



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
ELECTION PETITION NO. 21 OF 2017

IBRAHIM AHMEDPETITIONER

VERSUS

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

MARY NYAMBURA NDUNGU.....2NDRESPONDENT

YUSUF HASSAN ABDI.....3RDRESPONDENT

RULING

The Petitioner herein was one of the candidates for Member for National Assembly seat for the Kamukunji Constituency in the County of Nairobi. He contested the seat on the Wiper Democratic Movement Party ticket. He was unsuccessful. The 3rd Respondent contesting on a Jubilee Party ticket was declared the winner. The Petitioner was dissatisfied in the manner in which the election was conducted. He was of the view that the said election was not conducted in accordance with the law and therefore the election of the 3rd Respondent ought to be declared unconstitutional, null and void and should be nullified. He filed the petition before this court on 7th September 2017. The Petitioner did not deposit security for costs as provided under **Section 78** of the **Elections Act** which provides that:

“(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 act.

(2) A petitioner who presents a petition to challenge an election shall deposit –

(a) One million shillings, in case of a petition against a presidential candidate;

(b) Five hundred thousand shillings, in case of a petition against a member of Parliament or a county governor;

(c) One hundred thousand shillings, in 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 payments of the respondent's costs. “

Rule 13 of the Elections (Parliamentary and County Elections) Petition Rules, 2017 provides that:

“(1) Within ten days of the filing of the 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.”

During the Pre-trial Conference before this court on 2nd October 2017, the Petitioner did not bring to the attention of the court that he had not made the deposit for security for costs as required by the law. This court fixed the hearing of the petition for the 16th and 17th November 2017 subject to the parties complying with certain preliminaries issues which are not of concern in this Ruling. While preparing for the hearing of the petition, this court perused the pleadings filed by the parties. It was then that it came to the attention of the court that the Petitioner had not made the deposit for security for costs.

On 16th November 2017, the court brought to the attention of the Petitioner this failure to comply with the law. In the morning session, Mr. Abdihakim learned counsel for the Petitioner informed the court that he was not aware that the Petitioner had not made the required deposit for security for costs. He asked the court to adjourn the case to enable him seek instruction from the Petitioner. The court granted the adjournment to the afternoon. When the parties appeared before the court in the afternoon, Mr. Ogado appearing for the Petitioner told the court that while it was true that the Petitioner had not paid the deposit for security for costs within the ten (10) days period that is required by the law, nevertheless, he had deposited a cheque in the judiciary account on 19th September 2017. He submitted that the ten days period that the Petitioner was required to deposit security for costs expired on 17th September 2017 which fell on a Saturday hence the Petitioner's decision to deposit the sum on 19th September 2017, a Monday. The cheque was however unpaid on 20th September 2017 due to lack of funds in the Petitioner's bank account. Mr. Ogado submitted that due to the fact that the Petitioner had travelled out of the country, he was not aware that the cheque had been unpaid. He only became aware of the non-payment when he was informed by his advocate. He was willing to pay the amount with immediate effect if the court exercised discretion in his favour under **Rule 19 of the Election (Parliamentary and County Elections) Petition Rules, 2017** which provides that:

“(1) Where an act or omission is to be done within such time as may be prescribed in these Rules or ordered by an election court, the election court may, for the purpose of ensuring that injustice is not done to any party, extend or limit time within which the act or omission shall be done with such conditions as may be necessary even where the period prescribed or ordered by the Court may have expired.

(2) Sub-rule (1) shall not apply in relation to the period within which a petition is required to be filed, heard or determined.”

Mr. Ogado submitted that the court should lean towards determining the petition on its merit and not be shackled by procedural technicalities. In particular, he urged the court to invoke **Articles 39 and 159 of the Constitution**. He submitted that the Petitioner all along had the intention to make the deposit for security of costs and was keen to proceed with the hearing of the petition.

On their part, Mr. Nyamweya for the 1st and 2nd Respondents and Mr. Ngacha for the 3rd Respondent were of the view that failure by the Petitioner to make the deposit for security for costs within the stipulated statutory period rendered the petition incompetent and liable for dismissal. They urged the court not to be persuaded by the reasons given by the Petitioner for his failure to make the deposit as required by the law. They emphasized that it was the duty of the Petitioner to ensure that there were funds in his account when he issued the cheque for the said deposit for security for costs. The fact that there were no funds in his account clearly showed that the Petitioner had no intention or capacity of paying the said deposit for security for costs. They further pointed out that even if this court were to be persuaded that the Petitioner had the intention of paying the deposit, the Petitioner had not made the said payment in the manner envisaged by the law in that he had not paid the said sum to the Registrar and had not been issued with a receipt of the said sum. They reiterated that failure to make the deposit for costs was not an issue that could be excused by this court since it was a fundamental and mandatory requirement during the filing of an election petition. They urged the court to dismiss the petition with costs.

This court has carefully considered the arguments put forward by the parties to this application. Whereas the Petitioner is of the view that even at this stage of the proceedings this court can exercise its discretion and extend time for the Petitioner to make the deposit for the security for costs, the Respondents are of a contrary view. They have submitted that failure by the Petitioner to make the deposit for security for costs within the stipulated period of ten days after the filing of the petition renders the petition fatally defective and unsustainable. Several courts of concurrent jurisdiction have rendered conflicting opinions on this issue. In **Fatuma Zainabu Mohamed v Ghati Dennitah & 10 Others [2013] eKLR** and **Samuel Kazungu Kambi –vs- Nelly Ilongo & 2 Others [2017] eKLR**, the courts held that failure by the Petitioner to deposit security for costs within the stipulated statutory period was not fatal to the petition and therefore amenable to the court’s discretion to extend time to enable the Petitioner comply with the requirement for the deposit of security for costs. In **Evans Nyambaso Zedekiah & Another –vs- Independent Electoral and Boundaries Commission & 2 Others [2013] eKLR** the court (Sitati J) held thus:

“This issue was considered by Muriithi J in Kisii HC Election Petition No.6 of 2013 – Fatuma Zainabu Mohamed –vs- Ghati Dennitah & 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 exercised 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.”

Other courts have held that failure to deposit security for costs within the stipulated statutory period renders the petition fatally defective and therefore liable for striking out. These cases include: **Tom Onyango Agimba –vs – IEBC & 2 Others Nairobi HC Election Petition No.18 of 2017** (unreported), **Milton Kimani Waitinga –vs- IEBC & 2 Others Kiambu HC Election Petition No.2 of 2017** (unreported) and **Robert Mwangi Kariuki –vs- IEBC & 2 Others Nyeri HC Election Petition No.1 of 2017** (unreported). In **Milton Kimani Waitinga** (supra) Joel Ngugi J held thus:

“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 effort to get the leave of the court to deposit security for costs out of time.”

In the present petition, this court is of the opinion that the requirement for the deposit of security for costs is mandatory as provided under **Section 78(1)** of the **Elections Act. Section 78** of the **Act** does not give a Petitioner who has not deposited the requisite security for costs leeway to choose when to pay the security for costs. The security for costs must be paid within ten days of the lodgment of the petition. The Petitioner argued that he had made effort to pay the said deposit but was unaware that the cheque that he had deposited for the said deposit had been returned unpaid due to lack of funds in his account. This explanation is not persuasive. It was the duty of the Petitioner to ensure that his account had sufficient funds to cater for the cheque that he intended to deposit as security for costs. Further, this explanation does not hold in light of the fact that the deposit was supposed to be made with the Registrar of the court who was required to issue a receipt for the said deposit to the Petitioner. The Petitioner’s explanation that he made the deposit directly to the Judiciary’s account beggars belief. In any event, the Judiciary no longer accepts personal cheques for any payments made to the court. It was clear to this court that the Petitioner did not make the said deposit as he has alleged.

In the premises therefore, this court holds that the failure by the Petitioner to deposit security for costs within the stipulated statutory period of ten days after filing the petition renders the petition fatally defective. The requirement for the deposit for security of costs is a substantive legal requirement and is not a procedural technicality that this court can excuse or extend time to enable compliance to be made. The petition herein is therefore struck out with costs to the Respondents. In view of the fact that the parties had prepared for the hearing of the petition, and the fact that the actual hearing did not take place, this court caps the costs to be paid to the Respondents at Kshs.2,000,000/-. It is so ordered.

DATED AT NAIROBI THIS 17TH NOVEMBER 2017

L. KIMARU

JUDGE