



**REPUBLIC OF KENYA**

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

**ELECTION PETITION NO. 5 OF 2017**

**MUGAMBI IMANYARA.....PETITIONER**

**VERSUS**

**I.E.B.C.....1<sup>ST</sup> RESPONDENT**

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

**FRANKLIN MITHIKA LINTURI.....3<sup>RD</sup> RESPONDENT**

**RULING**

Pursuant to rule 21(1) of the Elections (Parliamentary and County Elections) Petitions Rules 2017, the Petitioner herein Hon. Milton Mugambi Imanyara sought leave of the court to withdraw the petition vide Notice dated 2<sup>nd</sup> February 2018 for reasons that he is no longer keen on pursuing the petition having now become a Public Officer following his appointment by His Excellency the President of the Republic of Kenya as Chairperson of the National Standards Council on 25<sup>th</sup> January 2018. Subsequent to Petitioner filing the application for leave to withdraw the petition, he published this intention in the Saturday Nation on 3<sup>rd</sup> February 2018.

When counsels and parties appeared in court on 5<sup>th</sup> February 2018 the petitioners Counsel sought that a hearing date be appointed for the hearing of application for leave to withdraw the petition. Mr Gitonga drew courts attention to the Notice published on 3.2.2018 on the Saturday Nation Newspaper and sought that it be deemed as compliance with Regulation 21(1).

It was also sought that the court dispenses with the requirement that Respondents file affidavits in response to the application. He undertook to have petitioner file affidavit stating grounds for seeking to withdraw. Mrs Kinara Advocate for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had no objection to withdrawal based on grounds on petitioners notice but said she would submit on the issue of costs.

Mr Kiogora Advocate holding brief for Prof. Ojienda said the 3<sup>rd</sup> Respondent had no objection to application for leave to withdraw. On 12.2.2018 Mr Oduol Advocate submitted that the petitioner having been appointed as State Officer by His Excellency the President can't aspire to be a Senator for Meru County at the same time and therefore wished to withdraw the petition as his aspirations have been overcome by events.

He pleaded that the court exercises its discretion to order that no costs will be paid. Mr Oduol informed the court that the Respondents advocates had no objection to withdrawal. Mrs Kinara Advocate for 1<sup>st</sup> and 2<sup>nd</sup> Respondents argued that although they are not opposed to application for leave to withdraw the petition was advanced and they were awaiting for judgement. That the 1<sup>st</sup> Respondent had incurred alot of costs in defending the petition and that costs should be awarded. Mr Oduol advocate for the Petitioner argued that circumstances leading to the application for withdrawal were beyond the petitioners control and the petitioner had no option but to take up the appointment by the President to serve. He said the petitioner could not continue prosecuting the petition and at the same time serve as a State Officer. Mr Oduol argued that in the Presidential Election petition the Supreme Court ordered each party to bear their own costs.

Prof Ojienda for the 3<sup>rd</sup> Respondent on his part filed a Replying Affidavit sworn by the 3<sup>rd</sup> Respondent on 11<sup>th</sup> February 2018 opposing application for leave to withdraw the petition for reasons that the Petitioner and Respondents had testified and closed their cases.

He argued that the petition and the intention to withdraw were not acts of good faith as it was merely filed to secure appointment into government. He annexed a letter FLM 2 to show the petitioner would only withdraw upon appointment and it showed the driving force was outside the court room.

Prof. Ojienda claimed that application for withdrawal was an interference with the courts independence and it must not be allowed as it is contrary to public policies and violates principles of governance. He said the 3<sup>rd</sup> Respondent was being arm twisted to pay all costs to all counsels if the petitioner withdraws the petition. He annexed an unsigned Deed of Indemnity drawn by Mr Gitonga Advocate for the

petitioner and forwarded to the 3<sup>rd</sup> Respondent through email dated 2<sup>nd</sup> February 2018 which he claims binds the 3<sup>rd</sup> Respondent to withdraw other related matters from the court.

Prof. Ojienda argued that many claims were made against the 3<sup>rd</sup> Respondent and if petition is withdrawn the tag of having stolen elections will remain with him throughout the 5 years cycle. He argued that petition only awaits submissions and the court should pronounce itself on the evidence tendered before it.

Prof. Ojienda argued that the 3<sup>rd</sup> Respondent will suffer prejudice if the petition is withdrawn. In the alternative Prof. Ojienda argued that if leave to withdraw is granted the petitioner should be condemned to pay costs. Prof. Ojienda was opposed to the intended substitution of the petitioner upon leave being granted for withdrawal. He said the interested party had not filed affidavit and cannot now file as pleadings were closed 28 days after declaration of the results. Mr Oduol in response to Prof. Ojiendas submissions argued that it can't be assumed that the decision of the court would be in favour of the the 3<sup>rd</sup> Respondent. He submitted that State Appointments are not foreseeable. He argued that the 3<sup>rd</sup> Respondents Replying Affidavit was an ambush with averments which are assumptions. He said the petitioner could not have known that after the Elections H. E. Uhuru Kenyatta would be President as he filed his petition long before Presidential Elections. He argued that without prejudice correspondence have been sneaked into the affidavit without authority and can't be relied upon. It is argued by Mr Oduol that the 3<sup>rd</sup> Respondents affidavit is contrary to good practise and what professional practise allows. He argued that Mr Gitonga advocate send the email to 3<sup>rd</sup> Respondent for approval on request by 3<sup>rd</sup> Respondent that he draws Deed of Indemnity but 3<sup>rd</sup> Respondent didn't respond.

He also argued that Letter of acceptance of the appointment written by the Petitioner to the Head of Public Service that is annexed to the 3<sup>rd</sup> Respondents affidavit was not for 3<sup>rd</sup> Respondents consumption and it is suspicious how the 3<sup>rd</sup> Respondent accessed it and it is irregular. Mr Oduol argued that reasons for withdrawal don't go into merits of the petition and submission that there will be a tag is misplaced as there is no determination on the merits. He argued that once petition is withdrawn the state will be as clean as it was before petition was filed. He argued further that the 3<sup>rd</sup> Respondents objection to Notice for Substitution is not reconcilable with their objection for leave to withdrawal.

Mr Oduol prayed that Notice of Substitution be disallowed as it will go against the wishes of the petitioner to have matter end and if it is not terminated it will amount to saying that it is petitioner who swore all the affidavits.

Mrs Kinara Advocate for 1<sup>st</sup> and 2<sup>nd</sup> Respondent said they are strangers to the averments in 3<sup>rd</sup> Respondents affidavit. Prof. Ojienda asked the court to assess costs at full scale and that it should be certified that 3<sup>rd</sup> Respondent had 3 advocates and costs to be capped at Kshs 15 million.

The procedure for withdrawal of an election petition is provided for under Regulations 21(1) to (7), 22, 23 and 24 of Elections (Parliamentary and County Election) Petition Rules 2017 as follows:-

**21(1) A petition shall not be withdrawn without the leave of the court.**

**21(2) The election court may grant leave to withdraw an petition on such terms as to the payment of costs or as the election court may otherwise determine.**

**21(3) An application for leave to withdraw shall**

- a) Be informs set out in the 1<sup>st</sup> 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**

**21(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 petition is intended to be withdrawn.**

**21(5) Despite sub-rule(4), an election court may on cause being shown, dispense with affidavit of a party to the petition if it seems to the elections court or special grounds to be fit or just.**

**21(6) Each affidavit filed under sub-rule (4) shall contain the following declaration –**

**“To the best of the deponents knowledge and belief, that no agreement or terms of any kind has been made, and that no agreement has been entered into, in relation to the withdrawal of the petition”**

**21(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 provides that the petitioner shall serve each respondent with a copy of the application for withdrawal.**

**22(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 1<sup>st</sup> schedule.**

**Rule 23 – Notice for Hearing of an application to withdraw an election petitions.**

**Rule 24 – substitution of a petitioner (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.**

**24(2) The election court may grant the application to substitute the applicant under sub-rule (1) as the petitioner.**

**24(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.**

The reason for the elaborate procedure provided herein is anchored on the nature of election petitions which are inherently suits in public interest and cannot be withdrawn at the instance of the petitioner or even at consent of parties. The regulation governing withdrawal is discretionally and this discretion is exercised based on whether or not the party seeking leave to withdraw has complied with conditions set out in the rules.

I have considered the application and it is made in form 5 as provided in the first schedule.

- It is signed by the Petitioner;
- It sets out the ground for withdrawal;
- It was filed at the relevant registry and
- The notice of Intention to withdrawal was published by the petitioner in the Saturday Nation on 3<sup>rd</sup> February 2018.

The petitioner has also sworn an affidavit annexing to it the gazette notice indicating his appointment by H. E. the President as the Chairperson of the National Standard Council. He has also annexed Newspaper publication for 3<sup>rd</sup> February 2018. The Petitioner has indicated he no longer has the interest in pursuing the petition.

Itewa Zablon Mathenge filed a Notice dated 6<sup>th</sup> February 2018 to be substituted as a petitioner. However when the application for leave to withdraw came up on 12<sup>th</sup> February 2018 for hearing the said Itewa Zablon Mathenge was called out but he didn't respond neither did he file an affidavit indicating his reasons for seeking to take up the petition. Zablon Itewa was one of the aspirants for the position of Senator for Meru County and his lack of attendance during the hearing and failure to file an affidavit in support of his intention to be substituted means he is not interested in pursuing the petition. We can safely say that no one is interested in taking up and proceeding with this petition.

The 3<sup>rd</sup> Respondents objection to withdrawal and claims of being arm twisted are not supported. The annexures to 3<sup>rd</sup> Respondents affidavit FML 1- Deed of Indemnity is not signed by him and the email forwarding the deed to him asks him to approve what he had discussed with Mr Gitonga Advocate to prepare. That is an agreement between 3<sup>rd</sup> Respondent and Mr Gitonga Advocate and is beyond this courts reach for purposes of determining whether to allow or disallow application for withdrawal. The unsigned Deed of Indemnity cannot be regarded as an agreement that offends Regulation 21(6) for reasons that it is unsigned and appears to have been initiated by the 3<sup>rd</sup> Respondent.

The petitioner having complied with all the requirements of an application for leave to withdraw the petition it would be futile to proceed with a petition without a Petitioner as any subsequent orders made maybe made in vain for lack of a party to execute or to be executed against. I do therefore allow the application for leave to withdraw.

Concerning costs this court has discretion to order payment of costs upon leave to withdraw being granted. The petition herein was heard fully and was almost coming to its conclusion scheduled for 15<sup>th</sup> February 2018. The petitioner had a total of 5 witnesses testify and the Respondents also had a total of 5 witnesses testify. There were applications filed, heard and determined including application for scrutiny and recount which was allowed and the exercise took from 12<sup>th</sup> January 2018 to 18<sup>th</sup> January 2018 to complete. It is obvious that costs were incurred by the parties and although the petitioner's appointment was not foreseeable this court finds that he is liable to pay some costs to the Respondents in lieu of the withdrawal at this advanced stage of the petition. It is my considered view that since the court has not had the opportunity to determine whether the petition is successful or not the petitioner will pay costs to mitigate the expenses incurred by the Respondents and a global sum of Kshs 500,000/- for 1<sup>st</sup> and 2<sup>nd</sup> Respondents jointly and Kshs 500,000 for 3<sup>rd</sup> Respondent would in my view be sufficient. The security deposited by the Petitioner should be utilised to pay part of the costs awarded to the Respondents. Orders accordingly.

**HON. A.ONG'INJO**

**JUDGE**

**Ruling Signed Delivered and Dated this 20<sup>TH</sup> FEBRUARY Day of 2018.**

**In the presence of :-**

Petitioner:- Mr Gitonga Advocate for Applicant

1<sup>st</sup> Respondent: Mr Kiogora Advocate holding brief for Mrs 2<sup>nd</sup> Respondent: Kinara Advocate

3<sup>rd</sup> Respondent: Mr Kiogora Advocate holding brief for Prof: Ojienda for 3<sup>rd</sup> Respondent.

**HON. A.ONG'INJO**

**JUDGE**

**Mr Kiogora Advocate**

I pray for a copy of the ruling.

**Order**

Certified copy of the ruling to be supplied to Respondents Counsel at their costs

**HON. A.ONG'INJO**

**JUDGE**