



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MALINDI**

**ELECTION PETITION NO. 12 OF 2017**

IN THE MATTER OF THE ELECTION FOR THE MEMBER OF  
NATIONAL ASSEMBLY OF KILIFI NORTH

AND

IN THE MATTER OF THE ELECTIONS ACT, 2011

IN THE MATTER OF THE ELECTION (PARLIAMENTARY AND COUNTY ELECTIONS)  
PETITION RULES, 2017

BETWEEN

COSMAS FOLENI KENGA.....PETITIONER

AND

THE INDEPENDENT ELECTION AND

BOUNDARIES COMMISSION (I.E.B.C).....1<sup>ST</sup> RESPONDENT

WAFULA CHEBUKATI.....2<sup>ND</sup> RESPONDENT

GULIYA HUSSEIN ABIDWAHID.....3<sup>RD</sup> RESPONDENT

OWEN YAA BAYA.....4<sup>TH</sup> RESPONDENT

**RULING**

1. The Petitioner, COSMAS FOLENI KENGA, filed a petition against the election of Member of Parliament for Kilifi North Constituency on 6<sup>th</sup> September, 2017, seeking several declarations, being that :-

- a) A declaration that the Kilifi North Constituency Member of National Assembly held on the 8<sup>th</sup> day of August, 2017 was not conducted in accordance with the Constitution and the applicable law rendering the declared result invalid, null and void.
- b) A declaration that the 3<sup>rd</sup> respondent was not validly declared as the Member of National Assembly for Kilifi North Constituency and that the declaration is invalid, null and void.

**c) An order directing the 1<sup>st</sup> Respondent to organize and conduct a fresh Kilifi North Constituency Member of National Assembly Elections in strict Conformity with the Constitution and the Election Act, 2011.**

**d) A declaration do issue that the degree and extend of electoral offences and malpractices perpetrated and/or attributable to the agent of the Respondent in the Kilifi North Constituency Member of National Assembly conducted on the 8<sup>th</sup> day of August, 2017 invalidated the law on elections.**

**e) A declaration do issue that the decree and extent of electoral offences and malpractices perpetrated by and /or attributable to the agent of the Respondents in the conduct of the Kilifi North Constituency Member of National Assembly of the 8<sup>th</sup> day of August, 2017 were in breach of and violated Article 86 of the Constitution.**

**f) A declaration that each and all of the Respondents jointly and severally committed election offences, malpractices/ or irregularities**

**g) Costs of the petition and**

**h) Any other orders that the Honourable Court may deem fit to grant.**

2. To support his petition, the Petitioner filed an affidavit sworn on 5<sup>th</sup> September, 2017 and through paragraph 6 of the said affidavit introduced as an annexures“CF5”, the witness affidavits of **ESTHER KACHE ZERO** and **JUSTINE YAA MAANGI**, sworn on the same day. In these affidavits, the petitioner introduced evidence which he was to later built his case during the hearing to prove his allegations.

3. On 21<sup>st</sup> September, 2017, the 4<sup>th</sup> respondent, through his advocate MMA Advocate, LLP, filed a response to the petitioner denying among other the allegations that:

**i. In totality that the alleged errors, malpractices illegalities and offences alleged in the petition occurred either as alleged by the petitioner is of any substantial degree to warrant the grant of orders sought.**

**ii. The election did not comply with the Constitution and Elections Act**

**iii. The result declared did not reflect the will of the people of Kilifi North.**

**iv. The election was not free and fair**

**v. The Petitioner is entitled to the relief sought in his petition.**

He also filed supporting affidavit and annexed affidavit of evidence.

4. On 22<sup>nd</sup> September, 2017, the 2<sup>nd</sup> and 3<sup>rd</sup> respondent also filed a response through their lawyers, M/S COOTOW & ASSOCIATES denying the allegations by the petitioner and averred that the same was bad in law and an abuse of the Court process. They prayed that the petition be struck out.

The 3<sup>rd</sup> Respondent filed a replying affidavit dated 21<sup>st</sup> September, 2017 and annexed a number of copies of documents to support his averments.

5. On 28<sup>th</sup> September, 2017, the 4<sup>th</sup> respondent through his advocate filed an application seeking to strike out the petition mainly on the ground that it is a replicate of the Presidential Petition and that the same law departed from the ordinary form of drafting and therefore there is want of particulars in it. He then sought for orders that the petition be struck out with costs.

6. On 2<sup>nd</sup> October, 2017, the Petitioner responded with an application in which he sought to withdraw the petition under Rule 23 (3) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017. The said application was accompanied with a notice of motion application dated 29<sup>th</sup> September, 2017 seeking for the following orders.

- a) That the Court be pleased to stay any further proceedings in this petition pending the hearing and determination of this application.**
- b) That this Honourable Court be pleased to grant leave to withdraw petition No. 12 of 2017 without any conditions attached, the petitioner herein having reconsidered the merits of challenging the Member of Parliamentary election in Kilifi North Constituency.**
- c) That in the alternative, this Honourable Court be pleased to strike out the petition number 12 of 2017 as the same is fatally defective having been filed without the petitioner's authority.**
- d) That in the interest of Justice, this Honourable Court do not award costs.**

7. The Petitioner/Applicant has predicated the application on 6 grounds which in summary are as follows:

- i. The Petitioner has reconsidered his position regarding the validity of the election of Mr. Owen Yaa as the Member of Parliament Kilifi North Constituency and now wishes not to challenge the said election.**
- ii. That in the alternative, whereas the petitioner had given initial authority and signed a petition on similar subject challenging the election of Member of Parliament for Kilifi North Constituency the authority was extended to file a different petition without the authority of the petitioner.**
- iii. The petitioner considers the unconditional withdrawal of the petition to be in the best interest and appropriate cause of action in the circumstances for the people of Kilifi North Constituency**
- iv. The petition herein dated at Malindi on the 6<sup>th</sup> September, 2017 is not properly on record in that it is materially different from an earlier petition which was filed with the authority of the petitioner in any respect which contents are explained to the petitioner.**
- v. No further proceedings can be entertained if the election Court saves this application.**
- vi. The petition therefore renders itself for withdrawal in the interest of justice or in the alternative for striking out and/or directed as having been fraudulently filed or an abuse of the Court processes.**
- vii. The orders sought are well merited in law.**

8. In support of this, the Applicant /Petitioner filed 11 paragraph affidavit whose contents are captured as follows:

- a) At paragraphs 2 to 4, he deponed that he gave proper instructions to m/s Gatundu & co. Advocates and denied instructing the firm of m/s Mwaniki Gitahi & Partners, Advocates that he consequently gave instructions to his preferred Advocates M/s Gatundu and Co. Advocates to file notice of appointment and change of Advocate.**
- b) At paragraph 6 of the said affidavit the applicant depones that :**

**“I have reconsidered my intention to file a petition and wish to unconditionally withdraw any petition filed under my name.”**

c) At paragraph 7 he depones that:

**“In my considered view, the interest of Kilifi North Constituency will not be served by a prolonged controversy regarding the parliamentary election and that the constituency can forge ahead.”**

d) He further depones at paragraph 8 that:

**“I have been informed by my advocate on record that they seek to be two petitions filed under reference and material differences in respect of contents of pleadings.”**

He then concludes that in light of the above:

**“.....I verily believe this Honorable court should grant leave for the withdrawal of the said petition or otherwise strike out the petition and all supporting affidavits as having being lodged without any authority this fatally and curably tainted. ”**

9. On 3<sup>rd</sup> October, 2017, the parties appeared before court and the further directives were given by the court after reading through the application by the petitioner/applicant:

**a) The petitioner do comply with rules 21, 22, 23 and 24 of the Elections (Parliamentary and county elections) Petitions Rules 2017.**

**b) The parties do appear before court on 11<sup>th</sup> October, 2017.**

10. And on 11<sup>th</sup> October, 2017, when the parties appeared before court, it was confirmed that the applicant had complied with the court’s directions of 3<sup>rd</sup> October 2017. The court then issued further directions being:

***(i)That the firm of M/s Aboubakar Mwanakitina & Co. Advocates having indicated that there was someone ready to be substituted as a petitioner were directed to file a notice of change of advocates and an application to substitute the petition with three (3) days and before close of business on 16<sup>th</sup> October, 2017.***

***(ii)That the registrar do comply with Rule 23 of the Elections (Parliamentary and County Elections) Petition Rules 2017, requiring that a notice for hearing of the application to withdraw an election petition to the parties specifying the time and place of hearing of the /Application for the said withdrawal under Rule 21 (1) of the Elections (Parliamentary and County Elections) Petitions Rule 2017. According to the said rule 21(1):***

**“A petition shall not be withdrawn without leave of the Election Court.”**

It can therefore be seen that withdrawal of an election petition is not automatic as the election Court’s leave must first be sought. Granting a permission to withdraw a petition is not discretionary as the petitioner must satisfy the election court with reason for this.

However, the condition upon which such withdrawal may be granted by an Election Court depends on the reasons which a petitioner who is desirous of withdrawing of an election petition advances; hence this is discretionary Rule 21(2) of the Election (Parliamentary and Elections) Petitions Rule 2017. Provides as follows:

**“The election court may grant leave to withdraw a petition on such terms to the payment of**

**costs in as the election court may otherwise determine.”**

11. The reason for such elaborate rule is to control and guard against conspiracy, fraud and electoral malpractices and stealing of a result from a bonafide petitioner and introduction of an imposter that may have been sponsored by an interested party and people of ill faith in the electoral area.

12. In the matter before court, the petitioner through his advocate Ms. Odiya, presented this application to withdraw the election petition based on the application to withdraw filed on 2.10.2017, a notice of motion application filed on 29.9.2017 and grounds deponed in his supporting affidavit. According to M/s Odiya, the petitioner had complied with the requirements of such an application to withdraw an election petition as provided for by Rules 21, 22, 23 and 24 of the Election (Parliamentary and County Elections) Petition Rule, 2017 and was now seeking for the same to be allowed unconditionally.

13. This application was not opposed by the 4<sup>th</sup> respondent, whose counsel stated they would not attach any conditions as long as the court allows the withdrawal of the entire petition

14. To this, Mr. Aboubakar, learned counsel for the substituting petitioner/respondent submitted that an election petition is about rights so that where there is another party interested in pursuing some rights in the petition like his client they should be allowed to proceed with the petition. He gave reasons why the applicant in the application for substitution filed on 13/10/2017, ESTHER KACHE ZERO wanted to be substituted as;

**i. The petitioner has applied to withdraw.**

**ii. That she was one of the candidates in the election of Member of Parliament for Kilifi North which is being challenged in this petition.**

**iii. That the election of the 4<sup>th</sup> respondent was not considered in accordance with the constitution and election laws**

**iv. That she participated in the filing of this petition and had requested the petitioner/applicant to file the petition and paid the deposit of Ksh. 500,000 as security.**

15. Mr. Owuor counsel for the 4<sup>th</sup> respondent objected to this arguing that:

**i. The applicant for substitution was seeking for extension of time in challenging the election, something she ought to have done by being the petitioner in the first instance.**

**ii. That the outgoing petitioner may have presented the petition out of influence;**

**iii. That there ought to have been restraint in challenging the election herein in public interest so as to allow the people of Kilifi North Constituency put the election behind them.**

16. In response to this, Mr. Abubakar, the counsel for the applicant wishing to be substituted submitted that under rule 24(3) (4) (5) & (6) of the Election (Parliamentary and County Elections) Petitions Act 2017, there is no requirement that an application by a party wishing be substituted be opposed. He also submitted that the law gives discretion for any person, qualified to be substituted as a petitioner. He further submitted that the applicant in this application has been at the centre of the petition and granting her prayer would not amount to expanding time as the same is not an amendment.

17. Having listened to all counsel in their argument before court, I find the reasons advanced by them are the same as those in their affidavits. They both tend to imply that the withdrawal by and substitution of parties in an election petition are automatic. My take is that the contrary is the truth for the reasons advanced hereunder.

**i. The petitioner in making its application, has given “a double speak” kind of scenario of the**

grounds he is relying on. While he denounces having given an advocate instructions, it is clear from the record that the affidavit he relied on and those of his witnesses, were signed on that same day and commissioned by an advocate. There is no evidence annexed to the said affidavit to support the claim of non-authorization on this part.

ii. As for the party seeking to be substituted Rule 24 (1) of the Election (Parliamentary and County Election) Petitions Rule, 2017 provides that;

**“At the hearing of the Application of the withdrawal of a Petition, a person who is qualified to be a petitioner in respect of the election to which the petition relates may apply to the election to be substituted as the petitioner in place of the petitioner who has to be applied to withdrawal that petition.”**

So clearly, the court has to determine whether the party seeking to be substituted is qualified, hence the provision under Rule 24 (2) that:

**“The election court may grant the application to substitute under sub rule (i) and the petitioner”**

The power for election court to allow a party to be substituted as a petitioner in an election petition is discretionary.

18. Another issue also arose in the course of hearing the application for withdrawal of the election petition by the petitioner. That the 4<sup>th</sup> respondent would not attach any conditions, such as payment of costs upon the petitioner as long as the court withdraws the entire petition. On the other hand, the party seeking to be substituted has claimed that she is the one who deposited the security of Ksh. 500,000/= in court after instructing the petitioner to file the petition on her behalf.

Again, this is a matter that would require the party to convince the court on their various claims.

19. The most important consideration for this court under the circumstances before it is the time left for the petition to be heard and concluded under the Law. In doing so, I also have to weigh the interests of the petitioner and those of the party seeking to be substituted.

20. I find that it has not been denied that the party seeking to be substituted was one of the candidates and therefore her interests in the petition are legitimate since she was supported by a large section of voters. There is also need to consider payment of costs and deposit of security.

21. The upshot of the matter is that the petitioner is allowed to withdraw as a petitioner but denied leave to withdraw the entire petition. The application for substitution of petitioner by one ESTHER KACHE ZERO is allowed.

22. Subsequently, both parties are directed as follows:

**a. The petitioner be and is hereby ordered to pay costs of the petition to the respondents who have filed response herein. The said cost to be paid from the deposited security as follows.**

*i. The 4<sup>th</sup> respondent to be paid Ksh. 250,000/=*

*ii. The 2<sup>nd</sup> and 3<sup>rd</sup> respondent to share the balance equally, that is, 125,000/= each;*

**b. The substituted petitioner to deposit Ksh. 500,000/= as security within 3 days from the day of this order.**

It is so ordered.

**Ruling read, signed and dated this 30<sup>th</sup> day of October, 2017.**

**D. O. CHEPKWONY**

**JUDGE**

In the presence of:

Mr. Abuobakar counsel for the substituted petitioner

N/A for counsel for petitioner

N/A for counsel for respondent

M/S Mwanaidi – C/A