



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**ELECTION PETITION NO. 8 OF 2013**  
**AND IN THE MATTER OF THE**  
**NATIONAL ASSEMBLY ELECTION**  
**FOR KITUI EAST CONSTITUENCY**

**PATRICK**  
NGETAKIMANZI.....PETITIONER

AND

MARCUS MUTUAMULUVI.....1<sup>ST</sup>  
RESPONDENT

ALICE KIMANI (RETURNING OFFICER).....2<sup>ND</sup>  
RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....3<sup>RD</sup>  
RESPONDENT

**RULING**

**Introduction**

1. After the general election held on 4th March 2013, the 1<sup>st</sup> respondent was returned as the Member of the National Assembly for Kitui East Constituency. The petitioner, a registered voter and an agent of one of the candidates in that election, filed this petition on 10<sup>th</sup> April 2013 challenging the election of the 1<sup>st</sup> respondent.

2. The issue for determination in this decision is whether the High Court under **section 78** of the *Elections Act, 2011* (“*the Act*”) has jurisdiction to extend time for depositing security for costs.

3. **Section 78** of the *Elections Act, 2011* provides as follows;

78. (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—*

(a) *one million shillings, in the case of a petition against a presidential candidate;*

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

(c) one hundred thousand shillings, in the case of a petition against a member of a county assembly.

(3) 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.

(4) The costs of hearing and deciding an application under subsection (3) shall be paid as ordered by the election court, or if no order is made, shall form part of the general costs of the petition.

(5) An election court that releases the security for costs deposited under this section shall release the security after hearing all the parties before the release of the security..

### **The applications**

4. Before me are two applications. The first is the 1<sup>st</sup> respondent's Notice of Motion dated 13<sup>th</sup> May 2013 which seeks, *inter alia*, to strike out the petition for want of compliance with mandatory statutory provision which include the failure to deposit security within the time limited by the law. The application is supported by the 1<sup>st</sup> respondent's affidavit sworn on 13<sup>th</sup> May 2013.

5. The petitioner has filed a Notice of Motion dated 16<sup>th</sup> May 2013 under **Order 50 rule 6 and 51 rule 1** of the **Civil Procedure Rules** which seeks an order that, "[T]he time within which to deposit Kshs. 500,000 being security for costs be enlarged by seven (7) days or any other time the court may order." The application is supported by the petitioner's affidavit sworn on 16<sup>th</sup> May 2013. The petitioner depones that he is a peasant farmer and he was unable to deposit money in court since he did not have money. He states that through friends and good Samaritans he has now raised the security and is ready to deposit the same upon an order of the Court.

### **The arguments**

6. It is common ground that the petitioner has not deposited the requisite security in compliance with **section 78** of *the Act*. When the applications came up for hearing on 21<sup>st</sup> May 2013, I directed the parties to address me on whether the court has jurisdiction to enlarge time to deposit the security as prayed in the petitioner's motion.

7. Mr Omwenga, learned counsel for the petitioner, submitted that the court has jurisdiction to extend time by virtue of **rule 20** of the **Elections (Parliamentary and County Elections) Petition Rules ("the Rules")** and that the purpose of the rule is to enable the petitioner comply with the rules. The **rule 20** provides as follows; "20. Where any matter is to be done within the time provided for in these Rules or granted by the court, the court may, for purposes of ensuring that no injustice is done to any party, extend the time within which the thing shall be done on such terms or conditions as it may consider fit even though the period initially provided or granted may have expired."

8. Mr Omwenga further submitted that even though **section 78** of the **Act** does not have a provision for extension of time to deposit the security for costs, **rule 20** is applicable as it gives the court jurisdiction to extend time and this should be read with **rules 4** and **5** of the **Rules**. **Rule 4** sets out the overriding objective and **rule 5** is one which provides for the duty of court and the parties in furtherance of the overriding objective under the **Rules**. Under that rule, the court and all the parties are to conduct themselves in such a manner as to achieve; the just determination of the election petition and the efficient and expeditious disposal of an election petition within the timelines provided in the Constitution and the **Act**.

9. Counsel distinguished the decisions in *Esposito Franco v Kingi and Another* [2009] KLR 518 and *Rotich Samuel Kimutai v Ezekiel Lenyongopeta and Others* CA Nairobi Civil Appeal No. 273 of 2003 [2005] eKLR where it was held that the provisions for the deposit of security were mandatory on the ground that these cases were determined on the basis of the *National Assembly and Presidential Elections Act (Repealed)* (“*the Repealed Act*”). Counsel further submitted that the rules governing the conduct of election petitions have now changed and under *the Act* there is no provision for striking out a petition. Furthermore, he noted that the court should be guided by Constitutional principles in making its decisions.

10. In response, Mr Kimuli, learned counsel for the 1<sup>st</sup> respondent, submitted that the court lacked jurisdiction to extend time under **section 78(1)** of *the Act*. He submitted that the deposit of security is mandatory for two reasons. First, **section 78(1)** is clear that security shall be deposited within 10 days. Second, under **section 78(3)**, if security is not deposited, no further proceedings shall be heard by the court. Counsel argued that ‘*no further proceedings include any steps including an application to extend time*’ and therefore the court cannot take up the matter and it ought to be struck out.

11. Mr Kimuli further submitted that the *Rules* are subservient to the provision of the *Act* and the *Act* does not confer any power on the court to extend time for depositing the security. Counsel noted that **rule 11** which deals with the deposit of security does not make provision for extension relating to security and that **rule 20** which is under **Part V** of the *Rules* deals with Case Management Directions which may be time bound and therefore the extension of time referred thereto only relates to time for compliance with directions the court may issue. Mr Kimuli asserted that this power under the *Rules* cannot be applied to **section 78** of the *Act*.

12. As regards constitutional principles, counsel posited that the right of access to justice guaranteed by **Article 48** was subject to rules of court that promote expeditious disposal of cases and that **section 78** of *the Act* was one such provision. He finally submitted that **section 78** provided an option for the respondents to apply for dismissal if security had not been deposited.

13. Ms Wambua, learned counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents supported the position taken by the 1<sup>st</sup> respondent and objected to the application for extension of time. She submitted that **section 78** of *the Act* is mandatory and that there was no jurisdiction to enlarge time for deposit. Ms Wambua cited the case of *Johnson Muthama v Minister of Justice and Constitutional Affairs and Others* Nairobi Petition No. 198 of 2011 (unreported) to support the proposition that the requirement of a deposit was necessary to deter frivolous litigants and a petitioner who has not deposited money is not a serious petitioner. She also cited *Rotich Samuel Kimutai v Ezekiel Lenyongopeta and Others* (Supra) to buttress the point that the court lacked jurisdiction to extend time to lodge security.

### **Determination**

14. Whether or not the court has jurisdiction to extend time for furnishing security calls for an interpretation of **section 78** of the *Act*.

15. The rationale for the deposit of the security for costs was considered in the case of *Franco v Kingi and Another* [2009] KLR 518 where Justices Wendoh and Dulu stated, “*What is the spirit of S 21 of Cap 7 Laws of Kenya? We are in agreement with the respondents that the requirement that an aggrieved party remits security for costs to court upon filing an Election Petition is to restrict the would-be vexatious litigants coming to court and ensure that the party who comes to court is serious and will be able to pay the costs in the event he is required to do so.*”

16. Security of costs ensures that the respondent is not left without a recompense for any costs or charges payable to him. The duty of the court is therefore to create a level playing ground for all the parties involved, in this case, the proportionality of the right of the petitioner to access justice *vis a vis* the respondent’s right to have security for any costs that may be owed to him and not to have vexatious proceedings brought against him. (See *Harit Sheth Advocate v Shamas Charania* Nairobi Court of Appeal, Civil Appeal 68 of 2008 [2010] eKLR).

17. In the case of **Hon Johnson Muthama v Minister of Justice and Constitutional Affairs & Others (Supra)** the court was asked to declare **section 78** of **the Act** unconstitutional on the basis that it violated **Article 48** which guarantees the right of access to justice. The court declining to strike down the provision stated, “[69] *Provision of payment of costs by a party coming before the court does not in my view, violate any provision for the constitution. It is a common practice in civil proceedings intended to safeguard the interests of the party against who a claim is brought and to prevent abuse of the court process. Given the nature of elections, it serves a useful and rational purpose of ensuring that only those who have a serious interest in challenging the outcome of an election do so.*”

18. Save for the time limit and the amount, **section 78** of **the Act** is in *parimateria* with **section 21** of **the Repealed Act** which provided as follows;

21. (1) *Not more than three days after the presentation of a petition, the petitioner shall give security for the payment of all costs that may become payable by the petitioner.*

(2) *The amount of security under this section shall be two hundred and fifty thousand shillings and shall be given by deposit of money.*

(3) *If no security is given as required by this section, or if an objection is allowed and not removed, no further proceedings shall be had on the petition, and the respondent may apply to the election court for an order directing the dismissal of the petition and for the payment of the respondent’s costs; and the costs of hearing and deciding that application shall be paid as ordered by the election court, or if no order is made shall form part of the general costs of the petition.*

(4) *(Deleted by 19 of 1979, s. 6).*

19. In the case of **Rotich Samuel Kimutai v Ezekiel Lenyongopeta and Others (Supra)**, the Court of Appeal addressed **section 21** of the **Repealed Act**. The petitioner appealed against an order dismissing the petitioner for failure to deposit security within the required time. The Court stated as follows, “*Once again we think the intention of Parliament was clear in enacting the time limit in such peremptory languages “Not more than three days ... shall give” does not admit ambiguity or further search for the intention of Parliament. Whether or not Parliament should have enacted a further provision for seeking extension of time is appropriate, would of course be academic for purposes of this appeal and in any event there was no attempt to apply for extension of time at all. Section 21(3) provides for the consequences of non-compliance which is what in the end transpired in this case. Failure to deposit the money within the time was not a mere irregularity which could be waived by the party.*”

20. The same provision was also addressed in **Esposito Franco v Kingi and Another (Supra)** where the court stated that, “*Section 21 of the Act is worded in a peremptory language. It does not admit of ambiguity or further search of the intention of Parliament. Failure to deposit the security within 3 days is not a mere irregularity. It goes to the root of the matter – jurisdiction. I find and hold that this court lacks jurisdiction.... to extend time within which to deposit security for costs.*”

21. Although the **Elections Act, 2011** was enacted to replace the **Repealed Act** the provision regarding security for costs was retained except to the extent I have pointed out. In the circumstances the applicant’s position is firmly anchored on the authoritative interpretation given by the Court of Appeal in the case of **Rotich Samuel Kimutai v Ezekiel Lenyongopeta & Others (Supra)**.

22. The petitioner relied on the power of the court to extend the time provided by **rule 20** of the **Rules**. I agree with the respondents that the power to extend time under that rule is for purposes of matters which the court is empowered to do under the rules. The imposition of security for costs is a statutory mandate and the consideration must first be whether the statute itself, expressly or impliedly, grants the court jurisdiction to extend time. The rules cannot be read as to oust clear provisions of a statute. In the absence of such jurisdictions, the application of the overriding objective contained in **rule 4** of **the Rules** cannot be used by the court to appropriate authority which the statute does not grant.

23. Similarly, the petitioner cannot call in aid the provisions of **Civil Procedure Rules**. The **Elections Act, 2011** and the rules and regulations made thereunder is a comprehensive code of substantive and procedural election law hence the **Civil Procedure Act (Cap 21 of the Laws of Kenya)** and the rules made thereunder, do not apply to the **Elections Act, 2011** except where expressly provided for in the Act or the Rules . An application for extension of time made under the **Civil Procedure Rules** is clearly incompetent (See also **Nyamweya v Oluoch and Others [1993 – 2009] 1 EAGR377**).

24. Although the parties did not refer to it, this matter would not be complete without reference to **section 59** of the **Interpretation and General Provisions Act (Chapter 2 of the Laws of Kenya)** which contains a general power for the court to extend time and it provides as follows:

*59. Where in a written law a time is prescribed for doing an act or taking proceeding, and power is given to a court or other authority to extend that time, then, unless a contrary intention appears, the power may be exercised by the court or other authority although the application for extension is not made until after the expiry of the time prescribed.*

25. Whether the court has jurisdiction to extend time for doing an act or taking a proceeding dependson the actual provision under consideration and whether there the power is express or implied must be determined from the language of the provision.

26. The argument that the decisions in the cases of **Rotich Samuel Kimutai v Ezekiel Lenyongopeta and Others (Supra)** and **Esposito Franco v Kingi and Another(Supra)**belong to the pre-2010 constitutional dispensation and must be considered in light of the Constitution principles and values is an attractive one. TheConstitutionis founded on values and principles that are intended to promote, human dignity, human rights, accountability, transparency and other values and national principles articulated in **Article 10**. At all times the Court is obliged in interpreting the law to give effect to these values and principles. Such interpretation must, however broad, fall within the language of the statute otherwise the Court will assume the role of the legislature.In other words, it is the duty of the court to give effect to legislative intent expressed in the language of the statute to the extent that the language can support the intent of the Constitution.

25. Can the intent and objects of the Constitution be read into the language of **section 78** of **the Act**? I must answer in the affirmative. Although **section 78(1)** is imperative as to the time of payment of the deposit, the language of **section 78(3)** negates the mandatory nature of **sub-section (1)**. In my view the words, “*or if an objection is allowed and not removed*” followed by “*no further proceedings shall be heard*” imply that an objection may be taken by the respondent and allowed by the court if no security is deposited. If that objection is allowed by the Court then no further proceedings may be taken in the matter by the petitioner and the petitioner may apply to dismiss the matter. The phrase, “*and not removed*”begs the question how is the objection removed. In my view, the objection is removed by the petitioner giving a reason why the deposit was not made within the time provided by **section 78(1)**. The plain meaning of the provision is that if the objection is allowed, the petition is then permitted to apply to remove it.

26. My reasoning is fortified by the fact that dismissal of the petition is not automatic. **Sub-section (3)** of **section 78** does not require the court to dismiss the petition upon failure to provide security. On the contrary, the provision merely states that, “*no further proceedings shall be heard on the petition.*” The fact that the respondent “*may apply*” to dismiss the petition implies that there is a window for the exercise of judicial discretion to dismiss the matter upon such application.

27. It is to be noted that even where there is leeway for extension of time, such extension is not automatic and discretion must be exercised judicially and this is dependent on the circumstances of each particular case. The burden is thus upon the person seeking the extension to satisfy the court that his circumstances are such that they are deserving of the court’s exercise of discretion in his favour.

28. I have read and re-read the decisions in **Rotich Samuel Kimutai v Ezekiel Lenyongopeta& Others (Supra)** and **Esposito Franco v Kingi and Another (Supra)** and I am constrained to note that the court in either case did not consider the precise meaning of the language of the **section 21** of the

**Repealed Act** and in view of the imperatives of the Constitution I am required to come to a different conclusion in order to give effect to the objects of the Constitution.

**Conclusion and disposition**

29. In light of what I have stated, I find as follows;

(a) The deposit of security deposit under **section 78** of *the Act* is mandated by the statute in imperative terms, it is not a mere irregularity or technicality.

(b) The provision of **section 78(3)** of the Act permits the court to extend time for furnishing security for costs.

30. The petitioner shall now show cause why the petition should not be dismissed for failure to deposit security within the time limited by the **section 78(1)** of the *Elections Act, 2011*.

**DATED** and **DELIVERED** at **MACHAKOS** this 28<sup>th</sup> day of May 2013.

**D.S. MAJANJA**  
**JUDGE**

Mr Omwenga instructed by Jackson Omwenga and Company Advocates for the petitioner.

Mr Kimuli instructed by M. M. Kimuli and Company Advocates for the 1<sup>st</sup> respondent.

Ms Wambua instructed by Anne M. Kiusya and Company Advocates for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.