



**REPUBLIC OF KENYA**

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

**ELECTION PETITION NO. 4 OF 2017**

**IN THE MATTER OF THE ELECTION ACT NO. 24 OF 2011 LAWS OF KENYA AND THE  
ELECTION (GENERAL) REGULATIONS, 2012 AND ELECTIONS (PARLIAMENTARY AND  
COUNTY) PETITION RULES 2017**

**AND**

**IN THE MATTER OF THE ELECTIONS OF WOMEN REPRESENTATIVE FOR KISII  
COUNTY, COUNTY NO. 45 HELD ON 8<sup>TH</sup> AUGUST 2017**

**BETWEEN**

**NAHASHON AKUNGA ..... PETITIONER/RESPONDENT**

**VERSUS**

**THE INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**ROBERTY ISAAC SIDNEY NAMULUNGU**

**KISII COUNTY RETURNING OFFICER ..... 2<sup>ND</sup> RESPONDENT**

**HON. JANET ONG'ERA ..... 3<sup>RD</sup> RESPONDENT**

**R U L I N G**

**Introduction:**

1. This ruling is in respect of the Notice of Motion dated 3<sup>rd</sup> October, 2017 taken out by Janet Ong'era (hereinafter, the 3<sup>rd</sup> respondent) in which she seeks orders:-

**1. THAT this Honourable Court enhances the security deposit to be paid under Section 84 and 103 of the Elections Act 2011 as read together with Rule 13 of the Elections (Parliamentary and County Elections) Petition Rules, 2017 from Kenya Shillings Two Million (Kshs.2,000,000.00) to Kenya Shillings Four Million (Kshs.4,000,000.00)**

**2. THAT in the alternative to the order sought hereinabove, the Petitioner herein be summoned to attend court and give an explanation on his known income and how he intends to pay the costs of defending the Election Petition in the event the Petition is determined**

against him.

**3. THAT the cost of the application be provided for.**

2. The application is premised on grounds as seen on the face thereof and listed thereunder as:

**1. THAT the Petitioner/Respondent herein filed this suit against the 3<sup>rd</sup> Respondent/Applicant alongside the 1<sup>st</sup> and 2<sup>nd</sup> Respondents through Election Petition No. 4 of 2017.**

**2. THAT in response to the said Petition, the 3<sup>rd</sup> Respondent/ Applicant filed the response to the Petition dated 17<sup>th</sup> September 2017, which is part of the court's record.**

**3. THAT the Petitioner herein is not a man of means.**

**4. THAT despite the attempts to hide, it is apparent from the Election Petition No. 4 of 2017 filed herein that the Petitioner is not a man of means and it is not clear what he does for his daily earnings that can guarantee payment of costs.**

**5. THAT the 3<sup>rd</sup> Respondent/Applicant is appreciably apprehensive that the Petitioner herein is highly unlikely to pay the sum of between Kenya Shillings Two Million (Kshs.2,000,000.00) and Kenya Shillings Four Million (Kshs. 4,000,000.00) or such other sums that this Honourable court will order that he pays in the event the Petition is determined against the Petitioner.**

**6. THAT it is just and fair that the said application be allowed.**

3. The same is supported by the sworn affidavit of the 3<sup>rd</sup> Respondent annexed thereto.

4. The application elicited no response either in opposition or support from the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

5. By an order of court issued on 18<sup>th</sup> October, 2017 the Petitioner was directed to file a response to this application by close of business on 19<sup>th</sup> October, 2017. At the time of writing this ruling, only written submissions had been filed without a response by way of grounds of objection or a replying affidavit. I will restrict myself to the issues of law raised in those submissions.

### **The Applicant's Case;**

6. The gist of the 3<sup>rd</sup> Respondent's case as gleaned from the grounds and affidavit in support of the application is that the Petitioner filed this suit against the 3<sup>rd</sup> Respondent alongside the 1<sup>st</sup> and 2<sup>nd</sup> Respondents through Election Petition No. 4 of 2017.

7. The 3<sup>rd</sup> Respondent has since responded to the Petition.

8. It is averred that the Petitioner herein is not a man of means and despite attempts to hide, it is apparent from Election Petition No. 4 of 2017 that the Petitioner is not a man of means and it is not clear what he does for his daily earnings that can guarantee payment of costs.

9. It is urged that the 3<sup>rd</sup> Respondent is apprehensive that the Petitioner herein is highly unlikely to pay the sum of between Kenya Shillings Two Million (Ksh.2,000,000) and Kenya Shillings Four Million (Ksh.4,000,000) or such other sums that this Honourable Court will order that he pays in the event the Petition is determined against the Petitioner.

10. The 3<sup>rd</sup> Respondent urges that based on the past decision of the Honourable Courts emanating from

Petitions, courts have capped the legal costs payable as between shs. Two Million (Ksh.2,000,000) and Kenya Shillings Four Million (Ksh.4,000,000).

11. Evidence is given of Meru High Court Election Petition No. 1 of 2013 as an example of a Petition filed by proxy litigants who at the end of the case were unable to pay legal costs of the successful Respondent.

### **Submissions;**

12. Direction were given that the application be disposed off by way of written submissions. The 3<sup>rd</sup> Respondent/Applicant and the Petitioner/ Respondent duly complied.

13. Learned Counsel for the Applicant opens the submissions by stating that this court has jurisdiction to enhance security for costs. Section 84 of the Elections Act 2011 provides:

**“An Election Court shall award the costs of and incidental to a Petition and such costs shall follow the cause.”**

It is submitted that from the foregoing, the law empowers this Honourable Court to make an order for enhancement of security for costs and that the issue of costs is a serious matter which must be contemplated by the Respondent/Petitioner when he intends to file a Petition because of the mandatory provision for depositing of Security for Costs after the filing of the Petition.

14. It is further submitted that costs are mandatory as decreed by Section 84 of the **Elections Act**.

15. I am also referred to Section 103 of the **Election Act** which stipulates that costs in a referendum petition shall be borne in such a manner and in such proportion as the High Court may order and costs caused by any vexatious conduct or by frivolous or vexatious allegations or objections on the part of the Petitioner or Respondent, may be ordered paid by the party by whom such costs have been caused.

16. It is submitted that the mandatory provisions of Section 84 requiring the court to award the costs of and incidental to the Petition as read together with Rule 13 of the **Elections (Parliamentary and County Elections) Petition Rules, 2017** cannot be disengaged from when interpreting the jurisdiction of this court to grant enhancement for security for costs.

17. The Petitioner, it is averred, is a proxy being used to file the Petition and reliance is placed on the decision in **Dickson Mwenda Kithinji –vs- Gatirau Peter Munya & 2 Others [2013] eKLR** where the court stated that:

**“This court observes that the proxy arrangement between Dr. Kilemi Mwiria and the petitioner was made outside this court. That when the fact dawned on the respondents that the petitioner had brought this petition as a proxy of Dr. Kilemi Mwiria they did not move this court to have Dr. Kilemi Mwiria enjoined as an interested party in the petition or have him compelled to attend court as an interested party for cross-examination on the allegation by the petitioner or sought to have the deposit enhanced, if they felt the petitioner, in case the petition was dismissed could not meet the costs of the petition.”**

In addition the court stated:-

**“The petitioner who accepts to be sponsored should in the proxy arrangement be prudent enough to make arrangements on how he would be able to settle costs in case the petition is dismissed.”**

18. The court proceeds to state;

**“The petitioner who agrees to bring a petition on behalf of an unsuccessful candidate should**

be ready to meet the consequences of a failed petition and cannot hide behind the fact of being a sponsored petitioner. He should make arrangements with the principal in advance. The petitioner in my view should not be left unpunished for his actions as by failing to do so would encourage the unsuccessful candidates to use men of no means to file petitions with hope of getting away with nonpayment of costs in case the petitioner does not succeed. This court would not let such petitioners get away without paying costs as one way of deterring the abuse of the court process; by both unsuccessful candidates and the sponsored petitioners of low income.”

19. Counsel concludes that from the foregoing the court has jurisdiction to enhance the security for costs.
20. On the application of the rule on security for costs, counsel reiterates the holding in the case of **Noor Mohammed Abdalla –vs- Banchhodhhal J. Patel and Another [1962] EA 448** where it was held:-

“The order for security for costs in such a case is not directed towards enforcing payment of the costs as such, but is designed to ensure that a litigant who by reason of near insolvency is unable to pay the costs of the litigation when he loses, is disabled from carrying on the litigation indefinitely except upon terms and conditions which afford some measure of protection to the other parties...”

21. It is urged that the 3<sup>rd</sup> Respondent is in line with the above seeking a measure of protection should the Petitioner lose the Petition. The Petitioner has not shown that he is able to meet the costs of the Petition in case it is decided against him. Am referred to the decision in the **Official Receiver and Liquidator of Sejpal Ltd –vs- Navanda Nanji Chandram [1961] EA 107 (CAK)** where the case of **Hall –vs- Snowdown Habbard & Co. (1), [1899] IQB 593** at page 594 was quoted thus:

“The ordinary rule of this court is that except in applications for new trials when the Respondent can show that the Appellant, if unsuccessful, would be unable through poverty to pay costs of the appeal, an order for security for costs is made.”

22. The assertion that the Petitioner is highly unlikely to pay the sum of between Two Million Shillings (Ksh.2,000,000) and Four Million Shillings (Ksh.4,000,000) is reiterated.

23. The case of **Patrick Ngeta Kimanzi –vs- Marcus Mutua Muluvi & 2 Others HC Election Petition No. 8 of 2013** is relied on to show the purpose for security of costs. In that case it was stated:-

“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 justice vis-à-vis the respondents’ right to have security for any costs that may be owed to him and not to have vexatious proceedings brought against him.”

24. The case of **Fiduciary –vs- Morning Star Research [2004] NSWSC 664** is relied on to show that it is fair for the courts to proceed on a basis which reflects the proposition that those who seek to benefit from litigation should bear the risks and burdens that the process entails.

25. While the 3<sup>rd</sup> respondent is alive to the provisions of Section 78 of the **Elections Act, 2011** which provides for security for costs for an election petition involving a woman representative at shs. 500,000, the court is asked to take consideration of other factors which include place of trial, out of station expenses, the nature and extent of allegations, the number of documents prepared and the filing charges and the fact that the matter is being handled by Senior Counsel.

26. It is submitted that the applicant herein does not violate the right to access justice. Article 48 of the Constitution of Kenya was interpreted by the court in **Johnson Muthama –vs- Minister for Justice and Constitutional Affairs & Another [2012] eKLR** where the court observed that:

**“Provision for payment of costs by a party coming before the court does not, in my view, violate any provision of the Constitution. It is common practice in civil proceedings intended to safeguard the interests of the party against whom a claim is brought and to prevent abuse of the court process. Given the nature of elections, it serves a useful and rational purpose of ensuring that only those who have a serious interest in challenging the outcome of an election do so.”**

27. The applicant prays for costs of the application reiterating that costs are a means by which a successful litigant is recouped for expenses to which he has been put in fighting an action. (See Justice Kuloba’s Judicial Hints on Civil Procedure at page 94 and **Mahindra Chandra Nandi –vs- Aswini Kumar Acharjya ILR [1921] 48 ca 427.**)

28. For the Petitioner/Respondent, learned counsel submitted that this court lacks jurisdiction to entertain the application.

29. It is urged that under Section 78(2) of the Elections Act, 2011, the National Assembly in its own wisdom set the amount of security for costs at kshs. 500,000/=. Neither the parent Statute nor its subsidiary, the Elections (Parliamentary and County) Petition Rules 2017, permits and election court to revise the figure upwards or downwards.

30. I am referred to the decision in **Henry Okello Nadimo –vs- IEBC and 2 Others [2013] eKLR** in which the applicant had sought enhancement for costs to kshs.3,000,000/=.

31. It is submitted that the application is an impediment to access to justice. Article 48 of the Constitution states;-

**“48. The state shall ensure access to justice for all persons and if any fee is required, it shall be reasonable and shall not impede access to justice”.**

32. It is urged that enhancing the amount sought to an amount beyond the reach of the Petitioner would have the effect of completely shutting out the Petitioner.

**Analysis and Determination:**

33. I have had occasion to consider the application, the supporting grounds and the learned submissions of counsel.

34. I summarize the issues arising for determination as follows:

- 1. Whether the court has the jurisdiction/powers or discretion to enhance the security for costs provided for under Section 78 of the Elections Act 2011.**
- 2. If in the affirmative, whether the applicant has established a case for enhancement of security for costs.**
- 3. Based on the answer to 2 above, what amount, if at all, would be appropriate as security for costs.**

35. Section 78 of the **Elections Act, 2011** provides:

**“S.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 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.”**

36. The security for the payment of costs provided for in the case of a petition against a member of parliament is shillings Five Hundred Thousand (500,000).

37. The Petitioner has dutifully paid this amount. Indeed the operative word in Section 78 is “**shall**” and any petitioner who fails so to comply risks the dismissal of the Petition under Section 78 (3). Does this court have jurisdiction, power or discretion to enhance this amount?

38. In my considered view, Parliament in its wisdom appreciated the need to insulate a respondent from the danger of failing to recoup costs when a Petitioner loses in a Petition. No wonder Section 78 of the **Elections Act, 2011** makes it mandatory for a Petitioner (in the case of a Petition against a Member of Parliament) to deposit Kenya Shillings Five Hundred Thousand (ksh.500,000) as security for costs.

39. By doing so, Parliament went a step further than the situation obtaining under the **Civil Procedure Act** where no amount for security for costs is stipulated and it is left for the parties to move the court under Order 26 of the **Civil Procedure Rules** for an order for Security for costs where found necessary.

40. The setting of the security for costs at kshs.(500,000) as above, in my view, was out of an abundance of caution on the part of Parliament, aware of the need not to hinder access to justice.

41. This is perfectly in line with the decision in **Patrick Ngeta Kimanzi –vs- Marcus Mutua Muluvi & 2 Others HC Election Petition No. 8 of 2013**. By the provisions of Section 78 of the **Election Act 2011**, Parliament achieved to create a level ground for all the parties involved balancing the rights of the Petitioner to access justice and 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.

42. The amount for security for costs herein is statutory. The Section leaves no discretion on the part of the court to either reduce or enhance the security.

43. Article 48 of the Constitution of Kenya provides:

**“48. The state shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.”**

44. Any order by the court to enhance the security for costs provided under Section 78 of the **Elections Act** would fly on the face of Article 48 of the Constitution being a blatant affront on access to justice by making the fee (in this case the security for costs) dear to many Kenyans and is a violation of the constitution.

45. And while I appreciate the need to cushion Respondents for the risk of non-payment of costs, great care must be taken to avoid impeding access to justice.

46. In any event, the law as set out in Section 78 of the **Elections Act** is clear. The amount to be deposited in our instant suit **shall** be kshs.500,000.

47. I make a finding that this court has no jurisdiction, power, or discretion to make an order enhancing security for costs. This renders issues No. 2 and 3 spent.

48. The Notice of Motion dated 3<sup>rd</sup> October, 2017 is dismissed with costs to the Petitioner.

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

**A. K NDUNGU**

**JUDGE**

**In the presence of:**

Mr. Sunkuli for the Petitioner

Mr. Karanja for the 1<sup>st</sup> Respondent

Ms. Karanja for the 2<sup>nd</sup> Respondent

Omogeni Senior Counsel for the 3<sup>rd</sup> Respondent

R. Okumu court assistant

**A. K. NDUNGU**

**JUDGE**