



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELECTION PETITION NO. 7 OF 2017

**IN THE MATTER OF: THE CHALLENGE OF THE VALIDITY OF THE MANDERA NORTH
CONSTITUENCY ELECTION, 2017**

AND

**IN THE MATTER OF: ARTICLE 1 (1); 2(2); 3(1); 4(2); 10; 21(1); 22(1); 23; 38(3)(C); 47(2); 48;
81(A); & (E); 82(2)(B); 84; 86; 87(2) & (3); 88(5); 165(3)(A) AND (E); 94; 95; 97;99 & 101 OF THE
CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF: SECTIONS 75, 76, 80 AND 82 OF THE ELECTIONS ACT NO. 24 OF
2011**

AND

IN THE MATTER OF: THE POLITICAL PARTIES ACT NO. 11 OF 2011

AND

**IN THE MATTER OF: LEGAL NOTICE NO. 128 OF 2012, THE ELECTIONS (GENERAL)
REGULATIONS, 2012**

AND

**IN THE MATTER OF: THE ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS)
PETITIONER RULES, 2017**

AND

**IN THE MATTER OF LEGAL NOTICE NO. 126 OF 2012 (THE ELECTIONS REGISTRATION
OF VOTERS) REGULATIONS, 2012**

AND

MOHAMMED IBRAHIM ABDIPETITIONER/APPLICANT

VERSUS

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION (IEBC).....1ST RESPONDENT
THE MANDERA NORTH CONSTITUENCY RETURNING
OFFICER (ABDIBASHIR ALINOOR ALI).....2ND RESPONDENT
BASHIR SHEIKH ABDULLAH3RD RESPONDENT

AND

HUSSEIN ABSHIRO HERIN.....1ST INTENDED PETITIONER
ISMAIL MOHAMUD IBRAHIM.....2ND INTENDED PETITIONER
ISSACK SHEIKH AHMED.....3RD INTENDED PETITIONER
ABDI ADAN.....4TH INTENDED PETITIONER
NOOR HASSAN EDO.....5TH INTENDED PETITIONER
ADAN MTHOBE BOSHE.....6TH INTENDED PETITIONER
HASSAN IBRAHIM ALIOW.....7TH INTENDED PETITIONER
HASSAN ISSACK MAALIM.....8TH INTENDED PETITIONER
MOHAMED ALIOW MOHAMED.....9TH INTENDED PETITIONER
MOHAMEDNOOR OSMAN MOHAMUD..10TH INTENDED PETITIONER
ADOW MOLU KIKE.....11TH INTENDED PETITIONER
ABID IBRAHIM MOHAMED.....12TH INTENDED PETITIONER
IBRAHIM MOHAED NUNOW.....13TH INTENDED PETITIONER
SULEIMAN MOHAMED FILA.....14TH INTENDED PETITIONER
BASHIR ADAN ISSACK.....15TH INTENDED PETITIONER
MOHAMUD IBRAHIM ALIOW.....16TH INTENDED PETITIONER
HUSSEIN BILLOW ABDI.....17TH INTENDED PETITIONER
HASSAN ALI BALAYA.....18TH INTENDED PETITIONER
KALLA ISSAK ALIOW.....19TH INTENDED PETITIONER
ALI ABDI ADAN.....20TH INTENDED PETITIONER
ISSACK ABDIRAHMAN.....21ST INTENDED PETITIONER

MOHAMED ABDOW ALI.....22ND INTENDED PETITIONER

HASSAN IBRAHIM ALI.....23RD INTENDED PETITIONER

RULING

1. **Mohamed Ibrahim Adbi** “the petitioner” herein was one of the candidates for the post of National Assembly for Mandera North in the 8th August, 2017 general elections, in which the 3rd respondent (Hon. Bashir Sheikh Abdullah) was declared the winner.

2. Being aggrieved with the results, the petitioner filed this petition on 5th September, 2017. He sought to nullify the same on grounds stated in the said petition.

3. Responses to the petition were filed and finally a pre-trial conference was held on 5th October, 2017. All the parties agreed that hearing of the petition would be on 6th, 7th, 8th and 10th November, 2017.

4. The matter could not proceed on 6th November, 2017 for two reasons;

(i) Prof. Ojienda for the petitioner was conducting EP No. 1 of 2017 before Justice Ochieng.

(ii) The petitioner and his witnesses were in Mandera after testifying in EP No. 1 of 2017.

By consent of the parties, it was directed that Prof. Ojienda be given a chance to finalize his matter before Justice Ochieng. Secondly, that the hearing commences on 7th November, 2017.

5. On 7th November, 2017 the hearing did not take off as agreed. To everyone’s surprise, there were three applications dated 7th November, 2017 which had been filed by the petitioner’s counsel, namely;

(i) An application seeking withdrawal of the petition by the petitioner;

(ii) An application seeking substitution by four (4) applicants;

(iii) An application seeking substitution by eleven (11) applicants;

6. Directions were given by this court on what needed to be done by which party and the time frames. Nothing could get going before the petitioner published his intended withdrawal. This was only done on 17th November, 2017 which was well outside the timelines given by the court. The 1st and 2nd respondents filed grounds of opposition while the 3rd respondent filed a replying affidavit opposing the applications.

7. On 27th November, 2017 when the applications for withdrawal and substitution came for hearing, the number of applicants for substitution had been raised from fifteen (15) to twenty three (23). This was through yet another application filed on 24th November, 2017 and served on counsel for the 3rd respondent on the same day at 4 pm. In spite of all these happening, counsel for the respondents were ready and willing to proceed since the substance of the applications remained the same.

8. **Mr. Hassan** for the petitioner and intended petitioners submitted that in their application dated 24th November, 2017 they sought the following orders;

(i) The petitioner’s names be substituted with the names of the intended petitioners;

(ii) That the security of costs deposited by the petitioner to remain as the deposit by the intended petitioners;

(iii) The intended petitioners be allowed to file further affidavits to support the petition; and

(iv) Costs to be provided for.

9. He asked the court to regard the non-compliance by the petitioner and intended petitioners as technicalities under Section 8 (1) (d) Election Act Rule 4 and 5 of the Election Petition Rules and Article 159 (2) of the Constitution. He referred to the case of ***Ezekiel Okanda Onchieku –vs- Independent Electoral & Boundaries Commission & 2 Others 2013 eKLR*** which dealt with the issues similar to what was before this court.

10. It was his submission that all the intended petitioners have locus to take over this matter as petitioners, since they are residents and voters in Mandera North Constituency. He added that they participated in the election of 8th August, 2017 in respect of Mandera North Constituency. On this, he referred to the case of ***David Ole Nkedianye & 2 Others –vs- Joseph Ole Lenku & 4 Others EP No. 2 of 2017 [2017]eKLR.***

11. He submitted that an election petition is a public interest litigation which cannot be terminated by the petitioner without informing the people of Mandera North Constituency. He cited the cases of;

(i) Kamunyu & Others –vs- AG & Others [2007] 1 EA 116

(ii) Abdi Osman Mohammed & Another –vs- Independent Electoral Boundaries Commission & 2 Others Civil Appeal No. 293 of 2013 (2014) eKLR

(iii) Joho –vs- Nyange & Another (2008) 3 KLR (EP) 500

He also relied on Articles 22 and 38 of the Constitution.

12. On security of costs, he argued that under Rule 24 of the Election Petition Rules, this court has power to grant their prayer. That the affidavits in support show that the petitioner did not contribute to the money deposited in court. He relied on the case of ***Ezekiel Okondo Onchieku*** (supra) in support.

13. ***Mr. Odhiambo*** for the 1st and 2nd respondents submitted that the applications filed on 7th November, 2017 were irregular as there was no compliance with the Rules. It was his argument that the said applications should be dismissed for being an abuse of the due process.

14. ***Mr. Havi*** for the 3rd respondent opposed all the applications and prayed for their dismissal. He submitted that the applications were an abuse of the process of the court because of the contradictory positions taken in the said applications. He pointed out some of these contradictions in the affidavits as follows;

(i) That the parties had been prevailed upon by the electorate not to proceed (petitioner's affidavit).

(ii) The petitioner also talks of having consulted widely.

(iii) Mr. Hussein Abshiro Herin's affidavit (paragraph 12 – 13) talks of forces intimidating the petitioner. At the same time, he says the petitioner had gone into hiding. He wondered how a threatened person could be, conniving and conspiring with his opponent.

15. Mr. Havi further submitted that paragraphs 22 and 23 of Mr. Herin's affidavit clearly brought out two clear words (i) Consultation and Financiers. It was his view that all this were influenced by Election Petition No. 1 of 2017. That counsel had indicated that the security of costs was paid by Financiers and not the petitioner. This meant that this litigation was by proxy, he said.

16. He further submitted that this case could be distinguished from the ***Ole Lenku*** one (supra) since the

intended petitioners therein instructed a different firm of advocates to represent them. The court in the said case did not allow the petitioners to benefit from the deposited security.

17. Mr. Havi pointed out that the application for withdrawal was not argued by counsel, who only argued the application for substitution. Counsel cited the case of **Anwar Mahendra Pandya –vs- Business Forms & Systems Ltd. & 3 Others Civil Appeal No. 65 of 2014** which relates to the issue of substitution. He in particular referred to the following words at page 15 of the said judgment;

“The Court should not allow a party to misuse the right of substitution of parties or amendment of pleadings to oppress other parties or to perpetuate law suits that lack bona fides.”

18. It was his final submission that the intended petitioners could under Section 76 (5) of the Elections Act file a supplementary petition. That the 3rd respondent’s wish was to proceed with the petition the way it is. He prayed for costs which should be paid now and not to await the petition.

19. In a rejoinder, Prof. Ojienda for the petitioner submitted that his firm’s contract with the petitioner ceased the moment he decided to withdraw the petition. That the petitioner could not be forced to proceed with the case. He asked the court to release the petitioner and allow the intended petitioners to proceed with the petition.

20. I have considered the applications, affidavits, submissions and authorities cited. I find the following to be the issues falling for determination;

(i) Whether the petitioner has met the threshold for withdrawal of the election petition filed on 5th September 2017.

(ii) Whether the intended petitioners have met the threshold for substitution as petitioners in place of the petitioner.

(iii) Who will bear the costs of these applications.

Issue No. (i) Whether the petitioner has met the threshold for withdrawal of the election petition filed on 5th September 2017.

21. It is true that in his submissions, Mr. Hassan did not argue the application for withdrawal of the petition by the petitioner. It is however, correct to state that the two applications are intertwined. There can be no substitution without a withdrawal. It is on the basis of the application for withdrawal that the application for substitution was filed. The application for withdrawal is on record and this court must deal with it before considering the one for substitution.

22. Withdrawal of an election petition is provided for under Rule 21 of the Election Petition Rules. Rules 21 provides thus;

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

(2) The election court may grant leave to withdraw a 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 authorised 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."

23. From the above provision, it follows that withdrawal of an election petition is not automatic, as the election court must grant leave. The leave will only be granted upon the petitioner meeting what is set out in Rule 21 of the Election Petition Rules.

24. The application for withdrawal herein is supported by the grounds on the face of the application and the petitioner's affidavit. In the grounds cited, he indicates that he has consulted the electorate and come to the conclusion that he withdraws the petition. His affidavit confirms the said position. He avers at paragraph 6 of his affidavit that there has been no agreement or terms reached in relation to the withdrawal. He requested that each party bears its own costs.

25. The intended petitioners have in their affidavits in support of their application for substitution accused the petitioner of conspiring with the respondents to defeat the cause of justice for the people of Mandera North Constituency. That the withdrawal was amidst threats by the very people he is said to have conspired with. It is on the basis of this contradiction that the respondents opposed his application for withdrawal. Besides the said averments, the intended petitioners have not placed before this court any evidence to confirm their allegations against the petitioner and respondents.

26. It is the petitioner who filed this election petition and he has decided that his is no longer keen on pursuing it. The issue is whether he has complied with the provisions of Rule 21 of the Elections Petition Rules. My finding is that the petitioner has met the requirements for withdrawal of an election petition.

Issue No. (ii) Whether the intended petitioners have met the threshold for substitution as petitioners in place of the petitioner.

27. There are two applications for substitution dated 7th November, 2017 which were prematurely filed by fifteen intended petitioners. The said applications were filed before the publication of the Notice for withdrawal, which was only done on 17th November, 2017. I therefore strike out the two said applications.

28. I will now deal with the application dated 24th November, 2017.

It is not disputed that an election petition is not a personal dispute. It touches on the interests of many who may not necessarily be parties to the dispute. ***Justice Maraga*** (as he then was) in the case of ***Joho – vs- Nyange & Another (2008) 3 KLR*** held as follows;

“Election Petitions are not ordinary suits. Though they are suits in rem, brought between certain parties, election petitions are nevertheless disputes of great public importance.”

29. The court in the case of ***Abdi Khaim Osman Mohammed & Another –vs- Independent Electoral & Boundaries Commission and 2 Others, Civil Appeal NO. 293 of 2013 (2014) eKLR*** held thus;

“The learned Judge further got the legal basis right when he stated that electoral disputes involve not only the parties to a petition, but also the electorate in the concern electoral area and that they are therefore matters of great public importance and interest.”

30. This position has not changed. All that the intended petitioners must show is that they have locus. This was also considered in the case of ***David K. Ole Nkedianye & Others (supra)***.

In the present application, the intended petitioners save for five have filed affidavits that are a mix up of paragraphs and related pages. Those with proper affidavits are

- Hassan Ali Balaya
- Kalla Isaak Aliow
- Isaak Abdirahiman
- Ali Abdi Adan
- Mohamed Abdow Ali

31. Despite the mix up in the affidavits which must have occurred at their counsel’s office, the applicants have managed to show that they are residents and voters in Mandera North Constituency. In their application is indicated their ID numbers, polling stations and wards. This has not been rebutted by the 1st respondent. It is the duty of an election court to ensure that the withdrawal of an election petition by a petitioner does not terminate it when there is a qualified substitute.

32. Rule 24 (1) of the Election Petition Rules provides;

“At the hearing of the application for 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 court to be substituted as the petitioner in place of the petitioner who has applied to withdraw the petition.”

Rule 24 (2)

“The election court may grant the application and substitute the applicant under sub rule (1) as the petitioner.”

33. The operative word here is ***“may”***. The grant of leave is therefore not automatic. This court has considered all the circumstances of the case and finds that all the applicants qualify as petitioners in this case.

34. The applicants have requested for leave to file affidavits in support of the petition. On perusal of the petition herein, I have curiously noted that **16** out of the **23** intended petitioners had filed affidavits as intended witnesses. These are;

- Ismail Mohamud Ibrahim.....2nd Intended Petitioner
- Abdi Adan.....4th Intended Petitioner
- Adan Mthobe Boshe.....6th Intended Petitioner
- Hassan Ibrahim Aliow.....7th Intended Petitioner
- Hassan Issack Maalim.....8th Intended Petitioner
- Mohamed Aliow Mohamed.....9th Intended Petitioner
- Adow Molu Kike.....11th Intended Petitioner

Abid Ibrahim Mohamed.....12th Intended Petitioner
Suleiman Mohamed Fila.....1^{4th} Intended Petitioner
Bashir Adan Issack.....1^{5th} Intended Petitioner
Mohamud Ibrahim Aliow.....16th Intended Petitioner
Kalla Issak Aliow.....19th Intended Petitioner
Ali Abdi Adan.....20th Intended Petitioner
Issack Abdirahman.....21st Intended Petitioner
Mohamed Abdow Ali.....22nd Intended Petitioner
Hassan Ibrahim Ali.....23rd Intended Petitioner

There would be no need for these **16** applicants to file any affidavits as their case is clear from the said affidavits, which will be adopted as their evidence.

35. Rule 24 (3) of the Election Petition Rules provides;

(3) The election court may direct that the security deposited on behalf of the original petitioner shall remain as security for any costs that may be incurred by the substituted petitioner, and that to the extent of the sum deposited as security, the original petitioner may be liable to pay the costs of the substituted petitioner.

Rule 24 (4) of the same Rules provides;

(4) If the election court does not make an order under sub-rule (3), security of the same amount as would be required of a new petitioner and subject to the same conditions imposed on the original petitioner, the substituted petitioner shall pay, within three days after the order of substitution, the security before proceeding with the petition

36. The person who deposited the security for costs herein is the original petitioner. There is no evidence that he conspired with anyone to withdraw the petition. Nothing has been placed before this court to show that he has foregone the security for costs deposited herein in favour of the intended petitioners. The application seeking leave to withdraw the election petition was filed by the same firm of advocates appearing for the intended petitioners. Had there been any such arrangement or agreement on the issue of security for costs, the petitioner could have been properly guided. There is no proof that the said security deposited was not money belonging to the depositor.

37. I also find as a fact, that as at the time this application for withdrawal came up, the respondents had already filed responses, pre-trial conference held and the matter was actually coming for full hearing on that day (7th November, 2017). Having made all consideration in terms of Rule 24 of the Election Petition Rules, I find the applicants' request in respect of the security of costs deposit to be unmerited and I disallow it.

I am persuaded by the cases of ***(i) Ngui & 2 Others –vs- Kithonga & Another [2008] 1 KLR (EP) (ii) David K. Ole Nkedianye & 2 Others (supra)*** in reaching this decision.

38. The upshot is that the two applications for withdrawal and substitution are merited and are allowed with the following orders;

- (a) Leave is hereby granted to the petitioner to cease acting as a petitioner herein forthwith.
- (b) The twenty three (23) applicants in the application dated 24th November, 2017 are hereby substituted as petitioners in place of Mohamed Ibrahim Abdi (petitioner) forthwith.
- (c) The substituted petitioners shall deposit security for costs in the sum of Kshs.500,000/= within three days from the date of delivery of this ruling.
- (d) The security deposited by the original petitioner will be used to defray the respondents' costs so far incurred as follows;

- (i) 1st and 2nd respondents to be paid Kshs.250,000/= ie Kshs.125,000/= each
- (ii) 3rd respondent to be paid Kshs.250,000/=

(e) The following substituted petitioners namely;

- Hussein Abshiro Herin.....1st Intended Petitioner
- Issack Sheikh Ahmed.....3rd Intended Petitioner
- Noor Hassan Edo.....5th Intended Petitioner
- Mohamednoor Osman Mohamud.....10th Intended Petitioner
- Ibrahim Mohamed Nunow.....13th Intended Petitioner
- Hussein Billow Abdi.....17th Intended Petitioner
- Hassan Ali Balaya.....18th Intended Petitioner

Are hereby granted two days from the date of today's ruling to file and serve their affidavits in support of the petition. The clear condition is that there **shall** be no introduction of new issues that will change the character of the petition.

- (f) Corresponding leave is granted to the respondents to file and serve their response thereto if need be within two days from the date of service of the said affidavits.
- (g) Mention on 7th December, 2017 at 9 am to confirm compliance and fixing of hearing dates for the petition.
- (h) Each party to bear his/its own costs for this application.

Orders accordingly.

Delivered, signed and dated, this 30th day of November, 2017 in open court at Nairobi.

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HEDWIG I. ONG'UDI
HIGH COURT JUDGE