



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MALINDI
THE ELECTIONS ACT (2011)
ELECTION PETITION NO. 11 OF 2013
ELECTION FOR THE SENATOR OF KILIFI COUNTY
ANASTASIA WANJIRU MWANGI.....PETITIONER

VERSUS

THE INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION.....1ST RESPONDENT

SHAKILA ABDALLA MOHAMED.....2ND RESPONDENT

R U L I N G

In her petition filed on the 4th April 2013, Anastasia Wanjiru Mwangi a candidate for Woman Representative for Lamu County for the elections held on the 4th March 2013 where the 2nd respondent Shakila Abdalla Mohamed was declared the winner petitions the court to declare the election null and void on ground that the election was not free and fair and was marred with bribery and numerous irregularities.

The respondents namely The Independent Electoral & Boundaries Commission and Shakila Abdalla Mohamed filed two separate applications dated 13th and 28th May 2013 respectively for orders for striking out the petition and for award costs. The applicants relied on similar grounds for striking out the petition which can be summarized thus:

That the petitioner did not and has not deposited the mandatory security for payment of costs as provided by the law.

The grounds in support of the application are contained in the affidavit of the counsel for the 1st respondent Emmanuel Wetangula on one hand and that of the 2nd Respondent Shakila A. Mohamed.

Mr. Kibe for the petitioner made it clear in his submissions that the petitioner is not opposed to the main prayer of striking out the petition but to the second prayer contained in the application by the 1st respondent that reads;

“That the costs of this application and the entire petition be borne by the petitioner herein”.

The second prayer in the 2nd respondent's application was not opposed and was worded thus:

“That the costs of this application be borne by the petitioner”

The issue which bothered the petitioner is that of bearing the **ENTIRE** costs of the petition.

In canvassing the 1st Respondent's application, Mr. Wetangula said that it was not in dispute that the petition was filed and that the 1st respondent entered appearance and the counsel has attended court three times. The cardinal principle that costs follow the event cannot be ignored. The petitioner had an obligation to withdraw the petition which he failed to do. The 1st respondent learnt of the petition from the Chief Justice's gazette notice on petitions and election courts. The party instructed his advocates who perused the court file and entered appearance as required by the law. According to Mr. Wetangula, the petitioner is obligated to pay costs to the 1st respondent.

Ms. Umara held brief for Mr. Munyiithia for the 2nd respondent. Relying on **Section 78 and 84** of the **Act** and **Rule 34**, the counsel argued that in all cases, costs follow the event. The 2nd respondent learnt of the petition through the gazette notice which is a legal document. She instructed her advocates who wrote the petitioners advocates but got no response. The advocates then obtained a copy of the petition from the court registry. Although the 2nd respondent did not file an answer to the petition, she and her advocates have attended court three times. She also took her witnesses from Lamu to Mombasa to swear affidavits. The payment of costs to the 2nd respondent was therefore necessary.

Mr. Kibe on behalf of the petitioner relied on Supreme Court decision in **Election Petition No. 1 of 2013, Raila Odinga & 2 Others -vs- IEBC and others** where the court said that the electoral law and elections are *suis generis*, meaning that everything must be done within the law and regulations. He referred the court to the provisions of **Section 78 (2)** of the **Act** which provides that court shall not entertain any further proceedings where a petitioner has failed to deposit security. The petitioners were not served with the petition as required by the law which provides for only two modes of service. The petitioner can only serve the petition through personal service on the respondent or by advertisement in the local newspapers of national circulation. The respondents should not blame the petitioner for any costs incurred as a result of their self-induced service or information obtained from the gazette notice. **Rule 14 (1)** is clear that a respondent can only file an answer to the petition upon being served with the petition. The 1st respondent should not have filed an answer to the petition in the circumstances. Neither should the 2nd respondent's counsel have advised his client to take witnesses from Lamu to Mombasa. According to Mr. Kibe, the only costs payable to the respondents are the costs of these two applications.

The only issues to be addressed in these applications are two-fold:

1. **whether the entire costs of the petition are payable to the respondents.**
2. **whether costs are payable in the event that a party has instructed an advocate before being served with the petition.**

Section 78 (1) requires that the petitioner deposits security for costs within ten days of filing the petition. **Sub-Section (2)** requires that Kshs.500,000/= be deposited in the case of a petition against a Member of Parliament or a county governor which is the amount applicable in this petition.

Section 78 (3), (4) and (5) explains what should happen where the petitioner defaults in depositing security:

“Section 78

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 law is clear that no further proceedings shall be entertained by the court where the petitioner has defaulted in depositing security. I understand this provision to mean that the court shall not proceed to hear a petition where no security has been deposited. However, the law is clear that the court may proceed to hear the respondent's application for dismissal of the petition for non-compliance with **Section 78** of the **Act** and in any application for payment of costs. The costs of hearing such applications is well covered by **Section 78 (4)**. These costs are not in disputed.

Section 84 is the only comprehensive provision on costs in a petition. It provides:

“Section 84 - An election court shall award the costs of and incidental to a petition, and such costs shall follow the cause.”

Rule 34 explains the manner and to whom costs shall be paid in **Sub-rules 1** and **2**. However **Rule 34 (3)** applies to cases where a petition abates:

“Section 34 (3) – The abatement of an election petition shall not affect the liability of the Petitioner or of any other person to the payment of costs previously incurred.”

Abatement refers to a situation where the petition has been withdrawn or stuck out. These provisions are clear that costs are payable in a petition whether it has abated or has been heard to conclusion.

The petitioner vehemently argued that except for costs of these applications, she is not obligated to pay the respondents any other costs incurred by them for the reason that she did not serve them with the petition. The respondents learnt of the existence of the petition from Chief Justice gazette notice dated 19th May 2013. The Kenya Gazette is the Kenya Government's official publication which is meant for notification of all Kenyan citizens of important matters. This is a legal publication which the respondents were entitled to read and take notice of any official matters that all Kenyan citizens were required to take notice of.

Rule 6 mandates the Chief Justice to publish in the Kenya gazette and in at least one newspaper of national circulation the names of the Judges and Magistrates to hear elections petitions. The gazette notice includes all the details of the petition including names of the parties, the name of the judge or magistrate to hear the petition and the court where the petition has been filed. The respondents could not ignore the publication which brought it to their notice that there was an election petition against them. An election petition is a matter of great public importance unlike other cases. The parties affected by this weighty matter were justified to be pro-active and find out more details about the petition. They got concerned as to why they had not been served yet there was a petition. They wrote to the petitioner's advocate requesting to be given a copy of the petition. The respondent did not get any response and decided to obtain a copy of the petition from the court through her advocate. The argument that the 2nd respondent served herself and is therefore not entitled cannot be sustained. It is indicated in paragraph 3 of the supporting affidavit that before obtaining a copy of the petition from the court, the 2nd respondent had learnt of the petition from the gazette notice. I reject the argument of the petitioner that only a party who has been served with the petition is entitled to costs. It is my considered opinion that each case should be treated on its own facts and circumstances.

Mr. Kibe in his affidavit said he had informally communicated to the respondents counsels by 30th April

2013 that the petitioner had decided not to proceed with the petition. None of the counsels disputed these averments of Mr. Kibe made on oath. This omission by the respondents may help to mitigate the case of the petitioner that no further costs incurred thereafter are payable. Mr. Kibe relying on the **Supreme Court Election Petition No. 1 of 2013** argued that election petitions are *suis generis* and everything must be done according to the law. By this he meant that if a respondent has not been served in accordance with **Rule 13**, then they cannot file any response to the petition. The history of this case is that on 14th May 2013, their counsels were summoned to court by the Deputy Registrar for mention of the petition. The address of the 2nd respondent's advocates Joseph Munyithia & Co. Advocates was in the court file vide a letter dated 23rd April 2013 addressed to the Deputy Registrar requesting for pleadings in this petition. This was only four (4) days after publication of the Chief Justice gazette notice. On 18th March 2013 the 1st respondent's advocate Mohamed Muigai & Company wrote to the Deputy Registrar requesting for copies of petitions filed in Malindi High Court against their clients. Among the petitions named in the letter was petition No. 11 of 2013. The Deputy Registrar was therefore duty bound to serve the respondents' advocates to attend court for the mention on 14th May 2013.

During the mention on 14th May 2013, the petitioner's counsel addressed the court on the issue of the abated petition. Mr. Kibe told the court that his client has not deposited security and has not served the parties. He also said that he had no intention to apply for withdraw of the petition and invited the respondents to apply for dismissal if they found it appropriate. This address made it clear to the court to all the parties that the petition was a non-starter. The respondents thereafter filed these applications.

I agree with Mr. Kibe that the respondents having not been served and with the knowledge that the petition was not going to take off, would have no justification whatsoever to take further steps in the petition save for filing applications to strike out the petition. **Omondi, J in Bungoma Election Petition No. 7 of 2013** allowed withdrawal of the petition and said the following in regard to costs:

“Since the respondents have incurred considerable expense and time in preparing the responses to the petition court and collecting evidence, I am persuaded that they are entitled to costs. I therefore order that costs of this petition shall be born by the the petitioner.”

Had the petitioner opted to withdraw his petition, pursuant to **Rule 23** or had the court struck it out on its own motion, costs would still have been incurred. The moment a petitioner decides to move the court and changes his mind along the way in regard to halting the proceedings, he must bear the consequences of the legal process. I am of the considered opinion that costs have been incurred by both the respondents in this petition and it is in order that an order for costs be made in their favour. The 2nd respondent took her witnesses to her advocates office in Mombasa for preparation of the evidence affidavits. The advocates prepared the answer to the petition and the evidence affidavits and filed them in this court on 3rd May 2013. The advocates for the respondents ought not to have engaged in this laborious exercise without having been formally served. I am in agreement with Mr. Kibe that the petitioner should not be condemned to pay these costs.

It is not in dispute that the respondents instructed their advocates to represent them in the petition, the counsels attended court two times for mention and two more times for this application, the date of ruling included. Costs were incurred and must be borne by the petitioner.

The 2nd respondent in this application did not ask for costs of the petition. However, in the arguments of her counsel in court, Ms Umara argued that the 2nd respondent is entitled to costs of the petition. I have already sanctioned that entitlement. In the event that the petition was to be dismissed by the court on its own motion, the costs of the petition would still go to the respondents in ordinary circumstances. The 2nd respondent has the option to forfeit the costs of the rest of the petition save for this application. I do not think that she intended to take that route.

I come to the conclusion that the petition should be and is hereby struck out for non-compliance with **Section 78** of the **Act** and **Rule 14** of the **Rules**. The costs of the petition and of this application shall be

born by the petitioner. I award the two respondents the costs in the petition.

F. MUCHEMI

JUDGE

Ruling dated and delivered on the **18th** day of **June, 2013** in the presence of:-

Mr. Kilonzo for Mr. Kibe for petitioner,

Mr. Wetangula for 1st respondent, and

Ms. Umara for 2nd respondent.

F. MUCHEMI

JUDGE