



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MERU**  
**ELECTION PETITION NO.6 OF 2017**  
**PETER GATIRAU MUNYA.....PETITIONER/APPLICANT**  
**VERSUS**  
**INDEPENDENT ELECTORAL AND BOUNDARIES ..**  
**COMMISSION.....1<sup>ST</sup> RESPONDENT**  
**MERU COUNTY RETURNING OFFICER.....2<sup>ND</sup> RESPONDENT**  
**KIRAITU MURUNGI.....3<sup>RD</sup> RESPONDENT**

**RULING**

**Application to withdraw petition**

[1] By an application dated 29<sup>th</sup> December 2017, the Petitioner has sought for leave to withdraw this petition. The major ground cited therein is that the petitioner is no longer keen on pursuing the petition. The application was not supported by any affidavit except the affidavit of Martin Muthomi Gitonga sworn on 14<sup>th</sup> December, 2017 annexing the publication of Notice of Intention to Withdraw Petition. .

[2] On 13<sup>th</sup> December, 2017 when the application came up for hearing, Mr. Gitonga argued:

- a) That statutory notice of intention to withdraw petition was published in a newspaper issue for 6<sup>th</sup> December 2017;
- b) That they have not received any application by any person wishing to substitute the petitioner;
- c) That the application be allowed with no orders as to costs.

[3] Mr. Kibanga, legal counsel for the 3<sup>rd</sup> Respondent and holding brief for M/S Lucy Kambuni, SC for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents associated himself fully with the submissions by Mr. Gitonga. He stated that the 3<sup>rd</sup> Respondent is not asking for costs, except that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent wish to have costs of the petition. Mr. Gitonga in reply to the quest for costs by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents urged that a petition is a natural consequence of conduct of elections by IEBC and that it was the conduct of IEBC which prompted the filing of this petition. They should, therefore, not be entitled to costs on such petition that has been withdrawn. He insisted that his client has been enthusiastic and diligent in the handling of the

petition. On that basis, he asked the court not to award costs.

## **DETERMINATION**

[4] Under rule 21 of the Elections (Parliamentary and County Elections) Petition Rules, 2017 (hereafter Election Petitions Rules, 2017) no petition shall be withdrawn unless with the leave of the court. This is because elections petitions are sui generis litigation and is inherently a suit in public interest- not purely a private suit of the petitioner- and therefore cannot simply be withdrawn at the instance of the petitioner or even on the consent of the parties. This explains the elaborate procedure for withdrawal set out in PART V of the Election Petitions Rules, 2017. But of relevance, please see provisions of rule 21(1), (2) & (3) below:

**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.**

Reading of this rule, it seems there may not be any strict requirement that such application for leave to withdraw a petition should be supported by an affidavit. However, rule 21(4), (5) & (5) throws the spanner to the works. See the said rules below:

**21(4) The parties to a petition shall each file an affidavit, before leave for withdrawal of a petition is determined, addressing the grounds 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) Each affidavit filed under sub-rule (4) shall contain the following declaration— “to the best of the deponent’s knowledge and belief, that no agreement or terms of any kind has been made, and that no undertaking has been entered into, in relation to the withdrawal of the petition.”**

[5] I am particularly perturbed by rule 21(6) when it states that:

**Each affidavit filed under sub-rule (4) shall contain the following declaration— “to the best of the deponent’s knowledge and belief, that no agreement or terms of any kind has been made, and that no undertaking has been entered into, in relation to the withdrawal of the petition.”**

The words: “...to the best of the deponent’s knowledge and belief, that no agreement or terms of any kind has been made, and that no undertaking has been entered into, in relation to the withdrawal of the petition.” Should relate to the petitioner too, for those words constitute an undertaking on oath. And the Petitioner must also give the undertaking under oath- something I do not think could be achieved by merely stating in the application...that no agreement or terms of any kind has been made, and that no undertaking has been entered into, in relation to the withdrawal of the petition. I could be wrong on this, and if my proposition is wrong, therefore the purpose the averment was meant to serve is lost. Worse still, therefore, the averment or existence of unlawful agreement or undertaking in relation to withdrawal of a

petition becomes mere embellishment of law without much importance. Nonetheless, the court may dispense with filing of affidavits by any party in the proceedings. See rule 21(5) of the Election Petition Rules, 2017. On 5<sup>th</sup> December, 2017 in exercise of the powers conferred in rule 21(5) the court dispensed with the filing of affidavits by the Respondents who stated that they do not oppose the withdrawal and that they wish not to file any affidavit thereto. Therefore, there is wide discretion in this rule. But, in my view; (1) the nature of election petitions, i.e. sui generis proceedings with public interest element; and (2) the fact that such proceedings cannot be withdrawn except in accordance with the elaborate procedure provided in PART V of the Elections Petitions Rules, 2017; gives the averment in rule 21(6) of the Election Petitions Rules, 2017 such a fundamental vitality to act as a safeguard valve against collusion by parties to withdraw a petition at unlawful gain and to the detriment of the residents of the locality to which the petition relates. Needless to state also that election petitions also serves as mechanisms to test the integrity of the electoral process. I see a kind of dilemma in that rules which may need clarification by the makers of the rules in the future.

[6] The foregoing notwithstanding, the application before me is in form 5 set out in the first schedule; it is signed by a person authorized by the petitioner; it has stated the ground for withdrawal; it was filed at the relevant registry; and the notice of intention to withdraw petition has been published in the Nation Newspaper issue of 6<sup>th</sup> December, 2017- a newspaper of nationwide circulation as had been ordered by the court. See the affidavit of Martin Muthomi Gitonga sworn on 14<sup>th</sup> December, 2017 and the annexure thereto. Again, the petitioner has stated that he has no interest in pursuing the petition. No person has filed any intention to be substituted for the petitioner in these proceedings. The Respondents do not also oppose the withdrawal. And, finally, the court has not been told of any unlawful agreement or terms of any kind which has been made, or any undertaking that has been entered into, in relation to the withdrawal of the petition. Accordingly, I grant leave for the petitioner to withdraw the petition. As such, the petition is marked as withdrawn.

#### **Of costs**

[7] Under rule 21(2) of the Election Petition Rules, 2017:-

***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.***

Therefore, the election court has discretion here to order payment of costs or otherwise. But I am reminded that, in election petitions, the general rule is that costs shall follow the cause. See section 84 of the Elections Act.

#### **84. Costs**

***An election court shall award the costs of and incidental to a petition and such costs shall follow the cause***

Hence, where there is such specific rule on costs, the general rule that costs shall follow the event does not apply. This petition was not heard. The Petitioner brought his application without undue delay. There is also nothing to show that he acted on bad faith in bringing these proceedings or that he did not have legitimate grievances. Therefore, at this stage it may not be proper to declare a successful party although I am aware that one need not be taken through rigorous and lengthy litigation in order to qualify to be a successful party. Litigation may be brief or extremely brief or lengthy or considerably lengthy or easy sailing or extremely tedious; but a successful party will not be denied his or her costs at whatever reasons. However, in the circumstances of this case, I will order costs limited only to the expense incurred during the re-sealing of ballot boxes by the court and the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. I had earlier ordered the parties and the court to file an inventory of the expenses incurred during that exercise. Let the inventories be filed by the court, 1<sup>st</sup> and 2<sup>nd</sup> Respondents if they have not filed already. The said costs shall be taxed or agreed by the parties and shall be paid out of the security deposited in court by the petitioner. Therefore, the said deposit shall remain in court until the taxation is completed. And any balance thereof

shall be released forthwith to the petitioner. It is so ordered.

**Dated, signed and delivered in open court at Meru this 14<sup>th</sup> day of December, 2017**

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**F. GIKONYO**

**JUDGE**

**In the presence of:**

Mr. Gitonga advocate for petitioner

Mr. Kiogora for m/s. Kambuni advocate for 1<sup>st</sup> and 2<sup>nd</sup> Respondent

Mr. Kiogora for Mr. Kibanga advocate for 3<sup>rd</sup> Respondent.

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**F. GIKONYO**

**JUDGE**