



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

ELECTION PETITION APPEAL NO.5 OF 2018

ODONGO VICTOR ROBERT.....APPELLANT

VERSUS

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

THE RETURNING OFFICER

KAGAN WARD, EZEKIEL JUMA OTIENO.....2ND RESPONDENT

ONYANGO PHILEMON.....3RD RESPONDENT

RULING

[1] During the mention of this matter for directions on the 7th June 2018, the third respondent, **ONYANGO PHILEMON**, through the learned counsel **M/S OPIYO** and **M/S MAUMO**, orally applied for the striking out and dismissal of the appeal for want of security for costs. **Section 78** of the **Elections act 2011** was cited as the legal basis for the application which was opposed by the appellant, **ODONGO VICTOR ROBERT**.

[2] It was the third respondent's contention that the appeal was filed on 17th March 2018, but the Kshs.100,000/= security for costs was not deposited within the ten (10) days prescribed by **Section 78** of the **Elections Act**. That, time for depositing the security has since lapsed and therefore this appeal is incurably defective and a non-starter.

It was further contended by the third respondent that the Court of Appeal Election Rules also provide for payment of costs in an appeal and therefore, the payment of costs in the lower court is not an exemption to paying costs on appeal. Consequently, no further proceedings should be taken in this matter as the appellant failed to deposit security for costs.

[3] The appellant, through the learned counsel, **MR. OBACH**, argued that **Section 78** of the **Elections Act** refers to a petition and not an appeal. That, the petition herein, was filed on 6th September 2017, with necessary security for costs being provided. That, there is no provision for deposit of security on appeal and therefore, the application by the third respondent is misplaced.

The first and second respondents took a back seat in the application and offered no arguments for or against it.

[4] Having given due consideration to the arguments raised by both sides for or against the application as fortified by the authorities cited by them respectively, including **Rotich S. Kimutai –vs- Ezekiel Lenyangopeta & Others (2005) eKLR**, **Esposito Franco –vs- Amason Kingi Jeffah & 2 Others (2010) eKLR**, **Apungu Arthur Kibira –vs- IEBC & 2 Others (2017), eKLR**, **Joel Nyabuto Omwenga & 2 Others –vs- IEBC & Another (2014) eKLR** and **Henry Okello Nadimo –vs- IEBC & 2 Others (2013) eKLR**, it is apparent that the basic issue emerging for determination is whether by dint of **Section 78** of the **Elections Act 2011**, the present appeal ought to be dismissed and/or struck out for being incompetent and/or defective.

[5] **Section 78** of the **Elections act** falls within **Part Seven (VII)** of the **Act** which essentially deals with election disputes resolution largely handled by both the lower and superior courts by way of electoral petitions and appeals from the decisions of the election courts. The present appeal arises from the decision of an election court in the Homa Bay Magistrate's court.

Section 75 (1A) of the **Elections act** provides that a question as to the validity of the election of a member of a county assembly shall be heard and determined by the Resident Magistrate's Court designated by the Chief Justice. **Section 78** of the **Act**, which is the operating provision in the present application provides for security for costs.

[6] Thus, under **Section 78 (1)** of the **Act**, a petitioner shall deposit security for the payment of costs that may become payable by the petitioner not more than ten (10) days after the presentation of a petition.

Sub Section (2) (c) of **Section 78** provides for a deposit of Kshs.100,000/= in the case of a petition against a member of a county assembly while **Sub Section (3)** provides for the consequences of the failure to deposit security to the extent that 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.

[7] Indeed, this application is anchored on the fact that this appeal was filed on 17th March 2018, but the appellant failed to deposit security of Kshs.100,000/= within the prescribed ten (10) days. The appellant does not dispute the fact but contends that **Section 78** of the **Elections act** applies to petitions and not appeals. He thus contends that this application is misplaced.

Basically, in election petitions the timelines are the very core of the petition (see, **LEMANKEN ARAMAT –VS- HARUN HEITAMEI LENYAKA & OTHERS (2014) eKLR.**) Hence, non-compliance with the set timelines would render a petition incompetent and fit for striking out.

[8] However, under **Rule 19** of the **Election (Parliamentary and County) Petitions Rules**, time may be extended by the election court. **Rule 19(1)** provides that:-

“Where any act or omission is to be done within such time as may be prescribed in these Rules or ordered by an elections court, the election court may, for the purposes of ensuring that injustice is not done to any party, extend or limit the time within which the act or omission shall be done with such conditions as may be necessary even where the period prescribed or ordered by the court may have expired.”

Such power is extended to the High Court in exercise of its appellate jurisdiction by dint of **Rule 34 (10)** of the **Elections Rules**.

[9] Even with respect to deposit of security for costs, an election court may extend time.

In the case of **ESPOSITO FRANCO** (supra) and that of **ROTICH S. KIMUTAI** (supra), the courts held that a court is deprived of jurisdiction if security for costs in an election petition was not deposited as it was a mandatory provision. In a recent case, **MORRIS M. MUTISO –VS- NAOMI SHABAN & OTHERS (2017) eKLR**, the court stated that failure to deposit the security for costs is not a procedural technicality that can be cured by **Article 159 (2) (d)** of the **Constitution** and that the said article is not a panacea of all omissions and commissions as some actions are hinged on mandatory and not discretionary provisions of the law.

[10] However, in the case of **SAMWEL K. KAMBI & ANOTHER –VS- NELLY ILONGO & OTHERS (2017) eKLR**, the court stated that:-

“My understanding is that an election petition can be revived, with the leave of the court, upon payment of the security deposit so long as the period for hearing the petition has not lapsed. Nothing would have been easier for parliament than to use the language used in Section 96 in Section 78 if the intention was to completely take away the discretion of an election court to enlarge time if sufficient cause is shown, an election court has jurisdiction to extend the time for depositing security for costs in an election petition.”

[11] All the foregoing cases referred to election petitions rather than appeals. **Section 78** of the **Election Act** provides for deposit of security for costs in petition, and not appeals (see, **Joel N. Omwenga & others –vs- IEBC & others** (supra). The provision was apparently not intended to apply **“Mutatis mutandis”** to appeals arising from the election petitions. Otherwise the Elections act would have clearly indicated as much.

Indeed, there is no express provision in the Election Act or Rules for security for costs in election appeals as was noted by the Court of Appeal in the case of **LYDIA MATHIA –VS- NAISULA LESVUDA & ANOTHER [2013] e KLR**.

[12] It was further noted by the same Court of Appeal that:-

“It is indisputable from the wording of Section 78 of the Act as a whole and from the definition of a “petition” and “Election Court” in Section 2 of the Act as well as from the provision of the relevant election petitions rules, that the deposit for security for costs is solely confined to election petition filed in an Election Court. the purpose for which the deposit was made was served by the conclusion of the petition.

To import the provisions of Section 78 as a general rule regarding provision of security for costs in election disputes including appeals to Court of Appeal is tantamount to legislating which is not the function of the court. It may well be that parliament deliberately avoided legislating on deposit for security of costs in the appeals in the Court of Appeal as an election petition is quite distinct from an appeal. An appeal is confined to matters of law while an election petition involves, in many cases, a mass of factual evidence. By providing for a relatively large and mandatory deposit for security of costs the parliament intended among other things, to filter out Frivolous petitions.”

[13] The rationale for security for costs was stated in the case of **GATIRAU P. MUNYA –VS- DICKSON M. KITHINJI AND OTHERS (2014) eKLR**, in the following terms:-

“The rationale for security for costs is to ensure firstly that a party is not left without recompense for costs that might be awarded to him in the event that the unsuccessful party is unable to pay the same due to poverty; secondly, it ensures that a litigant who by reason of his financial ability is unable to pay costs of the litigation if he loses, is, disabled from carrying on litigation indefinitely except on conditions that offer protection to the other party.”

[14] In the end result, it may safely be inferred that **Section 78** of the **Elections Act 2011**, applies to election petitions filed in the High Court and the Magistrate’s Court but not appeals arising from the decisions of those courts. It would therefore follow that the present application by the third respondent is without merit and is hereby dismissed. However, in view of the fact that the election rules provide for enlargement of time and that justice must be administered without undue regard to procedural technicalities and that the objective of the election rules is the just; impartial and expeditious determination of petitions and by extension of election appeals and taking into consideration the need to afford some measure of protection to the respondents herein, justice demands that this appeal be sustained to its conclusion on the merits but only on condition that the appellant deposits security for costs in the sum of Kshs.100,000= (One Hundred Thousand Shillings) within the next seven (7) days from this date hereof after which the parties shall appear in court on the 9th July 2018 for necessary directions on the hearing of the appeal. Ordered accordingly.

[15] As a rider, it may be noted that the third respondent invoked **Section 27** of the **Court of Appeal (Election Petition) Rules 2017** in support of his impugned application; however the provision applies only to appeals arising from the decisions of the High Court in elections petitions and not the decision of the Magistrate’s Courts which are appealable to the High Court in the first instance. This is because the rules defines all “**appeals**” to mean an appeal from the decision of the High Court and a “**Court**” to mean the Court of Appeal.

J.R. KARANJAH

JUDGE

28.06.2018

[Delivered and dated this **28th** day of **June, 2018**]

[In the presence of M/s Maumo for 3rd Respondent and holding brief for M/s Goga for 2nd and 3rd Respondent and M/s Amboya for appellant.]