



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**ELECTION PETITION NO 6 OF 2017**  
**IN THE MATTER OF PARLIAMENTARY ELECTION FOR TARBAJ CONSTITUENCY**  
**(WAJIR COUNTY)**

**BETWEEN**

**IDRIS ABDI ABDULLAHI.....PETITIONER**

**VERSUS**

**AHMED BASHANE.....1ST RESPONDENT**

**INDEPENDENT ELECTORAL &**

**BOUNDARIES COMMISSION (IEBC).....2ND RESPONDENT**

**RETURNING OFFICER TARBAJ CONSTITUENCY.....3RD RESPONDENT**

**RULING (2)**

The petitioner Idris Abdi Abdullahi, was one of the candidates who contested the Tarbaj Parliamentary seat on 8th August, 2017 General Elections. He filed petition on 5th September 2017 challenging election of the 1st Respondent Ahmed Bashane as Member of Parliament for Tarbaj Constituency, on grounds of irregularities and improprieties that marred the election that it was contrary to **Article 81 of the Constitution**. The Petitioner challenged the tallying of votes and validity of votes in the just concluded election.

The Petition was filed within the requisite and prescribed period of 28 days from the date of announcement of the general election on 10th August 2017 as prescribed by **Article 87(2) COK 2010** as read with **Section 78 of the Election Act, No 24 of 2011**.

As pleadings closed and the Court proceeded with Pre Conferencing, the 1st Respondent filed application on 10th November, 2017. On 13th November 2017, the date scheduled for Pre Conference proceedings the 1st Respondent through Counsel served the Petitioner. The Court granted application to file Replying affidavit within 7 days as it was stated payment was made in Garissa High Court and the party required to obtain the relevant documents. The Petitioner filed the Replying Affidavit on 20th November 2017 and the 1st Respondent sought to file a Supplementary Affidavit on 23rd November 2017 where he annexed the 2 copies of receipts of payment which they challenged.

**1ST RESPONDENT'S APPLICATION;**

The Notice of Motion filed on 10th November 2017 and sought that there be no further proceedings on

this Petition pursuant to **Section 78(3) of the Elections Act** and the Court dismisses the Petition dated 4th September 2017 filed on 5th September 2017 for want of compliance with mandatory requirements of **Section 78(1) of the Elections Act** with costs to the 1st Respondent on an advocate/client basis. The Court to grant any further orders as may seem appropriate.

The 1st Respondent's supporting affidavit, he deponed that upon advice of his advocate, he made enquiries at Garissa High Court where the Petition was filed and they were informed that there was no record of the Petitioner having deposited the mandatory security for costs and he was advised to check the Court file.

On 9th November 2017, his advocates wrote to Deputy Registrar Family Division; the copy of the letter is annexed to the affidavit and marked **ABG-001** requesting to peruse the Court file and ascertain if the Petitioner had paid the mandatory deposit. His advocate perused the Court file and confirmed that as at 10th November 2017, more than 55 days past the statutory period, the Petitioner had not deposited the mandatory security for costs and in the circumstances and as prescribed and envisaged under the mandatory provisions of **Section 78 (3) of the Elections Act**.

#### **PETITIONER'S REPLYING AFFIDAVIT:**

The Petitioner filed Replying affidavit on 20th November 2017 and deposed as follows; that he was informed by his advocate that Ms Tessy Elaine Marienga Advocate of High Court of Kenya attended the Garissa High Court Registry and the petition was assessed by Mr. Stephen Theuri, a clerk at the High Court Registry.

The said Advocate was issued with Judiciary Deposit Bank Account details for purposes of payment of security deposit and Court filing fees as follows;

**a) Kenya Commercial Bank Judiciary Deposit Bank Account- Account Number 1184367264**

**b) Kenya Commercial Bank Judiciary Revenue Current Bank Account -Account Number 1184366721**

The cash deposit slip annexed and marked **1AA-1**

Ms Tessy Elaine Marienga Advocate deposited Ksh 500,000/-as security deposit in the Judiciary Deposit Account and Ksh 30,949/- the requisite filing fees in Judiciary Current Account and annexed and marked **1AA-2** copies of banking slips duly received and stamped by KCB bank.

Ms Tessy Elaine Marienga Advocate presented the deposit slip to Cash Office at the High Court Registry Garissa and was issued an official receipt as acknowledgement of the Court payment a copy annexed and marked **IAA-3**

Ms Tessy Elaine Marienga Advocate presented copy of the KCB deposit slip for Ksh 500,000/- to Cash Office Garissa High Court and she was requested to present her Identity Card 27678911 and thereafter she was issued with a Court receipt in due acknowledgement of the paid security deposit. The copy of the original court payment receipt is annexed to the affidavit and marked **1AA-4**.

Therefore the Petitioner duly complied with **Section 78(3) of the Elections Act 2011**.

#### **1<sup>ST</sup> RESPONDENT FURTHER AFFIDAVIT**

The 1st Respondent filed a Further Affidavit on 23rd November 2017 and alluded to the following;

**a) On 10th November 2017 when his advocates on record perused the Court file at the Family Division Registry at the High Court Milimani, there was no duplicate of the deposit receipt in the said Court file as required by the mandatory provisions of Rule 13(3) (b) of the Elections**

**Petitions (Parliamentary & County Elections) Rules, 2017 and accordingly the filing of the application of 10th November 2017 was justified.**

**b) The Petitioner has now provided documents allegedly proving that he deposited the sum of Ksh 500,000/= but these documents do not form part of Court record and there is need for confirmation from Deputy Registrar Garissa and Principal Accountant of Judiciary at Garissa High Court to verify documents now produced to confirm payment.**

**c) When the advocates on record perused the Court file on 13th November 2017 they very conveniently discovered a duplicate of the said deposit receipt in the Court file, a copy of which was availed to the parties, despite the fact that the receipt was not available when the Court file was perused on 10th November 2017.**

**d) It is evident that the duplicate receipt that advocates for 2nd Respondent allegedly found in the Court file as compared to the duplicate receipt attached to the Petitioner's replying Affidavit filed on 20th November 2017 are not consistent despite the fact that they bear the same number. Firstly, the 2 receipts bear different signatures of the Receiving Officer. Secondly, in the duplicate receipt attached to the Petitioner's Replying affidavit filed on 20th November 2017 and marked 1AA-4 the word "Criminal" is crossed out while in the other receipt it is not crossed out at all.**

**e) A comparison between duplicate receipt produced in the Petitioner's Replying Affidavit filed on 20th November 2017 and marked IAA-4 and a receipt issued by the same Garissa High Court in a similar matter Election Petition 5 of 2017 herewith attached and marked AB-3 indicates the Receiving Officer's signature is very different.**

**f) The Bank Slip produced in the Petitioner's affidavit filed on 20th November 2017 and marked IAA-4 bears the name M.M Gitonga Advocates, while the Deposit receipt issued pursuant to the Bank slip marked 1AA-4 bears the name of an individual Tessa Elaine Marienga.**

**g) The Bank Slip for deposit of security deposit attached to Petitioner's Replying affidavit and marked 1AA-2 does not bear the Case Number for this suit Petition 6 of 2017 unlike banking Slip for deposit of Court fees for filing petition which bears the Case number.**

## **COURT RECORD**

Apart from the above pleadings referred to in relation to the instant application, on 13th November 2017, the Petitioner upon being served with Notice of motion of 10th November 2017, sought from Court time to file Replying affidavit and serve.

On 15th November 2017, the date scheduled for further Pre- Conference Proceedings; Counsel for the 1st Respondent Applicant objected to further proceedings and sought that the Petitioner through Counsel confirm compliance with **Section 78 (3) of the Elections Act 2011**. The 1st Respondent's Counsel sought that the Petitioner produced the receipt for the same to be confirmed with the duplicate from the Court file as in their view the Court record did not confirm the same and the Court was to address the matter first before any further proceedings.

The 2nd and 3rd Respondents also objected to further proceedings until the issue of **Section 78 (3) of the Elections Act** was resolved. They sought that the petitioner was to produce the receipt and then the same would be compared with any in the Court file and if found to be proper then the application would be withdrawn and the matter would proceed for hearing.

The Petitioner through Counsel objected and stated that the same would be provided within 7 days of filing Replying Affidavit as the payment was made in Garissa High Court. Clearly, the Court record contained no copy of payment of security for costs in the Court file at the time otherwise; the matter

would have been resolved instantly in open court by reference to the said copy with the original receipt if produced by the Petitioner then.

### **DETERMINATION**

**The issue for consideration is whether the Petitioner paid security costs within the prescribed period as provided by section 78(3) of Elections Act 2011.**

Section 78 (1) of Elections Act 2011 provides;

*A petitioner shall deposit security for the payment of costs that may become payable by the Petitioner not more than 10 days after presentation of a petition under this Part..*

Section 78 (3) of Elections Act 2011 provides;

*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 payment of the Respondent's costs.*

Section 13 (1) of the Elections (Parliamentary and County Elections) Petition Rules, 2017 provides;

*Within 10 days of filing of a petition, a petitioner shall deposit security for payment of costs in compliance with Section 78 (2) (b) & (c) of the Act.*

Section 13 (2) of the Act provides;

*The security for costs deposited under Sub rule (1) shall;*

- a) be paid to the Registrar*
- b) be for 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.*

Section 13 (3) of the Act provides;

*The Registrar shall*

- a) issue a receipt for the deposit under this Rule;*
- b) shall file the duplicate of the receipt issued under paragraph (a) in a record kept by him or her;*
- c) keep a record of deposits in which shall be entered from time to time the amount of a deposit and the petition to which the deposit relates;*
- d) allow any person concerned with the petition to examine the record of deposits.*

On 15th November, 2017, this Court released the Court file to the Deputy Registrar for perusal by parties on the issue regarding payment for security costs. An original/duplicate receipt was placed in the Court file a copy of which is marked **IAA-4** and annexed to the Replying Affidavit by the Petitioner filed on 20th November 2017. No explanation was provided on the recent development. Ideally, the petitioner ought to have produced the original copy to be compared to the duplicate copy if filed in the Court file and not the other way round. All Court files have duplicate receipts and original receipts are issued to the

Payee/client/customer. In fact **Rule 13(3) (b) of the Elections Petitions (Parliamentary & County Elections) Rules, 2017**; requires copies to be filed in the Election Petition Court file and not the original receipt.

At this time Garane & Somane Advocates for 2nd and 3rd Respondents wrote to Deputy Registrar, Judicial Review Division of the High Court on 13th November 2017 enquiring over the same issue, Advocates Michael, Daud & Associates had also similarly written a letter on 9th November 2017 enquiring on the same issue whether the Petitioner deposited security costs and intimated that in the course of conducting due diligence, the High Court Garissa confirmed that no such payment was made to Registrar of Garissa High Court. The letters were referred to Deputy Registrar Family Division who on 13th November 2017 wrote to the Petitioner's Advocate Messrs M.M Gitonga Advocates to confirm the position to enable the Deputy Registrar respond appropriately to the 2 letters. The Petitioner did not respond and Deputy Registrar has not replied to the letters to date. If any receipt was in the Court file to confirm that security costs were paid nothing would have been easier than for the Deputy Registrar to respond and confirm the same in Reply to the Respondents. These circumstances confirm the 1st respondent's version that as at 10th November 2017, on perusal of the Court file through the advocate, no receipt was in the Court file at the time.

On 20th November 2017, this Court sought from the Petitioner Official receipt issued by Garissa High Court and Finance Director Judiciary to produce the statement of account of the relevant period September-October 2017 to confirm payment of security costs. The petitioner did not produce the same except for what is contained in the Replying affidavit.

From the Accounts department -Judiciary, this Court was furnished with statement of Account of Judiciary Deposit Account Kenya Commercial Bank Judiciary Deposit Bank Account- Account Number 1184367264. (It is indicated above Current Account Number 1184367264 and not Deposit Account) for the period 1st September 2017-3rd October 2017 and shows that M.M Gitonga Advocates Deposited Ksh 500,000/= cash deposit on 5th September 2017.

Upon perusal of the application, affidavits and correspondence on behalf of the Respondents and on behalf of the Petitioner in his Replying Affidavit, this Court formed the view that certain issues have been raised that require clarification from Garissa High Court Registry where the petition was lodged before final determination of the application of 10th November 2017.

In the circumstances, it would be imperative that the Deputy Registrar/Executive Officer Garissa High Court and the Accountant to depone in affidavits as to the circumstances under which the statutory payments were made and the receipts thereof issued.

**DISPOSITION**

**The Deputy Registrar /Executive Officer Garissa High Court shall avail to this Court the original Receipt Book where the instant receipt for security costs was extracted and produce the same to this Court on Monday 4th December 2017.**

**DELIVERED SIGNED & DATED IN OPEN COURT IN NAIROBI ON 29TH NOVEMBER, 2017.**

**M.W.MUIGAI**

**JUDGE**

**IN THE PRESENCE OF;**

.....

.....

.....

.....