



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELECTION PETITION NO. 3 OF 2017

IN THE MATTER OF THE GUBERNATORIAL ELECTIONS FOR WAJIR COUNTY

BETWEEN

ADOW MOHAMED ABAKAR.....PETITIONER

AND

HON. MOHAMED ABDI MOHAMED.....1ST RESPONDENT

GICHOHI GATUMA PATRICK.....2ND RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....3RD RESPONDENT

RULING

1. After the 8th August, 2017 general elections, Hon. Mohamed Abdi Mohamed was returned as the winner of the gubernatorial seat for the County of Wajir. Pursuant thereto, Adow Mohamed Abakar, hereinafter “the Petitioner” filed this Petition at Garissa challenging the said election. Pursuant thereto, this petition was transferred to Nairobi and it was on 2nd October, 2017 consolidated with **Election Petition No. 14 of 2017, Ahmed Abdullahi Mohamad & Anor vs. Hon. Mohamed Abdi Mohamed and 2 Others.**

2. On 16th October, 2017, the petitioner changed his Advocates and lodged in this court an application for leave to withdraw the petition. That application prompted the court to de-consolidate this petition and **Election Petition No. 14 of 2017** aforesaid on the same day. This ruling is in respect of that application.

3. The application is expressed to be brought under ***section 1A, 1B, 3, 3A, and 63e of the Civil Procedure Act and Regulation 21 of the Elections (Parliamentary & County) Petition Rules, 2017 (“Election Petition Rules”)***. The grounds upon which the application was grounded upon were set out in the body of the Motion and the supporting affidavit of the petitioner sworn on 16th October, 2017. These are that; the petitioner had considered the responses of the respondents and was satisfied that they had effectively answered the issues raised in the petition; that having examined the statutory forms for the impugned election, he was satisfied that the election had been conducted in a free and fair manner; that after having conducted a retally of the election results, the petitioner was satisfied with results as returned.

4. The petitioner further contended that the application had been brought in a timely manner; that he had sought and obtained legal advice and had concluded that it was advisable to withdraw the petition to

enable the people of Wajir move away from electioneering mood and concentrate with development. He concluded that no one would suffer prejudice if he were allowed to withdraw the petition and urged that each party do bear own costs.

5. The application was duly served upon all the parties to these proceedings but none filed any documents in opposition thereto. The application was advertised twice in two different newspapers with national circulation, the Star of 24th October, 2017 and the Standard Newspaper of 6th November, 2017, respectively. The Deputy Registrar of this court also issued the requisite notice under **Rule 23 of the Election Petition Rules. Rule 21 of the Election Petition Rules provides:-**

“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 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 ground 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. ...”.

6. From the foregoing, I am satisfied that all the requisite steps for the application have been adhered to. When the matter came up for hearing, the 2nd and 3rd Respondent appeared and did not oppose the same. Ms. Musyoka, Learned Counsel for the 2nd and 3rd respondent only urged that costs be ordered in favour of her clients. The 1st Respondent did not appear.

7. I have on my part considered the grounds upon which the application is brought. I have also examined the grounds upon which the petition was lodged together with the responses of the respondents. I am satisfied that there are good grounds to grant the orders sought. This is so considering that, the petitioner who felt aggrieved with the returns of the impugned election and raised various issues in his petition, has now sworn on oath that he is satisfied with the responses he received from the respondents.

8. This court also notes that none of the grounds advanced for the withdrawal of the Petition is against public interest. Further, even after the application to withdraw was widely advertised, no one has come forward either to oppose or to take over the petition in terms of **Rule 24 of the Election Petition Rules**. This court is satisfied that the application has merit and it is hereby allowed with costs.

9. What remains is the issue of costs. **Rule 30 (1) of the Election Petition Rules** provides that:-

“30. 1. The election court may, at the conclusion of a petition, costs make an order specifying:-

(a) the total amount of costs payable;

(b) the maximum amount of costs payable;

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

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

10. From the foregoing, this court has the discretion to cap costs of a petition. This is so considering that it is the Election Court which has the advantage and benefit of conducting the trial and therefore is in a good position to gauge the weight to be given to the matter in question. It is on this basis that Ms. Musyoka and Mr. Wanjohi submitted before me on the issue of costs. Ms. Musyoka submitted that since the 2nd and 3rd respondent had already filed their responses, an award of Kshs. 500,000/- should be made in favour of her clients. On his part, Mr. Wanjohi submitted that since the petition has been withdrawn at the earliest opportunity, an award of Kshs.300,000/- would be sufficient.

11. In this court's view, the discretion given under **Rule 30** does not make the court a taxing court. The issue of taxation is left to the taxing officer of this court. All that this court has to do is to set the ceiling for which costs can be awarded. In this regard, I have considered the matters raised in the petition and the responses filed by the respondents. I have also considered that this matter came up only once before court and that the petition has been withdrawn at the earliest. **Schedule VI of the Advocates Remuneration Order paragraph 1 (i)** provides the minimum instruction fee of Kshs.500,000/= for presenting or opposing an election petition.

12. Taking into consideration that the petition was challenging a gubernatorial election; that the 2nd and 3rd respondents had responded to the same substantively to the satisfaction of the petitioner leading to the withdrawal of the petition. Considering that the petition has been withdrawn at the earliest opportunity and the proposals made by the learned Counsels, I cap the costs of the Petition at KShs.600,000/=. The monies held as security may be applied to defray the costs ordered.

DATED and **DELIVERED** at Nairobi this 17th day of November, 2017.

MABEYA

JUDGE