



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**GARISSA ELECTION PETITION NO. 8 OF 2013**

**AHMED ABULLAHI AMIN .....1<sup>ST</sup> PETITIONER**

**MOHAMEDKHER ADAM .....2<sup>ND</sup> PETITIONER**

**VERSUS**

**ABASS SHEIKH MOHAMED .....1<sup>ST</sup> RESPONDENT**

**THE INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION OF KENYA .....2<sup>ND</sup> RESPONDENT**

**NJOROGE MAINA ANDREW .....3<sup>RD</sup> RESPONDENT**

**RULING**

1. The petitioners have presented an application to withdraw the petition dated 29<sup>th</sup> May 2013. It is anchored upon Rule 23 (3) of the Elections (Parliamentary and County Elections) Petition Rules 2013 under Legal Notice 54 of 2013 (hereafter the Rules). The application is executed by both petitioners and their counsel of record Mr. Gitau Gikonyo. There are 3 fairly similar depositions sworn by the two petitioners and their counsel in support of the application.

2. Their learned counsel did indicate earlier to court that the elders in Wajir East Constituency had embarked on settlement of the petition in the interests of developing the constituency. The petitioners confirm that they have not been unduly influenced to withdraw the petition or entered into any illegal agreement, undertaking or compromise. The deposition of Ahmed Abdullahi Amin in particular states at paragraph 4 as follows:

*“That I have been advised by constituents that the petition is likely to create anxiety amongst clans and adversely affect development of the constituency”.*

He depones further that he is “no longer interested or desirous of pursuing the petition”. The petitioners thus crave leave of the Court to withdraw the petition.

3. The 1<sup>st</sup> respondent does not oppose the motion and stated that he will forfeit his costs. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents do not also oppose the withdrawal of the petition. They however pray for costs in the sum of Kshs 500,000. The petitioners have offered them costs of Kshs 200,000.

4. The application for withdrawal has been presented in form EP5 as prescribed by the Rules and was

advertised in the Kenya Gazette as Legal Notice number 8244 on 14<sup>th</sup> June 2013. The application was duly served on all the respondents as required by Rule 24.

5. There is no notice issued to the Registrar by any person to take over the petition or to be enjoined into the petition. I thus find that the petitioners have fully complied with Rules 23, 24 and 25 of the Rules and that the application is properly before me.

6. Rule 23 of the Elections (Parliamentary and County Elections) Petition Rules decrees that no petition shall be withdrawn without leave of the court. The underlying rationale is self-evident: the court may unwittingly become the anvil upon which political deals are hammered. Petitioners in election disputes at times act in bad faith. Those *mala fides* were recently brought to the fore in the High Court at Malindi in election petition number 16 of 2013 *Dobson Chiro Mwachungu Vs Independent Electoral and Boundaries Commission and others* [2013] e KLR. In that petition, a disinterested petitioner acting through a brief-case lawyer filed a petition using the law firm of a third party. The scheme that unruffled in court was aimed at extracting costs and other benefits from the respondent. Christine Meoli, J, struck out the petition on that ground among others.

7. Rule 23 thus requires the parties to show by affidavit the true circumstances leading to compromise. Specifically, the deponent must state that no agreement or terms of any kind have been made and that no undertaking has been entered into to settle the petition. That notwithstanding, if a lawful agreement has been made, the deponent should say so.

8. Article 159 (2) (c) of the constitution states as follows:

*“In exercising judicial authority, the courts and tribunals shall be guided by the following principles –*

*a. ....*

*b. ....*

*c. Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);*

Clause 3 limits traditional dispute resolution mechanisms that either contravene the Bill of Rights, are repugnant to justice and morality or inconsistent with the constitution.

9. The petitioners have deponed that no unlawful agreements or undertakings have been made to compromise the petition. The 1<sup>st</sup> petitioner has specifically stated that the petition is likely to create anxiety amongst clans in Wajir East Constituency which will adversely affect development of the constituency. Those averments have been restated by the petitioners’ learned counsel in his deposition of 29<sup>th</sup> May 2013. In remarks made to court earlier, he alluded to the fact that the clans and community of Wajir East Constituency were desirous of settling the political contest out of court. The 1<sup>st</sup> respondent concedes to the withdrawal of the petition and lays no claim to costs. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents do not oppose the motion save for their claim on costs. I am thus satisfied that this is a proper case to grant leave to withdraw the petition.

10. Granted those circumstances, and there being no application for substitution of the petitioners, I am minded to allow the application on the following terms:

- a. **THAT** the petition dated 5<sup>th</sup> April 2013 and filed in court on 8<sup>th</sup> April 2013 contesting the election of Abass Sheikh Mohamed, the 1<sup>st</sup> Respondent, as member of the National Assembly for Wajir East Constituency in the elections held on 4<sup>th</sup> March 2013 be and is hereby marked as withdrawn in its entirety.
- b. **THAT** there shall be no costs to the 1<sup>st</sup> Respondent.

- c. **THAT** the petitioners shall pay the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents costs of the petition. I assess those costs under powers granted to the court by Rule 36 at Kshs 300,000/-. It is a fair and reasonable sum considering that parties have appeared in court 6 times only and that the petition has been withdrawn fairly early and before the taking of oral evidence. I have also taken into consideration that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents are a public body and official respectively as well as the complexities and nature of the petition.
- d. **THAT** those costs shall be paid to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents or their counsel of record from the deposit held in court for the petitioners as security for costs. The remainder of that deposit shall be refunded to the petitioners or their counsel of record.

It is so ordered.

**DATED** and **DELIVERED** at **NAIROBI** this 25<sup>th</sup> day of June 2013.

**G.K. KIMONDO**

**JUDGE**

**Ruling read in open court in the presence of:**

Mr. Gitau Gikonyo for both petitioners instructed by Gitau Gikonyo & Company Advocates.

Mr. Issa Mansur for the 1<sup>st</sup> Respondent instructed by Issa & Company Advocates.

Mr. Kimani Muhoro instructed by Kimani Muhoro & Company Advocates.

Mr. Collins Odhiambo – Court clerk.