



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
ELECTION PETITION NO. 10 OF 2017

GILPHINE MOKEITA OMWENGA.....PETITIONER

VERSUS

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION.....1ST RESPONDENT

ISAAC KIPLAGAT RUTTO.....2ND RESPONDENT

MOSES MALULU INJENDI.....3RD RESPONDENT

(FOR MEMBER OF NATIONAL ASSEMBLY MALAVA CONSTITUENCY).

RULING

(On the petitioner's Application dated 6/12/2017 for leave to withdraw the petition.)

1. This Election petition is dated the 7/9/2017 and filed on the same day. The petitioner describes herself as a registered voter in Malava Constituency, Kakamega County who voted in the 8/8/2017 General Elections. She brought the petition in her own right and capacity as a registered voter.
2. The 1st Respondent is the **Independent Electoral & Boundaries Commission** established under **Article 88(1) of the constitution of Kenya** and is charged with the conduct and supervision of the Election as prescribed in **Article 88(4) of the constitution and other Electoral laws**.
3. The 2nd Respondent was the Returning Officer appointed by the 1st Respondent to officiate the conduct of the election for Malava Constituency.
4. The 3rd Respondent was a candidate, with others, for the position of Member of the National Assembly who was declared the winner with majority votes in the said Election on the 10/8/2017. He was sworn in as the duly elected Member of the National Assembly for Malava Constituency on the 31/8/2017.
5. The petition was filed on the 7/9/2017 within the time frame under the constitution and the **Election Act No 24 of 2011 and the Rules** made thereunder.

The grounds upon which the petition was brought are stated as follows:

- (i) Lack of transparency, accountability and verifiability in conducting the Member of National Assembly elections in Malava Constituency.**
- (ii) Failure to secure the Election .**

(iii) Undue influence, Bribery and pre- election events.

(iv) Verifiability of the Election.

6. In support of the petition, the petitioner filed her supporting affidavit with numerous annexures on the 7/9/2017 and sought the following orders and declarations:

a. The 1st and 2nd Respondents failed, neglected and or deliberately refused to conduct the Malava Constituency Member of National Assembly election in a manner consistent with the Constitution of Kenya, 2010; Election Act No. 24 of 2011 and other electoral laws.

b. The 1st and 2nd Respondent committed irregularities and illegalities, inter alia, in the transmission of results for the election of the Malava Constituency Member of the National Assembly.

c. The electoral irregularities and illegalities committed by the 1st and 2nd Respondents seriously affected the integrity of the impugned election thereby invalidating the entire election of member of national Assembly of Malava Constituency.

d. There be a scrutiny and recount of the results recorded in the aforesaid Member of National Assembly election for Malava Constituency in the Election held on the 8th August , 2017;

e. There be a scrutiny of the polling station diaries and actual voter's Registers including KIEMS Kits used at all Polling Stations within Malava Constituency during the said election of Member of National Assembly;

f. The results of the election for Member of National Assembly Malava Constituency held on the 8th August , 2017 in Malava Constituency be declared invalid , null and void;

g. It be determined that the 3rd Respondent has not been validly elected declared , published and sworn in to be the Member of the National Assembly for Malava Constituency;

h. Such election offences and electoral malpractices on the part of the 2nd and 3rd Respondents and the persons named in paragraph 16 (ii) (e) herein above as disclosed and found by this Honourable Court be reported to the Director of public prosecutions for appropriate action as well as their respective government employers for appropriate disciplinary action including summary dismissal.

i. The Honourable Court do find that the 3rd Respondent has committed serious electoral offences and order him barred from participating in subsequent elections for a periods of at least five (5) years or as the Court may deem just and expedient.

j. The Respondents be ordered to pay your Petitioner's costs of and incidental to this petition ; and

k. Such further, other and consequential orders as this Honourable Court may lawfully make.

7. On the 28/9/2017 the petitioner filed an application seeking for (a) orders of scrutiny and recount of all votes cast all polling stations in the constituency, (b) access to information and (c) leave to file further affidavits in support of the petition. On the 1/12/2017 I allowed the petitioner to file her further supporting affidavit to the petition and eight witness affidavits, which was done.

8. On the 16/11/2017, the 3rd Respondent approached the court by an application seeking that the

petition dated 7/9/2017 be struck out based on various grounds among them and deponed to in the supporting affidavit admitted illegalities on the part of the petitioner and maintaining that the proceedings could not be maintained as founded on wrongs by the petitioner. Upon hearing the application, I declined to strike out the petition by a ruling delivered on the 1/12/2017 on the basis that the petitioner ought to be given a chance to ventilate her petition and observed that not all evidence in support of the petition had been illegality and unlawfully obtained evidenced by the evidence on record and that striking out the entire petition would not only be draconian but would also deny the petitioner her electoral rights as enshrined in **Article 38 and 81 of the 2010 constitution.**

9. However, guided by the legal principles stated in the cases Priscilla Nyambura vs Marathon Corporation Kenya Ltd & 3 others (2008) eKLR and Charles Mwangi Kagomia Vs Dhraj D. Popat & another (2006) eKLR that a court of law cannot be permitted to enforce an illegality, nor should it allow a party to benefit from an illegality, I proceeded to order to be struck out, some of the petitioner's evidence contained in her affidavits and obtained by herself while illegality and unlawfully accessing, entering and being present at the electoral restricted areas being the polling stations and tallying centre within the constituency as she was neither a candidate nor an agent, but only a candidates spouse which did not give her authority to access observe or participate in the collating and tallying of votes at the tallying centre.

10. Further, by an oral application by the 1st and 2nd Respondents on the 5/12/2017, the Respondents sought to withdraw some of their documents as filed being Forms 35As and Polling Station Diarys as well as Form 35B. Upon consideration, the application was allowed by the court as a party's documents belong to them and the party is at liberty to withdraw its documents when and as they may wish. Following therefore, numerous paragraphs in the petitioners affidavits in support of the petition were withdrawn. See my Rulings dated 4/12/2017 and 5/12/2017.

11. The petitioner's case then proceeded for hearing after Pre-Trial Directions and Settlement of issues were taken on the 1/12/2017. Besides the petitioner, three (3) witnesses testified and the petitioners case was closed, despite having indicated that nine witnesses would testify.

12. On the 6/12/2017 when the 1st and 2nd Respondents case was scheduled to start (for hearing), the petitioner gave **Notice of Intention to Withdraw the petition under Rule 21 of the Election petition Rules 2017**, and proceeded to file the necessary application as provided under the said Rules.

In her application to withdraw the petition dated 6/12/2017 and brought **Under Rules 21 and 22 of the Rules, and section 23 of the Elections (Parliamentary and County) Petitions Rules 2017**, the petitioner stated grounds for the move as having been prompted by the striking out of substantial affidavit evidence contained in her affidavits in support of the petition and the Respondents withdrawal of some of their documents from the record, and thus could not sustain the petition nor a cause of action against the Respondents.

As mandated under, the 2017 the **Election Rules** stated above, **the Notice of Intention to withdraw the Election Petition was advertised in the Daily Nation Newspaper of the 19/12/2017.**

13. The 1st and 2nd Respondents pursuant to the notice proceeded to file their response to the Application on the 19/12/2017 supporting the withdrawal and by his supporting affidavit sworn on the 18/12/2017, **the Returning officer for Malava Constituency and 2nd Respondent Isaac Kip;angat Rutto** supported the withdrawal and deponed that no agreement or terms of any kind had been made nor any undertaking had been entered into, in relation to the withdrawal of the petition as provided under **Rule 22(2) of the Rules.**

He however prayed for costs of shs. 2.0 million.

14. The 3rd Respondent in his response to the application lauded the petitioner's decision and notice to withdraw the petition by his affidavit sworn on the 8/1/2018. By his advocate Mr. Luseno, he told court

that the 3rd Respondent did not wish to seek for costs of the withdrawn petition saying that he wished to unite the people of Malava Constituency and work with the other contestants for their benefit.

15. I have considered the petitioners application to withdraw the petition and the grounds put forth for the decision. I have also considered that the Respondents have supported the application by their Responses. I am also satisfied that the mandatory Procedure and steps stated under **Rules 21 and 22 of the Elections (parliamentary and County Elections) petition Rules 2017** have been complied with .

The notice of intention to withdraw the petition was advertised in the Daily Nation Newspaper of the 19/12/2017 pursuant to **Rule 22(2) of the Rules** . I am also satisfied that the Respondents , in their Responses to the application by their affidavits have also complied with **Provisions of Rule 21(6) of the Rules to the extent that “ to the best of my knowledge and belief, 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 “**

16. As at **11/1/2018** when the application for withdrawal came up for hearing , no person had come up or applied to be substituted as the petitioner in place of the petitioner who had applied to withdraw the petition – **in terms of Rule 24(1).**

There being no objection from any party in the petition ,and no person having applied to be substituted as a petitioner in the petition ,and having been satisfied that all legal requirements have been complied with , I have no reason whatsoever to deny the petitioner her wish , to withdraw the petition for reasons stated in her supporting affidavit to the application and as captured above.

The application for leave to withdraw is therefore allowed as prayed.

17. **Costs:-**

The 3rd **Respondent, Moses Malulu Injendi** told the court that he does not wish to be awarded costs as he seeks to unite the people of Malava Constituency as their Member of National Assembly.

That being the case, the 3rd Respondent shall not be awarded any costs for the withdrawn petition.

18. The 1st and 2nd Respondents have urged the court to award them costs to the tune of Kenya Shillings 2.0 million for the time taken, preparations, compilation of documents and preparations towards hearing of the petition.

Section 30 of the Election Rules 2017 provides :-

30 (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) and (b) and

d. the person to whom the costs payable under paragraphs (a) and (b) shall be paid .

e. Further, section 30 (2) provides:-

“When making an order under sub rule (1) ,an election court may –

a. disallow any prayer for costs which 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 expenses , whether that party is successful or not , in order to discourage any such expense.

19. I have considered the manner the Petitioner and the Respondents conducted the parheard petition before me. I cannot say that the conduct of either of the parties was offensive in any way to the court or to each other.

It was to say the least, cordial, and respectable despite the numerous interlocutory applications made by each of the parties.

I commend and thank the parties and their Advocates for the restraint and respect shown to all, and to the court.

20. However , considering the pleadings as filed by the petitioner at the very beginning ,it was evident that the petitioner could not sustain the Petition against the Respondents especially going by her dispositions in her affidavits and averments that as a spouse of one of the candidates,(who lost the election) , she was authorized to monitor , access observe and gain entry to all polling stations in the constituency ,and even worse participate in the collation and tallying of votes at the constituency tallying centre ,and being aware that she was not an “**accredited person**” pursuant to **Regulation 85 of the Elections (General) Regulations 2012 and Regulation 94 (5)** thereof, she should have taken this step earlier than at the stage she did.

See **Priscilla Nyambura vs marathon Corporation Kenya ltd & 3 others (2008) eKLR , Moses Masika Wetangula vs Musikari Kombo & 2 others petition No. 12 of 2014 (2015) eKLR** among others.

21. The petitioner’s conduct, as I stated in my ruling of the **1/12/2017 could be described as bounding on an election offence under Section 13(h) of the Election offences Act, 2016**, that she knowingly and willingly committed. For the Record , the petitioner is a trained lawyer and therefore expected to be knowledgeable in legal issues and provisions of the law including electoral laws and offences, thus my statement that she knowingly and willingly engaged in illegal and unlawful activities.

That as it may , the petitioner on her own volition and free will decided to withdrawal the petition – after her case was closed having called four witnesses, thus making the petition parheard.

22. There is no doubt that the Respondents put in a lot of time and resources in taking instructions,preparation , compilation of documents and affidavits and the long hours taken during the hearing of the numerous interlocutory applications and taking the Petitioner’s and the Petitioner’s and her witnesses evidence.

23. I have considered several decisions on costs on withdrawn and fully heard parliamentary petitions among **them Abdisalan Mahamed Vs IEBC & another Garissa Election petition No. 5 of 2013 (Garissa) , Kisumu Election petition No. 3 of 2017. Jackton Nyanungo Rangumo vs IEBC & 2 others, Kakamega Election Petition No. 11 of 2017 Hamzah Musuri Kerogo Vs IEBC and another, Henry Okello Nadimo Vs IEBC &2 others Busia Election petition No. 2 of 2013.**

The costs awarded in the above election petition were Kenya Shillings 1.5 million, shs. 3.0 million and shs. 4.0 million respectfully.

In my considered opinion, costs to the 1st and 2nd Respondents, capped at Kenya Shillings 2.0 million shall be sufficient.

24. FINAL ORDERS.

1. The petitioner Gilphine Mokera Omwenga is hereby granted leave to withdraw Kakamega Election petition No 10 of 2017 dated and filed on the 7/9/2017 with costs to the 1st and 2nd Respondents.

2. The 1st and 2nd Respondents costs shall be capped at Kenya Shillings Two million , and shall be taxed and certified by the Deputy Registrar of the court.

3. The security deposit placed in court by the petitioner shall be used to pay the certified costs to the 1st and 2nd Respondents.

4. No costs are awarded to the 3rd Respondent.

5. A certificate of determination of this petition shall issue interms of Section 86 (i) of the Election Act 2011 to the speaker of the National Assembly .

Delivered, dated and signed in open court on the 16th day of January, 2018

JANET MULWA

JUDGE

In the presence of

M/s Khatashi holding brief for Mrs. Ashioya for.Petitioner/Applicant

M/S Wakoli.....for 1st & 2nd Respondents

Mr. Luseno.....for 3rd Respondent

Lilian & SusanCourt Assistants.