



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**ELECTION PETITION NO. 7 OF 2013**

**BWANA MOHAMED BWANA.....APPLICANT/PETITIONER**

**VERSUS**

**SILVANO BUKO BONAYA.....1<sup>ST</sup> RESPONDENT**

**INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION (IEBC).....2<sup>ND</sup> RESPONDENT**

**SHAKILA ABDALLA MOHAMED.....3<sup>RD</sup> RESPONDENT**

**RULING**

**[NOTICE OF MOTION DATED 19<sup>TH</sup> JULY, 2017 BY THE PETITIONER AND NOTICE OF MOTION DATED 27<sup>TH</sup> APRIL, 2018 BY THE 3<sup>RD</sup> RESPONDENT]**

1. There are two applications before this court seeking the same order. One is by Bwana Mohamed Bwana, the Petitioner in this election petition and the other one is by Shakila Abdalla Mohamed, the 3<sup>rd</sup> Respondent whose election was being challenged by the Petitioner through this election petition.
2. The application by the Petitioner is dated 19<sup>th</sup> July, 2017 and that by the 3<sup>rd</sup> Respondent is dated 27<sup>th</sup> April, 2018. Each applicant seeks release to him/her of the Kshs. 500,000 deposited by the Petitioner in this petition as security for costs.
3. In brief, the facts of this case are that the Petitioner, a registered voter in Lamu County, had through this petition challenged the declaration by the 1<sup>st</sup> Respondent, Silvano Buko Bonaya and the 2<sup>nd</sup> Respondent, the Independent Electoral and Boundaries Commission of the 3<sup>rd</sup> Respondent as the elected Woman Representative of the County of Lamu. The petition was unsuccessful and the Petitioner's appeals to the Court of Appeal and the Supreme Court were equally unsuccessful.
4. The Petitioner's application for the release of the Kshs. 500,000 is premised on three grounds on the face of the application as follows:
  - “i. The petition having been finalized the amount of Kshs. 500,000 is no longer required as security.**
  - ii. The Court having ordered the 2<sup>nd</sup> Respondent to pay costs of the petition, the amount of Kshs. 500,000 is no longer required for payment to anyone.**
  - iii. There are no charges or expenses to be paid by the petitioner required or outstanding herein.”**
5. The Petitioner also supported his application by swearing an affidavit in which he stressed that the court had condemned the 2<sup>nd</sup> Respondent to pay costs. He annexed the judgement of the court to the affidavit.
6. The 3<sup>rd</sup> Respondent opposed the application through an affidavit sworn by her counsel, Mr. Joseph Manzi Munyithya on 16<sup>th</sup> April, 2018. According to the 3<sup>rd</sup> Respondent, the Petitioner's appeals to the Court of Appeal and the Supreme Court had been dismissed with costs. She averred that she had taxed costs against the Petitioner in the two higher courts and was in the process of commencing execution. She urged the court to instead release the security for costs to her in partial settlement of the costs awarded to her.

7. The 3<sup>rd</sup> Respondent immediately followed her response to the Petitioner's application by filing her own application dated 27<sup>th</sup> April, 2018. The application which is supported by grounds on its face and an affidavit sworn by her counsel is premised on the grounds she advanced in opposition to the release of the sum of Kshs. 500,000 to the Petitioner.

8. The parties were directed to file and exchange submissions on the two applications so that they could be heard together. It is only counsel for the 3<sup>rd</sup> Respondent who filed submissions.

9. No affidavit of service was filed by any of the parties in regard to the two applications and it is therefore not clear whether the 1<sup>st</sup> and 2<sup>nd</sup> respondents were served with the applications.

10. Who is entitled to the security for costs deposited in the petition by the Petitioner? In the judgement delivered on 23<sup>rd</sup> September, 2013 by the Election Court (F.N. Muchemi, J), the orders on costs were as follows:

**“It is hereby ordered that the 1<sup>st</sup> and 2<sup>nd</sup> respondents shall bear the costs of the petition.**

**The petitioner and the 3<sup>rd</sup> respondent will each be paid costs not exceeding Kshs.1,500,000/= to be taxed by the Deputy Registrar.**

**The total costs shall not exceed Kshs.1,500,000/= to be taxed by the Deputy Registrar.**

**The total costs shall not exceed Kshs.3,000,000/=. The security of costs deposited by the petitioner shall be released to him.”**

11. The parties did not place the decision of the Court of Appeal before me but the 3<sup>rd</sup> Respondent averred that the Petitioner's appeal was struck out with costs to the respondents and she has since taxed the costs.

12. One of the two orders issued by the Supreme Court in the ruling delivered on 19<sup>th</sup> February, 2015 in **Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 others [2015] eKLR; Petition No. 15 of 2014** states:

**“The petition of appeal dated 8<sup>th</sup> May, 2014 is dismissed with costs.”**

13. It is therefore clear that the respondents, the 3<sup>rd</sup> Respondent included, were awarded costs by the Supreme Court.

14. The security for costs deposited in court by a petitioner in an election petition is meant to secure the interests of the respondents and in the process ensure that only persons with serious issues step forward to challenge election results. The requirement for deposit of security for costs before an election petition can be entertained assists in weeding out egregious losers and their henchmen from filing spurious petitions.

15. In **Patrick Ngeta Kimanzi v Marcus Mutua Muluvi & 2 others HCEP No. 8 of 2013**, as cited by the Court of Appeal in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR**, Majanja, J explained the purpose of the security of costs thus:

**“Security of costs ensures that the respondent is not left without recompense for any costs or charges payable to him. The duty of the court is therefore to create a level ground for all the parties involved, in this case, the proportionality of the right of the petitioner to access to justice vis-à-vis the respondent's right to have security for any costs that may be owed to him and not to have vexatious proceedings brought against him.”**

16. Whereas the Election Court specifically directed that the 1<sup>st</sup> and 2<sup>nd</sup> respondents meet the costs of the petition and further directed that the security for costs that had been deposited by the Petitioner be released to the Petitioner, this changed when he moved to the higher courts. The Court of Appeal and the Supreme Court awarded costs to the respondents. The 3<sup>rd</sup> Respondent has since taxed her costs.

17. In the circumstances of this case the appropriate orders are to dismiss the Petitioner's application dated 19<sup>th</sup> July, 2017 and to allow that one of 3<sup>rd</sup> Respondent dated 27<sup>th</sup> April, 2018. The 3<sup>rd</sup> Respondent was not the sole beneficiary of the orders awarding the costs of the appeals to the respondents. The 1<sup>st</sup> and 2<sup>nd</sup> respondents must have their cut from the security of costs deposited in court.

18. As such, I order that out of the sum of Kshs. 500,000 deposited as security for costs, Kshs. 250,000 shall be released to the 3<sup>rd</sup> Respondent and the balance of Kshs. 250,000 shall be released to the 1<sup>st</sup> and 2<sup>nd</sup> respondents. Since the 1<sup>st</sup> and 2<sup>nd</sup> respondents did not participate in the hearing of the applications, the Deputy Registrar is directed to transmit a copy of this ruling to them for their record and action. I direct the Petitioner and the 3<sup>rd</sup> Respondent to each meet their costs in regard to the applications which have given rise to this ruling. In short, no costs are awarded in respect of the two applications.

**Dated, signed and delivered at Malindi this 17<sup>th</sup> day of December, 2018.**

**W. KORIR**

**JUDGE OF THE HIGH COURT**