REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

ELECTION PETITION NO. 4 OF 2017

SAMWEL KAZUNGU KAMBI……1ST PETITIONER

VERSUS

NELLY ILONGO THE COUNTY

RETURNING OFFICER, KILIFI COUNTY…....1ST RESPONDENT

THE INDEPENDENT ELECTORAL

AND BOUNDARIES COMMISSION……..2ND RESPONDENT

AMASON JEFFAH KINGI……3RD RESPONDENT

(AS CONSOLIDATED WITH ELECTION PETION NO. 5 OF 2017)

WILLIAM KAHINDI MGANGA……2ND PETITIONER

VERSUS

INDEPENEDENT ELECTORAL AND

BOUNDARIES COMMISSION (I.E.B.C.)…....1ST RESPONDENT

NELLY ILONGO (THE KILIFI

COUNTY RETURNING OFFICER)……...2ND RESPONDENT

AMASON JEFFAH KINGI ……3RD RESPONDENT

GIDEON EDMUND SABURI……4TH RESPONDENT

RULING NO. 4

[THE 1st & 2ND RESPONDENTS' NOTICE OF MOTION DATED 13TH OCTOBER, 2017, THE 3RD RESPONDENT'S NOTICE OF MOTION DATED 13TH OCTOBER 2O17 AND THE 3RD RESPONDENT'S PRELIMINARY OBJECTION DATED 2ND OCTOBER, 2017]

1. In the General Election held on 8th August, 2017, the 2nd Respondent Nelly Ilongo, the Returning Officer for the County of Kilifi and the 1st Respondent the Independent Electoral and Boundaries Commission (IEBC) declared the 3rd Respondent Amason Jeffah Kingi and the 4th Respondent Gideon Edmund Saburi as the persons elected Governor and Deputy Governor respectively for the County of Kilifi.

2. Samwel Kazungu Kambi who was one of the candidates in the gubernatorial race subsequently filed Malindi High Court Election Petition No. 4 of 2017 seeking to invalidate the election of the 3rd Respondent. On 6th September, 2017, William Kahindi Mganga who identifies himself as a voter registered in Kilifi County and the Chief Agent for Jubilee Party and more so for Hon. Maitha Gideon Mung'aro the Jubilee Party aspirant for the Kilifi County gubernatorial race filed Malindi High Court Election Petition No. 5 of 2017 questioning the validity of the election of the 4th Respondent, Amason Jeffah Kingi as the Governor of the County of Kilifi. He named Gideon Edmund Saburi as the 5th Respondent.

3. When both petitions came up for pre-trial directions on 29th September, 2017, this court acting in compliance with Rule 17 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 (hereinafter simply referred to as the Elections Petitions Rules, 2017) consolidated the two petitions as a matter of course.

4. Housecleaning done with the consent of the parties led to the removal from these proceedings of Wafula Chebukati who had been named in Petition No. 5 of 2017 as the 2nd Respondent in his capacity as the Returning Officer of the National Tallying Centre.

5. As a result of the consolidation and housecleaning, Petition No. 4 of 2017 is now the lead file with Samwel Kazungu Kambi being the 1st Petitioner and William Kahindi Mganga being the 2nd Petitioner. The IEBC and Nelly Ilongo the Kilifi County Returning Officer are the 1st Respondent and 2nd Respondent respectively. Amason Jeffah Kingi is the 3rd Respondent and Gideon Edmund Saburi is the 4th Respondent.

6. The parties thereafter filed several interlocutory applications, one of them being the application to which this ruling relates. In view of the diverse nature of the applications, I have opted to write separate rulings for the applications save for those based on the same grounds.

7. This ruling is in respect of two applications and a preliminary objection. The first application is the one dated 13th October, 2017 which was filed by the 1st and 2nd respondents. Through the application brought under Article 87(1) of the Constitution, Section 78(2) and (3) of the Elections Act and Rule 13 of the Elections Petitions Rules, 2017, they seek orders as follows:

> **"1.The Petition of SAMUEL KAZUNGU KAMBI dated the 8th September 2017 and filed herein on the same date be struck out and/or dismissed; and**
>
> **2. The costs of this application and the Petition be awarded to the 3rd Respondent/Applicant herein."**

The application is supported by the grounds on its face as follows:

> **"1. The Petition herein dated the 8th September 2017 was filed herein on the same day;**
>
> **2. Section 78(2) of the Elections Act and Rule 13 of The Election Petition Rules 2017 require a Petitioner to deposit security for payments of costs which may become payable by the Petitioner not more than 10 days after the presentation of a Petition;**

3. Petition No 4 of 2017 was filed on the 8th of September 2017 and the ten day period allowed for depositing security for cost elapsed on the 20th September 2017;

4. A failure to deposit the security as stipulated in law results in rendering this Petition a nullity in law. It is incurably and fatally defective to such an extent that the Petition and the Petitioner's rights flowing therefrom were extinguished as of that date;

5. In the premises, as of the 20th September 2017, this Honourable Court no longer had jurisdiction to hear and determine this Petition by reason of the Petitioner's lapse."

8. The 3rd Respondent has filed an application seeking similar orders. In the application, also dated 13th October, 2017, brought under Article 87(1) of the Constitution, Section 78(1), (2)(b), (3) & (4) of the Elections Act, 2011 and Rule 11 of the Election Petitions Rules, 2017 he prays for orders:

"1. THAT this Honourable Court reviews the order for consolidation of Petitions Nos. 4 and 5 of 2017 that was issued on 29th September 2017.

2. THAT Election Petition No. 5 of 2017 be dismissed and/or struck out.

3. THAT the Petitioner do pay costs to the 3rd Respondent."

The application is supported by the grounds on its face and the affidavit sworn by the 3rd Respondent's counsel Aoko Otieno on the date of the application. Although the 3rd Respondent's application targets Petition No. 5 of 2017, it was by consent orally amended so that the application seeks to strike out Petition No. 4 of 2017 as it was agreed by all the parties that the 2nd Petitioner complied with the requirement for deposit of security for payment of costs in respect of Petition No. 5 of 2017.

9. There is also a preliminary objection by the 3rd Respondent dated 2nd October, 2017 on the same lines.

10. The summary of the two applications and the preliminary objection is that the 1st Petitioner filed his Petition on 6th September, 2017 and had not made a deposit of Kshs. 500,000 by 16th September, 2017 as required by Section 78 of the Elections Act. They therefore urge the Court to dismiss or strike out the 1st Petitioner's Petition.

11. The 1st Petitioner opposed the application through the replying affidavit sworn on 5th October, 2017 by his advocate, Mr. Gicharu Kimani. Through the said affidavit counsel concedes that the 1st Petitioner had indeed not paid the security for costs within the time stipulated by the law.

12. The 1st Petitioner's counsel avers that he had instructions by the 1st Petitioner to seek extension of time to pay the security for costs outside the stipulated time when the matter came up for mention and/or pre-trial conference on 29th September, 2017. He states that on the said date the 1st Petitioner's Petition was consolidated with that of the 2nd Petitioner by consent of all the parties as stipulated by law. He also deposes that he later conversed with Mr. Jack Mwaniki the advocate for the 2nd Petitioner who informed him that the 2nd Petitioner had already paid the security for costs within the stipulated period.

13. It is the position of the advocate for the 1st Petitioner that the deposit for security of costs made by the 2nd Petitioner is sufficient and the 1st Petitioner needs not make a separate deposit. Counsel for the 1st Petitioner relied on the decision of L. N. Mutende, J in **Thomas Malinda Musau & 2 others v Independent Electoral & Boundaries Commission & 2 others [2013] eKLR** in support of his proposition that where there are two or more petitioners, only a single deposit need to be made as security for costs. It is the averment of the 1st Petitioner's counsel that he did agree with counsel for the 2nd Petitioner that the security for costs deposited by the 2nd Petitioner do serve as security for costs for the

two petitioners in the consolidated petition.

14. Finally, the advocate for the 1st Petitioner disclosed that his client is ready and willing to pay the security for costs should the court be inclined to order the deposit of security for costs. He urged the court to dismiss the applications and the preliminary objection.

15. The fact that the 1st Petitioner did not deposit the security for costs within ten days from the date of filing the Petition is not in dispute. The question to be answered in this ruling is the consequences of the 1st Petitioner's failure and whether the failure can be remedied.

16. There are two views as to the effect of the failure to deposit the security within the prescribed time. One view is that failure to deposit the security within the ten days provided by Section 78(1) of the Elections Act is fatal to the petition. This view is found in the cases of **Evans Nyambaso Zedekiah & another v Independent Electoral and Boundaries Commission & 2 others [2013] eKLR; Said Buya Hiribae v Hassan Dukicha Abdi & 2 others, Mombasa Election Petition No. 7 of 2013; Kumbatha Naomi Cidi v County Returning Officer, Kilifi & 3 others, Malindi Election Petition No. 13 of 2013;** and **Simon Kiprop Sang v Zakayo K. Cheruiyot & 2 others Nairobi Election Petition No. 1 of 2013.** The second view is that failure to deposit security for costs is not fatal to an election petition as the election court has discretion to enlarge time. Authorities in support of this position are **Fatuma Zainabu Mohamed v Ghati Dennitah & 10 others, Kisii Election Petition No. 6 of 2013; Charles Maywa Chedotum & another v IEBC & 2 others, Kitale Election Petition No. 11 of 2013;** and **Charles Ong'ondo Were v Joseph Oyugi Magwanga & 3 others, Homa Bay Election Petition No. 1 of 2103.**

17. The starting point is to look at the provision in question. Section 78 of the Elections Act provides that:

> **"Security for costs**
>
> **78. (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.**
>
> **(4) The costs of hearing and deciding an application under subsection (3) shall be paid as ordered by the election court, or if no order is made, shall form part of the general costs of the petition.**
>
> **(5) An election court that releases the security for costs deposited under this section shall release the security after hearing all the parties before the release of the security."**

18. Justice Ruth Nekoye Sitati in **Evans Nyambaso Zedekiah & another v Independent Electoral and Boundaries Commission & 2 others [2013] eKLR** dealt at length with the question as to whether deposit of security for costs is a substantive issue and concluded at Paragraph 80 of her decision that:

"I entirely agree with the learned judges in holding that the deposit of security for costs is a substantive issue that goes to the root of the proceedings as non-payment of the same deprives the court of the jurisdiction to deal with the matter further. I also agree that the requirement for deposit of security for costs keeps away from the court corridors some busy bodies who file cases in court while knowing that such cases have no chance of succeeding and also while knowing that they have no intention of paying the costs once they lose their cases. There is no argument that a court which has no jurisdiction cannot move one single step in a matter that is before it. See Owners of the Motor Vessel "Lillian S" –vs- Caltex Oil (Kenya) Ltd [1989] KLR 1."

She then proceeded to ask whether an election court can validate a late deposit of security and concluded that an election court had no power to enlarge time.

19. The other school of thought is well represented by Edward M. Muriithi, J. In **Fatuma Zainabu Mohamed v Ghati Dennitah & 10 others [2013] eKLR** the learned Judge stated that:

"22. The position in Kenya today is clearly different from the Indian situation and the old Kenya election dispute resolution regime. It has been changed not by the provisions of Rule 20 of the Election Petition Rules as contended by the Counsel for the Petitioner but by the Constitution of Kenya 2010. Under the Constitution, there is now a constitutional right to vote including the right to approach the Court on an election petition, which is a hybrid constitutional right being both a fundamental human right or civil right under Article 38 (3) (c) of the Bill of Rights and a political right under Articles 87 and 105 of the Constitution of Kenya 2010. The Elections Act of Kenya does not create or give the right to challenge an election as is the case for India. The object of the Act in accordance with Articles 87 (1) and 105 (3) of the Constitution is to give effect to the constitutional right to vote. Therein lies the difference between the Indian situation and the current constitutional dispensation of Kenya. Accordingly, where the Elections Act restricts the enjoyment of the constitutional right, the Constitution, in terms of Article 2 (4) thereof must prevail. I consider that if section 78 (3) of the Elections Act were construed as not allowing for any good cause an extension of time to deposit security for costs, it would unreasonably restrict the right to approach the court for a determination whether one has been elected to hold office, inconsistently with the constitutional right under Article 38 (3) (c) of the Constitution for "*every adult citizen has the right without unreasonable restrictions to be a candidate for public office or office within a political party of which the citizen is a member and if elected to hold office*". Accordingly, I find that the time prescribed for deposit of security for costs is a matter of procedure rather than substance of the right to petition the court on election dispute, which is granted by the Constitution itself.

23. In addition, the provision under sub-section 3 of section 78 of the Elections Act for the Respondent to apply for an order to dismiss the petition indicates that the dismissal of the petition is not automatic upon the default of the Petitioner to deposit the security for costs within the prescribed time. In my view, the procedure for application to court for an order to dismiss the petition provides an avenue for the Petitioner to show cause why the petition should not be dismissed on the ground of default of security by seeking leave of court to lodge the security out of time. The discretion to grant such leave must, of course, be exercised judicially for good cause shown.

24. The contention by counsel for the 1st Respondent that the application for extension of time should have been brought within and not later than the 10 days prescribed for the deposit of the security is, with respect, not well founded. Such a proposition would require that the misfortune or other cause that warrants the seeking of enlargement of time must happen well before the expiry of the 10 day period to enable the affected party to seek court's extension of time within the period. It would shut out from any hope of extension of time all those Petitioners who would be unfortunate enough to have their misfortune strike on the 10th day of the stipulated period because they would never have an opportunity to come to

court for extension within the prescribed period. This school of thought is contrary to provisions on enlargement of time under the Constitution, the Interpretations and General Provisions Act and the Civil Procedure Rules, which clearly provide for enlargement of time even where the application for enlargement is made after the expiry of the stipulated period."

20. I am alive to the strong voice of the Court of Appeal in **Esposito Franco v Amason Kingi Jeffah & 2 others [2010] eKLR** that:

"36. ….We think the message is clear that Parliament intended to elevate the matter of representation of the people in the National Assembly to a special level where the democratic rights of the individual would not be unduly violated. By using peremptory language in Part VI, it eliminated vexatious litigants who cannot provide security and assured expedition of election petitions by setting deadlines. The consequence of non-compliance with the provisions must therefore be to invalidate the petition. Whether the public interest in the speedy determination of elections petitions warrants such a draconian regime is again a matter for Parliament to review….

39. Unlike the case before us, the *Kimutai case* was one where the petitioner conceded that there was no deposit offered or made. It is also evident from the decision that the issue as to whether extension of time was permissible was left undecided but it is the issue now before us. In our view, the tenor of the Constitution (now repealed), statutory provisions, and rules relating to petitions, coupled with the absence of any express provision for extension of time, are pointers to the intention of Parliament that time would not be extended. Another pointer to the intention to limit the discretion of the court was the deletion in 1979 (by Act. No. 19/79) of a useful provision in *section 21 (4)* which donated the power to the court to accommodate poor persons who were unable to raise the security deposit of Sh.5,000 at the time. The upshot is that the terms set for the filing of an election petition are conditions precedent, non-compliance of which attracts the irreversible consequence of nullifying the petition.

40. There is also considerable force, backed by authority, in the submissions of the respondents on the second issue of law, that the failure to comply with the provisions of *section 21* is not curable under *section 23 (1) (d)* of the Act which is invoked in this matter. *Section 21* enacts substantive legal requirements and non-compliance with those provisions is not a mere technicality. Nor are the provisions of the Civil Procedure Act and the rules thereunder available to address the situation."

21. It is noted that although the decision of the Court of Appeal was delivered on 19th November, 2010 about three months after the promulgation of the current Constitution the same was premised on the repealed Constitution. The Court of Appeal was also interpreting a provision on deposit of security for costs that was repealed by the current Elections Act, 2011.

22. Mr Khagram for the 1st and 2nd respondents submitted that the repealed provision that the Court of Appeal was interpreting in the **Esposito Franco** case was word for word with Section 78 of the Elections Act, 2011 hence the decision of the Court of Appeal is applicable in this matter. I have not been able get the provision that the Court of Appeal was interpreting. However, at Paragraph 36 of the judgement, the Court referred to the language of several provisions related to the requirement for deposit of security for costs thus:

"On the first issue it is worthy of note that *section 21* is under *Part VI* of the Act which specifically governs election petitions and makes special provisions for the filing and conduct thereof. The section also comes hot on the heels of section 19 which provides that a petition "*...shall be heardand determined on priority basis", section 20* which provides that it "*shall be presented and served within 28 days of publication",* on security that "*...the petitioner shall give security*" (21(1)) "*No more than 3 days of filing the petition..*" (21/(1), "*...shall be Shs.250,000",* 21(2), "*...if no security .....no further proceedings shall be had on the petition .....*" 21(3). The other sections under *Part VI* are couched in similar peremptory language. There is in addition

a constitutional underpinning in *section 44* of the Constitution (now repealed) which created a special regime in the High Court for hearing and determination of election petitions."

A reading of the cited paragraph does not seem to support the submission that the provision the Court of Appeal was interpreting was word for word with the Section 78. In the circumstances I will have to reach my own decision as to my understanding of Section 78 of the Elections Act, 2011.

23. Looking at the decisions in **Evans Nyambaso Zedekiah & another** (supra) and **Fatuma Zainabu Mohamed** (supra) and considering that the time for depositing the security for costs is found in the Elections Act and cannot therefore be enlarged using the provision for extension of time found in the Elections Petitions Rules, 2017, one is tempted to agree with Ruth Nekoye Sitati, J that an election court has no authority to enlarge time for depositing security for costs in an election petition.

24. However, the finding by Edward M. Muriithi, J that the manner in which Section 78(3) of the Elections Act is drafted in itself gives the Court an opportunity to enlarge time if sufficient cause for non-compliance with the provision is shown by the petitioner, in my view, is the correct reading of that provision. My reasoning receives backing from the language used in another Section of the Act. I am referring to Section 96 which specifically provides for deposit of security of costs in referendum petitions. The Section states:

"96. Practice procedure and security for costs

(1) Subject to the provisions of section 98, the Rules Committee as constituted under the Civil Procedure Act (Cap. 21), may make rules generally to regulate the practice and procedure of the High Court with respect to the filing and trial of election and referendum petitions, including rules—

(a) specifying—

(i) the time within which any requirement of the rules is to be complied with;

(ii) the costs of and incidental to the filing and the trial of an election and referendum petition; and

(iii) the fees to be charged in respect of proceedings of an election and referendum petition; and

(b) generally with regard to any other matter relating to an election and referendum petition as the Chief Justice may deem necessary.

(2) A petitioner shall deposit one million shillings as security for costs of a petition presented under this Act, within ten days of presenting the petition.

(3) Where, a petitioner does not deposit security for costs as required under this section after presenting of a referendum petition, the referendum petition shall be struck out.

(4) The High Court may, make such order as to costs as it may deem fit and just in respect of any referendum petition dismissed under this section.

[Act No. 47 of 2012, Sch.]"

25. Sub-sections (2) and (3) of Section 96 leaves no doubt as to the fact that unless a deposit of security for costs is made within ten days from the date of presenting the referendum petition, the petition shall be struck out. Unlike Section 96(2) and (3) which commands the striking out of a referendum petition if no security for costs is deposited, Section 78(3) puts an election petition in comatose if no security for costs is deposited. 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. I therefore agree with Edward M. Muriithi, J that if sufficient cause is shown, an election court has jurisdiction to extend the time for depositing security for costs in an election petition.

26. That time is of essence in election petitions cannot be gainsaid. The Supreme Court stressed the importance of complying with the timelines in election disputes in the case of **Lemanken Aramat v Harun Meitamei Lempaka & 2 others [2014] eKLR.** In order to convey the message of the Supreme Court, I only need to reproduce a few paragraphs of that judgement in this ruling.

> **"[69] We have to note that the electoral process, and the electoral dispute-resolution mechanism in Kenya, are marked by certain special features. A condition set in respect of electoral disputes, is the *strict adherence to the timelines prescribed by the Constitution and the electoral law*. The jurisdiction of the Court to hear and determine electoral disputes is *inherently tied to the issue of time*, and a breach of this strict scheme of time removes the dispute from the jurisdiction of the Court. This recognition is already well recorded in this Court's decisions in the *Joho* case and the *Mary Wambui* case.**
>
> **[70] As urged by counsel for the 1st respondent, we recognize that there are instances in general litigation, when jurisdiction is not affected by a party's failure to meet the set filing requirements. For example, a Court may in certain instances exercise its discretion to admit a matter for hearing when an argument regarding *proper form* is pending before it. The Court's authority under Article 159 of the Constitution remains unfettered, especially where *procedural technicalities* pose an impediment to the administration of justice. However, there are instances when the Constitution links certain vital conditions to the power of the Court to adjudicate a matter. This is particularly true in the context of Kenya's *special electoral dispute-resolution mechanism*. By linking the settlement of electoral disputes to *time*, the Constitution emphasises the principles of efficiency and diligence, in the construction of vital governance agencies. This consideration addresses the historical problem of delayed *electoral justice*, that has plagued this country in the past."**

27. The Supreme Court went ahead and emphasised the importance of sticking to timelines at paragraphs 71 to 85. I am aware that in that particular matter the Supreme Court was dealing with the constitutional and statutory timelines. Nevertheless, the Court stressed that compliance applies to the timelines set in the rules. The Court explained this at paragraph134 thus:

> **"134] The critical question, clearly, rests on the relationship between timelines as laid down in the electoral law, and the issue of jurisdiction. In our Ruling in the *Raila Odinga* case, on 3rd April, 2013 we expunged a new affidavit from the record, for non-compliance with timelines, in these terms:**
>
> ***"…The parties have a duty to ensure they comply with their respective time-lines, and the Court must adhere to its own. There must be a fair and level playing field so that no party or the Court loses the time that he/she/it is entitled to, and no extra burden should be imposed on any party, or the Court, as a result of omissions, or inadvertences which were foreseeable or could have been avoided.""***

28. My understanding of the decision of the Supreme Court is that parties in election disputes have a duty to ensure that they stick to the timelines provided in the Constitution, the Elections Act, the regulations and the rules. It is therefore immaterial that the timelines are provided by the rules since if the timelines laid down in the rules are not complied with, the timelines fixed by the Constitution and the Elections Act may not be met. It therefore follows that the opportunity for enlargement of the timelines provided by the Elections Petitions Rules, 2017 is indeed a limited one. The party asking for extension of time must give cogent reasons as to why action was not taken within the prescribed time in the first place.

29. Now turning to the facts of this case, it is noted that the 1st Petitioner never filed a formal application seeking to deposit the security for costs out of time. He has not deposited the security for costs. His advocate avers that he had instructions when the matter came up for pre-trial on 29th September, 2017 to seek leave to deposit security for costs out of time. No such application was made and the 3rd Respondent was the first party to point out the 1st Petitioner's non-compliance with Section 78 of the Elections Act through the Notice of Preliminary Objection dated 2nd October, 2017.

30. When the respondents' application came up for hearing, the 1st Petitioner told the court that he was going to benefit from the deposit made by the 2nd Petitioner who was not objecting to this arrangement. On this point, reliance was placed on the decision of L. N. Mutende, J in **Thomas Malinda Musau & 2 others v Independent Electoral & Boundaries Commission & 2 others [2013] eKLR.** The respondents' position is that the decision in the cited case is not applicable to the facts of this case since in the cited case there were two petitioners in one file unlike in the instant matter where separate petitions had been filed before being consolidated by the Court.

31. Considering the facts of this case, I agree with the respondents that the facts in the case of **Thomas Malinda Musau & 2 others** were different from the facts of this case. In the current case two petitions were separately filed challenging the election of the Governor for the County of Kilifi. Each Petitioner in the two petitions was under a statutory duty to deposit money for security of costs in respect to his petition. Section 78 of the Elections Act requires that a petitioner deposits security for payment of costs not more than ten days after the presentation of the petition. Where no deposit is made, 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.

32. By the time the two petitions were being consolidated on 29th September, 2017, the provisions of Section 78(3) of the Elections Act had kicked in. By virtue of that subsection this court had no power to take any action in regard to the 1st Petitioner's Petition No. 4 of 2017, save to hear an application for dismissal of the same. The consolidation was thus an exercise in futility and the 1st Petitioner cannot rely on that futile act so as to benefit from the deposit made by the 2nd Petitioner in Petition No. 5 of 2017. It was incumbent upon the 1st Petitioner to make a deposit in his petition as required by the law.

33. The question is whether time should be extended for the 1st Petitioner in the circumstances of this case. In my view, time for depositing security for costs can only be enlarged upon application and upon sufficient cause being shown. Extension of time is not a matter of right. I posit that the principles enunciated by the Supreme Court in the case of **Salat v Independent Electoral & Boundaries Commission & 7 others [2014] eKLR** as applicable to an application for extension of the time for filing an appeal are applicable in this situation. In that case the Court stated that:

> **"17. The Court ought to consider the following principles in exercising the discretion to extend time for filing an appeal:**
>
> **1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;**
>
> **2. A party who seeks extension of time has the burden of laying a basis to the satisfaction of the court;**
>
> **3. Whether the court ought to exercise the discretion to extend time, is a consideration to be made on a case by case basis;**
>
> **4. Whether there is a reasonable reason for the delay, which ought to be explained to the satisfaction of the Court;**
>
> **5. Whether there would be any prejudice suffered by the respondents if the extension of time**

was granted;

6. Whether the application had been brought without undue delay; and

7. Whether in certain cases, like election petitions, public interest ought to be a consideration for extending time."

34. It is the duty of the court in considering an application for extension of time to use its discretionary power to do justice in the circumstances of a given case. In the United States case of **Osborn v Bank of Untied States, 22 U.S. 738 (1824)** Chief Justice John Marshall wrote about the exercise of discretion by a court as follows:

> **"Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge, always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law."**

35. The 9th edition of Black's Law Dictionary at page 534 defines judicial discretion as:

> **"The exercise of judgement by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court's power to act or not act when is not entitled to demand the act as a matter of right. – Also termed *legal discretion*."**

36. Discretion must therefore be exercised judiciously and legally for to do otherwise would amount to abuse of discretion. As already stated, the 1st Petitioner has not made a formal application to deposit security for costs out of time. There is an indication that he is ready, able and willing to do so if the court so directs. Even assuming that statement amounts to an informal application to deposit the security for costs out of time, the 1st Petitioner has not told the court why he failed to deposit the money within the statutory period.

37. On the other hand it is noted that striking out a case is a drastic measure especially where the same touches on the exercise of democratic rights by the people as is the case herein. None of the respondents will suffer any prejudice if this Petition proceeds to hearing on merit. Article 159(2)(d) of the Constitution comes to the aid of the 1st Petitioner in this situation.

38. In the case of **Alex Wainaina t/a John Commercial Agencies v Janson Mwangi Wanjihia [2015] eKLR** the Court of Appeal enunciated the principles governing the exercise of discretion by stating that:

> **"The principles governing the exercise of judicial discretion were well set out by Ringera JA (as he then was) in the case of Githiaka vs Nduriri [2004] 2 KLR 67. These are that such discretion should be exercised on sound reason rather than whim, caprice or sympathy and with the sole aim of fulfilling the primary concern of the court, that is to do justice to the parties before it."**

39. In exercising discretion, the key factor to take into account is to ensure that substantive justice is done in the given circumstances of the particular case. The instant matter raises questions concerning the validity of the election of the 3rd Respondent as the Governor of the County of Kilifi. It is therefore a matter of public interest and the 1st Petitioner's lethargy in the matter of depositing security should be overlooked so that the substantive issues raised in the Petition can be addressed.

40. In the circumstances I dismiss the respondents' applications and preliminary objection. Costs shall abide the outcome of the Petition.

41. Consequently, the 1st Petitioner is directed to deposit the requisite security before the close of business on 2nd November, 2017. Upon making the deposit it shall be deemed that the security is deposited in compliance with Section 78 of the Elections Act, 2011 and the Elections Petitions Rules, 2017 and any action so far taken in this matter shall be deemed to have been regularly done.

Dated, signed and delivered at Malindi this 31st day of October, 2017

W. KORIR,

JUDGE OF THE HIGH COURT