



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**THE ELECTIONS ACT 2011**  
**ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS)**  
**PETITIONS RULES 2017**  
**ELECTION PETITION NUMBER 6 OF 2017**

**CHARLES OBERA ORITO & ANOTHER.....PETITIONERS**

**VERSUS**

- 1. THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION**
- 2. ROBERT ISAAC SIDNEY NAMULUNGU**
- 3. SAMSON ONGERI KEGENGO.....RESPONDENTS**

**R U L I N G**

1. In his application dated 3<sup>rd</sup> October 2017 brought under **Section 78 (3) of the Elections (Parliamentary and County Elections) Petitions Rules 2017**, the 3<sup>rd</sup> Respondent/applicant seeks orders that:

**1. That this Honourable court enhances the security deposit to be paid under Section 78 (2) of the Elections Act 2011 as read together with Rule 13 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 from Kenya Shillings Five Hundred Thousand (Kshs. 500,000.00) to Kenya Shillings four Million (Kshs. 4,000,000.00).**

**2. That in the alternative to the order sought hereinabove, the Petitioners herein be summoned to attend Court and explain how they intend to pay the costs of defending the Election Petition in the event the petition is determined against them**

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

2. The application is supported by the 3<sup>rd</sup> respondent/applicant's affidavit dated 4<sup>th</sup> October 2017 wherein he deposes that he is the Senator of Kisii County and that he is aware that the petitioners are proxies of one James Omingo Magara who unsuccessfully vied for the Kisii Senatorial seat. He takes issue with the averment made by the petitioners in the petition to the effect that they (petitioners) were among the candidates who contested for the senatorial elections as a demonstration that the petitioners were proxies of James Omingo Magara who was the people's Democratic Party candidate and hence the drafter of the petition.

3. He further avers that courts had in the past election petitions filed in 2013 capped legal costs due to successful litigants in county level seats at between Kshs. 2,000,000/= and 4,000,000/= and that this is the figure that informed his instant application as he is apprehensive that the petitioners are not men of means who will be capable of paying his costs should they be unsuccessful in this petition.
4. The petitioners/respondents opposed the application through the 1<sup>st</sup> petitioner's replying affidavit filed on 10<sup>th</sup> October 2017 wherein he denies the allegation that they are not men of means or that they are proxies of any party and insists that their financial status has not been investigated so as to establish whether or not they will be able to meet any fees or costs that may eventually be awarded by court.
5. He further avers that the award of costs is a discretionary function of the court and that there is no guarantee that the successful party in this petition will be awarded costs. He reiterates that the fact that they were able to raise and deposit the requisite statutory security for costs of Kshs. 500,000/= and settle the advocates' legal fees was a clear demonstration of their financial muscle and ability to pursue the petition to the end.
6. He further deposes that the petitioners have a right to access to justice which right should not be defeated on economic grounds and that the enhancement of the security for costs at this early stage of the petition would be a premature move because the court is yet to determine the winner of the case which determination can only be made at the tail end of the petition.
7. The 1<sup>st</sup> respondent further states that this court has no jurisdiction to enhance or revise the amount set by the statute for security for costs as the sections of **the Elections Act** and **the Elections (Parliamentary & County Election) Petition Rules 2017** that were relied upon by the applicant do not donate powers to court to enhance or revise the amount set by the statute.
8. He further avers that the averment captured at paragraph 2 of the petition to the effect that he was one of the candidates who contested for the senatorial elections was a typographical error and thus maintained that the allegation that the petitioners were proxies of another contestant was speculative and unfounded.
9. When the application came up for hearing on 10<sup>th</sup> October 2017, Mr. Walukwe advocate for the applicant submitted that the application was anchored on the provisions of **Section 17 of the Elections Act** as read with section 84 and 103 of the same Act. According to Mr. Walukwe, the provisions of the above sections give this court the discretion to award costs which costs would then follow the event and that in the instant case, the applicant was apprehensive that if costs were awarded in his favour at the end of the petition, he would be unable to recover them from the petitioners as he did not know their financial means or place of residence.
10. Mr. Walukwe took issue with the petitioners' claim that they were also contestants in the just concluded Kisii County senatorial elections which claim, he submitted, was a blatant lie. He added that the petitioners had not, in their replying affidavit, discharged the burden of proof placed on them by **Section 112 of the Evidence Act** to provide their facts or particulars.
11. It was the applicant's submission that **Article 48 and 159 of the Constitution** provide that justice shall be dispensed to all parties including the 3<sup>rd</sup> respondent/applicant in which case, the applicant was entitled to recover his costs should the same be awarded to him at the end of the petition. According to the applicant, the petitioners did not need to deposit the entire Kshs. 4,000,000/= in court but only needed to demonstrate their capability to meet the costs that may eventually be awarded against them at the end of the petition.
12. The applicant relied on the decision of the High Court in the case of **Dickson Mwenda Kithinji vs Gitarau Peter Munya & 2 others [2013] eKLR** wherein the issue of payment of costs by parties who filed a petition as proxies for an unsuccessful election contestant was discussed.
13. In a rejoinder, Mr. Begi advocate for the respondents submitted that the application was a

misconception of the law, facts and the constitutional requirement of easy access to justice. He argued that the issue of security for costs is regulated by an **Act of Parliament** through **Section 78 of the Elections Act** which gives clear provisions on such costs and that the provisions are couched in mandatory terms.

14. Mr. Begi reiterated that the respondents had fully complied with the Act by paying the requisite Kshs. 500,000/= as security for costs upon the filing of the petition. He maintained that section **84 of the Elections Act** would only come into operation after the hearing of the petition which was not the case in the instant application since the petition is still at its preliminary stage because the hearing is yet to begin.

15. It was the respondents' position that **Article 48 of the Constitution** on access to justice envisages that court fees shall be reasonable so as not to impede justice and maintained that the court does not have powers to grant the orders sought. He added that no evidence was adduced to show that the petitioners were men of straw or that they had been unable to pay costs in any previous case.

16. The respondents relied on the case of **Henry Okello vs IEBC & 2 others [2013] eKLR** wherein the effect of enhancing costs in election petitions was discussed and argued that election petitions are public interest cases which any voter, even the lowest in the society, have a right to contest in court.

17. I have considered the instant application for enhancement of the security deposited for costs based on the applicants' apprehension that the respondents/petitioners may not be in a position to settle costs which may be awarded to him should they not be successful in the petition.

18. **Section 78 of the Elections Act No. 24 of 2011** stipulates as follows:

**"78. Security for costs**

**(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."**

19. **Section 84 of the Elections Act** provides:

**"84. Costs**

**An election court shall award the costs of and incidental to a petition and such costs shall follow the cause.”**

20. In the instant case, the respondents position was that they had fully complied with the provisions of **Section 78 (2) (b) of the Elections Act** and therefore the applicants fresh plea for the enhancement of the amount deposited for security for costs was not anchored on any law and would contravene their constitutional right to access justice. It was not disputed by the applicant that the respondents had already fulfilled the requisite statutory provision for deposit of security for costs.

21. It is my finding that the instant application for enhancement of security for costs is not anchored on any provision of the law. **Section 78 of the Elections Act** on the security for costs is very clear and specific on the amount of deposit to be made for costs and the said section is not only couched in mandatory terms but also gives the time frame, of 10 days after the presentation of the petition, within which the security deposit becomes payable.

22. Courts have on numerous occasions held that election petitions are special cases because their outcome affect, not only the litigants listed in the petition itself but also the larger constituency or public represented by the elected leader whose election is under contest/challenge in court. In the case of **Martin Sarakwe Wechuli Vs IEBC Election Petition No.7 of 2013, Omondi, J** Stated thus:-

**“...an election petition is not just for the interest of an individual, but affects interest of the entire public; this is why the notice of withdrawal must be published in the Kenya Gazette...”**

23. The requirement that petitioners deposit security for costs was therefore intended not only to provide recompense to respondents who are often constrained to incur expenses in defending hopeless and unsuccessful election petitions, but also to cure the mischief of frivolous or vexatious litigants from challenging the results of an election (**See Esposito Franco vs Amason Kingi Jeffah & 2 Others Civil Appeal (Nairobi) No. 248 of 2008**).

24. The provision for security for costs is therefore so critical to the election petition that it has been held in several cases that failure to deposit the security within the prescribed time is fatal to the election petition, and that the requirement to deposit security for costs is not a mere procedural requirement capable of being excused as a matter of judicial discretion. (**See Said Buya Hiribae vs Hassan Dukicha Abdi & 2 Others, Mombasa Election Petition No. 7 of 2013**).

25. I find that nowhere in the **Elections Act** is this court granted any powers to enhance the amount to be deposited as security for costs or to require a petitioner to demonstrate his financial capability to meet costs that may eventually be awarded an a successful opponent.

26. My humble view is that had the intention of the law makers been that courts could enhance the amount for security deposit for costs or to require litigants (petitioners) to demonstrate their financial worth before proceeding with a petition, then nothing would have been easier than for Parliament to make provisions for such a scenario.

27. In the same vein, even assuming that this court had the jurisdiction to make such order for enhancement of deposit of security for costs, which is not the law as I have already stated in this judgment, the question which will then arise is what would become of a petitioner who has already fulfilled the requirements of section 78 of the Elections Act and is for one reason or another unable to raise the enhanced amount of costs. Would such a petition be struck out or dismissed on grounds of the petitioner’s poverty? Perhaps this is an area that parliament could consider revisiting.

28. My humble view however, is that it could not have been the intention of the law makers to pass laws that would make access to justice beyond the reach of the common *mwanachi* or, in the exact words of the respondents’ advocate, beyond the reach of “*mama mboga*” who may have the desire to challenge the election of a Member of Parliament or Senate as that would go against the spirit of the Constitution which at Article 48 emphasizes on equal right to access justice.

29. It is worthy to note that the petition before the court is still at its initial stages of the pretrial as the hearing of the main case is yet to begin. The applicant has not demonstrated that the petitioners' case is a non starter or a basket case that is doomed to fail at the end so as to justify his claim to costs that may eventually be awarded to him at the end of the case. At this early stage of the petition, one can easily say that the petition could go either way in favour of any party, in which case, I concur with the respondents' submissions that the instant application is premature and speculative.

30. Turning to the allegation that the respondents are proxies of one James Omingo Magara, once again, this is an allegation that was not proved by any cogent evidence. No material was placed before this court to show that the respondents were not acting on their own motion but at the instance of a hidden hand. The applicant is however justified to suspect that the respondents are proxies of an unsuccessful candidate in the Kisii senatorial Elections going by their false claims in the affidavit in support of the petition to the effect that they were also candidates in the Senatorial Elections. However, mere suspicion without cogent proof, cannot be relied upon to sustain such a claim. Upon getting cogent evidence, the applicant may opt to applying to enjoin the petitioners' suspected principle as an interested party in this petition so that he can claim costs from him should he be win the case. This will be in line with the decision in **Dickson Mwenda Kithinji (supra)** wherein the court observed as follows:

***“This court observes that the proxy arrangement between Dr. Kilemi Mwiria and 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 had 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.”***

31. In the same **Dickson Mwenda** case the court further 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.***

***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 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 petition 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.”***

32. The above cited case is however distinguishable from the instant case in the sense that the said remarks and observations of the court were made at the tail end of the petition after the court had determined and dismissed the petitioners case. In this case, such a determination is yet to be made and this bolsters my earlier finding that the instant application is premature.

33. Having regard to my findings and observations in this ruling, I find that the instant application is unmerited and I dismiss it with orders that costs shall abide the outcome of the petition.

**Dated, signed and delivered in open court this 19<sup>th</sup> day of October, 2017**

**HON. W. OKWANY**

**JUDGE**

**In the presence of:**

- Mr. Nyamweya for Omwanza for the Petitioner
- Mr. Rigoro for the 1<sup>st</sup> & 2<sup>nd</sup> Respondents
- Omogeni for the 3<sup>rd</sup> Respondent
- Omwoyo: court clerk