



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

ELECTION PETITION NO. 2 OF 2017

(FORMERLY NAIROBI MILIMANI ELECTION PETITION NO.15 OF 2017)

IN THE MATTER OF: ARTICLE 1(2), 3, 38, 81, 84 , 86 AND 87 OF THE

CONSTITUTION OF KENYA

AND

IN THE MATTER OF: SECTION 78 OF THE ELECTION ACT (No.24 of 2011)

AND

IN THE MATTER OF: THE GUBERNATORIAL ELECTIONS FOR MARSABIT

COUNTY HELD DURING THE GENERAL ELECTIONS

CONDUCTED ON THE 8TH OF AUGUST 2017

BETWEEN

AMB. UKUR YATTANI KANACHO.....PETITIONER

VERSUS

1.I.E.B.C.....1ST RESPONDENT

2. ARNOLD MUTWIRI NJABANI.....2ND RESPONDENT

MARSABIT COUNTY RETURNING OFFICER

3. ALI MOHAMUD MOHAMED.....3RD RESPONDENT

PIUS YATTAN WARIO.....1ST INTENDED INTERESTED PARTY

DR. NOAH AKALA.....2ND INTENDED INTERESTED PARTY

RULING

The application dated 16th January 2018 seeks the following orders:-

(a) That this Honourable Court be pleased to grant leave to the Petitioner to withdraw the Election Petition herein.

(b) That the Security for costs deposited by the Petitioner herein before this honourable Court be refunded forthwith.

(c) That there be no orders as to costs.

The application is supported by the affidavit of the Petitioner sworn on 16.1.2018. The 3rd Respondent filed a replying affidavit sworn on 16.1.2018.

The application is based on the ground that the prevailing circumstances at the time the Petition was filed have changed. Grounds four and five of the petitions reads as follows:

4. That in the intervening period, the humble Petitioner herein has since been nominated by the President of the Republic of Kenya to serve as a Cabinet Secretary pursuant to Article 152 (2) of the Constitution of Kenya and his name has already been forwarded to the speaker of the National Assembly for approval.

5. That subsequent to the aforesaid nomination, the Petitioner herein has since accepted the President's nomination to serve as a Cabinet Secretary the effect of which is that it is now proper, courteous and befitting to withdraw the election petition herein.

The Petitioner contends that the decision to withdraw the petition is voluntary and not as a result of any agreement with the other parties.

The first intended interested party seems to have gotten wind of the intention to withdraw the petition. He quickly filed the application dated 16th January, 2018 seeking the following orders:-

1. That the applicant seeks leave of this Honourable court to be substituted and or be enjoined as petitioner in the petition.

2. That the Honourable Court do direct that security deposited on behalf of the original petitioner do remain as security for any cost that may be incurred by the substituted petitioner.

3. That petitioner be granted 4 days to seek legal representation.

4. That the cost of suit be in cause.

The second application is supported by the first interested party's affidavit sworn on the same date of the application. The 3rd respondent filed a replying affidavit sworn on 16.1.2018. Dr. Noah Akala has filed a third application seeking to be enjoined as a Petitioner.

The 1st interested party contends that he would wish to come on board as the Petitioner. It is his position that the continuance of the petition and the ultimate outcome is of great importance to the people of Marsabit County and his community in particular. He maintains that the elections held on 8.8.2017 were not conducted in accordance with the Constitution of Kenya, the Elections Act and other Electoral Regulations. The 1st interested party is a former member of the Marsabit County Assembly, Turbi Bubisa ward and is also the former Deputy Majority leader of the County Assembly during the period 2013-2017.

Mr. Oduor held brief for Mr. Walukwe for the Petitioner. Counsel relied on the application dated 16.1.2018 and the Petitioner's affidavit sworn on the same date. It is submitted that the application meets

the requirements provided under Rule 21. It was signed by the petitioner. The grounds for withdrawal have been stated. It was lodged at the Registry and the petitioner has not been coerced or intimidated to file the application. Mr. Oduor submit that the petitioner has been nominated as a Cabinet Secretary and is no longer interested in pursuing the case. It the petitioner's view that he has been called to serve in a higher duty. The petitioner is still of the view that the Election was not free and fair but he is exercising his Constitutional right to withdraw the petition. Counsel relies on the case of **DAVID K. OLE NKEDIANYE & TWO OTHERS V JOSEPH JAMA OLE LENKU AND FOUR OTHERS(2017)eKLR**. Counsel also relies on the case of **MOHAMED IBRAHIM ABDI V IEBC & TWO OTHERS(2017)EKLR**. It is submitted that the petitioner is willing to allow the amount deposited as security to continue being security for the intended petitioners.

Mr. Oduor also appeared for one of the intended petitioners, **Mr. Pius Yattani Wario**. The intended petitioner filed his application on the same date the application for withdrawal was filed. It is submitted that the applicant is qualified to be a petitioner. There is no specific procedure under **Rule 24** to be followed by an intending petitioner. All what is required is that the person must be qualified to be a petitioner. The petition will not be amended and the intended petitioner will simply prosecute it. He is aware of the time lines involved in such suits and is ready to prosecute the Petition. The

election of the Governor is a matter of public importance. The original petitioner did not file the petition as a personal dispute but felt that Marsabit residents were aggrieved in the manner the elections were conducted. The withdrawal of the petition will greatly prejudice the residents. The petitioner did not consult the people of Marsabit. The applicant would not like to be substituted in his personal capacity but on behalf of the residents. The fact that the application was filed before the notice to withdraw the petition was gazetted does not mean that the applicant has jumped the gun. Counsel relies on the case of **ROBERT KIBET KIMEI V ALFRED KIPTOO KETEL AND TWO OTHERS 2017)EKLR**.

Dr. Noah Akala filed an application dated 22.1.2018 and filed today 23.1.2018 seeking to be enjoined as a petitioner in the petition and that the deposited security do remain as security for any costs that may be incurred by the substituted petitioner. Miss Ochieng appeared for the applicant in that application. Counsel submit that the applicant has no objection to the application for withdrawal. **Article 22** of the Constitution allows any person to institute proceedings if a right has been violated or is likely to be infringed. Regulations 22 and 24 lay out the procedure for those intending to be substituted as petitioners. The applicant is a Kenyan and the deputy Director incharge of Elections and campaigns for the Orange Democratic Party (ODM). The party had a candidate for the post of a Governor in Marsabit County. The applicant is qualified to be a petitioner.

Mr. Odhiambo, Counsel for the 1st and 2nd Respondents opposed the applications. Counsel is not opposed to the application by the petitioner to withdraw but is against the request that the security deposited by the petitioner be released or continue as the security for the intended petitioners. It is submitted that the respondents have already incurred costs. Several officials of the IEBC travelled from various parts of Marsabit County to Nairobi in preparation of the response to the petition. The respondents have participated in the petition from the time it was filed. The petitioner should meet his bills before leaving the petition. The bills are more than the amount deposited. The security should be released to the respondents and further costs be ordered.

Mr. Odhiambo contends that Dr. Noah Akala does not have locus to be substituted. For one to be substituted he has to be qualified to be a petitioner to which the petition relates. Dr. Akala is not a voter or resident of Marsabit. On the application by Mr. Pius Yattani, Mr. Odhiambo submit that the applicant has jumped the gun and filed the application before the notice of withdrawal was advertised. This is an indication of mischief on its part. The application is frivolous and will prejudice the respondents as there will be no time to respond to the claims being raised by the new petitioners. Rule 22 (2) requires that the application of withdrawal of a petition be advertised. On the hearing of the application one can apply to be substituted. Counsel relies on the case of **MOHAMED IBRAHIM ABDI V IBC AND TWO OTHERS(Supra)**. Counsel maintain that since costs have already been incurred anyone wishing to be substituted has to be ready to meet costs.

Miss Hashim appeared for the 3rd Respondent. Counsel is in agreement with the contentions by Mr. Odhiambo. It is submitted that the 3rd respondent was served with a voluminous petition on the very last day allowed for service. He instructed his advocates to respond to the petition. The response which is equally voluminous was filed on 18.1.2017 within a period of 3 days. Costs have already been incurred. The 3rd respondent is of the view that the truth should be unearthed. The petitioner is withdrawing the petition in gratitude of personal appointment. That does not qualify to have the petition withdrawn. The petitioner and the intended petitioner is one and the same. The petitioner has cast aspersions on the validity of the election of the 3rd respondent. The 3rd respondent requires his day in Court to exonerate himself. Whereas the petitioner would like to withdraw the petition he at the same time believe that the election was not free and fair. The withdrawal is a mischief. It shows that the petitioner was not about public interest or the interest of Marsabit residents but was for personal interest. Counsel submit that cost have already been incurred and ought to be awarded. Reliance is made to the case of **GILPHINE MOKEITA OMWENGA V IEBC & TWO OTHERS, KAKAMEGA ELECTION PETITION NO.10 OF 2017** where the court held in a similar application for withdrawal of a petition that costs had already been incurred in form of defending the petition and capped the costs at Ksh.2 million.

On the issue of substitution by the two applicants, it is submitted that the application by Pius Yattan is pre-emptive. It is defective in form and content. It is a bargaining chip by the petitioner and his proxies. The court should frown upon these arrangements. Allowing the application will pass a message that parties can allow proxies to take over cases for personal gain. Rule 24 requires an intended applicant to deposit security in addition to the security already deposited. The application by Dr. Noah is made on behalf of ODM party. The applicant is not the Chief executive officer or a Principal of the party. His contention that he is the Deputy Director incharge of Elections and campaigns has not been established. The ODM candidate for the post of the Governor in Marsabit County is a witness for the 3rd respondent. He has sworn an affidavit indicating that the elections were free and fair. The application is an attempt by a Political party to file a petition out of time. He

The first application by the Petitioner is grounded on Rules 21, 22, 23 and 24 of the Election (Parliamentary and County Elections) Petition Rules 2017. **Rule 21** of the 2017 Election Petition rules provides as follows:

21. Withdrawal of Petition

(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 authorized 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 sworn, 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.

Rule 22 states:-

(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.

Rule 23 states:

(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 to the hearing of the application for the withdrawal of the petition under rule 21.

Rule 24 states:-

(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 a 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 proceedings 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 petition shall be made with the consent of all the other petitioners.

The issues for determination on the three applications are:-

1. Whether the Petitioner should be granted leave to withdraw the Petition.

2. Whether the two intended Petitioner should be substituted or enjoined as the petitioners.

3. What should be the orders on costs.

On the first application for withdrawal by the petitioner, the 1st and 2nd respondents are not opposed to the application. Their main dispute is on the issue of costs. The 3rd respondent is opposed to the application. The opposing arguments are that the application for withdrawal is meant to serve personal interest. The withdrawal is being made in appreciation of the petitioners nomination as a Cabinet Secretary. The 3rd respondent contends that the petitioner has made personal aspersions against him and would like to have his day in court and exonerate himself from those unfounded allegations. The 3rd respondent would like the petitioner to continue with his petition and prove his allegations.

Rule 21 of the Elections Petition Rules provide for the procedure of withdrawing election petitions. The rule permits the withdrawal of an Election Petition but that has to be done with the leave of the Court. The requirement that an election petition can only be withdrawn with the leave of the Court is borne on the fact that such litigation involves enormous costs. It cannot be a “**Walk in Walk out**” situation without regard to the cost element. The issue of cost is tied up with the prospect of a third party wishing to take over the petition. This does not mean that an application to withdraw an election petition will always or automatically lead to one for substitution. However, the court has to be satisfied that the intended withdrawal will bring the dispute to an absolute end. The Court is endowed with the Judicial discretion to either allow or refuse the application. That is why the word “**may**” is used in **rule 21**.

From the submission of the parties herein, I do find that the application is not made in bad faith. Although there is the undisclosed but glaring fact that the petitioner intends to pursue public interest so as to express his appreciation to his nomination as a Cabinet Secretary, that in itself cannot be the basis for this court to deny the petitioner his wish to exit the petition. There is no evidence of collusion or coercion from anyone. The Court should not stand against the petitioner’s wish. I do allow the application to withdraw.

Pius Yattani Wario filed his application to be substituted as a Petitioner on the very day the application for withdrawal was filed. The respondents maintain that the application was pre-emptive and premature. On 15.1.2018 counsels for the respondents appeared in court ready for the hearing of the petition. Mr. Walukwe, Counsel for the petitioner informed the court that the petitioner was intending to withdraw the

Petition and sought one week adjournment. I did allow the application for adjournment and directed the petitioner to make up his mind on the petition. The case came up for mention the following day 16.1.2018. One of my orders of 15.1.2018 was that the petitioner was to make up his mind on the petition by mid-day 16.1.2018 and that “**should the petitioner express his right to withdraw the petition, any party interested in pursuing the petition shall be at liberty to do so by 2.00pm 16.1.2018 when the matter was to be mentioned.**” These were the orders of the court. Rule 22 requires that the application to withdraw the petition should be served and the petitioner should publish in a newspapers of National Circulation a notice of intention to withdraw. The Court was having a mistaken belief that the parties would compromise the issue and dispense with the requirement for advertisement.

This Court on 16.1.2018 tried to resolve the two applications by having the parties agreeing on the way forward. Parties agreed that in order not to compromise the interest of other parties, the petitioner to advertise the intention to withdraw. Counsels realized that upon publication of the notice to withdraw, other parties might be interested in taking over the petition. My view is that the main purpose of advertising the notice in a newspaper is to enable the residents of the concerned ward or constituency or county to know of that intention and decide as to whether anyone is interested in continuing with the petition. The requirement of advertisement is simply to make the petitioner’s intention known to those interested in the petition whether such persons are in favour or against it. It therefore follows that if one is already aware of the petitioner’s intention to withdraw the petition and once a formal application to withdraw has been filed, one can appear before the court and express his/her intention to be substituted as a petitioner.

In the case of ROBERT KIBET KEMEI V ALFRED KIPTOO KETER & IEBC (2017) eKLR, my brother Justice Kanyi Kimondo stated as follows:

“There is no specific procedure under Rule 24 that an intending petitioner must follow. All that is required is for the applicant to be qualified to be a petitioner, that he serves a notice of his intention on the Deputy Registrar under Rule 22; and, lastly, that he makes an application at the hearing of the application for withdrawal of a petition. The intended petitioner has done exactly that. In short, there is no express provision about the format of the application. It can even be an oral application so long as it is preceded by the steps which I have highlighted.”

I entirely agree with the above sentiments. I do agree that an application for substitution as a petitioner can be made orally before the court. Although Justice Kimondo is of the view that the application must be preceded by the sequence of events such as an application for withdrawal having been filed and a notice having been advertised, I am of the view that the filing of an application for substitution before the advertisement of the petitioner’s intention to withdraw the petition cannot be fatal. Even if the application to substitute is expunged for having been filed before advertisement, the intended petitioner can still appear before the court on the day the application for withdrawal is heard and express his intention of being substituted as the petitioner. The court may direct such a person to file a formal application or hear his oral application. If an application has already been filed, it serves no purpose to terminate the application and order for a fresh one to be filed. **Section 80(d)** of the Elections Act No.24 of 2011 calls upon an election Court to decide all matters that come before it without undue regard to technicalities; Rule 4 of the Elections Petitions Rules provide that the objective of the Rules is to facilitate the just, expeditious, proportionate and affordable resolution of Election Petition.

Should the applicant be allowed to come in as a petitioner? **Section 2** of the **Election Act** defines a petition as application to the election court under the Constitution or under the Election Act. **Rule 2** defines a petitioner ***as a person who files a petition to the election court under the constitution or under the Act in accordance with the rules.*** The applicant has expressed his intention to be substituted as a petitioner.

He is aware of the effect of such a substitution.

It is well settled that election petitions are not suits between the parties to such disputes. Such litigation bring in the interest of the residents of the area as well as the nation as a whole. Such interest can be attributed to the need to know whether the person whose election is being challenged was validly elected or not. There is also need to know whether the IEBC conducts its responsibilities in accordance with the law.

In the case of **SHEODHAN SINGH V MOHAN LAL CAUTAN**[1969]3 SCR 417 OR 41 AIR 146 the Supreme Court of India observed as follows:

In an Election Petition, the contest is really between the Constituency on the one side and the person or persons complained of on the other. Once the machinery of the Act is moved by a candidate or an elector, the carriage of the case does not entirely with the election petitioner. The reason for the elaborate provision is to ensure to the extent possible that the persons who offend the election law are not allowed to avoid the consequences of their misdeeds.

Similarly, in the case of **BIJAYAWANDA PATWAK V SATRUG-HNA SAHA**, AIR 1963 S.C. 1566 **AT 1569**, the same Supreme Court stated as follows:-

“The Petitioner in an Election Petition has not an absolute right to withdraw it, nor has the respondent the absolute right to withdraw from opposing the petition in certain circumstances. The basis for this special provisions as to withdrawal of election petitions is to be found in the well-established principle that an election petition is not a matter in which the only persons interested are candidates who strove against each other at the election. The Public of the constituency also is substantially interested in it, as election is an essential part of the democratic process. That is why provision is made in election law circumscribing the right of the parties thereto to withdraw. Another reason for such provision is that the citizens at large have an interest in seeing and they are justified in insisting that all elections are fair and free not vitiated

by corrupt or illegal practices. That is why provision is made for substituting any elector who might have filed the petition in order to preserve the party of election”(emphasis added)

There is the issue of the 2nd interested party, Dr. Noah Akala, The objection against his application for substitution is that he is neither a voter nor resident of Marsabit. He is representing the ODM party and the application seeks to introduce a fresh petition out of time. The applicant swore an affidavit on 3rd September, 2017 contesting the manner in which the elections were conducted. Paragraph 5 of his affidavit states that he is convinced that the elections were done in a manner that grossly violated the constitutional principles of free, fair, verifiable, credible and accountable election whose effect is that the free will of the Marsabit Electorate was vitiated. The question which comes out is whether in an Election Petition the petitioner must be a resident or voter in the concerned area where the specific election is being challenged. The Constitution and the Elections Act does not provide for the qualifications of a petitioner in an election petition. **Rule 2** of the Election Petition Rules simply defines a petitioner as the person who files the petition. The Election Act defines a petition in **Section 2**. That definition does not exclude someone from a different ward or constituency or County from filing a petition. An election involves the interest of the Kenyans as well as other development partners. In this globalization era, we should not limit matters of public interest to the locality in which they occur. Any Kenyan should be free to challenge the results of an election of any ward or Constituency or County. Such challenges are intended for the benefit of the residents of those areas in particular as well as the general public in general. Dr. Akala has followed up the election process in Marsabit and has shown his interest by being a witness. At paragraph 11 of his affidavit in support of the application, the applicant reiterates that the elections were not conducted in line with Constitutional provisions. He is not bringing the application on behalf of the ODM party although he contends that the party did field a candidate for the position of Governor in Marsabit gubernatorial seat. There is no indication that the ODM candidate is not satisfied with the results of the elections. Dr. Noah Akala has made the application in his personal capacity.

I do therefore find that the two applications by the intended petitioners are merited and are hereby allowed.

Lastly, there is the issue of costs. The Petitioner has expressed his willingness to have the security retained in Court as security for the substituted petitioners. The respondents maintain that they have already incurred expenses which is more than the amount deposited as security. The petitioner should be made to settle his bills. In the case of ***COSMAS FULENI KENGA V IEBC & 3 OTHERS; Malindi Election Petition No.12 of 2017***, Justice D.O. Chepkwony allowed a petitioner to withdraw from the petition but condemned him to pay costs to the respondents. The entire sum of Ksh.500,000 deposited as security was shared amongst the respondents. In the ***DAVID K. OLE NKEDIANYE case (Supra)***, the applicants seeking to be

Substituted as petitioners were ordered to deposit their own security for costs amounting to Ksh.500,000 within three days. Similarly, in the case of ***SAMMY NDUNGU WAITY & DENNIS KIMGAROR LEMAN V IEBC & 3 OTHERS; Nanyuki Election Petition No.2 of 2017***. The Court shared out the security deposit to the four respondents at the rate of Ksh.125,000 each.

My view on the issue of costs involved in applications for withdrawal of petitions is that releasing the funds to any of the parties at this stage would be premature. It is true that costs have already been incurred. However, if the application for substitution is granted, the end result of the petition becomes unpredictable. It serves no purpose to release the security to the respondents only to subsequently condemn the same respondents to pay costs to the petitioner should the continued petition succeed.

The result would be calling upon the respondents to refund what has already been paid to them. Although releasing the security would cover the costs already incurred, my view is that the deposit was intended to be retained in Court until the finalization of the petition. **Rule 30** states that the election court may, at the conclusion of a petition, make an order on costs. **Rule 30 (3)** states as follows:

The abatement of petition shall not affect the liability of the petitioner or of any other person to the payment of previously incurred costs.

Rule 24(5) impose a duty on substituted petitioners to be subject to the same liabilities as the original petitioner. In essence therefore the costs incurred by the respondents are taken care of.

I am in agreement with the respondents that costs have already been incurred. The much I can do is to award the respondents costs for the Petitioner's application to withdraw. Such costs shall be taken into account upon completion of this petition. The outcome of the petition is yet to be known and the respondents cannot at this stage seek costs for getting up and preparation of the case. The petition is not being finalized by the withdrawal of the original petitioner. I do agree that the already incurred costs is more than the respondents' expenses so far. Although the sum of Ksh.500,000 deposited as security is provided by statute, I do find that the intended petitioners need to make their own deposit. I do order that each of the two applicants deposit a sum of Ksh.250,000 as security within seven (7) days hereof.

In the end, the three applications are hereby allowed in the following terms:-

- 1. The Petitioner is hereby allowed to withdraw himself from this petition.***
- 2. The two applicants namely Pius Yattani Wario and Dr. Noah Akala are hereby substituted as the Petitioners in this petition.***
- 3. No new affidavits shall be filed by the substituted petitioners.***
- 4. The two applicants shall each deposit in Court ksh.250,000 as security within seven (7) days hereof.***
- 5. Costs of the Petitioner's application for withdrawal to the respondents.***
- 6. Costs of the applications by the substituted petitioners shall follow the outcome of the Petition.***

Dated, Signed and Delivered at Marsabit this 23rd day of January 2018

S. CHITEMBWE

JUDGE