



REPUBLIC OF KENYA

High Court at Kakamega

Election Petition 10 of 2013

MOSES SAISIPETITIONER

V E R S U S

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION.....1ST RESPONDENT
RETURNING OFFICER, LIKUYANI CONSTITUENCY2ND RESPONDENT

ENOCH KIBUNGUCHY 3RD RESPONDENT

RULING

1. The petition herein challenging the election of the Member of National Assembly for Likuyani Constituency following the elections held on 4th March 2013, was filed by the petitioner on 10th April 2013. It sought for a declaration that the entire election process was marred by irregularities; that the election results be nullified and the process repeated; and that the 1st and 2nd respondents be condemned in costs.
2. The petitioner did not however deposit with the Deputy Registrar the security for payment of costs of Kshs.500,000/= within 10 days of filing of the petition as required under **Section 78 of the Elections Act No. 24 of 2011** (hereinafter the referred to as the Elections Act) and **Rule 11 of the Election (Parliamentary and County Elections) Petition Rules 2013** (hereinafter referred to as the **Election Petition Rules 2013**). The petition was also not served within 14 days of filing as required under **Section 77 of the Elections Act**, and **Rule 13 of the Election Petition Rules 2013**.
3. The petition was, among other petitions, Gazetted by the Chief Justice in the Kenya Gazette on 19th April 2013 and a Judge assigned to hear the same. Though the respondents were not served, the Independent Electoral and Boundaries Commission (1st respondent), the Returning Officer, Likuyani Constituency (2nd respondent) and Enoch Kibunguchy (3rd respondent) entered appearance through their counsel M/S Gumbo & Associates (for the 1st & 2nd respondents) and M/S Keter, Nyolei & Company (for the 3rd respondent) respectively on 6th May 2013.
4. On the same day, counsel for the 3rd respondent filed a response to the petition and an application for dismissal of the petition for *inter alia*, failure to effect service, and failure to deposit the security for costs as required by law.
5. The parties counsel were then summoned by the Deputy Registrar by a notice dated 14th May 2013 to appear in court for a mention of the petition on 22nd May 2013. On that day, Mr. Amasakha, learned

counsel for the petitioner, stated that his client had not yet made the deposit of the security for costs of Kshs.500,000/= as required by law. Counsel also stated that the petitioner had not served the petition. He indicated that he was in the process of seeking instructions to withdraw the petition.

6. The other counsel who appeared for the parties, Mr. Otieno for the 1st and 2nd respondents, and Mr. Keter for the 3rd respondent, stated that they had already raised the issue of competency of the petition in the document which they had filed in response to the petition. The court then put the matter for mention on 6/6/2013.

7. On 6/6/2013, Mr. Amasakha for the petitioner informed the court verbally that he had instructions from his client to withdraw the petition. He admitted that his client had not deposited the security for costs. He stated that the petition had also not been served within the period permitted by law, and that the petitioner did not intend to serve the same anymore. Counsel stated that he did not know how the respondents came to be on record, as they had not been served with the petition. He urged the court to mark the petition as withdrawn with no order as to costs.

8. In response, Mr. Ojuro for the 1st and 2nd respondents, stated that though under **Rule 23 and 24** of the **Election Petition Rules 2013**, the withdrawal of an election petition was required to be made through an application in writing, he did not object to the verbal request by counsel for the petitioner to withdraw the petition. Counsel however submitted that his clients should be awarded costs. Counsel further submitted that after the filing of the petition, his two clients, as well as the 3rd respondent, were affected by the knowledge of the pending proceedings in court. That was the reason why they came on record and filed responses to the petition, despite not having been served. Counsel argued that the court should infact penalize the petitioner under **Rule 5 (2)** of the **Election Petition Rules 2013** for the failure to deposit the security for costs as required by law.

9. Mr. Keter for the 3rd respondent also did not oppose the verbal request by counsel for the petitioner to withdraw the petition. Counsel associated himself with what was stated by Mr. Ojuro. Counsel further stated that, in accordance with the provisions of **Section 84 of the Elections Act**, costs followed the cause. Counsel stated that they had already filed an application for dismissal of the petition and requested for costs. Therefore, in counsel's view, the lack of service of the petition on his client, did not disentitle him to costs, as his client and the voters in the Likuyani Constituency were aware that an election petition had been filed against their representative.

10. In a brief response, Mr. Amasakha for the petitioner emphasized that the respondents had agreed that they were not served. Therefore, in his view, they were not called upon to appear in court. They should therefore not ask for costs.

11. Indeed, under **Rule 23 and 24 of the Election Petition Rules 2013**, there is a legal requirement that a request for withdrawal of an election petition be made in writing, and that the application for withdrawal of the petition be served on the respondents. The said Rules state as follows –

23 (1) An election petition shall not be withdraw without leave of the court.

(2) An application for leave to withdraw an election petition shall –

(a) be in the Form EP 5 set out in the schedule;

(b) be signed by the petitioner and his advocate;

(c) state the grounds on which the application is supported; and

(d) be filed at the office of the Registrar.

(4) The parties to the election petition and their advocates shall, before the leave for withdrawal of

a petition is granted, produce affidavits stating the ground on which the petition is intended to be withdrawn.

(5) Despite sub-rule (4), a court may, on cause to be shown, dispense with the affidavit of a person if it seems to the court on special grounds to be fit and just.

(6) Each affidavit shall state “to the best of the deponents knowledge and belief that no agreement or terms of any kind has been made, and no undertaking has been entered into, in relation to the withdrawal of the election petition.”

(7) Despite sub-rule (6), where a lawful agreement has been made with respect to the withdrawal of the election petition the affidavit shall set- out the terms of the agreement.

24 (1) The petitioner shall serve the respondent with a copy of the application to withdraw an election petition.

(2) The petitioner shall, publish in the Gazette, a notice of withdrawal of the election petition in form EP6 set out in the schedule at the petitioner’s own expense.

12. Flowing from the above provisions of the rules, it is clear to me that there are clear and elaborate procedures and steps to be complied with in regard to the withdrawal of an election petition. The requirements have to be complied with as the rules are worded in mandatory terms. The request to withdraw an election petition has to be in writing. A notice of withdrawal has to be published in the Gazette. There is no verbal withdrawal of an election petition – see Martin Sarakwe Wechuli -vs- IEBC, Returning Officer Bumula Constituency and Bonface Okhiya Otsiula- Bungoma HC Election Petition 7 of 2013 -where the High Court gave the rundown of the requirements for withdrawal of an election petition.

13. It follows therefore that in our present case, there is no valid request for withdrawal of the petition to be acted upon by the court. The verbal request for withdrawal of the petition is not a valid request for withdrawal. However, the petitioner wants to terminate the election petition proceedings.

14. In my view, the law governing the situation in the present petition is Section 78 (3) and (4) of the Elections Act, which states –

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.

15. Although the petitioner’s counsel on 6th June 2013 verbally requested to withdraw the petition, all the three respondents had by then already filed formal applications challenging the validity of the petition, and also requested for costs. The 3rd respondent filed his application on 6th May 2013, and the 1st and 2nd respondents filed their application on 3rd June, 2013. The law does not state that only respondents who have been served can make such applications for dismissal of an election petition.

16. The situation therefore, in my view, is that the verbal request by the petitioner to withdraw the petition, which was not opposed by the respondents, was an attempt to compromise the pending applications for dismissal of the petition. In judicial proceedings parties have a right to make compromises in the proceedings, and I will not interfere with their compromise herein.

17. As was correctly observed by the court in K. Naomi Cidi –vs- IEBC & 3 Others, Malindi HC Election Petition No. 13 of 2013, the law under **Section 73 (3) of the Elections Act** is clear that once the

deposit for costs has not been made, no further proceedings shall be heard on the petition and the respondents may apply for dismissal of the petition and for payment of costs. In that election petition, the application for dismissal of the election petition was filed by a party who was not served but became aware of the petition through its publication in the Gazette.

18. As there are pending applications filed by the respondents for dismissal of the election petition for default to comply with the law, and all parties having agreed that the election petition herein be terminated, I apply the provisions of **Section 78 of the Election Act** and dismiss the petition.

19. How about costs? I fall back to section 78 (3) of the Elections Act. Since all the respondents had already filed applications for dismissal of the petition for want of compliance with the law, and requested for costs before the petitioner's counsel indicated that he had instructions to terminate the petition, in my view, they are entitled to costs. As

20. stated earlier, the law does not require that the respondents be served with the petition before they can apply to court for dismissal of the same and be entitled to costs. I will therefore award them costs of the proceedings.

21. Consequently, I order as follows-

1. The election petition herein is hereby dismissed.

2. The petitioner will pay the costs of the respondents which will be determined in accordance with the law governing election petitions.

Dated and delivered at Kakamega this 13th day of June, 2013.

GEORGE DULU

JUDGE