



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
ELECTION PETITION NO.123 OF 2013

NYAMOHANGA CHARLES NYANGI
APPELLANT

AND

TOBIAS WEREMA RANGE
RESPONDENT

ADAN ALI MOHAMED 1ST INTERESTED
PARTY

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 2ND INTERESTED
PARTY

*(Being an appeal from the ruling/order of Hon. E. Nyaga dated
13th August 2013 in Migori SPM Election Petition No.2 of 2013)*

JUDGMENT

BACKGROUND

1. By a petition dated 10th April 2013 the 1st respondent TOBIAS WEREMA RANGE filed an election petition challenging the election of the Appellant as a Member of County Assembly for Isebania Ward wherein the 1st and 2nd Interested Parties were named as the 2nd and 3rd Respondents respectively.
2. The Appellant on 6th May 2013 filed a response to the petition by the respondent together with a replying affidavit and affidavits of witnesses thereto.
3. On 23rd May 2013 the respondent's advocate informed court that he had instructions to withdraw the petition and subsequently a formal application for withdrawal was filed which application was not opposed save for the issue of costs.
4. On 13th August 2013 the trial court E.M. Nyagah, Ag. PM, assessed cost thereon at Kshs.100,000/= for the respondents equally that is Kshs.50,000/= for the appellant and Kshs.50,000/= for the 1st and 2nd Interested party and further ordered that the security deposit be applied towards the settlement of cost.
5. Being aggrieved by the said decision the appellant filed this appeal and raised the following grounds:-

1. *The Learned Trial Magistrate erred in Law and facts in awarding costs of Kshs.50,000/= only to the appellant which award is inordinately low, unconventional and amounts to erroneous estimate of cost ordinarily awarded in Election Petition.*

2. *The Learned Trial Magistrate erred in Law and fact in awarding costs of Kshs.50,000/= only to the appellant without any reasoning in support or any basis as the Law would have required the appellant to file his Bill of Costs first before any assessment and award be made.*

SUBMISSIONS

1. On behalf of the appellant it was submitted that the trial magistrate operated under misconceived understanding that costs in an election petition is restricted to the value of the amount of money deposited upon filing of the petition which deposit has no nexus to the amount of cost awardable to a winning party.

2. It was submitted that the appellant had paid his counsel alone Kshs.300,000/= as legal fee which together with other expenses incurred in preparation and attendances ought to be compensated and therefore the court was urged to award cost of Kshs.2.5 million.

3. On behalf of the 1st respondent it was submitted that the exercise of award of costs is discretionary and that the appellant had not shown that the exercise was not done judiciously. It was therefore submitted that the appeal was frivolous with the proposed sum of Kshs.2.5 million being speculative and by trying to pursue business/commerce with the court of law.

4. It was further submitted that a certificate of cost ought to have been annexed to the record of appeal and having failed to do so the appeal was fatally defective.

5. The law on the award of cost as stated by the trial magistrate is now statutory provided for as follows:-

Section 84 of Elections Act:- “An election court shall award costs of and incidentals of a petition and such costs shall follow the cause.”

6. **Rule 34 of Elections and (Parliamentary and County Elections) Petitions Rules 2013** provides as follows:-

“34(1) The court shall at the conclusion of an election petition make an order specifying-

- a. **the total amount of costs payable and**
- b. **the persons by and to whom the cost shall be paid.**

(2) When making an order under sub rule (1) the court may:-

- a. **disallow any cost which may, in the opinion of the court, have been caused by vexatious conduct, unfounded allegations or unfounded objections on the part of either the petitioner or the respondent and**
- b. **impose the burden of payment on the party who has caused an unnecessary expense, whether such party is successful or not, in order to discourage any such expenses.”**

1. **Rule 35 (3) provides that:- “the court may direct that the whole or any part of money deposited by way of security be applied in the payment of taxed costs.”**

2. The court is granted powers under **rule 34 (1) (a)** to set the total amount of costs that may be paid. This power is so wide and unrestricted that it includes not awarding cost as was stated in the **Supreme Court Election Petition No.5 of 2013 Raila Odinga -vs- Uhuru Kenyatta & 3 others.**

3. The question therefore for this court to answer is whether an award of cost of Kshs.100,000/= in

respect of an election petition which is withdrawn before hearing is inordinately lower and whether the court did not exercise his discretion in awarding cost herein judicious to enable this court interfere with his exercise of discretion.

4. Having stated that the said discretion to award cost is so wide and that there is no statutory limits as to what amount can be awarded in cost and taking into account the fact that it is the trial court which is in a better position to assess the complexity of the matter which was before him, I am unable to find fault with the assessment of costs herein by the trial court this not being Advocate/client cost for which the amount paid by the appellant to his advocate would have been taken into account.

5. The trial court did not act on wrong principles in ordering that the amount paid as deposit be utilized in payment of cost. In the **Election Petition No.1'A" of 2008 Moses Ole Sakuda -vs- Hon. Prof. George Saitoti & 2 others** in an election petition which was withdrawn, K.H. Rawal J as she then was also directed that the whole or part of any money deposited by way of security under then **Rule 13** be applied in the payment of taxed costs.

6. I therefore find no merit on the appeal herein which I hereby dismiss with no order as to cost.

Delivered, dated and signed at Kisii this 18th day of March, 2015

J. WAKIAGA

JUDGE

In the presence of:-

Mr. Ondari for Odhiambo for Appellant

Mr. Okenye for Kerario for Respondent

N/A for 1st Respondent/Interested Party

N/A for 2nd Respondent/Interested Party