



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA
ELECTION PETITION APPEAL NO. 17 OF 2017

BETWEEN

OKOBA JOHANNES BOY.....APPELLANT

AND

THE INDEPENDENT ELECTORAL

& BOUNDARIES COMMISSION.....1ST RESPONDENT

THE CHAIRPERSON OF THE INDEPENDENT ELECTORAL

& BOUNDARIES COMMISSION.....2ND RESPONDENT

HON. OMANYI FELIX OPONDO.....3RD RESPONDENT

(Being an Appeal from the Ruling and Orders in Busia Chief Magistrate's Court Election Petition No.3 of 2017 by Hon. W.K. Chepseba- Chief Magistrate).

JUDGMENT

1. **OKOBA JOHANNES BOY**, the appellant herein, was a candidate for the seat of Member of County Assembly (**MCA**) in respect of Bunyala Central Ward in Budalangi Constituency, in the election held on 8th August 2017. He was sponsored by the Jubilee party.

2. In the election, there were seven candidates vying for the position and the results that were announced are as follows:

- i) Adhiwa Christine Adhiambo garnered **319** votes;
- ii) Muruka Lucas Afwande garnered **54** votes;
- iii) Mwolo Vincent Odhiambo garnered **501** votes;
- iv) Ogola Michael Norbertel garnered **1554** votes;
- v) Omanyi Felix Opondo garnered **1874** votes;
- vi) Opondo Wilson Tabu garnered **28** votes; and

vii) Okoba Johannes Boy garnered **1155** votes.

3. The appellant was dissatisfied with the outcome and filed a petition in Busia Chief Magistrate's Court. The petition was dismissed on two grounds. These were that the appellant failed to deposit security of costs within the stipulated time and when he did so, it was without the leave of court. Secondly, the appellant amended his petition without the leave of court. He was aggrieved by this decision and filed this appeal.

4. The appeal is premised on the following grounds:

a) That the learned magistrate erred in law and fact in dismissing the petition on grounds of late deposit of security.

b) That the learned magistrate erred in law and fact in finding that the amended petition was not duly filed.

c) That the learned magistrate erred in law and fact by failing to appreciate the import of Articles 50 and 159(2) (d) and (e) of the Constitution.

d) That the learned magistrate erred in law and fact by failing to appreciate the principle objectives of Rules 4 and 5 of the Elections (Parliamentary and County Elections) Petitions Rules 2017.

5. It was contended by the respondents that the appeal is fundamentally flawed and that it does not raise any legal issues.

6. The undisputed facts of this case are that the Election Petition No. 3 of 2017 was filed in Busia Chief Magistrate's Court on 4th September 2017. The pretrial conference was held on 4th October 2017 and the amended petition was filed on 10th October 2017.

7. The appellant did not deposit the requisite Kshs.100, 000/= security for costs until 8th November 2017. This, it was argued was in contravention of the provisions of section 78 of the Elections Act, 2011. Subsection 1 of section 78 provides as follows:

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. [Emphasis added]

Subsection 3 of the same section provides as follows:

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. [Emphasis added]

8. It was argued for the appellant that the learned trial magistrate failed to appreciate the mischief intended to be cured. It was contended that this was to deter vexatious litigants. It was further contended that by dint of Rule 13 (2) (a) of the Elections (Parliamentary and County Elections) Petitions Rules 2017, once the deposit has been received by the Registrar, the court had no option but to proceed to hear the petition. The said rule provides as follows:

(2) The security for costs deposited under sub-rule (1) shall—

(a) be paid to the Registrar;

9. The facts that we can discern from the petition and the legal provisions hereinabove are as follows:

- a) That the security for the costs was deposited 65 days after the filing of the petition.
- b) The same was deposited without the leave of court.
- c) The law requires the security for costs to be deposited not more than ten days after the presentation of a petition.
- d) Rule 13 (2) (a) of the Elections (Parliamentary and County Elections) Petitions Rules 2017, only specifies to whom the said deposit for security was to be paid.

10. From the foregoing analysis of the evidence on record, I make a finding that section 78 (3) of the Elections Act is couched in mandatory terms. It does not donate any powers to the election court to extend the time for paying the deposit for costs. The learned trial magistrate therefore interpreted the law correctly. My finding so is bolstered by the decision of the Court of Appeal in the case of **ESPOSITO FRANCO vs. AMASON KINGI JEFFAH & 2 OTHERS [2010] eKLR** at paragraph 43 where the court said:

In our judgment, there was simply no deposit of security made in accordance with the law and the motion before the superior court was properly dismissed on that score, even if the law allowed for extension of time, which it does not.

11. Articles 50 and 159(2) of the Constitution are meant to ensure that parties seeking redress in court are accorded a fair hearing without regard to procedural technicalities. These provisions cannot be treated as a panacea by a party who fails to comply with substantive provisions of the law that is supposed to give effect to the constitutional provisions. In the instant petition, the provisions the appellant failed to comply with cannot be termed as mere technicalities.

12. Though the Elections Act and Rules thereof do not specify within what time an amendment to a petition can be made, it is my opinion that an application for leave to amend the petition can be made either before or at the pretrial conference. In the instant case, the amended petition dated 5th October 2017 was irregular and the learned magistrate was justified to declare it as such.

13. From the foregoing, I find that the appeal lacks merit. The same is dismissed with costs to the respondents.

DELIVERED and SIGNED at BUSIA this 29th day of May, 2018

KIARIE WAWERU KIARIE

JUDGE