



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
ELECTION PETITION NO. 3 OF 2017

JOEL MAKORI ONSANDO & 2 OTHERS.....PETITIONERS

VERSUS

I.E.B.C. & 4 OTHERS.....RESPONDENTS

RULING

1. This matter for clarity is one Election Petition No.3 – following an order by the court that the same be consolidated with Election Petition No.7 and No.3 of 2017. The 3rd Petitioner **JUSTRY P. LUMUMBA NYABERI** who is the 3rd Petitioner in this matter had indicated a desire to withdraw and had filed a notice to that effect. When the matter came up for hearing on 22/11/17 both **MR. SONYE** and the 3rd petitioner were present in court and were ready to proceed with the application for withdrawal. Infact the 3rd petitioner even sought to personally address the court in his capacity as an officer of the Court on the matter of withdrawal but the court declined to give him audience as he had an advocate.
2. The court declined to proceed with hearing the application because certain pertinent procedural steps had not been met, namely that the Registrar had not issued a notice to all parties for hearing of the application in Form 7 set out in the First schedule. The notice is required to set out the time and place for hearing of the application for withdrawal.
3. The reason is simple – unlike the past where a petitioner in an election petition could withdraw a petition and that would mark the death of an election petition – the Election (P&C Elections) Petition Rules set a new approach on the basis that Elections are of public interest in nature, and the mere withdrawal by a petitioner should not mark the end of the election litigation.
4. That is why **Rule 23** required a notice to be sent out to all parties; so that it is not a closed door event and all the parties involved in the matter must be aware, including anyone wishing to join as a substitute to the retreating petitioner.
5. Unfortunately, there seems to have been a lapse on the part of the Deputy Registrar ... I see a notice in the court file signed by the Deputy Registrar regarding hearing of the application but I can't confirm that it was served. Unfortunately she is not within the station this week. Technically it would mean that the order of the court has not been complied with. Yet I pause to ask – are the rules supposed to be handmaidens of justice or tyrannical mistresses, insisting on procedure even when no prejudice is occasioned. As matters stand **ALL** the parties, including persons who are eager to take over the 3rd Petitioner's place should he be desirous of withdrawing the petition are present with their counsel to boot!!
6. I am persuaded and I hold that no prejudice would be occasioned by that lapse on the part of the

Deputy Registrar; it would have been different if some of the parties were claiming they were not aware of the date and place of hearing the application – in this instance everyone was aware of date, time and place.

7. Secondly there is now a fresh development. There is a change of mind on the 3rd petitioner's part and he is now ready to proceed with the hearing of the petition – none of the respondents seem to have a major concern with that position and they are willing to go on with hearing of the 3rd petitioner's case.

8. However **MR. OMBATI** for 1st and 2nd petitioner holds a different view saying the application for withdrawal ought to proceed and there are parties who have travelled to Kisii for purposes of substituting the 3rd petitioner.

9. He has urged this court to be guided by the decision in **Election Petition No.9 of 2017 – OMBATI RICHARD –VS- IEBC and 2 others** emphasizing on paragraph 28 and 29 of that decision and saying similar issues arose thereto. These paragraphs stated:-

“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 3rd 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 3rd October, 2017, which is a newspaper of national circulation.

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 26th September 2017 from the court record. I am accordingly satisfied that the petitioner has complied with the procedure for withdrawal of an election petition.”

10. Actually in that matter the Petitioner having filed a notice to withdraw the petition, suddenly disowned everything saying the application for withdrawal was made by an imposter. In this case the 3rd petitioner is not disowning the application – he has simply undergone a change of heart, so he now wishes to pursue the petition and is ready to give his evidence.

11. Whereas the proposed Petitioners may feel short-changed in their pursuit to join this petition, no prejudice is caused – they had not filed the petition in the first place, they would not have introduced new evidence as the Rules contemplate that they step right into the shoes of the petitioner who seeks to withdraw and to ensure the petition remains alive in its actual original form. They cannot introduce new witnesses – they inherit the petition with its benefits and liabilities.

12. There can be no better demonstration of the change of mind other than what the 3rd petitioner's counsel has said **“we are here and ready to proceed.”** To require that 3rd petitioner files an affidavit confirming his change of heart will be an amorphous exercise.

13. Under the circumstances the application for withdrawal be and is marked as abandoned and the 3rd petitioner's case shall proceed.

14. Since the 1st and 2nd Respondents had given evidence on Monday – the 3rd petitioner's counsel shall be allowed time to peruse the proceedings and the two persons who testified shall be recalled for cross

examination by 3rd Petitioner's counsel at an appropriate time. For now we proceed with 3rd petitioner's case.

Delivered and signed on the 29th day of November, 2017 at Kisii.

H.A. OMONDI

JUDGE

29.11.2017