01/2018 whereby one of the prayers was that he be allowed to file supplementary "Written Submissions" which the Respondents will be able to respond to the same. That the Written Submissions can only be filed with leave of court.

50. On the issue of costs, he is willing to avail security for costs herein and urged court humbly to allow application by Mr James Karubiu.

GOVERNING PRINCIPLES

Political rights:-

Article 38 of the Constitution

(2) Every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for—

- a. any elective public body or office established under this Constitution; or*
- b. any office of any political party of which the citizen is a member.*

(3) Every adult citizen has the right, without unreasonable restrictions—

- a. to be registered as a voter;*
- b. to vote by secret ballot in any election or referendum; and*
- c. to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office.*

Overriding objective:

Rule 4 of the Election (Parliamentary and County Elections) Petition Rules, 2017

- 1. The objective of these Rules is to facilitate the just, expeditious, proportionate and affordable resolution of elections petitions.*
- 2. An election court shall, in the exercise of its powers under the Constitution and the Act, or in the interpretation of any of the provisions in these Rules, seek to give effect to the objective specified in sub-rule (1).*

Costs:

Section 84 of the Elections Act.

An election court shall award the costs of and incidental to a petition and such costs shall follow the cause.

Rule 30 of the Election (Parliamentary and County Elections) Petition Rules, 2017

- 1. The election court may, at the conclusion of a petition, make an order specifying –*
 - a. the total amount of costs payable;*
 - b. the maximum amount of costs payable;*
 - c. the person who shall pay the costs under paragraph (a) or (b); and*
 - d. the person to whom the costs payable under paragraphs (a) and (b) shall be paid;*
- 2. When making an order under sub-rule (1), the election court may -*
 - a. disallow any prayer for costs which may, in the opinion of the election 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 may have caused an unnecessary expense, whether that party is successful or not, in order to discourage any such expense.

Withdrawal:

Rules 21 of the Election (Parliamentary and County Elections) Petition Rules, 2017

- 1. A petition shall not be withdrawn without leave of the election court.*
- 2. The election court may grant leave to withdraw a petition on such terms as to the payment of costs or as the election court may otherwise determine.*
- 3. An application for leave to withdraw a petition shall-*
 - a. be in Form 5 set out in the First Schedule*
 - b. be signed by the petitioner or a person authorised by the petitioner*
 - c. state the grounds for withdrawing the petition; and*
 - d. be lodged at the registry.*
- 4. The parties to a petition shall each file an affidavit, before leave for withdrawal of a petition is determined, addressing the grounds on which the petition is intended to be withdrawn.*
- 5. Despite sub-rule (4),, an election court may, on cause being shown, dispense with the affidavit of a party to the petition if it seems to the election court on special grounds to be fit and just.*
- 6. Each affidavit filed under sub-rule (4) shall contain the following declaration -*

"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 shall have been made with respect to the withdrawal of the petition, the affidavit shall set out the terms of the agreement.*

Rules 22 of the Election (Parliamentary and County Elections) Petition Rules, 2017

- 1. The petitioner shall serve each respondent with a copy of the application to withdraw a petition.*
- 2. The petitioner shall publish in a newspaper of national circulation a notice of intention to withdraw an election petition in Form 6 set out in the First Schedule and the petitioner.*

Rules 23 of the Election (Parliamentary and County Elections) Petition Rules, 2017

- 1. The Registrar shall issue a notice for hearing an application to withdraw an election petition in Form 7 set out in the First Schedule, to the parties in an election petition.*
- 2. The notice issued under sub-rule (1) shall specify the time and place for the hearing of the application for the withdrawal of the petition under rule 27.*

Rules 24 of the Election (Parliamentary and County Elections) Petition Rules, 2017

- 1. 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

2. The election court may grant the application to substitute the applicant under sub-rule 1) as the petitioner

3. The election court may direct that the security deposited on behalf of the original petitioner shall remain as security for any costs that may be incurred by the substituted petitioner, and that to the extent of the sum deposited as security, the original petitioner may be liable to pay the costs of the substituted petitioner

4. If the election court does not make an order under sub-rule (3), security of the same amount as would be required of a new petitioner and subject to the same conditions imposed on the original petitioner, the substituted petitioner shall pay, within three days after the order of substitution, the security before proceeding with the petition.

5. Subject to sub-rules (3) and (4), a substituted petitioner shall stand in the same position, to the extent possible, and shall be subject to the same liabilities as the original petitioner

6. Where there is more than one petitioner, an application to withdraw a petition shall be made with the consent of all the other petitioners.

ISSUES FOR DETERMINATION

51. The issues framed for determination after hearing the respective submissions made herein are as follows;

- i. Whether the Petitioner has met the threshold for withdrawal of the Petition No.4 of 2017 in the matter of the Senatorial Election for Kirinyaga County;
- ii. Whether the intended Petitioners have met the threshold for substitution as Petitioners;
- iii. Who shall bear the Costs.

ANAYSIS

Whether the Petitioner has met the threshold for withdrawal of the Petition No.4 of 2017 in the matter of the Senatorial Election for Kirinyaga County;

52. The Petitioner on his own will and volition has chosen to withdraw the Petition; to use his very own words “ **he has chosen to take a walk**”; the reasons given are that he had expected to secure justice expeditiously in order for the confirmed true winner to be determined to serve the people of Kirinyaga; that it had now become obvious that in the circumstances of this case he couldn’t secure justice without a long drawn out and costly appeal process; he was apprehensive that the prolonged electoral contestation over the outcome of the Senate election would be prejudicial to unity, public interest, cohesion and developmental vision of the Kirinyaga people; that after deep soul searching and reflection during the festive season he decided that the time had come for him to sacrifice his political ambitions by withdrawing this Petition in order to serve the greater interest and public good of the people of Kirinyaga to move on from the divisive electoral politics of 2017.

53. In order to protect public interest there is a procedure that must be followed which procedure is outlined in Rules 21; the petitioner must depone that no agreement or terms of any kind had been made and no undertaking had been entered into in relation to the withdrawal of the Petition; and he must publish in a newspaper of national circulation a notice in the prescribed Form of his intention to withdraw the Petition;

54. Unfortunately the choice to take a walk and to withdraw from an election petition is not an automatic nor an absolute right; and even after the compliance under the Election Petition Rules the leave of court is mandatory; the operative word used in Rule 21 is “**may**” and it is for the court to determine and exercise its discretion as to whether the petition should be withdrawn;

55. Both respondents opposed the application for withdrawal and submitted that the timing of the application was suspect and questionable; that in line with Article 259 of the Constitution and court’s overriding objectives for expeditious disposal of suits it was not in the interest of justice for this court to grant leave to withdraw as sought by the petitioner.

56. It is this courts considered view that the petitioner has decided that he is no longer keen in pursuing the Petition ; it is not for this court to interrogate the petitioners motive beyond the reasons given that he has done some deep soul searching and reflection during the festive season and decided that the time had come for him to sacrifice his political ambitions by withdrawing this Petition in order to serve the greater interest and public good of the people of Kirinyaga and to move on from the divisive electoral politics of 2017;

57. This court is satisfied with the reasons on which the petition is intended to be withdrawn; and is satisfied that the petitioner has complied with the procedure, requirements and standards set down in the provisions of Rule 21 of the Election Petition Rules for the withdrawal of the election petition;

58. The remaining issues for determination relate to substitution as three persons have expressed their interest in taking over the petition; the other issue relates to costs;

Whether the intended Petitioners have met the threshold for substitution as Petitioners;

59. When the application for withdrawal came up for hearing on the 22/01/2017 there were two sets of applicants who filed Notices of Intention seeking to take over the petition; in order to fully address this issue substantially this court has divided it into two(2) sub-headings;

INTENDED PETITIONERS; DUKE NYAIRO ONDIEKI & STEPHEN KARUA NYOIKE

60. It is trite law that election petitions are public interest litigation and therefore have to be advertised before being withdrawn; the applicants saw the advertisement in the Daily Nation and subsequently filed their Notice of Intention to take over the Petition which is dated the 19/01/2018;

61. At the hearing hereof it was submitted that it was in the interest of the general public interest to ensure that the matter proceeds to its logical conclusion; and they relied on Articles 3, 22 and 38 of the Constitution 2010 in that any Kenyan had a right to move to court to defend the constitution whenever any provisions were under threat;

62. Reference was also made to Rule 24(1) of the Election Petition Rules 2017 and it was submitted that this rule does not set out any requirements, threshold or benchmark as to who the petitioner should be; and that public interest and the overriding objectives set out in Rule 4 should guide the court; and that the court should facilitate the just , expeditious, proportionate and affordable resolution of the election petition;

63. The applicable law for substitution is found in Rule 24 (1) and (2) and the operative word is “**may**”; this court states that under Rule 24 (1) there is no automatic right to joinder; borrowing from the Indian authority cited by the 1st respondent Indian case **Jagal Kshoie S/o Lalchard Vs Dr. Balder Prakash**, at paragraph 7 and 8 of the authority this court concurs that leave would become redundant if courts were not allowed to exercise Judicial discretion; and therefore each case must be dealt with according to its peculiar circumstances;

64. The circumstances of this case are that the two intended petitioners contend that they have the **locus standi** to take over the matter; put in simple terms is that they believe that they have the qualifications to

be substituted as petitioners; they went as far as submitting that they had the same qualifications as the petitioner herein;

65. In this instance the petitioner was a candidate in the August 2017 election and was seeking to represent the interest of Kirinyaga County in the Senate; the first qualifications such a candidate must possess is that he must be resident in Kirinyaga and a registered voter therein; this court makes reference to and is persuaded by to the case of **Abdi Khaim Osman Mohamed & Anor vs IEBC and 2 Others (2014) eKLR** where it was held;

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

66. In the case of **Mohammed Ibrahim Abdi vs IEBC and 2 Others Election Petition No.7 of 2017** which is also persuasive the intended petitioners were found to be qualified substitutes on the following grounds;

“the applicants have managed to show that they are residents and voters in Mandera North Constituency. In their application is 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.”

67. Needless to say the applicants have nothing to show that they are from the concerned electoral area; the applicants have averred in their affidavit that they are registered as voters in Nairobi County, in addition to being registered in Muranga and Kisii Counties; and by such an averment the applicants are found to be in contravention of the electoral laws and thus disqualify themselves from any favourable exercise of this court’s discretion;

68. The application for withdrawal has been brought at the tail end of the proceedings that is after the election petition has been fully heard, final submissions have been filed and served by all the parties; the only issue left was the determination of costs and a final judgment; this court finds that no basis has been laid by the intended petitioners on how they will be prejudiced by the withdrawal of the Petition at this stage.

69. Save for stating that they are willing to abide by the direction of this court in terms of depositing security, the intended petitioners have not demonstrated their ability to pay costs of the Election Petition in the event of it being dismissed;

70. Election Petitions are serious matters and ought to be taken seriously; the two intended petitioners do not strike this court as being **“bona fide”** and can best be described as busy bodies up for hire; they appeared out of the blue and most likely will also disappear in the same manner they arrived;

71. This court concurs with the respondent’s submissions that the intended petitioners’ applications are a crafty maneuver to defeat the course of justice through the delaying of the speedy determination of the Election Petition;

72. For those reasons this court finds that the two intended petitioners namely Duke Nyairo Ondieki and Stephen Karua Nyoike are not qualified substitutes; and their applications are hereby disallowed;

INTENDED PETITIONER: JAMES KARIMI KARUBIU

73. This intended petitioner also filed a Notice of Intention to take over the petition;

74. The past conduct of this intended petitioner is an important factor that needs to be addressed when taking into consideration whether to allow him to take over the petition;

75. This court has judicial notice of the various petitions filed by the applicant James Karimi Karubiu; the applicant filed Election Petition No.1 of 2017 at Kerugoya High Court on the 18th day of August,2017 in which he sought orders for the cancellation of the declared results of the County Senator of Kirinyaga Election 2017; and also sought orders that fresh elections be conducted; this election petition was withdrawn on the same date it was filed with no reasons being given;

76. He then filed Election Petition No.3 of 2017 which petition was substantially similar to Petition No.1 of 2017 in that it involved the same parties and the same prayers were sought;

77. Counsel for the applicant never alluded nor did he make any admissions to the first petition either in the applicants affidavits or when making his oral submissions;

78. It is not disputed that Petition No.3 of 2017 was gazetted by the Hon. Chief Justice as an election petition; reason being the Petition contained prayers for nullification of the election results for the Senate Election for Kirinyaga County and a prayer that there be an order for fresh elections be conducted;

79. In Petition No.3 of 2017 the applicant was granted a lot of indulgence by this court to make a decision to either change the firm of advocates representing him, or to withdraw the Petition, or to consolidate it with this instant petition or to comply with the mandatory requirements under the Election Petition Rules; none of the above was done;

80. An application was filed for dismissal by the 2nd and 3rd respondent herein; the applicant chose not to defend the application and filed no response thereto; the application was heard and vide a ruling dated the 3rd November, 2017 the petition was dismissed by this court;

81. The petition having been dismissed by a court of competent jurisdiction it would therefore follow that if aggrieved by the decision the applicant ought to have appealed or applied for review of the orders therein; instead he is seeking to be substituted as a petitioner in a similar petition;

82. Firstly the failure by the intended petitioner to actively move Election Petition No.3 of 2017 speaks volumes for a person interested in taking over another petition; secondly allowing him to take over this instant election petition would be condoning abuse of the court process; refer to the case of **Ya tung Investment Co. Ltd Vs Hang Buith** where it was held that it is an abuse of court process to raise in subsequent proceedings matters that could have been litigated in earlier proceedings.

83. For those reasons the application for substitution by James Karimi Karubiu is found to lack merit and this court cannot be seen to condone the abuse of the court process; it therefore follows that he is not found to be a qualified substitute;

84. This court reiterates that it is the duty of the court to ensure that the withdrawal of an election petition is not terminated if there are qualified persons to take it over; but in this instance this court finds that there are no qualified persons who can take over the matter; the upshot is that the petitioner should not be held against his will and should be allowed to walk away with his head held up high;

85. The only issue left for determination is who should bear the costs of this petition.

Who will bear the Costs.

86. As the adage goes “**choices have consequences**”; the petitioner’s choice to walk away has consequences; and these consequences come in the form of costs which follow the cause; the applicable law is found at Section 84 and Rules 30 and 36 which provides that an election court shall award the costs of and incidental to a petition; that the award for costs is discretionary and the court is empowered to cap the costs payable.

87. The overriding objective is to ensure that such litigation is affordable and proportionate and not calculated to scare away potential litigants from accessing the courts;

88. It is a fact that the 1st, 2nd and 3rd Respondent incurred costs in taking instructions, preparing documentation for the various interlocutory applications and defending the election petition that was instituted by the petitioner;

89. The 1st respondent was represented by a team of three (3) counsel and the 2nd and 3rd respondent by a team of two (2) counsel;

90. The petition was fully heard and was indeed protracted; all the witnesses had testified; all applications had been disposed of and the prayer for recount disallowed; and as correctly conceded by the petitioner all that was left was for with the parties to highlight their respective submissions on costs and subsequently the giving of a judgment date; the withdrawal of the petition was brought at the very tail end of the proceedings; and for those reasons this court finds that the petitioner is liable for the costs incurred by the respondents;

91. It is this courts considered opinion that costs capped at Kshs.5,000,000/- for each respondent to be reasonable costs; refer to the case of **Henry Okello Nadimo vs IEBC & 2others Busia Election Petition No.2 of 2013** where costs of Kshs.4,000,000/- was awarded on a withdrawn and fully heard election petition.

FINDINGS

92. For the forgoing reasons this court makes the following findings;

- i. The Petitioner has met the threshold for withdrawal of the Petition No.4 of 2017 in the matter of the Senatorial Election for Kirinyaga County;
- ii. The intended Petitioners Duke Nyairo Ondieki and Stephen Karua Nyoike have not met the threshold for substitution as Petitioners;
- iii. The intended petitioner's James Karimi Karubiu application for substitution as a petitioner is found to be an abuse of the court process;
- iv. The respondents are entitled to costs.

DETERMINATION

93. For the forgoing reasons this court makes the following determinations;

- i. The Petitioner is hereby granted leave to withdraw Election Petition No.4 of 2017 filed at the Kerugoya High Court; and the Petition is hereby marked as withdrawn with costs to the 1st, 2nd and 3rd respondents;
- ii. The applications by Duke Nyairo Ondieki and Stephen Karua Nyoike for substitution are hereby dismissed with no order as to costs;
- iii. The application by James Karimi Karubiu is hereby dismissed with no order as to costs;
- iv. The Petitioner shall pay to the 1st Respondent costs of this instant application and costs of the Election Petition filed herein; the totals costs are hereby capped at Kenya Shillings Five Million (Kshs.5,000,000/-);
- v. The Petitioner shall pay the 2nd and 3rd respondents the costs of this instant application and costs of the Election Petition filed herein; the costs shall be joint and shall be hereby capped at Kenya Shillings Five Million (Kshs.5,000,000/-);

vi. The designated taxing master to tax the Bills of Costs filed by the respondents in accordance with the Advocates Remuneration Order but subject to the capping as ordered herein.

vii. The sum of Kenya Shillings Five hundred Thousand Kshs.500,000/- deposited herein by the Petitioner as security for costs to be divided equally towards payment of the respondents taxed costs.

Orders accordingly.

Dated, Signed and Delivered at Kerugoya this 31st day of January, 2018.

HON.A.MSHILA

JUDGE