



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**THE ELECTIONS ACT 2011**  
**THE ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS)**  
**PETITIONS RULES, 2017**  
**ELECTION PETITION NUMBER 9 OF 2017**

**OMBATI RICHARD.....PETITIONER**

**VERSUS**

- 1. THE INDEPENDENT ELECTORAL AND  
BOUNDARIES COMMISSION**
- 2. MARK MANGO**
- 3. HON OBAKI EZEKIEL MACHOGU.....RESPONDENTS**

**R U L I N G**

**Background**

1. On 6<sup>th</sup> September 2017, the petitioner herein, OMBATI RICHARD, filed this Election Petition against the respondents in which he sought orders, *inter alia*, that it be determined that Hon. Ombati Ezekiel Machogu, the 3<sup>rd</sup> Respondent herein, was not duly elected. The respondents filed their respective replying affidavits to the petition and, by a notice dated 22<sup>nd</sup> September 2017 issued by the Deputy Registrar of this court pursuant to Rule 15 of the Elections (Parliamentary & County Elections) Petitions Rules, 2017, parties were duly notified that a pre-trial conference would take place on 3<sup>rd</sup> October 2017 at 9 a.m.

2. On 26<sup>th</sup> September 2017, the petitioner herein filed the following documents in court:

- 1. Notice of Intention to Act in person.**
- 2. Notice of Intention to Withdraw Election Petition and;**
- 3. An application to withdraw petition together with a supporting affidavit sworn before one Simon Ndege advocate and Commissioner for Oaths.**

3. On 3<sup>rd</sup> October 2017, the matter came up for pre-trial conference when counsel for the respondents informed the court that they had been served with the petitioner's notice of withdrawal of petition,

application to withdraw the petition and notice of intention to act in person. Mr. Onyancha advocate for the 3<sup>rd</sup> respondent then drew the court's attention to an advertisement appearing on page 10 in the Standard Newspaper of 3<sup>rd</sup> October 2017 regarding the said notice of intention to withdraw the petition and submitted that under those circumstances, the notice to withdraw petition had a life span of 7 days within which anyone desirous of being substituted as a petitioner in the petition could apply to be enjoined in the suit. Notably however, neither the petitioner nor his counsel on record attended court for the said pre-trial conference of 3<sup>rd</sup> October 2017 and counsel for the respondents agreed that the petition be mentioned on 10<sup>th</sup> October 2017 for further directions.

4. The matter then came up for mention on 10<sup>th</sup> October 2017 but in a surprise turn of events, the petitioner herein had on 9<sup>th</sup> October 2017 filed an affidavit in court in which he purported to disown the notice and application to withdraw the petition which he alleged had been engineered by an unnamed imposter. In the said affidavit of 9<sup>th</sup> October 2017, the petitioner also averred that he had reported the imposter claim to Kisii Central Police station under OB number 74/28/9/2017 for investigation. Through Mr. Mirembe advocate, the petitioner made an oral application to have the notice and application to withdraw the petition expunged from the court record while arguing that the same were not authored by him. This turn of events prompted the counsel for the respondents to apply that the petitioner and the advocate who commissioned the affidavit in support of his application to withdraw the petition, Mr. Simon Ndege, be summoned to appear in court on 12<sup>th</sup> October 2017 for purposes of cross examination on the contents of the said affidavit, pursuant to order 19 Rule 2, in order to establish the veracity of the petitioner's averments. This ruling has therefore been precipitated by the petitioner's oral application to expunge the notice and application filed on 26<sup>th</sup> September 2017 from the court record.

#### **Petitioner's testimony on cross examination**

5. On cross examination the petitioner stated that he is literate having gone to school up to form four level and that he signs all his official documents through a signature and not thumb print. He conceded that he was aware that pre-trial conference was set for 3<sup>rd</sup> October 2017 but stated that he was not able to attend court on the said date due to illness. He testified that he was, on 27<sup>th</sup> September 2017, informed by his lawyer on that an imposter had filed an application to withdraw his petition and that this information prompted him to make a report to the police at Kisii Police Station so that the same could be investigated.

6. He narrated how on 20<sup>th</sup> September 2017 he met one Mr. Simon Ndege Advocate through his (Petitioner's) friend one Evans Anyona who took him to Mr. Ndege's office outside Embassy Hotel in Nairobi and that it is while at Mr. Ndege's office that he met the 3<sup>rd</sup> respondent and one Samuel Milewa who presented documents for the withdrawal of his petition to him and asked him to append his signature on them but he declined to comply with the said request and instead informed his lawyer about what had transpired. He stated that he was threatened with dire consequences if he did not withdraw the petition and added that the 3<sup>rd</sup> respondent promised to pay him an unspecified sum of money if he withdrew the petition. He denied having signed the notice and application to withdraw petition but conceded that the part of testimony regarding his Nairobi meeting with the 3<sup>rd</sup> respondent was neither contained in his affidavit of 9<sup>th</sup> October 2017 nor the report that he made to the Police at Kisii Central Police Station.

#### **Mr. Ndege Advocate's testimony**

7. Mr. Ndege's testimony was that he is an advocate of the High Court of Kenya of 23 years standing and a church elder. He stated that he was familiar with the affidavit dated 25<sup>th</sup> September 2017 that accompanied the application to withdraw the petition filed on 26<sup>th</sup> September 2017 and narrated, in detail, the sequence of events that took place on 25<sup>th</sup> September 2017 when, while he was at Milimani Commercial Courts in Nairobi, he received a telephone call from one Evans Anyona who informed him that he had a client who required his assistance after which he went back to his office where he met the said Mr. Evans, who was in the company of the petitioner and one Mr. Bunde, the area assistant chief of Masimba Sub-location.

8. At the said meeting, the petitioner explained to him that he (petitioner) had an already drafted application to withdraw the instant petition and handed over to him an already drawn notice of withdrawal of petition, application to withdraw petition together with a supporting affidavit which, he noted, had already been commissioned by one Mr. P. Morara Apiemi but had not been signed by the deponent/petitioner. He produced the said documents in court as exhibits and testified that the petitioner requested him to incorporate more information in his affidavit in support of the application to withdraw the petition that had already been commissioned by Mr. Apiemi advocate. Mr. Ndege testified that in order to confirm the authenticity of the documents that the petitioner had presented to him, he called the said Mr. Apiemi advocate to enquire about the documents and Apiemi confirmed to him that the documents had been drawn in his office but that he was away from the office whereupon he gave Mr. Ndege to go ahead and effect the amendments that the petitioner had requested for.

9. Mr. Ndege explained that it was upon receiving Mr. Apiemi's confirmation that he requested his secretary to retype the petitioner's affidavit and application to withdraw the petition which the petitioner thereafter signed in his presence before he commissioned the affidavit and that he later advised the petitioner on the need to comply with the rules requiring the advertisement of the intended withdrawal through the print media. He further explained that the error appearing on the place of swearing the said affidavit, which was indicated as Kisii instead of Nairobi, was a typographical error that was not uncommon in legal practice. He denied the allegation that the 3<sup>rd</sup> respondent and one Mr. Milewa were in his office on the day that he met the petitioner and further denied the claim that anyone threatened, intimidated or coerced the petitioner to withdraw the petition. He maintained that the petitioner signed all the documents for withdrawal of the petition in his office, in his presence and in the presence of the two other witnesses who had accompanied him to the office. He was categorical that the petitioner was free to subject his signatures to a handwriting expert if he so wished.

10. He further maintained that he had absolutely no reason or motivation to lie in court as he had no grudge against the petitioner who he met for the first time in his office. He was able to identify the petitioner in open court by picking him out among the members of the public sitting in the public gallery.

### **Analysis and determination**

11. I have carefully considered the impugned pleadings filed on 26<sup>th</sup> September, 2017, the testimonies of both the petitioner and Mr. Ndege during cross examination and I discern the main issue for determination to be whether the petitioner signed the said pleadings and if so, what orders this court should make following the filing of the said pleadings.

12. From the very outset, this court notes that the petitioner's affidavit of 9<sup>th</sup> October 2017, when juxtaposed with his testimony on cross examination, leaves a lot to be desired. Indeed, it can be said that the scenarios presented in both the petitioner's affidavit and his testimony in court raise more questions than answers and put to question his credibility not only as a main player in this petition as its initiator, but also as a witness before this court.

13. A highlight of some of the questions that arise from the petitioner's testimony are as follows:

14. Firstly and of critical importance in this case is the fact the petitioner claimed that he became aware of alleged "withdrawal" of his petition by the alleged imposter in on 27<sup>th</sup> September, 2017 way before the very first pre-trial conference of 3<sup>rd</sup> October, 2017. However, it is quite strange that not only did the petitioner and his advocate fail to attend court for the pre-trial conference which I have already stated in this ruling, was only attended by advocates for the respondents, but he also failed to take the earliest opportunity to inform the court of the strange happenings in this case, if at all there was anything strange. Instead, the petitioners sat pretty from 27<sup>th</sup> September 2017 till 9<sup>th</sup> October 2017 when he filed an affidavit purporting to 'report' the alleged imposter to court. One would have expected that the petitioner or his advocate would be the first person to appear in court at the pre-trial conference so as to seize the earliest opportunity to notify the court of any strange goings-on in the petition, but this was not the case. The petitioner's claim that he did not attend the pre-trial conference due to illness was not supported by

any documentary proof and did not also explain the absence of his advocate on record.

15. My finding is that the unexplained absence of the petitioner and his advocate from court on 3<sup>rd</sup> October 2017 was not a coincident but was a deliberate move to signify his lack of interest in the petition which for he had for all intents and purposes withdrawn.

16. The other lingering question which the petitioner failed to answer, to the satisfaction of this court, was why he did not immediately report the alleged threats, promises, intimidation or coercion that were allegedly issued to him, while at Mr. Ndege's office, to the police in Nairobi or Kisii despite the fact that he knew the identity of the suspects. The petitioner did not disclose those identities to the police or in his affidavit to court and instead chose to use the vague word "imposter". It is instructive to note that in his affidavit to court dated 9<sup>th</sup> October 2017, the petitioner did not disclose his encounter with the 3<sup>rd</sup> respondent, Evans, Samuel Milewa and Mr. Ndege. My take is that this was very crucial information which he ought to have brought to the attention of this court and law enforcement agents without any delay. Failure to do so can only lead to the irresistible conclusion that the petitioner was hiding the truth from the court thereby making him guilty of non-disclosure of material facts and that his belated attempts to make the said claims while under cross examination paint him as a witness who is not candid.

17. Courts have severally held that they would be reluctant to grant orders in favour of a party who is guilty of non-disclosure of material facts. In the case of **Johnson Kimeli vs. Barclays Bank of Kenya Ltd Kisumu HCCC No. 171 of 2003** it was held:

*“Where the plaintiff is seeking a remedy from court he must show a good account of himself for the Court would be reluctant to extend its hand to a person with dirty and unclean hands for he would soil the hands of justice. Secondly a Court would not allow a person to benefit from his own wrong for that would amount to judicial treason... The failure to make a candid disclosure of all material and essential facts would militate against the person concealing that evidence or facts from the Court... The courts would be strict on non-disclosure of material facts by a party seeking a remedy more so when he has concealed important material from the Court at the first instance.”*

18. In the instant case, the petitioner failed to disclose material facts to the court and also failed to report the known suspects of a crime to the police in which case one can conclude that the alleged threats, intimidation and coercion never took place. Furthermore, the petitioner did not tender any document from the police to support his claim that he reported the alleged imposter to them.

19. Lastly, this court finds it quite suspect that while the petitioner admits that he is literate and that he signs all his official documents using his signature, he chose to sign his pleadings in the instant petition using a thumb print which, under ordinary circumstances, is a form of marking of documents used only by those who can neither read nor write. My humble view is that while there is absolutely nothing wrong or unlawful about a party opting to sign court documents using a thumb print, in the instant case, where the issue of whether or not the petitioner signed pleadings is in contest, one can say that the petitioner intended to hide his true identity or was plotting to have a scenario, such as the one before the court, where he disowns documents he has signed using his signature.

20. This court could go on and on over the glaring discrepancies and inconsistencies surrounding the petitioner's story in support of the claim that he did not sign or present the pleadings of 26<sup>th</sup> September, 2017 that is the subject of this ruling. My finding is that the evidence on record points to the direction of the petitioner as the person who executed the application and notice to withdraw the petition.

21. In sharp contrast to the petitioner's testimony was the testimony of Mr. Ndege advocate who explained, in great detail and through supporting documents, the circumstances under which he prepared and commissioned the affidavit in support of the application to withdraw the petition together with all the accompanying documents. Mr. Ndege's testimony was candid, consistent, compelling and was not shaken or controverted even upon stinging cross examination by the petitioner's advocate. He provided a detailed account of the meeting he held with the petitioner and the role that he played in the entire withdrawal

exercise. Mr. Ndege presented himself as an advocate who is diligent and forthright. He promptly attended court on short notice to shed light on this case and I am satisfied that his sole aim and motivation, as would be expected of any officer of the court, was to assist the court get to the bottom of the case. From the above foregoing, I am satisfied that it is the petitioner herein who filed the notice and application to withdraw the petition and that he has, for reasons only known to him opted to make an about-turn on the same using the claim of an imposter as a smokescreen. I find that the imposter claim was not proved to the required standards through any tangible or concrete evidence. There was no document whatsoever availed in court from the police to confirm if indeed, the imposter report had been made to the said police. The petitioner's claim that he was intimidated, threatened and/or coerced by the 3<sup>rd</sup> respondent to withdraw his petition did not form part of the information contained in his affidavit dated 9<sup>th</sup> October 2017 and the only logical conclusion that one can draw from the omission of such critical information is that it was an afterthought intended to spice up the 'imposter' theory.

22. In the instant case, no material was placed before this court to prove that it is an imposter who filed the documents of withdrawal of petition and my finding therefore is that the said documents are properly on record. All the allegations made by the petitioner had no supportive evidence. The burden of proof in civil cases is on a balance of probability. Denning J. in **Miller Vs. Minister of Pensions (1947)** discussing the burden of proof had this to say: -

***“That degree is well settled. It must carry a reasonable degree of probability, but no so high as is required in a criminal case. If the evidence is such that the tribunal can say: ‘We think it more probable that not’, the burden is discharged, but, if the probabilities are equal, it is not.***

***Thus, proof on a balance of preponderance of probabilities means a win, however, narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties’ explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”***

23. Election petitions are, under the Constitution, time bound in which case this petition has to be determined within 6 months from the date of its filing. As I have already stated at the beginning of this ruling, this petition was filed on 6<sup>th</sup> September, 2017 and therefore in terms of timelines, as at the time of delivering this ruling, one and a half months have already lapsed out of the 6 months provided for the hearing and determination of the petition.

24. From the evidence on record, it is abundantly clear to me that the petitioner is either not keen on prosecuting this petition or is intent on using it for personal gain going by his claim that he had been promised a financial reward if he withdrew the petition.

25. Courts have on numerous occasions held that election petitions are not ordinary civil cases between individual litigants that they can choose to deal with in any manner that they so wish. Election petitions are inherently public interest suits because they affect not only the parties listed in the petition, but also persons/voters who elected the representative whose election is in dispute and the public at large. 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...”***

26. In the case of **Joho vs. Nyange & Another [2008] 3 KLR 500 at page 507**. Maraga J, (as he then was) said: -

***“Election Petitions are not ordinary suits. Though they are disputes in rem, fought between certain parties, elections petitions are nonetheless disputes of great importance - Kibaki Vs. Moi, Civil Appeal No. 172 of 1999. This is because when elections are successfully challenged, by-elections ensue which not only cost the country colossal sums of money to stage but also disrupt the constituents’ social and economic activities. It is for these reasons that I concur with the***

***Elections Court's decision in Wanguhu Nganga & Another Vs. George Owiti & Another, Election Petition No. 41 of 1993, that election petitions should not be taken lightly. Generalized allegations as the ones made in this petition are not the kind of evidence required to prove election petitions. As I said, they should be proved by cogent, credible and consistent evidence.***

27. In the instant case, one can say that the petitioner either took his petition lightly by failing to make material disclosures to the court or was intent on misleading the court regarding the application and notice to withdraw the petition that he had filed in court, It is because of the special nature of an election petitions that the lawmakers deemed it necessary to enact strict provisions to be adhered to by anyone wishing to withdraw an election petition. **Rules 21 and 22 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017** stipulate as follows:

**“21 (1) A petition shall not be withdrawn without leave of the election court.**

**(2) The election court may grant leave to withdraw petition on such terms as to the payment of costs or as the election court may otherwise determine.**

**(3) An application for leave to withdraw a petition shall-**

**(a) be in Form 5 set out in the first Schedule;**

**(b) be signed by the petitioner or a person authorized by the petitioner;**

**(c) state the grounds for withdrawing the petition; and**

**(d) be lodged at the registry.**

**(4) The parties to a petition shall each file an affidavit, before leave for withdrawal of a petition is determined , addressing the grounds on which the petition is intended to be withdrawn.**

**(5) Despite sub-rule (4), an election court may, on cause being shown, dispense with the affidavit of a party to the petition if it seems to the election court on special grounds to be fit and just.**

**(6) Each affidavit filed under sub-rule (4) shall contain the following declaration- “to the best of the deponent’s knowledge and belief, that no agreement or terms of any kind has been made, and that no undertaking has been entered into, in relation to the withdrawal of the petition.”**

**(7) Despite sub-rule (6), where a lawful agreement shall have been made with respect to the withdrawal of the petition, the affidavit shall set out the terms of the agreement.”**

**“(22) (1) The petitioner shall serve each respondent with a copy of the application to withdraw petition.**

**(2) The petitioner shall publish in a newspaper of national circulation a notice of intention to withdraw an election petition in Form 6 set out in the First Schedule. “**

28. In the instant case, I find that it was proved, to the required standards, that the petitioner was the author of the notice and application to withdraw the petition herein. The said application for withdrawal is in the prescribed Form 5 set out in the Schedule to Elections (Parliamentary and County Elections) Petitions Rules, 2017 and is supported by an affidavit setting out the grounds on which the petition is intended to be withdrawn. As early as at 3<sup>rd</sup> October, 2017, all the respondents confirmed that they had been served with the said application and affidavit and that the notice of intention to withdraw the petition had been published at page 10 of the Standard Newspaper of 3<sup>rd</sup> October, 2017, which is a newspaper of

national circulation.

29. Under the above circumstances, one can say that the withdrawal has technically crystallized and has been actualized in view of the fact that no other person, desirous of prosecuting the petition, following the advertisement of the notice of withdrawal by the petitioner, has applied to this court to be substituted in place of the petitioner. This being the case and having found, as a fact, that it is the petitioner who filed the application to withdraw the petition, I decline to grant the petitioner's oral application to expunge the impugned pleadings filed on 26<sup>th</sup> September 2017 from the court record. I am accordingly satisfied that the Petitioner has complied with the procedure for withdrawal of an election petition.

30. The remaining issue to be determined, at this point, is which party shall meet the costs of the petition. The applicable law is **Section 84 of the Elections Act (Act 24 of 2011)** which provides that an election court shall award the costs of and incidental to a petition and such costs shall follow the cause. **Rules 30 to 33 of the Elections (Parliamentary and County Elections) Petitions Rules of 2017** provide more details on the process of awarding and recovery of costs as follows:

**“Costs.**

**30. (1) The election court may, at the conclusion of an election petition, make an order specifying —**

**(a) the total amount of costs payable; and**

**(b) the maximum amount of costs payable;**

**(c) the person who shall pay the costs under paragraph (a) and (b); and**

**(d) the person to whom the costs payable under paragraph (a) and (b) shall be paid.**

**(2) When making an order under sub rule (1), the election court may —**

**(a) disallow any prayer for costs which may, in the opinion of the election court, have been caused by vexatious conduct, unfounded allegations or unfounded objections, on the part of either the Petitioner or the Respondent; and**

**(b) impose the burden of payment on the party who has caused an unnecessary expense, whether such party is successful or not, in order to discourage any such expense.**

**(3) The abatement of an election petition shall not affect the liability of the Petitioner or of any other person to the payment of costs previously incurred.**

**31. (1) The Registrar shall tax costs of an election petition on the order of the election court in the same manner as costs are taxed in civil proceedings and in accordance with the Advocates Act.**

**(2) An order of the Registrar under sub-rule (1) shall be confirmed by the relevant court.**

**(3) An election court may direct that the whole or any part of any moneys' deposited by way of security may be applied in the payment of taxed costs.**

**32. There shall be paid in respect of all proceedings under these rules, the fees prescribed by the Second Schedule.**

**33. (1) Money deposited under rule 13 shall, if and when it is no longer needed for security payment of costs, charges and expenses be returned or disposed of as the election court may, by order, determine to be just.**

**(2) An order under sub-rule (1) may be made upon an application by a party to the petition and proof that all just claims have been satisfied or sufficiently provided for as the court may require.**

**(3) The order may direct the payment of money either to the party in whose name it is deposited or to any person entitled to receive it.**

**(4) On the conclusion of a petition, the election court shall issue notice to the parties to show cause why the security for costs should not be disposed of”**

31. From the foregoing provisions, it is clear that it is the rule, in election petitions, that costs follow the cause, meaning that the unsuccessful party will be ordered to pay the costs of the successful party. The withdrawal of an election petition however, does not connote a determination of, or judgment on any questions or issues before the election court on their merit, and it cannot therefore be found that there was a successful or unsuccessful party herein. In the present scenario, this court will be guided by **Rule 30 (2) (b) of the Elections (Parliamentary and County Elections) Petitions Rules of 2017** which grants it the discretion to impose costs on the party who has caused an unnecessary expense, whether such party is successful or not.

32. The Petitioner, by filing an election petition and electing to withdraw the same, has caused the respondents to incur expenses which they would not have incurred were it not for the election petition. The said expenses include those incurred in hiring counsel, preparing the responses to the Petition, in addition to the court attendances. It is not in dispute that in this petition, steps were taken by the respondents in this respect. For this reason this Court finds the petitioner liable to meet the costs the respondents have incurred as a result of the election petition. This court is also granted the power under **Rule 30 (1) (a) and (b) of the Elections (Parliamentary and County Elections) Petitions Rules of 2017** to set a cap on the total amount of costs that may be payable in this respect.

33. Arising from the foregoing reasons and findings, I hereby order as follows:

**1. The Petitioner is granted leave to withdraw Election Petition No. 9 of 2017 dated 16<sup>th</sup> August, 2017 and filed on 6<sup>th</sup> September 2017 in the Kisii High Court, which Election Petition is hereby marked as withdrawn.**

**2. The Petitioner shall pay the 1<sup>st</sup> and 2<sup>nd</sup> Respondents the costs of the election petition filed herein, and the total costs awarded to them jointly shall not to exceed Kenya Shillings Two Hundred Thousand (200,000/=) only.**

**3. The Petitioner shall pay the 3<sup>rd</sup> Respondent the costs of the election petition filed herein, and the total costs awarded to the 3<sup>rd</sup> Respondents shall not exceed Kenya Shillings three hundred thousand (300,000/=) only.**

**4. The Respondents shall forward their Bills of Costs to the Deputy Registrar of the High Court for taxation in accordance with the Advocates Act, and subject to the limitation on the total costs to be awarded as ordered hereinabove.**

**5. The sum of Kshs 500,000/= deposited in court by the Petitioner as security for costs shall be applied equally to the payment of the taxed costs of the Respondents.**

Orders accordingly.

**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 the Petitioner

Mr. B'womote and Ombachi for the 3<sup>rd</sup> Respondents

Mr. Kinyanjui for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents

Omwoyo: court clerk