



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**ELLECTION PETITION NO. 23 OF 2017**

**JAPTHET MUROKO.....1<sup>ST</sup>  
PETITIONER**

**ZACHEUS OKOTH OLIECH.....2<sup>ND</sup>  
PETITIONER**

**VERSUS**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (IEBC).....1<sup>ST</sup>  
RESPONDENT**

**JOSEPH MELE EROO,**

**RETURNING OFFICER NAIROBI COUNTY.....2<sup>ND</sup>  
RESPONDENT**

**KIOKO MIKE SONKO MBUVI GIDEON.....3<sup>RD</sup>  
RESPONDENT**

**RULING**

1. Following the general elections conducted on 8<sup>th</sup> August 2017, the 3<sup>rd</sup> respondent herein was declared the winner of the gubernatorial seat of Nairobi City County. On 8<sup>th</sup> September 2017, the present petition was filed by the two petitioners, challenging that election for reasons set out therein.
2. This court gave directions as to the hearing and first set out the hearing dates for 28<sup>th</sup> to 30<sup>th</sup> November 2017 and 5<sup>th</sup> and 6<sup>th</sup> December 2017. The hearing of the petition did not take place on the appointed dates: first, because 28<sup>th</sup> November 2017 was declared a public holiday and secondly, some applications had been filed by the parties relating to the petition which needed to be determined before the main hearing.
3. The petition was subsequently set down for hearing on 8<sup>th</sup> to 12<sup>th</sup> January 2018. When the matter was called out for hearing on 8<sup>th</sup> January 2018, the petitioners were absent and their counsel informed the court that threats directed to the 1<sup>st</sup> petitioner had been received by him (the 1<sup>st</sup> petitioner) and therefore, had proceeded to the police station to make a report. The 2<sup>nd</sup> petitioner was said to have escorted the 1<sup>st</sup> petitioner to the police station. After a brief adjournment, the petitioners were still said to be at the police station and therefore the matter was stood over to 9<sup>th</sup> January 2018 for hearing.

4. When the matter was called out for hearing on 9<sup>th</sup> January 2018 as aforesaid, counsel for the petitioners informed the court that they had filed a Notice and Application for the withdrawal of the petition and asked for directions relating thereto alongside an application to adjourn the hearing. It is clear from the submission by counsel for the petitioners that they are no longer interested in the prosecution of the petition. In fact, whereas the 2<sup>nd</sup> petitioner was present in court, together with another witness, the 1<sup>st</sup> petitioner did not present himself. Counsel informed the court that they have no instructions from the petitioners to prosecute the petition.

5. Rule 21 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 provide for the withdrawal of a petition but this cannot be done without leave of the election court. The procedure that follows upon filing the application is elaborately set out under Rules 21, 22 and 23. To allow the petitioners proceed with the application to withdraw the petition ostensibly means that the hearing of the main petition shall be adjourned. This was the main concern raised by counsel for the respondents.

6. An application to adjourn the hearing was declined by the court. Faced with that situation, counsel for the petitioners informed the court as stated above, that they have no instructions to prosecute the petition.

7. Upon the filing of the Notice of Intention to Withdraw an Election Petition, the petitioners are required to serve each respondent with a copy of the Application to withdraw. They are also required to publish in a newspaper of national circulation the Notice of Intention to Withdraw. Thereafter, the Registrar of the court shall issue a notice for the hearing of the application specifying the time and place for the hearing. At the hearing of the application for the withdrawal of the petition, a person who is qualified to be a petitioner in respect of the election to which the petition relates, may apply to the court to be substituted as the petitioner in place of the petitioner who has applied to withdraw the petition. The election court may grant such an application.

8. The filing of this application is therefore, not a guarantee that this is the end of this petition; yet, the petitioners have expressly stated to the court through counsel, that they are no longer interested in the prosecution of the petition. Therefore, whereas the petitioners may be discharged from the petition if allowed to proceed with the application, anxiety shall still remain on the part of the respondents who may be compelled to stay on course in the event that any other party applies to be substituted. This is a situation that this court is unable to countenance in view of the circumstances of this petition and considering that there are strict timelines set out for the hearing and completion of election petitions.

9. In the circumstances, this court declines to exercise its discretion in favour of the petitioners to accept the Notice and Application to withdraw the petition. That being the case, the only course of action is to have the petition struck out. This court is alive to the fact that striking out of a pleading is a drastic measure, which should be exercised cautiously. It will be recalled that the respondents had made applications to strike out the petition for noncompliance with the Rules and non-joinder of the Deputy Governor as a respondent. The court declined to strike out the petition so as to allow the petitioners the right to a fair hearing as guaranteed under Article 50 of the Constitution.

10. The guiding principle of courts is to ensure sustenance of a suit rather than dismissing or striking it out so as to avail the parties their day in court. By dismissing the application to strike out the petition, the court intended to avoid the petitioners being driven out of the seat of justice without a hearing. As matters stand now, they are no longer interested in taking advantage of that right and the court cannot force them to proceed with the matter that they have lost interest in.

11. For now, this court is left with no alternative but to order that the petition filed by the two petitioners against the respondents shall be and is hereby struck out for want of prosecution.

12. Costs follow the event and I do not underestimate the resources expended by the parties and moreso the respondents in preparation for the hearing. The petitioners shall pay the respondents costs occasioned by the striking out of this petition capped at Ksh. 2.5 million to the 1<sup>st</sup> and 2<sup>nd</sup> respondents and Ksh. 2.5 million to the 3<sup>rd</sup> respondent, making a total of Ksh. 5 million.

Orders accordingly

**Dated and Delivered at Nairobi this 9<sup>th</sup> Day of January 2018**

**A. MBOGHOLI MSAGHA**

**JUDGE**

Delivered in the presence of:

1. for the 1<sup>st</sup> Petitioner }- Ms. Maumo, Mr. Oginga & Mr. Onyango h/b for
2. for the 2<sup>nd</sup> Petitioner} Mr. Olouch
3. for the 1<sup>st</sup>and 2<sup>nd</sup> Respondents} – Mr. Nani Mungai & Ms. Muthee
4. for the 3<sup>rd</sup> Respondent – Mr. Kinyanjui & Mr. Miller

Court Assistant- Kavata