



**REPUBLIC OF KENYA**

**High Court at Kitale**

**Petition 5 of 2013**

**JOHN LOKITARE LODINYO.....PETITIONER.**

**VERSUS**

**MARK LOMUNOKOL**

**THE I.E.B.C.....RESPONDENTS.**

**NOBERT K. KEMEI**

**R U L I N G.**

The present petition was filed on 4th April, 2013 and concerns the election of **Mark Lomunokol** as member of the National Assembly for Kacheliba Constituency in the County of West Pokot.

The petitioner, **John Lokitare Lodinyo**, was one of the unsuccessful candidates in the parliamentary election for the National Assembly seat for the Kacheliba constituency held on 4th March, 2013.

In essence, the petition questions the validity of the election and in particular whether Mark Lomunokol (herein, the first respondent) was validly elected as the member of the National Assembly for Kacheliba Constituency. It was filed within the stipulated time pursuant to section 76 of the Elections Act No. 24 of 2011 which is the applicable law for the conduct of elections to the National Assembly “inter-alia” and for election dispute resolution and for all connected purposes.

Service of the petition was to be effected within fifteen (15) days of the presentation of the petition to the court by way of personal service or by advertisement in a newspaper with national circulation as provided in section 77 of the Elections Act (herein, “the Act”).

The filing of a memorandum of appearance by **Messrs Nyaundi Tuiyott & Co. Advocates** on behalf of the independent Electoral & Boundaries Commission (IEBC) (herein, the second respondent) and Norbert K. Kemei (herein, the third respondent) on the 10th April, 2013 confirmed that the petition was served upon them. It is instructive to note that Messrs Gumbo & Associate Advocates, filed a notice of appointment of advocates on behalf of the first and second respondent on the 17th April, 2013.

the petition was itself filed on behalf of the petitioner by **Messrs David Ingosi & Co. Advocates**. It's presentation was subject to the condition imposed by section 78 (1) of the Act in 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.”***

In terms of section 78 (2) (b) of the Act, the petitioner herein was required to deposit a sum of Kenya

Shillings five hundred thousand (Ksh. 500,000/=) within ten (10) days after the presentation of the petition. However, the petitioner did not deposit the prescribed amount. Instead, he deposited the sum of Kenya Shillings one hundred thousand (Ksh. 100,000/=) on the 12th April, 2013 thereby bringing him into conflict with section 78 of the Act. To date the full amount has not been deposited and therefore, in terms of section 78 (3) of the Act, no further proceedings respecting this petition can be heard. However, there has been no objection forthcoming from any of the respondents with regard to the failure by the petitioner to deposit the full amount. Indeed, there has been no prior application from any of the respondents to have the petition dismissed other than that filed on 20th May, 2013.

The failure by the respondents to swiftly move the court accordingly may be attributed to their failure to file within time their respective responses to the petition. Indeed, they have since sought to correct the error by filing applications dated 29th April, 2013 and 30th April, 2013 for extension of time within which to file responses and affidavits to the petition.

The application dated 29th April, 2013 is by the first respondent while the application dated 30th April, 2013 is by the second and third respondents.

Be that as it may, the validity and sustainability of this petition has been brought into question on account of the failure by the petitioner to deposit the prescribed security. There is a deposit of Ksh. 100,000/= already made but that is not the required security and would strictly not amount to being the security envisaged by section 78 of the Act. It therefore suffices to say that the petitioner has breached a mandatory requirement of the law by failing to deposit Ksh. 500,000/= as security for costs.

In realization of his error and the drastic effect it may have in his petition, the petitioner, filed the present application dated 14th May, 2013, seeking extension of time within which he may deposit the outstanding balance of the required amount i.e. Ksh. 400,000/=.

In their respective supporting affidavit, the petitioner and his advocate indicate that they were ready and willing to deposit the required Ksh. 500,000/= but for the misleading information given to them at the registry they deposited only Ksh. 100,000/=. they further indicated that the source of the misleading information was a checklist supplied by the Registrar Magistrate Courts (i.e. Annexures marked "JLL 1" and "JLL 2" in the petitioner's supporting affidavit) to the registry.

The respondents were allowed by this court to file their responses to the present application despite the fact that their respective responses to the petition are yet to receive validation by the court having been filed out of time. In that regard the first respondent filed grounds of opposition dated 16th May, 2013 and the second and third respondents filed a replying affidavit dated 20th May, 2013.

It is the first respondent's contention that this application has been overtaken by events as there is no petition in place for time to be extended and that the reasons given by the petitioner are evasive, untruthful and unsupported by any evidence or admission from the court registry.

As for the second and third respondents, the thrust of their argument in opposition to the application is that the deposit of security is a mandatory requirement and since there has been non-compliance by the petitioner the petition is incompetent. Further, there having been a fundamental breach of the law by the petitioner he cannot seek refuge in Article 159 (2) (a) of the Constitution which deals with procedural technicalities and would not apply to substantive law hence, inapplicable herein.

It is for the foregoing reasons that the respondents are calling for the dismissal of the application which is essentially made pursuant to Article 159 of the Constitution and Rule 20 of the Elections Petition Rules 2013.

Indeed, Article 159 of the Constitution provides guidelines for the exercise of judicial authority such that justice shall be done to all irrespective of status and that justice shall be administered without undue regard to procedural technicalities. Above all, the Article bestows upon the courts to protect and promote the purpose and principles of the consultation.

The petitioner herein expects to be accorded justice and so do the respondent. What maybe justice to one party may not necessarily be justice to the other party. Nevertheless, the duty of the court is to do justice to all in accordance with the law and evidence.

Any party expecting justice is first and foremost required to adhere to the law. Herein, the applicable law is the electoral law. Accordingly, the petitioner was required to comply with the provisions of section 78 of the Elections Act and Rule 11 (1) of the elections Petition Rules. However, the petitioner did not comply with the said provisions of the law. His main reason for the omission was that he was misled and/or misdirected by the court registry staff into depositing Ksh. 100,000/= instead of Ksh. 500,000/=. However, at the time of depositing the lesser amount he was in the company of his advocate who was deemed to know the law and in that regard knew that a circular and/or checklist provided to the court shaft purportedly for purposes of specifying the deposit payable was absolutely insignificant and could not be held as a substitute for the clear provisions of the electoral laws (read section 78 of the Elections Act). If the petitioner's advocate was in doubt with regard to the deposit payable, then he should have done the easiest thing i.e. consult the court's Deputy Registrar (see, **Esposito Franco vs. Amason Kingi Jeffah Elections Petition No. 1 of 2008 at the High Court Malindi.**)

In any event, the alleged circular/checklist was not applicable to parliamentary elections but to the county representatives election petitions.

Clearly, the obligation placed by section 78 (1) of the elections Act is more a matter of law rather than technicality.

Article 159 (2) (a) of the Constitution would not therefore come in aid of the petitioner.

Nonetheless, Article 159 (2) (e) provides that the purpose and principles of the constitution shall be protected and promoted. In that regard, access to justice ought not be impeded by the mere failure of a party to deposit security for costs within the prescribed time. Access to justice is a principle of the Constitution by dint of Article 48 of the same.

Besides, section 78 (3) of the Elections Act presupposes that a petition would not be struck out for reason that the petitioner has failed to deposit security as required unless an application to that effect is made by the respondent. The provision indicates that the failure to deposit security would only halt any further proceedings respecting the petition. The provision gives the respondent the opportunity to apply to the court for dismissal of the petition and for payment of the respondent's costs.

Herein, there has been no application by any of the respondents to have the petition dismissed. The response to this application cannot be such an application and the application filed herein by the second and third respondents is belated and has since been overtaken by events since with a view to accessing justice and have the petition determined on the merits, the petitioner has moved the court not only under Article 159 of the Constitution but also Rule 20 of the elections Rules Act for an extension of time within which to deposit the balance of the required security.

Rule 20 of the Elections Petition rules provides that:-

***“Where any matter is to be done within such time as 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 fit even though the period originally provided or granted may have expired.”***

This is a discretionary provision such that whereas the Elections Act and Rules provide for a ten (10) day period within which to deposit security, the court may nevertheless extend the time if injustice shall be occasioned to the petitioner on account of his failure to deposit within time.

The question is whether the petitioner herein is entitled to a favourable exercise of discretion by this court despite his omission. Clearly, the petitioner has given less than satisfactory reason for his failure to deposit in full the prescribed amount. However, he was not entirely to blame for he apparently relied on

his advocate to give him necessary and lawful directions. In the circumstances, it would not be far-fetched for this court to opine that his advocate failed him but not deliberately. The advocate, with respect, treated the matter of security for costs in a very casual manner. It would not therefore be in the interest of justice to “punish” the petitioner for his omission which was highly contributed to by his advocate as doing so would be to prevent him from effectively accessing justice.

Consequently, this application is allowed on condition that the balance of the required amount (I.e ksh. 400,000/=) be deposited in court by the petitioner forthwith and in any event, not later than midday tomorrow the 23rd day of May, 2013.

That, being the position, it is the considered opinion of this court and so as to do justice to both sides, the pending applications by the respondents for leave to file their responses to the petition out of time are hereby granted.

In that regard, the respondents are given a period of three (3) days from this date hereof to file their respective responses, and accompanying affidavits. The respondent's applications dated 29th April, 2013 and 30th April, 2013 respectively be treated as having been overtaken by events and so is the application by the second and third respondents dated 20th May, 2013 for striking out the petition. The costs of this application and the aborted applications be borne by each party respectively.

Finally, upon due compliance with the conditions set hereinabove, respecting each party, this matter be fixed for a pre-trial conference on the 29th May, 2013 but in default of compliance by either party, each party be at liberty to apply prior to the scheduled pre-trial conference.

Ordered accordingly.

**[Read and signed this 22nd day of May, 2013.]**

**[In the presence of Mr. Ingosi for petitioner and Mr. Gatune for first respondent and H/B for Mr. Akenga for the second and third respondents.]**

**J.R. KARANJA.**

**JUDGE.**