



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

ELECTION PETITION NO.7 OF 2013

IN THE MATTER OF THE ELECTION OF THE MEMBER OF NATIONAL ASSEMBLY FOR LUANDA CONSTITUENCY AND

IN THE MATTER OF ELECTIONS ACT NO.24 OF 2011 AND

IN THE MATTER OF THE ELECTIONS (PARLIAMENARY AND COUNTY ELECTIONS) PETITION RULE, 2013

BETWEEN

1. ARTHUR KIBIRA APUNGU.....1ST PETITIONER

2. JULIUS ABRAHAM SIKALO OCHIEL..... 2ND PETITIONER

VERSUS

THE INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION.....1ST RESPONDENT

THE RETURNING OFFICER,

LUANDA CONSTITUENCY.....2ND RESPONDENT

CHRISTOPHER OMULELE.....3RD RESPONDENT

RULING

1. By a Notice of motion dated 1st April, 2016, brought under rule 34(1)(b) of the ~Elections (Parliamentary and County Election) petition Rules, 2013, **Arthur Kibira Apungu**, has moved the court for orders that each of the petitioners do bear half the taxed costs and that the law firm of **Odeny Maube & Co. Advocates** be granted leave to come on record for the 1st petitioner in place of **D.W. Muyundo & Associates, Advocates**. There are other prayers in the Notice of motion but the same were not pursued. The motion is based on the grounds appearing on its face and the supporting affidavit by the applicant sworn on the same date, 1st April, 2016.

2. The gist of the application is that the applicant and another person **Julius Abraham Sikalo Ochiel**, as petitioners in the petition, lost that petition to the respondent, **Independent Electoral and Boundaries Commission, The Returning Officer, Luanda Constituency**, and **Christopher Omulele**. Upon losing

the petition, the court ordered the applicant and his co-petitioner to bear costs of the petition.

3. In his affidavit in support of the application, the applicant deposes that they were Independent Petitioners nominated by two Independent Political Parties and the two were therefore rival contestants for the seat although they filed the petition together. The applicant further deposes that he solely deposited Kshs.500,000/- as security and therefore prays that each of the petitioners do bear half the taxed costs to the respondents. The applicant expresses fear that the respondents in the petition, will move to execute for costs which will see him suffer more, since already the security for costs he had deposited in court has been withdrawn by the respondents. To the application, the firm of **Omulele & Tollo Advocates** filed grounds of opposition to oppose the applicant's application. Those grounds are dated 24th May, 2016 and filed in court on even date. The application has been opposed on grounds that it is misconceived and fatally defective, and that in essence, the application seeks a review of the decree of the court without any new and important matter having been discovered.

4. When the application came up for hearing on 24th May, 2016, **Miss Masese** appeared for the applicant while **Mr Odhiambo** was for the 1st, 2nd and 3rd respondents. The second petitioner was not represented.

5. Miss Masese, learned counsel for the 1st petitioner/applicant, moved the motion and sought grant of prayers 3 and 4 in the Notice of motion that is, orders that costs be shared equally between the two petitioners, and an order allowing the firm of **Odeny, Mube & Co. Advocates** to act for the 1st petitioner/applicant in place of his former Advocates, Messrs D.W. Muyundo & Associates Advocates.

5. Mr Odhiambo on his part opposed the application submitting that it lacked merit. Counsel submitted further that the application was a ploy by the applicant to avoid paying the taxed costs. Counsel argued that once costs have been arrived at, parties are bound to pay those costs as one party. He argued that the reasons advanced by the applicant were not tenable because there was a single petition hence they cannot ask the court to split costs.

6. On the argument that the applicant deposited security for costs when the petition was being filed, counsel submitted that the petitioners were deemed to be one and the costs were deemed to have been deposited jointly.

7. Counsel was of the view that if the application were to be allowed, it would amount to a review since a decree was made and costs taxed hence there was no new matter arising for consideration. He prayed that the application be dismissed.

8. I have considered the application submissions by respective counsel and perused the record. There are four prayers sought in this application but only two were pursued, namely, an order that each of the petitioners pay half the costs and that the firm of **Odeny Maube & Co. Advocates**, be allowed to come on record and act on behalf of the 1st petitioner/applicant. I will dispose of this prayer first.

9. This was an election petition which was concluded and a judgment delivered. The 1st petitioner was being represented by a different firm of Advocates namely, **M/s D.W. Muyundo & Co. Associates, Advocates**. The applicant has now instructed the firm of **Odeny, Maube & Co. Advocates** to come on record on his behalf and take over from the former firm, hence this prayer.

10. This being a concluded litigation, it is a requirement in law that leave of court be sought if a party intends to change Advocates or take over the conduct of his case in person. This requirement was introduced to safeguard interests of the previous advocates and protect their legal fees in case a litigant intended to short change them by instructing a new firm of Advocates or take over the conduct of his own case without first settling legal fees owed to the previous firm of advocates.

11. There is an affidavit of service on record indicating that the former firm, M/s D.W. Muyundo & Associates, Advocates, were served with the application. However, they have not filed any response intimating objection to the applicant instructing a new firm of Advocates to take over the conduct of this

matter on his behalf. Under **Order 9 rule 9 of the Civil Procedure Rules**, where there is a change of advocates or a party decides to act in person having previously been represented by an advocate, after judgment has been passed, that party must seek leave of the court before such change or intention to act in person can take effect. Although the rule allows a party to file such an application together with other prayers, and that is exactly what the applicant herein has done, the rule is clear that the prayer for change of advocate or to act in person should be determined first. The import of that rule is that the applicant must move the prayer for change of Advocates first before any other prayer can be addressed. The applicant should have made the prayer for leave to change advocate first instead of making it the last prayer or still he should have moved prayer 4 first. That would avoid the court dealing with whole application before the issue of representation is determined. However in view of the fact that there is no objection by the previous Advocates prayer 4 is for granting

12. Turning to the substantive issue in this application, namely, splitting of costs, counsel for the respondents has opposed the application saying it amounts to a review of the judgment, and that petitioners were deemed to be one.

13. The Election court upon dismissing the petition, ordered the petitioners to pay costs to the respondents. The court capped the entire costs at not more than Kenya shillings two million (Kshs.2,000,000/-). The applicant has argued that he deposited the initial security of Kshs. 500,000/-, which has already been released to the respondents and wants the court to order that each of the petitioners pays half the costs, which has been opposed by the respondents.

14. Costs are at the discretion of the court and usually follow events. Where there are more than one litigant either as plaintiff (petitioner) or defendant (respondent), they are deemed to one in the litigation. Any order made it is made jointly and severally against each of them. Unless the court making that order states otherwise, the order affects them jointly and severally. That is, each one of them is affected by that order as if he was an individual as much as it affects them jointly. For that reason, the order for costs affected the two petitioners jointly and severally since they are deemed to be one in that litigation.

15. I say so because had it been otherwise, then each petitioner would be required to deposit security individually and not as a team. It is upon the respondents to pursue any of the petitioners or both so long as costs recovered do not exceed the costs awarded. They can pursue one or both petitioners. The court appreciates the concerns of the applicant, but that is the position in law. They were together in that petition and must pay the costs awarded against them. Moreover, **rule 34(1)** of the Elections (Parliamentary and County Elections) Petition Rules, 2013, is clear on this. It provides that **the court shall, at the conclusion of an election petition, make an order specifying the total amount of costs payable and the persons by or to whom the costs shall be paid.**

16. The court having determined that costs are payable by the petitioners, I find the application peculiar. The applicant should have asked the court at the time of making the order for costs, to direct that costs once taxed be paid equally by the petitioners. In any case, this was a joint liability for costs. Just like a judgment and decree entered jointly and severally, the party awarded costs is at liberty to pursue all or any of the petitioners. In the case of **Kenya Airways Limited v Mwaniki Gichohi & Another Civil Suit No.423 of 2002, Ringera J (as he then was) observed:-**

“The concept of joint and several liability comprehends one judgment and decree against two or more persons who are liable collectively and individually to the full extent of such decree; however double compensation is not allowed and accordingly whatever portion of the decree is recovered against one of such defendant cannot be recovered from the other defendant(s).”

17. In this case, the petitioners have a joint and several obligation to settle the taxed costs and each one of them is liable to settle the costs in full. The only difference would be where the two of them entered into an arrangement to settle those costs in equal halves, otherwise, the successful litigants have the option to direct their claim for costs against any of the two petitioners. Should one of the petitioners pay costs in full, he would obviously be entitled to a reimbursement from his co-petitioner on whose behalf he has paid costs

18. That being my view of the matter, I find that prayer 3 of the application is without merit. In the end I make the following orders:-

- 1) The firm of **Messrs Odeny, Maube & Co. Advocates** is hereby allowed to take over the conduct of this matter on behalf of the 1st petitioner in place of the firm of **Messrs D.W. Muyundo & Associates, Advocates**.
- 2) The prayer for an order directing that each of the petitioners do bear half of the taxed costs to the respondents is dismissed.
- 3) Each party do bear their own costs for this application.

Dated and delivered at Kakamega this 20th day of July, 2016.

E.C. MWITA

JUDGE