



**IN THE HIGH COURT OF KENYA AT KISUMU**  
**KAKAMEGA ELECTION PETITION NO. 14 OF 2017**  
**ELECTION FOR THE MEMBER OF SENATE KAKAMEGA COUNTY**  
**BETWEEN**  
**SETH AMBUSINI PANYAKO.....PETITIONER**  
**VERSUS**  
**THE INDEPENDENT ELECTORAL &**  
**BOUNDARIES COMMISSION.....1ST RESPONDENT**  
**THE RETURNING OFFICER**  
**KAKAMEGA COUNTY.....2ND RESPONDENT**  
**CLEOPHAS WAKHUNGU MALALAH.....3RD RESPONDENT**

**RULING**

**Background**

1. In this matter, the petition is faulted for alleged non-payment of security for costs on time and for not disclosing what results are being challenged. The 3rd Respondent's case is that as pleaded and filed, the petition violates the dictates of the law pursuant to which it was brought and therefore it is improperly before the court and urges the court to terminate it at this preliminary stage.

**Application**

2. By a Notice of Motion dated and filed on 17th November, 2017, brought under the Articles 105, 159 (b) and 261 of the Constitution and Section 78 of the Elections Act (**hereinafter referred to as the Act**), 2011, Rule 8(1) (c) and rule 13 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 (**hereinafter referred to as the Rules**), and all enabling provisions of the Law, **Cleophas Wakhungu Malala (hereinafter referred to as the 3rd respondent)** seeks the following orders:

- 1) That the petition dated 6th September, 2017 and filed on 8th September, 2017 together with the supporting affidavits and witness affidavits filed in support of the petition thereof be struck out***
- 2) That the court be pleased to grant such orders it may deem fit, just and expedient in the circumstances***
- 3) That costs of this application be provided for***

2. The application is based on the grounds among others:-

**1) That the petition is fatally defective for want of form and content due to the failure of the petitioner to state the results in compliance with the mandatory provisions of Act and the Rules**

**2) That the petitioner did not meet the mandatory requirement under Section 78(2)(b) of the Act and rule 13(1) and (2)(a) of the Rules that within 10 days of filing a petition, a petitioner shall deposit security for costs with the registrar**

**3) That under the requirements of Rule 8 of the Rules, the petitioner must state the actual final results with precision in both his petition and supporting affidavit**

**4) That the non-compliance is a substantive and not a procedural technicality that cannot be cured under Article 159 (2)(d) of the Constitution**

3. The application is also supported by 3rd respondent's 's affidavit sworn and filed on 17.11.17 in which he reiterates the grounds on the face of the application and gives further details in respect thereof. He avers that the final results declared by the 2nd respondent are the ones on Form 38C attached to the affidavit and marked **CM1** and that the results shown in the petition and the supporting affidavit by the petitioner are a misdirection of the final results. He further deposes that he is not able to discern the petitioner's case on the basis of wrong election results. The 3rd respondent further deposes that the petitioner did not pay the security for costs as required by law. Attached to the affidavit is a deposit slip for Kshs. 500,000/- issued on 16th September 2017 and a receipt for the said sum issued by court on 23rd October 2017.

### **3rd respondent's response**

4. The application is opposed on the basis of a replying affidavit sworn by **Seth Ambusini Panyako (hereinafter referred to as the petitioner)** on 27th November, 2017 and filed on 1st December, 2017. He avers that he deposited the security for costs on 16th September, 2017 as shown by a copy of the deposit slip marked **PS1**. He further avers that the issuance of the receipt marked **PS2** on 23rd October, 2017 was caused by court staff in Kakamega and Kisumu Law Courts who kept shoving him from one court registry to the other. He additionally avers that the results of 258,178 in favor of the 3rd respondent gazetted in Gazette Notice No. 118 of 18th September 2017 are different from the ones quoted by the 2nd respondent in her affidavit sworn on 12th October, 2017.

5. When the application came up for mention on 22nd November, 2017, the parties' advocates agreed to argue the same by way of written submissions which they dutifully filed.

### **3rd respondent's submissions**

6. On security for costs, the 3rd respondent submitted that the petitioner paid the deposit for security but did not obtain a receipt until 35 days later which is contrary to section 78 of the **Act** and rule 13(2) of the **Rules** which he submitted are coached in mandatory terms.

7. On the issue of declared results, it was submitted for the 3rd respondent that the petition did not meet the mandatory provisions of Rule 8(1) of the **Rules** as to the minimum requirements as to contents and form and that the filing of the petition with the wrong figures is not just misleading but is tantamount to providing no figures. To this end, the 3rd respondent cited **Mbaraka Issa Kombo v Independent Electoral and Boundaries Commission & 3 others [2017] eKLR** where the court in deciding an application for striking out of the petition for non-compliance with Rule 8(1) c & d and 12(2) c & d of the Election (Parliamentary and County Elections) Petition Rules held:-

***“The duty imposed upon him by the law would only be discharged if he set out and tabulated in the petition the complete result of the elections as declared by the Returning Officer”.***

8. The 3rd respondent also relied on the case of John Mututho –vs- Jaynen Kihara, (2008) 1 KLR, the Court of Appeal said that:-

***“.....The law has set out what a petition should contain and if any of the matters supposed to be included is omitted, then the petition would be incurably defective.”***

9. It was further submitted for the 3rd respondent that the fault on the part of the petitioner is not one that can be rectified by way of an amendment since an amendment cannot be allowed after 28 days allowed for filing the petition. In this regard, the 3rd respondent cited Amina Hassan Ahmed v Returning Officer Mander County & 2 Others [2013] eKLR.

10. On whether the non-compliance is substantive or procedural, the 3rd respondent submitted that the basic minimum requirements as set out in rule 8(1) of the **Rules** are substantive and cannot therefore be cured by Article 159 (2) (d) of the Constitution. He placed reliance on Moses Mwicigi & 14 Others v Independent Electoral and Boundaries Commission & 5 Others Supreme Court Petition No. 1 of 2015 in which the Supreme Court held that the requirement under Rule 8 (1) (d) and (c) of the **Rules** are procedural but intertwined with substantive issues. In the same case the court held:

***“This Court has on a number of occasions remarked upon the importance of rules of procedure, in the conduct of litigation. In many cases, procedure is so closely intertwined with the substance of a case, that it befits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is the handmaiden of justice. Where a procedural motion bears the very ingredients of just determination, and yet it is overlooked by a litigant, the Court would not hesitate to declare the attendant pleadings incompetent.”***

11. The 3rd respondent also relies on John Michael Njenga Mututho -V- Jane Njeri Wanjiku Kihara & 2 Others (2008) eKLR it was stated:

***“Election petitions are special proceedings. They have a detailed procedure and by law they must be determined expeditiously. The legality of a person’s election as a people’s representative is in issue. Each minute counts. Particulars furnished count if the petition itself is competent, not otherwise. Particulars are furnished to clarify issues not to regularize an otherwise defective pleading. Consequently if a petition does not contain all the essentials of a petition, furnishing of particulars will not validate it.”***

12. On the effect of non-compliance, the 3rd respondent urged the court to find that it has jurisdiction to strike out the petition since this application has been brought at the pre-trial stage. He relies on Iyoti Basu & others v Debi Bhosal & others AIR 1982 SC, 983, where the Supreme Court held as follows:

***“.....An Election petition is a special jurisdiction, and a special jurisdiction has always to be exercised in accordance with the statute creating it. ....”***

13. On the applicability of Article 159 (2) (d) of the Constitution, 3rd respondent cited Raila Odinga & 5 Others v IEBC & 3 Others (2013) eKLR where the Supreme Court stated:

***“Our attention has repeatedly been drawn to the provisions of Article 159 (2) (d) of the Constitution which obliges a Court of law to administer justice without undue regard to procedural technicalities. The article simply means that a court of law should not pay attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from courts of law.***

### **1st and 2nd respondents’ submissions**

14. On payment of security for costs, the 1st and 2nd respondents submitted that late payment was fatal to the petition as a whole. In support therefore, they urged the court to be guided by Evans Nyambaso

*Ledekiah & Another -V- IEBC & 2 Others (2013) eKLR* where the court held that deposit of security for costs is a substantive issue that goes to the root of the proceedings and *Fatuma Zainabu Mohamed v Ghati Dennitah & 10 Others, [2013] eKLR* where the court held that there is no express provision under the Elections Act 2011 for the enlargement of time to deposit the security for costs and *Rotich Samuel* ..... *Kimutai v Ezekiel Lenyongopeta & 2 Others, [2005] eKLR* where the Court of Appeal held that failure to deposit the money within the required time was not a mere irregularity which could be waived by the party.

15. On defect in the substance and form of the petition, 1st and 2nd respondents buttressed the 3rd respondent's submissions that the petitioner's reliance on electronically transmitted provisional results instead of declared results is contrary to the provisions of Rule 8 (1) of the **Rules**.

16. On what declared results are, the 1st and 2nd respondents submitted that declaration of results is, in this case, by way of Form 38C and relied on *Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others [2014] eKLR* where the Court of Appeal in dealing with a gubernatorial election petition held that the ultimate election outcome, for the gubernatorial office was the one declared and a certificate Form 38 issued thereof.

17. The 1st and 2nd respondents also submitted that Article 159 (2)(d) of the Constitution cannot shield the petitioner from compliance with mandatory provisions of the law and to this end relied on *Amina Hassan Ahmed v Returning Officer Mandera County & 2 Others (Supra), Martha Wangari Karua & another v Independent Electoral & Boundaries Commission & 3 others (Supra) and Moses Mwigigi & 14 Others v Independent Electoral and Boundaries Commission & 5 Others (Supra)*.

18. On whether the non-compliance can be cured by the fact that the respondents have annexed Form 38Cs to the responses, it was submitted that rule 8(1) (c) of the **Rules** requires that the results if any, and however declared, be pleaded in the petition. To this end, the 1st and 2nd respondents relied on *Bashir Haji Abdullahi v Adan Mohamed Nooru & 3 others [2014] eKLR* where the court held that rule 10 was intended to help the petitioner know information that should be included in the petition in order to constitute a probable cause of action.

19. The 1st and 2nd respondent additionally submitted that an election petition requires special components and on this end relied on *Evans Nyambaso Ledekiah & Another -V- IEBC & 2 Others (Supra)* where the court stated that a petition that does not comply with Rule 10 of the **Rules** is fatally incompetent and must be struck out.

### **Petitioner's submissions**

20. Petitioner concedes that he filed the petition on the basis of electronic results published in the 1st respondent's portal. He urged the court to be guided by the case of *D.T. Dobie v Muchina (1982) 1KLR* and to find that striking out is a draconian remedy that ought to be employed in the clearest of the clear cases.

21. Petitioner also relied on the Nigerian case of *Dr. Chris Nwebueze Ngige V. Peter Obi and 436 Others [2006] Vol. 18 WRN 33* where the Court of Appeal in that country emphasized the need to sustain, rather than strike out pleadings in election matters in the following words:-

***“Election petitions are by their nature peculiar from the point of view of public policy. It is, therefore, the duty of the court to endeavour to hear them without allowing technicalities to unduly fetter their jurisdiction.”***

22. Finally, the petitioner submitted that Section 80(1)(d) of the **Act** places a heavy premium on substantive justice and to this end cited *Abdirahman Abdi alias Abdirahman Muhumed Abdi v. Safi Petroleum Products Ltd. & 6 others, Nairobi Civil Application No. 173 of 2010* where the Court of Appeal held that:-

***“The overriding objective in civil litigation is a policy issue which the court invokes to obviate hardship, expense, delay and to focus on substantive justice.....”***

## **15. Issues and Determination**

23. Having read the application, the responses thereto and the submissions and list of authorities cited, the following issues have presented themselves as asking the court for resolution and determination.

### **1. Whether the petitioner complied with the dictates of Section 78 (1) &(2) (b) of the Election Act and rule 13(1) and (2) (a) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017**

24. The law on deposit of security for costs is found in Section 78 of the Election Act which provides as follows:

***(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 Part.***

***(2) A person who presents a petition to challenge an election shall deposit—***

***(b) five hundred thousand shillings, in the case of a petition against a member of Parliament or a county governor.....***

25. Rule 13 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 on the other hand provides as follows:-

***(1) Within ten days of the filing of a 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;***

26. The petition herein was filed on 8th September, 2017. There is evidence in the form of a deposit slip that confirms that the deposit of Kshs. 500,000/- was paid into the Kakamega Law Courts Bank Account on 16th September 2017. The receipt for the same was however not issued until 23rd October 2017. The petitioner has explained that the delay was occasioned by the fact that this petition was filed in Kakamega High Court and moved to Kisumu High Court and that he was shoved from one court registry to the other until 23rd October 2017 when the receipt was issued.

27. It is common knowledge that any monies paid to court are receipted in the accounts department and not by the Registrar of this court. The duty of the Registrar in so far as deposit for security of costs is concerned is to ensure that the same is paid before the acknowledgment note of petition is issued. The Registrar was on the basis of the deposit slip, satisfied that the deposit had been paid. I am equally satisfied that the deposit for security was paid in conformity with Section 78 (2) (b) of the **Act** and rule 13(1) and (2) (a) of the **Rules**. The delay in issuance of the receipt cannot in my considered view be visited upon the petitioner.

28. This court therefore rejects the respondents’ submission that the security ought to have been paid to the Registrar and finds and holds that the deposit for security was paid on time in compliance with the attendant provisions of the Act and the Rules.

### **2. Whether the petitioner complied with the requirements of Rule 8(1) (c) and Rule 12 (2) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017**

29. Rule 8 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 provides as follows:-

***(1) An election petition shall state -***

***(c) The results of the election, if any, and however declared***

30. Rule 12 (2) on the other hand provides thus:-

***“An affidavit in support of a petition under sub-rule (1) shall state***

***(c) the results of the election, if any, however declared...”***

31. The two rules are word for word for each other. The only difference being that Rule 8 is on the content of a petition while 12 is on the content of the affidavit in support of the petition. The two provisions bear the words **“SHALL STATE”**. The provisions are couched in mandatory terms and therefore require overall compliance.

32. It is evident that the petitioner did not plead the results of the election as they were declared. The petitioner therefore failed to discharge the duty imposed upon him by the law, to set out and tabulate in the petition and in the affidavit supporting the petition, the complete results of the elections as declared by the Returning Officer. The petitioner has not availed all that is needed in a clear and easily discernible manner and has left the court and the respondents to employ time in second-guessing what the declared results which form the mainstay of this petition are.

33. I have considered the holding in the case of **John Michael Njenga Mututho v Jane Njeri Wanjiku Kihara & 2 Others (2008) eKLR** where the Court of Appeal stated:

***“What would happen where, as here, the results as envisaged by regulation 40 above are not included in the petition? In our view an essential element would be missing. The petition shall be incomplete as the basis for any complaint will be absent. Whatever complaint a petitioner may be having about an election may be regarded as having no legal basis. The law has set out what a petition should contain and if any of the matters supposed to be included is omitted, then, the petition would be incurably defective”.***

34. I have equally considered the Court of Appeal decision in **Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 others (Supra)** and find that the complete election results relevant to this petition are the ones declared by the Returning Officer in Form 38C and not the electronic results published in the 1st respondent’s portal.

35. Having said that, I also find that the non-compliance cannot be cured by an amendment since the Act does not generally allow amendment of an election petition except in circumstances provided for under the Act which do not include the reasons upon which this petition is grounded.

36. And even if an amendment was viable, the 28 days allowed for filing the petition have already lapsed and there is not, and there cannot therefore be any room for any amendment of this petition to cure the impugned defect.

37. From what is stated hereinabove, I find and hold that the non-compliance with the basic minimum requirements as set out **Rule 8(1) (c) and Rule 12 (2) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017** is a procedural requirement that is intertwined with substance and cannot therefore be cured by Article 159 (2)(d) of the Constitution. (See **Moses Mwicigi & 14 Others v Independent Electoral and Boundaries Commission & 5 Others (Supra)**).

38. Moreover, the Supreme Court in the case of **Raila Odinga & 5 Others v IEBC & 3 Others (Supra)** rendered itself on the application of Article 159 (2) (d) of the Constitution as follows:

***“Our attention has repeatedly been drawn to the provisions of Article 159 (2) (d) of the Constitution which obliges a Court of law to administer justice without undue regard to procedural technicalities. The article simply means that a court of law should not pay attention to procedural requirements at the expense of substantive justice. It was never meant to oust the***

***obligation of litigants to comply with procedural imperatives as they seek justice from courts of law.***

39. The foregoing decision was reaffirmed in ***Amina Hassan Ahmed v Returning Officer Mandera County & 2 Others; Martha Wangari Karua & another v Independent Electoral & Boundaries Commission & 3 others; Moses Mwigigi & 14 Others v Independent Electoral and Boundaries Commission & 5 Others*** and ***Evans Nyambaso Ledekiah & Another v IEBC & 2 Others (Supra)*** and I have no reason to depart from it.

40. The fact that the respondents have annexed Form 38Cs to the responses does also not cure the defect in the petition for the reason that rule 8(1) (c) of the **Rules** requires that the results if any, and however declared, be pleaded in the petition. (See ***Bashir Haji Abdullahi v Adan Mohamed Nooru & 3 others (Supra)***).

41. Having found that the petitioner has not pleaded the mandatory details of declared results both in his petition and the supporting affidavit, I have come to the conclusion that the petition denies the respondents an opportunity to know what case they are faced with and how they may prepare their defence. The authorities cited above, all point to the fact that where material particulars are not included in the petition, then such a petition is fatally incompetent and must be struck out.

**3. What is the consequence of failure to comply with the said Act and Rules**

42. It is not in vain that the rules committee has devoted two distinct but elaborate rules on what ought and must be stated in a petition and the affidavit. I therefore find and hold that the petition filed herein by **SETH AMBUSINI PANYAKO** is incurably defective and being so incurably defective cannot be sustained because in its present form and substance, the petition will not facilitate the just expeditious, proportionate and affordable resolution of disputes envisioned under Rule 4 (1) of the **Rules**. Consequently; the petition is herein hereby struck out.

**4. What orders need be made on costs.**

43. An election Court has power under Section 84 of the **Act** and rule 30 of the **Rules** to award the costs of, and incidental to a petition and such costs shall follow the cause. I cap the costs to an all-inclusive sum of Kshs. 3,000,000/- to be paid by the petitioner to the Respondents. The 1st and 2nd respondents filed a joint response and will get half of the costs while the 3rd respondent will get the other half. The Deputy Registrar of the Court will at appropriate time tax the costs.

**DATED AND DELIVERED THIS 20th DAY OF December 2017**

**T. W. CHERERE**

**JUDGE**

**Read in open court in the presence of-**

Court Assistant - Felix

Petitioner - Mr. Odhiambo holding brief Mr. Jaoko

1st and 2nd Respondents - Mr. Bukania

3rd respondent - Mr. Malalah and Ms. Mburu