



**REPUBLIC OF KENYA**

**IN THE CHIEF MAGISTRATE'S COURT AT MILIMANI**

**IN THE MATTER OF THE OF ELECTIONS ACT 2011**

**ELECTION PETITION NO 12 OF 2017.**

**SAADIA AHMED MUMIN.....PETITIONER**

**-VERSUS**

**INDEPENDENT ELECTORAL &**

**BOUNDARIES COMMISSION.....1<sup>ST</sup> RESPONDENT.**

**CLERK COUNTY ASSEMBLY OF WAJIR.....2<sup>ND</sup> RESPONDENT.**

**KENYA AFRICA NATIONAL UNION.....3<sup>RD</sup> RSPONDENT.**

**KATUMA ABDULLAHL.....4<sup>TH</sup> RESPONDENT.**

**RULING**

The preliminary objection by the petitioner that there was no security for costs that was paid as required under section 78 act the election act. The 1<sup>st</sup> respondent prayed that the petitioner be dismissed.

The petitioner submitted that she contested the contest the issue of jurisdiction . There was notice to withdraw the petition. The 4<sup>th</sup> respondent seek to proceed with the petition there was no security for costs, none of the parties was paid. There was no party that filed any notice of intention to proceed. The petitioner rely of section 78 of the election Act is mandatory that the costs be deposited. There can be no further proceedings on the matter. The further proceedings. The court has no jurisdiction. There are compelling reasons why the costs were not paid. The petitioner lost interest. There was consent filed that is pending before the high court. The mater was over taken by events. The 4<sup>th</sup> respondent has not filed petition after the petitioner was sworn in, a petition cannot be prosecuted by an affidavit. The 4<sup>th</sup> respondent had an opportunity to file petition. The petitioner relied on the case of **Raila Odinga and 5 other –vs- IEBC**. We filed the petition and the 4<sup>th</sup> respondent never replied. The petitioner prayed that the p/o be allowed and the costs be by the 4<sup>th</sup> respondent.

The 1<sup>st</sup> respondent submitted filed the p/o the petition ought to be dismissed no security was deposited as proved in the election rules. The court should make a declaration on who was elected. It is matter of public interest. The 1<sup>st</sup> respondent relied on the case of **Bariu M'limunyi –vs- IEBC & 2 others no 4 of 2014 Meru**

The 4<sup>th</sup> respondent urged the court the objection by the petition does not hold water. There is no law that it is premised on. The respondent has the power to move the court to dismiss the petition for want of costs. Under section 78(3). The advocate for the petitioner cannot move the court. the court should make a determination on who was validly nominated. The 4<sup>th</sup> respondent relied on section 75. Rule 11(6) of the rules any respondent of the rules are empowered to raise issues relating to the nomination. The respondent could not file petition and can only raise issue as to whether there was valid nomination. The 4<sup>th</sup> respondent relied on section 6. There was no need for counter claim all that was needed to raise the issue whether there was valid nomination. We ought to be allowed through the response. The petitioner should pay costs she brought the petition and it has been an abuse of the court.

It was the 4<sup>th</sup> respondent submissions that the court should look at the issues of the 4<sup>th</sup> respondent. This was public interest issue. The petitioner was in office. The nomination was invalidated twice vide gazette notice attached to the documents. The election court was invalidated. The petitioner was still at the office. There is another gazette notice that stands and the 4<sup>th</sup> respondent has been denied by the opportunity chance to serve. The court should declare who won the petition. He relied rely on petition no 1 of 2013 Bungoma pg 10. Of submissions. The court did not leave the matter hanging and it resolved the matter in public good. The court should look at the issues by the 4<sup>th</sup> respondent and hear the petition.

In rejoinder the petitioner submitted that on the issue of public interest, It cannot triumph against the rules of procedures. Costs had not been paid and there cannot be public interest. The court cannot make declaration on who was validly nominated there has to be documents to support the claim. The p/o can be even by the court itself. It was not reserve of the respondents. The IEBC triggered the process. There was dispute at the high court and the petitioner was in office legally. There was a petition that was dismissed. There were proceedings that led to the swearing of the petitioner. The judgment did not order that 4<sup>th</sup> respondent to be nominated. The petitioner was validly nominated. The petitioner prayed that p/o be upheld and the court find that it does not have jurisdiction .

I have considered the submissions by all the parties. The p/o seeks that the petition be dismissed for failure to deposit security for cost by the petitioner and 1<sup>st</sup> respondent and the p/o was opposed by the 4<sup>th</sup> respondent. I have relied on section 78 of the Elections Act , 2011 makes provision for the deposit of Security for costs it states as follows;

*(1) A petitioner shall deposit security for the payment of costs that may become payable by the petitioner not more than ten days after the presentation of a petition under this Part.*

*(2) A person who presents a petition to challenge an election shall deposit— (a) one million shillings, in the case of a petition against a presidential candidate; (b) five hundred thousand shillings, in the case of a petition against a member of Parliament or a county governor; or (c) one hundred thousand shillings, in the case of a petition against a member of a county assembly.*

*(3) Where a petitioner does not deposit security as required by this section, or if an objection is allowed and not removed, no further proceedings shall be heard on the petition and the respondent may apply to the election court for an order to dismiss the petition and for the payment of the respondent's costs....*

The Election Courts have largely found that this provision is mandatory and failure to deposit security is fatal to a petition. Ngugi J. in **Milton Kimani Waitinga v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR** held that the petitioner's failure to deposit security for costs within the set time frame was a substantive issue that went to the root of the petition. The petition was struck out. In Nyeri HCEP No. 1 of 2017 **Robert Mwangi Kariuki v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR** the court found that section 78(1) of the Elections Act gave a mandatory period of 10 days for the deposit of security after filing of a petition thus failure to deposit the security within the prescribed period was fatal. The petition was struck out with costs to each respondent. In the present case there was no security for costs. I find that failure to comply with the mandatory provisions of the law was fatal omission on the part of the petitioner and the petition herein must be struck out.

#### **Whether substitution can be allowed where no deposit for security for deposit has been made?**

Withdrawal of petitions and substitution of petitioners is provided for under Rules 21 and 24 of the Election (Parliamentary and County Elections) Petition Rules, 2017. In **Sammy Ndungu Waity & Another v. IEBC & 3 Others Nanyuki<sup>[1]</sup>**, the 2<sup>nd</sup> Petitioner sought to withdraw from the petition on the grounds that he no longer wished to pursue the matter. The 1<sup>st</sup> Petitioner was opposed to the application for withdrawal on the basis that the 2<sup>nd</sup> Petitioner had been coerced to withdraw from the petition, and that such a withdrawal would affect the strength of the petition. The court held that a party reserves the right to withdraw from or remain in a suit, adding that coercing a party to remain would be a waste of time leading to escalation of unnecessary costs.

Substitution of a petitioner is a discretionary power of the court as held in **Cosmas Foleni Kenga v. IEBC & 3 Others (2017)<sup>[2]</sup>**, which discretion must be guided by the following considerations: *whether the person seeking substitution qualifies under Rule 24 of the Election Rules; the time out of the statutory six months, still remaining for the hearing of the petition; and the interests of the petitioner and the party seeking substitution.* In **David Ole Nkedianye v. Joseph Ole Lenku & 6 Others<sup>[3]</sup>**, the court set out the threshold to be met in considering substitution of a petitioner as follows: *the person seeking to be substituted is qualified to be a voter but is not required to be registered as a voter in the electoral area whose election is being challenged.; one must demonstrate a bona fide claim that the elections in the electoral area were not conducted in accordance with the law, hence the public interest in the petition and must demonstrate that the respondents stand to suffer no prejudice upon substitution.*

In **Hon. Nathif Jama Adan v. Ali Bunow Korane & 2 Others<sup>[4]</sup>**, Kariuki J. held that an application for substitution can only be granted upon the crystallization of a Petitioner's application by way of making a publication in a national newspaper of his intention to withdraw. In this case the Petitioner failed to prosecute its application for withdrawal of petition and the court found that the application for substitution as a petitioner could not be granted as the application for withdrawal had not been prosecuted. The Court therefore struck out the Petition. I find that although there was an advertisement in newspaper there was failure on the part of the petitioner to deposit security for costs and the petition has already been struck out due to non compliance under section 78(1) of the Elections Act. There can therefore be substitution on the as there exists no petition .

#### **Whether the present case merits substitution ?**

In **Bariu M'Limunyi v IEBC & 2 Others** Gikonyo, J. declared that as the petition had not been served neither had security for costs been deposited both of which rendered the petition incompetent and incapable of being taken over by any other person. It also considered that there was no improper agreement or undertaking behind the withdrawal. The petitioner was allowed to withdraw the petition with no order as to costs since none was sought by the respondents.

The Petitioner in the instant case did not at any time make an application for extension to deposit security for costs. The failure to deposit security goes to the root of the petition, it is a substantive issue as has been held severally by the election courts. The petition is therefore not properly before the court and ought to be struck out. In the circumstances there isn't in existence a petition that is capable of being withdrawn and in which a petitioner can be substituted. The same ought to be struck out as it brings to mind the words of Matheka J. in **Robert Mwangi Kariuki** supra where the Court stated; *In this case the petitioner did not make the slightest effort to pay or seek the court's indulgence to make a delayed payment. He made NO payment, bringing himself squarely into the description (as found in the submissions in the Rotich*

case), of busy bodies who needed to be kept out of these expensive proceedings, and for whom the rule was made. I therefore find that there is no petition being capable of being withdrawn or being substituted I therefore dismiss the same. there was however mischief on the part of the petitioner who well knew that he was supposed to comply as per law but failed to do so and has used the failure to deposit the security as ground for discontinuing the petition to the detriment of the 4<sup>th</sup> respondent who wanted to be substituted. I will order that the petitioner pays costs to the 4<sup>th</sup> respondent who sought to be substituted but has cannot be allowed due to the aforesaid reasons. I will assess the cost at ksh 500,000/=.

**Orange K. I. – S.R.M 20/02/18**

**Delivered dated and signed at Milimani court this 20<sup>th</sup> day of February 2018.**

-----in the absence/ presence for the petitioner.

-----in the absence / presence for the respondents.

-----in the absence / presence for the 4<sup>th</sup> respondents

-----in the absence / presence for the interested party

**Orange K. I. – S.R.M 20/02/18**

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