



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

ELECTION PETITION NO. 2 OF 2017

IN THE MATTER OF ARTICLE 2(3) AND (4) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE CHALLENGE OF THE VALIDITY OF THE MEMBER OF NATIONAL ASSEMBLY KABETE CONSTITUENCY ELECTION, 2017

AND

IN THE MATTER OF ARTICLES 1, 2, 4, 10, 23, 38, 47, 81, 82, 86, 87, 88, 101 & 165 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: THE ELECTIONS ACT, 2011

AND

IN THE MATTER OF: THE ELECTIONS ACT, 2011(ACT NO. 24 OF 2011) AS AMENDED

AND

IN THE MATTER OF ELECTIONS(GENERAL) REGULATIONS, 2012

AND

IN THE MATTER OF: ELECTION (PARLIAMENTARY AND COUNTY ELECTION) PETITIONS REGULATIONS, 2017

AND

IN THE MATTER OF: THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION ACT, 2011

BETWEEN

MILTON KIMANI WAITINGA PETITIONER

VERSUS

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1STRESPONDENT

NJOKI NJERU ROSEMARY2NDRESPONDENT

WAMACUKURU JAMES GITHUA KAMAU.....3RD RESPONDENT

RULING

1. After the General Elections held in Kenya on 08/08/2017, Wamacukuru James Githua Kamau was declared the duly elected member of the National Assembly for Kabete Constituency. The Petitioner herein, Milton Kimani Waitinga (“Waitinga”), was dissatisfied with the conduct of the elections and timeously filed an election Petition challenging the declaration. In his Petition, the Petitioner seeks, among other prayers, for an order nullifying the election of Member of the National Assembly for Kabete Constituency held on 08/08/2017.

2. The Petition was timeously filed on 06/09/2017 well within the 28-day period stipulated by law. It was also, apparently, timeously served as all the three Respondents entered appearance and filed responses within the time stipulated by the law.

3. In addition to the Responses to the Petition and Replying Affidavits, on 21/09/2017, the 3rd Respondent filed a Notice of Motion of even date seeking two prayers:

- a. That the Petition be dismissed for want of deposit of security for the payment of costs; and
- b. That the costs of the Application and the Petition be met by the Petitioner.

4. As part of its efforts to efficiently manage its elections Petitions docket, the Court scheduled the Petition for a mention on 29/09/2017 to give directions on the hearing of the Petition and, in particular, on the Pre-trial conference and the arguing of any interlocutory matters filed in the Petition.

5. The Parties appeared before me on 29/09/2017. I gave certain directions meant to ensure the smooth and efficient hearing of the Petition given the constitutional and statutory timelines for resolution of electoral disputes. After confirming that none of the parties intended to file any other interlocutory application other than the one filed by the 3rd Respondent, I directed that the Petitioner should respond to the 3rd Respondent’s Application dated 21/09/2017 within seven (7) days. I then scheduled the hearing of that Application for 13/10/2017. I also gave other directions related to the conduct of the Pre-trial conference which was also scheduled for 13/10/2017.

6. The Petitioner did not file any response to the Application. Consequently, the Respondents were forced to file their Written Submissions to the Application without the benefit of seeing the Petitioner’s response. When the matter came up on 13/10/2017, Mr. Munaawa appeared for the Petitioner. At first he informed the Court that his client had not been able to raise the Kshs. 500,000/= required because he is going through a rough patch financially after having just concluded a very expensive campaign season. He orally indicated that he wanted seven days to see if the Petitioner will raise the amount.

7. I pointed out to Mr. Munaawa that he had not filed any responses to the Application and that I had no formal application before me to consider the request he was making.

At Mr. Munaawa’s request, I took a short recess so that he could raise his client to determine how he wanted to proceed.

8. We resumed 45 minutes later and Mr. Munaawa indicated that he had not been able to raise his client and that his instructions from his law firm was that the Application should proceed to hearing.

9. The Application is a straightforward one. Section 78 of the Elections Act, 2011 provides as follows:

(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; 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.

10. Rule 13 of the Elections (Parliamentary and County) Election Regulations, 2017 gives effect to this statutory provision in the following terms:

(1) Within ten days of the filing of a petition, a petitioner shall deposit security for the payment of costs in compliance with section 78 (2)(b) and (c) of the Act.

(2) The security for costs deposited under sub-rule (1) shall—

(a) be paid to the Registrar;

(b) be for the payment of costs, charges or expenses payable by the petitioner; and

(c) subject to the directions of an election court, be vested in, and drawn upon from time to time by, the Registrar for the purposes for which security is required.

11. Luckily for this Court, these two provisions of the law have already been given interpretation and application in prior cases. The Respondents' Counsels cited some of these cases before me. Section 21 of the National Assembly and Presidential Elections Act (which is the predecessor to the current Elections Act, 2011), had a clause which was in all material parts the equivalent of the current Section 78 of the Elections Act, 2011. That section came up for interpretation by the Court of Appeal in **Rotich Samuel Kimutai v Ezekiel Lenyongopeta & 2 Others [2005]**. The Court rendered itself thus:

Once again we think the intention of Parliament was clear in enacting the time limit in such peremptory language. "Not more than three days.....shall give" does not admit of ambiguity or further search for the intention of Parliament. Whether or not Parliament should have enacted a further provision for seeking extension of time in appropriate cases, would of course be academic for purposes of this appeal and in any event there was no attempt to apply for extension of time at all. Section 21(3) provides for the consequences of non-compliance which is what in the end transpired in this case. Failure to deposit the money within time was not a mere irregularity which could be waived by the parties.

12. Similarly, the High Court reached a similar conclusion in **Evans Nyambaso Zedekiah & Another v IEBC & 2 Others**.

This time, the Court was applying the self-same Section 78(2)(b) which is at issue here. In this case, Justice Sitati expressed herself thus:

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.

13. Consequently, our decisional law has consistently concluded that the requirement that a Petitioner pays security for costs is not a technical requirement but a substantive question that goes to the root of the Court's jurisdiction. Courts have explained that the purpose of the requirement to deposit security for costs is to discourage frivolous or vexatious litigants from challenging the results of elections (See ***Esposito Franco v Amason Kingi Jeffah & 2 Others (Nairobi Civil Appeal No. 248 of 2008)***). The security so deposited also ensures that Respondents recover some of their costs from defending unsuccessful election petitions.

14. Further, our case law is categorical that the payment of the prescribed amount of security of costs within the stipulated time is an essential prerequisite for the hearing of election petitions. Hence, Justice Muriithi explained in Kisii Election Petition No.6 of 2013 – ***Fatuma Zainabu Mohamed – vs- Ghati Dennitali & 10 Others*** (unreported) on an application for extension of time to make the deposit. The Learned Judge noted that the law commands that where no security for costs is given, “whether it is ordered in exercise of discretion by the court or by statutory requirement” then no further proceedings in the matter should be undertaken by the court. He concluded the matter by saying the following:-

Accordingly, security for costs, whether it is required by statutory provision or order of the court, must be taken as going to the root of the jurisdiction of the court to entertain the dispute. If no security for costs is deposited, then the petition or other proceeding though validly lodged before the court in accordance with the applicable procedure rules cannot proceed to hearing and determination as further

proceedings are prohibited. As such, the provision for security for costs is, in my view, a substantive requirement underpinning the jurisdiction of the court to deal with the dispute in the proceeding in which the security for costs is required, and is based on the sound principle for the protection of the defendant from unrecoverable costs.

15. Similarly, in ***Kumbatha Naomi Cidi v County Returning Officer, Kilifi & 3 Others [2013] eKLR***, Justice Muchemi pronounced herself thus on the same question:

The provisions of Section 78 (2) of the Act and Rule 11(1) are very clear that the deposit is for the purpose of payment of costs that may become payable by the petitioner to the other parties in the case. The provisions state in no uncertain terms that where a petitioner does not deposit security as required by the law, no further proceedings shall be heard on the petition and the respondent may apply for dismissal of the petition and for payment of costs.

16. There are questions whether an Election Court can extend the time for depositing the costs for security under Rule 19 of the Elections (Parliamentary and County) Elections Regulations, 2017. Some Courts have expressed the view that a Court can so extend the 10-day period stipulated in the law in appropriate cases where the Court is properly moved while others have indicated that no such extension is possible since the requirement is statutory. In any event, that question is not before me as the Petitioner has not filed any properly enunciated application for extension of time.

17. In the circumstances, given the clear stipulation of Section 78(2)(b), Rule 13 and our decisional law, it follows that the Notice of Motion dated 21/09/2017 must succeed. The clear requirement of the statute and subsidiary legislation is that a Petitioner is required to deposit security for costs within ten days of filing their Petition. This did not happen here. Indeed, more than thirty-seven (37) days later (at the time of arguing the Application), the Petitioner had not paid the security deposit. The Petitioner had, also, not made any efforts to get the leave of the Court to deposit the security for costs out of time. What is more is that in this case the Court had instructed the Petitioner to respond to the Application seeking to strike out the Petition and he failed to do so. The clear indication is that the Petitioner is not serious about

prosecuting the Petition. There is simply no good reason to keep this Petition alive. As I have already indicated, failure to pay security deposit in Election petitions goes to the root of the jurisdiction of the Court to hear the Petition. The logical conclusion, then, is that the Court has no jurisdiction to take any further action in the Petition.

18. Consequently, the Application dated 21/09/2017 by the 3rd Respondent is hereby allowed in its entirety. The effect is the following:

a. The Petition herein is hereby struck out;

b. The Respondents are awarded the costs of this Application and the Petition;

c. A certificate of this determination in accordance with Section 86 of the Elections Act shall issue to the Independent Boundaries and Electoral Commission and the Speaker of the National Assembly.

19. Orders accordingly.

Dated and Delivered at Kiambu this 18th day of October, 2017.

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JOEL NGUGI

JUDGE