



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

ELECTION PETITION NO. 12 OF 2017

COSMAS FOLENI KENGA.....PETITIONER

VERSUS

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

WAFULA CHEBUKATI.....2ND RESPONDENT

THE KILIFI NORTH SUB- COUNTY

RETURNING OFFICER.....3RD RESPONDENT

OWEN YAA BAYA.....4TH RESPONDENT

RULING

1. This petition was filed by COSMAS FOLENI KENGA on 6th September, 2017 whereby he was contesting the 2017 Parliamentary Election of member of the National Assembly, OWEN YAA BAYA, the 3rd Respondent, who was declared the successful candidate for Kilifi North constituency. He cited that the Independent Electoral and Boundaries Commission (IEBC), who conducted the election and the Returning Officer of that constituency as the 1st and 2nd Respondents respectively.

2. In challenging the 3rd Respondent's petition the petitioner contended that the election of the said 3rd respondent was not conducted in accordance with the governing principles under the constitution, 2010, the Elections Act and the Rules and Regulations made there under and other relevant provisions of the law.

3. Upon being served with the said petition, the 1st and 2nd respondents filed their responses on 22nd September, 2017 which they served upon the other parties.

The 4th respondent was also served with the petition on and he filed his responses on 21st September, 2017.

4. On 3rd October, 2017 the matter came up for mention for pre-trial conference and court's determination was drawn to a notice of change of advocates and an application by the petitioner seeking leave to withdraw the petition, dated 29th September, 2017. The same were served upon the other parties on this day and the court then directed that;

(i) the petitioner complies with the provisions of rules 21,22,23 and 24, all of the Elections (parliamentary and County Elections) Petitions rules, 2017 within seven (7) days from today and not later than noon on 10th October, 2017;

(ii) the parties to attend court on 11th October, 2017 at 10.00 am for further directions.

5. On 11th October, 2017 Mr Aboubakar, advocate who had been holding brief for Mr Mwaniki counsel originally on record for the petitioner, on 3rd October, 2017 informed court that he had now come on record for the petitioner. He also informed court that the notice of withdrawal of the petition had been filed and advertised in the Daily Nation News paper on 10th October, 2017 in compliance with the rules with regard to withdrawal of petition. He also indicated to court that there was someone who was ready to be substituted as a petitioner as per the provisions of Rules 23 to 24 of the Elections (Parliamentary and county Elections) Petitions Rules, 2017 and as agreed with the counsel for the respondents, required time to file a formal application in this regard.

The court allowed the petitioner's counsel, Mr Aboubakar to file and serve a notice of change of Advocate together with an application to substitute the petitioner within three days from the 10th October, 2017 and the Registrar directed to comply with Rule 23 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017.

6. On 19th October, 2017 the matter came up for the hearing of two applications being;

(i) an application for petitioner to withdraw the petition;

(ii) an application for substitution.

Counsel for all the parties put forward their arguments with regard to the two applications.

7. On 30th October, 2017 the court delivered a ruling with regard to the two applications in which, after due consideration of the arguments that were advanced by counsel for the parties herein while allowing the petitioner to withdraw from the petition, denied leave to withdraw the entire petition and allowed ESTHER KACHE ZERO to be substituted as a petitioner with the following directions.

(a) The petitioner be and is hereby ordered to pay costs of the petition to the Respondents who have filed responses herein. The said costs to be paid from the deposited security as follows;

(i) the 4th Respondent to be paid Ksh 250,000/=;

(ii) the 2nd Respondent to share the balance of Ksh 250,000/= equally that is ksh 125,000/= each.

(b) The substituted petitioner to deposit ksh 500,000/= as security within three (3) days from the date of this order.

8. The court then directed that the case be mentioned on 9th November, 2017 for pre-trial conference with regard to the substituted petitioner. And on 9th November, 2017 when the matter came up for pre-trial conference, Mr Aboubakar, counsel for the petitioner indicated to court that after the ruling he was informed that his client, the substituted petitioner, was admitted in hospital and he had been engaged in other petitions before other Judges in Malindi High Court and Mombasa High Court on respective dates that he had been unable to follow up his client, the said substituted petitioner on the issue of depositing security of costs. He also indicated that he had not indicated on his file that the matter would be coming up on this day and so he was not aware of the matter being before court on that day.

9. To this, Mr Owuor, counsel for the 4th Respondent who apologised for failing to appear in court during delivery of the ruling but indicated that they had sent a clerk to check on the position of the case in the registry and it was confirmed to them that the same was coming up for directions on the 9th

November, 2017. He then proceeded to urge the court to enforce its directions with regard to deposit of security of costs, given the strict timelines which the election court is expected to adhere to and dismiss the petition if such payment had not been done.

10. Mr Aboubakar, counsel for the petitioner, indicated that he wanted to file an application before court with regard to the circumstances under which the deposit which the original petitioner had made.

11. The court then, in considering the arguments by Mr Owuor, counsel for the 4th respondents and Mr Aboubakar counsel for the petitioner directed as follows;

(a) THAT the Respondents to serve the substituted petitioner with the notice of motion application dated 28th September, 2017 and the notice of preliminary objection dated 9th November, 2017 before the close of that day

2. The substituted petition to file and serve

(i) the response to the Notice of Motion dated 28th September, 2017 and Notice of Preliminary objection dated 9th November, 2017, and;

(ii) the intended interlocutory applications in relation to payment of security, all within three (3) days from today, but not later than 16th November, 2017.

(c) The Respondents to file and serve their further affidavits and responses to the interlocutory application by the substituted petitioner within three (3) days of being served but not later than 21st November, 2017.

(d) That the substituted petitioner to file and serve their further affidavits, if any, to the responses to their intended applications in relation to the deposit of security by the Respondents within two (2) days of being served and not later than 23rd November, 2017.

(e) That such interlocutory applications to be heard on 4.12.2017 at 9.00am and a pre trial conference to proceed.

(f) That subject to the outcome of the interlocutory applications that may attack the petition, the petition shall be heard on 11th, 13th, 14th and 15th December, 2017.

These directions were given by this court in the presence of M/s Mwanakitina, counsel for the petitioner and Mr Owuor, counsel for the 4th Respondent.

12. Due to engagement at the Criminal court at the Mombasa High court, the hearing of the applications in this case which had been scheduled for 4th December, 2017 at 9.30 am, was rescheduled to the afternoon. This was communicated to all counsel by the Deputy Registrar. And on 4th December, 2017 at 3.15 pm, the court convened for hearing of the applications and pre-trial conference as scheduled.

It is worth noting that Mr Aboubakar, counsel for the petitioner was not in attendance and neither was there any representation from their firm or on their behalf. In attendance were only counsel for the respondents, being Mr Wafula, counsel for 1st and 2nd Respondents and Mr Owuor and Mr Mosota counsel for the 4th Respondent.

13. And while these counsel were ready to proceed with the applications as had been directed by this court, it was glaring that;

(a) Neither the substituted petitioner nor their counsel, Mr Aboubakar were in attendance in court. They had not even sent a representative or communication of any kind to explain their absence in court;

(b) the petitioner had not made any deposit for security for costs as had been ordered by this court on 30th October, 2017.

(c) the petitioner's advocate had not filed any responses to the applications that had been filed on 28th September, 2017 and served upon their firm on 9th November, 2017.

(d) the petitioner's counsel, Mr Aboubakar had not filed any application as indicated on 9th November, 2017.

14. All counsel present urged this court to dismiss or strike out the petition on these grounds and more particularly, on the ground that the petitioner has failed to deposit security of costs as required under sections 78 (3) of the Elections Act and within the time directed by this court.

The records clearly show that the substituted petitioner has yet to comply with the court's directions of 30th October, 2017. There is also no explanation for this nor an application on record where the substituted petitioner is seeking to extend the time limit that was given by the court.

15. The payment of security of costs is a statutory requirement and failure to pay the same after the court has directed that it be paid is in breach of a statutory requirement.

Section 78 (1) of the Elections Act, 2015 provides that;

"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"

This provision is in mandatory terms on the requirement to deposit security of costs.

Section 78 (2) of the said Act further specifies the amount to be deposited for each category of petitioner. The substituted petitioner was required to deposit Ksh 500,000/=

The mischief behind this requirement is to protect the office of the elected person and to allow only people with genuine grievances to file petitions.

16. Section 78 (3) of the Elections Act, 2015 states that;

"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 payment of the respondent's costs."

Again in mandatory terms, the statute states that non-compliance to deposit security, stalls any further proceedings and the respondents may apply to dismiss the petition and pray for costs.

17. Rule 13 of the Elections (Parliamentary and County Elections) Petition Rules, 2017 is synchronised with section 78 (2) (b) and (c) of the Elections Act and allows a party to pay the said deposit within ten (10) days.

18. In the instant case, the substituted petitioner having been allowed to come on board, the court directed that she deposit security within three (3) days of the date of ruling as per the provisions of rule 24 (4) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017, to enable her have audience as per Rule 24 (5) of the said rules.

Rule 24 (4) of the rules provides as follows;

"If the election court does not make an order under sub-rule (3) security of the same amount as would be required of a new petitioner and subject to the same conditions imposed on the original"

petitioner, the substituted petitioner shall pay, within three days after the order of substitution, the security before proceedings with the petition".

Rule 24 (5) goes on to state;

"subject to sub-rules 3 and 4 a substituted petitioner shall stand in the same petition, to the extent possible ,and shall be subject to the same liabilities as the original petitioner"

19. The substituted petitioner, who on 30th October, 2017 among other directions, was directed to deposit security within three (3) days, had , by 4th December, 2017 not complied with the same. This coupled with failure by the said substituted petitioner to attend court either by herself or by her counsel or sending an explanation to explain such absence, or file any application, is a clear indication that they have either lost interest in the petition or have total disregard of the court's directions.

This being the case, there is need, in public interest , to allow the elected member of parliament , (herein referred to as 4th Respondent) proceed with his mandate of representing the people of Kilifi North constituency and for the people of Kilifi North constituency to put the 2017 election behind them.

20. This court ,therefore allows the oral applications by the Respondent's counsel and order that this petition be struck out with costs.

The costs are capped at Ksh 250,000 and the same to be apportioned equally among the respondents.

Ruling delivered , signed and dated this 18th day of December,2017.

LADY JUSTICE D. O. CHEPKWONY

In the presence of

Mr Aboubakar ,counsel for the Petitioner

Mr Tsofwa,counsel holding brief for Wafula, counsel for the 1st and 2nd Respondents

Mr Fondo, counsel holding brief for Mr Owuor , counsel for the 4th Respondent

C/clerk- Zaituni